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COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

PM 5-10-10

PACIFIC TOPSOILS, INC., Appellant,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY, Respondent.

REPLY BRIEF OF APPELLANT (CORRECTED TO 25 PAGES)

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I. Ecology has no statutory authority to penalize violation of permitting systems administered by other agencies.

The Department of Ecology (“Ecology”) response brief fails to address the basic jurisdictional problem in this case: Ecology is attempting to wield the permitting and penalty authority that belong to other agencies. In the Water Pollution Control Act, (“WPCA”), the legislature has given it no concurrent authority over wetlands. *Twin Bridges Marine Park, LLC v. State Dep’t of Ecology* held that when the legislature has given another agency the exclusive authority to administer a permit system, Ecology lacks authority to directly regulate and issue independent penalties for violating that system. In *Twin Bridges Marine Park, L.L.C., v. State, Dep’t of Ecology*, 162 Wn.2d 825, 175 P.3d 1050 (2008), citing *Samuel's Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 457, 54 P.3d 1194 (2002). the Washington Supreme Court admonished:

We agree with one statement in the dissent when it says:
“A party cannot decide for itself who may assert jurisdiction over it.” But neither may an agency create for itself jurisdiction to levy fines. Only the legislature may do that.”

Twin Bridges, 162 Wn.2d at 840, n.14 (internal citations omitted).

II. Ecology’s actions render the statute and regulations vague as applied.

A. Ecology’s new argument in its response brief clearly demonstrates the flaw in its own argument.

Ecology fails to meet PTI’s argument that the regulations and the WPCA have been rendered vague as applied. In fact, in making its counter-argument, Ecology demonstrates why PTI should prevail:

It is undisputed that any aquatic feature that was on the ground surface prior to PTI's discharge of fill no longer provides "legitimate beneficial uses" or that the filling has rendered "such waters harmful, detrimental, or injurious . . . to wild animals, birds, fish or other aquatic life."

Resp. Br. at 28, *citing* RCW 90.48.020. This proposition is only "undisputed" in the sense that it has never been talked about before. There was no such surface water feature on the ground. ADR 305 ¶3, 4; ADR 916; ADR 995, ADR 989 Appx. 1. As detailed below, not a single witness or document at the hearing, including aerial photographs or historical records, showed any surface water feature on the ground. Ecology would have this Court rule that it was clear from the text of the statute and regulations that placing dirt on dirt violated the WPCA because it obliterated an "aquatic feature" that was "polluted" by virtue of being removed – even though that aquatic feature never existed at all, to anyone's knowledge. ADR 305 ¶3, 4; ADR 916; ADR 989; ADR 995, Appx. 2.

The new argument apparently stems from Ecology's position that this alleged wetland is a "surface water" under the regulatory definition – and it demonstrates why Ecology's attempted expansion of the statutory definition of "waters of the state" to apply to this case renders the statute vague as applied. Ecology enacted a regulatory definition of "surface waters" that includes wetlands. WAC 173-201A-020. This regulatory definition is how it imports wetlands into the Legislature's definition of "waters of the state". But assuming some of the land under the fill is

properly called a wetland, the soil is not saturated from above by surface water, but from below by groundwater. *See, e.g.*, Paul Anderson testimony, RP 239. Essentially, Ecology’s argument equates groundwater with “surface water”.

This only increases the vagueness resulting from Ecology’s application of the statute here. What legitimate beneficial uses might this hypothetical aquatic feature provide? How were animals, birds, fish, or other aquatic life harmed by the removal of this hypothetical aquatic feature? That Ecology must resort to bringing in hypothetical facts to support its reading of the statute is properly viewed as an admission that its actions in this case render the statute vague as applied.

Ecology also makes the amazing claim that wetlands “are comprised of surface water and/or ground water”, *see* Resp. Br. at 19 and 27.

Wetlands are not comprised of water. This is patently incorrect under the statutory wetland definition.

Wetlands’ means areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

RCW 90.58.030(2)(h). Thus, wetlands comprise hydric soil, hydrophytic vegetation, and a hydrology scheme that includes at least intermittent soil saturation.

B. Ecology's statutory argument on vagueness addresses facial, not as-applied, vagueness.

Ecology argues that “the WPCA’s definition of waters of the state, which includes all surface and underground waters, is sufficiently broad to encompass wetlands.” Resp. Br. at 27. That is relevant only to whether the statute is vague on its face, which is not PTI’s allegation. The question is not whether anyone can imagine a case involving a wetland that will not run afoul of the statute and regulations; the question is whether a person of common intelligence would know that the statute and regulations would be applied the way Ecology has applied them in this case. Here, Ecology’s allegation is that PTI placed fill on top of the dirt of an alleged wetland that is, beyond dispute, groundwater-driven. It has brought no evidence that there was any contamination of nearby surface water bodies such as the slough. ADR 846-847. It has not shown that the groundwater that allegedly saturates the soil of this wetland to within 12 or 14 inches of the surface was changed to the detriment of public health and beneficial uses or the health of wildlife. Indeed, Ecology apparently takes the position that it need not prove any of these things, because the fill dirt is touching the dirt of the wetland, and the dirt of the wetland is water.

Ecology’s position is a semantic one, based on its regulatory definition of “surface waters,” and is not obvious because it requires ignoring the attributes of the alleged wetland here. A person of common intelligence would not jump to Ecology’s conclusion that occasional saturation to within a foot of the soil’s surface by groundwater makes this

alleged wetland a “surface water,” particularly when there is no indication that the groundwater ever makes it up to the surface of the ground, and when there is no evidence of communication between the ground water in the wetland and nearby surface water bodies. ADR 846-847. The fact that there are some wetlands that might obviously fall into the WAC definition of a wetland as a surface water is irrelevant to the as-applied inquiry. Moreover, a person of common intelligence would not necessarily conclude that placing dirt on dirt constitutes polluting a surface water of the state.

Ecology had trouble at the hearing maintaining its fiction that wetlands, which are terrestrial areas, are waters of the state. Its opening witness, Peggy Toepel, a representative of the Everett Shoreline Coalition, testified about her organization’s concern about shorelines of the state such as PTI’s Smith Island site because “they have a good role in buffering the waters against usually contaminants, erosion and other problems like that.” RP 49. She also testified that her organization is concerned with shoreline activities such as filling. RP 50. Even Ecology’s counsel had trouble with the fact that a wetland is terrestrial rather than aquatic:

The remedial prong in this case is difficult. Typically, you see it where somebody is discharging out of a pipe and it is continuous discharge and Ecology can get them to either stop the discharge with an order or clean up whatever parameter of the water quality standards they are exceeding.

RP 588. The same field that Ecology now wants to call a “surface water” is a shoreland area under the Shoreline Management Act, which addresses actual waters and land areas, “shorelands”, that are adjacent to such waters. *See* RCW 90.58.030. Ecology is now focusing on the effect of the fill on supposed surface waters associated with the alleged wetland. The problem with this theory is that there are no surface waters associated with that wetland. Ecology could not show how PTI had contaminated surface water or ground water or violated any anti-degradation policy associated with surface waters of the state. The PCHB record totally fails to support any such claim. ADR 846-847; ADR 267-269.

Additionally, Ecology’s constantly changing theories underscore that its position is not “ascertainably certain” from the text of the statute and the \$88,000 penalty cannot constitutionally be applied under the fair notice doctrine. *See* App. Br. at 36-38.

III. As a fundamental principle of due process, a penalty can only lie when the government gives the alleged violator written notice of its theory of the violation.

Ecology asks this Court to disregard the charges that it actually made in its Order No. 4095 and Notice of Penalty Incurred and Due No. 4096 (hereinafter “Notices of Penalty” or “Notices”) and instead find that the violation was proved on a different theory, which was first unearthed at the hearing itself. In addition, Ecology now postulates the existence of an aquatic feature under the fill and claims that it proved pollution (by removal) of a nonexistent surface water feature. Under procedural due

process principles, Ecology cannot be allowed to continue to change its theory of the violation.

The right to be free of erroneous or excessive fines is an important right that implicates principles of procedural due process. *Post v. City of Tacoma*, 167 Wn.2d 300, 313, 217 P.3d 1179 (2009). “The purpose of notice statutes is to apprise fairly and sufficiently those who may be affected of the nature and character of an action so they may intelligently prepare for the hearing.” *Nisqually Delta Ass’n v. City of DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985). When an agency gives notice that a specific regulation has been violated, the agency cannot subsequently change its theory without proper new notice as to the specific violations it will pursue. *City of Marysville v. Puget Sound Air Pollution Control Agency*, 104 Wn.2d 115, 702 P.2d 469 (1985); *Levinson v. Washington Horse Racing Comm’n*, 48 Wn. App. 822, 828, 740 P.2d 898 (1987).

In criminal law, this principle is embodied in the “essential elements” rule, which requires the charging document to set forth “[a]ll essential elements of a crime, statutory or otherwise”, including “a description of the defendant's conduct that supports every statutory element of the offense.” *State v. Powell*, 167 Wn.2d 672, 682, 223 P.3d 493 (2009)(internal citations omitted). “The primary goal of the ‘essential elements’ rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against.” *Id.* That goal is carried over into other areas of law, including administrative appeals. The Administrative Procedure Act itself requires that notice of hearings

include “reference to the particular sections of statutes and rules involved” and a “short and plain statement of the matters asserted by the agency.” RCW 34.05.434(2)(g) and (h). These requirements provide a fixed accusation of wrongdoing that the alleged violator can be prepared to meet. Procedural due process is not satisfied by a vague citation to multitudinous statutory and regulatory provisions that fail to inform the alleged violator what the state’s theory will be at the hearing. ADR 267-269; ADR 839-841; RP 46-47; RP 194-195.

In *Nisqually Delta*, the Supreme Court found that notice was sufficient because “Plaintiffs make no showing anyone was actually misled by the application nor unprepared for the hearings. Under these circumstances, notice was adequate.” *Nisqually Delta*, 103 Wn.2d at 727. Here, as discussed below, the notice given was not adequate; rather, it actively misled PTI as to what Ecology’s claims would be at the hearing and did not enable PTI to prepare to meet the arguments that Ecology actually made at the hearing. It lacked factual and legal detail sufficient to inform PTI of the basis of Ecology’s action and actively misled PTI as to Ecology’s theory, and Ecology continues to change its theories even now. ADR 846-847; ADR 839-841.

A. The Order and Notice of Penalty outlined an NPDES violation, failing to give notice of Ecology’s actual theory at the hearing.

Ecology charged PTI with violating RCW 90.48.080 (discharging pollutants into waters of the state), RCW 90.48.160 (requiring an NPDES

permit for discharging pollutants into waters of the state), and WAC 173-201A-300 (regulating degrading surface waters). A reasonable person reading the Order and the Notice of Penalty would conclude that it alleged that contaminants were finding their way into the nearby slough from the fill through the wetland, and that PTI had violated the law by failing to obtain an NPDES permit before discharging pollutants into the slough.

Ecology's "Order No. 4095" provided the following statement of facts and law for the violation:

On or before October 17, 2006, approximately 12 acres of fill material was discharged into wetlands at the Pacific Topsoils, Inc. facility on Smith Island, Snohomish County. There is no record at the Department or Snohomish County of the submission of a permit application for the placement of said fill, nor a record of any permit for the placement of fill in the wetlands having been issued. Under RCW 90.48.080 and RCW 90.48.160 it is unlawful to discharge polluting matter into waters of the state without a permit. Discharge of such polluting matters into waters of the state is also a violation of the anti-degradation policy, WAC 173-201A-300.

ADR 40. Ecology's "Notice of Penalty Incurred and Due" provided the following statement of facts and law in support of the finding of violation:

Prior to January 24, 2006, fill was placed in approximately 12 acres of wetland at Pacific Topsoils' Smith Island facility without a permit in violation of RCW 90.48.080. Discharge of such polluting matters into waters of the state is also a violation of the anti-degradation policy, WAC 173-201A-300. Fill remains in place in the wetlands. Each and every day the fill remains in the wetlands constitutes a separate and distinct violation of RCW 90.48.080 and 90.48.160, and WAC 173-201A-300.

ADR 42. Significantly, Order 4095 refers to the lack of a record of a permit at the Department of Ecology – which would be an NPDES permit, a permit to discharge known contaminants into water bodies such as streams, rivers, and lakes. RCW 90.48.260. The Notice also refers to the lack of a permit on record with Snohomish County – that would be a grading permit for placing fill. When Ecology issued its Notices, PTI was already in a voluntary compliance agreement with Snohomish County to address the unpermitted fill placement. ADR 200. Thus, it was reasonable to believe that Ecology would be focusing on the alleged NPDES violation. This view was only reinforced by the notices’ citations to the antidegradation policy, which targets degrading the quality and beneficial uses of surface water bodies. WAC 173-201A-510 states that anti-degradation policies are implemented through “issuance of waste discharge permits as provided for in RCW 90.48.160 and RCW 90.48.260.” The state anti-degradation policies describe the designated beneficial uses of various navigable waters and water quality criteria for those waters based on those uses.

The Notices of Penalty were misleading, and did indeed mislead PTI as to what Ecology’s theory at hearing would be. PTI believed that Ecology meant it what it said in the Notices – that Ecology was claiming the NPDES and the anti-degradation policy were being violated as a result of the fill – and PTI prepared to meet that claim at the hearing. Having already dealt with the unpermitted filling aspect of the case with Snohomish County by paying a large fine and already working toward a

grading permit so as to be able to lawfully remove the fill, PTI went to the Ecology hearing prepared to argue about the permitting provision cited in the Notices: The NPDES permit. ADR 846-847; CP 380.¹

Without a doubt, Ecology changed its theory of the case after issuing the Notices of Penalties. A senior Ecology official shortly after Ecology issued the Penalty Orders described the case as follows:

We still do not know what may be in the fill and we are concerned that it may contain enough broken concrete to pose a direct water quality threat (leaching of high ph water into the nearby ditch that drains into the estuary.)

ADR 2115; Appx. 2.

B. Ecology changed its theory at the hearing, objecting to all references to NPDES, and instead pursuing a violation based on the federal Clean Water Act.

The NPDES statute was the sole permitting provision cited in the Notices, and provides, in pertinent part:

Any person who conducts a commercial or industrial operation of any type which results in the disposal of solid or liquid waste material into the waters of the state, including commercial or industrial operators discharging solid or liquid waste material into sewerage systems

¹ Ecology is wrong when it claims PTI failed to raise due process issues pertaining to the deficiencies of the two penalty orders until its reply brief in the Superior Court APA review proceeding. In fact, PTI expressed that notice issue in its statement of issues before the PCHB. PTI referred to it in its opening argument. RP 46. Its Superior Court trial brief thoroughly addressed due process notice issues. CP 138-141. The trial brief's section on due process problems posed by the deficient Notices made the same argument that PTI makes here: that its ability to defend itself was impaired because it did not understand what Ecology's burden of proof was at the hearing.

operated by municipalities or public entities which discharge into public waters of the state, shall procure a permit from either the department or the thermal power plant site evaluation council as provided in RCW 90.48.262(2) before disposing of such waste material...

RCW 90.48.160. At hearing, Ecology's counsel objected to a question about procedures under NPDES, stating that NPDES procedures had no relevance to the case. RP 234. Ecology's counsel argued that RCW 90.48.160 did not apply – even though it was the only permitting provision Ecology had cited in the Notices of Penalty.

PTI attempted to elicit information from Ecology witnesses about the NPDES permit. PTI's attorney asked Ecology's witness Paul Anderson the following question: "Mr. Anderson, did Ecology send out notice to Pacific Topsoils under the immediate actions section [RCW 90.48.240] and give them an opportunity to come forward and provide information to Ecology or to immediately cease the discharge?" RP 234. Ecology's counsel objected, stating: "Still, there is no foundation that that statute, which relates specifically to permits issued under RCW 90.48.160 which are NPDES permit has any relationship to the violations that occurred at Smith Island. So there is no foundation that in his work he would have had any reason to read or use 90.48.240." RP 234.

PTI's attorney asked Ecology employee Anderson many questions about whether the fill on PTI's field was actually running into waters of the state. *See* RP 268, 269, 270, 272; ADR 846-847. PTI's attorney asked the following question: "But at the time that Ecology penalized Pacific

Topsoils for discharging contaminants, pollutants into waters of the state, it didn't know, did it, if it was actually discharging into Puget Sound or Union Slough or any of the waters of the state or impairing those waters?"

RP 272. Ecology's counsel responded:

Objection. This is not the basis for the penalty and so it is asking Mr. Anderson to come up with a basis for the penalty that was not in the record. The penalty is for the filling of wetlands on the site. We may have a dispute about whether wetlands are waters of the state....

RP 272; RP 28; RP 34.

Clearly, Ecology did not pursue the NPDES claim or the anti-degradation claim at hearing. Instead, it claimed that the permit that was needed but not obtained was a Section 404 permit from the U.S. Army Corps of Engineers authorizing filling a wetland. ADR 1228; Finding 29. RP 28; 98; RP 174; RP 104-105; RP 580; RP 585; RP 587. It brought no evidence as to the need for an NPDES permit, no evidence as to any alleged violation of the anti-degradation policy, and no evidence that any pollutant was finding its way into any nearby body of surface water. ADR 847. Nor did it bring any proof that the alleged wetland here was saturated by surface waters as opposed to ground waters. Ecology presented no evidence, and PCHB entered no findings, that RCW 90.48.160 was violated by a failure to obtain an NPDES permit, as charged in the Notices of Penalty. As Ecology did not cite any other specific provisions of law, the basis of its penalty must be limited to WAC

173-201A-300 and its claim that PTI unlawfully filled wetlands without an NPDES permit under RCW 90.48.160.

Ecology now argues that it never claimed the fill was illegal for not being authorized by a Section 404 permit from the Army Corps of Engineers. This is simply false. Before both the PCHB and the Superior Court, it was clear that Ecology was pursuing such a theory. RP 98; RP 174; RP 104-105; RP 580; RP 585; RP 587. This is relevant to the present appeal because not all wetlands are subject to the provisions of Section 404, and it was not a foregone conclusion that filling a wetland on this property would require a Section 404 permit. Ecology presented testimony and argument, and the PCHB entered findings, that PTI did not have a United States Army Corps of Engineers' permit and that it had obtained an unfair advantage over its competitor, Cedar Grove, because unlike Cedar Grove, it had not obtained a Section 404 permit to authorize the filling of wetlands. ADR 1228. *See* Finding No. 29. The Board's findings and conclusions clearly show that Ecology argued that the wetlands filling was unlawful because PTI did not have a Section 404 permit. This was a factual allegation of which PTI needed prior notice, and of which it received no notice whatsoever. It was also one of the PCHB's justifications for the \$88,000 penalty. *See* Conclusion No. 18 and 21; ADR 1238; 1240. PTI went to the hearing expecting to argue about NPDES – which was the sole permitting provision cited in the notice – and instead found that Ecology objected to questions about NPDES and

instead concentrated its case on Section 404 of the federal Clean Water Act. RP 28; RP 34.

It was crucial that PTI be given correct notice of why Ecology claimed that the fill was illegal. Unlike the substances typically addressed under the WPCA, such as agricultural waste, petroleum and chlorinated organics, clean dirt placed on dirt is not an intrinsically harmful substance. As the party with the burden of proof, it was Ecology's job to show that the fill contained contaminants because that was important to support its penalty orders. Yet Paul Anderson testified that Ecology did not know whether the fill was contaminated. RP 331. Ecology has proceeded in this case as though it was the dirt itself, and not any contaminants, that was pollution.

This is a clear due process violation under *Mansour v. King County*, 131 Wn. App. 255, 271, 128 P.3d 1241 (2006)(due process demands that the individual subjected to a penalty be given notice of what the government must prove in order to prevail.) In *Mansour*, the Court found a due process violation because King County had simply cited the wrong subsection of the code. Citing the wrong statutory permitting requirement or pursuing an entirely new theory poses the same problem here. Based on the Notices, PTI went to the hearing prepared to address why requiring an NPDES permit was not appropriate in the context of placing dirt on dirt. It learned for the first time while cross-examining Paul Anderson that Ecology was claiming that an NPDES permit had nothing to do with the case, and that instead the fill was unlawful because it was not authorized

by a United States Army 404 permit. This was a crucial change in the character of the case, and there was no prior notice.

C. Ecology’s new theory postulating an aquatic feature, apparently aimed at helping it meet the WPCA’s “pollution” definition, cannot be allowed because it is a new theory without notice.

One of the fundamental problems for Ecology in this case is that it failed to present sufficient evidence at the hearing as to whether the fill “polluted” waters. The statutory definition of “pollution” requires:

Whenever the word “pollution” is used in this chapter, it shall be construed to mean **such contamination, or other alteration of the physical, chemical or biological properties**, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state **as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.**

RCW 90.48.020 (emphasis added). Merely showing that a physical property has been changed is not enough. It must be such alteration as will or is likely to create a nuisance, render the waters harmful to public health, legitimate beneficial uses², or livestock or wildlife. But Ecology presented no evidence whatsoever to satisfy the definition’s second half. ADR 847.

² The surface water code, codified at Chapter 90.03 RCW treats water as a commodity controlled by the state which can be used for beneficial uses such as domestic, manufacturing and agricultural purposes. *See* RCW 90.03.020 and 90.03.010.

Its newly-postulated hypothetical surface water feature appears to be designed to meet that need. Ecology argues, in part, that

the WPCA defines pollution to include the “alteration of the physical” properties of any water of the state... PTI has significantly altered the physical condition of the wetlands at Smith Island... It is undisputed that any aquatic feature that was on the ground surface prior to PTI’s discharge of fill no longer provides “legitimate beneficial uses” or that the filling has rendered “such waters harmful, detrimental, or injurious . . . to wild animals, birds, fish or other aquatic life.”

Resp. Br. at 28, citing RCW 90.48.020. No legitimate beneficial uses existed, because no surface aquatic feature existed. The loss of unnamed, theoretical beneficial uses, raised only in response to an appeal, does not satisfy the pollution definition. In fact, briefing documents Ecology developed for responding to public questions, stated that “the value of the wetland filled and the potential harm to public resources has not been determined.” ADR 1086.

Even if Ecology’s new theory did help meet the pollution definition, it has never been articulated before and cannot constitutionally form the basis of the penalty. *City of Marysville v. Puget Sound Air Pollution Control Agency*, 104 Wn.2d 115; *Levinson*, 48 Wn. App. at 828. The Notices charged PTI with discharging pollutants into surface waters without an NPDES permit, which was the gravamen of the offense.

Ecology has never before claimed, and there has never been any evidence, that a surface water feature existed in this cow pasture before the fill was placed. No photographs produced at the hearing showed any

surface water feature on the property. ADR 305; 306. Not one witness at the hearing contended that there had been a surface water feature of any kind on the property. No documents adduced at the hearing show any surface water feature on the property. PTI employee Thomas Finnerty testified that he avoided moist soils and avoided a small pond on the site and instead placed the stockpile on a very dry area of the site. RP 505-506. Dr. Kelley testified he saw no evidence of surface hydrology in aerial photos of the area beneath the fill. RP 448; RP 412. He installed ground water monitoring wells and saw ground water in some bored holes he monitored on the site within 12 inches of the original soil surface. ADR 306.

If the wetland had included a pond or other open surface water feature, it would have been classified as a Type 1 wetland under the Snohomish County Critical Area Code. *Snohomish County Code* 30.62.300(2)(a), *attached hereto as Appendix 3*. Dr. Kelley's analysis and Ecology's own analysis indicated that any wetland on this site was a degraded Type 3 wetland. ADR 654; 653.

Ecology's own witness Paul Anderson testified that surface inundation was not a factor that applied to this site. RP 238. According to Anderson, the sole evidence of wetland hydrology was oxidized rhizospheres, which pertain to groundwater driven wetland systems. RP 239. Anderson also testified:

Because as I stated, this site is protected by levies, I don't have it right in front of me, but those other indicators are

associated with overbank stream flow and flooding. I think that there's drift lines, sediment deposits... This site doesn't flood; therefore, those indicators aren't likely to be expected.

RP 241. Anderson later testified:

The factors we looked at were related to the nature of the violation, you know, harm the environment, is there a potential public health risk, like I testified to yesterday, with it being close enough to waters of the state. We don't know if there are contaminants in the fill that may be an issue should they leach either into the ground water or through the surface water into that slough.

RP 331. No witness nor any documentary evidence established that a surface water feature existed beneath the fill. This is a new theory on appeal that has no support in the record. PTI cannot be penalized for removing "legitimate beneficial uses" of a water body that never existed, nor can it be penalized for rendering a non-existent water body harmful or injurious to wildlife.

Ecology presented no evidence at the hearing showing that nearby surface water bodies such as Steamboat Slough were impaired or changed by the placement of the stockpiles. Indeed, Paul Anderson testified that he did not know of any contamination reaching the slough or Puget Sound:

Q: And what public health risks were you concluding occurred?

A: We were unclear what the content of the fill is and due to the proximity to the estuary, we were not sure what could be leaching into the ground or on the surface water and entering the waters of Puget Sound.

A: I believe that that's accurate.

Q: So you were uncertain about that?

A: Yes. We were concerned that there was a risk of contamination and that there were shellfish beds immediately past the mouth of the slough that is on the north boundary of the property.

Q: But you didn't know if the runoff was going into the slough did you?

A: I didn't know for certain but I think there is a good probability that it could....

Q: And you didn't know for certain whether the waters of Puget Sound were being impaired, did you?

Q: Well, Puget Sound is a very large water. It is a water of the state and as I have just stated, the slough is also a water of the state. I don't think it is accurate to say that Puget Sound was impaired, no.

RP 268-269; RP 28; RP 34.

D. Citation to the anti-degradation policy in the Notices did not clarify the case, but reinforced the impression that Ecology was alleging an NPDES violation.

The Penalty Notices' citation to the anti-degradation regulation, WAC 173-201A-300, was to more than three pages of widely varying requirements, and thus did not provide the kind of notice of regulatory authority that is required under *Mansour*. In fact, because the anti-degradation regulations are implemented through an NPDES permit, *see* WAC 173-201A-510, the citation to the anti-degradation regulations only served to strengthen the impression that Ecology was arguing PTI needed an NPDES permit.

Here, as in *Mansour*, Ecology did not provide the correct legal authority supporting its allegation of the violation, nor did it provide sufficient notice of what it would need to prove in order to prevail. First, it cited RCW 90.48.160, a provision it now claims does not apply to this case. Second, in designating the “anti-degradation policy” it cited a single regulation, WAC 173-201A-300, without specifying which section of that extensive regulation was actually violated. The three different tiers of regulations in WAC 173-201A-300 each have varying requirements, and a mere citation to the whole section does not give notice of how the policy was allegedly violated, nor does it explain Ecology’s claims in this proceeding. The Notices of Penalty provided absolutely no notice about how Ecology alleged that PTI had violated the anti-degradation policies and impaired beneficial public use of surface waters. The Penalty Notices failed to allege a specific violation. It is important to note that Ecology presented no evidence, and the Board made no findings, as to any violation of the anti-degradation policy.

E. The charges that were actually brought in the Notices of Penalty cannot be ignored.

In its response brief, Ecology essentially urges the Court to ignore the charging documents to conclude that Ecology proved a violation of RCW 90.48.080. But the purpose of the Notices of Penalty was to give PTI notice of what Ecology needed to prove to establish the violation.

The PCHB paid no attention to the fact that Ecology had abandoned the theory outlined in the Notices and embarked upon a new theory. The

PCHB did not enter any findings and conclusions that PTI had altered surface water features on the property, nor did it enter any findings that PTI impaired surface waters associated with the wetland. Rather, it concentrated on the lack of a Section 404 permit and the theory that the land beneath the fill was a wetland.

Now Ecology claims that it does not matter that PTI received no notice of its Section 404 claim, because Ecology was simply claiming that PTI discharged pollutants into waters of the state and violated RCW 90.48.080 and had violated anti-degradation policies. But this was not the charge. The two Notices of Penalty clearly charged that PTI had failed to obtain an NPDES permit before placing the fill. The PCHB ruled that PTI had unlawfully filled wetlands without a Army Corps of Engineers 404 permit; it ignored the fact that the charge in the Notices of Penalty was that PTI had unlawfully filled wetlands without a NPDES permit. By finding that PTI had committed a violation with which it had not been charged, the PCHB committed here the same constitutional error committed by the Puget Sound Air Pollution Control Agency in the *City of Marysville* case. In that case, the PSCAA found that the City was guilty of “air pollution” despite the fact that it had not been charged with that offense, but with causing detriment to the health, safety or welfare by emitting air contaminants.

F. PTI was entitled to prior notice of what alleged previous violations Ecology would rely on to enhance the penalty for a “repeat violator”.

At the hearing, Ecology argued for an enhanced “repeat violator” penalty based on federal EPA violations at PTI’s Thomas Lake peat mining operation. RP 193-194; RP 221-223; RP 195-196. But enforcement notes in the public records, which PTI examined prior to the hearing, indicated that Ecology would not pursue a “repeat violator” basis for the penalty because the repeat violations had to be on the same property as the one at issue in the hearing. ADR 416. Counsel for PTI questioned Paul Anderson during his deposition as to the basis of the penalty, and he failed to disclose the factors on which Ecology relied in calculating the penalty. He testified that Ecology could not rely on a repeat violator theory as a basis for an enhanced penalty because the past violations had to be on the same property. ADR 589; CP 464.

The relevant question is not whether PTI knew that in some cases “repeat violator” is a basis for raising a penalty; it did, because that is stated in the regulations. The relevant point is that Ecology concealed, until the hearing, that it was planning to justify this penalty based on a “repeat violator” theory in this particular case, and concealed what facts it planned to rely upon to prove PTI was a “repeat violator”. Had Ecology given proper notice of the basis of its penalty in the Notices of Penalty and the facts on which it was relying, PTI could have properly prepared to defend itself against the allegations. RP 194-195; RP 221-223. This is the very essence of proper notice – to allow cases to be decided on the best

evidence, rather than the agency's strategic advantage derived from holding its cards close to its chest.

The Notices of Penalty only notified PTI that “each day constitutes a separate and distinct violation of RCW 90.48.080 and 90.08.160 and WAC 173-201A-300.” They provided no notice that Ecology calculated the penalties based on 11 days of violation at the rate of \$8,000 per day and no notice of what factors the state considered in establishing the penalty – even though it had requested public records and had pointedly asked Ecology officials in depositions about the basis of the penalty. Just as Mr. Mansour did not have notice of the fact that King County was seeking to remove his dog because it was “vicious”, PTI did not have any idea that Ecology was seeking an \$8,000 a day penalty for 11 days. This deprived PTI of the ability to appeal the daily penalties. *Post*, 167 Wn.2d at 315 (failure to provide appeal process associated with each separate daily penalty violated right to due process). Just as Mr. Post was deprived of the ability to appeal each daily penalty, PTI was similarly deprived of the opportunity to appeal daily penalties because it was not informed in the Penalty Notices how the penalty was calculated.

The additional factors that caused Ecology to set an \$8,000 a day penalty – which were only disclosed at the hearing – were that Pacific Topsoils was an alleged repeat violator and did not obtain a 404 permit from the United States Army Corps of Engineers, and that it had obtained a market advantage over its competitor Cedar Grove because Cedar Grove

obtained a 404 permit to fill wetlands. RP 75. PCHB's Conclusion No.

21 stated:

The purpose of a penalty is to influence behavior, encourage compliance and deter future violation...imposition of civil penalties also ensures a level playing field for those businesses which, in good faith, expend money to comply with environmental laws and regulatory requirements. Here, competing businesses will be disadvantaged by the failure of a competitor to go through the necessary permitting process and expend the resources necessary to do it correctly [the Army Corps of Engineers 404 permitting process] given the seriousness and number of distinct violations, the uncooperative approach to Ecology's directions to come into compliance and the lack of appropriate response to the penalty and administrative order, the Board finds no basis for reducing the penalty which was assessed well below the maximum authorized by statute.

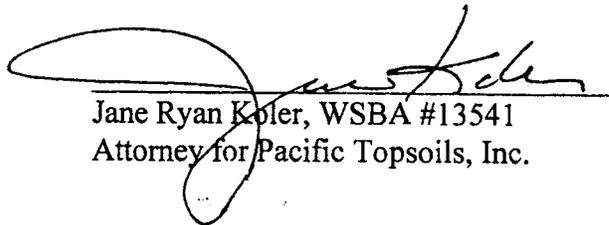
ADR 1240. These were all bases for the penalty that were not disclosed in the notice and were not properly relied upon. PTI was forced to go to hearing without understanding the basis of the penalty Ecology sought.

CONCLUSION

For the reasons stated above, the decision of the PCHB upholding the Penalty Orders should be reversed.

DATED this 10 day of May, 2010 at Gig Harbor, Washington.

Respectfully submitted,


Jane Ryan Koler, WSBA #13541
Attorney for Pacific Topsoils, Inc.

APPENDICES

1. Excerpts from record showing that there was no surface water feature beneath the fill.
2. E-mail from Ecology head of Ecology's surface water division showing that Ecology changed its theory of the case before the hearing.
3. Snohomish County Critical Area Code showing that a wetland with a surface water feature is a type 1 wetland.
4. Excerpts from record showing that Ecology did not rely on a repeat violator theory when violation did not occur on the same property.

APPENDIX 1

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED
COMMUNICATION

Kelly Preliminary Draft (7/16/07) Critique

Paul Anderson, WDOE Wetland Specialist, July 17, 2007

1. Pg. 1, Table 1. Wetland hydrologic conditions include standing water or shallow groundwater at or above 12 inches. Soil saturation within the upper 12 inches of the surface is also an indicator of wetland hydrology. In non-sandy soils, the groundwater capillary fringe typically extends 12 inches above the water table. For example, the water table could be at 23 inches with saturation extending to 11 inches depth, which would be a positive indicator of wetland hydrology (i.e., saturation within the upper 12 inches).
2. Pg. 2, Previous Wetland Maps, bullet 1. PTI site mapped as non-wetland in 1979 Snohomish Estuary Wetlands Study. More recent documents (Weyerhaeuser BA, Weyerhaeuser SEPA notice, SEWIP, NWI) identify the subject parcel as wetland or show wetlands on the site. Active management (e.g., diking, drainage, or mowing) may sufficiently alter the site so that wetland conditions are not present. If active management is discontinued, particularly on floodplain sites such as the subject property, wetland conditions may reestablish.
3. Pg. 4, Historical Aerial Photographs, Bullet 2. Historical photographs show no surface water in area of alleged wetland fill. Surface water (standing water) is not the only evidence of water needed to satisfy wetland hydrology parameter. Soil saturation and shallow groundwater, which may not be visible on aerial photography, are sufficient to meet the wetland hydrology parameter. In Western Washington, aerial photographs flights are typically flown during the summer when conditions are dry and surface water may not be present. More recent aerial photographs (1990-2004) do not show water but do show a diversity of vegetation consistent with wetland plant communities.
4. Pg. 4, Historical Aerial Photographs, Bullet 4. All available photographs taken during the winter...show a lack of standing water...lack wetland vegetation. The period covered by these photographs (1967-1985) coincides with the period the area was actively managed as farmland, as described in the preceding paragraph. Management as farmland may have sufficiently altered the hydrology and plants that wetland conditions were not present. More recent aerial photographs (1990-2004) do not show clear evidence of farming practices on the property. The 2006 aerial photograph, since the site was acquired by PTI does show mowing or tilling furrows on the site.
5. Pg. 4, Climate and Rainfall, Table 2. ...observations of groundwater during the spring of 2007 may be somewhat wetter than average. Dr. Kelly states that the rainfall in the spring of 2007 was somewhat wetter than normal, which appears to be contradicted by the precipitation data provided in Table 2. The long-term average reported for 2007 in Table 2 is 21.74 inches, exactly the same amount of rainfall reported for the summed average and for 1967 and 1976, the only other

years with complete data included in the table. This would indicate that rainfall in the spring of 2007 was normal.

The 30-year mean annual precipitation reported for 1971 to 2000 at Everett Junior College is 37.54 inches, which would indicate that the first half of the 2007 water year was not wetter than average. A direct comparison with Table 2 is not possible at this time as Dr. Kelly summarizes precipitation data only for November through March and does not provide the annual averages.

During my site visit on October 27, 2007, I found sufficient soil moisture to request a wetland delineation of the subject site. Regular fall rains had not yet returned and the preceding summer had been very dry.

6. Pg. 5, Vegetation adjacent to fill, ¶ 2. In nearly all locations, the dominant plants found are rated as facultative wetland plants...vegetation cannot be reliably used to determine the likelihood of wetlands on the site. These two statements appear to be contradictory. As stated in Table 1 (pg. 1), wetland vegetation is present when greater than 50 percent of the dominant vegetation is rated as FACULTATIVE or wetter. Dr. Kelly states on page 5 that the dominant plants are FACULTATIVE wetland plants, a statement that meets the wetland vegetation parameter. The presence of wetland vegetation (i.e., greater than 50 percent of dominant species are FACULTATIVE or wetter), is one of the three parameters required to establish the presence of a regulated wetland. In the concluding sentence of this paragraph, Dr. Kelly states that wetland determinations must be based on the presence of hydric soil and wetland hydrology. More correctly, wetland determinations must be based on the presence of hydric soil, wetland hydrology, and hydrophytic (wetland) vegetation.

Vegetation on much of the site may not be reliable for determining the presence of wetlands because it has been recently managed (i.e., replanted and mowed). In atypical situations where the vegetation has been altered, undisturbed reference sites or conditions, if available, should be used to characterize the vegetation. Vegetation that I observed over most of the site during my site visit on October 27, 2007, was non-native pasture grasses. Beyond the filled area, the site appeared to have been tilled, planted in grasses, and mowed. Where the vegetation had not been mowed reed canarygrass (*Phalaris arundinacea*) and Douglas' spiraea (*Spiraea douglasii*) were the dominant species, both of which are listed as FACULTATIVE WETLAND species. This may indicate that prior to mowing and recent site management by PTI, the dominant vegetation on the parcel was wetter than the current FACULTATIVE community.

7. Pg. 7, Groundwater monitoring wells located near the fill. Four of the seven monitoring wells, (Wells 6, 10, 27, and 27) indicate positive wetland hydrology with a water table within 1.3 feet of the surface. Well 6, which Dr. Kelly describes as "located in a small depression near the edge of the fill", clearly shows wetland hydrology was present during the monitoring period. Stating that the well is near the edge of the fill implies that the well is outside of the filled portion of the site. More properly, this location should be described as within the fill, as this well is located within an unfilled "doughnut hole" that is entirely surrounded by fill.

of filling, the "normal circumstance" for the Pacific Topsoils site was herbaceous pasture and/or mowed grassland³.

Table 4. Key aerial photographs examined to evaluate historical conditions and potential wetlands and surface water on the Pacific Topsoils site.

Date	Source	Date	Source
2006	Snohomish County	1981	Aero-metrics/Walker
2005	Google Maps	1976	Aero-metrics/Walker*
2003	Snohomish County	1974	UW Map Library
2001	UW Map Library	1970	UW Map Library
1997	UW Map Library	1967	Aero-metrics/Walker*
1995	UW Map Library	1965	UW Map Library
1993	Ecology Coastal Atlas	1955	UW Map Library
1991	UW Map Library	1947	UW Map Library
1985	Aero-metrics/Walker*	1944	Aero-metrics/Walker*
1983	UW Map Library		

*Photographs taken during the winter or early spring months

There are no streams, wetlands, or other surface water features visible on this aerial photograph within the area of fill placement.

Aerial photographs available at the University of Washington Library, Aero-Metric/Walker Division, and on-line internet sources. Aerial photographs were screened to find, photographs from multiple years and taken during the wet part of the growing season were sought, following recommendations of the Federal Interagency Committee for Wetland Delineation (1985) (see Table 3). These photographs were most likely to show evidence of surface water.

Photographs show the area in various combinations of farmland (pasture or hayfield) and shrub land. During the 1950s through most of the 1980s most of the area where fill was placed was a combination of shrub and grassland. Various trails appear to be present throughout the site that may be caused by grazing livestock. No photographs observed show any obvious colors or patterns that demonstrate wetlands are present on the site, including the 1.5 acre wetland mapped by the National Wetland Inventory.

The dark shades of shrub vegetation observed on aerial photographs during winter months (1976, 1981, and 1985) indicate the area may be dominated by evergreen shrubs. In Western Washington, the most prominent evergreen shrubs that occur in pastureland are evergreen blackberry, pacific blackberry, and Scots broom. Each of these species are

³ Various statements have been made that refer to grazing on the site and some aerial photographs show paths that would be consistent with a pasture land use. However, the lack of any fencing on the site suggests that the non-woody grassland condition is likely the result of mowing because fencing of cattle is the general practice in the Puget Sound area.

rated as a non-wetland plants (FACU, FACU+, NL respectively; see Table 2). These plants are more likely to occur in non-wetlands than in wetlands.

All available aerial photographs taken during the winter and early growing seasons were during years of near or above normal precipitation (March 8, 1985; February 27, 1981, April 2, 1976; and April 1, 1967), and should be representative of normal years (see Appendix I). Each show a lack of standing water in the area of recently placed fill. These photographs also lack any color or shading patterns that suggest wetland vegetation was present in areas where recent fill has been placed.

3.1.5 Soil Survey

The Snohomish County Soil Survey (NRCS 2007) maps the Puget (drained) soil series as occurring on the Pacific Topsoils site (Figure 11). The Puget soil is a very deep poorly drained soil that formed in alluvial soils located in floodplains and river terraces. Within Snohomish County, about 85% of the Puget Soil series is drained, and about 15% of the series may be undrained. The water and drainage features of the Puget soil and potential hydric soils associated with it are listed in Table 5. The drained Puget silty clay soil is rarely flooded or ponded. A seasonal high water table and soil saturation (occurring about 24 -36 inches beneath the soil surface) is found during the November - May period.

The mapping of a drained hydric soil on the site suggests that drainage alterations (levees and tide gates) have substantially altered drainage conditions on the site. Careful field evaluation of conditions on the Pacific Topsoils site are necessary to determine whether the soils on the site meet the wetland hydrology criteria, or alternatively that they are sufficiently drained such that they no longer meet the wetland hydrology criteria.

1 So in this case, don't you think to comply with the
2 WAC, you'd need to have other indicators of hydrology
3 besides just the evidence of oxidized rhizospheres,
4 especially since they are No. 7 on the manual's list?

5 A Yes. I asked Pacific Topsoils to provide a delineation,
6 and in reviewing the list of factors, they are No. 7.
7 But I believe -- I'm not sure where they are. The
8 previous factors listed before don't apply to wetlands
9 at this location in the landscape that have been diked.

10 They're not subject to flooding. What do we have?
11 We've got -- okay. One and two are visual observation
12 of inundation and saturation. I have said I didn't see
13 it during my first site visit. Three, four, five, and
14 six, water marks, drift lines, settlement deposits, and
15 drainage patterns. These are indicators associated with
16 periodic flooding from streams or tidal influence.

17 The dikes have effectively precluded these
18 indicators from occurring on this site, so they're not
19 applicable. We now move down to oxidized rhizospheres.

20 Q Well, and the fact that some of the indicators aren't
21 applicable is due to the fact that the site had been
22 altered?

23 A That's correct. It doesn't say that the soils won't
24 retain water or that wetland hydrology may not be
25 present.

1 season but early in the water year. We've a very dry summer.
2 You don't necessarily need to have the presence of water to
3 meet the hydrology criteria. You can have indicators of
4 hydrology, different indicators, including drift lines where
5 maybe high water has left debris on the site. Drainage
6 patterns in a wetland. Water staining on leaves, or what are
7 called oxidized rhizospheres. And I did observe those in the
8 soil, the oxidized rhizospheres. There was enough moisture in
9 the soil that I felt that wetlands were present and that a
10 delineation should be done.

11 Q Okay. Did you communicate this information to Mr. Bajsarowicz?

12 A Yes, I did. And he said that they were already in discussions
13 with Parametrix to have a delineation done.

14 Q And have you had an opportunity to review a delineation that
15 was completed by Parametrix?

16 A None was ever submitted. I was contacted by one of the
17 Parametrix biologists in December --

18 MS. KOLER: Objection. Based on hearsay and work
19 product --

20 HEARING EXAMINER CRANDALL: Mic is off.

21 MS. KOLER: Objection based on hearsay.

22 HEARING EXAMINER CRANDALL: You have to start again.

23 MS. KOLER: This is an out of court statement offered
24 for the truth of the matter asserted. And this is rank
25 unreliable hearsay.

3.1.6.3 Soil Borings through the Fill

Soil borings were made through the fill material and samples of natural soil from beneath the fill were obtained and examined for wetland soil colors and saturated conditions that could indicate the potential presence of wetland hydrology. Borings in the fill were obtained from about 44 locations (Appendix E). At these locations, the colors and textures of native soil materials were described. Soils were examined to determine if they were saturated. Saturation was evaluated by observing extracted soil samples for glistening, which indicates very wet soils conditions, where the soil pore spaces are largely filled with free water. Soils were also squeezed between the fingers to collapse their pore space.

When squeezed, if the pore space is filled or partially filled with free water, small water droplets emerge from the soil. If soils lacked free water in the pore space, no water droplets would emerge when squeezed. Since both saturated and non-saturated soils can emit water during the "squeeze test", the test cannot be used to confirm the presence of soil saturation and cannot be reliably used for wetland delineations. In this study, the test was used to identify areas where further evaluation of soil hydrologic conditions may be necessary. If soils lacked free water in the pore space, no water droplets were visible upon squeezing, and a reliable conclusion that saturation is absent and the area is non-wetland was made.

The natural soils found in all borings were found to meet the hydric soil color criteria within the upper 12 inches of soil. This finding is similar to the finding of hydric soil colors in areas adjacent to the fill, and may be similarly related to the drainage alterations caused by levees and a tidegate, which has apparently drained the area to permit farming.

Soils retrieved from most borings were not saturated in the upper 12 inches. In these soils, no glistening of the soil sample was present, and water could not be squeezed from the soil samples (see Appendix E). Several soil samples obtained near the west and southwestern portions of the fill were found to have free water in their pore space, and thus may be at or near saturation. Further evaluation of these soils is necessary to determine if they are saturated, and if this saturation meets the wetland hydrology criteria (saturation for 14 consecutive days during the growing season). The area of fill that is atop these wet soils is estimated to be between 0.1 and 0.2 acres in size.

Geotechnical consultants (Mr. Sondergaard of Associated Earth Sciences Inc., Kirkland, WA) determined that despite the volume of fill material placed atop natural soils, the presence of saturated soil beneath the fill would be expected if the areas beneath the fill were indeed wetland. This assessment was proven to be true, as areas of saturated soils were found beneath the fill, and these areas generally corresponded to areas of

1 Q (By Ms. Koler) Okay. But these earlier photos, when
2 you look at it -- when you look at this 2000 aerial
3 photo, can you tell that this is a wetland?

4 A No, not from the photo itself.

5 Q So the photos -- just so I'm straight and understand
6 your position, the photos don't present any evidence
7 that a wetland was filled?

8 A They are one of the pieces of evidence that we look at
9 when we consider the violation. They identify the area.
10 You can see where there isn't fill. You can see where
11 there is fill, but we are not relying on them alone to
12 determine whether wetlands have been filled.

13 Q Do these photographs tell you if this area, which
14 eventually was filled, is a wetland?

15 A No.

16 Q Looking at the 2002 photographs, do these photographs
17 tell you that the area which was eventually filled was a
18 wetland?

19 A No.

20 Q So they're just more descriptive material of the area --

21 A Correct.

22 Q -- which was eventually filled?

23 A Yeah.

24 Q So these photographs are really just anecdotal
25 information about the area that was filled?

1 A Well, I'm not sure what you mean by "anecdotal." These
2 are photographs. They show the site conditions. I
3 believe that, you know, they're labeled at a given time,
4 and I believe that that's accurate. They are part of
5 what we looked at when we considered the violation.

6 Q Okay. But these photographs wouldn't be used as
7 evidence that there was a wetland that was subsequently
8 filled?

9 A Not by themselves. They may be used for illustrative
10 purposes to show where wetland was identified on the
11 ground, something to that effect, but to look at the
12 photo and say, "This is wetland. This is not," they're
13 simply supporting evidence.

14 Q And I guess to clarify, they're supporting evidence in
15 that they present evidence about the context of where
16 the fill occurred?

17 A That's correct.

18 Q But not that wetlands were filled?

19 A You can't say from the photos whether wetlands were
20 filled.

21 Q Going on to look at the 2004 photographs of the site,
22 what do these photographs tell you that led you to the
23 conclusion that a penalty should be imposed?

24 A The photographs were one of the pieces of evidence that
25 we looked at, as I've said. They weren't more

1 probably dominant facultative species, weren't there?

2 A There may have been. My area of interest was around the
3 periphery of the fill, and in the areas that I looked
4 at, facultative wetland species dominated.

5 Q And did you observe any vegetation dominated by
6 facultative wet species?

7 A I just stated that I did, yes.

8 Q But was there an adjacent obligative species?

9 A I'm not clear what you're asking. There are cattails on
10 the site, which are obligates, but I wouldn't say they
11 were adjacent to the fill, if that's your question. I'm
12 not clear what you mean by "adjacent."

13 Q And is the site known to have altered hydrology?

14 A The hydrology on the site has been altered, as
15 Mr. Stockdale described at least twice, due to the
16 construction of levies or dikes back in the early
17 1900's.

18 Q Okay. And so in that circumstance, the wetland
19 delineation manual says that you have to document
20 evidence of periodic inundation or saturated soils, and
21 you didn't do that, did you?

22 A Oxidized rhizospheres are evidence of periodic
23 inundation or saturation. They form as a result of
24 prolonged water within the soil column.

25 Q Now you said that Dr. Kelly had incorrectly

1 that were mowed were not native.

2 Q So you saw a lot of not-native species out there?

3 A I saw areas beyond the fill that had been mowed that
4 appeared to be dominated by nonnative grasses.

5 Q And then you also have the possibility that the hydric
6 soil might be drained?

7 A A possibility.

8 Q That would cause two parameters to be in question here,
9 wouldn't it?

10 A Depends on where you dug the hole and did your sampling
11 point.

12 Q But that's pretty different from saying all 47 acres are
13 wetland, isn't it?

14 A I didn't say all 47 acres is wetland.

15 Q I thought you were saying that.

16 A Two of the Weyerhaeuser reports characterize this entire
17 parcel as wetland. I found wetland plants and wetland
18 soils -- wetland soils next to the fill, away from the
19 fill, a predominance of hydrophytic vegetation adjacent
20 to the fill where it wasn't mowed. And it met two of
21 the three parameters without doubt.

22 I also found oxidized rhizospheres, which I believe
23 meets the hydrology criteria, but I asked Pacific
24 Topsoils to have a delineation done. In my opinion,
25 there were wetlands on the site, and the fill was

1 So in this case, don't you think to comply with the
2 WAC, you'd need to have other indicators of hydrology
3 besides just the evidence of oxidized rhizospheres,
4 especially since they are No. 7 on the manual's list?

5 A Yes. I asked Pacific Topsoils to provide a delineation,
6 and in reviewing the list of factors, they are No. 7.
7 But I believe -- I'm not sure where they are. The
8 previous factors listed before don't apply to wetlands
9 at this location in the landscape that have been diked.

10 They're not subject to flooding. What do we have?
11 We've got -- okay. One and two are visual observation
12 of inundation and saturation. I have said I didn't see
13 it during my first site visit. Three, four, five, and
14 six, water marks, drift lines, settlement deposits, and
15 drainage patterns. These are indicators associated with
16 periodic flooding from streams or tidal influence.

17 The dikes have effectively precluded these
18 indicators from occurring on this site, so they're not
19 applicable. We now move down to oxidized rhizospheres.

20 Q Well, and the fact that some of the indicators aren't
21 applicable is due to the fact that the site had been
22 altered?

23 A That's correct. It doesn't say that the soils won't
24 retain water or that wetland hydrology may not be
25 present.

1 conclusion on.

2 Q Did you do any visual observations of inundation?

3 A No. I stated I did not see any inundation on the site,
4 and I didn't see saturation during my October 2006 site
5 visit.

6 Q Did you see any visual observation of soil saturation?

7 A We did observe, I believe, that one, maybe two of the
8 soil pits in our September site visit were saturated
9 within 12 inches of the surface.

10 Q But you don't remember how many of the pits were
11 saturated?

12 A No.

13 Q And the pits that you excavated in October of 2006 were
14 not saturated?

15 A That's correct.

16 Q And you're saying at least three of the pits that you
17 excavated in September of 2007 were not saturated?

18 A I don't recall saying that three of the pits weren't
19 saturated. I don't recall the number. I'd have to
20 refer to Mr. Stockdale's notes.

21 Q But all of them weren't saturated?

22 A I don't recall that they were, no.

23 Q Did you see water marks on woody vegetation?

24 A No.

25 Q Did you see drift lines?

APPENDIX 2

FW Pacific Topsoils figure.txt

Pacific Topsoils figure
From: White, Gordon (ECY)
Sent: Thursday, March 08, 2007 10:00 PM
To: Manning, Jay (ECY); Baldi, Josh (ECY); Zehm, Polly (ECY); Workman, David (ECY); Hart, Curt (ECY)
Cc: Clingman, Tom (ECY); Anderson, Paul (ECY NWRO SEA); Tallent, Geoff (ECY); Stockdale, Erik (ECY); Sturdevant, Ted (ECY)
Subject: FW: Pacific Topsoils figure

Attachments: PTI_RFE_Fig-1 3-6-07.doc

FYI. Here is a good aerial photo of the 12 acre illegal fill of a wetland on Smith Island bordering the Snohomish Estuary. We still do not know what may be in the fill and we are concerned that it may contain enough broken concrete to pose a direct water quality threat (leaching of high ph water into the nearby ditch that drains into estuary) to the estuary. It is a really good example of the importance of having an enforcement presence in order to protect Puget Sound and preserve opportunities for restoration.

Much kudos to our wetland specialist Paul Anderson and his supervisor Erik Stockdale who have worked diligently, fairly and firmly in bringing this enforcement action forward. Thank you Paul and Erik.

Gordon White
Program Manager
Department of Ecology
Shorelands and Environmental Assistance Program
phone: 360-407-6977
e-mail: gwhi461@ecy.wa.gov
PO Box 47600
Olympia, Washington 98504-7600

From: Anderson, Paul (ECY NWRO SEA)
Sent: Thu 3/8/2007 10:59 AM
To: White, Gordon (ECY)
Cc: Tallent, Geoff (ECY)
Subject: Pacific Topsoils figure

Gordon:

Geoff asked me to send you a copy of the Pacific Topsoils figure in case you want to provide it to Ecology management. Attached please find the figure that I prepared to accompany the Request for Enforcement. If you like, I can also send the original complaint from Everett Shorelines Coalition showing aerial photos of the site dating back to the early 1990s.

If you have any questions, or would like any additional information, please let me know.

Paul <<PTI_RFE_Fig-1 3-6-07.doc>>

Paul S. Anderson
Wetland Specialist
Washington State Department of Ecology
3190 - 160th Ave. SE
Bellevue, WA 98008
Phone (425) 649-7148
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APPENDIX 3

APPENDIX 3 – EXCERPT FROM SNOHOMISH COUNTY CODE

30.62.300 - Classification of streams and wetlands.

(1) Stream Classifications. Streams are classified based on the water typing criteria in former WAC 222-16-030 as adopted by the state in June 1993 and set forth in Table 30.62.300(1) below.

(Added Ord. 02-064, § 19 (part), Dec. 9, 2002, Eff date Feb. 1, 2003).

Table 30.62.300(1)
WATER TYPING CRITERIA

Water type	1	2	3	4	5
Channel Width	N/A	20' or greater between ordinary high water marks (OHWM)	• Anadromous fish: 5 ft. or wider between OHWM. • Resident game fish: 10 ft. or wider between OHWM	2 ft. wider between OHWM	Less than 2 ft. between OHWM.
Gradient	N/A	Less than 4% (less than 5% for off-channel drainage's)	• Anadromous fish: Less than 12%. Not upstream of a falls greater than 10 ft. high. • Resident game fish: Less than 12%	N/A	N/A
Flow	N/A	N/A	• Anadromous fish: N/A. • Resident game fish: Greater than 0.3 CFS at summer low flow	N/A	N/A
Impoundment	N/A	Water surface area of 1 acre or greater at seasonal low flow	• Anadromous fish: Surface area less than 1 acre at seasonal low flow. • Resident game fish: Surface area less than 0.5 acre at seasonal low flow	N/A	N/A
Fisheries	N/A	Used by substantial numbers of Anadromous or resident game fish for	Used by significant numbers of Anadromous or resident game fish for	Not used by significant numbers of fish	Not used by significant numbers of fish

		spawning, rearing or migration	spawning, rearing or migration		
(Continued on next page)					

Table 30.62.300(1)
WATER TYPING CRITERIA WAC (Continued)

Water type	1	2	3	4	5
Diversion	N/A	Domestic use for 100 or more residences or campsites, accommodation facility for 10 or more persons - Includes upstream reach of 1500 ft. or until the drainage area is < or = to 50%, whichever is less.	Domestic use for 10 or more residences of campsites, accommodation facility for 10 or more persons - Includes upstream reach of 1,500 ft. or until the drainage area is less than 50%, whichever is less	N/A	N/A
Other	All water within OHWM inventoried as "Shorelines of the State" excluding related wetlands.	Streams flowing through campgrounds available to the public having 30 campsites or more.	Contributes > 20% of the flow to a Type 1 or 2 Water. Anadromous fish impoundment's have outlet to stream with Anadromous fish	All natural waters not classified as Type 1, 2 or 3, and for the purpose of protecting downstream waters	All natural waters not classified as Type 1, 2, 3 or 4, or seepage areas, ponds, and drainageways having short runoff periods.

(2) Wetlands Categories. All determinations of wetlands ratings will be based on the entire extent of the wetlands, unrelated to property lines or ownership patterns. Wetlands are classified based on the following systems:

(a) Category 1 wetlands are wetlands which satisfy one or more of the following criteria:

(i) are equal to or greater than 10 acres in size, hydrologically connected and contain three or more wetland classes each covering 10 percent or more of the wetland, one of which is open water;

(ii) have been documented by the State Department of Fish and Wildlife priority habitat species program as regionally significant waterfowl or shorebird concentration areas;

- (iii) are bog/fen systems one acre or larger;
- (iv) are mature forested wetlands equal to or greater than 10 acres in size; or
- (v) are estuarine wetlands.

(b) Category 2 wetlands are wetlands which satisfy one or more of the following criteria:

- (i) are equal to or greater than five acres in size and contain three or more wetland classes; or
- (ii) are mature forested wetlands less than 10 acres in size;
- (iii) are bog/fen systems less than one acre.

(c) Category 3 wetlands are wetlands which satisfy none of the criteria for Categories 1, 2, or 4 wetlands.

(d) Category 4 wetlands are non-riparian wetlands less than one acre, with one wetland class, and >90 percent aerial coverage of any combination of species from the list in SCC Table 30.62.300(2) below:

Table 30.62.300(2)

CATEGORY 4 WETLANDS—INVASIVE/EXOTIC PLANT SPECIES

Scientific name	Common name	Scientific name	Common name
<i>Agropyron repens</i>	Quackgrass	<i>Lotus corniculatus</i>	Birdsfoot trefoil
<i>Alopecurus pratensis</i> , <i>A. aequalis</i>	Meadow foxtail	<i>Lythrum salicaria</i>	Purple loosestrife
<i>Arctium minus</i>	Burdock	<i>Matricaria matricarioides</i>	Pineapple weed
<i>Bromos tectorum</i> , <i>B. rigidus</i> , <i>B. japonicus</i> , <i>B. mollis</i> ,		<i>Medicago sativa</i>	Alfalfa
<i>B. commutatus</i> , <i>B. inermis</i> ,		<i>Melilotus alba</i> , <i>M. officinalis</i>	Sweet clover
<i>B. erectus</i>	Bromes	<i>Phalaris arundinacea</i>	Reed Canary Grass
<i>Cenchrus longispinus</i>	Sandbur	<i>Phleum pratense</i>	Timothy
<i>Centaurea solstitialis</i> , <i>C. repens</i> ,		<i>Phragmites communis</i>	Reed
<i>C. cyanus</i> , <i>C. maculosa</i> , <i>C. diffusa</i>	Knapweeds	<i>Poa compressa</i> , <i>P. palustris</i> ,	
		<i>P. pratensis</i>	Bluegrass
		<i>Polygonum aviculare</i> , <i>P.</i>	

APPENDIX 1 – EXCERPT FROM SNOHOMISH COUNTY CODE

Page 4 of 4

<i>Cirsium vulgare</i> , <i>C. arvense</i>	Thistles	<i>convolvulus</i> , <i>P. cuspidatum</i> ,	
<i>Cynosurus cristatus</i> , <i>C. echinatus</i>	Dogtail	<i>P. lapathifolium</i> , <i>P. persicaria</i>	Knotweeds
<i>Cytisus scoparius</i>	Scotch broom	<i>Ranunculus repens</i>	Buttercup
<i>Dactylis glomerata</i>	Orchardgrass	<i>Rubus discolor</i> , <i>R. laciniatus</i> ,	
<i>Dipsacus sylvestris</i>	Teasel	<i>R. vestitus</i> , <i>R. macrophyllus</i>	Non-native blackberry
<i>Digitaria sanguinalis</i>	Crab Grass	<i>Salsola kali</i>	Russian Thistle
<i>Echinochloa crusgalli</i>	Barnyard grass	<i>Setaria viridis</i>	Green Bristlegrass
<i>Elaeagnus augustifolia</i>	Russian Olive	<i>Sisymbrium altissimum</i> , <i>S. loeselii</i> ,	Tumblemustards
<i>Euphorbia peplus</i> , <i>E. esula</i>	Spurge	<i>S. officinale</i>	
<i>Festuca arundinacea</i> , <i>F. pratensis</i>	Fescue	<i>Tanacetum vulgare</i>	Tansy
<i>Holcus lanatus</i> , <i>H. mollis</i>	Velvet grass	<i>Trifolium dubium</i> , <i>T. pratense</i> ,	
<i>Hordeum jubatum</i>	Foxtail barley	<i>T. repens</i> , <i>T. arvense</i> ,	
<i>Hypericum perforatum</i>	St. John's wort	<i>T. subterraneum</i> , <i>T. hybridum</i>	Clovers
<i>Juncus effusus</i>	Soft Rush	Cultivated species:	Wheat, corn, barley, rye, etc.
<i>Lolium perenne</i> , <i>L. multiflorum</i> ,			
<i>L. temulentum</i>	Ryegrass		

(Added Ord. 02-064, § 19 (part), Dec. 9, 2002, Eff date Feb. 1, 2003).

APPENDIX 4

1 either the Department of Ecology or the Attorney
2 General's office.

3 Q Okay. And then Peggy Toepel apparently had made some
4 comment that Weyerhaeuser did not do a critical area
5 study. What significance does that have?

6 A I'm not sure what that refers to.

7 Q And what about comments about the DOE cannot view
8 Pacific Topsoils as a repeat violator unless it occurs
9 on the same site? Can you elaborate on that a little
10 bit?

11 A That is a standard that apparently under the way state
12 law is regulated, whatever, that in order to consider it
13 a repeat violation, it needs to be the same type of
14 action by the same entity at the same site, is my
15 understanding.

16 Q And was there interest in characterizing Pacific
17 Topsoils as a repeat violator?

18 A My understanding is that there was. They have had
19 previous violations for wetland -- unregulated wetland
20 fill, unpermitted wetland fill, yes.

21 Q And you're talking about the violation over at Thomas
22 Lake?

23 A Correct. The previous violation and apparently an
24 ongoing violation.

25 Q Wasn't that resolved?

Pacific Topsoil MTG @ DOE Hqs. 3-30-07

GEOFF TALLENT - DOE - Section Supervisor

JOAN GARIBAY - MIT BANK - EPA

DEBRA HILLMAN - EPA

BOB - EPA

SCOTT WEST - EPA

PAUL ANDERSON - DOE

GARY HANIDA - SNO H. D.

JOAN MAUHIARO - AG'S OFFICE

John Pell - Corps of Engineers

DOE - cannot view PT as repeat violator unless
it occurs on same site

DOE \leq in Oct from Snok Shorelines Coalition
* class 3 emergent wetland *

Peggy Toepel

↓

Weprhauser - did not do critical area study

Paul A - Oct 27th - imp - noted wetland soils

P.T. filling since Jan '06

Paul A - PT has been unresponsive

EXHIBIT

Exhibit 14

000589 A

25

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COURT OF APPEALS
MAY 11 2011

10 MAY 11 PM 12:21

STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

PACIFIC TOPSOILS, INC., a
Washington Corporation and DAVE
FORMAN, an individual

Appellant,

v.

THE WASHINGTON STATE
DEPARTMENT OF ECOLOGY, a Division
of the State of Washington

Respondent.

Court of Appeals No. 39691-2-II

CERTIFICATE OF SERVICE

I, Anita Hope, hereby state as follows:

I am over the age of 18 years, competent to testify, and certify to the following
based on my own knowledge and belief.

On the date below stated, I caused the **Reply Brief of Appellant (Corrected to
25 pages)** and Certificate of Service to be sent in the manner noted to the following
party.

To: The Department of Ecology
Joan Marchioro
Senior Counsel

CERTIFICATE OF SERVICE- 1
315:Pacific Topsoils Dept of Ecology/Cert. of Serv.

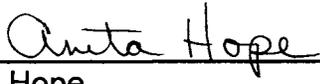
ORIGINAL

LAW OFFICE OF
JANE RYAN KOLER, PLLC
5801 Soundview Drive, Suite 258
P.O. Box 2509 - Gig Harbor 98335
TEL: 253 853-1806 FAX 253 851-6225

1 State of Washington
2 Department of Ecology
3 P.O. Box 40117
4 Olympia, WA 98504-0017

- 4 Via regular U.S. Mail, postage prepaid
5 Via federal express overnight delivery
6 Via legal messenger service
7 Via facsimile (360) 586-6760
8 Via electronic mail – JoanM2@ATG.WA.gov

8 DATED this 10th day of May, 2010.

10
11 
12 _____
13 Anita Hope