

NO. 49761-1-II

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

THE PUYALLUP TRIBE OF INDIANS,

Petitioner,

v.

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

Respondents.

RESPONDENT PORT OF TACOMA OPPOSITION BRIEF

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I. RESPONDENT PORT OF TACOMA'S RESTATEMENT OF ISSUE.

Should the Court of Appeals Dismiss the Appeal by the Puyallup Tribe of Indians where the Tribe Lacks Standing? **YES.**¹

II. INTRODUCTION/RESTATEMENT OF FACTS

The Port adopts the statement of facts as set forth in Respondent Puget Sound Energy's ("PSE") Opening Brief.

III. ARGUMENT AND AUTHORITY

A. Tribe's Dearth of Proof of Actual Injury Robs Tribe of Standing

Appellant Puyallup Tribe of Indians ("Tribe") spent significant time before the Shoreline Hearings Board ("Board") raising the specter of contamination in the Blair waterway and alleging potential adverse impacts. Yet, virtually all of Appellant's testimony and exhibits spoke to yet unknown and potential impacts, with no evidence of an immediate, concrete, and specific injury on any front. This omission is fatal, as without evidence of an immediate, concrete, and specific injury, the Tribe lacks standing. "If the injury is merely conjectural or hypothetical, there can be

¹ Pursuant to RAP 10.3(g), the Port assigns error to the Board's Findings of Fact 6 and 7 as insufficient to establish standing (CP 607-608) and Conclusions of Law 6, 7 and 8, the Board's ruling on standing. (CP 638-640).

no standing.²

B. Standing Is Jurisdictional; Proper to Raise on Appeal.

Standing is a jurisdictional issue that can be raised at any time. *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 212 n.3, 45 P.3d 186, 188 (2002).

Facts establishing standing are as essential to a successful claim for relief as is the jurisdiction of a court to grant it. Thus, Courts have held that the insufficiency of a factual basis to support standing may also be raised for the first time on appeal in accordance with RAP 2.5(a)(2). *Mitchell v Doe*, 41 Wn. App. 846 (Wash. Ct. App. 1985).

“Although Airport raised the standing issue as an affirmative defense in its answer to Union's complaint, it failed to assert it on summary judgment. The Court of Appeals, however, correctly observed that standing is a jurisdictional issue that can be raised for the first time on appeal”. *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 212 n.3, 45 P.3d 186 (2002).

Standing is a jurisdictional issue. *CORE v. Olympia*, 33 Wn. App. 667, 683-84 (1983). Standing is a constitutional doctrine

² *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117,129,272 P.3d 876,883 (2012) citing *Trepanier v. Everett*, 64 Wn. App. 380, 383, 824 P.2d 524, 525 (1992) emphasis in the original.

designed to assure that the plaintiff has a direct stake in the controversy. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973), as quoted in *Trepanier v. City of Everett*, 64 Wash.App. 380, 824 P.2d 524 (Wash.App. Div. 1 Feb 24, 1992), review denied, *Trepanier v. City of Everett*, 119 Wash.2d 1012, 833 P.2d 386 (Wash. Jun 03, 1992).

It is obvious that courts cannot resolve every issue which may be raised by a litigant. As a consequence, guidelines have been adopted by statute and through common law which limit access to the judicial process. This is not to say that concerned citizens are foreclosed from challenging state and other governmental actions through the appropriate administrative, legislative, or political process. It must be recognized, however, that courts cannot be open to every citizen's objection to every action of our governmental representatives in the legislative or executive branches of government. Consequently, the rules of standing have been promulgated by the legislatures and the courts to regulate access

Coughlin v. Seattle School District, 27 Wn App. 888, 621 P2d 183, (1980). *Emphasis provided.*

Standing is a constitutional doctrine designed to assure that the plaintiff has a direct stake in the controversy. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973), as

quoted in *Trepanier v. City of Everett*, 64 Wash.App. 380, 824 P.2d 524 (Wash.App. Div. 1 Feb 24, 1992), review denied, *Trepanier v. City of Everett*, 119 Wash.2d 1012, 833 P.2d 386 (Wash. Jun 03, 1992).

The Appellant, here the Tribe, bore the burden of proof to establish standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L. Ed. 2d 351 (1992). *Coalition to Protect Puget Sound Habitat v. Thurston County*, SHBNo. 13-006c (Order on Motions, Aug. 6, 2013) citing *Center for Environmental Law & Policy v. Ecology*, PCHBNo. 96-165 (1997). The Tribe failed to do so.

C. Tribe Meets Only Half of the Two Part Standing Test.

Courts apply a two-part test in determining whether person or entity has standing (1) the interest that appellant is seeking to protect must be arguably within zone of interests to be protected or regulated by statute; and (2) appellant must establish injury in fact, i.e., that he or she will be specifically and perceptibly harmed by proposed action. *Trepanier v. City of Everett*, 64 Wash.App. 380, 824 P.2d 524, Wash.App., 1992.

The Port concedes that as to the first prong, the Tribe is "within the zone of interests to be protected or regulated by the

statute or constitutional guarantee in question'. " *Save a Valuable Env't v. Bothell*, 89 Wash.2d 862, 866, 576 P.2d 401 (1978) (quoting *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970)). But more is required.

D. Tribe Fails to Establish the 2nd Standing Prong Which Requires "Injury In Fact".

To have standing, the Tribe must also show a specific "injury in fact," i.e., that it will be "specifically and perceptibly harmed" by the proposed action. *Save a Valuable Env't*, 89 Wash.2d at 866, 576 P.2d 401; *Concerned Olympia Residents v. Olympia*, 33 Wash.App. 677, 683, 657 P.2d 790 (1983); *Coughlin v. Seattle Sch. Dist. No. 1*, 27 Wash.App. 888, 621 P.2d 183 (1980).

It is not enough to generalize an alleged injury. Here the lack of proof at hearing of any actual injury means that this Court should find that the Tribe has not met its required standing burden.

In order to show injury in fact, the Tribe must present facts that show it will be adversely affected by the Shoreline Substantial Development Permit ("SSDP"), and provide "sufficient evidentiary facts to indicate that he will suffer an 'injury in fact' ". *Concerned Olympia Residents*, 33 Wash.App. at 683, 657 P.2d 790. "Standing ...requires the plaintiff to allege and prove facts that show a direct

adverse effect on her from the proposed action." *Leschi Improvement Council v. State Highway Comm'n.*, 84 Wn.2d 271, 525 P.2d 774 (1974).

In the present matter, Appellant Tribe asserted only unsupported "potentials:"

- According to the Tribe.... the City should have required PSE to perform sediment testing in the Project footprint before engaging in any in- water construction. Absent that information, it is possible that contaminants in the sediments could be disturbed during construction and entrained in the water column. Cherry Testimony; Knox Testimony. The Tribe also asserted that the Project is likely to have adverse impacts on water quality in violation of the TSMP. *Knox Testimony*³.
- In Ms. Knox's opinion, the potential adverse impacts of the Project had not been fully evaluated and it was likely that there will be adverse impacts to sediments, surface water and stormwater. *Knox Testimony*.⁴
- As for stormwater, Ms.Knox opined that it was likely that stormwater from the construction site will be contaminated and will add to existing contaminated stormwater discharged into Commencement Bay.⁵
- According to [Tribe Expert] Mr. Cherry, **if** the sediments are contaminated, the extraction and installation of piles, as well as the presence of the new piles, **could** result in the mobilization and redistribution of those contaminants. ⁶

³ Board Decision at Para 28, CP 620.

⁴ Board Decision at Para 29, CP 620-621.

⁵ Board Decision at Para 31, CP 621-622.

⁶ Board Decision at Para 32, CP 622.

- According to Mr. Deshler, shading has the potential to reduce prey species and plants they feed on. Shading may also create a barrier to migration of juvenile salmonids as they do not like to travel under large, shaded structures.⁷

The Board found no evidence supported the Tribe's "potentials:"

- None of the contaminants identified by Ms. Knox exceeded her selected screening levels in the vicinity of the proposed pile removal and installation work at the TOTE facility on the Blair Waterway. Id.⁸
- The Board finds that the evidence presented did not establish the presence of sediment contamination at the TOTE facility or demonstrate that the measures PSE is required to implement during in-water construction will not protect water quality and anadromous fish.⁹
- The Board finds that the SSDP requires PSE to implement measures during construction that are protective of water quality and anadromous fish.¹⁰
- Finally, the evidence established that the zero discharge of stormwater during construction and upgrading the existing stormwater system currently discharging to the Hylebos Waterway will serve to protect surface water and improve the quality of the post-construction stormwater discharge.¹¹
- The Board finds that the evidence presented establishes that the removal of creosote-treated materials will benefit surface water quality and salmonid habitat by removing a source of contamination¹².
- The Board finds that the record contains substantial evidence that the Revised Mitigation Plan adequately

⁷ Board Decision at Para 42, CP 628.

⁸ Board Decision at Para 30, CP 621.

⁹ Board Decision at Para 40, CP 626.

¹⁰ Board Decision at Para 41, CP 627.

¹¹ Board Decision at Para 41, CP 627.

¹² Board Decision at Para 50, CP 631.

compensates for the impacts of the Project and achieves no net loss of ecological functions.¹³

- Finally, the Board finds that in addition to the compensatory mitigation, the SSDP's conditions requiring that PSE use BMPs and a fish window for its in-water work satisfied the TSMP's requirement to give special consideration to the preservation and enhancement of anadromous fish habitat. TMC 13.10.6.4.4.B¹⁴

The Tribe's mere allegations of potentials are insufficient to establish standing. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i. e., with the manner and degree of evidence required at the successive stages of the litigation. See *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-889 (1990); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 114-115, and n. 31 (1979); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *supra*, at 527, and n. 6 (Brennan, J., dissenting).

The US Supreme Court in the *Lujan* case¹⁵ describes the varying levels of proof necessary to support standing criteria, as a case progresses:

¹³ Board Decision at Para 51, CP 632-633.

¹⁴ Board Decision at Para 51, CP 632-633.

¹⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation*, supra, at 889.

In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true.

And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." *Gladstone*, supra, at 115, n. 31.

Here, the Tribe produced lots of speculation, but no evidence of "actual injury" at the Shoreline Hearings Board hearing. The US Supreme Court dictates that standing is not "an ingenious academic exercise in the conceivable," *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973), but requires, at the summary judgment stage, a factual showing of perceptible harm, which was missing here.

Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied." *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221-227 (1974) at 221-222.

And, here, the Tribe is not the focus of the permitting action. It is a party by virtue of its choice to appeal the PSE permit. CP 603. This heightens the Tribe's requirement to establish standing. "When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed..." *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.); see also *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, at 41-42 (1976) .

Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish. *Allen v. Wright*, 468 U.S. 737, 751 (1984) at 758; *Simon, supra at at 41-42v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976), at 44-45; *Warth, supra*, at 505.

Further, here, no individual Tribal member filed appeal. CP 603. Instead, the Tribe filed as the collective voice for its members. This does not relieve the Tribe from the requirement to establish an injury in fact. Even in the absence of injury to itself, an association may have standing solely as the representative of its members. E. g.,

National Motor Freight Assn. v. United States, 372 U.S. 246 (1963). The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy. See *Sierra Club v. Morton*, 405 U.S. 727 (1972). Missing here, the association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justifiable case had the members themselves brought suit. *Id.*, at 734-741.

E. Board Erred in Finding Tribe Met the “Injury Prong”.

The Board erred when it found both prongs of the standing test had been met¹⁶. The facts articulated by the Board go only to the first standing prong, i.e., whether the Tribe is "'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question' ". *Save a Valuable Env't v. Bothell*, 89 Wash.2d 862, 866, 576 P.2d 401 (1978) (*quoting*

¹⁶ CP 638-9. Board Decision at Conclusion of Law, Para 6; “The Tribe presented evidence establishing a significant and active interest in maintaining and improving the environmental health of Commencement Bay in general and the Hylebos and Blair Waterways in particular. Naylor Testimony, Ladley Testimony. The Project site is within the Tribe’s usual and accustomed treaty area. *Id.* The Tribe is actively engaged in mitigation and habitat restoration projects in Hylebos Creek, the Hylebos Waterway, and Wapato Creek. 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”.

Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970)). The Board's reference to the Tribe having "a significant and active interest in maintaining and improving the environmental health of Commencement Bay" establishes only that the interest that Appellant Tribe is seeking to protect is arguably within zone of interests to be protected or regulated by statute. The Port does not contest that this first half of the test is met. But the Tribe failed to show any specific, actual injury, even at the conclusion of its case before the Board, and thus lacks standing. " ... the plaintiff must have suffered an "injury in fact" an invasion of a legally protected interest which is (a) concrete and particularized, see *id.*, at 756; *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-741, n. 16 (1972);^[1] and (b) "actual or imminent, not `conjectural' or `hypothetical,' " *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) at 155 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983))".

F. Mere Allegations of Possible Injury Is Not Enough.

When, as here, a ***threatened*** injury is merely alleged, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to him or herself. *Roshan v. Smith*, 615

F.Supp. 901, 905 (D.D.C.1985). Emphasis added. If the injury is merely conjectural or hypothetical, there can be no standing. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89, 93 S.Ct. 2405, 2416-17, 37 L.Ed.2d 254 (1973). In order to invoke the inherent power of the courts to review non-judicial administrative action which violates fundamental rights, a plaintiff must show that he is or will be directly and perceptibly harmed by the challenged action. *Coughlin v. Seattle School District*, 27 Wn App. 888, 621 P2d 183, (1980) (appeal alleging failure to require EIS as error dismissed based on lack of standing).

The Washington Supreme Court has expressly adopted the federal approach to standing in environmental cases and has required the allegations and proof to include "injury in fact," i.e., a perceptible present or future harm caused by the challenged action. *Save A Valuable Environment v. Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978); *See also Moran v. State*, 88 Wn.2d 867, 568 P.2d 758 (1977). The proof is insufficient if it merely reveal imagined circumstances in which the plaintiff could be affected.

Here, the Tribe's evidence of actual injury at hearing was limited to conclusory statements of concern, and failed completely

to prove any actual injury. Courts reject this.

Bare assertions that the SSDP will likely create serious adverse impacts should be disregarded because they have absolutely no factual support in the record. *Concerned Olympia Residents*, 33 Wash.App. at 683-84, 657 P.2d 790 (plaintiff's bald assertion of injury is insufficient to support standing absent evidentiary facts to support it); see also *Roshan*, 615 F.Supp. at 907, and *Trepanier v. City of Everett*, 64 Wash.App. 380, 824 P.2d 524 (Wash.App. Div. 1 Feb 24, 1992), *review denied*, *Trepanier v. City of Everett*, 119 Wash.2d 1012, 833 P.2d 386 (Wash. Jun 03, 1992). ("Trepanier's [standing] argument is fatally flawed because his bare assertion that the new code will likely create serious adverse impacts on unincorporated Snohomish County has absolutely no factual support in the record.")

Even liberally applying the injury test, Appellant Tribe failed to establish injury. "To show an injury in fact, the plaintiff must allege specific and perceptible harm." *Suquamish Indian Tribe v. Kitsap County*, 92 Wash. App. 816, 829, 965 P.2d 636 (1998). The "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself (or herself) among the injured. *Lujan v. Defenders of Wildlife*, 504

U.S. 555, 563, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). A party asserting general enforcement of a statute does not have standing unless he or she is “perceptibly affected by the unlawful action in question.” *Id.* at 566. Moreover, no standing is conferred to a party alleging a conjectural or hypothetical injury. *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wash. App. 44, 53, 882 P.2d 807 (1994).

Because Appellant Tribe did not and cannot now present any supporting evidence of its claims, the allegations of significant adverse impacts to are merely speculative. *Concerned Olympia Residents*, 33 Wash.App. at 683-84, 657 P.2d 790 (plaintiff’s bald assertion of injury is insufficient to support standing absent evidentiary facts to support it); see also *Roshan*, 615 F. Supp. at 907. Appellant Tribe showed no injury in fact; the Appeals Court should find the Tribe lacks standing and the appeal should be denied.

G. Port Endorses, Joins in and Adopts by Reference Fellow Respondents’ Analysis.

The Port endorses, joins in and adopts by reference the Issues and Arguments Raised by fellow Respondents PSE and City

of Tacoma.¹⁷

H. Port Should Be Awarded Fees & Costs.

Under RCW 4.84.370(1)(a) and (b)¹⁸, the Port is entitled to and seeks attorney fees on appeal, as the Port was one of the prevailing parties before the Shorelines Hearings Board.

IV. CONCLUSION

The Tribe failed to establish injury at hearing, thus lacks standing. Standing is a jurisdictional. This Court should find that it and the Board below lacked jurisdiction, and should deny the appeal.

¹⁷ The Port joined with fellow Respondents and briefed the full range of substantive issues before the Board. CP 570-588. Rather than be duplicative of Tacoma and PSE's analysis on appeal, the Port adopts that analysis by reference and briefs the additional standing issue.

¹⁸ RCW 4.84.370 Appeal of land use decisions—Fees and costs.

- (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
- (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and
- (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.
- (2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

RESPECTFULLY SUBMITTED this 24th day of July 2017.

GOODSTEIN LAW GROUP PLLC

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Attorneys for Respondent Port

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

| | |
|--|---|
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DATED this 24th day of July 2017, at Tacoma, Washington.

s/Carolyn A. Lake
Carolyn A. Lake

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