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

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ANNETTE HOLDINGS LLC D/B/A SUPER DUPER FOODS,

*Appellant,*

v.

NORTHWEST CLEAN AIR AGENCY,

*Respondent,*

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR OKANOGAN  
COUNTY

Okanogan County Cause No. 18-2-00026-4  
The Honorable Henry A. Rawson, Judge

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**NORTHWEST CLEAN AIR AGENCY'S RESPONSE BRIEF**

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## **I. INTRODUCTION**

This appeal concerns civil penalties that Northwest Clean Air Agency (“NWCAA”) issued to Annette Holding LLC for violations of the Washington Clean Air Act and NWCAA regulations. However, this appeal is not about whether those violations occurred. There is no question that Annette Holding LLC’s gas station operated without the required Order of Approval for eighteen months, and that once it received the Order it violated the Order’s terms, missing a deadline for installing vapor controls by six months and for completing testing by eleven months. NWCAA’s determination that those violations occurred was upheld by the Pollution Control Hearings Board (“PCHB”) and the Okanogan County Superior Court and have not been contested in this appeal.

While conceding the violations occurred, Annette Holding LLC asks the Court to determine that it nevertheless cannot be penalized. Annette Holding LLC claims NWCAA exceeded its statutory authority in issuing the civil penalties.

The alleged flaws in NWCAA’s actions stem from the fact that in operating the gas station Annette Holding LLC uses a registered trade name: Super Duper Foods. NWCAA issued notices of violation (“NOV”) that identified Super Duper Foods as the violator (and Annette Holding LLC as the owner) and issued notices of imposition of civil penalty (IOP”) to Super Duper Foods, which were served on Annette Holding LLC. NWCAA also later issued an IOP for one of the violations to Annette

Holding LLC. Contrary to Annette Holding LLC's claims, the NOV's and IOP's that NWCAA issued were well within its statutory authority. The fact that NOV's and penalties were issued to a registered trade name of the company does not undermine their legitimacy.

Annette Holding LLC also alleges that the civil penalties were issued too late, as they were received after the violations were corrected. That argument misapprehends Washington law. RCW 70.94.431 authorizes civil penalties for each day of violation of the Washington Clean Air Act and its implementing regulations. Past violations are not cured by an emissions source coming into compliance. There is no requirement that a violation be ongoing when the penalty is issued.

Finally, Annette Holding LLC asserts that one of the civil penalty notices was issued for the wrong gas station. As the PCHB's determination that the penalty was issued for the correct gas station is supported by substantial evidence, it must be upheld by this Court.

## **II. ASSIGNMENT OF ERROR**

Annette Holding LLC's Assignment of Error asks the Court to consider whether NWCAA acted outside its statutory authority or jurisdiction.

However, under that general rubric, Annette Holding LLC has identified different issues in its statement of Issues Presented on Appeal and in its Argument.

In its Opening Brief at 1 (Issues Presented On Appeal), it identifies the following two issues:

Whether NWCAA exceeded its statutory authority by:

(1) Serving a Notice of Violation (“NOV”) on Super Duper Foods; and

(2) Serving Notice of Violation 4174 on Annette Holding LLC after it was in compliance with the laws [referenced in that notice].

In its Opening Brief at 7-11 (Argument Section B), Annette Holding adds the following issues:

(3) Whether IOPs that are based on NOVs issued to Super Duper Foods are invalid because Super Duper Foods is not a “person”; and

(4) Whether an IOP issued to Annette Holding LLC is invalid because: (a) it does not reference an NOV issued to Annette Holding LLC; and (b) it was issued after the underlying violations had been corrected.

NWCAA will respond to all four of the identified issues.

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

#### **A. The Underlying Violations**

In October 2013, Annette Holding LLC opened a gas station at 18729 Fir Island Road in Mt. Vernon, Washington, under the registered

trade name Super Duper Foods. AR 363, 468. NWCAA regulations require the owner or operator of an emissions source to submit a Notice of Construction (“NOC”) application and obtain an Order of Approval before constructing a new source, or modifying an existing source. NWCAA Reg. 300.1(A) (see appendix). Annette Holding LLC opened the station without obtaining an Order of Approval from NWCAA. AR 379.

One year later, in October 2014, NWCAA discovered that the gas station was operating without the required agency review and Order. AR 388. In response to prompting from NWCAA, and after some delay due to deficiencies in the initial application, a complete NOC application was submitted in April 2015. AR 388, 391-92, 393, 397-98, 369.

NWCAA issued an Order of Approval for the gas station in May 2015. AR 369, 408-09. The Order required installation of vapor controls on the gas station’s storage tanks by July 6, 2015, and testing of the equipment by August 3, 2015. AR 369, 409. The company missed those deadlines. AR 370. The controls were not installed until December 2015 and testing was not completed until July 2016. AR 371.

#### **B. Enforcement under the Washington Clean Air Act**

The Washington Clean Air Act requires NWCAA to serve “the alleged violator” with a written notice that identifies the statute or rule alleged to be violated and the facts alleged to constitute a violation at least thirty days prior to the commencement of any formal enforcement action. RCW 70.94.211. This written notice is referred to as a “notice of

violation” or NOV. A NOV must offer the alleged violator an opportunity to meet with the agency prior to commencement of enforcement action. *Id.* Thus, the purpose of the NOV is to provide an opportunity to resolve alleged violations before formal enforcement action occurs. NWCAA has incorporated the NOV process required by RCW 70.94.211 into its regulations. NWCAA Reg. 131.

The Washington Clean Air Act authorizes the issuance of civil penalties for violations of the statute, regulatory requirements or orders issued under authority of the Act. RCW 70.94.431. “Any person” who violates any provision of the statute or implementing regulations “may incur a civil penalty” for each violation. RCW 70.94.431(1)(a). Each violation is a separate offense, and for continuing violations each day the violation continues is a separate and distinct violation. *Id.* Likewise, “any person” who fails to take action as specified in an order issued under authority of the Act is liable for a civil penalty “for each day of continued noncompliance.” RCW 70.94.431(1)(b). NWCAA has incorporated this civil penalty authority into its regulations. NWCAA Reg. 133.1.

An NOV does not by itself impose any civil penalties, but is a necessary precursor to civil penalties under the Washington Clean Air Act and identifies the alleged violations that form the basis for civil penalties. *See* RCW 70.94.211 and 70.94.431.

### **C. The NOVs and Civil Penalties**

On November 20, 2014, NWCAA issued NOV 4112 for violation of the requirement to submit a NOC application and obtaining an Order of Approval for the gas station. AR 13-14. The NOV identifies the violator as “Super Duper Foods - Chevron 306936” and the owner as “Annette Holdings LLC.” AR 13. The NOV was served at the gas station and at the business address of Annette Holding LLC. AR 367-68.

On August 24, 2015, NWCAA issued NOV 4174 for failure to comply with the Order of Approval issued for the gas station. AR 5. This NOV also identifies the violator as “Super Duper Foods – Chevron 306936” and the owner as “Annette Holdings LLC.” This NOV also was served at the gas station and at the business address of Annette Holding LLC. AR 370-71.

On February 19, 2016, NWCAA issued two IOPs: a \$3,000 penalty for the violations described in NOV 4112 and a \$6,154 penalty for the violations described in NOV 4174. AR 6, 12. Both IOPs were issued to “Super Duper Foods – Chevron 306936.” *Id.* The IOPs were both served at the gas station and at the business address of Annette Holding LLC. AR 323.

On March 25, 2016, Super Duper Foods appealed the two civil penalties to the PCHB. AR 1, 7, 323.

When the NOVs and IOPs were delivered to the gas station, they were served on Pierre Youssef, the son of the owners of Annette Holding LLC, who represented to NWCAA staff that he was the manager of the gas

station, signed the NOC application for the gas station and the check for permit fees, and interacted with NWCAA staff at all relevant times at the gas station. AR 313, 314, 315-16, 317, 318, 320, 323. The PCHB determined that, while not necessary to its determination that the violations occurred and the penalties are reasonable, it was reasonable for NWCAA to conclude that Pierre Youssef was a representative of the gas station. AR 320 at n.2. However, after the IOPs were issued, Hanna Youssef, one of the owners of Annette Holding LLC, told NWCAA that Pierre Youssef (Hanna's son) had no authority and had nothing to do with the gas station. AR 323.

On February 23, 2017, NWCAA issued an IOP to Annette Holding LLC d/b/a Super Duper Foods for \$6,154 based on the violations identified in NOV 4174. AR 324, 453. It did so in case the prior IOP for this NOV was determined to have been improperly issued. AR 324. However, this IOP was improperly dated February 23 of 2016 rather than 2017. *Id.*; AR 453. Recognizing the error, on June 27, 2017, NWCAA issued a replacement IOP for NOV 4174, dated June 27, 2017, and again issued to "Annette Holding LLC d/b/a Super Duper Foods." AR 324, 459. Annette Holding LLC filed timely appeals of both these IOPs with the PCHB. AR 324.

#### **IV. ARGUMENT**

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

This Court stands in the shoes of the superior court and reviews the PCHB's decision in this matter; it does not directly review the underlying NWCAA decisions or the superior court's decision. *See Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 587, 90 P.3d 659, 669 (2004). As Annette Holding LLC has acknowledged, the Court's review of the PCHB decision is governed by Washington's Administrative Procedures Act ("APA"). *Id.*

Annette Holding LLC asserts that the PCHB incorrectly interpreted NWCAA's statutory authority and jurisdiction. Under the APA, The Court may grant relief if the PCHB order is "outside the statutory authority or jurisdiction" of the PCHB or if the PCHB has "erroneously interpreted or applied the law." *Port of Seattle*, 151 Wn.2d at 587, 90 P.3d at 669, *citing* RCW 34.05.570(3)(b), (d). Where statutory construction is necessary, the Court will interpret statutes de novo. *Id.* "However, if an ambiguous statute falls within the agency's expertise, the agency's interpretation of the statute is 'accorded great weight, provided it does not conflict with the statute.'" *Id.* (*quoting Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002)).

**B. The two NOVs were correctly served on the “alleged violator.”**

The applicable statute and regulation require that written notice of a violation be served upon “the alleged violator” at least 30 days prior to commencing any formal enforcement action. RCW 70.94.211; NWCAA Reg. 131.1. Annette Holding LLC asserts that NOVs 4112 and 4174 were not properly served because they name as the violator a “non-entity” – Super Duper Foods – that is not a person under applicable NWCAA and PCHB rules. Opening Br. at 9. This objection has multiple flaws.

First, the NOVs were not just issued to Super Duper Foods. Both NOVs identify two parties: Super Duper Foods and Annette Holding LLC. AR 5, 13. Moreover, both NOVs were served on Annette Holding LLC at its company address as well as being served at the gas station. AR 367-68, 370-71. Regardless of the status of Super Duper Foods, Annette Holding LLC is a “person” within the meaning of NWCAA and PCHB rules. NWCAA Reg. 200 (“person” includes corporation); WAC 371-08-305(8) (same). Thus, the NOVs identify and were served upon a legal entity.

Second, Super Duper Foods is not a separate legal entity; it is the registered trade name of Annette Holding LLC. AR 466 (legal entity registration), 468 (Dept. of Revenue tax registration for the gas station). A “trade name” is the name “used by a person to identify the person’s business which: (a) Is not, or does not include, the true and real name of all persons conducting the business.” RCW 19.80.005(4). The “true and real name” includes “the registered corporate name of a domestic

corporation as filed with the secretary of state.” RCW 19.80.005(5)(c). Thus, Super Duper Foods is just another name for Annette Holding LLC – a name the company selected itself as a d/b/a. Accordingly, NWCAA documents that name Super Duper Foods are referring to the same legal entity as Annette Holding LLC.

Third and finally, any confusion regarding the legal status of Super Duper Foods is attributable to Annette Holding LLC alone. Given the several years of communications the gas station had with NWCAA under the name Super Duper Foods, including submittal of the NOC application (AR 393) and required reports (e.g., AR 404, 441), it was entirely understandable and appropriate for NWCAA to address communications and enforcement documents regarding the gas station to Super Duper Foods. Annette Holding LLC held out to the world – and to NWCAA in particular – that it was Super Duper Foods. It was not until January 26, 2017 – after the NOV and IOPs were issued and appeals of the IOPs were pending before the PCHB – that the company submitted a name change to NWCAA, changing the name of the gas station from “Super Duper Foods” to “Annette Holding Super Duper Foods (3)”. Annette Holding LLC cannot avoid liability for its actions by pretending that the trade name it registered with the State and used to carry out its business really refers to some non-existent other entity.<sup>1</sup>

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<sup>1</sup> Annette Holding LLC notes that NWCAA moved to join Annette Holding LLC as a plaintiff in the PCHB appeal on grounds that Super Duper Foods – the name under which the appeal had been filed – was a trade name and that Annette Holding LLC not the legal name of the entity.

**C. Two IOPs were correctly issued on February 19, 2016.**

Annette Holding LLC also argues that the civil penalties that NWCAA issued to Super Duper Foods are invalid because, under RCW 70.94.431(1) and NWCAA Reg. 133.1, civil penalties may only be issued to a “person,” and the IOPs and underlying NOV’s were issued to Super Duper Foods. Opening Br. at 8-10.

NWCAA issued two IOPs on February 19, 2016 in the name of “Super Duper Foods. AR 6, 12. The IOPs were served on the gas station and on Annette Holding LLC at its business address. AR 323. As discussed in the prior section, “Super Duper Foods” is the registered trade name of Annette Holding LLC. It also is the name the company used on its NOC application, AR 393, and is the name NWCAA place on the Order of Approval. AR 408. When NWCAA issued civil penalties to Super Duper Foods, it was not issuing them to some non-existent third party. The penalties were issued to Annette Holding LLC in the name it chose to use for the gas station business, e.g., AR 393, and which it had registered with the State for that purpose. AR 466. NWCAA did properly

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Opening Br. at 5; AR 102-104. The PCHB denied the joinder motion and also denied a motion by Annette Holding LLC to dismiss the case on grounds that the penalties named the wrong entity. AR 185-191. In its joinder motion, NWCAA argued that Super Duper Foods is not a “person” under the PCHB’s rules. AR 103. This was, perhaps, an inartful way of making the point that Super Duper Foods is a d/b/a rather than the legal name of the entity, which was the factual basis for NWCAA’s motion. *See* AR 102. There is no dispute that Annette Holding LLC owns the gas station and operates the gas station under the trade name Super Duper Foods. “Super Duper Foods” is not a separate entity from Annette Holding LLC.

issue the IOPs to a “person”: Annette Holding LLC, through its registered trade name Super Duper Foods.

**D. NWCAA properly issued an IOP to Annette Holding LLC**

After Annette Holding LLC raised the issue with the PCHB of whether NWCAA had used the proper name for its enforcement actions, and also applied to NWCAA to change the gas station name, NWCAA took the precautionary step of re-issuing one of the IOPs, for the violations addressed by NOV 4174, to “Annette Holding LLC d/b/a Super Duper Foods.” AR 324, 453. It later re-issued that IOP again to correct an erroneous date on the prior version. AR 324, 459. Annette Holding LLC argues that this IOP is invalid because the underlying NOV was issued to Super Duper Foods, not Annette Holding LLC. Opening Br. at 9-10. This argument fails.

As discussed in subsection A of this argument, in addition to listing Super Duper Foods, NOV 4174 identifies Annette Holding LLC as the owner of the gas station. AR 5. The NOV also was served on Annette Holding LLC at its business office, as well as being served at the gas station. AR 370-71. This satisfied the requirement of RCW 70.94.211 and NWCAA Reg. 131.1 that Annette Holding LLC be served with written notice of alleged violations before initiating formal enforcement in the form of a civil penalty.

Furthermore, Super Duper Foods is the registered trade name of Annette Holding LLC, and so a notice directed to Super Duper Foods is a

notice directed to Annette Holding LLC. This is particularly true here, where the company used the name “Super Duper Foods” on its application to NWCAA and the Order of Approval is issued in the name of Super Duper Foods. AR 393, 408.<sup>2</sup>

**E. The civil penalties were timely.**

Finally, Annette Holding LLC argues that all of the IOPs are invalid because they were served after the gas station was back in compliance. Opening Br. at 10-11. This argument is a *non sequitur*. A violation is complete and potentially subject to civil penalty on the day that it occurs. For a violation that continues, like operating without an Order of Approval, each day it continues is a separate and distinct violation. RCW 70.94.431(1)(a) and (b).

It is uncontested that Annette Holding LLC operated its gas station without the required Order of Approval for 18 months, in violation of NWCAA Reg. 300.1(A). It also failed to complete installation of equipment and testing of the equipment required by its Order of Approval, missing the required deadline by several months. Under RCW 70.94.431, each day the gas station operated without the required Order of Approval, then each day it operated without the control equipment required by the

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<sup>2</sup> The last paragraph of Annette Holding LLC’s opening brief offers a new argument: whether this final IOP was issued for the wrong gas station, since it was sent to Oroville, Washington. The PCHB had little difficulty concluding that the IOP refers to the correct station and that the name and address on the IOP resulted from the company having filed a Notice of Change with NWCAA. AR 332. Annette Holding LLC has not pointed to any evidence that contradicts the PCHB’s finding on this point.

Order of Approval, and then without completing required testing, was a separate violation. These three continuing violations ended, respectively, when the Order of Approval was issued, the emission controls were installed, and required testing was completed.

NWCAA could have issued civil penalties for each day the gas station operated without an Order of Approval, and also for each day it was then out of compliance with the Order. Instead, NWCAA exercised its enforcement discretion to issue a single penalty for operation without the required Order of Approval and a single penalty for violations of the Order. When the company came into compliance that did not, as Annette Holding LLC argues, excuse the preceding violations. To the contrary, each day of ongoing violation was a separate and distinct violation. *See* RCW 70.94.431(1)(a) and (b). Coming into compliance simply ended the accumulation of separate and distinct violations. *Id.*

## **V. CONCLUSION**

Annette Holding LLC has not contested the PCHB's determination that the violations for which it was cited and fined by NWCAA did occur. It has not disputed the PCHB's determination that the amount of the civil penalties for those violations was appropriate. The issues in this appeal are limited to points of confusion that stemmed from Annette Holding LLC using a registered trade name in operating the gas station. Nothing about the company's use of a registered trade name in conducting its business undercuts the fact that NWCAA acted within its statutory

authority when it issued the NOV's and civil penalties. NWCAA respectfully urges the Court to deny Annette Holding LLC's appeal and uphold the PCHB's decision.

Respectfully submitted this 14<sup>th</sup> day of November, 2019.

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## **VI. APPENDIX**

### **Northwest Clean Air Agency Regulations**

#### **SECTION 131 – NOTICE TO VIOLATORS**

131.1 At least 30 days prior to the commencement of any formal enforcement action under RCW 70.94.430 or 70.94.431, or NWCAA 132 or 133, the NWCAA shall cause written notice of violation to be served upon the alleged violator. The notice shall specify the provisions of chapter 70.94 RCW or the orders, rules, or regulations adopted pursuant thereto alleged to be violated, and the facts alleged to constitute a violation thereof, and may include an order pursuant to NWCAA 121 directing that necessary corrective action be taken within a reasonable time. In lieu of an order, the Control Officer may require that the alleged violator appear before the Board for a hearing pursuant to NWCAA 120. Every notice of violation shall offer to the alleged violator an opportunity to meet with the NWCAA prior to the commencement of enforcement action.

#### **SECTION 133 - CIVIL PENALTY**

133.1 In addition to or as an alternate to any other penalty provided by law, any person who violates any of the provisions of chapter 70.94 RCW, or any of the rules in force pursuant thereto, including the Regulation of the NWCAA may incur a civil penalty in an amount

not to exceed \$19,000 per day for each violation. Each such violation shall be a separate and distinct offense, and in the case of a continuing violation, each day's continuance shall be a separate and distinct violation. Any person who fails to take action as specified by an order shall be liable for a civil penalty of not more than \$19,000 for each day of continued noncompliance.

#### SECTION 300 – NEW SOURCE REVIEW

300.1 (A) A Notice of Construction (NOC) application must be filed by the owner or operator and an Order of Approval must be issued by the NWCAA, prior to beginning actual construction of any new source or making any modification, except for any of the following:

- (1) Emissions units that are categorically exempt under NWCAA 300.3.
- (2) Emissions units that are exempt under NWCAA 300.4.
- (3) Any temporary sources operating under NWCAA 300.17.
- (4) Any emissions unit covered under a General Order of Approval and operating in accordance with NWCAA 300.16.

**CERTIFICATE OF SERVICE**

I hereby certify that on November 14, 2019, I electronically filed the foregoing NORTHWEST CLEAN AIR AGENCY'S RESPONSE BRIEF with the Clerk of the Court for the Washington State Court of Appeals by using the appellate CM/ECF system which will send notification of such filing to participants in the case who are registered CM/ECF users.

Dated this 14<sup>th</sup> day of November, 2019.

*s/ Svend Brandt-Erichsen*  
Svend Brandt-Erichsen  
NOSSAMAN LLP

**NOSSAMAN**

**November 14, 2019 - 8:25 AM**

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