

No. 75457-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
FOR DIVISION ONE

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DAVE AND NANCY HONEYWELL, dba ORCA DREAMS LLC,  
Appellants,

vs.

WASHINGTON STATE DEPARTMENT OF ECOLOGY  
Respondents.

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**APPELLANTS' OPENING BRIEF**

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COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON

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I.

**INTRODUCTION**

COME NOW the Appellants, David and Nancy Honeywell (Honeywell) and file this brief in support of their appeal of the decision of the Shorelines Hearings Board in SHB 14-015. In the fall of 2013, a contractor hired by the Honeywells cleared nearly an acre of brush, alder and willow trees along about a third of the 1600' shoreline of the Honeywells' forty-acre property. The Appellants were fined \$1,000 by San Juan County and then fined a second time for the same act five months later by the Department of Ecology in the amount of \$55,000. For the reasons stated below Appellants pray for an order either eliminating or reducing the shoreline penalty imposed by DOE and affirmed by the SHB to \$1,000 for violation of RCW 90.58.210.

II.

**ASSIGNMENT OF ERROR/ISSUES**

**Assignment of Error**

The Shorelines Hearings Board erred by affirming a \$55,000 violation fine against the Honeywells issued by the Department of Ecology pursuant to RCW 90.58.210.

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### **Issues Pertaining to Assignments of Error**

1. Is the SHB finding that 80 trees were cut in violation of the SHB supported by substantial evidence?
2. Did the SHB erroneously conclude that the penalty for a violation issued pursuant to RCW 90.58.210 could be greater than \$1,000?
3. Was the SHB affirmation of Ecology's use of a made-up penalty matrix for this case alone an arbitrary and capricious act?
4. Did the SHB erroneously conclude that each tree cut greater than three inches in diameter at breast height (dbh) constituted a separate violation under RCW 90.58.210?
5. Did the SHB err by concluding the \$55,000 penalty was reasonable?

### **III.**

#### **STATEMENT OF THE CASE<sup>1</sup>**

After working their entire adult lives for the U.S. government, in 2012 David and Nancy Honeywell won a great deal of money in the Powerball Lottery while they were living in Virginia. On July 10,

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<sup>1</sup> The facts in this case are largely undisputed.

2013, the Honeywells<sup>2</sup> purchased an old resort property, forty-acres in size with 1600' feet of shoreline, with the intent of building a residence and compound where their friends, children and grandchildren could spend time with them during their retirement. Notably, the Honeywells did not move from Virginia to San Juan Island until July of 2014, a year after their purchase, and ten months after the act leading to the violation and this lawsuit.

The property the Honeywells purchased had suffered years of neglect and was heavily overgrown. The former Mar Vista Resort was established in 1947, had fourteen structures, including eight shoreside guest cabins, which were touted in the sales literature as all having "great views" (P2: CABR<sup>3</sup>1609-1610). In the last decade prior to purchase, the resort had been open, but the property had fallen into disrepair and became overgrown with shrubs and small willow nursery trees which had become impossibly entangled and had subsumed paths, views and walkways to the beach once used by guests. During it's heyday the resort's shoreline hillside brush had been traditionally kept trimmed and in check.

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<sup>2</sup> Orca Dreams LLC, title holder to the subject property is a non-commercial LLC owned by David and Nancy Honeywell.

<sup>3</sup> Certified Appeals Board Record

It had been common prior practice, when the property was running as a resort, for a caretaker to remove brush and vegetation on the subject slope. In fact, improved pathways with iron banisters are still found intertwined in the brush. As the resort fell into more disarray and began operating on a “shoe-string budget” it became more and more the practice to not remove the cut snags. This unfortunately had the unintended consequence of turning the willows into nursery logs – which fostered the growth of thick choking brush. (TR Elford, Vol. IV, pg. 776). During his sixteen-year tenure tending the resort, former caretaker Bob Elford testified he had routinely pruned and cut back trees and vegetation at the site, including snowberry, Nootka rose, blackberry, willow and alder. (TR Elford, Vol. IV, pg. 775-776). Because of a dwindling budget, Elford ceased trimming the hillside altogether around 2006. By 2013 brush and small trees on the hill had grown to between 12 and 20 feet high.

Prior to purchasing their property, the Honeywells had a number of questions regarding potential development. Was this a commercial or residential property? Could they build a new residence? Could the cabins be rebuilt? In addition to being the caretaker, Bob Elford was a realtor. While the Honeywells were considering purchasing the property he arranged a site visit with an

architect they were interviewing, and County Permit Coordinator Annie Matsumoto-Grah, and San Juan County Planner III Julie Thompson. The focus of the April 19, 2013 visit was on “*what they could do with their property*”, (TR Thompson, Vol. III, pg. 532-533). There was “*absolutely no vegetation discussion whatsoever*”. (TR Honeywell, Vol. II, pg. 489). On July 1, 2013, several months later, Annie Matsumoto-Grah electronically issued a Residential Pre-Application letter (“RPA”) to an incorrect email address for the architect (R9; CABR1864). A hardcopy of the RPA was never mailed. Although she emailed the RPA again to Elford on July 17, 2013, this was after the close of the sale and was not opened by Elford because by the time he received it the sale had been consummated and he thought it irrelevant. (TR Elford, Vol. IV, pg. 786) The Honeywells never saw the RPA before the clearing took place.(TR Honeywell, Vol. II, pg. 490).

During the fall of 2013 the Honeywells, during their off and on visits to the island, were fully engaged in improving the property and had contracted with an assortment of island contractors to help with getting various projects started, including the restoration of a Victorian house, installation of a solar photovoltaic power generation system and repairs to the existing barn and grounds. (TR Honeywell,

Vol II, pg. 488). Two of the dirt contractors were Casey Baisch and Ben Engle who were initially hired to remove some poplars along the driveway that were obstructing ingress and egress from the property.

Engle offered his services to Honeywells and indicated that he could also clean up the overgrown shoreline area. In November 2013 the Honeywells asked Engle to clear out the deadwood, trim up the trees and perform a limited amount of clearing around the upland cabins. (TR Honeywell, Vol. II, pg. 500). They also requested that the trees be appropriately limbed up along the shoreline and the bushes “trimmed” back to 1’-2’ high (TR Honeywell, Vol. II, pg. 500, 504), in an effort to reestablish the cabin views. The Honeywells were on Island November 19-22, 2013, at which time Dave gave Engle direction: “*I told them to trim the brush*” (TR Honeywell, Vol. II, pg. 501) and “*make it look like a bomb had not gone off*” on the bank. (R12: CABR1872 (Engle quote); See also TR Elford, Vol. IV, pg. 779).

Engle had been operating a marginally functional landscape service company and was subsequently shut down by Washington State Labor and Industries. (TR Engle, Vol. III, pg. 747). Engle had negotiated with Honeywell a verbal time and materials contract and was paid hourly by Honeywell. (TR Engle, Vol. III, pg. 747). It is

essential to remember that this was late fall and typically in the San Juans work in the trades, especially landscaping, falls off in the autumn and winter. (TR Engle, Vol. III, pg. 745). It is not hard to see how a contractor could take advantage of an absentee owner and expand the scope of the project in order to increase his billings.

When the Honeywells left on November 23, 2013, Engle's crew had started brush cutting and trimming 10' - 20' down the hill but there had been no significant cutting at this time. (TR Honeywell, Vol. II, pg. 502). The Honeywells did not return for nearly three weeks. During this time, Engle's crew vastly increased the scope of work without authority, attacking and razing the slope. Engle's bills to Honeywells totaled over \$50,000.

On Friday, December 13, 2013, San Juan County Building Official John Geniuch visited the site after a call from an unknown complainant and issued a stop work order. (R10: CABR1868-1869; R11: CABR1870). The slope devastation on a section of the waterfront was apparent. Much of the slash from the hill had already been removed. A number of small disposal fires had been lit that Mr. Geniuch ordered smothered though it was later determined that a burn permit was in place (TR Honeywell, Vol. IV, pg. 954). A silt fence

was put in place by Engle, and the hill was immediately covered in straw.

The Honeywells returned to the Island from an extended off-island trip late the same night as the County visit. They were not aware of what had happened while they were gone. When they awoke on December 14, 2013, the Honeywells were “*shocked*” at what they saw: the amount of vegetation removed from the bank far, far, exceeded the amount they had instructed the contractors to cut back. Mrs. Honeywell broke down in tears. About 30% of the Honeywell’s shoreline had been cleared. Roots of the cut bushes, shrubs, willows and alders were left intact – but the vegetation had been cut back to the quick. One live fir was removed, no cedars were cut, but quite a number of small to mid-size alders and willows, along with bushes such as blackberry and Nootka rose were cut down to the roots. “*It was just a shock.*” (TR Honeywell, Vol. II, pg. 506). There were little to no exposed soils.

The Honeywells called their attorney, Mimi Wagner, immediately. Ms. Wagner “took charge” and did everything possible to mitigate the damage. (TR Honeywell, Vol. II, pg. 507). She testified as follows: “*they knew the situation was really serious and they needed help*”. “*They were shocked and upset and really*

*concerned because this was a huge deal and they knew it and we knew it*" (TR Wagner, Vol. IV, pg. 848). *"I was freaked out because this was so bad"*. *Id* at pg. 853. Ms. Wagner confirmed that the clearing was far more than they had expected or anticipated. (TR Wagner, Vol. IV, pg. 849). The stop work order required the immediate installation of BMPs (Best Management Practices). By Monday, December 16, 2013, when Geniuch returned with SJC Enforcement Officer Chris Laws (both CESCLS), BMP's were in place - the site had been covered with straw and a silt fence was installed by the Engle crew to control runoff. The County officers were also accompanied by Paul Anderson, DOE wetland staff member, who happened to be on-island that day. That was the first day any staff member from DOE had visited the site. Mr. Anderson works in the DOE Shorelines Environmental Assistance (SEA) program. (TR Anderson, Vol. II, pg. 241).

The next day, December 17, 2013, Laws returned to the site and there met Attorney Mimi Wagner, and Bob Elford, the caretaker. (TR Wagner, Vol. IV, pg. 850). Attorney Wagner went immediately into action. Engle was nowhere to be found. Professional contractor Mike Carlson was called in. Additional erosion control measures were implemented immediately by CESCL (Certified Erosion and Sediment Control Lead) Mike Carlson, including a better silt fence, straw wattles and straw matting. Carlson said *"we're treating this like a 911 call"*. (TR Wagner, Vol. IV, pg. 853) The Honeywells and their contractors immediately and continuously communicated with

County officials regarding what steps should be taken to eliminate all environmental risk. Within hours of receiving instructions Carlson was installing proper silt fencing and covering exposed areas. (TR Wagner, Vol. IV, pg. 857) (P10: CABR1625).

San Juan County Code Enforcement Officer Christopher Laws was in frequent communication with Ecology about the County's enforcement from day one - December 16, 2013. There was testimony at hearing that by December 17, 2013, Ecology agreed that the County would take the lead on enforcement. (P5: CABR 1614; (TR Laws, Vol. III, pg. 582). For this reason, the Honeywells and their agents did not "report" to DOE, they "reported" to the County as instructed. DOE was not in the loop because their sole role at the time was to provide "*technical expertise*". (TR Laws, Vol. III, pg. 582) (P21: CABR1656) (TR Honeywell, Vol. IV, pg. 965). It was the County's enforcement proceeding, and the County had it under control.

On February 6, 2014, San Juan County Community Development and Planning issued a Notice of Violation to the Honeywells. (R24: CABR1912-1915). That Notice described the removal of vegetation within 200 feet of the ordinary high watermark without a substantial development permit and therefore declared that the clearing was in violation of San Juan County Code 18.50.060(A) and RCW 90.58.210(2). The County ordered the Honeywells to develop a Restoration Plan for the slope and specified that this Plan was to be reviewed and approved by Ecology. In addition, pursuant

to RCW 90.58.210 San Juan County fined the Honeywells \$1,000 and also fined the Contractor Engle for violation of the local shoreline code and the critical areas ordinance. The Honeywells complied with the terms of the Notice of Violation, paid the fine the day it was issued, and did not appeal the County's determination. (TR Wagner, Vol. IV, pg. 870).

Mimi Wagner called DOE staffer Paul Anderson the day the NOV was issued – who again told her DOE would be “*happy to assist however we can*”. (TR Wagner, Vol. IV, pg. 872), (P20: CABR1655). Contractor Carlson was initially assisting the Honeywells in retaining a qualified biologist to prepare a Restoration Plan. (TR Honeywell, Vol. IV, pg. 973). While Carlson was initially in charge of finding a biologist, his duties never included writing a restoration plan. (TR Honeywell, Vol. IV, pg. 973).

In March 2014, Ecology's Shoreline Planner for San Juan County, Bob Fritzen, reported that all indications were that the Honeywells were doing everything they could to comply with the County's NOV. (P23: CABR1959). Even DOE staffer Paul Anderson testified at the SHB hearing that he had no reason to believe that the Honeywells were not complying. (TR Anderson, Vol. II, pg. 357). The County and the Honeywells' agents were communicating

regularly. Dr. Thor Hanson, who had been engaged by the Honeywells to prepare a Golden Paintbrush enhancement plan for the top of the slope, was unavailable to prepare the overall Restoration Plan because of an upcoming book tour. (TR Honeywell, Vol. IV, pg. 973). The Honeywells then contracted in May 2014 for the professional firm of Northwest Ecological Services to produce a full Restoration Plan for the slope, as required by the County.

Honeywell had asked the County for an extension to the restoration deadline to allow a scientifically sound plan to be prepared by the Biologist. The County approved the extension to August. On March 31, 2014, DOE staff member Paul Anderson emailed Chris Laws to tell him (after-the-fact) that he strongly recommended the Restoration Plan be completed right away and the deadline not extended to August. (P25: CABR1662). Laws replied that he was surprised at Paul's reaction and saw no advantage to rushing a planting plan. (P25: CABR1662). Anderson testified: "*And I think this is when we began to have some concerns that things were headed the wrong direction.*" (TR Anderson, Vol. II, pg. 358).

During the months following the County NOV, scores of emails went back and forth between the Honeywells, their agents and attorneys, Mike Carlson and County Officer Chris Laws. Staff

members of the Department of Ecology, including Shoreline Planner Bob Fritzen, DOE staffer Paul Anderson and Regional SEA Manager Erik Stockdale of the NWRO (Northwest Regional Office).

Anderson admitted that initially back in December 2013, Ecology had indeed agreed the County would take the lead on the enforcement action, and that DOE's only role would be to provide *technical assistance* in the form of reviewing the restoration plan required by the County. (TR Anderson, Vol. II, pg. 343). Anderson testified that Ecology *assumed*, when the County extended the deadline for the submittal of the Honeywell restoration plan, on March 31, 2014, that the plan that was being proposed was a preliminary planting report submitted by Mike Carlson. This was an incorrect assumption on Ecology's part – but clearly snowballed into a DOE penalty plan of its own for the shoreline. (TR Anderson, Vol. II, pg. 347-348). In fact, while Anderson first testified that he had not spoken to Carlson in March 2014, he recanted when reminded about the skirmish he and Carlson had gotten into in March 2014 at the Woodman bulkhead SHB hearing in Friday Harbor, when Anderson believed he was personally being represented by Friends of the San Juans' attorney Kyle Loring. (TR Anderson, Vol. II, pg. 35-353) This clearly tainted his participation.

Because the County was the acknowledged lead on the Restoration Plan, Anderson was only sporadically included in email correspondence regarding steps being taken to restore the area. It was the County, not Ecology, that the Honeywells were to report to. No verbal or written guidance for a restoration plan was ever provided by Ecology. (TR Honeywell, Vol. IV, pg. 965-966). It is undisputed that the Honeywells immediately and cooperatively complied with all County directives. (TR Laws, Vol. III, pg. 590). Neither the Honeywells nor any of their agents were ever told to report with Paul Anderson or anyone else at DOE. (TR Honeywell, Vol. IV, pg. 964-966).

DOE officials all testified that the Honeywells were compliant with the County directives. But DOE agents, in particular Paul Anderson, made numerous incorrect assumptions, did not check their facts, and subsequently and surreptitiously insisted on additional shoreline penalties despite compliance. DOE assumed Mike Carlson was preparing the restoration plan. DOE assumed that the restoration plan only dealt with Golden Paintbrush. DOE assumed that the stumps on the slope were all from the December 2013 cutting. DOE assumed that a DNR permit was required. None of these assumptions were correct.

*Q. So it's fair to say that you didn't know what was going on with Mimi Wagner contacting other biologists and the CESCL, Mike Carlson, about restoration of this site, did you?*

*A. No, I didn't.*

*Q. So I think we understand that you weren't happy that they weren't involving you and keeping you in the loop, and that they had unilaterally changed the deadline to the end of August?*

*A. Correct.*

(TR Anderson, Vol. II, pgs. 353-354).

DOE agents, in particular Paul Anderson, made numerous incorrect assumptions, did not check their facts, and subsequently insisted that DOE imposed additional penalties despite the Honeywells' full and complete investigation. It was because of this unfounded aggravation that DOE incorrectly assumed non-compliance. DOE assumed Mike Carlson was preparing the restoration plan. DOE assumed that the restoration plan only dealt with Golden Paintbrush. DOE assumed that the stumps on the slope were all from the December 2013 cutting. DOE assumed that a DNR permit was required. None of these assumptions were correct.

Anderson's incorrect assumptions started the march toward a separate DOE NOP. (TR Anderson, Vol. II, pg. 364). He has admitted that he now understands that the extension given to the Honeywells in March 2014 by the County was to enable the Honeywells to hire a

biologist to prepare a professional Restoration Plan – but that he did not understand that at the time. (TR Anderson, Vol. II, pg. 380).

In June 2014, DOE wetland staffers Paul Anderson and Doug Gresham asked to visit the Honeywell property, under the auspices that they wanted to see the slope growth and offer “technical assistance” on the restoration plan. But this was a ruse. Instead, they spent an hour or two on the slope counting stumps. The Honeywells were given no clue that DOE was planning to issue them a shoreline penalty. There are no wetlands in this area, however it is a substantial stretch of shoreline. The Honeywells had been fully cooperative and had no reason to suspect covert behavior by the state employees. Anderson and Gresham, who do not have the same expertise as Vicki Jackson, the scientist hired by Honeywells, also had no knowledge of the history of the site or the previous care, pruning and cutting that had historically occurred on the slope. As such, they made incorrect assumptions, misidentified trees and counted old stumps during their brief visit.

DOE Regional Director Josh Baldi testified at the hearing that the DOE staff members involved in this, Erik Stockdale, Fritzen, Anderson and Gresham do not work or report to him. He acknowledged that the Water Quality (WQ) and Shorelines

Environmental Assistance Program (SEA) programs are separate, without a common supervisor. This explains the confusion and miscommunication between the programs and the management at DOE. Baldi testified that he did not visit the site, did not know how many trees were cut and did not know what a CESCL is. (TR Baldi, Vol. II, pg. 444).

Nevertheless, it was Director Baldi who was found to be the impetus behind the separate DOE fines, after being fueled by Anderson's misstatements and assumptions. DOE did not inform either the County or the Honeywells of their spring 2014 planning and scheme to issue separate penalties to the Honeywells. When Baldi finally talked to County Prosecuting Attorney Randy Gaylord to notify the County about his plan for DOE to separately penalize the Honeywells, just before issuance in July 2014 of the NOPs, he testified that Gaylord was not happy with Ecology's decision, and told him his belief that DOE could not issue a penalty greater than \$1,000 under RCW 90.58.210. Regional Director Baldi admitted at hearing that he was not aware of any shoreline penalties that had ever been issued by the NWRO of DOE, and that the Honeywell penalty was the largest SEA penalty ever issued. (TR Baldi, Vol. II, pg. 450).

The county required restoration replanting plan was prepared for the Honeywells by Biologist Vikki Jackson of Northwest Ecological Services (NES) during the summer of 2014. It was submitted to Ecology, reviewed, amended and subsequently approved by DOE. (P37: CABR1711-1751; P38: CABR1753). As early as May 2014, and prior to the DOE penalties, DOE reported good regrowth on the slope. Because no roots were removed, all of the willows and many of the alders have grown back. (P30: CABR1764). By July 2014, the hill had 80-90% natural vegetation cover. (TR Honeywell, Vol. IV, pg. 982). The cut bushes have grown back, all the willows actively re-sprouted and the slope was replanted in accordance with the restoration plan approved by San Juan County and DOE.

On July 7, 2014, over six months after the violation, the State Department of Ecology released their "Recommendations For Enforcement" (RFE) (R-29: CABR1939-1951) and immediately issued two separate Notices of Penalty (NOP) against the Honeywells - \$24,000 for alleged water quality violations of RCW 90.48.080 and 90.48.160, and \$55,000 for a shoreline violation of RCW 90.58.210. (R27: CABR1923-1931; R28: CABR1933-1937). This came as a complete and total surprise to the Honeywells, who

felt they had been deceived by the State Department of Ecology. (TR Honeywell, Vol. IV, pg. 964).

#### **IV.**

#### **CASE POSITIONING**

The Honeywells appealed the DOE Water Quality NOP to the PCHB and also the DOE Shoreline NOP to the SHB. Both Boards issued their Orders on Summary Judgment on June 15, 2015. A multi-day hearing was held in Tumwater, Washington before the combined SHB and PCHB in July 2015. The SHB affirmed the \$55,000 penalty. The PCHB affirmed half of the WQ penalty but dismissed the other half. Honeywell appealed the decisions to Superior Court. The cases were consolidated for oral argument. The NOP for the remaining water quality violation was dismissed in full by Superior Court. The \$55,000 penalty issued by the Department of Ecology to the Honeywells for violation of County shoreline law was upheld by Superior Court, and is presently before this court.

#### **V.**

#### **STANDARD OF REVIEW**

Under the Administrative Procedure Act, the SHB decision is to be reviewed by this Court under standards set forth in RCW 34.05.570(3)(d):

(3) *Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:...*

(d) *The agency has erroneously interpreted or applied the law;*

(e) *The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter.*

(i) *The order is arbitrary or capricious.*

A court grants relief from an agency's order arising from an adjudicative proceeding only if the court determines that one or more of the statutory bases for relief are established. *Edelman v. State*, 160 Wn.App. 294, 248 P.3d 581 (2011). The court is required to make a separate and distinct ruling on each material issue on which the court's decision is based. RCW 34.05.570(c).

Legal determinations of administrative agencies are reviewed under an error of law standard, which permits a reviewing court to substitute its interpretation of the law for that of the agency, though substantial weight is to be given to the agencies interpretations of the law within their areas of expertise. A court may substitute its interpretation of the law for that of the agency. *Overlake Fund v. Shorelines Hearings Board*, 90 Wn.App. at 754, 954 P.2d 304 (1998). A court may reverse the Board's decision if it determines that

the Board has “erroneously interpreted or applied the law.” *Batchelder v. City of Seattle*, 77 Wn.App. at 158, 890 P.2d 25 (1995), (citing RCW 34.05.570(3)(c), (d)). “[R]eview by an appellate court is to be on the agency record without consideration of the findings and conclusions of the superior court.” *Waste Mgmt. of Seattle v. Utility & Transp. Com’n*, 123 Wn.2d at 633, 869 P.2d 1034. *Herman v. State of Washington Shorelines Hearings Bd.*, 149 Wn.App. 444, 457, 204 P.3d 928, 934 (2009).

The Court of Appeals review is of the Shorelines Hearings Board's decision, not the decision of the local government or of the superior court. *Buechel v. Department of Ecology*, 125 Wn.2d at 202, 884 P.2d 910. And the standard of review is whether the board's decision was “arbitrary and capricious” or “clearly erroneous” in light of the entire record and public policy contained in the Shoreline Management Act. *Id.* at 201–02, 884 P.2d 910. *Herman v. State of Washington Shorelines Hearings Bd.*, 149 Wn.App. 444, 457, 204 P.3d 928, 933–34 (2009).

When reviewing an agency decision under the “arbitrary and capricious” standard, reviewing court determines whether the decision constitutes willful and unreasoning action, taken without regard to or consideration of the facts and circumstances

surrounding the action. *Spokane County v. Eastern Washington Growth Management Hearings Bd.* 176 Wn.App. 555, 309 P.3d 673 (2013).

## VI.

### ARGUMENT

#### A. SHB FINDING RE: TREE COUNT NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Honeywell challenges the SHB decision regarding the amount of vegetation and tree removal on the slope as not being supported by substantial evidence. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true.” *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn.App. 546, 555–56, 132 P.3d 789 (2006); *Pham v. Corbett*, 187 Wn.App. 816, 825, 351 P.3d 214, 219 (2015). Rather than accept the scientific and professional determination of the biologists engaged in this matter by the Honeywells, who prepared an in-depth report on the slope (CABR1711-1752 and 1681-1701), the SHB accepted the unverified testimony of DOE wetland staffer Paul Anderson, who had reviewed the site for less than two hours. The SHB erroneously concluded that the trees cut were primarily willow, alder and Douglas fir. In fact there was one live Douglas fir cut, and

no more. (TR Honeywell, Vol. IV, pg. 978). The cut trees were primarily alder – and arguably willow (whether a willow is a tree or not was debated at hearing – but is not being challenged here.)

The Honeywells engaged two biologists in this matter: Thor Hanson, and Vikki Jackson of Northwest Ecological Services (NES) (P37: CABR1711-1752). Both spent numerous days and countless hours at the site, and both prepared professional reports (P28: CABR1667-1671 and P34: CABR1681-1707; P37: CABR1711-1752). Table 2 of the NES report clearly stated the type and the dimension of the cut vegetation. NES identified 34 trees greater than 3 inches in diameter at the cut height. In addition, the NES biologist identified 33 cut willows that were cut – all which have grown back. Of the 34 trees, only two were identified as firs – and one of those was dead.

Table 2 Northwest Ecological Services/Honeywell Tree Count at stump height<sup>4</sup>

*Alnus Rubra*= alder

*Crataegus Douglasii*= Hawthorne

*Holodiscus discolor*= oceanspray

*Pseudotsuga menziesii*= douglas fir

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<sup>4</sup> Northwest Ecological Services was unable to measure the stumps at breast height, for obvious reasons, so measured at the cut height.

Salix Scouleriana= willow

Size class*	Number of plants								TOTAL
	<i>Alnus rubra</i>	<i>Crataegus douglasii</i>	<i>Holodiscus discolor</i>	<i>Malus fusca</i>	<i>Pseudotsuga menziesii</i>	<i>Salix scouleriana</i>	<i>Sambucus racemosa</i>	Unknown	
< 3"	0	0	5	0	0	0	0	0	5
3-4"	0	0	1	1	0	0	0	1	3
5-8"	4	0	2	1	0	6	10	1	24
9-12"	5	1	1	0	0	5	0	0	12
13-16"	7	0	0	0	0	9	0	0	16
> 16"	16	1	0	0	2	13	0	0	32
<b>TOTAL</b>	<b>32</b>	<b>2</b>	<b>9</b>	<b>2</b>	<b>2</b>	<b>33</b>	<b>10</b>	<b>2</b>	<b>92</b>

\* Diameter of largest stem per root system at cut height

Anderson testified that he was only on site to count tree stumps one time - on June 10, 2014 –for no more than two hours. He prepared no report. (TR Anderson, Vol. II, pg. 233) Mr. Anderson’s June visit was ostensibly to give “technical assistance” when the real surreptitious reason for his visit was to count trees (TR Honeywell, Vol. IV, pg. 965). His Recommendation for Enforcement (RFE) lists the number, species and size of trees cut, but he testified that he was guessing. (TR Anderson, Vol. II, pg. 368). Anderson guessed that there were nine Douglas fir cut, when the biologist lists two, one of which was dead at the time it was cut. Despite the fact that DOE’s Anderson, who is a wetland specialist and not a shoreline specialist, testified that he was guessing on the number and species of trees, the SHB accepted his testimony as verity and ignored the evidence. The bare assertion by Anderson does not constitute evidence of a

sufficient quantity to convince a fair minded and rational person that his tree count was true or accurate. He is not schooled in tree biology as are Ms. Jackson and Mr. Hanson, and he failed to take into consideration that many of the trees on the subject slope had been kept in check and cleared over a period of many years by the caretakers of the resort.

The SHB's Finding of Fact 35 therefore sets forth a false premise to justify the \$55,000 penalty imposed:

*Ecology based its shoreline penalty on the unauthorized removal of vegetation, including 80 trees within 200 feet of the shoreline. The SEA program treated each tree that was cut in the shoreline with a stump greater than five inches as a separate violation. At up to \$1,000 per violation, the maximum penalty for cutting 80 trees was \$80,000. The SEA program then exercised its enforcement discretion by developing a matrix categorizing the cut trees into four groups based on the size of the trees that had been cut. Larger trees were given higher dollar amounts based on the assumption that large trees have greater ecological value than smaller trees. The penalty amounts that were assessed were \$250 for 5-8 inch stumps, \$500 for 9-12 inch stumps, \$750 for 13-16 inch stumps and \$1,000 for stumps larger than 16 inches. There were 11 trees in the 5-8 inch category, 20 in the 9-12 category, 23 in the 13-16 category and 26 greater than 16 inches. The total reduced penalty based on the matrix was \$56,000. Ecology further reduced the penalty to \$55,000 by crediting the \$1,000 civil penalty*

*amount already issued by the County for the shoreline violations. Anderson Testimony, Exs. R-29, R-27.*

The Shorelines Hearings Board Finding of Fact was not based on substantial evidence. The Board chose to disregard the opinion of an expert, in lieu of acceptance of a guess by a DOE staff member who doesn't even work for the Shorelines Environmental Assistance (SEA) program. 80 regulated trees in the shoreline were not cut.

#### **B. THE DOE PENALTY MATRIX WAS ARBITRARY AND CAPRICIOUS**

The SHB erred by upholding the DOE fine. How did Ecology arrive at a \$55,000 fine? By taking an unverified unsubstantiated guess at what type of trees were taken off the slope and applying a made-up arbitrary matrix. While the Water Quality Division of DOE has established a matrix for water pollution fines, the SEA division of DOE has never, until this case, created a matrix or vetted a matrix. The SEA penalty matrix was a product of the Honeywell matter and has never been used before or since. Query: If the DOE SEA penalty was not to punish the Honeywells, why determine the penalty based on an arbitrary matrix (Table 4 of the RFE)? Why take their compliance into consideration? Ecology admitted it had never used the table before, it was not based on any administrative code and made up out of whole cloth by Paul Anderson.

Here is the Table (CABR 1947) invented by Ecology to establish the fines, which was affirmed by the SHB:

Size Class	Trees (n)	Penalty \$)/Tree	Penalty (\$)
5"-8"	11	250	2,750
9"-12"	20	500	10,000
13"-16"	23	750	17,250
➤ 16"	26	1,000	26,000
<b>Total</b>	<b>80</b>		<b>56,000</b>

Table 4 was arbitrary and was adopted just for use in the enforcement against the Honeywells.

*Q. Okay. So how long has this Table 4 matrix been used by Ecology for SEA calculations -- SEA penalty calculations?*

*A. This is the first time that I'm aware of.*

*Q. Because you drafted it? You made it up, right?*

*A. I drafted it at the request and direction of management, yes.*

(TR Anderson, Vol. II, pg. 375).

This was confirmed by DOE Regional Director Josh Baldi, who also testified at the hearing that the shoreline matrix was put together by Anderson just for this case and was reviewed by his shoreline management team. Baldi isn't aware of how trees are measured under the matrix, nor could he provide any justification for what was "a tree".

This is the only case that Paul Anderson can recall where DOE has issued a shoreline penalty. (TR Anderson, Vol. II, pg. 409-410). The SEA penalty was not based on days, but on trees. (TR Anderson, Vol. II, pg. 340). It was legal error for SHB to uphold a DOE SEA penalty on how many trees were cut – no matter what the count. The violation in this matter was for clearing the bank. This was a single, unfortunate act.

**C. DOE’S ROGUE PENALTY GOES AFOUL OF GOVERNING LAW: RCW 90.58.210 and WAC 173-27-280 LIMIT A PENALTY TO \$1,000 PER VIOLATION. A SINGLE ACT CANNOT EQUATE TO MULTIPLE VIOLATIONS.**

RCW 90.58.210(2) states:

*Any person who shall .... undertake development on the shorelines of the state without first obtaining any permit required under this chapter shall also be subject to a civil penalty not to exceed one thousand dollars for each violation. Each permit violation or each day of continued development without a required permit shall constitute a separate violation. (emphasis added)*

WAC 173-27-280, *Civil Penalty* augments state law and states in part:

(1) *A person who ... undertakes a development or use on shorelines of the state without first obtaining a permit, or who fails to comply with a cease and desist order issued under these regulations may be subject to a civil penalty by local government...*

- (2) *...Furthermore, no penalty shall be issued by the department until the individual or business has been given a reasonable time to correct the violation and has not done so. WAC 173-27-280(2)*
- (3) *Amount of penalty. The penalty shall not exceed one thousand dollars for each violation. Each day of violation shall constitute a separate violation. (emphasis added).*

The statute and the WAC limit a shoreline penalty to \$1,000 per violation. It is an arbitrary and capricious agency who decides it has omnipotent power to change the law and expand to suit their desire to penalize.

The question of whether it was appropriate for DOE to separately fine the Honeywells for each tree is a question of statutory interpretation.

*This court interprets the meaning of statutes de novo; we may substitute our interpretation of the law for that of the agency. Postema v. Pollution Control Hr'gs Bd., 142 Wn.2d 68, 77, 11 P.3d 726 (2000); State, Dept. of Ecology v. Theodoratus, 135 Wn.2d at 589, 957 P.2d 1241.*

*Ultimately, it is for the courts to determine the meaning and purpose of a statute. Postema, 142 Wn.2d at 77, 11 P.3d 726 (2000).*

*The purpose of statutory interpretation is "to determine and give effect to the intent of the legislature." State v. Sweany, 174 P.2d 909, 914, 281 P.3d 305 (2012).*

*When possible, we derive legislative intent solely from the plain language enacted by the legislature,*

*considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010); Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002). Plain language that is not ambiguous does not require construction. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003); State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).*

*If more than one interpretation of the plain language is reasonable, the statute is ambiguous, and we must then engage in statutory construction. City of Seattle 728 v. Winebrenner, 167 Wn.2d 451, 456, 219 P.3d 686 (2009); State v. Jacobs, 154 Wn.2d 596, 600–01, 115 P.3d 281 (2005).*

If a statute is within the agency's expertise, the agency's interpretation of the statute is accorded deference, so long as that interpretation does not conflict with the statute's plain language.” *Pub. Util. Dist. No. 1 of Clark County v. Pollution Control Hearings Bd.*, 137 Wn.App. 150, 157, 151 P.3d 1067 (2007). *Cnty. Ass'n for Restoration of Env't v. State, Dep't of Ecology*, 149 Wn. App. 830, 840, 205 P.3d 950, 956 (2009).

In this case, the interpretation conflicts with the statutes' plain meaning. RCW 90.58.210 is clear on its face that a fine or penalty of \$1000 per violation may be imposed. The Department of Ecology did not have the authority to expand its powers beyond the statute.

The question before the court is: What, under RCW 90.58.210 constitutes a single violation? The plain meaning of the words “each violation” connote one violation – a single act. In this particular case, the Honeywells went on a planned trip and their contractor went awry – Yes he did spend more than one day in the act of cutting, but the act was a single act – a single act of failure to obtain a permit before cutting. Neither Honeywell nor their contractor were aware that what they were doing was in violation of the County SMP – which precludes a landowner from removing trees over 3” dbh from the shoreline without an approved shoreline permit. The record is very very clear on this point. The record is also very clear that immediately after the Honeywells found out what had happened – all work came to a screeching halt and they took every available remedial action to contain the possible damage to the slope. The Honeywells adhered to every directive given by the authorities. There was no continued violation. The DOE citation was not for multiple days of activity – but rather based on the number of trees removed.

Why is this important? Because the Court is being asked to find the decision of the SHB invalid. The decision of the SHB was to affirm the DOE Penalty and the DOE penalty was for the number of

trees taken. Therefore, the Board's offhand justification that the cutting didn't simply occur on one day must fail. DOE did not issue a penalty for a multi-day violation – the penalty was based on number of trees taken.

The statute qualifies the meaning of the term “each violation” by stating that *each day of continued development without a required permit shall constitute a separate violation*. Again, this is a question of statutory interpretation. Why did the framers write this qualifying sentence? Doesn't this clause indicate an intent to punish the violator for repeat violations? Or for ignoring a directive to stop? The case law supports that position. See *Herman v. State of Washington Shorelines Hearings Bd.*, 149 Wn. App. 444, 460, 204 P.3d 928, 935 (2009), *infra*.

#### **D. ECOLOGY'S ACTIONS INCONSISTENT WITH THE REGULATORY REFORM ACT OF 1995.**

It is instructive to review the history of RCW 90.58.210. This statute was born in 1995 when the legislature adopted the Regulatory Reform Act, Laws of 1995, ch.403. Section (2)(b) iterates in part that an agency authorized to adopt laws, it must do so responsibly. *“The rules it adopts should be justified and reasonable, with the agency having determined, based on common*

*sense criteria established by the legislature, that the obligations imposed are truly in the public interest.”*

From the moment DOE became aware of what had transpired at the Honeywell site, the agency purported to repeatedly offer “technical assistance”. Part VI of the Regulatory Reform Act includes Section 601 entitled “Technical Assistance”, which was codified as RCW 43.05.005 and reads as follows:

*The legislature finds that, due to the volume and complexity of laws and rules it is appropriate for regulatory agencies to adopt programs and policies that encourage voluntary compliance by those affected by specific rules. The legislature recognizes that a cooperative partnership between agencies and regulated parties that emphasizes education and assistance before the imposition of penalties will achieve greater compliance with laws and rules and that most individuals and businesses who are subject to regulation will attempt to comply with the law, particularly if they are given sufficient information. In this context, enforcement should assure that the majority of a regulated community that complies with the law are not placed at a competitive disadvantage and that a continuing failure to comply that is within the control of a party who has received technical assistance is considered by an agency when it determines the amount of any civil penalty that is issued.*

It is important to remember in this case that there was no continuing failure to comply by the Honeywells. They should not be subject to the punitive penalty imposed by Ecology and affirmed by the SHB.

The actions of the SHB should be invalidated as inconsistent with the intent of the legislature. The legislature did not intend to give the Department of Ecology the powers to impose criminal or punitive penalties:

Section 602, codified as RCW 43.05.010 defines a civil penalty as not including a criminal penalty:

*(1) "Civil penalty" means a monetary penalty administratively issued by a regulatory agency for noncompliance with state or federal law or rules. The term does not include any criminal penalty, damage assessments, wages, premiums, or taxes owed, or interest or late fees on any existing obligation.*

Section 603 of the Act (RCW 43.05.020) directs agencies to develop programs to encourage voluntary compliance, and Section 605 (RCW 43.05.050) requires an agency to give an owner a reasonable period of time to correct violations before any civil penalties are imposed. Ecology did not follow the law.

*(1) The owner and operator shall be given a reasonable period of time to correct violations identified during a technical assistance visit before any civil penalty provided for by law is imposed for those violations.*

Finally, Section 637 of the Regulatory Reform Act adopted a new section, which was codified as RCW 90.58.210, the subject statute allowing the imposition of a civil penalty of \$1000 for each violation,

clarifying that each day of continued violation constitutes a separate violation.

The imposition of a \$55,000 fine in this case was contrary to the intent of the legislature, as expressed in the Regulatory Reform Act. The SHB decision affirming the fine is contrary to law.

**E. A \$55,000 FINE WAS NOT REASONABLE**

Even if the court concludes that a fine of more than \$1,000 is even legal, the next question to be asked is whether the fine in this case was “reasonable”. In reaching a decision on the reasonableness of a civil penalty, the Shorelines Hearings Board was to consider three primary factors: (1) the nature of the violation, (2) the prior history of the violator, and (3) the remedial actions taken by the penalized party. *Herman v. Ecology*, SHB No. 04-019 (2005); *Kinzel v. Ecology*, SHB No. 05-007 (2007).

1. DOE \$55,000 penalty based solely on the nature of the violation

The SHB erroneously affirmed the penalty based solely on the nature of the violation. Dave and Nancy Honeywell have never argued that the clearing was not egregious. But the way this clearing has been positioned is unfair, inflammatory and blown out of proportion, and not consistent with other enforcement action.

Under the San Juan County SMP there was no restriction prohibiting vegetation or removal of trees less than 3” at breast height along the shoreline. SJCC 18.50.330(B)(8):

*Removal of trees smaller than three inches in diameter, as measured four feet above grade, shall not be restricted unless there is evidence that the shoreline is unstable. The removal of smaller trees, brush, and groundcover may be restricted in unstable shorelines.*

It is the policy of the State of Washington that the SHB should have given substantial weight to a local government’s long-standing and consistent interpretation of its regulation. See *Marnin and Cook v. Mason County*, SHB No. 07-021. *Foreman v. Bellevue*, SHB 14-023.

County Planner Julie Thompson testified that under our current SMP, vegetation removal has traditionally not been regulated. If a shoreline owner wanted to cut back Nootka rose, hawthorn and blackberry bushes, they would not have needed a permit. (TR Thompson, Vol. III, pg. 541). Despite the fact that the County regulations had been in flux over the years as evidenced by the below exchange, one thing was clear -- brush cutting on the shore had not been regulated at the time of the cutting.

Q. "Trees smaller than three inches diameter at chest height, about four feet, are not regulated." Is that true or false?

A. That is true.

Q. Is it fair to say that in your history as a planner, your long-standing interpretation of our master program was that people could cut back shoreline vegetation as long as they didn't take out trees greater than three inches at breast height along the shoreline without getting a permit?

A. That is my interpretation of the code, yes.

(TR Thompson, Vol. III, pg. 542 and 536-537) (see also TR Matsumoto-Grah, Vol. I, pg. 146).

2. The Honeywells had no prior history of violations.
3. The Honeywells took every remedial action possible:

**12-13-13:** All work stopped immediately as ordered (CABR 1868-1869).

**12-13-13:** Straw placed over site, silt fence installed (TR Honeywell, Vol. IV, pg. 954)

**12-16-13:** Attorney Wagner hired. Hires stormwater engineers (TR Wagner, Vol. IV, pg. 852).

**12-18-13:** CESCL Mike Carlson hired by Wagner– straw wattles placed, silt fence replaced (CABR1615).

**12-30-13:** By this date jute matting placed by CESCL crew over entire site (TR Baumgarten, Vol I, pg. 98, P-10 and CABR1625).

**3-31-14:** County extends deadline for submission of professional restoration plan; approves of installation of native seed and some plants along slope for erosion control. (P24: CABR1661).

**4-16-14:** Thor Hanson Biologist vegetation analysis – emphasis on opportunity to restore a Golden Paintbrush colony at top of slope. (P28: CABR1667-1761).

**5-29-14:** Second Biologist called in – NES Vikki Jackson. (P32: CABR1679).

**8-14-14:** NES Restoration Plan draft issued. Finalized 12-31-14. (P37: CABR1711-1752).

**1-6-15:** Ecology approves revised Restoration Plan. (P38: CABR1753).

**F. IT WAS ERROR FOR THE SHB TO PENALIZE THE HONEYWELLS TO DETER OTHERS**

Every witness asked, testified that the Honeywells did everything they could to remedy the problem created by Engle. Every witness asked testified that the Honeywells fully complied with all County directives. DOE SEA staffer Bob Fritzen testified that he had no reason to believe the Honeywells would be repeat violators. (TR Fritzen, Vol. I, pg. 215). He also testified that this was one violation. He testified that the rationale behind the fine was “*to keep the next guy from doing it*”. (TR Fritzen 215). The Honeywells were fully cooperative. (TR Fritzen, Vol. I, pg. 225). Baldi testified that the

County did nothing wrong. So, if the Honeywells were fully compliant with County directives, why did Ecology come back, seven months after the incident and issue a second, \$55,000 fine?

The DOE compliance manual states "*Enforcement is not an end, but a means to achieve compliance and environmental protection.*" (TR Baldi, Vol. II, pg. 451). Publication No. 95-101. This is a statement taken from the on-line DOE compliance manual, written in part by Josh Baldi. Baldi admitted that the reason DOE issued its NOP was "*to deter others, not to punish the Honeywells*". (TR Baldi, Vol. II, pg. 453). He was very aware that the Honeywells had won the Powerball lottery, and admitted that fact was in the press release as well as the Governor's alert. *Id.* When asked what kind of vegetation removal would trigger a shoreline penalty, DOE Regional Director Josh Baldi testified that the removal of a mature tree probably would. He could not answer the question of what a mature tree was. (TR Baldi, Vol. II, pg. 465-466).

*Q. You just testified that the reason for this penalty was to deter others. How does that fit in with the specific fine on Honeywells?*

*A. I'm not following your . . .*

*Q. I mean, if the County's job was to ensure -- what was that line in the quote -- ensure compliance with the laws. But the County had taken the steps to ensure that the Honeywells were complying with the law, do you feel that the County did something wrong?*

A. No.

(TR Baldi, Vol. II, pg. 475)

Baldi stated in his testimony that DOE didn't issue this penalty to punish the Honeywells, but to deter others from like conduct in the future. (TR Baldi, Vol. II, pg. 453). But this is not a proper use of a civil penalty, nor is it within the purview of Ecology to use civil penalties to effectuate social compliance as such is traditionally delegated to those with responsibility for criminal enforcement. DOE claims that the purpose of a shoreline penalty is to "ensure compliance". But in our case, the Honeywells had already taken all steps they could to become compliant. All the officials, including from DOE, agreed they were compliant.

If DOE wants the law changed so it can assess more fines, then they should take their request to the legislature. DOE is not omnipotent, it is not vested with authority to criminalize environmental regulations and it cannot make up the law as it goes along. The law was not written to deter others, it was not designed to be punitive. This is not a criminal case. Punishing the Honeywells to deter others is not what the law is for. Ecology's penalty is simply contrary to state law.

A civil penalty is primarily intended to coax compliance with the law and deter future violations. *Herman v. State of Washington Shorelines Hearings Bd.*, 149 Wn. App. 444, 460, 204 P.3d 928, 935 (2009). In *Herman*, the Board imposed a \$30,000 penalty, with \$10,000 of it suspended for a year on the condition that Mr. Herman fully comply with the Board's order. But Herman was a repeat violator for literally years - between 1995 and 2004, who blatantly disregarded prior County and DOE directives and orders. In the *Herman* case, the penalty was required against the violator to secure compliance by the violator. Federal courts have reached the same conclusion when analyzing analogous federal statutes. In, *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services (TOC), Inc.*, 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (SCL 2000), a case brought under the Clean Water Act, the Supreme Court makes it very clear that the purpose of a penalty is to *deter future violations by the violator*, and not to be used as a deterrent to any other companies or individuals. The Court stated:

*For a plaintiff who is injured or threatened with injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. Insofar as they encourage defendants to discontinue current violations and deter future ones, they afford redress to citizen*

*plaintiffs injured or threatened with injury as a result of ongoing unlawful conduct. Id. at 186.*

This is a civil proceeding, not a criminal proceeding.

**G. DOE PENALTIES DRIVEN BY BODY POLITIC PRESSURES**

Josh Baldi testified that prior to becoming the DOE Regional Director, he was special assistant to the Ecology's director in charge of Puget Sound Restoration Protection Priority. Prior to that time, he worked for the Washington Environmental Council, where he associated with the Friends of the San Juans (FOSJ), and Senator Kevin Ranker, former Director of FOSJ. He testified to increasing pressure from environmental policy groups for the state to patrol the shorelines. Baldi testified that the Puget Sound Salmon Recovery Council was "leaning" on Ecology to "do more" to "implement shoreline responsibilities". (TR Baldi, Vol. II, pg. 459).

*"Actually, I would say the pressure that's in front of me next week, which I was explaining earlier, is the Puget Sound Leadership Council. An independent state agency is asking Ecology, Fish and Wildlife, and local governments how are we doing on shoreline management... I would just say there is a common expectation amongst the body politic that we will be doing a better job of shoreline management." (TR Baldi, Vol. II, pg. 437)*

*Q. Is the environmental community questioning whether the State is doing its duty to adequately protect habitat?*

A. Yes.

(TR Baldi, Vol. II, pg. 460)

#### **H. APPROPRIATE FINE of \$1,000 HAS BEEN PAID**

The SHB apparently decided that an increased fine was justified by using the methodology used by DOE - i.e. counting stumps and applying an arbitrary matrix. We have already pointed out that the Ecology tree count, from their less than two hours on site, was arbitrary and erroneous, and that at most, 34 trees greater than 3" at breast height were cut in violation of San Juan County Code.

Much of the language contained in the applicable state law and regulations speak of situations where the violation is ongoing – in other words where a violator is aware of the violation but keeps on performing the disallowed activity. This is not the case here. The clearing was one big mistake – not directed or caused by the Honeywells. It was not legally appropriate for the Board to fine the Honeywells \$55,000 for a single “violation”. First of all, the DOE penalty was based on number of trees cut, and not multiple days of violations. Second of all, this is not a case of being told to stop and the violator continuing – it is not a case of repeat or continuing violation. The error constituted a single violation.

There are no court cases on file on this issue – the case presents an issue of first impression for the court. There is only one case on point at the Administrative Level – in which the SHB fined a violator based on the number of trees cut. In 2011, the SHB reversed a \$15,000 penalty for shoreline tree removal and reduced it to \$3,000. It was not appealed to court. *Frank v. Ecology* SHB 11-003. In this case, Mr. Frank, unlike the Honeywells, had been previously put on notice and warned in 2007 that he could not take out trees along his shoreline. In addition, Spokane County had a long standing interpretation of their master program that prohibited any vegetation removal within 50' of the OHWM. Contrast to our case, where the County's long-standing interpretation of our SMP is that removal of brush and small trees was simply allowed and not regulated. Nevertheless, the decision in *Frank*, if indeed it allows a fine of greater than \$1,000 for a single incident, is an error of law and should be overturned.

The DOE shoreline penalty of \$55,000 against the Honeywells is a dramatic illegal departure from state law, and from the regulations promulgated by DOE. The law says DOE can issue a civil penalty for shoreline violations only if a violator has been given

a reasonable time to correct a violation and has not done so.  
Honeywells corrected their violation.

There was no ongoing violation in this case. There was no continued work. There was no previous notice to stop. There was no previous notice not to cut back vegetation. The Board should not have upheld a rogue decision by DOE and justified the erroneous decision by saying DOE could have penalized based on multiple days of activity.

## VI.

### CONCLUSION

Dave and Nancy Honeywell respectfully request that this Court recognize the facts of this case, and either eliminate the fine or reduce the shoreline penalty from a grossly excessive and legally unsupportable \$55,000 down to \$1,000. The Honeywells have no history of violations and did nothing but fully cooperate once the cutting was brought to their attention. They have spent thousands upon thousands of dollars defending their honor after being vilified in the news by the Department of Ecology. This fine is grossly out of proportion with other shoreline penalties issued over the years. The Honeywells cannot help but think they are being penalized for winning the lottery. Wealth should play no part in DOE fines.

Dated this 25<sup>th</sup> day of August 2016.

  
Stephanie Johnson O'Day, Attorney for  
Dave and Nancy Honeywell/Orca Dreams LLC  
WSB# 17266

## VIII. APPENDIX

RCW 90.58.210

**90.58.210. Court actions to ensure against conflicting uses and to enforce Civil penalty--Review**

(1) Except as provided in RCW 43.05.060 through 43.05.080 and 43.05.150, the attorney general or the attorney for the local government shall bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the shorelines of the state in conflict with the provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter.

(2) Any person who shall fail to conform to the terms of a permit issued under this chapter or who shall undertake development on the shorelines of the state without first obtaining any permit required under this chapter shall also be subject to a civil penalty not to exceed one thousand dollars for each violation. Each permit violation or each day of continued development without a required permit shall constitute a separate violation.

(3) The penalty provided for in this section shall be imposed by a notice in writing, either by certified mail with return receipt requested or by personal service, to the person incurring the same from the department or local government, describing the violation with reasonable particularity and ordering the act or acts constituting the violation or violations to cease and desist or, in appropriate cases, requiring necessary corrective action to be taken within a specific and reasonable time.

(4) The person incurring the penalty may appeal within thirty days from the date of receipt of the penalty. The term "date of receipt" has the same meaning as provided in RCW 43.21B.001. Any penalty imposed pursuant to this section by the department shall be subject to review by the shorelines hearings board. Any penalty imposed pursuant to this section by local government shall be subject to review by the local government legislative authority. Any penalty jointly imposed by the department and local government shall be appealed to the shorelines hearings board.

[2010 c 210 § 39, eff. July 1, 2010; 1995 c 403 § 637; 1986 c 292 § 4; 1971 ex.s. c 286 § 21.]

**WAC 173-27-280**

173-27-280. Civil penalty.

(1) A person who fails to conform to the terms of a substantial development permit, conditional use permit or variance issued under RCW 90.58.140, who undertakes a development or use on shorelines of the state without first obtaining a permit, or who fails to comply with a cease and desist order issued under these regulations may be subject to a civil penalty by local government. The department may impose a penalty jointly with local government, or alone only upon an additional finding that a person:

(a) Has previously been subject to an enforcement action for the same or similar type of violation of the same statute or rule; or

(b) Has been given previous notice of the same or similar type of violation of the same statute or rule; or

(c) The violation has a probability of placing a person in danger of death or bodily harm; or

(d) Has a probability of causing more than minor environmental harm; or

(e) Has a probability of causing physical damage to the property of another in an amount exceeding one thousand dollars.

(2) In the alternative, a penalty may be issued to a person by the department alone, or jointly with local government for violations which do not meet the criteria of subsection (1)(a) through (e) of this section, after the following information has been provided in writing to a person through a technical assistance visit or a notice of correction:

(a) A description of the condition that is not in compliance and a specific citation to the applicable law or rule;

(b) A statement of what is required to achieve compliance;

(c) The date by which the agency requires compliance to be achieved;

(d) Notice of the means to contact any technical assistance services provided by the agency or others; and

(e) Notice of when, where, and to whom a request to extend the time to achieve compliance for good cause may be filed with the agency.

Furthermore, no penalty shall be issued by the department until the individual or business has been given a reasonable time to correct the violation and has not done so.

(3) Amount of penalty. The penalty shall not exceed one thousand dollars for each violation. Each day of violation shall constitute a separate violation.

(4) Aiding or abetting. Any person who, through an act of commission or omission procures, aids or abets in the violation shall be considered to have committed a violation for the purposes of the civil penalty.;

(5) Notice of penalty. A civil penalty shall be imposed by a notice in writing, either by certified mail with return receipt requested or by personal service, to the person incurring the same from the department and/or the local government, or from both jointly. The notice shall describe the violation, approximate the date(s) of violation, and shall order the acts constituting the violation to cease and desist, or, in appropriate cases, require necessary corrective action within a specific time.

Statutory Authority: RCW 90.58.120, 90.58.200, 90.58.060 and 43.21A.681. WSR 11-05-064 (Order 10-07), S 173-27-280, filed 2/11/11, effective 3/14/11. Statutory Authority: RCW 90.58.140(3) and (90.58).200. WSR 96-20-075 (Order 95-17), S 173-27-280, filed 9/30/96, effective 10/31/96.

# SJCC SMP EXCERPT

18.50.060

## Clearing and Grading

## **18.50.060 Clearing and grading.**

A. Clearing and grading activities are allowed only if: (1) associated with an approved shoreline development; (2) conducted only landward of a required building setback from shorelines; and (3) disturbed areas not converted to another use within one year are replanted with native species. Replanted areas shall be maintained so that the vegetation is fully reestablished within three years of planting.

B. Normal nondestructive pruning and trimming of vegetation for maintenance purposes is not subject to these clearing and grading regulations. In addition, clearing by hand-held equipment of invasive nonnative shoreline vegetation or plants listed on the state noxious weed list is allowed, provided native vegetation is promptly reestablished in the disturbed area.

C. Tree removal permitted in a development approval is exempt from the regulations in this section.

D. Commercial timber harvest conducted in accordance with an approved forest practices permit is exempt from the regulations in this section. (Ord. 2-1998 Exh. B § 5.4.3)

**SJCC SMP EXCERPT**  
**18.50.330B**

**Residential Development**

**San Juan County SMP/SJCC 18.50.330B  
Residential Development**

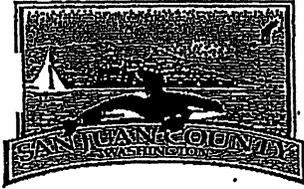
8. Land clearing, grading, filling, or alteration of wetlands, natural drainage, and topography for residential construction shall be limited to the area necessary for driveways, buildings, and view and solar access corridors. Cleared surfaces not to be covered with gravel or impervious surfaces shall be replanted promptly with native or compatible plants (i.e., groundcovers or other plant materials adapted to site conditions which will protect against soil erosion). This applies to individual construction and shoreline subdivisions.

Existing vegetation shall be used to visually buffer structures as viewed from the shoreline, public roads, and adjoining properties. All applications for new construction and subdivisions shall indicate any trees to be removed. If trees are to be removed beyond those required to construct a single-family residence, then a tree removal plan shall also be submitted. The plan shall:

- a. Identify the proposed building areas and driveways and view and solar access corridors; and
- b. Demonstrate how existing natural screening will be retained while providing for construction, views, and sunlight.

Removal of trees smaller than three inches in diameter, as measured four feet above grade, shall not be restricted unless there is evidence that the shoreline is unstable. The removal of smaller trees, brush, and groundcover may be restricted in unstable shorelines.

**2/6/2014**  
**SAN JUAN COUNTY**  
**NOTICE OF VIOLATION**



**San Juan County**  
**Community Development & Planning**  
135 Rhone Street P.O. Box 947 Friday Harbor, WA 98250  
(360) 378-2354 (360) 378-2116 Fax (360) 378-3922  
www.sanjuanco.com

CASE NO. PCI000-13-0009

## NOTICE OF VIOLATION

Date of Issuance: February 6, 2014 Date of Service: February 10, 2014 Tax Parcel #: 353344008 Property Address: 1601 A False Bay Drive Friday harbor, WA 98250 Comprehensive Plan Designation: RFF	Compliance Deadline: March 27, 2014
Owner: OrcaDreams LLC Address: 718 E. 35 <sup>th</sup> Ave. Spokane, WA 99203-3160	Responsible Person: Dave Honeywell Address: 1601 A False Bay Drive Friday Harbor, WA 98250 Additional Responsible Person: Allen Benjamin Engle d/b/a Solid Ground Address: 6429 Roche Harbor Road Friday Harbor, WA 98250

### BACKGROUND:

On December 13, 2013, the date this violation was first identified to or by the director of San Juan County Community Development & Planning, San Juan County Building Official John Geniuch visited tax parcel 353344008, now commonly referred to as the "Mar Vista" site, in response to a complaint regarding clearing, grading, and burning activity on the shoreline.

Upon his arrival Mr. Geniuch observed a crew of workers, later identified as employees of Allen Benjamin Engle, owner and operator of "Solid Ground", and near them on the ground a chain saw with a thirty two (32) inch bar, rakes, shovels, and one worker using a small orange excavator to push logs of mainly Alder, Maple, and Douglas Fir, and brush consisting of mainly small tree saplings and snow-berry, and other vegetative debris into four (4) large burn piles that were actively burning in an area of approximately one and a quarter acre located from the central small white cabin to the most western point of the property, and from the east of the bank down to the ordinary high water mark, and which had been cleared of vegetation down to mineral soil.

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Exhibit R-24

Mr. Geniuch spoke to the workers and directed them to stop their activity and to put out the fires; Mr. Geniuch then proceeded to write out and post a Stop Work Order during which Allen Benjamin Engle arrived at the site refusing to speak to Mr. Geniuch and directing his crew to pick up their gear and leave.

It has since been established that Allen Benjamin Engle was hired by the owner, Dave Honeywell, to "clean-up the hillside, remove any old trails, and return the hillside to a natural appearance..." —Dave Honeywell, Statement of Dave Honeywell 1/2/2014.

#### VIOLATIONS:

On or about days between September 26, 2013 and December 13, 2013 at the Orca Dreams Property and in the vicinity described above, David Honeywell and/or Allen Benjamin Engle did work or caused work to be done within 200 feet of the ordinary high water mark that included the clearing of vegetation to ground level, including the removal of approximately eighty (80) trees, shrubs and other vegetation, which work was not associated with an approved shoreline development and was conducted shoreward of shoreline building setback established by the legally existing non-conforming small white cabins at the crest of the bank, which work was not the normal nondestructive pruning and trimming of vegetation for maintenance purposes or the removal of plants listed on the state noxious weed list, in violation of SJCC 18.50.060(A) and the Revised Code of Washington State (RCW) 90.58.210(2).

On or about days between September 26, 2013 and December 13, 2013 at the Orca Dreams Property and in the vicinity described above, David Honeywell and/or Allen Benjamin Engle did work or caused work to be done within 200 feet of the ordinary high water mark that included the clearing of vegetation to ground level, including the removal of approximately eighty (80) trees, shrubs and other vegetation, which work was "land-disturbing activities of greater than one acre" and violating the requirements of SJCC § 18.60.070 Preamble by not conforming to the standards and minimum requirements set forth by the Washington Department of Ecology Stormwater Management Manual Volume 1, Chapter 1, and Section 1.6.9 by failing to apply for and receive approval of an NPDES Construction Stormwater General Permit from the Washington State Department of Ecology.

On or about days between September 26, 2013 and December 13, 2013 at the Orca Dreams Property and in the vicinity described above, David Honeywell and/or Allen Benjamin Engle did work or caused work to be done within 200 feet of the ordinary high water mark that included the clearing of vegetation to ground level, including the removal of approximately eighty (80) trees, shrubs and other vegetation, which work was "land-disturbing activities of greater than one acre" and violating the requirements of SJCC § 18.30.110(B) and § 18.60.070 Preamble by not conforming to the standards and minimum requirements set by the Washington Department of Ecology Stormwater Management Manual Volume 1, Chapter 2, and Section 2.4 by failing to apply for and receive approval of a stormwater management site plan that adheres to minimum requirements 1-10.

**CORRECTIVE ACTION:**

Required Corrective action(s) are:

1. Pursuant to Washington Administrative Code § 173-27-270 and San Juan County Code §18.100 *et al.* all clearing and grading activity in the Shoreline Jurisdiction is to cease and desist.
2. Pursuant to RCW 90.58.050 Orca Dreams LLC shall develop a Restoration Plan that mitigates the disturbed area as described above in accordance with the Washington State Department of Ecology who shall review and approve the plan.

The above violation(s) must be corrected by March 27, 2014.

**MONETARY PENALTY ASSESSED BY SAN JUAN COUNTY ON ALLEN BENJAMIN ENGLE**

Pursuant to the authority granted by San Juan County Code § 18.100.200, a civil penalty is hereby imposed on ALLEN BENJAMIN ENGLE for development on the shoreline in violation of the shoreline master program as described above, in the amount of one thousand dollars (\$1,000) for the violation of SJCC § 18.30.110(B), § 18.60.070 Preamble, and SJCC § 18.50.060 as described above.

The County may assign unpaid fines to a collection agency pursuant to SJCC 18.100.190.

San Juan County may claim a lien for any monetary penalty imposed and the cost of abatement.

**POTENTIAL FOR ADDITIONAL MONETARY PENALTIES FOR FAILURE TO COMPLY:**

Pursuant to SJCC 18.100.130 fines shall be assessed for failure to respond to or comply with this Notice by the compliance deadline as follows:

- Day 1 to 45 a fine of \$500 a day shall be assessed.
- Day 46 days to 60 an additional fine of \$1000 (=1500) a day shall be assessed
- Day 61 days to 90 an additional fine of \$1000 (=2500) shall be assessed

The County may assign unpaid fines to a collection agency pursuant to SJCC 18.100.190.

**NOTICE OF LIEN/ABATEMENT**

A lien for any monetary penalty imposed and the cost of abatement may be claimed by San Juan County.

**ADMINISTRATIVE APPEAL:**

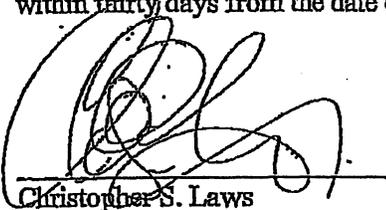
Pursuant to SJCC § 18.100.130, this Notice of Violation may be appealed by delivering a written appeal conforming to the requirements of SJCC § 18.100.130 to the Director of CD&P by U.S. Mail, or personal delivery during the business hours of CD&P, along with the administrative fee, within 45 days of the date of service of this Notice of Violation.

Failure to file a timely and complete appeal may constitute a waiver of all rights to appeal this Notice of Violation.

**MONETARY PENALTY ASSESSED BY SAN JUAN COUNTY ON DAVID HONEYWELL AND ALLEN BENJAMIN ENGLE**

Pursuant to the authority granted by RCW 90.58.210, a civil penalty is hereby imposed on DAVID HONEYWELL for development on the shoreline in violation of the shoreline master program as described above, in the amount of one thousand dollars (\$1,000) for the violation of SJCC § 18.50.060, as described above. Pursuant to RCW 90.58.210 (4) the penalty imposed pursuant to this section by San Juan County may be subject to review by the San Juan County Council by filing an appeal with the Clerk of the County Council within thirty days from the date of receipt of this document imposing the penalty.

Pursuant to the authority granted by RCW 90.58.210, a civil penalty is hereby imposed on ALLEN BENJAMIN ENGLE for development on the shoreline in violation of the shoreline master program as described above, in the amount of one thousand dollars (\$1,000) for the violation of SJCC § 18.50.060, as described above. Pursuant to RCW 90.58.210 (4) the penalty imposed pursuant to this section by San Juan County may be subject to review by the San Juan County Council by filing an appeal with the Clerk of the County Council within thirty days from the date of receipt of this document imposing the penalty.



Christopher S. Laws  
Code Enforcement Officer  
San Juan County Community Development & Planning Department  
(60) 370-7587

Cc: Bob Fritzen, Department of Ecology San Juan County Prosecuting Attorney  
Mike Thomas, County Manager

7/7/2014

DEPARTMENT OF ECOLOGY

ORDER AND NOTICE  
OF PENALTY INCURRED

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

IN THE MATTER OF THE COMPLIANCE	)	
BY ORCA DREAMS, LLC (DAVID HONEYWELL)	)	
WITH CHAPTER 90.58 RCW AND THE	)	DOCKET # 10792
RULES AND REGULATIONS ADOPTED	)	ORDER AND NOTICE
THEREUNDER INCLUDING THE SAN JUAN	)	OF PENALTY INCURRED
COUNTY SHORELINE MASTER PROGRAM	)	

To: Mr. David Honeywell  
Orca Dreams, LLC  
718 E. 35th Ave  
Spokane, WA 99203-3160

Notice of Penalty Docket #	10792
Site Location	(Former) Mar Vista Resort 1601 A False Bay Drive Friday Harbor, WA 98250
Penalty Amount	\$55,000
Due Date	Within 30 days after receiving this Notice of Penalty.

NOTICE IS HEREBY GIVEN that you and Orca Dreams, LLC have incurred and there is now due and payable a penalty in the amount of fifty-five thousand dollars (\$55,000) for the unauthorized removal of vegetation, including 80 trees, within 200 feet of the shoreline in violation of Chapter 90.58 Revised Code of Washington (RCW) and the San Juan County Shoreline Management Master Program. Each day of non-compliance with the requirements of this Order may incur additional penalties of up to one thousand dollars (\$1,000) per day.

RCW 90.58.210 allows for up to \$1,000 for each violation. Each cut tree is a separate violation for a total possible penalty under RCW 90.58.210 of \$80,000. The Washington Department of Ecology (Ecology) Shorelands and Environmental Assistance Program has elected to exercise enforcement discretion and reduce the penalty to \$55,000. The \$80,000 potential penalty was reduced based on tree size classes listed in the table below and subtracting out the \$1,000 penalty assessed by San Juan County for a total penalty of \$55,000.

Size Class*	Trees (n)	Penalty (\$)/Tree	Penalty (\$)
5-8"	11	250	2,750
9-12"	20	500	10,000
13-16"	23	750	17,250
> 16"	26	1,000	26,000
<b>Total</b>	<b>80</b>		<b>56,000</b>

\* Diameter at cut stump

SEA-NOP (9/2011)

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David Honeywell/Orca Dreams  
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Compliance with this Order to the satisfaction of the Department of Ecology may result in reduction of the original penalty.

#### **DETERMINATION OF VIOLATIONS**

Ecology's determination that violations have occurred is based on the violations listed below.

**Violation(s):**  
Violation description:

#### **ALLEGATIONS OF FACT**

1. That David Honeywell dba Orca Dreams, LLC (hereinafter referred to as "Orca Dreams") owns or controls certain real estate property located at 1601 False Bay Drive, Friday Harbor, WA 98250.
2. That the above described property is located near False Bay, a shoreline of the state.
3. That on July 1, 2013, San Juan County issued a Residential Pre-Application (RPA) to Orca Dreams and its representatives summarizing an April 15<sup>th</sup> meeting and April 21<sup>st</sup> site visit. Among other things, the RPA established the presence of a marine preserve at neighboring False Bay, and that removal of trees within shoreline jurisdiction required a Community Development & Planning approved tree removal plan.
4. That Orca Dreams hired Allen Engle dba Solid Ground (hereinafter referred to as "Solid Ground") to "clean-up the hillside, remove any old trails, and return the hillside to a natural appearance..." - Dave Honeywell, Statement of Dave Honeywell 1/2/2014.
5. That Solid Ground has removed approximately 1.25 acres of vegetation including 80 trees from within 200 feet of the ordinary high water mark of False Bay at the above address with no local or state approval.

#### **ALLEGATIONS OF LAW**

1. That False Bay has been designated to be a shoreline of the state pursuant to RCW 90.58.030(2)(e).

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2. That the above described actions took place within shoreline jurisdiction, RCW 90.58.030(2)(d).
3. That the San Juan County Shoreline Master Program (SMP) at Policy 3.4B *Clearing and Grading*, (1) limits clearing and grading to the minimum necessary to accommodate shoreline development and minimize adverse impacts to water quality and wildlife habitat; and (2) requires clearing and grading activities to be designed with the objective of maintaining density of ground coverage, and natural diversity in species, age, and vegetation.
4. That the SMP at regulation 18.50.060 *Clearing and Grading*, A.(1) states that clearing and grading activities are allowed only if associated with an approved shoreline development.
5. That the SMP Policy 3.2F *Conservation* (10) prohibits clearcutting unless allowed by an approved conversion option harvest plan or Class IV General forest practices permit.
6. That the SMP at regulation 18.50.240 *Forest management*, A.(4) states: "Clearcutting on shorelines shall not be permitted unless allowed by an approved Class IV General forest practices permit."
7. That the SMP at regulation 18.50.330 *Residential Development*, (B.8.) states in part: "If trees are to be removed beyond those required to construct a single-family residence, then a tree removal plan shall also be submitted."
8. The SMP at regulation 18.50.130 *Vegetation management*, A. requires the protection of vegetation from degradation caused by modification of the land surface with the shoreline area.
9. That RCW 90.58.210 (2) states that any person who undertakes development on the shorelines of the state without first obtaining any permit required under Chapter 90.58 RCW shall be subject to a civil penalty not to exceed one thousand dollars for each violation. Ecology has determined that each tree removed constitutes a violation.
10. That Washington Administrative Code (WAC) 173-27-280 provides that local government and the Department of Ecology shall have the authority to issue a civil penalty to any person who undertakes a development on shorelines of the state without first obtaining a permit.

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David Honeywell/Orcas Dreams  
July 7, 2014  
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11. That the unauthorized and prohibited removal of shoreline vegetation within 200 feet of the ordinary high water mark of False Bay undertaken by Orcas Dreams violates provisions of Chapter 90.58 RCW, Chapter 173-27 WAC and the San Juan County Shoreline Master Program.

#### **REMEDY OF VIOLATIONS**

Ecology is requiring the actions listed below to resolve the violations.

In view of the foregoing and in accordance with the provisions of RCW 90.58.210 and WAC 173-27-280(1)(b) & (d):

IT IS ORDERED THAT Orca Dreams and any other person acting as its employee or agent shall upon receipt of this Order immediately cease and desist from all further development activities, including but not limited to all clearing and grading within 200 feet of the ordinary high water mark of False Bay at the above referenced address, except to the extent that such work is specifically ordered and authorized by the Department of Ecology or San Juan County to bring the above mentioned project into compliance with the SMA except for unassociated activities approved by the County.

IT IS FURTHER ORDERED that Orca Dreams shall comply with all of the following:

- A) Submit a preliminary plan for restoration of the site to Ecology's Northwest Regional Office, Attn: Paul S. Anderson, 3190 160th Avenue SE, Bellevue, WA 98008-5452 no later August 31, 2014. Any submittals shall reference Order # 10792.
- B) The preliminary plan, prepared by a qualified consultant experienced in designing restoration plans in this setting, shall include restoration of the cleared area of marine riparian forest through the replanting of comparable species of trees and shrubs.
- C) Based on input and comments from Ecology on the preliminary plan, a final restoration plan shall be submitted to Ecology no later September 30, 2014 for final review and approval.
- D) The final restoration plan shall contain a monitoring plan and schedule (10 years), performance standards and contingency measures to ensure both

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short- and long-term survival of the plantings and that the site is on a trajectory to restore shoreline ecological functions lost or impaired through the unauthorized clearing.

- E) Any changes to the approved restoration plan shall be submitted in writing to Ecology (see Condition A) for review and approval before work begins.
- F) Site restoration shall be completed no later than October 31, 2014.
- G) Orca Dreams shall provide access to the sites upon request by Ecology personnel for site inspections, monitoring, necessary data collection, and/or to ensure that conditions of this Order are being met.
- H) Nothing in this Order waives Ecology's authority to issue additional orders if Ecology determines that further actions are necessary to implement the laws of the state. Further, Ecology retains continuing jurisdiction to make modifications hereto through supplemental order, if additional impacts due to project construction or operation are identified (e.g., violations of water quality standards, downstream erosion, etc.), or if additional conditions are necessary to further protect water quality and shoreline functions.
- I) If the Orca Dreams has not met all conditions, including performance standards for the restoration site at the end of the monitoring period, Ecology may require additional monitoring, additional restoration or mitigation:
- J) Until Orca Dreams has received written notice from Ecology that the restoration plan has been fully implemented, Orca Dreams' obligation to restore the site is not met.

Failure to comply with the terms of this order shall result in further actions by the Department of Ecology, including, but not limited to, the issuance of further civil penalties of up to one thousand dollars (\$1,000) per day per violation.

The penalty herein described is due and payable by you within thirty (30) days of your receipt of this Notice of Penalty. Please remit the penalty fee payable to Department of Ecology, Cashiering Section, P.O. Box 5128, Lacey, WA 98503.

**ELIGIBILITY FOR PAPERWORK VIOLATION WAIVER AND OPPORTUNITY TO CORRECT**

Under RCW 34.05.110, small businesses are eligible for a waiver of a first-time paperwork violation and an opportunity to correct other violations. We have made no determination as to

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whether you meet the definition of a "small business" under this section. However, we have determined that the requirements of RCW 34.05.110 do not apply to the violation(s) due to the fact that no correction of the violation is possible within the statutory period of 7 days.

**FAILURE TO COMPLY WITH THIS NOTICE OF PENALTY**

Continued failure to correct the violations listed in this Notice of Penalty may result in additional, escalated penalties.

**OPTIONS FOR RESPONDING TO A NOTICE OF PENALTY**

**Option 1: Pay the penalty within 30 days after receiving the Notice of Penalty.**

Make your payment payable to the *Department of Ecology*. Please include the penalty docket number on your payment.

Mail payment to:

Department of Ecology  
Cashiering Unit  
PO Box 47611  
Olympia, WA 98504-7611

Note: Ecology may take legal action to collect the penalty if you have not paid 30 days after receiving the Notice of Penalty, and have not appealed.

**Option 2: Appeal to the SHB and serve Ecology within 30 days after the date of receipt of the Notice of Penalty.**

The appeal process is governed by RCW 90.58.210(4) and Chapter 461-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do both of the following within 30 days after the date of receipt of this Notice of Penalty:

- File your appeal and a copy of this Notice of Penalty with the Shorelines Hearings Board (SHB) during regular business hours.
- Serve a copy of your appeal and this Notice of Penalty on Ecology in paper form, by mail or in person. E-mail is not accepted.

You must also comply with other applicable requirements in RCW 90.58.210 and Chapter 461-08 WAC.

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**ADDRESS AND LOCATION INFORMATION**

Street Addresses	Mailing Addresses
<p><b>Department of Ecology</b> Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503</p> <p><b>Shorelines Hearings Board</b> 1111 Israel Road SW STE 301 Tumwater, WA 98501</p>	<p><b>Department of Ecology</b> Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608</p>

**CONTACT INFORMATION**

Bob Fritzen  
Department of Ecology  
Bellingham Field Office  
1440 10<sup>th</sup> Street, Suite 102  
Bellingham, WA 98250

Phone: 360 715-5207  
Email: bfr461@ecy.wa.gov

**MORE INFORMATION**

- **Shorelines Hearings Board:**  
[http://www.cho.wa.gov/Boards\\_SHB.aspx](http://www.cho.wa.gov/Boards_SHB.aspx)
- **Chapter 461-08 WAC – Practice and Procedure**  
<http://apps.leg.wa.gov/WAC/default.aspx?cite=461-08>
- **Chapter 34.05 RCW – Administrative Procedure Act**  
<http://apps.leg.wa.gov/RCW/default.aspx?cite=34.05>
- **Laws:** [www.ecy.wa.gov/laws-rules/ecyrow.html](http://www.ecy.wa.gov/laws-rules/ecyrow.html)
- **Rules:** [www.ecy.wa.gov/laws-rules/ecywac.html](http://www.ecy.wa.gov/laws-rules/ecywac.html)

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Notice of Penalty Docket # 10792  
David Honeywell/Orca Dreams  
July 7, 2014  
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SIGNATURE

*Gordon White*

\_\_\_\_\_  
Gordon White  
Program Manager  
Shorelands and Environmental Assistance Program

July 7, 2014  
Date

001932

No. 75457-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
FOR DIVISION ONE

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DAVE AND NANCY HONEYWELL, dba ORCA DREAMS LLC,

Appellants,

vs.

WASHINGTON STATE DEPARTMENT OF ECOLOGY

Respondents.

2016 AUG 26 AM 11:27

COURT OF APPEALS  
STATE OF WASHINGTON

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**DECLARATION OF SERVICE BY MAIL**

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Stephanie Johnson O'Day, WSBA  
#17266, Attorney for Appellant  
Dave and Nancy Honeywell dba  
ORCA DREAMS, LLC

Law Offices of  
Stephanie Johnson O'Day  
P O Box 2112  
Friday Harbor, WA 98250  
(360) 378-6278

I, Nancy F. Fusare, being first duly sworn on oath under the laws of the state of Washington, declares as follows:

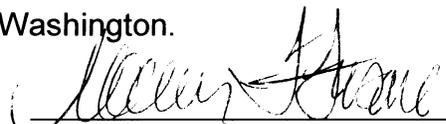
I am a citizen of the United States and a resident of San Juan County, State of Washington, over the age of 18 years and am not a party to the above-entitled action. My business address is 540 Guard Street, Suite 120, Friday Harbor, Washington, 98250.

On August 25, 2016, a true and correct copy of Appellants' Opening Brief was placed in an envelope addressed to and mailed to:

SONIA A. WOLFMAN  
Assistant Attorney General  
P.O. Box 40117  
Olympia, WA 98504-0117

Which envelope, with postage thereon fully prepaid, was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Friday Harbor, Washington.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct this 25<sup>th</sup> day of August, 2016 at Friday Harbor, Washington.

  
Nancy F. Fusare, Declarant