BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

OCT 26 2010
ATTORNEY GENERAL'S OFFICE
Ecology Division

ARTHUR WEST, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB NO. 09-085 ORDER OF DISMISSAL

SUMMARY OF ORDER

Pursuant to procedural rules adopted by this Board, the Presiding Officer has the authority to enter a default or dismissal order against a party who fails to attend or participate in a hearing or other stage of an adjudicative proceeding. WAC 371-08-465. The order is to contain a statement of the grounds for the default or dismissal order. Within seven days after service of the order for failure to attend or participate, the party against whom the order is entered may file a written motion requesting that the order be vacated, stating the grounds for such a request.

The Board now enters an Order of Dismissal in this case, based on Mr. West's failure to participate in various stages of the proceeding, including failure to appear for status conferences, failure to timely file necessary pre-hearing documents, and failure to participate in a manner that allowed the Board or parties to identify with any degree of specificity the issues that Mr. West seeks to have the Board decide. Respondent Department of Ecology (Ecology) has been prejudiced by Mr. West's failure to prosecute this case, cannot adequately prepare for hearing, and should not be expected to defend under such circumstances. The Board cannot adequately manage its time or the case in these circumstances. Consistent with Board rules, the Board gives Mr. West until NOVEMBER 10, 2010 (more than seven days after service of this order allowed for by the rules) to file a motion stating: 1) the grounds upon which this Order of Dismissal may

be vacated, **and** 2) specifying, *in detail*, the precise *modified permit terms* he wishes to appeal to the Board, and basis of any such challenge to each modified permit term. Ecology may respond to any such motion by November 19, 2010.

BACKGROUND

In this case, Appellant Arthur West (Mr. West) appealed the modified Phase I and Phase II (Western) NPDES Municipal Stormwater Permits governing discharges from municipal separate storm sewer systems. The Department of Ecology (Ecology) issued these modified permits on June 17, 2009, in response to remand Orders from this Board, which were issued after three separate, and lengthy hearings in the original appeals of the Phase I and Phase II municipal stormwater permits. Ecology also made other amendments to permit terms not required by the Board's Orders. Mr. West did not participate as a party in any of these original appeals. *See Puget Soundkeeper Alliance v. Ecology*, PCHB Nos. 07-021, 022, 023, 026, 027, 028, 029, 030, 037 (August 7, 2008)(Condition S4 Order); *Puget Soundkeeper Alliance v. Ecology*, PCHB Nos. 07-021, 026, 027, 028, 029, 030, 037 (August 7, 2008)(Phase I Order); *Puget Soundkeeper Alliance v Ecology,* PCHB Nos. 07-022, 023 (February 2, 2009)(Phase II Order).

When Mr. West filed this appeal, he attempted to make a number of broad challenges to the modified permits, but did not identify with any specificity which modified permit conditions he sought to contest. It appeared Mr. West was attempting to relitigate matters already determined in the Phase I and Phase II cases and to challenge terms of the permits that had not been modified by Ecology. For this reason, the Presiding Officer directed Mr. West to provide more detailed legal issues identifying exactly which permit modifications he sought to challenge. *Letter from Presiding Officer, August 19, 2009.* In response to the breadth of Mr. West's issues, the parties were then directed to brief the question of the proper scope of Board review over the modified permits. *See September 3, 2009 Pre-Hearing Order.* Mr. West filed a late brief on this subject, which the Board did not consider, noting Mr. West's ongoing pattern of unexcused failures to comply with procedural deadlines (however, the Board still required Ecology to show

it was entitled to relief as a matter of law). *West v. Ecology*, PCHB No. 09-085, (Order on Jurisdictional Issues, November 6, 2009).

The Board's Order on Jurisdictional Issues limited Mr. West to challenging only those provisions of the Phase I and Phase II municipal stormwater permits that had been modified by Ecology. *Id.* Modifications that Ecology made pursuant to the Board's Order on remand could be challenged only on the basis that they did not adequately implement the Board's decisions. *Id.* Since that order, Mr. West has failed to identify which modified permit conditions he seeks to challenge in this case, or identify how the modified terms fail to implement the Board's remand Order, despite ongoing direction to do so. *See Second Pre-Hearing Order, December 15, 2009.*

GROUNDS FOR ORDER OF DISMISSAL

1. Failure to Appear at Scheduled Status Conferences

The first pre-hearing conference in this case was scheduled by the Board for August 19, 2009. *See July 20, 2009 letter from the Board.* Mr. West failed to appear for that initial case conference. The Presiding Officer, then Judge Kay Brown, warned Mr. West at that time as follows: "Participation in the pre-hearing conference is mandatory. *See* WAC 371-08-435(3). Another instance of failure to attend by Appellant that is not justified by good cause may result in the issuance of an order of default or other appropriate action."

Mr. West has again failed to appear at two recently scheduled status conferences, set by the Presiding Officer to establish deadlines, refine legal issues, and ready the case for hearing. By letter of August 24, 2010, the Presiding Officer scheduled a case conference for September 27, 2010, at 11:00 a.m. The letter also set new hearing dates of October 25-26, 2010, and set new deadlines for filing pre-hearing documents, including the final witness and exhibit lists. Mr. West failed to appear for the scheduled case conference. Senior Counsel Ron Lavigne of the Attorney General's Office appeared on behalf of Ecology. Mr. West did not contact the Board about the conference, nor request a continuance or alternative date, as he has been instructed to do in past orders of the Board. Because of Mr. West's absence, the Board and parties were

unable to address the scope of the legal issues raised by Mr. West's appeal and the Board was unable to manage case time and potential evidentiary problems.

After the September 27, 2010 case conference, the Board issued a Final Pre-Hearing Order, dated September 28, 2010. The text of that Order contains the following admonitions to Mr. West, in addition to setting deadlines (emphasis in the original):

> **Final Witness and Exhibit Lists**: These shall be filed by **October 4, 2010.** *The Board notes that Mr. West has failed to file any preliminary list of witnesses or exhibits with the Board and Ecology, and that timely completion of this task is essential to pre-hearing preparation.* **Failure to timely inform the Respondent of exhibits and witnesses may result in a continuance of the hearing date, or default and dismissal.**
> **Exchange of Exhibits:** Parties shall accomplish this by **October 12, 2010.**

The Pre-hearing Order goes on to state:

> The Board has noted in other orders, and in its Order on Jurisdictional Issues (November 6, 2009) that the Board has experienced problems with Mr. West failing to meet applicable deadlines in past appeals, failing to appear, and failing to either request additional time or state any causes for late filings. *Mr. West is warned that his failure to meet any of the deadlines set forth above, or his failure to appear for regularly scheduled status conferences, or hearing, may result in the dismissal of all or a part of his case.*

The Final Pre-Hearing Order also set a final pre-hearing status conference for October 18, 2010, at 10:00 a.m.—one week before the hearing. Again, Mr. West did not appear for this status conference, nor did he contact the Board to request rescheduling of the conference. The Attorney General's Office appeared through Mr. Lavigne. The conference was necessary to discuss expected final evidentiary issues, and deal with the still broad and undefined legal issues Mr. West had submitted in February 2010. Mr. West's failure to appear made it impossible to keep the scheduled hearing dates of October 25-26, 2010, on the Board calendar and the Board struck those hearing dates.

In a prior case, Mr. West was warned by the Board that his failure to appear at status conferences risked placing him in default. *West v. Ecology*, PCHB No. 08-113 (Order of Dismissal, January 5, 2010). The Board dismissed that case as moot, but stated with respect to a similar pattern of non-participation in his own appeal, "[S]imply failing to appear at a conference, without giving prior notice, is improper procedure and unduly prejudices the Board and opposing counsel. In the future, Mr. West must notify the Board of any conflicts with mandatory conferences prior to the scheduled date or face the possibility of default."

2. Failure to file required witness and exhibit lists, or exchange documents with Ecology

The final Pre-Hearing Order set a specific deadline for Mr. West to file and serve final witness and exhibit lists, necessary for the parties to understand the opponent's case and to prepare for hearing. It set a deadline by which the parties were to exchange exhibits, a necessary step for each side to prepare for hearing. Mr. West did not comply with either deadline. The Board has also cautioned Mr. West that as a frequent litigant before this Board, he should be quite familiar with the deadlines established in Board orders, and that neither the procedural rules nor orders can simply be ignored in favor of his own schedule, without consequence. Accordingly, the Board has stated "[I]n future proceedings, Mr. West will be held to a higher standard of compliance." *West v. Ecology*, PCHB No. 08-113 (Order Denying Ecology's Motion to Dismiss for Default, June 30, 2009).

As is Mr. West's most unfortunate practice, he ultimately filed a brief, a final witness list, and a motion to continue the hearing in this case well after the cut off for such pleadings and after the final status conference in this case. The final witness list, received by the Board on October 19, 2010, was over two weeks tardy, and a mere four days before the hearing was scheduled to begin. Additionally, Mr. West failed to exchange exhibits with Ecology by the specified date in the Final Pre-Hearing Order.

His late filing again includes the same list of broad legal issues, all of which are beyond the scope of issues allowed by the Board's Order on Jurisdictional Issues.

Mr. West's proffered reasons for the late filing of the pleadings include absence from the State on October 2-16, ongoing medical problems, and "numerous court proceedings" in late September. He claims he was unaware of deadlines in this case.

3. Mr. West's failure to participate and timely prosecute this appeal has resulted in a failure to identify the issues to be tried before the Board

From the outset of this case, Mr. West has been informed that his appeal appeared to raise issues already litigated in the Phase I and Phase II hearings, and he was directed by the Presiding Officer to identify modified permit conditions that he sought to challenge. *See August 19, 2009 letter from Presiding Officer, (giving Mr. West a schedule by which to file issues with reference to the modified permit condition being challenged in each issue).*

On February 1, 2010, Mr. West submitted "Appellant's Revised Issues" in response to the Board's Order to submit, by January 29, 2010, a list of revised issues. According to Board procedural rules, the legal issues which the pre-hearing order identifies for the hearing control the subsequent course of the appeal. WAC 371-08-435. The list filed by Mr. West contained twenty (20) legal issues, many of which continued to be broad statements challenging the underlying Phase I and Phase II permits, and addressed matters that could have been litigated only in the original appeals of those permits. This list of broad issues was not timely filed, and did not comply with the Board's directive, (and Mr. West's agreement), to limit the list to "six to ten key issues and one overall issue." Nevertheless, the Board stated that this list would be the operative list of legal issues for the hearing, as modified and controlled by the Board's Order on Jurisdiction, dated November 6, 2009. That Order limited Mr. West to challenging only *modifications* to the Phase I and Phase II permits, as follows:

1. Only those provisions of the Phase I and Phase II (Western) Permits that were modified by Ecology are open for substantive challenge.
2. Those Permit modifications Ecology undertook at the Board's direction can only be challenged on the basis that they do not adequately implement the Board's decisions.

3. Modifications to permit conditions beyond the scope of the Board's direction on remand are subject to challenge in this case.

The status conferences set by the Board were a necessary step to draw boundaries around Mr. West's broad statement of legal issues. In Mr. West's last, and tardy, filing on October 19, 2010, he again presented the same set of broad legal issues, with no reference to permit modifications that he seeks to challenge. At this late juncture in the case, neither the Board nor the Respondents have been informed as to the particular modified provisions of the permit that Mr. West seeks to challenge and the basis of the challenge. Neither has Mr. West specified which modifications to the permit, made as a result of the Board's Phase I and Phase II remand Orders, do not adequately implement the Board's decision, or how they might fail to do so. In short, neither the Board nor the opposing party has any clear indication of what is at issue in this case. This situation is directly attributable to Mr. West's non-participation in the appeal he filed with the Board and his non-responsiveness to Board direction to identify more precisely what it is he wishes to appeal.

4. Conclusion

Board rules allow for waiver of filing and other procedural requirements for unrepresented parties where necessary to avoid manifest injustice. WAC 371-08-385. The Board routinely does this and gives liberal construction of its rules in the case of *pro se* litigants. . Over many cases, the Board has allowed Mr. West to file pleadings late and has not imposed the sanction of default or dismissal in the face of his neglectful litigation tactics. *See, e.g. West v. Ecology*, PCHB No. 08-113 (Order Denying Ecology's Motion to Dismiss for Default, June 30, 2009). However, as the discussion above indicates, the Board has also repeatedly, and increasingly, warned Mr. West that dismissal or default may result should he continue to fail to meet key procedural and substantive requirements of Board rules and practice.

In this case, Mr. West's failure to appear at the original pre-hearing conference, and status conferences critical to final hearing preparation, has wasted the time of the Board and

opposing counsel, prejudiced the party attempting to defend the appeal, and made it impossible to prepare for hearing. The reasons offered by Mr. West in his latest tardy filing (October 19, 2010), do not explain why or what cause he had for missing two status conferences, both scheduled while he was present in the State, and with significant advance notice to him. Nor do they suggest any reason why waiver of the rules and their associated deadlines is necessary to avoid manifest injustice. Mr. West cannot ignore all deadlines and status conferences in favor of filing a list of witnesses and exhibits, and an unchanged list of legal issues, a mere four days before the start of a hearing on a complex topic, such as a challenge to changes in the Phase I and Phase II Municipal Stormwater permits. As we have stated before, filing an appeal carries with it an obligation to prepare and keep track of the case and its deadlines. Mr. West offers no credible reason why he has failed to do so in this case. The press of other litigation is an inadequate excuse for ignoring the appeal in this matter. Mr. West's ongoing pattern of disrespect of deadlines and procedural rules that have been called to his attention merits additional sanction. In this case, his neglect of the appeal has been so serious as to require dismissal pursuant to WAC 371-08-465, leaving the door open for Mr. West to state just cause and grounds for the Board to vacate the Order of Dismissal.

ORDER

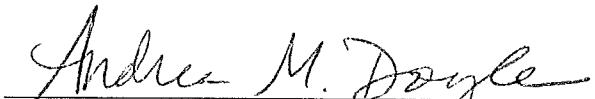
1. This case is DISMISSED, for failure to participate and prosecute the appeal.
2. Mr. West shall have until NOVEMBER 10, 2010, to file a written motion requesting that the order be vacated and stating the grounds relied upon for such request. Ecology may file a response to any such motion by November 19, 2010.
3. Any motion to vacate must contain a list of *revised* legal issues that specify the precise *modified permit terms* that Mr. West seeks to challenge, and *specify the basis for the challenge* or how the modified provision (if made in response to the Board's

earlier Orders) fails to implement the Board's earlier remand Orders in the Phase I and Phase II decisions.

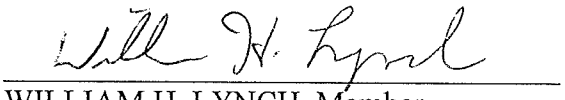
SO ORDERED this 25th day of October, 2010.

POLLUTION CONTROL HEARINGS BOARD

KATHLEEN D. MIX, Presiding



ANDREA McNAMARA DOYLE, Chair



WILLIAM H. LYNCH, Member