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Case No. 68532-5-I

**COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON**

PATRICK A.T. JONES, individually and as assignee of all right, title, and
interest of the chose in action of PETER POWELL,

APPELLANT,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,
WASHINGTON STATE DEPARTMENT OF ECOLOGY, and THE
TOWN OF HUNTS POINT, a Municipality,

RESPONDENTS.

RESPONDENTS' BRIEF

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I. INTRODUCTION

The Shorelines Hearings Board (Board) dismissed an untimely permit appeal filed by Patrick Jones. The Board's decision should be affirmed for two reasons. First, Mr. Jones is collaterally estopped from challenging the decision because the issue of timeliness was already litigated to a final conclusion in a companion appeal filed by the Fairweather Basin Boat Club. Second, the Board's dismissal does not constitute an error of law because the Board properly calculated the appeal deadline from the date that the applicant, Washington State Department of Transportation (WSDOT), received the permits from the Washington State Department of Ecology (Ecology). For both reasons, the Board's decision should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Mr. Jones failed to consolidate his case with a separate petition for review filed by Fairweather Basin Boat Club raising the same issues and involving the same parties. Under these facts, is Mr. Jones collaterally estopped from re-arguing that the Board's decision is erroneous?

2. Mr. Jones filed his petition for review with the Board six days after the appeal period had expired. Did the Board commit an error of law when it dismissed Mr. Jones's appeal as untimely filed?

3. Is Mr. Jones entitled to raise issues regarding the adequacy of notice for the first time on appeal and, if so, has Mr. Jones established that he was entitled to notice and lacked adequate notice of the permit decisions prior to the expiration of the appeal period?

III. COUNTERSTATEMENT OF THE CASE

WSDOT obtained a shoreline substantial development and conditional use permit from the Town of Hunts Point (Hunts Point) for improvements to State Route (SR) 520 east of Lake Washington. Ecology approved the shoreline conditional use permit on February 15, 2011. Ecology's representative, David Radabaugh, sent letters approving both permits by electronic mail to Scott White, WSDOT's permit coordinator, on that same day. Administrative Record (AR) 11-007, Doc. 10, Laing Decl. at Ex. C.¹ Mr. White acknowledged by e-mail on the same day that he had received the permits. *Id.* Mr. Radabaugh also sent the two letters approving the permits by e-mail to Mona Green, the town planner for the Town of Hunts Point, the same day. *Id.* at Ex. D.

¹ The Board's index of the record refers to two different cause numbers for two separate appeals: 11-007 and 11-008. These appeals were then consolidated under cause number 11-007. Citations to the Board's Administrative Record will appear as AR, followed by the appropriate cause number, the document number, and a short description of the document.

On February 22, 2011, Mr. White e-mailed Mr. Radabaugh at Ecology to ask how notice of the issuance of shoreline permits is provided to the public. *Id.* at Ex. E. Mr. Radabaugh responded, also by e-mail, that the local government has the responsibility to provide this notice to any interested parties. *Id.* Mr. White then e-mailed Ms. Green of Hunts Point to inquire whether Hunts Point had notified citizens of the permit approval. *Id.* Ms. Hunt responded to Mr. White by e-mail that notice would be sent out the following day. *Id.* The decision was then forwarded to Peter Powell and other parties of record by e-mail on February 24, 2011.² *Id.* at Ex. F.

Because Ecology's approval of the shoreline conditional use permit was received by WSDOT on February 15, 2011, the final day on which the permits could be appealed to the Shorelines Hearings Board was March 8, 2011. Appellants Jones and Powell appealed the decision to the Board on March 14, 2011. AR 11-007, Doc. 1. The Fairweather Basin Boat Club, a neighborhood group, also filed an appeal to the Board on March 14, 2011. AR 11-008, Doc. 1. This was 27 days after the letters are dated, 27 days after WSDOT received the decisions via e-mail,

² Mr. Jones states that he had to obtain a copy of the decision on his own and cites his own notice of appeal for that proposition. Appellant (App.) Br. at 6. However, the notice of appeal does not support his factual assertion, nor does a notice of appeal constitute "evidence" of a particular fact. Also, there is no evidence in the record that Mr. Jones was a party of record entitled to receive notice.

and 18 days after Hunts Point forwarded the letters to the appellants. There is no evidence that any of the appellants made an attempt to determine when Ecology initially provided the letters to WSDOT or made any inquiries regarding the appeal period. CP at 21.

The Board consolidated the two appeals, and WSDOT filed a summary judgment motion to dismiss the appeals as untimely. AR 11-007, Doc. 3. Appellants Jones, Powell, and Fairweather Basin Boat Club filed a joint response to WSDOT's motion. AR 11-007, Doc. 10. The Board granted the motion and dismissed the appeals. CP at 13-21.

On June 9, 2011, Fairweather Basin Boat Club appealed to King County Superior Court serving all parties, including Mr. Jones, with the petition. CP at 41. Mr. Jones subsequently filed a separate appeal to King County Superior Court on July 5, 2011. CP at 1-12.

In August 2011, Fairweather Basin Boat Club's appeal was heard by Judge Steven Gonzalez. Mr. Jones's attorney was provided with notice of the Boat Club's motion for summary judgment and the pleadings filed. CP at 42-45. Judge Gonzalez affirmed the Board's order dismissing the Boat Club's appeal. CP at 38-39. Fairweather Basin Boat Club did not appeal this decision. In February 2012, Judge John Erlick heard Jones's appeal, and also upheld the Board's ruling. Jones then appealed to this Court.

IV. ARGUMENT

A. Standard of Review

Appeals of Board decisions are governed by the Administrative Procedure Act (APA). RCW 90.58.180(3). Under the APA, the burden of proving invalidity of agency action rests on the challenging party. RCW 34.05.570(1)(a). The challenging party must establish invalidity of agency action according to the APA's standards of judicial review. RCW 34.05.570(1)(b); RCW 34.05.570(3); *Public Utility Dist. No. 1 of Pend Oreille County v. State, Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). In considering an appeal under the APA, the court of appeals stands in the same place as the superior court and reviews the agency's decision, applying the APA standards directly to the agency record. *Kraft v. Dep't of Social and Health Services*, 145 Wn. App. 708, 716-17, 187 P.3d 798 (2008).

The issue here is solely one of statutory interpretation: Did the Board properly interpret RCW 43.21B.001(2) when it concluded that "date of receipt" includes receipt by e-mail? Statutory interpretation issues are issues of law, so the error of law standard applies. RCW 34.05.570(3)(d). Under this standard, review is *de novo*, but the

court should give substantial weight to an agency's interpretation of statutes and rules that the agency is charged with implementing. *Public Utility Dist. No. 1 of Pend Oreille County*, 146 Wn.2d at 790. See also *Buechel v. State Dep't of Ecology*, 125 Wn.2d 196, 202-03, 884 P.2d 910 (1994); *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 515, 137 P.3d 31 (2006) (reviewing courts give due deference to the specialized knowledge and expertise of the Shorelines Hearings Board).

Furthermore, when the administrative agency has resolved a matter on summary judgment, review of the agency decision is also *de novo*. In ruling on summary judgment motions, the Board applies the CR 56 standard. When reviewing an agency's summary judgment order, the court of appeals considers both the APA standard of review and the CR 56 standard: “[W]e consider the APA standard of review together with the summary judgment standard of review, viewing disputed facts in the light most favorable to the nonmoving party while considering whether the moving party is entitled to judgment as a matter of law if based on undisputed facts.” *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 272 P.3d 876 (2012) (quoting *Kettle Range Conservation Group v. Washington Dep't of Natural Resources*, 120 Wn. App. 434, 456, 85 P.3d 894 (2003)).

B. Jones is Collaterally Estopped from Re-litigating the Issue of Timeliness

The application of collateral estoppel requires the party asserting the doctrine to prove four elements:

- (1) the issue decided in the prior adjudication is identical with the one presented in the second action;
- (2) the prior adjudication must have ended in a final judgment on the merits;
- (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and
- (4) application of the doctrine does not work an injustice.

Thompson v. State, Dep't of Licensing, 138 Wn.2d 783, 790, 982 P.2d 601 (1999) (citing *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998)). The purpose of collateral estoppel is “to promote the policy of ending disputes, to promote judicial economy, and to prevent harassment of and inconvenience to litigants.” *Reninger v. Dep't of Corrections*, 79 Wn. App. 623, 635, 901 P.2d 325 (1995) (citation omitted).

In the present case, both Mr. Jones and the Fairweather Basin Boat Club filed their Board appeals on March 14, 2011. AR 11-007, Doc 1; AR 11-008, Doc. 1. The Board consolidated the appeals, and WSDOT moved to dismiss both appeals because they were filed six days past the appeal deadline. AR 11-007, Doc. 3. Mr. Jones and Fairweather Basin Boat Club filed a joint response to WSDOT's motion. AR 11-007, Doc. 10. The Board issued one decision dismissing both appeals. CP at 13-21.

Fairweather Basin Boat Club filed its superior court appeal on June 9, 2011. CP at 41. Mr. Jones then appealed separately on July 5, 2011. CP at 1-12. Despite the fact that Jones and Fairweather Basin Boat Club filed a joint response to WSDOT's motion with the Board, Mr. Jones did not consolidate his appeal to superior court with that of the Fairweather Basin Boat Club. On September 1, 2011, Judge Steven Gonzalez affirmed the Board's order in the Boat Club's appeal. CP at 38-39. Fairweather Basin Boat Club did not appeal the superior court decision. Under this set of facts, the four elements of collateral estoppel are met and Mr. Jones should be barred from re-litigating this issue.

1. The issues in the two appeals are identical and the first appeal ended in a final judgment on the merits.

The first two elements of collateral estoppel require a showing that the issues in the two adjudications are identical and that the first adjudication ended in a final judgment on the merits. Both elements are easily met.

First, there can be no dispute that the two appeals involve an identical issue---whether the appellants timely filed their petitions for review. The specific legal issue in each appeal is whether e-mail receipt of the permit decisions by WSDOT triggered the appeal period. The Board held that it

did, and Judge Gonzalez agreed. Mr. Jones should have been barred from re-litigating this issue in his subsequent appeal before Judge Erlick.³

Second, there can be no dispute that the first appeal ended in a final judgment on the merits. Judge Gonzalez affirmed the Board's order and Fairweather Basin Boat Club did not appeal that decision. Therefore, the decision became final and binding 30 days after the court ruled.

2. Mr. Jones is in privity with Fairweather Basin Boat Club through the application of the Virtual Representation Doctrine.

Privity typically requires a mutual or successive interest in the same right or property. *World Wide Video of Washington, Inc. v. City of Spokane*, 125 Wn. App. 289, 306, 103 P.3d 1265 (2005). However, Washington recognizes the virtual representation doctrine as a well-established exception to the traditional privity requirement. *Garcia v. Wilson*, 63 Wn. App. 516, 519-20, 820 P.2d 964 (1991); *see also Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 891, 905, 251 P.3d 908 (2011) (noting that *Garcia's* recognition of the virtual representation doctrine is rooted in a long series of Washington cases).

³ WSDOT argued below that collateral estoppel barred Jones from re-litigating this issue. CP at 48-49. Judge Erlick declined to rule on collateral estoppel and instead ruled against Jones on the merits of his appeal. CP at 34-35. The court may affirm a judgment on any grounds that are supported by the record. *Lane v. Skamania County*, 164 Wn. App. 490, 497, 265 P.3d 156 (2011)

The virtual representation doctrine “allows collateral estoppel to be used against a nonparty when the former adjudication involved a party with substantial identity of interests with the nonparty.” *Garcia*, 63 Wn. App. at 520. The doctrine is applied cautiously and requires consideration of various factors. *Id.* at 521. The most important factor is whether the nonparty participated in some way in the prior adjudication, for example, as a witness. *Id.* Then, the issue must have been fully and fairly litigated in the prior adjudication and the evidence and testimony between the two proceedings must be identical. *Id.* Finally, there must be some sense that the failure to participate in the prior proceeding is the product of tactical maneuvering, such as when the nonparty failed to intervene but presents no valid reason for this failure. *Id.*

The present case presents a factual scenario that appears not to have been yet addressed by the appellate courts. Mr. Jones was not a “nonparty” to the original proceeding insofar as he participated jointly with Fairweather Basin Boat Club in the matter before the Board. However, when the Boat Club appealed the Board’s decision, Mr. Jones for reasons unknown elected not to participate in the Boat Club’s appeal and to instead file his own separate appeal involving an identical issue. Again for no known reason, Mr. Jones neglected to consolidate his appeal with Fairweather Basin Boat Club’s appeal, despite his knowledge that Fairweather Basin Boat Club’s

appeal was proceeding to hearing. Lacking a valid reason for his procedural decisions, it must be presumed that these decisions were the result of tactical maneuvering – either to benefit from the decision even without participating in the case had Fairweather Basin Boat Club prevailed, or to be able to offer different arguments if it did not.

The end result defeated judicial economy by requiring two separate superior court judges to rule on the same exact issue in the same exact case. Mr. Jones should not be permitted to further undermine judicial economy by pursuing appeal of an issue that should have been laid to rest when no party appealed the first decision issued by Judge Gonzalez. Although this case does not present the typical set of facts for application of the virtual representation doctrine, applying the doctrine here is consistent with the factors cited in *Garcia* and would further the purposes of the collateral estoppel doctrine.

3. Application of collateral estoppel does not work an injustice.

In determining whether application of the collateral estoppel doctrine will work an injustice, Washington courts focus on procedural unfairness. *Thompson*, 138 Wn.2d at 795. The key question is whether the parties to the prior proceeding received a “full and fair hearing on the issue in question.” *Id.* at 795, 796 (citation omitted). This furthers the public policy of avoiding

duplication of proceedings where parties had full opportunity and incentive to litigate an issue in the prior proceeding. *Id.* at 799.

Here, Mr. Jones had a full opportunity to litigate the issue of timeliness in the prior superior court appeal. He chose not to participate in the prior appeal and to instead try to litigate the same issue in a separate proceeding. Under these facts, it is not unjust to give preclusive effect to Judge Gonzalez's final ruling on this issue.

All four elements of collateral estoppel are met. Mr. Jones should have been barred from re-litigating the issue before the superior court and in the present appeal.

C. The Board Did Not Commit an Error of Law When It Dismissed Mr. Jones's Untimely Appeal

If this Court concludes that collateral estoppel does not bar the present appeal, then it must reach the merits of the appeal. As noted above, the Board's decision to dismiss is reviewed under an error of law standard, giving appropriate deference to the Board's interpretation of its own statutes. Here, the Board's decision is well-grounded in the statutory language governing shoreline permit appeals and should be affirmed.

1. Overview of permit decisions and appeals under the Shoreline Management Act.

The Shoreline Management Act authorizes local governments to issue three kinds of permits for shoreline development: substantial

development permits, conditional use permits, and variances. RCW 90.58.140. Conditional use permits and variances must be submitted for approval or disapproval to Ecology. RCW 90.58.140(10). Substantial development permits must be filed with Ecology, but Ecology does not exercise approval authority over substantial development permits. RCW 90.58.140(6).

An applicant or other party with standing may appeal a shoreline permit decision to the Shorelines Hearings Board. RCW 90.58.180(1). A permittee may not begin construction under a permit during the 21-day appeal period and, if the permit is appealed, may not begin construction until 30 days after the Board issues its decision on the appeal upholding the permit. RCW 90.58.140(5).

The former Shoreline Management Act⁴ sections set out the statutory time period in which review could be sought of a shoreline substantial development or conditional use permit:

Any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state pursuant to RCW 90.58.140 may, except as otherwise provided in chapter 43.21L RCW [⁵], seek review from the shorelines hearings board by filing a petition for review within

⁴ The 2011 Legislature changed the provisions of the Shoreline Management Act pertaining to when an appeal period commences and ends. The appeal in this case was filed March 14, 2011, prior to the enactment of the legislative changes and prior to their taking effect in July 2011.

⁵ Chapter 43.21L RCW was repealed by Laws of 2010, 1st Spec. Sess. Ch. 7 § 37 effective June 30, 2010, and by Laws of 2010, ch. 210 § 46, effective July 1, 2011.

twenty-one days of the date of receipt of the decision as provided for in RCW 90.58.140(6).

Laws of 2010, ch. 210 § 37 (Appendix A).

For substantial development permits, “date of receipt” was defined as “the date that *the applicant* receives written notice from the department that the department received the decision.” Laws of 2010, ch. 210 § 36(6) (emphasis added)(Appendix A). For conditional use permits and variances, “date of receipt” was defined as “the date a local government *or* applicant receives the written decision of the department rendered on the permit” *Id.* (emphasis added). For both types of permits, “date of receipt” had the same meaning as defined in RCW 43.21B.001. *Id.*

RCW 43.21B.001 defines “date of receipt” as:

“Date of receipt” means:

- (a) Five business days after the date of mailing; *or*
- (b) The date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence. The recipient’s sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the agency, shall constitute sufficient evidence of actual receipt. The date of actual receipt, however, may not exceed forty-five days from the date of mailing

(Emphasis added). Thus, for purposes of determining whether an appeal is timely, it is necessary to determine when the applicant or local government received the permit that has been appealed. The receipt date

is the date of actual receipt if it can be proven or, alternatively, five days from the date of mailing.

2. Summary judgment was appropriate because there were no disputed material facts.

The following are the only facts essential to support the Board's dismissal of Mr. Jones's petition for review:

1. The conditional use permit was approved by Ecology on February 15, 2011, and is dated February 15, 2011. AR 11-007, Doc. 3, Attachment to White Decl.

2. The conditional use permit and the shoreline substantial development permit were transmitted by e-mail by David Radabaugh of Ecology to Scott White at the Washington State Department of Transportation on February 15, 2011. AR 11-007, Doc. 10, Laing Decl. at Ex. C.

3. Mr. White actually received the e-mails with permits attached on February 15, 2011. AR 11-007, Doc. 3, White Decl. at ¶ 3.

4. Mr. White responded to Mr. Radabaugh by e-mail that he received the electronically transmitted permits on February 15, 2011. AR 11-007, Doc. 10, Laing Decl. at Ex. C.

5. Petitioner Powell received a copy of the permits on February 24, 2011. *Id.* at Ex. F.

6. The petitions for review were filed on March 14, 2011. AR 11-007, Doc. 1; AR 11-008, Doc. 1.

Neither Mr. Jones nor the other appellants disputed these facts. In addition, the following facts were undisputed in the consolidated matter before the Board:

1. Mr. Radabaugh at Ecology also transmitted an electronic copy of the permits to Hunts Point's planner, Mona Green, on February 15, 2011. AR 11-007, Doc. 10, Laing Decl. at Ex. D.

2. Mr. White at WSDOT contacted Mr. Radabaugh at Ecology by e-mail on February 22, 2011, to inquire as to whether there was some public notice given of the issuance and approval of the shoreline permits. *Id.* at Ex. E.

3. On February 23, 2011, Mr. Radabaugh responded to Mr. White by e-mail and copied the Hunts Point planner, Ms. Green, saying that it was the local government's responsibility to forward the permits to interested parties. *Id.*

4. Shortly afterward on that same day, Mr. White inquired of Ms. Green by e-mail about whether the permits had been forwarded to the interested parties. Ms. Green responded that she would mail or e-mail the permits to the interested parties the next day. *Id.*

Mr. Jones goes into great detail about who signed what letter, who said what to whom, and what e-mail accounts were used. App. Br. at 2-6. However, the only facts necessary to support the Board's ruling are the facts that WSDOT's representative, Mr. White, actually received the e-mailed permit from Ecology's representative, Mr. Radabaugh, on February 15, 2011, and that the petition for review to the Shorelines Hearings Board was filed on March 14, 2011. Mr. White established his receipt of the permit in his declaration, and it is supported by the e-mail itself. AR 11-007, Doc. 3, White Decl. There is no question as to when the petition was filed.

In consideration of these undisputed facts, the only legal issue before the Board was whether WSDOT's receiving the conditional use permit by e-mail constituted "actual receipt" of the permit, establishing the date from which the appeal period would run. There were no genuine issues of material fact that would have precluded the Board's deciding this matter on summary judgment.

3. The Board correctly concluded that the Shoreline Management Act required receipt of Ecology's decision by *either* the applicant or the local government, but not both, to trigger the appeal period.

Under the 2010 Shoreline Management Act, the "date of receipt" for a substantial development permit is the date that the applicant receives

notice that Ecology received the decision. Laws of 2010, ch. 210 § 36(6) (Appendix A). The date of receipt for a conditional use permit is the date that the applicant *or* local government receives the permit decision from Ecology. *Id.*

In this case, Mr. White of WSDOT submitted a declaration to the Shorelines Hearings Board stating that he actually received the permits from Ecology on February 15, 2011. AR 11-007, Doc. 3, White Decl. Mr. White had confirmed with Ecology by e-mail that he did in fact receive the permits on that date. None of these facts were disputed. Without proof by a preponderance of the evidence to the contrary, this was sufficient evidence to establish that the 21-day appeal period began to run on February 15, 2011, which marks the date that the applicant received the permits.

Courts give effect to the plain language of an unambiguous statute because it must be presumed that the legislature “says what it means and means what it says.” *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). Here, there is no reason to construe these statutes any other way than that the statutory appeal period started when the first of *either* the applicant *or* the local government received the permit from Ecology. Had the Legislature intended otherwise, it could have used “and” instead of “or,” or it could have stated that both needed to have received the

decision. The Board's conclusion that the appeal period began from the date WSDOT received the permits does not constitute an error of law and should be affirmed.

4. The Board correctly concluded that “date of receipt” should be determined based on the date of actual receipt when such date is known.

RCW 43.21B.001 establishes a “default” date of receipt as five business days after the date of mailing. However, it also allows the recipient to establish the actual date of receipt and use that date to begin the appeal period. These subsections are separated by “or” with no other qualification, indicating that they are to be read disjunctively. *See, e.g., Cerrillo v. Esparza*, 158 Wn.2d 194, 204, 142 P.3d 155 (2006). The statute establishes a statutory deadline—five business days after the date of mailing—that will apply *unless* a recipient establishes by affidavit or declaration that it received the decision on a different date. There is nothing in the statute that says that this “actual” date of receipt must be a later date, nor does the statute state that the date of receipt is the earlier or later of the two options.

Mr. Jones argues that e-mail is an inappropriate way for WSDOT to have received the permit decision. App. Br. at 11-14. However, the statute does not say that “receipt” must be by U.S. mail, personal delivery, or any other means. It simply says that “actual receipt” can constitute the

date of receipt. Although “receipt” is not defined in the statute, the ordinary dictionary definition, in pertinent part, is “the act or process of receiving,” and “receive” is further defined, in pertinent part, as “[t]o take possession or delivery of.”⁶ *Webster's Third New International Dictionary of the English Language* 1894 (2002). These common definitions are not limited to receipt by means of U.S. mail or hand delivery.

In the instances where the legislature wants Ecology’s decisions to be delivered by mail, it has said so expressly. For example, Ecology is required to mail its written findings and conclusions on shoreline master programs to local governments. RCW 90.58.090. Civil penalties for shoreline violations must be either personally served or sent by certified mail. RCW 90.58.210(3), .560. Thus, the legislature obviously knows how to direct Ecology to deliver its decisions by mail. Had the legislature wanted to mandate that Ecology send its shoreline permit decisions by mail, it would have said so expressly.⁷

This point is further bolstered by the fact that, under a prior version of RCW 43.21B, the Court of Appeals concluded that it was the date of

⁶ Courts may resort to dictionary definitions to determine the plain and ordinary meaning of terms that are not defined in statute. *State v. Watson*, 146 Wn.2d 947, 956, 51 P.3d 66 (2002).

⁷ Also, local governments are required to send their initial shoreline permit decisions to Ecology by return receipt requested mail. RCW 90.58.140(6). The fact that the legislature directed local governments to mail their decisions, but did not similarly direct Ecology do to so, further supports the argument that date of receipt does not require delivery by mail.

mailing that triggered the appeal period for Ecology decisions. *Den Beste v. State, Pollution Control Hearings Bd.*, 81 Wn. App. 330, 337, 914 P.2d 144 (1996) In reaching its conclusion, the *Den Beste* court specifically rejected a “date of receipt” trigger in favor of “date of mailing.” *Id.* However, in 2004, the legislature amended RCW 43.21B to expressly include “date of receipt” as the appeal trigger and to define date of receipt. Laws of 2004, ch. 204 § 1. “It is a well-recognized rule of statutory construction that where a law is amended and a material change is made in the wording, it is presumed that the legislature intended a change in the law.” *Guillen v. Pierce County*, 144 Wn.2d 696, 723, 31 P.3d 628 (2001), *rev’d in part on other grounds*, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003).

Mr. Jones also argues that Ecology was prohibited from e-mailing the permit decisions because Ecology rules define “transmit” as involving mail or hand delivery. App. Br. at 12-13 (*citing* WAC 173-27-030(16), 200(1)). Thus, Mr. Jones argues that Ecology’s rules require that an applicant receive a decision by mail or hand delivery before the appeal period is triggered. App. Br. at 14. This is incorrect. WAC 173-27-200(1) sets a deadline of 30 days within which Ecology must issue its decision, and WAC 173-27-030(16) defines Ecology’s internal practice

for how to deliver its decisions to local governments and applicants.⁸ Neither rule purports to address the issue of what constitutes “receipt” for purposes of triggering the appeal period.

Furthermore, it is well established that agency regulations cannot amend or change statutory enactments. *See, e.g., State ex rel. Public Disclosure Comm'n v. Rains*, 87 Wn.2d 626, 631, 555 P.2d 1368 (1976) (agency cannot amend a statute by adding a time period for compliance); *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn. App. 937, 948-49, 230 P.3d 1074 (2010) (Ecology cannot amend statute through promulgation of shoreline regulations), *aff'd* 172 Wn.2d 384, 258 P.3d 36 (2011) RCW 43.21B.001(2) defines “date of receipt” as five days from the date of mailing *or* the date of actual receipt. The statute does not limit actual receipt to receipt by U.S. mail or hand delivery.

Only WSDOT could have objected to delivery of the permit approvals by e-mail, and it did not do so. Rather, WSDOT’s permit coordinator acknowledged, also by e-mail, that he had received the approvals from Ecology. A third party who is not part of the permit application process does not have a right to object to the means of transmitting a decision from Ecology to WSDOT. The record before the Board demonstrated that WSDOT actually received the permit approvals

⁸ Ecology followed its internal practice in this case by mailing the decisions after they were e-mailed. AR 11-007, Doc. 10, Laing Decl. Ex. H at 16-17.

on February 15, 2011. The Board correctly concluded that that date started the 21 day appeal period.

5. Because the petition was not timely filed, the Board lacked jurisdiction to consider it.

The Board is a creature of statute, and may exercise only those powers conferred expressly or by necessary implication of its authorizing legislation. *See Washington State Human Rights Comm'n ex rel. Spangenberg v. Cheney School District No. 30*, 97 Wn.2d 118, 125, 641 P.2d 163 (1982) (quoting *State v. Munson*, 23 Wn. App. 522, 524, 597 P.2d 440 (1979)). The Board has express statutory authority to hear appeals of decisions granting, conditioning, or denying shoreline permits when those appeals are filed within the statutory appeal period:

Any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state pursuant to RCW 90.58.140 may . . . seek review from the shorelines hearings board by filing a petition for review within twenty-one days of the date of receipt of the decision as provided for in RCW 90.58.140(6).

RCW 90.58.180(1).

These statutes, RCW 90.58.180 and 90.58.140, set the limits of the Board's subject matter jurisdiction. *Kailin v. Clallam County*, 152 Wn. App. 974, 981-82, 220 P.3d 222 (2009). Nothing in these sections allows the Board to adjust the 21-day appeal period. The Board correctly concluded that it lacks authority to expand the jurisdictional

limits on its authority established by the Shoreline Management Act. *See King County v. Central Puget Sound Growth Mgmt Hearings Bd.*, 138 Wn.2d 161, 979 P.2d 374 (1999) (APA statutory limitation on petitions for review is jurisdictional and reflects the high value placed on finality in administrative processes).

Washington courts strictly construe filing deadlines in order to provide permit applicants with certainty and predictability. *Ward v. Board of County Comm'rs, Skagit County*, 86 Wn. App. 266, 272, 936 P.2d 42 (1997); *San Juan Fidalgo Holding Co. v. Skagit County*, 87 Wn. App. 703, 711-12, 943 P.2d 341 (1997). In fact, the appeal of a local land use decision in *San Juan Fidalgo* was dismissed for having missed the filing deadline by only a few hours. *See id.* In contrast, Mr. Jones missed the filing deadline by six days.

The dismissal of Mr. Jones's petition is consistent with prior Board decisions. Although administrative decisions are not binding on the courts, a court may rely on them for guidance, especially where the decision is made by the body primarily charged with interpreting a given statute. *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 185 n.3, 61 P.3d 332 (2002). RCW 43.21B.001, which defines "date of receipt" and is referenced in the 2010 Shoreline Management Act section setting out the appeal period, is part of the Pollution Control

Hearings Board statutes.⁹ In a decision issued in April 2011, the Pollution Control Hearings Board dismissed an appeal that was filed more than 30 days past the date that Ecology had established as the date the appellant actually received a notice of penalty. *Central Washington Asphalt, Inc. v. Washington State Dep't of Ecology*, PCHB No. 10-122 (April 14, 2011) (Order Granting Summary Judgment) (Appendix B). The Pollution Control Hearings Board held that the appellant was not entitled to rely on the later date that could be calculated under RCW 43.21B.001, but rather that the controlling date was the actual date of receipt where it could be proven:

“Date of receipt” focused on when the parties actually obtained the document. Parties were allowed to establish actual receipt by a preponderance of the evidence. The actual date of receipt could be more or less than five days from the date of mailing. In either case, the appeal period would run from the date the party actually received the order. If the date of actual receipt cannot be established, an alternate date five days after mailing can be allowed as a surrogate. In this instance, it would require an extremely strained interpretation of RCW 43.21B.001(2) and WAC 371-08-335 to conclude that the undisputed actual date of receipt should be ignored and an artificial surrogate substituted simply to extend the 30 day appeal period. Harmonizing the two provisions by using the artificial date only when the actual date is unknown gives meaning to each provision and avoids the strained consequences that would result from Central’s interpretation.

⁹ In addition, the three members that make up the Pollution Control Hearings Board also serve as three of the six members of the Shorelines Hearings Board. RCW 90.58.170; RCW 43.21B.020.

Id. at 7-8. After concluding that the petition was not timely filed, the Pollution Control Hearings Board dismissed for lack of jurisdiction.

The only difference between *Central Asphalt* and the present case is that the Shorelines Hearings Board in this case relied on the date that the permit was transmitted by e-mail. However, because the statute makes no distinction between the types of delivery used, that difference does not affect the outcome.

WSDOT submitted a declaration establishing the date of actual receipt of the permit, which was not disputed. Under RCW 43.21B.001, this evidence “shall constitute sufficient evidence of actual receipt.” The Board correctly concluded that this proof of the date of actual receipt superseded the use of the date of mailing plus five business days. The Board’s decision should be affirmed.

6. The Board’s guidelines do not require the “later” of the two potential dates in RCW 43.21B.001 to trigger the appeal period.

Mr. Jones also argues that Board guidelines allow the Board to apply the latest possible date of appeal to calculate his appeal period. App. Br. at 13-14. In making this argument, Mr. Jones relies on statements contained in a Board pamphlet that he takes out of context. *Id.*

The portion of the pamphlet cited by Mr. Jones interprets the Board’s procedural rule WAC 461-08-340(2)(c). This rule addresses the

situation where a local government simultaneously submits to Ecology its decision on a substantial development permit with a decision on a conditional use permit or variance:

When a local government simultaneously transmits to the department its decision on a shoreline substantial development with its approval of a shoreline conditional use permit and/or variance, a petition for review of the shoreline substantial development decision must be filed no later than twenty-one days from the date of receipt by the local government or applicant of the department's decision on the conditional use or variance permit.

WAC 461-08-340(2)(c).

This rule allows a party to appeal a substantial development permit at the same time that the party appeals a conditional use permit or variance. Without the rule, an appellant would need to first appeal the substantial development permit then wait up to 30 days for Ecology to issue a decision on a conditional use permit or variance before that decision can be appealed. This would result in piecemeal review of shoreline projects and would make it difficult for the Board to meet its mandate of issuing shoreline decisions with 180 days of appeal. RCW 90.58.180(3). The Board's rule averts these problems by allowing both permits to be appealed in one petition.¹⁰

¹⁰ In 2011, the Legislature codified the Board's rule. RCW 90.58.140(6)(c).

The Board describes the impact of its rule in layperson's terms in a pamphlet that it provides to pro se and other litigants: "Where a project involves both a substantial development and a conditional use or variance permit, the latest applicable date of receipt may be used in filing the petition for review." AR 11-007, Doc. 10, Laing Decl. Ex. L. The pamphlet then provides an example of how this works in practice:

If you are appealing a substantial development (either approved or denied) and a locally approved conditional use or variance permit, the "date of receipt" for both permit appeals is the conditional use/variance date; i.e., the date that Ecology transmits its final decision or order on the conditional use or variance permit to the local government or applicant.

Id. The pamphlet cautions its readers that "[i]t is not exclusive and **does not have the force and effect of state law or regulation.**" *Id.* (emphasis in original). The reader is then directed to the Board's regulations in WAC 461-08 and the Shoreline Management Act for additional information. *Id.* at 1.

Mr. Jones's arguments regarding this pamphlet are unsupported by WAC 461-08-340(2)(c), which is aimed at addressing a situation that is not implicated by the facts of this case. It also contradicts RCW 43.21B.001(2), which governs the appeal period.

Walker v. Point Ruston, a Board decision cited by Jones, does not require a different result. SHB Nos. 09-013, 016 (Jan. 19, 2010). In

Walker, the Board applied its rule to conclude that when both a substantial development permit and a conditional use permit are appealed, the appeal deadline applicable to the later of the two controlled. *Walker* does not stand for the proposition that Jones uses it for, that the Board has the ability to “liberally construe” the Shoreline Management Act so as to disregard the 21-day jurisdictional deadline.

The Board correctly dismissed Jones’s untimely appeal. The Board’s decision should be affirmed.

D. Mr. Jones Cannot Raise New Issues on Appeal

For the first time on appeal, Mr. Jones raises the issue of whether he received adequate notice of the permit decisions from Hunts Point. App. Br. at 25. With limited exceptions, none of which apply here, RCW 34.05.554 prohibits the introduction of new issues on appeal. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 73, 110 P. 3d 812 (2005). The prohibition on new issues “serves the important policy purpose of protecting the integrity of administrative decision making.” *Id.* (citing *King County v. Washington State Boundary Review Bd. for King County*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993)). It also supports the policies of allowing an agency to develop the necessary factual background on which to base its decision and allowing for the exercise of agency

expertise in the first instance. *Orion Corp. v. State*, 103 Wn.2d 441, 456-57, 693 P.2d 1369 (1985).

Even if Mr. Jones could raise this new issue, he cites no relevant legal authority for the proposition that he was entitled to receive notice from Hunts Point of the permit decision. Instead, he cites RCW 90.58.130 which relates to public involvement in shoreline master programs,¹¹ not to individual permit decisions. App. Br. at 9-11. Since Mr. Jones appealed an individual permit decision, not a shoreline master program, the citation to RCW 90.58.130 is inapposite.

Mr. Jones also cites *Nudd v. Fuller* for the proposition that he has a substantive right of appeal that cannot be taken away by the rule-making power of the court. App. Br. at 9 (*citing Nudd v. Fuller*, 150 Wash. 389, 390, 273 P. 200 (1928)). Mr. Jones neglects to point out that the holding of the case is that appeal deadlines are jurisdictional and that failure to appeal within a prescribed appeal period is grounds for dismissing the appeal. *Id.* Thus, *Nudd* supports the position of WSDOT and Ecology, not Mr. Jones.

Mr. Jones also implies that he was an “interested party” entitled to receive notice of the permit decision. However, there is no evidence in the

¹¹ A shoreline master program is the “comprehensive use plan for a described area, and the use regulations...a statement of desired goals, and standards developed in accordance with the policies enunciated in RCW 90.58.020.” RCW 90.58.030(3)(c).

record demonstrating that he notified Hunts Point that he wanted to be informed of the permit decision.

At any rate, it is evident that Mr. Jones received notice of the decision prior to filing his appeal with the Board. The record demonstrates the co-petitioner, Mr. Powell, received Ecology's decision from the Hunts Point town administrator on February 24, 2011, 12 days before the end of the appeal period. AR 11-007, Doc. 10, Laing Decl. Ex. F. The letters granting the permits were dated February 15, 2011. Mr. Jones made a choice not to seek clarification of when the letter was actually provided to the applicant and instead erroneously assumed a later appeal deadline. The Board did not commit an error of law when it dismissed the appeal. The Board's order should be affirmed.

Mr. Jones also argues that the Legislature's amendment of RCW 90.58.140(d) in 2011 was given retroactive application by the Board. App. Br. At 18-19. Again, this is a new issue not raised prior to this appeal and should not be considered. Even if this issue had been preserved for appeal, it does not affect this case. It cannot be used to interpret the prior RCW 90.58.140(a), which stated that the "date of receipt" was the date that the local government or the appellant received Ecology's written decision.

V. CONCLUSION

WSDOT and Ecology respectfully ask the Court to affirm the decision of the Shorelines Hearings Board dismissing Mr. Jones's appeal as untimely.

RESPECTFULLY SUBMITTED this 20th day of July, 2012.

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CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 2935

Chapter 210, Laws of 2010

61st Legislature
2010 Regular Session

ENVIRONMENTAL AND LAND USE HEARINGS BOARDS--CONSOLIDATION

EFFECTIVE DATE: Sections 1, 3, 5, 7, 9-14, and 16-42 become effective 07/01/10; sections 2, 4, 6, 15, 43, and 46 become effective 07/01/11; and section 8 becomes effective 06/30/19.

Passed by the House March 9, 2010
Yeas 91 Nays 6

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate March 8, 2010
Yeas 45 Nays 2

BRAD OWEN

President of the Senate

Approved March 25, 2010, 3:44 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 2935** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

March 26, 2010

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 2935

AS AMENDED BY THE SENATE

Passed Legislature - 2010 Regular Session

State of Washington

61st Legislature

2010 Regular Session

By House General Government Appropriations (originally sponsored by Representatives Van De Wege, Sells, Blake, Takko, Darneille, Walsh, Hinkle, and Kessler; by request of Governor Gregoire)

READ FIRST TIME 02/09/10.

1 AN ACT Relating to environmental and land use hearings boards;
2 amending RCW 43.21B.001, 43.21B.010, 43.21B.010, 43.21B.180,
3 43.21B.230, 43.21B.320, 36.70A.270, 70.95.094, 76.06.180, 76.09.050,
4 76.09.080, 76.09.090, 76.09.170, 76.09.310, 77.55.011, 77.55.021,
5 77.55.141, 77.55.181, 77.55.241, 77.55.291, 78.44.270, 78.44.380,
6 79.100.120, 84.33.0775, 90.58.140, 90.58.180, 90.58.190, 90.58.210, and
7 90.58.560; reenacting and amending RCW 43.21B.005, 43.21B.005,
8 43.21B.110, 43.21B.110, 43.21B.300, 43.21B.310, and 76.09.020; adding
9 a new section to chapter 43.21B RCW; adding new sections to chapter
10 36.70A RCW; adding a new section to chapter 76.09 RCW; creating new
11 sections; repealing RCW 43.21B.190, 76.09.210, 76.09.220, 76.09.230,
12 77.55.301, 77.55.311, 43.21L.005, 43.21L.010, 43.21L.020, 43.21L.030,
13 43.21L.040, 43.21L.050, 43.21L.060, 43.21L.070, 43.21L.080, 43.21L.090,
14 43.21L.100, 43.21L.110, 43.21L.120, 43.21L.130, 43.21L.140, 43.21L.900,
15 and 43.21L.901; providing effective dates; and providing expiration
16 dates.

17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

18 NEW SECTION. **Sec. 1.** It is the intent of the legislature to
19 reduce and consolidate the number of state boards that conduct

1 assessed under RCW 84.33.041. The department of natural resources
2 shall develop revisions to the form of the forest practices
3 notifications and applications to provide a space for the applicant to
4 indicate and the department of natural resources to confirm or not
5 confirm, whether the notification or application is subject to enhanced
6 aquatic resource requirements. For forest practices notifications or
7 applications submitted before January 1, 2000, the applicant may submit
8 the approved notification or application to the department of natural
9 resources for confirmation that the notification or application is
10 subject to enhanced aquatic resource requirements. Upon any such
11 submission, the department of natural resources will within thirty days
12 confirm or deny that the notification or application is subject to
13 enhanced aquatic resource requirements and will forward separate
14 evidence of each confirmation to the department of revenue. Unless
15 notified of a contrary ruling by the (~~forest practices appeals board~~)
16 pollution control hearings board, the department of revenue shall use
17 the separate confirmations in determining the credit to be allowed
18 against the tax assessed under RCW 84.33.041.

19 (5) A refusal by the department of natural resources to confirm
20 that a notification or application is subject to enhanced aquatic
21 resources requirements may be appealed to the (~~forest practices
22 appeals board under RCW 76.09.220~~) pollution control hearings board.

23 (6) A person receiving approval of credit must keep records
24 necessary for the department of revenue to verify eligibility under
25 this section.

26 **Sec. 36.** RCW 90.58.140 and 1995 c 347 s 309 are each amended to
27 read as follows:

28 (1) A development shall not be undertaken on the shorelines of the
29 state unless it is consistent with the policy of this chapter and,
30 after adoption or approval, as appropriate, the applicable guidelines,
31 rules, or master program.

32 (2) A substantial development shall not be undertaken on shorelines
33 of the state without first obtaining a permit from the government
34 entity having administrative jurisdiction under this chapter.

35 A permit shall be granted:

36 (a) From June 1, 1971, until such time as an applicable master
37 program has become effective, only when the development proposed is

1 consistent with: (i) The policy of RCW 90.58.020; and (ii) after their
2 adoption, the guidelines and rules of the department; and (iii) so far
3 as can be ascertained, the master program being developed for the area;

4 (b) After adoption or approval, as appropriate, by the department
5 of an applicable master program, only when the development proposed is
6 consistent with the applicable master program and this chapter.

7 (3) The local government shall establish a program, consistent with
8 rules adopted by the department, for the administration and enforcement
9 of the permit system provided in this section. The administration of
10 the system so established shall be performed exclusively by the local
11 government.

12 (4) Except as otherwise specifically provided in subsection (11) of
13 this section, the local government shall require notification of the
14 public of all applications for permits governed by any permit system
15 established pursuant to subsection (3) of this section by ensuring that
16 notice of the application is given by at least one of the following
17 methods:

18 (a) Mailing of the notice to the latest recorded real property
19 owners as shown by the records of the county assessor within at least
20 three hundred feet of the boundary of the property upon which the
21 substantial development is proposed;

22 (b) Posting of the notice in a conspicuous manner on the property
23 upon which the project is to be constructed; or

24 (c) Any other manner deemed appropriate by local authorities to
25 accomplish the objectives of reasonable notice to adjacent landowners
26 and the public.

27 The notices shall include a statement that any person desiring to
28 submit written comments concerning an application, or desiring to
29 receive notification of the final decision concerning an application as
30 expeditiously as possible after the issuance of the decision, may
31 submit the comments or requests for decisions to the local government
32 within thirty days of the last date the notice is to be published
33 pursuant to this subsection. The local government shall forward, in a
34 timely manner following the issuance of a decision, a copy of the
35 decision to each person who submits a request for the decision.

36 If a hearing is to be held on an application, notices of such a
37 hearing shall include a statement that any person may submit oral or
38 written comments on an application at the hearing.

1 (5) The system shall include provisions to assure that construction
2 pursuant to a permit will not begin or be authorized until twenty-one
3 days from the date (~~((the permit decision was filed))~~) of receipt as
4 provided in subsection (6) of this section; or until all review
5 proceedings are terminated if the proceedings were initiated within
6 twenty-one days from the date of (~~((filing))~~) receipt as defined in
7 subsection (6) of this section except as follows:

8 (a) In the case of any permit issued to the state of Washington,
9 department of transportation, for the construction and modification of
10 SR 90 (I-90) on or adjacent to Lake Washington, the construction may
11 begin after thirty days from the date of filing, and the permits are
12 valid until December 31, 1995;

13 (b) Construction may be commenced no sooner than thirty days after
14 the date of the appeal of the board's decision is filed if a permit is
15 granted by the local government and (i) the granting of the permit is
16 appealed to the shorelines hearings board within twenty-one days of the
17 date of (~~((filing))~~) receipt, (ii) the hearings board approves the
18 granting of the permit by the local government or approves a portion of
19 the substantial development for which the local government issued the
20 permit, and (iii) an appeal for judicial review of the hearings board
21 decision is filed pursuant to chapter 34.05 RCW. The appellant may
22 request, within ten days of the filing of the appeal with the court, a
23 hearing before the court to determine whether construction pursuant to
24 the permit approved by the hearings board or to a revised permit issued
25 pursuant to the order of the hearings board should not commence. If,
26 at the conclusion of the hearing, the court finds that construction
27 pursuant to such a permit would involve a significant, irreversible
28 damaging of the environment, the court shall prohibit the permittee
29 from commencing the construction pursuant to the approved or revised
30 permit until all review proceedings are final. Construction pursuant
31 to a permit revised at the direction of the hearings board may begin
32 only on that portion of the substantial development for which the local
33 government had originally issued the permit, and construction pursuant
34 to such a revised permit on other portions of the substantial
35 development may not begin until after all review proceedings are
36 terminated. In such a hearing before the court, the burden of proving
37 whether the construction may involve significant irreversible damage to

1 the environment and demonstrating whether such construction would or
2 would not be appropriate is on the appellant;

3 (c) If the permit is for a substantial development meeting the
4 requirements of subsection (11) of this section, construction pursuant
5 to that permit may not begin or be authorized until twenty-one days
6 from the date (~~(the permit decision was filed)~~) of receipt as provided
7 in subsection (6) of this section.

8 If a permittee begins construction pursuant to subsections (a),
9 (b), or (c) of this subsection, the construction is begun at the
10 permittee's own risk. If, as a result of judicial review, the courts
11 order the removal of any portion of the construction or the restoration
12 of any portion of the environment involved or require the alteration of
13 any portion of a substantial development constructed pursuant to a
14 permit, the permittee is barred from recovering damages or costs
15 involved in adhering to such requirements from the local government
16 that granted the permit, the hearings board, or any appellant or
17 intervener.

18 (6) Any decision on an application for a permit under the authority
19 of this section, whether it is an approval or a denial, shall,
20 concurrently with the transmittal of the ruling to the applicant, be
21 (~~(filed with)~~) transmitted to the department and the attorney general.
22 A petition for review of such a decision must be commenced within
23 twenty-one days from the date of receipt of the decision. With regard
24 to a permit other than a permit governed by subsection (10) of this
25 section, "date of (~~(filing)~~) receipt" as used herein (~~(means)~~) refers
26 to the date ((of actual receipt by the department)) that the applicant
27 receives written notice from the department that the department has
28 received the decision. With regard to a permit for a variance or a
29 conditional use, "date of (~~(filing)~~) receipt" means the date a local
30 government or applicant receives the written decision of the department
31 rendered on the permit pursuant to subsection (10) of this section (~~(is~~
32 ~~transmitted by the department to the local government. The department~~
33 ~~shall notify in writing the local government and the applicant of the~~
34 ~~date of filing)). For the purposes of this subsection, the term "date
35 of receipt" has the same meaning as provided in RCW 43.21B.001.~~

36 (7) Applicants for permits under this section have the burden of
37 proving that a proposed substantial development is consistent with the
38 criteria that must be met before a permit is granted. In any review of

1 the granting or denial of an application for a permit as provided in
2 RCW 90.58.180 (1) and (2), the person requesting the review has the
3 burden of proof.

4 (8) Any permit may, after a hearing with adequate notice to the
5 permittee and the public, be rescinded by the issuing authority upon
6 the finding that a permittee has not complied with conditions of a
7 permit. If the department is of the opinion that noncompliance exists,
8 the department shall provide written notice to the local government and
9 the permittee. If the department is of the opinion that the
10 noncompliance continues to exist thirty days after the date of the
11 notice, and the local government has taken no action to rescind the
12 permit, the department may petition the hearings board for a rescission
13 of the permit upon written notice of the petition to the local
14 government and the permittee if the request by the department is made
15 to the hearings board within fifteen days of the termination of the
16 thirty-day notice to the local government.

17 (9) The holder of a certification from the governor pursuant to
18 chapter 80.50 RCW shall not be required to obtain a permit under this
19 section.

20 (10) Any permit for a variance or a conditional use by local
21 government under approved master programs must be submitted to the
22 department for its approval or disapproval.

23 (11)(a) An application for a substantial development permit for a
24 limited utility extension or for the construction of a bulkhead or
25 other measures to protect a single family residence and its appurtenant
26 structures from shoreline erosion shall be subject to the following
27 procedures:

28 (i) The public comment period under subsection (4) of this section
29 shall be twenty days. The notice provided under subsection (4) of this
30 section shall state the manner in which the public may obtain a copy of
31 the local government decision on the application no later than two days
32 following its issuance;

33 (ii) The local government shall issue its decision to grant or deny
34 the permit within twenty-one days of the last day of the comment period
35 specified in (i) of this subsection; and

36 (iii) If there is an appeal of the decision to grant or deny the
37 permit to the local government legislative authority, the appeal shall
38 be finally determined by the legislative authority within thirty days.

1 (b) For purposes of this section, a limited utility extension means
2 the extension of a utility service that:

3 (i) Is categorically exempt under chapter 43.21C RCW for one or
4 more of the following: Natural gas, electricity, telephone, water, or
5 sewer;

6 (ii) Will serve an existing use in compliance with this chapter;
7 and

8 (iii) Will not extend more than twenty-five hundred linear feet
9 within the shorelines of the state.

10 **Sec. 37.** RCW 90.58.180 and 2003 c 393 s 22 are each amended to
11 read as follows:

12 (1) Any person aggrieved by the granting, denying, or rescinding of
13 a permit on shorelines of the state pursuant to RCW 90.58.140 may,
14 except as otherwise provided in chapter 43.21L RCW, seek review from
15 the shorelines hearings board by filing a petition for review within
16 twenty-one days of the date of ~~((filing))~~ receipt of the decision as
17 ~~((defined))~~ provided for in RCW 90.58.140(6).

18 Within seven days of the filing of any petition for review with the
19 board as provided in this section pertaining to a final decision of a
20 local government, the petitioner shall serve copies of the petition on
21 the department, the office of the attorney general, and the local
22 government. The department and the attorney general may intervene to
23 protect the public interest and ~~((insure))~~ ensure that the provisions
24 of this chapter are complied with at any time within fifteen days from
25 the date of the receipt by the department or the attorney general of a
26 copy of the petition for review filed pursuant to this section. The
27 shorelines hearings board shall schedule review proceedings on the
28 petition for review without regard as to whether the period for the
29 department or the attorney general to intervene has or has not expired.

30 (2) The department or the attorney general may obtain review of any
31 final decision granting a permit, or granting or denying an application
32 for a permit issued by a local government by filing a written petition
33 with the shorelines hearings board and the appropriate local government
34 within twenty-one days from the date ~~((the final decision was filed))~~
35 of receipt as provided in RCW 90.58.140(6).

36 (3) The review proceedings authorized in subsections (1) and (2) of
37 this section are subject to the provisions of chapter 34.05 RCW

1 pertaining to procedures in adjudicative proceedings. Judicial review
2 of such proceedings of the shorelines hearings board is governed by
3 chapter 34.05 RCW. The board shall issue its decision on the appeal
4 authorized under subsections (1) and (2) of this section within one
5 hundred eighty days after the date the petition is filed with the board
6 or a petition to intervene is filed by the department or the attorney
7 general, whichever is later. The time period may be extended by the
8 board for a period of thirty days upon a showing of good cause or may
9 be waived by the parties.

10 (4) Any person may appeal any rules, regulations, or guidelines
11 adopted or approved by the department within thirty days of the date of
12 the adoption or approval. The board shall make a final decision within
13 sixty days following the hearing held thereon.

14 (5) The board shall find the rule, regulation, or guideline to be
15 valid and enter a final decision to that effect unless it determines
16 that the rule, regulation, or guideline:

17 (a) Is clearly erroneous in light of the policy of this chapter; or
18 (b) Constitutes an implementation of this chapter in violation of
19 constitutional or statutory provisions; or

20 (c) Is arbitrary and capricious; or

21 (d) Was developed without fully considering and evaluating all
22 material submitted to the department during public review and comment;
23 or

24 (e) Was not adopted in accordance with required procedures.

25 (6) If the board makes a determination under subsection (5)(a)
26 through (e) of this section, it shall enter a final decision declaring
27 the rule, regulation, or guideline invalid, remanding the rule,
28 regulation, or guideline to the department with a statement of the
29 reasons in support of the determination, and directing the department
30 to adopt, after a thorough consultation with the affected local
31 government and any other interested party, a new rule, regulation, or
32 guideline consistent with the board's decision.

33 (7) A decision of the board on the validity of a rule, regulation,
34 or guideline shall be subject to review in superior court, if
35 authorized pursuant to chapter 34.05 RCW. A petition for review of the
36 decision of the shorelines hearings board on a rule, regulation, or
37 guideline shall be filed within thirty days after the date of final
38 decision by the shorelines hearings board.

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

CENTRAL WASHINGTON ASPHALT,
INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB No. 10-122

ORDER GRANTING SUMMARY
JUDGMENT

Central Washington Asphalt, Inc. (Central) appealed Penalty No. 7976 issued to Stampede Sand and Gravel, LLC (Stampede) by the State of Washington, Department of Ecology (Ecology). Ecology is moving to dismiss the case based on the Board's lack of jurisdiction over untimely appeals and Central's lack of standing. The Board considering this motion was comprised of Andrea McNamara Doyle, Chair, William H. Lynch, and Kathleen D. Mix. Administrative Appeals Judge Phyllis K. Macleod presided for the Board.

In deliberating on this motion the Board reviewed the following materials:

1. Ecology's Motion to Dismiss.
2. Ecology's Memorandum in Support of Motion to Dismiss.
3. Declaration of Phyllis Barney in Support of Motion with Exhibits A-B.
4. Declaration of Dee Ragsdale in Support of Motion to Dismiss with Exhibit A.
5. Declaration of Donna Smith in Support of Motion to Dismiss with Exhibits A-B.
6. Central's Memorandum in Opposition of Ecology's Motion to Dismiss.

ORDER GRANTING SUMMARY JUDGMENT
PCHB No. 10-122

1 7. Declaration of Pamp M. Maiers in Opposition to Ecology's Motion with Exhibits A-
2 B.

3 8. Ecology's Reply Brief.

4 The matter was decided on the record submitted without oral argument. Based upon the
5 records and files in the case, the evidence submitted, and the written legal arguments of counsel,
6 the Board enters the following decision.

7 Factual Background

8 Stampede Sand and Gravel, LLC (Stampede) is the owner of a gravel mining site located
9 near Easton in Kittitas County, Washington. As owner of the site, Stampede obtained coverage
10 from Ecology under the Sand and Gravel General NPDES Permit for activities at the site. The
11 permit coverage allowed Stampede to discharge process and storm water to groundwater, but did
12 not allow discharges to surface water. *Smith Decl.* ¶3. Central Washington Asphalt, Inc.
13 (Central) entered into a lease and lease extension with Stampede that allowed Central the right to
14 extract and process sand and gravel from locations on the gravel mining site from April 2010
15 through November 15, 2010. *Pamp Maiers Decl.* The terms of the lease agreement provided for
16 Stampede to maintain necessary licenses and permits for use of the land. The agreement
17 obligated Central to indemnify Stampede for any claims, liability, or obligation arising from the
18 intended use of the property for sand and gravel related operations. *Id.*

19 Central, in turn, contracted with two other entities to perform gravel mining and crushing
20 activities on the property. *Pamp Maiers Decl.* During gravel mining and crushing activities on
21 the site during the summer of 2010, Ecology inspectors found turbid water discharging from the

1 site into the Yakima River. *Smith Decl.* ¶5. On August 2, 2010, Ecology issued Administrative
2 Order No. 7903 to Stampede directing the company to take action to halt the turbid discharges
3 into surface waters of the state. *Smith Decl.* ¶6. The order was sent via certified mail, but was
4 never claimed. Ecology went on to issue Notice of Penalty No. 7976 to Stampede assessing the
5 \$21,000 penalty being challenged in this case. The Notice of Penalty was mailed by certified
6 mail on August 3, 2010, and claimed by Stampede on September 2, 2010, as shown by signature
7 on the return receipt. *Smith Decl., Ex. B.*

8 Stampede did not appeal the penalty assessment, but Central sent a document entitled
9 “Application for Relief from an Assessed Penalty – NOP 7976” to the Environmental Hearings
10 Office (EHO) and Ecology. The EHO considered this document an attempt to file an appeal of
11 the identified penalty assessment. The appeal was received by the EHO and date stamped on
12 Tuesday October 5, 2010. *Barney Decl. Exs., A and B.* Ecology received its copy on
13 Wednesday, October 6, 2010. *Ragsdale Decl.*

14 Analysis

15 Ecology presents the motion under consideration as a motion to dismiss as envisioned by
16 CR 12, and made applicable here by WAC 371-08-300. However, if, on a motion for judgment
17 on the pleadings, “matters outside the pleading are presented to and not excluded by the court,
18 the motion shall be treated as one for summary judgment and disposed of as provided in rule 56.”
19 CR 12(c). In this case declarations and exhibits have been submitted in connection with the
20 motion and, accordingly, the analysis will proceed in a manner similar to a motion for summary
21 judgment.

1 Summary judgment is a procedure available to avoid unnecessary trials where formal
2 issues cannot be factually supported and cannot lead to, or result in, a favorable outcome to the
3 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The summary
4 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.
5 Summary judgment is appropriate when the only controversy involves the meaning of statutes,
6 and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v.*
7 *Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d
8 1004 (1991).

9 The party moving for summary judgment must show there are no genuine issues of
10 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
11 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
12 summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*
13 *Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden,
14 then the non-moving party must present evidence demonstrating that material facts are in
15 dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990),
16 *reconsideration denied* (1991). In a summary judgment proceeding, all facts and reasonable
17 inferences must be construed in favor of the non-moving party. *Jones v. Allstate Ins. Co.*, 146
18 Wn.2d 291, 300, 45 P.3d 1068 (2002). In this case, the facts necessary to rule on the motion are
19 not in dispute and the matter is ripe for summary judgment.

20 Ecology contends that the Board lacks jurisdiction over the appeal in this case because it
21 was not timely filed. Filing a timely appeal with the Board is addressed in WAC 371-08-335:

1 (1) An appeal before the board is initiated by filing a notice of appeal
2 with the board at the environmental hearings office and by serving a
3 copy of the appeal notice on the agency whose decision is being
4 appealed. For the board to acquire jurisdiction both such filing and such
5 service must be timely accomplished.

6 (2) The notice of appeal shall be filed with the board within thirty days of
7 the date of receipt of the order or decision unless otherwise provided by
8 law. The board's rule governing the computation of time (WAC 371-08-
9 310) shall determine how the thirty-day appeal period is calculated. The
10 "date of receipt" of an order or decision means:

11 (a) Five business days after the date of mailing; or

12 (b) The date of actual receipt, when the actual receipt date
13 can be proven by a preponderance of the evidence. The
14 recipient's sworn affidavit or declaration indicating the date of
15 receipt, which is unchallenged by the agency, shall constitute
16 sufficient evidence of actual receipt. The date of actual
17 receipt, however, may not exceed forty-five days from the date
18 of mailing.

19 (3) An appeal may be filed with the board by personal delivery,
20 commercial delivery, facsimile, or first-class, registered or certified mail.
21 An appeal is filed with the board on the date the board actually receives
the notice of the appeal, not the date that the notice is mailed. Upon
receiving the notice of appeal, the board will acknowledge receipt. The
date stamped on the appeal notice shall be prima facie evidence of the
filing date. The board may thereafter require that additional copies be
filed.

WAC 371-08-335. *See also*, RCW 90.48.144 and RCW 43.21.B.300(2) (establishing appeal of a
penalty to the Pollution Control Hearings Board if filed within thirty days after receipt of the
penalty notice).

The undisputed facts show that Stampede actually received the Notice of Penalty No.
7976 on September 2, 2010, as evidenced by signature on the certified mail receipt. The

1 undisputed facts further show that Central filed the appeal with the Board on October 5, 2010, as
2 evidenced by the Board's receipt stamp. The dispute centers on whether the statutory
3 requirement to file an appeal within thirty days of the "date of receipt" of a penalty can be
4 construed to commence on a day later than the day of actual receipt. In this case, the notice of
5 penalty was actually received on September 2, 2010, more than thirty days prior to the date the
6 appeal was filed on October 5, 2010. Central argues that the date of receipt can be either a date
7 five business days after mailing or the date of actual receipt, whichever is more advantageous.
8 Ecology contends that the actual date of receipt governs, where that date is known. In this case
9 five days after mailing would have been September 8, 2010, and Central's October 5, 2010,
10 appeal would have been timely.¹

11 In interpreting the meaning of contested statutory or regulatory provisions, the Board
12 seeks to ascertain and give effect to the intent and purpose of the Legislature as expressed in the
13 act. *Burlington Northern v. Johnston*, 89 Wn.2d 321, 326, 572 P.2d 1085 (1977). The words
14 must be placed in the broader context of related statutes and other provisions of the specific
15 statutory scheme. *Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d, 1, 10-12, 43 P.3d 4
16 (2002). The act must be construed as a whole giving effect to all the language used, considering
17 all provisions in relation to each other and, if possible, harmonizing all to insure proper
18 construction of each provision. *Anderson v. Department of Corrections*, 159 Wn.2d 849, 861,
19 154 P.3d 220 (2007); *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985

20
21 ¹ The Notice of Penalty was mailed on Tuesday August 31, 2010. Monday September 6, 2010, was Labor Day and is excluded from the calculation of business days. Therefore, five business days from the date of mailing is September 8, 2010.

1 P.2d 262 (1999). Unlikely, absurd or strained consequences resulting from a literal reading of
2 language should be avoided. *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992).

3 Central argues that the Legislature's intent to simplify the appeal process, expressed in
4 the legislative purpose statement attached to the 1987 Ecology Procedures Simplification Act, is
5 proof that the Board should accept the most permissive reading of the filing deadline. *Central*
6 *Memorandum*, p. 4. The referenced 1987 Act was directed to simplification and clarification of
7 the appeal process, but there is no expressed intent to expand the deadlines governing appeals.
8 Moreover, the language defining "date of receipt," was adopted several years later during the
9 2004 session of the Legislature. *Laws of 2004, ch. 204*. By further defining "date of receipt" in
10 2004, the Legislature gave more certainty to parties regarding the starting date for calculating an
11 appeal deadline. The "date of receipt" definition adopted in 2004 clarified when a decision was
12 considered "received" and made clear that the appeal period did not begin upon mailing. "Date
13 of receipt" focused on when the parties actually obtained the document. Parties were allowed to
14 establish actual receipt by a preponderance of the evidence. The actual date of receipt could be
15 more or less than five days from the date of mailing. In either case, the appeal period would run
16 from the date the party actually received the order. If the date of actual receipt cannot be
17 established, an alternate date five days after mailing can be allowed as a surrogate. In this
18 instance, it would require an extremely strained interpretation of RCW 43.21.B.001(2) and WAC
19 371-08-335 to conclude that the undisputed actual date of receipt should be ignored and an
20 artificial surrogate substituted simply to extend the 30 day appeal period. Harmonizing the two
21 provisions by using the artificial date only when the actual date is unknown gives meaning to

1 each provision and avoids the strained consequences that would result from Central's
2 interpretation.

3 The overall structure of the penalty process contained in RCW 43.21.B.300(2), RCW
4 43.21.B.001(2) and WAC 371-08-335 also supports an interpretation that requires a party to use
5 the date of actual receipt, if known. Actual receipt provides a party with notice of the decision so
6 they can begin evaluating whether to file an appeal. No extension is justified to this period for
7 considering whether to file an appeal simply because the actual receipt occurred two days rather
8 than five days from mailing. The Board is not persuaded by Central's argument that an appellant
9 should be able to extend this 30 day period by using something other than the date the penalty
10 notice was actually received to calculate the applicable appeal period. Central's appeal was filed
11 beyond thirty days from the actual "date of receipt" and, therefore, was untimely.

12 The Board cannot accept jurisdiction of an appeal that fails to meet the applicable filing
13 requirements. *Baker Commodities Inc. v. Spokane County Air Pollution Control Authority*,
14 PCHB No. 03-015 (Order Granting Summary Judgment, June 27, 2003); *Thomas v. Yakima*
15 *Regional Clean Air Authority*, PCHB No. 02-047 (2002). The deadlines for filing and serving
16 appeals are mandatory and cannot be waived by the Board even for a pro se appellant: "The
17 presiding officer may waive any of these rules, *other than a rule relating to jurisdiction*, for any
18 party not represented by legal counsel where necessary to avoid manifest injustice." (emphasis
19 added). *WAC 371-08-385*; *Searls v. Olympic Region Clean Air Authority*, PCHB No. 09-004
20 (Order Granting Motion to Dismiss for Untimely Service, May 13, 2009). Central's appeal was
21

1 untimely and, accordingly, Ecology's motion for summary judgment dismissing the appeal
2 should be granted.²

3 Based upon the foregoing analysis, the Board enters the following:

4 **ORDER**

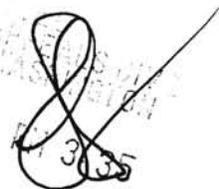
5 Ecology's Motion for summary judgment is hereby GRANTED and the appeal is
6 dismissed.

7 SO ORDERED this 15th day of April, 2011.

8 **POLLUTION CONTROL HEARINGS BOARD**
9 ANDREA MCNAMARA DOYLE, Chair
10 WILLIAM H. LYNCH, Member
11 KATHLEEN D. MIX, Member

12 Phyllis K. Macleod
13 Administrative Appeals Judge, Presiding
14
15
16
17
18
19
20

21 ² Having resolved the motion based on failure to timely file the appeal, it is not necessary for the Board to reach the issue of standing.

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
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NO. 68532-5-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

WASHINGTON STATE
DEPARTMENT OF
TRANSPORTATION, WASHINGTON
STATE DEPARTMENT OF
ECOLOGY, and THE TOWN OF
HUNTS POINT, a Municipality,

Respondents,

v.

PATRCK A.T. JONES, individually and
as assignee of all right, title, and interest
of the chose in action of PETER
POWELL,

Appellant,

CERTIFICATE OF
SERVICE

I, DANIELLE OLIVER an employee of the Transportation & Public Construction Division of the Office of the Attorney General of Washington, certify that on the date indicated below, true and correct copies of the Respondents' Brief and this Certificate of Service were served on the following parties via electronic mail pursuant to an E-Service Agreement between the parties:

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Attorney for Petitioner Patrick A.T. Jones
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ORIGINAL

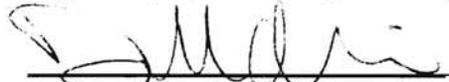
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of July, 2012, at Tumwater, Washington.



DANIELLE OLIVER, Legal Assistant