

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

COPPER DEVELOPMENT
ASSOCIATION, INC., and THE
INTERNATIONAL COPPER
ASSOCIATION, LTD., OLYMPIANS
FOR PUBLIC ACCOUNTABILITY,
ARTHUR WEST, PUGET
SOUNDKEEPER ALLIANCE,
COLUMBIA RIVERKEEPER and
STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, and
THE PORT OF OLYMPIA,
WEYERHEUSER COMPANY,

Respondents,

v.

THE BOEING COMPANY,

Petitioner,

GUNDERSON RAIL SERVICES,

Appellant Below,

POLLUTION CONTROL HEARINGS
BOARD.

Other Party.

No. 42411-8-II

FILED
COURT OF APPEALS
DIVISION II
OCT 11 AM 11:13
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

RULING ACCEPTING DIRECT
REVIEW

The Boeing Company seeks direct review in this court, under RAP 6.3 and RCW 34.05.518, of the April 25, 2011 Findings of Fact, Conclusions of Law and Order issued by the Pollution Control Hearings Board (PCHB) regarding the 2010

Industrial Stormwater General Permit (Permit) issued by the Department of Ecology. It also seeks direct review of the PCHB's summary judgment orders that preceded the April 25, 2011 Order. It argues that the PCHB erred by: (1) not applying a presumption of compliance with water quality standards; (2) not having sufficient evidence to support the Permit's numeric limit on total suspended solids; and (3) not having sufficient evidence to support the Permit's numeric limit on fecal coliform bacteria. The PCHB granted a Certificate of Appealability under RCW 34.05.518(6)(c), finding that as to issue (1), delay would be detrimental, that the appeal presented fundamental issues of state-wide and regional importance, and that the case has significant precedential value. It declined to make those findings as to issues (2) and (3). But because it made the findings as to issue (1), it issued the Certificate of Appealability.

Boeing has filed a motion for discretionary review under RCW 34.05.518(6)(d), asking this court to accept direct review of the PCHB's Order and the preceding summary judgment orders.¹ The Department opposes direct review, arguing that Boeing has failed to show that delay would be detrimental or that the appeal presents fundamental issues of state-wide or regional importance. It also argues that the case does not have significant precedential

¹ The Port of Olympia, the Copper Development Association, Inc., and the International Copper Association, Ltd. support Boeing's motion for direct review.

value because the Permit and the statute that authorizes it will both expire in 2015.²

Under RCW 34.05.518(3)(b), the PCHB may issue a certificate of appealability if it finds that:

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 statewide or regional issues are raised; or
- (ii) The proceeding is likely to have significant precedential value.

While expressing no opinion on the merits of the appeal, this court agrees with the PCHB's findings that this case is appropriate for direct review. RCW 34.05.518(5). Further, if this case was heard in the superior court and then appealed to this court, we would disregard any findings made by the superior court and would review the PCHB's findings. Accordingly, it is hereby

ORDERED that this court accepts direct review of the PCHB's April 25, 2011 Order and the preceding summary judgment orders. Boeing may raise all issues contained in its motion for summary judgment. The Clerk will issue a perfection schedule.

DATED this 11th day of October, 2011.

Eric B Schmidt

Eric B. Schmidt
Court Commissioner

² Puget Soundkeeper Alliance, Columbia Riverkeeper, Olympians for Public Accountability and Arthur West support the Department's opposition to direct review.

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