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FOR THE STATE OF WASHINGTON

ENVIRONMENTAL
HEARINGS OFFICE

AIRPORT COMMUNITIES COALITION,)

PCHB No. 01-160

Appellant,)

ACC'S RESPONSE TO PORT MOTION
TO COMPEL DEPOSITIONS AND FOR
LIMITATION ON ENTRY ONTO
LAND

v.)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY; and)
THE PORT OF SEATTLE,)

Respondents.)

The Port controls the site, data, and, reports which are the subject of this case. ACC experts have provided comments based on the DOE public record (consisting largely of Port submissions and DOE comments on them), but have never been allowed access to the site. DOE staff have freely acknowledged its importance here. The Port's studied refusal to allow ACC access suggests that the Port recognizes its importance as well and has gambled on forcing ACC experts to testify by deposition and in prefiled testimony (now due in less than a month) without access to the site.

On November 26, 2001, before any depositions were agreed upon or noted—and long before any party knew whether a Stay would be granted—ACC served on the Port a routine CR 34(a)(2) Request for Entry. The Request suggested that the Port set three dates no later than mid-January. The Port responded with a progressive cascade of conditions, refusals, and quibbles, but offered no dates. Now, almost two months later, the Port has demanded that, without benefit of site access, ACC experts appear for

ACC'S RESPONSE TO MOTION TO
COMPEL DEPOSITIONS AND FOR
LIMITATION ON ENTRY ONTO LAND - 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 depositions and that ACC proceed with depositions of Port consultants. The Port's motions to this effect¹
2 are not straight with the Board. Even apart from CR 34 law (which clearly supports ACC's position, as
3 discussed below), common sense and fairness dictate that ACC experts and ACC counsel not be forced to
4 participate in depositions or in prefilings of exhibits and testimony when they are the only ones who have
5 not had access to the site which is the subject of the appeal.

6
7 **I. Counter-Statement of the Facts**

8 ACC's November CR 34 Request asked "for itself and its experts entry to the Port
9 property on three dates between mid-December 2001 and mid-January 2002." Declaration of
10 Michael P. Witek in Support of ACC's Response to Port Motions to Compel and Limit Entry
11 ("Witek Decl."), Ex. A. The dates were needed to coordinate access for out-of-town and out-of-
12 state experts and to ensure that access could be arranged well before depositions of ACC and Port
13 witnesses commenced. The Port tells the Board that, in response to ACC's CR 34 request, it
14 stated that "it is willing to accommodate a site visit, consistent with the requirements set forth in
15 CR 34". In fact, the Port served on ACC a pleading which sets out four lengthy objections and
16 offered no access (or dates).² Even before the Port's formal refusal was received—and after—
17 ACC initiated several efforts to work the matter out with the Port. These were not productive, as
18 the Port progressively raised new demands and conditions and reasserted ones which the ACC
19 had already satisfied. Throughout, the Port refused to offer even tentative dates for access so that
20 the complex process of coordination among experts and counsel could begin. The Port's
21

22
23 ¹ The prehearing order limits nondispositive motions to seven pages. To get around this, the Port divided its motion to
24 compel depositions and for limitation on entry onto land into a three-page "motion" and a seven-page "memorandum" in
25 support of the motion. ACC is therefore submitting a ten-page response, to avoid disadvantage.

² See, Witek Decl. Ex. B (the Port's lengthy objections to ACC's Request for Entry) to read how "willing to accommodate"
the Port was in late December, 2001.

1 delaying tactics and ACC's cautionaries about their effect on depositions pre-dated the Board's
2 stay decision.

3 **A. The Deposition Schedule the Port Now Asserts Was Premised on Prior ACC Site Access.**

4 ACC's November 26, 2001, CR 34 Request for Entry did not come in a vacuum. The parties had
5 commenced scheduling depositions of Ecology witnesses which would come first (and which are still
6 ongoing). Then, in a conference call on December 3, 2001, the Port first listed the ACC witnesses it
7 sought to depose. ACC indicated it would follow up, but reminded the Port that site access had to be
8 scheduled first. After the conference call, apparently when the Port realized that some of its proposed
9 deposition dates overlapped with dates established for Ecology witnesses, the Port tried to unilaterally pre-
10 empt the dates by serving, on December 10, 2001, deposition notices and subpoenas duces tecum for ACC
11 witnesses.
12

13 ACC responded and objected to the Port's subpoenas by letter dated December 12, 2001:³

14 We are making every effort to schedule depositions of ACC's experts, some of whom are out of
15 state, and will provide you with available dates when they are known. This requires some
16 cooperation on the Port's part as well. For example, we requested from the Port some time ago
17 pursuant to CR 34 dates for site visits by our experts. In our December 3, 2001, telephone
18 conference, you asked for a description of the activities proposed for a site visit. We are providing
19 you with this information via e-mail today. However, knowing the activities proposed should
20 have no bearing upon scheduling the visit and to date, no dates have been offered. It would be
21 more convenient, and probably more informative for all the parties, to arrange those depositions
22 for a time immediately after a site visit, which we have requested pursuant to CR 34. It would also
23 be more convenient to do so for out-of-state experts who should not have to make the trip twice.

24 *Id.* at p. 2.

25 ACC reaffirmed that depositions had to be coordinated with the site visits in an email to Port
counsel on December 12:

³ Witek Decl. Ex. C.

1 Per our discussion of December 3, 2001, here is a description of the types of activities ACC may
2 pursue during the site visit requested in our November 26, 2001, CR 34 request for entry. We are
3 providing this as a courtesy: there is no obligation to provide such detail in order to obtain a site
4 inspection under the Rule. In any event, discussion of this description should not delay further the
Port's response to our request for dates for the site visits, since these need to be coordinated with
the deposition schedule. (emphasis added)⁴

5 However, the Port never provided tentative dates, even while ACC cooperated in setting tentative
6 dates for expert depositions on the understanding that access would be provided. Now, in demanding that
7 depositions proceed without site access, the Port seeks to take advantage of ACC's good faith, and to have
8 the benefit of its own bad faith.

9 **B. The Port Has Imposed Successive New Conditions on Site Access.**

10 The Port has progressively raised the bar on site access, imposing new conditions and revisiting
11 old, satisfied ones. This has made it impossible to conduct discovery in a fair and orderly manner. The
12 Port now complains to the Board about the consequences of its own actions. This pattern is evident from
13 the Port's December 18, 2001, response to ACC's December 12 e-mail:
14

15 There are a number of security concerns that require the Port know specifically who will
16 be coming, specifically where they want to go, and specifically what they want to do. I
17 also need to know from you why you cannot rely on reports of stormwater or other
samples that are routinely provided to Ecology.⁵

18 On December 28, 2001, well after the stay had issued, Port counsel raised more new obstacles to any site
19 visit by ACC: a new list of "security issues and other constraints that would be applicable to any site
20 visit."⁶ These demands included: that the group "be of a manageable size (e.g., four to five people)," that
21 "appropriate hold harmless agreements...be required from those ACC representatives or experts
22 undertaking the site visit," and that "Port and ACC representatives split samples so as to avoid conflicts
23

24 ⁴ Witek Decl., Ex. D.

⁵ Witek Decl., Exhibit E.

25 ⁶ Witek Decl., Ex. F.

1 over sampling protocols or sampling techniques.” *Id.*

2 The Port’s motion (p. 2) shamelessly uses the events of September 11 as a pretext for denying
3 ACC’s legitimate discovery request. Yet, others continue to have unfettered access to the site.⁷

4 In its Memorandum (p. 2), the Port claims ACC counsel (on January 4) made extreme demands
5 for access, as “confirmed” in a letter from the Port itself.⁸ ACC set the record straight (yet again) in a
6 January 8, 2002, letter which explained that its experts:
7

8 want to observe and photograph wetland complexes in the Master Plan area and in the
9 Miller, Walker and Des Moines Creek watersheds, and take samples by hand auger;
10 observe, photograph and take samples of the streams within the Master Plan area,
11 including existing stormwater outfalls and discharge gauging stations, any stations
12 downstream of Port outfalls and proposed locations for flow augmentation outfalls;
13 observe and photograph the area proposed for construction of the embankment and MSE
14 wall; and observe, photograph and take samples of the stockpiled fill material and any
15 areas cleared, graded or otherwise disturbed in anticipation of construction.⁹

16 The Port’s theme in its motions to the Board is that access issues have only arisen because ACC is
17 trying to delay matters now that the Board has entered a Stay. In fact, as the preceding chronology reflects,
18 ACC’s CR 34 request and its admonitions concerning the interrelationship of site access and the
19 deposition schedule were a matter of record (and frustration) before the stay was issued.

20 Finally, the Port berates ACC (Port Motion, p. 2) for not bringing various motions before the

21 ⁷ Ecology responses to Public Disclosure Act requests reveal that Ecology has had free access to the site after September
22 11, 2001, “just before Christmas,” when Rod Thompson, Ms. Kenny and at least one other person from Ecology went on a
23 site visit, without any of the preconditions the Port demands of ACC. Witek Decl. Ex. G. This was apparently Ms.
24 Kenny’s fourth site visit. *See*, pages 59-61 of the Deposition of Ann Kenny (attached to ACC’s Motion to Compel
25 Inspection of Port Property). As the attached excerpts from the depositions of Kevin Fitzpatrick and Gordon White
demonstrate, almost everyone at Ecology has had unfettered site access and found it important to understanding the issues.
Witek Decl., Exs. H, I. Further, the Port’s proposal would have, for years to come, literally hundreds of trucks a day enter
the site with construction workers throughout. Yet, to the Port, ACC’s environmental scientists are a greater threat.

⁸ The Port’s letter (Ex. D to Jones Declaration) is an example of the Port’s tactic of sending letters giving the Port’s warped
“understanding” of ACC’s “position” and then responding to this “understanding”— rather than resolving the issues. ACC
has never requested access to the airfield itself. The January 8, 2002, reaffirmed yet again that the Port counsel’s vehement
statements that “the Port will not allow access to the airfield” were therefore puzzling, “except in the context of the Port’s
resort to any excuse, however farfetched, to deny access to ACC.”

⁹ Witek Decl., Ex. J.

1 Board with regard to the Port's Subpoenas Duce Tecum. In fact, in keeping with the Presiding Officer's
2 admonitions for counsel to work matters out, ACC tried to avoid the need for motions by engaging in
3 dialogue with Port counsel. However, ACC also preserved its objections to the subpoenas by serving the
4 Port with formal notice of them under CR 45(b)(1) on January 2.¹⁰ The Port has no basis for complaint,
5 procedural or otherwise. ACC preserved its objections while trying to work through the Port's demands.
6

7 **II. Authorities and Argument**

8 **A. The Port's Objections to ACC's CR 34 Request Is Not Supported By ANY Authority.**

9 Cr 34 has been amended several times since it was first adopted in the federal and Washington
10 Civil Rules. The current version of the Washington rule, in effect since 1995, provides that a party may
11 serve on another party a request to:

12 permit entry upon designated land or other property in the possession or control of the
13 party upon whom the request is served for the purpose of inspection and measuring,
14 surveying, photographing, testing, or sampling the property or any designated object or
operation thereon, within the scope of Rule 26(b).¹¹

15 The purpose of CR 34 is to "make relevant and non-privileged documents and objects in the possession of
16 one party available to the other, thus eliminating strategic surprise and permitting the issues to be
17 simplified and the trial to be expedited. The rule is to be liberally, rather than narrowly, construed."

18 Wright, Miller & Marcus, *Federal Practice and Procedure*: Civil 2d §2202.

20 ¹⁰ The Port neglects to mention this in its motion recitation of facts. Under CR 45(b)(1):

21 If objection is made [to a subpoena], the party serving the subpoena shall not be entitled to inspect and
22 copy the materials except pursuant to an Order of the Court from which the subpoena was issued. The
23 party serving the subpoena may if objection has been made, move upon notice to the deponent for an
Order at any time before or during the taking of the deposition.

24 ¹¹ CR 26(b)(1) provides in pertinent part that:

25 It is not ground for objection that the information sought will be inadmissible at trial if the information
sought appears reasonably calculated to lead to the discovery of admissible evidence.

1 The Port would have the Board believe that CR 34 does not mean what it says about entry,
2 inspection, and sampling and that ACC must meet various burdens before gaining entry under its
3 terms. It relies chiefly on *Belcher v. Bassett Furniture Industries, Inc.*, 588 F.2d 904 (4th Cir.,
4 1978), a race discrimination case in which the plaintiffs sought to walk through the defendant's
5 manufacturing plants to interrogate employees about plaintiffs' claim that blacks had been
6 relegated to less attractive jobs than had been whites. *Id.* at 907.¹² The Fourth Circuit rejected this
7 procedure as an attempt to circumvent the deposition rules. *Id.* at 909-910.¹³

8
9 *Belcher* simply has no relevance here. ACC has not sought to interrogate Port employees at the
10 site. *Green Construction Company v. Kansas Power & Light Company, et al.*, 1988 U.S. Dist. LEXIS
11 18252 (D.C. Kan. 1988), a case which distinguishes *Belcher* is on point. *Id.* at *5-6. In *Green* the court
12 rejected objections to a CR 34 entry to "inspect, observe, photograph, and videotape as well as take soil
13 samples from the demolition and reconstruction of the dam which is the subject of this action." *Id.* at *2.¹⁴

14
15 In addition to *Green*, further authority in support of ACC's Request for Entry is found in
16 *Versatile Metals, Inc. v. The Union Corporation, et al.*, 1986 U.S. Dist. LEXIS 21801, (E.D. Pa 1986).

17 ¹² A copy of *Belcher* and all other non-Washington authority will be provided for the Board's convenience. The *Belcher*
18 site inspection was described as: "tantamount to a roving deposition, taken without notice, throughout the plant, of persons
19 who are not sworn and whose testimony was not recorded, and without any right by the defendant to make any objection to
20 the questions asked. Presumably on the basis of such interrogations, the expert would base his testimony."

21 ¹³ Presumably, the Port also relies on two cases from the early 1950s (*Tobin v. WKRZ, Inc.*, 12 F.R.D. 200, 201 (D.C.P.A.
22 1952) and *Service Liquor Distributors, Inc. v. Calvert Distillers Corp.*, 16 F.R.D. 344, 346 (D.C.N.Y. 1954)) to support its
23 arguments because it could find no other recent cases which would support its arguments. See Port Memorandum at p. 5.
24 Perhaps because of continuing debate as to CR 34's scope, the rule was "amended in important aspects in 1970." Wright,
25 Miller & Marcus, *Federal Practice and Procedure: Civil 2d* §2201. Per the Advisory Committee's notes on the 1970
amendments to CR 34 it was revised "(1) to eliminate the requirement of good cause; (2) to have the rule operate extra-
judiciously; (3) to include testing and sampling as well as inspecting or photographing tangible things; and (4) to make clear that
the rule does not preclude an independent action for analogous discovery against persons not parties." *Id.* citing Advisory
Committee note 48 F.R.D. at 526.

¹⁴ The court finds *Belcher* distinguishable. The inspection order in *Belcher* permitted 'roving interrogatories' by plaintiff's
attorneys at defendant's plant over a five day period.
Id. at 5.

1 In that case, prospective property purchasers sought entry upon defendant's land to take soil samples to
2 test for contamination allegedly caused by defendants. In addressing the scope of a request for entry
3 under CR 34, the court stated "this rule is designed to permit 'the broadest sweep of access.'" *Id.* at *3
4 (citing Wright & Miller, Federal Practice and Procedure § 2206 at 607 (1970)). Thus the court entered
5 an order granting the plaintiffs' motion to compel the request for entry and further ordered among
6 other things, that testings, samples or drillings could be conducted for a consecutive period of time not
7 to exceed thirty days. *Id.* at *8-10.

9 **B. There Is No Legal Authority for the Port's Demand for Split Samples or That an Agreed
10 Testing Protocol Must Be Established as a Precondition to Entry.**

11 The Port has refused to allow ACC to take small samples of soil and water, demanding not only
12 that ACC prove that such sampling is necessary, but also that the Port have approval of ACC's
13 sampling protocol and the right to split ACC's samples. The Port is not entitled to impose such
14 restrictions under CR 34, particularly its post-1970 version. In *Teer v. Law Engineering &*
15 *Environmental Services*, 176 F.R.D. 206 (E.D. North Carolina, 1997), the Court held that:

16 The plain language of this rule [CR 34] would permit defendant to gain access to the
17 property to take soil and water samples or do other things necessary to evaluate the
18 extent of the pollution. It does not, however, authorize defendant's experts to observe
19 plaintiff's experts as they do their work to assess the contamination or take steps to
20 correct it....The things they seek to observe may well be protected from discovery by
21 the attorney-work product rule; however it is not necessary for the Court to decide this.
22 It is quite sufficient to note that defendants have not cited one case from any court that
23 has ever permitted such a thing.

24 *Id.* at 207.

25 The cases the Port cites in support of its demands are not on point.¹⁵ For example, *Cabrera* concerned

¹⁵ *Cabrera v. Cortis Corp.*, 134 F.3d 1418, 1420 (9th Cir., 1998); *In Re Marriage of Parker*, 91 Wn.App. 219, 225, 957 P.2d 256 (1998); and *Sperberg v. Firestone Tire & Rubber Co., et al.*, 61 F.R.D. 80, 83 (N.D. Ohio 1973).

1 testimony of four expert witnesses: it had nothing to do with a CR 34 inspection. The Port's citation to
2 the Board of the *Parker* case is even more embarrassing. *Parker* also did not involve discovery but
3 addressed, as part of a parenting plan, the validity of a test for sexual deviancy. *Parker*, 91 Wn.App. at
4 221, 225.

5
6 *Sperberg* is the only case cited by the Port which even involves a CR 34 request for entry. In
7 *Sperberg*, the Court denied plaintiff's request pursuant to CR 34 that the defendant conduct a test for
8 plaintiff. *Id.* at 81. However, it approved plaintiff's alternative proposal to perform the tests himself. *Id.*
9 *Sperberg* actually supports ACC's position.

10 **III. Conclusion**

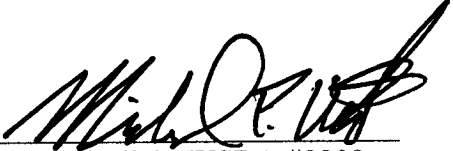
11 The Port controls the site, reports, and data in this case. It has given Ecology free access to the
12 site. In November, ACC requested access prior to depositions, to inspect, photograph and sample. The
13 Port has obstinately refused and thereby obstructed fair and orderly discovery. It demanded that ACC
14 agree to only one site visit for a total of five persons which would result in exclusion of many ACC
15 experts and counsel. It demanded that those persons sign an unspecified release and hold harmless
16 agreement, prove why sampling is necessary, and then not conduct sampling except pursuant to an
17 unspecified Port approved protocol and with the participation of Port consultants. It refused to allow
18 full access to the site (excluding the airfield, of course). It refused to offer proposed dates for site
19 visits and then demanded that ACC counsel and experts proceed with depositions without the benefit
20 of site access, which all other participants have had. The Board should therefore deny the Port's
21 motion to compel the depositions of ACC's witnesses under the current schedule and deny the Port's
22 request for an order limiting ACC's access under CR 34. Instead, it should order the Port to allow
23 access for ACC experts under the terms contemplated under the Rule and order that depositions be
24
25


1 scheduled to proceed only after that access has been provided.¹⁶

2 DATED this 17th day of January, 2002.

3 HELSELL FETTERMAN LLP

4
5 By:

6 
Peter J. Eglick, WSBA #8809
7 Kevin L. Stock, WSBA #14541
8 Michael P. Witek, WSBA #26598
Attorneys for Appellant

9  for
Rachael Paschal Osborn
10 WSBA # 21618
11 Attorney for Appellant

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¹⁶ On the afternoon of January 16, as this response to the Port's motion was being prepared, the Port faxed a letter to ACC counsel which retreated – **but only in part** – from the demands the Port had made in its motion to the Board. A copy of the Port's letter and ACC's response are attached as Exs. K, L to the Witek Decl.

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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

AR 004793