



FOSTER PEPPER PLLC

**STRATEGIES FOR ENVIRONMENTAL
LITIGATION**

July 30-31, 2007

Gillis E. Reavis

Phone: 206-447-7295
Email: reavg@foster.com



FOSTER PEPPER PLLC

**State Water Quality Certification
Section 401 of Clean Water Act**

- Assures that projects requiring a federal permit meet state water quality laws
- Issued by Washington Dept. of Ecology
- Appealed to PCHB
- Standard: “reasonable assurance” that state water quality standards will be met



The Pollution Control Hearings Board

- Three members appointed by Governor
- No more than two from the same political party
- One must be a lawyer
- Selected for expertise in environmental matters
- Do not necessarily have judicial or experience with rules of procedure or evidence



Scope and Standard of Review

- Appeals are not limited to the administrative record (*de novo*)
- Discovery is allowed
- Some deference is given to Ecology on technical matters
 - *Airport Communities Coalition v. Ecology*, 151 Wn.2d 568 (2004)



Procedure and Evidence

- Procedure follows Civil Rules
- Evidence rules may be followed
- Evidence that doesn't meet rules of evidence can be admitted if it is "the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs"
 - WAC 371-08-500



Hearing Procedures

- More and more like trials in court
- Written direct testimony frequently used
- Cross-examination allowed
- Usually some redirect testimony
- Time limited
- Use of chess clock



Case Example: Model Toxics Control Act
Taliesen v. Razore, 135 Wn.App. 106 (Div. I 2006)

- Condo development downtown Seattle
- Contamination discovered during construction
- Contaminated soil hauled off site
- Developer did not follow process for substantial equivalence
- Cleanup effective but not cost-effective



Taliesen v. Razore (cont.)

- Spent \$450,000 on soil disposal
– (\$600,000 total)
- Disposal costs excessive
- Soil volumes too high
- Developer allocated 45%
- Recovery \$37,400 (6% of claim)
- Awarded \$600,000 attorney fees
– \$500,000 net after offset