

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

1
2 AIRPORT COMMUNITIES COALITION,)
3 Appellant,) PCHB 01-160
4 CITIZENS AGAINST SEATAC) DISCOVERY ORDER AND
5 EXPANSION,) MODIFICATION OF PRE-HEARING
6 Intervenor,) DEADLINES
7 v.)
8 STATE OF WASHINGTON,)
9 DEPARTMENT OF ECOLOGY and THE)
10 PORT OF SEATTLE,)
Respondents.)

11 On January 22, 2002, the Board heard arguments on the following four motions pending
12 before it:

- 13 1. ACC's motion to compel inspection of Port property;
14 2. ACC's motion to extend discovery schedule;
15 3. Port's motion to compel depositions and for limitation on entry onto land
16 4. Port's motion to compel production of documents and response to subpoena duces tecum.

17 The Board reviewed the motions before it, along with all responsive and reply briefs
18 submitted by the parties. The following attorneys participated in the telephone hearing:

- 19 1. Richard Poulin, representing CASE;
20 2. Tom Young, representing Ecology;
21 3. Kevin Stock, Michael Witek and Rachel Paschal Osborn, representing ACC; and

1 4. Roger Pearce and Gil Reavis, representing the Port.

2 Kaleen Cottingham presided for the Board. Randi Hamilton, of Gene Barker and
3 Associates, provided court-reporting services.

4 Based on this review and being otherwise fully apprised in the circumstances of this case,
5 the Board enters the following order:

6 1. ACC's motion to compel inspection of Port property

7 The parties, having been unable to negotiate appropriate conditions to allow a site visit of
8 the Port's property, sought Board intervention to resolve this discovery dispute. Also related to
9 the site visit is the timing of the depositions of ACC's expert witnesses and the production of
10 documents relied upon by such experts. All of these issues are addressed in this order.

11 The Port contends that heightened security warrants heightened controls on entry to its
12 airport facilities and property. ACC contends that CR 34 and CR 26 should be liberally
13 construed to allow unfettered access to the property.

14 The decision of the Board is one of balancing the interests of the parties. The Board
15 looks to the relevance of the requested site visit, whether the information sought is unreasonably
16 cumulative or duplicative, whether the information can be obtained from other sources that are
17 more convenient, less burdensome or less expensive, and whether reasonable constraints on
18 access to the site are appropriate.

19 On balance, the Board finds that a well managed, but limited site visit is appropriate. The
20 limitations and controls are necessary in light of the September 11th events and the resulting
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1 increases to airport security. The Board imposes the following restrictions on the site visit by

2 ACC's expert witnesses:

3 (a) The parties shall consult with each other and get back to the Board with
4 acceptable dates for a site visit. The site visit shall be concluded in either one full
5 day or two half-day sessions. The parties shall indicate to the Board by the close
6 of business on January 22, 2002, which dates shall be used. Should the parties
7 fail to agree, the Board shall set the dates using any of the following dates:
8 January 28, 29, 30, 31 or February 1st.

9 (b) The Port shall provide to ACC, no later than Wednesday January 23rd, a detailed
10 map or aerial photo showing the airport's secured areas and the two areas with
11 "restricted access" due to on-going construction activity. This map or photo shall
12 be the basis for ACC's delineation of its site visit. Prior to the site visit, ACC
13 shall indicate on the map or photo the driving and approximate walking routes for
14 purposes of the site visit. This delineation shall be given to the Port at least 24
15 hours before the site visit.

16 (c) The scope of the site visit will be limited to those areas outside the Port's secured
17 areas. No entry shall be permitted onto the Airfield or other secured areas.

18 (d) The site visit will be limited to the following purposes:

- 19 1. To observe, sample and photograph wetland complexes and streams in the
20 Master Plan Area, specifically in the Miller, Walker and Des Moines Creek
21 Watersheds;

- 1 2. To observe, sample and photograph the outfalls;
- 2 3. To observe, sample and photograph the area proposed for construction of the
- 3 embankment and MSE wall; and
- 4 4. To observe, sample and photograph the existing stockpiled fill material.

5 (e) The participants in the site visit will be limited. The participants may be grouped
6 into two groups, either to minimize group size or to accommodate scheduling
7 conflicts. The following persons shall be allowed to participate in the site visit:

- 8 1. All nine scientists listed on page 3, footnote 5, of ACC's motion to compel;
- 9 2. One counsel representing ACC (after consultation with Intervenor CASE). If
10 the group is divided, one counsel shall be allowed per group;
- 11 3. One counsel representing the Port (after consultation with Ecology). If the
12 group is divided, one counsel shall be allowed per group; and
- 13 4. No more than two security personnel from the Port per group. The security
14 personnel shall be in charge of the group, but shall not limit the site visit,
15 observations, sampling or photography, except as indicated in this order.

16 (f) All non-Port participants in the site visit must sign the hold harmless agreement if
17 they wish to enter into the two restricted areas. The Port and ACC shall discuss
18 and modify, if agreeable, the hold harmless agreement by January 23rd. The
19 signed hold harmless agreements shall be provided to the Port at least 24 hours in
20 advance of the site visit. Failure to sign an agreement shall result in access to the
21 two restricted areas being denied to the person failing to sign.

1 (g) All site visits by ACC experts shall occur and be concluded in either one day or in
2 two half-day sessions.

3 (h) ACC shall make its experts who participate in the site visit available for
4 deposition following the site visit and before the discovery deadline.

5 (i) The Port provided no valid reason for the need for split sampling or scientific
6 checking of the ACC experts during the site visit. The Port will have the
7 opportunity to depose these experts and will have the opportunity to challenge
8 their sampling methodology and resulting data. Therefore, there is no
9 requirement for the Port's experts to participate in the site visit or for the samples
10 to be split or shared.

11
12 2. ACC's motion to extend discovery schedule

13 All parties recognize the need to modify the dates for the submittal of the pre-filed
14 testimony. Disagreement existed as to the extent of the changes. Further, some of the parties
15 implied that changing the dates for the hearing might be in order. Recognizing the magnitude of
16 depositions still outstanding, the Board is willing to slightly modify the dates for pre-filed
17 testimony set forth in the pre-hearing order. Those dates shall be modified by one week. This
18 was done somewhat reluctantly as the changes shorten the amount of time available for the
19 Board to review the pre-filed testimony prior to the hearing.

1 The following dates are the only dates changed in the Pre-hearing order:

- 2 1. Appellant and Intervenor pre-filed testimony shall be filed no later than
- 3 February 22nd;
- 4 2. Respondent pre-filed testimony shall be filed no later than March 7th;
- 5 3. The discovery deadline shall be February 20th; and
- 6 4. The final exhibit and witness lists shall be filed by February 20th.

7 The remainder of the pre-hearing order shall remain in effect. In order to accommodate
8 these shortened schedules, the parties shall assure that all pre-filed testimony is carefully
9 organized to ease the Board's review. In particular, an index or table of contents shall
10 accompany each binder. Binders shall be carefully labeled and tabbed for ease of use.

11 The parties are reminded that there is no room on the Board's calendar to move the
12 hearing on this appeal.

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14 3. Port's motion to compel depositions and for limitation on entry onto land

15 The limitation on entry onto the land has been addressed above. Given the modified
16 schedule above, the Port and ACC shall confer and agree on a new schedule for the deposition of
17 ACC's experts. Such schedule shall be agreed to no later than Wednesday January 23rd. Failure
18 to agree shall result in the Board setting the schedule. The depositions shall occur after the
19 appropriate documents have been either produced or listed as directed below.

1 4. Port's motion to compel production of documents and response to subpoena duces tecum

2 The Port contends that ACC has not produced documents relied upon by its expert
3 witnesses. ACC counters that all records relied upon are already in the public domain and easily
4 obtainable by the Port.

5 The Civil Rules do not distinguish between records or documents “in the public domain”
6 and other documents. However, CR 26(1) allows the court to limit discovery if it determines that
7 the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other
8 source that is more convenient, less burdensome, or less expensive. Therefore, to minimize the
9 duplicative production of documents that may already be in the public record, it shall be
10 sufficient to the request for production for the response to identify, in a list, the document relied
11 upon. The document shall be identified so that the requestor can locate it. This means providing
12 as much information as is available on the document, such as title, author, publication number
13 and date. In addition, the list shall indicate where in the public domain such document or record
14 can be found.

15 Further, the Board notes that some of the requests for production are overly broad. For
16 those requests to which ACC objected as overly broad, the Port shall provide more specificity on
17 the scope of the request.

18 Should document production or related expert depositions continue to cause discovery
19 conflicts, a party may move for Board intervention. Such a motion shall be specific as to witness
20 or the specific request for production at issue.

1 The above noted production of documents shall occur within the modified discovery
2 deadlines set forth in this order.

3 For the above noted reasons the Board enters the following:

4 **ORDER**

5 The Board partially grants the motions before it as set forth above.

6 SO ORDERED this 22nd day of January, 2002.

7 POLLUTION CONTROL HEARINGS BOARD

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11 KALEEN COTTINGHAM,
12 Presiding