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ENVIRONMENTAL
HEARINGS OFFICE

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)
Appellant,) PCHB No. 01-160
v.) PORT OF SEATTLE'S MEMORANDUM
STATE OF WASHINGTON) IN SUPPORT OF ITS MOTION TO
DEPARTMENT OF ECOLOGY, and) COMPEL DEPOSITIONS AND FOR
THE PORT OF SEATTLE,) LIMITATION ON ENTRY ONTO LAND
Respondents.)

The Port of Seattle ("Port") submits this memorandum in support of its motion to compel the Airport Communities Coalition ("ACC") to make its identified witnesses available for deposition and to impose limitations consistent with CR 34(b) on any site visit.

I. BACKGROUND FACTS

On November 26, 2001, ACC served the Port with a request for a site visit pursuant to CR 34(a)(2).¹ The Port responded to ACC's request for a site visit on December 24, 2001.² In its response, the Port objected to ACC's request because it failed to specify a reasonable time, place and manner for the proposed inspection. The Port noted that ACC had not specified the persons who were to have access to the site, where they were to go, the locations for any sampling or sampling protocols. The Port also objected to granting any access to the airfield. See Jones Dec., Ex. B at 2.

In response, on December 28, 2001, ACC's counsel Michael Witek telephoned the Port's counsel, Steven Jones, and suggested that counsel attempt to negotiate some elements of

¹ A copy of ACC's request is attached to the Second Declaration of Steven G. Jones as Exhibit A
² A copy of the Port's response is attached to the Second Jones Dec. as Exhibit B.

1 agreement regarding the site visit. In response to this message, Mr. Jones transmitted an e-mail to
2 Mr. Witek that same day, outlining the Port's position on the issue.³ In his e-mail, Mr. Jones
3 stated that the Port would accommodate a reasonable site visit request, subject to the following
4 conditions:

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

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

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

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

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

25 Second Jones Dec., Ex. C.

26 Following Mr. Jones' e-mail, a telephone conference was held on January 4, 2001. In that
phone conference, ACC's counsel Kevin Stock asserted that ACC was entitled to basically
unfettered access to the Port's property, without limitation as to location or without the necessity
of identifying what ACC's experts wished to sample, where ACC's experts wished to sample, or
the methods they intended to employ. Second Jones Dec., ¶ 4.

Mr. Jones sent a letter to Messrs. Stock and Witek that same day confirming the telephone
call.⁴ Mr. Jones reiterated the position that Mr. Stock had advanced as follows:

³ A copy of this e-mail is attached to the Second Jones Dec. as Exhibit C.

⁴ A copy of that letter is attached to the Second Jones Dec. as Exhibit D.

1 While the Port will accommodate a reasonable request for a site visit that accords
2 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:

- 3 • 17 people must be allowed to visit the site. This group includes all 9 of
4 ACC's experts, 5 attorneys and one paralegal, and two unnamed client
representatives;
- 5 • ACC demands that it be allowed to take hand-auger samples from any and
6 all of the more than 18 acres of wetlands within the project area.
7 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;
- 8 • ACC demands to be allowed to take samples from Miller, Des Moines and
9 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;
- 10 • ACC demands access to the entire proposed embankment area "from north
to south and east to west;"
- 11 • With respect to stockpiled fill material, ACC demands access to all areas
12 where fill has been stockpiled by the Port, without any restriction and
without specifying where or what type of samples are to be taken.

13 Second Jones Dec., Ex. D. Mr. Jones also reiterated the conditions under which the Port would
14 allow a site visit, which were the same as those set forth in his e-mail of December 28. *Id.*

15 In response to Mr. Jones' letter, Michael Witek wrote a letter to Mr. Jones on January 8,
16 2002.⁵ In his letter, Mr. Witek stated that ACC would not make any of its witnesses available for
17 deposition until the site visit had been agreed to. Jones Dec., Exhibit E at 1, ¶ 3. He outlined
18 ACC's demands for a site visit that accommodated: (1) 17 people (some as yet unnamed);⁶
19 (2) access to any portion of the site;⁷ (3) refusal to split samples with the Port or to identify its
20 sampling protocols prior to the site visit;⁸ (4) refusal to specifically identify where its experts
21 wished to sample in the streams, within the embankment area, or within the wetlands (some of
22 which are on the airfield).⁹

23 _____
24 ⁵ A copy of that letter is attached to the Second Jones Dec. as Exhibit E.

25 ⁶ Jones Dec., Ex. E at 2.

26 ⁷ Jones Dec., Ex. E at 2-3.

⁸ Jones Dec., Ex. E. at 4.

⁹ *Id.*

1 International, while simultaneously refusing to specifically name who will enter the Port's
2 property, where they will go, what they wish to test, any sampling protocol that will be used, or to
3 split samples with the Port.

4 The breadth of ACC's request is similar to one addressed in the case of *Belcher v. Bassett*
5 *Furniture Industries, Inc.*, 588 F.2d 904 (4th Cir. 1978), where the Fourth Circuit refused to
6 condone a request for a similar site visit by an expert and an unspecified number of attorneys, a
7 paralegal and two plaintiffs. Similar to ACC, the plaintiffs in *Belcher* demanded that their expert
8 be allowed to roam the premises at will, stop where he wished and make inspections at his
9 discretion. The Fourth Circuit rejected the request, noting that

10 Since entry upon a party's premises may entail greater burdens and risks than
11 mere production of documents, a greater inquiry into the necessity for inspection
12 would seem warranted. We therefore reject the plaintiffs' contention that the
13 inspection in this case must necessarily be governed by the general relevancy
14 standard of Rule 26(b). . . . [T]he degree to which the proposed inspection will
15 aid in the search for truth must be balanced against the burdens and dangers
16 created by the inspection.

17 *Belcher*, 588 F.2d at 908. Similarly here, the degree to which ACC's inspection will aid in the
18 search for truth must be balanced by the completely unfettered access that ACC is demanding.

19 The rule in *Belcher* has been followed by other courts, which have viewed discovery under
20 Rule 34 to be significantly more limited than that authorized under Rule 26(b). *See, e.g., Tobin v.*
21 *WKRZ, Inc.*, 12 F.R.D. 200, 201 (D.C. Pa. 1952) ("while fishing expeditions may be conducted
22 under Rules 26 to 33 by use of interrogatories and depositions, Rule 34 was not intended for such
23 purpose"); *Service Liquor Distributors, Inc. v. Calvert Distillers Corp.*, 16 F.R.D 344, 346
24 (D.C.N.Y. 1954) (Rule 34 never intended to allow "fishing excursions"). Particularly where the
25 Port is already sampling and providing data to Ecology on a regular basis, ACC should have to go
26 beyond a claim of mere "relevance" in justifying why it cannot rely on those samples or make a
showing of why those samples are defective before it is given access to a facility secured pursuant

1 to federal law, particularly in light of the security concerns arising from the events of September
2 11.

3 The *Belcher* decision counsels courts (or the Board in this instance) to use “precision and
4 care in the formulation of inspection orders.” 588 F.2d at 911. In doing so, the Board should
5 demand that ACC describe its proposed inspection and testing with sufficient “particularity” in
6 order to avoid the “risk of creating highly unreliable evidence.” *Cf. Cabrera v. Cordis Corp.*, 134
7 F.3d 1418, 1420 (9th. Cir. 1998) (for evidence to qualify as “scientific knowledge,” the evidence
8 must have a “grounding in the methods and procedures of science ... [and be] more than subjective
9 belief or unsupported speculation.”); *In re Marriage of Parker*, 91 Wn. App. 219, 225, 957 P.2d
10 256 (1998) (scientific evidence must be shown to be reliable). In order to assure that evidence
11 presented to the Board is reliable, the Board must place adequate limitations on any site visit.

12 In this regard, ACC’s refusal to develop an agreed sampling protocol and its refusal to
13 split samples with the Port shows particular disregard for the requirements of Rule 34. The Port
14 must be able to assess ACC’s testing procedures, as well as conduct its own tests on samples
15 taken by ACC in order to assure the validity of any test results. *Compare Sperberg v. Firestone*
16 *Tire & Rubber Co. et al.*, 61 F.R.D. 80, 83 (N.D. Ohio 1973) (any “party, through discovery, can
17 demand a detailed description of the test procedures employed by the other to determine whether
18 the test results can be discredited or distinguished.”)

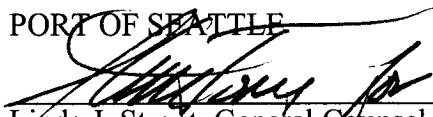
19 Finally, the unbounded scope of ACC’s requests is made more dubious by ACC’s threat to
20 withhold each and every one of its witnesses until the Port accepts its demands. ACC’s unilateral
21 withdrawal of all of its witnesses is completely contrary to the Supreme Court’s direction in
22 *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d
23 1054 (1993), reiterated in *In re Firestorm*, 129 Wn.2d 130, 916 P.2d 411 (1996) that “[c]ounsel
24 and parties may not unilaterally decide to withhold properly requested information on the ground
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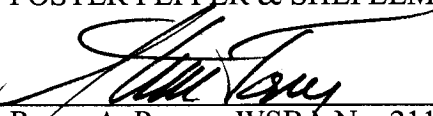
1 it is not relevant or admissible.” *Firestorm*, 129 Wn.2d at 152 (Talmadge, J. concurring) (citing
2 *Fisons*).

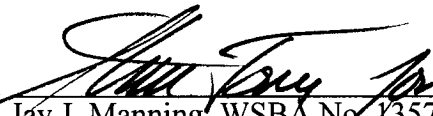
3 **V. CONCLUSION**

4 ACC demands unfettered access to all portions of Sea-Tac International, yet refuses to
5 identify the sites to be visited, sampling locations, or to agree to sampling protocols or to split
6 samples. This demand is being leveraged by ACC’s threat to withhold all of its witnesses from
7 deposition unless the Port agrees to its unreasonable requests. The Board should compel ACC to
8 produce its witnesses, and should require ACC to demonstrate why a site visit is necessary when
9 the Port is already supplying sampling data to Ecology, as well as imposing reasonable constraints
10 on any site visit ultimately allowed, consistent with the requirements of CR 34.

11 Respectfully submitted this 10th day of January, 2002.

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RULES FOR SUPERIOR COURT

RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any

designated object or operation thereon, within the scope of rule 26(b).

(b) **Procedure.** The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, 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.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or the court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objections shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; September 1, 1997.]