

Court of Appeals Case No. 40971-2-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

FIRST ROMANIAN PENTECOSTAL CHURCH OF KENMORE, a
Washington Corporation, Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, a division
of the State of Washington, Respondent.

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS

ORIGINAL

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I. ARGUMENT

A. Ecology's Penalty Order failed to provide the slightest notice about how the Church's tree cutting, grading and filling activities constituted pollution within the meaning of the Water Pollution Control Act ("WPCA").

Ecology fails to identify what notice the Penalty Order provided to the Church about how its actions constituted pollution within the meaning of the WPCA. Ecology explains in its brief that the definition of pollution in RCW 90.48.020 "focuses on the impact to the water body caused by the discharge." Ecology's Response Brief ("Brief") pg. 28. But the Penalty Order fails to give any notice how cutting down trees, clearing land, grading land, creating a new ditch for a creek and diverting the creek into that ditch polluted surface waters of the state. Ecology's response carefully catalogs the effect of the Church's activities on natural resources and claims that such activities, thus, constitute pollution within the meaning of RCW 90.48.020.¹ But, Ecology's Penalty Order did not

¹ Ecology's brief detailed how the Church's unauthorized activities "damaged important resources. It stated:

The undisputed evidence established that the Church's unauthorized activities significantly damaged important resources. The clearing, grading and filling caused the elimination or substantial impairment of the "valuable wetlands on the Property, including substantial damage to a mature, forested Class 1 wetland." Board Dec. at 12(FOF 20). Those activities also reduced or eliminated

provide the Church with a hint of notice of the theories about pollution advanced in its Response. CP 218.

Establishing that the Church's actions constituted pollution within the meaning of RCW 90.48.020 was an essential element of the offense with which the Church was charged, but the Penalty Order contained no notice about how the Church committed polluting acts. *See* RCW 90.48.080; RCW 90.48.020.

the wetlands' ability to provide water quality benefits, water storage, and habitat. *Id.* Impacts to the tributary include a reduction in its value as a migration corridor for riparian dependent wildlife, a reduction in its usefulness as fish rearing habitat, as well as a likely increase in the temperature of the stream due to the loss of shade. *Id.* at 13 (FOF 21). Finally, activities in the tributary bed and banks resulted in significant erosion and the transport of greater than normal quantities of sediment downstream. *Id.* (FOF 22). The deposition of this sediment and the increase in turbidity will have a negative impact on salmon spawning areas in the stream and Little Bear Creek. *Id.*

See Brief p. 28-29

The brief also stated:

The Board's unchallenged findings of fact, which are verities on appeal, establish that these actions "eliminated or substantially impaired the valuable wetlands" and "reduced or eliminated the wetlands' ability to provide water quality benefits, water storage, and habitat." Board Dec. at 12 (FOF 20). The Board further found that "[d]isturbances to the Tributary bed and banks resulted in significant erosion and much greater than normal quantities of sediment being transported downstream and deposited in spawning areas in both the Tributary and Little Bear Creek." Board Dec. at 13 (FOF 22).

See Brief p. 29-30.

Just as the Court of Appeals in the *Mansour v. King County*, 131 Wn. App. 255, 272, 128 P.3d 1241 (2006) ruled that the Penalty Order must be dismissed because it failed to give Mr. Mansour notice of an essential element of this offense - - that his dog Maxine was vicious - - this Court should dismiss the Penalty Order in this case because it left the Church guessing about what facts constituted an essential element (pollution) of the offense with which it was charged. See RCW 90.48.080; RCW 90.48.020.

B. The availability of the WPCA and the anti-degradation regulations do not clarify how the Church's actions constituted pollution within the meaning of the WPCA.

This Court should reject Ecology's appellate claim that the Church could have reviewed the WPCA and the anti degradation regulations to determine how it polluted waters of the state. It argues that the mere availability of the 39 page WPCA and the many anti degradation regulations relieved it of the obligation to give the Church notice of how it polluted waters of the state. It erroneously alleges that *City of Spokane v. Douglass*, 115 Wn.2d 171, 795 P.2d 693 (1992) supports this theory. But, *Douglass* only addressed an undefined term in a statute. The issue in this case is not whether a term in the WPCA is defined, but rather whether the WPCA definition of pollution gives notice that tree cutting, land clearing,

grading and filling qualify as "pollution". In contrast to *Douglass*, pollution is a defined term in the WPCA.

Mansour v. King County, held unequivocally that a Penalty Order must notify the person charged with government agency's burden of proof. 131 Wn. App. 255, 272, 128 P.3d 1241 (2006). It did not suggest that the availability of the King County Code compensated for the deficiencies of the County's Penalty Order. In that case, the Penalty Order failed to notify Mr. Mansour of the correct code section that allowed the County to remove a vicious dog; it also did not disclose that Mr. Mansour's dog was vicious, the characteristic that allowed exercise of the removal remedy. King County had cited code sections in the County Code Chapter pertaining to problem dogs, but it did not accurately cite the precise subsection of the Code which authorized the removal remedy. The Court of Appeals' analysis in *Mansour*, totally undermines Ecology's unsupported claims that the Church's ability to research statutes and regulations to determine why it was liable for pollution relieved Ecology of the obligation imposed by the due process clause of the United States Constitution to provide such notice.

Reviewing the WPCA and its anti degradation regulations would not have clarified how the Church's actions polluted surface waters of the state. The WPCA neither once mentions a wetland nor addresses tree

harvesting, grading, filling and stream rerouting activities. Thus, the WPCA provided no notice whatsoever about how the Church's land based activities constituted pollution within the meaning of RCW 90.48.020. Nothing in the text of the anti degradation policies tells what Ecology needed to prove. The anti degradation policies describe designated beneficial uses of various navigable waters and the water quality criteria for those waters based on those uses. It specifies that "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." *See WAC 173.201A-035(8)(a)*. Ecology's Response fails to disclose how the state's anti degradation policies would have provided notice to the Church how it polluted waters of the state. Because Ecology was acting on novel theories, the Church had absolutely no idea what Ecology needed to prove to establish a case against the Church. That impaired its ability to defend itself.

C. RCW 90.48.020 and RCW 90.48.080 are vague as applied in this case.

Due process requires that land use regulations which prohibit actions or impose penalties must provide clear notice of the acts which they encompass. *Burien Bark Supply v. King County*, 106 Wn. 2d 868, 725 P.2d 994 (1986); *Anderson v. Issaquah*, 70 Wn. App. 64, 851 P.2d

744 (1993). Here, Ecology's response fails to demonstrate how either RCW 90.48.020 or RCW 90.48.080 provide even the slightest notice that cutting down trees, clearing land, grading land, filling land, and changing the flow of streams constitutes a discharge of pollutants into waters of the state and is pollution within the meaning of RCW 90.48.020. Ecology's brief does not identify any statutory language supporting its theory that these statutes provide the notice which due process requires.

D. Ecology has provided no response to the Church's claim that the "fair notice doctrine" demands dismissal of the Penalty Order.

Effectively conceding the validity of the claim, Ecology's Response Brief provides absolutely no response to the Church's claim that even if this Court decides to defer to Ecology's reading of the statute, it still should deny Ecology its \$48,0000 penalty based on the "fair notice doctrine." No published cases and no provisions of the WPCA provide notice of Ecology's unique construction of the WPCA and its regulations in this case. If the Court decides to defer to Ecology's reading of the WPCA then it should find under the "fair notice doctrine" that the reading was not "ascertainably certain" under the plain text of the statute and regulations and vacate the penalty. *General Electric v. Environmental Protection Agency*, 53 F.3d 1324, 1328 -29 (D.C. Cir. 1995) invalidated a

penalty based on the "fair notice" doctrine because the agency's position was not "ascertainably certain from the text of the regulations."

E. The WPCA does not give Ecology the authority to regulate tree cutting, land clearing, grading and filling within wetlands and non wetland areas called buffers as polluting activities.

Ecology's claim that it has the authority to regulate tree cutting, land clearing and filling within wetland areas and non wetland buffer areas as polluting activities turns on the flawed premise that no statute prohibits Ecology from regulating such activities. This argument begs the question; in its Response, Ecology cannot identify any express language in the WPCA giving Ecology such authority. Moreover, the Church never argued that the WPCA was amended or repealed by the Growth Management Act ("GMA") or the Shoreline Management Act ("SMA") as claimed by Ecology. *See* Brief at 22-25. It is not a question of whether subsequent enactments removed authority from Ecology; Ecology cannot be divested of power it never possessed.

If the legislature gave Ecology blanket authority to regulate land based activities within wetlands and the acreage adjacent to wetland buffers as pollution and to order restoration within such areas, surely it would have specified such authority in the WPCA. It is doubtful that it would have limited Ecology's authority to regulate wetlands in the Aquatic

Resources Mitigation Act of 1997 if Ecology possessed such blanket authority; it gave Ecology authority to consider the functions and values of a watershed in reviewing wetland restoration and enhancement. *See RCW 90.70.020*. In doing so, it specified that the power it was giving Ecology was limited.

It is the intent of the legislature to authorize local government to accommodate the goals of this chapter. It is not the intent of the legislature to create any new authority for regulating wetlands or aquatic habitat beyond that which is specifically provided in this chapter. RCW 90.74.005(3).

In 1998, the legislature similarly delegated limited powers to Ecology relating to wetlands "banking" a system of creating new wetlands to compensate for wetlands eliminated or impaired by development. In doing so it again took pains to make it clear that it did not intend to "create any new authority for regulating wetlands or wetland banks beyond that which is specifically provided in this chapter. No authority is granted to the Department [of Ecology] to adopt rules or guidance other than banks under this chapter." RCW 90.48.020. Such subsequent limited grants of authority to regulate wetlands undercut Ecology's claim that the WPCA gave it unrestricted authority to regulate land based wetland activities in 1945; if Ecology had such blanket authority, such subsequent statutory limitations would be unnecessary.

Because society did not protect wetlands or wetland buffers in 1945 when the legislature promulgated its definition of waters of the street, it is not credible to claim that the WPCA intended to classify such land based activities as pollution. Ecology cannot identify a single provision of the WPCA in support of this theory. The federal Clean Water Act ("CWA") in contrast to the WPCA, was enacted in 1972 when there was an awareness of the importance of protecting wetlands. As a result, unlike the WPCA, the federal CWA has many express references to wetlands and the protection of them. See e.g. 43 U.S.C. § 1269(c)(2)(E); 33 U.S.C. 1270; 33 U.S.C. section 1444(g)(1). Wetlands were not protected by local governments for the most part until after 1990 when Ecology enacted a Model Wetlands Ordinance. Cities and counties based their wetlands regulation on that ordinance. *Washington Real Property Deskbook* section 101.4 (3rd ed.1996). Further, the Growth Management Act did not give Ecology regulatory authority over wetlands. If the WPCA had given Ecology blanket power to regulate wetlands, it is doubtful that the GMA would have specified that Ecology's role was limited to providing technical advice and support to the local governments. RCW 36.70A.050.

Contrary to Ecology's response, *Samuel's Furniture v. Dept. of Ecology*, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002) does not support its

claim that Ecology has the authority to penalize tree cutting, grading land, filling land and digging a ditch for a stream within wetland areas and non wetland buffer acreage. Ecology turns that decision on its head; in *Samuel's Furniture*, the Supreme Court refused to infer shared jurisdiction between Ecology and local government in the absence of an explicit statutory grant of such jurisdiction. *See* 147 Wn.2d 458.

F. The Church is not liable under the clear language of RCW 90.48.080.

Ecology encourages the Court to adopt the wrong standard of liability regarding RCW 90.48.080 despite the clear language of the statute and case law. RCW 90.48.080 provides:

It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the department, as provided for in this chapter.

RCW 90.48.080. This language requires that a person either take positive action resulting in pollution (“...throw, drain, run, or otherwise discharge...”), cause pollution, or have actual or constructive knowledge of actions resulting in pollution (“...permit or suffer to be thrown...”).

The statute does not state that property owners are strictly liable for pollution occurring on their property. CP 172. Ecology has failed to show

either that the Church, through the Church Board, took affirmative action resulting in pollution, that it approved such actions, or that the Church had knowledge of its members' actions resulting in the pollution.

The Church is governed by the Church Board; only the Board can make decisions for the Church or authorize the Church to act. *See* RCW 24.03.095. In evidence before the PCHB were declarations that the Church Board never authorized Church members to undertake the unpermitted work. CP 192; CP 189, 190-91; CP 222. Because there was no Board authorization, the Church itself did not take any action. All facts and reasonable inferences must be construed in favor of the non-moving party on summary judgment, *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002); it was, thus, erroneous for the Pollution Control Hearings Board ("PCHB") to grant Ecology's motion for summary judgment.

Ecology has failed to show that the Church Board caused the pollution. Because "cause" is a nontechnical word, it may be given its dictionary definition. *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). Thus the proper definition is "to be the cause of, to bring about, to induce or to compel." *Id.* The Court in *Chester* pointed out that "cause" is an active verb which "requires some affirmative act of assistance, interaction, influence or communication...." *Id.* Given this definition, it

is erroneous for Ecology to insist the Church is liable because it did not successfully stop unauthorized volunteers from performing unauthorized work on undeveloped acreage the Church owned in another town - - Woodinville, Washington; the Church is located in Kenmore. Res. Br. at 34. Contrary to Ecology's argument, the Church Board's failure to stop unknown, unauthorized activity cannot be said to be an affirmative act as required by case law. The Church cannot be liable for causing the acts in question unless it took positive steps to encourage or authorize its members to undertake these actions. Ecology has not made this showing and no such evidence was before the PCHB. Because of this, summary judgment should not have been granted imposing liability on the Church.

In its Response Brief, Ecology fails to address why the established interpretation of “permit or suffer” should not apply to RCW 90.48.080. It is well established that the term “permit or suffer” requires knowledge; “(e)very definition of ‘suffer’ and ‘permit’ includes knowledge of what is to be done under the sufferance and permission.” *Harris v. Turner*, 1 Wn. App 1023, 1027, 466 P.2d 2020 (1970) (citing *Gregory v. United States*, 10 Fed.Cas. 1195, 1198 (No. 5803) (C.C.S.D.N.Y. 1879)). Courts have interpreted this term to require actual or constructive knowledge on the part of the person charged. *Harris*, 1 Wn. App. at 1027; see also *Cotton v. Weyerhaeuser Timber Co.*, 20 Wn.2d 300, 320, 147 P.2d 299 (1944)

Weyerhaeuser Timber Co., 20 Wn.2d 300, 320, 147 P.2d 299 (1944) (“The act contemplates that the overtime work be such as the employer suffers or permits to be done, and this presupposes that the employer has knowledge, either actual or constructive, that it is being done.”); *United Food and Commercial Workers Union Local 1001 v. Mutual Ben. Life Insurance Co.*, 84 Wn. App. 47, 52, 925 P.2d 212 (1996) (“an employer ‘permits’ its employee to work when it has either actual or constructive knowledge of the ... work.”) (abrogated on other grounds by *Seattle Professional Engineering Employees Ass’n v. Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1126 (2000)). Ecology has not stated any reason why this clear and established interpretation of “permit or suffer” should not apply to RCW 90.48.080.

Ecology’s only argument why the long-established definition of “permit or suffer” should not be used is based on *Wm. Dickinson v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 914 P.2d 750 (1996). That case dealt with an interpretation of RCW 70.94.040. *Id.* The legislative history of this statute has already been explained to this court. Appellant's Brief at p. 14. This Court should note that the court in *Dickson* clearly stated that the reason the language of RCW 70.94.040 could not be interpreted as requiring knowledge was the action of the legislature in removing the word “knowingly” from the statute. *Dickson*,

81 Wn. App at 409. “The statute’s language, ‘cause or allow,’ cannot be read to impose a knowledge or intent element *because* the state legislature removed the word ‘knowingly’ from the statute, in effect reversing” a previous decision. *Id* (emphasis added). The lack of a knowledge requirement in that case was thus dependant upon the acts of the state legislature and not upon the inherent meaning of the words. Because the legislature has not taken similar action regarding RCW 90.48.080, the holding of the court in *Dickson* does not authorize this Court to abandon the consistent interpretation of “permit or suffer.”

Given that RCW 90.48.080 requires a person to take actual actions or have knowledge of actions, it was an error for the PCHB to grant Ecology summary judgment. As stated above, the Church Board did not authorize the acts in this case; thus, the Church itself has not acted. Similarly, there is no proof that the Church Board took affirmative steps to encourage various activities within wetlands and the stream tributary, thus it did not cause the damage. Finally, Ecology has not shown the Church Board knew, either actually or constructively, that the Church members would undertake these actions. Because of this, it was an error for the PCHB to find the Church liable on summary judgment.

Further, because the Church did not violate RCW 90.48.080 it is not liable for any civil penalties issued by Ecology. As the civil penalty

statute, RCW 90.48.144(3), requires a violation of RCW 90.48.080, it was improper for a penalty to be imposed on the Church. As demonstrated above, the Church did not violate the terms of RCW 90.48.080 because its Board did not act itself, it did not cause others to act, nor did it know the actions others were taking. If the Church is not liable under RCW 90.48.080, it cannot be liable under RCW 90.48.144(3). As such, it was an error for the PCHB to assess penalties against the Church.

Ecology's claim that a finding of the Pollution Control Hearings Board that expenditures of up to \$10,000 did not need Board approval does not demonstrate Board approval of the clearing and grading activities of volunteers was required. The matter at issue did not involve the expenditure of Church funds; the testimony on summary judgment was that Board approval was required to clear and grade the Church's Woodinville acreage and that the Board had not authorized such actions. CP189; 190-91. This circumstance should have prevented the Pollution Control Hearings Board from imposing liability on the Church.

G. Ecology lacks the authority to order wetland restoration.

Ecology's brief fails to identify what statute gives it authority to order and oversee wetland restoration. Ecology solely relies on RCW 90.48.120 and asks the Court to interpret that statute to give it blanket

authority to demand any restoration actions. But, no express statutory grant of power allows Ecology to demand the restoration of wetlands and acres of non wetland areas it calls buffers adjacent to wetlands and streams. Nor does any statute give Ecology authority to require monitoring and reporting on such land restoration efforts for a decade . RCW 90.48.120 does not authorize such actions.

It is unreasonable to assume that the legislature intended wetland restoration to be included in this statute. The language found in RCW 90.48.120(2), added in 1973, merely provides Ecology with the ability to quickly issue an order or directive in exigent circumstances. Laws of 1973 ch. 155 § 2. Nothing in RCW 90.48.120(2) hints that the legislature gave Ecology authority to order the restoration of wetlands and 2.5 acres of land adjacent to wetlands and streams.

Ecology's reliance upon *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 90 P.3d 659 (2004), is also misplaced. *Port of Seattle* in no way concerned RCW 90.48.120; rather it dealt with Section 401 Certification under federal Clean Water Act. 151 Wn.2d at 579. The case has no bearing as to whether the legislature granted Ecology authority to demand wetland restoration for a violation of the WPCA; the case dealt with conditions imposed on the Port of Seattle as a condition of the Certification, not as a penalty. The WPCA gives Ecology

actual authority to perform state certification in the context of the United States Army Corps of Engineers issuing Section 404 permits under the federal Clean Water Act. *See* RCW 90.48.260.

Ecology's brief conflates the need for restoration with its ability to demand such restoration. The issue before the Court is not whether wetland restoration is needed; as Ecology recognizes, the Church and Snohomish County are developing a restoration plan. *See* Response Brief at 47 n. 24. At issue is whether the WPCA grants Ecology the authority to demand such remedies. *See* Appellant Brief at 17-19.

It is clear that the legislature has granted local municipalities the power to ensure the wetlands are protected. The Growth Management Act defines wetlands as critical areas and provides that "[e]ach county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170." RCW 36.70A.060(2); RCW 36.70A.030. Snohomish County has enacted such regulations. *See* SCC 30.63B (Land Disturbing Activities); SCC 30.62 (Critical Areas Regulations). The County has also enacted comprehensive enforcement mechanisms. SCC 30.85 (Enforcement Procedures). Clearly, the issue of wetland restoration has been addressed by the County. There is no need

for Ecology to act as a super-agency which oversees the regulation of wetlands and non wetland buffer areas.²

II. CONCLUSION

For the above reasons the Church asks that the Court reverse the decision of the PCHB. This Court should refuse to condone Ecology's power grab in this case.³ The WPCA does not provide any notice that Ecology has the authority to regulate tree cutting, land clearing, filling and digging ditches, for the relocation of streams under the WPCA within wetland and non wetland acreage adjacent to wetlands (buffers). Other agencies presently regulate such activities.

Because the WPCA does not address such activities and gives Ecology no authority to issue permits authorizing such actions, it places entities such as the Church in a precarious position. Neither the WPCA nor its anti degradation regulations address such actions and place limits on Ecology's authority to regulate and penalize such activities. Thus, the

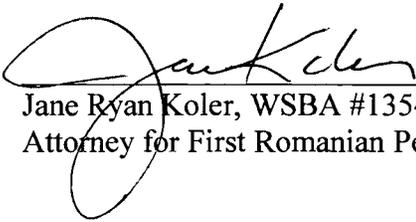
² Given the significant financial and budgetary crisis the state currently faces, the Court should not expand Ecology's powers thereby allowing such waste and inefficiency. Local municipalities have the power and tools necessary to oversee the restoration of damaged wetlands. The WPCA does not delegate the slightest authority to Ecology to demand restoration of wetlands and acres of non wetland buffer areas adjacent to wetlands.

³ In the past, the Washington Supreme Court has invalidated power grabs by Ecology which are unauthorized by any statute. *Retowski v. Dept. of Ecology*, 122 Wn.2d 220 858 P.2d 232, *Cowiche County Conservancy v. Dept. of Ecology*, 118 Wn.2d 804, 828 P.2d 549 (1992); *Samuel's Furniture v. Dept. of Ecology*, 144 Wn.2d 440, 54 P.3d 1194 (2001); *Twin Bridges Marine v. Dept. of Ecology*, 162 Wn.2d 440, 26 P.2d 241 (2001).

Church and other entities are subject to Ecology's unfettered authority to regulate and penalize such activities on an ad hoc basis.

DATED this 7th day of March, 2010 at Gig Harbor, Washington.

Respectfully submitted,



Jane Ryan Koler, WSBA #13541
Attorney for First Romanian Pentecostal Church

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NO. 40971-2

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

FIRST ROMANIAN PENTECOSTAL CHURCH OF KENMORE,
Appellant
v.

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY,
Respondent.

CERTIFICATE OF SERVICE

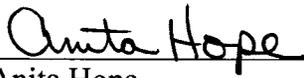
I certify that that on the 7th day of March, 2011, I caused to be served
Reply Brief of Appellant First Romanian Church in the above-captioned
matter upon the party herein as indicated below:

Ms. Joan Marchioro [x] Via regular U.S. Mail, postage prepaid
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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 March, 2011.



Anita Hope
Legal Assistant