SUPREME COURT NO. 92233-1

Court of Appeal Cause No. 71325-6-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

King County Department of Development and Environmental Services Building and Fire Services Division Code Enforcement Section, Respondents

v.

Stephen and Sandra Klineburger, Appellants

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

The petitioners, Stephen and Sandra Klineburger, ask this court to review the Court of Appeals decision Case No. 71325-6-1.

B. COURT OF APPEALS DECISION

The petitioners, Stephen and Sandra Klineburger, request that the Washington State Supreme Court review the Washington State Court of Appeals' decision Case No 71325-6-1 filed on August 3, 2015.

A copy of the decision is in the Appendix at pages A-1 through A-21. A copy of the *Hagman v. State of Washington Department of Ecology* decision is attached for ease of the Court at pages A22-A29. A copy of the *Steensma v. Washington State Dept. of Ecology and Bayes Brothers, LLC* decision is attached at pages A30-A31. A copy of the *Sylvia Ridge Developers, LLC v. Dept. of Ecology* is attached as pages A32-A35.

C. ISSUES PRESENTED FOR REVIEW

1. Were the Klineburgers denied due process because they had no available forum to challenge Ecology's arguments when Ecology failed to follow statutory notice requirements?

2. Would the Pollution Control Hearings Board have even accepted an appeal from letters which failed to contain statutory appeal notice requirements?

3. If the letters from Ecology were appealable decisions, should the time to appeal them be tolled until proper notice is given?

4. Should the Court of Appeals have remanded the matter to the trial court for failure to join a necessary party rather than reverse the trial court's decision affecting the merits of the Department of Ecology ruling?

5. Should the Klineburger property even be considered within the floodway? If the property is in the floodway, did the Klineburgers meet the four criteria necessary to develop in the Moderate Migration Zone of a Floodway.

D. STATEMENT OF THE CASE

Stephen and Sandra Klineburger own property located about 800 feet south of the middle fork of the Snoqualmie River near North Bend, Washington. CP 411-12. It lies within the federally mapped floodway: the area of the river floodplain where flood depths and velocities may reach hazardous levels. CP 413.

County regulations divide a channel migration zone into moderate hazard areas and severe hazard areas. CP 409, 411. Because of the existence of a road between the river and the Klineburger's property, the County has designated the Klineburgers' property a moderate hazard area. CP 436-438.

The Klineburgers purchased the property in 2011. CP 583. They contend that the mobile home at issue was on the property then. CP 333.

On October 24, 2011, the code enforcement officer posted a stop work order on the mobile home, directing the Klineburgers to obtain the necessary permits and inspections. CP 263, 333-34.

On January 3, 2012, the Klineburgers attended a "pre-application meeting" with DPER about the required permits. CP 372-74. Contrary to the factual statement in the Court of Appeals decision, DPER did not inform the Klineburgers they could not build in a floodway unless they could establish their site qualified as an exception to the flood plain management regulations. CP 374. The County actually indicated "the property is in the flood way and nothing is allowed in the floodway." CP 374. The County further noted that, "they should file a CAD, before we can take this in and in the CAD, Don can do his floodway review which will say nothing is allowed." CP 374.

Development regulations provide an exception which allows repair or replacement, under certain circumstances, or a "substantially damaged" dwelling and such was the position of the County and Department of Ecology. CP 381-382; see WAC 173.158.030 (definition of replacement residential structure). The County told Klineburgers nothing is allowed in

the floodway. CP 421. The Klineburgers persisted and submitted their reports from various experts including William Taylor. CP 423-424.

On January 9, 2012, DPER issued the Klineburgers a notice of code violation and order of abatement. CP 260, 337-339. The notice told them of their right to appeal and the procedures to do so. CP 337-39. The Klineburgers timely appealed. CP 340-361.

Klineburger's expert William Taylor evaluated the site according to the criteria of KCC 21A.24.260(G)(1)(a)(b)(c)(d). CP 409-420.

The report stated that the base flood depth at the building location was "slightly less than 3 feet with the exception of the southeast corner of the building" and that Taylor proposed to "adjust the grade slightly in that area to achieve compliance with the Base Flood Depth requirements of the code." *Id.* at 416. He found no evidence of flood-related erosion. CP 409. He noted that the "entire site" is located in the moderate channel migration hazard area of a federally mapped floodway. CP 409. But his inspection of the property disclosed "no signs of historic erosion," and "reports from long-term residents verify this." CP 409. Taylor's report did not address the warning system requirement. CP 409-420.

On October 22, 2012, Ecology floodplain specialist David Radabaugh sent a letter to Steve Bleifuhs, manager of the County's River and Floodplain Management Section. Radabaugh explained to Bleifuhs

that Ecology had determined the Klineburger site did not meet most of the required criteria for rebuilding in a floodway. CP 421-22. Radabaugh invited Bleifuhs to contact him or the engineer who reviewed the report with any questions about Ecology's "decision." Radabaugh sent a copy of this letter to Stephen Klineburger. CP 166.

A week later, Taylor sent Bleifuhs a response to Radabaugh's letter. CP 167-68. Taylor disputed Ecology's conclusions about flood depth and erosion and attached "reference pages from King County's website regarding flood alert programs." CP 167-68.

On December 18, 2012, Radabaugh responded to Taylor's letter in a second letter to Bleifuhs, in which he rejected most of Taylor's explanations and arguments. CP 436- 438. Radabaugh reminded Bleifuhs that before the County may issue a permit for a replacement residence in the floodway, Ecology must expressly recommend approval, repeating that Ecology "[did] not recommend" approval of the Klineburgers' replacement construction. CP 438. Once again, Mr. Radabaugh invited questions to contact him or the engineer who worked on the project. CP 438. Klineburger was one of the four people who were sent copies. CP 182.

In January 2013, Bleifuhs communicated Ecology's conclusion to DPER's permitting department, advising that the Klineburgers' site

"should not be approved for reconstruction or replacement of a residential structure." CP 386-389.

On March 20, 2013, the King County hearing examiner heard the Klineburgers' code enforcement appeal. CP 258-327, 623. On April 3, 2013, the appeal was denied. CP 333-334.

The Klineburgers appealed to superior court under LUPA. They asked the court to order King County to issue a permit to place a home on the property on the basis that either the lot is not in a floodway and "none of these regulations matter" or that the Klineburgers have met the criteria for an exception allowing development in the floodway.

The trial court agreed that "the County's decision was constrained by the law applicable to such decisions" but decided the superior court "has jurisdiction under the Constitution to review the decision of the Washington State Department of Ecology adopted by King County as their own to determine if the Department of Ecology/King County correctly interpreted the law and applied [it] to the facts in the case." CP 155-159. The court stated that it "is left with a definite and firm conviction a mistake has been made." CP 158.

The trial court adopted most of the findings of fact in the Klineburgers' proposed order, as well as some findings from the hearing examiner's decision, concluding, "The Court gives weight to the King

County Hearing Examiner's [findings and conclusions] that Klineburger proved that 428 Ave. SE had a localized diking effect." CP 155.

The trial court further held "[T]he County is ordered to allow the Petitioner to apply for whatever permits are needed to legalize his modular home and the permit is to be processed with the requirement the four criteria in WAC 173-158-076(1) (a) (b) [sic] and KCC 21A.24.260 (G) (1) (a) (b)(c)(d) [sic] have been met." CP 158.

The County appealed and Ecology intervened in the appeal. CP 220-221. The Klineburgers cross appealed, contending they successfully demonstrated that the floodway regulations do not apply because their property is not in the floodway.

The Court of Appeals reversed the trial court and held the Klineburgers failed to exhaust their administrative remedies by not appealing the Department of Ecology decision to the Pollution Control Hearings Board; the trial court could not reach the merits of the Department of Ecology decision on its own; and because the Department of Ecology was a necessary party to the litigation and had not been joined, the trial court not reach the merits of the Department of Ecology's decision through the LUPA hearing. *Klineburger v. King County Dept. of Development and Environment Services Bldg.*, 2015 WL 4610419, at 14-

15. In addition, due to the fact the Department of Ecology was not a local agency; their decision was not subject to LUPA actions. *Id.* at 14.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Klineburger's Were Not Given Required Statutory Notice of a Right To Appeal An Agency's Final Decision and Were Denied Their Statutory Right of Review.

The Decision is in Conflict with a Decision of the Court of Appeals in Division 2, RAP 13.4(b)(2); the Decision also Involves A Significant Question of Law Under the State Constitution Because It Impinges On Property Rights Without Assuring Statutory Due Process is Afforded, and The Decision Involves an Issue of Substantial Public Interest Because It Allows State Agencies to Take Final Action Without Giving Appropriate Statutory Notice of A Parties' Right to Appeal an Agency Decision. RAP 13.4(b)(3) and RAP 13.4(b)(4); WA Const. Art. 1, §3. U.S. Const. amend. V. (The Klineburgers will lose their house unless they have some forum where they can challenge the Department of Ecology's position)

The need of an agency to provide required notice of appeal rights in land use decisions has already been established. Felida Neighborhood Ass'n v. Clark County, 81 Wn.App. 155, 913 P.2d 823 (1996).

In Felida, an application for a development was heard by a land use hearing examiner. The matter then went to the FEIS Board which issued an oral decision on February 4, 1993 and memorialized that decision in a March 10, 1993 resolution. The County failed to file an official notice of its decision in violation of its own ordinance.

A letter was eventually sent dated July 26, 1993 which indicated the March action was the "final Board Action" and the time to file a judicial appeal had expired. *Id.* at 158. A group opposing the plan filed writs of certiorari and prohibition approximately nine months after the March decision. The Superior Court dismissed the writs because they were untimely. *Id.* at 158.

The Court of Appeals reversed and remanded. The first argument rejected by the Felida Court was the claim the Superior Court lacked subject matter jurisdiction because the underlying decision had not been timely appealed.[1] The Felida Court rightly noted that was not the issue. It found the County failed to give official notice of its underlying governmental action in violation of its own ordinance. As a result, the issue on appeal was whether the County's failure to give notice tolled the time for applying for a writ of review in Superior Court. *Id.* at 160-61.

That Court went on to state:

> Where statutorily-prescribed adequate notice of an administrative decision is integral to the process of invoking appellate jurisdiction, adequate notice is the statutorily required event that triggers the period for a timely appeal.

Id. at 161.

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[1] The Court in the instant case used that reasoning in part to reverse the Superior Court. That conclusion is in clear conflict with the reasoning of the Felida Court. Kineburger at paragraph 37

The Court went on to find that if, upon remand, the Superior Court could find that substantial compliance with the notice requirements had been met, the matter would be barred as untimely, however, if the Superior Court did not find substantial compliance with the notice requirements, the Superior Court was directed to review the merits of the underlying issue. *Id.* at 162-63. The holding of Felida is directly in conflict with the Court's decision in the instant case.

In the instant case, the Court of Appeals disregarded the argument that King County and the Department of Ecology failed to follow the statutory notice requirements that would trigger the Kineburger's right to appeal Ecology's decision.

The Court of Appeals found the Klineburgers failed to exhaust their administrative remedies because they did not appeal the "ruling" of the Department of Ecology concerning their land. That "ruling" ostensibly appeared in agency letters. As a result of that "ruling" not being appealed by the Klineburgers, it could not be disturbed by either the King County Hearing Examiner or the King County Superior Court.

The Klineburger's property was addressed in three relevant letters. Two from the Department of Ecology, one dated October 22, 2010 and the other December 18, 2012, and one from the King County Department of Natural Resources and Parks dated January 8, 2013.

RCW 43.21B.310(4), dealing with the Environmental and Land Use Hearings Office as it pertains to Pollution Control Hearings Board processes requires:

> An appealable decision or order *shall be identified as such and shall contain a conspicuous notice to the recipient that it may be appealed only by filing an appeal with the hearings board* serving it on the issuing agency within thirty days of the date of the receipt.

(Emphasis added).

None of the letters received by the Klineburgers contained any language as required by the statute. It is plain on the face of the documents they failed to meet the notice requirements if the letters are to be considered final appealable rulings. Consequently, the Klineburgers did not pursue a hearing before the Pollution Control Hearings Board because the ruling agency failed to notify them the letters they sent constituted appealable decisions. Instead, the Klineburgers pursued the only avenue that appeared available to them, a hearing before the King County Hearing Examiner on the permitting issues.

The catch 22 faced by the Klineburgers through that approach was the King County Hearing Examiner felt constrained to challenge anything set forth in the Department of Ecology letters. By that time, the opportunity for the Klineburgers to challenge the Department of Ecology "ruling" had passed. Because the letters in question failed to contain the

required statutory language, the Klineburgers were shut out of their appeal opportunity. That is the exact same problem created in Felida *supra*.

Not only did the purported letter "rulings" in Klineburger not contain the necessary statutory notice requirements, but it is questionable as to whether or not the last letter was even considered final by the Department of Ecology. The December 18, 2012 letter contains the language "Additionally, King county (sic) should consider whether this proposal is consistent with WAC 173-158-076(2):" The letter then goes on to set forth the WAC terms. By its own language, the Department of Ecology letter anticipated further action on the issue and it is incorrect to regard that letter as a final determination which cannot now be challenged because the Klineburgers failed to exhaust their administrative remedies.

The December 18, 2012 letter ends with the conclusion "If you have further questions, please contact me at ..." the letter goes on to set forth contact information for the author of the letter and contact information for the engineering report. There is nothing in that letter indicating it is an appealable decision or order. In fact, none of the letters involved in this case contain any language which could be considered *conspicuous notice to the recipient that it may be appealed only by filing an appeal with the hearings board and serving it on the issuing agency within thirty days of the date of receipt.* RCW 43.21B.310(4).

Regardless of the above, the Court of Appeals found the letters to be final decisions the Klineburgers failed to appeal to the Board.[2] Further, the Court of Appeals held the mandatory statutory notice of the right to appeal was not required to be in those letters, relying on Hagman v. Dep't of Ecology, No. 14-016c (Wash. Pollution Control Hrg's Bd. Dec. 3, 2014 copy attached as Ex. 2).

Hagman involved an appeal from a denial by the Department of Ecology to terminate coverage of a Construction Stormwater General Permit. There, Hagman claimed he should be terminated from coverage because the site had stabilized. Ecology sent Hagman an email denying the notice of termination. Hagman appealed that denial to the Pollution Control Hearings Board. At the hearing, Ecology argued the board shouldn't have jurisdiction to hear a denial issue. In rejecting the argument, the Hearings Board stated in a footnote:

> The fact that the email communicating Ecology's denial of Mr. Hagman's Notice of Termination did not include appeal language is not dispositive of whether the agency action at issue is appealable to the Board. While RCW 43.21B.310(4) requires that appealable decisions "shall contain a conspicuous notice to the recipient that it may be appealed only by filing an appeal with the hearings board", the failure to include this language does not divest the Board of its jurisdiction or impact whether the decision may be appealed.

(Order at p.14).

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[2] Court of Appeals Decision at Paragraph 33.

The issue in Hagman was not whether proper notice had been given. The issue was whether after a party appealed, the Board would exercise its jurisdiction *in spite of the fact no proper notice had been given.*

In the instant case, the ramifications of extending the language of the Hagman decision to allow an appealable ruling from an agency to omit the statutory notice of appeal requirements would have the effect of allowing the Pollution Hearings Control Board decision to rewrite legislation.

There is clearly a difference between a board exercising its jurisdiction to hear a case although an agency failed to comply with statutory notice requirements, and the instant case where a party is denied a right to appeal *because* the agency failed to provide statutory notice requirements. The holding that the Klineburger's failed to exhaust their administrative remedies was in error and if allowed to stand will adversely impact the property rights of the citizens of the State. It is also in clear conflict with the holding in Felida, *supra.*

In the instant case, the Court of Appeals found the letters were appealable decisions in spite of the fact they lacked the required notice of right to appeal language. The Court then proceeded to try to distinguish the letters in the instant case from letters in cases the Hearings Board

found were not appealable. The analysis by the Court of Appeals fails to contemplate the actual meaning of Hagman, *supra*, and the distinction is in error.

In Sylvia Ridge Developers, LLC v. Department of Ecology, PCHB No. 07-139 (2008)[3] the Board determined a noncompliance notification was not an order appealable to the Pollution Control Board because first, the document is captioned "non-compliance notification" and not order. The Board went on to hold a further indication the non-compliance notification was not an order was *because it did not contain the appeal language required under RCW 43.21B.310(4). Id.* at p.5.

The second case is Steensma v. Washington Department of Ecology and Bayes Brothers, LLC, PCHB No. 11-053 (2011).[4] There, the Board held a letter by Ecology to the Whatcom County Health Department commenting on a Bertand Creek Estates proposal for water for the subdivision was not a civil penalty, regulatory order, or water right relinquishment order. The Board further noted it was not sent directly to the applicant, (remember the Klineburgers were not applicants because they were not allowed to apply for a permit) *and it did not contain any*

[3] Case attached at Appendix 30-35.

[4] Case attached at Appendix 36-44.

language indicating it was an appealable decision as required by RCW 43.21B.310 (4).[5] *Id.* at p.7.

Consequently, review should also be accepted on the grounds there is a conflict between the decisions of the Pollution Control Board and the interpretation of those decisions by the Court of Appeals. It needs to be determined, if the notice of appeal language required by RCW 43.21B.310(4) does not appear in the document sent by an agency, *is it, or is it not*, a Final Appealable Order? This is a matter of substantial public importance. The average citizen cannot be expected to distinguish between letters from the Department of Ecology that amount to non-appealable decision letters and those qualifying as appealable orders without the benefit of the mandatory language of RCW 43.21B.310(4).

2. <u>The Decision of the Court of Appeals Conflicts With Case Law Regarding the Remedy When a Necessary Party is Not Joined</u>.

The Decision is in Conflict With A Decision of the Supreme Court Regarding the Appropriate Remedy When a Necessary Party is Not Joined. RAP 13.4(b)(2).

The Court of Appeals found the Department of Ecology was a necessary party pursuant to CR 19(a).[6] Because the Klineburger's did not join Ecology in their LUPA action, the trial court could not review the

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[5] Both of these decisions further buttress the argument presented in Section E(1) *supra*, that failure to include notice of appeal language is fatal to a claim a decision was "final".

[6] Court of Appeals Opinion, at Paragraph 29 and fn.31.

merits of the decision of Ecology. The Court of Appeals then reversed the trail court's finding the Department of Ecology's decision was in error because the "trial court could not justly decide a dispute to which the agency had not been joined"[7]

When a necessary party is not joined by the trial court, the proper remedy is vacation of the judgment with remand to the trial court for proceedings after proper joinder, not reversal of that court's decision. *See* Burt v. Washington State Dept. of Corrections, 168 Wn.2d 828, 836-37, 231 P.3d 191 (2010).

Further, it was wrong to put the onus on the Klineburgers to join the Department of Ecology. DPER was relying on the actions of Ecology when they refused to issue permits to the Klineburgers. Essentially, their actions relied on the Ecology letters and if their position was based on Ecology, the onus should have been on DPER, not the Klineburgers, to insure the necessary parties were before the court. Even in that case, dismissal at the Court of Appeals level was not proper.

Remand would be especially appropriate in the instant case because the right to review the Department of Ecology's decision was never properly communicated to the Klineburgers. By simply reversing the trial court, the Court of Appeals decision goes against the holding in

[7] Court of Appeals decision at paragraph 29.

Burt and compounds the significance of the failure to give proper statutory notice of the right to appeal the Ecology's ruling.

3. Petitioners Have Met the Four Criteria for Development Contained in WAC 173-158-076(1)(a)(b) and KCC 21A.24.26(G)(1)(a)(b)(c)(d).

Klineburger through his two experts has presented substantial evidence his projects meet all four criteria of the WAC and KCC cited in the heading. Robert Taylor, petitioner's expert engineer testified extensively before the hearing examiner. CP 276-300. He submitted two reports with extensive supporting documents to prove his findings. *Id.* Further, he explained how he approached the report and the methodology he used to come to his conclusions. *Id.* Jim Kemp, the petitioner's expert designer, also testified in support of the criteria. CP 303-310. These experts further supported their opinions by describing the extensive experience they have in applying for building permits in the moderate migration zone of the North and middle fork of the Snoqualmie River and the fact they had never had a building application in those areas denied by King County.

4. Petitioner's Lot is Not in the Floodway.

RCW 90.58.30(2)(b) provides that land protected by flood control devices maintained by federal, state or political subdivision of the state is not in the floodway. Judith Stoddard testified before the hearing Examiner

she has lived across the street for fifty-three years and had never seen floodwaters on the Petitioner's lot. CP 269-273. She also attached a declaration signed by eight of her neighbors who had lived in the area for years, indicating they had never seen floodwaters over the Petitioner's lot. CP 407.

Douglas Weber, the Seattle District, U.S. Army Corps of Engineers, Emergency Management Branch Chief signed a declaration that 428th Ave. SE, the road in front of the Petitioner's home, functions as a flood control structure and provides protection to the client's property from floodwaters, velocity, and erosion. CP 399.

The Court of Appeals erred when it found the Klineburger property was in the floodway.

F. CONCLUSION

This Court should accept review because the decision of the Court of Appeals is in conflict with decisions of the Supreme Court and the Court of Appeals, Division 2, and presents matters of substantial public interest. In addition, it presents issues regarding due process under the Constitution of the State of Washington. The petitioners have shown their lot is not in the Floodway or they have met the four criteria for

development in the Floodway.

Respectfully submitted this 2 day of September 2015

Ross Radley

Ross A. Radley WSBA #4972
Attorney for Petitioner

EXHIBIT 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEPHEN AND SANDRA KLINEBURGER, Respondents, v. KING COUNTY DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES BUILDING AND FIRE SERVICES DIVISION CODE ENFORCEMENT SECTION, Appellant, DEPARTMENT OF ECOLOGY, Intervenor.	)	No. 71325-6-I DIVISION ONE PUBLISHED OPINION FILED: August 3, 2015

LEACH, J. — This appeal involves the scope of the superior court's appellate review under the Land Use Petition Act (LUPA), chapter 36.70C RCW. King County (County) and the Department of Ecology (Ecology) appeal the trial court's order in this LUPA action. Stephen and Sandra Klineburger appealed a code enforcement order. The county hearing examiner affirmed the order, concluding that the County did not have the authority to disturb Ecology's determination that the Klineburgers' property did not qualify for an exception to state regulations prohibiting construction in a designated floodway. The superior court affirmed the examiner's conclusion about the County's authority but

decided that it could review Ecology's determination. Reversing Ecology's decision, the court directed the County on remand to process the Klineburgers' application consistent with its decision. In a cross appeal, the Klineburgers contend that the trial court did not go far enough—that it should have ruled that the floodway regulations do not apply to their property. We affirm the examiner's decision. Because the superior court's review of Ecology's decision exceeded its statutory authority under LUPA and the Klineburgers failed to exhaust their administrative remedies, we reverse the trial court's decision reviewing Ecology's decision, and we deny the Klineburgers' cross appeal. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS

Stephen and Sandra Klineburger own property located about 800 feet south of the middle fork of the Snoqualmie River near North Bend, Washington. It lies within the federally mapped floodway: the area of the river floodplain where flood depths and velocities may reach hazardous levels. The site also lies in the river's county-designated channel migration zone, the area where the river's channel can be reasonably predicted to migrate over time, creating an erosion hazard. The county regulations divide a channel migration zone into moderate hazard areas and severe hazard areas. A road, 428th Avenue SE, passes between the Klineburgers' property and the river. The County has

designated properties between the road and the river severe hazard areas and designated the Klineburgers' property a moderate hazard area.

The record does not provide a clear history of the residential development on the Klineburgers' property. Sometime between 2005 and 2007, a fire destroyed a home on the property. The Klineburgers purchased the property in 2011. They contend that the mobile home at issue was on the property then.

In October 2011, the King County Department of Permitting and Environmental Review (DPER)[1] investigated a complaint about the mobile home, accumulated debris, and inoperable vehicles on the Klineburgers' property. On October 24, 2011, the code enforcement officer posted a stop work order on the mobile home, directing the Klineburgers to obtain the necessary permits and inspections.

On January 3, 2012, the Klineburgers attended a "pre-application meeting" with DPER about the required permits. DPER informed them that they could not build in the floodway unless they could establish that their site qualified as an exception to the floodplain management regulations. An exception allows the repair or replacement, under certain circumstances, of a "substantially damaged" dwelling.[2]

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[1] DPER was formerly known as DDES (the Department of Development and Environmental Services).

[2] WAC 173-158-076.

On January 9, 2012, DPER issued the Klineburgers a notice of code violation and order of abatement. The notice told them of their right to appeal and the procedures to do so. The Klineburgers timely appealed. They also applied for a variance for nonconforming use under the King County Code (KCC), which the County denied.[3] The County told them that they had to submit a new building permit application, "including review of the floodplain/floodway, critical areas designation and Health Dept. approval."

The Klineburgers hired a civil engineer, William Taylor, to review the floodway issues affecting their property. Taylor's July 27, 2012, report evaluated the site according to the criteria of KCC 21A.24.260.G. This regulation requires that the base flood depth not exceed three feet, that the base flood velocity not exceed three feet per second, that there be no evidence of flood-related erosion, and that a flood warning system or emergency plan be in place. Taylor submitted a report to Ecology.

The report stated that the base flood depth at the building location was "slightly less than 3 feet with the exception of the southeast corner of the building" and that Taylor proposed to "adjust the grade slightly in that area to achieve compliance with the Base Flood Depth requirements of the code." Taylor found that the base flood velocity was 2.2 feet per second—within code

[3] The Klineburgers applied for a variance for nonconforming use within the shoreline jurisdiction under KCC 21A.32.045.

requirements. He found no evidence of flood-related erosion. He noted that the "entire site" is located in the moderate channel migration hazard area of a federally mapped floodway. But his inspection of the property disclosed "no signs of historic erosion," and "reports from long-term residents verify this." Taylor's report did not address the warning system requirement.

On October 22, 2012, Ecology floodplain specialist David Radabaugh sent a letter to Steve Bleifuhs, manager of the County's River and Floodplain Management Section. Radabaugh explained to Bleifuhs why, after reviewing Taylor's report, Ecology had determined that the Klineburger site did not meet most of the required criteria for rebuilding in a floodway. Radabaugh concluded, "Ecology does not recommend the approval of the Klineburger residence placement at 9609 - 428th Avenue SE." Radabaugh invited Bleifuhs to contact him or the engineer who reviewed the report with any questions about Ecology's "decision." Radabaugh sent a copy of this letter to Stephen Klineburger.

A week later, Taylor sent Bleifuhs a response to Radabaugh's letter. Taylor disputed Ecology's conclusions about flood depth and erosion and attached "reference pages from King County's website regarding flood alert programs."

On December 18, 2012, Radabaugh responded to Taylor's letter in a second letter to Bleifuhs, in which he rejected most of Taylor's explanations and

arguments. Radabaugh reminded Bleifuhs that before the County may issue a permit for a replacement residence in the floodway, Ecology must expressly recommend approval, repeating that Ecology "[did] not recommend" approval of the Klineburgers' replacement construction. In January 2013, Bleifuhs communicated Ecology's conclusion to DPER's permitting department, advising that the Klineburgers' site "should not be approved for reconstruction or replacement of a residential structure."

On March 20, 2013, the King County hearing examiner heard the Klineburgers' code enforcement appeal. In the decision denying the appeal, the hearing examiner stated that he "ha[d] no independent authority to review, modify or vacate the findings of the Department of Ecology with respect to floodway issues." The examiner noted that in the area of floodway management,

> [a]ll the essential regulatory determinations are made by the State Department of Ecology. The role of the County is limited to concurring with an affirmative recommendation from Ecology. . . . [I]f the Department of Ecology has concluded that the proposed floodway development should be denied, the County lacks any authority to overturn such determination. . . . Once Ecology had denied the Klineburger request for a floodway exemption, that determination was conclusive and binding on the County.

The Klineburgers appealed to superior court under LUPA, asserting, "King County is the final authority on the permit and should not abdicate to the Washington State Department of Ecology." They asked the court to order King County to issue a permit to place a home on the property on the basis that either

the lot is not in a floodway and "none of these regulations matter" or that the Klineburgers have met the criteria for an exception allowing development in the floodway.

The trial court agreed that "the County's decision was constrained by the law applicable to such decisions" but decided that the superior court "has jurisdiction under the Constitution to review the decision of the Washington State Department of Ecology adopted by King County as their own to determine if the Department of Ecology/King County correctly interpreted the law and applied [it] to the facts in the case." The court stated that it "is left with a definite and firm conviction a mistake has been made." The court adopted most of the findings of fact in the Klineburgers' proposed order, as well as some findings from the hearing examiner's decision, concluding, "The Court gives weight to the King County Hearing Examiner's [findings and conclusions] that Klineburger proved that 428 Ave SE had a localized diking effect."

The court struck language in the Klineburgers' proposed order directing the County to process the Klineburgers' permits "as if the lot was not in the floodway, [and] therefore the floodway regulations do not apply." However, the court adopted the Klineburgers' alternative language reversing and remanding to King County: "[T]he County is ordered to allow the Petitioner to apply for whatever permits are needed to legalize his modular home and the permit is to

be processed with the requirement the four criteria in WAC 173-158-7076(1)(a)(b) [sic] and KCC 21A.24.26(G)(1)(a)(b) [sic] have been met." The court added, "The Court does not make any decisions with regard to the remainder of the permit process at this time. That decision is up to the County in the first instance."

The County appeals. Intervenor Ecology also appeals. The Klineburgers cross appeal, contending that they successfully demonstrated that the floodway regulations do not apply because their property is not in the floodway.

STANDARD OF REVIEW

LUPA governs judicial review of land use decisions.[4] When reviewing an administrative land use decision under LUPA, an appellate court stands in the shoes of the superior court and reviews the administrative record.[5] A party seeking the reversal of a land use decision has the burden to establish one of six statutory standards under LUPA.[6] This case implicates the following grounds for relief:

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[4] Lauer v. Pierce County, 173 Wn.2d 242, 252, 267 P.3d 988 (2011).

[5] RCW 36.70C.130; King County Dep't of Dev. & Envtl. Servs. v. King County, 177 Wn.2d 636, 643, 305 P.3d 240 (2013) (King County DDES).

[6] RCW 36.70C.130(1). These grounds are

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> . . . .
>
> (d) The land use decision is a clearly erroneous application of the law to the facts.[7]

This court reviews alleged errors of law de novo.[8] "[A] decision is clearly erroneous if, 'although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed.'"[9]

ANALYSIS

Ecology, King County, and Floodway Management

Our state legislature has declared the alleviation of recurring flood damages to public and private property a matter of public concern and assumed "full regulatory control" over waters flowing or lying within the state, subject only

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> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts;
>
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.

[7] RCW 36.70C.130(1).

[8] King County DDES, 177 Wn.2d at 643.

[9] Lauer, 173 Wn.2d at 253 (quoting Phoenix Dev., Inc. v. City of Woodinville, 171 Wn.2d 820, 829, 256 P.3d 1150 (2011)).

to federal control, to the extent necessary to manage floodplains.[10] Ecology has the authority

> to examine, approve or reject designs and plans for any structure or works, public or private, to be erected or built or to be reconstructed or modified upon the banks or in or over the channel or over and across the floodway of any stream or body of water in this state.[11]

Ecology reviews and approves local floodplain management ordinances[12] and provides technical and enforcement assistance to local governments when requested.[13] Ecology also helps local governments identify the location of the 100-year floodplain, based on the areas that the federal emergency management agency designates as special flood hazard areas.[14] And Ecology establishes the minimum state requirements for floodplain management that meet or exceed federal requirements.[15]

Washington law generally prohibits construction or reconstruction of residential structures within designated floodways.[16] One exception may allow the repair or replacement of "substantially damaged residential structures."[17] After assessing the risk of harm, Ecology may recommend replacement or repair

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[10] RCW 86.16.010.
[11] RCW 86.16.025.
[12] RCW 86.16.031(1).
[13] RCW 86.16.031(2), (3), (5).
[14] RCW 86.16.031(7), .051.
[15] RCW 86.16.031(6), (8).
[16] RCW 86.16.041(2)(a).
[17] RCW 86.16.041(4); WAC 173-158-076(1).

of a dwelling if the site meets certain criteria.[18] At the request of a local government, Ecology will prepare a report of findings and recommendations for local government concurrence.[19] But without Ecology's permission, the local government may not allow repair or replacement of a damaged residential structure located within the floodway.[20]

RCW 86.16.110 allows any person "feeling aggrieved at any order, decision, or determination of the department or director [of Ecology] pursuant to this chapter [RCW 86.16], affecting his or her interest," to seek review under RCW 43.21B.310. Chapter 43.21B RCW establishes the Pollution Control Hearings Board (PCHB or Board) and grants it authority to hear and decide appeals from Ecology decisions, including those involving floodplain management.[21] RCW 43.21B describes procedures for filing an appeal to the PCHB[22] and provides for judicial review of a final PCHB decision under the Washington Administrative Procedure Act (WAPA), chapter 34.05 RCW.[23]

LUPA provides "the exclusive means of judicial review of land use decisions," which the statute defines as "a final determination by a local

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[18] RCW 86.16.041(4); WAC 173-158-076(1); KCC 21A.24.260.G.1.a-d.
[19] WAC 173-158-076(1).
[20] WAC 173-158-076(1); KCC 21A.24.260.G.2.
[21] RCW 43.21B.110(1)(b) (PCHB has jurisdiction over appeals of orders issued under RCW 86.16.020)).
[22] RCW 43.21B.230.
[23] RCW 43.21B.180.

jurisdiction's body or officer with the highest level of authority to make the determination."[24] Under the KCC, the hearing examiner makes the final decision on behalf of the County, a "local jurisdiction" under LUPA,[25] about code enforcement appeals.[26] An aggrieved party may appeal the examiner's determination to superior court, which reviews the decision under LUPA.[27]

The examiner's order denying the Klineburgers' code enforcement appeal described the County's limited authority in the floodway management scheme:

> The nub of the matter is that Mr. Klineburger needs a building permit for placement of a mobile home on his property. While he appears to be more than willing to get one, the County won't issue a permit because the State has determined that such siting would not meet its requirements for development within the floodway. Attempting to rectify such an outcome is well outside the jurisdictional boundaries of this code enforcement appeal. . . . The appeal must be denied.

In their land use petition, the Klineburgers asserted that "King County abdicated its responsibility" to exercise its "independent authority to review, modify, and vacate the findings of Department of Ecology with respect to floodway issues." The superior court affirmed the examiner's decision to the extent of noting that it "was constrained by the law applicable to such decisions."

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[24] RCW 36.70C.030(1), .020(2).

[25] RCW 36.70C.020(3). The statute's definition "does not include state agencies, such as Ecology." Samuel's Furniture, Inc. v. Dep't of Ecology, 147 Wn.2d 440, 453 n.12, 54 P.3d 1194 (2002).

[26] KCC 20.24.080.A.2; KCC 20.20.020.E (determinations under KCC 21A.24 are Type 2 land use decisions).

[27] RCW 36.70C.130(1).

We agree with the County and the superior court. The unambiguous language of the state regulation governing the replacement of dwellings located in a designated floodway states, "Without a recommendation from the department for the repair or replacement of a substantially damaged residential structure located in the regulatory floodway, no repair or replacement is allowed."[28] Under LUPA, the examiner's order denying the appeal was the only "land use decision" under review.[29] The superior court had to decide if the examiner erred using the standards in RCW 36.70C.130(1). Here, the court correctly concluded that the examiner did not err, given that it was "constrained by the law applicable to such decisions" and could not independently modify or vacate Ecology's determination.

The Superior Court's Authority under LUPA

The County argues next that because the Klineburgers could not appeal Ecology's decision under LUPA, the trial court violated the doctrines of primary jurisdiction and exhaustion by reviewing and reversing Ecology's decision. The Klineburgers counter that because the County alleges procedural, not jurisdictional, errors, RAP 2.5 bars the County from raising these issues for the first time on appeal.

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[28] WAC 173-158-076(1).
[29] RCW 36.70C.020(2).

We reject the Klineburgers' RAP 2.5 argument. First, under RAP 2.5, we "may refuse" to review an issue not raised below but are not required to do so. Second, the parties disputed the scope of the County's authority before the trial court. Therefore, the County may properly raise this issue on appeal. Contrary to the Klineburgers' position, this issue implicates the trial court's jurisdiction, which we may raise on our own under RAP 2.5(a)(1). Third, the Klineburgers did not request or brief the relief granted by the trial court. This circumstance makes declining review of this issue inappropriate and unfair.

We conclude that the trial court erred when it reviewed and reversed Ecology's decision. First, Ecology's recommendation was a determination by a state agency, not a local jurisdiction. Therefore, it was not a "land use decision" reviewable under LUPA.[30]

Second, although Ecology was a necessary party, the Klineburgers did not join the agency to their LUPA action. A party is necessary if that party's absence "'would prevent the trial court from affording complete relief to existing parties to the action or if the party's absence would either impair that party's interest or subject any existing party to inconsistent or multiple liability.'"[31] Here, the trial

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[30] RCW 36.70C.020(3) ("local jurisdiction" means a county, city, or incorporated town).

[31] Woodfield Neigh. Homeowner's Ass'n v. Graziano, 154 Wn. App. 1, 4, 225 P.3d 246 (2009) (quoting Coastal Bldg. Corp. v. City of Seattle, 65 Wn. App. 1, 5, 828 P.2d 7 (1992)); CR 19(a).

court could not review the merits of Ecology's determination without affecting Ecology's rights as the state agency tasked with floodplain management. Therefore, Ecology was a necessary party, and the trial court could not justly decide a dispute to which the agency had not been joined.[32]

Third, by reviewing the merits of Ecology's decision, the trial court allowed the Klineburgers to avoid the administrative exhaustion requirements the legislature established. Because a "land use decision" under LUPA must be a final determination by a local government, "a LUPA petitioner must necessarily exhaust all available administrative remedies" before the superior court may exercise its appellate jurisdiction.[33] Exhaustion furthers the purposes of

> "(1) discouraging the frequent and deliberate flouting of administrative processes; (2) protecting agency autonomy by allowing an agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors; (3) aiding judicial review by promoting the development of facts during the administrative proceeding; and (4) promoting judicial economy by reducing duplication, and perhaps even obviating judicial involvement."[34]

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[32] See Woodfield, 154 Wn. App. at 4-5 (county was necessary party where court's ruling affected county restrictions on development).

[33] West v. Stahley, 155 Wn. App. 691, 697, 229 P.3d 943 (2010); RCW 36.70C.060(2)(d); Durland v. San Juan County, 182 Wn.2d. 55, 66 n.6, 340 P.3d 191 (2014).

[34] IGI Res., Inc. v. City of Pasco, 180 Wn. App. 638, 642, 325 P.3d 275 (2014) (internal quotation marks omitted) (quoting King County v. Wash. State Boundary Review Bd., 122 Wn.2d 648, 669, 860 P.2d 1024 (1993)).

"Exhausting administrative remedies is always a condition precedent to challenging a 'land use decision' that is subject to review under LUPA."[35]

Here, the Klineburgers exhausted their administrative remedies for the hearing examiner's decision and properly appealed that determination under LUPA. But they did not exhaust administrative remedies for Ecology's decision because they never appealed that determination to the PCHB. Had they done so, they could have sought judicial review of an unfavorable PCHB decision—but under WAPA, not LUPA.

The Klineburgers argue that Ecology's October 22, 2012, letter was merely an "advisory recommendation," not an appealable order, and therefore they could not have sought relief from the PCHB. They cite RCW 43.21B.310(4), which states that an appealable decision "shall be identified as such and shall contain a conspicuous notice to the recipient" of the procedures for filing a PCHB appeal. They assert that "Ecology's letter is completely devoid of any identification of an appealable decision, nor does it contain a conspicuous notice to the Klineburgers on how it may be appealed."

To determine appealability of Ecology decisions, the PCHB has weighed, among other factors, an absence of such appeal language in an Ecology

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[35] West, 155 Wn. App. at 697.

communication.[36] But in a recent order,[37] the Board clarified that the fact that an e-mailed denial of an applicant's request did not contain RCW 43.21B.310(4)'s appeal language "is not dispositive of whether the agency action at issue is appealable to the Board. . . . [T]he failure to include this language does not divest the Board of its jurisdiction or impact whether the decision may be appealed."

Moreover, in PCHB cases where the Board has found that an Ecology determination was not appealable, the underlying facts are distinguishable from Ecology's letter here. For example, in Steensma v. Department of Ecology,[38] the Board noted that beyond an absence of appeal language, the letter at issue "[did] not constitute an Ecology decision on a water right application" but merely "offer[ed] Ecology's views on the applicant's proposal." The Board observed that Ecology did not send the letter directly to the applicant.[39] And the Board concluded that because of specific statutory limitations on Ecology's authority, "Ecology cannot render any binding decision" related to the disputed permits; in sum, "Ecology ha[d] not made a permitting decision" appealable to the PCHB.[40]

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[36] Steensma v. Dep't of Ecology, No. 11-053 (Wash. Pollution Control Hr'gs Bd. Sept. 8, 2011); Sylvia Ridge Developers, LLC v. Dep't of Ecology, No. 07-139 (Wash. Pollution Control Hr'gs Bd. Mar. 14, 2008).

[37] Hagman v. Dep't of Ecology, No. 14-016c, at 14 n.4 (Wash. Pollution Control Hr'gs Bd. Dec. 3, 2014).

[38] No. 11-053, at 6-7 (Wash. Pollution Control Hr'gs Bd. Sept. 8, 2011).

[39] Steensma, No. 11-053, at 7.

[40] Steensma, No. 11-053, at 8. The Board did describe other avenues by which the appellants could seek relief.

Similarly, in Sylvia Ridge Developers, LLC v. Department of Ecology,[41] the Board concluded that a "non-compliance notification" an Ecology water quality inspector sent to the permit applicants was not an appealable order. The Board observed that the water pollution control act[42] expressly provides that such a notification does not constitute "'an order or directive under RCW 43.21B.310,'" and the inspector did not have the authority under the statute to issue an order.[43]

Here, by contrast, Radabaugh had the authority to make Ecology's determination, which the County had to follow. No statutory provision limited Ecology's authority to make the decision or specified that it was not appealable under RCW 43.21B.310. Radabaugh referred to Ecology's determination as the agency's "decision." He sent the letter to Stephen Klineburger, who does not dispute he received it. Contrary to the Klineburgers' assertion that they "were left only one course: to challenge Ecology's letter through the Hearing Examiner," RCW 86.16.110 provided their route to relief from Ecology's "order, decision, or determination," an appeal to the PCHB.

Under both LUPA and WAPA, the superior court has jurisdiction to review administrative decisions. But we distinguish the court's subject matter jurisdiction from its statutory authority to exercise that jurisdiction by ruling in a particular

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[41] No. 07-139, at 5-6 (Wash. Pollution Control Hr'gs Bd. Mar. 14, 2008).
[42] Chapter 90.48 RCW.
[43] Sylvia Ridge Developers, No. 07-139, at 5 (quoting RCW 90.48.120(1)).

matter.[44] Here, the court had the authority under WAPA to review an Ecology determination following a PCHB decision, with a more complete factual record to do so. But by reaching the merits of Ecology's decision before the Klineburgers had exhausted their administrative remedies, the court exercised its jurisdiction prematurely and exceeded its authority under LUPA.

Our Supreme Court has recognized limited exceptions to the exhaustion requirement where, for example, appeal would be futile.[45] However, courts apply the futility exception narrowly, and "[i]n no circumstance would the exception permit appeal under some other distinct, inapplicable statutory review scheme."[46] In Stafne v. Snohomish County,[47] a landowner challenged a city's decision about a comprehensive plan amendment by filing a petition under LUPA. Our Supreme Court held that because a comprehensive plan amendment is not a "land use decision," Stafne could not seek relief directly from superior court through a LUPA petition.[48] Rather, under the Growth Management Act (GMA), chapter 36.70A RCW, he had to appeal first to the growth management hearings board.[49]

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[44] See Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 539-41, 886 P.2d 189 (1994).

[45] Stafne v. Snohomish County, 174 Wn.2d 24, 34, 271 P.3d 868 (2012).

[46] Stafne, 174 Wn.2d at 35; see also Coffey v. City of Walla Walla, 145 Wn. App. 435, 442, 187 P.3d 272 (2008) (superior court could not consider comprehensive plan amendment under land use petition).

[47] 174 Wn.2d 24, 28-29, 271 P.3d 868 (2012).

[48] Stafne, 174 Wn.2d at 33-34.

[49] Stafne, 174 Wn.2d at 34.

Even the circumstance of unlikely success before that board did not give him the right to challenge the city's decision directly via LUPA: "In other words, even if the chances for successful review before the growth board are slim, that cannot change a non-land-use decision into a land use decision under LUPA."[50]

Like Stafne, this case involves two "separate and distinct statutory schemes, with each containing expressly different review procedures."[51] To challenge Ecology's decision relating to floodway management, the Klineburgers first had to seek relief from the PCHB. The superior court interpreted Ecology's decision as "adopted by King County as their own" and reasoned that it could "determine if the Department of Ecology/King County correctly interpreted the law." But this interpretation "cannot change a non-land-use decision into a land use decision under LUPA."[52] The trial court erred when it reviewed and reversed Ecology's decision.

Cross Appeal: Merits of Ecology's Determination

In a cross appeal, the Klineburgers allege that the trial court erred by declining to order the County to process the Klineburgers' permits on their proposed alternative basis: "as if the lot was not in the floodway, therefore the floodway regulations do not apply." But because the superior court did not have

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[50] Stafne, 174 Wn.2d at 34.
[51] Stafne, 174 Wn.2d at 31.
[52] Stafne, 174 Wn.2d at 34.

authority under LUPA to review Ecology's determination on any basis, it did not err by declining to rule as the Klineburgers proposed. For the same reason, we decline to address the merits of Ecology's decision, and we deny the Klineburgers' cross appeal.

CONCLUSION

We affirm the order of the King County hearing examiner. We reverse the portion of the superior court's order setting aside Ecology's determination and holding that the Klineburgers' property meets the criteria for rebuilding in the floodway. We deny the Klineburgers' cross appeal and remand for further proceedings consistent with this opinion.

Leach, J

WE CONCUR:

Trickey, J

Appelwick, J

EXHIBIT 2

PAUL HAGMAN, APPELLANT v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, RESPONDENT
Pollution Control Hearings Board December 3, 2014 *(Approx. 13 pages)*

2014 WL 8514637 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board

State of Washington

PAUL HAGMAN, APPELLANT

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, RESPONDENT

PCHB No. 14-016c

December 3, 2014

ORDER ON MOTIONS

I. INTRODUCTION

*1 Paul Hagman appealed a penalty issued by the Department of Ecology (Ecology) for alleged violations of the Construction Stormwater General Permit (CSGP). While the appeal was pending, Mr. Hagman sought to terminate coverage under the CSGP. Ecology denied the request and Mr. Hagman appealed the denial. The appeals were consolidated for hearing. Mr. Hagman filed a Motion for Summary Judgment Dismissal of Penalties. Ecology filed a Partial Motion to Dismiss Issues 1, 2, and 7-9.

The Board hearing this matter was comprised of Board Chair Joan M. Marchioro, presiding, and Board Members Kathleen D. Mix and Thomas C. Morrill. Attorney Peter C. Ojalla represented Mr. Hagman. Assistant Attorney General Christopher H. Reitz represented Ecology.

In ruling on the motion, the Board considered the following material:

1. Mr. Hagman's Motion for Summary Judgment Dismissal of Penalties;

2. Declaration of Peter C. Ojalla In Support of Motion for Summary Judgment Dismissal of Penalties with attached Exhibits 1, R-9, R-19, R-20, and R-21;

3. Ecology's Response to Appellant's Motion for Summary Judgment Dismissal of Penalties;

4. Declaration of Christopher H. Reitz In Support of Ecology's Response to Appellant's Motion for Summary Judgment Dismissal of Penalties with attached Exhibits A through C;

5. Mr. Hagman's Reply on Summary Judgment Dismissal;

6. Respondent Department of Ecology's Partial Motion to Dismiss Issues 1, 2, and 7-9;

7. Mr. Hagman's Response to Motion to Dismiss; and

8. Respondent Department of Ecology's Reply in Support of Partial Motion to Dismiss Issues 1, 2, and 7-9.

The following issues, which were submitted by the parties and set out in the Pre-Hearing Order, are the subject of Mr. Hagman's and Ecology's motions:

1. Did Ecology fail to follow prescribed procedure under RCW 43.05 and RCW 90.48 when issuing penalties to Mr. Hagman?

2. Whether Ecology has authority to impose penalties for violations of the Construction Stormwater General Permit requirement that is not explicitly stated within a WAC or RCW without an allegation or showing of an actual water quality violation in the penalty notice?

Ecology also seeks dismissal of Mr. Hagman's appeal of the agency's denial of his termination of coverage under Issues 7-9, which state:

7. Does the Board have adjudicative jurisdiction to hear these issues under RCW 43.21B.240 and RCW 34.05.240?

8. Whether, as of June 23, 2014, the site met the criteria set out in condition S10.A.1 of the Construction Stormwater General Permit No. WAR 126588, including that the site had undergone final stabilization?

9 Whether Ecology's notification was insufficient under condition S10.B to deny Mr. Hagman's request to terminate Construction Stormwater General Permit No. WAR 126588 because the notification was transmitted by email?

*2 Based on its review of the record and foregoing pleadings, the Board enters the following ruling:

II. BACKGROUND

Mr. Hagman is covered under the CSGP, Permit #WAR126588, for a site located at 18454 Cascade View Drive, Mount Vernon, Washington. Ojalla Decl., Ex. R-9. On October 8 and 9, 2013, Ecology employees Stephanie Barney and Kurt Baumgartner inspected Mr. Hagman's site. *Id.* Ms. Barney completed a Corrections Required report form identifying several violations of the CSGP observed during the inspection, including violations of Conditions S5 and S9. *Id.* The report identified actions required to achieve compliance with the CSGP and a timeframe for completing those actions. *Id.*

On January 7, 2014, Ms. Barney conducted a second inspection of Mr. Hagman's site. Ojalla Decl., Ex. R-19. Ms. Barney completed a second Corrections Required report form, indicating that she again observed violations of CSGP Conditions S5 and S9. *Id.* The report also identified actions that Mr. Hagman needed to take to come into compliance with the terms of the CSGP. *Id.*

On January 21, 2014, Ms. Barney prepared a Notice of Penalty citing Mr. Hagman for violations of CSGP Conditions S5 and S9. Ojalla Decl., Ex. R-20. Ecology assessed Mr. Hagman a penalty of $1,500 for the cited violations. *Id.* Ecology sent the second Corrections Required report form and Notice of Penalty to Mr. Hagman via certified mail on January 21, 2014. Ojalla Decl., Exs. R-19, R-20. On February 21, 2014, the Board received Mr. Hagman's appeal of the Notice of Penalty.

On June 23, 2014, Mr. Hagman completed a Notice of Termination From Construction Stormwater General Permit (Notice of Termination). Hagman August 20, 2014 Notice of Appeal (Notice of Appeal), Ex. A. Mr. Hagman checked the box indicating that his site was eligible for termination because it had undergone final stabilization. *Id.* On July 22, 2014, Ms. Barney sent Mr. Hagman an email denying termination of the CSGP. Notice of Appeal, Ex. B. Ms. Barney stated that the "denial is based upon the determination that the site does not meet the definition of final stabilization. On-going construction of a single family residence and the evidence of continued erosion of soils associated with the initial clearing and grading was observed on site on 7/9/2014." *Id.* The Board received Mr. Hagman's appeal of Ecology's denial of the Notice of Termination on August 21, 2014. The Board consolidated Mr. Hagman's appeals for hearing.

III. ANALYSIS

A. Summary Judgment Standard [1]

Summary judgment is a procedure available to avoid unnecessary trials where formal issues cannot be factually supported and cannot lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d 1004 (1991).

*3 The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden, then the non-moving party must present evidence demonstrating that material facts are in dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990), *reconsideration denied* (1991). In a summary judgment proceeding, all facts and

[1] FN1. Support for the facts found by the Court is set out in OSP's Concise Statement of Material Facts, ER 4, and in the exhibits which were filed in support of OSP's motion. ER 5 (loan documents), 6 (A...

reasonable inferences must be construed in favor of the non-moving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

B. Issues

1. Ecology authority to issue penalty for violations of CSGP (Issue 2)

In Issue 2, the Board is asked to determine whether Ecology can issue a penalty for a violation of the CSGP when the penalty document does not include an allegation of a water quality violation. The relevant section of the civil penalty statute in the state Water Pollution Control Act, ch. 90.48 RCW, provides that a person who "violates the terms of a waste discharge permit issued pursuant to RCW 90.48.180 or 90.48.260 through 90.48.262 ... shall incur, in addition to any other penalty as provided by law, a penalty in an amount of ten thousand dollars a day for every such violation." RCW 90.48.144. The penalty in this case was issued for alleged violations of conditions of the CSGP governing submission of discharge monitoring reports and implementation/maintenance of best management practices. Ojalla Decl., Ex. R-20.

Mr. Hagman asserts that, absent evidence of a violation of water quality, Ecology lacks authority to issue a penalty under RCW 90.48.144. Mr. Hagman claims that penalties must be predicated on a violation of RCW 90.48.080 as that statute is the source of Ecology's authority "to regulate the water quality standards of waters of the state, whether through an NPDES general permit or otherwise." Hagman Response at 4-7.

Ecology asserts that RCW 90.48.144(1) authorizes the issuance of a penalty for violation of the conditions of a waste discharge permit issued pursuant to RCW 90.48.260. Ecology issued the CSGP pursuant to RCW 90.48.260 as a state waste discharge permit and National Pollution Discharge Elimination System (NPDES) permit. According to Ecology, the agency's authority to issue a civil penalty under RCW 90.48.144 is not predicated on the violations of any other statute, rule, or standard. Rather, the statute allows Ecology to impose a penalty for any violations of the terms or conditions of an NPDES or state waste discharge permit. Ecology Motion at 6-8.

The Board agrees that RCW 90.48.144 authorizes Ecology to issue a penalty for violation of the terms or conditions of the CSGP. Contrary to Mr. Hagman's assertion, RCW 90.48.080 does not restrict Ecology's authority under RCW 90.48.144. In other words, a discharge into waters of the state that violates water quality standards is not a prerequisite for the issuance of a penalty under RCW 90.48.144. By its plain terms, RCW 90.48.144(1) authorizes Ecology to issue a penalty for alleged permit violations. *See Weyerhaeuser Company v. Ecology*, PCHB Nos. 94-240 & 94-281 (Final Findings of Fact, Conclusions of Law and Order, April 26, 1995) (citing *Weyerhaeuser v. Ecology*, PCHB Nos. 86-224 & 87-33). Summary judgment is granted to Ecology on Issue 2.

2. Application of ch. 43.05 RCW (Issue 1)

*4 Issue 1 raises the question whether the notice and opportunity to correct provisions within ch. 43.05 RCW preclude Ecology's issuance of a civil penalty for violations of the CSGP. Under RCW 43.05.060(3), if Ecology "issues a notice of correction, it shall not issue a civil penalty for the violations identified in the notice of correction unless the responsible party fails to comply with the notice." However, the limitation on issuing a penalty does not apply where the alleged violation concerns the terms of a permit:

> This chapter shall not limit a regulatory agency's authority to issue a civil penalty as authorized by law based upon a person's failure to comply with specific terms and conditions of any permit or license issued by the agency to that person.

RCW 43.05.150. Moreover, any provision of ch. 43.05 RCW that is deemed to conflict with federal law or program requirements can be rendered inoperative if notice of such conflict is provided to the appropriate authorities. RCW 43.05.901, 43.05.902.

Mr. Hagman asserts that if Ecology elects to issue a notice of correction for an alleged permit violation, the agency cannot simultaneously issue a civil penalty for the same alleged violation. According to Mr. Hagman, once Ecology issues a notice of correction there must be a delay to allow compliance before a penalty can issue, unless the agency can prove that an exception applies. Mr. Hagman asserts that Ecology failed to provide sufficient time to correct the alleged violations noted during the January 2014 inspection, and thus the agency

was precluded from concurrently issuing a penalty for those alleged violations. Mr. Hagman asserts that although RCW 43.05.150 does not limit Ecology's authority to issue a civil penalty, having started down the notice of correction pathway the agency was required to allow him time to correct Hagman Motion at 5-7; Ojalla Decl., Exs. R-19, R-20.

Ecology argues that the notice and opportunity to correct provisions of ch. 43.05 RCW do not apply to this case for three reasons. First, the exception concerning permit violations set forth in RCW 43.05.150 governs as the alleged violations concern specific conditions of the CSGP. Second, pointing to correspondence from the Environmental Protection Agency (EPA) and the Director of Ecology, Ecology asserts RCW 43.05.060(3) is rendered inoperative by RCW 43.05.901 and 43.05.902. Reitz Decl., Exs. A-C. Finally, Ecology claims that even if RCW 43.05.060 applied, the agency provided Mr. Hagman with sufficient time to correct the alleged violations. The original notice of correction, which was sent in October 2013, identified violations of CSGP conditions S5 and S9. Ecology issued the civil penalty only after determining that Mr. Hagman had failed to correct those violations by January 2014. Ecology Reply at 2-4; Ojalla Decl., Exs. R-9, R-20.

The Board concludes that under the plain language of RCW 43.05.150, Ecology is authorized to issue a civil penalty when it finds that a permittee has failed to comply with the provisions of the permit without first providing notice and an opportunity to correct. In this instance, Ecology issued Mr. Hagman a civil penalty for alleged violations of the conditions of a permit, the CSGP, governing Mr. Hagman's construction activities. The cases cited by Mr. Hagman do not support his assertion that a notice of correction was required before Ecology could issue the civil penalty as neither case involved permit violations. *See M. Sawyer Drilling & Pump Service, Inc. v. Ecology*, PCHB No. 14-009 (Aug. 6, 2014) (penalty for failure to file notice of intent to decommission well); *Shannon & Wilson v. Ecology*, PCHB No. 99-066 (Mar. 27, 2000) (penalty for drilling water well without a license). Whether Mr. Hagman committed the alleged violations and the reasonableness of the civil penalty will be addressed at hearing.

***5** The Board also finds that pursuant to RCW 43.05.901 and 43.05.902, the civil penalty provision of RCW 43.05.060(3) is inoperative as applied to NPDES permits issued by Ecology. RCW 43.05.901 provides:

> If a regulatory agency determines any part of this chapter to be in conflict with federal law or program requirements, in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state ... *the conflicting part of this chapter shall be inoperative solely to the extent of the conflict*... .

(Emphasis added.)[2]

As required by RCW 43.05.901, EPA notified Ecology of potential conflicts between provisions of ch. 43.05 RCW and several federally delegated programs. In a letter dated November 20, 1997, EPA advised Ecology the "provisions of RCW 43.05.040, 43.05.050, 43.05.060(3), and 43.05.070" conflicted with federal law and programs such that the delegation of authority and funding was at risk. Reitz Decl., Ex. A. EPA specifically identified the Clean Water Act Program as one of the threatened programs. Upon receipt of EPA's letter, Ecology followed the procedures outlined in RCW 43.05.902 to declare a conflict. Reitz Decl., Exs. B and C.

Addressing this question in the context of a penalty issued under another federally delegated program, the Dangerous Waste Program, and presented with the same evidence provided here, the Board determined that RCW 43.05.060(3) was rendered inoperative. *U.S. Dep't of Energy v. Ecology*, PCHB No. 01-134 (April 11, 2002). Having not been presented with evidence demonstrating that a conflict no longer exists, the Board concludes that RCW 43.05.060(3) is inoperative as applied to NPDES permits issued by Ecology.

Finally, although not required, the Board finds that Mr. Hagman was provided notice and an opportunity to correct the alleged violations of the CSGP before the penalty was issued. Ecology's October 10, 2013, Corrections Required report notified Mr. Hagman of alleged violations of the CSGP and identified actions required to achieve compliance. Ojalla Decl., Ex. R-9. Among the violations noted were a failure to install/maintain best management practices under Condition S9 and failure to submit discharge monitoring reports required by Condition S5. *Id.* On her return site inspection three months later, Ecology's inspector found that the deficiencies persisted and issued Mr. Hagman a penalty for alleged violations of Conditions S5 and S9. Ojalla Decl., Exs. R-19, R-20. Contrary to Mr. Hagman's assertion,

the second Corrections Action report did not start the compliance clock on the violations found in October 2014. If RCW 43.05.060(3) was applicable in this case, the Board concludes that Ecology complied with the statute as Mr. Hagman was provided notice of and time to correct the alleged violations

The Board concludes that Ecology was authorized under RCW 43.05.150 to issue a penalty to Mr. Hagman for alleged violations of the CSGP regardless of whether a notice of correction was issued. The provisions of RCW 43.05.060(3) are rendered inoperative by RCW 43.05.901 for purposes of permits issued pursuant to the Clean Water Act. The Appellants' request for summary judgment on Issue 1 is denied. Summary judgment is granted to Ecology on this issue.

3. Board's jurisdiction over denial of CSGP Notice of Termination (Issues 7-9)

*6 Asserting that the Board lacks jurisdiction to review the denial of a Notice of Termination, Ecology seeks dismissal of Issues 7-9 and Mr. Hagman's appeal of the denial. Ecology argues that the Board's jurisdiction, as set forth in RCW 43.21B.110, extends only to Ecology's issuance of a permit, certificate or license. Because an Ecology decision concerning the termination of coverage under a general NPDES permit is not specifically listed in the statute, Ecology argues that the Board is without jurisdiction over such an appeal. Ecology Motion at 8-10.

Ecology supports its lack of jurisdiction argument by describing its denial of the termination of coverage under the CSGP variously as a "discretionary action," "a failure to perform a duty required by law," and "a decision not to take the action it would automatically take of terminating permit coverage." *Id.*, at 11; Ecology Reply at 5-6. According to Ecology, the denial constitutes ""other agency action" which may only be appealed to superior court under the Administrative Procedures Act, ch. 34.05 RCW. *Id.* In support of its argument, Ecology cites prior Board decisions holding that the Board lacks jurisdiction over denials of requests for permit modifications or revocations. *Id.*, at 10-13. Finally, Ecology argues that the Board should decline Mr. Hagman's invitation to augment its jurisdiction through principles of statutory construction absent a "strong basis" of support from the purpose and policies of the statute. Ecology Reply at 6-7.

The legislature identified the purpose of the Board as "provid[ing] for a more expeditious and efficient disposition of appeals with respect to decisions and orders of the department and director[.]" RCW 43.21B.010. The legislature "charged the [Board] with providing uniform and independent review of Ecology actions." *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 592, 90 P.3d 659 (2004). The state Supreme Court previously recognized that the statewide review provided by the Board is preferable to the fragmentation that could result from decisions produced by the various superior courts in the state:

> Next, uniform, independent review of not only the actions of the DOE but all the air pollution boards is patently preferable to fragmented and perhaps uneven results among the various superior courts in our 39 counties. Uniformity in administering the vast powers granted under our strong environmental and pollution control laws is an apparent and desirable goal of this act. That goal would be frustrated if the ultimate interpretation is vested in the several superior courts and their juries.

State ex rel. Martin Marietta Aluminum, Inc. v. Woodward, 84 Wn.2d 329, 333, 325 P.2d 247 (1974).

An agency has only those powers expressly granted to it by statute or necessarily implied therein. *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 156, 60 P.3d 53 (2002). The Board is expressly authorized under RCW 43.21B.110 to hear appeals of Ecology's "issuance, modification, or termination of any permit, certificate, or license[.]" The Board has also consistently interpreted RCW 43.21B.110 to provide implied authority to hear and resolve appeals of the denial of a permit, certificate, or license by Ecology. *See, e.g., Mayflower Equities, Inc. v. Ecology*, PCHB No. 13-006 (Findings of Fact, Conclusions of Law, and Order, June 13, 2014)(review of Ecology's denial of § 401 certification), *Orondo Fruit Company v. Ecology*, PCHB Nos. 10-164 & 10-165 (Findings of Fact, Conclusions of Law and Order, Sept. 20, 2011)(review of Ecology denial of application to change/transfer water rights); *Northwest Aquatic Ecosystems v. Ecology*, PCHB No. 05-101 (Order Denying Summary Judgment, Dec. 19, 2005)(review of Ecology's denial of coverage under general NPDES permit). [3]

*7 If Ecology's assertion that the Board lacks jurisdiction over the agency's "denial" decisions is taken to its logical extent, a significant number of appeals presently heard and resolved by the Board would be transferred to superior court. Such a result would be contrary to purposes and policies stated by legislature when it created the Board and would raise the potential for fragmented and uneven results being reached by the various superior courts across the state. The Board rejects Ecology's analysis of RCW 43.21B.110 and concludes that it has jurisdiction over the agency's decision to deny a Notice of Termination. [4]

Finally, even if the Board were to agree with Ecology regarding its interpretation of RCW 43.21B.110, the language of the CSGP's termination condition is unclear, contradictory and confusing in its effect. Condition S10.B provides that when a site is eligible for termination of coverage under the CSGP, the permittee is to complete and submit a Notice of Termination to Ecology. Condition S10.B further states that:

> The termination is effective on the date Ecology receives the NOT form, unless Ecology notifies the Permittee within 30 days that termination request is denied because the Permittee has not met the eligibility requirements in Special Condition S10.A.

Ecology asserts that the submission of a Notice of Termination by a permittee has no effect until the 30 day period set forth in Condition S10.B expires. Arguing in the alternative to its position that the Board lacks jurisdiction over the denial, Ecology claims that "the permit was never terminated and thus no decision related to the termination of the permit was ever made." Ecology Reply at 7 n.1. Under this alternative logic, Ecology asserts that because it denied the Notice of Termination, Mr. Hagman's termination request was never effective, and thus there was somehow no actual termination decision. *Id.*

The Board concludes that the express terms of Condition S10.B can fairly be read two ways. The first reasonable interpretation is that Mr. Hagman's coverage terminated on the date Ecology received the Notice of Termination, only to be revived or reissued approximately 28 days later by Ms. Barney's email. Under that interpretation, the email is a directive by Ecology that the site is required to be covered under the CSGP. A second equally plausible reading of Condition S10.B is that the submission of a Notice of Termination constitutes a modification of coverage for up to 30 days from the date of Ecology's receipt of the Notice of Termination. [5] During this 30-day time frame Ecology must determine whether to deny the termination request. Ecology refers to the 30-day time frame as the "automatic termination process," and acknowledges that an Ecology decision to deny a Notice of Termination takes a "permit out of the automatic termination process." Ecology Reply at 5.

*8 Unlike the actions at issue in the cases cited by Ecology, its action here is not an exercise of agency discretion or one of agency inaction, both of which are outside of the Board's jurisdiction. *See Preserve Our Islands v. Ecology*, PCHB No. 08-092 (Feb. 18, 2009) (discretionary action not to modify coverage under general NPDES permit or revise water quality certification); *Lake Entiat Lodge Associated v. Ecology*, PCHB No. 00-127 (Dec. 13, 2000) (Ecology's failure to act on request to rescind order and amend water right report); *Weyerhaeuser v Tacoma-Pierce County Health Dep't*, PCHB Nos. 99-067, 99-069, 99-097, 99- 102 (Sept. 23, 1999)(discretionary action not to revoke a solid waste permit). Rather, Ecology's denial of the Notice of Termination was an affirmative action contemplated by the CSGP. The action taken by Ecology requires Mr. Hagman to continue to operate under the terms and conditions of the Permit. Presumably, failure to do so will subject Mr. Hagman to potential enforcement action and/or penalties. Ecology's email denying the Notice of Termination is an order appealable to the Board.

Regardless of how it is characterized, the decision by Ecology is an appealable action subject to the Board's jurisdiction under RCW 43.21B.110. The Board denies Ecology's motion to dismiss Issues 7-9. The propriety of Ecology's denial of Mr. Hagman's Notice of Termination will proceed to hearing.

4. Request for declaratory order under RCW 34.05.240 (Issue 7)

In his appeal of Ecology's denial of the Notice of Termination, Mr. Hagman states that the relief he seeks includes a "declaration/order that the email provided by Ecology was not effective to continue the permit under [CSGP] S 10." Mr. Hagman states that he is seeking a declaratory order under RCW 34.05.240 and asserts that the Board has jurisdiction to decide that request. Hagman's Response at 9-10.

The Board's authority to issue a declaratory order under the Administrative Procedures Act is set forth in RCW 34.05.240, which provides in relevant part:

> Any person may petition an agency for a declaratory order with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency.

RCW 34.05.240(1). For the Board to issue a declaratory order, Ecology is a necessary party and the agency must consent to the entry of the declaratory order pursuant to RCW 34.05.240(7). *Boeing v. Ecology*, PCHB No. 11-050 (Order of Dismissal, August 5, 2011).

Ecology asserts that is has not consented to the Board's consideration of Mr. Hagman's declaratory order request. Ecology Reply at 9. Mr. Hagman asserts that the inclusion of Issue 7 in the Pre-Hearing Order constitutes consent by Ecology under RCW 34.05.240(7). Hagman Response at 11. The Board rejects Mr. Hagman's position. The inclusion of an issue in a prehearing order does equate to a party providing written consent to the issuance of a declaratory order.

*9 The Board's rejection of Mr. Hagman's request for a declaratory order does not prejudice him in light of the Board's determination above that the email sent by Ecology denying the Notice of Termination is an appealable order that is reviewable by the Board. Mr. Hagman will have his opportunity to challenge the validity of Ecology's action at the hearing.

ORDER

Mr. Hagman's Motion for Summary Judgment is DENIED. The Department of Ecology's Partial Motion to Dismiss is GRANTED as to Issues 1 and 2, and DENIED as to Issues 7-9. Mr. Hagman's request for a declaratory order is DENIED.

SO ORDERE this 3rd day of December, 2014.

Joan M. Marchioro
Chair, Presiding
Kathleen D. Mix
Member
Thomas C. Morrill
Member

Footnotes

1 Because the parties referred to matters outside the pleadings (*i.e.*, the CSGP, Notice of Termination and Ms. Barney's July 22, 2014 email) and the Board considered those materials when considering Ecology's motion, the Board will treat that motion as a request for summary judgment. See CR 12(b) and (c) (If, on a motion to dismiss, "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56."); *Schumacher Painting Co v. First Union Management, Inc.*, 69 Wn. App. 693, 698, 850 P.2d 1361, 1364 (1993) *rev. den.* 122 Wn.2d 1013, 863 P.2d 73 (1993)(holding that a CR 12(b)(1) motion should be treated as a summary judgment motion when court considers matters outside of the pleadings).

2 RCW 43.05.902 provides a process by which any such conflict can be identified and communicated to the governor, the president of the senate, and the speaker of the house.

3 Ecology's narrow interpretation in this matter is inconsistent with its position in *Northwest Aquatic Ecosystems*, where Ecology did not raise the question of jurisdiction concerning the Board's authority over denials of an NPDES permit but merely argued that the Board could only overturn a decision to grant or deny general NPDES permit coverage under an abuse of discretion standard.

4 The fact that the email communicating Ecology's denial of Mr. Hagman's Notice of Termination did not include appeal language is not dispositive of whether the agency action at issue is appealable to the Board. While RCW 43.21B.310(4) requires that appealable decisions "shall contain a conspicuous notice to the recipient that it may be appealed only by filing an appeal with the

hearings board", the failure to include this language does not divest the Board of its jurisdiction or impact whether the decision may be appealed.

5 Although not at issue in this appeal, it is unclear whether the terms of the CSGP continue to apply during Ecology's 30-day decision period. Reading the language of Condition S10.B in its strictest sense, all requirements of the CSGP terminate upon Ecology's receipt of a Notice of Termination and remain inapplicable for up to 30 days unless and until Ecology denies the request. Presumably, that is not Ecology's intent. More careful drafting of this provision could obviate the uncertainty created by its current wording.

2014 WL 8514637 (Wash.Pol.Control Bd.)

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EXHIBIT 3

2011 WL 4795083 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board
State of **Washington**

JOHN AND KAREN **STEENSMA**, APPELLANTS
v.
WASHINGTON STATE DEPARTMENT OF **ECOLOGY** AND BAYES BROTHERS, LLC, RESPONDENTS

PCHB No. 11-053
October 4, 2011

ORDER DENYING RECONSIDERATION

***1** John and Karen **Steensma (Steensmas)** filed an appeal with the Pollution Control Hearings Board (Board) challenging a letter from the **Washington State Department** of **Ecology (Ecology)**, regarding water resources for the Bertrand Creek Estates Plat. The plat applicant is Bayes Brothers, LLC (Applicant). **Ecology** filed a motion for summary judgment, and the Applicant joined the motion. The Board issued an Order Granting Summary Judgment to **Ecology** on September 8, 2011.

The **Steensmas** filed a timely petition for reconsideration on September 19, 2011. The Board requested that **Ecology** and the Applicant file answers to the petition for reconsideration. After reviewing the summary judgment order, the **Steensmas'** Petition for Reconsideration, and **Ecology** and the Applicant's answers, the Board denies reconsideration of its decision.

The **Steensmas** contend that the Board did not rule on the question of whether **Ecology's** letter was a decision on the use of the existing water right. This assertion is incorrect. The Board did decide that the letter did not constitute a decision by **Ecology** related to all the subject water rights. *See Summary Judgment Order at 7.* The **Steensmas** also contend that the Board's decision improperly relied upon the existence of a County decision to find the absence of a decision by **Ecology** in the March 8, 2011 letter. The key point, however, which the Board already addressed in its Summary Judgment Order, is that **Ecology** did not make a decision and therefore there can be no appeal to this Board. Other avenues of review, however, such as a review of the Whatcom County Hearing Examiner's decision by the Whatcom County Council, are available to the **Steensmas.**

The Board correctly applied the summary judgment standard and concluded that there were no contested material facts necessary to decide that **Ecology's** letter was not an appealable decision.

ORDER

Having found no basis to reconsider the final order of the Board, dated September 8, 2011, the **Steensmas'** Petition to Reconsider is DENIED.

DATED this 4th day of October, 2011.

Kathleen D. Mix
Chair
William H. Lynch
Member
Kay M. Brown
Administrative Appeals Judge, Presiding

2011 WL 4795083 (Wash.Pol.Control Bd.)

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EXHIBIT 4

2008 WL 5510422 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board

State of Washington

SYLVIA RIDGE DEVELOPERS, LLC, APPELLANT
v.
DEPARTMENT OF **ECOLOGY**, RESPONDENT

PCHB No. 07-139
March 14, 2008

ORDER GRANTING SUMMARY JUDGMENT TO **ECOLOGY**

***1** This matter comes before the Pollution Control Hearing Board (Board) on cross motions for summary judgment filed by Appellant **Sylvia Ridge Developers**, LLC (**Sylvia Ridge**) and Respondent State of Washington **Department** of **Ecology** (**Ecology**).

Clydia J. Cuykendall, Attorney, represented **Sylvia Ridge**. Ronald L. Lavigne, Assistant Attorney General, represented **Ecology**.

The parties submitted this matter to the Board for its consideration on the written record without oral argument. Kay M. Brown, Administrative Appeals Judge, presided. Board Members Kathleen D. Mix, Chair, William H. Lynch, Member, and Andrea McNamara Doyle reviewed and considered the pleadings and record pertinent to this motion, including the following:
1. **Sylvia Ridge Developers**, LLC Motion for Summary Judgment, Declaration of Douglas Truax in Support of Motion for Summary Judgment with Exhibits A and B;

2. Respondent **Department** of **Ecology's** Response in Opposition to **Sylvia Ridge Developers'** Motion for Summary Judgment, Attached Exhibit A, and Declaration of Stephanie Werkman in Support of Respondent **Department** of **Ecology's** Response in Opposition to **Sylvia Ridge Developers'** Motion for Summary Judgment; and

3. Reply in Support of Summary Judgment.

Based on its review of the record and foregoing pleadings, and being fully advised, the Board enters the following ruling:

BACKGROUND

In late 2006 and early 2007, **Sylvia Ridge** applied for, and received, approval on two forest practices applications. In one of the applications, **Sylvia Ridge** indicated that it was planning to convert the harvest site from forest land to a different land use. *Truax Decl, Ex. B.*

All of the harvesting operations authorized under the applications were completed in May of 2007. **Sylvia Ridge's** managing partner Douglas Truax, states that the company has not yet decided what future use to make of the property. For now, **Sylvia Ridge** intends to replant the property with seedlings in the spring of 2008. The seedlings have already been purchased. *Truax Decl. and Ex. A.*

On August 2, 2007, an **Ecology** water quality program inspector conducted a site inspection of the **Sylvia Ridge** site. Based on the visit, the inspector concluded a National Pollutant Discharge Elimination System (NPDES) Construction Stormwater Permit was required. The inspector issued a "noncompliance notification" to **Sylvia Ridge** on August 7, 2007, requesting that it apply for a permit by September 15, 2007. ***Ecology's** Ex. A and Werkman Decl.*

Sylvia Ridge filed an appeal of the noncompliance notification on September 7, 2007. It now moves for summary judgment, citing RCW 90.48.420(3), for the proposition that an NPDES permit is not required for nonpoint sources of pollution arising from forest practices. **Ecology** responds that the question of whether the forest practices on the site were "part of a construction activity" operation, and therefore subject to NPDES permitting requirements, is an issue of fact not appropriate for resolution on summary judgment. For support of its legal position, it cites Condition S1.B.1.a.i. of the construction stormwater general permit. It proceeds to argue, however, that it is entitled to summary judgment because the non-compliance notification issued by **Ecology** is not an appealable agency order.

***2** The Board agrees with **Ecology** that the noncompliance notification is not an appealable agency order, and therefore does not reach the issue of whether an NPDES permit is required in the circumstances presented by this case.

ANALYSIS

1. Summary Judgment

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 107, 108, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), rev. denied, 117 Wn.2d 1004 (1991).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts and reasonable inferences must be construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment may also be granted to the non-moving party when the facts are not in dispute. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 842 P.2d 470 (1992).

Here, the Board concludes there are no disputed issues of material fact regarding the question of whether the non-compliance notice is an appealable order. Therefore, this issue is amenable to resolution by summary judgment.

2. Non-compliance notification

The Board is a creature of statute and has only those powers expressly granted to it or necessarily implied therein. *Seattle v. Dep't of **Ecology***, 37 Wn. App. 819, 823, 683 P. 2d 244 (1984). The Board's jurisdiction is established by RCW 43.21B.110. RCW 43.21B.110(1)(b) provides jurisdiction over orders issued pursuant to ... RCW 90.48.120. **Sylvia Ridge** contends that the non-compliance notification notice is such an order, and therefore the Board has jurisdiction to hear this appeal.

The key question before the Board to determine whether or not it has jurisdiction over this appeal is whether or not the non-compliance notification is an order. If it is an order issued by **Ecology** pursuant to RCW 90.48.120, it is appealable to the PCHB. See RCW 43.21B.110(1)(b); *Helping Homes Development Corp. et al. v. **Ecology** & Kalama*, PCHB Nos. 02-079 & 02-080 (2002) (Order Granting Summary Judgment). However, there are several indications that the non-compliance notification is not an order.

*3 First, the document is captioned "non-compliance notification" and not "order." RCW 90.48.120(1) provides **Ecology** authority to issue a notice when it determines a person has violated, or has the potential to violate, the provisions of Ch. 90.48 RCW (The Water Pollution Control Act) or Ch. 90.56 RCW (The Oil and Hazardous Substance Spill Prevention and Response Act). RCW 90.48.120(1) expressly provides that such a determination does not constitute "an order or directive under RCW 43.21B.310."

A further indication the "non-compliance notification" is not an order is that it does not contain the appeal language that is required to be included in any appealable decision or order pursuant to RCW 43.21B.310(6) and WAC. This provision states:

> An appealable decision or order shall be identified as such and shall contain a conspicuous notice to the recipient that it may be appealed only by filing an appeal with the hearings board and serving it on the department within thirty days of the date of receipt.

Ecology's non-compliance notification does not contain any language of this nature.

A final point **Ecology** argues is that the water quality inspector that wrote and signed the letter does not have the authority to issue an order pursuant to RCW 90.48.120. *Werkman Decl.* The inspector states in her declaration that she did not intend the document she issued to be an order.

The Board concludes the non-compliance notification is not an order, and therefore it is not subject to appeal to this Board. *Accord West v. **Ecology***, PCHB No. 06-087, Order Granting Motion to Dismiss for Lack of Jurisdiction and Denying Motion for Stay (October 12, 2006).

On this basis, the Board grants summary judgment to **Ecology** and dismisses this appeal. The Board does not reach the merits of the dispute regarding **Ecology's** determination that an NPDES permit is required for the activities being conducted on this site.

Based on the foregoing analysis, the Board enters the following:

ORDER

Summary judgment is granted to **Ecology**, and this appeal is dismissed.

SO ORDERED this 14th day of March, 2008.

Kathleen D. Mix
Chair
William H. Lynch
Member
Andrea McNamara Doyle
Member
Kay M. Brown
Presiding
Administrative Appeals Judge

2008 WL 5510422 (Wash.Pol.Control Bd.)

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PROOF OF SERVICE

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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 2nd day of September 2015, at Seattle, Washington.

Loni L. Hinton