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OCT - 9 2001

ENVIRONMENTAL  
HEARINGS OFFICE

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,

Appellant,

No. 01-160

v.

DEPARTMENT OF ECOLOGY AND  
THE PORT OF SEATTLE,

Respondents.

PORT OF SEATTLE'S  
MOTION TO STRIKE  
OVERLENGTH BRIEF

Rather than abide by the rules agreed-upon by all parties and, even more importantly, the specific orders of the Pollution Control Hearings Board, appellant Airport Communities Coalition ("ACC") has filed a reply brief that is overlength by more than 16 pages. Instead of first asking the Board, the ACC has simply presented the Board with a fait accompli and included a motion to allow overlength brief. That motion does not show good cause for violating the Board's express orders. Therefore, respondent Port of Seattle respectfully requests the Board to strike and disregard all overlength pages in the ACC reply brief.

**A. Facts.**

After the Board's initial pre-hearing order in this matter, which limited each brief filed regarding the motion for stay to 15 pages, counsel for Airport Communities Coalition requested a page limit of 30 pages "per side." A copy of that letter is attached at Tab A.

In response, the Board modified its pre-hearing order to limit each brief to 30 pages: "Each brief filed shall be limited to 30 pages, not counting attachments." A copy of that Board letter is attached at Tab B.

ORIGINAL

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1 The parties subsequently agreed, and the Board ordered, that responding briefs from the Port and  
2 Ecology would be limited to 30 pages and filed on October 1, 2001, and that "Any reply brief [singular] from  
3 the ACC, not to exceed 30 pages" would be filed on October 8, 2001. A copy of that Agreement And Order  
4 Re Rescission Of 401 Certification is attached at Tab C.

5 In reliance on those orders and agreements, the Port of Seattle and the Department of Ecology limited  
6 their response briefs to 30 pages. In sharp distinction, the ACC has filed a 46-page reply memorandum (not  
7 counting the hearsay quotes on the unnumbered, opening page).

8 **B. Argument.**

9 The Pollution Control Hearings Board has authority to enforce procedures before the Board. In  
10 particular, scheduling letters and orders "shall control" unless modified by the presiding officer for good  
11 cause. WAC §371-08-430.


12 In this case, the Board expressly ordered, not once but twice, and the parties expressly agreed that  
13 each brief submitted would be limited to 30 pages in length. ACC has not even attempted to show good  
14 cause for its overlength brief. ACC merely states that it had to reply to both Ecology's and the Port's briefs,  
15 both of which were within page limits and both of which ACC knew were coming, so ACC felt it could  
16 ignore the Board's order. In similar situations, Washington courts have not hesitated to strike and disregard  
17 the overlength portions of briefs. *Ed Nowogorski Ins., Inc. v. Rucker*, 88 Wn. App. 350, 362, 944 P2d 1093  
(1997)(striking overlength reply brief).

18 Absent a compelling good cause for doing so, the Board should enforce its orders. Any other result  
19 will prejudice the other parties and allow an already complicated case to become chaotic. Accordingly, the  
20 Port requests the Board to strike and not consider any pages beyond page 30 of ACC's October 8, 2001 reply  
21 memorandum.

22 Respectfully submitted this 9<sup>th</sup> day of October 2001.

23  
24 PORT OF SEATTLE

AR 006530

25 

26 Linda J. Strout, General Counsel, WSBA No. 9422  
Traci M. Goodwin, Senior Port Counsel, WSBA No. 14974

FOSTER PEPPER & SHEFELMAN PLLC

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AR 006531



Law Offices  
**HELSELL  
FETTERMAN**  
A Limited Liability Partnership

Peter J. Eglick  
Kevin L. Stock  
Attorneys at Law

September 6, 2001

**Sent via Fax -- Urgent**

Kaleen Cottingham, Presiding Officer  
Pollution Control Hearings Board  
Office of Environmental Hearings  
P.O. Box 40903  
Lacey, WA 98504-0903

Re: *ACC v. Department of Ecology and Port of Seattle*, PCHB No. 01-133


Dear Presiding Officer Cottingham:

This is in brief reply to Mr. Pearce's September 6 letter concerning page limits on the motion for stay briefing. That letter appears to propose that ACC be limited to 30 pages on the opening brief in support of the stay, while the Port and DOE be permitted to submit 30 pages each, for a total of 60 pages in response, with ACC limited to only ten pages to reply. This would be inappropriate both in light of the scope of the case and the burden on ACC, as noted in my earlier letter. Moreover, the Port's statement that its interests are not strictly aligned with DOE indicates the need for a longer reply by ACC to address what Mr. Pearce suggests will be distinct arguments by the Port and DOE. This makes reducing the page limit on reply even more inappropriate.

ACC is comprised of six separate legal entities in the State of Washington, five cities and a school district, whose interests are also not precisely aligned, but who have, to date, not filed separate appeals. The Port's statement that it "objects to any page limit 'per side' on briefs" suggests that ACC cities are being penalized for their cooperation in crystallizing and formulating issues on a joint basis, cooperation which will benefit the Board in its review. ACC therefore again requests a page limit of 30 pages per side.

Sincerely,

HELSELL FETTERMAN LLP

  
Peter J. Eglick

cc by fax: Rachael Paschal Osborn  
Joan Marchioro/Thomas Young  
Linda Strout/Traci Goodwin  
Roger Pearce/Steven Jones  
Jay Manning/Gillis Reavis

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AR 006533

**B**

**AR 006534**

Pollution Control Hearing Board  
Shorelines Hearings Board  
Forest Practices Appeals Board  
Hydraulics Appeals Board



(360) 459-6327  
FAX (360) 438-7699  
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STATE OF WASHINGTON  
**ENVIRONMENTAL HEARINGS OFFICE**

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September 7, 2001

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RE: PCHB No. 01-133 **AIRPORT COMMUNITIES COALITION v. ECOLOGY  
and THE PORT OF SEATTLE**

Dear Parties:

This letter is in response to several inquiries about lengths of briefs in the upcoming stay motion. By this letter I am modifying slightly and clarifying the pre-hearing order issued on September 4, 2001. Each brief filed shall be limited to 30 pages, not counting any attachments. This page limit does not need to be shared by the respondents. This limitation applies to the motion and supporting brief, the responsive briefs, and the reply.

I grant this request somewhat reluctantly and ask that you utilize this expansion judiciously so as not to overwhelm the board members with duplicative materials. This is especially important given the limited time between the filing of the reply and the oral argument.

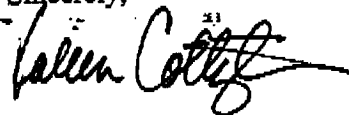
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Additionally, my reference in the pre-hearing order to numbers of copies refers to copies submitted to the Board.

I hope I have answered your inquiries and requests. If you have questions, please do not hesitate to call.

Sincerely,

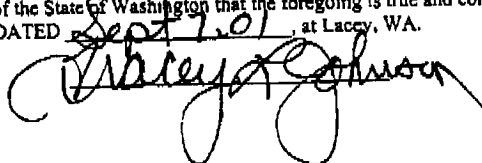


Kaleen Cottingham  
Presiding

KC/p 01-133  
Cc: Leann Ryser -7615

**CERTIFICATION**

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid to the attorneys of record herein. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED Sept 7, 01 at Lacey, WA.





C

AR 006537



STATE OF WASHINGTON  
ENVIRONMENTAL HEARINGS OFFICE  
4224 - 6th Avenue SE, Bldg. 2, Rowe Six  
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September 20, 2001

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RE: PCHB No. 01-133 ACC v. ECOLOGY and THE PORT OF SEATTLE  
PCHB No. 01-150 PORT OF SEATTLE v. ECOLOGY

Dear Parties:

Attached you will find the signed order of the Board regarding the Rescission of the § 401 Certification. If you have questions, please do not hesitate to call.

Sincerely,

Kaleen Cottingham  
Presiding

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid to the attorneys of record herein. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED Sept 21, 01, at Lacey, WA.

KC/p 01-133  
Cc: Leann Ryser --7615

AR 006538



RECEIVED

SEP 19 2001

ENVIRONMENTAL  
HEARINGS OFFICE

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

THE PORT OF SEATTLE,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF ECOLOGY,

Respondent.

AIRPORT COMMUNITIES COALITION,

Appellant,

v.

DEPARTMENT OF ECOLOGY and THE  
PORT OF SEATTLE,

RespondentS.

PCHB No. 01-150  
PCHB No. 01-133

AGREEMENT AND ORDER RE  
RESCISSION OF 401 CERTIFICATION

(CERTIFICATION UNDER §401 OF  
THE CLEAN WATER ACT AND  
COASTAL ZONE MANAGEMENT  
ACT CONCURRENCE; ECOLOGY  
ORDER NO. 1996-4-02325 RE:  
CONSTRUCTION OF A THIRD  
RUNWAY AND RELATED PROJECTS.  
COMPONENTS OF THE PROJECT  
INCLUDE CONSTRUCTION OF A  
8,500-FOOT-LONG THIRD PARALLEL  
RUNWAY WITH ASSOCIATED  
TAXIWAY AND NAVIGATIONAL  
AIDS, ESTABLISHMENT OF  
STANDARD RUNWAY SAFETY  
AREAS FOR EXISTING RUNWAYS,  
RELOCATING S. 154<sup>TH</sup> STREET  
NORTH OF THE EXTENDED  
RUNWAY SAFETY AREAS AND THE  
NEW THIRD RUNWAY,  
DEVELOPMENT OF THE SOUTH  
AVIATION SUPPORT AREA AND THE  
USE OF ON-SITE BORROW SOURCES  
FOR THE THIRD RUNWAY  
EMBANKMENT)

This matter came before the Pollution Control Hearings Board (the "Board") on the  
Stipulation And Agreed Order Of Dismissal filed jointly by the respondent Department of

ORDER - 1

FOSTER PEPPER & SHEFFELMAN PLLC  
1111 THIRD AVENUE, SUITE 3400  
SEATTLE, WASHINGTON 98101-3299 • 206-447-4400

1 Ecology ("Ecology") and appellant Port of Seattle ("Port"). The Board has considered the  
2 agreed order and the arguments of counsel in both this case and in the related case of *Airport*  
3 *Communities Coalition v. Department of Ecology and Port of Seattle*, PCHB No. 01-133. The  
4 Board finds as follows:

5 On August 10, 2001, Ecology issued Ecology Order No. 1996-4-02325, which included  
6 a water quality certification under Section 401 of the Federal Water Pollution Control Act and a  
7 concurrency statement under Section 307 of the Coastal Zone Management Act of 1972 (the  
8 "401 Certification").

9 On August 23, 2001, the Airport Communities Coalition ("ACC") filed a Notice Of  
10 Appeal of that 401 Certification with the Board. That appeal has been given PCHB Case No.  
11 01-133.

12 On September 12, 2001, the ACC filed with the Board a Motion For Stay of the 401  
13 Certification, along with an accompanying memorandum of authorities and supporting  
14 declarations.

15 On September 10, 2001, the Port filed a Notice of Appeal of the 401 Certification with  
16 the Board. That appeal has been given PCHB Case No. 01-150.

17 At the same time as the Notice Of Appeal was filed in Case No. 01-150, the Port and  
18 Ecology filed with the Board a Stipulation And Agreed Order Of Dismissal, in which Ecology  
19 and the Port agreed to certain changes in the 401 Certification. ACC objected to the stipulation.

20 On September 17, 2001, the Board held two status conferences with all parties in both  
21 cases on how best to proceed with the ongoing matters. As an alternative to approval by the  
22 Board of the Stipulation And Agreed Order of Dismissal, counsel for Ecology stated that  
23 Ecology would be willing to rescind the existing 401 Certification and issue a new 401  
24 Certification incorporating the changes in the proposed Stipulation And Agreed Order Of  
25 Dismissal.

26  
ORDER - 2

FOSTER PEPPER & SHEFFELMAN PLLC  
1111 THIRD AVENUE, SUITE 3400  
SEATTLE, WASHINGTON 98101-3299 • 206-447-4400

1 **AGREEMENT OF THE PARTIES**

2 Ecology may rescind the 401 Certification (Ecology Order No. 1996-4-02325). Upon  
3 notification of rescission of the existing 401 Certification, the parties will request the Board to  
4 dismiss the appeals brought under Cases No. 01-133 and No. 01-150.

5 Should Ecology issue a new 401 Certification incorporating the changes in the proposed  
6 Stipulation And Agreed Order Of Dismissal, and should ACC file a notice of appeal with regard  
7 to that new 401 Certification within ten days of receiving the new 401 Certification, the parties  
8 will request ACC's Motion For Stay and accompanying pleadings to be transferred by the  
9 Board to the new ACC appeal, and the schedule outlined below shall apply to the Motion For  
10 Stay. All briefs and supporting declarations will be filed under PCHB Case No. 01-133 unless  
11 and until the Board assigns a new case number for the new appeal, and upon assignment of a  
12 new case number, all motion for stay briefing from all parties, including supporting  
13 declarations, will be transferred to that new case number. Any appeal that ACC may file with  
14 respect to a new 401 Certification may incorporate by reference ACC's first Notice Of Appeal,  
15 in PCHB Case No. 01-133, together with its supporting exhibits and papers filed under that case  
16 number without ACC having to re-file and serve copies of its first Notice Of Appeal. Ecology  
17 and the Port agree to accept service through their undersigned counsel of any new appeal ACC  
18 may file with respect to a new 401 Certification.

19 Any responding briefs on the motion for stay from Port of Seattle and Ecology, not to  
20 exceed 30 pages each, shall be filed and served by 5:00 PM on October 1, 2001.

21 Any reply brief from the ACC, not to exceed 30 pages, shall be filed and served by 5:00  
22 PM on October 8, 2001. The ACC may address changes between the existing 401 Certification  
23 and, if issued, any new 401 Certification in its reply brief, and the sur-reply briefs and sur-  
24 rebuttal briefs allowed below will be limited to said changes.

25 Sur-reply briefs, not to exceed 4 pages, are permitted and shall be filed and served by  
26 5:00 PM on October 9, 2001, by the Port and Ecology.

ORDER - 3

FOSTER PEPPER & SHEFELMAN PLLC  
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1 A sur-rebuttal brief, not to exceed 4 pages, is permitted and shall be filed and served by  
2 5:00 PM on October 10, 2001 by ACC.

3 A hearing has been scheduled for October 15, 2001 at 9:00 AM should the Board wish  
4 to hear oral argument on the motion for stay. A secondary setting is set for October 12, 2001.

5 PORT OF SEATTLE

6 Roger A Pearce for  
7 Linda J. Strout, General Counsel, WSBA No. 9422  
8 Traci M. Goodwin, Senior Port Counsel, WSBA No. 14974 *per permission*  
9 FOSTER PEPPER & SHEFELMAN PLLC

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15 Gillis E. Reavis, WSBA No. 21451 *per permission*  
16 Attorneys for Port of Seattle

17 HELSELL FETTERMAN LLP

18 Peter J. Eglick, WSBA No. 8809 *FAXed signature page attached*  
19 Kevin L. Stock, WSBA No. 14541

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21 Rachael Paschal Osborn, WSBA No. 21618 *FAXed signature page attached*  
22 Attorneys for Airport Communities Coalition

23 CHRISTINE O. GREGOIRE, Attorney General

24  
25 Joan M. Marchioro, WSBA No. 19250 *FAXed signature page attached*  
26 Thomas J. Young, WSBA No. 17366  
Assistant Attorney General  
Attorneys for Department of Ecology

ORDER - 4

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5 PORT OF SEATTLE

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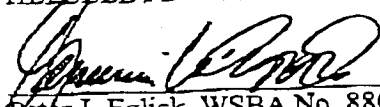
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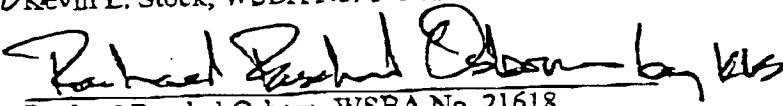
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24 CHRISTINE O. GREGOIRE, Attorney General

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Assistant Attorney General  
Attorneys for Department of Ecology

ORDER - 4

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5 PORT OF SEATTLE

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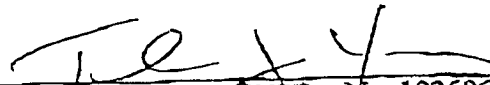
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Assistant Attorney General  
Attorneys for Department of Ecology

ORDER - 4

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**ORDER**

1  
2 Having reviewed the foregoing Agreement and the file and pleadings herein, and  
3 following two status conferences with the parties signatory to this agreement,

4 IT IS HEREBY ORDERED that the foregoing Agreement Re: Rescission Of 401  
5 Certification is entered as an Order of this Board.

6 DATED this 20<sup>th</sup> day of September 2001.

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9 KALEEN COTTINGHAM, Presiding

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ORDER - 5

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