POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, Appellant, CITIZENS AGAINST SEA-TAC EXPANSION, Intervenor/Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and THE PORT OF SEATTLE, Respondents.	PCHB No. 01-160 ACC'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO REDACT PRE-FILED TESTIMONY OF PAUL FENDT

Litigation is not supposed to be an exercise in mind-reading. The purpose of discovery is to provide a mechanism for making relevant information available to the litigants in a timely fashion. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495 (1947).

There are two pieces of sworn testimony relevant to this motion. First is a statement made by King County reviewer Kelly Whiting at his February 28, 2002 deposition indicating that, although he had discussed the problem of low flow frequencies in Walker Creek with Port consultants, he had not as of the date of his deposition received corrections to the Low Flow Plan. *See* Declaration of Peter J. Eglick, Attachment 1 (filed with Appellant's opening brief).

The second relevant testimony is Mr. Paul Fendt's post hoc explanation, attached to the Port's

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response brief, that he had investigated the issue, resolved it, and prepared a piece of evidence indicating his resolution, all during the month of February. He did not, however, share that information with Mr. Whiting or Appellants until March 6 or 7.

The sentence at page 11, lines 18-19 of Mr. Fendt's pre-filed direct testimony, along with the March 2002 version of the Walker Creek chart (Exhibit C, third page), are inadmissible because this information was not timely produced to ACC. Indeed the controversy over this particular piece of evidence illustrates the problem of allowing the Port to continue revising the low flow plan while litigation was ongoing.

ACC deposed Mr. Fendt on February 8, 2002, based on the Board's October 30 pre-hearing order which indicated that no new evidence relating to the Low Flow Plan could be produced for the hearing after February 1. It was not until the Board issued its Order Granting Appellant's Motion to Strike Certain Pre-Filed Testimony, on March 22, that the parties learned that new Low Flow Plan evidence and related opinions, developed between February 1 and February 28, would be admissible. As a practical matter it is not clear how parties can discover evidence that is created up until the last day of discovery. (And it is clear that the Port was furiously revising the Low Flow Plan in late February and early March.) The only fair way to address this problem is to put the burden on the party proposing to use the new information.

The Port's response avoids the key issue—when (and if) Mr. Fendt's opinions were disclosed—and instead argues that Mr. Fendt developed his opinions before the discovery cutoff. Here, if the Port wished to rely at the hearing on information developed during the month of February, it should have disclosed that information to Appellants. CR 26(e)(1)(B) requires parties to supplement interrogatory responses concerning the substance of the testimony of

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expert witnesses. Assuming Mr. Fendt did, in February, resolve issues regarding low flow frequencies in Walker Creek, timely disclosure was necessary to render this evidence admissible. Appellants have no way of disproving what was in Mr. Fendt's mind or on his computer absent disclosure. Moreover, objective evidence, i.e., the statement of Mr. Whiting, indicates that this information was not developed as of February 28, and therefore falls outside the scope of the Board's March 22 Order.

The Port's Low Flow Mitigation Plan is replete with errors and omissions. See Pre-Filed Testimony of William A. Rozeboom and Malcolm Leytham, Ph.D.; Exhibit 458 (Whiting 2/23/02 review comments). The question of the Walker Creek low flow frequencies is but one of many flaws in this critical document. It is not a trivial problem, however, and is antecedent to a number of other issues. Certainly questions about the impact of the Third Runway Project on Walker Creek in early summer (and to what extent mitigation should be required to ameliorate that impact) deserves full exposition. Allowing the Port to provide its view of the matter at the last minute, without adequate disclosure to Appellants, does not comport with the rules of discovery. The Fendt statement and exhibit should be stricken from the record.

DATED this 10th day of April, 2002.

HELSELL FETTERMAN LLP

By: _____
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AIRPORT COMMUNITIES COALITION And CITIZENS AGAINST SEA-TAC EXPANSION, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and THE PORT OF SEATTLE, Respondents.	No. 01-160 CERTIFICATE OF SERVICE

I, Michelle Isaacson, 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 resident of the State of Washington, and over the age of eighteen years.

On April 18, 2002, I caused to be delivered via facsimile and U.S. Mail true and correct copies of ACC's Reply Memorandum in Support of Motion to Redact Pre-Filed Testimony of Paul Fendt in the above matter to:

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

DATED this 18th day of April, 2002, at Seattle, Washington.

Michelle Isaacson
Michelle Isaacson

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