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POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

1 AIRPORT COMMUNITIES COALITION, )  
2 ) PCHB No. 01-160  
3 Appellant, )  
4 ) ACC'S RESPONSE TO MOTION TO  
5 v. ) COMPEL PRODUCTION OF DOCUMENTS  
6 ) AND RESPONSE TO SUBPOENAS DUCES  
7 STATE OF WASHINGTON, ) TECUM  
8 DEPARTMENT OF ECOLOGY; and )  
9 THE PORT OF SEATTLE, )  
Respondents. )

10  
11 The disparity of access to information regarding the Port's proposed Third Runway cannot be  
12 disputed: the Port is the applicant, has access to all the underlying facts and supporting analysis, and  
13 controls access to the site, something that has been allowed to everyone but ACC. ACC's primary tool in  
14 obtaining information has been the Public Disclosure Act, RCW 42.17.250, et seq. ("PDA"). Through  
15 PDA requests, ACC has obtained the plans and reports submitted by the Port to Ecology and Ecology  
16 comments on them. Based upon these PDA documents, ACC and its experts have provided comments to  
17 Ecology and prepared declarations in support of ACC's Motion for Stay. PDA documents also show that  
18 when ACC and its experts submitted comments to Ecology, those comments were forwarded (sometimes  
19 within minutes) to the Port.<sup>1</sup>

20  
21 Now the Port seeks, among other things, an Order from the Board compelling ACC to regurgitate  
22 back to the Port documents already in its possession and to produce documents clearly irrelevant to  
23

24  
25 <sup>1</sup> Declaration of Michael P. Witek in Support of ACC's Response to Motions to Compel and Limit Entry ("Witek Decl."), Ex. M.

ACC'S RESPONSE TO MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS AND RESPONSE  
TO SUBPOENAS DUCES TECUM - 1

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1 whether Ecology had reasonable assurance to issue the 401 Certification. Considering all the  
2 circumstances, the Board should deny the Port's motion for it is clear that the Port does not play by the  
3 rules -- even its own -- and certainly not the Board's.

4 **I. COUNTER-STATEMENT OF THE FACTS**

5 The Port served its first set of Interrogatories and Requests for Production on ACC on  
6 November 9, 2001. The Port's discovery requests include requests that are over-broad and  
7 unduly burdensome and thus inappropriate under CR 26. For example, Request for Production  
8 No. 3 states: "Please produce all documents in your control relating to the 401 certification or  
9 the Third Runway Project." Witek Decl., Ex. N at p. 9. The Port's discovery requests also  
10 seek documents that are clearly not reasonably calculated to lead to the discovery of admissible  
11 evidence, such as documents relating to ACC's contacts with the media.<sup>2</sup> The Port's Motion  
12 makes no effort to justify how such documents are relevant to the Port's case or the depositions  
13 of ACC witnesses. On November 26, rather than mimic the Port's abusive discovery requests,  
14 ACC propounded discovery requests that were much narrower than the Port's.  
15  
16

17 ACC served responses to the Port's discovery requests on December 10; a telephone conference  
18 was scheduled for December 12. Also on the 12th, ACC sent the Port a letter objecting to the broad scope  
19 of subpoenas duces tecum for various ACC witnesses that had been served on December 10:

20 The scope of those subpoenas is overbroad. It is unreasonable, for example, to ask ACC  
21 witnesses to bring with them 'all documents . . . reviewed (in full or in part) or drafted (in full  
22 or in part) that refer to, relate to, address or reflect the subject matter of the Port of Seattle's

23 \_\_\_\_\_  
24 <sup>2</sup> The Port's Request for Production No. 6 states: Please produce all documents in your control that (a) relate to 401  
25 certification or the third runway and (b) constitute or relate to communications between [ACC, including its counsel] and  
news media entities (including daily newspapers, radio or television news stations, periodicals, news journals) or their  
representatives, employees or agents. *Id.* at p. 11.

1 ('Port') Master Plan Update.' The overwhelming majority -- if not all -- of these materials are  
2 in the Port's possession and on the public record as well.

3 The subpoenas' demand for drafts is particularly inappropriate given the position the Port has  
4 already asserted with regard to draft documents in this matter. As you will recall, as a  
5 professional courtesy, counsel for ACC sent Mr. Pearce a letter informing him that pleadings  
6 and declarations he sent electronically on October 1, 2001, had Microsoft Word's 'track  
7 changes' function enabled, showing the revisions to the Port's pleadings and the supporting  
8 declarations of its experts. Mr. Pearce responded with a letter on October 2, 2001,  
9 unequivocally stating that 'the changes, of course, are privileged and/or protected work  
10 product. Please delete all of the electronic copies.'<sup>3</sup>

11 During the December 12 telephone conference, ACC reiterated the position in its written  
12 responses. ACC explained that the documents its experts relied on in forming their opinions were the  
13 documents submitted by the Port to Ecology, and that those documents were identified in the various  
14 comment letters from ACC's experts and in their declarations in support of ACC's Motion for Stay.  
15 Consistent with Mr. Pearce's letter of October 2, 2001, ACC asserted that any communications between  
16 counsel and its experts and experts' drafts were protected under the work product doctrine. ACC  
17 informed Port counsel that it was not seeking comments exchanged between Port counsel and Port experts  
18 or draft reports from experts, but that ACC did want data and test results obtained by Port experts whether  
19 or not they were relied upon or discarded by those experts. Witek Decl. at ¶¶ 24, 25.

20 On the December 12 call, Port counsel agreed to draft a proposed stipulation. Witek Decl. at ¶ 22.  
21 Port counsel sent ACC counsel the draft stipulation which is labeled "draft: for discussion purposes only"  
22 by facsimile on December 14, 2001, and by e-mail on December 18, 2001 (Witek Decl., Ex. P). The next  
23 week was consumed by depositions of Ecology witnesses.<sup>4</sup>

24 On December 26, 2001, the Port served by mail its Objections and Responses to ACC's

25 <sup>3</sup> Witek Decl., Ex.C. Mr. Pearce's October 2, 2001, letter is also attached to the Witek Declaration as Exhibit O.

<sup>4</sup> Chung Yee was deposed on December 17, 2001; Peter Kmet was deposed on December 19, 2001; Ann Kenny and Kelly Whiting were deposed on December 20, 2001; and Edward O'Brien and Ching Pi Wang were deposed on December 21, 2001.

1 Interrogatories and Requests for Production. Witek Decl., Ex. Q. Those responses state:

2 As stated by ACC in its discovery responses, the documents in this case are in the public  
3 domain and are readily accessible to the parties and need not be produced in discovery.  
4 The Port also notes that negotiations are ongoing between ACC and the Port on a  
5 stipulation regarding document discovery. The Port will comply with any stipulation  
ultimately agreed to by the parties and produce documents in accordance with that  
stipulation....<sup>5</sup>

6 The Port produced no documents in response to ACC's discovery requests. On January 7, 2002,  
7 after the "holiday discovery hiatus," ACC counsel e-mailed Port counsel proposed revisions to the  
8 stipulation regarding document discovery. Witek Decl., Ex. R. ACC proposed several changes to the  
9 stipulation.<sup>6</sup> ACC received no response until it received on January 11, 2002, the Port's Motion to  
10 Compel Production of Documents. The Motion describes the discovery discussions as an "agreement,"  
11 yet the Port's discovery responses describe the discussion of the discovery stipulation as  
12 "negotiations." The Port cannot have it both ways. The Port's draft stipulation is prominently labeled  
13 "Draft: for discussion purposes only."<sup>7</sup> Witek Decl. Exs. Q, P.

14  
15 Apparently realizing that it was in the untenable position of demanding production of  
16 documents while at the same time it had produced none, the Port sent a letter to ACC counsel on  
17 January 14, 2002, stating that "we can make documents available for your review and copying at your  
18 convenience." Witek Decl. Ex. S. However, when ACC went to inspect documents on January 16, no  
19 documents from Parametrix or Hart Crowser, two of the Port's primary consultants, were available. In  
20

21 \_\_\_\_\_  
<sup>5</sup> Id. at p 15.

22 <sup>6</sup> As written by the Port, the stipulation purported to identify both the types of documents that would be produced and the  
23 documents the parties thought would not need to be produced. ACC revised the stipulation to only define the types of  
24 documents that would not need to be produced to avoid the possibility that there were responsive documents that would not be  
specifically excluded or included by the Port's draft. ACC also amended the proposed stipulation to ensure that it did not limit  
ACC's ability to continue sending Public Disclosure Act requests to the Department of Ecology.

25 <sup>7</sup> As the Port's only response to ACC's proposed revisions was the motion to compel, apparently only a one-sided  
"discussion" was envisioned by the Port.

1 a subsequent telephone conference on January 16, Port attorneys acknowledged that when the Port  
2 does make the Parametrix and Hart Crowser documents available for ACC's review, the Port will not  
3 produce communications between Port counsel and experts "pursuant to an agreement reached with  
4 Mr. Stock" -- an agreement it now repudiates in its motion. Witek Decl., Ex. T.

5  
6 **II. APPLICABLE LAW**

7 Pursuant to CR 34, discovery is limited to matters within the scope of Rule 26(b):

8 Parties may obtain discovery regarding any matter, not privileged, which is relevant to the  
9 subject matter involved in the pending action. . . . The frequency or extent of use of the  
10 discovery methods set forth in section (a) shall be limited by the court if it determines that  
11 (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from  
12 some other source that is more convenient, less burdensome, or less expensive; (B) the  
13 party seeking discovery has had ample opportunity by discovery in the action to obtain the  
14 information sought; or (C) the discovery is unduly burdensome or expensive taking into  
15 account the needs of the case, the amount in controversy, limitations on the party's  
16 resources, and the importance of the issues at stake in the litigation. The court may act  
17 upon its own initiative after reasonable notice or pursuant to a motion under Section (c).

18 Although the Port asks the Board to compel ACC to produce documents responsive to all  
19 Port production requests and its subpoenas duces tecum, the Port's motion only discusses  
20 "documents with respect to its [ACC's] testifying experts." Port Motion at p. 4. As ACC  
21 explained in its December 10 Answers and Responses to the Port's Interrogatories:

22 The documents relied upon or reviewed by ACC's experts are referenced in the comments  
23 and declarations of ACC's experts and are in the public domain. . . . See the pleadings filed  
24 in ACC's Motion for Stay and the declarations filed in support of ACC's Motion for Stay.  
25 See also the comment letters submitted to the Department of 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. Mr. Wingard has only recently returned from an  
extended trip out of the country and has been unavailable. ACC will seasonably  
supplement its response to Interrogatory No. 4 with information regarding Mr. Wingard's  
testimony. The declarations of ACC's experts have already been served on the Port. As  
the Port's two-volume "Response to Comments, Master Plan Improvements at Seattle-  
Tacoma International Airport" dated April 2001 and submitted to the Department of

1 Ecology, responds to the comment letters provided by ACC experts referenced above, it is  
2 apparent that the Port already has these comment letters.<sup>8</sup>

3 Accordingly, and consistent with CR 26(b)(1), ACC should not be required to provide these  
4 documents yet again as the discovery sought would be “unreasonably cumulative or duplicative, or is  
5 obtainable from some other source that is more convenient, less burdensome, or less expensive....” CR  
6 26(b)(1).<sup>9</sup>

7 In addition to seeking to compel ACC to produce documents in response to production requests,  
8 the Port’s motion seeks an order requiring ACC to “comply with the subpoenas duces tecum that the Port  
9 has issued with respect to ACC’s expert witnesses.” Port Motion at p. 1. Those subpoenas request “all  
10 documents...reviewed (in full or in part) or drafted (in full or in part) that refer to, relate to, address or  
11 reflect the subject matter of the Port of Seattle’s (“Port”) Master Plan update.” Witek Decl., Ex. U at p. 3.  
12 This is contrary to the position taken by the Port’s counsel, Mr. Pearce, in his October 2, 2001, letter.  
13 Consistent with the Port’s position, ACC has asserted that expert’s drafts are protected by the work  
14 product doctrine. *See, Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985) (“under both  
15 the federal and Washington rules, there is no distinction between attorney and non-attorney work product.  
16 The test for determining whether such work product is discoverable is whether the documents were  
17 prepared in anticipation of litigation, and, if so, whether the party seeking discovery can show substantial  
18 need”). The Port already has the declarations and comment letters of ACC’s experts, which specifically  
19 indicate what those experts relied upon in forming their opinions, and the Port has made no showing of  
20  
21

22 <sup>8</sup> Witek Decl., Ex. U at pp. 11-12.

23 <sup>9</sup> *See also, American Medical Systems, Inc. v. National Union Fire Insurance*, 1999 U.S. Dist. LEXIS 12037, \*10 (E.D. La  
24 1999) (In products liability case regarding medical device regulated by FDA, plaintiffs ordered to obtain documents under  
25 FOIA from FDA prior to making discovery requests of manufacturer); *Penza, et. al. v. Drexel Burnham Lambert, Inc.*,  
1989 U.S. Dist. LEXIS 10193, \*6-7 (E.D. Pa 1989) (Plaintiffs’ request for production of pleadings in prior litigation denied  
where case name and cause number was provided; documents “are part of the public record, [and] therefore plaintiff may  
easily obtain the information in question.”)

1 any need for drafts, let alone a "substantial need."

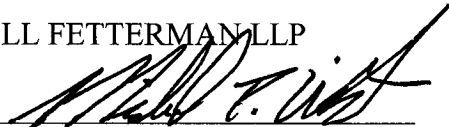
2 The Port's demands here demonstrate it does not play by its own rules; its position is  
3 inconsistent with its own general objections to ACC's interrogatory requests (Port Objection, p. 6),<sup>10</sup>  
4 and the assertion that any drafts are "of course...privileged and/or protected work product." Witek  
5 Decl., Ex. O. In a telephone conference on January 16, 2002, Port attorneys acknowledged that when  
6 the Port does make documents available for ACC's review, those documents will not include  
7 communications between Port counsel and experts "pursuant to an agreement reached with Mr. Stock."  
8 Yet, the Port is asking the Board to compel ACC to produce the same types of documents the Port has  
9 maintained are "of course...privileged and/or protected work product" and which the Port maintains it  
10 does not have to disclose pursuant to a stipulation labeled "draft: for discussion purposes only." The  
11 same rules should apply to all parties.


12  
13 ACC respectfully requests that the Board deny the Port's Motion to Compel Production of  
14 Documents and Response to Subpoenas Duces Tecum.

15 DATED this 17<sup>th</sup> day of January, 2002.

16  
17 HELSELL FETTERMAN LLP

18 By:

  
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20  
21 G:\LU\ACC\PCHB\DISCOVERY\RESP-MOTION-TO-COMPEL-PRODUCTION

22  
23 <sup>10</sup> The Port objects to ACC's first request, and each of them, to the extent that they seek the disclosure of  
24 information or documents protected from disclosure by the attorney-client privilege, the work product  
25 doctrine and/or any other recognized privilege or immunity....The Port will interpret each request in a manner  
that the request does not seek privileged information or documents.

Witek Decl., Ex. O at p. 6.