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POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, )

PCHB No. 01-160

Appellant, )

ACC'S REPLY ON MOTION TO  
EXTEND DISCOVERY SCHEDULE

v. )

STATE OF WASHINGTON, )

DEPARTMENT OF ECOLOGY; and )

THE PORT OF SEATTLE, )

Respondents. )

\_\_\_\_\_ )

The Port controls access to the site and has all the data and reports which are the subject of this case. Pursuant to the Pre-hearing Order, the general discovery deadline is February 1, 2002, just nine working days from today's date. The Port is no doubt aware of the discovery schedule. The Port has refused, until January 16, 2002, to even agree to propose dates for site visits and only two days before that, to begin metering out data and reports of its experts. ACC should not be forced to proceed to hearing on such disparate terms. Accordingly, the Board should grant ACC's Motion to Extend the Discovery Schedule.

The Port's Opposition is less than forthcoming with all of the facts and circumstances regarding the discovery process. First, the Port's Opposition (p. 2) states that, "ACC has failed to identify or produce a single document in response to the Port's Request for Production" (emphasis added). ACC's Answers and Responses to the Port's Interrogatories are attached as Exhibit U to the Declaration of Michael P. Witek in Support of ACC's Response to Motions to Compel and Limit Entry. ACC objected to the broad scope of the Port's requests, but nonetheless identified a number of responsive documents,

ACC'S REPLY ON MOTION TO EXTEND  
DISCOVERY SCHEDULE - 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 including "ACC's Notice of Appeal dated August 23, 2001; Notice of Appeal dated October 1, 2001;  
2 pleadings and declarations in support of ACC's Motion for Stay; and ACC's October 10, 2001, and  
3 November 15, 2001, Witness and Exhibit Lists, all of which have already been provided to the Port." *Id.*  
4 at pp. 9-10. In response to the Port's Request for Production No. 2 which asked ACC to produce "all  
5 documents relied upon or reviewed to form the basis of the opinions, facts or other testimony" of ACC's  
6 experts, ACC responded that:

7  
8       The documents relied upon or reviewed by ACC's experts are referenced in the comments  
9       and declarations of ACC's experts and are in the public domain. *See* the documents  
10       identified in response to Interrogatory No. 4, which have already been provided to the  
11       Port.<sup>1</sup>

12 *Id.* at pp. 11-12. Thus, it is simply not true to say that ACC has failed to identify or produce a single  
13 document in response to the Port's Requests for Production.

14       In its Opposition (p. 2), the Port complains that ACC has refused to allow the Port to depose a  
15 single one of ACC's witnesses. As explained in ACC's Response to Motion to Compel Depositions and  
16 for Limitation on Entry onto Land (at pp. 3-4), the schedule for the deposition of ACC witnesses was  
17 premised upon a prior ACC site visit and it was only after the Port refused ACC the site access provided  
18 to others that ACC notified the Port that the depositions could not move forward until ACC experts had  
19 been given the same opportunity to inspect the site as Ecology staff and Port consultants.

20       The Port complains in its Opposition (at fn. 1; and p. 3) that ACC "waited until January 10, 2002,  
21 to note any depositions of Port Witnesses." What the Port hides from the Board here is that ACC noted  
22

23 <sup>1</sup> In response to Interrogatory No. 4, ACC identified a number of documents including "the pleadings filed in ACC's Motion for  
24 Stay and declarations filed in support of ACC's Motion for Stay. *See also* the comment letters submitted to the Department of  
25 Ecology on behalf of ACC, which are identified in ACC's November 15, 2001, Exhibit List. Subsequent to November 15, NHC  
has also submitted an additional comment letter to the Corps of Engineers regarding the Port's low flow analysis." *Id.* at pp. 10-  
11.

1 these depositions only after the Port failed to respond to informal requests for deposition dates, including  
2 an e-mail request of December 27, 2001, in which ACC counsel asked Port counsel to “make available for  
3 deposition all persons listed as witnesses in the Port’s October 10, 2001, and November 15, 2001, Witness  
4 Lists.”<sup>2</sup> Without doubt, if ACC had not noted the depositions of Port witnesses when it did, then the Port  
5 would certainly now be arguing that ACC’s request to depose Port witnesses is untimely in light of the  
6 February 1, 2002, discovery deadline.  
7

8 The Port’s Opposition (p. 2) again suggests that ACC is “acting strategically in an effort to delay  
9 the hearing on the merits.” As explained in ACC’s Response to Motion to Compel Depositions and for  
10 Limitation on Entry onto Land (pp. 3-4), in both a letter and e-mail of December 12, 2001, a week before  
11 the Board’s Stay Order, ACC asserted the position that the depositions of its witnesses would need to take  
12 place after a site visit.  
13

14 The Port’s Opposition (p. 4) states that “ACC should not be allowed to benefit from its own failure  
15 to comply with its discovery obligations.” The facts don’t support the Port’s rhetoric. ACC requested  
16 entry upon Port property on November 26, 2001, and repeatedly asked the Port to provide dates for site  
17 visits so scheduling could take place while discussions about the scope of the site visit continued. The  
18 Port never provided proposed dates for site visits until January 16, 2002, after ACC filed its Motion to  
19 Compel Inspection of Port Property. On the other hand, the Port first provided notice of the ACC  
20 witnesses it sought to depose on December 3, 2001, and even though there was dispute as to the proper  
21 scope of subpoenas duces tecum filed by the Port for such depositions, ACC nonetheless provided dates  
22 for the depositions of those witnesses.  
23

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24 \_\_\_\_\_  
25 <sup>2</sup> See Exhibit F to Declaration of Michael P. Witek in Support of ACC’s Motion to Compel Inspection of Port Property and to  
Extend Discovery Schedule.

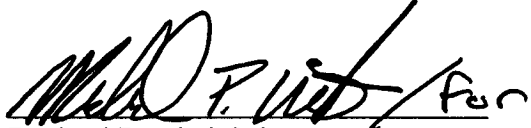
1 In this case, the Port controls the site, data, and reports which are the subject of this case. The Port  
2 has progressively raised the bar on site visit access, with a progressive cascade of conditions, refusals and  
3 quibbles, which puts ACC to an even greater disadvantage in conducting discovery. The Port also  
4 continues to hide the ball and limit access to key documents.<sup>3</sup> ACC should not be compelled to move  
5 forward on such unequal footing and accordingly the Board should enter an Order extending the discovery  
6 schedule in this matter.

7  
8 DATED this 18<sup>th</sup> day of January 2002.

9 HELSELL FETTERMAN LLP

10  
11 By:

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

  
Rachael Paschal Osborn  
WSBA # 21618  
Attorney for Appellant

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22 **AR 004758**

23 <sup>3</sup> In his January 14, 2002, letter (Exhibit S to Witek Declaration), Port counsel Steve Jones advised ACC counsel that “we  
24 can make documents available for review and copying at your convenience.” ACC’s counsel took Mr. Jones up on his  
25 offer and advised him that ACC would appear in his offices the next day at 10:00 a.m. to begin review. When ACC arrived  
to inspect Port documents, it became quickly apparent that the Port had not produced documents from its key consultants  
Parametrix and Hart Crowser.

ACC’S REPLY ON MOTION TO EXTEND  
DISCOVERY SCHEDULE - 4

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

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