

NO. 42668-4



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

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K.P. MCNAMARA NORTHWEST, INC. AND KERRY MCNAMARA,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

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**RESPONDENT/CROSS APPELLANT'S OPENING BRIEF**

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## I. INTRODUCTION

Kerry McNamara and K.P. McNamara Northwest, Inc. (McNamara) violated state Dangerous Waste Regulations by (1) receiving dangerous waste without a permit to do so, and (2) improperly shipping the dangerous waste it generated. The Washington State Department of Ecology (Ecology) issued a \$20,000 penalty for the two violations. The Pollution Control Hearings Board (Board) affirmed the penalty in full after granting Ecology partial summary judgment on some issues, and holding an evidentiary hearing on the remainder of the case.

On judicial review in superior court under the Administrative Procedure Act (APA), the court affirmed the Board's decision in part and reversed in part. The court upheld the Board's decision that McNamara violated state regulations when it shipped its dangerous waste. The court also upheld the Board's finding that Kerry McNamara was liable for the violations under the responsible corporate officer doctrine.

However, based on a finding that the Board committed a procedural error, the court overturned the Board's decision on the issue of McNamara's unpermitted receipt of dangerous waste. Based on this finding of procedural error, the superior court remanded the matter to the Board, and reserved ruling on McNamara's request for attorney's fees.

McNamara appeals from the superior court's decision on the merits of the two issues it affirmed, and further argues the court should have awarded him attorney's fees instead of remanding. Ecology cross-appeals from the court's finding that the Board committed a procedural error. Ecology contends that the Board committed no procedural errors, that McNamara is not entitled to any fees, and the Board's decision should be affirmed in its entirety.

## **II. RESTATEMENT OF ISSUES ON APPEAL**

1. Did the superior court properly affirm the Board's decision upholding the penalty issued for McNamara's mismanagement of dangerous waste?

2. Did the superior court properly affirm the Board's decision that Kerry McNamara is the responsible corporate officer at K.P. McNamara Northwest, Inc.?

3. Was McNamara entitled to attorney's fees at superior court, when his contentions were without merit and the Board's decision should have been affirmed?

4. Is McNamara entitled to attorney's fees on appeal to this Court when it failed to devote a section of its opening brief to its request for fees or expenses?

### **III. ASSIGNMENT OF ERROR AND ISSUE RELATING TO ASSIGNMENT OF ERROR ON CROSS APPEAL**

#### **A. Assignment Of Error**

The superior court erred when it found that the Board engaged in an unlawful procedure or decision making process in this case.

#### **B. Issue On Cross Appeal**

Was the Board's procedure or decision making process lawful when it affirmed the penalty based on the facts of the violations?

### **IV. STATEMENT OF THE CASE**

#### **A. Statement of Facts**

McNamara operated a facility near the Columbia River, close to restaurants, hotels, and multi-family dwellings. AR 8:2, CP 796 ¶ 5.<sup>1</sup> The facility washed and recycled plastic containers that originally held a variety of materials, including dangerous industrial waste that was corrosive, ignitable, or toxic. AR 6:33; CP 677 ¶ 4. The containers, which are referred to as "totes," were contaminated with materials that included biocides, resins, adhesives, and other hazardous products.

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<sup>1</sup> "AR" is used to designate the administrative record filed in this matter, found at CP 60-61. Citations to the administrative record will appear as AR XX:yy where XX is the document number and yy the page number. Because much of the relevant portions of the administrative record were submitted by the parties in briefing at the superior court, documents are also pincited to Clerk's Papers (CP) page numbers for ease of reference. Where a document from the administrative record is not in Clerk's Papers, a copy is provided for the Court's convenience.

AR 8:13; CP 796 ¶ 5. Cleaning these materials from the totes generated a large amount of rinse water. AR 6:33; CP 677 ¶ 4.

When McNamara received totes that held waste that was not dangerous, it drained and rinsed the totes, then refurbished or deconstructed them for scrap. *Id.* If the totes held small amounts of material that was not acutely hazardous, or the totes were properly cleaned prior to arriving at McNamara's facility, they are processed in the same manner. AR 8:13; CP 796 ¶ 4. Under WAC 173-303-160, such containers are defined as "empty." No permit is required for handling containers that meet the regulatory requirements to be classified as empty.

A permit is required for facilities that treat, store, or dispose of dangerous waste. WAC 173-303-800(2). To obtain a permit to handle dangerous waste, the facility must provide extensive information to establish that it can safely operate without endangering public health or the environment. WAC 173-303-800 to -840. McNamara's facility did not have a dangerous waste permit.

In August 2007, Ecology inspector Deann Williams conducted two inspections at the McNamara facility for compliance with the Dangerous Waste Regulations. WAC 173-303; AR 6:33, 6:46; CP 677 ¶ 6, 691. During the August inspections, Ms. Williams tested liquid in a tank of rinse water, and found the material was highly corrosive (caustic) with an

extremely high pH level of 13 to 14.<sup>2</sup> AR 6:50; CP 695. Williams also found totes containing dangerous waste residue in amounts greater than allowed, spills of material around the rinse system and stored totes, totes where contents were not properly labeled, a lack of required staff training, and a failure by McNamara to self-inspect the facility. AR 6:46-51; CP 691-96. McNamara's staff did not know where the totes containing dangerous waste came from, and could not explain how the totes would be managed at the facility. AR 8:13-14; CP 796-97 ¶ 7.

In September 2007, Ms. Williams met with Kerry McNamara, McNamara's President/CEO, and representatives of McNamara's environmental service contract providers, Philips Services and Creekside. AR 6:34, AR 6:51-53; CP 678 ¶ 8, CP 696-98. Philips Services had analyzed and transported waste for McNamara in the past. AR 6:50-51; CP 695-96. Creekside was hired by Mr. McNamara to address compliance issues at the McNamara facility in Vancouver. AR 6:51; CP 696.

During the meeting, Ms. Williams noted that some of the violations found in August had not been corrected. AR 6:34; CP 678 ¶ 8. Mr. McNamara told Ms. Williams that the wastes the facility generated were analyzed once each year. AR 6:52; CP 697. Mr. McNamara

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<sup>2</sup> The test for corrosivity is a pH test, where the range of pH readings is from 0 to 14. WAC 173-303-090(6)(a)(i).

explained that while McNamara had previously used a caustic solution for rinsing totes, he was changing the system and would instead use a soap solution. *Id.* Four totes of material labeled “hazardous waste, caustic” were onsite. AR 6:53; CP 698. Mr. McNamara said that material in the totes was a mix of soap and a caustic solution used in its rinse system, because the delivery lines for each solution had been confused by a McNamara employee. *Id.* Mr. McNamara proposed to ship these four totes offsite as corrosive dangerous waste, using a waste characterization previously prepared by Philips Services. *Id.* Ms. Williams pointed out that the prior characterization was for the caustic solution previously shipped, and that it was more appropriate to re-characterize the new waste that was created when the delivery lines were confused. *Id.* Mr. McNamara agreed. *Id.*

In October 2007, Creekside submitted a written description of McNamara’s new waste handling protocol to Ecology, which called for each batch of waste rinse water from the tote rinsing line to be individually analyzed, to determine whether it should be designated as dangerous waste, as required by WAC 173-303-070(1)(b). AR 6:34-35; CP 678-79 ¶ 9. Testing each batch before it was shipped offsite was proposed to address the variability of the rinse water resulting from the variable contents of the totes. Creekside indicated that each batch of rinse

water would be tested by fish bioassay, and analyzed for regulated metals and organics.<sup>3</sup> *Id.* Creekside's proposed protocol met the designation requirements of WAC 173-303-070, and addressed Ecology's concerns regarding McNamara's rinse water. *Id.*

In December 2007, Ms. Williams wrote a follow-up letter to Mr. McNamara, providing a written Compliance Summary, which reflected Ecology's understanding of how McNamara would achieve compliance. *Id.*; AR 6:62-68; CP 707-713. The Compliance Summary stated that McNamara would batch test rinse water prior to disposal and designate every batch of dangerous rinse water prior to shipment. AR 6:64-66; CP 709-11. The Compliance Summary included a draft policies and practices statement addressing specific points of compliance, which also reflected that each batch of rinse water would be tested. AR 6:67-68; CP 712-13.

In response to McNamara's concern with the high cost of testing each batch of rinse water, Ecology agreed that McNamara could designate all of its rinse water as dangerous waste based on McNamara's knowledge of how it processed the totes. AR 6:35; CP 679 ¶ 10. This so called "process knowledge" is allowed as an alternative to testing. *Id.*

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<sup>3</sup> A fish bioassay is a test where live fish are exposed to dilutions of the test substance under strictly defined conditions, and the number of mortalities in each dilution is analyzed. WAC 173-303-100(5)(c).

WAC 173-303-070(3)(c)(ii). Mr. McNamara signed a document titled “K.P. McNamara-Vancouver Policies and Practices,” (AR 6:35; CP 679 ¶ 10) stating that McNamara would “designate all waste in the 2500-gallon water storage tanks [the rinse water] as dangerous waste.” AR 6:70-71; CP 715-16. Mr. McNamara signed the Policies and Practices document as President of K.P. McNamara, certifying:

I have responsibility for the overall compliance of KP McNamara in Vancouver, Washington, and am duly authorized to sign all reports and other information pertaining to compliance with the state’s Dangerous Waste Regulations. I certify under penalty of law that the above statements are true, accurate and complete based on my knowledge and involvement with the KP McNamara – Vancouver facility. If any of the above policies or practices are changed, then this statement will be updated and signed by me, and submitted to Ecology.

AR 6:70; CP 716.

In May 2008, Ms. Williams conducted another inspection at McNamara. AR 6:36; CP 680 ¶ 12. Staff told her that four shipments of rinse water (material that McNamara had designated dangerous waste) had been shipped from McNamara to Pacific Power Vac in Portland, Oregon. *Id.* The rinse water was not properly labeled as dangerous waste, and was not sent on a Uniform Hazardous Waste Manifest as required by WAC 173-303-141(2). *Id.*, AR 6:72-75; CP 718-21. McNamara did not have the required certification, stating that Pacific Power Vac was

authorized by the state of Oregon to receive the waste McNamara shipped.

*Id.* Additionally, McNamara failed to use a federal Environmental Protection Agency (EPA) authorized transporter to ship the rinse water.

*Id.* On May 19, 2008, Ms. Williams informed Mr. McNamara of these violations by letter and written inspection report, stating that McNamara must cease its shipments of dangerous waste until it was in compliance with the regulations. *Id.*, AR 6:72; CP 718. Nevertheless on June 17, 2008, McNamara sent a fifth shipment of rinse water without proper manifesting, shipping, or documentation that Pacific Power Vac was qualified to accept the material. AR 6:36-37; CP 680-81 ¶ 15.

In response, McNamara acknowledged that it did not utilize a Uniform Hazardous Waste Manifest to transport the rinse water for out-of-state disposal. AR 6:73; CP 681 ¶ 16, AR 6:86-119; CP 732-65. McNamara supplied the missing documentation showing that Pacific Power Vac was a qualified dangerous waste receiving facility. *Id.* McNamara also supplied documentation for the new, EPA registered transporter that they would begin using for shipping. *Id.* Mr. McNamara reiterated that they would label and designate all rinse water as Washington dangerous waste. *Id.*

In October 2008, Ms. Williams conducted two compliance inspections at the McNamara facility. AR 6:73-74; CP 681-82 ¶ 17.

Ms. Williams noted that a large amount of rinse water had accumulated onsite. *Id.* Staff told Ms. Williams that Mr. McNamara was making arrangements for disposal of the rinse water. *Id.*, AR 6:123; CP 769. On both occasions Ms. Williams again observed totes containing more residue than allowable under WAC 173-303-160(2)(a). AR 6:73-74; CP 681-82 ¶ 17. She observed that some of these totes contained ignitable, extremely hazardous, toxic waste. *Id.* Ms. Williams sent an Immediate Action Letter regarding these totes to Mr. McNamara. *Id.*, AR 6:120-21; CP 766-67. The letter reiterated that McNamara was operating as a dangerous waste treatment, storage and disposal facility when it accepted totes that were not empty. AR 6:120; CP 766. Mr. McNamara responded that the facility would no longer accept totes that are not empty. AR 6:74; CP 682 ¶ 18, AR 6:131; CP 777. He signed the letter as CEO of K.P. McNamara Company. *Id.*

From August of 2007 through October of 2008, repeat violations related to McNamara's receipt of dangerous waste (in the form of non-empty totes) and handling of its rinse water were observed at the facility. Ecology issued an Administrative Order (AR 1:6; CP 259) and a Notice of Penalty to McNamara in December 2008. AR 1:12; CP 265. The Notice of Penalty cited violations related to McNamara's receipt of dangerous waste when it did not have a permit to do so, and mismanagement of the

dangerous waste it generated. AR 1:12; CP 265. McNamara timely appealed both violations to the Board.

**B. Procedural History**

Proceedings before the Board are governed by its rules of practice and procedure. RCW 43.21B.170. The rules call for a pre-hearing conference to set a schedule and identify issues, witnesses and exhibits for hearing. WAC 371-08-435. During the pre-hearing conference for this case, the parties agreed on seven issues in the appeal. Those seven issues were:

1. Is Kerry McNamara a person liable pursuant to the hazardous Waste Management Act (Chapter 70.105 RCW) for the alleged violations of K.P. McNamara Northwest, Inc.?
2. Did K. P. McNamara Northwest, Inc. violate the Washington State dangerous waste regulations Chapter 173-303 WAC as specified in Order no. 6237?
3. Did appellant “inappropriately dispose of” dangerous waste (rinse-water) when the waste was transported to and treated at an appropriate permitted waste water treatment facility?
4. Does Ecology’s jurisdiction under the Washington State Hazardous Waste management Act extend to the trench and/or sump at which Ecology claims dangerous or hazardous waste was generated (i.e. the “point of generation”)?
5. Is appellant required to obtain a permit or to comply with the requirements for operating a dangerous waste treatment, storage and disposal (TSD) facility if appellant receives from off-site generators containers which are not “empty” pursuant to WAC 173-30[3]-160 and/or 40 CFR 261.7(b)(1) and which contain dangerous waste if the container was shipped without a hazardous (dangerous)

waste manifest and its contents were [not] designated a “dangerous waste” by the generator?<sup>4</sup>

6. Did K.P. McNamara violate the hazardous waste statute and regulations as alleged in Notice of Penalty No. DE 6229?

7. Is the penalty of \$20,000 issued through Notice of Penalty Incurred and Due No. DE 6229 on December 3, 2008, reasonable under the facts and circumstances of the case?

AR 5:2; CP 296-98 at 297. Issue No. 6 referenced the two violations listed in the Notice of Penalty, specifically:

**WAC 173-303-141(2): Failure to use appropriate procedures and methods when sending a state-only designated dangerous waste to an out-of-state facility.** KP inappropriately disposed of five shipments of state-only toxic dangerous waste (rinse-water). In each case, the shipment was sent off-site without a dangerous waste manifest. It was hauled by a transporter without an EPA/State Transporter Identification Number, and without confirmation that the receiving facility was permitted to accept dangerous waste.

**173-303-280 and -400: Failure to obtain a permit or to comply with the requirements for operating a dangerous waste treatment, storage and disposal (TSD) facility.** KP accepted totes from off-site generators. These totes were not “empty” as defined in WAC 173-303-160(2), and contained significant amounts of ignitable, extremely hazardous and toxic dangerous waste. KP operated as an unpermitted dangerous waste treatment, storage and disposal facility when it accepted the totes containing dangerous waste.

AR 1:12; CP 265. The subject of Ecology’s cross-appeal before this Court is the superior court’s ruling that the Board’s improperly decided Issue

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<sup>4</sup> The parties agree that omission of the word “not” eight words from the end of Issue No. 5 in the Pre-Hearing Order was a typographical error.

No. 5 on the pre-hearing list, which asked whether a facility was required to have a permit to operate as a dangerous waste treatment, storage and disposal facility when it received dangerous waste under specified conditions. Although the wording of Issue No. 5, which was proposed by McNamara, is similar to the wording of the specific violation as it is recorded in Ecology's Notice of Penalty, it is not identical. AR 4:2; CP 299-302 at 300. Issue No. 5 is posed as a question of law on stipulated facts. Ecology's Notice of Penalty is based on the facts of McNamara's violations.

Ecology moved for summary judgment on several issues identified in the Pre-Hearing Order. AR 6. Because it is phrased as a question of law, the question of whether the hypothetical facility in Issue No. 5 was required to have a permit to receive hazardous was appropriate for a decision on summary judgment. In opposition to summary judgment, McNamara introduced facts related to its management of non-empty totes.<sup>5</sup> After the Board issued a decision granting summary judgment in Ecology's favor, McNamara filed a Motion for Reconsideration.

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<sup>5</sup> In its Memorandum in Opposition to Ecology's Motion for Partial Summary Judgment, McNamara alleged it could not control what generators shipped, that non-conforming shipments arrived from time to time, that it followed a protocol of inspecting totes received, that non-conforming totes containing hazardous waste were set aside to be returned or forwarded, and that it was "responsible" in its container management. McNamara also argued that WAC 173-303-370 (the manifest discrepancy regulations) allowed it to receive non-empty containers. AR 7:8-11; CP 342-45.

AR 16 (attached in its entirety as Appendix A). McNamara claimed that the Board's decision that a permit was required when a facility received dangerous waste was overbroad, and should have been limited only to the facility's receipt of waste, not to any subsequent management and actions regarding that waste. App. A at 5. On reconsideration the Board ruled material facts and the interpretation of the law were in dispute on whether a facility was required to have a permit to receive dangerous waste, which precluded summary judgment, and Issue No. 5 was held over for an evidentiary hearing. AR 21:4-5; CP 315-16. After that hearing, the Board issued its Findings of Fact, Conclusions of Law, and Order (Final Decision) affirming Ecology's Order and Penalty in full. AR 28, CP 270-295.

McNamara appealed the Board's decision to superior court under the APA. CP 1. The court affirmed the Board and Ecology regarding the penalty issued for McNamara's mismanagement of dangerous waste and Mr. McNamara's liability. CP 982-87. However, the court overturned the Board's decision on upholding the penalty for McNamara's receipt of dangerous waste without a permit because it found that the Board based its decision on "factual reasons not set out in the NOP" rather than solely as a question of law. CP 438, 996. The court remanded Issue No. 5 for a determination of the narrow legal issue presented. *Id.*

## V. STANDARD AND SCOPE OF REVIEW

On appeal under the APA the appellate court sits in the same position as the superior court. *King Cy. v. Cent. Puget Sound Growth Mgmt. Hearings Board*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). Thus this appellate court reviews the decision of the administrative board, not the decision of the superior court, and applies the standards of the APA directly to the record before the Board. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The burden of demonstrating the invalidity of the agency's action is on the party asserting invalidity, in this case, McNamara. RCW 34.05.570(1)(a).

### A. On Summary Judgment, The APA Standard Of Review Is Overlaid With The Summary Judgment Standard

The substantive issues being appealed by McNamara (the rinse water designation and Mr. McNamara's liability) were both decided by the Board on summary judgment. "[W]here the original administrative decision was on summary judgment, the reviewing court must overlay the APA standard of review with the summary judgment standard." *Verizon Northwest, Inc. v. Washington Emp't Sec. Dep't*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008) (citing *Alpine Lakes Prot. Soc'y v. Dep't of Natural Res.*, 102 Wn. App. 1, 14, 979 P.2d 929 (1999)). The decision is reviewed directly, based on the record before the Board. *Alpine Lakes Prot. Soc'y*,

102 Wn. App. at 14. The record before the Board on summary judgment in this case was the briefing of the parties, with attached declarations and exhibits.

The propriety of summary judgment is a question of law, and therefore the substantial evidence standard used for other factual findings is not appropriate. *Verizon*, 164 Wn.2d at 916 n.4. The facts in the administrative record are viewed in the light most favorable to the nonmoving party, and the law evaluated *de novo* under the error of law standard. *Id.* at 916. Under this standard, substantial weight is accorded to an agency's interpretation of a statute within its expertise, and to rules that the agency promulgated. *Id.* at 915.

The legislature granted Ecology "broad powers of regulation" on matters relating to the management of hazardous waste. RCW 70.105.007. Pursuant to the authorization found in RCW 70.105.020, Ecology promulgated the State Dangerous Waste Regulations, WAC 173-303. Ecology's interpretation of the law it administers is entitled to great weight. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). The Board was appointed by the legislature to adjudicate appeals arising out of Ecology actions. *Id.* at 597. Board members are qualified by experience or training in matters pertaining to the environment. *Id.* at 592. Where

both Ecology and the Board agree on a question, a reviewing court should be “loath to override the judgment of both agencies, whose combined expertise merits substantial deference.” *Id.* at 600.

“Summary judgment is appropriate only where the undisputed facts entitle the moving party to judgment as a matter of law.” *Verizon*, 164 Wn.2d at 916 (citing *Alpine Lakes Prot. Soc’y*, 102 Wn. App. at 14). On summary judgment the moving party bears the burden of demonstrating an absence of any genuine issue of material fact. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). “A ‘material fact’ is one upon which the outcome of the litigation depends.” *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). This does not require the party moving for summary judgment to meet “every speculation, conjecture or possibility by alleging facts to the contrary.” *Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 115, 529 P.2d 466 (1974). The non-moving party “may not rest on mere allegations in the pleadings but must set forth specific facts showing that there is a genuine issue for trial.” *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). “Ultimate facts or conclusions of fact are insufficient.” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). If the non-moving party “can only offer a scintilla of evidence, evidence that is merely colorable, or evidence that is

not significantly probative,” the non-moving party cannot defeat a summary judgment motion. *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 736, 150 P.3d 633 (2007) (internal quotation marks omitted). If the non-moving party fails to make sufficient showing establishing the existence of an essential element of its case, then the trial court should grant the moving party’s motion for summary judgment. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

**B. The Standard Of Review For Procedural Errors Is De Novo**

Procedural errors are reviewed *de novo*. *Stevens Cy. v. Loon Lake Prop. Owners Ass’n*, 146 Wn. App. 124, 129, 187 P.3d 846 (2008). A court may grant relief on review of an adjudicative proceeding if it determines that the agency engaged in an unlawful procedure or decision-making process, or failed to follow a prescribed procedure. RCW 34.05.570(3)(c). Relief is granted where the person seeking judicial relief has been substantially prejudiced by the action complained of. RCW 34.05.570(1)(d). “[T]hus, the petitioner must show that (1) the agency did not correctly follow its own procedure, and (2) the irregularity substantially prejudiced the petitioner.” *Alpha Kappa Lambda Fraternity v. Washington State Univ.*, 152 Wn. App. 401, 414, 216 P.3d 451 (2009).

A reviewing court “grant[s] substantial weight to an agency’s interpretation of its own rules.” *Id.* (quoting *Tapper*, 122 Wn.2d at 403).

The Board properly decided McNamara’s appeal, upholding the penalty issued by Ecology in full. The Board’s decisions that McNamara improperly shipped dangerous waste, and that Kerry McNamara was liable for the violations at the McNamara facility as the responsible corporate officer were supported by undisputed material facts before it on summary judgment. Contrary to McNamara’s argument before the superior court that the Board illegally decided part of the case, the Board properly decided the appeal on the facts.

On the issue of costs and attorneys fees at superior court, McNamara is not entitled to costs and fees because the Board did not err procedurally. Even if McNamara were entitled to costs and fees, McNamara has not been denied costs and fees, and the court did not abuse its discretion when it reserved a decision until the entire action was decided. Additionally, McNamara’s request for costs and fees at the appellate level should be denied, due to its failure to meet the requirements of RAP 18.1(b).

**C. The Board Properly Affirmed The Penalty Issued For McNamara's Mismanagement Of Dangerous Waste**

McNamara claims that Ecology must prove that the rinse water McNamara shipped in May/June 2008 met regulatory criteria for dangerous waste in order for the penalty to be upheld. Ecology is not required to do so for two reasons. First, it is McNamara as the generator of the waste, not Ecology, that has the obligation to determine if its waste is dangerous waste. Second, McNamara's decision to designate its rinse water as dangerous waste based on McNamara's process knowledge made that waste subject the dangerous waste regulations and required McNamara to manage it as dangerous waste. A generator cannot say its waste is dangerous waste to save money on testing, then it is not dangerous waste to escape enforcement. The Board properly affirmed the penalty issued by Ecology for McNamara's mismanagement of its dangerous waste.

**1. Federal and State Hazardous and Dangerous Waste Management Laws**

At the federal level, "hazardous waste" is regulated under The Resource Conservation and Recovery Act (RCRA). 42 U.S.C. §§ 6901 to 6992k. RCRA provides for the "cradle to grave" regulation of hazardous waste, including operations at facilities that transfer, treat, store, or dispose of hazardous waste. *See* WAC 173-303-800(2). Because Washington is

an authorized state under RCRA, Chapter 70.105 RCW and Chapter 173-303 WAC stand in lieu of RCRA as the operative law for managing hazardous waste (usually referred to as “dangerous waste” under state law) in Washington. *See* 42 U.S.C. § 6926(b); 40 C.F.R. § 271.3(b).

To be a dangerous waste under Chapter 70.105 RCW, a material must first be a “solid waste.” WAC 173-303-040. To constitute a “dangerous” waste, a solid waste must “designate” as dangerous. WAC 173-303-070(1)(a). In this context, “designate” is a term of art. *Hickle v. Whitney Farms, Inc.*, 148 Wn.2d 911, 920, 64 P.3d 1244 (2003). Whether a waste designates as dangerous waste is determined by reference to the procedures found in WAC 173-303-070(1)(b). *Id.*

**2. McNamara’s determination on the rinse water subjects it the dangerous waste regulations**

McNamara claims that Ecology is required to prove that McNamara’s rinse water met dangerous waste criteria. Pet. Op. Br. at 28. However, it is the generator of the solid waste, McNamara, that had the duty to determine whether or not its waste was subject to regulation. *Hickle*, 148 Wn.2d at 919–20. When it first issued its proposed rules under RCRA, EPA set out a generator’s responsibility with regard to waste designation:

## Waste Designation

**It is a generator's responsibility to determine if his waste is hazardous.** This determination can be made by evaluating the waste against the characteristics outlined in § 250.13 of Subpart A, or by identifying the waste on the hazardous waste lists presented in § 250.14 of Subpart A.

A person who has knowledge of the raw materials input into his process and knows these materials to be present in the waste may utilize this information to determine whether the waste would match the characteristics set forth in § 250.13 without testing. This can be accomplished by using the manufacturer's specifications and data or by consulting scientific literature and comparing the physical and chemical properties of the raw materials in the waste to the characteristics in §250.13 which make a waste hazardous.

**If a person believes his waste to be hazardous, he may also simply declare it to be so** without any references to Subpart A or to scientific literature.

CP 828 (emphasis added).<sup>6</sup> Consistent with EPA's mandate, Ecology's regulations provide two methods for determining if a solid waste is a dangerous waste: testing of the waste or application of process knowledge of the waste produced:

For the purpose of determining if a solid waste is a dangerous waste as identified in WAC 173-303-080 through 173-303-100, a person must either:

- (i) Test the waste according to the methods, or an approved equivalent method, set forth in WAC 173-303-110; or
- (ii) Apply knowledge of the waste in light of the materials or the process used . . .

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<sup>6</sup> 43 Fed. Reg. 58,969 (Dec. 18, 1978).

WAC 173-303-070(3)(c). The method found in WAC 173-303-070(3)(c)(ii), applying knowledge of the waste, is known as “process knowledge.” *United States v. Hoffman*, 154 Wn.2d 730, 747 n.6, 116 P.3d 999 (2005). “‘Process knowledge’ is a substitute for physical testing that may be gleaned from data and records produced at some point when there was reliable knowledge as to the contents of the waste. . . .” *Id.* Important in this case, EPA has said that the “regulations allow a generator to characterize its waste based on process knowledge, and it is understood that generators may at times characterize their wastes conservatively, rather than incur the costs of testing every batch or [waste] stream.” CP 837-39 at 838 (emphasis added).<sup>7</sup>

“Ecology has the discretion to approve or disapprove of the use of process knowledge.” *Hoffman*, 154 Wn.2d at 747 n.6. Regardless of which method is used, testing or process knowledge, once waste is designated as dangerous, its management must comply with the state’s dangerous waste regulations.

### **3. McNamara, used process knowledge to designate its rinse water as dangerous waste**

McNamara chose to designate its waste by process knowledge. Originally McNamara developed a protocol to test each batch of rinse

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<sup>7</sup> RCRA Online Document #RO 11918. Available through EPA RCRA Online (<http://www.epa.gov/epawaste/inforesources/online/index.htm>).

water prior to it being shipped offsite, and Ecology approved that plan. AR 6:34-35; CP 678-79 ¶ 9. However, McNamara then came back to Ecology with a counter-proposal to declare all its rinse water dangerous waste, thus avoiding the expense of individual batch testing. AR 6:35; CP 679 ¶ 10. Ecology accepted the change. *Id.* McNamara then documented the decision to designate using process knowledge through a declaration that Mr. McNamara signed under penalty of perjury. *Id.* The language McNamara used was plain:

Given the variability of wastewater generated by rinsing totes, KP McNamara will designate all waste in the 2500-gallon water storage tanks as dangerous waste.

AR 6:69-70; CP 715-16.

McNamara now disavows this signed certification as a mere “best practice,” but does not dispute that Mr. McNamara signed the statement. Pet. Op. Br. at 35. McNamara’s declaration that the rinse water was dangerous waste governed how the waste was to be handled from December 28, 2007, forward, and made the rinse water subject to the applicable requirements of WAC 173-303.

Requirements applicable to proper disposal of dangerous waste include:

- (a) The facility receiving the waste will legitimately treat or recycle the dangerous waste (disposal is an unacceptable management practice);
- (b) The generator has on file a letter or copy of a letter signed by the regulatory authority in the receiving state that the receiving facility may accept the waste;
- (c) The generator uses a transporter with a valid EPA/state identification number;
- (d) The generator complies with all other applicable requirements, including manifesting, packaging and labeling, with respect to the shipping of the waste. However, the EPA/state identification number for the receiving facility is not required on the manifest or annual report; and
- (e) The generator receives from the receiving facility a signed and dated copy of the manifest.

WAC 173-303-141(2).

The five shipments of dangerous waste that led to the penalty did not conform to these requirements, and thus violated the regulations. The undisputed facts in the record demonstrate that McNamara did not have on file the required documentation indicating that the receiving facility could accept the dangerous waste. Additionally, McNamara failed to use a transporter with a valid EPA/state identification number, and failed to properly placard or manifest the waste as required by the regulations. It took until July of 2008 for McNamara to provide Ecology with the required information on the transporter and the receiving facility. McNamara presented no evidence to dispute that the five May and June 2008 shipments violated the law. Mr. McNamara's declaration did not

present facts to refute the improper shipment. AR 7:13-22; CP 843-851. The declaration only provided excuses for why the violations occurred. AR 7:14; CP 844 ¶ 9. The Board considered the undisputed facts of the improper shipments and correctly decided that McNamara had violated the state dangerous waste regulations.

**4. Because McNamara had determined its waste was dangerous waste, no question of material fact remained as to whether the rinse water was dangerous waste**

The Board correctly decided that no question of fact was before it with regard to whether or not the rinse water was dangerous waste. Once McNamara determined, based on process knowledge, that its rinse water was dangerous waste and declared it to be so, the rinse water was subject to the requirements of WAC 173-303. WAC 173-303-070(4). In its response on summary judgment McNamara introduced evidence of bioassay testing indicating that rinse water tested once in January 2006 and once in January 2007 did not designate as dangerous waste. AR 7:16-22; CP 846-851. Even when viewed in the light most favorable to McNamara, the test results from 2006 and 2007 on unrelated batches of rinse water do not change the statement that Mr. McNamara signed in December of 2007 designating the rinse water as dangerous waste. Furthermore, old tests shed no light on whether wastes shipped in 2008

had the characteristics of dangerous waste. Therefore those earlier results were not material to the violations.

Mr. McNamara's determination that McNamara's waste was dangerous waste was well documented in evidence before the Board, and McNamara offered no evidence in the record to refute that Mr. McNamara had certified that McNamara's waste was dangerous waste. The Board did not err in finding that there was no dispute of material facts related to Mr. McNamara's declaration that the rinse water was dangerous waste. Summary judgment in favor of Ecology was properly decided.

**5. Ecology's interpretation of the laws and regulations it enforces is consistent with case law**

To support its argument that McNamara's designation of its own waste is not determinative, McNamara cites the *Hickle* case. However, *Hickle* is not helpful to McNamara. In *Hickle* the defendant fruit juice producers argued that the highly combustible fruit pulp that burned Mr. Hickle could not be designated as dangerous waste because it was not specifically designated so by Ecology, and because it was simply organic material. *Hickle*, 148 Wn.2d at 919. The Court rejected the producer's claims. First, the Court said that it is the generator, not Ecology, that has the duty to determine whether or not their wastes are regulated by the Chapter 70.105 RCW. *Hickle*, 148 Wn.2d at 919. Second, the Court itself

found that the industrial quantities of organic wastes generated by the producers met the legislative and regulatory definitions of dangerous waste, because it exhibited the characteristic of ignitability. *Hickle*, 148 Wn.2d at 922–23.

McNamara misreads the holding in *Hickle*. Pet. Op. Br. at 35. The Court did not remand on the question of whether the waste actually exhibited the characteristic of ignitability. The Court held that the producers of waste that exhibits the dangerous characteristic of ignitability have a duty to comply with the Chapter 70.105 RCW. *Hickle*, 148 Wn.2d at 923. The Court remanded to determine if the fruit companies violated the HWMA and whether their violations caused Hickle’s injuries. *Id.* at 923-24.

The *Hickle* Court was clear that the generator, not Ecology, is required to make the determination of whether or not its waste is regulated by WAC 173-303. McNamara did so by unambiguously stating that it would designate its rinse water as dangerous waste. Once McNamara made that declaration, it was obligated to comply with the regulations for proper shipment of dangerous waste. If McNamara wanted to later determine that its rinse water was not dangerous waste, McNamara’s option was to batch test the rinse water. At that point in time and going forward, whether the rinse water was regulated dangerous waste would be

guided by those results. *Cf. WHW, Inc. & Bobby Williams v. Dep't. of Ecology*, PCHB No. 05-142, at 10 (Mar. 30, 2006).<sup>8</sup> CP 910-21 at 919.

Contrary to McNamara's argument, the Board's decision in *Williams* does not conflict with the result in *Hickle*. See Pet. Op. Br. at 32-34. In *Williams Ecology* was confronted with 17,000 pounds of soda ash dumped along a roadway by a driver who then left the scene. *WHW, Inc.*, PCHB No. 05-142, at 3; CP 912. In the absence of the generator, Ecology followed the designation procedure in WAC 173-303-070(3) and determined that the soda ash was dangerous waste based on its toxicity to rats. *Id.* When the trucking company finally undertook cleanup five days after the spill, and tested the material, results showed that the soda ash no longer designated as dangerous waste. *Id.* at 5; CP 914. The waste was then disposed of as non-dangerous. *Id.* The designation first done by Ecology at the outset controlled how the waste was to be handled up until the time that the generator redesignated the material and found that it no longer was a dangerous waste. *Id.* at 10-11; CP 919-20.

In this case McNamara could have tested the waste subsequent to its process knowledge designation and reached a different result. However, it instead chose not to find out what was in the waste, but rather

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<sup>8</sup> Decisions of an administrative body are not precedential in this Court, but can constitute persuasive authority. See *Martini v. Empl. Sec. Dep't*, 98 Wn. App. 791, 795, 990 P.2d 981 (2000).

just shipped it in violation of the dangerous waste regulations. Having decided to treat all rinse water as dangerous through designation by process knowledge, McNamara cannot credibly complain after the fact that he should not have been required to treat the waste in question as dangerous.

In this case the Board correctly decided that the waste should have been managed under the dangerous waste regulations, and that McNamara violated those regulations when it improperly shipped its dangerous waste. The superior court did not err in affirming the Board on this issue.

**D. Kerry McNamara Is The Responsible Corporate Officer at McNamara And Therefore Liable For The Violations**

The superior court properly affirmed the Board's finding that Kerry McNamara was liable for the violations at McNamara. The Board found that Mr. McNamara "exercised operational hands-on control and acted as the responsible corporate officer" for the Vancouver facility. AR 22:12; CP 864. The Board's conclusion that Mr. McNamara is liable is a correct application of the law and supported by the undisputed facts in the record.

McNamara claims that Mr. McNamara is not liable for the violations because the Board did not find that he procured, aided or

abetted the wrongful conduct at the facility. Pet. Op. Br. at 38. No such finding is required for Mr. McNamara to be liable for the violations.

There are two related bases that support the personal liability of Mr. McNamara. First, RCW 70.105.080 provides that “every person who fails to comply with any provision of this chapter or of the rules adopted thereunder shall be subjected to a penalty in an amount of not more than ten-thousand dollars per day for every such violation.” RCW 70.105.080(1). A “[p]erson” means “any person, firm, association, county, public or municipal or private corporation, agency, or other entity whatsoever.” RCW 70.105.010(14). Kerry McNamara is a person and is liable for the violations at McNamara because of his actions at the facility. McNamara’s argument focuses on the last sentence of RCW 70.105.080 that governs persons who, through acts of commission or omission procure, aid or abet in a violation. Pet. Op. Br. at 38-39. This last sentence of the statute is inapplicable here. The first sentence of the statute makes it applicable to all persons who fail to comply, not only to parties who procure, aid or abet.

Second, Mr. McNamara is liable as a responsible corporate officer under Washington law. “If a corporate officer participates in the wrongful conduct, or knowingly approves of the conduct, then the officer, as well as the corporation, is liable for the penalties.” *Dep’t of Ecology v. Lundgren*,

94 Wn. App. 236, 243, 971 P.2d 948 (1999). Directing heads of a corporation may be held liable for the actions of subordinates during the normal course of business “regardless of whether or not these directing heads personally supervised the particular acts done or were personally present at the time and place of commission of these acts.” *Carolene Prods. Co. v. United States*, 140 F.2d 61, 66 (4th Cir. 1944). The question for the trier of fact is “whether the corporate officer had ‘authority with respect to the conditions that formed the basis of the alleged violations.’” *United States v. Iverson*, 162 F.3d 1015, 1024 (9th Cir. 1998). The doctrine has been applied in federal cases under RCRA. *See, e.g., United States v. Prod. Plated Plastics, Inc.*, 742 F. Supp. 956, 963 (W.D. Mich 1990) (stating “corporate officers and employees who actually make corporation decisions are personally liable under RCRA” (citing *United States v. Ne Pharm. & Chem. Co.*, 810 F.2d 726, 745 (8<sup>th</sup> Cir. 1986))).

If an officer controls corporate conduct, he or she is deemed an active participant in that conduct. *Lundgren*, 94 Wn. App. at 245. A prima facie case under the responsible corporate officer doctrine is established when sufficient evidence is introduced that the defendant, through his position, had authority to prevent the violation in the first instance, or to promptly correct it. *Lundgren* 94 Wn. App. at 244. Mr.

McNamara had authority over the McNamara facility and failed to prevent or correct violations.

There is no requirement that “wrongful action” be shown for the doctrine to apply. *Lundgren*, 94 Wn. App. at 243. Rather, the Court of Appeals in *Lundgren* listed the facts demonstrating Mr. Lundgren’s exercise of actual hands-on control of the corporate conduct. *Lundgren*, 94 Wn. App. at 245. Those facts included Mr. Lundgren’s notifying Ecology regarding facility operations, his appeal of Ecology’s administrative order, his expressions of willingness to comply with Ecology’s orders to rectify the violations, and his modification of facility operations. *Id.*

The material facts the Board relied on to reach its decision that Mr. McNamara is personally liable for the violations at issue were that Mr. McNamara personally met with Ecology inspectors, personally responded to correspondence and violation reports issued by Ecology, and signed compliance certificates and policies and practices related to the facility’s environmental compliance. AR 22:12; CP 864. Mr. McNamara signed an explicit certification that he was “responsible for overall compliance of KP McNamara in Vancouver.” AR 6:69-70; CP 715-16. The undisputed facts in the record before the Board demonstrate that Mr. McNamara was involved and directed environmental compliance at the facility, including

hiring consultants to address environmental issues. McNamara does not dispute any of these facts.

The Board did not err in applying these facts under the responsible corporate officer doctrine as set forth in case law, as they were very similar to the facts set forth in *Lundgren*. The facts showed that Mr. McNamara had the responsibility and authority to prevent the violations of the regulations in the first instance, or to promptly correct violations when they occurred. The Board was not required to find that Mr. McNamara procured, added or abetted the violations. Additionally, the Board was not required to find a wrongful action or specific conduct on his part in order to apply the responsible corporate officer doctrine, therefore the facts found in Mr. McNamara's declaration regarding the participation of others in the shipment of the rinse water are not material to the issue decided and do not preclude summary judgment. AR 7:13-14; CP 843-844.

The Board correctly concluded that Mr. McNamara is personally liable for the violations. McNamara does not dispute facts that support this conclusion. McNamara has not met its burden to show that the Board's action was invalid. The superior court did not err when it upheld the Board's decision on this issue.

**E. There Was No Illegal Procedure Error In This Case Because The Board Properly Decided The Appeal On The Facts Before It**

The Board was created by the legislature to adjudicate appeals of orders and decisions of Ecology and other regulatory agencies. RCW 43.21B.010, .160. Its statutory role is to provide uniform and independent review of Ecology's actions through trial-like adjudicative hearings. *Port of Seattle*, 151 Wn.2d at 576, 592. The Board is directed to promulgate rules of practice and procedure, which it has done. RCW 43.21B.170; *see* WAC 371-08.

The Board "has the implied authority to do everything lawful and necessary to provide for the expeditious and efficient disposition of [Ecology] appeals." *Motley-Motley, Inc. v. Pollution Control Hearings Board*, 127 Wn. App. 62, 74, 110 P.3d 812 (2005). In a penalty case, the Board must make findings of fact based on the preponderance of the evidence in order to uphold the penalty. WAC 371-08-485. The facts of McNamara's violations relating to its receipt of dangerous waste were before the Board through several issues identified for hearing, and the Board made appropriate findings related to those facts. In addition, the Board's rules allow for the modification of issues if needed. WAC 371-08-435(2).

**1. The facts related to McNamara's violations were properly before the Board**

In the superior court, McNamara claimed – and the superior court agreed – that the Board had committed a procedural error by considering the facts relating to his violations. According to McNamara, the Board was presented with only the narrow question of law of whether any unpermitted facility could receive dangerous waste. McNamara is wrong. The facts and circumstances of the violations were necessarily and properly before the Board because the Board was required to determine whether McNamara committed them. The Board did not need to consider the legal issue posed by McNamara because the facts were dispositive – he violated the regulations regardless of how that legal issue was resolved. Moreover, McNamara itself argued to the Board that the facts of the violations were relevant to resolution of the allegations in the Notice of Penalty.

The facts of the violations listed in the Notice of Penalty were that McNamara had received dangerous waste and that it did not have a permit to do so. AR 1:12; CP 265. The Board upheld the penalty issued by Ecology because it found that McNamara received “more than an incidental or occasional” number of totes holding more material than the regulations allowed after being directed by Ecology to stop such receipt.

AR 28:23, CP 32. The Board also found that McNamara failed to follow its own procedures directing that it would not receive and manage such totes. *Id.* The Board concluded “that KP McNamara was reasonably subjected to the requirements of WAC 173-303-280(1) and -400.” The Board’s conclusions relating to McNamara’s receipt of dangerous waste directly addressed the specific violation cited in Ecology’s Notice of Penalty, which was before the Board through Issues No. 6 and No. 7. *Id.*

The narrow question of law posed by McNamara was based on McNamara’s contention that it was allowed to receive dangerous waste without a permit under WAC 173-303-370(4). AR 16:7; CP 549.<sup>9</sup> These rules – known as the “manifest discrepancy rules” – provide guidance to a treatment, storage or disposal facility that has received dangerous waste that differs in quantity or type from what is described on the manifest or shipping paper. WAC 173-303-370(4)(a). While the Board discussed the manifest discrepancy regulations (AR 28:21; CP 30), its decision on McNamara’s receipt of dangerous waste was based on other factual findings that directly addressed violations noted in Ecology’s Notice of Penalty. AR 28:23, CP 32. Those findings included that McNamara continued to receive dangerous waste after being directed not to, and that

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<sup>9</sup> Ecology does not agree that the provisions of WAC 173-303-370(4) are applicable to a tote washing facility like McNamara—it applies to facilities that are permitted to transport, store or dispose of dangerous waste.

it violated its own policy designed to prevent such receipt. *Id.* Ultimately the Board did not reach a decision on the applicability of the manifest discrepancy rules to a tote recycling facility like McNamara's because it concluded that “[r]egardless of whether the manifest discrepancy rules are directly applicable to the KP McNamara facility, we conclude they do not operate to shield KP McNamara from a penalty or from TSD facility permitting or operating requirements under the facts of this case.” AR 28:22; CP 31 (emphasis added).

The Board's decision is clearly correct and should be affirmed. The Board was not required to reach the legal issue posed by McNamara to resolve the appeal, because the facts of the violations in this case were dispositive regardless of how that legal issue was decided. *See Spokane Cty. v. Miotke*, 158 Wn. App. 62, 69, 240 P.3d 811 (2010) (citing *Christiano v. Spokane Cty. Health Dist.*, 93 Wn. App. 90, 94, 969 P.2d 1078 (1998) (“principles of judicial restraint dictate that when one issue is dispositive, we should refrain from reaching other issues that might be presented.”)). Thus, the Board did not engage in an unlawful procedure in reaching its decision in this case.

**2. McNamara itself argued to the Board that it should consider facts related to the violations**

Ecology moved for summary judgment on Issue No. 5 (AR 6:11-12; CP 339-40) and initially the Board granted summary judgment in favor of Ecology. This would appear to be consistent with McNamara's position on appeal that the issue is a purely legal one. However, contrary to its position on appeal, McNamara took great pains to convince the Board that the issue was not a purely legal one and that there were material facts in dispute. Specifically, in its brief opposing summary judgment, McNamara set out facts related to its management of dangerous waste in the form of non-empty totes in its attempt to defeat summary judgment. AR 7:8-11; CP 342-45. In its reply brief on its Motion for Reconsideration, McNamara stated that "[i]f the Board decides that KPM-NW's management of the non-'RCRA empty' totes is at issue, then there is a question of fact in this regard that cannot be decided on summary judgment." AR 20:5; CP 356. That is exactly what the Board decided.

The Board, on reconsideration denying summary judgment to Ecology on Issue No. 5, gave explicit notice to the parties that that the facts of the nature and extent of McNamara's receipt of dangerous waste were indeed in dispute and that it anticipated receiving evidence on McNamara's receipt of dangerous waste at hearing. The Board stated:

These factual disputes make it premature for us to reach a legal conclusion on the issue of whether K.P. McNamara is required to obtain a permit or to comply with the requirements for operating a dangerous waste TSD facility by virtue of receiving such containers. The Board believes that because there are disputed facts, conflicting interpretations of the law, and potentially significant implications for the regulatory scheme involving manifest discrepancies, it is appropriate to reserve judgment at this time. The Board therefore denies summary judgment on Issue 5 and sets this issue over for hearing.

AR 21:4-5; CP 315-16 (emphasis added).

The Board's Order on Reconsideration could not have been clearer. McNamara introduced facts in opposition to summary judgment, the Board denied summary judgment on that basis, and held the issue over for hearing to resolve the factual disputes raised by McNamara. The Board's procedure was clearly correct and the superior court finding it improper should be reversed.

**3. McNamara had notice that the facts of its waste receipt would be before the Board at hearing**

When the Court reviews an agency action for procedural error, the Court will grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of. *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 217, 173 P.3d 885 (2007). McNamara cannot demonstrate substantial prejudice in this case, because

McNamara had notice that the facts were to be litigated at hearing and a full opportunity to present evidence on the material facts at issue.

“Due process requires that the Board base its findings against a party only upon matters brought to the party’s attention in the complaint or during the administrative hearing, and that are fully litigated.” *City of Marysville v. Puget Sound Air Pollution Control Agency*, 104 Wn.2d 115, 120, 702 P.2d 469 (1985) (citing *NLRB v. Temple-Estex, Inc.*, 579 F.2d 932, 936 (5<sup>th</sup> Cir. 1978)). In *Marysville*, the Board was overturned because it found the city had violated the Clean Air Act (CAA), which had not been cited by the regulator in the enforcement, resulting in the city having no opportunity to respond to CAA violations.

In contrast to *Marysville*, here McNamara was explicitly apprised of all the issues for hearing, and had opportunity to prepare and litigate those issues. First, the record demonstrates that the factual issues associated with the violations were encapsulated in the issues identified for hearing from the outset of the case. Second, upon McNamara’s own motion, the Board reversed itself on summary judgment and held Issue No. 5 over for the hearing, specifically noting that material facts were in dispute, because McNamara raised them. The Board’s decision on reconsideration was issued in November of 2009, and the hearing was held in March of 2010. McNamara had ample notice and opportunity to

prepare and to litigate the factual issues related to its receipt and management of totes and containers. In fact, McNamara offered evidence on its receipt of non-empty totes at hearing, through the testimony of Kerry McNamara. Transcript Vol. 2:392-397 (identified at CP 63), excerpted at CP 317-24. McNamara cannot demonstrate substantial prejudice due to an illegal order or decision-making procedure, because McNamara had sufficient notice as to the issues for hearing, a reasonable opportunity to prepare and litigate those issues, and at hearing presented factual testimony directly relating to its receipt of non-empty totes.

**4. The Board's procedure was lawful and followed established law and regulation**

The Board acted within its authority, and did not engage in an unlawful procedure when it adjudicated McNamara's appeal. The facts of McNamara's violations were set out in Ecology's Notice of Penalty, and were before the Board through the issues before it in the Pre-Hearing Order. Pursuant to the Board's statutory responsibility to adjudicate penalties issued by Ecology based on the facts of the violations, the Board properly resolved the appeal.

**F. McNamara Is Not Entitled To Costs And Fees At Superior Court**

McNamara is not entitled to any costs or attorneys fees as a consequence of the superior court's ruling, because the superior court

erred and should not have granted any relief to McNamara. Therefore McNamara should not have been considered a prevailing party at superior court. However, should this court rule otherwise, and reject Ecology's cross appeal, the superior court's reservation of final ruling on attorneys fees should be affirmed.

Fee decisions under RCW 4.84.350 are reviewed for abuse of discretion. *See Constr. Indus. Training Coun. v. Washington State Apprenticeship & Training Coun.*, 96 Wn. App. 59, 66, 977 P.2d 655 (1999). A trial court abuses its discretion when it makes a decision that is "manifestly unreasonable or based on untenable grounds." *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458–59, 229 P.2d 735 (2010) (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). A decision is manifestly unreasonable "if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take." *Id.* (internal quotation marks omitted).

In its Preliminary Ruling on Attorney's Fees and Transcriptions Costs, the court reserved its decision on whether McNamara was entitled to fees until resolution of the entire judicial review of the agency action was concluded. CP 641-42. The court stated it reserved the decision in order to "determine who is the prevailing party in the action as opposed to

individual issues.” CP 641 (emphasis in original). The court did not deny McNamara its costs and attorneys fees.

McNamara argues that an award of attorney’s fees is mandatory under RCW 4.84.350, but that is not the case. Pet. Op. Br. at 26. A party that has prevailed on only one or some issues in an appeal “is not necessarily entitled to attorney fees.” *Kettle Range Conservation Group v. Dep’t of Natural Resources*, 120 Wn. App. 434, 469, 85 P.3d 894 (2003). McNamara is barred from receiving costs and fees for a number of reasons.

First, at best, McNamara prevailed only on a procedural issue, and not on either substantive issue on which Ecology’s penalty was based, nor on any of the other assignments of error alleged in McNamara’s Petition for Review. CP 3-7. A qualified party has “prevailed” for purposes of the statute only if the qualified party obtained relief on a significant issue. RCW 4.84.350(1). Courts have denied fees where a party did not substantially prevail in the action. *See Densley*, 162 Wn.2d at 227. Additionally, remand—the remedy ordered by the court for the procedural error—is not final relief, and was not the relief sought by McNamara. McNamara repeatedly asked the court to set aside the Board’s decision in its entirety and vacate the penalty. CP 7, 425, 641. Because McNamara

did not obtain the relief it sought on a significant issue, its request for costs and attorneys fees may properly be denied.

Second, McNamara requested costs and attorneys fees under RCW 4.84.350 in a response brief. CP 426. “Claims for attorneys’ fees and expenses . . . shall be made by motion.” CR 54(d)(2). Whether McNamara is entitled to costs and reasonable attorneys fees is a determination to be made by the court, after having heard from both parties. McNamara did not brief for the court the basis by which it is entitled to costs and fees. *See Edelman v. State ex rel. Pub. Disclosure Comm’n*, 152 Wn.2d 584, 592, 99 P.3d 386 (2004) (denying attorneys fees where plaintiff provided no basis by which he would be entitled to fees under RCW 4.84.350).

Third, McNamara has failed to make any showing that both Respondents are qualified parties. RCW 4.84.340(5), .350(2). Absent such a showing, a request for attorney’s fees should be denied. *Edelman*, 152 Wn.2d at 592.

Fourth, “[t]he prevailing party requirement is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is reasonable.” *Comm’r, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 160–61, 110 S. Ct. 2316 (1990) (internal quotation marks omitted). “The

burden of proving the reasonableness of the fees requested is upon the fee applicant.” *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). McNamara has not met this burden.

Any fees awarded under RCW 4.84.350(1) must be “reasonable,” requiring the court to be provided with information sufficient to make such a determination. *See, e.g., Fetzer*, 122 Wn.2d 141; *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 593–602, 675 P.2d 193 (1983). Washington has adopted the lodestar approach for calculating attorneys fees. *Fetzer*, 122 Wn.2d at 149. “A lodestar award is arrived at by multiplying a *reasonable* hourly rate by the number of hours *reasonably* expended on the matter.” *Id.* Even then, a statutory limit of \$25,000 applies to attorney fee awards under RCW 4.84.350(2). McNamara has provided no amount for the fees it requests, no documentation of the work performed, no justification of a reasonable hourly rate and no analysis of the reasonableness of its proposed fee.

Fifth, if circumstances make an award unjust, then fees, including reasonable attorney’s fees, should not be awarded. RCW 4.84.350(1). The alleged procedural error in this case was committed by the Board, not Ecology. No error has been shown on any action of Ecology’s. Yet McNamara is requesting that fees and costs be assessed against Ecology. To penalize Ecology for the Board’s purported error is an unjust result. In

addition, the Board was acting in a purely adjudicative capacity when it issued its Final Order. Attorney's fees and costs are inappropriate against an administrative body acting in its purely adjudicative capacity, because such an award "would be akin to awarding fees against the trial court when an appellate court reverses its decision." *Duwamish Valley Neighborhood Pres. Coal. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 97 Wn. App. 98, 101, 982, P.2d 668 (1999).

And finally, if the agency's error is substantially justified then attorney's fees and costs should not be awarded. RCW 4.84.350(1). This requires a showing that the Board's position "has a reasonable basis in law and fact." *Constr. Indus.*, 96 Wn. App. at 68. "The government's failure to prevail does not raise a presumption that its position was not substantially justified." *Kali v. Bowen*, 854 F.2d 329, 332 (9<sup>th</sup> Cir. 1988). "Substantially justified" for purposes of RCW 4.84.250 has been held to mean "justified in substance or in the main – in other words, justified to a degree that could satisfy a reasonable person." *Alpine Lakes Prot. Soc'y*, 102 Wn. App. at 19 (2000).

The Board has responsibility for de novo review of the facts of the violations leading to penalties issued by Ecology. The Board was required to make findings of fact related to the violations found by Ecology as they related to the penalty under pre-hearing Issue No. 6, and as they related to

the reasonableness of the penalty adjudicated under Issue No. 7. It is reasonable that the Board's Final Decision referenced those facts. The Board acted in good faith to resolve the penalty appeal before it, and good faith is a basis to find action substantially justified. *See Constr. Indus.*, 96 Wn. App. at 69. Such a finding would make an award of attorney's fees and costs inappropriate in this case.

The factors outlined above, and McNamara's failure to appropriately brief the issue of attorneys fees, provide sound reasons for the court to have reserved its decision on the question of attorneys fees. The court's reservation of the decision on costs attorney's fees until the entire appeal is adjudicated is not manifestly unreasonable or based on untenable grounds. The court did not abuse its discretion.

McNamara also apparently seeks fees at superior court on issues decided against it. Pet. Op. Br. at 43, #4. It is difficult to see how McNamara would be considered a prevailing party where the court ruled against it, therefore those costs and fees related to McNamara's appeal of Issue No. 1 and Issue No. 3 at superior court should be denied. *See Citizens for Fair Share v. Dep't of Corrections*, 117 Wn. App. 411, 437, 72 P.3d 206 (2003) (denying fees where a party did not prevail).

**G. McNamara Failed To Brief Its Request For Attorneys Fees In This Court**

A party seeking fees at the appellate level “must devote a section of its opening brief to the request for fees or expenses.” RAP 18.1(b). “The rule regarding attorney fees on appeal requires more than a bald request for such fees.” *Grundy v. Brack Family Trust*, 116 Wn. App. 625, 636, 67 P.3d 500 (2003), *rev'd on other grounds*, 155 Wn.2d 1, 117 P.3d 1089 (2005). A brief explanation of fees at the superior court is insufficient.<sup>10</sup> *See Densley*, 162 Wn.2d at 227. As noted above, in *Edelman*, the Court denied fees where no argument on attorney’s fees and costs was presented. *Edelman*, 152 Wn.2d at 592. The Court said that Edelman had provided no basis by which it would be entitled to fees, or whether he even met the definition of a “qualified party” under RCW 4.84.340(5). *Id.* Even if McNamara were to prevail before this Court, with its bald statement requesting fees on appeal McNamara has provided no basis on which it is entitled to fees, nor established it is a qualified party. This Court should deny McNamara’s request for costs and attorneys fees at the appellate level for McNamara’s failure to comply with the requirements of RAP 18.1(b).

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<sup>10</sup> As noted above, McNamara failed to even provide a brief explanation to the superior court.

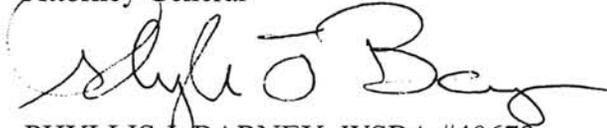
## VI. CONCLUSION

For the foregoing reasons, Ecology respectfully requests that this Court reverse the superior court's Order of Remand, and instead affirm the Board's Final Decision in its entirety. Ecology further requests that this Court deny McNamara costs and attorney's fees.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of February, 2012.

ROBERT M. MCKENNA

Attorney General

A handwritten signature in cursive script, appearing to read "Phyllis J. Barney". The signature is written in black ink and is positioned over the typed name of the signatory.

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POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

K.P. McNAMARA NORTHWEST, INC.,  
and KERRY McNAMARA

Appellants

v.

WASHINGTON DEPARTMENT OF  
ECOLOGY

Respondent

PCHB No. 09-001

**MOTION FOR RECONSIDERATION  
OF BOARD'S DENIAL OF  
APPELLANTS' MOTION IN LIMINE  
AND THE BOARD'S ORDER  
GRANTING ECOLOGY'S MOTION  
FOR SUMMARY JUDGMENT**

**ORAL ARGUMENT REQUESTED**

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K.P. McNamara Northwest, Inc. (aka the KP McNamara Company) and Kerry McNamara, President of K.P. McNamara Northwest, Inc. and individually, by and through their attorney Thomas R. Benke – The Environmental Compliance Organization LLC make this Motion for Reconsideration of the Board's Denial of Appellants' Motion in Limine and the Board's Order Granting Ecology's Motion for Summary Judgment issued September 16, 2009. Appellants request reconsideration because:

(1) The Order is based on a finding by the Board that: “[A]t the time [Appellant KPM-NW] **received, consolidated, and stored** dangerous or hazardous waste from off-site sources...Appellant ...was required to obtain proper permitting and observe storage and disposal requirements” (Order at page 19, lines 12 – 16). However, Ecology’s Motion was against issue No. 5, which is limited to liability for **receipt** of non-“RCRA empty” totes. Liability (if any) for appellants’ consolidation, storage and other on-site management practices is not at issue in this matter and cannot be the basis for judgment against Appellants.

(2) The Order is based on findings by the Board that: (i) “there is no question of fact as to whether or not the waste product at issue was dangerous waste or not – K.P. McNamara had **identified** it as such, set up procedures to handle it as such, and cannot now turn back the clock” (Order at page 14, lines 11 – 14); (ii) K.P. McNamara had “**characterized** [the rinse-water] as dangerous waste” (Order at page 14, lines 19 – 20); and (iii) K.P. McNamara had “**designated**” the rinse-water as dangerous waste (Order at page 15, lines 2 – 3). However, whether a solid waste is a “dangerous waste” depends not on whether the *generator* has “identified”, “characterized” or “designated” it as such but on whether the solid waste “is designated” *by law*, meaning that the solid waste has a characteristic of a dangerous waste or is otherwise listed in WAC 173-303. As we understand it, the Board’s premise that a generator is required “to designate”, and that a generator’s “designation” is conclusive, is based on or is otherwise in line with its decision WHW, Inc. and Bobby Williams v. Ecology, PCHB No. 05-142 decided March 30, 2006 (2006 WL 880089). The reasoning of that decision is in error, and to the extent that the Board has found that KPM-NW’s “designation” is determinative we request that the Board reconsider its finding that there is no question of fact as to whether or not the rinse-water was a

dangerous waste or, in the alternative, clearly state for the record (for purposes of appeal) that its decision with respect to the rinse-water is based on a ruling that the actual characteristics of the rinse-water are immaterial if the generator KPM-NW has otherwise “designated” the rinse-water a dangerous waste.

### I. RECEIPT OF NON-“RCRA EMPTY” TOTES

Ecology asked for partial Summary Judgment on Issues 1, 3, 4, and 5 as set out in the PCHB Pre-Hearing Order of February 9, 2009. (See Respondent Department of Ecology’s Motion and Memorandum in Support of Partial Summary Judgment at page 1, lines 20 – 22.) Issue 1 relates to Kerry McNamara’s personal liability; Issue 3 relates to the manifesting of rinse-water; Issue 4 relates to the scope of Ecology’s jurisdiction; and Issue 5 relates to receipt of non-“RCRA-empty” totes. Issue 5, as certified by ALJ Kay Brown, is in full:

*Is appellant required to obtain a permit or to comply with the requirements for operating a dangerous waste treatment, storage and disposal (TSD) facility if appellant receives from off-site generators containers which are not “empty” pursuant to WAC 173-30-160 and/or 40 CFR 261.7(b)(1) and which contain dangerous waste if the container was shipped without a hazardous (dangerous) waste manifest and its contents were [not] designated a “dangerous waste” by the generator?<sup>1</sup>*

The Board’s decision and its Order are based on a finding that “[A]t the time [Appellant KPM-NW] **received, consolidated, and stored** dangerous or hazardous waste from off-site sources...Appellant...was required to obtain proper permitting and observe storage and disposal requirements” (Order at page 19, lines 12 – 16). Because the Board’s finding is not limited to

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<sup>1</sup> The word “not” was accidentally omitted from the Board’s Pre-Hearing Order. Ecology is in agreement that the issue, as certified, is as stated above. (See the Department’s Motion and Memorandum at page 6, line 19.)

whether Appellant's receipt of ("receives") unmanifested, non-"RCRA empty" totes required a TSF facility permit, the Board should reconsider and reverse its decision on this Issue 5.

In its Statement of Legal Issues Ecology proposed one issue covering three separate alleged violations, certified as Issue 2: "Did K.P. McNamara Northwest, Inc. violate the Washington State dangerous waste regulations Chapter 173-303 WAC as specified in Order No. 6237." There are three violations cited in Ecology's Order No. 6237; one relating to the alleged failure to manifest a shipment of rinse-water; another relating to KPM-NW's "acceptance" of non-"RCRA empty" totes; and a third (actually listed second) alleging "Failure to properly accumulate dangerous waste in containers or tanks" relating to KPM-NW's "accumulation" of rinse-water generated from the KPM-NW tote washing process. Ecology's Notice of Penalty Incurred and Due is based only on two of the three alleged violations, the one relating to acceptance of non-"RCRA empty" totes and the other relating to the alleged failure to manifest a shipment of rinse-water. To better define the two issues for which Ecology was seeking penalties, Appellant proposed – and the Board certified – what became Issue 3 (relating to manifesting of a shipment of rinse-water) and Issue 5 (relating to receipt of non-"RCRA empty" containers.)

Issue 5 was proposed by Appellants specifically to address the following allegation by Ecology in its Order No. 6237:

**173-303-280 and -400: Failure to obtain a permit or to meet the requirements for a dangerous waste treatment, storage and disposal (TSD) facility.** KP accepted totes from off-site generators. These totes were not "empty" as defined in WAC 173-303-160(2), and contained significant amounts of ignitable, extremely hazardous and toxic dangerous waste. KP operated as a dangerous waste treatment, storage and disposal facility when it accepted the totes containing dangerous waste.

With respect to the above alleged violation, Ecology Ordered KPM-NW to “immediately implement operating practices and procedures to reject totes that are not “empty” as defined in WAC 173-303-160. (See page 4, section 10.)

It has been Ecology’s contention that when KPM-NW unloaded a non-“RCRA empty” tote from the transport vehicle that this alone violated WAC because KPM-NW does not have a TSD facility permit. Appellants proposed that the term “received” rather than “accepted” be used in the certified “Legal Issue” concerning non-“RCRA empty” containers because the underlying rule at issue, WAC 173-303-370 (which the PCHB is being asked to interpret both as it was during the time of the alleged violations and as now amended), is applicable “to owners and operators who receive dangerous waste from off-site sources.”<sup>2</sup> When an owner or operator “receives” a shipment of DW it can either accept or reject it, with certain management implications depending on whether the shipment was manifested and whether the receiving owner or operator has a TSD facility permit or can identify a suitable alternate TSD facility. The terms “receive” and “accept” are not interchangeable under the rules. The term “receive” is not so broad as to include “consolidation” and “storage”; those activities are addressed as separate management practices in State and federal rules . This was all discussed at the pre-hearing conference when ALJ Kay Brown certified Issue 5 as proposed by Appellants. Therefore, because Issue 5 relating to non-“RCRA empty” totes is limited to receipt, liability (if any) for appellants’ consolidation, storage and other on-site management practices is not at issue in this matter and cannot be the basis for judgment against Appellants.

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<sup>2</sup> WAC 173-303-370(1) states (both before and after the June 30, 2009 amendments): “Applicability. The requirements of this section apply to owners and operators who receive dangerous waste from off-site sources.”

Appellants filed their Motions in Limine and to Strike in part because it was evident that Ecology was attempting through Deanne Williams' Second Declaration and Ecology's Reply brief to expand the scope of Issue 5 as certified, and Ecology clearly succeeded. The Board wrote in its decision:

*Specifically, they [e.g., Deanne Williams' Second Declaration and the portions of Ecology's Reply Brief to which Appellants objected] present Ecology's explanation of how K.P. McNamara's transporting of rinse-water from its facility, and **acceptance and management** of non-"RCRA empty" totes, violated applicable regulations, and they are therefore within the scope of Issues No. 3 and 5.*

Perhaps the Board construed the term "receives" as broad enough in scope to include "acceptance and management," but as discussed above "receives" ("receipt", "receiving") means nothing more than the act of unloading (aka "off-loading") containers at the KPM-NW facility.

Appellants are entitled to a clear ruling as to whether KPM-NW violated WAC 173-303-280 and -400 simply because it unloaded non-"RCRA empty" containers. WAC 173-303-280 and -400 apply to "all owners and operators of facilities which store, treat or dispose of dangerous wastes and which must be permitted under the requirements of [Chapter 173-303] **unless otherwise specified in this chapter.**" Former WAC 173-303-370(5)(b) stated [now at WAC 173-303-370(6)(b)] that if an owner or operator determines that his facility cannot "accept" a waste shipment that:

*The owner or operator may send the shipment on to the alternate facility designated on the manifest or shipping paper, or contact the generator to identify another facility capable of handling the waste and provide for its delivery to that other facility, unless the containers are damaged to such an extent, or the dangerous waste is in such a condition as to present a hazard to the public health of the environment in the process of further transportation.*

Thus, the PCHB is tasked by Issue 5 to address whether the former rule (prior to amendments specifically addressing receipt of non-“RCRA empty” totes) contemplated temporary custody of dangerous waste by an unpermitted facility like KPM-NW that “receives” but does not “accept” a non-“RCRA empty” tote. As an aid to the Board’s interpretation of former WAC 173-303-370(5)(b) Appellants’ Memorandum (at page 9) referenced the federal rule in effect at the time relating to Manifest Discrepancies [40 CFR § 264.72(d)(2)] which specifically addresses receipt of unmanifested non-“RCRA empty” containers and allows for “secure, temporary custody of the waste” by the receiver without a permit pending preparation of a Uniform Hazardous Waste Manifest as an “offeror” and forwarding of the waste to an authorized (permitted) TSD facility. The federal Manifest Discrepancies rule was adopted by USEPA to fill the same “gap” with respect to non-“RCRA empty” containers that Phyllis Barney acknowledged existed in the State “Manifest Discrepancies” rule [former WAC 173-303-370(4) and (5)] prior to its amendment in June 2009.

The question before the Board may be stated thus: Did the June 30, 2009 amendments to WAC 173-303-370 (described in Ecology’s “Rule-Making Archive”<sup>3</sup> as “Updates to manifest requirements”) make lawful what was previously unlawful, or did the amendments simply provide clarification with regards to an already lawful activity? Appellants urge the later interpretation – clarification with regards to an already lawful activity – based on the wording of the former and amended rule, that when no alternate facility has been designated on the shipping papers the receiving facility must “provide for” delivery to another facility. To “provide for” delivery to another facility, the receiving facility must take possession of (e.g., unload) the

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<sup>3</sup> <http://www.ecy.wa.gov/laws-rules/activity/wac173303.html>

dangerous waste and hold it for some period of time pending shipment to an alternate facility.<sup>4</sup> For a variety of reasons, the receiving facility cannot simply “reject” the waste by refusing to unload it as Ecology has asserted, not the least of which is the prohibition against shipping a dangerous waste without a Uniform Hazardous Waste Manifest (with all the judgment and decisions that entails.)

Appellants’ interpretation of amendments to WAC 173-303-370 as a clarification of previously lawful activity is consistent with the approach taken by USEPA in amending the federal “Manifest Discrepancies” rule (40 CFR § 264.72). The new manifesting rules were proposed “to improve the tracking of certain problematic hazardous waste shipments known as “rejected loads” or “container residues”... 70 FR at 10803. Adopted within the context of broader rulemaking modifying the hazardous waste manifesting system, without any changes to existing TSD facility standards, the amendments only clarified what “management controls” were appropriate under existing law with respect to the “temporary staging of rejected wastes”. 70 FR at 10809. USEPA was careful in its wording, using the terms “temporary staging” and “secure, temporary custody” to describe appropriate “management controls” for rejected waste rather than “storage,” which might have implied the necessity of compliance with TSD facility permitting rules. In adopting identical amendments to its “Manifest Discrepancies” rule, the State of Washington similarly only provided clarification of “management controls” applicable to the existing lawful “secure, temporary custody” of rejected waste shipments.

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<sup>4</sup> In promulgating its “Manifest Discrepancies” rule for receipt of non-“RCRA empty” containers USEPA stated: “EPA believes 60 days is sufficient time for the rejecting TSDF to consult with the generator, locate an alternate facility and forward the shipment or return it to the generator.”

In conclusion, KPM-NW respectfully requests that the Board limit its findings and rulings to KPM-NW's "receiving" dangerous waste, the limited Issue 5 certified by ALJ Kay Brown. Furthermore, KPM-NW respectfully requests that the Board find that, pursuant to former WAC 173-303-370, KPM-NW did not need a TSD facility permit to receive unmanifested non-"RCRA empty" totes.

## II. "DESIGNATION" OF RINSEWATER AS A DANGEROUS WASTE

Issue 3 as certified by ALJ Kay Brown is:

*Did appellant "inappropriately dispose of" dangerous waste (rinse-water) when the waste was transported to and treated at an appropriate permitted waste water treatment facility?*

At most, KPM-NW's agreement to manage the rinse-water that was transported without a Uniform Hazardous Waste Manifest could be construed as an evidentiary admission that the rinse-water had a characteristic of a dangerous waste ("DW") described at WAC 173-303-070-090 or was listed at WAC-303-080 through 173-303-083.<sup>5</sup> Appellants KPM-NW and Kerry McNamara offered sufficient evidence overcoming their burden of proof that the rinse-water did not have a characteristic and was not listed to create an issue of fact with respect to "designation" under Washington law.

Ecology argues that every generator of a solid waste has a duty pursuant to WAC 173-303-070 "to designate" its waste as either dangerous or non-dangerous and that every "designation as dangerous waste" is determinative of whether a solid waste is subject to regulation as dangerous waste. To the contrary, WAC 173-303-070 (1)(b) states:

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<sup>5</sup> As discussed in Appellants' Memorandum in Opposition, pages 6 – 8, the circumstances under which Appellants' agreed to manage the rinse-water as a dangerous waste (threat of enforcement action by Ecology) substantially lessen the evidentiary value of any alleged admission.

*Any person who must determine whether or not their solid waste is designated must follow the procedures set forth in subsection (3) of this section. Any person who determines by these procedures that their waste is designated DW or EHW is subject to all applicable requirements of this chapter.*

Thus, the mandate applicable to generators is to “determine” rather than to “designate”, a distinction of critical importance and one consistently overlooked by Ecology and the Board.

Appellants see the Board’s decision on Summary Judgment as being consistent with its prior decision WHW, Inc. and Bobby Williams v. Ecology, PCHB No. 05-142 decided March 30, 2006 (2006 WL 880089). With all due respect to those Board members who participated in the Williams matter, that decision could not have been written had the Board adhered to the actual wording of applicable law. The phrase “designated as” a dangerous waste is nowhere found in statute or regulation, but it is regularly used by Ecology and shows up in the Williams decision (for example, “Facts” fourth paragraph, second sentence) as a shorthand means of saying that a solid waste is a dangerous waste. However,

*“Dangerous waste” means those solid wastes designated in WAC 173-303-070 through 173-303-100 as dangerous, or extremely hazardous or mixed waste. WAC 173-3-3-040.*

The above definition does not include “and/or because Ecology or the generator designates it as dangerous waste.” Just as “designating” an ignitable waste a “non-dangerous” waste does not exclude it from regulation under WAC 173-303 [see Hickle v. Whitney Farms, Inc., 148 Wash.2d 911 (2003)], neither does “designating” a solid waste having no DW characteristics as “dangerous” make it subject to regulation under WAC 173-303:

*If a person has checked the waste against each section and the waste is not designated, then the waste is not subject to the requirements of Chapter 173-303 WAC. WAC 173-303-070(3)(b).*

The Board will note that the above rule excludes non-DW from the *entire* Chapter 173-303 WAC. The exclusion might have excepted (saved) the requirement to make a determination under § 173-303-070 but does not. This simply means that a generator of non-dangerous waste cannot be found to be in violation of any part of WAC Chapter 173-303 for failing to determine that his non-DW is not dangerous. Ecology “interprets” the rule differently, and in fact regularly penalizes generators of non-dangerous waste for failing to “make a designation” (e.g., to engage in a “designation process” or “evaluation”) but this is clearly not in accord with WAC 173-303(3)(b).

Returning to the Board’s decision in Williams, the Board’s ruling was that *until* the generator engaged in the “designation process” of WAC that the waste was subject to regulation as a DW without regard to its actual characteristics because Ecology had previously “book designated” the waste. There are two glaring problems with this logic. The first is that it presumes that Ecology can “designate” waste; Ecology can penalize a generator for failing to determine that its DW is designated DW, but Ecology does not have authority “to designate”. The second problem is that the determination or evaluation required by WAC 173-303-070 – the so-called “designation process” – does not make a waste dangerous or non-dangerous, it merely sets out guidelines for establishing whether a waste has a characteristic, or is listed. Under the facts of Williams, the spilled soda ash never tested above the corrosivity threshold of pH 12.5 and it never failed toxicity testing. The soda ash was never “designated” DW and Appellants should never have been penalized.

Similarly, Appellants may not be found to be in violation of the regulatory mandate to manifest shipments of DW (as Ecology has alleged) if its waste rinse-water did not exhibit a

characteristic of a dangerous waste as specified at WAC 173-303-070-090 and is not listed at WAC-303-080 through 173-303-083. As Appellants argued in their Memorandum in Opposition, the State must prove that the rinse-water transported without a UHWM was a dangerous waste in order to prevail on its claim. There being an issue of fact with regard to that element, Summary Judgment on Issue 3 must be denied.

Dated: October 13, 2009

Respectfully submitted,



s/ Thomas R. Benke

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## **WAC 173-303-070**

### **Designation of dangerous waste.**

(1) Purpose and applicability.

(a) This section describes the procedures for determining whether or not a solid waste is DW or EHW.

(b) The procedures in this section are applicable to any person who generates a solid waste (including recyclable materials) that is not exempted or excluded by this chapter or by the department. Any person who must determine whether or not their solid waste is designated must follow the procedures set forth in subsection (3) of this section. Any person who determines by these procedures that their waste is designated DW or EHW is subject to all applicable requirements of this chapter.

(c) The requirements for the small quantity generator exemption are found in subsection (8) of this section.

(2)(a) Except as provided at WAC 173-303-070 (2)(c), once a material has been determined to be a dangerous waste, then any solid waste generated from the recycling, treatment, storage, or disposal of that dangerous waste is a dangerous waste unless and until:

(i) The generator has been able to accurately describe the variability or uniformity of the waste over time, and has been able to obtain demonstration samples which are representative of the waste's variability or uniformity; and

(ii)(A) It does not exhibit any of the characteristics of WAC 173-303-090; however, wastes that exhibit a characteristic at the point of generation may still be subject to the requirements of WAC 173-303-140 (2)(a), even if they no longer exhibit a characteristic at the point of land disposal; and

(B) If it was a listed waste under WAC 173-303-080 through 173-303-083, it also has been exempted pursuant to WAC 173-303-910(3); or

(iii) If originally designated only through WAC 173-303-100, it does not meet any of the criteria of WAC 173-303-100.

Such solid waste will include but not be limited to any sludge, spill

residue, ash emission control dust, leachate, or precipitation runoff. Precipitation runoff will not be considered a dangerous waste if it can be shown that the runoff has not been contaminated with the dangerous waste, or that the runoff is adequately addressed under existing state laws (e.g. chapter 90.48 RCW), or that the runoff does not exhibit any of the criteria or characteristics described in WAC 173-303-100.

(b) Materials that are reclaimed from solid wastes and that are used beneficially (as provided in WAC 173-303-016 and 173-303-017) are not solid wastes and hence are not dangerous wastes under this section unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.

(c)(i) A dangerous waste that is listed in WAC 173-303-081(1) or 173-303-082(1) solely because it exhibits one or more characteristics of ignitability as defined under WAC 173-303-090(5), corrosivity as defined under WAC 173-303-090(6), or reactivity as defined under WAC 173-303-090(7) is not a dangerous waste, if the waste no longer exhibits any characteristic of dangerous waste identified in WAC 173-303-090 or any criteria identified in WAC 173-303-100.

(ii) The exclusion described in (c)(i) of this subsection also pertains to:

(A) Any solid waste generated from treating, storing, or disposing of a dangerous waste listed in WAC 173-303-081(1) or 173-303-082(1) solely because it exhibits the characteristics of ignitability, corrosivity, or reactivity as regulated under (a) and (b) of this section.

(B) Wastes excluded under this section are subject to 40 CFR Part 268, which is incorporated by reference at WAC 173-303-140 (2)(a) (as applicable), even if they no longer exhibit a characteristic at the point of land disposal.

(3) Designation procedures.

(a) To determine whether or not a solid waste is designated as a dangerous waste a person must:

(i) First, determine if the waste is a listed discarded chemical product, WAC 173-303-081;

(ii) Second, determine if the waste is a listed dangerous waste source, WAC 173-303-082;

(iii) Third, if the waste is not listed in WAC 173-303-081 or 173-303-

082, or for the purposes of compliance with the federal land disposal restrictions as adopted by reference in WAC 173-303-140, determine if the waste exhibits any dangerous waste characteristics, WAC 173-303-090; and

(iv) Fourth, if the waste is not listed in WAC 173-303-081 or 173-303-082, and does not exhibit a characteristic in WAC 173-303-090, determine if the waste meets any dangerous waste criteria, WAC 173-303-100.

(b) A person must check each section, in the order set forth, until they determine whether the waste is designated as a dangerous waste. Once the waste is determined to be a dangerous waste, further designation is not required except as required by subsection (4) or (5) of this section. If a person has checked the waste against each section and the waste is not designated, then the waste is not subject to the requirements of chapter 173-303 WAC.

Any person who wishes to seek an exemption for a waste which has been designated DW or EHW must comply with the requirements of WAC 173-303-072.

(c) For the purpose of determining if a solid waste is a dangerous waste as identified in WAC 173-303-080 through 173-303-100, a person must either:

(i) Test the waste according to the methods, or an approved equivalent method, set forth in WAC 173-303-110; or

(ii) Apply knowledge of the waste in light of the materials or the process used, when:

(A) Such knowledge can be demonstrated to be sufficient for determining whether or not it designated and/or designated properly; and

(B) All data and records supporting this determination in accordance with WAC 173-303-210(3) are retained on-site.

(4) Testing required. Notwithstanding any other provisions of this chapter, the department may require any person to test a waste according to the methods, or an approved equivalent method, set forth in WAC 173-303-110 to determine whether or not the waste is designated under the dangerous waste lists, characteristics, or criteria, WAC 173-303-080 through 173-303-100. Such testing may be required if the department has reason to believe that the waste would be designated

DW or EHW by the dangerous waste lists, characteristics, or criteria, or if the department has reason to believe that the waste is designated improperly (e.g., the waste has been designated DW but should actually be designated EHW). If a person, pursuant to the requirements of this subsection, determines that the waste is a dangerous waste or that its designation must be changed, then they are subject to the applicable requirements of this chapter 173-303 WAC. The department will base a requirement to test a waste on evidence that includes, but is not limited to:

(a) Test information indicating that the person's waste may be DW or EHW;

(b) Evidence that the person's waste is very similar to another persons' already designated DW or EHW;

(c) Evidence that the persons' waste has historically been a DW or EHW;

(d) Evidence or information about a person's manufacturing materials or processes which indicate that the wastes may be DW or EHW; or

(e) Evidence that the knowledge or test results a person has regarding a waste is not sufficient for determining whether or not it designated and/or designated properly.

(5) Additional designation required. A generator must manage dangerous waste under the most stringent management standards that apply. The following subsections describe how waste that has been designated as DW under the dangerous waste lists, WAC 173-303-080 through 173-303-082, or characteristics, WAC 173-303-090, or in the case of (c) of this subsection, under the lists, characteristics, or criteria, must be further designated under the dangerous waste criteria, WAC 173-303-100. This further designation under the criteria is necessary because it may change how the waste must be managed. Additional designation is required when:

(a) The waste is designated as DW with a QEL of 220 pounds and the generator otherwise qualifies as a small quantity generator. In this case, a generator must determine if their DW is also designated as a toxic EHW, WAC 173-303-100, with a QEL of 2.2 pounds; or

(b) The waste is designated as DW and the waste is to be discharged to a POTW operating under WAC 173-303-802(4) (Permits by rule). In this case, a generator must determine if the waste is also an EHW under

WAC 173-303-100; or

(c) The waste is designated as a state-only DW and the waste is to be:

(i) Burned for energy recovery, as used oil, under the provisions of WAC 173-303-515; or

(ii) Land disposed within the state. In this case, a generator must determine if the waste is also an EHW under WAC 173-303-100.

(6) Dangerous waste numbers. When a person is reporting or keeping records on a dangerous waste, they must use all the dangerous waste numbers which they know are assignable to the waste from the dangerous waste lists, characteristics, or criteria. For example, if the waste is ignitable *and* contains more than 5 mg/l leachable lead when tested for the toxicity characteristic, they must use the dangerous waste numbers of D001 and D008. This will not be construed as requiring a person to designate their waste beyond those designation requirements set forth in subsections (2), (3), (4), and (5) of this section.

(7) Quantity exclusion limits; aggregated waste quantities.

(a) Quantity exclusion limits. In each of the designation sections describing the lists, characteristics, and criteria, quantity exclusion limits (QEL) are identified. The QEL are used to distinguish when a dangerous waste is only subject to the small quantity generator provisions, and when a dangerous waste is subject to the full requirements of this chapter. Any solid waste which is not excluded or exempted and which is listed by or exhibits the characteristics or meets the criteria of this chapter is a dangerous waste. Small quantity generators who produce dangerous waste below the QEL are subject to the requirements described in subsection (8) of this section.

(b) Aggregated waste quantities. A person may be generating, accumulating, or storing more than one kind of dangerous waste. In such cases, they must consider the aggregate quantity of their wastes when determining whether or not their waste amounts exceed the specific limits for waste accumulation or the specific quantity exclusion limits (QEL) for waste generation. Waste quantities must be aggregated for all wastes with common QEL's. Example: If a person generates 100 pounds of an ignitable waste and 130 pounds of a persistent waste, then both wastes are regulated because their aggregate waste quantity (230 pounds) exceeds their common QEL of 220 pounds. On the other hand, if a person generates one pound of a toxic EHW and 218 pounds of a corrosive waste, their quantities would not be aggregated because they

do not share a common QEL (2.2 pounds and 220 pounds, respective QEL's). (Note: In order to remain a small quantity generator, the total quantity of dangerous waste generated in one month, all DW and EHW regardless of their QELs, must not equal or exceed 220 pounds. Not more than 2.2 pounds of a waste with a 2.2 pound QEL may be part of that total.)

(c) When making the quantity determinations of this subsection and WAC 173-303-170 through 173-303-230, generators must include all dangerous wastes they generate, except dangerous waste that:

(i) Is exempt from regulation under WAC 173-303-071; or

(ii) Is recycled under WAC 173-303-120 (2)(a), (3)(c), (e), (h) or (5); or

(iii) Is managed in accordance with WAC 173-303-802(5) immediately upon generation only in on-site elementary neutralization units, wastewater treatment units, or totally enclosed treatment facilities as defined in WAC 173-303-040; or

(iv) Is recycled, without prior storage or accumulation, only in an on-site process subject to regulation under WAC 173-303-120 (4)(a); or

(v) Is spent lead-acid batteries managed under the requirements of WAC 173-303-120 (3)(f) and 173-303-520; or

(vi) Is universal waste managed under WAC 173-303-077 and 173-303-573.

(d) In determining the quantity of dangerous waste generated, a generator need not include:

(i) Dangerous waste when it is removed from on-site storage; or

(ii) Reserve; or

(iii) Spent materials that are generated, reclaimed, and subsequently reused on-site, as long as such spent materials have been counted once (Note: If after treatment or reclamation a residue is generated with a different waste code(s), that residue must be counted); or

(iv) The container holding/containing the dangerous waste as described under WAC 173-303-160(1).

(8) Small quantity generators.

(a) A person is a small quantity generator and subject to the requirements of this subsection if:

(i) Their waste is dangerous waste under subsection (3) of this section, and the quantity of waste generated per month (or the aggregated quantity if more than one kind of waste is generated) does not equal or exceed the quantity exclusion limit (QEL) for such waste (or wastes) as described in WAC 173-303-070(7); and

(ii) The quantity accumulated or stored does not exceed 2200 pounds for wastes with a 220 pound QEL and 2.2 pounds for waste with a 2.2 pound QEL. (Exception: The accumulation limit for the acute hazardous wastes described in WAC 173-303-081 (2)(iv) and 173-303-082 (2)(b) is 220 lbs); and

(iii) The total quantity of dangerous waste generated in one month, all DW and EHW regardless of their QELs, does not equal or exceed 220 pounds. If a person generates any dangerous wastes that exceed the QEL or accumulates or stores waste that exceeds the accumulation limits, then all dangerous waste generated, accumulated, or stored by that person is subject to the requirements of this chapter. A small quantity generator who generates in excess of the quantity exclusion limits or, accumulates, or stores waste in excess of the accumulation limits becomes subject to the full requirements of this chapter and cannot again be a small quantity generator until after all dangerous waste on-site at the time he or she became fully regulated have been removed, treated, or disposed.

Example. If a person generates four pounds of an acute hazardous waste discarded chemical product (QEL is 2.2 pounds) and 200 pounds of an ignitable waste (QEL is 220 pounds), then both wastes are fully regulated, and the person is not a small quantity generator for either waste.

(Comment: If a generator generates acute hazardous waste in a calendar month in quantities greater than the QELs, all quantities of that acute hazardous waste are subject to full regulation under this chapter. "Full regulation" means the regulations applicable to generators of greater than 2200 pounds of dangerous wastes in a calendar month.)

(b) Small quantity generators will not be subject to the requirements of this chapter if they:

(i) Designate their waste in accordance with WAC 173-303-070; and

(ii) Manage their waste in a way that does not pose a potential threat to human health or the environment; and

(iii) Either treat or dispose of their dangerous waste in an on-site facility, or ensure delivery to an off-site facility, either of which, if located in the United States, is:

(A) Permitted (including permit-by-rule, interim status, or final status) under WAC 173-303-800 through 173-303-840;

(B) Authorized to manage dangerous waste by another state with a hazardous waste program approved under 40 CFR Part 271, or by EPA under 40 CFR Part 270;

(C) Permitted to manage moderate-risk waste under chapter 173-350 WAC (Solid waste handling standards), operated in accordance with state and local regulations, and consistent with the applicable local hazardous waste plan that has been approved by the department;

(D) A facility that beneficially uses or reuses, or legitimately recycles or reclaims the dangerous waste, or that treats the waste prior to such recycling activities;

(E) Permitted, licensed, or registered to manage municipal solid waste and, if managed in a municipal solid waste landfill is subject to 40 CFR Part 258 or chapter 173-351 WAC;

(F) Permitted, licensed, or registered by a state to manage nonmunicipal nonhazardous waste and, if managed in a nonmunicipal nonhazardous waste disposal unit after January 1, 1998, is subject to the requirements in 40 CFR 257.5 through 257.30;

(G) A publicly owned treatment works (POTW): Provided, That small quantity generator(s) comply with the provisions of the domestic sewage exclusion found in WAC 173-303-071 (3)(a); or

(H) For universal waste managed under WAC 173-303-573, a universal waste handler or destination facility subject to the requirements of WAC 173-303-573; and

(iv) Submit an annual report in accordance with WAC 173-303-220 if they have obtained an EPA/state identification number pursuant to WAC 173-303-060.

(c) If a small quantity generator's wastes are mixed with used oil, the mixture is subject to WAC 173-303-510 if it is destined to be burned for energy recovery. Any material produced from such a mixture by processing, blending, or other treatment is also so regulated if it is destined to be burned for energy recovery.

(d) If a small quantity generator's used oil is to be recycled by being burned for energy recovery or re-refined, the used oil is subject to WAC 173-303-515.

[Statutory Authority: Chapters 70.105 and 70.105D RCW. 09-14-105 (Order 07-12), § 173-303-070, filed 6/30/09, effective 7/31/09. Statutory Authority: Chapters 70.105, 70.105D, and 15.54 RCW and RCW 70.105.007. 04-24-065 (Order 03-10), § 173-303-070, filed 11/30/04, effective 1/1/05. Statutory Authority: Chapters 70.105 and 70.105D RCW. 03-07-049 (Order 02-03), § 173-303-070, filed 3/13/03, effective 4/13/03. Statutory Authority: Chapters 70.105, 70.105D, 15.54 RCW and RCW 70.105.007. 00-11-040 (Order 99-01), § 173-303-070, filed 5/10/00, effective 6/10/00. Statutory Authority: Chapters 70.105 and 70.105D RCW. 98-03-018 (Order 97-03), § 173-303-070, filed 1/12/98, effective 2/12/98; 95-22-008 (Order 94-30), § 173-303-070, filed 10/19/95, effective 11/19/95; 94-01-060 (Order 92-33), § 173-303-070, filed 12/8/93, effective 1/8/94. Statutory Authority: Chapter 70.105 RCW. 93-02-050 (Order 92-32), § 173-303-070, filed 1/5/93, effective 2/5/93. Statutory Authority: Chapters 70.105 and 70.105D RCW, 40 CFR Part 271.3 and RCRA § 3006 (42 U.S.C. 3251). 91-07-005 (Order 90-42), § 173-303-070, filed 3/7/91, effective 4/7/91. Statutory Authority: Chapter 70.105 RCW. 89-02-059 (Order 88-24), § 173-303-070, filed 1/4/89; 87-14-029 (Order DE-87-4), § 173-303-070, filed 6/26/87; 86-12-057 (Order DE-85-10), § 173-303-070, filed 6/3/86; 84-14-031 (Order DE 84-22), § 173-303-070, filed 6/27/84. Statutory Authority: Chapter 70.105 RCW and RCW 70.95.260. 82-05-023 (Order DE 81-33), § 173-303-070, filed 2/10/82.]

**RCW 70.105.080**  
**Violations — Civil penalties.**

(1) Except as provided in RCW 43.05.060 through 43.05.080 and 43.05.150, every person who fails to comply with any provision of this chapter or of the rules adopted thereunder shall be subjected to a penalty in an amount of not more than ten thousand dollars per day for every such violation. Each and every such violation shall be a separate and distinct offense. In case of continuing violation, every day's continuance shall be a separate and distinct violation. Every person who, through an act of commission or omission, procures, aids, or abets in the violation shall be considered to have violated the provisions of this section and shall be subject to the penalty herein provided.

(2) The penalty provided for in this section shall be imposed pursuant to the procedures in RCW 43.21B.300.

[1995 c 403 § 631; 1987 c 109 § 12; 1983 c 172 § 2; 1975-'76 2nd ex.s. c 101 § 8.]

## **RCW 4.84.350**

### **Judicial review of agency action — Award of fees and expenses.**

(1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

(2) The amount awarded a qualified party under subsection (1) of this section shall not exceed twenty-five thousand dollars. Subsection (1) of this section shall not apply unless all parties challenging the agency action are qualified parties. If two or more qualified parties join in an action, the award in total shall not exceed twenty-five thousand dollars. The court, in its discretion, may reduce the amount to be awarded pursuant to subsection (1) of this section, or deny any award, to the extent that a qualified party during the course of the proceedings engaged in conduct that unduly or unreasonably protracted the final resolution of the matter in controversy.

[1995 c 403 § 903.]

NO. 42668-4

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

K.P. MCNAMARA NORTHWEST,  
INC. AND KERRY MCNAMARA,

Appellants/Cross-Respondent,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondents/Cross Appellant.

CERTIFICATE OF  
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 13th day of February 2012, I caused to be served Respondent/Cross Appellant's Opening Brief in the above-captioned matter upon the parties herein as indicated below:

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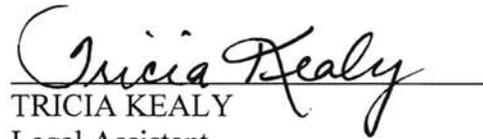
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the foregoing being the last known address.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13th day of February 2012, in Olympia, Washington.

  
TRICIA KEALY  
Legal Assistant