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5 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
6 **IN AND FOR THE STATE OF WASHINGTON**

7 AIRPORT COMMUNITIES
8 COALITION,

9 Appellant,

10 CITIZENS AGAINST SEA-TAC
11 EXPANSION,

12 Intervenor/Appellant,

13 v.

14 STATE OF WASHINGTON,
15 DEPARTMENT OF ECOLOGY; and
16 PORT OF SEATTLE,

17 Respondents.

PCHB No. 01-160

ECOLOGY'S MEMORANDUM
OPPOSING ACC'S APPLICATION
FOR CERTIFICATE OF
APPEALABILITY OF THE BOARD'S
ORDER ON MOTION FOR STAY

18 **I. INTRODUCTION**

19 In a January 8, 2002 letter to the Pollution Control Hearings Board ("the Board"), the
20 Airport Communities Coalition ("ACC") advised the Board that it has filed a Petition for
21 Review of the Board's Order granting ACC a stay of the Department of Ecology's § 401
22 Certification for the Third Runway Project. ACC seeks direct review in the Court of Appeals.
23 To that end, ACC asks the Board to issue a Certificate of Appealability for the Stay Order.
24 The Board should deny ACC's request. The Board cannot issue a Certificate of Appealability
25 for two reasons. First, under the Administrative Procedure Act ("APA"), RCW 34.05, the
26 Board's Stay Order was not an appealable "final decision." Second, under the Board's
enabling act, RCW 43.21B.320, Thurston County Superior Court is the only forum with
jurisdiction to hear ACC's Petition for Review of the Board's Stay Order.

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II. ARGUMENT

A. Procedures for Obtaining Judicial Review.

In RCW 34.05.518 and .522 the APA sets forth the procedures for obtaining direct review in the Court of Appeals. For non-environmental board decisions, once a petition for review is filed in Superior Court, a party has 30 days to file an “application for direct review” by the Court of Appeals. RCW 34.05.518(1). In 1995, the Legislature added specific provisions applicable to final decisions of “environmental boards.” See RCW 34.05.518(3)-(6) and amendments to RCW 34.05.522.¹ The Pollution Control Hearings Board is an “environmental board.” RCW 43.21B.005.

Within 30 days of filing its petition for judicial review, a party seeking direct review of a final decision of an environmental board files an application for direct review with the Superior Court, and requests a “certificate of appealability.” The environmental board has 30 days to grant or deny the request; a grant must be based on findings that a delay 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(6) and (3)(b).

If the request is granted and the Board issues a “certificate of appealability,” the parties have 15 days to file a Notice of Discretionary Review in Superior Court, with a copy of the certificate. RCW 34.05.518(6)(d). The Court of Appeals considers the same set of criteria the Board considered. RCW 34.05.518(5).² If the Board denies the request and does not issue a certificate then the Superior Court conducts the review. RCW 34.05.518 (6)(f).

B. The Board’s Order Staying Ecology’s § 401 Permit was not a “Final Order.”

Direct review is available only from a “*final decision*” of an administrative agency in an adjudicative proceeding. RCW 34.05.518(1) and (3)(a) (emphasis added). The APA does

¹ These procedures were added by Laws of 1995, ch. 382, §§ 5 and 6, respectively.

² The criteria in RCW 34.05.518(2) do not apply to review of final decisions of environmental boards. RCW 34.05.518(1).

1 not specifically define “final order.” The APA states, however, that an “order,” without further
2 qualification, is a written statement that “*finally* determines the legal rights, duties, privileges,
3 immunities, or other legal interests of a specific person or persons.” RCW 34.05.010(11)(a)
4 (emphasis added). This definition of “order” is consistent with the case law definition of a
5 “final order.” See, e.g., *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 634, 733
6 P.2d 182 (1987); *Bock v. State Bd. of Pilotage Comm'rs*, 91 Wn.2d 94, 99, 586 P.2d 1173
7 (1978); *Lewis Cy. v. Pub. Empl. Relations Comm.*, 31 Wn. App. 853, 862, 644 P.2d 1231
8 (1982) (“An administrative determination is not a final order where it is a mere preliminary
9 step in the administrative process, but it becomes final when a legal relationship is
10 subsequently fixed upon ‘consummation of the administrative process.’”).

11 In *Pub. Util. Dist. No. 1 of Pend Oreille Cy. v. Ecology*, PCHB No. 97-177, a previous
12 § 401 case before this Board, the parties agreed to seek direct review of the Board’s Summary
13 Judgment Order and the Board issued a Certificate of Appealability. Despite the parties’ and
14 the Board’s agreement regarding direct review, a panel of the Washington State Supreme Court
15 denied direct review and returned the case to the Board for further review on grounds that the
16 Board’s decision was not final under RCW 34.05.518(1). *Pub. Util. Dist. No. 1 of Pend Oreille*
17 *Cy. v. Ecology*, PCHB No. 97-177.³

18 In this case, the Board granted ACC’s request to “stay the effectiveness” of Ecology’s
19 § 401 Certification of the Port of Seattle’s Third Runway Project “*until the Board renders a*
20 *decision*” on ACC’s appeal of the § 401 Certification. Order Granting Motion to Stay, p. 20
21 (emphasis added). As the Board states, its Stay Order is not a final decision. Under the APA,
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23

24 ³ See Declaration of Jeff B. Kray. Attached to the Declaration are the Final Findings of Fact,
25 Conclusions of Law and Order in *Pub. Util. Dist. No. 1 of Pend Oreille Cy. v. Ecology*, PCHB No. 97-177. On
26 p. 3, ll. 1-3 the Order notes “The parties sought direct review of our summary judgment order pursuant to RCW
34.05.518. The matter returned to the PCHB without further review” Also attached to the Declaration is the
Supreme Court’s Order “That Petitioner’s Motion for Discretionary Review is denied because the decision of the
Pollution Control Hearings Board is not final. RCW 34.05.518(1).”

1 because the Stay Order is not a final decision, the Board cannot grant ACC's request for a
2 Certificate of Appealability.

3 **C. Under RCW 43.21B.320, only Thurston County Superior Court has Jurisdiction**
4 **to Review Board Decisions Granting a Stay.**

5 Under RCW 43.21B.320, Thurston County Superior Court is the only forum with
6 jurisdiction to hear ACC's Petition for Review of the Board's Stay Order. Under RCW
7 43.21B.320(1), a person appealing to the Board an order of the Department "may obtain a stay
8 of the effectiveness of that order *only as set forth in this section*" (emphasis added). RCW
9 43.21B.320(5) states that "any party or other person aggrieved by the grant or denial of a stay
10 by the hearings board may petition the superior court for Thurston county for review of that
11 decision pursuant to chapter 34.05 RCW pending the appeal on the merits before the board."⁴
12 By this statute, the Legislature has expressly limited judicial review to Thurston County
13 Superior Court.

14 ACC may argue that under RCW 34.05.518 the APA allows direct review by the Court
15 of Appeals. However, "it is an elementary rule that where certain language is used in one
16 instance, and different language in another, there is a difference in legislative intent." *Seeber*
17 *v. Pub. Disclosure Comm'n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981) (citations omitted).⁵
18 "Legislative intent is first to be deduced, if possible, from what is said." *In re Estate of Lyons*,
19 83 Wn.2d 105, 108, 515 P.2d 1293 (1973). "Statutes are to be construed, wherever possible,
20 so that 'no clause, sentence or word shall be superfluous, void, or insignificant.'" *United*
21 *Parcel Service, Inc. v. Dep't of Rev.*, 102 Wn.2d 355, 361-62, 687 P.2d 186 (citations omitted),
22 *see also Cox v. Helenius*, 103 Wn.2d 383, 387-88, 693 P.2d 683 (1985); *Gross v. Lynnwood*,

23 _____
24 ⁴ In addition to its present arguments, Ecology concurs with the Port of Seattle's argument that ACC is
not "aggrieved" by the Board's order staying the § 401 permit because the Board granted ACC the relief it
requested.

25 ⁵ *See also Cazzangigi v. Gen. Elec. Credit Corp.*, 132 Wn.2d 433, 446, 938 P.2d 819 (1997); *Van Dyk v.*
26 *Dep't of Rev.*, 41 Wn. App. 71, 77, 702 P.2d 472 (1985). That one use of the term is in the preamble section does
not make the principle less applicable. *See Hartman v. Washington State Game Comm'n*, 85 Wn.2d 176, 532
P.2d 614 (1975).

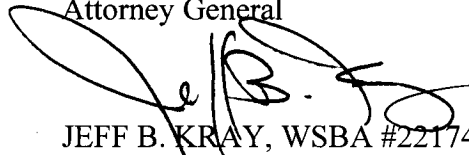
1 90 Wn.2d 395, 398-99, 583 P.2d 1197 (1978). “[I]f there are two conflicting provisions, then
2 that which is more clearly expressed should control.” *Williams v. Pierce Cy.*, 13 Wn. App.
3 755, 758, 537 P.2d 856 (1975), *see also State v. San Juan Cy.*, 102 Wn.2d 311, 320, 686 P.2d
4 1073 (1984). By these rules of statutory construction, RCW 43.21B.320 prohibits the Board
5 from granting ACC a “Certificate of Appealability” to the Court of Appeals with regard to the
6 Board’s Stay Order.

7 **III. CONCLUSION**

8 Because the Board’s Stay Order is not an appealable “final decision” under the APA
9 and because Thurston County Superior Court is the only forum with jurisdiction to hear ACC’s
10 Petition for Review of the Board’s Stay Order, the Board cannot grant ACC’s request for a
11 Certificate of Appealability.

12 DATED this 23rd day of January, 2002.

13 CHRISTINE O. GREGOIRE
14 Attorney General



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26 **AR 004653**