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Oct 10, 01

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)

No. 01-133

Appellant,)

No. 01-160

v.)

ACC'S REPLY ON MOTION TO FILE
OVERLENGTH REPLY BRIEF

STATE OF WASHINGTON,)

DEPARTMENT OF ECOLOGY; and)

THE PORT OF SEATTLE,)

(Section 401 Certification No.

1996-4-02325 and CZMA concurrency
statement, issued August 10, 2001,

Respondents.)

Reissued September 21, 2001, under No.
1996-4-02325 (Amended-1))

Ecology complains that ACC should not be allowed to file an overlength brief because Ecology and the Port "respected the Board's order on the briefing schedule and briefing length." For that to be true, the Board would have to strike and ignore the multiple sections of Ecology's and the Port's declarations that contain extensive legal argument as opposed to scientific fact and opinion.

For example, the Declaration of Kevin Fitzpatrick at ¶ 3 tries to explain why historic violations of the Port's NPDES permit are not really violations of the permit under the law for purposes of 401 certification. Again at paragraph 6 of his declaration, Mr. Fitzpatrick relies upon WAC provisions to try to explain why the 401 Certification really does not authorize "mixing zones." The Declaration of Erik Stockdale at paragraph 15 and 16 includes an extensive legal discussion regarding the applicability of RCW 90.74 *et seq.* as it relates to the Port's proposed out-of-basin wetlands mitigation plan. The Port's Paul Fendt Declaration at ¶¶51-53 contains the

ACC'S REPLY ON MOTION TO
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HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

ORIGINAL

AR 006426

1 legal argument that compliance with an existing NPDES permit provides sufficient reasonable
2 assurance for issuance of a 401 Certification.

3 In replying to the legal arguments contained in Ecology's and the Port's declarations,
4 ACC could have filed a thirty-page reply brief and then thrown more of its legal arguments into
5 longer declarations. It opted for the more intellectually honest approach of asking the Board for
6 permission to exceed the page limit on the brief itself.

7 Ecology and the Port also fail to acknowledge the strategic division of labor evident in
8 their Responses. The Port's arguments and Ecology's do not coincide in many respects, leaving
9 ACC with 30 pages in which to respond to 56 pages of distinct legal arguments.¹

10 Interestingly, on the same day that Ecology and the Port filed their oppositions to ACC's
11 request to file an overlength brief, Ecology and the Port filed Replies which were to be limited to
12 4 pages and only address stay issues relating to the amended 401. In "complying" with the 4-
13 page limit, however, Ecology filed a 5-page declaration of Erik Stockdale, while the Port filed a
14 7-page declaration of James Kelly, a 3-page declaration of Paul Fendt with attachment, and a 6-
15 page declaration of C. Linn Gould with multiple attachments. Yet, the Port and Ecology cry foul
16 when ACC follows proper procedure and ask permission to file an additional 16 pages in reply to
17 the mountains of material the Port and Ecology filed with the Board in opposition to ACC's
18 motion for stay. All the Board need do to understand why ACC asked for leave to file a brief
19 that exceeds the page limitation by 16 pages is to lift the two banker boxes of documents the Port
alone filed with the Board a week ago.

20 Rather than agree that ACC is entitled to a full and fair opportunity to reply to over 56
21 pages of briefing, 210 pages of declarations and thousands of pages of attachments, Ecology and
22 the Port oppose ACC's motion for permission to file an overlength brief. Why do respondents
23

24 ¹ For example, the Port briefs a purported requirement for deference to Ecology, a point which Ecology does not
address at all.

1 protest so much over a request for permission to file an additional 16 pages? All ACC seeks is a
2 fair and meaningful opportunity to be heard on the multitude of issues raised by Ecology and the
3 Port in their oppositions to ACC's motion for stay of what Ecology itself has labeled one of the
4 largest public works project ever attempted in Washington.

5 Ecology complains that ACC should be restricted to the 30 pages originally set by the
6 Board because ACC "created the current cramped briefing schedule." Whether a motion for stay
7 warrants an expedited schedule has nothing to do with whether ACC should be allowed an
8 additional 16 pages to reply to 56 pages of opposition briefs and over 210 pages of declarations.
9 Along the same lines, the Port is left arguing that what the Board ordered before it saw what
10 Ecology and the Port submitted should govern now no matter what. ACC is aware of the
11 Board's order: that is why it filed a motion. By its motion, ACC is asking the Board to address
12 the situation created by the Port and Ecology filings.

13 ACC did not intentionally strive to file an overlength brief, but conscientiously selected
14 issues counsel felt could not go unanswered.² ACC appreciates the burden imposed on the Board
15 by the voluminous material filed by all parties. However, if ACC is ordered to restrict its reply to
16 30 pages, no amount of word processing or editorial discretion will enable ACC to come close to
17 a full reply to the bulk of material the Port and Ecology presented in opposition to ACC's motion
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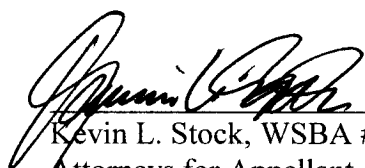
24 ² There are still several issues which ACC has had no opportunity to address.

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for stay. For the forgoing reasons, ACC respectfully request that the Board accepts its overlength brief.

DATED this 10th day of October, 2001.

HELSELL FETTERMAN LLP

By: 
Kevin L. Stock, WSBA #14541
Attorneys for Appellant

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No. 01-133
No. 01-160

CERTIFICATE OF SERVICE

I, Rachel Parks, an employee of Helsell Fetterman LLP, attorneys for the Airport
Communities Coalition, certify that:

I am now, and at all times herein mentioned was, a citizen of the United States, a
resident of the State of Washington, and over the age of eighteen years.

On October 10, 2001, I caused to be served via FAX a true and correct copy of
ACC's Reply on Motion to File Overlength Reply Brief in the above-captioned case to:

CERTIFICATE OF SERVICE - 1

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

ORIGINAL

AR 006430

1 Joan M. Marchioro
2 Thomas J. Young
3 Assistant Attorneys General
4 Ecology Division
5 2425 Bristol Court SW, 2nd Floor
6 Olympia, WA 98502
7 FAX: (360) 586-6760

8 Linda J. Strout, General Counsel
9 Traci M. Goodwin, Senior Port Counsel
10 Port of Seattle
11 2711 Alaskan Way
12 Seattle, WA 98121
13 FAX: (206) 728-3205

14 Roger A. Pearce
15 Steven G. Jones
16 Foster Pepper & Shefelman PLLC
17 1111 Third Avenue, Suite 3400
18 Seattle, WA 98101
19 FAX: (206) 447-9700

20 Jay J. Manning
21 Gillis E. Reavis
22 Marten & Brown LLP
23 1191 Second Avenue, Suite 2200
24 Seattle, WA 98101
25 FAX: (206) 292-6301

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

DATED this 10th day of October, 2001, at Seattle, Washington.



Rachel Parks

G:\LU\ACC\PCHE\CERTSERV-101001

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

CERTIFICATE OF SERVICE - 2

AR 006431