

No. 49761-1-II

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

**THE PUYALLUP TRIBE OF INDIANS,  
Petitioners,**

**v.**

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

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**RESPONDENT PUGET SOUND ENERGY'S OPPOSITION BRIEF**

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**TABLE OF CONTENTS**

	Page
I. SUMMARY.....	1
II. STATEMENT OF ISSUES.....	6
III. STATEMENT OF THE CASE.....	7
A.    The Tacoma LNG Project.....	7
B.    The City Prepared a Full EIS to Evaluate Project Impacts.....	8
C.    The City Issued the SSDP with Conditions to Ensure Compliance with the SMA and TSMP. ....	11
D.    The Tribe Appeals to the Board.....	13
E.    The Board Rejects All of the Tribe’s Arguments. ....	15
IV. STANDARDS OF REVIEW.....	15
A.    The Board Reviewed the SSDP <i>de Novo</i> .....	15
B.    On Appeal, This Court Defers to the Board’s Specialized Expertise.....	16
V. ARGUMENT.....	18
A.    The Tribe Misinterprets the SMA, TSMP, and No Net Loss Standard. ....	18
1.    The SMA and TSMP Do Not Require Sediment Testing to Establish No Net Loss (Issue 1).....	18
2.    The SMA Requires Cooperation with State and Federal Agencies with Shoreline Jurisdiction (Issue 4). ....	22
B.    The Board’s Conclusion the Project Meets No Net Loss Is Supported by Substantial Evidence. ....	28
1.    The Tribe Conceded that Removing Creosote Piles Is Beneficial and that Pile- Pulling Impacts Are Short-Term and Offered No Evidence of Net Loss (Issue 2).....	29

2.	Mitigation at Sperry Dock Was a Permit Condition (Issue 3).....	33
C.	Miscellaneous Issues.....	37
1.	The Tribe Misconstrues Its Burden of Proof (Issue 5).....	37
2.	The Tribe Failed to Object to Testimony About Instrumented Monitoring (Issue 6). .....	40
3.	The Board Did Not “Usurp” the City’s Function (Issue 7). .....	42
4.	The Tribe Had a Fair Hearing (Issue 8).....	48
D.	PSE Is Entitled to Attorney Fees on Appeal.....	50
VI.	CONCLUSION.....	50

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Buechel v. State Dep't of Ecology</i> , 125 Wn.2d 196, 884 P.2d 910 (1994).....	17, 18, 35
<i>De Tienne v. Shorelines Hearings Bd.</i> , 197 Wn. App. 248, 391 P.3d 458 (2016).....	passim
<i>Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council</i> , 178 Wn.2d 320, 310 P.3d 780 (2013).....	28
<i>Friends of the San Juans v. Wash. State Dep't of Fish &amp; Wildlife</i> , PCHB No. 10-085 at *6, 2011 WL 3792991 (Aug. 19, 2011).....	28
<i>Hayes v. Yount</i> , 87 Wn.2d 280, 552 P.2d 1038 (1976).....	46, 48
<i>Jefferson County v. Seattle Yacht Club</i> , 73 Wn. App. 576, 870 P.2d 987 (1994).....	17
<i>May v. Robertson</i> , 153 Wn. App. 57, 218 P.3d 211 (2009).....	16, 38
<i>New Hampshire v. Maine</i> , 532 U.S. 742, 121 S.Ct. 1808 (2001).....	32
<i>Overlake Fund v. Shoreline Hearings Board</i> , 90 Wn. App. 746, 954 P.2d 304 (1998).....	46
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	passim
<i>Postema v. Pollution Control Hearings Bd.</i> , 142 Wn.2d 68, 11 P.3d 726 (2000).....	17
<i>Pres. Our Islands v. Shorelines Hearings Bd.</i> , 133 Wn. App. 503, 137 P.3d 31 (2006).....	16, 17, 38

<i>Samuel’s Furniture v. Ecology</i> , 147 Wn.2d 440, 54 P.3d 1194 (2002).....	23
<i>San Juan County v. Dep’t of Nat. Res.</i> , 28 Wn. App. 796, 626 P.2d 995 (1981).....	16, 45
<i>Spokane County v. Sierra Club</i> , Civ. No. 47158-2-II, 195 Wn. App. 1042 (August 16, 2016).....	46
<i>In re SSDP Issued by City of Anacortes</i> , SHB No. 81-23, 1985 WL 21987 (Feb. 21, 1985).....	34
<i>State v. Mendoza-Solorio</i> , 108 Wn. App. 823, 33 P.3d 411 (2001).....	41
<i>Stollar v. City of Bainbridge</i> , SHB Nos. 06-024 & 06-027, 2007 WL 2833125 (Sept. 25, 2007).....	34
<i>In re Substantial Dev. Permit Issued by the City of Spokane</i> , SHB No. 214, 1976 WL 38798 (July 14, 1976).....	47
<b>Statutes</b>	
RCW 4.84.370(1)(a) .....	6, 50
RCW 4.84.370(1)(b).....	6, 50
RCW 34.05.570(1)(a) .....	6
RCW 34.05.570(3).....	16
RCW 43.21C.080.....	11
RCW 90.56.140(7).....	15
RCW 90.58.020 .....	passim
RCW 90.58.050 .....	20
RCW 90.58.080 .....	20

RCW 90.58.140(1).....	18
RCW 90.58.140(2).....	18
RCW 90.58.140(2)(b).....	20
RCW 90.58.140(3).....	26
RCW 90.58.140(7).....	22, 29, 38
RCW 90.58.180(1).....	20
RCW Ch. 90.58.....	18, 42
TMC 13.10.1.7.1.....	18, 23
TMC 13.10.5.5.5.A.....	20
TMC 13.10.5.5.5.B.....	21
TMC 13.10.6.4.2.A.1.....	21
TMC 13.10.6.4.2.C.1.....	22
TMC 13.10.6.4.2.C.2.....	22
TMC 13.10.7.6.2.A.5.b.....	23, 24, 26
<b>Rules</b>	
RAP 2.5(a).....	41
<b>Regulations</b>	
WAC 173-14-064.....	46
WAC 173-14-064.....	47
WAC 173-26-020(13).....	20, 29
WAC 173-26-186(8).....	20
WAC 173-26-186(8)(b)(i).....	20

WAC 173-26-191(1)(d) .....	21
WAC 173-26-201(2)(e)(ii)(A) .....	20
WAC 173-27-100.....	passim
WAC 173-27-100(e) .....	44
WAC 173-27-150.....	20
WAC 461-08-500(1).....	15, 38
WAC 461-08-505(1)(c) .....	15, 20
WAC 461-08-505(2).....	15, 38
WAC 471-08-500(3).....	4

**Other Authorities**

<i>Ecology Shorelines Management Act Handbook, Ch. 4,</i> <a href="http://www.ecy.wa.gov/programs/sea/shorelines/smp/handbook/index.html">http://www.ecy.wa.gov/programs/sea/shorelines/smp/ handbook/index.html</a> .....	3, 20, 31
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## I. SUMMARY

Puget Sound Energy, Inc. (“PSE”) proposes to build a liquefied natural gas facility (“Project”) on the tideflats between the Hylebos and Blair Waterways in Tacoma. The site is owned by the Port of Tacoma (“Port”). The Project will provide natural gas for PSE customers during peak demand. It will also provide LNG as fuel to Totem Ocean Trailer Express (“TOTE”) vessels, replacing bunker fuel, a significant source of Puget Sound area air pollution. The proposed work originally included improvements to the existing TOTE dock in the Blair Waterway and the construction of a new dock for fueling LNG barges on the Hylebos Waterway. The work in both waterways required removal of old creosote-treated piles. Creosote leaches carcinogens.

PSE informed the City of Tacoma (“City”) and Respondent Puyallup Tribe of Indians (“Tribe”) of its intent to obtain required permits, including a Shoreline Substantial Development Permit (“SSDP”) for the proposed work in the shorelines. The City evaluated the Project in an environmental impact statement (“EIS”). AR 1463-2246. It received input from the public, the Washington Department of Ecology (“Ecology”), and the United States Environmental Protection Agency (“EPA”). *See, e.g.*, AR 1841-45, 1832-33. The EPA commented on contaminated sediments in the Hylebos Waterway, which is a cleanup site listed on the

Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) National Priority List (“NPL”). AR 1832-33. The EPA had no concerns about the sediments on the Blair Waterway, which was dredged, cleaned up and delisted from the NPL in 1996. *Id.*; *see also* AR 1607 (describing clean-up histories of both waterways).

The final EIS (“FEIS”) addressed the Project’s potential impacts to water, sediments, and anadromous fish. *See* AR 1463-2246. It stated that federal resource agencies encourage removing creosote-treated piles and replacing them with steel or concrete piles. AR 755-6; *see also* RP (Vol. I at 117-118; Vol. III at 82) (as acknowledged by the Tribe’s witnesses). The FEIS concluded that impacts associated with the proposed creosote-treated pile removal (such as the potential disturbance and re-suspension of the sediments on the seafloor) were expected to be short-term. AR 1817. Longer term, removing creosote-treated piles is beneficial to sediment and water quality. *Id.* The FEIS identified construction best management practices (“BMPs”) that mitigate potential impacts of pile removal to salmonids and their habitat and recommended undertaking construction during the fish window (when salmonids are least likely to be present). AR 1616-19. The FEIS was not challenged.<sup>1</sup>

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<sup>1</sup>The Tribe initiated an appeal of the FEIS in an associated Land Use Petition Act proceeding, but withdrew its complaint after receiving notice that it failed to exhaust administrative remedies.

The City approved PSE’s application for an SSDP, subject to conditions and mitigation, as consistent with the Shoreline Management Act (“SMA”) and the Tacoma Shoreline Master Program (“TSMP”). AR 669-738. After an extensive permitting process, which included consultations with state and federal agencies, the City concluded that the Project, as conditioned and mitigated, would result in “no net loss of ecological functions” as required by the SMA and TSMP. AR 667 (containing original SSDP decision). “No net loss” means that, “[o]ver time, the existing condition of shoreline ecological functions should remain the same.” *Ecology Shorelines Management Act Handbook*, Ch. 4, at 1 (“SMA Handbook”).<sup>2</sup> The Tribe sought reconsideration of the City’s decision. AR 685-90. In response, the City modified conditions of SSDP approval, requiring, in part, that work on the Hylebos Waterway could not proceed until sediment testing on the Hylebos was completed. AR 675-76. The Tribe appealed the modified SSDP to the Shorelines Hearings Board (“Board”).

In an effort to address the Tribe’s concerns, PSE stipulated to forgo the in-water work in the Hylebos Waterway shortly after the Tribe filed its appeal. AR 13-17. As a result, proposed in-water construction within

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<sup>2</sup> The SMA Handbook is available online at [www.ecy.wa.gov/programs/sea/shorelines/smp/handbook/index.html](http://www.ecy.wa.gov/programs/sea/shorelines/smp/handbook/index.html).

shoreline jurisdiction is now limited to the removal of an existing creosote-treated trestle with 24 creosote-treated piles and the installation of 5,751 square feet of overwater decking and 48 steel piles in the Blair Waterway. The Tribe was still not satisfied and proceeded with the appeal.

In May 2016, the Board conducted a five-day hearing on the Tribe's appeal of the SSDP. It reviewed the City's approval *de novo* and considered new arguments and evidence. AR 642. Although presenting evidence of impacts to habitat, the Tribe presented no evidence that the re-suspension of marine sediments during Project construction would cause a net loss of ecological functions in the Blair Waterway. AR 636-38. Its lead experts Tad Deshler and Janet Knox either *disclaimed* any opinions on no net loss or confirmed the City's finding of no net loss. RP (Vol. II at 103:22-25) (Knox Testimony); AR 641 (explaining "[t]he compensatory mitigation provided by [PSE's] Revised Mitigation Plan... exceeds the net results of the Mr. Deshler's... analysis").

On July 18, 2016, the Board issued a detailed order affirming the SSDP. AR 611-59. The Board found that the Tribe failed to carry its burden of proof under WAC 471-08-500(3). It stated, in part:

[T]he record contains substantial evidence [that] the Project's impacts were sufficiently analyzed in the Final EIS and SSDP permitting process. Through construction measures being employed by PSE and the conditions of the SSDP, the Project will result in a no net loss of ecological

functions. ... The use of BMPs and a fish window during construction will minimize impacts to anadromous fish and minimize the resuspension of sediments in the water column.

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The record also contains substantial evidence that the Revised Mitigation Plan meets the TSMP's no net loss standard and compensatory mitigation requirement. As required by the TSMP, PSE engaged in mitigation sequencing. The Revised Mitigation Plan provides sufficient mitigation to compensate for the project's unavoidable impacts.

AR 655-56 (Conclusions of Law ("CL") 20-21).

In this appeal, the Tribe tries hard to shift focus away from the Board's detailed findings and its own failure of proof. It insists, without any authority, that the SMA requires sediment testing to determine whether the Project will cause "no net loss" of ecological functions and blames the City and the Board for acting with "no knowledge or understanding" of the conditions in the Blair Waterway. *See* Tribe Br., Issues 1-3. The Tribe misconstrues the SMA, TSMP, and the no net loss standard and ignores a substantial record and the complementary responsibilities of the state and federal agencies over shorelines. The City and Board do not achieve "no net loss" by a specific test favored in hindsight by the Tribe's expert. Rather, they ensure no net loss by (1) applying SMP planning and (2) requiring mitigation sequencing. The record easily shows that the City and Board adequately supported their no

net loss conclusion. The City prepared an EIS, consulted with state and federal agencies, engaged the public in an extensive EIS and SSDP permitting process, and required the full suite of mitigation sequencing under TSMP 6.4.2.C.2.a-f.

This Court reviews the Board's decision, not the City's. RCW 34.05.570(1)(a). In its *de novo* review of the SSDP, the Board heard—and credited—extensive additional evidence that creosote piles will be removed using methods that cause minimal sediment disruption and during the window when fish are absent. *See* AR 621, 631-32. Subject to these conditions and with compensatory mitigation replacing impacted habitat, the Board agreed that the SSDP will cause no net loss. The Tribe failed to meet its burden to prove otherwise. None of multiple errors it now assigns to the Board's decision can change that. The Board's decision should be affirmed. PSE is entitled to and seeks attorney fees on appeal. RCW 4.84.370(1)(a), (b).

## **II. STATEMENT OF ISSUES**

The Tribe listed its Issues in random order. To facilitate the argument, PSE reorganizes and discusses the Issues as follows:

A. Whether the SMA/TSMP require sediment testing in order to determine whether the Project meets no net loss? (Issues 1, and 4).

B. Whether substantial evidence supports the Board's finding that the Project, as mitigated, meets no net loss? (Issues 2 and 3).

C. Miscellaneous (Issues 5, 6, 7, and 8).

### **III. STATEMENT OF THE CASE**

#### **A. The Tacoma LNG Project**

PSE proposes to build and operate a water-dependent LNG facility at the Port. AR 612. As originally proposed, the Project would (a) liquefy and store natural gas for use in PSE's natural gas distribution system during periods of high demand, (b) provide LNG to TOTE to fuel vessels (the "TOTE Fueling System"), and (c) provide LNG for a marine vessel bunkering facility that would come into operation if a market for LNG vessel fuel ever developed (the "Barge Loading Facility"). AR 612-13.

The proposed facility is located between the Hylebos and Blair Waterways in City of Tacoma. AR 612. The land is zoned high intensity and Port Maritime Industrial and has been in industrial use for 75 years.<sup>3</sup> AR 613, 787. The Blair-Hylebos peninsula is highly developed with the majority of shorelines composed of riprap and timber bulkheads. AR 613.

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<sup>3</sup> As explained by the City, "[t]he 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." AR 702.

The Project consists of approximately 30.16 acres of uplands and three acres of submerged lands. *Id.* The proposed TOTE Fueling System requires the removal of 24 existing creosote-treated piles and construction of a new trestle, concrete loading platform, and catwalk, inclusive of 48 new stainless steel piles, along the Blair Waterway. AR 624-25. On the Hylebos Waterway, the proposed barge loading facility would have involved the construction of a trestle, pier, and catwalk, inclusive of 86 new stainless steel piles, and required the removal of over 500 existing creosote-treated piles. AR 1513. PSE also proposed removing existing overwater decking to mitigate shoreline impacts. AR 625; AR 2620-36.

PSE will ultimately need to secure multiple state and federal approvals for its Project. AR 617. The Project requires an SSDP from the City, a Clean Water Act (“CWA”) Section 404 Permit from the United States Army Corps (“Corps”), a CWA Section 401 Water Quality Permit and Section 402 Stormwater Discharge Permit from Ecology, and a Hydraulic Project Approval from the Washington Department of Fish and Wildlife (“WDFW”). *Id.* PSE applied for all of these approvals in a Joint Aquatic Resources Permit Application (“JARPA”), initially drafted and submitted to the City on November 21, 2014. AR 616-17.

**B. The City Prepared a Full EIS to Evaluate Project Impacts.**

Prior to granting any approval, the City was required to evaluate

the impacts of the Project as required by SEPA. AR 616. On July 7, 2015 the City published the draft EIS and solicited public comment. *Id.* The City received 27 written comments, including comments from the Tribe, EPA, and Ecology. *Id.*

Potential significant adverse environmental impacts of the proposed Project were fully evaluated in a comprehensive EIS. AR 1463-2246. The EIS considered all impacts to (a) earth resources, including geologic hazards, groundwater, and sediment, and the Project's impacts on existing contaminated sites; (b) air quality; (c) water quality, including the impacts of existing contaminated soils and sediments on surface and groundwater; (d) plants and animals; (e) health and safety; (f) noise; (g) land use and recreational resources; (h) aesthetics; (i) cultural resources; and (j) socioeconomic factors. *See id.*

The EIS explains that sediments in the Hylebos Waterway were contaminated by historic industrial activity, were previously subject to clean-up actions under CERCLA, and have been designated for monitored natural recovery. *See* AR 1562-65. The Blair Waterway was also part of a historic cleanup site associated with the Asarco smelter. AR 1562. The Blair Waterway was dredged between 1993 and 1995, and in 1996 the EPA removed the Blair Waterway from the NPL. *Id.* Since that time, no

federal or state agency has sought to put the Blair Waterway back on the NPL, and contamination has only been found in isolated pockets. *Id.*

The EIS discusses the potential that in-water work activities (*e.g.*, removal of existing creosote-treated piles) may impact water quality or result in “resuspension of contaminated sediments.” AR 1817. The EIS explains, however, that “any increase is expected to be short term,” and is “likely to be greatly diminished within one or two tide cycles after the completion of the removal and installation activities.” *Id.* In addition, the “long-term consequences of this action would be qualitatively beneficial, ***improving sediment and water quality, by removing the creosote source from the environment.***” *Id.* (emphasis added).

In comments on the draft EIS, the Tribe, Ecology, and EPA raised concerns about contaminated sediments in the Hylebos Waterway. AR 1841-45 (Ecology comments); AR 1832-33 (EPA comments). In response, the EIS suggests a mitigation measure requiring further characterization of the sediments in the Hylebos Waterway before allowing the removal of any piles. AR 1834. The City received no comments whatsoever from any agency or tribe about potential contamination in the Blair Waterway or suggesting that characterization of sediment in the Blair was necessary.

The EIS addressed BMPs for pile removal and installation. AR 621. Existing creosote pilings leach carcinogenic polycyclic aromatic

hydrocarbons (“PAHs”) into surface water and sediment. *See* AR 1610; AR 2682. The creosote pilings will be replaced with steel pilings. *See* AR 1513. Removal and installation of pilings will comply with EPA’s BMPs, and construction will only occur in approved “fish windows” when juvenile salmon are unlikely to be present. AR 0621.

The City issued the FEIS on November 9, 2015. AR 1463-2246. The EIS was subject to a 21-day appeal period that began on November 19, 2015. RCW 43.21C.080. No appeals to the City Hearing Examiner were filed. The Tribe filed a Land Use Petition Act appeal in the Superior Court but withdrew it in response to PSE’s argument that it had failed to exhaust administrative remedies. Any challenge to the adequacy of the EIS is now barred, and the SSDP may not be “reviewed ... on grounds of noncompliance” with SEPA. *Id.*

**C. The City Issued the SSDP with Conditions to Ensure Compliance with the SMA and TSMP.**

On November 19, 2015, the City issued the SSDP, subject to several conditions. AR 669-82; AR 0697-738. Before doing so, the City reviewed the EIS, JARPA, PSE’s shoreline permit application, and all agency and public comments and evaluated them under the Tacoma Municipal Code (“TMC”), the TSMP, the SMA, and Ecology regulations. AR 700. The City also reviewed PSE’s mitigation plan, which included

impact avoidance, minimization, and compensatory mitigation measures. AR 705.

PSE's original proposal in the Blair Waterway called for the removal of 24 creosote-treated piles, the addition of 48 steel piles, the removal of 671 square feet of overwater coverage, and the addition of 5,751 square feet of overwater coverage. AR 732-34. In the Hylebos Waterway, PSE proposed the removal of 508 creosote-treated piles, the addition of 86 concrete piles, the removal of 4,973 square feet of overwater coverage (decking removal), the removal of 9,051 square feet of overwater coverage (existing pier), and the addition of 6,094 square feet of overwater coverage (new pier). *Id.* The combined net result was 398 fewer total piles and 3,668 square feet less overwater coverage. *Id.* As set forth in the City's Technical Memorandum, the City concluded that based on these (and other) measures the "project has minimized impacts and provided appropriate compensatory mitigation that should result in no net loss of ecological functions." AR 729. Accordingly, the SSDP states that "if constructed per the provided plans and with the proposed mitigation, the project requires no further review or mitigation" under the TSMP. AR 706. The Tribe did not comment during the SSDP review process.

The Tribe sought reconsideration of the SSDP, raising concerns about the Hylebos Waterway portions of the Project. AR 685-90. On

December 30, 2015, the City partially granted the Tribe's request for reconsideration and imposed additional clarifying conditions in the SSDP. AR 669-82. The City stated that the Hylebos Waterway "has not been presented as a core component of the project: the purpose of the project is to provide fuel directly to the TOTE facility and to provide utility peak-shaving." AR 672 ("[B]arge loading in the Hylebos" is "secondary."). Nonetheless, the City addressed the Tribe's Hylebos Waterway-related concerns. AR 675. First, as already set forth in the EIS, the City required that "[w]ork within the Hylebos Waterway may not proceed until the applicant demonstrates that further sediment testing has been completed and that the project will be constructed and operated in compliance with all applicable water quality regulations." *Id.* Second, the City imposed a condition that the mitigation set forth in the City's Technical Memorandum is "required" and that "[a]ny modification of the mitigation as proposed will require additional review and approval." *Id.*

**D. The Tribe Appeals to the Board.**

The Tribe was unmoved and appealed the revised SSDP to the Board on January 20, 2016. AR 1-12. In an effort to fully address the Tribe's stated concerns, on January 28, 2016, PSE filed a stipulation committing to forgo the in-water portions of the Project in the Hylebos

Waterway. AR 13-17. That stipulation provided that PSE will not conduct any of the following work:

Any in-water or over-water construction, dredging or fuel bunkering in the Hylebos Waterway authorized by [the SSDP] other than (a) work to improve three existing storm water outfalls to meet new, more stringent stormwater requirements and (b) removal of 4,973 square feet (approximately 37%) of overwater decking from the existing pier (piles to remain in place).

AR 14.

The Stipulation eliminated the Tribe's stated concern that the Project would release contaminated sediments in the Hylebos Waterway. Nonetheless, the Tribe proceeded with its appeal. During pre-hearing discovery, PSE became aware of a new concern— that the proposed mitigation was inadequate in light of the Stipulation. PSE began working on a Revised Mitigation Plan. Although the City believed that the existing mitigation “would be sufficient” to ensure no net loss, the Revised Mitigation Plan gave the City “even more assurance . . . that there would be no net loss.” RP (Vol. IV at 225:9-20). The Revised Mitigation Plan provides for the removal of additional creosote piles and overwater coverage on the Hylebos Waterway, and for the restoration of benthic habitat at the nearby Sperry Ocean Terminal (“Sperry Dock”). AR 2620-36. PSE submitted the Revised Mitigation Plan to the City as required by the SSDP. *Id.*; AR 675.

The Tribe presented the Board with 27 Issues, including subparts. AR 642-45. The Tribe now argued for the first time that sediment characterization was needed in the delisted Blair Waterway, a view not shared by the EPA or Ecology and not included in the Tribe's comments to the FEIS. AR 643; AR 628. The Tribe also claimed that PSE's Stipulation was ambiguous and improper, and that the entire matter had to be sent back to the City for a new decision. AR 644.

**E. The Board Rejects All of the Tribe's Arguments.**

The Board held five days of evidentiary hearings. The Tribe examined City witnesses, presented lay and expert testimony on the issues of sediment contamination and the adequacy of compensatory mitigation, and cross-examined PSE's lay and expert witnesses on the same issues. The Board rejected the Tribe's arguments and evidence in a detailed order. AR 611-59. The Tribe's appeal to the Superior Court followed. This Court accepted direct review.

**IV. STANDARDS OF REVIEW**

**A. The Board Reviewed the SSDP *de Novo*.**

The Board reviewed the City's SSDP *de novo*, based on the record that the parties developed before the Board. WAC 461-08-500(1) ("scope and standard of review shall be *de novo*"); WAC 461-08-505(2) ("Evidence that is material and relevant to" the appeal "shall be admitted

into the record whether or not such evidence had been submitted to the local government unit.”). As the party requesting review of the SSDP, the Tribe had the “burden of showing that the SSDP issued to PSE is inconsistent with the requirements of the SMA or the TSMP.” AR 642 (citing RCW 90.58.140(7)). The Tribe was allowed to (and did) present evidence and argument to the Board that was never presented to the City. See WAC 461-08-505(2). The Board then made its own *de novo* determination whether the SSDP met the requirements of the SMA and TSMP, including achieving no net loss. See *San Juan County v. Dep’t of Nat. Res.*, 28 Wn. App. 796, 800, 626 P.2d 995 (1981) (the Board has “the power to approve or condition the approval of a permit”).

**B. On Appeal, This Court Defers to the Board’s Specialized Expertise.**

The Tribe incorrectly suggests that this Court review *the City’s* decision. Tribe Br. at 20. This Court “review[s] the Shorelines Hearings Board’s decision, not that of the local government.” *Pres. Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 516, 137 P.3d 31 (2006), as amended (May 15, 2007). The party appealing the Board’s decision bears the burden of demonstrating that the *Board’s* actions are invalid. *May v. Robertson*, 153 Wn. App. 57, 73, 218 P.3d 211 (2009), as corrected (Dec. 8, 2009), as corrected (Mar. 23, 2010). A party may challenge the Board’s

decision (1) as an erroneous interpretation or application of the law, (2) for lack of substantial evidence, and (3) as arbitrary or capricious, among other grounds. RCW 34.05.570(3).

The specific review standard depends on the nature of the alleged error. The Court reviews the Board's "conclusions of law *de novo* and the SHB interpretation of the SMA and local government shoreline regulations *de novo*," but gives the Board's interpretation of the SMA and SMP "great weight." *De Tienne v. Shorelines Hearings Bd.*, 197 Wn. App. 248, 277, 391 P.3d 458 (2016); *Pres. Our Islands*, 133 Wn. App. at 516 (deference given to Board's interpretation of the law); *Buechel v. State Dep't of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994) (the Court gives "due deference . . . to the specialized knowledge and expertise of the Board"). If the Board's "interpretation is consistent with the language of the [SMA], and clearly serves to further its goals," the Court will affirm the Board's decision. *De Tienne*, 197 Wn. App. at 277 (citations omitted).

The Board's factual findings "are reviewed under a substantial evidence standard." *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 588, 870 P.2d 987 (1994). Evidence is "substantial" if it would "convince an unprejudiced, thinking mind of the truth of the declared premise." *Id.* The Court does "not weigh the credibility of witnesses or substitute [its] judgment" for the Board with respect to findings of fact.

*Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004). Unchallenged findings are verities on appeal. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 100, 11 P.3d 726 (2000).

A board’s decision is arbitrary or capricious if it is “willful and unreasoning action in disregard of facts and circumstances.” *Buechel*, 125 Wn.2d at 202. If “there is room for two opinions, action is not arbitrary ... when exercised honestly and upon due consideration though it may be felt that a different conclusion might have been reached.” *Id.*

## V. ARGUMENT

### A. The Tribe Misinterprets the SMA, TSMP, and No Net Loss Standard.

The Tribe’s central argument, repeated in Issues 1 and 4, is that the SMA and TSMP require sediment testing to comply with no net loss and that the City (and the Board) “abdicated” its duties by failing to require it. Tribe Br. at 4-5. The Tribe misinterprets the SMA, TSMP and the no net loss standard.

#### 1. The SMA and TSMP Do Not Require Sediment Testing to Establish No Net Loss (Issue 1).

All development on the shorelines of the state after June 1, 1971 must conform to the SMA of 1971. Ch. 90.58 RCW; *Buechel*, 125 Wn.2d at 203 (citing RCW 90.58.140(1), (2)). In passing the SMA, the legislature stated that “there is ... a clear and urgent demand for a planned, rational

and concerted effort, *jointly performed by federal, state and local governments*, to prevent the inherent harm in an uncoordinated and piecemeal development of the state’s shorelines.” RCW 90.58.020 (emphasis added); *see also* AR 651-52 (CL 14).<sup>4</sup> To ensure coordinated development of shorelines, the SMA establishes a system placing the primary responsibility for permit administration with local governments, pursuant to local Shoreline Master Programs (“SMPs”). RCW 90.58.050, .140(2). Local SMPs are approved by Ecology. RCW 90.58.080, .090(7). A local government may issue an SSDP “only when the development proposed is consistent with the applicable master program and [the SMA].” RCW 90.58.140(2)(b); WAC 173-27-150. A person aggrieved by a local government’s SSDP issuance can seek review to the Board. RCW 90.58.180(1). The Board has jurisdiction to determine whether a shoreline permit complies with the SMA and SMP. WAC 461-08-505(1)(c).

The SMA and SMPs protect shorelines through the concept of “no net loss of ecological function.” *See, e.g.*, WAC 173-26-186(8)(b)(i); TSMP 13.10.6.4.2.A.1. “Ecological function” means “the work performed or role played by the physical, chemical, and biological processes that

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<sup>4</sup> The TSMP also acknowledges the fact of concurrent jurisdiction over shoreline projects. “Developments and activities regulation by this Master Program may also be subject to ... various other provisions of local, State and federal law.” TMC 13.10.1.7.1; *see also* AR 651-52 (CL 14 was not challenged by the Tribe).

contribute to the maintenance of the aquatic and terrestrial environments that constitute the shoreline's natural ecosystem." WAC 173-26-020(13). No net loss means that the "the existing condition of shoreline ecological function should not deteriorate due to permitted development." SMA Handbook, Ch. 4, at 2.

No net loss is achieved, first and foremost, at the planning level. WAC 173-26-186(8). "The existing condition or baseline is documented in the shoreline inventory and characterization." SMA Handbook, Ch. 4, at 2. Project impacts are assessed against this ecological baseline, and, at the permitting level, no net loss is achieved through mitigation sequencing. WAC 173-26-201(2)(e)(ii)(A) ("application of the mitigation sequence achieves no net loss of ecological functions for each development"). Mitigation sequencing requires applicants to "avoid impacts, minimize impacts, rectify impacts, reduce impacts over time, compensate for impacts, monitor impacts and take corrective measures." SMA Handbook, Ch. 4, at 3 ("Through mitigation and restoration, a jurisdiction would achieve no net loss of shoreline ecological functions."); TSMP 6.4.2.C.2.a-f. Using mitigation sequencing, the local government ensures that any ecological loss from baseline conditions is remedied.

The Tribe argued below that no net loss means something entirely different. “Relying on a partial reading of TSMP 13.10.5.5.5.A<sup>5</sup>] and the SMA’s policy statement in RCW 90.58.020, the Tribe contends that the City should have required PSE to characterize the sediments in the Blair waterway before construction could begin.” AR 648-49. This is not the law. Under the SMA, the baseline ecological function for the purposes of no net loss is determined by the classification adopted by the local jurisdiction, not by a test. *See* WAC 173-26-191(1)(d) (“different sets of environmental protection measures, allowable use provisions, and development standards ... [correspond to] each of [the] shoreline segments”).

The Board’s CL 17, which remains unchallenged by the Tribe, states that the “TSMP classification system consists of six shoreline environments” and that the Project “is located in the High-Intensity Environment.” AR 653 (citing TMC 13.10.5.5.5.B). Shoreline areas are designated ‘high-intensity’ if they ‘currently support high-intensity uses related to commerce, transportation or navigation.” *Id.* The Project

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<sup>5</sup> TMC 13.10.5.5.5.A provides that “[t]he purpose of the ‘high density environment’ is to provide for high-intensive water-dependent and water-oriented water-use[,] commercial, transportation, and industrial uses while protecting existing ecological functions and restoring ecological functions in areas that have been previously degraded.”

continues the same use of the shoreline and so meets the no net loss at the planning level.

The Board's CL 18 and CL 19, also unchallenged, conclude that the no net loss was also met at the permitting stage:

“Shoreline use and development shall be carried out in a manner that prevents or mitigates adverse impacts so that no net loss of existing ecological functions occurs.” TMC 13.10.6.4.2.A.1.... If modification to a marine shoreline is unavoidable, “all adverse impacts from a development proposal ... shall be mitigated so as to result in no net loss of shoreline and/or critical area functions or processes.” TMC 13.10.6.4.2.C.1.

AR 654-55 (“A project proponent is required to follow the mitigation sequence of avoidance, minimization and compensation.”) (citing TMC 13.10.6.4.2.C.2).

The Tribe's attempt to reduce the no net loss standard to a sediment test has no basis in the SMA, is contrary to the SMA Guidelines, and should be rejected. It is offered to excuse the Tribe's failure to offer any evidence connecting potentially contaminated sediments to a loss of ecological function as required by RCW 90.58.140(7). *See infra* at 4.

**2. The SMA Requires Cooperation with State and Federal Agencies with Shoreline Jurisdiction (Issue 4).**

The Tribe misconstrues the SMA in another fundamental way. It argues that the City and the Board “abdicated” their SMA duties by failing

to require sediments testing in the Blair Waterway and by “deferring” to the state and federal agencies, which expressed no concern about sediments in the Blair Waterway. Tribe Br. at 25-27. The Tribe ignores the SMA’s explicit mandate of cooperation in the shorelines. *See* RCW 90.58.020.

Far from discouraging collaboration with state and federal resource agencies, the SMA and TSMP require it. “There is ... a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local government, to prevent the inherent harm in an uncoordinated and piecemeal development of the state’s shorelines.” RCW 90.58.020; *see also Samuel’s Furniture v. Ecology*, 147 Wn.2d 440, 456, 54 P.3d 1194 (2002) (the legislature “contemplate[d] a cooperative effort on the part of Ecology and local governments in enforcing the SMA”). The TSMP also integrates concurrent jurisdiction over shoreline projects: “Developments and activities regulation by this Master Program may also be subject to ... other provisions of local, state and federal law,” TMC 13.10.1.7.1. And, an SSDP applicant is required to demonstrate “[t]hat contaminated sediments are managed and/or remediated in accordance with state and federal laws.” TMC 13.10.7.6.2.A.5.b.

The Tribe does not challenge CL 13 and 14, which discuss the concurrent shoreline jurisdiction. Tribe Br. at 3 ¶ 1 (Assignments of

Error), at 4-6 (Issues). Instead, the Tribe assigns error to CL 16 and argues that the Board “erroneously adopted the City’s position that it ***lacked authority*** to require sediments characterization.” *Id.* at 25-26 (emphasis added). The Tribe argues that this cannot possibly be true because “the City did require sediment testing for the Hylebos portion of this very project.” *Id.* at 25.

The Tribe mischaracterizes the scope of the Board’s CL 16 and the record. The Board stated that the City “has not required sediment characterization in any previous shoreline substantial development permit and asserts that the TSMP does not provide the necessary authority to require testing.” AR 653 (CL 16). The Board “accord[ed] substantial weight to the City’s longstanding and consistent interpretation of its TSMP in this regard.” *Id.* ***However, the Board’s actual legal conclusion was narrow.*** “The Board concludes that the City did not violate the SMA or TSMP by ***deferring*** the issue of sediment characterization to other agencies with concurrent jurisdiction over PSE’s project.” *Id.* (emphasis added); *see also* TMC 13.10.7.6.2.A.5.b.

The record makes clear that the City can impose conditions related to sediment testing (or other concerns) when requested by other agencies with jurisdiction and expertise over sediments. This issue was the subject of direct follow-up questioning by the Board Members of the City’s

Environmental Specialist, Shannon Brenner. *See id.* (Finding of Fact 16 citing Brenner Testimony). Ms. Brenner testified that it is not “typical for the City to require a sediment analysis on a project like this” because other agencies have jurisdiction over sediment, and testing “requires permit and approval from the Corps and Department of Ecology.” RP (Vol. III at 157-58).

Following this testimony, Presiding Board Member Marchioro asked: “Q: . . . And it sounds as though the City has never imposed sediment sampling and characterization conditions in the SSDP that you’re aware of; is that right? A. That’s correct.” RP (Vol. III at 167).

Board Member Smith then followed up:

Q: So I guess what I’m trying to understand is when you’re evaluating an application for an SSDP, how do you determine which impacts are appropriate to be—for an impact where there might be multi-jurisdictions covering it, how do you determine which ones are appropriate to assess at your stage and which ones, maybe, you would sort of rely on conditions that might be applied to other stages of the project?

A. When there’s other authorities that have jurisdiction, we would, in general, condition the permit, I think, to meet their requirements. Or that’s my experience with the City. If we receive comments with specifics from those agencies, we will include those in the permit decision so that the applicant is aware of those.

RP (Vol. III at 169-70). This is precisely what the City did and the Board upheld: the City required sediment testing on the Hylebos Waterway but not on the Blair Waterway, as recommended by the EPA and Ecology, the agencies with expertise. *See* AR 1841-45 (Ecology comments); AR 1832-33 (EPA comments); *see also* TMC 13.10.7.6.2.A.5.b.

The Tribe argues that the deference is impermissible because state and federal agencies with jurisdiction over additional permits for the Project (*e.g.*, Section 404 Permit from the Corps and Section 401 CWA Permit from Ecology) apply standards different from no net loss. Tribe Br. at 26-27. Surely the legislature was aware of the different state and federal statutory schemes when it required “increased coordination,” “coordinated planning,” and “concerted effort, jointly performed by federal, state, and local governments,” in the shorelines. RCW 90.58.020. Moreover, the legislature stated that the lack of collaboration would cause “inherent *harm* in an uncoordinated and piecemeal development of the state’s shorelines.” *Id.*<sup>6</sup>

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<sup>6</sup> The Tribe’s reliance on RCW 90.58.140(3) is misplaced. The statute provides that the City is required to establish a program, consistent with the Ecology’s rules, “for the administration and enforcement” of the SMA/SMP permit system. The “administration of the system so established shall be performed exclusively by the local government.” *Id.* There is no conflict between the City’s exclusive role in administering the SMA/SMP permit system in RCW 90.58.140(3) and the SMA’s explicit

The City did not “abdicate” its duty by doing exactly what SMA and TSMP require. It afforded “EPA and Ecology, the agencies with jurisdiction over contaminated sediments,” the opportunity to provide an opinion, and “[n]either agency expressed a concern with regard to the Blair Waterway.” AR 652. Their lack of concern was reasonable given that available data “showed no contamination in the vicinity of the TOTE facility on the Blair Waterway.” *Id.*

On *de novo* review, the Board heard additional evidence and made its own finding that “[t]hrough construction measures being employed by PSE and the conditions of the SSDP, the Project will result in no net loss of ecological functions.” AR 655. The record basis for the Board’s finding includes the facts that (a) the Project will remove creosote-treated piles, thereby removing “a source of surface water contamination” and (b) the BMPs and fish windows “will minimize impacts to anadromous fish and minimize the resuspension of sediments in the water column.” *Id.* The Board also found that “by conditioning PSE’s in-water work on the implementation of BMPs and observation of a fish window, the SSDP complies with the TSMP’s requirements” related to contaminated sediment. AR 652-63.

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mandate to work cooperatively with state and federal agencies with parallel jurisdiction in the shoreline in RCW 90.58.020. Tribe Br. at 27.

This record shows no “abdication” by the City or by the Board. Ecology and EPA have jurisdiction over contaminated sediments. Both agencies raised concerns about contamination in the Hylebos Waterway, requesting additional sediment testing. The City included that testing as a condition of the SSDP. AR 675. Ecology and EPA raised no concerns about contamination in the Blair Waterway. The City agreed and did not include a condition related to contamination in the Blair Waterway. AR 1841-45 (Ecology comments); AR 1832-33 (EPA comments). On *de novo* review and additional evidence, the Board correctly concluded that “the City did not violate the SMA or TSMP by deferring the issue of sediment characterization to other agencies with concurrent jurisdiction.” AR 653. CL 16 is both correct and supported by the evidence.

**B. The Board’s Conclusion the Project Meets No Net Loss Is Supported by Substantial Evidence.**

Whether no net loss is met is a question of fact. *Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 342-43, 310 P.3d 780 (2013); *Friends of the San Juans v. Wash. State Dep’t of Fish & Wildlife*, PCHB No. 10-085 at \*6, 2011 WL 3792991 (Aug. 19, 2011) (determination of no net loss turned on “a site-specific analysis and [finding] that removal of an anchor and mooring

buoy would fully mitigate any impacts to eelgrass that would be caused by the project”).

**1. The Tribe Conceded that Removing Creosote Piles Is Beneficial and that Pile-Pulling Impacts Are Short-Term and Offered No Evidence of Net Loss (Issue 2).**

The Tribe had the burden to demonstrate to the Board “that the SSDP issued to PSE is inconsistent with the requirements of the SMA or the TSMP.” AR 642; RCW 90.58.140(7) (“the person requesting the review has the burden of proof.”). But the Tribe put on no evidence that pile removal and replacement would result in a net loss of ecological function. Its contaminated sediment expert, Ms. Knox, professed to have no opinion on net loss. RP (Vol. II at 103:19-20 (“A: I am not a biological expert, so I’m not commenting on the net loss of the function.”). The Tribe’s other witnesses offered no evidence of any tribal fishery in the Blair Waterway, much less any evidence of related ecological functions as defined in WAC 173-26-020(13).<sup>7</sup>

The Tribe’s lack of proof is not surprising. Every agency with expertise (including the EPA, federal wildlife agencies, Ecology, and

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<sup>7</sup> The shoreline along the Blair Waterway lacks eelgrass, is covered in riprap, and quickly deepens into a shipping channel. RP (Vol. IV at 228:6-10). The Tribe’s expert Mr. Deshler testified that the Project site provides little ecological value for juvenile salmonids. RP (Vol. II at 172:25; *id.* at 240:18-242:6).

WDFW) agrees that removing creosote-treated piles is environmentally better than leaving them in place because creosote piles will continue to leach PAHs for years to come. AR 755. Even the Tribe's own water quality manager conceded that "the Tribe's position was that it's better to remove piles." RP (Vol. I at 117:10-11); RP (Vol. I at 118:10-14 (agreeing that "EPA's position was that it is better to pull the piles than leave them or cut them off"))).

Although, as acknowledged in the EIS, pile removal may temporarily re-suspend sediment or cause a minor release of existing contaminants as the pile is removed, removal remains the preferred alternative because it prevents decades of future carcinogenic contamination and harm to ecological function. AR 756; AR 780. The uncontroverted findings in the EIS are that the negative impacts of pile removal are "short term" and will be diminished "within one or two tide cycles," while the "long-term consequences of this action would be qualitatively beneficial, improving sediment and water quality, by removing the creosote source from the environment." AR 780. In other words, pile removal and replacement *improves* ecological functions.

The Tribe cites *De Tienne* to argue that there was "no scientific basis" behind the Board's no net loss conclusion. Tribe Br. at 21-23. *De Tienne* provides the Tribe no help. The court in *De Tienne* affirmed the

due deference afforded to the Board and *the Board's* determination that a city's buffer in an SSDP had no scientific basis. 197 Wn. App. at 283. Here, by contrast, the Board had ample scientific evidence from the EIS, EPA's position on pile replacement and BMPs, expert testimony on the benefits of pile removal, and expert testimony regarding the efficacy of fish window restrictions, to conclude that the pile removal and replacement would result in no net loss of ecological functions. AR 655 (citing Naylor Testimony, Deshler Testimony, Brenner Testimony, Tornberg Testimony). To the extent *De Tienne* is applicable at all, it only confirms that the Board's well-reasoned decision is entitled to deference.

Absent any actual evidence of net loss of ecological functions, the Tribe resorts to selectively citing the "facts at hearing." Tribe Br. at 20-21. The Tribe cites testimony that it claims shows the effects of pile removal are uncertain, making it "impossible for Tacoma to know how to mitigate for any such impacts." *Id.* The Tribe then repeats its own argument and claims that without sampling the sediments "one cannot know what risks to shoreline ecological functions exist or are likely." *Id.* at 23-25. The Tribe's circular reasoning distorts the SMA, *see supra* at 18-22, and ignores the evidence supporting the Board's no net loss conclusion.

The question is not whether pile removal has potential short-term adverse impacts but *whether the removal will cause a net loss of*

*ecological functions over time.* SMP Handbook, Ch. 4, at 1 (“[o]ver time, the existing condition of shoreline ecological functions should remain the same as the SMP is implemented”). The Board had ample evidence to conclude that the answer to that question is no, including the undisputed conclusions in the EIS about long-term benefits of pile removal, the EPA’s position that removal with BMPs is preferred to leaving piles in place, and testimony about the effectiveness of fish window restrictions. Nothing more was required to support the Board’s no net loss findings.

Ultimately, the Tribe asks this Court to create a categorical rule that any project that may temporarily disturb sediment must conduct a full sediment characterization before any SSDP can issue. No such rule appears in the SMA, the SMA Guidelines, or TSMP because pile replacement projects have undisputable long-term environmental benefits and are encouraged. The Tribe’s argument finds no support in the law or the record and makes no sense as a practical or policy matter.

It is also disingenuous. In 2012, the Tribe, in a joint venture with SSA, applied for and received an SSDP permit for a proposed container terminal, also on the Blair Waterway, that involved installation of 555 pilings and dredging of 1.75 million cubic yards of soil and sediment. AR 631; AR 2580-92. The Tribe did not believe that sediment testing was required to show that *that* project would meet no net loss of ecological

functions. Courts are inherently skeptical of litigants who “deliberately chang[e] positions according to the exigencies of the moment.” *New Hampshire v. Maine*, 532 U.S. 742, 751, 121 S.Ct. 1808 (2001) (internal quotation marks and citations omitted). Given its own recent permitting history in the Blair Waterway, the Tribe’s claim that it is “impossible” to grant an SSDP without requiring sediment characterization rings hollow.

**2. Mitigation at Sperry Dock Was a Permit Condition (Issue 3).**

Alternatively, the Tribe contends that the Board’s no net loss finding was flawed because it considered off-site mitigation at the Sperry Dock. The Tribe claims that the Sperry Dock mitigation is “speculative” because at the time of the hearing, PSE did not yet have a formal agreement to perform it. Tribe Br. at 33-34. The Tribe is mistaken.

Sperry Dock is an existing site where mitigation can be performed to compensate for unavoidable impacts elsewhere in Commencement Bay. AR 626; RP (Vol. V at 58-59). PSE developed and submitted to the City a Revised Mitigation Plan that reflects PSE’s Stipulation eliminating in-water portions previously planned for the Hylebos Waterway. AR 2620-36 (Revised Mitigation Plan); AR 624 (Board decision discussing the Revised Mitigation Plan). The Revised Mitigation Plan included off-site compensatory mitigation at the Sperry Dock, in the form of removal of

2,500 square feet of overwater decking, an additional 24 creosote-treated pilings, and underwater concrete blocks to restore benthic habitat. AR 626; AR 2631. These measures were added in direct response to the Tribe's concerns about the adequacy of the existing plan. AR 625.

PSE is required to complete the identified compensatory mitigation **as a condition** of the SSDP. AR 675 (condition 9). Having submitted the Revised Mitigation Plan to the City, PSE is now bound to implement all mitigation in the plan. Because the mitigation is a condition of the SSDP, if PSE fails to perform the mitigation at the Sperry Dock the City may rescind the permit. AR 675. There is nothing speculative about a permit condition. The mitigation will happen; otherwise PSE could lose its SSDP and the Project will not go forward.

The Tribe relies on *De Tienne*, but in that case there was no issue as to whether the mitigation would be performed. Rather, the issue was evidentiary, whether the mitigation buffer was sufficiently protective of eelgrass beds. *See De Tienne*, 197 Wn. App. at 283. The Tribe's reliance on *Stollar v. City of Bainbridge* and *In re SSDP Issued by City of Anacortes* is equally misplaced. At issue in each case was the *effectiveness* of mitigation, not the uncertainty about whether the planned mitigation would occur. *Stollar*, SHB Nos. 06-024 & 06-027, 2007 WL 2833125, at \*12 (Sept. 25, 2007) ("The effectiveness of depositing a coarse sand, pea

gravel mix. . . as a beach nourishment mitigation strategy is speculative.”); *In re SSDP Issued by City of Anacortes*, SHB No. 81-23 at \*3, 1985 WL 21987 (Feb. 21, 1985) (“On this record it was not proven that any amount of artificially planted habitat would succeed in making up for the loss of natural habitat for herring spawning.”).

The benefits of the mitigation at the Sperry Dock are not speculative. They involve well-recognized mitigation measures such as removal of existing piles, removal of overwater decking, and removal of debris that interferes with benthic habitat. AR 625-26; RP (Vol. V at 106). For ecological impacts to low quality habitat in the Blair Waterway, the proposed mitigation grows existing, higher-quality fish habitat at Sperry. RP (Vol. V at 59); RP (Vol. V at 97). The Board found that this is a “standard approach” to compensatory mitigation. AR 641-42. It also found that “the removal of creosote-treated materials from the Sperry Ocean Terminal will benefit surface water quality and salmonid habitat” and, together with the other conditions, “achieves no net loss of ecological functions.” *Id.* The Board’s conclusions are within “the specialized knowledge and expertise of the Board,” are well-supported by the record, and are entitled to “due deference.” *Buechel*, 125 Wn.2d at 203.

The Tribe then argues that without the Sperry Dock mitigation (an assumption that is contrary to the record) the Project does not meet the no

net loss based on a Habitat Equivalency Analysis (“HEA”). Tribe Br. at 34-37. The City has never accepted a HEA model in a no net loss analysis, and the Tribe’s expert Mr. Deshler conceded that he “has never performed a shoreline substantial development no net loss analysis or used a HEA modeling for shoreline permitting,” and “did not conduct a site visit to evaluate his habitat modeling.” AR 640; RP (Vol. IV at 220-21) (Brenner Testimony on previously rejecting the use of HEA for the purposes of no net loss). Mr. Deshler excluded the Sperry Dock mitigation from his HEA model. AR 637.

The Board concluded that including Sperry Dock mitigation was reasonable and appropriate. It found that “with the inclusion of mitigation activities at the Sperry [Dock],” the proposed mitigation “exceeds the net results of Mr. Deshler’s HEA analysis” and “satisfies Mr. Deshler’s criteria that the final habitat area equal or surpass the initial habitat area, with the mitigated areas *exceeding* the impacted area by some 2,393 square feet.” AR 641-42 (emphasis added). The Tribe misses the point by attacking adequacy of the mitigation *without* Sperry Dock, a decision the Board did not make.<sup>8</sup>

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<sup>8</sup> In any event, the Board heard extensive testimony that the HEA analysis is inapplicable to a no net loss determination and failed to account for the poor habitat values in the Blair Waterway. AR 640. Furthermore, the City witnesses testified that the “initial mitigation was sufficient to

**C. Miscellaneous Issues**

**1. The Tribe Misconstrues Its Burden of Proof (Issue 5).**

The Tribe concedes that it had the burden of proof before the Board (as set forth in the second sentence of RCW 90.58.140(7)), but argues that the Board “improperly imposed on the Tribe a burden to prove contamination was present in the Blair Waterway.” Tribe Br. at 28. Instead, the Tribe argues that its burden was to “prove that the original decision to grant or deny the permit [by the City] was erroneous.” *Id.* at 29. The Tribe maintains that it need only prove that “the applicant had not met its burden to prove” *to the City* that there would be no net loss; the Tribe maintains that it met its burden by showing to the Board an alleged “data gap” in the information reviewed by the City. *Id.* at 30.

That is not how the SMA works. PSE initially had the burden of establishing SMA/TSMP compliance to the City. RCW 90.58.140(7); AR 707 (SSDP; explaining applicant’s burden). PSE met that burden and the City issued the SSDP. AR 709. The Board then reviews *de novo* whether the Project meets the requirements of the SMA, the TSMP, and Ecology

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meet the TSMP’s no net loss standard,” and that the addition of the Sperry Dock work simply gave “more assurance that the mitigation will achieve no net loss of ecological functions.” AR 639; RP (Vol. IV at 220-25).

regulations. WAC 461-08-500(1). The Board's *de novo* review was not limited to the record presented to the City and included submission of new evidence. WAC 461-08-505(2). On appeal, this Court "review[s] the ... Board's decision, not that of the local government," *Pres. Our Islands*, 133 Wn. App. at 516, and "the party appealing the Board's decision bears the burden of demonstrating the invalidity of the **Board's** actions," not the actions of the applicant or the local government." *May*, 153 Wn. App. at 73 (emphasis added).

The Board considered new arguments and evidence presented by the Tribe that were never made or presented to the City, including evidence of the presence of contamination in the Blair Waterway, "data gaps," and the supposed need for testing. AR 628-30. The Board also considered competing evidence offered by the City, the Port, and PSE that sediment impacts, if any, would be short term, and that testing was unnecessary. AR 631; AR 633. The Board then made a *de novo* finding that "the evidence presented did not establish the presence of sediment contamination at the TOTE facility or demonstrate that the measures PSE is required to implement during in-water construction will not protect water quality and anadromous fish." AR 634. The Board also determined *de novo* that the Project would result in no net loss of ecological functions,

and that the Tribe failed to carry its burden “of proving the SSDP’s inconsistency with the SMA and/or the TSMP.” AR 655.

Under the SMA, the Tribe had an opportunity—and the burden—to demonstrate to the Board, *de novo*, that the SSDP did not comply with the SMA and TSMP. The Tribe tried to do so by offering evidence of contamination in the Blair, but none that was in the vicinity of the Project. The Board did not find this evidence persuasive. AR 652-53 (“Data collected from the EIM system, regardless of the screening level employed, showed no contamination in the vicinity of the TOTE facility on the Blair waterway.”); AR 2727-37 (maps identifying known areas of contamination). The Board also found that “by conditioning PSE’s in-water work on the implementation of BMPs and observation of a fish window, the SSDP complies with TSMP’s requirement concerning ... contaminated sediment management.” AR 652-53.

There was no unfair burden. The Tribe tried but failed to prove any contamination in proximity to the Project site. The Tribe presented no evidence that pile removal would result in a net loss even if the sediment was contaminated or that the BMPs and fish windows were insufficient. The Tribe only pointed out potential uncertainty regarding contamination that was fully addressed by BMPs. The Board did not err by concluding that the Tribe failed to carry its burden of proof.

**2. The Tribe Failed to Object to Testimony About Instrumented Monitoring (Issue 6).**

Nevertheless, one of the new issues raised by the Tribe in the Board proceedings was that PSE needed to do “instrumented monitoring” in order to ensure protection of water quality<sup>9</sup> during pile removal. RP (Vol. II at 63). To rebut that testimony, PSE’s witness, Larry Tornberg, testified *without objection from the Tribe* that the current version of PSE’s Water Quality Protection and Monitoring Plan (a plan required by Ecology for its CWA Section 401 certification for the Project and part of the JARPA) requires instrumented monitoring:

Q. Describe for me what you understood through Ms. Carroll regarding the Tribe’s concerns about instrumented monitoring?

A. That instrumented monitoring be used instead of visual monitoring for determining compliance.

Q. Have you made the changes just described?

A. Yes, we have.

Q. Have you submitted that water quality monitoring plan as revised to the Department of Ecology?

A. Yes, we have.

RP (Vol. V at 47).

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<sup>9</sup> Water quality protection is the province of a CWA Section 401 Water Quality Certification, a permit that was yet to be issued by Ecology and that was not before the Board on review of the SSDP. Note also that instrumented monitoring was proposed in the EIS, AR 1451-53, and required by the SSDP. AR 706 (second bullet).

On cross-examination, the Tribe elicited from Mr. Tornberg testimony regarding the Water Quality Protection and Monitoring Plan. RP (Vol. V at 83). After cross-examination, PSE offered the plan as an exhibit, but the Board concluded that it had already heard “discussion” about it, and declined to admit the plan because it was not on the final exhibit list. RP (Vol. V at 89). The Board then proceeded to allow additional testimony from Mr. Tornberg regarding the Water Quality Protection and Monitoring Plan without objection from the Tribe. *Id.*

The Board then received additional testimony regarding the Water Quality Protection and Monitoring Plan from PSE’s sediment expert, Rick Moore, explaining that Ms. Knox’s concerns were unfounded “[b]ecause the Water Quality Protection Plan requires instrumented monitoring at a very intense level.” RP (Vol. V at 165). Again, the Tribe had no objection to this testimony and, on cross-examination, elicited testimony from Mr. Moore on this document. *Id.* (Vol. V at 198).

The Tribe argues that the Board “improperly rel[ied] on evidence that it had expressly excluded from the record.” Tribe Br. at 43. The record shows, however, that the Board relied on the testimony of Mr. Tornberg and Mr. Moore—admitted without objection from the Tribe—to conclude that instrumented monitoring is required by the Water Quality Monitoring and Protection Plan. AR 655 (CL 20). The Tribe’s failure to

object to the Tornberg Testimony and Moore Testimony (and eliciting of additional testimony) about instrumented monitoring precludes review of Issue 6. *See State v. Mendoza-Solorio*, 108 Wn. App. 823, 834, 33 P.3d 411 (2001); RAP 2.5(a).

**3. The Board Did Not “Usurp” the City’s Function (Issue 7).**

The Tribe complains that the Project was “significantly altered” in the course of the appeal, and that the Board “usurped the City’s role” by making a no net loss determination “for itself.” Tribe Br. at 38-42. In the Tribe’s view, once PSE stipulated to forgo in-water work in the Hylebos Waterway and agreed to additional mitigation at Sperry Dock, it was required to start over with a new SSDP application. This is not the law.

Ecology’s shoreline regulations provide that:

A permit revision is required whenever the applicant proposes substantive changes to the design, terms or conditions of a project from that which is approved in the permit. Changes are substantive if they materially alter the project in a manner that relates to its conformance to the terms and conditions of the permit, the master program and/or the policies and provisions of chapter 90.58 RCW. Changes which are not substantive in effect do not require approval of a revision.

WAC 173-27-100 (emphasis added). Hence, a project need only be returned to the City for “substantive changes” that “materially alter the project.” *Id.*

The Board properly found that the “requirements for a revision under WAC 173-27-100” were not met. AR 658<sup>10</sup> (CL 26). The Project was not materially altered. PSE simply agreed (in response to Tribal concerns) to eliminate the in-water portions of the Project in the Hylebos Waterway. AR 657-58. Moreover, as the City explained, the Hylebos part of the Project “ha[d] not been presented as a core component of the project.” AR 672. Rather, the core “purpose of the project [was] to provide fuel directly to the TOTE facility” and to “provide utility peak shaving.” *Id.* Those core components remain unchanged. This supports the Board’s conclusion that “the changes... prompted by the Stipulation does not meet the requirement for a permit revisions under WAC 173-27-100.” AR 658.

The Tribe argues in a footnote that a “new application is required” under WAC 173-27-100(e) and (f). Tribe Br. at 41 n.19. The regulation provides that the City may approve a revision if it is “within the scope and intent of the original permit,” which is defined to include situations where “(e) The use authorized pursuant to the original permit is not changed; and (f) No adverse environmental impact will be caused by the project revision.” WAC 173-27-100.

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<sup>10</sup> The City reached the same conclusion: “Q. To this point, has anything happened relevant to the SSDP as finalized that triggers the application of WAC 173-27-100 in your view? A. No.” RP (Vol. III at 206).

This provision applies only where City approval is required in the first instance. This is not the case here because “[c]hanges which are not substantive in effect do not require approval of a revision.” *Id.* The core “use” authorized by the Permit— manufacturing and delivery of LNG to vessels— has not changed. Rather, PSE stipulated to *forego* part of the authorized use. The Tribe presented no evidence (and there is none) of an “adverse environmental impact” caused by the revision.

The Tribe’s argument that the stipulation somehow “shifted” the “location of the impacts to be mitigated from primarily the Hylebos to exclusively the Blair,” thereby changing the Project’s “location” and “also its very nature,” is contrary to the record. Tribe Br. at 39. The Tribe’s own witnesses conceded that no Project activity was shifted from the Hylebos to the Blair. RP (Vol. I at 86-87). Planned activities in the Blair remained unchanged as a result of PSE’s stipulation. AR 13-17.

Moreover, the Tribe’s “moving target” argument was rejected in *Port of Seattle*, 151 Wn.2d at 598-99. In *Port of Seattle*, the Pollution Control Hearings Board (“PCHB”) applied the same *de novo* standard to review a water quality certification issued by Ecology. The PCHB limited its *de novo* review to the issues presented to and initially decided by Ecology. It reasoned that otherwise certifications would become ““moving targets,’ making review unmanageable.” *Id.* at 598.

The Washington Supreme Court disagreed, explaining that the Washington Administrative Procedure Act (“APA”) and administrative regulations “call for *de novo* review” which requires the PCHB to “perform an independent review.” *Id.* at 599. It would make no sense (and be contrary to the Washington APA) to allow “a challenger to raise a novel issue,” not presented to the agency “but then prohibit[] Ecology from presenting evidence to rebut the novel claim.” *Id.*

*Port of Seattle* is controlling. Notwithstanding the City’s determination on the adequacy of the existing mitigation, PSE developed and submitted the Revised Mitigation Plan in direct response to “concerns raised by the Tribe.” *See* AR 625-26. The Tribe did not raise its opposition to the work on the Blair until after the City issued the FEIS and SSDP. It then raised the Blair sediment issue for the first time before the Board. It would make no sense to prohibit PSE from responding to the Tribe’s unexpected opposition by presenting post-decisional “plans, reports, and studies.” *Port of Seattle*, 151 Wn.2d at 597-99. The Board’s *de novo* review required it to consider all this evidence and perform an “independent review” of whether the Project complies with SMA. *Id.*

Nothing in this process usurps the City’s role. *See San Juan County*, 28 Wn. App. at 800. In *San Juan County* the court explained, in response to the argument that the Board’s *de novo* review was taking over

the City's role, that the SMA "calls for a planned, rational and concerted effort to be performed by federal, state and local governments to prevent the harm inherent in uncoordinated and piecemeal development." *Id.* To coordinate that effort, the Board is "charged with review of the local decisions to grant or deny a development permit" and "[t]his responsibility necessarily requires that SHB have the power to approve or condition the approval of a permit." *Id.* In so doing, "the administration of the permit system is not thereby removed from the local jurisdiction, but is made to be consistent with the Shorelines Management Act," and the "the power to review a permit decision does not remove from the local jurisdiction the general administration of a permit system." *Id.*<sup>11</sup>

The Tribe cites *Hayes v. Yount*, 87 Wn.2d 280, 552 P.2d 1038 (1976), for the proposition that revisions to a substantial development

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<sup>11</sup> The Tribe cites an unpublished decision in *Spokane County v. Sierra Club*, Civ. No. 47158-2-II, 195 Wn. App. 1042 (August 16, 2016). In *Spokane County* the court "could not conduct a de novo review of Ecology's analysis because Ecology acknowledged it did not perform one." *Id.* at \*11. Here, the City made the required no net loss finding. AR 729. The Board reviewed that finding *de novo* in light of new arguments and evidence. This is precisely what is required by *Port of Seattle*, and is entirely consistent with *Spokane County*.

*Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 760, 954 P.2d 304 (1998), is also inapposite. In that case the Board's legal and factual errors were compounded by a "sua sponte determination . . . that a hotel, a use permitted outright by the zoning, was not a reasonable use of the property." *Id.* No such errors occurred here.

permit needed to be presented to the county. Tribe Br. at 41. The Tribe neglects to mention that the applicable shoreline regulations were *different in 1976*. The former version of WAC 173-27-100 (then WAC 173-14-064) did not have a provision stating that “[C]hanges which are not substantive in effect do not require approval of a revision.” The 1976 regulation stated instead that “[w]hen an applicant seeks to revise a substantial development permit, local government shall request from the applicant detailed plans and text describing the proposed changes in the permit” and that the revision will be approved if it is “within the scope and intent of the original permit.” WAC 173-14-064 (1976 regulation); *see In re Substantial Dev. Permit Issued by the City of Spokane*, SHB No. 214 at \*2, 1976 WL 38798 (July 14, 1976) (providing text of regulation in 1976). Here, the City and Board found that the changes were not significant under the current version of WAC 173-27-100.

Beyond its legal and factual failings, the Tribe’s “usurpation” argument makes no policy sense. The legislature intended that SSDP permits be processed on an expedited basis. *Compare* RCW 90.58.140(2) and (10) (requiring Ecology approval of shoreline conditional use permits, but not SSDPs, thereby expediting SSDP review). The Board’s *de novo* review promotes this goal by allowing challengers of the shoreline permits

to raise new concerns and respondents to meet them by revising mitigation plans or other reports without starting the application process over.

**4. The Tribe Had a Fair Hearing (Issue 8).**

The Tribe's final argument reiterates its complaints about the supposed "shifting" nature of the Project. Tribe Br. at 44-48. This time, the Tribe argues that PSE was "amend[ing] its application on the fly," and in so doing created "an ever-shifting target" that deprived the Tribe of a fair hearing. The Tribe again mischaracterizes the law and the record.

The Board's *de novo* review by definition contemplates that the Project may evolve. *See Port of Seattle*, 151 Wn.2d at 601 (the Board is not only empowered to hear new evidence, "it is well within [its] authority to add conditions" to bring the permit into compliance). The Tribe cannot claim to be prejudiced by the Stipulation that was filed in January 2016, a full six months before the hearing. *See* AR 13-17. The Tribe fully explored the Stipulation in pre-hearing discovery and at the hearing. The City and Board both concluded that the stipulation did not require amendment under WAC 173-27-100. AR 658. The Board specifically cited *Hayes* and found that the PSE application was substantially complete. AR 656-57.

The Tribe's complaint about the revision of the Water Quality Monitoring and Protection Plan is equally meritless. *See Port of Seattle*, 151 Wn.2d at 601. "Instrumented monitoring" is specifically cited in

PSE's SSDP Application, AR 1445, the City's Technical Memorandum evaluating the Project's impacts and mitigation sequencing, AR 395, and the City's SSDP decision, AR 382. The Tribe also raised its concerns that there was no "instrumented monitoring" for pile removal during the deposition of Janet Knox. RP (Vol. V at 46-47). It cannot now complain that PSE responded to Ms. Knox's critique and included instrumented monitoring in the plan, particularly when Mr. Tornberg and Mr. Moore testified about the additional monitoring at the hearing, without objection from the Tribe.

The only "moving target" here is the Tribe's ever-shifting objection to the Project. But that is a matter of the Tribe's own doing. The Tribe could have raised concerns about contamination in the Blair Waterway, about its belief that instrumented monitoring was needed, or any of its other concerns in response to the EIS or at any time during the permitting process. PSE reached out directly to the Tribe by going to the tribal offices, and reaching out by phone, mail, and e-mail, but received no response until just before the EIS publication. RP (Vol. V at 40:3-18; *id.* at 53:18-20).

The Tribe did not comment *at all* during the comment period of the City's SSDP review. On reconsideration of the SSDP, the Tribe raised concerns about the sediment contamination in the Hylebos, not the Blair.

The City and PSE promptly addressed those late-raised concerns. AR 669-82. The Tribe was not satisfied. It then had the opportunity to explore its new concerns about the Blair in discovery and present them to the Board for *de novo* review. The SMA and due process require nothing more.

**D. PSE Is Entitled to Attorney Fees on Appeal.**

The Board's decision correctly interprets the SMA/TSMP and is supported by substantial evidence and should be affirmed. Under RCW 4.84.370(1)(a) and (b), PSE is entitled to and seeks attorney fees on appeal.

**VI. CONCLUSION**

For the foregoing reasons the Board's decision should be affirmed.

DATED this 23rd day of June, 2017.

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**CERTIFICATE OF SERVICE**

I, Sharman D. Loomis, certify:

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 June 23, 2017, I served true and correct copies of the foregoing document, ***RESPONDENT PUGET SOUND ENERGY'S OPPOSITION BRIEF***, on the following persons in the manner listed below:

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

DATED: June 23, 2017 at Seattle, WA.

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