

RECEIVED  
JAN 11 2002  
ENVIRONMENTAL  
HEARINGS OFFICE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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  
SECOND DECLARATION OF STEVEN G. JONES

Steven G. Jones declares as follows:

1. I am one of the attorneys representing the Respondent Port of Seattle. I have a personal knowledge of the facts set forth in this declaration and would be competent to testify to them if necessary.
2. On November 26, 2001, ACC served the Port with a request for a site visit pursuant to CR 34(a)(2). A copy of ACC's request is attached to this declaration as Exhibit A. The Port responded to ACC's request on December 24, 2001, by serving its Responses and Objections. A copy of the Port's response is attached to this declaration as Exhibit B.
3. On December 28, 2001, counsel for ACC, Michael Witek, telephoned me and suggested that counsel attempt to negotiate some elements of agreement regarding the site visit, in anticipation of a later telephone conference between counsel for the parties. In response to this message, I sent Mr. Witek an e-mail that same day, outlining the Port's position on the issue. A copy of my e-mail to Mr. Witek is attached to this declaration as Exhibit C.

SECOND DECLARATION OF STEVEN G. JONES - 1

FOSTER PEPPER & SHEFELMAN PLLC  
1111 THIRD AVENUE, SUITE 3400  
SEATTLE, WASHINGTON 98101-3299  
206-447-4400

ORIGINAL

1           4.       A telephone conference regarding ACC's request for a site visit was held on  
2 January 4, 2001. I represented the Port in that conference; ACC was represented by Kevin Stock  
3 and Michael Witek. In that phone conference, Mr. Stock asserted that ACC was entitled to  
4 basically unfettered access to the Port's property, without limitation as to location or without the  
5 necessity of identifying what ACC's experts wished to sample, where ACC's experts wished to  
6 sample, or the methods they intended to employ.

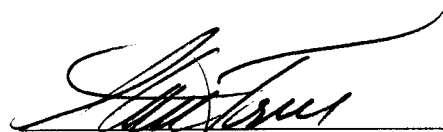
7           5.       Following the January 4 telephone conference, I sent a letter to Messrs. Stock and  
8 Witek that same day confirming the telephone call and outlining both ACC's position during the  
9 telephone conference and the Port's position, based on my notes of the telephone call. A copy of  
10 my letter of January 4, 2001 is attached to this declaration as Exhibit D.

11          6.       Michael Witek responded to my January 4, 2001 letter with a letter of his own sent  
12 on January 8, 2002. A copy of Mr. Witek's letter is attached to this declaration as Exhibit E.

13          7.       In his letter of January 8, Mr. Witek stated that ACC would not make any of its  
14 witnesses available for deposition until the site visit had been agreed to. On January 9, 2002, I  
15 responded to Mr. Witek's letter in a phone call to Mr. Witek, leaving a message informing Mr.  
16 Witek that the Port intended to go forward with the depositions per the parties' agreed schedule. I  
17 also sent Mr. Witek a letter confirming the Port's position that same day on January 9, 2002,  
18 informing him that the Port would view ACC's failure to produce its named witnesses for  
19 deposition as a violation of the Board's Prehearing Order. A copy of that letter is attached to this  
20 declaration as Exhibit F.

21           I declare under penalty of perjury that the foregoing is true and correct.

22           Executed at Seattle, Washington this 10<sup>th</sup> day of January, 2002.

23  
24   
25 \_\_\_\_\_  
26 Steven G. Jones

**A**

**AR 005423**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

ACC'S CR 34(a)(2) REQUEST FOR  
ENTRY UPON PORT PROPERTY  
FOR INSPECTION AND OTHER  
PURPOSES

TO: PORT OF SEATTLE ("Port");

AND TO ITS COUNSEL: Jay Manning and Gillis Reavis, Marten Brown, Inc.;  
Roger Pearce and Steven Jones, Foster Pepper &  
Shefelman;  
Linda Strout and Traci Goodwin, Port of Seattle

**REQUEST FOR ENTRY UPON LAND FOR INSPECTION AND OTHER  
PURPOSES.**

Pursuant to the PCHB's October 30, 2001, Prehearing Order and CR 34(a)(2),  
ACC requests that the Port permit ACC and its experts to enter upon Port property  
for the purpose of "inspection and measuring, surveying, photographing, testing or  
sampling the property." CR 34(a)(2).

**AR 005424**

1           **Scope of Request.** ACC requests that the Port permit ACC and its experts to  
2 enter upon the portions of the Port property upon which the Port proposes to  
3 construct the Third Runway and Related Projects as described in the October 25,  
4 2000, JARPA application (as amended).  
5

6           **Time, Place and Manner of Inspection.** ACC requests for itself and its  
7 experts entry to the Port property on three dates between mid-December 2001 and  
8 mid-January 2002. ACC will coordinate scheduling with its experts.

9           **Time for Response.** Pursuant to CR 34(b) you must serve a written response  
10 to this request within 30 days after this request is served upon you. Space for your  
11 response is provided below. If you object to this request, please provide sufficient  
12 information regarding the basis for your objection to allow ACC to make a motion  
13 to compel pursuant to Civil Rule 37.  
14

15           **RESPONSE:**  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**AR 005425**

1 Request to permit entry upon land or property dated this 26th day of  
2 November, 2001.

3 **HELSELL FETTERMAN LLP**

4  
5 By: 

Peter J. Egluck, WSBA No. 8809  
6 Michael P. Witek, WSBA No. 26598  
7 Attorneys for Appellant Airport  
Communities Coalition

8 G:\LU\ACC\PCHB\Discovery\CR34req for entry.doc  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**AR 005426**

ACC'S CR 34(a)(2) REQUEST FOR ENTRY  
UPON PORT PROPERTY FOR INSPECTION  
AND OTHER PURPOSES - 3

**HELSELL  
FETTERMAN**  
*A Limited Liability Partnership*

1500 PUGET SOUND PLAZA P.O. BOX 21846  
SEATTLE, WA 98111-3846 PH: (206) 292-1144

1 SIGNED on behalf of Port of Seattle

2 By: \_\_\_\_\_  
3 Signature

4 \_\_\_\_\_  
5 Printed Name

6  
7 STATE OF WASHINGTON )  
8 COUNTY OF \_\_\_\_\_ ) ss:  
9 )

10 \_\_\_\_\_, being first duly sworn, on oath deposes  
11 and says:

12 That \_\_\_\_\_ is the \_\_\_\_\_ for the  
13 Respondent named herein, has read the request for entry upon Port property  
14 contained herein and the answers and responses thereto; believes the response to  
15 be true and correct; and has not interposed any objection for any improper purpose,  
16 such as to harass or to cause unnecessary delay or needless increase in the cost of  
17 litigation.

18 SUBSCRIBED AND SWORN to before me this . day of \_\_\_\_\_, 2001.

19 \_\_\_\_\_  
20 NOTARY PUBLIC in and for the State of  
21 Washington residing at \_\_\_\_\_

22 My commission expires \_\_\_\_\_

23 \_\_\_\_\_, attorney for Port of Seattle, certifies that (s)he  
24 has read the response and objection (if any) to the foregoing request for entry upon  
25 Port property and, to the best of her/his knowledge, information, and belief formed  
after a reasonable inquiry they are (1) consistent with these rules and warranted by  
existing law or a good faith argument for the extension, modification, or reversal of  
existing law; (2) not interposed for any improper purpose, such as to harass or to  
cause unnecessary delay or needless increase in the cost of litigation; and (3) not

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

unreasonably or unduly burdensome or expensive, given the needs of the case. the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

By: \_\_\_\_\_  
(WSBA No. \_\_\_\_\_)  
Attorney for Port of Seattle

g:\lu\acc\pchb\discovery\cr34req for entry.doc

**AR 005428**



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

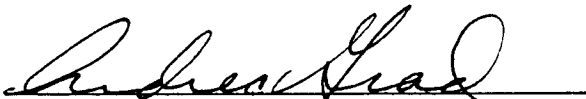
**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 26th day of November, 2001, served  
ACC's CR 34(a)(2) Request for Entry Upon Port Property for Inspection and Other  
Purposes on the following persons, by legal messenger:

Jay J. Manning  
Gillis E. Reavis  
Marten & Brown LLP  
1191 Second Avenue, Suite 2200  
Seattle, WA 98101

Roger Pearce  
Steven Jones  
Foster Pepper & Shefelman  
1111 Third Avenue, Suite 3400  
Seattle, WA 98101

Linda J. Strout, General Counsel  
Traci M. Goodwin, Senior Port Counsel  
Port of Seattle, Legal Dept.  
Pier 69  
2711 Alaskan Way  
Seattle, WA 98121

  
Andrea Grad

**AR 005429**

**B**

**AR 005430**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

) ACC'S CR 34(a)(2) REQUEST FOR  
) ENTRY UPON PORT PROPERTY FOR  
) INSPECTION AND OTHER PURPOSES  
) AND RESPONSES AND OBJECTION  
) OF RESPONDENT PORT OF SEATTLE

TO: PORT OF SEATTLE ("Port");

AND TO ITS COUNSEL: Jay Manning and Gillis Reavis, Marten Brown, Inc.;  
Roger Pearce and Steven Jones, Foster Pepper & Shefelman;  
Linda Strout and Traci Goodwin, Port of Seattle

**REQUEST FOR ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES.**

Pursuant to the PCHB's October 30, 2001, Prehearing Order and CR 34(a)(2), ACC requests that the Port permit ACC and its experts to enter upon Port property for the purpose of "inspection and measuring, surveying, photographing, testing or sampling the property." CR 34(a)(2).

**Scope of Request.** ACC requests that the Port permit ACC and its experts to enter upon the portions of the Port property upon which the Port proposes to construct the Third Runway and Related Projects as described in the October 25, 2000, JARPA application (as amended).

ACC'S CR 34(a)(2) REQUEST FOR ENTRY UPON PORT  
PROPERTY FOR INSPECTION AND OTHER PURPOSES  
AND RESPONSES AND OBJECTIONS OF RESPONDENT  
PORT OF SEATTLE - 1

FOSTER PEPPER & SHEFELMAN PLLC  
1111 THIRD AVENUE, SUITE 3400  
SEATTLE, WASHINGTON 98101-3299  
206-447-4400

COPY

AR 005431

1           **Time, Place and Manner of Inspection.** ACC requests for itself and its experts entry to  
2 the Port property on three dates between mid-December 2001 and mid-January 2002. ACC will  
3 coordinate scheduling with its experts.

4           **Time for Response.** Pursuant to CR 34(b) you must serve a written response to this  
5 request within 30 days after this request is served upon you. Space for your response is provided  
6 below. If you object to this request, please provide sufficient information regarding the basis for  
7 your objection to allow ACC to make a motion to compel pursuant to Civil Rule 37.

8           **RESPONSE:**

9           **OBJECTIONS:**

10           1.       **Respondent Port of Seattle ("Port") objects to the above request to the extent**  
11 **it attempts to impose requirements beyond the Superior Court Civil Rules or the Prehearing**  
**Order entered by the Pollution Control Hearings Board in this action.**

12           2.       **The Port objects to the above request because it is vague and ambiguous,**  
13 **overbroad and unduly burdensome.**

14           3.       **The Port objects to the above request to the extent it seeks discovery not**  
15 **relevant to this action and beyond the scope of CR 26. In particular, the scope of the present**  
16 **appeal involves whether the Washington Department of Ecology had reasonable assurance**  
17 **that the planned improvements requiring a §404 permit under the Clean Water Act will**  
**conform to state water quality standards. ACC's request to test existing improvements at**  
**the Port in an attempt to collaterally attack the Port's existing §402 permit for existing**  
**permitted facilities is neither relevant to the present appeal nor permitted by controlling**  
**law.**

18           4.       **The Port objects to the above request because it fails to specify any reasonable**  
19 **time, place and manner for the proposed inspection and fails completely to specify the items**  
20 **to be inspected with any reasonable particularity. Even after repeated requests for**  
21 **clarification by the Port of Seattle, ACC has failed to specify precisely who the persons are**  
22 **that it wishes to have access to Seattle Tacoma International Airport property, precisely**  
23 **where those persons want to go, what they want to test, and where they want to test.**  
24 **Instead, ACC has merely stated that it wants all of its "experts" to come onto STIA and test**  
**wetlands, dirt and water at the existing STIA operation, without specifying any locations or**  
**rationale for the proposed inspections. This overbroad request does not conform to the**  
**requirements of CR 34. The request is also unduly burdensome because STIA is a secure**  
**facility and, particular after the events of September 11, 2001, security issues at STIA are of**  
**paramount concern, especially in the area of the operational airfield, which is included in**  
**the scope of ACC's request.**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Request to permit entry upon land or property dated this 26th day of November, 2001.

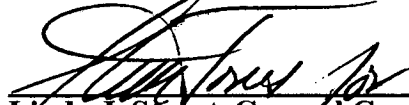
**HELSELL FETTERMAN LLP**

By: \_\_\_\_\_  
Peter J. Eglick, WSBA No. 8809  
Michael P. Witek, WSBA No. 26598  
Attorneys for Appellant Airport Communities  
Coalition

SIGNED on behalf of Port of Seattle

DATED this 24<sup>th</sup> day of December 2001.


**PORT OF SEATTLE**

  
\_\_\_\_\_  
Linda J. Strout, General Counsel, WSBA No. 9422  
Traci M. Goodwin, Senior Port Counsel, WSBA No.  
14974

**FOSTER PEPPER & SHEFELMAN PLLC**

  
\_\_\_\_\_  
Roger A. Pearce, WSBA No. 21113  
Steven G. Jones, WSBA No. 19334

**MARTEN & BROWN LLP**

  
\_\_\_\_\_  
Jay J. Manning, WSBA No. 13579  
Gillis E. Reavis, WSBA No. 21451

Attorneys for Port of Seattle

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**OBJECTION: The verification or affidavit signature called for below is not required under either the Superior Court Civil Rules or the prehearing order governing the conduct of discovery in this action.**

By: \_\_\_\_\_  
                    Signature  
  
\_\_\_\_\_  
                    Printed Name

STATE OF WASHINGTON      )  
                                      ) ss.  
COUNTY OF \_\_\_\_\_ )

\_\_\_\_\_, being first duly sworn, on oath deposes and says:

That \_\_\_\_\_ is the \_\_\_\_\_ for the Respondent named herein, has read the request for entry upon Port property contained herein and the answers and responses thereto; believes the response to be true and correct; and has not interposed any objection for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2001.

\_\_\_\_\_  
NOTARY PUBLIC in and for the State of  
Washington, residing at \_\_\_\_\_  
My commission expires \_\_\_\_\_

\_\_\_\_\_, attorney for Port of Seattle, certifies that (s)he has read the response and objection (if any) to the foregoing request for entry upon Port property and, to the best of her/his knowledge, information, and belief formed after a reasonable inquiry they are (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonably or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

By: \_\_\_\_\_ (WSBA No. \_\_\_\_\_)  
Attorney for Port of Seattle

**C**

**AR 005435**

## Steven Jones

---

**From:** Steven Jones  
**Sent:** Friday, December 28, 2001 4:14 PM  
**To:** Mike Witek (E-mail)  
**Cc:** Traci Goodwin (E-mail); Elizabeth Leavitt (E-mail); Roger Pearce; Gillis Reavis (E-mail)  
**Subject:** Response to your message on site visit

Mike:

I am writing in response to your voice-mail of this afternoon regarding ACC's request for a site visit to Sea-Tac International. I think that your suggestion that we try to establish any points of agreement between the Port and ACC with respect to a site visit by your clients and experts is a good one. Accordingly, Roger Pearce and I have been in contact with officials at the Port today regarding the security issues and other constraints that would be applicable to any site visit. I have outlined them below:

First, the Port needs to know specifically who will be visiting. Security at the airport requires that all persons must be escorted. This means that the group be of a manageable size (e.g. 4-5 people). Your generic request that all of ACC's experts, some attorneys and client representatives is unreasonable.

Second, we need to know specifically where ACC wishes to go. The Port must notify any contractors who are working in an area of a site visit, so that appropriate hold harmless provisions can be executed. Appropriate hold harmless agreements will also be required from those ACC representatives (or experts) undertaking the site visit.

Third, if sampling is to be conducted, the Port needs to have an appropriate expert there to review any sampling or to conduct its own sampling as a control. I have been informed that on a previous occasion, Port and ACC representatives split samples so as to avoid conflicts over sampling protocols or sampling techniques. We believe this is a good approach and would offer that as an option that is acceptable to the Port.

Fourth, we need to know specifically what ACC wishes to sample or photograph. This will allow us to arrange for appropriate Port personnel to accompany any site visit and assure that appropriate releases are obtained from contractors.

Finally, the Port will not allow access onto the airfield. This is not reasonable given the impact to airport operations that this would entail.

Within those parameters, we would be happy to discuss any reasonable requests for a site visit by ACC experts or representatives. Both Roger and I will be here on Monday (I will be here until 12:00 -- Roger will be here in the afternoon). We will not be in on Tuesday, but will be available on Wednesday, January 2. Please let me know when you would like to schedule a call on these issues.

---

### Steven G. Jones

Foster Pepper & Shefelman PLLC  
1111 Third Avenue, Suite 3400  
Seattle, WA 98101

**AR 005436**



Direct phone: 206-447-8902  
Direct fax: 206-749-1962  
Mobile: 206-226-2897

E-mail: [jones@foster.com](mailto:jones@foster.com)  
Web: [www.foster.com](http://www.foster.com)

**AR 005437**

**D**

**AR 005438**

FOSTER PEPPER & SHEFELMAN PLLC  
ATTORNEYS AT LAW



January 4, 2002

**VIA FACSIMILE**

Mr. Kevin Stock  
Mr. Michael Witek  
Helsell Fetterman, LLP  
1325 Fourth Avenue  
Suite 1500  
Seattle, WA 98101

Re: ACC's Requested Site Visit to Sea-Tac International

Dear Kevin and Michael:

I am writing as a follow-up to our telephone discussion yesterday regarding ACC's request for a site visit to Sea-Tac International ("STIA"). While the Port will accommodate a reasonable request for a site visit that accords with CR 34, ACC's current demands are far in excess of those allowed under the rule. Based on the discussions yesterday, we understand ACC's position to be as follows:

- 17 people must be allowed to visit the site. This group includes all 9 of ACC's experts, 5 attorneys and one paralegal, and two unnamed client representatives;
- ACC demands that it be allowed to take hand-auger samples from any and all of the more than 18 acres of wetlands within the project area. Designation of which wetlands are to be sampled, the sample location and the method of sampling will not be made prior to the visit, but instead will be made at the experts' discretion, during the site visit;
- ACC demands to be allowed to take samples from Miller, Des Moines and Walker Creek, at any point on the project site, with designation of the types of samples and sample location to be made by ACC's experts during the site visit;
- ACC demands access to the entire proposed embankment area "from north to south and east to west;"

*Direct Phone*  
(206) 447-8902

*Direct Facsimile*  
(206) 749-1962

*E-Mail*  
JonesS@foster.com

1111 THIRD  
AVENUE  
Suite 3400  
SEATTLE  
Washington  
98101-3299

*Telephone*  
(206)447-4400  
*Facsimile*  
(206)447-9700  
*Website*  
WWW.FOSTER.COM

ANCHORAGE  
Alaska

PORTLAND  
Oregon

SEATTLE  
Washington

SPOKANE  
Washington

Mr. Kevin Stock  
Mr. Michael Witek  
January 4, 2002  
Page 2

- With respect to stockpiled fill material, ACC demands access to all areas where fill has been stockpiled by the Port, without any restriction and without specifying where or what type of samples are to be taken.

You did concede that ACC's group could be accompanied by Port personnel and that the group could be broken up into a manageable size, but you stated that you anticipated that each group would likely require a day to complete its site visit activities.

CR 34(b) specifically requires that ACC must "set forth the items to be inspected . . . and describe each item with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts." ACC's current position is entirely at odds with those requirements.

In the Port's response to ACC's request for entry upon land, the Port raised the following objections:

**(1) ACC is seeking discovery that is beyond the scope of this action and thus beyond the scope of CR 26.**

The scope of the present appeal involves whether the Department of Ecology had reasonable assurance that the planned improvements requiring a §404 permit under the Clean Water Act will conform to state water quality standards. ACC's request to test improvements at the Port in an attempt to collaterally attack the Port's §402 permit for existing permitted facilities is neither relevant to the present appeal, nor permitted by controlling law. Even after our telephone conference, ACC continues to maintain that it is entitled to sample any and all stormwater outfalls. In addition, ACC maintains that it is entitled to access any portion of the Port's stockpiled fill, even though ACC has made no contention that the stockpiled fill is placed in waters of the U.S. With the stay of the §401 Certification, there can be no argument that there are fill criteria currently applicable to that fill. In addition, during our phone call, you consistently refused to specify a location of inspection or sampling of any wetland, any stream, any outfall or any portion of the embankment or stockpiled fill. Even assuming for argument's sake that each and every expert must participate in each and every sample (a position we would dispute), it is very difficult to understand why five lawyers, a paralegal and two lay clients have the need to participate in any such sampling.

Mr. Kevin Stock  
Mr. Michael Witek  
January 4, 2002  
Page 3

**2. ACC has failed to specify any reasonable time, place and manner for the proposed inspection and completely failed to specify the items to be inspected with any reasonable particularity.**

Throughout our phone conversation you refused to accept any restriction on where ACC's representatives could go, or any request that the locations to be visited, samples to be taken, sampling locations or sampling protocols be specified prior to the site visit. Instead, you maintained that CR 34 allowed ACC basically unfettered access to any and all locations on the project site, maintaining that it was the Port that had designated the project site, not ACC, and accordingly, that ACC had no obligation to specify where it wished go within the site. It was your position that any ACC expert could decide, during the site visit, to visit any wetland, any stream, any stormwater outfall, and any portion of the embankment or fill and to take samples using procedures to be designated only during the site visit. Such a position is entirely at odds with CR 34.

**3. In addition to going beyond the scope of CR 34, ACC's position is unduly burdensome and entirely unreasonable.**

By federal law, STIA is a secure facility and, particularly after the events of September 11, 2001, security issues at STIA are of paramount concern, especially in the area of the operational airfield, which is included in the scope of ACC's request. While you maintained that you did not desire to be allowed access to the airfield, your specification of the range of the embankment, the fill site, and some of the wetlands would include the airfield.

As we have stated previously, the Port will accommodate a reasonable CR 34(b) request for entry upon land, subject to the following conditions:

First, the Port needs to know specifically who will be visiting. Security at the airport requires that all persons must be escorted. This means that the group is of a manageable size (e.g. 4-5 people). ACC's request that 17 experts, attorneys, client representatives and a paralegal is unreasonable, as is your request that the Port accommodate that many persons in groups of 7-8, each of which will require a day for a site visit (using your estimate). Under your assumptions, site visits would require anywhere from four to six working days, if ACC's entire entourage was accompanied by Port personnel/experts.

Second, the Port needs to know specifically where ACC wishes to go. This is not simply a security concern (though that is a paramount issue), but also a requirement of CR 34. In addition, there are contractual and safety concerns if any portion of the site visit includes areas where contractors are working. For this reason, the Port will require all those on the site visit to sign a hold harmless agreement protecting both the Port and those contractors currently working on site.

Mr. Kevin Stock  
Mr. Michael Witek  
January 4, 2002  
Page 4

Third, if sampling is to be conducted, the Port needs to have an appropriate expert there to review any sampling or to conduct its own sampling as a control. In my message to Mike Witek of December 28, I offered the alternative of having ACC and the Port split samples so as to avoid conflicts over sampling protocols or sampling techniques. I was disappointed that you had not even raised this proposal with any of ACC's experts prior to our phone call yesterday morning. In the event that you ultimately reject this offer, the Port's experts will be taking split samples at the same time as ACC's experts, as a control.

Fourth, the Port needs to know specifically what ACC wishes to sample or photograph. This will allow the Port to arrange for appropriate personnel to accompany any site visit and assure that appropriate releases are obtained from contractors. Here again, this is not a requirement the Port manufactured, but it is a requirement under CR 34.

Fifth, the Port will not allow access onto the airfield. This is not reasonable given the impact to airport operations that this would entail.

Within those parameters, we remain willing to discuss any reasonable requests for a site visit by ACC experts or representatives and believe that a site visit can be accommodated some time next week. If ACC continues to maintain its current position, then we would suggest that the issue be resolved by a conference call with the Board at the earliest possible time so as to avoid any delay in discovery.

Sincerely,

FOSTER PEPPER & SHEFELMAN PLLC



Steven G. Jones

cc: Elizabeth Leavitt  
Traci Goodwin  
Tom Newlon  
Gillis Reavis  
Roger Pearce

E

AR 005443

*Law Offices*  
**HELSELL**  
**FETTERMAN**  
*A Limited Liability Partnership*

January 8, 2002

Michael P. Witek  
Attorney At Law

**Sent via FAX and Mail**

Mr. Steven G. Jones  
Foster Pepper & Shefelman  
1111 Third Ave., Suite 3400  
Seattle, WA 98101

Re: PCHB No. 01-160  
CR 34 Request for Entry (Site Visits)

Dear Steven:

This is in response to your letter of January 4, 2001, regarding ACC's CR 34 Request for Entry. We had hoped that our telephone conference on January 3, 2002, would have resulted in progress on this request. Instead, the January 4 letter reflects that the conference was used as a springboard for letter writing rather than problem solving.

Worse yet, the letter continues the Port's pattern of adding new conditions to make the site visit goal unattainable, and materially distorts some points ACC made in explaining how the site visit ought to be conducted while overlooking others. And, despite our repeated requests, the Port still has not offered any dates when such site visits by our experts could occur, despite our repeated requests in writing and by phone, in light of the substantial lead time necessary to schedule experts for such activities. It therefore appears likely that this dispute over the Request for Entry will impact the discovery schedule, including the schedule for deposition of our experts and possibly the hearing schedule in this matter. This appears especially likely in light of your January 7 telephone call which offered no solutions - and no dates - and instead essentially encouraged ACC to file a Motion to Compel before the Board.

We have requested, beginning with my email of December 12, 2001, my email of December 27, 2001, and in our telephone conferences of December 12, 2001, and January 3, 2002, that the Port immediately provide three dates for site visits, so that we can begin to make scheduling arrangements with our experts while negotiations on the terms of the visits continue. Now, in light of the Port's obstructionism ACC's experts have not had the opportunity to inspect the site. The Port should not expect to depose any of ACC's experts prior to resolution of the dispute over the Request for Entry. As we have explained numerous times, it makes little sense for the Port to depose ACC's experts prior to a site visit and it would put ACC's experts at an unfair disadvantage to depose them prior to such a visit. We hope, however, that the Port

**AR 005444**



Mr. Steven G. Jones  
January 8, 2002  
Page 2

will reconsider its position and avoid unnecessary discovery disputes and consequent delay in the proceeding. Meanwhile, in light of your call on January 7, which asserted that the Port would be unwilling to further change its position, ACC will likely be forced to bring the matter before the Board.

To assist the Port in reconsidering its position, we offer below partial responses to the five apparently nonnegotiable "conditions" demanded in your letter as bases under which the Port will comply with the discovery rules concerning entry:

1. Who Will Attend. As we have stated a number of times, ACC is requesting that the experts identified in its November 15, 2001 witness list, the ACC attorneys and our paralegal, Ms. Grad, and two client representatives from the ACC be permitted on the site. As we discussed on the phone on January 3, 2002, you know the specific names of all persons that will attend, with the exception of the client representatives, and we can provide you with the two additional names shortly after we know the dates for the site visits. This is not an extraordinary number of persons: we understand that the Port has in fact offered site visits specifically in connection with the Third Runway project for far larger groups. As we stated in our telephone conference of January 3, 2002, ACC is willing to work with the Port in organizing the visits into smaller groups if the Port thinks it is necessary although we understand that the Port has previously conducted site visits using a bus. Of course, we will know more about what the group sizes will be after the Port proposes three dates for site visits and we poll our experts for their availability.

2. Where ACC Wishes To Go. As we have stated, ACC is requesting the same access that was provided to the Department of Ecology, as well as to other agencies and entities. For example, during her deposition, Ecology's Ms. Kenny testified that she has been to 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. Please consider the following exchange between Ms. Kenny and Mr. Stock during the December 20, 2001, deposition:

Q. But prior to going to the site visit you didn't go through any sort of security clearance?

A. No, no.

Q. Or give your social security number or anything like that?

A. I don't believe so.

AR 005445

Mr. Steven G. Jones  
January 8, 2002  
Page 3

Q. Were you required to do anything in advance of these site visits?

A. No.

Q. Where you allowed to see whatever you wanted to see?

A. Yes.

Q. Were you always escorted?

A. Yes.

Q. By a Port person, I'm talking about?

A. Right. We went in Port vehicles and they drove, primary consideration there being sure that you don't cross the pathway of a jet that's taking off or landing.

Q. Sure. Other than that, though, there weren't any restrictions on where you could go or what you could see?

A. No, it was whatever we wanted to go. We'd stop, We'd get out, we'd look around. Whatever we wanted to do was fine.

Q. So if you wanted to see a particular outfall, you told them and you were taken there?

A. Yeah, we went, that's correct.

See, Deposition Transcript of Ann Kenny, December 20, 2001, pages 59-61.

ACC is agreeable to having its site visit parties escorted by Port personnel and is asking for the same access provided to Ecology and others.

Your letter of January 4, 2002, makes a demand that all those visiting the site sign a "hold harmless agreement" a copy of which has not been provided in any event. This demand well illustrates the Port tactic of progressively placing new obstacles in the way of agreement on a site visit even while ACC attempts to address older ones. No mention was made of any need for a hold harmless agreement in any of the Port's correspondence, or in our telephone conferences, or even in the Port's formal objection to the Request for Entry, dated December 24, 2001. In fact, it was not until your email of December 28, 2001, that the Port first insisted that any hold harmless agreement would be required. The PCHB has not been required to sign a hold

Mr. Steven G. Jones  
January 8, 2002  
Page 4

harmless agreement for its site visit nor was Ecology for its visits, nor were others not associated with the PCHB case. In our discussion you also were unable to tell us that you signed such an agreement prior to going on the site. Rather, it appears that this requirement is merely another obstacle generated late in the discussion by the Port in order to keep ACC experts off the site.

3. Sampling. Again, this is another issue the Port did not raise until late in the game, even after the Port's December 24, 2001, Objection to ACC's Request for Entry and even though we specifically informed you of the sampling ACC seeks to perform at the site in my email to you of December 12, 2001. You have requested that we agree to "split samples." Rather than take weeks to work out the appropriate protocols for such split samples, the simple solution seems to be for ACC to allow the Port's experts to take their own samples at the same time and at the same location as ACC's experts take samples during the site visits. The specific sampling protocols that ACC's experts may choose to employ to collect samples at the site may be the proper basis for questions during depositions, but it is not a legitimate objection to deny access to the site.

4. What ACC Wishes To Photograph Or Sample. As we have stated, for example, in our email to you on December 12, 2001, ACC and its experts want to 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; and observe, photograph and take samples of the stockpiled fill material and any areas cleared, graded or otherwise disturbed in anticipation of construction. ACC cannot reasonably be expected to be more specific than this, particularly given that ACC's experts have not yet been given access to the site. What the Port has **not** credibly explained is why this explanation does not suffice.

5. Access To Airfield. As we have discussed, ACC is **not** requesting access onto the airfield itself. The statement in the January 4, 2002, letter that "this is not reasonable given the impact to airport operations that this would entail" therefore makes no sense except in the context of the Port's resort to any excuse, however farfetched, to deny access to ACC.

We hope that the Port will reconsider its position on ACC's Request for Entry. However, as stated above, unless the Port agrees to provide entry without the current

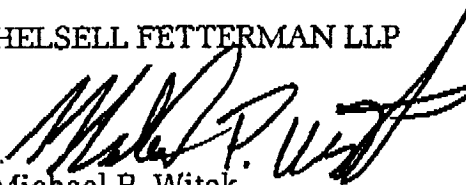
AR 005447

Mr. Steven G. Jones  
January 8, 2002  
Page 5

preconditions and provides the requested dates by the close of business on January 8, 2002, we will pursue our remedies and meanwhile will not make ACC experts available for deposition.

Sincerely,

HELSELL FETTERMAN LLP



Michael P. Witek

MPW:mpw

cc: Jay J. Manning / Gillis E. Reavis  
Joan M. Marchioro / Thomas J. Young / Jeff B. Kray  
Linda Strout / Traci Goodwin  
Richard A. Poulin  
Rachel Paschal Osborn

G:\LJ\ACC\PCHE\Discovery\Jones010702.doc

AR 005448

**F**

**AR 005449**



January 9, 2002

Direct Phone  
(206) 447-8902

Direct Facsimile  
(206) 749-1962

E-Mail  
Jones@foster.com

VIA FACSIMILE

Mr. Michael P. Witek  
Helsell Fetterman  
1500 Puget Sound Plaza  
1325 Fourth Avenue  
Seattle, WA 98101-2509

Re: Port of Seattle's Demand That ACC Produce Witnesses for Deposition

Dear Mike:

This letter responds to your letter to me of January 8, 2002 in which you stated that "[t]he Port should not expect to depose **any** of ACC's experts prior to resolution of the dispute over the Request for Entry." (Emphasis in original). The Port interprets this statement as notice that ACC will refuse to produce any of its witnesses for deposition until the site visit issue has been resolved.

The Board's Pre-Hearing Order of October 30, 2001 provides: "If requested by another party, employees of the parties (including employees of members of appellant ACC) and witnesses whose testimony a party has proffered by declaration *shall be made available for deposition* by the employer or proffering party without the necessity of a subpoena." Order at 6:10-13 (emphasis supplied). As you know, the Port has both noted the deposition and served subpoenas duces tecum for each of ACC's identified expert witnesses, and those depositions are currently scheduled to commence next week. ACC's unilateral decision to withhold its witnesses from deposition violates both the Pre-Hearing Order, as well as the discovery rules.

Consistent with my phone message to you earlier today and pursuant to CR 26(i), I am confirming that if ACC fails to make its witnesses available for deposition according to the currently agreed schedule, the Port will view ACC's actions as a willful violation of the Prehearing Order and seek appropriate relief.

1111 THIRD  
AVENUE  
Suite 3400  
SEATTLE  
Washington  
98101-3299

Telephone  
(206) 447-4400  
Facsimile  
(206) 447-9700  
Website  
WWW.FOSTER.COM

ANCHORAGE  
Alaska

PORTLAND  
Oregon

SEATTLE  
Washington

SPOKANE  
Washington

Mr. Michael P. Witek  
January 9, 2002  
Page 2

The Port intends to go forward with John Strand's deposition, currently scheduled for Monday, January 14, 2002, and with the other depositions of ACC witnesses per the agreed schedule and will expect those witnesses to be made available for deposition.

Sincerely,

FOSTER PEPPER & SHEFELMAN PLLC



Steven G. Jones

cc: Traci Goodwin  
Tom Newlon  
Roger Pearce  
Gillis Reavis  
Jay Manning  
Joan Marchioro  
Tom Young

RECEIVED  
JAN 11 2002  
ENVIRONMENTAL  
HEARINGS OFFICE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,

Appellant,

No. PCHB 01-160

v.

CERTIFICATE OF SERVICE

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

Respondents.

Wendy S. Clement certifies that, on January 11, 2002, I filed/served the following documents on the following persons by the means specified below:

1. Port of Seattle's Motion to Compel Depositions and For Limitation on Entry onto Land;
2. Port of Seattle's Memorandum in Support of its Motion to Compel Depositions and for Limitation on Entry onto Land; and
3. Second Declaration of Steven G. Jones

**ORIGINAL**



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Joan M. Marchioro  
Thomas J. Young  
Jeff Kray  
Department of Ecology  
2425 Bristol Court S.W., 2nd Floor  
Olympia, Washington 98502  
**By FedEx Overnight-delivery**

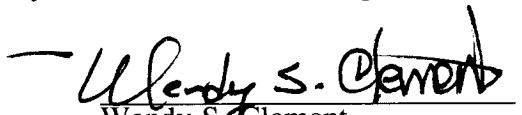
Peter J. Eglick  
Kevin L. Stock  
Michael P. Witek  
Helsell Fetterman LLP  
1500 Puget Sound Plaza  
1325 Fourth Avenue  
Seattle, WA 98101-2509  
**By hand-delivery**

Rachael Paschal Osborn  
2421 W. Mission Avenue  
Spokane, WA 99201  
**By FedEx Overnight-delivery**

Richard A. Poulin  
Smith & Lowney, P.L.L.C.  
2317 East John Street  
Seattle, WA 98112  
**By hand delivery**

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Executed this 11<sup>th</sup> day of January 2002, at Seattle Washington.

  
Wendy S. Clement