

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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FIRST ROMANIAN PENTECOSTAL CHURCH OF KENMORE, a  
Washington Corporation, Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, a division  
of the State of Washington, Appellant.

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BRIEF OF APPELLANT

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## **I. INTRODUCTION.**

After parishioners of the First Romanian Pentecostal Church performed unpermitted development work on the Church's vacant property without the knowledge of the Church governing board, several Washington State agencies imposed remediation and penalties. The Department of Fish and Wildlife and the Department of Natural Resources had already addressed clearing, grading, and stream diversion, and the County was addressing wetland damage, when the Department of Ecology stepped in and imposed a penalty for all the violations together. Ecology overstepped its authority by issuing penalties for development that is subject to permits controlled by other agencies. Ecology's penalty orders failed to give sufficient notice of its theories under the Water Pollution Control Act, and failed to give sufficient notice of how the penalties were calculated. Ecology's attempt to make the Water Pollution Control Act cover the gamut of environmental violations has rendered that statute vague as applied. Further, the Pollution Control Hearings Board (PCHB) erroneously found the Church liable on summary judgment where there were disputed issues of material fact. The Court should reverse the Pollution Control Hearings Board order affirming the finding of violation and penalty.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The PCHB made an error of law on summary judgment when it concluded that Ecology has authority to regulate land clearing, grading, filling, and stream diversion.  
  
(Summary Judgment(SJ) Order AD 353-355  
  
Administrative Record ("AD"))
2. The PCHB erroneously granted summary judgment on the issue of liability when facts were in dispute as to who actually committed the violation. (SJ Order AD 350-353)
3. The PCHB made an error of law on summary judgment when it concluded that the Water Pollution Control Act gives Ecology jurisdiction to regulate wetlands. (SJ Order AD 353-355)
4. The PCHB erred in finding that Ecology's jurisdiction over waters of the state extends to wetland and buffer restoration. (SJ Order AD 355-357)
5. The PCHB and trial court erred in failing to find that Ecology's action has rendered the Water Pollution Control

Act unconstitutionally vague as applied. (SJ Order AD 359-362)

6. The PCHB and trial court erroneously ruled that the penalty order gave the church constitutionally sufficient notice. SJ Order AD 359-362)
7. The PCHB and trial court erred in failing to find that the “fair notice” doctrine bars this penalty.
8. The trial court erred by failing to hold that the Church’s due process rights had been violated.
9. The PCHB and trial court erroneously upheld the penalty orders [See Conclusion No. 10] when Ecology lacked authority to issue such orders.

**B. Issues Pertaining to Assignments of Error**

1. Is the WPCA a strict liability statute, or does it require proof that the accused violator was the person who committed or solicited the violation?
2. Is the Church liable for a violation of the WPCA that was committed on its property by persons who were not authorized to make decisions for the Church, and whose activities were not directed by the Church?

3. Does the WPCA give Ecology the authority to regulate land grading and filling activities that are regulated by the local jurisdiction under the Grading Ordinance and Sensitive Area Ordinance?
4. Does the WPCA give Ecology the authority to regulate stream diversion activities that are regulated by the Department of Fish and Wildlife under the Hydraulics Project Approval statute?
5. Does the WPCA give Ecology the authority to regulate tree cutting activities that are regulated by the Department of Natural Resources under the Forest Practices Act?
6. Did Ecology's Penalty Order give the Church constitutionally sufficient notice of the charges and what Ecology had to prove to prevail at the hearing?
7. Has Ecology's application of the WPCA rendered the statute void for vagueness as applied?
8. Does the WPCA give Ecology jurisdiction to regulate wetlands?
9. Does the WPCA give Ecology the authority to order wetland and buffer restoration?

10. Did the trial court err in finding that the Church's constitutional right to due process had not been violated?
11. Did the trial court err by upholding the penalty orders when Ecology lacks authority to regulate wetlands under the WPCA?

### **III. STATEMENT OF THE CASE.**

This is an appeal from a decision of the Thurston County Superior Court, which affirmed the Pollution Control Hearings Board ("PCHB") grant of summary judgment against the First Romanian Pentecostal Church of Kenmore ("Church"). The Church appeals the grant of summary judgment against it on the issue of liability, as well as the amount of the fine imposed and the remedial measures it has been ordered to perform.

The Church is a growing congregation comprised of Romanian immigrants, with a church building located in Kenmore, Washington. AD 439 [Finding 1]. The Church is governed by a Board, which is the only entity having authority to make decisions for the Church. Vasile Antemie is the pastor of the Church. AD 000038. In December 2005, the Church purchased a 15-acre property (hereinafter "the Property") in Snohomish County, which is not near the present church site. AD

000039; AD 439 [Finding 1]. The Church planned to build a new church building there in the future, but has never occupied the Property. AD 000039.

At the time of purchase, the Property had two houses, a barn and a lawn. A portion of Little Bear Creek is located on the Property, along with a swampy area. AD 439 [Finding 2]. The Property also contains an unnamed tributary to Little Bear Creek, although the Church pastor was not aware of its existence until the enforcement actions were brought. AD 439 [Finding 2].

In summer 2006, the Church made an effort to clean up around the existing houses, mow the grass, and remove sheds, trailers, and other debris left by the Property's previous owners. AD 443 [Finding 8]. Church members carried out the cleanup effort independently. *Id.* The Church board knew that cleanup was ongoing, but believed that it was limited to the area near the residence and barn. AD 443 Pastor Antemie was visiting Romania on a mission trip in August 2006. AD 443 [Finding No. 8.]

On September 13, 2006, the County visited the Property because it had received a citizen complaint about alterations to the creek. AD 443 [Finding 9]. The next day the County posted a stop-work order on the property because of "grading, filling, altering drainage, and disturbing a

critical area without first obtaining a grading permit per Snohomish County Code, Section 30.63B.010.” AD 443 [Finding 9]. On the day after the County visit, a representative of the Washington State Department of Fish and Wildlife (“Fish and Wildlife”) visited the property. AD 444 [Finding 10]. Fish and Wildlife issued an emergency Hydraulic Project Approval so as to allow the Church to undertake certain measures to restore the creek and reduce erosion.

By the time Ecology first visited the site in October, the Church had re-established the tributary channel, sloped the sides of the channel, installed gradient steps in the channel to slow water runoff, put coir mats along the bank to control erosion, and erected silt fencing, pursuant to Fish and Wildlife’s Hydraulic Project Approval. AD 445 [Finding 12]. The Church also worked with the Adopt-A-Stream program to implement additional erosion control measures in the area of the tributary, including placing gravel in the stream and planting live stakes along the banks. *Id.* Fish and Wildlife further required that the church submit a complete stream restoration plan that included mitigation. AD 445 [Finding 12].

Not long afterwards, in January 2007, it was discovered that all this hard work had been ruined: a church member, without the knowledge or consent of the Board, had dug a new trench with an

excavator and re-routed the tributary into the trench. AD 446; 447 [Findings 14 and 16]. During this period, unpermitted tree-clearing had occurred in the northern and northwestern portions of the Property as well. AD 446;447 [Findings 14 and 15]. On February 5, 2007, Ecology sent the Church a warning letter about its clearing and grading of wetlands. AD 447 [Finding 17]. The Church hired a wetland consulting company, which submitted a draft restoration plan that satisfied Ecology. AD 448 [Finding 18].

Snohomish County, Ecology, Fish and Wildlife, and the Department of Natural Resources (“DNR”) have all launched enforcement efforts. AD 235. Of these agencies, only Ecology has chosen to duplicate the enforcement of other agencies, subjecting the Church to conflicting orders and requirements. The Church has been working extensively with Snohomish County to obtain the permits for key restoration work. CP 450-451 [Finding 23]. The County has explicitly required the Church to hold off such work until a grading and clearing permit is issued. AD 443 [Finding 9]; AD 453 [Finding 27]; Conclusion 7, AD 457; AD 238. At the same time, Ecology is ordering the Church to perform work that Snohomish County prohibits. AD 238. The Church’s alleged recalcitrance in failing to comply with Ecology’s order has subjected it to greater penalties. AD 453 [Finding 27];

Conclusion 7; AD 457. The PCHB found that the Church's cooperation with Ecology and the other agencies was "commendable", AD 442 [Conclusion 7] , yet it also found that "the Church could and should have undertaken additional restoration efforts even though the County has not yet issued the grading permit necessary for major components of the restoration." AD 442 [Conclusion 7.]

Ecology's Order of Penalty provided, in pertinent part:

Prior to September 13, 2006, the Church mechanically cleared, graded and filled wetlands and a tributary to Little Bear Creek and again prior to January 24, 2007. The Church mechanically cleared, graded and diverted flow from a tributary to Little Bear Creek without a permit in violation of RCW 90.48.080. Discharge of such polluting matter into waters of the state is also a violation of the anti degradation policy, WAC 173-201A-300-330. Fill remains in the wetlands. Each and every day the fill remains is a violation of 90.48.080, and 90.48.160 and WAC 173-201A-300-330.

AD 478. The Church appealed this Order to the PCHB. Ecology moved for summary judgment, and the PCHB ruled in its favor, affirming the \$48,000 penalty and the required restoration work. AD 355-357; AD 478-40; Conclusion 10 and order; AD 459. This work includes obtaining a National Pollution Discharge Elimination System (NPDES) permit – a permit used to allow commercial ventures to discharge polluting matter into surface water as a matter of course. ad 478. Ecology is also requiring the Church to restore over two acres of wetland buffer – not

wetland – that is located far from the affected stream and is adjacent to the wetland. AD 150 Par. 7 The Pollution Control Hearings Board noted that the cost of restoration work Snohomish County imposed on the Church pursuant to the Penalty Orders "will be approximately 1.2 million dollars." [Finding No. 24] AD 452. It is unclear why Ecology needed to impose further penalties and restoration work when the agencies charged with protecting wetlands, wetland buffers, trees and streams had required extensive restoration work. The Church appealed the PCHB decision to the Superior Court, which affirmed.

#### **IV. ARGUMENT.**

##### **A. Standard of Review**

The Administrative Procedure Act, RCW 34.05.001 *et seq.*, governs appellate review of Pollution Control Hearings Board decisions. *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 76-77, 11 P.3d 726 (2000). Under the error of law standard, this Court reviews the PCHB's legal conclusions *de novo*. *City of Union Gap v. Dept. of Ecology*, 148 Wn.App. 519, 525, 195 P.3d 580 (2008). This Court sits "in the same position as the superior court" and reviews the PCHB decision, ignoring trial court findings. *Willowbrook Farms LLP v. Dept. of Ecology*, 116 Wn. App. 392, 396-97, 66 P.3d 664 (2003).

Any application of the law to the facts constitutes a mixed question of law and fact, which this Court reviews *de novo*. *Tapper v. Employment Security Dept.*, 122 Wn.2d 397, 402-03, 858 P.2d 494 (1993). The Court reviews the agency’s pure findings of fact for substantial evidence in the record. *Union Gap*, 148 Wn.App. at 526. A pure finding of fact “is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect.” *Leschi Improvement Council v. Washington State Highway Comm’n*, 84 Wn.2d 271, 283, 525 P.2d 774 (1974).<sup>1</sup>

After the Notice of Appeal was filed in this case, this Court issued its decision in *Pacific Topsoils, Inc. v. Department of Ecology*, No. 39691-2-II. That opinion was published in part and unpublished in part. Three of the issues in the published portion of the opinion bear directly on the issues in this case: Ecology’s authority under the Water Pollution Control Act (WPCA); Ecology’s overall authority to regulate wetlands in relation to the WPCA and other statutes such as the Shoreline Management Act and the Growth Management Act; and whether the

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<sup>1</sup> Under the “substantial evidence” standard, an agency finding of fact will be upheld if supported by evidence that is substantial when viewed in light of the whole record before the court. . . substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *Alpha Kappa Lambda Fraternity v. Washington State University*, 152 Wn.App. 401, 417-18, 216 P.3d 451 (2009)(internal quotes and citations omitted).

WPCA is void for vagueness as applied. This Court previously denied requests to consolidate the present case with the *Pacific Topsoils* case. There is currently a Motion for Reconsideration pending in that case; if the Motion for Reconsideration is denied, then Pacific Topsoils will file a petition seeking review in the Washington Supreme Court. See Koler declaration. Thus, although the published opinion in *Pacific Topsoils, Inc.* bears on those issues, the Church is compelled to continue to respectfully argue in good faith for a contrary result, so as to preserve arguments for appeal. See Koler declaration.

**B. The PCHB should not have found the Church liable on summary judgment because the WPCA is not a strict liability statute.**

*1. The WPCA is not a strict liability statute.*

Ecology argued below, and the PCHB found, that the WPCA is a strict liability statute, and that the Church is liable for a violation committed on its property by virtue of the fact that it owns the property, regardless of whether it instigated or allowed the violation to occur. AD 348. This is clearly incorrect. Each of the charged violations requires proof that a particular individual committed the offense or caused it to be committed, and it is that individual who is liable under the statute.

Ecology charged violations of RCW 90.48.080 and RCW 90.48.160, and imposed penalties under RCW 90.48.144. These statutes provide, in relevant part:

**It shall be unlawful for any person to throw, drain, run or otherwise discharge** into any waters of the state **or cause, permit or suffer....to be discharged** into such waters any organic or inorganic matter that shall cause or tend to cause pollution...

RCW 90.48.080 (emphasis added).

**Any person who conducts** a commercial or industrial operation...which results in the disposal of solid or liquid waste materials into waters of the state....shall procure a permit from the Department.

RCW 90.48.160 (emphasis added).

**Every person who 1) violates** the terms or conditions of the solid waste discharge permit, **2) conducts** a commercial or an industrial operation without a waste discharge permit, **3) violates** the provisions of RCW 90.48.180...shall incur, in addition to any other penalty required by law, a penalty.

RCW 90.48.144 (emphasis added). All of these provisions impose a penalty on the person who actually commits the violation, not on a person who merely owns the property where it was committed.

The statutory term “to cause, permit or suffer to be ... discharged” in RCW 90.48.080 requires knowledge of the action suffered or permitted to be done.

In *Willis v. Gerking*, our Supreme Court held that the word ‘suffer’ means ‘permit’ and permit requires consent or

knowledge. This is consistent with decisions dating back to the early leading case of *Gregory v. United States*, wherein the court stated that “(e)very definition of ‘suffer’ and ‘permit’ includes knowledge of what is to be done under the sufferance and permission...”

*Harris v. Turner*, 1 Wn.App. 1023, 1027, 466 P.2d 202 (1970)(internal citation omitted). “‘Cause’ means to be the cause of, to bring about, to induce or to compel.” *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). Thus, like the words “permit” and “suffer”, “cause” necessarily implies knowledge. Ecology relied below on *Wm. Dickson Co. v. PSAPCA*, 81 Wn.App. 403, 914 P.2d 750 (1996), which is inapposite. In that case, the Court of Appeals found the Clean Air Act imposed strict liability because the Legislature had amended the statutory language to remove the word “knowingly”. Importantly, the amendment was made in direct response to a judicial decision interpreting the statute to require knowledge. Thus, it was clear that the Legislature intended to impose strict liability under the Clean Air Act. The statutes and their legislative histories are not parallel on this point, and the phrase “cause, suffer, or permit” must be given its usual and customary meaning.

2. *The PCHB erred in imposing liability on summary judgment where material facts were in dispute as to whether the Church directed the activity.*

Had the PCHB relied on the correct standards of law set forth above, it could not have found for Ecology on summary judgment because there was a genuine issue of disputed material fact as to liability for the violations. The party moving for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co. Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under governing law. *Eriks v. Denver*, 118 Wn. 2d 451, 456, 824 P.2d 1207 (1992). On summary judgment, all facts and reasonable inferences must be construed in favor of the non-moving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

Before the PCHB there were two declarations from Pastor Vasile Antemie, attesting that the Church Board had not authorized church members to do the unpermitted work. CP 192. Pastor Antemie averred that overzealous volunteers who had undertaken site cleanup efforts had committed the violations. AD 000039. For its part, Ecology claimed below that Pastor Antemie had himself taken responsibility after the fact

for the violations on behalf of the Church. AD 191-92.<sup>2</sup> Thus, there was a clear dispute of material fact about who had performed or authorized the work that caused the violation. Summary judgment was inappropriate.

**C. Ecology has no authority to regulate land clearing, grading, filling, and stream diversion activities, or to order the remedy of stream restoration.**

Where 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. *Twin Bridges Marine Park, L.L.C., v. 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). As the Supreme Court pointed out in *Twin Bridges*: “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).

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<sup>2</sup> Ecology’s evidence that the Church had admitted responsibility for the violations consisted only of Pastor Antemie’s assurances that the Church would follow through with any restoration work that was required, and his attempt to shield the names of members of his flock who had actually committed the violations by writing his own name in response to a question about who was responsible for the acts.

In this case, Ecology is attempting to use the WPCA to penalize acts that are expressly regulated by other statutes: diverting a stream, against RCW 77.55.011(7), administered by the Department of Fish and Wildlife; cutting down trees, against the Forest Practices Act, Chapter 76.09 RCW, administered by the Department of Natural Resources; and unpermitted filling and grading, against the Snohomish County Grading Code, administered by Snohomish County. Ecology has yet to justify or explain how the WPCA allows it to penalize the Church for these activities. Nor has it explained why it is entitled to impose penalties that duplicate those imposed by the agencies empowered to give (or deny) the permits the Church did not obtain, or for penalizing the Church for failing to comply with its orders that conflict with the orders of other agencies. AD 249; 243-246; 253-258; 250. In fact, the Church is between a rock and a hard place: Ecology has ordered it to do work that is prohibited by a stop-work order from Snohomish County.

In *Twin Bridges* and *Samuel's Furniture*, Ecology disagreed with the local jurisdictions over permitting and penalty decisions and decided to issue penalty orders of its own. Our Supreme Court held that if Ecology was dissatisfied with the local jurisdiction's action, then it was required to file a Land Use Petition Act appeal within 21 days of the decision. Ecology did not have the authority to ignore the previous

decisions of other agencies. *Twin Bridges*, 162 Wn.2d at 841, *citing Samuel's Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 457, 54 P.3d 1194 (2002). Other agencies had already dealt with the land clearing, grading, filling, and stream diversion activities when Ecology issued its penalty notice.

Even if, for the sake of argument, Ecology has jurisdiction to regulate wetlands under the WPCA, no statute gives authority for it to order the Church to engage in wetland or stream restoration. Ecology has never cited any statutory authority giving it the right to demand remediation of wetlands or creeks, or to demand replanting.

The department shall have the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state of Washington.

RCW 90.48.030. In this case, Ecology has ordered far more than abatement of alleged pollution. It has ordered the Church to perform corrective actions, including:

1. Providing a wetland restoration plan;
2. Restoring disturbed wetlands, streams and buffers;
3. Providing the department an “as-built” report with maps;
4. Recording a wetlands notice at the county recorder’s office;
5. Monitoring the restoration site for ten years minimum;

6. Submitting monitoring reports to the department;
7. Delineating wetlands halfway through and at the end of the process;
8. Replacement of dead or dying plants;
9. Rating the wetlands at the end of the process;
10. Allowing the department to enter the site.

AD 478-480.

Ecology's power to order a remedy under the WPCA is as follows:

(1) Whenever, in the opinion of the department, any person shall violate or creates a substantial potential to violate the provisions of this chapter or chapter 90.56 RCW, or **fails to control the polluting content of waste discharged** or to be discharged into any waters of the state, the department shall notify such person of its determination by registered mail. Such determination shall not constitute an order or directive under RCW 43.21B.310. Within thirty days from the receipt of notice of such determination, such person shall file with the department a full report stating what steps have been and are being taken **to control such waste or pollution** or to otherwise comply with the determination of the department. Whereupon the department shall issue such order or directive as it deems appropriate under the circumstances, and shall notify such person thereof by registered mail.

(2) Whenever the department deems immediate action is necessary to accomplish the purposes of this chapter or chapter 90.56 RCW, it may issue such order or directive, as appropriate under the circumstances, without first issuing a notice or determination pursuant to subsection (1) of this section. An order or directive issued pursuant to this subsection shall be served by registered mail or personally upon any person to whom it is directed.

RCW 90.48.120 (emphasis added). The Order issued by Ecology greatly exceeds this jurisdictional authority. There is no statute or regulation that allows Ecology to require restoration of lands, plants, or other restorative activities, as it attempts to do here. An agency may only perform those actions authorized by statute. *Rettkowski v Department of Ecology*, 128 Wn.2d 508, 910 P.2d 462 (1996).<sup>3</sup>

The penalty orders cite no authority that would authorize the remediation of wetlands, wetland buffers and areas adjacent to streams by planting trees and plants. RCW 90.48.144 is the statute governing remedies under the WPCA, and it gives Ecology only the authority to levy monetary penalties. The WPCA gives no authority to require a property owner to plant trees and vegetation in wetland areas and buffer areas. The wetland and stream buffer areas are a 2.9 acre area beyond the wetland and stream. The penalty order cites no statute conferring such authority on Ecology. In a civil penalty action, the government agency must disclose the regulatory basis of its actions. *Mansour v. King County*, 131 Wn.App. 255, 271, 128 P.3d 1241 (2006); *City of Marysville v. Puget Sound Air Pollution Control Agency*, 104 Wn.2d

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<sup>3</sup> Ecology also issued an Order and Penalty for alleged violation of RCW 90.48.160. To violate RCW 90.48.160, the Church must have conducted a commercial or industrial operation resulting in the disposal of solid or liquid waste into the waters of the state. It did not. It is a religious organization. Ecology provides no evidence otherwise.

115, 702 P.2d 469 (1985); *Levinson v. Washington Horse Racing Comm'n*, 48 Wn.App. 822, 828, 740 P.2d 898 (1987). The PCHB erred by upholding this penalty because Ecology failed to disclose the regulatory basis of this action and there is no support in the WPCA for this action. AD 459.

**D. The local jurisdiction, not Ecology, has authority to penalize for unpermitted wetland filling.**

The PCHB had no jurisdiction to hear this case because Ecology did not have the authority to issue the Penalty Order in the first place.<sup>4</sup> As a state agency, Ecology has no inherent authority, and no plenary authority, but only that explicitly delegated by statute. *State ex rel. Public Disclosure Comm'n v. Raines*, 87 Wn.2d 626, 555 P.2d 1368 (1976). Any regulatory action beyond the express grant of statutory authority, regardless of its practical necessity, is invalid. *Washington Independent Telephone Ass'n v. Telecommunications Rate Payers Ass'n.*, 75 Wn. App. 356, 363, 880 P.2d 50 (1994).

The agency given the authority to issue or deny a permit is the agency that has the authority to punish for failure to obtain that permit.

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<sup>4</sup>As noted in Section IV(A), *supra*, the Church recognizes that this Court's published opinion in *Pacific Topsoils, Inc. v. Department of Ecology*, No. 39691-2-II, is controlling on this issue, but because appeals in that case are pending the Church is compelled to continue to argue in good faith for a contrary result, so as to preserve those arguments for appeal.

*Herrington v. City of Pearl, Miss.*, 908 F.Supp. 418 (S.D. Miss. 1995)(“Generally, the power of licensing a business, activity or thing is power to regulate it, at least to the extent of prohibiting under penalty the doing of it without a license.”).<sup>5</sup> Allowing Ecology to issue penalties relating to a permitting scheme that Ecology itself does not administer exposes the public and other agencies to the same kind of conflicting determinations and orders that our Supreme Court acted on in *Twin Bridges* and *Samuel’s Furniture*.

The legislature has not authorized Ecology to issue permits relating to wetlands or to penalize filling a wetland, nor has it given the authority to penalize the failure to obtain permits that must be issued by some other agency. Under *Twin Bridges* and *Samuel’s Furniture*, the very fact that the Legislature has given authority to issue or deny a permit to another agency means that Ecology does not have the authority to independently penalize. The legislature has given authority to enact and enforce wetlands regulations to the local jurisdictions under the Shoreline Management Act (SMA), RCW 90.58, and the Growth Management Act (GMA), RCW 36.70A.

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<sup>5</sup> See also *Cohen v. Board of Supervisors*, 40 Cal.3d 277, 219 Cal. Rptr. 467, 707 P.2d 840 (1985); *Perry v. Hogarth*, 261 Mich. 526, 246 N.W. 214 (1933); *Chilvers v. People*, 11 Mich. 43, 1862 WL 1127 (1862); *Mathison v. Brister*, 166 Miss. 67, 145 S. 358 (1933).

Local government shall have the primary responsibility for initiating the planning required by this chapter and administering the regulatory program consistent with the policy and provisions of this chapter. ***The department shall act primarily in a supportive and review capacity with an emphasis on providing assistance to local government*** and on insuring compliance with the policy and provisions of this chapter.

RCW 90.58.050 (emphasis added).

The SMA specifically calls out wetlands, such as the alleged wetland areas involved in this case, associated with rivers, lakes, streams, and Puget Sound as “shorelands” and brings them under its auspices. RCW 90.58.030(f). The GMA defines wetlands as critical areas and provides that “[e]ach county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.” RCW 36.70A.060(2); RCW 36.70A.030. By the statutes’ clear terms, Ecology has no independent wetlands enforcement authority under the GMA or SMA. Rather, that authority is exercised by the local jurisdictions, with Ecology working in a “supportive and review capacity.” Thus, even if the WPCA applies in some way to wetlands – a claim refuted below – the legislature clearly intended for wetland protection authority to be exercised by the local jurisdictions, and that necessarily means that Ecology cannot exercise the same authority. Otherwise, from a citizen’s practical point of view,

nothing would ever be settled with the local jurisdiction; Ecology could always gallop in afterwards and reach its own conclusions and issue its own penalties. *Samuel's Furniture*, 147 Wn.2d 458-59; *see also Skamania Cty. v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 26 P.3d 241 (2001).

This analysis holds true even if, as Ecology claims and the Church denies, the WPCA gives Ecology some authority to regulate wetlands. In *Samuel's Furniture*, the Supreme Court acknowledged that the Shoreline Management Act gave Ecology some say in whether a Substantial Development Permit was required. Yet the Court found that it was the local jurisdiction, not Ecology, that had the primary right to make the permitting decision, and once that permitting decision had been made, Ecology's only option to change the result was to appeal the county's decision – not to issue its own decision and order. 147 Wn.2d at 458.

**E. The WPCA does not apply to this case.**

The *Pacific Topsoils* case represents a new regulatory basis upon which Ecology is only now embarking with respect to wetlands. In the case at bar, Ecology has gone even farther by attempting to use the WPCA to regulate logging, stream diversion, and other activities that have only a tangential relationship to the WPCA in that they may eventually affect water quality. The penalty order charged the following:

Prior to September 13, 2006, the Church mechanically cleared, graded and filled wetlands and a tributary to Little Bear Creek and again prior to January 24, 2007. The Church mechanically cleared, graded and diverted flow from a tributary to Little Bear Creek without a permit in violation of RCW 90.48.080. Discharge of such polluting matter into waters of the state is also a violation of the anti degradation policy, WAC 173-201A-300-330.

AD 478. The penalty order reads as though diverting flow from a stream's tributary is pollution. It is not; the act itself is a violation of the hydraulics project statute, not the WPCA. What is the "polluting matter" in diverting a tributary? What is the "polluting matter" in cutting down trees? This is the problem resulting from Ecology's strategy: all the acts charged here as violations of the WPCA are actually violations of other statutes, which were already being enforced by the appropriate agencies.

Ecology's claim in *Pacific Topsoils* and below in this case that the WPCA covers wetlands is based not on the statute itself, but on WAC 173-201A-020. The statutory definition of "waters of the state" does not mention wetlands:

Wherever the words "waters of the state" shall be used in this chapter, they shall be construed to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington.

RCW 90.48.020.<sup>6</sup> In the statutory definition, the legislature specified what resources were to be included in that definition. All of the listed aquatic resources are distinct from the land that borders them. Even though the Legislature amended the WPCA in 1955, 1967, 1969, 1970, 1987, 1992, 1995, and 2002, it does not mention wetlands even once. The WPCA contains an express grant of authority to Ecology that also does not mention wetlands: “[t]he department shall have the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state of Washington.” RCW 90.48.030. There is no ambiguity as to this issue in the statute: the legislature did not mention wetlands. The statute is clear and requires no interpretation.

In an obvious effort to expand its regulatory authority, Ecology has enacted a secondary regulatory definition of “surface waters of the state” and added the term “wetlands” to the list provided by the Legislature:

“Surface waters of the state” includes lakes, rivers, ponds, streams, inland waters, saltwaters, wetlands and all other

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<sup>6</sup> When the word “shall” is used in a statute, the legislature is making a specific command. *Waste Management of Seattle, Inc., v. Utilities and Transportation Comm’n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994) (“The use of the word ‘shall’ [in a statute] imposes a mandatory duty.”). The phrase “shall be construed to include” denotes a finite explanatory list or that the items following lay out the scope of the defined word. *State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 558, 452 P.2d 943 (1969)(phrase “shall be construed to include” defines the scope of the defined term, with an eye to preventing too narrow a construction and aiming to remove uncertainty as to the term’s meaning).

surface waters and water courses within the jurisdiction of the state of Washington.

WAC 173-201A-020. By defining the term “surface waters” to include wetlands, Ecology attempts to import wetland regulation into the WPCA, ignoring the numerous statutes in which the Legislature has defined wetlands as *land*, not as water, and ignoring the Surface Water Code in which the Legislature has made it clear that surface water means water collected in a distinct and usable body. This also ignores that the statutory definitions of wetlands recognize that sometimes a wetland is land that is periodically saturated by underground waters – *e.g.*, a rising water table – and may never be touched by surface water at all.

An agency cannot expand its own authority by enacting a regulation that exceeds the authority contained in its enabling statute. *Rettkowski v Department of Ecology*, 128 Wn.2d 508, 910 P.2d 462 (1996); *Raines*, 87 Wn.2d at 631. An agency’s determination of the scope of its own statutory authority is entitled to no deference whatsoever by the courts. *Telephone Ass’n*, 75 Wn.App. at 363.

If there is any manner of statutory construction in which the judiciary should not defer to an administrative agency, it is in defining the parameters of the agency’s authority under the statute. The agency should not be the arbiter of its own jurisdictional limits.

*California Rural Legal Assistance, Inc. v. Legal Services Corp.*, 937 F.2d 465 (9<sup>th</sup> Cir. 1991)(Farris, J., concurring). In order to accept Ecology's interpretation of the Water Pollution Control Act to include the authority to penalize placing a stockpile of dirt on an agricultural field, this Court would have to ignore the unambiguous text of other environmental statutes that form Title 90 and of the WPCA itself.

Ecology cannot legitimately bring wetlands into the domain of the WPCA merely by redefining wetlands as "surface waters" because the Legislature has already spoken clearly: wetlands are land, not water. In its statutory scheme for protecting water resources in RCW Title 90, the Legislature consistently makes a clear distinction between land and water, and has repeatedly defined wetlands as land, not as watercourses. The Legislature has defined "wetlands" in many environmental protection statutes, such as the Growth Management Act, the Shoreline Management Act, and the Reclaimed Water Use Statute:

"Wetland" or "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 36.70A.030(21)(emphasis added); *see also* RCW 90.58.030; RCW 90.46.010(21).<sup>7</sup> The Shoreline Management Act defines wetlands adjacent to bodies of water as “shorelands”:

“Shorelands” or “shoreland areas” means *those lands* extending **landward** for two hundred feet in all directions ... floodways and contiguous floodplain areas landward two hundred feet from such floodways; and *all wetlands* and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter...

RCW 90.58.030(f)(emphasis added). The SMA differentiates between lands under its purview, which are called “shorelands,” and waters, which are called “waters”, “water areas”, or “shorelines”. RCW 90.58.030. There is no hint in the text of the statute that the Legislature intended for Ecology to redefine “surface water” in a manner which diverges from how water and land areas are treated in other statutes.

Ecology’s rule defining “surface waters” to include wetlands demands that crucial phrases be ignored in statutory definitions of the term “wetlands”. For example, such phrases as “inundated or saturated by surface water or ground water” and “support a prevalence of vegetation typically adapted for life in saturated soil conditions” are

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<sup>7</sup> Waters of the state, as defined in various statutory schemes in RCW Title 90, do not contain soils. Waters of the state such as “rivers and lakes” do not have terrestrial vegetation and saturated soil conditions. The Water Code specifies that the right to water attaches to land. *See* RCW 90.03.380. It is not assumed that these land areas are “surface waters” or “water courses.”

meaningless if wetlands are surface water.<sup>8</sup> In addition, Ecology's definition of "surface waters" leads to logical absurdity. "Surface water" cannot be inundated or saturated by other water. "Surface water" cannot have saturated soil conditions supporting vegetation that grows in dirt. Ecology's position renders the statutory definitions meaningless and leads to a logical absurdity. In applying a statute, courts must give all the language in a statute effect if possible. *Whatcom Cy. v. City of Bellingham*, 128 Wn.2d 537, 909 P.2d 1303 (1996). Moreover, they must be mindful of the overall statutory scheme:

When construing two statutes pertaining to the same subject matter we assume that the legislature does not intend to create an inconsistency. ... Statutes are to be read together, whenever possible, to achieve a "harmonious total statutory scheme ... which maintains the integrity of the respective statutes."

*State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 245-46, 88 P.3d 375 (2004), quoting *State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transportation*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000); see also *Bell v. Muller*, 129 Wn. App. 177, 188, 118 P.3d 405 (2005).

Moreover, penalty provisions must be strictly construed against the state. *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 720 P.2d

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<sup>8</sup> Moreover, Ecology's definition of "surface waters" to include wetlands conflicts with Ecology's own wetlands definition in WAC 173-22-030.

782 (1986); *Uhl Estate Co. v. Commissioner of Internal Revenue*, 116 F.2d 403, 405 (9th Cir. 1940)(civil penalty statutes, including notice requirements, must be strictly construed).<sup>9</sup> This fine is penal in nature because it is based on the seriousness of the violation and other non-restitution factors. *Tull v. United States Army Corps of Engineers*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987).

**F. Ecology's actions have rendered the Water Pollution Control Act unconstitutionally vague as applied.**

Ecology's misuse of the WPCA renders it vague as applied to the Church.<sup>10</sup> The WPCA's text, including the pollution definition, neither states nor implies that cutting trees in a wetland or wetland buffer, filling or grading a wetland, or diverting a stream constitutes polluting a water of the state.

An ordinance is unconstitutional when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application. Such an ordinance violates the essential element of due process of law – fair warning. In the area of land use a court does not look solely at the face of the ordinance; the language of the

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<sup>9</sup> See also *State v. Enloe*, 47 Wn.App. 165, 171, 734 P.2d 520 (1987); *State v. Dear*, 96 Wn.2d 652, 657, 638 P.2d 85 (1981); *Brown v. Kildea*, 58 Wn. 184, 108 P. 452 (1910).

<sup>10</sup> As noted in Section IV(A), *supra*, the Church recognizes that this Court's published opinion in *Pacific Topsoils, Inc. v. Department of Ecology*, No. 39691-2-II, is controlling on this issue, but because appeals in that case are pending the Church is compelled to continue to argue in good faith for a contrary result, so as to preserve those arguments for appeal.

ordinance is also tested in its application to the person alleged to have violated it.

*Burien Bark Supply v. King Cy.*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986) (internal citations omitted), *citing, inter alia, Grant County v. Bohne*, 89 Wn.2d 953, 577 P.2d 138 (1978); *see also City of Seattle v. Crispin*, 149 Wn.2d 896, 905, 71 P.3d 208 (2003).

The Water Pollution Control Act provides no notice whatsoever that wetlands are regulated as a “water of the state”.

Whenever the words “waters of the state” shall be used in this chapter, they shall be construed to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and water courses within the jurisdiction of the state of Washington.

RCW 90.48.020 (emphasis added). This legislative definition of “waters of the state” does not mention wetlands. Ecology’s enforcement policy, which is first embodied in its enactment of WAC 173-201A-020 importing wetlands into this definition of “waters of the state”, renders the statute unconstitutionally vague.

Importantly, under existing constitutional analysis, the existence of WAC 173-201A-020 defining “surface waters” to include wetlands cannot be used to “clarify” the statute to avoid vagueness. This Court appears to do so in its published opinion in the *Pacific Topsoils, Inc.* case. Ecology’s very act of enacting WAC 173-201A-020 renders the

statute void for vagueness as applied. The regulation is the expression of the agency's impermissible application of the statute, which found full fault in its penalty orders in this case.

The statute's text does not give notice that fill dirt is a pollutant, that cutting trees is "pollution", or that diverting a stream tributary is "pollution".

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. The WPCA prohibits discharge of substances which are intrinsically harmful and which impair public water supplies, such as oil (RCW 90.48.366), chlorinated organics (RCW 90.48.455), municipal wastewater (RCW 90.48.162), agricultural waste (RCW 90.48.450) or substances that harm public the health safety or welfare or interfere with the beneficial use of public water supplies. *See* RCW 90.48.020 (pollution definition). "Beneficial use" of a public water supply is defined elsewhere in Title 90 as the domestic, commercial, industrial,

agricultural or recreational uses or other legitimate beneficial uses of public water supplies. *See* RCW 90.03.010 (governing public use of surface waters). Thus, the “pollutant” definition contemplates a substance which, when discharged into public waters, impairs the public’s right to make beneficial public use of public waters, harms livestock, wild animals, birds or other aquatic life. RCW 90.48.020. The overall statutory scheme also demonstrates that clean fill is not in the category of “pollutant”. RCW 90.48.530 recognizes that construction projects in public waters can involve placing clean fill in those waters, as authorized by Federal Clean Water Act. There are things that clearly fall within the ambit of the statute; oil and industrial chemicals are two such pollutants. For these reasons, the WPCA, *as it has been applied in this case*, violates due process because it is impermissibly vague.

Ecology’s Notice of Penalty also stated that “discharge of such polluting matters into waters of the state is also a violation of the anti-degradation policy, WAC 173-201A-300.” The text of that regulation provides not the slightest notice that it prohibits placing clean fill onto an alleged wetland area. It does not mention wetlands and does not prohibit filling wetlands, much less cutting trees and diverting streams; thus, this

Court should also rule that the WAC 173-201A-300 is vague as it has been applied in this case.

**G. Ecology's Violation Order gave the Church constitutionally insufficient notice of the alleged violation and the amount of the penalty.**

*1. Due process required clear notice of Ecology's theory of the violation.*

The penalty orders' narrative description of the alleged violations were vaguely worded and failed to set forth clearly Ecology's theory of the violation; thus, the PCHB and the trial court erred by failing to find that the Church's due process rights were violated.

Prior to September 13, 2006, the Church mechanically cleared, graded and filled wetlands and a tributary to Little Bear Creek and again prior to January 24, 2007. The Church mechanically cleared, graded and diverted flow from a tributary to Little Bear Creek without a permit in violation of RCW 90.48.080. Discharge of such polluting matter into waters of the state is also a violation of the anti degradation policy, WAC 173-201A-300-330. Fill remains in the wetlands. Each and every day the fill remains is a violation of 90.48.080, and 90.48.160 and WAC 173-201A-300-330.

CP 478. This narrative description does not provide any explanation as to how Ecology believes clearing, logging, grading, and flow diversion constitutes "pollution" in the meaning of RCW 90.48.080. The citation to RCW 90.48.160 and WAC 173-201A-300 to 330 does not provide clarity; rather, these citations to the NPDES standards and permitting

scheme further cloud the notice because NPDES is what permits a commercial enterprise to dump pollutants into water bodies.

Ecology has claimed below that it was not necessary for it to specify what permits were required but not obtained. [Resp. Trial Brief at 21, n.11]. The Orders are the documents that set out what must be proved at the hearing. Those orders outlined the violations as having “mechanically cleared, graded and diverted flow from a tributary to Little Bear Creek without a permit in violation of RCW 90.48.080.” The orders also referenced RCW 90.48.160, which subjects the Church to a penalty for discharging pollution without a permit. Given that the notice failed to state how these things could constitute “pollution”, and given that Ecology is following a theory that is not obvious from the express terms of the statute, it is not a question of explaining “how one could avoid violating the law in the first place”, [Resp. Trial Brief at 21 n.11], but rather of giving notice of Ecology’s theory so as to allow the Church to be prepared to meet those allegations at the penalty hearing.

The PCHB erroneously ruled on summary judgment that the penalty orders issued to the Church gave it constitutionally sufficient notice of the penalties. See Order on Summary Judgment. AD 361-362. *Mansour v. King County*, 131 Wn. App. 255, 271, 128 P.3d 1241 (2006), emphasized the paramount importance of due protections in the context

of civil penalty proceedings. Division I of this Court, Judge Agid writing for the panel, held that due process demands that the individual subjected to a penalty be given narrative notice of the charges and the regulatory authority supporting the penalty. In that case, King County had failed to give Mr. Mansour notice of a crucial element of the charge against him: that his dog was “vicious”. The notice given to Mr. Mansour was also defective because it failed to cite the proper King County subsection that gave the county the authority to remove the dog. Mere references to the County Code were insufficient to provide meaningful notice. *Id.* at 271. Moreover, specific notice of the facts that are alleged to have violated the Code must be given in the official document charging the document. *City of Seattle v. Jordan*, 134 Wn. 30, 235 P.6 (1925); *State v. Primeau*, 70 Wn.2d 109, 422 P.2d 302 (1967). *See also Kansas City v. Franklin*, 401 SW 2d 949 (Mo. App. 1966) (“an information charging an ordinance violation...must nevertheless set forth the facts which if found true would constitute the offense prohibited by the ordinance.”)

In this case, Ecology failed to provide any facts whatsoever describing what permits Ecology was alleging that the Church needed to authorize the clearing, grading, filling of wetlands and stream diversion activities. The order cites RCW 90.48.160, which requires that

commercial and industrial enterprises obtain an NPDES permit to discharge “solid or liquid waste materials into waters of the state.” It appeared that Ecology’s theory was that this non-profit religious organization, which is not operating any commercial or industrial enterprise discharging solid or liquid waste materials into state waters, needed an NPDES permit to authorize land clearing, grading, and filling enterprises. It was not clear from this penalty order that Ecology was charging the Church with having failed to obtain a clearing and grading permit from Snohomish County and a Hydraulic Project Approval from the Department of Fish and Wildlife to authorize the stream diversion project – because Ecology did not specify these things. Moreover, the Church could not be expected to guess this. The Church had no way of knowing that Ecology had decided to enforce the regulations of other agencies, especially since these agencies had already issued their own penalty orders.

Further, the penalty orders provide not the slightest notice of what Ecology’s theory at hearing would be: how clearing, grading and filling land constitutes polluting waters of the state within the meaning of RCW 90.48.080. This provision deals with the actual discharge of pollutants into actual waters of the state:

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

RCW 90.48.080. Pollutants under the WPCA are defined as follows:

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. The WPCA definition of pollutants does not suggest that cutting down trees on land, grading land, or filling land constitutes discharging pollutants into state waters. Nor does it provide any hint that making a new ditch for a stream by grading and diverting the stream to the ditch constitutes pollution within the meaning of the WPCA. The notice of penalty failed to provide a simple factual statement explaining what permits Ecology claimed needed to be obtained to authorize land clearing, land filling and land grading, and stream diversion and how

such activities polluted waters of the state. The Church was left to guess about Ecology's theory on these issues.

Although the penalty orders charge the Church with violating the anti-degradation policies set forth at WAC 173-201A-300 through WAC 173-201A-330, no simple plain factual description notifies the Church about how it violated the anti degradation regulations. 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 [NPDES permits], 90.48.162 and 90.48.260.” WAC 173-201A-510 further states that “waste discharge permits, whether issued pursuant to the National Pollutant Discharge Elimination System or otherwise must be conditioned so that the discharges will meet water quality standards.” The state anti-degradation policies describe designated beneficial uses of various navigable waters and the water quality criteria for those waters based on those uses. It specifies that “existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.” *See* WAC 173-201A-035(8)(a). Nothing in the text of the anti-degradation policies clarifies the Penalty Order or what Ecology would need to prove at hearing. It is odd Ecology claimed at the hearing that the Church needed an NPDES permit even though it is a non-profit

entity and is not conducting any sort of commercial activity on the property.

It is useful to compare the penalty order in this case with a typical penalty order issued by the Water Quality division of Ecology in a case of placing contaminants in a stream. *See* example Penalty Order, APA Petition for Review, Exhibit C. This penalty order issued to the construction company provided an abundance of data about the observations Ecology officials had made about what pollutants were discharged into waters of the state. The penalty order in that case detailed the precise data documenting the contamination (that muddy water was discharged into Terrell Creek) and provided details about water samples drawn from this construction company's stormwater detention facility as well as samples drawn from Terrell Creek which established background levels of contamination and then samples that were drawn from Terrell Creek after the discharge which contained numeric data establishing contamination levels in the Creek. Moreover, the construction company penalty order detailed how the penalty was calculated. The charging document was 8 pages long. That penalty order underscores the deficiencies of the penalty orders issued by the Shorelands division of Ecology in this case. In this case, there was no

data or even narrative description about how the acts were alleged to have caused pollution.

These vague charges created great uncertainty about Ecology's burden of proof. Ecology acted upon novel theories. Because of the vague charges, the Church had absolutely no idea what Ecology needed to prove to establish a case against the Church. Not having this information severely impaired the Church's ability to defend itself, particularly on summary judgment, without a hearing to clarify the charges. It could not claim that Ecology had presented insufficient proof of the charges against it because it had no idea what those charges were.

2. *Due process required that Ecology inform the Church of how it calculated the penalty, so as to allow the Church to prepare argument against the penalty amount.*

The penalty order in this case gave the Church no notice whatsoever about how Ecology computed its penalties. The PCHB's Findings and Conclusions cited numerous factors which Ecology considered in imposing the \$48,000 penalty; the Church did not receive any prior notice of what these factors might be, even though the PCHB's findings indicate that Ecology "considered seven factors to assess the gravity of the violations when it prepared the penalty calculation." Finding No. 26; CP 452. The Church did not know until the hearing that

the penalty was based on a “definitely willful and knowing violation” and that Ecology “regarded the Church as being unresponsive” and having derived “an economic benefit from noncompliance”. *Id.* It did not know until the hearing that the \$48,000 penalty was based on a \$6,000 a day penalty for eight violations. Principles of due process dictated that Ecology notify the Church of the basis of the penalty. The hearing about whether the penalty was reasonable was rendered a meaningless exercise by the fact that the Church was forced to go to the hearing in a total information vacuum about the basis of the penalty.

Ecology has argued below that “the WPCA does not require Ecology to provide notice that it is issuing a penalty... or to detail how the penalty amount was calculated.” [Resp. Tr. Br. at 18]. The statute may not require it, but due process does. U.S. Const. Am. V, XIV; Wash. Const. Art. I §3; *Mansour v. King County*, 131 Wn. App. 255, 271, 128 P.3d 1241 (2006). 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). Ecology has

claimed below that the Church “refused to prosecute its case” and that its request for its due under the Due Process Clause is “offensive and absurd”. [Resp. Tr. Br. at 19 n. 8]. This is mere huffing and puffing. The Church did request public documents, did review those documents, and did not receive in those documents any disclosure of the basis for determining the fine amount.

In any event, the Church’s discovery and public records requests are not the issue. Ecology had an affirmative duty to give notice of the basis of its penalty sufficient to allow the Church to intelligently prepare to argue against it at the hearing. Ecology provided no such notice and cannot be heard to push off its own failures onto the Church. An important component of notice is to fix ahead of time the claims of the party bearing the burden of proof, so as to not subject the defending party to a moving target at hearing. Ecology could very easily have explained the basis of the penalty, which would have openly and easily informed the Church how the penalty was calculated. Ecology’s Water Quality Division does so apparently as a matter of course. Petition for Review , Exhibit C, See Appendix 1.

**H. The “fair notice” doctrine bars this penalty.**

Even if this Court decides to defer to Ecology’s reading of the statute and regulations, it should still deny Ecology its \$48,000 penalty if

the Court finds that Ecology's interpretation is not "ascertainably certain" from the plain text of the statute and regulations.

Due process requires that parties receive fair notice before being deprived of property. The due process clause thus prevents ... deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires. In the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability.

*General Electric Corp. v. Environmental Protection Agency*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)(violation and penalty invalidated because agency's position was not "ascertainably certain" from the text of the regulations)(internal citations and quotes omitted); *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931)(the law must provide fair warning by the text of the statute).

The interpretation that cutting trees, diverting a stream, and placing fill dirt on a wetland constitute "pollution" of "waters of the state" and subjects one to penalties is not "ascertainably certain" from the text of the statute. The Church is a canary in the coal mine in Ecology's bid to extend the WPCA to cover cutting trees in wetlands, grading and diverting the flow of streams. Members of the public, such as the Church, had no notice of Ecology's claimed authority to issue fines for cutting trees in wetlands. Ecology has made no official interpretation of

the WPCA stating that cutting trees and grading an alleged wetland constitutes polluting a surface water of the state. No published cases and no provisions in the WPCA provide notice of such a construction. Further, because Ecology failed to comply with RCW 90.48.120 and give the Church written notice of its interpretation that placing fill in an alleged wetland constituted polluting surface waters of the state, the Church had no notice of this departmental interpretation until after the Department had issued its Administrative Orders – and, indeed, until the PCHB hearing itself. This was a novel use of the WPCA by a division of Ecology that does not usually enforce it, and it would be unjust to uphold the penalty against the Church.

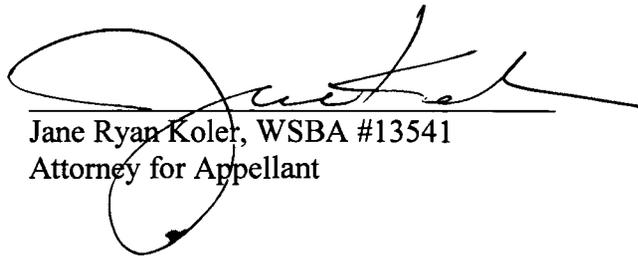
In order to relieve the Church of this unfair and excessive penalty under the fair notice doctrine, the Court is not even required to reject Ecology’s construction of the statute and regulations. *General Electric*, 53 F.3d at 1327 (according deference to the agency’s interpretation of the regulations); *Rollins Environmental Services (NJ), Inc., v. Environmental Protection Agency*, 937 F.2d 649, 652 (D.C. Cir. 1991)(same). If the Court decides to defer to Ecology’s reading, then it should find that reading was not “ascertainably certain” under the plain text of the statute and regulations and vacate the penalty.

**V. CONCLUSION.**

Based on the foregoing, the Church respectfully requests that this Court reverse the decision of the PCHB finding the Church liable for the penalty and vacate the penalty. Ecology was without authority to impose such orders and failed to disclose to the Church the basis of the penalties.

DATED this   7   day of November, 2010 at Gig Harbor, Washington.

Respectfully submitted,



Jane Ryan Koler, WSBA #13541  
Attorney for Appellant

40971-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

---

FIRST ROMANIAN PENTECOSTAL CHURCH OF KENMORE,

Appellant,

v.

THE WASHINGTON STATE DEPARTMENT OF ECOLOGY

Respondent

---

**CERTIFICATE OF SERVICE REGARDING  
BRIEF OF APPELLANT**

---

JANE RYAN KOLER  
Attorney for Appellant

5801 Soundview Drive  
Suite 258  
PO 2509  
Gig Harbor, WA 98335

10/10/11-2 PM 02:21  
STATE OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY  
Court of Appeals  
Division II

ORIGINAL

I, Anita Hope, legal assistant for Jane Ryan Koler, hereby state as follows:

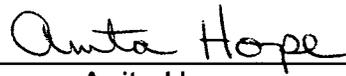
I am over the age of 18 years, competent to testify, and certify to the following based on my own knowledge and belief.

On the date below stated, I caused the Brief of Appellant and Certificate of Service to be sent in the manner noted to the following party:

Ms. Joan Marchioro  
Senior Counsel  
Department of Ecology  
P.O. Box 40117  
Olympia, WA 98504-0117

Via regular U.S. Mail, postage prepaid

DATED THIS 1st day of November, 2010

  
\_\_\_\_\_  
Anita Hope

## **INDEX TO APPENDICES**

**First Romanian Pentecostal Church v. Department of Ecology  
Court of Appeals Case No. 40971-2-II**

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| Appendix No. 2            | Order on Summary Judgment Motions   |
| Appendix No. 3            | Penalty Order 6009 and Penalty Order 6008   |
| Appendix No. 4            | Stop Work Order from Snohomish County Planning and<br>Development Services  |
| Appendix No. 5            | Letter Dated October 9, 2006 to First Romanian<br>Pentecostal Church from State of Washington Department<br>of Fish and Wildlife Regarding Hydraulic Code Violation       |
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Appendix No. 15	Declaration of Cleveland Steward III
Appendix No. 16	Photograph of property owned by Church - 2007
Appendix No. 17	E-mail from Vasile Antemie to Paul Anderson dated March 8, 2007
Appendix No. 18	Trial Court Decision on Review

# **APPENDIX 1**



DB Johnson NOP, DE 06WQBE-3906

October 18, 2006

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- Between December 9, 2004 and January 12, 2006, Ecology inspectors found DBJ repeatedly to have inadequate implementation or maintenance of Best Management Practices (BMPs) to prevent and control soil erosion at the Bay Crest North site.
- During this same period, Ecology inspectors also observed muddy stormwater discharges off site into state waters (ditches that flow into Terrill Creek - a salmon stream), in excess of Washington State Surface Water Quality Standards turbidity criteria [WAC 173 201A.030(2)(c)(iv)].
- DBJ's inadequate implementation or maintenance of BMPs allowing muddy stormwater discharges to state waters from December 9, 2004 to January 12, 2006 constitute violation of the Washington State Water Pollution Control Act (RCW 90.48.080) and/or the NPDES CSWGP (i.e., Compliance with Standards and Stormwater Pollution Prevention Plan conditions).
- DBJ staff was verbally notified by Ecology of all RCW 90.48.080 and/or CSWGP violations during site inspections and/or in writing after inspections were completed.
- Cumulatively, DBJ allowed 26 violations of RCW 90.48.080 and/or NPDES permit conditions.
- The RCW 90.48.080 violations occurred on three days in 2004. The NPDES permit condition violations occurred on one day in 2005 and two days in 2006.
- This penalty is based upon only a portion of the 2006 NPDES permit condition violations (Violations of NPDES Permit conditions S3, S4, and S9) that were directly related to discharges off site:

#### Findings of Fact

RCW 90.48.010 of the Water Pollution Control Act requires the use of all known, available and reasonable methods to prevent and control the pollution of waters of the state.

RCW 90.48.030 provides that Ecology shall have the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state of Washington.

RCW 90.48.080 provides that it shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of Ecology.

RCW 90.48.160 provides that 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 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: PROVIDED, That this section shall not apply to any person discharging domestic sewage only into a sewerage system.

D. B. Johnson NOP, DE 06WQBE-8906  
October 18, 2006  
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Chapter 173-201A Water Quality Standards for Surface Waters of the State of Washington, [of the Washington Administrative Code] establishes water quality standards for all surface waters of the state.

Chapter 173-201A.030.(2)(c)(vi) provides that turbidity must not exceed 5 NTUs over background when background is 50 NTUs or less (or) no more than a 10 percent increase over background when background is over 50 NTUs.

Previous version of the NPDES Construction Stormwater General Permit Condition S5 (Compliance with Standards) (pg. 9 of 20)

Previous version of the NPDES Construction Stormwater General Permit Condition S9 (Stormwater Pollution Prevention Plan Activities) (pgs 10-13 of 20)

Current version of the NPDES Construction Stormwater General Permit Condition S3 (Compliance with Standards) (pg. 9 of 46)

Current version of the NPDES Construction Stormwater General Permit Condition S5 (Reporting and Recordkeeping) (pgs 15-17 of 46)

Current version of the NPDES Construction Stormwater General Permit Condition S9 (Stormwater Pollution Prevention Plan) (pgs. 21-28 of 46)

The penalty is due and payable by you within thirty (30) days of your receipt of this Notice. Please send your penalty payment to: Department of Ecology, Cashiering Section, P.O. Box 5128, Lacey, Washington 98509-5128.

You have the right to submit an Application for Relief to Ecology. You also have the right to Appeal this penalty to the Pollution Control Hearings Board immediately without exercising the option of filing an Application for Relief to Ecology.

If you file a timely Application for Relief to Ecology within thirty (30) days of your receipt of this notice of penalty, Ecology will respond with a "Notice of Disposition Upon Application for Relief." You will then have a right to appeal Ecology's "Notice of Disposition Upon Application for Relief" to the Pollution Control Hearings Board.

**NOTICE: If you do not submit a timely Application for Relief or Appeal, this Penalty will become due and owing and will not be subject to further administrative or judicial review.**

To submit an Application for Relief from an Assessed Penalty: Pursuant to chapter 43.21B RCW, your Application for Relief must be submitted in writing to the Department of Ecology within thirty (30) days of the date of receipt of this document. The Application for Relief must be sent to the following two locations:

Original Application for Relief sent to:  
Mark Kaufman

D. B. Johnson NOP, DE 05WQBE-8905  
October 18, 2006  
Page 6 of 8

Department of Ecology  
Bellingham Field Office  
1204 Railroad Avenue, Suite 200  
Bellingham, WA 98225

Copy sent to:

Department of Ecology  
Fiscal Office  
P.O. Box 47615  
Olympia, Washington 98504-7615.

To Appeal this Notice of Penalty to the Pollution Control Hearings Board: Pursuant to chapter 43.21B RCW, your appeal must be filed with the Pollution Control Hearings Board, and served on the Department of Ecology, within thirty (30) days of the date of receipt of this document. Your notice of appeal must contain a copy of the Notice of Penalty you are appealing.

Your appeal must be filed with:

The Pollution Control Hearings Board  
4224 - 6th Avenue SE, Rowe Six, Bldg. 2  
P.O. Box 40903  
Lacey, Washington 98504-0903

Your appeal must also be served on:

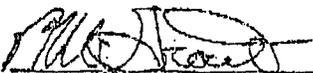
The Department of Ecology  
Appeals Coordinator  
P.O. Box 47608  
Olympia, Washington 98504-7608.

In addition, please send a copy of your appeal to:

Mak Kaufman  
Department of Ecology  
Bellingham Field Office  
1204 Railroad Avenue, Suite 200  
Bellingham, WA 98225

For additional information: Environmental Hearings Office Website: <http://www.eho.wa.gov/>

DATED this 26 day of October, 2006 at Bellingham, Washington.

  
Richard M. Grout, Manager  
Bellingham Field Office

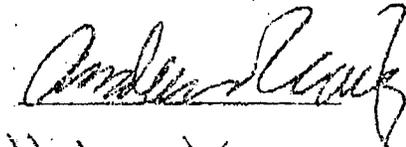
RECOMMENDATION FOR ENFORCEMENT ACTION  
WATER QUALITY PROGRAM

Bellingham Field Office

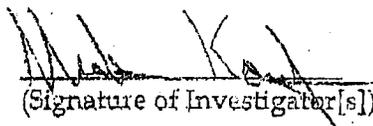
Docket No. DE 06WQBE-3906

Date: June 1, 2006

From: Andrew Craig and Mark Kaufman  
(Names of Investigators)



Environmental Specialists

  
(Signature of Investigator[s])

RECOMMEND ENFORCEMENT ACTION BE TAKEN:

I. Against  
D. B. Johnson Construction Inc. David Johnson (owner)

II. Location (Address, City, State, Zip Code, Telephone Number)  
Northeast corner of Bay 1801 Grove Street, Unit B  
and Jackson Roads Marysville, WA 98270  
Birch Bay, WA 98230 (360) 659-1579

III. Type of Action

- A. Penalty, RCW 90.48.144
- B. Notice of Violation, RCW 90.48.120 (1)
- C. Follow-up Order, RCW 90.48.120(1)
- D. Immediate Action Order, RCW 90.48.120(2)
- E. Amendment of Action
- F. Other (specify authority) \_\_\_\_\_

IV. Nature of Violation

- 1) Unlawful Discharge of Polluting Matter into Waters of the State, RCW 90.48.080.
- 2) Violation of the Terms of a Waste Discharge Permit Issued under RCW 90.48.160, 90.48.180 or 90.48.260 through 90.48.262.

D.B. Johnson RFE  
June 19, 2006  
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- 3) Discharging Pollutants Without a Permit Authorized under RCW 90.48.160, 90.48.180, or 90.48.260 through 90.48.262.
- 4) Violation of the Terms of a Regulatory Order or other provisions of RCW 90.48.
- 5) Agricultural Discharges, RCW 90.48.450. Has consideration been given to the effect of the action on conversion of agricultural to nonagricultural uses? \_\_\_\_\_  
If yes, what attempts have been made to minimize the possibility of such conversion? (Water Quality Program Policy #1-05)
- 6) Other

V. Name of Watercourse Involved: Terrell Creek

VI. Narrative of Incident

Executive Summary

- Bay Crest North is a residential planned unit development and is located in the northern part of a larger development commonly referred to as Bay Crest which is being built by three separate companies. It is located at the corner of Bay and Jackson Roads, Birch Bay, WA.
- JIJ Corporation, Inc. (JIJ) was the original landowner and construction stormwater permit holder (permit # WAR-006174) for the Bay Crest site.
- In 2004, JIJ sold Bay Crest North to D. B. Johnson Construction, Inc. (DBJ).
- On February 7, 2005, DBJ obtained coverage under the National Pollution Discharge Elimination System (NPDES) Construction Stormwater General Permit (CSWGP) for the Bay Crest North site (permit # WAR-006031).
- Ecology conducted thirteen (13) site inspections of Bay Crest North construction site from October 2004 to January 2006.
- Between December 9, 2004 and January 12, 2006, Ecology inspectors found DBJ repeatedly to have inadequate implementation or maintenance of Best Management Practices (BMPs) to prevent and control soil erosion at the Bay Crest North site.
- During this same period, Ecology observed muddy stormwater discharges offsite into state waters (ditches that flow into Terrell Creek - a salmon stream), in excess of Washington State Surface Water Quality Standards turbidity criteria [WAC 173.201A.030(2)(c)(iv)].
- DBJ's inadequate implementation or maintenance of BMPs and allowing muddy stormwater discharges to state waters from December 9, 2004 to January 12, 2006 constitute violation of the Washington State's Water Pollution Control Act (RCW 90.48.080) and/or the NPDES CSWGP (i.e., Compliance with Standards and Stormwater Pollution Prevention Plan criteria).
- DBJ staff was verbally notified by Ecology of all RCW 90.48.080 and/or CSWGP violations during site inspections and/or in writing after inspections were completed.

D.B. Johnson RFE  
June 19, 2006  
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- Cumulatively, DBJ allowed 26 violations of RCW 90.48.080 and/or NPDES permit conditions. The RCW 90.48.080 violations occurred on three days in 2004, before DBJ obtained coverage under the CSWGP. The NPDES permit condition violations occurred on one day in 2005 and two days in 2006.
- However, we are electing to exercise enforcement discretion and recommending this penalty for only a portion of DBJ's CSWGP condition violations (Violations of NPDES Permit conditions S3, S4, and S9) on January 11 and 12, 2006. Discretion was applied due to DBJ's implementation of some BMP's to prevent and control erosion in 2004 and 2005, in addition and other relevant factors.

\* = JIJ's role and responsibility for 80-90% of the Bay Crest North site in 2004; no documented DBJ discharge off site in October 2005; some 2006 violations were not directly related to muddy stormwater discharges off site

- A Notice of Penalty in the amount of \$14,000 is recommended to resolve this matter.

#### Fall 2004 Inspection Summary

- In fall of 2004, Ecology water quality inspector Andrew Craig conducted nine inspections of the Bay Crest North construction site (see summary table below for specific dates).
- During this same time period, DBJ purchased 51.4 acres of the Bay Crest North site from the JIJ Construction Corporation Inc. (JIJ) - the original owner, operator and permittee for the Bay Crest construction site.
- When DBJ took ownership and started conducting construction activities on site, they had not yet applied for or received coverage under Ecology's CSWGP. They were, instead, conducting construction activities under JIJ's CSWGP.
- During his 2004 inspections on the 51.4 acres that DBJ owned and operated, Mr. Craig observed and documented pollution problems on three separate days. The problems were: limited implementation or maintenance of BMP's to prevent and control soil erosion and muddy stormwater discharges to Terrell Creek (state waters).
- Such observations and documentation showed DBJ was in violation RCW 90.48.080 for three (3) days in 2004.
- After receiving notice from Ecology in December 2004, DBJ applied for CSWGP coverage and coverage was granted on February 7, 2005 (CSWGP # WAR-006031).
- On and after the December 9, 2004 inspection, Mr. Craig provided technical assistance regarding compliance with RCW 90.48 and the CSWGP permit to DBJ personnel. Mr. Craig made these efforts to gain compliance through non-enforcement channels.
- On and after the December 9, 2004 inspection, Mr. Craig also notified DBJ that their construction activities in 2004 were in violation of RCW 90.48.080. Notice was provided either verbally while on-site at each inspection or later in writing.
- For complete documentation of these 2004 inspections see photos, field notes, water sample data and email documentation in file.

D.E. Johnson RFE  
 June 19, 2006  
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### Summary of 2004 DBJ Bay Crest North Site Inspections

Inspection Date	RCW 90.48.080 violation?	DBJ Notified?
December 9, 2004	Yes	Yes
December 14, 2004	Yes	Yes
December 23, 2004	Yes	Yes

### October 27, 2005

- Andrew Craig conducted another Bay Crest site inspection, including the 51.4 acre area DBJ owned and operated.
- For DBJ portion of the site, DBJ had coverage under the CSWGP permit (# WAR-006031).
- This inspection was conducted after Whatcom County Planning and Development Services (WCPDS) staff provided correspondence to Ecology regarding DBJ. The correspondence stated DBJ had limited or no erosion and sediment control BMPs implemented on site. It also indicated that the site had substantial potential for muddy stormwater leaving the site (see WCPDS October 10 and October 20, 2005 correspondence to DBJ in file).
- During his inspection, Mr. Craig found the DBJ site was not discharging water above state standards. It was, however, still in violation of NPDES permit conditions S5, S9 and G3 of the October 2005 version of the NPDES CSWGP. The violations were caused by DBJ not implementing BMPs and their SWPPP and not reporting noncompliance with permit conditions to Ecology. NOTE: the CSWGP was reissued in November 18, 2005 (see description below)
- Mr. Craig verbally notified DBJ of these violations. He then submitted a written Notice of Noncompliance (NNC) to Mr. Scott Fisher, DBJ site manager.
- See NNC report and field notes in file for more complete description and photos of site conditions, permit condition violations and also for DBJ response to the NNC.

### Summary of October 27, 2005 DBJ Bay Crest North Site Inspection

Inspection Date	S5 violation?	S9 violation?	G3 violation?	DBJ Notified?
October 27, 2005	Yes	Yes	Yes	Yes

### 18 November 2005

The former NPDES Construction Stormwater General Permit expired and was replaced by a revised permit. Existing permittees, including DBJ, had their permit coverage administratively transferred to the more recent version of this NPDES general permit. This general permit is in effect until December 16, 2010.

The current version of this permit has similar conditions to the former permit, but has been changed to reflect recent legislative requirements including:

D.B. Johnson RJE  
June 19, 2006  
Page 5 of 12

- 1) More rigorous site inspection/inspector requirements.
- 2) Water sampling to evaluate BMP performance.
- 3) Adaptive management techniques and actions.
- 4) Additional recordkeeping requirements.

January 11 and 12, 2006

- We (Ecology inspectors Mark Kaufman and Andrew Craig) responded to Environmental Report Tracking System (ERTS # 352701). The report, dated January 9, 2006, stated that "water the color of chocolate milk" was flowing in the Bay Road ditch adjacent to the Bay Crest Estates site.
- Prior to entering the site on January 11, 2006 we collected an upstream, background water sample from Terrell Creek for comparison to other water samples.
- When we arrived at the DBJ/Bay Crest North portion of the site we observed and documented similar violations to those seen in 2005. There was limited implementation or maintenance of BMP's to prevent and control soil erosion. There also was a muddy stormwater discharge from the site's pond to state waters above water quality standards (WAC 173-201A turbidity criteria).
- We collected a sample of stormwater flowing from the detention pond into the Key Road ditch (state waters) which then flows to Terrell Creek (state waters). The results of the analyzed samples collected on January 11, 2006 were:
  1. Background water sample from Terrell Creek = 17.4 NTUs
  2. Discharge sample from DBJ stormwater pond = 85.9 NTUs
- On January 12, 2006, we completed another site inspection of the Bay Crest Estates sites. During this inspection, we collected another sample of stormwater leaving the DBJ stormwater pond. The results of the analyzed sample collected on January 12, 2006 was 83.1 NTUs.
- Although no background sample was collected on January 12, 2006, photographic evidence indicates DBJ's discharges caused and/or contributed to violations of state water quality standards (WAC 173-201A turbidity criteria). See inspection report and photos in file.
- The sample data above indicates the DBJ/Bay Crest North site exceeded Washington State's Surface Water Quality Standards WAC 173.201A.030(2)(c)(iv) for turbidity. Exceeding the standard for turbidity constitutes violation of NPDES permit condition S3 (Compliance with Standards).
- Additionally, we observed and documented nine other NPDES permit violations.
- For a complete list of violations cited, see Notice of Noncompliance to DBJ, dated January 20, 2006, in file.
- Such NNC criteria constitute the most significant contributing factors that, if implemented, would have prevented or significantly reduced DBJ muddy stormwater discharges offsite.

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 June 19, 2005  
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- On January 11 and 12, 2006, DBJ was in violation of NPDES permit conditions S3, S4, S5 and S9. For a more complete description and examples of these violations, see the photos and January 11 & 12 inspection report in file.

#### Summary of January 11 and 12, 2006 DBJ Bay Crest North Site Inspections

Inspection Date	S3 violations?	S4 violation?	S5 violations?	S9 violations?	DBJ Notified?
January 11, 2006	Yes	Yes	Yes	Yes	Yes
January 12, 2006	Yes	Yes	Yes	Yes	Yes

#### January 19, 2006 Phone Conversation with Mr. David Johnson

- On January 19, 2006 we phoned the owner of DBJ, Mr. David Johnson. We described the numerous violations we had observed at the Bay Crest North site up to that point. We voiced our concerns that the violations were not being corrected (see phone memo and notes in file).
- Initially, Mr. Johnson claimed that he had no idea that his site had ever been out of compliance. We explained that DBJ staff had been e-mailed the previous notices of noncompliance and that we had record of these notices.
- We explained Ecology's policy of escalating levels of enforcement. We stated that Ecology had exhausted all of the informal enforcement mechanisms normally used to gain compliance.
- Further, we explained that non-compliance at Bay Crest North construction site may result in issuance of formal enforcement to DBJ that could include penalties of up to \$10,000 per day, per violation.
- Mr. Johnson replied that he had recently fired Mr. Scott Fisher, site superintendent for the Bay Crest North site. He explained that he hired someone new to supervise the construction site and this should ensure there would be no more problems.
- He requested that Ecology conduct another inspection with him and his new Bay Crest North site superintendent. The inspection would allow us to explain all of the conditions of the NPDES construction permit and what actions are required to achieve and remain in compliance.
- We agreed to his suggestion.
- On January 20, 2006, we issued a Notice of Noncompliance citing all of the January 11 and 12, 2006 violations listed above to Mr. Johnson. Mr. Johnson personally responded to this notice on January 24, 2006 (see both documents in file).

#### January 23, 2006

- Mark Kaufman conducted a compliance inspection of the DBJ Bay Crest North NPDES construction site.
- Attending this inspection was Mr. Johnson, two of his assistants and his new site superintendent.
- During this inspection Mark Kaufman explained that as the permittee he, (Mr. Johnson) was responsible for compliance with all elements of this NPDES CSWGP.

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- Mr. Kaufman provided a comprehensive explanation of permit conditions S3, S4, S5, S9 and G14. He also explained, in detail, what was required to achieve and remain in compliance.
- As a group, they inspected the entire building site including the detention pond.
- The detention pond still had muddy water discharging to waters of the state. Mr. Kaufman explained that they should consider implementing additional treatment BMPs to reduce the turbidity of the pond.
- The site still was not in compliance with permit conditions (e.g., the pond discharge, exposed soil areas on some building sites; straw bales were used as extra storm drain inlet protection).
- He notified Mr. Johnson of these violations and requested that they correct these problems immediately.
- Mr. Johnson agreed and repeated to his staff to correct the violations.
- He also emphasized that DBJ should conduct maintenance of the pond in the early summer of 2006 to remove accumulated sediments. Such sediments were caused by limited or no implementation of erosion control BMPs on site.

#### Findings of Fact

RCW 90.48.010 of the Water Pollution Control Act requires the use of all known, available and reasonable methods to prevent and control the pollution of waters of the state.

RCW 90.48.030 provides that Ecology shall have the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state of Washington.

RCW 90.48.080 provides that it shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of Ecology.

RCW 90.48.160 provides that 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 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: PROVIDED, That this section shall not apply to any person discharging domestic sewage only into a sewerage system.

Chapter 173-201A Water Quality Standards for Surface Waters of the State of Washington, [of the Washington Administrative Code] establishes water quality standards for all surface waters of the state.

Chapter 173-201A.030.(2)(c)(vi) [of the Washington Administrative Code] provides that turbidity must not exceed 5 NTUs over background when background is 50 NTUs or less (or

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no more than a 10 percent increase over background when background is over 50 NTUs.

Previous version of the NPDES Construction Stormwater General Permit Condition S5 (Compliance with Standards) (pg. 9 of 20)

Previous version of the NPDES Construction Stormwater General Permit Condition S9 (Stormwater Pollution Prevention Plan Activities) (pgs 10-13 of 20)

Current version of the NPDES Construction Stormwater General Permit Condition S3 (Compliance with Standards) (pg. 9 of 46)

Current version of the NPDES Construction Stormwater General Permit Condition S5 (Reporting and Recordkeeping) (pgs 15-17 of 46)

Current version of the NPDES Construction Stormwater General Permit Condition S9 (Stormwater Pollution Prevention Plan) (pgs. 21-28 of 46)

#### Severity

- The DBJ stormwater pond discharges observed on January 11 and 12, 2006 were high volume discharges that caused large, visible muddy water plumes in the lower reach of Terrell Creek - indicating a severe violation.
- DBJ's Bay Crest North NPDES construction site has had chronic compliance problems over a two year period.
- Ecology has exhausted all informal enforcement mechanisms normally used to gain compliance with RCW 90.48 and/or NPDES permit conditions at this site.
- Terrell Creek has documented populations of Coho Salmon, Chum Salmon and Cutthroat Trout according to Washington Dept. of Fish and Wildlife. DBJ's muddy water discharges have negatively affected these fish populations and their habitat.

#### History

- DBJ does not have any past or ongoing pollution violation history for other DBJ sites with Ecology or EPA.

#### Recommendations

- DBJ allowed RCW 90.48.080 violations for three (3) days in 2004.
- DBJ allowed NPDES permit condition violations for one day in 2005 and two days in 2006.
- Cumulatively, DBJ violated RCW 90.48.080 and/or NPDES permit conditions on six (6) separate days. During these six days, DBJ allowed three (3) RCW 90.48.080 violations and twenty-three (23) NPDES permit condition violations.
- For the 2004 and 2005 violations, we recommend exercising enforcement discretion.
- For the 2006 violations, we recommend issuance of a Notice of Penalty in the amount of \$14,000 to Mr. David Johnson and D.B. Johnson Construction Inc. The penalty is recommended for violating NPDES general permit conditions S3, S4 and S9 that were directly related to muddy stormwater discharges offsite.

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- Enforcement discretion for all 2004, 2005 and some of 2006 violations is also recommended for the following reasons:
  1. DBJ's implementation of some BMP's to prevent and control erosion in 2004 and 2005.
  2. Other relevant factors (e.g., JIJ's role and responsibility for 80-90% of the Bay Crest North site in 2004; no documented DBJ discharge offsite in October 2005; and some 2006 DBJ violations not directly related to muddy stormwater discharges offsite).
- ~~For penalty calculations, see matrices below.~~

#### VII. Technical Assistance Efforts to Resolve Violation

- Ecology has provided DBJ with large amounts of technical assistance during several site inspections between 2004 and 2006. Additionally, Ecology has provided DBJ with references to Ecology's stormwater web-site and all of Ecology's Stormwater technical manuals. Despite this effort, DBJ has failed remain in compliance with its NPDES permit at the Bay Crest North site.

#### VIII. Evidence Obtained

- Samples, Lab. Report No. \_\_\_\_\_
- Pictures
- Video Tape
- Witness Statements
- Documents
- Maps
- Other: \_\_\_\_\_

## **APPENDIX 2**

1 BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
2 STATE OF WASHINGTON

3 FIRST ROMANIAN PENTECOSTAL  
4 CHURCH OF KENMORE,

5 Appellant,

6 v.

7 STATE OF WASHINGTON,  
8 DEPARTMENT OF ECOLOGY,

9 Respondent.

PCHB NOS. 08-098 & 08-099

ORDER ON SUMMARY JUDGMENT  
MOTIONS

10 This matter comes before the Pollution Control Hearings Board (Board) on motions for  
11 summary judgment filed by Appellant First Romanian Pentecostal Church of Kenmore (Church)  
12 and Respondent State of Washington Department of Ecology (Ecology). The Church has  
13 appealed an enforcement order and a civil penalty issued by Ecology. The enforcement order  
14 requires the Church to remove unpermitted fill and restore wetlands and buffers on its property.  
15 Ecology assessed the penalty in the amount of \$48,000 for the Church's alleged unlawful  
16 discharge of pollutants into waters of the state.

17 Joan M. Marchioro, Senior Counsel, Assistant Attorney General, represented Ecology.  
18 Jane Ryan Koler, Attorney, represented the Church. The Board ruling on the motion was  
19 comprised of Kathleen D. Mix, Chair, William H. Lynch, and Andrea McNamara Doyle.  
20 Administrative Appeals Judge Kay M. Brown presided for the Board. The Board reviewed the  
21 following pleadings submitted by the parties:

ORDER ON SUMMARY JUDGMENT  
PCHB NOS. 08-098, 08-099

(1)

1. Appeal of Notice of Penalty 6008 with attachments (PCHB No. 08-098);
2. Appeal of Order 6009 with attachments (PCHB No. 08-099);
3. Appellant's Motion for Summary Judgment and Declaration of Vasile Antemie;
4. Ecology's Response to Appellant's Motion for Summary Judgment and Cross Motion for Summary Judgment, Declaration of Deborah Nicely, Declaration of Steve Britsch, Declaration of Paul Anderson with Exhibits 1 through 6, and Declaration of Joan M. Marchioro with Exhibit 1;
5. Reply to Response to Motion for Summary Judgment and Response to Untimely Cross-Motion for Summary Judgment, Declaration of Jane Koler,<sup>1</sup> Declaration of Vasile Antemie with Exhibit 1, and Declaration of Cleveland R. Steward III;
6. Ecology's Second Motion for Summary Judgment, Second Declaration of Paul Anderson with Exhibits 1 through 6, Second Declaration of Joan M. Marchioro with Exhibit 1;
7. Appellant's Response to State's Second Motion for Summary Judgment;
8. Ecology's Reply in Support of Cross Motion for Summary Judgment, Third Declaration of Paul Anderson with Exhibits 1 through 5, and Declaration of Joan M. Marchioro with Exhibit 1; and,
9. Ecology's Reply in Support of Ecology's Second Motion for Summary Judgment, Fourth Declaration of Paul Anderson with Exhibit 1, and Declaration of Greg Stephens.

Based on its review of the record and foregoing pleadings, the Board enters the following ruling:

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<sup>1</sup> Portions of this declaration were stricken or restricted to consideration as argument by an order issued on March 27, 2009.



1 Ecology actions. See RCW 43.21B.110 (1)(a) and (b). Therefore, the Board denies the Church's  
2 Motion to Stay Ruling.

3 BACKGROUND

4 The Church is a Washington nonprofit corporation, established for charitable (religious)  
5 purposes. It is governed by a Board. The Church owns 14.87 acres of land in Snohomish  
6 County (the property). The property is located approximately seven miles from the existing  
7 church facilities. The Church has plans to develop the property in the future for use by the  
8 Church. The property contains wetlands, Little Bear Creek, and a tributary to Little Bear Creek.  
9 Little Bear Creek provides spawning and migratory habitat for Chinook salmon and steelhead,  
10 which are federally listed species under the Endangered Species Act. *Antemie Decl. (December*  
11 *30, 2008); Antemie Decl. (February 13, 2009); Anderson Decl, Ex. 3; Second Anderson Decl.,*  
12 *Exs. 3, 4, 5, and 17.*

13 On September 12, 2006, a neighbor witnessed several people working at the Church  
14 property, including an operator on a bulldozer. The neighbor talked to a person on site and  
15 informed the person that she would notify the authorities of the activities occurring on the  
16 property. That same evening, the Church Pastor Vasile Antemie and another Church  
17 representative went to the neighbor's home to assure the neighbor that the Church would take  
18 responsibility for addressing any issues on the property. *Antemie Decl. (Feb. 13, 2009); Nicely*  
19 *Decl.*

20 The neighbor reported her concerns to Snohomish County. On September 13, 2006, a  
21 county water quality analyst, Steve Britsch, visited the site and saw that several acres of land had

1 been cleared, a designated riparian wetland area had been destroyed, and the tributary to Little  
2 Bear Creek had been graded. The Pastor, a Church Administrator, a member of the Board, and  
3 several other people were present on site during the County's site inspection. No one had  
4 obtained permits for the work that had been done. Mr. Britsch informed the group of the need  
5 for several different permits, including a county grading permit and a hydraulics permit from the  
6 Washington Department of Fish and Wildlife (WDFW). The Pastor introduced Britsch to a man  
7 named George, whom he identified as a member of the Board.<sup>2</sup> *Antemie Decl. (Feb. 13, 2009)*;  
8 *Britsch Decl.* On September 14, 2006, Snohomish County issued a Stop Work order for the site.  
9 *Second Anderson Decl.*, ¶ 2, Ex. 1.

10 Ecology also received a complaint on September 13, 2006. On October 6, 2006, Paul  
11 Anderson, a wetland specialist from Ecology, met with the Pastor and two Board members on  
12 the site. Anderson observed recent clearing and grading in wetlands and a newly reconstructed  
13 stream channel on the property. The Church representatives assured Anderson that they would  
14 obtain a wetland delineation for the property, and would not do any additional work in the  
15 wetlands or streams on the property without permits. *Antemie Decl. (Feb. 13, 2009)*, pp. 4, 5;  
16 *Anderson Decl.* ¶¶ 2, 3; *Second Anderson Decl.*, ¶ 5.

17 On January 25, 2007, Anderson received information that additional work had occurred  
18 on the property. On February 1, 2007, Anderson visited the site and observed additional wetland  
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21 <sup>2</sup> Further details regarding this visit, such as what was said and how people were identified are in dispute. See  
*Antemie Decl. (Feb. 13, 2009)*, p p. 2, 3; *Britsch Decl.*, ¶¶ 3, 5, 6, 7. These facts are not material to the question of the  
Church's liability for the violations.

1 clearing and grading, and a second stream diversion on the site. *Anderson Decl.*, ¶¶ 4, 5; *Second*  
2 *Anderson Decl.*, ¶¶ 6, 7.

3 On February 5, 2007, Ecology issued an enforcement warning letter. The letter was sent  
4 to the Pastor of the Church, described the violations, warned the Church that it could be liable for  
5 a penalty of up to \$10,000 per violation for each day of noncompliance, and asked for a list of all  
6 people responsible for the clearing and grading, and the dates of the observed clearing and  
7 grading. It also informed the Church of the need to mitigate impacts to the affected wetlands and  
8 to prepare both a site plan and a restoration plan for damage at the site. *Anderson Decl.*, ¶ 5 and  
9 *Ex. 2; Antemie Decl. (Feb. 13, 2009).*

10 In response to Ecology's letter, the Church hired a wetland biologist to perform a Wetland  
11 Delineation and Investigation and Critical Area Study. The report, dated March 5, 2007, was  
12 shared with Ecology. The Pastor also sent an e-mail to Anderson indicating that the clearing  
13 occurred in August, September, and December of 2006. In the e-mail, the Pastor indicated that  
14 he was the person responsible for the grading and that it was his decision to keep other persons  
15 anonymous. *Anderson Decl.*, ¶¶ 5, 6, 7 and *Exs. 3 and 4; Second Anderson Decl.*, ¶ 8; *Antemie*  
16 *Decl. (Feb. 13, 2009).*

17 In March, there was a meeting and site visit involving interested parties and experts,  
18 including a private wetland consulting firm hired by the Church, Snohomish County, the Army  
19 Corp of Engineers, the Washington Department of Fish and Wildlife, and Ecology. On March  
20 28, 2007, Ecology again informed the Church that the unpermitted clearing and grading of  
21 wetlands at the site was a violation of federal and state law, and that the agency needed to

1 investigate to obtain reasonable assurance of compliance with water quality standards and state  
2 law. Ecology gave the Church 30 days to provide specific information about activities at the site,  
3 responsible parties and the need to mitigate damage. *Anderson Decl.*, ¶¶ 8-11, *Ex. 5*; *Second*  
4 *Anderson Decl.*, ¶¶ 8, 9, and 10.

5 For an additional year or more after that enforcement warning, Ecology attempted to  
6 work cooperatively with the Church in an effort to achieve compliance at the site. Mitigation  
7 requirements were developed and wetland and stream restoration milestones were established.  
8 Some work was done to restore the lower portion of the tributary stream, however, the Church  
9 undertook no wetland or buffer restoration.. *Anderson Decl.*, ¶ 12; *Second Anderson Decl.*, ¶¶  
10 13, 14, 22; *Third Anderson Decl.*, ¶¶ 4, 5.

11 On September 10, 2008, Ecology issued the Church an enforcement order related to the  
12 clearing, grading, and filling the wetlands on its property and diverting the flow from a tributary  
13 to Little Bear Creek. The order required the Church to remove the fill and restore the wetlands  
14 and buffers on the property. On the same day, Ecology issued the Church a \$48,000 civil  
15 penalty. The Church appealed both the order and the civil penalty to this Board. *Second*  
16 *Anderson Decl.*, ¶¶ 13-15; *Third Anderson Decl.*, ¶ 5; *Notices of Appeal for PCHB Nos. 08-098*  
17 *and 08-099 with attachments.*

18 The parties identified the following issues on appeal:

- 19 1. Did Appellant violate applicable law by excavating and discharging fill material  
20 into waters of the state?
- 21 2. Does Ecology have the burden of proving that Appellants filled wetlands on its  
property?

1 3. Does Ecology have jurisdiction over this matter if it does not prove that  
2 Appellants filled wetlands on its property?

3 4. Does Ecology have authority to order the Appellant to take the actions specified  
4 in the agency order?

5 5. Will the requirement that the Appellant delineate wetlands half way through and  
6 at the end of the restoration process result in an increase in the amount of wetlands  
7 located on the site?

8 6. Does Ecology have authority pursuant to RCW 90.48 or other applicable statutes  
9 to regulate wetlands?

10 7. Does the Board have jurisdiction to hear constitutional claims?

11 a. Does the order improperly deprive the Appellant of the ability to make  
12 reasonable use of its property?

13 b. Whether the Ecology orders violate the Appellant's right to due process?

14 c. Whether Ecology violated the Appellant's right to due process and  
15 fundamental fairness by failing to accord due process protections afforded by the  
16 Water Pollution Control Act?

17 8. Is the penalty amount reasonable?

18 9. Did Ecology's penalty order give the Church clear notice of actions it needed to  
19 take to avoid penalties?

20 *See Pre-Hearing Order for PCHB Nos. 08-098 and 08-099, Section III.*

21 The Church has filed for summary judgment on the question of whether the Church can  
be held legally responsible for the clearing, grading, and filling of the wetlands on the property  
when the actions were performed by volunteers on the Church property. Ecology has responded  
with its own motion on this issue, and has filed a second motion for summary judgment on all of  
the issues in the case.



1           **2. Church's responsibility for the actions of its volunteers (Issues 1 and 2)**

2           Ecology issued the order and civil penalty at issue in this appeal pursuant to the Water  
3 Pollution Control Act, Ch. 90.48 RCW (WPCA). This Board has described RCW 90.48.080 as  
4 specific and broad in its prohibition of discharges that pollute the waters of the State. *See*  
5 *Mountain West Senior, LLC v. Ecology*, PCHB No. 06-073, 06-110 (Order on Summary  
6 Judgment, Aug. 15, 2007), ¶ 16. RCW 90.48.080 states:

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

12           Compliance with this provision is a matter of strict liability. *Mountain West*, at ¶ 16,  
13 citing *Nordevin v. Ecology*, PCHB No. 90-202 (1992); *C. R. Johnson, Inc. v. Ecology*, PCHB  
14 No. 00-121 (2001). *See also Ecology v. Lundgren*, 94 Wn. App. 236, 244, 245, 971 P.2d 948  
15 (1999)(noting that compliance with the Federal Clean Water Act, which in Washington State is  
16 implemented through the WPCA, is a matter of strict liability.) Strict liability means that a  
17 defendant's intentions or good faith efforts to comply do not excuse a violation. *Lundgren*, at  
18 244 (citing *United States v. Golf Park Water Company*, 972 F. Supp. 1056 (S.D. Miss. 1997)).  
19 Therefore, in order to prove a violation of state water quality laws, Ecology must establish that  
20 there was a discharge of polluting matter into waters of the state. *Jerome Rosa v. Ecology*,  
21 PCHB Nos. 01-083 and 01-124 (Denial of Motion to Stay Proceedings and Discovery, January  
11, 2002).

1 The Church argues on summary judgment that the Church itself cannot be held  
2 responsible for a discharge under RCW 90.48.080 because the individuals who took the  
3 unpermitted actions were volunteers. The Church asserts it neither solicited nor authorized the  
4 unlawful acts that may have been performed by these volunteers. It argues that only the Church  
5 Board and/or the Church employees can act on behalf of the Church. Here, according to the  
6 Church, the volunteers were acting solely at their own behest. The Church argues that Ecology  
7 has not proven, for purposes of defending against the Church's summary judgment, that the  
8 volunteers were acting with the Church's consent, or were under the control of the Church Board  
9 or Church employees. The Church points out that Ecology has offered no facts that establish that  
10 the church solicited the volunteers to do the unpermitted work, or even knew about their actions  
11 before they were taken. The Church reasons that in order for the charitable organization itself to  
12 be liable for the violations, Ecology must prove that the volunteers were acting as agents of the  
13 Church. *See Baxter v. Morningside, Inc.*, 10 Wn. App 893, 896-897, 521 P.2d 946  
14 (1974)(holding that a charitable organization can only be held liable for the actions of its  
15 volunteers if the Church solicited, directed, or consented to their actions).

16 The undisputed facts for purposes of this summary judgment are: (1) the Church owns the  
17 property, (2) the Church intends to develop its property sometime in the future, (3) the property  
18 is located more than seven miles from the actual Church itself, (4) unpermitted work in a wetland  
19 and the diversion of a stream occurred on the property in August and September of 2006, (5) the  
20 Pastor and Church Administrator knew that the work was underway on the day the complaint  
21 was received (September 12, 2006) and were on the site the next day as further grading activities

1 were underway, (6) the Pastor told Ecology that the Church would take responsibility for the  
2 work done on the property and that there would be no additional work in the wetlands and stream  
3 without permits, (7) there was additional unpermitted work of the same type in wetlands on the  
4 property in December 2006 or January 2007, after Ecology and the County both provided  
5 information about needed permits and other limitations, (8) on March 8, 2007, the Pastor again  
6 accepted responsibility on behalf of the Church for the unpermitted work, and, (7) Ecology  
7 issued the penalty in September 2008, approximately two years after the initial unpermitted  
8 work, and, with the exception of restoring the lower portion of the tributary stream, the Church  
9 has made no efforts to remediate the violations at the property.

10 Here, if the unpermitted actions had ended after the Church first became aware of them  
11 on September 12, 2006, the Board would be more sympathetic to the Church's argument that it is  
12 not liable for the violations, based on an argument that unknown volunteers undertook  
13 unauthorized grading and filling actions at the site. It is conceivable that activities can occur on  
14 an absent landowner's property that are not solicited or consented to by the landowner.<sup>3</sup>  
15 However, the Pastor and some Board members were present at the site at least by the second day  
16 of unpermitted activities. Even after the County and Ecology had discussions with Church  
17 leaders, there was additional, more extensive, wetland clearing and grading and stream diversion,  
18 approximately three months after the discovery of the initial violation. These facts undermine  
19

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20  
21 <sup>3</sup> If that were in fact the case, the volunteers would be trespassers, subject to action against them by the Church. There is no evidence that the Church has taken this position. To the contrary, the Church's Pastor is shielding the volunteers by refusing to disclose their identities. Further, the Pastor has stated repeatedly that the Church is taking

1 *Spackman v. Ecology*, PCHB No. 91-122 (1992)(holding that landowner that allowed dredging  
2 equipment to be brought onto his property, but did not authorize the unpermitted dredging and  
3 was not present when it occurred, had "permitted" or "suffered" dredging to occur in violation of  
4 RCW 90.48.080). This is consistent with the Board's cases involving the Washington Clean Air  
5 Act, which is also a strict liability statute. In the Clean Air Act cases, the Board has held  
6 landowners responsible for violations occurring on their property regardless of their presence on  
7 the site during the commission of the violation or their knowledge of violation. *Scheppe v. Puget*  
8 *Sound Clean Air Agency*, PCHB No. 07-004 (2007)(COL 1 and 2)(citing *Wm. Dickson Co. v.*  
9 *PSAPCA*, 81 Wn. App. 403, 409-410 (1996)).

10 Here, the Church owns the property, and was on notice of the need for permits before the  
11 second round of unpermitted actions.. The Church could have taken decisive action to prevent  
12 future unwanted intrusions onto its property.<sup>7</sup> Certainly, once a landowner becomes aware of  
13 illegal or unpermitted activities on its property, it has the authority and the duty to stop the  
14 unpermitted activities. Allowing a landowner to turn a blind eye to unpermitted activities on its  
15 land, to refuse to disclose the identity of the actors involved, and then to avoid responsibility for  
16 restoration of the site and for penalties assessed for the violations, defeats the purposes of the  
17 WPCA and is inconsistent with the language of RCW 90.48.080. *See* RCW 90.48.010 (It is

18  
19 action including penalties, constitutes ratification of the volunteers' unpermitted actions. *See Anderson Decl. Exs. 2,*  
20 *4, 5, and 6.*

21 <sup>7</sup> The Pastor indicates in a letter dated March 30, 2007, that he will reiterate that no work is to be performed on the  
property, and that the Church will post no trespassing signs and tape around the affected areas of the property.  
These types of precautionary measures, taken after the first violation occurred, to protect the church property from  
intrusion, could likely have prevented the second round of violations from occurring. *Anderson Decl., Ex. 6.*

1 the Church's position that it did not solicit or consent to the volunteers' activities.<sup>4</sup> Additionally,  
2 the Pastor made repeated statements that the Church would take responsibility for the actions of  
3 the volunteers,<sup>5</sup> both after the first and second episodes of illegal grading and filling on the site.  
4 These facts can lead a reasonable person (and this Board) to only one conclusion: The Church  
5 either solicited or consented to the actions of its volunteers.<sup>6</sup> Therefore, summary judgment is  
6 appropriate to Ecology. *See Kelsey Lane Homeowners Ass'n. v. Kelsey Lane Co., Inc.*, 125 Wn.  
7 App. 227, 232, 103 P.3d 1256 (2005)(Summary judgment is proper "only if reasonable persons  
8 could reach only one conclusion from all of the evidence.")(citations deleted).

9 Even if the Board were to conclude that the Church had not solicited or consented to the  
10 actions of its volunteers, the Board has held landowners responsible in the past for water quality  
11 violations that have occurred on their property, without their direct action or authorization. *See*  
12

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13  
14 responsibility for the volunteers' actions. *See Antemie Decl.* (Feb. 13, 2009), p. 4, lines 3-9. That is not a typical  
landowner's response to trespassers on their property.

15 <sup>4</sup> This fact is even more significant because the volunteers' were apparently building a volley ball court or ball field,  
which is consistent with the type of activities a church would generally support and encourage. *See Antemie Decl.*,  
p. 2, lines 22-23.

16 <sup>5</sup> The Church contends that the Board should exclude these statements pursuant to ER 407 and 408. Neither rule is  
applicable in this situation. ER 407 excludes evidence of subsequent remedial measures offered to prove negligence  
or culpability. The Pastor's statements that the Church will accept responsibility for the actions of its volunteers are  
not evidence of subsequent remedial measures. ER 408 excludes statements made during settlement negotiations.  
17 The Pastor made his statements frequently and repeatedly, from September 2006 through 2007, and not in the  
18 context of settlement negotiations. Any settlement negotiations, if they occurred, were not until August 2008, when  
unsuccessful efforts were made to negotiate an agreed order.

19 <sup>6</sup> An additional basis in agency law for holding the Church liable would be the doctrine of ratification.

20 "[r]atification is the affirmance by a person of a prior act which did not bind him but which was done or professedly  
done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him. To  
be charged by ratification with the unauthorized act of an agent, the principal must act with full knowledge of the  
facts, accept the benefits of the acts, or without inquiry assume an obligation imposed. *Riss v. Angel*, 131 Wash.2d  
21 612, 636, 934 P.2d 669 (1997)(citations deleted). Here, the Pastor's repeated statements that the Church would be  
responsible for the actions of its volunteers, even with the knowledge that Ecology might be taking enforcement

1 declared to be the public policy of the state of Washington to maintain the highest possible  
2 standards to insure the purity of all waters of the state . . ."); RCW 90.48.080 (It shall be  
3 unlawful for any person to . . . discharge into any of the waters of this state, or to cause, permit or  
4 suffer to be . . . discharged . . .); *See generally Brown Boy Feed, Inc. v. Ecology*, PCHB No. 02-  
5 050 (2003)(Holding an employer responsible for employees dumping of fuel, even though  
6 management was unaware of employees' actions, because to do otherwise would allow the  
7 Legislature's intent to be frustrated by an employer who chooses to be uninformed about business  
8 operations). Here, the Board concludes that the Church had sufficient control as a landowner to  
9 conclude that it "permitted" or "suffered" the second wetland clearing at the property. <sup>8</sup>

10 **3. Wetlands are waters of the state, and the filling of wetlands constitutes polluting**  
11 **under RCW 90.48.080 (Issues 3 and 6)**

12 The Church argues that Ecology lacks the authority to regulate pollution in wetlands  
13 under the WPCA. The Church points to the language of RCW 90.48.030, which provides  
14 Ecology with jurisdiction to prevent the pollution of "streams, lakes, rivers, ponds, inland waters,  
15 salt waters, water courses, and other surface and underground waters of the state of Washington."  
16 It argues that wetlands, which are not separately called out on this list, are not waters of the state.

17 The argument that wetlands are not waters of the state within the jurisdiction of Ecology  
18 under the WPCA has been specifically rejected by the Board in previous cases. *See Pacific*  
19 *Topsoils Inc. v. Ecology*, PCHB Nos. 07-046 & 07-047 (2008)("Pacific Topsoils' arguments that  
20 Ecology lacks authority to regulate wetlands are completely without merit. The Board concludes

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21 <sup>8</sup> The Board does not reach the equitable estoppel argument raised by Ecology because it has concluded the Church

1 that Ecology has clear authority and also a duty to protect and regulate the wetlands on Pacific  
2 Topsoils' property on Smith Island.")(COL 13); *Kariah Enterprises, LLC v. Ecology*, PCHB No.  
3 05-021 (Corrected Order Granting Partial Summary Judgment, Jan. 6, 2005).<sup>9</sup> The question of  
4 Ecology's authority to regulate wetlands under the WPCA has also been raised in Thurston  
5 County Superior Court, and that Court has concluded that wetlands are waters of the state subject  
6 to regulation by Ecology under RCW 90.48. *See Building Industry Ass'n. of Washington v. City*  
7 *of Lacey*, Thurston County Cause No. 91-2-02895-5 (1995) pp. 11-14 (concluding that wetlands  
8 are waters of the state). Based on this past precedent, and in the absence of new authority being  
9 cited to the Board by the Church, the Board concludes that Ecology does have authority over  
10 wetlands on the Church's property.

11 The Church does not dispute, as a factual matter, that there are wetlands on the Church's  
12 property, that filling occurred in the wetlands, and that there was a diversion of a tributary to a  
13 stream.<sup>10</sup> RCW 90.48.080 makes it unlawful to discharge any matter into waters of the state  
14 that shall "cause or tend to cause pollution of such waters." The term "pollution" is defined as:

15 [S]uch contamination, or other alteration of the physical, chemical or biological  
16 properties, of any waters of the state, including change in temperature, taste, color,  
17 turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid,  
18 radioactive, or other substance into any waters of the state as will or is likely to create a  
19 nuisance or render such waters harmful, detrimental or injurious to the public health,  
20 safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or

21 is legally responsible under the WPCA for the violations.

<sup>9</sup> The Board's full analysis on this issue is provided in *Pacific Topsoils*, at Conclusions of Law 7 through 13, and *Kariah* at ¶¶ 25-29, and will not be repeated herein.

<sup>10</sup> Whether the Church is responsible for the actions is addressed in Analysis, Section 2 herein.

1 other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic  
2 life.

3 RCW 90.48.020.

4 The Church does not dispute as a factual matter that clearing and grading of wetlands  
5 constitutes pollution. Nor does it offer any legal argument as to why these activities would not  
6 constitute the discharge of pollutants, except its argument, which the Board has already rejected,  
7 that wetlands are not waters of the state. The Board has also held that the filling of wetlands  
8 constitutes the discharge of pollutants into waters of the state. *Pacific Topsoils*, COL 9.

9 Therefore, the Board concludes as a matter of law that the filling of the wetlands and the stream  
10 diversion without a permit constituted the unlawful discharge of pollutants into the waters of the  
11 state. Since there is no factual dispute that these events occurred, the Board grants summary  
12 judgment to Ecology on Issue 6. Further, since Ecology has proven that the Church can be held  
13 responsible under the WPCA for the action of its volunteers, , the Board concludes that Issue 3 is  
14 without merit .

#### 15 4. Ecology's authority to require restoration of wetlands (Issues 4 and 5)

16 The Church challenges Ecology Order 6009 (Order) which requires the Church to restore  
17 the damaged wetlands and stream to their pre-disturbance condition. The Church contends that  
18 Ecology lacks the authority to require these actions. The Church also specifically disputes  
19 requirement 17 of the Order, which requires that the Church, as part of a ten-year or longer  
20 mitigation process, to delineate the wetlands half-way through the ten-year monitoring period,  
21 and again at the end of the monitoring period, in order to ensure success of the mitigation plan.

1 Ecology moves for summary judgment on these issues, arguing that its authority to  
2 require restoration stems from RCW 90.48.120. RCW 90.48.120 states that whenever there is a  
3 violation of the chapter, Ecology shall provide notice of the violation, and may issue an "order or  
4 directive as it deems appropriate under the circumstances . . ."

5 Ecology provides a declaration from Paul Anderson stating that the Order's requirements  
6 to provide a wetland restoration plan, begin restoration, have a wetland professional supervise  
7 and inspect all restoration, and meet specific conditions for implementation, monitoring, and  
8 maintenance of the restoration are the same conditions that would have been required had the  
9 Church applied for a water quality certification from Ecology in the first instance, to authorize  
10 the filling of wetlands. Mr. Anderson's declaration also states that for mitigation projects that  
11 require ten years of monitoring, as is necessary for this project, a delineation of the wetlands half  
12 way through the monitoring period (year 5) is consistent with its guidance documents and  
13 appropriate wetland restoration methodology. Mr. Anderson states that the results of this  
14 delineation will be used, as necessary, to adjust the mitigation efforts to ensure full restoration of  
15 the damaged wetlands and stream. *Second Anderson Decl. at ¶¶ 13, 14.*

16 The Church responds that Ecology's order exceeds its statutory authority because there is  
17 no statute or regulation that expressly allows Ecology to require restoration of land, plant, or  
18 other restorative activities. The Church offers no factual material to dispute Anderson's  
19 declaration addressing the need for the restoration of the wetlands and the requirement of a mid-  
20 point delineation of the wetlands.

21

1 The Board has construed the language of RCW 90.48.120(1) in the past. In *R/L*  
2 *Associates, Inc. v. Ecology*, PCHB No. 90-124 (1991) (COL 2), the Board stated:

3 [T]he test for a regulatory order under RCW 90.48.120 is whether it is “appropriate under  
4 the circumstances” to accomplish the purposes of the Washington State Clean Water Act,  
chapter 90.48 RCW. (citations deleted).

5 Here, Ecology has made a showing that, given the damage done to the wetlands and streams on  
6 the Church property, the requirements of the Order are appropriate to accomplish the purposes  
7 stated in 90.48.010. The Church has not offered facts that contravene this showing. The  
8 Shorelines Hearings Board has also previously upheld Ecology’s imposition of a restoration plan  
9 to repair a damaged shoreline. *Kinzel v. Ecology*, SHB No. 05-007 (2007) (COL 8). The Board  
10 concludes that the requirements of the Order are well within Ecology’s authority under RCW  
11 90.48.120, and are not arbitrary in light of the damage to the wetlands and stream on the  
12 property. Therefore, summary judgment is appropriate to Ecology on these issues.

13 **5. The Board’s jurisdiction to hear constitutional claims raised by Appellant (Issues**  
14 **7 and 9)**

15 Ecology moves for summary judgment on Issues Nos. 7, 7(a), 7(b), and 7(c), arguing the  
16 Board lacks jurisdiction over the constitutional questions raised by Appellants. The Church  
17 asserts that Ecology’s Order deprived the Appellant of reasonable use of its property, and  
18 deprived the Appellant of due process of law both by lack of required notice prior to issuance of  
19 the penalty, and by lack of specifics in the penalty itself. Appellants rely on *Inland Foundry*  
20 *Company, Inc. v. Spokane County Air Pollution Control Authority*, PCHB Nos. 94-150 & 94-154  
21 (Order Denying Motion to Dismiss Constitutional Claims, Dec. 2, 1994) for the proposition that

1 the Board has jurisdiction to consider “as applied” constitutional claims, and those that are  
2 primarily procedural in nature.

3 We preface our analysis of these constitutional claims by reference to our recent analysis  
4 of such claims in *Cornelius v. Ecology*, PCHB No. 06-099(Order on Summary Judgment (As  
5 Amended on Reconsideration), Jan. 18, 2008). The Board has jurisdiction to hear and decide  
6 appeals of Ecology orders and penalties. RCW 43.21B.110. In *Cornelius*, we noted that this  
7 jurisdiction necessarily includes the authority to determine whether Ecology’s action (there a  
8 water right change, here a penalty and order) complied with applicable laws. The Board does not  
9 have jurisdiction over a facial challenge to the constitutionality of a statute, but will construe a  
10 statute in a manner that presumes it is constitutional. When ruling on an “as applied” challenge,  
11 the Board has limited its jurisdiction to addressing procedural defects or issues that arise in  
12 particular cases. *PSA v. Ecology*, PCHB Nos. 07-022, 07-023 (Order on Summary Judgment,  
13 Sept. 29, 2008), citing *Inland Foundry*. The Board also has jurisdiction over whether a  
14 challenged agency action complied with the applicable laws. *Cornelius*, (Order on Summary  
15 Judgment (As Amended on Reconsideration), Jan. 18, 2008) at pp. 8-9. Our consideration of the  
16 agency’s compliance with statutes and regulations may, accordingly, also dispose of procedural  
17 due process claims which assert noncompliance with those laws. With these standards in mind,  
18 we address the two aspects of Appellants constitutional claims separately.

19 *5.a. Reasonable Use of Property or Takings Claim (Issue 7.a.)*

20 The Board is without jurisdiction over Appellant’s claim that Ecology’s Order somehow  
21 deprived the Church of the ability to make reasonable use of its property. The Board has

1 previously analyzed a takings claim as one of substantive due process, and as such, outside the  
2 Board's jurisdiction. *Patrick O'Hagan v. State*, PCHB No. 95-25 (1995) (COL II); *PSA v.*  
3 *Ecology* at pp. 8-9.<sup>11</sup> The Church's takings claim is not "mostly procedural" as discussed in the  
4 *Inland Foundry* case and does not call on the Board to review or apply a particular statute or  
5 regulation to the facts of this case. The Board also is without jurisdiction over such a claim  
6 because we are without authority to fashion any remedy responsive to such a claim, such as an  
7 award of monetary damages. Accordingly, summary judgment is granted to Ecology on this  
8 issue.

9 *5.b. Notice Claims (Issue 7.b. and 7.c.)*

10 The Church asserts that Ecology has not complied with the notice provisions of the  
11 statutes that authorize the agency to issue orders and penalties, arguing that it had neither notice  
12 that the penalty was forthcoming, nor notice of how the Church violated water pollution statutes.  
13 The Church asserts this amounted to a procedural due process violation. This argument is  
14 founded on RCW 90.48.120, which sets forth a formal procedure for making a determination  
15 whether a violation has occurred.

16 Whenever, in the opinion of the department, any person shall violate or creates a  
17 substantial potential to violate the provisions of this chapter or chapter 90.56  
18 RCW, or fails to control the polluting content of waste discharged or to be  
19 discharged into any waters of the state, the department shall notify such person of  
its determination by registered mail. Such determination shall not constitute an  
order or directive under RCW 43.21B.310. Within thirty days from the receipt of  
notice of such determination, such person shall file with the department a full

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20  
21 <sup>11</sup> We also note that a related environmental board, the Shorelines Hearings Board has also held it is without  
jurisdiction over a claim that a permit denial deprived an applicant reasonable use of property. *Fiadseth v. Mason*  
*County*, SHB No. 05-026 (2007)(COL C2).

1 report stating what steps have been and are being taken to control such waste or  
2 pollution or to otherwise comply with the determination of the department.  
3 Whereupon the department shall issue such order or directive as it deems  
4 appropriate under the circumstances, and shall notify such person thereof by  
5 registered mail.

6 RCW 90.48.120(1).

7 We conclude the Church's claims that Ecology violated the notice provisions of this  
8 statute are without merit, both legally and factually. RCW 90.48.080 prohibits discharge of any  
9 pollutant into the waters of the state as determined by Ecology. Ecology's penalty authority is  
10 contained in RCW 90.48.144(3), and does not contain a requirement that advance notice be  
11 provided prior to issuance of a penalty. What is required is that the penalty itself be in writing  
12 and describe the violation with reasonable particularity. RCW 43.21B.300(1). Compliance with  
13 the provisions of RCW 90.48.120 is not a necessary prerequisite to issuance of a penalty under  
14 other provisions of the water pollution control statutes.

15 Even if we were to conclude that the statute relied upon by the Church was applicable,  
16 the record is abundantly clear that Ecology complied with these requirements, providing more  
17 than ample notice of potential water quality violations, requiring the Church to provide  
18 information on actions to correct the problems at the site, and to propose a mitigation plan. In  
19 February 2007, Ecology sent the Church an enforcement warning letter, informing them that the  
20 clearing and grading of wetlands and stream diversion at the site could be a violation of state and  
21 federal law, with the potential for penalties up to \$10,000 per day. Ecology informed the Church  
of the need to mitigate impacts to the affected wetlands, and to prepare both a site plan and a

1 restoration plan for damage at the site. *Anderson Decl., Ex.2.* On March 28, 2007 Ecology again  
2 informed the Church that the unpermitted clearing and grading of wetlands at the site was a  
3 violation of federal and state law, and that the agency needed to investigate to obtain reasonable  
4 assurance that water quality standards and state law were being complied with. Ecology gave the  
5 Church 30 days to provide specific information about activities at the site, responsible parties  
6 and a delineation of all wetlands on the site. *Anderson Decl., Ex. 5.* For an additional year or  
7 more after that enforcement warning, Ecology attempted to work cooperatively with the Church  
8 in an effort to achieve compliance at the site. Thus, even if the referenced statute were  
9 applicable, Ecology has more than complied with it, and the Church's allegations to the contrary  
10 are not supported by the record.

11 Finally, we find the Church's argument that the penalty itself did not provide adequate  
12 notice of the violations at issue to be without support in the record and unsupported by the  
13 language of the penalty itself. As noted in the Appellant's Motion for Summary Judgment, the  
14 Penalty provided as follows:

15 Prior to September 13, 2006, the Church mechanically cleared, graded and filled  
16 wetlands and a tributary to Little Bear Creek and again prior to January 24, 2007, the  
Church mechanically cleared, graded and filled additional wetlands and diverted flow  
from a tributary to Little Bear Creek without a permit....

17 *See Appeal of Notice of Penalty 6008 with attachments.*

18 This language described the violations at issue with reasonable particularity, as required  
19 by law, and provided the Church information and detail adequate to inform it of the nature of the  
20 violations it was charged with by Ecology. Moreover, after nearly 18 months of letters  
21

1 (including enforcement warnings), in-person discussion, and other communications with  
2 Ecology, the Church cannot be heard to complain that it was unaware of what actions were at  
3 issue and gave rise to the penalty.

4 Based on these facts the Board concludes Ecology has complied with the statute that the  
5 Church claims is applicable (RCW 90.48.120). This provided the Church with notice and  
6 opportunity to be heard prior to the imposition of the penalty. The penalty itself provides  
7 appropriate notice of the particular violations at issue.<sup>12</sup> To the extent the Church has couched  
8 their claims in this regard as procedural due process violations, such arguments also must fail,  
9 based on the factual record before the Board. The Board grants summary judgment to Ecology  
10 on all issues raised in Legal Issue No. 7(a)-(c), and Legal Issue No. 9.

11 **6. Reasonableness of the Penalty (Issue 8)**

12 Ecology moves for summary judgment on Issue No. 8, arguing that the amount of the  
13 \$48,000 civil penalty is reasonable. This Board considers three factors when it evaluates the  
14 reasonableness of a penalty. These are: (1) the nature of the violation, (2) the prior history of  
15 violations, and (3) the remedial actions taken by the penalized party. *Douma v. Dep't of Ecology*,  
16 PCHB No. 00-019 (2005)(COL 19). The reasonableness of a penalty is typically a mixed  
17 question of fact and law requiring the application of law to specific factual circumstances.  
18 *Brown/Golden West Farms v. Ecology*, PCHB No. 07-060 (Order on Summary Judgment, Sept.  
19 17, 2007).

1 Here, there are facts which are both contested and relevant to the inquiry the Board  
2 makes to determine whether the amount of the penalty is reasonable. For example, the level of  
3 active participation the Church Board and/or its employees had in the commission of the  
4 violations is relevant to the reasonableness of the penalty amount to be imposed on the Church.  
5 There is also a dispute of fact regarding the level of remedial efforts made by the Church.  
6 Therefore, the issue of the reasonableness of the penalty should proceed to a factual hearing.

7 Based on the foregoing analysis, the Board enters the following:  
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21 <sup>12</sup> Appellants also argue that the penalty order itself is required to tell the violator what actions it can take to avoid receiving a penalty. See Issue 9. Appellants do not point to any legal requirement that supports this claim. Further, Appellants do not clarify this issue in their briefing. Therefore, the Board concludes that Issue 9 is without merit.

1 ORDER

2 Summary judgment is denied to the Church. Summary judgment is granted to Ecology  
3 on Issues No. 1 through 7, and 9. Summary judgment is denied to Ecology on Issue No. 8, and  
4 that issue shall proceed to hearing.

5 SO ORDERED this 22<sup>nd</sup> day of May, 2009.

6  
7 POLLUTION CONTROL HEARINGS BOARD

8 Kathleen D. Mix  
9 Kathleen D. Mix, Chair

10 William H. Lynch  
11 William H. Lynch, Member

12 Andrea M. Doyle  
13 Andrea McNamara Doyle, Member

14 Kay M. Brown  
15 Kay M. Brown  
16 Administrative Appeals Judge, Presiding  
17  
18  
19  
20  
21

## **APPENDIX 3**

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

IN THE MATTER OF AN ) ORDER No. 6009  
ADMINISTRATIVE ORDER )  
AGAINST: )  
First Romanian Pentecostal )  
Church Of Kenmore )

To: First Romanian Pentecostal Church of Kenmore  
Vasile Antemie, Pastor  
8315 NE 155th St  
Kenmore, Washington 98011-4749

For the site located at: 22332 State Route 9 SE, Woodinville, Washington

This is an Administrative Order requiring the First Romanian Pentecostal Church of Kenmore (hereafter, Church) to comply with Chapter 90.48 of the Revised Code of Washington (RCW) by taking certain actions which are described below. RCW 90.48.120(2) authorizes the Department of Ecology (Department) to issue Administrative Orders requiring compliance whenever it determines that a person has violated, or is about to violate, any provision of Chapter 90.48 RCW.

The Department's determination that a violation has occurred is based on the following facts:

**Violation: Unlawful discharge of polluting matter into waters of the state**

On or before September 13, 2006, the Church mechanically cleared, graded and filled wetlands and a tributary to Little Bear Creek; there is no record on file at the Department of an application for or authorization of these activities. On or before January 25, 2007, the Church mechanically cleared, graded and filled additional wetlands and diverted flow from a tributary to Little Bear Creek; there is no record on file at the Department of an application for or authorization of these activities. Under RCW 90.48.080, it is unlawful to discharge polluting matters 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.

**Corrective Action:** For these reasons, and in accordance with RCW 90.48.120(2), it is ordered that the Church take the following actions at the property at 22332 State Route 9 SE, Woodinville, Washington:

1. Provide a wetland restoration plan for review and approval by Ecology within 60 days of receipt of the Administrative Order
2. Begin restoration of all disturbed wetlands, streams, and their associated buffers within 9 months of the date of this Administrative Order. If restoration does not begin within 9 months, the Department may require additional compensation to account for additional temporal loss.
3. To ensure proper installation, the Church's wetland professional must supervise and inspect all restoration construction and planting.

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4. Implementation

5. Within 60 days of completing the restoration site construction and planting, the Church shall give the Department a final as-built report with maps. The as-built report must document site conditions at Year Zero.
6. The as-built report shall include the information listed in Attachment A.
7. The Church shall provide the Department one electronic copy on compact disc or by e-mail and one hard copy of the as-built report, addressed to Paul Anderson, Shorelands and Environmental Assistance Program, 3190 – 160th Avenue SE, Bellevue, WA, 98008-5452, identified with Order No. 6009. E-mail may be sent to: [paan461@ccy.wa.gov](mailto:paan461@ccy.wa.gov).
8. If the restoration project is not completed within 13 months of the date of this Administrative Order, the Church shall submit a written status report on the restoration construction and submit status reports every 12 months until construction (including planting) is complete and the final as-built report is submitted.
9. The Church shall record a Wetlands Notice (see Attachment B), a copy of the Department's Order, and a copy of the drawings that show the constructed restoration within 30 days of completing restoration and planting. These documents shall be recorded with the County Recording Office, Registrar of Deeds, or other appropriate official responsible for maintaining records to, or interest in, real property. Include documentation that this requirement has been fulfilled in the as-built report.

Monitoring and Maintenance

10. The Church shall monitor the restoration site for a minimum of ten (10) years. The Church shall use the monitoring methods described in the approved restoration plan, or as revised and approved by the Department.
11. The Church shall submit monitoring reports to the Department (one on compact disc or via e-mail, and one hard copy [see 6. above]) for monitoring years one, two, three, five, seven, and ten containing, at a minimum, the information in Attachment C.
12. The Church shall submit the Year One monitoring report no sooner than 12 months and no later than 24 months after submitting the as-built report.
13. The Church shall submit the reports for the remaining monitoring years (years two, three, five, seven and ten) no later than October 31st of the respective monitoring year.
14. The Church shall implement the approved restoration plan's contingency measures if goals, objectives, and performance standards are not being met.
15. The Church shall consult with the Department if unidentified contingency measures are necessary.
16. When necessary to meet the performance standards, the Church shall replace dead or dying plants during the first available planting season with the same species or a native plant alternative appropriate for the location and note species, numbers, and approximate locations of all replanted materials in the subsequent monitoring report.
17. The Church shall delineate the wetlands as part of monitoring half-way through, and at the end of, the monitoring period and include information on delineation in the monitoring reports.
18. To delineate wetlands, the Church shall use the *1997 Washington State Wetlands Identification and Delineation Manual* (or as updated) to determine the actual area of

wetlands. All restoration areas shall be delineated including those that have been rehabilitated and enhanced.

19. The Church shall rate the wetlands at the end of the monitoring period and include the information in the monitoring report. All restoration areas shall be rated, except for non-wetland areas.
20. To rate the wetlands, the Church shall use the *Washington State Wetlands Rating System for Western Washington* (annotated August 2006) or as updated.
21. If the Church has not met all the conditions and performance standards at the end of the monitoring period, the Department may require additional monitoring and/or additional wetland compensatory mitigation.
22. Nothing in this Administrative Order shall in any way relieve the Church of its obligations to comply with the requirements of its National Pollution Discharge Elimination System Permit. Neither shall anything in this Administrative Order limit the Department's authority to enforce the provisions of the aforementioned permit for violations occurring after the date of this Administrative Order.
23. The Church shall provide access to the site upon request by Ecology personnel for site inspections, monitoring, necessary data collection, and/or to ensure that conditions of this Administrative Order are being met.

Failure to comply with this Administrative Order may result in the issuance of civil penalties or other actions, whether administrative or judicial, to enforce the terms of this Order.

You have a right to appeal this Order. To appeal this you must:

- File your appeal with the Pollution Control Hearings Board within 30 days of the "date of receipt" of this document. Filing means actual receipt by the Board during regular office hours.
- Serve your appeal on the Department of Ecology within 30 days of the date of receipt of this document. Service may be accomplished by any of the procedures identified in WAC 371-08-305(10). "Date of receipt" is defined at RCW 43.21B.001(2).

Be sure to do the following:

- Include a copy of this document that you are appealing with your Notice of Appeal.
- Serve and file your appeal in paper form; electronic copies are not accepted.

**1. To file your appeal with the Pollution Control Hearings Board**

Mail appeal to:

The Pollution Control Hearings Board  
PO Box 40903  
Olympia, WA 98504-0903

OR

Deliver your appeal in person to:

The Pollution Control Hearings Board  
4224 - 6th Ave SE Rowe Six, Bldg 2  
Lacey, WA 98503

**2. To serve your appeal on the Department of Ecology**

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Mail appeal to:

The Department of Ecology  
Appeals Coordinator  
P.O. Box 47608  
Olympia, WA 98504-7608

Deliver your appeal in person to:

OR The Department of Ecology  
Appeals Coordinator  
300 Desmond Dr SE  
Lacey, WA 98503

**3. And send a copy of your appeal to:**

Department of Ecology  
Northwest Regional Office  
Attn: Paul Anderson  
3190 160<sup>th</sup> Avenue SE  
Bellevue, WA 98008

For additional information visit the Environmental Hearings Office Website:  
<http://www.eho.wa.gov>

To find laws and agency rules visit the Washington State Legislature Website:  
<http://www1.leg.wa.gov/CodeReviser>

Your appeal alone will not stay the effectiveness of this Order. Stay requests must be submitted in accordance with RCW 43.21B.320. These procedures are consistent with Ch. 43.21B RCW.

DATED this 10<sup>th</sup> day of September, 2008 at Bellevue, Washington.



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Geoff Tallent  
Section Manager  
Shorelands and Environmental Assistance Program

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**Attachment A**  
**Information for As-built Reports**  
**(See Administrative Order Condition 5.)**

**First Romanian Pentecostal Church of Kenmore**  
**Woodinville Property Wetland Restoration**

**Administrative Order No. 6009**

**Background Information**

- 1) Project name.
- 2) Ecology docket number and, if applicable, the Corps reference number.
- 3) Name and contact information for the parties responsible for the mitigation site including:
  - a) The applicant.
  - b) The landowner.
  - c) Wetland professional on site during construction of the compensatory mitigation site.
- 4) Name and contact information for the party responsible for preparing the report.
- 5) Who the report was prepared for (name, address, and phone number)
- 6) Month and year the report was produced.

**The Development Site**

- 7) Brief description of the development project. Include:
  - a) Directions to the site.
  - b) Month and year construction of the development project started and ended.
  - c) Area (acres) and type(s) (rating category, HGM classification, and Cowardin classification) of wetlands that were **actually** impacted by the development project, including temporary impacts.

**The Restoration/Compensatory Mitigation Project**

- 8) Brief description of the final mitigation project with any changes from the approved plan made during construction. Include:
  - a) Directions to the site.
  - b) Who completed the mitigation project (name, address, and phone number.
  - c) Acreage and type(s) (re-establishment, rehabilitation, creation, enhancement, and preservation) of mitigation authorized to compensate for wetland impacts.
  - d) Important dates including:
    - i. Month and year the wetland impacts occurred.
    - ii. When work on the mitigation site began and ended.
    - iii. When different activities began and ended such as grading, removal of invasive plants, installing plants, and installing habitat features.
- 9) Description of any problems encountered and solutions implemented (with reasons for changes) during construction of the mitigation site.
- 10) Any changes to the goals, objectives, and performance standards of the mitigation project.
- 11) List of any follow-up actions needed, with a schedule.
- 12) 8 1/2" X 11" (or larger) final site maps of the mitigation site(s) including the following (at a minimum). The final site maps should reflect on-the-ground conditions after the site work is

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completed. Include the month and year when the maps were produced and, if applicable, when information was collected

- a) Geographic location of the site with landmarks.
  - b) Clear delineation of the project perimeter(s).
  - c) Topography (with a description of how elevations were determined),
  - d) Installed planting scheme (quantities, densities, sizes approximate locations, and the source(s) of plant material)
  - e) Location of habitat features.
  - f) Location of permanent photo stations..
- 13) Photographs of the site at as-built conditions taken from photo stations (photo pans are recommended).
- 14) Copies of any records of deed notification or conservation easements.

000483

**Attachment B  
Wetland Notice for Deed Notification  
(See Administrative Order Condition 8.)**

**First Romanian Pentecostal Church of Kenmore  
Woodinville Property Wetland Restoration**

**Administrative Order No. 6009**

Tax Parcel Number: \_\_\_\_\_

Legal Description: \_\_\_\_\_

Legal Owner: \_\_\_\_\_

NOTICE: This property contains wetlands as defined by Chapter 36.70A030(20) RCW, Chapter 90.58.030 (2)(h) RCW and WAC 173-201A-020. The property was the subject of an Ecology action under Chapter 90.48.120(2) RCW.

\_\_\_\_\_, issued on \_\_\_\_\_, 20\_\_\_\_  
Ecology Docket #

to \_\_\_\_\_ for \_\_\_\_\_  
(Applicant Name) (Project Name)

Restrictions on use or alteration of the wetlands may exist due to natural conditions of the property and resulting regulations. A copy of Ecology's Order and the site map from the final wetland restoration plan indicating the location of wetlands and their buffers is attached hereto.

EXECUTED this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

State of Washington)  
County of \_\_\_\_\_)

I certify that I know or have satisfactory evidence that \_\_\_\_\_  
Signed this instrument and acknowledged it to be his/her free and voluntary act for the uses and purposes mentioned in this instrument.

GIVEN under my hand an official seal this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
NOTARY PUBLIC in and for the state of Washington,  
residing at \_\_\_\_\_  
\_\_\_\_\_. (Amended by Ord. 11200 § 50 (part), 1996)

000484

**Attachment C**  
**Required Information for Monitoring Reports**  
**(See Administrative Order Condition 10.)**

**First Romanian Pentecostal Church of Kenmore**  
**Woodinville Property Wetland Restoration**

**Administrative Order No. 6009**

Ecology requires the following information, for monitoring reports submitted under this Order. Ecology will accept additional information that may be required by other regulators.

**Background Information**

- 1) Project name
- 2) Ecology docket number
- 3) Name and contact information of the parties responsible for the mitigation site including:
  - a) The applicant
  - b) The landowner
- 4) Name and contact information for the party responsible for the monitoring activities and report
- 5) Who the report was prepared for (name, address, and phone number)
- 6) Month and year the monitoring data were collected
- 7) Month and year the report was produced

**Mitigation Project Information**

- 8) Brief description of the mitigation project including:
  - a) Directions to the site
  - b) Acreage and type(s) (re-establishment, rehabilitation, creation, enhancement, and preservation) of mitigation authorized to compensate for wetland impacts
- 9) Brief description of monitoring approach and methods.
- 10) A list of the goals and objectives for the mitigation project
- 11) Summary table of monitoring data compared with performance standards. Using the monitoring data, describe how the site is developing toward goals and objectives and whether the project is in compliance with performance standards
- 12) Summary (including dates) of management actions (maintenance, contingencies, and corrective actions) implemented at the site(s)
- 13) Summary of any difficulties or significant events that occurred on the site that may affect the ultimate success of the project
- 14) Specific recommendations for any additional corrective actions or adaptive management with a time table
- 15) Summary of any lessons learned
- 16) 8 1/2" x 11" (or larger) maps of site(s) including, at a minimum, the following:
  - a) The month and year when the maps were produced and, if applicable, when information was collected
  - b) The geographic location of the site with landmarks.

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- c) Clear delineation of the project perimeter(s).
  - d) Species, numbers, and approximate locations of all replanted material vegetation.
  - e) Location of habitat features.
  - f) Location of permanent photo stations and location of any other photos.
  - g) Location of sampling points or transects.
- 17) Photographs taken at photo stations from the most recent monitoring visit, which are dated and clearly indicate the direction from which the photo was taken. (We recommend photo pans.)

000488

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

IN THE MATTER OF PENALTY	)	NOTICE OF PENALTY
ASSESSMENT AGAINST	)	INCURRED AND DUE
First Romanian Pentecostal	)	No. 6008
Church of Kenmore	)	

To: Pastor Vasile Antemie  
First Romanian Pentecostal Church of Kenmore  
8315 NE 155th St  
Kenmore, Washington 98011-4749

For the site located at:  
22332 State Route 9 SE, Woodinville, Washington

Notice is given that the Department of Ecology (Department), pursuant to RCW 90.48.144(3), has assessed a penalty against you in the amount of \$48,000.00 for violation of RCW 90.48.080 and WAC 173-201A-300 through 330 at the First Romanian Pentecostal Church of Kenmore property located at 22332 State Route 9 SE, Woodinville, Washington.

The penalty is based on the following Department findings:

Prior to September 13, 2006, the Church mechanically cleared, graded and filled wetlands and a tributary to Little Bear Creek and again prior to January 25, 2007, the Church mechanically cleared, graded and filled additional wetlands and diverted flow from a tributary to Little Bear Creek 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 through 330. 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 through 330.

The penalty is due and payable by the First Romanian Pentecostal Church of Kenmore within thirty (30) days of your receipt of this Notice. Please send your penalty payment to: Department of Ecology, Cashiering Section, P.O. Box 5128, Lacey, Washington 98509-5128.

You have the right to submit an Application for Relief to Ecology. You also have the right to Appeal this penalty to the Pollution Control Hearings Board immediately without exercising the option of filing an Application for Relief to Ecology.

If you file a timely Application for Relief to Ecology within thirty (30) days of your receipt of this notice of penalty, Ecology will respond with a "Notice of Disposition Upon Application for Relief." You will then have a right to appeal Ecology's "Notice of Disposition Upon Application for Relief" to the Pollution Control Hearings Board.

**NOTICE:** If you do not submit a timely Application for Relief or Appeal, this Penalty will become due and owing and will not be subject to further administrative or judicial review.

**To submit an Application for Relief from an Assessed Penalty:** Pursuant to Chapter 43.21B RCW, your Application for Relief must be submitted in writing to the Department of Ecology within thirty (30) days of the date of receipt of this document. The Application for Relief must be sent to the following two locations:

**Original Application for Relief sent to:**

Paul Anderson  
Department of Ecology  
3190 160th Ave. SE  
Bellevue, Washington 98008-5452

**Copy sent to:**

Department of Ecology  
Fiscal Office  
P.O. Box 47615  
Olympia, Washington 98504-7615.

**To Appeal this Notice of Penalty to the Pollution Control Hearings Board:** Pursuant to Chapter 43.21B RCW, your appeal must be filed with the Pollution Control Hearings Board, and served on the Department of Ecology, within thirty (30) days of the date of receipt of this document. Your notice of appeal must contain a copy of the Notice of Penalty you are appealing. Be sure to do the following:

- Include a copy of this document that you are appealing with your Notice of Appeal.
- Serve and file your appeal in paper form; electronic copies are not accepted.

**1. To file your appeal with the Pollution Control Hearings Board**

**Mail appeal to:**

The Pollution Control Hearings Board  
PO Box 40903  
Olympia, WA 98504-0903

OR

**Deliver your appeal in person to:**

The Pollution Control Hearings Board  
4224 – 6th Ave SE Rowe Six, Bldg 2  
Lacey, WA 98503

**2. To serve your appeal on the Department of Ecology**

**Mail appeal to:**

The Department of Ecology  
Appeals Coordinator  
P.O. Box 47608  
Olympia, WA 98504-7608

OR

**Deliver your appeal in person to:**

The Department of Ecology  
Appeals Coordinator  
300 Desmond Dr SE  
Lacey, WA 98503

**3. And send a copy of your appeal to:**

Department of Ecology  
Northwest Regional Office  
Attn: Paul Anderson  
3190 160<sup>th</sup> Avenue SE  
Bellevue, WA 98008

Notice of Penalty Incurred and Due No. 6008  
Page 3 of 3

For additional information visit the Environmental Hearings Office Website:  
<http://www.eho.wa.gov>

To find laws and agency rules visit the Washington State Legislature Website:  
<http://www1.leg.wa.gov/CodeReviser>

**In addition, please send a copy of your appeal to:**

Ms. Kerry Carroll  
Department of Ecology  
P.O. Box 47600  
Olympia, WA 98504-7600

DATED this 10th day of September, 2008 at Bellevue, Washington.



---

Geoff Tallent  
Section Manager  
Shorelands and Environmental Assistance Program

## **APPENDIX 4**

PLANNING AND DEVELOPMENT SERVICES

ALL PERSONS ARE HEREBY ORDERED TO AT ONCE

# STOP WORK

PERTAINING TO CONSTRUCTION, ALTERATIONS, REPAIRS  
GRADING OR REGULATED EQUIPMENT

On these Premises at 22332 SR 9 SE Woodinville, WA

Tax account number 270527-004-010-00

This order is issued because Grading, filling, altering drainage and disturbing a critical area without first obtaining a grading permit per Snohomish County Code, Section 30.63B.010.

Sec. 104.2.4 U.B.C.

Building Official  
County of Snohomish

Posted 9-14-06 A.M. 2:15 P.M. ~~2006~~ By Ed Soderman

## WARNING

The failure to stop work, the resuming of work without per Official, or the removal, mutilation, destruction or conc punishable by fine and imprisonment.

HEARING EXHIBIT 2  
PROJECT NUMBER  
CT06-132145

3/97

#552 P. 002/003

12/12/2008 11:10

000233

From:

Exhibit 1

## **APPENDIX 5**



State of Washington  
Department of Fish and Wildlife

Mailing Address: 16018 Mill Creek Boulevard, Mill Creek, Washington 98012 (425) 775-1311

October 9, 2006

First Romanian Pentecostal Church  
Vasile Antemie  
8315 NE 155<sup>th</sup>  
Kenmore, WA

Dear Mr. Antemie:

**SUBJECT: Hydraulic Code Violation: Non Permitted Hydraulic Project, 22332 SR 9, Woodinville; Little Bear Creek and Unnamed Tributary to Little Bear Creek; Section 26, Township 27North, Range 5East, Snohomish County, WRIA 08.0080**

The Washington Department of Fish and Wildlife (WDFW) was notified on September 13, 2006, that a violation of the Hydraulic Code occurred on your property at the above-referenced address. The violation included 1. Clearing and grading through a tributary of Little Bear Creek and 2. Pushing vegetation into Little Bear Creek. There is no record of a Hydraulic Project Approval being issued for this work.

RCW 77.55 clearly states:

Except as provided in RCW 77.55.031, 77.55.051, and 77.55.041, in the event that any person or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure the approval of the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.

"Hydraulic project" means the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state.

On September 14, 2006, WDFW, Snohomish County and DNR met with your representative, John Puravet to discuss the violation and immediate corrective action to stabilize the tributary and Little Bear Creek. Silt fence had been installed previously, but sediment was still entering Little Bear Creek threatening sockeye redds. On September 21, 2006, WDFW issued an emergency HPA to install additional silt fence and coir mats.

000243

Exhibit 3

Mr. Antemie  
October 9, 2006  
Page 2 of 2

On October 2, 2006, Ginger Holser, the WDFW Area Habitat Biologist (AHB), walked the entire property to ensure all disturbed areas have been stabilized. It was noted that several bare earth areas still need to be stabilized. The WDFW Engineer has also suggested placing willow stakes and streambed gravels in the tributary to further reduce the sediment discharging into Little Bear Creek. It is important that a professional who is knowledgeable in fish habitat perform this work as there are salmon redds in the vicinity that will be destroyed if sediment is released into Little Bear Creek. Please contact Ginger immediately at 425-379-2305, to arrange for installation of these measures. Due to a predicted rain event the weekend of October 14, 2006, it is necessary to have these measures installed no later than October 13, 2006.

In accordance with the Enforcement Report FW12518, a complete stream restoration plan, including mitigation, shall be submitted to the WDFW AHB no later than March 31, 2007. Restoration work shall be completed by August 31, 2007.

Restoration and mitigation may be required by other agencies in addition to WDFW's requirements.

Sincerely,

Richard Oosterwyk  
Fish and Wildlife Enforcement Officer

RO:gh

cc: Ginger Holser, WDFW  
Craig Young, Snohomish County  
Paul Anderson, Department of Ecology  
Tom Hardy, Adopt-A-Stream

000244

## **APPENDIX 6**



STATE OF WASHINGTON  
**DEPARTMENT OF FISH AND WILDLIFE**

16018 Mill Creek Boulevard • Mill Creek, Washington 98012 • (425) 775-1311 FAX (425) 338-1066

March 21, 2007

First Romanian Pentecostal Church  
Vasile Antemie  
8315 NE 155<sup>th</sup>  
Kenmore, WA 98028

Dear Mr. Antemie:

**SUBJECT: Third Hydraulic Code Violation: 22332 SR 9, Woodinville; Unnamed Tributary to Little Bear Creek; Section 26, Township 27North, Range 5East, Snohomish County, WRIA 08.0080, Case Number 07,0061**

Today, the Washington Department of Fish and Wildlife (WDFW) met with Snohomish County, Department of Natural Resources, Department of Ecology, Army Corps of Engineers, Mukleshoot Indian Tribe, Steward and Associates and representatives of your church at the above-referenced property. The meeting was to discuss the restoration and mitigation plans for the previous wetland and stream violations. WDFW noted that the Hydraulic Code violations are continuing to occur on this property even though a Snohomish County Stop Work Order is in place.

The following violations have occurred since WDFW's visit on January 24, 2007.

1. Clearing and grading through wetlands containing a stream
2. Excavating additional trenches to divert streams
3. Routing an existing stream into a pipe. This included trespassing on private property to dig trenches.
4. Placing and removing vegetation debris and wood into streams

Again, there is no record of a Hydraulic Project Approval being issued for this work.

RCW 77.55 clearly states:

Except as provided in RCW 77.55.031, 77.55.051, and 77.55.041, in the event that any person or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure the approval of the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.

"Hydraulic project" means the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state.

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Mr. Antemie  
March 21, 2007  
Page 2

These ongoing violations are causing continuing degradation to the fish habitat in the tributaries and Little Bear Creek. Little Bear Creek contains Endangered Species Act (ESA) listed species.

This and the previous violations have been referred to the Snohomish County Prosecutor's office for charging. You are hereby directed to cease and desist any further criminal activity on the above-referenced property. Violators caught in the act will be arrested and booked into the Snohomish County Jail.

As previously notified, WDFW will require complete restoration of all the streams on the above-referenced property. Please submit the restoration plan, including mitigation, to the WDFW Area Habitat Biologist (Ginger Holser, 16018 Mill Creek Blvd., Mill Creek, WA 98012) no later than April 30, 2007. Stream restoration work shall be completed by August 31, 2007. A Hydraulic project Approval shall be obtained before any further stream work is done.

Restoration and mitigation will be required by other agencies in addition to WDFW's requirements.

Thank you for the opportunity to provide these comments. If you have any questions, please contact me at (425) 775-1311.

Sincerely,

  
Julie Cook  
Fish and Wildlife Enforcement Officer

JC:gh

cc: Ginger Holser, Washington Department of Fish and Wildlife  
Steve Britsch, Snohomish County Public Works  
Ed Soderman, Snohomish County Code Enforcement  
Craig Young, Snohomish County Surface Water Management  
Elizabeth Larsen, Snohomish County Planning and Development Services  
Paul Anderson, Department of Ecology  
Dan Vidican, First Romanian Pentecostal Church  
Todd Olson, Department of Natural Resources  
Martin Fox, Mukleshoot Indian Tribe  
Terri Zuver, Steward and Associates  
John L. Pell, Army Corps of Engineers

000248

## **APPENDIX 7**



# Forest Practices Notice to Comply

1. FPA No.	2. Region NW	4. Class of Forest Practice <input type="checkbox"/> Class II <input type="checkbox"/> Class IV-General <input type="checkbox"/> Class III <input type="checkbox"/> Class IV-Special	5. Legal Subdivision SE1/4		
NTC No. 0707503	3. County Snohomish		Section 27	TWP 27	Rge E/W 5E
6. Landowner First Romanian Pentecostal Church		7. Timber Owner Same as Landowner		8. Operator Same as Landowner	
Mailing Address 8315 NE 155 <sup>th</sup>		Mailing Address		Mailing Address	
City, State (Province), Zip (Postal Code) Kenmore, WA 98028		City, State (Province), Zip (Postal Code)		City, State (Province), Zip (Postal Code)	
Under authority of Ch. 76.09 RCW, Title 222 WAC -- (Name of Violator): <u>          </u> You are given this NOTICE TO COMPLY in connection with violation(s), deviation(s), damage(s), or potential damage(s) described below.					
9. Reasons for Notice: <input type="checkbox"/> Deviation from approved application <input checked="" type="checkbox"/> Violation of Forest Practices Act and/ or Rules <input checked="" type="checkbox"/> Immediate action is necessary to stop or to avoid material damage to public resources.			10. Damage Amount \$ _____		
11. Assessed by: _____					
12. Description of violation(s), deviation(s), damage(s), or potential damage(s):  Harvesting over 5MBF of timber (including within core zone of the RMZ of type F stream) with intent to convert without approved FPA from the DNR. Other violations are being investigated by other agencies listed in box 16.  Some logs are decked in the SW portion of the parcel.  Snohomish County Property Parcel(s) # 27052700401000 and 27052700401001. Site address is 22332 State Route 9.					
13. Violation of WAC(s): Not a violation 222-20-010, 222-20-050, and 222-30-021		14. Violation Observed: <u>3/2/2007</u> at <u>1300</u> (Mo / Day / Yr)                      am/pm		15. Steps described in #16 must be completed by: <u>4/30/07</u> Date	
16. You must complete the following steps:  An approved FPA from the DNR will be required if the decked logs are to be marketed.  An on site meeting is schedule for Wednesday March 21 at 1000 with the consultants from Steward and Associates (representing the landowners) with representatives from Dept. of Fish and Wildlife, Dept. of Ecology, Snohomish County Planning and Development Services, Snohomish County Surface Water Division, and the Representatives from the Muckleshoot Tribes.  Prepare and submit a mitigation plan (Forest Practice violations mitigations) for approval by DNR forest Practices by April 30, 2007.					
17. The operator, timber owner or forest landowner may request a hearing before the department to review this Notice to Comply. To be valid, the department must receive your written request at the region office within fifteen (15) calendar days of the Date of Service (box 19).  CONTACT <u>Northwest</u> Region Office with any questions. Telephone: <u>360-856-3500</u>					
18. Signature and Printed Name of Person Order Given / Mailed to: Mailed certified: 7006 0100 0003 6471 9725		19. Date of Service 03/20/2007		20. Signature of Compliance Officer Steven Huang 	
21. (Office Use Only) Date <u>3-20-07</u> Initials <u>L-U</u>		22. Title of Compliance Officer Skykomish Forest Practice Forester		23. Position No. 2925	
Copies Sent To: [ ] Timber Owner [ X ] Landowner [ X ] FPDM [ X ] FP Coordinator, RPARM, JD, SKY 30, FPDIV [ X ] Other  [ X ] Other Agencies SNO CO, DOE, DOFW, DOR, TULALIP, MUCKLESHOOT					

J021 Rev. 12/06 White--Region Canary--Operator Pink--Compliance Officer  
*E-mailed 3-20-07*

000243

## **APPENDIX 8**

CERTIFIED MAIL



REPLY TO  
ATTENTION OF

**DEPARTMENT OF THE ARMY**  
SEATTLE DISTRICT, CORPS OF ENGINEERS  
P.O. BOX 3755  
SEATTLE, WASHINGTON 98124-3755

Regulatory Branch

APR 5 2007

First Romanian Pentecostal Church  
8315 Northeast 155th  
Kenmore, Washington 98028

Reference: NWS-2007-366-CR  
First Romanian  
Pentecostal Church

Ladies and Gentlemen:

In response to a complaint, my staff recently inspected work performed on your property located at 22332 State Route 9, at Woodinville, Washington. It appears that you have landcleared and placed fill in a water of the United States, without a Department of the Army permit. I consider this work to be in violation of Federal law. I direct you to do no further work in wetlands or in any of the creeks at this site. Please read the enclosure entitled *Clean Water Act and Rivers and Harbors Act Extracts and Definitions* which describes laws that may apply to the unauthorized work.

To assist in the evaluation of this violation, I request the following information:

- a. As-built sketch of the work. The attached sketch supplied in the delineation report generally shows the extent of wetlands on the property, but does not show the extent of the unauthorized impacts. We require a sketch that shows the extent of impacts to waters of the U.S., and must include a scale and dimensions of the impacted areas and the location of the delineation data points.
- b. Who did the work? If a contractor, please furnish name, address, and telephone number.
- c. Date when the work started.
- d. Reasons why the work was started before obtaining a Department of the Army permit.
- e. Property ownership at time of construction.
- f. Primary purpose of the project.
- g. Practicable alternatives available that would not involve filling or land clearing of wetlands.

000250

- 2 -

Please furnish the requested information within 30 days from the date of this letter. Your comments will be beneficial in resolving this matter.

The U.S. Environmental Protection Agency (EPA) also enforces Section 404. The EPA will receive a copy of this letter and may provide views and/or recommendations concerning this matter to our office.

During our meeting, you proposed to resolve the above-referenced violation by restoring the impacted wetlands and streams. You must submit a restoration plan that includes a map of the areas to be restored, methods of restoration and a list of the proposed species to be planted, their size (whip or 1 gallon) and the number of plants to be planted. This information must be sent to my office within 60 days from the date of this letter. We must approve your restoration plan before you may commence work. Upon completion of the restoration work, you must submit a brief report, including photographs, documenting that the work has been completed. After reviewing the photographs, we may contact you to schedule a site visit.

A copy of this letter will be sent to your consultant, Steward & Associates, 120 Avenue A, Suite D, Snohomish, Washington 98290. If you have any questions concerning your reply, please contact Mr. John Pell, telephone (206) 764-6914 or email [John.L.Pell@usace.army.mil](mailto:John.L.Pell@usace.army.mil).

Sincerely,



*Pat* Michael McCormick  
Colonel, Corps of Engineers  
District Engineer

Enclosures

*KJ* 3/27/07  
TONG/OD-RG

*AM* 3/28/07  
MARTIN/OD-RG

*WJ* 3/29/07  
WALKER/OD-RG

*WJ* 4/4/07  
NELSON/OC *3/27/07*  
WALKER/OD-RG

PARKS/OD

GUMAER/XA

MCCORMICK/DE/s/

OD-RG/FILE/

000251

## **APPENDIX 9**



STATE OF WASHINGTON

**DEPARTMENT OF FISH AND WILDLIFE**

16018 Mill Creek Boulevard • Mill Creek, Washington 98012 • (425) 775-1311 FAX (425) 338-1066

February 8, 2007

First Romanian Pentecostal Church  
Vasile Antemie  
8315 NE 155<sup>th</sup>  
Kenmore, WA 98028

**SUBJECT: Hydraulic Code Violation: Non Permitted Hydraulic Project, 22332 SR 9, Woodinville; Unnamed Tributary to Little Bear Creek; Section 26, Township 27North, Range 5East, Snohomish County, WRIA 08.0080, Case Number 07-0061**

The Washington Department of Fish and Wildlife (WDFW) was notified on January 22, 2007, that a second violation of the Hydraulic Code occurred on your property at the above-referenced address. This violation included 1. Clearing and grading through wetlands containing a stream; 2. Excavating a trench to divert a stream; 3. Dewatering a existing stream and causing the death of at least one cutthroat trout; 4. Placing vegetation debris into a stream. Again, there is no record of a Hydraulic Project Approval being issued for this work.

RCW 77.55 clearly states:

Except as provided in RCW 77.55.031, 77.55.051, and 77.55.041, in the event that any person or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure the approval of the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.

"Hydraulic project" means the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state.

On January 24, 2007, WDFW Area Habitat Biologist (AHB) Ginger Holser and I along with Steve Britsch and Cami Apfelbeck of Snohomish County met with you and your representative, John Puravet to discuss the latest violation.

WDFW will require complete restoration of all the streams on the above-referenced property. Please submit a restoration plan, including mitigation, to the WDFW AHB (Ginger Holser, 16018 Mill Creek Blvd., Mill Creek, WA 98012) no later than April 30, 2007. Restoration work shall be completed by August 31, 2007. A Hydraulic project Approval shall be obtained before any further stream work is done.

000245

Mr. Antemie  
February 8, 2007  
Page 2

Restoration and mitigation may be required by other agencies in addition to WDFW's requirements.

Thank you for the opportunity to provide these comments. If you have any questions, please contact me at (425) 775-1311.

Sincerely,

Julie Cook  
Fish and Wildlife Enforcement Officer

JC:gh

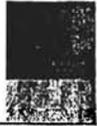
cc: Ginger Holser, Washington Department of Fish and Wildlife  
Steve Britsch, Snohomish County Public Works  
Ed Soderman, Snohomish County Code Enforcement  
Craig Young, Snohomish County Surface Water Management  
Elizabeth Larsen, Snohomish County Planning and Development Services  
Paul Anderson, Department of Ecology

000246

## **APPENDIX 10**



JIS-Link Application Screen



D0030I Beginning of Docket DD1000PI

DD1000MI Case Docket Inquiry (CDK) SNO CO-SOUTH DIV 02/25/09 08:09:52 PUB

Case: 2863A-07D SNO CN Csh: Pty: StID:

Name: ANTEMIE, VASILE NmCd: IN 881 92512

Name: ANTEMIE, VASILE Cln Sts:

UNLAWFUL HYDRAULIC PROJECT ACTVT

Note:

Case: 2863A-07D SNO CN Criminal Non-Traffic Closed N

S	07	18	2007	Case Filed on 07/18/2007	AAG
S				DEF 1 ANTEMIE, VASILE Added as Participant	AAG
S				ARR Set For 07/31/2007 01:30 PM In Room S	AAG
S	07	19	2007	Notice Issued for ARR on 07/31/2007 01:30 PM	AAG
				COPY OF CITATION MAILED TO DEFENDANT WITH HEARING NOTICE.	AAG
S	07	30	2007	ARR on 07/31/2007 01:30 PM	AAG
S				Changed to Room 1 with Judge TPR	AAG
	07	31	2007	NOTICE OF APPEARANCE FILED	SEI
S				ATY 1 NICHOLS, JOEL PHILLIP Added as Participant	SEI
				DISCOVERY DEMANDS FILED	SEI
S				ARR on 07/31/2007 01:30 PM	SEI
S				in Room 1 with Judge TPR Canceled	SEI
				WAIVER OF ARRAIGNMENT FILED	SEI

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PF01	PF02	PF03	PF04	PF05	PF06	PF07	PF08	PF09	PF10	PF11	PF12
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DD1000PI

DD1000MI Case Docket Inquiry (CDK)

SNO CO-SOUTH DIV

02/25/09 08:10:05

PUB

Case: 2863A-07D SNO CN Csh:

Pty:

StID:

Name: ANTEMIE, VASILE

NmCd: IN 881 92512

Name: ANTEMIE, VASILE

Cln Sts:

UNLAWFUL HYDRAULIC PROJECT ACTVT

Note:

Case: 2863A-07D SNO CN Criminal Non-Traffic Closed

N

S 07 31 2007 Plea/Response of Not Guilty Entered on Charge 1

MMC

S PTR Set For 10/12/2007 09:30 AM In Room A

MMC

08 01 2007 CASE REPORT TO PROSECUTOR

MMC

S 10 08 2007 PTR on 10/12/2007 09:30 AM changed to Room 3

LAM

10 09 2007 MOTIONS FILED.

VLS

S 10 10 2007 PTR on 10/12/2007 09:30 AM

MMC

S Changed to Room 3 with Judge JXG

MMC

10 12 2007 SOD3/1008

AAG

HEARING - JUDGE JEFFREY D GOODWIN. PROSECUTOR HALLORAN.

AAG

DEFENDANT PRESENT WITH COUNSEL

AAG

SUBSTITUTION OF COUNSEL

AAG

DEFENSE MOTION TO CONTINUE - GRANTED

AAG

THIS IS AN EXCLUDED PERIOD FOR SPEEDY TRIAL

AAG

S PTR: Held

AAG

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JIS-Link Application Screen



D0071I More records available.

DD1000PI

DD1000MI Case Docket Inquiry (CDK)

SNO CO-SOUTH DIV

02/25/09 08:10:11

PUB

Case: 2863A-07D SNO CN Csh: Pty: StID:

Name: ANTEMIE, VASILE NmCd: IN 881 92512

Name: ANTEMIE, VASILE Cln Sts:

UNLAWFUL HYDRAULIC PROJECT ACTVT

Note:

Case: 2863A-07D SNO CN Criminal Non-Traffic Closed

N

S	10	19	2007	PTR Set For 01/11/2008 01:30 PM In Room A	AAG
				JURY TRIAL TENTATIVELY SET FOR 1/16/2008 @ 8:15 AM	AAG
	11	08	2007	NOTE FOR MOTION AND MOTION TO DISMISS FILED.	VLS
S	11	16	2007	MOT Set For 11/26/2007 09:30 AM In Room A	VLS
S	11	20	2007	MOT on 11/26/2007 09:30 AM changed to Room 3	RPJ
	11	21	2007	DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR PRETRIAL DISMISSAL	MID
				FOR INSUFFICIENT EVIDENCE PURSUANT TO STATE V KNAPSTAD FILED.	MID
S	11	26	2007	ATY 1 NICHOLS, JOEL PHILLIP Removed	AAG
S				ATY 2 KUNSCH, KELLY Added as Participant	AAG
				***ATTORNEY KUNSCH ADDED IN ERROR***	AAG
S				ATY 3 KOLER, JANE RYAN Added as Participant	AAG
				SOD3/1042	AAG
				HEARING - JUDGE JEFFREY D GOODWIN - PROSECUTOR HALLORAN	AAG
				DEFENDANT PRESENT WITH COUNSEL	AAG

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JIS-Link Application Screen



D0071I More records available.

DD1000PI

02/25/09 08:10:19

DD1000MI Case Docket Inquiry (CDK)

SNO CO-SOUTH DIV

PUB

Case: 2863A-07D SNO CN Csh:

Pty:

StID:

Name: ANTEMIE, VASILE

NmCd: IN 881

92512

Name: ANTEMIE, VASILE

Cln Sts:

UNLAWFUL HYDRAULIC PROJECT ACTVT

Note:

Case: 2863A-07D SNO CN Criminal Non-Traffic Closed

N

11 26 2007 MOTION TO DISMISS - DENIED

AAG

COURT FINDS THERE IS DISPUTED FACT  
MATTER IS SET FOR READINESS AND TRIAL

AAG

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MOT: Held

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S 11 27 2007 ATY 2 KUNSCH, KELLY Removed

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S 01 09 2008 PTR on 01/11/2008 01:30 PM changed to Room 3

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S 01 10 2008 PTR on 01/11/2008 01:30 PM

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S Changed to Room 3 with Judge JXG

MMC

01 11 2008 SOD3/140

AAG

READINESS HEARING - JUDGE JEFFREY D GOODWIN - PROS HALLORAN  
DEFENDANT PRESENT WITH COUNSEL

AAG

AAG

S Finding/Judgment of Bail Forfeiture for Charge 1

AAG

S Case Heard Before Judge GOODWIN, JEFFREY

AAG

S Judge GOODWIN, JEFFREY Imposed Sentence

AAG

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D0031I End of Docket DD1000PI  
 DD1000MI Case Docket Inquiry (CDK) SNO CO-SOUTH DIV PUB  
 02/25/09 08:10:25  
 Case: 2863A-07D SNO CN Csh: Pty: StID:  
 Name: ANTEMIE, VASILE NmCd: IN 881 92512  
 Name: ANTEMIE, VASILE Cln Sts:  
 UNLAWFUL HYDRAULIC PROJECT ACTVT  
 Note:  
 Case: 2863A-07D SNO CN Criminal Non-Traffic Closed N

S 01 11 2008 Total Imposed on Charge 1: 250.00 AAG  
 S with 0.00 Suspended AAG  
 S And 0.00 Other Amount Ordered AAG  
 S Accounts Receivable Created 250.00 ALG  
 S 8014100409 Fine Payment Paid in Full 250.00 ALG  
 S Case Disposition of CL Entered AAG  
 S PTR: Not Held, Hearing Canceled AAG  
 S SEN: Held AAG  
 S 06 12 2008 8165100495 Miscellaneous Payment Received 0.50 NXC  
 S for COPY/TAPE FEES NXC  
 S 06 19 2008 8172100902 Miscellaneous Payment Received 16.75 NXC  
 S for COPY/TAPE FEES NXC  
 S 10 03 2008 8280101024 Miscellaneous Payment Received 17.25 NXC  
 S for COPY/TAPE FEES NXC

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## **APPENDIX 11**

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BEFORE THE POLLUTION CONTROL  
HEARINGS BOARD

FIRST ROMANIAN PENTECOSTAL  
CHURCH OF KENMORE, INC., a Washington  
nonprofit corporation,  
Appellant,

v.

STATE OF WASHINGTON DEPARTMENT  
OF ECOLOGY,  
Respondent.

PCHB Nos. 08-098 and 08-099  
(Consolidated)

APPELLANT'S RESPONSE TO STATE'S  
SECOND MOTION FOR SUMMARY  
JUDGMENT

COMES NOW the First Romanian Pentecostal Church of Kenmore, Inc. (the Church), by and through its attorneys of record, the Law Office of Jane Ryan Koler, PLLC, and responds to the Department of Ecology's ("Ecology") Second Motion for Summary Judgment. The Church requests the Board deny the Motion.

**I. FACTS**

In September of 2006, the Church became aware that volunteers had erroneously conducted work at land the Church owns when the Department of Ecology contacted the Church regarding alleged violations. While the Church owns the property located at 22332 State Route 9 SE, Woodinville, Washington that is the subject of the Orders, neither its pastor, Vasile Antemie, nor its Board members or

1 employees regularly visit the site. It is located more than seven miles from the Church itself. Church  
2 officials did not observe the activities on the site that resulted in the Penalty and Administrative Orders  
3 currently before the Pollution Control Hearings Board, and were unaware of them until after they  
4 occurred. Antemie Declaration filed January 16, 2009; (a copy of this Declaration is attached for the  
5 convenience of the Board).

6 The Church did not clear, fill or grade the wetlands and tributary. The allegedly unlawful actions  
7 that occurred on Church property were performed by volunteers without the permission of the Church.  
8 The Church did not authorize, solicit, or direct these actions, either overtly or tacitly. Antemie  
9 Declaration.

10 The Church is a nonprofit corporation, organized for charitable (religious) purposes. It does not  
11 conduct commercial or industrial operations. The Church acts through its employees, with the approval  
12 of its Board of Directors. The Church is not a member-run nonprofit corporation. Antemie Declaration.

13 The Church, through its pastor, Pastor Antemie, and its Board members, met many times over the  
14 next seventeen months with Ecology personnel, as well as other local agencies regarding the development  
15 desired, the permits needed, and the restoration of the site. Second Declaration of Paul Anderson, ¶¶ 2-12  
16 (“Second Anderson Decl.”) (filed by Dept. of Ecology). The Church hired a wetlands professional to help  
17 it determine the extent of wetlands on their property, Steward and Associates. See Second Anderson  
18 Decl. ¶ 11 (acknowledging receipt of report from same).

19 The Dept. of Ecology admits that the real reason it issued an Administrative Order and Penalty  
20 Order was because “the expiration of the statute of limitations was looming.” Second Anderson Decl. ¶  
21 13. Although it attempts to imply the Church was “stonewalling,” Ecology admits the Church had  
22 already restored the lower portion of the tributary on the property when it issued the penalty. Second  
23  
24  
25

1 Anderson Decl. ¶ 22. Ecology alleges the Church had “made no effort” to remediate its violations. *Id.* In  
2 truth, it is undisputed the Church had done the following:

- 3 • Obtained multiple wetlands delineation studies in compliance with Ecology demands;
- 4 • Restored a tributary;
- 5 • Obtained a restoration plan; and
- 6 • Initiated the permitting process with local agencies as required to potentially comply with  
7 Ecology’s restoration Orders;

8 In the midst of these efforts, the Department of Ecology issued Administrative Order 6009 and  
9 Penalty Order 6008 to the Church, finding that

10 Prior to September 13, 2006, the Church mechanically cleared, graded and filled  
11 wetlands and a tributary to Little Bear Creek and again prior to January 24,  
12 2007, the Church mechanically cleared, graded and filled additional wetlands  
13 and diverted flow from a tributary to Little Bear Creek without a permit in  
14 violation of RCW 90.48.080. Discharge of such polluting matters into the  
15 waters of the state is also a violation of the antidegradation policy, WAC 173-  
201A-300 through 330. Fill remains in place in the wetlands. Each and every  
16 day the fill remains in the wetlands constitutes a separate and distinct violation  
17 of RCW 90.48.080 and 90.48.160, and WAC 173-201A-300 through 330.

18 Ecology, through its witness Mr. Anderson, claims that the Church again knowingly conducted  
19 violative work by diverting, filling, or otherwise impacting a stream after the first contact by Ecology.  
20 Second Anderson Decl. ¶ 21. Mr. Anderson is mistaken – as is fully briefed and set out in Appellant’s  
21 pending Motion for Summary Judgment, and as is well known by Ecology *the Church* did not conduct or  
22 authorize any of the violative work at the site. This is made clear by the Church’s responses to discovery  
23 which showed that the Church Board was not even aware of the existence of the stream until after the  
24 notification by Ecology. *See* Answer to Interrogatory No. 13 (Exhibit 1 to Marchioro Declaration). As  
25 stated, however, *the Church* did not authorize this later land-clearing, either. There is no evidence that *the*  
*Church* authorized or ordered any of the actions alleged by Ecology to have violated the WPCA.

1 **II. EVIDENCE RELIED UPON**

2 The Church relies upon Penalty Order 6008, Administrative Order 6009, and the  
3 Declaration of Vasile Antemie filed on January 16, 2009 as well as the pleadings and  
4 declarations on file in this matter.

5 **III. STANDARD FOR SUMMARY JUDGMENT**

6 “Summary judgment is proper if the pleadings, affidavits, and depositions establish that  
7 there is no genuine issue of material fact and that the moving party is entitled to judgment as a  
8 matter of law.” *American Safety Casualty Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 768,  
9 174 P.3d 54, 55 (2007).

10 **IV. ARGUMENT**

11 **A. Ecology is not Entitled to Summary Judgment on Issue Nos. 1 & 3.**

12 Ecology tucks into its brief the acknowledgment that if it does not prove *the Church*  
13 filled wetlands, it lacks jurisdiction to issue the Orders herein. Motion at 16:17-19. Despite  
14 this, and despite the fact that that very question of whether *the Church* can be liable for actions  
15 taken by others is the subject of a yet-pending Motion for Summary Judgment filed by  
16 Appellants, Ecology attempts to “fold in” summary judgment on these points. Appellants’  
17 briefing on its Motion for Summary Judgment is incorporated by reference as if set forth  
18 verbatim. The Board should deny summary judgment on Issues Nos. 1 and 2.

19 **B. Ecology Lacks Jurisdiction Over Wetland Filling And Thus The Authority To Impose The  
20 Penalty And Bring The Enforcement Action (Issue No. 6)**

21 Ecology’s orders in this case are outside of Ecology’s jurisdiction and may not be enforced on  
22 summary judgment. An administrative agency only has that authority which has been explicitly  
23 delegated to them by statutes; they do not have inherent authority. *Butler v. Republic School Dist.*, 34  
24 Wn. App. 421 (1983); *Barendregt v. Walla Walla School District*, 26 Wn. App. 246 (1980); *State v.*  
25

1 *Raines*, 87 Wn. 2d 626 (1976). In the past, the Washington Supreme Court has invalidated actions of  
2 Ecology on the basis that the actions radically and improperly expanded Ecology’s authority. *See, e.g.,*  
3 *Rettkowski v. Dep’t of Ecology*, 122 Wn.2d 220, 858 P.2d 232 (1993); *Cowiche County Conservancy v.*  
4 *Dep’t of Ecology*, 118 Wn.2d 804, 828 P.2d 549 (1992).

5 Here, the Water Pollution Control statute explicitly limits the authority of Ecology to control and  
6 prevent the pollution of “streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and  
7 other surface and underground waters of the State of Washington.” *See* RCW 90.48.030. It delegates no  
8 separate authority to Ecology to regulate pollution in alleged wetlands. Ecology has not alleged that the  
9 placement of stockpiles of earth on this alleged wetland has resulted in the pollution of any “waters of  
10 the state” that are defined as such in the statute, such as any groundwaters. Government actions taken in  
11 derogation of statutory authority are *ultra vires* and invalid. *Biggers v. City of Bainbridge Island*, 162  
12 Wn.2d 683, 169 P.3d 14 (2007). Any regulatory action beyond statutory bounds, regardless of its  
13 practical necessity or appropriateness, is invalid. *Telephone Ass’n v. Rate Payers Assn.*, 75 Wn. App.  
14 356, 363 (1994).

15  
16 Ecology will no doubt argue that it is given authority to regulate wetlands under the Water  
17 Pollution Control Act (WPCA). The Water Pollution Control Act regulates discharge of pollutants into  
18 bodies of water in the state of Washington. There is no doubt that Ecology is the agency designated by  
19 the legislature to administer the WPCA. However, the WPCA does not apply to wetlands for the simple  
20 reason that wetlands are not water – they are land. The WPCA’s legislative history clearly shows that  
21 the legislature did not intend for wetlands to be defined as “waters of the state” under the statute. The  
22 Legislature’s overall environmental regulation scheme consistently differentiates between aquatic  
23 environments and terrestrial environments – and classes wetlands as land, not as water. Thus, Ecology’s  
24 regulation defining “waters of the state” to include wetlands is *ultra vires* and Ecology has exceeded its  
25

1 statutory authority in attempting to regulate wetlands under the WPCA. Moreover, the delegation of  
2 authority in the WPCA itself states:

3 “The department shall have the jurisdiction to control and prevent the pollution of **streams,**  
4 **lakes, rivers, ponds, inland waters, salt waters, water courses and underground**  
5 **waters** in the state of Washington.”

6 RCW 90.48.030 (emphasis added). Chapter 90.48 does not delegate to Ecology the authority to regulate  
7 the filling of wetlands.

8 The language of the WPCA and its legislative history show that the Legislature did not intend that  
9 wetlands to be included in the statutory term “waters of the state.” The WPCA defines “waters of the  
10 state” as follows:

11 Wherever the words “waters of the state” shall be used in this chapter, they **shall be**  
12 **construed to include** lakes, rivers, ponds, streams, inland waters, underground waters, salt  
13 waters and all other surface waters and watercourses within the jurisdiction of the state of  
14 Washington.

15 RCW 90.48.020 (emphasis added). This definition was included in the statute when it was first  
16 enacted in 1945, and the definition of “waters of the state” has never been amended. *Laws 1944-45*, ch.  
17 216, §2; *cf.* current RCW 90.48.020. Nobody can seriously argue that the 1945 state Legislature was  
18 concerned about protecting wetlands when it enacted the WPCA. *Laws 1944-45*, ch. 216, §1.

19 Furthermore, a search through the Legislative Digest, the Journal of the Senate and the Journal of the  
20 House for discussion of Senate Bill No. 294, which became the WPCA, showed that the measure passed  
21 without significant debate and without any discussion at all on the floor of the Senate or House as to  
22 what “waters of the state” should mean. Although the WPCA was amended in 1973, after the enactment  
23 of the Federal Clean Water Act, the legislature did not amend the definition of “waters of the state” to  
24 include wetlands. *Laws of 1973*, ch. 155, §1. Nor did the legislature amend the definition of “waters of  
25 the state” when it made changes to the WPCA in 1955, 1967, 1969, 1970, 1987, 1992, 1995, or 2002. In

1 fact, after all those amendments, wetlands are not mentioned even once in the Water Pollution Control  
2 Act.

3 This interpretation is the only one that is consistent with the Legislature's comprehensive statutory  
4 scheme for protecting water resources in our state codified in Chapter 90 RCW, which specifically  
5 defines wetlands as land that is saturated at least periodically with water, not as watercourses.

6 When construing two statutes pertaining to the same subject matter we  
7 assume that the legislature does not intend to create an inconsistency. ...  
8 Statutes are to be read together, whenever possible, to achieve a  
9 "harmonious total statutory scheme ... which maintains the integrity of  
the respective statutes.

10 *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 245-46, 88 P.3d 375 (2004),  
11 quoting *State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transportation*, 142  
12 Wn.2d 328, 342, 12 P.3d 134 (2000); see also *Bell v. Muller*, 129 Wn. App. 177, 188, 118 P.3d 405  
13 (2005) ("Statutes are read together to give effect to all and to harmonize each with the others."). In its  
14 environmental statutory scheme, the Legislature consistently makes a clear distinction between land and  
15 water, and has repeatedly defined wetlands as land, not as watercourses. The Legislature has defined  
16 wetlands in the Growth Management Act, the Reclaimed Water Use Statute, and the Shoreline  
17 Management Act:

18 **Wet lands**

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

23 RCW 36.70A.030 (21)

24 **Wet lands** are just that - - they are lands "inundated or saturated by surface or ground water". The  
25 definition of wetland does not conflate land and water. It distinguishes between land and water.

1 Further, wetlands have salient characteristics not shared by waters - - they have “saturated soil  
2 conditions” which support vegetation. Waters of the state do not have soils, and only can support plant  
3 life which lives in water as opposed to saturated soils. RCW 36.70A.030(21); *see also* RCW 90.58.030  
4 *and* RCW 90.46.010(21).

5 The Shoreline Management Act (“SMA”) goes even further to define wetlands adjacent to bodies  
6 of water as shorelands:

7 “Shorelands” or “shoreland areas” means those lands extending  
8 landward for two hundred feet in all directions as measured on a  
9 horizontal plane from the ordinary high water mark; floodways and  
10 contiguous floodplain areas landward two hundred feet from such  
11 floodways; and **all wetlands** and river deltas associated with the streams,  
lakes, and tidal waters which are subject to the provisions of this  
chapter...

12 RCW 90.58.030(f). It is also important to note that the SMA differentiates between lands under its  
13 ambit, which are called “shorelands,” and waters under its ambit, which are called “waters”:

14 “‘Shorelines’ means all of the water areas of the state, including reservoirs, and their associated  
15 shorelands, together with the lands underlying them...” RCW 90.58.030.

16 The State of Washington’s own *Environmental Permit Handbook* makes it clear that Ecology has  
17 no authority to deal with wetlands under the Water Pollution Control Act; the *Environmental Permit*  
18 *Handbook* discusses water quality permits issued under the Water Pollution Control Act and explains  
19 that “Ecology is also delegated by Environmental Protection Agency (EPA) to implement the National  
20 Pollutant Discharge Elimination System (NPDES) permit program for the [Federal] Clean Water Act.”  
21 *Handbook* at Wetland Section. It is clear from review of Water Quality Permits issued by Ecology under  
22 the Water Pollution Control Act, that Ecology does not control any system of permits pertaining to  
23 wetlands other than certifications for the federal Clean Water Act. *Id.* The wetland page of the *State*  
24  
25

1 *Environmental Permit Handbook* summarizes the jurisdiction of Ecology over wetlands and points out  
2 statutory schemes which give Ecology at least some jurisdiction over certain wetlands:

3 Wetlands.....

4 State jurisdiction

5 Aquatic Use Authorization (Aquatic Resources, Department of Natural Resources)  
6 Hydraulic Project Approval (Aquatic Resources, Department of Fish and Wildlife) Section  
7 401 Water Quality Certification (Federal Requirements, Ecology) Coast Zone Consistency  
8 Determination (Federal Requirements, Ecology) Noxious Aquatic and Emergent Weed  
9 Permit (Aquatic Resources, Department of Agriculture)

9 Federal Authority

10 Section 404 Permit (Federal Requirements, Army Corps of Engineers).

11 *State Environmental Permit Handbook.*

12 Further, the handbook specifies that local governments have jurisdiction over wetlands under  
13 Growth Management Act critical areas ordinances as well as within context of issuing permits pertaining  
14 to flood plains and the Shoreline Management Act:

15 **Local Jurisdiction (City or County Planning**

16 Floodplain Development Permit (Local Permits), Shoreline Substantial  
17 Development, Variance, or Conditional Use Permit (Local Permits),  
18 Growth Management Critical Areas Ordinance Requirements.

19 *State Environmental Permit Handbook.*

20 Neither the Water Pollution Control Act nor the Environmental Handbook indicate that Ecology  
21 has the authority to regulate fill in an area Ecology suspects to be a wetland under the Water Pollution  
22 Control Act. That is clearly the province of local governments under the Shoreline Management Act  
23 and local critical area ordinances promulgated pursuant to the authority of the Growth Management Act.  
24 To perpetuate the fiction that wetlands are surface waters or groundwaters requires turning the  
25 conventional dictionary definitions and legislative definitions of those terms on their heads and ignoring

1 that **wetlands** are defined as land and not water. Because regulations which restrict the use of private  
2 property must be strictly construed against the state, the Court should reject any claim that “waters of the  
3 state” includes wetlands. *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986).

4 In this case, Ecology is acting without authority and engaging in unauthorized enforcement  
5 activity. It is not entitled to summary judgment on Issue Nos. 4 and 6.

6  
7 **1. Even where the legislature has given Ecology express statutory authority over some**  
8 **aspects of wetland regulation, it has defined such authority narrowly and has even**  
9 **placed express limitations on Ecology’s exercise of that authority.**

10 The Washington State Legislature has given Ecology some limited jurisdiction to perform discrete  
11 duties with respect to wetlands regulation: (1) to administer wetland mitigation banking, RCW 90.74; (2)  
12 to administer the aquatic resource mitigation statute, RCW 90.84; and (3) to fulfill the state’s role and  
13 responsibilities for certification under the federal Clean Water Act, see RCW 90.48.260. Each time the  
14 legislature has given Ecology any authority over wetlands, it has carefully limited Ecology’s role.

15 For example, in authorizing Ecology to administer the wetland mitigation statute, the legislature  
16 clearly intended to circumscribe Ecology’s authority over wetlands:

17 This chapter **does not create any new authority for regulating wetlands** or wetlands  
18 **banks** beyond what is specifically provided for in this chapter. **No authority** is granted to  
19 the department under this chapter **to adopt rules** or guidance **that apply to wetland**  
20 **projects other than banks** under this chapter.

21 RCW 90.84.020 (emphasis added).<sup>1</sup>

---

22 <sup>1</sup> In this context, “bank” means “a site where wetlands are restored, created, enhanced, or in exceptional  
23 circumstances, preserved expressly for the purpose of providing compensatory mitigation in advance of  
24 authorized impacts to similar resources.” RCW 90.84.010. “Department” is defined in the same section  
25 as the Department of Ecology. *Id.*

1           Additionally, while Ecology has been delegated limited specific duties with respect to wetlands  
2 under the Federal Clean Water Act (it is designated as the state water pollution control agency for the  
3 purpose of fulfilling the state's role and responsibilities under the Federal Clean Water Act), Ecology's  
4 only responsibility is to certify to the Corps of Engineers, as required by Section 401 of the federal  
5 Clean Water Act, that any proposed discharge of dredge or fill material into the waters of the United  
6 States complies with 33 U.S.C. §§1311-1313, 1316, and 1317. 33 USC §§ 1341(a)(1) in the context of a  
7 issuing federal 404 permit which allow wetlands to be filled. RCW 90.48.260. This certification is  
8 commonly known as §401 Water Quality Certification or State Water Quality Certification, but these  
9 responsibilities do not give Ecology the authority to impose penalties under the Washington Pollution  
10 Control Act for the alleged filling of wetlands.  
11

12                           **2.       Even if Ecology was Authorized to Regulate Wetlands, the**  
13                           **Notices Do not Allege A Discharge of Pollutants into the**  
14                           **Waters of the State.**

15           In order to prove a violation of the Water Pollution Control Act, Ecology is required to provide  
16 proof that the Church discharged "pollutants" into "waters of the state" within the meaning of the Act.  
17 Specifically, Ecology must prove that the Church discharged contaminants or altered the physical,  
18 chemical, or biological properties of waters of the state, including change in temperature, taste, color,  
19 turbidity or odor, or that it caused a nuisance or public health danger. RCW 90.48.020. The only  
20 evidence Ecology submits is the allegation that someone filled wetlands, cleared land, removed  
21 vegetation, and graded fields. Ecology does not even argue that the Church polluted any waters of the  
22 state, and it is not entitled to summary judgment on this ground.  
23  
24  
25

1                   **3. If The Water Pollution Control Act Applies here, it is**  
2                   **Unconstitutionally Vague As Applied In This Case**  
3                   **Because It Gives No Notice That It Regulates Wetlands.**

4                   “[A] statute which either forbids or requires the doing of an act in terms so vague that men [and  
5 women] of common intelligence must necessarily guess at its meaning and differ as to its application,  
6 violates the first essential of due process of law.” *Anderson v. Issaquah*, 70 Wn.App. 64, 75, 851 P.2d  
7 744 (1993). In this case, Ecology’s penalty orders accused the Church of violating the Water Pollution  
8 Control Act (WPCA):

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

12                   *See* RCW 90.48.080. The statute gives no notice that Ecology regulated the filling of wetlands under the  
13 Water Pollution Control Act. In fact, wetlands are not mentioned once in the Water Pollution Control  
14 Act. The Act defines waters of the state as including “lakes, rivers, ponds, streams, inland waters,  
15 underground waters, salt waters and all other surface waters and water courses within the jurisdiction of  
16 the state of Washington.” *See* RCW 90.48.020. The delegation of authority to Ecology under the  
17 Water Pollution Control Act states: “The department shall have the jurisdiction to control and prevent  
18 the pollution of the streams, lakes, rivers, ponds, inland waters, water courses and underground waters in  
19 the state of Washington.” RCW 90.48.030. No authority is delegated to Ecology under the Act to  
20 control the filling of wetlands.  
21

22                   As discussed above, various Washington statutes address wetlands and define wetlands to  
23 be land areas with vegetation that grows on land, in soil, as contrasted with aquatic  
24 environments where vegetation grows in water. *See* RCW 36.70A.030(21); RCW  
25 90.58.030; RCW 90.46.010(21); RCW 90.58.030(f). The Water Pollution Control Act does  
not define wetlands.

1 Ecology's penalty orders also alleged that the Church violated the Water Pollution Control Act  
2 and a water anti-degradation policy articulated at WAC 173-201A-300. Neither the Water Pollution  
3 Control Act nor the Anti-Degradation policy gave the Church any notice that Ecology regulated the filling  
4 of wetlands under the Water Pollution Control Act. In fact, wetlands are not mentioned once in the Water  
5 Pollution Control Act. The Act defines waters of the state as including "lakes, rivers, ponds, streams,  
6 inland waters, underground waters, salt waters and all other surface waters and water courses within the  
7 jurisdiction of the state of Washington." See RCW 90.48.020. Moreover, no authority is delegated to  
8 Ecology under the Water Pollution Control Act to regulate and penalize the filling of wetlands. The  
9 delegation of authority to Ecology under the Water Pollution Control Act at RCW 90.48.030 states:  
10

11 The department shall have the jurisdiction to control and prevent the  
12 pollution of the streams, lakes, rivers, ponds, inland waters, salt waters,  
water courses and underground waters in the state of Washington.

13 Ecology cites *Kariah Enterprises, LLC v. Dept. of Ecology*, PCHB No. 05-021, and *Pacific*  
14 *Topsoils v. Dept. of Ecology*, PCHB No. 07-0464 & 07-047 (following *Kariah*). With respect, the Board  
15 may not legislate its own jurisdiction; one must look to the statutes of Washington to determine the  
16 jurisdiction of agencies. For example, the conclusion in *Kariah*, that inclusion of "wetlands" in the  
17 definition of waters of the state is consistent with the intent of the Legislature is not borne out by the  
18 legislative history, the plain language of the WCPA and other statutes describing waters and wetlands, or  
19 the express, limited jurisdiction granted in other circumstances. See *Kariah*, PCHB No. 05-021 at 16;  
20 lack of inclusion in statutes discussed above.

21 Further, the Superior Court decision cited by Ecology, *Building Industry Assoc. of Washington v.*  
22 *City of Lacey*, Thurston County Cause No. 91-2-00895-5 (1993), did not really address whether wetlands  
23 are within Ecology's jurisdiction. The excerpt provided by Ecology is somewhat of a non sequitur,  
24 because the Court states that the issue is whether underground bodies of water or bodies of water larger  
25 than a puddle are "waters of the state." It would seem obvious that underground bodies of water are not

1 “wetlands.” In any event, this decision, which fails to cite any specific statutory authority providing  
2 Ecology with jurisdiction over wetlands, is therefore distinguishable and off-point.

3 Chapter 90.48 RCW does not delegate to Ecology any authority to regulate or penalize the filling  
4 of wetlands, and Ecology is not entitled to summary judgment on Issue Nos. 4 and 6.

5 **C. Ecology’s Jurisdiction over Waters of State Does not Extend to Restoration**  
6 **(Issue Nos. 4 and 5).**

7 Even if wetlands were within the jurisdiction of Ecology, no statutory authority is provided to this  
8 Board which would allow it to grant summary judgment on Issue No. 4. The Dept. of Ecology fills pages  
9 discussing whether or not it may protest and punish discharges into wetlands. It never addresses the fact  
10 that there is no statutory authority for its assertion of the right to demand remediation of wetlands or  
11 creeks, or replant plants.

12 The jurisdiction of the Department of Ecology is set out in RCW 90.48.030:

13 The department shall have the jurisdiction to control and prevent the  
14 pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water  
15 courses, and other surface and underground waters of the state of  
16 Washington.

17 In this case, Ecology has ordered far more than abatement of alleged pollution. It has ordered the Church to  
18 perform corrective actions including

- 19 A. providing a wetland restoration plan
- 20 B. restoring disturbed wetlands, streams and buffers
- 21 C. providing the Department an “as-built” report with maps
- 22 D. recording a Wetlands Notice at the county recorder’s office
- 23 E. monitoring the restoration site for ten years minimum
- 24 F. submitting monitoring reports to the Department
- 25 G. delineating wetlands half-way through and at the end of the process
- H. replacement of dead or dying plants

1 I. rating the wetlands at the end of the process

2 J. requiring the Church to allow the Department to enter the site.

3 Ecology also issued an Order and Penalty for alleged violation of RCW 90.48.160. To violate  
4 RCW 90.48.160, the Church must have conducted a commercial or industrial operation which results in  
5 the disposal of solid or liquid waste into the waters of the state. It did not. It is a religious organization.  
6 Ecology provides no evidence otherwise.

7 Ecology's authority is spelled out by RCW 90.48.120:

8  
9 (1) Whenever, in the opinion of the department, any person shall violate or  
10 creates a substantial potential to violate the provisions of this chapter or  
11 chapter 90.56 RCW, or fails to control the polluting content of waste  
12 discharged or to be discharged into any waters of the state, the department  
13 shall notify such person of its determination by registered mail. Such  
14 determination shall not constitute an order or directive under RCW  
15 43.21B.310. Within thirty days from the receipt of notice of such  
16 determination, such person shall file with the department a full report  
17 stating what steps have been and are being taken to control such waste or  
18 pollution or to otherwise comply with the determination of the department.  
19 Whereupon the department shall issue such order or directive as it deems  
20 appropriate under the circumstances, and shall notify such person thereof by  
21 registered mail.

22 (2) Whenever the department deems immediate action is necessary to  
23 accomplish the purposes of this chapter or chapter 90.56 RCW, it may issue  
24 such order or directive, as appropriate under the circumstances, without first  
25 issuing a notice or determination pursuant to subsection (1) of this section.  
An order or directive issued pursuant to this subsection shall be served by  
registered mail or personally upon any person to whom it is directed.

26 The Order issued by Ecology greatly exceeds this jurisdictional authority. There is no statute or  
27 regulation that allows Ecology to require restoration of lands, plants, or other restorative activities, as it  
28 attempts to do here. An agency may only perform those actions authorized by statute. *Rettkowski v.*  
29 *Dep't of Ecology*, 122 Wn.2d 219, 226, 858 P.2d 232 (1993).

30 Board decision *Pacific Topsoils v. Dept. of Ecology*, PCHB No. 07-0464 & 07-047, is the only  
31 decision cited by Ecology which held that Ecology has the authority to order restoration of lands, plants

1 and wetlands. It does not, however, cite to any statute or regulation, but merely bootstraps the authority  
2 to govern discharge into the waters of the State into the right to order restoration. As discussed above, the  
3 Board may not legislate additional powers to either itself or Ecology. The Board should deny summary  
4 judgment on Issue Nos. 4 and 5.

5 **D. This Board, as it has Previously Ruled, has the Authority to Determine Whether the Agency**  
6 **Violated the Church's Right to Due Process (Issue 7).**

7 As acknowledged Ecology in a footnote, (Motion, fn. 7), this Board has the authority to hear the  
8 Church's constitutional claims alleging a lack of due process. Despite this, Ecology expends several  
9 pages arguing against this. It is well settled that the Board may hear the Church's claims of procedural  
10 constitutional violations. *See, e.g., Inland Foundry Company, Inc. v. Spokane County Air Pollution*  
11 *Control Authority*, PCHB Nos. 94-150 & 94-154 (1994) (hereinafter "*Inland Foundry I*") (holding the  
12 PCHB had jurisdiction to consider constitutional claims arising out of the application of statutes to the  
13 facts, commonly termed "as applied" constitutional claims). The Board's decision in *Inland Foundry I* is  
14 supported by *dicta* in *Buechel v. DOE*, 125 Wn.2d 196, 201 n. 4 (1994), wherein the Supreme Court  
15 refused to consider the appellant's recently raised inverse condemnation claim noting that "[g]enerally, an  
16 issue not raised in a contested case before the Shorelines Hearings Board may not be raised for the first  
17 time on review of the Board's decision." Generally, claims that are "mostly procedural" are within the  
18 purview of this Board. *See Inland Foundry Company, Inc. v. SCAPCA*, Order Ruling of Motion and  
19 Granting Summary Judgment, PCHB No. 94-150 (1995), and Order Granting Summary Judgment, PCHB  
20 No. 94-154 (1995)(hereinafter collectively "*Inland Foundry II*"). In rendering those decisions, the PCHB  
21 ruled on *Inland Foundry*'s constitutional claims of procedural due process, equal protection, *ex post facto*  
22 applications of the law and vagueness. The Board may hear the Church's constitutional claims that the  
23 restoration order will deny the church the ability to make reasonable use of the property, and that the  
24 Orders did not provide the notice required by the statute. The Board should deny Ecology's motion for  
25 summary judgment on these issues, which is based on jurisdiction.

1 **E. Ecology Failed to Comply With Procedural Requirements by Failing to Provide**  
2 **Pre-Penalty Notice under RCW 90.48.120 (Issue Nos. 7 and 9).**

3 The Department admits it failed to comply with the procedural requirements set out by statute.  
4 Motion at p. 17 (citing fn. 3, and claiming, evidently, that a warning letter “substantially” complies with  
5 the due process requirements of the statute). It is an elementary and fundamental principle of due  
6 process that government agencies must follow their own laws. *Layton v. Swapp*, 484 F.Supp. 958  
7 (U.S.D.C.N. Dist. Utah, 1979) *Berst v. Snohomish County*, 114 Wn.App. 245, 57 P.3d 273 (2002), rev.  
8 denied, 150 Wn.2d 1015, 79 P.3d 445 (2003), teaches that due process protections must be accorded  
9 before a penalty is imposed. In *Berst*, a Forest Practices Act penalty was imposed without any notice or  
10 opportunity to be heard on the allegation. In the case at bar, Ecology imposed a significant penalty and  
11 orders which became final by their own terms, without providing the Church any notice and opportunity  
12 to be heard – a clear due process violation.

13 The Water Pollution Control Act specifies certain procedures which must be followed when  
14 Ecology suspects a violation of the statute. First, “when in the opinion of the department [of Ecology],  
15 any person shall violate... the provisions of this chapter... the department shall notify such person of its  
16 determination by registered mail.” RCW 90.48.120 (1). The statute then requires that “[w]ithin thirty  
17 days from the receipt of notice of such determination, such person shall file with the department a full  
18 report stating what steps have been and are being taken to control such waste or pollution or to otherwise  
19 comply with the determination of the department.” In this case, Ecology admits that it failed to comply  
20 with the statute.  
21

22 Ecology’s failure to comply with RCW 90.48.120 and give the Church notice that it contemplated  
23 the imposition of the penalty prevented the Church from knowing that Ecology was considering a  
24 penalty. Indeed, it is admitted by Ecology that its staffers told the Church and its wetland consultants  
25

1 that so long as the Church cooperated, no penalties would be imposed.<sup>2</sup> The Church is completely  
2 inexperienced in dealing with agencies such as the Department of Ecology, and there exists a substantial  
3 language barrier. Despite this, Ecology lulled the Church into a false sense of amiability, and then  
4 suddenly imposed the Penalty Order.

5 Proper notice would have allowed the Church to consult with an attorney before the Penalty was  
6 imposed. Here, the failure of Ecology to follow the procedures specified in 90.48.120 violated the  
7 Church's right to due process. It is an indispensable component of procedural due process that a person  
8 accused of wrongdoing, must be told under what authority the government is charging them, and what  
9 facts the government must prove in order to prevail – and that notice must be given ahead of time, in the  
10 official document charging them with the violation. *Seattle v. Jordan*, 134 Wn. 30, 235 P. 6 (1925). *City*  
11 *of Green Ridge v. Brown*, 523 S.W.2d 609 (Mo. App. 1975), (dismissing a municipal code violation  
12 penalty because the pleadings did not set forth the facts constituting the alleged the violation of the  
13 ordinance.) “[A]n information charging an ordinance violation...must nevertheless set forth the facts  
14 which if found true would constitute the offense prohibited by the ordinance.” *Id.* at 611. *See also State*  
15 *v. Primeau*, 70 Wn.2d 109, 422 P.2d 302 (1966) (due process requires that property owners receive  
16 specific notice of facts alleged to violate code.) *See also Kansas City v. Franklin*, 401 S.W.2d 949 (Mo.  
17 App. 1912).

18  
19 *Mansour v. King County*, 131 Wn.App. 255, 128 P.3d 1241 (2006), addressed a civil penalty  
20 citation issued by King County. Judge Agid found that the citation gave insufficient notice of the  
21 charges (“a fundamental tenet of due process is notice of the charges or claims against which one must  
22

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23 <sup>2</sup> The State admits the existence of the agreement, and it is patently clear from the State's briefing that it  
24 issued the Order and Notice of Penalty because the statute of limitations was about to run. Declaration of  
25 Paul Anderson ¶ 3 (filed in support of DOE's Response to Appellant's Motion for Summary Judgment.

1 defend”). *Mansour* observed that due process protections are especially critical in civil penalty  
2 proceedings because “there is little solace to be found in the availability of judicial review which is high  
3 on deference but low on the correction of errors.” *Id.* at 267. The penalty citation did not cite County  
4 code provisions allowing the removal of a pet, causing the violation notice to be “insufficient to satisfy  
5 the fundamental due process requirement for notice of the charges.” *Id.* at 131. Judge Agid reasoned  
6 that it is crucial that the person charged with committing a civil offense have notice of the regulatory  
7 authority under which the penalty action is instituted, to clearly understand the burden of proof.  
8 Additionally, the penalty citation did not make the factual allegation that the dog to be removed was  
9 “vicious”, which was the legal standard by which the case would be determined.  
10

11 Here, Ecology’s Violation order, which coincided with a Penalty Order, failed to provide any  
12 notice about how the Church violated RCW 90.48.144, 90.48.080. The order stated:

13 Prior to September 13, 2006, the Church mechanically cleared, graded and filled  
14 wetlands and a tributary to Little Bear Creek and again prior to January 24,  
15 2007, the Church mechanically cleared, graded and filled additional wetlands  
16 and diverted flow from a tributary to Little Bear Creek without a permit in  
17 violation of RCW 90.48.080. Discharge of such polluting matters into the  
18 waters of the state is also a violation of the antidegradation policy, WAC 173-  
19 201A-300 through 330. Fill remains in place in the wetlands. Each and every  
20 day the fill remains in the wetlands constitutes a separate and distinct violation  
21 of RCW 90.48.080 and 90.48.160, and WAC 173-201A-300 through 330.

18 First, “mechanically” clearing, grading or filling is not the subject of any portions of the WPCA. The  
19 mere allegation that wetlands were filled without permits fails to give notice of what permits were  
20 required by RCW 90.48.180 or 90.48.144. The statute also references 90.48.160 which demands that  
21 waste discharge (NPDES) permits be obtained; it is not clear, however, whether Ecology was alleging  
22 that the Church needed an NPDES permit because it was claiming that the fill was entering actual waters  
23 outside the area. Review of the referenced statutes provide no guidance whatsoever about what permits  
24 were supposed to be necessary to authorize placement of fill.  
25

1 Most egregiously, the Notice of Violation provides absolutely *no facts* giving the Church notice of  
2 the factual basis of Ecology’s claim that it violated RCW 90.48.080, RCW 90.48.144, WAC 173-  
3 201(A)(300) – (330), or RCW 90.48.160. Although the Church was charged with depositing “polluting  
4 matters into the waters of the state”, the Notice of Violation failed to specify any facts which gave notice  
5 of how placing fill in a field, clearing vegetation, or grading constituted discharging a pollutant into  
6 waters of the state within the meaning of RCW 90.48.020 – and that is an essential question.<sup>3</sup>

7  
8 **F. The Penalty is Unreasonable (Issue No. 8).**

9 In reviewing whether the amount of an assessed penalty is reasonable, the Board considers three  
10 factors: (1) the nature of the violations, (2) the prior behavior of the violator, and (3) the remedial actions  
11 subsequently taken by the violator to rectify the problem. *Olympia Fuel & Asphalt, Inc. v. Puget Sound*  
12 *Clean Air Agency*, PCHB No. 07-048 (2007); *Kaiser v. Ecology*, PCHB No. 99-121, 135 (2000).

13 In this case, the Department of Ecology has not come forward with any evidence to refute the  
14 Church’s explanation that the work was done by volunteers, not the Church, and that the wetlands and  
15 stream impacts were mistakes, and not done intentionally. There is no evidence that the Church acted  
16 with indifference to the state requirements; indeed, the Church immediately stepped up and acknowledged  
17 its moral, if not legal, responsibility to restore the property. The Department admits the Church has  
18 absolutely no history of violations.

19 Lacking any evidence of prior knowledge, willfulness, or a history of violations, Ecology  
20 downplays the remediation efforts undertaken by the Church. The Church has expended thousands of  
21 dollars so far in consultant fees and other fees connected with the restoration efforts. The Church has  
22

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23 <sup>3</sup> The statute defines a pollutant as “contamination”... which changes the “temperature, taste, color,  
24 turbidity or odor of the waters” or creates a nuisance rendering such waters “harmful, dangerous or  
25 injurious to public health or livestock, wild animals, birds, fish or aquatic life.” RCW 90.48.020.

1 long been embroiled in the local permitting process (several local permits are required before the work  
2 demanded by Ecology may even begin). Ecology has no evidence that the Church has “abandoned” the  
3 effort, or is merely playing lip service. There is no evidence of a lack of cooperation with officials. The  
4 Church is a non-profit religious organization, and there is no evidence the violations occurred in an  
5 attempt to avoid the cost of obtaining permits.

6 However, the Church, as it is entitled, obtained the advice of an attorney after Ecology slapped it  
7 with the Penalty Order. As is its right, it has disputed, in the administrative review process, whether  
8 Ecology even has the authority to demand restoration of the wetlands, or to issue the penalty.  
9

10 The purpose of a civil penalty is to influence behavior, encourage compliance, and deter future  
11 violations. *Watts Construction Inc. and Masterson Construction, Inc. v. BCAA*, PCHB Nos. 04-032 &  
12 037 (2005). Imposing the onerous penalty on the Church in this case will only mean the Church, a non-  
13 profit religious organization, will have less money to put toward restoration and core Church activities. In  
14 this case, the penalty is unreasonable, unfair, and wholly punitive.

#### 15 IV. CONCLUSION

16 The Department of Ecology lacked the jurisdiction to issue the Order and Penalty in this matter;  
17 not only did *the Church* not conduct the allegedly violative work, but Ecology lacks jurisdiction over  
18 wetlands. Further, Ecology does not even allege any pollutants were discharged, precluding summary  
19 judgment under the WCPA. Finally, it is patent that Ecology failed to comply with the notice  
20 requirements under the WCPA, precluding summary judgment for Ecology on that ground. The Church  
21 requests the Board deny Ecology’s Motion in its entirety.  
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DATED this 26<sup>th</sup> day of February, 2009.

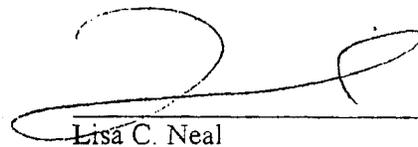
LAW OFFICE OF JANE RYAN KOLER, PLLC

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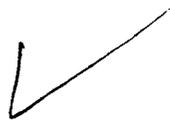
Jane Ryan Koler, WSBA #13541  
Attorney for the Appellant

\*Signed by permission:



Lisa C. Neal  
WSBA # 25686

## **APPENDIX 12**



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BEFORE THE POLLUTION CONTROL  
HEARINGS BOARD

FIRST ROMANIAN PENTECOSTAL  
CHURCH OF KENMORE, INC. a  
Washington nonprofit corporation,  
Appellant,

PCHB Nos. 08-098 and 08-099  
(Consolidated)

DECLARATION OF VASILE ANTEMIE

v.

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY,  
Respondent.

Vasile Antemie deposes and says:

I am over the age of eighteen and have personal knowledge of the following facts:

I am the Pastor of Appellant the First Romanian Pentecostal Church of Kenmore, Inc.  
(the Church), and was Pastor during the time periods involved in Penalty Order 6008 and  
Administrative Order 6009 (collectively, the orders). The Church is a Washington nonprofit  
corporation, established for charitable (religious) purposes. It is not a member-run nonprofit  
corporation. Rather, it is governed by a Board, and acts through that Board. The Church does  
not conduct commercial or industrial operations.

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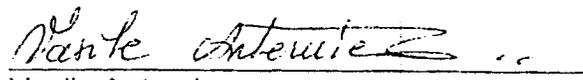
1 The Church owns the property located at 22332 State Route 9 SE, Woodinville,  
2 Washington that is the subject of the orders. This property is not adjacent to our existing church  
3 facilities. Rather, it is located more than seven miles away. Although the Church owns the  
4 property, neither the members of the Board, nor Church employees, nor I regularly visit it. We  
5 did not observe the activities on the site that resulted in the Penalty and Administrative Orders  
6 currently before the Pollution Control Hearings Board, and were unaware of them until after they  
7 occurred.

8  
9 The Church did not authorize the allegedly unlawful activity that occurred on the property,  
10 either tacitly or overtly. Neither the Board nor I solicited the activity that occurred. Neither the  
11 Board nor I directed the activity that occurred. Neither the Board nor I consented to the activity.  
12 Neither the Board nor I controlled the activity. The allegedly unlawful activity was conducted by  
13 volunteers at their own behest, not by the Church.

14 If the conditions of Administrative Order 6009 are allowed to remain, the Church will lose  
15 all economically viable use of the land. We will not be able to use the property at all.

16 I declare under penalty of perjury under the laws of the State of Washington that the foregoing  
17 is true and correct to the best of my knowledge.

18 SIGNED this 30TH day of DECEMBER, 2008 at 5:00PM, Washington.

19  
20   
21 Vasile Antemie

# **APPENDIX 13**

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BEFORE THE POLLUTION CONTROL  
HEARINGS BOARD

FIRST ROMANIAN PENTECOSTAL  
CHURCH OF KENMORE, INC., a  
Washington nonprofit corporation,  
Appellant,

v.

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY,  
Respondent.

PCHB Nos. 08-098 and 08-099  
(Consolidated)

REPLY TO RESPONSE TO MOTION  
FOR SUMMARY JUDGMENT and  
RESPONSE TO UNTIMELY CROSS-  
MOTION FOR SUMMARY  
JUDGMENT

**I. INTRODUCTION**

The Church has been charged with violating RCW 90.48.080 (impermissible discharge) and RCW 90.48.160 (permit required). A **person** who has discharged impermissibly into the waters of the state or caused, permitted or suffered in an organic matter to be “thrown, run, drain, allowed to seep or otherwise discharge into state water” without a permit has violated the statutes. See RCW 90.48.080, RCW 90.48.160. RCW 90.48.144 imposes civil penalties for violation of RCW 90.48.080, and imposes such penalties on every **person** who “violates the divisions of RCW

1 90.48.080 or who discharges matters into waters of the state without a discharge  
2 permit.”

3 Many statutes and ordinances governing environmental offenses contain “strict  
4 liability” provisions – that is, the owner of the property on which the offense is  
5 committed is liable, whether he actually committed the violation, or not. That is not  
6 the case here. Here, the State has the burden to demonstrate that the Church created  
7 and filled the wetlands, not just that the violations occurred on Church property. The  
8 State does not deny this burden. The State has failed to come forward with anything  
9 beyond conclusory argument in response to the Church’s motion, and the Church  
10 requests the Court grant it summary judgment and dismiss the Orders against it.  
11

### 12 **III. LEGAL AUTHORITY**

#### 13 **A. The Burden on this Motion Lies with the State, Not the Church**

14 The State goes to some length to discuss the burden on summary judgment in  
15 its Response brief, thereby implying that the Church must first prove it did not cause  
16 the actions leading to this case. This is incorrect. In fact, as shown in the opening  
17 Motion, and unrefuted by the State, the State must prove the Church caused the  
18 violations in order to prevail before this Board. Where, as here, the responding party  
19 bears the burden of proof at trial, once the movant makes a properly supported Motion  
20 for Summary Judgment, the responding party cannot simply rest upon the mere  
21 allegations or denials of his pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323  
22 (1986) (summary judgment burdens of proof). The non-moving party must offer  
23 specific evidence, sufficient to establish that the responding party will be able to meet  
24 its burden of proof with respect to every element of its claim, which is found in the  
25

1 record, which contradicts the evidence averred by the movant and demonstrates that  
2 genuine issues of material fact require trial. *Celotex*, 477 U.S. at 322-23. A material  
3 fact is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118  
4 Wn.2d 451, 456, 824 P.2d 1207 (1992).

5  
6 In this summary judgment proceeding, therefore, the State must come forward  
7 with facts that are “evidentiary in nature.” *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417,  
8 430, 38 P.3d 322 (2002). Ultimate facts or conclusions of law are insufficient. *Id.* If  
9 the non-moving party “can only offer a ‘scintilla’ of evidence, evidence that is merely  
10 ‘colorable,’ or evidence that ‘is not significantly probative,’” the non-moving party  
11 cannot defeat a summary judgment motion. *Seiber v. Poulbso Marine Ctr., Inc.*, 136  
12 Wn. App. 731, 736, 150 P.3d 633 (2007) (citing *Herron v. Tribune Pub. Co.*, 108 Wn.2d  
13 162, 170, 736 P.2d 249 (1987)). The non-moving party “may not rely on speculation,  
14 on argumentative assertions that unresolved factual issues remain, or on having its  
15 affidavits considered at face-value.” *Id.* Rather the non-moving party “must set forth  
16 specific facts that sufficiently rebut the moving party’s contentions and disclose that a  
17 genuine issue as to a material fact exists. Ultimate facts or conclusions of fact are  
18 insufficient, conclusory statements of fact will not suffice.” *Seiber*, 136 Wn. App. at  
19 736-37 (citations omitted).

## 21 **B. Objections**

### 22 **1. Evidence that the Church Agreed to Remediate is Inadmissible**

23 The evidence offered by the State can be boiled down to two things: 1) we don’t  
24 believe Pastor Antemie when he says the Church did not authorize the violative work  
25

1 at the site, and 2) the Church agreed to remediate, therefore it must be guilty. The  
2 second offer of evidence is inadmissible under ER 407 and ER 408.

3 Evidence Rule 407 requires this Board exclude evidence of subsequent remedial  
4 measures:

### 5 SUBSEQUENT REMEDIAL MEASURES

6  
7 When, after an event, measures are taken which, if taken  
8 previously, would have made the event less likely to occur,  
9 evidence of the subsequent measures is not admissible to  
10 prove negligence or culpable conduct in connection with the  
11 event. This rule does not require the exclusion of evidence of  
subsequent measures when offered for another purpose, such  
as proving ownership, control, or feasibility of precautionary  
measures, if controverted, or impeachment.<sup>1</sup>

12 Further, the Church stepped up and agreed to remediate the site because it is a good  
13 citizen, and has concern for the environment. To use the evidence against the Church  
14 to enforce a huge monetary fine would be against public policy.

15 Finally, the Church also quickly agreed to conduct all requested remediation in  
16 an attempt to pacify the State and avoid the onerous and punitive fines imposed in  
17 this action. The State admits this, as shown in its offered testimony of Paul Anderson  
18 at ¶ 3. As such, this evidence is also inadmissible under ER 408:

### 20 COMPROMISE AND OFFERS TO COMPROMISE

21 In a civil case, evidence of (1) furnishing or offering or  
22 promising to furnish, or (2) accepting or offering or promising  
23 to accept a valuable consideration in compromising or  
24 attempting to compromise a claim which was disputed as to  
either validity or amount, is not admissible to prove liability

25 <sup>1</sup> It is anticipated the State may attempt to “back door” evidence it has showcased to show culpability as  
intended to show control – there is, however, no dispute that the Church owns the land, so this  
argument would be in bad faith under CR 11.

1 for or invalidity of the claim or its amount. Evidence of  
2 conduct or statements made in compromise negotiations is  
3 likewise not admissible. This rule does not require exclusion  
4 of any evidence otherwise discoverable merely because it is  
5 presented in the course of compromise negotiations. This rule  
6 also does not require exclusion when the evidence is offered  
7 for another purpose, such as proving bias or prejudice of a  
8 witness, negating a contention of undue delay, or proving an  
9 effort to obstruct a criminal investigation or prosecution.

10 All evidence and any inferences arising from evidence regarding the Church's  
11 taking responsibility, including the statement of Pastor Antemie highlighted by the  
12 State, for the remediation of the site is inadmissible under ER 407 and ER 408. To  
13 allow the agreement to remediate to be used against the Church here would violate  
14 public policy, which strongly favors settlements. *Snyder v. Tompkins*, 20 Wn. App.  
15 167, 173, 579 P.2d 994 (1978) (Washington courts favor amicable settlement of  
16 disputes and are inclined to view settlements with finality). Washington law strongly  
17 favors the public policy of settlement over litigation. *E.g., City of Seattle v. Blume*, 134  
18 Wash.2d 243, 258, 947 P.2d 223 (1997) ("[T]he express public policy of this state ...  
19 strongly encourages settlement."); *Seafirst Ctr. Ltd. P'ship v. Erickson*, 127 Wash.2d  
20 355, 366, 898 P.2d 299 (1995) (referring to "Washington's strong public policy of  
21 encouraging settlements"); *Haller v. Wallis*, 89 Wash.2d 539, 545, 573 P.2d 1302  
22 (1978) ("[T]he law favors amicable settlement of disputes..."). Using the Church's  
23 agreement against it would tend to deter future parties from agreeing to quick  
24 remediation, something which is expressly in the interests of the citizens of  
25 Washington, and would violate the strong public policy in favor of settlement. See  
*American Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 772, 174 P.3d 54

1 (2007) (waiver of contractual provisions would not be inferred from settlement  
2 negotiations).

3 Frankly, the fact that the State gained agreement from the Church to voluntarily  
4 conduct the extensive, and expensive, remediation before pouncing upon the Church  
5 with a very large penalty is distasteful and does not further the spirit or the letter of  
6 Washington state's environmental laws. RCW 90.48.010 (policy does not include  
7 imposition of penalties).  
8

9 Despite the Church cooperating for over seventeen months, the State issued the  
10 violation order and huge penalty, thereby violating the settlement agreement.<sup>2</sup> The  
11 Church requests this Board rule the evidence inadmissible and strike the evidence  
12 from the record.

## 13 **2. State's Cross-Motion is Untimely**

14 The State argues both that there is a material disputed fact which precludes  
15 summary judgment, and argues for summary judgment on cross motion. Since the  
16 Church's motion was based on the lack of facts rather than a legal question, the State  
17 may not cross-move on a factual basis without allowing sufficient time to respond. If  
18 this Board does not grant the Church summary judgment, the Board should continue  
19

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21 <sup>2</sup> The existence of this settlement agreement is another basis for this Board to dismiss the Order and  
22 Notice of Penalty. The State admits the existence of the agreement, and it is patently clear from the  
23 State's briefing that it issued the Order and Notice of Penalty because the statute of limitations was  
24 about to run. *Snyder v. Tompkins*, 20 Wn. App. 167, 173, 579 P.2d 994 (1978) (Washington courts  
25 favor amicable settlement of disputes and are inclined to view settlements with finality). Washington law  
strongly favors the public policy of settlement over litigation. *E.g.*, *City of Seattle v. Blume*, 134 Wash.2d  
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to "Washington's strong public policy of encouraging settlements"); *Haller v. Wallis*, 89 Wash.2d 539,  
545, 573 P.2d 1302 (1978) ("[T]he law favors amicable settlement of disputes....").

1 the motions to allow the Church the required time to respond under Board rules  
2 (fourteen days).

3 **B. The Facts and Testimony Submitted by the State Would Not Support a**  
4 **Final Judgment that the Church Committed the Violations.**

5 As stated, the core of admissible “evidence” offered by the State boils down to  
6 one conclusory argument: “We don’t believe Pastor Antemie when he says the Church  
7 did not authorize the violative work.”<sup>3</sup> The state attempts to characterize Pastor  
8 Antemie’s statements as “conclusory,” but it is the *State’s* evidence which must be  
9 more than conclusory argument. Indeed, the State implies the Church must prove a  
10 negative in order to even bring this Motion! That is not supported by any rule or case  
11 authority.

12 No, the State is required to prove, in essence, that Pastor Antemie is lying. The  
13 evidence offered by the State does no more than to show that the Church owns the  
14 property, the Church planned to construct a summer camp, and the Church agreed to  
15 fix the erroneous work (which last, as shown above, is inadmissible).

16 Showcased by the State is Pastor Antemie’s taking of responsibility for the  
17 mistake. Again, taking responsibility so as to conduct remediation or reach a  
18 settlement or other agreement is inadmissible under ER 407 or ER 408. Further, the  
19 actual statement of the pastor shows he was protecting others who had actually  
20 committed the mistake. State’s Response, Anderson Decl. Ex. 4. This statement, even  
21 if it were admissible, standing alone, does not support an ultimate finding that the  
22  
23

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24 <sup>3</sup> It is somewhat offensive that the State would characterize Pastor Antemie’s statements as a claim that  
25 a “marauding band” committed the errors. Pastor Antemie has never said that, and the statement has  
derogatory undertones, especially since the Church is comprised of Romanians.

1 Church authorized the destruction of the streams and wetlands. Similarly, the  
2 desperate attempt by the State to characterize a statement made by a state-required  
3 wetlands assessor (that the Church altered the property) as an admission of liability by  
4 the Church should be disregarded by the Board. See Anderson Decl. ¶ 6 Ex. 3.

5 Tacitly admitting it must prove, not just allege, that the Church committed the  
6 violations, the State provides this Board with extensive testimony from persons having  
7 contact with the Church, persons who visited the site, and persons who talked with  
8 Pastor Antemie. All of the testimony, even if believed, describes interactions which  
9 occurred *after* the violations occurred. None of the evidence and testimony would  
10 support an ultimate finding that the Church authorized, induced or solicited  
11 individuals to commit such acts.

13 The mere fact that Mr. Antemie, who is Pastor of the Church and its spiritual  
14 leader, attempted to soothe upset neighbors by talking about future development  
15 which would occur on the Church site or assumed responsibility for meeting with  
16 regulators and obtaining permits does not establish that the Church “mechanically  
17 cleared, graded, filled and filled wetlands and a tributary to Little Bear Creek.” The  
18 very fact that he is Pastor of the Church - - that is the spiritual leader of the Church --  
19 means that he is the most likely person to be contacted by the people during the  
20 alleged actions after their encounter with Ms. Nicely. There is no evidence showing  
21 that the Board acted to command or solicit commission of the offense. Here, to  
22 establish the violation, the state must prove that the Church Board performed the acts  
23 charged or actively caused the acts to be performed in behalf of the Church. There is  
24 not a shred of evidence in the record that Pastor Antemie or the Church Board had  
25

1 actual before-the-fact involvement in the alleged bulldozing of the stream or another  
2 acts that Ms. Nicely, Mr. Anderson or Mr. Britsch addressed.

3 **1. Deborah Nicely's Declaration**

4 The fact that Ms. Nicely discovered that bushes had been removed on Church  
5 property and that she saw a bulldozer operating on Church property does not  
6 establish that the Church Board authorized the bulldozer to operate on its vacant lot.  
7 Pastor Antemie and John Puravet's efforts to soothe Ms. Nicely and discuss the  
8 beneficial future uses of Church property, which would enhance the community in no  
9 way, proves that the Church Board had directed or authorized the bulldozer to be used  
10 to perform such work. The Church property is vacant. The Church Board members  
11 and Pastor Antemie are, consequently, unable to monitor acts which occur on the  
12 Church property. Just as parents take responsibility for the acts of naughty children  
13 and attempt to smooth things over with neighbors when their children misbehave,  
14 Pastor Antemie and Mr. Puravet's visits to Ms. Nicely was nothing more than such an  
15 effort. They simply were attempting to demonstrate that the Church wanted to be a  
16 good neighbor.  
17  
18

19 **2. Steve Britsch's Declaration**

20 Mr. Britsch determined that the responsible party was the Church because the  
21 Snohomish County Code allows penalties and enforcement actions to be issued to the  
22 owner of property on which the violation occurs. That is not the case under RCW  
23 90.48.080 and 90.48.160 which only imposes liability on the person who committed  
24 the bad act. Pastor Antemie never stated that a hired contractor had removed  
25 vegetation and excavated a tributary to Bear Creek. The Church has not hired a

1 contractor. Further, Pastor Antemie and Mr. Puravet's cooperation with Mr. Britsch  
2 when he was making his investigation does not demonstrate that the Church  
3 committed the violation. It simply shows that the Church wanted to work  
4 cooperatively with regulatory agencies to correct the problem. In fact, based on the  
5 same evidence, the Snohomish County prosecutor charged Pastor Antemie with  
6 committing the alleged bad acts. The Snohomish County prosecutor charged Pastor  
7 Antemie with committing a hydraulics project approval violation. That action was  
8 subsequently dismissed without entering any findings to effect that Pastor Antemie  
9 was guilty. It arose from the same set of facts. See Exhibit 1 of Koler Declaration.

11 **3. The Fact That Pastor Antemie, Constanciancu And John Puravet  
12 Met With Mr. Anderson And Other Regulators On Church Property  
13 Does Not Establish That The Church Board Directed That The Illicit  
14 Grading Acts Be Performed On Behalf Of The Church**

14 All the meetings described by the State's witnesses occurred after the acts were  
15 performed. The mere circumstance that the Church worked with Paul Anderson to  
16 resolve violations and retained professionals to prepare necessary permits and reports,  
17 does not establish that the Church did the work or directed the work be done.  
18 Further, the Church's plan to develop the site in the future does not demonstrate that  
19 it caused or directed the alleged grading violations occurred. The fact that consultants  
20 hired to do permitting and prepare wetland reports states that the applicant altered  
21 the parcel does not demonstrate liability. The Church never provided such  
22 consultants with information about who did the work, and it is clear that the  
23 consultants simply assumed that the Church committed the violations since they  
24 occurred on Church property. There is no evidence that the Church authorized  
25

1 Steward and Associates to make admissions on its behalf, and the statement in the  
2 assessment is not necessary to the consultant's analysis. He simply stated in the  
3 report that the Church had done the work because he was aware that overly  
4 enthusiastic Church members had done the work. However, when Steward and  
5 Associates made that statement, he was aware that the Church Board and Pastor  
6 Antemie had not authorized the work and, in fact, did not know about the work until  
7 after it was done.  
8

9 The fact that Pastor Antemie stated that he was the responsible person, does not  
10 establish that he authorized the alleged bad acts. It simply reflects a decision to  
11 assume responsibility for conditions on the Church property and to protect the  
12 identity of overzealous Church volunteers who performed the work. In fact, Pastor  
13 Antemie states that "this is my decision to keep other persons anonymous" in the  
14 letter to Ecology in which he assumes responsibility for correcting conditions on  
15 Church property. That statement demonstrates that Pastor Antemie is protecting the  
16 identity of the individuals who committed the work but that neither he nor the Church  
17 authorized the work. All of Mr. Anderson's comments focus on events which occurred  
18 **after** the alleged violations. None of the facts recited by Mr. Anderson demonstrate  
19 that the Board authorized the work or did the work. Such facts merely demonstrate  
20 that the Church, as a matter of being a good neighbor, determined that it would take  
21 responsibility for addressing the correction of such conditions.  
22

23 Although Mr. Anderson implies that the Church has admitted doing the work,  
24 by assuming responsibility for correcting the problems on its property, in Ecology's  
25 February 5, 2007 to Pastor Antemie it demanded that the Church "provide a list of

1 persons responsible for clearing and grading.” Clearly, if Mr. Anderson had been  
2 aware that the Church Board had authorized the activity, he would not have  
3 demanded that the Church disclose the list of persons responsible for the activity. In  
4 any event, an “implication” is not sufficient evidence to defeat summary judgment.  
5 There is no evidence before the Board demonstrating that the Church Board or Pastor  
6 Antemie authorized the work.  
7

8 **C. The Attempt to Transform the Statutory Requirements into Vicarious  
9 Liability is Improper**

10 Likely recognizing the weakness of its factual evidence, Ecology asks the Board,  
11 inappropriately, to make new policy in the context of an enforcement action; to expand  
12 the ambit of liability under RCW 90.48.080. Ecology seems to argue that simply  
13 because the alleged violation occurred on the Church property, that the Church must  
14 be held responsible for it and pay penalties. In other words, despite the plain  
15 language of the statutes which imposes liability only the person who actually commits  
16 the violation, Ecology would penalize the Church if any Church volunteer committed  
17 any violation. This is not permitted. *See, e.g. State, Dept. of Ecology v. Lundgren*, 94  
18 Wn. App. 236, 245-46, 971 P.2d 948 (Div. 2), *review denied*, 138 Wash.2d 1005, 984  
19 P.2d 1035 (1999) (imposing personal liability under RCW 90.48.080 and RCW  
20 90.48.144 on corporate officer only because the facts as found by the PCHB establish  
21 that Lundgren controlled the facility with knowledge of the violations before or as they  
22 occurred). The State offers no case authority which would allow this Board to impose  
23 a penalty on an innocent entity based on theories of vicarious liability.  
24  
25

1 In fact, even strict liability environmental statutes in Washington allow this  
2 Board to reduce or deny imposition of a penalty if the respondent is innocent of the  
3 violation. See e.g. *Sprague v. Southwest Air Pollution Control Authority*, PCHB 85-69.  
4 In that case, the Board noted that the Clean Air Act is a strict liability act, imposing  
5 liability and penalties on landowners rather than only those committing the violation.  
6 PCHB 85-69 at 6. Based on the testimony of the homeowner that she hired  
7 independent contractors who built the fires, and that the burning of materials was not  
8 authorized or known by her before the fact, however, the Board dismissed the  
9 violations against the landowner. See also *Rose v. Puget Sound Pollution Control*  
10 *Agency*, PCHB 92-63 at p. 5.

12 Here, the Board is charged with deciding cases under statutes that allow  
13 charging only those who **actually committed the violation**. There is no evidence  
14 before the Board that the Church did anything except cooperate with the State and  
15 seek to remediate the problems caused by the volunteers' errors. It is clear that the  
16 Board should decline to participate in such ad hoc amendment of RCW 90.48.080 and  
17 RCW 90.48.160. That is the sole province of the legislature.

19 **D. The State's Last Ditch Estoppel Argument Fails.**

20 The State, obviously realizing that it has no evidence that the Church actually  
21 committed the violations, closes its Brief with a last ditch allegation of "estoppel."  
22 First of all, there is no statutory or case authority which would allow the State to  
23 evade its burden under RCW 90.48.080 and .160 to allow imposition of liability based  
24 on "estoppel." Indeed, an innocent party has no obligation to assist the State in  
25 imposing \$40,000 penalties against other persons.

1 Second, even if “estoppel” could establish liability under the statutes, the State  
2 shows no harm. An inability to charge a penalty is not a “harm” under estoppel. It is  
3 certainly not the Church’s fault that the State waited almost two years to renege on  
4 the settlement agreement between the parties. The Church’s acceptance of  
5 responsibility and agreement to remediate the site did not “cause” Ecology to not  
6 charge the penalty – if that were true, there would be no penalty now. Essentially,  
7 Ecology wishes to gain agreement to remediate in return for an agreement to not  
8 impose penalties, and then, when Ecology decides to claim the \$40,000 in penalties  
9 after all, cries “estoppel” when the Church reminds Ecology it was not the guilty party.  
10 Ecology wants to have its cake and eat it too. Paul Anderson told Steward and  
11 Associates that Ecology would not be seeking penalties. *See Declaration of Pastor*  
12 *Antemie.*

14 Finally, even if estoppel were available as a defense here (which it is not),  
15 Ecology’s argument is made in violation of CR 11. In its own brief Ecology admits that  
16 Pastor Antemie took responsibility on behalf of the Church to protect others.  
17 Anderson Decl. ¶ 7, Ex. 4. Ecology at the time obviously did not care whether the  
18 Church had actually authorized the clearing, since the Church had agreed to  
19 remediate. The fact that Ecology had been on notice from the beginning that the  
20 Church had not authorized the clearing is revealed by the Enforcement warning,  
21 which demanded the identity of those who had committed the violations. Anderson  
22 Decl. ¶ 5, Ex. 2. For Ecology to “lay behind the log” for almost two years so as to gain  
23 the Church’s agreements (all without the benefit of counsel), and then spring a  
24  
25

1 \$40,000 penalty on the Church at the last minute is bad enough. For Ecology to claim  
2 *it* has been “deceived” by the good will and responsibility of the Church is too much.<sup>4</sup>

### 3 **III. CONCLUSION**

4 This Board should not be deceived by the loud arguments of the Department of  
5 Ecology. The facts are clear in this case, and, despite the late-day obfuscation by the  
6 State, well-known to the Department of Ecology. Some church volunteers, unfamiliar  
7 with state regulation, graded and cleared land in violation of the Department’s  
8 regulations and State law. Upon learning of this, the Church took responsibility and  
9 worked diligently with the State to correct the problems caused. The State agreed to  
10 not impose penalties if the Church cooperated.<sup>5</sup> Despite that agreement, the State  
11 now wishes to impose a \$40,000 penalty on the Church, and even asks this Board to  
12 estop the Church from stating the truth – it did not commit the violations. There is no  
13 evidence before the Board today which demonstrates that the Church Board performed  
14 such work or caused such work to be performed in the name or on behalf of the  
15 Church. The State wants the Board to allow it to proceed to hearing (or even grant it  
16 summary judgment) based on the mere possibility that the Church Board may have  
17 committed the acts at issue or may have caused such acts to be performed or on  
18 behalf of the Church corporation and are now lying. It is an abuse on Ecology’s part  
19  
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21

22 \_\_\_\_\_  
23 <sup>4</sup> Additionally, as established in the Church’s Objections pursuant to ER 407 and 408, this evidence is  
24 not admissible to prove guilt, and therefore cannot form the basis of an estoppel claim by Ecology.

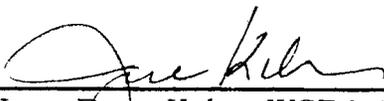
25 <sup>5</sup> A more cynical counsel would suspect that the Church, which was not at the time represented by  
counsel, was tricked by the State into making statements in good faith that would later be used to  
impose large penalties.

1 to impose penalties on the Church when it has no evidence that the Church Board  
2 authorized the acts which are subject to penalties.

3 The Church requests the Board dismiss the Notice of Violation and Penalty  
4 against it, in the interests of justice and under RCW 90.48.080 and .144.

5 DATED this 16 day of February, 2009.

6 LAW OFFICE OF JANE RYAN KOLER, PLLC  
7

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9 \_\_\_\_\_  
Jane Ryan Koler, WSBA #13541  
10 Attorney for the Appellant  
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## **APPENDIX 14**

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BEFORE THE POLLUTION CONTROL  
HEARINGS BOARD

FIRST ROMANIAN PENTECOSTAL  
CHURCH OF KENMORE, INC., a  
Washington nonprofit corporation,  
Appellant,

PCHB Nos. 08-098 and 08-099  
(Consolidated)

DECLARATION OF VASILE ANTEMIE

v.

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY,  
Respondent.

Vasile Antemie deposes and says:

I am over the age of eighteen and the Pastor of the First Romanian Pentecostal Church  
of Kenmore, a Washington non-profit corporation and have personal knowledge of the following  
facts:

I am from Romania and am unfamiliar with penalty proceedings such as this. The  
Church owns vacant property in Woodinville, Washington. Because the property is vacant, I  
only go to the property about once a month. I believe that the first unauthorized work on the  
Church site occurred in August of 2006. At that time, I was out of the country on a mission. I  
can't say exactly the date on which such work occurred, but I was not on the site when it  
occurred and the Church Board did not authorize the work.

1 We speak Romanian and I have a heavy accent. Perhaps some of the  
2 misunderstanding, which is apparent in the declarations of Ms. Nicely, Steve Britsch and Paul  
3 Anderson, are related to the fact that there is somewhat of a language barrier.

4 After I understood, in September, 2006, that there had been an encounter between a  
5 Church member and Ms. Nicely, I went to meet with her.

6 My objective in going to Ms. Nicely's home was to assure that the Church wanted to be a  
7 good neighbor and that we would take responsibility for addressing any issues on the property.  
8 I also, in an attempt to establish rapport with Ms. Nicely, who seemed not happy to have the  
9 Church on the property, explained to her that in the future the Church would develop a youth  
10 camp or some sort of project that would benefit the community. I did not tell her that the site  
11 work was being done for a summer camp. I told her that, in the future, the Church planned,  
12 perhaps, to develop a summer camp on the property.

13 I was simply attempting to make friendly small talk with Ms. Nicely. It is my  
14 understanding that some Church members started clearing a playfield/volleyball area in the  
15 vicinity of the Church barn. They removed weeds, low bushes and scotch broom to create a  
16 playfield area. The barn area is far away from critical areas.

17 Apparently, overly zealous volunteers got carried away and moved away from the barn  
18 area to critical areas and commenced clearing in those areas.

19 I never told Mr. Britsch that the Church had hired a contractor to construct a volleyball  
20 court. The Church has not ever hired a contractor to do such work. All I can think of is that I  
21 was explaining that volunteers had started out doing work in the barn area to create a playfield  
22 or volleyball court. The barn area of the Church property is outside of critical areas. Such  
23 volunteers were basically removing blackberry, scotch broom and noxious shrubs from that  
24 area. The Church members who decided to move into critical areas to do clearing work  
25

1 operated without any direction or authorization from the Board or me. I am not aware of a  
2 gentlemen, named George, who was doing dirt work on the site. When Mr. Britsch was there, I  
3 introduced him to George, a member of the Board, who I explained was familiar with dirt work  
4 and who would be the contact person for permits which the Church has to obtain. I never  
5 identified George as the site manager or a construction manager for the alleged illicit work.

6 The Church, at all times, has assured Mr. Anderson that it would take full responsibility  
7 for the work done on the Church property. We understood from Steward and Associates that  
8 Ecology would not impose penalties. See true copy of e-mail to that effect at Exh. 1.

9 But neither I nor any Church member has ever told such government officials that the  
10 Church Board authorized the work or that I authorized the work.

11 The critical area study, prepared by Steward and Associates, was prepared without any  
12 supervision by the Church Board. The Church Board, because Steward and Associates has the  
13 necessary expertise to prepare the report, simply directed Steward and Associates to prepare  
14 the reports which government agencies were demanding.

15 I and the Church Board members are entirely unfamiliar with critical area reports. We  
16 simply trusted that Steward and Associates had the necessary expertise to prepare the report.  
17 Because we do not have such expertise, we did not supervise Steward and Associates and  
18 simply left Steward and Associates on their own to prepare the report. Because we do not have  
19 expertise about critical areas, we did not bother to read the report that Steward and Associates  
20 prepared. We had no idea that Steward and Associates represented that the applicant had  
21 done clearing and grading work. In fact, we did not authorize Steward and Associates to make  
22 such a representation and we did not indicate that the Church or I had done the work. Steward  
23 and Associates must have simply inferred that the Church had done the work since the Church  
24 was paying for the studies and taking full responsibility for the project.

1 In retrospect, we should have hired a professional to read over the report to insure that all  
2 the statements in it were correct.

3 Although Ecology is now claiming apparently that the Church admitted to doing the work,  
4 it is significant to note that Paul Anderson sent me a letter dated March 28, 2007 demanding  
5 that I provide "a list of all persons responsible for the clearing and grading." I made a decision  
6 to withhold the names of the Church members who had done the work and simply told him that  
7 the Church would take full responsibility for doing the work and that I, Vasile Antemie, would  
8 take responsibility for addressing Ecology's issues. I stated in that letter "this is my decision to  
9 keep other persons anonymous." I never meant to imply that I had done the work. I simply was  
10 telling Mr. Anderson my decision to keep the identity of the persons who performed the work  
11 confidential and for the Church to assume responsibility for correcting the alleged violation. The  
12 fact that the Church has assumed responsibility for correcting the alleged violation does not  
13 mean that I did the work or authorized it.

15 Ecology claims that the Church has changed its position; this is not correct. In a HPA  
16 criminal action in which I was charged, I explained that I had not done the work the state  
17 claimed that I had and the case was dismissed without any finding that I had committed the  
18 charged acts. In this case, I have always claimed to Ecology that the Church would take  
19 responsibility for doing the restoration work. I have never claimed that the Church Board  
20 authorized the work.

22 I declare under penalty of perjury under the laws of the State of Washington that the  
23 foregoing is true and correct to the best of my knowledge.

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SIGNED this 13<sup>th</sup> day of February, 2009 at 3:45PM, Washington.

Vasile Antemie  
Vasile Antemie

DECLARATION OF VASILIE ANTEMIE - 5

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

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## **APPENDIX 15**

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BEFORE THE POLLUTION CONTROL  
HEARINGS BOARD

FIRST ROMANIAN PENTECOSTAL  
CHURCH OF KENMORE, INC., a  
Washington nonprofit corporation,  
Appellant,

v.

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY,  
Respondent.

PCHB Nos. 08-098 and 08-099  
(Consolidated)

DECLARATION OF CLEVELAND R.  
STEWARD III

I, Cleveland R. Steward III, declare under penalty of perjury under the laws of the State of Washington, that the following is true and correct.

I am over the age of eighteen and have personal knowledge of the following facts:

I was the owner of Steward and Associates, LLC. My firm was purchased by AMEC Earth & Environmental, Inc. in January, 2008. I am currently employed by AMEC..

The Board of the First Romanian Pentecostal Church hired Steward and Associates in 2007 to prepare a habitat restoration plan for the property they own near State Route 9 in Woodinville, Washington.

1 We had quite a lot of trouble communicating with Church representatives because there  
2 is a genuine language barrier. In my opinion, the language barrier contributed significantly to a  
3 lack of comprehension by Church members of the consequences of their actions, and poor  
4 communication with outside parties.

5 In our draft habitat restoration plan, we made reference to the Church having performed  
6 work that caused adverse environmental impacts to the property. We were referring to  
7 members of the Church in general, and not to individuals that were known to us. Portions of the  
8 Church property had been recently disturbed, and it was our understanding that Church  
9 members were responsible. However, the specific individuals involved in the work were not  
10 known to us. Based on several conversations I had with the Church leadership, I did not believe  
11 then, nor do I believe now, that the Church Board or Pastor Antemie had authorized these  
12 actions. As far as I know, the Board had no idea that this work was done until after it had  
13 occurred.  
14

15  
16 I declare under penalty of perjury under the laws of the State of Washington that the  
17 foregoing is true and correct to the best of my knowledge.  
18

19 SIGNED this \_\_\_\_\_ day of February, 2009 at \_\_\_\_\_, Washington.  
20

21 *Cleveland R. Steward* 

22 \_\_\_\_\_  
23 Cleveland R. Steward  
24  
25

# **APPENDIX 16**



000160

Exhibit 5

Site conditions on FRPC Woodinville property after Church acquisition, 2007 orthophotograph from Snohomish County Online Parcel viewer. FRPC parcel is central parcel in image with dual parcel numbers (27052700401000, 27052700401001).

1.5

## **APPENDIX 17**

Letter from FRP Church!.txt

From: Vasile Antemie [FRPC@comcast.net]  
Sent: Thursday, March 08, 2007 11:24 AM  
To: Anderson, Paul (ECY NWRO SEA)  
Cc: Ed Sodermen; Ginger Holser; Steve Bristsch  
Subject: Letter from FRP Church!

Dear Paul Anderson,

This letter is a response to your letter dated from February 5th 2007.

I have been asked to provide some information about the property at 22332 SR 9 SE.

1. The clearing occurred in August, September of 2006. Some of the clearing around the property

line occurred in December when the surveying agency delineate the boundary of the property!

2. Responsible person of the clearing is: Vasile Antemie!(This is my decision to keep other persons anonymous).

3. we hire wetland biologist STEWARD AND ASSOCIATES to do the delineation and Terry Zuver is

the contact person(360-862-1255).

4. A wetland report is done. Probably is going to you this week.

I will try to have a meeting with You, Terri, Steve Britsch and Ginger Hoster Monday or Tuesday next week!

From 14-28 March I will be out of the States and Constantine Iancu(425-260-1300) will be a contact

person from FRPC side!

Hopping that this information is covering your request, I thank you for your time!

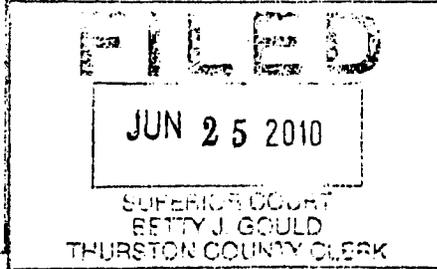
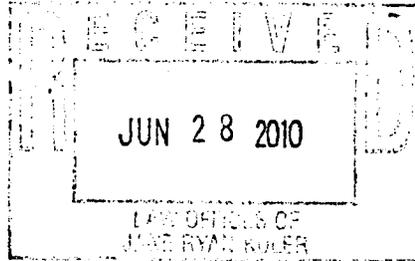
Sincerely,

Vasile Antemie

Pastor of FRP Church

## **APPENDIX 18**

1  EXPEDITE  
2  No Hearing Set  
3  Hearing is Set:  
4 Date: 6/25/2010  
5 Time: 9:00 AM  
6 Paula Casey



7  
8 **STATE OF WASHINGTON**  
**THURSTON COUNTY SUPERIOR COURT**

9 **FIRST ROMANIAN PENTECOSTAL**  
10 **CHURCH OF KENMORE, a**  
11 **Washington Corporation,**

12 **Appellant,**

13 **v.**

14 **THE WASHINGTON STATE**  
15 **DEPARTMENT OF ECOLOGY, a**  
16 **Division of the State of Washington,**

17 **Respondent.**

NO. 09-2-02085-7

**JUDGMENT ON PETITION FOR  
JUDICIAL REVIEW OF AGENCY  
ACTION AND RULES CHALLENGE  
COMPLAINT**

18 Pursuant to Chapter 34.05 RCW, this matter came before the Court on Appellant First  
19 Romanian Pentecostal Church of Kenmore's (Church) Petition for Review of Agency Action  
20 and Rules Challenge Complaint challenging a decision by the Pollution Control Hearings  
21 Board (Board). The matter before the Board was an appeal by the Church of Order No. 6009  
22 and Penalty No. 6008 issued by the Department of Ecology (Ecology) to the Church on  
23 September 10, 2008. The Board issued its final decision on July 31, 2009. In its decision, the  
24 Board affirmed Ecology's Order and Penalty.

25 The Church timely appealed the Board's decision to the Thurston County Superior  
26 Court. The parties stipulated under RCW 34.05.566(4) to shorten the record on appeal, with  
the Church challenging only the Board's ruling on summary judgment. The Church did not  
challenge the Board's Findings of Fact, Conclusions of Law and Order affirming the penalty.

1 In reaching its decision, the Court considered the following:

- 2 1. The shortened record identified in the parties' stipulation;
- 3 2. Appellant First Romanian Pentecostal Church's Revised and Shortened Trial  
4 Brief;
- 5 3. Respondent Department of Ecology's Trial Brief;
- 6 4. Appellant First Romanian Pentecostal Church's Reply Brief;
- 7 5. Oral argument of counsel for Ecology and the Church.

8 The Court concluded that wetlands are waters of the state subject to the jurisdiction of  
9 the Department of Ecology. The Court further concluded that the Church's constitutional due  
10 process claims were without merit and the evidence in the record demonstrated that the notice  
11 Ecology provided to the Church that its actions constituted violations of state law was  
12 sufficient.

13 Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED that the Petition  
14 for Review of Agency Action and Rules Challenge Complaint is DENIED and DISMISSED,  
15 and the order of the Board dated July 31, 2010, is AFFIRMED.

16 DONE IN OPEN COURT this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

17  
18 PAULA CASEY

19 \_\_\_\_\_  
JUDGE PAULA CASEY

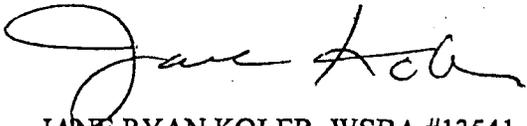
20 Presented by:

21 ROBERT M. MCKENNA  
22 Attorney General

23   
24 JOAN M. MARCHIORO, WSBA #19250  
25 Senior Counsel  
26 Attorneys for Respondent

Approved as to form:

LAW OFFICES OF JANE RYAN KOLER

  
JANE RYAN KOLER, WSBA #13541  
Attorney for Appellants

Y9100