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**BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON**

7 AIRPORT COMMUNITIES  
COALITION,

8 Appellant,

9  
10 CITIZENS AGAINST SEA-TAC  
EXPANSION,

11 Intervenor/Appellant,

12 v.

13 STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY; and  
14 PORT OF SEATTLE,

15 Respondents.

PCHB No. 01-160

ECOLOGY'S RESPONSE TO ACC'S  
MOTION TO PUBLISH  
DEPOSITIONS

16  
17  
**I. INTRODUCTION**

18 On the last working day before trial, ACC has filed a motion under CR 32(a)(2) to add  
19 over a thousand pages of deposition transcripts to the record in this matter, in lieu of filing  
20 direct testimony. This motion should be denied. ACC has not shown that the depositions are  
21 admissible, that these witnesses fall within the terms of the rule, and ACC failed to timely file  
22 this request pursuant to the Board's pre-hearing order.

23  
**II. AUTHORITY AND ARGUMENT**

24  
**A. CR 32(a) Requires That Deposition Testimony Be Admissible Before A Motion To  
Publish Can Be Granted**

25 CR 32(a) states:

**AR 002206**

26 At the trial or upon the hearing of a motion or an interlocutory proceeding, any  
part or all of a deposition, so far as admissible under the rules of evidence

**ORIGINAL**

1 applied as though the witness were then present and testifying, may be used  
2 against any party who is present or represented at the taking of the deposition or  
3 who had reasonable notice thereof . . . .”

4 ACC ignores this language in its motion, instead citing CR 32(a)(2). Plainly, however,  
5 the introductory language to the rule applies to all the subparts, including subpart two. Under  
6 this language, a deposition is admissible only if the testimony is admissible under the rules of  
7 evidence. See 8A Charles A. Wright, et al., *Federal Practice and Procedure* § 2151 (1994).  
8 ACC has made no showing that the testimony it seeks to introduce is admissible. The  
9 depositions contain numerous examples of testimony to which objection was made or which is  
10 otherwise inadmissible. See CR 32(d)(3) (objections reserved to time of trial).

11 Under the rule, ACC must designate those portions of the depositions it intends to  
12 admit. See Wright, *supra* at § 2148 (“the better practice is for counsel not to offer an entire  
13 deposition indiscriminately but to read only the parts of a deposition that he or she desires to be  
14 considered in evidence”). Ecology and the Port may then make their objections and offer other  
15 parts of the depositions as needed for clarity. CR 32(a)(4). The Board may then rule on  
16 whether the testimony is admissible.

17 Here, the depositions sought to be published by ACC consist of many hundreds of  
18 pages of testimony.<sup>1</sup> ACC has not specified which portions of those depositions it intends to  
19 admit. Nor is there time, at this late date in the process, on the eve of trial, to go through the  
20 depositions and make evidentiary objections and rulings on each portion of testimony. ACC  
21 could have brought this motion much sooner because the depositions have existed for weeks.

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22 <sup>1</sup> The depositions, and the length, are as follows:

23	Fitzsimmons	122 pp.
24	White	140 pp.
25	Hellwig	265 pp.
26	Kenny	325 pp.
	Stockdale	215 pp.
	Drabek	132 pp.
	Fitzpatrick	175 pp.
	Kmet	<u>50 pp.</u>
		1424 pp.

**AR 002207**

1 ACC's failure to bring this motion in a timely fashion and its failure to be specific in the  
2 motion require that it be denied.

3 **B. CR 32(a) Does Not Apply To These Witnesses**

4 With the exception of Tom Fitzsimmons, none of the listed witnesses have the authority  
5 to speak for the agency on all issues. And while Gordon White and Ray Hellwig arguably are  
6 "managing agents," none of the other witnesses fall within the terms of CR 32(a)(2).

7 ACC claims that Ecology designated Ann Kenny, Erik Stockdale, John Drabek, Kevin  
8 Fitzpatrick, and Peter Kmet as witnesses under CR 30(b)(6). This is not the case. The  
9 correspondence between counsel reveals that Ecology did not designate anyone pursuant to CR  
10 30(b)(6) because ACC's request for such designation was over-broad and improper. *See* Exs.  
11 C and E to the Declaration of Michael Witek. ACC never moved to compel such designation  
12 but elected instead not to pursue the matter. ACC's effort now to unilaterally declare that the  
13 listed witnesses are Ecology's designees should be denied.

14 ACC argues that efficiency requires the admission of these lengthy depositions.  
15 Efficiency cannot override the rules of evidence. Moreover, several of the witnesses listed by  
16 ACC in its motion will be testifying in person — Gordon White, Ann Kenny, Kevin  
17 Fitzpatrick, Erik Stockdale — so that there is no "efficiency" gained in admitting their  
18 depositions. The other persons listed in the motion — John Drabek, Tom Fitzsimmons, Ray  
19 Hellwig, and Peter Kmet- could have been called in person by ACC but ACC elected not to do  
20 so.<sup>2</sup> Therefore, ACC has waived its right to introduce their depositions.

21 **C. ACC Has Not Complied With The Board's Pre-Hearing Order**

22 The Board's pre-hearing order in this matter required the parties to pre-file written  
23 direct testimony for each of their witnesses and the testimony was limited to 30 pages. ACC  
24 apparently intends to submit these deposition transcripts as part of its direct testimony without  
25

26 <sup>2</sup> Though ACC served a Notice to Attend Trial on Ecology pursuant to Rule 43(f), the notice did not include these persons (except for Pete Kmet, who has since been dropped from ACC's list).

1 complying with either the Board's timing requirements or length restrictions. The deposition  
2 transcripts are over 1,400 pages in length. By seeking to include them in the record at the last  
3 minute, ACC is imposing an unreasonable burden on the parties. Its motion should be denied.

4 **III. CONCLUSION**

5 For the reasons stated above, ACC's motion to publish depositions should be denied.

6 DATED this 15 day of March, 2002.

7 CHRISTINE O. GREGOIRE  
8 Attorney General

9 

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11 THOMAS J. YOUNG, WSBA # 17366  
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26 **AR 002209**

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**POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON**

AIRPORT COMMUNITIES COALITION,

Appellant,

CITIZENS AGAINST SEA-TAC  
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v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY; and  
PORT OF SEATTLE,

Respondents.

PCHB No. 01-160

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on March 15, 2002, I caused to be served, Ecology's Response to ACC's Motion to Publish Depositions, Ecology's Response to ACC's Motion to Exclude Testimony from Dave Garland, Ecology's Response to Appellants' Motion in Limine to Exclude "Late-Produced" Plans and Reports, and this Certificate of Service, in the above-captioned matter to be served upon the parties herein, as indicated below:

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**AR 002210**

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20 the foregoing being the last known business addresses.

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

23 DATED this 15th day of March, 2002, in Olympia, Washington.

24   
25 TANYA M. ROSE  
Legal Assistant  
26

**AR 002211**