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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

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4 AIRPORT COMMUNITIES COALITION,)
5) PCHB No. 01-160
6 Appellant,)
7 v.) ACC'S REPLY ON MOTION TO COMPEL
8 DEPARTMENT OF ECOLOGY; et al.,) INSPECTION OF PORT PROPERTY
9 Respondents.)

10 The Port controls the site and is doing everything in its power to restrict ACC's
11 inspection of the soil, wetlands and streams located therein. This leads to the obvious question:
12 what is the Port trying to hide? The Port has given unrestricted access numerous times to
13 Ecology staff, Port consultants and contractors. Yet, ever since ACC's November 26, 2001,
14 CR 34 Request for Entry, the Port has thrown up every obstacle imaginable to block access.
15 Even in its opposition brief, the Port continues to insist that ACC's demand for a site visit is
16 unprecedented¹ because ACC wants to inspect and sample project area wetlands, surface waters
17 and soils. The Port engages in this fiction in spite of the plain language of CR 34, which
18 expressly provides that any party may serve on any other party a request :

19
20 to permit entry upon designated land or other property in the possession or control of
21 the party upon whom the request is served for the purpose of inspection and measuring,
22 surveying, photographing, testing, or sampling the property or any designated object or
operation thereon, within the scope of rule 26(b).

23 CR 34(a)(2) (emphasis added). The Board need look no farther than the authorities cited in ACC's
24

25 ¹ See Port Opposition at pp.1-3.

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ACC'S REPLY ON MOTION TO COMPEL
INSPECTION OF PORT PROPERTY - 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

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1 Response to the Port's Motion to Compel Depositions and for Limitation on Entry onto Land to see that
2 ACC's request is well within the scope of discovery permitted under CR 34 and applicable case law
3 decided under the rule following its amendment in 1970.

4 The access ACC seeks is consistent with the scope of access that the Port has provided in the past
5 to Ecology personnel, and others. Ecology's Ms. Kenny testified in her deposition that she was not
6 subject to any security procedures and was allowed to go where ever she wanted: "it was whatever
7 [sic] we wanted to go. We'd stop, We'd get out, we'd look around. Whatever we wanted to do was
8 fine."²

9
10 In an attempt to appear reasonable prior to Tuesday morning's telephone hearing, the Port now
11 claims (Port Opposition Brief at p. 3-4) that it has "offered a reasonable site visit." Worth noting is
12 that this "offer" comes in the form of a letter dated January 16, 2002, after ACC has moved to compel
13 a site visit, and, approximately eight weeks after ACC first requested the Port to provide dates for such
14 visits.³ ACC responded to the Port's letter the following morning. That letter is attached to the Second
15 Witek Declaration as Exhibit L. As stated in the letter, the Port's offer is too little, too late, and still
16 leaves significant issues to be resolved regarding scheduling, why a strict "route" for the site visit is
17 necessary, why any sampling protocols are required, and why ACC participants must sign a "hold
18 harmless agreement" when others have not in the past. Despite repeated requests, the Port has yet to
19 produce the "hold harmless" agreement it demands be executed. Moreover, there is no legal
20

21
22 ² The relevant portions of the Kenny Deposition Transcript are attached as Exhibit A, to the Declaration of Michael P.
23 Witek in Support of ACC's Motion to Compel Inspection of Port Property and to Extend Discovery Schedule ("First Witek
24 Decl."). Other Ecology personnel have testified in Deposition that they were provided similar access. See Ray Hellwig
25 Deposition Transcript excerpt, Exhibit B to First Witek Declaration; Kevin Fitzpatrick Deposition Transcript excerpt,
Exhibit H to Declaration of Michael P. Witek in Support of ACC's Response to Port Motions to Compel and Limit Entry
("Second Witek Decl."); and the Gordon White Deposition Transcript excerpt, Exhibit I to Second Witek Decl.

³ Also worth noting is that ACC counsel FAXed a response to the Port's "offer" on January 17, 2002, at 9:02 a.m. The Port did not extend the courtesy of attaching ACC's response to its opposition pleadings.


1 requirement under CR 34 for site visit participants to sign a hold harmless nor has the Port cited any
2 cases imposing such an obligation. Nor has ACC been provided with a map of proposed route
3 referenced in the Port's recent site visit offer nor has the Port described the sampling protocol it wishes
4 to follow.


5
6 Given the delay that has occurred and the need to move promptly with discovery, the Board
7 should grant ACC's Motion to Compel Inspection of Port Property under the terms set forth in ACC's
8 Proposed Order.

9 DATED this ^u18 day of January, 2002.

10 HELSELL FETTERMAN LLP

11
12 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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