

No. 47717-3-II

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

DARRELL de TIENNE and CHELSEA FARMS, INC.,

Appellants,

vs.

SHORELINES HEARINGS BOARD; PAUL H. GARRISON and
BETTY N. GARRISON; PIERCE COUNTY; and COALITION TO
PROTECT PUGET SOUND HABITAT,

Respondents.

APPELLANTS' REPLY BRIEF

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I. ARGUMENT

This brief replies to the briefs filed by Respondents Paul and Betty Garrison (“Garrison Brief”), Shorelines Hearings Board (“Board Brief”), and Coalition to Protect Puget Sound Habitat (“Coalition Brief”). This brief maintains the structure of Appellants’ Opening Brief (“Opening Brief”) and replies to Respondents’ responses (if any) thereto. For the reasons set forth in the Opening Brief and below, the Court should set aside the Board’s decision (“Decision”) reversing Pierce County’s (“County’s”) shoreline substantial development permit (“SDP”) for Appellants’ geoduck clam farm (“Farm”) and reinstate the County’s SDP.

A. The Decision Is Void.

1. The Board Exceeded its Authority by Issuing the Decision After the Statutory Deadline.

The Board and Coalition argue the Decision was timely because it was issued within 210 days of the date that Darrell de Tienne and Chelsea Farms (“the Growers”) filed their petition for review. Board Brief at 5-8; Coalition Brief at 15-19. This argument fails for several reasons. First and foremost, the Growers settled all of their claims prior to hearing, did not act as petitioners during the hearing, and their petition was not considered in the Decision. CP 25. The Board concedes these points yet contends the statutory deadline should run from filing of the Growers’ petition because “they were never dismissed by the Board as a party, and they continued to participate in the hearing procedure.” Board Brief at 8. However, the Growers remained parties and participated in the hearing

because they were necessary and named parties in the Coalition’s and Garrisons’ petitions, not because they filed a petition themselves. WAC 461-08-350(2); AR 1, 247. The Growers participated solely as respondents, exactly as they would have had they never filed a petition.¹

Second, the plain language of the Shoreline Management Act (“SMA”), chapter 90.58 RCW, shows the Legislature did not intend the Board’s deadline to run from the filing of the last petition in consolidated appeals. The Legislature amended the SMA in 1995 to require the Board to issue its decision 180 “days after the date the petition is filed with the board or a petition to intervene is filed by the department or the attorney general, whichever is later.” RCW 90.58.180(3). In contrast, in the same bill, the Legislature amended RCW 36.70A.300 to clearly state the decision deadline in a consolidated appeal to the Growth Management Hearings Board (“GMHB”) runs from the date the last petition is filed. Laws of 1995, ch. 347, § 110. The Legislature is presumed to intend different results when it uses different terms in the same legislation. *State v. Roggenkamp*, 153 Wn.2d 614, 625-26, 106 P.3d 196 (2005). Thus, the Legislature intended different results for GMHB and SHB timelines in consolidated appeals: the GMHB’s deadline runs from the date the last

¹ The Board also speculates that basing the Board’s 210-day time limit on the Garrisons’ or Coalition’s petitions could lead to a less thorough order and review. Board Brief at 8. However, there is no evidence in this case—and the Board does not contend—that the Growers’ filing a petition for review and settling all of their claims prior to hearing impacted the Board’s review. Indeed, since the claims advanced in the Growers’ petition were never argued to, much less decided by, the Board, it is unclear how the Growers’ petition could possibly have impacted the Board’s review timeline.

petition is filed, while the Board’s deadline runs from the first filed petition except in the enumerated cases of intervention. Construing RCW 90.58.180(3) otherwise would violate numerous rules of statutory construction. *Ellensburg Cement Products, Inc. v. Kittitas County*, 179 Wn.2d 737, 750, 317 P.3d 1027 (2014) (where a statute specifically designates the things upon which it operates, courts infer all other things are intentionally omitted); *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (courts must not add words to a statute that the Legislature chose to omit).

Finally, consistent with these authorities, the Board in this case conceded the deadline runs from the filing of the first petition. The Board stated to the parties that it was “required to render a written decision within 180 days after a petition for review is filed” and informed them: “Due to the Board’s schedule, the 180-day timeline provided under RCW 90.58.180 is extended from December 8, 2013 to January 7, 2014.” CP 229.² The Board cannot now credibly take a contradictory position.

The Garrisons argue the Decision was timely issued because: (1) RCW 34.05.080 authorizes the Board to deviate from the statutory time limit; (2) the statutory time limit is ambiguous; and (3) the Growers

² The Garrisons filed their petition, the first challenging the SDP, on June 11, 2013, 180 days before December 8, 2013, and 210 days before January 7, 2014. AR 247. The Board, in its brief, admits it took this position during the pendency of the Board appeal and that it was “*extending the decision deadline until January 7, 2014.*” Board Brief at 6 (emphasis added). Yet in nearly the same breath, the Board, along with the Coalition, make the contradictory argument that the deadline never was December 8, 2013 (or, with a 30-day extension, January 7, 2014). Board Brief at 5-8; Coalition Brief at 15-19. The Board does not, and cannot, credibly explain this about-face.

waived the time limit. Garrison Brief at 13-14. These arguments are not supportable. First, RCW 34.05.080 is inapplicable because it only allows time limits established “in this chapter” to be modified, and the Board’s time limit is established in a different chapter: 90.58 RCW. Second, RCW 90.58.180(3) clearly states the Board’s deadline, and the Garrisons offer no argument or authority to show it is ambiguous. RAP 10.3(a)(6); *Talps v. Arreola*, 83 Wn.2d 655, 657, 521 P.2d 206 (1974) (contentions unsupported by argument or authority are not considered). Third, the Growers did not explicitly waive the time limit and the Garrisons have not met the high burden to prove an implicit waiver. *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998) (“To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors.”).

2. The Board is Required, Not Simply Encouraged, to Issue Decisions within the Statutory Time Limit.

RCW 90.58.180(3) states the Board “shall” issue its decision within 180 days after a petition is filed (subject to one 30-day extension for good cause). The Board and Coalition offer numerous arguments that “shall” does not mean “shall,” but rather “should” or “may.” These arguments fail to address two critical points: (1) the Board is a statutorily-created administrative entity that may only act within its statutory boundaries; and (2) the Legislature specifically amended the SMA in 1995, after a long history of dilatory actions by the Board, expressly to require the Board to issue decisions within 180 days. RCW 90.58.170, 180(3); *Kailin v. Clallam County*, 152 Wn. App. 974, 979, 220 P.3d 222

(2009) (the Board “is a quasi-judicial agency” whose “authority is statutorily limited”); Laws of 1995, ch. 347, § 310; CP 233, 236, 241, 301. All of the legal authority the Board and Coalition offer either supports the Growers’ position or is distinguishable.

The Board and Coalition rely on *State v. Miller*, 32 Wn.2d 149, 155, 201 P.2d 136 (1948) for the claim that a statute specifying a time for an official to perform an act “is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the officer.” Board Brief at 10; Coalition Brief at 14. This authority supports the Growers’ position. The “nature of the act” here—the Board’s issuance of a final decision—must be considered a limitation on the Board’s power because the Board is a creature of statute and can “exercise only those powers conferred by statute,” which includes issuing a decision within the jurisdictional timeline afforded by statute. *Kailin*, 152 Wn. App. at 979. Further, “the phraseology of the statute” expressly states the Board shall—not should or may—issue its decision within 180 days. RCW 90.58.180(3). “Shall” is presumptively imperative and creates a duty unless there is a contrary legislative intent. *Erection Co. v. Dep’t of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993). The legislative history makes clear that the Legislature’s express purpose in amending RCW 90.58.180(3) was so that the Board “be *required* to issue its decision on the appeal of a [SDP] within 180 days.” CP 301 (emphasis added).

The Board also argues “shall” means “should” because the SMA

was enacted to protect natural resources. Board Brief at 14, 15, 16-18. This value-based interpretation requires the Court to ignore the plain language and legislative history of RCW 90.58.180(3) and to adopt a simplistic view of the SMA that Courts have explicitly rejected. *Overlake Fund v. Shorelines Hearings Bd.*, 90 Wn. App. 746, 761, 954 P.2d 304 (1998) (reversing a Board decision to impose a condition prohibiting development in a wetland and holding the Board failed to recognize the SMA’s “purpose is to allow careful development of shorelines by balancing” various interests). Indeed, the Board’s argument could lead to the absurd result that the 180-day limit is permissive when the Board denies a permit but is mandatory when it upholds a permit.

The Board relies on the principle that the Legislature is presumed to know relevant case law, but this too supports the Growers’ position. Board Brief at 17-18. Case law is clear that statutorily-created bodies such as the Board can only exercise those powers that are expressly conferred and that “shall” is mandatory. *Erection Co.*, 121 Wn.2d at 518; *Kailin*, 152 Wn. App. at 979. If the Legislature did not intend the time limit to be mandatory and jurisdictional it would have used permissive language like “may” or “should,” and it would have made clear that the Board retained jurisdiction even after the deadline expired.

The Board down-plays the only two Board decisions that specifically address RCW 90.58.180(3)—*Moe v. King County*, SHB No. 11-013 and *Eagles Roost v. San Juan County*, SHB No. 96-047. The Board claims these decisions, both of which interpreted the 180-day limit

as mandatory and jurisdictional, should be disregarded as dicta. However, “w[hen] an interpretation of statute is essential to a judicial decision, it is not dicta.” *Pierson v. Hernandez*, 149 Wn. App. 297, 305, 202 P.3d 1014 (2009). In *Moe*, the Board refused to issue a stay because the Board could not waive the 180-day decision deadline. Opening Brief, App. B at 5-6. That determination was essential to the SHB’s ruling and, thus, not dicta.

In *Eagles Roost*, when deciding whether the 21-day deadline for filing an appeal under 90.58.180(1) could be extended, the concurring opinion emphasized “we have no authority to expand the clear jurisdictional limits established by the [SMA],” and that the 1995 SMA amendments “reduced the appeal period from thirty to the present twenty-one days and limited the jurisdiction of the board to 180 days from the date a request for review is filed.” Opening Brief, App. C at 2. Even if, as the Board claims, this discussion is dicta, the Board provides no good reason for treating the time limit in RCW 90.58.180(1) as jurisdictional and the limit in subsection (3) as discretionary. *Snohomish County v. Pollution Control Hearings. Bd.*, No. 46378-4-II, 2016 WL 225256, at *29 (Wash. Ct. App. Jan. 19, 2016) (dicta should not be disregarded unless there is an adequate explanation or basis for doing so).

Finally, the litany of cases the Board and Coalition cite to support their position are all distinguishable. Not one of those cases addresses RCW 90.58.180(3) or even an analogous situation to that presented here—an administrative appeal body, with limited jurisdiction, whose statute was specifically amended to require that decisions be made within an explicit

time period, in order to remedy an extended history of abuse. Most of the cited cases involve functions of agencies or officials with general jurisdiction. *See Miller*, 32 Wn.2d 149 (time in which the attorney general may maintain a certain action); *Frank v. Washington State Dept. of Licensing*, 94 Wn. App. 306, 972 P.2d 491 (1999) (time in which a police officer is to transmit a report); *Sullivan v. Dep't of Transp.*, 71 Wn. App. 317, 858 P.2d 283 (1993) (timeline for an agency to perform evaluations); *Niichel v. Lancaster*, 97 Wn.2d 620, 647 P.2d 1021 (1982) (timeline for assessor to list and value property); *Application of Santore*, 28 Wn. App. 319, 623 P.2d 702 (1981) (compliance with adoption statutes); *Washington State Liquor Control Bd. v. Washington State Personnel Board*, 88 Wn.2d 368, 561 P.2d 195 (1977) (noting appellant liquor control board to be at fault in delays, recognizing “shall” generally creates a duty, but holding this term directory in this case because no legislative intent to treat it as mandatory); *Giles v. Dept. of Social & Health Servs.*, 90 Wn.2d 457, 583 P.2d 1213 (1978) (similar); *Demaris v. Barker*, 33 Wn. 200, 74 P. 362 (1903) (deadlines for superior court to take action).

3. Respondents’ Additional Arguments Are Meritless.

The Board and Coalition raise additional meritless arguments. The Board claims the Growers’ proper remedy is an order to compel under RCW 34.05.570(4)(b), but RCW 34.05.570(4)(a) limits the scope of this subsection to “agency action not reviewable under subsection (2) or (3) of this section . . .” Board Brief at 20-23. The Decision here is an agency order reviewable under RCW 34.05.570(3), so RCW 34.05.570(4)(b) does

not apply. RCW 90.58.180(3); *Bellevue Farm Owners Ass'n v. State of Washington Shorelines Hearings Bd.*, 100 Wn. App. 341, 362, 997 P.2d 380 (2000). RCW 34.05.570(3) allows the Court to grant relief from an order if it finds the agency lacked jurisdiction.³ Indeed, invalidation of the Decision is the only available remedy since the Board cannot take any action outside of its statutory authority. *Kailin*, 152 Wn. App. at 979.

The Coalition also argues that only it can object to the Board's failure to issue a timely decision. Coalition Brief at 16. The only support cited, *Olympians for Public Accountability v. Dep't of Ecology*, 2010 WL 1920560 (May 7, 2010) (App. A), is inapplicable; it addresses who can challenge lack of service. Moreover, since the Growers' SDP was stayed during the pendency of the Board appeal, accepting this argument would mean that the party most harmed by the Board's illegal delay could not object to it. RCW 90.58.140(5). This absurd result would undermine the Legislature's purpose in amending the SMA to require the Board to make timely decisions. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002); Laws of 1995, ch. 347, § 310; CP 233, 241, 301.

The Board contends that enforcing the mandatory deadline is unfair because it "would punish appealing parties for the Board's

³ The cases cited by the Board are inapplicable. Board Brief at 21-23. *State ex el. Burgunder v. Superior Court*, 180 Wn. 311, 39 P.2d 983 (1935) predates the APA. *Sullivan*, 71 Wn. App. 317, involved review under standards specific to the Personnel Appeals Board, not the APA. *Trohimovich v. State*, 90 Wn. App. 554, 952 P.2d 192 (1998), did not involve a challenge to a decision reviewable under RCW 34.05.570(2) or (3). *State v. Martin*, 137 Wn.2d 149, 969 P.2d 450 (1999), is a criminal case.

inaction.” Board Brief at 15. The Board is in no position to make this argument, since it is admittedly the *Board’s* inaction that causes this alleged unfairness. Moreover, enforcing the mandatory deadline affects project proponents and opponents equally, since either may appeal a shoreline decision. The Legislature is the proper body for resolving fairness concerns, and it determined the prior system—under which the Board was taking over one year on average to issue decisions—was unfair. CP 301. Future fairness claims must similarly be directed to, and resolved by, the Legislature. *Fix v. Fix*, 33 Wn.2d 229, 231, 204 P.2d 1066 (1949) (courts do not make laws, but only apply laws to the facts). The Board’s vehement arguments against enforcing the mandatory deadline are concerning, as they suggest the Board intends to continue to violate the statute. This underscores the importance of this Court affirming the statutory deadlines established by the Legislature.

B. The Decision Must Be Reversed Because the Board Erroneously Interpreted and Applied the Law.

Substantively, the Board committed five clear errors in issuing the Decision. The facts underlying these errors are largely agreed upon and set forth in the Decision. The Court simply must decide whether the Board correctly interpreted and applied the law. For the reasons set forth below and in the Opening Brief, it is clear the Board did not.

1. The Board Erroneously Disregarded Critical and Uncontroverted Testimony.

In Finding 29, the Board disregarded uncontroverted testimony demonstrating numerous agencies with expertise agreed that the eelgrass

buffers imposed by the County provide adequate protection. The Board offered a single basis for ignoring this testimony: “the record lacks documentation to show agreement by all agencies involved.” CP 40. This constitutes clear legal error for two reasons: (1) testimony is itself evidence and does not require corroborating documentation; and (2) the record does, in fact, contain such documentation. Opening Brief at 20-22.

The Coalition does not dispute the salient points: Ms. Meaders’ testimony on this issue is *itself* evidence; no rule of evidence or Board rule requires testimony to be corroborated by documentation; the Board did not find Ms. Meaders’ testimony lacked credibility or was controverted; yet the Board disregarded this evidence. *See* Coalition Brief at 19-24. Instead of arguing that Finding 29 was appropriate (i.e. that the law supports the Board’s decision to ignore testimony solely because it is not corroborated by documents), the Coalition argues Ms. Meaders did not actually testify as the Board found. Coalition Brief at 23 (citing Tr. 1057:5-1058:9).⁴ In so doing, the Coalition is challenging Finding 29, where the Board clearly found Ms. Meaders testified “that agreement was reached as to the acceptability of a smaller buffer in conversations with individuals at the State Department of Ecology, WDFW, DNR, the USFW and/or the Corps.” CP 39-40. This challenge is improper, as the Coalition neither

⁴ The Coalition’s characterization of Ms. Meaders’ testimony is baffling, as she testifies at the referenced pages “there was no indication to me from the agencies that a 10-foot buffer was of concern.” Tr. 1058:4-5. This is consistent with her testimony in many other instances that the eelgrass buffer and monitoring plan were not simply agreed to, but developed in coordination with, the various agencies. Tr. 1031:3-10, 1055:20-1056:10, 1057:5-1058:3, 1074:11-1075:20, 1187:10-16, 1188:19-1190:4.

filed a cross-appeal nor assigned error to Finding 29. *State v. Kidsvogel*, 149 Wn.2d 477, 481, 69 P.3d 870 (2003); RAP 5.1(d), 10.3(b), (g).

Moreover, while the Coalition argues that Ms. Meaders' testimony was controverted, it fails to identify any evidence that demonstrates agencies did not agree with the County-imposed buffer. For example, the Coalition states the County continued to object to the buffer, citing AR 2436-38 (Ex. R-18). But this exhibit, authored by Mr. Risvold, documents that a two-foot vertical buffer is not appropriate; states the County facilitated a meeting between the Growers and Departments of Ecology and Fish and Wildlife ("WDFW") during which they agreed upon a 25-foot buffer; and it recommends a 25-foot buffer with reductions and monitoring. AR 2437-38. The Coalition also falsely states Ecology continued to support a two-foot vertical buffer; the document it cites as support for that claim was prepared *prior to* the meeting at which Ecology agreed to reduced buffers. Coalition Brief at 21 (citing AR 2178).

Finally, contrary to Finding 29, the agencies' agreement to the Farm's eelgrass buffers is clearly documented in the record. The record includes a report that the Growers' environmental experts sent to the U.S. Army Corps of Engineers ("Corps"), the Washington Department of Natural Resources ("DNR"), Ecology, and the County that details the agreed-upon buffer and monitoring plan, along with the scientific basis for it. AR 2697-2712 (Ex. R-34). The record also contains correspondence between DNR and the Growers' expert that plainly states DNR no longer requires a two-foot vertical buffer; DNR instead requires a 25-foot buffer

and reductions are allowed with monitoring and adaptive management, which is exactly what was authorized for the Farm. CP 743-45. The Coalition cites nothing to show the agencies later changed their positions on these buffers, and the Board erred in disregarding these documents.

2. The Board Erred by Misapplying the Burden of Proof.

The Coalition admits in its introduction that the Board misapplied the burden of proof: “The SHB properly concluded that de Tienne provided insufficient evidence to demonstrate that the farm could exist on the site without net loss of eelgrass and ecological functions.” Coalition Brief at 1. The Growers agree that this is what the Board concluded. *See, e.g.*, Findings 47 (CP 48) (“The Board finds these studies do not provide sufficient scientific support for Ms. Meaders’ opinion that the buffers imposed will adequately protect eelgrass at this Site”), 51 (CP 50) (“The Board finds a lack of complete and/or reliable scientific evidence in the record to support a buffer of this size at this Site”). These findings demonstrate the Board misapplied the burden of proof.

RCW 90.58.140(7) states applicants for SDPs “have the burden of proving that a proposed substantial development is consistent with the criteria that must be met before a permit is granted” and that on appeal “the person requesting the review has the burden of proof.” The Growers were required to prove before the County that the SDP criteria had been met—not simply criticize information offered in opposition to the Farm. The Growers met that burden, and the County issued the Growers’ SDP.

On appeal, the Coalition bore the burden to prove the Farm would

not meet those criteria—not simply criticize supporting information for the Farm. Similarly, the Board could only deny the SDP if substantial evidence showed approval criteria would not be met. *Id.* The Board knows how to properly allocate the burden of proof and has done so in appeals for other geoduck farms.⁵ Yet here it switched the burden and denied the SDP because, as the Coalition admits, the Board “concluded that de Tienne provided insufficient evidence.” Coalition Brief at 1.

The Coalition does not attempt to demonstrate the Board properly allocated the burden of proof. Coalition Response at 24-27. Instead, it admits it bore the burden, makes numerous unattributed factual assertions, and summarily concludes “any fair reading of the lengthy FOF addressing the adequacy of the eelgrass buffers which are set forth in FOF 23-53 (AR 969-983), easily demonstrates how mistaken de Tienne is in making this argument.” *Id.* at 27. The Decision is certainly lengthy and includes many findings, but as demonstrated above and in the Opening Brief, those findings are largely based on a perceived lack of evidence to disprove potential impacts. That is a misallocation of the burden of proof.

3. The Board Erred in Requiring Preparation of a Cumulative Impact Analysis.

This case represents the first time in the Board’s history that preparation of a cumulative impact analysis was required for a SDP *before*

⁵ See, e.g., *Coalition to Protect Puget Sound Habitat v. Pierce County*, SHB No. 11-019, at 25 (Findings of Fact, Conclusions of Law, and Order, July 13, 2012) (“Absent substantial evidence to support Petitioners’ assertions of negative impacts, the Board concludes that Petitioners failed to meet their burden of showing that the SDP is inconsistent with either the SMA or the Pierce County SMP. The Board dismisses all of the Petitioners SDP-related claims.”). Opening Brief, App. D.

the SDP came before the Board. Opening Brief at 25-27. There is no statutory, regulatory, or case law authority for such a requirement. *Id.* The Coalition does not dispute this essential fact and the authority it cites confirms only that the *Board itself* can consider cumulative impacts in limited cases. Coalition Brief at 28 (“the Board has held it is not precluded from considering cumulative impacts”) (citing AR 934), 32 (“the SHB can reverse a local grant of a Permit, as it did here, if there was likely to be unacceptable ‘cumulative impacts’”) (citing *Hayes v. Yount*, 87 Wn.2d 280, 552 P.2d 1038 (1976)).⁶

The Coalition argues the Board did not err because it did not specifically require the County to prepare a cumulative impact analysis; the Growers could have prepared such an analysis themselves. Coalition Brief at 27. The Coalition misses the point. While there is precedent for the *Board itself* to consider cumulative impacts, there is no precedent or authority for requiring a local jurisdiction or SDP applicant to prepare a cumulative impact analysis, and the practical effect of such a requirement is to shift the burden of proof. Opening Brief at 27. In fact, the Coalition’s own description of the Decision demonstrates the error, as it states “the SHB did not assert – nor need it have – that cumulative impacts would definitely occur . . .” Coalition Brief at 35. In order to invalidate

⁶ The Coalition also inappropriately relies upon regulations promulgated by Ecology at chapter 197-11 WAC to implement the State Environmental Policy Act (“SEPA”). Coalition Brief at 30. The Farm’s SEPA determination (mitigated determination of non-significance) was not appealed and hence SEPA, and its implementing regulations, are inapplicable. CP 30; RCW 34.05.554(1).

the SDP on the basis of cumulative impacts, that is precisely what the Board was required to do: find that cumulative impacts would occur from the Farm. If the evidence did not support such a finding (which it did not), the Board could not overturn the SDP based on cumulative impacts.

4. The Board Erred in Determining the County Failed to Balance Statewide Interests.

The Coalition fails to meaningfully respond to the Growers' argument that the Board erred in determining the County did not balance statewide interests in issuing the SDP. Coalition Brief at 37-39. Instead, the Coalition lists various findings and conclusions made by the Board and summarily concludes the Board engaged in the appropriate balancing. *Id.*

This issue revolves around the interpretation and application of a County Code provision, PCC 20.24.020(A)(10). To the limited extent the Coalition attempts to address that provision, it commits the same mistake as the Board. The Coalition states this provision “encourage[s] use of shoreline areas for aquaculture *only* in ‘areas well suited for it,’ and that the PCC Code provision, by its express terms, gave priority to aquaculture uses *only* to ‘shoreline areas having the prerequisite qualities’ for such uses . . .” *Id.* at 37 (emphasis added). “Only” is not included in PCC 20.24.020(A)(10), and the Coalition, like the Board, errs in adding this word to this section. *Lake*, 169 Wn.2d at 526. This section of the Pierce County Code is included to *protect* certain areas for aquaculture, a preferred shoreline use, not to exclude aquaculture from any location.

The Coalition, like the Board, improperly construes “priority” to mean “allowed,” transforming this provision from one that prioritizes

aquaculture uses over other uses into an exclusionary zoning limitation that allows aquaculture only in certain areas. The Board erred in adopting an overly simplistic view of the SMA that focuses only on potential environmental impacts, fails to foster reasonable development, and ignores related regulatory programs. This case is strikingly similar to *Overlake Fund*, where the court reversed the Board's decision to impose a condition (precluding development within a wetland), holding the Board committed these same errors. *Supra* at 6; 90 Wn. App. at 761-62; Opening Brief at 30, 49 n.18. The Board's action here was even more extreme, as it denied (rather than simply conditioned) the SDP in question, and the development here would not only avoid construction in eelgrass but would maintain buffers and include extensive monitoring to ensure eelgrass is protected.

5. The Board Erred in Applying a No Net Loss Standard.

The Board erred in imposing a "no net loss" standard that is not found in the County's SMP or the SMA. The Coalition defends the Board's action by claiming PCC 20.24.020(A)(3) "is effectively a 'no net loss' provision." Coalition Brief at 40. This claim must be rejected. The Coalition offers no reasoned argument to support it, and it is undermined by the Decision itself which treats "no net loss" and PCC 20.24.020(A)(3) as separate standards. CP 74 (Conclusion 17); RAP 10.3(a)(6)); *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (contentions unsupported by reasoned argument do not merit judicial consideration).

The Coalition also claims the Growers' "own consultants equate

this Code provision with the ‘no net loss’ requirement.” Coalition Brief at 40. The Coalition misrepresents the record. The referenced document, AR 725, is a response to public comments submitted regarding the Farm, and the linkage between the no net loss standard and the County Code is made by Farm opponents, not the Growers’ consultant.

C. The Decision Must Be Reversed Because It Is Not Supported by Substantial Evidence.

In addition to committing the five clear legal errors above, any one of which should result in reversal, the Decision must be reversed because it is not supported by substantial evidence.

1. The Board Erred in Denying the SDP on the Basis of the Farm’s Alleged Impacts to Eelgrass.

The Coalition fails to show that there is substantial evidence demonstrating the Farm will adversely impact eelgrass, and that these impacts will result in a violation of specific SDP approval criteria. Instead, the Coalition states “the SHB was under no obligation to make such a finding in order to deny de Tienne’s Permit.” Coalition Brief at 41.⁷ To the contrary, in order to invalidate the SDP the Board must have found that substantial evidence in the record demonstrated that the Farm will adversely impact eelgrass and violate specific SDP approval criteria.

The only evidence the Board cited that could potentially support

⁷ The Coalition also misrepresents the Growers’ argument, stating the Growers contend there is not substantial evidence to “support the conclusion that there *definitely* will be damage to eelgrass from the proposed commercial geoduck farm.” Coalition Brief at 41 (emphasis added). The Growers do not use “definitely” in their Opening Brief. The Growers’ argument is that substantial evidence does not support a finding that damage to eelgrass is likely (or even possible) in light of the County’s imposed buffers and the evidence presented at hearing.

such a finding is: (1) the Supplemental Environmental Impact Statement (“SEIS”) prepared by DNR for the wild geoduck fishery; (2) the testimony of Dan Penttila; and (3) the testimony of Marlene Meaders. Opening Brief at 34. The Opening Brief establishes that none of these pieces of evidence provides a credible basis for finding that the Farm will damage eelgrass, and the Coalition fails to provide an effective response. *Id.* at 34-41.

Most strikingly, the Coalition does not even attempt to argue the SEIS supports a finding that the Farm will harm eelgrass. Specifically, the Coalition does not respond to the Growers’ argument that the SEIS does not itself impose a two-foot vertical buffer as a mitigation measure but only states “[g]eoduck harvest is not allowed in eelgrass beds . . .” AR 1205 (Ex. P-7). The SEIS simply states the two-foot vertical buffer is one of several measures that had already been implemented through State-Tribal agreements, that the buffer was designed to address a variety of interests unrelated to eelgrass, and that DNR agreed that a two-foot vertical buffer is inappropriate for this specific Farm. Opening Brief at 34-36. These critical points are also highlighted by the dissent. CP 84-85. The Coalition concedes these points by failing to respond to them. *State v. Ward*, 125 Wn. App. 138, 144, 125 P.3d 61 (2005) (respondent’s failure to respond to appellant’s point results in concession).

The Coalition also does not attempt to demonstrate Dan Penttila’s testimony provided substantial evidence to support a likely eelgrass impact, instead relying on “testimony from Wenman and Newell.” Coalition Brief at 43. Mr. Wenman and Mr. Newell are not experts,

cannot credibly testify to the Farm's likely impacts on eelgrass, and the Coalition's and Board's reliance on their testimony constitutes error. *May v. Robertson*, 153 Wn. App. 57, 89, 218 P.3d 211 (2009) (Board erred by relying on lay testimony to conclude eelgrass beds were in recovery).

The Coalition discusses Ms. Meaders' testimony, but it commits the same error as the Board. It references her testimony regarding the possibility of sediment to travel across eelgrass, but it dismisses her conclusion that there is a very low likelihood of this impacting eelgrass, claiming she is not an expert on sediment transport. Coalition Brief at 44-47; CP 42-43 (Finding 36). Again, the Board and Coalition cannot have it both ways, relying on Ms. Meaders' testimony acknowledging sediment transport is possible, but dismissing her conclusion that there is a very low possibility of adverse impacts. Opening Brief at 39-41.

The Coalition also attempts to defend the Decision through Mr. Risvold's testimony, stating that the eelgrass buffers were agreed to simply to increase cultivable area. Coalition Brief at 48. The transcript pages cited by the Coalition, 847:18-848:21, do not support this statement. County planner Ty Booth provided the testimony found at these pages, and he testified that the buffers were agreed to through consultation with several resource agencies with expertise on eelgrass. These buffers were designed to advance twin goals of allowing for a viable geoduck farm while providing adequate protection for eelgrass. *See also* CP 740-745; AR 2697-2712 (Ex. R-34); Opening Brief at 20-22; *supra* at 10-13. In so doing, the County properly balanced various interests advanced by the

SMA and County SMP; unnecessarily limiting the size of the farm with overly conservative and inapplicable buffers would not strike this balance. *Overlake Fund*, 90 Wn. App. at 761-62. And, contrary to the Coalition's and Board's assertions, these are not the smallest buffers possible. The record shows the Corps only imposes a 10-foot buffer and does not require monitoring. AR 3840 (Ex. R-135); Tr. 977:9-20.

The Coalition also falsely states the County Hearing Examiner approved the buffers in the SDP without any additional public input. Coalition Brief at 6. In fact, the Hearing Examiner held the record open for two weeks after the initial hearing on March 27, 2013 and reconvened the hearing on May 2, considering extensive written and oral input on the appropriate buffer size from the County, the Growers, and the public, including the Coalition and the Garrisons. Opening Brief at 7; CP 553.

Finally, the Coalition criticizes the County monitoring program for eelgrass included in the SDP conditions. Coalition Brief at 44, 47. Since the Coalition failed to demonstrate that the Farm would adversely impact eelgrass, there is no factual or legal basis for concluding these conditions are inadequate. But even if there were such evidence, the proper remedy should have been to revise the conditions to remedy any deficiencies rather than deny the SDP. The Board has properly chosen to condition, rather than deny, projects in the past to ensure compliance with the SMA and a local SMP. *See e.g., Preserve Our Islands v. Shorelines Hearings Board*, 133 Wn. App. 503, 137 P.3d 31 (2006) (affirming Board's decision to overturn denial of shoreline permits and imposition of conditions).

Here, the Board erred in denying the SDP as the evidence failed to prove the Farm would harm eelgrass and violate the SMP or SMA.

The Garrisons take a different approach, claiming the studies performed by Drs. Pearce and Horwith confirm the buffers in the SDP are inadequate. Garrison Brief at 7. The Garrisons are incorrect. Dr. Pearce's study is the most comprehensive analysis available regarding the impacts of subtidal geoduck harvest on eelgrass, and it concludes this activity "does not appear to cause significant negative impacts to the benthic environment beyond the borders of the immediate harvest area, including nearby eelgrass beds." AR 1822 (Ex. P-116). The Horwith study considered an intertidal geoduck farm in an area that did not contain eelgrass, but that eelgrass colonized after the farm was planted; there were no buffers in that study and it provided no information regarding impacts associated with eelgrass between 3 and 9 meters from the proposed Farm. Tr. 1029:6-24, 1173:19-1175:15, 1208:9-16.

The Garrisons also reference a large number of pages in the record, state there is virtually no science cited, and conclude the buffers were reached by negotiation, not science. Garrison Brief at 8. Similar to the Coalition, the Garrisons are improperly switching the burden of proof to the Growers by making this argument. *Supra* at 13-14. Moreover, the Garrisons are wrong. As discussed in the Opening Brief, the record as a whole demonstrates the Farm will not impact eelgrass. Opening Brief at 41-44. Similarly, as the dissent concluded, while the majority Decision improperly treated the SEIS as creating a regulatory requirement and

required the Growers to justify a “buffer reduction,” the evidence still shows the County’s buffers would avoid all impacts to eelgrass. CP 85.

2. Substantial Evidence Does Not Support Requiring a Cumulative Impact Analysis to Be Prepared.

The Board committed clear legal error in requiring preparation of a cumulative impact analysis. *Supra* at 14-16. But even if the Board could impose this requirement, substantial evidence does not support a finding that it should be required for the Farm’s SDP. Opening Brief at 45-47.

The Coalition’s response brief references a laundry list of exhibits and testimony that allegedly require consideration of cumulative impacts. Coalition Brief at 29-30. Most of these references are irrelevant and do not warrant a reply. However, it bears noting that the Coalition incorrectly states Mr. Booth acknowledged the need for a cumulative impact analysis. Mr. Booth does no such thing, and in fact his testimony makes clear that there are not any active geoduck farm applications pending near the proposed Farm (one of the factors for considering cumulative impacts). Tr. 839:3-840:17 (noting a potential farm next to the project site would need a new application; stating a potential farm on the east side of Key Peninsula is not proceeding; and discussing applications on the west side of Key Peninsula, not in the vicinity of the Farm site). He states the County might engage in this analysis in the future, but “[w]e did not believe that the de Tienne proposal was one that tripped that one because it’s not required in our regulations to -- in this case, there aren’t any other geoduck farms in Henderson Bay or Burley Lagoon.” Tr. 843:9-12. The Coalition failed to satisfy its burden to prove other factors that favor

considering cumulative impacts. The Coalition failed to show the Farm will harm eelgrass or other habitat, and record evidence demonstrates the County has previously approved numerous other intertidal and subtidal geoduck harvesting activities. *Supra* at 18-23; Tr. at 834:22-835:4, 968:15-969:11; AR 2077-2084 (Ex. P-142d). Hence, substantial evidence does not support a finding that cumulative impacts must be considered.

D. The Court Should Disregard Nonresponsive Arguments.

The Coalition and Garrisons raise a litany of additional arguments that do not respond to the Opening Brief, are irrelevant to whether the Board properly determined the Farm does not comply with SDP approval criteria, and must be disregarded. RAP 10.3(b), (g); RCW 34.05.554; *Kidsvogel*, 149 Wn.2d at 481. These arguments primarily relate to prior activities that have occurred at the Farm site. *See, e.g.*, Coalition Brief at 3-4, 43, 44, 49; Garrison Brief at 5-6. They have no bearing on the Farm's compliance with the SDP approval criteria and are improperly offered as a thinly-veiled attack on Mr. deTienne's character. Moreover, Mr. deTienne clearly testified that he did not engage in any of these activities himself, only his prior lessor did. Mr. deTienne terminated his relationship with the lessor over 10 years ago and took several steps to ensure any future geoduck operations would be performed responsibly. Tr. 630:16-631:8.

The Coalition also claims eelgrass at the Farm site has not recovered from the actions of Mr. deTienne's former lessor. Coalition Brief at 4. The Coalition relies on testimony from Mr. Wenman for this assertion, but Mr. Wenman's lay testimony cannot form a credible basis

for findings on eelgrass impacts, presence, or recovery. *May*, 153 Wn. App. at 89. Moreover, record evidence demonstrates the Farm's buffer is appropriate even if there was damage to the site 10 years prior, given that 10 years would be sufficient time for eelgrass to return to its natural condition. Tr. 1141:13-21; AR 3295 (Ex. R-87) (showing a two-year recovery time for eelgrass after harvesting within an eelgrass bed).

Finally, the Garrisons raise a host of additional arguments that must be disregarded because they have no relation to the issues presented. Garrison Brief at 1-2 (Bush Act), 3-4 (property boundaries), 8-9 (vesting), 9-10 (application procedures), 11 (SEPA), 15-18 (various).

E. The Coalition Is Not Entitled to Attorney's Fees.

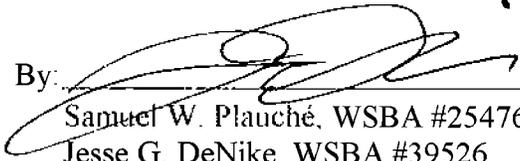
Because this Court should set aside the Board's Decision and reinstate the Farm's SDP, the Coalition is not the prevailing party and is not entitled to reasonable attorney's fees and costs. RCW 4.84.370(1).

II. CONCLUSION

For the reasons set forth above and in the Opening Brief, the Growers request the Court set aside the Decision and reinstate the SDP.

Respectfully submitted this 4th day of February, 2016.

PLAUCHÉ & CARR LLP

By: 

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Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Christine M. Lengele, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein;

That I, as a legal assistant in the office of Plauché & Carr LLP, caused true and correct copies of the foregoing document to be delivered as set forth below:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on February 4, 2016.



Christine M. Lengele, Declarant

Exhibit A

2010 WL 1920560 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board

State of Washington

OLYMPIANS FOR PUBLIC ACCOUNTABILITY, APPELLANT

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, AND PORT OF OLYMPIA, RESPONDENTS

PCHB No. 09-158

May 7, 2010

ORDER DENYING PARTIAL SUMMARY JUDGMENT AND MOTION TO DISMISS

INTRODUCTION

*1 Appellant Olympians for Public Accountability (OPA) filed an appeal with the Pollution Control Hearings Board (Board), challenging coverage provided by the Department of Ecology (Ecology) to the Port of Olympia (Port) under the Industrial Stormwater General Permit (ISGP or General Permit) issued in October 2009. By agreement of the parties, the Board entered a stay of this matter, allowing limited discovery and the filing of procedural motions related to jurisdictional matters. Consistent with the Board's earlier Order, the Port has moved for summary judgment or dismissal under CR 12(b)(6) on several issues presented in the Preliminary Pre-Hearing Order in this matter. Attorney Richard A. Smith represents OPA. Attorney Carolyn A. Lake represents the Port. Senior Counsel Ronald L. Lavigne of the Attorney General's Office represents the Department of Ecology. However, Ecology has not participated in or responded to the procedural motions filed by the Port.

Board Member Kathleen D. Mix presided for the Board, joined by Chair Andrea McNamara Doyle and Member William H. Lynch. The Port's motions were based solely on the written record, which consisted of the following:

1. Respondent Port of Olympia's Summary Judgment and CR 12(b)(6) Motions to Dismiss.
2. Declaration of Joanne Snarski, with Exhibits A-E.
3. Declaration of Maylee Collier, Department of Ecology, with Exhibit A (Notice of Appeal and Certificate of Service).
4. Olympians for Public Accountability's Response to Port of Olympia's Motion to Dismiss.
5. Declaration of Stanley Stahl RE: Standing, with Exhibits A-C.
6. Declaration of Lonnie Lopez.
7. Declaration of Harry Branch RE: Standing, with Exhibit A.
8. Respondent Port of Olympia's Reply.

PROCEDURAL BACKGROUND AND FACTS

Ecology issued the ISGP on October 21, 2009. At the same time it issued the General Permit, it granted coverage to many individual dischargers, including the Port of Olympia. OPA filed an appeal of both the terms of the General Permit, and the

applicability or coverage afforded the Port under the terms of the General Permit. OPA's appeal of the terms of the General Permit is part of consolidated proceedings in *Copper Development et al. v. Ecology*, PCHB Nos. 09-135 through -141, currently pending before the Board. The Board ordered that the portion of OPA's appeal that dealt solely with Port coverage under the ISGP proceed separately from the multi-party appeal of the terms of the ISGP. See *Order Consolidating Cases and Granting Intervention*, PCHB Nos. 09-135 through -141, December 29, 2009.

The Port has moved for summary judgment on the following issues from the Preliminary Pre-Hearing Order and Stay entered in this case on January 28, 2010.

- *2 1. (Issue No. 1) Has Appellant met its burden to establish it has standing to bring this appeal?
2. (Issue No. 2) Did Appellant timely file and/or serve their appeals?
3. (Issue No. 5) Whether Appellant OPA timely filed and served its appeal of its stated challenge to Ecology's 2008 decision that the Weyerhaeuser log yard facility located on the Port's Ocean Terminal was properly covered under the Port's Industrial Stormwater General Permit?
4. (Issue No. 7) Does the Board have jurisdiction to consider a site-specific application a general permit as part of an appeal of the jurisdiction wide General Permit?

The Port also makes argument with respect to Legal Issues Nos. 8, 9, and 10 from the Preliminary Pre-Hearing Order, but the argument is limited to the question of whether the Board has jurisdiction to consider substantive terms of the ISGP in the context of an appeal of the applicability of the General Permit to the Port. The Board will address this question as part of the analysis of the other jurisdictional issues presented by the Port's motions.

ANALYSIS

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 Wn.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), review denied, 117 Wn.2d 1004(1991).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts and reasonable inferences must be construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment may also be granted to the non-moving party when the facts are not in dispute. *Impehoven v. Department of Revenue*, 120 Wn.2d 357, 365, 842 P.2d 470 (1992).

I. Appellant timely filed and served the appeal.

The Port argues that OPA failed to properly serve the appeal in this matter on Ecology. The Port supports this argument with the Declaration of Ecology's Appeal Coordinator, Maylee Collier. Ms. Collier states that on November 19, 2010 (we take this to mean 2009, as stamped on the appeal document), Ecology received OPA's Notice of Appeal by fax, filed by attorney Richard Smith. Ms. Collier also states that in response to a subpoena from the Port, she conducted a diligent search of Ecology's

records, and has not located a copy of the Notice of Appeal served on Ecology by first-class, registered or certified mail, or by commercial delivery of any kind. Because Ecology has been able to locate a copy of only the faxed, not mailed, appeal document in its official record, the Port infers that OPA failed to make proper service on Ecology. In the absence of proper service, the Port contends that the Board is without jurisdiction, and must dismiss the case.

*3 OPA responds to the Port's dismissal motion by calling to the Board's attention the original "Certificate of Service" appended to the Notice of Appeal, and signed by Lonnie Lopez, a paralegal at Mr. Smith's law firm. The Certificate states that the Notice was served by overnight mail on Ecology on November 17, 2009 (two days before the fax to Ecology). *Collier Decl., Ex. A; Lopez Decl.* Lopez also states in the current declaration that the Notice of Appeal was taken to the post office and deposited in the mail on November 17, 2009. *Lopez Decl.*

The Port correctly states that timely service on the agency whose decision is being appealed is a prerequisite for the Board to have jurisdiction in an appeal. Both RCW 43.21B.230 and RCW 43.21B.310 require any appeal of a notice of an order, or of a permit, certificate, or license to be filed with the Board and served on the Department or air authority within thirty days from the date of receipt of the order.¹ The Board's rules clearly state that for the Board to acquire jurisdiction, both filing and service must be timely accomplished. WAC 371-08-335 and -405. The Board's rules also provide that service may be made in any of several enumerated ways, including: "First-class, registered or certified mail. Service is complete upon deposit in the United States mail properly stamped and addressed." WAC 371-08-305(10)(b). See *Olga Water Users, Inc., v. Dep't of Ecology*, PCHB No. 08-123 (Order Denying Motion to Dismiss, March 19, 2009).

Based on the record before us, we cannot conclude that the Board lacks jurisdiction based on lack of proper service. First, the Certificate of Service appended to the Notice of Appeal creates the presumption that service upon Ecology was correct. See *Leen v. Demopolis*, 62 Wn. App. 473, 479, 815 P.2d 269 (1991); see also CR 5(b) (proof of service of all papers permitted to be mailed may be by written acknowledgment of service, by affidavit of the person who mailed the papers). Lonnie Lopez has further provided a current Declaration restating that, consistent with the Certificate filed at the time, the Notice of Appeal was deposited in the U.S. mail on November 17, 2009, for overnight delivery. The Port's inference that service was not made, based on Ecology's inability to locate a mailed copy of the appeal, does not overcome the presumption of correct service, based on the Certificate of Service prepared at the time of filing the appeal. The Lopez declaration, reiterating that service by mail was timely accomplished by OP A, bolsters the presumption further. We conclude that there was compliance with the Board's service rules, and deny the Port's motion to dismiss on this basis.

Second, as our related Shorelines Hearings Board has held, the right to challenge lack of service is personal to the party to whom service was denied. *Morgan et al. v. Clark County*, SHB No. 05-008 (Order on Motion to Dismiss, July 18, 2005); *Dunlap v. City of Nooksack*, SHB No. 02-026 (Order on Summary Judgment, April 3, 2003). Ecology itself has not claimed lack of, or improper, service of this appeal. Because the Port cannot assert Ecology's right to proper service, we deny the Port's motion to dismiss on this basis as well.

2. Appellant OPA has standing to bring this appeal.

*4 The Appellant has the burden of proof to demonstrate that it has standing to bring this appeal. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), *Puget Soundkeeper Alliance, et al. v. Department of Ecology*, PCHB Nos. 05-150, 05-151, 06-034, and 06-040 (Consolidated) (Order Granting & Denying Partial Summary Judgment, July 7, 2006). This is a jurisdictional issue as the Board cannot hear an appeal unless the parties before it have standing to pursue their claims. *Center for Environmental Law & Policy (CELP) v. Department of Ecology*, PCHB No. 96-165, p. 2 (Order on DNR Motion to Dismiss, January 7, 1997) (citing *CORE v. Olympia*, 33 Wash. App. 667, 683-84 (1983)). This Board has regularly required a party to meet three requirements to demonstrate standing: first, the appellant must suffer an actual or imminent "injury-in-fact" that is concrete and particularized; second, the appellant's injury must come within the "zone of interests" protected by the statute at issue; and third, that the Board must have within its legal power the ability to impose a remedy that will "redress" the injury. *Id.* at p. 3, See also *Ronald Brown v. Snohomish County*, SJTB No. 06-035 (Order on Summary Judgment, May 11, 2007); *Bill*

Green v. Ecology, PCHB No. 07-012 (Summary Judgment Order, August 22, 2007). An organization that shows that one or more of its members is specifically injured by a governmental action may represent those members in appeal proceedings as well. *Associated General Contractors of Washington et al. v. Dep't of Ecology*, PCHB No. 05-157, 158, 159 (Order on Partial Summary Judgment, October 26, 2006). In addition, this Board has required that the injury must be caused by the challenged action of the opposing party to the litigation. *CELP v. Ecology*, PCHB 96-165 at p. 3 (citing *Lujan*, 504 U.S. at 563-64).

We conclude that OPA has standing to challenge the applicability or nonapplicability of coverage under the ISGP to the Port. OPA has met its burden to show that its members use and enjoy the waters of Budd Inlet on a regular and frequent basis. *Stahl Decl.; Branch Decl.* OPA's members provide specific and detailed information about their use, or limitations in use, of Budd Inlet for fishing, birding, kayaking, clam and oyster harvesting, and related water-based activities. They point out that polluted discharges from the Port affect the quality of the environment and their enjoyment of it. They set out the purposes of OPA, their connection to the organization, and actions OPA has taken to influence and address the environmental effects of stormwater discharges from the Port to Budd Inlet. *Stahl Decl.; Branch Decl.*

Based on the declarations and supporting factual material, the Board finds OPA and its members more than adequately allege specific, concrete, and perceptible injuries, within the zone of interest protected by water quality laws, sufficient to withstand the Port's argument that they lack standing. Because OPA meets the test for organizational standing set forth in previous Board decisions,² the Board denies the Port's motion to dismiss on the basis of lack of standing.

3. Appellant may appeal Ecology's decision to authorize the Port's discharges under the ISGP, as defined below.

*5 The Port makes several arguments related to OPA's appeal of the Port's coverage under the ISGP. First, the Port asserts that the Board lacks jurisdiction over Ecology's earlier decision to include Weyerhaeuser's log operation on Port property within the Port's coverage under an earlier version of the ISGP (this coverage continues under the current version of the ISGP). Second, the Port asserts that even if the Board had jurisdiction over that decision, this appeal is untimely. Finally, the Port seeks to limit what can be challenged in the current appeal, and to foreclose OPA from an appeal of the substantive terms of the ISGP. The Port argues that under WAC 173-226-190(2), review in this case is limited to the "applicability or non-applicability" of the General Permit to the Port, an inquiry "limited to whether coverage was properly granted to the Port, as applicant." See Port's Motion for Summary Judgment, p. 22.

Ecology regulations authorize two kinds of appeals of NPDES permits. WAC 173-226-190. A party may appeal the permit's terms and conditions as they apply to a class of discharges, or they may appeal the permit's terms and conditions as they apply to an individual discharger. WAC 173-226-190(1) and (2). The latter appeal is limited to "applicability or non-applicability" of the permit to that individual discharger. WAC 173-226-190(2). OPA filed both kinds of appeals in this case, the challenge to the General Permit pending in the *Copper Development* case, and the challenge to the General Permit's application to the Port as an individual discharger pending in this case.

As we have previously held, Ecology's grant of coverage under a General Permit constitutes a determination by the agency that pollution associated with the permitted activity will or should be controlled by the requirements of the General Permit. *Cascade Conservation League v. Dep't of Ecology*, PCHB No. 98-82 (Order Granting and Denying Summary Judgment, Dec. 31, 1998). Consistent with this holding, in an appeal of the "applicability or non-applicability" of a permit to an individual discharger, the Board will evaluate whether the activities by an individual discharger will result in, or are likely to result in, pollution that will not be adequately regulated under the General Permit. *Id.*, See also *CARE v. Dep't of Ecology*, PCHB No. 06-057 (Order on Motions, August 1, 2007).

In this case, it is appropriate for OPA to contend that the conditions of the ISGP are inappropriate or inadequate to address discharges from the Port, on the basis that those General Permit conditions do not satisfy the requirements of applicable state or federal water quality laws, given the site-specific nature and quality of the Port's discharges and the circumstances of the receiving waters. The scope of the challenge OPA may bring is, therefore, broader than the Port appears to define (whether

coverage was properly granted), though not without some limitation. We also note that Ecology's rules anticipate a challenge such as this, by providing that if the terms of the general permit are found inapplicable to a particular discharger, the matter should be remanded to Ecology for consideration of an individual NPDES permit. WAC 173-226-190(3).

*6 The Port makes a number of related arguments about the scope of the Board's jurisdiction in this matter. The Port asserts that the reissuance of the ISGP in October 2009, does not re-open the door for OP A to appeal the inclusion of Weyerhaeuser's log operation within the Port's General Permit coverage. The Port also argues that OPA cannot raise issues related to the substantive terms of the re-issued ISGP, noting again that the appeal is limited to the applicability or non-applicability of the General Permit to the Port. In this regard, they assert the Board is without jurisdiction over Legal Issues 8-10 of the Pre-Hearing Order, each of which questions whether or not Port discharges comply with water quality laws.

It is undisputed that Ecology previously determined that stormwater generated by Weyerhaeuser's industrial activities on property leased from the Port were covered under the Port's existing ISGP coverage. The Board recognized this in a previous decision, and concluded that it was without jurisdiction to consider Ecology's decision to include Weyerhaeuser under the Port's permit. *West v. Weyerhaeuser Company and Dep't of Ecology*, PCHB No. 08-076 (Order Granting Motion to Dismiss, January 14, 2009). If OPA were raising an issue related to Ecology's previous action to allow Weyerhaeuser to operate under the Port's permit, we would be presented with the same jurisdictional question, with respect to both the timeliness and nature of the action appealed, and we would agree we lack jurisdiction over that specific question. However, we conclude that OPA is *not* appealing Ecology's decision to allow discharges from the Weyerhaeuser facility to be covered within the scope of the Port's ISGP coverage. OPA has admitted as such in its responsive brief. Instead, OPA is appealing Ecology's decision to grant coverage to the Port under the re-issued ISGP. While OPA cannot now directly challenge Ecology's decision to include Weyerhaeuser within the Port's ISGP coverage, it can contend and present a case that the activities and discharges from the Port, including Weyerhaeuser operations at the Port, will result in or are likely to result in, water pollution that will not be adequately regulated under the terms of the ISGP. To this extent, the Board can consider whether the Weyerhaeuser discharges, just like other Port discharges, are adequately addressed by the terms of the 2009 ISGP.

Likewise, OPA does not directly appeal Ecology's decision to not require an individual permit for the Port, nor does it directly appeal substantive terms of the ISGP in this case. As OPA states, it is appealing "the appropriateness of Ecology's determination to authorize the Port's discharges under the ISGP." OPA's Response, at p. 6. We read Legal Issues 8, 9, and 10 of the Pre-Hearing Order to simply identify those areas in which OPA wishes to contend that the terms of the General Permit are inadequate to address this individual discharger's situation, in light of the stormwater discharges from the Port, and the nature of the receiving waters (e.g. Issue 10 asks whether the conditions of the ISGP are adequate to ensure that discharges from the Port property meet AKART). We have concluded that we have jurisdiction over such issues, when raised within the framework we have described in this opinion.

*7 We have disposed of the Port's remaining arguments by setting forth the scope of what can be appealed when a party challenges the "applicability or non-applicability" of General Permit terms to a specific discharger, and by clarifying what may, or may not be, included in an appeal of the same. Accordingly, the Board denies the Port's motion for summary judgment, or to dismiss, regarding Issues 5, 7, 8, 9, and 10 as stated in the Pre-Hearing Order.

ORDER

In accordance with the analysis above, the Board finds that it has jurisdiction in this matter, and the Port's Motion to Dismiss and for Summary Judgment are DENIED on all issues.

SO ORDERED this 7th day of May, 2010.

Kathleen D. Mix
Presiding

Andrea McNamara Doyle
Chair
William H. Lynch
Member

Footnotes

- 1 The Port also makes occasional reference to the need for service on the Attorney General's Office, but provides no authority for that requirement. While the rules pertaining to petitions filed with the state Shorelines Hearings Board have certain requirements related to service on the Attorney General (*see* WAC 461-08-355), the rules governing appeals before the Pollution Control Hearings Board do not.
- 2 As we have in other cases, we reject OPA's argument that there is no standing requirement whatsoever before the PCHB. Parties challenging an administrative action must possess standing, just as any litigant must. *Associated General Contractors et al. v. Dep't of Ecology*, PCHB Nos. 05-157,158, 159 (Order on Partial Summary Judgment, October 26, 2006), citing *Dew Beste v. PCHB*, 81 Wn. App. 330, 339 (1996).

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