

No. 04-35011

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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AIRPORT COMMUNITIES COALITION,

Appellant,

v.

COLONEL RALPH H. GRAVES, Commander and District Engineer of the  
Seattle District, United States Army Corps of Engineers; UNITED STATES  
ARMY CORPS OF ENGINEERS, an agency of the United States government;  
and PORT OF SEATTLE, a municipal corporation,

Respondents.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

Docket No. CV02-2483-MJP

The Honorable Barbara J. Rothstein / The Honorable Marsha J. Pechman

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**APPELLANT'S MOTION  
TO EXCEED TYPE VOLUME LIMITATION IN APPELLANT'S BRIEF  
PURSUANT TO CIRCUIT RULE 32-2**

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Peter J. Eglick, WSBA #8809  
Michael P. Witek, WSBA #26598  
HELSELL FETTERMAN LLP  
1001 Fourth Avenue, Suite 4200  
P.O. Box 21846  
Seattle, Washington 98111  
(206) 292-1144  
Attorneys for Appellant  
Airport Communities Coalition

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## **I. Relief Requested**

Appellant Airport Communities Coalition (“ACC”) moves the Court pursuant to Circuit Rule 32-2 for leave to file a principal brief not to exceed 15,195 words, or 1,195 words over the 14,000-word limit in FRAP 32(a)(7)(B)(i). As set out in the Certificate of Compliance attached to ACC’s Brief prepared pursuant to FRAP 32(a)(7)(C)(i), ACC’s Brief accompanying this Motion contains 15, 195 words.

## **II. Grounds for Relief Requested**

The grounds for ACC’s motion are detailed below and in the attached Declaration of Michael P. Witek (“Witek Decl.”), counsel for ACC. An overlength brief is necessary to ensure adequate briefing of the issues in the case for the following reasons:

1. The Sea-Tac Airport Third Runway Project, the Corps of Engineers’ decision concerning it and the U.S. District Court Order upholding the Corps’ decision are all unusually complex. The project itself is immense -- one of the largest public works projects ever attempted in Washington, involving the importation of over 23 million cubic yards of fill material upon which the runway would be constructed. Witek Decl., ¶ 3.
2. The issues raised by the project and addressed in the Corps and District Court decisions at issue in this case are highly technical and broad ranging,

including matters of hydrology, water chemistry, detection and transport of toxic materials, wetlands assessment and mitigation, and transportation planning. Witek Decl., ¶ 4. One indicator of this complexity is the size of the Corps administrative record, which exceeds 100,000 pages and is contained on some 22 CDs. *Id.* The Corps Record of Decision (“ROD”), the operative Corps determination based on its 100,000-page record, is itself 360 pages. A decision by the Washington Pollution Control Hearings Board (“PCHB”), also implicated in this case, is by itself 139 pages.

3. Appellant’s principal brief will cover a number of issues raised by the 100,000-page Corps record, 360-page Corps ROD, and 139-page PCHB decision. These include: 1) the Corps’ failure to include all water quality certification conditions imposed by the PCHB in the Corps’ §404 permit, in violation of the Clean Water Act and its implementing regulations; 2) the Corps’ arbitrary and capricious approval of permit conditions and mitigation measures that are inconsistent with CWA requirements; 3) the Corps’ failure to conduct an adequate need and public interest analysis; and 4) the Corps’ failure to prepare supplemental NEPA documentation to account for new information and circumstances. *Id.* at ¶ 5. The factual and legal questions implicated by any one of these issues would readily fill the normal 14,000-word briefing limit; 15, 195 words to address all of these issues is necessary and not excessive. *Id.*

4. For the most part, the issues in the case cannot be resolved by simple reference to a controlling precedent or isolated portions of the administrative record, but will require detailed citation to and analysis of statutory and regulatory language, legislative history, related case law, and substantial portions of the administrative record. *Id.* at ¶ 6.

5. The briefing before the U.S. District Court was extensive, exceeding normal page limits. ACC sought and was granted permission to file an overlength Motion for Summary Judgment due to the complexity of the issues. *Id.* at ¶ 7; *see* Order Granting in Part and Denying in part Plaintiff's Motion to Extend Briefing Schedule and Motion to File Overlength Brief, dated February 24, 2003 (Docket No. 41) (copy attached to Witek Declaration). The District Court allowed ACC to exceed the normal 24-page limit on dispositive motions by 26 pages, for a total of 50 pages. In turn, respondents' motions for summary judgment also exceeded applicable page limits, as did ACC's Reply. The briefing below on the merits by all parties (not including supporting declarations and attachments or the State of Washington's *amicus* brief) totaled some 265 pages. Reconsideration briefing (the Judge's Order denying ACC's motion for reconsideration is also at issue in this appeal) added another 17 pages. Judge Rothstein's two orders under review by this Court total 48 pages.

In light of the above, in order to efficiently and effectively direct the Court to the appropriate legal authorities and portions of the record, counsel for appellants have exercised diligence in attempting to comply with the briefing limits and have a substantial need for permission to file an overlength brief, not to exceed 15, 195 words. Witek Decl., ¶ 8.

### **III. Legal Argument**

Circuit Rule 32-2 states, in pertinent part:

The court looks with disfavor on motions to exceed the applicable page or type- volume limitations. Such motions will be granted only upon a showing of diligence and substantial need. A motion for permission to exceed the page or type-volume limitations set forth at Fed. R. App. P. 32(a)(7) (A) or (B) must be filed on or before the brief's due date and must be accompanied by a declaration stating in detail the reasons for the motion.

Any such motions shall be accompanied by a single copy of the brief the applicant proposes to file and a Form 8 certification as required by Circuit Rule 32-1 as to the line or word count. The cost of preparing and revising the brief will not be considered by the court in ruling on the motion.

As set forth in the attached Declaration of Michael P. Witek, counsel for ACC has been diligent and has substantial need for additional pages/words for its principal brief.

### **IV. Conclusion**

For the reasons set forth above, ACC respectfully requests that the Court, pursuant to Circuit Rule 32-2, grant ACC's motion for leave to file an overlength brief not to exceed 15, 195 words.

DATED this 7<sup>th</sup> day of May, 2004.

HELSELL FETTERMAN LLP



Peter J. Eglick, WSBA #8809

Michael P. Witek, WSBA #26598

Attorneys for Appellant

Airport Communities Coalition

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No. 04-35011

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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AIRPORT COMMUNITIES COALITION,

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v.

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**DECLARATION OF MICHAEL P. WITEK IN SUPPORT OF  
APPELLANT'S MOTION TO EXCEED TYPE VOLUME LIMITATION  
IN APPELLANT'S BRIEF PURSUANT TO CIRCUIT RULE 32-2**

---

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Michael P. Witek, WSBA #26598  
HELSELL FETTERMAN LLP  
1001 Fourth Avenue, Suite 4200  
P.O. Box 21846  
Seattle, Washington 98111  
(206) 292-1144  
Attorneys for Appellant  
Airport Communities Coalition

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Michael P. Witek declares as follows:

1. I am an attorney of record for appellant Airport Communities Coalition (“ACC”). I make this declaration on personal knowledge and am competent to testify.

2. An overlength brief is necessary in this case to ensure adequate briefing of the issues in the case for the reasons detailed below.

3. The Sea-Tac Airport Third Runway Project, the Corps of Engineers’ decision concerning it and the U.S. District Court Order upholding the Corps’ decision are all unusually complex. The project itself is immense: one of the largest public works projects ever attempted in Washington, involving the importation of over 23 million cubic yards of fill material upon which the runway would be constructed.

4. The issues raised by the project and addressed in the Corps and District Court decisions at issue in this case are highly technical and broad ranging, including matters of hydrology, water chemistry, detection and transport of toxic materials, wetlands assessment and mitigation, and transportation planning. One indicator of this complexity is the size of the Corps administrative record, which exceeds 100,000 pages and is contained on some 22 CDs (contained in USDC Docket No. 14, filed January 13, 2003). The Corps Record of Decision (“ROD”), the operative Corps determination based on its 100,000-page record, is itself 360



pages. A decision by the Washington Pollution Control Hearings Board (“PCHB”), also implicated in this case, is by itself 139 pages.

5. Appellant’s principal brief will cover a number of issues raised by the 100,000-page Corps record, 360-page Corps ROD, and 139-page PCHB decision. These include: 1) the Corps’ failure to include all water quality certification conditions imposed by the PCHB in the Corps’ §404 permit, in violation of the Clean Water Act and its implementing regulations; 2) the Corps’ arbitrary and capricious approval of permit conditions and mitigation measures that are inconsistent with CWA requirements; 3) the Corps’ failure to conduct an adequate need and public interest analysis; and 4) the Corps’ failure to prepare supplemental NEPA documentation to account for new information and circumstances. The factual and legal questions implicated by any one of these issues would readily fill the normal 14,000-word briefing limit; 15, 195 words to address all of these issues is necessary and not excessive.

6. For the most part, the issues in the case cannot be resolved by simple reference to a controlling precedent or isolated portions of the administrative record, but will require detailed citation to and analysis of statutory and regulatory language, legislative history, related case law, and substantial portions of the administrative record.

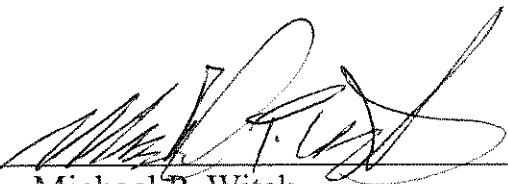
7. The briefing before the U.S. District Court was extensive, exceeding normal page limits. ACC sought and was granted permission to file an overlength Motion for Summary Judgment due to the complexity of the issues. *See* Order Granting in Part and Denying in part Plaintiff's Motion to Extend Briefing Schedule and Motion to File Overlength Brief, dated February 24, 2003 (Docket No. 41) (copy attached). The District Court allowed ACC to exceed the normal 24-page limit on dispositive motions by 26 pages, for a total of 50 pages. In turn, respondents' motions for summary judgment also exceeded applicable page limits, as did ACC's Reply. The briefing below on the merits by all parties (not including supporting declarations and attachments or the State of Washington's *amicus* brief) totaled some 265 pages. Reconsideration briefing (the Judge's Order denying ACC's motion for reconsideration is also at issue in this appeal) added another 17 pages. Judge Rothstein's two orders under review by this Court total 48 pages.

8. In light of the above, in order to efficiently and effectively direct the Court to the appropriate legal authorities and portions of the record, counsel for appellants have exercised diligence in attempting to comply with the briefing limits and have a substantial need for permission to file an overlength brief, not to exceed 15,195 words.

9. Counsel for ACC has been diligent and has substantial need for additional pages/words for its principal brief.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 7<sup>th</sup> day of May, 2004.



---

Michael P. Witek

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*[Signature]*  
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AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AIRPORT COMMUNITIES COALITION,

Plaintiff,

v.

COLONEL RALPH H. GRAVES,  
Commander and District  
Engineer of the Seattle  
District, United States Army  
Corps of Engineers;  
UNITED STATES ARMY CORPS OF  
ENGINEERS, an agency of the  
United States government, and  
PORT OF SEATTLE, a municipal  
corporation,

Defendants.

NO. C02-2483R

ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION TO EXTEND BRIEFING  
SCHEDULE AND MOTION TO FILE  
OVERLENGTH BRIEF

BEFORE the court is Plaintiff Airport Communities Coal-  
tion's ("ACC") motion to file an overlength brief and motion to  
extend the briefing schedule to which the parties stipulated on  
December 24, 2002. According to that stipulation and order, the  
Federal Defendants agreed to lodge the certified administrative  
record concerning the Army Corps of Engineers' decision to issue  
a Section 404 permit authorizing the construction of a third  
runway at Sea-Tac International Airport. On January 13, 2003,  
the Corps filed with the court 22 compact disks containing the  
administrative record. ACC, which received a duplicate set of  
these CDROMs, complains that the record is "impenetrable and


*CAC, BJR, ET*

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1 voluminous" and requests an extension of the briefing schedule in  
2 light of the extra time needed to analyze the record. ACC also  
3 requests permission to file an overlength brief.

4 Inasmuch as ACC may have been overly optimistic in agree-  
5 ing to an aggressive briefing schedule in light of the voluminous  
6 weight of the record, the court finds that granting a limited  
7 extension is justified. However, the court finds that given  
8 ACC's existing familiarity with this case, ninety days is unwar-  
9 ranted. The court grants ACC an extension of 30 days to allow it  
10 more time to review the record, whether it be paper or elec-  
11 tronic. Furthermore, the court finds that the complexity of the  
12 case warrants more substantial briefing than allowed by local  
13 rules, though less than what ACC requests. Accordingly, ACC's  
14 motion for an extension [docket no. 19-1] and motion to file an  
15 overlength brief are GRANTED in part and DENIED in part. The  
16 parties shall submit a briefing schedule accommodating all  
17 parties that at least extends ACC's filing for summary judgment  
18 to March 31, 2003. That briefing schedule shall be filed no  
19 later than February 28, 2003. Furthermore, plaintiff is permit-  
20 ted to file a summary judgment motion not to exceed fifty (50)  
21 pages.

22 DATED at Seattle, Washington this 24<sup>th</sup> day of February,  
23 2003.

24  
25   
26 BARBARA JACOBS ROTHSTEIN  
UNITED STATES DISTRICT JUDGE

No. 04-35011

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

---

Peter J. Eglick, WSBA #8809  
Michael P. Witek, WSBA #26598  
HELSELL FETTERMAN LLP  
1001 Fourth Avenue, Suite 4200  
P.O. Box 21846  
Seattle, Washington 98111  
(206) 292-1144  
Attorneys for Appellant  
Airport Communities Coalition

Andrea Grad certifies as follows:

1. I am an employee of Helsell Fetterman LLP, attorneys for appellant Airport Communities Coalition. I am now, and at all times herein mentioned was, a resident of the State of Washington, a citizen of the United States, and over the age of eighteen years.

2. On Friday, May 7, 2004, I caused to be sent, via Federal Express, for delivery on Monday, May 10, 2004, a true and correct copy of the following documents in the above-captioned case to the parties listed below:

- Appellant's Motion to Exceed Type-Volume Limitation in Appellant's Brief Pursuant to Circuit Rule 32-2
- Declaration of Michael P. Witek in Support of Appellant's Motion to Exceed Type-Volume Limitation in Appellant's Brief Pursuant to Circuit Rule 32-2; and
- Brief of Appellant, with attached Certificate of Compliance,

To:

David Shilton  
Appellate Division  
U.S. Department of Justice  
ENRD, Appellate Section 8934  
601 D Street, N.W., Room ~~8702~~  
Washington, D.C. 20004

Beth Ginsburg  
Laurie K. Beale  
Stoel Rives LLP  
600 University Street, Suite 3600  
Seattle, WA 98101

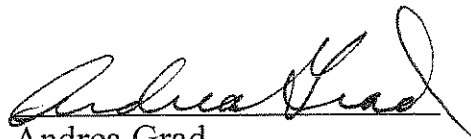
Traci Goodwin  
Linda Strout  
Port of Seattle Legal Department  
Pier 69  
2711 Alaskan Way  
Seattle, WA 98121

Siri Nelson  
Deputy District Counsel  
U.S. Army Corps of Engineers  
4735 East Marginal Way South  
Seattle, WA 98134

Joan Marchioro  
Assistant Attorney General  
Ecology Division  
2425 Bristol Court SW, 2nd Floor  
Olympia, WA 98502

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

DATED this 7<sup>th</sup> day of May, 2004, at Seattle, Washington

  
Andrea Grad