

NO. 35864-6

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

HERM DOUMA, MIKE DOUMA, MJD FARMS L.L.C., RICHARD M.
STEPHENS and POLLUTION CONTROL HEARINGS BOARD,

Appellants,

v.

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

Respondents.

**REPLY BRIEF OF CROSS APPELLANT STATE OF
WASHINGTON, DEPARTMENT OF ECOLOGY**

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT1

 B. The PCHB Agrees It Must Find That Ecology’s Penalty
 Determination Is Incorrect Before The PCHB Reduces A
 Penalty.....6

 C. The Board Erred In Granting Any Penalty Reduction And
 A Further Penalty Reduction Is Not Justified8

III. CONCLUSION18

TABLE OF AUTHORITIES

Cases

<i>Amberson Egg Farm v. Dep't of Ecology</i> PCHB No. 99-029 (July 19, 1999)	11
<i>Dale DeBoer dba Borderview Dairy v. Dept. of Ecology</i> PCHB No. 99-107 (Jan. 28, 2000).....	10
<i>Misterek v. Washington Mineral Prods., Inc.</i> 85 Wn.2d 165, 531 P.2d 805 (1975).....	3
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> 151 Wn.2d 568, 90 P.3d 659 (2004).....	7, 8
<i>Wilber v. Dep't of Labor & Industries</i> 38 Wn. App. 553, 686 P.2d 509 (1984).....	3

Statutes

RCW 90.48	1-3, 5, 6
RCW 90.48.020	2
RCW 90.48.080	1, 3, 4, 6
RCW 90.48.144	2, 4, 6, 8-10
RCW 90.48.160	2
RCW 90.48.260	5
RCW 90.64	2, 3, 6
RCW 90.64.005	5
RCW 90.64.030(6).....	1-4, 6, 18
RCW 90.64.030(9).....	6

RCW 90.64.120(1).....	1, 2, 3
33 U.S.C. § 1311.....	5
33 U.S.C. § 1311(a).....	5
33 U.S.C. § 1342(b).....	5
33 U.S.C. § 1342(b)(1)(A).....	5
33 U.S.C. § 1342(c)(3).....	5

Regulations

WAC 371-08-500(1).....	16
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I. INTRODUCTION

The Doumas argue that their discharge of dairy waste into waters of the state is not subject to RCW 90.48.080 because RCW 90.64.030(6) implicitly amended RCW 90.48.080 and dairies are now free to pollute state waters so long as the pollution is not “significant.” In order to accept the Doumas’ argument, the Court must ignore the presumption against implicit amendment of statutes, ignore the language of RCW 90.64.120(1), and add language to RCW 90.64.030(6). The Court should decline the Doumas’ invitation to ignore RCW 90.64.120(1) and rewrite RCW 90.64.030(6). The Court should also reverse the penalty reduction that the Pollution Control Hearings Board (“PCHB” or “Board”) granted the Doumas and affirm Ecology’s penalty assessment.

II. ARGUMENT

A. **RCW 90.64.030(6) Does Not Shield The Doumas From Enforcement For Their Unauthorized Discharge Of Dairy Waste Into Waters Of The State Of Washington**

In 1945, the legislature passed the Water Pollution Control Act, which is currently codified at chapter 90.48 RCW. The Water Pollution Control Act makes it unlawful for any person to allow “**any** organic or inorganic matter that shall cause or tend to cause pollution” to seep into waters of the state of Washington. RCW 90.48.080 (emphasis added).

Pollution is broadly defined to include the discharge “of **any** liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters as harmful” RCW 90.48.020 (emphasis added). Waters of the state are broadly defined to include all water courses within the jurisdiction of the state of Washington, including “underground waters.” RCW 90.48.020. Later amendments to the Water Pollution Control Act make it unlawful for any person conducting a commercial or industrial operation of any type to dispose of solid or liquid waste material into waters of the state without obtaining a waste discharge permit. RCW 90.48.160. Violations of chapter 90.48 RCW are subject to civil penalties under RCW 90.48.144.

In 1993, the legislature passed the Dairy Nutrient Management Act, codified at chapter 90.64 RCW. The Dairy Nutrient Management Act provides that nothing in the act “shall affect the department of ecology’s authority or responsibility . . . to administer the provisions of chapter 90.48 RCW.” RCW 90.64.120(1). Notwithstanding this expression of legislative intent, the Doumas argue that RCW 90.64.030(6) implicitly amended Ecology’s authority to administer chapter 90.48 RCW because, according to the Doumas, RCW 90.64.030(6) authorizes dairies to allow organic or inorganic matter to enter waters of the state so long as the organic or inorganic matter entering waters of the state does not cause a

“significant” amount of pollution. Appellants’ Reply Brief at 4-12. The Doumas’ interpretation of RCW 90.64.030(6) is wrong for three reasons.

First, in order to accept the Doumas’ interpretation, the Court not only needs to ignore the language of RCW 90.64.120(1), but also needs to conclude that the legislature implicitly amended RCW 90.48.080 when it adopted RCW 90.64.030(6). However, as this Court has recognized, implied amendments are disfavored in the law. *Wilber v. Dep’t of Labor & Industries*, 38 Wn. App. 553, 559, 686 P.2d 509 (1984) (citing *Misterek v. Washington Mineral Prods., Inc.*, 85 Wn.2d 165, 531 P.2d 805 (1975)). If the legislature intended to amend RCW 90.48.080 to authorize “insignificant” pollution from dairies, the legislature would not have included RCW 90.64.120(1) in the Dairy Nutrient Management Act, and would have clearly stated that only those dairies that contribute a “significant” amount of pollution are subject to civil penalties. To the contrary, the legislature specifically provided that nothing in chapter 90.64 RCW would affect Ecology’s authority to administer chapter 90.48 RCW. The Court should decline the Doumas’ invitation to ignore both the presumption against implied amendment of statutes and the specific language in RCW 90.64.120(1).

The second problem is that the Doumas’ interpretation would require the Court to add language to RCW 90.64.030(6). The statute

provides a dairy farm determined to be “a significant contributor of pollution” is subject to civil penalties levied under RCW 90.48.144. RCW 90.64.030(6). The Doumas argue that this statute shields dairies from enforcement unless the amount of pollution a dairy contributes is “significant.” Appellants’ Reply Brief at 9-10. The Doumas’ interpretation adds language to RCW 90.64.030(6), by reading it to say that “**only** those dairies that contribute **a significant amount of pollution**” are subject to civil penalties under RCW 90.48.144. However, under the statute as written by the legislature, it is the **contribution** that needs to be significant, not the amount of pollution. A dairy that significantly contributes to a small amount of pollution is subject to a penalty under RCW 90.64.030(6).

The Doumas’ decision to pump half a million gallons of dairy waste into an unlined trench, and then do nothing for over two months, significantly contributed to pollution of the state’s groundwater. Consequently, the Doumas are not only subject to civil penalties for violating RCW 90.48.080, but also civil penalties under RCW 90.64.030(6).¹

Finally, the Doumas’ interpretation of RCW 90.64.030(6) would make state law inconsistent with the federal Clean Water Act. Under

¹ Ecology penalized the Doumas for violating RCW 90.48.080, but did not penalize the Doumas for violating RCW 90.64.030(6). See Ex. R-11 at 1.

Section 301(a) of the Clean Water Act, “the discharge of any pollutant by any person shall be unlawful” unless done pursuant to a valid discharge permit. 33 U.S.C. § 1311(a). Ecology is authorized to administer the Clean Water Act waste discharge permit program in the state of Washington pursuant to RCW 90.48.260 and Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b). In order to continue administering the federal program, the State of Washington must have authority to issue permits that ensure compliance with 33 U.S.C. § 1311. *See* 33 U.S.C. § 1342(b)(1)(A). If only those dairies that contribute “significant” amounts of pollution are subject to chapter 90.48 RCW, then dairies that contribute pollution that is not significant would not be subject to Washington’s permit program which would be inconsistent with the prohibition in 33 U.S.C. § 1311(a). The inconsistency would jeopardize Washington’s delegation to administer the Clean Water Act waste discharge permit program in this state. *See* 33 U.S.C. § 1342(c)(3) (authorizing administrator of the Environmental Protection Agency (“EPA”) to withdraw approval of state permit program if state not administering program in accordance with Clean Water Act requirements). This would be inconsistent with the legislature’s objective “to maintain the administration of the water quality program as it relates to dairy operations at the state level.” RCW 90.64.005. The Court should decline the

Doumas' invitation to interpret RCW 90.64.030(6) in a manner that is inconsistent with the requirements of federal law.

When read together, RCW 90.64.030(9) and RCW 90.64.030(6) indicate that dairies are subject to enforcement action if they either discharge pollutants to waters of the state or are significant contributors of pollution even if they are not the sole cause of the pollution but only a significant contributor of the pollution. In this case, the Doumas not only significantly contributed to pollution, but actually caused pollution of state waters. This action violated RCW 90.48.080 and is subject to a civil penalty under RCW 90.48.144. The Board properly interpreted the interaction between chapters 90.48 and 90.64 RCW in Conclusions of Law 6-14, and the Court should affirm the Board's interpretation of these statutory provisions.

B. The PCHB Agrees It Must Find That Ecology's Penalty Determination Is Incorrect Before The PCHB Reduces A Penalty

The Doumas accuse Ecology of arguing that the Board "is powerless to reduce the penalty Ecology chose." Appellants' Reply Brief at 12. The Doumas also accuse Ecology of arguing "that the Board cannot modify a penalty." *Id.* at 18. It is not surprising that the Doumas fail to provide any citations to these alleged arguments, because Ecology has never made these arguments. Rather, Ecology has consistently argued that

the Board cannot reduce a penalty unless the Board concludes that Ecology's penalty determination is incorrect in a particular respect. Amended Brief of Respondent/Cross Appellant State of Washington, Department of Ecology ("Ecology Brief") at 7, 39 (*citing Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 592, 90 P.3d 659 (2004)).

The Board agrees that it cannot reduce a penalty established by Ecology or add new conditions to a penalty unless the Board "determines that Ecology's penalty determination is incorrect in a particular respect." Brief of Pollution Control Hearings Board ("PCHB Brief") at 1 (*citing Ecology Brief at 7, 39*). However, while the Board has indicated it agrees with this principle, in this case the Board suspended \$10,000 of the gravity portion of the penalty and placed conditions on that suspension without finding that Ecology erred at all in setting the gravity component of the penalty at \$40,000. Given the Board's recognition of its obligation to find an error in Ecology's penalty calculation before it reduces or adds new conditions to a penalty, and given the Board's failure to make any such finding in this case, the Court should reverse the Board and fully affirm the \$40,000 gravity component of the penalty.

The PCHB attempts to distinguish *Port of Seattle* on the grounds that *Port of Seattle* involved review of a section 401 certification and this

case involves review of a penalty. PCHB Brief at 5-7. The Supreme Court's conclusion that the Board must find that Ecology erred in a particular respect before the Board changes the conditions in a section 401 certification was based on the Court's recognition that "Ecology is the agency charged with issuing § 401 certifications, *see* RCW 90.48.260" *Port of Seattle*, 151 Wn.2d at 592. Likewise, Ecology is the agency charged with assessing penalties under RCW 90.48.144.

Whether the case involves review of a section 401 certification or review of a penalty, the Board cannot change Ecology's decision unless the Board finds that Ecology erred in a particular respect. In a penalty case, once Ecology has met its burden of proving both the violation and the reasonableness of the penalty, as Ecology did in this case, the Board must affirm the penalty assessed by Ecology unless the Board finds that Ecology erred in a particular respect in assessing the penalty. In this case, the Board failed to make the finding necessary to support a reduction of the penalty and the Court should therefore reverse the Board and fully affirm the \$53,000 penalty assessed by Ecology.

C. The Board Erred In Granting Any Penalty Reduction And A Further Penalty Reduction Is Not Justified

In reviewing the reasonableness of the \$53,000 penalty, the Board properly considered the fact that the \$40,000 gravity portion of the penalty

could have been higher if Ecology had assessed the maximum penalty amount of \$10,000 per day, or if Ecology had assessed a penalty for each of the 69 days the dairy waste remained in the unlined trench. PCHB Order at COL 21. Inspector Craig testified that Ecology derived the \$40,000 gravity portion of the penalty by using a \$4,000 base penalty multiplied by 10 days. TP at 92:13-24. Ecology selected 10 days because the 500,000 gallons of dairy waste the Doumas pumped into the unlined trench represented 10 days of manure production at the Douma farm. *Id.* at 92:17-21; PCHB Order at FOF 7. If Ecology had assessed the maximum \$10,000 per day penalty authorized by RCW 90.48.144 for each of the 69 days the dairy waste remained in the unlined trench the penalty would have been \$690,000 instead of \$53,000.²

In their opening brief, without any citation to authority, the Doumas argued that the Board's analysis of the maximum penalty amount was "flawed." Appellants' Opening Brief at 18. In response, Ecology noted that the Board's consideration of the maximum penalty that could have been applied was consistent with analogous cases under the Clean Water Act. Ecology Brief at 26-27. The Doumas have correctly noted that while some courts use the "top-down" approach for setting penalties

² The Doumas allege that the discharge did not extend for over two months. Appellants' Reply Brief at 14. However, the Board specifically concluded "the discharge of dairy waste was done knowingly, to groundwater, and for a duration of over two months before discovery by Ecology." PCHB Order at COL 18.

under the Clean Water Act, other courts use a “bottom-up” approach for setting penalties under the Clean Water Act. Appellants’ Brief at 13-14. However, regardless of the method used to establish the initial penalty amount, the Doumas have failed to establish why it is “flawed” for a reviewing tribunal like the PCHB to consider what the maximum penalty could have been as part of its review of the reasonableness of the penalty actually assessed.³ The Board properly considered what the maximum penalty could have been, but erred in reducing a penalty that was already well below the maximum penalty authorized by RCW 90.48.144.

In *Dale DeBoer dba Borderview Dairy v. Dep’t of Ecology*, PCHB No. 99-107 (Jan. 28, 2000), Ecology assessed the maximum penalty allowed under RCW 90.48.144 and the Board fully affirmed the penalty. *DeBoer* at FOF 8 and Order. By contrast, the penalty Ecology assessed against the Doumas was a tiny fraction of the maximum penalty Ecology could have assessed, Board Order at COL 21, and the Board further reduced the penalty without a sufficient justification for doing so. As it did in the *DeBoer* case, the Board should have fully affirmed the penalty Ecology assessed against the Doumas.

³ As a practical matter, Ecology’s initial penalty determination was similar to the “bottom-up” approach because Ecology separately derived the economic benefit component of the penalty (\$13,000) and the gravity portion of the penalty (\$40,000) and added the two together to arrive at the \$53,000 penalty. TP at 83-93; PCHB Order at FOF 7, 8.

In *Amberson Egg Farm v. Dep't of Ecology*, PCHB No. 99-029 (July 19, 1999), the superior court reversed the Board's reduction of the penalty assessed by Ecology because the Board failed to provide a sufficient justification for the penalty reduction. See Ecology Brief at 32-33 (citing *Dep't of Ecology v. Amberson Egg Farm*, Thurston County Cause No. 99-2-01532-8, Judgment on Petition For Judicial Review at 3-2). The Board committed the same error in this case. This Court should reverse the Board's penalty reduction and fully affirm the penalty assessed by Ecology.

The Board evaluated Ecology's penalty calculation at Findings of Fact 7 and 8, and concluded that Ecology could have assessed a larger penalty based on the gravity component of the penalty. PCHB Order at COL 21. However, the Board failed to make any finding that Ecology's assessment of the \$40,000 gravity component of the penalty was incorrect in any respect. Consequently, the Court should reverse the Board's decision to suspend \$10,000 of the gravity portion of the penalty.

The Doumas' argument that Ecology set the penalty against the Doumas in order to perpetuate the alleged "bad relationship" between the Ecology inspectors and the Doumas, Appellants' Reply Brief at 14, is not supported by any of the Board's findings. In fact, the Board specifically concluded, "the Doumas could have worked with Ecology and other

agencies, but chose not to.” PCHB Order at COL 20. This conclusion is supported by the testimony of Andrew Craig who testified that he did not feel that the relationship between Ecology and the Doumas was strained, and felt that he was “greeted with some cooperation by the Doumas” when Ecology first inspected the dairy waste in the unlined trench in May 1999. TP at 109-111.

Inspector Craig testified at length regarding the penalty matrix Ecology used to establish the penalty against the Doumas. TP at 83-92. Throughout his testimony, Mr. Craig noted instances where Ecology exercised discretion in a manner that led to a penalty that was smaller than the penalty Ecology could have assessed against the Doumas. *See, e.g.*, TP at 86:1-18 (Ecology “exercised some discretion” by giving Doumas credit for eventually removing the manure from the unlined trench.); TP at 87-88 (giving Doumas credit for applying for permit after pumping waste into the unlined trench even though the Doumas “didn’t have coverage under the permit when they discharged manure from their facility into the trench and groundwater.”); TP at 92:9-25 (Ecology exercised discretion by only penalizing the Doumas for 10 days of violation). Mr. Craig’s penalty recommendation was reviewed by his supervisor, Richard Grout. TP at 135:2-6. In explaining why Ecology did not set the penalty as high as

Ecology could have, Mr. Grout explained “we were trying to be consistent and reasonable in the penalties we imposed.” TP at 137:12-13.

The penalty Ecology assessed against the Doumas was not based on an intent to perpetuate a “bad relationship,” as alleged by the Doumas. The penalty was a reasonable exercise of Ecology’s enforcement discretion that resulted in a penalty that was a tiny fraction of the penalty Ecology could have assessed. The Board erred by reducing the penalty further and the Court should fully affirm the penalty assessed by Ecology.

The Board found that the economic benefit the Doumas realized as a result of their illegal activity was based on “Ecology estimates of what the Doumas saved by avoiding having the dairy waste hauled and field applied.” PCHB Order at FOF 8. Ecology estimated that the Doumas saved \$13,000. *Id.* These findings are supported by the testimony of Andrew Craig. TP at 91:10-22. The Doumas assert a May 18, 1999, receipt from Pacific Pumping, Inc. for \$3,910 is a more accurate representation of what it would have cost the Doumas to pump and apply the dairy waste from their lagoon rather than putting the waste into the unlined trench. Appellants’ Reply Brief at 15-16; Ex. A-4, p.4. There are several flaws with the Doumas’ assertion.

First, the Board found the “receipts provided by the Doumas do not clearly establish the type of work, date of work, and amount paid, though

there is no dispute that the Doumas did pay for excavation and pumping services.” PCHB Order at FOF 8. Second, the \$3,910 receipt that the Doumas claim represents the cost of pumping the dairy waste from the unlined trench is a receipt from Pacific Pumping, Inc. Ex. A-4, p. 4. However, in a June 21, 1999 letter, the Doumas informed Ecology that “on May 7 and 8, 1999, Schuouten Pumping pumped approximately 500,000 gallons of manure and water out of the temporary emergency lagoon onto nearby fields.” Ex. R-9 at 3. The receipt from Pacific Pumping, Inc. (Ex. A-4, p.4) cannot be a receipt for pumping the dairy waste from the unlined trench, because that pumping was done by Schuouten Pumping, not Pacific Pumping, Inc. Finally, the receipt at Exhibit A-4, p. 4, is for an invoice dated May 18, and the Doumas had the dairy waste pumped from the unlined trench on May 7 and 8, not May 18.

The Board correctly found that the receipts submitted by the Doumas were not persuasive. PCHB Order at FOF 8. There is not substantial evidence in the record to support the Board’s conclusion that \$13,000 is “about twice as high as it should have been.” PCHB Order at COL 21. The Board should have fully affirmed the \$13,000 economic benefit portion of the penalty because the Doumas’ failed to rebut Ecology’s determination that it would have cost \$13,000 for the Doumas to have their dairy waste pumped, hauled away, and field applied.

PCHB Order at FOF 8. The Court should reverse the Board's decision to reduce the economic benefit portion of the penalty to \$6,500.

In its Order, the Board properly concluded:

even if the need to construct the trench and pump dairy waste into the trench were emergency situations at the outset, the failure to inform Ecology, DNR, or other agencies of the situation or take remedial measures for over two months undercuts the concept that only emergency action was taken.

PCHB Order at COL 20.

In their opening brief, Appellants argued that this conclusion was unsupported because there was no requirement that the Doumas notify Ecology, let alone another State agency in this type of situation. Appellants' Opening Brief at 17. In response, Ecology noted that the Doumas' lease with DNR required the Doumas to immediately notify the State of the release of dairy waste into the unlined trench on DNR's property. Ecology Brief at 25. The Doumas now argue it was improper for Ecology to identify the DNR lease violations because the Doumas settled these violations with DNR. Appellants' Reply Brief at 12-13. However, in evaluating the Doumas' claim that they were simply responding to an emergency, it was appropriate for the Board to consider the fact that the Doumas concealed their activity from Ecology, DNR, and other agencies and failed to take remedial measures for over two months.

As the Board properly concluded, the Doumas' "failure to inform Ecology, DNR, or other State agencies of the situation or take remedial measures for over two months undercuts the concept that only emergency actions were taken." PCHB Order at COL 20.

The Doumas argue that it took "incredulous chutzpah" for Ecology to point out that the Doumas had an extensive history of failing to properly manage their dairy waste prior to their decision to pump half a million gallons of dairy waste into the unlined trench. Appellants' Reply Brief at 16-17. While it is true that Exhibits R-16, 18, and 19 were admitted over the Doumas' hearsay objection, the Board is not bound by the rules of evidence and the Board specifically authorizes the admission of hearsay evidence if it is "the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." WAC 371-08-500(1). The warning letters from the EPA (R-16) and Ecology (R-18 and 19) are the kind of evidence on which reasonably prudent persons are accustomed to rely on. The Board properly relied on these exhibits when it found that the Doumas had a number of dealings with Ecology, EPA, the Natural Resource Conservation Service, and the Whatcom County Conservation District regarding water quality and farm management issues; and had received letters from Ecology and EPA regarding dairy waste management issues. PCHB Order at FOF 9 and 10. In addition,

inspector Craig testified that at the time the Doumas put dairy waste into the unlined trench, the Doumas:

had caused several discharges of manure into waters of the state on several previous occasions. Once in 1995, again in 1998, and then in February 5th of 1999 they allowed manure to overflow or leave their facility and enter a roadside ditch that led to Dakota Creek.

TP at 87:23-88:3. When asked why Ecology did not waive the penalty against the Doumas, Mr. Craig's supervisor, Richard Grout, testified that the discharge from the unlined trench:

wasn't the first offense. You had testimony earlier from Mr. Craig about the 3 – total of 3 warning letters from EPA and Department of Ecology from between '95 and '97. And then there were two violations that Mark Coffman identified in his inspections, late '98 and early '99, and then the incident that we're discussing here. So there's no way I could have construed it as a first offense.

TP at 141:18-25.

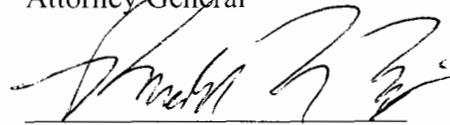
There is significant evidence in the record to demonstrate that the Doumas had a history of poorly managing their dairy waste prior to pumping 500,000 gallons of dairy waste into an unlined trench. It was proper for Ecology to explain that prior history to this Court. Given the Doumas' prior history of poorly managing dairy waste, the Board erred in reducing the penalty.

III. CONCLUSION

For the reasons discussed above and in Ecology's initial briefing, the Doumas' interpretation of RCW 90.64.030(6) is incorrect and does not justify a penalty reduction. Ecology respectfully requests that the Court reverse the PCHB Order suspending a portion of the gravity component of the penalty and reducing the economic benefit portion of the penalty. Ecology respectfully requests that the Court fully affirm the \$53,000 penalty Ecology assessed against the Doumas.

RESPECTFULLY SUBMITTED this 7th day of December, 2007.

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CERTIFICATE OF
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Pursuant to RCW 9A.72.085, I certify that on the 7th day of
December, 2007, I caused to be served the Reply Brief of Cross Appellant

- 1 -
ORIGINAL

State of Washington, Department of Ecology in the above-captioned matter upon the parties herein as indicated below:

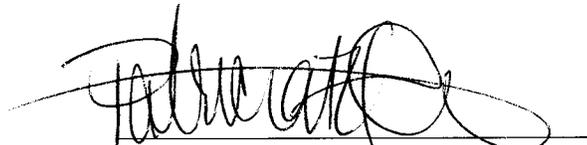
Richard M. Stephens	<input checked="" type="checkbox"/>	U.S. Mail
Groen Stephens & Klinge LLP	<input type="checkbox"/>	State Campus Mail
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	<input type="checkbox"/>	By Fax

the foregoing being the last known address.

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

DATED this 7th day of December, 2007, in Olympia, Washington.



PATRICIA F. DAVIDSON
Legal Assistant