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SUPREME COURT OF THE STATE OF WASHINGTON

TWIN BRIDGE MARINE PARK, LLC, and KEN YOUNGSMAN (KEN
YOUNGSMAN AND ASSOCIATES),

Respondents,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Petitioner.

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**SUPPLEMENTAL BRIEF OF STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY**

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I. INTRODUCTION

The Shorelines Hearings Board affirmed penalties issued by the Department of Ecology when Twin Bridge Marine Park constructed a large marina without a permit under the Shoreline Management Act (SMA), and in violation of its existing shoreline permits authorizing only a marine construction and dredging business.¹ Twin Bridge, relying on this Court's decisions interpreting the bar on untimely review of land use decisions in the Land Use Petition Act (LUPA), argued that Ecology's penalties were barred under LUPA because of the county's issuance of a final building permit for the marina structures. Twin Bridge COA Br. at 9–20.

Unlike the Court's prior LUPA cases barring collateral attacks, Ecology's penalties did not involve untimely review or invalidation of final local permits. Ecology simply enforced SMA permits and requirements. The Court of Appeals erred by expanding the bar against collateral attacks to "inferential" county decisions about SMA permits in a local building permit. That ruling directly contradicts SMA provisions for how shoreline permits are issued and achieve finality.

Under the SMA, a shoreline permit obtains finality when issued in writing by local government, filed with Ecology, and when there is no appeal within 21 days. RCW 90.58.140(1), (2), (6); RCW 90.58.180(1).

¹ The Board's decisions are in the Appendix.

Where conditional use permits are involved, the SMA requires Ecology approval for issuance or revision before finality arises. RCW 90.58.140(10); WAC 173-27-100(6). In this case, the original permits for a marine construction business were final and enforceable. Any inferential decision by the county in the building permits could not change these final SMA permits.

Samuel's Furniture v. Dep't of Ecology, 147 Wn.2d 440, 54 P.3d 1194 (2002) is therefore distinguishable. In that case, LUPA gave finality to a local decision that a project was outside shoreline jurisdiction. Here, there is no question that the project is within SMA jurisdiction and that the SMA provided means to get a new permit or revise the existing permits and obtain finality. Ecology therefore properly penalized Twin Bridge when it decided to build its marina prior to proper SMA permitting.

II. ISSUES PRESENTED

1. Does the bar to an untimely appeal of a building permit under LUPA also bar Ecology's statutory authority to penalize development violating the terms of a Shoreline Management Act conditional use permit approved by Ecology?

2. Does a county have authority to alter what is allowed by a final SMA conditional use permit approved by Ecology by issuing a building permit allowing different construction and use?

3. If the county issued building permits for the marina based on a decision that no further shoreline permits were necessary, does that local decision deprive Ecology and the Board of their statutory authority to ensure compliance with the original permits and the SMA?²

III. STATEMENT OF THE CASE

The facts are accurately recited in the Board's initial ruling affirming Ecology's penalties and the Board's subsequent ruling on remand rejecting Twin Bridge's argument based on *Samuel's Furniture*. No party assigned error to the Board's findings or argued that the findings lack substantial evidence. See RAP 10.3(h). Unchallenged findings are verities on judicial review. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 102, 11 P.3d 726 (2000). Twin Bridge has not challenged the reasonableness of the penalty amount.

Twin Bridge built an indoor or "backshore" marina that includes two large buildings, in excess of 66,000 and 7,600 square feet; a forklift to lift boats from the water; a reinforced concrete pier; parking; boat washing facilities; septic pump out facilities; and boat repair, fueling, and retail facilities. Appendix A at 6, 10, 11, FF IX, XVI, and XVII. Twin Bridge built the marina when it held shoreline conditional use permits (CUPs) numbered 7-82 and 15-86, approved by Ecology in the 1980s, which did

² This last issue reflects the argument presented by Twin Bridge in its opposition to Ecology's Petition for Review.

not allow the large marina complex. These original permits approved development and use of the site as a marine construction and dredging business. Appendix A at 4-5, FF V, VI, VII. Rather than 70,000 square feet of building, the original permits limited the use of the site to a small office building of approximately 5,000 square feet, and for storage of construction materials, equipment, dredges, dredge tenders, and dredge pipe. Ex. R-3, R-6.

The original permits required modification if Twin Bridge pursued additional or different development:

[T]his permit [CUP 7-82] only authorizes 90,000 cubic yards of fill to be placed on site and subsequent use of the site for the operation of a marine construction and dredging business to include storage of materials and equipment. *Any other substantial development on the site such as buildings, shore structures, hard surfacing, and drainage improvements will be submitted as a new permit*

Appendix A at 4, FF V; Ex. R-4 (emphasis added). Ecology told Twin Bridge a number of times that a new or updated permit was needed for the larger marina project. Appendix A at 16-18, COL VIII, X; Exs. R-17, R-19, R-39; Appendix B (SHB Denial of Motion to Vacate at 11). Twin Bridge "chose to ignore and/or reject" Ecology's request. Appendix A at 18, COL X; Ex. R-47.

Ecology issued penalties totaling \$59,000 to Twin Bridge for use and development of the site in violation of the existing shoreline CUPs and

before obtaining a new or revised shoreline permit for the marina complex. Exs. R-50, R-82, R-93. Ecology ordered Twin Bridge to stop work, but Ecology never sought review or invalidation of the building permits. Twin Bridge appealed the penalties to the Shorelines Hearings Board, which affirmed.³

On judicial review, the superior court reversed. It described the original conditional use permits as “substantial development permits” and treated the building permits as local decisions that the marina complex was consistent with the original shoreline permits. The Court of Appeals, in a split decision, held that the county “necessarily determined,” or made an “inferential decision,” that the existing permits allowed the marina development and use. Based on this broad view of the building permits, the Court of Appeals characterized the penalties as untimely collateral attacks. *Twin Bridge Marine Park v. Dep’t of Ecology*, 130 Wn. App. 730, 745, ¶ 27, 125 P.3d 155 (2005). Judge Becker dissented.

³ In settlement of Ecology’s initial penalty, Twin Bridge agreed to “pursue in good faith [an] application for a new” shoreline permit for the marina complex, and to “not resume work on the site until all required federal, state, and local permits have been obtained.” Appendix A at 7–9, FF XI, XII; Exs. R-50, R-80. Although Twin Bridge applied for a new shoreline permit, it did not wait for the county to issue the new permit and instead built the marina. Appendix A at 9 FF XIII; Ex. A-1. Ecology then reinstated the original penalty and issued new penalties that the Board reviewed and affirmed.

IV. ARGUMENT

The Board's ruling that Twin Bridge acted without necessary shoreline permits and in violation of its original conditional use permits should be affirmed. Ecology's penalties involved no collateral attacks barred by LUPA. This is a question of law reviewed *de novo*. *Macy v. Dep't of Empl. Sec.*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988).

A. Ecology's Penalties Were Not Barred By LUPA Because They Did Not Collaterally Attack Any Final Land Use Decisions

LUPA creates a bar to collateral attacks on land use decisions because it provides the exclusive avenue of review for final land use decisions. A "land use petition" must be timely filed to review a final "land use decision." RCW 36.70C.040(2). As shown in this section, this bar applies when there is an untimely attempt to review and invalidate final land use decisions. LUPA, therefore, is not applicable to Ecology's penalties because the penalties did not require review or invalidation of the building permits.

In several cases, the Court has applied the bar to untimely petitions brought under LUPA that directly sought review and invalidation of prior land use decisions. See *Wenatchee Sportsman Ass'n v. Chelan Cy.*, 141 Wn.2d 169, 180, 4 P.3d 123 (2000) (untimely challenge to rezone); *Habitat*

Watch v. Skagit Cy., 155 Wn.2d 397, 406, 120 P.3d 56 (2005) (untimely challenge to permit extension).

In other cases, this Court has applied the bar to actions that were not petitions for review under LUPA but constituted “collateral attacks” on a local land use decision. *Chelan Cy. v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), for example, rejected a declaratory judgment action brought by a county *to invalidate* its own prior decision issuing a boundary line adjustment. The Court concluded that LUPA applies to both ministerial and quasi-judicial land-use decisions and therefore to the boundary line adjustment. The Court then relied on *Wenatchee Sportsmen* for the proposition that the declaratory judgment was “precluded [as a] collateral attack of the land use decision.” *Id.* at 932. *See also Richards v. City of Pullman*, 134 Wn. App. 876, 142 P.3d 1121 (2006) (barring declaratory action attacking local order).

James v. Cy. of Kitsap, 154 Wn.2d 574, 115 P.3d 286 (2005), involved a class action seeking a refund of impact fees imposed by building permits. The Court resolved the “central issue” in *James* by holding that “imposition of impact fees as a condition on the issuance of a building permit *is a land use decision* and is not reviewable unless a party timely” challenges it under LUPA. *Id.* at 580, ¶ 11, and 586, ¶ 23 (emphasis added). Therefore, “whether the County improperly imposed impact fees as a

condition on the issuance of building permits is no longer reviewable.” *Id.* at 586, ¶ 24. *James* thus involved a collateral attack seeking to review and invalidate a final land use decision.⁴

In *Samuel’s Furniture v. Dep’t of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002), the Court found that potential penalties or enforcement actions by Ecology amounted to a collateral attack on a local decision determining that a project was not within shoreline jurisdiction:

Ecology must file a timely LUPA petition challenging a local government’s decision to allow a development project after it has determined that the project at issue is not within the shoreline boundary. If Ecology fails to file a LUPA petition under such circumstances, it cannot *collaterally challenge the local government’s determination that the project is not within the shoreline jurisdiction* by bringing independent enforcement actions against the property owner or developer.

Samuel’s, 147 Wn.2d at 463 (emphasis added).

Samuel’s Furniture involved a local decision on jurisdiction that was arguably implicit. *See id.* at 451 n.11. However, in response to the dissent argument that there was no final local decision on SMA jurisdiction, the majority emphasized that Ecology had the means and the authority to require express notification of the jurisdictional decision thus allowing for

⁴ *Skamania Cy. v. Columbia River Gorge Comm’n*, 144 Wn.2d 30, 26 P.3d 241 (2001), also involves a collateral attack, although it did not involve LUPA. The Court there rejected an untimely attempt to invalidate a homeowner’s building permit, which the Gorge Commission had never appealed. *See Skamania Cy.*, 144 Wn.2d at 40–41.

an appeal. *Id.* at 463. Accordingly, the holding of *Samuel's Furniture* bars a collateral attack on the jurisdiction decision of local government.

The elements of LUPA's bar are thus clear. The bar arises if a later case directly or collaterally attacks a final land use decision. A collateral attack exists if the later case requires review and invalidation of the final land use decision. Here, Ecology's enforcement actions did not seek review or invalidation of Skagit County's building permits, nor of any decision by Skagit County underlying those permits. Under LUPA, "[c]laims that do not depend on the validity of a land use decision are not barred." *Asche v. Bloomquist*, 132 Wn. App. 784, 800, 133 P.3d 475 (2006) citing *Grundy v. Thurston Cy.*, 155 Wn.2d 1, 117 P.3d 1089 (2005). Here, Ecology's penalties depended solely on whether or not Twin Bridge was violating the SMA or its SMA permits.⁵

More significantly, none of the above cases construes the enforcement of separate laws, or independent property rights, as a collateral attack on a building permit. That principle is important because a building permit should not bar a land owner from restraining a trespass, even if an unappealed building permit purports to authorize construction constituting a trespass. Similarly, Ecology's penalties were no more of a collateral attack

⁵ Ecology did order Twin Bridge to stop work, but that was also because Twin Bridge was violating its existing shoreline permits and lacked a new shoreline permit. The stop work orders depended and relied entirely on the SMA.

on the building permits than if the federal government ordered Twin Bridge to obtain a permit or if a neighbor enjoined Twin Bridge's construction work for trespass. *See also Dep't of Ecology v. Pacesetter Constr. Co., Inc.*, 89 Wn.2d 203, 571 P.2d 196 (1977) (discussed in Section C).

Ecology did not seek invalidation of the building permits or any other decision of Skagit County. Ecology simply enforced the conditional use permits as they were written and as they were limited by Ecology when they were issued. Accordingly, the LUPA finality given to the building permits cannot, under this Court's precedent, bar enforcement of separate permits and independent legal requirements of the SMA.

B. Ecology's Enforcement Of The SMA Did Not Collaterally Attack Any Final Shoreline Decisions By Skagit County

The Court of Appeals went beyond preventing an untimely review and invalidation of the building permits. It concluded that Ecology's penalties were barred as collateral attacks on an inferential SMA decision underlying the building permit.⁶ By concluding LUPA protected these "inferential" decisions, the Court of Appeals barred enforcement of the original SMA conditional use permits. It defeated the SMA requirement

⁶ *Twin Bridge Marine Park*, 130 Wn. App. at 732, ¶ 2 ("When Skagit County issued and later reinstated the building permits for Twin Bridge, it necessarily determined that the marina project was consistent with the existing shoreline permits and that the project did not require another shoreline permit."); *id.* at 740, ¶ 15 (a building permit "*represents* a decision by the local government that the development is consistent with already existing shoreline permits and that a further shoreline development permit is not required.") (emphasis added).

that a shoreline permit must specifically authorize substantial development. RCW 90.58.140(2).

This Court should reject this overly broad view of the building permits. By inferring final shoreline decisions and making them immune from collateral attack, the Court of Appeals directly contradicted the requirements of the SMA for creating final shoreline permits. Moreover, the Court's analysis leads to the absurd result that an inference from a building permit may be used to destroy the finality of written, filed, and unamended shoreline permits.

1. When A Party Claims A Collateral Attack On A Shoreline Decision, The SMA Determines Whether There Is A Final Shoreline Decision

LUPA bars collateral attack only if there is a final, appealable land use decision. RCW 36.70C.020(1); *WCHS, Inc. v. City of Lynwood*, 120 Wn. App. 668, 679–80, 86 P.3d 1169 (2004). Because LUPA excludes shoreline decisions from its coverage, finality for shoreline decisions must be determined under the SMA.

Under the SMA, for finality to attach to a shoreline substantial development permit decision, the local government must actually issue a written substantial development permit, after a public hearing. RCW 90.58.140(2), (4). If a conditional use permit is involved, the SMA also requires Ecology's approval. RCW 90.58.140(10). The SMA requires the

written permit to be filed with Ecology, which establishes a “date of filing.” See RCW 90.58.140(6). Appeals to the Board can be taken for 21 days after the date of filing of the written local decision. RCW 90.58.180(1); *H & H Partnership v. State*, 115 Wn. App. 164, 62 P.3d 510 (2003) (barring Ecology appeal that was more than 21 days after date of filing). When a shoreline permit is issued according to this process, the permittee and third parties can rely on the filed permit to establish what is allowed and prohibited, and a violation may trigger enforcement under RCW 90.58.210.

The SMA requires a permit revision if there is a substantive change to an approved development and use. See WAC 173-27-100(1) (“A permit revision is required whenever the applicant proposes substantive changes to the design, terms or conditions of a project from that which is approved in the permit.”). The SMA provides straightforward tools to achieve finality for a revision. Revisions to permits must be filed with Ecology, again to establish a date of filing. WAC 173-27-100(5). Revisions to conditional use permits, such as the original Twin Bridge permits, again require Ecology’s approval. WAC 173-27-100(6). As with final original permits, finality for revisions comes after 21 days, because there is no longer a right to appeal. WAC 173-27-100(8).

As recognized in LUPA, RCW 36.70A.030(1)(a)(ii), the SMA grants the Shorelines Hearings Board jurisdiction to review decisions on

permit applications and enforcement of SMA permits. RCW 90.58.180(1).

The courts then review the Board's decisions under the Administrative Procedures Act. *See* RCW 34.05.

2. A County Building Permit Cannot Create A Final Shoreline Permit Decision By Inference Where There Is No Compliance With The SMA

The SMA establishes that shoreline permit decisions (including permit revisions) must be in writing, approved by Ecology if a conditional use or variance, then filed with Ecology for public review and potential appeal, before the permit is final. If a county wants to issue building permits that vary from a final shoreline permit, the SMA places modest burdens on the county and developer to revise the permits. In the absence of a revision the permits remain as written and all persons may rely on their finality.

In this case, the building permits issued by the County were not filed with Ecology as required by the SMA for public review and finality of shoreline decisions. The public did not obtain notice that the shoreline permits for marine construction were going to be used for a marina. Ecology did not review and approve changes to the conditional use permit limits of the original CUP 7-82. The original permits—which did not allow a marina—remained unchanged and could properly be enforced by Ecology before the Board.

This point is captured by Judge Becker, in dissent:

Because Twin Bridge accepted Ecology's limitations without challenge, development of the property was subject to the limited scope of conditional use permits as Ecology consistently interpreted them.

Twin Bridge Marine Park, 130 Wn. App. at 749 (Becker, J. dissenting). See also Pet. for Rev. at 10–14. The Court of Appeals lost sight of the unremarkable legal principle that a written SMA permit means what is says until lawfully revised.

Expanding the finality bar beyond shielding the actual building permits frustrates the purposes of the SMA—contrary to RCW 90.58.900 (SMA must be broadly construed to effectuate its purposes). RCW 90.58.140(2), (10). It also frustrates the requirement that SMA permits be written and available to the public. RCW 90.58.140(4), (6). Using LUPA to bar shoreline permit compliance also contradicts SMA provisions granting jurisdiction over permit issuance and compliance to the Shorelines Hearings Board.

The Court of Appeals reasoned that “[b]ecause WAC 173-27-140 prohibits a local government from authorizing shoreline development unless it is consistent with the SMA and the local government’s shoreline master program,” then the county must have been following the SMA. *Twin Bridge* at 742, ¶ 18. The weakness in this analysis is first, it overlooks the

above inconsistencies with SMA requirements. Second, it relies on local government's generalized obligation to follow the SMA which is no guarantee that local government will in fact implement and follow SMA requirements and procedures. A better analysis is that WAC 173-27-140 merely contemplates local compliance, but that the SMA also contemplates that there may be a mistake or noncompliance. Then, as a check against actions that might be mistakenly or deliberately inconsistent with final SMA permits, the SMA allows enforcement of written permits until modified. In this case, the SMA allowed Ecology to take action based on the original permit, which allowed a marine construction business but did not allow a marina.⁷

3. The Court Of Appeals' Other Reasons Do Not Support Extending *Samuel's Furniture* To This Case

The Court of Appeals reasoned that this case presented “the same problem” as *Samuel's Furniture*, because a developer faced “contradictory positions” regarding what was permitted on the property. *Twin Bridge*

⁷ The Court of Appeals may have placed undue weight on the Board's passing statement that “Skagit County *apparently* concluded that the existing CUP 7-82 covered the shoreline aspects of the project” Appendix A at 6, FF IX (emphasis added). The next findings, however, note that the County suspended the building permits, faced litigation, reinstated the building permits, and had not acted on shoreline permit applications for the marina. Appendix A at 9, FF XIII. On this record, it is unclear if the County made any shoreline decision when it issued the building permits. This uncertainty illustrates the importance of applying the SMA's procedures for permit issuance and revision. The procedures ensure that shoreline permitting is not conducted by inference, hidden from public view, and detrimental to the interests served by RCW 90.58.020 (SMA fosters reasonable uses while protecting shorelines).

Marine Park, 130 Wn. App. at 742 n.6. This case does not present the same problem as *Samuel's Furniture* for a number of reasons.

In *Samuel's Furniture*, Ecology had no review authority over the local decision that the project was outside the shoreline jurisdiction. As a result, local government made a final shoreline decision that the project was outside shoreline jurisdiction. Here, by contrast, Ecology had review authority to approve and impose the conditions in CUP 7-82, and legally Ecology must approve revisions to conditional use permits. RCW 90.58.140(10); WAC 173-27-100(6).

This Court in *Samuel's Furniture* noted that finality differs for conditional use permits where Ecology has specific approval power. *Samuel's*, 147 Wn.2d at 455 n.13 (citing RCW 90.58.140(10), (6)). The Court of Appeals did not give effect to the SMA's requirements for finality of conditional use permits, instead stating that local government has "exclusive authority" to administer the permit system. *Twin Bridge Marine Park*, 130 Wn. App. at 740, ¶ 15.

In *Samuel's Furniture*, the local decision that the project was outside shoreline jurisdiction was not appealable to the Shorelines Hearings Board. LUPA filled this gap by providing a means of review of that local decision. Use of LUPA was necessary because otherwise a land owner would have no finality if local government affirmatively acted to decline shoreline

jurisdiction. Here, the landowner had a variety of ways to work within the SMA and obtain new or revised SMA permits for a marina. Moreover, Ecology consistently pointed out the need to update the permits to provide permission for the marina project.⁸

Finally, *Samuel's Furniture* did not cause the same harm to the interests of the public and neighboring property owners. The provisions of the SMA create reasonable expectations that final and filed shoreline permits mean what they say, until another shoreline permit is issued, reviewed, and allows something different. The legitimate expectations of neighbors and the public that there will be SMA review and conditioning of a marina is defeated if that process is bypassed by a final building permit that shows no compliance with SMA substantive and procedural requirements.

C. This Case Involves Conditional Use Permits But The Result Applies Equally To Shoreline Substantial Development Permits

Twin Bridge's brief in opposition to review argued that no conditional use permits were at issue. However, the Board's decision and the hearing record confirm that this case involved enforcement of permits that provided both conditional use approval and substantial development

⁸ Ecology gave Twin Bridge many opportunities to comply and avoid penalties. See Appendix A at 8-9, FF XII and XIII; Appendix B at 10. Twin Bridge, moreover, generated the local decision by suing local government to assert its erroneous legal theory that it did not need any revised or new shoreline permits for a marina. Appendix A at 15-17, COL VI-IX. See also Appendix B at 9-12.

permission. Ecology penalized Twin Bridge for violation of the terms and conditions of those permits and for undertaking development of a marina not authorized by any shoreline permit. Appendix A at 16–18, COL VII, XI. The Board heard extensive evidence to that effect. *See* Tr. 5/28/02, at 62, 67–68, 70, 108–09; Tr. 5/29/02, at 10–11, 41. The Board’s supplemental decision unambiguously confirmed that Twin Bridge’s marina was not allowed by the conditional use permits.

Even if this case involved a local building permit contrary to a final substantial development permit, local interpretation cannot supercede a written and unrevised permit unless there is compliance with SMA requirements for revising the permit. *See* Section B.1 (discussing WAC 173-27-100(1), (5), (8)). Twin Bridge cannot show that these SMA requirements impose an unreasonable hardship, or why a sophisticated developer would build contrary to a written shoreline permit.

This Court rejected Twin Bridge’s approach to the SMA long ago, when a land owner claimed that a building permit superseded the SMA requirement for a permit. *Dep’t of Ecology v. Pacesetter Constr. Co., Inc.*, 89 Wn.2d 203, 571 P.2d 196 (1977). *Pacesetter* involved a person with building permits for construction of two houses on Lake Washington, but no substantial development permits. The neighbors sued to abate the construction because the houses violated the SMA in several regards.

Pacesetter, 89 Wn.2d at 207 (citing RCW 90.58.320, .140, and .020). This Court rejected *Pacesetter*'s argument that the SMA should be construed *in pari materia* with the building code "because they all regulate construction." The "SMA is a state statute of general application basically intended for the protection of the environment rather than the quality of construction, and, that, to the extent of any conflict between the Seattle building code and SMA, the latter must govern." *Id.* at 214. The Court explained further that

defendants willfully violated SMA by proceeding with construction without first obtaining a substantial development permit. It is unchallenged that they committed fraud to avoid complying with the permit requirement. Such fundamental violation is a threat to future effectiveness of SMA.

Id. at 213.

While Twin Bridge's case does not involve fraud, the concerns are the same whenever the SMA is bypassed. As explained by the Board below:

It would be contrary to the statutory framework for consideration of shoreline issues to expand the holding in *Samuel's* to allow a project using every inch of the two hundred foot shoreland area to proceed without shoreline permits simply because the local government has erroneously issued a building permit.

Appendix B at 11.

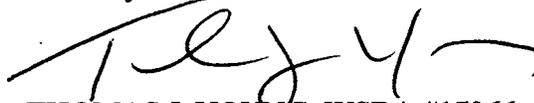
Pacesetter confirms Ecology's fundamental point that it is enforcing independent legal rights under the SMA. There is no collateral attack on a building permit because building permits do not function as shoreline permits—directly or inferentially. Nor can a final building permit trump the finality of previously issued shoreline permits, because the SMA controls how to issue and change a shoreline permit.

V. CONCLUSION

Twin Bridge cannot establish any error in the Findings or Conclusions of the Board. This Court should reverse the ruling of the Court of Appeals and affirm the decisions of the Shorelines Hearings Board.

RESPECTFULLY SUBMITTED this 16th day of February, 2007.

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1 4,000 square feet. To prepare the upland portions of the site Youngsman planned to place dredge
2 spoils on the upland property.

3 III.

4 Environmental review was conducted of Mr. Youngsman's proposed actions on the site
5 under the State Environmental Policy Act in a 1975 Final Environmental Impact Statement
6 (FEIS). The FEIS evaluated primarily a proposed zone change from Agricultural to Industrial.
7 It further addressed dredging a lagoon, disposal of fill material on the northern half of the inland
8 portion of the site, construction of a dock and dolphins for company vessels, construction of an
9 office/shop building of approximately 960 square feet, a repair/storage building of approximately
10 4,000 square feet and a communications antenna, expansion of a gravel road to provide access,
11 later construction of a railroad siding, and expansion of fill operations on the south portion of the
12 site to provide a disposal site for dredge spoils generated from maintenance of the Swinomish
13 Channel.

14 The FEIS did not mention any type of marina use, launching facilities, paving, reinforced
15 cement pads, boat washing, parking for substantial numbers of vehicles, retail services open to
16 the public, traffic or impacts associated with numerous customers frequenting the site, upland or
17 on the dock fueling, sewage pump-out or drainage swales. The evaluated project was limited to
18 a headquarters for Marine Construction and Dredging's business. The only further
19 environmental documentation relating to the site was contained in later addendums to the 1975
20 FEIS.

1 IV.

2 Mr. Youngman's early efforts to develop the property as a headquarters for his business
3 were interrupted by a number of years of litigation over the project. He first obtained a shoreline
4 substantial development permit from Skagit County in 1976. The permit approved placement of
5 dredge spoils on the 11-acre site and use of the area for storage of construction equipment and
6 office space for his dredging business. A Shoreline Hearings Board decision limited the dredge
7 spoils placement to 4 acres on the site. The decision was appealed and the Washington Supreme
8 Court disapproved any placement of dredge spoils in a June 1980 decision, *Skagit County v.*
9 *Dep't of Ecology*, 93 Wn. 2d 742, 751, 613 P.2d 115 (1980).

10 V.

11 After the shoreline permitting case was remanded to Skagit County, two shoreline
12 conditional use/substantial development permits (CUPs) were issued to Mr. Youngsman. CUP
13 7-82 was issued in December 1984 authorizing "placement of about 90,000 yards of landfill,
14 construction and operation of a marine dredging and construction business and the storage of
15 construction materials and equipment." Ecology approved CUP 7-82 in a letter dated March 20,
16 1985 which stated:

17
18 It is our understanding that this permit only authorizes 90,000 cubic
19 yards of fill to be placed on site and subsequent use of the site for the
20 operation of a marine construction and dredging business to include
21 storage of materials and equipment. Any other substantial development
on the site such as buildings, shore structures, hard surfacing, and
drainage improvements will be submitted as a new permit or a revision
to this permit pursuant to WAC 173-14-064.

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VI.

Skagit County issued CUP/SDP 15-86 to Marine Construction and Dredging Company in July 1986. The permit authorized "Hydraulic dredging of approximately 40,000 cubic yards of material with upland disposal on site for the creation of a boat basin, with dock and dolphins, to moor the applicant's dredging and construction equipment." No buildings, utilities, paving, or public access were included in the project description or approval.

VII.

Dredging and filling activities under CUP 7-82 and CUP 15-86 did not begin immediately. The project was delayed by litigation over the configuration of the manmade moorage basin. Mr. Youngsman was involved for several years in litigation with the Washington Department of Fish and Wildlife and others over the dredging proposal. When the litigation was ultimately concluded, Skagit County determined that CUPs 7-82 and 15-86 were still valid despite the passage of time because they were related and construction had been prevented by the litigation. The dispute over the moorage basin was actually resolved through a settlement that provided for reconfiguration of the moorage basin. Mr. Youngsman sought a revision of CUP 15-86 to accommodate the reconfiguration contemplated by the settlement. In March 1998 Ecology and Skagit County granted a revision to CUP 15-86 to reflect reconfiguration of the basin. No additional uses were authorized as part of the revision.

1 VIII.

2 Mr. Youngsman began to dredge the moorage lagoon in the spring of 1998. At about this
3 same time he began to investigate a proposal to sell or lease the property to a company named
4 Northern Marine Inc., a builder of heavy-duty vessels of industrial and commercial lineage.
5 Extensive facilities would have been needed for the Northern Marine use. Skagit County
6 approved the proposal as a revision to CUP 7-82, but Ecology denied it for failure to meet the
7 criteria in WAC 173-27-100. Mr. Youngsman did not appeal Ecology's decision or pursue the
8 proposal further.

9 IX.

10 At some point Mr. Youngman's intentions for the property changed from a storage yard
11 and headquarters for his marine construction business to a drystack boat storage concept. By
12 1999, when Mr. Youngsman applied to Skagit County for three building permits on the site, the
13 plans included an intention to build a dry-stack storage facility capable of holding approximately
14 350 recreational boats of various sizes. A second building would house office and retail
15 facilities. The boats would be moved from the storage building to the moorage lagoon by a large
16 forklift, which would lower the boats from a reinforced concrete pad into the water. The site
17 plans associated with the building permit applications included utilities for the buildings, a
18 reinforced concrete pad, boat washing facilities, septic pump-out equipment, fuel dispensing,
19 paving, and drainage improvements. Skagit County apparently concluded the existing CUP 7-82
20 covered the shoreline aspects of the project since Mr. Youngsman was not required to obtain a
21 revision or seek a new shoreline substantial development permit or conditional use permit.

1 Skagit County issued building permits 99-1065 and 99-1226 for the project on March 7, 2000.
2 Ecology did not appeal issuance of the building permits under the Land Use Petition Act. The
3 City of Anacortes did lodge such an appeal.

4 X.

5 In March 2000 Skagit County also issued a Final Environmental Impact Statement
6 Addendum for the project stating: "This addendum modifies the Final Environmental Impact
7 Statement (FEIS 1975) for Shoreline Substantial Development/Conditional Use Permits # 7-82
8 and 15-86. Building permits #99-1065 and 99-1226 modify fill and grade permit #95-0474 by
9 adding drainage and site plan details as well as clearly identifying the building's configuration,
10 location, and size." The document goes on to determine "that the revision is 'insignificant' and
11 does not have a probable significant adverse impact on the environment. A Final Environmental
12 Impact Statement was issued in 1975 for the original proposal. This addendum adds information
13 about the proposal but does not substantially change the analysis of significant impacts or
14 alternatives in the existing environmental document." No additional environmental review was
15 conducted for the upland marina proposal or the specific improvements being constructed on
16 shorelands.

17 XI.

18 When construction under the building permits began on the site, Ecology issued a Notice
19 of Correction to Twin Bridge dated May 1, 2000. This notice requested that Twin Bridge stop
20 work at the site and obtain a new shoreline permit for use of the site as a marina and for the
21 structures and site work placed within the shoreline. Twin Bridge chose not to stop work and

1 Ecology then issued its first administrative order and penalty (00SEANR-1209) to Twin Bridge
2 on June 21, 2000. The order required Twin Bridge to stop work at the site, obtain a new
3 shoreline permit, and pay a penalty of \$17,000.

4 XII.

5 Ken Youngsman appealed the Order and Notice of Penalty to the Shorelines Hearings
6 Board. In the meantime Twin Bridge stopped construction and grading work at the site with
7 certain authorized safety exceptions. The company also submitted a permit application to Skagit
8 County for a new shoreline permit authorizing use of the site as a marina with buildings, and
9 related improvements such as boat washing and fuel dispensing facilities. The application
10 included a SEPA checklist, Joint Aquatic Resource Permit Application (JARPA), and Shoreline
11 Development Checklist. The applicant, Twin Bridge, supplied additional requested information
12 to Skagit County in October 2000. In February of 2001, Ecology and Twin Bridge entered into a
13 settlement agreement of the 00SEANR-1209 appeal. The stipulations provided as follows:

- 14
- 15 1. Ecology hereby withdraws its Penalty Order No. 00SEANR-1209 issued to Ken
16 Youngsman on or about June 21, 2000, subject to the following conditions:
 - 17 a. Mr. Youngsman shall continue to pursue in good faith his application for a new
18 Shoreline Substantial Development Permit for the Twin Bridge Marine Park.
 - 19 b. In the event that Skagit County issues a Substantial Development Permit to Mr.
20 Youngsman or his associates, Ecology reserves the right to appeal the permit to
21 the Shorelines Hearings Board and to raise any issue therein.

1 c. Mr. Youngsman, his associates, and contractors shall not resume work on the site
2 until all required federal, state, and local permits have been obtained.

3 2. Mr. Youngsman hereby dismisses his appeal in this matter.

4 XIII.

5 At the time the settlement agreement was negotiated, the Skagit County building permits
6 were suspended. Pursuant to a settlement of other litigation, the permits were reinstated
7 shortly after the settlement agreement in 00SEANR-1209 was signed and Twin Bridge
8 resumed work on the site. When Twin Bridge resumed construction, Skagit County was still
9 processing Twin Bridge's application for a new shoreline permit. At the time of hearing in
10 this case Skagit County had not yet rendered a decision on Twin Bridge's new shoreline
11 permit application.¹

12 XIV.

13 When Twin Bridge proceeded with construction on the site, Ecology issued a second
14 administrative order and penalty (No. 01SEANR-2101) requiring Twin Bridge to stop work
15 on the site, reinstating the \$17,000 penalty from 00SEANR-1209, and adding another penalty
16 of \$17,000. This order was issued March 5, 2001. Rather than stopping work on the site,
17 Twin Bridge continued with construction, alleging it was fully authorized to proceed under
18 the Skagit County building permits. Twin Bridge completed construction of the two
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21 ¹ In addition, a controversy existed over the need for a permit from the U.S. Army Corps of Engineers for work done on the moorage basin. It is not necessary for the Board to resolve the issue of what federal permits might have been required or what jurisdiction the Board might have to address such issues.

1 buildings on the site and received approval for occupancy from Skagit County in late May
2 2001. The facility opened for business as a marina in June 2001.

3 XV.

4 On June 27, 2001, Ecology issued its third Order and Notice of Penalty Incurred
5 (01SEANR-3032 & 01SEANR-3031) to Twin Bridge, assessing an additional penalty of
6 \$25,000 and ordering Twin Bridge to cease construction and operations on the site until
7 shoreline permits authorizing the construction and use are obtained. Twin Bridge appealed
8 Order No. 01SEANR-3032 and 01SEANR-3031 to this Board. The appeal was given SHB
9 No. 01-017. Twin Bridge separately appealed Order 01SEANR-2101, which was given SHB
10 No. 01-016. The cases were consolidated for hearing before the Board.

11 XVI.

12 The improvements constructed within 200 feet of the manmade moorage basin include
13 paving much of the area between the storage building and installing a ten-inch thick
14 reinforced concrete pad used by the forklift in launching boats. The concrete pad is wholly
15 within the shoreline and extends partially over the water. A boat washing facility is located
16 in the area between the storage building and the concrete pad. One boat washing area
17 involves the use of detergent. Several others areas are established within the 200-foot zone
18 for a clear water wash. Utility lines, a septic tank, an oil water separator, and asphalt parking
19 spaces have been included within the 200-foot shoreline area. A sewage pump-out unit is
20 located on a dock over the water.

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XVII.

Additional improvements directly linked to construction within the 200-foot zone have also been erected. The 66,000 square foot boat storage building (Building A) has been completed approximately 201 feet from the moorage basin. A second building 7,600 square feet in size (Building B) for offices and retail/repair has also been constructed. At the time of the hearing a lessee was operating a boat repair and retail boat/accessory operation in Building B. Gas tanks have been installed on the site upland of the 200-foot line and fuel transfer is occurring. A bioswale system draining into the moorage basin and several septic tanks are also located upland of the 200-foot line. Much of the general vicinity has been paved or asphalted for access and parking.

XVIII.

The upland and shoreland facilities on the Twin Bridge site are currently being used for storage and launching of recreational boats and associated activities such as fueling, repair, marine retail, administration, and washing and sewage disposal. Twin Bridge did not discontinue or limit its activity in response to Ecology's issuance of Order 01SEANR-2101 and Orders 01SEANR-3031 and 01SEANR-3032. In fact, the project has recently been expanded to include Cap Sante Marine's repair and marine retail business.

XIX.

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

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

1 CONCLUSIONS OF LAW

2 I.

3 The Board has jurisdiction of the parties and the subject matter of this case under RCW
4 90.58.210(4). The Board hears the case *de novo*. The Department of Ecology has the burden of
5 proving that a violation has occurred, that the amounts of the penalties assessed are reasonable,
6 and that a cease and desist order is justified.

7 II.

8 RCW 90.58.140 prohibits substantial development on shorelines of the state without a
9 permit:

10 A substantial development shall not be undertaken on shorelines of the
11 state without first obtaining a permit from the government entity having
12 administrative jurisdiction under this chapter.

13 The Shoreline Act also authorizes Ecology to assess civil penalties for development undertaken
14 without a permit:

15 Any person who shall fail to conform to the terms of a permit issued
16 under this chapter or who shall undertake development on the shorelines
17 of the state without first obtaining any permit required under this chapter
18 shall also be subject to a civil penalty not to exceed one thousand dollars
19 for each violation.

20 RCW 90.58.210(2)

21 III.

22 Twin Bridge has argued that shoreline jurisdiction on this site should be measured from
the edge of the main Swinomish Channel and not from the edge of the manmade moorage basin.

FINDINGS OF FACT, CONCLUSIONS
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1 The moorage basin is connected directly to the water of the Swinomish Channel. Creation of the
2 moorage lagoon modified the ordinary high water mark in this area. RCW 90.58.030(2)(b)
3 indicates the ordinary high water mark is measured from a mark upon the soil distinguishing the
4 character of the vegetation from the abutting upland "as it may naturally change thereafter, or as
5 it may change thereafter in accordance with permits issued by a local government or the
6 department" In this case the ordinary high water mark is properly placed at the edge of the
7 moorage lagoon. The shorelands subject to regulation under the act are "those lands extending
8 landward for two hundred feet in all directions as measured on a horizontal plane from the
9 ordinary high water mark." RCW 90.58.030(2)(f).

10 IV.

11 Twin Bridge constructed a number of improvements within two hundred feet of the
12 moorage lagoon. The ten-inch thick reinforced concrete launching pad, vessel washing areas,
13 paving, utility installations, and the sewage pump out facilities were all placed within shoreline
14 jurisdiction. These improvements are properly considered substantial developments under RCW
15 90.58.030(3)(e).² The shoreline permits of record in CUP 7-82 and CUP 15-86 (as revised) did
16 not discuss or authorize any of those improvements. Construction of these improvements within
17 two hundred feet of the moorage basin was undertaken without a shoreline permit in violation of
18 RCW 90.58.140.

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21 ² RCW 90.58.030(3)(e) defines substantial development as "any development of which the total cost or fair market value exceeds two thousand five hundred dollars, or any development which materially interferes with the normal public use of the water of shorelines of the state". . . .

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

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V.

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2 Ecology contends the SEPA review conducted in connection with the construction and
3 operation of the storage/marina facilities on the site was inadequate. The March 2000 addendum
4 to the FEIS concludes that the proposal did not substantially change the analysis of significant
5 impacts or alternatives from those in the 1975 FEIS. This conclusion is unsupported by the
6 record. The 1975 FEIS did not address the majority of the improvements contemplated by the
7 building and grading permits issued to Twin Bridge. The original concept evaluated in 1975 did
8 not include public storage or moorage facilities. The buildings evaluated in 1975 totaled no
9 more than 5,000 square feet. The 1999 building permits authorized one building with 66,000
10 square feet for the storage of up to 350 boats, and a second building of 7,600 square feet for
11 offices and retail/repair. The original concept did not involve paving. The building permit site
12 plans show extensive paving for parking and access. The original plan did not discuss boat
13 washing, the bioswale system, sewage pump-out, the ten-inch thick concrete pad, or traffic
14 concerns associated with a public marina. Chemicals and other toxic materials common to
15 vessel repair and maintenance activities anticipated under the current proposal were not
16 evaluated. To the extent fueling was mentioned in the FEIS, it was limited to a fuel barge. No
17 upland fueling was evaluated and no land to water fuel transport was considered. In light of the
18 many notable differences between the environmental issues raised by a business
19 headquarters/open storage yard as evaluated in 1975, and the upland marina for 350 vessels
20 addressed by the building/grading permits, the conclusion that the revision is "insignificant" is
21 clearly erroneous.

1 VI.

2 Twin Bridge argues that construction of the storage buildings and other improvements
3 outside the 200-foot shoreline area was fully authorized without consideration of the Shoreline
4 Management Act. The boat storage building is located immediately upland of the 200 foot line.
5 The doors of the building open to the water side and use of the storage facility as an upland
6 marina for recreational vessels is dependent upon access to the water across the shoreland area.
7 Use of the shoreland area is an integral part of building design and use. The forklift traverses the
8 area between the building and the water to the concrete launching pad each time a boat is
9 retrieved from or returned to storage for a customer. The upland and shoreline components of
10 this project are directly and integrally related. The Board and the courts have previously held
11 that upland components of an integrated shoreline project cannot be constructed until a shoreline
12 permit is obtained for the shoreline portions of the project. *Merkel v. Port of Brownsville*, 8 Wn.
13 App. 844, 509 P.2d 390(1973); *Allegra Development Co., Inc. et al. v. Wright Hotels, Inc., et al.*,
14 SHB No. 99-08, 99-09(1999). The issue presented in this case is the same as the issue stated in
15 *Merkel*: "The question, therefore, is whether the port may take a single project and divide it into
16 segments for purposes of SEPA and SMA approval. The frustrating effect of such piecemeal
17 administrative approvals upon the vitality of these acts compels us to answer in the negative."
18 *Merkel* at 851. The *Merkel* court goes on to discuss the coercive effect of constructing one
19 segment of the proposal upon the other portion. In this case Twin Bridge's attempt to separate
20 the buildings located 201 feet from the ordinary high water mark from the launching activities
21 and improvement in the shoreline is an artificial division of a single integrated project. Twin

1 Bridges should have obtained a shoreline permit for the shoreline portions of the project before
2 constructing the upland components of the design. Failure and/or refusal to do so constitute a
3 violation of the SMA.

4 VII.

5 Twin Bridge has argued the case is properly narrowed to the sole issue of whether the
6 settlement agreement entered into by the parties resolving the appeal of penalty 00SEANR-1209
7 was breached. A settlement agreement reached between an applicant and Ecology cannot
8 supplant the provisions and protections of the SMA. The public interest is a significant
9 consideration under the Act, and its protection cannot be diminished by any settlement
10 agreement.

11 The settlement agreement in question, however, does not compromise the public interest
12 if properly construed. The settlement agreement states that Twin Bridge "shall not resume work
13 on the site until all required federal, state and local permits have been obtained." Twin Bridge
14 was required to have a shoreline permit to construct the project improvements located within the
15 200-foot shoreline area. The existing permits CUP 7-82 and CUP 15-86 did not extend to the
16 improvements Twin Bridge installed. The Board concludes that resuming construction before
17 obtaining the required shoreline permit(s) was a violation of the settlement agreement.

18 VIII.

19 Twin Bridge argues that Ecology cannot issue a shoreline enforcement order for
20 construction and operation of the marina because it did not appeal the Skagit County building
21 permits under the Land Use Petition Act (LUPA). Skagit County did issue building permits

1 covering the construction performed on the site. Ecology, on the other hand, consistently took
2 the position a shoreline permit was needed for construction and operation of the on-site
3 improvements. Relevant authority does not support Twin Bridge's argument that Ecology is
4 prevented from enforcement action because it did not appeal the building permits under LUPA.
5 Under the SMA, Ecology is given an oversight role that includes the ability to independently
6 enforce the terms of the Act if a local government fails to do so. *See, Samuel's Furniture v.*
7 *Ecology*, 105 Wn. App. 278, 19 P.3d 474 (2001) *pet. rev. granted*, 145 Wn. 2d 1001 (2001).³

8 IX.

9 The parties have presented conflicting arguments regarding whether a shoreline permit is
10 unnecessary because Twin Bridges is engaged in a "permitted use" under the shoreline act. Twin
11 Bridge contends that a "permitted use" can be conducted without a permit. Ecology argues the
12 term "permitted use" means a permit is required. Categorizing a use as "permitted" does not
13 eliminate the need for obtaining a shoreline permit for construction, and potentially for
14 operation, of a permitted use. In this context a permitted use is one that is allowed and not
15 prohibited. The term does not address the issue of which permits might be required to engage in
16 the use permitted. As applied to this case, the fact that a marina is a permitted use under the
17 Skagit County Master Program does not answer the question whether a substantial development
18 permit or conditional use permit is needed for the project. Designation as a permitted use simply
19 means that marinas are one of the activities that can properly be allowed in this shoreline area.

20 _____
21 ³ Contrary to Twin Bridge's arguments, Ecology had no responsibility to rescind permits the agency did not believe covered the actions in controversy. Rescission would not address failure to have permits for activity or action

1 The Board has concluded a shoreline substantial development permit was necessary before
2 constructing the improvements on this site. The Board is not ruling on whether a conditional use
3 permit is required to run a marina under the Skagit County Master Program since it is not
4 necessary to reach that issue to resolve the case and the record does not contain the local
5 government's analysis of this question.

6 X.

7 While Twin Bridge has obviously invested heavily in this project, it is equally clear that
8 Ecology has consistently taken the position shoreline permits are required for construction and
9 operation of an upland marina on the site. Twin Bridge was fully aware of Ecology's position at
10 the time it constructed the improvements within the shoreline and when it resumed construction
11 in February 2001. Twin Bridge chose to ignore and/or reject Ecology's role in enforcing the
12 shoreline act and to rely exclusively on the building permits issued by Skagit County. Rather
13 than resolving the ongoing permit controversy with Ecology, Twin Bridge moved forward with
14 construction and operation despite Ecology's position. Reliance on the county permits, with full
15 knowledge of Ecology's contrary position, was an intentional and knowing act and does not give
16 rise to any relief from the otherwise applicable provisions of the SMA.

17 XI.

18 The Board concludes a shoreline substantial development permit was required for
19 construction of improvements within 200 feet of the moorage lagoon. Such a permit was not
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21 outside the scope of the relevant permits. The permits in place were not invalid. They simply did not cover the
activity in question.

1 obtained prior to construction of the existing improvements. The shoreline permit should also
2 have been obtained prior to building the upland portions of the integrated marina development.

3 XII.

4 When the Board finds liability for violations under RCW 90.58.210 the severity of the
5 violation is reviewed based on several factors including: (1) the nature and extent of the
6 violation including any damage or risk to the public or to public resources, (2) the need to
7 promote compliance with the law, (3) whether the persons took steps to mitigate their actions
8 after being informed of illegality and prior to issuance of a penalty order, and (4) whether there
9 have been prior violations. *Dorsey v. Island Cy. and Ecology*, SHB Nos. 89-72, 90-12 (1990).
10 Given the knowing and continuing nature of the violation, the magnitude of the project, and the
11 potential for impact on the shoreline environment and public shoreline resources posed by the
12 unapproved activities in this location, the penalty amounts assessed are reasonable and should be
13 upheld. Failure to uphold the penalties assessed for failure to obtain necessary shoreline permits
14 prior to construction within the shoreline would not promote compliance with the SMA.

15 XIII.

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

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

19 ORDER

20 Twin Bridge has constructed improvements and engaged in activity subject to the SMA
21 without necessary permits, in violation of the Shoreline Management Act. Penalty 01SEANR-

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

SHB NOS. 01-016 & 01-017

1 2101 in the amount of \$34,000 (including \$17,000 reinstated from Penalty 00SEANR-1209) and
2 Penalties 01SEANR-3032 and 01SEANR-3031 in the amount of \$25,000 are affirmed for a total
3 penalty affirmed of \$59,000. The Ecology Order to cease and desist is affirmed to the extent it
4 prohibits activity utilizing the 200 feet of shorelands on the site. For example moving boats from
5 storage to the launch area, across the shorelands uses the shorelands and should be discontinued
6 until a shoreline permit authorizing construction of the shoreland improvements is obtained. The
7 cease and desist order is not affirmed to the extent it attempts to address activities outside the
8 200 foot line if those activities do not utilize or rely upon uses within the shorelands.

9 DONE this 17th day of July 2002.

10 SHORELINES HEARINGS BOARD

11 Kaleen Cottingham
12 Kaleen Cottingham, Member

13 William H. Lynch
14 William H. Lynch, Member

15 Judy Wilson
16 Judy Wilson, Member

17 Dan Smalley
18 Dan Smalley, Member

19 Phyllis Shrauger
20 Phyllis Shrauger, Member

21 Phyllis K. Macleod
Phyllis K. Macleod
Administrative Appeals Judge, Presiding

1 decision on July 29, 2002, arguing the Washington Supreme Court ruling in *Chelan County v.*
2 *Nykreim*, 146 Wn.2d 904, 52 P. 3d 1 (2002) mandated a different result. The Board denied
3 reconsideration and Twin Bridge appealed the Board's decision to Skagit County Superior Court.
4 After the Supreme Court decision was rendered in *Samuels' Furniture v. Ecology*, 147 Wn. 2d
5 440, 63 P.3d 764 (2002), Twin Bridge moved this Board to vacate its ruling and dismiss the case.
6 The Skagit County Superior Court entered an order staying action on the appeal during the
7 Board's consideration of Twin Bridge's motion. The parties presented briefing and oral
8 argument to the Board on the motion to vacate and dismiss. Counsel, Kurt A. Denke, appeared
9 with Mr. Magnusson on behalf of Twin Bridge during oral arguments on the motion to vacate
10 and dismiss. Based upon the written submissions of the parties, and the arguments of counsel,
11 the Board enters the following decision.

12 Facts

13 The facts of this case are set forth in some detail in the Board's Final Findings of Fact,
14 Conclusions of Law and Order dated July 17, 2002. The decision outlines the history of project
15 development plans for the property dating from the mid 1970s. The original concept was a
16 storage yard and headquarters for owner Ken Youngsman's marine dredging business.
17 Conditional use permits 7-82 and 15-86, authorizing dredging, filling, and limited construction,
18 were issued in connection with that proposal. The marine dredging proposal was not
19 constructed. Long term litigation with other entities over various elements of the dredging and
20 filling delayed implementation. Mr. Youngsman later proposed leasing the property to a builder
21 of large commercial vessels. Ecology refused to approve the improvements under the

1 conditional use permits for the prior project. Ultimately the concept changed to a dry-stack
2 marina facility. Twin Bridge constructed a large upland storage building capable of holding
3 approximately 350 recreational vessels. The building was located 201 feet from the water's
4 edge. The boats housed in the storage building were to be moved by forklift across a paved area
5 covering the 200-foot shoreland. Construction between the building and the water included a
6 ten-inch thick concrete reinforced pad, boat washing facilities, paving, drainage improvements,
7 and infrastructure.

8 Skagit County issued building permits for the improvements on March 7, 2000. Ecology
9 did not file a LUPA appeal. Ecology had been engaged in discussions with the developer
10 throughout this period. Soon after construction commenced on the site, Ecology issued a Notice
11 of Correction to Twin Bridge indicating work should be stopped until a new shoreline permit
12 was obtained authorizing construction of improvements and use of the site for a marina. When
13 Twin Bridge chose not to stop work, Ecology issued its first administrative order and penalty
14 (00SEANR-1209) on June 21, 2000. Mr. Youngsman appealed the Order and Notice of Penalty
15 to the Shorelines Hearings Board. The parties to the appeal entered into a settlement agreement
16 resolving the case. The meaning and intent of the agreement was disputed at the hearing. The
17 language provided:

- 18 1. Ecology hereby withdraws its Penalty Order No. 00SEANR-1209 issued to
19 Ken Youngsman on or about June 21, 2000, subject to the following
20 conditions:
 - 21 a. Mr. Youngsman shall continue to pursue in good faith his application
for a new Shoreline Substantial Development Permit for the Twin Bridge
Marine Park.

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2 b. In the event that Skagit County issues a Substantial Development
3 Permit to Mr. Youngsman or his associates, Ecology reserves the right to
4 appeal the permit to the Shorelines Hearing board and to raise any issue
5 therein.

6
7 c. Mr. Youngsman, his associates, and contractors, shall not resume work
8 on the site until all required federal, state, and local permits have been
9 obtained.

10 By this agreement, Twin Bridge agreed to seek a shoreline substantial development permit for
11 the Twin Bridge Marine Park. Twin Bridge did pursue the permit and it was eventually issued,
12 subject to conditions, in April 2003. The Board found Twin Bridge had violated the settlement
13 agreement by continuing construction within the shorelands without necessary shoreline permits.
14 The only shoreline permits in existence during construction were the conditional use permits
15 pertaining to the marine dredging headquarters proposal in the mid 1980s. Ecology found the
16 Twin Bridge construction went beyond the activity authorized by those conditional use permits.
17 The Board agreed the conditional use permits did not extend to activities necessary for the dry-
18 stack marina project.¹

19 When Twin Bridge proceeded with construction after the settlement, Ecology issued
20 further orders and penalties, which reinstated the initial penalty and added new penalties and
21

¹ The parties presented argument on whether the Board's decision found a substantial development permit was needed or whether the Board found the conditional use permits did not cover the project. The Board's opinion covered both of those issues concluding that the conditional use permits did not authorize the marina improvements and that a shoreline permit was needed for the construction. The decision did not address whether a conditional use permit was needed to engage in marina operations because it was not necessary to reaching a decision in the case. The local government did not testify at the shoreline hearing about the need for a conditional use permit under the local master program. The argued distinction does not compel a particular result on the facts of this case.

1 involved a dispute over whether a development project was within shoreline management act
2 jurisdiction. The Shorelines Hearings Board has never had jurisdiction over appeals of the
3 threshold issue of whether a shoreline permit is needed or if an exemption applies.² Such
4 challenges are brought in superior court. The *Samuel's* case examined the necessary procedure
5 and timing for such a jurisdictional challenge. The issue as enunciated by the court was:

6 The single issue before this court is whether Ecology is prevented from
7 collaterally attacking the City's determination that the Samuel's project is
8 outside the shoreline jurisdiction because it failed to file a timely LUPA
9 petition challenging the City's decision to issue either the fill and grade or
10 building permits or to withdraw the stop work order.

11 *Samuel's* 147 Wn. 2d at 448.

12 In keeping with this formulation of the issue, the holding in the case was limited to the
13 jurisdictional controversy existing in *Samuel's*:

14 We hold that Ecology must file a timely LUPA petition challenging a local
15 government's decision to allow a development project after it has
16 determined that the project at issue is not within the shoreline boundary. If
17 Ecology fails to file a LUPA petition under such circumstances, it cannot
18 collaterally challenge the local government's determination that the project
19 is not within the shoreline jurisdiction by bringing independent enforcement
20 actions against the property owner or developer.

21 *Samuel's* 147 Wn. 2d at 463.

The *Samuel's* court did not attempt to address the Land Use Petition Act's (LUPA)
impact on cases involving the undisputed need for a shoreline permit. Twin Bridge would have
this Board construe the *Samuel's* decision broadly to preclude Ecology from acting to enforce the

² Like *Samuel's Furniture*, the *Grundy v. Brack Family Trust, Thurston County*, No. 26347-5-II (Ct. App. Div 2, March 18, 2003) decision, cited to the Board as supplemental authority on the motion, involved a Thurston County determination that the project qualified for an exemption from shoreline permit requirements.

1 shoreline act against a party who knows a shoreline permit is required. Twin Bridge contends,
2 even when a shoreline permit is needed, if a local government issues a building permit, and a
3 LUPA appeal is not filed, Ecology cannot require compliance with the SMA through either
4 penalties or administrative orders. Sound statutory and public policy grounds exist for rejecting
5 this call to expand the *Samuel's* holding to a much larger group of cases.

6 The Shoreline Management Act (SMA or Act) is a statute designed specifically to protect
7 and preserve the unique nature of Washington's shorelines. As the legislature found in the Act:
8 "the shorelines of the state are among the most valuable and fragile of its natural resources and
9 that there is great concern throughout the state relating to their utilization, protection, restoration,
10 and preservation." RCW 90.58.020. The legislature went on to observe:

11 that much of the shorelines of the state and the uplands adjacent thereto are
12 in private ownership; that unrestricted construction on the privately owned
13 or publicly owned shorelines of the state is not in the best public interest;
14 and therefore, coordinated planning is necessary in order to protect the
15 public interest associated with the shorelines of the state while, at the same
16 time recognizing and protecting private property rights consistent with the
17 public interest.

18 RCW 90.58.020.

19 The Shoreline Management Act is a distinct and intentional regulatory structure designed
20 to give extra protection to the vulnerable and limited resources located along the state's
21 shorelines. Unlike many building permit situations, development on shorelines has the potential
to impact many unique values, ranging from recreation to aesthetics to riparian habitat.

1 Shorelines are different from standard building sites and the Shoreline Management Act
2 acknowledges and protects that distinct nature.

3 Consistent with the genesis and purpose of the SMA, the Act contains a specific
4 direction to interpret its terms broadly in support of shoreline protection: "This chapter is
5 exempted from the rule of strict construction, and it shall be liberally construed to give full effect
6 to the objectives and purposes for which it was enacted." RCW 90.58.900. The distinct nature
7 of the shoreline act is further demonstrated by RCW 90.58.140(1), which prohibits development
8 on the shorelines of the state unless it is consistent with the policy of the Act, even if a
9 substantial development permit is not required. The SMA is not a typical development
10 regulation. It reaches beyond local borders to protect the interests of all citizens of the state in its
11 shorelines.

12 Ecology is assigned a significant role in this process. The Department is responsible for
13 assisting the local governments in developing local master programs and is charged with taking
14 action to ensure compliance with the Act is achieved. Ecology is not on the front line for many
15 permits, but both its review and enforcement functions are directly established in RCW
16 90.58.050: "The department shall act primarily in a supportive and review capacity with an
17 emphasis on providing assistance to local government and on insuring compliance with the
18 policy and provisions of this chapter." (Emphasis added). Ecology should not be considered the
19 same as any other interested party when activity is proposed within a shoreline. Ecology is
20 charged with reviewing and enforcing shoreline regulations to assure the protection of broader
21 statewide and public interests.

1 Expanding the mandatory filing of a LUPA appeal to projects clearly located within the
2 shoreline would be inconsistent with the protections of the Act and the defined role of the
3 Department of Ecology. This is a particularly troubling prospect since Ecology does not receive
4 any meaningful notice of building permits issued by the many local governments throughout the
5 state. Expanding the LUPA requirement to cases requiring shoreline permits would undoubtedly
6 result in diminished protection for the shorelines of the state.

7 The facts of the Twin Bridge case differ from those in *Samuel's Furniture* in ways that
8 support a different result. While the *Samuel's* case involved a dispute over whether the proposal
9 was even subject to shoreline regulation, the Twin Bridge proposal is clearly located in the
10 shorelands of the Swinomish Channel. By its terms, LUPA specifically exempts those land use
11 decisions subject to review by the shorelines hearings board from its coverage, stating: "...this
12 chapter does not apply to ...(ii) Land use decisions of a local jurisdiction that are subject to
13 review by a quasi-judicial body created by state law, such as the shorelines hearings board or the
14 growth management hearings board." RCW 36.70C.030(1)(a)(ii). The *Samuel's* holding is
15 limited by its terms to situations where a local government has decided, "to allow a development
16 project after it has determined that the project at issue is not within the shoreline boundary." The
17 facts of this case fall outside that holding and no sound basis exists for extending the LUPA
18 appeal requirements to projects located squarely within jurisdictional shorelands.

19 Equitable considerations and undue delay, which were present in recent Washington
20 Supreme Court decisions on administrative finality, are lacking in this case. Beginning with
21 *Wenatchee Sportsmen*, the supreme court noted the extended time between action on the permit

1 in question and the subsequent challenge. The developer in *Wenatchee Sportsmen* obtained
2 initial approval of a rezone in August 1996, but a challenge was first raised after subsequent
3 subdivision approval in April 1998. Likewise, the court in *Skamania County v. Columbia River*
4 *Gorge Comm'n*, 144 Wn.2d 30, 26 P.3d 241 (2001) was concerned about the inequity of
5 requiring a homeowner to move a structure that was over half constructed before the building
6 permit was ever challenged. In *Chelan County v. Nykriem* 146 Wn. 2d 904, 52 P. 3d 1 (2002)
7 the county filed an action fourteen months after it had issued a boundary line adjustment. The
8 *Samuel's Furniture* majority, as well, noted the effort and expenditure the applicant made before
9 Ecology's action against the project. In this case, Ecology did not delay in opposing the project,
10 and equitable principles provide no justification for relief.

11 Unlike the developers in *Samuel's*, Twin Bridge always knew the marina project would
12 require shoreline approval. Twin Bridge was fully aware of Ecology's position that a new
13 substantial development permit was necessary for the marina. After the building permit was
14 issued, and the initial penalty was assessed, the project proponents went so far as to enter into a
15 settlement agreement with Ecology that obligated them to seek a new substantial development
16 permit. The settlement provided:

17 2. Ecology hereby withdraws its Penalty Order No. 00SEANR-1209 issued to
18 Ken Youngsman on or about June 21, 2000, subject to the following
conditions:

19 a. Mr. Youngsman shall continue to pursue in good faith his application
20 for a new Shoreline Substantial Development Permit for the Twin Bridge
Marine Park.

1 b. In the event that Skagit County issues a Substantial Development
2 Permit to Mr. Youngsman or his associates, Ecology reserves the right
 appeal the permit to the Shorelines Hearing board and to raise any issue
 therein.

3
4 c. Mr. Youngsman, his associates, and contractors shall not resume work
 on the site until all required federal, state, and local permits have been
 obtained.

5
6 The Board found Twin Bridge had breached the settlement agreement by continuing
7 construction without obtaining the needed substantial development permit. Unlike the *Samuel's*
8 case, Twin Bridge knew it needed a permit, applied for it, and ultimately received a shoreline
9 substantial development permit subject to a number of conditions.

10 Ecology consistently informed Twin Bridge the marina construction fell outside the
11 scope of the existing shoreline permits, which were conditional use permits. Ecology has an
12 even greater role under the SMA in the case of conditional use permits, since the department
13 makes the final decision on their issuance. The scope and extent of the previously issued
14 conditional use permits was a major issue in the case and is properly before the Shorelines
15 Hearings Board on appeal. If the conditional use permits were insufficient to authorize the
16 project, as the Board found they were, a new shoreline permit of some type would be necessary.
17 All of these issues fall within the expertise of the Shorelines Hearings Board. It would be
18 contrary to the statutory framework for consideration of shoreline issues to expand the holding in
19 *Samuel's* to allow a project using every inch of the two hundred foot shoreland area to proceed
20 without shoreline permits simply because the local government has erroneously issued a building
21 permit. Ecology has been given an oversight role in enforcement of the SMA to provide a

1 broader view of the public interest and a consistent interpretation of regulations throughout the
2 state. This balance between local and state roles should be maintained for cases squarely within
3 shoreline jurisdiction.

4 The Twin Bridge case does not fall within the language of the Supreme Court's holding
5 in *Samuel's Furniture*. The Board concludes there is an insufficient basis in law or policy to
6 expand the holding in *Samuel's* to cases requiring a shoreline permit. The Shoreline
7 Management Act contemplates Ecology review and enforcement for those cases located clearly
8 within the shorelands.

9 ORDER

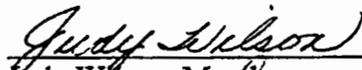
10 Based on the foregoing analysis the Twin Bridge motion to vacate the Board's decision
11 and dismiss the case is DENIED.

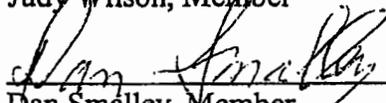
12
13 DONE this 11th day of June 2003.

14 SHORELINES HEARINGS BOARD

15 
16 Kaleen Cottingham, Member

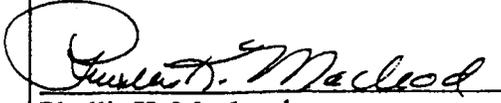
17 
18 William H. Lynch, Member

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20 Judy Wilson, Member

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Dan Smalley, Member

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Phyllis Shrauger, Member


Phyllis K. Macleod
Administrative Appeals Judge, Presiding