

NO. 47717-3

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

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FILED  
COURT OF APPEALS  
DIVISION II  
2016 JAN -8 AM 9:37  
STATE OF WASHINGTON  
BY DERBY

DARRELL de TIENNE and CHELSEA FARMS, INC.,

Appellants,

v.

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

Respondents.

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**RESPONDENT'S BRIEF**

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## I. INTRODUCTION

Appellants Darrell de Tienne and Chelsea Farms, Inc., appeal the Shorelines Hearings Board's final permitting decision, arguing, among other things, the decision is void because the Board was divested of jurisdiction after it failed to follow the directive of RCW 90.58.180(3) that the Board "shall issue" a decision within 210 days after a petition for review is filed with the Board.<sup>1</sup>

But the Board timely issued its final decision within 210 days of the filing of the last of three petitions, which were consolidated by the Board on review. As a result, the Board's order is valid, and this Court does not need to determine whether the time designated in RCW 90.58.180(3) is mandatory or directory.

Even if the Board's decision was untimely, the statutory language, the purpose of the Shoreline Management Act in general and the review provisions in particular, and consideration of equity principles all lead to one conclusion: the time by which the Board "shall" render a decision is directory. RCW 90.58.180 expresses a legislative concern for prompt

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<sup>1</sup> The Board, an independent, quasi-judicial body, is responsible for hearing and deciding appeals of persons aggrieved by the granting, denying, or rescinding of a state shoreline substantial development permit. RCW 90.58.180(1); *Bellevue Farm Owners Ass'n v. State of Wash. Shorelines Hrgs. Bd.*, 100 Wn. App. 341, 351, 997 P.2d 380 (2000). A quasi-judicial agency may participate in review of its decision to address the scope of its authority and integrity of its decision-making process. *See Kaiser Aluminum & Chemical Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 782, 854 P.2d 611 (1993). Here, the Board addresses only Appellants' arguments concerning the timing of the Board's order.

performance of the quasi-judicial functions of state agencies but does not impose a mandatory time requirement. Further, the appropriate remedy for an untimely decision is to seek an order compelling issuance of a decision under the APA, not to vacate the decision. This Court should uphold the validity of the Board's order.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. RCW 90.58.180(3) provides that the Board "shall issue" its appeal decision within 210 days after the date "the petition" is filed with the Board. Did the Board timely issue its decision where it consolidated three petitions for review regarding the same permit, and the Board's decision was issued 208 days after the last petition was filed?
2. Even if the Board's decision was untimely, is the decision still valid because the statutory language, the primary purpose of the Shoreline Management Act, legislative history, and equity considerations all evince a legislative intent that the time requirement in RCW 90.58.180(3) be solely directory?

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

An individual aggrieved by the granting, denying, or rescinding of a state shorelines permit may seek review from the Shoreline Hearings Board (Board) by filing a petition for review. RCW 90.58.180(1). In June 2013, three parties petitioned the Board to review a Pierce County approved permit for a proposed geoduck farm: Respondents Paul and Betty Garrison on June 11; Respondent Coalition to Protect Puget Sound Habitat on June 25 (Coalition); and Appellants Darrell de Tienne and

Chelsea Farms, Inc., on June 28 (Growers). Agency Record (AR) 001-0092, 128-222, 247-63. The Board consolidated the three petitions and later dismissed the Garrisons' petition. AR 323-334, 891-916. Although the Growers settled the issues in their petition prior to the hearing, they were never dismissed by the Board as a party, and they continued to participate in the hearing procedure. CP 25.

Under the Shoreline Management Act, the Board "shall issue its decision . . . within one hundred eighty days after the date the petition is filed," but the Board may extend this time "for a period of thirty days upon a showing of good cause." RCW 90.58.180(3). A hearing was conducted from November 12 through November 19, 2013. CP 25. Following the hearing, the Board informed the parties that due to its schedule, it would be extending the decision deadline until January 7, 2014, in accordance with RCW 90.58.180. CP 229. On December 30, 2013, the Board issued a letter to the parties indicating that it would not be able to reach its initial deadline and that the "final decision would be issued shortly thereafter." CP 231. The Board issued its decision on January 22, 2014, 208 days after the Growers filed their petition. CP 80; AR 956-1018.

The Growers filed a petition for judicial review in Thurston County superior court. CP 4-81. The Growers then moved for summary

judgment, asserting that the Board's decision was "void" because the appeal decision was untimely. CP 214-225. The court denied the motion for summary judgment and upheld the validity of the Board's order. CP 821-24.

#### **IV. STANDARD OF REVIEW**

"Statutory interpretation is a question of law reviewed de novo." *Williams v. Tilaye*, 174 Wn.2d 57, 61, 272 P.3d 235 (2012). Thus, the Growers' challenge to the Board's decision-making authority and interpretation of RCW 90.58.180(3) is reviewed de novo. However, the Board is responsible for hearing and deciding shoreline permit appeals, and courts grant substantial weight to a Board's interpretation of the statutory language and legislative intent of the statutes it administers. *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000); *Overton v. Washington State Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981); RCW 90.58.180(1).

#### **V. ARGUMENT**

The Board timely issued its order within 210 days of the filing of the last petition for review. Therefore, the Court does not need to determine whether the time provisions in RCW 90.58.180 are mandatory or directory. Even if the Board's decision was untimely, the statutory time

provision for the issuance of a decision is directory, not mandatory or “jurisdictional.” Accordingly, the Board’s decision is not void. If the Board fails to timely issue a decision, the appropriate remedy is to seek an order compelling performance under the APA.

**A. The Board Timely Issued Its Decision Within the Shoreline Management Act’s 210-day Timeline.**

This Court does not need to determine whether the statutory time requirement for the Board to issue a decision is directory or mandatory in RCW 90.58.180(3) because the Board complied with the statute by issuing its final decision within 210 days of the filing of the last petition.

The Shoreline Management Act of 1971, Chapter 90.58 RCW, governs the management and development of the state’s shorelines through a permitting process enabling reasonable and appropriate use of the shoreline. *Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994). An individual aggrieved by the granting, denying, or rescinding of a state shoreline permit may seek review from the Board by filing a petition for review. RCW 90.58.180(1).

The Board’s review proceedings are governed by the Administrative Procedure Act, chapter 34.05 RCW, except that RCW 90.58.180(3) governs the time within which the Board should render its decision:

The board shall issue its decision on the appeal authorized under . . . this section within one hundred eighty days after the date the petition is filed with the board or a petition to intervene is filed by 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.

Thus, the Board may extend the initial 180 days by which the statute directs it to issue a decision by 30 days, for a total of 210 days. The parties also may agree to waive the 180-day deadline. *Id.*; WAC 461-08-560(2).

In this case, three parties filed separate petitions appealing the same permit. The first petition was filed on June 11, 2013, and the final petition, filed by the Growers, was filed on June 28, 2013. AR 001-0092, 128-222, 247-63. The Board consolidated the petitions and conducted a hearing in November 2013. AR 323-34, 891-916. Following the hearing, the Board informed the parties that due to its schedule, it would be extending the decision deadline until January 7, 2014, in accordance with RCW 90.58.180. CP 229. No party objected. On December 30, 2013, the Board issued a letter to the parties indicating that it would not be able to reach its initial deadline and that the “final decision would be issued shortly thereafter.” AR 231. Again, no party objected. On January, 22, 2014, the Board issued its decision, 208 days after the Growers filed their

petition. AR 956-1018; CP 80. Thus, the decision was issued within 210 days of the last petition filed.

Here, three petitions for review were filed with the Board, each on a different date. However, the statutory language contemplates only a single petition for review being considered by the Board. RCW 90.58.180(3) (“The board shall issue its decision . . . within one hundred eighty days after the date *the petition* is filed with the board . . . .” (emphasis added)).<sup>2</sup> The statute does, however, expressly extend the commencement of the decision deadline if there is a petition to intervene by the Department of Ecology or the Attorney General. RCW 90.58.180(3) (180 days runs from “the date the petition is filed with the board or a petition to intervene is filed by the department or the attorney general, *whichever is later.*” (emphasis added)). This demonstrates the Legislature intended to have the decision deadline commence only when all the parties to the appeal were established.

In this case, the Growers’ petition was the last petition filed, on June 28, 2015, and their petition was consolidated with the other two petitions filed. AR 323-334, 891-916. Although the Growers settled the

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<sup>2</sup> WAC 461-08-560 does contemplate more than one petition being filed (“The board shall . . . issue a final decision on *petitions for review* . . . within one hundred eighty days of the following . . . .” (emphasis added)). However, the use of the plural supports the interpretation that when multiple petitions are consolidated for review, the time for issuing a decision commences from the last petition filed but it provides no further guidance on the decision deadline.

issues in their petition prior to the hearing, they were never dismissed by the Board as a party, and they continued to participate in the hearing procedure. CP 25, 80. Their suggestion that the resolution of the issues in their petition prior to the hearing means that the decision deadline should run from a previously-filed petition could lead to absurd results, which should be avoided. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). If the decision deadline in a consolidated petition changes after the issues in one petition are resolved, the Board's timeline for issuing an opinion could be unexpectedly truncated during the course of review. In instances where this happens close to the hearing date, this would likely lead to a less thorough order and review of the record.

Because the Board's decision was issued within 210 days of the last, consolidated petition for review, it was timely. As a result, this Court does not need to determine whether the time designation in RCW 90.58.180(3) is directory or mandatory.

**B. The Time Designation in RCW 90.58.180(3) is Directory and Does Not Divest the Board of Authority to Render a Decision for Failing to Fulfill the Legislative Directive.**

Even if the Board's decision was issued beyond the 210-day timeframe, the statutory time provision is directory rather than mandatory. Therefore, the Board is not divested of its authority to render a decision if

it issues a decision after 210 days. Further, the Board has not previously interpreted the statutory language as mandatory.

**1. The plain meaning of RCW 90.58.180 indicates that the time requirement is directory.**

The Growers assert the time requirement in RCW 90.58.180(3) is mandatory rather than directory because the statute contains the word “shall.” Appellant’s Opening Br. at 16. Growers’ emphasis on this term is misplaced. “Although the word ‘shall’ is presumptively mandatory, its meaning is not gleaned from [the] use of that word alone because [the court’s] purpose is to ascertain legislative intent of the statute as a whole.” *State v. Rice*, 174 Wn.2d 884, 855, 279 P.3d 849 (2012). In determining whether “shall” is mandatory or directory, the court considers “all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.” *Id.*

The plain meaning of RCW 90.58.180, as evidenced by the statutory language, the Shoreline Management Act’s expressed purpose, the consideration of the effect of alternative statutory constructions, and relevant legislative history demonstrates that the Legislature intended the time designation to be directory rather than mandatory or jurisdictional.

- a. **The statute is directory because it sets forth a timeframe within which a government officer is requested to act without any language denying performance after a specific time.**

RCW 90.58.180 is directory because it does not impose any consequences if the Board fails to act within the specified timeframe. The statute simply serves as a guide for the conduct of business and for orderly procedure rather than as a limitation on the Board's power.

“A statute specifying a time within which a public officer 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 Wn.2d 149, 155, 201 P.2d 136 (1948); *Sullivan v. Dep't. of Transp.*, 71 Wn. App. 317, 323, 858 P.2d 283 (1993). “When a ‘statute is merely a guide for the conduct of business and for orderly procedure rather than a limitation of power,’ it is directory.” *Id.* (citation omitted).

For example, *Niichel v. Lancaster*, 97 Wn.2d 620, 647 P.2d 1021 (1982), involved statutes stating that a county assessor “shall” list and value all property by May 31, give notice of any change in value no later than 30 days after appraisal, and file his or her assessment book on the first Monday of July. RCW 84.40.040, RCW 84.40.045, RCW 84.40.320.

After a Clallam County assessor missed all three deadlines, a local property owner challenged his property assessment, arguing the assessor's failure to perform by the deadlines made the assessment invalid. *Id.* at 621-23. The court upheld the assessment, holding that the use of the word "shall" was intended to be directory rather than mandatory. *Id.* at 628. It reasoned that the statutes prescribed assessment procedures and did "not purport to limit the taxing power. The words are affirmative and relate to the manner in which the assessment power is to be exercised." *Id.* at 624.

Similarly, in *Miller*, the court construed a statute providing "it shall be the duty of the attorney general" to institute legal action "within thirty days of receipt of" a report from the State Auditor that discloses an unlawful act on the part of any public officer or employee. *Miller*, 32 Wn.2d at 149-56. The court noted that "[a]ffirmative statutory provisions relating to the time or manner of performing official acts, unlimited or unqualified by negative words, are generally considered directory" and do not forbid action after expiration of the period mentioned in the statute. *Id.* at 154. The court also concluded the Legislature could not have intended public officials to escape liability for illegal expenditure of public funds if commencement of an action was somehow delayed. *Id.* at 156. As a result, the court held the 30-day period was only directory and simply

instructed the attorney general to expedite the public business by bringing actions within a certain period. *Id.*

Here, RCW 90.58.180 is directory because the statutory language relates to the procedural manner in which decisions should be written and served. The statute specifies the time within which the Board should issue its decision but provides no indication that the designation of time should be construed as a limitation on the Board's power. RCW 90.58.180(3). Like the statutes in *Niichel* and *Miller*, it lacks any language purporting to limit the Board's authority and indicates only the manner in which the Board's power to issue a decision should be exercised. Further, the Legislature did not impose any consequences for failure to issue an order within the designated time; the statute does not forbid issuing a decision after the expiration of the time period. *Miller*, 32 Wn.2d at 154. As such, the time designation solely sets forth an orderly procedure for the time and method for the Board to render a decision. The statutory time frame is therefore directory.

**b. The essential purpose of Chapter 90.58 RCW supports the conclusion that the time designation in RCW 90.58.130(3) is directory.**

Importantly, the specific time for the Board to issue a decision is not "essential to the purpose of the statute." *Niichel*, 97 Wn.2d at 624. "Shall" is interpreted as directory, rather than mandatory or jurisdictional,

when a literal reading would frustrate the legislative intent. *Frank v. Washington State Dep't of Licensing*, 94 Wn. App. 306, 972 P.2d 491 (1999). Likewise, "where the time or manner of performing the action 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*, 97 Wn.2d at 624.

In *Frank*, the court held that the implied consent statute's provision that an officer "shall" transmit to the Department of Licensing a sworn report of a driver's refusal to submit to a breath test within 72 hours of the refusal was directory. *Frank*, 94 Wn. App. at 311-12. The time designation was not essential, and a mandatory interpretation would frustrate the statute's general purpose of preventing driving under the influence. *Id.* at 311-12. Additionally, even if "shall" was mandatory, the officer's failure to timely transmit the report did not deprive the Department of jurisdiction to decide the matter absent an additional showing by the driver of prejudice. *Id.* at 312-13.

In *Application of Santore*, the court held that an adoption statute, which provided that an order of relinquishment "shall" not be granted unless the petitioner first meets two conditions, was merely directory. *Application of Santore*, 28 Wn. App. 319, 326, 623 P.2d 702 (1981); former RCW 26.32.210 (1979). The court noted that even though

adoption statutes should be strictly construed, “they should not be given a construction so narrow and technical as to defeat their manifest intent and beneficial aims.” *Id.* Construing “shall” as mandatory would disrupt the statute’s goal of protecting the new family relationship from subsequent disturbance by the natural parents. *Id.*

Similarly here, the liberal construction and expressed objectives of the Shoreline Management Act and RCW 98.58.180 support the reading of “shall” as directory. “The [Act] is to be broadly construed in order to protect the state’s shorelines as fully as possible.” *Buechel*, 125 Wn.2d at 202. This policy is “based upon the recognition that shorelines are fragile and that the increasing pressure of additional uses being placed on them necessitated increased coordination in their management and development.” *Id.* The Act contemplates that by regulating state shorelines, the state will protect “against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally the public right of navigation and corollary rights incidental thereto.” *Id.*; RCW 90.58.020. And the purpose of RCW 90.58.180 is to allow parties aggrieved by a shorelines permitting decision to obtain the Board’s substantive review. Treating the time designation as mandatory would not only be antithetical to the liberal construction of the chapter, but would also frustrate the

legislative intent of protecting the state's natural resources by precluding thorough and meaningful review of contested permits.

**c. Construing “shall” as mandatory results in an absurd and harsh result that could not have been intended by the Legislature.**

The conclusion that the time designation is directory is further supported in light of the extreme consequences that would result if the statute is construed as mandatory. “The court must avoid constructions that yield unlikely, absurd or strained consequences.” *Kilian*, 147 Wn.2d at 21; *see also State v. McDougal*, 120 Wn.2d 334, 351, 841 P.2d 1232 (1992) (holding that “departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question.”). Importantly, “time provisions are often found to be directory where a mandatory construction might do great injury to persons not at fault.” 3 Sutherland, *Statutory Constructions*, § 57:19 (7<sup>th</sup> ed. 2013).

Construing the time designation here as mandatory would punish appealing parties for the Board's inaction through no fault of their own and lead to a harsh and inequitable result by imposing further costs and delay. *See Washington State Liquor Control Bd. v. Washington State Personnel Board*, 88 Wn.2d 368, 377, 561 P.2d 195 (1977) (construing statute stating Personnel Board “shall” hear an employee appeal within 30

days of filing as mandatory would result in right of employee appeal to be “totally extinguished without any fault on the part of the employee”); *Demaris v. Barker*, 33 Wn. 200, 74 P.2d 362 (1903) (reading Article IV, § 20’s requirement that superior courts “shall” decide cases within 90 days as mandatory would unfairly punish litigants for the court’s inaction). Further, should an untimely decision be rendered void because it was untimely, a petitioner seeking review of a permit decision would effectively be deprived of their statutory right to review. RCW 90.58.180(1). The Legislature could not have intended such a harsh result stemming from no fault of the petitioner. This harsh and unjust result only further confirms the time designation is directory.

**d. The legislative history of RCW 90.58.180 supports the interpretation that the time designation is directory.**

Because review of RCW 90.58.180 demonstrates the time designation is directory, the Court does not need to review legislative history. *See Darkenwald v. State Emp’t Sec. Dep’t*, 183 Wn.2d 237, 245, 350 P.3d 647 (2015) (“We consider other matters, including legislative history, if the statute remains susceptible to more than one reasonable meaning after completing this plain-meaning analysis.”) Regardless, contrary to the Growers assertion, the legislative history of RCW 90.58.180 does not demonstrate that the time designation creates a

mandatory duty or otherwise divests the Board of its power to render a decision if it fails to timely issue an order. Appellant's Opening Br. at 16.

Prior to the 1995 regulatory reform legislation, chapter 90.58 RCW contained no timeline for rendering decisions. Instead, the APA provided the timeframe; all orders were to be served within 90 days after the conclusion of the hearing. Former RCW 34.05.461(8) (1989). The Task Force on Regulatory Reform recommended the Board's decision deadline change to 180–210 days after the filing of the petition, and the Legislature adopted this recommendation. Laws of 1995, ch. 347, § 310. The Legislature also amended RCW 34.05.461 to reflect that the APA no longer controlled the Board's timeline.

However, neither the Task Force report nor the legislative history pertaining to the time period change give any indicia that the Legislature intended to make the time period mandatory and thus penalize petitioners by terminating their appeal in the event the Board was unable to timely issue a final decision. If the Legislature had actually intended to void an untimely decision, it is reasonable to conclude it would have clearly added such language in light of the considerable body of Washington case law holding that statutes directing government action within a specific time are generally deemed directory unless there is clear language divesting power for failing to act. *See Washington Fed. of State Employees v. Joint Center*

*for Higher Educ.*, 86 Wn. App. 1, 7, 933 P.2d 1080 (1997) (“The Legislature is presumed to know existing case law in areas in which it is legislating . . .”). In fact, the Legislature notably did not change the statute’s citation to APA’s provisions regarding judicial review, which provide that an order to compel is the appropriate remedy in instances where a person’s rights have been violated by an agency’s failure to perform a statutory duty. RCW 34.05.570(4)(c). Thus, contrary to the Growers assertion, the legislative history of RCW 90.58.180 does not support the conclusion that the time designation is mandatory.

**2. The Board has not previously determined that RCW 90.58.180(3) is mandatory.**

The Growers incorrectly assert the Board has previously determined the time requirement is mandatory. Appellant’s Opening Br. at 17. They cite to *Moe v. King County*, SHB No. 11-013, and *Eagles Roost v. San Juan County*, SHB No. 96-047, to support this assertion. Appellant’s Opening Br. at 17-18. Reliance on dicta in these cases is unfounded.

In *Moe*, the County simultaneously issued a Shoreline Substantial Development Permit (SSDP) and State Environmental Policy Act (SEPA) determination of nonsignificance. SHB No. 11-013, at 2. To preserve its appeal rights, *Moe* petitioned the Board for review of the SSDP and

appealed the issuance of the SEPA determination with the County. *Id.* Moe then asked the Board to stay its proceedings pending completion of the SEPA determination review or remand to the County for completion of the SEPA determination. *Id.*

The Board remanded, relying on two core SEPA concepts: (1) SEPA requires an aggrieved person to exhaust administrative remedies before seeking judicial review or the Board's administrative review; and (2) SEPA requires linkage of the SEPA review with the underlying permit action. SHB No. 11-013, at 4. Having determined that a remand was appropriate, the Board then added the footnote quoted by the Growers. SHB No. 11-013, at 4 n.3; Appellant's Opening Br. at 17.

This footnote is dicta. Statements made in the course of a court's reasoning that are "wholly incidental" to the basic decision are not binding. *Burress v. Richens*, 3 Wn. App. 63, 66, 472 P.2d 396 (1970); *see also DuPont-Fort Lewis Sch. Dist. v. Clover Park Sch. Dist. No. 400*, 65 Wn.2d 342, 344 n.2, 396 P.2d 979 (1964) ("Prior statements are not to be confused with prior holdings. Courts generally . . . use language much broader in its scope than required for the decision of the particular matter presently before them."). Further, the Board's footnote does not suggest the legal consequence of staying the proceeding would be the Board's

complete loss of authority to issue a decision. The statement merely signals the Board's intention to heed the Legislature's directive.

The Growers also misconstrue *Eagles Roost*, specifically, the significance of the quotation they italicized indicating the 1995 legislation "limited the jurisdiction of the board to 180 days from the date a request for review is filed." SHB No. 96-047, at 2; Appellant's Opening Br. at 19. This comment is also dicta. In *Eagles Roost*, the only issue before the Board was whether Eagles Roost timely appealed an issued permit. The concurrence's comments regarding the Board's jurisdiction were not at issue and are not precedential. *State v. Potter*, 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992) ("Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute *obiter dictum*, and need not be followed.").

**C. The Appropriate Remedy For Failing To Timely Issue a Decision is to Seek an Order Compelling Performance Under the APA.**

Even if the Court determines the Board's decision was untimely and the time designation in RCW 90.58.180 created a mandatory duty, the decision still is not void. The remedy for failing to timely issue a decision is for a litigant to seek an order compelling performance under the APA.

RCW 90.58.180 provides no specific remedy for an untimely decision. Instead, it directs the parties to the APA: "The review

proceedings authorized . . . in this section are subject to the provisions of [the APA] pertaining to procedures in adjudicative proceedings. Judicial review of such proceedings of the shorelines hearings board is governed by [the APA].” RCW 90.58.180(3). Under the APA, “A person whose rights are violated by an agency’s failure to perform a duty that is required by law to be performed may file a petition for review . . . seeking an order pursuant to this subsection requiring performance.” RCW 34.05.570(4)(b). Thus, if a party has an issue with the timeliness of the Board’s order, the appropriate and available remedy is to seek an order requiring performance under the APA.

This Court has previously determined that an order requiring performance is an appropriate remedy for an agency’s failure to meet a statutory deadline. For example, under the APA, “an agency *shall* transmit to the court . . . the agency record for judicial review” within 30 days. RCW 34.05.566(1) (emphasis added). In *Trohimovich v. State*, 90 Wn. App. 554, 557, 952 P.2d 192 (1998), the Court held that the agency’s failure to transmit the record within the timeframe should not result in a default judgment. Rather, the remedy provided under the APA is to seek an order requiring performance. *Id.*

In other instances where a public officer or agency has failed to perform an action within a prescribed period of time, compelling

performance is the appropriate remedy. *Sullivan v. Department of Transportation*, 71 Wn. App. 317, 858 P.2d 283 (1993) (department's failure to perform work evaluations within the time specified in statute did not void the evaluations or adversely affect the employees, and remedy was to seek court order compelling performance). Similarly, where a judge has failed to submit a timely decision in accordance with statute, the remedy has been to seek an order requiring performance. *State ex. Rel. Burgunder v. Superior Court for King County*, 180 Wn. 311, 315, 39 P.2d 983 (1935) (remedy for judge's failure to render a decision within 90 days was to seek a writ of mandamus).

Even in instances where the court has determined that statutory time designations are mandatory, the court has still refused to void judicial decisions. For example, in *State v. Martin*, a juvenile moved to dismiss his guilty plea on the grounds that the court lost jurisdiction to sentence him because the disposition hearing was scheduled after the statutory deadline. *State v. Martin*, 137 Wn.2d 149, 153-54, 969 P.2d 450 (1999). The court reaffirmed its earlier decisions holding that the disposition hearing deadline is mandatory, but nevertheless held that failure to meet the time prescription did not extinguish the superior court's right to enter judgment. *Id.* The Court also noted that Martin had failed to show how he was prejudiced by the delay. *Id.*

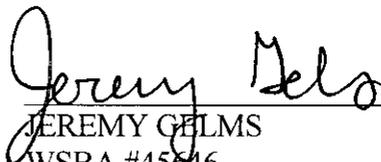
Here, voiding the Board's decision would be inconsistent with established case law. The time limits imposed by RCW 90.58.180(3) afford a petitioner the right to compel performance under the APA, not a right to vacate an untimely order. Further, as in *Sullivan* and *Martin*, the Growers may be adversely affected by the Board's decision, but they fail to show they are adversely affected by the untimeliness of the decision.

## VI. CONCLUSION

The Board timely issued its decision under RCW 90.58.180(3). Even if it was untimely, the language and purpose of the statute, the legislative history, and well established case law demonstrate that the language requiring the Board to issue a decision within 180 or 210 days is directory. Failure to timely comply does not deprive the Board of power to issue a decision on properly appealed state shorelines permits. For the foregoing reasons, the Court should uphold the validity of the Board's decision.

RESPECTFULLY SUBMITTED this 7<sup>TH</sup> day of January, 2016.

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**PROOF OF SERVICE**

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FILED  
COURT OF APPEALS  
DIVISION II  
2016 JAN -8 AM 9:37  
STATE OF WASHINGTON  
BY  DEPUTY

Filed by ABC Messenger Service with:

David Ponzoha, Court Administrator/Clerk  
Court of Appeals Division II  
950 Broadway, Ste. 300  
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7<sup>th</sup> day of January, 2015, at Seattle, Washington.

A handwritten signature in cursive script, appearing to read "Katie Mocerri".

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Katie Mocerri, Legal Assistant