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DIVISION II

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

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FIRST ROMANIAN PENTECOSTAL CHURCH OF KENMORE,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent.

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**BRIEF OF RESPONDENT  
WASHINGTON STATE DEPARTMENT OF ECOLOGY**

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## I. INTRODUCTION

Without authorization of any kind, the First Romanian Pentecostal Church (Church) significantly cleared, filled and graded wetlands adjacent to Little Bear Creek and filled portions of a tributary to the Creek that provides important habitat for several fish species. The Department of Ecology (Ecology), finding violations of the state's Water Pollution Control Act (WPCA), Chapter 90.48 RCW, issued the Church an administrative order requiring restoration of the damaged wetland and stream. Ecology also issued the Church a \$48,000 penalty for its unauthorized discharges to waters of the state.

Several of the issues raised by the Church are identical to those recently rejected by this Court in *Pacific Topsoils, Inc. v. Department of Ecology*, 157 Wn. App. 629, 238 P.3d 1201 (2010). First, wetlands are waters of the state and, as such, are regulated by Ecology under the WPCA. Second, Ecology's regulation of wetlands as waters of the state does not render the WPCA unconstitutionally vague. Third, other state statutes do not divest Ecology of its authority under the WPCA to protect all waters of the state, including wetlands.

Moreover, the Church's filling of the stream is without question a violation of RCW 90.48.080's prohibition against discharging pollution into waters of the state. Finally, the Church's claims that it did not receive

sufficient notice of its violations of the WPCA are unfounded. Consistent with its ruling in *Pacific Topsoils*, the Court should affirm the Pollution Control Hearing Board's (Board) and superior court's decisions upholding Ecology's order and penalty issued to the Church.

## **II. COUNTERSTATEMENT OF ISSUES**

1. Whether wetlands are waters of the state protected from pollution under the WPCA?

2. Whether RCW 90.48.080 is unconstitutionally vague as applied to the Church?

3. Whether compliance with RCW 90.48.080 is a matter of strict liability?

4. Whether Ecology's order and penalty satisfied due process requirements by identifying the facts underlying the violation and citing the statutory authority that justified the order and penalty?

5. Whether the order's requirement that the Church restore the damaged wetlands, stream, and buffers exceeded the authority granted Ecology under RCW 90.48.120(2) to issue "such order or directive, as appropriate under the circumstances" to carry out the purposes of the WPCA?

### III. COUNTERSTATEMENT OF FACTS

#### A. Ruling Under Review

The Church appeals only the Board's summary judgment ruling. CP 133-34. Based on the limited scope of the Church's appeal, the parties stipulated to a shortening of the record to include only the summary judgment pleadings and supporting materials. CP 134-36. The Church does not challenge the Board's Findings of Fact, Conclusions of Law and Order (Board Dec.),<sup>1</sup> issued after an evidentiary hearing regarding the reasonableness of the penalty.<sup>2</sup>

#### B. Undisputed Facts

The summary judgment declarations and attached exhibits established the following undisputed facts.

The Church owns property located at 22332 State Route 9, Woodinville, Washington. ADR 56 (¶ 2).<sup>3</sup> The property contains wetlands, Little Bear Creek, and a tributary to Little Bear Creek. Little Bear Creek provides spawning and migratory habitat for Chinook salmon and steelhead,

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<sup>1</sup> *First Romanian Pentecostal Church v. Dep't of Ecology*, PCHB Nos. 08-098 & 08-099 (July 31, 2009). For the Court's convenience a copy of the Board's Findings of Facts, Conclusions of Law, and Order are attached as Appendix 1.

<sup>2</sup> Findings of fact that are unchallenged are verities on appeal. *See, e.g., Hilltop Terrace Homeowners' Ass'n v. Island Cy.*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995).

<sup>3</sup> References to the Board's record will appear as ADR page number. When referencing a declaration and/or exhibits thereto, the citation will include the paragraph number and/or exhibit number.

which are federally listed species under the Endangered Species Act. Board Dec. at 3-5 (FOF 3-5), 12-13 (FOF 20-22).

On September 12, 2006, a local resident, Deborah Nicely, went for a walk near her home, which is located near the land owned by the Church on State Route 9. ADR 54 (¶¶ 1-2). During her walk, Ms. Nicely observed that bushes that had been growing between her neighbor's property and the Church's property had been removed. ADR 54 (¶ 2). Seeing bulldozer activity on site, Ms. Nicely entered the Church property. *Id.* Ms. Nicely spoke to an individual on site and informed him that she would notify the authorities of the activities occurring on the site. ADR 55 (¶ 3). While on site, Ms. Nicely observed several other persons in addition to the bulldozer operator performing work. *Id.* That evening, the Church's Pastor, Vasile Antemie, and another Church representative, John Puravet, went to Ms. Nicely's home to discuss the work being done. ADR 55 (¶ 4). Ms. Nicely subsequently contacted Snohomish County and Ecology to complain about the unpermitted work on the Church's property. ADR 56 (¶ 2), 59 (¶ 2), 64-65 (Ex. 1).

The next day, September 13, 2006, Steve Britsch with Snohomish County's Surface Water Management Department began investigating a complaint the County received concerning unpermitted grading on the Church's property. ADR 56 (¶ 2). Mr. Britsch contacted Pastor Antemie

and informed him that Snohomish County had received a complaint regarding impacts to waters of the state. ADR 57 (¶ 3). Pastor Antemie agreed to meet Mr. Britsch onsite that afternoon. *Id.*

During his site visit, Mr. Britsch spoke with Pastor Antemie and Mr. Puravet. ADR 57 (¶ 4). Mr. Britsch was given permission to walk the site and take photographs and samples. *Id.* Mr. Britsch discovered that several acres of land were cleared, a designated riparian wetland had been destroyed, and the tributary to Little Bear Creek was graded completely through. *Id.* (¶ 5). Mr. Britsch also observed several other individuals on the property. *Id.* (¶ 6). Mr. Britsch informed the group of the need for several permits prior to the start of land development such as what he had observed. *Id.* At 2:15 p.m. that day, Snohomish County posted a Stop Work notice on the Church's property. ADR 154 (Ex. 1).

A complaint regarding the unpermitted work at the Church's property was lodged with Ecology on September 13, 2006. ADR 59 (¶ 2), 64-65 (Ex. 1). Paul Anderson, a Wetlands Specialist with Ecology's Northwest Regional Office, was assigned to investigate the complaint. ADR 59-60 (¶ 2). Mr. Anderson contacted Pastor Antemie and made arrangements to meet him at the Church's property on October 6. *Id.*

During his site visit on October 6, Mr. Anderson met with Pastor Antemie and two Church Board members, Constantin Iancu and

Mr. Puravet. ADR 60 (¶ 3). Mr. Anderson observed recent clearing and grading in wetlands and a newly reconstructed stream channel on the property. *Id.* The original stream channel had been filled and flow diverted into the new channel. ADR 145 (¶ 3). The Church representatives told Mr. Anderson that all of the site work within critical areas was an accident and that they were aware they needed permits for work in wetlands and streams. ADR 60 (¶ 3). They also assured Mr. Anderson that a wetland delineation would be prepared and that the Church would not do any additional work in wetlands or streams on the subject property without permits. *Id.* At the conclusion of the site visit, Mr. Anderson informed the Church representatives that the work that had occurred appeared to constitute a violation of state law, that state permits would be required for this work, and that the first step in resolving the violation was to have the wetlands delineated. *Id.*

On January 25, 2007, Mr. Anderson received information that additional, more extensive wetland clearing and grading and stream diversion had occurred on the Church property within the previous four to six weeks. *Id.* (¶ 4). Mr. Anderson contacted Pastor Antemie the next day, informing him of the newly discovered impacts and arranging for a site visit on February 1. *Id.* During the February 1 site visit, Mr. Anderson observed additional wetland clearing and grading and a

second stream diversion on the site. ADR 60 (¶ 4), 146-47 (¶ 7), 161-64 (Ex. 6).

On February 5, Mr. Anderson sent Pastor Antemie an enforcement warning letter. ADR 61 (¶ 5), 66-68 (Ex. 2). The warning letter stated that impacting wetlands without prior authorization is a violation of state and federal law and violations of RCW 90.48.080 can result in penalties of up to \$10,000 per day for each day that the violations continue. ADR 66-68 (Ex. 2). The warning letter then set forth the facts of the Church's violations of the WPCA. *Id.* The warning letter asked that, within 30 days of receipt, the Church provide information regarding when the unauthorized wetland work occurred and the identities of the individuals who conducted the work. *Id.* The warning letter also asked the Church to provide a wetland delineation report and restoration plan. *Id.* On February 23, Mr. Anderson received an email from Teri Zuver, a wetland biologist with Steward and Associates, who stated that she was working with Pastor Antemie and Mr. Iancu to prepare a wetland delineation and mitigation plan. ADR 61 (¶ 5).

On March 8, Ms. Zuver sent Mr. Anderson the Critical Area Study and Wetland Investigation and Delineation for The Romanian Pentecostal Church prepared by Steward and Associates dated March 5, 2007. *Id.* (¶ 6). The report includes a Disclaimer which provides the "results and

conclusions of this report . . . are based in part upon (a) site reconnaissance and testing, (b) information provided by the property owner, and (c) examination of public domain information concerning the proposed site.” *Id.*, ADR 72 (Ex. 3). The report’s Executive Summary states that:

The applicant has altered the parcel by clearing vegetation, excavating approximately 10-12 truck loads of fill and vegetation and grading portions of the parcel in order to prepare for the construction of a church, classroom building, reception hall, small housing unit and a parking area for 500 cars.

ADR 70. The Executive Summary also states that the “project proposes to create approximately 150-200 thousand square feet of impervious surface . . . .” *Id.*

On March 8, Mr. Anderson received an email from Pastor Antemie that responded to Ecology’s warning letter. ADR 61 (¶ 7), 73 (Ex. 4). In the email, Pastor Antemie stated that the “[r]esponsible person of the clearing is: Vasile Antemie! (This is my decision to keep other persons anonymous.)” ADR 73 (Ex. 4). Pastor Antemie also stated that Steward and Associates had been hired to prepare the wetland delineation and that Ms. Zuver was the contact person for that effort. *Id.*

The existence of new clearing, grading, and filling work was discovered during a March 12 meeting with Ecology and other regulatory

agencies. ADR 147 (¶ 9). Photographs of the new work, which included a freshly dug ditch draining to Little Bear Creek, were shared with the participants. *Id.* The Church's unpermitted clearing, grading and filling activities (1) impacted over 1.75 acres of wetland (58 percent of the total wetland area on the property), nearly an acre of which is high quality forested wetland; (2) damaged approximately 2.5 acres of stream and wetland buffer; and (3) significantly degraded over 900 feet of stream channel, constituting 87 percent of the entire stream length on the Church's property. ADR 150 (¶ 16). Unauthorized work within waters of the state resulted in the siltation of Little Bear Creek on a number of occasions. *Id.* Best management practices to protect water quality were not used during the unauthorized actions. *Id.* At the March 12 meeting and again at a March 21 meeting, Pastor Antemie stated that the Church was responsible for the wetland and stream violations and that the Church would cooperate in restoring the wetlands and streams on the site. ADR 62 (¶¶ 8-9).

On March 29, per Pastor Antemie's request, Mr. Anderson sent him a letter summarizing Ecology's position on the stream and wetland restoration that needed to occur. ADR 62-63 (¶ 11), 74-76 (Ex. 5). The letter included specific steps that the Church needed to take to resolve the violation. *Id.* Pastor Antemie responded with a letter dated March 30 and

received by Ecology on April 6. ADR 62-63 (¶ 11), 77-78 (Ex. 6). In the letter, he stated that the Church was aware of the minimum required to resolve the violations and acknowledged that Ecology was still considering taking enforcement action for the violations. ADR 77-78.

Over the next 17 months Mr. Anderson continued to work with Church representatives and its consultants to refine mitigation requirements, restoration milestones, and agency expectations, but no restoration work occurred. ADR 63 (¶ 12). In a final attempt to obtain voluntary compliance from the Church, in August 2008 Mr. Anderson prepared an agreed order for the Church's consideration. ADR 236 (¶ 5). On September 3, Mr. Anderson was informed that Pastor Antemie declined to sign the document. *Id.* Failing to obtain compliance through its technical assistance efforts, on September 10, 2010, Ecology issued Order No. 6009 (Order) requiring the Church to remediate the damages caused to waters of the state. ADR 4-8, 236-37 (¶ 12). On that same date, Ecology also issued the Church Notice of Penalty Incurred and Due No. Order 6008 (Notice of Penalty) imposing a \$48,000 penalty for its unauthorized discharges to waters of the state. ADR 477-86, 236-37 (¶ 12). The Church timely appealed the Order and Notice of Penalty to the Board.

### **C. Procedural History**

The parties identified nine legal issues before the Board. ADR 345-46. The Church filed a motion for summary judgment seeking a ruling that it was not responsible for the violations at its property. Ecology filed a cross motion for summary judgment on that issue, as well as a second motion for summary judgment on the remaining issues. On May 22, 2009, the Board granted Ecology summary judgment on eight of the nine issues and affirmed the Order. ADR 339-64. An evidentiary hearing on the remaining issue, whether the Notice of Penalty was reasonable, was held on June 24-26, 2009. On July 31, 2009, the Board issued Findings of Fact, Conclusions of Law, and Order affirming the Notice of Penalty in full. *First Romanian Pentecostal Church of Kenmore v. Dep't of Ecology*, PCHB Nos. 08-098 & 08-099 (July 31, 2009).

The Church filed a Petition for Review of Agency Action and Rules Challenge Complaint in Thurston County Superior Court. CP 3-59. The Church subsequently limited its appeal to the Board's summary judgment ruling, foregoing a challenge to the Board's Findings of Fact, Conclusions of Law and Order, as well as its challenge of WAC 173-201A-020. CP 133-37. The superior court affirmed the Board's summary judgment decision in full. CP 346-47. The court

further concluded that the Church's constitutional due process claims were without merit and the evidence in the record demonstrated the notice Ecology provided to the Church that its actions constituted violations of state law was sufficient. *Id.* The Church timely appealed the superior court's decision to this Court.

#### IV. STANDARD OF REVIEW

The decision under review is the Board's Order on Summary Judgment Motions. This Court reviews the Board's summary judgment decision de novo. *Johnson Forestry Contracting, Inc. v. Dep't of Natural Res.*, 131 Wn. App. 13, 20, 126 P.3d 45 (2005).<sup>4</sup>

"Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000) (citing *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993)). "A material fact is one upon which the outcome of the litigation depends, in whole or in part." *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 487, 84 P.3d 1231 (2004). While the court must consider facts and all reasonable inferences from these facts in the light

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<sup>4</sup> While the Administrative Procedure Act, Chapter 34.05 RCW, does not expressly provide for summary judgment proceedings, case law has established that administrative agencies can employ summary proceedings. *Johnson Forestry*, 131 Wn. App. at 20. The Board's procedural rules permit the filing of motions dispositive of all or part of an appeal. WAC 371-08-450(4).

most favorable to the non-moving party, that party must set forth specific facts to defeat the summary judgment motion, rather than relying on bare allegations. *Id.* at 487–88. The non-moving party “may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.” *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 736, 150 P.3d 633 (2007). Rather, the non-moving party “must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists. Ultimate facts or conclusions of fact are insufficient; conclusory statements of fact will not suffice.” *Id.* at 736–37.

The facts relevant to the legal issues addressed in the Board’s summary judgment decision are undisputed. Therefore, the Court must determine whether the Board’s decision was erroneous as a matter of law. *Johnson Forestry*, 131 Wn. App. at 20. Questions of law under RCW 34.05.570(3)(d) are reviewed de novo, but the Court accords substantial weight to the agency’s interpretation of the statutes it administers. *Id.* Ecology is the state agency responsible for protecting the quality of all of the state’s waters, including wetlands. RCW 90.48; WAC 173-201A; WAC 173-200. “Because Ecology is the agency designated by the legislature to regulate the State’s water resources, RCW 43.21A.020, this

court has held that it is Ecology’s interpretation of relevant statutes and regulations that is entitled to great weight.” *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

## V. ARGUMENT

### A. The WPCA Protects Wetlands From Pollution

#### 1. Waters of the state are broadly defined to include wetlands

Pursuant to the WPCA, the legislature authorized Ecology to protect the quality of all waters of the state, including wetlands. *Pacific Topsoils*, 157 Wn. App. at 644. The purpose behind the state’s water quality laws is set forth in RCW 90.48.010:

It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington.

The term “waters of the state” is broadly defined in RCW 90.48.020 and “shall be construed to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters

and watercourses within the jurisdiction of the state of Washington.”<sup>5</sup>

Wetlands are transitional areas between upland and aquatic environments and are comprised of surface and/or ground water.<sup>6</sup> Acknowledging the breadth of Ecology’s authority over state waters, RCW 90.48.030 provides that Ecology has “the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state of Washington.”

Ecology is further authorized to promulgate:

[R]ules and regulations as it shall deem necessary to carry out the provisions of this chapter, including but not limited to rules and regulations relating to standards of quality for waters of the state and for substances discharged therein in order to maintain the highest possible standards of all waters of the state in accordance with the public policy as declared in RCW 90.48.010.

RCW 90.48.035.

Carrying out the state’s water quality policy and exercising its authority to promulgate regulations to implement the WPCA, Ecology developed water quality standards for protection of the state’s waters—

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<sup>5</sup> When “interpreting statutory definitions, ‘includes’ is construed as a term of enlargement while ‘means’ is construed as a term of limitation.” *Queets Band of Indians v. State*, 102 Wn.2d 1, 4, 682 P.2d 909 (1984). In *Pacific Topsoils*, this Court held that the legislature expressed its intent that Ecology protect “all waters of the state” in RCW 90.48.010 and indicated the broad scope of that intent by using the enlarging term “include” to modify the phrase “all other surface waters” in its definition of “waters of the state” in RCW 90.48.020. *Pacific Topsoils*, 157 Wn. App. at 644.

<sup>6</sup> See Washington State Department of Ecology, U.S. Army Corps of Engineers Seattle District, U.S. EPA Region 10, *Wetland Mitigation in Washington State, Part 1: Agency Policies and Guidance*, Department of Ecology Publication No. 06-06-011a, at 9–10 (Mar. 2006) (available at <http://www.ecy.wa.gov/pubs/0606011a.pdf>).

Chapter 173-201A WAC (surface water) and Chapter 173-200 WAC (ground water). The water quality standards are comprised of narrative criteria, numeric criteria for conventional pollutants and toxic substances, and an antidegradation policy. The antidegradation policy set forth in RCW 90.54.020(3)(b) provides that:

Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served.

*See also* WAC 173-201A-300, -310, -320, -330. The water quality standards define “surface waters of the state” as including “lakes, rivers, ponds, streams, inland waters, saltwaters, wetlands and all other surface waters and water courses within the jurisdiction of the state of Washington.” WAC 173-201A-020. “Wetlands” are defined as:

[A]reas that are **inundated or saturated by surface water or groundwater** at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

WAC 173-201A-020 (emphasis added).<sup>7</sup> Both surface and ground water are waters of the state. RCW 90.48.020.

**2. Ecology is authorized to enforce violations of the WPCA affecting waters of the state**

The WPCA prohibits the discharge of pollution to waters of the state. Under RCW 90.48.080:

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.

The legislature provided Ecology with authority to enforce against violations of the WPCA through the issuance of orders, RCW 90.48.120(2), and penalties, RCW 90.48.144.

The court's fundamental objective in construing a statute is to ascertain and carry out the intent of the legislature. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The

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<sup>7</sup> Ecology's water quality laws and regulations are similar to those of the federal government. The federal Clean Water Act (CWA) prohibits the discharge of pollutants into the navigable waters. 33 U.S.C. § 1311(a). Navigable waters are defined in the CWA as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Federal regulations promulgated by the United States Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) further define waters of the United States to include "all interstate waters including interstate wetlands." 33 C.F.R. § 328.3(a)(2); 40 C.F.R. § 122.2. Because the purpose of the WPCA is to protect *all* waters of the state, not just those protected by the CWA, the legislature broadly defined that term to include all forms of surface and ground water, whether interstate or intrastate. RCW 90.48.020. Ecology's water quality standards, like the Corps' and EPA's implementing regulations, clearly identify wetlands as waters of the state. WAC 173-201A-020.

intent of the legislature must be determined primarily from the language of the statute itself. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). Where 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." *Campbell & Gwinn*, 146 Wn.2d at 9-10.

This Court recently upheld Ecology's regulation of wetlands under the WPCA as consistent with the legislature's intent that Ecology be granted broad authority to protect all the waters of the state:

RCW 90.48.010 expresses the legislature's intent that the DOE protect "all waters of the state." The legislature indicated the broad scope of this intent by its choice of the enlarging term "include" which modifies the phrase "all other surface waters" in its definition of "waters of the state." RCW 90.48.020. RCW 90.48.035 authorizes and requires the DOE to issue regulations it determines are necessary to protect the quality of "waters of the state." Accordingly, the DOE issued regulations that reflected its determination that wetlands contain "surface water or ground water," that this brings wetlands within the definition of "surface waters of the state" and, therefore, that wetlands must be protected under the WPCA. WAC 173-201A-020. Thus, the plain language of the WPCA clearly indicates that the DOE acts within its statutory authority over "waters of the state" when it regulates wetlands.

*Pacific Topsoils*, 157 Wn. App. at 644. *See also Port of Seattle*, 151 Wn.2d at 583-84 (terms of water quality certification permitting filling of wetlands issued under federal Clean Water Act and WPCA is independently enforceable under state law.)

The Church, while acknowledging the Court's holding in *Pacific Topsoils*, seeks to distance itself from that decision by asserting, incorrectly, that the Order and Notice of Penalty deal with its violation of the Hydraulics Code, RCW 70.55, and Forest Practices Act, RCW 76.09.<sup>8</sup> Pet. Br. at 24-25. Contrary to the Church's claims, the Order and Notice of Penalty do not address the Church's violations of the Hydraulics Code or Forest Practices Act. ADR 4-8, 477-86. In fact, the very language from the Notice of Penalty quoted by the Church proves this point.

Prior to September 13, 2006, the Church mechanically cleared, graded and filled wetlands and a tributary to Little Bear Creek and again prior to January 25, 2007, the Church mechanically cleared, graded and filled additional wetlands and diverted flow from a tributary to Little Bear Creek without a permit in violation of RCW 90.48.080. Discharge of such polluting matters into waters of the state is also a violation of the anti-degradation policy, WAC 173-201A-300 through 330. Fill remains in place in the wetlands. Each and every day the fill remains in the wetlands constitutes a separate and distinct violation of RCW 90.48.080 and RCW 90.48.160, and WAC 173-201A-300 through 330.

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<sup>8</sup> Both Department of Fish and Wildlife (WDFW) and Department of Natural Resources exercised their respective authority to address the Church's violation of those statutes. ADR 155-57 (Ex. 2), 239-49 (Exs. 2-4). Ecology's discussion of those regulatory actions was intended to illustrate the expansiveness of the Church's harm to natural resources. For example, forested wetlands are considered the highest rated class of wetlands due to their rarity and the important functions they provide. Board Dec. at 4-5 (FOF 6), ADR 150 (¶ 16). It does not, as the Church claims, constitute evidence of Ecology's expansion of its regulatory authority. As is apparent from the evidence in the record, the wetland from which the trees were harvested was devastated in the logging process. ADR 161-64 (Ex. 6). Restoration of that wetland to its pre-disturbance condition will take generations. Board Dec. at 12-13 (FOF 20-22).

ADR 5.<sup>9</sup> As detailed above, the Church's unauthorized actions resulted in the discharge of pollution into waters of the state, namely the wetlands and tributary.<sup>10</sup> Ecology was well within its authority under the WPCA to issue the Order and Notice of Penalty to the Church for its violation of RCW 90.48.080.

**3. Ecology acted within its authority in adopting WAC 173-201A-020**

The Church also challenges Ecology's adoption of WAC 173-201A-020, asserting that the agency exceeded its authority when it included wetlands in the definition of waters of the state. Pet. Br. at 25-31. While its appeal to Thurston County included a challenge to WAC 173-201A-020, the Church abandoned that cause of action when it elected to limit its appeal to the Board's summary judgment decision. CP 133-37, 346-47. The Court should therefore disregard the Church's attack on WAC 173-201A-020.

Even if the Church had not abandoned its challenge to WAC 173-201A-020, as is clear from the Court's recent decision in *Pacific Topsoils*, the assertion that Ecology acted beyond its statutory authority in promulgating the rule is unfounded. “[A]dministrative rules adopted

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<sup>9</sup> The Order contains nearly identical language detailing the Church's actions constituting violations of the WPCA and its implementing regulations. ADR 478.

<sup>10</sup> At no time has the Church disputed that the wetlands on its property in fact were cleared, filled and graded, and that portions of the tributary were filled and its flow diverted. The Church's after the fact claim that it is not responsible for those unauthorized actions is addressed in Section B below.

pursuant to a legislative grant of authority are presumed to be valid and should be upheld on judicial review if they are reasonably consistent with the statute being implemented.” *Campbell v. Dep’t of Social & Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004) (quoting *Fahn v. Cowlitz Cy.*, 93 Wn.2d 368, 374, 610 P.2d 857 (1980), *amended by Fahn v. Civil Serv. Com’n of Cowlitz Cy.*, 621 P.2d 1293 (1981)); *Wm. Dickson v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 407, 914 P.2d 750 (1996) (court upholds agency regulations that are consistent with the legislative scheme.) Analyzing applicable provisions of the WPCA and the inclusion of wetlands in the definition of surface waters in WAC 173-201A-020, this Court recently held that the plain language of the WPCA supports Ecology’s exercise of its statutory authority to regulate wetlands as waters of the state. *Pacific Topsoils*, 157 Wn. App. at 644. Ecology unquestionably possesses the authority under the WPCA to protect the quality of all of the state’s waters, including wetlands.

**4. Ecology’s authority to regulate wetlands is not displaced by other statutes**

The Church argues that Ecology is precluded from regulating wetlands under the WPCA because that authority is contained in other statutes such as the GMA, the Shoreline Management Act (SMA), and the Reclaimed Water Act. Pet. Br. at 21-24, 28-31. The Church’s assertion that these other statutes preclude Ecology from acting pursuant to the

authority granted by the legislature under the WPCA to regulate wetlands is unfounded and should be rejected.

The correct analysis of those statutes is whether they contain a prohibition on Ecology's exercise of its WPCA authority. No such prohibition exists. Other than broad statements regarding the alleged exclusivity of other statutes in the regulation of wetlands, the Church cannot point to a single statutory provision that precludes Ecology from exercising its authority under the WPCA to protect wetlands. "Repeal or amendment by implication is not favored" under the law. *Mistereck v. Wash. Mineral Prods., Inc.*, 85 Wn.2d 166, 168, 531 P.2d 805 (1975) (citing *Wash. State Welfare Rights Org. v. State*, 82 Wn.2d 437, 511 P.2d 990 (1973)).

The fact that the legislature has enacted two or more statutes that touch on the same issue does not mean that one statute trumps the other. As the state Supreme Court held:

The construction of two statutes shall be made with the assumption that the Legislature does not intend to create an inconsistency. Statutes are to be read together, whenever possible, to achieve a "harmonious total statutory scheme . . . which maintains the integrity of the respective statutes."

*State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000) (citations omitted) (quoting *Employco Personnel Servs., Inc. v. City of Seattle*, 117 Wn.2d 606, 614,

817 P.2d 1373 (1991)). The WPCA can be reconciled with these other statutes and all given effect. For instance, Ecology's responsibility to protect all waters of the state is undiminished by the enactment of the GMA and the planning required by the GMA can proceed without interference from the WPCA.<sup>11</sup>

This Court recently rejected this identical argument in *Pacific Topsoils*, holding that “none of the statutes cited by PTI contains an express prohibition of [Ecology’s] jurisdiction over wetlands under the WPCA. Further, none of the statutes implicitly conflicts with [Ecology’s] jurisdiction over wetlands as ‘waters of the state’ under the WPCA.” *Pacific Topsoils*, 157 Wn. App. at 645. While recognizing that the SMA includes the term wetlands within its definition of “shorelands,” this Court rejected the claim that it must consider wetlands only as land, concluding that to do so “would ignore [Ecology’s] mandate to protect ‘all waters of the state,’ including ‘other surface waters,’ under the WPCA.”<sup>12</sup> *Id.*

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<sup>11</sup> The definition of critical areas includes wetlands, as well as “(b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas. . . .” RCW 36.70A.030(5). As stated above, the definition of waters of the state under the WPCA includes wetlands. RCW 90.48.020; *see also* WAC 173-201A-020. Protection of critical areas such as wetlands from pollution can be, and has been for years, balanced with the requirement of local governments to plan for development within their jurisdictions. Moreover, one could not suggest that Ecology’s authority to protect ground water from pollution is precluded by the GMA’s inclusion of aquifer recharging areas in the definition of critical areas. These statutory requirements are complementary, not conflicting.

<sup>12</sup> The Court also rejected the appellant’s assertion, also advanced by the Church, that the legislature has regulated wetlands as land, not water. Pet. Br. at 27. “Additionally, as a matter of common sense, the fact that one may consider wetlands as

This Court further held that “no statutory conflicts arise from an interpretation of shared jurisdiction between [Ecology] and local authorities over wetlands in this case.” *Id.* Evaluating the planning requirements of the GMA, this Court concluded that the statute’s requirement that local jurisdictions “create critical areas regulations as part of their comprehensive plans does not demonstrate an intent to divest [Ecology] of wetlands jurisdiction under other statutes.” *Id.*

Turning to the SMA, this Court stated that, as noted by the Supreme Court, the legislature delegated enforcement authority under the SMA to Ecology to address unpermitted development on a shoreline through issuance of cease and desist orders, require corrective action, or impose penalties. *Id.* (citing *Samuel’s Furniture, Inc. v. Dep’t of Ecology*, 147 Wn.2d 440, 449, 54 P.3d 1194 (2004)). Noting that the appellant “acted without a permit of any kind,” this Court concluded that even assuming that the SMA applied, Ecology’s “exercise of authority to issue penalties under the WPCA was harmonious with its authority to issue penalties under the SMA. For all these reasons, we hold that [Ecology’s] jurisdiction over wetlands under the WPCA in this case is harmonious with these statutes.” *Id.* at 646.

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both land and water is inherent in the nature of wetlands. PTI’s interpretation would lead to an absurd result.” *Pacific Topsoils*, 157 Wn. App. at 645 n.5.

The fact that more than one statute or regulatory authority governs an activity is unremarkable. Absent an express statement by the legislature that Ecology is precluded from exercising its authority to protect wetlands under the WPCA, such authority remains intact. No provision of the GMA, SMA, or Reclaimed Water Act serves to preempt Ecology's authority under the WPCA. The Court should reject the Church's unsupported allegations to the contrary.

**5. RCW 90.48.080 is not unconstitutionally vague**

The Church argues that Ecology's application of the WPCA's prohibition against discharging pollution into waters of the state renders the statute's text vague as applied to it. Pet. Br. at 31. This argument is predicated on the Church's assertion that (1) the WPCA provides no notice that wetlands are waters of the state and (2) the statute provides no notice that the filling and grading of wetlands and filling of a stream constitute the discharge of pollution into waters of the state. The Church also claims that the state's antidegradation policy, WAC 173-201A-300, does not provide notice that it applies to the filling of wetlands. Pet. Br. at 34-35. This Court rejected these very arguments in *Pacific Topsoils*.

The void for vagueness doctrine applies principally to criminal or penal statutes. See *City of Seattle v. Montana*, 129 Wn.2d 583, 596-97, 919 P.2d 1218 (1996). Because the doctrine is an aspect of procedural due

process, it is relevant only when analyzing penal statutes or regulatory statutes that prohibit conduct or impose sanctions for violations of their standards. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 739–40, 818 P.2d 1062 (1991); *Dep't of Natural Res. v. Lake Lawrence Pub. Lands Prot. Ass'n*, 92 Wn.2d 656, 667, 601 P.2d 494 (1979); *Pacific Wire Works, Inc. v. Dep't of Labor & Indus.*, 49 Wn. App. 229, 237, 742 P.2d 168 (1987).

The doctrine has been expanded to address prohibitory land use regulations. *See Burien Bark Supply v. King Cy.*, 106 Wn.2d 868, 725 P.2d 994 (1986); *Anderson v. City of Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (1993). “A statute is void for vagueness if it is framed in terms so vague that persons ‘of common intelligence must necessarily guess at its meaning and differ as to its application.’” *Haley*, 117 Wn.2d at 739 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). However, the Washington Supreme Court has cautioned that “[s]ome measure of vagueness is inherent in the use of language. ‘Condemned to the use of words, we can never expect mathematical certainty from our language.’” *Id.* at 740 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)). The presence of undefined terms in a statute does not automatically render it unconstitutionally vague. *City of Spokane v.*

*Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990). “For clarification, citizens may resort to the statements of law contained in both statutes and in court rulings which are ‘[p]resumptively available to all citizens’.” *Douglass*, 115 Wn.2d at 180 (quoting *State v. Smith*, 111 Wn.2d 1, 7, 759 P.2d 372 (1988)).

The Church challenges the applicability of RCW 90.48.080 to its activities, asserting that it is not apparent that the term waters of the state includes wetlands and that pollution includes the dumping of fill material into waters of the state. As detailed above, the WPCA’s definition of waters of the state, which includes all surface and underground waters, is sufficiently broad to encompass wetlands. See RCW 90.48.020. Moreover, wetlands have been included in the water quality standards since 1997. WAC 173-201A-020.

The WPCA defines pollution to include the “alteration of the physical” properties of any water of the state. The common definition of “alter” is “to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else.” *Webster’s Third New International Dictionary* 63 (1971). As the undisputed facts demonstrate and the Church does not deny, the physical condition of the wetlands and tributary stream at its Woodinville property have been significantly altered. It is

undeniable that any aquatic feature that was on the ground surface or in the stream prior to the Church's discharge of fill no longer provides "legitimate beneficial uses" or that the filling has rendered "such waters harmful, detrimental or injurious . . . to wild animals, birds, fish or other aquatic life." RCW 90.48.020.

Finally, the Church's assertion that its discharge of soil into wetlands did not constitute pollution because the soil was allegedly clean should be rejected. The statutory definition of pollution does not require that the material discharged be contaminated. Rather, the definition focuses on the impact to the water body caused by the discharge.

[S]uch contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such 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 harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

RCW 90.48.020.

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 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.*

Moreover, the Church's vagueness arguments are the same as those this Court rejected in *Pacific Topsoils*. The Court should reject them here for the same reasons. First, because the statutes and regulations defining waters of the state and wetlands were presumptively available to the Church, "the WPCA's application to wetlands is not unconstitutionally vague." *Pacific Topsoils*, 157 Wn. App. at 647.

Second, the unauthorized clearing, grading and filling of wetlands, and filling of the stream at the Church's property undisputedly altered those environmental resources. 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). Given the extent of the clearing, grading and filling activities, persons of ordinary intelligence could understand that such actions altered the physical properties of the wetlands and stream in a way that is detrimental to the “legitimate beneficial uses” of those environmental resources. *Pacific Topsoils*, 157 Wn. App. at 648. The WPCA’s definition of pollution is not unconstitutionally vague when applied to the placement of fill material in a wetland or stream. *Id.*

Finally, consistent with its decision in *Pacific Topsoils*, the Court should reject the Church’s claim that application of the state’s antidegradation policy, embodied in WAC 173-201A-300 and RCW 90.54.020(3)(b), to the filling of a wetland and a stream renders that policy unconstitutionally vague. The pertinent statutes and regulations setting forth the antidegradation policy were presumptively available to the Church. *Pacific Topsoils*, 157 Wn. App. at 649. Persons of ordinary

intelligence could discern that the antidegradation policy applied to the filling of the wetlands and stream. *Id.* Neither the WPCA nor the state's antidegradation policy is unconstitutionally vague as applied to the Church in this case.

**B. Church Is Responsible For Violations Of WPCA**

After receiving the Order and Notice of Penalty, the Church claimed in its notices of appeal that it was not responsible for the unauthorized clearing, filling and grading of the wetlands and stream at its Woodinville property. ADR 2, 474. The Church subsequently moved for summary judgment on this issue, asserting that volunteers committed the violations without approval of the Church Board. ADR 31-39. Ecology filed a cross motion for summary judgment on the issue of liability. ADR 40-85. On appeal the Church challenges the Board's determination that, because RCW 90.48.080 imposes strict liability, the Church is responsible for the documented violations of the WPCA at its property. Pet. Br. at 12-14. Despite submitting its own motion for summary judgment on liability, the Church further challenges the Board's decision now claiming that there were material facts in dispute precluding the grant of summary judgment to Ecology on this issue. Pet. Br. at 15-16. The Church's arguments are without merit and should be rejected.

**1. RCW 90.48.080 is a strict liability statute**

Under RCW 90.48.080, the legislature prohibited without exception the discharge of pollution into waters of the state.

It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any 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. As is clear from the plain language of RCW 90.48.080, it does not contain a knowledge requirement. The same is true of the civil penalty statute, RCW 90.48.144(3), which provides in pertinent party that every person who:

Violates the provisions of RCW 90.48.080, or other sections of this chapter or chapter 90.56 RCW or rules or orders adopted or issued pursuant to either of those chapters, shall incur, in addition to any other penalty as provided by law, a penalty in an amount of up to ten thousand dollars a day for every such violation. . . . Every act of commission or omission which procures, aids or abets in the violation shall be considered a violation under the provisions of this section and subject to the penalty herein provided for.

In contrast, where knowledge is a required element, the legislature explicitly identifies it in the statute. *See* RCW 90.48.140 (“Any person found guilty of willfully violating any of the provisions of this chapter or chapter 90.56 RCW, or any written final orders or directive of the

department or a court in pursuance thereof is guilty of a gross misdemeanor . . . .”)

Contrary to the Church’s claim, this Court held that similar language in the Washington Clean Air Act, Chapter 70.94 RCW, imposes strict liability. *Wm. Dickson*, 81 Wn. App. 403. In *Dickson*, the Puget Sound Air Pollution Control Agency (PSAPCA), pursuant to RCW 70.94.040, issued an order and penalty to a contractor for violation of its asbestos removal regulations. RCW 70.94.040 provides that, absent a variance, “it shall be unlawful for any person to cause air pollution or permit it to be caused in violation of this chapter, or of any ordinance, resolution, rule or regulation validly promulgated hereunder.” Appellant challenged PSAPCA’s use of strict liability to enforce its regulations, asserting that it was contrary to RCW 70.94.040 because the statute required proof of knowledge and causation. *Wm. Dickson*, 81 Wn. App. at 406. The court rejected appellant’s argument:

Also, we uphold the agency’s application of strict liability as being consistent with the underlying statute, RCW 70.94.040, which does not require proof of knowledge. The statute’s language, “cause or allow,” cannot be read to impose a knowledge or intent element because the Legislature removed the word “knowingly” from the statute . . . .

*Id.* at 409.<sup>13</sup>

The language of RCW 90.48.080 commands the same conclusion. It is unlawful for a person to “cause” pollution to enter waters of the state. The statute does not require proof of knowledge. As the court held in *Dickson*, the statutory language cannot be read to impose a knowledge or intent element.<sup>14</sup> The Church was on notice in September 2006 that the clearing, grading and filling activities were illegal. ADR 57-58 (¶¶ 6-7). Despite that notice, the illegal activities continued. ADR 146-47 (¶¶ 6-8). The Church, which had every opportunity to halt those activities, did not. Consequently, the Church caused continued violations of RCW 90.48.080 to occur. The Board correctly concluded that RCW 90.48.080 is a strict liability statute and the Church is strictly liable for the WPCA violations on its property.

Moreover, the Church’s failure to reign in its members after the initial contact with regulatory agencies subject it to penalties for violation

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<sup>13</sup> Former RCW 70.94.040 provided: “Except where specified in a variance permit, as provided in RCW 70.94.181, it shall be unlawful for any person knowingly to cause air pollution or knowingly permit it to be caused in violation of this chapter, or of any ordinance, resolution, rule or regulation validly promulgated hereunder.” The term knowingly was removed from the statute in 1980. Laws of 1980, ch. 175, § 2.

<sup>14</sup> The Church asserts that *Dickson* is inapposite because the legislature amended RCW 70.94.040 to remove the word knowingly. Pet. Br. at 14. This assertion is untenable. RCW 90.48.080 has never included the term knowingly, therefore, from its initial passage, the statute imposed strict liability. Moreover, former RCW 70.94.040 on its face required knowledge. The legislature affirmatively removed that requirement when it amended the statute in 1980. Both RCW 90.48.080 and RCW 70.94.040 are strict liability statutes.

of the WPCA. Under RCW 90.48.144, “[e]very act of commission or omission which procures, aids or abets in the violation shall be considered a violation under the provisions of this section and subject to the penalty herein provided for.” On October 6, 2006, the Church was notified by Ecology that the unauthorized clearing, grading and filling of the wetlands and stream constituted a violation of the WPCA.<sup>15</sup> ADR 60 (¶ 3). Despite receiving that information, additional violations occurred in December/January and March. Board Dec. at 9-12 (FOF 14-15, 19). Assuming, *arguendo*, the accuracy of the Church’s assertions that it did not authorize the work, its failure to stop ongoing violations of the WPCA at its Woodinville property nevertheless constituted an omission that aided or abetted the violation of the statute. Ecology’s issuance of the Notice of Penalty is consistent with the requirements of RCW 90.48.144(3).

**2. Board did not err in holding the Church responsible for violations of WPCA**

The Church asserts that the Board wrongly granted summary judgment to Ecology on liability because there are disputed issues of material fact regarding whether the Church authorized the actions resulting in violations of the WPCA. Pet. Br. at 14-15. The Church

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<sup>15</sup> At the same time, the Church had also been informed that its activities violated the Hydraulics Code and Snohomish County’s grading ordinance. Board Dec. at 6-7 (FOF 9), ADR 57-58 (¶ 6). Additionally, Snohomish County posted a Stop Work order at the property. ADR 154 (¶ 1). Despite that information, unauthorized clearing, grading and filling activities continued into the spring of 2007. Board Dec. at 9-12 (FOF 14-15, 19), ADR 146-47 (¶¶ 6-8).

alleges that the unpermitted impacts to the wetlands and streams on its property were committed by Church volunteers without the permission of the Church Board or Pastor Antemie. A review of the record demonstrates that the Board properly applied the summary judgment standard and correctly determined that the Church was responsible for the illegal activity. The Court should reach the same conclusion.

The Church, which moved for summary judgment on the issue of liability, presented declarations from Pastor Antemie that contained the flat assertion that neither he nor the Church Board authorized the work. ADR 39, 87. The Church now claims that the Board failed to view the facts in the light most favorable to the non-moving party. That assertion, as well as the Church's arguments to this Court, ignores the undisputed evidence in the record establishing the Church's responsibility for the illegal activities: (1) the Church owns the property, ADR 39; (2) the Church had plans to develop the property, ADR 70 (Ex. 3); (3) unpermitted clearing, grading and filling activities were initially performed in the summer of 2006, Board Dec. at 6 (FOF 8); (4) Pastor Antemie and other Church administrators were aware of the unpermitted work and were on site when Mr. Britsch of Snohomish County investigated a citizen's complaint on September 13, 2006, *id.*, ADR 57 (¶ 5); (5) additional unpermitted work was being done on site during

Mr. Britsch's site visit and in plain view of the Pastor and others, ADR 57-58 (¶ 6); (6) during Ecology's site visit on October 6, 2006, Mr. Anderson was told that no further work would be done until permits were received, ADR 60 (¶ 3); (7) more extensive unpermitted work impacting the wetlands and the tributary stream was done in December 2006, and January and March 2007, ADR 60-61 (¶ 4), 147 (¶ 9); (8) in his response to Ecology's enforcement warning letter Pastor Antemie identified himself as the person responsible for the clearing, ADR 73 (Ex. 4); and (9) at meetings with regulatory agency staff on March 12 and 21, Pastor Antemie stated that the Church was responsible for the unpermitted work, ADR 62 (¶¶ 8-9).

The declarations submitted by the Church on summary judgment did not dispute these facts. Rather, on this issue, Pastor Antemie's declaration contained nothing more than statements regarding the ultimate fact or conclusion of fact in the case—his view that the Church was not responsible. As such, those declarations are insufficient to “rebut [Ecology's] contentions and disclose that a genuine issue as to a material fact exists.” *Seiber*, 136 Wn. App. at 736-37. The undisputed evidence proves that the Church was aware of the unpermitted work and that, despite contacts from Snohomish County, Washington Department of Fish and Wildlife, and Ecology, additional unpermitted work was performed.

In light of the uncontroverted facts, the Board properly concluded that the Church either solicited these acts or consented to them. ADR 351.

Even if the Court were to agree that there are material facts in dispute regarding the Church's authorization of the work, which Ecology does not concede it should, remand for an evidentiary hearing on this issue is unnecessary. Following its summary judgment decision, the Board held a three-day evidentiary hearing addressing the reasonableness of the penalty. In upholding the penalty in full, the Board made the following unchallenged Finding of Fact:

The first summer after the Church purchased the Property (Summer 2006), it decided to have a clean-up effort on the site. The intent, as described by the Pastor, was to clean the area around the houses, cut the grass, and remove clutter such as sheds, trailers, and other debris left from prior gardening and farming activity. The Church board was aware that the work was planned, but based on existing Church policy Church members could spend up to \$10,000 on the clean-up without the need of specific board authorization. The work was organized and started in June and July of 2006. In August 2006, the Pastor left the country for a mission in Romania. *Antemie Testimony*.

Board Dec. at 6 (FOF 8).<sup>16</sup> Accepting for the sake of argument that the Board's summary judgment on this issue was premature, the testimony elicited from Pastor Antemie at the hearing supports the determination that

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<sup>16</sup> The Church relies on this finding in its Statement of the Case. Pet. Br. at 6.

the Church was responsible for the violations of the WPCA.<sup>17</sup> All of the facts necessary to reach a resolution of this issue were presented to the Board and support the conclusion that the Church is responsible for the violations of the WPCA. Remand for further fact finding is unnecessary.

**C. Ecology Provided Required Notice To The Church**

The Church's due process arguments can be summarized as (1) the Order did not provide sufficient notice of the laws and regulations the Church violated or sufficiently describe the Church's violations and (2) the Notice of Penalty needed to detail how the penalty was calculated. The Church's claims are easily dismissed.

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<sup>17</sup> In Conclusion of Law No. 6, the Board addressed the Church's failure to control the activities at its property.

The remedial response by the Church is of concern as well. The fact that the second round of violations occurred after the first incident in the fall is especially troubling to the Board. After the strong response from WDFW, the County, and Ecology to the Church's unauthorized activities, it is hard to understand why the Church failed to take stronger measures to control the actions of its members on the Property, or otherwise allowed or possibly even directed further actions in violation of the law. Property owners who invite or allow others to perform work on their property bear the risk of those individuals complying with applicable environmental laws and regulations and have a responsibility to exercise appropriate supervision or control to ensure that they do. By choosing not to inform the congregation about the regulators' concerns regarding activities at the site, and by not directing all Church members to refrain from any further clearing, grading, or filling activity or otherwise restricting access to the Property, the Church left open the door for the additional violations in January 2007.

Board. Dec. at 19-20 (COL 6).

**1. Order and Notice of Penalty apprised Church of offending conduct and laws violated**

The Church's claim that the Order and Notice of Penalty do not provide it with notice of the factual basis for Ecology's claim that it violated RCW 90.48.080 and WAC 173-201A-300 through -330 is unfounded. The Church itself quotes the Notice of Penalty, which states that the penalty is based on the following findings:

Prior to September 13, 2006, the Church mechanically cleared, graded and filled wetlands and a tributary to Little Bear Creek and again prior to January 25, 2007, the Church mechanically cleared, graded and filled additional wetlands and diverted flow from a tributary to Little Bear Creek without a permit in violation of RCW 90.48.080. Discharge of such polluting matters into waters of the state is also a violation of the anti-degradation policy, WAC 173-201A-300 through 330. Fill remains in place in the wetlands. Each and every day the fill remains in the wetlands constitutes a separate and distinct violation of RCW 90.48.080 and RCW 90.48.160, and WAC 173-201A-300 through 330.

ADR 5.<sup>18</sup> The Order sets forth essentially identical language detailing the acts constituting a violation of the WPCA and the provisions of that statute

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<sup>18</sup> Citing to Appendix 1 to its brief, the Church asserts that Ecology was required to send the Church a similar document when it issued the Penalty. Pet. Br. at 41-42. The Church's assertion should be rejected. First, the document in Appendix 1, consisting of a penalty and a Request for Enforcement (RFE), is not part of the stipulated record on appeal. It was not part of the Board's record nor did the Church ask the superior court to add it to the administrative record as required by RCW 34.05.562(1). Second, the Church did not appeal the Board's determination that the Penalty was reasonable. As a result, the Church has waived any claims that it may have regarding the calculation of the penalty. Third, there is no evidence that the RFE in Appendix 1 was sent to the penalized party with the penalty. Therefore, the Church's claim that Appendix 1 represents a "typical penalty order" is baseless. Finally, despite its protestations that it was unprepared for the hearing because the RFE was not sent with the Penalty, the Church, in fact, obtained the

violated. ADR 478. The Order also states that “there is no record on file at [Ecology] of an application for or authorization of these activities.” *Id.* It is abundantly clear from the Order and Notice of Penalty that Ecology is asserting that the Church’s mechanized clearing, grading, and filling of the wetlands and stream, as well as the diversion of flow from the stream, without a permit are violations of RCW 90.48.080 and the antidegradation policy, WAC 173-201A-300 through -330.<sup>19</sup>

As detailed above, the complete obliteration of wetlands and a tributary stream degrades and eliminates any beneficial uses that those aquatic features once provided. Both the Order and Notice of Penalty provided the Church with detailed notice of the actions that constituted violation of state law and citations to those very laws. The Order and Notice of Penalty comply with all applicable due process requirements.<sup>20</sup>

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RFE through both a public records request and discovery. Its refusal to review the RFE, which was available in advance of the summary judgment briefing, is not Ecology’s fault or a basis to find a violation of due process.

<sup>19</sup> The Penalty also states that every day the fill remains in the wetlands constitutes a separate and distinct violation of RCW 90.48.160, which governs NPDES and state waste discharge permits. The Church did not challenge this violation in its Notice of Appeal, identify it as a legal issue, or argue on summary judgment that the citation to RCW 90.48.160 was erroneous. ADR 1-2, 16-22, 473-76. Consequently, the Church waived its right to challenge the Penalty’s citation to RCW 90.48.160. Even if the Church had not waived that claim, its assertion that it was prejudiced because Ecology did not advance arguments under RCW 90.48.160 is unavailing. Ecology did not pursue that violation in the proceedings before the Board nor did the Board even mention RCW 90.48.160 in its summary judgment decision. It was simply not an issue in this appeal.

<sup>20</sup> The Church’s reliance on *General Electric Company v. Environmental Protection Agency*, 53 F.3d 1324 (D.C. Cir. 1995) is misplaced. In *General Electric*, EPA issued a penalty to GE for violating regulations governing disposal of toxic pollutants. *Gen. Elec. Co.*, 53 F.3d at 1326–27. Addressing GE’s challenge to the penalty, the court held that the interpretation EPA

Moreover, contrary to the Church's assertions, the Order and Notice of Penalty are both consistent with the requirements of due process discussed by the Court of Appeals in *Mansour v. King County*, 131 Wn. App. 255, 270–71, 128 P.3d 1241 (2006). In *Mansour*, King County Animal Control issued an order requiring a dog owner to remove his dog from the county. *Mansour*, 131 Wn. App. at 260–61. However, the order did not cite the ordinance the agency subsequently relied upon at the administrative hearing, nor did the order refer to the dog as “vicious,” a necessary finding for invoking that ordinance. *Mansour*, 131 Wn. App. at 271. Because of those defects, Division I determined that the notice failed to meet due process requirements. *Mansour*, 131 Wn. App. at 272.

In contrast to the order in *Mansour*, Ecology's Order and Notice of Penalty provided the Church with “notice of the charges or claims against which [it] must defend.” *Mansour*, 131 Wn. App. at 270. Both documents cited (1) the authority for taking enforcement action under the WPCA (Notice of Penalty – RCW 90.48.144; Order – RCW 90.48.120), (2) the statute violated (RCW 90.48.080), and (3) the actions that constituting the violation (clearing, grading and filling of wetlands and

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made of its regulation was permissible but, because GE first learned of that interpretation through the penalty, EPA's penalty violated due process. *Id.* at 1328. As noted by the court, “[h]ad EPA merely required GE to comply with its interpretation, the case would be over.” *Id.* By contrast, Mr. Anderson's communications with Pastor Antemie and other Church officials made the Church fully aware that Ecology asserted jurisdiction over wetlands at its Woodinville property. Ecology's pre-enforcement contacts with the Church, including its warning letters, provided sufficient notice of Ecology's asserted jurisdiction over wetlands.

stream). ADR 5, 478. Additionally, both documents stated that the Church's violations arose from its discharge of fill material into wetlands and the tributary stream, waters of the state, at its Woodinville property. ADR 5, 478.

Because the Order and Notice of Penalty clearly identified the gravamen of the allegations against it, the Church's contention that it was unable to prepare its defenses is untenable.<sup>21</sup> The Church never disputed that the clearing, grading and filling of the wetlands and stream occurred. Rather than asserting that the activities did not violate RCW 90.48.080 or that it had obtained authorization to undertake those activities, the Church claimed it was not responsible for the actions of its members and challenged Ecology's authority to protect wetlands under the WPCA. The Church's trial strategy to pursue only those defenses cannot be converted into a denial of due process by Ecology. The Order and Notice of Penalty provided notice of the factual and legal bases for the penalty and, therefore, satisfied applicable due process requirements.<sup>22</sup>

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<sup>21</sup> The Church did not appeal the Board's decision affirming the Notice of Penalty. Therefore, the Church has waived any claims that it may have regarding that decision.

<sup>22</sup> The Church's argument that the Order and Penalty violate due process because they do not identify the permit that the Church *should have* obtained before it filled wetlands is equally unavailing. Due process requires notice of what constitutes the violation, not a description of how one could avoid violating the law in the first place. Given RCW 90.48.080's prohibition, without exception, of the discharge of pollutants into waters of the state, the Order and Penalty provide sufficient notice to the Church of its illegal behavior.

**2. Notice of Penalty provided sufficient notice regarding its calculation**

The Church asserts that due process requires that Ecology provide it with a description of how the penalty was calculated. In making this claim, the Church overlooks the fact that it failed to appeal the Board's decision affirming the penalty and therefore waived any claims it may have regarding that decision. The Court should reject the Church's attempt to backdoor a challenge to the Board's unappealed decision under the guise of due process.

Ecology's penalty authority is contained in RCW 90.48.144, which provides in pertinent part that any person who:

Violates the provisions of RCW 90.48.080 . . . shall incur, in addition to any other penalty as provided by law, a penalty in an amount of up to ten thousand dollars a day for every such violation. Each and every such violation shall be a separate and distinct offense, and in case of a continuing violation, every day's continuance shall be and be deemed to be a separate and distinct violation. . . . The penalty herein provided for shall be imposed pursuant to the procedures set forth in RCW 43.21B.300.

RCW 90.48.144(3). The procedures established in RCW 43.21B.300 require that the penalty be in writing and describe the violation with reasonable particularity. The Notice of Penalty clearly complies with the statutory procedures by providing a written statement detailing the violation as well as citing to the statute and regulation violated. ADR 5.

There is no requirement that the penalty include a statement regarding the calculation of the penalty. The Notice of Penalty issued to the Church fully complies with the requirements of both RCW 90.48.144 and RCW 43.21B.300 and the requirements of due process.<sup>23</sup>

As noted previously, the Board held a three-day hearing on the reasonableness of the penalty, in which the Church fully participated. In determining the reasonableness of a penalty, the Board evaluates how the penalty amount was reached. Specifically, the Board considers (1) the nature of the violation, (2) the prior history of the violator, and (3) the remedial actions taken by the penalized party. Board Dec. at 18 (COL 4). In this instance, the Board weighed the testimony and evidence presented and determined that the \$48,000 penalty was reasonable. If the Church disagreed with that conclusion its recourse was to appeal it. It did not do so. The Court should dismiss the Church's challenge to the Notice of Penalty calculation.

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<sup>23</sup> The Church alleges that it was unaware of how the penalty was calculated until the hearing. Pet. Br. at 24. The Church's assertion is false. As discussed in note 17 above, when Ecology determines that a penalty is warranted, the agency prepares a RFE. In this case, well in advance of the penalty hearing, the Church received copies of the RFE through both a public records request and discovery. Additionally, the RFE was one of Ecology's hearing exhibits and was provided to the Church a week prior to the hearing. The Church cannot credibly claim that "it did not receive any prior notice" of the penalty calculation factors until the hearing. Pet. Br. at 42. The Church's alleged failure to review the various copies of the RFE it received does not constitute a deprivation of its due process by Ecology. This is not "mere huffing and puffing" by Ecology. Pet. Br. at 44. Rather, it is a matter of taking responsibility for adequately preparing a case for trial. Ecology's Notice of Penalty satisfied all due process requirements.

Even if the Church had appealed the Board's final decision, its assertion that due process requires Ecology to describe how it calculated the Notice of Penalty is without merit. As discussed above, due process requires "notice of the charges or claims against which [a party] must defend." *Mansour*, 131 Wn. App. at 270. The Notice of Penalty, by clearly identifying Ecology's authority for issuing the penalty, the statute and regulation violated, and the actions constituting the violations, complied with applicable due process requirements.

**D. Ecology Can Order Restoration Under WPCA**

The Church challenges the Order's requirement that it repair the damages caused by its unauthorized clearing, filling and grading, alleging that Ecology exceeded its authority in requiring the restoration. According to the Church, Ecology can only order abatement of the polluting activity. Pet. Br. at 18. Contrary to the Church's assertion, the WPCA provides Ecology with ample authority to require the restoration of the wetlands, stream and buffers damaged by its unauthorized activities.

RCW 90.48.120(2) provides:

Whenever the department deems immediate action is necessary to accomplish the purposes of this chapter or chapter 90.56 RCW, it may issue such order or directive, as appropriate under the circumstances, without first issuing a notice or determination pursuant to subsection (1) of this section.

The purpose of the WPCA is “to maintain the highest possible standards to insure the purity of all waters of the state . . . .” RCW 90.48.010. In this case, the Church significantly damaged 1.17 acres of wetlands, approximately one acre of which was high quality forested wetland, and 87 percent of a tributary to Little Bear Creek, a stream that provides habitat for federally listed salmonids. ADR 150-51 (¶¶ 16-17). The unpermitted clearing, grading, and filling of wetlands and a stream is contrary to the purpose of maintaining the purity of these waters as such activity causes an alteration of their chemical, physical, and biological properties. ADR 276-77 (¶¶ 3-4). The circumstances presented—the destruction of valuable wetlands and a tributary to a creek supporting listed salmonids, as well as their buffers—clearly require restoration of the wetlands and stream to their pre-disturbance condition.<sup>24</sup> ADR 149 (¶ 13).

Ecology’s authority to require wetlands and stream restoration is well recognized. The state Supreme Court acknowledged Ecology’s authority to regulate wetlands under the WPCA in *Port of Seattle*, which

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<sup>24</sup> Without citation to any evidence, because none exists, the Church claims that “only Ecology has chosen to duplicate the enforcement of other agencies, subjecting the Church to conflicting orders and requirements.” Pet. Br. at 8. As this Court previously held, the WPCA authorizes Ecology to protect wetlands and issue appropriate regulatory orders and penalties for violations of the Act. *Pacific Topsoils*, 157 Wn. App. at 640-46. The same holds for the discharge of pollution into a stream. The only conflict in this case is between the Church and Snohomish County. In its unchallenged findings of fact, the Board found that “It is close to three years since the first damage to Wetland A/B and its buffer, and the Church and the County are still fighting over the restoration plan.” Board Dec. at 20 (COL 7).

addressed a Clean Water Act Section 401 certification issued by Ecology to the Port Seattle for construction of the third runway. The project included the filling of several acres of wetlands and required extensive mitigation for those impacts to waters of the state. *Port of Seattle*, 151 Wn.2d at 580. As discussed above, the state Supreme Court in *Port of Seattle* acknowledged Ecology's authority to regulate wetlands under the WPCA and confirmed Ecology's mitigation requirements in the Section 401 Certification and WPCA order. *Port of Seattle*, 151 Wn.2d at 580-81, 583-84.

Absent prior authorization, it is unlawful to discharge pollutants into wetlands and streams. RCW 90.48.080. Had the Church contacted Ecology prior to undertaking the activity, it would have been required to mitigate any proposed impacts to the wetlands and stream. ADR 149 (¶ 13). The Church's failure to seek prior approval does not negate its responsibility to repair the damages it wrought. The requirements of the Order are legally and scientifically authorized.

**VI. CONCLUSION**

For the reasons stated above, the Court should affirm the Board's  
Order on Summary Judgment Motions.

RESPECTFULLY SUBMITTED this 3rd day of January 2011.

ROBERT M. MCKENNA  
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1                                   BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
2                                   STATE OF WASHINGTON

3 FIRST ROMANIAN PENTECOSTAL  
4 CHURCH OF KENMORE,

5                                   Appellant,

6                                   v.

7 STATE OF WASHINGTON,  
8 DEPARTMENT OF ECOLOGY,

9                                   Respondent.

PCHB NOS. 08-098 & 08-099

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

10                   This matter arises from the appeal of a \$48,000 penalty issued by the Department of  
11 Ecology (Ecology) to The First Romanian Pentecostal Church of Kenmore (Church) on  
12 September 10, 2008, for unlawful discharge of pollutants into waters of the state.

13                   A hearing was held on June 24 and 25, 2009, in Bellevue, Washington, and continued on  
14 a third day, June 26, 2009, at the offices of the Pollution Control Hearings Board (Board) in  
15 Lacey, Washington. Jane Ryan Koler, Attorney at Law, appeared on behalf of the Church. Joan  
16 M. Marchioro, Senior Counsel, Assistant Attorney General, appeared on behalf of Ecology. The  
17 Board was comprised of Andrea McNamara Doyle, William H. Lynch, and Kathleen D. Mix.  
18 Kay M. Brown, Administrative Appeals Judge, presided for the Board. Kim Otis, with Olympia  
19 Court Reporters, provided court reporting services.

20  
21  
FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER  
PCHB NOS. 08-098, 08-099                   (1)

1 The Board received the sworn testimony of witnesses, admitted exhibits, and heard the  
2 arguments of the parties to the appeal. Having fully considered the record, the Board enters the  
3 following:

4 FINDINGS OF FACT

5 1.

6 The Church has a growing congregation which originally met in a rented facility in  
7 Bellevue. Pastor Vasile Antemie (the Pastor) has been its pastor since 1992. In 1993, the  
8 Church built a new facility on property it purchased in Kenmore. The new facility was  
9 approximately 7000 square feet with a 250 stall parking lot. By 2005, the Church was short of  
10 space. In December 2005, the Church purchased an almost 15 acre rectangular parcel in  
11 Snohomish County (Property). *Antemie Testimony.*

12 2.

13 At the time of purchase, the Property was partially forested with open spaces, and had  
14 two residential structures, a barn, and a surrounding lawn area. In the past, parts of the Property  
15 have been farmed and used for livestock. The Church purchased the Property with the intention  
16 of building a new facility with approximately twice the square footage and parking as their  
17 Kenmore facility. During the purchasing process, the Church obtained an informal feasibility  
18 study indicating that the site contained a suitable buildable area sufficient for their needs, along  
19 with some three to five acres of wetland. The Church obtained no other formal feasibility studies  
20 or wetland investigations. At the time of the purchase, Pastor was aware of the presence of Little  
21 Bear Creek on the property, as well as a swampy area, but was not aware specifically of the

1 unnamed Tributary to Little Bear Creek (Tributary). *Antemie Testimony, Iancu Testimony,*  
2 *Stephens Testimony, Exs. J-6, R-7A.*

3 3.

4 The Property contains significant environmental resources. Little Bear Creek flows from  
5 north to south in the eastern portion of the Property, eventually flowing into the Sammamish  
6 River three miles to the south. It varies in size from a minimum of 10 feet across during the dry  
7 season, to a maximum of 30 feet across during flood events. Little Bear Creek is one of only two  
8 documented salmon-bearing tributaries located in the upper reach of the Cedar-Sammamish  
9 watershed, and is known habitat for two endangered fish species, Chinook salmon and Steelhead  
10 trout. It is also known habitat for other salmon and trout species including Coho, Sockeye,  
11 Cutthroat, and Kokanee. The fish use Little Bear Creek for all stages of their life cycles,  
12 including spawning, fry emergence, nururance, and a corridor to the ocean. *Britsch Testimony,*  
13 *Holser Testimony, Exs. J-6, R-2KK, R-6.*

14 4.

15 The Church property also contains the Tributary which flows from west to east through  
16 the northern and central portion of the property roughly 1,000 feet to its confluence with Little  
17 Bear Creek. The Tributary is approximately three to six feet wide, and varies in depth from one  
18 to two feet. It provides rearing and spawning habitat for Cutthroat trout, and high water refuge  
19 and rearing habitat for the salmonids in Little Bear Creek. *Holser Testimony, Exs. R-8, J-6.*

20  
21  
FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER

PCHB NOS. 08-098, 08-099

(3)

1 5.

2 Although the County had no record of wetlands on the site prior to the Church's purchase  
3 of the Property, the Property does in fact contain three wetlands. According to the most recent  
4 wetland report prepared by the Church's consultant, which is still in draft form, these wetlands  
5 total 3.51 acres on the Property and extend beyond the parcel boundaries. Their associated  
6 buffers constitute 9.09 acres on the Property. Ecology categorizes wetlands based on their  
7 significance, with Category I having the highest significance and Category IV having the least.  
8 Wetland C on the Property is a Category I wetland containing mature forests. Wetland C is  
9 estimated at five acres in size, with 1.67 acres on the Property. Wetland C has a buffer width of  
10 225 feet. Wetland A/B on the Property is rated as a Category II wetland, is estimated at 3 acres  
11 total, with 1.55 acres on the Property. Wetland A/B has a 75 foot wide buffer. Wetland D is a  
12 Category III wetland, and is estimated at less than 5 acres, with .29 acres located on the Property.  
13 Wetland D has a 60 foot buffer. *Anderson Testimony, Duncan Testimony, Iancu Testimony, Exs.*  
14 *J-6, R-2SS.*

15 6.

16 The wetlands on the Property provide a number of important functions to Little Bear  
17 Creek and its watershed. Wetlands provide habitat for aquatic and terrestrial species, improve  
18 water quality, and support stream flow. The more diverse the plant structure in the wetland, the  
19 more diverse the wildlife that can be found in the area. This is especially true for a mature  
20 forested wetland such as Wetland C, which contains a mixed stand of established conifers and  
21 deciduous trees. This is why WDFW has designated mature forest stands, such as exist on the

1 Property, as a priority habitat. It is apparent from large oblong holes in a tree on the ground in  
2 Wetland C that Pileated Woodpeckers, a priority species in Washington, have in fact been using  
3 the trees in Wetland C for foraging. A mature forested wetland is the most protected and valued  
4 type of wetland in Washington. It is rare, and is the most difficult wetland to replace. *Anderson*  
5 *Testimony, Duncan Testimony, Exs. J-6, J-7, R-2SS.*

6 7.

7 A volunteer citizen group, Little Bear Creek Protective Association (Association) exists  
8 to preserve and enhance water, habitat, fish, and wildlife of Little Bear Creek and its watershed.  
9 The Association educates landowners in the area about the environmental importance of Little  
10 Bear Creek, attends neighborhood meetings, and obtains grants to do restoration work. The  
11 President of the Association, Greg Stephens (Stephens), met and talked with members of the  
12 Church including a Church board member Constantin Iancu (Iancu) and the Pastor. The purpose  
13 of these conversations from Stephens's perspective was to inform the Church about Little Bear  
14 Creek, the Tributary on the Property, and the important fish species that they contain. This  
15 Board finds that at least one conversation occurred in the summer or fall of 2006 with the Pastor,  
16 Iancu, and Stephens. During this conversation, Stephens conveyed substantial information  
17 regarding Little Bear Creek and its environmental significance, and the presence of the Tributary  
18 on the Property. This Board cannot determine from the testimony presented whether this  
19 conversation occurred before or after the 2006 violation. *Iancu Testimony, Antemie Testimony,*  
20 *Stephens Testimony.*

1 8.

2 The first summer after the Church purchased the Property (Summer 2006), it decided to  
3 have a clean-up effort on the site. The intent, as described by the Pastor, was to clean the area  
4 around the houses, cut the grass, and remove clutter such as sheds, trailers, and other debris left  
5 from prior gardening and farming activity. The Church board was aware that the work was  
6 planned, but based on existing Church policy Church members could spend up to \$10,000 on the  
7 clean-up without the need of specific board authorization. The work was organized and started  
8 in June and July of 2006. In August 2006, the Pastor left the country for a mission in Romania.

9 *Antemie Testimony.*

10 9.

11 On September 13, 2006, the County, in response to a citizen complaint, visited the  
12 Property with the Pastor and a board member from the Church. County employee Steven Britsch  
13 (Britsch) observed that an area, later determined to be wetland A/B, had been cleared and graded  
14 using machinery. The Tributary had been completely denuded. At the time of the visit, track  
15 hoes and a dump truck were on site. Water quality samples, taken by Britsch, documented  
16 violations of state water quality standards for turbidity. Britsch also spoke with the Pastor and  
17 the Church board member about the impacts of these actions to the Tributary and Little Bear  
18 Creek. The next day the County posted a stop work order on the property because of "grading,  
19 filling, altering drainage, and disturbing a critical area without first obtaining a grading permit  
20 per Snohomish County Code, Section 30.63B.010." Britsch also furnished the Church with a  
21 copy of the stormwater control manual for erosion control practices when he returned to the site

1 on September 15, 2006, to provide technical assistance. *Britsch Testimony, Exs. R-1, R-2A*  
2 *through R-2J.*

3 10.

4 On September 14, 2006, Ginger Holser (Holser) from Washington State Department of  
5 Fish and Wildlife (WDFW) visited the site. She observed that the Tributary on the Property had  
6 been graded over, and that it was now cutting through the fill material and entering Little Bear  
7 Creek, carrying with it large amounts of sediment. She observed 15 to 20 sockeye salmon  
8 spawning at the confluence of the Tributary and Little Bear Creek, in the sediment plume. She  
9 also observed Chinook salmon, an endangered species, migrating through the area. Holser has  
10 been an Area Habitat Biologist with WDFW for four and one half years, and she described the  
11 violation as the most egregious turbidity violation that she has observed. *Holser Testimony, Exs.*  
12 *R-2Z through R2-BB, J-4.*

13 11.

14 Ecology was also informed about the violation on September 13, 2006, and Paul  
15 Anderson (Anderson), Ecology Wetlands Specialist, conducted a site visit on October 6, 2006.  
16 He met the Pastor, Iancu, and another Church member on site. Anderson observed clearing  
17 almost down to the bank of Little Bear Creek where the driveway enters the Property. He also  
18 observed the area of clearing, grading, and fill in what was subsequently delineated as Wetland  
19 A/B and around the Tributary. He determined from studies of aerial photographs taken in 2002  
20 that the Tributary on the Property in the area that was now denuded, had previously run through  
21 an area of mostly deciduous trees and shrubs. Anderson talked with the Church representatives

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1 on the site about the need to obtain a wetland and buffer delineation, and appropriate permits  
2 before proceeding further with any more work. *Anderson Testimony, Antemie Testimony, Ex. R-*  
3 *7.*

4 12.

5 Pursuant to an emergency Hydraulic Project Approvals (HPA) issued by WDFW, the  
6 Church undertook measures to reduce the sediment entering Little Bear Creek. By the time of  
7 Anderson's visit on October 6, 2006, the Church had re-established the Tributary channel, sloped  
8 the sides of the channel, installed gradient steps in the channel to slow water run-off, put coir  
9 mats along the banks to control erosion, and erected silt fencing. The Church subsequently  
10 worked with Adopt-A-Stream to implement some additional erosion control measures in the area  
11 of the Tributary, including placing gravel in the stream and planting live stakes along the banks.  
12 These measures were adequate to address the immediate turbidity issues, stabilize the site, and  
13 meet the requirements of the emergency HPA. WDFW requested, however, that the Church  
14 submit a complete stream restoration plan, including mitigation, no later than March 31, 2007.  
15 *Anderson Testimony, Holser Testimony, Antemie Testimony, Exs. A-5, A-7, A-8, J-2, J-3, J-4.*

16 13.

17 Once the Pastor became aware of the violations, he advised the Church board of the  
18 situation. The volunteers that had been involved in the clean-up activities were contacted by a  
19 Church member and advised not to do any further work on the site. The Church also posted a  
20 "private" sign on the property. Neither the Pastor nor the Church board informed the general  
21

1 congregation of the situation regarding the violations or concerns and directions from regulatory  
2 agencies. *Antemie Testimony.*

3 14.

4 On January 23, 2007, WDFW received a new complaint about additional work occurring  
5 on the Church's property. WDFW, the County, and Ecology met on site on January 24, 2007,  
6 along with Church representatives to investigate the latest allegations of unauthorized work on  
7 site. On this visit, and subsequent visits during January and February 2007, agency inspectors  
8 observed and documented evidence of new grading and filling activities on the site. A new  
9 trench had been dug with machinery on the northern portion of the property and the Tributary  
10 had been re-routed into this trench. The new trench varied in both width and depth. Holser  
11 estimated both dimensions at between four and six feet. The now-dewatered portion of the  
12 Tributary channel had been covered with branches and brush. A dead cut-throat trout was found  
13 in the dry bed of the Tributary. The Property along the northern boundary line had also been  
14 cleared. Anderson estimated that the clearing extended roughly 60 to 100 feet onto the adjoining  
15 land to the north that was not owned by the Church. This clearing impacted both Wetland A/B  
16 and Wetland C, and was not consistent with the type of clearing a professional surveyor would  
17 do to establish a sight line necessary for surveying. Surveyors typically use machetes to do this  
18 type of clearing, and the clearing that had occurred was not done in this manner. *Holser*  
19 *Testimony, Britsch Testimony, Anderson Testimony, Exs. R-2K through R-2Q, R-2CC through R-*  
20 *2FF, R-2 KK through R-2PP.*

1 15.

2 During this same time frame, site inspectors discovered an additional area of clearing and  
3 grading on the northwest side of the Property. A rough road had been created into Wetland C.  
4 Clearing and grading had occurred in Wetland C and both deciduous and conifer trees estimated  
5 to be 60 to 80 years old had been freshly cut. Approximately 1.09 acres of Wetland C had been  
6 cleared. One cedar tree that had been cut measured 28 inches in diameter. While some trees  
7 may have blown down, there were stumps remaining that established that some trees had been  
8 cut with a chainsaw. Also, there were areas where the trees and stumps had been completely  
9 removed. Another wetland, Wetland D, located on the southwest portion of the property, had  
10 also been filled. *Anderson Testimony, Britsch Testimony, Exs. R-2K through R-2O, R-2QQ*  
11 *through R-2SS, Exs. J-6, J-7.*

12 16.

13 Pastor Antemie acknowledged in his testimony that Church members worked on the  
14 Property in January. He testified that a storm in January 2007, blew down 10 to 15 trees and that  
15 Church members cut the trees and stacked them. He also admitted that a Church member had  
16 dug a trench with an excavator just prior to January 23, 2007, without the permission or  
17 knowledge of the Church board. He also testified that Church members had used an excavator to  
18 clear the northern property line to provide better access for surveying. *Antemie Testimony.*

19 17.

20 On February 5, 2007, Ecology sent the Church a warning letter advising the Church that  
21 it twice cleared and graded wetlands in violation of state law. Ecology stated in the letter that it

1 was investigating, and warned that violations of RCW 90.48.080 could result in a penalty of up  
2 to \$10,000 for each day of continuing non-compliance. The letter requested a delineation of all  
3 wetlands on the property; a site plan showing the delineated wetland boundaries, disturbed  
4 wetland areas, and wetland buffers; and a mitigation plan for restoration of all cleared and graded  
5 wetlands and buffers. The Church was to submit these documents within 30 days. *Anderson*  
6 *Testimony, Ex. A-17.*

7 18.

8 The Church hired a wetland consultant, Steward and Associates, who contacted Anderson  
9 at Ecology. The Church's consultant submitted a draft restoration plan within Ecology's 30 day  
10 time period. Ecology commented on the plan, and a "Final Report" dated January 25, 2008, was  
11 completed and submitted to Ecology. This restoration plan was acceptable to Ecology, but it was  
12 subsequently determined by the County that the Church's consultant had not adequately  
13 delineated Wetland D on the Property. *Anderson Testimony, Duncan Testimony, Exs. J-6, J-7.*

14 19.

15 A large group of agencies visited the Church property again on March 21, 2007. During  
16 this visit, the agencies observed that the Tributary, which had been rerouted into the excavated  
17 trench, had been partially moved back into its historic channel. Sediment laden water was  
18 flowing through the Tributary, under ineffective silt fencing, toward Little Bear Creek. Agency  
19 representatives found underground piping on the property, which appeared to route water from  
20 the western boundary of the Property, around the forested wetlands. The adjoining property to  
21 the west is owned by Iancu. No HPAs or other permits were obtained for any of the additional

1 stream and piping work. The Pastor testified that some piping had existed on the Property from  
2 the days when it was farmed, and he admitted that a Church member had reconnected a pipeline  
3 sometime in the weeks prior to the March site visit. The Pastor also testified that he had been out  
4 of the country in March of 2007. *Anderson Testimony, Britsch Testimony, Holser Testimony,*  
5 *Iancu Testimony, Antemie Testimony, Exs. R-2S through R-2Y, R-2TT through R-2FFF, R-5.*

6 20.

7 The unpermitted activities that occurred on the Property during the period between the  
8 summer of 2006, and March of 2007, caused serious impacts to important environmental  
9 resources. The actions eliminated or substantially impaired the valuable wetlands on the  
10 Property, including substantial damage to a mature, forested Class I wetland. Overall, 1.14 acres  
11 of wetland had been graded through, and .61 acres had been cleared and filled. These activities  
12 also harmed almost three acres of buffers. The filling and grading reduced or eliminated the  
13 wetlands' ability to provide water quality benefits, water storage, and habitat. This reduction in  
14 functioning is ongoing, and will continue until the Church completes the wetland restoration.  
15 While the damaged wetlands and buffer areas have begun the process of naturally re-  
16 establishing, there has been no active restoration activity of the wetlands since the violations.  
17 Even with active restoration, the temporal aspect of the damage cannot be cured. This is  
18 especially true for the Category I mature forested wetland, where it will take many years to  
19 replace the conifers that were removed. Even replacing the deciduous trees, which are faster  
20 growing, will take 20 to 25 years, and the wetland function may never return to its original high  
21 quality state. *Anderson Testimony, Duncan Testimony, Exs. J-6, J-7.*

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1 21.

2 The denuding and re-routing of the Tributary decreased the value of this riparian area as a  
3 migration corridor for riparian-dependent wildlife. The re-routing of the Tributary altered onsite  
4 hydrology, affecting the connectivity between the Tributary and adjacent wetlands. The clearing  
5 of large woody debris from the Tributary channel, and the removal of live trees along the  
6 Tributary that would have contributed to future large woody debris, reduced the Tributary's  
7 usefulness as fish rearing habitat. Because of the reduction of shade, water temperatures in the  
8 Tributary and Little Bear Creek have likely increased, which is detrimental to fish rearing and  
9 fish life. *Holser Testimony, Anderson Testimony, Exs. J-6, J-7.*

10 22.

11 Disturbances to the Tributary bed and banks resulted in significant erosion and much  
12 greater than normal quantities of sediment being transported downstream and deposited in  
13 spawning areas in both the Tributary and Little Bear Creek. Increased sediment and turbidity has  
14 a negative impact on salmon spawning areas. Sediment covers the salmon eggs and can smother  
15 them. Sediment also covers the gravel in which the salmon dig depressions to deposit the eggs.  
16 The sediment layer makes it harder for the salmon to dig, and therefore to spawn. Suspended  
17 sediment also causes abrasions to fish gills, which weaken the fish and make them more  
18 susceptible to disease. *Holser Testimony, Anderson Testimony, Exs. J-6, J-7.*

19 23.

20 Through the remainder of 2007, and into the spring and summer of 2008, the Church, the  
21 Church's consultant, and the County continued efforts to complete a satisfactory restoration plan

1 for the site. Ecology had only limited involvement in this process after reviewing the January  
2 2008 "Final Report" submitted by the Church. Several events complicated the process. First, the  
3 County determined that Wetland D had not been properly designated in the 2007 restoration  
4 plan, and this resulted in the need to modify the restoration plan. Second, the consulting firm  
5 that prepared the initial restoration plan for the Church was purchased by another firm in January  
6 2008. The new consulting firm did not send Ecology copies of proposed revisions to the  
7 restoration plan that it prepared in response to the County's concerns. Third, the County and the  
8 Church could not agree on the amount of compensation that is appropriate for the wetland  
9 damage, and this has delayed the County's approval of the restoration plan. As a result, the  
10 Church was not able to obtain the necessary grading permit and permission from the County to  
11 proceed with key elements of the restoration work on the Property during the summer of 2008.

12 *Duncan Testimony, Anderson Testimony, Exs. J-6, J-7.*

13 24.

14 The restoration work needed will be extensive and costly. The most recent plan  
15 submitted by the Church provides that the Church will remove the fill from the wetlands and  
16 regrade them, where necessary, to restore hydrological conditions; enhance vegetation along  
17 Little Bear Creek; fill the trench and replant the area; and install large woody debris and add a  
18 gravel substrate in the Tributary. The Church has also offered to move an existing septic drain  
19 field on the Property to higher ground. The drain field is currently located within the active  
20 flood plain of Little Bear Creek. The County is currently requesting that the Church create 1.8  
21 acres of compensatory wetlands, and their associated buffers, on the Property. The materials

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1 alone for the work, without consideration of labor costs, will be \$400,000. The Church's  
2 consultant estimates that the total cost, bid at a commercial rate and not including some of the  
3 work added during the most recent negotiation process with the County, will be approximately  
4 1.2 million dollars. *Duncan Testimony*.

5 25.

6 On September 10, 2008, Ecology issued an Administrative Order describing the  
7 violations observed on September 13, 2006, and January 25, 2007, and requiring the Church to  
8 take specific corrective actions. Ecology also issued a \$48,000 civil penalty to the Church for  
9 the identified violations. The Order states that the violation is ongoing for every day the fill  
10 remains in the wetland. *Anderson Testimony, Exs. J-1, A-21*.

11 26.

12 Ecology considered seven factors to assess the gravity of the violations when it prepared  
13 the penalty calculation. Each factor was assigned a varying number of points depending upon  
14 the degree to which the factor was present. Ecology concluded that there was definitely  
15 environmental damage (three points); that the penalty was definitely willful or knowing (three  
16 points); that the Church was possibly unresponsive in correcting the violation (one point); that  
17 there was definitely improper operation or maintenance (three points); that there was definitely  
18 failure to obtain necessary permits (three points); and that there was definitely economic benefit  
19 from noncompliance (three points). Based on a total of 16 points, Ecology assessed a \$6,000  
20 penalty per violation, consistent with the gravity component penalty table it uses in all cases.  
21 Ecology determined that there had been eight violations, because that was the number of times

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1 Ecology had contacted the Church. This resulted in a penalty of \$48,000. The Church appealed  
2 both the Administrative Order and the Penalty to this Board. *Anderson Testimony, Ex. R-10.*

3 27.

4 In its defense, the Church maintains that it was prevented from restoring the site because  
5 Snohomish County has not issued the necessary grading permits. The Church, however, could  
6 have undertaken certain restoration activities, such as hand-planting vegetation, that did not  
7 require a grading permit. The Church also maintains that it understood Ecology had deferred or  
8 delegated enforcement over the site to the County, and that it is now unfair for Ecology to  
9 impose a penalty. Ecology vigorously disputes that it ever deferred or delegated its enforcement  
10 authority to the County. Ecology could have issued the penalty much sooner, but chose to wait  
11 to issue the penalty until the September of 2008. It did so then because the site had not been  
12 restored nearly two years after the initial violations had been identified, and the statute of  
13 limitations would bar Ecology from issuing a penalty more than two years after the date the  
14 violation is discovered. *Anderson Testimony.*

15 28.

16 Any Conclusion of Law deemed to be properly considered a Finding of Fact is hereby  
17 adopted as such.

18 Based upon the foregoing Findings of Fact, the Board enters the following:  
19  
20  
21

1 CONCLUSIONS OF LAW

2 1.

3 The Board has jurisdiction over the parties and the subject matter of this case pursuant to  
4 RCW 43.21B.110. Both the scope and standard of review for this matter are *de novo*. WAC 371-08-  
5 485(1). As the penalty issuing agency, Ecology bears the burden of proving that the penalty  
6 assessed for the violation(s) was reasonable. WAC 371-08-485(3). Ecology must make the  
7 necessary showings by a preponderance of the evidence. *Piccolo/Magnum Trailers v. Ecology*,  
8 PCHB No. 05-154 (2006)(COL 3).

9 2.

10 The Board has already ruled, on summary judgment in this appeal, that all of the Church's  
11 challenges to the Administrative Order are without merit. The Board also ruled that the Church  
12 itself is legally responsible for the clearing, grading, and filling activities on its property, that  
13 those activities were violations of the Water Pollution Control Act (WPCA), Ch. 90.48 RCW,  
14 and that Ecology has authority to regulate wetland filling under the WPCA. The Board  
15 concluded that it lacked jurisdiction over the Church's taking claims. Lastly, the Board  
16 concluded that Ecology had provided all notice required by RCW 90.48.144(3)(the statute  
17 containing Ecology's penalty authority), that RCW 90.48.144(3) does not require advance notice  
18 of the penalty, that the penalty order itself was sufficient in that it was in written form and  
19 described the violations with specificity, and that there is no legal requirement that the penalty  
20 order inform the violator what it can do to avoid the issuance of the penalty. The only remaining  
21 issue for this hearing is whether the \$48,000 civil penalty is reasonable.

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1 3.

2 Ecology is authorized by state law to assess civil penalties for violations of Washington water  
3 pollution laws and regulations in an amount up to ten thousand dollars for each day of violation.

4 RCW 90.48.144 provides:

5 [Any person who] Violates the provisions of RCW 90.48.080, or other sections of this  
6 chapter or chapter 90.56 RCW or rules or orders adopted or issued pursuant to either of those  
7 chapters, shall incur, in addition to any other penalty as provided by law, a penalty in an  
8 amount of up to ten thousand dollars a day for every such violation. Each and every such  
9 violation shall be a separate and distinct offense, and in case of a continuing violation, every  
10 day's continuance shall be and be deemed to be a separate and distinct violation. Every act of  
11 commission or omission which procures, aids or abets in the violation shall be considered a  
12 violation under the provisions of this section and subject to the penalty herein provided for.  
13 The penalty amount shall be set in consideration of the previous history of the violator and  
14 the severity of the violation's impact on public health and/or the environment in addition to  
15 other relevant factors. The penalty herein provided for shall be imposed pursuant to the  
16 procedures set forth in RCW 43.21B.300.

11 RCW 90.48.144(3)

12 4.

13 This Board considers three factors when it evaluates the reasonableness of a penalty.  
14 These are: (1) the nature of the violation, (2) the prior history of violations, and (3) the remedial  
15 actions taken by the penalized party. *Douma v. Dep't of Ecology*, PCHB No. 00-019 (2005)(COL  
16 19).

17 5.

18 In this case, the Board concludes that the most significant consideration in evaluating the  
19 reasonableness of this penalty is the magnitude of the environmental damage caused by the  
20 activities of the Church members. The first round of unauthorized activities in the summer of  
21 2006 resulted in significant amounts of sediment entering Little Bear Creek while endangered

1 fish species were present and spawning. The removal of vegetation along the Tributary, Little  
2 Bear Creek itself, and in Wetland A/B and its buffers, will cause water temperature to increase  
3 until the canopy coverage is able to re-establish. Wetland A/B has not been providing wetland  
4 functions on this property since it was filled and graded, a period which is now approaching  
5 three years. The rerouting of the Tributary resulted in discharges of significant sediment  
6 amounts, and disrupted the hydrology on the site. The clearing of Wetland C has destroyed a  
7 category I mature forested wetland that will not be effectively restored for decades, if ever. The  
8 Board concludes that the environmental consequences of the Church's actions are most serious  
9 and warrant the imposition of the \$48,000 penalty.

10 6.

11 The remedial response by the Church is of concern as well. The fact that the second  
12 round of violations occurred after the first incident in the fall is especially troubling to the Board.  
13 After the strong response from WDFW, the County, and Ecology to the Church's unauthorized  
14 activities, it is hard to understand why the Church failed to take stronger measures to control the  
15 actions of its members on the Property, or otherwise allowed or possibly even directed further  
16 actions in violation of the law. Property owners who invite or allow others to perform work on  
17 their property bear the risk of those individuals complying with applicable environmental laws  
18 and regulations and have a responsibility to exercise appropriate supervision or control to ensure  
19 that they do. By choosing not to inform the congregation about the regulators' concerns  
20 regarding activities at the site, and by not directing all Church members to refrain from any

1 further clearing, grading, or filling activity or otherwise restricting access to the Property, the  
2 Church left open the door for the additional violations in January 2007.

3 7.

4 In other respects, the Church did take limited and effective remedial action. The Board  
5 concludes that the Church was initially very responsive to the agencies. The Pastor's immediate  
6 willingness to take financial responsibility for the actions of Church volunteers and individual  
7 members is commendable. And the Church's prompt retention of expert consultants and timely  
8 preparation of the required wetland delineation demonstrates a responsiveness that weighs in the  
9 Church's favor. Additionally, the remedial action taken on the lower Tributary was swift and  
10 effective. Unfortunately, the restoration of the wetlands, and the filling of the ditch and  
11 disconnection of the pipes, has not proceeded as smoothly. It is close to three years since the  
12 first damage to Wetland A/B and its buffer, and the Church and the County are still fighting over  
13 the restoration plan. In the meantime, there has been no active restoration on the remainder of  
14 the site and damage is ongoing. The Board concludes that the Church could and should have  
15 undertaken additional restoration efforts even though the County has not yet issued the grading  
16 permit necessary for major components of the restoration.

17 8.

18 The Board also notes that Ecology issued a significantly smaller penalty than allowed by  
19 law (\$10,000 per day/per violation) despite what were ongoing serious violations and discharges  
20 to the waters of the state. We also note that the Church avoided certain development costs by  
21 proceeding with the clearing, grading, and filling actions without required permits, and may have

1 benefitted economically by not incurring application fees and wetland assessment costs in the  
2 first instance. These are factors the Board considers in weighing the reasonableness of the  
3 penalty. *Delta Marine Industries, Inc. v. Puget Sound Clean Air Agency*, PCHB No. 08-050  
4 (2008)( COL 4); *Manning v. Puget Sound Clean Air Agency*, PCHB No. 05-085 (2007)(COL 9 –  
5 11); *Cascade Ag Services v. Ecology*, PCHB No. 03-082 (2004)(COL 25). Based on these  
6 factors, in addition to the seriousness of the violation and inadequate response to regulatory  
7 agencies, we also conclude that the penalty is reasonable.

8 9.

9 The Church argues that the penalty is not fair because the Church did not receive the  
10 appropriate "notice." WDFW, Ecology, and the County explained, in writing, and during  
11 multiple site visits and telephone conversations, what violations they observed on the ground in  
12 the fall of 2006 and in January of 2007, and what laws were violated. The Board has already  
13 concluded on summary judgment that the notice provided to the Church complies with statutory  
14 notice requirements. The Board concludes that the amount of the penalty is not unfair due to  
15 any defects in the notice provided to the Church.<sup>1</sup>

---

19 <sup>1</sup> Counsel for the Church argued at the hearing, that a Washington case, *Mansour v. King Co.*, 131 Wn. App. 255,  
20 128 P.3d 1241 (2006), requires more. The *Mansour* case held that insufficient notice had been provided to a pet  
21 owner by a County order requiring the pet owner to remove his dog from the county or give her up to be euthanized  
because the order did not specify the ordinance or statute it was invoking to support its issuance. *Id.* at 270, 271.  
Here, in contrast, both the administrative order and penalty order issued to the Church cite the statutory basis for  
their issuance. *See Ex. J-1, A-21.*

10.

1  
2 The Church attempts to claim surprise as a mitigating factor or a defense to Ecology's  
3 issuance of the penalty. There is no evidence that Ecology deferred or delegated its regulatory  
4 enforcement authority over this matter to the County, and the Church cites no authority that  
5 would preclude Ecology from exercising its discretion to issue a penalty under these  
6 circumstances. It is regrettable that the Church mistakenly believed Ecology had deferred to the  
7 County, because that misunderstanding appears to have contributed to the lack of communication  
8 with Ecology after submission of the January 2008 restoration plan, and to missed opportunities  
9 to continue working cooperatively with Ecology to begin implementing those portions of the  
10 plan that were not dependent on receiving the grading permit from Snohomish County. The  
11 Board concludes the penalty is a reasonable exercise of Ecology's authority, and affirms it in its  
12 entirety.

13 ORDER

14 The Board affirms the \$48,000 penalty issued to the Church, and these appeals are  
15 dismissed.

1 SO ORDERED this 31st day of July, 2009.

2  
3 POLLUTION CONTROL HEARINGS BOARD

4 Andrea McNamara Doyle, Chair

5 William H. Lynch, Member

6 Kathleen D. Mix, Member

7 Kay M. Brown

8 Administrative Appeals Judge, Presiding

9

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STATE OF WASHINGTON  
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DEPUTY

FIRST ROMANIAN PENTECOSTAL  
CHURCH OF KENMORE,

Appellant,

v.

WASHINGTON STATE  
DEPARTMENT OF ECOLOGY,

Respondent.

CERTIFICATE OF  
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 3rd day of January 2011, I caused to be served Brief of Respondent Washington State Department of Ecology in the above-captioned matter upon the party herein as indicated below:

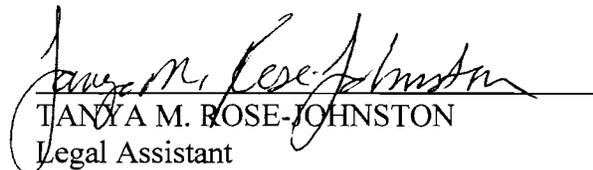
Jane Ryan Koler, PLLC  
Attorney At Law  
5801 Soundview Dr., Suite 258  
P.O. Box 2509  
Gig Harbor, WA 98335

U.S. Mail  
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 Hand Delivered  
 Overnight Express  
 By Fax: (253) 851-6225

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 3rd day of January 2011, in Olympia, Washington.

  
TANYA M. ROSE-JOHNSTON  
Legal Assistant