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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

ENVIRONMENTAL
HEARINGS OFFICE

1	AIRPORT COMMUNITIES COALITION,)	
2)	
3)	PCHB No. 01-160
4	Appellant,)	
5	v.)	ACC'S MOTION TO EXTEND
6)	DISCOVERY SCHEDULE
7	DEPARTMENT OF ECOLOGY; et al,)	
8)	
9	Respondents.)	
10	_____)	

I. RELIEF REQUESTED

Airport Communities Coalition ("ACC") moves for the following relief:

1. Modification of the Board's October 30, 2001, Pre-hearing Order to extend the time for ACC to depose Port of Seattle witnesses from February 1, 2002, to February 25, 2002.
2. Modification of the Board's October 30, 2001, Pre-hearing Order to extend the time for filing of Appellants' final exhibit list from February 8, 2002, to March 1, 2002.
3. Modification of the Board's October 30, 2001, Pre-hearing Order to extend the time for filing of Appellants' pre-filed direct testimony from February 15, 2002, to March 1, 2002.

II. STATEMENT OF FACTS

The Board's October 30, 2001, Pre-hearing Order (p. 6) states that "the parties shall cooperate in scheduling depositions and other discovery." Pursuant to the Board's directive, on November 14, 2001, during a telephone conference, ACC counsel advised counsel for Ecology and the Port that ACC intended to take the depositions of Ecology witnesses first, and that ACC would make every effort to do so in December. Declaration of Michael P. Witek in Support of ACC's Motion to Compel Inspection of Property and to Extend Discovery Schedule ("Witek Decl.") at ¶ 18. On November 21, 2001, ACC counsel sent an email to Ecology counsel, with a copy to Port counsel, listing the Ecology

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1 witnesses that ACC sought to depose and asking Ecology to provide dates for the availability of the
2 requested deponents. Witek Decl., Ex. L. On November 29, 2001, Ecology provided a list with one
3 proposed date and time for most of the proposed deponents. Counsel for the Port was copied on the
4 November 29, 2001, email from Ecology. Witek Decl., Ex. M. ACC and Ecology have continued to
5 work informally on deposition scheduling. Many have already taken place, although not all, due to
6 scheduling conflicts and the Christmas and New Year's holidays.¹
7

8 Pursuant to the Pre-hearing Order, the general discovery deadline is February 1, 2002; final
9 exhibit lists are due February 8, 2002; and ACC's pre-filed testimony is due February 15, 2002. With
10 this schedule in mind, on November 26, 2001, pursuant to CR 34(a)(2), ACC served the Port with a
11 Request for Entry Upon Port Property for Inspection and Other Purposes ("Request for Entry"). Witek
12 Decl., Ex. C. ACC anticipated that it would need to have its witnesses on the site to observe,
13 photograph and sample wetlands, soils, streams and other surface waters and analyze the results of the
14 site visit before those witnesses could determine what exhibits would be required and prepare their pre-
15 filed testimony. Further, ACC anticipated that the Port would want to depose ACC witnesses, and
16 ACC wanted its witnesses to have an opportunity to go on the Third Runway site. Thus, in ACC's
17 Request for Entry, ACC stated, "ACC requests for itself and its experts entry to the Port property on
18 three dates between mid-December 2001 and mid-January 2002. ACC will coordinate scheduling with
19 its experts." *Id.*
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23 ¹ Deposition scheduling was also complicated by the Port's November 26, 2001, production of the Final Natural Resources
24 Mitigation Plan, and December 12, 2001, production of the Low Stream Flow Analysis and Summer Low Flow Offset
25 Facility Proposal, as witnesses to be examined about those plans could not be deposed until after they had an opportunity to
review them. Witek Decl. Ex. N, O.

1 On December 3, 2001, ACC and the Port had a telephone conference to discuss discovery
2 issues. In it, Port counsel listed the depositions it sought to take of ACC witnesses. In response, dates
3 were tentatively set for the depositions of ACC witnesses starting January 14, 2002, through February
4 1, 2002. In the same conference, ACC counsel pressed the Port for dates on which the Port would
5 allow site access, to facilitate the advance notice needed for ACC experts and counsel to attend.
6 Counsel for the Port asked ACC to provide "more detail" regarding who would attend the site visits,
7 where such persons would want to go, and what activities were proposed. Witek Decl. at ¶ 19.
8 ACC responded to the Port's request by email on December 12, 2001:

9
10 Per our discussion of December 3, 2001, here is a description of the types of activities ACC
11 may pursue during the site visit requested in our November 26, 2001, CR 34 request for entry.
12 We are providing this as a courtesy: there is no obligation to provide such detail in order to
13 obtain a site inspection under the Rule. In any event, discussion of this description should not
14 delay further the Port's response to our request for dates for the site visits, since these need to
15 be coordinated with the deposition schedule.²

16 On December 18, 2001, counsel for the Port responded, raising new issues and concerns, but
17 offering no dates for site visits.³ ACC replied to the Port by email on December 27, 2001, suggesting a
18 telephone conference, and again cautioning that:

19 ACC and its experts need to go on the site to prepare for the hearing on the merits. Delay in
20 proposing dates compresses the advance notice we can give our experts, making it less likely
21 they can participate. As we have noted before, it makes no sense to expect our experts to make
22 themselves available for deposition before they have been permitted on the site . . . The
23 December 18 email we received in response still offers NO DATES.

24 * * *

25 in the absence of some movement by the Port on the site visit issue, it will be difficult to
proceed with the depositions of ACC witnesses. This in turn may affect the hearing schedule

² Witek Decl., Ex. D (emphasis added).

³ Witek Decl., Ex. E.

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1 as a whole. We suggest therefore that the Port provide the requested dates now. On another
2 discovery matter and to follow up on our discussion of December 20, 2001, ACC requests that
3 the Port make available for deposition all persons listed as witnesses in the Port's October 10,
4 2001, and November 15, 2001, witness lists. ACC has a pending set of interrogatories to the
5 Port requesting information regarding expert witnesses. If ACC receives early responses to
6 those interrogatories, depending on the responses, we will consider narrowing the number of
7 Port experts we will depose.⁴

8 The Port never offered site visit dates, nor did it respond to ACC's request for availability of
9 Port witnesses for deposition. Instead it served a Response and Objection to ACC's Request for Entry,
10 signed by Port counsel on December 24, 2001, and served on ACC by mail. Witek Decl., Ex. __.

11 On December 28, 2001, the Port also responded to ACC's December 27, 2001, email. The
12 response still offered no dates. Witek Decl., Ex. H.

13 ACC counsel continued to try to resolve the matter informally, through a January 3, 2002,
14 telephone conference with Port counsel. In that conference, ACC again requested that the Port
15 immediately offer dates for site visits so scheduling arrangements could be made while the details of
16 the visits were negotiated. Further, ACC warned that it would not make its experts available for
17 deposition before those experts were given access to the site. Witek Decl. at ¶¶ 20, 21.

18 The Port's "response" was a letter dated January 4, 2002, which offered no dates, and
19 reiterating the same Port conditions for entry. Witek Decl., Ex. I. In a January 8, 2002, letter, counsel
20 for ACC again cautioned that, "unless the Port agrees to provide entry without the current
21 preconditions and provides the requested dates by the close of business on January 8, 2002, we will
22 pursue our remedies and meanwhile will not make ACC experts available for deposition." Witek
23 Decl., Ex. J. By January 10, 2002, the Port still had provided no site visit dates and no availability

24 _____
25 ⁴ *Id.*

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1 dates for the deposition of any Port witnesses in response to ACC's requests. ACC served a deposition
2 notice on Port Counsel on January 10, 2002, for the depositions of the 30 witnesses who have been
3 listed as witnesses by the Port.

4 Under the current Pre-hearing Order, Appellant's discovery deadline is February 1, 2002,
5 Appellants' final exhibit list is due February 8, 2002, and Appellants' pre-filed testimony is due
6 February 15, 2002. Dates for site visits by ACC's experts have yet to be proposed. In addition, forty-
7 five (45) depositions are scheduled to take place between now and February 1, 2002. Witek Decl., Ex.
8 P.

9 III. STATEMENT OF THE ISSUE

10 Whether there is good cause for the Board to amend the Pre-hearing Order to extend the time
11 for ACC to depose Port of Seattle witnesses from February 1, 2002, to February 25, 2002; extend the
12 time for filing of ACC's final exhibit list from February 8, 2002, to March 1, 2002; and extend the time
13 for filing of ACC's pre-filed direct testimony from February 15, 2002, to March 1, 2002?
14

15 IV. EVIDENCE RELIED UPON

16 ACC relies upon WAC 371-08-430 and WAC 371-08-435, the legal authorities cited herein;
17 the Declaration of Michael P. Witek and the pleadings, declarations, and other documents previously
18 filed in this matter and referenced herein.
19

20 V. LEGAL AUTHORITY AND ARGUMENT

21 Pursuant to the Board's rules of procedure a scheduling letter or pre-hearing order may be
22 amended "for good cause by subsequent order of the board or the presiding officer." WAC 371-08-
23 430(3); WAC 371-08-435(2). Such good cause exists here in light of the amount of discovery which
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25

1 must take place in the time currently provided under the Pre-hearing Order and the Port's failure to
2 cooperate in scheduling depositions of Port witnesses and scheduling site visits for ACC and its
3 witnesses.

4 ACC has made repeated efforts to informally resolve discovery disputes and keep discovery
5 moving toward completion, and was, in fact, the first party to begin efforts to schedule depositions.
6 Despite ACC's efforts, there are now only 15 working days remaining before the February 1, 2002,
7 discovery deadline under the Pre-hearing Order. There are still Ecology witnesses to be deposed, and
8 the Port has yet to indicate on what dates its witnesses are available.
9

10 Further, as detailed in ACC's Motion to Compel Inspection of Port Property, despite efforts to
11 reach agreement on the terms of site visits, no dates have been proposed. There is good cause for the
12 Board to amend the discovery schedule, as ACC would be substantially prejudiced if it is forced to
13 prepare its case under the current schedule. It would be patently unfair for ACC's witnesses to be
14 subjected to deposition by the Port before they have had an opportunity to inspect the site. There is
15 currently a February 8 deadline for exhibits and February 15 deadline for submission of pre-filed
16 testimony by ACC witnesses. ACC witnesses need a reasonable amount of time following site visits to
17 analyze the results of observations and any samples before those witnesses can identify the exhibits
18 that will be needed at the hearing and before those witnesses can prepare pre-filed testimony.
19

20 VI. CONCLUSION

21 For the foregoing reasons, ACC respectfully request that the Board enter an Order to extend the
22 time for ACC to depose Port of Seattle witnesses from February 1, 2002, to February 25, 2002; extend
23 the time for filing of ACC's final exhibit list from February 8, 2002, to March 1, 2002; and extend the
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1 time for filing of ACC's pre-filed direct testimony from February 15, 2002, to March 1, 2002.

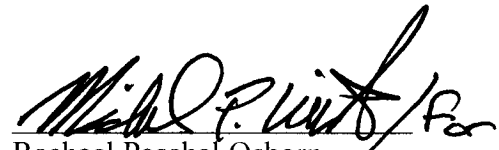
2 DATED this 11th day of January, 2002.

3 Respectfully submitted,

4 HELSELL FETTERMAN

5
6 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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