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Case No. 53041-4-II

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

NATIONAL PARKS CONSERVATION ASSOCIATION,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and
BP WEST COAST PRODUCTS LLC,

Respondents.

RESPONSE BRIEF OF BP WEST COAST PRODUCTS LLC

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I. INTRODUCTION

By failing to perfect filing of a petition for review within the statutory 30-day appeal window, Appellant National Parks Conservation Association ("NPCA") failed to timely invoke the appellate jurisdiction of the Thurston County Superior Court. The Superior Court properly construed its jurisdictional limits and dismissed NPCA's untimely appeal. That ruling should be affirmed.

NPCA asks this Court to either: (1) ignore that NPCA's initial submission was incomplete as a matter of fact and law; and/or (2) apply an equitable doctrine of "constructive filing" or "substantial compliance" to cure the untimely submission. Neither is appropriate. The Superior Court correctly found that the Clerk of Court's rejection of NPCA's initial submission was proper because it lacked a required document, the Case Information Cover Sheet, which is mandatory. Further, under Washington law a party's failure to comply with statutory deadlines cannot be cured by equitable doctrines such as "substantial compliance" or "constructive filing." *See, e.g.*, *Medina v. Pub. Util. Dist. No. 1 of Benton Cty.*, 147 Wn.2d 303, 317, 53 P.3d 993 (2002) ("[W]here time requirements are concerned, [our Supreme Court] has held that 'failure to comply with a statutorily set time limitation cannot be considered substantial compliance'

with the statute." (quoting *City of Seattle v. Pub. Emp't Relations Comm'n*, 116 Wn.2d 923, 929, 809 P.2d 1377 (1991) (hereinafter *"PERC"*))). Jurisdiction is not fluid; it is strictly construed and must be timely invoked. Here, the Superior Court's jurisdiction was not timely invoked.

II. BACKGROUND

In 2017, the Washington Department of Ecology ("Ecology") issued an air permit authorizing BP West Coast Products LLC ("BP") to replace and modernize certain equipment at its Washington State refinery. CP 78. NPCA appealed Ecology's issuance of the permit to the Pollution Control Hearing Board ("PCHB"). After a five-day trial addressing the technical and legal merits of the permit, on July 17, 2018, the PCHB ruled in favor of Ecology and BP and upheld the air permit in full. CP 74-103.

NPCA then attempted to appeal the PCHB's decision to the Thurston County Superior Court. The following timeline provides the essential, undisputed facts relevant to this appeal:

- **July 17, 2018** – The PCHB issued and served its decision denying NPCA's challenge of the air permit issued to BP.[1]
- **August 15, 2018** – NPCA sent its petition for review of the

[1] CP 74-103.

PCHB's decision to Thurston County Superior Court via FedEx.[2] The petition was rejected as incomplete.[3]

- **August 16, 2018** – The 30-day appeal window to challenge the PCHB's decision expired per RCW 34.05.542(2) and WAC 371-08-555.[4]

- **August 21, 2018** – NPCA re-sent its petition for review to the Court[5] and it was accepted for filing.[6]

NPCA's attempted filing on August 15, 2018 via FedEx was rejected by the Clerk of Court as incomplete because it did not comport with legal filing requirements. Per Superior Court Administrative Rule 2: "Each new civil and domestic case filing shall be accompanied by a Case Information Cover Sheet prepared and submitted by the plaintiff." NPCA's submittal did not include the required Case Information Cover Sheet, so the Clerk of Court rejected the petition and sent it back to NPCA. Court records establish that NPCA did not complete its filing until August 21, 2018, which was five days after the appeal window closed.[7]

BP and Ecology moved to dismiss NPCA's appeal for lack of jurisdiction because the appeal was not timely filed, and NPCA moved to

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[2] CP 192.
[3] CP 196.
[4] CP 74, 178.
[5] CP 198-203.
[6] CP 239-40 (Court record indicating that NPCA's petition for review was filed August 21, 2018).
[7] *Id.*

verify that the appeal was timely filed.[8] At hearing on December 14, 2018,[9] the Superior Court found that "[i]t is clear and undisputed that, in fact, the petition for review was not filed within 30 days."[10] Based on this finding that the appeal was untimely, the Superior Court granted BP and Ecology's motions and dismissed the case for lack of jurisdiction.[11] NPCA now appeals the Superior Court's dismissal for lack of jurisdiction.

III. ARGUMENT

This case presents a narrow issue of law—whether NPCA's initial, deficient submission of its petition for review constitutes a proper and timely filing invoking the appellate jurisdiction of the Superior Court. The Superior Court correctly concluded the answer is "no."

A. The Superior Court Properly Dismissed NPCA's Petition for Review Because the Petition Was Not Timely Filed with the Superior Court.

Per the Administrative Procedure Act ("APA") at RCW 34.05.542(2) and the PCHB's procedural rules at WAC 371-08-555, a petition for review of a final agency action must be filed within 30 days from the date of service of the final order. The APA provides:

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[8] CP 173-76, 66-69, 204-05.
[9] The Thurston County Superior Court filed the report of proceedings for the December 14, 2018 motions hearing with this Court on January 31, 2019.
[10] Mot. Hr'g Tr. 16:14-15, Dec. 14, 2018.
[11] *Id*. at 17:7-9.

> A petition for judicial review of an order **shall be filed with the court** and served on the agency, the office of the attorney general, and all parties of record **within thirty days after service of the final order**.

RCW 34.05.542(2) (emphasis added). Further, a petition for review under the APA "shall be instituted by paying the fee required under RCW 36.18.020 and filing a petition in the superior court." RCW 34.05.514(1).

The APA "mandates rigid procedural conditions before judicial review of an agency decision can be sought." *New Cingular Wireless PCS, LLC v. City of Clyde Hill*, 185 Wn.2d 594, 603, 374 P.3d 151 (2016). All statutory procedural requirements must be met before a court's appellate jurisdiction is properly invoked. *PERC*, 116 Wn.2d at 926 (citing *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990)). A party's failure to timely file a petition for judicial review within 30 days of the final agency action is grounds for dismissal. *See Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 362-63, 271 P.3d 268 (2012) (failure to file petition for judicial review within 30 days of final agency action required dismissal); *Clymer v. Emp't Sec. Dep't*, 82 Wn. App. 25, 26-27, 917 P.2d 1091 (1996) (dismissal appropriate when claimant's attorney filed petition for judicial review one day after the deadline for filing expired).

NPCA's petition for review was not filed within 30 days, as required.[12] The PCHB's ruling was served on July 17, 2018. NPCA's deadline for filing its petition was thus August 16, 2018. NPCA recognized this; on August 15, 2018, NPCA provided the parties with a "courtesy copy" of its petition and stated, in that same email, that the "Petition will be filed in Thurston County today."[13] NPCA then sent its petition to the Thurston County Superior Court via FedEx. NPCA's submission, however, was incomplete; it did not include the required Case Information Cover Sheet. The Clerk of Court rejected NPCA's submission because it was incomplete and returned it to NPCA. NPCA did not successfully file the petition for review until the following week, on August 21, 2018, when it resubmitted the package with the required Case Information Cover Sheet. The filing was thus untimely because NPCA did not perfect its appeal until August 21, 2018.

1. The Thurston County Superior Court Clerk Rightfully Rejected NPCA's Deficient Petition for Review.

Washington law provides the framework and legal basis for the Clerk of Court's rejection of NPCA's deficient petition for review. The

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[12] *See* Mot. Hr'g Tr. 16:14-15, Dec. 14, 2018 ("It is clear and undisputed that, in fact, the petition for review was not filed within 30 days.").
[13] CP at 107.

statutorily prescribed powers and duties of county court clerks are enumerated in RCW 2.32.050. This statute requires that "each county clerk … file all papers delivered to him or her for that purpose in any action or proceeding in the court as directed by court rule or statute." RCW 2.32.050(4). This provision recognizes that there are two distinct actions that occur in a court filing: (1) the delivery of papers to the clerk, and then (2) the filing. In conducting a filing, a clerk is to act "*as directed by court rule or statute*." Civil Rule 5(e) explicitly recognizes the clerk's role in a filing and the ability to reject for filing submissions that do not comport with "court rule or statute":

> Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court…. **The clerk may refuse to accept for filing any paper presented for that purpose because it is not presented in proper form as required by these rules or any local rules or practices**.

(Emphasis added.)

The clerk serves an important role in the filing process; if a submission does not comport with applicable requirements, the clerk "may refuse to accept [it] for filing." CR 5(e). One such requirement is Superior Court Administrative Rule 2: "Each new civil and domestic case filing shall be accompanied by a Case Information Cover Sheet prepared

and submitted by the plaintiff." The Thurston County Superior Court has unequivocally informed parties that any new action filed without a Case Information Cover Sheet will be *rejected and returned* to the filer.[14] Thus, the Clerk of Court's rejection of NPCA's petition for review lacking a Case Information Cover Sheet was entirely consistent with the clerk's statutorily prescribed duties, and the court's prescribed rules and policies.

NPCA tries to circumvent its failure to submit its petition with a Case Information Cover Sheet by arguing the requirement is not "jurisdictional" in nature. NPCA's position twists applicable law. While the APA does not specifically identify Superior Court Administrative Rule 2 and the Case Information Cover Sheet, they are inextricably tied to statutory jurisdictional requirements. A petition for review must be *accepted* for filing within the statutory window. If the petition for review is not accepted for filing within 30 days of the final agency action, jurisdiction is not secured under the APA. RCW 34.05.542(2). Here, there is no dispute that NPCA's initial submission was not accepted for filing within the statutory window.

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[14] *See* CP 536-39 (Thurston County Clerk's Office Faulty Document Policy listing filings without a Case Information Cover Sheet as number 10 on the list of defective filings to be returned to filers).

NPCA challenges the soundness and "uniformity" of the Thurston County Superior Court Clerk's refusal to file submissions that do not include a Case Information Cover Sheet. *See* Appellant's Brief at 12-13. In an attempt to discredit the actions of the Thurston County Clerk of Court, NPCA claims the King County Superior Court Clerk will only assess a fee for failure to include a Case Information Cover Sheet, but will not reject a submission for filing. *Id*. NPCA's representation is inaccurate; in fact, the King County Superior Court Clerk is authorized to assess a fee for erroneous filings and may also return submissions. Per King County Code § 4A.630.060:

> The department of judicial administration is hereby authorized to assess a fee to anyone who files a document that requires special handling because of errors, failure to follow court rules or statutes or lack of completeness. <u>The department shall make the decision to return the document to the filer on a case-by-case basis</u>.

(Emphasis added.)

The practice in Thurston County of rejecting deficient or incomplete filings is entirely consistent with that of King County, which also authorizes the clerk to return such submissions to filers. Both procedures/policies are designed to ensure the onus is on the filing party to indicate the type of case being submitted and relied on by the clerk for processing and docketing the case. Without this document, the clerk

would be forced to use his/her discretion to interpret a submission and apply legal judgment to decide—for the party—what type of case it is, which case schedule applies, and related procedural requirements. As the Thurston County Superior Court correctly concluded, this is not the clerk's role:

> [T]he cover sheet […] is mandatory in all filings […] – because the clerk cannot determine what type of case is being filed. They have to be told what type of case is being filed, because they aren't allowed to make that sort of analysis.

Mot. Hr'g Tr. at 14:11-16. Therefore, the Thurston County Clerk of Court was justified in refusing to accept NPCA's incomplete petition for review.

2. NPCA's Petition for Review Was Not "Filed" Until August 21, 2018—Five Days After the Filing Deadline.

The Thurston County Clerk of Court rightfully refused to file NPCA's deficient petition for review submitted on August 15, 2018. A submission cannot logically be considered "filed" if a court clerk *rejects it* and *refuses to file it*:

> The use of the word "file" or "filing" in a legal sense is almost universally held to mean the delivery of the paper or document in question to the proper officer and <u>its receipt by him to be kept on file</u>.[15]

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[15] *14,766 Seattle Voters, Citizens Coal. on Domed Stadium v. Erlandson*, 9 Wn. App. 409, 412, 512 P.2d 766 (1973) (emphasis added; internal quotation marks and citation omitted). The *Erlandson* case evaluated whether the act of mailing a referendum petition

(...continued)

NPCA's petition for review was not "filed" until August 21, 2018, when it was resubmitted as a complete package (including the Case Information Cover Sheet) and received by the Clerk of Court "to be kept on file."

To be timely, the APA and the PCHB's rules require that a petition for review be "filed" within 30 days of the agency's final action. RCW 34.05.542(2); WAC 371-08-555. The APA does not contain a definition for "filing." The PCHB's rules define the term "filing" as follows:

> "Filing" of a document means **actual receipt by the board** between the hours of 8:00 a.m. and 5:00 p.m. on days other than Saturdays, Sundays, or legal holidays. The board's date stamp placed on the document shall be evidence of the date of filing.

WAC 371-08-305(6) (emphasis added). The PCHB's rules support the interpretation that filing is not mere submission of a document by a party, but rather, it must be *received* as accepted, indicating some reactive or responsive action by the clerk (or Board). The clerk's statutory duties, as well as the Rules of Civil Procedure (described in the previous section), further confirm that tendering a deficient petition for review and

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(...continued)

is sufficient to be deemed "filed," or if it must be *received* by the Comptroller's office to be "filed." The facts differ from our current case, but the interpretation by the Court of Appeals, Division 1, of the meaning of the term "file" is instructive here.

subsequent rejection of same by a clerk does not constitute a "filing." The clerk "may refuse to accept for filing" such deficient submissions. CR 5(e).

There is a similar case to this one on point. In *Rahman v. Washington Department of Employment Security*, 189 Wn. App. 1010, 2015 WL 4518347 (2015) (unpublished),[16] the Washington Court of Appeals addressed similar facts and held that a petition for review is not "filed" when it is submitted but *rejected* by the clerk for lack of a Case Information Cover Sheet.

In *Rahman*, the appellant, Shaw Rahman, attempted to file a petition for review of an unfavorable employment benefit decision by the Commissioner of the Employment Security Department. *Id*. at *1. The decision was issued and mailed to Rahman on December 13, 2013. *Id*. Rahman claimed he attempted to submit a petition for review with the superior court on January 6, 2014, well before the 30-day appeal window lapsed, but the clerk of the court *rejected* the petition because it did not contain the Case Information Cover Sheet. *Id*. Rahman did not ultimately re-submit the petition for review until January 30, 2014, which was after

[16] Pursuant to GR 14.1(a), this case may be accorded such persuasive value as the Court deems appropriate.

the 30-day appeal period.[17]

The Court of Appeals held that Rahman's unsuccessful attempt to file an incomplete petition for review was not sufficient to invoke the superior court's appellate jurisdiction:

> There are no "good cause" exceptions excusing a failure to comply with the strict filing and service requirements of the APA. *Clymer v. Emp't Sec. Dep't*, 82 Wn. App. 25, 30, 917 P.2d 1091 (1996). And even if the doctrine of substantial compliance applies, Rahman's alleged attempt to file his petition on time does not satisfy it. *See City of Seattle v. Pub. Emp't Relations Comm'n*, 116 Wn.2d 923, 928–29, 809 P.2d 1377 (1991).… Rahman does not explain why he should be excused from providing a cover sheet if that was necessary to get his petition filed on time.
>
> Rahman had 30 days from December 13, 2013, to file his petition for review with the superior court. It is undisputed that Rahman's petition was not filed within the statutory time period. Rahman has not cited authority, and we are not aware of any, that would permit this court to find that he complied with the filing deadline.
>
> Dismissal is an appropriate response to noncompliance.

Id. at *1-2.

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[17] *Id*. Rahman's appeal also suffered other deficiencies: *e.g.*, Rahman did not timely serve the Commissioner, and Rahman did not initially raise the argument that he attempted to timely file the petition for review but that it was rejected because it lacked the Case Information Cover Sheet. Nonetheless, the Court of Appeals still considered and rejected Rahman's claim that the petition for review was timely filed even though it lacked a Case Information Cover Sheet. *Id*.

NPCA similarly argues the act of sending its petition for review with a filing fee via FedEx to the Thurston County Superior Court constitutes "filing," *regardless of the fact that the Clerk of Court refused to accept the petition for filing*. NPCA relies on the definition of "filing" in RCW Chapter 36.18, which addresses "Fees of County Officers" for various services including filing legal instruments (*e.g.*, issuing marriage license, recording plats, etc.).[18] Under this chapter, "filing" is "the act of delivering an *instrument* to the auditor or recording officer for recording into the official public records." RCW 36.18.005(2) (emphasis added). NPCA's reliance on this reference is misplaced.

NPCA relies on two Washington Court of Appeals cases (one unpublished) that cite this definition for "filing."[19] The cases involve a clerk's rejection of an attempted filing because they were not accompanied by the required filing fees (which explains why the courts looked to the statutory provision on filing fees for direction). In both cases, the plaintiff/appellant did not effectively invoke the jurisdiction of the court because the initial submittals were deficient and rejected by the clerk and were thus not timely "filed." Neither case offers a basis for this Court to

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[18] Appellant's Brief at 7-9.
[19] *Id.*; *see Margetan v. Superior Chair Craft Co.*, 92 Wn. App. 240, 963 P.2d 907 (1998);

(...continued)

adopt NPCA's position that its petition for review was timely "filed" even though the Clerk of Court refused to accept the petition until after the statutory deadline.

In *Margetan v. Superior Chair Craft Co.*, 92 Wn. App. 240, 963 P.2d 907 (1998), the applicable statute of limitations ran on December 3, 1996. On November 27, 1996, the plaintiff hired a special messenger to deliver the summons and complaint to the clerk of the court's office. The messenger placed the documents in a "document filing receptacle" at the clerk's office, but did not pay a filing fee. On December 6, 1996, the plaintiff received a notice from the clerk that the documents were not accepted because he had failed to pay the filing fee. The plaintiff paid the filing fee the same day, and the clerk assigned a case number. The court concluded the claim was time-barred because "a complaint is 'filed' for purposes of commencing an action in time to toll the statute of limitations when the required filing fee is paid." 92 Wn. App. at 248.

The *Margetan* court addressed whether a complaint can be considered "filed" if it is submitted without the accompanying filing fee. The answer is no. The clerk in *Margetan* refused to file the complaint

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(...continued)

State v. Krier, 149 Wn. App. 1012, 2009 WL 597288 (2009).

because it was incomplete, and the court held that the "mere delivery of a complaint does not constitute filing." *Id*. at 246. *Margetan* in fact furthers the Superior Court's holding that a deficient submission is properly rejected by the clerk.

NPCA's reliance on *State v. Krier*, 149 Wn. App. 1012, 2009 WL 597288 (2009) (unpublished), is similarly unpersuasive. Krier appealed dismissal of his petition for judicial review of a forfeiture order. Krier mailed the petition to the superior court, but failed to include the filing fee. The clerk refused to file the petition and returned it to Krier because it lacked the filing fee. Krier resubmitted the petition with a motion to waive the filing fee, this time over a month after the appeal window closed. 2009 WL 597288, at *1. The superior court granted a motion to dismiss the appeal as untimely. *Id*.

On appeal, Krier argued, among other things, that the doctrine of substantial compliance should cure his initial attempt to timely file the appeal without the statutorily required fee. *Id*. at *2. The court rejected this argument, holding that the filing cannot be accomplished without paying the filing fee and that the doctrine of substantial compliance does not apply. *Id*. at *2-3.

The *Krier* case does not support NPCA's position here. In *Krier*, the court upheld the clerk's refusal to accept the initial petition for review because it was incomplete, lacking the filing fee. The court also rejected application of substantial compliance. If anything, this case confirms the Clerk of Court's ability to refuse to file a deficient petition, and the Superior Court's dismissal of NPCA's appeal.

NPCA also cites *City of Lakewood v. Cheng*, 169 Wn. App. 165, 279 P.3d 914 (2012), which again, is not instructive for determining whether NPCA's appeal was timely filed. In *Cheng*, the defendant was found guilty by the municipal court of two traffic violations on June 15, 2009. Cheng faxed a notice of appeal to the superior court at 4:02 p.m. on July 15, the final day of the 30-day appeal window. The court processed and docketed the filing the next morning, July 16. 169 Wn. App. at 166. The City argued the appeal was not timely "filed" because it was not processed and docketed until one day after the appeal window closed. The superior court found that the appeal was timely filed because it was submitted within the appeal window and accepted by the clerk: "[I]t sounds like [the City] accepted a fax appeal the very next morning given the exact same circumstances." *Id*. at 168 (brackets in original; internal quotation marks and citation omitted).

The *Cheng* court agreed and found the evidence of the fax transmission to the clerk on June 15, and the fact that the clerk accepted and processed the notice of appeal, as submitted, the following morning, sufficient grounds to demonstrate timely filing. *Id*. at 171. In other words, the notice of appeal was not rejected for filing by the clerk for being incomplete or deficient, as it was here. Therefore, the fact that the clerk did not perform the ministerial docketing/processing until the next morning was of no consequence. *Cheng* does not counsel in favor of finding NPCA's initial submittal timely where, as here, it has been rejected by the Clerk of Court.

Another case cited by NPCA, *State v. Robinson*, 104 Wn. App. 657, 17 P.3d 653 (2001), similarly has very little import here and only supports the Superior Court's ruling that the doctrine of substantial compliance does not apply to noncompliance with a statutory time limit.

In *Robinson*, a defendant convicted of multiple crimes filed a motion to withdraw his guilty plea. Robinson sent the motion to both the clerk and the prosecutor by priority mail three days before the one-year time limit on motions for collateral attack expired. 104 Wn. App. at 660. The prosecutor timely received the motion on the final day (a Friday), but the county clerk's office did not receive the motion until three days later

(the following Monday). *Id*. The superior court dismissed the motion as time-barred and Robinson appealed. *Id*. Robinson argued that the filing should be deemed timely because he mailed it at least three days before the deadline and as an equitable matter this should be sufficient. Alternatively, Robinson argued that substantial compliance should apply to cure the untimeliness. *Id*. at 665-66.

The *Robinson* court rejected Robinson's arguments, holding the appeal was time-barred because the motion was not delivered to the clerk until the filing deadline passed, and the doctrine of substantial compliance cannot apply to cure untimeliness. *Id*. Apart from providing another example of a court refusing to apply the doctrine of substantial compliance to a time limit, this case does not aid in determining whether NPCA's petition for review was "filed" when it was submitted but rejected by the Clerk of Court.

Unquestionably, the Clerk of Court has the authority to "*refuse to accept for filing*" deficient submittals and exercised that authority in rejecting NPCA's petition for review. A clerk's refusal to file a document means it is not filed. The cases cited by NPCA in fact confirm that the Thurston County Clerk of Court has such authority and do not direct this Court to hold otherwise.

B. The Equitable Doctrines of "Substantial Compliance" and "Constructive Filing" Do Not Cure NPCA's Untimely Filing.

NPCA did not file its petition for review until five days after the 30-day appeal deadline required under the APA. Washington courts have consistently found that "[n]oncompliance with a statutory mandate is not substantial compliance." *Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 409-10, 842 P.2d 1006 (1992). Indeed, "failure to comply with a statutorily set time limitation cannot be considered substantial compliance." *PERC*, 116 Wn.2d at 929.

NPCA argues that it "substantially complied" with the filing requirements and any defects in its filing should be disregarded by this Court.[20] In support of this argument, NPCA cites two cases interpreting and applying the statute governing tortious claims for damages brought against local governmental entities, RCW 4.96.010.[21] Reliance on these cases is misplaced. The statute governing tortious claims expressly provides: "The laws specifying the content for [claims for damages] shall be liberally construed so that substantial compliance therewith will be

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[20] *See* Appellant's Brief at 15-20.

[21] *See* Appellant's Brief at 15-17 (citing *Stevens v. City of Centralia*, 86 Wash. App. 145, 152, 936 P.2d 1141 (1997); *Burnett v. Tacoma City Light*, 124 Wash. App. 550, 559, 104 P.3d 677 (2004)).

deemed satisfactory."[22] The same instruction to "liberally construe" the requirements and allow for "substantial compliance" is not found in the statutory provision governing this appeal, RCW 34.05.542(2).

NPCA cites three additional cases in support of its argument that the Court should excuse its untimely filing.[23] These cases are distinguishable and do not direct a similar result here. In NPCA's cited cases, either the court accepted the timely filing of a petition despite its deficiencies, all parties to the case had stipulated to the petition, or the case was remanded to further evaluate whether proper service was given. *See Griffith v. City of Bellevue*, 130 Wn.2d 189, 922 P.2d 83 (1996) (petition for statutory writ of certiorari was timely filed and served, but affidavit was not signed); *Crosby v. Cty. of Spokane*, 137 Wn.2d 296, 303, 971 P.2d 32 (1999) (petition for writ of certiorari was filed without affidavit, but all parties had stipulated to issuance of the writ so "there was little point in submission of an affidavit"); *In re Saltis*, 94 Wn.2d 889, 621 P.2d 716 (1980) (case was remanded to determine adequacy of service provided to the Director of the Department of Labor and Industries in disability award case).

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[22] RCW 4.96.010(1).
[23] Appellant's Brief at 19.

This case is different. Here, the Clerk of Court refused to accept NPCA's incomplete submittal and the filing was not completed until after the appeal window closed. NPCA itself took the risk of waiting until the end of the appeal period to submit its petition, and not calling to confirm whether the submission was successful.[24] Because the petition was not accepted and filed by the Clerk of Court until 35 days after the PCHB issued its decision, the petition is untimely. Since timely filing is a jurisdictional requirement, the Superior Court's dismissal should be affirmed. *PERC*, 116 Wn.2d at 928-29 ("It is impossible to substantially comply with a statutory time limit.… [F]ailure to comply with a statutorily set time limitation cannot be considered substantial compliance with that statute.").

A recently issued ruling supports this result. In *Waste Connections of Washington, Inc. v. Department of Labor & Industries*, 5 Wn. App. 2d 902, 428 P.3d 1224 (2018), Division III of the Washington Court of Appeals refused to apply the theory of "substantial compliance" to a statutory appeal deadline:

[24] This issue was raised by the Thurston County Superior Court at the December hearing: "So why didn't you call the clerk's office to verify that they had received your materials and filed them, knowing the importance of the filing within 30 days?" *Id*. at 9:12-15.

> A court will not grant equitable relief in contravention of a statutory requirement. *Longview Fibre Co. v. Cowlitz County*, 114 Wn.2d 691, 699, 790 P.2d 149 (1990). Here, RCW 49.17.140(1) prohibits the BIAA and courts from exercising jurisdiction to hear an untimely WISHA appeal. We are without authority, through equity or artifice, to expand our jurisdiction.[25]

Per *Waste Connections*, a court cannot simply disregard a statutory appeal deadline, as NPCA asks this Court. The 30-day appeal deadline at issue here is a jurisdictional requirement under RCW 34.05.542(2). NPCA's filing was not accepted by the Court until *after* the statutory deadline. Jurisdiction was thus never timely invoked.

Another Washington Court of Appeals case, *Clymer*, 82 Wn. App. 25, is similarly instructive. The *Clymer* court upheld dismissal as appropriate when claimant's counsel filed his client's petition for judicial review one day after the deadline for filing expired. *Id*. at 26-27. Well before the statutory deadline, claimant's counsel left the original petition for review for a legal messenger, instructing the legal messenger to file it in superior court. *Id*. at 27. The messenger did not take the petition because it was not accompanied by a check. *Id*. No one at counsel's office realized that the petition had not been filed until one day after the 30-day period for filing had expired. *Id*. On that day, counsel filed the

[25] 5 Wn. App. 2d at 908.

petition for judicial review. *Id*. The court held that the claimant's failure to comply with the APA's 30-day filing requirement "resulting from a messenger's failure or refusal to accept a Petition for Review for filing, does not constitute substantial compliance." *Id*. at 29.

Washington law is consistent with the Superior Court's ruling that equitable doctrines, such as substantial compliance or constructive filing, cannot be applied to jurisdictional filing deadlines:

> The court is not allowed to disregard a statutory deadline for an appeal. The court cannot expand it. The court has no authority to act in a case until it has jurisdiction.

Mot. Hr'g Tr. 16:20-23, Dec. 14, 2018. The Superior Court properly held that NPCA's petition for review was untimely.

IV. CONCLUSION

For all the foregoing reasons, this Court should affirm the Thurston County Superior Court's dismissal of NPCA's petition for review for lack of jurisdiction.

DATED this 17th day of May, 2019.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on May 17, 2019, I caused to be served the foregoing *Response Brief of BP West Coast Products LLC* in the above-captioned matter upon the parties herein via the Appellate Court filing portal and as indicated below:

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