

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

1 AIRPORT COMMUNITIES COALITION, )  
2 and CITIZENS AGAINST SEATAC ) PCHB No. 01-160  
3 EXPANSION, )  
4 )  
5 Appellants, ) AIRPORT COMMUNITIES COALITION'S  
6 ) AND CITIZENS AGAINST SEATAC  
7 v. ) EXPANSION'S REPLY IN SUPPORT OF  
8 ) CERTIFICATE OF APPEALABILITY  
9 )  
10 STATE OF WASHINGTON, )  
11 DEPARTMENT OF ECOLOGY; and )  
12 THE PORT OF SEATTLE, )  
13 Respondents. )  
14 )  
15 )

I. INTRODUCTION

16 On January 8, 2002, the Airport Communities Coalition (ACC) and Citizens Against  
17 Seatac Expansion (CASE) filed, with both the Thurston County Superior Court and the Pollution  
18 Control Hearings Board, an Application for Direct Review by the Court of Appeals and a  
19 Request for a Certificate of Appealability from the Board.<sup>1</sup> Pursuant to the statutory provisions  
20 governing the direct review of final decisions of environmental boards including the PCHB,  
21 ACC and CASE cited detrimental delay, fundamental state-wide or regional urgency, and the  
22 significant precedential value of the proceeding as factors under RCW 34.05.518(3)(b)

23 <sup>1</sup> ACC and CASE intended their Application for Direct Review and Request for a Certificate of  
24 Appealability to apply both to the Port of Seattle's Petition for Review in Cause No. 01-2-02386-9 (filed  
25 with the Superior Court on December 31, 2001), and to their own Petition for Review in Cause No. 02-2-  
00029-8 (filed with the Superior Court on January 8, 2002). When the Port raised a question as to  
whether this was so, ACC timely filed a second Application for Direct Review and Request for Certificate  
of Appealability on January 16, 2002, directed solely to securing direct appellate review of Cause No. 01-  
2-02386-9.

1 supporting direct review. *See*, Application at 5-8, *citing* RCW 34.05.518(3). In plain terms,  
2 ACC and CASE were pointing out that, where respondents have claimed the project at issue is  
3 urgent and where respondents have claimed that supposed confusion in Board jurisprudence  
4 concerning its stay standard requires correction, direct review (as authorized explicitly by  
5 statute) in the Court of Appeals makes sense because that is where such weighty and precedential  
6 issues will ultimately be resolved.

7  
8 Significantly, neither the Port nor Ecology has argued that the substance of the request  
9 for a Certificate of Appealability does not meet the applicable statutory criteria -- i.e., whether:

10 delay in obtaining a final and prompt determination of the issues would be detrimental to  
11 any party or the public interest and either:

12 (i) Fundamental and urgent state-wide or regional issues are raised; or

13 (ii) The proceeding is likely to have significant precedential value.

14 RCW 34.05.518(3)(b). Respondents are, nevertheless, arguing against direct resolution in the  
15 Court of Appeals on a variety of procedural pretexts. For example, while the Port of Seattle has  
16 filed no formal opposition papers with the Board, it has relied on its argument to the Superior  
17 Court that ACC and CASE do not have standing to file a Petition for Review at all where ACC  
18 prevailed on some stay issues before the Board. The Department of Ecology goes further,  
19 arguing that the Board's Stay decision was not a "final order" and is therefore not subject to the  
20 provision in the APA for direct review of "final decisions." *Id* at 2. Ecology also argues the  
21 Court of Appeals cannot assume jurisdiction over the Petition for Review where it must first be  
22 filed in Thurston County Superior Court. *Id.* at 4-5. All of respondents' arguments, which  
23 ignore the wording and fundamental purpose of the direct review statute, are addressed below.  
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**II. ARGUMENT**

**A. Under the APA, Any Party in a Petition Case May Seek Direct Review, and Both CASE and ACC Are Parties.**

Although the Port filed no formal opposition to ACC's request for the Certificate of Appealability, the Port did send a letter to the Board on January 16, 2002, attaching a copy of the Port's Motion to Dismiss ACC's Thurston County Petition for Review of the Stay Order. In that letter the Port argued that ACC's request for the Certificate of Appealability should be denied because ACC was not "aggrieved" by the Order Granting the Stay. The Port's argument lacks merit. The statute authorizing direct review provides without qualification that "a party may file an application for direct review . . ." RCW 34.05.518(6)(a) (emphasis added). Thus, even if ACC and CASE had not filed their own petition for review, ACC and CASE's request for a Certificate of Appealability would be properly before the Board because they are each named as a party to the Port's Petition for Review of the Stay Order.

**B. The Board's Stay Order is Subject to Direct Review Within the Discretion of the Board and the Court of Appeals.**

Ecology first argues that the Board's December 17 Stay Order is not a "final decision" to which direct review applies. *Id.*, citing RCW 34.05.518(1) and (3)). In doing so, Ecology ignores the portion of RCW 43.21B.320 explicitly mandating that Board stay decisions be subject to appeal under the APA, which governs appeal of Board decisions generally.

RCW 34.05.518, in turn, explicitly authorizes direct review of "final decisions of environmental boards" (*see, e.g.*, RCW 34.05.518.(3)(a)). Ecology's discussion focuses on the terms "final order" and "order" (Opp. at 2-3), although neither term appears in the APA section

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1 authorizing direct review of Board decisions. In doing so, Ecology overlooks the fundamental  
2 rule of statutory construction -- which it cites elsewhere -- that, "where certain language is used  
3 in one instance, and different language in another, there is a difference in legislative intent." *See*,  
4 *Opp.* at 4, *quoting* Seeber v. Pub. Disclosure Comm'n, 96 Wn.2d 135, 139, 634 P.2d 303 (1981).  
5 The term "order" is defined at RCW 34.05.010(11)(a), to mean a written statement "that finally  
6 determines the legal rights duties, privileges, immunities, or other legal interests of a specific  
7 person or persons" (emphasis added). If the Legislature had intended that direct review would  
8 apply only to such "orders" as narrowly defined under RCW 34.05.010(11)(a), it could have used  
9 that term in RCW 34.05.518.<sup>2</sup> Instead, it used a different term.

11 The difference is illustrated by this case. Here, the Board made a final decision on an  
12 aspect of the 401 appeal which is by statute discrete, and which is by statute (RCW 43.21B.518)  
13 immediately appealable in court pursuant to the APA. That same APA prescribes a process for  
14 moving such judicial review to the Court of Appeals if certain criteria are met. Ecology is  
15 essentially arguing to decouple the statutory provision which makes Board stay decisions  
16 appealable under the APA without qualification from the APA mechanism which allows for such  
17 appellate review to be moved to the Court of Appeals.

18 The April 7, 1999 Order Denying Discretionary Review (Kray Dec. Attachment 2) does  
19 not address the *subsequently decided* August 15, 2000 "Amended Final Findings of Fact  
20 Conclusions of Law and Order" (Kray Dec. Attachment 1). Rather, the 1999 Order Denying  
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24 <sup>2</sup> Ecology concedes the term "final order" is not defined by the Administrative Procedure Act. *Opp.* at 2-  
25 3. The term "final order" is redundant in any event in light of the APA's definition of "order."

1 Discretionary Review addressed an unspecified, earlier decision of the Board.<sup>3</sup> See, Kray Dec.  
2 Attachment 2.  
3 Ecology's reliance on the Supreme Court's denial of the Motion for Discretionary Review of a  
4 Board partial summary judgment order in Public Utility District No. 1, of Pend Oreille County v.  
5 Department of Ecology, PCHB Nos. 97-177, 98-043 and 98-044 ("*Pend Oreille*"), is misplaced.  
6 See, Opp. at 3, at 3 n.3, and attachments to Declaration of Jeff B. Kray (Kray Dec.). In that case,  
7 the parties were not seeking review of a stay order, but of a partial summary judgment order  
8 which decided some, but not all issues in the case. As set forth in the Board's Final decision and  
9 Order (Attachment 1 to Kray Declaration), five issues were not decided on summary judgment  
10 and were reserved for the hearing on the merits. Id. at p. 3. Thus, in *Pend Oreille*, the State  
11 Supreme Court appropriately found that the partial summary judgment order was not a "final  
12 decision" ripe for review under the APA generally, and specifically for purposes of  
13 RCW 34.05.518.<sup>4</sup>  
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16 By contrast, Board stay orders are expressly treated as final for purposes of appeal under  
17 APA by RCW 43.21B.320(5), which (again) provides:

18 Any party or other person aggrieved by the grant or denial of a stay by the hearings board  
19 may petition the superior court for Thurston county for review of that decision pursuant

20 <sup>3</sup> See, Public Utility District No. 1 of Pend Oreille County v. Department  
21 of Ecology, PCHB No. 97-177, "Amended Summary Judgment" dated October  
22 15, 1998 (1998 WL 934932).

23 <sup>4</sup> The Supreme Court's decision in Pend Oreille was therefore consistent with the Civil Rules, which  
24 provide generally that an order which:

25 adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall  
not terminate the action as to any of the claims or parties, and the order or other form of decision  
is subject to revision at any time before the entry of judgment adjudicating all the claims and the  
rights and liabilities of all the parties.

CR 54(b).

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1 to chapter 34.05 RCW pending the appeal on the merits before the board. [emphasis  
2 added]

3 Thus, in this case, RCW 43.21B.320(5) makes available for Board stay decisions the panoply of  
4 APA appeal procedures, including the right to seek a Certificate of Appealability from the Board.  
5 There is no similar provision in the Board statute for partial summary judgments such as the one  
6 in Pend Oreille.

7 **C. Initial Venue in Thurston County Has Nothing to Do with Authorization of Direct**  
8 **Review.**

9 Ecology also argues that RCW 43.21B.320(5) negates the provisions in Chapter 34.05  
10 RCW providing for direct review by the Court of Appeals because RCW 43.21B.518(5) states  
11 that an aggrieved party can “petition the superior court for Thurston County for review of that  
12 decision pursuant to Chapter 34.05 RCW ...” Opp. at 4. This is pretzel logic.

13 Ecology was unable to cite a single case which suggests that the reference to venue in the  
14 statute establishing an appeal process negates APA provisions authorizing a request for direct  
15 review, once the initial petition is properly filed in the superior court which has venue. Nothing  
16 in RCW 43.21B.320(5) forbids use of the direct review provision in RCW 34.05.518(3). Indeed,  
17 the incorporation by reference in RCW 43.21B.320(5) of the APA is all encompassing, as  
18 evidenced by its language that review of the appealed decision shall be, without exclusions,  
19 “pursuant to Chapter 34.05.”  
20

21 There is no conflict here, as Ecology tries to suggest, which must be resolved in favor of  
22 one statute over another. There is a complete incorporation of one into another, including all  
23 available procedures, without any exclusion. Thus, Ecology's argument fails because it ignores a  
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1 basic rule of statutory construction:

2 The principle of reading statutes in *pari materia* applies where statutes relate to  
3 the same subject matter. In re Personal Restraint Petition of Yim, 139 Wn.2d 581,  
4 592, 989 P.2d 512 (1999). Such statutes " 'must be construed together.' " *Id.*  
5 (quoting State v. Houck, 32 Wn.2d 681, 684-85, 203 P.2d 693 (1949)). "In  
6 ascertaining legislative purpose, statutes which stand in *pari materia* are to be  
7 read together as constituting a unified whole, to the end that a harmonious, total  
8 statutory scheme evolves which maintains the integrity of the respective statutes."  
9 State v. Wright, 84 Wn.2d 645, 650, 529 P.2d 453 (1974). If the statutes  
10 irreconcilably conflict, the more specific statute will prevail, unless there is  
11 legislative intent that the more general statute controls.

12 Hallauer v. Spectrum Properties, Inc., 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (other citations  
13 omitted). The related provisions of the APA and the law governing the PCHB can and should be  
14 construed together. They authorize when the criteria are met direct review by the Court of  
15 Appeals of the Port's Petition for Review.

16 Ecology does not offer any logical reason why a provision in the APA adopted for the  
17 explicit purpose of authorizing direct review of Board decisions should not apply in this case, or  
18 why such review would be contrary to public policy or the public interest. It cites nothing in the  
19 Board statute or in the APA which suggests a public policy in favor of having an important  
20 decision reviewed twice: once by a superior court judge, and then, again, by three appellate  
21 judges who, by law, must apply their review directly to the Board record and decision, without  
22 regard to any resolution by the superior court. Postema v. PCHB, 142 Wn.2d 68, 77, 11 P.3d  
23 726 (2000).

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1 **III. CONCLUSION**

2 The law authorizes direct review of the Board's Stay Order in the Court of Appeals.

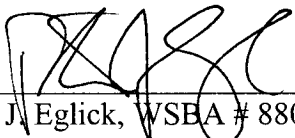
3 Neither Ecology nor the Port has contested appellants' showing of detrimental delay,  
4 fundamental state-wide or regional urgency, and the significant precedential value of the  
5 proceeding. Accordingly, the Board should issue the requested Certificate of Appealability.  
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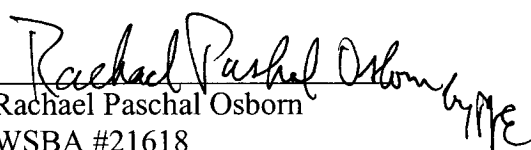
7 DATED this 29<sup>th</sup> day of January, 2002.

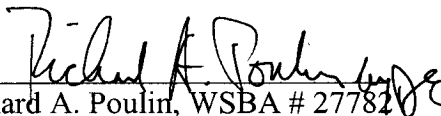
8 Respectfully submitted,

9 HELSELL FETTERMAN

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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. )  
\_\_\_\_\_ )

No. 01-160

CERTIFICATE OF SERVICE

(Section 401 Certification No.  
1996-4-02325 and CZMA concurrency  
statement, issued August 10, 2001,  
Reissued September 21, 2001, under No.  
1996-4-02325 (Amended-1))

I, Andrea Grad, an employee of Helsell Fetterman LLP, attorneys for the Airport  
Communities Coalition, certify that:

I am now, and at all times herein mentioned was, a citizen of the United States, a resident of  
the State of Washington, and over the age of eighteen years.

On January 29, 2002, I caused to be sent via facsimile and via U.S. Mail, First Class, a true  
and correct copy of ACC's and CASE's Reply in Support of Certificate of Appealability in the  
above-captioned case to:

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CERTIFICATE OF SERVICE - 1

ORIGINAL

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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.

DATED this 29<sup>th</sup> day of January, 2002, at Seattle, Washington.

  
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**AR 004636**