

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 35864-~~6~~II

(Thurston County Superior Court
Consolidated Nos. 05-2-00671-1 and 06-2-00784-8)

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

HERM DOUMA, MIKE DOUMA, MJD FARMS L.L.C., RICHARD M.
STEPHENS, and POLLUTION CONTROL HEARINGS BOARD,

Appellants,

vs.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and
POLLUTION CONTROL HEARINGS BOARD,

Respondents.

APPELLANTS' OPENING BRIEF

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ORIGINAL

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INTRODUCTION

Appellants (Doumas) file this Opening Brief, seeking reversal of the Superior Court's decision affirming the Pollution Control Hearings Board's (Board) Decision on the merits of their challenge to Ecology's issuance of a \$53,000 penalty.

ASSIGNMENTS OF ERROR AND ISSUES RELATING TO ASSIGNMENTS OF ERROR TO THE SUPERIOR COURT (RAP 10.3(A)(4))

A. Assignments of Error

The Superior Court erred in issuing its Judgment on Petition for Judicial Review.

B. Issues Pertaining to Assignments of Error

1. Did the Court erroneously interpret and apply RCW 90.58 in upholding the finding of a violation of that statute in absence of finding a violation of Chapter 173-200 WAC?
2. Did the Court erroneously interpret and apply RCW 90.64.030(6) because the Doumas were not a significant contributor of pollution and even if such determination were made, it would not be supported by substantial evidence?
3. Is the Court's decision on the reasonableness of the penalty arbitrary and capricious in light of all of the facts and circumstances?

**ASSIGNMENTS OF ERROR AND ISSUES RELATING TO
ASSIGNMENTS OF ERROR TO THE POLLUTION CONTROL
HEARINGS BOARD (RAP 10.3(H))**

A. Assignments of Error

1. The Board erred in issuing its Findings of Fact, Conclusions of Law, and Order (Decision) dated March 30, 2005.

B. Issues Relating to Assignments of Error

1. Did the Board erroneously interpret and apply RCW 90.58 in finding a violation of that statute in absence of finding a violation of Chapter 173-200 WAC?
2. Did the Board erroneously interpret and apply RCW 90.64.030(6) because the Doumas were not a significant contributor of pollution and even if such determination were made, it would not be supported by substantial evidence?
3. Is the Board's decision on the reasonableness of the penalty arbitrary and capricious in light of all of the facts and circumstances?

STATEMENT OF THE CASE

Plaintiffs and appellants (Doumas) operate a dairy farm in Whatcom County. Board's Findings of Fact, Conclusions of Law and Order (Decision) attached hereto as Appendix A. To handle dairy waste (cow manure), the Doumas had four interlocking manure lagoons and a fifth lagoon separated from the other four. Typically, the lagoons are filled with manure from the dairy barns in the winter and stored until late spring when the lagoons are emptied and the material placed on fields on

the farm. With the exception of the winter of 1998-1999, the Doumas' five lagoons had never been full. Certified Record provided pursuant to RAP 9.7(c), (CR) 92.

During heavy rains at the end of 1998 and the first two months of 1999, the Doumas' five manure lagoons on their farm were about to overflow due to excess rainwater. Faced with this emergency and the need to protect an adjacent stream, Dakota Creek, the Doumas created emergency temporary additional manure storage until the rains subsided and manure could be applied to nonsaturated fields. The Doumas had been warned by the Environmental Protection Agency to make sure they did not allow manure to leave the farm.

This emergency storage facility was built on the only nonsaturated soil on the Doumas' farm on February 25, 1999 and 500,000 gallons of manure and water were pumped into this temporary lagoon the next day. CR 93. In response to a complaint, Ecology personnel inspected the site on May 5, 1999. On May 7 and 8, the Doumas removed the manure and water from the site and applied it to adjacent fields which were no longer saturated.¹

¹ The Doumas also built a sixth lagoon to handle excess manure which for several years has never been necessary to use.

On May 21, 1999, the Department of Ecology (Ecology) issued a Notice of Violation to Herm Douma, Mike Douma, d/b/a MJD Farms L.L.C. The Doumas' attorney submitted a letter on behalf of them explaining the circumstances of the alleged violation, however, Ecology issued a Notice of Penalty Incurred and Due on August 25, 1999, imposing a \$53,000 penalty against the Doumas. By way of the undersigned counsel of record, the Doumas submitted an application for relief from the penalty on September 9, 1999 pursuant to RCW 43.21B.300. Ecology denied the application for relief from penalty. The Doumas appealed to the Pollution Control Hearings Board (Board). The Board dismissed the appeal for failure to timely file the appeal. The Doumas appealed the Board's dismissal to Whatcom County Superior Court, arguing that their procedural due process rights have been violated by failing to serve their attorney with a copy of the decision on the application for relief from penalty. The Whatcom County Superior Court agreed that the Doumas' procedural due process rights had been violated and reversed the Board's dismissal and remanded the matter to the Board for a hearing on the merits. CR 168.

A hearing on the merits was held before the Board on December 20, 2004. On March 30, 2005, the Board entered a decision on the Doumas' appeal. The Board's Decision reduced the \$53,000 penalty to

\$46,500 and suspended \$10,000 of the \$46,500 penalty on the condition that the Doumas obtain technical assistance to review their dairy nutrient practices and implement any recommendations, and do not have any water quality violations for a period of two years from March 30, 2005. CR 65.

Ecology filed a petition for review in Thurston County Superior Court. The Doumas filed a petition for review in Whatcom County Superior Court. The two petitions were consolidated in Thurston County because Ecology's petition was filed first. Clerk's Papers (CP) 34.

Ecology argued to the Superior Court that one of the Board's findings resolving a dispute as to "who said what" was not supported by substantial evidence. It also argued that the Board had no authority to suspend a portion of the penalty. The Doumas made the same arguments they make in this brief. The Superior Court affirmed the Board's decision in its entirety. CP 131-33.

This appeal follows.

ARGUMENT

I

THE COURT'S AFFIRMATION OF THE BOARDS' DECISION IS IN ERROR BECAUSE THE BOARD'S DECISION IS THE RESULT OF AN UNLAWFUL PROCEDURE

The APA provides relief from an administrative agency's decision when:

- (d) The agency has erroneously interpreted or applied the law;
- ...
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
- ...
- (i) The order is arbitrary or capricious.

RCW 34.05.570(3). Here, the Board’s Decision erroneously interpreted and applied the law, was not supported by substantial evidence, and was arbitrary and capricious.

Ecology bore the burden of proving by a preponderance of the evidence that the violation occurred and that the penalty was reasonable. WAC 371-08-485(2). The Board's Decision, however, wrongfully concluded that Ecology met this burden.

The Board Decision concluded that Ecology met its burden that the Doumas had violated Chapter 90.48 RCW by discharging pollution to state waters. Decision at 18. The Decision wrongfully held that the Doumas could be penalized for this violation since there was no finding that the Doumas were “significant contributors of pollution” as that phrase is used in RCW 90.64.030(6). The legislature has determined that dairies are to be treated differently than other entities and cannot be subject to the enforcement provisions of RCW 90.48 without such a finding.

The Notice of Penalty cited violations of RCW 90.48.080, RCW 90.48.160, RCW 90.48.144², and WAC 173-200-040.³ RCW 90.48.080 prohibits the discharge into waters of the state any substance that shall cause or tend to cause pollution:

It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the department, as provided for in this chapter.

The Board's Decision states:

There is no dispute that **some amount** of dairy waste seeped into groundwater from the trench, and that groundwater more likely than not entered the trench. Therefore, the actions at the Doumas' dairy constituted a discharge of pollutants into waters of the state under Chapter 90.48 RCW.

Decision at 12-13 (emphasis added). However, the legislature has determined that dairies are not subject to the enforcement provisions of 90.48 RCW unless it can be determined to be a **significant** contributor of pollution based on hard evidence. RCW 90.64.030(6) provides:

A dairy farm that is determined to be a significant contributor of pollution based on actual water quality tests, photographs, or other pertinent information is subject to the provisions of this chapter and to the enforcement provisions of Chapters 43.05 and

² RCW 90.48.144 simply provides the penalty for violations and is not an independent legal requirement that Appellants supposedly violated.

³ The Board correctly held that Ecology had not met its burden of proving a violation of water quality standards under WAC 173-200. Decision at 18.

90.48 RCW, including civil penalties levied under RCW 90.48.144.

The Doumas had argued before the Board that Ecology never properly determined that the Doumas were a “significant contributor of pollution” and thus had not met its burden of proof that a water quality violation occurred. The Board disagreed holding that Chapter RCW 90.64 does not establish a process for making a **formal** determination that a dairy is a “significant contributor of pollution” as a condition precedent to institution an enforcement action. Decision at 14. The Board’s Decision misses the point. Regardless of whether RCW 90.64.030(6) requires “a process for making a formal determination,” it still requires that Ecology meet its burden of proof that the dairy was a **significant contributor** of pollution before an enforcement action can be brought. The Board’s decision does not address whether Ecology met this burden, but the evidence establishes that it did not. Absolutely no evidence was presented on how much of the manure might have seeped into ground water. Decision at 12-13.

The lack of evidence is because Ecology conducted no actual water quality tests of either ground water or nearby surface waters. Decision at 7. To determine whether a violation has occurred, there must be actual water quality tests, photographs, or other pertinent information that the

dairy farm is a significant contributor of pollution. *Tevelde v. Washington*, PCHB No. 99-197 (2000). Nor are there photographs of polluted water bodies. The only tests and photographs are of a trench filled with manure, not groundwater. In the absence of testing, there is no evidence that any groundwater exceeded any groundwater standard. Without such evidence, Ecology failed to meet its burden that the Doumas were a significant contributor of pollution.

The Board's decision ignored one of its previous decisions holding that Ecology did not prove by a preponderance of the evidence that a violation occurred in a case even where water samples were taken. *Heutink Pumping Service v. Ecology*, PCHB NO. 99-130 (April 6, 2000). In response to a manure lagoon about to overflow, the business charged with disposing excess manure from the dairies, injected manure into a stubble cornfield. The tractor which applied the manure apparently ran through these piles and spread them out. When the inspector visited the site he noticed the field saturated with water and observed that the field had clumps of floating manure in the standing water on the field. Despite the fact that the inspector took several water samples, the Board held that Ecology had not made a prima facie case that the pollution was caused by the injections. As a result, the Board did not need to reach the issue of the reasonableness of the penalty. The facts in *Heutink* are remarkably similar to the present

case, except in the present case Ecology chose not to take any ground or surface water samples.

In the present case, the Board's decision continues by stating that RCW 90.48 does not "include a limitation on what discharges from dairies constitute a violation [of Chap. RCW 90.48,]" but instead turns to RCW 90.64.030(9) for guidance. That statute reads:

A discharge, including a storm water discharge, to surface waters of the state shall not be considered a violation of this chapter, Chapter 90.48 RCW, or Chapter 173-201A WAC, and shall therefore not be enforceable by the department of ecology or a third party, if at the time of the discharge, a violation is not occurring under RCW 90.64.010(18).

The Board reasoned that "for a discharge from a dairy to constitute a water quality violation under RCW 90.64 and 90.48, it must be a violation under RCW 90.67.010(18)." Decision at 14. However, RCW 90.64.010(18) is simply stating certain other generic exemptions when a violation does not occur. This statute does not change the separate specific provision for dairies providing no enforcement without being a significant contributor of pollution.

Given that Ecology conducted no water quality tests, the Doumas cannot be determined to be a **significant** contributor of pollution as required by RCW 90.64.030(6) and therefore not be subject to the enforcement provisions upon which Ecology relies. The implication of

this statute is that if a dairy farm is not a significant contributor of pollution, then it is not subject to the enforcement provisions of Chapter 90.48 RCW and of RCW 90.48.144 in particular. This is important in light of the burden of proof being placed on Ecology.

Ecology contends that it was not required to establish that the Doumas were significant contributors of pollution under RCW 90.64.030(6) to meet its burden that the Doumas violated Chapter 90.48 RCW by discharging pollution to state waters. Ecology contends that enforcement actions are not limited to those dairies which are significant contributors of pollution. Under Ecology's interpretation of Chapter 90.48 RCW, a dairy can be penalized for discharging a mere drop of a pollutant into groundwater. Ecology's argument is fatally flawed because it cannot be reconciled with RCW 90.64.030(6), which sets forth a higher standard of evidence in regard to dairies and a higher level of pollution to find an enforceable violation than for others. The legislature made a policy choice that, in cases involving a dairy farm, the dairy farm will only be subject to penalties if it is found to have violated RCW 90.48.080 and a significant contributor of pollution.

Ecology also argued that, even if it had the burden of establishing that the Doumas were significant contributors of pollution under RCW 90.64.030(6), it met this burden. According to Ecology, it made this determination before the actual violation at issue in this case occurred.

Ecology claims it made the determination that the Doumas' farm was a significant contributor of pollution based on unstated reasoning underlying a letter dated February 17, 1999 advising the Doumas that the Doumas met the criteria for a Concentrated Dairy Animal Feeding Operation (CDAFO) and requiring that the Doumas obtain a National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge Permit. CR, Exhibit R-21. The letter that Ecology relies upon, however, does not support Ecology's position that it met its burden of establishing that the Doumas were a significant contributor of pollution for the violation at issue in this case.

First, the letter Ecology is referencing simply states that Ecology has determined that the Doumas' farm must be covered by the Dairy Farm NPDES and State Waste Discharge Permit. *See* CR,

Exhibit R-21. While the letter does mention that during the site visit of December 31, 1998, Ecology advised the Doumas that their dairy met the definition of a CDAFO, the letter itself does not even list the criteria for such a designation or why the Doumas' farm meets designation under RCW 90.64.020. CR, Exhibit R-21.

Ecology also argued that the February 17, 1999 letter was a determination that the Doumas' farm was a CDAFO and it was an appealable decision which the Doumas failed to appeal. The Doumas had no objection to being covered by the NPDES permits. Certainly, there was nothing in that letter to suggest as Ecology now argues that in all potential, future enforcement actions, the Doumas' farm would no longer be under the protection from penalties provided RCW 90.64.030(6).

Simply because Ecology stated that the Doumas needed a NPDES permit (but did not state that such a determination was appropriate only if the Doumas' farm was a significant contributor of pollution) back in December of 1998 does not mean that the Doumas were a significant contributor of pollution for the alleged violation that occurred and was litigated in this case. The requirement that a dairy

farm is not subject to enforcement unless it is determined to be a significant contributor of pollution must correlate to the alleged violation and not a prior incident.

Ecology chose not to conduct any water tests on nearby groundwater or surface water for some unexplained reason. Perhaps that reason is that they knew the tests would not produce the results they desired. To determine whether a violation occurred, there must be actual water quality tests, photographs, or other pertinent information that the dairy farm was a significant contributor of pollution.⁴ Given that Ecology conducted no water quality tests or offered no photographs showing pollution entering ground or surface water, the Doumas cannot be determined to be a significant contributor of pollution as required by RCW 90.64.030(6) and therefore are not subject to the enforcement provisions upon which Ecology relies.

II.

THE BOARD'S DECISION ON THE PENALTY WAS ARBITRARY AND CAPRICIOUS

The Board's Decision reduced the \$53,000 penalty to \$46,500 and suspended \$10,000 of the \$46,500 penalty on the condition that the

⁴ While Ecology did submit photos showing manure in the trench, there were no photos introduced into the record showing the manure entering any surface water.

Doumas obtain technical assistance to review their dairy nutrient practices and implement any recommendations, and do not have any water quality violations for a period of two years from March 30, 2005. Decision at 21. Although reducing and suspending a portion of the penalty was a step in the right direction, the Board's decision on the reasonableness of the remainder of the penalty is arbitrary and capricious. The Superior Court's affirmation of the Board's decision suffers from the same defect.

RCW 90.48.144 provides:

The penalty amount shall be set in consideration of the previous **history** of the violator and the **severity** of the violation's impact on public health and/or the environment in addition to other relevant factors.

(emphasis added).

The Board interprets this statute by using three factors it considers when evaluating the reasonableness of a penalty: (1) the nature of the violation; (2) the prior history of the violator; and (3) the remedial actions taken by the penalized party. *Kaiser Aluminum and Chemical Corp. v Ecology*, PCHB No. 99-121 & 99-135 (2000); *Deskins Farms v. Ecology*, PCHB No. 98-073 (1998). The purpose of civil penalties is to influence behavior, promote compliance and to deter future violations, both by the violator and by others in the same occupation. *Lundvall v. Ecology*, PCHB 86-91 (1987); *Coastal Tank Cleaning v. Ecology*, PCHB 90-61 (1991).

Actions taken to remedy a problem after a discharge has occurred can be properly considered in determining the appropriate amount of a penalty. *Henry Bosma Dairy v. Ecology*, PCHB 94-121 (1995). In *Bosma*, the Board held that these purposes are furthered where the dairy farmer fully complied with the law as soon as possible after the violations were noted. *Id* at 5.

Applying the first criteria for assessing a penalty, the Board was required to look to the nature and in the words of RCW 90.48.144, the severity of the violation. The Board's Decision analyzing the nature of the violation in this case relied upon incorrect assumptions by the Board. Indeed, the Board's conclusions wrongly suggest that the facts do not show that the Doumas were acting in response to an emergency when they created emergency temporary additional manure storage until the rains subsided. Decision at 18. At the time, however, it was an emergency. The evidence was undisputed that had the Doumas not taken the action for which they were penalized at that time, the manure lagoons would have overflowed into a stream.

The Decision also unfairly states, "[i]n part, the situation was one of the Doumas' own making" because recommendations in the farm plan to prevent the barn roof from filling up the manure lagoons were not fully implemented. Decision at 18. First of all, there is no evidence that had the management plan been fully implemented, this would have prevented

the manure lagoons from being in danger of overflowing. There was no testimony that this one reference to the barn roof made any difference during this unprecedented rainfall. Furthermore, the undisputed evidence is that seventy percent of the management plan had been implemented at the time of the incident. Indeed, only one roof was still draining to the manure lagoons. Decision at 6.

The Decision states that, even if this case presented an emergency, this was undercut by the failure to inform Ecology, the Department of Natural Resources, or another state agency of the situation. Decision at 18. Absent in the Decision, however, is citation to any requirement that the Doumas notify Ecology, let alone another state agency, in this type of situation. Without any legal support for this argument, this basis for the Board's decision is unsupported. The fact that the Doumas had not notified Ecology of the situation should not matter in determining the amount of the penalty since there was no legal requirement that the Doumas notify Ecology.

More importantly, the Board should have focused on the seriousness of the violation for reviewing the appropriateness of the penalty. The Board's review of the severity of the violation was perfunctory and did not adequately address the issue of the severity of the violation. Ecology set the gravity portion of the penalty at \$40,000 and

the Board suspended \$10,000 on the condition that the Doumas obtain technical assistance to review their dairy nutrient practices and implement any recommendations, and do not have any water quality violations for a period of two years from March 30, 2005. Decision at 21. The Board reasoned that this component of the penalty could have been higher if a penalty was assessed for each of the 69 days the dairy waste remained in the trench. Decision at 19. The Board's analysis is flawed because this is true in all cases where the maximum penalty has not been imposed. Just because an alleged violator was not given the maximum penalty does not mean the penalty is reasonable.

The Board's analysis is incomplete because it glosses over the importance of knowing the seriousness of the violation. Because Ecology conducted no water quality sampling, no one will ever know what the severity of the supposed violation's impact on public health, and/or the environment, if any, was. The Board recognized that the extent to which groundwater entered the trench was unknown, but that some seepage had occurred.

The solids in dairy waste can settle to the bottom of a storage area and have a sealing effect, but it is unknown to what extent this occurred in the trench. The sealing effect was minimized in part because solids were filtered out of the dairy waste pumped to the trench, which meant there were fewer solids to create a seal. The seal forms over a period of days as solids gradually settle out. Thus, during the first few days when the dairy waste was in

the trench, a seal was not yet formed, which resulted in dairy waste seeping into the groundwater.

Id. at 8. However, the Board should have recognized this in its analysis and reduced the penalty accordingly.

The inappropriate harshness of the penalty in this case is evident from reviewing other similar cases. The Board has reduced a \$43,000 penalty issued by Ecology to \$20,000 in a case involving a dairy farm's manure lagoons that were full and contaminated a creek based on actual water samples. *Dale Deboer DBA Borderview Dairy v. Ecology*, PCHB No. 99-107 (2000). Unlike the present case, that farm had a history of past water quality violations.

Similarly in *Amberson Egg Farm v. Ecology*, PCHB No. 99-029 (1999), Ecology issued a fine of \$21,000 to a farm after an inspector found there was an excessive accumulation of chicken manure between the barns and numerous other locations on the property which contaminated a pond. Unlike this case, water sampling confirmed very high concentrations of fecal coliform in the discharges. The Board reduced the penalty to \$10,000 and suspended it in its entirety on the condition that the farm not violation the provisions of the Water Pollution control Act for a year. The trial court reinstated the \$21,000 penalty, but then suspended \$11,000, leaving a \$10,000 penalty for manure entering a surface water body, a pond. *See also*

Hallberg v. Ecology, PCHB NO. 99-095 (2000) (\$2000 fine assessed by Ecology reduced by Board to \$500 and suspended if no further violations for a year); *Bouma Farms, Inc. v. Ecology*, PCHB 00-023 (2000) (\$8,000 fine assessed by Ecology reduced to \$1,000); *Two Bobs Dairy v. Ecology*, PCHB No. 99-096 (2000) (\$12,000 penalty assessed by Ecology reduced to \$8,000 of which \$4,000 was suspended despite previous enforcement action against farm); and *Tevelde*, PCHB No. 99-197 (\$8,000 fine imposed by Ecology reduced to \$4,000 by Board). The fact that the penalty assessed in this case is alarmingly higher than these similar cases is even more troubling given the fact that the violations in those cases were all supported by water samples where the extent of pollution could be quantified.

Moreover, while the Board did reduce the economic benefit portion of the penalty from \$13,000 to \$6,500, the penalty should have been further reduced. Decision at 19, 21. In applying the penalty matrix, Ecology staff included for their estimate of \$13,000 for the avoided cost of hiring someone to pump the manure as an “economic benefit” for which the Doumas should be penalized. While the Board properly recognized that the \$13,000 was “twice as high as it should have been,” the Board wrongly concluded that the Doumas were not entitled to any credit for funds spent in constructing the trench or having the dairy waste pumped. Decision at 19. The purpose of the economic benefit factor is to prevent a

situation where there is a financial incentive to pollute. However, this must take into account the **net** savings, if any. The \$6,500 in this case was not a net economic benefit since the Doumas spent thousands of dollars building the trench, pumping the manure and filling in the trench. Indeed, the evidence showed that the Doumas paid a pumper \$3,910. The economic benefit enhancement to increase the penalty should only be the difference between money saved and money spent.

Second, the Board was required to consider the prior history of the violator. It is undisputed that the Doumas have never been penalized for violating any water quality rule, regulation or standard. Decision at 6. Moreover, the Doumas have always been immediately responsive to warnings or concerns about manure spills by the Department of Ecology. The part of the Decision reviewing the reasonableness of the penalty never discusses that this is the first time the Doumas had been penalized. The Board should have taken this into consideration and reduced the penalty accordingly.

Third, the Board was required to consider the remedial actions taken by the penalized party. The Decision states that the Doumas did not take remedial measures for over two months, but this mischaracterizes undisputed facts. Decision at 18. The Decision fails to mention that as soon as the Doumas were notified of the possible violation, they

immediately took steps to remove the manure. There is no dispute that the fields in the area were wet and unavailable for spreading manure during that time. Indeed, the Board had previously recognized in another case the problem with spreading manure in wet conditions. *Tevelde*, PCHB No. 99-197. The Doumas removed the manure as soon as the fields were dry so that they could accept manure without contaminating groundwater.

The Decision also fails to acknowledge that the Legislature intended to focus more on bringing dairies into compliance than on issuing penalties. For a violation of water quality laws that is a first offense for a dairy producer, the penalty may be waived to allow the producer to come into compliance with water quality laws. The department shall record all legitimate violations and subsequent enforcement actions. RCW 90.64.030(8).

This statute was quoted by the Board in *Bouma Farms, Inc.*, PCHB 00-023. If the Court were to uphold the violation, the penalties should be waived as indicated in RCW 90.64.030(8). The Board has explained that the “statute indicates a legislative intent to focus initially on obtaining dairy compliance, rather than on imposing penalties.” *Bouma Farms, Inc.*, PCHB 00-023. The Board erred in failing to consider that statute in assessing the penalty in this case.

The penalty in this case was unreasonable based on the severity of the violation (only evidence that a small amount of seepage ended up in the water), the Doumas had never been penalized in the past for water violations, and the Doumas immediately took action to remedy the situation after being notified by Ecology. Based upon other Board decisions, the penalty imposed in this case was arbitrary and capricious.

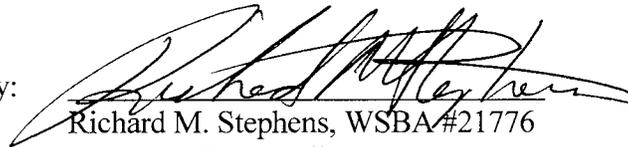
CONCLUSION

For the foregoing reasons, the Doumas respectfully request that the Court reverse the Superior Court's and the Board's decisions or in the alternative, the Court remands to the Board to make a determination on an appropriate penalty.

RESPECTFULLY SUBMITTED this 6th day of July, 2007.

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Attorneys for Appellants

DECLARATION OF SERVICE

I, Linda Hall, declare: I am not a party in this action. I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP of Bellevue, Washington.

On July 6, 2007, a true copy of Appellants' Opening Brief was placed in envelopes, which envelopes with postage thereon fully prepaid were then sealed and deposited in a mailbox regularly maintained by the United State Postal Service in Bellevue, Washington addressed to:

For State of Washington, Department of Ecology:

Ronald L. Lavigne
Office of Attorney General
Ecology Division
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For PCHB:

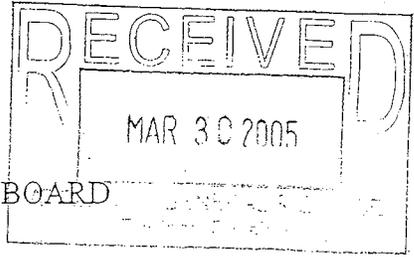
Bruce L. Turcott
Assistant Attorney General
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Olympia, WA 98504-0100

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 6th day of July, 2007 at Bellevue, Washington.



Linda Hall

APPENDIX A



BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

HERM DOUMA, MIKE DOUMA, MJD
FARMS L.L.C., and RICHARD M.
STEPHENS,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 00-019

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

This is an appeal of a civil penalty issued to Appellants Herm Douma, Mike Douma, and MJD Farms LLC ("Doumas") by Respondent Department of Ecology ("Ecology") based on events that occurred in the spring of 1999. The Doumas appealed the civil penalty to the Board in 2000. The Board dismissed the appeal for failure to timely file the appeal. Douma appealed the Board's dismissal to Whatcom County Superior Court, which reversed the Board's dismissal and remanded the matter to the Board for a hearing on the merits.

The Board held a hearing on the merits on December 20, 2004. Richard M. Stephens of Groen Stephens & Klinge represented Douma. Ronald L. Lavigne, Assistant Attorney General, represented Ecology. The Board consisted of Bill Clarke, Presiding, William H. Lynch, Chair, and David W. Danner. Betty J. Koharski of Gene Barker and Associates provided court reporting services. The Board received sworn testimony of witnesses, exhibits, and argument on behalf of the parties. Having fully considered the record, the Board enters the following:

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

PCHB NO. 00-019

(1)

1 FINDINGS OF FACT

2 [1]

3 The Doumas operate a dairy and beef cattle ranch with approximately 1,200 acres of
4 owned and leased land and over 2,000 cows near Custer, Washington, in Whatcom County.
5 Waste from dairy cows is collected and stored in manure lagoons until it is applied to field crops
6 such as corn and pasture grass during the growing season. Actively-growing field crops use the
7 dairy waste as fertilizer. In the end of 1998 and beginning of 1999, the area around the
8 Doumas' dairy received higher than normal precipitation. This caused the Doumas' manure
9 lagoons to fill more quickly than normal. This phenomenon also occurred at other dairies in the
10 area. The Doumas felt that the manure lagoons might overflow, causing dairy waste to enter
11 nearby surface waters including Dakota Creek. To prevent an overflow, the Doumas attempted
12 to increase the storage capacity of the manure lagoons by raising the height of the lagoon walls,
13 but could not do so because the softness of the dirt in the lagoon walls prevented earthmoving
14 equipment from moving up the sides of the lagoon walls. *Testimony of Mike Douma; Testimony*
15 *of Stephen Swope; Testimony of Andrew Craig.*

16
17 [2]

18 The Doumas then hired an excavation company to construct an unlined trench on wooded
19 land adjacent to the Doumas' dairy. Washington State Department of Natural Resources
20 ("DNR") managed the land and leased it to the Doumas. Based on photographs presented to the
21 Board, it appears that the wooded area is slightly higher in elevation, by a few feet, than the
surrounding fields. The Doumas' excavation contractor constructed the trench on or about

1 February 25, 1999. The trench was rectangular in shape, with four sides each approximately 550
2 feet long. The trench varied in width between 5 and 10 feet wide, and was 3 to 6 feet in depth.
3 After the trench was constructed, approximately 500,000 gallons of dairy waste were pumped
4 from the manure lagoons into the trench, a volume roughly equal to 10 days of dairy waste
5 production at the dairy. *Testimony of Mike Douma; Ex. R-3.*

6 [3]

7 After the dairy waste was pumped into the trench, the Doumas took no further action
8 related to the dairy waste in the trench during February or March of 1999. In late April, DNR
9 was informed by an anonymous third party of the manure trench and initiated an inspection.
10 DNR contacted Ecology on May 3, 1999. Ecology inspectors Mark Kaufman and Andrew Craig
11 inspected the site on May 5, 1999. *Testimony of Patrick Hennessey.*

12 [4]

13 The parties disagree on the content of conversations that occurred between the Doumas
14 and Kaufman and Craig during the May 5, 1999, inspection. Craig testified he recalled Mike
15 Douma admitting that the trench had been constructed in the wooded area rather than in an open
16 area in order to conceal it from aerial view. Mike Douma testified that he did not admit that the
17 trench was constructed in the wooded area to conceal it from view, or that if he said something
18 of that nature that it was not a serious statement. Mike Douma testified the trench was
19 constructed in the wooded area because it was slightly higher than other areas of the farm, and
20 was known as one of the drier places on the farm based on conversations he had with a
21 subcontractor who did field work for the Doumas. The Board makes factual findings based on a
preponderance of evidence standard. WAC 371-08-485(2). The Board finds it more likely than
not that the Doumas did not admit that the trench was constructed in the wooded area to conceal

1 it. This type of admission is highly unlikely given the working relationship between the Doumas
2 and Ecology and that it would have been made in the context of an enforcement situation.

3 [5]

4 Kaufman and Craig, accompanied by the Doumas, inspected the trench area. Craig dug a
5 hole approximately six to twelve inches deep near the trench with his boot. The hole gradually
6 filled with water. Based on this, Craig concluded that the water table was at the level of the
7 dairy waste in the trench, and that the dairy waste in the trench came in contact with
8 groundwater. The level of the groundwater table during Ecology's May 1999 inspection of the
9 trench was likely lower than the groundwater table level in February 1999 when the waste was
10 pumped into the trench. Consistent with orders from Ecology, the Doumas had the dairy waste
11 pumped out of the trench and applied to nearby fields on May 7 and 8, 1999. *Testimony of
Andrew Craig; Testimony of Mike Douma.*

12 [6]

13 On May 21, 1999, Ecology issued a Notice of Violation to the Doumas. The Doumas
14 responded through correspondence from their attorney Richard M. Stephens on June 21, 1999,
15 explaining the circumstances of the incident. On August 25, 1999, Ecology issued a Notice of
16 Penalty in the amount of \$53,000. On September 9, 1999, the Doumas submitted an application
17 for relief from the penalty, again through their attorney, which Ecology denied. The Doumas'
18 appeal to the Board followed. DNR also took enforcement action against the Doumas for
19 digging the trench and storing dairy waste on DNR property in violation of the terms of the lease
20 between DNR and the Doumas. DNR's enforcement action was eventually settled for \$9,500
21 based on the value of trees harmed by the Doumas. *Ex. R-8; Ex. R-10; Ex. R-11; Ex. R-12; Ex.
R-13.*

1
2 [7]

3 Ecology calculated the \$53,000 penalty based on a penalty matrix used to determine the
4 gravity of the violation and economic benefit. The gravity matrix includes seven factors, each of
5 which can be scored from zero to three points based on the nature of the alleged violation.

6 Ecology calculated the point total for the Doumas as 12 total points, based on one point for a
7 possible public health risk; two points for environmental damage; three points for a willful or
8 knowing violation; three points for improper operations or maintenance; and three points for
9 economic benefit from noncompliance. Under Ecology's penalty matrix, a point total of 12
10 resulted in a penalty of \$4,000. Ecology multiplied the \$4,000 penalty by 10, because 10 days'
11 manure production was pumped into the trench, for a total gravity penalty of \$40,000. *Ex. R -10*

12 [8]

13 Ecology then added \$13,000 in economic benefit to the gravity penalty for a total penalty
14 of \$53,000. The economic benefit penalty amount was based on Ecology estimates of what the
15 Doumas saved by avoiding having the dairy waste hauled and field applied. The Doumas paid
16 for excavation of the trench and pumping from the trench. The receipts provided by the Doumas
17 do not clearly establish the type of work, date of work, and amount paid, though there is no
18 dispute that the Doumas did pay for excavation and pumping services. *Ex. R-10; Testimony of*
19 *Andrew Craig; Testimony of Mike Douma, Ex. A-4.*

20 [9]

21 In the period prior to and during construction of the dairy waste trench, the Doumas had a
number of dealings with Ecology, the Environmental Protection Agency (EPA), the Natural
Resource Conservation Service (NRCS), and the Whatcom County Conservation District on
water quality and farm management issues. A number of these agency interactions focused on
dairy waste management procedures. In 1995, the NRCS and Conservation District developed a

1 farm plan with the Doumas with a number of recommendations, including ensuring that gutters
2 diverting roof water from barns be connected to ditches rather than to manure lagoons to prevent
3 manure lagoons from filling up with rainwater. By the fall of 1998 and spring of 1999, the roof
4 water from at least one barn was still draining to the manure lagoons. *Ex. R-2.*

5 [10]

6 The Doumas also received letters from Ecology and EPA regarding dairy waste
7 management issues, but were not issued civil penalties prior to the trench incident. During
8 February and March 1999, after the Doumas had constructed the trench and pumped dairy waste
9 into it, but prior to Ecology and DNR having knowledge of these actions, the Doumas
10 corresponded with Ecology on a Notice of Violation for a high fecal coliform discharge in late
11 1998 from the dairy to a nearby surface water. As part of this, Ecology sent the Doumas a letter
12 informing the Doumas that their dairy was being designated as a Concentrated Dairy Animal
13 Feeding Operation, and that they must seek coverage under Ecology's Dairy Waste General
14 Discharge Permit. Ecology received an application for NPDES Permit coverage from the
15 Doumas on March 2, 1999. The application indicated 70 percent of the dairy waste management
16 plan had been implemented. At that time, Mike Douma was unsure of what parts of the plan had
17 not been implemented and provided 70 percent implementation as an estimate. *Ex. R-14; Ex. R-*
15; Ex. R-16; Ex. R-20; Ex. R-21. Testimony of Andrew Craig; Testimony of Mike Douma.

18 [11]

19 Testimony on groundwater issues concerned whether the dairy waste in the trench
20 actually came into contact with groundwater. The soils in the area of the trench consist of sand,
21 gravel, fines, and organic matter. This soil type is permeable. Ecology has previously conducted
technical analysis of manure lagoons in the Lynden Terrace area, which includes the Doumas'
property. In this area, groundwater levels in the area are high during the winter and spring. In

1 the spring of 1999, saturated fields demonstrated the high groundwater levels in the area. The
2 groundwater level was likely within a few feet of the surface. *Testimony of Dave Garland;*
3 *Testimony of Stephen Swope.*

4 [12]

5 During the period between trench construction and when the dairy waste was pumped
6 into the trench, groundwater did not seep into the trench. Ecology did not take groundwater
7 samples near the manure trench during or after the May 5, 1999, inspection. Groundwater
8 samples can be taken using a number of techniques, from relatively inexpensive hand augers or
9 geoprobes, to comparatively costly piezometers. During the May 5, 1999, inspection, Craig dug
10 a small hole near the trench with the heel of his boot. The hole filled with water. Appellants'
11 expert witness described this type of water as "surficial perching." The Board finds this
12 surficially perched water to be groundwater.

13 [13]

14 Dairy waste can contribute a number of different water pollutants, including fecal
15 coliform bacteria, chloride, and ammonia. Ammonia converts to nitrates. Fecal coliform will
16 not survive in groundwater for an extended period of time. Ecology took samples of the dairy
17 waste from the trench, and it had values of Total Nitrogen of 541 mg/L, fecal coliform of
18 110,000 colonies per 100 mL, and Nitrates of .06 mg/L. *Testimony of Andrew Craig; Testimony*
19 *of Stephen Swope.* The state standard for fecal coliform is 100 fecal coliform colonies per 100
20 ml of water. WAC 173-201A-030.
21

1
2 [14]

3 The precise groundwater level during February to May 1999, extent to which dairy waste
4 entered groundwater through the trench, and extent to which groundwater entered the trench is
5 unknown. However, both Ecology's and Doumas' technical witnesses testified that some
6 amount of dairy waste seeped both into groundwater and into surficially perched water. The
7 solids in dairy waste can settle to the bottom of a storage area and have a sealing effect, but it is
8 unknown to what extent this occurred in the trench. The sealing effect was minimized in part
9 because solids were filtered out of the dairy waste pumped to the trench, which meant there were
10 fewer solids to create a seal. The seal forms over a period of days as solids gradually settle out.
11 Thus, during the first few days when dairy waste was in the trench, a seal was not yet formed,
12 which resulted in dairy waste seeping into groundwater. *Testimony of Dave Garland; Testimony
13 of Stephen Swope.*

14 [15]

15 The volume of dairy waste in the trench in May 1999 was about equal to the volume
16 pumped into the trench in February 1999. This does not mean, however, that no dairy waste
17 seeped from the trench during that 10-week period. This is because the volume of liquid in the
18 trench varied based on a number of factors, including seepage loss from the trench into
19 groundwater, seepage gain from groundwater entering the trench, evaporative loss, and
20 precipitation. *Testimony of Stephen Swope; Testimony of Andrew Craig; Testimony of Mike
21 Douma.*

[16]

During the spring of 1999, other dairies in the area contacted Ecology or the NRCS
regarding possible manure lagoon overflows due to high precipitation. Solutions to this

1 problem included land application of dairy waste and sharing of lagoon space. The Doumas did
2 not contact Ecology regarding any potential emergency situation or possible overflow of the
3 manure lagoons. The Doumas also did not contact Ecology prior to or after the trench in the
4 woods was constructed and dairy waste pumped into the trench. The Doumas did not contact
5 Ecology because Mike Douma felt Ecology was not helpful and had an adversarial relationship
6 with Ecology. *Testimony of Andrew Craig; Testimony of Mike Douma; Ex. A-2.*

7 [17]

8 The legal issues before the Board in this appeal are:

- 9 1. Whether the Appellants violated Chapter 90.48 RCW and/or the federal Clean
10 Water Act, Section 402?
- 11 2. Whether the Appellants' actions were justified based on emergency conditions
12 caused by Acts of God or justified in order to comply with federal law, or
13 justified under any other basis?
- 14 3. Whether the amount of the penalty is reasonable?

15 [18]

16 Any Conclusion of Law deemed to be a Finding of Fact is adopted as such.

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1 CONCLUSIONS OF LAW

2 [1]

3 The Board has jurisdiction over the persons and subject matter of this appeal pursuant to
4 RCW chapters 43.21B, 90.48, and 90.64.

5 [2]

6 The Board reviews the issues raised *de novo*. WAC 371-08-485(1). Ecology bears the
7 burden of proving by a preponderance of the evidence that the violations occurred and that the
8 penalty is reasonable. WAC 371-08-485(2); WAC 371-08-485(3).

9 [3]

10 RCW 90.48.080 prohibits the discharge into waters of the state any substance that shall
11 cause or tend to cause pollution:

12 It shall be unlawful for any person to throw, drain, run, or otherwise discharge
13 into any waters of this state, or to cause, permit, or suffer to be thrown, run,
14 drained, allowed to seep or to otherwise discharge into such waters any organic or
15 inorganic matter than shall cause or tend to cause pollution of such waters
16 according to the determination of the department, as provided for in this chapter.

17 [4]

18 Any person who violates RCW 90.48.080 is liable for a penalty of up to \$10,000 per day
19 for each such violation. RCW 90.48.144.

20 [5]

21 A dairy farm that is found by the department to be a significant contributor of pollution,
based on actual water quality tests, photographs or other pertinent information is subject to the

1 enforcement provisions of Chapter 90.48 RCW, including civil penalties pursuant to RCW
2 90.48.144. RCW 90.64.030(3).

3
4 **APPLICABLE WATER QUALITY LAWS AND REGULATIONS**

5 [6]

6 The Doumas argue that a dairy cannot be subject to the enforcement provisions of
7 Chapter 90.48 RCW unless there is also a violation of Chapter 90.64 RCW, and further that a
8 violation based on groundwater quality cannot occur under Chapter 90.48 RCW unless a
9 violation of groundwater quality standards at WAC Chapter 173-200 is proven. The Doumas
10 contend Ecology has not met its burden of proving a water quality violation under RCW
11 90.64.030(6). Ecology responds that the Doumas did not list compliance with Chapter 90.64
12 RCW as an issue in this appeal and thus cannot raise it as an issue now. In the alternative,
13 Ecology argued that even if Chapter 90.64 RCW is applied to this appeal, that the actions at the
14 Doumas' dairy violate RCW 90.64, in addition to Chapter 90.48 RCW and Chapter 173-200
15 WAC.

16 [7]

17 Chapter 90.64 RCW is the Dairy Nutrient Management Act, passed by the Legislature in
18 1998. 1998 c 262 § 1. In passing Chapter 90.64 RCW, the Legislature recognized the
19 importance of the Washington's dairy industry and the need to develop industry-specific water
20 quality management, permitting, technical assistance, and enforcement measures. Enforcement
21 procedures are based both on Chapter 90.48 RCW, and on industry-specific procedures in the

1 Dairy Nutrient Management Act. For example, RCW 90.64.028(1) states “department actions
2 pertaining to water quality violations are appealable under chapter 90.48 RCW.” RCW
3 90.64.030(6) states that the civil penalty provisions of RCW 90.48.144 apply to water quality
4 violations at dairies. However, Chapter 90.64 RCW also provides exceptions specific to dairies
5 that do not exist in Chapter 90.48 RCW or other water quality laws. See RCW 90.64.010(18).
6 It is clear that Chapter 90.48 RCW provides the underlying authority for the enforcement
7 provisions referenced in Chapter 90.64 RCW. Thus, it would be improper to resolve a water
8 quality enforcement case involving a dairy without applying both the general water quality laws
9 in Chapter 90.48 RCW and the dairy-specific provisions in Chapter 90.64 RCW.¹ Thus, the
10 Board concludes that failure to specifically cite to Chapter 90.64 RCW in the list of issues does
11 not prevent the Board from considering it in this appeal.

12
13 **WATER QUALITY VIOLATION**

14 [8]

15 It is unlawful to cause the discharge or seepage of any organic or inorganic matter
16 causing pollution into the waters of the state. RCW 90.48.080. Waters of the state include
17 underground waters. RCW 90.48.020. Any person who violates RCW 90.48.080 is liable for a
18 penalty of up to \$10,000 per day for each such violation. RCW 90.48.144. Dairy waste is a
19 pollutant. There is no dispute that some amount of dairy waste seeped into groundwater from the
20
21

1 trench, and that groundwater more likely than not entered the trench. Therefore, the actions at
2 the Doumas' dairy constituted a discharge of pollutants into waters of the state under Chapter
3 90.48 RCW. Because the discharge was from a dairy, the Board then considers whether the
4 discharge was a violation under the Dairy Nutrient Management Act, Chapter 90.64 RCW.

5 [9]

6 RCW 90.64.030(6) provides:

7 A dairy farm that is determined to be a significant contributor of pollution based on
8 actual water quality tests, photographs, or other pertinent information is subject to the
9 provisions of this chapter and to the enforcement provisions of chapters 43.05 and 90.48
10 RCW, including civil penalties levied under RCW 90.48.144.

11 The Doumas argue that Ecology never properly determined that Douma was a
12 "significant contributor of pollution" and thus has not met its burden of proof that a water quality
13 violation occurred. Ecology responds that determining that a dairy is a significant contributor of
14 pollution is not a formal condition precedent to taking enforcement action under either Chapter
15 90.48 or 90.64 RCW, but that even if it were, such determination was made through its February
16 1999 letter to the Doumas regarding December 1998 water quality issues. See R-Ex. 21.

17 [10]

18 The Board has previously considered the Dairy Nutrient Management Act and found "a
19 legislative intent to focus initially on obtaining compliance, rather than on imposing penalties,"
20 while still authorizing Ecology "to take appropriate steps against polluters who fail to respond to

21 ¹ The Board considered a number of dairy water quality cases between 1999 and 2001, all of which involved
consideration of Chapter 90.64 RCW. See e.g., PCHB Nos. 99-094; 99-107; 99-098; 99-108; 99-096; 99-130; 01-
111.

1 the need for corrective actions, and to react to extreme situations ... “ *DeGroot Dairy v.*
2 *Ecology*, PCHB No. 99-094 (2000). The Dairy Nutrient Management Act does not establish a
3 process for making a formal determination that a dairy is a “significant contributor of pollution”
4 as a condition precedent to taking enforcement action. Rather, this phrase is consistent with the
5 statutory purpose of the act to provide technical and compliance assistance, while retaining
6 enforcement authority when necessary to address serious violations.

7 [11]

8 However, the act does include a limitation on what discharges from dairies constitute a
9 violation of the Dairy Nutrient Management, chapter 90.48 RCW, or chapter 173-201A WAC:

10 A discharge, including a storm water discharge, to surface waters of the state shall not be
11 considered a violation of this chapter, chapter 90.48 RCW, or chapter 173-201A WAC,
12 and shall therefore not be enforceable by the department of ecology or a third party, if at
13 the time of the discharge, a violation is not occurring under RCW 90.64.010(18).

14 RCW 90.64.030(9).

15 [12]

16 Thus, for a discharge from a dairy to constitute a water quality violation under RCW
17 90.64 and 90.48, it must be a violation under RCW 90.64.010(18). This provision provides that
18 a discharge of pollutants into waters of the state is a water quality violation

19 “except those discharges that are due to a chronic or catastrophic event, or to an upset as
20 provided in 40 C.F.R. § 122.41, or to a bypass as provided in 40 C.F.R. § 122.41, and that
21 occur when:

- (i) A dairy producer has a current national pollutant discharge elimination system permit with a wastewater system designed, operated, and maintained for the current herd size and that contains all process-generated wastewater plus average annual precipitation minus evaporation plus contaminated storm water runoff from a twenty-five year, twenty-four hour rainfall event for that specific location,

1 and the dairy producer has complied with all permit conditions, including dairy
2 nutrient management plan conditions for appropriate land application practices; or

3 (ii) A dairy producer does not have a national pollutant discharge elimination
4 system permit, but has complied with all of the elements of a dairy nutrient
5 management plan that: Prevents the discharge of pollutants to waters of the state,
6 is commensurate with the dairy producer's current herd size, and is approved and
7 certified under RCW 90.64.026;

8 In this case, subsection (i) is inapplicable because Douma did not have a current NPDES
9 permit at the time of the discharge.

10 [13]

11 A bypass is authorized only if the bypass was unavoidable to prevent loss of life, personal
12 injury, or severe property damage, there were no feasible alternatives, and notice of the bypass
13 was provided. 40 C.F.R. § 122.41(m)(4). Douma did not provide evidence that the requirements
14 for a bypass were met. In contrast to the course of conduct at the Douma dairy, other dairy
15 farmers in the area took steps to inform Ecology of lagoon capacity issues in an attempt to avoid
16 the necessity of a bypass. Even assuming a bypass was necessary, the presence of the dairy
17 waste in the lagoon for 69 days without notice to Ecology, and while being in the midst of water
18 quality permitting activities with Ecology, prevents Douma from meeting the bypass criteria.

19 [14]

20 A catastrophic event is defined as "a tornado, hurricane, earthquake, flood, or other
21 extreme condition that causes an overflow from a required waste retention structure." RCW
22 90.64.010(3). "Chronic" is defined as "a series of wet weather events that precludes the proper
23 operation of a dairy nutrient management system that is designed for the current herd size."
24 RCW 90.64.010(5). The increased rainfall during the winter of 1998 and spring of 1999 did not

1 constitute a catastrophic event. Assuming the wetter than normal period constitutes a chronic
2 event, the exception in statute only applies if there was both a series of chronic events and the
3 dairy producer "has complied with all of the elements of a dairy nutrient management plan." By
4 March 1999, Douma estimated only 70 percent of the plan had been implemented. Thus, the
5 exception contained in subsection (ii) cannot apply.

6 [15]

7 RCW 90.64.030(3) states that "actual water quality tests, photographs or other pertinent
8 information" provide the basis for enforcement under Chapter 90.48 RCW and including civil
9 penalties pursuant to RCW 90.48.144. In this case, while no actual water quality tests of the
10 groundwater were performed, there is no dispute that (1) dairy waste is or tends to cause
11 pollution; and (2) dairy waste entered groundwater. Photographs of the trench, information on
12 the nature and quantity of the dairy waste pumped into the trench, and testimony on the
13 interaction between dairy waste in the trench and groundwater all provide a basis for water
14 quality enforcement action. The Board concludes the discharge of dairy waste into the trench,
15 and the presence of the dairy waste in the trench for 69 days constituted the discharge of
16 pollutants into waters of the state. None of the exceptions in RCW 90.64.010(18) apply, and
17 thus the discharge was a violation under RCW Chapter 90.64 RCW.

18 [16]

19 The Doumas also argue that a violation under Chapter 90.48 RCW for groundwater
20 pollution cannot occur without finding a violation of the groundwater standards in Chapter 173-
21 200 WAC. Ecology's Notice of Violation (Ex. R-8), Recommendation for Enforcement Action

1 (Ex. R-10), Notice of Penalty Due and Incurred (Ex. R-11), and Notice of Disposition Upon
2 Application for Relief from Penalty (Ex. R-12) all state that the discharge constituted a violation
3 of both Chapter 90.48 RCW and Chapter 173-200 WAC. The appeal issues before the Board do
4 not include whether the Doumas violated a particular water quality standard. In this case,
5 Ecology did not take groundwater samples, but took samples of the dairy waste after it had been
6 in the trench for approximately two months.

7 [17]

8 Ecology assigned a lower score under the public health and environmental damage
9 criteria in the penalty matrix, resulting in a lower penalty amount, because it did not have
10 groundwater samples or other proof that state groundwater standards were violated. The Board
11 concludes this was appropriate. The Legislature has provided that water quality samples are a
12 preferred, though not exclusive, method of proof of water quality violations. RCW 90.64.030(3)
13 refers to the use of "actual water quality tests, photographs or other pertinent information" as the
14 basis for enforcement of water quality violations at dairies. Similarly, the Board has concluded a
15 violation of Chapter 90.48 RCW can occur without violation of a particular water quality
16 standard. See Cascade Ag Services, Inc., v. Ecology, PCHB No.03-182 (2004).

17 [18]

18 Most dairy water quality cases before the Board have involved accidental pollution of
19 surface waters, usually ditches near dairies. These cases typically involved water quality
20 samples taken by Ecology. In contrast, this is a unique case in which the discharge of dairy
21 waste was done knowingly, to groundwater, and for a duration of over two months before

1 discovery by Ecology. These factual differences, and the clear evidence that dairy waste did in
2 fact enter groundwater, result in Ecology meeting its burden of proof that a discharge of
3 pollution to state waters occurred. While Ecology also asserted violations of groundwater
4 quality standards in its orders and penalty documents, it did not meet its burden of proof that the
5 Doumas violated a specific groundwater quality standard.

6
7 **REASONABLENESS OF THE PENALTY**

8 [19]

9 The Board has three criteria it reviews in determining the reasonableness of a civil
10 penalty: “(1) the nature of the violation, (2) the prior history of violations, and (3) remedial
11 actions taken by the penalized party.” *Drohman v. ORCAA*, PCHB No. 04-120 (2005), citing
12 *U.S. Army v. Puget Sound Clean Air Agency*, PCHB No. 00-190, at 7 (2001).

13 [20]

14 While Douma claims to have been acting in response to an emergency situation, the facts
15 say otherwise. In part, the situation was one of the Doumas’ own making. Recommendations in
16 the farm plan to prevent barn roof water from filling up the manure lagoons were not fully
17 implemented. Second, even if the need to construct the trench and pump dairy waste into the
18 trench were emergency situations at the outset, the failure to inform Ecology, DNR, or other
19 agencies of the situation or take remedial measures for over two months undercuts the concept
20 that only emergency action was taken. Further, the construction of the trench, filling of the
21 trench with dairy waste, and letting the dairy waste remain in the trench for over two months all

1 coincided with a time period when the Doumas and Ecology were in contact regarding
2 permitting and compliance issues. The Doumas could have worked with Ecology and other
3 agencies, but chose not to.

4 [21]

5 The \$53,000 penalty assessed by Ecology had two components. The gravity portion of
6 the penalty totaled \$40,000. This component could have been higher, based on the maximum
7 penalty amount of \$10,000 per day, or if a penalty was assessed for each of the 69 days the dairy
8 waste remained in the trench. The economic benefit portion of the penalty totaled \$13,000.
9 Based on testimony on the costs of the having dairy waste pumped and removed from the
10 Doumas dairy, the Board concludes the \$13,000 economic benefit calculation was about twice as
11 high as it should have been. Thus, the Board reduces the economic benefit portion of the penalty
12 to \$6,500. The Doumas are not entitled to any credit for funds spent in constructing the trench or
13 having the dairy waste pumped.

14 [22]

15 The Board heard a number of appeals involving water quality penalties at dairies from
16 1999 – 2001. The resolution of the Doumas' appeal would have been part of this group of dairy
17 industrial civil penalty cases had it not be subject to appeals on procedural filing issues. The
18 consistent theme of those prior dairy cases was to base penalty amounts on the seriousness of the
19 conduct and violation, while being mindful of the state's efforts to reach compliance with water
20 quality requirements in the dairy industry. The Board is mindful that the purpose of civil
21 penalties is to influence behavior, promote compliance and to deter future violations, both by the

1 violator and by others in the same occupation. *Steensma v. Ecology*, PCHB No. 99-098 (2000),
2 citing *Robert V. Lundvall v. Department of Ecology*, PCHB 86-91 (1987); *Coastal Tank*
3 *Cleaning v. Department of Ecology*, PCHB 90-61 (1991).

4 [23]

5 It is clear that relationships between the Doumas and Ecology staff were not productive
6 during the time period in question. The need to develop cooperative relationships between the
7 dairy industry, technical assistance providers, and regulators was part of intent underlying the
8 adoption of the Dairy Nutrient Management Act. For some reason, the intentions of that law fell
9 short at the Doumas dairy in 1999 and 2000. Based on testimony to the Board regarding
10 compliance efforts at the Doumas' dairy, the Board concludes a portion of the penalty should be
11 suspended pending review of dairy waste management processes and absence of water quality
12 violations for a period of two years.

13 [24]

14 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

15
16 BASED ON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, THE
17 BOARD ENTERS THE FOLLOWING
18
19
20
21

ORDER

The \$53,000 civil penalty issued by Ecology is modified as follows:

1. The economic benefit component of \$13,000 is reduced to \$6,500.
2. Of the \$40,000 gravity component, \$10,000 is suspended on the following conditions:
 - (a) The Doumas shall obtain technical assistance consistent with the procedures of Chapter 90.64 RCW to review its dairy nutrient management practices and implement any recommendations; and
 - (b) The Doumas shall not have any water quality violations for a period of two years from the date of this order.

Dated this 30th day of March, 2005

POLLUTION CONTROL HEARINGS BOARD

Bill Clarke

BILL CLARKE, PRESIDING MEMBER

William H. Lynch

WILLIAM H. LYNCH, CHAIR

David W. Danner

DAVID W. DANNER, MEMBER