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NO. 72512-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

THOMAS MCLAREN,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Respondent.

RESPONSE BRIEF OF WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES

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I. INTRODUCTION

This case comes before the Court on review of the King County Superior Court Order that dismissed Appellant Thomas McLaren's Petition for Review of an order of the Pollution Control Hearings Board (the Board). The superior court dismissed Mr. McLaren's Petition for Review based on Mr. McLaren's failure to serve it on the Board as required under the Administrative Procedure Act, RCW 34.05. Accordingly, one of the issues before the Court is whether the superior court correctly determined that Mr. McLaren failed to perfect his appeal of the Board's order and dismissed Petition for Review. A related question before the Court is whether the superior court properly denied Mr. McLaren's motion for reconsideration of the dismissal order, in which Mr. McLaren sought to present for the first time evidence related to service of his Petition for Review.

As fully explained below, because Mr. McLaren failed to serve a copy of his Petition for Review on the Board within 30 days of service of the Board's Order as required under RCW 34.05.542(4), the superior court correctly dismissed Mr. McLaren's Petition for Review. The superior court also properly denied Mr. McLaren's motion for reconsideration because the evidence presented by Mr. McLaren was available but not presented before the superior court dismissed the petition, and, in any

case, did not establish that Mr. McLaren served his Petition on the Board as required under RCW 34.05.542(4).

Mr. McLaren also asserts for the first time in his appeal to this Court that the Board's Order was not a final order for purposes of appeal, because it did not establish the dollar amount of the costs for which he is liable under the Derelict Vessel Act. As explained below, because the Board's Order was the result of extensive administrative proceedings which culminated in a five-day administrative hearing, resolved all issues presented to the Board for adjudication, affirmed Respondent Department of Natural Resources' (DNR) right to take custody and dispose of vessels claimed by Mr. McLaren, and was designated by the Board and acknowledged by Mr. McLaren to be a final order, the Board's Order was a final order for purposes of appeal. The issue of the dollar amount of the costs for which Mr. McLaren is liable was not before the Board, in part, because the costs, including the cost of disposing of the vessels, were not yet known. Accordingly, DNR had not made a decision on costs for the Board to review.

The Court should also reject Mr. McLaren's argument because it would render judicial review of agency action under the Derelict Vessel Act a meaningless exercise. If Mr. McLaren were correct that vessel owners could not obtain judicial review until after all costs, including

vessel disposal costs, were determined by DNR and reviewed by the Board, judicial review could never result in the return of a wrongfully taken vessel to its owner.

II. COUNTER-STATEMENT OF THE ISSUES

1. Did Appellant fail to perfect his appeal of the Board's Order in this case where it is undisputed that Appellant did not deliver a copy of his Petition for Review to the Board as required by RCW 34.05.542(4) and presented no evidence to the superior court regarding mailing of his Petition for Review prior to his motion for reconsideration of the superior court's dismissal order? (Appellant's Issues Nos. 3 and 4.)

2. Was the Board's Order a final order for purposes of appeal, where the Order followed a lengthy administrative proceeding culminating in a five-day hearing, resolved all issues presented to the Board for the hearing, advised the Appellant of his right to appeal, was identified by the Board as a final order, and was treated by Mr. McLaren as final? (Appellant's Issues Nos. 1 and 2.)

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III. COUNTER-STATEMENT OF THE CASE

On April 24, 2014, the Board[1] entered its final order in *Thomas McLaren v. State of Washington, Department of Natural Resources*, PCHB Appeal No. 13-058 ("the Board's Order"). CP 3. The Board's Order followed lengthy proceedings before the Board, which ended in a five-day hearing spread between December 2013 and March 2014, at which the Board "received the sworn testimony of witnesses, admitted exhibits, and heard arguments on behalf of the parties." CP 5-6.

The Board's Order affirmed DNR's declaration that the vessels *Porte De La Reine* and *Porte Quebec* were derelict, its decision to take custody of the vessels, and its determination that Thomas McLaren is liable for DNR's reasonable and auditable costs including its costs of disposing of the vessels, under the Derelict Vessel Act, RCW 79.100 (the "Act"). CP 33. At the time of the hearing, DNR had not yet disposed of the vessels. CP 5 n.1 (discussing stipulation by Mr. McLaren to pay moorage for vessels in exchange for agreement on continuance of hearing date).

On April 24, 2014, the Board mailed a copy of the Board's Order to all parties. CP 3. The cover letter accompanying the Board's Order

[1] The Board is a quasi-judicial, independent state agency that is part of the Environmental and Land Use Hearings Office. RCW 43.21B. The Board reviews certain actions of DNR relating to the Derelict Vessel Program, including seizure and disposal of derelict vessels. *See* RCW 79.100.120(2).

explained that the Order was "a FINAL ORDER for purposes of appeal to Superior Court" and identified Thomas McLaren's appeal rights, including the necessity of serving a copy of a petition for judicial review on the Board to initiate review. *Id.* (emphasis in original). By its terms, the Board's Order was the final resolution of the issues identified in the parties' Pre-Hearing Order. CP 4-5, 22-33.[2]

On May 23, 2014, Thomas McLaren filed a Petition for Judicial Review of the Board's Order with the superior court.[3] CP 1. Mr. McLaren's Petition identified the Board's Order as a "Final Order." *Id.* DNR received the Petition for Review of the Board's Order by mail on May 27, 2014. CP 70. As of June 26, 2014, the Petition for Review had not been delivered to the Board. CP 105-06. Consequently, the Board never produced a record of the administrative proceeding for review by the superior court. CP 1-170. Based on Thomas McLaren's failure to timely serve the Board with his Petition for Review, DNR filed and served on both Thomas and Alexander McLaren its motion to dismiss the appeal

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[2] Two of the six issues identified by the parties' Pre-Hearing Order were dismissed on summary judgment. CP 5.

[3] In the Petition, Thomas McLaren's brother, Alexander McLaren, is listed as a "contingent petitioner" requesting review of the Final Order "to the extent that he shall be deemed to hold an interest in the vessels." CP 1. Alexander McLaren was not a party to the Board proceeding, and the Board's Findings of Fact indicate Alexander McLaren himself confirmed that Thomas McLaren owned the vessels. CP 7. Accordingly, the superior court ruled Alexander McLaren does not have standing to pursue the instant appeal. CP 154.

on June 30, 2014. CP 47, 107-08. DNR noted the hearing on the motion for August 8, 2014. CP 45. Both DNR and Thomas McLaren were represented by counsel at the August 8, 2014, hearing and presented argument to the superior court. CP 151. Following the hearing, the superior court granted DNR's motion to dismiss. CP 152-55.

Thomas McLaren filed a motion for reconsideration of the superior court's dismissal order. CP 164. Mr. McLaren offered for the first time in support of his motion for reconsideration a declaration from his brother, Alexander McLaren, in which Alexander McLaren asserted that he had mailed a copy of the Petition to the Board at the same time he mailed copies of the Petition to the superior court and counsel for DNR on May 22, 2014, nearly three months before the declaration was made. CP 156-57. In support of his declaration, Alexander McLaren attached a copy of a receipt for a single stamp and a copy of an un-postmarked, handwritten document listing addresses for the King County Superior Court, the Board, and counsel for DNR.[4] CP 158-60. The superior court denied Thomas McLaren's motion for reconsideration. CP 165.

[4] From the document provided as an attachment to Alexander McLaren's declaration, one cannot discern whether any of the addresses were actually written on envelopes as Mr. McLaren asserts. Because no postmark or date is apparent from the document, it is also impossible to tell when the document was created. Accordingly, the document adds no weight to Alexander McLaren's declaration that an envelope was mailed to the Board.

Thomas McLaren then filed his appeal of the superior court's order denying his motion for reconsideration. CP 166-68. More than a year later, after numerous delays and requests for extension, Thomas McLaren filed his opening brief and a motion to supplement the record. The Court rejected Mr. McLaren's opening brief and ordered him to re-file it on or before November 9, 2015. Mr. McLaren re-filed his opening brief on November 21, 2015, arguing, inter alia, that the Board's Order was not final for purposes of appeal. Appellant's Br. at 6-9. In a Commissioner's ruling on December 21, 2015, the Court denied Mr. McLaren's motion to supplement the record.

IV. STANDARD OF REVIEW

Whether the superior court may exercise original appellate jurisdiction is a question of law that is subject to de novo review. *James v. Kitsap County,* 154 Wn.2d 574, 115 P.3d 286 (2005); *Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 351, 271 P.3d 268, 273 (2012), *review denied,* 175 Wn.2d 1009, 285 P.3d 885 (2012). A trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion. *Go2Net, Inc., v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245, 1252 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons. *Id.*

V. ARGUMENT

The Court should affirm the order of the superior court dismissing Mr. McLaren's Petition for Review of the Board's Order with prejudice because Mr. McLaren failed to perfect his appeal by delivering a copy of his petition to the Board as required under RCW 34.05.542(4). In doing so, the Court should reject Mr. McLaren's argument that the superior court should have dismissed Mr. McLaren's appeal without prejudice. Because the Board's Order was a final order for purposes of appeal and Mr. McLaren failed to timely perfect his appeal, the superior court correctly dismissed Mr. McLaren's appeal from the Order with prejudice.

A. The Superior Court Properly Dismissed Mr. McLaren's Appeal of the Board's Order Because Mr. McLaren Failed to Perfect His Appeal by Delivering His Petition for Review to the Board as Required by RCW 34.05.542(4).

Appeals of the decisions of the Board are governed by the Administrative Procedure Act (APA), RCW 34.05. RCW 43.21B.180. "[B]efore a superior court may exercise its appellate jurisdiction, statutory procedural requirements must be satisfied. A court lacking jurisdiction must enter an order of dismissal." *Knight v. City of Yelm*, 173 Wn.2d 325, 337, 267 P.3d 973 (2011) (citing *Conom v. Snohomish County,* 155 Wn.2d 154, 157, 118 P.3d 344 (2005); *Crosby v. County of Spokane*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999)).

RCW 34.05.542(2) contains the procedural requirements that must be satisfied to invoke a superior court's appellate jurisdiction under the APA. *Sprint Spectrum, LP, v. Dep't of Revenue*, 156 Wn. App. 949, 953, 235 P.3d 849, 850-51 (2010). RCW 34.05.542(2) provides:

> A petition for judicial review of an order shall be filed with the court and *served on the agency*, the office of the attorney general, and all parties of record *within thirty days after service of the final order.*

(Emphasis added.) In this case, the Board is "the agency" to which RCW 34.05.542(2) refers. RCW 34.05.010(2) defines "agency" to include "any state board . . . authorized . . . to conduct adjudicative proceedings." RCW 34.05.542(2) thus makes "[t]imely service of a copy of the petition for review on the Board, the agency whose order is the subject of the petition, . . . required." *Sprint Spectrum*, 156 Wn. App. at 955 (addressing appeals from the Board of Tax Appeals).

Under the APA, the 30-day time period within which a party must file and serve a petition for judicial review under RCW 34.05.542 begins to run on the date the agency mails the final order to the parties. RCW 34.05.010(19); *Ricketts v. Bd. of Accountancy*, 111 Wn. App. 113, 117, 43 P.3d 548 (2002) ("If service is by mail, then it is complete upon deposit in the mail"). Here, the Board mailed its Order on April 24, 2014. Accordingly, Mr. McLaren had until May 27, 2014, to file his Petition for

Review with the superior court and serve it on the Board and all parties of record.[5]

To accomplish service on the Board, Mr. McLaren was required to deliver a copy of the Petition to the Board. RCW 34.05.542(4) creates an exception to the general rule under RCW 34.05.010(19) that service by mail is complete upon deposit in the mail. *Ricketts*, 111 Wn. App. at 118. Under RCW 34.05.542(4), "[s]ervice of the petition on the agency *shall be by delivery* of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency." *Ricketts,* 111 Wn. App at 118, quoting RCW 34.05.542(4) (emphasis added).[6] RCW 34.05.542(4) thus required Mr. McLaren to deliver his Petition for Review to the Board no later than May 27, 2014, to complete service and perfect his appeal. By failing to do so, Mr. McLaren failed to invoke the superior court's original appellate jurisdiction, and the superior court properly dismissed Mr. McLaren's appeal. *See Sprint Spectrum,* 156 Wn. App. at 962 (failure to serve Board of Tax Appeals (BTA) with petition for review supported dismissal of

[5] Thirty days after April 24, 2014, of the Final Order was May 24, 2014, a Saturday, and the following Monday was Memorial Day. Thus, the last day for Mr. McLaren to file and serve his Petition for Review was May 27, 2014, under CR 6(a).

[6] In *Ricketts*, alternative service on the agency was completed by service on the attorney of record for the agency as permitted under RCW 34.05.546. No such alternative service was completed by Mr. McLaren in this case.

petition); *Banner Realty, Inc., v. Dep't of Revenue*, 48 Wn. App. 274, 278-79, 738 P.2d 279 (1987) (late service of BTA required dismissal).

In his opening brief, Mr. McLaren argues that although he failed to deliver a copy of his Petition for Review to the Board as required for service on the Board, the Court should find he substantially complied with the service requirements of RCW 34.05.542(2). Appellant's Br. at 9-12. Mr. McLaren's argument that he substantially complied with the requirements of RCW 34.05.542 fails for two reasons: (1) the evidence on which Mr. McLaren relies to establish substantial compliance should not be considered because it was available before the superior court ruled on DNR's motion to dismiss, but was not presented to the superior court until Mr. McLaren's motion for reconsideration of the Order and (2) even if the evidence of mailing provided in support of reconsideration had been timely submitted to the superior court, it does not establish substantial compliance with the requirements of RCW 34.05.542.

1. The Superior Court Properly Rejected the Evidence of Mailing, Which Mr. McLaren Presented for the First Time in His Motion for Reconsideration, Because the Evidence Was Available but Not Presented Before the Superior Court Ruled on DNR's Motion to Dismiss.

The burden of proving compliance with the APA's procedural requirements is on the party seeking judicial review of an administrative order. The APA requires that the petitioner set forth "[f]acts to

demonstrate that [he is] entitled to obtain judicial review." RCW 34.05.546(6). Here, DNR moved to dismiss Mr. McLaren's Petition on the grounds that he had failed to timely serve the Board. CP 50-53. Thus, Mr. McLaren was well aware of the necessity of bringing forward any facts relevant to that issue before the court issued its decision. Mr. McLaren failed to do so and only presented facts regarding service of his Petition for Review on the Board after the court's decision, in support of his motion for reconsideration of the superior court's dismissal order. Appellant's Br. at 4 (citing CP 156-64). Because the facts presented by Mr. McLaren were available but not presented to the superior court prior to its ruling on DNR's motion to dismiss, the superior court did not abuse its discretion in denying Mr. McLaren's motion for reconsideration. *Go2Net, Inc.*, 115 Wn. App. at 91 (refusing to consider evidence submitted in declaration supporting reconsideration because not newly discovered); *Fishburn v. Pierce County Planning & Land Servs. Dep't*, 161 Wn. App. 452, 472-73, 250 P.3d 146 (2011) (holding that party not entitled to submit evidence on reconsideration if available but not offered until after the decision).

Evidence submitted for the first time in support of a motion for reconsideration will be considered only under limited circumstances. Under CR 59(a)(4), the superior court may vacate a verdict or other order

based on "newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial." Under the rule, a new trial or hearing may be granted based on newly presented evidence only if the evidence: (1) will probably change the result; (2) was discovered after the trial; (3) could not have been discovered before trial with due diligence; (4) is material; and (5) not merely cumulative or impeaching. *Go2Net, Inc.,* 115 Wn. App. at 88 (citing *Holaday v. Merceri,* 49 Wn. App. 321, 329, 742 P.2d 127 (1987)). If the newly proffered evidence fails to satisfy any one of the five criteria, it is grounds for denial of the motion for reconsideration. *Id.*

The evidence of mailing that Mr. McLaren provided in support of his motion for reconsideration fails to meet any of the first three criteria. First, the evidence, if timely submitted, would not have changed the result. Under RCW 34.05.542(4), service on the Board is accomplished by delivery of the Petition for Review to the Board. *See Ricketts*, 111 Wn. App. at 118 (RCW 34.05.542(4) creates exception to the general rule that service is complete upon deposit of petition in the mail). Because Mr. McLaren's evidence of mailing does not establish delivery of the Petition, it would not have changed the outcome at the superior court.[7]

[7] Even assuming *arguendo* that the Court were to hold that sufficient proof of mailing could create a presumption of delivery under RCW 34.05.542(4), Alexander McLaren's declaration that he mailed the Petition for Review to the Board is

Second, Mr. McLaren fails to meet the requirements for presenting new evidence under CR 59(a)(4) because it is beyond dispute that the purported evidence of mailing, if it occurred as stated in Alexander McLaren's declaration, was known to the McLarens as of May 22, 2014. The evidence could have been presented, therefore, at the August 8, 2014, hearing through the use of ordinary diligence. DNR served its motion to dismiss on June 30, 2014, more than a month in advance of the hearing. CP 107-08. Because "the evidence was available but not offered until after the opportunity passed," Mr. McLaren was not entitled to submit the evidence, and the superior court did not abuse its discretion in denying his motion for reconsideration. *Fishburn*, 161 Wn. App. at 472-73; *Go2Net, Inc.*, 115 Wn. App. at 89-90 ("There is no abuse of discretion where the trial court refuses to consider an untimely affidavit concerning matters that occurred well before the suit was brought.") Accordingly, the Court should affirm the superior court's dismissal order and its denial of Mr. McLaren's motion for reconsideration.

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insufficient to establish the presumption. *See* pp. 20-21 below. Moreover, it is undisputed that the Petition was never received by the Board. Appellant's Br. at 4, 12. Accordingly, the declaration from the Board that the Petition was never received would have rebutted any such presumption. *See Tassoni v. Dep't of Ret. Sys.*, 108 Wn. App. 77, 87, 29 P.3d 63 (2001).

2. Even if the Evidence of Mailing Presented in Alexander McLaren's Declaration Had Been Timely Submitted to the Superior Court, It Would Not Have Established Substantial Compliance With the APA's Service Requirements.

Mr. McLaren argues that the Court should excuse his failure to serve the Board with his Petition for Review under the doctrine of substantial compliance. Appellant's Br. at 9-12. As explained above, the superior court properly disregarded the evidence of mailing submitted by Mr. McLaren because he presented it for the first time on a motion for reconsideration. Even assuming *arguendo* that the evidence of mailing had been timely submitted, however, the doctrine of substantial compliance has no application here because (1) RCW 34.05.542(4) requires delivery to complete service of a petition for judicial review on the Board and (2) the evidence of mailing provided by Mr. McLaren does not create a presumption under RCW 34.05.542(4) that the Petition for Judicial Review was delivered to the Board.

a. Mailing of Petition for Review Is Not Sufficient for Service on the Board.

Generally, the doctrine of substantial compliance permits some deviation from the requirements of a statute if there has been actual compliance with the "substance essential to every reasonable objective" of the statute. *See, e.g., City of Seattle v. Pub. Emp't Relations Comm'n*

("*PERC*"), 116 Wn.2d 923, 928, 809 P.2d 1377 (1991). It is well established, however, that one cannot substantially comply with a time limit. *See id.* at 928-29. A party acts either before or after a time limit. *Id.* In this case, the doctrine of substantial compliance cannot, therefore, turn late or no service of the Petition on the Board into timely service. Here, it is undisputed that Mr. McLaren's Petition for Review was not delivered to the Board within 30 days of service of the Board's Order as required by RCW 34.05.542(4). Appellant's Br. at 4, 12. Accordingly, service on the Board was not accomplished.

Mr. McLaren's assertion that his brother mailed the Petition to the Board does not establish substantial compliance with the requirement that the Petition be delivered to the Board as required under RCW 34.05.542(4). Even assuming substantial compliance could be applied to the requirement of delivery of the Petition to the Board under RCW 34.05.542(4), mailing the Petition to the Board standing alone cannot turn noncompliance with the delivery requirement into compliance. A primary reason for the 30-day service requirement in RCW 34.05.542 is to ensure that judicial review is promptly sought and completed. *See Banner Realty*, 48 Wn. App. at 278 (discussing dismissal for late service of agency under prior version of statute). To that end, delivery of the petition to the agency that issued the final decision subject to judicial

review is "vital to the timely functioning of the review process. Without such service, there is no record before the superior court and thus, no basis for review." *Id.*; *Sprint Spectrum*, 156 Wn. App. at 958-59. Because receipt of the Petition for Review by the Board is "vital" to the judicial review process established in RCW 34.05.542(4), Mr. McLaren's failure to deliver the Petition for Review to the Board within the time allowed does not comply with the "substance essential to every reasonable objective" of RCW 34.05.542(4). Thus, regardless of whether Mr. McLaren mailed the Petition for Review, evidence that the Petition was mailed does not establish substantial compliance with the statute. *Id.*

b. Alexander McLaren's Declaration of Mailing Does Not Create a Presumption That the Petition for Review Was Delivered to the Board.

Because the plain language of RCW 34.05.542(4) requires delivery to complete service on the Board, no presumption of service can be created based on mailing. "[I]t is well established that statutory procedural requirements must be met in order for a superior court to exercise its appellate jurisdiction." *Knight*, 173 Wn.2d at 337 (citation omitted).

Where the procedural requirements of a statute relate to the time for service and filing of the appeal with the superior court, strict compliance with the statutory procedural requirements is required. *Id.*

Accordingly, courts have long held that there can be no substantial compliance with the timeliness of statutory deadlines for service or filing of an appeal with the superior court. *See, e.g., PERC,* 116 Wn.2d at 927-28; *Clymer v. Emp't Sec. Dep't*, 82 Wn. App. 25, 29, 917 P.2d 1091 (1996) (" failure to comply . . . or belated compliance, cannot constitute substantial compliance with the requirements relating to the filing of a petition for judicial review"); *Banner Realty,* 48 Wn. App. at 277 (substantial compliance does not encompass noncompliance with service requirements).

It is undisputed here that the Petition for Review was not delivered to the Board.[8] Appellant's Br. at 4, 12. Accordingly, Mr. McLaren's evidence of mailing fails to establish compliance with the requirements of RCW 34.05.542(4). When interpreting a statute "[t]he court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Sprint Spectrum*, 156 Wn. App. at 953 quoting *Dep't of Ecology v. Campbell &*

[8] The cases that have recognized substantial compliance do so where service has been completed but is procedurally deficient in some manner. *See, e.g., Skinner v. Civil Serv. Comm'n of City of Medina*, 168 Wn.2d 845, 232 P.3d 558 (2010) (service on city clerk rather than Commission was substantial compliance). That might be the case, for example, where a petition for review was delivered to the city clerk at city hall where the city council designated by statute for service maintained its offices. *Id.* In this case, however, it is undisputed that the Petition was not delivered at all. Accordingly, there was no compliance with RCW 34.05.542(4), substantial or otherwise.

Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Read in the context of RCW 34.05.542(4) as a whole, the plain language of RCW 34.05.542(4) requiring that "[s]ervice of the petition on the agency shall be by delivery . . ." establishes that mailing does not meet the requirement of service on the Board; delivery is required.

The express language of RCW 34.05.542(4) does create a presumption of service *on parties* based on mailing as evidenced by a postmark but excludes service on "the agency" from that presumption. Service on the agency is not deemed complete based on mailing. Under RCW 34.05.542(4), service on the agency is only complete upon delivery. Because the Legislature provided the presumption of service based on mailing for service on parties but not the agency in RCW 34.05.542(4), the statutory language precludes a presumption of receipt based on mailing for service of the agency. *See Ellensburg Cement Prods., Inc., v. Kittitas County*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014) (applying the maxim "unius est exclusio alterius — specific inclusions exclude implication").

Even assuming *arguendo* that sufficient proof of mailing could create a presumption of delivery for purposes of RCW 34.05.542, Alexander McLaren's declaration that he mailed the Petition for Review to the Board is insufficient to establish such a presumption.

To establish a presumption of receipt "requires proof of mailing, such as an independent proof of a postmark, a dated receipt, or evidence of mailing apart from a party's own self-serving testimony." *Olson v. The Bon, Inc.*, 144 Wn. App. 627, 634, 183 P.3d 359 (2008). Mr. McLaren's belated declaration that the Petition was mailed to the Board does not present anything more than the McLarens' own self-serving testimony. Similarly, the receipt for a single stamp purchased on May 22, 2014, does not help establish a copy of the Petition was mailed to the Board on that date, especially considering it is undisputed that Mr. McLaren mailed other documents for which the stamp may have been purchased that day. The other attachment to Alexander McLaren's declaration, a handwritten and undated document listing addresses, likewise does not have a postmark or other indication that something was mailed to the Board.

At a minimum, RCW 34.05.542(4) requires a postmark to create a presumption of service. RCW 34.05.542(4) provides that service (other than service on "the agency") is deemed complete upon deposit in the United States mail, "as evidenced by the postmark." Based on the plain language of the statute, the postmark establishes evidence of completion of service on parties of a petition for judicial review. RCW 34.05.542 thus allows application of the mailbox rule for service of a petition for review

on parties with the proviso that completion of service is to be established by the postmark on the petition for review. Given that RCW 34.05.542(4) requires a postmark to establish the completion of service on parties, and that actual delivery is required for service on the Board, a presumption that would allow service to be completed upon the Board based solely on a declaration that the Petition was mailed would be contrary to express statutory language.

Because a presumption of receipt is contrary to the express language of RCW 34.05.542(4) which requires delivery of the petition for review to the Board, and, in any case, Mr. McLaren has failed to present evidence that would establish such a presumption, the Court should affirm the superior court's dismissal of Mr. McLaren's appeal, even if the Court finds that Mr. McLaren's belatedly presented evidence of mailing should have been considered by the superior court as part of Mr. McLaren's motion for reconsideration of its dismissal order.

B. The Board's Order Was a Final Order Because It Followed Lengthy Proceedings That Resolved All Issues Presented to the Board for Hearing and Was Designated a "Final Order" by the Board.

As discussed above, the superior court properly dismissed Mr. McLaren's Petition with prejudice because Mr. McLaren failed to serve his Petition for Judicial Review on the Board within 30 days of

service of the Board's Order. Mr. McLaren, nonetheless, argues that the superior court should have dismissed his appeal without prejudice. In support of his argument, Mr. McLaren raises for the first time on appeal an argument that he "jumped the gun" in filing his Petition for Judicial Review because the Board's Order was not a final order for purposes of appeal. Appellant's Br. at 6-9. Mr. McLaren's argument fails for at least two reasons: (1) the Board's Order satisfies the well-established test for finality under Washington law and (2) the Board's Order resolved all issues that were presented and properly before the Board for hearing.

1. Mr. McLaren Failed to Preserve the Issue of the Finality of the Order for Review.

Mr. McLaren expressly admits that he raised the issue of whether the Board's Order was final for the first time on appeal to this Court. Appellant's Br. at 6. Because Mr. McLaren failed to present issue of the finality of the Order to the Board or the superior court, he is precluded by RAP 2.5(a) from making the finality of the Order an issue now. *See State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988) ("RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.").

Mr. McLaren's motion provides no basis for the Court to depart from the general rule and address a new issue on appeal. Mr. McLaren

argues that courts may address issues raised for the first time on appeal if the issues relate to the right to maintain the action. Appellant's Br. at 6. In support of his contention, Mr. McLaren cites cases which consider whether the trial court had authority to hear a cause of action based on claims raised at the trial court. *See, e.g.*, *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990) ("The central issue of this case is plaintiffs' right to maintain their action"). But here, there is no dispute regarding Mr. McLaren's right to maintain the action. In fact, Mr. McLaren's action before the Board was not dismissed but proceeded to a hearing on the merits. As Mr. McLaren's Petition for Judicial Review indicates, Mr. McLaren's appeal is not an effort to obtain his day in court (or before the Board) but an effort to compel a different result. CP 1. His appeal concerns the correctness of the Board's decision following a full hearing on the merits. *Id.* Under such circumstances, Mr. McLaren's failure to raise the issue of the finality of the Board's Order to either the Board or on appeal to the superior court, precludes him from doing so now.

2. The Board's Order Satisfies the Test for Finality.

Generally, administrative orders are reviewable "when they impose an obligation, deny a right, or fix some legal relationship as the consummation of the administrative process." *Dep't of Ecology v. City of*

Kirkland, 84 Wn.2d 25, 30, 523 P.2d 1181 (1974) (citations and internal quotation marks omitted). In this case, by establishing that Mr. McLaren is liable for DNR's reasonable and auditable costs under RCW 79.100.060, the Board's Order imposed an obligation [and fixed a legal relationship?] on Mr. McLaren. By affirming DNR's decision to take custody of the vessels at issue under RCW 79.100.040, the Board's Order both denied Mr. McLaren's right to the vessels and fixed the legal relationship of DNR and Mr. McLaren with respect to the vessels.

The Board's Order was also "the consummation of the administrative process." The Order followed a lengthy administrative proceeding, which included discovery, motions, and ultimately five days of hearing before an administrative law judge. CP 5, n.1. The Board specifically designated its Order as a final order and advised Mr. McLaren of the need to appeal the Order to superior court within 30 days. CP 3. Based on these facts, the Board's Order is indisputably final. *See Bock v. State,* 91 Wn.2d 94, 99, 586 P.2d 1173 (1978) (letter from Board informing appellant it would take no further action on application "was both a denial of a right and the fixing of a legal relationship as a consummation of the administrative process" and was therefore a final decision for purposes of appeal); *see also Wells Fargo*, 166 Wn. App.

at 356 (letter was final agency action where it informed Wells Fargo that closing agreement was final and conclusive.).

Nor can there be argument that Mr. McLaren was somehow prejudiced because he did not understand the Order was a final order. Washington courts look to the actions of the parties as evidence of their understanding of the finality of an agency action. *Wells Fargo,* 166 Wn. App. at 356 (citing *Bock*, 91 Wn.2d at 99). In this case, Mr. McLaren's actions in filing his Petition for Review with the superior court following the issuance of the Board's Order and his designation of the Order as a final order in his Petition for Review demonstrate Mr. McLaren's understanding that the Board's Order was final. CP 1. In fact, it was not until his appeal of the superior court's Order in this Court that Mr. McLaren first raised the issue of finality. Under such circumstances, as the Washington Supreme Court explained in *Bock,* the "Appellant cannot now complain the Board took no final action." *Bock,* 91 Wn.2d at 99.

3. The Board's Order Resolved All Issues Presented and Properly Before the Board for Hearing.

Mr. McLaren's argument that the Board's Order was not final rests on the misconception that the Board's Order failed to resolve all the issues before the Board. Appellant's Br. 6-9. The record demonstrates the

opposite is true. The Board's Order resolved all the issues presented to the Board for hearing. CP 4 (identifying issues before the Board in the proceeding); CP 5 (discussing disposition of Issues 3 and 4 on summary judgment); CP 22-33 (Board's decision on remaining issues). Mr. McLaren argues, however, that an issue not presented to the Board for hearing precludes the Board from entering a final order on the issues that were. Appellant's Br. at 6-9. Because the issue identified by Mr. McLaren in his appeal was never before the Board, it does not preclude the Board from entering a final order on the issues that were.

Mr. McLaren argues that because the Board's Order determined Mr. McLaren's liability but not the dollar amount for which Mr. McLaren is liable, the Board's Order cannot be final. Appellant's Br. 8-9. Mr. McLaren's argument rests on a misunderstanding of the nature of the Board proceeding. The role of the Board is to hear appeals from agency action. RCW 43.21B.110 (jurisdiction of the Board); RCW 43.21B.230 (appeals of agency actions). It is axiomatic that the Board cannot review an administrative decision that has not been made. *See Inland Foundry Co. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App. 121, 989 P.2d 102 (1999) ("An administrative review board has only the jurisdiction conferred by its authorizing statute").

In this case, there was no decision by DNR regarding the amount for which Mr. McLaren is liable to reimburse DNR to be appealed to the Board. The decisions of DNR that Mr. McLaren appealed to the Board were the decisions under RCW 79.100.030 to take temporary possession, and custody of the vessels at issue, and DNR's determination under RCW 79.100.060 that Mr. McLaren was liable for DNR's costs. *See* CP 4, 14 (discussing DNR's decisions related to temporary possession, custody, and liability for costs). The record is devoid of any decision by DNR regarding the amount for which Mr. McLaren is liable. That is because at the time of Mr. McLaren's appeal to the Board, the total damage amount for which Mr. McLaren is liable under RCW 79.100.060 was not yet known.

Under RCW 79.100.060, the costs for which a derelict vessel owner such as Mr. McLaren are liable include "all reasonable and auditable costs associated with the removal or disposal of the owner's vessel under [RCW 79.100]." By definition, the costs include the cost of disposal of the derelict vessel and costs associated with environmental damages directly or indirectly caused by the vessel. *Id.* In this case, because Mr. McLaren contested DNR's right to custody of the vessels, DNR had not yet taken any action to dispose of the vessels. *See* CP 5, n.1 (discussing stipulation of Mr. McLaren to pay moorage fees for vessels as

part of agreement on continuance of hearing date). Because costs of disposal of the vessels and other costs were not known at the time of the proceeding before the Board, DNR had not made a final decision regarding the amount for which Mr. McLaren was liable that could be appealed to the Board.

Mr. McLaren has presented no evidence that he actually appealed any decision of DNR related to costs or that the Board identified such a decision as an issue for hearing. To the extent the record contains any discussion of resolution of the amount for which Mr. McLaren is liable, it indicates only that Mr. McLaren would not be precluded from appealing a decision from DNR regarding the amount of the costs at the appropriate time—after the decision is made. *See* Appellant's Br. at 2 (quoting DNR's pre-hearing brief at Board).[9]

Mr. McLaren's argument that the Board's Order cannot be final until DNR makes and the Board reviews a final determination of the costs for which Mr. McLaren is liable, is antithetical to any meaningful judicial review of agency action under the Derelict Vessel Act. Mr. McLaren's argument would have the result of precluding judicial review of an agency's decision to take custody of a vessel under RCW 79.100.030 until

[9] DNR disputes that the supplemental documents referenced in Mr. McLaren's brief are properly part of the record in this case. On December 21, 2015, the Court, by Commissioner's Order, denied Mr. McLaren's motion to supplement the record.

the vessel has been destroyed or otherwise disposed of and all costs for which the owner may be liable under RCW 79.100.060 are known. If that were the case, no owner could ever get judicial review of an agency decision to take custody of a vessel under the Derelict Vessel Act until it was too late to do the owner any good. Judicial review could not restore a vessel owner to possession of the vessel and, in light of the limitations on civil liability under RCW 79.100.030(3), could not result in the imposition of damages for the loss of the vessel in most circumstances.

Washington courts recognize that judicial review of administrative orders should occur when review is meaningful, even if future administrative proceedings are contemplated. As the Washington Supreme Court has pointed out, finality depends on "a realistic appraisal of the consequences of such [agency] action." *City of Kirkland*, 84 Wn.2d at 29 (citing *Isbrandtsen Co. v. United States*, 93 U.S. App. D.C. 293, 211 F.2d 51, 55 (1954)). Thus, ultimately the availability of judicial review of an order may depend on "the need of the review to protect from the irreparable injury threatened . . . by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudication that may follow . . ." *Id.* (quoting *Columbia Broad. Sys., Inc., v. United States*, 316 U.S. 407, 425, 62 S. Ct. 1194, 1205, 86 L. Ed. 1563 (1942) (Frankfurter, J., dissenting)). In fact, the recognition that judicial

review should occur when it is meaningful forms the basis for the general rule that administrative orders are final "when they impose an obligation, deny a right, or fix some legal relationship as the consummation of the administrative process." *City of Kirkland*, 84 Wn.2d at 29.

In this case, that the Board had not reviewed decisions that had not been made does not affect the finality of the Board's Order. Because the Board's Order indisputably imposed an obligation on Mr. McLaren, fixed the legal relationships of the parties with respect to the vessels at issue, and was the culmination of the proceedings before the Board, the Board's Order was a final order.

VI. CONCLUSION

For the reasons set forth above, the Court should affirm the superior court's dismissal of Mr. McLaren's Petition for Judicial Review with prejudice.

RESPECTFULLY SUBMITTED this 20th day of January, 2016.

ROBERT W. FERGUSON
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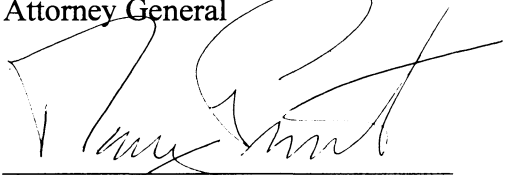

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on January 20, 2016, as follows:

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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 20th day of January, 2016, at Olympia, Washington.

Kim L. Kessler

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