POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, and CITIZENS AGAINST SEATAC EXPANSION, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and THE PORT OF SEATTLE, Respondents.	PCHB No. 01-160 AIRPORT COMMUNITIES COALITION'S AND CITIZENS AGAINST SEATAC EXPANSION'S REPLY IN SUPPORT OF CERTIFICATE OF APPEALABILITY

I. INTRODUCTION

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

[1] ACC and CASE intended their Application for Direct Review and Request for a Certificate of Appealability to apply both to the Port of Seattle's Petition for Review in Cause No. 01-2-02386-9 (filed 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.

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

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

> delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either:
>
> (i) Fundamental and urgent state-wide or regional issues are raised; or
>
> (ii) The proceeding is likely to have significant precedential value.

RCW 34.05.518(3)(b). Respondents are, nevertheless, arguing against direct resolution in the Court of Appeals on a variety of procedural pretexts. For example, while the Port of Seattle has filed no formal opposition papers with the Board, it has relied on its argument to the Superior Court that ACC and CASE do not have standing to file a Petition for Review at all where ACC prevailed on some stay issues before the Board. The Department of Ecology goes further, arguing that the Board's Stay decision was not a "final order" and is therefore not subject to the provision in the APA for direct review of "final decisions." *Id* at 2. Ecology also argues the Court of Appeals cannot assume jurisdiction over the Petition for Review where it must first be filed in Thurston County Superior Court. *Id.* at 4-5. All of respondents' arguments, which 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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authorizing direct review of Board decisions. In doing so, Ecology overlooks the fundamental rule of statutory construction -- which it cites elsewhere -- that, "where certain language is used in one instance, and different language in another, there is a difference in legislative intent." *See,* Opp. at 4, *quoting* Seeber v. Pub. Disclosure Comm'n, 96 Wn.2d 135, 139, 634 P.2d 303 (1981). The term "order" is defined at RCW 34.05.010(11)(a), to mean a written statement "that finally determines the legal rights duties, privileges, immunities, or other legal interests of a specific person or persons" (emphasis added). If the Legislature had intended that direct review would apply only to such "orders" as narrowly defined under RCW 34.05.010(11)(a), it could have used that term in RCW 34.05.518.[2] Instead, it used a different term.

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

The April 7, 1999 Order Denying Discretionary Review (Kray Dec. Attachment 2) does not address the *subsequently decided* August 15, 2000 "Amended Final Findings of Fact Conclusions of Law and Order" (Kray Dec. Attachment 1). Rather, the 1999 Order Denying

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[2] Ecology concedes the term "final order" is not defined by the Administrative Procedure Act. Opp. at 2-3. The term "final order" is redundant in any event in light of the APA's definition of "order."

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Discretionary Review addressed an unspecified, earlier decision of the Board.[3] *See,* Kray Dec. Attachment 2.

Ecology's reliance on the Supreme Court's denial of the Motion for Discretionary Review of a Board partial summary judgment order in Public Utility District No. 1, of Pend Oreille County v. Department of Ecology, PCHB Nos. 97-177, 98-043 and 98-044 ("*Pend Oreille*"), is misplaced. *See,* Opp. at 3, at 3 n.3, *and* attachments to Declaration of Jeff B. Kray (Kray Dec.). In that case, the parties were not seeking review of a stay order, but of a partial summary judgment order which decided some, but not all issues in the case. As set forth in the Board's Final decision and Order (Attachment 1 to Kray Declaration), five issues were not decided on summary judgment and were reserved for the hearing on the merits. Id. at p. 3. Thus, in *Pend Oreille*, the State Supreme Court appropriately found that the partial summary judgment order was not a "final decision" ripe for review under the APA generally, and specifically for purposes of RCW 34.05.518.[4]

By contrast, Board stay orders are expressly treated as final for purposes of appeal under APA by RCW 43.21B.320(5), which (again) provides:

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

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[3] *See,* Public Utility District No. 1 of Pend Oreille County v. Department of Ecology, PCHB No. 97-177, "Amended Summary Judgment" dated October 15, 1998 (1998 WL 934932).

[4] The Supreme Court's decision in Pend Oreille was therefore consistent with the Civil Rules, which provide generally that an order which:

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

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

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

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

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

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

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basic rule of statutory construction:

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

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

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

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III. CONCLUSION

The law authorizes direct review of the Board's Stay Order in the Court of Appeals. Neither Ecology nor the Port has contested appellants' showing of detrimental delay, fundamental state-wide or regional urgency, and the significant precedential value of the proceeding. Accordingly, the Board should issue the requested Certificate of Appealability.

DATED this 29th day of January, 2002.

Respectfully submitted,

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

DATED this 29th day of January, 2002, at Seattle, Washington.

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