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E-Newsletter!

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encourage your feedback.

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the section if they find
the newsletter informative!

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Representational Accommodation — Improving Access to Justice in Administrative Hearings

By Pamela Meotti & Johnette Sullivan

A Hearing Scenario

Agency's attorney: Mr. Jones, are you interested in settling this matter?
The agency is willing to rescind the citation, including the penalty, if you agree to surrender your license.

Mr. Jones: I don't know. What does re-send mean?

Agency's attorney: Rescind? I meant we would cancel the citation. We would make it void, if you give up your license and stop doing this type of work.

Mr. Jones: Sorry, I forget some words since the accident. Okay. If that's what you think I should do.

Agency's attorney: Well, I cannot advise you what to do, Mr. Jones. Remember, I represent the agency. You do not have to decide today. I recommend you review this with an attorney or someone you trust.

Mr. Jones: If you're an attorney, I think I can trust you. Do I need to sign something?

When a party in a hearing has a disability that makes him or her unable to meaningfully participate, the party's pro se appearance can have a significant impact on the hearing process. This article describes how the Office of Administrative Hearings (OAH) promulgated a rule¹ for appointing suitable representatives as a form of accommodation under the Americans with Disabilities Act (ADA).² This process ensures compliance with the ADA and enables access to justice for parties with qualifying disabilities.

Background

OAH hears appeals from more than 20 state and local agencies under the Administrative Procedure Act (APA)³ including cases such as unemployment insurance and medical benefit appeals. OAH's work directly affects people's lives. As a separate state agency, OAH's mission is to independently resolve administrative disputes through accessible, fair, prompt processes and issue sound decisions. Most parties appear pro se in OAH hearings. Unlike a traditional court proceeding, under the APA and Model Rules, the Administrative Law Judge (ALJ) applies evidentiary rules in a relaxed manner and

takes an active role to develop a complete record.⁴ ALJs accord to all parties a "full right to be heard according to law."⁵ If the ALJ "deems it necessary to advance the ability of a party not represented by an attorney or other relevant professional to be fully heard," the ALJ may employ a number of techniques.⁶ For example, ALJs may question witnesses to elicit information and obtain clarification, modify the order of taking evidence, and make referrals to resources that may be available to assist the party in the preparation of the case.⁷

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The Administrative Law Section welcomes articles and items of interest for publication. The editors and Executive Committee reserve discretion whether to publish submissions.

Send submissions to: Bill Pardee
(Bill.Pardee@bta.wa.gov).

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association or its officers or agents.

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**Representational Accommodation —
Improving Access to Justice in Administrative Hearings**

For a party with a disability, ALJs may also approve and implement ADA accommodations needed for the party to access the hearing process. Accommodations could include providing an assisted listening device or additional breaks. ALJs could also modify the hearing process so that a party has time to review an audio recording of direct testimony before asking cross-examination questions. Given OAH's informal hearing process, techniques used by ALJs, and accommodations for parties with a disability, most pro se parties with a disability are able to represent themselves in OAH hearings.

**Why Do We Need
Suitable Representatives?**

Some parties have substantial impairments from a disability that prevent them from participating in their hearing in a meaningful way, even with accommodations. When a party who has substantial impairments appears pro se, it can have a profound impact on the proceedings. The hearing process is built on the notion that both parties will have an opportunity to present their side of the story. Even with accommodations, a party who has substantial impairments from a disability may not be able to follow an ALJ's instructions, understand what is relevant, or present coherent arguments. Even if the ALJ explains the process and asks numerous questions, the ALJ may not be able to elicit enough evidence to complete the record. This can lead to an imbalance in the case that is incompatible with OAH's mission to resolve disputes in a fair manner and the mandates of the ADA. This imbalance can also pose difficulties for opposing counsel.

Consider Mr. Jones from the opening scenario. Mr. Jones does not appear to understand the role of the agency's attorney.

His reference to an accident indicates that his forgetfulness and misplaced trust may stem from a substantial cognitive impairment. If the agency's attorney attempts to learn more about the impact of the accident on Mr. Jones, counsel risks that Mr. Jones may divulge private health information without understanding that counsel may have a duty to share the information with the agency. The agency's attorney may be reluctant to pursue settlement talks for fear that Mr. Jones may be incapable of knowingly entering into an agreement. In addition, the agency's attorney is in a difficult spot because Mr. Jones may continue to ask for guidance, even after the agency's attorney explains that he cannot provide advice.⁸ To the extent that the agency's attorney offers assistance, without offering legal advice, that assistance may be misinterpreted or misunderstood. OAH's accommodation rule provides a process for the agency's attorney to raise on the record that Mr. Jones may qualify for a suitable representative accommodation.

With Mr. Jones' consent, the ALJ may delay the proceedings for a referral to the ADA coordinator. The benefits of this process are far reaching. As members of the legal profession, our collective reputation benefits from a program that promotes fairness and aims to level the playing field for parties like Mr. Jones. For individuals who cannot meaningfully participate in their hearings because of a substantial impairment, even with other accommodations, suitable representation may be the only ADA accommodation that allows the party meaningful access to the hearing process.

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Representational Accommodation — Improving Access to Justice in Administrative Hearings

Who Can Serve as a Suitable Representative?

Effective January 1, 2018, OAH's accommodation rule allows OAH to select and appoint an individual who is qualified by training or experience to be a party's suitable representative.⁹

In selecting an individual to serve as a suitable representative, OAH considers the party's preferences as well as the individual's experience and training advocating for people with disabilities.

The rule authorized the OAH Chief ALJ to develop a network of individuals who are able and available to be appointed as suitable representatives. The suitable representative program offers an opportunity for pro bono service, which is both rewarding and a valuable public service. This opportunity is not limited to attorneys. Paralegals, Limited License Legal Technicians, and interns may also gain valuable career experience volunteering as a suitable representative.

OAH has developed a free, self-paced online training program for persons who are interested in serving as suitable representatives. The program, accessible from OAH's public website,¹⁰ consists of four modules: Introduction to OAH and the Suitable Representative Accommodation; Advocating for People with Disabilities; Procedural Rules; and Substantive Law. We

strongly encourage anyone who is interested in serving as a suitable representative to contact OAH's ADA coordinator¹¹ to arrange to complete the training (equivalent experience or other non-OAH training may be substituted for some of the training). Efforts to make CLE credits available for the training are in the works.

Conclusion

Although OAH's informal hearing process allows most parties to represent themselves, the process may fail a pro se party who has substantial impairments from a disability. In such cases, OAH appoints a suitable representative when necessary for that party to have meaningful access to the hearing process as mandated by the ADA. The suitable representative process also benefits ALJs and attorneys who practice in the administrative arena because it decreases the risk that the party may turn to opposing counsel for advice, allows the party a way to provide confidential health information to the ADA Coordinator, avoids ex parte communication, may increase settlements, and may minimize submission of irrelevant evidence. Most notably, the suitable representative initiative presents an opportunity for pro bono work that is both rewarding and a valuable public service.

Help us Make this Newsletter MORE RELEVANT to Your Practice.

If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please contact Bill Pardee Bill.Pardee@bta.wa.gov.

Administrative Law Section List Serve

The Administrative Law Section has a "closed" list serve, which means only current subscribers of the list serve can send an email to the list serve. You can request to receive the list serve messages in a daily digest format by contacting the list administrator below.

Sending Messages: To send a message to everyone currently subscribed to this list, address your message to administrative-law-section@list.wsba.org. The list server will automatically distribute the email to all subscribers. A subject line is required on all email messages sent to the list serve.

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1 Washington Administrative Code (WAC) 10-24-010(2)(b).

2 42 U.S.C. § 12101 et seq.; 28 C.F.R. § 35.150(a).

3 Revised Code of Washington (RCW) 34.12.020(2); Chapter 34.05 RCW.

4 RCW 34.05.452 and .461 and WAC 10-08-200.

5 Washington State Office of Administrative Hearings, Code of Ethics for Administrative Law Judges, Canon 2 (B) (6).

6 *Id.*

7 *Id.*

8 Rules of Professional Conduct 4.3, entitled "Dealing with Person not Represented by a Lawyer," provides:

In dealing on behalf of a client with a person who is not represented by a lawyer, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure the services of another legal practitioner, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

9 WAC 10-24-010.

10 [http://oah.wa.gov/Home/Index/3449#ContentBlockItem4470?Criteria=Training Checklist](http://oah.wa.gov/Home/Index/3449#ContentBlockItem4470?Criteria=Training%20Checklist).

11 Contact the ADA Coordinator by email to OAH_ADACoordinator@oah.wa.gov

STATE AGENCIES' INDICES OF ORDERS AND STATEMENTS – Part 2

By Richard E. Potter & John M. Gray

This article follows our article in the Section's Fall 2018 newsletter, in which we reported on a Public Records Act requirement that state agencies create and make available indices of decisions and statements.

RCW 42.56.070(5) requires state agencies to "by rule, establish and implement a system of indexing for the identification and location of the following records" (as defined in the Administrative Procedure Act):

- Final orders in adjudicative proceedings "that contain an analysis or decision of substantial importance to the agency in carrying out its duties;"
- Declaratory orders "that contain an analysis or decision of substantial importance to the agency in carrying out its duties;"
- Interpretive statements;
- Policy statements.

In addition, subsection (6) of that statute states that a public record (which includes these four types of documents) may be used by an agency as precedent only if it "has been indexed in an index available to the public" (or if the "parties affected have timely notice (actual or constructive) of the terms thereof").

In our first article, after describing the requirement's legislative history and its relation to some Administrative Procedure Act provisions, as well as briefly summarizing our review of state agencies' index rules, we described the online availability of these indices and/or similar resources for five state agencies. In this second article we describe the resources made available online by seven additional state agencies. Most, but not all, of these agencies responded to some questions from us and

provided useful information beyond what our research had found.

Office of the Insurance Commissioner (OIC)

The OIC provided the following information:

Final and declaratory orders: The OIC does not have a formal index of final and declaratory orders. The OIC makes its final orders available to the public by posting them on our website in two places. Our Consumer Tools orders page (<https://fortress.wa.gov/oic/consumertoolkit/Search.aspx?searchtype=ord>) allows you to search for all the types of orders issued by the agency. Our Administrative hearings page (<https://www.insurance.wa.gov/hearings-cases-with-documents>) contains the cases that have gone through the administrative process per Ch. 48.04 RCW and Ch. 34.05 RCW.

Interpretive and policy statements: The OIC does, from time to time, issue Technical Assistance Advisories (TAAs), which fall under the APA's definition of an interpretative statement. The TAAs advise the public of the OIC's current opinions, approaches, and likely courses of action related to the interpretation and/or application of particular insurance laws and regulations. The TAAs get filed with the State Office of the Code Reviser and are distributed to the affected segment of the insurance industry. The most current TAAs are posted on our website (<https://www.insurance.wa.gov/technical-assistance-advisories>). Many of the TAAs that have been issued in the past have been retired or converted to rules codified in the Washington Administrative Code. The OIC will review its older TAAs to determine if

there are any others that should be included on an index and posted to the website.

We reviewed these OIC websites. On the "Look Up an Order" page in the Consumers Tools section of the website, if you select one "Order Type," such as "Administrative Hearing Decisions," and then search, you get a list of decisions in the format Order Number – Name – Order Summary. This may produce a list of hundreds of items, but you can then do a word search and perhaps get useful hits in the order summaries. The "Hearings cases with documents" website can produce a list of decisions by "Type of Action." An order summary is not provided, however; just "Outcome." But this site produces far fewer cases than does the "Look Up an Order" one, so reviewing each decision is more feasible.

Employment Security Department (ESD)

RCW 50.32.095 of the Washington State Employment Security Act provides that the "commissioner may designate certain commissioner's decisions as precedents. The commissioner's decisions designated as precedents shall be published and made available to the public by the department." The Employment Security Department considers these designated precedential decisions to also be the final orders that "contain an analysis or decision of substantial importance to the agency in carrying out its duties" per the PRA's indices requirement. On its website ESD posts a link to "Precedential Decisions of Commissioner" that takes one to a Westlaw searchable database at <http://government.westlaw.com/wapcd/>. This serves

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as ESD's online version of the final decisions index required by the PRA. The agency annually updates and publishes its index in conjunction with the publishing of its Commissioner Decisions.

ESD advised us as follows regarding its designated precedential decisions: Precedential Commissioner's Decisions are published in full form. Each compilation of 1200 decisions is designated as a "Series." The first series encompasses 1200 decisions, covering the period from April 14, 1954 through October 10, 1975. The second series currently contains 1006 decisions, covering the period from October 17, 1975 through December 31, 2016. As with any publication system of quasi-judicial or judicial decisions, the precedential Commissioner's Decisions are inextricably intertwined with later decisions citing former decisions and the principles of law set forth therein. Thus, the publication system is not divisible and must necessarily be used in its entirety, comprised of all decisions published from 1954 through today. Per its rule WAC 192-04-200 EDS does not issue "declaratory orders." Also, it does not issue policy and interpretive statements as those terms are defined in the Administrative Procedure Act.

Board of Tax Appeals (BTA)

The Board of Tax Appeals' homepage (<http://bta.state.wa.us/>) has a link to "Decisions," which takes one to a webpage with a "Search Decisions Using DtSearch" link, which leads to <http://bta.state.wa.us/defaultsearch.html>. This is a word-searchable database of BTA decisions. BTA designates this database as its compliance with RCW 42.56.070(5) and as its

compliance with RCW 82.03.110, which requires the BTA to publish "those of its findings and decisions which are of general public interest." The BTA does not issue declaratory orders, interpretive statements, or policy statements.

Department of Ecology (DOE)

The "About Us" link at the top of the Department's homepage leads to a webpage with a box titled "How We Operate." Clicking on the "Laws, rules, & rulemaking" link there takes one to a webpage that has an "Index" link in a left-hand column, which takes one to a recently added resource called "Ecology's Index of Interpretive and Policy Statements and Declaratory and Final Orders." In the lower part of that webpage there are eight topic lines with "+" links that produce lists of documents. Most of the documents are titled "policies" and most listed items are hotlinks to the documents. These are DOE's indexes of "interpretive and policy statements."

Above this policies list the Department explains that "Ecology does not issue declaratory orders or final orders. See RCW 43.21B.240. Declaratory orders and final orders pertaining to Ecology actions are issued by the Pollution Control Hearings Board, the Shoreline Hearings Board, and the Growth Management Hearings Board." There is a hotlink that eventually leads to these boards' searchable databases of cases and decisions.

Utility and Transportation Commission (UTC)

The UTC does not presently post its RCW 42.56.070(5) indices, but it is in the process of updating them and will be providing them on its website. The "Documents and Proceedings" drop-down menu

at the top of the UTC's homepage (www.utc.wa.gov) includes a link to its "Online Records Center," which provides searchable databases of filings and Commission orders.

Department of Revenue

On the Department's website we did not find resources identified as being the indices required by RCW 42.56.070(5). The "Laws and Rules" link at the top of the Department's homepage (<https://dor.wa.gov/>) leads to a webpage that includes links of interest to our topic. The first is "Taxpedia - Search for information regarding laws, rules, Washington tax decision, etc." That hotlink leads to a database that provides searches of several types of documents, including "Washington Tax Decisions (WTDs)." We did some test searches, which indicated that this database includes thousands of decisions. The second link of interest is "Interpretive statements - Overview of tax advisories, Excise Tax Advisories (ETAs), Property Tax Advisories (PTAs)."

The Department's authorizing legislation includes RCW 82.32.410 "Written determinations as precedents," which provides as follows:

- 1 The director may designate certain written determinations as precedents.
 - a. By rule adopted pursuant to chapter 34.05 RCW, the director shall adopt criteria which he or she shall use to decide whether a determination is precedential. These criteria shall include, but not be limited to, whether the determination clarifies an unsettled interpretation of Title 82 RCW or where the determination modifies

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or clarifies an earlier interpretation.

b. Written determinations designated as precedents by the director shall be made available for public inspection and shall be published by the department.

c. The department shall disclose any written determination upon which it relies to support any assessment of tax, interest, or penalty against such taxpayer . . .

Such identified decisions might also serve as the Department's index required by RCW 42.56.070(5)(b). On the Department's website we did not find a list of decisions identified as "precedential" per this statute.

Liquor and Cannabis Board

On the left side of the Liquor and Cannabis Board's homepage (<https://lcb.wa.gov/>) there is a "Public Records" link that leads to a webpage with a "Public Records Index" link. This takes one to a webpage with hotlinks to a large selection of documents, including "Final Orders of the Board (Adjudicative Proceedings)" and "Board Interim Policies." We did not find a general link to "permanent policies." The Final Orders link takes one to a webpage with an "Adjudicative Proceedings Log" link and a "Declaratory Orders" link. The log is an Excel spreadsheet that lists many decisions and includes a helpful "Matter/Violation Type" column. We found that if one clicks on "Enable Editing" at the top of the spreadsheet, the "find" feature allows word searching of the spreadsheet. In the sheet's first column the file numbers are hotlinks to the documents. The Declaratory Orders link produced one document.

In summary, our review of 12 state agencies found that a few post on their website resources that are specifically identified as being the indices required by the Public Records Act or are otherwise resources that substantially meet those requirements. Overall, many agencies are now posting searchable databases of their adjudicative decisions (and in some cases also declaratory orders), as well as documents that are effectively policy or interpretive statements.

While the posting of a large databases of seemingly all of an agency's adjudicative decisions is useful and to be encouraged, even with word-search capabilities they do not have the ready usefulness of an index of select decisions that, in the words of RCW 42.56.070(5)(b), "contain an analysis or decision of substantial importance to the agency in carrying out its duties." Those are the seminal, foundational case law that constitute key information for practitioners before the agency.

Perhaps agencies that do not post their PRA-required indices do have them and will produce them pursuant to normal public records requests. We did not investigate that possibility, as we were focusing on website resources.

Errata: In our first article we referred to the Department of Retirement Systems online resource "Disposition of Administrative Appeals 2033-Present," but of course it should be "2003 to Present."

Remembering JANELL STEWART

WSBA Administrative Law Section Executive Committee at-large trustee Janell Stewart passed away in early 2019. In addition to her role on the Executive Committee, Janell served as the Section's Public Service Committee Chair. Janell graduated from the University of Washington in 2000, earned her law degree (cum laude) in 2003 and worked as an attorney for the State of Washington. Janell was generous with her time and had been a contributor to the Administrative Law Section in several different capacities for as long as her fellow Executive Committee members can remember. Janell's colleagues within the Section are going to dearly miss her expertise, her viewpoints and contributions, and her camaraderie.

Join Our Section!

We encourage you to become an active member of the Administrative Law Section. Benefits include a subscription to this newsletter and networking opportunities in the field of administrative law.

[Click here to join!](#)

The Section also has **six committees** whose members are responsible for **planning CLE programs, publishing this newsletter, tracking legislation** of interest to administrative law practitioners, and much more.

Feel free to contact the chair of any committee you have an interest in for more information.

Committee chairpersons are listed on page two of this newsletter, and on the Section's website.

ADMINISTRATIVE LAW
 ALTERNATIVE DISPUTE
 RESOLUTION
 ANIMAL LAW
 ANTITRUST, CONSUMER
 PROTECTION AND
 UNFAIR BUSINESS
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 BUSINESS LAW
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What about law students?

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Newly admitted members can join one section for free during their first year.

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THE FRANK HOMAN AWARD

The Frank Homan Award is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law.

Only Administrative Law Section members can nominate, but a nominee does not have to be an attorney or a section member.

Nominations for the 2019 Award are due by June 30, 2019. For nominations, send an email to Chad Standifer at ccstandifer@yahoo.com.

Please include:

- Your name and contact information
- Information about the person being nominated (name, position, affiliation)
- Why you think this person should be recognized

The award is named for **Frank Homan**, a dedicated teacher and mentor who was passionate about improving the law. After receiving his law degree from Cleveland State University of Law in 1965, he began practicing in Washington in 1968, serving as an Employment Security Department hearings examiner from 1970 to 1974 and as a senior administrative law judge at the Office of Administrative Hearings from 1975 to 1993. He continued to serve as an ALJ pro tem after his retirement in 1993. He was an early proponent for the creation of a central hearings panel, and played an important role in the creation of the Office of Administrative Hearings (RCW 34.12).

Frank was generous with his time and expertise and is well remembered for his sense of humor, his command of the English language, and his writing style — including his knowledge of legal terminology and history. His commitment to promoting justice for all and the practice of administrative law is the inspiration for the award that bears his name.

His commitment to promoting justice for all and the practice of administrative law is the inspiration for the award that bears his name.



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CASELAW UPDATE

Asotin County v. Eggleston, No. 35720-1-III,
(Wash. Ct. App. Jan. 17, 2019)

By Alexandra Kenyon

The Washington Court of Appeals Division III overturned a superior court's order denying Eggleston's request for an award of reasonable attorney fees and costs in a lawsuit regarding Eggleston's public records request. The court determined that a record requester need not have filed a complaint or other motion for affirmative relief to be a prevailing party entitled to attorneys fees in Public Records Act (PRA) litigation.

The court examined RCW 42.56.550(4), which states:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

The court examined the phrase "any person who prevails against an agency in any action in the courts" and harmonized it with the other sections of RCW 42.56.550. The court found that it is more consistent with the policy of the PRA to read the phrase "seeking the right to inspect or copy ...or ...to receive a response" as applying to "a person who prevails" as opposed to "action in the courts" as argued by Asotin County. The court further found that it would frustrate the purpose of the PRA to construe the attorney fees provision as applying only to requester-initiated litigation by allowing agencies to avoid attorneys fees by winning the race to the courthouse.

The court further held that Eggleston prevailed on substantial issues and was thus entitled to an award of attorneys' fees. One issue was whether the County's attorney invoices were entirely exempt. The court recognized that the PRA is clear on this issue and that attorney invoices are never exempt in their entirety with respect to the PRA and may only be redacted to the extent they would reveal attorney mental impressions, legal advice, theories, opinions, or are otherwise exempt. Another issue that Eggleston prevailed upon concerned whether the County should have engaged in good faith redaction before submitting invoices to the court for in camera review. The court held that the burden to determine whether exemptions apply (and to what extent) is placed on the agency by RCW 42.56.520 and that an agency cannot shift this responsibility to the court.

The American Waterways Operators, et. al v. Department of Ecology, No. 51547-4-II

(Wash. Ct. App. Mar. 5, 2019)

By Eileen Keiffer

The Washington State Department of Ecology (Ecology) made application to the United States Environmental Protection Agency (EPA) for permission to engage in rulemaking to prohibit marine vessel sewage discharge into Puget Sound. A portion of Ecology's application was entitled "Certificate of Need," and claimed that Puget Sound requires greater environmental protections than the federal standards provide. The American Waterways Operators (the Operators) appealed the Certificate of Need to the Pollution Control Hearings Board (Board). The Court of Appeals held that the Board did not have jurisdiction to hear the Operators' appeal of the Petition's Certificate of Need and affirmed the Board's order dismissing the Operators' appeal.

The Operators argued that the Board had jurisdiction because RCW 43.21B.110(1)(d) provides jurisdiction over appeals of certificates. The Court of Appeals disagreed, and reviewed the Board's decisions under the Administrative Procedure Act (APA), Ch. 34.05 RCW, as well as the Board's enabling legislation.

The court explained that the Legislature granted the Board certain adjudicatory functions, but left rule making, interpretive, and enforcement functions with Ecology. *Port of Seattle v. Pollution Control Hr'gs Bd.*, 151 Wn.2d 568, 592, 90 P.3d 659 (2004); RCW 43.21B.010, .240. Citing *Rosemere Neighborhood*, the court explained that Ecology's authority to engage in rule making includes "everything lawful and necessary" to effectively execute its power. *Rosemere Neighborhood Ass'n v. Clark County*, 170 Wn. App. at 859 (quoting *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 125, 864 P.2d 1382 (1994)).

The court interpreted the Board's subject matter jurisdiction as granted by RCW 43.21B.110, including that to hear and decide appeals from certain enumerated "decisions" of Ecology and other environmental agencies relating to legal rights or interests of a specific person or persons. The court found it relevant that the Board has express jurisdiction to hear appeals from decisions related to "the issuance, modification, or termination of any permit, certificate, or license by (Ecology)." RCW 43.21B.110(1). However, this authority to hear appeals is limited by the provisions of chapter 34.05 RCW relating to adjudicative proceedings. RCW 43.21B.160.

Interpreting the APA's definitions of rulemaking and adjudicative proceedings, the court determined that

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The American Waterways Operators, et. al v. Department of Ecology, No. 51547-4-II

the Board's jurisdiction to hear appeals of certificates issued by Ecology is limited to those appeals addressing the rights and duties of specific persons. RCW 43.21B.110(1). The Certificate of Need was a declaration of Ecology's position on the importance of Puget Sound and Ecology's desire to restore water quality and lacked the required characteristics of an adjudicative decision. Rather, the court found such rulemaking to be a legislative activity of Ecology pursuant to the APA's definition of rulemaking, and not subject to appeal to the Board. RCW 34.05.010(16).

Further, while the Board has adjudicatory authority, adjudications are limited to "resolving the rights and duties of specific persons." RCW 43.21B.110(1). The court found that Ecology did not issue the Petition to a specific person or project, or at the request of a specific person or project. Because the Certificate of Need does not determine the legal rights or interests of specific persons, it is not subject to adjudication by the Board under the APA. The Petition was a part of Ecology's rule making process and therefore, the Board did not have jurisdiction to hear the Operators' appeal of it under the APA.

The court finally rejected the Operators' argument that the Board is the only forum that can review the Certificate of Need. The Court of Appeals acknowledged the Operators' implications that they cannot challenge the Certificate of Need in superior court as an "other agency action" under RCW 34.05.570 because those types of actions must be based on allegations of an agency failing to act. However, the court found the Operators failed to provide authority supporting this proposition. The Board also noted that the superior court has jurisdiction over discretionary agency acts. Under the APA, a party may challenge an agency's rules or "other agency action," including the agency's discretionary actions. RCW 34.05.570(2)-(4). The party may do so by filing a petition for review in superior court. RCW 34.05.514; 34.05.570(4).

