NO. 93551-3

SUPREME COURT OF THE STATE OF WASHINGTON

THOMAS MCLAREN,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Respondent.

RESPONDENT WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES' ANSWER IN OPPOSITION TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Petitioner Thomas McLaren (Mr. McLaren)[1] seeks review of the court of appeals' decision affirming dismissal of his appeal of an order of the Pollution Control Hearings Board (the Board) based on his assertion that the order was not final. As noted by the court of appeals, the Board's order followed a five-day administrative hearing and addressed all issues presented to the Board for decision. In rejecting Mr. McLaren's argument, the court of appeals followed well-established law that an administrative order is final when it imposes an obligation, denies a right, or fixes a legal relationship as a consummation of the administrative process. The decision of the court of appeals does not conflict with any decision of this Court or any other, and the petition for review fails to establish any reason why review would be warranted under RAP 13.4. The petition should be denied.

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[1] DNR notes that Alexander McLaren is not an appropriate Petitioner because he did not appeal DNR's decision to take custody or participate as a party in the administrative proceedings before the Board. *See* CP 154. Accordingly, it is DNR's position that Alexander McLaren failed to exhaust his administrative remedies as required under RCW 79.100.120 and does not have standing. *Id.* Nonetheless, to the extent Alexander McLaren is considered a Petitioner, the term "Mr. McLaren" should be understood to apply to both Thomas and Alexander McLaren.

II. IDENTITY OF RESPONDENT

The Washington State Department of Natural Resources (DNR) asks this Court to deny review of the court of appeals' decision terminating review entered on June 20, 2016.

III. COURT OF APPEALS' DECISION

The court of appeals' slip opinion is attached.

IV. STATEMENT OF THE ISSUES

1. Did the court of appeals err when it determined that the Board's order affirming that DNR had custody and could dispose of the vessels *Porte Quebec* and *Porte de la Reine* under the Derelict Vessel Act was a final order for purposes of appeal?

2. Is review by this Court warranted based on Mr. McLaren's argument, raised for the first time in his Petition, that the Board's order deprives him of constitutionally protected due process rights if it is final?

V. STATEMENT OF THE CASE

A. Factual Background.

In April 2014, the Board entered a final order in *Thomas McLaren v. State of Washington, Department of Natural Resources*, PCHB Appeal No. 13-058 (the Board's Order). CP 3. The Board's Order followed lengthy proceedings before the Board, which ended in a five-day hearing,

at which the Board "received the sworn testimony of witnesses, admitted exhibits, and heard arguments on behalf of the parties." CP 5-6.

The Board's Order affirmed DNR's declaration that the vessels *Porte de la Reine* and *Porte Quebec* were derelict, its decision to take custody of the vessels, and its determination that Thomas McLaren is liable for DNR's reasonable and auditable costs including its costs of disposing of the vessels, under the Derelict Vessel Act, RCW 79.100 (the Derelict Vessel Act). CP 33. At the time of the hearing, DNR had not yet disposed of the vessels. CP 5 n.1 (discussing stipulation by Mr. McLaren to pay moorage for vessels in exchange for agreement on continuance of hearing date).

The Board mailed a copy of the Board's Order to all parties. CP 3. The cover letter accompanying the Board's Order explained that the Order was "a FINAL ORDER for purposes of appeal to Superior Court" and identified Thomas McLaren's appeal rights, including the necessity of serving a copy of a petition for judicial review on the Board to initiate review. *Id.* (emphasis in original). By its terms, the Board's Order was the final resolution of the issues identified in the parties' Pre-Hearing Order. CP 4-5, 22-33.[2] Mr. McLaren filed his Petition for Judicial Review with

[2] Two of the six issues identified by the parties' Pre-Hearing Order were dismissed on summary judgment. CP 5.

the King County Superior Court and identified the Board's Order as a "Final Order," CP 1, but Mr. McLaren failed to serve the Board with a copy of his Petition. Decision at 3; CP 1-170.

B. Proceedings Below.

Based on Mr. McLaren's failure to timely serve the Board with his Petition for Review, the superior court granted DNR's motion to dismiss Mr. McLaren's appeal, CP 152-55, and, subsequently, denied Mr. McLaren's motion for reconsideration. CP 165. Mr. McLaren then filed his appeal of the superior court's order denying his motion for reconsideration. CP 166-68. More than a year later, Mr. McLaren filed his opening brief raising the issues of whether the Board's Order was a final order subject to appeal and whether he had substantially complied with the requirement of service on the Board. At the same time, Mr. McLaren filed a motion to supplement the record. In a Commissioner's ruling, the court of appeals denied Mr. McLaren's motion to supplement the record. The court of appeals filed its unpublished decision affirming the superior court on June 20, 2016.

Mr. McLaren filed his Petition for Review on August 19, 2016. In his Petition, Mr. McLaren raises only the issue of whether the Board's Order was final. Mr. McLaren does not contest the superior court's determination affirmed by the court of appeals that by failing to serve the

Board with his Petition for Judicial Review he failed to timely invoke the appellate jurisdiction of the superior court.

VI. REASONS REVIEW SHOULD BE DENIED

Mr. McLaren fails to demonstrate how the issues raised in his Petition for Review satisfy the requirements of RAP 13.4(b). Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only if it presents one or more of the circumstances identified in the rule. In his Petition for Review, Mr. McLaren argues that the decision of the court of appeals conflicts with decisions of this Court and others and presents an issue of constitutional due process. As explained below, the decision of the court of appeals does neither. Accordingly, review should be denied.

A. The Decision of the Court of Appeals Is Consistent With Long-Established Law Regarding When an Administrative Order Is Final.

1. The Board's Order Satisfies This Court's Test for Finality.

Mr. McLaren's Petition is based solely on his contention that the court of appeals erred by rejecting his claim that the Board's Order was not final. Mr. McLaren acknowledges that the test for finality of an administrative order was expressed by this Court in *Department of Ecology v. City of Kirkland*, 84 Wn.2d 25, 30, 523 P.2d 1181 (1974).

Petition at 5. Under that test, an administrative order is final when "it imposes an obligation, denies a right, or fixes a legal relationship as a consummation of the administrative process." *City of Kirkland*, 84 Wn.2d at 30 (citations omitted); *see also Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 355, 271 P.3d 268 (2012) (quoting *Bock v. State Bd. of Pilotage Comm'rs*, 91 Wn.2d 94, 99, 586 P.2d 1173 (1978)). The court of appeals applied that test in determining that the Board's Order was final. Decision at 4. Thus, Mr. McLaren's Petition amounts to nothing more than a request for this Court to re-apply settled law. Because the court of appeals' application of test for finality is in accord with established precedent from this Court and others, the Petition does not present a question warranting this Court's review.

The record in this case unambiguously supports the court of appeals' conclusion that the Board's Order was final under the test in *City of Kirkland*. As noted by the court of appeals, the order was the consummation of a five-day administrative hearing that established DNR's right to take custody of the vessels at issue and Mr. McLaren's liability for the costs associated with DNR's custody action. Decision at 4. The Board's Order also addressed all issues presented to the Board for hearing, as the court of appeals found. Decision at 4; CP 4-5, 22-33. Moreover, the Board and all parties understood that the Order was final for purposes of

appeal. CP 3 (Board notice); CP 1 (Mr. McLaren's superior court petition for review).

Based on these facts, the court of appeals' conclusion that the Board's Order is final is in accord with how the test for finality in *City of Kirkland* has been construed by this Court and others. *See Bock*, 91 Wn.2d at 99 (letter from Board informing appellant it would take no further action on application "was both a denial of a right and the fixing of a legal relationship as a consummation of the administrative process" and was therefore a final decision for purposes of appeal); *see also Wells Fargo*, 166 Wn. App. at 356 (letter was final agency action where it informed Wells Fargo that closing agreement was final and conclusive.). As the court of appeals recognized, Mr. McLaren simply provides no support for his argument that the Board's Order lacked finality. Decision at 4. The Board's Order indisputably imposed an obligation and fixed a legal relationship as the consummation of the administrative process as a final order.

2. Requiring the Board to Determine Costs Before Issuing a Final Order Affirming Custody Would Have Exceeded the Board's Jurisdiction in This Case and Denied Meaningful Judicial Review of the Board's Order.

Mr. McLaren's argument rests on his incorrect assertion that to be final the Board's Order must have addressed the amount of the costs for

which he is liable under the Derelict Vessel Act. Mr. McLaren's argument fails because there was no decision regarding costs for the Board to review.

"An administrative review board has only the jurisdiction conferred by its authorizing statute." *Inland Foundry Co. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App. 121, 124, 989 P.2d 102 (1999). In this case, the Board's statutory authority authorizes it to hear appeals from agency action. RCW 43.21B.110 (jurisdiction of the Board); RCW 43.21B.230 (appeals of agency actions). It is axiomatic that the Board cannot review an administrative decision that has not been made. Because there was no decision by DNR on the amount of its costs in the record before the Board, the Board had nothing to review with respect to the dollar amount of the costs for which Mr. McLaren is liable.

This case arises under the Derelict Vessel Act, RCW 79.100. Under RCW 79.100.060, the costs for which a derelict vessel owner such as Mr. McLaren are liable include "all reasonable and auditable costs associated with the removal or disposal of the owner's vessel under [RCW 79.100]." By definition, these costs include the cost of disposal of a derelict vessel and costs associated with environmental damages directly or indirectly caused by the vessel. *Id.* But here, DNR had not yet disposed of the vessels because Mr. McLaren contested DNR's decision to take

custody. *See* CP 5, n.1 (discussing stipulation of Mr. McLaren to pay moorage fees for vessels as part of agreement on continuance of hearing date). Because the disposal costs associated with the vessels were unknown and could not be determined at the time of the proceeding before the Board regarding DNR's right to custody of the vessels, DNR had not made a final decision regarding the amount for which Mr. McLaren was liable that could be appealed.

Mr. McLaren's argument also fails because Washington courts recognize that judicial review of administrative orders should occur when review is meaningful, even if future administrative proceedings are contemplated. As the Washington Supreme Court has pointed out, finality depends on "a realistic appraisal of the consequences of such [agency] action." *City of Kirkland*, 84 Wn.2d at 29 (citing *Isbrandtsen Co. v. United States*, 211 F.2d 51, 55 (D.C. 1954)). Ultimately, the availability of judicial review of an order may depend on "the need of the review to protect from the irreparable injury threatened . . . by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudication that may follow . . ." *Id.* (quoting *Columbia Broad. Sys., Inc., v. United States*, 316 U.S. 407, 425, 62 S. Ct. 1194, 1205, 86 L. Ed. 1563 (1942)). Thus, contrary to Mr. McLaren's assertions, an administrative order may be final and subject to review even where

"other hearings and adjudication" are contemplated. It is the recognition that judicial review should occur when it is meaningful that forms the basis for the general rule that administrative orders are final "when they impose an obligation, deny a right, or fix some legal relationship as the consummation of the administrative process." *City of Kirkland*, 84 Wn.2d at 29; *Isbrandtsen*, 211 F.2d at 55 ("Under this test, a final order need not necessarily be the very last order.").

The decision of the court of appeals holding that the Board's Order is final is consistent with decisions of this Court requiring that judicial review of administrative decisions occur at a time when review is meaningful. Mr. McLaren's argument would have the result of precluding judicial review of an agency's decision to take custody of a vessel under RCW 79.100.030 until the vessel has been destroyed or otherwise disposed of and all costs for which the owner may be liable under RCW 79.100.060 are known. If Mr. McLaren were correct, judicial review of an agency decision to take custody of a vessel under the Derelict Vessel Act could never occur until it was too late to do a vessel owner any good. Under those circumstances, judicial review could not restore a vessel owner to possession of the vessel or, in light of the limitations on civil liability under RCW 79.100.030(3), result in the imposition of damages for the loss of the vessel in most cases.

Mr. McLaren devotes several pages of his Petition to string citation of federal cases addressing when appellate review of decisions of federal district courts is appropriate under 28 U.S.C. § 1291. Petition at 6-9. None of the myriad of cases discussing the "final judgment rule" under 28 U.S.C. § 1291 cited by Mr. McLaren address when an order of an administrative agency is reviewable. As the court of appeals noted, these cases are inapposite. Decision at 4 ("[Mr. McLaren] fails to identify any authority supporting his position that the Board's order was not final merely because the issue of costs was segregated and reserved for a future determination").

The two federal cases cited by Mr. McLaren that address judicial review of administrative orders confirm that review of an administrative order should occur when review is meaningful and support the conclusion of the court of appeals that the Board's Order in this case was final. In the first case, *Federal Power Commission v. Metropolitan Edison Co.*, 304 U.S. 375, 58 S. Ct. 963, 82 L. Ed. 1408 (1938), cited by this Court in *City of Kirkland*, the United States Supreme Court construed a provision of the Federal Power Act and determined it did not allow review of procedural decisions of the Federal Power Commission. *Id.* at 383. The Court reasoned that "delays in the course of the administrative proceeding for the purpose of reviewing mere procedural requirements or

interlocutory directions, would do violence to the manifest purpose of the provision." *Id.* at 383-84. Instead, the Court found that the statute allowed review of "orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." *Id.* at 384. The Board's Order here, which was designated as a final order and contained findings and conclusions based on a five-day hearing on the merits, indisputably satisfies that test.

The other federal case addressing the reviewability of federal administrative decisions cited by Mr. McLaren, *Isbrandtsen*, 211 F. 2d 51, was relied upon by this Court in *City of Kirkland* and strongly supports the court of appeals' conclusion that the Board's Order was final. In *Isbrandtsen*, the court determined that an order of the Federal Maritime Board to allow proposed shipping rates to go into effect prior to a hearing on the rates was a final order subject to judicial review. *Id.* at 56. In doing so, the court observed, as this Court has, that administrative orders are ordinarily reviewable when "they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." *Id.* at 55. The court then explained that test does not necessarily require a final order to be the last order in a proceeding. *Id.*

In *Isbrandtsen*, the court reasoned, as noted by this Court in *City of Kirkland*, that whether requirements of finality are met by a particular administrative order depends on "a realistic appraisal of the consequences of the action." *Id.* Because "grave consequences" to Isbrandtsen would have resulted from the order implementing the proposed shipping rates prior to a hearing on the rates, the court concluded that the order was final, although it was not the last order from the Commission. *Id.* at 56. In this case, the Board's Order was identified as a final order following a hearing on the merits and had the grave consequence of affirming that DNR could dispose of Mr. McLaren's vessels. The Board's Order is thus a final order for purposes of review under the reasoning in *Isbrandtsen,* even though it does not address the amount for which Mr. McLaren is liable under the Derelict Vessel Act.

That the Board did not review decisions that DNR had not yet made does not affect the finality of the Board's Order. Because the Board's Order indisputably imposed an obligation on Mr. McLaren, fixed the legal relationships of the parties with respect to the vessels at issue, and finally resolved the issues presented to the Board on appeal of DNR's decision to take custody of the vessels, the Board's Order was a final order.

B. Mr. McLaren's Due Process Claims Do Not Support Review.

In the final two paragraphs of his Petition, Mr. McLaren claims for the first time that the Board's Order deprives him of due process. Mr. McLaren's belated due process argument does not support review. Under RAP 2.5(a)(3), a constitutional challenge may be raised for the first time on appeal only where the challenge arises from a manifest error. *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting RAP 2.5(a)). No such error is presented by the Board's Order here.

An error is manifest for purposes of RAP 2.5(a)(3) only if it "results in a concrete determent to the claimant's constitutional rights, and . . . rests upon a plausible argument supported by the record." *WWJ Corp.*, 138 Wn.2d at 603. To meet this test, the record must be sufficiently developed to evaluate the merits of the constitutional claim. *Id.* (citing *State v. Riley,* 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). In this case, the record provides no support for Mr. McLaren's due process argument. Mr. McLaren cannot point to any evidence in the record that tends to show the Board's Order was intended to preclude judicial review of subsequent decisions regarding the amount Mr. McLaren must reimburse DNR. Likewise, nothing in the decision of the court of appeals suggests Mr. McLaren is precluded from appealing subsequent decisions on costs. Because there is no support for Mr. McLaren's due process argument in

the record, the argument may not be raised for the first time on appeal under RAP 2.5(a)(3) and does not support review of the decision of the court of appeals.

VII. CONCLUSION

The decision of the court of appeals is consistent with well-established law regarding finality of administrative orders, and Mr. McLaren has failed to identify any reason review is warranted under the standards of RAP 13.4(b). Accordingly, DNR respectfully submits that the Petition should be denied.

RESPECTFULLY SUBMITTED this 16th day of September, 2016.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on September 16, 2016, as follows:

Thomas McLaren 5805 NW Rhododendron Newport, OR 97365 *Petitioner Pro Se*	[X] U.S. Mail Postage Prepaid [ ] Certified Mail Postage Prepaid [ ] State Campus Mail [ ] Hand Delivered [ ] ABC Legal Messenger [ ] FedEx Overnight [ ] Email
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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 September, 2016, at Olympia, Washington.

Kim L. Kessler

KIM L. KESSLER
Legal Assistant
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