## POLLUTION CONTROL HEARINGS BOARD STATE OF WASHINGTON

Appellant,

Respondents.

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v.

STATE OF WASHINGTON,

PORT OF SEATTLE,

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PCHB 01-160 ORDER ON ECOLOGY'S MOTION TO STRIKE

AIRPORT COMMUNITIES COALITION, ) PCHB 01-160 ORDER ON MOTION TO STRIKE DEPARTMENT OF ECOLOGY and THE

The Department of Ecology (Ecology) has moved to strike certain references to a document relied on in the Appellant Airport Communities Coalition (ACC) motion for stay and supportive reply materials. The basis of the request is that the document is attorney-client privileged and was inadvertently disclosed. Ray Hellwig, Ecology's NW Regional Director, prepared the document in question as a briefing paper for a senior management team meeting in April 2001. The document was intended to have certain paragraphs redacted before disclosure, but instead an un-redacted copy was inserted into the packet of documents disclosed as part of fulfilling a public disclosure request.

Under the Public Disclosure Act, Chapter 42.17 RCW, an agency may exempt records from disclosure if those records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts, including attorney-client privileged communications. RCW 42.17.310(1)(j). Although the privilege can be waived voluntarily, it is not waived if the mistaken disclosure of the privileged information was "sufficiently involuntary

and inadvertent as to be inconsistent with a theory of waiver." <i>United States v. Zolin</i> , 809 F.2d
1141, 1415, 1417 (9 <sup>th</sup> Cir. 1987). Although the Washington Courts have not addressed the
question of whether the attorney-client privilege is waived by an inadvertent disclosure of the
privileged information, the board is persuaded that Ecology intended to redact and not disclose
certain privileged information and as a result Appellants should not be allowed to benefit from
this error.
For the reasons stated above, Ecology's Motion to Strike is granted and the Appellants
are ordered to return the attorney-client privileged document to Ecology and refrain from using
the information. Ecology shall inform the board where in the current submittals reference exists
to this document so that all references to the information can be stricken from the record.
ORDER
Ecology's motion to strike is granted.
SO ORDERED this day of Odober, 2001.
POLLUTION CONTROL HEARING S BOARD
Valeen Cottingham
KALEEN COTTINGHAM, Presiding