

No. 73419-4

THE SUPREME COURT OF WASHINGTON

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PORT OF SEATTLE, a port district of the State of Washington,  
Petitioner,

v.

THE POLLUTION CONTROL HEARINGS BOARD, an agency of the  
State of Washington,  
Respondent,

AIRPORT COMMUNITIES COALITION; and CITIZENS AGAINST  
SEA-TAC EXPANSION,  
Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, an agency  
of the State of Washington,  
Petitioner.

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**RESPONDENT/CROSS-PETITIONER  
AIRPORT COMMUNITIES COALITION'S  
SUPPLEMENTAL BRIEF IN SUPPORT OF  
ITS EMERGENCY MOTION FOR INJUNCTIVE RELIEF**

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## I INTRODUCTION

The Airport Communities Coalition (“ACC”) brought an emergency motion for injunctive relief on April 2, 2004, when it became clear that the Port was moving forward with the Third Runway Project without complying with the conditions imposed by the Pollution Control Hearings Board (“PCHB”). During oral argument on April 20 on ACC’s motion, the Court Commissioner requested simultaneous<sup>1</sup> additional briefing on whether a provision of the Administrative Procedure Act (“APA”), RCW 34.05.550, applied.

## II AUTHORITY AND ARGUMENT

RCW 34.05.550 provides, in pertinent part, that:

- (1) Unless precluded by law, the agency may grant a stay, in whole or in part, or other temporary remedy.
- (2) After a petition for judicial review has been filed, a party may file a motion in the reviewing court seeking a stay or other temporary remedy.
- (3) If judicial relief is sought for a stay or other temporary remedy from agency action based on public health, safety, or welfare grounds the court shall not grant such relief unless the court finds that:
  - (a) The applicant is likely to prevail when the court finally disposes of the matter;

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<sup>1</sup> In light of the simultaneous submissions, ACC requests that the Commissioner disregard new arguments or contentions by the Port and/or Ecology which ACC will not have an opportunity to address. ACC further requests the opportunity to submit a supplemental response to any such new arguments or contentions (whether legal or factual).

- (b) Without relief the applicant will suffer irreparable injury;
- (c) The grant of relief to the applicant will not substantially harm other parties to the proceedings; and
- (d) The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances.

\* \* \*

(Emphasis added.)

Subsection 1 of RCW 34.05.550 authorizes an agency itself (here, the PCHB) to grant a stay of its own order. Subsection 2 authorizes a party to seek a stay from a reviewing court once judicial review has commenced. Finally, Subsection 3 establishes a more rigorous standard for judicial stays of a special category of agency action (recognized elsewhere in the APA), such as emergency orders.

None of these provisions has particular application to ACC's motion to enjoin the Port from violating the PCHB Order and from preempting the fruits of the pending ACC and CASE appeals.<sup>2</sup>

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<sup>2</sup> They may, however, apply in the sense suggested by the Commissioner's questions in oral argument on April 20. That is, an injunction is particularly appropriate here because the Port has failed to obtain a stay of the PCHB Order.

A. **RCW 34.05.550 Does Not Bear on ACC's Motion Pursuant to RAP 8.3.**

RCW 34.05.550 does not bear on ACC's motion because ACC is not requesting a stay of the PCHB's decision. Rather, ACC seeks an injunction both prohibiting the Port from violating the Board's decision and preserving the status quo pending a final decision on the merits by the Supreme Court.

The motion is brought to ensure that the Court can grant effective relief on the merits. As matters now stand, the Port is prohibited, per the PCHB, from filling wetlands before it has provided mitigation for on-site wetland loss at no less than a 2:1 ratio -- without, for example, counting as mitigation wetland buffers or "preservation" of existing wetlands that are already protected as mitigation. PCHB Order at p. 137, Condition 11 (AR 000910). *See* ACC/CASE Combined Response Brief at pp. 99-103.<sup>3</sup> Per the PCHB Order, the Port is also prohibited from importing contaminated fill to the site based on the SPLP "Workplan" which the PCHB declared incapable of ensuring compliance with State water quality standards. AR

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<sup>3</sup> In oral argument to the Commissioner, the Port quoted language from the Board's decision which found the requisite reasonable assurance for wetlands mitigation -- but only based on compliance with the Board's new conditions, including on wetlands. The Port has not complied to date. Its previous claim that a self-labeled "draft" report both dated and submitted to this Court on April 8, 2004, demonstrates such compliance is frivolous, at best, particularly because the report reflects delay and defiance in the face of the Board's decision.

000838-839 (PCHB Order at 65-66), AR 000910 (PCHB Order at 137, Condition 8).

The Port nevertheless proposes to proceed in disregard of the PCHB Order. As part of the contract for wetland destruction and placement of contaminated fill which the Port has pending, the Port would also “rechannel” Miller Creek (AR 025119). It would clear the entire site of vegetation and engage in extensive site alteration including filling and excavating (AR 025119). The excavation would include removal of approximately 9,600 cubic yards of soils in the floodplain area of the Vacca farm site (AR 025110, 025117), “instream” work in Miller Creek (AR 025139), and construction of temporary stormwater ponds (AR 025139-140). In other words, the site would be rendered unrecognizable before this Court had ever ruled on the merits.

It is unlikely under such circumstances that the Port could have obtained a stay from the PCHB. In any event, it failed to make the request, as might have been authorized under RCW 34.05.550(1). In fact, the Port even withdrew a motion for reconsideration it filed with the PCHB before it could be addressed. AR 000754-755.

Finally, even if the Port believes it “ought” to prevail on the hotly

contested<sup>4</sup> issue of the effect of the “Dirty Fill Bill,” SSB 5787, on the PCHB Order, that Order’s prohibition on use of the Port’s SPLP Workplan remains in effect until, if, and when this Court determines otherwise. Indeed, as ACC and CASE have pointed out in their briefs on the merits, a “win” for the Port on the legality of SSB 5787 would be a pyrrhic victory. The PCHB Order finding the requisite reasonable assurance that water quality standards will not be violated is explicitly based on compliance with the Board’s sixteen new conditions. A determination that the Board could not prohibit use of the Port’s SPLP Workplan based on SSB 5787 would leave a gap in the Board’s certification and require remand -- not a toothless approval as the Port has argued previously.

In summary, RCW 34.05.550 has no substantive effect on ACC’s motion to enjoin the Port from altering the status quo and anticipatorily depriving ACC of the fruits of its appeal. Further, RCW 34.05.550 does not under any reading authorize the Port to forge ahead, preempting a decision by this Court.

**B. RAP 8.3 Is the Applicable Standard for Granting the Relief Requested by ACC**

Both RAP 8.3 and RCW 34.05.550(2) authorize a reviewing court to issue a temporary remedy, such as a stay or an injunction. There is no

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<sup>4</sup> See ACC/CASE Combined Response Br. at pp. 29-45.

conflict here, but, if there were, case law suggests that RAP 8.3 governs.

In *City of Richland v. Franklin County Boundary Review Bd.*, 100 Wn.2d 864, 873-74, 676 P.2d 425 (1984), the Court held that a statute allowing for an automatic stay on appeal to superior court did not govern in subsequent appeals to appellate courts. This principle applies here as well, where RCW 34.05.550(2) looks to the filing of the initial petition for review in superior court as the trigger for a potential judicial stay request under the APA, but does not address subsequent review by this Court.

In any event, there is no conflict between RAP 8.3 and RCW 34.05.550(2). Both provide for the issuance of temporary remedies preserving the status quo pending review. The RAP 8.3 standards for such remedies apply here.<sup>5</sup>

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<sup>5</sup> Pursuant to those standards, ACC and co-appellant CASE would be entitled to relief even if the Port's proposed actions did not violate the portions of the PCHB Order which it has appealed. Relief would still be appropriate because the appeal grounds cited by ACC and CASE would be rendered completely moot if the Port proceeds before this Court has ruled on the merits. See ACC Op. Br. at p. 15 (decision should be remanded to Ecology for a new decision after all incomplete reports delivered to Ecology and made available for public review); ACC Op. Br. at pp. 37-38 (in addition to shortcomings in wetland mitigation ratio acknowledged by Board, certification should have been denied based on Port's out-of-basin mitigation); CASE Op. Br. at p.32 (certification provision allowing substantive modifications by future NPDES permit requires reversal, vacation and remand); CASE Op. Br. at pp. 45, 58 (reversal/remand required because Board improperly applied review standard by allowing introduction of post-Ecology certification plans and reports -- some of which were incomplete); CASE Op. Br. at p. 51 (Port's proposed use of "adaptive management" inconsistent with assurance that state water quality standards will be met, requiring reversal and remand); CASE Op. Br. at p. 55 (PCHB erred in trying, through conditions, to salvage a fundamentally flawed Ecology §401 certification; certification should have been remanded back to Ecology).

C. **RCW 34.05.550(3) Does Not Apply to ACC's Motion**

RCW 34.05.550(3) establishes distinct requirements for stays in particular cases where the agency order in question was “based on public health, safety, or welfare grounds.” This is intended to limit stays of orders issued in exigent circumstances where the agency took action to protect against a substantial threat to the “public health, safety or welfare.” See Uniform Laws Annotated, Vol. 15, Model State Administrative Procedure Act (1981), §5-111, and Comment following.<sup>6</sup> For example, it has been held that the standard in Model Act §5-111 and RCW 34.05.550(3) is “applicable only after an agency has denied a requested stay and claims that such denial ‘is justified to protect against a substantial threat to the public, health, safety or welfare.’” *Griffin Hospital v. Commission on Hospitals and Health Care*, 493 A.2d 229, 233 n.2 (Conn. 1985).

RCW 34.05.550(3) therefore applies to emergency or summary agency actions. Examples of these are called out in other sections of the Washington APA. One, RCW 34.05.479(1), provides for “emergency adjudicative proceedings in a situation involving an immediate danger to

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<sup>6</sup> There is little Washington law interpreting RCW 34.05.550. As the notations in West's RCWA indicate, however, RCW 34.05.550 is:

...similar to §5-111 of the Model State Administrative Procedure Act (1981).

See 15 Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

West's RCWA 34.05.550, Historical and Statutory Notes.



the public health, safety, or welfare requiring immediate agency action.”<sup>7</sup> Similarly, RCW 34.05.422(4) authorizes summary license suspension “if the agency finds that public health, safety or welfare imperatively requires emergency action and incorporates a finding to that effect in its order ...”

Agency action to protect the “public health, safety or welfare” is clearly a term of art under the APA. RCW 34.05.550(3) applies to circumstances where the term of art is brought to bear -- not to an adjudication by the PCHB under distinct statutory authority, Chapter 43.21B RCW. The PCHB issued its decision here in the regular course, not as an emergency order or license revocation. Thus, to the extent that ACC is said to be asking for a stay of provisions of the PCHB decision to preserve the potential fruits of its appeal, subsection (3) would still not apply. Again, if any portion of the APA applies it is subsection (2),<sup>8</sup> which is entirely consistent with RAP 8.3 and the case law concerning the standard for an injunction on appeal.

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<sup>7</sup> The emergency adjudications made pursuant to RCW 34.05.479, and thus subject to the stay procedures of RCW 34.05.550(3), include orders requiring inspection or return of shipments of horticultural plants under RCW 15.13.400; or the issuance of “hold orders” to stop the distribution of “noncomplying fruits or vegetables.” RCW 15.17.200.

<sup>8</sup> RCW 34.05.550(2) provides: “After a petition for judicial review has been filed, a party may file a motion in the reviewing court seeking a stay or other temporary remedy.”

**D. The Court Should Issue an Injunction Under RAP 8.3.**

RAP 8.3 provides:

Except when prohibited by statute, the appellate court has authority to issue orders, before or after acceptance of review . . . to insure effective and equitable review, including authority to grant injunctive or other relief to a party.

RAP 8.3 applies unless “prohibited by statute.” The reference to other statutes in RAP 8.3 refers to “statutes restricting delays in enforcement or stays of proceedings on review . . .” Washington Court Rules Annotated, Comment to RAP 8.3, Vol. I at 687 (2<sup>nd</sup> ed. 2003-04).

For example, RCW 48.31.190(6) specifically provides:

No appellate review of a superior court order, entered after a hearing, granting the commissioner's petition to rehabilitate an insurer or to carry out an insolvency proceeding under this chapter, shall stay the action of the commissioner in the discharge of his responsibilities under this chapter, pending a decision by the appellate court in the matter. [emphasis added]

Neither RCW 34.05.550 nor any other statute contains such a limitation on issuance of an injunction pursuant to RAP 8.3. On the contrary, RCW 34.05.550(2) explicitly confirms that parties may seek relief in the courts.

**CONCLUSION**

For the reasons above, and in ACC’s Motion and Reply, ACC respectfully requests that the Court enjoin the Port from taking any action that would alter the status quo or that would preempt the Court from

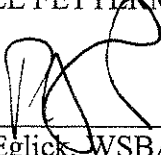
granting any of the requested relief in this case.

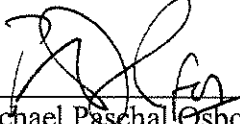
DATED this 30 day of April, 2004.

Respectfully submitted,

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