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The Honorable Richard D. Hicks  
Hearing Date: February 22, 2002  
Hearing Time: 9:00 AM

**STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT**

PORT OF SEATTLE, a municipal  
corporation of the State of Washington,

Petitioner,

v.

STATE OF WASHINGTON,  
POLLUTION CONTROL HEARINGS  
BOARD, AIRPORT COMMUNITIES  
COALITION, and STATE OF  
WASHINGTON, DEPARTMENT OF  
ECOLOGY,

Respondents.

NO. 01-2-02386-9

POLLUTION CONTROL HEARINGS  
BOARD'S RESPONSE TO MOTION  
TO SET ASIDE AGENCY ACTION

**I. ROLE OF THE POLLUTION CONTROL HEARINGS BOARD**

The Pollution Control Hearings Board (PCHB) submits this Response to apprise the court of its concerns with some of the arguments raised by the Port of Seattle's Motion to Set Aside Agency Action.

This Response is not intended to be a complete response to the Port's motion. Failure to address some of the Port's arguments should not be construed as a concession by the PCHB. Rather, the PCHB is merely limiting its response in recognition of the principal that

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1 as a quasi-judicial agency, it has a limited role when a party requests judicial review of one  
2 of its Orders under the Administrative Procedures Act (APA). Typically, the party that  
3 prevailed in the PCHB case continues to advocate in favor of its position on APA judicial  
4 review. In Kaiser Aluminum v. Labor and Industries, 121 Wn.2d 776, 781, 854 P.2d 611  
5 (1993), the State Supreme Court concluded a quasi-judicial board is like a trial court in the  
6 respect that such a board does not as a general matter participate on judicial review merely to  
7 argue in support of the substantive correctness of the order being reviewed. However, a  
8 quasi-judicial board has an interest in its procedures and rules, and may address such issues  
9 on judicial review. 121 Wn.2d at 781, 782. Likewise, quasi-judicial boards may participate  
10 in judicial review proceedings to address issues relating to the quasi-judicial board's  
11 jurisdiction. Snohomish County v. State, 69 Wn. App. 655, 661-62, 850 P.2d 546, review  
12 denied, 123 Wn.2d 1003 (1993).

13 This brief addresses three matters. First, the Port's argument the PCHB did not  
14 comply with a procedural statute, RCW 43.21B.320. Second, the Port's argument the  
15 superior court can conduct appropriate judicial review of the PCHB Order Granting Stay  
16 under the APA without reviewing any portion of the PCHB's record. Finally, the Port's  
17 argument the PCHB's Order Granting Stay has jurisdictional significance, and that the PCHB  
18 exceeded its jurisdiction.

19 **II. PCHB'S APPLICATION OF RCW 43.21B.320 TO ACC'S STAY MOTION**

20 RCW 43.21B.320 is a procedural statute. The PCHB has adopted a procedural rule  
21 incorporating the standards of this statute, WAC 371-08-415. Pursuant to the statute, the party  
22 requesting a stay makes a prima facie case for a stay by demonstrating:

23 1) it is likely to succeed on the merits

24 OR

25 2) irreparable harm if the stay is not granted.

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1 If the party requesting the stay makes this prima facie showing, the PCHB "shall grant the  
2 stay" unless the Department of Ecology shows either:

3 a) a substantial probability of success on the merits

4 OR

5 b) likelihood of success on the merits and an overriding public interest which justifies  
6 denial of the stay.

7 It is important to place this statute in context. The statute governs stays, a temporary  
8 remedy. The statute requires the PCHB to make a preliminary determination regarding the  
9 merits of the case, but RCW 43.21B.320 should not be construed as requiring the PCHB to try  
10 the case twice, once in the stay motion and again in the hearing on the merits. Moreover, in  
11 considering this stay motion, the PCHB had only written materials to consider, whereas at the  
12 PCHB hearing in March, additional evidence (e.g. testimony) will likely supplement the  
13 evidence submitted with respect to the stay.

14 On this stay motion, the PCHB considered ACC's motion and supporting materials  
15 (Declarations and Exhibits) submitted by ACC, and Ecology's and the Port's responsive  
16 arguments and materials (Declarations and Exhibits) submitted for the purpose of rebutting  
17 ACC's arguments. Order Granting Stay, page 1 and Attachment A. Based on the limited  
18 record before it, the PCHB weighed the relative merits of the opposing sides' prospects for  
19 success on the merits and concluded ACC had shown "a likelihood of success on the merits"  
20 with the respect to three issues in the case. Order Granting Stay, page 12, line 18; page 14,  
21 lines 7-8; page 17, lines 8-9.

22 Having concluded ACC was likely to succeed on these three issues, based on the  
23 limited record then before it, the PCHB had already done an analysis of part a) of RCW  
24 43.21B.320(3) (i.e. did Ecology and the Port have a substantial probability of success on the  
25 merits?). In other words, in order to reach the conclusion that ACC is likely to succeed on the  
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1 merits, the PCHB had decided Ecology and the Port had not shown a substantial probability of  
2 success on the merits. Phrased differently, it is not logically possible for one side - ACC here -  
3 to be likely to succeed on the merits of an issue, and the opposing side to have a substantial  
4 probability of succeeding on the merits of that same issue. In summary, the PCHB's decision  
5 that ACC made a showing that ACC is likely to succeed means that the PCHB has determined  
6 Ecology and the Port had not shown that they have a substantial probability of success on the  
7 merits. There was no need for the PCHB to expressly address part a) separately in its Order  
8 Granting Stay.

9 The Port argues the PCHB erred because it did not consider part a), whether the Port  
10 had a substantial probability of success on the merits. However, the PCHB's Order shows the  
11 PCHB did in fact consider the Port's and Ecology's opposition to the stay motion, and  
12 supporting declarations and exhibits. Order Granting Stay, page 1 and Attachment A. The  
13 Port's motion acknowledges the PCHB considered the Port's argument and evidence. Motion  
14 to Set Aside Agency Action, page 10, footnote 6.

15 As to part b) of RCW 43.21B.320(3), the PCHB is not required to expressly address  
16 Ecology's and the Port's likelihood of success on the merits. Part b) has two prongs. In order  
17 to overcome ACC's showing that it was likely to succeed on the merits, the responding parties  
18 must demonstrate both prongs of part b). Failure to demonstrate one prong means the party  
19 has failed to make the showing required by part b). The PCHB discussed the second prong of  
20 part b) in its Order Granting Stay, and decided the overriding public interest weighed in favor  
21 of granting a stay. Having ruled against Ecology and the Port on this second prong, the PCHB  
22 did not need to address the first prong of part b).

23 The Port's interpretation of the statutory procedure in RCW 43.21B.320(3) seems to be  
24 the PCHB is required to expressly address each and every part and prong of RCW  
25 43.21.B.320(3) in its stay order. The court should reject the argument that the PCHB must  
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1 expressly address every part and prong in every case, whether or not necessary to reach a  
2 decision given the circumstances of that particular case. If the Port's interpretation were  
3 adopted, the PCHB would be required to undergo analysis and procedure not required to reach  
4 a decision in a particular case, and unwarranted given the narrow procedural step addressed by  
5 the statute, a short-term stay of the underlying Ecology action. RCW 43.21B.320 requires the  
6 PCHB to make a preliminary determination regarding the merits of the case, in order to make a  
7 decision about granting a temporary remedy. The court should not interpret the statute as  
8 requiring that an order granting a stay be something almost the same as a full-blown written  
9 analysis of the case, in which the PCHB thoroughly and expressly discusses all of the parties'  
10 legal arguments and evidence. If this were the case, there could be little practical difference  
11 between the stay motion and order, and the hearing and final order.

### 12 III. JUDICIAL REVIEW IS GOVERNED BY THE APA

13 The Port's motion asks the court to set aside the PCHB's Order Granting Stay without  
14 looking at any portion of the PCHB's record. The court should not conduct judicial review of  
15 the Order Granting Stay without reviewing the pertinent parts of the record before the PCHB.

16 The APA governs this appeal pursuant to RCW 43.21B.320.<sup>1</sup> Under the APA, judicial  
17 review of agency orders is conducted "on the record." In other words, the agency transmits its  
18 record to the superior court, and consideration of the agency record is part of the process of  
19 reviewing the agency's order. RCW 34.05.476(3), .566 and .570(3).

20 The Order Granting Stay is premised, first, on the PCHB's decision that ACC is likely  
21 to succeed on the merits. The PCHB considered evidence submitted by all parties, and  
22 concluded ACC had made a showing that it was likely to succeed. The Order Granting Stay  
23 devotes many pages to a discussion of factual information. It does not seem possible the court  
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25 <sup>1</sup> Any party or other person aggrieved by the grant or denial of a stay by the hearings board may petition  
26 the superior court for Thurston county for review of that decision pursuant to chapter 34.05. RCW 43.21B.320.

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1 could review the PCHB decision that ACC showed it had a likelihood of success on the merits,  
2 unless the court conducts some level of review of the pertinent parts of the record in which  
3 ACC, Ecology, and the Port set forth evidence to support their respective positions. The same  
4 is true for the other two issues addressed in the Order Granting Stay (overriding public interest  
5 and irreparable harm).

#### 6 IV. THE PCHB DID NOT EXCEED ITS JURISDICTION

7 The Port erroneously argues the PCHB Order exceeds the PCHB's jurisdiction. Motion  
8 to Set Aside Agency Action, page 13. The PCHB's Order does not state the Stay would have the  
9 effect of preventing the filling of wetlands. The Port does not provide a citation to the PCHB  
10 Order to support this assertion. The Port is reading something into the PCHB's Order that is  
11 simply not there.

12 Rather, the Order states the Stay could have this effect ("failure to stay the effectiveness of  
13 the § 401 certificate could cause irreparable harm to the wetlands proposed for filling.") Nor is  
14 there language in the PCHB Order that attempts to impose an injunction on a federal agency, the  
15 Army Corps of Engineers. Rather, the PCHB is imposing a stay on Ecology's action, which in  
16 this case is the issuance of a § 401 certificate, authority the PCHB clearly has under RCW  
17 43.21B.320.

18 Apparently, the Port believes the law permits the Corps to issue a § 404 permit despite  
19 the stay, but the PCHB did not make a ruling on this issue. The Order stated the stay could  
20 affect the § 404 permit; PCHB did not state the stay would affect the § 404 permit.

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The Order Granting Stay simply does not raise the jurisdictional issue suggested by the Port. The PCHB clearly has jurisdiction to issue a stay with respect to the §401 permit issued by Ecology.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of February, 2002.

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Attorney General

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JEAN M. WILKINSON, WSBA #15503  
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**STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT**

**PORT OF SEATTLE, a municipal  
corporation of the State of Washington,**

**NO. 01-2-02386-9**

**CERTIFICATE OF SERVICE**

**Petitioner,**

**v.**

**STATE OF WASHINGTON,  
POLLUTION CONTROL HEARINGS  
BOARD, AIRPORT COMMUNITIES  
COALITION, and STATE OF  
WASHINGTON, DEPARTMENT OF  
ECOLOGY,**

**Respondents.**

**Pursuant to RCW 9A.72.085, I certify that on February 11, 2002, I caused to be served, Pollution Control Hearings Board's Response to Motion to Set Aside Agency Action, in the above-captioned matter to be served upon the parties herein, as indicated below:**

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

ORIGINAL was filed via legal messenger to:

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

  
TANYA SEWALELOT, Legal Assistant

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