

POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,

Appellant,

CITIZENS AGAINST SEATAC  
EXPANSION,

Intervenor,

v.

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

Respondents.

On January 8, 2002, Airport Communities Coalition (ACC) and Citizens Against Airport Expansion (CASE) filed with the Pollution Control Hearings Board (Board) a request for a Certificate of Appealability to allow for direct review by the Court of Appeals of a petition filed by ACC in Thurston County Superior Court (Cause No. 02-2-00029-8). Subsequently, ACC and CASE filed a second request for a Certificate of Appealability for direct review of a petition filed earlier by the Port of Seattle (Port) in Thurston County Superior Court (Cause No. 01-2-02386-9). The requests for these Certificates of Appealability are opposed by the Port and the Department of Ecology (Ecology).

The Board, comprised of Kaleen Cottingham (presiding) and Robert V. Jensen, has determined it does not have the authority to issue these Certificates of Appealability, although

1 the matters presented clearly meet the criteria for such direct review. The Board's determination  
2 is based on the following materials submitted by the parties:

- 3 1. Application for Certificate of Appealability of Board's Order on Motion for Stay, dated  
4 January 8, 2002, filed by ACC and CASE, along with the accompanying attachments and  
5 exhibits;
- 6 2. Application for Direct Review and Request, Pursuant to RCW 34.05.518, for Certificate  
7 of Appealability (Thurston County Cause No. 01-2-02386-9) dated January 16, 2002  
8 filed by ACC and CASE;
- 9 3. Letter from the Port's attorneys dated January 16, 2002; re: Port of Seattle's Opposition  
10 to ACC's RCW 34.05.518 Application for Certificate of Appealability of Board's Order  
11 on Motion for Stay, along with accompanying attachments;
- 12 4. Ecology's Memorandum Opposing ACC's Application for Certificate of Appealability of  
13 the Board's Order on Motion for Stay, along with attached declarations; and,
- 14 5. ACC's and CASE's Reply in Support of Certificate of Appealability.

#### 15 ANALYSIS

16 The statute authorizing the Board to issue a stay also provides for judicial review of such  
17 stay decisions. See RCW 43.21B.320(5). In pertinent part, the statute provides:

18 Any party or other person aggrieved by the grant or denial of a stay by the  
19 hearings board may petition the superior court for Thurston County for review of  
20 that decision pursuant to chapter 34.05 RCW pending the appeal on the merits  
21 before the board. The superior court shall expedite its review of the decision of  
the hearings board.

1 RCW 43.21B.320(5). The Board issued its Stay Order on December 17, 2001. Shortly  
2 thereafter, the Port filed a petition for review in Thurston County Superior Court. This petition is  
3 noted as Cause No. 01-2-02386-9. This was followed shortly by a petition for review filed by  
4 ACC and CASE. This petition is noted as Cause No. 02-2-00029-8. ACC and CASE then filed  
5 a motion to consolidate these two petitions. No decision has been made on the motion to  
6 consolidate.

7 The Administrative Procedures Act (APA) authorizes direct appellate review of final  
8 decisions of the Board and other specified environmental boards. See RCW 34.05.518. In  
9 pertinent part, the APA provides:

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

16 RCW 34.05.518(1). Under the statute, once a petition for review has been filed with the  
17 Thurston County Superior Court, “a party may file an application for direct review with the  
18 superior court and serve the appropriate environmental board and all parties of record. The  
19 application shall request the environmental board to file a certificate of appealability.” RCW  
20 34.05.518(6)(a).

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

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

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

5 RCW 34.05.518(3)(b). The Board shall state in the Certificate of Appealability which criteria it  
6 applied, explain how the criteria was met, and file with the certificate a copy of the final  
7 decision. RCW 34.05.518(4). If a Certificate of Appealability is denied, review shall be by the  
8 superior court. The superior court's decision may be appealed to the court of appeals. RCW  
9 34.05.518(6)(f).

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

13 First, the hearing on the merits before the Board is scheduled to begin on March 18<sup>th</sup>.  
14 Interlocutory actions, which delay the preparation of the parties for this monumental hearing,  
15 would not be in the best interests of the parties or the Board. Finding alternative dates for such a  
16 hearing on the Board's already crowded docket would push the resolution of this matter out  
17 many, many months. Because the Board finds a two-step interlocutory appeal has the potential  
18 to frustrate the tight pre-hearing and discovery schedule set by the Board, any further delays in  
19 obtaining a final and prompt determination of the issues would be detrimental to any party or the  
20 public interest.

1           Secondly, the Board finds both criteria set forth in RCW 34.05.518(3)(b)(i) and (ii) are  
2 met in this matter. A determination of the Board's role and process when issuing a stay is a  
3 fundamental question relating to reviews of administrative decisions. Should the authority be  
4 limited, decisions by the board could be weakened if an action proceeded prior to a hearing on  
5 the merits. In some cases, such challenges could be moot if the Board has limited abilities to  
6 stay a proposed action. The questions about the Board's stay authority raise "fundamental and  
7 urgent state-wide or regional issues." Further, the stay standard of "likelihood of success on the  
8 merits" requires a legal analysis with fundamental and precedential importance, such as whether  
9 a water right is required for the kind of storm water retention facility proposed by the Port. The  
10 decision on this issue will have wide-ranging precedential impact as well for every project  
11 proposing to manage and control storm water in order to maintain stream flows necessary to  
12 protect fish, wildlife and other environmental or aesthetic values. Additionally, an analysis of  
13 acceptable levels of wetland mitigation will also have precedential impact on the myriad of  
14 construction projects across this state. For these reasons, the Board finds the matter on appeal  
15 from the Board meets both criteria set forth in 34.05.518(3)(b).

16           The Board, however, finds the Stay Order issued on December 17, 2001, does not qualify  
17 as a final order of the Board. The Board has issued two certificates of appealability in recent  
18 history: *Pub. Util. Dist. No. 1 of Pend Oreille Cy. v. Ecology*, PCHB 97-177 (summary judgment  
19 issued October 15, 1998) and *Gregory H. Bowers v. SWAPCA, et al*, PCHB 98-3 (1999). The  
20 Shoreline Hearings Board has issued one Certificate of Appealability in *Willapa Grays Harbor*  
21 *Oyster Growers Assoc. v. Pacific County and the Moby Dick Corporation*, SHB 00-035 (2001).

1 The Forest Practices Appeals Board has issued one Certificate of Appealability in *Kettle Range*  
2 *Conservation Group and the Land Council v DNR and Stimson Lumber Company*, FPAB 98-33,  
3 99-18, and 00-006. Only one of these Certificates of Appealability was related to an  
4 interlocutory appeal. In *Pub. Util. Dist. No. 1 of Pend Oreille Cy. v. Ecology*, the parties  
5 mutually agreed to appeal the summary judgment order. Despite the agreement of the parties  
6 and the Board, a panel of the Washington State Supreme Court denied direct review and returned  
7 the case to the Board for further review on the basis of the Board's decision not being final under  
8 RCW 34.05.518(1). The other certificates were issued following the issuance of Final Findings  
9 of Fact and Conclusions of Law.

10 Direct review is only available from a "final decision" of an administrative agency in an  
11 adjudicative proceeding. RCW 34.05.518(1) and (3)(a). The APA does not specifically define  
12 "final order" but does identify an order as a written statement that "finally determines the legal  
13 rights, duties, privileges, immunities, or other legal interest of a specific person or persons."  
14 RCW 34.05.010(11)(a). This definition of "order" is consistent with the case law definition of a  
15 "final order." See e.g., *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 634 (1987);  
16 *Bock v. State Bd. Of Pilotage Comm'rs.* 91 Wn.2d 94, 99 (1978); *Lewis Cy. v. Pub. Empl.*  
17 *Relations Comm.*, 31 Wn. App. 853, 862 (1982) ("An administrative determination is not a final  
18 order where it is a mere preliminary step in the administrative process, but it becomes final when  
19 a legal relationship is subsequently fixed upon "consummation of the administrative process.")

20 In the case on appeal, the Board granted ACC's request to "stay the effectiveness" of  
21 Ecology's § 401 Certification of the Port's Third Runway Project "until the Board renders a

1 decision” on ACC’s appeal of the § 401 Certification. Order Granting Motion to Stay at page 20.

2 A Stay Order of the Board is not a final decision. As stated in the Stay Order at page 3:

3 A stay is akin to a preliminary injunction and is not an adjudication on the merits,  
4 but rather a device for preserving the status quo and preventing irreparable loss of  
5 rights before the judgment. *Textile Unlimited, Inc. v. ABMH and Co., Inc.*, 240  
6 F.3d 781 (9<sup>th</sup> Cir. 2001), citing *Sierra On-line, Inc. v. Phoenix Software, Inc.*, 739  
7 F.2d 1415, 1422 (9<sup>th</sup> Cir. 1984).

8 Under the APA, because the Stay Order is not a final decision, the Board denies ACC’s request  
9 for a Certificate of Appealability.

10 ORDER

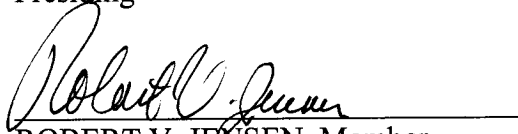
11 The request for a Certificate of Appealability pursuant to RCW 34.05.518 for both  
12 petitions for review pending in Thurston County Superior Court is hereby DENIED.

13 SO ORDERED this 1st day of February, 2002.

14 POLLUTION CONTROL HEARINGS BOARD

15 

16 KALEEN COTTINGHAM,  
17 Presiding

18 

19 ROBERT V. JENSEN, Member