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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.

PETITIONER THE PUYALLUP TRIBE OF INDIANS'
REPLY BRIEF

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TABLE OF CONTENTS

- I. INTRODUCTION 1
- II. ARGUMENT..... 3
 - A. The Tribe Has Standing 3
 - 1. Standing Requirements 7
 - 2. Standing Does Not Require Meeting the Burden of Proof on the Merits 8
 - 3. Future or Potential Harms are Sufficient to Support Standing, Especially in the Permitting Context..... 9
 - 4. The Tribe's Showing of Harm Exceeds That Found Sufficient in the Cases Cited by the Port..... 12
 - B. Respondents' Contentions that the Board Correctly Applied the No Net Loss Standard Cannot be Reconciled With the Applicable Requirements of the SMA and TSMP 17
 - 1. Respondents No Net Loss Arguments Ignore the SMA and TSMP No Net Loss Requirements 18
 - 2. Respondents' Positions Do Not Comport With the SMA Because Permitting a Project While Ignorant of Its Potential Impacts Violates the No Net Loss Standard..... 22
 - a. Removing creosote-treated materials does not remove the need to assess potential project impacts in a former Superfund site. 26
 - b. Best Management Practices do not inherently or sufficiently ensure there will be no net loss of ecological function. 28

3.	Respondents Do Not (And Cannot) Show That the Mitigation Before the Board Was Adequate to Satisfy the Requirements of the No Net Loss Standard.....	31
C.	The Board Erred By Imposing Upon the Tribe a Burden to Affirmatively Prove Contamination Because Doing So Exceeds the Burden of Proof Imposed by the SMA.....	35
D.	The Board Exceeded the Bounds of its de novo Review.....	38
1.	The Board Improperly Allowed Transformation of the Project Without Review by the City	38
2.	The SMA's Statutory Right to Challenge a Granted Permit is Meaningless If a Project is Allowed to Undergo Material Changes Without Further Review By the Permitting Entity.....	41
E.	The Potentiality That Other Regulatory Agencies Might Address Something in the Future Does Not Eliminate the Need to Obtain Sufficient Information to Determine SMA Compliance	45
F.	PSE and the Port Are Not Entitled to Attorney Fees on Appeal Because They Have Not Successfully Defended the Board's Decision in At Least Two Courts.....	48
III.	CONCLUSION.....	50

TABLE OF AUTHORITIES

	Page(s)
Washington Cases	
<i>Anderson v. Pierce County</i> 86 Wn. App. 290, 936 P.2d 432 (1997).....	8, 9
<i>Beatty v. Fish and Wildlife Comm'n,</i> 185 Wn. App. 426, 341 P.3d 291 (2015).....	37
<i>Bellevue Farm Owners Assoc. v. State of Washington</i> <i>Shorelines Hearings Board,</i> 100 Wn. App. 341, 997 P.2d 380 (2000).....	2
<i>Buechel v. Dep't of Ecology,</i> 125 Wn.2d 196, 884 P.2d 910 (1994).....	19, 35
<i>City of Burlington v. Wash. State Liquor Control Board,</i> 187 Wn. App. 853, 187 P.2d 875 (2015).....	7, 11, 12
<i>Concerned Olympia Residents for Env't (CORE) v.</i> <i>Olympia,</i> 33 Wn. App. 677, 657 P.2d 790 (1983).....	15
<i>de Tienne v. Shoreline Hr'gs Bd.,</i> 197 Wn. App. 248, 391 P.3d 458 (2016).....	34, 42
<i>Dep't of Transp. v. Mendoza de Sugiyama,</i> 182 Wn. App. 588, 330 P.3d 209 (2014).....	8
<i>Durland v. San Juan Cty.,</i> 182 Wn.2d 55, 340 P.3d 191 (2014).....	49
<i>Garrison v. State Nursing Bd.,</i> 87 Wn.2d 195, 550 P.2d 7 (1976).....	47
<i>Hayes v. Yount,</i> 87 Wn.2d 280, 552 P.2d 1038 (1976).....	40, 41, 42
<i>Honeywell v. Dep't of Ecology,</i> No. 75457-2-I, 2017 Wash. App. LEXIS 2395 (2017)	18, 25

<i>Jefferson County v. Seattle Yacht Club</i> , 73 Wn. App. 576, 870 P.2d 987 (1994).....	36
<i>Julian v. City of Vancouver</i> , 161 Wn. App. 614, 255 P.3d 763 (2011).....	49
<i>KS Tacoma Holding, LLC v. Shorelines Hearings Board</i> , 166 Wn. App. 117, 272 P.3d 876 (2012).....	7, 15
<i>Lands Council v. Wash. State Parks & Recreation Comm'n</i> , 176 Wn. App. 787, 309 P.3d 734 (2013).....	10
<i>Leavitt v. Jefferson County</i> , 74 Wn. App. 668, 875 P.2d 681 (1994).....	11
<i>Leschi Improvement Council v. Wash. State Highway Comm'n</i> , 84 Wn.2d 271, 525 P.2d 774 (1974).....	10, 14
<i>Magnolia Neighborhood Planning Council v. City of Seattle</i> , 155 Wn. App. 305, 230 P.3d 190 (2010).....	10
<i>Overlake Fund v. Shorelines Board</i> , 90 Wn. App. 746, 954 P.2d 304 (1998).....	44
<i>Patterson v. Segale</i> , 171 Wn. App. 251, 289 P.3d 657 (2012).....	9, 11, 16, 17
<i>Port of Seattle v. Pollution Control Hearings Board</i> , 151 Wn. 2d 568, 90 P.3d 659 (2004).....	42, 43
<i>Puget Sound Harvesters Ass'n v. Dep't of Fish & Wildlife</i> , 157 Wn. App. 935, 239 P.3d 1140 (2010).....	23, 36
<i>Quinault Indian Nation v. Imperium Terminal Servs., LLC</i> 187 Wn.2d 460, 387 P.3d 670 (2017).....	6
<i>Samson v. City of Bainbridge Island</i> , 149 Wn. App. 33, 202 P.3d 334 (2009).....	38
<i>Samuel's Furniture v. Dep't of Ecology</i> , 147 Wn.2d 440, 54 P.3d 1194 (2002).....	46

<i>San Juan County v. Dept. of Nat. Res.</i> , 28 Wn. App. 796, 626 P.2d 995 (1981).....	40
<i>Save a Valuable Environment (SAVE) v. Bothell</i> , 89 Wn.2d 862, 576 P.2d 401 (1978).....	13
<i>Skokomish Indian Tribe v. Fitzsimmons</i> , 97 Wn. App. 84, 982 P.2d 1179 (1999).....	6
<i>Spokane County v. Sierra Club</i> , No. 47158-2-II, 2016 Wash. App. LEXIS 1941 (2016)	3, 41, 44
<i>Squaxin Island Tribe v. Dep't of Ecology</i> , 177 Wn. App. 734, 312 P.3d 766 (2013).....	23
<i>State v. Lilyblad</i> , 163 Wn.2d 1, 177 P.3d 686 (2008).....	47
<i>State v. Pacesetter Constr. Co.</i> , 89 Wn.2d 203, 571 P.2d 196 (1977).....	38
<i>Suquamish Tribe v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 156 Wn. App. 743, 235 P.3d 812 (2010).....	6
<i>Suquamish Tribe v. Kitsap County</i> , 92 Wn. App. 816, 965 P.2d 636 (1998).....	14
<i>Trepanier v. Everett</i> , 64 Wn. App. 380, 824 P.2d 524 (1992).....	15
<i>Twin Bridge Marine Park, LLC v. Dep't of Ecology</i> , 162 Wn.2d 825, 175 P.3d 1050 (2008).....	46
<i>Yakima Cty. (West Valley) Fire Prot. Dist. No. 12 v. Yakima</i> , 122 Wn.2d 371, 858 P.2d 245 (1993).....	34

Environmental Hearings Board Decisions

Friends of Grays Harbor County v. City of Westport,
ELUHB No. 03-001, 2005 WA ENV LEXIS 52
(October 12, 2005 Findings of Fact, Conclusions of
Law and Order).....23

Puget Soundkeeper Alliance v. Dept. of Ecology,
PCHB Nos. 05-150, 05-151, 06-034 & 06-040, 2007
WA ENV LEXIS 3 (Jan. 26, 2007)27

Matter of SSDP Issued by City of Anacortes,
SHB No. 81-23; 82-30 (Jan. 23, 1985).....34, 35

Stollar v. City of Bainbridge Island,
SHB No. 06-024; 06-027 (Oct. 25, 2007)34

Other Cases

Lujan v. Defenders of Wildlife
504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351
(1992).....14

*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.
Co.*,
463 U.S. 29, 103 S. Ct. 2856, 77 L.Ed.2d 443 (1983).....22, 36

Roshan v. Smith,
615 F.Supp. 901 (D. D.C. 1985).....15

*United States v. Students Challenging Regulatory Agency
Procedures*,
412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973).....13

United States v. Washington,
853 F.3d 946 (9th Cir. 2017)4

Statutes

RCW 4.84.370(1).....48, 50

RCW 4.84.370(1)(a)49

RCW 4.84.370(1)(a)-(b)	48
RCW 34.05.001	37
RCW 34.05.530	7
RCW 34.05.530(1).....	9
RCW 90.58.020	12, 18
RCW 90.58.080	18
RCW 90.58.140(3).....	46, 48
RCW 90.58.140(7).....	35
RCW 90.58.180	9, 41
RCW 90.58.180(1).....	9
RCW 90.58.900	18
State Regulations	
WAC 173-26-010	19
WAC 173-27-100	41
WAC 173-27-100(1).....	41
WAC 173-27-150(a).....	18
Tacoma Municipal Code	
TMC 13.10.1.2.5.....	20, 21
TMC 13.10.4.4.2.....	12
TMC 13.10.5.5.2.A.....	20
TMC 13.10.5.5.2.D.5.b.iii	20
TMC 13.10.5.5.5.D.3.....	29

TMC 13.10.6.4.2.C.2.a	29
TMC 13.10.6.4.2.C.3.b.i.....	32
TMC 13.10.6.4.2.D.4.b.....	21, 24, 29
TMC 13.10.6.4.3.....	20
TMC 13.10.6.4.3.E.b	32
TMC 13.10.7.6.2.A.5.b.....	29
Other Authorities	
American Heritage Dictionary (3d Ed., Houghton Mifflin 1992).....	47
Black's Law Dictionary (9th ed. 2009).....	33

I. INTRODUCTION

Contrary to the Port of Tacoma's (Port) assertions, which are not joined by any other Respondent, the Tribe has standing. The Puyallup Tribe of Indians (Tribe) is an adjoining landowner with legal, cultural, economic, health and safety interests implicated by the construction of an LNG facility and related over-water components in its usual and accustomed hunting and fishing grounds. The law on standing is clear that Tribe need not wait to be harmed by the permitted activity to bring this appeal of an issued permit.

The arguments raised by Respondents Puget Sound Energy (PSE) and the City of Tacoma (City) likewise fail to furnish a basis for affirming the Board's erroneous decision and order. This case is not about requiring sediment sampling prior to undertaking *any* in-water construction activity; it is about permitting entities having sufficient information to make permitting decisions that comply with applicable law. When the City granted the Shoreline Substantial Development Permit (SSDP) at issue, no one—not the project proponents, not the permitting entity, not the Tribe—knew what the contamination situation was within the Project footprint.

Because the in-water construction authorized by the SSDP at issue had the potential to release buried contamination, knowing site conditions was crucial to determining whether permits should issue and work should proceed. In fact, because of that potential, the United States Environmental

Protection Agency (EPA) required characterization of sediments within the Project's footprint in the Hylebos Waterway before in-water construction work could occur.¹ The Final Environmental Impact Statement's (FEIS) conclusion that two tide cycles would pull released contamination out of the Project area mattered not to the EPA; it demanded information concerning site conditions before work could proceed. For purposes of Washington's Shoreline Management Act (SMA), there existed no legitimate reason for requiring sediment characterization in the Hylebos but not in the Blair. *See* Tribes Opening Brief at 8-10.

PSE also consistently conflates this SMA-based appeal with challenges to environmental impact statements brought under Washington's State Environmental Policy Act ("SEPA"), RCW Ch. 43.21C. It is well-settled that nothing in the SMA or the APA makes challenging an EIS a pre-requisite to an SMA appeal, much less renders EIS conclusions binding outside of SEPA. *Bellevue Farm Owners Assoc. v. State of Washington Shorelines Hearings Board*, 100 Wn. App. 341, 351-355, 997 P.2d 380 (2000) (SMA and SEPA present separate and distinct inquiries; SEPA

¹ Similarly, the Department of Ecology's comments on the Project's draft environmental impact statement (DEIS) also demonstrate its acknowledgement that disturbance of contaminated sediments during in-water construction activities can release contaminants into the water column. AR 1842. Respondents' argument that Ecology's comments related to a section of the DEIS addressing the Hylebos, if its comments were so restricted, do not alter Ecology's recognition of the physical and chemical processes that occur when contaminated sediments are disturbed and suspended.

determinations and EIS contents do not dictate the outcome of an analysis under the SMA).

Finally, while the Board's review of the matter was *de novo*, that review is not unbounded. *See Spokane County v. Sierra Club*, No. 47158-2-II, 2016 Wash. App. LEXIS 1941, at *30 (2016).² It was improper for the Board make determinations on Project components that had not first been assessed by the City; indeed, proceeding in such a fashion renders the SMA's appeal process meaningless. Moreover, the possibility that other regulatory agencies might address something in the future does not eliminate the need to obtain sufficient information to determine SMA compliance. The Board erred in concluding otherwise.

II. ARGUMENT

A. The Tribe Has Standing

The Port's³ only argument is that the Tribe lacks standing due to an alleged absence of injury-in-fact. The Port's superficial discussion of

² In accordance with GR 14.1(a), the Tribe identifies this case as an unpublished opinion from the Court of Appeals, Division II.

³ The Port and the City asserted the Tribe lacked standing in their written closing arguments submitted to the Board following the hearing. The Shorelines Hearings Board (Board) rejected those arguments. AR 646-48. The City has since retreated from its position on the Tribe's standing; the Port apparently has not. However, the Port has not cross-appealed the Board's determination that the Tribe has standing here. That the Port persists in opposing standing is not surprising. A decision in the Port's favor on standing could be used to shield the Port (and all ports) from permit challenges concerning the siting of controversial fossil fuel projects in Western Washington.

generic standing principles is undermined by the facts of the very cases upon which it relies. When the facts in this matter are compared to on-point case law, no serious argument can be made that the Tribe lacks standing.

The Tribe submitted evidence establishing, *inter alia*, the following:

- The Project site sits on the border of the 1873 survey boundary for the Tribe's Reservation and is adjacent to several Tribal trust and fee properties on both the Blair and Hylebos Waterways; these include two important Tribal-operated conservancy areas for fish habitat. AR 615, 985; RP (Vol. 1 at 31-34). A majority of the Tribe's members live on or near the Reservation. AR 615; RP (Vol. 1 at 31-34).
- Among other things, the Project involves the construction of a holding tank capable of storing eight million gallons of liquefied natural gas, placing a large volume of explosive material on the Reservation's 1873 survey boundary. AR 2601; AR 1150.
- The Tribe has a long established treaty right to fish in the waters of Commencement Bay, its usual and accustomed fishing grounds; this right includes the right to a healthy and abundant fishery and sufficient habitat to support it. *See United States v. Washington*, 853 F.3d 946, 964-65 (9th Cir.

2017). *See also* AR 615; RP (Vol. 1 at 30, 141-144).

- The Tribe has strong subsistence, economic, environmental, cultural, health and safety interests in the well-being of the fish population and marine environment in and around its Reservation and in Commencement Bay. AR 615; RP (Vol. 1 at 141-143).
- The Tribe is actively engaged in ongoing efforts to study, protect, mitigate and improve habitat and fish populations in the area. AR 615; RP (Vol. 1 at 143-46).
- As the Board's Order recognizes, the Project's in-water work will inevitably impose "impacts to marine waters [that] could not be avoided." AR 638. The inevitability of such harm thus requires mitigation. *Id.* The impacted waters are located in the Tribe's usual and accustomed fishing areas. AR 615.
- The Project's in-water construction activities are located on the bank and nearshore areas—rather than the navigation channel—of the Blair Waterway, a former Superfund site. AR 1159. It undisputed that only the navigation channel was remediated (by dredging), and that areas of significant contamination continue to be found in the sediments of the

Blair Waterway's un-dredged areas. RP (Vol. 2 at 53-54; Vol. 4 at 122-123); AR 968-978.

- Release of contaminants from in-water construction would adversely affect the health of resident and migrating fish, as well as the organisms they consume. RP (Vol. 2 at 169-70).
- Shading from the Project's new overwater structures will impact fish habitat. RP (Vol. 2 at 173-175).
- The Project's proposed mitigation for unavoidable impacts to habitat is not adequate. *E.g.* RP (Vol. 3 at 16-17).
- The Board found that "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." AR 647.

As shown below, the foregoing (while not an exhaustive list) far exceeds the showings made by litigants in cases where Washington courts found sufficient "injury in fact" to support standing.⁴

⁴ Indeed, a denial of standing under these circumstances cannot be reconciled with courts' routine consideration of environmental-based permit challenges brought by Tribes and community groups. *See, e.g., Quinault Indian Nation v. Imperium Terminal Servs., LLC* 187 Wn.2d 460, 387 P.3d 670 (2017) (Tribe challenged SSDP); *Suquamish Tribe v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn. App. 743, 235 P.3d 812 (2010) (Tribe and citizens' group challenge of zoning decision); *Skokomish Indian Tribe v. Fitzsimmons*,

1. Standing Requirements

Standing under the SMA is governed by the Administrative Procedure Act (APA), which bestows standing where:

- (1) The agency action has prejudiced *or is likely to prejudice* that person;
- (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
- (3) A judgement in favor of that person would substantially eliminate or redress the prejudice[.]

RCW 34.05.530 (emphasis added); *KS Tacoma Holding, LLC v. Shorelines Hearings Board*, 166 Wn. App. 117, 126-27, 272 P.3d 876 (2012). The first and third elements constitute the "injury in fact" prong of the traditional 2-factor common law test, while the second element embodies the common law "zone of interest" prong. *City of Burlington v. Wash. State Liquor Control Board*, 187 Wn. App. 853, 862, 187 P.2d 875 (2015). The Port concedes that the Tribe is within the zone of interest, and does not contend that a favorable judgment in this case would not eliminate the harm claimed by the Tribe.⁵ Port Brief at 4-5. It contests only the first element—that the agency action has or is likely to prejudice the Tribe. *Id.*

97 Wn. App. 84, 982 P.2d 1179 (1999) (Tribal challenge of Department of Ecology's decision regarding Coastal Zone Management Act certification).

⁵ Nor would it. Invalidation of the SSDP would be of benefit to the Tribe.

2. Standing Does Not Require Meeting the Burden of Proof on the Merits

The Port's brief is largely a re-hash of the standing arguments it made to the Board. *Compare* Port's Brief, with AR 0584-585 (Written Closing Argument). The Board correctly noted that the Port's (and City's) standing arguments "conflate[d] standing with burden of proof." AR 648 (CL 8). As the Board recognized, permit challenges are, by their nature, "forward looking and raise[] questions of potential project impacts." *Id.*

The right to present a challenge to these impacts cannot require the same quantum of proof necessary to prevail on the merits. Otherwise, any party challenging a permit would lack standing to appeal an adverse decision by the Board.⁶ This point is amply illustrated by *Anderson v. Pierce County* 86 Wn. App. 290, 936 P.2d 432 (1997). There, the court determined on the merits that a proposed development's mitigation measures were sufficient. *Id.* at 305-06. But the court also found an injury-in-fact sufficient to support standing, where the owner of adjacent property asserted that the proposed mitigation measures were inadequate to control storm water impacts to his property. *Id.* at 300. In other words, the court found an injury in fact supporting standing, even though plaintiff did not

⁶ Thus, beyond its other infirmities, the Port's position yields absurd results. *See Dep't of Transp. v. Mendoza de Sugiyama*, 182 Wn. App. 588, 600, 330 P.3d 209, 214 (2014) ("Adopting DOT's position would lead to absurd results. And we endeavor to interpret the PRA specifically to avoid absurd results.").

ultimately meet his burden to prevail on the merits. *Id.* Here, the identified injuries to the Tribe's interests are more than adequate to support standing, regardless of whether the Tribe ultimately prevails.

3. Future or Potential Harms are Sufficient to Support Standing, Especially in the Permitting Context

RCW 90.58.180(1)'s requirement that appeals be filed within "twenty-one days of the date of filing of the decision" makes facially unworkable the Port's position that a permit can only be challenged after a permitted activity causes an injury. The Port's position is also repugnant to the SMA's codified right to appeal the granting of a permit pursuant to RCW 90.58.180. This right exists to address and prevent problems associated with a permitted activity before those problems come to pass.

Contrary to the Port's argument (Port Br. at 6-9, 12-14), the APA's plain language also makes clear that potential harm confers standing, granting it to persons who the agency action "is likely to prejudice." RCW 34.05.530(1). Washington courts likewise recognize that one need not wait to sustain an injury before having the ability to challenge issuance of a permit. For example, in *Patterson v. Segale*, 171 Wn. App. 251, 259-60, 289 P.3d 657 (2012), the court held that a complaint by an opponent to a bulkhead permit of "the *potential* of the proposed bulkhead to produce 'a negative effect on the Petitioners' esthetic enjoyment of the shoreline in this

area'" was sufficient to confer standing. (Emphasis added). Similarly, the court in *Leschi Improvement Council v. Wash. State Highway Comm'n*, 84 Wn.2d 271, 274, 525 P.2d 774 (1974) upheld the standing of neighbors claiming that a *proposed* highway project would cause noise and fumes.

Even where the exact nature of the proposed project is not finalized, courts have upheld standing based upon potential harms, declining to find those alleged harms to be excessively speculative. For example, in *Lands Council v. Wash. State Parks & Recreation Comm'n*, 176 Wn. App. 787, 799-800, 309 P.3d 734 (2013), the court upheld the standing of an environmental organization whose users claimed a ski area expansion would interfere with their use of the area and "jeopardize wildlife and its habitat," notwithstanding the lack of specific plans for the expansion's location. Similarly, in *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 312-313, 230 P.3d 190 (2010), the court declined to dismiss neighbors' challenge to a proposed major residential development that they claimed would "injure their property without SEPA review," even though the proposal remained subject to federal approval and was not certain to go forward. If the complaining parties in *Lands Council* and *Magnolia* had standing, then the Tribe certainly has it here, where the Project is more defined and its potential harms considerably more likely due to the fact that the SSDP allows issuance of subsequent building permits.

If actual, occurring harm were a condition precedent to challenging the validity of a permit, seemingly no party would ever have standing to raise such a challenge. The court in *Leavitt v. Jefferson County*, 74 Wn. App. 668, 679, 875 P.2d 681 (1994) recognized this in affirming the standing of a neighboring landowner who asserted that her property downhill from an area slated for development under a new zoning code would be damaged by increased traffic and "2,500 residences draining polluted water onto her property." The court acknowledged that the "alleged impacts are *speculative and undocumented*; they are *possible*, not necessary, impacts of the Board's adoption of the Code." *Id.* (emphasis added). However, because the impacts were "within the interests protected by SEPA" and the plaintiff alleged that "they directly impact her property and interests," the court was willing to "assume" standing. *Id.* The harms in the present matter are considerably less speculative than those in *Leavitt*; and—unlike that case—are supported by evidence and testimony (including expert testimony).⁷

⁷ In response to the Port's observation concerning forward-looking language used by Tribe witnesses, Port Br. at 6-7, the Tribe's witnesses used such language ("will," "potential" and "could") because no honest witness without a crystal ball could state with certainty the future impacts from a proposed project. Standing does not require such certainty. *See, e.g., City of Burlington*, 187 Wn. App. at 874 (City challenging relocation of business holding liquor permit not required to prove history of criminal activity at proposed location to have standing; "[i]t is enough for the City to show a *potential* threat to public safety and its interest in public safety.") (emphasis added); *Patterson*, 171 Wn. App. at 260.

That the Tribe has standing in this matter is also consistent with the policies of the SMA and the Tacoma Shoreline Master Program (TSMP). As the Board recognized, the SMA is to be "liberally construed to give full effect to the objectives and purpose for which it was enacted." AR 647 (quoting RCW 90.58.900). The SMA's purpose includes "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. This cannot be achieved if those "adverse effects" must come to pass before the permit allowing them to occur can be challenged.

Further, the TSMP expressly recognizes the strong interest held by the Tribe in ensuring the continued health and vitality of the Shoreline environment and fishery of Commencement Bay. TMC 13.10.4.4.2. (stating the "Puyallup Tribe . . . should be consulted for development proposals that could affect anadromous fisheries."). *Cf., City of Burlington*, 187 Wn. App. at 862 & n.6 (City's statutory right to file objections to liquor licenses created a "unique and compelling interest adversely affected by the Board's action" applicable to the injury in fact test).

4. The Tribe's Showing of Harm Exceeds That Found Sufficient in the Cases Cited by the Port

The Port's superficial discussion of generic standing principles takes no account of the facts underlying the cases in which those principles are

applied. Standing does not pose a close question here—what the Tribe has adduced in this case far exceeds what has been held to be sufficient in the cases the Port relies upon. This is apparent from a review of the facts in the cases cited by the Port, in which the following factual backgrounds furnished sufficient "injury in fact" to support standing:

- An assertion by an organization's members that their use of forests, streams and mountains for recreation would be disturbed by an "adverse environmental impact" caused by a reduction in the use of recyclable goods that would result from a general railroad rate surcharge. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 685, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973).
- An allegation by neighbors that re-zoning farmland for development of a shopping mall "will have serious detrimental effects on both the environment and the economy of the area." *Save a Valuable Environment (SAVE) v. Bothell*, 89 Wn.2d 862, 865, 576 P.2d 401 (1978). Notably, the court's discussion on the merits relied upon potential harms. *Id.* at 868-869.
- Claims by neighbors of a proposed highway project that they would be "adversely affected by the noise and noxious fumes

from the proposed highway." *Leschi*, 84 Wn.2d at 274.⁸

- Assertion by neighbors of a proposed development project that they would be injured by increased traffic if the development went forward (even though the increases were predicted by the EIS to be well within the capacities of the roads). *Suquamish Tribe v. Kitsap County*, 92 Wn. App. 816, 831-32, 965 P.2d 636 (1998). The court noted that "[i]n general, parties owning property adjacent to a proposed project and who allege that the project will injure their property have standing." *Id.* at 829-30.

These cases present harms more attenuated than those at issue in the present matter. In contrast, the cases cited by the Port wherein parties lacked standing involved harms that were considerably more vague, speculative, or remote than those at issue here:

- Unspecified "some day intentions" to view endangered species in foreign countries that might be harmed by development projects funded by the United States Agency for International Development. *Lujan v. Defenders of Wildlife* 504 U.S. 555, 564, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

⁸ The quotation that the Port attributes to *Leschi*, Port Br. at 6, cannot be found in that case.

- A city resident's unsupported claim that the city's revised zoning code would reduce allowable development potential within the city and, in turn, lead to increased development pressure in outlying areas. *Trepanier v. Everett*, 64 Wn. App. 380, 383-84, 824 P.2d 524 (1992).
- A competing hotel owner's unsupported claim that a proposed revision to a development to make it exclusively a hotel use (rather than mixed hotel and residential) would decrease appeal for future investment and development in the area. *KS Tacoma Holdings*, 166 Wn. App. at 131-132.
- A bald assertion that "your affiant . . . will suffer all of these impacts personally on his property," where the property was not plaintiff's residence and there was no allegation that the property was developed or that plaintiff intended to use it. *Concerned Olympia Residents for Env't (CORE) v. Olympia*, 33 Wn. App. 677, 682, 657 P.2d 790 (1983)
- Hypothetical claims by detainees that a plan to build a new detention center in a rural setting potentially lacking in pro bono counsel might deprive them of counsel if they were to be transferred to the center after it was built. *Roshan v. Smith*, 615 F.Supp. 901, 904 (D. D.C. 1985).

The contrast posed by the foregoing cases denying standing to the facts in the present matter make clear that the Tribe has standing. In the foregoing cases, the purported harms were several steps removed from the challenged action, were unsupported by facts, and required leaps of speculation. In contrast, the Tribe is an immediate neighbor to the Project, with direct interests and rights implicated by the Project and SSDP undergirding this appeal.

That the Tribe has standing based on this contrast is well-illustrated in the SMA context by two harms asserted by neighbors opposing a SSDP for a bulkhead replacement project in *Patterson*, 171 Wn. App. at 259-60. First, the neighbors claimed the City of Burien had improperly applied King County's Shoreline Management Program as its own, and asserted that they "may be harmed by a future permitting decision" using the same Program. *Id.* at 259. This "nonspecific and conjectural" injury was insufficient to support standing. *Id.* at 260. However, the second harm plaintiffs claimed was "based upon the *potential* of the proposed bulkhead to produce 'a negative effect on the Petitioners' esthetic enjoyment of the shoreline in this area'" and sufficient to confer standing. *Id.* (emphasis added). Notably, the court found that claim to be "all the more immediate, concrete, and specific"

following the SHB's decision upholding the permit. *Id.*⁹

Here, the Tribe's harm is even more "immediate, concrete and specific" than the diffuse esthetic claim deemed sufficient in *Patterson*, because the prejudice asserted by the Tribe directly affects its legally protected treaty interests and the health and safety of its members. The bar for standing in this case is not high; the Tribe has standing here.

B. Respondents' Contentions that the Board Correctly Applied the No Net Loss Standard Cannot be Reconciled With the Applicable Requirements of the SMA and TSMP

Both PSE and the City¹⁰ urge that actual knowledge of hazards within the Project footprint can be dispensed with in favor of boilerplate processes that at best limit, but do not eliminate, impacts to shoreline ecological functions. The no net loss standard does not permit such a form over substance approach because making sufficiently-informed decisions is compelled by the SMA and TSMP, particularly where—as here—Project work is being performed in a location with a long history of significant contamination. The no net loss standard is further violated by the insufficiency of mitigation efforts that were put before the Board.

⁹ The court ultimately found a lack of standing, solely due to the fact that this claim had been settled and dismissed. *Id.*

¹⁰ The Port has joined in the briefs of PSE and the City but has not made its own argument on the merits.

1. Respondents No Net Loss Arguments Ignore the SMA and TSMP No Net Loss Requirements

The SMA "shall be liberally construed to give full effect to its "objectives and purposes." RCW 90.58.900. The State's policy for the SMA "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." RCW 90.58.020; *see also Honeywell v. Dep't of Ecology*, No. 75457-2-I, 2017 Wash. App. LEXIS 2395, at *9 (2017) ("The legislature found that the public interest in maintaining shorelines ... outweighed private interests in developing shoreline property.").¹¹ Accordingly, an SSPD may be granted only when "the development proposed is consistent with" the policies of the SMA. WAC 173-27-150(a).

Pursuant to the SMA, local governments must enact their own Shoreline Master Programs, which reflect their unique environments and issues. RCW 90.58.080. Tacoma enacted its Program (the TSMP), which is codified at TMC 13.10. However, instead of relying on the TSMP and its specific requirements, PSE begins a chain of daisies (ultimately leading to the incorrect contention that knowing site conditions has no bearing on making a meaningful no net loss determination), by pointing to an advisory handbook from the Department of Ecology. *See* PSE Br. at 19-22. The

¹¹ Pursuant to GR 14.1, the Tribe identifies this case as an unpublished opinion of the Court of Appeals, Division One.

Handbook is merely a "*guide* for local governments developing or updating Shoreline Master Programs (SMP) in Washington State." SMP Handbook, ch. 1 at 1 (emphasis added).¹² The handbook is not authority.

Likewise, the Department of Ecology Guidelines at WAC 173-26 (cited by PSE to continue its daisy chain, PSE Br. at 20-21), were enacted to "provide[] guidance for developing the content of shoreline master programs." WAC 173-26-010. They are intended "to provide *minimum procedural requirements* . . . to comply with the statutory requirements while providing latitude for local government to establish procedural systems based on local needs and circumstances." *Id.* (emphasis added). Tacoma already followed this guidance in creating the TSMP long ago. The TSMP is what controls here, not the preliminary guidance Tacoma followed in drafting it. *See Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 207, 884 P.2d 910 (1994) (Board correctly applied local rule where its requirements are "more restrictive"). As the City concedes, the City's no net loss rules are found in the TSMP. *See City Br.* at 7 n. 11 (citing TMC 13.10.1.1, .1.2.5, .1.4.6.b, .5.5.5.D.3, .6.2, and .6.4.).

Turning to the relevant standard, the TSMP's purpose is to "ensure, *at a minimum*, no net loss of shoreline ecological functions and processes

¹² Available at:
<http://www.ecy.wa.gov/programs/sea/shorelines/smp/handbook/index.html>.

and to plan for *restoring* shorelines that have been impaired or degraded." TMC 13.10.1.2.5 (emphasis added). Thus, the Program imposes strict requirements on development in the area at issue, although the area has (as PSE notes) felt the impact of "industrial use for 75 years." PSE Br. at 7.

Far from justifying uninformed development as PSE appears to urge, PSE Br. at 21-22, the TSMP demands particular care of degraded areas like the shoreline locations at issue here:

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.

TMC 13.10.6.4.3.¹³ For the "Aquatic Environment" in which the Project's in-water work falls, the purpose is to "protect, restore, and manage the unique characteristics and resources of the marine areas." TMC 13.10.5.5.2.A. The Program also specifically discusses structure removal from waterways, noting that removal is *not* advisable if it "would have substantial potential to release harmful substances into the waterways despite use of reasonable precautions." TMC 13.10.5.5.2.D.5.b.iii.

No net loss of ecological function is the minimum standard that must be met. TMC 13.10.1.2.5. To ascertain whether it will be met, one must

¹³ Notably, the Blair Waterway serves as both a fish migration corridor and a feeding area important to adult and juvenile fish. AR 703 (¶21); AR 2622; RP (Vol. 1 at 150-151).

determine what loss will occur. That requires working knowledge of existing conditions, particularly when there are reasons to believe that conditions with the potential to cause a loss in ecological function exist. Indeed, the TSMP demands such knowledge in requiring "assessment of impacts including the amount, existing condition and anticipated functional loss" as the first mitigation step. TMC 13.10.6.4.2.D.4.b.

Here, far from becoming adequately informed, Respondents insist knowledge of site conditions in an unremediated portion of a former Superfund site is unnecessary, claiming instead that any harms or losses would be rectified by Project work—primarily in the form of pile removal (which has the potential to release even more contamination into the waters of Commencement Bay). PSE Br. at 29-30. This is the antithesis of "ensur[ing] . . . no net loss of shoreline ecological functions." TMC 13.10.1.2.5. In all likelihood, the potential of pile pulling to release buried contamination is also why EPA required characterization of sediments within the project footprint in the Hylebos Waterway before creosote treated piles could be removed. AR 1832-33; *see also* AR 882 ("recommendation to acquire surface sediment quality data before and after some type of in-water work with the potential to displace subsurface contamination has precedent. (And it would make sense if even there were none.)"). Clearly, the EPA did not consider it a sufficient substitute merely to pull more piles

from an area where the contamination status was unknown, and its concerns were not assuaged by the notion that released contaminants would be pulled into Puget Sound over the course of two tidal cycles. *See* PSE Br. at 30.

For SMA purposes, there was no legitimate reason for viewing or treating Project work in the Blair differently than planned work in the Hylebos. The Blair Waterway is a former Superfund site, removed from the National Priorities List following dredging of its navigation channel. RP (Vol. 2 at 53-54; Vol. 3 at 42-44; Vol. 4 at 122-23). The Project's in-water construction work is not in the navigation channel, AR 1159, but is within the near-shore and bank areas which were not dredged and (like the Hylebos) continue to present very real contamination risks. *See* RP (Vol. 2 at 53-54; Vol. 4 at 122-23). Indeed, significant contamination has been identified throughout the Blair Waterway outside the navigation channel, including in areas near the TOTE site. AR 2644 and 2649; RP (Vol. 2 at 45); AR 968-978 (Exs. P-165-175, discussed at RP (Vol. 2 at 46-81)).

2. Respondents' Positions Do Not Comport With the SMA Because Permitting a Project While Ignorant of Its Potential Impacts Violates the No Net Loss Standard

It is arbitrary and capricious for an agency to act without knowledge of material information or—if it has such information—to ignore it. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L.Ed.2d 443 (1983) (agency action "would be

arbitrary and capricious" if it "failed to consider an important aspect of the problem"); *Puget Sound Harvesters Ass'n v. Dep't of Fish & Wildlife*, 157 Wn. App. 935, 950, 239 P.3d 1140 (2010) (it is "not rational" for an agency "to ignore the considerable information that it does have" in making its determination). Likewise, an agency properly refuses to act where it *lacks* material information. *Squaxin Island Tribe v. Dep't of Ecology*, 177 Wn. App. 734, 747, 312 P.3d 766 (2013).

Accordingly, administrative entities performing *de novo* review of issued permits have held that, in the absence of material information, the granting of a permit cannot stand. For example, in *Friends of Grays Harbor County v. City of Westport*, ELUHB No. 03-001, 2005 WA ENV LEXIS 52 (October 12, 2005) Findings of Fact, Conclusions of Law and Order) Slip Op. at 40, the Environmental and Land Use Hearings Board found the Washington Department of Ecology lacked assurance sufficient to support its conclusion that water quality standards would be met, because it lacked critical information regarding groundwater levels. Without this information, Ecology "had insufficient data . . . to make a reasoned decision." *Id.* *Friends* is instructive because here, similar to *Friends*, neither the extent of lost ecological function nor the extent and nature of necessary mitigation could be known without developing sufficient

information concerning the sediments in the Project footprint to ascertain impacts of Project work.

PSE's and the City's accusations that the Tribe seeks to impose a sediment characterization condition on all SSDPs, PSE Br. at 22; City Br. at 11, demonstrate their misapprehension of the fundamental issues presented. This case is not about requiring sediment sampling prior to undertaking *any* in-water construction activity; it is about permitting entities having sufficient information to make permitting decisions that comply with applicable law.

Given the Blair Waterway's long history of industrial use and contamination (including the recent issues at Pier 4, discussed in the Tribe's opening brief at 9 n.8 and *infra* at n.20)—as well as the fact that cleanup efforts did not reach the banks and near-shore areas where Project construction is to occur (RP Vol. 3 at 43; Vol. 4 at 122-123)—the City could not know what impacts Project work could have on ecological functions without knowing whether there exists a contamination issue within the Project footprint. Under such circumstances, it is simply not possible to comply with the TSMP's requirement of "assessment of impacts, including the amount, existing condition and anticipated functional loss" from Project activity. TMC 13.10.6.4.2.D.4.b.

In response to the City's assertion that the Tribe did not present evidence that sediment testing has been required in Washington (City Br. at 12, 19), the City fails to recognize that it required such testing in connection with the SSDP at issue here. *See* AR 675 (Condition 5). The City's position is also undermined by the fact that its own expert, Mr. Thornton, testified he was aware of other municipal governments requiring sediment sampling to assess site conditions. RP (Vol. 4 at 111-12, 130-131); *see also* AR 882 (EPA email discussing examples of prior sediment testing). Additionally, as a practical matter, that something has not been done or required previously is not relevant to the question of whether an agency determination comports with the SMA. *See Honeywell*, 2017 Wash. App. LEXIS 2395, at *11 ("The Honeywells rely on Anderson's testimony to show that this penalty matrix had not been previously used. But Anderson's belief that this was the first time such a penalty matrix had been used is not relevant.").

And contrary to PSE's contention, PSE Br. at 22, the Tribe did submit evidence (including expert testimony) concerning net loss of ecological function.¹⁴ The Tribe's expert, Tad Deschler, testified that in his

¹⁴ Misleadingly, PSE points only to an excerpt of testimony from the Tribe's witness, Janet Knox. Ms. Knox, who is not a biologist but rather a chemist, did not offer an opinion embracing the ultimate issue on net loss. She did, however, offer a great deal of testimony going to the issue of whether there would be a net loss of ecological function -- as did the Tribe's other witnesses. Unlike PSE, the City acknowledges (1) that the Tribe submitted

assessment the Project would result in a net loss of ecological function. *See* RP (Vol. 3 at 16-17) (proposed mitigation measures "come up short"); *see also id.* at 15 (inadequacy of proposed revegetation as mitigation); RP (Vol. 2 at 170) (potential impacts to fish from contaminated sediments released during pile removal), *id.* at 174 (overwater shading would degrade habitat), *id.* at 182 (juvenile salmon migration will be impeded), *id.* at 187-88 (City's analysis for measuring mitigation did not account for ecological function).

a. Removing creosote-treated materials does not remove the need to assess potential project impacts in a former Superfund site.

PSE relies heavily on the purported benefits of creosote pile removal as a method of mitigating the harmful impacts to the ecosystem that the Board recognized were inevitable. PSE Br. at 29-30. While some witnesses agreed as a general matter that pile removal could be beneficial in the abstract, whether it is actually beneficial is a cost benefit assessment turning on (a) whether the piles are actually leaching contaminants, and (b) whether worse contaminants would be released by their removal. RP (Vol. 1 at 119;

such testimony and (2) the criticisms of mitigation sufficiency levied by the Tribe's witnesses (primarily by Mr. Deschler but also by others) went to the no net loss standard not being met. *See* City Br. at 16 ("The Tribe's witnesses, particularly Tad Deschler, opined that the proposed mitigation was insufficient to meet the 'no net loss' standard."). Furthermore, PSE does not (because it cannot) provide any support for its seeming contention that a *prima facie* case concerning mitigation adequacy requires expert testimony.

Vol. 2 at 170-171, 226).¹⁵ These factors were unknown to the City when it issued the SSDP, and to the Board when it upheld the permit. PSE does not point to anything establishing that the piles to be removed were actually leaching contaminants, nor do Respondents point to evidence establishing that any such leaching would be more harmful to the environment than the release of buried contamination as a result of in-water construction work. Furthermore, Respondents do not proffer any explanation as to why pile removal in the Hylebos would be sufficiently problematic for the City to first require sediment testing, but not in the Blair.

In addition, the negative impact of contaminated sediment disruption is not, as PSE asserts, merely a short term issue. PSE Br. at 2. As Mr. Deschler testified, contamination risk is not limited to the immediate water column at the time of release; instead, contaminated sediments would also be re-deposited on the bed and consumed by prey organisms, risking continued contamination of the fish that consume them. RP (Vol. 2, 168-171). Further, even short-duration events can have significant impacts on the ecology of a site.¹⁶

¹⁵ Again, this is perhaps best demonstrated by the fact that the EPA required characterization of Hylebos sediments before allowing piles to be pulled.

¹⁶ For example, copper is a contaminant with toxicity the Washington Pollution Control Hearings Board (PCHB) has found manifests itself in salmonids "on a time scale of minutes." *Puget Soundkeeper Alliance v. Dept. of Ecology*, PCHB Nos. 05-150, 05-151, 06-034 & 06-040, 2007 WA ENV LEXIS 3, at *31 (Jan. 26, 2007).

As a final matter, PSE raises the Tribe's abandoned terminal project in a thinly-veiled attempt to influence the Court by painting the Tribe as hypocritical. While the Tribe's abandoned project is not relevant to these proceedings, a response is warranted because PSE's unsupported assertions are incorrect. During discovery, PSE received documentation that *the Tribe did conduct sediment testing* in connection with the terminal project.¹⁷ Notably, that sampling work was performed in the summer of 2008, well-before the May 21, 2012 issuance date of the related SSDP PSE points to.

b. *Best Management Practices do not inherently or sufficiently ensure there will be no net loss of ecological function.*

Respondents contend there is no need to know the site's contamination situation because best management practices (BMPs) will be used. PSE Br. at 27, 39; City Br. at 12-13, 15. In so doing, Respondents inappropriately treat the use of BMPs as a *per se* substitute for actual knowledge and analysis of likely impacts from Project work. To be clear, BMPs are merely a means of limiting the impacts of proposed work¹⁸; Respondents provide nothing showing that such (assumed) reduced releases

¹⁷ While not a part of the administrative record (due to the fact that this case does not concern the abandoned tribal terminal project), the Tribe directs PSE to documents bates labeled: 'PUYALLUP TRIBE 000404-000546'.

¹⁸ A simple review of EPA's BMP document upon which Respondents rely shows that the document undertakes no analysis of whether compliance with the BMPs will result in no net loss of ecological function (or Washington's SMA more generally). *See* AR 2677—2685.

translates into no net loss of ecological functions. Thus, while following BMPs may be good practice, blind faith that applying BMPs will *per se* result in no net loss of ecological functions is a dereliction of the City's regulatory charge and is contrary to the SMA's and TSMP's mandates of "assur[ing] no net loss of ecological functions." TMC 13.10.5.5.5.D.3.

PSE's substantial reliance on BMPs also disregards its own argument that the "mitigation sequence" controls. PSE Br. at 20. The sequence requires, initially, that projects attempt to "avoid the adverse impact altogether," TMC 13.10.6.4.2.C.2.a; this cannot be done without knowledge of actual site conditions. Perhaps more importantly, as discussed in sub-section B.1. above, Respondents' sequencing argument also fails because the Project's proponents did not adequately perform the first step they acknowledge is required, PSE Br. at 20—documenting the existing condition so as to establish a baseline against which mitigation can be ascertained. *See* TMC 13.10.6.4.2.D.4.b.

In a similar vein, the TSMP provides that "contaminated sediments" be "managed and/or remediated in accordance with state and federal laws." TMC 13.10.7.6.2.A.5.b. PSE notably invokes this provision regarding City collaboration with other governmental entities. But one cannot know what state and federal laws concerning management or remediation might apply without knowing the existing character of the sediments and whether they

need to be "remediated" or otherwise "managed." The issue is key in this case, as PSE concedes, because of the Blair Waterway's former Superfund status and the fact that contamination issues continue to be discovered.¹⁹ See PSE Br. at 9-10.

The City's glib statement that "either BMPs work or they do not," City Br. at 15, only underscores this point. Beyond the fact that there is nothing in the record demonstrating that BMPs will work sufficiently well to meet the law, one cannot even know what the BMPs need to accomplish to achieve no net loss unless site conditions and likely consequences are understood. At a site with a long history of multiple sources of contamination and evidence of continued contamination nearby, actual knowledge of site conditions is required; it is not sufficient simply to apply "consensus" procedures and assume things will be fine.²⁰

¹⁹ A real-world example from the Pier 4 site (directly across the Blair from the Project site) is the unexpected discovery of tributyltin (TBT), a "marine biocide," in one of the "highest concentrations ever found globally." RP (Vol 1 at 43, 36). The source of this contaminant was never located, *id.* at 43, indicating contamination issues in the Blair Waterway are legion—regardless of whether the City believes the Blair is on the "same footing" with the Hylebos. City Br. at 8. The TBT discovery led to a "significant situation" that required an emergency removal action. RP (Vol. 5 at 227). Significantly, prior to the characterization work that led to this discovery, nobody was aware of the contamination. *Id.* at 226. Rather than proceed with the project using BMPs, an emergency cleanup was required. *Id.*

²⁰ The City's suggestion that it did not have "a complete dearth of information regarding conditions in the Blair," City Br. at 14, falls well short of sufficient knowledge of site conditions to know what management or remediation requirements might be triggered. Further, assuming the presence of some contamination for purposes of BMPs, does not get to the question of what contamination is present, how significant the contamination situation is, or whether—like at Pier 4—remediation needs to be undertaken.

Finally, in response to the question posed by the City of what would be done differently if testing revealed contamination, City Br. at 15, the Tribe reminds the City that it is not required to grant an SSDP. If granting the permit cannot comport with the requirements set out in the SMA and TSMP, the permit is properly denied.

3. Respondents Do Not (And Cannot) Show That the Mitigation Before the Board Was Adequate to Satisfy the Requirements of the No Net Loss Standard

The City's mitigation argument (City Br. at 16-18) almost entirely fails to address the Tribe's mitigation arguments at pages 31-38 of its opening brief. Instead, the City first provides a very broad overview of Ms. Brenner's methodology without explaining how that methodology meets (or the Board's decision concerning mitigation adequacy comports with) the no net loss standard. That the City staff went "line by line" through the TSMP and "measure[d] it up against the application," City Br. at 15, does not somehow render the mitigation sufficient under applicable law. Similarly, that Ms. Brenner looked at different "scenarios," City Br. at 16, in no way makes her analysis one that appropriately resolves whether the mitigation is sufficient to avoid a net loss of ecological function.

The City next makes a cursory attack on the methodology of the Tribe's expert, Mr. Deschler, in assessing mitigation adequacy. Whatever the City's view on actually considering ecological function in assessing

mitigation sufficiency, the City does not articulate why its simplistic 1-to-1 square footage approach comports with the no net loss standard in this case. This is problematic given that EPA made clear its concerns regarding 1-to-1 mitigation. AR 872 (stating EPA's concerns about "trading coverage on the Blair for coverage on the Hylebos").²¹

Finally, the City points to mitigation in the form of "significant shoreline revegetation" in its attack on Mr. Deschler's analysis. City Br. at 17. That argument also fails. 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.3.b.i. And even if shoreline re-vegetation did constitute in-kind mitigation, the TSMP *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 (or any) ratio.

²¹ Moreover, Mr. Deschler did not need to "contact[] anyone at the City" concerning the City's 1-to-1 analysis, City Br. at 16, because, as discussed in the Tribe's opening brief, the shortcomings of that approach are evident in the permitting documents themselves. RP (Vol. 2 at 212). The City's assertion concerning Mr. Deschler's "only having partially read the TSMP" is likewise specious. City Br. at 16. Mr. Deschler made clear that he studied the portions of the TSMP relevant to his analysis, including those addressing "ecological function," but did not "read the entire document cover to cover." RP (Vol. 2 at 213).

PSE's arguments in support of the Board's conclusions on mitigation sufficiency are no more availing than the City's. Citing Condition 9 of the SSDP, PSE asserts that when mitigation at the Sperry Dock was before the Board, PSE was "required to complete the identified compensatory mitigation as a condition of the SSDP." PSE Br. at 34 (emphasis in original). This argument is properly rejected for the simple reason that Condition 9 does not refer to work at the Sperry Dock and Finding 18 of Attachment C is also silent regarding the Sperry site. AR 675 (Condition 9); AR 733-34 (Finding 18).

PSE further argues that the mitigation at the Sperry site is not speculative because "[h]aving submitted the Revised Mitigation Plan to the City, PSE is now bound to implement all mitigation in the plan." PSE Br. at 34. PSE notably fails to provide any authority for this suggestion.²² Respectfully, the Tribe cannot be "mistaken" in its contention that the Sperry mitigation was speculative when Mr. Tornberg's testimony was unequivocal that no agreement regarding mitigation at the Sperry site had been reached. RP (Vol. 5 at 80). Speculation is defined as "[t]he act or practice of theorizing about matters over which there is no certain knowledge." Black's Law Dictionary, 1529 (9th ed. 2009). Because the

²² This is particularly glaring when one considers that the mitigation activities come from a plan that changed multiple times—and the City admits those changes were not formally reviewed. RP (Vol. 3 at 132); City Br. at 8.

Sperry Dock site is owned by a private party not involved in this matter, the Sperry mitigation was based on a condition precedent—PSE and the Sperry owner reaching an agreement that would enable PSE to perform the work. Such agreement was necessary to provide "certain knowledge" that the Sperry work would occur and thus take the proposal outside the realm of the speculative.²³ Mr. Tornberg's testimony makes clear that there was no such *consensus ad idem* between PSE and the owner of the Sperry site.

And while creative, PSE's attempt to distinguish, *de Tienne v. Shoreline Hr'gs Bd.*, 197 Wn. App. 248, 391 P.3d 458 (2016); *Stollar v. City of Bainbridge Island*, SHB No. 06-024; 06-027 (Oct. 25, 2007); and *Matter of SSDP Issued by City of Anacortes*, SHB No. 81-23; 82-30 (Jan. 23, 1985), on the grounds that, PSE says, they deal with mitigation effectiveness fails. PSE Br. at 34-35. These cases show that the record must contain sufficient information establishing proposed mitigation will accomplish the needed level of mitigation.²⁴ Whether a question of occurrence or effectiveness, it

²³ In other words, there was no mutual assent concerning the Sperry mitigation. This failure is fatal to the notion that there existed any right or obligation to perform the mitigation work at the Sperry site. *See Yakima Cty. (West Valley) Fire Prot. Dist. No. 12 v. Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245, 255 (1993) (Mutually manifested assent is required for the formation of a valid contract). That the work was unilaterally written into a mitigation plan submitted to the City does not overcome this foundational deficiency.

²⁴ *De Tienne*, 197 Wn. App. at 283 ("We conclude the SHB did not err in finding the record lacked documentation showing that all of the state and federal agencies involved agreed the smaller buffers were acceptable."); *Stollar v. City of Bainbridge Island*, SHB No. 06-024; 06-027 at 34 (Oct. 25, 2007) (There are no long term studies to establish whether beach nourishment as a mitigation measure for a rock bulkhead actually works.); *see also*

is a distinction without a difference because whether mitigation will actually occur is just as important as its effectiveness (if not more so).

C. **The Board Erred By Imposing Upon the Tribe a Burden to Affirmatively Prove Contamination Because Doing So Exceeds the Burden of Proof Imposed by the SMA**

Contrary to PSE's argument, PSE Br. at 37-38, the Tribe acknowledges both that it bore the burden of proof before the Board, and that the Board's review is *de novo*.²⁵ But PSE's argument fails to address the Board's imposition of an extra burden upon the Tribe, beyond that required by the SMA. A permit applicant has the initial burden to prove that the issuance of an SSDP is "consistent with the criteria that must be met before a permit is granted." RCW 90.58.140(7); *Buechel v. Dep't of Ecology*, 125 Wn.2d at 205. On appeal, the burden lies with the party appealing the decision. *Id.* The Board correctly articulated that the burden is "to prove that the City erred in granting the permit." AR 648. But the Board then erroneously imposed an *additional* burden—to affirmatively prove "the

Matter of SSDP Issued by City of Anacortes, SHB No. 81-23; 82-30 at *6 (Jan. 23, 1985) (finding mitigation plan insufficient due to its reliance on unsupported assumption that herring would shift to nearby spawning habitat not affected by project).

²⁵ The Tribe is, however, puzzled as to why PSE proceeds to discuss the Tribe's burden in the appeal before *this* court to prove the *Board's* error. PSE Br. at 38. While the Tribe acknowledges this burden, its argument here is directed at the Board's review—which was of the SSDP issued by the City. In that proceeding, it was the Tribe's burden to prove that the SSDP was improperly issued, not that the Board (which had not yet made any ruling) had erred.

presence of sediment contamination" in the Project footprint. AR 634. This was an error of law.²⁶

As the Board recognized, the burden is to prove "error" in the issuance of the permit. AR 648. It is not to affirmatively establish the reverse of every item that must be established by the permit applicant. The error the Tribe asserts (and had the burden of proving) is the failure to require material information necessary to make a legitimate no net loss determination. As discussed in Section (B)(2), willful ignorance of existing conditions violates the policies of both the SMA and the TSMP.

Thus, making the determination without needed information is itself the source of error because it is arbitrary and capricious to make a decision without sufficient information. *See Motor Vehicle Mfrs.*, 463 U.S. 29 at 43; *Puget Sound Harvesters Ass'n*, 157 Wn. App. at 950. The Tribe's burden was to establish this absence, as well as to establish why the information was needed—not to fill in the gap by "establish[ing] the presence of contamination at the TOTE facility." AR 634. In predicating its decision on the lack of proof of contamination, the Board improperly restricted the manner in which the Tribe could meet its burden.

²⁶ Errors of law are subject to *de novo* review and the reviewing court may, when necessary to insure compliance with the SMA, "substitute its judgment" for that of the Board. *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 589, 870 P.2d 987 (1994).

The Board's requiring the Tribe to affirmatively prove the presence of contamination is also problematic from a policy perspective. Imposing an obligation to fill data gaps upon a party opposing a permit creates troubling hurdles to parties challenging permits and improperly insulates permit proponents. In such situations, as here, it is the property owner (or permit applicant) who holds the necessary information or the ability to readily obtain it. It is "not appropriate . . . to shift the burden of proof" under such circumstances. *Beatty v. Fish and Wildlife Comm'n*, 185 Wn. App. 426, 450, 341 P.3d 291 (2015). Ordinarily, when information necessary to meet the burden "is exclusively within the knowledge of one or the other of the parties, the burden would be upon the party possessed of that knowledge." *Id.* (internal quotations and citations omitted). Shifting the obligation to parties challenging permitting decisions disincentivizes permit applicants from initially providing or obtaining full information material to a permitting decision.

In addition, if the pervasive uncertainties and costs associated with obtaining site information from a project proponent are imposed upon concerned third parties, then rarely (if ever) would such parties be able to succeed in challenging a permit grant when no party is knowledgeable about site conditions. This result, advocated for by Respondents, is contrary to the policies undergirding the SMA. *See* RCW 34.05.001 ("The Legislature

intends, by enacting [the Administrative Procedure Act] . . . to provide greater public . . . access to administrative decision making."); *State v. Pacesetter Constr. Co.*, 89 Wn.2d 203, 214, 571 P.2d 196 (1977) ("[The] SMA is a state statute of general application basically intended for the protection of the environment"); *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334 (2009) (The SMA's protections of "private property rights are 'secondary to the SMA's primary purpose, which is to protect the state shorelines as fully as possible.'" (internal quotation marks omitted) (quoting *Lund v. Dep't of Ecology*, 93 Wn. App. 329, 336-37, 969 P.2d 1072 (1998)).

D. The Board Exceeded the Bounds of its *de novo* Review

The Board's *de novo* authority must be evaluated in the proper context: does the Board's implementation of this authority deprive parties before it of a fair hearing? Here, the answer is yes. First, the changes to Project in this case were significant—well-beyond mere addition of permit conditions—and thus required further formal review by the City. Second, allowing permits to undergo such transmogrification without further review by the permitting entity renders the SMA's appeal process meaningless.

1. The Board Improperly Allowed Transformation of the Project Without Review by the City

Respondents incorrectly contend the Project's transformation can be analogized to adding permit conditions. PSE Br. at 45-46; City Br. at 26-

27. PSE undertook a wholesale alteration of the Project that left it without much of the mitigation that was required by the SSDP, made continuing changes to the proposals for mitigation that would occur, and made changes to the monitoring program even during the course of the hearing. AR 14; AR 2620-36.²⁷ The Tribe does not fault any project proponent for making changes to a project in light of identified shortcomings; here, however, the law and the SSDP require that the City assess those in making a determination that the Project comports with the SMA and TSMP.

Mitigation is required because the Project, as all parties concede, will yield inevitable impacts in the shoreline zone. AR 638. Accordingly, the SMA and TSMP mandate compensatory mitigation. *Id.* The SSDP requires the mitigation measures discussed in the Technical Memorandum that it incorporates. AR 675. PSE concedes that the measures set out in the Technical Memorandum are "'required' and that '[a]ny modification of the mitigation as proposed will required additional review and approval.'" PSE Br. at 13 (*quoting* AR 675). The vast majority of these required mitigation measures were to take place in the Hylebos. AR 733. Yet the City concedes (and conceded at the hearing) that it did not conduct a new review after those were removed from the Project. City Br. at 8.

²⁷ And according to the City, key aspects of it may continue to change. City Br. at 14.

During the course of this appeal, PSE belatedly recognized the gap in the SSDP's mitigation requirements left by the removal of activities in the Hylebos. It thus submitted a revised mitigation plan after the discovery cutoff to attempt to improvise a fix. AR 2620-36. The City admits that it conducted no review of this plan either. RP (Vol. 3 at 132). Furthermore, as discussed in Section B.3. above, the new proposal by PSE was just that—a speculative proposal to conduct work at an off-site location with no agreement establishing the work could be performed. RP (Vol. 5 at 80).

In other words, there were material changes to one of the SSDP's key components, going to the very heart of the no net loss analysis. This goes beyond (and is fundamentally different from) the mere addition of a permit condition in *San Juan County v. Dept. of Nat. Res.*, 28 Wn. App. 796, 626 P.2d 995 (1981), upon which PSE relies in arguing that the Board may revise an SSDP. PSE Br. at 45. While the Board may add conditions to a permit, it needs to be reviewing the same project that was permitted. In this case, a review of the same permit did not occur because mandatory elements were (1) removed after the SSDP issued and (2) replaced without the City review *mandated by the SSDP itself*. See AR 675 (Condition 9). As in *Hayes v. Yount*, 87 Wn.2d 280, 291, 552 P.2d 1038 (1976), PSE's offer of replacement mitigation "did not alter the duty of the board to rule on the specific permit before it which did not contain" those provisions.

Finally, to the extent the City and PSE imply that the Tribe is seeking revision of the permit pursuant to WAC 173-27-100, they are incorrect. PSE Br. at 42-43; City Br. at 18, 27.²⁸ Because the Project is not the same as the one described in the permit, it is properly remanded to the City and considered in its new configuration. *Hayes*, 87 Wn.2d at 291; *see also* AR 675 (Condition 9) ("Any modification of the mitigation as proposed will require additional review and approval.").²⁹

2. The SMA's Statutory Right to Challenge a Granted Permit is Meaningless If a Project is Allowed to Undergo Material Changes Without Further Review By the Permitting Entity

The SMA provides a person "aggrieved" by the grant or denial of a permit the right to have it reviewed, and sets timeframes for the completion thereof. RCW 90.58.180. But if the object of "review" is continually shifting after the permit is granted, review cannot be meaningful, effective, or even relevant.

²⁸ Revision is not what the Tribe seeks. *See* AR 565-566. Revision is not even appropriate here, where there is a wholesale change to fundamental aspects of the Project altering both its "scope and intent" and its "authorized use" of water dependency. *See* WAC 173-27-100(1); (2)(e)-(f).

²⁹ The City's assertion that the Tribe's request for a remand is "without authority," City Br. at 26, is incorrect. Remand is precisely what was approved by the Supreme Court in *Hayes*. *See also Spokane County v. Sierra Club*, 2016 Wash. App. LEXIS 1941 at *28-29 (2016) ("remand was the proper remedy" when required analysis had not been performed). Moreover, PSE's puzzling attempt to distinguish *Hayes* (PSE Br. at 46-47) fails. PSE inexplicably relies on an intervening change in the wording of the revision regulation (WAC 173-27-100), but fails to mention that *Hayes* does not in any way rely upon, or even discuss, that regulation.

In arguing that its constant shifts of the Project were justified,³⁰ PSE incorrectly contends that *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn. 2d 568, 90 P.3d 659 (2004) is controlling. In that case, the PCHB imposed 16 new conditions on a Clean Water Act certification after the Department of Ecology had performed a reasonable assurance analysis. The court held that these additions were within the Board's authority. *Id.* at 600-01. But the PCHB was reviewing the *same* project Ecology had reviewed, and was reviewing the actual reasonable assurance determination Ecology had made.

The circumstances of this case distinguish it from *Port of Seattle* to such a degree that the conclusions reached in that case cannot be properly applied here. In this matter, the Board was not reviewing the *City's* no net loss analysis but was conducting its *own* initial analysis of a project that differed from that before the City. Thus, this case is far more analogous to *Hayes*, where proposals to significantly change the permit "did not alter the duty of the board to rule on the specific permit before it which did not contain such conditions." 87 Wn.2d at 291. *See also De Tienne*, 197 Wn. App. at 278-279, 279 n.13 (noting Board's determination that although a settlement purported to change the permit, "no changes to the Permit made

³⁰ PSE also argues that it filed the Stipulation "a full six months before the hearing." PSE Br. at 48. This is incorrect. PSE actually filed the Stipulation on January 28, AR 14—a little more than three months before the hearing commenced on May 9, 2016.

subsequent [to the County's Hearing Examiner's decision] are before the Board."").

Even if *Port of Seattle* otherwise applied here, it does not aid Respondents. While allowing the consideration of new evidence during review, the court only rejected concerns of the review becoming a "moving target" because of "the PCHB's ability to set a firm discovery deadline." 151 Wn.2d at 599. The integrity of review and fairness to the parties, the Court reasoned, were preserved by setting and adhering to discovery deadlines. *Id.*

In stark contrast to *Port of Seattle*, some of the most significant "moving targets" in this case were introduced after the April 8, 2016 discovery cutoff. PSE's second revised mitigation plan, adding the speculative mitigation activity at the Sperry site, was first provided on April 25, 2016 as a hearing exhibit—17 days after the cutoff.³¹ Worse, PSE's revised Water Quality Protection and Monitoring Plan was created *during* the hearing and submitted very late in the proceedings. The Board's decision relied heavily on the contents of both. Thus, in this case, the "moving target" concerns raised by the appellants in *Port of Seattle* ring true—and, contrary to that court's observations, discovery deadlines did not

³¹ Although the Tribe was able to depose PSE's mitigation expert after this date, it does not remove the impact of the ever-changing object of review or the impact of the Board's reliance on excluded exhibits.

adequately address the concerns occasioned by a Project that continually morphed up to and during the hearing.

PSE's attempt to distinguish *Spokane County* by asserting the Board, here, merely performed a *de novo* review of a determination that was, in fact, made by the City likewise rings hollow. PSE Br. at p. 46 n. 11. Because the Board looked at a re-configured project, with new components that had not been reviewed by the City, *Spokane County* is squarely on point. In that case, the court found it improper for the PCHB to make for itself a determination that should have been made by the Department of Ecology. *Spokane County*, 2016 Wash. App. LEXIS 1941 at *2. Likewise here, the Board could not properly conduct a *de novo* review of the City's analysis of the revised Project because the City had not performed that analysis to begin with.³²

PSE's contention that the Project's continual changes are somehow the Tribe's fault, PSE Br. at 49-50, likewise misses the mark. The Tribe did no more than exercise its statutory right to appeal under the SMA, timely made each of its arguments in accordance with the SMA's codified procedures, and prepared its case (and witnesses) accordingly. It was PSE's

³² PSE's attempt to distinguish *Overlake Fund v. Shorelines Board*, 90 Wn. App. 746, 760, 954 P.2d 304 (1998) also fails. PSE observes that the court found that the SHB had made multiple errors, PSE Br. at 11, but those errors do not diminish the Board's error in supplanting the local agency or render the case inapposite.

decision to materially alter the Project after the Tribe filed its appeal, including making changes after the discovery cutoff and during the hearing, and the City's decision not to perform further formal review.

E. The Potentiality That Other Regulatory Agencies Might Address Something in the Future Does Not Eliminate the Need to Obtain Sufficient Information to Determine SMA Compliance

Respondents hope to persuade this Court that the City was permitted to defer to other agencies, or that it could not require the Project proponents to furnish more specific information concerning contamination within the Project footprint. Neither is true.

Contrary to PSE's contention, PSE Br. at 24-26, nothing in the SMA or TSMP limits the City's authority to impose such conditions to situations where other agencies suggest them. In fact, PSE's argument to that effect is belied by the very facts of this case. The City did *not* require sediment testing in the Hylebos after it received comments from the EPA in August 2015, recommending it. It was not until the Tribe sought reconsideration of the SSDP in December of 2015, that the City required sampling in the Hylebos.³³ This demonstrates that the City did not consider itself bound by

³³ Specifically, the time line was as follows: (a) EPA and Ecology submitted comments to the DEIS in August 2015, expressing concern about sediment contamination and recommending testing, AR 1832, 1842; (b) the City granted the SSDP in November 2015, *without* any condition requiring sediment characterization, AR 699-738; (c) the Tribe sought reconsideration of the SSDP on December 3, 2015, AR 669; (d) on December 30, 2015, the City issued its Order Granting Request for Reconsideration in Part, which conditioned work in the Hylebos upon sediment testing. AR 675 (Condition 5).

the EPA's comments when they were made. Instead, in requiring sediment testing, the City acted on its own volition and the possibility that additional permits or approvals might be needed to conduct testing did not prevent the City from making testing a condition to the SSDP. AR 675.³⁴

The City, for its part, appears to deny that it is the "exclusive" administrator of its shoreline program, City Br. at 23, despite the fact that its exclusive status is codified in the SMA. RCW 90.58.140(3) ("[T]he administration [of the local shoreline management program] *shall* be performed *exclusively* by the local government.") (emphasis added). The City's assertion of its purportedly limited role is also contrary to case law. *See Twin Bridge Marine Park, LLC v. Dep't of Ecology*, 162 Wn.2d 825, 842, 175 P.3d 1050 (2008) ("We hold that the permitting decision was *exclusively* the County's . . . and Ecology cannot directly enforce its own different interpretation of a county SMP") (emphasis added); *Samuel's Furniture v. Dep't of Ecology*, 147 Wn.2d 440, 455, 54 P.3d 1194 (2002) (The SMA "specifically grants local governments the *exclusive power* to

³⁴ PSE is likewise misguided in its attempt to re-draft Conclusion of Law 16. PSE Br. at 24. Ignoring the Board's direct statement that it "accords substantial weight" to the City's interpretation that it lacked authority to order sediment testing, PSE instead unilaterally deems the Board's "actual legal conclusion" to be something else entirely. PSE Br. at 24. In any event, the salient point is that the Board's position, and the City's position that it affirmed, are incorrect: the City had, and used, its authority to require sediment testing.

administer the permit system" and Ecology is not granted a right to review its decisions) (emphasis in original).

"Exclusive" means what it says. "Statutory construction begins by reading the text of the statute." *State v. Lilyblad*, 163 Wn.2d 1, 6, 177 P.3d 686 (2008) (internal quotations omitted). When a word used in a statute is not specially defined, it is given its common meaning—a dictionary definition. *Garrison v. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). "Exclusive" is defined as "[n]ot divided or shared with others." American Heritage Dictionary (3d Ed., Houghton Mifflin 1992). Thus, the City's statutory role to "exclusively" administer the TSMP means that it does not share this duty. It is the City's obligation to make the no net loss determination, and nothing in the SMA or the TSMP allows delegation of that exclusive duty to other agencies. There is also no limitation in the statutory or regulatory scheme preventing the City from requiring permit applicants to provide the information necessary for it to make a meaningful net loss determination. Indeed, the City required such information for that portion of the project on the Hylebos (which PSE subsequently eliminated). AR 675.

While the Tribe fully acknowledges that the SMA contemplates coordination between agencies with concurrent jurisdiction, coordination does not mean abdication—the City must still meet its statutory charge

under the SMA and TSMP. As discussed in the Tribe's opening brief at pgs. 26-27, the SSDP is the only permit requiring a finding of no net loss—a matter within the City's "exclusive[]" administration. RCW 90.58.140(3). The competence of other agencies to "do what they do," City Br. at 21, does not excuse the City from doing what it must under the SMA: require permit applicants to provide information sufficient for the City to make a meaningful (and thus legally legitimate) determination of compliance with the SMA and TSMP. The Board erred in concluding otherwise.

F. **PSE and the Port Are Not Entitled to Attorney Fees on Appeal Because They Have Not Successfully Defended the Board's Decision in At Least Two Courts**

PSE's and the Port's requests for attorney fees (PSE Br. at 50; Port Brief at 16) are properly rejected because RCW 4.84.370(1) does not currently apply to this matter. Under RCW 4.84.370(1), a party is entitled to attorneys' fees on appeal if "the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; *and* . . . was the prevailing party or substantially prevailing party in all prior *judicial proceedings*." RCW 4.84.370(1)(a)-(b) (emphasis added).

Our Supreme Court recently clarified that the "judicial proceedings" language in RCW 4.84.370(1) means that a party is required to prevail in *two courts* before attorney fees are available: "[u]nder subsection (1),

prevailing parties are entitled to attorney fees only if a county, city, or town makes a permitting decision in their favor and the party is successful in defending that decision in *at least two courts.*" *Durland v. San Juan Cty.*, 182 Wn.2d 55, 77, 340 P.3d 191, 203 (2014) (emphasis added) (citing *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 413, 120 P.2d 56 (2005)). See also *Julian v. City of Vancouver*, 161 Wn. App. 614, 632, 255 P.3d 763 (2011) ("The statute allows reasonable attorney's fees to a party who prevails or substantially prevails at the local government level, *the superior court, and before the Court of Appeals or the Supreme Court.*") (emphasis added) (quoting *Baker v. Tri-Mountain Res., Inc.*, 94 Wn. App. 849, 852, 973 P.2d 1078 (1999)).

Here, the Shorelines Hearings Board does not constitute a court and the proceedings before it do not qualify as "judicial." Indeed, RCW 4.84.370(1)(a) specifically identifies the Shorelines Hearings Board and equates it with counties, cities, and towns—and not with the "judicial proceedings" that are separately called out in subsection (b).

The Court of Appeals accepted direct review of this matter, and therefore will be the first (and only) court to review and render a decision

herein thus far. Accordingly, attorney fees are not available to PSE or the Port under RCW 4.84.370(1).³⁵

III. CONCLUSION

The administrative process used in this case, both by the City and the Board, was seriously flawed and not on conformance with either the spirit or rule of the law. The Tribe respectfully asks the Court to correct those errors, reverse the Board's order, and to set aside or invalidate the SSDP.

RESPECTFULLY SUBMITTED this 13th day of November, 2017.

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³⁵ The City has not similarly requested attorney fees on appeal.

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 November 13, 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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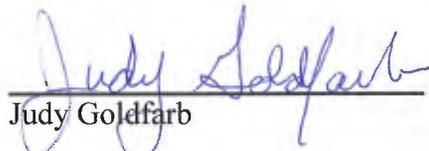
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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

SIGNED on November 13, 2017, at Seattle, Washington.



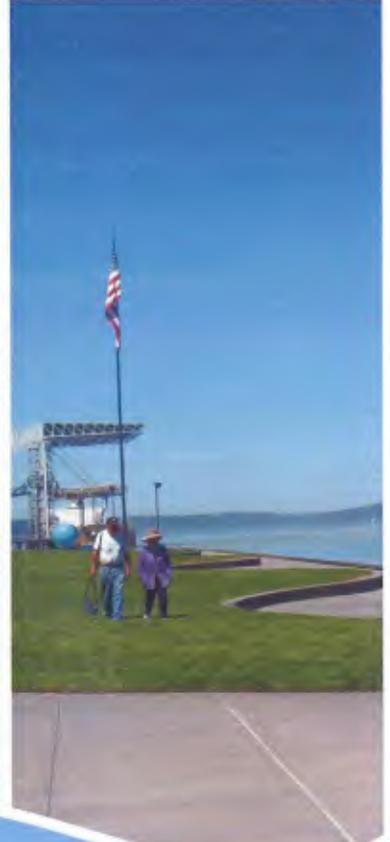
Judy Goldfarb

Appendix 1 –

**Excerpts, Tacoma Shoreline Master
Program**

SHORELINE MASTER PROGRAM

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



Tacoma CITY OF TACOMA, WASHINGTON

City Council

Marilyn Strickland, Mayor
David Boe
Joe Lonergan
Robert Thoms
Victoria Woodards

Marty Campbell, Deputy Mayor
Anders Ibsen
Ryan Mello
Lauren Walker

T.C. Broadnax, City Manager

Tacoma Planning Commission

Jeremy Doty, Chair
Chris Beale
Donald Erickson
Scott Morris
Matthew Nutsch

Tom O'Connor, Vice Chair
Peter Elswick
Sean Gaffney
Ian Morrison

Planning and Development Services Department

Peter Huffman, Interim Director
Ian Munce, Special Assistant to the Director

Planning Services Division

Brian Boudet, Manager
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Development Services Division

Karla Kluge
Shannon Stragier
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Jana Magoon
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Other City Departments

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Nancy Grabinski-Young, Community and Economic Development Department
Mike Murnane, Community and Economic Development Department
Josh Diekmann, Public Works Department
Jennifer Kammerzell, Public Works Department
Diane Wiatr, Office of Environmental Policy and Sustainability
Ramie Pierce, Environmental Services

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



The City of Tacoma does not discriminate on the basis of disability in any of its programs, activities, or services. To request this information in an alternative format or to request a reasonable accommodation, please contact the Planning and Development Services Department at (253) 591-5030 (voice) or (253) 591-5820 (TTY).

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. Policies 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."

6. Increase recreational opportunities for the public in the shoreline; and
7. Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

4.4 Policies for Shorelines of Statewide Significance

The statewide interest should be recognized and protected over the local interest in shorelines of statewide significance. To ensure that statewide interests are protected over local interests, the City shall review all development proposals within shorelines of statewide significance for consistency with RCW 90.58.020 and the following policies:

1. Redevelopment of shorelines should be encouraged where it restores or enhances shoreline ecological functions and processes impaired by prior development activities.
2. The Washington Departments of Fish and Wildlife and Ecology, the Puyallup Tribe, and other resource agencies should be consulted for development proposals that could affect anadromous fisheries.
3. The range of options for shoreline use should be preserved to the maximum possible extent for succeeding generations. Development that consumes valuable, scarce or irreplaceable natural resources should not be permitted if alternative sites are available.
4. Potential short term economic gains or convenience should be measured against potential long term and/or costly impairment of natural features.
5. Protection or enhancement of aesthetic values should be actively promoted in new or expanding development.
6. Resources and ecological systems of shorelines of statewide significance should be protected.
7. Those limited shorelines containing unique, scarce and/or sensitive resources should be protected to the maximum extent feasible.
8. Erosion and sedimentation from development sites should be controlled to minimize adverse impacts on ecosystem processes. If site conditions preclude effective erosion and sediment control, excavations, land clearing, or other activities likely to result in significant erosion should be not be permitted.
9. Public access development in extremely sensitive areas should be restricted or prohibited. All forms of recreation or access development should be designed to protect the resource base upon which such uses in general depend.
10. Public and private developments should be encouraged to provide trails, viewpoints, water access points and shoreline related recreation opportunities whenever possible. Such development is recognized as a high priority use.
11. Development not requiring a waterside or shoreline location should be located upland so that lawful public enjoyment of shorelines is enhanced.

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.

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:

2. The mitigation plan shall provide for construction, maintenance, monitoring, and contingencies as required by conditions of approval and consistent with the requirements of this Program.
3. The mitigation plan shall be prepared by a qualified professional; provided, that the Director may waive the requirement to hire a qualified professional to prepare a mitigation plan when the required mitigation involves standard planting or enhancement practices. The waiver shall not be granted for mitigation practices involving critical area creation, rehabilitation and/or restoration.
4. A Compensatory mitigation plan shall be provided for all permanent impacts and will conform to the general mitigation requirements listed in TSMP 6.4.2(C) and any specific requirements identified in this chapter for the critical area. The plan shall include the following:
 - a. Mitigation sequencing. The applicant shall demonstrate that an alternative design could not avoid or reduce impacts and shall provide a description of the specific steps taken to minimize impacts.
 - b. Assessment of impacts including the amount, existing condition and anticipated functional loss. Include probable cumulative impacts.
 - c. The amount and type of mitigation. Include goals, objectives, and clearly defined and measurable performance standards. Include contingency plans that define the specific course of action if mitigation fails.
 - d. A description of the existing conditions and anticipated future conditions for the proposed mitigation area(s) including future successional community types for years 1,5,10 and 25, future wildlife habitat potential, water quality and hydrologic conditions. Compare this to the future conditions if no mitigation actions are undertaken;
 - e. A description of the shoreline ecological functions or critical areas functions and values that the proposed mitigation area(s) shall provide, and/or a description of the level of hazard mitigation provided;
 - f. A description and scaled drawings of the activities proposed to reduce risks associated with geologic hazards and/or flooding, and/or to mitigate for impacts to shoreline buffers or critical area functions and values. This shall include all clearing, grading/excavation, drainage alterations, planting, invasive weed management, installation of habitat structures, irrigation, and other site treatments associated with the development activities;
 - g. Specifications of the mitigation design and installation including construction techniques, equipment, timing, sequence, and best management practices to reduce temporary impacts;
 - h. Plan sheets showing the edge of the shoreline marine buffer, critical area and/or critical area buffer. The affected area shall be clearly staked, flagged, and/or fenced prior to and during any site clearing and construction to ensure protection for the critical area and buffer during construction;

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

4. 'Urban-Conservancy' and 'Shoreline Residential' Designated Shorelines: The buffer shall not be reduced to any less than $\frac{3}{4}$ 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 $\frac{1}{2}$ 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 ($\frac{1}{4}$) 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 ($\frac{1}{4}$) 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.

- f. That the proposed development will be designed to have a minimum adverse impact on the natural environment of the site, and shall fully mitigate for any adverse impact.
4. New non-water-oriented commercial uses or development are prohibited unless they meet one of the following tests and as a conditional use unless otherwise specified:
 - 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.
 5. An applicant for a non-water-oriented commercial use shall demonstrate ecological restoration is undertaken to the greatest extent feasible.
 6. Non-water-dependent commercial uses shall avoid impacts to existing navigation, recreation, and public access.
 7. Non-water-dependent commercial uses are prohibited over water except for water-related and water-enjoyment commercial uses in an existing structures, and where necessary to support a water-dependent use.
 8. Artisan/craftsperson uses must demonstrate that the use is compatible with surrounding uses and protection of public safety. Further, the site must be consistent with public access components as specified for water-enjoyment uses.
 9. Outdoor uses are encouraged, including mobile vendors and uses associated with permitted indoor uses such as a restaurant or cafe. Outdoor uses shall not obstruct public accessways or access to public recreation facilities.

B. "S-8" Thea Foss Shoreline District

1. Mobile vendors shall not be permitted in the Dock Street and East D Street rights-of-way.

7.6 Port/Industrial Use

The past geologic development of the Puget Sound Basin has created one of the few areas in the world which provides several deepwater inland harbors. The use of Puget Sound waters by deep-draft vessels is increasing due in part to its proximity to the Pacific Rim countries. This increased trade will attract more industry and more people which will put more pressure on the Sound in the forms of recreation and the requirements for increased food supply.

The Port of Tacoma is a major center for waterborne traffic and as such has become a gravitational point for industrial and manufacturing firms. Heavy industry may not specifically require a shoreline location, but is attracted to the port because of the variety of transportation modes available.

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 2 –

Friends of Grays Harbor County v. City of Westport, ELUHB No. 03-001 (October 12, 2005 Findings of Fact, Conclusions of Law and Order)

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BEFORE THE ENVIRONMENTAL AND LAND USE HEARINGS BOARD
STATE OF WASHINGTON

FRIENDS OF GRAYS HARBOR and
WASHINGTON ENVIRONMENTAL
COUNCIL,
Appellants,
v.
CITY OF WESTPORT, MOX-CHEHALIS
LLC, PORT OF GRAYS HARBOR, and
STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Respondents.

ELUHB NO. 03-001
(DE NOVO)

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

Appellants Friends of Grays Harbor (FOGH) and Washington Environmental Council (WEC), challenged the Shoreline Conditional Use Permit approved initially by the City of Westport and issued by the Department of Ecology, Ecology’s §401 Certification under the Clean Water Act and Ecology’s determination of consistency with the Coastal Zone Management Act (CZMA) for a destination resort project known as the Links at Half Moon Bay. The Environmental and Land Use Hearings Board (Board) conducted a hearing on this de novo portion of the case on August 22-26, 2005, and on September 12, 2005. Counsel Knoll Lowney represented FOGH, counsel Jennifer Joseph and Jennifer Harris represented WEC, counsel Barnett Kalikow and Charles Roe represented Mox-Chehalis, counsel Jeffrey S. Meyers represented the City of Westport, Sr. Assistant Attorney General Joan Marchioro and Assistant Attorney General Thomas Young represented Ecology and counsel Arthur A. Blauvelt III

FINDINGS OF FACT, CONCLUSIONS
OF LAW and ORDER
ELUHB NO. 03-001

1 represented the Port of Grays Harbor. The Port did not actively participate in the hearing.
2 Administrative Appeals Judge, Phyllis Macleod, presided for the Board comprised of Bill
3 Clarke, chair, William H. Lynch, David W. Danner,¹ Judy Wilson, O’Dean Williamson and Dan
4 Smalley. Kim Otis and Randi Hamilton of Gene Barker and Assoc., Olympia, Washington,
5 recorded the proceedings.

6 Witnesses were sworn and heard, exhibits were introduced, and the parties presented
7 arguments to the Board. The Board affirms Ecology’s CUP under the Shoreline Management
8 Act (SMA) authorizing wetland fill and related mitigation for the golf course, and also Ecology’s
9 CZMA consistency determination. While the design of the golf course and the NRMP provide
10 an appropriate basis to meet water quality standards, the Board remands the Clean Water Act
11 §401 determination to Ecology to clarify certain aspects of the Natural Resource Management
12 Plan (NRMP) necessary to meet the standard of reasonable assurance and to determine
13 groundwater levels to provide reasonable assurance that infiltration can indeed occur. Based on
14 the evidence presented, the Board issues the following:

15 FINDINGS OF FACT

16 1.

17 The respondent Mox-Chehalis L.L.C. proposes a project known as the Links at Half
18 Moon Bay, including two hotels, a conference center, a “Scottish Links” style golf course, ocean
19 front condominiums, and supporting commercial development. It is anticipated Phase I of the

20
21 ¹ Board member Danner was present at the hearing and participated in the Board discussion of the case. He is not a signatory to the decision because he accepted appointment to a position in another agency prior to completion of this decision.

1 development will include one hotel structure with conference center and some commercial/retail
2 development. Phase I will also include the construction of the 18-hole golf course with all
3 appurtenances including shelters/restrooms, cart paths, bridges, club house, golf maintenance
4 building, and driving range. Utility and transportation infrastructure improvements will also be
5 part of Phase I construction activities. Phase II will include construction of the second 200-room
6 hotel, additional commercial/retail development, and approximately 200 condominium units in
7 eight buildings. (RW-1, WSH00004).

8 2.

9 The project site is approximately 355 acres in size and is located in the northwest portion
10 of the City of Westport near Point Chehalis, adjacent to Westhaven State Park and north of
11 Westport Light State Park. The site is located in the Urban Shoreline Environment and is zoned
12 Tourist Commercial. (Ex. RW-12). The property is bordered by the Pacific Ocean to the west
13 and Half Moon Bay to the north, Westport Light State Park to the south, and Forrest Avenue to
14 the east. The site is bisected in the northerly area by Jetty Access Road, which leads to
15 Westhaven State Park and the South Jetty. A pedestrian walkway connecting Westhaven State
16 Park and Westport Light State Park runs north/south along the western portion of the property.
17 A pedestrian walkway also extends along the shore of Half Moon Bay north of the property
18 leading toward a Coast Guard viewing tower and public parking area adjacent to Half Moon Bay.
19 (Ex. RW-1, WSH00004, RW-10). The public areas adjacent to the site contain some of the most
20 frequently visited ocean beaches in the State of Washington. The Pacific Ocean beach and the

1 Half Moon Bay beach are used by the public for a variety of shoreline uses including surfing,
2 swimming, beachcombing, and picnicking. (Testimony of Arthur Grunbaum and Ex. A-25).

3 3.

4 In 1993, the Pacific Ocean breached the South Jetty west of the project site. Significant
5 erosion ensued. The U.S. Army Corps of Engineers developed plans to repair and maintain the
6 jetty as part of its mission to protect the Grays Harbor navigation channel. Part of the work
7 undertaken in response to the jetty breach involved construction of a buried revetment along a
8 portion of the shoreline of Half Moon Bay. In litigation regarding the jetty repair and buried
9 revetment project, the Corps agreed to maintain a beach profile of approximately 1 vertical on 60
10 horizontal on Half Moon Bay to allow for continued public access to the water. (Ex. A-63). The
11 Corps also built a wave diffraction mound and gravel transition beach on the west end of Half
12 Moon Bay adjacent to the South Jetty. Sandy dredge spoils are placed on the beach and upland
13 area of Half Moon Bay to help avoid future erosion in the area. (RW-17, p. 13).

14 4.

15 The major buildings contemplated by the developer for this project are located on
16 uplands north of Jetty Access Road in areas that will not require filling wetlands. The
17 condominium site, however, is on uplands south of the Jetty Access Road near the parking lot for
18 Westhaven State Park. The proposed construction does not directly call for installation of
19 bulkheads, riprap, seawalls, or other shoreline protection structures. (RW-17, p. 14). Utilities
20 will be located in the existing Jetty Access Road right of way to the maximum extent possible.
21 The developer will be required to improve Jetty Access Road to include a sidewalk and bicycle

1 path, which will improve public access to Westhaven State Park. A pedestrian walkway will be
2 constructed to link the hotel and conference center with the City of Westport waterfront trail in
3 the area. The developer will also be required to install paved access points from the trail to the
4 beach every 660 feet along the trail. (Ex. RW-17, p. 9).

5 5.

6 The hotels are proposed on uplands in the northeast portion of the site. The hotels will be
7 visible from the commercial areas near the Westport marina, but they will not block any views of
8 the Pacific Ocean or Half Moon Bay from existing residences. The condominiums are visible
9 from Westhaven State Park and the Westport Light Trail. The condominium buildings, however,
10 are landward of the park and trail property and will not block views from Park property of the
11 Pacific Ocean or Half Moon Bay. After construction of the project, the view looking east from
12 the Westport Light Trail will be different from the existing undeveloped dunal area. (RW 17- p.
13 8).

14 6.

15 The golf course design proposed for the site has been modified a number of times to
16 address concerns over filling and/or impacting wetlands. The designers carefully evaluated if a
17 design could be developed that did not require alteration of wetlands. The conclusion was that
18 such a design could not be used and still allow for play by most average golfers. The pattern of
19 wetlands on the site is very scattered in small pockets with small upland spaces between them,
20 leaving very few areas of any good size to design golf play areas. If the course were designed
21

1 with no wetland impacts, it would present a “forced carry”² situation on almost every shot,
2 which would not be considered fair or playable by most golfers. Having concluded that some
3 filling would be necessary, the course designers worked diligently to reduce any impacts to
4 wetlands to an absolute minimum while maintaining the integrity of play for the average resort
5 golfer. (Prefiled testimony of Richard Robbins, ¶4).

6 7.

7 The course design involves 18 holes and a practice driving range. The course will be
8 open for play by the public and resort guests. Greens fees will be charged. A nine hole course
9 was evaluated, but such a design is not consistent with the type of play desired by the golfing
10 community, and such a course would not have the capacity to handle the amount of play required
11 to service a resort and the public. *Id.*, ¶5. The Links at Half Moon Bay design will require
12 maintaining only 52 acres of turf rather than the 80-90 acres typical on average golf courses in
13 the United States. *Id.*, ¶3. The Scottish Links style course utilizes the seaside terrain as a feature
14 of the design and incorporates sand dunes and existing vegetation into the overall experience.

15 8.

16 The area south of Jetty Access Road is currently comprised of undeveloped coastal dunes
17 and interdunal wetlands extending well into Westport Light State Park. (Ex. A-6). Jurisdictional
18 wetlands within the boundaries of the project site were originally delineated by Ecological Land
19 Services, Inc. in 2000. The delineation showed 170 wetlands on the site, which totaled

20 ² A “forced carry” is a situation that makes a player hit a shot of some distance over a hazard. These hazards may be
21 sand bunkers, water bodies, streams or wetlands. If the golfer does not “carry the shot” far enough, they must count
a 1-stroke penalty and they must replay the shot. (Prefiled testimony of Richard Robbins ¶4)

1 approximately 150 acres. Wetlands at the site are comprised of emergent, scrub-shrub, and
2 forested vegetative communities surrounded by uplands vegetated with European beach grass,
3 Scot's broom, and shore pine. Vegetation in the wetland areas consists of emergent species
4 within the westernmost wetland areas with more heavily dominant shrub and forest species in the
5 middle and easternmost portions of the site. (Ex. RW-8, p.1). The easterly 100 plus acres of the
6 site is a forested wetland with a more diverse habitat than the emergent and shrub areas to the
7 west. (Ex. RW-8, p. 15).

8 9.

9 Many areas on the site are heavily impacted by infestations of Scot's broom. Scot's
10 broom covers approximately 50 acres of the site with over 30 percent coverage. Absent human
11 intervention, the proliferation of Scot's broom could double or triple in the next ten years and
12 could interrupt the succession of native plants, diminish native plant diversity, and cause
13 deterioration of wetland habitat. (Ex. RW-17, p. 5 ¶17).

14 10.

15 Hydrology at the site is influenced by both surface water and groundwater and is highly
16 variable throughout the year. The majority of the wetland areas are inundated during the winter
17 months and dry during the summer months. Groundwater is generally shallow throughout the
18 site and is expected to match surface water elevations in the larger wetland areas in the center
19 and eastern portions of the site. Surface water at the site generally flows to the north where it
20 eventually enters ditches that drain to a roadside ditch that parallels the western side of Forrest
21 Avenue. From this point, surface water flows beneath Forrest Avenue via a culvert and enters

1 another ditch system that eventually discharges to Grays Harbor near the airport. (Ex. RW-1,
2 WSH00006). Movement of groundwater on the site and groundwater elevations on the property
3 have not been thoroughly studied. Some fifteen test wells have been drilled on the site, but data
4 has not been collected from them since a preliminary effort in October 2001. (Ex. RW-4, Ex.
5 8)(Testimony of Horton). That initial testing revealed groundwater levels in October 2001
6 ranging between 3.0 feet and 5.0 feet. *Id.* It is believed that most groundwater on the site flows
7 to the north and is hydraulically connected to Half Moon Bay. Some groundwater may flow
8 south to areas near the Westport drinking water wells. (Testimony of Kimsey).

9 11.

10 Over the years, birds have used the site as habitat primarily for bathing and resting. No
11 evidence was presented establishing the presence of endangered or threatened bird species on the
12 site. The Grays Harbor area is known as an important location on the migration route for north-
13 migrating spring shorebirds. The interdunal environment, such as that located on the site,
14 provides shelter for the migrant birds and fresh water for bathing. Food for shorebirds is
15 available in nearby saltwater mudflats and tidal zones. Significant areas in the Grays Harbor
16 vicinity critical to shorebird use during migration have been specifically protected through
17 federal legislation in 1988, leading to creation of the Grays Harbor National Wildlife Refuge.
18 (Ex. A-142). The project site is not included within the boundaries of the Grays Harbor National
19 Wildlife Refuge.

12.

The parties disputed the nature and extent of any habitat on the site for Coho salmon. Initially, the area was not identified as Coho habitat, but in February 2002, the Washington Department of Fish and Wildlife (WDFW) observed 5-6 Coho smolts in a flooded area along the Fire Road on the south edge of the project property, and 5-6 Coho smolts in the Forrest Avenue ditch along the eastern boundary of the property. (Ex. A-150). Juvenile Coho salmon are known to use flooded coastal wetland habitat for rearing and refuge. To some extent they are also capable of emigrating from flooded wetlands. There is no upstream source for fish to access the project site. (Prefiled testimony of Fisher ¶8). Coho entering the area would have to leave salt water and pass the floodgate located on the Forrest Avenue ditch.

13.

WDFW's findings were based on data obtained by shocking water in the Forrest Avenue Ditch and water near the intersection of the Forrest Avenue Ditch and the Fire Road on the southern border of the property. The remainder of the site was inaccessible on the day of WDFW's site visit due to high water on the Fire Access Road. WDFW was unable to systematically sample the areas within the wetland complex on the site for useable Coho habitat. Dr. Jeffrey Fisher was hired by the applicant to conduct a more complete analysis of the area. He evaluated fish habitat along transects within the interior of the project site. He observed "dendritic" (i.e. capillary-like) channels connected to the Forrest Avenue ditch, which could provide access to the adjacent forested wetland if water levels extended above the elevation of the tops of the channels due to temporary high water. The likelihood of fry/smolts being

1 stranded on the site by receding waters increases as the fry/smolt stray further from the ingress
2 and egress channels associated with the Forrest Avenue ditch. (Prefiled testimony of Fisher,
3 ¶14). There was no substantial evidence salmonids are actively using wetlands on the site
4 beyond the forested wetland area that is being preserved under the proposed project. (Prefiled
5 testimony of Fisher ¶¶ 14-20).

6 14.

7 For many years the Port of Grays Harbor owned the property in question. During that
8 time the area remained largely undeveloped, although there are signs people have used portions
9 of the property for camping, walking, and off-road vehicle use. (Ex. RW-10, p.3). During 1995
10 and 1996, the Port engaged in a public planning process that culminated in a decision reflected in
11 the Port's Master Plan to encourage the sale of this property to private parties for development as
12 a major destination resort. Development of a destination resort was seen as the central
13 programmatic element in the revitalization and redevelopment of Westport. (Ex. RW-15). The
14 City of Westport updated its Shorelines Master Program and Zoning Code in 1996 to allow for a
15 master planned destination resort on this parcel. *Id.*

16 HISTORY OF THE PROJECT

17 15.

18 Environmental review of the Links at Half Moon Bay destination golf resort development
19 for this site began with the City of Westport issuing a Determination of Significance and Request
20 for Comments on Scoping, which led to a scoping meeting and preparation of a Draft
21 Environmental Impact Statement (DEIS) dated November 1, 2000. A Final Environmental

1 Impact Statement (FEIS) was issued, dated March 23, 2001. The applicant also applied for a
2 Master Plan Approval for the project and a shoreline substantial development permit (SSDP) and
3 shoreline conditional use permit (CUP).

4 16.

5 The City approved the master plan for the Links at Half Moon Bay after the Hearing
6 Examiner held an open record predecision hearing to take testimony regarding the application on
7 May 21 and May 23, 2001. Following a recommendation from the hearing examiner for
8 conditional approval of the application, the City Council approved the Master Plan. The plan
9 approval was challenged by Friends of Grays Harbor in Thurston County Superior Court
10 pursuant to the Land Use Petition Act, Ch. 36.70C RCW. The appellants also challenged the
11 adequacy of the project EIS in that proceeding. On January 29, 2002, the Superior Court issued
12 an oral opinion dismissing the SEPA claims for failure to exhaust administrative remedies. On
13 March 1, 2002, a written order was entered dismissing the SEPA claims made in the LUPA
14 action.

15 The Superior Court, however, remanded the master plan ordinance to the City of
16 Westport based on an appearance of fairness violation. The City Council again approved a
17 master plan ordinance for the Links at Half Moon Bay after a closed record hearing on
18 September 10, 2002. The City Council proceeded to pass Ordinance 1277 on October 8, 2002,
19 approving the Master Use Plan for the Links at Half Moon Bay. (Ex. RW-13). FOGH appealed
20 the new approval to Thurston County Superior Court and the court upheld the master plan
21 ordinance in an Order dated May 21, 2003. (Ex. RW-14). FOGH did not appeal this decision.

1 17.

2 In 2001, the City issued both a SSDP and a shoreline CUP for the project. A CUP was
3 necessary to authorize filling wetlands as part of the golf course construction. The Department
4 of Ecology denied the CUP and appealed the SSDP to the Shorelines Hearings Board (SHB).
5 FOGH intervened in the SHB case. While the case was pending before the SHB, the applicant,
6 the City of Westport, and Ecology engaged in a lengthy series of negotiations regarding revisions
7 to the project plans and conditions. An agreement was ultimately reached, but the project had
8 been modified to the extent that a new SSDP application and shoreline CUP application was
9 deemed appropriate. At the parties' request, the SHB remanded the appeal to the City of
10 Westport for processing of new applications.

11 18.

12 Following the Superior Court's approval of the Master Plan ordinance and the SHB
13 remand, the applicant submitted a new Joint Aquatic Resource Project Application (JARPA) for
14 issuance of a SSDP and shoreline CUP. (Ex. RW-1). That application contained the proposal on
15 appeal in the current case. In conjunction with the new JARPA, the applicant filed an addendum
16 to the FEIS addressing changes incorporated since the original FEIS. (Ex. RW-4).

17 The City of Westport Planning Commission held an open record hearing on the shoreline
18 permits on September 10, 2003. (Ex. R-17, p. 2). The Planning Commission entered Findings of
19 Fact and Conclusions of Law approving the SSDP and CUP on September 30, 2003. FOGH and
20 WEC appealed the approval to the Westport City Council, which held a closed record appeal
21 hearing on October 28, 2003. After refusing to allow supplementation of the evidentiary record

1 to reflect significant October 2003 erosion events on Half Moon Bay, the Council affirmed the
2 Planning Commission's decision on the SSDP and CUP on October 28, 2003. (Ex. RW-18).
3 The Department of Ecology then approved the shoreline CUP by letter dated December 4, 2003.
4 (Ex. RW-19). FOGH and WEC timely appealed the shoreline decisions to the ELUHB Board in
5 this case.

6 19.

7 The case was filed before the ELUHB Board because Mox-Chehalis applied to the State
8 of Washington Office of Regulatory Assistance in July 2003 requesting the Links at Half Moon
9 Bay be designated as a "qualifying project" under the Laws of 2003, Chapter 393, Section 3 (Ch.
10 43.21L, RCW). The Office of Regulatory Assistance found the project qualified because it was
11 proposed in a "distressed area" as defined by the statute and was designed to provide at least
12 thirty full-time year-round jobs. (RE-21). The Westport and Port of Grays Harbor governments
13 have been looking for economic development opportunities to revitalize the tourist segment of
14 the local economy, since traditional fishing and timber businesses have declined in recent years.

15 §401 CERTIFICATION

16 20.

17 On August 14, 2003, Mox-Chehalis LLC requested a water quality Certification from the
18 State of Washington for the Links at Half Moon Bay project pursuant to the provisions of 33
19 U.S.C. §1341 (Federal Water Pollution Control Act §401)(§ 401 Certification). Such a
20 Certification is required as a step in obtaining the necessary approval from the Army Corps of
21 Engineers to fill wetlands. Construction of the golf course will require filling certain wetlands to

1 create the fairways, tees, and greens. On August 13, 2004, Ecology issued Order #1612,
2 granting §401 Certification for the Links project. (Ex. A-134).

3 The Certification incorporated the Audubon International Natural Resource Management
4 Plan (NRMP) dated August 1, 2001, and the Wetland Mitigation Plan for the Links at Half Moon
5 Bay Westport Golf and Hotel Destination Resort dated February 6, 2002, with identified
6 additions and clarifications. (Ex. A-134, pp. 11, 4 respectively). At hearing, Ecology testified
7 the NRMP incorporated into the §401 Certification was actually a revised version still dated
8 August 1, 2001, but received by Ecology in March 2004.

9 21.

10 In evaluating a request for §401 Certification, Ecology must determine whether there is
11 “reasonable assurance” the activity in question will be conducted in a manner that will not
12 violate applicable water quality standards. Ecology utilized a number of experts from within the
13 Department to examine the proposal and review reports submitted by the project proponent’s
14 consultants. Ecology was evaluating the adequacy of mitigation for impacts resulting from the
15 filling of wetlands, the likelihood of groundwater contamination, and the potential for pollution
16 of on-site and surrounding surface waters.

17 22.

18 Golf courses are considered a high impact use under Ecology’s most recent guidance on
19 protecting and managing wetlands. (Ex. A-35, April 2005). This rating reflects the level of
20 human activity typical on a golf course, as well as the common use of pesticides, fertilizers, and
21 other chemicals to maintain a course in optimum playing condition. Most golf courses have a

1 stormwater collection system to intercept water flow from the highly managed areas of the
2 course such as tees and greens for treatment prior to discharge into surface water. The original
3 design for the Links at Half Moon Bay proposed such a collection system. During the ongoing
4 discussions between the applicant, the City, and Ecology, it was determined that the collection
5 system might not be workable because it would modify the existing hydrology of the wetlands
6 and groundwater on the site, and could result in severe groundwater mounding, flooding, and
7 localized changes in groundwater flow. (Prefiled testimony of Kimsey, p.5).

8 23.

9 In response to the problems attending a “collect and treat” type of system, the applicant
10 developed a plan involving infiltration without additional treatment as the method for protecting
11 water quality. The infiltration plan is unique to the site in question and takes into account the
12 sandy soils on the Links property. The use of infiltration, rather than a collect and treat system,
13 would help maintain the existing hydrology of the site. The infiltration plan is contained in the
14 NRMP prepared for the applicant by Audubon International Institute. (Ex. RE-6). Audubon
15 International is a not-for-profit environmental organization that specializes in sustainable natural
16 resource management. The Audubon Signature Program provides comprehensive environmental
17 planning assistance to landowners with projects in the design and development stages. The
18 Signature Program focuses on wildlife conservation and habitat enhancement, water quality
19 management and conservation, waste reduction and management, energy efficiency, and
20 Integrated Pest Management. (Ex. E-6, p. 1-5). The project approvals for the Links at Half
21 Moon Bay require the golf course to maintain an approved status with the Audubon International

1 Signature Program at the Silver Level. In this case, the Natural Resources Management Plan for
2 the Links at Half Moon Bay focuses on three main components: (1) Prevention, (2) Control, and
3 (3) Detection. (Pre-filed testimony of Peacock, p.3).

4 24.

5 Prevention involves careful construction practices, preserving wooded areas and
6 specimen trees to the maximum extent possible, and using the least intrusive methods and
7 machinery for clearing. The NRMP also indicates construction should direct surface and
8 subsurface drainage away from greens over vegetative buffers, through vegetative swales, or into
9 sumps before discharging to water. Fairway drainage also should be routed away from direct
10 input to surface waters. (Ex. RE-6, p. 2-17).

11 Another prevention strategy is to observe special management zones in an effort to
12 protect resources. In this case, a 25-foot no spray zone has been established around each water
13 body including ponds and wetlands. No pesticides will be used in these areas and only organic
14 fertilizers will be applied. A limited spray zone is also contemplated which will either extend to
15 the entire golf course or will extend over the area beginning 25 feet landward from the normal
16 water elevation and extending 50 feet landward from the normal water elevation. (Ex. RE-6, p.
17 2-30). The limited spray zone would involve use of a limited set of pesticides and would allow
18 only organic fertilizers or “spoon feeding” of non-organic fertilizers. Equipment to avoid
19 overspray in windy conditions is also required in the limited spray zone (Ex RE-6, p. 2-12).

20 While the evidence indicated the applicant had agreed to make the entire course a limited spray
21

1 zone, the NRMP in evidence, and incorporated into the §401 Certification, has inconsistent
2 language regarding that limit. (Compare Ex. RE-6, p. 2-12, Ex. RE-6 pp. 2-30-33.)

3 25.

4 A comparison of the details contained in the “revised” 2004 version of the NRMP and the
5 2001 NRMP showed that the later version did make some additional restrictions on the use of
6 pesticides, but it also made some restrictions more ambiguous and may provide less water
7 quality protection.

8 Three different management zones are established in both versions of the NRMP to
9 address resource and habitat protection. No Spray Zones are established around each water
10 body³ 25 feet landward from normal water elevation. Limited Spray Zones are established
11 around each water body beginning 25 feet landward from normal water elevation and extending
12 50 feet landward from normal water elevation. Bridge crossings are special management zones
13 for constructing the bridges associated with the cart path. The narrative portion of the 2004
14 NRMP states that “[t]he Links at Half Moon Bay will be treated as a Limited Spray Zone
15 because of the proximity of the golf holes to wetlands.” (Ex. RE-6, at 2-12.) When reviewing
16 the detailed recitation of practices for each golf hole, however, there are portions of the course
17 that are not contained within a management zone. (Ex. RE-6, Table 2-4.) Comparing holes 1
18 and 4, hole 1 has a No Spray Zone and a Limited Spray Zone established for the green, tees, and
19 fairway. Hole 4 only has a No Spray Zone and a Limited Spray Zone established for the green.

20
21

³ Ponds and wetlands.

1 The tee area and the fairway/landing area for hole 4 are not contained within a management
2 zone. The tee area and the fairway/landing area for hole 4 does not require drainage to pass
3 through at least 50 feet of vegetative filter or into a regulated runoff impoundment. The
4 fairway/landing area for hole 4 does not require the use of lateral swales or elevated fairway
5 edges to direct the water. Likewise, holes 7 and 15 are identical to the management zones and
6 treatment specified for hole 4. Table 2-4 is also confusing because sometimes the management
7 area for a particular hole will include the fairway but not the landing area⁴, sometimes it will
8 include the landing area but not the fairway⁵, and other times it will list both the fairway and the
9 landing area.⁶ It is unclear to the Board whether the terms “fairway” and “landing area” are
10 meant to be used synonymously in this section, or whether it is intended to exclude additional
11 portions of the course from the management zones. Regardless, it is clear that the detailed
12 recitation of practices for each hole is inconsistent with the narrative in the NRMP that the entire
13 course will be treated as a Limited Spray Zone.

14 26.

15 The second element of the resource protection plan involves control. The NRMP views
16 control as providing appropriate management of materials and systems so that environmental
17 problems do not occur. The plan utilizes Best Management Practices and Integrated Pest
18 Management to meet this goal. Best Management Practices identified for the Links include the
19 use of biofilters or vegetated buffer strips to provide filtration before drainage reaches open

20 ⁴ Hole 1 for example.

21 ⁵ Hole 3 for example

⁶ Hole 6 for example.

1 water areas or wetlands. While detention with associated filtration, grassy swales, and dry ponds
2 are mentioned in the plan as possible control practices, the only evidence these devices are
3 actually incorporated into the Links design is the description of practices for each golf hole. (Ex.
4 RE-6, Table 2-4). Although the level of detail is lacking on how these BMPs will eventually be
5 incorporated around each golf hole, the Board believes Ecology will ensure that these are in fact
6 incorporated into the final design and construction of the golf course.

7 27.

8 The primary treatment method for stormwater at the Links site is infiltration. Infiltration
9 is a recognized means to manage stormwater identified by the Stormwater Management Manual
10 for Western Washington. (Ex. RE-29). Infiltration was seen as a viable option at the project site
11 because it will mimic the natural conditions. (Prefiled Testimony of Kimsey, p. 7). In order for
12 infiltration to work effectively as a stormwater treatment strategy, all Site Suitability Criteria
13 (SSC) must be met. (Ex. RE-29, p. 3-70). Depth to water table is addressed at SSC-5:

14 The base of all infiltration basins or trench systems shall be ≥ 5 feet
15 above the seasonal high-water mark, bedrock (or hardpan) or other low
16 permeability layer. A separation down to 3 feet may be considered if the
17 ground water mounding analysis, volumetric receptor capacity, and the
design of the overflow and/or bypass structures are judged by the site
professional to be adequate to prevent overtopping and meet the site
suitability criteria specified in this section.

18 Viability of the infiltration system is dependent on adequate separation between the soil
19 surface and the groundwater table. The data submitted to Ecology in connection with this project
20 does not contain groundwater table readings for the wet season occurring from November
21 through March. The only data in support of infiltration treatment reports ground water levels in

1 October and May. (Testimony of Kimsey). Testimony and photographic evidence indicate the
2 groundwater table is very near the surface during the rainy parts of the year. To support a
3 scientifically valid analysis of the potential for groundwater or surface water contamination on
4 this site, or any limitations necessary to avoid it, adequate data for all seasons is necessary. On
5 the record before the Board, this data has not been collected or analyzed.

6 28.

7 Operational issues at the golf course are addressed through a combination of source
8 controls and monitoring. Source controls include the design elements targeted to reduce runoff
9 to wetlands and open waters, as well as the plan for selection and application of pesticides, and
10 fertilizers. A risk assessment was conducted for the use of numerous pesticides⁷ at the golf
11 course. The risk assessment, known as a Tier 1, evaluated these pesticides by assuming the
12 “worst case” application and environmental conditions and comparing the resulting maximum
13 anticipated concentrations of the pesticide against acute and chronic toxicity levels for aquatic
14 organisms as well as human health toxicity levels. Under the formula used, if the quotient for
15 the equation was less than one, negligible risk for the pesticide was assumed. If the quotient was
16 greater than one, potential risk for the pesticide was assumed. (Ex. RE-6, at 3-21 – 3-24.) The
17 results of the risk assessment are illustrated in Table 3-9. (2004 NRMP is Ex. RE-6, at 3-25 – 3-
18 27; 2001 NRMP is Ex. RW-6, at 64 – 66.)

19
20
21 ⁷ Pesticides include fungicides, herbicides, insecticides, and nematicides. A plant growth regulator, triexpac-ethyl was also evaluated.

1
2 The Petitioners raise concerns regarding the reclassification of the herbicides bromoxynil
3 and dithiopyr from the potential risk category in Table 3-9 in the 2001 NRMP to the negligible
4 risk category in Table 3-9 in the 2004 NRMP without explanation. (Testimony of Philip Dickey,
5 September 12, 2005). The reclassification of dithiopyr is particularly puzzling because the
6 appendix, which contains the results of the Tier I modeling contains a blank on the last column
7 of the table, and this column pertains to human health. (See Ex. RE-6, Appendix I, Table I-2.)
8 Despite the lack of explanation for the reclassification of these two pesticides, Petitioners'
9 concerns are not well-founded because the 2004 NRMP also prohibits the use of these pesticides
10 on the golf course. (Ex. RE-6, at 3-24; Table 3-10.)

11 The 2004 NRMP also removed the use of trichlorfon, chlorothalonil, mancozeb,
12 chlorpyrifos, thiopnate-methyl, thiram from the golf course. (Ex. RE-6, at 3-23 – 3-24; Table 3-
13 10.) Trichlorofon is listed as having a potential risk, the other pesticides are listed as having
14 negligible risk. Table 3-10 also lists cyfluthrin as not available for use on the golf course, but
15 this is not listed in the narrative portion of the NRMP. It is also confusing that some pesticides
16 that are banned from use on the golf course appear in the risk assessment results in Table 3-9⁸,
17 but other banned pesticides do not appear in this same table.⁹ Similarly, the results of the risk
18 assessment for some pesticides are listed in Table 3-9 in the 2001 NRMP¹⁰, but the results of
19 these same pesticides are not listed in Table 3-9 of the 2004 NRMP, and there is no

20 ⁸ Bromoxynil, dithiopyr, trichlorfon, chlorothalonil, chlorpyrifos, thiopnate-methyl, and cyfluthrin.

21 ⁹ Mancozeb and thiram.

¹⁰ PCNB for example.

1 accompanying explanation. The Board can only assume that pesticides that are not listed in
2 Table 3-9 of the 2004 NRMP are not approved for use on the golf course, and that even if a
3 pesticide is listed in Table 3-9, it still may not be approved for use on the golf course if the
4 NRMP indicates elsewhere it is not to be used. The NRMP version before the Board will not be
5 the final version incorporated into the §401 Certification. The revised NRMP should ensure
6 there is consistency between Table 3-9, Table 3-10, and the narrative portion of the NRMP.

7 30.

8 Pesticides allowed for use within the limited spray zone are more difficult to interpret
9 under the 2004 NRMP. In the 2001 version, only certain products identified with an asterisk on
10 Table 3.9 were authorized for use in the limited spray zone. The corresponding table in the
11 revised NRMP does not contain any asterisks, raising an ambiguity regarding pesticide use in the
12 limited spray zone. A number of pesticides prohibited for use in the older version are now
13 allowed without limitation. These include the herbicides bensulide, bentazon, mecoprop,
14 oxadiazon, and prodiamine, which were specifically restricted in the 2001 NRMP to only one
15 application per year outside the management zones. Similarly, the insecticide lambda-cyhalothrin
16 was prohibited for use within the management zones and was limited to two applications per
17 year. (Ex. RW-6, Table 3-10.) The lack of any explanation in the 2004 NRMP for the unlimited
18 use of these pesticides in management zones is a serious flaw in the NRMP. In addition,
19 halosulfuron, was reclassified as having no data to negligible risk, even though there is no data
20 available on the risk to human health. (Ex. RE-6, Table 3-9; Appendix I-2.)

1 31.

2 The NRMP generally states that the application of pesticides should be avoided when
3 “heavy rain” is forecast. (Ex RE-6, p. 2-22.) Although there were references over the course of
4 the hearing regarding no application of pesticides within 48 hours of a storm event, this language
5 is lacking in the NRMP and the §401 Certification. Because the NRMP itself recognizes that
6 “water is the primary movement mechanism for contaminants,”¹¹ the NRMP needs to provide
7 more specificity regarding the application of pesticides around rainfall events. In addition, the
8 NRMP and §401 Certification are silent about irrigation after the application of pesticides.
9 Irrigation water is also a potential source for moving contaminants on the golf course.

10 32.

11 Concerns were raised over the use of fertilizers. The NRMP does address fertilizer
12 applications. The supervisor is responsible under the NRMP for controlling the rate and
13 frequency of fertilizer application. Ex. RE-6, at 3-12. Table 3-3 sets forth the general fertilizer
14 applications for the greens and tees. In this table, different application frequencies are
15 established for nitrogen, phosphorous, and potassium. The roughs are to be fertilized three times
16 a year. Ex. RE-6, at 3-14.

17 33.

18 The expert testimony of Ecology Senior Ecologist Thomas Hruby indicated the
19 applicant’s mathematical modeling using EPA models GENEEC and SCI-GROW was not
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¹¹ Ex. RE-6, at 2-18.

1 reliably predictive of pesticide concentrations to be expected in sandy soils with high rainfall
2 such as exist at the Links site. As a result, he recommended additional conditions be placed in
3 the §401 Certification at Condition J., requiring a monitoring program adequate to serve as an
4 early detection system for any unacceptable concentrations of nutrients or pesticides occurring
5 on the site that might pose a risk to water quality. (Pre-filed testimony of Hruby, p.3).

6 34.

7 A condition was incorporated in the §401 Certification relating to Dr. Hruby's concern
8 over adequate monitoring, stating:

9 Prior to the operation of the golf course the Applicant shall submit to
10 Ecology for its review and written approval a final plan for monitoring
11 the movement into groundwater and adjacent surface water, including
12 wetlands, of each pesticide to be used on the golf course. The first two
13 applications of each pesticide will have to be monitored at a minimum of
14 three separate greens or fairways.

15 (Ex. A-134 p. 12, Condition J(3)(f)).

16 35.

17 The monitoring plan that is contained in the 2004 NRMP does not meet the standards set
18 forth by Dr. Hruby in his testimony or in Condition J(3)(f). The §401 Certification relies upon
19 the applicant submitting a new monitoring plan and the details that will be included on
20 significant elements, such as sampling frequency and capture of peak concentrations, are
21 unknown at this time. Under Dr. Hruby's analysis, the monitoring plan is the centerpiece of
water quality protection. Rather than relying on unreliable mathematical modeling to predict
pesticide concentrations on this site, monitoring will be used to carefully track the actual impacts

1 from pesticide use. The adequacy of the monitoring plan to detect water quality impacts on a site
2 containing 170 separately identified wetlands and important groundwater resources is vital to
3 determining whether reasonable assurance exists that water quality standards will be met during
4 operation of the project.

5 36.

6 The monitoring program to protect water quality also lacks a clear standard against which
7 the results are to be compared. Dr. Hruby suggests groundwater should not exceed human health
8 standards and surface water should not exceed the acute or chronic toxicity criteria set by the
9 U.S. Environmental Protection Agency. (Ex. A-134, p.12, Condition J (3)(g)). The testimony
10 showed that EPA criteria for acute or chronic toxicity are not developed for many of the
11 substances in question. The water quality standards required under the §401 Certification are not
12 currently identified with any certainty. Dr. Hruby suggested the registration information or
13 labeling could be used for items without EPA approved toxicity levels. Identification of the
14 precise regulatory standard being required for monitored substances is lacking in the NRMP or
15 the §401 Certification.

16 37.

17 In addition, the Board is concerned that no specific monitoring conditions are attached to
18 the use of the nematicide fenamiphos, which has been identified under the risk assessment as
19 having a potential risk to aquatic life and to human health. Although the application of
20 fenamiphos is limited to one application per year on the greens only, there is no recognition of
21

1 the potential risks associated with its use in the monitoring provisions. Its use is treated the same
2 as any other pesticide under the monitoring provisions of the NRMP

3 38.

4 By relying heavily on monitoring during operations to assure water quality standards are
5 not violated, it becomes critical to define adequate remedial actions required if the monitoring
6 program reveals a pollution problem. The §401 Certification simply provides that a new
7 condition will be placed in the NRMP providing “the Applicant will discontinue the use” of any
8 pesticide whose concentration in groundwater exceeds human health standards or whose
9 concentration in the surface water of adjacent wetlands exceeds the acute or chronic toxicity
10 criteria set by the U.S. Environmental Protection Agency. Detailed provisions for detections
11 below or approaching trigger levels are not contained in the §401 Certification and are not
12 adequately addressed by the NRMP. Expected actions in the case of excessive nutrients revealed
13 by monitoring are also undefined.

14 WETLANDS

15 39.

16 The delineation of wetlands on the project site identified approximately 150 acres of
17 wetlands on the property. (RW-8, p.1). To construct the golf course and associated
18 improvements under the current plan, 9.96 acres of wetland will be filled, 0.23 acres of wetland
19 will be excavated, and 14.63 acres of wetlands will be routinely pruned. There will be wetland
20 buffer impacts of 12.36 acres from the golf course, 1.3 acres from cart paths and other structures
21 associated with the golf course, and .027 acres from the condominiums.

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40.

The wetland delineation and rating for the Links project was initially performed by Ecological Land Services, Inc. in a report dated September 2000. The original rating categorized the entire series of interdunal wetlands on the site as Category II wetlands. The wetlands were considered an interconnected mosaic. A later wetland delineation and characterization report was prepared by Ecological Land Services, Inc. in June 2003, which changed the characterization of wetlands on approximately the western third of the site from Category II to Category III. Francis Naglich, wetland biologist and principle of Ecological Land Services, Inc, performed the reclassification.

41.

Mr. Naglich indicated he engaged in this reclassification because:

After reviewing the previous wetlands classification, it was my professional opinion that the patchwork area of wetlands in roughly the western one-third of the site had the vegetative diversity, habitat features and hydrological characteristics that are typical of Category 3 wetlands. These wetlands are relatively immature and have not had sufficient time to develop into more mature plant communities. Based on my observation they are more typical of Category 3 wetlands. I also reviewed the Dept. of Ecology Wetland Rating Manual (1993) which provides guidance on the categorization of wetlands within a patchwork or mosaic. The guidance states that wetlands that form less than 50 percent of the total area of uplands and wetlands can be categorized individually. In this case the percentage of wetlands was 33 percent of the total area and they could therefore be rated independently of the more mature wetlands in the eastern two-thirds of the site.

(Ex. RM-5, pp. 2-3).

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42.

The most recent guidance publications from the Department of Ecology recommend classifying all interdunal wetlands as Category II due to their unique characteristics and the lack of complete understanding of their function. These documents were not available at the time the decisions on this project were made and were not used by Ecology in analyzing this proposal. (Ex. A 35, A-36). Ecology allowed the applicant to categorize the western wetlands as Category III, based on Ecology’s guidance and the specific characteristics of the site. (Prefiled Testimony of Lund, pp. 11-12). The Board gives deference to Ecology’s application of its own classification guidance to the project in question.

43.

The applicant has developed a wetland mitigation plan that combines onsite wetland creation, restoration and preservation, with offsite restoration and preservation. Mitigation for the wetland fill impacts will include creating and/or restoring 5.21 acres of on-site interdunal wetlands, restoring 7.00 acres of estuarine wetland at Firecracker Point, preserving 14.00 acres of rare sphagnum bog and forested peat wetland at Seastrand Bog, and preserving 30.00 acres of interdunal habitat on the Pacific Coast at Mar Vista. (Ex. RW-5, WSH00950). Mitigation for the pruning or excavating of 14.86 acres of wetlands on the site will be accomplished through preservation of 107.00 acres of on-site upland and forested wetland area. The mitigation ratios applied to the wetland fill mitigation are:

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Acres	Site/Type	Ratio	Acres of Mitigation Satisfied
5.21*	On-site interdunal wetland creation/restoration	2:1	2.60
7.00*	Firecracker Point estuarine wetland restoration	1.5:1**	4.66
14.00	Seastrand bog and forest preservation	8:1 for 6 acres bog 10:1 for 8 acres forest	1.55
30.00	Interdunal habitat preserved (Mar Vista Lots 5-7 or 10-12)	10:1	3.00
Total 56.21			11.81 Total***

* Sum of these mitigation activities meets or exceeds no-net-loss of wetlands.
 ** Ratio less than 2 is appropriate due to restoration of Category I wetland at Firecracker Point for impacts to Category II wetlands.
 *** Meets or exceeds fill impacts of 9.96 acres.

(Prefiled testimony of Lund, p. 7).

44.

The areas referred to as Firecracker Point, Mar Vista, and Seastrand Bog are offsite mitigation sites. Firecracker Point is a Category I estuarine wetland located near the Westport marina adjacent to Grays Harbor. The restoration work to be accomplished at the Firecracker Point site is expected to significantly increase the habitat values of the site for fish and other wildlife. The Firecracker Point wetlands provide crucial habitat (e.g., foraging and refugia) for fish during several stages of their life history. Seastrand Bog is a rare, Category I sphagnum peat bog located in the Grayland area. The area is proposed for preservation to prevent logging or cranberry cultivation on the site. Mar Vista is a series of developable lots on the Pacific coast south of the project site that contain interdunal wetlands similar to, but less extensive than, those found on the project site. The applicant will preserve the interdunal wetlands in this area and

1 restore upland areas being impacted by invasive species such as Scot's broom. (Pre-filed
2 testimony of Lund, p. 6).

3 45.

4 In evaluating the adequacy of the applicant's proposed wetland mitigation plan, Ecology
5 applied a 2:1 mitigation ratio contained in the Westport Shoreline Master Program. Ecology
6 concluded the mitigation plan meets or exceeds that ratio. (Pre-filed testimony of Lund, p. 7).

7 The evidence demonstrated the combination of mitigation strategies required, including the
8 restoration of particularly important habitat at Firecracker Point, the preservation of Seastrand
9 bog, and preservation of interdunal habitat at Mar Vista, would serve to mitigate the wetland
10 impact generated by filling 9.96 acres of wetlands on the site. Appellant's evidence did not
11 establish that the interdunal wetlands on this site are so unique that their functions and values
12 simply cannot be mitigated through any plan.

13 46.

14 Wetland buffer impacts associated with the golf course were quantified by the applicant
15 at 31.27 acres, using a standard of 100-foot buffers from Category II wetlands and 50 foot
16 buffers from Category III wetlands. Buffer averaging in the amount of 18.91 acres was applied
17 as an offset, to derive a net buffer impact of 13.93 acres. The mitigation proposed for these
18 buffer impacts includes 22.32 acres of on-site upland dune restoration at a ratio of 2:1, 5.00 acres
19 of upland dune restoration at Mar Vista at a ratio of 2:1, and 1.13 acres of enhancement and
20 restoration of the remaining upland dune buffer following condominium construction at a ratio of
21 4:1. (Prefiled testimony of Lund pp. 12-13).

Acres	Site/Type	Ratio	Acres of Mitigation Satisfied
22.32	On-site upland dune restoration by removal and suppression of Scot's broom	2:1	11.16
5.00	Upland dune restoration at Mar Vista Lots 5-7 (or 10-12) by removal/suppression of Scot's broom and gorse	2:1	2.50
1.13	Enhancement/restoration of remaining upland dune buffer following condominium construction.	4:1	0.27
Total 28.45			13.93 Acres

47.

The width of wetland buffers on the golf course will not meet the standard of 100 feet for Category II wetlands and 50 feet for Category III wetlands in all cases. The adequacy of the buffers will be a function of several items including the sandy nature of the soils on the site and limitations on chemical applications near wetlands. While the 50 and 100-foot standards are not met throughout the course, mitigation has been required to offset the wetland buffer impacts. Much of the habitat generated by mitigation will have superior functions and values compared to current habitat because invasive plant infestations, which are increasingly limiting the diversity and value of existing uplands in the area, will be suppressed. (Ex. RM-5, p. 5).

48.

A wetland denominated HMB (Half Moon Bay) has been identified on the site just north of the Jetty Access Road. Wetland HMB was delineated by Ecological Land Services, Inc., in its original September 2000 report. The U.S. Army Corps of Engineers inspected the property on November 2, 2000, and January 24, 2001, and concurred with the delineation by letter dated April 4, 2001. (Ex. RM-1). Previously, wetland HMB had been delineated in conjunction with a

1 Corps of Engineers buried revetment project in the area. The revetment project required
2 disturbance of a portion of wetland HMB. The Corps' delineation in 1998 was substantially
3 larger than the Ecological Land Services' delineation in 2000. Appellants' expert Sarah Cooke,
4 PhD., testified that the applicant's delineation was incorrect and that the Corps of Engineers
5 delineation in 1998 more accurately reflected the extent of wetland HMB. The Wetland HMB
6 area has been disturbed on more than one occasion and it is not of the same quality and nature as
7 the nearby interdunal mosaic.

8 Ms. Cooke engaged in a reconnaissance of the site in June 2005, but did not actually
9 perform a formal delineation of wetland HMB. Given the formal delineation of wetland HMB
10 performed by Ecological Land Services and the Corps of Engineers' written acceptance of that
11 delineation, the Cooke evidence, while credible, did not mandate a finding that the factual
12 findings made by the City of Westport and Ecology regarding the size, location, and
13 classification of wetland HMB were unsupported by substantial evidence.

14 49.

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

16 Based on the foregoing Findings of Fact, the Board enters the following

17 CONCLUSIONS OF LAW

18 1.

19 The Environmental and Land Use Hearings Board has jurisdiction over the parties and
20 the subject matter of this case pursuant to RCW 43.21L.020 which provides, in part:

1 The appeal process authorized in this chapter shall, notwithstanding any
2 other provisions of this code, be the exclusive process for review of the
3 decisions made by participating permit agencies on permit applications
4 for a qualifying project.

5 In this case, the Links at Half Moon Bay project has been certified as a qualifying project
6 by the Washington Office of Permit Assistance and the ELUHB Board is the appropriate forum
7 for all final permit decisions on the qualifying project. This decision deals with those permit
8 decisions subject to de novo review – the §401 Certification, the shoreline CUP, and the CZMA
9 consistency determination.

10 2.

11 The scope of review for the ELUHB Board on the §401 Certification and the shoreline
12 CUP is de novo. The burden of proof is on the appealing parties to show by a preponderance of
13 the evidence that relief is appropriate.¹²

14 3.

15 In deciding the case, the ELUHB Board is guided by the standards in RCW 43.21L.130:

16 (1) The Board shall review the decision record and all such evidence as is
17 permitted to supplement the record for review restricted to the decision
18 record or is required for de novo review under RCW 43.21L.120. The
19 board may grant relief only if the party seeking relief has carried the
20 burden of establishing that one of the standards set forth in (a) through
21 (f) of this subsection has been met. The standards are:

(a) The body or officer that made the permit decision engaged in
unlawful procedure or failed to follow a prescribed process, unless the
error was harmless;

¹² The appellants made a second motion for judicial notice after the close of hearing. The motion is denied. The appellants made an inadequate showing of grounds for the Board to take judicial notice of the proffered material.

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- (b) The permit decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by an agency with expertise;
 - (c) The permit decision is not supported by evidence that is substantial when viewed in light of the whole record before the board;
 - (d) The permit decision is a clearly erroneous application of the law to the facts;
 - (e) The permit decision is outside the authority or jurisdiction of the body or officer making the decision; or
 - (f) The permit decision violates the constitutional rights of the party seeking relief.
- (2) The board may affirm or reverse each and every permit decision under review or remand the decision for modification or further proceedings involving the permit agencies.

4.

In reviewing Ecology’s §401 Certification for the project, the Board recognizes Ecology is the agency charged with issuing §401 Certifications for the State. In doing so, Ecology must determine whether “there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards. 40 C.F.R §121.2(a)(3).” *See, Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004).¹³ In this appeal to the ELUHB challenging Ecology’s Certification, the Board is determining whether Ecology’s §401 Certification is adequate or inadequate to give reasonable assurance that water

¹³ In this case the §401 certification did not contain language specifically stating that Ecology had reasonable assurance the activity would be conducted in a manner which will not violate applicable water quality standards. Any subsequent §401 certification in this case should comply with this requirement of the federal regulations.

1 quality standards will be met. *Id.*, at. 592. In conducting such a review, the Board gives weight
2 to Ecology’s interpretation of the laws it administers and due deference to Ecology’s technical
3 expertise. *Id.*, at 594.

4 5.

5 In order to overturn a §401 Certification, Appellants must establish by a preponderance
6 of the evidence that there is no reasonable assurance the applicable provisions of the Clean
7 Water Act and state water quality standards will be complied with. *Port of Seattle*, 151 Wn.2d,
8 at 592. Preponderance of the evidence means evidence that is more probably true than not true.
9 *Airport Communities Coalition v. Ecology & Port of Seattle*, PCHB No. 01-160, Findings of
10 Fact, Conclusions of Law & Order (2002), citing *In re Sego*, 82 Wn.2d 736, 746, 513 P.2d 831
11 (1973). Mere speculation or evidence raising only the possibility of an occurrence does not meet
12 the preponderance of the evidence standard. “Reasonable assurance” does not require absolute
13 certainty. The inherent predictive nature of a §401 Certification cannot be avoided; each § 401
14 Certification must address future events and the likelihood that those events will result in
15 violations of water quality standards. *Port of Seattle*, 151 Wn.2d at 600, citing *Airport*
16 *Communities Coalition, supra*. The appellants have argued the §401 Certification is in error
17 because it relies on information to be submitted at a later time. The decision in *Port of Seattle*,
18 151 Wn.2d at 601, acknowledges the validity of relying on additional information in issuing a §
19 401 Certification: “Yet the need for additional studies, plans and reports does not, by itself, call
20 into question a finding of reasonable assurance.” Whether reliance on future submissions is

1 appropriate depends on whether the implementation and outcome of the studies, plans, and
2 reports meets the reasonable assurance test. *Id.*

3 6.

4 The State of Washington has developed its own water quality standards, as permitted by
5 the Clean Water Act 33 U.S.C. §1313. The Washington State Legislature has also provided a
6 standard for water quality policy:

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

17 RCW 90.48.010.

18 7.

19 In furtherance of the state's water quality policy and the implementation of the Clean
20 Water Act, Ecology has promulgated specific water quality standards for surface water (Ch. 173-
21 201 WAC) and groundwater (Ch. 173-200 WAC). Washington's water quality standards consist
of narrative criteria protecting the beneficial uses of state water, numeric criteria for conventional
pollutants and toxic substances, and an antidegradation policy.

1 § 401 CERTIFICATION

2 Water Quality

3 8.

4 In evaluating a project's compliance with water quality standards, Ecology must consider
5 whether wastes and other materials and substances proposed for entry into waters of the state
6 have been provided with all known, available, and reasonable methods of treatment prior to
7 entry. This requirement is commonly referred to as AKART.

8 Waters of the state shall be of high quality. Regardless of the quality of
9 the waters of the state, all wastes and other materials and substances
10 proposed for entry into said waters shall be provided with all known,
11 available, and reasonable methods of treatment prior to entry.

12 RCW 90.54.020. *See also*, RCW 90.52.040.

13 9.

14 In order to obtain §401 Certification, proposed activities must also comply with the
15 antidegradation provisions of RCW 90.54.020:

16 Notwithstanding that standards of quality established for waters of the
17 state would not be violated, wastes and other materials and substances
18 shall not be allowed to enter such waters which will reduce the existing
19 quality thereof, except in those situations where it is clear that overriding
20 considerations of the public interest will be served.

21 Ecology's regulations establishing water quality standards for surface water also address
antidegradation:

Existing beneficial uses shall be maintained and protected and no further
degradation which would interfere with or become injurious to existing
beneficial uses shall be allowed.

1 WAC 173-201A-070.¹⁴

2 10.

3 The appellants claim Ecology had inadequate assurance that water quality standards
4 would be met because pesticides and fertilizers used on the golf course pose a significant threat
5 to beneficial uses in the on-site wetlands and in the Grays Harbor Estuary. Concern was also
6 expressed over the risk of groundwater contamination impacting the City of Westport's drinking
7 water supply and over failure to require AKART to control and treat stormwater from the golf
8 course.

9 11.

10 Ecology concluded the NRMP, the Integrated Pest Management Plan, the Stormwater
11 Plan, and Wetland Mitigation Plan, together, provided adequate protections to assure water
12 quality standards would be met during construction and operation of the project. The applicant
13 has indicated its approach to water quality compliance involves prevention, control, and
14 detection. The primary vehicle for establishing operational conditions designed to implement
15 this strategy is the NRMP.

16 12.

17 The NRMP referenced and incorporated into the §401 Certification is "dated August 1,
18 2001." The testimony at hearing revealed that the correct version of the NRMP was erroneously
19 labeled August 1, 2001, but was actually a modified version received by Ecology in March 2004.

20 ¹⁴ Ecology adopted new surface water quality regulations in 2003; however, those regulations have not been fully
21 accepted by the U.S. Environmental Protection Agency. At this time, the prior antidegradation regulation, quoted
herein, is controlling.

1 Yet another version of the NRMP is anticipated, which would incorporate additional
2 requirements set forth by Ecology in the §401 Certification. (Ex. A-134, p. 11). At this point it
3 is unclear what the final NRMP, the mechanism through which water quality will be protected,
4 will actually require.

5 13.

6 After Ecology received the initial 2001 version of the NRMP, various experts from
7 within the Department commented on areas that would have to be modified in order to meet
8 reasonable assurance standards. After an exchange of memoranda, Audubon International
9 summarized changes they were planning to incorporate into the NRMP in a memorandum to Bob
10 Berquist dated January 16, 2002. (Ex. A-90). Audubon International proposed to manage the
11 entire golf course as a limited spray zone in response to comments regarding a 100-foot buffer
12 zone around the wetlands. Audubon further indicated applications of fertilizers would be made
13 only when no rain is forecast for 48 hours and air temperatures are in the 60-75 F range.¹⁵
14 Neither of these criteria is clearly reflected in the revised March 2004 NRMP.

15 14.

16 The water quality strategy being implemented for the Links at Half Moon Bay is site
17 specific and does not follow standard practices for managing stormwater from golf courses.
18 While a unique system may be very well suited to this site, deviating from conventional

19 _____
20 ¹⁵ Ecology expert Tom Hruby questioned whether this rain and temperature requirement was viable given the
21 climatic conditions in the Westport area. Average temperatures stay below this range during much of the spring,
when fertilizing would typically be contemplated. Rainfall is also quite prevalent during both the spring and fall
seasons. (Ex. A-88).

1 technology can only meet the standard for §401 Certification if it is done pursuant to a very
2 specific program containing adequate guidance and monitoring to assure water quality will be
3 protected. The NRMP incorporated into the §401 Certification and the infiltration system
4 proposed by the applicant do not meet this standard and cannot form an adequate basis for
5 Ecology to find reasonable assurance water quality standards will be met by the project.

6 15.

7 When it approved the §401 Certification, Ecology was lacking information documenting
8 groundwater levels on this site during the seasonal high water period. This data is critical to
9 determining whether the infiltration system will work to treat pesticides and fertilizers on the
10 golf course. If inadequate separation is present, the infiltration strategy will not provide
11 reasonable assurance that water quality standards will be met. This is particularly important
12 given the smaller than average buffers between the golf course and the interdunal wetlands on
13 the course. While the §401 Certification contemplates gathering additional water level
14 information prior to operation of the golf course, no required actions are identified in the event a
15 3-5 foot separation is not available during parts of the year. Ecology had insufficient data on
16 groundwater separation to make a reasoned decision on whether infiltration alone is adequate to
17 assure water quality compliance on this site.¹⁶

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21 ¹⁶ Ecology did not review data on groundwater levels throughout the year, even though the site has a number of wells drilled that would have provided the information on whether adequate separation exists for infiltration to succeed.

2 The primary protection mechanism in the Links management plan to prevent water
3 quality problems is source control. Important details regarding the source control program are
4 lacking from the NRMP and §401 Certification. Identification of allowable pesticides is
5 inadequate.¹⁷ The 2004 modifications to the 2001 NRMP have made the allowable pesticides
6 less clear. No pre-approval process for newly proposed pesticides is contained in the plan and
7 monitoring protocols are yet to be developed. The NRMP provisions, which will guide golf
8 course operations, do not provide clear direction for day-to-day decisions. Witnesses before the
9 Board were unable to state with any certainty what substances were allowed, at what frequency
10 and in what amounts they could be applied, and what sampling was required under the NRMP.
11 The Board, similarly, had difficulty determining what exactly is allowed and disallowed under
12 the NRMP. It is unlikely that even a trained golf course superintendent would be able to use the
13 NRMP effectively as a guide to proper application and monitoring of pesticides. The Board
14 concludes, the source control program for pesticides in the NRMP is inadequate to provide a
15 basis for Ecology’s conclusion that reasonable assurance exists that water quality standards will
16 be met during operation of the golf course.

17 In this regard, this §401 certification is unique in that the act of filling wetlands is not the water quality concern, but rather, the use of pesticides and fertilizers on the golf course is the concern. Thus, the pollutants of concern in the § 401 certification are not naturally-occurring pollutants that would be picked up by stormwater runoff, but are chemicals that would be introduced to the site as an ongoing part of golf course maintenance.

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As to fertilizers, however, the Board concludes that the NRMP does provide sufficient guidance on their use by the course supervisor. The appellants have not met their burden of proof in showing lack of reasonable assurance regarding the use of fertilizers on the course.

18.

The source control, infiltration, and monitoring approach to water quality management is being proffered as meeting AKART in this case. Yet, certain items the applicant has actually offered to incorporate into the plan to provide the needed protection of existing beneficial uses have not been included in the 2004 NRMP. The failure to make the entire golf course a limited spray zone is an important oversight. The suggested limit on applying chemicals if rain is forecast within 48 hours and provisions addressing the concern over irrigation after chemical application are also lacking from the NRMP text. These missing protections are significant source control measures to keep pesticides out of the wetlands on the course.

19.

The evidence established that the mathematical models used in developing the NRMP standards for pesticide application are not considered entirely reliable in predicting pesticide behavior for the site conditions at the Links property. As a result, Ecology is relying heavily on a monitoring program to detect any problems with water quality arising from golf course operations. The §401 Certification requires the applicant to develop a monitoring program for Ecology approval prior to operation of the golf course. (Ex. A-134, p. 12). The new monitoring program must include monitoring the first two applications of each pesticide used on the golf

1 course at a minimum of three separate greens or fairways. The §401 Certification further
2 provides that the applicant “will discontinue the use of any pesticide whose concentration in
3 groundwater exceeds human health standards or whose concentration in the surface water of
4 adjacent wetlands exceeds the acute or chronic toxicity criteria set by the U.S. Environmental
5 Protection Agency.” (Ex. A-134, p. 12).

6 20.

7 Careful monitoring can be part of a meaningful strategy to assure the performance of a
8 novel water quality management approach. In this case, however, many important details of the
9 monitoring plan are unknown. Previous Ecology comments on the project have proposed
10 monitoring designed to analyze runoff from peak flows and to try to capture first flush runoff.
11 The applicant has not incorporated these protections into the NRMP plan. The effectiveness of
12 the monitoring effort to assure compliance with water quality standards will be a function of the
13 rigor of the monitoring plan. The monitoring plan must be scientifically viable and adequate to
14 ascertain with reasonable certainty the existence, nature, and extent of contaminants entering
15 surface and groundwater on, and adjacent to, the site. The plan identified in the §401
16 Certification fails to meet this standard.

17 21.

18 The monitoring plan being required by the §401 Certification uses the exceedance of
19 human health standards in groundwater and the exceedance of acute or chronic toxicity criteria
20 set by the U.S. EPA as the triggers for responsive action. The evidence at hearing indicated
21 many of the substances in question do not have acute or chronic toxicity criteria set by the U.S.

1 EPA. Ecology indicated labels or registration information for the pesticides could be used as the
2 standard for response under the plan. This may or may not be an adequate standard. However,
3 to assure compliance with water quality standards, the maximum levels protective of beneficial
4 uses on the site must be identified with specificity before monitoring begins. At a minimum, a
5 clear and scientifically supportable standard should be identified in writing for each substance
6 before its use on the golf course. This will allow the Department, or interested members of the
7 public, to determine whether the monitoring is revealing a water quality problem.

8 Additional monitoring should also be specified for use of the nemiticide fenamiphos
9 because of its potential risk to human health and aquatic organisms. Samples should be taken in
10 surface water and groundwater after each use of fenamiphos, even if sampling after the first three
11 years of operation show no changes in water quality after its use. (*See Ex. RE-6, at 5-24.*)

12 Ecology shall also consider whether it is appropriate to use additional monitoring wells to ensure
13 that groundwater close to the greens where fenamiphos is used appropriately sampled. The
14 proximity of the course to the municipal water supply requires not only a strict application of
15 fenamiphos, but rigorous monitoring provisions associated with its use as well.

16 22.

17 Monitoring and adaptive management can properly be relied upon in a §401 Certification
18 “so long as requirements are set forth with specificity, and the future corrective action and
19 outcome are reasonably certain to occur.” *Port of Seattle* 151 Wn.2d at 605. The *Port of*
20 *Seattle* court went on to state: “[S]pecific enforcement requirements must be contained in the
21 §401 Certification for implementation in the event that monitoring reveals that water quality

standards are not being met.” *Id.* See also, *Confederated Tribes of the Umatilla v. Ecology*,
P.U.D. No. 1 of Chelan Cy., PCHB No. 03-075 (2004). In this case the corrective action and
enforcement requirements are not adequately addressed by the §401 Certification.

23.

While the respondents at hearing suggested that the Board could add conditions to the
§401 Certification to correct the provisions in need of clarification, the Board is without
authority to add conditions to the §401 Certification, thus a remand is necessary.¹⁸ The evidence
on the project’s use of source control, reliance upon infiltration, and ongoing monitoring is
insufficient to support Ecology’s finding of reasonable assurance that water quality standards
will be met in the following ways:

The NRMP and § 401 Certification:

1. Fail to define the limited spray zone as extending through the entire golf course.
2. Inadequately identify pesticides authorized for use on the course prior to their application.
3. Fail to establish restrictions on the application of pesticides close in time to anticipated rain events or course irrigation.
4. Fail to establish written and scientifically supportable standards for pesticides in the surface and groundwater prior to their use.

¹⁸ Compare RCW 43.21L.130(2) “The Board may affirm or reverse each and every permit decision under review or remand the decision for modification or further proceedings involving the permit agencies,” with *Port of Seattle v. PCHB*, 151 Wn.2d 568, 90 P.3d 659 (2004)(PCHB may condition §401 certifications under certain conditions).

1 dependent structures, public use needs, or when joining an existing city
2 road or utility network, pursuant to the additional requirements identified
in Section 17.32.055:

- 3 (A) Erosion control;
- 4 (B) Docks, piers, and other water/land connectors;
- 5 (C) Ports and water-related industries;
- 6 (D) Shoreline works and structures;
- 7 (E) Marinas;
- 8 (F) Roads and railroads;
- 9 (G) Bridges and water control devices;
- 10 (H) Utilities;
- 11 (I) Recreation;
- 12 (J) Restoration.

13 WMC 17.32.065(d)(1).

14 25.

15 In this case, the City found that the exception for public use needs for recreation applied
16 to the Links at Half Moon Bay project. WMC 17.32.065(d)(1)(I). The proposed golf course
17 meets the definition of recreation contained in WMC 17.32.055:

18 (13) Recreation. Recreation is the refreshment of body and mind
19 through forms of play, amusement or relaxation. Water-enjoyment
20 recreation accounts for a very high proportion of all recreational activity
21 on the Pacific beaches and shorelines. The recreational experience may
be either an active one involving boating, swimming, surfing,
windsurfing, fishing, or hunting or the experience may be passive such
as enjoying the natural beauty of a vista of a lake, river or saltwater area.

WMC 17.32.055(13).

26.

The project also meets the criteria requiring a “public” use need for recreation. Access to
the golf course will be available to members of the public upon payment of a greens fee. The

1 course will not be restricted to a discrete group of members or owners. The appellants have
2 argued that the greens fees contemplated for the course will result in only an elite segment of the
3 public having meaningful access to the recreational opportunity it provides. However, fees
4 associated with use of recreational facilities are common. In this case, the payment of a greens
5 fee does not change the proper characterization of the project as public, rather than private,
6 recreation. The Links at Half Moon Bay proposal was properly allowed to proceed under the
7 exception to wetland fill and buffer restrictions contained in WMC 17.31.065(d)(1)(I).¹⁹

8 27.

9 Although the golf course fill project is excepted from the prohibition on wetland filling
10 contained in WMC 17.32.065(c), wetland mitigation is required by WMC 17.32.065(e)(2):

11 If a wetland area is filled, as may be authorized in certain instances,
12 wetland mitigation shall be required. This may include a substitution or
13 increase of wetland area, or it may be an enhancement a restoration of
14 wetland functions and values at an existing wetland in accordance with
best science available at the time. A mitigation plan shall be prepared
that describes how the proposed mitigation will replace the functions and
values of the altered wetland.

15 The Westport Code goes on to identify a replacement ratio of 2:1 for Category B wetlands.
16 WMC 17.32.065(e)(2)(A). Curiously, Category A wetlands are not specifically mentioned, but it
17 can be assumed that these more valuable wetlands would receive at least as much protection as
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21 ¹⁹ The appellants have argued the Comprehensive Plan provisions prohibiting fill on accreted oceanfront lands
precludes the project. The City has correctly relied upon the specific regulatory provisions in the WSMP rather than
the Comprehensive Plan to determine the allowable development on this site. See, Ex. RW-10, pp. 21-23.

1 Category B wetlands. The replacement ratios applied by the City and Ecology were 2:1 for both
2 Category A and B wetlands.

3 28.

4 In order for the §401 Certification to be valid, there must be reasonable assurance that
5 impacts to wetlands will be mitigated in accordance with the applicable antidegradation policy.
6 Existing beneficial uses must be maintained and protected, and no further wetland degradation
7 should be allowed. *Port of Seattle*, 151 Wn.2d, at 636. In this case, Ecology reviewed the
8 wetland mitigation proposal and the operational plans for the golf course to evaluate whether the
9 functions and values of the wetlands on this site were being protected or mitigated, and
10 concluded that they were.

11 29.

12 The wetland impacts identified in connection with the project include filling 9.96 acres of
13 wetlands. The wetland mitigation associated with this 9.96 acres includes 5.21 acres of on-site
14 interdunal wetland creation or restoration, 7 acres of offsite estuarine wetland restoration at
15 Firecracker Point, 14 acres of bog and forest wetland preservation at Seastrand bog, and 30 acres
16 of off-site interdunal habitat preservation at Mar Vista. The appellants have challenged the
17 adequacy of this mitigation, arguing that it improperly relies on preservation as a component of
18 the mitigation plan. Ecology guidance documents allow credit to be given for preservation, at
19 high ratios, where the wetlands being preserved may be lost due to development. (Prefiled
20 testimony of Lund, p. 9). This standard has been met for the Mar Vista and Seastrand Bog sites.
21 Off-site mitigation has been allowed in order to minimize disruption to the existing dunal

1 environment. The habitat anticipated at the Firecracker Point site will be very high quality and
2 of particular value to fish during several stages of their life history. The overall package of
3 mitigation proposed for the 9.96 acres of fill is meaningful and will adequately offset the impacts
4 to wetlands caused by golf course fill on the Links site.

5 30.

6 The pruning and excavating of 14.86 acres of wetlands on the site is being mitigated by
7 preservation of 107 acres of primarily forested wetland on the easterly portion of the project.
8 This provides over 7 acres of high quality wetland preservation for each acre of pruning or
9 excavation in a wetland. Ecology concluded the ratio was appropriate in this instance given the
10 nature of the wetlands to be preserved and the nature of the impacts. The appellants did not meet
11 the burden of establishing a lack of substantial evidence or error of law in Ecology's conclusion.

12 31.

13 While the Westport SMP does not require mitigation for wetland buffer impacts in
14 connection with this project due to the "public use needs" exception, Ecology required the
15 applicant to quantify buffer impacts and mitigate for them because they present indirect impacts
16 to the wetlands the buffers protect. The applicant identified 13.66 acres of buffer impacts arising
17 from the golf course and 0.27 acres resulting from the condominium construction for a total net
18 impact of 13.93 acres. The mitigation to compensate for wetland buffer impacts included 22.32
19 acres of onsite upland dune restoration, 5.0 acres of upland dune restoration at Mar Vista, 1.13
20 acres of enhancement/restoration of upland dune buffer following condominium construction.
21 Ecology concluded this mitigation package was adequate to meet any concerns about wetland

1 buffer impacts under the §401 Certification. While wide buffers may provide better protection
2 for wetlands, the appellants have failed to meet the burden of proving the wetland buffer impacts
3 on this site are not adequately mitigated by the combination of actions identified by the project
4 applicants and accepted by Ecology.

5 32.

6 The appellants argue the functions and values of this particular wetland system cannot be
7 adequately mitigated. They contend the wetland mosaic on the site and the expanse of interdunal
8 features is unique and cannot be replaced by smaller wetland areas or restoration projects. While
9 the interdunal area at this site does provide meaningful habitat for shorebirds and terrestrial
10 creatures, the appellants have not established birds and other impacted species will be unable to
11 find adequate habitat in the remaining and restored wetlands on the site, including the 107 acres
12 of forested wetlands on the eastern portion of the property. The spring shorebird migration is
13 being protected, in large part, by the nearby National Wildlife Refuge in Grays Harbor. The
14 appellants presented insufficient evidence of the nature and extent of the impact on spring
15 migrating shorebirds using this particular site to prove they would be irreparably harmed by the
16 modifications proposed. Nearby areas for rest and bathing exist, including the Westport Light
17 Park, the Mar Vista lots, and the Firecracker Point restoration site. The golf course itself might
18 be viable resting and bathing habitat during the limited migration season, because adverse
19 weather conditions may diminish use of the course. The evidence did not support a finding that
20 the wetlands on this site are so unique and valuable that compensatory mitigation could never
21 occur.

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33.

The wetland mitigation plan approved by the City of Westport and Ecology meets both the provisions of the WSMP and the state antidegradation policy. The functions and values of the wetlands being impacted are protected by the combination of onsite wetlands creation, restoration, and preservation, and offsite restoration and preservation. The appellants have failed to meet their burden of proof to establish Ecology lacked reasonable assurance the functions and values of the on-site wetlands would be retained through implementation of the wetland mitigation plan.

CONDITIONAL USE PERMIT

34.

Any wetland fill allowed by the WSMP must meet the requirements for a conditional use permit. WMC 17.32.050(6). Fill associated with the Links at Half Moon Bay golf course was evaluated by the City under the terms of the WSMP and approved. Since only the wetland fill aspects of the project required a conditional use permit, other aspects of the resort development were considered under the shoreline substantial development permit. After reviewing the Westport decision and considering additional information, Ecology rendered its decision approving the shoreline conditional use permit.

35.

The standards for obtaining a conditional use permit are identified in the WSMP:

- (3)Review Criteria for Shoreline Conditional Uses. The purpose of a conditional use is to allow greater flexibility in varying the application of the use policies of RCW 90.58.020: provided, that

1 approval of conditional uses should also be granted in
2 circumstance where denial of the use would result in a thwarting
3 of the policy enumerated in RCW 90.58.020. In authorizing a
4 conditional use, special conditions may be attached to the permit
5 by the city to prevent any undesirable effects of the proposed use.
6 In accordance with WAC 173-27-160:

- 7 (A) Uses which are classified or set forth in Title 17 WMC
8 as conditional uses may be authorized provided the applicant can
9 demonstrate all of the following:
 - 10 (i) The proposed use will be consistent with the
11 policies of the Shorelines Management Act and the Westport
12 shoreline master program;
 - 13 (ii) The proposed use will not interfere with the normal
14 public use of public shorelines;
 - 15 (iii) The proposed use is compatible with other
16 authorized uses in the area or uses planned for the area under the
17 city's comprehensive plan and shoreline master program.
 - 18 (iv) The proposed use of the site and design of the
19 proposed project will cause no unreasonably adverse effects to
20 aquatic and shorelines areas;
 - 21 (v) The proposed use will not have substantial adverse
cumulative effects;
 - (vi) There will not be substantial detrimental effects to
the public's interest in the area, including normal public use of
the shorelines.

WMC 17.32.080(c)(2). *See, also:* Ecology Regulations, WAC 173-27-160.

36.

The appellants contend the project fails to meet the criteria for a shoreline CUP because the activities are inconsistent with the state Shorelines Management Act, the proposed use will interfere with normal public use of the public shorelines, the project will cause unreasonable adverse effects to aquatic and shoreline areas, the cumulative effects were inadequately analyzed,

1 and there will be substantial detrimental effects to the public's interest in the area, including use
2 of the shorelines.

3 37.

4 The appellants argue the project is inconsistent with the SMA because it is violates the
5 order of preference for development in shorelines of statewide significance contained in RCW
6 90.58.020:

7 The legislature declares that the interest of all of the people shall be
8 paramount in the management of shorelines of statewide significance.
9 The department, in adopting guidelines for shorelines of state-wide
10 significance, and local government, in developing master programs for
11 shorelines of state-wide significance, shall give preference to uses in the
12 following order of preference which:

- 13 (1) Recognize and protect the state-wide interest over local interest;
- 14 (2) Preserve the natural character of the shoreline;
- 15 (3) Result in long term over short term benefit;
- 16 (4) Protect the resources and ecology of the shoreline;
- 17 (5) Increase public access to publicly owned areas of the shorelines;
- 18 (6) Increase recreational opportunities for the public in the shoreline;
- 19 (7) Provide for any other element as defined in RCW 90.58.100 deemed
20 appropriate or necessary.

21 The appellants' argument that the project violates the SMA because it is not a water
dependent use is not supported by the language of RCW 90.58.020 or its judicial interpretation.
While a general preference system is outlined in 90.58.020, it does not limit development in the
shorelines area to solely water dependent uses. *Eastlake Community Council v. Seattle*, 64 Wn.
App. 273, 277, 823 P. 2d 1132 (1992); *See also, Department of Ecology v. Ballard Elks Lodge*,
84 Wn2d 551, 557, 527 P.2d 1121 (1974). The WSMP explicitly allows for the type of

1 destination resort proposed by the applicant and the general terms of RCW 90.58.020 do not
2 preclude such an authorized use on this site.²⁰

3 38.

4 The evidence in the case does not demonstrate that local interest is being served at the
5 expense of statewide interests. The physical access to publicly owned beaches would be
6 enhanced, not diminished by the project. The beaches and dunes adjoining Half Moon Bay and
7 the Pacific Ocean will not be altered or modified during construction of the resort. While the
8 appellants are concerned development of the project will lead to future armoring of the shoreline,
9 the permit approvals do not allow such activity. The interdunal wetlands on the golf course site
10 are the only aspect of the shoreline being modified under the Conditional Use Permit. The fill
11 impacts are being fully mitigated, as discussed above in connection with the wetlands analysis.
12 Accordingly, no inconsistency with the provisions of RCW 90.58.020 has been established.

13 39.

14 Filling wetlands on the golf course will not cause unreasonable and adverse impacts to
15 the aquatic and shoreline areas. In light of the protections required under this decision to obtain
16 §401 Certification authorizing the fill, full mitigation of wetland impacts and demonstrable
17 protection of water quality will be in place before the golf course is constructed.

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19
20 ²⁰ The ELUHB is not convinced the provisions of RCW 90.58.020 can never be used to substantively evaluate a
21 project, as argued by the respondents. Significant authority to the contrary exists in prior decisions of the Shorelines
Hearings Board and the appellate courts. In this case, however, the policies of RCW 90.58.020 do not preclude the
use specifically authorized by the WSMP.

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40.

The concern appellants have expressed over the “privatizing” of this shoreline is not a basis for concluding a CUP cannot be granted. The public interest will not be impaired by wetland fill connected with the golf course. The public has no current authorized access to the dunal areas inland of the public shorelines. The property is privately owned and no legal authority has been cited for protecting it as a de facto park. The City of Westport has long planned for this particular property to be developed as a destination resort. The City’s Comprehensive Plan and Zoning Code both publicly adopted provisions supporting this use of the property. A golf course is a permitted use under the urban shoreline designation and the applicable Tourist Commercial (TC) zoning. A master plan for the project has been approved by the City and upheld on appeal and the proposed use is compatible with authorized and planned uses in the area.

41.

Appellants suggest that the cumulative effects analysis performed by the City was erroneous. The decision on appeal to the ELUHB is Ecology’s approval of the CUP. No evidence was presented, or authority cited, addressing Ecology’s consideration of the issue. Conditional use permit approvals are decided on a case-by-case basis on the facts of a given application. The appellants in this case failed to meet the burden of showing the golf course fill project would result in substantial adverse cumulative effects.

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42.

Appellants argue that the City of Westport’s shoreline map fails to contain a designation for a portion of the project site and that shoreline permits cannot be issued for any undesignated property. While the map may be partially incomplete, the text of the zoning code (incorporated by the WSMP) clearly includes the entire site in the TC zone:

The tourist commercial zone is intended to provide a zoning designation which would enable the development planned for the Westport property owned by the Port of Grays Harbor and which is identified in the comprehensive plan as the tourist commercial zone.

WMC 17.21.010. The text of the code controls over the map and shoreline permits can properly be issued for the entire Links project site.

43.

In view of the Board’s decision upholding the applicability of WMC 17.32.065(d)(1)(I), the buffer requirements of the WMC pose no barrier to approval of the CUP. Wetland buffer requirements, impacts and mitigation under the §401 Certification are discussed earlier in this decision.

44.

The evidence in this case shows that the City of Westport planned for a destination resort and golf course on this site. The City properly adopted shoreline regulations consistent with the anticipated uses. The wetland fill being authorized by the CUP relates only to the golf course and meets the local and state criteria for granting a CUP. Accordingly, the Ecology decision approving the CUP is affirmed.

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45.

The appellants allege the hotel and conference center violate the WSMP because their construction will require filling wetlands, specifically a portion of wetland HMB. Fill to accommodate a hotel/conference center is not allowed under WMC 17.32.065(c). The conditional use permit on appeal in this case, however, relates only to fill necessary for constructing the golf course, so the issue regarding Wetland HMB does not fall within the scope of the issues before the Board on the CUP appeal. Even if the Board were to consider this argument, given the Board's factual finding recognizing the formal delineation of wetland HMB approved by the Corps of Engineers, no violation has been demonstrated.

CZMA CONSISTENCY

46.

During the pre-hearing process, appellants raised two issues challenging Ecology's determination that the project is consistent with the Coastal Zone Management Act. (CZMA). The limited material in the appellants' brief on these issues argued Ecology improperly failed to determine the project's consistency with the Ocean Resources Management Act. (ORMA). The only evidence presented regarding Ecology's CZMA determination indicated that Ecology did not consider the ORMA applicable to this project. The appellants have not provided sufficient authority to support their contention that ORMA was a mandatory element of Ecology's CZMA consistency determination for this project.

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47.

The appellants also raised a number of other legal issues in the pre-hearing process that were not supported by further evidence or argument during the hearing and are therefore, not addressed in this opinion.²¹ Legal Issue No. 18 raised the topic of coastal erosion, which the Board concluded was not relevant to the §401 Certification or shoreline CUP cases. Accordingly, the issue is not substantively addressed in this decision.

48.

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

Based on the foregoing Findings of Fact and Conclusions of Law, the Board enters the following:

-
- 21 4. Do the stated limitations of the temporal, operational, and geographic scope of the certification violate the requirements of Section 401 of the Clean Water Act and applicable state water quality law?
 - 7. Is there reasonable assurance that the Links at Half Moon Bay Project will not violate §401 and applicable water quality law due to the failure to require AKART for cart paths and pollution generating pervious surfaces?
 - 10. Is there reasonable assurance that contaminated and/or low quality fill material will not cause the Links at Half Moon Bay Project to violate §401 and applicable water quality law?
 - 14. Is there reasonable assurance that the Links at Half Moon Bay Project will not violate Section 401 and applicable state water quality law when Ecology failed to conduct the required alternatives analysis?
 - 15. Is there reasonable assurance that the Links at Half Moon Bay Project will not violate Section 401 and applicable state water quality law when Ecology failed to require mitigation sequencing?
 - 17. Is there reasonable assurance that the Links at Half Moon Bay Project will not violate Section 401 and applicable state water quality law when Ecology failed to require performance bonding?
 - 21. Did Ecology err in failing to conduct its normal two step review process for finding reasonable assurance with regard to the Links at Half Moon Bay application?

ORDER

1. Ecology's decision approving the shoreline CUP for golf course filling for the Links at Half Moon Bay project is AFFIRMED.
2. Ecology's §401 Certification for the Links at Half Moon Bay is remanded to Ecology for modification to areas which the Board concludes Ecology did not have adequate assurance water quality standards would be met:
 - A. Protecting water quality by extending the limited spray zone to the full extent of the golf course.
 - B. Protecting water quality by identifying pesticides authorized for use on the course prior to their application.
 - C. Protecting water quality by establishing restrictions on the application of pesticides close in time to anticipated rainfall events or course irrigation.
 - D. Protecting water quality by establishing written and scientifically supportable standards for pesticides in the surface and groundwater prior to their use.
 - E. Protecting water quality by requiring a monitoring plan for review prior to Certification that will assure adequate rigor to provide scientifically necessary information to detect any water quality problems and that will require sufficient monitoring for the use of fenamiphos.
 - F. Protecting water quality by requiring a defined and adequate response to any water quality issue revealed during the monitoring or adaptive management process.

1 G. Protecting water quality by obtaining seasonal high water readings showing
2 sufficient separation of groundwater from the surface to support the expected
3 performance of the infiltration system on the golf course prior to construction
4 as well as defined actions if such separation is not available.

5 All other aspects of the §401 Certification are AFFIRMED.

6 3. Ecology's finding of CZMA consistency is AFFIRMED.

7 Dated this 12th day of October 2005

8 ENVIRONMENTAL AND LAND USE HEARINGS BOARD

9 BILL CLARKE, CHAIR

10 WILLIAM H. LYNCH, MEMBER

11 JUDY WILSON, MEMBER

12 O'DEAN WILLIAMSON, MEMBER

13 DAN SMALLEY, MEMBER

14 Phyllis K. Macleod
15 Administrative Appeals Judge

SHORT CRESSMAN AND BURGESS

November 14, 2017 - 12:23 PM

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