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MAR 15 2002
ENVIRONMENTAL
HEARINGS OFFICE

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)
Appellant,) No. 01-160
v.) DECLARATION OF MICHAEL P.
STATE OF WASHINGTON,) WITEK IN SUPPORT OF
DEPARTMENT OF ECOLOGY; and) APPELLANTS' MOTION TO PUBLISH
THE PORT OF SEATTLE,) DEPOSITIONS OF ECOLOGY
Respondents.) MANAGERS AND CR30(b)(6)
DESIGNATED WITNESSES
(Section 401 Certification No.
1996-4-02325 and CZMA concurrency
statement, Issued August 10, 2001,
Reissued September 21, 2001, under No.
1996-4-02325 (Amended-1))

Michael P. Witek declares as follows:

1. I am over the age of 18, am competent to testify, and have personal knowledge of the matters set forth in this declaration, and am competent to testify thereto.
2. Attached to my declaration as Exhibit A is a true and correct copy of an email thread covering the dates of November 28, 2001 and November 29, 2001, containing a discussion of CR30 (b)(6) issues.

DECLARATION OF MICHAEL P. WITEK IN
SUPPORT OF APPELLANTS' MOTION TO
PUBLISH DEPOSITIONS - 1

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

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

AR 002237

1 3. Attached to my declaration as Exhibit B are true and correct copies of a letter
2 dated December 6, 2001 from Michael P. Witek to Ms. Joan Marchioro with the attached
3 deposition notice.

4 4. Attached to my declaration as Exhibit C is a true and correct copy of a letter dated
5 December 11, 2001, from Thomas Young to Michael P. Witek which responds to the December
6 6, 2001, letter and deposition notice.

7 5. Attached to my declaration as Exhibit D is a true and correct copy of a letter dated
8 February 12, 2002, from Michael P. Witek to Ms. Joan Marchioro and Mr. Thomas J. Young,
9 asking the Attorney General's office to designate witnesses pursuant to CR30(b)(6).
10

11 6. Attached to my declaration as Exhibit E is a true and correct copy of a February
12 15, 2002 letter from Thomas Young to Michael P. Witek responding to the letter dated February
13 12, 2002 from Michael P. Witek to Thomas J. Young and Joan Marchioro.

14 7. Attached to my declaration as Exhibit F is a true and correct copy of the February
15 18, 2002 letter from Michael P. Witek in response to the February 15, 2002, letter from Thomas
16 J. Young to Michael P. Witek.
17

18 8. On December 4, 2001, Joan Marchioro, counsel for Ecology called and stated
19 that, despite previously agreeing to respond the following week to ACC's request that Ecology
20 designate a CR 30(b)(6) witness for each issue in the 401 appeal, Ecology had determined that it
21 could not identify witnesses to speak to "legal" issues.
22

23 9. Mr. Young never responded to my letter of February 18, 2002.
24

25 DECLARATION OF MICHAEL P. WITEK IN
SUPPORT OF APPELLANTS' MOTION TO
PUBLISH DEPOSITIONS - 2

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

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

AR 002238

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

3 DATED this 14th day of March, 2002, at Seattle, Washington.

4 
5 _____
6 Michael P. Witek

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25 DECLARATION OF MICHAEL P. WITEK IN
SUPPORT OF APPELLANTS' MOTION TO
PUBLISH DEPOSITIONS - 3

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

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

AR 002239

Witek, Michael P.

From: Marchioro, Joan (ATG) [JoanM2@ATG.WA.GOV]
Sent: Thursday, November 29, 2001 4:23 PM
To: Witek, Michael P.
Cc: Young, Tom (ATG); Kray, Jeff (ATG); Winkelman, Christine (ATG)
Subject: RE: 30(b)(6) Designation and Discovery

Mike -

As we discussed on the telephone, Ecology will respond to your request to designate a CR 30(b)(6) witness for each issue set forth in the Board's November 21, 2001 Order by early next week.

With respect to Ecology's responses to the ACC's first discovery requests, you and I agreed that, given the discussion at the prehearing conference regarding a discovery hiatus during the holidays, Ecology's responses would not be due until January 7, 2002.

If you have any questions regarding these matters, please let me know.
Thanks, Joan

-----Original Message-----

From: Witek, Michael P. [mailto:mwitek@helsell.com]
Sent: Wednesday, November 28, 2001 6:09 PM
To: Marchioro, Joan (ATG); Young, Tom (ATG)
Subject:

Dear Joan and Tom:

Following upon my email of November 21, 2001, regarding deposition scheduling, can you give us an update on the availability of the Ecology witnesses? We will need some lead time to schedule, prepare for and take the depositions and we will need more time for some witnesses than others. If we can get some initial dates, we can start working out a schedule. Also, we would like Ecology to designate a CR 30(b)(6) witness for each of the issues in this case. I have attached as a word document a list of the issues (current as of the Board's November 26, 2001, Order). You can insert the name of your 30(b)(6) witness by each issue in the attachment and send it back to us via email. If you object to what is proposed, please call me so we can discuss further.

Thanks,
Mike Witek
(206) 689-2137

<<Boardissuelist112601.doc>>

AR 002241

1. Did Ecology violate applicable law pertaining to public and agency notice, hearing, comment and modification regarding the original 401/404 application and Amended Certification?
2. Does Ecology's concurrence with the Port's consistency certification, issued pursuant to the Coastal Zone Management Act ("CZMA"), fail to comply with the requirements of the CZMA and Washington's approved Coastal Zone Management Plan?
3. Do the stated limitations on the temporal, operational, and geographic scope of the Certification, including its limitation to "Port 404 projects," violate the requirements of Section 401 of the Clean Water Act and applicable state water quality law?
4. Is there reasonable assurance that the Third Runway and related projects, for which a Clean Water Act Section 401 ("§ 401") certification is required ("Third Runway Project"), will not violate § 401 and applicable water quality law?
5. Must there be reasonable assurance that a proposed project will not violate § 401 and applicable water quality law when a § 401 Certification is issued?
6. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if the Certification relies on data, reports, and plans that were not in being at the time of issuance of the Certification?
7. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if (1) the Certification relies on future monitoring; or (2) if the Certification fails to require adequate pre-construction monitoring?
8. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as a result of low flow impacts (with the identified mitigation) of the Third Runway Project?
9. Must the Port obtain a water right to implement the low stream flow conditions in the certification and if so:
 - (a) is there reasonable assurance that § 401 and applicable water quality law will not be violated in the absence of such a water right; and
 - (b) Is there reasonable assurance that § 401 and applicable water quality law will not be violated in the absence of review of a water right application under the State Environmental Policy Act ("SEPA")?
10. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as a result of the stormwater impacts (with the identified mitigation) of the Third Runway Project?
11. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if discharges from the airport have violated water quality standards or the Port's NPDES (§ 402) permit?

12. May a certification of reasonable assurance that § 401 and applicable water quality law will not be violated be based upon current and future NPDES (§ 402) permits?
13. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if the certification authorizes a mixing zone without compliance with applicable procedural and substantive requirements for authorization of such a zone?
14. Did Ecology and the Port comply with SEPA?
15. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as a result of the embankment and fill criteria, including:
 - (a) the method of determining compliance with the fill criteria;
 - (b) embankment and wall construction specifications; and
 - (c) groundwater discharges from the embankment and Mechanically Stabilized Earth ("MSE") wall.
16. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as a result of the possibility of MSE wall and embankment failure?
17. Is there reasonable assurance that potential migration and discharge of existing groundwater pollutants originating from the airport (with the identified mitigation) will not violate § 401 and applicable water quality law?
18. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if the Port is in violation of the terms of the MTCA Agreed Order for SeaTac International Airport (Ecology Order No. 97TC-N122, dated 5/15/99)?
19. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as a result of wetland fill, stream alteration and identified mitigation activities?
20. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if the Certification does not address water quality impacts to Gilliam Creek?
21. Is there reasonable assurance that § 401 and applicable water quality law will not be violated where the Certification allows future amendment of its terms "by any future Ecology-approved NPDES (§ 402) permit for the Seattle-Tacoma international Airport (STIA) . . . as determined in that permit"? (*See, e.g.,* amended Certification at P. 4, § 1.f.)
22. Did Ecology have reasonable assurance that § 401 and applicable water quality law would not be violated when it relied on a stormwater detention system that may require future compliance with dam safety regulations (chapter 173-175 WAC) and may require a dam safety permit prior to commencing construction?

EXHIBIT B

AR 002244

Law Offices
HELSELL
FETTERMAN
A Limited Liability Partnership

December 6, 2001

Michael P. Witek
Attorney At Law

Ms. Joan Marchioro
Attorney General's Office
Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117

Re: PCHB Case No. 01-160
CR30(b)(6) Deposition Notice

Dear Ms. Marchioro:

Enclosed please find ACC's CR 30(b)(6) deposition notice to the Department of Ecology ("Ecology"). Please let us know who Ecology designates and we will work with you to find mutually agreeable dates for the examinations.

Sincerely,

HELSELL FETTERMAN LLP



Michael P. Witek

cc: Gillis E. Reavis
Roger A. Pearce
Steven G. Jones

MPW:rxp

Enclosure

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AR 002245

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)
) PCHB No. 01-160
)
) Appellant,)
)
) NOTICE OF DEPOSITION UPON ORAL
) EXAMINATION PURSUANT TO
) CR 30(b)(6)
)
) v.)
)
) STATE OF WASHINGTON,)
) DEPARTMENT OF ECOLOGY; and)
) THE PORT OF SEATTLE,)
)
) Respondents.)

TO: WASHINGTON STATE DEPARTMENT OF ECOLOGY ("Ecology");

AND TO: Joan Marchioro and Thomas Young, Assistant Attorneys General

Your deposition will be taken at the offices of Helsell Fetterman, 1500 Puget Sound Plaza, 1325 Fourth Avenue, Seattle, Washington, on January 11, 2002, at 9:00 a.m., then and there to testify as a witness on behalf of Respondent Ecology in the above-entitled cause, and to remain in attendance upon the undersigned or any other Notary Public until discharged. Your testimony is required concerning the following matters:

1. Did Ecology violate applicable law pertaining to public and agency notice, hearing, comment and modification regarding the original 401/404 application and Amended Certification?
2. Does Ecology's concurrence with the Port's consistency certification, issued pursuant to the Coastal Zone Management Act ("CZMA"), fail to comply with the requirements of the CZMA and Washington's approved Coastal Zone Management Plan?
3. Do the stated limitations on the temporal, operational, and geographic scope of the Certification, including its limitation to "Port 404 projects," violate the requirements of Section 401 of the Clean Water Act and applicable state water quality law?

AR 002246

- 1 4. Is there reasonable assurance that the Third Runway and related projects, for which a Clean
2 Water Act Section 401 ("§ 401") certification is required ("Third Runway Project"), will not violate
3 § 401 and applicable water quality law?
- 4 5. Must there be reasonable assurance that a proposed project will not violate § 401 and
5 applicable water quality law when a § 401 Certification is issued?
- 6 6. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if
7 the Certification relies on data, reports, and plans that were not in being at the time of issuance of the
8 Certification?
- 9 7. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if
10 (1) the Certification relies on future monitoring; or (2) if the Certification fails to require adequate pre-
11 construction monitoring?
- 12 8. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as
13 a result of low flow impacts (with the identified mitigation) of the Third Runway Project?
- 14 9. Must the Port obtain a water right to implement the low stream flow conditions in the
15 Certification and if so:
16 (a) is there reasonable assurance that § 401 and applicable water quality law will not be violated
17 in the absence of such a water right; and
18 (b) Is there reasonable assurance that § 401 and applicable water quality law will not be
19 violated in the absence of review of a water right application under the State Environmental
20 Policy Act ("SEPA")?
- 21 10. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as
22 a result of the stormwater impacts (with the identified mitigation) of the Third Runway Project?
- 23 11. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if
24 discharges from the airport have violated water quality standards or the Port's NPDES (§ 402) permit?
- 25 12. May a certification of reasonable assurance that § 401 and applicable water quality law will not
be violated be based upon current and future NPDES (§ 402) permits?
13. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if
the Certification authorizes a mixing zone without compliance with applicable procedural and
substantive requirements for authorization of such a zone?
14. Did Ecology and the Port comply with SEPA?
15. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as
a result of the embankment and fill criteria, including:

AR 002247

- 1 (a) the method of determining compliance with the fill criteria;
2 (b) embankment and wall construction specifications; and
3 (c) groundwater discharges from the embankment and Mechanically Stabilized Earth ("MSE")
4 wall.

5 16. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as
6 a result of the possibility of MSE wall and embankment failure?

7 17. Is there reasonable assurance that potential migration and discharge of existing groundwater
8 pollutants originating from the airport (with the identified mitigation) will not violate § 401 and
9 applicable water quality law?

10 18. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if
11 the Port is in violation of the terms of the MTCA Agreed Order for SeaTac International Airport
12 (Ecology Order No. 97TC-N122, dated 5/15/99)?

13 19. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as
14 a result of wetland fill, stream alteration and identified mitigation activities?

15 20. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if
16 the Certification does not address water quality impacts to Gilliam Creek?

17 21. Is there reasonable assurance that § 401 and applicable water quality law will not be violated
18 where the Certification allows future amendment of its terms "by any future Ecology-approved
19 NPDES (§ 402) permit for the Seattle-Tacoma international Airport (STIA) . . . as determined in that
20 permit"? (See, e.g., Amended Certification at p. 4, § 1.f.)

21 22. Did Ecology have reasonable assurance that § 401 and applicable water quality law would not
22 be violated when it relied on a stormwater detention system that may require future compliance with
23 dam safety regulations (Chapter 173-175 WAC) and may require a dam safety permit prior to
24 commencing construction?
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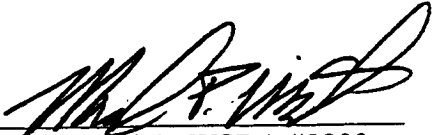
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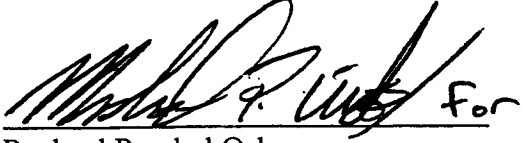
1 Pursuant to Civil Rule 30(b)(6), you should designate one or more persons knowledgeable on
2 these matters to testify on your behalf. The persons so designated "shall testify to the matters known
3 or reasonably available to [Ecology]." CR 30(b)(6).

4 DATED this 6th day of December, 2001.

5 HELSELL FETTERMAN LLP

6
7
8 By:


Peter J. Eglick, WSBA #8809
Kevin L. Stock, WSBA #14541
Michael P. Witek, WSBA #26598
Attorneys for Appellant

 For
Rachael Paschal Osborn
WSBA # 21618
Attorney for Appellant

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EXHIBIT C

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DEC 12 2001

PCHB
Corr.

Christine O. Gregoire

HELSELL FETTERMAN LLP

ATTORNEY GENERAL OF WASHINGTON

Ecology Division

2425 Bristol Court SW 2nd Floor • Olympia WA 98502

Mailing Address: PO Box 40117 • Olympia WA 98504-0117

(360) 586-6770

December 11, 2001

Michael P. Witek
Helsell Fetterman LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, Washington 98101-2509

RE: **PCHB Case No. 01-160**
CR 30(b)(6) Deposition Notice

Dear Mr. Witek:

I am in receipt of your CR 30(b)(6) Deposition Notice in the above-referenced case. 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. Indeed, we are already in the process of scheduling depositions of these persons. If you wish to depose other Ecology staff, we will work with you to schedule those depositions as necessary.

If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

THOMAS J. YOUNG
Assistant Attorney General
(360) 586-4608

TJY:tmr
cc: Roger Pearce

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AR 002252

Law Offices
HELSELL
FETTERMAN
A Limited Liability Partnership

February 12, 2002

Michael P. Witek
Attorney At Law

Sent via FAX

Ms. Joan Marchioro
Mr. Thomas J. Young
Attorney General's Office
Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117

Re: Airport Communities Coalition v. Ecology and Port of Seattle

Dear Joan and Tom:

As you will recall, in November I asked if Ecology would designate a 30(b)(6) witness for each of the issues in the case. Although Joan initially agreed, the following day, Joan called to let me know that Ecology had reconsidered and could not designate a 30(b)(6) witness to speak to "legal" issues. In December we sent a CR 30(b)(6) deposition notice, to which you did not formally object, although Tom sent a letter stating again that Ecology could not designate witnesses to speak to legal issues.

Please re-read ACC's Notice of 30(b)(6) Depositions carefully. ACC properly noted for deposition the Department of Ecology noting with "reasonable particularity the matters on which examination is requested." Pursuant to CR 30(b)(6), Ecology has no choice in the matter as the language of 30(b)(6) is mandatory: "In that event the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters know on which he will testify."

To be clear, ACC is not seeking legal opinions or conclusions from the Department of Ecology on the issues designated in the 30(b)(6) notice. Rather, ACC is seeking and is entitled to the sworn testimony of the Department of Ecology on the facts and policy issues relating to each of the issues identified in ACC's notice. Therefore, ACC requests that Ecology immediately designate a CR 30(b)(6) to speak to the facts regarding the following:

1. Wetlands and wetland mitigation for the Third Runway Project;
2. Stormwater and stormwater mitigation for the Third Runway Project;

Ms. Joan Marchioro
Mr. Thomas J. Young
February 12, 2002
Page 2

3. Stream flow analysis and mitigation for the Third Runway Project;
4. Fill Criteria for the Third Runway Project; and
5. The Department's policy on beneficial use of stormwater.

Time is short to complete these depositions. Please advise immediately of who Ecology will designate as its 30(b)(6) designee on each of these areas. We will work with you to find mutually convenient dates to complete these depositions.

Sincerely,

HELSELL FETTERMAN LLP



Michael P. Witek

MPW:rp

cc: Roger Pearce / Steven G. Jones
Linda Strout / Traci Goodwin
Jay J. Manning / Gillis E. Reavis
Rachael Paschal Osborn
Richard A. Poulin

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Christine O. Gregoire

ATTORNEY GENERAL OF WASHINGTON

Ecology Division

2425 Bristol Court SW 2nd Floor • Olympia WA 98502
Mailing Address: PO Box 40117 • Olympia WA 98504-0117
(360) 586-6770

February 15, 2002

Michael P. Witek
Helsell Fetterman LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, Washington 98101-2509

RE: *ACC v. Ecology & Port of Seattle*
PCHB Case No. 01-160

Dear Mr. Witek:

I am in receipt of your letter dated February 12, 2002, renewing your request for Ecology to designate witnesses pursuant to ACC's CR 30(b)(6) deposition notice. As I previously explained by letter to you dated December 11, 2001, we believe your request is unreasonable for several reasons. First, Ecology already has identified, in responses to ACC's interrogatories, its witnesses and the general subject matter of their testimony. Second, ACC already has deposed Ecology's witnesses at least once, and intends to continue two of those depositions for a second day. ACC also has either deposed or intends to depose Ecology staff that Ecology does not intend to use as witnesses. Third, ACC has 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 flows, fill criteria, and "[t]he Department's policy on the beneficial use of stormwater." Given the extensive discovery that already has 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. Since there is very little time left in which to conduct discovery, and what time does remain has already been scheduled for other depositions, we do not believe any purpose is served by engaging in further duplicative discovery.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

THOMAS J. YOUNG
Assistant Attorney General
(360) 586-4608

TJY:tmr
cc: All Counsel

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Law Offices
HELSELL
FETTERMAN
A Limited Liability Partnership

February 18, 2002

Michael P. Witek
Attorney At Law
EMAIL: mwitek@helsell.com
DIRECT DIAL: 206-689-2137

By Fax and Mail

Mr. Thomas J. Young
Assistant Attorney General
Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117

Re: *ACC v. Ecology & Port of Seattle*, PCHB No. 01-160
CR 30(b)(6) Designation of Ecology Witnesses

Dear Mr. Young:

Thank you for your letter of February 15, 2002 (received at the close of business on Friday at the start of the three day weekend) concerning our CR 30(b)6 request for designation dated December 6, 2001, and our reminder dated February 12, 2002. The February 15, 2002, letter refers to Ecology's identification of its witnesses, ACC's depositions of them, and concludes that "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."

The provisions of CR 30 are mandatory, not permissive. When a CR 30(b)6 notice is served "the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters known on which he will testify." Based upon your letter, we therefore understand that the Ecology witnesses we have deposed or will depose are Ecology's 30(b)(6) witnesses for the subject areas upon which the witnesses have testified (or will testify). If Ecology does not agree and is, contrary to our understanding of the February 15 letter, refusing to make any of the designations required under CR 30(b)6, please advise at the start of business on February 19, 2002, so we can take the matter up **immediately** with the Board.

Sincerely,

HELSELL FETTERMAN LLP


Michael P. Witek

cc: All counsel, by fax
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