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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 OPPOSITION TO  
ACC'S MOTION TO COMPEL  
INSPECTION OF PORT PROPERTY

The Port of Seattle ("Port") submits this opposition to ACC's Motion to Compel Inspection of Port Property. Because the Port has brought its own motion with respect to the site visit, the facts surrounding ACC's request for a site visit, the Port's response and the various communications of counsel regarding the visit have already been set forth in that motion and are incorporated herein by this reference. See Port of Seattle's Memorandum in Support of Its Motion to Compel Depositions and for Limitation on Entry Onto Land at 1:15 – 4:4; Second Declaration of Steven G. Jones ¶¶ 2-7, Exs. A – F. Accordingly, the Port's opposition will be confined to outlining the legal basis upon which ACC's motion should be denied, and limits placed on any site visit ultimately allowed.

**I. ACC Has Sited No Authority In Support Of Its Demand for an Unlimited Site Visit.**

The Board will search in vain for any case law in ACC's motion supporting its position that its experts are entitled to go anywhere they wish, photograph anything they want, and sample

PORT OF SEATTLE'S OPPOSITION TO ACC'S  
MOTION TO COMPEL INSPECTION OF PORT  
PROPERTY - 1

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1 anywhere and anything they decide to, without restriction. This is not because no case law exists  
2 on this issue; rather, it is because the relevant case law clearly indicates that CR 34(a) was not  
3 designed to allow fishing expeditions. Instead, the cases indicate that any site visit is subject to  
4 reasonable restrictions, consistent with the intrusive nature of the discovery requested, namely,  
5 entry onto another's property. *See, e.g., Tobin v. WKRZ, Inc.*, 12 F.R.D. 200, 201 (D.C. Pa. 1952)  
6 ("while fishing expeditions may be conducted under Rules 26 to 33 by use of interrogatories and  
7 depositions, Rule 34 was not intended for such purpose"); *Service Liquor Distributors, Inc. v.*  
8 *Calvert Distillers Corp.*, 16 F.R.D 344, 346 (D.C.N.Y. 1954) (Rule 34 never intended to allow  
9 "fishing excursions").

10 **II. The Relevant Case Law Supports the Port's Position that ACC Is Not Allowed**  
11 **Unfettered Access to Port Property.**

12 The Fourth Circuit was very clear that Rule 34 does not allow unrestricted access to  
13 another's property. *Belcher v. Bassett Furniture Industries, Inc.*, 588 F.2d 904 (4<sup>th</sup> Cir. 1978). In  
14 *Belcher*, the Fourth Circuit refused to condone a request for a similar site visit by an expert and  
15 an unspecified number of attorneys, a paralegal and two plaintiffs, noting that:

16 Since entry upon a party's premises may entail greater burdens and risks than  
17 mere production of documents, a greater inquiry into the necessity for inspection  
18 would seem warranted. We therefore reject the plaintiffs' contention that the  
19 inspection in this case must necessarily be governed by the general relevancy  
20 standard of Rule 26(b). . . . [T]he degree to which the proposed inspection will  
21 aid in the search for truth must be balanced against the burdens and dangers  
22 created by the inspection.

23 *Belcher*, 588 F.2d at 908.

24 ACC's only authority for its demand for an unbounded site visit is the "scope of discovery  
25 under CR 26(b)." *See* ACC Motion at 6:13. But, as the *Belcher* decision makes clear, that scope  
26 is limited by both the demands of relevance and the case law construing Rule 34. CR 34(b)  
demands that that any request for entry onto land "*set forth the items to be inspected . . . and*  
*describe each item and category with reasonable particularity.* The request shall specify a

1 *reasonable time, place and manner* of making the inspection and performing the related acts.”  
2 (Emphasis supplied).

3 In this situation, where the Port is already sampling and providing data to Ecology on a  
4 regular basis, ACC’s reliance on the mere “scope of discovery” is untenable. ACC should have to  
5 go beyond a claim of mere “relevance” in justifying why it cannot rely on those samples or make  
6 a showing of why those samples are defective before it is given unfettered access to the Port’s  
7 property.

8 The *Belcher* decision is particularly apt on this point, requiring that the Board use  
9 “precision and care in the formulation of inspection orders.” 588 F.2d at 911. In doing so, the  
10 Board should demand that ACC describe its proposed inspection and testing with sufficient  
11 “particularity” to avoid the “risk of creating highly unreliable evidence.” *Cf. Cabrera v. Cordis*  
12 *Corp.*, 134 F.3d 1418, 1420 (9th. Cir. 1998) (in order to consider evidence that qualifies as  
13 “scientific knowledge,” the evidence must have a “grounding in the methods and procedures of  
14 science ... [and be] more than subjective belief or unsupported speculation.”); *In re Marriage of*  
15 *Parker*, 91 Wn. App. 219, 225, 957 P.2d 256 (1998) (scientific evidence must be shown to be  
16 reliable). In order to assure that evidence presented to the Board is reliable, the Board must place  
17 adequate limitations on any site visit.

### 18 **III. The Port Has Offered ACC a Reasonable Site Visit**

19 Contrary to the impression given by ACC’s motion, the Port is not taking the position, nor  
20 has it advanced the position, that ACC cannot come onto Port property under any circumstances.  
21 Rather, the Port has merely insisted on ACC complying with the requirements of CR 34(b). In an  
22 attempt to narrow the issues left for the Board to resolve before a site visit could take place, the  
23 Port transmitted a letter to ACC on January 16, 2002. A copy of that letter is attached to this  
24 opposition for the Board’s reference. In that letter, the Port stated that:

- 25 • it would agree to allow all 17 of the people ACC has requested on site in two  
26 separate site visits;

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- ACC’s representatives would be allowed to take the same route as has been taken by Ecology officials and other public officials who have visited the Port’s property;
- The Port would agree that ACC representatives, counsel or experts were free to take photographs of any portion of the Port’s property or facilities during the site visit;
- The Port will accommodate requests by those on the site visit to go to any stormwater outfall that is not located within the secured area of the Airport.
- the Port reiterated its offer to split samples with ACC.

ACC has bristled at the requirement that its representatives be required to sign hold harmless agreements, asserting that this requirement was instituted specifically for ACC and was not applied to any other visitor. This requirement has arisen since the time of the last visit to the project site by Ecology personnel and other public officials, and is based on the fact that the Port has recently established an owner-controlled insurance program. Under that program, it is necessary for any person going onto a contractor-controlled work site to sign a release and hold harmless agreement. This applies to Port personnel as well as to other individuals, but does not apply to those portions of the site that are not contractor-controlled (i.e., sites that are not active construction sites). Here again, this is a requirement that might be possible to avoid if ACC were willing to specify where it wanted its representatives to go, and if those areas are not active construction sites. But, without ACC’s specification, the Port cannot waive the requirement.

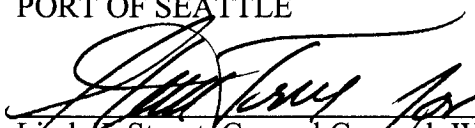
**IV. Conclusion**


ACC demands unrestricted access to all portions of Sea-Tac International Airport, yet refuses to identify the sites to be visited, sampling locations, or to agree to split samples. This demand is being leveraged by ACC’s threat to withhold all of its witnesses from deposition unless the Port agrees to ACC’s unreasonable requests.

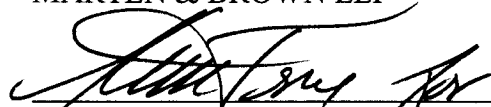
ACC has cited no authority to support its claim that an unrestricted site visit is required by the scope of discovery under CR 26(b). To the contrary, the courts interpreting Rule 34 have been clear that, because of the intrusive nature of a site visit, the scope of such discovery is much more

1 limited than that applied in the context of interrogatories or depositions. Mere relevance is not the  
2 standard, and, based on the fact that the Port is routinely supplying sampling data to Ecology, the  
3 Board should require ACC to demonstrate why a site visit is necessary. In addition, the Board  
4 should supply reasonable constraints on any site visit ultimately allowed, consistent with the  
5 requirements of CR 34. The Port has already made an offer of such a site visit and the Board  
6 should require ACC to demonstrate conclusively why the Port's offer does not satisfy the  
7 requirements of Rule 34.

8 Respectfully submitted this 17<sup>th</sup> day of January, 2002.

9 PORT OF SEATTLE  
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11 \_\_\_\_\_  
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13 Traci M. Goodwin, Senior Port Counsel, WSBA No. 14974

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FOSTER PEPPER & SHEFELMAN PLLC  
ATTORNEYS AT LAW



January 16, 2002

**VIA FACSIMILE**

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

Re: Port of Seattle's Offer On Site Visit

Dear Mike:

I am writing as a follow-up to the exchange of correspondence and the parties' cross-motions with respect to ACC's requested site visit. The Port would like to narrow the issues that need to be resolved by the Board as much as is practicable. In an attempt to do so, the Port proposes the following parameters for a site visit by ACC representatives, counsel and witnesses:

**1. Attendees**

The Port will agree to all 17 persons that ACC has requested visit the site, consistent with the conditions outlined in this letter. The Port has a van that will seat approximately 10 adults. We believe that ACC's representatives and accompanying Port personnel and consultants can be accommodated in two separate site visits. For efficiency, we would suggest that the wetlands experts be grouped together in one group and the water quality experts in another group.

**2. Dates and Duration of Visit**

We propose that the site visits take place on Friday January 25 and Monday January 28, 2002. Tuesday January 22 would also be feasible if we get resolution prior to that date. Each site visit will last three to four hours. These dates should give ACC sufficient time to prepare, but we request the ACC to suggest alternate dates.

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Washington

**3. Locations Visited**

The Port proposes that the same route that was used for Ecology personnel and other public officials that ACC has referred to in its correspondence regarding the site visit. This route encompasses portions of the wetlands on site, Miller Creek, the embankment area and areas where fill material has been stockpiled. It does not encompass the airfield, which we understand is not within the scope of ACC's site visit request in any event. We will forward a map to you showing the proposed route.

**4. Photographs**

The Port would agree that ACC representatives, counsel or experts were free to take photographs of any portion of the Port's property or facilities during the site visit.

**5. Observance of Outfalls**

The Port will accommodate requests by those on the site visit to go to any stormwater outfall that is not located within the secured area of the Airport.

**6. Sampling**

The Port reiterates its offer to split samples with ACC, pursuant to an agreed sampling protocol.

**7. Hold Harmless Agreements**

The Port has recently established an owner controlled insurance program (OCIP). Under those insurance arrangements, it is generally necessary for any person going on to a contractor-controlled work site to sign a release and hold harmless. This applies to Port personnel as well as to other individuals, but does not apply to those portions of the site that are not contractor controlled (i.e., sites that are not active construction sites).

We hope that this letter can form a framework within which an agreement can be worked out that narrows the range of issues that require resolution by the Board. After you have reviewed this letter, please get back to me at your earliest convenience so that we can discuss these issues.

Mr. Michael P. Witek  
January 16, 2002  
Page 3

Sincerely,

FOSTER PEPPER & SHEFELMAN PLLC

A handwritten signature in black ink, appearing to read "Steve", written in a cursive style.

Steven G. Jones

Attachment

cc: Traci Goodwin  
Roger Pearce  
Gillis Reavis