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NO. 69808-7

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

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PACIFIC RIM PAVING,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES  
OF THE STATE OF WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR AND INDUSTRIES**

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## I. INTRODUCTION

Under the Contractor Registration Act, RCW 18.27, a person or firm must register as a contractor with the Department of Labor and Industries (Department) in order to offer to perform (or to actually perform) construction labor. The Department cited Pacific Rim Paving for violating the Contractor Registration Act. Under the relevant statutes, an appellant must ensure that the Department *receives* an appeal within 20 days of the date that the Department placed the infraction in the mail, or else the infraction becomes final and binding.

Here, it is undisputed that the Department did not receive an appeal from Pacific Rim Paving within 20 days of the date that the Department deposited the infraction in the mail. Therefore, the superior court properly dismissed Pacific Rim Paving's appeal as untimely.

## II. COUNTERSTATEMENT OF THE ISSUES<sup>1</sup>

1. Did Pacific Rim Paving file a timely appeal from the Department's notice of infraction, when the plain language of RCW 18.27.270 and RCW 18.27.250 provide that a contractor must

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<sup>1</sup> Pacific Rim posits as an issue "[i]s an 'appeal' of an infraction jurisdictional, or should the Department accept an appeal if the contractor substantially complies by filing an appeal within 20 days of receipt of the infraction?" App. Br. at 2. This issue statement is unaccompanied by any argument and it should be disregarded on this basis. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any event, substantial compliance does not apply to contractor's appeals under RCW 18.27. RCW 18.27.005. Moreover, substantial compliance requires actual compliance with a deadline. *City of Seattle v. Pub. Emp't Relations Comm'n*, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991).

ensure that the Department receives a notice of appeal within twenty days of the date that the Department deposited the notice of infraction in the mail, and when it is undisputed that the Department did not receive Pacific Rim Paving's appeal until more than 20 days after it placed the notice of infraction in the mail?

2. May Pacific Rim Paving avoid the 20-day deadline for filing an appeal of a citation based on its claim that the Department did not "properly address" the citation because it was issued to "Pacific Rim Paving" rather than "Pacific Rim Paving, Inc.," where the Department's records showed the business as "Pacific Rim Paving"?

3. Was Pacific Rim Paving deprived of due process, when due process requires that a party be served in a manner that is reasonably calculated to result in actual notice, when service by the mail has long been recognized as a reasonably reliable and efficient method of service, and when Pacific Rim Paving received the Department's notice of infraction four days before its deadline to appeal had elapsed?

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

On April 29, 2010, the Department issued an infraction to Pacific Rim Paving for violation of RCW 18.27.200(1)(b). CP 11-12. The Department issued the infraction to Pacific Rim Paving for not being properly registered as a contractor on March 24, 2010, when it submitted a

bid to another contractor. CP 11. A letter accompanied the notice of infraction that explained Pacific Rim Paving's options, including the process for filing an appeal. CP 9, 11-12. The notice of infraction and the accompanying letter were deposited in the U.S. Mail on May 4, 2010, with return receipt requested. CP 9, 11-12. Pacific Rim Paving received the notice of infraction on May 20, 2010. CP 85-86. The accompanying letter expressly notified Pacific Rim Paving that, to appeal the citation, an appeal must be "received" by the Department within 20 days of the date of the letter, and further identified the date of the letter as May 4, 2010. CP 12.

On May 26, 2010, the Department received a notice of appeal from Pacific Rim Paving regarding the infraction. CP 10, 13.<sup>2</sup> Pacific Rim Paving did not pay the mandatory \$200 appeal bond until June 9, 2010. CP 10, 14. On June 9, 2010, the Department sent Pacific Rim Paving a letter explaining that its appeal was denied as untimely because Pacific Rim Paving had failed to appeal the infraction and pay the mandatory appeal bond within 20 days service of the infraction. CP 10, 15. The

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<sup>2</sup> Pacific Rim Paving asserts, in conclusory fashion, that "[t]here is no way to know when it was actually delivered to the Department." App. Br. at 3. However, the Department stamped the notice of appeal as having been received on May 26, 2010, and Pacific Rim Paving has not articulated any reason why the Court should not conclude that it was delivered on the date that it was stamped as received. *See* App. Br. at 3.

Department refunded the \$200 appeal bond to Pacific Rim Paving on June 9, 2010. CP 14.

Pacific Rim Paving appealed the Department's determination that it had failed to file a timely appeal with the Skagit County Superior Court. CP 16. The superior court concluded that Pacific Rim Paving had failed to timely appeal the Department's notice of infraction and that that infraction had therefore become final and binding. CP 99-100. Pacific Rim Paving appealed. CP 101-02.

#### **IV. STANDARD OF REVIEW**

As the current appeal relates to a decision with regard to the Contractor Registration Act, it is subject to the APA. RCW 18.27.310. An "adjudicative proceeding" was not conducted in this case, because the Department determined that Pacific Rim Paving failed to file a timely appeal. Because this appeal does not involve a challenge to a rule and it is not an appeal from an adjudicative proceeding, it is governed by RCW 34.05.570(4) related to other agency action.

Under RCW 34.05.570(4), a party may receive relief on appeal only if the court determines that the agency's action was:

- (i) Unconstitutional;
- (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;
- (iii) Arbitrary or capricious; or

- (iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

Pacific Rim Paving does not contend that the Department lacked the statutory authority to make a determination as to whether its appeal was timely, nor does it contend that the Department staff who made that determination were not properly constituted as agency officials lawfully entitled to make such a decision. Therefore, Pacific Rim Paving can prevail on appeal only if it shows the Department's decision was either unconstitutional or arbitrary and capricious.

Arbitrary and capricious agency action means willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action. *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46-47, 959 P.2d 1091 (1998). "Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." *Hillis v. Dep't. of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997).

However, action that is taken based on an erroneous interpretation of a statute may constitute arbitrary and capricious action. *See Children's Hosp. & Med. Ctr. v. Wash. State Dep't of Health*, 95 Wn. App. 858, 873-74, 975 P.2d 567 (1999). Questions of law, including questions of

statutory construction, are considered de novo, but an appellate court gives due deference to a state agency's expertise in interpreting the law that it administers. *See City of Redmond*, 136 Wn.2d at 46-47.

## V. SUMMARY OF THE ARGUMENT

Pacific Rim Paving failed to file a timely appeal from the Department's notice of infraction and, therefore, the superior court properly dismissed its appeal.

Under RCW 18.27.270(1) as it existed at the time that these infractions were issued, a contractor had 20 days to respond to a notice of infraction from "the date of issuance of the notice of infraction."<sup>3</sup> Consistent with this deadline, RCW 18.27.250 provided that a contractor had 20 days to file a notice of appeal from the date of service of the infraction, and RCW 18.27.010(11) defined "service" as being complete once the notice was deposited in the mail. It follows that a contractor's duty to appeal a decision of the Department within 20 days is triggered when the notice of infraction is deposited in the mail, not when the contractor receives the notice of infraction.

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<sup>3</sup> At the time that the Department issued the infractions that are the source of this appeal, the Contractor Registration Act allowed a contractor 20 days to file an appeal. *See* Laws of 2007, ch. 436, § 14, 15. The Contractor Registration Act was amended in 2011 to extend the appeal period to 30 days. Laws of 2011, ch. 15, § 1, 2. Pacific Rim Paving does not dispute that it is the version of the statute that was in effect in 2010 that governs whether its appeal was timely. Therefore, throughout this brief, unless expressly indicated otherwise, the Department will cite to the language in those statutes that were in effect as of 2010 rather than the current versions of those statutes.

Furthermore, RCW 18.27.250 required a contractor to “file a notice of appeal” within 20 days, and RCW 18.27.010(4) defined “filing” as delivery of a document to the Department at a place the Department has designated for such documents. Thus, for an appeal to be timely, a contractor must ensure that the Department actually receives the appeal within 20 days of the date that the Department deposited the notice of infraction in the mail. Here, it is undisputed that Pacific Rim Paving failed to do that. Therefore, its appeal is untimely.

Pacific Rim Paving argues that RCW 18.27.010(11)’s reference to another statute, RCW 18.27.370, supports the conclusion that a contractor’s notice of appeal can be filed within 20 days of the date that the contractor actually receives the notice, as opposed to when it was deposited in the mail. However, Pacific Rim Paving cites to language in the statute that was not in effect in 2010 and its arguments should be disregarded. In any event, RCW 18.27.010(11)’s reference to RCW 18.27.370 refers to the special collection procedures the Department uses when enforcing a final and unappealed notice of infraction, and it does not apply to the issue of whether a timely appeal was filed. Thus, even if the 2011 language applied, it would not support Pacific Rim Paving’s argument that it timely appealed the infraction.

Pacific Rim Paving also argues that RCW 34.05.413(3) of the APA provides that a litigant always receives at least 20 days from the date of actual service to file an appeal from any administrative decision. This argument fails as well. RCW 34.05.413(3) contemplates an agency adopting rules, forms, or policies that govern how applications for adjudicative proceedings shall be requested. Here, in contrast, RCW 18.27.270, RCW 18.27.250, and RCW 18.27.010(4) and (11) specifically govern whether a notice of appeal was timely. Under the plain language of those statutes, Pacific Rim Paving's appeal was untimely, and RCW 34.05.413(3) does not purport to constrain the Legislature's authority to proscribe an appeal period from an administrative decision. In any event, to the extent there is a conflict in the laws, the more specific statutes in RCW 18.27 control.

Finally, Pacific Rim Paving contends that the Department's interpretation of the relevant statutes would result in a deprivation of due process, because it is possible that the Department could deposit a notice of infraction by mail but that a contractor would not actually receive it. Pacific Rim Paving fails to support this argument with proper citations to authority, and, therefore, this Court should not consider it. In any event, if the Court elects to consider the argument, the argument should be rejected because it is contrary to the weight of authority.

The superior court properly determined that Pacific Rim Paving's notice of appeal was untimely, and this Court should affirm.

## VI. ARGUMENT

### A. **Pacific Rim Paving Failed To Timely Appeal The Department's Notice Of Infraction And The Superior Court Properly Dismissed Its Appeal**

Pacific Rim Paving failed to timely appeal the Department's notice of infraction because it failed to ensure that the Department received its appeal within 20 days of the date that the Department served the notice of infraction, and because it failed to timely provide the necessary appeal bond. Disregarding the plain language of the relevant statutes, Pacific Rim Paving argues that the 20-day deadline does not begin until and unless the contractor receives the Department's notice. *See* App. Br. at 6-9.

Pacific Rim Paving's argument fails because the plain language of the Contractor Registration Act establishes that service of a notice of infraction is complete upon the date that the Department placed the infraction in the mail. RCW 18.27.010(11) (stating that "[s]ervice by mail is complete upon deposit in the United States mail to the last known address provided to the department."); RCW 18.27.270 (stating that an appeal from an infraction must be made "within twenty days of the date of

issuance of the notice of infraction”).<sup>4</sup> Furthermore, the plain language of RCW 18.27.250 established that an appeal must be “filed” within 20 days of the date that the infraction was issued, and RCW 18.27.010(4) defined “filing” as “delivery of a document . . . to a place designated by the agency.” Since it is undisputed that the Department did not actually receive the appeal until more than 20 days after it issued the infraction, Pacific Rim Paving’s appeal was untimely and was properly dismissed.

**1. Under RCW 18.27.010(11) and RCW 18.27.270, a contractor must appeal a notice of infraction within 20 days of the date that the notice of infraction was placed in the mail**

RCW 18.27.010(11) defines “service” under the Contractor Registration Act as follows:

“Service”, except as otherwise provided in RCW 18.27.225 and RCW 18.27.370, means posting in the United States mail, properly addressed, postage prepaid, return receipt requested, or personal service. *Service by mail is complete upon deposit in the United States mail to the last known address provided to the Department.*

(Emphasis added.)<sup>5</sup> Thus, under the plain language of this statute, service of a notice of infraction is complete when the notice is placed in the mail,

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<sup>4</sup> As noted, the Department will cite to the language in those statutes that was in effect as of 2010, rather than the current versions of those statutes, unless the brief expressly indicates otherwise.

<sup>5</sup> The APA similarly defines service as complete once a document is deposited in the mail. See RCW 34.05.010(19).

not when the contractor receives the notice of infraction. RCW 18.27.010(11).

Consistent with the statutory definition of service as complete upon mailing, a contractor must appeal a notice of infraction within 20 days of the date that the notice was issued, not within 20 days of the date that the contractor received the notice. RCW 18.27.270(1) further provided that a contractor must “respond” to a notice of infraction “within twenty days of the *date of issuance* of the infraction.” (Emphasis added.) Thus, it plainly ties a contractor’s duty to respond to a notice of infraction to the date that the notice of infraction was issued, not to the date that the contractor receives the notice.

Additionally, RCW 18.27.270(2) provided that a contractor who wishes to appeal an infraction must file an appeal “in the manner specified in RCW 18.27.250.” RCW 18.27.250 provided that an appeal from a notice of infraction must be filed “within twenty days of service of the infraction . . . .” As noted, RCW 18.27.010 defined “service” as being complete upon the date the notice of infraction is placed in the mail. It follows that a contractor must appeal an infraction within 20 days of the date that the Department placed the notice of infraction in the mail.

Thus, RCW 18.27.010, RCW 18.27.270, and RCW 18.27.250 all plainly support the conclusion that a contractor’s duty to appeal a notice of

infraction is triggered once the Department places the infraction in the mail, rather than upon the date the contractor receives the notice.

Where a term is defined, the court will use the definition. *United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the language is unambiguous, the court gives effect to that language alone because it is presumed, "the legislature says what it means and means what it says." *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). RCW 18.27.010 plainly defines "service" in a manner that makes service of a notice of infraction complete once the notice of infraction is placed in the mail, and RCW 18.27.270 plainly provides that an appeal must be filed within 20 days of the date the notice of infraction is issued.

**2. Under the plain language of RCW 18.27.010(4) and 18.27.250, a contractor must ensure that the Department receives its notice of appeal within 20 days of the date that the Department issued the infraction**

RCW 18.27.010(4) defines "filing" to mean "delivery of a document that is required to be filed with an agency to a place designated by the agency." Thus, under that statutory definition, a document has not been "filed" with the Department until it has actually been delivered to it

at a place the Department has designated for the receipt of such documents. RCW 18.27.010(4).<sup>6</sup>

Furthermore, RCW 18.27.250 provides that if a contractor wishes to appeal a notice of infraction, the contractor must “file a notice of appeal with the department . . . within twenty days of service of the infraction in a manner provided by this chapter.” Reading RCW 18.27.250 and RCW 18.27.010(4) together, a contractor must actually *deliver* a notice of appeal to the Department within 20 days, or the appeal is untimely.

Pacific Rim Paving suggests that the Contractor Registration Act should be construed as requiring it to place its notice of appeal in the mail within 20 days, rather than requiring it to ensure that the Department actually receives the appeal within that time frame. App. Br. at 8-9. However, Pacific Rim Paving fails to cite to any legal authority in support of this contention, and, therefore, it should be rejected. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any event, the plain language of RCW 18.27.010(4) and RCW 18.27.250 rebut Pacific Rim Paving’s argument and establish that an appeal must have actually been delivered to the Department by the applicable deadline, which did not occur here.

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<sup>6</sup> Under the APA, “filing” similarly refers to the actual delivery of a document to a place that has been designated by the agency for the delivery of such documents. *See* RCW 34.05.010(6).

**3. Pacific Rim Paving failed to provide the necessary appeal bond until after the deadline to appeal had expired**

In addition to failing to timely appeal the notice of infraction, Pacific Rim Paving also failed to timely perfect its appeal by providing the appeal bond that is required by RCW 18.27.250. RCW 18.27.250 provides that when a contractor has appealed a notice of infraction, “[t]he appeal *must* be accompanied by a certified check for two hundred dollars.” (Emphasis added.) When Pacific Rim Paving filed its notice of appeal on May 26, 2013, the appeal did not include the statutorily required check for \$200. The check was not delivered to the Department until June 9, 2013, well after Pacific Rim Paving’s deadline to appeal the notice of infraction had expired. Since RCW 18.27.250 unambiguously provides that a notice of appeal “must be accompanied” by a check for \$200, it follows that a notice of appeal cannot be accepted as timely unless the contractor filed both the appeal and the required necessary payment by the applicable deadline, which did not occur in this case.

**4. Pacific Rim Paving’s reliance on RCW 18.27.010(11)’s statement that its definition of service applies “except as otherwise provided” in RCW 18.27.370 is misplaced**

Pacific Rim Paving argues that its duty to appeal the infraction was not triggered until it actually received the notice of infraction based on RCW 18.27.010(11)’s statement that its definition of “service” applies

“except as otherwise provided” in RCW 18.27.370, and based on the current RCW 18.27.370(2)’s statement that a notice of infraction becomes final “thirty days from the date *it is served upon the contractor* unless a timely appeal of the infraction is received as provided in RCW 18.27.270.”<sup>7</sup> App. Br. at 6-7; Laws of 2011, ch. 15, § 3. Pacific Rim Paving contends that the current RCW 18.27.370(2)’s reference to a notice of infraction being “served upon” a contractor establishes that the deadline to appeal an infraction is not triggered until the contractor receives the notice of infraction. *See* App. Br. at 7.

However, Pacific Rim Paving’s argument fails, because RCW 18.27.010(11)’s reference to RCW 18.27.370 is a reference to the special service requirements that RCW 18.27.370 imposes on the Department when it attempts to collect upon a final and binding notice of assessment, and it has no applicability to the issue of whether Pacific Rim Paving filed a timely appeal from the notice of infraction.

First, it must be noted that Pacific Rim Paving cites and relies upon statutory language that did not exist at the time the Department issued its

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<sup>7</sup> RCW 18.27.010(11) also provides that its definition of service applies except as provided by RCW 18.27.225. Pacific Rim Paving does not contend that RCW 18.27.010(11)’s reference to RCW 18.27.225 supports its argument in this case. In any event, RCW 18.27.225 plainly does not apply here, as it governs the Department’s authority to issue orders restraining work on a job site and its authority to seek an injunction from a superior court. Here, the Department did not take either of those actions, and simply issued a notice of infraction to Pacific Rim Paving.

infraction. RCW 18.27.370 was amended in 2011 to add the current language that Pacific Rim Paving relies upon. Laws of 2011, ch. 15, § 3. At the time relevant to this appeal, the Department had to follow a two-step process to collect a fine from a contractor who violated the Contractor Registration Act. First, the Department would, as it does under the current statute, issue a “notice of infraction” to the contractor. Then, once the notice of infraction became final, the Department would issue a “notice of assessment” certifying the amount due. Laws of 2001, ch. 159, § 6 (1). Subsection 2 of the former RCW 18.27.370 provided that “[a] notice of assessment becomes final thirty days from the date it is served upon the unregistered contractor unless a written request for reconsideration is filed with the department or an appeal is filed in a court of competent jurisdiction in the manner specified in RCW 34.05.510 through 34.05.598.” Laws of 2001, ch. 159, § 6 (2).

Once the notice of *assessment* became final, the statute allowed the director or designee to file a warrant, which had to be mailed to the contractor within three days of filing with the clerk. Laws of 2001, ch. 159, § 6 (3). The statute also allowed the director or designee to issue a notice and order to withhold and deliver property. Laws of 2001, ch. 159, § 6 (4). The notice and order to withhold and deliver must be served

by the sheriff or deputy, by certified mail or by an authorized representative of the director. Laws of 2001, ch. 159, § 6 (3).

Conversely, under the current version of RCW 18.27.370, the Department can simply issue a notice of infraction if it finds that a violation occurred, and, once the notice of *infraction* becomes final, the Department can collect the amount due without needing to take the extra step of issuing a separate notice of assessment. The current version of RCW 18.27.370 does, however, require the Department to follow extensive service procedures in collecting upon a final notice of infraction, which are identical to the procedures it had to follow when collecting upon a final “notice of assessment” under the pre-2011 version of the statute.

RCW 18.27.010(11), which defines “service”, was not amended in 2011, and it continues to provide that its definition of service applies “except as otherwise provided” by RCW 18.27.370. It is plain that, under the 2010 versions of the statutes, RCW 18.27.010(11)’s reference to its definition applying “except as otherwise provided” by RCW 18.27.370 was a reference to the special procedures that the Department must use when serving and executing a final *notice of assessment*, and that it has no applicability to the issue of whether a worker has filed a timely appeal from a *notice of infraction*. The language in the 2011 version of RCW 18.27.370 is plainly inapplicable here, as the notice of infraction

which is at issue in this appeal was issued well before that amendment was enacted, and the issue here is whether Pacific Rim Paving timely appealed the notice of infraction, not whether a notice of assessment has become final.

Furthermore, even assuming for the sake of argument that the language in the 2011 version of RCW 18.27.370 could somehow be considered when deciding whether Pacific Rim Paving timely appealed the Department's 2010 notice of infraction, Pacific Rim Paving's argument would still fail. As noted, the current version of RCW 18.27.370 does not require the Department to issue a "notice of assessment" after a "notice of infraction" has become final. It does, however, require the Department to follow extensive procedures when executing or collecting upon a final notice of infraction. RCW 18.27.010(11)'s statement that the definition of "service" contained therein applies "except as otherwise provided" by RCW 18.27.370 plainly refers to the special procedures that the Department must follow when collecting upon a final and binding notice of infraction. Therefore, it has no applicability to the issue of whether a contractor has filed a timely appeal from a notice of infraction.

A further problem with Pacific Rim Paving's argument is that its interpretation of RCW 18.27.370 would make that statute directly conflict with RCW 18.27.270, since RCW 18.27.270 plainly ties a contractor's

duty to appeal a notice of infraction to the date that the infraction was issued, not the date that the infraction was received. When it is possible to harmonize language in related statutory provisions to avoid a conflict, the courts do so. See *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 408, 924 P.2d 13 (1996) (stating that “if apparent conflicts in the statutes can be reconciled and effect given to each without distortion of the language used, the statute will be harmonized”); *In re Eaton*, 110 Wn.2d 892, 901, 757 P.2d 961 (1988). Here, the conflict that Pacific Rim Paving attempts to create between RCW 18.27.010(11)’s reference to RCW 18.27.370 and RCW 18.27.270 can be easily avoided by concluding that RCW 18.27.10(11)’s reference to its definition of service applying “except as otherwise provided” by RCW 18.27.370 refers only to the special collection procedures that the Department must follow when enforcing a final and binding notice of infraction.

Finally, Pacific Rim Paving’s interpretation of RCW 18.27.010(11) and the current language in RCW 18.27.370 should be rejected because it would render meaningless RCW 18.27.010(11)’s statement that service is complete once the notice is placed in the mail. The courts decline to interpret statutes in ways that render significant portions of them meaningless. *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010). Under Pacific Rim Paving’s interpretation, RCW 18.27.010(11)’s

reference to the current RCW 18.27.370 essentially nullifies RCW 18.27.010(11)'s statement that service is complete once a notice is placed in the mail: it is only in the context of deciding whether a notice has become final that it is necessary to determine the precise date that service of a notice became complete. Under Pacific Rim Paving's interpretation of RCW 18.27.010(11), its definition of when service is complete applies except when it is necessary to determine the date of service, which is a plainly absurd result that would render RCW 18.27.010(11) meaningless.

**5. Pacific Rim Paving's reliance on RCW 18.27.010's requirement that the Department mail a notice of infraction "return receipt requested" is misplaced**

Pacific Rim Paving also argues that RCW 18.27.010 must be interpreted as tying a contractor's duty to appeal a notice of infraction to the contractor actually receiving the notice of infraction, or else RCW 18.27.010's provision that the Department must request "return receipt" when it serves a contractor by mail would be meaningless. App. Br. at 7. However, Pacific Rim Paving fails to support this argument with a citation to authority, and case law establishes that this contention is incorrect.

The Supreme Court considered, and rejected, an almost identical argument in *In re Marriage of McLean*, 132 Wn.2d 301, 307-08, 937 P.2d

602 (1997). In that case, a father alleged that he had not been properly served with notice of a petition to modify his support obligations. *Id.* at 305. The service issue in that case was governed by RCW 26.09.175(2), which allows a petitioner to serve the nonpetitioning party “by personal service or by any form of mail requiring a return receipt.” *Id.* at 306. In that case, a summons and petition were sent by mail, return receipt requested, but the documents were returned unclaimed. *McLean*, 132 Wn.2d at 304. The father argued that the requirement that the documents be sent by a form of mail “requiring a return receipt” would be meaningless unless the statute was construed as requiring the petitioner to show that the nonpetitioning party actually received those documents. *Id.* at 305.

The Supreme Court rejected that argument, concluding that the statutory requirement of serving a document through a form of mail by a method in which a return receipt was requested has meaning even if the statute is not construed as requiring proof of actual receipt of notice. *Id.* at 307-08. First, the Court noted that “the return receipt form of mail . . . enables the court and the parties to track what happens to the mail after it is sent.” *Id.* at 307. The Court observed that “[t]his may be important where it is claimed the petitioner used an incorrect address” when mailing the notice to the nonpetitioning party. *Id.* Second, the Court noted that

“while there may not be evidence of actual receipt, there will be evidence that notice was sent as required by the statute.” *Id.* at 308. The Court concluded that even though the statute required that service by mail be made through a method in which return receipt was requested, the statute plainly did not require that the nonpetitioning party actually receive the summons and petition. *Id.* at 307-08.

As in *McLean*, requiring an entity (here, the Department) to request return receipt when sending a notice of infraction by mail allows the parties to track what happened after the notice of infraction was placed in the mail, and it allows the parties to confirm that the notice of infraction was, in fact, placed in the mail. *See McLean*, 132 Wn.2d at 307-08. It also allows the parties to confirm whether the notice was mailed to the correct address. *See id.* Thus, the statutory requirement that the Department use a method of mailing in which a return receipt is requested fulfills several legitimate purposes, but does not mean that the statute requires proof of actual notice. Pacific Rim Paving’s suggestion that the statute’s requirement would be meaningless unless it is construed as requiring actual notice fails.

An additional problem with Pacific Rim Paving’s argument is that it did, in fact, receive the Department’s notice of infraction, and it received that notice before its deadline to appeal had elapsed. CP 85-86. Thus,

even assuming that RCW 18.27.010(11) can be construed as requiring the Department to demonstrate that the contractor actually received the notice of infraction, this would not support Pacific Rim Paving, since it did, in fact, receive it. Pacific Rim Paving's argument that RCW 18.27.010(11) must be construed as tying a contractor's duty to appeal to actual receipt of a notice of infraction is without merit.

**6. Pacific Rim Paving fails to support its argument that RCW 34.05.413 requires that parties be given 20 days from the date of service to appeal any administrative decision**

Pacific Rim Paving contends that its appeal must be considered timely under RCW 34.05.413(3), based on the language in that statute that “[t]he agency shall allow at least twenty days to apply for an adjudicative proceeding from the time notice is given of the opportunity to file such an application.” App. Br. at 9-10. Although Pacific Rim Paving does not couch its argument in these terms, it would follow from its argument that if a state agency's decisions are subject to appeal under the APA, then they cannot be subject to an appeal period of less than 20 days from the date that an individual received actual notice of the agency's decision, and that any statute that purported to impose a shorter appeal period would be invalid. This argument fails for several reasons.

First, Pacific Rim Paving's argument takes the statutory language out of its proper context. RCW 34.05.413 provides:

(1) Within the scope of its authority, an agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.

(2) When required by law or constitutional right, *and upon the timely application of any person*, an agency shall commence an adjudicative proceeding.

(3) An agency *may provide forms for and, by rule, may provide procedures* for filing an application for an adjudicative proceeding. An agency *may require by rule* that an application be in writing and that it be filed at a specific address, in a specified manner, and within specified time limits. *The agency shall allow at least twenty days to apply for an adjudicative proceeding from the time notice is given of the opportunity to file such an application.*

(Emphasis added.) Thus, RCW 34.05.413(3) applies to an *agency* that adopts rules, forms, or policies that define when and how a party should file a request for an adjudicative proceeding. RCW 34.05.413(3) does not purport to place a limit on the *Legislature's* authority to define the requirements for filing a timely notice of appeal. Furthermore, RCW 34.05.413(3) does not purport to override the requirements for filing a timely appeal from a notice of infraction that are contained in any statute, including RCW 18.27.250, RCW 18.27.270, and RCW 18.27.010(4) and (11), and Pacific Rim Paving's suggestion that that provision of the APA should be construed in that fashion is meritless.

Second, when it is possible to harmonize language in related statutory provisions to avoid a conflict, the courts do so. *See Peninsula Sch. Dist. No. 401*, 130 Wn.2d at 408. Here, Pacific Rim Paving's argument would place RCW 34.05.413(3) in direct conflict with RCW 18.27.250, RCW 18.27.270, and RCW 18.27.010(4) and (11). This conflict can be easily avoided by interpreting RCW 34.05.413(3) as placing a limit on an *agency's* ability to proscribe an appeal period through a regulation, form, or policy, but as not precluding the *Legislature* from establishing a shorter appeal deadline through a statute.

Third, in the event that the Court concludes that there is an irreconcilable conflict between RCW 34.05.413(3) and RCW 18.27.010, RCW 18.27.250 and RCW 18.27.270, the more specific statutes in RCW 18.27 control. *See In re Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004) (specific statute controls over a general one).

Finally, even assuming RCW 34.05.413(3) limits the Legislature's authority to proscribe an appeal period by statute, a more reasonable interpretation of RCW 34.05.413(3) than the one offered by Pacific Rim Paving would be that, under RCW 34.05.413(3), a statute must allow a party to file an appeal 20 days from the date that notice of the right to appeal was *sent*, not that a statute must allow an entity at least 20 days to appeal from the date that actual notice is *received*. RCW 34.05.413(3)

states that agency shall allow 20 days to request a hearing from the date “notice is given,” not 20 days from the date that notice is received. Furthermore, while the APA does not define “notice,” it does define “service,” and that definition provides that “[s]ervice is complete upon deposit in the United States mail.” RCW 34.05.010(19). Furthermore, the APA defines “filing” as “delivery of a document to a place designated by the agency” for the filing of such documents. RCW 34.05.010(6). Given that the APA defines “service” as being complete once an agency deposits a notice in the mail, and that it defines “filing” as being complete only upon the agency’s actual receipt of a document, it is implausible that the Legislature understood that RCW 34.05.413(3) requires an agency to allow a party at least 20 days to file an appeal from the date that the party received notice as opposed to 20 days from the date that the notice was issued.

**B. Pacific Rim Paving Received A “Properly Addressed” Notice Of Infraction**

Pacific Rim Paving also contends that the Department failed to “properly address” the notice of infraction to it, and that, therefore, its appeal cannot be considered untimely. *See App. Br. at 7-8.* Specifically, Pacific Rim Paving seeks to avoid its obligation to file an appeal within the statutory deadline, asserting that the infraction addressed to “Pacific

Rim Paving” was improperly addressed because it should have been issued to “Pacific Rim Paving, Inc.” To support its argument, Pacific Rim Paving incorrectly claims that a declaration by Courtlan Erickson, an Assistant Attorney General, somehow supports the conclusion that the Department’s records indicate that Pacific Rim Paving’s business name is “Pacific Rim Paving, Inc.” rather than “Pacific Rim Paving,” and that the latter is a “nonexistent entity.” App. Br. at 2, 7 (citing CP 18). However, the declaration of Mr. Erickson refers to the business as “Pacific Rim Paving,” not Pacific Rim Paving, Inc., and indicates that Pacific Rim Paving is the trade name under which Pacific Rim Construction, Inc., does business. *See* CP 18-19. Indeed, the Department of Revenue and Secretary of State websites each indicate that “Pacific Rim Paving” is a name that Pacific Rim Construction, Inc. is “doing business as.” CP 18-19, 23-24.

Furthermore, Pacific Rim Paving does not dispute that the notice of infraction was sent to the proper address, nor does it dispute that it actually received the notice of infraction, nor does it contend that it did not understand that it was the intended recipient of that notice of infraction. Rather, it seems to be contending that the failure to include the word “Inc.” in the notice of infraction rendered the Department’s service improper as a matter of law, regardless of whether the alleged error

impacted its receipt of the service or resulted in any confusion with regard to who the subject was of that infraction. Pacific Rim Paving offers no citation to authority that would support such an interpretation of RCW 18.27.010(11), and the Department is aware of none.

Furthermore, it should be noted that RCW 18.27.010 states that service by mail is complete once the Department has mailed a notice of infraction to a contractor at the “last known address as shown by the department’s records.” The Department’s records indicate that the business name of Pacific Rim Paving is “Pacific Rim Paving.” CP 18-21. Although the Department’s records indicate that Pacific Rim Paving is a corporation, neither the word “corporation” nor “Inc.” is contained in the name of the organization that is reflected in the Department’s records.<sup>8</sup>

Thus, assuming for the sake of argument that the Department was required to use a particular name for Pacific Rim Paving when sending a notice of infraction to it, the only reasonable conclusion would be that the Department is required by RCW 18.27.010(11) to use the name of that business that is contained in the Department’s records. Here, the Department did so.

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<sup>8</sup> The Department’s records indicate that Pacific Rim Paving has a “parent company” known as “Pacific Rim Construction, Inc.” CP 21. But, in any event, the company is listed in the Department’s records as “Pacific Rim Paving.” CP 21.

**C. Pacific Rim Paving Fails To Support Its Argument That It Was Deprived Of Procedural Due Process**

Finally, Pacific Rim Paving argues that it was deprived of procedural due process because it was not given adequate notice of its right to appeal the notice of infraction. App. Br. at 9-10. However, aside from contending in general terms that it was entitled to, and was not provided with, notice and a reasonable opportunity to be heard, Pacific Rim Paving fails to explain how, in particular, it was deprived of due process. See App. Br. at 9-10. As the Supreme Court has observed, “naked castings into the constitutional sea” do not merit consideration by an appellate court. *In re Request of Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)). As Pacific Rim Paving offers nothing more than unsupported assertions, this Court should decline to consider its arguments. See *id.*

In any event, even assuming that this Court entertains Pacific Rim Paving’s vague constitutional assertions, Pacific Rim Paving is not entitled to relief under such a theory. Pacific Rim Paving contends that under the Department’s interpretation of RCW 18.27.010(11) and RCW 18.27.270, a notice of infraction could be found to be final and binding even if a contractor did not receive actual notice of the infraction, and this, Pacific

Rim Paving contends, would be unconstitutional. App. Br. at 9-10. There are at least two reasons why this argument fails.

First, Pacific Rim Paving received actual notice of the infraction, and it received the notice of infraction before the deadline to appeal it had elapsed. Therefore, Pacific Rim Paving was not deprived of having an opportunity to appeal the Department's notice of infraction under the Department's interpretation of the relevant statutes. The question of whether it would have been a violation of Pacific Rim Paving's rights if the infraction had become final despite Pacific Rim Paving's failure to receive actual notice of the infraction is not properly before this Court, as that is not what occurred in this case.

Second, procedural due process can be satisfied even if a party did not receive actual notice of a court matter or administrative action. As the Washington Supreme Court explained, "Due process requires 'notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *McLean*, 132 Wn.2d at 309 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed.2d 865 (1950)). However, *McLean* underscores that "[d]ue process does not require proof of actual notice in all circumstances." *Id.* Rather, so long as there is a "reasonable probability" that notice will be received if

the serving party complies with the necessary service procedures, due process is satisfied, even though there may be instances in which actual notice is not received. *Id.*

In determining what constitutes a reasonable probability that an entity will receive actual notice, a court considers (1) the private interest impacted by the government action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government interest, including the additional burden that added procedural safeguards would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *McLean*, 132 Wn.2d at 312; *Morrison v. State Dep't of Labor & Indus.*, 168 Wn. App. 269, 273, 277 P.3d 675, 677, *review denied*, 175 Wn.2d 1012, 287 P.3d 594 (2012).

Here, Pacific Rim Paving's interest is purely economic. *See Morrison*, 168 Wn. App. at 273 (interest in analogous electrical citation "solely an economic, pecuniary one"). In *Morrison*, given that the private interest was "solely a financial one," the court found permissible a statute that imposed a filing fee to appeal an electrical citation. *Id.* at 275. It was important to the court's analysis that the private right involved was only economic. *See id.*

Courts have found service by mail to be constitutionally sufficient, whether actual notice is demonstrated or not, even in cases involving significant private interests. For example, in *Rogers*, the Supreme Court concluded that with regard to a state's decision to revoke a driver's license, service by mail was sufficient even if actual notice was not received. *State v. Rogers*, 127 Wn.2d 270, 275-76, 898 P.2d 294 (1995). The stakes in such a case are considerable as the revocation of a driver's license could result in a loss of one's livelihood. *McLean*, 132 Wn.2d at 312 (citing *State v. Baker*, 49 Wn. App. 780, 745 P.2d 1334 (1987)). *McLean*, similarly, involved a significant private interest, as a modification to a child support requirement imposes a significant, and ongoing, financial obligation on a parent, yet the Supreme Court concluded that service by mail was sufficient and that actual notice was not constitutionally required. *McLean*, 132 Wn.2d at 312.

In this case, the private interest at stake cannot be said to be of greater constitutional magnitude than the revocation of a driver's license or a modification to a parent's ongoing financial obligations for a child: Pacific Rim Paving faces a one-time fine for a violation of the Contractor Registration Act. Pacific Rim Paving offers no citation to legal authority supporting the conclusion that this is a stake of greater constitutional

magnitude than the loss of a driver's license or an ongoing child support obligation, and the Department is aware of none.

With respect to the second factor, the risk of erroneous deprivation is slight. *See Mathews*, 424 U.S. at 335. Mail is commonly used in this country to send information to people. Placing something in the mail is reasonably calculated to reach that person, which is what is constitutionally mandated. *See McLean*, 132 Wn.2d at 309. And, here, Pacific Rim Paving actually received the notice of infraction. CP 85.

The third factor is the governmental interest. *Mathews*, 424 U.S. at 335. In contrast to the weak private interest involved here and the slight risk of deprivation, the state has a significant interest in ensuring compliance with the Contractor Registration Act. The Contractor Registration Act protects homeowners from financial hardship in the event that a contractor fails to perform work as promised or performs the work in a slipshod and negligent fashion. To this end, the Legislature directed the Department to strictly enforce the Contractor Registration Act, and forbade the Department from recognizing any form of "substantial compliance" with the Act. RCW 18.27.005.

Thus, when Pacific Rim Paving's private interest is compared to the state's interest in enforcing compliance with the Contractor Registration Act, there is no basis for concluding, as Pacific Rim Paving

does, that nothing short of actual notice of a notice of infraction is constitutionally adequate. Pacific Rim Paving's argument fails.

## VII. CONCLUSION

The Department asks this Court to affirm the decision of the superior court that dismissed Pacific Rim Paving's appeal as untimely and unperfected.

RESPECTFULLY SUBMITTED this 4 day of November, 2013.

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