

ENVIRONMENTAL  
HEARINGS OFFICE

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

1	AIRPORT COMMUNITIES COALITION,	)	
2		)	PCHB No. 01-160
3		)	
4	Appellant,	)	
5	v.	)	APPELLANTS' REPLY ON MOTION TO
6	STATE OF WASHINGTON,	)	PUBLISH DEPOSITIONS OF ECOLOGY
7	DEPARTMENT OF ECOLOGY; and	)	MANAGERS AND CR 30(b)(6)
8	THE PORT OF SEATTLE,	)	DESIGNATED WITNESSES
		)	
	Respondents.	)	

CR 32 is unequivocal that the deposition of an "officer, director, or managing agent" may be used for any purpose at hearing. See Wright, Marcus & Miller, Federal Practice and Procedure, 8A Civil 2d § 2145 (1994 ed.) ("Rule 32(a)(2) allows the deposition of a party to be used by an adverse party for any purpose. The same free use may be made of the deposition of anyone who at the time of taking of the deposition was the officer, director, or managing agent of a public or private corporation, partnership, association, or governmental agency"). The mechanism by which the depositions are entered as testimony in the record is known as publication. This normally occurs as a routine matter "at trial" pursuant to CR 32(a). ACC noted its motion to publish in advance to save time at the hearing.<sup>1</sup>

Ecology acknowledges that Ecology Director Tom Fitzsimmons surely falls within the Rule<sup>2</sup>, as does Gordon White (Director of the Shorelands and Environmental Assistance Program) and Ray Hellwig (Director of Northwest Regional Office), but then asserts "objections" to these and the other depositions -- none based on actual law or supported by

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<sup>1</sup> Port and Ecology counsel are all experienced practitioners under Washington and parallel federal rules and are well aware of how depositions are used under the rules and published at trial.

<sup>2</sup> Ecology at p. 3

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1 facts. For example, Ecology points out that entire depositions need not come in--a party can  
2 designate only portions, but then identifies no particular deposition portion which should not  
3 come in here. An option to designate less than an entire deposition cannot be turned into a  
4 basis for excluding the entire one when it is designated.<sup>3</sup>

5 Ecology also suggests that there are portions of the depositions where it objected and  
6 that those objections are reserved for trial.<sup>4</sup> Of course, the Board may rule on such objections  
7 as it reviews the depositions, as courts do all the time. CR 32(d)(3). Such objections, which  
8 routinely come up, are not grounds under the rules to exclude the entire deposition. Further,  
9 Ecology has not identified a single specific objection in or to any deposition which would  
10 actually preclude anything.

11 Ecology puts great emphasis on the total length in pages of the depositions (about  
12 1400).<sup>5</sup> This is a case in which the Port and the Ecology have between them offered 38  
13 notebooks full of exhibits compared to the 17 notebooks of exhibits offered by Appellants, 10  
14 of which contain deposition exhibits. Much of the Board's "reading" in this case will  
15 arguably consist of documents which could have been dispensed with, but for the  
16 Respondents' insistence (repeating their tactic on the Stay Motion) on entering into evidence  
17 every page of "background" documents such as the 1992 Puget Sound Regional Council  
18 Flight Plan Report and EIS, which are more than 3 inches thick and easily over a thousand  
19 pages. See Port Exhibits 1059 and 1060, (Port Exhibit binder No. 5).  
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22  
23 <sup>3</sup> Appellants could have designated just the portions of the depositions "favorable" to its case, but did not in  
24 anticipation that Port and Ecology would object and counter-designate as permitted under CR 32(a)(4), resulting  
25 in designation of the entire depositions any way.

<sup>4</sup> CR 32(d)(3)(A) ("Objections to the competency of a witness or the competency of, relevancy, or materiality of  
testimony are not waived by failure to make them before or during the taking of the deposition unless the ground  
for the objection is one which might have been obviated or removed if presented at that time").

<sup>5</sup> The Board should bear in mind that these are deposition pages with ample margins and spacing and are by no  
means equivalent even to briefing pages.

1 The key issue in this case is whether Ecology had reasonable assurance to issue the  
2 401. The depositions offer testimony on the key issues in the 401 by those responsible for it,  
3 including testimony by several key Ecology participants whom Ecology, curiously, will not  
4 call as witnesses. These include: Mr. Hellwig and Mr. Fitzsimmons, both of whose  
5 deposition testimony demonstrates amply that they were fully, intimately, and continuously  
6 involved in 401 deliberations and decisions; Pete Kmet, a senior staff member in the Ecology  
7 toxics cleanup program who criticized the fill criteria; and John Drabek, an environmental  
8 engineer in the water quality program who served for a time as Ecology's permit manager for  
9 the Port's NPDES permit. Respondent's demand that the Board read thousands of pages of  
10 background documents, but not read, in a fraction of those pages, the sworn deposition  
11 testimony of those who analyzed the actual 401 application for Ecology represents, at best, a  
12 misplaced priority.

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14 Finally, Ecology's claim that its various staff (excluding Messrs. Fitzsimmons, White  
15 and Hellwig) do not fall within CR 32 lacks merit. For some--like Ann Kenny and Kevin  
16 Fitzpatrick--their very positions bring the depositions within the rule, which applies to any  
17 "officer, director, or managing agent" of a governmental agency.<sup>6</sup> For the others, Ecology  
18 initially refused to respond to Appellants' CR 30(b)(6) designation notice, which is a  
19 mandatory obligation under the rule. *see*, CR 30(b)(6) and Witek Decl., Ex. F. When  
20 pressed, in correspondence, Ecology said that its designated representatives were the persons  
21 Appellants were deposing (inter alia, Tom Fitzsimmons, Gordon White, Ray Hellwig, Ann  
22 Kenny, Erik Stockdale, John Drabek, Kevin Fitzpatrick and Peter Kmet). Per the Prehearing  
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<sup>6</sup> Kevin Fitzpatrick is the director of the Northwest regional office water quality program and Ann Kenny is Ecology's federal permit manager and principal author of the 401.

Order<sup>7</sup> Appellants accepted this but cautioned Ecology, in writing on February 18, 2002, that  
1 if Ecology had other ideas it must “advise at the start of business on February 19, 2002, so we  
2 can take the matter up immediately with the Board.”<sup>8</sup> Ecology did not do so.

3 DATED this 17 day of March, 2002.

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25 <sup>7</sup> The October 30, 2001 Pre-Hearing Order directed the parties to “cooperate in scheduling depositions and other discovery” (p. 6) and encourages the parties to try to resolve discovery issues “without resorting to the filing of a motion” (at p. 7).

<sup>8</sup> Witek Decl., Ex. F.