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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)
)
Appellant,)
)
v.)
)
STATE OF WASHINGTON)
DEPARTMENT OF ECOLOGY, and)
THE PORT OF SEATTLE,)
)
Respondents.)

PCHB No. 01-160
PORT OF SEATTLE'S REPLY
MEMORANDUM ON ITS MOTION TO
COMPEL DEPOSITIONS AND FOR
LIMITATION ON ENTRY ONTO LAND

ACC's response to the Port's motion to compel ACC to make its witnesses available for deposition and to agree to reasonable restrictions on a site visit is both typical of ACC's past approach and completely consistent with ACC's strategy of pushing out discovery as far as possible. In a Response which the Board's Prehearing Order limited to 7 pages, ACC spends fully 6 pages misstating the Port's position, accusing the Port of bad faith, and incessantly complaining about the Port's failure to provide dates¹ for a site visit.

Amidst all the vitriol and recrimination, ACC's Response fails to acknowledge the following salient facts that have a direct bearing on both the discovery dispute and the parties' ability to prepare for the hearing on the merits in March:

¹ ACC incorrectly complains that the Port has failed to offer dates for a site visit no fewer than 5 times in its 9-page Response (1:21; 2:27; 2:20; 4:5 and 9:19). The Port initially waited to provide dates in the vain hope that ACC would agree to reasonable restrictions on its site visit. However, in a letter sent and received prior to ACC's response, the Port offered two dates for such a visit: January 25 and January 28. Consistent with its strategy of stifling discovery, ACC promptly rejected both of those dates in a letter sent on January 17.

PORT OF SEATTLE'S REPLY ON ITS MOTION TO
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ENTRY ONTO LAND - 1

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- 1 • ACC has not produced a single document in this case;²
- 2 • Despite having failed to obtain any protective order or bring a motion to compel a site
- 3 visit, ACC has unilaterally refused to make a single one of its witnesses available for
- 4 deposition in this action;³
- 5 • ACC has also refused to go forward with its own depositions of the Port's witnesses;
- 6 • In the face of all of this, ACC is demanding that the Board reward it for this conduct by an
- 7 extension of the discovery cutoff through the entirety of the month of February (applying
- 8 only in favor of ACC), that it be allowed to file its direct testimony *after* the Port and
- 9 Ecology's responsive testimony, and allowing the Port and Ecology only two weeks to
- 10 review that testimony in preparation for the hearing on the merits.

11 The bottom line is that ACC has used a disagreement over a site visit to bring the entire
12 preparation for this case to a halt. In a case where time was already short to begin with, ACC's
13 actions have caused the parties to lose a minimum of three weeks of discovery, since ACC still
14 maintains that it will not make any of its experts available for deposition until after a site visit (at
15 the same time it is refusing to agree to the dates offered by the Port for such a visit). As a result of
16 ACC's unilateral actions, none of which have been sanctioned by an order from the Board, the
17 Port has been precluded from seeing *any* of ACC's documents or deposing *any* of ACC's
18 witnesses, while at the same time being forced to respond to ACC's demands that ACC needs
19 extra time to take depositions that it is currently refusing to go forward with.

20 As set forth in the Port's response to ACC's motion to compel a site visit, the Port has
21 offered reasonable site visits to ACC and specific dates on which those visits can take place. The
22 only remaining issue for the Board to resolve is whether ACC must specify where it wishes to go
23 on site and what ACC wishes to sample. With respect to water samples, ACC should be limited
24 to in-stream sampling, first because outfall sampling data is already being collected and reported

25 ² The speciousness of ACC's claims that all relevant documents are in the "public domain" is set forth in the Port's
26 reply on its motion to compel production of documents and responses to its subpoenas duces tecum, which is being
filed concurrently.

³ ACC's approach is completely contrary to the requirements of Washington law, as established by the Washington
Supreme Court. The Port has previously outlined that law in its initial motion to compel depositions at 4:21 – 5:3;
6:20 – 7:2, and in its motion to compel production of documents at 5:10 – 6:20. The Port incorporates that legal
argument here by this reference.

1 to Ecology; second, because Ecology's §401 Certification already requires preparation of a site-
2 specific standard before discharge from new facilities can take place, and the creation of such a
3 standard can only be done using in-stream samples;⁴ and third because numeric water quality
4 criteria are to be assessed using in-stream samples.⁵

5 If the current case schedule is to be salvaged, the Board needs ignore rhetoric and take
6 firm action to get the case back on track. To this end, the Port offers the following proposal as a
7 recommendation for relief on the parties' discovery motions:

8 1. ACC should be compelled to immediately produce all relevant documents sought
9 by the Port (*see* Port's Reply Supporting Motion to Compel Document Production).

10 2. ACC should be compelled to accept the two dates proposed for a site visit (January
11 25 and January 28), and participate in a site visit similar to the ones offered to other public
12 officials, consistent with the Port's letter of January 16, 2002.

13 3. Following the site visit, ACC should be required to make its witnesses available for
14 deposition immediately. In order to account for the three weeks lost while ACC has refused to
15 provide witnesses for deposition, the Port should be allowed until February 15, 2002 to complete
16 its deposition of ACC witnesses.

17 4. ACC should be required to complete its depositions of Port witnesses that have
18 already been noted by February 8, 2002, with the exception of depositions concerning reports
19 filed after November 15, 2001. For issues pertaining to those reports, the Board's Prehearing
20 Order already allows discovery until February 15, 2002.

21 5. In the event that any leave is given with respect to the filing of direct testimony, the
22 Port and Ecology should be given a full two weeks to review such testimony before any
23 responsive testimony is due.

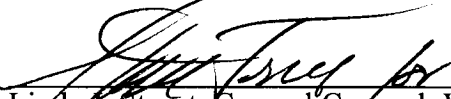
24 _____
25 ⁴ §401 Certification, Condition J.2.a.

26 ⁵ During her deposition on January 15, 2002, Kate Rhoads, a water quality specialist for King County, testified that
any assessment of state numeric water quality criteria could only be done using in-stream sampling data.

1 This proposed form of relief will still allow the Board to maintain the current hearing
2 schedule and will not reward ACC for its unilateral termination of the discovery process.

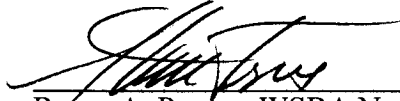
3 Respectfully submitted this 18th day of January, 2002.

4 PORT OF SEATTLE

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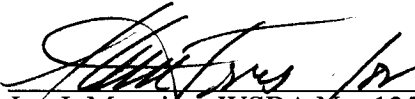
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PORT OF SEATTLE'S REPLY ON ITS MOTION TO
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ENTRY ONTO LAND - 4

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