

CROSS-RES/APP REPLY

VSC

No. 35864-6II

(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' REPLY BRIEF

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ORIGINAL

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RESPONSE TO ECOLOGY'S STATEMENT OF THE CASE AND CHARACTERIZATION OF TESTIMONY

The Doumas file this brief response to Ecology's characterization of the facts of this case, both in its Statement of the Case and in later discussions of facts.

Faced with impending manure runoff into Dakota Creek, the Doumas found the only dry spot on their farm for placing the excess manure. Ecology suggests that the Doumas should have contacted Ecology during this heavy rainfall event instead of deciding to "take matters into their own hands." Amended Brief of Ecology at 3, 26. Of course, this dairy is the responsibility of the Doumas and, at the time, they took actions which would reduce the potential for manure runoff into waters of the state.

Ecology claims it was willing to work amenably with other dairies in this time frame. Ecology's brief on this point cites the testimony of Ecology inspector, Andrew Craig. Amended Brief of Ecology at 20. Mr. Craig asserts how easy he is to work with. However, his testimony was directly contradicted by that of Mike Douma. *See* Trans. at 160-61 (threatening to put the Doumas in jail).¹ The PCHB recognized the

¹ Mike Douma explained concerns about being fined, in trouble and in the newspaper as the reason for not letting the manure lagoon overflow or put on wet field which they expected to be dry and legal soon. Trans. at 153.

adversarial relationship between the Doumas and the two Ecology inspectors assigned to this area. PCHB Order, at 9.

Additionally, Mr. Craig's testimony should be considered, as did the PCHB, in light of all of his testimony. He asserted that the Doumas had admitted to placing the manure on the forested property leased from the Department of Natural Resources (DNR) in an effort to conceal their actions. Trans. at 67-68.² This supposed admission came after Ecology inspectors had specifically warned the Doumas that, if there was an intent to conceal, it would be dealt with more seriously. Trans. at 114-15. This supposed admission was flatly rejected by the Doumas and it defies common sense to suggest that one would claim they intended to conceal after being warned that intent to conceal would result in more severe consequences. Trans. at 162. The PCHB believed the Doumas and disbelieved Ecology inspector Craig. PCHB Order at 3-4.

Ecology also suggests that the emergency was of the Doumas' own making because they failed to remove the water coming from barn gutters to the manure lagoon system. While technically true, the undisputed

² The reality is the treed location was selected because it was a higher elevation, and therefore, drier, than all the other land on the Doumas' farm. PCHB Order at 3; Trans. at 156-57 (treed area was 6-8 feet higher than fields; see also Exhibit R-3 and A-5 (pictures showing higher level); *see also* testimony of Stephen Swope, Trans. at 194-95 (impossible to dig trench if saturated).

testimony is that it was only the gutter on one small barn which was still connected to the manure lagoons. Trans. at 169-70. This does not detract from the unprecedented nature of the rain event in early 1999.

Given the history of Ecology's treatment of the Doumas, both prior to enforcement and in the litigation of this case, it is fortunate for both the Doumas and the public that the Doumas' handling of waste is now regulated by the Department of Agriculture, instead of Ecology. Trans. at 172. Because of the circumstances in 1999, they built an extra lagoon which at the time of the hearing, four of five years later, had never been used. Trans. at 168-69. Having been originally fined \$53,000 and having spent far more than that in attorneys' fees and expert witness costs to defend themselves up to this point, the Doumas contend the purpose of enforcement to promote compliance has been achieved, even though the legal basis for enforcement in this case is not present. The present case results in a strong motivation for the Doumas to never again move manure without some regulatory agency's approval. Nevertheless, the propriety of the penalties in this case must be based on the law and not the fact that this enforcement action, whether affirmed or reversed, has achieved what Ecology believes to be compliance.

I.
THE DECISIONS BELOW MUST BE REVERSED
BASED ON RCW 90.64.030(6)

RCW 90.64.030 deals with the applicability of the water pollution laws to dairies. This chapter provides special rules in the enforcement of water quality regulations in the dairy context. RCW 90.64.030(6) precludes the Doumas from being assessed penalties in this case because it requires a prior determination that the Doumas are a “significant contributor of pollution” which must be based on some form of hard data, rather than mere opinion.

Ecology responds with three arguments. First, it argues that Subsection (6) does not require any determination regarding significance. Second, it claims that it made a determination that the Doumas were a significant contributor of pollution when it told them they needed to get an NPDES permit. Third, it claims that the Doumas could have been determined to be a significant contributor of pollution in the present case. Each of these arguments is unpersuasive.

As part of its first argument, Ecology notes that Subsection (9) of RCW 90.64.030 provides that certain surface water discharges are not considered violations as long as there is no violation of permit requirements. By giving that protection to dairies (not applicable here because there was no surface water discharge), Ecology argues that this must be the only statutory

protection for dairies. Ecology's conclusion does not follow from its premise.

It is clear that Subsection (6) of RCW 90.64.030 is a separate, independent protection of dairies from enforcement of water pollution laws. The Legislature did not tie Subsection (6) to Subsection (9) or make one dependent upon the other. Clearly, if a dairy meets the criteria in Subsection (9), the dairy is not subject to any enforcement by Ecology. Similarly, if a dairy has not been determined to be a significant contributor of pollution, it is not subject to civil penalties because of Subsection (6).

To further this argument, Ecology notes that the Legislature did not use the word "only" or state that "only a dairy determined to be a significant contributor of pollution" is subject to penalties. Amended Brief of Ecology, at 11. In Ecology's view, the Legislature is merely stating that dairies determined to be significant contributors of pollution can be subject to penalties and that ones which are not so determined are equally subject to the same penalties. While the argument is grammatically clever, Ecology's "reasoning" renders this statutory language meaningless, a result this Court should be refused to reach. *Truly v. Heuft*, 138 Wn. App. 913, 922, 158 P.3d 1276 (2007).

Furthermore, Subsection (10) provides a context for both of the protections of dairies from civil penalties.

As provided under RCW 7.48.305, agricultural activities associated with the management of dairy nutrients are presumed to be reasonable and shall not be found to constitute a nuisance unless the activity has a substantial adverse effect on public health and safety.

RCW 90.64.030(10). Agricultural activities are presumed reasonable unless there is a “substantial adverse effect on public health.” *Id.* Water quality violations outside the dairy context do not require any level of substantiality before being subject to enforcement.

Second, the notion that Ecology’s notice that the Doumas needed to get an NPDES permit (Exhibit R-21) constitutes the necessary determination fares no better. While the decision to require an NPDES permit may be predicated upon a determination that the dairy is a significant contributor of pollution and that decision could have been appealed, those two factors should not bind the Doumas in this case. The Doumas did not appeal the NPDES permit requirement, because they have no opposition to getting such a permit. *See Trans.* at 141 (Doumas promptly filed for a permit). That does not mean that they are agreeing that they are substantial contributors of pollution and agreeing that they can be moved from the category of dairies that cannot have penalties imposed against them to the category that can.

What Ecology is really arguing is that the Doumas waived any rights to challenge whether they were a significant contributor of pollution under the statute or that its prior unappealed notice of need for a permit with an

unstated assumption that they have been so determined should act as a collateral estoppel bar in this case. First, not appealing the NPDES permit requirement is not a knowing and intelligent waiver of anything other than a right to challenge whether a NPDES permit requirement should be imposed. It is not a waiver of any right to contest unstated considerations of Ecology that supposedly provided a basis for that decision.

Nor can the Doumas be collaterally estopped from challenging whether they are a significant contributor of pollution solely because of Ecology's NPDES letter.

Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice. To that end, we hold it is not generally appropriate when there is nothing more at stake than a **nominal fine. There must be sufficient motivation for a full and vigorous litigation of the issue.**

Hadley v. Maxwell, 144 Wn.2d 306, 315, 27 P.3d. 600 (2007) (emphasis added). Unlike *Hadley*, there was no fine at all in connection with the letter notifying the Doumas they needed a NPDES permit, merely a requirement that they come under the NPDES jurisdiction with which the Doumas were perfectly content. Any underlying "determination" that they were significant contributors of pollution was made for different purposes than are at issue in the present case. The Doumas obviously were not motivated to appeal the letter and cannot be estopped from arguing that they are exempt from penalties under RCW 90.64.030(6).

Next, Ecology falsely accuses the Doumas of arguing that “water quality tests are necessary before a dairy can be determined to be a significant contributor of pollution.” Amended Brief of Ecology at 15. The statute requires the determination that one is a substantial contributor of pollution in RCW 90.64.030(6) be based on water quality tests, photographs, or other pertinent information. Because of this specific statutory language for making this determination, in order for it to have any meaning, the reference to the type of evidence must require something greater than what is required for simply proving an illegal discharge. Clearly, the context of referring to water quality tests or photographs (presumably of discharges into state waters) is the type of evidence which allows a determination (and review by the Court) whether or not the contribution to pollution is **substantial**.

In the present case, there are photographs, but they are not showing pollution entering surface or ground waters. There are tests, but they are tests of manure, not surface or ground water. Here, there is no hard evidence of pollution, only expert opinion (from both sides) that some small amount of manure seeped through into ground water. This evidence, while sufficient to show a violation generally, is insufficient to show the Doumas’ contribution to pollution is *significant*.

Ecology complains that it could not obtain ground water samples because it learned the material was placed in a trench months after it was placed. This provides no explanation of why Ecology did not conduct testing of ground water as it typically does. Instead, it tested samples taken out of the manure itself, which, of course, would exceed any standard for fecal coliform. Plus, the Ecology inspectors “dug into the soils” with the heel of their boot near the trench and found what they thought was the water table, but was really water perched near the surface. Trans. at 42; 196.

Nevertheless, even though they believed it was ground water, they never bothered to sample that water. A sampling of the manure itself would guarantee high fecal coliform levels; a sample of water nearby might not.

Ecology argues that only one of the factors for determining whether a dairy is a significant contributor of pollution relates to the amount of waste reaching state waters. Amended Brief of Ecology at 16-17. Those factors are:

1. The size of the operation and the amount of waste reaching waters of the state;
2. The location relative to waters of the state;
3. The means by which waste reaches waters of the state;
4. Slope, vegetation, rainfall and other factors that might affect likelihood or frequency of discharges into waters of the state; and
5. Other factors.

RCW 90.64.020(1). Although only one factor specifically references “the amount of waste,” it is plainly obvious that all of the factors relate to the

amount of waste that would reach waters of the state. The distance between water and waste, the slope, vegetation and rainfall all suggest how much material might enter the waters of the state. Whether the means of conveyance is direct or indirect, short or long, suggests the extent to which waste reaches waters of the state is the critical factor for determining in this context whether a dairy is significant contributor of pollution. Each factor relates to the **amount** of waste reaching the water, which makes clear that the significance of one's pollution is tied to amount. Ecology's position that the determination of whether one is a **significant contributor** of pollution has little to do with the **amount** of pollution flies in the face of the plain meaning of these words. Amended Brief of Ecology at 16-17.

In applying these factors, Ecology focused on the substantial amount of waste placed in the temporary manure lagoon, but that does not answer the question as to how much waste entered the waters of the state. It is not pollution of waters of the state unless it enters waters of the state. The Doumas do not contend that the amount has to be determined with precision. However, in the present case, there is no evidence (or even opinion) that the amount of waste that entered the waters of the state was anything more than miniscule. Despite Ecology's abilities to test ground water, Ecology inspectors decided not to test ground water even though they had every opportunity to do so. Hence, the Board had nothing on which to base a

determination (which it did not attempt to make) that the Doumas' contribution to pollution was significant.

In regard to the means of conveyance, Ecology rightfully notes that the means was by percolation. Amended Brief of Ecology at 18. What Ecology fails to inform the Court is that the trench was "self-sealing" and that very little waste likely entered even the perched water above the water table. *See* Trans. at 31 (Ecology witness, Garland); Trans. at 198 (Doumas' witness, Swope).

Nevertheless, Ecology's briefing of these factors now has no bearing on the case before the Court. Ecology did not argue to the PCHB that it was making a determination during the hearing or in the context of this enforcement action that the Doumas were significant contributors. It cannot argue now that the Doumas are a significant contributor of pollution based on the facts presented because the Board did not review any such determination in this case. That the Board did not review any such determination is expected, since there was no determination to review. Ecology should not be allowed to argue now that it could have made the necessary determination, when it plainly did not.

Finally on this issue, Ecology argues:

More importantly, the Doumas did more than significantly contribute to the pollution of state waters, the Doumas actually caused pollution in violation of RCW 90.48.080. Since

Ecology proved that the Doumas actually caused pollution in violation of RCW 90.48.080, it was not necessary for either Ecology or the Board to determine that the Doumas' dairy was a significant contributor of pollution.

Amended Brief of Ecology at 18-19. Ecology's argument is nonsensical. While the statute provides that dairies are subject to enforcement if they pollute significantly, that they were found to pollute says nothing about whether their contribution to overall pollution is significant or not. Once again, Ecology's reading of the statute makes the reference in RCW 90.64.030(6) to being a "significant contributor of pollution" meaningless. The Court should give meaning to Subsection (6), recognize that no determination has been made, and rule that the penalties in this case were improperly imposed.

II. THE PENALTY SHOULD HAVE BEEN REDUCED FURTHER

Ecology argues that the penalty should not be reduced further and that the Board, and presumably the Court, is powerless to reduce the penalty Ecology chose. In regard to the Board's analysis of the penalty amount, Ecology spins the testimony of its witnesses before the Board. Amended Brief of Ecology at 20-24.

Ecology also argues that the land on which the temporary manure lagoon was placed was leased from DNR is a factor relevant to the penalty.

The Doumas already paid DNR for any asserted breach of the lease and a doubled figure for damage to the leased land. Trans. at 24. After settling this dispute with DNR, the State should not be able to attempt recover more from the Doumas through Ecology by arguing about alleged lease violations which were settled.

In regard to viewing the reasonableness of the penalty by starting at the theoretical maximum penalty, Ecology argues that is what federal courts do under the federal Clean Water Act. Amended Brief of Ecology at 26-27 (citing *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1140 (11th Cir. 1990); *Community Ass'n for Restoration of Environment v. Henry Bosma Dairy*, (E.D. Wash. 2001)).³

The *Atlantic States* “top down” approach is far from being universally accepted. See *United States v. Municipal Authority of Union Tp.*, 929 F. Supp. 800 (M. D. Pa. 1996); *aff'd*, 150 F.3d 259 (3rd Cir. 1998); *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 528 n.7 (4th Cir. 1999); *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 178 (3rd Cir. 2004); *Friends of the Earth, Inc. v. Lardlaw Envtl. Servs., Inc.*, 956 F. Supp 588, 603 (D.S.C. 1997). The “bottom up” approach starts with the economic benefit to the violator. The Court makes sure that any economic benefit in

³ The *Bosma Dairy* case is an unpublished district court opinion, not intended to be for precedent-setting purposes. See generally, *Marriage of Gilbert*, 88 Wn. App. 362, 945 P.2d 238 (1997).

violating the law is removed by including that amount in the penalty and then adjusting that amount upward.

Ecology argues that the penalty should not be reduced because the Douma case was unique “in which the discharge of dairy waste was done knowingly to groundwater and for a duration of over two months before discovery by Ecology.” Amended Brief of Ecology, at 31 (quoting PCHB Order at 18). First, while the placement of material was knowing, there are no facts to demonstrate that the discharge was done knowingly **to ground water**. The Doumas chose the place for placing the lagoon because it was the furthest away from ground water and surface water. *See infra* at 2, n.2.

Moreover, the “discharge” did not extend for over two months. While the material was in the lagoon for two months, there is no evidence that it was discharging into the water perched above the water table for any length of time. The undisputed testimony was that a manure lagoon of this type would be self-sealing as solids settled on the bottom. Trans. at 31; 198.

Nevertheless, there are plenty of cases where intentional placement of manure in waters of the state resulted in much lower penalties, evidencing that the selection of the penalty in this case was not about influencing behavior regarding water quality, but about perpetuating the bad relationship between these Ecology inspectors and the Doumas. Trans. 160-61.

Ecology refers to the *DeBoer v. Ecology*, PCHB No. 99-107 (Jan. 28 2000), a case where a \$20,000 penalty was upheld.⁴ DeBoer was liable for this penalty for intentionally spraying manure on wet fields where the water table was on the surface. DeBoer was doing exactly what the Doumas wished to avoid by locating the lagoons on the only dry ground in the area. Trans. 153. For this, they get a \$53,000 penalty while DeBoer is assessed less than half that amount.⁵

In regard to the economic benefit component of the penalty, Ecology relies almost exclusively on the Board's conclusion that the receipts the Doumas presented at the hearing did not make clear to which activity each receipt related. While the cost of digging and making the berm may have been unclear, the cost of pumping the material was very clear. Ecology's unsubstantiated claim that the cost of pumping would be \$13,000 is far less

⁴ Ecology also argues that *Amberson Egg Farm v. Ecology*, PCHB No. 99-029 (1999) supports its position. Since there is no method of "shepardizing" PCHB decision, the superior court decision in *Amberson Egg* was unknown to Douma's counsel. Nevertheless, a superior court decision is certainly not binding precedent in this Court and Judge Tabor's decision is silent as to his reasoning, rendering his decision hardly persuasive.

⁵ Ecology also argues that *DeBoer* proves that Ecology can fine a dairy without a prior determination that the dairy is a significant contributor of pollution, but provides no explanation. There is nothing in *DeBoer* which states that DeBoer was liable even though he is not a significant contributor of pollution. The issue is not addressed in *DeBoer*. Cases do not stand for propositions which are not addressed in them. See generally, *Northwest Ecosystem Alliance v. Washington Forest Practices Board*, 149 Wn.2d 67, 74-75, 66 P.3d 614 (2003).

persuasive the actual cost of pumping of \$3910. Trans. 163 and Exhibit A-4 (4th page).

Ecology argues that the Board inappropriately reduced the economic benefit portion of the penalty as part of its own cross-appeal. Amended Brief of Ecology at 38. Specifically, it argues that the Board's decision is "internally inconsistent" because it decided to not give the Doumas any credit for funds spent in having the waste pumped or the lagoon dug, but then cut the economic benefit component in half, from \$13,000 to \$6500.

Incredibly, Ecology argues that it established the cost of pumping at \$13,000 and that the Doumas did not contest Ecology's conclusions. Amended Brief of Ecology at 43. Ecology arrived at its costs by its inspector calling two companies which pump manure. Trans. at 91. In contrast, the Doumas had actual costs, not theoretical ones. Trans. 163 and Exhibit A-4 (4th page).

In regard to the consideration of the prior history, Ecology accuses the Doumas of failing to inform the Court of "an extensive history of failing to properly manage their dairy waste." Amended Brief of Ecology, at 35-36. There are multiple problems with Ecology's argument. First and foremost, Ecology fails to reveal that each of the letters it cited was not admitted for the truth of the matters asserted in them. *See* Trans. 104:12-15 (R-16 is not admitted for the purpose of its contents being true); Trans 105:22-24 (R-18);

Trans. 106:20-23 (R-19).⁶ It takes incredulouschutzpah to argue that these letters evidence a negative history when they were specifically not admitted for the truth of any matter asserted therein. Those unappealed evidentiary rulings by the PCHB make sense because the authors of them were not subject to cross-examination as to what the assertions mean or are based upon. The second problem with Ecology's argument is that the only theoretical violation is in the first cited letter, Exh. R-18, and the last. Exh. R-21. Of course, because no violation was found either time and, more importantly, no penalty issued, the Doumas had no opportunity to contest any alleged violation, if violations ever were alleged. RCW 43.21B.300 (only decisions issuing penalties may be appealed).

Additionally, the other cited letters are ones where the Doumas were given advice to make changes to their manure handling system. That someone recommended changes is far from having a rap sheet of prior violations. These letters do not prove that the Doumas "failed to properly manage their dairy." That they have had no violations other than the one at issue speaks well to their ability to manage manure.

⁶ Exhibit R-21 was the letter notifying the Doumas that they needed to obtain an NPDES permit. As addressed previously, they had no opposition to obtaining an NPDES permit.

III.
THE BOARD'S SUSPENSION OF THE GRAVITY
COMPONENT IS WITHIN ITS POWER

Ecology argues that its interpretation of RCW 90.44.144 is entitled to deference and the Board cannot reduce a penalty established by Ecology or add new conditions to a penalty unless the Board concludes that Ecology's penalty determination is incorrect in a particular respect. Amended Brief of Ecology at 39. First, Ecology's unsupported assertion of entitlement to deference is simply wrong, as is its argument that the PCHB is so restricted in its power that it cannot reduce a penalty as it has done dozens of times.

Ecology relies upon *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 672, 990 P.3d 659 (2004) to argue that the Board cannot modify a penalty, but that case does not support Ecology's position. *Port of Seattle* involved a challenge to a §401 certification permit by a group of citizens challenging the third runway at Sea-Tac Airport. In *Port of Seattle*, the Supreme Court commented on when the Board (PCHB) could add conditions to a § 401 certification permit. *Id.* at 592-593. Contrary to Ecology's argument, *Port of Seattle* does not deal with whether the Board can modify a **penalty**.

Moreover, a case more closely on point clearly rejects Ecology's argument and holds that the PCHB indeed has implicit authority to

suspend a fine. *Puget Sound Air Pollution Control Agency v. Fields Products, Inc.*, 68 Wn. App. 83, 841 P.2d 1297 (1992). In that case, the Puget Sound Air Pollution Control Agency (Air Pollution Agency) challenged the Board's suspension of a \$400 fine, arguing that the Board could not review the propriety of the penalty because its authority was limited to determining if a violation had occurred. *Id.* at 86. Then Court of Appeal Justice Alexander flatly rejected the Air Pollution Agency's argument, reasoning that such a holding would give the agency absolute discretion to impose any penalty it wished as long as it did not exceed the maximum permitted by statute. *Id.* at 88.

If we were to agree with Puget Sound's assertion that the amount of the penalty imposed by that agency is not reviewable by the Board, we would be recognizing unprecedented powers on the part of a law enforcement agency. Under such a holding, the Puget Sound Air Pollution Control Agency would have absolute discretion to impose any penalty it wished as long as it did not exceed the maximum permitted by RCW 70.94.431(1). We do not believe that the legislature intended such a scheme. Puget Sound did not conduct any hearings or provide any due process to Fields Products before it imposed the penalty. Indeed, it was not required to do so. It simply notified Fields that it was issuing a civil penalty; much like the policeman on the beat would issue a citation to a traffic offender. The Board, on the other hand, provided Fields Products its one and only hearing at which testimony and other evidence was offered and received. We believe that the forum, to which the "penalty" may be appealed, has the implicit authority to judge the propriety of the penalty as well as the existence of a violation.

Id. at 86-89.

Similarly, Ecology's position would give it the same unbridled discretion to impose any penalty it wished that this Court warned against in the *Puget Sound Air* case. The Court should reject Ecology's argument based on *Puget Sound Air*. The brief of the PCHB in the present case further supports this view.

Ecology further suggests that it is entitled to deference in applying the law to the facts. This position is contrary to well-established precedent. *Conway v. Washington State Dept. of Social and Health Services*, 131 Wn. App. 406, 419, 120 P.3d 130 (2005).

The process of applying the law to the facts, however, is a question of law and is subject to de novo review. *Henson*, 113 Wn.2d at 377, 779 P.2d 715; *Johnson v. Department of Empl. Sec.*, 112 Wn.2d 172, 175, 769 P.2d 305 (1989).

Tapper v. State Employment Sec. Dept., 122 Wn.2d 397, 858 P.2d 494 (1993). Here, the only statutory language at issue, RCW 90.64.030(6), is not ambiguous.

What Ecology is really asking for is deference to all its decisions made in this case, including its litigation position. Such is not authorized by state law precedent and deference to litigation positions has been specifically rejected in analogous federal court decisions. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212, 109 S.Ct. 468, 473-474, 102 L.Ed.2d 493 (1988); *Southern Utah Wilderness Alliance v. Dabney*,

222 F.3d 819, 828 (10th Cir.2000) (“A position taken by an agency during litigation, however, is not sufficiently formal that it is deserving of . . . deference”).

Ecology does not argue that the PCHB improperly weighed the factors for setting penalties, but rather that the PCHB weighed the factors based on the evidence it received in a manner differently than Ecology. Ecology’s cross appeal on this issue should be rejected.

**IV.
REDUCTION OF THE ECONOMIC PENALTY COMPONENT IS
SUPPORTED BY SUBSTANTIAL EVIDENCE**

In applying the penalty matrix, Ecology staff included for its 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. This estimate was based on an \$80/hour pumping rate. Exh. R-10, at 5. The \$13,000, therefore, was based on an assumed time of 162.5 hours of pumping. There was no evidence to contradict the Doumas’ detailed invoice from the pumping company that it took only 68 hours to pump the same volume of material, totaling \$5,440. Exh. A-4. The evidence actually supports reducing the economic benefit portion further. However, the Board’s decision to reduce the economic benefit is well within its discretion given these facts.

The Board found that it was undisputed that the Doumas paid for excavation of the trench and pumping from the trench despite a discrepancy in the amount paid. Decision, at 5 (Finding of Fact No. 8). Notably, Ecology does not challenge this finding. Instead, Ecology argues that the Board's decision is internally inconsistent because the Board found that the receipts provided by the Doumas about the work done did not clearly establish the type of the work done and the cost. That is true only for the cost of trench digging and refilling. Later, the Board's decision concluded that the Doumas were not entitled to any credit for the funds spent in constructing the trench or having the dairy waste pumped. Ecology suggests this is inconsistent.

Contrary to Ecology's position, the Board's decision is not internally inconsistent. The Board's decision gave no credit to the Doumas for the work they had done and expenses incurred. Rather, it simply found that the economic benefit calculation was twice as high as it should be and reduced the penalty to \$6,500. Order, at 19 (Conclusion of Law No. 21). This reduction did not amount to a credit for the work done by the Doumas, but recognition that Ecology's economic benefit

component was double what it should be.⁷ The actual number of hours it takes to pump the material is far more reliable than Ecology's unsubstantiated estimate based on unidentified phone calls.

The Court should reject Ecology's argument to increase the economic benefit component.

**V.
RESPONSE TO PCHB**

In penalty cases, while the PCHB process is nominally referred to as an "appeal" in RCW 43.21B.110(1)(a), the PCHB does not act in what is normally considered to be an "appellate" capacity. Ecology's initial decision is a prosecutorial decision. When the hearing arrives, however, it is Ecology's burden of proof, and the PCHB is not limited to evidence, reasoning or anything which may have prompted Ecology's decision to issue the notice of violation.

The *de novo* nature of the PCHB's "review" in WAC 371-08-485 is not really a review of Ecology's earlier decision. It is a *de novo* review of the facts, law and application of the law to the facts as indicated in the PCHB Brief at 4.

⁷ The Doumas contend that the economic benefit calculation should be further reduced because the Board's decision does not factor in that the \$13,000 was not a net economic benefit since the Doumas spent thousand of dollars on building the trench, pumping the manure and filling in the trench. The economic benefit component should be further reduced.

The PCHB notes:

That the burden of proof is on Ecology necessarily implies that the PCHB starts with Ecology's position, and it may find that the facts of a violation occurred and conclude those facts amount of a violation of law justifying the penalty as described in Ecology's original order setting a penalty. But equally, the PCHB may find and conclude that Ecology did not meet the burden of proof and enter findings and conclusions to support a lesser penalty.

PCHB Brief, at 4-5. This language could be easily misinterpreted.

The Doumas contend that, because the burden of proof is on Ecology, the PCHB should start with the Doumas' position that they are not liable. The Doumas are innocent until proven guilty. Only if Ecology proves a violation, does the PCHB then decide what, if any, penalty should exist. Because the PCHB is the first neutral body to review the facts and law of this case, it cannot be limited to simply affirming or reversing an order by Ecology assessing penalties.

The PCHB next addresses Ecology's argument regarding deference to PCHB on some issues and deference to Ecology on others. PCHB Brief at 5. The Doumas agree that deference is less appropriate (or entirely inappropriate) when the PCHB or court is reviewing an Ecology decision to seek penalties as opposed to the administrative process on whether to issue a permit. If the PCHB is to give deference to Ecology when it puts on its case for the first time before a neutral decision maker,

that would seriously undermine the PCHB's role as being neutral.

In regard to deference in interpreting statutes, the Doumas agree that decisions regarding determining facts and imposing penalties do not involve the interpretation of a statute. In regard to deference to Ecology based on its experience in technical matters, the Doumas agree with the PCHB that such deference is not appropriate in cases involving penalties. For the PCHB or this court to defer to Ecology's view of the facts, since it is the prosecutor in this action, would raise serious due process concerns. Such deference would also be tantamount to reversing the burden of proof from Ecology to the Doumas.

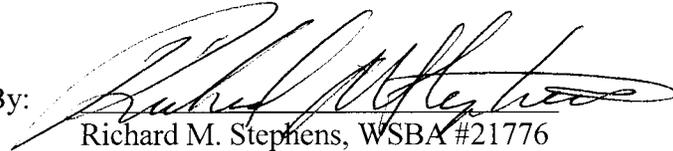
CONCLUSION

The Doumas respectfully request the Court to reverse the decisions below based on RCW 90.64.030(6). In the alternative, they request that the Court reduce their penalty in light of the penalties imposed on others who have directly placed manure in waters of the state, a result the Doumas specifically sought to avoid.

RESPECTFULLY SUBMITTED this 5th day of November, 2007.

GROEN STEPHENS & KLINGE LLP

By:



Richard M. Stephens, WSBA #21776

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 November 5, 2007, a true copy of Appellants' Reply 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:

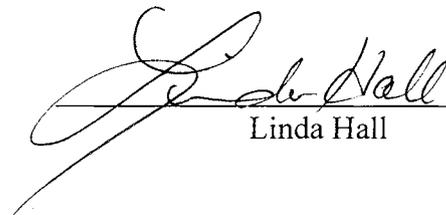
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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 5th day of November, 2007 at Bellevue, Washington.



Linda Hall