

Tue 8/30/2011  
4:11 PM

Set 7/28/11

87892-7  
NO. 42411-8

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

THE BOEING COMPANY,  
  
Petitioner,

v.

STATE OF WASHINGTON,  
POLLUTION CONTROL  
HEARINGS BOARD, and  
STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,  
  
Respondents.

DEPARTMENT OF  
ECOLOGY'S RESPONSE  
IN OPPOSITION TO  
BOEING'S MOTION FOR  
DISCRETIONARY  
REVIEW

**I. INTRODUCTION**

On April 25, 2011, the Pollution Control Hearings Board (Board) issued its decision in *Copper Development Association v. Department of Ecology*, PCHB Nos. 09-135 through 09-141 (Apr. 25, 2011) ("ISGP Decision"). The ISGP Decision resolved appeals of the Industrial Stormwater General Permit (ISGP or Permit) the Department of Ecology (Ecology) issued on October 21, 2009. The Permit expires on January 1, 2015. The Boeing Company (Boeing) was the only permittee to appeal the Permit. The Weyerhaeuser Company intervened as a respondent and supported the terms of the Permit as issued by Ecology. The ISGP Decision largely affirmed the Permit as written, but did remand the Permit to Ecology with directions to make some changes to the Permit.

Boeing appealed the ISGP Decision to Thurston County Superior Court on or about May 25, 2011. On June 23, 2011, Boeing filed an Application for Direct Review and Request for Certificate of Appealability from the Pollution Control Hearings Board (Application for Direct Review). On July 15, 2011, the Board issued a Certificate of Appealability despite its conclusion that only one of the issues Boeing seeks to raise on appeal warrants discretionary review under RCW 34.05.518(3)(b). In particular, the Board concluded there would be precedential value in having an appellate court interpretation of the “presumption of compliance” language in RCW 90.48.555(6), and that delay in obtaining review “may be detrimental to Boeing.” Certificate of Appealability at 3-4.<sup>1</sup> With respect to Boeing’s appeal of the effluent limits for fecal coliform and total suspended solids, the Board concluded these issues did not warrant discretionary review because they were mainly fact-based issues that involved the weighing of expert testimony and “required consideration of Ecology’s specialized knowledge and expertise in a highly technical and scientific area, requiring the Board to give some deference to Ecology.” *Id.* at 5. Boeing has now filed a Motion for Discretionary Review with this Court. As discussed below, Boeing’s appeal does not meet the requirements of RCW 34.05.518(3)(b) and the Court should deny Boeing’s Motion for Discretionary Review.

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<sup>1</sup> A copy of the Certificate of Appealability is included in Appendix 1 to Boeing’s Motion for Discretionary Review.

## II. ARGUMENT

The majority of Boeing's Motion for Discretionary Review is devoted to presenting Boeing's views of the Industrial Stormwater General Permit, the governing law, the evidence presented to the Board, and the Board's decisions. Motion for Discretionary Review at 1-15. Ecology disagrees with Boeing's views of the Permit, governing law, evidence, and the Board's decisions. However, Ecology will not provide its point by point rebuttal of these arguments in this response. Ecology will present those arguments in its brief on the merits, either before Thurston County Superior Court or this Court. This response will focus on the reasons why the Court should deny Boeing's Motion for Discretionary Review.

Under RCW 34.05.518(3)(b), the Board:

may issue a certificate of appealability if it finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either:

(i) Fundamental and urgent statewide or regional issues are raised; or

(ii) The proceeding is likely to have significant precedential value.

The Court applies the same test as the Board in evaluating Boeing's Motion for Discretionary Review. RCW 34.05.518(5). As discussed below, Boeing has failed to meet the criteria in RCW 34.05.518(3)(b) and the Court should therefore deny Boeing's Motion for Discretionary Review.

**A. Boeing Has Failed To Establish That A Delay In Obtaining Review By The Court Of Appeals Would Be Detrimental**

Boeing first argues that delay in obtaining a final and prompt determination of its issues will be detrimental because Boeing “potentially faces substantial costs to treat stormwater” and “potentially faces enforcement liability” if it is unable to comply with the Industrial Stormwater General Permit. Motion for Discretionary Review at 17-18. Boeing fails to identify any portion of any Boeing facility that will actually require stormwater treatment for any pollutant. Rather, Boeing speculates about costs it may “potentially” incur. In its Certificate of Appealability, the Board concluded that delay “may require Boeing to incur costs to develop stormwater treatment methods.” Certificate of Appealability at 3-4. However, RCW 34.05.518(3)(b) requires more than a party’s speculation of detriment that “may” occur. The statute requires a finding that delay “would be detrimental to any party or the public interest . . . .” RCW 34.05.518(3)(b). This distinction is important because a party will almost always be able to speculate about harm that may occur as a result of delay. This is especially true with respect to the pollution discharge permit at issue in this case because violations of a discharge permit are always subject to enforcement liability and discharge permits often include conditions that require permittees to devote effort and expense to keep pollution out of waters of the state of Washington. If speculation about potential future treatment costs or potential future enforcement liability is sufficient to find detrimental delay under

RCW 34.05.518(3)(b), almost any pollution discharge permittee will be able to demonstrate detrimental delay, and RCW 34.05.518(3)(b) will not serve the important screening function the legislature intended when it established a procedure to allow for direct review of environmental decisions based on a specific finding that delay will be detrimental.

Boeing has offered little more than speculative assertions in its attempt to demonstrate that a delay in obtaining review by the Court of Appeals would be detrimental. Boeing has failed to demonstrate that a delay would be detrimental and the Court should therefore deny Boeing's Motion for Discretionary Review.

**B. Boeing Has Failed To Demonstrate That Its Appeal Raises Fundamental And Urgent Statewide Or Regional Issues**

Boeing alleges that its appeal involves issues "that are fundamental to the effective implementation of the ISGP, and of urgent importance to industrial dischargers throughout Washington." Motion for Discretionary Review at 18. Boeing supports this allegation by arguing that "[i]f even a fraction of the industrial facilities subject to Level 3 corrective action requirements must install additional stormwater treatment . . . the issue of whether ISGP Condition S8.D is consistent with the presumption of compliance in RCW 90.48.555(6) is of fundamental statewide importance." *Id.* Boeing also notes that there are facilities in Washington that are subject to the effluent limits for fecal coliform and total suspended solids. *Id.* at 19. However, Boeing was the only ISGP permittee to appeal

the ISGP and it stretches credibility to suggest that Boeing's appeal raises urgent and fundamental issues to permittees who are willing to accept the ISGP as drafted. Moreover, Boeing's argument regarding fundamental and urgent statewide issues, like its argument regarding detrimental delay, is based on speculative assertions. In particular, Boeing argues that the presumption of compliance in RCW 90.48.555(6) is of fundamental statewide importance "[i]f even a fraction" of permittees "subject to Level 3 corrective action requirements must install additional stormwater treatment." Motion for Discretionary Review at 18. However, Boeing fails to identify any permittee who will need to install additional stormwater treatment.

Boeing's attempt to rely on the interests of permittees who did not appeal the Permit is particularly troublesome with respect to Boeing's challenge to the effluent limit for total suspended solids because Boeing appears to argue that Ecology should have developed a more burdensome effluent limit. In 2006, Ecology's Toxics Cleanup Program wrote a memo to the Water Quality Program Management Team outlining options for regulating industrial stormwater discharges into waterbodies with contaminated sediments. Motion for Discretionary Review at 11-12.<sup>2</sup> The Toxics Cleanup Program presented three options, and the first option was to continue to rely on the 30 mg/l total suspended solids effluent limit.

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<sup>2</sup> The memo is Appendix 11 to Boeing's Motion for Discretionary Review.

Motion for Discretionary Review, Appendix 11 at 2. Ecology's Water Quality Program selected this option and put the 30 mg/l effluent limit in the Permit. Boeing challenges this decision, but the other two options presented by the Toxics Cleanup Program involved a more burdensome and expensive suite of monitoring requirements. *See, id.* (suggested monitoring for PCBs, PDBEs and semi-volatile organic compounds at an estimated cost of \$560 per sample, and \$500-\$1,000 in equipment costs). While a company as large as Boeing may be able to absorb these higher monitoring costs, it is difficult to believe that permittees who chose to accept the Permit rather than appeal it would agree it is fundamental and urgent for them to absorb the higher monitoring costs Boeing is arguing for.

While this appeal is undoubtedly important to Boeing, Boeing is the only permittee that challenged the Permit and Boeing has failed to demonstrate that its appeal raises fundamental and urgent statewide or regional issues. The Court should therefore deny Boeing's Motion for Discretionary Review and allow Boeing's appeal to proceed in Thurston County Superior Court.

**C. Boeing Has Failed To Demonstrate That Its Appeal Is Likely To Have Significant Precedential Value**

Boeing argues that this Court's interpretation of the presumption of compliance in RCW 90.48.555(6) "is likely to affect the role of benchmarks, the scope and nature of required BMPs, and Ecology's duty

to update its manuals.”<sup>3</sup> Motion for Discretionary Review at 20. The Board found there “would be precedential value in having an appellate interpretation of RCW 90.48.555(6)” because the statute “applies to all permittees of both the current and future iterations of the ISGP and the related Construction Stormwater General Permit.” Certificate of Appealability at 4.

RCW 34.05.518(3)(b)(ii) requires more than “precedential value” before granting a motion for discretionary review. The statute requires that the precedential value be “significant.” In this case, Boeing has consistently argued that it is entitled to a presumption of compliance with water quality standards “so long as it is implementing Ecology’s stormwater management manuals, and BMPs described therein, . . . and need not take further corrective action steps, even if it is not meeting benchmarks.” ISGP Decision at 69, Conclusion of Law (CL) 35. As the Board correctly noted in its ISGP Decision, Boeing misconstrues “the manner in which the presumption of compliance stated at RCW 90.48.555(6) must be applied.” *Id.* at 70, CL 36. The Board correctly interpreted RCW 90.48.555(6) and concluded that the statute “affords industrial permittees a ‘presumption of compliance’ with water quality standards when the permittee is in full compliance with *all permit conditions, and fully implementing stormwater best management practices*

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<sup>3</sup> Boeing has not cited any statute that imposes a “duty” on Ecology to “update its manuals.”

contained in stormwater technical manuals approved by Ecology (or demonstrably equivalent practices)” (emphasis in original). ISGP Decision at 69, CL 35.

While Boeing has consistently attempted to read the “full compliance with all permit conditions” language out of RCW 90.48.555(6)(a), it is highly unlikely that this Court, or the Thurston County Superior Court would do so because both courts are required to give effect to all the language in a statute, as the Board did when it interpreted RCW 90.48.555(6). The interpretation of RCW 90.48.555(6) is a straight-forward legal exercise and it is unlikely that interpreting the plain meaning of the statute will have significant precedential value.

Moreover, in arguing that an interpretation of RCW 90.48.555(6) will have significant precedential values, Boeing overlooks the fact that RCW 90.48.555 is set to expire on January 1, 2015. Motion for Discretionary Review at Appendix 5. The Industrial Stormwater General Permit also has a January 1, 2015, expiration date. *Id.* at Appendix 6.<sup>4</sup> Consequently, unless the legislature extends RCW 90.48.555 unchanged prior to its January 1, 2015, expiration date, the statute will have no impact on future versions of either the Industrial Stormwater General Permit or the Construction Stormwater General Permit.

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<sup>4</sup> The Board’s Certificate of Appealability also references the Construction Stormwater General Permit (CSGP). The CSGP expires on December 31, 2015, almost a year after RCW 90.48.555 expires. The CSGP can be viewed at <http://www.ecy.wa.gov/programs/wq/stormwater/construction/permitdocs/cswgppermit120110.pdf>.

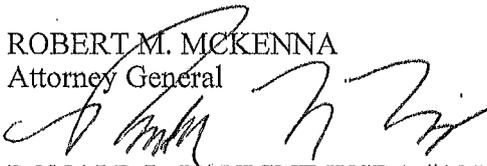
With respect to whether the effluent limits for fecal coliform and total suspended solids were “appropriately derived” under RCW 90.48.555(7), the fact specific analysis of whether two particular effluent limitations were appropriately derived is not likely to have significant precedential value. Moreover, RCW 90.48.555(7) is part of the statute that is set to expire on January 1, 2015, further limiting the significance of an appellate interpretation of whether Ecology appropriately derived two particular effluent limits.

### III. CONCLUSION

While the issues Boeing has raised in its appeal may be important to Boeing, Boeing has failed to meet the requirements of RCW 34.05.518(3), and Ecology respectfully requests that the Court deny Boeing’s Motion for Discretionary Review and allow Boeing’s appeal to proceed in Thurston County Superior Court.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of August, 2011.

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CERTIFICATE OF  
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 30 day of August 2011, I caused to be served the Department of Ecology's Response in Opposition to Petitioner's Motion for Discretionary Review in the above-captioned matter upon the parties herein as indicated below:

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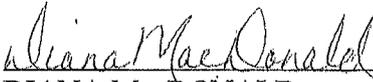
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30 day of August 2011, in Olympia, Washington.

  
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