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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

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| AIRPORT COMMUNITIES COALITION, |) | |
| |) | PCHB No. 01-160 |
| Appellant, |) | |
| v. |) | APPELLANTS' MOTION TO PUBLISH |
| |) | DEPOSITIONS OF ECOLOGY |
| STATE OF WASHINGTON, |) | MANAGERS AND CR 30(b)(6) |
| DEPARTMENT OF ECOLOGY; and |) | DESIGNATED WITNESSES |
| THE PORT OF SEATTLE, |) | |
| |) | |
| Respondents. |) | |
| |) | |
| |) | |

I. INTRODUCTION

Civil Rule ("CR") 32(a)(2) allows the deposition of a party or an officer, director, or managing agent, or a person designated to testify on behalf of a governmental agency which is a party to be "used by an adverse party for any purpose." ACC and CASE ("Appellants") ask this Board for leave to publish the depositions of Ecology's director, Tom Fitzsimmons; Gordon White, the Director of Ecology's Shorelands and Environmental Assistance program; and its Northwest Region Director, Ray Hellwig. The Civil Rules also allow the use of deposition testimony by an adverse party of any person designated under CR 30(b)(6) to testify on behalf of the party. Appellants move to offer the deposition testimony of Ann Kenny, Erik Stockdale,

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APPELLANTS' MOTION TO PUBLISH DEPOSITIONS OF
ECOLOGY MANAGERS AND CR 30(b)(6) DESIGNATED
WITNESSES- 1

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

1 John Drabek, Kevin Fitzpatrick and Peter Kmet all of whom are Ecology's designated
2 representatives.

3 II. FACTS

4 CR 30(b)(6) states that:

5
6 A party may in his notice and in a subpoena name as the deponent a public or private
7 corporation or a partnership or association or governmental agency and designate with
8 reasonable particularity the matters on which examination is requested. In that event the
9 organization so named shall designate one or more officers, directors, or managing
10 agents, or other persons who consent to testify on its behalf, and may set forth, for each
11 person designated, the matters known on which he will testify. A subpoena shall advise a
12 nonparty organization of its duty to make such a designation. The persons so designated
13 shall testify as to the matters known or reasonably available to the organization. This
14 subsection (b)(6) does not preclude taking a deposition by any other procedure authorized
15 in these rules.

16
17 On November 28, 2001, ACC counsel sent an e-mail to Ecology counsel asking Ecology
18 to designate, pursuant to CR 30(b)(6), a representative from the Department to speak to each of
19 the stipulated issues in this case. Witek Decl., Ex. A. In response, Ecology initially said that it
20 would respond to the request by early the following week. *Id.* However, on December 4, 2001,
21 Ecology counsel called ACC counsel and stated that it could not designate CR 30(b)(6) witnesses
22 because the formally approved issues were all "legal" issues. Witek Decl. ¶ 8.

23
24 After informal efforts to get CR 30(b)(6) designations from Ecology failed, ACC counsel
25 served on December 6, 2001, a CR 30(b)(6) deposition notice to the Department of Ecology
requesting that it designate a witness to speak to each of the twenty-two issues in the case.

Witek Decl., Ex. B. On December 11, 2001, Ecology counsel responded by letter and stated:

We believe your notice is unreasonable and improper because the matters upon
which you request testimony are legal issues. Further, we have already identified,
in Ecology's preliminary list of witnesses, those persons that we expect to testify
on behalf of Ecology in this matter.

1 Witek Decl., Ex. C. On February 12, 2002, ACC counsel again sent Ecology a letter reminding
2 them of their obligation to identify CR 30(b)(6) witnesses and stated:
3

4 To be clear, ACC is not seeking legal opinions or conclusions from the
5 Department of Ecology on the issues designated in the 30(b)(6) notice. Rather,
6 ACC is seeking and is entitled to the sworn testimony of the Department of
7 Ecology on the facts and policy issues related to each of the issues identified in
8 ACC's notice. Therefore, ACC requests that Ecology immediately designate a
9 CR 30(b)(6) to speak to the facts regarding the following: (1) wetlands and
10 wetland mitigation for the third runway project; (2) stormwater and stormwater
11 mitigation for the third runway project; (3) stream flow analysis and mitigation
12 for the third runway project; (4) fill criteria for the third runway project; and (5)
13 the Department's policy on beneficial use of stormwater. Time is short to
14 complete these depositions. Please advise immediately of who Ecology will
15 designate as its 30(b)(6) designee on each of these areas. We will work with you
16 to find mutually convenient dates to complete these depositions.

17 Witek Decl., Ex. D.

18 Ecology responded by letter dated February 15, 2002. In that letter, Ecology stated:

19 We believe your request is unreasonable for several reasons. First, Ecology
20 already has identified, in responses to ACC's interrogatories, its witnesses and the
21 general subject matter of their testimony. Second, ACC has already deposed
22 Ecology's witnesses at least once, and intends to continue two of these
23 depositions for a second day. ACC also has either deposed or intends to depose
24 Ecology staff that Ecology does not intend to use as witnesses. Third, ACC has
25 received through public disclosure all the documents prepared by Ecology staff
regarding this matter. In your letter, you request that Ecology identify persons to
testify regarding wetlands, stormwater, stream flow, fill criteria, and the
Department's policy on the beneficial use of stormwater. Given the extensive
discovery that has already occurred in this matter, ACC must already be aware of
the Ecology staff responsible for these subject areas and must already know in
detail the subject matter of their testimony.

Witek Decl., Ex. E (emphasis added).

Rather than troubling the Board with yet another motion, and mindful of the Pre-hearing
Order's directive for the parties to cooperate with discovery, ACC advised Ecology by letter

1 The deposition of a party or of anyone who at the time of taking the deposition
2 was an officer, director, or managing agent, or a person designated under rule
3 30(b)(6) or 31(a) to testify on behalf of a public or private corporation,
4 partnership or association or governmental agency which is a party may be used
5 by an adverse party for any purpose.

6 ACC took the depositions of Ecology's Director, Tom Fitzsimmons; it's Shorelands and
7 Environmental Assistance Program Director, Gordon White; and its Northwest Regional
8 Director, Ray Hellwig. Under CR 32(a)(2), these deponents are clearly Ecology officers,
9 directors and managing agents, and their depositions may be submitted into the Board record not
10 just as exhibits, but as testimony, and used "for any purpose."

11 Further CR 30(b)(6), quoted in full above, required Ecology to designate:

12 one or more officers, directors, or managing agents, or other persons who consent
13 to testify on its behalf

14 A plain reading of CR 32(a)(2) and CR 30(b)(6) allows ACC to use the depositions of
15 Ecology's designated witnesses "for any purpose" and thus allows the admission of these
16 depositions into the Board record as testimony. Orland and Tegland confirm this plain reading
17 of the civil rules:

18 The deposition of a party or of specified representatives of a party may be used at trial by
19 the adverse party for any purpose. This use of the adversary's deposition is permitted
20 even though the party who gave the deposition has taken the stand.

21 14 Washington Practice, Trial Practice Civil § 170, pp. 327-328 (5th Ed. 1996) (footnote
22 omitted); *See also* Wright, Miller and Marcus, 8A Civil Procedure 2d, § 2145 (1994 ed.)
23 (CR 32(a) "should be liberally construed. The trial court has discretion to exclude parts of
24 depositions that are unnecessarily repetitious in relation to the testimony of the party on the
25 stand, but it may not refuse to allow the deposition to be used merely because the party is

1 available to testify in person”).

2 ACC made repeated inquiries to Ecology counsel, asking them to affirmatively identify
3 its designated witnesses to speak to the issues in this case. Ecology indicated that it would rely
4 upon its designation of witnesses and did not object when ACC stated “we therefore understand
5 that the Ecology witnesses we have deposed or will depose are Ecology’s 30(b)(6) witnesses for
6 the subject areas upon which the witnesses have testified (or will testify).” Witek Decl., Ex. F.
7 Having not objected earlier when ACC made the ground rules clear, Ecology has waived and is
8 precluded at this late date from repudiating that the persons it identified, and whom ACC
9 deposed, are Ecology’s CR 30(b)(6) witnesses. Thus, under a plain reading of these rules,
10 Appellants may offer at hearing the deposition testimony of Ecology witnesses, including Ann
11 Kenny, Erik Stockdale, John Drabek, Kevin Fitzpatrick and Peter Kmet for any purpose in the
12 hearing. Accordingly, the Board should permit the use of the deposition testimony of these
13 witnesses at the hearing “for any purpose” and admit this deposition testimony into the Board
14 record.
15
16

17 Finally, allowing the use of the deposition transcripts is dictated by the need for
18 efficiency in this “monumental”¹ hearing regarding one of the “largest public works projects ever
19 attempted in the state of Washington” with potential effects on water quality and the natural
20 environment that have been described by Ecology as “enormous . . .”² Each side has just twenty-
21 two and one-half hours to present testimony and, in order to streamline presentation of evidence,
22 these depositions should be admitted into the record rather than have the depositions read—
23

24 _____
¹ Denial of Certificates of Appealability, p. 4.

25 ² Ecology Press release (No 01-137) dated August 10, 2001.


1 which would be impossible given the limited time.


2 **VI. CONCLUSION**

3 Tom Fitzsimmons, Gordon White and Ray Hellwig are all clearly officers, directors or
4 managing agents for Ecology, and their deposition testimony should be admitted into the record
5 pursuant to CR 32(a)(2). Ann Kenny, Erik Stockdale, John Drabek, Ray Hellwig, Tom
6 Fitzsimmons, Kevin Fitzpatrick and Peter Kmet have been designated as CR 30(b)(6) witnesses
7 by Ecology and the Civil Rules allow the use of these depositions for any purpose at hearing.
8 Accordingly, the Board should GRANT Appellant's Motion to Publish these depositions and
9 admit this testimony into the record.
10


11 DATED this 14th day of March, 2002.

12 HELSELL FETTERMAN LLP

13
14 By: 
15 Peter J. Eglick, WSBA #8809
16 Kevin L. Stock, WSBA #14541
17 Michael P. Witek, WSBA #26598
Attorneys for Respondent
Airport Communities Coalition


Rachael Paschal Osborn
WSBA # 21618
Attorney for Respondent
Airport Communities Coalition

18 SMITH & LOWNY P.L.L.C.

19
20 By:  For
21 Richard A. Poulin, WSBA #27782
22 Attorneys for Citizens Against Sea-Tac Expansion

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