

1 Thurston County Superior Court issued a ruling transferring venue to King County Superior
2 Court.

3 On September 12, 2002, ACC and CASE filed an Application for Direct Review to the
4 Court of Appeals and requested the Board to issue a Certificate of Appealability to allow direct
5 review by the Court of Appeals of the petition filed in Thurston County Superior Court (Cause
6 No. 02-2-01549-0). On September 17, 2002, the Port of Seattle (Port) filed an Application for
7 Direct Review and also requested the Board to issue a Certificate of Appealability for direct
8 review of the petition filed in King County Superior Court (Cause No. 02-2-25658-9SEA).

9 The Board, comprised of Kaleen Cottingham (presiding), Robert V. Jensen, and William
10 H. Lynch, grants both of these requests for a Certificate of Appealability to allow for direct
11 review by the Court of Appeals. The decision of Judge Hicks has not yet been fully
12 implemented. Therefore, for judicial economy should that decision be appealed, the Board is
13 granting each of these requests, although it currently appears the venue is with King County
14 Superior Court.

15 The Board's determination is based on the following materials submitted by the parties:

- 16 1. Port of Seattle's Application for Direct Review to Court of Appeals and Request for
17 Certificate of Appealability from Pollution Control Hearings Board;
- 18 2. Airport Communities Coalition's and Citizens Against Sea-Tac Expansion's Application
19 for Direct Review by Court of Appeals, and Request Pursuant to RCW 34.05.518 for
20 Certificate of Appealability of Pollution Control Hearings Board's Granting Final Order.

1 ANALYSIS

2 The Administrative Procedures Act (APA) authorizes direct appellate review of final
3 decisions of the Board and other specified environmental boards. See RCW 34.05.518(3) and
4 WAC 371-08-560. In pertinent part, the APA provides:

5 The final decision of an administrative agency in an adjudicative proceeding
6 under this chapter may be directly reviewed by the court of appeals either (a)
7 upon certification by the superior court pursuant to this section or (b) if the final
8 decision is from an environmental board as defined in subsection (3) of this
9 section, upon acceptance by the court of appeals after a certificate of appealability
10 has been filed by the environmental board that rendered the final decision.

11 RCW 34.05.518(1). Under the statute, once a petition for review has been filed with the superior
12 court, “a party may file an application for direct review with the superior court and serve the
13 appropriate environmental board and all parties of record. The application shall request the
14 environmental board to file a certificate of appealability.” RCW 34.05.518(6)(a).

15 The Board has thirty days in which to issue a decision on the request for Certificate of
16 Appealability, and must base its decision upon the following factors:

17 An environmental board may issue a certificate of appealability if it finds that
18 delay in obtaining a final and prompt determination of the issues would be
19 detrimental to any party or the public interest and either:

- 20 (i) Fundamental and urgent state-wide or regional issues are raised; or
- 21 (ii) The proceeding is likely to have significant precedential value.

RCW 34.05.518(3)(b). The Board shall state in the Certificate of Appealability which criteria it
applied, explain how the criteria was met, and file with the certificate a copy of the final
decision. RCW 34.05.518(4). If a Certificate of Appealability is denied, review shall be by the

1 superior court. The superior court's decision may be appealed to the Court of Appeals. RCW
2 34.05.518(6)(f).

3 The analysis by the Board prior to issuing a Certificate of Appealability is, therefore, two
4 pronged: (1) does the decision of the Board qualify as a final decision, and (2) does the matter
5 meet the criteria set forth in RCW 34.05.518(3)(b).

6 The Board issued its Findings of Fact and Conclusions of Law on August 12, 2002.
7 Although a Motion for Reconsideration was filed on August 22, 2002, it was disposed of on
8 September 6, 2002. Pursuant to WAC 371-08-535, the Board's Findings of Fact and
9 Conclusions of Law constitute a final decision of the Board. A Motion for Reconsideration does
10 not stay the effectiveness of the final decision. WAC 371-08-550 (b). Thus, the decision at hand
11 qualifies as a "final decision."

12 Whether fundamental and urgent statewide or regional issues are raised.

13 The Board's August 12th final decision affirmed the issuance of a water quality
14 certification issued by the Department of Ecology to the Port in conjunction with the Port's
15 Master Plan Update projects at the Seattle-Tacoma International Airport. This includes the Third
16 Runway at the Airport. The proposal to construct the projects at the Airport was the culmination
17 of years of study, debate, and decisions by governmental bodies and elected officials in the Puget
18 Sound region to address the region's commercial air transportation needs and, in particular, to
19 address poor weather delays and increasing demand on facilities at the Airport.

20 The Board recognizes that each of the parties in this case have alleged differing reasons
21 to support a finding of "fundamental and urgent state-wide or regional issues." The Port relies

1 on the impact that delay could have on the costs of the projects and the public interest. The
2 Appellants also rely on the detrimental impact delay could have on the parties and the public
3 interest. They cite the financial burden caused by the potential for review by both the superior
4 court and the Court of Appeals. The Board agrees that all parties, except the Intervenors, are
5 public entities and that duplicative judicial review at both the superior court and Court of
6 Appeals will be a burden on public coffers at a time when those coffers can little afford such
7 expenses. The public interest is best served by having a timely resolution to this appeal.

8 Whether the proceeding is likely to have significant precedential value

9 This Board has already recognized that the issues set forth in this action satisfy the
10 criteria of RCW 34.05.518. Although the Board denied an earlier Request for a Certificate of
11 Appealability on the grounds that the decision at issue then was not a “final decision”, it stated:

12 The decision on this issue will have wide-ranging precedential impact as well for every
13 project proposing to manage and control storm water in order to maintain stream flows
14 necessary to protect fish, wildlife and other environmental or aesthetic values.
15 Additionally, an analysis of acceptable levels of wetland mitigation will also have
16 precedential impact on the myriad of construction projects across this state. For these
17 reasons, the board finds the matter on appeal from the Board meets both criteria set forth
18 in 34.04.518(3)(b).

16 *ACC v. Department of Ecology*, PCHB 01-160 (Order Denying Certificate of Appealability,
17 February 1, 2002).

18 The Findings of Fact and Conclusions of Law, much like the earlier Stay Order, will have
19 wide-ranging precedential impact. Several of the issues decided by the Board, and challenged in
20 the subsequent appeals, are questions of first impression. This includes, for example, the
21 question of whether a water right is required to utilize detained stormwater to mitigate for low

1 stream flow conditions. It also includes the question of whether stringent criteria for the
2 importation of fill can be imposed by the state through the Board's conditioning authority.

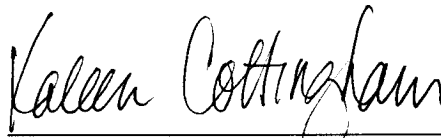
3 For these reasons, the Board finds the matter on appeal from the Board meets both
4 criteria set forth in 34.05.518(3)(b).

5 ORDER

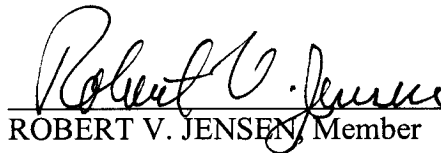
6 The request for a Certificate of Appealability pursuant to RCW 34.05.518 for the Petition
7 for Review pending in King County Superior Court is hereby GRANTED.

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9 SO ORDERED this 9th day of October, 2002.

10 POLLUTION CONTROL HEARINGS BOARD

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12
13 KALEEN COTTINGHAM,
14 Presiding

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16 ROBERT V. JENSEN, Member

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18 WILLIAM H. LYNCH, Member
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