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.	No. 01-133 No. 01-160 ACC'S OPPOSITION TO ECOLOGY'S MOTION TO STRIKE DOCUMENTS, MOTION TO RESCIND EX PARTE ORDER AND FOR RECONSIDERATION BY FULL BOARD, AND REQUEST FOR HEARING PER WAC 371-08-450(3)[1]

I INTRODUCTION

In its opening brief in support of a stay, ACC set out the law requiring that the Port obtain a water right before Ecology could claim reasonable assurance on the elements of the Port's proposal calling for appropriation of stormwater in perpetuity to address low flow impacts. In their responses, Ecology and the Port went on the attack, snidely labeling ACC's argument as "creative" (Ecy. Br. at 12) and "radical" (Port Br. at 13). At the same time, the Port further demanded that the Board give "great deference" to Ecology's expertise, in assessing Ecology's claim of reasonable assurance,

[1] Ecology's Motion to Strike was received late on October 9, 2001. The Board issued an order granting Ecology's Motion on October 10 which ACC counsel received by mail on October 11. Per WAC 371-08-450(4)(a), a response from ACC was not due until "ten days from the date the motion is received." Because the deadline for ACC's Sur-rebuttal on the stay motion as well as the deadline for submission of a list of proposed legal issues, witnesses and exhibits was October 10, ACC had just started to prepare a response when the Board's Order was received. To the extent necessary, then, ACC seeks rescission and reconsideration. ACC further requests per WAC 371-08-450 a hearing before the Board.

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including on the water right question. Port Br. at 4. In Reply, ACC quoted to the Board a document released by Ecology itself, giving the benefit of the Ecology Attorney General's expertise on the issue. Now, based on an incomplete description of how the document was released, Ecology asks this Board not only to strike the document, but to require ACC to return it based on attorney-client privilege. As will be discussed in detail below, the document should not be stricken because it was not inadvertently disclosed. Even if inadvertently disclosed, it should not be stricken because its disclosure by the client has waived any pretense to privilege. Further, the matters allegedly subject to the privilege are waived when they are at issue in the litigation itself. Finally, Ecology's demand that the Board "order" return of a document obtained pursuant to a public disclosure request (prior to the pendency of any appeal) has no basis in the law or the Board's jurisdiction, and would be futile, in any event.

II BACKGROUND FACTS

For the better part of three years, one of the stumbling blocks which the Port has failed to address in its third runway application has been the absence of a guaranteed source of water to address diminution in stream flow as a result of the Port's projects. After various zigs and zags (as described in the First Declaration of Peter Willing at ¶ 8-12), Ecology and the Port resorted several months ago to reliance on a new, untested proposal for dedicating captured stormwater to address low flow. *See* Second Luster Decl. at 35. As with other significant changes in the Port's plans, this was not announced publicly. ACC only became aware of it through public disclosure documents. ACC then submitted comments, through Rachael Paschal Osborn, an attorney expert in water rights law, pointing out that the Port's proposal for appropriation and dedication of stormwater, in perpetuity, for this function, required a water right.

The April 3, 2001, typewritten memorandum and handwritten notes (prepared by Ray Hellwig) which are now the subject of Ecology's Motion to Strike were originally released to ACC in redacted form several months ago with the notation "Deliberative" written across the top of each page by Mr.

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Hellwig. Declaration of Andrea Grad in Support of ACC's Opposition to Ecology's Motion to Strike Attorney-Client Privileged Documents at ¶ 5. In their redacted form, the notes read as a one-sided case against requiring a water right, concluding one page with the statement "Rachael P.'s arguments are full of holes."

Months later, on the same day that Ecology issued its August, 2001, 401 decision, ACC submitted a public disclosure request to Ecology for all documents which had previously been withheld as deliberative. *See* Grad Decl., ¶ 6. Ann Kenny, Ecology's lead staffperson assigned to the 401, then replied:

> I have Deliberative documents that can be released to you in response...as soon as they are photocopied.
>
> I will ask all others involved in the project to compile all previously withheld documents for release. It may take a week or two to get everything gathered up but we will send you what we have when it becomes available.

Email exchange between Ann Kenny and Andrea Grad, dated August 10, 2001 (copy attached as Exhibit A to Grad Decl.). Subsequently, Ecology transmitted to ACC a packet of documents previously withheld, including Mr. Hellwig's typewritten memorandum with annotations labeled "deliberative," but with the previously redacted portions now disclosed.[2] This was not surprising because deliberative materials may not be withheld under the Public Disclosure Act once a decision has issued and because, without the redacted material, it was impossible to understand the deliberative process which led to Ecology's 401 decision. This is best understood by looking at the center of the memorandum, where seven lines had been redacted. These seven lines were followed by the word "**But,**" after which the memorandum laid out the argument against requiring a water right. The fully

[2] Mr. Hellwig's Declaration omits this part of the chronology, not acknowledging ACC's explicit subsequent request for previously withheld deliberative material and Ecology's positive response, clearly stating its understanding that it would be releasing previously withheld materials.

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disclosed document contains the counterpoint argument supporting requiring a water right, attributed to Joan Marchioro, the Ecology Assistant Attorney General assigned to the third runway project.[3] The disclosure confirmed what the 401 suggested: that Ecology had taken a "policy position" not to demand a water right, although the Water Code -- including its requirement for a water right -- is actually triggered by the Port's 401 proposal.

In defending this "policy position" before the Board, respondents claimed reasonable assurance under, *inter alia*, the Water Code -- and in terms suggesting that ACC's appeal grounds on water rights represented an extreme position inconsistent with deference to Ecology's expertise.[4] Despite respondents' placement of these points at center stage of their defense, Ecology now seeks to unring the bell on its disclosure of documents which undercuts them and which demonstrate that respondents' characterizations were less than candid.

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[3] The portions Ecology disclosed in August stated:

> Our AAG (JM) has indicated she/the office will support any policy position we choose to adopt, but she is currently advising we require the water right.
>
> She has presented several logical arguments to support her advice, but clearer answers are needed for a few key questions.
> * * *
> Part of the JM argument is that this "fix" under the 401 triggers the water code, and we need certainty around the "fix" for reasonable assurance.
>
> Also, JM says, unlike a 402 permit, the 401 calls in other state laws to help protect WQ -- this requirement for mitigation may be a key point.
>
> Where we have direct authority under 401 to protect flows -- under the 402, flows are protected by indirect authority i.e., as a result of actions driven by provision of the permit -- e.g., land use planning strategies
> * * *
> JM/401 look at any other applicable law including water code

April 3, 2001, Hellwig notes at pp. 1-2.

[4] Ecology continued this tack in its Sur-Reply to ACC's Motion for Stay, saying little on the merits, but instead attacking ACC as continuing "to rest its case on misstatement and inaccurate renditions of the record." Ecology Sur-Reply at pp. 1-2.

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II ARGUMENT AND AUTHORITY

In light of the full story of Ecology's intentional disclosure of previously withheld documents (see Declaration of Andrea Grad filed herewith) --not provided in Ray Hellwig's declaration -- and without an evidentiary hearing, the Board cannot conclude that the material in question here was inadvertently disclosed. Even if inadvertent disclosure were proven, there is no Washington rule or law which supports Ecology's demand that the documents be stricken from the Board record -- and no jurisdiction in the Board to order their return.

> The Washington Supreme Court has held that attorney-client privilege is not absolute:
> Because the privilege sometimes results in the exclusion of evidence otherwise relevant and material, and may thus be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege is not absolute; rather it is limited to the purpose for which it exists.

Dietz v. Doe, 131 Wn.2d 835, 843, 935 P.2d 611 (1997); *see Dike v. Dike*, 75 Wn.2d 1, 11, 448 P.2d 490 (1968). The *Dietz* court also noted that any privilege which exists can be waived, including by the client, as occurred here in Ecology's post-decision production of a document it had previously withheld. *Id.* at 850.[5] While Ecology's brief does not acknowledge it, the treatise which it cites on Washington practice, Tegland, Washington Practice, Vol. 5A, §501.22 (2001) actually states that even if a disclosure is inadvertent, "the traditional rule, at least, is that the privilege is waived..."[6]

The Washington Supreme Court has spoken on the issue of waiver and exceptions to the privilege in *Pappas v. Holloway*, 114 Wn.2d 198, 787 P.2d 30 (1990).[7] *Pappas* reaffirmed that the

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[5] In October, 1998, a proposal was placed before the WSBA Board of Governors to adopt a proposed formal opinion calling for the return of "inadvertently disclosed material." The Board did not adopt it.

[6] The treatise then provides, in footnote 17, citations to McCormick on Evidence, to a Michigan Law Review article, and to six cases finding automatic waiver in an inadvertent disclosure. It then acknowledges that "many courts have held to the contrary" and provides three case citations.

[7] Ecology cites *Pappas*, in passing, but only for the proposition that the attorney-client privilege extends to documents. Ecology Br. at p. 3, ln. 3.

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attorney-client privilege was not absolute and was subject to several "notable exceptions." *Id.* at 204. The Washington Supreme Court in *Pappas* relied on *Hearn v. Rhay*, 68 FRD 574, (ED Wash. 1975), and utilized its "test to determine whether the facts in a given case support an implied waiver of the attorney-client privilege." *Id.* at 198. In *Hearn*,[8] the District Court had raised an affirmative defense relying on their "good faith" and "on advice of their legal counsel." *Pappas, supra,* at 207 (describing *Hearn* at 577). The *Hearn* court ordered disclosure because, *inter alia*, "the asserting party put the protected information at issue by making it relevant to the case." *Pappas, supra,* at 207, quoting *Hearn, supra*, at 581. .

Rejecting criticism of the *Hearn* test, the Washington Supreme Court held in *Pappas*:

> While it is true that the attorney-client privilege is statutory in nature, it is also true that this court has held that the privilege itself should be strictly limited for the purpose for which it exists. *Dike v. Dike,* 75 Wn.2d 1, 11, 448 P.2d 490 (1968).

Id. at 208.

Here, ACC alleged that there could not be reasonable assurance for Ecology's decision dispensing with the requirements of the water code with regard to the Port's low flow plan. Ecology and the Port led off their responses with pejoratives ("radical," "creative") to the effect that ACC's arguments were beyond the legal pale, claiming reasonable assurance for this aspect of the decision. The Port played the "deference card," demanding that the Board give deference to Ecology's expertise, as articulated, *inter alia*, in Ecology's brief. Ecology now seeks to suppress information which it earlier released which undercuts the defenses which respondents asserted. Per the Washington Supreme Court in *Pappas,* the attorney-client privilege is not meant to protect in such circumstances.[9]

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[8] *Hearn* is not cited at all by Ecology in its motion.

[9] Evidence of action contrary to counsel's advice was also relied upon in *Mission Springs v. Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998). There, the Washington Supreme Court held that the City had acted irrationally in refusing to issue permits, a "departure from the mandatory legal process." *Id.* at 971. The Court concluded that "the irrationality is further

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Ecology's reliance on *United States v. Zolin,* 809 F.2d 1411 (9th Cir. 1987), is inapposite. *Zolin,* although decided prior to the Washington Supreme Court's decision in *Pappas,* was not relied upon by our court in that case. *Zolin* is not controlling authority.

Further, Ecology cites *Zolin* as holding "that the attorney-client privilege was not waived if the mistaken disclosure of the privileged information was '...sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver.'" Ecology Motion at 3, quoting *Zolin, supra,* 809 F.2d at 1417. In fact, the *Zolin* court's description of the law in this area is considerably fuller and less favorable to Ecology, regardless of the mixed outcome of the *Zolin* case itself. It states the basic rule that, "The voluntary delivery of a privileged communication by a holder of the privilege to someone not a party to the privilege waives the privilege." *Zolin* at 1415. It further states that, "Moreover, when the disclosure of a privileged communication reaches a certain point, the privilege may become extinguished even in the absence of a wholly involuntary delivery." *Id.* (*citing In Re Sealed Case,* 676 F.2d 793, 818 (D.C. Cir. 1982) ("Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege.").

Here, while Ecology has presented the Board with an artfully worded declaration by Ray Hellwig suggesting that Ecology's disclosure of the redacted portion of the document in question was inadvertent, the declaration leaves out some important facts about the process which suggest that the Department's disclosure was voluntary, with the Department only now reconsidering because its attorneys are embarrassed in light of their arguments to this Board.

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dramatized by the overt rejection of advice from the City's own attorney in favor of a defiant course of action well summarized by the comment." *Id.* Here, Ecology rejected advice that the law required a water right, instead adopting a "policy position" which would leave ACC no option but to file an appeal. Now, in response to ACC's appeal, Ecology and the Port seek to argue reasonable assurance, deference and the like while suppressing evidence by which its lack of reasonable assurance is "dramatized by the overt rejection of advice from the [Department's] own attorney."

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Ecology also quotes the 1989 edition of the Epstein treatise, The Attorney-Client Privilege and the Work-Product Doctrine, (at p. 65) for the proposition that, as Ecology puts it, "a majority of state and federal courts have rejected the traditional rule that inadvertent disclosure waives the attorney-client privilege." Ecology Motion at 3. Of course, the question for this Board, a creation of the Washington Legislature, and subject to Washington law, is what the rule is in Washington, not what the rule is in other jurisdictions, and not what the Board would fashion were it an appellate court of general jurisdiction.

Further, while ACC counsel have not been able to check the 12-year-old second edition of the Epstein treatise cited by Ecology, the current and largely rewritten year 2001 fourth edition is available. It suggests that Ecology's claim of a majority rule is not correct. Per the 2001 edition, there are three lines of reasoning around the country: one a "strict accountability" approach, akin to the "traditional" approach (holding a waiver in all circumstances cited in the Washington Practice treatise, *supra;* a middle ground approach, applying a "balancing test"; and a "lenient" approach. *Id.* at 309-29.

Significantly, the current version of the Epstein treatise confirms that there is a distinction between documents allegedly inadvertently produced by a "sending lawyer" and ones disclosed by the client itself, as was the case here. The quote from the 1989 treatise (at p. 3) which Ecology offers the Board appears to be a predecessor of the 2001 Epstein treatise's comment "in the discovery context" (not in the context of prior production by a government agency pursuant to a public disclosure request) of the following:

> In the course of document production and discovery, an attorney is invariably an intermediary between the client and the disclosure. The question arises regarding what effect should be given to that inadvertent or careless disclosure. Early on, the courts took a strict approach to any inadvertent disclosure. It would appear that a large number of recent cases are coming to the view expressed in the 1989 second edition of this treatise: Where the disclosure resulted because of the attorney's negligence and not that of the client, the *client's* privilege should not necessarily be deemed to have been relinquished. The more frequent rationale now appearing

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> in the cases is that the negligence-free client should not be expected to bear the burden of a careless attorney by the global loss of the privilege. Nor should a court necessarily make every privileged document turned over by a careless attorney in the course of discovery admissible at trial.

2001 Edition at 316-318 (emphasis added).

Even if the portion of the treatise cited by Ecology, as updated in the treatise's current version, were to be applied in Washington, it would do Ecology no good in this instance. The disclosure here did not come from Ecology's attorney. It came from Ecology itself, as Mr. Hellwig's declaration affirms. It came prior to this litigation, in response to a public disclosure request which explicitly asked for materials which had previously been withheld. Whether client negligence was involved or the client just decided that the document should no longer be withheld, as was decided in the case of many others,[10] the disclosure did not involve attorney negligence, and therefore does not fall within the treatise's discussion or the rule Ecology now seeks to rely on.

Finally, Ecology has asked this Board to order return of the documents in question. Ecology cites no authority for this request. Respectfully, the Board has no jurisdiction to enter such an order. RCW 43.21B.110. Documents obtained pursuant to a public disclosure request (and prior to pendency of any appeal before the Board) do not fall within the Board's purview. If the Board were to rule otherwise, then it would invite an avalanche of such requests (and of counterpoint requests by ACC seeking to enforce the Public Disclosure Act before this Board) in this case, and in others. What happens in the "outside world" with a document disclosed by Ecology pursuant to a request under RCW Ch. 42.17 is not within the Board's appellate jurisdiction.[11]

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[10] For example, ACC's Reply on the Stay also includes on its cover page a quote from AAG Ron Lavigne from another public disclosure document released by Ecology many months ago. Ecology has not moved to strike it or claimed inadvertent disclosure.

[11] In any event, such an order would be futile. When PDA materials are received by ACC, they are routinely shared with other interested groups and members of the public (which has saved Ecology countless hours by avoiding duplicative PDA requests by such parties, as Ecology well knows). Further, when filed, the brief and attachments in this case were circulated

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CONCLUSION

For all the reasons discussed above, the Board's *ex parte* Order should be rescinded, reconsideration, if necessary, should be granted, and Ecology's motion should be denied.

DATED this 11 day of October, 2001.

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by ACC staff to ACC member officials (spread among five cities and one school district), experts, and members of the public who typically request them. They are subject to public disclosure by the cities and are matters of public record and are now and have been within the public domain.

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