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STATE OF WASHINGTON
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No. 47717-3-H
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DARRELL de TIENNE and CHELSEA FARMS, LLC,

Appellants,

v.

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

Respondents.

RESPONDENT COALITION TO PROTECT PUGET SOUND
HABITAT'S ANSWERING BRIEF

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I. INTRODUCTION

This appeal by Appellants de Tienne and Chelsea Farms, LLC (“Appellants” or “de Tienne”) challenges a decision by the Washington State Shorelines Hearings Board (“SHB” or “Board”), in which the SHB properly concluded that the Shoreline Substantial Development Permit (“Permit”) issued by Pierce County to construct and operate a large, five-acre industrial geoduck farm on the shoreline of Henderson Bay in Pierce County (“Farm Site”), should be denied. The SHB properly concluded that de Tienne provided insufficient evidence to demonstrate that the farm could exist on the site without net loss of eelgrass and ecological function. The SHB further properly concluded that the Permit failed to offer adequate protection for eelgrass and was therefore inconsistent with the Shoreline Management Act (“SMA”), and its implementing regulations, and with the Pierce County Shoreline Master Program (“SMP”), and that a cumulative impacts analysis should have been performed prior to approval of de Tienne’s proposed aquaculture operation.

II. RESPONSE TO ASSIGNMENTS OF ERROR

The SHB decision should not be voided because of the delay in issuance. Findings of Fact (“FOF”) 6-10, 13-22, 25-29, 31-39, 41-48,

and 50-58, 62, 63, 73, and 79, and Conclusions of Law (“COL”) 8, 9, 11, 14, 16-27 were not in error, are supported by substantial evidence in the record as a whole, and are consistent with applicable law.

III. COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the SHB’s issuance of its decision within 210 days from the date Respondents Garrison/Coalition filed their Petitions for Review with the SHB renders them *ultra vires* and void?

2. Whether the SHB erroneously interpreted and applied the law in concluding that the Pierce County decision to issue the Permit was not consistent with the SMA because: (1) it lacked adequate protection for eelgrass as a fragile aquatic resource; (2) there was a lack of appropriate balance of statewide interests; (3) there was a need for a cumulative impacts analysis given the Farm Site’s location on “a shoreline of statewide significance;” and (4) it was the SHB’s first opportunity to consider the potential impacts of a larger, 5+-acre geoduck farm where extensive, but fragile resources, including eelgrass, were present, where the proposed farm would be the first of its kind operating in an area where minimal aquaculture already exists, where unauthorized practices impacted fragile marine resources through prior harvesting activities, where farm

operations pose a potential harm to habitat and loss of community recreational use, and where additional projects have either been approved, proposed, or are likely to be proposed, including at least one similar project?

3. Whether, in denying the Permit, the SHB's finding that a cumulative impacts analysis was warranted, was consistent with applicable law and is supported by substantial evidence?

4. Whether the SHB properly interpreted Pierce County Code ("PCC") 20.24.020(A)(10)?

5. Whether the SHB erred in applying a "no net loss" standard?"

IV. COUNTERSTATEMENT OF THE CASE

A. Relevant Background and Facts.

In the early 2000's, de Tienne entered into his first agreement to operate an industrial-scale, commercial shellfish on his Henderson Bay waterfront property. The farm was operated without required shoreline permits and found to have violated state law and Pierce County Code provisions by "working or allowing work to be done in eelgrass beds without authorization," causing substantial ecological destruction of the shoreline, and was ultimately the subject of a "Cease and Desist" order issued by the

County. Ex. 142l, AR 2089. The illegally operated farm caused extensive damage to eelgrass beds from which it has yet to recover. Tr. 104:7-120:7; 188:1-194:12; Ex. 142 (AR 2124-25); Ex. 128 (AR 1884-1897). Recovery may take decades. AR 1906. Recognizing the still-increasing commercial demand for geoduck, de Tienne then partnered with another entity, Chelsea Farms, LLC, to construct and operate another geoduck farm on his property in July 2005. Tr. 836:18-25. The property includes extensive eelgrass beds (Ex. 7 (AR 1066-67)), and is considered critical habitat for eelgrass. Tr. 700:1-3. While most of the proposed farm will be located in a subtidal area, some will be farmed within intertidal habitat. AR 2282-83. De Tienne owns four other parcels, including intertidal parcels right next to the proposed farm which can be approved for farming administratively without any additional hearings. Tr. 857:1-861:6, 868:7-19. Importantly, the bulk of the farm has been designated "a shoreline of statewide significance." Tr. 99:18-100:71.

De Tienne's assertion that the application was subjected to eight years of rigorous review is false. In reality and as the record reflects, concerned citizens and neighbors, understandably fearful about the consequences of a large geoduck farm on the fragile

shoreline ecology and on their quality of life, objected. De Tienne asked the County to put his application on hold in the Spring of 2006 following a “tidal wave of public outcry with regard to geoduck farms” while the legislature and Sea Grant went forward with further research studies regarding them. That research is still ongoing. Ultimately, because it became evident that “the research was going to take awhile to work itself out,” the application started to move forward. Tr. 837:11-839:1. In the March 2013 Staff Report for the project prepared by the County for the Permit for de Tienne’s proposed geoduck farm, Staff recommended a 2’ vertical buffer on the water side between farm activities and the eelgrass beds. *See* AR 2337 (Condition 26C(1)). This protective buffer was a critical component of the conservation measures used in issuing the Mitigated Determination of Nonsignificance (“MDNS”) for the Farm Site under the State Environmental Policy Act (“SEPA”). Tr. 825:3-828:7. The 2’ vertical buffer standard for eelgrass protection was proposed by de Tienne dating back to his submission of his consultant’s Habitat Assessment Study in 2009. AR 1108, 2223. That buffer width was derived from the only assessment ever performed for subtidal geoduck operations – a 2001 Washington Department of Natural Resources (“WDNR”) and Department of Fish

& Wildlife (“WDFW”) Supplemental Environment Impact Statement (“SEIS”). Tr. 122:18-123:20; Ex. 7, AR 1197-1210. That SEIS was a “notable” study, relied upon by Pierce County in issuing the MDNS for de Tienne. Tr. 820:20-821:24. A 2’ vertical separation waterward buffer to protect eelgrass equates to an estimated 180’ horizontal buffer for gently sloping substrate such as is present on the Farm Site). Tr. 822:1-8; AR 1201. This was especially appropriate because this was the very first subtidal geoduck farm in the County. Tr. 869:1-13. The 2’ vertical eelgrass buffer was an integral part of de Tienne’s 2011 Biological Evaluation (“BE”) prepared for the Site (AR 2553, 2559), and was reflected in the Pierce County Staff Report prepared for the Hearing (AR 2337). Prior Pierce County aquaculture SSDPs included a 180’ buffer to protect eelgrass. Tr. 803:15-804:18; Ex. 142d.

Without any additional public input and subsequent to the issuance of the Habitat Assessment Study, the SEPA/MDNS, the BE, and the Staff report, a Pierce County Hearing Examiner reduced the 2’ vertical buffer to a horizontal 25’ waterward edge without any demonstration that the huge reduction was scientifically justified or approved by the appropriate public oversight agencies.

Other protective eelgrass conditions in the Staff Report/MDNS were also discarded by the Hearing Examiner, all based upon the County's acquiescence to de Tienne's desire to increase cultivable acreage. Tr. 847:18-848:2; 964:1-24. On appeal by the Coalition, the SHB reversed that decision and denied the Permit, making extensive Findings of Fact ("FOF") in support of its Conclusions of Law ("COL"). AR 956-1018. The SHB determined that an enormously reduced eelgrass buffer could not be justified, and in the absence of clear evidence of a more appropriate standard, concluded that the Permit should be denied. Further, the SHB concluded that given the proliferation of geoduck farms in the same vicinity (Tr. 839:7-840:17, 842:6, 844:7), the fact that this was the very first subtidal geoduck farm in Pierce County (Tr. 869:1-13), that it was situated on "a shoreline of statewide significance," and, as the Pierce County officials testified, would serve as a precedent for future decisions (Tr. 934:8-25), a cumulative impacts assessment needed to be performed.

De Tienne then appealed, initially contending that there were procedural errors that should serve to nullify and invalidate the SHB's decision. Those arguments were rejected by the Superior Court. Now, de Tienne again challenges the Board decision, both

procedurally and substantively. Fortunately for the Respondents and all other citizens concerned about the environmental consequences of the rapid expansion of commercial, industrial-scale geoduck farming in south Puget Sound, the SHB's decision is supported by substantial evidence and is fully consistent with applicable law, including the Pierce County *SMP and SMA*, which recognize the primary importance of protecting statewide interests and the natural character of the shoreline over the parochial profit-minded interests of developers. Therefore, the SHB decision should be affirmed in all respects.

B. Overview of the SMA and the SMP.

This is a case decided under the SMA. RCW 90.58.020 sets forth the legislative findings and state policy and use preferences:

The legislature finds that the shorelines of the State are among the most valuable and fragile of its natural resources and that there is great concern throughout the State relating to their utilization, protection, restoration, and preservation....

* * * *

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. The Department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, should give preference to uses in the following order:

- (1) Recognize and protect the statewide interest over local interest;

- (2) Preserve the natural character of the shoreline;
- (3) Result in long-term over short-term benefits;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shoreline;
- (6) Increase recreational opportunities for the public in the shoreline;
- (7) Provide for any other element as defined in RCW90.58.100 deemed appropriate and necessary.

* * * *

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

RCW 98.58.020 (emphasis added).

Importantly, RCW 90.58.900 provides that "this chapter is exempted from the rule of strict construction and it shall be liberally construed to give full effect to the objectives and purposes for which it was enacted."

To effectuate this concerted effort, the SMA establishes a "cooperative program of shoreline management between local government and the State." RCW 90.58.050; *see also* RCW 90.58.020. Under this framework, the State, through the DOE, works closely with local governments to implement master programs for governance of shoreline development consistent with the goals and policies of the SMA. *See generally* RCW 90.58.080-090.

The relevant provisions from the County SMP are found at PCC 20.24.020(A)(3) and (10):

(3) Aquacultural operations shall be conducted in a manner which precludes damage to specific fragile areas and existing aquatic resources. These operations shall maintain the highest possible levels of environmental equality and compatibility with native flora and fauna.

* * * *

(10) Shoreline areas having the prerequisite qualities for aquacultural uses shall have priority in order to protect Pierce County's aquacultural potential.

The SMP and local shoreline development must be consistent with the SMA which authorizes its adoption. *Bellevue Farm Owners Ass'n. v. SHB*, 100 Wash. App. 341, 350 (2000), *rev. denied*, 142 Wash.2d 1014, 16 P.3d 1265 (2000); *Ritchie v. Markley*, 23 Wash. App. 569, 598 P.2d 449 (1979); *Snohomish Co. v. State*, 97 Wash.2d 646, 649, 648 P.2d 430 (1982); AGO 1988 No. 24; AGO 2007 No. 1.

V. STANDARD OF REVIEW

De Tienne sets forth generally the applicable standard of review set forth in RCW 34.05.570(3)(a)-(i).

On review of administrative FOF, the Court will not substitute its judgment on witness's credibility or the weight to be given conflicting evidence. *W. Ports Transp., Inc. v. Emp't Sec. Dept. of State of Wash.*, 110 Wash. App. 440, 41 P.3d 510 (2002). "Where there is

room for two opinions, an action is not arbitrary or capricious so long as it is undertaken honestly and upon due consideration, even if the reviewing court disagrees with it. *Overlake Fund v. SHB*, 90 Wash. App. 746, 754 (1998). “The burden of demonstrating the invalidity of agency action is on the party asserting invalidity; and the court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.” RCW 34.05.570(1)(a), (d). With respect to evidentiary rules, judicial review is confined to the Agency record. RCW 34.05.558.

The SMA gives the SHB jurisdiction over “the granting, denying, or rescinding of a Permit on shorelines of the State.” RCW 90.58.180(1). The SHB then conducts a *de novo* review of the County’s action. Because of the specialized expertise of the SHB, this Court accords deference and gives substantial weight to the SHB’s interpretation of the SMA. *P.T. Air Watchers v. DOE*, 179 Wash.2d 919, 926-27 (2014).

The SHB may use policy statements of the local SMP to interpret shoreline development regulations that were applicable to the Permit at issue. *Concerned Neighbors for East Bay Drive v. City of Olympia*, SHB No. 08-036 (2009). The goals, policies, and objectives

section of the local SMP should be used to aid in the interpretation of the development regulations contained within the SMP. *Richter v. City of Des Moines*, SHB No. 10-013 (Order on Partial Summary Judgment, Dec. 7, 2010) (Analysis § B).

VI. ARGUMENT

A. **The SHB FOF, COL, and Decision Should Not Be Voided Because of the Delay in Issuance.**

RCW 90.58.180(3) provides as follows:

The review proceedings authorized in subsections (1) and (2) of this section are subject to the provisions of Chapter 34.05 RCW pertaining to procedures in adjudicated proceedings. Judicial review of such proceedings of the Shoreline Hearings Board is governed by Chapter 34.05 RCW. The Board shall issue its decision on the appeal authorized under subsections (1) and (2) of this section within one hundred eighty days after the date the petition is filed with the Board or a petition to intervene is filed on the Department or the Attorney General, whichever is later. The time period may be extended by the Board for a period of thirty days upon a showing of good cause or may be waived by the parties.

De Tienne contends the decision of the SHB is void because it was not issued within 180 days of the filing of the first of three Petitions for Review, the Garrison Petition for Review, filed on June 11, 2013. De Tienne further argues that, regardless of whether that 180-day period was extended for good cause by thirty days, the ensuing failure to issue the opinion within 210 days (180 days + 30-day extension) serves to invalidate the SHB's decision. The

Coalition submits that de Tienne's argument is without merit. The Coalition incorporates by reference the Argument contained within the brief of Respondent Shoreline Hearings Board on this issue.

1. The Statutory Deadlines are Directory, Not Mandatory.

Washington courts have found that language similar to RCW 90.58.180 expresses a legislative concern for prompt performance of quasi-judicial functions of agencies, but does not impose a jurisdictional requirement. *Giles v. Dept. of Social and Health Services*, 90 Wash.2d 457, 583 P.2d 1213 (1978); *Washington State Liquor Control Bd. v. Washington State Personnel Bd.*, 88 Wash.2d 368, 561 P.2d 195 (1977). In *Giles*, an employee contended that the State Personnel Appeals Board lost jurisdiction over him by failing to hold a hearing within thirty days of his appeal. RCW 41.06.170(2) stated that an appeal "shall be heard by the board within thirty days of its receipt." The Court held that the thirty-day hearing requirement was discretionary, and "in the absence of a showing of prejudice caused by the delay," the failure of the Board to hear the case within thirty days did not deprive it of jurisdiction. *Id.* at 460. "The important point is that the employee be assured the right of appeal." *Id.* "To have treated the provision as mandatory would have denied the employee a legislatively

mandated right of appeal through no fault of the employee.” *Id.* Likewise, in this case, to treat the 180-day statutory deadline of RCW 90.58.180 as mandatory, would deny the Coalition its legal recourse through no fault of its own.

In *Liquor Control Bd., supra*, the Court found that statutory time limits for the State Personnel Board’s hearing an appeal and rendering a decision were neither mandatory nor jurisdictional, although each of the statutory time limits was introduced by the word “shall.” In analyzing whether a statute containing the word “shall” is directory rather than mandatory, the Washington Supreme Court has stated:

A statute specifying the time within which a public official is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the officer.

State v. Miller, 32 Wash.2d 149, 155, 201 P.2d 136 (1948), *quoting* J. Sutherland, *Statutory Construction*, § 5816 at 102 92d ed. 1943).

More recently, the Court noted that this principle still stands and cited Sutherland as follows:

The directory character of a statute may likewise be indicated by the purpose of a statute and the manner in which its purpose is expressed. Thus it was said: “Where words are affirmative, and relate to the manner in which the power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they

may and often have been construed as directory....” Likewise, where the time or manner of performing the act directed by the statute is not essential to the purpose of the statute, provisions in regard to time or method are generally interpreted as directory only.

Niichel v. Lancaster, 97 Wash.2d 620, 623-24, 647 P.2d 1021 (1982), quoting 1A C. Sands, *Statutory Construction*, § 25.04 (4th ed. 1972) (footnotes omitted).

An analysis of RCW 90.58.180 applying the principles cited above shows that the 180-day time period for issuing written decisions is directory rather than mandatory or jurisdictional. The language of the statute is affirmative and relates to the procedural manner in which decisions shall be written, entered, and served. It does not purport to limit an agency’s statutory power or jurisdiction, but deals with the manner in which power shall be exercised.

The SHB’s extension of the decision past the 180-day directed period and thirty-day extension did not materially affect any party. For this reason *and because* the statute should be read as directory and not mandatory, the SHB never lost jurisdiction over this matter.

2. The SHB’s Decision Was Timely Issued.

Here, the holder of the Permit, de Tienne, received a ruling from the SHB within 210 days of the filing of their Petition for

Review. Importantly, it is the SHB itself “on its own motion” that has the authority “to extend the 180-day deadline for issuing its decision for thirty days after determining that good cause exists for the extension.” See WAC 461-08-560(3). That extension of thirty days is not only made by the SHB itself on its own motion, but it, by its terms, can only be made after the SHB itself “determines that good cause exists for the extension.” *Id.* The Coalition submits that the decision by the SHB, which expressly references the SHB’s ability to extend the date for cause for no more than thirty days, ***necessarily and implicitly*** was made upon a determination that good cause existed for the extension. Accordingly, any argument that a thirty-day extension of the 180-day decision deadline was not appropriate should be rejected.

The Coalition also submits that the right to challenge a decision of an administrative agency like the SHB for failure to timely issue a decision regarding a Petition for Review should be personal to the party whose Petition for Review was at issue. See *Olympians for Public Accountability v. Dept. of Ecology and Port of Olympia*, 2010 WL 1920560 (May 7, 2010), at p. 3.

Here, it is noteworthy that the Petition for Review filed by the appealing parties, de Tienne, was not filed with the SHB until

June 28, 2013. The SHB's decision was filed within the 210-day extension period (January 22, 2014 from the filing date of de Tienne's Petition for Review. The allotted statutory period for issuing a decision applicable to the Petition for Review filed by de Tienne would not have expired until January 25, 2014. Accordingly, de Tienne should not be heard to complain.

Second, the statutory language at issue, RCW 90.58.180(3), is ambiguous as to when the 180-day period is to commence in the context of an appeal involving multiple Petitions for Review. It contemplates only a single Petition for Review being considered by the SHB, and expressly extends that period for the SHB to issue its decision if there is a motion to intervene filed by Ecology or the Attorney General, "whichever is later." This strongly suggests that it was the legislative intent to have that 180-day period commence only when all of the parties to the appeal before the SHB were established. Here, there were three separate Petitions for Review filed, and the third and final one (filed by the de Tienne) was not filed until June 28, 2013. Coupled with the 30-day extension expressly allowed by the statute "upon a showing of good cause" - which the Coalition submits occurred here - the Court should conclude the SHB's decision was timely issue in this complicated

case, which resulted in the issuance of a 54-page decision; and where there was also an earlier summary judgment motion regarding the procedural defense raised by Pierce County. The SHB timely notified the parties of the need for delays in issuing its decision. There were no objections from any party, including de Tienne. Under such circumstances, the Coalition submits that the SHB's decision was issued on a timely basis and was consistent with the legislative intent to have the time period commence from the date of the filing of de Tienne's Petition for Review.

Like RCW 90.58.180(3) which directs the SHB to issue its decision within 180 days "after the date the Petition is filed with the Board," WAC 461-08-560(1) also makes it clear that the 180-day period for issuance of a decision is to commence on "***the date the Petition for Review is filed.***" In other words, only a single Petition for Review was contemplated to be filed. In the present circumstance, there were three separate Petitions for Review filed and then consolidated, and de Tienne filed their Petition for Review last. The 180-day period should therefore be interpreted to commence ***upon the filing date of the last Petition for Review.*** Significantly, RCW 36.70A.300(2)(a), unlike the statutory language pertaining to the SHB, recognizes that in certain circumstances,

more than one Petition for Review would be filed: “[I]f multiple petitions are filed, [then the SHB is to issue its decision] within 180 days of receipt of the last petition that is consolidated....” Coupled with a 30-day extension which the SHB was entitled to grant itself under RCW 90.58.180(3), its ruling should be considered timely, just as it would be were it to be a decision issued by the Growth Management Hearings Board that was being considered.

B. The SHB Did Not Erroneously Interpret or Apply the Law Regarding Eelgrass Buffers.

1. The SHB Did Not Erroneously Disregard Critical and Uncontroverted Testimony.

De Tienne contends that the SHB committed clear legal error regarding the minimal buffer for eelgrass set forth in the proposed Permit, citing ER 702, 703, and 705 as legal authority for the novel proposition that the SHB was obligated to accept certain testimony that he claims – falsely -- was uncontroverted. Those Rules of Evidence regarding testimony by experts provide for no obligation to accept allegedly uncontroverted expert testimony. That is especially so when the expert was not testifying about a subject within his/her expertise, but instead engaging in hearsay in attempting to characterize out-of-court statements by others as to whether there was agreement by the various government agencies responsible for

natural resource protection about the propriety of a more limited eelgrass buffer. Moreover, that testimony was, in fact, controverted.

De Tienne argue that there was “documentation” to show agreement by all agencies involved, claiming that there was uncontroverted testimony of such an agreement from Pierce County biologist David Risvold and their own expert witness Marlene Meaders, as reflected in the Hearing Examiner’s decision at AR 2278, n. 21. This contention is not supported by the record.

First, as a reading of n. 21 states, Risvold testified he was not present on the April 24, 2013 conference call involving the USACE and WDNR staff, and therefore obviously could not testify about any agreement by WDNR. Second, the contention that Ecology agreed to a 10’ horizontal buffer is belied by Risvold’s further testimony, in which he acknowledges that Rick Mraz of DOE continued to insist on a 2’ vertical buffer as set forth in the EIS. Risvold further acknowledged he had “no formal letter from Ecology saying this is what we think you should do for this project.” *See* Tr. 932, 932:3-24, 949:5-950:4. There was no testimony from WDFW or DOE supporting such reduced buffers. Tr. 946:8-947:23, 984:18-25. The 10’ buffer came out of a “a subsequent conference call, I think, between Ms. Meaders, the Corps, and I think DNR. I wasn’t a party

to the conference call. I wasn't able to attend that. But it was – it was a reduction to allow for better statistical modeling. That's where that came from. That's why they reduced the buffer to 10' in places." Tr. 946:8-947:23.

The minimal buffers came about because de Tienne did not want them, and the County acquiesced. TR 906:1-16, 946:1-6. Risvold recommended a 180' horizontal (2' vertical) buffer. Tr. 986:9-17. He continued to recommend a larger buffer through April 2013, questioning the justification for any large reduction. Tr. 950:4; Ex. 1421, AR 2167, 2193-94. Even in his memorandum to colleague Ty Booth of April 24, 2013, the same date of the alleged agreement, he continues to object to the huge reduction in the eelgrass protection buffer that de Tienne wanted. *See* AR 2436-2438. County officials recognized the similarities between the 2001 SEIS on geoduck dive harvest and its required 2' vertical buffer to protect eelgrass and the private diver geoduck buffer proposed by de Tienne, and stated they saw no reason to change it. Tr. 965:6-967:1. Pierce County also recognized DOE's continuing support for the 2' vertical buffer. *See* AR 2178; Tr. 715:6-717:15; 932:3-24.

Risvold was questioned extensively by the SHB members regarding the scientific basis for the last minute decision to replace the 2' vertical buffer with 25' seaward and 10' landward buffers, and he simply could not do so. Tr. 943:1-950:10, 950:22-951:2, 957:7-962:6, 964:1-24, 965:6-968:14.

Risvold testified “[I] don’t know if I have a good answer for you.” Tr. 958:3-6. “I’m not sure I can answer the question. I just keep going back to what, we, we -- we discussed it, and that seemed like a reasonable, based on historically what we’ve deferred to for HPAs. I don’t have an adequate answer for you.... Well, now you’re going to ask me about statistics, and I’m not sure I can answer the question.” He went on to say, “There were more reductions [in the eelgrass protective buffer] than I thought were going to happen, though.” Tr. 958:7-12, 958:16-959:7.

Moreover, while Risvold testified that the effectiveness of the 25' buffer would be tested through monitoring, both he and de Tienne admitted that there was no provision in the Permit to allow it to be increased, that he (or anyone else from Pierce County) was not involved at all in the establishment of the monitoring provision, and that a reassessment of the adequacy of the buffer was not even required in the Permit, even though that was the supposed basis for

the buffer reduction. Tr. 762:2-16, 967:2-968:3, 971:12-20, 971:2-25, 972:1-6; AR 2261-2314. He agreed that it would have been “prudent” to include a permit condition specifying that the buffers would increase if monitoring showed them to not be protective. Tr. 971:8-972:6. Risvold also acknowledged that there as an intertidal portion of the farm in which there was eelgrass located, and he had no idea what, if any, buffer was to protect that eelgrass. Tr. 981:3-8. He conceded that it is a windy, wave action site, and that Pierce County did not do a study of sediment transport to inform the decision on sediment effects, and he does not know how easily that can be done in a subtidal site that is covered with water. Tr. 983:25-984:17.

Moreover, any fair reading of Meaders’ own testimony discloses that she, too, did not testify that there was any agreement from the agencies to a 10’ buffer. *See* Tr. 1057:5-1058-9. Under questioning, Meaders acknowledged “perhaps it’s also an assumption on my part [that the Corps and DNR created buffers].” Tr. 1216:1-13. Meaders acknowledged that the Army Corps of Engineers was really not part of any agreement, and that there was no documentation anywhere that any of the agencies had agreed to this reduced buffer, and that the only study addressing eelgrass

buffers for subtidal harvest of geoduck was the DNR SEIS which has a 180' horizontal buffer. Tr. 1176:7-9, 1178:2-3, 1217:1-22.

Accordingly, at FOF 51 (AR 982), based upon substantial evidence in the record, including numerous exhibits and much testimony regarding the decision to delete the longstanding 2' vertical buffer, the SHB properly found:

Based on the preceding Findings of Fact, the [SHB] finds that the Coalition has met its burden to show that the Permit conditions are inadequate to protect eelgrass. The 10' landward buffer and 25' seaward buffer (50% of which has already been reduced to 10', with further reduction possible), represents the lowest size buffer that could have been applied from the range of buffers typically applied to protect eelgrass. The [Board] finds the lack of complete and/or reliable scientific evidence in the record to support a buffer of this size at this Site given the scale and density of the commercial geoduck farming proposed in both intertidal and subtidal zones, and the conditions found at this Site.

2. The SHB Did Not Err in Interpreting the Law by Misapplying the Burden of Proof.

De Tienne contends that the SHB committed legal error by misdirecting the burden of proof by requiring Pierce County and themselves to shoulder the burden of demonstrating that the eelgrass buffers imposed by the County provided adequate protection for eelgrass. This is demonstrably incorrect. *See* Argument above. RCW 90.58.140(7) provides that:

Applicants for permits under this section have the burden of proving that a proposed substantial development is consistent

with the criteria that must be met before a permit is granted. In any review of the grant or denial of an application for a permit as provided in RCW 90.58.180(1) and (2), the person requesting the review has the burden of proof.

The SHB recognized that in both FOF 51 (AR 982) and COL 14, (AR 1009). In addressing this issue, it is important to understand what the burden was that the Coalition had at the SHB level. Coalition submits that its burden was to show exactly what the SHB concluded – that the Permit conditions were inadequate to protect eelgrass. Of course, the party appealing the SHB’s decision bears the burden of demonstrating the invalidity of the SHB’s actions. *Preserve Our Islands v. SHB*, 133 Wash. App. 503, 515, 137 P.3d 31 (2006).

Permit applicants bear the burden of proving that a proposal that is the subject of a SSDP is consistent with the SMP and the State Shoreline Management Act. *Buechel v. DOE*, 125 Wash.2d 196, 205 (1994).

[Appellant] argues that if any deference is due, it should be accorded to the County rather than the Board because the County wrote the Master Program and the SMA grants local governments primary responsibility for “administering the regulatory program consistent with the policy and provisions of [the SMA].” While this is true, as far as it goes, our courts have long recognized that the Board “draws on its special knowledge and expertise as the entity charged with administering and enforcing the [SMA].” The important distinction here is that the Board hears cases like this one *de novo* and it does not accord deference to the local

government's decision ... because we review the Shoreline Hearings Board's decision, not the local government. To the extent we give deference, it is to the Board. This is particularly true where it has applied its "specialized knowledge and expertise" following an extensive fact-based inquiry."

Preserve Our Islands, supra, 133 Wash. at 515-16.

The SMP, in pertinent part, mandates that aquaculture operations must "preclude damage to specific fragile areas and existing aquatic resources," and "maintain the highest possible levels of environmental quality and compatibility with native flora and fauna." PCC 20.24.020(A)(3). The SMA mandates that shoreline development in Washington be consistent with the policies of the SMA and the SMP. Here, the Board's interpretation and application of both the applicable SMP provision and the overarching provisions of the SMA were properly interpreted and applied, resulting in factual findings that the "last minute, enormous reduction in the eelgrass buffers for the Farm Site, reductions made after years of assessments, studies, and determinations" (including the County Staff Report) that had all been predicated upon the existence of much larger buffers, was not adequate to "preclude damage to specific fragile areas and existing aquatic resources," nor to "maintain the highest possible levels of environmental quality and compatibility with native flora and fauna."

Indeed, any fair reading of the lengthy FOF addressing the adequacy of the eelgrass buffers which are set forth in FOF 23-53 (AR 969 - 983), easily demonstrates how mistaken de Tienne is in making this Argument. In that regard, the Coalition also refers the Court to the evidence and FOF set forth in the Coalition Brief at pp. 20-27, *supra*, addressing the previous Assignment of Error regarding the adequacy of the minimal eelgrass buffers as they apply to this Assignment of Error as well. The SHB's FOF were supported by evidence that is substantial when viewed in light of the whole record before the Court, and represent a proper interpretation and application of the applicable law.

3. The SHB Did Not Erroneously Mandate that the County Prepare a Cumulative Impacts Analysis, and that Decision is Supported by Substantial Evidence.

In discussing the need for a cumulative impacts analysis, as set forth at AR 1008-1012, contrary to de Tienne's contention, the SHB did not require a local jurisdiction, in this case Pierce County, to prepare a cumulative impacts analysis in the context of reviewing a Permit application. Rather, the SHB's decision makes clear that it was not imposing such a requirement on the County as it expressly recognized that such an analysis could just as easily have been performed by de Tienne. Thus, "neither the County nor de Tienne

performed a cumulative impacts analysis prior to approval of the Permit.” AR 1008. In ¶ 21, the SHB went on to acknowledge that a cumulative impacts analysis was not required on review of a Permit, but that such cumulative impacts could properly be considered:

While the SMA contains no mandate for a cumulative impacts analysis on review of a SSDP, the Board has held it is not precluded from considering cumulative effects where appropriate.

De Tienne’s counsel earlier conceded this. *See* AR 934.

The SHB correctly cited numerous decisions for support for such authority, including *Skagit Co. v. Dept. of Ecology*, 93 Wash.2d 742, 750, 613 P.2d 121 (1980), and *Hayes v. Yount*, 87 Wash.2d 280, 288, 552 P.2d 1038 (1976).

There is ample factual support in the record to support the SHB’s determination that a cumulative impacts analysis was necessary prior to approving this unique project. It would be the first subtidal geoduck farm in Pierce County (Tr. 869:1-13), there had never been any cumulative impacts analysis in Pierce County for aquaculture (Tr. 842:25-843:1), there were numerous proposed additional commercial shellfish farms in the same general area (Tr. 839:4-840:17), and Risvold acknowledged this decision would have precedential value for those proposed farms. Tr. 843:5-844:3-7, 934:20-25.

The number of proposed additional aquaculture/geoduck farms in the same vicinity and the need for and propriety of a cumulative impacts analysis was supported by extensive testimony and exhibits. *See* Tr. 59:3-17, 68:12-17, 99:22-100:5, 155:1-156:12, 182:13-183:8, 211:2-214:13, 216:23-218:23, 228:21-231:1, 358:9-22, 700:1-3, 752:5-16, 759:5-760:10. County official Booth acknowledged the need for a cumulative impacts analysis. Tr. 837:1-840:15; 842:6-844:7, 848:20-849:10, 1178:8-14. *See also* AR 1717, (Carr Inlet/Purdy eelgrass locations), AR 1742-1743 (dramatic increase in commercial shellfish production), AR 1902-1910 (prior eelgrass damage re first de Tienne farm and importance of eelgrass ecologically), AR 2134-2135 (WDFW acknowledgment of the importance of protecting eelgrass/kelp beds), AR 686 (SMP handbook giving "... preference to reserving appropriate areas for protecting and restoring ecological functions over reserving areas for water-dependent and associated water-related uses, and specifically aquaculture," citing RCW 90.58.020, WAC 173-26-201(2)(d) and WAC 173-26-251(2)); AR 714 (de Tienne's own consultant acknowledging the uniqueness of the de Tienne Application due to its subtidal location), AR 1770 (Respondents' identification of cumulative effects of aquaculture

operations), AR 3426 (acknowledging clam harvest effect on seagrasses).

WAC 197-11-792(2) expressly states that agencies are supposed to consider “three types of impacts” which are then defined to include “... (iii) *cumulative*.” Also, WAC 197-11-060 specifies the “content of [the] environmental review” and expressly recognizes that “the range of impacts to be analyzed in an EIS (direct, indirect and cumulative impacts may be wider than the impacts for which mitigation measures are required....” WAC 197-11-060(4)(e).

In calling for a cumulative impacts analysis to be performed, the SHB further noted in FOF 57 (AR 985) that while there was a long history of oyster cultivation at Burley Lagoon at the tip of Henderson Bay, but only 15-20 acres had been farmed historically. The County admitted that because of recent significant expansion in farms, “a tidal wave of public outcry with regard to geoduck farms, not just the de Tienne proposal” had occurred. Tr. 837:8-23. The SHB further noted that there were six additional pending Applications for geoduck farms in Pierce County; that Taylor Shellfish was now harvesting oysters and clams on 79 acres and had just proposed a new geoduck farm project in Burley Lagoon for

30 acres. AR 1846; Tr. 874:5-875:23. The SHB pointed to testimony that an additional geoduck farm was intended to be located northeast of the Farm Site and would be virtually right on forage fish habitat. Tr. 839:7-840:17, 842:6-844:7. The SHB also cited to the fact that geoduck agriculture bed preparation had been witnessed since 2012 near the Farm Site. Booth confirmed this observation and testified that he understood there may be an attempt in the near future to submit another geoduck application. FOF 58 (AR 986); Tr. 68:10-17, 217:4-218:23; 228:21-232:2, 354:11-20, 358:4-22, 759:5-760:7, 874:5-875:23, 837:11-840:17, 842:6-844:7; AR 1846-1847, AR 2012-2015, AR 2075-2076.

In explaining its decision to require a cumulative impacts analysis, the SHB noted that neither the County nor the Petitioners had performed a cumulative impacts analysis prior to approval of the Permit. COL 21 (AR 1008). No EIS or cumulative impacts analysis had ever been performed for geoduck or aquaculture in Pierce County. Tr. 842:25-843:8, 1178:10-14, 1185:16-25.

Respondents submit that under the facts presented here, the SHB acted well within its authority to require such a cumulative impacts analysis for “cases where there is a clear risk of harmful impacts to high-value habitat, loss of community uses, impacts to

views, or the loss of extraordinary aesthetic values,” citing *May v. Pierce Co.*, SHB No.06-031(2007) (attached as Appendix 1) and *Fladseth v. Mason Co.*, SHB No.05-026 (2007). In fact, the Washington Supreme Court has specifically held that the SHB can reverse a local grant of a Permit, as it did here, if there was likely to be unacceptable “cumulative impacts.” *Hayes, supra*, 87 Wash.2d at 287. The *Hayes* court went on to note that it was also appropriate for the SHB to consider, in making that reversal, the “precedential effect” of approving an Application. *Id.* at 291.

What the *Hayes* said in upholding the SHB’s reversal of the Permit in that case so applies equally here: “Logic and common sense suggest that numerous projects each having no significant effect individually, may well have significant effects when taken altogether.” *Id.* at 287. The *Hayes* court went on to point out that the SMA itself recognizes, in RCW 90.58.020, “the necessity of controlling the cumulative adverse effect of “piece-meal development of the state’s shorelines....” *Id.* at 288. The SHB was properly concerned about the precedent-setting effect of the approval for future similar projects in calling for a cumulative impacts analysis to be performed. *Id.*; *Skagit Co. v. Dept. of Ecology*, 93 Wash.2d 742, 750, 613 P.2d 124 (1980). The precedent-setting

effect of the de Tienne decision was confirmed by Risvold. Tr. 934:15-25 (“... we will look at what we’ve done on de Tienne for future projects”).

The SHB then identified the factors it considered and weighed, as it was entitled to do, in determining whether a cumulative impacts analysis was required for this particular SSDP:

- (1) Whether a shoreline of statewide significance was involved;
- (2) Whether there was potential harm to habitat, loss of community use, or a significant degradation of views and aesthetic values;
- (3) Whether a project would be a ‘first of its kind’ in the area;
- (4) Whether there is some indication of additional applications for similar activities in the area;
- (5) Whether the local SMP requires a cumulative impacts analysis be completed prior to the approval of an SSDP; and
- (6) The type of use being proposed and whether it is a favored or disfavored use.

See COL 22 (AR 1010); *Coalition to Protect Puget Sound Habitat v. Thurston Co. (“Lockhart”)*, SHB No. 13-006c(2013).

The SHB properly determined that factors (5) and (6) did not apply to the de Tienne Farm Site, but that the rest of the factors did, and that they weighed in favor of a cumulative impacts analysis being required. COL 23 (AR 1010). This weighing of the evidence was a perfectly appropriate decision for the SHB to engage in and make based upon the extensive evidence demonstrating the need

for such an analysis to be performed for this particular site. As the SHB said, "... this case is unique compared to the past geoduck farm proposals considered by the Board," for which the SSDPs issued by Thurston and Pierce Counties were upheld. The first geoduck proposal that the SHB considered, in *Coalition to Protect Puget Sound Habitat, et al. v. Pierce Co. and Longbranch Shellfish, LLC*, SHB No. 11-019 (2012) ("*Longbranch*"), involved a 2.5 acre intertidal farm to be located on Key Peninsula in Pierce County, but that shoreline was not designated a "shoreline of statewide significance," eelgrass was not present, and the herring did not spawn nearby. Therefore, the conclusion there was that there was insufficient evidence to support the preparation of a cumulative impacts analysis. COL 24 (AR 1010).

The SHB also properly concluded that the so-called *Lockhart* decision was distinguishable for a host of reasons: the farm sizes at issue were less than 1.25 acres of intertidal tidelands, and none were situated on a "shoreline of statewide significance," no eelgrass was present in the areas to be farmed, and no herring spawned nearby.

De Tienne also contends that, independent of any authority of the SHB to require a local jurisdiction, such as Pierce County, to

prepare a cumulative impacts analysis when reviewing an SSDP application (an erroneous assertion as explained above), there is no evidence that the de Tienne project would result in a cumulative impact and that the SHB “is requiring that the County point to some analysis in the record showing the project will not result in a cumulative impact which they assert as an erroneous interpretation and application of the law). *See* Appellants’ Opening Brief, p. 27. Contrary to de Tienne’s assertion, the SHB did not assert – nor need it have -- that cumulative impacts would definitely occur, but rather, again as explained in detail by the SHB in that section of its Order (COL 21-27 (AR 1008-1012)), because of the unique factual circumstances surrounding this specific site, as well as its precedent-setting potential, a cumulative impacts analysis by either de Tienne or the County was required because of these unique circumstances and the potential harm posed by the project. Specifically, the SHB noted that it was the SHB’s:

... first opportunity to consider the potential impacts of a larger, five-plus acre geoduck farm proposed on a shoreline of statewide significance, where extensive but fragile resources, including eelgrass, are present and where herrings spawn nearby. The proposed farm would be the first-of-its-kind in operation in an area where minimal aquaculture already exists, where unauthorized practices have impacted fragile marine resources through prior harvesting activity, where farm operations pose a potential harm to habitat and loss of community recreational use, and where additional projects

have either been approved, proposed, or are likely to be proposed – including one similar project.

COL 26 (AR 1011). Based on the above, the SHB properly concluded that:

The careful review required for the shoreline of statewide significance weighs in favor of requiring a cumulative impacts analysis of the impacts that *might* result from granting the first subtidal geoduck farm permit in Henderson Bay – in particular, to assess the potential for longer term impacts to fragile resources like eelgrass, as well as unique use of the area by recreationalists like windsurfers.

COL 27 (AR 1012). Moreover, there was testimony that such cumulative impacts would likely occur. Expert witness Dan Penttila, whose expertise was found by the SHB to include forage fish and submerged aquatic vegetation, including eelgrass, testified impacts to herring spawning sites were highly likely. Tr. 256:2-257:20, 352:23, 354:25.

In sum, the SHB did not require Pierce County to perform a cumulative impacts analysis. The analysis could be performed by either the County or de Tienne, and the SHB was well within its legal authority to do so. It was also a decision supported by substantial evidence. The Assignments of Error related to this issue are thus without merit.

4. The SHB Did Not Misinterpret PCC 20.24.020(A)(10).

De Tienne contends the SHB erred in interpreting PCC 20.24.020(A)(10) regarding aquaculture siting and failed to recognize that aquaculture is designated as a preferred use under the SMA. Again, de Tienne's contention is meritless.

The SHB expressly noted that the then-extant Pierce County SMP encouraged use of shoreline areas for aquaculture only "in areas well suited for it," and that the PCC Code provision, by its express terms, gave priority to aquaculture uses only to "shoreline areas having the prerequisite qualities" for such uses in order to protect the County's aquaculture." COL 6 (AR 1001). The shoreline area here did not have those "prerequisite qualities." The SHB also properly interpreted and applied the law to conclude that there is "a balance inherent in the SMA, its associated regulations and the PCC, while seeking to encourage aquaculture, also seeks to prevent damage to the shoreline and environment and avoid interference with recreational use." COL 8 (AR 1002). The SHB also noted that guidance had been provided by the DOE to local governments for developing local shoreline master programs that urged limits on aquaculture farm siting:

Local government should consider local ecological conditions and provide limits and conditions to assure appropriate

compatible types of aquaculture for the local conditions as necessary to assure no net loss of ecological functions. WAC 173-26-241(3)(b).

COL 8 (AR 1002).

The SHB went on to explain in its decision why the factors it applied in “balancing these considerations as mandated by the SMA weighs in favor of denying the Permit for this shoreline of statewide significance.” COL 17-20 (AR 1006-08). The SHB properly interpreted PCC 20.24.020(A)(10) to have prioritized only those projects that were situated in areas that were well suited to having the “prerequisite qualities” for aquaculture, and the “... fact that the Farm Site here will be operated in a high-energy subtidal environment, bordering a continuous eelgrass bed that provides spawning habitat for nearby herring, and habitat and refuge for other forage fish, juvenile salmon, and various aquatic organisms – makes this site one without the prerequisite qualities for prioritizing it as an appropriate aquaculture site under PCC 20.24.020(A)(10).”

The SHB went on to conclude that “... the Farm may negatively impact the public’s use of the area for windsurfing and other recreational uses,” and does not “increase recreational opportunities for public and the shoreline,” as required by

RCW 90.58.020(5). COL 20 (AR 1008). The impacts on windsurfing were the subject of much testimony. Tr. 43:14-44:1-2, 56:5-57:1, 61:17-62:10, 80:1-25, 161:3-20.

In sum, the SHB engaged in the appropriate balancing of statewide interests, including an appropriate interpretation of Pierce County's own code provisions pertaining to aquaculture to arrive at the conclusion that this Permit should be denied.

5. The SHB Did Not Err In Applying a No Net Loss Standard.

The source of the "no net loss" standard is statutory. *See* RCW 90.58.020 (requiring that permanent uses in the shorelines of the state "... be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline and area...") and RCW 36.70A.480(4):

Shoreline master programs shall provide a level of protection in critical areas located within shorelines of the state that assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources as defined by Department of Ecology guidelines. RCWS 90.58.060"

As the SHB properly concluded, the concept of "no net loss" is embedded within the County's Code provisions, even if not expressly stated. COL 9 (AR 1002-03). As the SHB explained in COL 17 (AR 1006), the challenged Permit contravened the Pierce County SMP provision mandating that all "aquaculture operations

shall be conducted in a manner which precludes damage to specific fragile areas and existing aquatic resources,” and “to maintain the highest possible levels of environmental quality and compatibility with native flora and fauna.” PCC 20.24.020(A)(3). That language in the Code is effectively a “no net loss” provision, as reflected in AR 725, wherein de Tienne’s own consultants equate this Code provision with the “no net Loss” requirement. Pierce County’s Special Project Coordinator Debby Hyde emphasized the importance of its SMP assuring “no net loss of ecological functions” in the context of aquaculture applications. AR 2229. Risvold also recognized the applicability of a “no net loss” requirement as it applied to the de Tienne farm. *See* AR 2138. Moreover, the concept of no net loss, as the SHB explained, is contained within the SMP and the SMP Handbook. *See also* WAC 173-26-241(2)(a)(iv) and (3)(b), mandating that local SMPs implement certain principles, including “... use regulation designed to assure no net loss of ecological functions associated with the shoreline,” and directing that “... aquaculture should not be permitted in areas where it would result in a net loss of ecological functions, adversely impact eelgrass, and macroalgae.” *See also* WAC 173-26-241(2)(a)(iv) mandating that local SMPs implement certain principles, including: “... use

regulations designed to assure no net loss of ecological functions associated with the shoreline,” and directing that “... aquaculture should not be permitted in areas where it would result in a net loss of ecological functions, and adversely impact eelgrass and macroalgae. *See also* WAC 173-26-241(3)(b)(i)(A), (C), (F)(III), and (L)(VI). De Tienne’s argument, accordingly, lacks merit.

C. The SHB Decision Regarding Eelgrass is Supported by Substantial Evidence.

As set forth above, there is substantial evidence to support the SHB’s FOF and COL regarding eelgrass. De Tienne contends that FOF 51 (AR 982) does not support the conclusion that there definitely will be damage to eelgrass from the proposed commercial geoduck farm. First, the SHB was under no obligation to make such a finding in order to deny de Tienne’s Permit. Rather, the SHB found “... that the Coalition has met its burden to show that the Permit conditions are inadequate to protect eelgrass.” The SHB noted that the buffer established “represents the lowest size buffer that could have been applied from the range of buffers typically applied to protect eelgrass,” and could be reduced even further below that, and that:

The Board finds the lack of complete and/or reliable scientific evidence in the record to support a buffer of this size at this Site, given the scale and density of the commercial geoduck

farming proposed in both intertidal and subtidal zones, and the conditions found at this Site.

FOF 51 (AR 982). This is only one of many factual findings, based on evidence pertaining to the adequacy of the protection of eelgrass, made by the SHB. As such, it is inappropriate to view it in isolation. But, even if it were so viewed, it is supported by substantial evidence.

De Tienne objects to the SHB's reference to the ecological importance of eelgrass recognized in two of its prior decisions, *Friends of the San Juans v. San Juan Co.*, SHB No. 08-005 (2008); and *Holley v. San Juan Co.*, SHB No. 00-001 (2000) because they are not in the record. First, it is evident from reading all of the FOFs pertaining to eelgrass (FOF 14-53 (AR 963-983)) that there was sufficient evidence in the record independent of the prior decisions of the SHB pertaining to eelgrass, including peer-reviewed published scientific studies regarding the critical ecological role played by eelgrass in the shoreline environment. AR 1409-11, 1515, 1522-23, 1905-10. *See also* FOF 14 (AR 963-64), Ex. P-4 and P-49, and WAC 220-110-250 pertaining to the functions of eelgrass and its likely use as herring spawn sites at the de Tienne farm (AR 261, 271, 273, 352-53, Exs. P-4, P-23, P-40, P-41, P-44-49), and the Permit and regulatory conditions themselves which require eelgrass protection,

and the extensive testimony regarding the subject of buffers which were needed to protect eelgrass. FOF 23-53 (AR 969-83); WAC 173-26-241(3)(b)(c).

Contrary to de Tienne's assertions, it was not simply the testimony of expert Penttila that dealt with eelgrass, but also the testimony of Risvold and Booth. In addition, there was relevant testimony from Wenman and Newell, concerning the extent of eelgrass present at the Site (*see* Tr. 99-100) and the amount of eelgrass damaged by de Tienne's previous illicit operations from Wenman (Tr. 104-120, 129:14-17; Exs. P-128, 142g) and from de Tienne himself, as well as a long list of exhibits dealing with the subject, including P-89, depicting eelgrass bed locations, all of which were identified in that section of the SHB's decision addressing eelgrass. FOF 14-53 (AR 963-83) and COL 13-27; (AR 1004-12).

Critically, the BE that supported the consultations by the National Marine Fisheries Services and U.S. Fish & Wildlife Service, and the Corps of Engineers' compliance with the Endangered Species Act, were based on the much greater 2' vertical buffer, not on the tiny 10' and 25' buffers that the Permit ultimately contained. Tr. 1214:22-1215:21. This is also true of the Habitat Assessment Study (AR 2223), the MDNS (Tr. 825:14-825:7; AR 2340-49), and

the County's own Staff Report prepared for the hearing which resulted in the reduced buffers. AR 2337.

De Tienne was also forced to acknowledge that the Habitat Assessment Study he authorized for the Farm Site prepared by Environ also did not indicate the areas of past eelgrass degradation (Tr. 697:3-7) – areas degraded by de Tienne during his previous illicit commercial shellfish operations. Tr. 695:25-696:15. He does admit, however, that the project area is considered critical habitat for eelgrass. Tr. 700:1-3, as did Meaders. Tr. 1158:22-25.

There was no recognition of the need for the expansion of eelgrass since the established buffer can only be reduced, not expanded, and yet eelgrass expansion is important because eelgrass beds do expand. Tr. 138:10-141:5; 930:2-23; Ex. 142l, AR 2136. This was expressly noted by Risvold by WDFW in its January 29, 2010 email to him regarding the de Tienne farm. AR 2136.

Meaders acknowledged that the continuous eelgrass bed along the entire shoreline would be inevitably exposed to the sediment deposition because it is transported linearly to the shore, yet that deposition was not reviewed or quantified. Tr. 1195:4-11, 1196:6-9. The intertidal portion of the Site “poses more problematic conditions compared to the subtidal. Just in terms of the sediment,

it's likely to move into the beds rather than – because you have offshore transport from the intertidal area. There is also a long shore transport.... So the answer is the sediment very well could move into the eelgrass." Tr. 1194:9-14. "And that is not being monitored." Tr. 1194:25-1195:1. Meaders acknowledges that subtidal sediment transport is subjected to greater time of suspension in the water column because there is more wave action than in the intertidal. Tr. 1223:13-1225:1.

Further, testimony confirmed that farming in the intertidal area of the Site "will allow sediment to be distributed over the landward edge of the eelgrass bed during harvest activities. This is likely because sediment will travel laterally along the shore and therefore over the eelgrass, where it will begin to settle out." FOF 32 (AR 973); Tr. 1058:10-14, 1240:11-12, 1237:10-24; 1231:20-1232:8, 1208:17-1210:25; 1194:9-1196:25. The SHB was thus correct in finding "[t]here has been no analysis of the effects of this sediment deposition on the eelgrass in this area, only a recognition of the potential problem. No Permit term addresses this issue." FOF 32 (AR 973).

Finally, Meaders acknowledged it is unclear where the edge is that defines the boundary between the eelgrass bed on the Farm

Site and the farm itself because "... there is really no defining condition associated with where you plant if conditions change prior to that year." Tr. 1228:6-1229:15.

Contrary to Meaders' opinion, the SHB reviewed more critically the published studies she relied upon in support of her opinion that minimal buffers would not adversely affect eelgrass and found:

Published studies have proven that severe effects result when geoduck harvesting occurs *within* eelgrass beds. See R-20 at 3 and R-87 (AR 2515 and AR 3289-3297). However, no published studies have examined the effects of geoduck harvest on *nearby* eelgrass..

FOF 38 (AR 976).

Regarding Meaders' opinion as to the adequacy of the minimal buffer and the ability of eelgrass to expand at the Farm Site based on limitations in subtidal light, the SHB then properly found Meaders' opinion:

... was not supported by any site-specific analysis. Nor did Ms. Meaders evaluate the fact of prior eelgrass damage and degradation as it pertains to the manner in which eelgrass would be expected to recover and expand at the Site over time.

FOF 39 (AR 976-77).

Ultimately, exercising its fact-finding authority, the SHB did **not** find Marlene Meaders, Petitioners' environmental consultant and overall expert witness:

... to be a credible expert in all aspects of study related to the near-shore environment to which she claimed expertise. The Board finds that Ms. Meaders is not an expert, in particular, in geomorphology or sediment transport, or eelgrass biology growth. Due to her lack of independent expertise in these areas, Ms. Meaders' testimony largely constituted her summarization of work done by other experts on the potential for spillover effects to eelgrass, thus making her unable to offer an independent opinion. In any event ... the Board found the studies upon which Ms. Meaders relied to be unpersuasive scientific support for the smaller eelgrass buffer at the Site.

FOF 36 (AR 974-75).

All of these findings were well-reasoned and supported by substantial evidence. See Tr. 113:6-118:20; 131:8-132:5; 677:4-*; 696:6-297:8; 760:1-13; 930:2-10; 1141:6-21, 1195:4-8, 1229:1-15, 1231:10-1234:4; AR 4036-AR 4062.

Another FOF challenged by de Tienne related to the inadequacy of the minimal eelgrass buffer centered on de Tienne's contention that adaptive management principles would assist in ensuring adequate protection for eelgrass. While the Permit set a 25' seaward buffer, "... it allowed further reductions in the size of this buffer 'in a limited number of locations for purposes of monitoring.'" FOF 33 (AR 2291 (Condition 26C(1))). "... [T]he Permit also allows for reductions in the 25' seaward buffer 'if monitoring over the course of at least one complete planting and harvest cycle demonstrates a smaller buffer provides effective

protection of the eelgrass bed.” AR 2291 (Condition 26C(2)). But, as the SHB found from the evidence, “no standards, criteria, or process were established for determining whether a buffer change is appropriate.” AR 2291. Moreover, Pierce County will not perform any monitoring of the Site and no other agency has ever performed monitoring at a Pierce County shellfish farm, so, practically, monitoring will be performed by de Tienne. Tr. 807:8-811:18.

Indeed, Risvold confessed that he did not contemplate the buffers being reduced so substantially. Tr. 946:2-950:4. The reduction to 10’ and 25’ was agreed to simply to increase cultivable acreage. Tr. 847:18-848:21.

The SHB, accordingly, based on ample support in the record, found another factual basis for rejecting such limited buffers to protect eelgrass:

The [SHB] also finds an overreliance on monitoring and adaptive management to mitigate impacts. This overreliance is particularly concerning given that the Permit does not incorporate any required implementation for change – *i.e.*, to increase the buffer should monitoring prove the need for greater protection. There may be real consequences from selecting the small buffer here, given the particularly fragile state of eelgrass at this Site. Neither the [Appellants] nor [Pierce] County considered the extent to which eelgrass might persist in a degraded state, that the past survey(s) may consequently have set what is an already-degraded baseline for assessing eelgrass, and that no area for potential expansion was included in the buffer [*see* AR 2291 (Condition 26C(4))].

Instead, the degraded Site will be used for aquaculture in a manner that will ensure no further recovery.

FOF 52 (AR 982-83). *See also* AR 2291 (Condition 26C(4)); Tr. 1227-1228:3. *See also* de Tienne Testimony acknowledging the County required no mitigation at all for the eelgrass he previously degraded when he operated illegally under his partnership with Washington Shellfish and that he would be operating now in that same area. Tr. 113:6-118:20; 695:25-696:12; 760:1-13; 1195:4-8.

In sum, de Tienne's contention that limited eelgrass buffers were supported by all of the scientific evidence and that the SHB substituted its own judgment in rejecting their evidence is simply not supported by the record. The SHB's FOF related to these buffers are all supported by substantial evidence in the record as a whole. FOF 14-53 (AR 963-83) and COL 16-18 (AR 1005-07).

REQUEST FOR ATTORNEY FEES AND COSTS

The Coalition seeks reasonable attorney fees and costs pursuant to RCW 4.84.370. RCW 4.84.370(1) provides that reasonable attorney fees and costs are to be "awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals ... if (a) the prevailing party on appeal was the prevailing or substantially prevailing party ... in a decision involving a substantial development permit under chapter 90.58 RCW, the

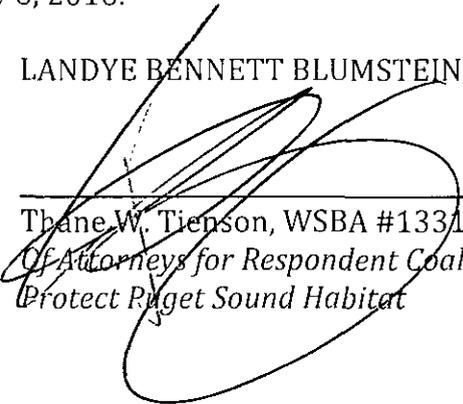
prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline hearings board; and (b) if the prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.” The Coalition submits that those criteria have been satisfied here if this Court, as the Coalition requests, affirms or substantially affirms the decision of the SHB.

CONCLUSION

For all of the foregoing reasons, the Coalition requests that the decision of the SHB be affirmed in all respects.

DATED: January 8, 2016.

LANDYE BENNETT BLUMSTEIN LLP



Thane W. Tienison, WSBA #13310
*Of Attorneys for Respondent Coalition to
Protect Puget Sound Habitat*

Appendix 1

1 members¹. Administrative Appeals Judge Cassandra Noble presided for the Board. Kim L. Otis
2 of Gene Barker & Associates, Olympia, Washington, provided court reporting services. All the
3 Board members conducted a site visit on February 12, 2007. Witnesses were sworn and heard,
4 exhibits were introduced, and the parties presented arguments to the Board.

5 Sixteen issues were raised at the Pre-Hearing Conference. Two issues relating to
6 standing were not argued, nor was evidence presented with regard to them. Therefore, the Board
7 concludes they have been abandoned. The remaining issues in this case concern five broad
8 subject areas. The issues raised include challenges to the proposed project's compliance with
9 Pierce County's Shoreline Master Program (PCSMP) and the requirements of the Shoreline
10 Management Act (SMA) with regard to each of its two components: the pier, ramp and float
11 (PRF) and the floating watercraft lift (float lift). Other issues challenge the project's
12 compatibility with the surrounding shoreline area and its uses, Pierce County's compliance with
13 the requirements of the State Environmental Protection Act (SEPA), the Board's subject matter
14 jurisdiction.

15 Based on the testimony from sworn witnesses, exhibits admitted, and arguments by the
16 parties, the Board enters the following:

17
18
19
20

¹ Board Member Mary-Alyce Burleigh was unable to attend portions of the hearing, but listened to the recording
21 from the portion of the hearing she missed, and she participated in the Board decision making.

1 **FINDINGS OF FACT**

2 [F1]

3 Respondents Robertson and Kvinsland applied together to Pierce County for an SSDP for
4 a joint use pier, ramp, and float structure (PRF) and a shoreline conditional use permit for a
5 floating watercraft lift (float lift) to be used by the two families. The Respondents want to
6 achieve improved access to the water, particularly for older members of their families and for
7 individuals in their families who have health issues that make it difficult to get on and off the
8 families' boats. *Testimony of Robertson.*

9 [F2]

10 Respondents Robertson own a 1.02-acre parcel of waterfront property abutting Hale
11 Passage in unincorporated Pierce County. The parcel extends from Powell Drive NW to the
12 shoreline and along the shoreline for 145 lineal feet. Respondents Kvinsland own a 0.7 acre
13 parcel of waterfront property abutting the east property line of the Robertson parcel. The
14 Kvinsland parcel extends between Powell Drive NW and the shoreline of Hale Passage and abuts
15 the shoreline for 100 linear feet. The Robertsons and the Kvinslands requested the permits so
16 that they could construct the PRF extending waterward from their common property line. *Ex.*
17 *R83.*

18 [F3]

19 The Petitioners are neighboring shoreline waterfront property owners on Powell Drive
20 NW, except for one, who lives on nearby Horsehead Bay Drive NW, all in Gig Harbor,
21 Washington.

1 [F4]

2 The PRF and float lift are proposed to be installed on the northwest shore of Puget
3 Sound's Hale Passage, approximately 5 miles southwest of Gig Harbor, Washington. *Ex. R72,*
4 *R79.* The Gig Harbor Peninsula is located in northwest Pierce County, where it and Fox Island
5 encompass approximately 58 square miles of urban, suburban, and rural lands. Hale Passage is
6 part of the Puget Sound marine waters that surround the Gig Harbor Peninsula on three sides.
7 *Ex. R108.*

8 [F5]

9 The site for the proposed PRF is near the center of a 300-yard long crescent-shaped
10 stretch of no-bank beach in an area of Pierce County called the "Arletta" area. The shoreline
11 within the crescent is very gentle sloping beach with a 40 to 50 foot wide band of rock, gravel,
12 and sand near the immediate shoreline, followed by fine grain sand that extends waterward
13 nearly 400 feet at an extreme low tide. *Ex. P-5, P-20.* The beach adjacent to the bulkhead on the
14 Robertson property consists of small gravel changing to sand approximately 75 feet waterward
15 of the bulkhead. The beach extends in an east/west direction from Green Point on the west,
16 approximately 1,500 feet east to the approximate location of a 150-foot long dock that is not
17 visible from the crescent beach. A 50-foot long, joint use PRF is located approximately 300 feet
18 to the west of the proposed PRF where the shoreline transitions to a medium to high bank area.
19 This PRF is visible from the project site. No docks currently extend into the sandy beach area.
20 *Testimony of May.*

1 [F6]

2 Due to its unusually long stretch of unobstructed sandy shoreline, this shoreline is
3 considered "prime waterfront," whose "gentle sloping beach makes it perfect for shoreline
4 recreational activities." *Ex. P2, P4, P5; Testimony of May, Johnson, & Christensen.* The
5 crescent beach is considered by some to be "perhaps the most beautiful beach in Pierce County."
6 *Ex. P2 (Roe-Trochim letter, March 15, 2006), Ex. P5.*

7 [F7]

8 The Respondents' proposed joint use PRF would serve two single family residences. It
9 would extend approximately one hundred feet into the water. The PRF consists of a 6-foot by
10 50-foot pier, a 4-foot by 32-foot aluminum ramp with 1-foot width of grating along the center,
11 and an 8-foot by 24-foot float (with 50% grating). In the aggregate, the PRF would constitute an
12 area of 620 square feet. The structure would be secured by eight 10-inch galvanized steel pilings
13 installed with a drop hammer pile driver. The structure will be attached to an existing bulkhead.
14 *Ex. P109 (6/26/06 Site Plan), P8, R79, R 83.* The dock is considered to be small by Pierce
15 County standards. *Testimony of Stroud.*

16 [F8]

17 The float lift proposed by the Respondents utilizes a solar electrically powered hydraulic
18 system to lift and lower a boat between a float and the water. The frame supporting the boat is
19 positioned above the structure, allowing the boat to rest upon floating pontoons. *Ex. R76, R86.*
20 The proposed float lift would be 18 feet long by 12 feet wide, with an associated sediment screw
21 anchor system. *Ex. R 86.* The impacts of a float lift are similar to those of a moored, floating

1 boat, which also sits on the water's surface. *Ex. R78.* The Respondents intend to install the float
2 lift approximately 150 feet from the end of the dock, meaning it will be located approximately
3 425 feet waterward of the existing bulkhead at the Robertson residence.

4 [F9]

5 Shoreline residents have observed heavy wave action at all times of year, which causes
6 some scouring of the tidelands. Some residents, including the Respondents, have installed
7 bulkheads to protect from wave damage. *Testimony of Robertson.* Tides in the general vicinity
8 have been measured and recorded from +14 feet to -4 feet from mean low tide (as recorded in
9 Tacoma). The lowest tide recorded in recent records of the area where this project is proposed
10 was measured at -3.1 in a May through September 153-day period. *Ex. P6.* As is somewhat
11 common in the shallow beaches of the area, at low tides, the PRF could be expected to "ground"
12 due to the lack of water, but because the PRF's design includes "stops" it would remain elevated
13 above the tidelands. The float lift is not designed in the same way. At the lowest tides, the float
14 lift could come within one foot of tidelands, but this would not be a common occurrence. *Ex. P6;*
15 *Testimony of Lund, May.* A float lift is no more difficult to maneuver around than a mooring
16 buoy. *Testimony of Robertson, Testimony of Lund.* Ecology found the float lift consistent with a
17 medium intensive use. The location of the float lift is well below the sand lance spawning area.
18 *Testimony of Lund*

19 [F10]

20 A public launch is located less than one-half mile from the site, and is a ten-minute ride
21 by boat. Another public launch is located on Fox Island, which is approximately one and one-

1 half miles from the site. Although no permanent moorage exists at these two launches, there is
2 permanent moorage at Gig Harbor. Day Island, which is on the Tacoma side of the Narrows,
3 also has permanent moorage and is approximately twenty minutes away by boat. *Testimony of*
4 *May.*

5 [F11]

6 The shallow profile beach adjacent to the proposed PRF has traditionally been used freely
7 by all neighbors and their families for group and individual water-associated activities such as
8 beach walking, building sand castles, playing in the shallow water, and fishing from shore. No
9 barriers presently exist to free access up and down the full length of this crescent beach, and no
10 PRFs or other dock structures have ever been constructed along this stretch of shoreline. The
11 neighborhood is characterized by families of long-time residence and individuals who have a
12 deep historical recollection of the changes that have taken place over the years in the natural
13 environment. *Testimony of Johnson, May, & Christensen.* Several of the Petitioners have lived
14 on this beach for most of their lives and raised their children in their houses on the beach. The
15 sandy crescent expanse has traditionally been the center for community activities and impromptu
16 sports activities. Over time, these residents have enjoyed observing the come and go of the
17 weather and wildlife that characterizes life on this beautiful beach. *Testimony of Christensen,*
18 *May, Johnson.* The area off the beach is also used by kayakers, and sports fishers who troll for
19 salmon. *Testimony of May.*

1 [F12]

2 The proposed PRF would be placed in the approximate center of the sandy crescent
3 beach. It would be adjacent to no-bank single-family houses that sit at beach level and have
4 expansive views of the beach, Mount Rainier, Fox Island, and a long, low bridge in the distance.
5 From the location of the proposed PRF and surrounding houses, no other PRFs of comparable
6 size are visible, including along the visible shore of Fox Island. Only one other PRF of
7 comparable size is located nearby on the rocky edge beyond the sandy beach crescent. There are
8 three other small structures of 50 feet or less, visible from the site. Local residents include the
9 uninterrupted beach itself in their description of the beauty of the expansive view. *Ex. P36,*
10 *Testimony of May, Christensen, Johnson, Robertson.*

11 [F13]

12 The proposed PRF and float lift project are located within an area of the Gig Harbor
13 Peninsula that has been designated by Pierce County as a Rural Residential Shoreline
14 Environment, and a Rural 10 (R10) zone classification. In Pierce County, the Rural Residential
15 designation allows medium intensity land uses. *Ex. R 83.*

16 [F14]

17 All the shoreline areas in the vicinity of the project have been designated by the National
18 Marine Fisheries Service as critical habitat for Puget Sound Chinook salmon. *Ex. P31, P52* The
19 beach on which the PRF is proposed is recognized as an important area of forage fish habitat.
20 Forage fish species are important to larger fish such as Chinook salmon. *Ex 17; Testimony of*
21 *Daley.* The Washington Department of Fish and Wildlife has identified the beach as an

1 established area supporting Pacific sand lance spawning. Therefore it is classified as a saltwater
2 habitat of special concern under WAC 220-110-250(1)(b). *Ex. P53, R94; Testimony of Daley.*

3 Pacific sand lance (*Ammodytes hexapterus*) spawn at high tide in the upper intertidal area on
4 sandy gravel beach material. Their ability to spawn at a given location is determined by the
5 availability of sandy material. To have a place to spawn and carry on their life processes, fish
6 need gravelly sand and an open beach area. The fine sandy beach material coats the eggs and
7 likely serves to assist in moisture retention when the eggs are exposed during low tides. Sand
8 also serves to conceal the eggs from predators. In Puget Sound, the spawning season is from
9 November 1 through February 15, and larvae commonly are present between January and April
10 in the Puget Sound area. Sand lance feed in open water in daylight and burrow into the bottom
11 substrate at night to avoid predation. They are a significant dietary component of many
12 economically important resources in Washington, such as juvenile salmon, whose diets consist of
13 35% Pacific sand lance. These forage fish are particularly important to Chinook salmon. *Exhibit*
14 *P54.* Pacific sand lance comprises 60% of the juvenile Chinook diet. The sand lance habit of
15 spawning in upper intertidal zones of protected sand and gravel beaches makes them particularly
16 vulnerable to the direct and cumulative effects of shoreline development because loss of
17 spawning habitat limits their numbers. *Ex. P54 (p. 27-38).* One long-time resident at the beach
18 has, on different occasions over successive years, spotted the distinctive circular waves on the
19 water in the winter months that signal the presence of spawning Pacific sand lance just off shore.
20 He observed this activity in the vicinity of the proposed PRF. *Testimony of Christensen.* A pier
21 can provide some value by shading sand lance and surf smelt eggs. *Testimony of Cheney*

1 [F15]

2 The beach is also the site of various nearshore marine plants. These are very important to
3 provide areas for juvenile salmon to feed on the spawning forage fish. The plants required for
4 forage fish habitat include the larger plants (called "macroalgae") such as eelgrass, to the very
5 small zooplankton, which provide places for fish to live and function. Another important
6 function of nearshore marine plants is to provide a place for juvenile salmon to regulate their
7 body processes and adjust from fresh to salt water in their migration. *Testimony of Daley.* Light
8 is the single most important factor affecting plants because it drives the photosynthetic process,
9 which controls plant growth and survival. Because overwater structures and associated activities
10 reduce light in the water, they can impact the ecological functions of habitat and interfere with
11 habitat processes (photosynthesis of benthic algae and eelgrass, for example) that support the key
12 ecological functions of organisms' spawning, rearing, and refugia. *Ex. P54. Testimony of*
13 *Daley:* Eelgrass is spread by the distribution of seeds, and shading can affect its propagation.
14 *Testimony of Cheney.* Even with the best design, such as the use of open grating, overwater
15 structures still diminish available light in the water, which adversely affects fish and plants.
16 *Testimony of Daley.*

17 [F16]

18 Eelgrass is a grass-like marine flowering vascular plant (*Zostera spp.*) with dark green,
19 long, narrow, ribbon-shaped leaves which are typically 8 to 20 inches in length. *Ex. R78.* Light
20 is the primary factor limiting the survival and distribution of eelgrass. *Ex. P54.* Out-migrating
21

1 juvenile chum feed extensively upon organisms that live in eelgrass stands, where they occur in
2 magnitudes four to five times higher than in sand habitat without eelgrass. *Ex. P54.* Because
3 eelgrass stands provide such productive foraging habitat, loss of eelgrass poses the risk of
4 reduced prey resources. Prey resource limitations likely impact migration patterns and the
5 survival of many juvenile fish species, such as chum salmon. *Testimony of Daley.*

6 [F17]
7

8 The project site was once part of a large stand of eelgrass that supported migratory birds
9 and aquatic species, but some years ago, a high bank on the nearby shore was disturbed as part of
10 a development project, and a large quantity of soil and sediment was deposited into the bay.
11 This event heavily impacted the eelgrass bed and diminished the abundance of wildlife that
12 depended upon it. Years after, the local residents have recently observed small patches of
13 eelgrass growing in the water and eel grass reestablishing itself along the beach and in the
14 vicinity of the proposed float lift. *Ex. P104 (p.41-44); Testimony of Christensen, May.* In April
15 of 2006, the Respondents hired a consultant to conduct a survey of the presence and distribution
16 of eelgrass along the shoreline of the project area up to 350 feet waterward of the bulkhead, and
17 none was noted. *Ex. P33.*

18 [F18]
19

20 The beach area also serves as a migration corridor for juvenile salmonids and supports
21 various other marine species. *Ex. R72.* Long-time residents recall the availability of fish for

1 catching along the shoreline, and have observed the migration of salmonids, particularly chum,
2 through the area. *Testimony of Christensen, May.* Changes to ambient underwater light
3 environments pose a risk of altering fish migration behavior and increasing mortality risks.
4 Studies have shown that light reduction from the existence of docks and other overwater
5 structures changes fish behavior, driving the migration of juvenile fish into deeper waters,
6 increasing the risk of predation. *Ex P54; Testimony of Daley.* Prevailing winds affect the
7 waves. A structure in the water can affect the wave action by causing greater disturbance of the
8 bottom of the water body, which increases the turbidity. *Testimony of Daley.* Any such structure
9 will produce some increased scouring. *Testimony of Cheney*

10 [F19]

11 Where overwater structures cause adverse impacts on the marine environment, the extent
12 of these impacts is magnified by increasing numbers of such structures. To the degree that each
13 single dock structure alters the light, substrate, and wave energy regimes of nearshore habitat
14 areas, they contribute to a cumulative effect on those areas. “[I]t is likely that each geographic
15 subsystem has a threshold over which the nearshore habitat will no longer be able to support the
16 biologic assemblages native to it.” *Ex. P-54 (p 81)*

17 [F20]

18 To avoid or minimize impacts to the extent and quality of nearshore habitats, it is
19 possible to place floating docks in deeper water. This can avoid disturbances and losses to
20 habitat and predation. *Ex. P-54.* The Respondents’ proposed float lift location was originally
21 adjacent to the end of the PRF structure. It is currently proposed to be located 425 feet from the

1 Robinson bulkhead. This location has not yet been surveyed to determine whether eelgrass is
2 present. Ex. P-10 (6/26/06 drawing); *Testimony of Robinson*.

3
4 **Relevant Procedural History**

5 [F21]

6 On September 21, 2004, Petitioner May wrote to the Pierce County Department of
7 Planning and Land Services with a comment on the SEPA Environmental Checklist prepared for
8 the Respondents' project. As the lead agency, Pierce County issued a Determination of Non-
9 Significance (DNS) on November 10, 2005, that specified that the comment period would end on
10 November 28, 2005, and that appeals must be filed within 14 days of the expiration of the
11 comment deadline. *Ex. P-11*. A corrected DNS was issued on December 7, 2005 correcting the
12 project description with regard to the number of pilings to be installed on the structure and
13 revising a finding concerning federal review. The corrected DNS again stated that the comment
14 deadline was November 28, 2005, and re-stated the 14-day deadline for appeals. *EX. P-12*. No
15 appeals were filed, and the DNS became final on December 13, 2005. The Corrected DNS was
16 subsequently revised to include the proposed boat lift and reissued on May 31, 2006. *Ex. P-11,*
17 *P-, P-13*

18 [F22]

19 Petitioner May timely received a copy of the SEPA DNS, and the corrected DNS with a
20 cover letter dated December 7, 2005, indicating that appeal would be possible within 14 days of
21 November 28, 2005. He did not appeal the DNS. On November 28, 2005, Petitioner May

1 delivered a letter to Pierce County Planning and Land Services that stated "...we are requesting
2 that you reconsider the [DNS]." The letter listed six criticisms of the DNS in lengthy detail. It
3 did not state, however, that it was an *appeal* of the DNS. *Ex. P-14, Testimony of May.* On
4 December 13, 2005 (the day the DNS became final), Petitioner May visited Pierce County to
5 inquire about appealing the DNS and was told that the appeal deadline had already passed. On
6 March 21, 2006 (prior to the May 31, 2006 "Addendum to Existing Environmental Document"),
7 Petitioner May stated that he "chose not to appeal but issue comments as appealing would have
8 cost approx. \$1500. Comments were free." *Ex. 98.* The Board finds that Petitioners knowingly
9 chose not to appeal the DNS, opting instead to provide comments on the draft.

10 [F23]

11 On June 14, 2006, the Peninsula Advisory Commission (PAC) held a public hearing to
12 consider the applications for the SSDP and the SCUP. The PAC decided to recommend to
13 Pierce County approval of the PFR and denial of the SCUP for the floating watercraft lift.

14 [F24]

15 Pierce County Department of Planning and Land Services prepared a Staff Report on
16 June 21, 2006, recommending that the Pierce County Hearing Examiner deny the SSDP for the
17 dock and approval of the float lift and anchor buoy. The recommendation differed from the PAC
18 recommendation, but agreed that the request was "of an intensity that is not compatible with the
19 Rural Residential Shoreline environment." Staff based its recommendation, in part, on the fact
20 that over water structures in the area were minimal, and the conclusion that the shallow profile of
21 the beach is "not conducive to constructing docks that achieve a water depth for longer term

1 moorage,” causing a boat moored at the proposed dock to be grounded “on a regular basis.”
2 Staff also concluded that the proposed dock would “unduly impact the views, the marine
3 oriented recreation, and public use of the surface waters.” *Ex. P-1*. The conclusion regarding
4 the “undue” nature of the impacts was based on balancing the limited utility of the dock against
5 the other values. *Testimony of Prendergast*.

6 [F25]

7 On August 7, 2006, the Pierce County Hearing Examiner issued a Report and Decision of
8 Hearing Examiner approving the Respondents’ request for an SCUP to allow the floating
9 watercraft lift subject to conditions stated in the decision, and approved the request for an SSDP
10 to allow a 100-foot long 8-foot wide joint use dock subject to conditions stated in the decision.

11 *Exhibit R-84*.

12 [F26]

13 On August 16, 2006, Respondents Kvinfosland filed a request for reconsideration of the
14 Hearing Examiner’s decision regarding the condition requiring removal of all existing buoys
15 because they wished to retain a mooring buoy for continuous moorage for their boat. On
16 September 5, 2006, the Hearing Examiner issued a decision on reconsideration that allowed the
17 Kvinfoslands to retain their existing buoy. *Exhibit R- 85*.

18 [F27]

19 On September 28, 2006, the Department of Ecology (Ecology) received notice of Pierce
20 County’s approval of the SSDP and commenced its review of the SCUP for the float lift. On
21 October 17, 2006, Ecology approved the SCUP, concurring that the proposal, as conditioned,

1 met the intent of the master program and the criteria set forth in WAC 173-27-160 for granting a
2 Conditional Use Permit. *Exhibit R-87.*

3
4 [F28]

5 The Washington Department of Fish and Wildlife (WDFW) issued a Hydraulic Project
6 Approval (HPA) for the Respondents' PRF on April 17, 2006, pursuant to Chapter 77.55 RCW.
7 The Petitioner appealed that approval on May 10, 2006, and WDFW denied his appeal on June
8 20, 2006. WDFW's review of the proposed PRF did not include any analysis of fish and wildlife
9 habitat impacts that might result if approval of this PRF lead to additional PRF's being built in
10 this previously undeveloped stretch of shoreline. *Ex. R70; Testimony of Stewart .*

11 [F29]

12 Respondents applied to the U.S. Army Corps of Engineers (the Army Corps) for a permit
13 for their proposed float lift. The Army Corps has issued a Regional General Permit with policies
14 and conditions specifically addressing the installation of floating watercraft lifts. *Ex. R-78.*
15 These policies include project impact reduction and conservation measures that include
16 placement of float lift structures in deeper water to minimize impacts to the shallow water
17 habitat. In response to these policies, Respondents amended their initial proposal for the float lift
18 to provide that it would be placed 425 feet from the Robertson bulkhead. *Testimony of Stroud.*
19 *Robertson.* The Army Corps' decision on the float lift permit float application is still pending.

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

3
4
5 **CONCLUSIONS OF LAW**

6 [C1]

7 The Board has jurisdiction over the parties and the subject matter of this case pursuant to
8 RCW 90.58.180(1). Both the scope and standard of review for this matter is *de novo*. WAC
9 461-08-500(1). As the appealing parties, the Petitioners have the burden of proof. RCW
10 90.58.140(7). WAC 461-08-500(3). The appealing parties must establish that the permit
11 approval is inconsistent with the requirements of the Shoreline Management Act (SMA) or
12 Pierce County's Shoreline Master Program (PCSMP).

13 The issues identified in the Pre-Hearing Order remaining in dispute at the hearing were:

- 14 1. Whether the Shoreline Conditional Use Permit (SCUP) and the Shoreline Substantial
15 Development Permit (SDP) are inconsistent with the requirements of the Shoreline
16 Management Act and the Pierce County Shoreline Master Program.
- 17 2. Whether SDP 36-04 violates the Pierce County SMP's general criteria and guidelines
18 for piers and docks in PCC 20.56.040.
- 19 3. Whether the SCUP can be issued for a project not located on land owned by the
20 applicant where the owner of the underlying land has not consented to the application.
- 21 4. Whether SCUP 36-04 violates the criteria for conditional uses in PCC 20.72.030.
5. Whether the proposal conflicts with the SMP's General Regulations and Policies for
the Rural-Residential Environment because the proposal is in excess of medium

1 intensity and would impair the public recreational use by including both a private
2 dock and float lift.

- 3 6. Whether the dock is inconsistent with use policies for piers including, but not limited
4 to, policies which discourage the use of piers for single-family residences and which
5 policies provide that in considering any pier, considerations such as environmental
6 impact, navigational impact, existing pier density, and impact on adjacent proximate
7 land ownership should be considered.
- 8 7. Whether the project is inconsistent with the policy for piers which encourages the use
9 of mooring buoys as an alternative to space-consuming piers such as those in front of
10 single-family residences.
- 11 8. Whether the project is inconsistent with the use policy for piers which stipulates that
12 floating docks should be encouraged in those areas where scenic values are high and
13 where conflicts with recreational boaters and fishermen will not be created.
- 14 9. Whether the project conflicts with the general development guidelines for substantial
15 development permits for piers and docks in PCC 20.56.040.B.
- 16 10. Whether Pierce County erred in not requiring preparation of an Environmental Impact
17 Statement and failed to allow for the required time frame for an appeal of the DNS.
- 18 11. Whether the Shoreline Hearings Board has jurisdiction in this appeal to determine
19 whether the proposed project has sufficient protections for forage fish as set forth in
20 RCW 75.08.012, WAC 220-110-250 and.300.
- 21 12. Whether petitioners' claims that the proposed project has insufficient protections for
forage fish, as set forth in RCW 75.08.012, WAC 220-110-250 and.300, are barred by
the doctrines of res judicata and/or collateral estoppel, since these issues were fully
adjudicated in petitioners' appeal of the Washington State Department of Fish and
Wildlife Hydraulic Project Approval.
13. Whether petitioners failed to exhaust their administrative remedies and are therefore
barred from seeking review of Pierce County's Determination of Nonsignificance.
14. Whether petitioners' claims regarding environmental impacts from the proposed
project are barred by the doctrines of res judicata and/or collateral estoppel, since
petitioners failed to appeal the Determination of Nonsignificance issued by Pierce
County.

1 must be at least one foot above bed bottom throughout the range of normal tidal conditions. PCC
2 20.56.040 B.4.

3 [C5]

4 To be eligible for an SSDP in Pierce County, a party bears the burden of showing that the
5 proposed project is consistent with the policies of the Master Program and with the following
6 criteria in PCC 20.56.040:

- 7 1. Important navigational routes or marine oriented recreation areas will not be
8 obstructed or impaired;
- 9 2. Views from surrounding properties will not be unduly impaired;
- 10 3. Ingress-Egress as well as the use and enjoyment of the water or beach on adjoining
11 property is not unduly restricted or impaired;
- 12 4. Public use of the surface waters below ordinary high water shall not be unduly
13 impaired;
- 14 5. A reasonable alternative such as joint use, commercial or public moorage facilities
15 does not exist or is not likely to exist in the near future;
- 16 6. The use or uses of any proposed dock, pier or float requires, by common and
17 acceptable practice, a Shoreline location in order to function;
- 18 7. The intensity of the use or uses of any proposed dock, Pier and/or float shall be
19 compatible with the surrounding environment and land and water uses.

20 PCC 20.56.040 A.

21 The criteria at issue in this case are those that relate to views from surrounding properties,
the use and enjoyment of the water or beach on adjoining property, the public's use of the
waters, the availability of commercial or public moorage facilities, and the compatibility of the
proposal with surrounding land and water uses.

[C6]

Pierce County Planner Prendergast recommended denial of Respondents' application for
an SSDP after performing a balancing analysis addressing the PCSMP mandate in PCC

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20

1 20.56.040A to weigh competing values. The planner's analysis focused on whether there were
2 *undue* restrictions and impairments to views and public enjoyment of the beach including the
3 particular environmental and biological impacts that would be involved at the beach and in the
4 water. The PCSMP provides that only one moorage space is allowed per waterfront owner using
5 a joint use dock. PCC 20.56.040 B.7.e. If the PRF and the float lift were approved without the
6 removal of the existing moorage buoys, as is planned, there would be a total of four moorage
7 spaces for two families. *Testimony of Prendergast.*

8 [C7]

9 In lieu of adopting specific standards relating to design, location, bulk, and use for
10 substantial shoreline developments, Pierce County has also adopted development guidelines that
11 the County's reviewing authority must apply to site-specific project applications to achieve a
12 "satisfactory degree of consistency with the policies and criteria set forth in [the PCSMP Piers
13 and Docks chapter]. Using these guidelines, the County may extend, restrict, or deny an
14 application to achieve the purposes of the Piers and Docks chapter. The development guidelines
15 include the following:

16 2. In areas identified by the Department of Fisheries, Game or Natural Resources in
17 accordance with a study inexistence at the time of application as having a *high*
18 *environmental value for shellfish, fish life or wildlife, piers, docks and floats shall not be*
19 *allowed* unless functionally necessary to the propagation, harvesting, testing or
20 experimentation of said marine or wildlife, *unless it can be conclusively established that*
21 *the dock, pier or float will not be detrimental to the natural habitat*

1 7. Joint use piers and docks.

2 a. Maximum intrusion into water² should be only so long as to obtain a depth of
3 eight feet of water as measured at mean lower low water on saltwater shorelines,
4 or as measured at ordinary high water on freshwater shorelines, except that the
 intrusion into water of any pier or dock should not exceed the lesser of 15 percent
 of the fetch or 150 feet on saltwater shorelines

5 e. Joint dock facilities should have no more moorage spaces than one space per
6 waterfront owner using the dock.

7 PCSMP 20.56.040 B. (Emphasis added).

8 Pierce County Planner Prendergast's recommendation to the Hearing Examiner that
9 Respondents' application for a SSDP be denied was based on the PCSMP mandate to weigh two
10 basic classes of values as set forth in PCC 20.56.040 A. One side concerns whether the proposal
11 would cause *undue* restrictions or impairments of the views of the beach, the enjoyment of the
12 water and beach on adjoining properties, and impairment of the public's use of surface waters
13 below ordinary high water. To be weighed against those values is the question of whether
14 reasonable alternatives exist for shoreline property owners, and whether the intensity of proposed
15 uses is compatible with the surrounding environment and land and water uses. PCSMP
16 20.56.040 A. Prendergast concluded that, in this case, the balancing analysis required by the
17 county SMP tipped the scale – that it was too much to expect in a rural residential environment
18 to have a dock, a pier, a ramp, and a float lift where owners already had use of two boat launches
19 and buoys.

20 ² Intrusion into the water means the length of a dock or pier together with any attached structures such as a gangway
21 and/or float measured along a perpendicular line from the ordinary high water line or lawfully established bulkhead
 to the most seaward projection of the structure PCC 20.56.010 E.

1 [C8]

2 The Pierce County guidelines for reviewing SSDPs for piers and docks criteria require an
3 analysis of whether a reasonable alternative such as joint use, commercial, or public moorage
4 facilities exists and whether it is likely to exist in the near future. PCC 20.56.040 A.5. The
5 Board uses an objective standard, rather than personal circumstances of a particular proponent to
6 evaluate the need for a project. *Harman v. Bellevue, Order Denying Reconsideration*, SHB-94-
7 75. The evidence was insufficient to establish that existing launching facilities were generally
8 insufficient.

9 **B. Compatibility with Surrounding Environment and Uses (Issues 5, 8 & 9)**

10 [C9]

11 The evidence established that the site is located on a beach that has a wide expanse of
12 sandy, gently sloping shoreline and is, to date, virtually undeveloped. The docks that do exist in
13 the area are located on the rocky ends of the crescent and do not interrupt the long expanse of
14 sandy beach in between. The fact that this would be the first dock within this sandy crescent is a
15 significant factor in the compatibility analysis. The Board has addressed the issue of
16 compatibility before. For example, in *Inskeep v. San Juan Co, SHB No. 98-033 (1999)*, the
17 Board granted an SCUP and variance for a dock that was the first such facility in a bay because it
18 sufficiently minimized the impact by its location and design. In this case, the proposal is for a
19 dock much longer than the nearest two older structures, and it is situated in the middle of a long,
20 relatively undeveloped stretch of wide sandy beach where there are no other docks. Therefore,

1 compatibility is more of a concern to the Board. The fact that a dock is a permitted use in the
2 Rural Residential zone does not eliminate the necessity for a compatibility analysis. The Court
3 of Appeals has recognized that it is appropriate to consider compatibility, aesthetics, and the
4 preservation of scenic views in the context of a substantial development permit. *Bellevue Farm
5 Owners Ass'n v. Shorelines Hearings Board*, 100 Wn.App. 341, 355, 997 P.2d 380 (2000).
6 Pierce County general criteria and guidelines for reviewing substantial development permits
7 include compatibility issues such as the impairment of views from surrounding properties. PCC
8 20.56.040 A.2. For shoreline development proposals, compatibility has both upland and
9 waterward aspects. Even where the shore is lined with structures on relatively narrow lots, the
10 beach may still be in a relatively natural state. The Board has addressed compatibility and
11 aesthetics in relation to the siting of docks, and recognized that property owners in dock cases
12 are less concerned about their views being blocked than seeing man-made structures in a natural
13 setting. *Citizens to Preserve the Upper Snohomish River Valley v S-R Broadcasting*, SHB 06-
14 022 (2006).

15 [C10]

16 The Pierce County General Criteria and Guidelines for Reviewing Substantial
17 Development Permits Development Guidelines as found in PCC 20.56.040 B.2, require that, to
18 approve a PRF structure in areas having a high environmental value, it must be *conclusively*
19 *established* that a PRF will not be detrimental to the natural habitat.
20
21

1 [C11]

2 The site of this proposal is Hale Passage, which is part of a shoreline of statewide
3 significance. For shorelines of state-wide significance, the first order of preference is to
4 recognize and protect the state-wide interest over the local interest. The legislature has declared
5 that the interest of all of the people shall be paramount in the management of shorelines of state-
6 wide significance. RCW 90.58.020. The SMA provides an order of preference for uses on such
7 shorelines in RCW 90.58.020, which is as follows:

- 8 (1) Recognize and protect the state-wide interest over local interest;
- 9 (2) Preserve the natural character of the shoreline;
- 10 (3) Result in long term over short term benefit;
- 11 (4) Protection of the resources and ecology of the shoreline;
- 12 (5) Increasing public access to publicly owned areas of shorelines;
- 13 (6) Increasing recreational opportunities for the public in the shoreline; and
- 14 (7) Providing for other elements defined in RCW 90.58.100 as necessary and appropriate.

15 [C12]

16 The SMA allows the development of reasonable and appropriate uses along the state's
17 shores, but it is the policy of the state to provide for the management of the shorelines of the state
18 by insuring development of the shorelines in a manner that will promote and enhance the public
19 interest, contemplating protecting against adverse effects to the public health, the land and its
20 vegetation and wildlife, and the waters of the state and their aquatic life, while protecting
21 generally public rights..." RCW 90.58.020. "The policy of the SMA was based upon the

1 recognition that shorelines are fragile and that the increasing pressure of additional uses being
2 placed on them necessitated increased coordination in their management and development.”
3 *Beuchel*, 125 Wn.2d at 203, 884 P.2d 910. The evidence in this case demonstrated the fragile
4 nature of this shoreline. The area involved in this application for a PRF is in a state of recovery
5 following an event occurring prior to the enactment of the SMA that destroyed environmentally
6 valuable eelgrass beds, which, in turn, impacted species, including endangered salmonid species,
7 that depend on them. The beach is also an established area for sand lance spawning.

8 [C13]

9 The fact that the County issued a DNS in this case is not controlling, since a DNS is not
10 binding on the Shorelines Hearings Board, nor does it preclude other environmental review. The
11 SMA is to be broadly construed to protect the state shorelines as fully as possible. *Bellevue*
12 *Farm Owners Assoc. v. SHB*, 100 Wn.App. at 352 (2000); RCW 90.58.170, 180(1). SEPA is
13 essentially a procedural statute, not designed to usurp local decision making or to dictate a
14 particular substantive result. *Save Our Rural Env't v. Shohomish County*, 99 Wn.2d 363, 371,
15 662 P.2d 816 (1983).

16 [C14]

17 The project area is classified by the WDFW as a Nearshore Marine Area. It has been
18 designated a critical habitat area for Hood Canal summer-run chum salmon, and Puget Sound
19 Chinook Salmon, listed as Endangered under the Endangered Species Act. 50 C.F.R. Part 226,
20 70 F.R. 52705; 16 U.S.C. §§1531 to 1544. *Exhibit P-51, P-52*.

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26

1 [C15]

2 Pierce County's development guidelines for shoreline uses include a requirement that, to
3 approve a PRF structure in areas having a high environmental value, it must be *conclusively*
4 *established* that a PRF will not be detrimental to the natural habitat. PCSMP 20.56.040 A. The
5 Board concludes that the shoreline area involved in this proposal is one of high environmental
6 value and that, in this case, the proposed structure would likely be detrimental to the natural
7 habitat currently existing and recovering at this location.

8 [C16]

9 The evidence amply established fact that residents and visitors alike consider the beach
10 and the views it affords to be beautiful and unique. Aesthetic values are *inherent* in the values to
11 be protected under the SMA and Pierce County's Shoreline Master Program. Uses of shorelines
12 of state-wide significance are prioritized. The Board concludes that inherent in all of these use
13 preferences is protection of the aesthetics of the state's shorelines, particularly for relatively
14 undeveloped stretches like the beach that is the subject of this case. The Board concludes that a
15 100-foot PRF constructed in the middle of the sandy crescent of this beach would have a jarring
16 visual effect, and it would not further any of the priorities set forth in the SMA.

17 [C17]

18 The Board recognizes that private property rights, which are also protected by the SMA
19 and at the same time is mindful of case law from our higher courts concluding that the protection
20 of private property rights is secondary to the SMA's primary purpose which is "to protect the
21 state shorelines as fully as possible." *Buechel v. Department of Ecology*, 125 Wn.2d 196, 203,

1 884 P.2d 910 (1994); *Lund v. Department of Ecology*, 93 Wn.App. 329,336, 969 P.2d 1072
2 (1998). In this case, the law requires this Board to balance the Respondents' rights to enjoyment
3 of their property against not only the competing private property rights of their neighboring
4 property owners, but also those priority rights of the public in a shoreline of statewide
5 significance.

6 [C18]

7 Respondents argue that cumulative effects are not part of the criteria required to be
8 considered in applications for substantial development permits, citing *Roller v. Unger*, SHB No.
9 06-016 (2006).³ This is in contrast to shoreline conditional use permits and shoreline variances
10 where cumulative impacts must be specifically considered. WAC 173-27-160, 170. Even
11 though cumulative impacts are not listed, *per se*, as shoreline substantial development permit
12 criteria, the Board is not precluded from considering them. The Supreme Court has held that, in
13 light of its statutory duties, the Board was neither arbitrary nor capricious to be concerned over
14 the ultimate cumulative impact of piecemeal development on the state's shorelines when it
15 vacated and remanded an SSDP for filling wetlands. *Hayes v. Yount*, 87 Wn.2d 280, 288, 552
16 P.2d 1038 (1976).

17 In a case involving review of an SSDP issued by a local government, the Washington
18 Supreme Court upheld the Board's remand of that permit based upon the potential cumulative
19 impacts of other projects removing buffer protections along the shoreline. *Skagit County v.*

1 *Department of Ecology*, 93 Wn.2d 742, 750, 613 P.2d 121 (1980). Citing the *Hayes* decision,
2 the *Skagit County* court approved the SHB's consideration of cumulative effects in the granting
3 of a substantial development permit, recognizing that approval of one project can be adverse to
4 the environment by setting a precedent for other similar projects. The Court said, "Logic and
5 common sense suggest that numerous projects, each having no significant effect individually,
6 may well have very significant effects when taken together." *Skagit County*, 93 Wn. 2d at 750
7 (quoting *Hayes* at page 287). The *Skagit County* court went on to conclude that "The SMA
8 recognizes the necessity for controlling the cumulative detrimental impact of piecemeal
9 development through coordinated planning of all development. RCW 90.58.020." *Skagit*
10 *County*, 93 Wn.2d at 750 (1980).

11 This Board has also found that, under some circumstances, it is appropriate to consider
12 SSDP applications for docks in the context of potential future development:

13 We must also consider the present proposal in the context of potential future development
14 of similar docks along Pickering Passage. The board noted in *Gennotti v. Mason County*,
15 SHB No. 99-011 (1999), that listed salmon stocks on Hood Canal have been adversely
16 impacted by extensive development. Even if the proposed dock alone would have no
17 adverse impact, it should be considered in the cumulative adverse impact attendant on
18 potential future dock development.

19 *Viafore v Mason County*, SHB No. 99-033, p. 4 (2000).

20 The facts of this case are distinguishable from those in the *Roller* case in several
21 important respects and more like those presented in *Viafore*. First, in *Roller*, it was significant

³ While it is true that, in *Roller*, the Board held that neither the SMA nor the Pierce County Code *requires* consideration of cumulative effects, it also acknowledged that they do not *preclude* such consideration where appropriate. *Roller v Pierce County*, SHB 06-016 (2006).

1 [C20]

2 To be eligible for a CUP in Pierce County, a party bears the burden of showing that the
3 all of the following criteria in PCC 20.72.030 have been met:

- 4 A. That there is some necessity for a shoreline site for the proposed use or that the
5 particular site applied for is essential for this use.
- 6 B. The use will cause no unreasonably adverse effects on the environment or other uses.
- 7 C. That water, air, noise, and other classes of pollution will not exceed the level
8 customarily found in that particular environment.
- 9 D. Design of the site will be compatible with the Master Program.
- 10 E. The use will not interfere with public use or public shorelines.

11 [C21]

12 Piers, pilings, docks, floats, rafts, ramps, etc., and associated mooring projects must
13 incorporate mitigation measures as necessary to achieve no-net loss of productive capacity of
14 fish and shellfish habitat. WAC 220-110-300. Floats and rafts "shall not ground on...Pacific
15 sand lance..." WAC 220-110-300(1). Piers, docks, floats, rafts, ramps, boathouses, houseboats,
16 and associated moorings shall be designed and located to avoid shading of eelgrass (*Zostera*
17 spp). WAC 220-110-300(3).

18 [C22]

19 Although there was dispute regarding the presence of eelgrass in the precise project area,
20 it was undisputed that the survey that was conducted did not extend to the likely location of the
21 float lift. The Board has found that the evidence established the presence of at least one stand of

1 eelgrass and that eelgrass is re-establishing itself in the area. The evidence also established that
2 the location of the float lift does not involve sand lance spawning because it is further waterward
3 than the normal near-shore spawning habitat. The Army Corps general permit requires that no
4 work on float lifts be performed over or within 50 feet of eelgrass and macroalgae beds. The
5 Board concludes that the Army Corp's implementation of this separation between the proposed
6 float lift and the eelgrass bed(s) would provide sufficient protection for the nascent re-
7 establishment of eelgrass beds in the area. and meets the shoreline environmental protection
8 requirements of RCW 90.58.020.

9
10 **D. Pierce County's Compliance with SEPA (Issues 10, 13 & 14)**

11 [C23]

12 Petitioner bases his appeal partly on SEPA. In this case, the evidence established that
13 Petitioner was particularly active in the SEPA process. It also demonstrated that the County
14 followed required SEPA procedures and provided proper notice of the appeal deadline to the
15 general public, including actual notice to Petitioner. The DNS was issued on November 10,
16 2005, and it included a specific notice that the deadline for appeals was 14 days after the
17 expiration of the comment deadline, which was also specifically stated as November 28, 2005.
18 Petitioner May did not appeal. A corrected DNS was issued on December 7, 2005 and provided
19 to Petitioner May, and although the appeal deadline was repeated on that document, Petitioner
20 May still filed no appeal, although he did comment. However, he did not state that his comment
21 was meant to be an appeal. In a later communication by e-mail to the County, Petitioner stated

1 that he had chosen not to appeal, but only to comment as it was free. Unless there has been a
2 substantial change in a proposal between the time of the first governmental action and the
3 subsequent governmental action that is likely to have adverse environmental impacts beyond the
4 range of impacts previously analyzed and proper notice provided, a corrected DNS does not
5 require additional time for filing an appeal. RCW 43.21C.080(2)(b). The Board concludes that,
6 although Petitioner May was actively involved throughout the SEPA process, he failed to timely
7 appeal the County's SEPA determination and exhaust his administrative remedies. Therefore,
8 the issues raised in this appeal pursuant to SEPA are not properly before this Board and they
9 cannot be considered.

10
11 **E. Jurisdiction of the Shoreline Hearings Board (Issues 11, 14, and 12)**

12 [C24]

13 Respondents challenge the Board's jurisdiction to determine whether the proposed
14 project has sufficient protections for forage fish. Chapter 77.55 RCW requires the WDFW to
15 consider the welfare of fish. Protection of fish life is the only ground upon which approval of a
16 [hydraulic] permit may be denied or conditioned. RCW 77.55.021(3)(a). The Board does not
17 implement WDFW statutes. This Board is a quasi-judicial body with powers of *de novo* review
18 authorized by Chapter 90.58 RCW to adjudicate or determine appeals from any person aggrieved
19 by the granting, denying, or rescinding of a permit issued or penalties incurred pursuant to
20 chapter 90.58 RCW (the SMA). RCW 90.58.180(2); WAC 461-08-315. The broad shoreline
21 protection mandates of the SMA require the Board to balance the sometimes competing uses of

1 shorelines in light of the state mandate to protect the natural resources of the shorelines. “This
2 policy contemplates protecting against adverse effects to the public health, the land and its
3 vegetation and wildlife, and the waters of the state and their aquatic life, while protecting
4 generally public rights of navigation and corollary rights incidental thereto.” RCW 90.58.020.
5 In order to do that, the Board must consider the environmental conditions that are necessary for
6 the protection of the shoreline natural environment, including the fish and plant life. The
7 Department of Fish and Wildlife (WDFW) does not consider the potential cumulative effects of a
8 project when issuing a hydraulic project approval. *Testimony of Stewart*. Therefore, the fact that
9 the WDFW has reviewed Respondents’ proposal and issued a permit under the laws that govern
10 hydraulics permitting does not preclude the Board from considering potential impacts to forage
11 fish and other organisms in its evaluation of whether a proposal adequately achieves the SMA’s
12 goals of balancing uses and impacts. The Board concludes that it has jurisdiction under the
13 SMA to hear and decide matters relating to the welfare of forage fish, and that the Board is not
14 barred by the doctrines of *res judicata* and/or *collateral estoppel* from considering impacts to
15 forage fish.

16 [C25]

17 Petitioners raised, but did not argue, an issue as to the ownership of the underlying
18 tidelands, and whether an SSDP can be issued for a project not located on land owned by the
19 Respondents. The Board rejects this issue because ownership of the underlying land is not
20 necessary in an application for an SSDP first because the DNR has already issued a hydraulics
21 permit for the PRF. With regard to the float lift, the Board has held that entitlement to an SSDP

1 is not dependent upon the applicant's property interest, but upon the nature of the SSDP itself
2 under the SMA. *Friends of the Earth v. Westport*, SHB No. 84-63 (1985); *Casey v. City of*
3 *Tacoma*, SHB No. 79-19 (1979).

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

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

7 **ORDER**

- 8 1. Pierce County's decision approving the Robertsons' and Kvinslands' Application for
9 a Shoreline Substantial Development Permit for a PRF is REVERSED.
- 10 2. Pierce County's decision approving the Application for a Shoreline Conditional Use
11 Permit for the floating watercraft lift is AFFIRMED, with the additional condition
12 that a supplemental eel grass survey is conducted to allow placement of the float lift
13 in a location that will not impact eelgrass.

14 SO ORDERED this 16th day of April 2007.

15 **SHORELINES HEARINGS BOARD**

16 WILLIAM H. LYNCH, Chair

17 ANDREA McNAMARA DOYLE, Member

18 MARY-ALYCE BURLEIGH, Member

19 CASSANDRA NOBLE, Presiding
20 Administrative Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **RESPONDENT COALITION'S ANSWERING BRIEF** on the following-named counsel on January 8, 2016, by email and first class mail:

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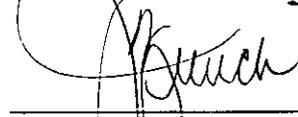
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