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ENVIRONMENTAL  
HEARINGS OFFICE

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

|                                |   |                             |
|--------------------------------|---|-----------------------------|
| AIRPORT COMMUNITIES COALITION, | ) |                             |
|                                | ) | PCHB No. 01-160             |
| Appellant,                     | ) |                             |
| v.                             | ) | ACC'S MOTION TO COMPEL      |
|                                | ) | INSPECTION OF PORT PROPERTY |
| DEPARTMENT OF ECOLOGY; et al., | ) |                             |
|                                | ) |                             |
| Respondents.                   | ) |                             |
|                                | ) |                             |

I. INTRODUCTION

The Airport Communities Coalition ("ACC") moves for an order for entry upon the Third Runway/Master Plan Update project area ("Project Area") to observe, photograph, and sample soils, wetlands and streams.

II. STATEMENT OF FACTS

In order to prepare for the March hearing, ACC and its experts need access to the Project Area to observe, photograph, and in some instances sample Project Area wetlands, soils and streams. The Port has routinely provided such access to others without preconditions or paperwork requirements, but has denied it to ACC. For example, Ecology's Ms. Kenny testified in deposition that she has visited the site at least three times, including one visit with counsel for Ecology and the Port, which extended to any and all portions of the site.<sup>1</sup> Ms. Kenny testified that she was not subject to any security

<sup>1</sup> When Ms. Kenny was asked why attorneys were involved in the site visit, she answered "I believe that our attorneys and the Port's attorneys - well, first they wanted to better understand the technical issues involved with this very complex analysis that was done for the low flow work. And then our attorneys wanted some familiarity with the layout of the site and locations for proposed structures under the third runway application." Ann Kenny December 20, 2001, deposition transcript, at p. 59 (Ex. A to the Declaration of Michael P. Witek in Support of ACC's Motion to Compel Inspection of

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1 procedures and was given unfettered access: “it was whatever [sic] we wanted to go. We’d stop,  
2 We’d get out, we’d look around. Whatever we wanted to do was fine.” *Id.* at 59-61.

3 Ray Hellwig, Director of Ecology’s Northwest Regional Office, testified that he has been on  
4 several site visits as well, because “it would add context to [his] understanding.”<sup>2</sup> He was not required  
5 to sign any paperwork prior to going on the site, and was not prohibited from bringing a camera.  
6

7 The Port has allowed access by non-governmental groups as well. For example, it invited a  
8 group of approximately 50 people from the Des Moines Chamber of Commerce, including Ms. Jeanne  
9 Moeller, on a site tour.<sup>3</sup> Ms. Moeller was not subjected to any security procedures and was not asked  
10 to sign any paper work prior to her site visit. Moeller Decl. at ¶ 5.

11 With this background, the history of the Port’s obstruction of ACC’s CR 34 request for entry is  
12 telling. On November 26, 2001, pursuant to CR 34(a)(2), ACC served a Request for Entry. Witek  
13 Decl., Ex. C. On December 3, in a telephone conference, ACC counsel asked the Port for dates on  
14 which the Port would allow entry, to facilitate advance scheduling with ACC experts and counsel. Port  
15 counsel demanded “more detail” regarding attendees, inspection locations and activities, but offered no  
16 dates. Witek Decl. at ¶ 19. ACC responded to the Port’s demand by email on December 12, 2001:

18 Per our discussion of December 3, 2001, here is a description of the types of activities ACC  
19 may pursue during the site visit requested in our November 26, 2001, CR 34 request for entry.  
20 We are providing this as a courtesy: there is no obligation to provide such detail in order to  
21 obtain a site 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.<sup>4</sup>

22 Property and to Extend Discovery Schedule (“Witek Decl.”)).

23 <sup>2</sup> Ray Hellwig Deposition transcript, 1/8/02, pp. 71-75, (Witek Decl. Ex. B).

24 <sup>3</sup> Declaration of Jeanne Moeller in Support of ACC’s Motion to Compel Inspection of Property (“Moeller Decl.”).

25 <sup>4</sup> Witek Decl., Ex. D (emphasis added). The Port’s “solution” to the problem of no site access prior to depositions is to  
require ACC experts to be deposed twice: now, and then later -- after, when, and if site access is ever obtained. This is  
unreasonable. Further, it has meant that ACC counsel have already had to take several depositions of Ecology staff in  
which virtually everyone in the room has been on and were familiar with the site except ACC.

ACC’S MOTION TO COMPEL INSPECTION OF  
PORT PROPERTY - 2

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1  
2 The December 12 ACC email identified the site visit participants as “one or two client  
3 representatives, counsel, paralegal(s), and the experts identified in ACC's November 15, 2001, Witness  
4 List.” *Id.*<sup>5</sup> It also described the proposed activities and areas of inspection.<sup>6</sup>

5 On December 18, 2001, counsel for the Port responded by raising new obstacles:

6 With respect to the site visit, we still need some more detail from you. You have not specified  
7 precisely who will be visiting. There are a number of security concerns that require that the  
8 Port know specifically who will be coming, specifically where they want to go and specifically  
9 what they want to do. I also need to know from you why you cannot rely on reports of  
10 stormwater or other samples that are routinely provided to Ecology. If there is a reason that  
11 you need to verify those sampling reports, or if you have a basis for contending that they are  
12 inaccurate, then please provide it to us.<sup>7</sup>

13 ACC replied by email on December 27, suggesting a telephone conference, and cautioning that:

14 ACC and its experts need to go on the site to prepare for the hearing on the merits. Delay in  
15 proposing dates compresses the advance notice we can give our experts, making it less likely  
16 they can participate. As we have noted before, it makes no sense to expect our experts to make  
17 themselves available for deposition before they have been permitted on the site . . . The  
18 December 18 email we received in response still offers NO DATES, and instead raises the bar,  
19 requiring that ACC provide still ‘more details’ as to who will be attending, where they want to

20  
21  
22  
23  
24  
25  
<sup>5</sup> The experts listed on ACC's November 15, 2001, witness list include Amanda Azous, Azous Environmental Sciences;  
Dyanne Sheldon, Sheldon & Associates; Bill Rozeboom and/or Malcolm Leytham, Northwest Hydraulic Consultants; Dr. Peter  
Willing, Water Resources Consulting, Inc.; Dr. John Strand, Columbia Biological Assessments; Dr. Patrick Lucia and/or Dr. Ed  
Kavazanjian, GeoSyntec Consultants; and Greg Wingard, Waste Action Project.

<sup>6</sup> The scope of the request and proposed activities were described as follows:

Observe and photograph wetland complexes in the Master Plan area and in the Miller, Walker and Des Moines  
Creek watersheds, and take samples by hand auger.

Observe, photograph and take samples of the streams within the Master Plan area, including existing stormwater  
outfalls and discharge gauging stations, any stations downstream of Port outfalls and proposed locations for flow  
augmentation outfalls.

Observe and photograph the area proposed for construction of the embankment and MSE wall.

Observe, photograph and take samples of the stockpiled fill material and any areas cleared, graded or otherwise  
disturbed in anticipation of construction.

*Id.*  
<sup>7</sup> Witek Decl., Ex. E.

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1           go and what they want to do.

2           \*       \*       \*

3           Not having been on the site, it would be impossible for ACC to provide you with a detailed  
4           itinerary, and such a request is not consistent with CR 34 or with ‘security concerns.’ During  
5           her deposition, Ecology's Ms. Kenny testified that she has been to the site at least three times,  
6           including one visit with counsel for Ecology and the Port, which extended to any and all  
7           portions of the site. The PCHB itself had no trouble in scheduling a site visit without  
8           successive demands from the Port for information. Others have had similar access. ACC is  
9           entitled to no less under the discovery rules. Further, the rules do not require ACC to establish  
10          some ‘probable cause’ for taking water or soil samples.<sup>8</sup>

11          ACC’s December 27 email explicitly warned that:

12                   in the absence of some movement by the Port on the site visit issue, it will be difficult to  
13                   proceed with the depositions of ACC witnesses. This in turn may affect the hearing schedule  
14                   as a whole. We suggest therefore that the Port provide the requested dates now.<sup>9</sup>

15          The Port’s obstructionism was confirmed in its formal Response and Objection to ACC’s  
16          Request for Entry, signed by Port counsel on December 24, and served on ACC by mail. Witek Decl.,  
17          Ex. G. In it the Port objected to the site visit request on a kitchen sink’s worth of grounds:

18                   vague and ambiguous, overly broad and unduly burdensome . . . not relevant<sup>10</sup> to this action  
19                   and beyond the scope of CR 26 . . . failed to specify precisely who the persons are that [ACC]  
20                   wishes to have access to Seattle Tacoma International Airport Property, [and] precisely where  
21                   those persons want to go . . .<sup>11</sup>

22          No dates were offered. On December 28, the Port also responded to ACC’s December 27  
23          email. The response still offered no dates, and upped the ante further, with a list of four “security  
24          issues and other constraints that would be applicable to any site visit.” Witek Decl., Ex. H. For the  
25          first time, the Port stated that “appropriate hold harmless agreements will also be required from those

26                   <sup>8</sup> Witek Decl., Ex. F (emphasis added).

27                   <sup>9</sup> *Id.*

28                   <sup>10</sup> The Port has never explained how a visit to the site of the proposed project would be “irrelevant,” or why it did not tell  
29                   the PCHB so when the Board scheduled its own site visit.

30                   <sup>11</sup> *Id.* (emphasis added)

1 ACC representatives (or experts) undertaking the site visit.” *Id.* Also for the first time, the Port  
2 demanded that “if sampling is to be conducted, the Port needs to have an appropriate expert there to  
3 review any sampling or to conduct its own sampling as a control.”

4 ACC counsel tried to resolve the matter informally again, in a January 3, 2002, telephone  
5 conference. In it, ACC again requested that the Port offer dates for site visits so scheduling  
6 arrangements could be made while the details of the visits were negotiated. ACC again warned that it  
7 would not make its experts available for deposition before those experts were given access to the site.  
8 Witek Decl. ¶¶ 20, 21. The Port’s “response” was a letter dated January 4, 2002, (mis)stating ACC’s  
9 position, offering no dates, and reiterating the same Port conditions for entry. Witek Decl., Ex. I.  
10

11 In a January 8 letter, counsel for ACC again explained that the attendees had already been  
12 identified, and that ACC had no interest in visiting the airfield itself.<sup>12</sup> Witek Decl. Ex. J. ACC again  
13 cautioned that, “unless the Port agrees to provide entry without the current preconditions and provides  
14 the requested dates by the close of business on January 8, 2002, we will pursue our remedies and  
15 meanwhile will not make ACC experts available for deposition.” *Id.* No dates were offered by the  
16 Port in response. Witek Decl. ¶ 22. Instead, in a January 9 letter, the Port accused ACC of a “willful  
17 violation” of the Prehearing Order. Witek Decl. Ex. K. Realizing that the Port would never allow site  
18 access without Board intervention, ACC advised by letter dated January 10 that it would bring the  
19 matter to the Board.  
20

### 21 III. ISSUES

22 1. Whether, pursuant to CR 34(a)(2) and WAC 371-08-300, the Port may obstruct a site  
23 visit by appellants to observe, photograph and sample wetlands, soils and streams?  
24

25 <sup>12</sup> The Port had, with no basis, suggested that ACC was seeking to enter the airfield.

1 IV. EVIDENCE RELIED UPON

2 ACC relies upon the Declarations of Michael P. Witek and Jeanne Moeller and the pleadings,  
3 declarations, and other documents previously filed.

4 V. LEGAL ARGUMENT AND AUTHORITY

5 CR 34 provides in pertinent part that:

6 Any party may serve on any other party a request . . . (2) to permit entry upon designated land  
7 or other property in the possession or control of the party upon whom the request is served for  
8 the purpose of inspection and measuring, surveying, photographing, testing, or sampling the  
9 property or any designated object or operation thereon, within the scope of rule 26(b).

10 \* \* \*

11 The request shall set forth the items to be inspected either by individual item or by category,  
12 and describe each item and category with reasonable particularity. The request shall specify a  
reasonable time, place and manner of making the inspection and performing the related acts.<sup>13</sup>

13 The scope of discovery under CR 26(b) is broad, thus the rule provides that “it is not ground for  
14 objection that the information sought will be inadmissible at the trial if the information sought appears  
15 reasonably calculated to lead to the discovery of admissible evidence.” ACC has sought a site visit  
16 consistent with the Rule, and described its scope in terms consistent with the issues:

17 Observe and photograph wetland complexes in the Master Plan area and in the Miller, Walker  
18 and Des Moines Creek watersheds, and take samples by hand auger; Observe, photograph and  
19 take samples of the streams within the Master Plan area, including existing stormwater outfalls  
20 and discharge gauging stations, any stations downstream of Port outfalls and proposed  
21 locations for flow augmentation outfalls; Observe and photograph the area proposed for  
22 construction of the embankment and MSE wall; and Observe, photograph and take samples of  
23 the stockpiled fill material and any areas cleared, graded or otherwise disturbed in anticipation  
24 of construction.<sup>14</sup>

25 <sup>13</sup> The plain language of CR 34 permits parties “to gain access to the property to take soil and water samples or to do other things necessary to evaluate the extent of pollution.” *Teer v. Law Engineering and Environmental Svcs.*, 176 F.R.D. 206, 207 (E.D. N.C. 1997).

<sup>14</sup> Witek Decl., Ex. D (Dec 12 email).

1 The Port's "conditions" are patently unreasonable and inconsistent with CR 34. For example,  
2 the Port has demanded that ACC identify "precisely" where ACC wants to go. Witek Decl, Ex. G  
3 (Port formal objection). Not having been to the site, ACC's experts cannot, in advance, indicate  
4 "precisely" where they want to go. Such a request is not consistent with CR 34. Nor is it consistent  
5 with the approach the Port has taken in allowing Ecology free-ranging access to the site.  
6

7 Similarly, the Port's demand that ACC meet some burden of proof before engaging in the  
8 "inspection and measuring, surveying, photographing, testing or sampling" explicitly allowed by CR  
9 34 is pure obstructionism.<sup>15</sup>

10 The Port's belated fiat that site visit participants must sign a "hold harmless agreement" (which  
11 the Port has not even produced) is no more defensible. This "requirement" does not apply to Ecology  
12 staffers, assistant attorneys general, Des Moines Chamber of Commerce sightseers, or PCHB Board  
13 members; the Port has demanded it to inhibit ACC access.<sup>16</sup>  
14

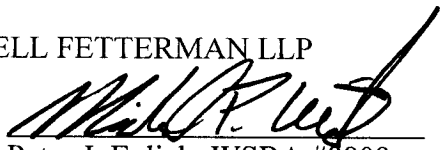
15 VI. CONCLUSION

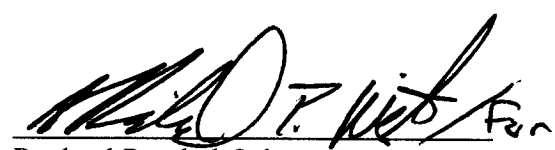
16 For the foregoing reasons, ACC respectfully requests entry of the attached Order.

17 DATED this 11<sup>th</sup> day of January, 2002.

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19 By:

  
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23

24 <sup>15</sup> It further raises the question, "What is the Port hiding?"

25 <sup>16</sup> It would be a substantial burden to obtain approval of such a "hold harmless" agreement by the numerous ACC experts, who would require advice of their own counsel before signing an agreement proposed by the Port. In any event, the Port has failed to even produce such a document while setting its execution as a precondition to a site visit.