NO. 49761-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE PUYALLUP TRIBE OF INDIANS

Appellant,

v.

WASHINGTON STATE SHORELINES HEARINGS BOARD, CITY OF TACOMA, PUGET SOUND ENERGY, PORT OF TACOMA, AND WASHINGTON STATE DEPARTMENT OF ECOLOGY

Respondents.

APPELLANT PUYALLUP TRIBE OF INDIANS' OPENING BRIEF

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I. INTRODUCTION

The Puyallup Tribe of Indians ("Tribe") appeals the Findings of Fact, Conclusions of Law and Order entered July 18, 2016 ("Final Order") by the Shorelines Hearings Board ("Board") in *Puyallup Tribe of Indians v. City of Tacoma et al.*, Shorelines Hearings Bd. Case No. 16-002.

In the underlying administrative proceeding, the Board erroneously upheld Respondent City of Tacoma's ("Tacoma" or "City") rush to judgment in granting Shoreline Substantial Development Permit SHR2014-40000246123 ("SSDP"), which authorized a liquefied natural gas facility ("Project" or "LNG Project") proposed by Respondents Puget Sound Energy ("PSE") and the Port of Tacoma ("Port").[1] The Board's Final Order was made to the substantial detriment of the Tribe's 1855 Treaty rights, the Tribe's Land Claims Settlement rights, the Tribe's rights to continue and enhance sustenance fishing in Commencement Bay, and the Tribe's cultural practices and traditions.

The Board's Final Order disregards the public interests in protecting and preserving the environmental health of Shorelines of the State in accordance with the Shoreline Management Act, RCW ch. 90.58 ("SMA").

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[1] The Port is also the owner of the land and water on which the Project will be located. Part of the Port's property will be leased directly to PSE, while another part to be used by PSE, including that portion located on the Blair Waterway, is leased by the Port to Totem Ocean Trailer Express ("TOTE"). A general diagram of the Project location (Ex. P-183) is attached at **Appendix 1** for the Court's convenience.

The SMA requires that shoreline development like the LNG Project be consistent with SMA policies, including those "protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life." RCW 90.58.020. Tacoma's Shoreline Master Program ("TSMP"), adopted pursuant to the SMA and approved by the Department of Ecology, requires that "*at minimum*, no net loss of shoreline ecological functions and processes" can result from any shoreline development.[2] The Board's Final Order warrants reversal for disregarding these key substantive policies and standards.

In affirming the SSDP, the Board made findings that lack factual support, misinterpreted and misapplied the law, allowed or overlooked substantial and continuing changes in the Project during the appeal process, and committed a number of other evidentiary and procedural errors which individually and collectively deprived the Tribe of its due process right to a fair hearing. For all of the foregoing reasons, the Tribe respectfully asks the Court to reverse the Final Order and set aside the SSDP.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The Tribe assigns error to Board Findings of Fact Nos. 5, 12,

[2] Tacoma Municipal Code ("TMC") 13.10.1.2.5 (emphasis added).

13, 23, 24, 26, 30, 37, 38, 40, 41, 45, 46, 47, 49, 50 and 51; and assigns error to Board Conclusions of Law Nos. 10, 15, 16, 20, 21, 23 and 26.[3]

2. The Board erred in finding the Project to be consistent with the substantive standards of the SMA and the TSMP, specifically including the "no net loss of shoreline ecological functions" standard and the preservation of shorelines policy.

3. There is no substantial evidence supporting the challenged Findings, and the weight of the evidence is to the contrary.

4. The Board erred in finding and concluding that Tacoma did not have the legal ability to require PSE and the Port to undertake sediment characterization of the Project's in-water footprint.

5. The Board misapplied and erroneously interpreted the standards of the SMA and TSMP, and in affirming the SSDP, by failing to require PSE and the Port to characterize the sediments which will be disturbed by construction occurring in the Project's in-water footprint.

6. The Board's failure to require PSE and the Port to characterize the sediments that will be disturbed by construction occurring in the Project's in-water footprint comprises an erroneous interpretation of

[3] The Final Order (AR 000611-659) is attached at **Appendix 2** for the Court's convenience. Citations to the Tacoma Municipal Code are likewise attached at **Appendix 3**. Decisions from Shorelines Hearings Board matters cited in this brief are attached as **Appendix 4**.

the "no net loss of shoreline ecological functions" standard, in violation of the SMA and TSMP.

7. Board erred by assuming for itself the City's duty to determine whether the Project met the TSMP requirement of "no net loss of ecological functions".

8. The Board erred in affirming the SSDP and the Project when the Project scope and key elements were in constant metamorphosis during the Board's appeal process.

9. The Board erred in reversing the burden of proof and requiring the Tribe to prove the fact of sediment contamination in the Project's in-water footprint.

10. The Board erred and failed to comply with its own rules, the Administrative Procedure Act, and due process of law in relying in its Final Order upon a document that had been excluded from evidence.

B. Issues Pertaining to Assignments of Error

1. May an adequate determination of the "no net loss of shoreline ecological functions" standard be made when there is no knowledge or understanding of sediment conditions that will be disturbed during construction of the Project?

2. May an adequate determination of mitigation necessary to address in-water impacts caused by the Project be made when there is no

knowledge or understanding of sediment conditions that will be disturbed during construction of the Project and no steps have been required to prevent contamination from occurring?

3. May an adequate determination of the "no net loss of shoreline ecological functions" standard be made, an SSDP issued, and appeal of the SSDP be conducted and concluded when the Project scope, mitigation plans and remedies, and other key parameters are not established?

4. Does Tacoma have the authority to require and obtain sufficient information of sediment conditions at a project site before granting an SSDP for that project?

5. Did the Board improperly shift the burden to prove sediment contamination to the Tribe?

6. May the Board rely in its Final Order upon a document it excluded from evidence?

7. May the Board usurp the City's exclusive role to administer the SMA and TSMP permitting during its *de novo* review when the Project has changed substantially from the original application considered by the City?

8. Does the Board's quasi-judicial role and status in considering the appeal of the Project SSDP qualify the Board to perform scientific and

other factual analysis of the Project that was not initially performed by the City?

III. STATEMENT OF THE CASE[4]

A. Procedural History

On January 20, 2016, the Tribe appealed Tacoma's December 30, 2015 SSDP approving the LNG Project. AR 0001-12. The Board held a five-day hearing May 9-13, 2016, and issued its Final Order affirming the SSDP on July 18, 2016. AR 0611-659.

On August 16, 2016, the Tribe filed its Petition for Review in Thurston County Superior Court. PSE filed an Application for Direct Review with the Court of Appeals on September 14, 2016. The Board issued a Certificate of Appealability on September 29, 2016, and this Court issued its Ruling Accepting Direct Review on January 17, 2017.

B. The Tribe's Interest

Commencement Bay is part of the Tribe's historic hunting and fishing grounds, and has been used as its subsistence fishery from time immemorial. Salmon and shellfish are the key traditional food sources and cultural staples of the fishery. RP (Vol. 1 at 30, 141-143). The Tribe is a

[4] Citations to the Certified Administrative Record of the Board proceedings, which includes both pleadings and the hearing exhibits, are set forth as "AR__." Citations to the Verbatim Report of Proceedings are set forth as "RP___." Findings of Fact are abbreviated as "FF," and Conclusions of Law are abbreviated as "CL."

sovereign nation and signed the Treaty of Medicine Creek with the United States, 10 Stat. 1132 (1855), reserving rights to harvest fish and other natural resources both within and outside of its reservation boundaries ("Treaty Right"). The Tribe's Treaty Right encompasses a fishery that is healthy in both abundance and quality, together with sufficient habitat to support that fishery. *See United States v. Washington*, No. 13-35474, 2017 U.S. App. LEXIS 3816, at *34-39 (9th Cir. March 2, 2017); *U.S. v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash., 1974).

The Tribe takes an active role as a co-manager of the Commencement Bay fishery, is a provider of key fish habitat through restoration sites and conservation areas, and supplements the fishery through hatcheries it owns and operates. RP (Vol. 1 at 143-44). The Tribe owns land abutting the Hylebos and Blair Waterways, and many of its members live near the area at issue in this case. RP (Vol. 1 at 31-34); AR 0185.[5]

C. Site of the Proposed LNG Project

The Project will be located between the Blair and Hylebos Waterways in the Tacoma Tideflats of Commencement Bay, and as

[5] No Respondent cross-appealed the Board's Final Order or its determination that the Tribe has standing in this matter. Nevertheless, as set out below, the Tribe has been adversely impacted, prejudiced, and injured by the Board's Final Order granting the SSDP and by the Board's errors in taking that action.

originally approved, involved in-water construction in each waterway. AR 0612-13 (FF 2; AR 0683; AR 0699.[6] The Blair and Hylebos Waterways were excavated from the Commencement Bay tidelands, and the adjacent tidelands between the waterways were filled to create the upland portion of the Blair-Hylebos peninsula. AR 0612-13 (FF 2.

Two zoning designations apply to the Project under the TSMP – "S-10" for the "high intensity" upland area, and "S-13 Shoreline District – Marine Waters of the State" – characterized as an aquatic environment. AR 0613 (FF 3. The TSMP designates the portion of the project site "lying seaward from the line of extreme low tide" as a shoreline of statewide significance. TMC 13.10.4.2.2.[7] Because the in-water areas at issue are part of the Commencement Bay fishery and serve as juvenile salmonid migration corridors, *see e.g.,* RP (Vol. 1 at 149-151), they constitute "critical habitat" under the SMA and TSMP. *See* WAC 173-26-221(2)(c)(iii); TMC 13.10.6.4.4.

Both waterways have experienced considerable contamination, and the Hylebos Waterway remains an active Superfund site. *E.g.*, AR 0879. The Blair Waterway is a former Superfund site, but was removed from the National Priorities List following dredging of its navigation channel. AR

[6] The Project still includes the original eight million gallon LNG storage tank.
[7] Shorelines of statewide significance are treated with greater concern and care under SMA and TSMP regulations.

00382; RP (Vol. 4 at 122-23).

The Project's in-water construction work is not in the Blair navigation channel, *see* AR 1159, but is within the near-shore and bank areas of the Blair Waterway which were not dredged and remain at risk for contamination. *See e.g.*, RP (Vol. 2 at 53-54; Vol. 4 at 122-23). High levels of contaminants have been identified throughout the Blair Waterway outside the navigation channel, including in areas near the proposed in-water construction site. AR 2644 and 2649; RP (Vol. 2 at 45); AR 00968-978 (Exs. P-165-175, discussed at RP Vol. 2 pp. 46-81).[8]

Because of the this history and the contamination issues, a number of regulatory agencies raised issues regarding the Project's in-water construction work. For example, the Department of Ecology made formal comments to the Draft Environmental Impact Statement (prepared for the Project under the State Environmental Policy Act) stating that "[d]isturbing sediments 2 feet deep could potentially release buried contaminated sediments." AR 1842 (at Sec. 2.3.1.1).[9] Nevertheless, PSE and the Port

[8] Port witness Scott Hooton testified that characterization of sediments taken from the Blair Waterway directly across from the Project site revealed a "significant situation" involving tributyltin ("TBT") that transformed a dredge characterization project into an emergency removal action overseen by the U.S. Environmental Protection Agency ("EPA"). RP (Vol. 5 at 227). Significantly, no one was aware of this contamination until sediments at the site were characterized. *Id.* The source of the TBT contamination has not been determined. RP (Vol. 2 at 71; Vol. 5 at 227-28).

[9] Similarly, on January 20, 2016, the EPA advised of its "recommendation to acquire surface sediment quality data before and after some type of in-water work with the potential

made no effort to determine whether contamination exists in the Project site's sediments; nor did Tacoma or the Board require such determination for the Blair Waterway. RP (Vol. 3 at 134); AR 0653 (CL 16).

The Blair and Hylebos Waterways contain habitat for fish and other aquatic life of importance to the Tribe and its members, and are part of the Tribe's usual and accustomed fishing grounds. RP (Vol. 1 at 30, 149-51). Because federally listed endangered species and State Priority Habitat and Species are present in the waterways, both are regulated as Fish and Wildlife Habitat Conservation Areas. *E.g.*, AR 0703 (Ex. P-7 at ¶21). In addition, the Wapato Creek, a tributary to the Blair, contains fish including Chum and Coho Salmon and Cutthroat Trout, and is used as spawning habitat by endangered species. RP (Vol. 1 at 143-44, 153-54); AR 2622. The Blair Waterway is also a migration area for juvenile salmon. RP (Vol. 1 at 151).

The disturbance of sediments in connection with the Project would re-suspend contaminants present in the sediments, which could harm fish not only via the suspension and ingestion of toxic substances from the water column, but also via later ingestion of benthic invertebrates exposed to the contaminants. RP (Vol.2 at 169-170, 173-75; Vol. 5 at 192-93); *see also* AR 0882. In addition, the migration of salmonids could be adversely

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to displace subsurface contamination has precedent. (And it would make sense if even there were none.)." AR 0882.

affected by shading created by the contemplated overwater structures. RP (Vol. 2 at 173-175).

D. The Project Application, Mitigation Analysis, Sediment Testing Requirements, and Reconsideration Decision

PSE's SSDP application stated the purpose of the Project was: (1) installing a barge facility on the Hylebos to load LNG fuel onto barges to fuel ships in Commencement Bay; (2) installing the Blair loading platform to provide fuel directly to TOTE's vessels; and (3) storing LNG for conversion back to gas during PSE's peak demand periods. AR 1125. To construct facility components within the shoreline jurisdiction, PSE and the Port are required to obtain an SSDP from the City. AR 0700. PSE submitted its application for the SSDP on May 6, 2015. AR 0616 (FF 10).

As originally proposed and approved, in-water demolition and construction work would be performed in both waterways, including construction of barge loading facility in the Hylebos and a pipeline and loading platform for fueling two TOTE vessels per week on the Blair. AR 1127-30; RP (Vol. 5 at 17).

The Project also proposed mitigation work in the Hylebos to compensate for impacts to ecological functions caused by the Project. AR 1189-1201. With regard to mitigating such impacts, on June 12, 2015 EPA first expressed its concerns regarding "trading coverage on the Blair for

coverage on the Hylebos, when they likely have very different contamination levels." AR 0872. These concerns were provided to PSE and the Port on June 15, 2015. AR 0871. At some point prior to Tacoma's permitting decision, PSE and the Port provided the City with information about their planned mitigation. RP (Vol. 4 at 231-32). Despite EPA's concerns, that information merely compared the square footage of impacts in the Blair Waterway against the square footage of mitigation in the Hylebos Waterway, using a 1-to-1 ratio and thus treating the Blair and Hylebos Waterways as identical. AR 0734 (Table 1).

Using the mitigation figures provided by PSE, the City's Environmental Specialist, Shannon Brenner, prepared a technical analysis of the proposed mitigation's adequacy, AR 0729; RP (Vol. 4 at 231-32), employing the same 1-to-1 ratio. AR 0639 (FF 47); AR 0734 (Table 1). The City granted the SSDP on November 19, 2015, AR 0697, noting that its determination on mitigation adequacy was based on Ms. Brenner's memorandum. AR 0706 (¶41).

The Tribe sought reconsideration, and on December 30, 2015, the City issued its Order Partially Granting Reconsideration and Modifying Conditions of Approval. AR 000669-682 (Ex. P-2) ("Reconsideration Order"). The City added several conditions to its original approval, including requiring that "the applicant demonstrate[ ] that further sediment

testing has been completed" in the Hylebos Waterway. AR 0675. Significantly to the Tribe's issues in this appeal, the *City required no such testing in the Blair Waterway. Id.*

E. The Tribe's Appeal and Proceedings Before the Board.

The Tribe appealed Tacoma's SSDP to the Board on January 20, 2016. AR 0001-0012. Within days of that appeal, PSE filed a unilateral "Stipulation" removing most of the Hylebos actions from the Project scope, stating as follows:

> PSE Hereby stipulates to not engage in:
> Any in-water or over-water construction, dredging or fuel bunkering in the Hylebos Waterway authorized by [the SSDP] other than (a) work to improve three existing storm water outfalls to meet new, more stringent storm water requirements and (b) removal of 4,973 square feet (approximately 37%) of overwater decking from the existing pier (pilings to remain in place).

AR 00014. By doing so, the Stipulation eliminated most of the compensatory mitigation for the Project's adverse impacts on ecological functions. The City never formally reevaluated the SSDP in light of the changes. RP (Vol. 3 at 130:6 – 132:8).

Following the Stipulation, the Project – by way of PSE's Joint Aquatic Resources Permit Application ("JARPA") and PSE's Mitigation Plan and Water Quality Protection and Monitoring Plan ("WQPMP") – underwent changes throughout the course the Tribe's appeal to the Board

(in the case of the WQPMP, those changes occurred even during the hearing). *See* AR 1189-1201; AR 2620-36; RP (Vol. 1 at 52-55; Vol. 2 at 188, 208; Vol. 3 at 128-30, 263-65; Vol. 4 at 61-62; Vol. 5 at 54-57, 83, 198-99). Thus, the Tribe's mitigation expert had to assess three different mitigation plans between the filing of the appeal and the Board's hearing. *See* RP (Vol. 2 at 188).[10]

At the time of the hearing, the components of the Project within the shoreline jurisdiction at the TOTE site on the Blair Waterway included a portion of the an underground/aboveground cryogenic pipeline transition point, a concrete trestle, loading platform and loading arm, a grated catwalk and a breasting dolphin. AR 0624 (FF 21). A trestle with 24 creosote-treated timber piles was planned to be removed. *Id.* New construction in the Blair Waterway consists of installing 5,751 square feet of overwater decking and 48 steel piles (having 158 square feet net benthic coverage). AR 0625 (FF 21).

PSE's attempts to mitigate for the impacts resulting from this work were memorialized in a number of mitigation plans developed as the case progressed. PSE first proposed to remove 4,973 square feet of over-water decking from the Hylebos Waterway, 671 square feet of over-water decking

[10] Two of those Mitigation Plans are in the record (AR 1189-1201 and AR 002620-36, respectively). The third, dated April 5, 2016, preceded the Revised Mitigation Plan dated April 25, 2016, but was not admitted into evidence during the hearing.

from the Blair Waterway, and 24 pilings from the Blair Waterway. AR 0625 (FF 22). During discovery, the Tribe criticized the mitigation as being insufficient. *See* AR 0625 (FF 23). Thus, on April 25, 2016, after the April 8, 2016 discovery cutoff date (AR 0032), PSE provided a Revised Mitigation Plan ("RMP") as Exhibit R-27 "[t]o address issues raised by the Tribe's mitigation expert, Tad Deshler of Coho Environmental." AR 0624 (FF 20). The April 25 RMP added removal of 2,500 square feet of over-water decking, 24 creosote-treated piling, and underlying detritus and concrete blocks, all to occur at the Sperry Ocean Terminal located across Commencement Bay near Ruston. AR 0625-26 (FF 23. The Board found the addition of mitigation work at the Sperry site was to "address [the Tribe's] concerns and meet the TSMP's no net loss standard." *Id.* at AR 0626. However, at the hearing, PSE's Siting Project Manager testified that PSE had not reached a formal agreement with the owner of the Sperry Dock site to actually perform mitigation work there. RP (Vol. 5 at 80).

IV. ARGUMENT

A. Legal Standards

1. APA Review Standards

Board decisions are reviewed under the Washington Administrative Procedure Act, Ch. 34.05 RCW ("APA"). RCW 90.58.180(3); *Robertson v. May*, 153 Wn. App. 57, 72, 218 P.3d 211 (2009); RCW 34.05.514(3).

The Court's review of the facts is confined to the record before the Board. RCW 34.05.558. In reviewing the Board's Final Order, the Court applies the APA standards directly to the agency record. *See Jensen v. Department of Ecology*, 102 Wn.2d 109, 113, 685 P.2d 1068 (1984). The Court reviews the Board's conclusions of law *de novo*, and is not bound by the Board's interpretation of the SMA or the TSMP. *See, e.g., Robertson v. May*, 153 Wn. App. at 73 (courts "review the Board's interpretation of the [SMA] and local government shoreline regulations *de novo* because they involve questions of law") (citation omitted). Even if a proposal does not violate the terms of a shoreline master program, the SMA allows the Board and the appellate court to consider whether the project violates essential policies of the SMA. *Batchelder v. City of Seattle*, 77 Wn. App. 154, 163, 890 P.2d 25 (1995) (citing RCW 90.58.140(2)).

Under the APA, the Court may grant relief if, *inter alia*, (1) the Final Order is contrary to law[11]; (2) the Final Order is not supported by substantial

[11] An order is contrary to the law if it is outside the Board's statutory authority or jurisdiction, is an erroneous interpretation or application of the law, or is inconsistent with an agency rule. *Cmty Ass'n for Restoration of Env't v. Dep't of Ecology*, 149 Wn. App. 830, 840, 205 P.3d 950 (2009). Courts are the final arbiters of conclusions of state law and are not bound by agency interpretation of those laws. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

evidence[12]; or (3) the Final Order is arbitrary and capricious.[13] RCW 34.05.570(3). The Tribe bears the burden of demonstrating the invalidity of the Board's Final Order and its action. RCW 34.05.570(1)(a).

2. SMA Requirements and Standards

Shoreline development is subject to the policies of the SMA, which are liberally construed "to give full effect to the objectives and purposes for which it was enacted." RCW 90.58.900; *Samuel's Furniture v. Dep't of Ecology*, 147 Wn.2d 440, 448, 54 P.3d 1194 (2002). The purpose of the SMA is to protect the shorelines of the state, which are "among the most valuable and fragile of its natural resources." RCW 90.58.020. Accordingly, shoreline uses "shall be designed and conducted in a manner to minimize . . . any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water." *Id.* Washington courts take a broad view of the SMA's capacity to protect the shorelines of the state. *See, e.g., Weden v. San Juan County*, 135 Wn.2d 678, 696, 958 P.2d 273 (1998) (ban of personal jet ski watercraft held consistent with the SMA).

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[12] "Evidence is 'substantial' if it is sufficient to persuade a fair-minded person of the truth or correctness of the finding." *Clark Cty. v. Rosemere Neighborhood Ass'n*, 170 Wn. App. 859, 871, 290 P.3d 142 (2012).

[13] A board's decision is arbitrary or capricious if it is "'willful and unreasoning action in disregard of facts and circumstances.'" *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994) (citation omitted).

The SMA establishes a permit system that requires shoreline permits to be consistent with the SMA and the applicable local shoreline master program. RCW 90.58.050, .140(2). The administration of the system is vested with and to be performed "exclusively" by the local government. RCW 90.58.140(3); *Samuel's Furniture*, 147 Wn.2d at 448. A permit may be issued "only when the development proposed is consistent with the applicable master program and [the SMA]." RCW 90.58.140(2)(b).

3. Tacoma SMP Requirements and Standards

The TSMP is codified at Tacoma Municipal Code (TMC) ch. 13.10. It is to be "liberally construed, to give full effect to the purposes, goals, objectives, and policies for which the [SMA] and this Program were enacted and adopted." TMC 13.10.1.9. In accordance with the SMA, the purpose of the TSMP is to "*[e]nsure, at a minimum, no net loss* of shoreline ecological functions and processes *and to plan for restoring shorelines* that have been impaired or degraded by adopting and fostering [the policy set forth in RCW 90.58.020]." TMC 13.10.1.2.5 (emphasis added). For the High Intensity Environment in which the Project falls, the TSMP's purpose is not only to "*protect*[ ] existing ecological functions," but also to "*restor[e]* ecological functions in areas that have been previously degraded." TMC 13.10.5.5.5.A (emphasis added). This obligation requires

that projects "*assure* no net loss of shoreline ecological functions as a result of new development." TMC 13.10.5.5.5.D.3 (emphasis added).

Similarly, the purpose of the TSMP regulations for the in-water (Aquatic Environment) portions of the Project is to "protect, restore, and manage the unique characteristics and resources of the marine areas." TMC 13.10.5.5.2.A. To this end, uses must be managed to "*prevent degradation* of water quality *and alteration* of natural hydrologic conditions *including sediment transport* and benthic drift patterns." TMC 13.10.5.5.2.D.1.e (emphasis added). Shoreline uses must also, *inter alia*, preserve water quality, habitat and "safe, unobstructed passage of fish". TMC 13.10.5.5.2.D.5.

B. The Board Erred in Affirming Tacoma's No Net Loss Determination Because Neither the City Nor the Board Had Sufficient Factual or Scientific Basis for that Determination

1. There is No Factual Basis Supporting a Conclusion that the SMA and TSMP Requirements Have Been Met

Tacoma is obligated under the SMA and TSMP standards in Section IV.A above to evaluate projects for their potential impacts and then condition those projects to "*prevent degradation*" of the shorelines; "*prevent ... alteration*" of hydrology; and "*ensure, at minimum, no net loss* of ecological function" from such projects. TMC 13.10.5.5.2.D.1.e; TMC 13.10.1.2.5 (emphasis added). The Board in its *de novo* review must also ensure that shoreline projects meet those requirements.

Tacoma and the Board abdicated their responsibilities under those standards – Tacoma when it granted the SSDP, and the Board when it affirmed the SSDP. The facts at hearing showed the following:

(1) When Tacoma issued the SSDP, it lacked knowledge regarding sediment conditions and contamination presence at the Project site on the Blair Waterway. *E.g.*, RP (Vol. 2 at 53-55; Vol. 5 at 197); AR 0628 (FF 28-29).

(2) Tacoma did not require any pre-construction sediment sampling or testing at the Blair Waterway site in its SSDP. *See* AR 0669-682, 0699-783; RP (Vol. 3 at 134).

(3) The Project's in-water construction activities have the potential to release unevaluated sediments and any accompanying contaminants into the environment. *E.g.*, AR 0882; RP (Vol. 2 at 169-170; Vol. 5 at 192-93).

(4) The best management practices for piling removal and installation do not prevent sediments from entering into the water column and dispersing. RP (Vol. 2 at 38; Vol. 3 at 53-57; Vol. 5 at 147).

(5) The SSDP did not require instrumented monitoring to discern whether in-water construction activities were releasing toxic and other chemicals into the Blair Waterway. AR 0699-738; RP (Vol. 2 at 62-63).

(6) Uncontroverted testimony showed that Commencement Bay is rife with areas of contaminated sediments. *E.g.*, RP (Vol. 2 at 45; Vol. 5 at

210, 227-28); AR 0968-978 (Exs. 165-175)).

(7) Two of the Tribe's expert witnesses provided uncontroverted testimony demonstrating the potential for the Project's in-water work to injure the existing ecological functions of the Blair Waterway. *E.g.*, RP (Vol. 2 at 43, 168-171).

(8) Contaminants contained in sediments pollute the water, can be up-taken by fish and their food sources, and can adversely affect the health of the fish and benthic population, and thus adversely affect humans, including the Tribe's members, who consume the fish. RP (Vol. 1 at 131-32, 138-43; Vol.2 168-171).

All of that makes it impossible for Tacoma to have reached a reliable conclusion that the SMA and TSMP standards had been, were, or would be met by the Project. Moreover, it makes it impossible for Tacoma to know how to mitigate for any such impacts, and explains why the Project contains no plan for mitigation addressing any release of contaminated sediments that might occur. In affirming the City's erroneous decision despite the fatal deficiencies underlying it, the Board failed to perform its *de novo* duty to assure the SMA and TSMP were met, and thus committed clear error.

2. There is No Scientific Basis to Support a Conclusion that the No Net Loss of Ecological Functions Standard is Met

Washington courts have observed that a scientific basis is necessary to support a local government's no net loss determination. For example, in

de Tienne v. Shorelines Hearings Board, 197 Wn. App. 248, 288, __ P.2d __ (2016), the Court of Appeals upheld the Board's determination that the no net loss standard was violated where the local government approved a project "in the absence of any scientific basis" for allowing an excessively small buffer.

Like the situation in *de Tienne*, Tacoma had no knowledge of, and failed to require any steps to discover, the condition of the sediment in the Project's Blair Waterway footprint. In short, it had no scientific basis for its "no net loss" conclusion. Tacoma's failure is all the more surprising because Tacoma had required PSE to perform sediment sampling at the Hylebos side of the Project as condition of approval in the original SSDP.

The Board was no better informed regarding sediment conditions by the end of the hearing because, still, no one had actually examined the sediments at the Blair Waterway Project site. Thus, like Tacoma, the Board made its finding of "no net loss of shoreline ecological functions" without any scientific basis, contrary to the stringent SMA and TSMP mandates to *protect* the shorelines, *preserve* water quality, *prevent* harm, and *ensure, at minimum*, there would be no net loss of shoreline ecological functions from the Project. A decision made "in disregard of the facts" is arbitrary and capricious and must be reversed. *Buechel*, 125 Wn.2d at 202. The Board's

action to affirm the SSDP under the circumstances of this case is serious error that is contrary to law, arbitrary and capricious.

3. There is No Basis to Determine What Mitigation is Necessary, Sufficient, and Appropriate to Address the Project's In-Water Impacts

The SSDP notes that because in-water work is part of the Project, impacts cannot be avoided. AR 2609 (noting at Sec. 8d that "avoidance of in-water impact would not be possible with development of this Project"). In such cases, mitigation is required. TMC 13.10.6.4.C.1. But in the absence of information about sediment conditions where the Project's in-water work will occur, there is no basis – scientific or otherwise – to ascertain what type of impact will occur, and thus no basis to determine what type or quantity of mitigation is necessary to prevent a "net loss of shoreline ecological functions." Applied to this case, neither the Board nor the City have any data regarding contamination presence that would enable them to meet their legal duties and requirements under the SMA and TSMP. The Board's Final Order affirming the SSDP is therefore crucially flawed.

While the SSDP does include compensatory mitigation designed to remedy some potential creosote leaching (by removal of the creosote pilings) and to compensate for the effects of some additional overwater shading, the SSDP is limited solely to that mitigation. While as a general matter it can be beneficial to remove creosote-containing piles, the removal

process itself could cause more damage if the piles are embedded in contaminated sediments. RP (Vol. 2 at 88, 170). Without sampling those sediments, one cannot know what risks to shoreline ecological function exist or are likely. The SMA and TSMP do not say try to avoid damage, or some harm is acceptable, or do your best; they say it is necessary to "*prevent degradation* of water quality *and alteration* of natural hydrologic conditions" and that projects "*shall assure no net loss* of shoreline ecological functions"). TMC 13.10.5.5.2.D.1.e; TMC 10.13.7.6.2.A.2.

There is no compensatory mitigation proposed for any effects caused by contamination released by in-water construction work. According to the Board, the City's requirement that PSE follow best management practices ("BMPs") for pile removal, and conduct in-water activities only during windows of time when fish migration is minimal ("fish windows"), constituted mitigation by avoidance and minimization. AR 0626-27 (FF 24 25). However, those limitations are not adequate to address the actual release of toxins, nor are they a surrogate for knowing if contamination is present, because: (1) BMPs constitute only a means of reducing – not eliminating – releases of contaminants into the environment, RP (Vol.3 at 53-57); and (2) key fish species are present in the Blair Waterway year-round. RP (Vol. 1 at 151; Vol. 2 at 38). Perhaps more

importantly, the adequacy of such measures cannot even be determined without knowledge of the actual types and risk of contamination.

Without knowing whether contamination exists, the Board could neither determine whether the Project would cause adverse ecological effects, nor determine the necessary mitigation. The Board's Final Order thus contravenes the policies and standards of the SMA and the TSMP, was made "in disregard of the facts" presented to it, and is thus arbitrary and capricious under the APA. *Buechel*, 125 Wn.2d at 202.

C. The Board Incorrectly Determined the City Lacked Authority to Require Sediment Characterization

The Board erroneously adopted the City's position that it lacked authority to require sediment characterization. AR 0653 (CL 16). What the City's position and the Board's Final Order ignore is that the City *did require sediment testing for the Hylebos portion of this very Project*. *See* AR 0675 (Ex. P-2). In fact, Tacoma's own expert witness on the subject of "identifying ... and the procedures involved in handling sediments on projects of this nature," RP (Vol. 4 at 106), testified to the Board that cities can, and have, required such testing. RP (Vol. 4 at 111-114). And the Board's Final Order expressly recognized the City's understanding that it could require sediment testing in the SSDP. AR 0623 (FF 19, lines 8-10).

In sum, the Board's conclusion that the City lacked the necessary authority to require sediment testing at the Blair Waterway was inconsistent with the City's SSDP, the City's testimony on that issue, and the Board's own Findings of Fact. Accordingly, the Board's determination that the City could not require sediment sampling is not supported by substantial evidence. *See May*, 153 Wn. App. at 89 (holding SHB decision was not supported by substantial evidence because SHB's conclusion "disregarded its own finding" that the "biological evaluation found no eelgrass").

D. The Board Misapplied the SMA and TSMP by Upholding Tacoma's Delegation of Sediment Characterization to Other Agencies at a Later Time

The Board ratified Tacoma's failure to require sediment characterization, reasoning that other agencies must review the Project and might address sediment issues. AR 0652 (CL 15). In so doing, the Board noted the Project requires the following: (1) a "404 permit" from the Army Corps of Engineers pursuant to 33 U.S.C. § 1344; (2) a Clean Water Act certification and permit from the Washington Department of Ecology pursuant to 33 U.S.C. §§ 1341 and 1342; and (3) a permit from the Washington Department of Fish and Wildlife pursuant to RCW 77.55.021(1). AR 0651 (CL 13).

The Board erred when it failed to recognize that *none* of these agencies is required to determine whether the Project will cause a net loss

of ecological functions under the TSMP.[14] Critically, that determination is mandatory *before* an SSDP may be issued. TMC 13.10.2.3.1.2 (permit may be granted "only when the development proposed is consistent with the policies and procedures of [the SMA, applicable regulations], and this Program"); TMC 10.13.7.6.2.A.2 (Port/Industrial uses "shall assure no net loss of ecological function"). Making this determination is to be performed "exclusively" by the City. RCW 90.58.140(3).

While the SMA contemplates a "cooperative program of shoreline management between local government and the state," it provides no authority for the local government to delegate (or abdicate performance of) this "exclusive" duty. RCW 90.58.050; RCW 90.58.140(3). *See Samuel's Furniture*, 147 Wn.2at at 455 ("once an SMP has been approved, the SMA specifically grants local governments the *exclusive power* to administer the system.") (emphasis in original). The City could not delegate its "no net loss" determination to a *different* entity *after* the permit that must be based upon that standard has already been issued. The Board's Final Order allowing that result comprises an erroneous interpretation and application of the law, and must be reversed for that reason.

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[14] The standard for a 404 permit is whether there will be an "unacceptable adverse effect" on water supplies, fisheries, wildlife or recreational areas. |33 U.S.C. § 1344 (c). The standard to obtain a Clean Water Act certification is "reasonable assurance" that there will be compliance with water quality standards. |33 U.S.C. §1341. A Fish and Wildlife permit requires adequate means for the "protection of fish life." RCW 77.55.021(1).

E. The Board Misapplied the Burden of Proof in Finding the Tribe Did Not Establish the Presence of Sediment Contamination at the Project Site

The SMA allows issuance of a shoreline permit "only when the development proposed is consistent with the applicable master program and this chapter." RCW 90.58.140. The burden of establishing this is squarely upon the applicant. RCW 90.58.140(7); *Buechel*, 125 Wn.2d at 205 ("Applicants for permits have the burden of proving that a proposed substantial development permit is consistent with the criteria that must be met before a permit is granted"); AR 0707 (Conclusion 2). To meet the requirements of the TSMP, the applicant is required to "*assure* no net loss of ecological functions." TMC 13.10.7.6.2.A.2 (emphasis added).

As the exclusive administrator of its shoreline permitting system, Tacoma has the obligation to require applicants like PSE and the Port to provide the information necessary for the City to evaluate their proposed projects under the policies and requirements of the SMA and TSMP. Instead of following the law, the Board improperly imposed upon the Tribe a burden to prove contamination was present in the Blair Waterway sediments. AR 0634 (FF 40 ("[the Board] finds that the evidence presented did not establish the presence of sediment contamination at the TOTE facility"). In so doing, the Board erred because the SMA and TSMP do not

impose an affirmative burden on the Tribe to establish the presence of sediment contamination.[15]

On appeal, the burden of proof is upon the "person requesting review." RCW 90.58.140(7). But that burden is to prove that the *original decision* to grant or deny a permit was *erroneous*; it is not a full assumption of the same original burden on the applicant. Moreover, "[w]hen information necessary to proof "is exclusively within the knowledge of one or the other of the parties, the burden would be upon the party possessed of that knowledge to make the proof.'" *Beatty v. Fish & Wildlife Comm'n*, 185 Wn. App. 426, 450, 341 P.3d 291 (2015) (quoting *Cedar River Water & Sewer Dist. v. King County*, 178 Wn.2d 763, 779, 315 P.3d 1065 (2013); *Jolliffe v. N. Pac. R.R.*, 52 Wash. 433, 436, 100 P. 977 (1909)).

No party, including the Tribe, possessed data regarding sediments at the Project site in the Blair because there has been no characterization of sediments at that site. For the SSDP to issue, it was incumbent on PSE and the Port to factually establish no net loss of ecological function, and it was Tacoma's obligation to ensure that it obtained sufficient information to

[15] This result is also troublesome because the Project proponents have no interest at the Board's hearing in proving that their Project site is contaminated, and would not present such evidence unless compelled to so do. The Board's decision thus effectively insulates the Project proponents from this issue on appeal, for if they can avoid the question during the City's review, then the burden of the TSMP requirement is placed on third parties. *See also* footnote 16 and text accompanying.

make that determination. On appeal, it was the Tribe's burden to show that the City did not have adequate information to support its finding of no net loss. The Tribe was not required to prove that there would be an actual net loss, only that the applicant had not met its burden to prove there would be no such loss, and the City had thus improperly issued the SSDP.

The Tribe met its burden by showing that Project work would disturb and entrain sediments, that there existed a data gap as to sediment conditions at the location of in-water construction, and thus the SSDP was inconsistent with and violative of the SMA and TSMP. The Tribe also showed why ascertaining sediment conditions was needed to make the required no net loss determination in this instance, specifically (a) the Project site is located in a former Superfund site, has not been dredged, and has been an active industrial port for many decades; (b) the available sampling data in the Blair Waterway consistently reveals elevated levels of contaminants when sampling is performed; and (c) the high concentrations of TBT recently found on the same waterway just across from the Project site was unknown, extensive, and required an EPA-led emergency removal action after it was discovered.

As a practical matter, the Board's position that it is the Tribe's responsibility (rather than the permitting entity's) to ascertain the presence of contamination under the circumstances presented by this case

incentivizes willful ignorance on the part of applicants and permitting agencies – a result this Court recently counseled against. *See Spokane Cty. v. Sierra Club*, No. 47158-2-II, 2016 Wash. App. LEXIS 1941, at *26 (2016) ("Following Spokane County's argument to its natural conclusion reveals its tenuousness. The permitting authority would be encouraged to avoid and defer analyses meant to protect water quality, so as to not trigger other regulation requirements.").[16]

The Board erroneously interpreted and applied the law when it concluded the Tribe bore the burden of establishing the presence of contamination within the Project's in-water construction footprint. The Final Order must be reversed to correct this error.

F. The Board's No Net Loss Determination is Erroneous Because the Board Erred in Concluding the Revised Mitigation Plan Sufficiently Mitigates Project Impacts

The purpose and intent of the TSMP includes, *inter alia*, "[e]nsur[ing], at a minimum, no net loss of shoreline ecological functions *and to plan for restoring shorelines that have been impaired or degraded.*" TMC 13.10.1.2.5. Shoreline development must therefore "be carried out in a manner that prevents or mitigates adverse impacts so that no net loss of existing ecological functions occurs." TMC 10.13.6.4.2.A. If an adverse

[16] In accordance with GR 14.1(a), the Tribe identifies this case as an unpublished opinion from the Court of Appeals, Division II.

impact cannot be avoided or remedied, a project will need to apply compensatory mitigation "by replacing, enhancing, or providing similar substitute resources or environments." TMC 13.10.6.4.2.C.2.e.

In this case, the shorelines at issue are located in the zone designated "High-Intensity Environment," TMC 13.10.5.5.5.A, the purposes of which include "protecting existing ecological functions and restoring ecological functions in areas that have been previously degraded." TMC 13.10.5.5.5.A. The policies for this zone make clear that "[p]olicies and regulations *shall assure* no net loss of shoreline ecological functions as a result of new development." TMC 13.10.5.5.5.D.3 (emphasis added).

The Board found that work in the Blair Waterway will negatively impact habitat and thus compensatory mitigation was required. AR 0638 (FF 46. As to whether these impacts would be sufficiently mitigated, the Board stated (in pertinent part):

> The record also contains substantial evidence that the Revised Mitigation Plan meets the TSMP's no net loss standard and compensatory mitigation requirement .... *The Revised Mitigation Plan provides sufficient mitigation to compensate for the Project's unavoidable impacts*. The mitigation sites are within the City and, as preferred under the High-Intensity Environment Zone, *the Sperry Ocean Terminal site concentrates mitigation at a larger location that will provide greater shoreline function.*

AR 0656 (CL 21) (emphasis added).

The Board erred in reaching this conclusion because (1) the evidence before the Board did not establish that mitigation work at the Sperry Dock site was, in fact, going to occur; and (2) the April 25, 2016 RMP, on which the Final Order expressly relied, was speculative mitigation work that did not sufficiently mitigate the project impacts.

1. The Board Improperly Relied on Mitigation Work at the Sperry Dock Site to Conclude that Project Impacts Were Adequately Mitigated

Mitigation work at the Sperry Dock site became a case issue late in the proceedings. Respondents contended the RMP's inclusion of the Sperry work was intended to address criticisms the Tribe articulated during the discovery period. At the hearing, however, PSE's Senior Siting Project Manager, Larry Tornberg, testified that no formal agreement to perform work at the Sperry site had been reached. RP (Vol. 5 at 80). As a result, the Board's record lacked information establishing mitigation work at the Sperry site would in fact occur. *See de Tienne*, 197 Wn. App. at 283 (record lacked documentation showing all of the state and federal agencies involved agreed the smaller buffers where "there was no documentation from the Department of Ecology, WDFW, or DNR agreeing to a buffer of 25 feet").

Accordingly, given the speculative nature of the work at the Sperry Dock site, it was improper for the Board to rely on that proposed mitigation in deciding whether the RMP met the TSMP's no net loss standard. *See id*;

see also Stollar et al. v. City of Bainbridge Island et al., SHB NO. 06-024; 06-027(Oct. 25, 2007), *at 25 (noting insufficiency of speculative mitigation); *In the Matter of SSDP Issued by City of Anacortes*, SHB No. 81-23; SHB No. 82-30 (Jan. 23, 1985), at * 6 (same).[17]

2. The Non-Speculative Mitigation Before the Board Did Not Sufficiently Mitigate the Project Impacts

The TSMP requires consideration of ecological function in performing the no net loss analysis. TMC 13.10.6.4.2.C.1 ("If modification to a marine shoreline ... [or] FWHCA ... is unavoidable, all adverse impacts resulting from a development proposal or alteration *shall be mitigated so as to result in no net loss of shoreline and/or critical area functions or processes.*") (emphasis added).

Even notwithstanding the TSMP's plain language and the EPA's stated concerns about "trading coverage on the Blair for coverage on the Hylebos," AR 0872, neither the City nor the RMP considered ecological function in assessing the sufficiency of proposed mitigation. For its part, the City performed a "no net loss of square footage" analysis that compared,

[17] And even if the Sperry Dock work presented to the Board was not speculative, the City had performed no formal analysis as to whether that work provided legally sufficient mitigation. Indeed, Shannon Brenner testified that she had not even been to the Sperry site such that she could evaluate its capacity to mitigate for impacts at the Blair Waterway site. RP (Vol. 4 at 239). Further, the Board was provided with no specifics regarding where at the Sperry Dock site the proposed mitigation work would be performed, nor whether it would actually mitigate for Project impacts arising from in-water construction.

at a 1-to-1 ratio, square footage of impacts in the Blair Waterway against square footage of mitigation in the Hylebos Waterway. AR 0639; RP (Vol. 2 at 188). The RMP likewise used the methodology of trading square footage in the Blair for square footage in the Hylebos. *See* RP (Vol. 2 at 188); AR 2630-35.

In contrast to the simplistic 1-for-1 approach, the Tribe's expert biologist, Tad Deshler, performed a Habitat Equivalency Analysis ("HEA") that accounted for the habitat value of the mitigation site (*i.e.*, located at a current Superfund site) relative to the location of project impacts (not located in a Superfund site). AR 0636-37 (FF 43, 44); RP (Vol. 2 at 184-188). Mr. Deshler's was the only analysis at the hearing that thoroughly considered ecological function. Based on his analysis, Mr. Deshler concluded that the non-speculative mitigation within the RMP did not sufficiently mitigate the project impacts. RP (Vol. 3 at 16-17).

PSE's witness, Mr Boyle, criticized Mr. Deshler's approach as being "subjective"; however, Mr. Boyle acknowledged that different geographic locations present different habitat values to be accounted for when circumstances warrant doing so. RP (Vol. 5 at 135). Mr. Deshler's approach was far less subjective than PSE's and the City's failure or refusal to account for the known degraded state of the Hylebos Waterway relative to the Blair in assessing mitigation adequacy. The Board also noted that Respondents

criticized Mr. Deshler's analysis for "fail[ing] to account for the removal of the existing catwalk." AR 0640 (FF 49). To the extent this constituted a finding that factored into the Board's conclusion,[18] it was erroneous because Mr. Deshler *did* consider the catwalk's removal in determining that the RMP's compensatory mitigation was insufficient to meet the no net loss standard. RP (Vol. 2 at 207; Vol. 3 at 16-17).

Washington courts have recognized that the Shoreline Hearings Board does not accord deference to the decisions of local governments. *See Pres. Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 516, 137 P.3d 31, 37-38 (2006) ("The important distinction here is that the Board hears cases like this one *de novo*, and it does not accord deference to the local government's decision. This is unlike review under the Growth Management Act (GMA), which requires that the Growth Management Hearings Board defer to the decisions and actions of counties and cities under the GMA."). Nevertheless, the Board's decision reflects that it accorded deference to (1) the City's typical failure to consider habitat

[18] The Board also found "[t]he City considers revegetation of the shoreline to constitute mitigation for project impacts." AR 0627 (FF 26. The Board's conclusion regarding mitigation adequacy does not appear to rely on this finding. *See* AR 0656 (CL 21. In any event, placing vegetation in upland areas is not mitigation for in-water impacts because it does not constitute *in-water* mitigation as required under the TSMP. *See* TMC 13.10.6.4.2.C.1. And even if shoreline re-vegetation did constitute in-kind mitigation, the *TMC requires a 3 to 1 mitigation ratio* given that the mitigation site "occurs more than one quarter (1/4) mile along the shoreline from" the affected locations in and adjacent to the Blair Waterway. TMC 13.10.6.4.3.E.b. At the hearing, there was no evidence or testimony that the envisioned shoreline revegetation satisfies this ratio.

quality, AR 0641 (FF 50); and (2) the fact that the City previously rejected a HEA mitigation analysis presented under significantly differing circumstances. AR 0640 (FF 48); RP (Vol.3 at 13-25).

The standard, however, is not "no net loss of square footage," and the City (and the RMP) each improperly ignore ecological function in assessing mitigation in this instance. It was arbitrary and capricious for the Board, without any stated basis, to reject Mr. Deshler's responsive and considered analysis in favor of the City's and RMP's mere arithmetic comparison of square footage lost in one location to square footage gained in a current Superfund site. AR 0879.

Even using the City's 1-for-1 approach (endorsed by the Board), simple math demonstrates that the non-speculative mitigation set out in the RMP does not sufficiently offset the Project impacts. With regard to Bed Coverage, the RMP indicates the non-speculative mitigation work provides 0 square feet of mitigation for the 158 square feet of Bed Coverage that will result from the Project work in the Blair Waterway. AR 2631 (Table 1).

Likewise, with regard to Over-Water Coverage, the RMP indicates that non-speculative mitigation work will accomplish the following: (a) of the 1084 feet of intertidal habitat impacted, 57 feet will be mitigated (a net loss of 1,053 sq. ft.); (b) of the 675 feet of shallow subtidal habitat impacted, 64 feet will be mitigated (a net loss of 611 sq. ft.); and (c) of the 3992 feet

of subtidal habitat impacted, 4973 feet will be mitigated (a net gain of 981 sq. ft.). AR 2633 (Table 2). All totaled, the RMP-proposed mitigation work will provide 5644 square feet of overwater mitigation in exchange for 5751 square feet of overwater impacts – an overall *net loss* of 105 square feet. *Id.*

In sum, the RMP's proposed mitigation undergirding the Board's decision does not sufficiently offset Project impacts even taken at face value. The Board's decision to the contrary was clearly erroneous, arbitrary and capricious, and not supported by substantial evidence.

G. The Board Erred by Substantively Reviewing a Significantly Altered Project, Thus Usurping the City's Exclusive Role to Administrator its Shoreline Management Plan

For the reasons discussed Section IV.B.3 above, the Board's determination of no net loss suffers from the same lack of factual basis as the City's because, like the City, the Board had no information on the character of the sediments and therefore could not adequately evaluate net loss of ecological function. The Board compounds the City's error (and usurped the City's role) by taking this determination on for itself, after the Project was significantly altered.

Because the Project reviewed by the Board was no longer the same one for which the SSDP was issued, the Board should have rejected the SSDP or remanded it to the City for review of the transmogrified project. Instead, it took on the different Project, with new (and constantly evolving)

conditions, plans and proposed mitigation and—under the guise of an appeal—effectively issued a new shoreline permit on a different project. This exceeds the scope of *de novo* review, and constitutes a procedural error warranting reversal of the Final Order.

1. The Project Approved by the Board is Not the Same Project for Which the City Granted the SSDP

The City approved a project that included a water-dependent barge facility on the Hylebos, and most, if not all, mitigation work on the Hylebos. AR 0699-738 (Ex. P-7). After the SSDP was appealed, almost all of that activity was removed by PSE's Stipulation. AR 0014. This eliminated the vast majority of water-dependent use for the eight million gallon LNG storage tank, and reduced the water-dependent use to the relatively minor fueling of two ships per week at the TOTE dock on the Blair. AR 2597. It also necessitated the substantial alteration of the mitigation activities because (1) the Stipulation eliminated the vast majority of the anticipated mitigation activities, and (2) the location of the impacts to be mitigated shifted from primarily in the Hylebos to exclusively in the Blair. Thus, the Project had changed not only in its scope and to a degree its location, but also in its very nature.

PSE then (even during the hearing) altered crucial components of the Project which had been specifically made a part of the original SSDP.

Specifically, there were multiple iterations of the Mitigation Plan following the Stipulation. A more glaring example involved the WQPMP (discussed in Section IV.H. below).

2. Because of the Substantial Changes to the Project, Further Review by the City was Required

The City, not the Board, is the exclusive administrator of its shoreline master program, and the City must assure that a project will result in "no net loss of ecological function" before issuing an SSDP. After it did so here (though erroneously), the determination is appealable to the Board for "review" of the City's decision. RCW 90.58.180. Although review is *de novo*, WAC 461-08-500, the proceeding remains a "review" of the original permitting decision. RCW 90.58.180(1).

This Court recently recognized that there are limits on what analysis a quasi-judicial board may perform in its *de novo* capacity. *See Spokane Cty. v. Sierra Club*, No. 47158-2-II, 2016 Wash. App. LEXIS 1941, at *30 ("We agree with Ecology that the PCHB [in deciding a permitting challenge] should not have conducted its own reasonable potential analysis."). Nothing in the SMA or the APA allows the transformation of a proceeding to review a permit into the consideration of a different and evolving project. Transforming a "review" proceeding under the APA into a new permit application usurps the City's exclusive role to make the no net

loss determination and to issue the permit in the first instance. *See Overlake Fund v. Shorelines Board*, 90 Wn. App. 746, 751, 760, 954 P.2d 304 (1998) (Error for Board to "'redesign' the building to do what [the local government] had not done[.]").

Furthermore, the City, not the Board, is the appropriate entity to consider a substantially revised project. The Board is a quasi-judicial body whose function is to *review* these decisions *after* the local jurisdiction performs groundwork and issues (or denies) a permit. In *Hayes v. Yount*, 87 Wn.2d 280, 291, 552 P.2d 1038 (1976), the Supreme Court determined that the Board had properly ruled only on the permit before it, and not on a project proponent's proffered revisions because, the court held, those revisions to the project should have been "submitted to the county."[19]

The Supreme Court's reasoning in *Hayes* applies with equal force here. The Board was not reviewing Tacoma's no net loss analysis, but rather was conducting its own initial analysis of a project that materially differed from that originally before the City. As recognized in *Hayes*, the Board could not conduct a *de novo* review of City's analysis because the City had not performed one of the Project in its substantially changed form. *See also*

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[19] The Board concluded that a Revision pursuant to WAC 173-27-100 was not required. The Tribe disputes that the revision process should be applied here, where the Project is fundamentally different, because the changes are not "within the scope and intent of the original permit," and the "authorized use" of water dependency has changed. WAC 173-27-100(1); (2)(e)-(f). Instead, a new application is required.

Spokane Cty. v. Sierra Club, 2016 Wash. App. LEXIS 1941, at *32 ("[The PCHB] could not conduct a *de novo* review of Ecology's analysis because Ecology ... did not perform one."). In so doing, the Board acted outside its statutory authority.

Relief for this error is appropriate pursuant to RCW 34.05.570(3)(b). The Court should reverse the Board's decision reject the SSDP, and direct PSE and the Port to submit a new application to the City so that it may properly review the revised Project against the requirements of the SMA and TSMP.

H. The Board Abused its Discretion and Committed Legal Error When it Relied on Information it Had Excluded From Evidence

The APA requires that findings of fact be based solely on the record:

> Findings of fact shall be based *exclusively on the evidence of record* in the adjudicative proceeding and on matters officially noticed in that proceeding.

RCW 34.05.461(4) (emphasis added). The Board is thus prohibited from relying upon materials that are not admitted into evidence.

Here, the Board did just that. Late in the proceedings, PSE sought to introduce a brand new version of the WQPMP. RP (Vol. 5 at 88). Because it was presented to the Tribe for the very first time at the hearing, the Board excluded the document from evidence. RP (Vol. 5 at 89). Thus, it is not "evidence of record" for purposes of RCW 34.05.461(4).

Remarkably, the Board then relied on the purported contents of the revised WQPMP in at least two of its Findings of Fact and a Conclusion of Law.[20] In Finding of Fact No. 24, the Board finds that:

> PSE's Water Quality Protection and Monitoring Plan, recently submitted to Ecology for its review and approval, provides for instrumented monitoring of pile removal.

AR 0626. Similarly, in Finding of Fact No. 38, the Board states that the revised WQPMP was revised specifically to address the testimony *in the hearing* of the Tribe's expert, Janet Knox—and on that basis dismisses Ms. Knox's testimony. *See* AR 0634.[21] Finally, Conclusion of Law No. 20 also relies on the excluded document. AR 0655.

The Board thus erred by (1) improperly relying on evidence that it had expressly excluded from the record, (2) improperly relying on the (presumed) fact of "instrumented monitoring", (3) improperly dismissing the testimony of the Tribe's expert on the basis of the excluded evidence,

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[20] The Board exacerbated this still more by relying on Mr. Tornberg's testimony from the very last day of hearing.

[21] That testimony from Ms. Knox, as noted by the Board, was that the proposed WQPMP she reviewed "was insufficient to protect water quality as it did not require instrumented monitoring for turbidity or monitoring for toxics." AR 0629 (FF 31). Assuming *arguendo* that it was appropriate for the Board to rely on testimony concerning a document that it excluded from evidence, to the extent the Board understood Mr. Tornberg's testimony to legitimately address Ms. Knox's testimony, the Board was wrong. RP (Vol. 5 at 47). At no time did Mr. Tornberg specifically testify that turbidity and releases of toxic substances would be monitored such that Ms. Knox's criticisms were, in fact, addressed by his testimony concerning the excluded document. *See* RP (Vol. 5 at 46-47). Mr. Tornberg's testimony on the Tribe's concerns regarding lack of instrumented monitoring are also specious on the grounds that his testimony was based on what he understood through Kerry Carroll at the Department of Ecology, RP (Vol. 5 at 47) – not based on what he understood from the Tribe and/or its witnesses.

and (4) denying the Tribe a fair hearing in doing so. These collectively comprise an erroneous procedure, erroneous application of the law to the facts, an abuse of discretion, and arbitrary and capricious action.

I. The Board Erred by Allowing the Project to Constantly Change, Rendering the Project Insufficiently Complete for Review

1. The Project's Constant Evolution Rendered it Insufficiently Complete to be Decided by the Board

As discussed above, it is the duty of the local government to determine whether a project is consistent with the policies of the SMA and the local shoreline master program, such that it protects the State's fragile shorelines and prevents loss of ecological function. This can only be accomplished when the actual scope, potential harms, and mitigation plans are fully formed. As the Supreme Court stated in *Hayes*, 87 Wn.2d at 295-96:

> Effective operation of the permit review process . . . demands that shoreline permits be complete in themselves and contain sufficient detail to enable the local government and the board to determine consistency with the . . . policies set forth in RCW 90.58.020[.]

In *Hayes*, like here, the applicant attempted to amend his application on the fly. The *Hayes* court rejected that attempt; the land owner's proffered amendments "did not alter the duty of the board to rule on *the specific permit before it* which did not contain [the proposed] conditions." *Id.* at 291 (emphasis added). Instead, the appropriate avenue is submission of a new

permit: "Respondent may still make effective his offer . . . by submitting to the county an application for a [consistent] permit." *Id. See also Luce v. City of Snoqualmie Rlw'y Museum*, SHB No. 00034 (August 27, 2001) at *21 (Project is not sufficiently complete pursuant to *Hayes* where "site plans have continued to be submitted after the fact and will probably continue to evolve as the proponents move to comply with all of the conditions proposed.").

The Board misinterpreted and misapplied the law when it failed to act in accordance with the Supreme Court's instructions in *Hayes*.

2. The Continuing Changes Deprived the Tribe of a Fair Hearing

The APA requires that parties to an adjudicative proceeding be given the opportunity to present evidence and argument, conduct cross-examination, and submit rebuttal evidence to the extent necessary for full disclosure of all relevant facts and issues. RCW 34.05.449(2). A "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). This applies to administrative agencies which adjudicate, as well as to courts. *Gibson* v. *Berryhill,* 411 U.S. 564, 579, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973).

To meet due process requirements, a proceeding must be subject to fair and adequate notice and provide an opportunity for an interested party to present its case. *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607,

617, 70 P.3d 847 (2003) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). The elements of a fair hearing include:

> Notice; an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; an opportunity to know the claims of opposing parties and to meet them; and a reasonable time for preparation of one's case.

Cuddy v. State Dep't of Public Assistance, 74 Wn.2d 17, 19, 442 P.2d 617 (1968).

A proceeding must provide adequate notice of what is being litigated. Fundamentally, a party is deprived of fair notice when a project is subject to continual change. For example, in *Glaspey & Sons v. Conrad*, 83 Wn.2d 707, 521 P.2d 1173 (1974), a case involving rulemaking, the court found a due process violation when an agency made substantial amendments to a zoning ordinance on the eve of the hearing, after publishing only an unamended version of it. There, the Supreme Court concluded:

> [T]he notice was a trap. No one could have adequately prepared for the hearing under the circumstances before us.

83 Wn.2d at 711. The court further noted that "enable[ing interested parties] to prepare intelligently for the hearing" is a fundamental purpose of the notice requirement. *Id.* at 711-12 (quoting *Passero v. Zoning Comm'n*, 155 Comn. 511, 514, 235 A.2d 660 (1967)).

The Tribe deserved a similar opportunity to prepare intelligently for the Board's hearing on the SSDP that was issued, not an ever-shifting target that – through constant changes to key parameters of the Project, including its scope, water dependency and mitigation strategy – continuously metamorphosed throughout the course of the SHB appeal. The Board exacerbated this by predicating the Final Order on the most recent Project iteration, which iteration the Tribe had the least time to consider and prepare to address at the hearing, and relying on Mr. Tornberg's testimony from the last day of hearing concerning the latest proposed changes to the Project.[22]

Even if the Court determines the hearing was fair in substance despite the defects described above, the propriety of the proceedings run afoul of the appearance of fairness doctrine, under which the decision making process must be "not only fair in substance, but fair in appearance as well." *Smith v. Skagit Cty.*, 75 Wn.2d 715, 739, 453 P.2d 832 (1969). The doctrine's intent is to maintain public confidence in quasi-judicial decisions. *See, e.g., Westside Hilltop Survival Comm. v. King Cy.*, 96 Wn.2d 171, 181, 634 P.2d 862 (1981) (Rosellini, J., concurring).

While the Tribe does not assert bias by the Board, allowing ongoing and eleventh-hour modifications of the Project – and in the case of the

[22] *See* footnote 21 and text accompanying.

excluded WQPMP submitted for the first time at the hearing, notably relying on that document and related testimony about it despite excluding it from evidence – resulted in a hearing that was unfair both in appearance and in substance.

V. CONCLUSION

For the foregoing reasons, the Tribe respectfully asks the Court to reverse the Final Order and set aside or invalidate the SSDP.

RESPECTFULLY SUBMITTED this 21st day of April, 2017.

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CERTIFICATE OF SERVICE

I, Judy Goldfarb, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein.

On April 24, 2017, I served true and correct copies of the document to which this certificate is attached on the parties in the manner listed below:

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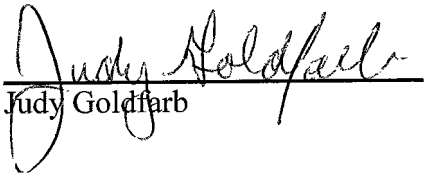
I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

SIGNED on April 24, 2017, at Seattle, Washington.



Judy Goldfarb

Appendix 1 – Map (Ex. P-183; AR 0985)


Puyallup Tribe
Proposed Location
for
Liquified Natural
Gas (LNG) Facility
Proposed LNG Facility Site
1873 Survey Area
Pierce County Parcels (Pierce Co)
Puyallup Tribal Lands
Trust Status
In Fee
Tribal Trust
Member Trust
Note The boundary of the Puyallup Indian Reservation is similar, but not identical, to the 1873 Survey
Map Author Puyallup Tribe GIS Dept
10 August 2015
Puyallup Tribe
GIS
Feet
0
500
1,000
1,500
2,000
Ole & Charlie's
Marina
Chinook
Landing
LNG
Hylebos Waterway
Blair Waterway
NORPOINT
BROWNS POINT
49TH

Appendix 2 – Washington Shorelines Hearings Board Findings of Fact, Conclusions of Law and Order (AR 0611-0659)

SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

THE PUYALLUP TRIBE OF INDIANS, Petitioner, v. CITY OF TACOMA, PUGET SOUND ENERGY, PORT OF TACOMA, and WASHINGTON STATE DEPARTMENT OF ECOLOGY, Respondents.	SHB No. 16-002 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On January 20, 2016, the Puyallup Tribe of Indians (Tribe) filed an appeal with the Shorelines Hearings Board (Board) requesting review of a shoreline substantial development permit issued by the City of Tacoma (Tacoma) to Puget Sound Energy (PSE) for the construction and operation of a proposed liquefied natural gas (LNG) facility.

The Board held a hearing in this matter on May 9-13, 2016, at its office in Tumwater, Washington. Board Chair Joan M. Marchioro presided for the Board, joined by Board Members Lily Smith and John Bolender.[1] Attorneys Scott M. Missall, Nicholas G. Thompson and Lisa A.H. Anderson represented the Tribe. Deputy City Attorney Jeffrey H. Capell represented Tacoma. Attorneys Rita V. Latsinova, Erin L. Anderson and Sara A. Leverette represented PSE. Attorney Carolyn A. Lake represented the Port of Tacoma.[2]

[1] A three-member panel is hearing this case pursuant to RCW 90.58.185.
[2] Respondent Washington State Department of Ecology (Ecology) did not participate in the litigation.

The Board received the sworn testimony of witnesses, admitted exhibits, and reviewed the arguments on behalf of the parties. Written closing arguments were filed on May 27, 2016. The Board also viewed the site of the proposed development and mitigation. Having fully considered the record, the Board enters the following:

FINDINGS OF FACT

1.

PSE proposed to construct and operate a small-scale LNG liquefaction and storage facility (the Project) at the Port of Tacoma. Ex. R-2 at 140.[3] As originally proposed, the Project would produce LNG to fuel marine vessels and to provide LNG to industries through bunkering barges and tanker trucks. *Id.* LNG would be distributed directly to Totem Ocean Trailer Express (TOTE) at its facility on the Blair Waterway for use as maritimc transportation fuel, thus enabling TOTE to meet new emission standards for maritime vessels established for the North American Emission Control Area. Exs. R-4 at 588, R-19. The Project would also have the capability to convert LNG to natural gas for reinjection into PSE's natural gas distribution system at times of high demand. Ex. R-4 at 587-88.

2.

The Project would be constructed at existing industrial sites on the peninsula between the Blair and Hylebos Waterways in the Tacoma Tideflats and would involve construction in both waterways, which are shorelines within the City. Ex. R-4 at 610 and 617. The Blair and Hylebos Waterways were excavated from Commencement Bay tidelands, with adjacent tidelands

[3] Some, but not all, exhibits were Bates stamped. For those exhibits that are Bates stamped, the pinpoint citation is to the Bates number; for all other exhibits, the pinpoint citation is to the document page number.

filled to create the upland portion of the peninsula. The upland, marine tidal, and subtidal habitats have been actively developed, managed and maintained for industrial uses and commercial shipping. *Id.*, at 707-08. The baseline conditions of the aquatic habitat at the Project site "are severely degraded as a result of anthropogenic changes." Ex. R-2 at 309.

3.

As initially proposed, the main components of the proposed Project consisted of: (1) an upland LNG processing facility on the Hylebos Waterway; (2) a TOTE marine vessel LNG fueling facility on the Blair Waterway; and (3) a barge fueling facility on the Hylebos Waterway. Ex. R-2 at 138-39. The Project site is zoned "S-10" Shoreline District-Port Industrial and "S-13" Shoreline District – Marine Waters of the State. Ex. R-1 at 3. The Blair-Hylebos peninsula is highly developed with the majority of the shoreline comprised of riprap and timber bulkheads. Ex. R-2 at 312.

4.

The LNG facility site on the Hylebos Waterway consists of approximately 30.16 acres of uplands and approximately three acres of submerged lands. Ex. P-91 at 1. Nearly all of the upland area is developed, paved, or graveled. Ex. R-2 at 139. There are two creosote-treated timber piers extending into the Hylebos Waterway from the shoreline. The site has sparse shoreline vegetation, with some weedy vegetation growing at the top of the shoreline bank. Along the shoreline there are small, scattered patches of salt marsh, as well as macroalgae species. *Id.*, at 310. Aquatic vegetation is also sparse, with sea lettuce, sugar kelp and *Ceramium spp.* observed during a December 2012 biological survey. Ex. R-4 at 739. The

subtidal substrate in the Hylebos Waterway is a combination of riprap, small cobbles, or other fine-grained sediments comprised of sand, silty sand, and organic sediments entering the waterway from Hylebos Creek. Ex. R-2 at 310. Hylebos Creek supports runs of Chinook, coho, pink, and chum salmon and steelhead trout. There are numerous constructed habitat mitigation and restoration sites in Hylebos Creek and the Hylebos Waterway. Ex. R-27 at 3; Ladley Testimony.

5.

The TOTE fueling facility would be located at TOTE's existing facility and in the Blair Waterway. The site has several existing in-water structures, including a timber T-pier, three concrete piers, and a breasting dolphin. Ex. R-2 at 138. The site is developed with loading and unloading ramps, a few buildings, and a paved trailer yard. *Id.*, at 139. Upland and aquatic vegetation along the Blair Waterway is sparse. *Id.*, at 311. The intertidal shoreline of the Blair Waterway is steeply sloped and armored with riprap. Aquatic vegetation is scant, with macroalgae along the shoreline consisting solely of sea lettuce. Sea lettuce, sugar kelp, *Gracilaria spp.*, and *Ceramium spp.* are present near the surface. The subtidal substrate of the Blair Waterway contains a mixture of riprap, small cobbles and fine sediments, with sand, silt, and other organic sediments discharged into the waterway from Wapato Creek. *Id.* Wapato Creek supports limited runs of coho and chum salmon, and steelhead trout. Ex. R-27 at 3; Ladley Testimony. The intertidal, shallow subtidal and subtidal habitats at the TOTE facility are degraded, providing limited habitat for out-migrating juvenile salmonids. Ex. R-27 at 14-15.

6.

The Project site is within the Tribe's usual and accustomed treaty area, which includes the entire Puyallup River basin and Commencement Bay. The Tribe has a treaty-protected right to fish and shellfish within that area. Naylor Testimony; Ladley Testimony. "Anadromous fish are intricately tied to the Tribe's culture and have been for thousands of years. [The Tribe has] spiritual, cultural, ceremonial, and economic connections to salmonid fishes." Ladley Testimony. The Tribe has a recognized interest in the quality of the aquatic environment of usual and accustomed treaty area, as well as an interest in protecting that environment from contamination and/or degradation. Ladley Testimony; Ex. P-5. The Tribe is engaged in mitigation and restoration projects intended to improve fish habitat on the Puyallup River. Ladley Testimony.

7.

The Tribe owns property, both held in trust by the United States and in fee, on the Hylebos Waterway across from the Project site. *Id.*; Exs. P-5, P-183. The property is maintained in conservancy status to provide essential fish habitat. Naylor Testimony; Ex. P-5. Approximately 75 percent of the Tribe's 5,000 members live on or near the Tribe's reservation boundary. Naylor Testimony. The Tribe also owns property on the Blair Waterway, southeast of the TOTE facility. Naylor Testimony; Ex. P-183.

8.

On August 7, 2014, PSE informed the City of its intent to proceed with the Project and obtain required permits, including an SSDP, for the proposed developments on the shorelines of

the Blair and Hylebos Waterways. Ex. R-11 at 2382-84. On September 12, 2014, the City, acting as lead agency under the State Environmental Policy Act, ch. 43.21C RCW, issued a Determination of Significance stating that an Environmental Impact Statement (EIS) was required in order to assess the potential environmental impacts of the project. *Id.*, at 3289-90. At the same time, the City notified the public of the start of the 30-day EIS scoping process. The City accepted written comments on the scope of the EIS through October 13, 2014, and held a public scoping meeting on September 24, 2014. *Id.*

9.

A Draft EIS was prepared for the Project. On July 7, 2015, the City issued a Notice of Availability of the Draft EIS. The Notice stated that written comments on the Draft EIS would be accepted until August 6, 2015, and that a public meeting on the proposal would occur on July 16, 2015. Ex. R-7. The City received 27 written comments from various stakeholders, including the Tribe, the United States Environmental Protection Agency (EPA) and Ecology. Ex. R-4 at 942-1074.

10.

On November 21, 2014, PSE submitted a Joint Aquatic Resources Permit Application (JARPA) to the City requesting a shoreline substantial development permit for the Project. Ex. R-2. PSE revised the JARPA in March 2015. *Id.* The City deemed PSE's application to be complete on May 6, 2015. Exs. P-2, P-5. Public notice of the shoreline permit application was issued by the City on May 12, 2015, with a 30-day comment period provided through June 11, 2015. *Id.*

11.

In order to construct the in-water elements of the Project, PSE must also obtain permits from other government agencies with jurisdiction over those proposed activities. Ex. R-2 at 157. PSE needs a Clean Water Act Section (CWA) 404 Permit (404 Permit) and Rivers and Harbors Act Section 10 Permit (Section 10 Permit) from the Army Corps of Engineers (Corps), a CWA Section 401 Certification (401 Certification) and Section 402 stormwater discharge permit (NPDES Permit) from Ecology, and a Hydraulic Project Approval from the Washington Department of Fish and Wildlife (WDFW). *Id.* Through its JARPA, PSE requested those permits from the pertinent agencies. *Id.*

12.

The City considered the comments submitted by EPA and Ecology on the Draft EIS to also be applicable to the SSDP, in particular comments regarding contamination in the Hylebos Waterway. Ex. R-1 at 5-6 and 55. EPA initially noted that the Blair Waterway had been removed from the National Priorities List and its sediment is assumed to be cleaner than the sediment in the Hylebos Waterway. EPA stated that the agency's main concerns with the proposal were related to Project components in the Hylebos Waterway, which is the subject of a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cleanup. Ex. R-1 at 14. According to EPA, characterization of sediments ten centimeters below the mudline in some areas of the Hylebos Waterway has not been done. Through its CERCLA coordination with the Corps, in June 2015 EPA asked PSE and the Port to provide existing Hylebos Waterway sediment characterization data and a draft sampling and analysis plan for

sediment characterization. As of the date of EPA's letter, the requested information had not been provided. *Id.* Expressing concern that contaminated sediments could be released in the demolition of in-water structures such as piles, Ecology commented that EPA should be consulted regarding all in-water construction in the "Hylebos Waterway problem area." Ex. R-1 at 88.

13.

At the same time the City was processing the SSDP, the Corps was considering PSE's request for 404 Permits for the Project's proposed in-water components. As noted in its comment letter on the Draft EIS, EPA was engaged in CERCLA coordination with the Corps on those permits. Ex. R-1 at 14. On September 11, 2015, EPA sent the Corps its CERCLA Coordination Comments on the 404 Permit for the proposed LNG structures and mitigation in the Blair and Hylebos Waterways. Exs. P-102 at 382-84, R-1 at 14. Reiterating its comments on the Draft EIS, EPA stated that it had no concerns with the proposed work in the Blair Waterway and that its standard CERCLA condition would suffice. Ex. P-102 at 382-83. As for the Hylebos Waterway, EPA stated that the Project components in that location were of particular concern from a CERCLA and sediment quality perspective. Because environmental characterization of the sediments in the Hylebos Waterway had not been conducted, EPA provided the Corps with general conditions and reserved its concurrence on in-water Project components in the Hylebos Waterway until sediment data are available. *Id.* Among other things, EPA's conditions precluded in-water work in the Hylebos Waterway without the agency's concurrence, required sediment characterization, and stated that the results of the

characterization may result in design or sequencing changes. *Id.*, at 383-84. EPA's conditions would become conditions of the Corps' 404 Permit. Warfield Testimony.

14.

The Corps' issuance of permits for the Project constitutes a federal action requiring compliance with the federal Endangered Species Act (ESA), 16 U.S.C. § 1531, and the Magnuson-Stevens Fishery Conservation and Management Act of 1996 (MSA), 16 U.S.C. § 1801. In support of its request for permits from the Corps, PSE prepared a Biological Evaluation (BE) to demonstrate the Project's compliance with both statutes. Ex. R-2 at 267-441. The BE evaluated the Project's potential effects on species listed as threatened or endangered under the ESA and any designated critical habitat for those species. Ex. R-2 at 277. Addressing whether the Project complied with the MSA, the BE also analyzed whether the Project would adversely affect Essential Fish Habitat (EFH). *Id.* The species covered by the BE were Puget Sound Chinook salmon, Puget Sound steelhead, Puget Sound/Georgia Basin yelloweye rockfish, canary rockfish, and bocaccio, North Pacific southern resident killer whale, humpback whale, marbled murrelet, and streaked horned lark. *Id.*, at 278-79. The BE found that the Project "may affect, but is not likely to adversely affect" those listed species or their designated critical habitats. Ex. R-2 at 331-36. The BE also found that the Project "will not adversely affect" EFH for Pacific salmon, groundfish, and coastal pelagic species. *Id.*, at 435-41.

15.

Pursuing informal consultation under Section 7(a)(2) of the ESA, the Corps requested written concurrence from the National Marine Fisheries Service (NMFS) that the Project is not

likely to adversely affect species listed as threatened or endangered under the ESA. Ex. R-35 at 1. On July 14, 2015, NMFS provided the Corps with a response to the request. In its response, NMFS stated that the Corps had made determinations of "may affect, not likely to adversely affect" for Puget Sound Chinook salmon, Puget Sound steelhead, Puget Sound/Georgia Basin yelloweye rockfish, canary rockfish, and bocaccio, southern resident killer whale, and humpback whale. *Id.*, at 3. After describing its analysis, NMFS concluded that it concurred with the Corps that "the proposed action is not likely to adversely affect the subject listed species and designated critical habitats." *Id.*, at 6. NMFS further concluded that the Project "would adversely affect EFH by creating short term, localized, adverse water quality conditions through increased sound energy." *Id.*, at 7. Because NMFS found that EFH would be adversely affected, the agency provided the Corps with a conservation recommendation necessary "to avoid, mitigate or offset the impact of the proposed action: When possible, to further minimize sound effects, use only a vibratory hammer for piling installation." *Id.*

16.

The Corps also engaged in informal consultation under the ESA with the United States Fish and Wildlife Service (USFWS) regarding the federally listed marbled murrelet, bull trout, and designated bull trout critical habitat. Ex. R-36. Based on its analysis of the information provided, USFWS concluded that any effects would be "insignificant or discountable" and concurred with the Corps' "may affect, not likely to adversely affect" determinations. *Id.*, at 5.

17.

On November 9, 2015, the City issued the Final EIS for the Project. Ex. R-1. The Final EIS evaluated the Project's potential impacts on the environment, including impacts to water, sediments and anadromous fish. Ex. R-4 (Sections 3.3, 3.4). For those impacts that cannot be avoided, the Final EIS includes proposed mitigation conditions. Ex. R-4 (Sections 3.3.6, 3.4.6). Addressing the removal of creosote-treated piles, the Final EIS first noted that the policy of federal resource agencies, including NMFS and USFWS, is to require replacement of such piles with steel or concrete piles where possible because creosote is a carcinogen. Ex. R-4 at 713. With respect to potential water quality impacts associated with pile removal, the Final EIS stated that, while the removal of piles would temporarily disturb sediment on the seafloor and had the potential to re-suspend background concentrations of polycyclic aromatic hydrocarbons (PAHs) (including creosote),

> any increase is expected to be short term, and elevated concentrations are likely to be greatly diminished within one or two tide cycles after the completion of the removal and installation activities. Moreover, the long-term consequences of this action would be qualitatively beneficial, improving sediment and water quality, by removing the creosote source from the environment.

Id., at 927. The Final EIS identified several construction BMPs to mitigate for potential impacts associated with pile removal and installation, including potential impacts to salmonids and other fishes. *Id.*, at 723 and 755. The BMPs are intended "to reduce the potential risk of increased turbidities and sedimentation impacts to habitat that supports local salmonid populations." One

such BMP is the restriction of in-water work to defined time period, or fish window, when juvenile salmonids are absent, or present in very low numbers. *Id.*, at 755.

18.

On November 19, 2015, the City issued its Notice of Decision approving PSE's application for an SSDP for the Project, subject to conditions. Ex. P-6. The City determined that the Project was generally consistent with the policies of the Shoreline Management Act (SMA) and applicable provisions of the City's Shoreline Master Program (TSMP). Ex. R-1 at 55-57. The City also concluded that the proposed compensatory mitigation met the TSMP's marine shoreline mitigation requirements. *Id.*, at 57. In reaching its determination, the City gave substantial weight to project review conducted by Shannon Brenner, Environmental Specialist and subject matter expert for the City's Planning and Development Services Department. Ex. R-1 at 53. Ms. Brenner, evaluating the Project for compliance with the critical area policies and regulations of the TSMP, determined that the Project had "minimized impacts and provided appropriate compensatory mitigation that should result in no net loss of ecological functions." *Id.*, at 77. Among the conditions imposed in the SSDP are the requirement that PSE (1) follow the best management practices (BMPs) and construction techniques outlined in the JARPA throughout demolition and construction; (2) comply with restrictions and criteria approved by WDFW for all work waterward of the ordinary high water mark/line; and (3) as required by the TSMP, TMC 13.10.6.4.3.B, revegetate the 50-foot marine buffer on the portion the Project's Hylebos Waterway shoreline not needed for direct water access. Ex. R-1.at 57-58.

19.

The Tribe timely requested reconsideration of the City's decision. Ex. R-1 at 17-28. On December 30, 2015, Tacoma's Director of Planning and Development Services issued Order Partially Granting Reconsideration and Modifying Conditions of Approval. Ex. R-1 at 1-16. In the decision, the Director affirmed the original SSDP and modified the conditions of approval. The modifications included the requirement that (1) before development permits can be issued by the City, PSE must first secure all other agency permits or demonstrate that such permits are not required; (2) work within the Hylebos Waterway cannot proceed until PSE demonstrates that further sediment testing has been completed and the Project will comply with water quality regulations; and (3) PSE shall provide the mitigation described in the mitigation plan and any modification of the proposed mitigation must be reviewed and approved by the City. Ex. R-1 at 9. The Tribe timely appealed the City's decision to issue the SSDP to the Board contending, among other things, that the SSDP violated the SMA and TSMP by failing to require PSE to perform sediment characterization and approving a mitigation plan that did not provide for no net loss of ecological functions.

20.

On January 28, 2016, PSE filed Stipulation Restricting SSDP Re In- and Over-Water Work in Hylebos Waterway (Stipulation) with the Board and the City. Ex. P-90.[4] In the Stipulation, PSE stated that it would restrict its in- and over-water work in the Hylebos

[4] Although used at the hearing without objection, Exhibit P-90 was not among the exhibits noted as admitted into evidence. Because its failure to be offered into evidence appears to have been an oversight, the Board now admits Exhibit P-90 into evidence in this case.

Waterway to those activities related to the improvement of three existing stormwater outfalls and the removal of 4,973 square feet of overwater decking. *Id.* Larry Tornberg, PSE's permit coordinator for the Project, testified that the purpose of the Stipulation was to address the Tribe's concerns by eliminating work in the Hylebos Waterway. Tornberg Testimony. PSE revised the JARPA (Revised JARPA) to reflect the Project's reduced scope. Tornberg Testimony; Ex. R-26. To address issues raised by the Tribe's mitigation expert, Tad Deshler of Coho Environmental, regarding the different depths of habitat being impacted as compared to the mitigation area, PSE revised the In-Water Mitigation Plan for Tacoma LNG (Revised Mitigation Plan) to increase the amount of overwater decking that would be removed. Tornberg Testimony; Ex. R-27. The Revised JARPA and Revised Mitigation Plan are both dated April 25, 2016. Exs. R-26, R-27. City staff testified that the reduction in the scope of work would be captured by not approving development permits for that activity and placing notice on the parcel that in-water construction cannot take place. Schultz Testimony; Brenner Testimony.

21.

The scope of the Project reviewed by the Board, as set forth in the Revised JARPA and Revised Mitigation Plan, reflects PSE's Stipulation eliminating in-water portions of the Project previously planned for the Hylebos Waterway. *Id.* Accordingly, the components of the Project within shoreline jurisdiction on the Blair Waterway include a portion of the underground cryogenic pipeline, underground/aboveground pipeline transition point, a concrete trestle, loading platform and loading arm, a grated catwalk, and one breasting dolphin. Exs. R-26, R-1 at 49. An existing creosote-treated timber trestle with 24 creosote-treated timber piles will be

removed from the Blair Waterway. Ex R-26 at 12. In-water construction in the Blair Waterway will consist of the installation of 5,751 square feet of overwater decking and 48 steel piles (158 square feet net benthic coverage). Exs. R-26, R-27 at 14. Project components with shoreline jurisdiction on the Hylebos Waterway include the demolition of an existing structure located within the 50 foot marine buffer, removal of 4,973 square feet of overwater decking, and improvement of three existing stormwater outfalls. Exs. R-26 at 12, R-27 at 4.

22.

The Revised Mitigation Plan is intended to compensate for the unavoidable impacts resulting from the installation of 48 new steel piles and the creation of 5,751 square feet of new over-water coverage through the construction of the proposed pier and loading platform, trestle, catwalk, and breasting dolphin at the TOTE facility on the Blair Waterway. Ex. R-27. As compensatory mitigation, PSE initially proposed to remove (1) 4,973 square feet of creosote-treated over-water decking from the Hylebos Waterway and (2) 24 creosote-treated wood pilings and 671 square feet of creosote-treated over-water decking from the Blair Waterway. Ex. R-27 at 11-13.

23.

Concerns were raised by the Tribe regarding the loss of benthic habitat from pile installation and the differences in depth at the Hylebos Waterway mitigation site as compared to the new in-water structures being constructed on the Blair Waterway. Deshler Testimony; Tornberg Testimony; Ex. R-27 at 13. To address those concerns and meet the TSMP's no net loss standard for benthic function, the Revised Mitigation Plan now includes the removal of

2,500 square feet of over-water decking, 24 creosote-treated pilings, underlying detritus and concrete blocks in the intertidal and benthic habitat at Sperry Ocean Terminal in Commencement Bay. Ex. R-27 at 13-15; Boyle Testimony. Sperry Ocean Terminal is a site where mitigation of intertidal mudflats can be performed to compensate for unavoidable impacts elsewhere in Commencement Bay. Boyle Testimony; Tornberg Testimony. The removal of piles and overwater decking at the Sperry Ocean Terminal site will continue beach restoration at that location and provide valuable nearshore habitat. Ex. R-27 at 14. The compensatory mitigation proposed by the Revised Mitigation Plan produces a decrease in intertidal overwater coverage of 1,473 square feet over existing conditions. *Id.*, at 16.

24.

The Revised Mitigation Plan also describes the BMPs PSE will employ to minimize the impacts of Project construction, demolition of in-water structures, and pile removal and installation. *Id.*, at 8-11. The BMPs are current through EPA Region 10's BMPs for Pile Removal and Replacement in Washington State. Tornberg Testimony; Ex. R-33. PSE's Water Quality Protection and Monitoring Plan, recently submitted to Ecology for its review and approval, provides for instrumented monitoring of pile removal. Tornberg Testimony. Mr. Tornberg testified that changes to the plan to provide for increased monitoring frequency and instrumented monitoring were made to address concerns raised by the Tribe and communicated to Ecology. *Id.*

25.

To minimize impacts to anadromous fish, PSE will only perform in-water work during a defined fish window. Ex. R-27 at 9. The fish window for the portion of Commencement Bay where the work will take place is July 1 through February 14. Tornberg Testimony. In consultation with NMFS, PSE will restrict in-water pile removal and installation to a shorter fish window of between August 15 and February 1415. *Id.*; Ex. R-27 at 9.

26.

The SSDP requires PSE to revegetate the portions of the 50-foot marine buffer at the Project site on the Hylebos Waterway that is not needed for direct marine access. Ex. R-1 at 58. The City considers revegetation of the shoreline to constitute mitigation for project impacts. Brenner Testimony. According to Ms. Brenner, revegetation of the shoreline provides several environmental benefits by providing detritus to feed benthic organisms and invertebrates for salmon to eat, as well as providing basic water quality treatment for stormwater runoff and erosion control. *Id.* The Tribe's witnesses agreed that revegetation of the shoreline constituted a mitigation measure. Naylor Testimony; Ladley Testimony; Deshler Testimony.

27.

As part of the Project, PSE will upgrade the existing stormwater system at the LNG facility site. Hogan Testimony; Moore Testimony. The existing buildings at the site have lead paint or asbestos siding. Hogan Testimony. Stormwater at the site is currently routed to catch basins, which provide limited treatment, before being discharged into the Hylebos Waterway through one of ten existing outfalls. Moore Testimony. During construction, zero stormwater

will be discharged from the existing outfalls. Instead, all stormwater will be collected and routed to settling tanks before being discharged into the City's sanitary sewer. *Id.* Following construction, stormwater will be sent to rain gardens or modular wetlands for enhanced treatment and then discharged through one of the three outfalls that will remain operational. Hogan Testimony. In order to meet more stringent stormwater requirements, in-line check valves will be installed in the three remaining outfalls. Ex. R-26 at 9.

Sediments and Surface Water Quality

28.

At hearing, the Tribe asserted that the SSDP violated the SMA and TSMP by failing to require sediment characterization in the Blair Waterway. According to the Tribe, because the Blair Waterway provides ecological functions and was previously degraded, the City should have required PSE to perform sediment testing in the Project footprint before engaging in any in-water construction. Absent that information, it is possible that contaminants in the sediments could be disturbed during construction and entrained in the water column. Cherry Testimony; Knox Testimony. The Tribe also asserted that the Project is likely to have adverse impacts on water quality in violation of the TSMP. Knox Testimony.

29.

In support of its position, the Tribe presented the testimony of its expert Janet Knox, an environmental geochemist with Pacific Groundwater Group. Ex. P-110. The Tribe asked Ms. Knox to review a series of reports, including the Final EIS, and to identify any adverse impacts from a project such as PSE's proposal. In Ms. Knox's opinion, the potential adverse impacts of

the Project had not been fully evaluated and it was likely that there will be adverse impacts to sediments, surface water and stormwater. Knox Testimony.

30.

With regard to sediments, Ms. Knox testified that PSE should be required to characterize the sediments at the TOTE facility before removing or installing piles. Ms. Knox gathered information on ten contaminants from Ecology's Environmental Information Management System (EIM), a database for environmental monitoring data, and from dredge data for the TruGrit, Gypsum, and Pier 4 sites on the Blair Waterway. Ms. Knox used that data to evaluate whether there are any contaminants in the Blair and Hylebos Waterways that exceeded levels that are protective of human health and the environment. Applying screening level criteria that she drew from the Record of Decision for the Lower Duwamish Waterway cleanup, the Natural Resource Damage Assessment (NRDA) for the Hylebos Waterway, and Ecology regulations, Ms. Knox plotted the location of each contaminant exceeding the selected screening level on aerial maps. Knox Testimony; Exs. P-166 – P-175. None of the contaminants identified by Ms. Knox exceeded her selected screening levels in the vicinity of the proposed pile removal and installation work at the TOTE facility on the Blair Waterway. *Id.*

31.

Ms. Knox testified that the proposed Water Quality Protection and Monitoring Plan she reviewed was insufficient to protect water quality as it did not require instrumented monitoring for turbidity or monitoring for toxics. Knox Testimony; Ex. P-176. As for stormwater, Ms. Knox opined that it was likely that stormwater from the construction site will be contaminated

and will add to existing contaminated stormwater discharged into Commencement Bay. Ms. Knox testified that during construction stormwater will be exposed to new materials, such as PVC, vinyl and galvanized steel. The contaminants from these materials will be picked up by the stormwater and would contribute to increased contaminant loading in the stormwater. Knox Testimony; Ex. P-177.

32.

The Tribe also presented the expert testimony of Shane Cherry, a consulting scientist. Ex. P-107. The Tribe asked Mr. Cherry to review the permit documents and determine whether there were deficiencies. Cherry Testimony. Mr. Cherry concurred with Ms. Knox that sediment characterization should be required before PSE can engage in pile removal and installation in the Blair Waterway. Mr. Cherry further testified that the City should require PSE to perform a scour study in order to evaluate the potential impacts of the placement of new piles in the Blair Waterway. Mr. Cherry estimated that mean total volume of the tide in the Blair Waterway was 100 million cubic feet of water, with an extreme high and low tidal volume of 200 million cubic feet. Cherry Testimony; Ex. P-140. According to Mr. Cherry, if the sediments are contaminated, the extraction and installation of piles, as well as the presence of the new piles, could result in the mobilization and redistribution of those contaminants. Mr. Cherry also testified that he had not worked on a project where a scour study was required only for pile scour. Cherry Testimony.

33.

The City asserts that it lacks authority to require sediment characterization, that it has never included such a requirement in a shoreline permit, nor has it previously required a scour study prior to issuing a shoreline substantial development permit. Schultz Testimony; Brenner Testimony. A recent shoreline substantial development permit issued by the City involving the dredging of sediments and installation of 555 new piles on the Blair Waterway did not require the applicant to characterize the sediment or perform a scour study. *Id.*; Exs. R-22, R-23. There are approximately 9,400 piles located on properties owned by the Port in the Blair Waterway. Warfield Testimony. The Port has a programmatic pile maintenance program, approved by the Corps, WDFW and the City, under which it repairs and replaces piles as necessary. The Port has never received a request from the Corps, EPA or Ecology to perform a sediment characterization or scour study for its pile maintenance program. *Id.*

34.

The SSDP requires PSE to use BMPs during pile removal and installation. Ex. R-1 at 57. PSE has committed to using EPA's most current BMPs for pile removal and installation. Tornberg Testimony; Ex. R-33. If followed, BMPs are effective at minimizing impacts from those activities, particularly the release of turbidity into the water column and containing creosote that is on the removed piling. Moore Testimony; Cherry Testimony. Any resuspension of sediments is expected to be short term, lasting one or two tide cycles. Ex. P-48 at 927. In addition, to avoid conducting work when juvenile salmonids may be present, PSE will restrict its in-water work to a shortened fish window of August 15 through February 14. Tornberg

Testimony. PSE's expert biologist, Matthew Boyle of Grette Associates, testified that the fish window for Commencement Bay is highly effective in protecting anadromous fish. Boyle Testimony; Ex. R-56.

35.

Shirley Schultz, a principal planner in the City's Planning and Development Services, testified that a shoreline substantial development permit is not a "development" permit as used in the City's municipal code because it does not authorize development in the shoreline. Rather, it tells the applicant that it may now seek development permits, such as building or demolition permits, for the work proposed to occur within the shoreline. Schultz Testimony. In addition to other City permits, shoreline projects also require permits from other agencies, such as the Corps, Ecology and WDFW. Brenner Testimony. The SSDP provides that, before the City will issue development permits for the Project, PSE must secure all other agency permits or demonstrate that such permits are not required. Ex. R-1 at 9. The City relies on the experts in those agencies to use their authority to impose appropriate conditions to address potential sediment contamination. Schultz Testimony.

36.

With regard to the issue of scouring, witnesses for the Port and PSE testified that water moves slowly through the Blair Waterway. Warfield Testimony; Hooton Testimony; Moore Testimony. While the end of the Hylebos Peninsula is subject to wind and wave forces, the TOTE facility is approximately 3,000 feet from the mouth of the Blair Waterway where the wave energy is greatly dissipated. The replacement of 24 existing piles with 48 new piles will serve to

dissipate wave energy and discourage erosion. The new piles will also help stabilize the shoreline bank. Moore Testimony.

37.

In response to Ms. Knox's testimony regarding existing sediment contamination in the Blair Waterway, PSE presented the expert testimony of Rick Moore, an associate environmental geologist with GeoEngineers. Ex. R-57. Mr. Moore conducted an assessment of sediment data in the Blair Waterway. In contrast to Ms. Knox's analysis, Mr. Moore used data from the last ten years in order to reflect current conditions and applied standards from Ecology sediment cleanup regulations and guidance documents to further screen the data. Moore Testimony; Exs. R-50, R-55. The results of Mr. Moore's analysis showed the presence of contaminants at significantly fewer locations in the Blair Waterway and no contaminants at or near the TOTE facility. *Id.*

38.

Mr. Moore also disagreed with Ms. Knox's criticisms of the Water Quality Protection and Monitoring Plan. Mr. Moore testified that he participated in the preparation of the Plan and that it requires intensive instrumented monitoring. Moore Testimony. Mr. Tornberg testified that PSE revised the Water Quality Protection and Monitoring Plan to address the Tribe's concerns and recently submitted the revised Plan to Ecology for its review and approval. The Plan will become part of the 404 Permit decision issued by the Corps for in-water construction. Tornberg Testimony.

39.

Responding to Ms. Knox's testimony concerning stormwater, Mr. Hogan described the measures PSE will take to control and improve the quality of stormwater discharged from the LNG facility site. On-site measures will be implemented so that zero stormwater is discharged during construction. Revisions will be made to the existing stormwater system, with stormwater routed to rain gardens for enhanced treatment before being discharged to the Hylebos Waterway. Hogan Testimony; Moore Testimony. The number of stormwater outfalls will be reduced, with in-line check valves installed in the three remaining outfalls to meet more stringent stormwater requirements. Ex. R-26 at 9. The demolition of existing buildings with lead paint and asbestos siding will remove a source of stormwater contamination. Hogan Testimony.

40.

The Board finds that the evidence presented did not establish the presence of sediment contamination at the TOTE facility or demonstrate that the measures PSE is required to implement during in-water construction will not protect water quality and anadromous fish. The monitoring data from contaminated sites presented showed that contaminants were found at locations within the Blair Waterway; however, data was not presented that showed contaminants in the vicinity of the TOTE facility. Exs. P-166 through P-175, R-50; Knox Testimony; Moore Testimony. While EPA and Ecology expressed concerns regarding in-water work in the Hylebos Waterway, no similar concerns were raised with respect to the Blair Waterway. Exs. R-1 at 14-15, 87-91; P-102 at 382-84.

41.

The Board finds that the SSDP requires PSE to implement measures during construction that are protective of water quality and anadromous fish. The baseline conditions of the aquatic habitat at the Project site are degraded and provide little to no fish habitat. Brenner Testimony; Deshler Testimony; Ex. R-2 at 309. The parties agree that removal of creosote-treated piles provides an environmental benefit by eliminating a source of PAHs, which leach into the water. Naylor Testimony; Deshler Testimony; Brenner Testimony; Tornberg Testimony. The parties also agree that BMPs, if properly implemented, are useful in minimizing impacts of in-water construction activity such as the proposed pile removal and installation. Naylor Testimony; Deshler Testimony; Thornton Testimony; Moore Testimony. Likewise, fish windows are a recognized means of minimizing potential impacts to anadromous fish moving through the Blair Waterway and Commencement Bay. Boyle Testimony; Deshler Testimony. The Final EIS's conclusion that any resuspension of sediments caused by pile removal would dissipate within one to two tide cycles was not controverted. Ex. P-48 at 927. Finally, the evidence established that the zero discharge of stormwater during construction and upgrading the existing stormwater system currently discharging to the Hylebos Waterway will serve to protect surface water and improve the quality of the post-construction stormwater discharge. Hogan Testimony; Moore Testimony.

No Net Loss and Mitigation

42.

The Tribe presented the testimony of Mr. Deshler in support of its assertion that PSE's compensatory mitigation for in-water impacts does not meet the TSMP's no net loss of ecological function standard. Based on his document review, Mr. Deshler testified that he believed that the Project will impact habitat value in the Blair Waterway. Specifically, the habitat will be impacted by construction of the trestle on the Blair Waterway and its potential to create overwater shading. According to Mr. Deshler, shading has the potential to reduce prey species and plants they feed on. Shading may also create a barrier to migration of juvenile salmonids as they do not like to travel under large, shaded structures. Juvenile salmonids may mill around the end of the dock delaying their migration or they may travel around the structure and be subjected to increased predation. Conversely, Mr. Deshler testified that the removal of overwater decking on the Hylebos Waterway would have a potentially negative impact on habitat value as it could encourage fish to swim along the shoreline near PAH contaminated sediments. Deshler Testimony.

43.

Mr. Deshler testified that the compensatory mitigation for the Project is insufficient to meet the no net loss standard as it fails to account for the different habitat values being impacted. Mr. Deshler used a habitat equivalency analysis (HEA) model to assess the adequacy of the mitigation. Under HEA, values are assigned to different types of habitats, allowing for the comparison of the value of the habitat being impacted to the value of the habitat at the mitigation

site. HEA was originally created under NRDA regulations for evaluating compensatory restoration of hazardous waste sites. Mr. Deshler used a simplified version of the HEA model created for NRDA use in the Hylebos Waterway. Deshler Testimony.

44.

In his HEA analysis, Mr. Deshler calculated the square footage of the area being impacted and the mitigation area. Those areas were then multiplied by an initial habitat value and a final habitat value, to arrive at an initial weighted habitat area and a final habitat weighted area. Deshler Testimony; Exs. P-153, P-185. In his final HEA Scenario 4, which adjusted for various factors not considered in his previous scenarios, Mr. Deshler calculated an initial weighted habitat area of 2,037 square feet and a final habitat weighted area of 1,660 square feet. Ex. P-185. According to Mr. Deshler, "to be a sufficient offset or sufficient mitigation, I think the final habitat weighted area should be larger than the initial, or at least equal to." Deshler Testimony. While Mr. Deshler's Scenario 4 accounted for PSE's changes to its proposed activities in the Hylebos Waterway, it did not include the additional mitigation being provided at the Sperry Ocean Terminal. Ex. P-185. Based on the results of his HEA analysis, Mr. Deshler concluded that the proposed mitigation fails to compensate for the potential impacts to the Blair Waterway. Deshler Testimony.

45.

In response, the Respondents asserted that the mitigation outlined in the Revised Mitigation Plan more than compensates for the Project's impacts to the Blair Waterway. The Project is being constructed at an existing industrial site in a highly altered environment. The

shoreline of the Blair Waterway is steeply sloped and is heavily armored with riprap. Ex. R-27 at 14; Brenner Testimony. The intertidal, shallow subtidal and subtidal habitats at the TOTE facility are degraded, providing limited habitat for out-migrating juvenile salmonids. Ex. R-27 at 14-15. Ms. Brenner testified that, due to its industrial nature, fish habitat in the Blair Waterway is poor. Brenner Testimony. Mr. Deshler agreed that the salmonid habitat in the Blair Waterway was marginal, having very little riparian habitat and no significant eelgrass beds. Deshler Testimony. Because there is no opportunity for on-site mitigation at the TOTE facility, the mitigation will occur within the Commencement Bay watershed at locations that are beneficial to the species being impacted. Brenner Testimony; Ex. R-27.

46.

Ms. Brenner testified that she evaluated the proposed mitigation to determine whether it met the critical area policies and regulations of the TSMP. As required by the TSMP, the mitigation plan followed the mitigation sequence of avoidance, minimization and compensation. Brenner Testimony; TMC 13.10.6.4.2.D.4.a. Minimization measures included the application of BMPs during demolition and construction, and the restriction of in-water work to a defined fish window. Brenner Testimony. Because the Project includes a water-dependent component requiring direct access to the Blair Waterway, all impacts to the marine waters could not be avoided and thus required compensatory mitigation. *Id.* The TSMP also provides that activities within a waterbody used by anadromous fish are to be given special consideration to the preservation and enhancement of anadromous fish habitat. TMC 13.10.6.4.4.B. Ms. Brenner testified that the use of BMPs designed to protect anadromous fish, adherence to the fish

window, mitigation of adverse impacts and conditions in the SSDP constituted the special consideration required under the TSMP. Brenner Testimony.

47.

The TSMP provides that "[s]horeline use and development shall be carried out in a manner that prevents or mitigates adverse impacts so that no net loss of existing ecological functions occurs[.]" TMC 13.10.6.4.2.A. Ms. Brenner testified that no net loss is measured from baseline conditions that currently exist at the site and that SMP guidance provides that one method to measure no net loss and determine the sufficiency of mitigation is by documenting the square footage of in-water structures. Ms. Brenner used that approach in her evaluation of PSE's proposed mitigation, comparing the square footage of the proposed in-water structures to the structures being removed. Brenner Testimony; Ex. P-122 at 81-82. Ms. Brenner testified that in her no net loss evaluation, she also considered the revegetation of the marine shoreline that was required by the TSMP and the environmental benefits of the removal of creosote-treated materials from the water. Brenner Testimony. Based on her analysis, Ms. Brenner concluded that the proposed compensatory mitigation met the TSMP's no net loss standard. Brenner Testimony; Ex. P-122. Ms. Brenner testified that, while she considered the initial mitigation sufficient to meet the TSMP's no net loss standard, the addition of mitigation at the Sperry Ocean Terminal gave her more assurance that the mitigation will achieve no net loss of ecological functions. Brenner Testimony.

48.

The Respondents challenged Mr. Deshler's use of the HEA model in this context. Ms. Brenner testified that the City has not previously accepted the use of HEA for shoreline mitigation purposes. Brenner Testimony. On cross-examination, Mr. Deshler testified that he has never performed a shoreline substantial development no net loss analysis or used an HEA model for shoreline permitting. Deshler Testimony. Mr. Deshler also testified that he did not conduct a site visit to evaluate the habitat being impacted or the areas where mitigation will occur, relying instead on a review of documents and photographs. Deshler Testimony. The HEA model used by Mr. Deshler contains a disclaimer stating that it was created for use in the Hylebos Waterway and may not be applicable to other sites or other contexts. Deshler Testimony.

49.

The Respondents asserted that the habitat values Mr. Deshler assigned to the intertidal habitat on the Blair Waterway and the habitat reduction applied to the Hylebos Waterway were too high. Boyle Testimony. According to the Respondents, Mr. Deshler's HEA analysis was deficient as it failed to account for the removal of the existing catwalk, the additional mitigation at the Sperry Ocean Terminal, and the revegetation of the shoreline on the Hylebos Waterway. Brenner Testimony; Boyle Testimony. Addressing Mr. Deshler's criticism concerning the lack of analysis of habitat value, PSE's Revised Mitigation Plan includes a comparison of habitat zones, with the impacted and mitigation areas broken down into the square footage of the intertidal, subtidal and shallow subtidal zones. Ex. R-27 at 14; Boyle Testimony. With the

addition of the proposed mitigation at Sperry Ocean Terminal, the Revised Mitigation Plan provides for 8,144 square feet of overwater mitigation as compared to 5,751 square feet of overwater impacts. *Id.* The Respondents contend that the Project, as conditioned by the SSDP and mitigated pursuant to the Revised Mitigation Plan, meets the TSMP's no net loss standard. Brenner Testimony; Boyle Testimony.

50.

The Board finds that the City employed its standard approach to evaluate PSE's proposed compensatory mitigation. Brenner Testimony. Under the Revised Mitigation Plan, PSE will remove existing creosote-treated piles from the Blair Waterway and Sperry Ocean Terminal, and remove creosote-treated overwater decking from the Hylebos Waterway and Sperry Ocean Terminal.[5] Ex. R-27. The Board finds that the evidence presented establishes that the removal of creosote-treated materials will benefit surface water quality and salmonid habitat by removing a source of contamination. Naylor Testimony; Brenner Testimony; Boyle Testimony.

51.

While their analytical methods may vary, both Mr. Deshler and the City use the same metric, square footage, to assess the adequacy of the proposed mitigation. Brenner Testimony; Deshler Testimony. The compensatory mitigation provided by the Revised Mitigation Plan, with the inclusion of the mitigation activities at the Sperry Ocean Terminal, exceeds the net results of Mr. Deshler's HEA analysis. Exs. P-185, R-27. In addition, it satisfies Mr. Deshler's criteria

[5] The revegetation of the marine buffer on the shoreline of the Hylebos Waterway is a condition of the SSDP. Ex. R-1 at 58. It is not included as part of the Revised Mitigation Plan as compensatory mitigation and was not considered as such by the Board.

that the final habitat area equal or surpass the initial habitat area, with the mitigated area exceeding the impacted area by some 2,393 square feet. Ex. R-27 at 14. The Board finds that the record contains substantial evidence that the Revised Mitigation Plan adequately compensates for the impacts of the Project and achieves no net loss of ecological functions. Finally, the Board finds that in addition to the compensatory mitigation, the SSDP's conditions requiring that PSE use BMPs and a fish window for its in-water work satisfied the TSMP's requirement to give special consideration to the preservation and enhancement of anadromous fish habitat. TMC 13.10.6.4.4.B.

52.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

Based upon the foregoing Findings of Fact, the Board enters the following:

CONCLUSIONS OF LAW

1.

The Board has jurisdiction over this matter pursuant to RCW 90.58.180(1). WAC 461-08-315(2)(a). Both the scope and standard of review for this matter are *de novo*. WAC 461-08-500(1). The Tribe has the burden of proving that the SSDP issued to PSE is inconsistent with the requirements of the SMA or the TSMP. RCW 90.58.140(7); WAC 461-08-505(1)(c).

2.

The following issues were identified for resolution in the Prehearing Order:

1. Whether the SSDP for the Project is defective or noncompliant with the Applicable Shorelines Requirements regarding the SSDP's analysis, in whole or in part, for the following matters:

a. Blair Waterway operational impacts and the effect thereon to waters, shorelines, sediments and habitats that will be affected by the Project?

b. Hylebos Waterway demolition and operational impacts and the effect thereon to waters, shorelines, sediments and habitats that will be affected by the Project?

c. TSMP and TMC moorage facilities standards?

d. Cumulative impacts related to permitting and future operation of a nearby methanol plant?

e. Anadromous fish habitat impacts related to construction and/or ongoing Project operations?

f. Sediment impacts in the context of demolition, construction and/or ongoing operation of the Project?

2. Whether the SSDP for the Project is defective or noncompliant with Applicable Shorelines Requirements for reasons related to delegation and/or deferral of sediment impacts analysis to subsequent permitting reviews and/or entities other than the City of Tacoma?

3. Whether the SSDP for the Project is defective or noncompliant with Applicable Shorelines Requirements because the SSDP:

a. Allows activities and impacts that do not comply with the 'no net loss' requirements and standards of the Applicable Shorelines Requirements?

b. Does not address and/or fails to make affirmative findings that the Project will not violate 'no net loss' requirements and standards of the Applicable Shorelines Requirements?

c. Does not make affirmative findings that the Project is consistent with the Applicable Shorelines Requirements?

4. Whether the SSDP for the Project defective or noncompliant with Applicable Shorelines Requirements because the application documents are unclear or internally inconsistent?

5. Whether the SSDP for the Project is defective and noncompliant with Applicable Shorelines Requirements because the specified mitigation conditions for the Project:

   a. Are inadequate to address impacts arising from the Project?

   b. Are based on inadequate and/or defective analysis and data?

6. Whether the Hylebos Waterway stipulation unilaterally issued by PSE ("PSE Stipulation") is ambiguous, inconsistent with the SSDP, and/or undermines or invalidates the SSDP because:

   a. The status and enforcement of the PSE Stipulation are questionable due to the fact it was issued in the context of an appeal and after issuance of the SSDP?

   b. The duration of the PSE Stipulation is unstated?

   c. The PSE Stipulation does not state and define its exact scope and effect on the currently permitted Project, including effects on overall operations and on fueling methods, procedures, equipment, and activities?

   d. The PSE Stipulation does not state whether, when, or how PSE and/or the City of Tacoma may subsequently retract, alter, waive or change the PSE Stipulation?

   e. The PSE Stipulation does not state whether future retraction, waiver, or alteration thereof can result in resurrection or reestablishment of the Hylebos component of the Project, whether such action would require additional permitting review, and whether such action would then be required to comply with Applicable Shorelines Requirements?

   f. The PSE Stipulation has the effect of avoiding scrutiny of the Hylebos portion of the Project by the Board in this case?

   g. The PSE Stipulation does not define its effects on the related Project permitting reviews by other agencies?

   h. The PSE Stipulation comprises a substantial change in the configuration and elements of the Project as presented to and analyzed by the City of Tacoma, and upon which the SSDP was predicated?

7. Whether the City's decision to issue the SSDP was appropriate under applicable laws

8. Whether the Petitioner has standing to bring this petition for review?

9. Whether Petitioner timely filed and served its petition for review?[6]

A. Tribe's Standing to Appeal (Issue 8)

3.

The Shoreline Management Act (SMA) allows any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state pursuant to RCW 90.58.140 to seek review from the Shorelines Hearings Board. RCW 90.58.180(1). In order to maintain an appeal, a party must show that he or she is a "person aggrieved" within the meaning of RCW 90.58.180. The term "person aggrieved" has been interpreted to include anyone with standing to sue under existing law. *Anderson v. Pierce County*, 86 Wn. App. 290, 299, 936 P.2d 432 (1997). This requires a party to show that he or she has suffered an injury in fact within the zone of interests protected by the statute and that the Board has authority to redress the injury suffered. *CORE v. Olympia*, 33 Wn. App. 677, 657 P.2d 790 (1983); *Alexander v. City of Port Angeles*, SHB Nos. 02-027 & 02-028 (Summary Judgment, March 13, 2003).

4.

"To show an injury in fact, the plaintiff must allege specific and perceptible harm." *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 829, 965 P.2d 636 (1998). The "injury in fact" test requires more than an injury to a cognizable interest. It requires that the

[6] No evidence was presented or argument advanced that the Tribe's appeal was untimely. The Board, therefore, considers Issue 9 to have been abandoned.

party seeking review be among the injured. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). A party asserting general enforcement of a statute does not have standing unless he or she is "perceptibly affected by the unlawful action in question." *Id.*, at 566. Moreover, no standing is conferred to a party alleging a conjectural or hypothetical injury. *Trepanier v. Everett,* 64 Wn. App. 380, 382, 824 P.2d 524, rev. denied 119 Wn.2d 1012, 833 P.2d 386 (1992). The party asserting standing bears the burden of establishing each of these elements. *Coalition to Protect Puget Sound Habitat v. Thurston County,* SHB No. 13-006c (Order on Motions, Aug. 6, 2013) citing *Center for Environmental Law & Policy v. Ecology,* PCHB No. 96-165 (1997).

5.

In their written closing arguments, the City and the Port asserted that the Tribe lacks standing to challenge the SSDP.[7] Conceding that the Tribe satisfies the zone of interest and redressability prongs, the City and the Port argue that the Tribe did not demonstrate that it will suffer an injury in fact. According to the City and the Port, the Tribe's witnesses testified to potential, as opposed to concrete and immediate, injury. Because the Tribe lacks standing, the City and the Port assert that the appeal must be denied.

6.

The Tribe presented evidence establishing a significant and active interest in maintaining and improving the environmental health of Commencement Bay in general and the Hylebos and Blair Waterways in particular. Naylor Testimony, Ladley Testimony. The Project site is within

[7] PSE did not challenge the Tribe's standing.

the Tribe's usual and accustomed treaty area. *Id.* The Tribe is actively engaged in mitigation and habitat restoration projects in Hylebos Creek, the Hylebos Waterway, and Wapato Creek. Ladley Testimony; R-27 at 3. Permitting of insufficiently mitigated development and/or use of substandard construction practices threatens to further reduce available habitat for fish and shellfish, which the Tribe has a treaty protected right to harvest. Naylor Testimony, Ladley Testimony.

7.

The objectives of the SMA are broad and the types of interests protected are diverse. The policies of the SMA contemplate "protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto." RCW 90.58.020. The potential impacts described by the Tribe's witnesses are the type of alleged injury sufficient to confer standing under the broad construction the Board has given the SMA. *Friends of the San Juans v. San Juan County*, SHB No. 13-001 (Order Granting and Denying Summary Judgment, May 15, 2013). This liberal interpretation of standing is consistent with the Board's past decisions addressing the standing of parties bringing legitimate environmental interests before it. *Nicholson v. City of Renton,* SHB No. 10-016, pp. 13-14 (Order on Summary Judgment, Dec. 22, 2010). It is based on the Legislature's directive in RCW 90.58.900, which requires the SMA to be "liberally construed to give full effect to the objectives and purpose for which it was enacted."

8.

In their arguments, the City and the Port conflate standing with burden of proof. A challenge to a permit for future construction is, by its nature, forward looking and raises questions of potential project impacts. The issue for hearing is whether the Tribe met its burden to prove that the City erred in granting the permit. The Board finds and concludes that the Tribe has identified a potential injury sufficient to confer standing and it should be afforded the opportunity to present its case concerning the impacts of the Project on the environment through this appeal. Accordingly, the Board concludes that the Tribe has standing to appeal the SSDP and rejects the request to deny the appeal on that ground.

B. Delegation and/or Deferral (Issue 2)

9.

The Tribe argues that the SSDP fails to comply with applicable shoreline requirements because the City deferred any sediment impact analysis to future permits issued by entities other than the City. Relying on a partial reading of TSMP 13.10.5.5.A and the SMA's policy statement in RCW 90.58.020, the Tribe contends that the City should have required PSE to characterize the sediment in the Blair Waterway before construction could begin. According to the Tribe, because contaminants have been found at some locations in the Blair Waterway and the status of the sediments at the TOTE facility are unknown, those sediments should be tested in order to protect existing ecological functions and to restore ecological functions in a degraded area. The Tribe rejects the City's reliance on future permits issued by state or federal agencies to

cure any shortcomings in the SSDP, asserting that it does not absolve the City of performing its SMA duty. Tribe's Closing Argument at 2-8.

10.

The City asserts that it lacks the legal authority to require sediment testing and has never imposed such a condition in a shoreline substantial development permit. Schultz Testimony; Brenner Testimony. According to the City, the SSDP is not a development permit; rather, it signifies that the Project can be constructed in the shoreline and that PSE must obtain necessary authorizations from state and federal agencies before it can pursue additional City permits needed to construct the Project. Schultz Testimony; Ex. R-1 at 7. Prior to receiving a City building permit, PSE must secure permits from the Corps, Ecology, and WDFW. Because it lacks the authority to require sediment testing, the City relies on the state and federal agencies with the legal authority and expertise to address those issues. Schultz Testimony. The City argues that the policy of the SMA contemplates a multi-jurisdictional approach to shoreline development between federal, state and local governments in order to prevent the harm caused by the uncoordinated development of the state's shorelines. City's Closing Argument at 3. PSE and the Port concur with the City's position.

11.

The Board has jurisdiction to determine whether a shoreline permit issued by the City complies with the SMA and the TSMP. WAC 461-08-505(1)(c). A shoreline substantial development permit may be granted only if the proposed development is consistent with both the policies and procedures of the SMA, its implementing regulations, and the applicable local

master program. WAC 173-27-150. While the Board gives substantial weight to a local government's interpretation of its own master program and related shoreline policies, the Board is not required to accord a legal interpretation by the local government any particular deference under its *de novo* standard of review. *Buechel v. Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994). The concept of substantial weight means only that an interpretation by a local government of its own master program and related policies is relevant and important for the Board to consider in any appeal. The Board accords substantial weight to a local government's longstanding and consistent interpretation of its regulation. *Foreman v. City of Bellevue*, SHB No. 14-023 (2015).

12.

The Project location is designated as a High-Intensity Environment under the TSMP. "The purpose of the 'high-intensity' environment is to provide for high-intensity water-dependent and water-oriented mixed-use commercial, transportation, and industrial uses while protecting existing ecological functions and restoring ecological functions in areas that have been previously degraded." TMC 13.10.5.5.5.A. Building and other permits cannot be issued until the local government issues the necessary shoreline permits. "No development may occur on a shoreline of the state unless it is consistent with the policy of the SMA and a [shoreline] permit is first obtained." *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 448, 54 P.3d 1194 (2002); WAC 173-27-140(1).

13.

Other state and federal agencies share complementary responsibilities over in-water work in the Blair and Hylebos Waterways, and may require additional analysis and permits before PSE may construct the Project. Among the authorizations PSE is required to obtain are (1) a 404 Permit from the Corps for the removal and installation of piles, 33 U.S.C. § 1344; (2) a CWA 401 Certification and NPDES Permit from Ecology for the protection of water quality, 33 U.S.C. §§ 1341, 1342; and (3) a Hydraulic Project Approval from WDFW for the protection of fish life, RCW 77.55.021(1). The status of Commencement Bay as a Superfund site requires EPA to engage in CERCLA coordination with the Corps to confirm the Project's consistency with CERCLA laws and regulations. Ex. P-102. Through the CERCLA coordination, EPA requested that PSE and the Port provide sediment characterization data only for the Hylebos Waterway. EPA also provided the Corps with CERCLA conditions to include the 404 Permit. *Id.* Finally, because ESA listed species may be present in the Project area, the Corps is required to consult with NMFS and USFWS to ensure that those species and their critical habitat are not adversely affected. Exs. R-35 and R-36. In the ESA consultation, both NMFS and USFWS concurred with Corps' determination that the Project may affect, but is not likely to adversely affect listed species or their critical habitat. *Id.*

14.

The SMA recognizes the concurrent jurisdiction of multiple agencies over shoreline resources. "There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in

an uncoordinated and piecemeal development of the state's shorelines." RCW 90.58.020. The TSMP also acknowledges the fact of concurrent jurisdiction over shoreline projects. "[D]evelopments and activities regulation by this Master Program may also be subject to . . . various other provisions of local, state and federal law[.]' TMC 13.10.1.7.1. This concept is carried through to the SSDP, which conditions the issuance of development permits on PSE's demonstration that "no additional federal or state permits are necessary, or shall provide copies of the approved permit(s) to the City prior to the issuance of the necessary development permit." Ex. R-1 at 9.

15.

The Board concludes that the City did not err in relying on the expertise and authority of state and federal agencies to address potential sediment contamination at the Project site. In this case, the Board gives deference to the City's interpretation of the TSMP and related shoreline policies regarding the inclusion of sediment characterization as part of the SSDP. The evidence presented demonstrated that EPA and Ecology, the agencies with jurisdiction over contaminated sites, provided their opinions about the potential for contaminated sediments to be found at the proposed in-water work sites. Exs. P-102; R-1 at 88. Neither agency expressed a concern with regard to the Blair Waterway. *Id.* Data collected from the EIM system, regardless of the screening level employed, showed no contamination in the vicinity of the TOTE facility on the Blair Waterway. The Board finds and concludes that, by conditioning PSE's in-water work on the implementation of BMPs and observation of a fish window, the SSDP complies with the

TSMP's requirement concerning on contaminated sediment management. TMC 13.10.7.6.2.A.5.b.

16.

The City has not required sediment characterization in any previous shoreline substantial development permit and asserts that the TSMP does not provide the necessary authority to require testing. Brenner Testimony; City's Closing Argument at 4-5; Exs. R-22 and R-23. The Board accords substantial weight to the City's longstanding and consistent interpretation of its TSMP in this regard. *Foreman v. City of Bellevue*, SHB No. 14-023 (2015). The Board concludes that the City did not violate the SMA or TSMP by deferring the issue of sediment characterization to other agencies with concurrent jurisdiction over PSE's Project.

C. Project's Compliance With Applicable Shoreline Requirements (Issues 1, 3, 5 and 7)

17.

As required by the SMA, the TSMP includes shoreline environment designations prescribing "different sets of environmental protection measures, allowable use provisions, and development standards for each of these shoreline segments." WAC 173-26-191(1)(d); TMC 13.10.5. The environmental designations "reflect the type of development that has occurred, or should take place in a given area." TMC 13.10.5.1. The TSMP classification system consists of six shoreline environments. As noted above, the Project is located in the High-Intensity Environment. TMC 13.10.5.5.5.B. Shoreline areas are designated "high-intensity" if they "currently support high-intensity uses related to commerce, transportation or navigation; or are suitable and planned for high-intensity water-oriented uses." TMC 13.10.5.5.5.C. The

management policies governing the High-Intensity Environment require, among other things, that "[p]olicies and regulations shall assure no net loss of shoreline ecological functions as a result of new development. Where applicable, new development shall include environmental cleanup and restoration of the shoreline to comply with relevant state and federal law." TMC 13.10.5.5.5.D.3. The management policies are implemented through the TSMP's use regulations and development standards. TMC 13.10.5.5.

18.

Regulations governing shoreline use are contained in Chapter 6 of the TSMP. "Shoreline use and development shall be carried out in a manner that prevents or mitigates adverse impacts so that no net loss of existing ecological functions occurs[.]" TMC 13.10.6.4.2.A.1. Ecology's Shoreline Master Program Guidelines define "ecological functions" as "the work performed or role played by the physical, chemical, and biological processes that contribute to the maintenance of the aquatic and terrestrial environments that constitute the shoreline's natural ecosystem." WAC 173-26-020(13). If modification to a marine shoreline is unavoidable, "all adverse impacts from a development proposal or alteration shall be mitigated so as to result in no net loss of shoreline and/or critical area functions or processes." TMC 13.10.6.4.2.C.1.

19.

A project proponent is required to follow the mitigation sequence of avoidance, minimization and compensation. TMC 13.10.6.4.2.C.2; Brenner Testimony. A project proponent can compensate "for the adverse impact by replacing, enhancing, or providing similar substitute resources or environments[.]" TMC 13.10.6.4.C.2.e. Preference shall be given to

mitigation projects located within the City. TMC 13.10.6.4.C.3.a. For projects within the High-Intensity Environment, "[t]he preference for compensatory mitigation is for innovative approaches that would enable for concentration of mitigation into larger habitat sites in areas that will provide greater critical area or shoreline function." TMC 13.10.6.4.C.3.c.i.

20.

The Tribe has the burden of proving the SSDP's inconsistency with the SMA and/or TSMP. WAC 471-08-500(3). The Board concludes that the Tribe failed to carry its burden in this case. As discussed in the Findings of Fact above, the record contains substantial evidence the Project's impacts were sufficiently analyzed in the Final EIS and SSDP permitting process. Through construction measures being employed by PSE and the conditions of the SSDP, the Project will result in a no net loss of ecological functions. PSE will protect water quality by discharging zero stormwater during construction, upgrading the existing stormwater system at the LNG facility site, and demolishing buildings that constitute sources of stormwater contaminants. Hogan Testimony; Moore Testimony. Under the Water Quality Protection and Monitoring Plan, instrument monitoring will be used during pile removal. Tornberg Testimony. Removal of creosote-treated piles and overwater decking will also remove a source of surface water contamination. Naylor Testimony; Deshler Testimony; Brenner Testimony; Tornberg Testimony. The use of BMPs and a fish window during construction will minimize impacts to anadromous fish and minimize the resuspension of sediments in the water column. Brenner Testimony; Exs. R-27 and R-33.

21.

The record also contains substantial evidence that the Revised Mitigation Plan meets the TSMP's no net loss standard and compensatory mitigation requirement. As required by the TSMP, PSE engaged in mitigation sequencing. Brenner Testimony. The Revised Mitigation Plan provides sufficient mitigation to compensate for the Project's unavoidable impacts. Brenner Testimony; Boyle Testimony; Ex. R-27. The mitigation sites are within the City and, as preferred under the High-Intensity Environment Zone, the Sperry Ocean Terminal site concentrates mitigation at a larger location that will provide greater shoreline function.[8] Boyle Testimony; Tornberg Testimony; Ex. R-27.

D. Application (Issue 4)

22.

Under RCW 90.58.180, the Board has jurisdiction over the granting, denying, or rescinding of a permit issued under the SMA. This includes a determination of whether an application for a shoreline substantial development permit is complete. *See Friends of Seaview v. Pacific County*, SHB No. 05-017 (Order Granting Summary Judgment, Oct. 19, 2005); *Laccinole v. City of Bellevue*, SHB No. 03-025 (2004). For a shoreline substantial development permit to be deemed complete it must "contain sufficient detail to enable the local government and the Board to determine consistency" with the policies of the SMA and its implementing regulations. *Hayes v. Yount*, 87 Wn.2d 280, 295-96, 552 P.2d 1038 (1976); *North Park Neighbors v. City of Long Beach*, SHB No. 05-030 (Findings of Fact, Conclusions of Law and

[8] The Tribe provided no evidence on Issues 1.c or 1.d. The Board deems those issues to have been abandoned.

Order, Sept. 28, 2006). Determination of whether an application meets applicable statutory requirements is based on the record developed below and before the Board. *Eklund v. San Juan County*, SHB No. 99-029 (2000). The Board uses a harmless error standard in reviewing the completeness of a shoreline development application. *North Park* at 11 (COL VI).

23.

The Board finds that the record establishes that the information gathered by City staff during its initial review of the application through final decision contained sufficient detail to enable the local government and the Board to determine consistency with the SMA and TSMP. The Board concludes that the Tribe failed to present evidence to support its claim that the SSDP did not comply with applicable shoreline regulations because the application materials were unclear or internally inconsistent.

E. Stipulation (Issue 6)

24.

Through the Stipulation, PSE notified the Board and the City that it would not pursue its planned in-water development in the Hylebos Waterway approved under the SSDP. Ex. P-90; Tornberg Testimony. The Tribe objected to the Stipulation on various grounds, as noted in Issue 6. However, the Tribe failed to present evidence in support of its claims.

25.

The Stipulation provides that PSE will not engage in

> [a]ny in-water or over-water construction, dredging or fuel bunkering in the Hylebos Waterway authorized by SSDP No. SHR 2015-40000246123 other than (a) work to improve three existing

> storm water outfalls to meet new, more stringent storm water requirements and (b) removal of 4,973 square feet (approximately 37%) of overwater decking from the existing pier (pilings to remain in place).

Ex, R-90. The environmental impacts of those activities were analyzed in the Final EIS. Ex. R-4. The activities were also part of the SSDP application reviewed by the City for compliance with the SMA and TSMP. Brenner Testimony; Schultz Testimony; Ex. R-1. PSE's Revised JARPA and Revised Mitigation Plan, submitted to the remaining permitting agencies, reflect the reduced scope of the Project. Exs. R-26 and R-27; Tornberg Testimony.

26.

As the Board concluded above, PSE presented sufficient information in its application for the City and the Board to evaluate the Project for consistency with the SMA and TSMP. The evidence presented at the *de novo* hearing before the Board further substantiated the Project's compliance with the SMA and TSMP. The changes to the SSDP prompted by the Stipulation do not meet the requirements for a permit revision under WAC 173-27-100. The Board concludes that the Tribe did not meet is burden of proof on Issue 6.

27.

Any Finding of Fact deemed to properly be a Conclusion of Law is hereby adopted as such.

Having so found and concluded, the Board enters the following:

ORDER

The City of Tacoma's Shoreline Substantial Development Permit, SHR2014-400002461 23, as limited by the Stipulation and mitigated for under the In-Water Mitigation Plan for Tacoma LNG, dated April 25, 2016, is AFFIRMED

SO ORDERED this 18th day of July, 2016.

SHORELINES HEARINGS BOARD

JOAN M. MARCHIORO, Presiding

LILY SMITH, Member

JOHN BOLENDER, Member

Appendix 3 – Cited Excerpts, Tacoma Shoreline Mater Program

SHORELINE MASTER PROGRAM

An Element of the Comprehensive Plan and
Title 13 of the Tacoma Municipal Code

Tacoma **CITY OF TACOMA, WASHINGTON**

Shoreline Master Program And Land Use Regulatory Code

The City of Tacoma's *Shoreline Master Program* is an element of the City's *Comprehensive Plan* and *Land Use Regulatory Code*. The *Master Program* was developed in compliance with the Washington State Shoreline Management Act and Washington State Growth Management Act. The *Comprehensive Plan* is the City's official statement concerning future growth and development and includes goals, policies and strategies for the health, welfare, safety and quality of life of Tacoma. The *Land Use Regulatory Code* consists of development regulations which control land use activities and includes zoning, platting, and shoreline regulations.

Adopted by the Tacoma City Council on November 29, 2011

Approved by the Department of Ecology, amended, on October 1, 2013

Final Ordinance:

Effective Date: October 15, 2013

City of Tacoma
Planning and Development Services Department
Planning Services Division
747 Market Street, Room 345
Tacoma, WA 98402-3793
(253) 591-5030
www.cityoftacoma.org/planning

General policies and regulations that apply throughout the shoreline, in all shoreline districts and environment designations, are contained in TSMP Chapter 6. Provisions of this chapter address shoreline use, site planning, archeological and historic resources, marine shoreline and critical areas protection, public access, vegetation conservation, views and aesthetics, and water quality. The treatment of critical areas in the shorelines, uses allowed in required buffers, and circumstances under which buffers may be modified are found in TSMP 6.4. Polices and regulations for public access including when and under what circumstances public access is required as part of a proposed project are contained in TSMP 6.5.

TSMP Chapter 7 includes policies and regulations for specific shoreline uses such as commercial, port, industrial, transportation, and the like. Some developments may be subject to more than one of the subsections. TSMP Chapter 8 includes policies and regulation addressing shoreline modifications, including shoreline armoring or bulkheads, dredging and filling, and moorage. Lastly, TSMP Chapter 9 includes policies and regulations that are specific to each shoreline district as well as a table of allowed and prohibited uses.

Initial Procedures

If you intend to develop or use lands adjacent to a shoreline of the state as defined in TSMP 4.1, consult first with Planning and Development Services to determine if you need a shoreline permit; they will also tell you about other necessary government approvals. To find out if your proposal is permitted by the Program, first determine which shoreline district and shoreline environment designation applies to your site. Then refer to Table 9-2 to see if the proposed use is allowed outright, allowed as a conditional use or prohibited. Then check TSMP 2.3 to determine if your proposal is exempt from a shoreline permit. Then refer to the policies and shoreline district regulations in TSMP Chapters 6 through 9. In some cases your proposal may be prohibited, but because of dimensional or other constraints, may be eligible for a shoreline variance (TSMP 2.3.5).

Although your proposal may be permitted by Program regulations or even exempt from specific permit requirements, all proposals must comply with all relevant policies and regulations of the entire Program as well as the general purpose and intent of the SMP.

For development and uses allowed under this Program, the City must find that the proposal is generally consistent with the applicable policies and regulations, unless a variance is to be granted. When your proposal requires a Letter of exemption, submit the proper application to the City's Permit Intake Center. Processing of your application will vary depending on its size, value, and features. Contact Planning and Development Services for additional information.

1.2 Purpose and Intent

Consistent with the Shoreline Management Act, this Program is intended to:

1. Prevent the inherent harm of uncoordinated and piecemeal development of the state's shoreline.

2. Implement the following laws or the applicable elements of the following:

    a. Shoreline Management Act: RCW 90.58;

    b. Shoreline Guidelines: WAC 173-26;

    c. Shoreline Management Permit and Enforcement procedures: WAC 173-27;

    d. and to achieve consistency with the following laws or the applicable elements of the following:

i. The Growth Management Act: RCW 36.70A;

ii. City of Tacoma Comprehensive Plan; and

iii. Chapter 13 of the City of Tacoma Municipal Code;

3. Guide the future development of shorelines in the City of Tacoma in a positive, effective, and equitable manner consistent with the Washington State Shoreline Management Act of 1971 (the "Act") as amended (RCW 90.58).

4. Promote the public health, safety, and general welfare of the community by providing long range, comprehensive policies and effective, reasonable regulations for development and use of Tacoma's shorelines; and

5. Ensure, at minimum, no net loss of shoreline ecological functions and processes and to plan for restoring shorelines that have been impaired or degraded by adopting and fostering the following policy contained in RCW 90.58.020, Legislative Findings for shorelines of the State:

"It is the policy of the State to provide for the management of the shorelines of the State by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner, which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the State and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto...

In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the State shall be preserved to the greatest extent feasible consistent with the overall best interest of the State and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment or are unique to or dependent upon use of the State's shoreline. Alterations of the natural condition of the shorelines of the State, in those limited instances when authorized, shall be given priority for single family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the State, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the State, and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the State.

Permitted uses in the shorelines of the State shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water."

developments and uses undertaken on federal lands and on lands subject to nonfederal ownership, lease or easement, even though such lands may fall within the external boundaries of a federal ownership.

8. Pursuant to RCW 90-58-350, nothing in this chapter shall affect any rights established by treaty to which the United States is a party. The rights of treaty tribes to resources within their usual and accustomed areas should be accommodated.

1.9 Liberal Construction

As provided for in RCW 90.58.900, Liberal Construction, the Act is exempted from the rule of strict construction; the Act and this Program shall therefore be liberally construed to give full effect to the purposes, goals, objectives, and policies for which the Act and this Program were enacted and adopted.

1.10 Severability

Should any section or provision of this program be declared invalid, such decision shall not affect the validity of this Program as a whole.

1.11 Effective Date

This Master Program shall take effect 14 days from Department of Ecology final approval and shall apply to new applications submitted on or after that date and to incomplete applications submitted prior to that date.

1.12 Master Program Review

This Master Program shall be periodically reviewed and adjustments shall be made as are necessary to reflect changing local circumstances, new information or improved data, and changes in State statutes and regulations. This review process shall be consistent with WAC 173-26 requirements and shall include a local citizen involvement effort and public hearing to obtain the views and comments of the public.

g. Shoreline Variance.

2.2 Administrative Authority and Responsibility

A. Director

1. The Director shall have the authority to act upon the following matters:

   a. Interpretation, enforcement, and administration of the City's Shoreline Master Program as prescribed in this title;

   b. Applications for Shoreline Management Substantial Development Permits as prescribed in this title;

   c. Applications for Shoreline Conditional Use Permits as prescribed in this title;

   d. Applications for Shoreline Variances as prescribed in this title;

   e. Modifications or revisions to any of the above approvals.

2.3 Shoreline Permits and Exemptions

2.3.1 Shoreline Substantial Development Permit Required

1. A shoreline substantial development permit shall be required for all proposed use and development of shorelines unless the use or development is specifically identified as exempt from a substantial development permit.

2. The Director may grant a substantial development permit only when the development proposed is consistent with the policies and procedures of RCW.90.58; the provisions of WAC 173-27; and this Program.

3. In the granting of all shoreline substantial development permits, consideration shall be given to the cumulative environmental impact of additional requests for like actions in the area. For example, if shoreline substantial development permits were granted for other developments in the area where similar circumstances exist, the sum of the permitted actions should also remain consistent with the policy of RCW 90.58.020 and should not produce significant adverse effects to the shoreline ecological functions and processes or other users.

2.3.2 Exemptions from a Substantial Development Permit

1. All uses within shoreline jurisdiction must be consistent with the regulations of this Master Program whether or not they require a Shoreline Substantial Development Permit. An exemption from the Substantial Development Permit requirements does not constitute an exemption from the policies and use regulations of the Shoreline Management Act, the provisions of this Master Program, and other applicable City, state, or federal permit requirements.

2. The Director is hereby authorized to grant or deny requests for a letter of exemption from the shoreline substantial development permit requirement for uses and developments within

CHAPTER 4 SHORELINES OF THE STATE

4.1 Shoreline Jurisdiction

The shoreline area to be regulated under the City of Tacoma's SMP includes all "shorelines of statewide significance", "shorelines of the state" and their adjacent "shorelands" (defined as the upland area within 200 feet of the OHWM), as well as any associated wetlands. "Associated wetlands" are in proximity to and either influence or are influenced by tidal waters or lake or streams subject to the SMA (WAC 173-22-030(1)). Water bodies in Tacoma regulated under the SMA and this Program include the marine shorelines of Puget Sound and Commencement Bay, the Puyallup River, Hylebos Creek, and Wapato Lake.

For the purposes of this Program, shoreline jurisdiction shall include designated floodways and the 100-year floodplain, that is within 200 feet of the designated floodway.

For other critical areas that occur within shoreline jurisdiction, such as geologically hazardous areas, only that portion of the critical area and its buffer that is within 200' of the ordinary high water mark (OHWM) of a marine or freshwater shoreline shall be regulated by this Program. That portion of the critical area that occurs outside 200' of the OHWM shall be regulated by TMC 13.11. To avoid dual regulatory coverage of a critical area by the TSMP and TMC 13.11 Critical Areas, TMC 13.11 shall not apply to any portion of a critical area and/or its buffer that is within the jurisdiction of this Program.

4.2 Designation of Shorelines of Statewide Significance

In accordance with RCW 90.58.030(2)(f), the following City of Tacoma shorelines are designated shorelines of statewide significance:

1. The Puyallup River and associated shorelands within the City boundary consistent with RCW 90.58.030(2)(f)(v)(A) and (vi); and

2. Those areas of the Puget Sound and Commencement Bay within the City lying seaward from the line of extreme low tide.

4.3 Statewide Interests Protected

In accordance with RCW 90.58.020, the City shall manage shorelines of statewide significance in accordance with this section and in accordance with this Program as a whole. Preference shall be given to uses that are consistent with the statewide interest in such shorelines. Uses that are not consistent with this section or do not comply with the other applicable policies and regulations of this Program shall not be permitted on shorelines of statewide significance. In managing shorelines of statewide significance, The City of Tacoma shall:

1. Recognize and protect the statewide interest over local interest;

2. Preserve the natural character of the shoreline;

3. Seek long-term benefits over short-term benefit;

4. Protect the resources and ecology of the shoreline;

5. Increase public access to publicly owned areas of the shoreline;

5.5.2 Aquatic Environment

A. Purpose

The purpose of the "aquatic" environment is to protect, restore, and manage the unique characteristics and resources of the marine areas waterward of the ordinary high-water mark.

B. Areas Proposed for Designation

1. District S-13 Marine Waters of the State

C. Designation Criteria

The "aquatic" environment designation is assigned to marine waters below the ordinary high-water mark and the underlying lands.

D. Management Policies

1. Uses

a. Limit new uses and activities within the Aquatic environment, with few exceptions, to water-dependent uses and public access/recreational improvements designed to provide access to the shoreline for a substantial number of people.

b. Water-enjoyment and water-related uses may be permitted on/in existing over-water buildings.

c. Non-water oriented uses should only be permitted on/in existing over-water structures where they are in support of water-oriented uses and the size of the use is limited to the minimum necessary to support the structure's intended use.

d. New uses and development in the Aquatic environment that have an upland connection should also be consistent with the permitted uses in the adjacent upland shoreline designation and district. Uses prohibited in the upland shoreline district should not be permitted overwater.

e. Aquatic uses and modifications should be designed and managed to prevent degradation of water quality and alteration of natural hydrologic conditions including sediment transport and benthic drift patterns.

f. Water oriented recreational uses in the aquatic environment should not detrimentally impact the operations of existing water-dependent port and industrial uses.

2. New Over-Water Structures

a. New over-water structures may be permitted only for water-dependent uses, restoration projects, public access, or emergency egress. New over-water structures must show significant public benefits.

b. New overwater structures for non-water-dependent uses, including residential, restaurants, hotels and office buildings, should be strictly prohibited.

c. The size of new over-water structures should be limited to the minimum necessary to support the structure's intended use.

d. In order to reduce the impacts of shoreline development and increase effective use of water resources, multiple use of over-water facilities should be encouraged.

3. Reuse of Over-water Structures

a. Refurbish or rebuild existing piers and wharves along Thea Foss Waterway and Ruston Way to maintain a modern-day link with the community's maritime history.

b. Develop, in coordination with the Foss Waterway Development Authority, a moorage float and dock facility for passenger-only ferries and other seasonal commercial tour vessels at the Municipal Dock site on the Thea Foss Waterway.

4. Design Elements

a. All developments and uses on navigable waters or their beds should be located and designed to minimize interference with surface navigation, to be compatible with adjacent aquatic and upland uses, and to consider impacts to public views.

5. Environmental Protection

a. Shoreline uses and modifications within the Aquatic environment should be designed and managed consistent with the Environmental Protection policies and regulations of Chapter 6 including but not limited to preservation of water quality, habitat (such as eelgrass, kelp, forage fish spawning beaches, etc.), natural hydrographic conditions, and safe, unobstructed passage of fish and wildlife, particularly those species dependent on migration.

b. Remove abandoned over-water structures when they no longer serve their permitted use unless:

i. Retaining such structures provides a net environmental benefit, for example, artificial reef effect of concrete anchors; or

ii. Such structures can be reused in a manner that helps maintain the character of the City's historic waterfront; or

iii. Removing such structures would have substantial potential to release harmful substances into the waterways despite use of reasonable precautions.

5.5.3 Shoreline Residential Environment

A. Purpose

The Shoreline Residential designation accommodates residential development and accessory structures that are consistent with this chapter. An additional purpose is to provide appropriate public access and recreational uses.

techniques for surface water management should be implemented to minimize adverse impacts to existing shoreline ecological functions.

6. Public access and public recreation objectives should be implemented whenever feasible and adverse ecological impacts can be avoided. Public access along the marine shoreline should be provided, preserved, or enhanced consistent with this policy.

7. Protection of ecological functions should have priority over public access, recreation and other development objectives whenever a conflict exists.

8. Permitted uses should consist of low intensity uses that preserve the natural character of the area or promote preservation of open space and critical areas.

9. Water-oriented commercial uses are encouraged when specific uses and design result in substantial open space, public access and/or restoration of ecological functions and if compatible with surrounding uses.

10. Existing historic and cultural buildings and areas should be preserved, protected and reused when feasible.

11. Water-oriented uses should be given priority over nonwater-oriented uses. For shoreline areas adjacent to commercially navigable waters, water-dependent uses should be given highest priority.

5.5.5 High-Intensity Environment

A. Purpose

The purpose of the "high-intensity" environment is to provide for high-intensity water-dependent and water-oriented mixed-use commercial, transportation, and industrial uses while protecting existing ecological functions and restoring ecological functions in areas that have been previously degraded.

B. Areas Proposed for Designation:

1. District S-1a Western Slope South

2. District S-7 Schuster Parkway

3. District S-10 Port Industrial Area

4. District S-15 Point Ruston/Slag Peninsula

C. Designation Criteria

The "high-intensity" environment designation is assigned to shoreline areas if they currently support high-intensity uses related to commerce, transportation or navigation; or are suitable and planned for high-intensity water-oriented uses.

D. Management Policies

1. First priority should be given to water-dependent uses. Second priority should be given to water-related and water-enjoyment uses. Non-water oriented uses should not be permitted

except as part of mixed use developments and where they do not conflict with or limit opportunities for water oriented uses or on sites where there is no direct access to the shoreline.

2. Full utilization of existing high intensity areas should be achieved before further expansion of intensive development is permitted.

3. Policies and regulations shall assure no net loss of shoreline ecological functions as a result of new development. Where applicable, new development shall include environmental cleanup and restoration of the shoreline to comply with relevant state and federal law.

4. Where feasible, visual and physical public access should be required as provided for in WAC 173-26-221(4)(d). Pedestrian and bicycle paths should be permitted as public access opportunities.

5. Aesthetic objectives should be implemented by means such as sign control regulations, appropriate development siting, screening and architectural standards, and maintenance of natural vegetative buffers.

6. Require new development to provide physical and visual access to shorelines whenever possible and consistent with constitutional and statutory limitations, provided such access does not interfere with industrial operations or endanger public health and safety.

5.5.6 Downtown Waterfront

A. Purpose

1. Foster a mix of private and public uses, including parks and recreation facilities, that are linked by a comprehensive public access system;

2. Strengthen the pedestrian-orientation of development on the Thea Foss Waterway;

3. Promote the design vision for the Thea Foss Waterway through the establishment and implementation of design guidelines and standards;

4. Manage the shoreline area in a way that optimizes circulation, public access, development, and environmental protection;

5. Encourage and provide opportunities for mixed-use development that supports water-oriented uses and provides significant public benefit and enjoyment of the Waterway for the citizens of Tacoma;

6. Promote the east side of the Foss Waterway as a center for industries and firms specializing in the design, research, development, and implementation of clean technology;

7. Encourage a mix of uses, including water-oriented industrial and commercial uses.

8. Encourage high density residential development;

9. Retain and enhance characteristics of the Thea Foss Waterway that support marine and recreational boating activities.

discovery. Based upon the findings of the site investigation and consultation with the Washington State Department of Archaeology and Historic Preservation, the Puyallup Tribe, and the proponents unanticipated discovery plan prepared consistent with TSMP 2.4, the Director may require that an immediate site assessment be conducted or may allow stopped work to resume.

3. If a site assessment is required, the area of inadvertent discovery shall be stabilized, contained or otherwise protected until the site assessment and/or CRMP is completed. The site assessment shall be prepared to determine the significance of the discovery and the extent of damage to the resource and shall be distributed to the Washington State Department of Archaeology and Historic Preservation, and the Puyallup Tribe

4. Upon receipt of a positive determination of a site's significance, the Director may invoke the provisions of TSMP 2.4.6 for a Cultural Resource Management Plan (CRMP), if such action is reasonable and necessary to implement.

6.4 Marine Shoreline and Critical Areas Protection

Intent

The intent of this chapter is to provide policies and regulations that protect the shoreline environment as well as the critical areas found within the shoreline jurisdiction. These policies and regulations apply to all uses, developments and activities that may occur within the shoreline jurisdiction regardless of the Shoreline Master Program environment designation. They are to be implemented in conjunction with the specific use and activity policies and regulations found in this Master Program.

The Shoreline Management Act (SMA) mandates the preservation of the ecological functions of the shoreline by preventing impacts that would harm the fragile shorelines of the state. When impacts cannot be avoided, impacts must be mitigated to assure no-net-loss of ecological function necessary to sustain shoreline resources. The SMA also mandates that local master programs include goals, policies and actions for the restoration of impaired shoreline ecological functions to achieve overall improvements in shoreline ecological functions over time.

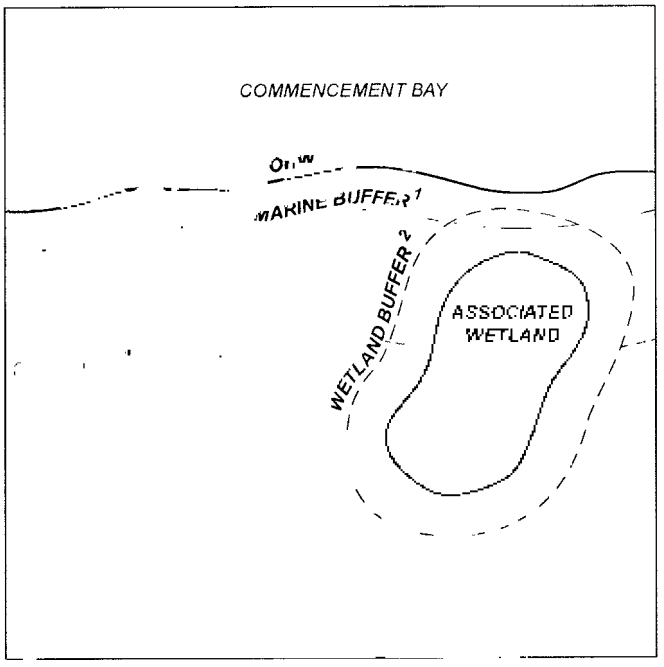
The environment protection policies and regulations of this Master Program address general environmental impacts and critical areas. General environmental impacts include effects upon the elements of the environment listed in the State Environmental Policy Act (SEPA) (WAC 197-11-600 and WAC 197-11-666). This chapter is not intended to limit the application of SEPA.

Organization

This chapter first presents General Policies and Regulations including critical area buffer modifications, mitigation sequencing, and sureties. Second, it provides standards for marine shoreline buffers, which provide an 'avoidance' function for ecosystem-wide processes and functions and are based upon a review of the existing ecological functions as well as land use patterns and level of alteration. These standards additionally act as shoreline setbacks, establishing buffer reductions based upon the use orientation, ensuring that valuable and scarce shoreline frontage is reserved for priority uses. Thirdly, this chapter presents policies and regulations for specifically defined "critical areas" including: Fish and Wildlife Habitat Conservation Areas, Wetlands, Streams and Riparian Habitats, Geologically Hazardous Areas, and Aquifer Recharge Areas. When using this chapter, a permit applicant should review the general policies and regulations first, which establishes standards applicable to all of the specific critical areas. Then, review the specific type of critical area that is applicable to the permit. For instance, the General Regulations establish standards for buffer modifications and for mitigation, but each section thereafter will have additional detail for buffer reductions and mitigation that are specific to each type of critical

area. Figure 6.1 provides a graphic illustration of the types of buffers present in the shoreline and the TSMP location of relevant regulations. Finally, Chapter 2 Administration outlines the permit submittal requirements necessary for critical areas review.

Figure 6-1. Multiple Types of Shoreline Buffers



1. Marine Shoreline buffer standards — TSMP 6.43 (B) & (C)
2. Wetland buffer standards —TSMP 6.4.5 (B) through (F)
3. Stream buffer standards — TSMP 6.4.6 (B) through (F)

6.4.1 General Policies

1. Maintain healthy, functioning ecosystems through the protection of ground and surface waters, marine shorelines, wetlands, and fish and wildlife and their habitats, and to conserve biodiversity of plant and animal species.

2. Prevent cumulative adverse impacts to water quality, streams, FWHCAs, shoreline functions and processes, and wetlands over time.

3. Give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

4. Shoreline use and development should be carried out in a manner that achieves no net loss of ecological functions; in assessing the potential for net loss of ecological functions or processes, project specific and cumulative impacts should be considered.

5. The City should encourage innovative restoration strategies to provide for comprehensive and coordinated approaches to mitigating cumulative impacts and restoration rather than piecemeal mitigation.

6. Required mitigation should be in-kind and on-site, when feasible and practicable, and sufficient to maintain the functions and processes of the modified critical area or buffer.

7. Protect members of the public and public resources and facilities from injury, loss of life, or property damage due to landslides and steep slope failures, erosion, seismic events, volcanic eruptions, flooding or similar events.

6.4.2 General Regulations

A. General Regulations

1. Shoreline use and development shall be carried out in a manner that prevents or mitigates adverse impacts so that no net loss of existing ecological functions occurs; in assessing the potential for net loss of ecological functions or processes, project specific and cumulative impacts shall be considered.

2. Any shoreline development proposal that includes modification to a marine shoreline, marine buffer, critical area or buffer is subject to the Review Process in TSMP Section 2.4.2.

B. Critical Area Buffer Modification

1. Modification of a critical area and/or marine buffer is prohibited except when:

   a. Modification is necessary to accommodate an approved water-dependent or public access use, including trails and/or pedestrian/bicycle paths; provided, that such development is operated, located, designed and constructed to minimize and, where possible, avoid disturbance to shoreline functions and native vegetation to the maximum extent feasible; or

   b. Modification is necessary to accommodate a water-related or water-enjoyment use or mixed-use development if it includes a water-oriented component provided that the proposed development is operated, located, designed and constructed to minimize and, where possible, avoid disturbance to native vegetation and shoreline and critical area functions to the maximum extent feasible; or

   c. Modification is associated with a mitigation, restoration, or enhancement action that has been approved by the City and which complies with all of the provisions of this Program; or

   d. Modification is approved pursuant to the variance provisions of this Program (TSMP Section 2.3.5).

2. The following specific activities may be permitted within a critical area or marine buffer as part of an authorized use or development, subject to submittal of a critical area report, when they comply with the applicable policies and regulations of this Program.

   a. Clearing, filling and grading;

   b. New, replacement, or substantially improved shoreline modification and/or stabilization features;

   c. Construction of trails, roadways, and parking;

d. New utility lines and facilities; and

e. Stormwater conveyance facilities.

C. Modification of a shoreline or critical area buffer is subject to the site review requirements in TSMP Section 2.4.2. General Mitigation Requirements

1. If modification to a marine shoreline, wetland, stream, FWHCA, or buffer is unavoidable, all adverse impacts resulting from a development proposal or alteration shall be mitigated so as to result in no net loss of shoreline and/or critical area functions or processes.

2. Mitigation shall occur in the following prioritized order:

a. Avoiding the adverse impact altogether by not taking a certain action or parts of an action, or moving the action;

b. Minimizing adverse impacts by limiting the degree or magnitude of the action and its implementation by using appropriate technology and engineering, or by taking affirmative steps to avoid or reduce adverse impacts;

c. Rectifying the adverse impact by repairing, rehabilitating or restoring the affected environment;

d. Reducing or eliminating the adverse impact over time by preservation and maintenance operations during the life of action;

e. Compensating for the adverse impact by replacing, enhancing, or providing similar substitute resources or environments and monitoring the adverse impact and the mitigation project and taking appropriate corrective measures;

f. Monitoring the impact and compensation projects and taking appropriate corrective measures.

3. Type and Location of Mitigation

a. Preference shall be given to mitigation projects that are located within the City of Tacoma. Prior to mitigating for impacts outside City of Tacoma jurisdiction, applicants must demonstrate that the preferences herein cannot be met within City boundaries.

b. Natural, Shoreline Residential and Urban Conservancy Environments:

i. Compensatory mitigation for ecological functions shall be either in-kind and on-site, or in-kind and within the same reach, subbasin, or drift cell, except when all of the following apply:

- There are no reasonable on-site or in subbasin opportunities (e.g. on-site options would require elimination of high functioning upland habitat), or on-site and in subbasin opportunities do not have a high likelihood of success based on a determination of the natural capacity of the site to compensate for impacts. Considerations should include: anticipated marine

shoreline/wetland/stream mitigation ratios, buffer conditions and proposed widths, available water to maintain anticipated hydrogeomorphic classes of wetlands, or streams when restored, proposed flood storage capacity, potential to mitigate riparian fish and wildlife impacts (such as connectivity); and

- Off-site mitigation has a greater likelihood of providing equal or improved critical area functions than the impacted critical area.

c. High-Intensity and Downtown Waterfront Environments:

i. The preference for compensatory mitigation is for innovative approaches that would enable the concentration of mitigation into larger habitat sites in areas that will provide greater critical area or shoreline function.

ii. The Director may approve innovative mitigation projects including but not limited to activities such as advance mitigation, mitigation banking and preferred environmental alternatives. Innovative mitigation proposals must offer an equivalent or better level of protection of critical area functions and values than would be provided by a strict application of on-site and in-kind mitigation. The Director shall consider the following for approval of an innovative mitigation proposal:

- Creation or enhancement of a larger system of natural areas and open space is preferable to the preservation of many individual habitat areas;
- Consistency with Goals and Objectives of the Shoreline Restoration Plan and the Goals and Objectives of this Program;
- The applicant demonstrates that long-term management and protection of the habitat area will be provided;
- There is clear potential for success of the proposed mitigation at the proposed mitigation site;
- Restoration of marine shoreline functions or critical areas of a different type is justified based on regional needs or functions and processes;
- Voluntary restoration projects initiated between 2006 and the adoption of this program when they comply with Section D Mitigation Plan Requirements. If this option is used, the relief provisions set forth in RCW 90.58.580 do not apply;
- The replacement ratios are not reduced or eliminated, unless the reduction results in a preferred environmental alternative; and
- Public entity cooperative preservation agreements such as conservation easements.

d. Aquatic Environments:

minimum of five (5) years after they have been constructed and approved. The value of the surety shall be based on the average or median of three contract bids that establish all costs of compensation, including costs relative to performance, monitoring, maintenance, and provision for contingency plans. The amount of the surety shall be set at 150 percent of the average expected cost of the compensation project. All surety shall be on a form approved by the City Attorney. Without written release, the surety cannot be cancelled or terminated. The Director shall release the surety after determination that the performance standards established for measuring the effectiveness and success of the project have been met.

6.4.3 Marine Shorelines

Nearly all shoreline areas, even substantially developed or degraded areas, retain important ecological functions. For example, an intensely developed harbor area may also serve as a fish migration corridor and feeding area critical to species survival. Also, ecosystems are interconnected. For example, the life cycle of anadromous fish depends upon the viability of freshwater, marine, and terrestrial shoreline ecosystems, and many wildlife species associated with the shoreline depend on the health of both terrestrial and aquatic environments. Therefore, the marine shoreline buffer standards for protecting ecological functions generally apply to all shoreline areas, not just those that remain relatively unaltered. Modifications to and activities in marine waters or a marine shoreline buffer are subject to the review process in TSMP 2.4.2 as well as the mitigation requirements of 6.4.2(C) through (D).

Managing shorelines for protection of their natural resources depends on sustaining the functions provided by:

- Ecosystem-wide processes such as those associated with the flow and movement of water, sediment and organic materials; the presence and movement of fish and wildlife and the maintenance of water quality.

- Individual components and localized processes such as those associated with shoreline vegetation, soils, water movement through the soil and across the land surface and the composition and configuration of the beds and banks of water bodies.

The loss or degradation of the functions associated with ecosystem-wide processes, individual components and localized processes can significantly impact shoreline natural resources and may also adversely impact human health and safety.

In addition, shoreline areas, being a limited ecological and economic resource, are the setting for competing uses and ecological protection and restoration activities. Therefore, marine buffer standards also implement the use priorities of the WAC by:

- Reserving appropriate areas for protecting and restoring ecological functions to control pollution and prevent damage to the natural environment and public health.
- Reserving shoreline areas for water-dependent and associated water related uses.

A. Classification

1. Marine shorelines include all marine "shorelines of the state", including commencement Bay and the Tacoma Narrows, as defined in RCW 90.58.030 within the City of Tacoma.

B. Marine Shoreline Buffers

1. A buffer area shall be maintained on all marine shorelines for all non-water-dependent and public access uses adjacent to the marine shoreline to protect and maintain the integrity, functions and processes of the shoreline and to minimize risks to human health and safety. The buffer shall be measured horizontally from the edge of the ordinary high water mark landward.

2. Buffers shall consist of an undisturbed area of native vegetation or areas reserved for priority uses (water-dependent uses and public access), including restoration established to protect the integrity, functions and processes of the shoreline. Required buffer widths shall reflect the sensitivity of the shoreline functions and the type and intensity of human activity proposed to be conducted nearby.

3. Buffer widths shall be established according to Table 6-1. Buffer widths may be increased under the following circumstances:

   a. The Director determines that the minimum width is insufficient to prevent loss of shoreline functions.

   b. The Director determines that the proposed shoreline modification would result in an adverse impact to critical saltwater habitats including kelp beds, eelgrass beds, or spawning and holding areas for forage fish.

Table 6-1. Standard Marine Buffers

Marine Habitat Area	Buffer Width (feet)
S-1a, S1b	50
S-2	115
S-3, S-4	200
S-5, S-6, S-6/7, S-7	115
S-8, S-10	50
S-11	115
S-12	200
S-15	50

C. Marine Shoreline Buffer Reductions

1. All uses and development within a reduced buffer remain subject to mitigation sequencing and any unmitigated impacts resulting from a buffer reduction are required to be compensated for consistent with TSMP 6.4.2(A) through (E) to achieve no net loss of ecological functions.

2. In all shoreline designations, water-dependent and public access uses and development may reduce the standard buffer such that direct water access is provided.

3. 'Natural' Designated Shorelines: Buffer reductions shall not be permitted for non-water-dependent and public access uses and development except through a shoreline variance.

4. 'Urban-Conservancy' and 'Shoreline Residential' Designated Shorelines: The buffer shall not be reduced to any less than ¾ of the standard buffer width for water-related and water-enjoyment uses and development, including mixed-use development. Further reductions shall only be allowed through a shoreline variance.

5. 'High-Intensity' and 'Downtown Waterfront' Designated Shorelines: Buffer reductions for water-related and water-enjoyment uses, including mixed-use development, shall not exceed ½ the standard buffer width. Further reductions shall only be allowed through a shoreline variance.

6. Reductions of the standard buffer for any stand-alone non-water-oriented use or development shall not be allowed except through a shoreline variance.

7. Reduction of the standard buffer may be permitted for stairs or walkways necessary to access the shoreline or access an existing use or structure provided that any stair or walkway in the marine shoreline complies with all provisions of the Program, conforms to the existing topography and, to the extent feasible, minimizes impervious surfaces.

8. Where a marine buffer geographically coincides with a stream, FWHCA or wetland, provisions for increasing buffers, buffer averaging, and buffer reductions for the wetland and stream component shall apply as described within this chapter only when there is no impact to shoreline functions associated with the marine shoreline.

D. Marine Shoreline Mitigation Requirements

1. All marine shoreline buffer mitigation shall comply with applicable mitigation requirements specified in TSMP Section 6.4.2(C) and (D) and 6.4.3 (D) and (E) including, but not limited to, mitigation plan requirements, monitoring and bonding.

2. Where a designated marine shoreline geographically coincides with a FWHCA, stream or wetland, mitigation will comply with applicable mitigation requirements for those resources as described within this Program.

E. Marine Shoreline Mitigation Ratios

1. The following mitigation ratios are required for impacts to the marine shoreline buffer. The first number specifies the area of replacement shoreline buffer area, and second specifies the area of altered shoreline buffer area.

   a. 1:1 for areas on the parcel or on a parcel that abuts the ordinary high watermark within one quarter (1/4) mile along the shoreline from where the vegetation removal, placement of impervious surface or other loss of habitat occurred.

   b. 3:1 for off-site mitigation that occurs more than one quarter (1/4) mile along the shoreline from where the vegetation removal, placement of impervious surface or other loss of habitat occurred. Mitigation must be consistent with the Shoreline Restoration Plan.

2. If mitigation is performed off-site, a conservation easement or other legal document must be provided to the City to ensure that the party responsible for the maintenance and monitoring of the mitigation has access and the right to perform these activities.

6.4.4 Fish and Wildlife Habitat Conservation Areas (FWHCAs)

This section provides policies and regulations that apply to critical saltwater habitats as defined by WAC 173-26-221(2)(c)(iii). Kelp beds, eelgrass beds, herring spawning areas, smelt and sand lance spawning areas and other critical saltwater habitats are classified as fish and wildlife habitat conservation areas and are designated as "critical areas" in WAC 365-190-080(5)(a)(6). The guidelines for classifying critical areas also include commercial and recreational shellfish areas. The Department of Fish and Wildlife has identified the following habitats of special concern: kelp beds, eelgrass beds, herring spawning areas, sand lance spawning areas, smelt spawning areas, juvenile salmonid migration corridors, rock sole spawning beds, rockfish settlement and nursery areas, and lingcod settlement and nursery areas.In addition, it's important to give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries, such as juvenile salmon (RCW 36.70A.172), some of which are classified as "Threatened" under the Endangered Species Act. Critical fish and wildlife habitat conservation areas include, but are not limited to, areas with which endangered, threatened, and sensitive species have a "primary association" (see WAC 365-190-080(5)(a)(i)). Critical Saltwater Habitats include these "primary association" areas. Examples of "primary association" areas include, but are not limited to, the following:

- Shallow water/low gradient habitats along shorelines
- Migratory corridors that allow juvenile salmon to move within and between habitats (e.g., beaches, as well as eelgrass, kelp, etc.).

In addition, a diversity of shoreline habitats is essential for providing adequate functions for juvenile salmon.

A. FWHCA Classification

1. Fish and Wildlife Habitat Conservation Areas (FWHCAs) shall include:

   a. Lands containing priority habitats and species;

   b. All public and private tidelands or bedlands suitable for shellfish harvest, including any shellfish protection districts established pursuant to RCW 90.72. The Washington Department of Health's classification system shall be used to classify commercial shellfish areas;

   c. Critical saltwater habitats including kelp and eelgrass beds and herring, sand lance, and smelt spawning areas. Kelp and eelgrass beds may be classified and identified by the Washington Department of Natural Resources Aquatic Lands Program and the Washington Department of Ecology. Locations are compiled in the WDNR Aquatic Lands Shore Zone Inventory, and the Puget Sound Environmental Atlas, Volumes 1 and 2. Herring, sand lance, and surf smelt spawning times and locations are outlined in RCW 220-110, Hydraulic Code Rules and the Puget Sound Environmental Atlas;

   d. Natural ponds or lakes under 20 acres and their submerged aquatic beds that provide critical fish or wildlife habitat; and

   e. Lakes, ponds, streams and rivers planted with game fish, including those planted under the auspices of a federal, state, local, or tribal program and waters which support priority fish species as identified by the Washington Department of Fish and Wildlife.

B. FWHCA Standards

1. Whenever activities are proposed within or adjacent to a habitat conservation area with which state or federally endangered, threatened, or sensitive species have a primary association, such area shall be protected through the application of protection measures in accordance with a critical area report and habitat management plan prepared by a qualified professional and approved by the City.

2. If the Director determines that a proposal is likely to adversely impact a FWHCA, s/he may require additional protective measures such as a buffer area.

3. Any activity proposed in a designated FWHCA shall be consistent with the species located there and all applicable state and federal regulations regarding that species. In determining allowable activities for priority habitats and species that are known or that become known, the provisions of the Washington State Hydraulic Code and Department of Fish and Wildlife's (WDFW) Management Recommendations for Washington Priority Habitats and Species shall be reviewed.

4. Where a designated FWHCA geographically coincides with a marine shoreline, stream or wetland, the appropriate wetland or stream buffer and associated buffer requirements shall apply as described in this Program.

5. Bald eagle habitat shall be protected pursuant to the Washington State Bald Eagle Protection Rules (WAC 232-12-292). The City shall verify the location of eagle management areas for each proposed activity. Approval of the activity shall not occur prior to approval of the habitat management plan by the Washington Department of Fish and Wildlife.

6. All activities, uses and alterations proposed to be located in water bodies used by anadromous fish or in areas that affect such water bodies shall give special consideration to the preservation and enhancement of anadromous fish habitat.

7. No structures of any kind shall be placed in or constructed over critical saltwater habitats unless they result in no net loss of ecological function, are associated with a water-dependent or public access use, comply with the applicable requirements within this Program and meet all of the following conditions:

    a. The project, including any required mitigation, will result in no net loss of ecological functions associated with critical saltwater habitat;

    b. Avoidance of impacts to critical saltwater habitats by an alternative alignment or location is not feasible or would result in unreasonable and disproportionate cost to accomplish the same general purpose;

    c. The project is consistent with the state's interest in resource protection and species recovery;

    d. The public's need for such an action or structure is clearly demonstrated and the proposal is consistent with protection of the public trust, as embodied in RCW 90.58.020;

e. Shorelands that are adjacent to critical saltwater habitats shall be regulated per the requirements within this Program;

f. A qualified professional shall demonstrate compliance with the above criteria in addition to the required elements of a critical area report as specified in this Chapter.

C. FWHCA Mitigation Requirements

1. All FWHCA mitigation shall comply with applicable mitigation requirements specified in TSMP Section 6.4.2 including, but not limited to, mitigation plan requirements, monitoring and bonding.

2. Where a designated FWHCA geographically coincides with a marine shoreline, stream or wetland, mitigation will comply with applicable mitigation requirements for those resources as described within this Program.

3. Mitigation sites shall be located to preserve or achieve contiguous wildlife habitat corridors, in accordance with a mitigation plan that is part of an approved critical area report, to minimize the isolating effects of development on habitat areas, so long as mitigation of aquatic habitat is located within the same aquatic ecosystem as the area disturbed.

4. Mitigation shall achieve equivalent or greater biological and hydrological functions and shall include mitigation for adverse impacts upstream or downstream of the development proposal site. Mitigation shall address each function affected by the alteration to achieve functional equivalency or improvement on a per function basis.

6.4.5 Wetlands

Wetlands are those areas that are inundated or saturated by ground or surface 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. A wetland directly impacts water quality and stormwater control by trapping and filtering surface and ground water. Wetlands also provide valuable habitat for fish and wildlife. Because of the difficulty in replacing these rare and valuable areas, these regulations control development adjacent to and within wetlands, and limit the amount of wetlands, which may be altered. The purpose of these regulations is to protect the public from harm by preserving the functions of wetlands as recharge for ground water, flood storage, floodwater conveyance, habitat for fish and wildlife, sediment control, pollution control, surface water supply, aquifer recharge and recreation.

A. Wetland Classification

1. Wetlands shall be classified Category I, II, III, and IV, in accordance with the criteria from the Washington State Wetlands Rating System for Western Washington, August 2004, Revised Annotated Version, August 2006, Publication Number 04-06-025, August 2004.

2. Category I wetlands are those that 1) represent a unique or rare wetland type; or 2) are more sensitive to disturbance than most wetlands; or 3) are relatively undisturbed and contain ecological attributes that are impossible to replace within a human lifetime; or 4) provide a high level of functions. Category I wetlands include the following types of wetlands: Estuarine wetlands, Natural Heritage wetlands, Bogs, Mature and Old-growth Forested wetlands; wetlands that perform many functions very well and that score 70 or more points in the Washington Wetlands Rating System for Western Washington.

8. Land transportation and utility corridors serving ports and water-related industry should follow the guidelines provided under the sections dealing with utilities and road and railroad construction. Where feasible, transportation and utility corridors should not be located in the shoreline to reduce pressures for the use of waterfront sites.

9. Port and industrial uses should be encouraged to permit viewing of harbor areas from viewpoints, and similar public facilities which would not interfere with operations or endanger public health and safety.

10. Special attention should be given to the design and development of facilities and operational procedures for fuel handling and storage in order to minimize accidental spills and to the provision of means for satisfactorily handling those spills which do occur.

B. "S-8" Thea Foss Shoreline District

1. Improvements to existing industrial uses, such as the aesthetic treatment of storage tanks, cleanup of blighted areas, landscaping, exterior cosmetic improvements, landscape screening, and support of the Waterway environmental cleanup and remediation plan effort are encouraged.

7.6.2 Regulations

A. General Regulations

1. Water-dependent port and industrial uses shall have shoreline location priority over all other uses in the S-7 and S-10 Shoreline Districts.

2. The location, design, and construction of port and industrial uses shall assure no net loss of ecological functions.

3. New non-water-oriented port and industrial uses are prohibited unless they meet one of the following criteria:

   a. The use is part of a mixed-use project or facility that supports water-oriented uses and provides a significant public benefit with respect to the public access and restoration goals of this Program;

   b. Navigability is severely limited at the proposed site and the use provides a significant public benefit with respect to the public access and restoration goals of this Program;

   c. The use is within the shoreline jurisdiction but physically separated from the shoreline by a separate property, public right-of-way, or existing use, and provides a significant public benefit with respect to the public access and restoration goals of this Program. For the purposes of this Program, public access trails and facilities do not constitute a separation.

4. Deep-water terminal expansion shall not include oil super tanker transfer or super tanker storage facilities.

5. Where shoreline stabilization or in-water structures are required to support a water-dependent port or industrial use, the applicant shall be required to demonstrate:

a. That the proposed action shall give special consideration to the viability of migratory salmonids and other aquatic species;

b. That contaminated sediments are managed and/or remediated in accordance with state and federal laws;

c. That public access to the water body is provided where safety and operation of use are not compromised;

d. That shading and water surface coverage is the minimum necessary for the use.

6. Port and industrial development shall comply with all federal, state, regional and local requirements regarding air and water quality.

7. Where possible, oxidation and waste stabilization ponds shall be located outside the Shoreline District.

8. Best management practices shall be strictly adhered to for facilities, vessels, and products used in association with these facilities and vessels.

9. All developments shall include the capability to contain and clean up spills, discharges, or pollutants, and shall be responsible for any water pollution which they cause.

10. Petroleum products sump ponds shall be covered, screened, or otherwise protected to prevent bird kill.

11. Procedures for handling toxic materials in shoreline areas shall prevent their entering the air or water.

B. Log Rafting and Storage

1. New log rafting and storage shall only be allowed in the "S-10" Port Industrial Area Shoreline District, the "S-11" Marine View Drive Shoreline District and in the associated portions of the "S-13" Marine Waters of the State Shoreline District.

2. Restrictions shall be considered in public waters where log storage and handling are a hindrance to other beneficial water uses.

3. Offshore log storage shall only be allowed on a temporary basis, and should be located where natural tidal or current flushing and water circulation are adequate to disperse polluting wastes.

4. Log rafting or storage operations are required to implement the following, whenever applicable:

a. Logs shall not be dumped, stored, or rafted where grounding will occur.

b. Easy let-down devices shall be provided for placing logs in water. The freefall dumping of logs into water is prohibited.

c. Bark and wood debris controls and disposal shall be implemented at log dumps, raft building areas, and mill-side handling zones. Accumulations of bark and wood debris

Appendix 4 – Cited Shorelines Hearings Board Decisions

SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

LEONEL S. and ISLE K. STOLLAR, husband and wife; PAUL B. and MARGERY M. GREENAWALT, husband and wife; PATRICK J. and SUZANNE C. MILLER, husband and wife; STEPHEN and FRANCINE SADOWSKY, husband and wife; and MARK and CHERYL VRIELING, husband and wife, Petitioners, v. CITY OF BAINBRIDGE ISLAND, and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondents.	SHB NO. 06-024 06-027 CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Petitioners Leonel S. and Isle K. Stollar, Paul B. and Margery M. Greenawalt, Patrick J. and Suzanne C. Miller, Stephen and Francine Sadowsky, and Mark and Cheryl Vrieling (Petitioners) filed a petition with the Shorelines Hearings Board (Board) for review of a Department of Ecology (Ecology) decision, dated July 28, 2006, denying a joint application for a conditional use permit to construct a common single-family residential bulkhead. Petitioners Stollar and Greenawalt had previously filed a petition for review of the decision of the City of Bainbridge Island denying their application to construct a bulkhead (SHB No. 06-024). The Board consolidated the cases for hearing.

The Board held a hearing in this matter on June 25 through June 28, 2007. On the first day of hearing, the Board conducted a site visit. Attorney Dennis D. Reynolds represented the Petitioners. Assistant Attorneys General Thomas J. Young and Katharine G. Shirey represented Ecology. Attorney Rod P. Kaseguma represented the City of Bainbridge Island. Olympia Court Reporters provided court-reporting services.

The Board issued an Order on Summary Judgment on January 9, 2007, granting summary judgment to Ecology in part, and denying it in part. Two of the issues addressed in the Motion were set over for hearing on the merits.

The following legal issues are now before the Board, based on the Pre-Hearing Order, and resolution of some issues on summary judgment:

1. Did Ecology properly deny Petitioners' conditional use permit based on the criteria set forth in Chapter 173-27-160 WAC for granting a conditional use permit?
2. Do the applications satisfy the requirements and criteria of Bainbridge Island Municipal Code (BIMC) 16.12.310 and 16.12.380?
3. Is the proposed common bulkhead project consistent with the goals and policies of the Shoreline Management Act (SMA) and the Bainbridge Island 1996 Shoreline Master Program (BISMP)?
4. Did Petitioners adequately demonstrate that nonstructural solutions are unworkable within the meaning of BIMC Sec. 16.12.310B(5)(c)?
5. Is Ecology's cumulative impacts analysis legally and factually flawed because it is (a) not based upon a site-specific study; (b) does not take into account reasonable available project mitigation; and (c) does not take into account the beneficial effects of existing regulatory laws as to proposed impacts, including, but not limited to, the State Hydraulic Code, Federal Clean Water Act and the Federal Threatened and Endangered Species Act?
6. Can the department deny approval of the requested conditional use permit on the basis that some features such as "feeder bluffs" are in the vicinity of

the proposed bulkhead project, where adequate mitigation is available to ameliorate project impacts?

The Board received the sworn testimony of witnesses, admitted exhibits, and heard arguments on behalf of the parties. Having fully considered the record, the Board enters the following:

FINDINGS OF FACT

[1]

The Petitioners live in five homes located on contiguous parcels on the west side of Harvey Road NE on Bainbridge Island. The properties sit on a bluff that overlooks Agate Passage, south of the Agate Passage Bridge. The arrangement of the homes, from south to north is as follows: Stollar, Greenawalt, Miller, Sadowsky, and Vrieling. The homes were built at different times and sit at varying distances from the top of the bluff. The Stollar home is approximately 80 feet from the top of the bluff, the Greenawalt home 85 feet, the Miller home 16 feet, the Sadowsky home 65 feet, and the Vrieling home 45 feet. Some appurtenant structures are closer to the bank than the homes themselves. Mr. Stollar put in a modified septic system in 1999, and the drain field was placed between the house and the bank of the bluff, due to limited alternative sites. Part of the Stollar septic infiltration system is approximately 34 feet from the top of the bluff. The Sadowsky septic system sits about 46 feet from the bluff. The vertical distance from the top of the bluff to the beach below the homes ranges from approximately 70 to 80 feet at the Stollar property, to 90 to 100 feet at the Vrieling property at the north end of the

site. The properties are all within the Semi-rural shoreline designation of the Bainbridge Island Shoreline Master Program (BISMP). *Exhibits 1*, 3, 4, 5, 6, *9, 19; R-111, R-130*; *Testimony of Stollar, Greenawalt.*

[2]

The Petitioners have observed the loss of eight to ten feet at the toe of the bluff over a ten year period, as well as slumping and receding of the upper area of the slope. *Testimony of Greenawalt, Stollar.* The Miller residence, which was built in 1978, was substantially remodeled in recent years. At that time, the geo-technical engineers recommended installation of a horizontal slope drain to protect the upper slope from saturation, which could lead to slumping and landslides. Miller did not install the drain due to cost considerations. *Testimony of Miller.* The Vrieling property, sitting farthest to the north, is slightly more protected from erosion processes, as a stream-cut ravine angles downward between that property and the Sadowsky property. *Ex. R-111; Testimony of Shipman.*

[3]

On December 5, 2005, the Petitioners filed a joint application with the City of Bainbridge Island for a conditional use permit to build a rock bulkhead on the beach at the bottom of the bluff below their houses. *Ex. 3.* The Petitioners wanted to protect the toe of the bluff from ongoing erosion and were concerned about the long term stability of the bluff beneath their homes. The Stollars and Greenawalts each sought to construct 90 feet of rock bulkhead. The Millers, Sadowskys, and Vrielings each sought to build approximately 80 feet of rock bulkhead.

The total length of the bulkhead would be approximately 420 feet. The application indicated that the rock bulkhead would have a maximum beach encroachment of six feet below the Ordinary High Water Mark (OHWM). *Ex. 3.* As part of the application process, the Petitioners retained Aspect Consulting, a geotechnical engineering firm, to complete a Geologic Slope and Beach Processes Investigation (February 24, 2005 Aspect Report). *Ex. 8.* That investigation observed and evaluated existing geologic conditions of the slope and beach at the site. As part of that study, Aspect recommended protection of the colluvial slope at the toe of the bluff in order to maintain long-term slope stability at the project site. *Ex. 8.* At the request of the City, the Petitioners completed a slope stability analysis, again retaining Aspect, and submitted it as a part of their application (August 8, 2005 Aspect Report). *Exs. 3, 9.* In that analysis, Aspect again recommended protection of the colluvial slope at the toe of the bluff with a hard surface shore protection structure (bulkhead) in order to better protect the homes from ongoing slope erosion. *Ex. 9.*

[4]

On June 16, 2006, the Hearing Examiner for the City approved construction of the rock bulkhead, with conditions, for the Miller, Sadowsky and Vrieling properties, and denied it for the Stollar and Greenawalt properties. The City approved the conditional use permit for the Miller and Vrieling properties based, in part, on their closeness to the top of the bluff, and the risk of damage to those homes should there be slope failures or landslides on the bluff. The City approved the bulkhead for the Sadowsky property, which sits between the Miller and Vrieling

parcels, in order to avoid making that property vulnerable to becoming a "pocket beach" subject to greater erosion as a result of the adjoining bulkheads. *Exhibit 19.*

[5]

On July 28, 2006, Ecology denied the conditional use permit for the Miller, Sadowsky, and Vrieling properties, concluding that the proposal did not meet the criteria set forth in WAC 173-27-160. Ecology found the proposal to be inconsistent with those provisions of the Bainbridge Island Shoreline Master Plan (BISMP) that prohibit bulkheads on certain types of feeder bluffs, as well as those that favor use of nonstructural solutions for bank stabilization. Ecology also concluded that the permit, if granted, would change the character of the shoreline in the area because additional bulkheads would likely be more easily approved for adjacent properties under the rule that allows a bulkhead if there is another within 100 feet. Ecology concluded that future bulkhead requests would not be subject to the same public and agency scrutiny because they would not be subject to the conditional use permit process. Ecology therefore also denied the permit on the basis of the cumulative impact of granting the permit in this case, under WAC 173-27-160(2). *Exhibit R-109, R-130; Testimony of Renkor.*

[6]

The bluff along the Harvey Road site is a "feeder bluff," defined as a high or steep slope that through erosion, contributes a significant amount of sediment to the beach below. Feeder bluffs maintain and nourish beaches through the erosion of sand, silts, and clay. Not all high bluffs are feeder bluffs. As feeder bluffs erode, wave action transports the finer of the sediments

into Puget Sound, while the coarser sands and cobble remain on the beach. Feeder bluffs can create "drift cells," which are units that comprise a stretch of littoral transport and deposit of sediments. As these sediments are sorted by water and wave action, they deposit both in deeper water, along the near shore and on the beach, creating various benefits and habitat for marine organisms. Approximately eleven percent (11%) of the 53 miles of Bainbridge Island shoreline is defined as feeder bluff. *Testimony of Cousins, Shipman, J. Peterson, Namtvedt Best.*

[7]

The feeder bluff in the area of the project site is approximately 3600 feet long, the third longest feeder bluff on Bainbridge Island, and encompasses an area much longer than the project site. *Testimony of Namtvedt Best.* This feeder bluff contributes to a long drift cell which starts south of the Harvey Road site near Manzanita Bay and extends to the north tip of Agate Passage. *Testimony of J. Peterson, Shipman.* The feeder bluff in this area makes a significant contribution of sediments to Puget Sound in the Agate Passage area. As part of this feeder bluff, the area of the project site is geologically significant because of the sediment-producing erosion, the ability of woody debris and sediment to accumulate in the upper most intertidal bench, and the cycle of beach nourishment that supports biological processes in this area. The area supports a diversity of biological processes, including documented off-shore fish spawning sites, and a rich near-shore environment used by many species. *Testimony of Shipman, Thurston, Machen.*

[8]

The Petitioners retained Sealevel Bulkhead Builders to design and build the proposed bulkhead. The 420 foot bulkhead would be made of "A" and "B" boulders weighing between one and seven tons. Base rocks would be keyed into the beach approximately three feet below beach grade, with the remaining rocks stacked on top of the base. The bulkhead would be six feet wide at its base and five feet high. It would have a sloped angle, in order that waves could "run up" the bulkhead, and not be deflected by it, thereby reducing the scouring effect of the hard bulkhead. The slope would be on a four to one ratio in relation to the bulkhead height. The rocks would be placed on the beach with use of a track-mounted backhoe on a barge. Contrary to the information in the permit application, Sealevel testified that it would attempt to construct eighty percent (80%) of the bulkhead landward of the Ordinary High Water Mark (OHWM). At this site the OHWM is equivalent to the toe of the bank. The remaining twenty percent (20%) would be constructed waterward of the OHWM, but approximately five feet above the mean higher high water mark (MHHWM), which is approximately eight to ten feet from the toe of the bank. Construction of the entire bulkhead above the OHWM would require drilling or excavating into the bank and placing materials into the bank. The possible distance for going back into a bank for this purpose is site specific. Placement of the bulkhead below the MHHWM would require review or permits from the Army Corps of Engineers and the National Marine Fisheries Service, which Petitioners sought to avoid. *Ex. 10; Testimony of C. Powell, Cousins.* Placement of the bulkhead landward of the OHWM will lessen any change in beach profile,

minimize the coarsening of the beach due to sediment transport interruption, and lessen the effect on littoral drift of sediments to deeper water, and is therefore a preferred location. *Testimony of Cousins*. However, construction of a bulkhead, as proposed by the Petitioners, will affect the cycle of erosion, beach nourishment, and sediment transport, even if constructed higher up on the beach. *Testimony of Shipman.*

[9]

As part of the conditions set forth in the Hydraulic Project Approval (HPA) for this bulkhead construction by the Washington Department of Fish and Wildlife (WDFW), Sealevel would provide beach nourishment for a period of 20 years. The beach nourishment would be provided at five-year intervals. *Exs. 21, 11.* The 20-year time period established for beach nourishment correlates to the expected life expectancy of the bulkhead, which was also a condition contained in the Mitigated Determination of Non-Significance (MDNS) issued for the project by the City of Bainbridge Island under the State Environmental Policy Act (SEPA). *Ex. 15.* The beach nourishment consists primarily of a sand and pea gravel mix, known as "fish mix." This sand and gravel mix is designed to imitate natural processes on the shoreline, and provide sediments that will migrate to the beach and littoral system in somewhat the same fashion as natural erosion from the bluffs. Aspect calculated the necessary amount of beach nourishment as part of their studies. *Testimony of C. Powell.*

[10]

The MDNS contained several conditions in addition to the requirement to provide beach nourishment in accordance with a plan approved by WDFW to mitigate for sediment supply. These include the development of a monitoring and contingency plan submitted for approval to the Director of the Department of Planning and Community Development to ensure no-net-loss of forage fish and juvenile salmonid migration habitat. The contingency plan may include restoration or creation of intertidal habitat either on or off-site. The native vegetation zone of any uplands within 50 feet of the OHWM that are disturbed by construction must be enhanced and restored with native vegetation in accordance with a plan submitted to and approved by the Department of Planning and Community Development. *Ex. 16.*

[11]

There is general agreement in the scientific community that placement of hard armoring, such as bulkheads, revetments, and seawalls, along shorelines results in sediment impoundment, beach narrowing and lowering of the shore profile. Hard armoring placed waterward of the OHWM will result in the immediate and permanent loss of upper intertidal beach. Sediment impoundment can result in significant impacts on downdrift areas which receive less transported sediment. Shoreline hardening also typically results in the removal of vegetation that occurs naturally low on the bank, replacing it with a hard, steepened surface. There is a resulting loss of shade, natural debris placement and beneficial habitat conditions. Beaches become more coarsened with hard armoring, affecting biologic processes. The more landward of the OHWM

the hard armoring is placed, the less the negative effect on the beach. *Ex. 73, R-115; Testimony of Shipman, Cousins, Thurston.*

[12]

In contrast to a traditional rip rap or other "hard" bulkhead such as is proposed at the Harvey Road site, a "soft protective bulkhead" is made of natural materials, including root wads, logs, igneous boulders, anchor roots, and similar materials. If effectively designed, soft bank protective bulkheads can stop toe erosion of a bank. *Testimony of Cousins, Shipman.* Soft shore protective devices minimize many of the problems associated with hard armoring, but do not eliminate them completely. Soft bank technology minimizes the potential for beach narrowing, and does not cause deepening of the beach profile. Fish mix is also added to soft protective bulkheads to provide beach nourishment, although this type of bulkhead has less impact on beach structures, and does not impound sediment in the same manner as hard armoring. Soft shore structures can also better preserve the natural vegetation along the shoreline *Ex R-115; Testimony of Shipman, Thurston.* Soft protective bulkheads are approximately two-thirds of the initial cost of a traditional hard bulkhead, but require ongoing maintenance and monitoring, and potentially, periodic replacement. *Testimony of C.Powell*

[13]

Sealevel will not warrant soft protective bulkheads, does not recommend such a bulkhead at the Harvey Road site, and believes that a major winter storm, such as might occur every ten years, would require replacement of the soft bank bulkhead, as it would not withstand the storm.

Testimony of C. Powell. Aspect also rejected use of soft alternative bank protection, concluding it could not be built in a manner that would behave predictably, and would require constant maintenance. *Ex. 9; Testimony of Cousins.* There are examples of soft bank protection efforts in other parts of Puget Sound, including one site on the east side of Bainbridge Island (Rockaway Beach), and another in the Semiahoo area, both in conditions somewhat similar to the Harvey Road site. Other examples exist in the Port Orchard area, and at Lincoln Park in Seattle, *Ex.9, R-115; Testimony of Cousins, M .Pederson.* The effectiveness of these soft bank protection efforts is mixed in areas subject to large waves. The Semiahoo project involved heavy cobble placed before logs. The logs needed to be repaired and the cobble replaced within five years. *Testimony of Pederson.* The Rockaway Beach project has yet to be tested over a winter, but much of the sediment has eroded and the logs are exposed. *Testimony of Powell, Cousins.* The Lincoln Park project involved placement of 20,000 cubic yards of fill before the seawall, and much of this has been eroded. *Testimony of Cousins.* Adding heavy cobble in front of logs to dissipate wave energy, which is frequently used as part of a soft bank protection project, is not feasible at the Harvey Road site because the beach is used as spawning habitat for sand lance and surf smelt. *Testimony of Pederson.* Ecology has also documented recent soft bank and alternative shore protection projects in the Puget Sound region, providing information about issues and design for future projects. *Ex.R-116 ("Alternative Bank Protection Methods for Puget Sound Shorelines" May, 2000).*

[14]

Some soft bank features can be used in conjunction with a hard rock bulkhead, including placement of woody debris waterward of the structure, and planting of vegetation above it. *Testimony of C. Powell.* In Ecology's judgment, it is also possible to design a "hybrid" bulkhead that combines aspects of soft and hard armoring, with a resulting reduction in beach impact. Ecology and the Washington Department of Fish and Wildlife (WDFW) wanted the Petitioners to more thoroughly explore the range of bioengineered options, and possible combinations of hard and soft bank protection alternatives, prior to any approval of the proposed bulkhead. *Testimony of Shipman, Thurston.*

[15]

WDFW provided the City of Bainbridge Island comments on the bulkhead proposal by letter of December 30, 2005. *Ex. 12, R-115.* WDFW did not support the construction of a bulkhead at the Harvey Road site because the rate of retreat of a bluff was not excessive for Puget Sound, structures were not threatened, and there would be a permanent loss of critical fish resources. WDFW disagreed with Petitioner's geotechnical assessment that soft bank technology was unworkable at the site. Noting other examples of successful soft bank protection projects in Puget Sound, the agency requested that there be an independent "third party" review of the application of soft bank protection options at the site, and a thorough biological evaluation of the effect of the bulkhead/rock revetment on marine resources. WDFW suggested several

qualified engineering companies with expertise in soft bank technology for this endeavor.[1] *Ex. 12*; *Testimony of Thurston.*

[16]

The Petitioners made limited efforts to explore and consider alternative, or soft bank, shore protection approaches for the Harvey Road properties. In August, 2001, Myers Biodynamics, Inc. provided Mr. Stollar several alternative, soft shore protection approaches which appeared appropriate for the properties. *Ex. R-117.* Mr. Stollar concluded that these options required a high degree of maintenance and were expensive, and did not pursue any of the options. *Testimony of Stollar.* In its February, 2005 investigation, Aspect Consulting stated that soft bulkhead methods could be placed in the moderate to high wave energy environment of the site, but that more frequent and intensive repairs would be necessary. As a result, Aspect concluded that a soft bank protection was not feasible. Aspect concluded that a rock bulkhead utilizing sediment nourishment as mitigation would provide adequate protection to the toe of the slope, while supplying sediment to the littoral drift cell. This investigation did not examine particular soft bank protection options, but rather described a general soft bank protection. *Ex. 8, p. 7.* Aspect reiterated these conclusions in a February 22, 2006 letter to Mr. Stollar, in response to WDFW comments on the bulkhead proposal. The Petitioners did not pursue the actions recommended by WDFW for further assessment of soft bank technology at the Harvey Road

[1] WDFW did issue a Hydraulic Project Approval (HPA) for the bulkhead project, with conditions. *Ex. 21*; *Testimony of Thurston.* Although WDFW believed there would be a net loss of resources from the bulkhead project, they concluded that the standards for approval of HPAs required issuance of the HPA.

site, and never offered an independent, third party consultant to review soft bank options. *Ex. R-9*; *Testimony of Stollar.*

[17]

High bluffs on Bainbridge Island, and Puget Sound more generally, are characterized by a steeper upper slope, a bench area and a steeper lower slope, comprised of various geologic layers. At the toe of the slope, at beach level, there is colluvium, which is loose, collapsed material, shed from the upper slopes. This colluvial material protects the toe of the bluff, which in the Agate Passage area, is a relatively erosion-resistant hard silt and clay layer. The colluvial material itself is easily eroded by wave action. Above the harder toe of the slope are geologic layers more susceptible to erosion. At the top of the bluff is a layer of approximately 20 feet of moderately sloping outwash sand and gravel. The upper slope is often permeable, and rests on the impermeable second layer, with the bench area between these layers. This is a common site for landslides because of erosion, drainage, and contact between the two top layers. The bluff at the Harvey Road site is consistent with this general description. *Ex. 8; Testimony of Cousins, Shipman.* The project site is located in an area on Bainbridge Island designated as unstable due to recent landslides. *Exs. A-68, A-69; Testimony of Powell.*

[18]

Landslides are the primary erosion mechanism on slopes such as those at the Harvey Road site. Erosion and bluff retreat occurs along this type of shoreline through both upper and lower bluff landslide mechanisms. *Testimony of Cousins, LaVassar.* Upper bluff failures are

usually caused by elevated groundwater levels in the upper geologic layers within the bluff. Heavy rains or wet periods contribute to upper slope instability and resulting landslides. Such slides occur in the upper half of the bluff and are independent of erosion of the bluff toe. These type of slides contribute colluvium to the toe of the slope, protecting it from ongoing erosion. Upper bluff sloughing and landslide activity are apparent at the Harvey Road site, and are bringing the edge of the bluff closer to the homes and related structures. *Ex.8, R-111; Testimony of Cousins*.

[19]

Lower bluff slide mechanisms are somewhat different, and operate independently of upland stability issues, to a large extent. Erosion of the bluff occurs when wave action at high tides and during storms erodes the toe of the slope, leading to undercutting of the bank and contributing to periodic slumps and surficial slides of the colluvial material. The overall stability of the entire slope is usually not directly implicated in this kind of erosion. Lower slope erosion of the colluvium is apparent at the Harvey Road site due to this kind of activity. A third type of landslide mechanism is a larger failure that extends from the toe of the bluff to the top of the slope, a failure that would cut many feet into the upland bank. This type of large "slab" landslide over all or a part of the slope is not common, but is possible on these eroding bluffs. Erosion of the toe of the slope can result in the loss of lateral support for the rest of the bank, which is evidenced by tension cracks in the slope, and ultimately in slabs of bank failing. At the Harvey Road site, a slab landslide would bring the steep slope of the bank closer to the houses. There is

also risk of a larger, cross section rotational landslide in an area such as the Harvey Road bluff. This type of landslide could cause a larger loss of land at the top of and throughout the bank. If the area had experienced such rotational slides, it would be a relevant consideration in any slope stability analysis, and in the assessment of the risk to homes at the site. However, the evidence before the Board on whether there had been such larger, rotational slides in recent history in the vicinity of this site was inconclusive. *Exs. 8, R-118; Testimony of Cousins, Peterson, Shipman, LaVassar.*

[20]

Aspect Consulting contends that a rotational slide recently occurred only one-quarter to one-eighth of a mile away from the project site and that tension cracks are observable in the whole slope. *Ex. 13, Testimony of Cousins.* Aspect Consulting opined that the colluvial material at the toe of the slope currently provides an erosion buffer to the toe of the slope, and that upper slope landslide activity has historically replenished the colluvial toes. Upland stabilization efforts have reduced this landslide activity, diminished the sediment supply, potentially making the intact toe of the bluff vulnerable to erosion. Because the toe is more vulnerable to erosion, there may be an increased risk of larger landslide activity at the site, according to Aspect. Aspect Consulting also observed severe horizontal erosion ranging from two, to approximately eight feet, of the colluvial toe as a result of a storm on February 4, 2006. These observations formed a part of the basis of their recommendation to install a hard bulkhead at the toe of the slope. *Exs. 8, 9, 13; Testimony of Cousins, J.Peterson.*

[21]

Ecology disagrees with Aspect Consulting's analysis regarding how the erosion of the colluvial toe will result in upper slope instability. Ecology contends that any upper slope failure due to erosion of the toe would be thin in nature and would take place over time. Ecology was unable to verify whether a rotational slide had occurred near the property because Ecology's expert was unable to access the site prior to the hearing. *Ex. R-118; Testimony of LaVasser.*

[22]

The Coastal Zone Atlas identifies the bluff along the Harvey Road shoreline as "unstable" (U). It also maps recent slide activity (early 1970s) in the vicinity of the Miller or Greenawalt property, giving that area an "unstable/recent slide" (Urs) characterization. *Testimony of Shipman, Ex. R-108, R-111.* The bluff slope at the Harvey Road site is greater than forty percent (40%), (approximately 45%), and therefore considered geologically hazardous. For new construction in geologically hazardous areas, the City of Bainbridge Island requires an analysis of the overall risk of failure and impact to the proposed structure through a quantified process, such as a "factor of safety" analysis. *Ex.72.* The City requested a slope stability analysis as part of the review of the application for the bulkhead. Although not required by the BISMP, nor directly applicable to the bulkhead proposal, Aspect calculated a factor of safety for slope stability at the project site, using an accepted slope stability software program, ("SLIDE"). A factor of safety analysis calculates the ratio of capacity to demand, or the capacity of cohesion to friction. When the capacity is in balance with the demand, there is a factor of safety of 1.0. A

factor of safety above 1 indicates that there are more factors resisting landslides than are contributing to landslides, and that the area is more stable. Below 1.0, you would expect to see slope failure, because the demand is greater than the capacity. *Testimony of J.Peterson, LaVassar.*

[23]

Aspect concluded that the site needed to exhibit a minimum factor of safety of 1.5, consistent with new construction standards from the building code as a performance standard. If the slope stability analysis fell below the 1.5 safety factor, Aspect believed that use of some shoreline and slope protection was necessary. However, neither this standard, nor a resulting bulkhead requirement is explicit in any regulation or city requirement. Aspect calculated a factor of safety above 1.5 at the Harvey Road site when the colluvial toe of the slope remained intact, but between 1 and 1.5 in certain areas if the colluvial toe were exposed. *Ex 9; Testimony of J. Peterson.* Ecology disagreed with the factors used by Aspect Consulting in calculating its bluff stability analysis because Ecology did not believe that the slope would still be standing if Aspect Consulting's values were correct. Ecology also found a factor of safety of less than 1.5 for some of the properties, but disagreed that bulkhead protection of the colluvial toe was the logical or necessary outcome of the risk analysis. Rather, Ecology concluded based on the factor of safety, and other site conditions, that failures of the slope would be rare, and addition of a bulkhead adds almost nothing to the overall stabilization of the slope. All experts agreed that other factors also contribute to risk at a particular site, such as seismic history, and beneficial abatement at the top

of a slope, and that other factors are necessary to initiate landslide activity. *Exs. 9, R-118; Testimony of LaVassar, Peterson.*

[24]

The Miller residence is indisputably at the highest risk from landslide activity because it is much closer to the top of the bluff than any of the other residences. A factor of safety analysis puts this residence between 1.2 and 1.34, depending on whether modeling done by Aspect or Ecology is utilized. Although slope failures at that risk level are considered rare, a single failure of the upper slope could affect and damage that residence. The Miller residence is also at increased risk of upper bluff landslide because the owner did not install a horizontal slope drain on the property, which could remove excess surface and ground waters at the top of the slope, the presence of which contribute to upper bluff failures. The presence of a bulkhead at the base of the bluff will have no effect on the likelihood of an upper bluff landslide in the area of the Miller property. However, ongoing erosion and smaller slides on the entire bluff are likely to affect the Miller property far sooner than other properties, simply due to its closeness to the edge of the bluff. The remaining properties are of sufficient distance to not face immediate threat from ongoing slope erosion and landslide activity. This is also true of the Vrieling property because of the protection offered by the ravine. Given the expressed factor of safety, the distance from the top of the bluff, and the likely erosion rates, Ecology expresses the risk to the properties (other than Miller), in terms of many decades or well beyond one hundred years. *Testimony of Cousins, Shipman, LaVassar, Peterson, Miller.*

[25]

The Board finds, based on all the evidence, that there will be a continuing risk of landslide at the project site because it is an eroding shoreline bluff. Over time, this will present a risk to the properties. The bluff along the Harvey Road site will retreat, and will lose ground to ongoing erosion processes at a rate of anywhere between 3 inches or less a year (Ecology's estimate) to 6 inches a year (Aspect's estimate). The retreat may occur in larger (e.g. five foot) slides periodically, rather than in a steady, progressive loss of slope. A bulkhead will offer no protection from upper bluff failures that are evident in areas of the project site. A bulkhead will add, at most, a small degree of protection to the stabilization of the lower slope that exists at the site, through protection of the colluvial toe. *Testimony of Shipman LaVassar; Ex. 8, 9, R-118.*

[26]

The Board finds that a properly designed alternative approach to bank protection that incorporates elements of soft bank protection offers much of the same protection of the colluvial toe of the slope as the hard armored bulkhead. *Ex. R-111; Testimony of Shipman, Cousins.* The factor of safety analysis completed by Petitioners concluded that a hard bulkhead was necessary to maintain that safety factor, but did not examine in any detail whether a different or alternative type of bank protection would achieve the same goal. While such alternative protective devices may not provide the same confidence level as traditional and conventional shoreline armoring methods, they can be effective in slowing the rate of erosion, and reducing slope failure. *Ex. R-111; Testimony of Shipman, Cousins.*

[27]

In 2004, the City of Bainbridge Island published the "Bainbridge Island Nearshore Habitat Characterization & Assessment, Management Strategy Prioritization, and Monitoring Recommendations" (Nearshore Assessment). *Ex.R-112.* Prepared by Battelle, the study was funded through the Washington State Salmon Recovery Funding Board, with involvement of the National Oceanic and Atmospheric Administration (NOAA). The City undertook the study because it needed an inventory and assessment of the condition of its marine shorelines in order to make effective planning and regulatory decisions, to identify priority areas for salmon recovery, and to update its Shoreline Master Program. The study characterized ecological functions and conditions in various shoreline areas (management areas), existing modifications to the shoreline and evaluated the cumulative impact of such modifications. *Ex. R-112; Testimony of Namtvedt Best.*

[28]

The Nearshore Assessment was based on the general assumption that alteration of the shorelines often results in a change in nearshore ecological functions. *Ex. R-112, §1.3.* The Assessment employed a conceptual model to assess the potential effects of changes to ecological functions caused by human modifications to nearshore habitats. The model assumes that shoreline modifications exert effects at varying degrees on an ecosystem's "controlling factors," which are physical processes or environmental conditions that control habitat structure and composition. One of the nine controlling factors that the Assessment evaluated was sediment

supply (others were wave energy, light, substrate, depth/slope, pollution/nutrient, hydrology, physical disturbance). The conceptual model was applied to a geomorphic class (e.g. low bank or high bluff), by each of the controlling factors. Application of the model to a high bluff, such as at the Harvey Road site, concluded that alteration of the sediment supply was a major and significant concern, particularly along feeder bluffs. The Harvey Road project area fell within the Agate Passage Management Area of the Nearshore Assessment. According to the study, this area currently has a higher ecological function than other areas of the Island's shoreline, because there are fewer human modifications of the shoreline. The Agate Passage Management Area is, however, at risk because sediment supply is a key controlling factor supporting the ecological functions of that area. The Assessment notes that the most obvious opportunity for improving scoring of the controlling factor metrics in Agate Passage Management Area is the removal of shoreline armoring structures in front of feeder bluffs to allow natural sediment processes. *Ex. R-112; Testimony of Namtvedt Best.*

[29]

Many organisms depend on eroding sediments for their existence. When sediment supply to a beach is cut off, the functions and nature of the beach change, particularly down drift, and there is a resulting degradation of habitat throughout the marine system. WDFW opposed shoreline armoring at the Harvey Road site because of the negative impact to beaches and marine riparian zones, which, in turn, negatively affects fish and wildlife. *Ex. 12*; *Testimony of Thurston*. As part of a much longer feeder bluff, the Harvey Road site is continually depositing

sediments onto the beach and into the marine environment. The Harvey Road site is characterized by a well-vegetated beach, with an abundance of large woody debris, both of which hold sediments in place and provide shade and cooler temperatures. The area is a documented spawning site for surf smelt, rock sole and herring. *Testimony of Pederson, Thurston*. WDFW considers such spawning sites a marine habitat of special concern, and notes that many other marine mammals and bird prey on fish in these areas. *Testimony of Thurston.* The nearshore waters surrounding Bainbridge Island are designated critical habitat for Chinook salmon by the National Marine Fisheries Service. *Ex. 110, 112*. There will be short term impacts to building a rock bulkhead, including vegetation removal, loss of woody debris and excavation of beach area for placement of rock anchors. Of greater concern are the long term and permanent impacts of hard structures along the shoreline. Armoring of the beach waterward of the OHWM will result in immediate and permanent loss of upper intertidal beach. *Ex. 12; Thurston testimony*. While the long term impact of shoreline armoring on physical processes is well understood (e.g. impoundment of sediment, beach starvation), the link to biological processes and the long term impact to those processes is harder to quantify. Armoring of the beach waterward of the OHWM will result in a reduction of vegetation and woody debris recruitment, and change the beach profile, with a resulting loss of the critical upper intertidal habitat. This will negatively affect habitat used for spawning, foraging, and rearing of many fish species. This area is a migratory corridor for juvenile salmon, and a spawning area for surf smelt and sand lance, two species that supply the diet of other fish. Invertebrates, a key part of

the food chain, will also be harmed by the loss of sand and gravel from upper intertidal beaches. Even with mitigation, such as fish mix placement and replanting of vegetation, there will be a net loss of biological resource with the placement of a hard bulkhead. The further below the OHWM the bulkhead is placed, the greater the harm. *Ex. 12; Testimony of Thurston, Pederson.*

[30]

The effectiveness of depositing a course sand, pea gravel mix ("fish mix") as a beach nourishment mitigation strategy is speculative. There are no long term studies to establish whether beach nourishment as a mitigation measure for a rock bulkhead actually works. *Testimony of Cousins, Thurston.* Unless continually replenished, the beach nourishment placed at construction may be depleted in a much shorter time than the expected life of the bulkhead, depending in part on site conditions. *Ex. 12; Testimony of Thurston, Pederson.* Determining the amount of sediment, the timing of placement and the distribution on the beach is difficult. If the volume of beach nourishment is calculated only on the basis of how much of the colluvial toe will erode and not the entire bluff, the amount used as nourishment may be greatly underestimated. In short, it is difficult, if not impossible to imitate the natural erosion process through the beach nourishment mitigation strategy. And while such a mitigation strategy is generally considered a good idea, no studies demonstrate whether it mimics nature, or interferes with it. *Ex. 36, p. 6, Testimony of Shipman.*

[31]

The Board finds that the feeder bluff at the project site is part of a larger feeder bluff along Agate Passage that demonstrates valuable geo-hydraulic and biological processes. These processes are both sensitive to interference and are critical to shoreline conservation. The geo-hydraulic process, which can be described as the process of water and land interacting through erosion and transport of sediment, is of high value at this stretch of feeder bluff, as it supports a long drift cell of value to the geology and biology of Puget Sound. As the Nearshore Assessment concluded, this is an area of high ecological function, where shoreline armoring can have a major, negative effect on those functions. The intertidal processes occurring along the bluff include spawning, foraging and migration, and are critical biologic processes that are sensitive to interference. While mitigation will help to limit interference with these processes, as would locating the bulkhead further landward of the OHWM, all experts who presented evidence to the Board agreed that there will be a degree of impact, and that there will be a net loss to the resource with a hard bulkhead at this site. The more waterward of the OHWM the bulkhead is located, the greater the impact to the geo-hydraulic and biologic processes at the site. *Testimony of M. Pederson, Shipman, Thurston.*

CONCLUSIONS OF LAW

[1]

The Board has jurisdiction over the subject matter and parties pursuant to RCW 90.58.180. As the appealing parties, the Petitioners have the burden of proof. RCW 90.58.140(7). The Board's review of shoreline decisions is *de novo*, without deference to the decision of the local government. WAC 461-08-500(1).

[2]

The Shoreline Management Act requires that each shoreline master program and Ecology's rules include provisions for conditional uses and variances, the purpose of which is as follows:

> ...to insure that strict implementation of a program will not create unnecessary hardships or thwart the policy enumerated in RCW 90.58.020. Any such varying shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect.

RCW 90.58.100(5).

Each master program must have standards that effectively and timely protect single family residences and appurtenant structures against damage or loss due to shoreline erosion. RCW 90.58.100(6). Accordingly, the City of Bainbridge Island Shoreline Master Program establishes standards to govern issuance of permits for shoreline protection, including structural and nonstructural methods of protection. The BISMP contains specific regulations on revetments and bulkheads. *Ex. R-130 (BISMP);* BIMC Title 16.12.

[3]

The BISMP states that revetments and bulkheads are permitted uses in Rural, Semi-rural, and Urban environments where there are revetments or bulkheads within approximately 100 feet on either side of the property. If there are no revetments or bulkheads within that distance, a new revetment or bulkhead is a conditional use, and subject to the criteria for such uses. Revetments and bulkheads are prohibited outright in Natural, Conservancy, and Aquatic Conservancy environments. Because there was no bulkhead within 100 feet of the proposed bulkhead at the Harvey Road site, the Petitioners were required to obtain a conditional use permit. BISMP 16.12.310 B.

[4]

The BISMP addresses construction of revetments and bulkheads in two sections, the general "Shoreline Modification" provisions and the more specific "Shoreline Armoring (Revetments and Bulkheads)" provisions. *Ex.R-130 (BISMP)*. Each of these sections is organized by a statement of general applicability, followed by "policies," "regulations," and "prohibited" sub-sections. The "General Shoreline Modification Provisions" (BISMP 16.12.290) state that rip-rapping and other bank stabilization measures should be located, designed, and constructed "primarily to prevent damage to existing development and property." The policies state a clear preference for nonstructural solutions to protect against shoreline damage, as follows:

> 3. Stabilization and protection works which are more natural in appearance, more compatible with on-going shore processes, and more flexible for

long-term streamway management, such as protective berms or vegetative stabilization, should be utilized over structural means such as concrete revetments or extensive riprap.

4. Structural solutions to reduce shoreline damage should be permitted only after it is demonstrated that nonstructural solutions would not be able to achieve the same purpose.

BISMP 16.12.290 (Policies).

[5]

The more specific "Shoreline Armoring " section of the BISMP re-states a strong policy to limit use of "armored structural revetments" to situations where it is demonstrated that nonstructural solutions, such as bioengineering, setbacks, and buffers or any combination thereof, will not provide sufficient shoreline stabilization. Recognizing the potential impact on complex, littoral long-shore drift systems, and potential damage to other shoreline properties, the master program sets a policy of discouraging bulkhead construction unless it is demonstrated that nonstructural solutions are not "feasible." An additional policy statement states "[S]horeline armoring should not be constructed waterward of feeder bluffs." Neighboring property owners are encouraged to coordinate planning and development of revetments or other solutions for an entire sector to avoid erosion of down-drift properties. BISMP 16.12.310 (Policies). The BISMP also provides that all forms of protective structures must be designed, constructed, and maintained in a manner that does not degrade fisheries habitat, and must conform to WDFW policies and regulations. BISMP 16.12.310. B.2.

[6]

Critical to the decision in this case are the regulations and prohibitory language of the shoreline armoring section of the BISMP, which provide as follows:

> Regulations - General
>
> 5. Revetments and bulkheads may be allowed only when evidence is presented which *conclusively demonstrates* that the following conditions exist:
>
> a. Serious wave erosion threatens an existing development or land:
> b. [not applicable]; and
> c. That use of natural materials and processes and nonstructural solutions to bank stabilization are unworkable in protecting existing development.
>
> *Prohibited*
>
> 4. Shoreline hardening (i.e., revetments, bulkheads, seawalls*) shall not be located* on shores where valuable geo-hydraulic or biological processes are sensitive to interference and critical to shoreline conservation *such as feeder bluffs*, marshes, wetlands,.....(emphasis added)

BISMP 16.12.300 B.5. and C.4.

[7]

To be eligible for a conditional use permit, the petitioners bear the burden of showing that they meet all the conditional use criteria of WAC 173-27-160, Ecology's shoreline conditional use rule. *Ex. R-110; Testimony of Renkor*. To obtain a conditional use permit, the Petitioners must demonstrate all of the following:

> (a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;

(b) That the proposed use will not interfere with the normal public use of public shorelines;

(c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;

(d) That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and

(e) That the public interest suffers no substantial detrimental effect.

WAC 173-27-160(1).

In addition to reviewing whether an applicant meets these criteria, Ecology's rules require that "consideration shall be given to the cumulative impact of additional requests for like actions in the area." WAC 173-27-160(2).

[8]

Petitioners carry a heavy burden under both the BISMP provisions related to bulkheads, and the CUP criteria. As an initial matter, the BISMP prohibits outright shoreline hardening in certain situations, a provision not analyzed by the City in its review of Petitioner's application for a CUP. BISMP 16.12.310 C.4. If not prohibited outright at this location due to the presence of the feeder bluff, in order to receive a CUP the Petitioners must "conclusively demonstrate" that erosion threatens existing development or land, and that nonstructural solutions to bank stabilization are unworkable in protecting the development. BISMP 16.12.310 B.5. The Petitioners must also demonstrate that they meet *all* the conditional use review criteria of WAC

173-27-160, including that the "public interest suffers no substantial detrimental effect." RCW 90.58.100(5); *Buechel v State*, 125 Wn.2d 196, 884 P.2d 910 (1994).

[9]

The Board concludes, as did Ecology, that the proposed bulkhead does not meet the first of the CUP criteria, as the proposed use is inconsistent with the policies of RCW 90.58.020 and the BISMP. The BISMP prohibits bulkheads on shorelines with valuable geo-hydraulic or biological processes that are sensitive to interference, and lists feeder bluffs as an example of such a shoreline. BISMP 16.12.310 C.4. As Petitioners have argued, this standard in the BISMP requires a site-specific analysis of conditions to determine whether a site presents valuable geo-hydraulic and biologic processes, and whether they are sensitive to interference. While we do not believe that the evidence demonstrated that every feeder bluff meets this standard, the evidence did demonstrate that the long feeder bluff that runs from Manzanita Bay to the tip of Agate Passage, and encompasses the project site, was a primary element of the quality habitat that exists along that reach. The evidence supports the conclusion that this feeder bluff demonstrates the type of geo-hydraulic and biologic processes that are sensitive to interference. As one of several important and active feeder bluffs along Bainbridge Island, this particular bluff deposits a wealth of sediment into Agate Passage, preserves beach conditions and near shore habitat and is the type of valuable "geo-hydraulic" process the BISMP seeks to protect. The Nearshore Assessment, the opinions of several fisheries biologists, and accepted science on the effect of a hard bulkhead on the beach processes and intertidal habitat, support the conclusion

that there will be a net loss to key habitat and species, and that the cycle of erosion and beach nourishment necessary to sustain the habitat will be detrimentally interrupted by the placement of this bulkhead as proposed. This same evidence leads us to conclude that at this site, these processes are sensitive to interference in a manner that might not exist at every other site. Unless the bulkhead can be constructed landward of the OHWM in a manner that does not interfere with the existing geo-hydraulic and biological processes at the site, the BISMP prohibits construction of a hard armored bulkhead on a feeder bluff such as exists at Harvey Road. The Board concludes that the Petitioners have not demonstrated that the bulkhead will be constructed at the site in a manner that will not interfere with these processes. Thus, the Board concludes that the Petitioners have not met their burden to show the use is consistent with the prohibitory clause of the BISMP. In so concluding, the Board also holds that a properly designed bulkhead that uses both soft and hard shore protection elements, and is characterized by Ecology and the City as a "hybrid" bulkhead, would not fall under the "prohibited" section of the BISMP, as that section deals specifically with "[S]horeline hardening (i.e.,revetments, bulkheads, seawalls)." BISMP 16.12.310 C.4.

[10]

Even if we were to conclude that the bulkhead is not prohibited outright due to the effort to locate it as landward as possible above the OHWM, we would find that the Petitioners have failed in their burden to show the use is consistent with the regulatory section of the BISMP. This section requires the Petitioners to "conclusively demonstrate" a threat to existing land or

development, *and* that the use of nonstructural solutions to bank stabilization are unworkable. BISMP 16.12.310 B.5. With respect to the first prong of this two-part test, four of the Petitioners (Stollar, Greenawalt, Sadowsky, and Vrieling) did not conclusively demonstrate that the ongoing erosion of the bluff below their homes threatens their homes or appurtenant structures, other than over a period of many decades, or centuries. Petitioner Miller, whose home is a mere 16 feet from the top of the bank, demonstrated the greatest threat to property from ongoing erosion at the site. The Miller residence faces landslide risk from upper bluff failures unrelated to the erosion at the toe, which the bulkhead is designed to protect. This risk is exacerbated by the failure to install an upper slope drain system on that property. The Miller property is also threatened by the ongoing and likely lower bluff mechanisms due to its closeness to the bluff. Even smaller and ongoing slide activity could reach the structure of that home in a reasonable period of time.

[11]

In analyzing the first prong of the test discussed above, the City has argued that BISMP Sec. 16.12.310 B.5.(a), should be read to include a threat to "on-site sewer systems" and not just residences. The City argues that the section could include a threat to any structure built and located between a single family residence and the top of a bluff on a shoreline, but then offers an interpretation which limits the applicability of this section to integral and necessary components of a single family residence, specifically, an on-site sewer system. The City leaves it to the Board to determine if the Stollar sewer system is in imminent danger from erosion, and whether soft bank protection is unworkable. If the Board concludes that these conditions exist, then the

City does not oppose issuance of a CUP to the Stollars and Greenawalts, apparently a different position than the City took in its denial of the CUP to these properties in the first instance. The Board declines the City's invitation, having concluded that Petitioners Stollar and Greenawalt have failed to show a threat to their residences or appurtenant structures as a result of ongoing erosion of the bluff, and that soft bank protection alternatives are unworkable. While it may be that the Stollar sewer system is more vulnerable than the home to bluff failure, simply because it is closer to the bluff, the evidence did not support a conclusion that there are no reasonable alternatives available to Stollar for the septic system placement, should the bluff continue its inexorable progression eastward. Moreover, our decision is also based on the absence of effort to pursue soft bank shore protection methods, and the City's argument does not change this analysis.

[12]

The Board concludes that while one of the five Petitioners has shown that erosion threatens the existing development at the Harvey Road site, none of the Petitioners have conclusively demonstrated that use of natural materials and nonstructural solutions to bank stabilization were unworkable at the site to protect the properties, the second prong of the applicable test. Little effort went into assessing soft bank technology as a solution to the toe erosion at this site. Possible "hybrid" solutions that combined elements of soft bank materials with rock or other traditional "hard" armoring techniques went virtually unexplored. Although the WDFW requested further assessment of the soft bank alternatives, the Petitioners took no

action to provide a supplemental assessment of such options. While we do not believe it was necessary to do an "independent, third party review" such as WDFW requested, a more diligent and thorough review of soft bank options was called for, given the policies of the BISMP and the importance of the feeder bluff along Agate Passage. The policies of the BISMP emphasize the need to limit the use of armored structural revetments to those situations where nonstructural solutions, or combinations of techniques, will not provide sufficient shoreline stabilization. Both Ecology and WDFW state that nonstructural shore protection alternatives, or a hybrid approach to bank stabilization, may be feasible and workable at this site. Like a hard armored solution, such an alternative shore protection methodology will slow the rate of erosion of an eroding feeder bluff, if effectively designed. While it may require ongoing monitoring, regular maintenance and periodic major repairs, it is the type of structure strongly preferred by the BISMP. Given the strong policies, and regulations of the BISMP, the Board cannot conclude that the proposed bulkhead is consistent with those provisions. The Petitioners have failed to meet their burden to show that the proposal meets the first criteria for a conditional use permit, because the proposal is inconsistent with the BISMP. The conditional use permit must be denied on this basis. WAC 173-27-160(1).

[13]

Because we have concluded that the proposal does not meet the first, and an essential aspect of the CUP criteria, i.e. the proposal is not consistent with the BISMP, we do not find it necessary to address the remaining CUP criteria in detail. However, we do conclude that the

placement of a three to five family bulkhead of 420 feet along this stretch of shoreline, if below the OHWM in a manner that interferes with or damages the geo-hydraulic and biologic processes, will cause significant adverse effects to the shoreline environment in which it is to be located, and that as a result, the public interest will suffer a substantial detrimental effect. WAC 173-27-160(1)(d) and (e).

[14]

Ecology also denied the bulkhead on the basis of the cumulative impact of additional requests for like actions in the area, pursuant to WAC 173-27-160(2). The BISMP requires a conditional use permit when there is no other bulkhead or revetment within 100 feet of either side of the parcel. If a hard armored bulkhead or revetment is approved for one or more of the Harvey Road parcels, adjacent property owners would not need to apply for a conditional use permit, but would proceed through a local shoreline exemption process.[2] In the absence of the need for a conditional use permit, Ecology review would not be required.

It is proper for the Board to consider the cumulative effects that become possible with the granting of one shoreline permit, recognizing that approval of one project can set a precedent for other similar projects. *Skagit County v. Dept. of Ecology*, 93 Wn.2d 742, 750, 613 P.2d 121 (1980). The *Skagit County* court noted the concern over cumulative impacts expressed in *Hayes*

[2] The Board also concludes that should a soft bank (or hybrid) protection method be used at the site, the rule which makes further bulkheads within 100 feet a permitted use would not come into play. The regulation distinguishes between "bulkheads and revetments" and other "nonstructural shore stabilization" options. It is only when a revetment or bulkhead is placed at a site that the 100 foot rule appears to be applicable. Thus, placement of soft shore protection at the site would continue to require a conditional use permit for additional shore protection efforts by adjacent property owners.

v. Yount, 87 Wn.2d 280, 552 P.2d 1038 (1976), "[l]ogic and common sense suggest that numerous projects, each having no significant effect individually, may well have very significant effects when taken together." *Skagit County* at 750. The Board concludes that the permit should be denied on the basis of cumulative impacts to this stretch of shoreline. Once one or more bulkheads have been established, there is a high risk of further hard armoring of this shoreline, particularly given the absence of a more stringent permitting process for future, adjacent applications. This could quickly, or over time, change the nature of this long, high-value feeder bluff along Agate Passage, and the associated beneficial effects to the marine environment.

[15]

Petitioners suggested throughout the hearing that some form of "off-site" mitigation would be an appropriate condition of approval of the CUP. They suggest restoration of another beach area in the vicinity, but the concept is not well-developed at this point. While the Board would encourage use of such off-site mitigation concepts, there is nothing that requires or authorizes such off-site mitigation in exchange for the construction of a bulkhead at this site. To the contrary, the multiple provisions of the BISMP discourage or prohibit use of a bulkhead at a feeder bluff such as exists at the Harvey Road site, in order to preserve the biological and geological processes at work along such valuable feeder bluffs.

[16]

The Petitioners have failed to meet their heavy burden to justify the issuance of a conditional use permit for a bulkhead under the terms of the BISMP. The strong policies and

regulations of the BISMP, which favor soft shore protection alternatives, require more diligent and exhaustive consideration of such options than has been given in this case. Petitioners have failed to satisfy the two prong test of the BISMP, which requires a conclusive demonstration that existing development is threatened and that nonstructural solutions to bank stabilization are unworkable. Accordingly, they have not shown that they meet all the conditional use review criteria of WAC 173-27-160. The cumulative impact of granting the permit in such a circumstance is clear—more armoring will occur along this stretch of Agate Passage. The request for a conditional use permit must be denied, and Ecology and the City affirmed.

ORDER

The City's denial of a conditional use permit for the Stollar and Greenawalt properties is AFFIRMED. Ecology's denial of a conditional use permit for the Miller, Sadowsky, and Vrieling properties is AFFIRMED. The Appeal is DENIED.

SO ORDERED this 25th day of October 2007.

SHORELINES HEARINGS BOARD

Kathleen D. Mix, Presiding

William H. Lynch, Member

Judy Wilson, Member

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

LOUISE B. WENBERG LUCE and PAM and FRANK McFADDEN, Appellants, v. CITY OF SNOQUALMIE and NORTHWEST RAILWAY MUSEUM, Respondents.	SHB NO. 00-034 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter comes before the board on the appeal of a Shoreline Substantial Development permit (SDP), and the associated Declaration of Non-Significance (DNS), issued by the City of Snoqualmie to the Northwest Railway Museum (NRM) for the construction of phase 1 of their Conservation and Restoration Center (CRC). A hearing on the matter was held on May 29th and 30th, 2001, in Snoqualmie, Washington. The Board was comprised of Kaleen Cottingham, Robert V. Jensen, James A. Tupper, Jr., Judy Wilson, Phyllis Shrauger, and Dan Smalley. Kaleen Cottingham presided for the Board. James A. Tupper, Jr., was unable to attend the first day of the hearing, but did review all materials and the transcription of the day and participated in the decision of the Board. Betty J. Koharski of Gene Barker & Associates provided Court reporting services. The board conducted a site visit on the first day of the hearing.

The appellants, Ms. Louise B. Wenberg Luce and Pam and Frank McFadden, appeared through their attorney, Jennifer Dold of the Law Offices of Bricklin & Gendler. The Respondent, City of Snoqualmie, appeared through its attorney, Patrick B. Anderson.

Respondent, Northwest Railway Museum, appeared through its attorneys Robert C. Rowley and James J. Klauser of the Law Offices of Rowley and Klauser.

The Board received the sworn testimony of the witnesses, admitted the parties' exhibits, and heard the arguments of the parties. Having fully considered this record, the Board makes the following:

FINDINGS OF FACT

I.

The Northwest Railway Museum[1] (NRM) has been in existence since 1957. It received by deed approximately eight miles of operating railroad right-of-way and track extending from Snoqualmie Falls through the City of Snoqualmie to the center of the city of North Bend. The tracks themselves have been in existence since 1889. The appellants Louise B. Wenberg Luce and Pam and Frank McFadden own two parcels which adjoin the NRM property along the northeastern side of the tracks, on the side closest to the river. Both of the appellants' parcels, while adjacent to the right-of-way, are not immediately adjacent to the site of the proposed CRC. Ms. Luce has owned her undeveloped property since 1959. Her property runs along the tracks and is approximately 300-400 yards from the proposed project site. The McFaddens have owned their property since 1971 and live on site. Their parcel is 9.8 acres with two homes and outbuildings. Their property also runs along the tracks and is approximately 300 to 600 feet from the proposed site of the CRC. The McFadden's property is closer than Ms. Luce's property to the proposed site.

II.

NRM operates the historic railroad, giving public rides on its trains between the Snoqualmie Depot and the North Bend Depot. NRM owns the historic Snoqualmie Depot in the center of the City of Snoqualmie where it sells tickets to ride the train, maintains a gift shop, and has conducted restoration work outside on railroad artifacts for nearly 50 years.

III.

NRM's collection of railroad artifacts includes approximately 70 historic pieces of "rolling stock;" most of which are large artifacts originally utilized, for the most part, in rail-oriented transportation, lumbering, and mining from the earliest days of Washington's history. The bulk of NRM's collection is stored on sidings north of the Snoqualmie Depot, secured by a chain-link fence. The collection is visible from the main street through Snoqualmie. NRM has been narrowing its collection to artifacts significant to the NW. The rolling stock consists of large diesel, steam, and diesel/electric locomotives and coaches retired from service and conveyed to NRM. The collection also includes numerous railroad special purpose artifacts, such as snowplows, tenders, cranes and track maintenance equipment.

IV.

All of the collection is slated for restoration at some point in the future. NRM's goal is to restore each piece to as close to original condition as possible. The bulk of the restoration process involves woodworking, replacing cracked, broken or missing windows, painting, and installing upholstery, floor coverings, roof panels, and wiring. Mechanical work on wheels,

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[1] The previous name of NRM was the Puget Sound Railway Historical Association. The name change occurred in

axles, engines and connectors is also conducted. Hazardous materials, such as paints, lubricants, cleaning products, greases, solvents, and paint thinners are used in the restoration process. Asbestos may be present in some of the inventory. Sanding is part of the restoration process and may cause the release of dust containing residue from lead based paint. Additionally, some of the inventory occasionally leaks oil or other lubricants along the tracks.

V.

NRM has only one paid employee. The work is done primarily by volunteers. The volunteers, after training and certification, operate the trains. The volunteers conduct the assessment of the rolling stock inventory, as well as perform the restoration and conservation work.

VI.

Restoration of the inventory is a piece-meal process. It is very dependent on funding and availability of materials. Much of the funding for restoration of the rolling stock and for the construction of the facilities comes from government grants. Once restored, some of the items will be operational. Some will be on view only. All will be moveable. Only a few pieces of the inventory will be used in the public train rides.

VII.

NRM attracted more than sixty thousand visitors in 2000.

1999.

VIII.

The current restoration work is done outdoors. The reason given by NRM on why so much of the rolling stock is not restored is the lack of an indoor restoration facility. Volunteers apparently do not like to work outdoors in the rain. In addition to the problems caused by inclement weather, the lack of an indoor facility for restoration has caused problems with security, unsafe working conditions, and reduced control over the inventory and restoration processes.

IX.

NRM began planning for the construction of an indoor restoration facility in the mid-1990s.

X.

Every proposed land development project in the City of Snoqualmie is reviewed in a pre-application review process pursuant to chapter 14.20 of the Snoqualmie Municipal Code. The pre-application review process is mandatory, as no application can be accepted for filing until pre-application review has been conducted. Representatives from all City departments attend a meeting to consider each land development proposal, and jointly endeavor to identify all codes, ordinances, regulations and policies applicable to the proposal. The proposal is discussed, and the determinations made are communicated to the applicant.

XI.

On July 15, 1999, NRM applied for pre-application review with the City of Snoqualmie. Attached to the "pre-application" was a not very detailed map and site plan for the CRC that

showed the existing and proposed tracks and a 40-foot by 100-foot structure. The pre-application indicates the lot coverage of the structure at 4000 square feet with a height of 22 feet. A 10 stall, gravel parking lot is also proposed at this stage. Subsequent documents, such as the DNS, indicate the structures (phase 1 and 2) will cover 2,390 square feet and 5,270 square feet, respectively, for a total lot coverage of 7,660 square feet. The subsequent environmental checklist indicates the structural height will not exceed 35 feet.

XII.

The pre-application review for NRM's proposed CRC was conducted on July 21, 1999. The pre-application review letter was sent to the applicant on August 19, 1999. It identified requirements applicable to the project. The City identified the potential environmental impacts of the proposed project, and identified the applicable regulations and other requirements required for final approval. The City informed NRM that the following would be required for their proposed CRC:

- State Environmental Policy Act (SEPA) compliance;
- Zoning variance;
- Certificate of zoning compliance;
- Conditional Use permit for a museum/interpretive center in the Parks and Open Space zoning;
- Shoreline Substantial Development Permit (SDP);
- Flood improvement permit;
- Barrier-free compliance;

- Design review;
- Sensitive area review;
- Building permit with a clearing and grading design review;
- Fire Marshall's review;
- Site Plan for water, wastewater, and storm drainage; and
- Parking and traffic review.

XIII.

The Shoreline substantial development permit is not the only permit required for this proposal. The project also requires at least five other permits and other reviews: a Conditional Use Permit for a museum use in the parks and open space zoning; a variance, as the building is proposed close to the property line within the building setbacks; a building permit; a flood improvement permit for development of lands within the areas of special flood hazard; and a sign permit for any signs proposed for the business. A sensitive areas review is required. Additionally, the permit must conform to the conditions of approval of the Design Review Board.

XIV.

The City does not dictate the order that permits are applied for or granted, that decision is made by the applicant. The applicant can decide to select a consolidated approach to its permits. NRM, for reasons not presented to the board, chose to proceed first with obtaining the SDP rather than a consolidated approach to all of the permits.

XV.

On February 18, 2000, NRM filed the SDP application with the City of Snoqualmie to build the CRC, described as a facility for restoring, conserving, storing, and performing maintenance on historic locomotives and train cars. The application was for Phase 1 of an envisioned two-part project. Phase 1 of the proposal includes an approximately 2,390 square foot structure, 1,200 feet of new rail tracks and parking. Phase 2, which is not part of the SDP at issue here, contemplates building a 5,270 square foot addition and siding track. On March 20, 2000, the City of Snoqualmie determined that the application was complete.

XVI.

The environmental checklist prepared by NRM was submitted to the City on February 18, 2000. Along with the checklist, NRM submitted the site plan associated with the Conditional Use Permit showing placement of the building, delineation of wetlands A & B, a 50-foot wetland buffer, and a 15-foot building set back from the wetland buffer. It also showed the parking lot, access to Stoen Quarry Road, sidewalks and the placement of a future building (phase 2 of this project). On March 17, 2000, a revised site plan was submitted to the City showing greater building setback from the wetland buffers. On March 20, 2000, the Conditional Use permit (for the zoning, not for the shoreline) was deemed complete with notations of the need for the hazardous materials inventory and usage determination, as well as provision of a method for the containment of contaminants within the structure.

XVII.

On February 19, 2000, a wetland delineation and analysis report was prepared by NRM's wetland consultant, B & A. It was submitted to the City on April 24, 2000, along with proposed buffers and a copy of the site plan from December 17, 1999. The City submitted this wetland delineation and analysis report to its independent wetland consultant on April 28, 2000. On May 9, 2000, a revision to the wetland survey was prepared by NRM's consultant and submitted to the City.

XVIII.

On May 1, 2000, the City issued its Determination of Non-Significance (DNS) under SEPA. The City indicated that the proposal "does not have a probable significant adverse impact on the environment that can not be mitigated through compliance with all applicable City codes and regulations."

XIX.

On May 9, 2000, the Director of Planning issued the SDP. A corrected notice of decision was issued on May 12, 2000. Conditions for the applicant were contained throughout the permit (in both the application of applicable master program policies section, the applicable shoreline regulations section, and in the section called "terms and conditions.") Specifically, all of these sections together required NRM to obtain or perform the following prior to construction:

- Obtain "a conditional use permit because of its location within Parks and Open Space zoning."

- Provide "compensatory storage for all fill associated with the project. Existing soils will be removed from the same location as where the fill is proposed such that no net-fill will be included in the project."
- Include "oil separation of sump water, sewage treatment and containment and absorbtion (sic) of fueling spills."
- Provide "additional information from the proponent regarding the use and disposal of these [hazardous] materials";
- Comply "with other regulations of general applicability, including Building Regulations, Flood Hazard Regulations, Sensitive Areas Regulations and Clearing and Grading regulations;"
- Septic will only be allowed if approved by King County, otherwise the proponents are required to hook up to the municipal sewer system;
- Prepare a hazardous materials inventory and a hazardous materials management plan to be reviewed by Ecology for the storage and use of hazardous materials on the site and their proper disposal.
- Grading shall be in conformance with SMC code provisions
- Comply with any other federal, state of local statutes, ordinances, or regulations
- Conform to the conditions of approval of the Design Review Board.

XX.

The City's independent wetland consultant, Sheldon and Associates, issued its review of the wetland delineation and analysis report on May 25th and June 8, 2000. On June 7, the City

received yet another revised site plan associated with the Conditional Use permit for the structure.

XXI.

The proposed CRC is within the 100-year floodplain of the Snoqualmie River, a shoreline of statewide significance. The area is designated "urban floodplain" in the Snoqualmie Shoreline master program and is zoned "Parks and Open Space" in the Snoqualmie Vicinity Comprehensive Plan. Although the proposal is within the 100-year floodplain, it is not adjacent to a water body, but rather is located approximately a half a mile landward of the ordinary high water mark of the Snoqualmie River.

XXII.

The site for the proposed CRC is approximately 2.1 acres of the NRM right of way running parallel to Stoen Quarry Road. The site of the proposed CRC contains no existing structures. The existing rail line runs the entire length of the site and there are piles of rails and other associated debris and equipment in the general vicinity. The majority of the site not associated with the rail line is a second growth forest of mixed conifer and hardwoods. The property is generally level ground and contains areas of high ground water and wetlands. Two of those wetlands were documented prior to permit issuance (known as Wetland A and Wetland B). A third wetland was discovered and noted by appellants' wetland consultant as part of discovery. Wetland A is located in the north corner of the property, while Wetland B is at the southeastern edge of the property. The third wetland is between Stoen Quarry Road and the tracks. It has not

been delineated or identified, although evidence of the presence of saturated soils and wetland plants was presented.

XXIII.

The soil in this area is Si silt loam and Puget silty clay loam. The Si series is a moderately well drained soil. The Puget series is a poorly drained soil. The Puget series is on the hydric soils list and is generally considered a wetland soil.

XXIV.

The property is prone to flooding. Flooding events were described in testimony for 1959, 1986, 1991, and 1993. Not only is this property subject to flooding, but also so is much of the City of Snoqualmie. In 1991, a big flood event pushed water to within 300 feet of the McFaddens' driveway and within 100 feet of their buildings. During this flood event, testimony indicated water covered the NRM site. In 1993, the road was closed due to water over the roadway. During the 1993 flood event, water was noted on the railroad tracks.

XXV.

The railroad right-of-way is generally 100 feet wide, except in the area proposed for this project. The right-of-way here is 200 feet wide. The facility will be constructed on the right-of-way but adjacent to the mainline so as not to disrupt rail traffic. The facility will be enclosed and a side-track will terminate inside. The facility will be designed to capture all materials used in the restoration process. The facility is not a toxic storage facility, although some toxic materials will be used on site. Asbestos, although rare, is found on some old equipment and will be removed and disposed of by certified contractors. The facility is designed to be self-contained

for liquids that might leak or be spilled inside, including a sump pump to capture liquids for transport to a separator and subsequent disposal in either an approved septic or public sewer system.

XXVI.

The project review is on going, and the precise conditions to be imposed pursuant to other applicable Snoqualmie municipal code provisions have not yet been specifically established. Further action includes drainage review, civil engineering review, design review, conditional use permit review, and flood improvement permit review.

XXVII.

There is a history of, and evidence of recent leakage of oil or other liquid material from the rolling stock along the tracks in the general vicinity of the proposed project.

XXVIII.

Although the City of Snoqualmie issued the SDP on May 9, 2000, it was not transmitted to Ecology until November 9, 2000. The "date of filing" as defined in RCW 90.58.140(6) was determined by Ecology to be November 13, 2000.

XXIX.

On November 30, 2000, this appeal was timely filed.

XXX.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I.

The board has jurisdiction over the persons and subject matter of this appeal. RCW 90.58.180. The board reviews the proposed development for consistency with: 1) the Shoreline Management Act (SMA), chapter 90.58 RCW; 2) the City of Snoqualmie Shoreline Master Program (SMP); and 3) the provisions of the State Environmental Policy Act (SEPA), chapter 43.21C RCW. See WAC 461-08-505.

II.

The board's scope of review is de novo. WAC 461-08-500. The board's standard of review is preponderance of the evidence for the Shoreline Substantial Development permit issues and clearly erroneous for the SEPA challenges. Since this matter involves the issuance of a permit, the appellants bear the burden of proof. RCW 90.58.140(7).

III.

The issues in this case are:

1. Did the City of Snoqualmie err in issuing a Determination of Non-significance for the NW Railway museum in violation of the requirements of the State Environmental Policy Act (SEPA)?
2. Did the City of Snoqualmie fail to adequately evaluate impacts to wetlands, surface and groundwater, air, soils, fisheries and wildlife, floodplains, fire utilities, and impacts from use of hazardous materials in violation of SEPA?
3. Did the City of Snoqualmie err in issuing a substantial development permit to the NW Railway Museum Company for the Railroad Car Restoration Building in violation of applicable provisions of the Shoreline Management Act,

Snoqualmie's Shoreline Master Program, and Snoqualmie's shoreline regulations?

4. Does the Board have jurisdiction to consider issues relating to compliance with shoreline regulations when such regulations have not been approved by the Department of Ecology as part of the City's Shoreline Master Program?
5. Is the petition for review time-barred?
6. If the petition for review is not time-barred, have the petitioners failed to exhaust administrative remedies?

The last two issues, numbers 5 and 6, were addressed in preliminary motions. The board ruled that the parties were barred by collateral estoppel from raising these issues as a result of a Thurston County Superior Court ruling on May 25, 2001.

The remaining issues will be consolidated for analysis into the following three categories and each will be separately addressed:

1. The role of the board in SEPA threshold determination challenges;
2. The issuance of the SDP; and
3. The issuance of the DNS.

IV.

1. The role of the board in SEPA threshold determination challenges.

The respondents argue that the board is precluded from hearing extra-record testimony on the SEPA threshold determination. Respondents argue that the board's role is to review only the record as compiled by the local government when it made its SEPA threshold determination. The board does not agree with respondents' articulation of the law. The legislature has granted

the board sole jurisdiction over all aspects of a Shoreline Management Act (SMA) appeal, including any related SEPA issues. RCW 43.21C.075 (7) provides:

> In an appeal under this chapter regarding a project or other matter that is also the subject of an appeal to the shorelines hearings board under chapter 90.58, the shorelines hearings board shall have sole jurisdiction over both the appeal under this section and the appeal under chapter 90.58, shall consider them together, and shall issue a final order within one hundred eighty days as provided in RCW 90.58.180.

This amendment was added by the legislature in 1994 to eliminate the bifurcation of appeals of the same project as well as to clarify the confusing roles previously granted to the board and the local governments. The amendment confers upon the board exclusive jurisdiction over an administrative SEPA appeal related to a shoreline permit application that has been appealed to the board. The 1994 amendment is consistent with the general SEPA requirement to consolidate appeals of SEPA determinations with appeals of agency decisions on the proposed actions. RCW 43.21C.075 (3)(a); WAC 197-11-680(3)(a)(v). Further, RCW 43.21C.075 clearly indicates that an appeal of a SEPA action "shall be linked to a specific governmental action." In this matter, the appeal of the SEPA action is clearly linked to the issuance of the SDP, which is squarely within the jurisdiction of the board.

In *San Juan County v. Department of Natural Resources*, 28, Wn. App. 796 (1981), the court held that the board had properly considered evidence outside the record and subsequently upheld the board's determination that the DNS was supported by the record. Further, the board has adopted rules regarding the scope of review and standard of review. Both terms have separate meaning. "Scope of review" means the breadth of the evidence reviewed by the board,

whereas "standard of review" means the burden of persuasion carried, in this case, by the appellants. The board's scope of review in both SMA and SEPA challenges is de novo. WAC 461-08-500. The board's standard of review for SMA challenges is preponderance of the evidence. The standard of review for SEPA challenges is "clearly erroneous." *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wn.2d 267(1976)).

In determining whether the SEPA decision is consistent with the requirements of chapter 43.21C RCW, the board may admit "evidence that is material and relevant to determination of the matter consistent with the standards.....whether or not such evidence had been submitted to the local government unit." WAC 461-08-505(2). This was upheld in *Citizens for Sensible Growth v. City of Leavenworth*, SHB No. 98-24 (1998), holding that the scope of review is de novo, and is not confined to the record made before the local government; the standard of review is whether the threshold determination is "clearly erroneous." See also, *Swift v. Island County*, 87 Wn.2d. 348, 356-7 (1976).

The board has consistently heard SEPA appeals with extra-record evidence. In *Save Our Industrial Land v. City of Seattle*, SHB No. 95-41 (1996), the board held that a SEPA appeal is not limited to the administrative record before the administrative agency. See also *Young v. San Juan County*, SHB No. 95-51 (1996). Thus, the clearly erroneous standard as exercised by the board does not preclude consideration of extra-record testimony.

Respondents argue that a SEPA appeal be in conjunction with the appeal of the underlying land use action and pursuant to Land Use Petition Act (LUPA). Chapter 36.70C RCW. The board agrees that the SEPA appeal must be heard in conjunction with the underlying

permit appeal, but does not agree that LUPA applies. A LUPA appeal arises in a wholly different context from an appeal before the board. LUPA provides for a judicial appeal of quasi-judicial land use decisions made by local governments to a superior court. RCW 36.70C.030. A superior court's review of the quasi-judicial decision is generally limited to the record with some exceptions. The Shorelines Hearings Board is a quasi-judicial body, not a judicial body. Even if LUPA did apply to the board, respondents' argument fails due to RCW 36.70C.120(3) which allows for the record to be supplemented by evidence of material facts when the underlying decision was not made by a quasi-judicial body or officer and the parties did not have access to a quasi-judicial proceeding in which to make a record. That is the situation before us with the City of Snoqualmie's decision. First, the City admitted that there was no previous appeal of the DNS allowed. Second, the decision was not made by a quasi-judicial body or officer; it was made by Nancy Tucker, the Planning Director. Nor was there a quasi-judicial process for the appellants' to have assured that the record was complete. Thus, the review by the board is the opportunity to make sure the record is complete. Evidence may be taken by the board to assure that the record is complete.

Finally, the evidence presented by appellants was not exclusively related to the SEPA determination, but rather to both the SEPA determination and the SDP determination. Precluding the testimony would have precluded evidence clearly related to the board's role in determining whether the SDP was consistent with the policies of the SMA.

V.

2. The issuance of the SDP.

The proposed CRC is located within the Urban Floodplain Environment designation in the Snoqualmie Shoreline Master Program. Allowable uses in that designation include "Roads and Railroads," so long as such uses meet the existing zoning code and comprehensive plan. The underlying zoning is "Parks and Open Space." Under the zoning code and comprehensive plan, museums and interpretive centers are allowed as a conditional use in this zoning designation.

The CRC is an integral part of the NRM's overall operation as an operating railroad and museum. The railroad tracks are already located on the site, and this proposal is related to the extension of the existing railroad and museum. The appellants contend the CRC is a light industrial use and thus prohibited under both the zoning and the Shoreline Master Program. The board does not agree. The SMC specifically identifies light industrial as "the mechanical or chemical transformation of materials, substances or components into new products." The proposed CRC is not a light industrial use, as new products will not be constructed on site, but rather routine maintenance and restoration of existing equipment necessary for the continuation of the railroad operation will be performed as well as allowing occasional public access for interpretive purposes.

Despite the CRC being an allowable use in this general location, several major errors have occurred in the issuance of the SDP that require remanding the decision to the City of Snoqualmie for processing consistent with this opinion.

Under the Shoreline Management Act, the scope and extent of the authorized uses is defined only by the contents of the development permit itself. Effective operation of the permit review process, as well as enforcement of the SMA, demands that shoreline permits be complete in themselves and contain sufficient detail to enable the local government and the board to determine consistency with the policies set forth in the SMA, implementing regulations and Shoreline Master Programs. *Hayes v. Yount*, 87 Wn.2d 280, 295 (1976). WAC 173-27-180(9)(f) requires an application for a SDP to contain, at a minimum, project diagrams and site plans. Specifically the regulations require:

> The dimensions and locations of all existing and proposed structures and improvements including but not limited to; buildings, paved or graveled areas, roads, utilities, septic tanks and drainfields, material stockpiles or surcharge, and stormwater management facilities.

More importantly, WAC 173-27-130(4) requires that "when the project has been modified in the course of the local review process plans or text shall be provided to the department that clearly indicate the final approved plan."

These regulations are clear and unambiguous. The terms are not specifically defined within chapter 173-27 WAC. We give such words their usual and ordinary meaning. *Stastny v. Board of Trustees*, 32 Wn.App. 239, 253 (1982). What is required is a scale drawing showing dimensions and locations of structures of what is actually proposed to be built and what was approved by the local government. *Save a Valuable Environment v. City of Bothell*, et al, SHB No. 82-29 (1982). While the board does not rule on whether the conditions referring to compliance with other parts of the Snoqualmie Municipal Code are adequate, it does find that it

is unable to tell what those provisions in the code will do to the proposed CRC. As such, the board has no idea what was approved by the City of Snoqualmie. Site plans have continued to be submitted after the fact and will probably continue to evolve as the proponents move to comply with all of the conditions imposed.

It appears that the project proponents knew far in advance what other requirements were applicable to this proposal. The pre-application review process is very commendable. However, it is unclear to the board whether NRM used the information provided in the August 19, 1999, letter to enrich the design process. Either their proposal did not incorporate the requirements of all of those referenced in the pre-application review letter or the City felt constrained to comment on the likelihood of the proposal complying with the other provisions. In either case, the board is left with the sense that this proposal is far from complete and that the evolution of the design may well substantially change the look, feel, impact, location and buffers of the CRC. Until a proposal is more fully developed and likely to pass all hurtles, it was inappropriate for the City to have issued the SDP.

It is also important to this analysis that NRM chose to proceed first with the SDP, despite the opportunity to consolidate the permits. It is not known why NRM did not choose to use the consolidated approach to permitting authorized by 14.30.010 and 14.30.130 of the Snoqualmie Municipal Code. A decision to consolidate the process might have changed the outcome in this appeal.

By choosing to proceed first with the SDP placed a burden on both the project proponent and the City of Snoqualmie to assure that the permit approved, and the associated site plans, reflected the imposition of conditions, not just as cross references to codes, but to actual impact of conditions on a project.

A complete application must at a minimum comply with WAC 173-27-130 and must provide sufficient information for the public, Ecology, and the board to know the details of the proposed project as approved by the local government. In particular, when the project has been modified in the course of the local review process, plans or text shall be provided to Ecology that clearly indicates the final approved plan. WAC 173-27-130(4). That did not occur in this process. The board, and presumably the public, is unable to determine the extent of the proposed CRC. Nor was the board able to ascertain the impact of the conditions and determine whether the conditions would assure that the proposal was consistent with the SMA and the local master program. This does not mean that the conditions, when fully incorporated into the project's design will not be adequate, only that the board was unable to determine the adequacy.

In *Citizens for Sensible Growth v. City of Leavenworth and Vacation International, Ltd.*, SHB No. 98-24, the board was faced with a SDP contingent on future plans and studies, much like the current case is contingent on complying with other provisions in the City's municipal code. The board has previously held that the soundness of a proposal should be determined before approval of a shoreline permit, not afterwards. *Department of Ecology v. Barden*, SHB No. 83-42, 84-27 and 84-33 (1985). We reversed the shoreline permit in that case because the very feasibility of the proposal was contingent on future study. We contrasted that case with the

facts of a later case, *Evergreen Islands v. City of Anacortes and Leeward Development*, SHB No. 91-39 (1992), where study had shown the feasibility and all that was left was locating the development as proposed. In the case before us today, the feasibility of the development under a wide variety of other municipal code provisions has not been fully detailed. This case is akin to *Barden* and distinguishable from *Leeward.* The permit granted by the City postpones any determination of feasibility. It is even acknowledged by the City in its closing briefs and testimony that the appellants' arguments are "based on the mistaken notion that the Substantial Development permit in itself will permit construction." Development review, and thus proposal evolution, will continue right up to the issuance of the building permit.

Finally, the board questions the decision to segment the proposal into phase 1 and phase 2 for purposes of review under the SMA. Although this decision to segment the project may not be technically flawed, the board reiterates that segmentation of projects has the potential to overlook or minimize the impacts of a proposal. First, segmentation of shoreline permits from other permits is not allowed if the piecemeal administrative approvals would frustrate the vitality of either the SMA or SEPA. *Merkel v. Port of Brownsville*, 8 Wn. App. 844 (1973). Second, the entirety of the project must be evaluated under SEPA. It appears that the SEPA environmental checklist was prepared for both phase 1 and phase 2, however, it is not clear whether the City has met the standards set forth in *Merkel.* There should be a similar review under the SMA. It is not necessary to obtain a single permit for both phases. It is critical, however, that there be some assessment of the cumulative impact of the entire project under shoreline policies and regulations. *Hayes v. Yount*, 87 Wn.2d 280, 284 (1976).

VI.

3. The issuance of the DNS.

As noted above, the standard of review for the DNS is whether the decision was clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed. *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wn.2d 267, 274(1976)). For a DNS to survive judicial scrutiny, the record must demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA and that the decision to issue an DNS was based on information sufficient to evaluate the proposal's environmental impact. *Pease Hill Community Group v. County of Spokane*, 62 Wn. App. 800, 810, 816 (1991). The SEPA review must be affirmed unless "the reviewing court is firmly convinced in light of the record and the public policy contained in RCW 43.21C.010 that a mistake has been committed."

The clearly erroneous standard allows a reviewing court to give substantial weight to the agency determination as required by RCW 43.21C.090, yet at the same time it allows a reviewing court to consider "the public policy contained in the act of the legislature authorizing the decision or order." *Norway Hill Preservation*, 87 Wn.2d at 274.

In order to facilitate the "threshold determination," the applicant must prepare an environmental checklist, which must provide information reasonably sufficient to evaluate the environmental impact of the proposal. WAC 197-11-315 et. seq. The responsible official must then thoroughly consider a proposal's potential environmental significance as documented in the

environmental checklist. WAC 197-11-315(1)(a). Based upon independent review of all relevant information and analysis, the responsible official determines whether the proposal is "likely to have a probable significant adverse environmental impact." WAC 197-11-330(1)(b). The responsible official then renders a "determination of significance" (DS) or a "determination of non-significance" (DNS). A DS mandates intensified environmental review through preparation of an EIS. WAC 197-11-360. Conversely, a DNS means that no EIS will be required. WAC 197-11-340. A*nderson v. Pierce*, 86 Wn. App. 290 (1997).

A DNS must be based upon adequate information, information reasonably sufficient to evaluate impacts. WAC 197-11-335. The Supreme Court recently held that a decision to issue a negative threshold determination must be based upon "information sufficient to evaluate the proposal's environmental impacts." *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 176 (2000). Significance under SEPA is defined as "a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794. The purpose of SEPA is to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences. *King County v. Boundary Review Board*, 122 Wn.2d 648, 664 (1993).

The primary argument of the appellants to show that the DNS was clearly erroneously issued is that the information was inadequate and therefore it was incorrect to determine that no significant adverse impacts would occur. The inadequacy of the information claim by appellants focused primarily on the failure to evaluate stormwater impacts, failure to delineate and evaluate the third wetland and failure to evaluate the impacts from hazardous materials used in the CRC.

As to the allegation regarding stormwater, although much testimony was provided on differing methods to analyze stormwater for sizing of runoff control facilities (Santa Barbara method versus the Rational method), the board does not find that the appellants met their burden of showing that a mistake has been made. While it may be true that the 1990 King County Surface Water Design manual is required by 19.12 of the Snoqualmie Municipal code for purposes of applying for the stormwater permit, it is not specifically required as part of the SEPA analysis. The fact that Snoqualmie relied on an acceptable scientific method of calculating stormwater impacts, is sufficient for the purposes of SEPA. On this issue alone, the issuance of the DNS was not clearly erroneous.

On the failure to delineate the third wetland, the board finds that the definition in RCW 90.58.030(2)(h), RCW 36.70A.030(20) and WAC 173-22-080(2) provide for certain artificial wetlands created as a result of road construction to be considered wetlands for purposes of protection under the SMA. The definition of wetlands in the SMA excludes those artificial wetlands "created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway." RCW 90.58.030 (2)(h). By implication, those wetlands created before July 1, 1990, are subject to the SMA. Conflicting evidence was provided that the construction or existence of the road and railroad may have caused the creation of this third wetland or that it may have existed prior to the construction. Regardless of the conflicting testimony, since the road and railroad have been in existence since long before 1990, this wetland, whether artificial or pre-existing, is considered a wetland for purposes of the SMA. Therefore, it was an error to not delineate this wetland, to not include it on the environmental

checklist and to not consider the impact of the proposal on this wetland. The lack of this information is substantial, given the location of various aspects of the proposed project. Failure to include this information in the SEPA threshold determination was clearly erroneous.

On the failure to adequately evaluate the impacts of hazardous materials, the board finds that the appellants have not met their burden of proof. The environmental checklist prepared by NRM is less than forthcoming on the type, magnitude and risks associated with the vast array of chemicals, cleansers, paints and petroleum products used in the restoration process and in operating the locomotives and other rolling stock. However, the City of Snoqualmie has required the preparation of a chemical and hazardous waste materials inventory by a chemical engineer and approved by the Fire Marshall. This indicates that the City evaluated the impacts at some level. The board is, however, struck by the absence of analysis on the impact of these materials to the environment.

In general, the board is troubled by the City's general reliance on its municipal codes as providing adequate analysis of environmental impacts of specific projects. The City argues that as a result of the 1995 Regulatory Reform legislation (Engrossed Substitute House Bill 1724), which attempted to better integrate SEPA with Growth Management, SEPA is now allowed to rely on City codes for mitigation of impacts. Despite the City's arguments, SEPA still requires the local government to consider, in the course of project review, the "specific probable adverse environmental impacts to the proposed action and determines that these specific impacts are adequately addressed by the development regulations..." It appears the City relied on its

development regulations and other portions of the municipal code without specifically evaluating the impacts of the proposal on the environment. Missing from this analysis is any assessment of whether the site specific impacts can be successfully mitigated through compliance with the applicable provisions of the municipal code. This is not allowed by SEPA.

For the reasons cited above, the issuance of the DNS was clearly erroneous. The board does not render an opinion as to whether the project warrants a finding of significance, only that the City failed to adequately evaluate pertinent information in issuing its DNS and that the City relied on its municipal code provisions rather than specifically evaluating the impact of the proposal on the environment.

VII.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the above Findings of Fact and Conclusions of Law, the Board enters the following:

ORDER

The SDP and associated DNS are hereby remanded to the City of Snoqualmie for processing and reconsideration in accordance with this order.

Done this 27th day of August 2001.

SHORELINES HEARINGS BOARD

KALEEN COTTINGHAM, Presiding

JAMES A. TUPPER, Jr., Member

ROBERT V. JENSEN, Member

JUDY WILSON, Member

PHYLLIS SHRAUGER, Member

DAN SMALLEY, Member

1985 WA ENV LEXIS 175

Shorelines Hearings Board

January 23, 1985

SHB No. 81-23; SHB No. 82-30

Reporter
1985 WA ENV LEXIS 175 *

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT ISSUED BY CITY OF ANACORTES TO ANACORTES-FIDALGO BAY MARINA, INC., STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and DEPARTMENT OF FISHERIES, Appellants, and WASHINGTON ENVIRONMENTAL COUNCIL, Intervenor, v. CITY OF ANACORTES and ANACORTES-FIDALGO BAY MARINA, INC., Respondents. IN THE MATTER OF A SHORELINE CONDITIONAL USE PERMIT DENIED BY THE CITY OF ANACORTES TO ANACORTES-FIDALGO BAY MARINA, INC., ANACORTES-FIDALGO BAY MARINA, INC., Appellant, v. CITY OF ANACORTES, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and DEPARTMENT OF FISHERIES, and WASHINGTON ENVIRONMENTAL COUNCIL, Respondent

Core Terms

shoreline, dredge, proposed development, conditional use, fill, spawn, spit, site, conditional use permit, habitat, herring, development permit, fishery, smelt, acre, boat, elevation, foot, adverse effect, salmon, storing, height, marine, revise, fish, public access, landfill, proven, beach, spoil

Action

[*1] FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Panel: SHORELINES HEARINGS BOARD; Lawrence J. Faulk, Chairman (See Dissent); Gayle Rothrock, Vice Chairman; Rodney M. Kerslake, Member; Nancy R. Burnett, Member; Beryl Robison, Member; William A. Harrison, Administrative Appeals Judge

Opinion

This matter is the request for review of a shoreline substantial development permit granted and a shoreline conditional use permit denied by the City of Anacortes to Anacortes-Fidalgo Bay Marina, Inc. This matter came on for hearing before the Shorelines Hearings Board, convened at Anacortes, Washington, on September 4 and 5, 1984, and convened at Redmond, Washington, on September 6 and 7, 1984, and convened at Lacey, Washington, on September 10, 11, 12, 13 and 14, 1984.

This matter was heard by Board members Lawrence J. Faulk, Gayle Rothrock, Rodney M. Kerslake, Nancy R. Burnett, and Beryl Robison. Administrative Appeals Judge William A. Harrison presided in these proceedings.

Anacortes-Fidalgo Bay Marina, Inc., was represented by its attorney Mark Bennett. The State of Washington, Department of Fisheries was represented by Dennis D. Reynolds, Assistant Attorney General. The State of Washington, Department of Ecology was represented by Jay J. Manning, Assistant Attorney General. The Washington Environmental Council was represented by its attorney, j. Richard Aramburu. The City of Anacortes was represented by Stephen E. Mansfield, **[*2]** City Attorney.

The parties filed briefs in this matter, the last of which was filed on October 10, 1984.

Having considered the testimony, exhibits, briefs, argument of counsel, and being fully advised, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

This matter arises on the shoreline of Fidalgo Bay in Anacortes.

II

The site of the proposed development is known as Weaverling Spit. This is a small peninsula (23 acres) jutting out from the western shore of Fidalgo Bay. Weaverling Spit is visible to motorists entering and leaving Anacortes by the main highway (SR 20).

III

Weaverling Spit was purchased in 1954 by Mr. Richard V. Stockwell who has deeded it in trust for the benefit of his family. His son, Mr. Richard V. Stockwell, Jr., is trustee of the trust and President of the proponent of the proposed development, Anacortes-Fidalgo Bay Marina, Inc., (hereafter AFBM).

IV

Mr. Stockwell, Jr., resides upon Weaverling Spit. There is a line of the Burlington Northern railroad crossing the site. It is used by one train every three to four days. Otherwise, Weaverling Spit exists almost wholly in its natural condition. Its beaches are pleasant and walkable. Its upland is grassy **[*3]** and covered, in part, by mature timber. The beds underlying the waters on the north side of Weaverling Spit support lush stands of eelgrass, an aquatic plant which sustains and nurtures marine life.

V

The Pacific herring, a primary link in the food chain supporting the salmon fishery, spawns in the eelgrass adjacent to Weaverling Spit and elsewhere in Fidalgo Bay. Another marine species, the surf smelt, spawns upon the northern beach of Weaverling Spit and upon other beaches in Fidalgo Bay. The southern shore of Weaverling Spit and lower Fidalgo Bay is a shallow rearing area where juvenile salmon feed and grow on their migration from the Skagit River to deeper waters.

VI

Operating under grant appropriated through the Federal Coastal Zone Management Act of 1972, the Skagit Regional Planning Council surveyed Skagit County for potential marina sites in 1977. Their report, entitled Skagit County marine Recreation Site Analysis, contained the following conclusion concerning Weaverling Spit, the site of the proposed development:

> . . . based on the analysis, this site should not be developed for wet moorage. It is, however, highly suitable for day-use recreation and shoreline access. **[*4]** (supra at p. ii).

VII

The development proposed by AFBM consists of a marina, crane-launch facilities, restaurant, boat repair shop and retail shops. The marina would include 641 "wet" slips for mooring both pleasure and commercial craft up to 70 feet or more in length. It would also include 1,600 "dry" spaces inside three large buildings for storage of boats up to 2S feet in length. There would be no public boat launch ramp.

VIII

Weaverling Spit is too small to accommodate the dry storage proposed for 1,600 boats in addition to other proposed development. The dry storage would therefore be located over the water.

IX

Access to the marina floats would be by eight elevated walkways crossing over the north beach of Weaverling Spit. These would be supported by piling and provide six to eight feet clearance underneath.

X

Fidalgo Bay adjacent to weaverling Spit is too shallow to accommodate the size of boats contemplated for moorage at the floats. It is therefore necessary to dredge the subtidal lands to create a basin for the marina.

XI

The number of proposed mooring slips (641) would necessitate dredging 32 acres of Fidalgo Bay on the north of the 23-acre Weaverling Spit. The dredging **[*5]** would total 650,000 cubic yards and would eliminate approximately 32 acres of eelgrass presently serving as herring spawning habitat.

XII

The eggs of herring attach to the blades of eelgrass. After birth, the larval herring are sustained by the cover provided by the eelgrass habitat.

XIII

Herring "home" back to a general area, such as Fidalgo Bay to spawn. This creates a separate "stock" of herring. Observation has shown that although there are about 1,200 acres of apparent spawning habitat for herring in Fidalgo Bay, a particular 200 acres of it is consistently unused. The acreage of preferred habitat includes the 32 acres proposed for elimination. The proposed development would result in the loss of 3 percent of the herring spawning habitat of Fidalgo Bay.

XIV

It was not proven that if 32 acres were eliminated, herring would resort to the customarily unused 200 acres of apparent spawning habitat. To the contrary, the disuse of this acreage suggests a biological adversity which causes herring to avoid it.

XV

It was not proven that the loss of herring spawning habitat would not result in a corresponding loss of herring population.

XVI

It was not proven that the loss of herring **[*6]** population would not result in consequent loss of salmon and other species higher up the food chain.

XVII

Mitigation for the loss of herring spawning habitat has been discussed by the parties at length prior to these proceedings. On this record it was not proven that any amount of artificially planted habitat would succeed in making up for the loss of natural habitat for herring spawning. Speculation that such would be the case has not been confirmed by a reliable study at this time. Mitigation for the loss of herring spawning habitat has not been proven feasible in this matter.

XVIII

The spawning stock in Fidalgo Bay, in tons of herring, has averaged 500 to 600 tons since 1980. For comparison, the following are the major herring spawning areas of the state with their average spawning stock, in tons:

		Tonnage
1.	Strait of Georgia	10,000
2.	Discovery Bay	3,000
3.	Port Orchard	1,500 - 2,000
	Quartermaster Harbor	each
	Port Susan	
	Port Gamble	
4.	Totten-Squaxin	1,000
	Central Hood Canal	each
5.	Fidalgo Bay	Less than 1,000
	and others	each

XIX

Boats moored at the marina would be protected from unwanted wave action by a timber breakwater constructed waterward **[*7]** of the floats and parallel to the north shore of Weaverling Spit. The proposed breakwater would be 1,945 feet long.

XX

Surf smelt spawn in the upper intertidal areas of Fidalgo Bay. Smelt provide forage for salmon and other fish of sport and commercial importance.

XXI

Specifically, smelt spawn on the site of the proposed development. The north shore of Weaverling Spit is the longest stretch of natural spawning beach for surf smelt remaining in Fidalgo Bay. To date, all development on Fidalgo Bay has probably eliminated 50 percent of the original smelt spawning areas. The north shore of Weaverling Spit contains 30 percent of the existing smelt spawning area in Fidalgo Bay.

XXII

The smelt spawning area on the north shore of Weaverling Spit is maintained by wave action which washes the gravel and stirs up the sandy materials composing the beach. The proposed breakwater would reduce wave action on the spawning area. It was not proven that this change would not result in siltation and hardening of the spawning beach rendering it unfit for further smelt spawning.

XXIII

It was not proven that the loss of smelt spawning habitat would not result in a corresponding loss of smelt population.

[*8] XXIV

It was not proven that the loss of smelt population would not result in consequent loss of salmon and other species higher up the food chain.

XXV

Artificially flushing or raking the beach is not a practical long-term means of maintaining it for smelt spawning. This would not substitute for the natural wave action which would be halted by the proposed breakwater.

XXVI

The number of proposed boat storage spaces, wet and dry, results in a proportionate number of required parking spaces [1] which Weaverling Spit is too small to accommodate along with the other proposed uses. Accordingly, the proposed development includes filling 18 acres of Fidalgo Bay on the south side of the 23-acre Weaverling Spit. This fill is necessary to absorb the parking accessory to the marina.

XXVII

The proposed fill would total approximately 500,000 cubic yards. The fill material would be a portion of the 650,000 cubic **[*9]** yards dredged to form the marina basin. The remaining 150,000 cubic yards would be placed on Weaverling Spit to develop parking areas there.

XXIX

The proposed fill would commence near +6.0 feet tidal elevation and extend waterward to or beyond the zero tidal elevations (mean lower low water). It would therefore cover and eliminate tidelands which are presently a natural rearing area for juvenile salmon. There are approximately 700 acres of such tidelands in lower Fidalgo Bay so that approximately 2.5 percent of this salmon rearing habitat would be lost to the proposed fill.

XXX

In December, 1980, the City of Anacortes (City) annexed the site of the proposed development which was previously within Skagit County. In the same month, AFBM applied to the City under the Shoreline Management Act, chapter 90.58 RCW, for a substantial development permit for the proposed marina development.

XXXI

On June 12, 1981, the City granted to AFBM the substantial development permit for which it had applied. The Washington State Department of Ecology (DOE) then filed its request for review of that permit before this Board. The Washington State Department of Fisheries (DOF) and the Washington Environmental **[*10]** Council (WEC) intervened as appellants with DOE.

XXXII

On November 16, 1981, this Board entered its Order Granting Motion for Summary Judgment, which motion had been filed by DOE. Therein. we held that the substantial development permit granted to AFBM must be remanded because it purported to allow development (dredging and filling) which constitutes a conditional use while a conditional use permit had neither been sought nor obtained from the City nor approved by DOE as required by law.

XXXIII

This Board's Order Granting Summary Judgment was appealed by AFBM to the Superior Court for Skagit County. The Court, upon review, entered its Order on July 26, 1982, wherein it remanded the substantial development permit to this Board for further review, but remanded the conditional use issues to the City. The Court further

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[1] A ratio of .75 parking spaces to each boat space is proposed for the site. Using this ratio, 1,683 spaces are necessary.

directed that any appeal of the conditional use issues, when decided by the city or DOE, be consolidated with the substantial development permit matter for hearing before this Board.

XXXIV

On June 4, 1982, AFBM applied to the City under the Shoreline Management Act, chapter 90.58 RCW, for a conditional use permit.

XXXV

On August 4, 1982, the City denied to AFBM the **[*11]** conditional use permit for which it had applied. AFBM filed its request for review before this Board on August 27, 1982. The DOE, DOF, and WEC were joined as parties respondent in the matter of the conditional use denial. The substantial development permit grant (SHB No. 81-23) and conditional use permit denial (SHB No. 82-30) were consolidated for hearing before this Board.

XXXVI

The Anacortes Shoreline Master Program (ASMP), implementing the Shoreline Management Act, chapter 90.58 RCW, became effective in 1976. Shoreline areas of the City are designated by the ASMP under of the following five designations:

1. Urban I

2. Urban II

3. Urban Residential

4. Conservancy

5. Natural

XXXVII

Following annexation of the site in question, it was designated within the ASMP as Urban II. The general intent of the Urban II designation is set forth at p. 11 of the ASMP:

> This designation is primarily for those areas which contain a mixture of commercial, light manufacturing and high density residential uses. It is the intent of this designation to maintain existing character of the area without substantially increasing bulk or scale of development, and to encourage location of water related uses **[*12]** attractive to the public. (Emphasis added.)

XXXVIII

The Urban II designation allows marinas meeting the requirements for that use. ASMP Use Activity Regulations chart, Appendix A. The requirements for marinas are set forth at ASMP Section 20(5), p. 18:

> (5) MARINAS: Commercial facilities which provide boat launching, storage, supplies and services for small commercial and pleasure craft.
>
> POLICIES
>
> a) Marinas are to be designed to minimize adverse impacts to water quality, and to be aesthetically compatible with the shoreline area.
>
> b) Viewpoints and public access to marina areas are encouraged in marina plan and design.
>
> c) Marinas must be designed in accordance with guidelines prepared by the Washington State Department of Fisheries and other agencies having jurisdiction over such development.
>
> Regulations
>
> a) Marina development shall comply with "Criteria Governing the Design of Bulkheads, Landfills, and Marinas in Puget Sound, Hood Canal, and Strait of Juan De Fuca for Protection of Fish and Shellfish Resources," State of Washington, Department of Fisheries, February 5, 1971.

b) Placement of breakwaters, jetties, groins, bulkheads, landfills, and dredging activities associated **[*13]** with marina construction shall comply with regulations contained in this Master Plan pertaining to those activities.
c) Marinas and boat launch ramps shall provide parking facilities adequate to meet demand/need analysis projections.
d) Covered moorages are permitted when views from water or upland areas will not be substantially affected, and when design and construction meets City standards.
e) Height limit for covered moorage is twenty-five feet above mean higher high water.

XXXIX

Under Regulation (a) of Section 20(5), above, the Department of Fisheries "Criteria" dated February 5, 1971, provide:

In cases where solid bulkhead and/or land fill construction principles must be utilized, the following criteria must be strictly adhered to and shall be included in any approval written by the State of Washington for construction affecting all marine waters lying east of the entrance of the Strait of Juan de Fuca (Cape Flattery). Adherence to these design criteria is mandatory in order to protect fish and shellfish.

1. Bulkheads and/or land fills may be constructed with a vertical face seaward to the tidal elevations listed by geographic areas as shown in Table 1. Construction to **[*14]** these tidal elevations may make use of any type of permanent facing material, not subject to erosion or siltation (figure 1).
2. Construction may extend seaward of the elevations shown in Table 1, but the toe shall in no instance extend beyond the tidal values by area shown in Table 2, figure 1. (Emphasis added.)

The Table 1 tidal elevation is +7.5 feet. The Table 2 tidal elevation is +6.1 feet. Criteria, Area (9), page 7.

XXXX

Under Regulation (b) of Section 20(5), above, the following are pertinent regulations relating to dredging and filling:

ASMP Section 20(13), p.22;
(13) LANDFILL: The creation of upland area or the elevating of existing upland by deposition of soil, dredge spoil, or other solid material onto land or into shallow water bodies.
POLICIES
a) Landfills which reduce the area of marine surface waters should be permitted for water dependent uses only.
b) Fill materials are not to contain pollutants which could cause an adverse impact upon water quality.
c) Landfills should be landscaped to maintain or improve existing views and prevent erosion where feasible.
Regulations

a) Landfills shall comply with "Criteria for Governing the Design of Bulkheads, Landfills, **[*15]** and Marinas in Puget Sound, Hood Canal, and Strait of Juan de Fuca, for Protection of Fish and Shellfish Resources," State of Washington, Department of Fisheries, February 5, 1971.
ASCMP Section 20(14), p. 23:
(14) DREDGING: Removal, displacement, and disposal of material from the bottom of water bodies, or natural wetlands.
POLICIES
a) Dredging shall be done in such a manner as to minimize adverse impacts on marine life and habitat.
b) Polluted spoils should be deposited at upland sites and measures taken to contain runoff from the sites.
Regulations
a) Dredging for the purposes of obtaining fill or construction material is prohibited except where the applicant can show that:
1) the existing benthos is sterile or largely degraded and shows no sign of regeneration, and
2) impacts upon water quality and aquatic life are mitigable.
b) Dredge spoil shall be deposited in an approved submerged site only if the spoils meet EPA criteria for deposit in navigable waters.

c) Dredging shall be scheduled so as not to interfere with migratory movements of anadromous fish.
XXXXI

The Urban II designation does not allow dredging and filling outright. Rather, dredging and filling are subject **[*16]** to scrutiny under separate criteria as conditional uses. In this respect there is no difference among the Urban I, Urban II, Urban Residential or Conservancy designations. ASMP Use Activity Regulations Chart, Appendix A.

XXXXII

There are two criteria governing conditional uses. One is within the ASMP at Section 14, page 7 and it states:

SECTION 14: Shoreline Conditional Uses

Uses which are designated in this Master Plan as shoreline conditional uses, and other uses may be authorized by the Planning Commission after public hearing, and upon approval of the Department of Ecology, if it is found that:

a) the use will not have significant adverse effect upon the environment or other adjacent or nearby uses, or that such adverse effects can be mitigated, or that the benefits to the community of permitting such use outweigh the adverse effects;

b) the use will not interfere with public use of public shorelines;

c) design and appearance of the development will be compatible with the design and appearance of surrounding uses;

d) the use will not be contrary to the general intent of the Shoreline Master Program of the City of Anacortes;

e) the burden of proof that the above conditions exist **[*17]** shall be on the applicant;

f) in authorizing a shoreline conditional use, the Planning Commission may impose conditions and requirements in addition to those expressly set forth in this Master Program.

This other conditional use criterion is that of the DOE at WAC 173-14-140:

Review criteria for conditional use permits. The purpose of a conditional use permit is to allow greater flexibility in varying the application of the use regulations of the master program in a manner consistent with the policies of *RCW 90.58.020*: Provided, That conditional use permits should also be granted in a circumstance where denial of the permit would result in a thwarting of the policy enumerated in *RCW 90.58.020*. In authorizing a conditional use, special conditions may be attached to the permit by local government or the department to prevent undesirable effects of the proposed use.

(1) Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided the applicant can demonstrate all of the following:

(a) That the proposed use will be consistent with the policies of *RCW 90.58.020* and the policies of the master program.

(b) That the proposed use **[*18]** will not interfere with the normal public use of public shorelines.

(c) That the proposed use of the site and design of the project will be compatible with other permitted uses within the area.

(d) That the proposed use will cause no unreasonably adverse effects to the shoreline environment designation in which it is to be located.

(e) That the public interest suffers no substantial detrimental effect.

(2) Other uses which are not classified or set forth in the applicable master program may be authorized as conditional uses provided the applicant can demonstrate, in addition to the criteria set forth in WAC 173-14-140(1) above, that extraordinary circumstances preclude reasonable use of the property in a manner consistent with the use regulations of the master program.

(3) Uses which are specifically prohibited by the master program may not be authorized.

(4) In the granting of all conditional use permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other

developments in the area where similar circumstances exist, the total of the conditional uses should also remain **[*19]** consistent with the policies of *RCW 90.58.020* and should not produce substantial adverse effects to the shoreline environment.

XXXXIII

The relation between the two conditional use criteria is that WAC 73-14-140 of DOE is the minimum criterion for review while the master program criterion, such as ASMP Section 14, may be applied where more restrictive. WAC 173-14-155.

XXXXIV

Any Findings of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

We review the proposed development for consistency with the Anacortes Shoreline Master Program (ASMP), Department of Ecology regulations at chapter 173-14 WAC, and the shoreline Management Act (SMA). After the adoption of an applicable master program and its approval by DOE, we do not review a proposed development for consistency with the DOE Guidelines for Development of Master Programs, chapter 173-16 WAC. *RCW 90.58.140(2)(a)* and (b) and -.140(3).

II

The State Department of Ecology (DOE), the State Department of Fisheries (DOF) and Washington Environmental Council (WEC), having requested review or intervened with the requestor, bear the burden **[*20]** of proof with regard to the substantial development permit granted by the City of Anacortes. *RCW 90.58.140(7)*.

III

The proposed development is not inconsistent with Regulations under ASMP Section 20(14), p. 23, relating to dredging. In particular, the fact that the proposed fill would be derived from dredge spoils is not inconsistent with Regulation (a) prohibiting dredging for the purpose of obtaining fill. The purpose of the dredging is to create the marina basin. Use of the spoils for fill is secondary to this purpose. Accord, Protect the Peninsula's Future v. Clallam County, et al., SHB No. 82-7 (1982).

IV

The proposed development is inconsistent with the regulations of ASMP Section 20(5)(a) and (b), p.18, relating to marinas and Section 20(13)(a), p.23, relating to landfill. Each of these regulations incorporates by reference the DOF "Criteria" governing the design of landfills and marinas dated February 5, 1971. [2] Those criteria prohibit

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[2] At hearing and in briefs, all parties argued with reference to DOF chapter 220-110 WAC which took effect in 1983 and addresses many subjects in common with the DOF Criteria of 1971. Chapter 220-110 WAC has been applied by DOF in the denial of a Hydraulics Permit to the proposed development under RCW 75.20.100.

In our review of the shoreline substantial development permit granted under the SMA, 90.58 RCW, we will give application to the regulations of the ASMP which, themselves, are adopted as WAC 173-19-3701 pursuant to *RCW 90.58.120*. Those regulations specify the DOF Criteria of 1971, which we conclude to be the correct criteria for our review.

In our review of the denial of the shoreline conditional use permit under the SMA, 90.58 RCW, we will give application to the stipulation of the parties within the Pre-Hearing Order herein dated June 14, 1984, that the criteria for conditional use permits be that in effect in August, 1982. The conditional use permit denied by the City was denied in that month and the criteria was the

landfill waterward of the +6.1 foot tidal elevation. The proposed landfill is nearly all waterward of that elevation. See Finding of Fact XXIX above.

[*21] V

The shoreline substantial development permit granted by the City authorizes fill inconsistent with the ASMP and should be reversed.

VI

Anacortes-Fidalgo Bay Marina, Inc. (AFBM), having requested review bears the burden of proof with regard to the shoreline conditional use permit denied by the City of Anacortes. *RCW 90.58.140(7)*.

VII

A shoreline conditional use permit is required to proceed with the proposed dredging and filling. ASMP, Use Activity Regulations Chart, Appendix A.

VIII

The proposed development is inconsistent with the conditional use criteria of ASMP Section 14(d), p. 8, which is set forth at Finding of Fact XXXXII, above. That section requires consistency with the general intent of the ASMP. The intent of the Urban II designation applied to the site by the ASMP is to maintain the existing character of the area. The proposed development which includes dredging 32 subtidal acres and filling 18 acres of tidelands adjacent to a natural spit of only 23 acres, would not maintain the existing character of the area.

IX

The conditional use criteria of ASMP Section 14(d), p. 8, cited aDove, is more restrictive than DOE criteria, and applies to the proposed development. WAC **[*22]** 173-14-155.

X

The proposed development is inconsistent with the conditional use criteria of DOE at WAC 173-14-140(1)(a), which requires consistency with the policies of the SMA and master program (ASMP).

XI

The proposed development is inconsistent with the policy of the SMA at *RCW 90.58.020* that:

> Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

This requirement exists in addition to the SMA's preference for water dependent uses, which the proposed development would be. Despite its water dependency, the proposed development is not designed in a manner to minimize damage to the environment. Rather, it entails an expanse of floats and over-the-water dry storage disproportionately large in comparison with the uplands involved. This has resulted in the necessity of extensive filling to support parking and other services to match the scale of the float and storage proposal. All of this would occur in a productive marine environment.

XII

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same on the date of application. Thus, to the extent that any conditional use criteria invokes the policy of ASMP Section 20(5)(c) that:

> Marinas must be designed in accordance with guidelines prepared by the Washington State Department of Fisheries and other agencies having jurisdiction over such development.

AFBM cites our decision in PROW, et al. **[*23]** v. City of Olympia, et al., SHB No. 225 (1977), for the proposition that extensive dredging and filling are warranted for the development of a marina. That case is distinguishable from this one. In PROW we found that:

> [the site] . . . attracts little human activity and presents at low tide an unsightly vista of heavily polluted mud flats littered with piling remnants and chunks of cement. (PROW, id, Finding of Fact IV.)

Moreover, we noted in Conclusion of Law VI:

> . . . the sediment of East Bay [the site] is heavily polluted and, unfortunately, it appears there is little likelihood of either the City or the Port attempting to abate such polluted sediment.

The policy of the SMA requiring uses to minimize any resultant damage did not forbid extensive dredging and filling in the deadened environment of East Bay, but does forbid it in the vital marine environment of Fidalgo Bay.

XIII

The proposed development is inconsistent with the conditional use criteria of DOE at WAC 173-14-140(1)(d) which requires that a proposed use will cause no unreasonably adverse effects to the shoreline environment designation in which it is to be located. AFBM has not carried its burden of proving that **[*24]** the proposed dredging and filling will not have an unreasonably adverse effect through elimination of herring, smelt and juvenile salmon habitat, nor that such adverse effect could be mitigated.

IVX

In concluding that the proposed development is inconsistent with WAC 173-14-140(1)(d), above, we have given consideration to the cumulative impact of additional requests for like actions in the area as required by WAC 173-14-140(4). Were other conditional use permits to be granted for similarly expansive dredging and filing in similar herring, smelt and juvenile salmon habitat in the area, these would reduce that habitat piecemeal and the total of conditional uses would thereby produce substantial adverse effects to the shoreline environment.

XV

The shoreline conditional use permit denied by the City would authorize dredging and filling inconsistent with DOE and City conditional use criteria. Its denial should be affirmed.

XVI

The provisions of the ASMP and DOE conditional use regulations cited herein have not been shown to be inconsistent with the chapter 90.58 RCW.

XVII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Conclusions **[*25]** the Board enters this

ORDER

The shoreline substantial development permit granted to Anacortes-Fidalgo Bay Marina, Inc., by the City of Anacortes is reversed.

The denial of a shoreline conditional use permit to Anacortes-Fidalgo Bay Marina, Inc., by the City of Anacortes is affirmed.

DONE at Lacey, Washington, this 23rd day of January, 1985.

SHORELINES HEARINGS BOARD

Nick Thomas

(See Dissent)

LAWRENCE J. FAULK, Chairman

GAYLE ROTHROCK, Vice Chairman

RODNEY M. KERSLAKE, Member

NANCY R. BURNETT, Member

BERYL ROBISON, Member

WILLIAM A. HARRISON

Administrative Appeals Judge

SHB No. 81-23

ORDER DENYING MOTION FOR RECONSIDERATION

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT ISSUED BY CITY OF ANACORTES TO ANACORTES-FIDALGO BAY MARINA, INC.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and DEPARTMENT OF FISHERIES, Appellants, and WASHINGTON ENVIRONMENTAL COUNCIL, Intervenor, v. CITY OF ANACORTES and ANACORTES-FIDALGO BAY MARINA, INC., Respondents.

SHB No. 82-30

ORDER DENYING MOTION FOR RECONSIDERATION

IN THE MATTER OF A SHORELINE CONDITIONAL USE PERMIT DENIED BY THE CITY OF ANACORTES TO ANACORTES-FIDALGO BAY MARINA

ANACORTES-FIDALGO BAY MARINA, INC., Appellant, v. CITY OF ANACORTES, STATE **[*26]** OF WASHINGTON, DEPARTMENT OF ECOLOGY and DEPARTMENT OF FISHERIES, and WASHINGTON ENVIRONMENTAL COUNCIL, Respondents.

On February 1, 1985, Anacortes Fidalgo Bay Marina, Inc., filed its Motion for Reconsideration of the final decision in this matter.

Having granted specified time for answer and having considered the Motion for Reconsideration and the Department of Ecology's Response dated February 13, 1985, and these constituting the only submission within the specified time, and

Having considered the record and file herein and being fully advised

NOW THEREFORE IT IS ORDERED that the Motion for Reconsideration is denied.

DONE at Lacey, WA this 21st day of February, 1985.

LAWRENCE J. FAULK, Chairman

GAYLE ROTHROCK, Vice Chairman

(Not Available for Signature)

ROD KERSLAKE, Member

NANCY BURNETT, Member

BERYL ROBISON, Member

WILLIAM A. HARRISON

Administrative Appeals Judge

SHB No. 81-23

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT ISSUED BY CITY OF ANACORTES TO ANACORTES-FIDALGO BAY MARINA, INC.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and DEPARTMENT OF FISHERIES, Appellants, and WASHINGTON ENVIRONMENTAL COUNCIL, Intervenor, v. CITY **[*27]** OF ANACORTES and ANACORTES-FIDALGO BAY MARINA, INC., Respondents.

Appellant Department of Ecology having filed on October 6, 1981, its "Motion for Summary Judgment," and having read the following:

1. Department of Ecology's "Motion for Summary Judgment" filed October 6, 1981, and

2. Affidavit of Emily Ray, dated October 6, 1981, and Exhibits A through E listed thereon, and

3. Memorandum in Support of Motion for Summary Judgment of Department of Ecology, filed October 6, 1981, and

4. Exhibit F: Public Notice of Application for Permit - U.S. Army Corps of Engineers, dated 1 September, 1981, and filed at the motion hearing of November 3, 1981, and

5. Exhibit G: Findings of Fact and Conclusions of the Anacortes Planning Commission entered August 12, 1981, and filed at motion hearing on November 3, 1981, and

6. Anacortes-Fidalgo Bay Marine, Inc.'s Reply Brief on Summary Judgment filed October 30, 1981, and

7. Department of Ecology's Memorandum Regarding Effect of Skagit County Shoreline Management Master Program on Motion for Summary Judgment, filed November 6, 1981, and the Skagit Master Program, and

8. Letter, Michael W. Smith to Shorelines Hearings Board, filed November 12, 1981, and **[*28]**

9. The records and file herein, and having viewed the site

The following facts are undisputed:

1. On December'4, 1980, respondent Anacortes-Fidalgo Bay Marina, Inc. (Marina) applied to the respondent, City of Anacortes (City) for a shoreline substantial development permit. The proposed development is described in the Final Environmental Impact Statement and includes the following aspects among others:

a. Dredging to a maximum of 650,000 cubic yards in Fidalgo Bay adjacent to Weaverling Spit.

b. Filling an area of 18 acres with dredge spoils for parking which is now predominantly Fidalgo Bay and is also adjacent to Weaverling Spit. [1]

c. A boat storage structure 50 feet or more in height above mean lower low water (and more than 35 feet in height above ordinary high water) and extending over water.

d. A moorage float layout involving 641 slips.

2. Also in December, 1980, the City annexed the site of the proposed development which was previously within Skagit County.

3. On March 16, 1981, the City adopted an amendment to the Anacortes Shoreline Master Program (ASMP) designating the project site "Urban II."

4. On June 12, 1981, the City issued a document entitled "Permit for Shoreline **[*29]** Management Substantial Development" to the Marina allowing the proposed development. In doing so, the City applied the terms of its newly amended ASMP. It did not apply the Skagit County Shoreline Master Program (SCSMP).

5. On July 1, 1981, Department of Ecology (DOE) approved the ASMP amendment applicable to the site. On July 2, 1981, DOE filed that amendment with the Code Reviser to amend the State Shoreline Master Program, chapter 173-19 WAC.

The motion should be granted for the following reasons:

1. The City applied the wrong shoreline master program when issuing this permit. In this regard, WAC 173-19-044 of the State Shoreline Master Program is clear: **[*30]**

> Until a revised program is approved or adopted by the department, any ruling on an application for permit in the annexed shoreline area shall be based upon compliance with the pre-existing master program approved and adopted for the area.

A revised program is "approved or adopted" by the department (DOE) when the rule adoption procedure of the Administrative Procedure Act, chapter 34.04 RCW, has been completed with regard to the revision. Department of Natural Resources v. Kitsap Co., SHB No. 78-37 (Order on Pre-Hearing Motion dated May, 1979, citing *Harvey v. Board of County Commissioners, 90 Wn.2d 473, 584 P.2d 391, 393 (1978)* and *RCW 90.58.100(1)* and .120.) When this permit was issued on June 12, 1981, the revised Anacortes Shoreline Master Program had not been so approved or adopted by DOE. DOE's approval became effective on August 3, 1981, which is 30 days after the revision was filed with the Code Reviser as an amendment to chapter 173-19 WAC. The 30-day rule is imposed by RCW 34.04.040(2). The Skagit County Shoreline Master Program applied to the annexed portion of the subject site on the date this permit was issued.

2. The permit **[*31]** in question must be remanded because it allows development which requires a shoreline conditional use or variance without the same having been issued by the City or presented to DOE for approval as required. The Skagit County Shoreline Master Program (SCSMP) designates the area seaward of the ordinary high water line as "aquatic." SCSMP Designation Map and Section 3.03(A)(10). The proposed development is for extensive filling in that environment (See Final Impact Statement (FEIS) Exhibit C). Landfills are a conditional use in that environment. SCSMP, p. 7-2 and p. 7-35 section 7.06(2)(A)(6). Dredge spoil disposal is also permitted as a conditional use. Section 7.04(2)(A)(6)(2). Height limitations in the aquatic area for marina structures are a maximum of 15 feet. SCSMP, P. 7-46. Regarding the point from which such heights are measured, we rely upon WAC 173-14-030(6) and (8) which specify that height of structures over water be measured from the elevation of ordinary high water. The diagram of the proposed boat storage structure in the FEIS demonstrates that it would exceed 15 feet above ordinary high water and this be inconsistent with the height limitation of the SCSMP. Such height, **[*32]** if allowable, would require a variance.

Assuming that the revised Anacortes Shoreline Master Program had applied to all or to portions of the site, the result would be the same. Under the Urban II designation adopted for the site in question, both dredging and landfill are conditional uses. ASMP, Appendix A. Likewise, the proposed boat storage structure as shown in the FEIS would exceed the 35-foot height limitation applicable to Urban II in the Fidalgo Bay. ASMP, Regulation Table between pp. 14 and 15. Such height, if allowable, would require a variance under the ASMP also.

The subject substantial development permit must be remanded as it purports to authorize development without the necessary shoreline conditional use and variance permits. These have not been issued by the City, nor presented

for the approval or disapproval of the DOE as required by RCW 90.58.140(12) of the Shoreline Management Act. As proposed, the substantial development is inconsistent with the SCSMP and/or the ASMP.

3. This matter should be remanded to the City for application of the correct shoreline master program with attention to conditional use and variance requirements. Upon remand, the City may apply **[*33]** its revised ASMP within its boundaries as it has now become effective. Attention must especially be given to the requirements for conditional uses and variances. In addition to the ASMP, the requirements of chapter 173-14 WAC of DOE would bear consideration.

ORDER

The substantial development permit issued by the City of Anacortes on June 12, 1981, to Anacortes-Fidalgo Bay Marina, Inc., is hereby vacated and the matter is remanded to the City of Anacortes for further proceedings.

DONE at Lacey, Washington, this 16th day of November, 1981.

SHORELINES HEARINGS BOARD

NAT W. WASHINGTON, Chairman

GAYLE ROTHROCK, Vice Chairman

DAVID AKANA, Member

RICHARD A. O'NEAL, Member

RODNEY KERSLAKE, Member

WILLIAM A. HARRISON

Administrative Law Judge

DISSENTING OPINION - LAWRENCE J. FAULK

I dissent.

The decision of the majority prevents development which would expand public access to the shorelines of the state. The policy of the SMA states, at RCW 90.58.020:

> It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, **[*34]** while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.
>
> In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of **[*35]** the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. Alterations of the natural condition of

> the shorelines and wetlands of the state shall be recognized by the department. Shorelines and wetlands of the state shall be appropriately classified and these classifications shall be revised when circumstances warrant regardless of whether the change in circumstances occurs through man-made causes or natural causes. Any areas resulting from alterations of the natural condition of the shorelines and wetland of the state no longer meeting the definition of "shorelines of the state" shall not be subject to the provisions of chapter 90.58 RCW. Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

Development on shorelines is not prohibited. Rather, what is called for is planning **[*36]** for and fostering all reasonable and appropriate uses See *DOE v. Ballard Elks Lodge, 84 W.2d 551 (1974).*

The proposed development, a marina, is among those uses preferred by the policy of the SMA. Even natural shorelines may be altered to accommodate such uses, which are preferred because they facilitate public access to the shorelines of the state.

In this case, the City of Anacortes has annexed an area, Weaverling Spit, which is aligned with its present, developed waterfront. It has designated the site for marina use. The proposed development would allow boat owners, their guests, and members of the public to have access to the water and shoreline which they presently do not enjoy.

The majority has concluded that the dredging is not inconsistent ASMP regulations. See Conclusion of Law III. I would add that the proposed fill, which would be used for parking to support the marina, is not inconsistent with ASMP Section 20(13)(a), p.22, requiring a water dependent use. Accord, PROW, et al v. City of Olympia, SHB No. 225 (1977) and DOE v. City of Tacoma, SHB No. 76 (1974).

The essence of the majority opinion is that the proposed marina, a planned and preferred **[*37]** shoreline use, must be denied because of harm to aquatic life. I disagree. The small amount of herring, smelt and juvenile salmon habitat which would be lost is a loss contemplated by the SMA, and permitted. by it, when outweighted, as here, by the countervailing gain in public access to the shoreline.

Lastly, I note that the DOF Criteria of 1971, which I agree is the DOF criteria made applicable by the ASMP, states, with regard to all numerical limits on landfills:

> The above provisions may be further restricted or liberalized at such time as the Department of Fisheries may provide additional information for the protection of fish and/or shellfish. (P.3)

The information Contained in this record is that neither dredging nor filling will impact more than a minor amount of fish habitat. It would be desirable for DOF to reevaluate this proposal in light of the record made before us.

The proposed development is a reasonable and appropriate use of the shoreline in question. I would affirm the substantial development permit granted by the City, and reverse its denial of a conditional use permit.

LAWRENCE J. FAULK, Chairman

Dissent By: Lawrence J. Faulk, Chairman

Dissent:

DISSENTING OPINION - LAWRENCE J. FAULK **[*38]**

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In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention **[*39]** of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. Alterations of the natural condition of the shorelines and wetlands of the state shall be recognized by the department. Shorelines and wetlands of the state shall be appropriately classified and these classifications shall be revised when circumstances warrant regardless of whether the change in circumstances occurs through man-made causes or natural causes. Any areas resulting from alterations of the natural condition of the shorelines and wetland of the state no longer meeting juvenile salmon habitat **[*40]** which would be lost is a loss contemplated by the SMA, and permitted by it, when outweighted, as here, by the countervailing gain in public access to the shoreline.

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LAWRENCE J. FAULK, Chairman

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Court of Appeals Case Number: 49761-1

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■ Brief: Appellant's

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Comments:

Appellant's Opening Brief

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