

DRAFT PRE-HEARING ORDER

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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,
Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY and THE PORT OF SEATTLE,
Respondents.

PCHB No. 01-160
PRE-HEARING ORDER

On August 23, 2001 appellant Airport Communities Coalition (“ACC”) filed a request for review with the Pollution Control Hearings Board (“Board”) of a combined certification under section 401 of the federal Clean Water Act and order under chapter 90.48 RCW (the “401 Certification”) issued by respondent Washington Department of Ecology (“Ecology”) to respondent Port of Seattle (the “Port”). Ecology subsequently rescinded the 401 Certification and reissued an amended one on September 21, 2001, which ACC appealed on October 1, 2001. A pre-hearing conference was held on October 15, 2001. Kaleen Cottingham presided for the Pollution Control Hearings Board.

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1 Appearances for the parties were as follows:

2 Appellant: Peter J. Eglick, Kevin L. Stock, Helsell Fetterman LLP, and Rachael
3 Paschal Osborn.

4 Respondents: Joan M. Marchioro and Thomas J. Young, with the Attorney General's
5 Office, for Ecology; Roger Pearce and Steven Jones, with Foster, Pepper & Shefelman, Gillis E.
6 Reavis and Jay Manning, with Marten Brown Inc., and Linda Strout and Traci Goodwin for the
7 Port of Seattle.

8 Based on the conference, the following pre-hearing order is entered:

9 I. HEARING

10 The hearing has been set for **March 18 through 29, 2002, commencing at 9:30 a.m.**
11 **each morning.** The hearing will be held at the Board's office in Lacey. Although the Board has
12 held 10 days for the hearing, by **February 8, 2002**, the parties shall provide to the Board a better
13 estimate of time needed for the hearing because the Board will be relying on the use of pre-filed
14 testimony.

15 The Board may elect to do a site visit, which will be scheduled to occur prior to the first
16 day of the hearing. No testimony or discussion will occur on the site visit.

17 The parties shall file with the Board a Joint Status Report, setting forth settlement
18 possibilities in the case, by **February 8, 2002**. Appellant shall be responsible for initial
19 preparation, routing and submittal of the Joint Status Report.

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II. LEGAL ISSUES

The parties shall meet and seek agreement on proposed legal issues to be considered by the Board. On or before **November 1, 2001**, the parties shall file a proposed list of agreed issues together with any issues for which there is no agreement. On or before **November 15, 2001**, the parties shall file their objections to the issues proposed separately by other parties.

III. PRELIMINARY WITNESSES

The parties presented preliminary witness lists at the pre-hearing conference but were urged to review those lists and eliminate potentially unnecessary or duplicative witnesses. The parties shall file and serve updated preliminary witness lists by **November 15, 2002**.

Final lists of witnesses shall be filed with the Board and served on the parties by **February 8, 2002**. Any witness listed herein or in final lists may be called by any party. The party calling a witness has the responsibility to ensure his or her attendance at the hearing.

All direct testimony of witnesses shall be in writing and pre-filed with the Board. Appellant shall file and serve its direct testimony by **February 15, 2002**. Respondents shall file and serve their direct testimony by **February 28, 2002**. Written direct testimony shall be limited to a maximum of 30 pages per witness, excluding exhibits. Ecology and the Port shall coordinate so that only one written direct testimony is filed for each witness to be called by the Respondents.

A witness' expertise shall be established by résumé offered as an exhibit in lieu of testimony regarding qualifications. Parties may review an expert's qualification by way of brief introduction during oral direct examination.

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IV. PRELIMINARY EXHIBITS

The parties presented preliminary exhibit lists at the pre-hearing conference but were urged to review those lists and identify specific documents rather than documents by category, and were also urged to eliminate potentially unnecessary or duplicative exhibits. The parties shall file and serve updated preliminary exhibit lists by **November 15, 2002**.

On or before **November 15, 2001**, respondents Ecology and the Port shall identify all plans and reports (other than ministerial documents) prepared or expected to be prepared pursuant to the §401 Certification and which either Ecology or the Port intends to rely upon at the hearing. For those plans and reports that are complete as of November 15, 2001, Respondents shall provide copies to Appellant ACC on or before **November 15, 2001**. For those plans or reports expected to be completed between November 16, 2001 and February 1, 2002, Respondents shall identify the estimated completion dates. If those plans and reports are completed on or before February 1, 2002, Respondents shall provide copies to Appellant ACC when complete. Ecology and the Port are prohibited from relying at the hearing upon any plan or report prepared after November 15, 2001 unless such plan or report is noted on the above-required list. Even if noted on the list, Ecology and the Port are prohibited from relying at the hearing upon any plan or report prepared after February 1, 2002. Notwithstanding the timeframes established below for discovery, the parties shall be allowed additional discovery on documents identified on the list for completion between November 16 and February 1st. Such additional discovery shall be allowed until **February 28, 2002**.

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1 Final exhibit lists shall be served on the parties and filed with the Board by **February 8,**
2 **2002.** The parties shall exchange exhibits by **February 8, 2002.** In addition to filing the exhibit
3 lists with the Board, the parties shall submit an electronic copy of the final exhibit lists to the
4 presiding officer at kaleenc@eho.wa.gov. The parties are directed to meet in person prior to
5 filing the final exhibit lists for the purpose of attempting to stipulate to exhibits' authenticity and
6 admissibility and to remove any duplicative exhibits. Parties are encouraged to offer only those
7 exhibits, or portions, they intend to rely upon in their case. Even though the parties may stipulate
8 to the admissibility of exhibits, the exhibits generally should be offered through a witness at the
9 hearing. It is not necessary for the witness to lay a foundation for any exhibit to which
10 admissibility has been stipulated.

11 When meeting with the presiding officer on the first hearing day, each party shall have
12 available for the Board an original and three (3) copies of its exhibits and exhibit lists which
13 shall identify those admissible by stipulation of the parties. An original and one copy of any
14 exhibit that cannot be conveniently copied due to size, bulk, reproduction difficulty, etc., must be
15 available for the Board at the hearing.

16 Each exhibit shall be pre-marked and organized by tab for identification (A-1, A-2, etc.,
17 for appellant, E-1, E-2, etc., for respondent Ecology, and P-1, P2, etc., for respondent Port) and
18 so identified on the exhibit lists. The number given to an exhibit does not limit the order of its
19 introduction at hearing. The exhibits must be bound in 3-ring binders to keep them organized
20 and it is recommended that the parties coordinate before hand so that the binders are easy to
21 distinguish, either by distinctive labels or color.

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1 Any exhibit listed by one party may be introduced by another party.

2 **V. DISCOVERY**

3 The discovery deadline is **February 1, 2002**, except as noted above for plans or reports
4 completed between November 16, 2001 and February 1, 2002. Written discovery requests shall
5 be served in a manner to allow response by the discovery deadline. All discovery shall be
6 conducted in accordance with the Superior Court Civil Rules. If requested by another party,
7 employees of the parties (including employees of members of appellant ACC) and witnesses
8 whose testimony a party has proffered by declaration shall be made available for deposition by
9 the employer or proffering party without necessity of a subpoena. In such instances, a notice of
10 deposition shall have the same effect as a subpoena. This requirement shall extend to production
11 of documents requested by a party that are relevant to the witnesses' testimony or the subject
12 matter of this case. Depositions of non-party deponents shall, absent agreement by all parties
13 and the witness, occur at a mutually acceptable location or, if agreement can not be reached, at a
14 location near the residence or workplace of such witness. For out of state deponents, if mutual
15 agreement can not be reached on the location for the deposition, such deposition shall occur at
16 the Board's office in Lacey. The parties may conduct telephonic depositions by agreement. The
17 parties shall cooperate in scheduling depositions and other discovery.

18 Depositions, interrogatories, requests for production or inspection, requests for admission
19 and the responses shall not be filed with the Board. It is the initiating party's responsibility to
20 maintain the original together with answers to interrogatories and to make them available for
21 proceedings.

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VI. MOTIONS

Except for scheduling matters, the parties are discouraged from seeking relief from the Board except by motion. Except as modified herein, the parties shall comply with the procedures set forth in WAC 371-08-450 regarding motions. For exigent matters, the parties may contact the Board and all parties to establish an expedited briefing schedule or to discuss another manner of expedited resolution, as circumstances require.

A. Non-dispositive and discovery motions. Parties are encouraged to try to resolve procedural, discovery or other pre-hearing issues without resorting to the filing of a motion. In the event a party is unable to resolve an issue, it may file a motion. Such a motion shall be accompanied by an affidavit reciting efforts to resolve the dispute. There is no limit on the number of non-dispositive motions that any party may file; however, no memorandum in support of a non-dispositive motion shall exceed 7 pages in length. An original and one (1) copy of the non-dispositive motion pleadings shall be filed with the Board and served on opposing parties. The Response to a non-dispositive motion shall also be limited to 7 pages and shall be filed and served within 4 days of the date of receipt of such motion. A reply by the moving party shall be limited to 4 pages and shall be filed and served within 2 days of the date of receipt of any response. WAC 371-08-310 shall govern computation of time. WAC 371-08-305 (9) shall govern acceptable methods of service.

B. Dispositive motions. Any motion, which would be dispositive of the case, or any legal issue, shall be filed and served on or before **February 8, 2002**. There is no limit on the number of dispositive motions that any party may file; however, no memorandum in support of a

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1 dispositive motion shall exceed 24 pages in length. No dispositive motions shall be bifurcated to
2 avoid the page limit. If a motion to lengthen is contemplated, it shall be filed and served in
3 sufficient time for the Board to rule before the deadline. An original and three (3) copies of
4 motion pleadings shall be filed with the Board and served on opposing parties. Opposing parties
5 shall have 10 calendar days from the date of receipt of the motion, to file and serve a response.
6 Responses shall be limited to 24 pages in length. An original and three (3) copies of the response
7 shall be filed and served. A Reply is due 7 days after receipt of the response. Replies shall be
8 limited to 12 pages in length. An original and three (3) copies of the reply shall be filed and
9 served. WAC 371-08-310 shall govern computation of time. WAC 371-08-305(9) shall govern
10 acceptable methods of service.

11 Motions will be decided based on the written record, unless oral argument is requested by
12 a party and granted by the Board pursuant to WAC 371-08-450. At the parties' request,
13 argument may be held by telephone with the parties arranging the connections.

VII. BRIEFS

14 Pre-hearing briefs are optional. If submitted, they shall be filed and served no later than
15 **March 11, 2002**, with an original and three (3) copies for the Board.

16 Briefs are limited to 30 pages in length, including attachments. If a motion to lengthen is
17 contemplated, it shall be filed and served in sufficient time for the Board to rule before the
18 deadline.
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20 If a citation is made to a case other than a PCHB decision, Wn. App. or Wn.2d, a
21 complete copy of the referenced citation must be attached to the brief, motion or memorandum.

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VIII. COMMUNICATION

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2 All correspondence and filings with the Board shall be sent to the attention of the
3 presiding officer with copies sent as required below.

IX. MISCELLANEOUS

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5 "Filed and served" means the date received by the Board.

6 Service and filing of papers may be by telefax for papers 10 pages or less including
7 attachments, provided that the original and required number of copies is mailed the same day. If
8 telefax is used to file with the Board, it shall also be used to serve the other parties so that the
9 date of receipt is the same.

10 The standards of General Rule 14 adopted by the Supreme Court regarding paper size and
11 formatting shall apply to all papers filed with the Board. In addition, the parties shall not
12 manipulate document fonts or line spacing to attempt to crowd more words on each page. The
13 font size shall be 12 points and the line spacing shall be double, except when blocking a
14 quotation.

15 All correspondence with the Board shall be sent to the attention of the presiding
16 officer with copies sent at the same time to all parties. Requests for *ex parte* relief will not
17 be granted without allowing all parties an opportunity to be heard unless the moving party
18 satisfies the Board that unusual or exigent circumstances exist preventing the giving of
19 notice and an opportunity to be heard.
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ORDER

This order shall govern the proceedings, unless subsequently modified by order of the Board for good cause upon a party's motion or the Board's volition.

SO ORDERED this ____ day of _____, 2001.

POLLUTION CONTROL HEARINGS BOARD



KALEEN COTTINGHAM,
Presiding