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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.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

This appeal presents a straight-forward legal question on the jurisdictional requirements for filing a timely appeal. Appellants National Parks and Conservation Association (“NPCA”) sent the Thurston County Superior Court its Petition for Review of a decision of the Pollution Control Hearings Board (“PCHB”) with the appropriate filing fee; the Superior Court received the petition and fee within the 30-day appeal deadline. Delivery of the petition and filing fee to the Thurston County Clerk’s Office (“Clerk’s Office”) are the only statutory requirements for perfecting an appeal. As argued in its opening brief and now joined by Respondent Department of Ecology (“Ecology”), the missing cover sheet, required by administrative court rule, did not make the filing untimely. NPCA respectfully asks the Court to reverse the Superior Court and direct the filing of the Petition for Review.

ARGUMENT

I. NPCA PROPERLY INVOKED THE SUPERIOR COURT’S JURISDICTION OVER ITS APPEAL.

NPCA properly invoked the Superior Court’s jurisdiction when it timely met the statutory requirements for judicial review set out in RCW 34.05.514, 34.05.542, 34.05.546 and WAC 371-08-555; *Stewart v. State, Dep’t of Employment Sec.*, 191 Wn.2d 42, 52, 419 P.3d 838, 843 (2018),

as amended (Aug. 30, 2018) (requiring all statutory procedural requirements to be met for judicial review of an administrative decision).

A. NPCA Timely Satisfied the Statutory Requirements for Filing Its Petition for Review with the Superior Court.

NPCA met the statutory deadline to file its appeal by delivering its Petition for Review with the required filing fee to the Clerk’s Office on August 15, 2018—29 days after the PCHB issued its Final Decision. *See* RCW 34.05.514(1); RCW 34.05.542(2); and WAC 371-08-555.

Washington statutes and case law make clear that a document is properly filed when it is delivered to the clerk’s office with the appropriate filing fee. RCW 36.18.005(2) (defining filed as the “act of delivery”), RCW 36.18.020(2) (filing fees), RCW 36.18.060 (tender of fees); *Margetan v. Superior Chair Craft Co.*, 92 Wn. App. 240, 246, 963 P.2d 907, 910 (1998) (explaining that RCW 36.18.005 dictates that a document is filed with the court when it is delivered to the clerk’s office with the required filing fee).

As NPCA previously explained, NPCA timely filed its appeal when the Clerk’s Office verified its receipt of NPCA’s Petition for Review and filing fee on August 15, 2018—one day before the deadline. Clerk’s Papers (“CP”) at 183, 189, 192. *See* RCW 34.05.514(1); RCW 34.05.542(3); and WAC 371-08-555; *see also* NPCA Opening Br. at 7-10. On that same day, NPCA timely served its Petition for Review on

Ecology, the Attorney General's Office, and Respondent BP West Coast Products ("BP"). RCW 34.05.542(2); WAC 371-08-555; CP at 182-88, 190-91. NPCA also filed a copy of its Petition for Review with the PCHB. WAC 371-08-555. NPCA's Petition for Review gave full and complete notice of the appeal, the grounds for appeal, and the issue appealed. RCW 34.05.546; CP at 2-13. NPCA's Petition for Review included copies of the PCHB's Final Decision and Order on Summary Judgement Motions. RCW 34.05.546; CP at 2, 3, 14-65.

The Superior Court found that NPCA's appeal was untimely based on the clerk's refusal to accept NPCA's filing without a cover sheet as required by Superior Court Administrative Rule ("AR") 2. While obviously an error, and while a cover sheet is understandably an important tool for court administration, the cover sheet is not a statutory jurisdictional requirement. As NPCA discussed in its opening brief (at 9-10, 12), the statutes that govern the judicial review of PCHB decisions contain no reference to AR 2 or any other cover sheet requirement. AR 2 is a rule of administrative convenience that, like the civil rules themselves, cannot deprive the superior court of jurisdiction. *Diehl v. W. Washington Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 216-17, 103 P.3d 193 (2004) (“[s]uperior court civil rules are procedural rules...and thus do not purport to extend [or limit] subject matter jurisdiction of the court.”)

(quoting *Vasquez v. Dept. of Labor & Indus.*, 44 Wn. App. 379, 383, 722 P.2d 854 (1986)).

Washington law explicitly counsels against elevating a procedural requirement not mandated by statute to the level of a jurisdictional prerequisite. *Conom v. Snohomish County*, 155 Wn.2d 154, 162, 118 P.3d 344 (2005) (explaining that the courts will not elevate a procedural requirement to a jurisdictional threshold requirement); *Quality Rock Prod., Inc. v. Thurston Cty.*, 126 Wn. App. 250, 271-72, 108 P.3d 805 (2005) (declining to elevate the civil rule requirements for the caption of a petition to a jurisdictional threshold.); *Biomed Comm. Inc. v. State Dep't of Health Bd. of Pharmacy*, 146 Wn. App. 929, 940-42, 193 P.3d 1093 (2008) (echoing that the court “will not read into [a] statute a jurisdictional ... requirement where the legislature has not stated one.”). Yet that is exactly what BP urges the court to do here with AR 2. BP Resp. Br. at 8. This Court should reject BP’s invitation to turn NPCA’s administrative error into a jurisdictional barrier.

B. Ecology Agrees that NPCA Timely Filed Its Appeal.

Before the Superior Court, Ecology joined BP in arguing that NPCA’s appeal was untimely filed. Further review, however, has changed Ecology’s position. “After reviewing the opening brief filed by [NPCA] 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.” Ecology Resp. Br. at 3. Ecology now agrees with NPCA that a petition for review is properly filed when it is delivered to the clerk’s office with the appropriate filing fee and that in this case NPCA met all statutory requirements. Ecology Resp. Br. at 4-6. Ecology’s change of heart provides further support to reverse the decision of the Superior Court and reinstate NPCA’s appeal.

II. BP PRESENTS NO VALID ARGUMENTS IN REBUTTAL.

BP’s efforts to contest NPCA’s showing that its Petition for Review was timely fail for several reasons. First, Washington case law provides the proper construction of the term “filing” and how it should apply in this matter. Second, BP’s distorted interpretation of “filing” defies logic and disregards Washington law and jurisprudence. Finally, the unpublished opinion that BP cites as support for its argument that a cover sheet is a requirement for filing is distinguishable and unpersuasive.

A. Washington Case Law Verifies the Statutory Requirements for Filing.

BP argues that the definition of “filing” relied on by NPCA is inapplicable in this case. As support, BP cites the fact that the definition of filing comes from cases in which the courts found that an initial submission did not constitute filing. BP Resp. Br. at 14-19. Yet

regardless of the factually specific outcomes in the cited cases, each court set a clear standard for when a document is properly filed that BP cannot avoid. *See Margetan*, 92 Wn. App. at 246 (explaining that a document is filed with the court when it is delivered to the clerk's office with the required filing fee); *State v. Robinson*, 104 Wn. App. 657, 668, 17 P.3d 653 (2001) (finding that "[a] document is filed with the clerk when it is delivered to the clerk.").

BP's argument also ignores the fact that in each case where the court found that an initial submission did not constitute a filing, it did so because a statutorily required element for filing was not met. Under Washington law, a document is filed when it is delivered to (meaning received by) the proper clerk's office with the appropriate filing fee. *See Robinson*, 104 Wn. App. at 668, 670 (finding a motion to withdraw a guilty plea time-barred because the clerk's office did not receive delivery of it until after the statutory deadline had expired); *Margetan*, 92 Wn. App. at 248 (pleading was not properly filed with the court because it was delivered to the clerk's office without the statutorily required filing fee.); *State v. Krier*, 149 Wn. App. 1012, 2009 WL 597288 *2-3 (2009) (unpublished) (not reported in P.3d) (pleading was not filed when the clerk's office refused to accept it without the statutorily required filing fee). Here, NPCA satisfied the definition of filing by delivering its

Petition for Review with the required fee to the Clerk's Office before the statutory deadline.

Further, BP's attempt to distinguish this case from *City of Lakewood v. Cheng*, 169 Wn. App. 165, 279 P.3d 914 (2012) fails. BP states that the court in *Cheng* found that a notice of appeal was timely filed, in part, because "the clerk accepted and processed [it], as submitted, the following morning [after the appeal deadline expired]." BP Resp. Br. at 18. This representation is inaccurate. In *Cheng*, the court concluded that a notice of appeal was timely filed even though the clerk's office did not acknowledge its receipt until after the statutory deadline had passed. *Cheng*, 169 Wn. App. at 169-70. The *Cheng* court determined that the filer's transmission verification report provided sufficient evidence of the date that the clerk's office received the notice of appeal via fax. *Id.*, 169 Wn. App. 165, 169-70 (citing Black's Law Dictionary at 628 (6th ed.1990) (defining "filing with court" as the "[d]elivery of legal document to clerk of court or other proper officer with intent that it be filed with court")). The same result is warranted in this case.

B. BP Misconstrues the Term "Filing."

BP also argues that NPCA's submission of its Petition for Review to the Clerk's Office on August 15, 2018 did not constitute filing because the Clerk's Office refused to accept it. According to BP, "filing" means

that a document must be delivered and “received as accepted, indicating some reactive or responsive action by the clerk...” BP Resp. Br. at 11. This interpretation of “filing” not only sets up a false distinction between delivery and receipt, but it also substitutes acceptance for simple receipt yet cites nothing to support such a substitution.

Despite the definition of “filing” established by Washington statutes, BP relies on the PCHB Rules for its argument that “filing” encompasses acceptance. Under the PCHB Rules, the definition of filing provides that the “clerk’s filing stamp is evidence of the time and date of delivery.” WAC 371-08-305(6). BP points to this statement to confirm its interpretation of “filing” as meaning the acceptance of a document, indicated by the clerk taking some responsive action. BP Resp. Br. at 11. This reliance on the PCHB Rules to construe “filing” is improper.

As explained above and in NPCA’s opening brief, Washington statutes and case law establish that a document is “filed” when it is delivered to the appropriate clerk’s office with the required filing fee. *See* RCW 36.18.005(2) (defining filed as the “act of delivery”), RCW 36.18.020(2) (filing fees), RCW 36.18.060 (tender of fees); *Margetan*, 92 Wn. App. at 246; *Cheng*, 169 Wn. App. at 169-70. There is nothing in these authorities nor in those cited by BP that supports its claim that “filing” turns on the clerk taking “some reactive or responsive action.”

The Washington Rules of Appellate Procedure (“RAP”) and General Rules (“GR”) also undermine BP’s invented construction of filing.

RAP 18.6(c) states:

Except as provided in GR 3.1, any other paper, including a petition for review, is timely filed only if it is *received* by the appellate court within the time permitted for filing.

(emphasis added). GR 30(c)(1) specifies that:

An electronic document is *filed when it is received by the clerk's designated computer during the clerk's business hours*; otherwise the document is considered filed at the beginning of the next business day. (emphasis added).

The Court should decline BP’s invitation to change the definition of “filed” in Washington state courts.

C. BP’s Reliance on *Rahman v. Washington Department of Employment Security* is Misplaced.

Finally, BP cites *Rahman v. Washington Department of Employment Security*, 189 Wn. App. 1010, 2015 WL 4518347 (2015) (unpublished), to support its assertion that NPCA’s Petition for Review was not filed on August 15, 2018, because the Clerk’s Office refused to accept it without a cover sheet. *Rahman* is wholly distinguishable from the situation here. In *Rahman*, the appellant challenged the superior court’s dismissal of his petition for judicial review of an administrative decision as untimely. Mr. Rahman argued that his petition should be considered timely filed because

it was submitted before the 30-day appeal deadline, but the clerk's office refused to accept it without a cover sheet. *Id.* at *1-2. The Court of Appeals upheld the superior court's dismissal of Mr. Rahman's petition for several reasons, none of which were as simple as the clerk's office refusal to accept it:

First, the excuse that a timely filed petition was returned because it lacked a cover sheet is *not supported by competent evidence*. Second, Rahman *did not provide this excuse to the trial court* until after the court had already granted the agency's motion to dismiss for untimely filing and service. Third, 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.

Id. (emphasis added).

The landscape of facts is much different here. First, unlike *Rahman*, there is indisputable proof that NPCA filed its Petition for Review before the statutory deadline and that the Clerk's Office returned it for lack of a cover sheet. The Clerk's Office confirmed receipt of NPCA's Petition for Review on August 15, 2018—one day before the lapse of the statutory period. CP at 183, 189, 192. When the Clerk's Office returned NPCA's Petition for Review, it provided a note explaining that NPCA's filing was sent back because it lacked a cover sheet. CP at 183, 195-96. Second, unlike in *Rahman*, NPCA presented this argument before the Superior Court. Third, again in contrast to *Rahman*, NPCA

cites authorities that demonstrate that its Petition for Review was timely filed and that the inadvertent omission of a cover sheet is an administrative error, not a jurisdictional one.

III. THE DOCTRINES OF SUBSTANTIAL COMPLIANCE AND OF CONSTRUCTIVE FILING ARE APPLICABLE TO NPCA'S PETITION FOR REVIEW.

NPCA agrees with Ecology that the Court “need not reach the question of constructive filing and substantial compliance” because NPCA timely filed its appeal. Ecology Resp. Br. at 7. However, if the Court deems a cover sheet to be a requirement to perfect an appeal—a decision the Court should not reach—then it would be appropriate for the Court to apply the doctrines of substantial compliance and constructive filing to NPCA's Petition for Review to prevent an unfair result.

A. NPCA Substantially Complied with Administrative Rule 2.

To clarify, NPCA does not argue that it substantially complied with the statutorily set time limit for filing its appeal, as BP and Ecology suggest. BP Resp. at 20-24; Ecology Resp. at 7-8. Rather, NPCA contends that its Petition should be allowed to advance because it met all jurisdictional requirements before the statutory deadline and substantially complied *with AR 2's cover sheet requirement*. In other situations, Washington courts have used the doctrine of substantial compliance to excuse a procedural fault that rendered compliance with a requirement in a

statute or rule imperfect. *In re Det. of Turay*, 139 Wn.2d 379, 391, 986 P.2d 790, 796 (1999), *as amended on denial of reconsideration* (Dec. 22, 1999) (requiring “some level of *actual* compliance with the substance essential to the statute [or rule],” to excuse a procedural fault.).

NPCA’s mistaken omission of the cover sheet required by AR 2 is the very type of error that the doctrine of substantial compliance is meant to excuse. *See In re Messmer*, 52 Wn.2d 510, 512-13, 326 P.2d 1004, 1005 (1958) (holding that the omission of a signature on the verification filed with the Superior Court did not deprive the court of jurisdiction because the petition and affidavit were timely.); *Griffith v. City of Bellevue*, 130 Wn.2d 189, 190, 922 P.2d 83 (1996) (finding that the superior court “acquired jurisdiction when the petition and defective verification were timely filed”). First, as detailed above and in its opening brief, NPCA met all the jurisdictional requirement to perfect its appeal. Second, NPCA’s inadvertent omission of the cover sheet required by AR 2 did not prejudice any of the parties; no party disputes that they were properly and timely served. Finally, NPCA substantively complied with AR 2 by providing the information required to be included in a cover sheet within its Petition for Review. CP at 2, 3, 12.

BP points to *Waste Connections of Washington, Inc. v. Department of Labor & Industries*, 5 Wn. App. 2d 902, 428 P.3d 1224 (2018) and

Clymer v. Employment Sec. Dep't, 82 Wn. App. 25, 28-29, 917 P.2d 1091, 1092–93 (1996) to argue that the doctrine of substantial compliance cannot be applied to NPCA's Petition for Review. Both cases are readily distinguishable. In *Waste Connections*, the Court of Appeals declined to find that the appellant had substantially complied with the notice requirements to appeal a citation from the Department of Labor and Industries because the agency did not actually receive the notice of appeal until *after* the statutory deadline. 5 Wn. App. 2d at 903-04. The outcome in *Waste Connections* reflected the Washington Supreme Court's determination that substantial compliance cannot cure the failure to comply with a statutorily set time limitation. *See City of Seattle v. Pub. Emp't Relations Comm'n*, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991).

This case differs from *Waste Connections* in two significant ways. First, as mentioned earlier, NPCA does not argue that it substantially complied with the statutory thirty-day deadline. Indeed, NPCA has always maintained that it actually complied with the statutory deadline for filing its appeal by delivering its Petition for Review and filing fee to the Clerk's Office on August 15, 2018—within the statutorily set time limitation. Instead, NPCA contends that it substantially complied with AR 2 by providing the information that had to be included in the cover sheet in its Petition for Review. CP at 2, 3, 12. Second, unlike the Department of

Labor and Industries in *Waste Connections*, the Clerk's Office actually received NPCA's Petition for Review one day *before* the deadline. CP at 183, 192. NPCA failed to comply with an administrative rule, not a statutory requirement as was the case in *Waste Connections*. CP at 182-92; RCW 34.05.514, RCW 34.05.542, 34.05.546 and WAC 371-08-555.¹ Accordingly, application of the doctrine of substantial compliance to NPCA's Petition for Review is appropriate and warranted.

B. NPCA Constructively Filed its Petition for Review on August 15, 2018.

Under the doctrine of constructive filing, a pleading is considered timely filed on the date that it was first submitted to the clerk's office and the clerk refused to accept it because of a non-jurisdictional error, when there is a showing that the clerk's refusal to accept the otherwise proper pleading would lead to an inequitable result. *Stevens v. City of Centralia*, 86 Wn. App. 145, 149-50, 936 P.2d 1141, 1145 (1997).

Each of these elements are present here. NPCA complied with all the jurisdictional requirements for filing a petition for judicial review of a PCHB order, and the only discrepancy in NPCA's filing was the mistaken omission of a cover sheet required by the administrative rules—a non-

¹ *Clymer*, 82 Wn. App. at 28-29 is similarly distinguishable as the superior court did not receive the appellant's petition for judicial review until after the statutory deadline.

jurisdictional error. Dismissal of NPCA's Petition for Review in this situation would be inequitable because NPCA's error prejudiced neither the parties nor the court, while the refusal to allow an appeal from a substantive ruling in a significant air quality case is an extreme penalty. *Stevens*, 86 Wn. App. at 152; *see also Burnett v. Tacoma City Light*, 124 Wn. App. 550, 559, 104 P.3d 677, 683 (2004) (reiterating the requirements for constructive filing); CP at 182-92, 196; RCW 34.05.514, RCW 34.05.542, RCW 34.05.546, and WAC 371-08-555.

BP urges the Court to not follow this precedent here because they claim that constructive filing is only applicable in cases where a statute directs the court to "liberally construe" its requirements. While *Stevens* and *Burnett* both involve a statute, RCW 4.96.010, that contains a "liberally construe" directive, the decisions did not turn on that language in either case. *Stevens*, 86 Wn. App. at 151-52; *Burnett* 124 Wn. App. at 558-560. In *Stevens*, the Court neither cited to nor relied on the "liberal construction" directive in RCW 4.96.010 for its application of concept of constructive filing. *Stevens*, 86 Wn. App. at 151-52. In *Burnett*, the court explicitly stated that RCW 4.96.010(1) only allows for the liberal construction of the statute's content requirements, not the statute's procedural requirements. *Burnett* 124 Wn. App. at 558. It then went on to analyze whether constructive filing applied to a pleading that was filed

“with the wrong...employees...in the wrong...offices.” This demonstrates that the court’s discussion of constructive filing was not linked to the liberal construction directive in RCW 4.96.010(1), as BP claims. BP Resp. at 20-21. If necessary, this Court can and should apply the doctrine of constructive filing here.

CONCLUSION

NPCA complied with all the jurisdictional requirements for judicial review of the PCHB’s Final Order and its inadvertent omission of an administrative cover sheet was an error that had no effect on the court’s jurisdiction. For the reasons stated above and in its opening brief, NPCA asks the Court to (1) find that NPCA timely filed its Petition and (2) reverse the Superior Court’s Order of Dismissal of NPCA’s Petition for Review. NPCA requests that the case be remanded to the Superior Court for reinstatement of NPCA’s appeal of the PCHB’s Final Order and that this Court reinstate consideration of NPCA’s Request for Direct Review of the Appeal in this Court.

* * * *

Respectfully submitted this 14th day of June, 2019.

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s/ Diana Brechtel

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