

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

K.P. MCNAMARA NW, INC. AND KERRY MCNAMARA,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY,

Respondent.

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STATE OF WASHINGTON
BY [Signature]
DEPUTY
b. [Signature]
[Signature]

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Daniel L. Stahnke, Judge

BRIEF OF APPELLANTS

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A. ASSIGNMENTS OF ERROR & ISSUES PRESENTED ON APPEAL

1. Failure to award attorneys' fees and costs to a prevailing party pursuant to RCW 4.84.350.

Issue on Appeal: Does the Superior Court have discretion pursuant to RCW 4.84.350 to withhold attorneys' fees and other expenses from a party who has prevailed on procedural issues appealed pending that party prevailing on the substantive issue remanded?

2. Failure to remand the rinse-water issue to the Pollution Control Hearings Board for an evidentiary hearing and findings of fact as to whether the rinse-water at issue met the criteria of a dangerous waste.

Issue on Appeal: Must the Department of Ecology prove that the subject rinse-water met the criteria of a dangerous waste as an element of its claim that KPM-NW violated WAC 173-303-141 and -180 (the dangerous waste transport rules)?

Issue on Appeal: Did the evidence introduced by KPM-NW and McNamara in response to Ecology's motion for Summary Judgment create a genuine issue of fact as to whether the subject rinse-water met the criteria of a dangerous waste?

3. Failure to apply the appropriate standard for personal liability of a corporate officer for violation of the Dangerous Waste statute RCW 70.105.050 et seq. as that standard is codified at RCW 70.105.080(1).

Issue on Appeal: Did the PCHB and the Superior Court appropriately apply the “responsible corporate officer” doctrine standard of liability in determining whether Kerry McNamara could be held personally liable for the rinse-water shipment penalty assessment?

Issue on Appeal: Did the PCHB and the Superior Court correctly apply the applicable standard for personal liability – whether the standard of RCW 70.105.080(1) or of the “responsible corporate officer” doctrine – in finding Kerry McNamara personally liable for the rinse-water shipment penalty assessment?

B. STATEMENT OF THE CASE

This matter came before the Clark County Superior Court, Judges Roger A. Bennett and Daniel L. Stahnke presiding (Cause No. 10-2-02557-3), on appeal from decision by the Pollution Control Hearings Board (“PCHB”) in the matter of K.P. McNamara Northwest, Inc. and Kerry McNamara v. State of Washington Department of Ecology, Administrative Law Judge Andrea McNamara Doyle presiding (PCHB No. 09-001).

1. SUBSTANTIVE FACTS

Except where otherwise indicated, the following facts are excerpted from the Pollution Control Hearings Board’s November 6, 2009 Order on Summary Judgment (As Amended on Reconsideration), included in the Certified Administrative Record, Clerk’s Papers (“CP”) Sub#10.

At all relevant times, the K.P. McNamara Northwest, Inc. (“KPM-NW”) facility in Vancouver, Washington received empty plastic totes of approximately 300 gallons in size from other manufacturing processes, and then further processed the totes. The KPM-NW facility drained the totes of residue, rinsed them with water, and then refurbished or deconstructed the totes. When the totes arrived at the facility, the residue in the totes sometimes consisted of materials that were designated dangerous waste by the State Dangerous Waste Regulations, contained at WAC 173-303. Residual materials in the totes included biocide, paint,

resin and adhesives, which may be corrosive, ignitable, toxic or extremely hazardous waste.

Ecology inspected the KPM-NW facility on August 1 and August 16, 2007. During the August 16 inspection, the inspector collected a sample of wash [rinse] water that had accumulated in a floor sump that was part of the tote rinse system. Both field-testing and later analysis confirmed that the waste [in the sump] was corrosive (pH of 14), and also contained toxic compounds (phenol and formaldehyde).

On August 28, 2007 Ecology sent a follow up “immediate action required” letter to Mr. Jeff Hughes at the KPM-NW facility, identifying various violations of dangerous waste regulations and informing the facility of corrective actions that must be taken with respect to use of its tank system (including use of the trench/sump), proper labeling and storage of containers, and off-site shipment of wastes. On September 5, 2007, Ecology forwarded this letter to Kerry McNamara. Kerry McNamara is the President and Chief Executive Officer of KPM-NW and resides in Ohio. Ecology and McNamara agreed to a plan to close the trench and sump where the corrosive rinse-water had accumulated, consistent with tank closure standards of the dangerous waste regulations.

In follow-up to a September 1, 2007 meeting with Mr. McNamara at the KPM-NW facility, Ecology sent a letter to Mr. McNamara

addressing additional compliance issues, enclosing guidance documents and a copy of the state dangerous waste regulations. With that letter was a 14 page “Compliance Report” that detailed inspection history and compliance problems, including the failure to designate wastes, failure to prepare hazardous waste manifest(s), failure to label containers for risk, and several other deficiencies.

On October 30, 2007 KPM-NW’s consultant Creekside Environmental, submitted a written description of a protocol for designating wash [rinse] water from the tote rinsing process, consistent with the dangerous waste regulations. The protocol provided that each batch of wash [rinse] water would be tested, including a fish bioassay and determination regarding regulated metals and organics. This approach addressed Ecology’s concerns as to the toxicity or corrosiveness of the rinse-water. Ecology confirmed with KPM-NW that the batch testing process addressed agency concern over the variability of the wastewater generated from rinsing totes.

At that time, Ecology inspector Dee William’s concern about the variability of the rinse-water had to do with the potential toxicity only (not the characteristic of corrosivity) because caustic was not in use at the time that the subject rinse-water was generated. CP 13 (Adm. Record – PCHB Hearing Transcript pp. 285-286, ll. 8-8.)

By letter of December 6, 2007, to Kerry McNamara, Ecology noted that the facility had taken several steps to comply with regulations, but that the company still needed to do additional work. The agency provided a “Compliance Summary” which directed the facility to take actions related to proper designation of rinse-water... and to take other actions. Ecology offered the company certain “Policies and [Practices]” to ensure compliance, and offered to modify that document before KPM-NW signed it.

On December 20, 2007, Ecology agreed that KPM-NW could modify the wash [rinse] water designation process by simply declaring the waste to be dangerous, based on its own knowledge (generator knowledge), and avoid the costs of batch testing, which the initial policy called for. On December 28, 2007, Kerry McNamara signed a modified version of the policy document entitled “Policies and Practices”. [A copy of that document is attached as Exhibit 1.]

The “Policies and Practices” included the following provision:

The following policies and practices will be followed to ensure compliance with the State’s Dangerous Waste Regulations (WAC 173-303) at the KP McNamara-Vancouver facility.

WAC 172-303-070 – Waste Designation

- Given the variability of wastewater generated by rinsing totes, KP McNamara will designate all waste in the 2500-gallon water storage tanks as dangerous waste.

CP 43 (Exh. D thereto).

KPM-NW's adoption of the "Policies and Practices" was an additional protective measure to address concerns that Dee Williams had about variability of toxicity of the rinse-water. CP 13 (Adm. Record – PCHB Hearing Transcript pp. 292, ll. 16-19.) It was a "best management practice". CP 13 (Adm. Record – PCHB Hearing Transcript pp. 294, ll. 5-6.)

Ecology conducted another inspection of the KPM-NW facility on January 10, 2008. Ecology learned that the floor sump that had previously been noted as a problem was no longer in use. Ecology restated its position that the tanks holding rinse-water were regulated under WAC 173-303 as dangerous waste.

Ecology conducted a third inspection of the KPM-NW facility on May 7, 2008. Staff at the facility gave the Ecology inspector documents that showed the facility had shipped rinse wastewater off-site in a manner that did not comply with the dangerous waste regulations. The facility had no documentation that the disposal site, Pacific Power Vac (PPV) in Portland, Oregon was authorized to accept the type of waste generated by KPM-NW. KPM-NW had not used a certified dangerous waste transporter, nor completed a Uniform Hazardous Waste Manifest, as required by the regulations. Ecology sent an Inspection Report and

various Notices to Comply, dated May 19, 2008, to Kerry McNamara in follow-up to this inspection, directing that the facility cease off-site shipments until it demonstrated compliance with the dangerous waste regulations contained in WAC 173-303-141(2).

Despite this direction from Ecology, on June 17, 2008, KPM-NW sent another shipment of rinse-water off-site in the same manner as it previously had.¹

Subsequently, on July 3, 2008, Kerry McNamara provided documentation that the facility to which it previously had shipped the rinse wastewater (PPV) was authorized to receive dangerous waste. In the letter, Kerry McNamara committed to begin use of an approved transporter and complete proper paperwork for such shipments. McNamara stated that rinse wastewater would be labeled and classified as dangerous waste. A “compliance certificate” signed by Kerry McNamara (dated 6/7/08) was returned to Ecology at that time.

¹ Here, the PCHB Decision adds “again in violation of the dangerous waste regulations.” KPM-NW and McNamara dispute that any violation of the dangerous waste regulations occurred because the subject rinse-water did not meet the criteria of a dangerous waste. The Board never found that the subject rinse-water met the criteria of a dangerous waste, ruling instead that the “designation” in the “Policies and Practices” was dispositive. The Board ruled “K.P. McNamara had identified it as such, set up procedures to handle it as such, and cannot now turn back the clock.” [See the Procedural History of the PCHB decision, below.]

On December 3, 2008, Ecology issued a \$20,000 penalty to KPM-NW and Kerry McNamara for failure to use appropriate procedures and methods when sending a state-only designated dangerous waste to an out-of-state facility, and for failure to obtain a permit or to comply with the requirements for operating a dangerous waste TSD facility. Ecology also issued an Administrative Order directing compliance with a number of provisions of the state's dangerous waste regulations.

End reference to excerpts of the Pollution Control Hearings Board's November 6, 2009 Order on Summary Judgment (As Amended on Reconsideration), included in the Certified Administrative Record. CP 10.

On appeal to the Pollution Control Hearings Board, KPM-NW and Kerry McNamara contested Ecology's penalty assessment relating to the rinse-water shipments. In response to Ecology's motion for Summary Judgment on that issue (PCHB certified Issue #3), KPM-NW and Kerry McNamara submitted a Declaration by Kerry McNamara (attached as Exhibit 2 herein) in which he testified at paragraph 4 as follows:

The rinsewater generated by KPM-NW is not dangerous waste. KPM-NW tested its rinse-water for toxicity as recently as February 6, 2006 and January 17, 2007, and each time there was no mortality in the test (i.e., the rinse-water did not designate as dangerous waste.) Attached hereto are true copies of those test results (without appendices).

CP 10 (Adm. Record) and CP 38 (Exh. 19 to Declaration of Thomas Benke). Mr. McNamara then went on to explain in his Declaration why

there was no significant variability in the toxicity of container residues in the rinse-water (i.e., because the rinse-water never contains more than ten percent “dirty” rinse-water.) Mr. McNamara also explained in his Declaration, at paragraph 9, how the rinse-water came to be shipped by a non-authorized transporter without a Uniform Hazardous Waste Manifest. McNamara testified as follows:

The underlying reason why the rinse-water was not shipped under a UHWM was that the Portland, Oregon facility authorized to treat the rinse-water (Pacific Power Vac) was not a transporter with a valid EPA/state identification number. The PPV driver customarily just stopped by the KPM-NW facility to pick up rinse-water without being called. The KPM-NW facility manager apparently assumed that if PPV was authorized to treat the rinse-water that it was also authorized to transport it and would transport it in compliance with all Washington regulations. Likewise, the PPV truck driver apparently assumed that if the PPV facility was authorized to treat the wastewater that he was authorized to pick it up, just as he always had.

Id.

2. PROCEDURAL HISTORY

Decisions of the Pollution Control Hearings Board

The PCHB certified seven legal issues for hearing. CP 10 [Adm. Record – PCHB Prehearing Order dated February 9, 2009.] Three of the seven certified legal issues are the basis for imposition of two separate \$10,000 penalties assessed by Ecology against KPM-NW and its President, Kerry McNamara (Issues 1, 3 and 5). As stated in the Prehearing Order, those certified issues are:

1. Is Kerry McNamara a person liable pursuant to the Hazardous Waste Management Act (Chapter 70.105 RCW) for the alleged violation of K.P. McNamara Northwest, Inc.?
3. Did appellant “inappropriately dispose of” dangerous waste (rinse-water) when the waste was transported to and treated at an appropriate permitted waste water treatment facility?
5. Is appellant required to obtain a permit or to comply with the requirements for operating a dangerous waste treatment, storage and disposal (TSD) facility if appellant receives from off-site generators containers which are not “empty” pursuant to WAC 173-303-160 and/or 40 CFR 261.7(b)(1) and which contain dangerous waste if the container was shipped without a hazardous (dangerous) waste manifest and its contents were [not] designated a “dangerous waste” by the generator?²

The PCHB found for Ecology on all three of the above certified issues, upholding on Summary Judgment a \$10,000 penalty assessment against

² The State of Washington has stipulated, as is reflected in the record on appeal, that the word “not” was inadvertently omitted from the statement of Issue #5 in the Prehearing Order.

KPM-NW for the alleged inappropriate disposal of dangerous waste rinse-water, upholding after an evidentiary hearing another \$10,000 penalty assessment against KPM-NW for receipt of non-“empty” dangerous waste containers without a TSD facility permit, and holding on Summary Judgment that Kerry McNamara is personally liable for both \$10,000 penalty assessments.

With regard to PCHB certified Issue #1, whether Kerry McNamara could be held personally liable for the alleged violations of KPM-NW, the Board cites RCW 70.105.080(1) in finding that KPM-NW is a “person” who may be held liable under the Washington Hazardous Waste Management statute, then analyzes the facts of Mr. McNamara’s control of the KPM-NW facility and his knowledge of the violations to conclude that under the “responsible corporate officer” doctrine KPM-NW’s statutory liability is imputed to Mr. McNamara. The Board stated in its Order on Summary Judgment (as Amended on Reconsideration) (CP 10):

“Under RCW 70.105.080(1), Kerry McNamara is a “person” liable for civil penalties for failure to comply with the hazardous waste statute and regulations. Based on this statute, the responsible corporate officer doctrine, and the factual record on summary judgment, which consists of letters, signed compliance certificates, and sworn

declarations, the Board concludes that Kerry McNamara, as the President and CEO of K.P. McNamara, is liable for violations of the dangerous waste regulations at the facility.”

With regard to PCHB certified Issue #3, whether KPM-NW had inappropriately disposed of dangerous waste rinse-water, the Board stated in its Order on Summary Judgment (as Amended on Reconsideration) (CP 10):

“In response to Ecology’s motion, K.P. McNamara now argues not that they appropriately disposed of waste rinse water, but that Ecology must first prove that the rinse water was a dangerous waste in order for it to prevail on summary judgment. K.P. McNamara then asserts that the rinse water was not dangerous waste, and that the adopted policies and procedures defining it as such were “compelled” by Ecology. Based on these assertions, K.P. McNamara argues there is a question of fact requiring denial of summary judgment.

“The Board is not persuaded by the Appellant’s argument. There is no remaining question of fact as to whether or not the waste product at issue was dangerous

waste or not – K.P. McNamara had identified it as such, set up procedures to handle it as such, and cannot now turn back the clock. See *Williams Decl. Exh. D.*³ The company chose to comply with WAC 173-303-070(3), which allowed it to designate the waste based on its knowledge of the waste, in light of the processes used at the facility. There is no basis in the record by way of declaration or otherwise, to support the assertion that the company was “compelled” by Ecology to characterize its rinse-water as dangerous waste. The question on summary judgment is whether once the rinse-water was characterized as dangerous waste, did the company inappropriately handle or dispose of such waste.

“The Board concludes, based on the undisputed record before it on summary judgment, that there was an inappropriate disposal of dangerous waste. Designation of the rinse-water as dangerous waste required K.P. McNamara to follow the requirements of WAC 173-303-141 to offer the waste only to a permitted treatment, storage

³ This is a reference to the KPM-NW “Policies and Practices” document addressed above.

and disposal facility (TSD), and to do so with a proper label, use of a manifest, and use of a certified transporter.

* * * Having undertaken to manage rinse-water or other waste products as dangerous wastes, the company was required to manage the waste according to the “cradle to grave” system of dangerous waste management set out in the regulations, and cannot be heard to now say it did not generate dangerous waste in the first instance. WAC 173-303-070(1)(b).⁴ The Board concludes that K.P. Mcnamara disposed of dangerous waste in violation of WAC 173-303-141.

CP 10 (emphasis added).

With regard to PCHB certified Issue #5, whether “receipt” of non-“empty” containers required that KPM-NW obtain a TSD facility permit, the Board stated in its final Decision on Petition for Review of

⁴ WAC 173-3-3-070(1)(b) provides:

The procedures in this section are applicable to any person who generates a solid waste (including recyclable materials) that is not exempted or excluded by this chapter or by the department. Any person who must determine whether or not their solid waste is designated must follow the procedures set forth in subsection (3) of this section. Any person who determines by these procedures that their waste is designated DW or EHW is subject to all applicable requirements of this chapter. (emphasis added)

Administrative Order (CP 10) that KPM-NW's "receipt" of non-"empty" containers required that it operate under a TSD facility permit because:

"[KPM-NW] failed to demonstrate that the manner in which it responded to receipt of the non-empty totes complied with the manifest discrepancy regulations."

and

"[KPM-NW's] handling of the non-empty totes at its facility failed to comply with the on-site accumulation requirements of WAC 173-303-200."

Decisions of the Clark County Superior Court

KPM-NW and Kerry McNamara petitioned the Washington Superior Court for review of the PCHB's Administrative Orders. The Petition for Review contains numerous assignments of error, chief among them and most important for purposes of this Appeal are:

Regarding PCHB Certified Issue #1

Erroneous application of the “responsible corporate officer” doctrine. The Board's ruling that Kerry P. McNamara (“McNamara”) is a person liable pursuant to the Hazardous Waste Management Act for the alleged violations of KPM-NW is based on an erroneous interpretation or application of law, is inconsistent with a rule of Ecology, and/or is otherwise arbitrary and capricious.

Regarding PCHB Certified Issue #3

Erroneous Ruling regarding the Definition of a Dangerous Waste as an Element of Ecology's Claims The Board's ruling that there was no “question of fact” as to whether or not the rinse-water was a dangerous waste because the solid waste had been “designated as” dangerous waste, and more generally that Ecology did not have the burden of proving that the rinse-water exhibited a characteristic of a dangerous waste or was otherwise listed as a dangerous waste as an element of its claim that KPM-NW violated the requirements of WAC 173-303-141 and -180, was an erroneous interpretation or application of the law, was inconsistent with a rule of Ecology, or was otherwise arbitrary and capricious.⁵

⁵ Appellants also assigned error to the Board's findings that the rinse-water that was transported without a hazardous waste manifest was a dangerous waste and also that KPM-NW and/or McNamara had “designated (the rinse-water) as” dangerous waste.

Regarding PCHB Certified Issue #5

Unlawful Procedure or Decision-Making Process The Board has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure:

- i. In that the issue decided – to wit, that KPM-NW and Kerry McNamara did not comply with the “Manifest Discrepancies” rule promulgated at WAC 173-303-370(4) – was not certified to the Board, and/or in that KPM-NW and McNamara were not given fair notice that they would be required at hearing to prove that they had complied with the “Manifest Discrepancies” rule as an affirmative defense to Ecology’s claim that KPM-NW and McNamara unlawfully operated without a TSD facility permit pursuant to WAC 173-303-280 and -400.
- ii. In that the issue decided – to wit, that KPM-NW and McNamara did not comply with the on-site accumulation rule applicable to generators promulgated at WAC 173-303-200 – was not certified to the Board, and/or in that KPM-NW and McNamara were not given fair notice that they would be required at hearing to prove that they had complied with the on-site accumulation rule applicable to generators as an affirmative defense to Ecology’s claim that KPM-NW and McNamara unlawfully operated without a TSD facility permit pursuant to WAC 173-303-280 and -400.

To avoid convoluting the dangerous waste statutes and regulations applicable to PCHB certified Issue #3 (relating to rinse-water) and PCHB certified Issue #5 (relating to receipt of non-“empty” containers), the court bifurcated the proceedings.

The court addressed the penalty assessment for receipt of non-
“empty” containers (Issue #5) first. Ruling in favor of KPM-NW and
McNamara, J. Bennett wrote:

“By upholding the \$10,000 penalty imposed by [Notice of
Penalty] DE 6229 for factual reasons not set out in the NOP, the
board exceeded the scope of the Pre-Hearing Order, and thereby
engaged in an unlawful procedure or decision making process, and
failed to [follow] a prescribed procedure, in contravention of RCW
34.05.070(3)(c). The Final Decision upholding the penalty
imposed is therefore overturned.”

J. Bennett remanded the matter to the PCHB “to make a ruling of law” on
Issue #5.⁶ In a Preliminary Ruling on Attorney’s Fees and Transcription
Costs the court withheld from KPM-NW and McNamara their fees and
costs, stating:

“Petitioner prevailed on the issue of whether or not the
Board had engaged in improper procedure by upholding a penalty
for reasons not stated in the Board’s statement of issues. Whether
or not Petitioner will ultimately prevail on the penalty assessment

⁶ J. Bennett referred in his Ruling to “the limited legal issue set out” at
PCHB certified Issue #5. The Department of Ecology conceded in its
memoranda and on the record at hearing that Issue #5 was a “question of
law, not of fact.” CP 10 (Adm. Record – Ecology’s Motion and
Memorandum in Support of Partial Summary Judgment, p. 6, ll. 3-4.)

is unknown. The Board may rule in Petitioner's favor, in which case, Petitioner will be in all probability entitled to the requested award. Until final determination of the aspect of the appeal, however, as well as the rinse water issue still pending, this court cannot determine who is the prevailing party in the action, as opposed to individual issues. Therefore, the court reserves ruling on the entitlement, if any, of Petitioner to an award of attorney's fees and transcription costs." (emphasis in original)

KPM-NW and McNamara filed a Motion for Reconsideration Regarding Award of Attorney Fees in which they requested "leave to file a cost bill with the court for an award of attorneys' fees and expenses relating to the legal issues pertaining to the receipt of non-"RCRA empty" totes." CP 49 In its Decision relating to the remaining rinse-water and personal liability issues (CP 51), the court (J. Stahnke presiding for the retired J. Bennett) ruled:

"The reservation [on the issue of attorney fees for the remanded matter] will continue until further proceedings after the remand issue has been resolved."

On briefing and oral argument by the parties the Superior Court next reviewed the Board's decisions on Issue #3 (relating to transport of

rinse-water) and Issue #1 (relating to the personal liability of Kerry McNamara.)

In its Decision on Petition for Review of Administrative Order dated September 12, 2011 (CP 51) the Superior Court (Judge Stahnke presiding) upheld the PCHB's decision that KPM-NW had violated the Washington dangerous waste rules when it shipped rinse-water off-site without a manifest and using an unlicensed transporter. The Court wrote in support of its Decision as follows:

“The primary focus of the oral and written arguments is whether the Board's decision regarding management (shipment) of waste-water without the use of a certified dangerous waste transporter, without completion of Uniform Hazardous Waste Manifests, and without verification that the disposal facility (Pacific Power Vac) was authorized to accept such waste was 1) supported by substantial evidence and 2) whether the prior designation of the waste water by the KPM-NW and McNamara was dispositive of the subsequent offsite transports.

* * * * *

“McNamara⁷ affirmatively determined “designation” as a generator that all waste in the 2500 gallon water storage tank⁸ is “dangerous waste.”

* * * * *

“Pursuant to WAC 173-303-070(3) any person who determines that their waste is designated dangerous waste is subject to this chapter. Further, [pursuant to] WAC 173-303-070(2)(a) once determined to be dangerous waste, it continues until [the] generator describes variability and obtains samples to show non-dangerous waste. McNamara’s declaration in opposition to summary judgment simply stated ‘the rinsewater generated by KPM-NW is not dangerous waste.’ Additionally, McNamara alleges that the rinse water tested in February 2006 and January 2007 is proof that the shipments in spring of 2008 were not dangerous. This argument is not persuasive because Inspector Williams’ positive dangerous waste test post dated those tests and establishes a new foundation for future action. The balance of McNamara’s declaration discusses the process of water accumulation and fails to provide sufficient support that he has

⁷ This is a reference to Kerry McNamara personally.

⁸ This is a reference to the subject rinsewater.

first hand knowledge of the process or that those processes were followed prior to the shipments in question. In fact, McNamara's declaration stated that the non-conforming shipments occurred without his participation or knowledge. McNamara has indicated several times that his plant manager failed to follow other policy and procedure on other issues. Evidence to support or defend against summary judgment must be evidence that would be admissible at trial.

“Once the moving party on a summary judgment motion demonstrates that there is no genuine issue of material fact present and that the party is entitled to judgment as a matter of law, the opposing party may not rest on the pleadings but must demonstrate that a triable issue remains. Burmeister v. State Farm Ins. Co., 92 Wn.App. 359, 966 P.2d 921 (1998).

“Because KPM-NW and McNamara “designated” its rinse-water as dangerous waste it had the burden to prove the shipments at issue in this case were not dangerous waste and he has failed to do so therefore violated WAC 173-303-141(2).” (sic)

CP 51.

The Superior Court also upheld the PCHB's decision regarding the personal liability of Kerry McNamara (Issue #1). The court ruled that “the

ability to control the facility, coupled with knowledge of the violation is sufficient to impose personal liability” under the “responsible corporate officer” doctrine as recognized in Department of Ecology v. Lundgren, 94 Wash.App. 236, 971 P.2d 948 (1999).

C. ARGUMENT: DENIAL OF ATTORNEYS' FEES AND TRANSCRIPTION COSTS TO PREVAILING PARTY

RCW 4.84.350 REQUIRES THAT THE COURT AWARD ATTORNEYS' FEES TO A PREVAILING PARTY IN A JUDICIAL REVIEW OF AGENCY ACTION. KP MCNAMARA NW, INC. AND KERRY MCNAMARA PREVAILED ON THEIR CLAIM THAT THE POLLUTION CONTROL HEARINGS BOARD ENGAGED IN AN UNLAWFUL PROCEDURE OR DECISION MAKING PROCESS. THE SUPERIOR COURT ERRED WHEN IT DECLINED TO AWARD ATTORNEYS' FEES PENDING OUTCOME OF THE MATTER ON REMAND AND PENDING THE COURT'S RULING ON AN UNRELATED CLAIM.

Issue on Appeal: Does the Superior Court have discretion pursuant to RCW 4.84.350 to withhold attorneys' fees and other expenses from a party who has prevailed on procedural issues appealed pending that party prevailing on the substantive issue remanded?

RCW 4.84.350 provides as follows:

Judicial review of agency action — Award of fees and expenses.

(1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

As is clearly stated in the statute, the right to an award of attorneys' fees and costs depends only upon Petitioners having prevailed on "judicial review" of the agency action appealed. The Superior Court expressly stated that KPM-NW and McNamara had "prevailed." The award of attorneys' fees and other expenses is not discretionary (e.g., "shall"). The award is mandated even if the court orders that the procedural decision overturned be remanded to the administrative agency for further proceedings. *See Mills v Western Washington University*, 150 Wash.App 260, 208 P.3d 13, 24 (2009).

Judge Bennett indicated that an award of attorneys' fees and other expenses could be dependent on a "final determination" of the rinse-water issue then still pending. J. Stahnke, having ruled against KPM-NW and McNamara on the rinse-water issue, did not deny attorneys' fees and other expenses on that basis. Therefore, the only error on appeal is the Court's

denial of attorneys' fees and other expenses (transcription costs, filing fees, etc.) pending resolution of PCHB certified Issue #5 on remand.

D. ARGUMENT: DANGEROUS WASTE CRITERIA AS AN ELEMENT OF ECOLOGY'S RINSE-WATER CLAIM

BECAUSE THE EVIDENCE INTRODUCED BY KPM-NW AND MCNAMARA IN RESPONSE TO ECOLOGY'S SUMMARY JUDGMENT MOTION WAS SUFFICIENT TO MEET THEIR BURDEN ON SUMMARY JUDGMENT, AND BECAUSE THE SUPERIOR COURT RELIED ON EVIDENCE INTRODUCED BY ECOLOGY AT HEARING TO UPHOLD THE BOARD'S DECISION, THE SUPERIOR COURT ERRED IN FAILING TO REMAND THE ISSUE TO THE BOARD FOR AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE RINSE-WATER ACTUALLY MET THE CRITERIA OF A DANGEROUS WASTE.

Issue on Appeal: Must the Department of Ecology prove that the subject rinse-water met the criteria of a dangerous waste as an element of its claim that KPM-NW violated WAC 173-303-141 and -180 (the dangerous waste transport rules)?

Issue on Appeal: Did the evidence introduced by KPM-NW and McNamara in response to Ecology's motion for Summary Judgment create a genuine issue of fact as to whether the subject rinse-water met the criteria of a dangerous waste?

Issue #3 as certified by the Pollution Control Hearings Board asks whether KPM-NW inappropriately disposed of “dangerous waste” rinse-water. In its Response brief on Ecology’s Motion for Summary Judgment KPM-NW argued:

The State must prove that the rinse-water was a dangerous waste to prevail on its claim that KPM-NW [violated the Washington dangerous waste rules.]

CP 10 (Adm. Record – Appellants’ Memorandum in Opposition dated June 26, 2009, page 6] Ecology replied:

*Designation of a dangerous waste is accomplished in one of several ways. WAC 173-303-070(3). Waste may be specifically listed, may exhibit specific characteristics, or may meet specific dangerous waste criteria. WAC 173-303-070(3)(a). Waste can be tested according to specific methods. WAC 173-303-070(3)(c)(i). The **designation of dangerous waste** may also be determined by application of the “knowledge of the waste in light of the materials or the process used...” WAC 173-303-070(3)(c)(ii). This last method was chosen by K.P. McNamara **to designate** the waste generated by the rinsing of totes as dangerous waste.*

* * * * *

*Once **K.P. McNamara designated** its waste as dangerous waste in December of 2007, it was required to follow the regulations for the management of its dangerous waste.*

CP 10 (Adm. Record – Ecology Memorandum in Opposition dated July 6, 2009, pages 5-6 (emphasis added).]

The Board decided in favor of Ecology’s argument, that once KPM-NW had “designated (its rinse-water) as” dangerous waste that it could not “turn back the clock”. The “designation”, the Board concluded, was itself determinative.

The Superior Court followed the PCHB's lead in ruling that the "designation as" was "dispositive" of whether the rinse-water was dangerous waste. The Court stated in its final Decision "McNamara affirmatively determined 'designation' as a generator that [the rinse-water] is dangerous waste", a reference to the "Policies and Practices" adopted by KPM-NW at the behest of Ecology.

Nowhere in statute or rule does it say that a solid waste is a dangerous waste because it has been "identified" or "characterized" as such, or "designated as" a dangerous waste by Ecology or a generator. Dangerous waste is designated by law – by the criteria set forth in WAC 173-303 – not by Ecology, not by the generator. If a solid waste does not meet the criteria of a dangerous waste it is not subject to the Washington dangerous waste rules. WAC 173-303-070(3)(b) states:

A person must check each section, in the order set forth, until they determine whether the waste is designated as dangerous waste. Once the waste is determined to be a dangerous waste, further designation is not required except as required by subsection (4)⁹ or (5)¹⁰ of this section. **If a person has checked the waste against each section and the waste is not designated, then the waste is not subject to the requirements of chapter 173-303 WAC.** (emphasis added)¹¹

⁹ Subsection (4) gives Ecology authority to require testing of a solid waste "to determine whether or not the waste is designated under the dangerous waste lists, characteristics, or criteria" if the Department has reason to believe that the waste would be designated as dangerous waste by the dangerous waste lists, characteristics or criteria.

¹⁰ Subsection (5) specifies that "additional designation" may be required depending on certain waste management practices.

¹¹ Cf. the Superior Court's inaccurate interpretation of the administrative rule: "Pursuant to WAC 173-303-070(3) any person who determines that their waste is designated dangerous waste is subject to this chapter."

Thus, if none of the dangerous waste criteria apply, none of the dangerous waste rules apply. Ecology's contrary interpretation of the dangerous waste rules, as reflected in certain PCHB decisions and in this case, is that a waste is subject to the Washington dangerous waste rules (for example, the manifesting rules) if the waste is "designated as" a dangerous waste by either of Ecology or the generator even if the solid waste does not actually meet any of the criteria set forth in WAC 173-303-100. KPM-NW and Kerry McNamara request that this court reject Ecology's interpretation of the dangerous waste rules as being an erroneous interpretation or application of the law in accordance with RCW 34.05.570(3)(d).

The various assertions by the PCHB – that KPM-NW had "*identified it as such*", that Ecology's rules "allowed [KPM-NW] *to designate the waste*", that KPM-NW was not compelled by Ecology "*to characterize the rinse water as dangerous waste*", that "the rinse water was *characterized as dangerous waste*", and that "*designation of the rinse water as dangerous waste*" required KPM-NW to offer the waste only to a permitted TSD facility – all reflect Ecology's and the PCHB's carelessness in quoting Washington's dangerous waste rules which require *not* that the generator "identify", "characterize" or "designate as" dangerous waste but instead require that the generator "*determine*" whether a solid waste is a dangerous waste by the "*criteria*" set forth in WAC 173-303-100.

The issue of whether Ecology was required to prove as an element of its claim that the rinse-water¹² met the criteria of a dangerous waste was clearly set out in the parties' briefs to the PCHB. KPM-NW argued to the Board:

¹² Not the rinse-water generally, but specifically the several loads for which KPM-NW was penalized.

As we understand it, the Board's premise that a generator is required "to designate", and that a generator's "designation" is conclusive, is based on or is otherwise in line with its decision in WHW, Inc. and Bobby Williams v. Ecology, PCHB No. 05-142 decided March 30, 2006 (2006 WL 880089). The reasoning of that decision is in error, and to the extent that the Board has found that KPM-NW's "designation" is determinative we request that the Board reconsider its finding that there is no question of fact as to whether or not the rinse-water was a dangerous waste or, in the alternative, clearly state for the record (for purposes of appeal) that its decision with respect to the rinse-water is based on a ruling that the actual characteristics of the rinse-water are immaterial if the generator KPM-NW has otherwise "designated" the rinse-water a dangerous waste.

CP 10 (Adm. Record – KPM-NW Motion for Reconsideration of Board's Denial of Appellants' Motion in Limine and the Board's Order Granting Ecology's Motion for Summary Judgment dated October 13, 2009, p. 2.) Ecology responded "This is an argument the Board correctly rejected on summary judgment." CP 10 (Adm. Record – Ecology Response to Motion for Reconsideration dated October 19, 2009, page 4, line 18.]

The case of WHW, Inc. and Bobby Williams v. Department of Ecology, PCHB No. 05-142 decided March 30, 2006 (2006 WL 880089) (Exh. 3) illustrates the absurdity of Ecology's interpretation of WAC 173-303-070 ("Designation of Dangerous Waste") and -100 ("Dangerous Waste Criteria") that a solid waste does not actually need to be a dangerous waste to be regulated as one. Appellant's truck driver spilled soda ash along the highway. Ecology's field test of the spilled soda ash was inconclusive (the field test yielded a pH reading between 12 and 13 and the dangerous waste criteria for corrosivity is 12.5.) Nevertheless, Ecology conducted a "book designation" of the soda ash and "considered"

the material a dangerous waste under WAC 173-303-070(3)(iv) and WAC 173-303-100.¹³ Appellant subsequently tested the spilled soda ash and determined that it did not meet the criteria for corrosivity or toxicity. Nevertheless, Ecology fined Appellant for violations of the Washington dangerous waste rules. The PCHB ruled that “the regulations require a person generating a solid waste to designate the waste by following the procedures outlined in WAC 173-303-070(3).”¹⁴ The PCHB ruled that “Ecology properly [book] designated the material as dangerous waste...”¹⁵ Finally, the Board ruled that:

At the outset, the soda ash was properly treated as a dangerous waste based on Ecology's book designation of the substance as toxic to rats. WHW's duties as a generator arose at that time under the controlling regulations and did not end until test results further defining the material's characteristics were produced. At [that] point, the bioassay data took precedence over the earlier book designation pursuant to WAC 173-303-

¹³ WAC 173-303-100(5)(b) provides that “A person may determine if a waste meets the toxicity criteria” by following a prescribed “book designation” procedure based on the toxicity and concentration of each known constituent. This procedure is in lieu of biological testing methods (i.e., “a person may determine...”) at the election of the generator and is not itself a separate dangerous waste criteria. WAC 173-303-100(5)(d) specifies that “If the designation acquired from book designation and bioassay data do not agree, then bioassay data will be used to designate a waste.”

¹⁴ Actually, as shown above, that rule prescribes procedures “to determine whether or not a solid waste is designated as a dangerous waste.”

¹⁵ Actually, the duty to make a dangerous waste determination applies to “any person who generates a solid waste” pursuant to WAC 173-303-070(1)(b). Ecology’s authority in WAC 173-303-070 is limited to subsection (4), which states that “the department may require any person to test a waste...” Ecology can test the waste itself and might then conclude that the waste meets the criteria for a dangerous waste, but the duty “to determine” applies only to persons who generate a solid waste.

100(5)(d). WHW was then relieved of further responsibility to treat the soda ash as dangerous waste.

Astonishingly, on WHW, Inc.'s motion for summary judgment that the soda ash *was not* a dangerous waste and on Ecology's cross-motion for summary judgment that the soda ash *was* a dangerous waste, the Board granted both motions in part and denied both motions in part on this one issue!

WHW, Inc. and Bobby Williams v. Department of Ecology is illustrative of the Board's errant premise, as applied in the case at bar, that Ecology is not required to prove that a solid waste meets the criteria of a dangerous waste as an element of its claim that a facility operator has violated the Washington dangerous waste rules. The case also illustrates how a judicial opinion can easily stray off track in the thicket of dangerous waste rules if the author does not adhere strictly to the exact phrasing of the rules, in particular to the phrasing "for determining if a solid waste is a dangerous waste by the criteria set forth in this section" (as phrased in WAC 173-303-100) rather than to Ecology's and the Board's phrasing "to designate" or "designate as" a dangerous waste.

Not surprisingly, the Supreme Court of Washington in Hickle v. Whitney Farms, Inc., 148 Wash.2d 911, 64 P.3d 1244 (2003) managed to stay on track when it ventured the dangerous waste thicket. In that case the Court concluded that what matters is whether the waste meets any criteria of a dangerous waste, not whether the waste was "designated as" dangerous waste by the generator or Ecology. In that case, almost a negative image of WHW, Inc. and Bobby Williams v. Department of Ecology, the waste in question was discarded fruit pulp ("pomace"). At first blush fruit pulp should be harmless enough, but because it was left to rot in an abandoned pit this fruit pulp spontaneously combusted. Plaintiff

fell into the pit while hunting and the discarded fruit pulp burned his legs off at the knees. The facility operator argued that it had no statutory duty (in negligence) under the Washington Uniform Hazardous Waste Management Act because the waste was not specifically “designated” as a “dangerous waste” by the generator or Ecology. The trial court agreed, awarding summary judgment in favor of the fruit producer. The court of appeals reversed and the Supreme Court upheld the reversal, returning to the trial court the question of whether the waste actually exhibited the characteristic of ignitability.

The PCHB ruled that Mr. McNamara’s Declaration was not sufficient to create a genuine issue of fact as to whether the rinse-water was a dangerous waste. In his Declaration, McNamara testified that “The rinsewater generated by KPM-NW is not dangerous waste.”

Mr. McNamara attached to his Declaration fish bioassay testing results from the two previous years demonstrating that KPM-NW’s rinse-water did not meet the “toxicity criteria” set forth at WAC 173-303-100(5) and Mr. McNamara explained that “While the toxicity of residues in totes is variable, the toxicity characteristics of the rinse-water is not variable because the two 2500-gallon rinse-water storage tanks always contain rinsate from many different totes and because container residues always amount to less than ten percent of the rinse-water shipped offsite.” The Board dismissed Mr. McNamara’s sworn statement based on its ruling that the “designation” in the “Policies and Practices” was determinative. However, when viewed in the light most favorable to KPM-NW, the company’s agreement “to designate” its rinse-water as a toxic dangerous waste was no more than a “best management practice”, or an “additional protective measure to address concerns that Ms. Williams had about

variability of toxicity of the rinse-water. CP 13 [Adm. Record – Hearing Trans. Page 292, ll. 16-19, and page 296, ll. 19-22.]

The Superior Court went further in dismissing McNamara’s testimony, relying in part *on evidence adduced at hearing*. The Court stated in its Decision on Petition for Review of Administrative Order (CP 51) at page 4, line 8: “The argument is not persuasive because Inspector Williams’ positive dangerous waste test post dated those tests and establishes a new foundation for future action.” Besides being in error as to the facts (because the “dangerous waste test” was of a different waste in a sump that no longer existed and for a characteristic – corrosivity – that was no longer at issue), the Superior Court’s analysis indicates that at the least there was a genuine issue of fact as to whether the rinse-water that was transported without a manifest met the criteria of a dangerous waste.

E. ARGUMENT REGARDING PERSONAL LIABILITY OF KERRY MCNAMARA

THE SUPERIOR COURT ERRED IN FINDING KERRY MCNAMARA PERSONALLY LIABLE WITH RESPECT TO THE ALLEGED RINSE-WATER VIOLATIONS BECAUSE THE STANDARD OF LIABILITY IS ESTABLISHED BY RCW 70.105.080(1) (“PROCURES, AIDS, OR ABETS”) OR ALTERNATIVELY BECAUSE LIABILITY UNDER THE “RESPONSIBLE CORPORATE OFFICER DOCTRINE” REQUIRES MORE THAN THE “ABILITY TO CONTROL THE FACILITY” AND “KNOWLEDGE OF THE VIOLATION” UPON WHICH THE SUPERIOR COURT BASED ITS RULING.

Issue on Appeal: Did the PCHB and the Superior Court appropriately apply the “responsible corporate officer” doctrine standard of liability in determining whether Kerry McNamara could be held personally liable for the rinse-water shipment penalty assessment?

Issue on Appeal: Did the PCHB and the Superior Court correctly apply the applicable standard for personal liability – whether the standard of RCW 70.105.080(1) or of the “responsible corporate

officer” doctrine – in finding Kerry McNamara personally liable for the rinse-water shipment penalty assessment?

Issue #1 as certified by the Pollution Control Hearings Board asks whether Kerry McNamara is “a person liable pursuant to the Hazardous Waste Management Act (RCW 70.105)”. RCW 70.105.080(1) provides the standard for personal liability under the Act:

Violations – Civil Penalties.

(1) Except as provided in RCW 43.05.060 through 43.05.080 and 43.05.150, every person who fails to comply with any provision of this chapter or of the rules adopted thereunder shall be subjected to a penalty in an amount of not more than ten thousand dollars per day for every such violation. Each and every such violation shall be a separate and distinct offense. In case of continuing violation, every day's continuance shall be a separate and distinct violation. Every person who, through an act of commission or omission, procures, aids, or abets in the violation shall be considered to have violated the provisions of this section and shall be subject to the penalty herein provided. (emphasis added)

Thus, Mr. McNamara cannot be found liable pursuant to RCW 70.105 unless he is found to have procured, aided or abetted the allegedly wrongful conduct of KPM-NW. The Board made no such finding and therefore erred in holding Mr. McNamara personally liable under the Act.

Nor did the Superior Court find that Mr. McNamara procured, aided or abetted in the alleged violation. Rather, the Court analyzed Mr. McNamara’s personal liability under the “responsible corporate

officer” doctrine as recognized in Department of Ecology v. Lundgren, 94 Wash.App. 236, 971 P.2d 948 (1999). The doctrine imposes liability upon corporate officers who fail “to fulfill the duty imposed by the interaction of the corporate agent’s authority and the statute.” Id. The Court found that McNamara “exercised operational hands-on control” and was “clearly aware of and engaged in the compliance problems” at the KPM-NW facility, but the Court did not determine what duty was imposed on McNamara “by the interaction of [his] authority and the statute” with respect to rinse-water shipments. The Department of Ecology has never provided any authority for application of the “responsible corporate officer” doctrine within the context of the Hazardous Waste Management Act RCW 70.105 and Appellants KPM-NW and McNamara deny the doctrine’s applicability. But at a minimum, the Superior Court’s and the Board’s Decisions that McNamara is personally liable should be vacated and remanded for a determination of what duty was imposed on McNamara by the statute and for an evidentiary hearing to determine whether he failed in that duty.

Just as Issue #3 (relating to transport of the rinse-water) was decided by the Board on Summary Judgment, so was Issue #1 (relating to McNamara’s personal liability). Because this case is before the Court of Appeals for review of a ruling on a motion for Summary Judgment, this

Court must review the facts and the reasonable inferences from them in the light most favorable to KPM-NW and Kerry McNamara as the non-moving party. Bishop v. Miche, 137 Wash.2d 518, 523, 973 P.2d 465 (1999). A genuine issue of material fact exists if, after weighing the evidence, reasonable minds could reach different factual conclusions about an issue that is material to the disputed claim. See Hartley v. State, 103 Wash.2d 768, 698 P.2d 77 (1985). Jones v. State, 170 Wash.2d 338, 242 P.3d 825 (Wash., 2010). All the evidence offered by Ecology regarding Mr. McNamara's "hands on control" suggests that he was doing everything he could to ensure that rinse-water shipments were transported in accordance with the Dangerous Waste regulations. The testimony that Mr. McNamara gave in his Declaration explains why the alleged transport violations occurred despite his best efforts to the contrary. Because this evidence was sufficient to create a genuine issue of fact (as to whether McNamara procured, aided or abetted the alleged rinse-water violations, or alternatively as to whether McNamara failed to fulfill his statutory duties with regard to the rinse-water's transport), remand for an evidentiary hearing with respect to those elements of Ecology's claim is required. In short, Mr. McNamara is entitled to findings of fact detailing what, if anything, he did wrong with respect to the rinse-water shipments.

F. REQUEST FOR ATTORNEYS FEES ON APPEAL

RCW 4.84.350 provides a statutory cap of \$25,000 in attorneys fees for each level of judicial review of an agency action. Costanich v. Washington State Department of Social and Health Services, 164 Wash.2d 925, 194 P.3d 988 (2008). KPM-NW and Kerry McNamara request that fees, including attorneys fees, and other expenses be awarded them pursuant to RAP 18.1(a) and (d).

G. CONCLUSION

For all of the aforementioned reasons, KPM-NW and Kerry McNamara respectfully request:

1. That the Court of Appeals order the Superior Court to allow KPM-NW and Kerry McNamara to file a cost bill and that attorneys fees and other expenses relating to their appeal to the Superior Court on PCHB certified Issue #5 be awarded in accordance with RCW 4.84.350;
2. That the Court of Appeals vacate the Decision of the Pollution Control Hearings Board relating to PCHB certified Issue #3 and the affirming Decision of the Superior Court and order that the matter be remanded to the PCHB for an evidentiary hearing and findings of fact as to whether the rinse-water that was transported without a manifest met the criteria of a dangerous waste as set out in WAC 173-303-070(3);
3. That the Court of Appeals vacate the Decision of the Pollution Control Hearings Board relating to PCHB certified Issue #1 and the affirming Decision of the Superior Court and order that the matter be remanded to the PCHB for an evidentiary hearing and findings of fact as to whether Kerry McNamara is personally liable pursuant to RCW 70.105.080(1) as either a

person who failed to comply with any provision of RCW 70.105 or who procured, aided or abetted in the violation.

4. That the Court of Appeals order the Superior Court to allow KPM-NW and Kerry McNamara to file a cost bill and that attorneys fees and other expenses relating to their appeal to the Superior Court on PCHB certified Issues #1 and #3 be awarded in accordance with RCW 4.84.350;
5. That the Court of Appeals allow KPM-NW and Kerry McNamara to file a cost bill for recovery of attorneys fee and other expenses for this appeal of the Superior Court decisions in accordance with RAP 18.1.

DATED this 12th day of January 2012.

Respectfully submitted,



THOMAS R. BENKE
OSB No. 922251
Attorney for Appellants

APPENDIX

- Exhibit 1 – KPM-NW “Policies and Practices”
- Exhibit 2 – Declaration of Kerry McNamara
- Exhibit 3 – WHW, Inc. and Bobby Williams v. Department of Ecology, PCHB No. 05-142 decided March 30, 2006 (2006 WL 880089)

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JAN 04 2008

Washington State
Department of Ecology

**KP McNamara-Vancouver
Policies and Practices**

The following policies and practices will be followed to ensure compliance with the State's Dangerous Waste Regulations (WAC 173-303) at the KP McNamara-Vancouver facility.

WAC 172-303-070 – Waste Designation

- Given the variability of wastewater generated by rinsing totes, KP McNamara will designate all waste in the 2500-gallon water storage tanks as dangerous waste
- Prior to disposal, KP McNamara will designate all wastes including kitty-litter contaminated with residue, dirty rages, and other "solid materials". These wastes will not be added to, or managed off-site with crushed totes.
- All designation information will be kept on-site and made available to Ecology upon request. Supporting documentation (e.g., waste profiles and any analytical data) will also be available. Any waste stream that is determined to be "non-hazardous" will have appropriate documentation to show that the waste has been designated according to WAC 173-303-100 by bio-assay or book designation (generator knowledge)

WAC 173-303-640 – Spill Clean-up

- Spills around totes (or other containers) are cleaned-up as they happen. Spills that threaten human health or the environment are immediately reported as required in WAC 173-303-145
- Cleanup debris (kitty litter with residue, dirty gloves, etc.) is accumulated for subsequent designation and proper disposal
- Spills to the trench or sump will be cleaned up immediately, so liquid is not accumulated or left standing in either system.

WAC 173-303-640 – Tank Standards

- Rinse water from the wash-troughs will be hard piped to the 2500 gallon poly water storage tanks. Rinsing will take place to prevent liquid from accumulating in the floor trench or sump. The tank system (pipes, valves, pumps, tanks, etc.) will be inspected daily as required in WAC 173-303-640, and the system will be maintained to meet the WAC 173-303-640 requirements.

EXHIBIT 1

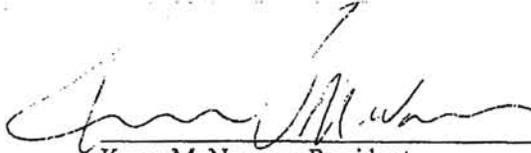
PAGE 1 OF 2

Exhibit D

WAC 173-303-950(2): Non-permitted Operations ("Empty" Totes Accepted)

- KP McNamara will not operate as a dangerous waste treatment, storage or disposal facility. The Company will not accept totes (or other containers) with residue that would designate as RCRA-regulated waste, UNLESS the container is "empty" as defined in WAC 173-303-160
- KP McNamara will not accept totes (or other containers) that once held pesticides¹, acutely hazardous waste or toxic extremely hazardous waste UNLESS the containers is "empty" (i.e., it has been triple rinsed as required in WAC 173-303-160).
- Totes (or other containers) that are not "RCRA empty" according to WAC 173-303-160 will not be off-loaded at KP McNamara in Vancouver. They will not be accumulated at the site for any period of time. These containers will be shipped directly back to the generating facility.
- Employees have been trained to understand WAC 173-303-160, and know which totes might require triple-rinsing prior to acceptance. They have also been trained to screen shipments according to KP McNamara's policy for tote acceptance or rejection.

I have responsibility for the overall compliance of KP McNamara in Vancouver, Washington, and am duly authorized to sign all reports and other information pertaining to compliance with the state's Dangerous Waste Regulations. I certify under penalty of law that the above statements are true, accurate and complete based on my knowledge and involvement with the KP McNamara-Vancouver facility. If any of the above policies or practices are changed, then this statement will be updated and signed by me, and submitted to Ecology.


Kerry McNamara, President 12-28-07
KP McNamara Date

¹ This includes herbicides, fungicides, insecticides, biocides, and rodenticides. The tote will usually be marked as a "poison", or the Material Safety Data Sheet may describe the product is a pesticide, herbicide, fungicide, insecticide, biocide, rodenticide, etc.

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Attorney for Appellants

POLLUTION CONTROL HEARINGS BOARD

STATE OF WASHINGTON

K.P. McNAMARA NORTHWEST, INC.,
and KERRY McNAMARA

Appellants

v.

WASHINGTON DEPARTMENT OF
ECOLOGY

Respondent

PCHB No. 09-001

**DECLARATION OF KERRY
MCNAMARA IN SUPPORT OF
APPELLANT'S MEMORANDUM IN
OPPOSITION TO ECOLOGY'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

I, Kerry McNamara, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I reside in Cleveland, Ohio.
2. There have been no spills or releases of hazardous substances from the K.P. McNamara NW, Inc. facility. KPM-NW completed a thorough Phase II Environmental Site Assessment in response to Ecology's concerns and found no releases to the environment.
3. Dangerous and hazardous wastes shipped to the KPM-NW facility were not processed or disposed of at the KPM-NW facility, but were instead stored onsite before being forwarded to authorized disposal facilities

EXHIBIT 2
PAGE 1 OF 2

~~EXHIBIT 5
PAGE 1 OF 9~~

4. The rinsewater generated by KPM-NW is not dangerous waste. KPM-NW tested its rinse-water for toxicity as recently as February 6, 2006 and January 17, 2007, and each time there was no mortality in the test (i.e., the rinse-water did not designate as dangerous waste.) Attached hereto are true copies of those test results (without appendices).
5. The two 2500 gallon poly-tanks used to store rinse-water, by the time they are emptied, receive a mixture of clean water, soap, and residues from many different totes. While the toxicity of residues in totes is variable, the toxicity characteristic of the rinse-water is not variable because the two 2500-gallon rinse-water storage tanks always contain rinsate from many different totes and because container residues always amount to less than ten percent of the rinse-water shipped off-site.
6. The KPM-NW wash system recycles wash-water from the interiors of empty containers and stores this "dirty" rinse-water in a 500 gallon tank located at the head of the process. When this "dirty" rinse-water becomes too dirty to re-use it is drained to two 2500 gallon poly-tanks.
7. "Clean" rinse-water from the second interior rinse (if needed) and from the exteriors of containers is sent directly to the same two 2500 gallon poly-tanks.
8. When the two 2500 gallon poly-tanks are full the combined rinse-water (consisting of at most 10% "dirty" rinse-water, perhaps half of that being residue) is shipped off-site. The rinse-water never contains more than ten percent "dirty" rinse-water, thereby buffering any variability in the toxicity of container residues in the rinse-water.
9. The underlying reason why the rinse-water was not shipped under a UHWM was that the Portland, Oregon facility authorized to treat the rinse-water (Pacific Power Vac) was not

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*The Environmental Compliance Organization LLC
7845 SW Capitol Hwy, Ste 8, Portland OR 97219
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a transporter with a valid EPA/state identification number. The PPV driver customarily just stopped by the KPM-NW facility to pick up rinse-water without being called. The KPM-NW facility manager apparently assumed that if PPV was authorized to treat the rinse-water that it was also authorized to transport it and would transport it in compliance with all Washington regulations. Likewise, the PPV truck driver apparently assumed that if the PPV facility was authorized to treat the wastewater that he was authorized to pick it up, just as he always had.

Dated: June 26, 2009



KERRY P. MCNAMARA

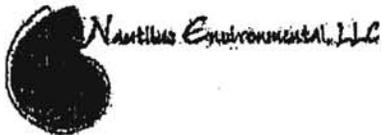
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Dangerous Waste Characterization

Sample ID: Tank 1 & 2 A & B

Report date: February 6, 2006

Submitted to:

Philip Services Corp
1701 E. Alexander
Tacoma, WA 98421

Washington Laboratory
5008 Pacific Hwy East
Suite 2
Tacoma, WA 98424

Dangerous Waste Characterization
PSC Sample ID: Tank 1&2 A&B
January 2006

A dangerous waste characterization using the test organism *Oncorhynchus mykiss* (rainbow trout) was conducted on a sample submitted by PSC to Nautilus Environmental. The sample identified as Tank 1&2 A&B was received in the laboratory on 30 January 2006. The test procedure is outlined in Table 1.

Table 1. Summary of Dangerous Waste Characterization Test Conditions

Test Number	0602-01WA
Test initiation date; time	1 February 2006; 1315h
Test termination date; time	5 February 2006; 1245h
Endpoint	Mortality or 96-hours
Test chamber	10-L glass tank
Test temperature	12°C
Dilution water	Carbon filtered water
Test concentrations (mg/L)	100, 10, 0
Test solution volume	8 L
Number of organisms/ chamber	10
Number of replicates/ concentration	3
Test organism	<i>Oncorhynchus mykiss</i> (rainbow trout)
Test organism source	Troutlodge; Sumner, WA
Test organism age	47 days from swim-up (Hatch date 12/02/05)
Feeding	No feeding during test
Mean weight	0.29 g
Mean length	29 mm
Ratio of longest to shortest	1.1
Loading	0.36 g/L
Photoperiod	16 hours light/ 8 hours dark
Extraction	Rotary agitation (30 +/- 2 rpm) for 18 hours
Deviations	None
Reference Toxicant	Copper sulfate

Nautilus Environmental
Washington Laboratory

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Dangerous Waste Characterization
PSC Sample ID: Tank 1&2 A&B
January 2006

Results

A summary of results for the dangerous waste characterization conducted on the sample is contained in Table 2. There was no mortality in the test. Based on these results, the sample would not designate as either a dangerous or extremely hazardous waste.

Table 2. Summary of Results

Sample ID	Concentration (mg/L)	Survival (# fish, N=30)	Percent Mortality	Dangerous Waste Designation
Control	0	30	0	NA
Tank 1&2 A&B	10 100	30 30	0 0	None

Quality Assurance

The most recently completed reference toxicant test was initiated 12 January 2006. The LC_{50} of 64.0- μ g/L copper was acceptable based on control charting for this laboratory. The coefficient of variation (CV) for the last 20 tests was 41.4 percent, which is considered good by the Biomonitoring Science Advisory Board.

References

Laboratory Guidance and Whole Effluent Toxicity Test Review Criteria. Washington State Department of Ecology Publication # WQ-R-95-80. Revised June 2005.

Biological Testing Methods 80-12 for the Designation of Dangerous Waste. Washington State Department of Ecology Publication #80-12. Revised April 1997.

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Nautilus Environmental, LLC

KP

Off 765313

Dangerous Waste Characterization

Sample ID: Tanks 1& 2

Report date: January 17, 2007

Submitted to:

Philip Services Corp
20245 77th Avenue
Kent, WA 98032

Washington Laboratory
5009 Pacific Hwy East
Suite 2
Tacoma, WA 98424

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A dangerous waste characterization using the test organism *Oncorhynchus mykiss* (rainbow trout) was conducted using a sample submitted by PSC to Nautilus Environmental. Nautilus received the sample, identified as Tanks 1 & 2, on January 5, 2007. The test procedure is outlined in Table 1.

Table 1. Summary of Methods for the Dangerous Waste Characterization

Test Number	0701-T023
Test initiation date; time	1/11/07; 1545
Test termination date; time	1/15/07; 1530
Endpoint	Mortality or 96-hours
Test chamber	10-L glass tank
Test temperature	12°C
Dilution water	Carbon filtered water
Test concentrations (mg/L)	100, 10, 0
Test solution volume	8 L
Number of organisms/ chamber	10
Number of replicates/concentration	3
Test organism	<i>Oncorhynchus mykiss</i> (rainbow trout)
Test organism source	Thomas Fish; Anderson, CA
Test organism age	36 days from swim-up (Hatch date 11/12/06)
Feeding	No feeding during test
Mean weight	0.32 g
Mean length	30 mm
Ratio of longest to shortest	1.3
Loading	0.40 g/L
Photoperiod	16 hours light/ 8 hours dark
Extraction	Rotary agitation (30 +/- 2 rpm) for 18 hours
Deviations	None
Reference Toxicant	Copper sulfate

Results

A summary of results for the dangerous waste characterization conducted on sample Tanks 1 & 2 is contained in Table 2. There was no mortality in the test. Based on these results, the sample would not designate as either a dangerous or extremely hazardous waste.

Table 2. Summary of Results

Sample ID	Concentration (mg/L)	Survival (# fish, N=30)	Percent Mortality	Dangerous Waste Designation
Control	0	30	0	NA
Tanks 1 & 2	10 100	30 30	0 0	None

Quality Assurance

The most recently completed reference toxicant test was initiated 3 January 2007. The LC_{50} of 93.3 $\mu\text{g/L}$ copper was acceptable based on control charting for this laboratory. The coefficient of variation (CV) for the last 20 tests was 41.5 percent, which is considered good by the Biomonitoring Science Advisory Board.

References

Laboratory Guidance and Whole Effluent Toxicity Test Review Criteria. Washington State Department of Ecology Publication # WQ-R-95-80. Revised June 2005.

Biological Testing Methods 80-12 for the Designation of Dangerous Waste. Washington State Department of Ecology Publication #80-12. Revised April 1997.

2006 WL 880089 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board
State of Washington

***1 WHW, INC. AND BOBBY WILLIAMS, APPELLANTS**
v.
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, RESPONDENT

PCHB No. 05-142

March 30, 2006

ORDER ON SUMMARY JUDGMENT

Appellants WHW, Inc. and Bobby Williams (WHW) are challenging a \$40,000 penalty issued by the Washington Department of Ecology (Ecology) for alleged violations of dangerous waste laws and regulations in connection with a spill of soda ash onto the ground adjacent to SR 397 and Finley Road in Finley, Washington. WHW and Ecology have both filed motions for summary judgment in the case. The WHW motion seeks dismissal of the case on the basis that Ecology did not have the authority to penalize under the dangerous waste laws and regulations because the material spilled was not dangerous waste. Ecology has filed a partial summary judgment seeking a ruling that the soda ash was a dangerous waste.

In considering the motion, the Board, comprised of William H. Lynch and Kathleen D. Mix, reviewed the following submissions:

1. Appellants' Motion for Summary Judgment.
2. Declaration of Josh Whited with Ex. A-K.
3. Declaration of Bobby Williams in Support of Appellants' Motion for Summary Judgment.
4. Ecology Motion for Summary Judgment on Issue (1)(a).
5. Declaration of Alexandra K. Smith in Support with Ex. A-I.
6. Declaration of Richard Granberg with Ex. A-H.
7. Ecology Response to Appellants' Motion for Summary Judgment.
8. Declaration of Alexandra K. Smith in Support of Ecology Response.
9. Declaration of Richard Granberg in Support of Ecology Response.
10. Appellants' Response to Ecology's Motion for Summary Judgment on Issue (1)(a).
11. Declaration of Mike Kendall in Support of Appellants' Response.
12. Ecology Reply Brief in Support of Its Motion for Summary Judgment on Issue (1)(a).
13. Declaration of Alexandra K. Smith in Support of Ecology's Reply with Ex. A.
14. Reply in Support of Appellants' Motion for Summary Judgment with Appendices A, B, and C.
15. Second Declaration of Mike Kendall.

The matter was decided on the record without oral argument. Based upon the records and files in this case and the evidence submitted, the Board enters the following decision.

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Facts

WHW is a small, family-owned trucking company headquartered in Billings, Montana, that specializes in dry and liquid bulk transportation throughout the western United States. Company policy is cognizant of environmental regulations and strictly prohibits a driver from disposing of or cleaning out residual material to the ground. WHW has a good compliance record and has not been the subject of environmental enforcement action related to its business in the past. (Williams Declaration ¶3, 4).

On or around April 15, 2005, WHW driver, Joseph Lambe, was driving a truck that had been loaded with soda ash at Solvay Chemicals in Wyoming. He had delivered the load to Bullseye Glass in Portland, Oregon, and then proceeded to Finley, Washington, to pick up fertilizer at the Agrium facility. The truck was weighed at Agrium and was over-weight, indicating the presence of residual material in the trailer. After leaving the Agrium plant, Mr. Lambe apparently opened the release valve on the trailer and soda ash began escaping from the tank. (Williams Declaration ¶6). The truck dumped approximately 17,000 pounds of soda ash along the roadway in the vicinity of SR 397 and Finley Road. The spill extended for approximately three-quarters of a mile, and a portion of the spill lay across the street from Finley Middle School. (Granberg Declaration ¶4).

*2 The State Patrol and the local fire department both responded to the spill and consulted existing lists of hazardous substances to determine whether hazardous waste crews were needed on site. They did not find soda ash listed as a hazardous material and did not notify Ecology of the spill. They did notify the driver that the spilled material would need to be cleaned up. The driver indicated he had contacted the company about the spill, but this fact is in dispute. (Granberg Declaration, Ex. F). The next morning, April 16, 2005, Mr. Lambe returned to Agrium, picked up the load of fertilizer, and left the area. (Williams Declaration ¶6).

Ecology was first notified of the spill on April 18, 2005, by a confidential source, and the agency responded on April 19, 2005. Ecology conducted a field test of the soda ash to determine if it **designated** as a corrosive waste under the State's regulations. The field test yielded a pH reading between 12 and 13. The **dangerous waste** standard for corrosivity is 12.5. Ecology took a sample of the soda ash for laboratory analysis and that sample later tested with a pH of 12.11. The Ecology inspector also evaluated whether the soda ash was a **dangerous waste** based on toxicity. Ecology conducted a book **designation** of the waste, pursuant to WAC 173-303-100(5), by reviews of available resource and database materials. [FN1] This data indicated soda ash is toxic to rats when given to them orally. This was referred to as failing the LD50 "Oral Rat" criteria. (Granberg Declaration ¶5, 6). Accordingly, Ecology considered the material a **dangerous waste** under WAC 173-303-070(3)(iv) and WAC 173-303-100. In addition, the Material Safety Data Sheet later provided to Ecology by WHW details health hazards associated with soda ash including irritation to ear, nose, throat, and respiratory tract, severe eye irritation, risk of serious or permanent eye lesions, and risk of burns to mouth, throat, esophagus and stomach if ingested. To prevent harm from soda ash, protective clothing is recommended for those handling soda ash. The data safety sheet also specifically indicated soda ash should be kept away from children. (Granberg Declaration, Ex. E, Whited Declaration Ex. J).

Ecology notified WHW of the spill on April 19, 2005, and informed the company of its responsibility to clean up the spilled material. The timing and exact content of ensuing conversations between WHW and Ecology are in dispute, but WHW did arrange for a cleanup contractor to address the spill. The cleanup was begun on April 20, and completed on April 21, 2005. The material removed and the material contaminated by the soda ash were put in 55-gallon drums for storage pending further information about the nature of the material and the proper method of disposal. (Granberg Declaration ¶12).

A battery of tests was performed on the spill material. The test results showed the material ranged from a pH of

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11.06 to 12.11, slightly below the corrosivity standard of 12.5 pH. As a result, the soda ash was not considered a **dangerous waste** for its corrosive properties. Toxicity testing was conducted which revealed a mortality rate for rainbow trout of only three percent. Based on the toxicity test results, the soda ash did not meet the criteria for designation as a **dangerous waste based on toxicity**. Ecology reviewed the test results submitted by WHW and determined the material was **no longer designated as dangerous waste** and could be disposed of at a non-hazardous waste facility. (Whited Declaration, Ex. H). The material was subsequently disposed of as a non-dangerous waste at a landfill in Boardman, Oregon. (Williams Dec. at 4 ¶12). Ecology later assessed a penalty against WHW of \$40,000 for violations of **dangerous waste** regulations and that penalty is on appeal in this case.

Analysis

*3 Ecology has filed a motion for summary judgment seeking a ruling that the soda ash was a dangerous waste. WHW has filed a summary judgment seeking a ruling that the soda ash was not a dangerous waste and that Ecology exceeded its authority by issuing a dangerous waste penalty because there was no dangerous waste involved. (Issues 1(a) and 1(b) from the Pre-Hearing Order). The WHW motion seeks invalidation of the entire penalty and dismissal of the case. The Board does not find the ultimate characterization of the waste, alone, determinative of the case.

Ecology Authority

The Notice of Penalty in this matter identifies three grounds for penalizing WHW: (1) failure of the generator to determine whether the waste was a **dangerous waste**, [FN2] (2) failure to notify authorities and Ecology of the spill, [FN3] and (3) failure to clean up the spilled material. [FN4] Under the state HWMA, Ecology implements "cradle to grave" regulation of **hazardous and dangerous waste** to ensure they are managed in a manner than protects human health and the environment. RCW 70.105.007. The **Dangerous Waste** Regulations contained in WAC Chapter 173-303 were promulgated to implement the state HWMA and the state's responsibilities under the federal Resource Conservation and Recovery Act (RCRA). Identification of **dangerous wastes** and safe handling of such wastes are among the enunciated purposes of the regulations:

- (1) **Designate** those solid wastes which are **dangerous** or extremely **hazardous** to the public health and environment;
- (2) Provide for surveillance and monitoring of **dangerous** and extremely **hazardous wastes** until they are detoxified, reclaimed, neutralized, or disposed of safely;
- (3) Provide the form and rules necessary to establish a system for manifesting, tracking, reporting, monitoring, record keeping, sampling, and labeling **dangerous** and extremely **hazardous wastes**.

WAC 173-303-010

The dangerous waste regulations specifically impose a responsibility on solid waste generators to evaluate the nature of their waste under WAC 173-303-070. A "solid waste" is defined as "any discarded material" not otherwise excluded from the regulations. WAC 173-303-016(3)(a). A material is "discarded" if it is abandoned by being disposed of. WAC 173-303-016(3)(b)(i); WAC 173-303-016(4)(a).

The regulations require a person generating a solid waste to **designate** the waste by following the procedures outlined in WAC 173-303-070(3):

- (a) This section describes the procedures for determining whether or not a solid waste is DW or EHW.
- (b) *The procedures in this section are applicable to any person who generates a solid waste (including recyclable materials) that is not exempted or excluded by this chapter or by the department.* Any person who must determine whether or not their solid waste is **designated** must follow the procedures set for in subsection (3) of

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this section. Any person who determines by these procedures that their waste is **designated** DW or EHW is subject to all applicable requirements of this chapter.

*4 WAC 173-303-070(1)(a)&(b)(emphasis added). This regulation requires all generators of solid waste to **designate** whether the waste is **dangerous**, unless the waste is exempted or excluded. [FN5]

The regulations spell out the steps a generator of solid waste must take to determine whether the solid waste **designates** as a **dangerous waste**. WAC 173-303-070(3). First, the generator must determine if the waste is a listed discarded chemical product (*i.e.* specifically listed in the regulations), and therefore a **dangerous waste**. Second, the generator must determine if the waste is a listed **dangerous waste** source, and therefore a **dangerous waste**. WAC 173-303-070(3)(a)(ii). Third, if the waste is not on the **dangerous waste** lists, the generator must determine if the waste exhibits any of the characteristics (ignitability, corrosivity, reactivity, and toxicity) that would cause it to **designate** as **dangerous**. WAC 173-303-070(3)(a)(iii). Fourth, if the waste is not listed, and does not exhibit **dangerous waste** characteristics, the generator must determine if the waste meets any of the **dangerous waste** criteria in WAC 173-303-100. WAC 173-303-070(3)(a)(iv). See, Hickle v. Whitney Farms, Inc. 148 Wn.2d 911, 921, 64 P.3d 1244 (2003). The generator's responsibility to **designate** its waste is not dependent on whether the substance ultimately is or is not determined to be **dangerous waste**.

In this case, the responsibility to **designate** arose at the time the WHW driver chose to discard the soda ash on the shoulder of a public road. At that time the material became solid waste and the duty to **designate** was operative. [FN6] Even though the material may have been characterized as non-**dangerous** two to three weeks later, WHW had a duty to **designate** the waste at or before the time it was placed on the ground. Therefore, even though the waste fell slightly below the **dangerous waste** standard after later laboratory toxicity testing, that result alone does not preclude Ecology from assessing a penalty for failure to comply with the duties governing solid waste generators. WHW's motion for summary judgment dismissing Ecology's penalty solely on the basis that the waste was eventually considered non-**dangerous** is appropriately denied.

Characterization of the Soda Ash

The undisputed facts demonstrate that the WHW driver chose to simply drive away from the spill and that neither he, nor the company, **designated** the waste. When Ecology became aware of the spill two days later, the agency undertook an immediate evaluation of the waste under the **designation** standards in WAC 173-303-070(3). A field test of the material resulted in a pH reading at or around the standard for **designation** as a **dangerous waste** based on corrosivity. The material safety data sheet confirmed this concern by indicating soda ash could irritate eyes, nose, and throat and could cause permanent lesion to eyes. A book **designation** performed by Ecology personnel indicated soda ash was properly **designated** as a **dangerous waste** based upon its toxic effect on rats reported in the LD50 oral rat test. [FN7] Based upon the information available soon after the spill, Ecology properly **designated** the material as **dangerous waste** and expected the generator, WHW, to treat the waste as such. The duty to notify authorities and the duty to clean up the spill are applicable to the generator of **dangerous waste** and were applicable to WHW while the soda ash was reasonably categorized as **dangerous waste**.

*5 WHW argues that it was not required to comply with the duties imposed on a generator of **dangerous waste** because the soda ash ultimately tested as non-corrosive and non-toxic. In essence, WHW would have these later test results relate back to the time the waste was generated to exonerate the company from its duties under the **Dangerous Waste** Regulations. Such a limited interpretation of the duties incumbent on a generator of waste would be inconsistent with regulations' overriding concern for protecting the public health. When a substance is dumped on the ground, the generator is in the best position to know its components and evaluate its dangerous characteristics. Placing responsibility to **designate** on the generator of potentially dangerous materials is not unduly burdensome. The court in Hickle v. Whitney Farms, Inc. 148 Wn.2d 911, 919, 64 P.3d 1244 (2003) acknowledged that generators of solid waste have a duty to determine whether or not their wastes are regulated by the HWMA.

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A generator of solid **waste** can avoid the responsibility to treat a particular substance as **dangerous waste** by engaging in the **designation** process prior to releasing the material into the environment. In this case, through the unfortunate actions of its driver, WHW discharged a substantial amount of soda ash onto the public road without **designation**. At the outset, the soda ash was properly treated as **dangerous waste** based on Ecology's book **designation** of the substance as toxic to rats. WHW's duties as a generator arose at that time under the controlling regulations and did not end until test results further defining the material's characteristics were produced. At the point, the laboratory bioassay data took precedence over the earlier book designation pursuant to WAC 173-303-100(5)(d). WHW was then relieved of further responsibility to treat the soda ash as **dangerous waste**.

Under the facts of this case, the Board concludes the soda ash was properly considered a **dangerous waste** from the time it was book **designated** by Ecology until the bioassay results were evaluated and accepted by Ecology. Accordingly, the Ecology motion and for summary judgment that the soda ash was **dangerous waste** is granted in part and denied in part. Likewise, the WHW motion that the soda ash was not a **dangerous waste** is granted in part and denied in part.

Ecology has raised WAC 173-303-016 as an alternate basis for regulating the spilled material. In rendering this decision, the Board does not reach the issue of whether the manner of use or handling of a material alone would support imposition of a penalty under the HWMA. [FN8] Ecology's citation of WAC 173-303-960 as an independent basis for enforcement action is not persuasive because the language in the regulation addresses the process available for enforcement rather than the parameters of Ecology's penalty jurisdiction.

The record contains a number of facts indicating that WHW was responsive to the spill after Ecology notified the company of the situation and that a considerable amount was spent cleaning up the site. The driver involved in the spill was terminated from his employment in direct response to this incident. Some of the details surrounding when the company first learned of the spill and when the specific arrangements for cleanup were made are in dispute and will undoubtedly be fully developed at the hearing. These facts, however, are relevant to the reasonable amount of the penalty, not the existence of a violation.

*6 Based upon the foregoing analysis the Board enters the following:

ORDER

The Ecology motion for summary judgment is GRANTED in part and DENIED in part. WHW's motion on the nature of the soda ash is GRANTED in part and DENIED in part. The soda ash was properly treated as **dangerous waste** from the time it was spilled onto the ground until the laboratory test results established it did not **designate** as a **dangerous waste**. WHW, as the generator of the waste, had duties under the controlling regulations, violations of which could properly form the basis for a penalty assessment. Therefore, dismissal of Ecology's penalty on the basis the agency lacked the authority to assess a penalty for handling of the soda ash is unwarranted under the facts and circumstances of this case and the WHW motion for summary judgment of dismissal is DENIED.

SO ORDERED this 30th day of March 2006.

William H. Lynch
Chair

Kathleen D. Mix
Member

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Phyllis K. Macleod
Administrative Appeals Judge

FN1. Ecology used toxicity data from the SIRI database, which has the same toxicity data as the National Institute for Occupational Safety and Health's (NIOSH) Registry of Toxic Effects of Chemical Substances (RTECS) database. The data showed oral rat toxicity at 4,090 mg/kg. Substances with 500-5,000 mg/kg on the oral rat toxicity criteria are identified under WAC 173-303-100(5)(b)(i) as Toxic Category D materials. (Granberg Second Declaration 4,5); (Smith Declaration, Ex. A).

FN2. WAC 173-303(1)(a) & (b)

FN3. WAC 173-303-145(2)(a)

FN4. WAC 173-303-145(a)(i)

FN5. No argument has been made that soda ash was exempt or excluded from WAC 173-303-070.

FN6. Pursuant to Federal Regulations solid waste is to be evaluated at the point of generation, which is the point when a material first becomes a solid waste. 55 Fed. Reg. 11798 @ 11830 (March 29, 1990)(Smith Declaration, Ex. G); EPA Faxback 11631 at 1 (Smith Declaration, Ex. I). Ecology's program for dangerous waste regulation is authorized by the Environmental Protection Agency on the condition that the HWMA and accompanying regulations are equivalent to and no less stringent than the federal RCRA scheme. 59 Fed. Reg. 55322 (November 4, 1994).

FN7. WHW has argued the book designation was improper or unsound, but insufficient evidence supporting the argument has been submitted to justify invalidation of the designation.

FN8. It should also be noted this regulation was not referenced by Ecology in the Notice of Violation or Penalty.

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END OF DOCUMENT

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CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, I served a true and correct copy of the foregoing BRIEF OF APPELLANTS to:

Phyllis J. Barney
Assistant Attorney General
Ecology Division
PO Box 40117
Olympia, WA 98504-0117

- by first class mail, postage prepaid
- by hand delivery
- by facsimile transmission
- by electronic transmission

Dated: January 12, 2012

12 JAN 19 AM 9:30
STATE OF WASHINGTON
BY _____
DEPUTY
COURT OF APPEALS
CIVIL DIV II



s/ Thomas R. Benke

THOMAS R. BENKE
OSB 922251
503-246-1514
Attorney for Appellants K.P. McNamara
Northwest Inc. and Kerry P. McNamara