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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 EXTEND
DISCOVERY SCHEDULE

The Port of Seattle ("Port") submits this memorandum opposing ACC's motion to extend the discovery schedule in this case. Having failed to comply with its discovery obligations and failed to schedule depositions, ACC now requests that the Board reward its recalcitrance by extending the discovery schedule and granting ACC more time to present its witness list and, more importantly, more time to file its direct testimony. Granting ACC's motion would work a significant prejudice on the Port and on the Department of Ecology, as well as sanctioning ACC's conduct in failing to honor its discovery obligations.

I. Statement of Facts.

ACC's one-sided version of the facts must be corrected so that the Board can properly assess ACC's motion to extend the discovery schedule or allow ACC extra time to submit its witness and exhibit lists, and most significantly, its direct testimony.

1 **First**, as was noted in the Port’s motion to compel production, ACC has failed to identify
2 or produce a single document in response to the Port’s requests for production. *See* Port’s Motion
3 to Compel Production of Document at 2:11-3:24 and Third Jones Declaration, ¶¶ 2-7, Ex. B.

4 **Second**, ACC has refused to allow the Port to depose a single one of ACC’s witnesses.
5 *See* Memorandum In Support of Port’s Motion to Compel Depositions and Limit Entry Onto Land
6 at 3:15-22; Second Jones Dec., Ex. E.

7 **Third**, having noted 31 depositions¹ to be taken in 8 working days, and having received
8 word from the Port that the Port was ready to make its witnesses available for deposition on the
9 dates requested,² ACC’s counsel is now *refusing to take depositions that ACC itself noted*. *See*
10 Letters from Kevin Stock to Steven Jones and Roger Pearce, dated January 14, 2002 and January
11 15, 2002 respectively.³

12 ACC has failed to identify or produce documents, failed to produce a single witness for
13 deposition, and has now failed to go forward with depositions that ACC noted itself. In the face
14 of these facts, ACC now requests that the Board reward its actions with an extension of the
15 discovery cutoff and an extension of time to file its direct testimony.

16 **II. ACC’s Is Acting in a Manner Designed to Delay the Hearing on the Merits.**

17 As was noted in the Port’s Motion to Compel Depositions, ACC is acting strategically in
18 an effort to delay the hearing on the merits. ACC’s reason for doing so is clear – having been
19 granted a stay of the §401 Certification, ACC is now seeking every opportunity to delay discovery
20 with the ultimate aim of setting over the hearing on the merits. ACC’s intentions are stated in the
21

22 ¹ It is significant that, of the “forty-five (45) depositions . . . scheduled to take place between now and February 1,
23 2002” (*see* ACC’s motion at 5:7-8), fully 31 of those depositions were noted only last week, *by* ACC, and scheduled
24 to commence on January 17.

25 ² ACC’s claim that the Port “has yet to indicate on what dates its witnesses are available” is simply false. In response
26 to the ACC’s wholesale notation of 31 of the Port’s witnesses, the Port responded that the witnesses noted for January
17 and January 18 (the first dates on which ACC requested depositions) would be made available. *See* Fourth
Declaration of Steven G. Jones, ¶ 2.

³ Copies of both of these letters are attached to the Fourth Jones Dec. as Exhibits A and B.

1 words of ACC's own counsel, writing with respect to the site visit: "It therefore appears likely
2 that this dispute over the Request for Entry will impact the discovery schedule, including the
3 schedule for deposition of our experts and possibly the hearing schedule in this matter." Second
4 Jones Dec., Ex. E at 1.

5 ACC's motion to extend the discovery schedule and to extend the time to file its direct
6 testimony is completely consistent with this strategy. In addition, ACC's request to delay filing
7 its final exhibit list and direct testimony is clearly designed to prejudice the Port and Ecology, *who*
8 *would be forced to file their responsive testimony prior to the testimony to which it was supposed*
9 *to respond!*⁴ In addition, the extended deadlines that ACC requests will significantly prejudice
10 both the Port and Ecology in their preparation for the hearing, allowing just over two weeks from
11 the time testimony is filed until the hearing on the merits, instead of the four weeks allowed by the
12 Board in its Prehearing Order.

13 **III. Any Prejudice to ACC Is Of Its Own Making.**

14 Any prejudice asserted by ACC arose from ACC's own conduct. ACC waited until
15 January 10th to note any depositions of Port witnesses, and then, noted 31 depositions to take place
16 between the dates of January 17 and January 31. After the Port notified ACC that it was prepared
17 to make its witnesses available beginning on January 17, 2002, ACC then declined to go forward
18 with the depositions that ACC itself had noted.

19 As is explained in the Port's Motion to Compel Depositions, ACC is not legally justified
20 in withholding its own witnesses from deposition. But even if ACC could withhold its own
21 witnesses from deposition until the site visit issue has been resolved, ACC's position on that issue
22

23 _____
24 ⁴ In its motion, ACC conveniently neglects to acknowledge that, per the Board's Prehearing Order, the Port and
25 Ecology are required to submit their direct testimony on February 28, 2002. See Prehearing Order at 3:13-15. ACC's
26 selection of the date for the submittal of its direct testimony (March 1, 2002) not only allows the Port and Ecology
just over two weeks to review it prior to the hearing, but it forecloses any hope that the Respondents' direct testimony
might be directed to the contentions made in the ACC's direct testimony, which was clearly the intent of the Board in
establishing the dates in its Prehearing Order.

1 still provides no basis whatsoever for its refusal to take depositions of the Port's witnesses or its
2 failure to identify or produce documents in response to the Port's discovery requests.

3 With respect to documents, unlike ACC, the Port has been willing to identify and produce
4 documents. ACC began reviewing the Port's documents for the first time on January 16, and only
5 then after the Port reminded ACC of its document requests and that it had documents available for
6 review. In a letter dated January 15, ACC counsel expressed surprise that documents existed for
7 review, apart from documents submitted to the Department of Ecology, notwithstanding the Port's
8 notice in its responses to ACC's written discovery requests that "Pursuant to CR 33(c), non-
9 privileged documents will be produced for inspection and copying in the same manner as they are
10 kept within the ordinary course of business, at a mutually convenient time and place." See Fourth
11 Jones Dec., ¶ 3 (quoting relevant portion of discovery responses). In that same letter, ACC's
12 counsel unilaterally scheduled a document review for 10:00 a.m. the next day. Despite having not
13 been consulted with respect to this schedule, the Port complied with this demand, and has
14 continued to make documents available to ACC for review and copying. *Id.*

15 **IV. ACC Should Not Be Allowed To Benefit From Its Own Failure to Comply**
16 **With Its Discovery Obligations**

17 Citing only the disagreement on the site visit, ACC has not only refused to make its
18 witnesses available for deposition, but has now refused to go forward with depositions that ACC
19 itself noted, notwithstanding the Port's agreement to make witnesses available. ACC's unilateral
20 demand to review documents has also been accommodated, despite ACC's own refusal to identify
21 or produce documents in response to the Port's discovery requests.

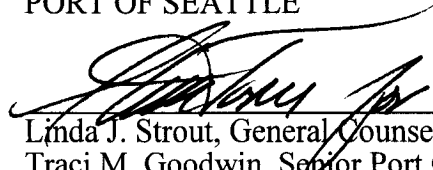
22 Now, in the face of these facts, ACC not only asks the Board to extend the discovery
23 cutoff, but makes the even more incredible request that it be allowed to file its direct testimony
24 *after* the Port and Ecology file their responsive testimony.

25 ACC's obvious intention is to delay discovery with the ultimate aim of postponing the
26 hearing on the merits. The Board should not reward ACC's failure to comply with the discovery


1 rules by solving a problem that ACC itself created. To paraphrase ACC's counsel in his letter to
2 the Board of January 15, "any emergency here is of ACC's own making." Grounded as they are
3 on prejudice arising from ACC's own actions, ACC's demands for relief are a transparent attempt
4 to either delay the hearing on the merits or severely compromise the Port and Ecology's ability to
5 properly prepare for that hearing.

6 Respectfully submitted this 17th day of January, 2002.

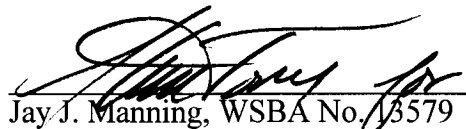
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