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DIVISION II

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STATE OF WASHINGTON

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NO. 39691-2

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

PACIFIC TOPSOILS, INC., a Washington Corporation and DAVE
FORMAN, an individual,

Appellants,

v.

THE WASHINGTON STATE DEPARTMENT OF ECOLOGY, a
Division of the State of Washington,

Respondent.

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

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I. INTRODUCTION

Washington's Water Pollution Control Act ("WPCA"), RCW 90.48, prohibits the discharge of pollution into waters of the state, including wetlands. Pacific Topsoils, Inc. ("PTI") violated the WPCA by discharging soil into waters of the state of Washington resulting in an unauthorized and illegal filling of wetlands on PTI's Smith Island site. The Department of Ecology ("Ecology") issued an order requiring PTI to remove the soil from the wetland, and penalized PTI and Dave Forman \$88,000.

The Pollution Control Hearings Board ("Board") affirmed Ecology's order and penalty, finding that the area of Smith Island PTI filled contained wetlands and concluding that the filling of those wetlands constituted a violation of RCW 90.48.080. The Board also concluded that Ecology's penalty was reasonable. The Thurston County Superior Court affirmed the Board's decision. In addition, the superior court held that Ecology's actions did not violate PTI's due process rights and that RCW 90.48.080 was not unconstitutionally vague as applied to PTI. Because the record contains substantial evidence establishing that PTI filled wetlands, Ecology appropriately issued the order and penalty. The Court should therefore affirm the Board and superior court decisions upholding Ecology's order and penalty issued to PTI for violations of the WPCA.

II. COUNTER STATEMENT OF ISSUES

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

2. Whether the Board's determination that PTI discharged pollution into waters of the state when it filled wetlands at Smith Island is supported by substantial evidence?

3. Whether the Board's affirmance of the penalty is supported by substantial evidence, is consistent with applicable law, and is not arbitrary and capricious?

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

5. Whether RCW 90.48.080 is unconstitutionally vague as applied to PTI?

III. COUNTER STATEMENT OF CASE

A. Procedural History

On October 16, 2006, Ecology received a complaint concerning unauthorized grading and filling of a Category 3 wetland area at PTI's site on Smith Island. RP 55:16–56:7; Ex. R-1. Ecology assigned wetland specialist Paul Anderson to investigate the complaint. RP 173:20–21. Through his investigation, which included a site visit on October 27, 2006,

Mr. Anderson determined that wetlands had been filled. RP 173:20–189:24; Exs. R-7, R-29. At the conclusion of his site visit, Mr. Anderson communicated his conclusion to PTI’s Environmental Director, Janusz Bajsarowicz, and requested a wetland delineation. RP 189:15–189:24. Mr. Bajsarowicz informed Mr. Anderson that a wetland delineation was being prepared for PTI by the consulting firm Parametrix. RP 189:25–191:6. Over the next four months, Ecology made several requests to PTI for the wetland delineation to no avail. RP 190:19–191:13.

On March 7, 2007, Ecology issued Order 4095 alleging that PTI violated RCW 90.48.080 by filling wetlands and requiring PTI to comply with the WPCA by: (1) removing approximately 12 acres of fill material discharged into wetlands at the PTI facility on Smith Island, and (2) restoring the affected wetland to its pre-fill condition within 15 days of removal. Ex. R-13. On the same day, Ecology issued an \$88,000 civil penalty to PTI for its violation of RCW 90.48.080. Ex. R-14.

PTI appealed Order 4095 and Penalty 4096 to the Board, and following a two-day evidentiary hearing, the Board fully affirmed Order 4095 and Penalty 4096. Findings of Fact, Conclusions of Law, and Order (“Board Order”) at 35.

B. Board Findings And Conclusions

The following facts were found by the Board, or reflect evidence

supporting Board findings:

PTI is a soil processing company that owns property on Smith Island, Snohomish County, Washington. Board Order at 2 (Finding of Fact (“FOF”) 1); Exs. A-1 (p. 1), R-19 (pp. 1, 21). Smith Island has large areas of historically documented wetlands. Board Order at 2–3 (FOF 2); Exs. R-3, R-4, R-15 (pp. 1-2, 5-1), A-129 (Fig. 1), A-140. A wetland study done on the subject property described the site as a “mosaic of wetlands.” Board Order at 2–3 (FOF 2); RP 66:9–68:14. PTI sought to expand its operations. Board Order at 3 (FOF 3); Ex. R-19 (Fig. 3, pp. 7, 21). In furtherance of its expansion plans, PTI placed fill material on approximately 12 acres of the site without permits of any kind. Board Order at 3 (FOF 3); Ex. A-142; RP 120:13–121:6, 98:24–99:1, 173:13–174:7. The fill pile, estimated to be 15 to 17 feet deep and 75,000 to 150,000 cubic yards, would require 15,000 dump truck and trailer loads to remove. Board Order at 5–6 (FOF 7); Ex. R-21 (p. 3). The fill material was not tested for contaminants prior to placement at the site. Board Order at 3 (FOF 3); RP 510:7–19.

A wetland is transitional land that lies between terrestrial and aquatic systems where the water table is at or near the surface or where the

land is covered by shallow water. Board Order at 9 (FOF 13).¹ There are three indicators of the existence of a wetland: (1) vegetation adapted to hydric (wet) soil conditions, (2) hydric soils, and (3) hydrology (the presence of water). Board Order at 13 (FOF 18); Ex. A-38 (p. 6). Investigation of PTI's site by Ecology and PTI's consultant, Parametrix, found the presence of all three wetland indicators. Board Order at 13 (FOF 18); RP 186:12–188:24, 200:19–201:17, 237:9–15, 316:4–10, Exs. R-19 (pp. 16–17), R-7, R-29, R-30.

Because the presence of unauthorized fill had altered previous site characteristics and conditions, Ecology's Wetland Delineation Manual calls for the use of the Atypical Situations methodology. Board Order at 11-12 (FOF 16); Ex. A-38 (p. 70); RP 426:18–21. *See also* Ex. A-51 (p. 98). Both Mr. Anderson and Parametrix employed that methodology in their contemporaneous investigations. Board Order at 11–12 (FOF 16); RP 188:25–189:14; Ex. R-19 (pp. 15, 17). The Atypical Situations methodology is used to determine the *previous* existence of a wetland, and to decide where a wetland boundary existed in the past when it is no longer obvious in the present due to unauthorized alteration of one or more

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

wetland indicators. Board Order at 11–12 (FOF 16); Exs. A-38 (p. 70), A-51 (p. 98); RP 168:22–172:17.

Vegetation: Both Ecology and Parametrix wetland specialists determined that, although the vegetation that existed prior to the fill was no longer present under the fill, the wetland vegetation surrounding the fill was typical and representative of what once grew on the filled areas. Board Order at 13–15 (FOF 19); RP 173:13–189:12, 199:22–201:17; Ex. R-19 (p. 17). “A distinction between vegetative communities present in undisturbed wetland areas and filled wetland areas was not observed in review of aerial photographs, indicating fill areas previously were vegetated with a similar hydrophytic vegetative community found throughout undisturbed portions of the wetland.” Ex. R-19 (p. 17). The site contains a small unfilled area situated within a slight depression and surrounded on all sides by fill material. Board Order at 13–15 (FOF 19); Exs. R-2, R-19 (p. 17). Observations of its plant species regeneration, buried plant material and native soil layers, as well as review of historic aerial photographs established that this small area is an obvious wetland and is representative of the adjacent surrounding land under the fill. Board Order at 13–15 (FOF 19); RP 199:22–201:17, 432:5–434:1; Ex. A-1 (Appendix A).

Soils: The Atypical Situations methodology requires a description and analysis of the alteration, the effects on the soils, and a characterization of soils that previously occurred, including the buried soils when fill material has been placed over the original soil. Board Order at 15–16 (FOF 20); Ex. A-38 (pp. 73–74). Indicators of the existence of a wetland in mineral soils include observations of surface water or saturated soils and the listing of the soil as a hydric soil. Ex. A-38 (pp. 24–26). Oxidized rhizospheres along living roots, composed of oxidized iron concentrations, are evidence of current or recent soil saturation. Board Order at 15–16 (FOF 20); RP 171:19–172:17, 186:3–187:1, 237:10–240:12; Ex. A-51 (pp. 69, 87–88).

The investigations of Ecology, Parametrix, and PTI's wetlands expert, James Kelley, revealed the presence of oxidized rhizospheres in the soils surrounding living roots. Board Order at 15–16 (FOF 20); Exs. A-5, A-79, R-19 (p. 16); RP 186:3–187:1, 399:11–17. Oxidized rhizospheres on living plant roots are a primary wetland hydrology indicator. Board Order at 15–16 (FOF 20); Exs. R-19 (p. 16), A-38 (p. 33–34), A-51 (pp. 69, 87–88); RP 171:19–172:17, 538:4–540:1. The presence of oxidized rhizospheres on live roots indicates that wetland hydrology is active and present at PTI's site and that hydric soil indicators

are a contemporary, not relict, feature. Board Order at 15–16 (FOF 20); RP 237:10–240:12; Exs. A-38 (pp. 73–75), A-51 (pp. 69, 87–88), R-7.

Hydrology: Under the Atypical Situations methodology, to determine whether wetland hydrology previously occurred on a site, investigators must examine whether the site has been altered, the effects of the alteration on area hydrology, and characteristics of hydrology that previously existed in the area. Board Order at 16–18 (FOF 21); Ex. A-38 (pp. 75–77). If there is evidence that hydrology existed prior to site alteration, investigators can determine that the hydrology criteria is satisfied. Board Order at 16–18 (FOF 21); Ex. A-38 (p. 77). When there has been filling of a wetland, some primary hydrology indicators (i.e., inundation or saturation) may be obscured, and investigators must rely on indicators such as the presence of oxidized rhizospheres, sediment deposits (including dried algae), surface scouring, and soil survey data indicating positive wetland hydrology for their conclusions. Board Order at 15–16 (FOF 20); Ex. A-38 (pp. 33–34).

Ecology and Parametrix made extensive investigations of the historic record. Board Order at 16–18 (FOF 21); RP 173:13–179:15, 201:18–209:17; Ex. R-19 (pp. 2, 15–18). Although the site had been drained with dikes and ditches in the past for farming, these efforts were never completely successful. Board Order at 16–18 (FOF 21); Exs. R-2,

A-27; RP 215:17–216:6. Photographic evidence from 1947 forward shows that the site has consisted of wetlands for many years. Board Order at 16–18 (FOF 21); Exs. R-2, A-27. The National Cooperative Soil Survey describes the soils at the PTI site as hydric (wetland) soil. Board Order at 16–18 (FOF 21); Ex. R-3. The national wetlands inventory of the United States Department of Fish and Wildlife Service identifies seasonally and temporarily flooded wetlands on much of the PTI site. Board Order at 16–18 (FOF 21); RP 177:11–179:15; Ex. R-4. Parametrix reviewed aerial photographs in addition to its field observations of inundation, saturation to the surface, oxidized rhizospheres and landscape hydrologic patterns, and concluded they indicated a historic continuity of hydrologic regimes between wetland fill areas and undisturbed wetland areas. Board Order at 16–18 (FOF 21); Ex. R-19 (pp. 16–17).

Ecology concluded that PTI filled wetlands at its Smith Island site. Board Order at 11 (FOF 15); Exs. R-13, R-14. PTI's consultant, Parametrix, reached the same conclusion in its report. Board Order at 18–19 (FOF 22); Ex. R-19 (pp. 17, 21, 23). Parametrix identified and delineated two palustrine emergent wetlands on the site and concluded that approximately 7.81 acres of wetland was mechanically graded and/or filled with non-native soils. Board Order at 18–19 (FOF 21); Ex. R-19 (pp. 1, 17, 21, 23). Although the wetland on site does not provide high

quality habitat, it does provide water quality and hydrologic functions by slowing down the water flow, absorbing pollutants, and decreasing the amount of potential erosion. Board Order at 20 (FOF 25); RP 327:16–330:8, Ex. R-19 (pp. 18–19).

Based on the above findings, the Board concluded that PTI violated RCW 90.48.080 by discharging pollution into waters of the state. Board Order at 26–27 (Conclusions of Law (“COL”) 5-8). The Board affirmed the \$88,000 penalty. *Id.* at 32–34 (COL 17–21).

C. Superior Court Decision

PTI appealed the Board’s Order to Thurston County Superior Court. The superior court affirmed the Board’s Order in full. Findings of Fact, Conclusions of Law, and Order (“Superior Court Order”) at 4 (CP 566–69). The superior court also denied PTI’s constitutional due process and void for vagueness challenges. *Id.* at 14–15. PTI timely appealed the superior court’s decision to this Court.

IV. STANDARD AND SCOPE OF REVIEW

An appellate court reviews administrative decisions on the record of the administrative tribunal, in this case the Board, rather than the record of the superior court. *Sherman v. Moloney*, 106 Wn.2d 873, 881, 725 P.2d 966 (1986). The Court reviews the Board’s decision under the Washington Administrative Procedure Act (“APA”), RCW 34.05.

Pub. Util. Dist. 1 of Pend Oreille Cy. v. Dep't of Ecology, 146 Wn.2d 778, 789–90, 51 P.3d 744 (2002) (“*PUD No. 1*”); *see also* RCW 34.05.518(1), (3)(a). The Court sits in the same position as the superior court and applies the standards of the APA directly to the record before the Board. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The Court’s review of the facts is confined to the record before the Board. RCW 34.05.558. The burden of demonstrating the invalidity of the Board’s decision is on PTI, the party asserting invalidity. RCW 34.05.570(1)(a).

The Board’s application of law to a particular set of facts is reviewed de novo, but the Court should not “undertake to exercise the discretion that the legislature has placed in the agency.” *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004) (quoting RCW 34.05.574(1)). Where statutory construction is necessary, a court will interpret statutes de novo. *PUD No. 1*, 146 Wn.2d at 790. However, Ecology’s interpretation of the laws it administers is entitled to “great weight.” *Port of Seattle*, 151 Wn.2d at 594. In this case, PTI seeks to reverse a decision that both Ecology and the Board agreed upon, and the Court should be “loath to override the judgment of both agencies, whose combined expertise merits substantial deference.” *Id.* at 600.

The Court may grant relief if the Board’s Order is “not supported

by evidence that is substantial when viewed in light of the whole record before the court.” RCW 34.05.570(3)(e). The substantial evidence test is “highly deferential.” *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The test is not whether the evidence is sufficient to persuade the reviewing court of the truth or correctness of the order; rather, the test is whether any fair-minded person could have ruled as the Board did after considering all of the evidence. *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997). Evidence may be “substantial” even if it is in conflict with other evidence in the record. *Id.* at 676. A reviewing court does not weigh the credibility of witnesses or substitute its judgment for the Board’s with regard to findings of fact. *Port of Seattle*, 151 Wn.2d at 588 (citing *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 596, 13 P.3d 1076 (2000)).

Finally, this Court may grant relief if the Board’s Order is “arbitrary or capricious.” RCW 34.05.570(3)(i). Arbitrary or capricious agency action has been defined as action that ““is willful and unreasoning and taken without regard to the attending facts or circumstances.”” *Port of Seattle*, 151 Wn.2d at 589 (quoting *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 149 Wn.2d 17, 26, 65 P.3d 319 (2003), and *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997)). Where

there is room for two opinions, and the agency acted honestly upon due consideration, the Court should not find that an action was arbitrary and capricious, even though the Court may reach an opposite conclusion. *Port of Seattle*, 151 Wn.2d at 589 (citing *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994)).

V. SUMMARY OF ARGUMENT

Through enactment of the WPCA in 1945, the legislature provided for comprehensive protection of the quality of all waters of the state. To ensure the expansive reach of those protections, waters of the state are broadly defined to include all surface and underground waters. Wetlands are landscape features saturated or inundated by surface and/or ground water. Employing its authority to develop regulations to implement the WPCA, Ecology promulgated surface water quality standards, which include a definition of wetlands and further identifies those wetlands that are regulated under the WPCA. The wetlands at Smith Island filled by PTI constitute such wetlands.

This case does not represent a novel interpretation of the WPCA, rather it is simply the first instance where a penalty for illegally filling wetlands has been appealed. Ecology's regulation of wetlands under the WPCA is longstanding and judicially recognized. In 1993, the Thurston County Superior Court affirmed Ecology's protection of wetlands as

waters of the state. In the 17 years since that decision, the legislature has chosen not to amend the WPCA thus demonstrating legislative acquiescence in that decision.

The WPCA is not unconstitutionally vague. A person of common intelligence can ascertain from the statute and implementing regulations that wetlands are waters of the state and that the dumping of soil into wetlands constitutes pollution of those waters by altering their physical properties. Nor is Ecology's authority to regulate wetlands under the WPCA displaced by other statutes. None of the statutes cited by PTI prohibits Ecology's exercise of authority under the WPCA. Rather, those statutes can be reconciled with the WPCA and all given effect.

Throughout this enforcement proceeding, PTI received all of the process it was due. Ecology's issuance of Order 4095 and Penalty 4096 fully complied with the requirements of due process. Through those documents PTI was informed of the statutory authority for Ecology's enforcement action as well as the statutes violated and the actions that constituted such violations. The WPCA does not require Ecology to provide advance notice of its issuance of an administrative order or penalty. Through the penalty statute, RCW 90.48.144(3), the legislature directed Ecology to consider the history of the violator in establishing the penalty. Moreover, the Board appropriately administered the hearing

below and was evenhanded in its treatment of the parties. PTI's failure to appropriately manage its case does not constitute a denial of due process by the Board.

Finally, there is substantial evidence in the record supporting the Board's findings of fact. Rather than demonstrating a lack of evidence, PTI seeks to reargue the evidence and to have the Court overturn the Board's determination of the credibility of the witnesses, neither of which are permissible on appeal under the APA. The Board's finding that PTI filled wetlands at its Smith Island site is fully supported by the record. The Court should affirm the decisions of the Board and superior court.

VI. ARGUMENT

A. PTI's Appeal Is Predicated On An Inaccurate Claim And Evidence Not In The Record Before The Board

1. Ecology's order and penalty are not based on PTI's failure to obtain a 404 permit

PTI, with no citation to any evidence, claims Ecology alleged for the first time at the hearing that its enforcement action was based on PTI's failure to obtain a Clean Water Act ("CWA") Section 404 Permit ("404 Permit"). Pet. Br. at 10, 26–28. PTI first raised this inaccurate allegation in its reply brief to the superior court. CP 446. As such, it constituted a new issue barred by RCW 34.05.554. A party must raise all arguments in support of its appeal in its initial brief and cannot reserve arguments to be

raised for the first time in a reply brief. *See R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 147 n.10, 969 P.2d 458 (1999).

Regardless, PTI's claim is patently inaccurate. As is evident from the record, Ecology's order and penalty are based on PTI's clear violation of RCW 90.48.080 and WAC 173-201A-300.² Exs. R-13, R-14. The references to a 404 Permit at the hearing merely acknowledge that (1) the neighboring property owner needed to obtain such a permit to place fill on its site (RP 75:8–19), (2) PTI had been advised by its consultant that filling wetlands at its Smith Island site required a 404 Permit (RP 151:18–21), and (3) PTI's wetlands expert recognized the applicability of Section 404 to Smith Island's wetlands. RP 430:16–25. PTI compounds its error by asserting that the Board "relied solely on the reasoning that PTI obtained no 404 permit from the U.S. Army Corps of Engineers" in reaching its determination that wetlands are waters of the state protected by the WPCA. Pet. Br. at 24–25 (citing FOF 29). In fact, the Board's decision is based on its analysis of the provisions of the WPCA. In addition, the finding of fact cited for PTI's inaccurate proposition simply

² Ecology's Order 4095 and Penalty 4096 also state that PTI's discharge of pollution without a permit constitutes a separate violation of RCW 90.48.160, which governs NPDES and state waste discharge permits. Recognizing that RCW 90.48.160 did not apply, Ecology's defense of its enforcement actions and its presentation before the Board focused solely on PTI's violation of RCW 90.48.080 and WAC 173-201A-300. The term NPDES permit was referred to three times at the hearing but never as the basis for Ecology's enforcement actions: RP 39:2–4 (PTI opening statement discussing Ecology's review of prior violations by PTI); RP 234:5–11 (Ecology objection regarding applicability of RCW 90.48.240); RP 527:22–25 (Ecology witness describing experience with Smith Island).

provides that PTI avoided substantial costs in not obtaining appropriate permits before filling wetlands at its Smith Island site. Board Order at 22–23 (FOF 29). PTI’s 404 Permit claims are both untimely and baseless, and should be rejected.

2. PTI improperly relies on evidence not in the record

PTI relies on evidence that is not in the record. Judicial review under the APA is confined to the record. RCW 34.05.558. Before the hearing, the Board granted Ecology’s motion to strike PTI Exhibits A-99 and A-100.³ RP 7:13–8:14. *See also* ADR 3193–3206. Despite the Board’s ruling striking Exhibit A-99, PTI included a copy of the cover page of that document in Appendix 9 submitted with its Brief of Appellant and PTI repeatedly cites that document. On appeal to the superior court, PTI did not assign error to the Board’s ruling striking the document. Therefore, PTI is bound by that ruling and Exhibit A-99 is not part of the administrative record under review.⁴ PTI’s inclusion of the stricken

³ Ecology’s motion identified substantive changes made to the report after Parametrix finalized the document and transmitted it to PTI. ADR 3194–95. The Board ruled that the copy of the Parametrix wetland delineation report Ecology obtained in discovery, Exhibit R-19, was a more reliable copy than Exhibit A-99 offered by PTI. RP (Feb. 19, 2008) 6:24–8:13. PTI did not object to the admission of Exhibit R-19. RP 144:6-14. Exhibit R-19 is part of the record below and the Board properly relied upon that exhibit in rendering its findings of fact and conclusions of law in this case.

⁴ Additionally, the documents in PTI’s Appendix 6 and 24 are not part of the Board’s record. The Court’s review is limited to evidence in the record unless a motion to admit new evidence pursuant to RCW 34.05.562 is granted. Appendix 6 is PTI’s Exhibit A-54, which was withdrawn at the hearing. RP 602:20–25. Appendix 24, a deposition transcript excerpt, was never offered into evidence. As PTI did not move to admit Appendices 6 or 24, the documents and arguments regarding them should be disregarded.

document in its appendix is inappropriate, as are its statements regarding that document. Exhibit A-99, Appendix 9 and PTI's arguments should not be considered by the Court in its review of the record below.

Finally, the superior court did not err in denying PTI's motion to add Appendix 8 to the record.⁵ There are very limited circumstances under the APA where new evidence can be added to the administrative record. RCW 34.05.562(1). "If the admission of new evidence at the superior court level was not highly limited, the superior court would become a tribunal of original, rather than appellate, jurisdiction and the purpose behind the administrative hearing would be squandered." *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App 62, 76 ¶ 34, 110 P.3d 812 (2005). PTI provides no plausible argument demonstrating that it met the requirements of RCW 34.05.562 or that the superior court erred in denying its motion.

B. The WPCA Protects Wetlands From Pollution

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

Ecology is authorized to regulate activities occurring in waters of the state, including wetlands. Pursuant to the WPCA, the legislature

⁵ PTI's claim that the superior court "allowed Ecology to significantly expand the record" is untrue. In order to respond to newly raised claims PTI made in its trial brief, Ecology moved to admit deposition and hearing transcripts to demonstrate that the claims were unfounded. In ruling on the motion, Judge McPhee permitted *both* parties to submit no more than 25 transcript pages. CP 489-91. Ecology and PTI both availed themselves of the superior court's ruling and submitted transcript excerpts. CP 456-88; 498-531.

authorized Ecology to protect the quality of all waters of the state. The purpose behind the state's water quality laws is set forth in RCW 90.48.010:

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

The term "waters of the state" is broadly defined in RCW 90.48.020 and "shall be construed to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington." Wetlands are transitional areas between upland and aquatic environments and are comprised of surface and/or ground water.⁶ Acknowledging the breadth of Ecology's authority over state waters, RCW 90.48.030 provides that Ecology has "the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and

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

other surface and underground waters of the state of Washington.”

Ecology is further authorized to promulgate:

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

RCW 90.48.035.

Carrying out the state’s water quality policy and exercising its authority to promulgate regulations to implement the WPCA, Ecology developed water quality standards for protection of the state’s waters— Chapter 173-201A WAC (surface water) and Chapter 173-200 WAC (ground water). The water quality standards are comprised of narrative criteria, numeric criteria for conventional pollutants and toxic substances, and an antidegradation policy. The antidegradation policy set forth in RCW 90.54.020(3)(b) provides that:

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

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

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

WAC 173-201A-020 (emphasis added).⁷ Both surface and ground water are waters of the state. RCW 90.48.020. Finally, the legislature provided Ecology with authority to enforce against violations of the WPCA through the issuance of orders, RCW 90.48.120(2), and penalties, RCW 90.48.144.

The court’s fundamental objective in construing a statute is to ascertain and carry out the intent of the legislature. *State v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). The intent of the legislature must be determined primarily from the language of the statute itself. *Lacey*

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

Nursing Ctr., Inc. v. Dep't of Revenue, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). When “interpreting statutory definitions, ‘includes’ is construed as a term of enlargement while ‘means’ is construed as a term of limitation.” *Queets Band of Indians v. State*, 102 Wn.2d 1, 4, 682 P.2d 909 (1984).

PTI argues that because “wetlands” are not specifically included in the definition of “waters of the state” in RCW 90.48.020, that Ecology has exceeded its authority by including “wetlands” in the definition of “surface waters of the state” in WAC 173-201A-020. PTI mistakenly focuses its statutory interpretation on the phrase “shall be construed,” arguing that it constitutes a limitation on the scope of the term “waters of the state.” Pet. Br. at 17 n.10. However, the operative word used by the legislature is “include,” which indicates the broad reach of the WPCA to protect all waters of the state, including wetlands. Contrary to PTI’s assertion, WAC 173-201A-020’s definition of waters of the state does not constitute an attempt by Ecology to expand its regulatory authority.⁸ Rather, that regulation is a clear expression of the legislature’s purpose behind the WPCA—to protect the quality of *all* waters of the state, whether on the surface of the land or underground. *See* RCW 90.48.010.

⁸ In arguing that Ecology’s jurisdiction under the WPCA is narrow, PTI fails to accurately quote RCW 90.48.030, omitting the phrase “and other surface waters”. Pet. Br. at 18. When read in full, RCW 90.48.030 evidences the legislature’s intent that Ecology’s jurisdiction under the WPCA be as broad as possible.

Contrary to PTI's claims, Ecology's use of the WPCA to protect wetlands is not novel. Ecology's interpretation of the WPCA as encompassing wetlands is longstanding and judicially recognized.⁹ In 1993, the Thurston County Superior Court addressed a challenge to Ecology's authority under the WPCA to regulate wetlands. *Bldg. Indus. Ass'n of Wash. (BLAW) v. City of Lacey*, Thurston County No. 91-2-02895-5 (Mar. 30, 1993) (copy attached as Appendix 1). Rejecting petitioner's claim that the Growth Management Act ("GMA") governs the regulation of wetlands, the court held that wetlands are waters of the state subject to the protections of the WPCA. *Id.* at 8–14. In 2004, the state Supreme Court recognized Ecology's authority to regulate wetlands under the WPCA in *Port of Seattle*, which addressed a CWA Section 401 certification issued by Ecology to the Port Seattle for construction of the third runway. The project included the filling of several acres of wetlands and required extensive mitigation for those impacts to waters of the state. *Port of Seattle*, 151 Wn.2d at 580. Discussing a revised certification

⁹ Citing to a list of Board decisions issued under the WPCA, PTI claims that this case is the first instance where Ecology issued a penalty for the filling of wetlands. Pet. Br. at 30. At most, the Board docket proves that others receiving penalties from Ecology for the unauthorized filling of wetlands have not appealed the penalty. As the testimony before the Board established, most individuals seeking to develop their property are aware that permits are required and, while unauthorized filling occurs, because people know that such activity is prohibited, Ecology rarely has to take enforcement action. RP 557:7–558:24; 560:19–23. Finally, as the Board concluded "[t]he relevant inquiry for this Board is not how frequently Ecology has issued penalties for the filling of wetlands, but rather, whether there has been a serious violation of the water pollution control laws of this state and whether Ecology properly acted to penalize such violations *in this case*." Board Order at 29 (COL 12). The Board correctly concluded that such a violation had occurred. Board Order at 27, 32 (COL 8, 18).

issued to the Port of Seattle, the Supreme Court noted that “Ecology issued the new § 401 certification as an order under [the WPCA], thereby ensuring that its conditions would be enforceable, independent of the federal § 404 permit.” *Port of Seattle*, 151 Wn.2d at 580–81.

In the 17 years since the court’s decision in *BIAW*, the legislature has declined to amend the WPCA’s definition of waters of the state to exclude wetlands, thus demonstrating legislative acquiescence in Ecology’s interpretation of the WPCA. “This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision.” *Federal Way v. Koeing*, 167 Wn2d 341, 348 ¶ 12, 217 P.3d 1172 (2009) (citing *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999)). By not modifying the WPCA’s definition of waters of the state, the legislature has implicitly assented to the court’s holding in *BIAW* that the wetlands are protected under the WPCA.

Given the fact that wetlands are specifically identified in the state’s water quality standards implementing the WPCA, Ecology is obligated under the Act to protect wetlands from degradation.¹⁰ Ecology

¹⁰ PTI asserts that the Water Resources Act of 1971, Chapter 90.54 RCW, limits Ecology’s authority to protect wetlands. This argument fails for several reasons. First, the purported limiting language in RCW 90.54.900 relates solely to Ecology’s regulation of “the

unquestionably possesses the authority to protect the quality of all of the state's waters, including wetlands.

2. RCW 90.48.080 is not unconstitutionally vague

PTI argues that Ecology's application of the WPCA's prohibition against discharging pollution into waters of the state renders the statute's text vague as applied to it. Pet. Br. at 32. This argument is predicated on PTI's assertion that wetlands are not waters of the state and that the statute does not give notice that allegedly clean fill is a pollutant. PTI's premise is unfounded.

The void for vagueness doctrine applies principally to criminal or penal statutes. *See City of Seattle v. Montana*, 129 Wn.2d 583, 596–97, 919 P.2d 1218 (1996). Because the doctrine is an aspect of procedural due process, it is relevant only when analyzing penal statutes or regulatory statutes that prohibit conduct or impose sanctions for violations of their standards. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 739–40, 818 P.2d 1062 (1991); *Dep't of Natural Res. v. Lake Lawrence Pub. Lands Prot. Ass'n*, 92 Wn.2d 656, 667, 601 P.2d 494 (1979); *Pacific Wire*

surface of waters” and “structures on the underlying beds, tidelands or shorelands,” none of which are implicated in this case. Second, at the time that the Water Resources Act was enacted, the WPCA had already been law for some 26 years and the protections it provided to waters of the state were well established. Finally, the Water Resources Act does not contain a direct prohibition on Ecology's exercise of its authority under the WPCA. Consequently, the Legislature's command to Ecology to protect the quality of all waters of the state, including wetlands, is not impaired by the Water Resources Act of 1971.

Works, Inc. v. Dep't of Labor & Indus., 49 Wn. App. 229, 237, 742 P.2d 168 (1987).

The doctrine has been expanded to address prohibitory land use regulations. See *Burien Bark Supply v. King Cy.*, 106 Wn.2d 868, 725 P.2d 994 (1986); *Anderson v. City of Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (1993). “A statute is void for vagueness if it is framed in terms so vague that persons ‘of common intelligence must necessarily guess at its meaning and differ as to its application.’” *Haley*, 117 Wn.2d at 739 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). However, the Washington Supreme Court has cautioned that “[s]ome measure of vagueness is inherent in the use of language. ‘Condemned to the use of words, we can never expect mathematical certainty from our language.’” *Id.* at 740 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)).

The Supreme Court has described the concern with vague statutes as follows:

The mere fact that a person’s conduct must be subjectively evaluated . . . to determine if that person has violated a statute does not make that statute unconstitutionally vague. If this were so, most criminal statutes would be void for vagueness. What is forbidden by the due process clause are criminal statutes that contain no standards and allow police officers, judge, and jury to

subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case.

State v. Maciolek, 101 Wn.2d 259, 267, 676 P.2d 996 (1984) (emphasis added).

PTI challenges the applicability of RCW 90.48.080 to its activities, asserting that it is not apparent that the term waters of the state includes wetlands and that pollution includes the dumping of fill material into waters of the state.¹¹ As detailed above, the WPCA's definition of waters of the state, which includes all surface and underground waters, is sufficiently broad to encompass wetlands. *See* RCW 90.48.020. Moreover, wetlands have been included in the water quality standards since 1997. WAC 173-201A-020. Even PTI's wetlands expert recognizes that wetlands are comprised of ground and/or surface water. Ex. A-1 (pp. 5-6, 9-10).

Moreover, the WPCA defines pollution to include the "alteration of the physical" properties of any water of the state. The common definition of "alter" is "to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else." Webster's Third New

¹¹ Based on an incomplete citation to the record, PTI alleges that Ecology itself was confused at the hearing regarding whether wetlands are waters of the state. Pet. Br. at 35-36. When read in its entirety, the record demonstrates that Ecology consistently asserted that wetlands are waters of the state protected under the WPCA. *See* RP 268:3-273:11.

International Dictionary 63 (1971). As the evidence in the record amply supports, PTI has significantly altered the physical condition of the wetlands at Smith Island, which were covered by some 75,000 to 150,000 cubic yards of fill. Board Order at 5–6 (FOF 7). It is undisputed that any aquatic feature that was on the ground surface prior to PTI’s discharge of fill no longer provides “legitimate beneficial uses” or that the filling has rendered “such waters harmful, detrimental or injurious . . . to wild animals, birds, fish or other aquatic life.” RCW 90.48.020. RP 316:16–18; 327:16–330:8.

Finally, PTI’s assertion that its discharge of soil into wetlands did not constitute pollution because the soil was allegedly clean should be rejected. The record does not support PTI’s claim that the fill was clean as its own site manager testified that the soil was not tested before being dumped into the wetlands. RP 510:7–19. Regardless, the statutory definition of pollution does not require that the material discharged be contaminated. Rather, the definition focuses on the impact to the water body caused by the discharge.

[S]uch contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the

public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

RCW 90.48.020. As the superior court concluded, “it seems axiomatic that discharge of a solid substance (fill) that eliminates the wetland is detrimental to nearly every use of the wetland.” CP 536.

The WPCA is not void for vagueness. A person of average intelligence can readily conclude that the discharge of soil into a wetland constitutes pollution. The Court should reject PTI’s claims to the contrary.

3. Ecology’s authority to regulate wetlands not displaced by other statutes

PTI argues that Ecology is precluded from regulating wetlands under the WPCA because such regulation is contained in other statutes such as the GMA, the Shoreline Management Act (SMA), Chapter 90.74 RCW (Aquatic Resource Mitigation), and Chapter 90.84 RCW (Wetlands Mitigation Banking). While not specifically stated, PTI is essentially asserting that those statutes preempt Ecology from regulating wetlands under the WPCA. This claim is not supported by the law and should be rejected. One state statute cannot preempt another. *Cf. Dep’t of Ecology v. Pub. Util. Dist. 1 of Jefferson Cy.*, 121 Wn.2d 179, 849 P.2d 646 (1993) (federal CWA not preempted by Federal Power Act).

To the extent that PTI is alleging that the GMA, SMA, or any other state statute precludes Ecology from acting pursuant to the authority granted by the legislature under the WPCA to regulate wetlands, that argument fails as well. The correct analysis of those statutes is whether they contain a prohibition on Ecology's exercise of its WPCA authority.¹² No such prohibition exists. Other than broad statements regarding the alleged exclusivity of other statutes in the regulation of wetlands, PTI cannot point to a single statutory provision that precludes Ecology from exercising its authority under the WPCA to protect wetlands. Repeal or amendment by implication is not favored under the law. *Misterek v. Wash. Mineral Prods., Inc.*, 85 Wn.2d 166, 168, 531 P.2d 805 (1975).

The fact that the legislature has enacted two or more statutes that touch on the same issue does not mean that one statute trumps the other.

As the state Supreme Court held:

¹² PTI's claim that Ecology's authority to protect wetlands under the WPCA is constrained by RCW 90.48.260 is inaccurate. First, the WPCA predates the CWA by almost 30 years. Following enactment of the CWA, the legislature did not amend the WPCA to reduce its broad reach. Second, the designation of Ecology as the "State Water Pollution Control Agency for all purposes of the [CWA]" in no way diminishes the purposes of the WPCA to protect the quality of *all* waters of the state, not just the navigable waters protected by the CWA. Navigable waters are a subset of waters of the state. Otherwise, if waters of the state were coterminous with navigable waters, there is no reason for the WPCA. Finally, as can be gleaned from the legislative purpose in enacting the WPCA and comparing the definitions of waters of the state and navigable waters, it is clear that the legislature intended the WPCA to have as broad a reach as possible. *See also* RCW 90.48.010 (policy of WPCA to work cooperatively with federal government to preserve quality of waters where there is joint jurisdiction "while at the same time preserving and vigorously exercising state powers to insure that present and future standards of water quality within the state shall be determined by the citizenry, through and by the efforts of state government, of the state of Washington.")

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

State ex rel. Peninsula Neighborhood Ass’n v. Dep’t of Transp., 142 Wn.2d 328, 342, 12 P.3d 134 (2000) (citations omitted). The WPCA can be reconciled with these other statutes and all given effect. For instance, Ecology’s responsibility to protect all waters of the state is undiminished by the enactment of the GMA and the planning required by the GMA can proceed without interference from the WPCA.¹³ Additionally, where developments permitted under the SMA or other land use regulations cause unavoidable wetland impacts, compensatory mitigation is available under the Aquatic Resource Mitigation and Wetlands Mitigation Banking statutes.

The fact that more than one statute or regulatory authority governs an activity is unremarkable. Absent an express statement by the legislature that Ecology is precluded from exercising its authority to protect wetlands under the WPCA, such authority remains intact. No

¹³ The definition of critical areas includes wetlands, as well as “(b) areas with critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas. . . .” RCW 36.70A.030(5). As stated above, the definition of waters of the state under the WPCA includes wetlands. RCW 90.48.020; *see also* WAC 173-201A-020. Protection of critical areas such as wetlands from pollution can be, and has been for years, balanced with the requirement of local governments to plan for development within their jurisdictions. Moreover, one could not suggest that Ecology’s authority to protect ground water from pollution is precluded by the GMA’s inclusion of aquifer recharging areas in the definition of critical areas. These statutory requirements are complementary, not conflicting.

provision of the GMA, SMA, Wetlands Banking Mitigation, or Aquatic Mitigation Resources statutes serves to preempt Ecology's authority under the WPCA. The Court should reject PTI's unsupported allegations to the contrary.

C. Ecology And The Board Provided PTI Due Process

1. Ecology provided required notice to PTI

PTI's claims that Ecology deprived it of due process can be summarized as (1) Order 4095 and Penalty 4096 did not provide sufficient notice of the facts demonstrating that PTI violated applicable laws and regulations; (2) Order 4095 and Penalty 4096 did not specify what permit PTI should have obtained before it discharged pollutants into waters of the state; (3) Ecology needed to notify Pacific Topsoils that it would receive an administrative order; and (4) Penalty 4096 did not alert PTI that RCW 90.48.144 requires Ecology to consider the previous history of the violator in calculating a penalty. All of these issues are easily dismissed.

a. Order 4095 and Penalty 4096 identify law violated and facts substantiating the violation.

Order 4095 begins by citing the statute under which it was issued, RCW 90.48.120(2). Ex. R-13. This is followed by a statement of the facts supporting the determination that PTI violated the WPCA and the laws/regulations violated:

Violation: Unlawful discharge of polluting matter into waters of the state

On or before October 17, 2006, approximately 12 acres of fill material was discharged into wetlands at the Pacific Topsoils, Inc. facility on Smith Island, Snohomish County. There is no record at the Department or Snohomish County of the submission of a permit application for the placement of said fill, nor a record of any permit for the placement of fill in the wetlands having been issued. Under RCW 90.48.080 and RCW 90.48.160, it is unlawful to discharge polluting matters into waters of the state without a permit. Discharge of such polluting matters into waters of the state is also a violation of the anti-degradation policy, WAC 173-201A-300.

*Id.*¹⁴ After detailing the corrective actions that must be taken to remedy the violation, Order 4095 states that it may be appealed and provides the addresses where such an appeal is to be filed. *Id.* Similarly, Penalty 4096 begins with a citation to the WPCA's penalty statute, RCW 90.48.144(3), and states that a penalty in the amount of \$88,000 is being issued for violation of RCW 90.48.080 at PTI's Smith Island facility. Ex. R-14. Penalty 4096 next sets forth the facts supporting Ecology's determination that RCW 90.48.080 and WAC 173-201A-300 (antidegradation policy) was violated:

Prior to January 24, 2006, fill was placed in approximately 12 acres of wetlands at Pacific Topsoils' Smith Island facility without a permit in violation of RCW 90.48.080. Discharge of such polluting matters into waters of the state is also a violation of the anti-degradation policy, WAC

¹⁴ Discussion of Ecology's citation to RCW 90.48.160 is provided *supra* in n.1.

173-201A-300. Fill remains in place in the wetlands. Each and every day the fill remains in the wetlands constitutes a separate and distinct violation of RCW 90.48.080 and RCW 90.48.160, and WAC 173-201A-300.

Ex. R-14. The document concludes by stating that it can be appealed.

PTI's claim that Order 4095 and Penalty 4096 do not provide it with notice of the factual basis for Ecology's claim that it violated RCW 90.48.080 and WAC 173-201A-300 is specious. As the quoted language demonstrates, both Order 4095 and Penalty 4096 clearly state that the unauthorized filling of wetlands constituted a discharge of polluting matter into waters of the state in violation of RCW 90.48.080 and WAC 173-201A-300. The fact that PTI disputes Ecology's authority to protect wetlands under the WPCA does not serve to establish that Order 4095 and Penalty 4096 are constitutionally deficient.

Moreover, both are consistent with the requirements of due process discussed by the Court of Appeals in *Mansour v. King Cy.*, 131 Wn. App. 255, 270–71, 128 P.3d 1241 (2006). In *Mansour*, King County Animal Control issued an order requiring a dog owner to remove his dog from the county. *Id.* at 260–61. Challenging the order, appellant claimed that he received insufficient notice because the order cited the wrong authority for removal and that he did not have notice of the code Animal Control was relying on until the administrative hearing. *Id.* at 270–71. After detailing

other procedural defects in the administrative proceeding, the court reviewed the various ordinances governing removal of animals and noted that three ordinances governed removal. *Id.* at 271. The court found that the ordinance advanced by Animal Control at the hearing was not one cited in the removal order, nor did the order refer to the dog as “vicious,” a finding that must be made to invoke the ordinance subsequently relied upon by Animal Control. *Id.* Noting that the King County Code does not require citation to authority in a removal order, the court stated that this was “insufficient to satisfy the fundamental due process requirement for notice of the charges.” *Id.* at 272.

Unlike the order in *Mansour*, Order 4095 and Penalty 4096 provide PTI with “notice of the charges or claims against which [it] must defend.” *Mansour*, 131 Wn. App. at 270. Both documents cited (1) the authority for taking enforcement action under the WPCA, (2) the statute violated, and (3) the actions that constituting the violation. And, unlike *Mansour*, the Board applied to proper burden of proof (Board Order at 24 (COL 1)), PTI was afforded the right to conduct discovery and availed itself of that opportunity (CP 456–88; 498–531), and PTI subpoenaed a

witness for the hearing.¹⁵ Order 4095 and Penalty 4096 satisfy applicable due process requirements.¹⁶

b. Ecology need not provide advance notice when issuing order under RCW 90.48.120(2)

Ecology's issuance of an administrative order under the WPCA is governed by RCW 90.48.120(2), which provides in relevant part:

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

Invocation of RCW 90.48.120(2) is not restricted to emergency situations. Rather, issuance of an order under that provision is triggered when Ecology determines immediate action is necessary to accomplish the purposes of the WPCA. The facts of this case demonstrate that Ecology correctly invoked RCW 90.48.120(2).¹⁷

¹⁵ Board rules do not require subpoenas to be filed with Board. A copy of the trial subpoena PTI issued to an Ecology employee is attached in Appendix 2.

¹⁶ PTI's argument that Order 4095 and Penalty 4096 violate due process because they do not identify the permit that PTI *should have* obtained before it filled wetlands is unavailing. Due process requires notice of what constitutes the violation, not a description of how one could avoid violating the law in the first place. Given RCW 90.48.080's prohibition, without exception, of the discharge of pollutants into waters of the state, Order 4095 and Penalty 4096 provide sufficient notice to PTI of its illegal behavior.

¹⁷ As noted by the superior court, none of the WPCA's statutes addressing enforcement—RCW 90.48.037, .080, .144, .240—suggest that compliance with RCW 90.48.120(1) is a prerequisite to issuing an order under RCW 90.48.120(2). CP 542. The Legislature provided Ecology with discretion to determine the appropriate enforcement vehicle, providing that the agency could seek cooperation through the issuance of a Notice of Violation (RCW 90.48.120(1)) or require immediate action through issuance of an administrative order (RCW 90.48.120(2)). Ecology's issuance of Order 4095 pursuant to RCW 90.48.120(2) did not violate PTI's due process rights.

The evidence in the record establishes that, on October 27, 2006, Mr. Bajsarowicz of PTI was informed by Mr. Anderson of Ecology that he determined that wetlands had been filled at PTI's Smith Island facility, such filling was a violation, and a wetland delineation needed to be prepared. RP 189:15–24. Mr. Bajsarowicz informed Mr. Anderson that a contract with Parametrix to conduct the wetland delineation was being finalized.¹⁸ RP 189:25–190:5. Mr. Anderson contacted Mr. Bajsarowicz multiple times over the next several months inquiring about the wetland delineation. RP 190:10–20. Mr. Bajsarowicz never expressed to Mr. Anderson any confusion he may have had regarding the need to prepare a wetland delineation. RP 191:4–6. In a telephone call on January 8, 2007, Mr. Bajsarowicz told Mr. Anderson that the delineation was completed and that a copy would be sent to Ecology later that week. *Id.* The wetland delineation was not sent to Ecology. RP 190:21–25. Having not received the promised wetland delineation over a four month period, Ecology issued Order 4095 requiring PTI to remove the unauthorized fill and restore the site to its pre-fill condition. Ex. R-13. Ecology's decision to require immediate action is fully supported by the evidence.

¹⁸ On December 1, 2006, Mr. Bajsarowicz was informed by PTI's wetlands consultant, Parametrix, that mitigation for its unauthorized filling of wetlands would be required by Ecology, as well as the Corps, and Snohomish County. Ex. A-89.

Moreover, PTI was well aware that Ecology asserted jurisdiction over the filling of wetlands. In 2002, Ecology wetland staff investigated PTI's unauthorized fill of wetlands at its Thomas Lake property, with EPA and the Corps ultimately issuing a penalty. RP 559:23–560:11. Further, the direct communications between Ecology and PTI's Environmental Director identifying the unauthorized wetland fill as constituting a violation of law apprised PTI of Ecology's asserted jurisdiction.¹⁹ Ecology appropriately exercised its enforcement discretion when issuing Order 4095 pursuant to RCW 90.48.120(2).²⁰

c. History of violator consideration required by RCW 90.48.144(3)

Finally, PTI argues that Penalty 4096 violates due process because it did not include a description of how the penalty was calculated and did not state that PTI's history of past violations had been considered in setting the penalty. Pet. Br. at 27. Additionally, PTI claims that the Board

¹⁹ PTI's reliance on *Gen. Elec. Corp. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995) is misplaced. In *General Electric*, EPA issued a penalty to GE for violating regulations governing disposal of toxic pollutants. *Id.* at 1326–27. Addressing GE's challenge to the penalty, the court held that the interpretation EPA made of its regulation was permissible but, because GE first learned of that interpretation through the penalty, EPA's penalty violated due process. *Id.* at 1328. As noted by the court, “[h]ad EPA merely required GE to comply with its interpretation, the case would be over.” *Id.* By contrast, Mr. Anderson's communications with Mr. Bajsarowicz made PTI fully aware that Ecology asserted jurisdiction over wetlands at Smith Island. Moreover, PTI had been the subject of prior enforcement actions for unauthorized wetland filling, with Ecology participating in the investigation of those violations. RP 559:23–560:11. Ecology's pre-enforcement contacts with PTI, and the company's prior enforcement history, provided sufficient notice of Ecology's asserted jurisdiction over wetlands.

²⁰ PTI also contends that Ecology did not comply with RCW 90.48.240. The use of that statute is discretionary, not mandatory, providing that “the director may issue a written order.” In this instance, Ecology employed its authority to issue an administrative order, RCW 90.48.120(2), and penalty, RCW 90.48.144(3).

improperly allowed testimony regarding those prior violations. Pet. Br. at 63–65. PTI’s arguments in this regard are baseless.

Ecology’s authority to issue penalties for violations of the WPCA is contained in RCW 90.48.144(3) and provides for a penalty of up to \$10,000 per day for each violation, with each violation being separate and distinct. Where a violation is continuing in nature, such as the permanent placement of fill in wetlands, every day’s continuance is deemed to be a separate and distinct violation. RCW 90.48.144(3). With regard to consideration of the history of the violator, a simple reading of RCW 90.48.144(3), which Ecology cited in the Penalty, shows that the legislature has directed Ecology to take the history of past violations into consideration when setting the penalty. “The penalty amount shall be set in consideration of **the previous history of the violator** and the severity of the violation’s impact on public and/or environment in addition to other relevant factors.”²¹ (Emphasis added.) Ecology’s consideration of PTI’s past violations of the water quality laws was entirely appropriate, not novel.

PTI’s claim that it was unaware that its history of prior violations would be an issue at the hearing and it was, therefore unprepared for the

²¹ As is clear from the language of RCW 90.48.144(3), the legislature refers to the penalized party as the “violator.” The Board’s use of that term at the hearing when referencing PTI is consistent with the statute and, contrary to PTI’s claim (Pet. Br. at 65), does not demonstrate bias by the Board.

hearing, is belied by the evidence.²² Pet. Br. at 64. First, in its depositions of Ecology's employees three months before the hearing, PTI specifically inquired about the prior history of the violator prong of the penalty assessment. CP 460–61; 464–67. For instance, Erik Stockdale was asked “[n]ow when you consider past violations, what past violations are you talking about in this case?” CP 460. This alone proves that PTI was well aware that its history of past violations was an element of the penalty and an issue that would be raised at the hearing.²³

Moreover, in addition to the plain language in RCW 90.48.144(3), for years the Board's written decisions²⁴ have articulated the factors it considers when reviewing a penalty issued by Ecology under RCW 90.48.144(3).²⁵ A simple search of those decisions would have revealed that the Board considers the history of the violator as one of the factors it evaluates when determining the reasonableness of the penalty. As illustrated by PTI's Exhibit A-62, it obtained a list of the Board's decisions issued under the WPCA. ADR 2626–67. That list includes

²² PTI discussed Ecology's review of its prior history in its opening statement. RP 39:2–6.

²³ PTI's assertion that “the reliability of this testimony could not even be tested by cross-examination” is untrue. Pet. Br. at 64. The testimony cited by PTI was offered in direct examination, which was then followed by cross examination by PTI. RP 571:15–574:19. PTI's election not to question the witness on this issue does not equate to being denied the opportunity to do so.

²⁴ The Board's prior decisions are available through its website at <http://www.eho.wa.gov/Decisions.aspx>.

²⁵ The reasonableness of the penalty was a legal issue identified in this case by Ecology and set forth in the Pre-Hearing Order issued on May 11, 2007. ADR 19-20.

numerous cases reviewing penalties issued by Ecology. In those cases decided on the merits, the Board consistently recites its three prong penalty analysis. *See, for example, I-5 Properties v. Dep't of Ecology*, Pollution Control Hearings Bd. No. 05-063, at 43 (Feb. 12, 2007).²⁶ Finally, Ecology's hearing brief also set out the Board's three prong test for determining the reasonableness of the penalty. ADR 731.

The Court should reject PTI's attempt to cast its failure to properly prepare for the hearing as a violation of its due process. PTI questioned Ecology's witnesses regarding this subject over three months before the hearing. PTI's failure to read the penalty statute, Board decisions reviewing penalties, and Ecology's hearing brief, does not amount to a denial of its due process. PTI's claim of lack of knowledge on this issue is not credible.²⁷

Finally, RCW 90.48.144 provides that any penalty levied shall be imposed pursuant to the provisions of RCW 43.21B.300. The procedures established in RCW 43.21B.300 require that the penalty be in writing and describe the violation with reasonable particularity. Ecology is not

²⁶ *See* <http://www.eho.wa.gov/searchdocuments/2007%20archive/pchb%2005-063%20final.pdf>.

²⁷ PTI's claim that Mr. Anderson should not have been permitted to testify regarding two complaints Ecology had received against it because he did not investigate those complaints is absurd. Pet. Br. at 64. As Mr. Anderson testified, he attempted to investigate those complaints but, on the advice of counsel, PTI refused him access to the properties. RP 225:2-16. PTI should not be permitted to benefit from the situation its own actions created. The Board properly permitted Mr. Anderson to testify regarding his knowledge of the complaints lodged with Ecology.

required to detail the penalty calculation. Penalty 4096 complied with the requirements of due process and the statutory requirements of RCW 90.48.144 and RCW 43.21B.300.

2. Board provided PTI the process it was due

PTI alleges that the Board did not accord it due process because the Board denied its request for additional hearing time. This argument is predicated on PTI's unsupported allegations that the Board (1) did not grant PTI additional hearing time, (2) did not apply its procedural rules evenhandedly, (3) spent too much time questioning PTI's wetlands expert, (4) did not allow PTI to cross-examine an unnamed witness,²⁸ and (5) struck its over length brief. As with PTI's' due process claims regarding Ecology's enforcement actions, its claims against the Board are easily refuted.

a. Board treated the parties equally and did not abuse its discretion in denying PTI's request for more hearing time after it had rested.

The Board applied the same procedural rules to both parties and its denial of PTI's last minute request for an extension of the hearing was not an abuse of discretion. "The trial court has considerable latitude in

²⁸ Making this allegation, PTI asserts that the "most egregious example" of the Board's uneven treatment of the parties "was that the Board denied PTI the opportunity to cross-examine important witnesses" Pet. Br. at 61. Not surprisingly, this claim is not supported by citations to the record. PTI's failure to properly allocate its hearing time is its own fault, not the Board's, which afforded PTI additional hearing time beyond that allocated Ecology. RP 474:11-475:6.

managing its court schedule to ensure the orderly and expeditious disposition of cases.” *Idahosa v. King Cy.*, 113 Wn. App. 930, 937, 55 P.3d 657 (2002). Such issues are reviewed under the abuse of discretion standard. *Id.* “An appellate court will find an abuse of discretion only ‘on a clear showing’ that the court’s exercise of discretion was ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). PTI has not made a showing, let alone a clear one, that the Board’s denial of its request was manifestly unreasonable, based on untenable grounds or for untenable reasons.

At the request of PTI, at the May pre-hearing conference, the Board set this matter for a two-day hearing to occur in October 2007. ADR 18–23, 1202. PTI subsequently filed a motion to continue the hearing, which the Board granted. ADR 286–287. Prior to the hearing, PTI made no request for additional hearing time. ADR 1203–1204. On February 14, 2008, the parties had a conference call with the Board to discuss the logistics for the hearing. ADR 775. In that conversation, at PTI’s request, the Board agreed to provide six hours of hearing time per day, rather than the normal five and one half hours. ADR 1204. The parties agreed to equally divide the time allotted, thus giving each party

six hours to present their case. *Id.* The Board treated each side equally with respect to the measurement of time used, with each party charged time for (1) opening statements, (2) presentation of their witnesses, (3) cross examination of the opposing sides' witnesses, and (4) questioning of their witnesses by the Board.²⁹ ADR 1202–06. The Board's use of a clock and its measurement of time was not a surprise as it was discussed in the February 14 conference call. *See also* RP 22:12–19.

Because it bore the burden of proof, Ecology presented its case first and reserved time for rebuttal. RP 23:24–24:4. PTI cross examined Ecology's witnesses and, on the second day, presented its responsive case. After PTI exceeded its allotted time by 25 minutes, the Board on its own motion granted PTI an additional 45 minutes to present its case “in the interests of trying to make sure this is a fair proceeding that allows sufficient time for [Pacific Topsoils] to finish up its case.” RP 474:11–475:6. PTI made no assertion that the extra time allotted was insufficient or that it was unable to present the remainder of its case. Following presentation of its last witness, PTI rested. RP 516:22–24. At that time,

²⁹ PTI, apparently claiming that the Board only did so to eat up its trial time, asserts that the Board spent over an hour asking Dr. Kelly about his wetland analysis. Pet. Br. at 62. One would think that the Board's questioning of the witness PTI holds out as the preeminent expert in the field would be appreciated, demonstrating that the Board was interested in hearing his opinions. Regardless, the Board questioned Ecology's witnesses at length and, consistent with Board practice, that time was charged against Ecology's six hours. Although Ecology did not time the Board, using pages of transcript as a measure, Board questions of Ecology's wetland specialist took approximately the same amount of time. *Compare* RP 323:15–338:7 to RP 451:24–470:2.

PTI did not assert it needed additional time, indicating instead it would use its remaining time for cross examination of Ecology's rebuttal witnesses. RP 516:17-19. Only after exhausting all of the time it was provided, totaling more than seven hours, did PTI orally request additional hearing time, arguing that it needed this time to present rebuttal witnesses. RP 564:16-570:6. The Board did not abuse its discretion in denying PTI's oral motion or its subsequent written motion for an extension of the hearing. RP 567:2-568:8; ADR 1202-1206.

Moreover, PTI cannot show that it was prejudiced by the Board's denial of its motion. First, despite its claim to the contrary, PTI was provided additional time to present its witnesses and rested its case with time to spare. RP 474:11-475:6, 516:22-24. Second, PTI's claim that it would have had various witnesses testify if given more time is just another attempt to cover for its inefficient trial presentation. It bears repeating that PTI rested its case without calling any of the witnesses it now alleges were necessary to its case.

With respect to the testimony of Ms. Reininger, PTI's assertion she would have provided essential testimony about the Parametrix report is contradicted by its previous assertion that she did not "perform[] any actual work" on the Parametrix Wetland Delineation Report and Impact Analysis, Exhibit R-19. ADR 695. To the extent that Ms. Reininger was

competent to testify that the report was preliminary, that issue was covered in PTI's examination of its own Environmental Director, Mr. Bajsarowicz, the recipient of the report and emails from Parametrix.³⁰ As the Board noted, the issue of the nature of the Wetland Delineation Report was highly contested. Had PTI truly believed that Ms. Reininger's testimony was "essential," it would have made every effort to present that testimony during its allotted time.

The other testimony PTI alleges it would have presented is either from witnesses who testified at the hearing (Mr. Bajsarowicz) or would have been cumulative (Ed Sewell, Mr. Haggith). Finally, PTI's claim that Mr. Rachey was needed to rebut the "newly" raised claim that prior history must be considered in establishing a penalty amount is unfounded. As discussed above, PTI knew its past history was at issue and simply elected not to provide Mr. Rachey's testimony as part of its case in chief. The Court should reject PTI's attempts to hold the Board responsible for its failure to present a coherent case.

The cases cited by PTI are distinguishable. Unlike the mother in *In re Marriage of Goellner*, 770 P.2d 1387 (Colo. App. 1989), PTI presented its full case within the allotted time. PTI's failure to efficiently

³⁰ The likelihood that PTI would have actually called Ms. Reininger is remote at best. If Ms. Reininger had been called to testify, she would have been asked to repeat her deposition testimony regarding substantive changes made to the Parametrix Wetland Delineation Report several months after it was provided to PTI. ADR 3193-3206.

present its case and its failure to reserve time to respond to Ecology's rebuttal case, which it was on notice Ecology would present, does not constitute a denial of its due process rights. The decision in *In the Matter of the Marriage of Glenn*, 856 P.2d 1348 (Kan. Ct. App. 1993), also provides no support that the Board abused its discretion in denying PTI's request for more hearing time. Unlike the present matter, there is no indication that the trial court in *Glenn* had allocated a specific amount of time to each side or that any time parameters had been placed on the hearing. Also, unlike the present matter, the trial court arbitrarily ended the hearing during the father's presentation of his case. No such abuse of discretion occurred in this case. The Court should reject PTI's assertions to the contrary.

b. Board did not abuse its discretion in striking PTI's over length hearing brief

The Pre-Hearing Order, issued nine months in advance of the hearing, required the submission of hearing briefs and specified that they not exceed 15 pages, not 12 as claimed by PTI. ADR 18-23. The Pre-Hearing Order further provided that relief from the page limit could be obtained only by motion. *Id.* As with its filing of a dispositive motion five days prior to the hearing, well past the dispositive motion deadline in the Pre-Hearing Order, PTI ignored the hearing brief provisions in the Pre-Hearing Order. Without the submittal of a motion to file an over

length brief, PTI submitted a 61 page trial brief, which included numerous attachments. Ecology moved to strike the brief for failing to comply with the Pre-Hearing Order. ADR 1114–1115.

In ruling on the motion, the Board articulated the factors supporting its decision to grant Ecology’s motion, including that the brief raised constitutional issues that are outside the Board’s jurisdiction and did not need to be preserved, and PTI had not filed any dispositive motions on the legal arguments raised. RP (Feb. 19, 2008)³¹ 17:13–21:21. Identifying the purposes of a hearing brief, the Board found that PTI’s brief, while purporting to be a hearing brief, went beyond those purposes. RP (Feb. 19, 2008) 18:25–19:21. The Board concluded by allowing PTI to submit a hearing brief that conformed with the page limits in the Pre-Hearing Order.³² RP (Feb. 19, 2008) 21:5–11. The Board did not abuse its discretion in limiting the hearing briefs of both parties to 15 pages.³³

D. Ecology Proved That PTI Discharged Pollutants Into Waters Of The State

PTI asserts that Ecology “utterly failed” to prove that the filling of wetlands constituted the discharge of pollutants into waters of the state.

³¹ Transcript of Proceeding Re: Motion on Stay, Motion to Dismiss for Want of Jurisdiction, Motion in Limine, Motion Concerning Overlength Brief (Feb. 19, 2008).

³² PTI sought reconsideration by the entire Board, which was denied. RP 310:7–311:2.

³³ PTI’s claim that the Board allowed Ecology to submit a substantial appendix with its hearing brief is disproved by the record. Ecology’s lone attachment to the hearing brief is the decision in *Bldg. Indus. Ass’n of Washington v. City of Lacey*, Thurston County No. 91-2-02895-5 (Mar. 30, 1993), which held that wetlands are waters of the state subject to regulation by Ecology under the WPCA. ADR 721–766.

Pet. Br. at 38. This argument is predicated on the legal theory that wetlands are not waters of the state protected from pollution under the WPCA, with the additional claim that covering a wetland with dirt does not change its chemical, physical, and biological properties.³⁴ The Court should reject these arguments as the legal analysis is flawed and there is substantial evidence in the record supporting the Board's conclusions that PTI's filling activity polluted waters of the state. Board Order at 27, 32 (COL 8, 18).

As detailed in Section VI.B, *supra*, wetlands are waters of the state protected under the WPCA from the unauthorized discharge of pollution. Moreover, there is substantial evidence in the record supporting the Board's determination that the filling of a wetland changes the physical properties of the wetland and amounts to the discharge of pollutants into waters of the state. Board Order at 27, 32 (COL 8, 18). Ecology presented testimony that soil, a solid, is pollution under the WPCA and detailing the impairment of wetlands functions caused by being filled. RP 316:16–18, 327:16–330:8. *See also* Ex. R-19 (pp. 15–22) (describing functions of wetlands on site, 7.81 acres of which had been mechanically

³⁴ The WPCA defines “pollution” to mean the “alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any . . . , solid . . . into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to . . . legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.” RCW 90.48.020.

graded and/or filled with non-native soils). As PTI's Construction Manager testified, the fill was of unknown content.³⁵ RP 510:7-19.

The Board's conclusion that the site was physically altered is amply supported by reviewing the aerial photographs of the site taken before and after filling. *Compare* Exs. R-1, R-2, R-19. An estimated 75,000 to 150,000 cubic yards of fill, ranging from 15 to 17 feet deep, was placed on the wetlands at Smith Island. Ex. R-21 at 3. According to PTI's soil expert, the ground beneath the fill had compacted a minimum of two feet. Ex. R-27. The logs of borings drilled through the fill identify the soils at the interface between the bottom of the fill and the surface of the ground as wetland sediments. Ex. A-86. There can be no dispute that any plant life within the fill footprint prior to PTI's placement of thousands of cubic yards of fill on its Smith Island site no longer exists. Ecology proved that PTI's filling of wetlands at Smith Island constituted a discharge of pollution into waters of the state barred by RCW 90.48.080.

E. Board's Factual Findings Are Supported By Substantial Evidence

PTI challenges virtually every finding of fact, alleging that they are not supported by substantial evidence.³⁶ In actuality, PTI seeks to reargue

³⁵ PTI asserts that the fill was not contaminated. Pet. Br. at 41. It is unclear how such a conclusion can be reached if the fill was not tested prior to its discharge into the wetlands. RP 501:17-19. The logs of borings made into the fill indicate that the fill layer includes rubble and wood. Ex. A-86. Regardless, the placement of fill, contaminated or not, into waters of the state violates RCW 90.48.080 as it changes the chemical, physical, and biological properties of the water. *See* RCW 90.48.020.

the evidence and asks the Court to override the Board's judgment on the credibility of the witnesses and the weight to be given conflicting evidence, none of which is permitted under the APA. What PTI cannot escape is that the record contains substantial evidence that it filled wetlands at Smith Island in violation of RCW 90.48.080. As demonstrated above in the Statement of the Case and supplemented below, the record contains substantial evidence supporting the Board's findings. Therefore, the Court should affirm all of the Board's Findings of Fact.

1. The Court cannot reweigh the evidence or make credibility determinations

PTI dedicates a significant portion of its brief arguing over the credibility of various expert witnesses who testified before the Board. Arguments pertaining to witness credibility may have been appropriate at the closing argument stage, but are not appropriate at this appellate level of review. The Board has already weighed the evidence and determined the weight to be given to competing inferences. These functions reside with the Board as fact-finder and this Court cannot reweigh the evidence at this juncture. *City of University Place v. McGuire*, 144 Wn.2d 640, 652–53, 30 P.3d 453 (2001). Rather, the only question before the Court is whether the Board's findings are supported by substantial evidence in the

³⁶ PTI did not assign error to Findings of Fact 1, 4, 5, 26, and 30. Findings of fact that are unchallenged are verities on appeal. *See, for example, Hilltop Terrace Homeowners' Ass'n v. Island Cy.*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995).

record. As established below, the findings are supported and the Court's inquiry need go no further.

Even if PTI could argue witness credibility at this stage, PTI's suggestion that its expert witnesses are more credible than Ecology's expert witnesses is unsubstantiated. For one thing, PTI exaggerates or misstates its own experts' testimony. More importantly, as detailed in the hearing transcript, Ecology's expert witnesses—Paul Anderson, Erik Stockdale, and Rod Thompson—each possess significant experience in their respective fields. Mr. Anderson, a wetland specialist with Ecology, has 18 years experience as a wetland scientist and has held a variety of jobs in that field. RP 155:5–157:15. Mr. Anderson has significant training in the field of wetland science, including advanced soils and hydrology, wetland plant identification, wetland rating and delineation. RP 156:5–18. Mr. Stockdale, currently an Ecology Unit Supervisor, is a wetland scientist with advanced training in wetland hydrology and hydric soil determination, wetland plant identification and function assessment. RP 534:5-535:7. Mr. Stockdale is also one of the authors of various Ecology wetland guidance documents. RP 535:8-18. Finally, Mr. Thompson is a hydrogeologist who has been employed by Ecology for 18 years, with 10 of those years spent as the well drilling coordinator in Ecology's Water Resources Program. RP 519:5-18. The Board correctly

weighed the evidence and witness credibility in affirming Ecology's Order 4095 and Penalty 4096.³⁷

2. Board has significant expertise regarding wetlands

The legislature created the Environmental Hearings Office (“EHO”) in 1979 to provide “a more expeditious and efficient disposition of appeals” of Ecology decisions. RCW 43.21B.010. The EHO is comprised of five independent environmental boards—Pollution Control Hearings Board, Shorelines Hearings Board (“SHB”), Forest Practices Appeals Board, Environmental and Land Use Hearings Board (“ELUHB”) and Hydraulic Appeals Board. The members of the Board also serve on the SHB and the ELUHB. RCW 90.58.170; RCW 43.21L.040(1). Discussing the Board, this Court noted that the Board’s “primary function is to use its environmental expertise expeditiously and uniformly to resolve pollution control controversies. RCW 43.21B.110.” *City of Seattle v. Dep’t of Ecology*, 37 Wn. App. 819, 823, 683 P.2d 244 (1984).

³⁷ Without any supporting evidence, PTI accuses Mr. Anderson of “dramatically” changing prior testimony made under oath before the Snohomish County Hearings Examiner and in his deposition. Pet. Br. at 45-46. PTI’s accusations are baseless and should be rejected. Even if the accusation were true, which Ecology does not concede it is, the correct response would have been to impeach the witness with the prior inconsistent statement. This was not done. The sum total of PTI’s questioning of Mr. Anderson regarding his testimony before the Hearing Examiner, and giving PTI the benefit of the doubt that what it is asking relates to that prior testimony, is contained on a handful of pages of the transcript: RP 249:21–24, 250:22–25, 251:1–12, 259:2–12, 282:25–283:1–4. At no point did PTI assert during those portions of the transcript that Mr. Anderson’s testimony was inconsistent with that provided before the Hearing Examiner. Apparently, PTI conflates Mr. Anderson’s critique of Dr. Kelley’s report in Exhibit A-71 with testimony before the Hearing Examiner. While the exhibit does not constitute sworn testimony, PTI cross examined Mr. Anderson about its contents at length and did not establish any inconsistency with his testimony before the Board. RP 282:16–296:15.

Presumably because it did not agree with the Board's decision in this case, PTI attacks the Board's competence with respect to the regulation of wetlands and wetland science, asserting that the "Board itself has no expertise about wetlands" Pet. Br. at 42. The thin reed upon which PTI bases this argument is the list of appeals to the Board of Ecology's enforcement actions taken under Chapter 90.48 RCW. *Id.* However, a simple search of the decisions of the EHO using the term "wetlands" reveals that the Board, the SHB, and the ELUHB have addressed numerous cases dealing with wetlands.

The one example PTI provides as support for its assertion is Finding of Fact 18. However, as is readily apparent by reading Finding of Fact 18, PTI's characterization of the finding is wholly inaccurate. Pet. Br. at 51–52. The finding states that investigators, which would include PTI's experts, found that the site had one or more of the three wetland parameters. Citing WAC 173-22-080(3), in Conclusion of Law 4 the Board concluded that Ecology and Parametrix, as required by Ecology's regulations, found all three wetland parameters at PTI site. This factual conclusion is supported by substantial evidence in the record. RP 186:12–188:24, 200:19–201:17, 237:9-15, 316:4-10; Exs. R-19 (pp. 16–17), R-7, R-29, R-30. The Board's thorough decision in this case demonstrates its

expertise regarding wetlands, its grasp of scientific evidence, and its ability to weigh the credibility of the evidence.

3. Board's findings are supported by substantial evidence.

PTI has not, and cannot, meet its burden to set aside the Board's Findings of Fact. The Board's findings are supported by substantial evidence. Ecology responds to PTI's specific challenges to the Board's findings below.

a. Board decision demonstrates its understanding regarding wetland hydrology and the growing season.

PTI challenges Findings of Fact 17, 18, 20, and 21 asserting that the Board does not understand wetland hydrology and the growing season. The basis for PTI's argument is essentially that the Board did not accept Dr. Kelley's testimony regarding the applicability of the Problem Area delineation methodology, use of oxidized rhizospheres as an indicator of hydrology, and length of the growing season.³⁸ PTI is simply trying to reargue the evidence and have this Court reweigh the credibility of the witnesses that testified on these issues.

Substantial evidence in the record supports the use of the Atypical Situations methodology and the finding that the hydric soils and hydrology indicators were present on the site. RP 168:22-189:9; Exs. A-38 (pp. 70,

³⁸ Although not cited by PTI, its arguments challenge Finding of Fact 16 where the Board found that Ecology's and Parametrix's use of the Atypical Situations methodology was appropriate.

73-75, 77), A-51 (p. 98). PTI's own expert acknowledged finding oxidized rhizospheres at the site. RP 399:11-18. As is clear from the evidence in the record, oxidized rhizospheres are a primary indicator of extended saturation, not an unreliable secondary indicator. Ex. A-51 (p. 87). PTI's claim that the wetlands on Smith Island were seasonal, thus requiring the use of the Problem Area methodology, was rebutted by testimony from Ecology. RP 215:1-16, 550:1-551:2. Site alterations such as levees and dikes are addressed in the Atypical Situations methodology in Ecology's Wetland Delineation Manual. Ex. A-38 (p. 70). Contrary to PTI's claims, the relevant alteration in this case is the unauthorized placement of fill within the wetlands, not the historic diking and ditching. RP 540:2-541:13. Substantial evidence supports Findings of Fact 16, 17, 18, 20, and 21.

b. Board appropriately relied on Parametrix Wetland Delineation and Impact Analysis

Citing no specific finding of fact, PTI asserts that the Board incorrectly relied upon the Parametrix Wetland Delineation and Impact Analysis, Exhibit R-19, claiming that the report was "preliminary." Substantial evidence in the record demonstrates that the report was final, not preliminary. The December 4, 2006, Parametrix memorandum cited by PTI recommended that, before finalizing the wetland report, additional field work should be done. Ex. A-90 (p. 5). PTI's Environmental

Director, Mr. Bajsarowicz, testified that additional site inspections by Parametrix took place, which are documented in the report as occurring on December 5 and 8, 2006. RP 148:23-149:13; Ex. R-19 (p. 15). The final report was sent to Mr. Bajsarowicz on January 24, 2007. RP 126:23-127:14; Ex. R-19 (p. 1). The document itself provides no statement that it is preliminary. Ex. R-19; RP 149:20–22.

Parametrix’s conclusion regarding the existence of wetlands beneath the fill was definitive: “[a]pproximately 7.81 acres of a palustrine emergent wetland (Wetland 1) was mechanically graded and/or filled with non-native soils.”³⁹ Ex. R-19 (p. 23). Substantial evidence in the record supports the Board’s reliance on the Parametrix delineation.

c. PTI’s remaining claims are easily dismissed

PTI makes somewhat random arguments regarding the lack of evidence in the record. Pet. Br. at 59-61. To the contrary, substantial evidence in the record supports the Board’s findings.

³⁹ PTI argues that Dr. Kelley was the only person to investigate the area under the fill. In fact, Parametrix did evaluate conditions beneath the fill. To assess the pre-fill conditions on the site, Parametrix reviewed aerial photos for a number of years, concluding that the herbaceous plant community seen on a 2005 aerial photo in the filled area was similar to vegetation on the remaining undisturbed portions of the site. Ex. R-19 (p. 2 ¶ 8). “A distinction between vegetative communities present in undisturbed wetland areas and filled wetland areas was not observed in review of aerial photographs.” Ex. R-19 (p. 17 ¶ 2). Parametrix’s determination of the area of wetland filling was based on the review of background information and onsite examination of vegetation, soils, topography and best professional judgment, Ex. R-19 (p. 17 ¶ 1), all of which are valid methods described in Washington’s Wetlands Delineation Manual. Ex. A-38 (§ B, pp. 36–39, ¶ 62; pp. 46–48).

In Finding of Fact 13 the Board states the definition of hydrophytic vegetation contained in WAC 173-22-030(7). Wetland vegetation, which is hydrophytic vegetation, often grows in water. Ex. R-10 (pp. 16–19, Figs. 5–7; p. 26, Fig. 11; p. 43, Fig. 20).

The Board cites the ample evidence in the record supporting facts in Finding of Fact 14 that Mr. Anderson found evidence of prolonged inundation of soil during his site visit. PTI does not challenge the existence of evidence, rather it seeks to reweigh that evidence. Mr. Anderson testified that during his site inspection he observed and photographed “obvious redoximorphic features, which indicate prolonged inundation or saturation and also shows the oxidized rhizospheres that I discussed earlier.” RP 186:12–18. Dr. Kelley also observed oxidized rhizospheres on Pacific Topsoils’ site. RP 399:11–18.

In Conclusion of Law 2, the Board correctly cited the *Washington State Wetland Identification and Delineation Manual* (Ecology 1997) and WAC 173-22-080(1), both of which provide that the purpose of the manual is “to provide information and methods that will allow a delineator to make an accurate wetland delineation any time of year.”

There is substantial evidence in the record supporting the Board’s Conclusion of Law 18 that “Smith Island contains a ‘mosaic of wetlands’ requiring business owners to manage properties with wetland regulatory

requirements in mind.” RP 67:25–68:18; Exs. R-19 (p. 16 ¶ 2), A-102 (Fig. 7). PTI’s claim the Mr. Wolken was biased is unproven and untrue.

The Board’s statements in Finding of Fact 24 concerning capillary fringe are supported by substantial evidence. Mr. Stockdale provided testimony on that subject, RP 543:1-544:3, and it is recognized in the *Washington State Wetland Identification and Delineation Manual*, Ex. A-38 (p. 32 ¶ (2)). Contrary to PTI’s characterization, the purpose of the testimony was not to recommend a deviation from the 12-inch saturation standard in the Manual. Rather, the reference to the 14–18 inch capillary fringe was cited to support Ecology’s professional judgment that it is reasonable to include water table levels within 18 inches of the surface to determine if the wetland hydrology criterion has been met. The Board’s acceptance of this information is supported by the record.

The record contains substantial evidence supporting Board Finding of Fact 19 that the vegetation in the unfilled wetland amongst the fill was representative of the vegetation now under fill. Exs. R-2, R-19 (p.17). Under the Atypical Situations methodology, in order to determine what vegetation that has been covered with fill, you are to look at vegetation from reference sites. RP 168:22-172:17; RP 442:13-443:20. One such reference site is the wetland that was not filled. Ex. R-19 (p. 17).

PTI, by misstating Board Findings of Fact 16 and 17, claims the Board found that Mr. Anderson conducted a delineation of PTI's site. In fact, the Board found that the use of the Atypical Situations methodology by both Mr. Anderson and Parametrix in their independent analyses of PTI's site was supported by the evidence and Ecology's delineation manual. Exs. A-38 (pp. 70-78), R-19 (pp. 14-17); RP 168:22-172:17. The record contains substantial evidence supporting the Board's findings.⁴⁰

VII. CONCLUSION

For the reasons stated above, the Court should affirm the Board's Order affirming Ecology's Order 4095 and Penalty 4096 issued to PTI.

RESPECTFULLY SUBMITTED this 3rd day of March, 2010.

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⁴⁰ Through an Errata Sheet Reflecting Corrections to its Trial Brief, PTI purported to include a new assignment of error regarding holding Dave Forman personally liable for the penalty. CP 248-51. The APA bars the raising of an issue on judicial review that was not raised below. RCW 34.05.554. Regardless, Mr. Forman did not appeal the Penalty. ADR 3301-04. To the extent that Mr. Forman was concerned about being personally liable for the penalty, he waived his opportunity to raise the issue.

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The Superior Court of Washington
For Thurston County

Building Industries Association of Washington,
et al,

v.

City of Lacey, et al,

Petitioner,

Respondent.

No. 91-2-02895-5

MEMORANDUM OPINION

This matter came before the court on motions for summary judgment brought by the Cities of Lacey and Tumwater, the Department of Ecology, and on cross-motions for summary judgment brought by the Building Industries Association of Washington (BIAW). The motion brought by the City of Lacey deals exclusively with procedural issues. The Tumwater motion deals with many of the same issues, and also deals with the substantive issues raised by BIAW's motion for summary judgment. BIAW's motion contends that the challenged ordinances violate the Washington and Federal Constitutions, in that they disallow actions allowed by state statutes, and violate the requirements of substantive due process found in these two constitutions.

There do not presently appear to be any material facts in dispute, and that the issues raised appear to be only issues of law.

SUMMARY OF RELEVANT FACTS

During the 1990 legislative session, the Washington Legislature passed the Growth Management Act (GMA), Ch. 36.70A RCW. This act imposed certain planning and legislative actions on counties with a population of 50,000 or more, and on all cities within such counties. Other cities and counties, not relevant to this motion, could be brought within the requirements of the GMA, due either to the rate of population growth, or to an election to impose GMA coverage on the county. RCW 36.70A.040. Since Thurston County met the express requirements for GMA applicability, it, and the cities' time lines required adoption of any GMA required plan by 1 July 1993.

The ordinances challenged in this suit were adopted in furtherance of the requirements imposed by the GMA. The passage, publication and effective dates of these two ordinances are as

1 follows:

	Lacey Ordinance No. 912	Tumwater Ordinance No. 1278
2 Passed by Council	25 July 1991	20 August 1991
3 Published	28 July 1991	23 August 1991
4 Effective Date	2 August 1991	28 August 1991

6
7 This present action was filed by the BIAW on 19 December 1991.

8 DEPARTMENT OF ECOLOGY'S MOTION FOR SUMMARY JUDGMENT

9 Ecology's first challenge to BIAW's action is that the named petitioners lack standing to bring
10 their claim against DOE.¹ DOE has brought two challenges to the standing of the Petitioners to
11 bring this suit. First, it questions whether a person in this lawsuit can show prejudice from the
12 DOE's actions; and, secondly, it questions whether a judgment in the petitioner's favor will terminate
13 the controversy.

14 DOE argues that no member of the association has shown that he has been or is likely to be
15 prejudiced by the alleged invalid DOE rules. A member of an association must show that "they have
16 been or will be 'specifically and perceptibly harmed' by the challenged action." If the alleged harm is
17 a threatened injury, injury must be immediate, concrete and specific - not merely conjectural or
18 hypothetical. Furthermore, an immediate injury is one that is certainly impending.

19 DOE argues that the petitioners allege only a threatened injury, but that no member has
20 applied for a section 401 water quality certification. Further, petitioners have not shown that the
21 alleged rules have been or are about to be applied to them, or that such an application would
22 necessarily impair the members' rights. DOE contends that while John Piazza owns wetlands, on one
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24 ¹ There is some disagreement over whether this challenge to a DOE rule is properly brought
25 under Ch. 7.24 RCW (Declaratory Judgment Act) or Ch. 34.05 RCW (APA). This is answered by
26 two provisions: RCW 7.24.146 ("This chapter does not apply to state agency action reviewable under
27 chapter 34.05 RCW.") and RCW 90.48.230 ("The provisions of chapter 34.05 RCW, the
Administrative Procedure Act, apply to all rule making and adjudicative proceedings authorized by or
arising under the provisions of this chapter.") On these bases, only APA aspects of the case are
discussed.

1 of which he is awaiting a § 404 determination, he has not yet sought a § 401 certification from DOE.

2 In response to these contentions, BIAW argues, with respect to the argument that no person
3 has applied for a 401 permit, that the Corps of Engineers has determined that Piazza's property has
4 wetlands that are jurisdictional, and thus not eligible for a Nationwide Permit 26 Exemption.
5 Therefore, Piazza's property has entered the 401 process. This should be sufficient, since Piazza
6 must obtain a 401 certification before he can proceed with any development of his property.
7 Furthermore contends, BIAW, that the APA requires only that the agency action "is likely to
8 prejudice" the person. Prejudice is likely here, as DOE asserts authority under CH. 90.48 RCW over
9 all wetlands, including Piazza's.

10 In reply, DOE contends that Piazza does not know whether he will be required to obtain a
11 401 certification, and his declaration shows that he is attempting to convince the Corps of Engineers
12 that he should fall within Nationwide Permit 26. Therefore, it argues that his claims of harm are
13 speculative and premature.

14 The APA requirements for standing are found in RCW 34.05.530. This section provides that:

15 A person has standing to obtain judicial review of agency action if that person is aggrieved or
16 adversely affected by agency action. A person is aggrieved or adversely affected within the
17 meaning of this section only when all three of the following conditions are present:

- 18 (1) The agency action has prejudiced or is likely to prejudice that person;
- 19 (2) That person's asserted interests are among those that the agency was required
20 to consider when it engaged in the agency action challenged; and
- 21 (3) A judgment in favor of that person would substantially eliminate or redress
22 the prejudice to that person caused or likely to be caused by the agency action.

23 RCW 34.05.530

24 An Association has standing to seek relief, if one or more of its members has standing to sue
25 in that member's own right. See Warth v. Selden, 422 U.S. 490, 511, 45 L.Ed.2d 343, 95 S.Ct
26 2197, 2211 (1975). There is no dispute that BIAW or Washington Association of Realtors (WAR)
27 would have standing in the suit, if any one member has sufficient standing to assert the challenges
28 before the court. The critical issue is whether the individuals named have such standing. With
respect to Piazza, the central issue is whether Ecology's action "ha[ve] prejudiced or [are] likely to
prejudice" Piazza. Looking to the claims asserted in the complaint, if the standards which are applied
to 401 certification proceedings should have been promulgated as rules, then Ecology's actions are

1 likely to prejudice Piazza in two respects: First, the standards should have been promulgated as rules
2 under the APA procedures, and, secondly, the fact that a 404 determination that Piazza's wetlands are
3 jurisdictional, a determination which invokes the 401 procedure, means that the standards will
4 eventually be applied to Piazza. While this is perhaps not case of standing which courts prefer to
5 have established, it appears that control over when a 401 certification demand is made is in the hands
6 of a third party: the Corps of Engineers. Under these circumstances, Piazza has done all he can to
7 place his wetlands in the 401 process, short of accepting the Corps' determination without question.
8 Therefore, this Court finds that Piazza has demonstrated sufficient interest in this case to satisfy the
9 first requirement for standing. This court concludes that Piazza and the BIAW have sufficiently met
10 the requirements for standing under the APA as there is not a genuine dispute that Piazza's interests
11 were among those required to be considered if the standards are rules, and since a judgment in
12 Piazza's favor would redress the prejudice that was caused by DOE's action.

13 JUDGEMENT WOULD NOT END CONTROVERSY

14 DOE's second challenge to BIAW's action is that a judgment in this case would not end the
15 controversy. It argues that even if the Court ruled in favor of the Petitioners, the Petitioners would
16 still be required to obtain 401 certifications on projects requiring 404 permits, as DOE is the
17 designated state agency under the Federal Clean Water Act. RCW 90.48.260. BIAW responds that a
18 judgment in one of its member's favor would prevent DOE from attempting to regulate wetlands
19 under the guise of water quality protection. Additionally, if an unpromulgated rule is being applied,
20 such a judgment would conclusively resolve the matter in its favor.

21 This Court concludes that since the challenge in the DOE portion of the suit is over whether
22 DOE should have promulgated standards as rules, a judgment in the Petitioner's favor would prevent
23 DOE from utilizing an unpromulgated rule, and remedy the injury. Certainly, such will not prevent
24 DOE from enforcing properly promulgated and otherwise applicable standards under the applicable
25 Federal Act.

26 PETITIONER'S CLAIMS ARE NOT JUSTICIABLE

27 DOE contends that no party has alleged that they have planned a project which will in fact
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1 require a § 401 permit, or applied for a § 401 permit, or been issued a permit with conditions, or
2 been denied a § 401 permit based on the challenged standards (In other words, the allegations in the
3 complaint are merely hypothetical). BIAW responds, arguing that this complaint is not
4 hypothetical, since a party is currently involved in the 401 process, and since DOE's actions will
5 continue to impact this and other future development actions by BIAW's members. In reply, DOE
6 argues that BIAW presents no set of concrete facts upon which the court can base its decision and that
7 there is not present case for the court to decide.

8 A justiciable controversy must exist before a court will act. For a justiciable controversy to
9 be found, there must be:

- 10 1. An actual, present and existing dispute, or the mature seeds of one, as distinguished
- 11 2. from a possible, dormant, hypothetical, speculative or moot disagreement,
- 12 3. between parties having genuine and opposing interests,
- 13 4. which involves interests that must be direct and substantial, rather than potential,
- 14 theoretical, abstract or academic, and
- 15 a judicial determination of which must be final and conclusive.

16 DiNino v. State, 102 Wn.2d 327, 330, 684 P.2d 1297 (1984). DOE's argument appears to be
17 directed primarily at the first requirement, that there must be "an present existing dispute, or the
18 mature seed of one." It is clear in this Court's mind that the dispute over whether DOE has authority
19 under the State Pollution Control Act, Ch. 90.48 RCW, to regulate wetlands under the guise of
20 protecting water quality in this state is more than merely hypothetical as to the petitioners. In the
21 context of the facts presented to the Court, the mature seeds of an actual dispute are present, the
22 parties have a genuine and opposing interest in the outcome of this challenge, and the interests of
23 petitioners' are sufficiently direct and substantial. A determination of this challenge would be
24 conclusive as to DOE's ability to enforce the challenged standards.

25 FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

26 DOE's next challenge is that the Petitioners have failed to exhaust their administrative
27 remedies. It argues that a party may not seek APA review unless that party has exhausted all
28 administrative remedies, unless administrative review would be futile. Since no petitioner has been
denied a § 401 certification, or been issued one with conditions, the Petitioners have failed to exhaust
an administrative remedy. In response, the Petitioners argue that their action is not a challenge the

1 application of a rule, but challenges whether DOE's enforcement of the wetland development
2 standards constitute enforcement of a "rule" not adopted in compliance with the APA. The APA
3 expressly provides that a party need not participate in the rule making proceeding to challenge the
4 rule, and therefore, the petitioner's can seek judicial review. RCW 34.05.534. BIAW further
5 contends that

6 The state's Administrative Procedure Act (APA), however, provides for specific
7 exceptions to this exhaustion requirement. Where a party challenges the validity of a rule,
8 and the rule's threatened application "immediately threatens to interfere with or impair "the
9 party's legal rights or privileges, the party may petition the superior court for a declaratory
10 judgment.

11 Simpson Tacoma Kraft, 119 Wn.2d 646 (emphasis added). Since Piazza has entered the 401 process,
12 the case has entered the area of "threatened application" of a rule, which is sufficient to confer
13 standing on Piazza. In reply, DOE contends that the 401 certification requirement is a federal
14 requirement, which will remain even if the Court grants the petitioner's declaratory judgment.
15 Further, the only point raised by the petitioners is that they believe that DOE may impose more
16 stringent requirements than those imposed by the Federal requirements. If DOE does impose such
17 requirements, they can properly be raised before the Pollution Control Hearings Board (PCHB) and in
18 an appeal to this Court.

19 The technical requirements of exhaustion when challenging an agency action are applied
20 differently when the challenge involves a rule or a threatened application of a standard or policy
21 which should have been promulgated as a rule. RCW 34.05.534 provides:

22 A person may file a petition for judicial review under this chapter only after exhausting all
23 administrative remedies available within the agency whose action is being challenged, or
24 available within any other agency authorized to exercise administrative review, except:

25 (1) A petitioner for judicial review of a rule need not have participated in the
26 rule-making proceeding upon which that rule is based, or have petitioned for its amendment
27 or repeal.

28 (emphasis added). Furthermore, RCW 34.05.570(2)(b) provides that "The declaratory judgment may
be entered whether or not the petitioner has first requested the agency to pass upon the validity of the
rule in question." Here, the standards or policy being challenged were not adopted in a formal rule-
making proceeding. Therefore, the petitioners could not have participated in such proceeding.

1 Furthermore, a rule not having been expressly adopted, the petitioners could not seek its repeal, and
2 therefore, petitioners are not required to request that the agency pass upon the validity of the rule.
3 Since exhaustion is not required when a rule has been formally adopted, it should not be required
4 when the agency is alleged to have adopted a rule without compliance with the APA. Therefore, this
5 Court concludes that the challenge for failure to exhaust administrative remedies is without merit.

6 DOE RULES HAVE BEEN PROPERLY PROMULGATED

7 DOE contends that any rules being applied by it under Ch. 90.48 RCW to Water Quality
8 Certifications have been properly promulgated. The APA defines a rule as:

9 any agency order, directive or regulation of general applicability (a) the violation of which
10 subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or
11 revokes any procedure, practice or requirement relating to agency hearings; (c) which
12 establishes, alters or revokes any qualification or requirement relating to the enjoyment of
13 benefits or privileges conferred by law; (d) which establishes, alters, or revokes any
14 qualifications or standards for the issuance, suspension, or revocation of licenses to pursue
15 any commercial activity, trade or profession; or (e) which establishes, alters, or revokes any
16 mandatory standards for any product or material which must be met before distribution or
17 sale.

14 RCW 34.05.010(15) (emphasis added). DOE contends that the critical element in the above definition
15 is the "of general applicability" element. The test for this element has been stated as follows: "if it
16 applies uniformly to individuals as members of a class" then it is of general applicability. See
17 Simpson Tacoma Kraft v. Ecology, 119 Wn.2d 640, 648 (1992). Here DOE asserts that any specific
18 conditions imposed on 401 certifications depend on the nature of the wetland, the potential impacts of
19 the project, and are site specific and not class specific. Thus, such conditions are not generally
20 applicable and do not constitute a rule.

21 In response, BIAW contends that DOE applies wetland mitigation criteria, implementing a
22 "no net loss" system, which have not been adopted by DOE in accordance with the APA procedures.
23 In support of this position, it relies on the testimony of Mr. Llewelyn, who testified that without
24 compliance with the no net loss standard, a 401 certification will not be issued by DoE.

25 In reply, DOE contends that DOE is not applying a no net loss standard uniformly to all
26 water quality certifications. Furthermore, addressing Llewelyn's testimony, DOE contends that
27 Llewelyn is not responsible for 401 water quality certifications, and, thus, does not speak for it on
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1 | this issue. It avers that McMillan is responsible for 401 certifications, and, as stated in his
2 | deposition, that the no net loss standard was not applied to 401 certifications.

3 | To prevail on this issue, BIAW must show that DOE is applying a standard or order generally
4 | to individuals as a member of a class. Resolving all reasonable inferences in favor of BIAW, it has
5 | only been able to show that under the proposed regulations, which the DOE has withdrawn from the
6 | adoption process, the DOE proposed adoption of a no net loss standard for protection of wetlands.
7 | BIAW has not been able to show that this standard is actually being applied. While it has been shown
8 | that site specific decisions are being made to protect wetlands, no showing has been made that these
9 | are generally applicable to all wetlands for which permits are sought. The dispute between petitioners
10 | and DOE over the testimony of Llewellyn and McMillan could be argued to create an issue of fact in
11 | this case. However, a careful reading of Llewellyn's testimony shows that he only testified that the
12 | proposed but withdrawn regulations used a no net loss standard. This is far different from the
13 | McMillan's testimony that, at the present time, the no net loss standard is not being applied. Such
14 | difference does not rise to the level of being material to the outcome. Therefore, it is not necessary
15 | to further examine the speaking authority of the two gentlemen, or deny summary judgment on the
16 | basis of the differences in their testimony.

17 | Accordingly, this Court concludes that petitioner's have not demonstrated that DOE is
18 | applying a standard that was required to be promulgated as a rule.

19 | **BIAW's MOTION FOR SUMMARY JUDGMENT RE DOE**

20 | In BIAW's motion for summary judgment against DOE, it challenges whether DOE has
21 | authority under Ch. 90.48 RCW to regulate isolated intermittent wetlands under the guise of
22 | protecting state waters from pollution. BIAW concedes that DOE has sufficient authority to regulate
23 | wetlands that are associated with state shorelines, or which are not intermittent. Opening Brief at 6.

24 | BIAW cites the court to two key sections of Ch. 90.48 RCW: RCW 90.48.020 provides that
25 | "waters of the state"

26 | . . . shall be construed to include lakes, rivers, ponds, streams, inland waters, underground
27 | waters, salt waters, and all other surface waters and watercourses within the jurisdiction of the
28 | state of Washington.

1 RCW 90.48.030 provides:

2 The department shall have the jurisdiction to control and prevent the pollution of streams,
3 lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and
4 underground waters of the state of Washington.

5 BIAW asserts that DOE relies on the phrase "other surface and underground waters" to
6 conclude that if water is present, RCW 90.48.030 confers sufficient authority to prevent water quality
7 degradation. BIAW contends that this position is not supported by the doctrine of eiusdem generis
8 (where general words follow the enumeration of particular classes of things, the general words will be
9 construed as applying only to things of the same general class as those enumerated.):

- 10 1. The dictionary definitions of the terms used in RCW 90.48.030 have a consistent
11 theme of substantial water, flowing in a defined area above or below ground, which
12 have a capacity to beneficially serve the state and its residents through apportionment.
- 13 2. Since isolated intermittent wetlands do not satisfy these themes, they are outside the
14 class of water bodies mentioned in the specific enumerations, and may not be
15 regulated under this statute.²

16 In addition, BIAW argues that the interpretation favored by DOE results in duplicative legislation
17 regulating wetlands as the Shorelines Management Act governs associated wetlands, granting
18 regulatory authority to DOE, and the GMA governs isolated wetlands, and grants authority to cities
19 and counties to regulate these wetlands.³ Finally, the Legislature knows how to delegate authority to
20 DOE to regulate isolated intermittent wetlands if it so intended. To do so all it would be required to
21 do would be to add reference to the term in the statute. It has not done so, and this should end the
22 inquiry, and result in a decision favorable to BIAW.

23 In response, DOE contends that in interpreting a statute, the Court is to ascertain and give

24 ² But note, the rule making authority granted to DOE, RCW 90.48.035, is broader, as it uses
25 language of "Waters of the State," a broader term than those found in RCW 90.48.030. Note
26 also that the use of "includes" in definition in RCW 90.48.020 suggests eiusdem generis has
27 limited applicability.

28 ³ But note, the GMA does not govern all isolated wetlands. It necessarily governs only those
wetlands in counties with populations over 50,000 people and those counties which elect to be
governed by the act. RCW 36.70A.040.

1 effect to the intent of the Legislature, and to construe the statute to effect the purpose and avoid
2 strained, unlikely or absurd consequences. The statement of purpose in the statute provides as
3 follows:

4 It is declared to be the public policy of the state of Washington to maintain the highest
5 possible standards to insure the purity of all waters of the state consistent with public health
6 and public enjoyment thereof, the propagation and protection of wildlife, birds, game, fish
7 and other aquatic life, and the industrial development of the state, and to that end require the
8 use of all known available and reasonable methods by industries and others to prevent and
9 control the pollution of the waters of the state of Washington. Consistent with this policy, the
10 state of Washington will exercise its powers, as fully and as effectively as possible to retain
11 and secure high quality for all waters of the state.

12 RCW 90.48.010 (emphasis added). DOE contends that wetlands clearly fall within the definition of
13 "Waters of the state," as (1) Wetlands contain either surface or ground water, (2) Wetlands cannot
14 exist in the absence of such water, and (3) Wetlands can be saltwaters, inland waters, or ponds.

15 Thus BIAW's eiusdem generis argument is without merit because it is based on the faulty assumption
16 that wetlands do not contain substantial amounts of water, while the types of bodies of water in RCW
17 90.48.020 do. DOE avers, that in fact, many wetlands contain more water than many intermittent
18 streams or watercourses. DOE also argues that wetlands that are wet for part of the year, but
19 relatively dry at other parts are analogous to intermittent streams and watercourses that have been
20 held to be "waters of the state," such as

- 21 1) artificial drainage ditches (AGO 1969 No. 4),
- 22 2) ditches leading to wasteways (PCHB no. 86-232),
- 23 3) drainage ditches (PCHB no. 84-182, 85-66), and
- 24 4) dry arroyos and canyons as subject to Federal Clean Water Act (DOE brief at 14).

25 Furthermore, wetlands are waters of the U.S. under the Federal Clean Water Act, U.S. v. Riverside
26 Bayview Homes, 474 U.S. 121, 88 L.Ed.2d 419, 106 S.Ct. 455 (1985), where the court held that
27 wetlands were appropriately within the definition of "navigable waters," which the agency was
28 authorized to regulate.

In reply, BIAW argues that DOE does not contend that the phrase "waters of the state" is
ambiguous, and, therefore, the statutory definition of the term found in RCW 90.48.020 should be
used, and the words used should in it be given their ordinary meaning. BIAW contends that the

1 terms used in the definition are different in kind, not merely degree, from those terms used to
2 describe wetlands. Finally, BIAW argues that the cases and provisions relied on by DOE for other
3 agencies holding that bodies of water not included in RCW 90.48.020's are waters of the state are
4 distinguishable on the basis that the bodies of water, although they may have been intermittent, were
5 tied into a stream or river, or other body of water clearly within the term "water of the state" (i.e. the
6 waters are "associated" with other waters that are clearly within the meaning of "waters of the state").

7 The issue presented by BIAW's motion before the court requires a determination of what the
8 term "waters of the state" means, specifically, whether it is properly extended to include non-
9 associated intermittent wetlands within the jurisdiction of DOE. Several rules of statutory
10 construction apply to this situation. First, "[t]he fundamental objective of statutory construction is to
11 ascertain and carry out the intent of the Legislature." Rozner v. Bellevue, 116 Wn.2d 342, 347, 804
12 P.2d 24 (1991). Secondly, as a general rule, a definition of a term contained in a statute, either
13 expressly or by reference, is binding on the court. See, e.g. Seattle v. Shepherd, 93 Wn.2d 861,
14 866, 613 P.2d 1158 (1980); 2A Sutherland Stat Const § 47.07 (5th ed). However, "in interpreting
15 statutory definitions, "includes" is construed as a term of enlargement while "means" is construed as a
16 term of limitation." Queets Band of Indians v. State, 102 Wn.2d 1, 4, 682 P.2d 909 (1984).

17 A term whose statutory definition declares what it "includes" is more susceptible to extension
18 of meaning by construction that where the definition declares what a term "means." It has
19 been said "the word 'includes' is usually a term of enlargement, and not of limitation. . . . It,
therefore, conveys the conclusion that there are other items includable, though not specifically
enumerated.

20 2A Sutherland Stat Const, §47.07 (5th ed).

21 In this case, the stated purpose of the act, Ch. 90.48 RCW, is "to maintain the highest
22 possible standards to insure the purity of all waters of the state consistent with public health and
23 public enjoyment, the propagation and protection of wild life, birds, game, fish and other aquatic life,
24 and the industrial development of the state." RCW 90.48.010 (emphasis added). "Waters of the
25 state" is defined for purposes of Ch. 90.48 RCW to "include" first, lakes, rivers, ponds, and streams;
26 secondly, inland waters, underground waters, and salt waters; and finally, all other surface waters and
27 watercourses within the jurisdiction of the state of Washington. As the Attorney General recognized
28

1 in AGO 1969 No. 4, at 5, the definition of waters of the state can be broken down into two classes:
2 waters of the state based on the location (i.e.: lakes, rivers, ponds or streams) or waters of the state
3 based on quality (e.g. inland waters, salt waters, underground waters); together with a general
4 category, "all other surface waters and watercourses within the jurisdiction of the state of
5 Washington."

6 In addition, since there are two classes of waters listed in the statutory definition, and since
7 the waters at issue are those which are intermittent and not associated with other waters of the state, it
8 is necessary to examine the following terms from RCW 90.48.020: lakes, ponds, and underground
9 waters. Since these terms are not defined in this chapter, resort to a dictionary is appropriate.

10
11 A lake is defined as:

12 A considerable body of standing water in a depression of land or expanded part of a river.
13 An inland body of water or naturally enclosed basin serving to drain surrounding country; or
14 a body of water of considerable size surrounded by land; . . . A large body of water,
contained in a depression of the earth's surface, and supplied from the drainage of a more or
less extended area.

15 Black's Law Dictionary, 5th ed, p. 788. On the other hand, "Pond" is defined in an amusing way as
16 "A body of stagnant water without an outlet, larger than a puddle and smaller than a lake; or a like
17 body of water with a small outlet." Id., p. 1044. Since Black's does not define "puddle," Webster's
18 Third New International Dictionary, p. 1837, shows "puddle" defined as "a shallow depression full of
19 water and esp. of muddy or dirty water." The characteristics which seem to characterize "lake" or
20 "pond" include:

- 21 1. a body of water
- 22 2. that is clear (lake) or stagnant (pond)
- 23 3. with or without an outlet
- 24 4. generally contained in some sort of depression
- 25 5. that is bigger than a "shallow (small) depression" full of water.

26 "Underground waters" are defined by reference to "Subterranean waters," which are defined
27 as:

1 Waters which lie wholly beneath the surface of the ground, and which either ooze and seep
2 through the subsurface strata without pursuing any defined course or channel (percolating
3 waters), or flow in a permanent and regular but invisible course, lie under the earth in a more
4 or less immovable body, as a subterranean lake.

5 Id., p. 1427. "Percolating Waters" are defined as:

6 Those which pass through the ground beneath the surface of the earth without any definite
7 channel, and do not form part of the body or flow, surface or subterranean, of any water-
8 course. They may be either rain waters which are slowly infiltrating through the soil or
9 waters seeping through the banks or the bed of a stream, and which have so far left the bed
10 and other waters as to have lost their character as a part of the flow of that stream. Those
11 which ooze, seep, or filter, through the soil beneath the surface without a defined channel, or
12 in a course that is unknown and not discoverable from surface indications without excavation
13 for that purpose.

14 Id. "Surface Waters" are defined as :

15 as distinguished from the waters of a natural stream, lake or pond, surface waters are such as
16 diffuse themselves over the surface of the ground, following no defined course or channel,
17 and not gathering into or forming any more definite body of water than a mere bog or marsh.

18 Id.

19 The purpose of Ch. 90.48 RCW is to protect all "waters of the state." This phrase includes

- 20 1. all underground waters
- 21 2. all salt waters, and
- 22 3. all inland surface waters that are
 - 23 (a) streams, rivers or similar bodies, or
 - 24 (b) lakes, ponds or similar bodies

25 As noted by DOE in its brief, streams can be intermittent, as can ponds. Therefore, a wetland that is
26 only wet at certain times of the year is not excluded from being within the protection of Ch. 90.48
27 RCW.

28 Another aspect of the wetlands that forms the basis for BIAW's argument is that the wetlands
are not associated with other (larger) bodies of water. However, one of the general characteristics of
a pond is that it frequently does not have an outlet, and is stagnant. It seems that these are
characteristic of a non-associated body of water.

Therefore, to the extent the wetlands regulated by DOE are either underground, or bodies of
water bigger than puddles, this court concludes that these bodies of water are included within the

1 definition of "waters of the state" under Ch. 90.48 RCW.⁴ Since the definition of "waters of the
2 state" is stated in terms of "include," the terms used to define waters, should be given the broadest
3 possible reading consistent with the language of the section. Under this reading, this Court concludes
4 and holds that any body of water that is either underground, or salt water, or above ground and either
5 flowing like a stream, or bigger than a puddle, is properly within the jurisdiction of the Department
6 of Ecology to regulate pursuant to Ch. 90.48 RCW.

7 CITIES MOTIONS FOR SUMMARY JUDGMENT

8 In moving for summary judgment, the cities base the motion on several common
9 grounds. These common grounds are:

- 10 a. No Petitioner has standing to bring this action
11 b. Failure to exhaust an administrative remedy

12 In addition, the City of Lacey presents the following procedural arguments:

- 13 c. No justiciable controversy
14 d. Failure to comply with applicable time requirements

15 These issues will be addressed in this order, with respect to both cities' motions.

16 LACK OF STANDING

17 Lacey and Tumwater are in agreement that an association has standing to bring a suit
18 only if at least one of its members has standing to bring the same suit in the member's own right.

19 This test was first stated in Washington in SAVE v. Bothell, 89 Wn.2d 862, 866 (1978), where the
20 court adopted the two part test used by the U.S. Supreme Court. This test is as follows:

21 A basic two-part test for determining whether a corporation has standing was set out in
22 Association of Data Processing Serv. Organizations [. . .] The first part of that test, that the

23 ⁴ Perhaps it could be argued that language in the definition of surface water suggests that
24 surface water might exist in some form other than a lake, pond, puddle, river or stream, based on its
25 reference to "bogs" and "marshes." However, Webster's defines bogs as "wet spongy ground where
26 a heavy body is likely to sink." A "marsh" is "a tract of soft wet land . . . such a tract of land often
27 periodically inundated and treeless and usu. characterized by grasses, cattails, or other
28 monocotyledons." There is nothing in these definitions that suggests that such waters would not be
otherwise included within the definition of underground waters, other than the fact that these bodies
of water are closer to the surface of the earth.

1 interest sought to be protected be "arguably within the zone of interests to be protected or
2 regulated by the statute or constitutional guarantee in question," is easily met in environmental
3 because of the abundance of laws affecting use of our natural resources. More troublesome
4 for environmental groups has been the second part of the test, the requirement that the
5 corporation allege the challenged action has caused "injury in fact," economic or otherwise.
6 In practical terms, an organization must show that it or one of its members will be specifically
7 and perceptibly harmed by the action. . . . This lack of concern over the precise form of
8 organization points to the courts' central concern that a specific and perceptible injury to a
9 member of the organization be alleged. An organization whose interest is only speculative or
10 indirect may not maintain an action.

11 In its opening brief, Lacey argues that Puckett, the only then-named Lacey property owner
12 did not have any wetlands on his property. Since he did not own any wetlands, he could not be
13 specifically and perceptibly harmed by Ordinance No 912. Similarly, Tumwater argued that
14 McCarthy, the only named Tumwater resident, did not own any property at all within the city of
15 Tumwater. The property it was alleged that McCarthy owned is in fact owned by "Shamrock
16 Investments." This is an unincorporated association composed of McCarthy and his father.

17 In partial response to these arguments, an amendment to the second amended complaint was
18 granted by this Court. This amendment effectively added Timothy Burgmen et ux, and Shamrock
19 Investments as parties to the suit.

20 Since Shamrock Investments/J. McCarthy own wetlands subject to development in
21 Tumwater, and since Burgman owns wetlands subject to development in Lacey, generic standing has
22 been sufficiently established and the summary judgment sought by Lacey on this basis is denied.

23 At oral argument on this motion, the City of Tumwater contended further that J. McCarthy
24 d/b/a Shamrock Investments could not bring suit on the basis that RCW 19.80.040 prohibits a
25 partnership from bringing suit unless the partnership was appropriately registered.

26 Since an association has standing to seek relief only if one or more of its members has
27 standing to sue it the member's own right, See Warth v. Selden, *supra*, and since it is undisputed that
28 J. McCarthy d/b/a Shamrock Investments have not complied with the requirements of RCW
19.80.010, this Court concludes that J. McCarthy d/b/a Shamrock Investments lacks standing to bring
this suit, and therefore, BIAW also lacks standing to challenge the Tumwater ordinance.

Accordingly, summary judgment is granted in favor of the City of Tumwater. However, even if a
court could conclude that McCarthy and BIAW had established standing, since Tumwater's ordinance

1 is insignificantly different from the Lacey ordinance, the analysis and ruling on Lacey's ordinance
2 would apply with equal force to the Tumwater ordinance. Therefore, discussion of both the Lacey
3 and the Tumwater ordinances will be included on the merits.

4 In addition to the generic standing argument, Tumwater argues that the GMA imposes
5 a specific standing requirement. In RCW 36.70A.280 provides:

6 (2) A petition [for review by the Growth Planning Hearings Board (GPHB)] may
7 be filed only by the state, a county or city that plans under this chapter, a person who has
8 either appeared before the county or city regarding the matter on which review is being
9 requested or is certified by the governor within sixty days of filing the request with the board,
10 or a person qualified pursuant to RCW 34.05.530.

11 RCW 36.70A.280(2) (emphasis added). It is Tumwater's position that neither McCarthy nor
12 Shamrock Investments appeared at any of the public hearings leading up to the adoption of Ordinance
13 No. 1278, and that neither has standing under section to seek review under the GMA. Lacey does
14 not raise this issue as Puckett appeared at the hearings leading up to the adoption of Ordinance No.
15 912.

16 In opposition, BIAW argues that this argument is misplaced as the Hearings Boards
17 do not have jurisdiction over the issues raised in these challenges, and therefore, standing before the
18 Boards are not relevant.

19 I conclude that this standing provision does not control who has standing in this case, for a
20 different reason. By its terms, RCW 36.70A.280 governs standing only before the GPHB.
21 Assuming arguendo for this aspect of this motion, and since the Boards are given authority to dismiss
22 actions based on lack of standing, RCW 36.70A.290(3) ("Unless the board . . . finds that the person
23 filing the petition lacks standing, the board shall . . . set a time for hearing the matter."), the Court
24 would be deciding an issue reserved for the Board and reviewable by the Court in the normal course
25 of judicial review. I conclude that this issue is better left to the agency with primary jurisdiction to
26 determine the issue. Tumwater's motion for summary judgment based on standing under the GMA is
27 denied.

28 FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Both Lacey and Tumwater argue that BIAW has failed to exhaust its administrative remedies

1 by the filing of the petition for review of these ordinances in the Superior Court rather than before the
2 Growth Planning Hearings Boards. The Board's jurisdiction is set forth in RCW 36.70A.280(1),
3 which provides:

4 A growth planning hearings board shall hear and determine only those petitions alleging
5 either: (a) That a state agency, county or city is not in compliance with the requirements of
6 this chapter, or chapter 43.21 RCW as it relates to plans, regulations, and amendments
7 thereto, adopted under RCW 36.70A.040; or (b) that the twenty-year growth management
8 planning population projections adopted by the office of financial management pursuant to
9 RCW 43.62.035 should be adjusted.

10 In addition to reliance on this provision, Tumwater argues that its ordinance provides a clearly
11 defined procedure for the modification and resubmission of a wetland permit, together with an appeal
12 procedure through the hearing examiner and city council. It is Tumwater's position that McCarthy
13 has not applied for or been denied a wetlands permit, nor has he attempted to modify or appeal a
14 previously denied or condition wetland permit.

15 In opposition to this argument, BIAW focuses primarily on the argument that the Boards do
16 not have authority to determine the constitutionality of ordinances or other laws. It also notes that to
17 the extent Lacey and Tumwater argue that the permit procedures built into the ordinances have not
18 been utilized, this is irrelevant, as BIAW is making a challenge solely to the facial validity of the
19 ordinances, and the courts do not require exhaustion in such situations:

20 In the case before use considerations of fairness and practicality far outweigh this
21 policy. Here, there is no factual dispute between the parties, and hence no need to defer to
22 agency fact-finding procedures. Rather this is a purely legal dispute. These factors militate
23 heavily against requiring exhaustion. Upon consideration of the fairness and practicality of
24 requiring exhaustion in this case, we must point out that the only avenue of appeal available
25 would have been to the city council, a body which had itself previously imposed these fees
26 directly upon these developers.

27 Moreover, this case comes within the exhaustion exception providing that the
28 requirement of exhaustion of remedies does not apply to prevent review of constitutional
29 issues. Where the issue raised is the constitutionality of the very law sought to be enforced,
30 exhaustion is unnecessary. This is because the administrative body does not have authority to
31 determine the constitutionality of the law it administers; only the courts have that power.

32 Prisk v. Poulsbo, 46 Wn.App. 793, 798 (1987). Finally, BIAW notes that application of the
33 Ackerley Communications, 92 Wn.2d 905, rule deserves consideration. This rule provides that if the
34 real merits of the controversy are unsettled, and a continuing question of great public importance
35 exists, then excusal of the exhaustion requirement might be warranted.

1 The occasions when exhaustion of remedies is required before court intervention are as
2 follows:

3 (1) "when a claim is cognizable in the first instance by an agency alone"; (2) when the
4 agency's authority "establishes clearly defined machinery for the submission, evaluation and
5 resolution of complaints by aggrieved parties"; and (3) when the "relief sought . . . can be
6 obtained by resort to an exclusive or adequate administrative remedy."

7 State v. Multiple Listing Service, 95 Wn.2d 280, 284 (1980). In discussing the purpose behind this
8 exhaustion requirement, the Supreme Court noted:

9 The exhaustion requirement (1) prevents premature interruption of the administrative process;
10 (2) allows the agency to develop the factual background on which to base a decision; (3)
11 allows the exercise of agency expertise; (4) provides a more efficient process and allows the
12 agency to correct its own mistakes; and (5) insures that individuals are not encouraged to
13 ignore administrative procedures by resort to the courts.

14 Citizens for Clean Air v. Spokane, 114 Wn.2d at 30.

15 The Supreme Court considered the exhaustion of administrative remedies question in an
16 environmental setting, and noted

17 To determine whether the exhaustion requirement bars the final EIS claims we must decide:
18 (1) whether administrative remedies were exhausted; (2) whether an adequate remedy was
19 available; (3) whether adequate notice of the appeals procedure was given; and (4) whether
20 exhaustion would have been futile.

21 Citizens for Clean Air v. Spokane, 114 Wn.2d 20, 26 (1990). It should be noted that if the Board
22 procedure noted above constitutes an appropriate administrative remedy, BIAW has made no attempt
23 to exhaust such remedy before GPHB. With respect to the third factor, constructive notice of the
24 Boards hearing process was given by the statute creating the Boards, Ch. 36.70A RCW. See
25 Citizens, 114 Wn.2d at 28, 29 ("The record shows constructive notice of the appeals procedure. The
26 procedure was available in a duly enacted ordinance."; "Citizens argue that they must receive actual
27 notice of the time and place to begin an appeal. . . . Citizens fail to show that the law requires such
28 specific notice.") However, BIAW does not argue that the GPHB hearing process would be futile,
except for the fact that BIAW does not believe the Boards have authority to grant the relief sought.
Thus, this Court will not consider futility in the context of this case as a basis for an exception to the
exhaustion requirement.

Therefore, the pivotal issue to be determined with respect to the exhaustion argument is

1 | whether the administrative remedy provided at the Boards is adequate. However, since much of this
2 | can only be determined after looking at the merits of BIAW's motion for summary judgment, the
3 | Court will only reference the statutory description of the Board's authority at this time. In addition to
4 | the provision noted above, RCW 36.70A.280(1), related sections provide:

5 | (2) All petitions relating to whether or not an adopted comprehensive plan,
6 | development regulation, or permanent amendment thereto, is in compliance with the goals and
7 | requirements of this chapter must be filed within sixty days after publication by the legislative
8 | bodies of the county or city. The date of publication for a city shall be the date the city
9 | publishes the ordinance, or summary of the ordinance, adopting the comprehensive plan or
10 | development regulation, or amendment thereto, as is required to be published.

11 | (4) The board shall base its decision on the record developed by the city, county,
12 | or the state and supplemented with additional evidence is the board determines that such
13 | additional evidence would be necessary or of substantial assistance to the board in reaching its
14 | decision.

15 | RCW 36.70A.290.

16 | . . . In the final order, the board shall either: (a) Find that the state agency, county or city is
17 | in compliance with the requirements of this chapter; or (b) find that the state agency, county
18 | or city is not in compliance with the requirements of this chapter, in which case the board
19 | shall remand the matter to the affected state agency, county, or city and specify a reasonable
20 | time not in excess of one hundred eighty days within which the state agency, county, or city
21 | shall comply with the requirements of this chapter.

22 | (2) Any party aggrieved by a final decision of the hearings board may appeal the
23 | decision to Thurston county superior court within thirty days of the final order of the board.

24 | RCW 36.70A.300

25 | Comprehensive plans and development regulations, and amendments thereto, adopted under
26 | this chapter are presumed valid upon adoption. In any petition under this chapter, the board,
27 | after full consideration of the petition, shall determine whether there is compliance with the
28 | requirements of this chapter. In making its determination, the board shall consider the criteria
adopted by the department under RCW 36.70A.190(4). The board shall find compliance
unless it finds by a preponderance of the evidence that the state agency, county, or city
erroneously interpreted or applied this chapter.

RCW 36.70A.320.

JUSTICIABILITY AND TIME LIMITATIONS

Lacey has moved for summary judgment on the basis that there is no justiciable
controversy in the complaint. The basis for this argument is that, while the action is brought under
Ch. 7.24 RCW, there is still a requirement for a justiciable controversy. According to Lacey, the
requirements to be met are:

1. a justiciable controversy requires parties having existing and genuine, as distinguished from
theoretical, rights or interests;

- 1 2. the controversy must be one upon which the judgment of the court may effectively operate, as
2 distinguished from a debate or argument evoking a purely political, administrative,
philosophical or academic conclusion;
- 3 3. it must be a controversy the judicial determination of which will have the force and effect of a
4 final judgment in law or decree in equity upon the rights, status or other legal relationships of
5 one or more of the real parties in interest, or, wanting these qualities be of such great and
6 overriding public moment as to constitute the legal equivalent of all of them;
- 7 4. the proceedings must be genuinely adversary in character and not a mere disputation, but
8 advanced with sufficient militancy to engender a thorough research and analysis of the major
9 issues.

10 See Lacey Brief, at 6. Lacey argues that because no person has standing to bring the suit, there is no
11 justiciable controversy. Simply put, because of the amendment permitted by this court with respect to
12 Mr. Burgman, there is now a person with standing, and for the reasons discussed earlier the other
13 requirements for a justiciable controversy are satisfied.

14 Finally, Lacey (and Tumwater in its reply brief) argues that BIAW has failed to satisfy the
15 time limitations for judicial review of the petition. Lacey argues that three time limits are possible
16 under the logic of Federal Way v. King County, 62 Wn.App. 530 (1991), these being the 30 day
17 limit for appeals from wetland permit decisions under the ordinance, the 30 day limit for seeking a
18 writ of certiorari from the superior court under Lacey land use decision ordinances; and the 60 day
19 limit provided under RCW 36.70A.290 for petitions for review to the Growth Planning Hearings
20 Board. Lacey accepts that under Federal Way the longest possible period is the period that applies.

21 In response BIAW argues that Federal Way is distinguishable and not controlling under the
22 facts in this case. Instead, to the extent a time limitation applies, it should be the general 2 year
23 statute of limitation.

24 Federal Way appears to be distinguishable. First, that case involved a challenge to the
25 validity of a land use ordinance affecting only a single specific piece of property: an un-used street
26 right of way. The County determined that the public way should be vacated and returned to the
27 adjacent property owners. It also determined that an emergency existed and that the ordinance would
28 be effective immediately, rather than 10 days after passage. This fact was highly significant to the
court, as on the actual effective date, the City of Federal Way did not exist, but two days later came
into existence. Federal Way was opposed to the vacation, and filed suit to review to action of the

1 County. The city did not challenge the authority of the County to do what it did, other than the
2 ability of the County to include a conclusory emergency clause. There was no challenge to the
3 constitutionality of the ordinance. Under these the specific facts in Federal Way, the rationale of the
4 Court of Appeals in determining that it was necessary to impose a time limitation can be easily
5 understood. Not to have done so could have resulted in the adjacent property owners building on or
6 otherwise blocking the public way, and then being required more than two years later to remove these
7 actions.

8 In this Court's view, the attempt of both sides to argue the applicability of the time limitation
9 are inapposite. If this action is one that should be subjected first to review by the Board hearing
10 process, then the 60 day limitation would clearly apply, and the Board should have authority to
11 dismiss the action for failure to timely seek review. However, if this action is a proper constitutional
12 challenge to the two ordinances, the Court is not persuaded that there is a time limitation for seeking
13 review. To hold that a constitutional challenge to a statute or ordinance must be brought within 60
14 days or 2 years of passage of the ordinance, would permit an enactment that is otherwise clearly
15 violative of a constitutional protection to become "constitutional" merely because of the passage of
16 time without someone having sufficient standing or incentive to challenge the statute. Because this
17 Court concludes the gist of the Petitioner's action is a constitutional challenge to the respective
18 ordinances on their face, the Cities' motions for summary judgment on the basis that the action was
19 not timely filed in accordance with the above referenced time requirements is denied.

20 BIAW's MOTION FOR SUMMARY JUDGMENT

21 BIAW has moved for summary judgment, declaring the two city ordinances facially invalid
22 and violative of the Washington Constitution Article XI, § 11 or the substantive due process
23 protections of the Washington or Federal Constitutions. Its prayer for relief seeks a declaration that
24 the entire ordinances are invalid, and not subject to the severability clauses contained in the
25 ordinances. See § 12 of Section 1 of Lacey Ordinance 912, p. 46; Section 16.28.310 of Tumwater
26 City Code, p. 38.

27 It is BIAW's position that Tumwater and Lacey have admitted that they intended their
28

1 Wetland Protection Ordinances to be more restrictive than the provisions of the DOE's Model
2 Wetland Ordinance. This goal was accomplished by adoption of a no-net-loss of wetland acreage,
3 function or value standard, a standard urged by Governor Gardner in an executive order in 1990, but
4 not adopted by the Washington Legislature in passing the GMA. BIAW argues that since no-net-loss
5 is a stricter standard than that promulgated by the legislature, the ordinances prohibit what would
6 otherwise be allowed under the GMA or other statute, and violate Washington Constitution Art. XI, §
7 11.

8 Tumwater's Ordinance

9 Under the terms of the Tumwater Ordinance, any development or land use which results in
10 any loss of wetlands is prohibited. Wetland buffers are required to surround any wetland area.
11 These buffers vary in width from 25 feet to 300 feet, depending on the category of wetland to be
12 buffered, and on the intensity of use of the land surrounding the wetland.⁵ The buffers are subject to
13 adjustment on a case-by-case basis. To attain no-net-loss, wetland impacts are to be avoided, a
14 standard presumed capable of achieving if the development is not dependent on use of surface water,
15 and rebuttable only upon showing that there is no other land within "the general region" of Tumwater
16 where the project can be developed without loss of wetlands. Finally, the Tumwater ordinance
17 requires the creation of sensitive area tracts or easements, containing the wetlands and associated
18 buffers. The tract must be maintained undeveloped, and the wetland functions and values must be
19 maintained against loss due to human impacts. To protect the tract, the owner must 1) restrict the
20 deed to reflect the tract's existence; 2) offer to deed the tract to the city; or 3) offer to deed the tract
21 to an approved non-profit entity. TCC 16.28.210.

22 Lacey's Ordinance

23 Lacey's ordinance is very similar to that of Tumwater. It requires wetland buffers of a size

24 _____
25 ⁵ E.G.:

26 Category I: "high quality native wetland communities" or "documented habitat for endangered or
27 threatened fish or animal species": High intensity use (5 or more dwellings per acre) = 300 ft
28 buffer; low intensity use (4 or less dwellings per acre) = 200 ft buffer;

Category IV: "isolated wetlands that are less than or equal to one acre in size": High intensity = 50
ft buffer; low intensity = 25 ft buffer

1 similar to those required by Tumwater, and allows variation on a case-by-case basis (both to increase
2 the size of the required buffer, and to reduce the size of the required buffer). Lacey imposes similar
3 requirements to avoid injury to wetlands, and similar standards to allow development if the activity is
4 water-dependant, and no other practical alternatives are available. Finally, Lacey requires that the
5 sensitive area tracts be either deeded to the city, an approved non-profit entity, or protected by a deed
6 restriction. These options are intended to retain the sensitive areas in an undeveloped state "in
7 perpetuity."

8 It is these last requirements of each ordinance, that sensitive area tracts be deeded to the cities
9 or otherwise protected by deed restriction, which form the basis of BIAW's challenge to the
10 ordinances under the substantive due process clause.

11 ART. XI, § 11

12 Article XI, § 11 of the Washington Constitution provides:

13 Any county, city, town, or township may make and enforce within its limits all such local
14 police, sanitary and other regulations as are not in conflict with general laws.

15 Since at least 1960, the test to determine whether a local ordinance is in conflict with general laws has
16 been:

17 whether the ordinance permits or licenses that which the statute forbids and prohibits, and
18 vice versa. . . . Judged by such a test, an ordinance is in conflict if it forbids that which the
19 statute permits.

20 Snohomish County v. State, 97 Wn.2d 646, 649, 648 P.2d 430 (1982) (citing State v. Lundquist, 60
21 Wn.2d 397 (1962)).

22 Therefore, as an initial beginning point, it is necessary to determine what is required or
23 permitted by the GMA, Ch. 36.70A RCW.

24 The following goals are adopted to guide the development and adoption of
25 comprehensive plans and development regulations of those counties and cities that are
26 required . . . to plan under RCW 36.70A.040. The following goals are not listed in order of
27 priority and shall be used exclusively for the purpose of guiding the development of
28 comprehensive plans and development regulations:

- 25 (1) Urban growth
- 26 (2) Reduce sprawl
- 27 (3) Transportation
- 28 (4) Housing
- (5) Economic development
- (6) Property rights

- 1 (7) Permits
- 2 (8) Natural resource industries
- 3 (9) Open space and recreation
- 4 (10) Environment
- 5 (11) Citizen participation and coordination
- 6 (12) Public facilities and services
- 7 (13) Historic preservation.

8 RCW 36.70A.020 (descriptive text of each goal omitted).

9 (5) "Critical Areas" include the following areas and ecosystems: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

10 (7) "Development regulations" means any controls placed on development of land use activities by a county or city, including, but not limited to, zoning ordinances, official controls, planned unity development ordinances, subdivision ordinances, and binding site plan ordinances.

11 (17) "Wetland" or "wetlands" means areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence or vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities. However, wetlands may include those artificial wetlands intentionally created from nonwetland areas created to mitigate conversion of wetlands, if permitted by the county or city.

12 RCW 36.70A.030.

13 Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. For counties and cities that are required or choose to plan under RCW 36.70A.040, such development regulations shall be adopted on or before September 1, 1991.

14 RCW 36.70A.060(2).

15 (1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:

16 * * *

17 (d) Critical areas.

18 (2) In making the designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050.

19 RCW 36.70A.170

20 The first argument made by BIAW is that the Legislature adopted an amendment to RCW 21 36.70A.060 in 1991 which changed what the cities/counties were required to do. As originally 22 passed in 1990, this section provided:

23 Each county that is required or chooses to plan under [RCW 36.70A.040], and each city 24 within such county, shall adopt development regulations on or before September 1, 1991,

25

1 precluding land uses or development that is incompatible with the critical areas that are
2 required to be designated under [RCW 36.70A.170].

3 Laws 1990, 1st Ex. Sess., Ch. 17, § 6. BIAW argues that the no net loss standard adopted by the
4 cities is more consistent with this requirement that the development regulations preclude land use that
5 is incompatible with wetlands. It argues that the 1991 amendment requires only that the cities protect
6 the critical areas, a lesser standard.

7 The plain and ordinary meaning of "Preclude," as found in the dictionary, is:

8 To shut out or obviate by anticipation : prevent or hinder by necessary consequence or
9 implication : deter action of, access to, or enjoyment of : make ineffectual.

10 "Protect"'s plain and ordinary meaning, on the other hand, includes:

11 to cover or shield from that which would injure, destroy, or detrimentally affect: secure or
12 preserve usu. against attack, disintegration, encroachment or harm.

13 Therefore, "preclude" necessarily involves prevention of action, "protect" could involve preclusion
14 or something less than restrictive than preclusion.

15 While it might be argued that a change in the language of a statute is presumed to have been
16 done for a purpose, BIAW's interpretation of what the effect of the change was does not necessarily
17 follow. While one might agree that "preclude" suggests a stiffer standard, more likely to prohibit
18 development than "protect," one equally valid construction of this change is that the legislature
19 broadened the language of the statute to permit cities to adopt policies that do not preclude
20 development within wetlands, while still protecting the wetlands to some greater or lesser degree.

21 This Court is persuaded by the Cities' arguments that if the Legislature had truly wanted to define the
22 exact standard to be used by cities and counties, it could have done so merely by expressly adopting
23 the standard as a state statute. Instead the legislature chose to leave to the individual counties and
24 cities the choice of what kind of standard should be used to protect wetlands. Therefore this Court
25 concludes that adoption of a strict protection standard is constitutionally inconsistent with the
26 requirements of RCW 36.70A.060, especially given the presumption found in the GMA that properly
27 adopted ordinances are valid, and the general rule of law that properly adopted ordinances are
28 presumed constitutional.

In addition, the Court notes the following from the Growth Planning Hearings Board decision

1 in 92-02-0001: Re: Clark County Wetlands Protection Ordinance:

2 In response to the petitioners' prehearing motion, Clark County correctly pointed out that the
3 original enactment of this section (1990 1st ex. s. ch. 17 §5) required adoption of
4 development regulations "precluding land uses or developments that are incompatible with the
5 critical areas that are required to be designated...", while the 1991 amendment required
6 adoption of development regulations "that protect" critical areas. Because of that language
change and the overall scheme of the Act which authorizes discretion by local government in
formulating policy decisions, we hold that .060(2) does not require regulation of each and
every wetland.

7 Clark County, Final Order, at 4. This clearly appears to be a recognition that the 1991 amendment
8 placed discretion in the local decisionmaker to determine the nature and extent of the protection to be
9 provided to the wetlands.

10 The second argument offered by BIAW is that the use of wetland buffers by the Cities is a
11 means of protection not permitted under the GMA. BIAW's argument here is that where the
12 legislature intended buffer areas to be used as protective means, the GMA provided express language
13 so indicating. See RCW 36.70A.060(1). This was not done with respect to wetland buffers. In
14 addition, BIAW argues that the Legislature was aware of the concept of wetland buffers as is
15 considered bills which recognized such bodies during the legislative sessions leading up to the
16 adoption of the GMA.

17 Lacey's position in opposition is that just as adoption of a no net loss standard is one method
18 to protect wetlands, so is the use of a buffer surrounding a wetland.

19 Further this Court notes that the Clark County Ordinance which GPHB considered in
20 92-02-0001 apparently contained a wetlands buffer provision similar to that found in Lacey and
21 Tumwater.⁶ The Board noted:

22 The ordinance also provides for differences in buffer size. Buffers are limited to not more
23 than twice the size of the wetland itself unless such reduction is greater than an overall 50
24 percent reduction of the designated buffer size. Rural area buffers are set at 50 percent of the
25 urban area buffer size. The rationale for that distinction by the county was a recognition that
wildlife habitat within the urban areas has, to a large extent, been destroyed by urbanization
and that buffer size was not as significant as it would be in the rural area. Replacement ratios
are not set on a 1:1 basis because replacements are directed to be a higher category of

26
27 ⁶ The exact text of the Clark County ordinance is not provided to the court, but the opinion
28 notes the existence of the provision, and the ordinance is based to greater or lesser degree on the
DOE model Wetland ordinance, the same model upon which both Tumwater and Lacey are based.

1 wetlands resulting from the replacement.

2 Clark County, Final Order at 12. Since the primary issue before the Board in Clark County was a
3 determination of whether the ordinance was in compliance with the GMA, it seems to this Court that
4 by finding compliance, the Board has recognized that buffers are allowed by the GMA, and are not
5 inconsistent with the Act.

6 This Court concludes that use of buffers is a means of protecting wetlands which is allowed
7 under the GMA, and has been recognized as in compliance with the GMA by the Board created by
8 the Legislature to make just this type of determination. This aspect of the ordinances is not in
9 violation of the Washington Constitution.

10 The third basis which BIAW asserts brings the ordinances into conflict with a general law
11 such as the GMA is that "each ordinance prohibits development and land uses within areas regulated
12 by the Shoreline Management Act [(SMA)] which would be allowed under the terms of that act." It
13 is BIAW's position that both Lacey and Tumwater have adopted shoreline master programs, and
14 designated the cities' shorelines as "shorelines of the state." As a result, the wetlands associated with
15 these shorelines are governed by the SMA, which pre-empts local interests as to shorelines of state-
16 wide significance. Under BIAW's theory, since the wetlands ordinances impose a stricter
17 development standard on associated wetlands, development which might be allowed under the SMA,
18 will be prohibited under the ordinances.

19 In opposition, Lacey and Tumwater point out first that there are no shorelines of statewide
20 significance within the two cities. As such, the SMA does not preempt local interest. However, if it
21 did, at least Lacey provides in its ordinance that the wetlands ordinance does not apply to shorelines
22 of the state. This leaves only the wetlands associated with these shorelines as affected by the
23 ordinance. Since both Lacey and Tumwater were following the directions of the Legislature to
24 protect wetlands, bodies of water that are not necessarily covered by the SMA, this court should
25 apply the rule that the later and more specific act controls, in this case the GMA, and the cities
26 ordinances are not in conflict with general statutes.

27 While BIAW contends that there is a potential for conflict between the requirements of the
28

1 SMA and the GMA ordinances, before such a contention could be determined, BIAW would have to
2 demonstrate a factual situation which details the conflict in particular. BIAW has not done so in this
3 litigation. It seems to the Court that there may be more than one situation where two acts which may
4 apply to the same setting in different ways, resulting in conflicting applications. Given such a
5 possibility, and given the cities uncontroverted assertions that there are no affected waters of state-
6 wide significance, this Court does not conclude that the two ordinances are in conflict with the GMA
7 without a showing as to a specific parcel of property (i.e. do not find facial invalidity, but would
8 consider the issue further upon an "as applied" invalidity argument in a litigation involving application
9 of the challenged ordinances to development of specific parcels).

10 SUBSTANTIVE DUE PROCESS

11 The final argument offered by BIAW is that the requirements of the two ordinances which
12 require the developer to "convey wetland areas and buffers to the public" is in violation of the
13 substantive due process protections afforded by both the Washington and Federal Constitutions. The
14 provisions of the two ordinances in dispute state:

15 As a condition of any approval issued pursuant to this chapter, the applicant shall be required
16 to create a separate sensitive area tract or tracts containing the areas determined to be wetland
17 and/or wetland buffer in field investigations performed pursuant to Section 4.3. Sensitive
18 areas tracts are legally created tracts containing wetlands and their buffers that shall remain
undeveloped in perpetuity. Sensitive area tracts are an integral part of the lot in which they
are created, are not intended for sale, lease or transfer, and shall be included in the area of
the parent lot for purposes of subdivision.

19 A. Protection of Sensitive Are Tracts

The City of Lacey shall require, as a condition of any approval issued pursuant to this
chapter, that the sensitive area tract or tracts created pursuant to Section 7.5.a be
protected by one of the following methods determined by the City of Lacey:

21 i. The applicant shall convey an irrevocable offer to dedicate to
the City of Lacey or other public or non-profit entity specified by the City of
Lacey the wetland and buffer area for the protection of the wetland and its
buffer to ensure management of the wetland resource in the best interest of the
public; or

23 ii. The applicant shall establish and record a permanent and
irrevocable deed restriction on the property title and a division of property is
involved on the subdivision, short subdivision or binding site plan map. and in
home or lot owners association agreements, covenants and articles of
25 incorporation. All such tracts within a subdivision, short subdivision or
binding site plan shall be designated as common open space separate and
distinct from private lot areas. Such deed restriction(s) shall prohibit in
26 perpetuity the development, alteration, or disturbance of vegetation within the
sensitive area tract except for purposes of habitat enhancement as part of an
enhancement project which has received prior written approval from the City

1 of Lacey, and any other agency with jurisdiction over such activity.
2 Lacey Ordinance No. 912, Section 7.5, at 31. The Tumwater provision, TCC 16.28.210, is
3 comparable to the Lacey provision, except that rather than being "in perpetuity," the tract/easement
4 "shall remain undeveloped as long as wetland functions and values are present. Loss of wetland
5 functions due to human impacts will result in sensitive area tracts/easements being maintained."

6 The parties agree on the test which should be applied to determined if a regulation violates
7 due process. The Supreme Court reaffirmed this test in Presbytery of Seattle v. King County, 114
8 Wn.2d 320, 787 P.2d 907 (1990):

9 Substantive Due Process

10 However, even if the regulation protects the public from harm, and does not deny the
11 owners a fundamental attribute of ownership (and is thus insulated from a "takings"
12 challenge), it still must withstand the due process test of reasonableness. The inquiry here
13 must be whether the police power (rather than the eminent domain power) has exceeded its
14 constitutional limits. To determine whether the regulation violates due process, the court
15 must engage in the classic 3-prong due process test and ask: (1) whether the regulation is
16 aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably
17 necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner.
18 "In other words, 1) there must be a public problem or 'evil,' 2) the regulation must tend to
19 solve this problem, and 3) the regulation must not be 'unduly oppressive' upon the person
20 regulated." The third inquiry will usually be the difficult and determinative one.

21 Presbytery, 114 Wn.2d, at 330 (footnotes omitted). See also Robinson v. Seattle, 119 Wn.2d 34
22 (1992).

23 BIAW argues that the provisions of the Tumwater and Lacey Ordinances violate two of the
24 three prongs of the Presbytery test. First, BIAW asserts that the restrictions are not reasonably
25 necessary to protect the wetlands. Then it makes the assertion that if the cities "wish to protect
26 wetlands, they should be required to pay for them" and that "there are other more reasonable,
27 alternative, methods of protecting wetlands." BIAW does not at any point specify what these other
28 methods are, or why they are more reasonable methods.

Tumwater responds only that "[a] policy of "no net loss" of wetlands is, arguably, the only
means necessary to truly protect those wetlands." Tumwater at 9. Lacey, on the other hand, relies
on Presbytery's discussion of the failure to exhaust administrative remedies, arguing that similarly in
this case, the lack of factual development for a specific piece of property deprives the court of the
facts necessary to determine if the property owner is unduly oppressed by the regulation. It should be

1 noted that before discussing this issue, the Presbytery court assumed without deciding that the three
2 prong due process test applied, and that the legitimate public purpose and use of a means to achieve
3 that purpose had been satisfied by the facts of the case. The court did not expressly discuss the
4 proper analysis of the second prong "means" test.

5 This Court notes that the Presbytery court, in making its assumption, appears to rely more on
6 the Orion II standard English formulation of the test: "The regulation must tend to solve this
7 problem." Using this formulation, it is clear that the ordinances in dispute do tend to solve the
8 problem of wetland destruction. This Court therefore concludes that this means is as reasonably
9 necessary as any to solve the problem of wetland destruction, and thus satisfies the second prong of
10 the Presbytery test.

11 The third prong which BIAW argues the ordinances violate is the "unduly oppressive to the
12 landowner" prong. The Presbytery contains a fairly extensive discussion of application of this prong:

13 The "unduly oppressive" inquiry lodges wide discretion in the court and implies a
14 balancing of the public's interest against those of the regulated landowner. We have
15 suggested several factors for the court to consider to assist it in determining whether a
16 regulation is unduly oppressive, namely: the nature of the harm sought to be avoided; the
17 availability and effectiveness of less drastic protective measures; and the economic loss
18 suffered by the property owner. Another well regarded commentator in this area of the law,
19 Professor William B. Stoebuck of the University of Washington Law School, has suggested a
20 helpful set of nonexclusive factors to aid the court in effecting this balancing. On the public's
side, the seriousness of the public problem, the extent to which the owner's land contributes
to it, the degree to which the proposed regulation solves it and the feasibility of less
oppressive solutions would all be relevant. On the owner's side, the amount and percentage
of value loss, the extent of remaining uses, past, present and future uses temporary or
permanent nature of the regulation, the extent to which the owner should have anticipated
such regulation and how feasible it is for the owner to alter present or currently planned uses.
21 Use of these factors can materially assist the court in determining whether of not the
22 regulation on use is unduly oppressive to the landowner.

23 Presbytery, 114 Wn.2d at 331 (emphasis added, citations omitted).

24 In relying on these statements, BIAW argues that the ordinances "deprive any owner of a
25 wetland of all use of that land without compensation." BIAW brief at 27. The effect of the
26 ordinance is to place the burden of protecting wetlands on owners, thus singling out wetland owners
27 to pay a price more appropriately borne by the public at large. BIAW asserts similar logic in the
28 Robinson case forced the Supreme Court to find an obligation of developers to replace low-income
housing that the developers destroyed was an imposition of a burden more appropriately borne by the

1 public at large. Robinson, 119 Wn.2d at 55.

2 In opposition, Lacey argues that Presbytery actually supports its position, particularly with
3 regard to the argument that the failure to exhaust administrative remedies is fatal to BIAW's motion,
4 and secondly, that Robinson is distinguishable, on the basis that Robinson noted that its result might
5 be different if "development of a particular piece of property would cause direct harm to the
6 environment, such as destruction of an irreplaceable wetland." Robinson, 119 Wn.2d at 53.

7 Tumwater's position on this aspect is similar to the position taken by Lacey on the failure to
8 exhaust aspect of its opposition. Tumwater has discussed the nonexclusive factors announced by the
9 Presbytery court to be considered. Each factor will be considered individually.

10 Public Side

11 1. Seriousness of the Public Problem

12 It appears that no one disagrees that there is a substantially serious public problem of
13 wetland destruction. See BIAW's failure to challenge prong 1 (presence of legitimate public
14 problem); Lacey Ordinance No. 912, Section 1.1: Findings of Fact; Tumwater Ordinance No. 1278,
15 section 16.28.020 (intent); RCW 36.70A.010 (Legislative Findings re: GMA). Consideration of this
16 factor tilts the balance in favor of the ordinances' validity.

17 2. The extent to which the owner's land contributes to "it" (the problem or the solution?)

18 Again no party has specifically addressed this factor, and as with some of the other
19 later factors, it requires development of a factual record which has not been done in this case.

20 3. The degree to which the proposed regulation solves the problem

21 Other than BIAW's assertion that a monetary compensation would better address the
22 problem, this issue has not been expressly addressed. However, given this Court's conclusion that
23 the second prong of Presbytery has been satisfied, this factor balances in favor of the ordinances'
24 validity.

25 4. The feasibility of less oppressive solutions

26 Whether better solutions are available, or what the nature of those solutions would be
27 if they are available, has not been addressed. In addition, neither BIAW nor the cities have addressed

1 | what the likely cost of BIAW's suggested alternative of just compensation would be.

2 | Private Side

3 | 1. The amount and percentage of loss

4 | BIAW has not presented information concerning either McCarthy or Burgman's lost
5 | usable property resulting from the Ordinances. Tumwater argues that McCarthy testified that he was
6 | not sure whether a 50 or a 200 foot buffer applied to his property. Given that the burden of proof is
7 | on BIAW as to this factor, the lack of evidence produced strikes the balance in favor of the cities.

8 | 2. The extent of remaining past, present and future uses of the property.

9 | Again, BIAW has presented no evidence either one way or the other relating to this
10 | factor. Given that McCarthy, at least, expects to develop his property under the Tumwater
11 | Ordinance, this factor is not in favor of BIAW's position.

12 | 3. The temporary or permanent nature of the regulation

13 | Given that neither City argues that the ordinances are in any way temporary, this
14 | factor balances in favor of BIAW.

15 | 4. The extent to which the owner could have foreseen the regulation and altered present
16 | or planned uses

17 | Since the regulations were adopted in August or September 1991, after a process
18 | which began at various points as follows:

- | | |
|----------------------|---|
| 19 1 July 1990: | Effective date of GMA, Ch. 17 Laws 1990 1st ex. sess. |
| 20 September 1990: | Model Wetland Protection Ordinance issued by DOE. |
| 21 26 Nov. 1990 | Lacey's Proposed Scope of Work for Wetland Protection Grant
Program issued (Have been unable to locate actual grant agreement in
the materials) |
| 22 9 Jan. 1991: | Grant Agreement between Tumwater and DOE for development of
Wetland Protection Ordinance |
| 23 15 March 1991 | Staff Report on Wetlands Report to City of Lacey, eventually leading
to adoption of Wetlands Ordinance. (I was not able to find any
24 indication of when Tumwater began its process) |
| 25 28 July 1991 | Lacey Adopts Ordinance 912 |
| 26 2 August 1991 | Lacey Ordinance becomes effective |

1 20 August 1991 Tumwater Adopts Ordinance 1278

2 28 August 1991 Tumwater Ordinance becomes effective

3 Given the GMA was a significant topic of discussion during the 1990 legislative
4 session, and given the length and breadth of discussions leading up to the adoption of the two city
5 ordinances in dispute here, this Court cannot find that this factor balances in favor of BIAW. While
6 it may be true that the time frame was insufficient to fully plan a project to get the necessary permits
7 before the effective date of the ordinances, it appears to the Court that there has been no showing that
8 these persons made any attempt to do so. McCarthy has had title to the Tumwater property since
9 October 1990, and Burgman has had title to the property for a significantly longer period.

10 Having evaluated these eight factors, based on the materials presented, this Court concludes
11 that the regulations are not unduly oppressive. Furthermore, the rationale of Presbytery suggests that
12 application and evaluation of the substantive due process tests can not be done in a vacuum, but
13 requires a specific piece of property where the owner has attempted to comply with the challenged
14 regulation.

15 Accordingly, this Court concludes that the wetland protection ordinances do not violate the
16 substantive due process protections available under the Washington or Federal Constitutions; nor does
17 it conclude that the ordinances violate Art. XI, § 11 of the Washington Constitution.⁷

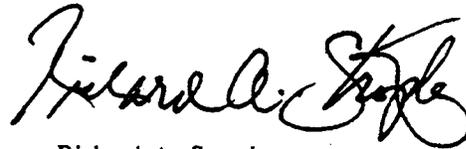
18
19 ⁷ One last matter may be worthy of note. Since the Court has concluded that Art. XI, § 11 is
20 not violated, is dismissal of BIAW's claims for failure to exhaust an administrative remedy
21 appropriate? Since the GPHB is given express jurisdiction to determine if a local development
22 regulation is "in compliance" with the GMA, the challenge that BIAW has made concerning the
23 alleged conflict between the GMA and the local ordinances might suggest that its Art XI, § 11
24 challenge is not so much a constitutional challenge as a declaratory judgment challenge, re technical
25 compliance with the GMA: i.e., does the local ordinance satisfy the technical requirements imposed
26 by the State legislature in the applicable RCW? If this were the case, the GPHB would be entitled to
27 primary jurisdiction, and the chance to develop any necessary factual record. In other words, it could
28 be held that BIAW should have challenged the cities' ordinances in the GPHB first, established an
appropriate detailed factual record and then sought review in this court if it was dissatisfied with the
result. By considering BIAW's challenge as essentially seeking a declaratory judgment regarding
whether the ordinances were in technical compliance with the GMA, the court could then have
concluded that the GPHB provided an adequate remedy for resolution of BIAW's concerns: an
independent third party evaluator knowledgeable in the subject area, with authority to tell the two
cities that their ordinances were not appropriately drafted and to redraft them to be consistent with the
technical requirements of the GMA. Such a disposition would have given service to the principle that

CONCLUSION

In light of the above:

- (1) DOE's Motion for Summary Judgment against the petitioners is granted on the merits;
- (2) BIAW's Cross-Motion for Summary Judgment against DOE is denied on the merits;
- (3) Lacey's Motion for Summary Judgment on procedural grounds of lack of standing, no justiciability, and failure to exhaust administrative remedies is denied;
- (4) Tumwater's Motion for Summary Judgment against the petitioners BIAW and McCarthy d/b/a Shamrock Investments on the basis of lack of standing pursuant to application of RCW 19.80.040 is granted; and
- (5) BIAW's Cross-motion for Summary Judgment against Lacey and Tumwater is denied on the merits, and, conversely, summary judgment in favor of the cities of Lacey and Tumwater is granted on the merits.

The court will sign an order in conformity with this opinion upon presentation.



Richard A. Strophy,
Judge

reviewing courts avoid reaching constitutional challenges when disposition on other grounds is appropriate.

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A Professional Limited Liability Company zoning land use real property environmental

FAX COVER SHEET

DATE: February 8, 2008
TO: David Pater
Ecology Northwest Region
FAX: 425-649-7098
FROM: Anita Hope, Secretary
REGARDING: Pacific Topsoils v. Dept. of Ecology

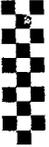
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DEPT OF ECOLOGY

COMMENT: Attached is a Subpoena to David Pater.

This transmittal consists of 5 page(s), including this cover sheet.
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**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

PACIFIC TOPSOILS, INC., a
Washington Corporation,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY

Respondent.

PCHB Nos. 07-046 & 07-047

SUBPOENA

THE STATE OF WASHINGTON TO: David Pater

YOU ARE HEREBY COMMANDED to appear and testify in the above-entitled cause, the hearing is set for Thursday, February 21, 2008 at 9:00 a.m. **AT THE STATE OF WASHINGTON, ENVIRONMENTAL HEARINGS OFFICE LOCATED AT 4224 – 6TH AVE. SE, BLDG. 2, ROWESIX, LACEY, WASHINGTON** then and there to testify as a witness before a qualified Notary Public and Court Reporter at the request of the Appellants in the above-entitled matter.

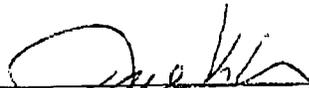
You are to appear and testify and there remain until discharged. For failure to attend this hearing, you will be deemed guilty of contempt of court and liable to pay all losses and damages

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occasioned by such failure.

DATED this 8 day of February, 2008

LAW OFFICE OF JANE RYAN KOLER, PLLC

By: 
Jane Ryan Koler, WSBA #13541
Attorney for the Appellants

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POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PACIFIC TOPSOILS, INC., a
Washington Corporation

Appellant,

v.

STATE OF WASHINGTON,,
DEPARTMENT OF ECOLOGY.

Respondent.

PCHB Nos. 07-046 & 07-047

CERTIFICATE OF SERVICE

I, Anita Hope, hereby state as follows:

I am over the age of 18 years, competent to testify, and certify to the following
based on my own knowledge and belief.

On the date below stated, I caused the following documents to be sent via Facsimile
and regular U.S. mail:

DOCUMENTS: 1. Subpoena

To: David Pater
Ecology Northwest Region
3190 160th Ave. SE

CERTIFICATE OF SERVICE- 1
315:Pacific Topsoils Dept of Ecology/Cert. of Serv.

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LAW OFFICE OF
JANE RYAN KOLER, PLLC
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Bellevue, WA 98008-5452

Fax No. (425) 649-7098

DATED this 8th day of February, 2008.

Anita Hope
Anita Hope

CERTIFICATE OF SERVICE- 2
315: Pacific Topsoils Dept of Ecology/Cert. of Serv.

LAW OFFICE OF
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