

The Honorable Richard D. Hicks

RECEIVED
JAN 16 2002

ENVIRONMENTAL
HEARINGS OFFICE

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

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

NO. 01-2-02386-9

Petitioner,

AIRPORT COMMUNITIES COALITION'S
AND CITIZENS AGAINST SEA-TAC
EXPANSION'S APPLICATION FOR
DIRECT REVIEW BY COURT OF
APPEALS, AND REQUEST PURSUANT
TO RCW 34.05.518 FOR CERTIFICATE
OF APPEALABILITY OF POLLUTION
CONTROL HEARINGS BOARD'S ORDER
GRANTING STAY

v.

STATE OF WASHINGTON, POLLUTION
CONTROL HEARINGS BOARD; AIRPORT
COMMUNITIES COALITION; CITIZENS
AGAINST SEA-TAC EXPANSION; and
STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

(PCHB No. 01-160)

Respondents.

I. INTRODUCTION

Pursuant to RCW 34.05.518, the Airport Communities Coalition ("ACC") and Citizens Against Sea-Tac Expansion ("CASE") hereby apply for direct review by the Washington Court of Appeals, Division II, of the "Order Granting Motion to Stay the Effectiveness of Section 401 Certification" issued by the Pollution Control Hearings Board ("PCHB" or "Board") on December 17, 2001 ("Stay Order"), and appealed to the Superior Court of Thurston County by the Port of Seattle on December 31, 2001. ACC and CASE have also filed a Petition for Review of Agency Action regarding the Stay

ACC'S/CASE'S APPLICATION FOR DIRECT REVIEW
OF PCHB'S ORDER GRANTING STAY -- 1

HELSELL
FETTERMAN
A Limited Liability Partnership

AR 005036

1500 PUGET SOUND PLAZA P.O. BOX 21846
SEATTLE, WA 98111-3846 PH: (206) 292-1144

1 Order and an Application for Direct Review in a related case regarding the same Order, Thurston
2 County Cause No. 02-2-00029-8. Further, ACC and CASE hereby request that the PCHB issue a
3 Certificate of Appealability of the Stay Order, pursuant to RCW 34.05.518(3)(b).

4 II. APPLICATION FOR DIRECT REVIEW

5 As an initial matter, the statute authorizing the Pollution Control Hearings Board to issue stay
6 orders also provides for judicial review of those decisions as final decisions under the Administrative
7 Procedures Act (APA). *See* RCW 43.21B.320(5) (citing RCW 34.05); *see also* RCW 34.05.550, RCW
8 34.05.570(3), and WAC 371-08-415(6). In pertinent part, the statute provides that:

9
10 Any party or other person aggrieved by the grant or denial of a stay by the hearings
11 board may petition the superior court for Thurston county for review of that decision
12 pursuant to chapter 34.05 RCW pending the appeal on the merits before the board.

13 RCW 43.21B.320(5). Here, both the Port and ACC/CASE have exercised the right to judicial review
14 by filing separate petitions for review.

15 The APA, in turn, authorizes direct appellate review of final decisions of the PCHB and other
16 specified environmental boards. *See* RCW 34.05.518. In pertinent part, the APA provides:

17 The final decision of an administrative agency in an adjudicative proceeding under this
18 chapter may be directly reviewed by the court of appeals . . . if the final decision is from
19 an environmental board as defined in subsection (3)¹ of this section, upon acceptance by
20 the court of appeals after a certificate of appealability has been filed by the
environmental board that rendered the final decision.

21 RCW 34.05.518(1) (emphasis added). Under the statute, once a petition for review has been filed with
22 the Thurston County Superior Court, "a party may file an application for direct review with the superior
23

24 ¹ RCW 34.05.518(3)(a) provides that, for the purposes of direct review of final decisions of
25 environmental boards, "environmental boards include those boards identified in RCW 43.21B.005." RCW
43.21B.005 includes the Pollution Control Hearings Board, whose decision is at issue here.

1 court and serve the appropriate environmental board and all parties of record. The application shall
2 request the environmental board to file a certificate of appealability." RCW 34.05.518(6)(a) (emphasis
3 added).

4 The APA does not define the term "final decision." However, the Washington Supreme
5 Court discussed the meaning of the term in the context of Washington's prior version of the
6 APA in the following illuminating passage:
7

8 Since there are no Washington cases discussing what is meant by a 'final decision' under
9 RCW 34.04.130, we feel it appropriate to look to the federal realm for guidance in this
10 area. Initially, it is noted that whether or not the statutory requirements of finality are
11 satisfied in any given case depends not upon the label affixed to its action by the
12 administrative agency, but rather upon a realistic appraisal of the consequences of such
13 action. Justice Frankfurter stated in *Columbia Broadcasting System, Inc. v. United*
14 *States*, 316 U.S. 407, 425, 62 S.Ct. 1194, 1205, 86 L.Ed. 1563 (1942), that:

13 The ultimate test of reviewability is not to be found in an over-refined
14 technique, but in the need of the review to protect from the irreparable injury
15 threatened in the exceptional case by administrative rulings which attach legal
16 consequences to action taken in advance of other hearings and adjudications
17 that may follow, the results of which the regulations purport to control.

16 Thus, administrative orders are ordinarily reviewable when 'they impose an obligation,
17 deny a right, or fix some legal relationship as a consummation of the administrative
18 process.'

18 *State Dept. of Ecology v. City of Kirkland*, 84 Wn.2d 25, 29-30, 523 P.2d 1181 (1974) (other citations
19 omitted).

20 Under the *City of Kirkland* analysis, RCW 34.05.518 authorizes direct appellate review of the
21 Board's Stay Order, and of the parties' appeal of that administrative agency action. A "realistic
22 appraisal of the consequences" confirms that direct appellate review is needed to protect from the
23
24

1 An environmental board may issue a certificate of appealability if it finds that delay in
2 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); *see also*, WAC 371-08-560.

6
7 In this case, as discussed below, delay in obtaining a final and prompt determination of the
8 issues would be detrimental to ACC, CASE and the public interest. Further, this proceeding is likely to
9 have significant precedential value.

10 **A. Delay in Obtaining a Final and Prompt Determination of the Validity of the Board's Stay**
11 **Order Would Be Detrimental to ACC, CASE and the Public Interest**

12 Delay in obtaining a final and prompt determination of the validity of the Board's Stay Order
13 most assuredly would be detrimental to ACC, CASE and the public. Given the importance of the
14 issues at stake, ACC, CASE and the public are entitled to an efficient and final resolution of the issues
15 underlying the parties' appeal of the Stay Order. Such resolution will follow from prompt adjudication
16 of the issues by the Court of Appeals since any decision of the Superior Court in this action will
17 doubtless be appealed by one party or another to the Court of Appeals on an expedited or emergency
18 basis. Particularly since the appellate court's review must be based directly on the Board's record and
19 decision rather than the Superior Court's review,² both judicial economy and the public's need for a
20 prompt and final decision dictate skipping the unnecessary step of obtaining a temporary ruling in the
21
22

23
24 ² *See, e.g., Plum Creek Timber Co. v. Washington State Forest Practices Appeals Bd.*, 99 Wn. App. 579,
588, 993 P.2d 287 (2000), *citing King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648, 672,
860 P.2d 1024 (1993).

25 **AR 005040**

1 Superior Court. Prior consideration by the Superior Court will serve only to delay the inevitable
2 review by the Washington Court of Appeals.

3 In addition, both the Port and ACC/CASE raise issues that warrant Court of Appeals
4 consideration and resolution prior to any remand to the Board. Delay in obtaining a final and prompt
5 determination of these issues would be detrimental to ACC, CASE and the public interest. For
6 example, the Port seeks reversal of the Board's Stay Order based on an allegation that the Board
7 applied "an erroneous standard of what constitutes a likelihood of success on the merits, and what
8 constitutes irreparable harm." Port's Petition at 6. The State Pollution Control Hearings Board's expert
9 interpretation of the stay's standard in its own organic statute should not be overturned until and unless
10 an appellate court has reviewed the Port's claims and has provided clear direction to the Board.
11

12 While ACC and CASE support the Board's resolution of the stay issues the Board addressed,
13 their Petition points out that the Board failed to decide all issues which provided a basis for grant of a
14 stay. *See* RCW 34.05.570(3)(f). Because these low flow and stormwater pollution issues provide
15 separate and independent grounds for a stay, and since the appellate court can affirm a decision on any
16 basis supported by the Board's record,³ these issues should be resolved without delay and before the
17 Stay Order is disturbed.
18

19 Further, ACC/CASE's Petition alleges the Board, in bending over backward to be fair to the
20 Port, excluded from consideration in ruling on ACC's Motion for Stay evidence of admissions by
21 Ecology concerning the same issues on which ACC was seeking a stay. Thus, delay in resolving this
22

23
24 ³ *See, e.g., Backlund v. University of Washington*, 137 Wn.2d 651, 670, 975 P.2d 950 (1999), *citing*
25 *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

AR 005041

1 important evidentiary issue would also be detrimental to ACC, CASE and the public interest, because
2 the Stay Order should not be disturbed or remanded until the appellate court determines whether the
3 evidence was properly excluded. Even in the unlikely event the stay might otherwise be overturned, it
4 will be necessary to resolve these evidentiary issues since, depending on the resolution, the additional
5 evidence would preclude reversal of the stay.
6

7 **B. The Validity of the Stay Order Raises Fundamental and Urgent State-wide or Regional**
8 **Issues**

9 The statewide and/or regional significance and urgency of the matters on appeal is not disputed.
10 Indeed, the significance and urgency of the matters on appeal is reflected both in the legal issues at
11 stake, and in the physical consequences of the Court's rulings.

12 Legally, the matters on appeal involve the very standards with which the Board determines
13 whether the effectiveness of an agency order may be stayed under WAC 371-08-415. As demonstrated
14 by the case at bar, the power to issue a stay can be essential to preserving the Board's very ability to
15 render a meaningful decision on the merits of an appeal. Stay Order at 18. Thus, the legal standard
16 governing the availability of stays is fundamental to the Board's authority and relevance.
17

18 There can be no dispute that there is a fundamental and urgent regional interest in clean water.
19 In adopting the Clean Water Act Congress declared that, "The objective of this chapter is to restore and
20 maintain the chemical, physical, and biological integrity of the Nation's Waters." 33 U.S.C. § 1251(a).
21 In implementing the Clean Water Act, our own Legislature declared that it is the policy of Washington
22 to:
23

24 [M]aintain the highest possible standards to insure the purity of all waters of the state consistent
25 with public health and public enjoyment thereof, the propagation and protection of wild life,
birds, game, fish and other aquatic life, and the industrial development of the state, and to that

1 end require the use of all known available and reasonable methods by industries and others to
2 prevent and control the pollution of the waters of the state of Washington. Consistent with this
3 policy, the state of Washington will exercise its powers, as fully and as effectively as possible,
4 to retain and secure high quality for all waters of the state. The state of Washington in
5 recognition of the federal government's interest in the quality of the navigable waters of the
6 United States, of which certain portions thereof are within the jurisdictional limits of this state,
7 proclaims a public policy of working cooperatively with the federal government in a joint effort
8 to extinguish the sources of water quality degradation, while at the same time preserving and
9 vigorously exercising state powers to ensure that present and future standards of water quality
10 within the state shall be determined by the citizenry, through and by the efforts of state
11 government, of the state of Washington.

12 RCW 90.48.010.

13 Thus, the urgency of the matters on appeal is beyond dispute.

14 **C. Resolution of the Stay Order Will Have Significant Precedential Value**

15 As discussed above, the issues in the parties' appeals include the legal standard governing the
16 availability of an administrative stay order, the Board's obligation to address issues placed before it,
17 and the admissibility of evidence supporting a motion for stay. The prompt and final resolution of each
18 of these issues by the Court of Appeals will have significant precedential value. This is so not only
19 because of the considerable number of appeals and related stay motions considered by the PCHB, but
20 also because the appellate court's construction of the issues on appeal here will apply by analogy to
21 issues pending before the State's other environmental hearings boards, including the Shoreline
22 Hearings Board, the Forest Practices Board, and the Hydraulic Appeals Board. See RCW 43.21B.005.

23
24
25 **AR 005043**

1 IV. CONCLUSION

2 For the reasons set forth above, ACC and CASE respectfully request that the Pollution Control
3 Hearings Board issue a Certificate of Appealability for the Board's Stay Order, and that ACC/CASE's
4 Application for Direct Review be granted.

5 DATED this 16th day of January, 2002.

7 HELSELL FETTERMAN LLP

8
9 By: Michael P. Witek
10 Peter J. Eglick, WSBA #8809
11 Kevin L. Stock, WSBA #14541
12 Michael P. Witek, WSBA #26598
13 Attorneys for Respondent
14 Airport Communities Coalition

Rachael Paschal Osborn
15 Rachael Paschal Osborn
16 WSBA # 21618
17 Attorney for Respondent
18 Airport Communities Coalition

14 SMITH & LOWNEY P.L.L.C.

15
16 By: Richard A. Poulin
17 Richard A. Poulin, WSBA # 27782
18 Attorneys for Citizens Against Sea-Tac Expansion

19 g:\u\acc\pchb\thurston\appl4directreview.doc

20
21
22
23
24
25 **AR 005044**

The Honorable Richard D. Hicks
RECEIVED
JAN 16 2002
**ENVIRONMENTAL
HEARINGS OFFICE**

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

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

Petitioner,

v.

STATE OF WASHINGTON, POLLUTION
CONTROL HEARINGS BOARD; AIRPORT
COMMUNITIES COALITION; CITIZENS
AGAINST SEA-TAC EXPANSION; and
STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

Respondents.

NO. 01-2-02386-9

CERTIFICATE OF SERVICE

I, Rachel Parks, 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 16, 2002, I caused to be hand-delivered a true and correct copy of Airport
Communities Coalition's and Citizens Against Sea-Tac Expansion for Direct Review by Court of

CERTIFICATE OF SERVICE - 1

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

AR 005045

1 Appeals, and Request Pursuant to RCW 34.05.518 for Certificate of Appealability of Pollution

2 Control Hearings Board's Order Granting Stay in the above captioned case to

3 Kaleen Cottingham, Presiding Officer
4 Pollution Controls Hearings
5 4224 - 6th Avenue S.E.
6 Building 2, Rowe 6
7 Lacey, WA 98504

8 On January 16, 2002, I further caused to be sent, via FAX and mail, true and correct
9 copies of the above to:

10 Joan Marchioro
11 Thomas Young
12 Jeff Kray
13 Assistant Attorneys General
14 Ecology Division
15 2425 Bristol Court S.W., 2nd Floor
16 Olympia, WA 98502
17 FAX: (360) 586-6760

Linda Strout
Traci Goodwin
Port of Seattle, Legal Dept.
2711 Alaskan Way, Pier 69
Seattle, WA 98121
FAX: (206) 728-3205

18 Roger Pearce
19 Steven Jones
20 Foster Pepper & Shefelman
21 1111 Third Avenue, Suite 3400
22 Seattle, WA 98101
23 FAX: (206) 447-9700

Jay Manning
Gillis Reavis
Marten & Brown LLP
1191 - 2nd Avenue, Suite 2200
Seattle, WA 98101
FAX: (206) 292-6301

24 Richard Poulin
25 Smith & Lowney
2317 East John Street
Seattle, WA 98112
FAX: (206) 860-4187

Jean Wilkinson
Assistant Attorney General
1125 Washington Street
Olympia, WA 98504
FAX: (360) 664-0174

CERTIFICATE OF SERVICE - 2

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

AR 005046

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

DATED this 16th day of January, 2002, at Seattle, Washington.

Rachel Parks
Rachel Parks

G:\LU\ACC\PC\HB\THURSTON\CERTSERV-011602