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**BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON**

AIRPORT COMMUNITIES  
COALITION,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY; and  
PORT OF SEATTLE,

Respondents.

PCHB No. 01-160

ECOLOGY'S REPLY TO ACC'S  
OPPOSITION TO ECOLOGY'S  
MOTION TO STRIKE  
ATTORNEY-CLIENT PRIVILEGED  
DOCUMENTS

**I. INTRODUCTION**

Pursuant to the Board's direction, Ecology submits this reply to the Airport Communities Coalition's (ACC) opposition to Ecology's motion to strike attorney-client privileged documents. In its reply, ACC argues that (1) the attorney-client privileged advice is "at issue" in this case so that the privilege does not apply, and (2) the advice was withheld as deliberative and then intentionally released with other deliberative documents so that the privilege has been waived. Both of these arguments are meritless.

**II. AUTHORITY AND ARGUMENT**

**AR 006357**

**A. The Attorney-Client Privileged Advice Is Not At Issue In This Case.**

ACC correctly notes that the attorney-client privilege is waived in circumstances where the privileged communications are placed "at issue" in a lawsuit. *Pappas v. Holloway*, 114

**ORIGINAL**

1 Wn.2d 198, 204, 788 P.2d 30 (1990). ACC neglects to point out, however, that this waiver  
2 occurs almost exclusively in malpractice cases where the attorney needs to rely on his advice  
3 to defend himself:

4 There are several notable exceptions to the attorney-client privilege. One  
5 example of particular importance here occurs when an attorney is sued for  
6 malpractice by a client. Where it would be manifest injustice to allow the client  
7 to take advantage of the rule of privileges to the prejudice of the attorney, or  
when it would be carried to the extent of depriving the attorney of the means of  
obtaining or defending his own rights, this court has ruled the privilege is  
waived.

8 *Pappas*, 114 Wn.2d at 204.

9 Similarly, in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), cited by ACC, the court  
10 required three prerequisites to finding an implied waiver of the privilege:

11 ... where the following three conditions are satisfied, an implied waiver of the  
12 attorney-client privilege should be found: (1) assertion of the privilege was the  
13 result of some affirmative act, such as filing suit, by the asserting party; (2)  
14 through this affirmative act, the asserting party put the protected information at  
issue by making it relevant to the case; and (3) application of the privilege  
would have denied the opposing party access to information vital to his defense.

15 *Hearn v. Rhay*, 68 F.R.D. at 581; quoted in *Pappas*, 114 Wn.2d at 207.

16 These principles have no application here. Ecology did not initiate this suit, nor has  
17 Ecology taken any position that puts its attorneys' advice at issue. The question of whether a  
18 water right is required before the Port may implement its Stormwater Management Plan and  
19 Low Flow Mitigation Plan is a purely legal question. Ecology submits that a water right is not  
20 required because these plans do not involve a "use" of water as the term is employed in the  
21 water code. Ecology's attorneys' advice on this legal question is not relevant and certainly  
22 cannot be considered "information vital" to ACC's case. ACC argues that the advice is  
23 relevant because it allegedly contradicts Ecology's characterization of ACC's arguments as  
24 "creative", but this type of "need" is patently insufficient to justify an implied waiver of the  
25  
26

**AR 006358**

1 attorney-client privilege. *See Pappas*, 114 Wn.2d at 207-208. ACC's arguments should be  
2 rejected.<sup>1</sup>

3 **B. Ecology's Disclosure Of The Attorney-Client Privileged Material Was**  
4 **Inadvertent.**

5 As the Declaration of Ray Hellwig submitted in support of Ecology's motion to strike  
6 shows, Ecology intended to withhold the attorney-client privileged information from  
7 disclosure. The exhibits to Mr. Hellwig's declaration show that Ecology classified the  
8 information as attorney-client privileged and thus exempt from disclosure. Hellwig Decl., Ex.  
9 1, p. 1; Ex. 2, p. 2. Ecology actually did withhold the information from one copy of the  
10 document on the basis of attorney-client privilege.

11 Ecology claimed the remainder of Mr. Hellwig's notes as deliberative and withheld  
12 them initially on that basis. Once the final decision on the Section 401 Certification was made,  
13 however, the deliberative process exemption no longer applied and Ecology was required to  
14 disclose, and did disclose, the remainder of the document. Ecology, however, inadvertently  
15 failed to redact the attorney-client privileged information from the copy disclosed with the  
16 deliberative process documents. Hellwig Decl., ¶ 5.

17 Contrary to ACC's claims, these facts do not establish an intentional waiver. Rather,  
18 they establish that Ecology inadvertently disclosed attorney-client privileged information that it  
19 intended to withhold. The Board should affirm its previous decision granting Ecology's  
20 Motion to Strike.

21 **III. CONCLUSION**

22 For the reasons stated above, the Board correctly granted Ecology's Motion to Strike


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25 <sup>1</sup> ACC also cites *Mission Springs v. City of Spokane*, 134 Wn.2d 947, 971, 954 P.2d 250 (1998), in  
26 support of its argument. That case does not apply here, however, because the court there did not address the  
question of whether there was a waiver of the attorney-client privilege. Also, the rationality of the city council's  
action was directly at issue in that case while the rationality or irrationality of Ecology's action here is not.

1 and ACC should be required to return the attorney-client privileged information to Ecology  
2 and to refrain from referring to it in the future.

3 DATED this 22 day of October, 2001.

4  
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17 MARCHIORO\SEATAC\PCHB 01-160 & 01-133\REPLY TO OPP TO STRIKE DOCS.DOC  
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**AR 006360**

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BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

AIRPORT COMMUNITIES  
COALITION,

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STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY; and  
PORT OF SEATTLE,

Respondents.

PCHB No. 01-160

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on October 22, 2001, I caused Ecology's Reply to ACC's Opposition to Ecology's Motion to Strike Attorney-Client Privileged Documents, and this Certificate of Service in the above-captioned matter to be served upon the parties herein, as indicated below:

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AR 006361

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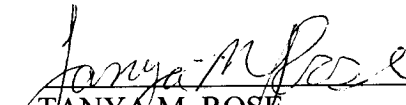
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17 the foregoing being the last known business address.

18 I certify under penalty of perjury under the laws of the State of Washington that the  
19 foregoing is true and correct.

20 DATED this 22<sup>nd</sup> day of October, 2001, in Olympia, Washington.

21  
22   
23 TANYA M. ROSE  
Legal Assistant

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25  
26 **AR 006362**