

FILED
Court of Appeals
Division II
State of Washington
5/17/2019 11:57 AM

NO. 53041-4-II

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

NATIONAL PARKS CONSERVATION ASSOCIATION

Appellant,

v.

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

Respondents.

**STATE OF WASHINGTON DEPARTMENT OF ECOLOGY
RESPONSE BRIEF**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE2

III. STANDARD OF REVIEW.....3

IV. ARGUMENT3

 A. The National Parks Conservation Association Timely
 Filed Its Petition for Review3

 1. A document is properly filed when it is delivered to
 the clerk’s office with the appropriate filing fee4

 2. All statutory requirements were met5

 B. The Doctrines of Constructive Filing and Substantial
 Compliance Do Not Apply7

 1. It is impossible to substantially comply with time
 limits for filing an appeal7

 2. The doctrine of constructive filing does not apply8

V. CONCLUSION10

TABLE OF AUTHORITIES

Cases

<i>Burnett v. Tacoma City Light</i> , 124 Wn. App. 550, 104 P.3d 677 (2004).....	10
<i>Cintron v. Union Pac. RR. Co.</i> , 813 F.2d 917 (9th Cir. 1987)	10
<i>City of Lakewood v Cheng</i> , 169 Wn. App. 165(70, 279 P.3d 914 (2012).....	5
<i>City of Seattle v. Pub. Emp't Relations Comm'n</i> , 116 Wn.2d 923(29, 809 P.2d 1377 (1991)	7
<i>Crosby v. Cty. of Spokane</i> , 137 Wn. 2d 296, 971 P.2d 32 (1999).....	3, 5, 10
<i>Diehl v. W. Wash. Growth Mgmt. Hearings Bd.</i> , 118 Wn. App. 212, 75 P.3d 975 (2003).....	2
<i>First Fed. Sav. & Loan Ass'n of Walla Walla v. Ekanger</i> , 93 Wn. 2d 777(82, 613 P.2d 129 (1980)	7
<i>Huber v. Home Savings and Loan Ass'n</i> , 99 Wash. 593	9
<i>Lewis Cty. v. W. Wash. Growth Mgmt. Hrgs. Bd.</i> , 113 Wn. App. 142(57, 53 P.3d 44 (2002).....	8
<i>Loya v. Desert Sands Unified Sch. Dist.</i> , 721 F.2d 279 (9th Cir. 1983)	10
<i>Margeton v Superior Chair Craft Co.</i> , 92 Wn App. 240, 963 P.2d 907 (1998).....	4
<i>Nickum v. City of Bainbridge Island</i> , 153 Wn. App. 366, 223 P.3d 1172 (2009).....	10
<i>State v. Krier</i> , (unpublished), 149 Wn. App. 1012 (2009).....	5
<i>State v. Robinson</i> , 104 Wn. App. 657, 17 P.3d 653 (2001).....	5
<i>Stevens v. City of Centralia</i> , 86 Wn. App. 145, 936 P.2d 1141 (1997).....	8, 9

<i>Waste Connections of Washington, Inc. v. Dep’t of Labor and Indus.</i> , 5 Wn. App. 2d 902, 428 P.3d 1224 (2018).....	9
---	---

Statutes

RCW 18.005	4
RCW 34.05.542(2).....	2, 5
RCW 35A.31.030.....	9
RCW 36.18	1
RCW 36.18.005(2).....	4
RCW 36.18.020(2)(c)	4, 6
RCW 36.18.020(5)(c)	4, 6
RCW 36.18.060	4
RCW 38.18.020	6
RCW 4.36.240	8

Rules

Fed. R. Civ. P. 3.....	10
Fed. R. Civ. P. 83.....	10

Other Authorities

1993 HB 1218, § 9.....	9
------------------------	---

I. INTRODUCTION

After reviewing the opening brief filed by the National Parks Conservation Association¹ and the additional authorities cited in that brief, the Department of Ecology has determined that the appeal to the Thurston County Superior Court was timely filed, and that the lack of a cover sheet was an administrative error rather than a jurisdictional error. As the National Parks Conservation Association points out, the cases interpreting RCW 36.18 make it clear that an appeal is properly filed when it is delivered to the clerk's office with the appropriate filing fee. The National Parks Conservation Association's appeal was timely delivered to the clerk with the proper fee on August 15, 2018. Ecology therefore asks the court to reverse the Superior Court ruling and remand the case. Because the appeal was timely filed, it is not necessary for the court to consider the National Parks Conservation Association's arguments concerning constructive filing and substantial compliance. Indeed, resolving this case based on constructive filing or substantial compliance would unnecessarily expand those doctrines. Ecology therefore asks the court to refrain from invoking constructive filing or substantial compliance.

¹ The National Parks Conservation Association is not the National Park Service, and is not associated with the National Park Service. CP 4. The National Parks Conservation Association is, rather, a nonprofit organization that accepts donations to help support the national parks. *Id.*

II. STATEMENT OF THE CASE

The Washington Administrative Procedure Act (APA) requires a party to file an appeal of an agency action within 30 days of receiving notice of the agency action. RCW 34.05.542(2). A petitioner has the burden of proving compliance with APA filing and service requirements. *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 118 Wn. App. 212, 219, 75 P.3d 975 (2003), *rev'd on other grounds*, 153 Wn.2d 207, 103 P.3d 193 (2004). On July 17, 2018, the Pollution Control Hearings Board issued its decision upholding a permit that Ecology had issued to BP West Coast Products LLC (BP). CP 42. The Board emailed the decision to the parties that same day. CP 208. Therefore, any appeal of the PCHB decision was required to be filed by August 16, 2018.

The National Parks Conservation Association sent its appeal of the Board's ruling via Federal Express to the Thurston County Superior Court clerk. CP 182; 188–92. The National Parks Conservation Association received confirmation from Federal Express that its appeal had been delivered to the court clerk on August 15, 2018. CP 192. The court clerk rejected the filing and returned it to the National Parks Conservation Association for lack of a required cover sheet. CP 196. The National Parks Conservation Association affixed the cover sheet and returned the appeal to the Superior Court, where it was stamped as received on August 21, 2018. CP 2, 203. The National Parks Conservation Association filed a motion with the Superior Court to clarify the filing date (CP 173–176), and Ecology and BP filed motions to

dismiss for late filing (CP 66–69 (BP)); CP 204–205 (Ecology)). The Superior Court ruled for Ecology and BP, finding that the lack of a cover sheet deprived the court of jurisdiction. CP 556–557. The National Parks Conservation Association appealed that ruling to this court.

III. STANDARD OF REVIEW

The question in this case, whether the court has jurisdiction, is a question of law subject to de novo review. *Crosby v. Cty. of Spokane*, 137 Wn. 2d 296, 301, 971 P.2d 32 (1999).

IV. ARGUMENT

A. The National Parks Conservation Association Timely Filed Its Petition for Review

After reviewing the opening brief filed by the National Parks Conservation Association and the additional authorities cited in that brief, Ecology has determined that the appeal to the Thurston County Superior Court was timely filed, and that the lack of a cover sheet was an administrative error rather than a jurisdictional error. The Thurston County Superior Court made a distinction between delivery of an appeal to the clerk’s office and acceptance of that appeal by the court. VRP, attached hereto as an Appendix, 15:1–10; 16:8–10, Dec. 14, 2019. However, as the National Parks Conservation Association points out, case law makes it clear that an appeal asking for judicial review of an agency decision is properly filed when it meets all the statutory requirements and is delivered to the clerk’s office with the appropriate filing fee. The National Parks Conservation Association’s appeal was delivered to the Thurston County

Court Clerk on August 15, 2018 along with the proper filing fee. In addition, the National Parks Conservation Association’s appeal as delivered on August 15, 2018 met all the statutory requirements for obtaining jurisdiction. Therefore, it was timely filed.

1. A document is properly filed when it is delivered to the clerk’s office with the appropriate filing fee

The Thurston County Superior Court determined that, although the National Parks Conservation Association’s petition for review was delivered to the court clerk on August 15, 2018, it was not processed and filed with the court until August 21, 2018. VRP, 14–16.

The Legislature, however, has provided that “filing” means “the act of delivering an instrument to the auditor or recording officer for recording into the official public records.” RCW 36.18.005(2). In addition, any party filing a petition for judicial review under the Administrative Procedure Act must pay a filing fee of two hundred dollars (RCW 36.18.020(2)(c)) plus a surcharge of forty dollars (RCW 36.18.020(5)(c)). “[O]n such payment, the officer must perform the services required.” RCW 36.18.060.

Courts have interpreted these provisions to mean that a document is filed with the court when it is delivered to the clerk’s office with the required filing fee. *Margeton v Superior Chair Craft Co.*, 92 Wn App. 240, 246, 963 P.2d 907 (1998) (RCW 18.005 dictates that a document is filed with the court when it is delivered to the clerk’s office

with the required filing fee); *State v. Krier* (unpublished), 149 Wn. App. 1012 (2009) (same); *State v. Robinson*, 104 Wn. App. 657, 668, 17 P.3d 653 (2001) (a document is filed with the clerk when it is delivered to the clerk); *City of Lakewood v Cheng*, 169 Wn. App. 165, 169–70, 279 P.3d 914 (2012) (transmission of a notice of appeal to the clerk rendered it timely filed). Under these cases, the determining factor for determining the filing date is when the documents (and fee) are provided to the clerk’s office, not when they are accepted by the court.

Here, the National Parks Conservation Association appeal was delivered to the court clerk on August 15, 2019. CP 192. The appeal was accompanied by the required filing fee. CP 185. Therefore, the appeal was in fact timely filed on August 15, 2019.

2. All statutory requirements were met

In appealing to the Thurston County Superior Court, the National Parks Conservation Association sought to invoke the superior court’s limited appellate jurisdiction under the Administrative Procedures Act. CP 2. When a superior court acts in an appellate capacity, it has only such jurisdiction as is conferred by law. *Crosby v. Cty. of Spokane*, 137 Wn.2d 296, 300–301, 971 P.2d 32 (1999). Thus, statutory procedural requirements must be satisfied before a superior court’s appellate jurisdiction is invoked. *Id.* Under the Administrative Procedure Act, a petition for judicial review must be filed in superior court and served on the agency, the Office of the Attorney General, and all parties of record within 30 days of service of an agency final order. RCW 34.05.542(2).

Under RCW 38.18.020, the filing must be accompanied by a two hundred dollar filing fee plus a forty dollar surcharge. RCW 38.18.020(2)(c); (5)(c).

Here, the Pollution Control Hearings Board issued its final decision on July 17, 2018. CP 42. The National Parks Conservation Association delivered its petition for judicial review to the Thurston County Superior Court on August 15, 2018, accompanied by the required filing fee. CP 192; 185. On that same day, the National Parks Conservation Association served BP, Ecology, the Attorney General's Office, and the Pollution Control Hearings Board. CP 188–191. Therefore, the statutory requirements set forth in the Administrative Procedure Act and RCW 38.18.020 were met.

The requirement for a cover sheet is not a statutory requirement—it is contained in a superior court administrative court rule (AR). AR 2. Therefore, the lack of a cover sheet was an administrative defect that did not deprive the superior court of jurisdiction. This conclusion is supported by the fact that other superior courts treat the lack of a cover sheet as an administrative defect rather than a jurisdictional defect. For example, King County Superior Court treats the omission of a cover sheet as an administrative deficiency deserving of a penalty. Opening Br. at 12–13.

The determination that the lack of a cover sheet is an administrative defect rather than a jurisdictional defect is further supported by the direction from the Washington Supreme Court to apply procedural

rules “in such a way that substance will prevail over form.”

First Fed. Sav. & Loan Ass’n of Walla Walla v. Ekanger, 93 Wn. 2d 777, 781–82, 613 P.2d 129 (1980).

B. The Doctrines of Constructive Filing and Substantial Compliance Do Not Apply

Because the National Parks Conservation Association timely filed its appeal, the Court need not reach the questions of constructive filing and substantial compliance. Ecology asks the Court to refrain from invoking those doctrines, as applying them in this case would expand them unnecessarily.

1. It is impossible to substantially comply with time limits for filing an appeal

The National Parks Conservation Association argues that it substantially complied with the time limit for filing its appeal. Opening Br. at 18–21. The Supreme Court, however, has determined that substantial compliance cannot satisfy time limits for filing an appeal. *City of Seattle v. Pub. Emp’t Relations Comm’n*, 116 Wn.2d 923, 928–29, 809 P.2d 1377 (1991) (Service after the time limit cannot be considered to have been actual service within the time limit. Failure to comply with a statutorily set time limitation cannot be considered substantial compliance with that statute). As the court stated, “It is impossible to substantially comply with a statutory time limit in the same way [as a service requirement]. It is either complied with or it is not.” *Id* at 929. Here, as discussed above, the National Parks Conservation Association complied

with the time limit. Therefore, there is no need for the court to invoke substantial compliance. To do so would contradict the Supreme Court and impermissibly expand the doctrine of substantial compliance.

Similarly, invoking RCW 4.36.240, as the National Parks Conservation Association tries to do (Opening Br. at 18), would deviate from judicial precedent and expand the applicability of the statute.

RCW 4.36.240 states:

The court shall, in every stage of an action, disregard any error or defects in the pleadings which shall not offset the substantive rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.

This court has determined that RCW 4.36.240 applies only after an action has been commenced and does not apply to jurisdictional determinations associated with filing a lawsuit. *Lewis Cty. v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 113 Wn. App. 142, 156–57, 53 P.3d 44 (2002) (refusing to apply RCW 4.36.240 to excuse late payment of filing fee). The court found that RCW 4.36.240 was designed to prevent the reversal of a judgment entered by a court having jurisdiction, not to mandate the waiver of jurisdictional defects. *Id.* Invoking RCW 4.36.240 in this case would therefore contradict that case and expand the applicability of that statute.

2. The doctrine of constructive filing does not apply

The National Parks Conservation Association argues that its appeal was constructively filed on August 15, 2018 when it was first received by the clerk's office, in accordance with *Stevens v. City of*

Centralia, 86 Wn. App. 145, 152, 936 P.2d 1141 (1997). Opening Br. at 15. As discussed above, the National Parks Conservation Association actually filed its appeal on time. Therefore, there is no need for the Court to look to constructive filing. Moreover, no court in Washington has applied the doctrine of constructive filing to the filing of a lawsuit with a court. Therefore, invoking constructive filing in this case would unnecessarily expand that doctrine.

The *Stevens* case cited by the National Parks Conservation Association concerned providing notice to a city in advance of initiating a tort claim, not the filing of a lawsuit with a court. *Stevens*, 86 Wn. App. at 147, citing RCW 35A.31.030;² *Id.* at 149. In that case, the city clerk refused to accept Mr. Stevens' attempt to file the required notice. *Id.* at 149. The Court determined that the city's refusal to accept the notice was analogous to a creditor's refusal to accept tender of payment, and that such refusal waived any claims of formality concerning the manner in which the tender was offered. *Id.* at 152, citing *Huber v. Home Savings and Loan Ass'n*, 99 Wash. 593, 596, 169 P.979 (1981). Here, the issue concerns the filing of a lawsuit. A court may not waive the formalities required for filing. See, e.g. *Waste Connections of Washington, Inc. v. Dep't of Labor and Indus.*, 5 Wn. App. 2d 902, 908, 428 P.3d 1224 (2018).

² In mid-1993, after the actions that formed the basis for the *Stevens* case occurred, RCW 35A.31.030 was amended to remove the 60-day notice requirement. 1993 HB 1218, § 9.

The other case cited by the National Parks Conservation Association, *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 559, 104 P.3d 677 (2004), is equally inapplicable as it concerns the application of the same statute requiring notice to a city prior to the filing of a tort claim. *Id.* at 558. Indeed, in *Burnett*, the court found that constructive filing had not occurred. *Id.* at 559. Thus, in Washington, the concept of constructive filing has not been applied to the filing of a lawsuit with a court.³ To do so here is unnecessary and would expand that doctrine for no reason.

V. CONCLUSION

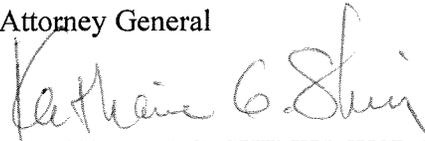
For the reasons outlined above, Ecology asks the Court to reverse the superior court by finding that the National Parks Conservation Association timely filed its appeal, and to remand this case back to the superior court for reinstatement of the National Parks Conservation Association's appeal, which will authorize this Court to reinstate

³ National Parks Conservation Association cites two federal cases that have recognized constructive filing of lawsuits. Opening Br. at 13. These federal cases are not applicable here. First, as federal cases construing federal law, they are not binding on this court's determinations under state law. Second, they construe federal requirements whose language differs from state rules. *Cintron v. Union Pac. RR. Co.*, 813 F.2d 917, 919 (9th Cir. 1987) (construing Fed. R. Civ. P. 3); *Loya v. Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 280 (9th Cir. 1983) (construing Fed. R. Civ. P. 83). Third, unlike these federal cases, the appeal in this case sought to invoke the superior court's jurisdiction as an appellate court to review a decision by the Pollution Control Hearings Board. Opening Br. at 1. When a superior court acts in an appellate capacity, it has only such jurisdiction as is conferred by law. *Crosby*, 137 Wn.2d 296 at 300–301. Thus, statutory procedural requirements must be satisfied before a superior court's appellate jurisdiction is invoked. *Id.* A statutory filing deadline is jurisdictional, and failure to meet the deadline deprives the court of jurisdiction. *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 381–82, 223 P.3d 1172 (2009).

consideration of the National Parks Conservation Association's Request
for Direct Review in this Court.

RESPECTFULLY SUBMITTED this 17th day of May 2019.

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing document with the Clerk of the Court of Appeals, Division II, using the CM/ECF system, which will send notification of such filing to all parties of record.

DATED this 17th day of May 2019.



MEAGHAN KOHLER
Legal Assistant

APPENDIX

Verbatim Report of Proceedings
Thurston County Superior Court No. 18-2-4146-34
December 14, 2018

FILED

Court of Appeals
Division II
State of Washington
1/31/2019 9:56 AM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

NATIONAL PARKS CONSERVATION ASSOCIATION,)	
)	
Plaintiff,)	COURT OF APPEALS
)	NO. 53041-4-II
vs.)	
)	THURSTON COUNTY
WASHINGTON STATE DEPARTMENT OF ECOLOGY, et al.,)	NO. 18-2-4146-34
)	
Defendants.)	
)	

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on December 14, 2018, the above-entitled matter came on for hearing before the HONORABLE CHRISTINE SCHALLER, Judge of Thurston County Superior Court.

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1 THE COURT: On the dispositive motion
2 calendar, we have numbers one through three,
3 18-2-4146-34, National Parks Conservation Association
4 versus the Department of Ecology and BP Coast
5 Products, if I said that correctly. Go ahead and
6 come forward.

7 These matters are before the court on two motions
8 to dismiss and one motion to verify the filing date
9 and issue of jurisdiction. And I will have counsel
10 please identify themselves for the record. I'm going
11 to start here and just go across.

12 MS. BRIMMER: Your Honor, Janette Brimmer on
13 behalf of National Parks Conservation. With me in
14 the courtroom is Ashley Bennett.

15 THE COURT: Thanks.

16 MS. COX: Rachel Cox on behalf of BP West
17 Coast Products, and I have with me in the courtroom
18 Vanessa Power.

19 THE COURT: Thank you.

20 MS. SHIREY: K. Shirey on behalf of Washington
21 State Department of Ecology.

22 THE COURT: Thank you. I have reviewed all of
23 the materials that have been submitted in this matter
24 and am prepared to hear argument. The first motion
25 was filed by BP West Coast, and so I will hear

1 argument from them first. Ms. Cox.

2 MS. COX: Thank you, Your Honor. Jurisdiction
3 is a fundamental threshold matter, and the court's
4 jurisdiction for appellate review is limited and
5 strictly defined by statute. Creating exceptions to
6 the statutory limits leads to a slippery slope of
7 expanding the court's jurisdiction.

8 In this case, the Washington Administrative
9 Procedure Act requires an appeal from a final order
10 by the PCHB to be completed within 30 days of receipt
11 of the order. NPCA's appeal was not perfected and
12 filed within that statutory 30-day deadline. While
13 NPCA attempted to file the petition one day prior to
14 the deadline, the filing was incomplete and found to
15 be deficient by the clerk of the court and properly
16 rejected, and it wasn't filed until five days after
17 the 30-day appeal deadline when it was submitted as a
18 complete package.

19 The clerk's rejection of the filing is consistent
20 with the clerk's policy on faulty documents, as
21 explained in the Department of Ecology's briefing.
22 The filing package lacked the case information cover
23 sheet, which is an important document. The court --
24 the clerk of the court relies on this document to
25 indicate what type of case the party is intending to

1 file. Without that, the clerk of the court would be
2 forced to evaluate the pleadings and use legal
3 judgment to determine what type of case is this going
4 to be and how it should be docketed and processed in
5 the court system. That is why the court places the
6 duty on the filing party under the Superior Court
7 administrative rules.

8 As I said before, NPCA's petition for review was
9 not accepted for filing, not processed until five
10 days after the 30-day deadline, and a timely attempt
11 of filing that is rejected due to such deficiencies
12 does not satisfy the jurisdictional requirements.
13 There are no Washington cases directly on point with
14 the facts that we have here, but Washington caselaw
15 is clear that equitable doctrines such as substantial
16 compliance do not apply to statutory deadlines.
17 Deadlines should be strictly construed.

18 Dismissal of this case is warranted and would be
19 consistent with Washington caselaw, which holds that
20 it is impossible to substantially comply with the
21 statutory time limit and other cases that hold that a
22 court will not grant equitable relief in
23 contravention of a statutory requirement. And on
24 those grounds, we respectfully request that NPCA's
25 appeal be dismissed for lack of jurisdiction.

1 THE COURT: Thank you. So I'm going to hear
2 -- although the next motion that was filed was the
3 National Parks motion, I'm going to go ahead and just
4 hear both the motions to dismiss, and then I will
5 hear the motion to verify. Is it Shirey?

6 MS. SHIREY: Shirey.

7 THE COURT: Apologize. Ms. Shirey on behalf
8 of Ecology.

9 MS. SHIREY: Good morning. May it please the
10 court, my name is K. Shirey on behalf of Washington
11 State Department of Ecology. We are here today to
12 learn the import of this court's action in rejecting
13 NPCA's defective appeal. NPCA found no cases that
14 dictate the outcome here. They have cited federal
15 cases that found constructive filing, there are no
16 state cases that have found constructive filing of a
17 court -- of a lawsuit in court. The federal cases
18 construe different law using different language,
19 different rules, and those cases base their results
20 on a conclusion that does not apply here, that
21 conclusion that local rules should not be elevated
22 above general rules. But here, the rule that NPCA
23 failed to meet was a statewide rule, not a local
24 rule.

25 We cite to a recent Washington State case, *Waste*

1 *Connections of Washington vs. Department of Labor and*
2 *Industries* that was decided in October of 2018. And,
3 in that case, which has facts reasonably similar to
4 the facts here, a filing was determined to be late,
5 even though it was placed in the mail on time, but it
6 had insufficient postage, and the post office
7 returned it to the filer, and the judge determined
8 that the submission had not been mailed if it had not
9 had the proper postage on it. And in that case, the
10 statute said that once something is placed in the
11 mail, it had been filed. But here -- so the court
12 rejected that argument saying it had -- in order to
13 be filed, it had to be properly filed -- mailed. It
14 had to be properly mailed with the proper postage.

15 Similar here, a case needs to be filed by a
16 certain date, and "filing" should imply proper
17 filing. In this case, it was a defective filing. As
18 Ms. Cox pointed out, this court's jurisdiction is
19 being invoked in its limited appellate capacity, not
20 in its general capacity, and its jurisdiction is
21 dictated by statute.

22 Under the circumstances of this case and the cases
23 that we cite in our pleadings, we ask the court to
24 find that NPCA's defective filing did not invoke the
25 jurisdiction of this court and that its later

1 corrected filing was untimely. Thank you.

2 THE COURT: Thank you. Ms. Brimmer.

3 MS. BRIMMER: Thank you, Your Honor. Janette
4 Brimmer on behalf of National Parks Association.
5 This case is properly before the court as it appealed
6 from the Pollution Control Hearings Board because all
7 of the statutory requirements were met in this case,
8 and the substantive rights of the parties have not
9 been adversely affected, and those are the key
10 components under applicable statute and caselaw for
11 consideration, for the court to consider this matter
12 timely filed and that jurisdiction is proper.

13 The statutory requirements for an appeal from the
14 Pollution Control Hearings Board includes a petition
15 for judicial review, which identifies the issues
16 being appealed, the decision appealed, the basis for
17 the appeal. It requires service, and those things
18 must be filed within 30 days of the PCHB's decision
19 with a filing fee. Here, the decision was July 17th
20 of 2018. That was the date that the PCHB issued its
21 decision. All of those statutory requirements were
22 met in this case. The petition is proper. It
23 includes the decision appealed from. It was filed
24 and received -- it was received at Thurston County on
25 day 29 of the 30-day appeal period, and it met all

1 the statutory requirements. It did not meet the
2 general rule for a cover sheet, which would have
3 included my e-mail address, which was part of the
4 cover letter and the pleadings as well, and it would
5 have included a box checked to say that this was an
6 appeal from an administrative decision.

7 So that is a correct characterization of what was
8 missing, and we don't make light of that that was
9 missing. We did not receive notice that that was
10 missing until approximately a week after filing when
11 we received the entire packet back in regular mail.

12 THE COURT: So why didn't you call the clerk's
13 office to verify that they had received your
14 materials and filed them, knowing the importance of
15 the filing within 30 days?

16 MS. BRIMMER: Your Honor, we did not call. We
17 did send it certified mail, and we received that
18 back.

19 THE COURT: Right.

20 MS. BRIMMER: And, again, because we did not
21 know that we were missing that particular document --

22 THE COURT: So you just assumed that
23 everything was fine instead of calling to ensure,
24 since you were filing -- and I'm not -- many people
25 file at the deadline for very good reasons.

1 MS. BRIMMER: Yes.

2 THE COURT: But you knew you were filing at
3 the very end. So I still don't think you answered my
4 question as to why there wasn't a phone call to the
5 clerk's office to ensure that not only they'd
6 received it, you knew they had received it, but that
7 they processed it.

8 MS. BRIMMER: Your Honor, for whatever reason,
9 we had no reason to believe that -- once we confirmed
10 receipt and we knew we had met the statutory
11 requirements, we didn't have a reason to think there
12 was a problem --

13 THE COURT: Do you regularly file things in
14 Superior Court that don't have a cover sheet on them?

15 MS. BRIMMER: Your Honor, we do not regularly
16 file things that don't have a cover sheet on them,
17 that's correct.

18 THE COURT: Well, all right. Go ahead.

19 MS. BRIMMER: Turning to the arguments that
20 have been made with respect to both the motion to
21 dismiss and our motion to the court concerning filing
22 and jurisdiction, first off, I would like to say that
23 we did disagree strongly that there is no case on
24 point. There is no case about an appeal from the
25 Pollution Control Hearings Board, that is correct,

1 but I would direct the court's attention to the
2 *Stevens vs. City of Centralia* case that has been
3 cited to in a number of pleadings before the court.
4 That case is extremely similar to the case here,
5 where the plaintiff filed an appeal, and, again, it
6 was an administrative appeal, with the appropriate
7 clerk's office with the appropriate documents, but at
8 the time, the clerk refused to accept it for filing
9 because it was not presented on the required
10 preprinted form. And the filing was at the very end
11 of the appeal time, it was near the end of the day,
12 and so the deadline was missed.

13 In that instance, the Court of Appeals of
14 Washington determined the claim was constructively
15 filed as of the date first received by the clerk's
16 office because it was timely presented with all of
17 the statutorily required components for an appeal,
18 and that it, therefore, met the requirements.

19 And I would also direct the court's attention to
20 RCW 4.36.240 about defects and errors at every stage
21 of the litigation. The court is aware of that
22 statute. We have presented arguments on that. And I
23 would like to respond to something in the reply
24 briefing from -- I think it was from the State and/or
25 BP, which talked about, well, this isn't really at a

1 stage of the litigation because we were filing the
2 appeal anew. And I would just submit that that is
3 not supported by a plain reading of the statute, that
4 every stage of the litigation, appeal is an ongoing
5 stage of litigation that has been going on for quite
6 some time, and that is a reading that is not
7 supported by any caselaw nor by the plain language of
8 the statute.

9 I would also -- we have supplied the court with a
10 number of cases, both Washington cases and similar
11 federal cases, for guidance if the court chooses to
12 review them. We understand that that's not a
13 precedent for this court, but to demonstrate to the
14 court the concept of constructive filing in
15 situations where repeatedly are similar to this.

16 I would also like to address the recent decision
17 of *Waste Connections of Washington*. I think Ms.
18 Shirey addressed that in her argument. That is a
19 distinguishable case and quite readily
20 distinguishable. In that case, with insufficient
21 postage, the pleadings never arrived at the
22 designated place. It was not that they arrived and
23 were rejected for failure to meet a requirement under
24 administrative rules; it was that they just never
25 arrived there in the first instance. And I think

1 that that's important, because that is a statutory
2 requirement; whereas, here, statutory requirements
3 were met.

4 And the last note that I would like for the court,
5 again, we have put this in the briefing, substantial
6 compliance is a concept that is recognized in
7 Washington. Washington courts have applied it, and,
8 again, it can't apply to excuse failure to meet a
9 statutory requirement. But we submit here that we
10 have met the statutory requirements. And substantial
11 compliance is also a doctrine that can be applied
12 here by the court to find that it has jurisdiction.
13 Thank you.

14 THE COURT: Thank you. I'm not going to hear
15 any rebuttal argument.

16 So, this matter is before the court on two motions
17 to dismiss, one brought by BP West Coast Products and
18 one brought by Department of Ecology and then
19 National Parks Conservation Association to verify the
20 filing date and to verify this court has
21 jurisdiction. On July 17, 2018, the PCHB issued and
22 served its decision from a hearing that had happened
23 back in April of this year. It issued the decision
24 and served it by both e-mail and the United States
25 mail. On August 14, 2018, that's the date that

1 appeared on the petition for judicial review. On
2 August 15, 2018, National Parks provided copies of
3 the petition by e-mail to Ecology and BP and
4 indicated by way of the transmission of that by
5 e-mail that it was being filed that day in Thurston
6 County.

7 On August 15, 2018, there is confirmation from
8 Federal Express that they had delivered the materials
9 from National Parks to the Thurston County clerk.
10 And that contained all of the appropriate documents
11 for filing, except for the cover sheet, which is
12 mandatory in all filings so that -- because the clerk
13 cannot determine what type of case is being filed.
14 They have to be told what type of case is being
15 filed, because they aren't allowed to make that sort
16 of analysis. Therefore, the clerk, although they
17 received those documents, they did not process them
18 and they did not file them. The 30th day to file the
19 petition for review was August 16, 2018.

20 On August 20, 2018, National Parks received the
21 materials back from the clerk's office with a note
22 indicating they were being returned because they
23 could not be accepted for filing because there was no
24 cover sheet.

25 And I just want to be clear. Sometimes in the

1 briefing, it talked about Thurston County Superior
2 Court, and then it will talk about the clerk. I know
3 the parties know this, but I just want the record to
4 be clear. The clerk and the court are two separate
5 entities. Although the clerk maintains the court's
6 records, they run their office based upon the elected
7 clerk's policies and procedures. So when they
8 rejected the filing, it was the clerk who rejected
9 the filing. The court did not in and of itself
10 reject the filing. And I believe that was the
11 wording in one of the briefs that I read.

12 On that same date, National Parks re-sent the
13 entire package back with the correct cover sheet,
14 and, therefore, it was ultimately filed on August 21,
15 2018, here in Thurston County, which was five days
16 after the 30-day deadline to file a petition for
17 review.

18 As is cited in everyone's materials, I believe,
19 certainly as it relates to a petition of review for
20 an administrative decision, the court does not sit in
21 general jurisdiction as we do for the majority of the
22 things that Superior Court hears, and, instead, we
23 sit in an appellate capacity. So the court only has
24 jurisdiction to act if the proper -- if the law is
25 followed. That would convey jurisdiction in an

1 appellate capacity. The court does not obtain this
2 appellate jurisdiction, again, until after all
3 statutory procedural requirements are satisfied.

4 The APA specifically sets forth in RCW 34.05.542
5 the procedures as it relates to the time for filing
6 the petition for review, and under subsection (2), it
7 indicates, "Petition for judicial review of an order
8 shall," it's mandatory, "be filed with the court,"
9 even though it's not with the court, it's with the
10 clerk for the court, "and served on the agency, the
11 office of the Attorney General, and all parties of
12 record within 30 days after service of the final
13 order."

14 It is clear and undisputed that, in fact, the
15 petition for review was not filed within 30 days.
16 And so the issue is whether or not the court could
17 use substantial compliance or a theory like
18 substantial compliance that would allow for the court
19 to indicate that it had jurisdiction and verify the
20 filing date. The court is not allowed to disregard a
21 statutory deadline for an appeal. The court cannot
22 expand it. The court has no authority to act in a
23 case until it has jurisdiction.

24 I just would like to indicate also that,
25 realistically, the court doesn't like to dismiss

1 cases and not get to the merits. The court should
2 get to the merits of cases. But with that said, we
3 have a statute of limitations. We have statutes that
4 set forth specific requirements. And, in this case,
5 the specific requirements have to be met or we don't
6 have jurisdiction.

7 We don't have jurisdiction in this case, and,
8 therefore, I'm required to dismiss this action for
9 lack of jurisdiction. I grant the two motions that
10 were filed by the Department of Ecology and BP West
11 Products. I deny the motion that has been brought by
12 National Parks Conservation Association. I will sign
13 the orders once you've been able to circulate them
14 amongst yourselves.

15 MS. COX: Thank you, Your Honor.

16 MS. SHIREY: Thank you, Your Honor.

17 THE COURT: Thank you.

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CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, AURORA J. SHACKELL, CCR, Official Reporter of the Superior Court of the State of Washington in and for the County of Thurston do hereby certify:

1. I reported the proceedings stenographically;
2. This transcript is a true and correct record of the proceedings to the best of my ability, except for any changes made by the trial judge reviewing the transcript;
3. I am in no way related to or employed by any party in this matter, nor any counsel in the matter; and
4. I have no financial interest in the litigation.

Dated this 31st day of January, 2019.

AURORA J. SHACKELL, RMR CRR
Official Court Reporter
CCR No. 2439

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

May 17, 2019 - 11:57 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53041-4
Appellate Court Case Title: National Parks Conservation Association, Appellant v. State Ecology, et al.,
Respondents
Superior Court Case Number: 18-2-04146-2

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