

RECEIVED
APR 11 2002
ENVIRONMENTAL
HEARINGS OFFICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

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

I. INTRODUCTION

ACC moves for redaction of a portion of the pre-filed direct testimony of Paul Fendt, consulting hydrologist for the Port of Seattle, as described below. This motion was first made during the hearing; the Board ordered the parties to confer on ACC's proposed redactions. It is renewed now because, after considerable delay, Port counsel have responded by flatly rejecting ACC's proposal.

AR 001898

II. FACTS

On March 7, 2002, the Port produced its pre-filed direct testimony, including testimony from Port consultant Paul Fendt of Parametrix, Inc. In his pre-filed testimony, Mr. Fendt discussed low flow frequencies in the three streams surrounding Sea-Tac Airport, including

ORIGINAL

1 Walker Creek. Among other assertions, Mr. Fendt stated at paragraph 42 that, “In Walker Creek,
2 44 of the 47 low flows occurred between August 7 and November 9.” Pre-Filed Direct
3 Testimony of Paul S. Fendt, P.E. (“Fendt Pre-Filed”) at p. 11, lines 18-19. ACC moves for the
4 redaction of that sentence. Mr. Fendt also attached to his pre-filed testimony a chart providing a
5 graphical representation of Walker Creek low flow frequencies. Fendt Pre-Filed at Exhibit C,
6 third page (“7-Day Low Flow Occurrences in Walker Creek, 1949-1995 (1994 HSPF)”). ACC
7 moves for the redaction of all of Exhibit C to the Fendt Pre-Filed Testimony.
8

9 Questions about the version of the Walker Creek chart in the December 2001 Low Flow
10 Plan had been raised by Ecology reviewer Kelly Whiting in his February 23, 2002 comments
11 (Exhibit 458) on the December LFP. Further, at his February 28, 2002 deposition, Mr. Whiting
12 indicated that he had specifically discussed his concerns about the Walker Creek chart with Port
13 consultants, but had not as of that date received a response. See Declaration of Peter J. Eglick,
14 Attachment 1 (Whiting Deposition, 2/28/02, p. 173). In light of this, it is significant that
15 paragraph 42 of Mr. Fendt’s March 7 prefiled testimony and his Exhibit C do not correspond to
16 what is included in the December 2001 Low Flow Plan (LFP) (Exhibit 1308, Appendix I (Bar
17 Graph of Low Flow Occurrences in Walker Creek)).
18

19 Fendt’s Exhibit C, a new version of the Walker Creek chart, was not produced or
20 disclosed to ACC prior to the Port’s service of Mr. Fendt’s pre-filed testimony on March 7. Nor
21 did the Port or Mr. Fendt identify the chart as new material. Even at hearing before the Board,
22 the Port did not voluntarily disclose that the Walker Creek chart attached by Mr. Fendt
23 represented an alteration to the December 2001 LFP. Only when Mr. Fendt was queried about
24 the chart under cross-examination did he acknowledge that it was a “replacement page” to the
25

1 December 2001 LFP. ACC then moved orally for redaction of portions of Mr. Fendt's
2 testimony. The Board directed the parties to confer with each other and with Administrative
3 Law Judge Eric Lucas. On March 29, 2002 and April 3, 2002 ACC reminded Port counsel that
4 the issue needed resolution. On April 8, 2002, ACC counsel was finally informed by Mr.
5 Reavis' office that the Port would not agree to redaction. See Declaration of Rachael Paschal
6 Osborn.
7

8 III. ISSUE PRESENTED

9 Whether the Board, pursuant to its earlier rulings, should order redaction of portions of
10 the revisions to the December 2001 Low Flow Plan which were created after February 28, 2002
11 and which were not previously disclosed to ACC?
12

13 IV. AUTHORITIES RELIED UPON

14 ACC relies upon WAC 371-08-450, WAC 371-08-435, the Board's Pre-Hearing Order
15 (10/30/01), the Board's Order Granting Appellant's Motion to Strike Certain Pre-Filed
16 Testimony and Limit Oral Testimony, (3/22/02), and the authorities cited herein.
17

18 V. ARGUMENT

19 The Board should redact portions of Paragraph 42 (sentence on p. 11, lines 18-19, quoted
20 above) and all of Exhibit C to Mr. Fendt's pre-filed testimony relating to Walker Creek low flow
21 frequencies because their submission contravenes principles established in the Board's orders
22 and relies upon a version of the Low Flow report which was prepared **after** the discovery cutoff
23 date of February 28, 2002. ACC was prejudiced by the Port's failure to disclose Mr. Fendt's
24 revisions to the Low Flow Plan in a timely manner that would have allowed for preparation of
25 ACC witnesses and cross-examination of Mr. Fendt at hearing.

1 Once entered, a prehearing order controls the subsequent course of the appeal “unless
2 modified for good cause by subsequent order of the board or the presiding officer.”¹ WAC 371-
3 08-435. The Board’s 10/30/01 Prehearing Order required respondents to produce post-
4 certification plans and reports by February 1, 2002. The 3/22/02 Order partially extended the
5 discovery date to February 28, 2002 for submission and use of revisions to the Port’s post-
6 certification plans and reports.²

8 The Port, after producing an incomplete Low Flow Plan in July 2001 (Exhibit 1259), was
9 directed via numerous detailed conditions in the 401 Certification (Exhibit 1) to submit a
10 complete document. A second version of the Low Flow Plan was finally produced on December
11 17, 2001 (Exhibit 1308), long after the 401 was issued. However, it was again not complete, as
12 reflected in the comments of Kelly Whiting, the King County Department of Natural Resources
13 hydrologist who has provided continuing review of the Port’s low flow documents for Ecology.
14 Mr. Whiting circulated, in February 2002, a critique of the December 2001 Low Flow Plan
15 which detailed its significant deficiencies and concerns.

17 Mr. Whiting specifically questioned the accuracy of the Walker Creek chart, the subject
18 of this motion. Because the Walker Creek chart implicates several additional issues raised in Mr.
19 Whiting’s review, its accuracy is important. These issues include, *inter alia*, how changes to the
20 Port’s ‘existing conditions’ model for Walker Creek affect low flow impact predictions, whether
21 the post-401 certification mitigation target in Walker Creek is based on accurate data and
22 modeling, whether the Walker Creek watershed is able to produce surface water flows adequate
23

24 _____
25 ¹ *Falk v. Keene Corp.*, 53 Wn. App. 238, 250-251, 767 P.2d 576 (Div 1. 1989), *aff’d on other grounds*, 113 Wn.2d
645, 782 P.2d 974 (1989) (trial court has broad discretion to regulate discovery, especially in complex cases).

1 to fill the mitigation reservoirs within a timeframe which does not rob water from late spring and
2 early summer flows (particularly given the large acreage of “non-contiguous groundwater flow”
3 assigned to Walker Creek in the model), and, importantly, whether impacts to Walker Creek
4 occurring prior to the mitigation ‘window’ selected by the Port (beginning on August 1) merit
5 mitigation. Exhibit 458 at 1-2. Mr. Whiting noted in his annotated February 23, 2002 review
6 comments that:
7

8 The 47 year flow frequency analysis and occurrence distribution chart for Walker Creek
9 (1994 conditions) currently shows 17 annual low flow events occurring in June/July. This
10 is very different than information presented during the 2001 facilitated meetings, when
11 the August 1 start date was proposed. If the updated flow frequency data is correct, some
12 consideration should be given to the implications on the proposed mitigation.

13 Ex. 458 at 1. The annotation to Mr. Whiting’s comment states:

14 Indication is that the problem has been researched and the flow frequency analysis
15 included in the 12/01 low flow report is inaccurate.

16 *Id.* When asked about this comment at his February 28 deposition, Mr. Whiting indicated that
17 his concern had not yet been resolved.

18 Q. So the resolution of this [the inaccurate chart] is that there will be a
19 replacement graph provided; is that correct?

20 A. That is my understanding from the meeting, although -- that's my expectation.

21 Eglick Decl. at Attachment 1.

22 Based on Mr. Whiting’s overall review of the December 2001 Low Flow Plan, Ecology
23 directed the Port to attempt to demonstrate (in a report) that it could validate the model results
24 and explain the implications of post-certification model changes for mitigation quantity and
25 timing in each of the three streams.

² Of course, ACC reserves all rights to challenge any admission and use of late-produced evidence.

1 Despite King County's concerns about unmitigated early summer impacts to the streams,
2 (see Ex. 458 at 8; Ex. 461 at 2), Ecology did not require the Port to address biological impacts of
3 the Third Runway Project on low flows during June and July. As it stands, the 401 provides
4 "protection" only through a condition requiring the Port to monitor adverse impacts in June and
5 July.³ Ex. 1 at 25 (Condition I.1.e.vi). It is therefore particularly important that the Port's low
6 flow submittals contain accurate information about *when and to what extent* the Third Runway
7 Project will deplete stream flows in Walker Creek. This information is derived, in part, from the
8 Walker Creek low flow occurrence chart.

9
10 At least three versions of the Walker Creek chart have now been produced by the Port,
11 including July 2001, December 2001 and March 2002 versions. Eglick Decl. at Attachments 2,
12 3, 4. All differ -- with the latest version providing the interpretation most favorable to the Port.
13 The Port has offered no explanation for the three graphs' differing information. It is clear,
14 however, that the Low Flow Plan remains a work in progress, and very much a moving target for
15 those who wish to review and assess or rely on its contents.
16

17 The purpose of discovery timelines is to allow parties the opportunity to fully explore the
18 content of potential evidence, to present opposing evidence if appropriate, and to prepare for
19 cross-examination of witnesses. Discovery activities should occur in an orderly fashion that
20 enables the parties to present their best evidence at hearing.
21

22 Here, the latest version of the Walker Creek chart was only produced, silently, as one of
23 several attachments to Mr. Fendt's March 7 pre-filed testimony -- **after** the February 28 Whiting
24

25 ³ Per testimony of Mr. Whiting and Gordon White at the hearing, it appears that Ecology has never undertaken a review of the early summer flow data to determine whether mitigation should be occurring in June and July.

1 deposition, and **after** the Board's 2/28/02 deadline for use of additional documents relating to the
2 Low Flow Plan. The Port did not produce to ACC, prior to February 28, a copy of the revised
3 Walker Creek chart or provide a supplement to its response to interrogatories, as required by CR
4 26(e), concerning Mr. Fendt's testimony. ACC was left to discover the new information in
5 reviewing Mr. Fendt's prefiled testimony.
6

7 Admission to the record of late-created "replacement pages" undermines the fairness of
8 the truth-seeking process under both PCHB and Civil Rules by placing before the Board data
9 which has not been reviewed by opposing experts and vetted for accuracy. There are now at least
10 three differing data sets for Walker Creek low flow occurrences. While the Port has asserted
11 which of the data it believes to be correct, ACC had no opportunity to review and provide
12 evidence and opinion about that data. The Walker Creek chart and Mr. Fendt's testimony about
13 it should therefore be redacted.
14

15 VI. CONCLUSION

16 The Port, in belatedly offering a new Walker Creek chart and Mr. Fendt's testimony
17 about the chart, is attempting to present to the Board last-minute information in violation of the
18 Board's deadlines and the discovery rules. ACC therefore respectfully requests redaction of the
19 identified portions of Mr. Fendt's prefiled direct testimony.
20

21 DATED this 11 day of April, 2002.

22 HELSELL FETTERMAN LLP

23 By: _____

24 Peter J. Eglick, WSBA #8809

25 Kevin L. Stock, WSBA #14541

Michael P. Witek, WSBA #26598

g:\lu\acc\pchb\motn-redact-pf.doc

Rachael Paschal Osborn, WSBA #21618
Attorney for ACC

AR 001904

ACC' MOTION TO REDACT
TESTIMONY OF PAUL FENDT - 7

HELSELL
FETTERMAN
A Limited Liability Partnership

1500 PUGET SOUND PLAZA P.O. BOX 21846
SEATTLE, WA 98111-3846 PH: (206) 292-1144