

*Respondent PCHB  
in response to Cross-  
App. D.O.E.*

NO. 35864-6

---

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

---

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

Appellants,

v.

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

Respondents.

---

**BRIEF OF THE POLLUTION CONTROL HEARINGS BOARD**

---

ROBERT M. MCKENNA  
Attorney General

BRUCE L. TURCOTT  
Assistant Attorney General  
WSBA No. 15435  
PO BOX 40100  
Olympia, WA 98504-0100  
(360) 586-2738

*pm*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT .....	2
	A. The PCHB Is A Proper Party To This Appeal And Is Not Advocating On The Merits .....	2
	B. The PCHB Has Authority To Reduce or Suspend Penalties When Adjudicating Decisions of Ecology .....	3
	1. Background On PCHB Adjudications Reviewing Ecology Penalties .....	3
	2. PCHB and Judicial Deference to Ecology.....	5
	a. Deference Based on Roles and Burdens of Proof Before the PCHB .....	5
	b. Deference To Interpretation of Statutes or Regulations.....	7
	c. Deference Based on Factual Expertise.....	9
	3. This Court Has Affirmed the PCHB’s Authority To Suspend Penalties .....	11
III.	CONCLUSION .....	12

**TABLE OF AUTHORITIES**

**Cases**

*Gregory H. Bowers v. Pollution Control Hearings Bd.*,  
103 Wn. App. 587, 13 P.3d 1076 (2000)..... 4

*Kaiser Aluminum and Chemical Corp. v. Dep't of Labor & Indus.*,  
121 Wn.2d 776, 854 P.2d 611 (1993)..... 2

*Port of Seattle v. Pollution Control Hearings Bd.*,  
151 Wn.2d 568, 90 P.3d 659 (2004)..... 2, 3, 4, 5, 6, 7, 9, 10

*Puget Sound Air Pollution Control Agency v. Fields Products, Inc.*,  
68 Wn. App. 83, 841 P.2d 1297 (1992)..... 9, 11

*Snohomish Cty v. State*,  
69 Wn. App. 655, 850 P.2d 546 (1993)..... 2

*State Ex Rel. Martin Marietta Aluminum, Inc. v Woodward*,  
84 Wn.2d 329, 525 P.2d 247 (1974)..... 3

**Statutes**

RCW 34.05.570(3)..... 3

RCW 43.21B.110(1)(a)..... 3

RCW 43.21B.170..... 3

RCW 43.21B.300(2)..... 11

RCW 90.48.144(3)..... 4, 8

**Rules**

WAC 371-08-485..... 4

WAC 371-08-485(3)..... 4

## I. INTRODUCTION

The Pollution Control Hearings Board (PCHB) submits this brief to address its scope of authority, as it has been characterized in the briefing by the Department of Ecology (Ecology). The PCHB writes separately because its role is affected by how the Court might characterize de novo review versus deference to statutory interpretation and Ecology's technical expertise. The PCHB is concerned that the Court preserve the appropriate standard of review for the PCHB to apply in adjudication, but the PCHB takes no position on the merits of this case.

Ecology argues, and the PHCB does not disagree, that Ecology's interpretation of statutes administered by Ecology may be entitled to appropriate deference by the PCHB and the courts; the PCHB also recognizes that it does not reduce a penalty established by Ecology or add new conditions to a penalty unless the PCHB determines that Ecology's penalty determination is incorrect in a particular respect. *See* Amended Brief of Respondent/Cross Appellant Ecology at 7, 39 (citing *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 592, 90 P.3d

659 (2004).<sup>1</sup> However, this brief will address more fully the PCHB's standard of review.

The PCHB agrees with the general standards of review on judicial review as stated by Ecology. Amended Brief of Respondent/Cross Appellant Ecology at 6-7.

## II. ARGUMENT

### A. The PCHB Is A Proper Party To This Appeal And Is Not Advocating On The Merits

The PCHB is a named party to this appeal. However, it is only the parties who appeared before the PCHB who advocate the merits of the action on judicial review. The PCHB's only purpose for participating at this point is to address the scope of its jurisdiction and authority. *See, e.g., Kaiser Aluminum and Chemical Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 854 P.2d 611 (1993) (Quasi-judicial administrative agency or board does not argue the merits on appeal, but only participates as necessary to preserve the authority and jurisdiction of the agency or board.); *Snohomish Cty v. State*, 69 Wn. App. 655, 662, 850 P.2d 546 (1993) (Forest Practices Appeals Board had standing to appeal jurisdictional issue where it served quasi-judicial function.).

---

<sup>1</sup> The *Port of Seattle* case did not involve an appeal from PCHB penalties, but from conditions the PCHB added to a § 401 certification, a type of permit Ecology issued under the federal Clean Water Act for an airport runway project that required filling wetlands. Some of the additional PCHB conditions were reversed by the Supreme Court, not for lack of authority, but for inadequate support in the record.

The PCHB therefore emphasizes that it does not take a position on whether its decision on penalties should be affirmed or Ecology's appeal should be granted. The PCHB is not attempting to act as advocate of a particular outcome and does not have a stake in the merits. It is this Court's function to review the action of the PCHB and determine if it erred, applying the judicial review standards of RCW 34.05.570(3). *Port of Seattle*, 151 Wn.2d at 587-89. In this brief, the PCHB addresses the nature of its de novo adjudicative hearings that review Ecology penalties and the nature of any deference to Ecology.

**B. The PCHB Has Authority To Reduce or Suspend Penalties When Adjudicating Decisions of Ecology**

**1. Background On PCHB Adjudications Reviewing Ecology Penalties**

The Legislature granted the PCHB jurisdiction to conduct adjudicative proceedings to affirm or reverse challenged decisions of Ecology. *State Ex Rel. Martin Marietta Aluminum, Inc. v Woodward*, 84 Wn.2d 329, 332, 525 P.2d 247 (1974). The PCHB's authority includes the ability to "hear and decide" appeals from civil penalties ordered by Ecology. RCW 43.21B.110(1)(a).

The Legislature also charged the PCHB with promulgating rules of practice and procedure. RCW 43.21B.170. In adjudicating a case, the

PCHB is bound by WAC 371-08-485 which provides for scope and standard of review and burden of proof at hearings as follows:

(1) Hearings shall be formal and quasi-judicial in nature. The scope and standard of review shall be de novo unless otherwise provided by law.

(2) The board shall make findings of fact based on the preponderance of the evidence unless otherwise required by law.

(3) The issuing agency shall have the initial burden of proof in cases involving penalties or regulatory orders. In other cases, the appealing party shall have the initial burden of proof.

WAC 371-08-485 (emphasis added).

Therefore, the PCHB's function is to conduct a de novo review of facts, law, and application of law to facts in relation to penalties assessed by Ecology.<sup>2</sup> *Port of Seattle*, 151 Wn.2d at 584, 597.

If a penalized party seeks an adjudicative hearing at the PCHB, Ecology has the burden of proving its penalties by a preponderance of the evidence. *Gregory H. Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 598-99, 13 P.3d 1076 (2000).<sup>3</sup> That the burden of proof is on Ecology necessarily implies that the PCHB starts with Ecology's position,

---

<sup>2</sup> The statutory criteria for determining the amount of penalties is very broad and set forth in RCW 90.48.144(3): "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."

<sup>3</sup> By contrast, in cases such as *Port of Seattle* that involve permits, rather than penalties, the appealing party, not Ecology, has the burden of proof before the PCHB. WAC 371 08 485(3).

and it may find that the facts of a violation occurred and conclude that those facts amount to 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. As a result, the PCHB is not limited to simply affirming or reversing an order assessing penalties *in toto*.

## **2. PCHB and Judicial Deference to Ecology**

Ecology has cited *Port of Seattle* to point out that interpretations of statutes it is charged with administering, and of its own rules, are entitled to great weight. Similarly, when evaluating appropriate factual issues, deference is due to Ecology's evidence on technical issues, based on Ecology's specialized expertise. *See Port of Seattle*, 151 Wn.2d at 584, 591-95. While Ecology's brief emphasizes deference to "interpretations" of statutes, the court describes a number of reasons for different types of deference that are relevant in different circumstances.

### **a. Deference Based on Roles and Burdens of Proof Before the PCHB**

The *Port of Seattle* court started with a discussion of the different roles of Ecology and the PCHB when issuing clean water act permits.

In 1970, the legislature created the PCHB, a quasijudicial body whose members must be "qualified by experience or training in pertinent matters pertaining to the environment."

RCW 43.21B.020. . . . Rule making, interpretive, and enforcement functions remain with Ecology, the agency “charged with administration” of water quality statutes and rules. . . .

When one of Ecology’s § 401 certifications is challenged, the PCHB conducts a trial-like adjudicative hearing. The challenger bears the burden of proving to the PCHB, by a preponderance of the evidence, that Ecology’s § 401 certification does not provide reasonable assurance that state water quality standards will be met. *See* WAC 371-08-485(2) (citation omitted) The scope and standard of PCHB review is *de novo*. WAC 371-08-485(1) (citation omitted).

Because *Ecology* is the agency charged with issuing § 401 certifications, *see* RCW 90.48.260, the PCHB must begin by determining whether Ecology’s § 401 certification is adequate. The PCHB cannot add conditions simply because it feels such conditions would make the certification more protective of water quality. The PCHB is to add conditions to a § 401 certification only if the parties challenging the certification have first shown, by a preponderance of the evidence, that Ecology’s § 401 certification is inadequate in a particular respect, and additional conditions are needed to reach reasonable assurance.

*Port of Seattle*, 151 Wn.2d at 592-93 (emphasis in original).

This illustrates that a type of deference is owed to Ecology’s permitting actions that is rooted in the role of Ecology in writing the permit and rooted in how the challenger bears the burden of proof such that the permit is considered valid unless the challenger shows otherwise.

This type of deference, however, is less relevant when the PCHB reviews a penalty as opposed to reviewing a technical permit. First, unlike

the permit discussed in *Port of Seattle*, a penalty is a matter in which Ecology – not a third party challenger – has the burden of production and proof. WAC 371-08-485(3). Whereas a permit is deemed valid unless proven otherwise, a penalty has the opposite standing before the PCHB.

To the extent there needs to be any “deference” in penalty adjudications to Ecology’s role, it is fulfilled by the PCHB’s practice of not suspending or reducing a penalty absent an articulated reason. That approach respects the role of Ecology in selecting the enforcement level, while protecting other litigants by requiring Ecology to meet its burden of proof and allowing a de novo decision by a neutral adjudicative agency.

**b. Deference To Interpretation of Statutes or Regulations**

The *Port of Seattle* court also discussed how the PCHB and courts give weight to Ecology’s interpretation of certain statutes. “Interpretation of statutes” appears to be the primary point cited by Ecology as a basis for deference: “Because the legislature entrusted Ecology with administration of water quality standards, we conclude, in accordance with our prior case law, that we must give great weight to Ecology’s interpretation of the laws that it administers.” *Port of Seattle*, 151 Wn.2d at 594.

This type of deference arises in the context of the PCHB’s and the courts’ powers to make a de novo interpretation of laws at issue in a case.

In the context of reviewing the interpretation of law, both the PCHB and then the courts should give appropriate consideration to Ecology's interpretation of a statute that it is charged with implementing. Ecology's interpretation of a statute thus stands as a type of persuasive legal authority—relevant to the PCHB or reviewing court, but far from binding on the PCHB or reviewing court.

This principle of deference to statutory interpretation, however, has only slight application to the penalty statute quoted in footnote 2, above. *See* RCW 90.48.144(3). The *interpretation* of such a statute is not in dispute in this case; this is distinguished from a case where there are two competing interpretations of a statute. Instead, the selection of a penalty involves the application of the factors set out in statute to a set of findings and conclusions about a particular violation, to ensure that a reasonable and appropriate penalty is imposed. Thus, rather than interpretation, the review of the penalty involves the application of the statute to a particular set of facts.

The considerations in the penalty statute are therefore appropriately reviewed by the PCHB in its evaluation of whether a penalty is reasonable and appropriate. The *de novo* power of the PCHB to review a penalty level is particularly appropriate because the PCHB is designed by law to be separate from Ecology and provide a neutral adjudication that

subtracts any agency bias from the enforcement action. *Puget Sound Air Pollution Control Agency v. Fields Products, Inc.*, 68 Wn. App. 83, 87-88, 841 P.2d 1297 (1992).

The PCHB, therefore, adequately considers Ecology's interpretation and application of the penalty statute because the PCHB's practice is not to change a penalty absent reasons based in the record.

**c. Deference Based on Factual Expertise**

The *Port of Seattle* court also discussed how to defer to Ecology in connection with its specialized expertise in technical matters. This type of deference is typically not at stake in the selection of a penalty level, but the PCHB will describe it to complete its account of this subject.

In a given case, the PCHB may consider how Ecology's technical expertise can be given weight in the fact finding process. This also applies when there is judicial review of facts found by the PCHB:

Ecology also argues that it is entitled to deference with regard to its technical judgments, especially when they involve complex scientific issues. The PCHB contends that it conducts a de novo fact-finding hearing "in which the technical expertise of Ecology is put to the test in an adversary proceeding." (citation omitted) Therefore, the PCHB asserts that this court should not assign more weight to Ecology's technical judgments than to the PCHB's evaluation of those judgments.

This court reviews a PCHB decision by applying the WAPA [Washington Administrative Procedure Act] standards of review to the PCHB's order and the record

created before the PCHB. (citation omitted) The PCHB's findings of fact are reviewed under the substantial evidence test. RCW 34.05.570(3)(e). This court should overturn a factual finding only if the finding is clearly erroneous. (citation omitted) Therefore, the standard of review for factual findings inherently assigns deference to the PCHB's factual conclusions. This system respects both the PCHB's statutory role as independent reviewer of Ecology actions and the trial-like nature of the PCHB hearings. (citation omitted) WAC 371-08-475, -485.

...  
Therefore, this court begins by applying the clearly erroneous standard to PCHB's factual determinations. Within the framework of determining whether one of the PCHB's factual findings is clearly erroneous, this court gives due deference to Ecology's expertise.

*Port of Seattle*, 151 Wn.2d at 594-95 (emphasis added).

Selecting the level of a penalty does not involve weighing specialized factual expertise on technical matters in fact finding. Affirming that the level of a penalty is reasonable is characterized as judicial and the exercise of discretion.

In summary, the role of the PCHB in adjudicating a penalty is to start with the penalty selected by Ecology and then determine, after finding the facts de novo and making conclusions of law, whether Ecology has met its burden of proof to show that the penalty was appropriate, or whether the facts or legal conclusions support a different penalty. The PCHB therefore asks this Court to evaluate Ecology's argument concerning "deference" and the *Port of Seattle* case by considering the

underlying reasons for deference, and by considering the differences between a § 401 permitting case and the PCHB’s review of a penalty.

**3. This Court Has Affirmed the PCHB’s Authority To Suspend Penalties**

In *Puget Sound Air Pollution Control Agency v. Fields Products, Inc.*, the PCHB suspended an agency penalty on condition that Fields not violate air quality standards for one year. The court found the PCHB had implicit authority to suspend Ecology penalties based on the authorizing statute, RCW 43.21B.300(2), that provides for appeal of civil penalties, including penalties assessed by Ecology, to the PCHB. *Puget Sound Air Pollution Control Agency v. Fields*, 68 Wn. App. at 87. The *Fields* court held, “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.” *Puget Sound Air Pollution Control Agency v. Fields*, 68 Wn. App. at 88.

///

///

### III. CONCLUSION

The PCHB respectfully requests that this Court consider the PCHB's description of its role in providing de novo adjudicative hearings that may affirm, reduce, or suspend penalties assessed by Ecology.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of September,  
2007.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read 'Bruce L. Turcott', is written over the typed name and title. The signature is stylized with a large loop and a long horizontal stroke extending to the right.

BRUCE L. TURCOTT  
Assistant Attorney General  
Attorneys for Pollution Control Hearings  
Board

NO. 35864-6

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

FILED  
BY [Signature]  
[Date]

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

Appellants,

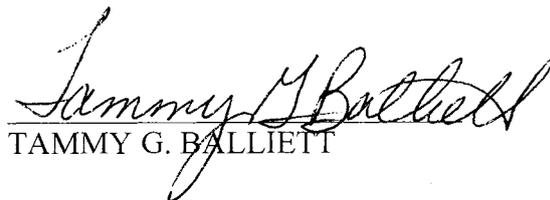
v.

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

Respondents.

CERTIFICATE OF  
SERVICE

I certify that on September 7, 2007, I mailed, postage prepaid, via US Mail, a copy of the Brief of Pollution Control Hearings Board, to Richard M. Stephens, Attorney for Appellant, at Groen Stephens & Klinge LLP, 11100 NE 8<sup>th</sup> St. Ste 750, Bellevue, WA 98004, and to Ronald L. Lavigne, JR., Assistant Attorney General, attorney for The Department of Ecology, via Consolidated Mail Services to Mail Stop 40117.

  
TAMMY G. BALLIETT