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Case No. 68532-5-I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

PATRICK A.T. JONES, individually and as assignee of all right, title, and
interest of the chose in action of PETER POWELL,

APPELLANT,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,
WASHINGTON STATE DEPARTMENT OF ECOLOGY, and THE TOWN
OF HUNTS POINT, a
Municipality,

RESPONDENTS.

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STATE OF WASHINGTON
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APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The trial court erred when it dismissed Appellant Jones' petition for review and affirmed the decision of the Shoreline Hearings Board ("SHB") issued on June 7, 2011, which dismissed Jones' appeal for lack of jurisdiction on the grounds that the appellants' petitions were not timely filed. In asserting this assignment of error, Appellant Jones asks the court to consider the following issues:

- (1) Did Jones have a right to notice and a substantive right to appeal?
- (2) Did WSDOT, WSDOE and HP have an obligation to provide Jones with a full opportunity for involvement in the development and implementation of a shoreline master program and did they fail in that obligation?
- (3) Did statutory and administrative authority require that the agency, WSDOE, provide its approval or disapproval by mail or hand delivery?
- (4) Was the amendment of the statute retroactively applicable such that electronic notice constituted actual notice, when the amendment affected Jones' substantive right to appeal?
- (5) Even if it is determined that the WSDOE was authorized to email the decision, did the local authority, HP, have an obligation to timely provide notice to homeowners or interested

parties, did it fail in that obligation, and if so, is the remedy to allow appeal 21 days from when HP provides notice?

III. STATEMENT OF THE CASE

The, Appellant Patrick A.T. Jones is the owner of real property located within the city limits of the Town of Hunts Point (“HP”)¹. (Appendix “AP” 1)²

On May 4, 2010, the Washington State Department of Transportation (“WSDOT”) submitted an application to HP for a shoreline substantial development permit (“SSDP”) to construct portions of an expansion of SR 520 with a noise wall and pedestrian/bike trail improvements and a conditional use permit (“CUP”) to construct a stormwater treatment facility with an outfall at Fairweather Bay within the Town of Hunts Point. (AP 14-40) The proposed location of the facility was within 200 feet of Jones’ property and would negatively impact half a million dollars in dredging responsibilities of Peter Powell. (AP 4)

Over a course of two months between December 2010 and January 2011, WSDOT’s applications for the SSDP and CUP were heard by the

¹ Mr. Jones appealed to the SHB along with another Hunts Point homeowner, Peter Powell. Powell has assigned all right, title, and interest to this matter to Jones, therefore, references to Mr. Jones include the interests of Mr. Powell.

² All documents contained in the appendix are part of the Certified Appeal Board Record provided to the Court and are included in the appendix for the court’s ease and reference.

Town of Hunts Point (“HP”) Hearing Examiner. The Department of Ecology (“WSDOE”) participated in the hearing and was responsible for reviewing and approving or disapproving the decision on the SSDP and CUP and giving notice of any changes to the SSDP and CUP decision under RCW 90.58.140(10). On February 2, 2011, HP Hearing Examiner Theodore Paul Hunter issued Findings, Conclusions and Decision conditionally approving WSDOT’s application for SSDCUP. (AP 41-64)

On February 15, 2011, Geoff Tallent, Section Manager of the Shorelands and Environmental Assistance Program of WSDOE wrote a letter to Scott White of the WSDOT whereby WSDOE approved the WSDOT CUP application provided WSDOT met certain conditions. (AP 65-67) Under RCW 90.58.140(6) and (10), RCW 43.21B.001, WAC 173-27-200(1) and WAC 173-27-030(16), WSDOE was required to mail its approval or disapproval of the CUP to HP, the local jurisdiction, and to WSDOT, the applicant. This is of significance and importance because the mailing of WSDOE’s decision on the CUP triggered the statutory response period of the interested parties, including Jones and/or Powell as a property owners and interested parties.

The mailing of notice of WSDOE’s CUP decision was purportedly done by Mr. Tallent of the WSDOE. (AP67) Mr. Tallent signed the WSDOE decision, and he represented the mailing status of the CUP decision. (Id.) The line directly below Mr. Tallent’s indicates that the letter

was sent by certified mail with using tracking number 7010 0290 0000 8205 2225. (Id.) Mr. Tallent recognized within his letter that “date of receipt” was defined by RCW 43.21B001. (AP 66) However, the envelope received by the Town of Hunts Point did not contain the same certified mail tracking number. (AP 74). A search of U.S. Postal Service records revealed no results for tracking number 7010 0290 0000 8205 2225. (AP 81)

On February 15, 2011, the WSDOE also issued a notice that it had received notice of Hunts Point’s approval of WSDOT’s application for an SDP. (AP 84-85) This letter was directed to Mr. Scott White of the WSDOT and signed by David Radabaugh. (Id.) The letter purports that Mr. Radabaugh transmitted WSDOE’s notice of receipt of the SSDP to Mr. White of WSDOT, Mr. Daniel Babuca of WSDOT, and Ms. Mona Green of HP. (Id.) This letter also indicates that the decision was sent by certified mail using certified mail tracking number 7010 0290 0000 8205 3328; there was only one tracking number. (Id.) The U.S. Postal records show one result for this tracking number. (AP 79) There is no evidence that the SSDP decision was mailed, certified or otherwise, to the local authority, HP.

As a property owner, Mr. Jones was entitled to receive notice WSDOE’s approval of the CUP and notice that WSDOE had received WSDOT’S SSDP. However, Mr. Jones did not receive a copy of either

decision and had to acquire the decisions on his own. (AP 2) Evidence was presented to the Shoreline Hearings Board that a purported email was sent by David Radabaugh to Scott White on February 15, 2011, attaching his letter. (AP 91) The email states that the purpose of the email was to provide notice of the WSDOE's approval of the CUP and SSDP and that Mr. White's "receipt of this email will start the 21 day appeal period." (Id.) The same document purports that Mr. White confirmed receipt of Mr. Radabaugh's email; however, there is no date indicated on the purported email communication. (Id.)

On February 15, 2012, David Radabaugh purportedly emailed two documents to Mona Green, a part-time independent contractor acting as HP Town Planner, to her personal Comcast account. (AP 104) This email communication purports to attach two documents: Scott White Department of Transportation Town of Hunts Point Permit No. 10-04 Conditioned Shoreline Conditional Permit No. 147 2-15-11 and Scott White Department of Transportation Town of Hunts Point Permit No. 10-04 Approved 2-15-11. (Id.) Nothing in this documentation indicates a notice of receipt of the SSDP to Ms. Green, and it is not clear from the names of the documents allegedly attached, that one document is Mr. Tallent's letter and one document is Mr. Radabaugh's letter. (Id.) In fact, agents of WSDOT, WSDOE, and HP all questioned whether any email notification was sufficient. (CP 106-107) On February 22, 2011, Mr.

White, of WSDOT, emailed Mr. Radabaugh, of WSDOE, to ask how WSDOT publishes notices of its decisions. (Id.) On February 23, 2011, Mr. Radabaugh responded that it is the local jurisdiction's responsibility to publish and notify interested parties, which in this instance was the Town of Hunts Point. (Id.) On February 23, 2011, Mr. White emailed Ms. Green to verify whether HP had published the notice. (Id.) Ms. Green responded on February 23, 2011 that she had forwarded Mr. Radabaugh's earlier message to the Town Administrator that all parties of record be sent the two decisions. (Id.) When Mr. White questioned Ms. Green whether this had happened "when the permit first came out", Ms. Green responded, "It will be emailed and/or mailed to all parties of record tomorrow." (Id.) On February 23, 2011, Ms. Greene forwarded Mr. Radabaugh's email to Jack McKenzie, the Town Planner for HP, who in turn forwarded the email to Sue Israel, the Town Clerk for HP. (Id.) Finally, on February 24, 2011, Ms. Israel forwarded an email to purported interested parties, including Peter Powell but not including Appellant Jones. (AP 109) Thus, there was no confirmation that "all parties of record" were provided with the decisions when they first came out, HP did not provide a copy of the decisions to Mr. Jones, and Mr. Jones had to obtain the decisions on his own. (AP 2)

Appellant Jones and Mr. Powell, as well as the Fairweather Basin Boat Club, Inc. appealed the CUP decision on Monday, March 14, 2011,

to the Shoreline Hearings Board. (AP 1-13) On March 17, 2011, the Environmental Hearings Office wrote to Mr. Jones' counsel to explain the initial process for SHB appeals and provided a publication document titled "Your Right To Be Heard." (AP 133-135) The publication contains a section titled "When to File a Petition for Review," which states:

SHORELINES PERMITS: If you are appealing the grant, denial, or rescission of a shorelines permit of any type, your petition must be filed within 21 days of the "date of receipt" as defined in RCW 43.21B.001. The "date of receipt" is the trigger date for when the twenty-one day appeal period begins to run. It is important to recognize that the "date of receipt" varies according to the type of permit you are appealing.

If you want to appeal a local government's decision approving, denying, or rescinding a **substantial development** or a local government's denial of a **variance** or **conditional use**, the "date of receipt" is the date that the applicant receives written notice from Ecology that it has received the local government's decision.

If you want to appeal a **conditional use** or **variance permit** which has been approved by a local government, and either approved or denied by Ecology, the "date of receipt" is the date the local government or applicant actually receives Ecology's written decision.

Where a project involves both a substantial development and a conditional use or variance permit, the latest applicable date of receipt may be used in filing the petition for review.

(136-139³)

WSDOT and WSDOE have maintained that the email notification satisfied the “mailing” requirement under RCW 90.58.140 for the purpose of commencing the 21-day appeal time frame. (*See generally* Motion to Dismiss within Certified Appeal Board Record) For this specific reason, WSDOT moved to dismiss Jones and Powell’s petition. (*Id.*) The SHB granted WSDOT’s motion to dismiss, and in doing so indicated that the Board’s definition of “date of receipt” did not prescribe that mailing was the exclusive means of transmitting a shoreline permit. (AP 144-152) However, the SHB also issued a 15-page dissenting opinion, an extraordinarily rare action by SHB, which specifically stated that WSDOE’s own regulations did not authorize sending the CUP decision by email. (AP 153-168) The bottom line is that the decisions of WSDOE were not provided properly to HP under the statute, and the SHB determined that it was sufficient even though no notice was provided Mr. Jones and Mr. Powell received is notice after February 24, 2011, nine days into his 21 day appeal time period. As a result the SHB did not reach the merits of Jones’ Petition for Review.

³ The language contained in this publication remains unchanged today and exists in electronic format on the website of the SHB, despite changes to the laws that govern SHB appeals.

IV. ARGUMENT

A. Legal Standard

The Court of Appeals will not disturb the Shorelines Hearings Board's decision unless it is clearly erroneous or arbitrary and capricious; "arbitrary and capricious" means willful and unreasoning action, without consideration and in disregard of facts or circumstances, but where there is room for two opinions, and action is exercised honestly and upon due consideration, the action is not arbitrary and capricious. *Herman v State of Washington Shoreline Hearings Bd.*, 149 Wn.App. 444, 204 P.3d 928 (2009), *review denied* 166 Wn.2d 1029, 217 P.3d 336.

B. **The trial court erred when it affirmed the dismissal of Jones' administrative appeal on the grounds that the appeal was not timely, and the matter should be remanded to the trial court for further remand to the SHB for consideration of Jones' appeal on the merits.**

i. **Jones had a right to notice and a substantive right to appeal.**

A right of appeal is a substantive right and one which cannot be taken away by the rule-making power of the court. *Nudd v. Fuller*, 150 Wash. 389, 390, 273 P. 200 (1928) As an interested party in the Town of Hunts Point, Mr. Jones had a right to receive notice of the approval or denial of approval of the CUP and notice of receipt of the SSDP by the WSDOE. RCW 90.58.130. Mr. Jones had a substantive right to appeal the decision of the WSDOE. *Nudd*, 150 Wash. at 390.

ii. **WSDOT, WSDOT and HP failed to provide Jones with a full opportunity for involvement in the development and implementation of a shoreline master program.**

The agency (WSDOE), and applicant (WSDOT), and the local authority (HP), all had an equal duty to provide Jones, as homeowner and interested party affected by the WSDOT application, with a full opportunity for involvement. RCW 90.58.130 provides:

To insure that all persons and entities having an interest in the guidelines and master programs developed under this chapter are provided with a full opportunity for involvement in both their development and implementation, the department and local governments shall:

(1) Make reasonable efforts to inform the people of the state about the shoreline management program of this chapter and in the performance of the responsibilities provided in this chapter, shall not only invite but actively encourage participation by all persons and private groups and entities showing an interest in shoreline management programs of this chapter; and

(2) Invite and encourage participation by all agencies of federal, state, and local government, including municipal and public corporations, having interests or responsibilities relating to the shorelines of the state. State and local agencies are directed to participate fully to insure that their interests are fully considered by the department and local governments.

The agency (WSDOE), and applicant (WSDOT), and the local authority (HP) all failed in their duty to Mr. Jones. Mr. Jones could not be meaningfully or fully involved in any master program if he was not provided notice. The Court should reject the notion that the obligation to

Mr. Jones ended when Mr. Radabaugh emailed the CUP decision and SSDT notice to Mr. White (WSDOT) and Ms. Greene (HP) on February 15, 2011. At the very earliest, some notification to interested parties occurred on February 24, 2011, when City Clerk Sue Israel finally emailed the decision to some interested parties, including Peter Powell. However, even that notification was not authorized by statute or administrative provision, as argued *infra*.

iii. The statutory and administrative authority required that the agency, WSDOE, provide its approval or disapproval by mail or hand delivery.

The application by WSDOT to the Shoreline Hearings Board for the SSDP and CUP constituted an application for a conditional use permit, which required approval by the local government, here HP, under their approved master program. RCW 90.58.140(10)

At the time the WSDOE's CUP decision was issued, an appeal of the CUP decision was governed by RCW 90.58.140(6) which provided at that time, in relevant part:

Any decision on an application for a permit under the authority of this section, whether it is an approval or a denial, shall, concurrently with the transmittal of the ruling to the applicant, be transmitted to the department and the attorney general. A petition for review of such a decision must be commenced within twenty-one days from the date of receipt of the decision. . . .With regard to a permit for a variance or a conditional use, "date of receipt" means the date a local government or applicant receives the written decision of the department rendered on the permit pursuant

to subsection (10) of this section. For the purposes of this 14 subsection, the term “date of receipt” has the same meaning as provided in RCW 43.21B.001

RCW 90.58.140(10) further stated:

Any permit for a variance or a conditional use issued with approval by a local government under their approved master program must be submitted to the department for its approval or disapproval.

RCW 43.21B.001 clarifies that “business days” means Monday through Friday exclusive of any state or federal holiday and further defines the term “date of receipt”:

- (2) “Date of receipt” means:
 - (a) Five business days after the date of mailing; or
 - (b) The date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence. The recipient’s sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the agency, shall constitute sufficient evidence of actual receipt. The date of actual receipt, however, may not exceed forty-five days of mailing.

In issuing its Order dismissing Mr. Jones appeal, the SHB reasoned that the Board’s definition of “date of receipt” does not purport to prescribe that mailing is the exclusive means of transmitting a shoreline permit decision. (AP 149) However, WSDOE’s actions were further governed by WAC 173-27 *et seq.* WAC 173-27-200(1) provides:

After local government approval of a conditional use or variance permit, local government shall submit the permit to the department for the department’s approval, approval with conditions, or denial. The department shall render and transmit to local government and the applicant its final

decision approving, approving with conditions, or disapproving the permit within thirty days of the date of submittal by local government pursuant to WAC 173-27-110.

WAC 173-27-030(16) is further instructive to provide the meaning of “transmit” as follows:

“Transmit” means to send from one person or place to another by mail or hand delivery. The date of transmittal for mailed items is the date that the document is certified for mailing or, for hand-delivered items, is the date of receipt at the destination. (*Emphasis added*)

The SHB’s own publications are also consistent with the statutes and code provisions. In March 2011 the SHB provided Mr. Jones’ counsel with a publication titled “Your Right to be Heard.” (AP 136-139) The publication contains a section titled “When to File a Petition for Review that is consistent with the language of RCW 90.58.140(6) as it was amended in 2010 and effective through July 22, 2011. The publication states:

SHORELINES PERMITS: If you are appealing the grant, denial, or rescission of a shorelines permit of any type, your petition must be filed within 21 days of the “date of receipt” as defined in RCW 43.21B.001. The “date of receipt” is the trigger date for when the twenty-one day appeal period begins to run. It is important to recognize that the “date of receipt” varies according to the type of permit you are appealing.

If you want to appeal a local government’s decision approving, denying, or rescinding a **substantial development** or a local government’s denial of a **variance** or **conditional use**, the “date of receipt” is the date that the

applicant receives written notice from Ecology that it has received the local government's decision.

If you want to appeal a **conditional use** or **variance permit** which has been approved by a local government, and either approved or denied by Ecology, the "date of receipt" is the date the local government or applicant actually receives Ecology's written decision.

Where a project involves both a substantial development and a conditional use or variance permit, the latest applicable date of receipt may be used in filing the petition for review.

(Appendix 136-37)

Contrary to the SHB's determination, the language of RCW 43.21B.001 is itself instructive that "actual receipt" was indeed related to mailing: "The date of actual receipt, however, may not exceed forty-five days of mailing." Together with the express provision of WAC 173-27-030(16) that defines the term "transmit", it is clear that transmission was directly related to mailing or hand delivery at the time the WSDOE decisions were issued, and transmission by electronic means was not authorized as a means for providing actual notice.

iv. Immediately following the WSDOE decisions and appeal, the statutory notice requirements were amended to include notice by electronic means, but the amendment does not have retroactive applicability related to Mr. Jones substantive right of appeal.

The record clearly supports that WSDOT, WSDOE and HP questioned whether notice requirements had been met. However, the issue of electronic transmission of notice was not addressed by the Washington

legislature until after Jones' appeal to the SHB. Prior to July 1, 2010, RCW 90.58.140(6) existed in the following form:

(6) Any decision on an application for a permit under the authority of this section, whether it is an approval or a denial, shall, concurrently with the transmittal of the ruling to the applicant, be filed with the department and the attorney general. With regard to a permit other than a permit governed by subsection (10) of this section, "date of filing" as used herein means the date of actual receipt by the department.

With regard to a permit for a variance or a conditional use, "date of filing" means the date a decision of the department rendered on the permit pursuant to subsection (10) of this section is transmitted by the department to the local government. The department shall notify in writing the local government and the applicant of the date of filing.

1995 Wash. Legis. Serv. Ch. 347 (S.H.B. 1724), approved May 15, 1995, effective July 23, 1995. At the time this law went into effect in 1995, WAC 173-27-030 did not yet exist, and thus no definition of "transmit" related to permits for development of shorelines of the state existed. WAC 173-27-030, defining "transmit" was enacted in 1996.

Fifteen years later, 2010 session, the Washington legislature amended the language of RCW 90.58.140(6) as follows:

(6) Any decision on an application for a permit under the authority of this section, whether it is an approval or a denial, shall, concurrently with the transmittal of the ruling to the applicant, be ~~filed with~~ transmitted to the department and the attorney general. A petition for review of such a decision must be commenced within twenty-one days from the date of receipt of the decision. With regard to a permit

other than a permit governed by subsection (10) of this section, “date of filing receipt” as used herein ~~means~~ refers to the date of actual receipt by the department that the applicant receives written notice from the department that the department has received the decision. With regard to a permit for a variance or a conditional use, “date of filing receipt” means the date a local government or applicant receives the written decision of the department rendered on the permit pursuant to subsection (10) of this section ~~is transmitted by the department to the local government. The department shall notify in writing the local government and the applicant of the date of filing.~~ For the purposes of this subsection, the term “date of receipt” has the same meaning as provided in RCW 43.21B.001.

2010 Wash. Legis. Serv. Ch. 210 (S.H.B. 2935), approved March 25, 2010, effective July 1, 2010. It is clear that the legislature was concerned not only that the agency or department send out a decision but that the decision actually be received. This was the law in effect at the time of WSDOE’s action in transmitting its decision by email in February 2011, but at that time the Legislature had yet not specifically addressed the issue of notification by electronic means.

Recognizing the increased use by businesses and government of electronic communication and the obvious deficiency of RCW 90.58.140(6), the Washington legislature again addressed RCW 90.58.140(6) in its 2011 session, and changed the language of RCW 90.58.140(6) as follows:

(6) Any decision on an application for a permit under the authority of this section, whether it is an approval or a denial, shall, concurrently with the transmittal of the ruling to the applicant, be ~~transmitted to~~ filed with the department

and the attorney general. This shall be accomplished by return receipt requested mail. A petition for review of such a decision must be commenced within twenty-one days from the date of ~~receipt~~ filing of the decision.

(a) With regard to a permit other than a permit governed by subsection (10) of this section, “date of receipt” as used herein refers to the date that the applicant receives written notice from the department that the department has received the decision. With regard to a permit for a variance or a conditional use, “date of receipt” means the date a local government or applicant receives the written decision of the department rendered on the permit pursuant to subsection (10) of this section. For the purposes of this subsection, the term “date of receipt” has the same meaning as provided in RCW 43.21B.001 filing as used in this section refers to the date of actual receipt by the department of the local government’s decision.

(b) With regard to a permit for a variance or a conditional use governed by subsection (10) of this section, “date of filing” means the date the decision of the department is transmitted by the department to the local government.

(c) When a local government simultaneously transmits to the department its decision on a shoreline substantial development with its approval of either a shoreline conditional use permit or variance, or both, “date of filing” has the same meaning as defined in (b) of this subsection.

(d) The department shall notify in writing the local government and the applicant of the date of filing by telephone or electronic means, followed by written communication as necessary, to ensure that the applicant has received the full written decision.

2011 Wash.Legis.Serv. Ch. 277 (S.S.B. 5192), approved May 5, 2011, effective July 22, 2011. Of importance and specific to the issues before this Court, the Legislature specifically adopted language whereby the

department (WSDOE) would be able to notify the local government (HP) and the applicant (WSDOT) of the date of filing by electronic means. RCW 90.58.140(6)(d). This would have been critically important in this case because HP could have then provided the electronic receipt date to the interested parties rather than the mailing date as the date of receipt. This is the only manner in which the interested parties can reliably know when the 21-day appeal period begins to accrue.

Regardless of how a statute is characterized, it is presumed to run prospectively, as are all statutes. *1000 Virginia Ltd Partnership v. Vertecs Corp*, 432, 584 citing *Wash. Waste Sys., Inc. v. Clark County*, 115 Wash.2d 74, 78, 794 P.2d 508 (1990). A statute or an amendment to a statute may be retroactively applied if the legislature so intended, if it is clearly curative, or if it is remedial, provided that retroactive application does not “ ‘run afoul of any constitutional prohibition.’ ” *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 585, 146 P.3d 423 (2006), citing *McGee Guest Home, Inc. v. Dep’t of Soc. & Health Servs.*, 142 Wash.2d 316, 324, 12 P.3d 144 (2000) (quoting *State v. Cruz*, 139 Wash.2d 186, 191, 985 P.2d 384 (1999) (citing *In re F.D. Processing, Inc.*, 119 Wash.2d 452, 460, 832 P.2d 1303 (1992))). A statute is remedial if it relates to “ ‘practice, procedure or remedies, and does not affect a substantive or vested right.’ ” *Bayless v. Community College District No. XIX*, 84 Wash.App. 309, 311, 927 P.2d 254 (1996) citing *In re F.D.*

Processing, Inc., 119 Wash.2d 452, 462-63, 832 P.2d 1303 (1992) (quoting *In re Mota*, 114 Wash.2d 465, 471, 788 P.2d 538 (1990)).

Here, the SHB and the trial court have given retroactive application to the amendment of RCW 90.58.140 in 2011 where none is authorized. The statute itself is silent as to retroactive application, and there is no statement that the legislature intended retroactive application to this section as opposed to other sections of the same statute where the legislature specifically states the retroactive status of the statute. However, the result of the amendment had a direct effect on the date the 21-day appeal period commenced. Jones, in exercising his substantive appeal right, relied upon the law as it existed prior to the amendment. This court should reject the SHB's and trial court's retroactive application of the amendment and restore to Jones' his substantive right of appeal.

The SHB was without authority determine that provision of the letters by email was sufficient under the existing law to constitute actual notice, especially when Mr. Jones was provided absolutely no notice. The Court should reject the SHB action in dismissing Mr. Jones' appeal, which are clearly erroneous, or arbitrary and capricious. *Herman v State of Washington Shoreline Hearings Bd.*, 149 Wn.App. 444, 204 P.3d 928 (2009), *review denied* 166 Wn.2d 1029, 217 P.3d 336.

- v. **There is no evidence that the CUP decision was ever mailed, or if it was may have been mailed on February 24, 2011, and Jones appeal was timely.**

WSDOE's actions in transmitting its CUP decision and SSDP were governed by RCW 90.58.140, RCW 43.21B.001, WAC 173-27-200(1) and WAC 173-27-030(16). The amendment to RCW 90.58.140(6) having no retroactive application, transmission of the decisions by electronic means was not authorized under RCW 90.58.140(6). Thus, the SHB was without authority to determine that WSDOE was not subject to a type of formal service obligation or that such authority "should be read . . . into the SMA when it is plainly not there." In 2011, when the decision was issued, the authority plainly stated that transmission was accomplished by mail or hand delivery, and the legislature only amended the statute to authorize transmission by electronic means after the WSDOE decisions had been issued and Jones' appeal had been filed. Given that this was a specific amendment by the legislature, and that the state and local agencies were relying heavily on electronic communication, it is clear that transmission by electronic means was an issue that needed to be addressed. However, before the amendment notification by email was insufficient and did not mean that actual notice had been provided.

A preponderance of the evidence supports that one of the letters was mailed to HP on February 15, 2011 and received on February 16, 2011: Mr. Radabaugh's letter providing notice that the WSDOE had

receive notice that Hunts Point approved WSDOT'S application for an SDP. (AP 79 and 84-85) There is no evidence that Mr. Radabaugh's letter was mailed to WSDOT as required by RCW 90.58.140, RCW 43.21B.001, WAC 173-27-200(1) and WAC 173-27-030(16). There is no evidence that Mr. Tallen's letter was mailed to anyone at any time. Finally, there is no evidence that Mr. Jones was provided any notice by any of the authorities or was otherwise provided notice so that Mr. Jones had no opportunity for involvement let alone the full opportunity for involvement required under RCW 90.58.130.

WSDOE and WSDOT argued that under RCW 43.21B.001 the date of receipt can mean either five days after the date of mailing, or the date of actual receipt by WSDOT without any regard for the local jurisdiction. This argument is specifically contrary to WAC 173-27-001 which required WSDOE specifically to transmit (which means mail or hand deliver) the Decision to the local jurisdiction. Thus, taking advantage of "or" language and descriptive statutory language in which the agency (WSDOT) can prove service, does not eliminate the requirement that the local government be given notice by WSDOE. It is that notice to the local government that is intended to trigger notice to interested parties for the purpose of public notice and participation.

Notice to the agency, particularly when the agency is the applicant, cannot commence the appeal period because that action fails to meet the

requirements of notice to the local jurisdiction for the purpose of public notice. If notice to WSDOT commenced the 21-day period, then it is extremely conceivable and highly likely that interested parties would not receive notice until after the 21-day appeal period had expired, which eliminates the ability for public participation. At the time WSOE issued its decision, it is was intent of the then-governing statutes and the administrative code that the local government be mailed notice by WSDOE so that the local government could then, in turn, provide notice to the interested parties. Absent adherence to the law by WSDOE as it was written, the SHB was without authority to dismiss Jones' appeal, and the trial was further without authority to dismiss Jones' appeal.

The actions by the SHB and trial court in dismissing Jones' appeal based upon WSDOT's argument are clearly erroneous, or arbitrary and capricious, and the Court of Appeals should reverse the trial court's dismissal of Jones' appeal, remand the appeal back to the trial court for further adjudication with direction to the trial court to reverse its dismissal of Jones' appeal in the trial court and to remand the appeal to the SHB for further consideration of the appeal on the merit.

Moreover, the SHB rules of practice provide, "where a project involves both a substantial development and a conditional use or variance permit, the latest applicable date of receipt may be used in filing the petition for review." *See also Walker v. Pt. Ruston, et. al.* SHB case No.

09-013, 09-16 (Consolidated), January 19, 2010 Order on Summary Judgment at 46-50 (denying motion to dismiss appeal as untimely)(*Emphasis added*).

In *Walker*, the SHB liberally construed the SMA to give full effect to the objectives and purposes for which it was enacted. The SHB quoted the Washington Supreme Court's policy of liberal construction in the context of timeliness of an appeal stating:

The overriding purpose for which the SMA was enacted was to preserve the natural resources of the State and to regulate construction upon the shorelines in accordance with the public interest. See RCW 90.58.010-020. It seems well-nigh irrefutable that these goals and purposes can be effectuated best by giving an expansive rather than a restrictive reading to the appeals provisions of the SMA. If there is inadequate time to review the issuance of a permit and to file an appeal, the policies of the SMA might very well be thwarted.

WSDOT's permit application here included both a shoreline substantial development permit and a conditional use permit, and under the SHB rules the latest applicable date of receipt applies. Here, the latest applicable "date of receipt" was clearly no earlier than February 22, 2011, date if the date of the Decision on February 15, 2011, is included within the calculation. If WSDOE complied with the law (which it did not), and mailed the CUP Decision and notice of filing of the SSDP Decision on February 15, 2011 to both WSDOT and HP, then the earliest date for commencement of the appeal process was February 22, 2011, in

consideration of the interim federal holiday on February 21, 2011 and if the date of the Decision is included within the calculation. With a commencement date no earlier than February 22, 2011, Jones' March 14, 2011, appeal was within the 21-day time-frame contemplated by RCW 90.58.140(6) as it existed at the time of the appeal and the appeal was timely.

However, Jones calculates that the 21-day time-frame for appeal commenced on an even later date. Under WAC 173-27 *et seq*, WSDOE was required to transmit the Decision by mail or hand delivery; electronic service, while contemplated by the Legislature at or about the time of WSDOE's electronic notice, was not the rule of law at the time. In this case, WSDOE finally complied with the statutory requirements by certifying the Decision for mailing to the local jurisdiction on February 24, 2011, and the actual receipt date contemplated by RCW 90.58.140(6) was no earlier than February 28, 2011. Thus, while WSDOE eventually satisfied its obligation under WAC 173-27-200(1), it did not do so until the Decision was certified for mailing to the local jurisdiction, which is unequivocally February 24, 2011 based upon the certified mailing envelope. Thus, Jones' appeal on March 14, 2011 within 21 days of February 24, 2011 was timely.

Again, the actions by the SHB and trial court in dismissing Jones' appeal are clearly erroneous, or arbitrary and capricious. The SHB was

without authority to dismiss Mr. Jones' appeal, and its actions were clearly erroneous, or arbitrary and capricious. *Herman v State of Washington Shoreline Hearings Bd.*, 149 Wn.App. 444, 204 P.3d 928 (2009), *review denied* 166 Wn.2d 1029, 217 P.3d 336. Therefore, this Court should reverse the rulings of the SHB and the trial court and remand the matter back to the trial court for further adjudication with direction to the trial court to remand the appeal back to the SHB for consideration on the merits.

- vi. **Even if it is determined that the WSDOE was authorized to email the decision and notice to HP, HP failed to immediately provide notice to the homeowners or interested parties.**

The WSDOT, WSDOE and HP have maintained that because WDDOE emailed the decisions to WSDOT and to a part-time contracting agent for HP after hours on February 15, 2011 rather than the Town Clerk or Town Administrative Manager, the time for appeal by all parties commenced on February 15, 2011. However, there is nothing in the record that shows that HP notified homeowners and interested parties of the WSDOE decision and notice. HP and the other agencies failed in their duty to provide an opportunity to be involved in the appeal process.

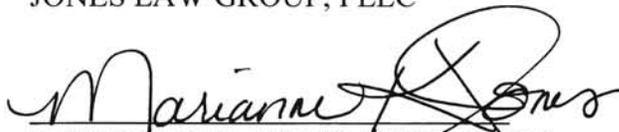
The action by the Shoreline Hearings Board and the trial court in dismissing Jones' appeal was clearly in disregard of the facts and circumstances in light of the law as it existed in 2011 prior to amendment

of the law after the appeal. The actions are clearly erroneous, or arbitrary and capricious, and the Court of Appeals should reverse the trial court's dismissal of Jones' appeal, remand the appeal back to the trial court for further adjudication with direction to the trial court to reverse its dismissal of Jones' appeal in the trial court and to remand the appeal to the SHB for further consideration of the appeal on the merit.

V. CONCLUSION

By applying the statutes, administrative code, and Washington Supreme Court policies to the facts in this matter, each direct a ruling by this court to find that Jones' Petition for Review was timely filed on March 14, 2011. The matter should be remanded to the trial court for further adjudication, with direction to the trial court to remand the appeal back to the SHB for review on its merit. RESPECTFULLY SUBMITTED this 8th day of June, 2012.

JONES LAW GROUP, PLLC



MARIANNE K. JONES, WSBA #21034

MONA K. MCPHEE, WSBA #30305

Attorneys for Appellant Cosgrove

Case No. 68532-5-I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

PATRICK A.T. JONES, individually and as assignee of all right, title, and
interest of the chose in action of PETER POWELL,

APPELLANT,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,
WASHINGTON STATE DEPARTMENT OF ECOLOGY, and THE TOWN
OF HUNTS POINT, a
Municipality,

RESPONDENTS.

APPENDIX TO APPELLANT'S OPENING BRIEF

Attorney for Appellant Jones

Jones Law Group, PLLC
Marianne K. Jones
11819 NE 34th Street
Bellevue, WA 98005
425-576-8899

2012 JUN - 8 3: 27
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

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RECEIVED

MAR 15 2011

ENVIRONMENTAL
HEARINGS OFFICE

SHORLINE HEARINGS BOARD

In re: Town of Hunts Point Permit 10-4
Daniel Babuca Applicant for the Washington
State Department of Transportation
Shoreline Substantial Development Permit 485

Case No. _____

PETITION FOR REVIEW

PETER POWELL, individually and
PATRICK A. T. JONES, individually

Petitioners,

ORIGINAL

1.0 JURISDICTION, VENUE, AND COMPLIANCE WITH WAC 461-08-350

1.1 At all material times, Petitioners Peter Powell and Patrick A. T. Jones, held title to two different parcels of real property located in Hunts Point, King County.

1.2 At all material times, The Town of Hunts Point, was a municipality operating within King County, State of Washington.

1.3 Jurisdiction in this matter is pursuant to RCW 90.58 et. seq. This matter was timely filed with the Shoreline Hearings Board by fax and followed up by mail and served upon the Department of Ecology, Attorney General, and Permit Applicant pursuant to statute.

1 Department of Transportation. The Hearing Examiner made his decision dated February 2, 2011³³⁴
2 and the Department of Ecology issued its letter decision dated February 15, 2011. These are the
3 decisions being appealed. Neither Petitioner Jones or Powell received copies of any decisions
4 but acquired them on their own.
5

6 3.0 FACTUAL SUMMARY

7 3.1 Peter Powell is a property owner of certain property located in the Town of Hunts
8 Point with the street address of 3151 Fairweather Place Hunts Point, WA 98004; his phone
9 number is 425 453 8020 and there is no fax number to provide.
10

11 3.2 Patrick A. T. Jones is the property owner of certain property located in the Town
12 of Hunts Point, under King County Auditor's Number 3537900165, legally described as follows:

13 Lot 11 in Block 2 of Hunts Point Park Addition, as per plat recorded in Volume 29 of plats,
14 page 8, records of King County Auditor;

15 Situate in the City of Hunts Point, County of King, State of Washington. The street address
16 is 8301 Hunts Point Circle, Hunts Point, Washington, 98004; his phone number is 425 453 0365
17 and his fax number is 425 576 9898.
18

19 3.3 The applicant represents the Department of Transportation and in connection with
20 the creation of carpool lanes on SR520; moved for a Shoreline Substantial Development
21 Conditional Use Permit (SCUP) to construct portions of an expansion of SR 520 including a
22 regional bike trail and industrial waste collection site.
23
24

25 3.4 The permit proposed to use a "design-build" contracting method which prohibits
26 full disclosure of the extent of the project design, engineering, construction methods, exact

1 location of utilities, and leaves fundamental design and building methods to the discretion of ³³⁵the
2 contractor and the applicant to determine following approval of the SCUP without further
3 process for the petitioners following approval by the SCUP appeal any design which results in
4 damage to the ecology and environment of the shoreline area and interference with the public's
5 use of the water.
6

7 3.5 Petitioner Powell's property rests directly on Lake Washington waterfront within
8 the same plat and neighborhood as the project. Petitioner Powell property will be uniquely
9 affected by the sediment that will result from the industrial waste collection facility located
10 within the general proximity of the lake front property of Petitioner Powell. Petitioner Powell's
11 property is not included within the Fairweather Basin but rather within the Haug Channel.
12 Petitioner Powell and others have each contributed substantial expenditure of funds in dredging
13 the Haug Channel and believe that the applicant's proposal will have long and lasting effects on
14 the ecology, environment, and expenses Petitioner Powell will again have to incur as a direct
15 result of the sediment that will necessarily be released from the applicant's proposed industrial
16 waste collection facility.
17
18
19

20 3.6 Petitioner Jones' property is adjacent to a creek which flows directly into Lake
21 Washington adjacent to the property purchased by the Department of Transportation for the SR
22 520 project. The close proximity of Petitioner Jones property and the changed use of the
23 property from single family residence to industrial waste collection facility are economically
24 harmful to Jones.
25
26

4.0 STATEMENTS OF ERRORS FOR REVIEW

336

Petitioners incorporate paragraphs 1.1-3.6 into the following Errors for Review.

4.1 The Hearing Examiner erred in process followed by not permitting persons the opportunity to speak at the public hearing when those persons attended the hearing on December 1, 2010, signed up to speak, and were not provided the opportunity to speak. Then on January 20, 2011 the hearing was continued and again persons who attended signed in and expected the opportunity to be heard but were then told that there would be no "additional" public comment at this meeting. However, public comment was never concluded at the December 1, 2010 meeting and there were no additional meetings or notices regarding public comment in between those dates. Due process was violated.

4.2 The Hearing Examiner erred by failing to recognize that the applicant is circumventing the constitution requiring that property takings be compensated. By placing an industrial waste collection facility within a close proximity of feet of Petitioner Jones property and permitting the change of use of the property from single family as required by the plat restrictions and determining that the proposed expansion of the state highway in this regard is consistent with the SMA is a property taking without just compensation.

4.3 The findings of fact include an environmental review which is based upon an updated Environmental Analysis dated May 2010 which is based upon a project that has been *changing over time and that has still not been designed because it is based upon a design build* concept. Environmental considerations cannot be accurate or complete with the extensive changes that remain within the discretion of the applicant and the contractor.

1 4.4 The updated Environmental Analysis dated May 2010 upon which the Hearing³³⁷
2 Examiner relied and upon which the Town of Hunts Point relied to provide their staff report was
3 based upon a design of an on-ramp to the westbound lanes of SR 520 adjacent to Hunts Point
4 called the "Half-Diamond" which was based upon representations to WSDOT by the Mayor of
5 Hunts Point wherein WSDOT knew that it did not have the support of the Hunts Point Town
6 Council which the Mayor twice stated he needed to obtain before the project could go forward.
7 After this was discovered in July 2010, WSDOT began working with the Town of Hunts Point to
8 develop an alternative on-ramp configuration "flyover" which differs from what was proposed on
9 the updated Environmental Analysis May 2010. In addition, if the "flyover" design is not built
10 for whatever reason, the Hunts Point Town Council has consistently voted in favor to retain the
11 loop design which is the same as today's configuration. Neither the Hearing Examiner nor the
12 Department of Ecology considered these issues in determining the reliability of the updated
13 Environmental Analysis May 2010 in making the findings of fact and conclusions of law within
14 the February 2, 2011 decision, and the approval dated February 15, 2010.

15 4.5 The Department of Ecology erred in approving and the Hearing Examiner erred in
16 concluding within paragraph 1 of his conclusions that there would be "water quality treatment"
17 for highway runoff that now enters Fairweather Bay untreated. There were insufficient facts to
18 make such a conclusion including but not limited to the following: there is neither "treatment"
19 nor "quality" nor was there any determination as the highway runoff that now enters Fairweather
20 Bay untreated.

1 4.6 The Department of Ecology erred in approving and the Hearing Examiner erred³³⁸
2 concluding within paragraph 1 of his conclusions that Hydraulic Project Approval and Water
3 Quality Certification include conditions to limit pollution, control waste, protect fish and control
4 erosion in Lake Washington that may result from the proposed project. This is not consistent
5 with the Town SMA goals.

7 4.7 The Department of Ecology erred in approving and the Hearing Examiner erred in
8 concluding in paragraph 22 of the findings that the applicant placing 46,464 cubic yards of fill in
9 the Hunts Point Shoreline environment meets the Town SMA goals and complies with other
10 applicable laws, disclosures, and approvals received by applicant.

12 4.8 The Department of Ecology erred in modifying the Hearing Examiner's decision
13 related to condition 2 and on the Exhibit 32b permitting public access and signage for public use
14 along the maintenance road and signage without enforcement, rather than deterrence for public
15 bicycle and pedestrian access through the maintenance access road. This is not consistent with
16 the Town SMA, with the covenants, nor with the safety and health of the community, gives
17 property to the public without justly compensating those effected by the taking, and otherwise
18 violates the law.

21 4.9 The Department of Ecology erred in approving and the Hearing Examiner erred in
22 concluding within paragraph 5 of his conclusions that the proposed landscape plantings would
23 help to reduce the visual impact of the noise wall. The Applicant stated without providing any
24 evidence that utilities would be present and the amount of and type of vegetation planted between
25 the industrial waste collection facility and the noise wall was not known. There remains no
26

1 redress for citizens related to condition number 4 for “additional landscaping.” Rather Petitioners³³⁹
2 are to wait to see what applicant and the utilities determine thereby giving applicant *carte*
3 *blanche*. The ruling may be unenforceable providing for an agreement to agree in the future on
4 issues upon which due process was supposed to be afforded.
5

6 4.10 The Department of Ecology erred in approving and the Hearing Examiner erred in
7 concluding in general that the application does not violate law. The Town of Hunts Point
8 previously took the position that determination by the Town of a violation of a plat restriction or
9 covenant was a reason to deny acceptance of an Application for Permit. The same Hearing
10 Examiner found that while it wasn’t reason to deny acceptance it was reason to deny approval.
11 The matter is currently pending in the Court of Appeals, Division I and Petitioner Jones is a party
12 in that matter. The Town of Hunts Point has taken the position with this application that it
13 cannot enforce plat restrictions against the Department of Transportation despite the fact that it
14 purchased the property without utilizing condemnation proceedings. Incorporated into this error
15 specifically are the facts related to this taking by the State of Washington cited within this
16 Petition for Review but also that this ruling is completely contrary to a decision made by the
17 Town of Hunts Point and a decision made by the same Hearing Examiner wherein the Town
18 believed that a plat restriction is violated. Here, the property purchased, without condemnation,
19 is subject to covenants which the remainder of the plat owners relied upon and which adjoining
20 plat owners relied upon. To rule that now the property is outside the jurisdiction of Hunts Point
21 because of the purchaser of property and without condemnation violates the constitution as an
22 uncompensated taking. Petitioner Powell and Jones while not being directly effected through the
23
24
25
26

1 Fairweather Boat Basin will be financially damaged by the actions of WSDOT in building on the ³⁴⁰
2 property as proposed in the application and to approve such application is contrary to public
3 policy and law.
4

5 4.11 The Department of Ecology erred in approving and the Hearing Examiner erred in
6 concluding generally that the applicant may have a design build construction which fails to
7 provide for the long term permanent harm to Petitioner Powell through the sediment collection in
8 the Haug Channel and to Petitioner Jones in the industrial waste collection use being permitted
9 so close in proximity to his property without any ability to have due process at the time the
10 decisions which have yet to be made are made for the design. This is a violation of law because
11 the applicant failed to have information which applicants should be able to provide relating to
12 design, engineering, utilities, and environmental concerns specific to the design, none of which
13 were provided with specificity with an opportunity to be heard, and some of which will not be
14 known until following the opportunity to be heard is concluded.
15
16

17 5.0 REQUESTS FOR REVIEW

18 5.1 WHEREFORE, petitioners request that the Shoreline Hearings Board render
19 decision as follows:
20

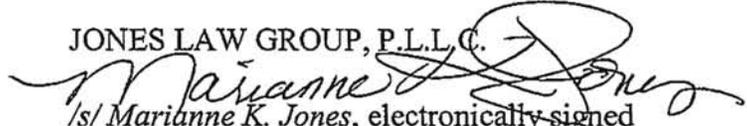
21 (a) For an Order declaring that due process was denied to Petitioners who desired to
22 speak and be heard at a public hearing, who signed up to be heard, were told on December 1,
23 2010 that they would be heard at the continuation of the hearing.
24

25 (b) For an Order declaring that the Hearing Examiner's decision fails to meet
26 applicable law and that the application for Conditional Use must be denied.

1 (c) Alternatively, for an Order remanding the Hearing Examiner's decision with ³⁴¹
2 respect to one or more of the matters raised by Petitioners and remand the decision back to the
3 Hearing Examiner for the Decision to be revised accordingly.
4

5 DATED this 14th day of March, 2011.

6 JONES LAW GROUP, P.L.L.C.



7 /s/ Marianne K. Jones, electronically signed

8 And intended to be consistent with Civil
9 Rule 11.

Original signature to follow by mail

10 _____
11 MARIANNE K. JONES, WSBA #21034
12 Attorney for the Petitioners
13
14
15
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26

**Copy of Application for Shoreline Permit which was filed
with Hunts Point**



May 4, 2010

Mona Green

Town Planner

Town of Hunts Point

3000 Hunts Point Road

Hunts Point, WA 98004

**Re: Shoreline Substantial Development Conditional Use Application; Medina to SR 202:
SR 520 Eastside Transit and HOV Project**

Dear Ms. Green:

The Washington State Department of Transportation (WSDOT) is submitting the enclosed application for a Shoreline Substantial Development Conditional Use for the SR 520 Eastside Transit and HOV Project (Eastside Project or Project). The overall Eastside Project includes improvements to the SR 520 highway between approximately Evergreen Point Rd. in Medina and 108th Ave NE in Bellevue with further restriping to SR 202 in Redmond. The portion of the Project that is located within the shoreline district of Hunts Point and is included in this application includes; the construction of a stormwater treatment pond and stormwater outfall at Fairweather Bay and portions of the roadway expansion and pedestrian/bike trail improvements.

WSDOT understands that a Conditional Use Permit is required for the Project because the Hunts Point Shoreline Master Program includes residential as the only permitted primary use of the shoreline. WSDOT has completed a National Environmental Policy Act Environmental Assessment and State Environmental Policy Act Determination of Non-Significance for the Project and has applied for State and Federal Permits using a Joint Aquatic Resources Permit Application (JARPA) form. WSDOT has also prepared a Biological Assessment as part of compliance with the Federal Endangered Species Act and received approvals from the U.S. Fish and Wildlife Service and National Marine Fisheries Service.

The 2009 JARPA package and Biological Assessment are included in this application. Please refer to the project description in the Supplemental Memorandum of this application for the most up to date project description.

Enclosed please find the following Materials:

- General Application Form
- Supplement Memorandum

- Figure 1 - Vicinity Map
- Figure 2 - Site Plan
- Figure 3 - Cross Sections
- Proof of Agency/ Hold Harmless Agreement
- Environmental Assessment and Determination of Non-Significance
- JARPA Materials
- Biological Assessment

Please if you have any questions regarding the application or project please contact me at 206-770-3632 or whites@consultant.wsdot.wa.gov.

Sincerely,



Scott White
Permit Team Lead
SR 520 Bridge Replacement and HOV Program

cc: WSDOT Document Control
Project File



May 4, 2010

Mona Green
Town Planner
Town of Hunts Point
3000 Hunts Point Road
Hunts Point, WA 98004

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Sincerely,



Scott White
Permit Team Lead
SR 520 Bridge Replacement and HOV Program

cc: WSDOT Document Control
Project File



Washington State
Department of Transportation

SR 520 Bridge Replacement and HOV Program



Medina to SR 202: Eastside Transit and HOV Project

Medina to SR 202: SR 520 Eastside Transit and HOV Project

Shoreline Substantial Development Conditional Use Application Town of Hunts Point

Prepared by
Washington State Department of Transportation

May 4, 2010

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Supplemental Memorandum

This Supplemental Memorandum contains additional information and detail regarding the project that could not fit on or was not requested by the General Application Form.

Design-Build Contracting Approach

The SR 520 Eastside Transit and HOV Project (Eastside Project or Project) is currently proceeding under a "design-build" contracting method. In a design-build scenario, the Washington State Department of Transportation (WSDOT) will complete a preliminary design of the Project before bringing on a Design-Builder to finish design while portions of the construction are proceeding. This is in contrast to a "design-bid-build" contracting method where the Project would be completely designed before it was turned over to a contractor for construction.

The design-build approach does limit some of the available information on construction methods and timing and even details of the design because these issues are left to the discretion of the Design-Builder.

Overall Project Description

WSDOT is proposing to construct the Eastside Project to reduce transit and HOV travel times and enhance travel time reliability, mobility, access, and safety for transit and high-occupancy vehicles in rapidly growing areas along the State Route SR 520 corridor east of Lake Washington. The project includes building a complete HOV system between Lake Washington and 108th Avenue NE and restriping the existing HOV lanes from the outside lanes to the inside lanes between the 108th Avenue NE interchange and SR 202 in Redmond.

The portion of the Eastside Project between Evergreen Point Road and 108th Avenue NE was previously part of the SR 520 Bridge Replacement and HOV Project. However, on June 18, 2008, the Federal Highway Administration (FHWA) authorized WSDOT to develop the SR 520 Eastside Transit and HOV Project as an independent project. The project limits extend approximately 8.5 miles along SR 520 from the east shore of Lake Washington (vicinity of Evergreen Point Road) to the interchange with SR 202 in Redmond.

- SR 520 Improvements from Lake Washington to I-405
 - Construct a new eastbound HOV lane from Lake Washington to the existing eastbound HOV lane west of the I-405 interchange. This improvement will complete the currently discontinuous HOV network on the Eastside and improve travel time reliability for buses and carpools.
 - Relocate existing westbound HOV lane to the inside shoulder from Lake Washington to I-405. This change will enhance safety by eliminating the existing need for merging vehicles to weave across the faster-moving HOV lanes to reach the general purpose lanes.
 - Construct new lid with inside transit stop over SR 520 at Evergreen Point Road.

- Construct new lid and modify existing interchange at 84th Avenue NE.
- Construct new lid with inside transit stop over SR 520 at 92nd Avenue NE and modify the existing interchange.
- Reconfigure existing interchange at Bellevue Way.
- Construct new HOV direct access ramps at 108th Avenue NE. This improvement will connect SR 520 with 108th Ave NE, eliminating the need to connect to the South Kirkland Park & Ride via local streets.
- Add a bike/pedestrian path from Lake Washington to approximately 108th Avenue NE. This will facilitate nonmotorized use of SR 520, provide connections for bikes and pedestrians, and complement the existing nonmotorized transportation network on the Eastside.
- Other Improvements
 - Provide sound walls between Evergreen Point Road and 108th Avenue NE.
 - Provide retaining walls and stormwater management system improvements.
 - Portions of the Yarrow Creek stream channel will be realigned and some culverts shortened to improve stream habitat.
 - The project will improve fish passage culvert crossings to restore fish passage and open up habitat that was previously inaccessible to salmon and other fish species.
 - Impacts to wetlands and streams will be mitigated at mitigation sites as appropriate.
- SR 520 Improvements from I-405 to SR 202
 - Restripe existing eastbound and westbound HOV lanes to the inside shoulder. This change will enhance safety by eliminating the existing need for merging vehicles to weave across the faster-moving HOV lanes to reach the general purpose lanes.

Hunts Point Shoreline Elements

The portion of the Eastside Project that is located within the shoreline district of the Town of Hunts Point includes the following elements:

- Construction of a stormwater treatment pond at the southern end of Fairweather Bay. The pond, known as Facility I-3, will be constructed on two previously residential parcels that have been purchased by WSDOT and are being converted to State right-of-way. The facility will remove pollutants from highway stormwater runoff and is required to comply with Federal and State requirements regarding highway runoff. The north side of the facility will be ringed by a berm, approximately 5 to 20 foot tall (from the shoreline), that will also serve as maintenance access. The facility ponds will be approximately 5 to 10 feet deep, however they will only have standing water immediately after rain events.

- Construction of a stormwater outfall to Fairweather Bay from Facility I-3. The stormwater outfall is located at the southern tip of Fairweather Bay just to the northwest of the stormwater facility. The outfall has been designed to avoid fill in Fairweather Bay and minimize flow velocities to prevent erosion. A new channel, approximately 15 feet long, will be dug behind the existing bulkhead. At the landward end of the channel the outfall pipe will discharge through a concrete energy dissipation structure. The channel will be rock-lined and sloped so that the waterward end will be the same elevation as the bed of Fairweather Bay. After construction of the channel, approximately 15 feet of the existing bulkhead will be removed, connecting the channel to Fairweather Bay. This outfall design has been coordinated with Federal and State resource agencies.
- A portion of the proposed SR 520 roadway expansion will be within 200 feet of the shoreline. In addition a portion of the realigned Points Loop Pedestrian Trail and a new regional bike path will be within 200 feet of the shoreline. The Points Loop Trail will be located to the south of Facility I-3, approximately 120 feet from the shoreline at its closest point. The trail will be adjacent to a 25 foot tall retaining wall. At the top of this wall will be the new regional bike path and the expanded highway. The highway will be as close as 150 feet to the shoreline and will be within 200 feet of the shoreline for approximately 400 linear feet.

Environmental Review

WSDOT prepared an Environmental Assessment (EA) for the Project as part of compliance with the National Environmental Policy Act (NEPA). As the State Environmental Policy Act (SEPA) Lead Agency, WSDOT has adopted the EA according to the procedures in WAC 197-11-630 and issued a Determination of Non-Significance (DNS) on December 1, 2009 in accordance with WAC 197-11-340.

On behalf of the Federal Highway Administration (FHWA), WSDOT prepared a Biological Assessment (BA) for the Project in compliance with the Federal Endangered Species Act. The BA concluded that the Project "May affect, likely to adversely affect" Chinook salmon and "may affect, not likely adversely affect" steelhead trout and bull trout. The BA was submitted to the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) in June, 2009. On July 30, 2009 USFWS issued a Letter of Concurrence with the findings of the BA. On October 22, 2009 NMFS issued a Biological Opinion authorizing the incidental take of Chinook salmon from project impacts.

In July 2009 WSDOT applied for several Federal and State permits for the Project using the Joint Aquatic Resources Permit Application (JARPA) form. The permits that have been applied for and associated agencies are;

- Individual Section 404 Permit, U.S. Army Corps of Engineers (Corps)
- Section 401 Water Quality Certification, Washington Department of Ecology (Ecology)
- Coastal Zone Management Act Consistency Determination, Ecology
- Hydraulic Project Approval, Washington Department of Fish and Wildlife (WDFW)

WSDOT has had ongoing coordination with these agencies through the Multi-Agency Permit (MAP) Team. A joint public notice was issued by the Corps and Ecology in July 23, 2009 with a 30-day public comment period. In addition to the Federal and State agencies WSDOT has had ongoing coordination with the Muckleshoot Indian Tribe. Coordination with these agencies and tribe has directly led to the current design of the Fairweather Bay stormwater outfall.

Consistency with Chapter 173-27 WAC, Shoreline Management Permit and Enforcement Procedures

Per WAC 173-27-160 a conditional use may be authorized provided the following criteria are met;

- (a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;*

The proposed Project is consistent with the legislative findings and policies of the Shoreline Management Act and the conditional use provisions of the Hunts Point Shoreline Master Program.

- (b) That the proposed use will not interfere with the normal public use of public shorelines;*

The proposed Project does not include or alter public shorelines or uses.

- (c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;*

The proposed Project has been designed to minimize impacts including visual impacts on neighboring residential properties and the shoreline environment and has included design negotiations with the Town of Hunts Points and adjoining properties.

- (d) That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and*

The proposed project will not have adverse effects to the shoreline environment and will likely improve the environment through shoreline plantings and improvement to water quality due to highway stormwater runoff treatment.

- (e) That the public interest suffers no substantial detrimental effect.*

The proposed project is supported by State and Local elected officials and has been coordinated with relevant agencies to improve design and minimize impacts and will not detrimentally affect the public interest.

Per WAC 173-27-160(3) uses other than those classified or set forth in the Shoreline Master Program may be authorized as conditional uses provided they can comply with the above criteria. The Hunts Point Shoreline Master Program does not include specific conditional uses.

Consistency with Hunts Point Shoreline Master Program

The following describes how the Project complies with the Goals and Policies of the Hunts Point Shoreline Master Program.

V. Goals and Policies

1. Residential/Recreational

The Project will result in the removal of two shoreline residential structures however the Project has been designed to minimize impacts to adjoining residents and any recreational uses of Lake Washington. No feasible alternatives for the Project have been identified that would result in less impact to residential properties.

2. Conservation Element

The proposed Project will improve the functions and values of Lake Washington through habitat and water quality improvements. The Project will remove the current lawn and concrete paths adjacent to the shoreline and plant the area with native species. The existing stormwater from the highway is untreated. Construction of the treatment facility will allow for treatment of stormwater improving water quality over existing conditions even with the expansion of the highway area and increase in traffic. Analysis conducted for the Endangered Species Act Biological Assessment indicated that pollutant loading and concentrations would decrease for total suspended solids, total copper and total and dissolved zinc. Dissolved copper annual loading will increase due to the increased area of runoff and increased traffic; however concentrations will decrease due to the proposed treatment.

The stormwater outfall has been designed to avoid direct physical impacts to Lake Washington and includes energy dissipation to minimize potential erosion impacts.

3. Public Access Element

Due to concerns over both public safety and the privacy and security of neighboring properties the Project does not include public access to the shoreline. Consistent with the Hunts Point Shoreline Master Program the project will provide increased visual access to Lake Washington from the realigned Points Loop pedestrian trail and the new Regional Bike Path.

4. Historical, Cultural, Scientific and Educational Element

No "unique or fragile areas" will be affected by the Project.

5. Circulation Element

The proposed Project will not alter the existing circulation pattern. The proposed stormwater facility will utilize existing streets for maintenance access. The Project includes a pedestrian and bike path within 200-ft of the shoreline but restricts shoreline access consistent Shoreline Master Program and Comprehensive Plan.

The Points Loop pedestrian trail and its recognized access benefits will be maintained and augmented with the new Regional Bike Path. Expansion of the SR 520 highway is necessary to provide for increased regional demands. The expansion into the shoreline has been minimized through the use of retaining walls rather than slopes.

6. *Economic Development Element*

No commercial uses are proposed as part of the Project.

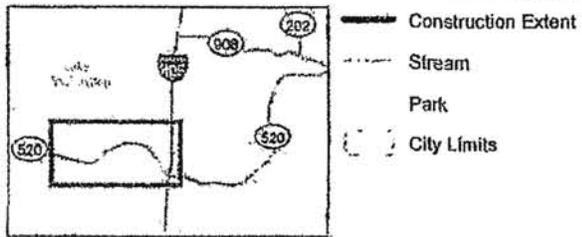
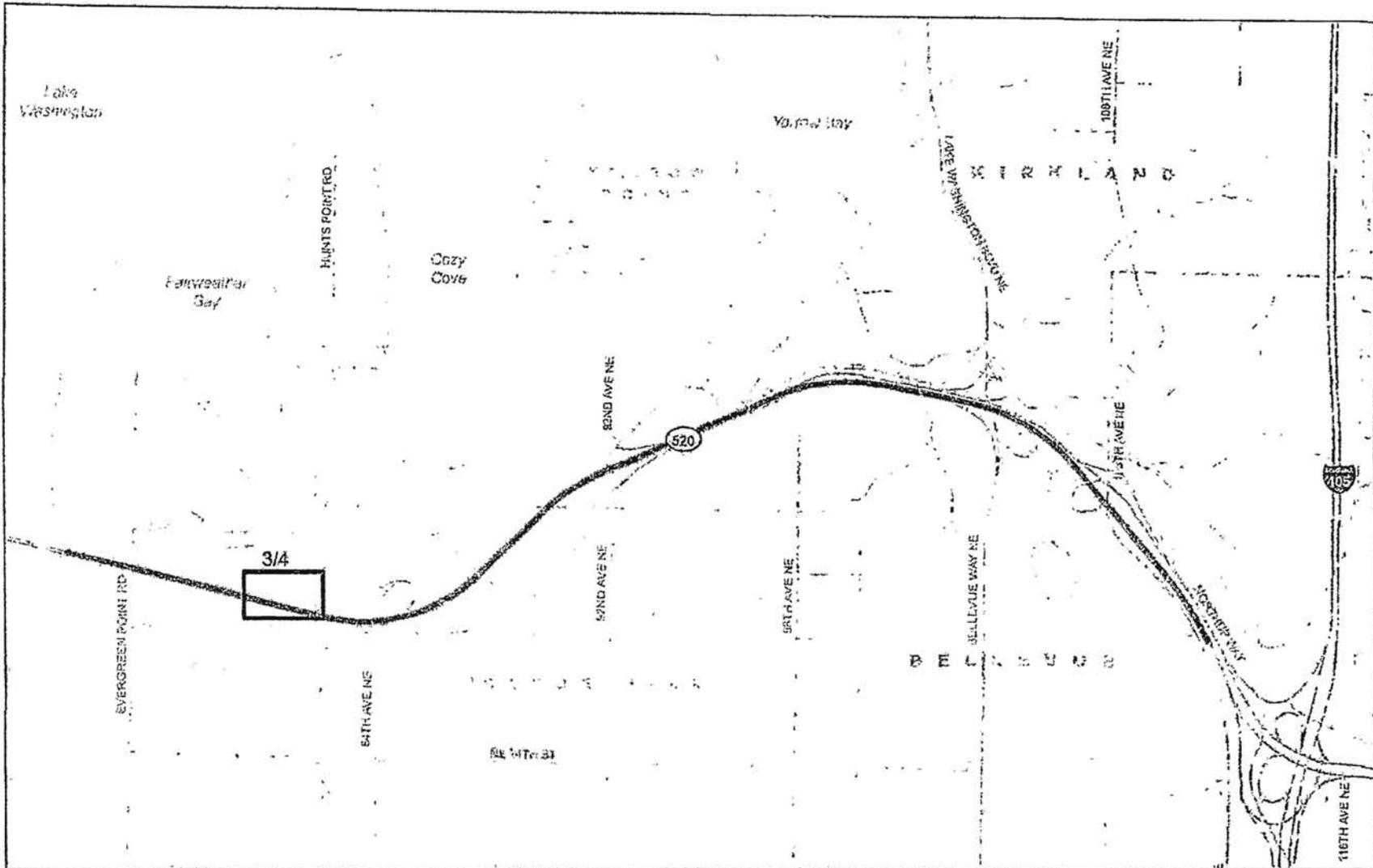
Consistency with Hunts Point Comprehensive Plan

The proposed Project is consistent with the Transportation Element of the Hunts Point Comprehensive Plan (2004). The Project will include the installation of noise barrier walls throughout the alignment in Hunts Point and will include an overpass lid at the 84th Ave interchange. Additionally the access to public transit by Town residents will be maintained and improved through the continued availability of pedestrian trails and the new regional bike path and access to improved transit facilities at Evergreen Point Road and 92nd Ave NE.

In accordance with the Transportation Goals of the Comprehensive Plan, the Project will realign the HOV lanes to the inside of the highway, eliminating a dangerous merge point at the 84th Ave interchange. Additionally the Eastside Project is designed to be compatible with a future bridge replacement project including the "six-lane bridge configuration" discussed in the Goals.

Figure 1 – Vicinity Map

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Source: King County (2008) GIS Data (Streams, Streets, Water Bodies), CH2M HILL (2008) GIS Data (Parks). Horizontal datum for all layers is NAD83(91), vertical datum for layers is NAVD88.

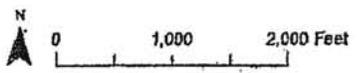


Figure 1. Vicinity Map
 Medina to SR 202: Eastside Transit and HOV Project

Proof of Agency / Hold Harmless Agreement**9a**PROPERTY ADDRESS: 2840 80th Ave NE, Bellevue, WA 98004PERMIT TYPE: Shoreline Conditional Use PERMIT NUMBER: SDP-CU 10-04**Proof of Agency**

A Proof of Agency is required for the acceptance of any permit where the permit applicant ("agent") is not the recorded owner of the property ("owner"). If the owner is a corporation, LLC, LLP, or partnership, this form must be completed and signed by the chief executive of the entity that holds ownership of the property in question.

Owners which apply for permits on their own behalf do not need to complete this form. **All other applicants must fully complete this form, including the owner's signature, before the Town of Hunts Point will process any application documents.** Each separate application must include an original, fully executed Form 9a, Proof of Agency/Hold Harmless Agreement.

TO BE COMPLETED BY OWNER:

I, Daniel Babuca, on behalf of the Washington State Department of Transportation, as the owner of
(print name of property owner or, in case of corporation, LLC, LLP or partnership, company Chief Executive)
 the above-referenced property, hereby authorize the person or entity outlined below (the "agent") to act as my sole agent regarding the above-referenced property, and further stipulate that the Agent may act on my behalf for purposes of filing applications for decisions, determinations, permits, or review under any applicable Hunts Point Codes, and further stipulate that the Agent has full power and authority to perform, on my behalf, all acts necessary to enable the Town to process or review applications, issue permits, authorize revisions, and perform inspections required under all codes in force. **I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.**

Daniel R Babuca
[Signature of Property Owner/Chief Executive]5/4/2010
[Date]600 Stewart St, Suite 520SeattleWA98101

[Contact Address]

[City]

[State]

[Zip]

206-770-3545

[Phone]

[Fax]

TO BE COMPLETED BY AGENT:Scott White

[Print Name of Agent]

Permit Coordinator

[Title]

600 Stewart St, Suite 520

[Contact Address]

Seattle

[City]

WA

[State]

98101

[Zip]

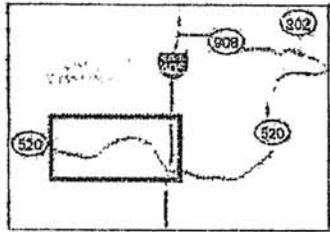
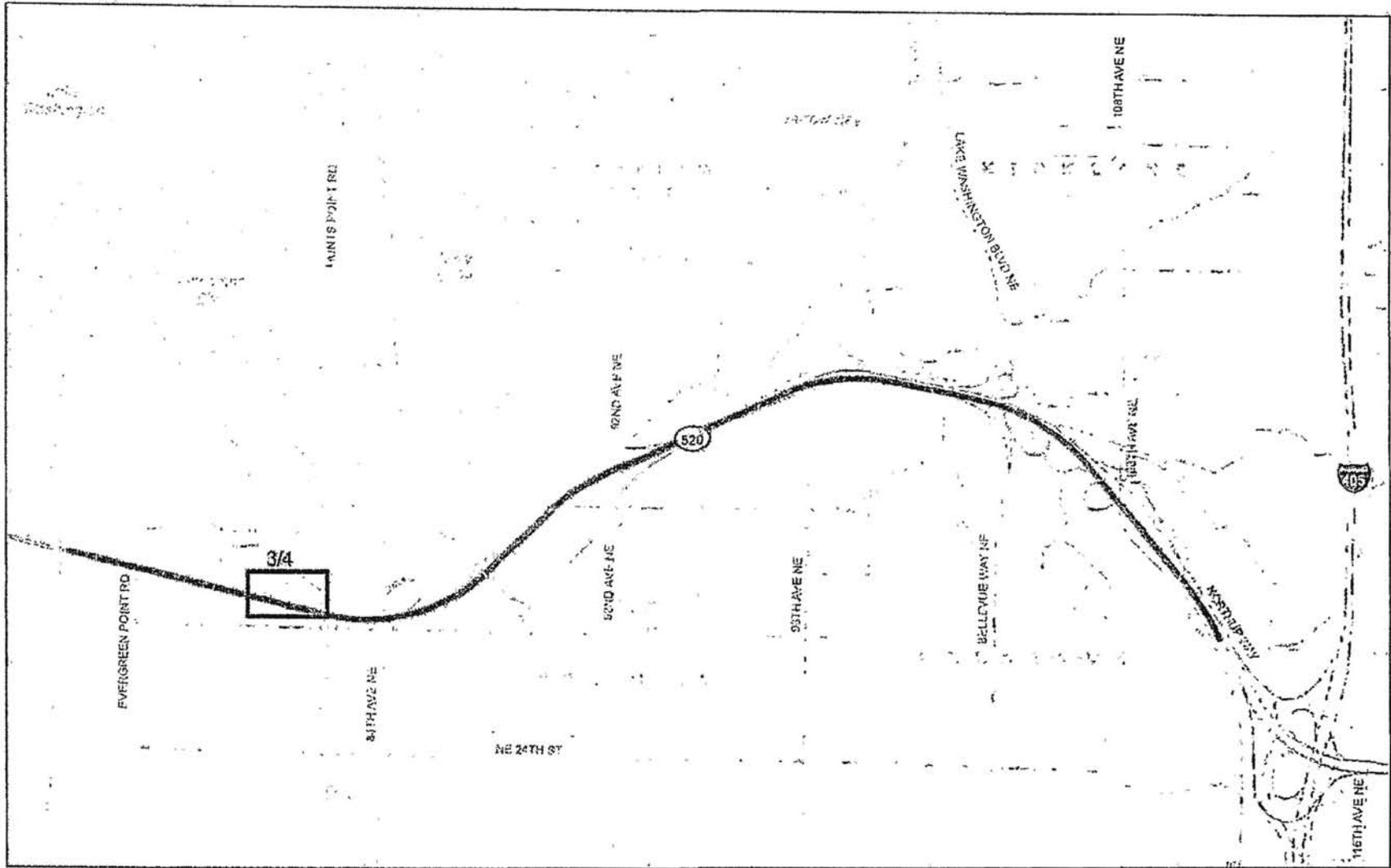
206-770-3632

[Phone]

[Fax]



Town Hall, 3000 Hunts Point Road, Hunts Point, WA 98004-1121. Phone 425.455.1834, FAX 425.454.4586. Permit intake and issuance hours are Tuesday and Thursday, 8am-12pm and 1pm-5pm. Building Services Department 425.455.1834.



-  Construction Extent
-  Stream
-  Park
-  City Limits

Source: King County (2008) GIS Data (Streams, Streets, Water Bodies), CH2M HILL (2008) GIS Data (Parks). Horizontal datum for all layers is NAD83(91), vertical datum for layers is NAVD88.

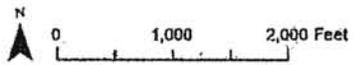


Figure 1. Vicinity Map

Medina to SR 202: Eastside Transit and HOV Project

BEST AVAILABLE IMAGE POSSIBLE



Source: King County (2003) GIS Data (Streets, Steeps, Wetlands), horizontal datum for all layers is NAD83; vertical datum for layers is NAVD83.

- Ordinary High Water Mark
- - - 200-Foot Buffer of Ordinary
- - - Existing Culvert
- ▭ Steam Channel
- ▭ Wellland
- ▭ Wellland Buffer
- - - Existing Right of Way
- - - Parcel Boundary
- - - Jurisdictional Boundary

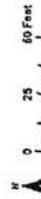
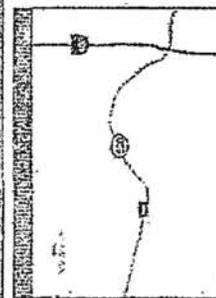
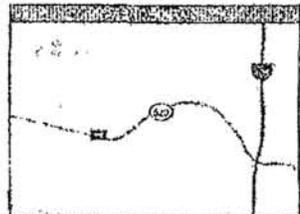
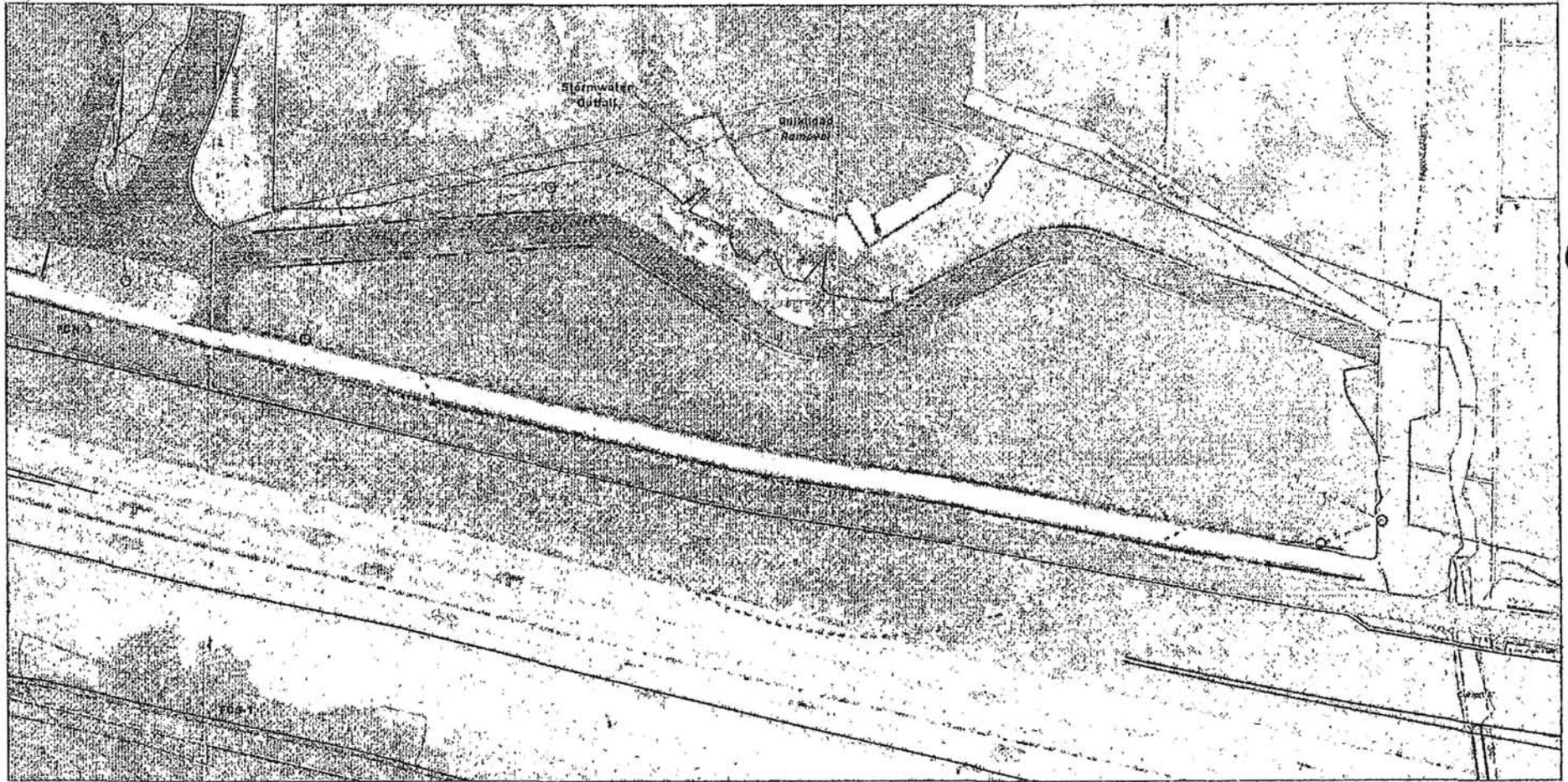
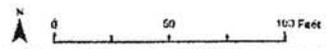


Figure 2. Project Corridor Map
Medina to SR 202: Eastside Transit and HOV Project

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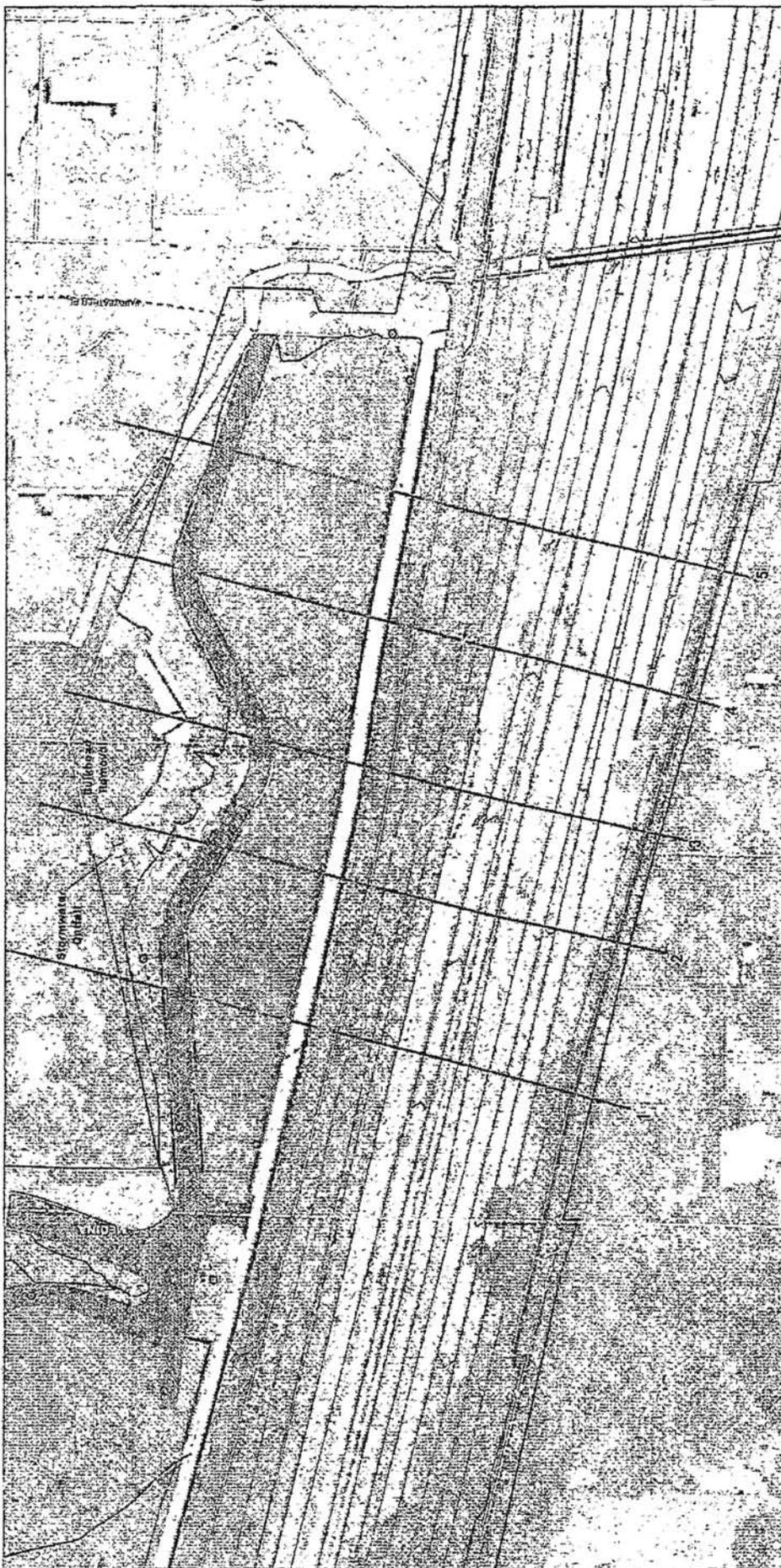


- | | | | |
|---------------------------|----------------------|-------------------------------|---------------------------|
| — Proposed Retaining Wall | ▨ Access Road | — Ordinary High Water Mark | ▨ Existing Right of Way |
| ▨ Proposed Noise Wall | ▨ Bike Path | ▨ 200-Foot Buffer of Ordinary | ▨ Parcel Boundary |
| — Cul/Fill Limit | ▨ Point Loop's Trail | ▨ Existing Feature Type | ▨ Jurisdictional Boundary |
| — Limits of Construction | ▨ Stormwater Pond | ▨ Existing Stream | |
| ▨ Proposed Culvert | ▨ Wetland | ▨ Wetland Buffer | |
| ▨ Proposed Stream | | | |



Source: King County (2008) GIS Data (Streams, Streets, Waterbodies). Horizontal datum for all layers is NAD83(91); vertical datum for layers is NAVD83.

Figure 3. Site Plan
Medina to SR 202: Eastside Transit and HOV Project



Source: King County (2008) O'S Data (Streams, Streets, Waterbodies). Horizontal datum for all layers is NAD83(11). Vertical datum for elevations is IGLD85.

- Access Road
- Bike Path
- Point Loose Trail
- Stormwater Pond
- Ordinary High Water Mark
- 200-Foot Buffer
- Existing Feature Type
- Existing Stream
- Existing Right of Way
- Parcel Boundary
- Jurisdictional Boundary

- Cross Section
- Proposed Retaining Wall
- Proposed Hoop Wall
- Cliff/Fill Limit
- Limits of Construction
- Proposed Culvert
- Proposed Stream

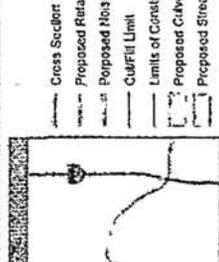
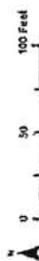
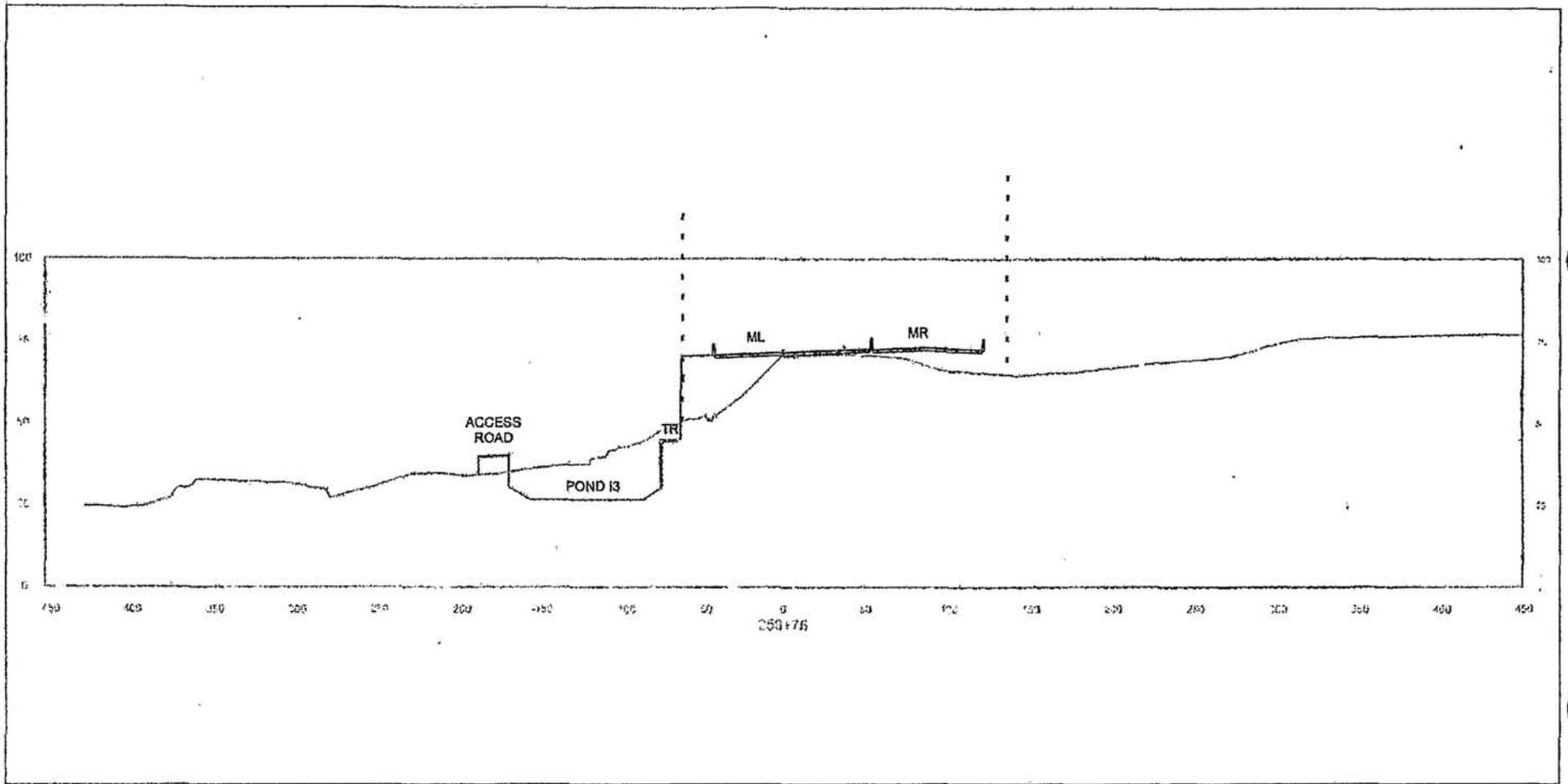


Figure 4. Cross-Section

Medina to SR 202, Eastside Transit and HOV Project



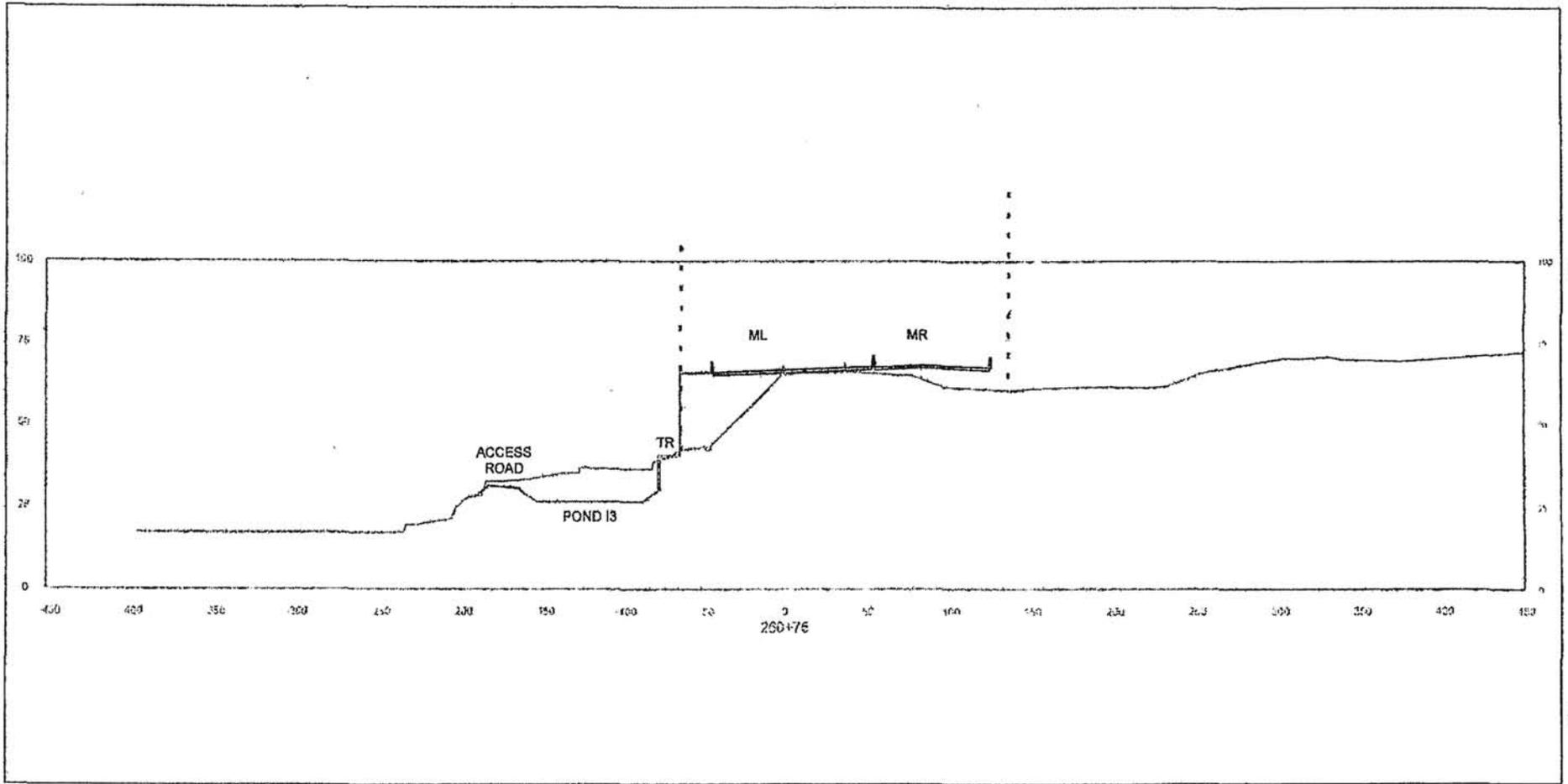


- Access Road
- Bike Path
- Ground
- Major Grid
- Minor Grid
- Pond
- Roadway
- Trail
- - - Existing ROW

Source: WSDOT (2006) Aerial Imagery (2008) GIS Data (Hilland), King County (2008) GIS Data (Streams, Streets, Water Bodies), CH2M HILL (2006) GIS Data (Parks). Horizontal datum for all layers is NAD83(91), vertical datum for all layers is NAVD83.

Figure X. Stormwater Pond 13 - Cross-Section #1

Medina to SR 202: Eastside Transit and HOV Project

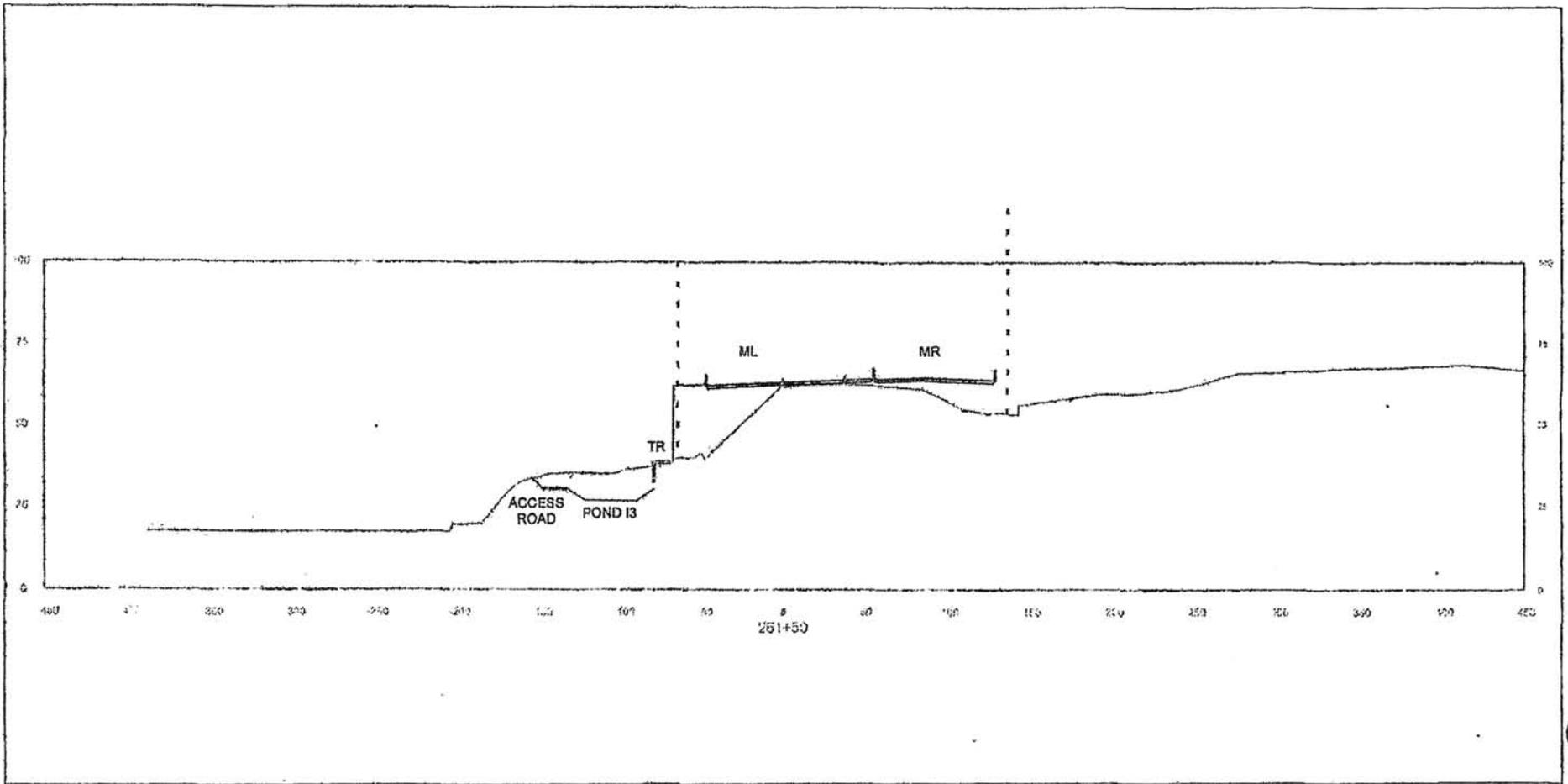


- Access Road — Pond
- Bike Path — Roadway
- Ground — Trail
- Major Grd - - - Existing ROW
- Minor Grd

Source: WSDOT (2005) Aerial Imagery (2008) GIS Data (Wetlands), King County (2008) GIS Data (Streams, Streets, Water Bodies), CH2M HILL (2008) GIS Data (Parks). Horizontal datum for all layers is NAD83(11), vertical datum for layers is NAVD83.

Figure X. Stormwater Pond 13 - Cross-Section #2

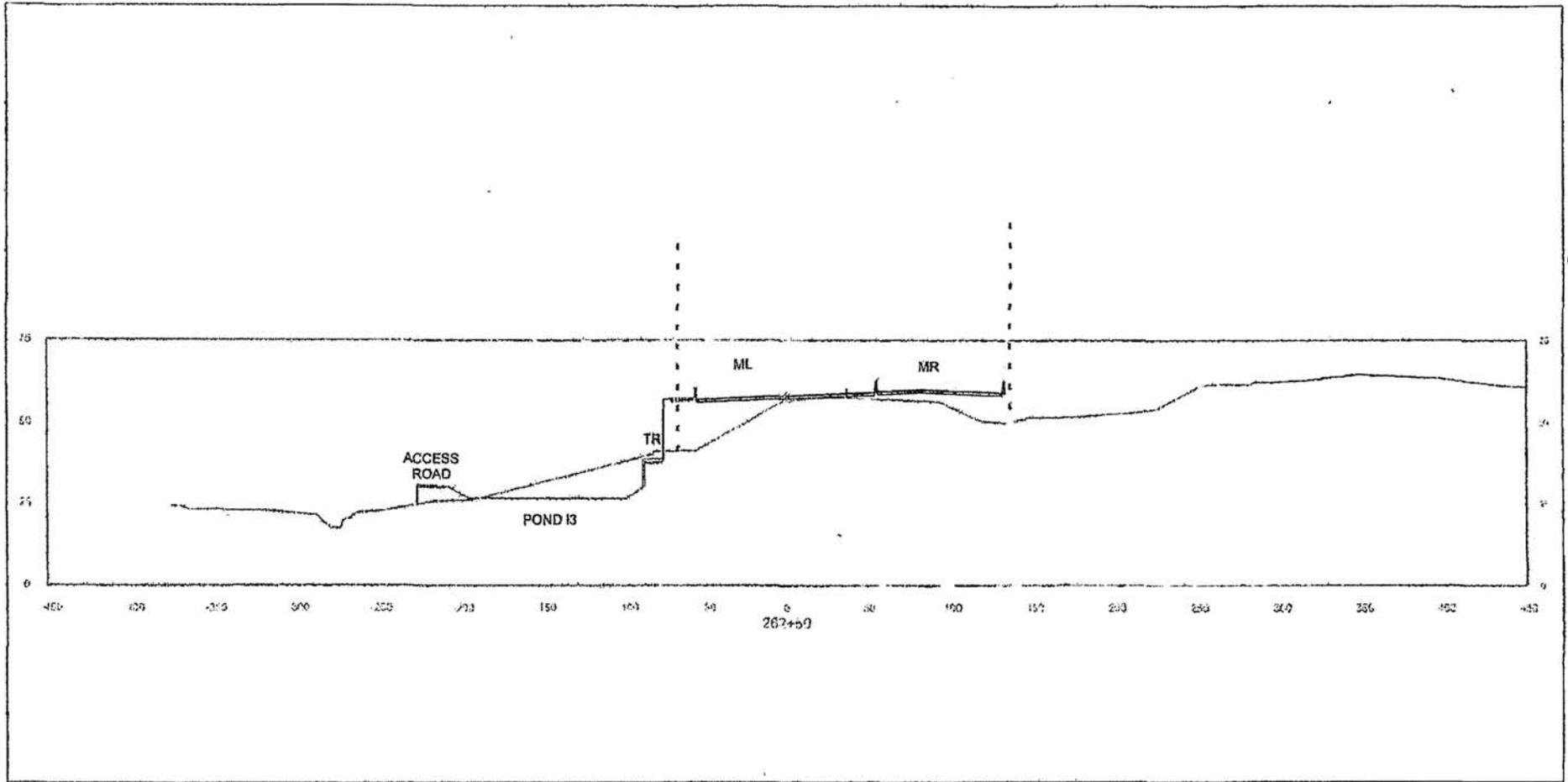
Medina to SR 202: Eastside Transit and HOV Project



- Access Road
- Bike Path
- Ground
- Mayor Grid
- Minor Grid
- Pond
- Roadway
- Trail
- - - Existing ROW

Source: WSDOT (2003) Aerial Imagery (2003) GIS Data (Wetlands), King County (2003) GIS Data (Streams, Slopes, Water Bodies), CH2M HILL (2004) GIS Data (Parks), Horizontal datum for all layers is NAD83(11), vertical datum for layers is NAVD83.

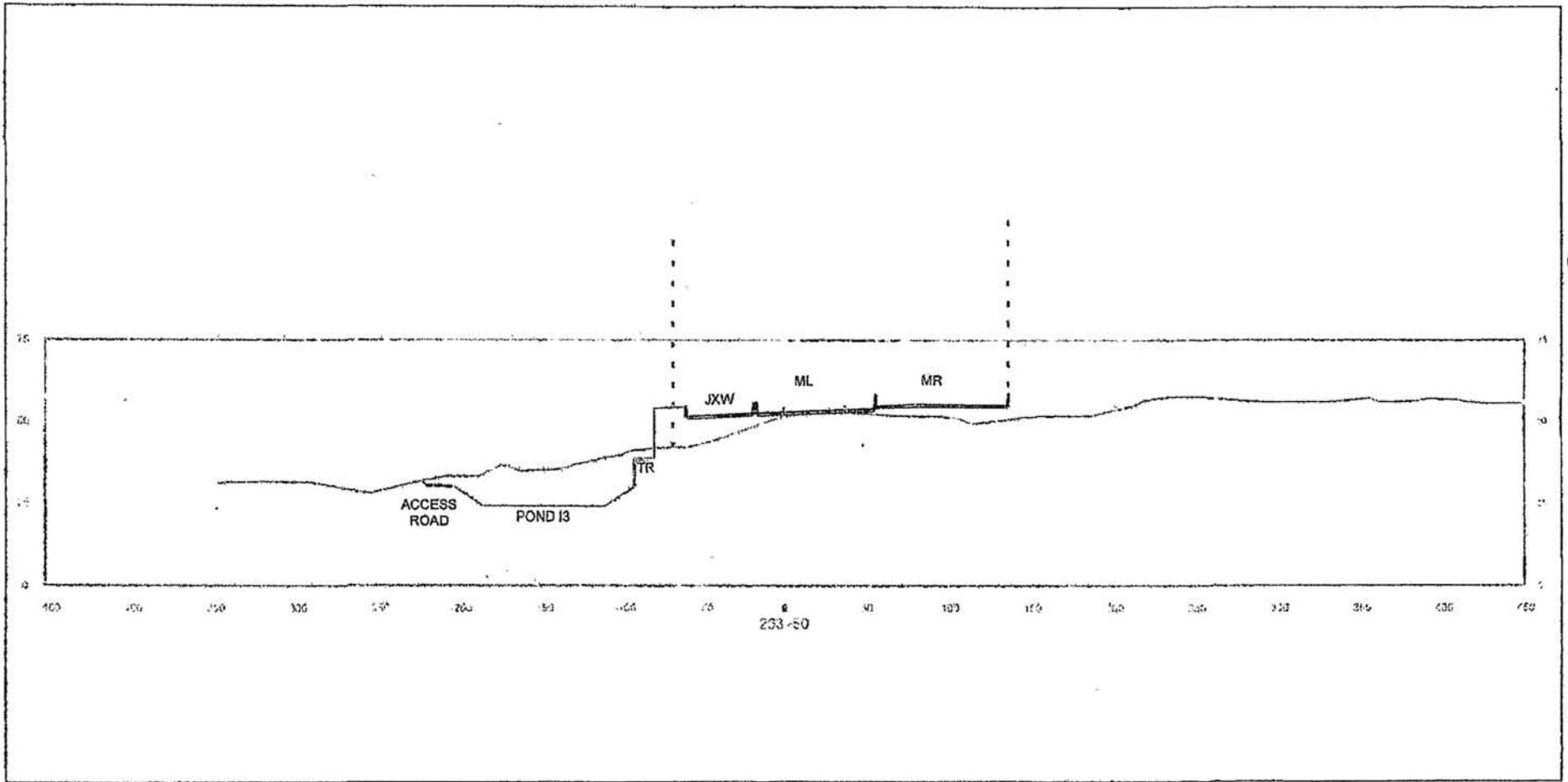
Figure X. Stormwater Pond I3 - Cross-Section #3
Medina to SR 202: Eastside Transit and HOV Project



- Access Road
- Bike Path
- Ground
- Major Grid
- Minor Grid
- Pond
- Roadway
- Trail
- - - Existing ROW

Source: WSDOT (2005) Aerial Imagery (2008) GIS Data (Woods), King County (2008) GIS Data (Streams, Swales, Water Bodies), CH2M HILL (2006) GIS Data (Parks). Horizontal datum for all layers is NAD83(91), vertical datum for layers is NAVD88.

Figure X. Stormwater Pond 13 - Cross-Section #4
Medina to SR 202: Eastside Transit and HOV Project



- Access Road
- Pond
- Bike Path
- Roadway
- Ground
- Trail
- Major Grid
- Existing ROW
- Minor Grid

Source: WSDOT (2005) Aerial Imagery (2003) GIS Data (Wetlands), King County (2003) GIS Data (Streams, Streets, Water Bodies), CH2M HILL (2000) GIS Data (Parks). Horizontal datum for all layers is NAD83(11), vertical datum for layers is NAVD83.

Figure X. Stormwater Pond I3 - Cross-Section #5
 Medina to SR 202: Eastside Transit and HOV Project

**BEFORE THE HEARING EXAMINER
FOR THE TOWN OF HUNTS POINT**

In the Matter of the Application of)	No. 10-04
)	
Daniel Babuca, on behalf of the)	Medina to SR 202: SR 520 Eastside
Washington State Department of)	Transit and HOV Project
Transportation)	
)	
For a Shoreline Substantial)	FINDINGS, CONCLUSIONS
<u>Development Conditional Use Permit</u>)	AND DECISION

SUMMARY OF DECISION

The request for a Shoreline Substantial Development Conditional Use Permit (SCUP) to construct portions of an expansion of SR 520 with a noise wall and pedestrian/bike trail improvements, and a stormwater treatment facility with an outfall at Fairweather Bay within the Town of Hunts Point, Washington is **APPROVED**. Conditions of approval are necessary to address specific impacts of the proposed development.

SUMMARY OF RECORD

Request:

Daniel Babuca, on behalf of the Washington State Department of Transportation, requests a Shoreline Substantial Development Conditional Use Permit to construct portions of an expansion of SR 520 with a noise wall and pedestrian/bike trail improvements, and a stormwater treatment facility with an outfall at Fairweather Bay within the Town of Hunts Point, Washington.

Hearing Date:

The Town of Hunts Point Hearing Examiner held an open record hearing on the request on December 1, 2010. The Hearing Examiner determined at the hearing that there was a need for additional testimony and evidence: *HPMC 2.35.090(2)*. The hearing was reconvened on January 20, 2010.¹

The Applicant filed a letter request to reconvene the open record hearing at an earlier date of January 5, 2011. Letter from Assistant Attorney General Deborah Cade to Hearing Examiner, dated December 3, 2010. The Hearing Examiner issued an order requesting responses to the Applicant's request. Hearing Examiner Order for Reconvened Hearing Date and Opportunity to Respond, Town of Hunts Point, WSDOT SSCUP, No. 10-04, dated December 6, 2010. Four objections were filed to the January 5 date. Attorney John C. McCullough letter to Hearing Examiner, dated December 7, 2010; Peter W. Powell letter to Hearing Examiner, dated December 9, 2010; Michael Hejler letter to Hearing Examiner, dated

*Findings, Conclusions and Decision
Town of Hunts Point Hearing Examiner
WSDOT SSCUP, No. 10-04*

Testimony:

The following individuals presented testimony under oath at the open record hearings:

December 1, 2010

Mona Green, Town Planner
 Daniel Babuca, WSDOT, Engineering Manager
 Scott White, WSDOT, Permit Team Lead
 Mike Cotton, WSDOT, Design Build Director
 Rod Olson
 Peter Powell

January 20, 2011

Scott White, WSDOT, Permit Team Lead
 Daniel Babuca, WSDOT, Engineering Manager
 Susan Wessman, WSDOT Landscape Architect Consultant
 Mona Green, Town Planner
 David Radabaugh, Department of Ecology, Regional Shoreline Planner

Attorney Mike Kenyon represented the Town; Attorney Deborah L. Cade represented WSDOT; Attorneys Aaron M. Laing and Dennis L. Dunphy represented the Fairweather Basin Boat Club; and Attorney John C. McCullough represented Rodney and Janice Olson.

Exhibits:

The following exhibits were admitted into the record:²

1. Staff Report, dated November 22, 2010
2. SCUP Application and Proof of Agency/Hold Harmless Agreement, dated May 4, 2010
3. WSDOT Cover Letter and Supplemental Memorandum, dated May 4, 2010, with
 - a. Figure 1 – Vicinity Map
 - b. Figure 2 – Existing Conditions, including Existing Utilities, Sewer, Water Plan (EU03), Preliminary Not for Construction, dated May 26, 2010, and Project Corridor Map
 - c. Figure 3 – Site Plan
 - d. Figure 4 – Cross Sections
 - e. Figure X – Cross-Sections #1- #5

December 16, 2010; Attorney Aaron M. Laing letter to Hearing Examiner, dated December 22, 2010. On December 23, 2010; the Hearing Examiner issued an order setting the reconvened hearing for January 20, 2011. Hearing Examiner Order RE: Hearing Date, Town of Hunts Point, WSDOT-SSDCUP, No. 10-04, dated December 23, 2010.

² The Town provided Exhibits 1-18 prior to the December 1, 2010, hearing. Exhibits 19-22 were introduced at the December 1, 2010 hearing. The Hearing Examiner determined at the hearing that there was a need for additional testimony and evidence. *Hearing Examiner Order for Submission of Additional Evidence, Town of Hunts Point, WSDOT-SSDCUP, No. 10-04, dated December 6, 2010.* In response, the Applicant provided Exhibits 23-31 on December 10, 2010. The Applicant provided Exhibit 32 on January 13, 2011. These exhibits and Exhibits 33-37 were introduced into the record at the January 20, 2011 hearing.

*Findings, Conclusions and Decision
 Town of Hunts Point Hearing Examiner
 WSDOT-SSDCUP, No. 10-04*

4. Letter from WSDOT to Town Planner, dated October 6, 2010
 - a. Stormwater Facility I3 & J, dated July 2010
 - b. Fairweather Basin – Perspective A, “Conceptual, Draft – This sketch only depicts the idea. Engineering, operations and environmental analysis required,” dated September 2010
 - c. Fairweather Basin – Perspective B, “Conceptual, Draft – This sketch only depicts the idea. Engineering, operations and environmental analysis required,” dated September 2010
 - d. Fairweather Basin – Perspective C, “Conceptual, Draft – This sketch only depicts the idea. Engineering, operations and environmental analysis required,” dated September 2010
 - e. Fairweather Basin Screening Study Section Views, “Conceptual, Draft – This sketch only depicts the idea. Engineering, operations and environmental analysis required,” dated September 2010
 - f. Fairweather Basin Planting Concept Plan, “Conceptual, Draft – This sketch only depicts the idea. Engineering, operations and environmental analysis required,” dated July 2010
5. Determination of Nonsignificance, dated December 1, 2009
6. Letter from Ecology to WSDOT, dated May 27, 2010, with Water Quality Certification Order 7718
7. Joint Aquatic Resources Permit Application (JARPA) Form, dated June 3, 2009
8. Hydraulic Project Approval, dated July 20, 2010
9. Email from Ken Fisher to Town Planner, dated July 7, 2010
10. Letter from Jill Hejjer to Town of Hunts Point, dated November 11, 2010
11. Letter from Gillian Spencer to Town of Hunts Point, regarding December 1, 2010, public hearing, undated
12. Public Notice
 - a. Notice of Application/Adoption of SEPA DNS and Notice of Public Hearing for SCUP, posted October 21, 2010
 - b. Affidavit of Notice of Hearing, signed December 1, 2010
 - c. Affidavit of Publication of Notice of Application/Adoption of SEPA DNS and Notice of Public Hearing, *The Seattle Times*, published October 21, 2010, with ad
 - d. Notification mailing list
13. Letter from John C. McCullough to Michael Kenyon, dated November 29, 2010
14. Letter from Scott White, WSDOT, to John C. McCullough, dated November 30, 2010
15. Letter from Aaron M. Laing, to Town of Hunts Point, dated November 29, 2010
16. Letter from Scott White, WSDOT, to Aaron M. Laing, dated November 30, 2010
17. Letter from Daniel Babuca, WSDOT, to Mona Green, dated November 30, 2010
18. Email from Karen Walter, Muckleshoot Indian Tribe, to Mona Green, dated December 1, 2010, with email string
19. Existing Utilities Sewer Water Plan, “Preliminary not for Construction,” undated
20. Fairweather Basin Planting Concept Plan, “Conceptual,” dated November 2010
21. Environmental Assessment, SR 520, Medina to SR 202: Eastside Transit and HOV Project, Executive Summary, WSDOT/FHA, dated December 2009 (paper and CD)
22. Environmental Assessment, dated December 2009; and Biological Assessment, dated June 2009 (on CD)
23. Letter from Scott White, WSDOT, to Mona Green, dated December 10, 2010, listing additional information
24. Updated Environmental Assessment, dated May 2010 (hard copy and on CD) (included in the original application)
25. WSDOT FONSI, dated May 2010 (hard copy and on CD) (mitigation commitments part of Attachment 4)

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26. WSDOT Biological Assessment, dated June 2009 (hardcopy and on CD) (included in the original application) (*same as Ex. 22*)
27. NMFS Biological Opinion, October 22, 2009 (hardcopy and on CD) (conditions of the BO incorporated into Project contract documents)
28. USFWS Letter of Concurrence, July 30, 2009 (hardcopy and on CD) (conditions of the Letter of Concurrence have been incorporated into Project contract documents)
29. Permits obtained for the project (summary of conditions in project permits that are most relevant to the work in the Hunts Point Shoreline Environment):
 - a. Draft Section 404 permit (incorporated into contract documents) (*discussed as part of Ex. 23*)
 - b. Hydraulic Project Approval (hardcopy and on CD) (*same as Ex. 8*) (included with October 6 material) (incorporated into contract documents) Conditions 5-9, 11-17, 19-21, 23 and 15
 - c. Section 401 Water Quality Certification, May 27, 2010 (hardcopy and on CD) (*same as Ex. 6*) (included with October 6 material) (incorporated into contract documents) Conditions C.1-C.8, D.1-D.8, E.1-E.3, F.1-F.5, H.1-H.2 and I.1 - I.2
30.
 - a. Request for Proposal (on two CDs)
 - b. Table of relevant sections (hardcopy and on CD)
31. Additional information (on CD) (*part of Ex. 23*)
 - a. Existing Contours and Proposed Contours & Finished Grades (two sheets), dated December 9, 2010, "Preliminary not for Construction" (hardcopy and on CD)
 - b. Impervious/Pervious Area Existing Condition and Proposed Condition (two sheets), dated December 9, 2010, "Preliminary not for Construction" (hardcopy and on CD)
 - c. Quantity and Source of Material to be Removed/Filled (*discussed as part of Ex. 23*)
 - d. Tree Inventory, dated December 8, 2010, "Preliminary not for Construction" (hard copy and on CD)
 - e. Sediment Loading Discharged from the Water Quality Facility (*discussed as part of Ex. 23*)
32. Letter from Scott White to Town of Hunts Point, dated January 13, 2011, with the following enclosures:
 - a. Project Summary- Fairweather Basin Vicinity, "Preliminary, For information Only, subject to change without notification," dated January 2011
 - b. Fairweather Basin - Permit Features, "Preliminary, For information Only, subject to change without notification," dated January 2011
 - c. Fairweather Basin Planting Concept, "Preliminary, For information Only, subject to change without notification," dated January 2011
 - d. Fairweather Basin Cross Sections, "Preliminary, For information Only, subject to change without notification," dated January 2011
33. Additional public comment:
 - a. Letter from Ken Fisher, President, Fairweather Basin Boat Club, Inc., to Hearing Examiner, dated January 14, 2011
 - b. Email from Dan Niles to Hearing Examiner, dated January 19, 2011
 - c. Letter from Dan and Denise Niles to Town of Hunts Point, dated December 1, 2010
34. Letter from Pal and Annie Ottesen, dated January 20, 2011, with email string dated January 20, 2011
35. WSDOT Process chronology since December 1, 2010 Shoreline Hearing, dated January 20, 2011
36. Updated Fairweather Basin- Perspectives A, B, and C of Exhibits 4.b - d
 - a. Fairweather Basin - Perspective A, "Conceptual Draft - This sketch only depicts the idea. Engineering, operations and environmental analysis required," dated January 2011

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- b. Fairweather Basin – Perspective B, “Conceptual, Draft – This sketch only depicts the idea. Engineering, operations and environmental analysis required,” dated January 2011
 - c. Fairweather Basin – Perspective C, “Conceptual, Draft – This sketch only depicts the idea. Engineering, operations and environmental analysis required,” dated January 2011
37. Composite Photos of Existing Condition of south end of Fairweather Basin

Pleadings and Orders:

- Letter from Assistant Attorney General Deborah L. Cade to Hearing Examiner, dated December 3, 2010, requesting a continued hearing date of January 5, 2011
- Hearing Examiner Order for Reconvened Hearing Date and Opportunity to Respond, Town of Hunts Point, WSDOT SSCUP, No. 10-04, dated December 6, 2010
- Hearing Examiner Order for Submission of Additional Evidence, Town of Hunts Point, WSDOT SSCUP, No. 10-04, dated December 6, 2010
- Letter from Attorney John C. McCullough to Hearing Examiner, dated December 7, 2010, objecting to a January 5, 2011, continued hearing date
- Letter from Peter W. Powell to Hearing Examiner, dated December 9, 2010, RE: ORDER FOR RECONVENED HEARING DATE AND OPPORTUNITY TO RESPOND
- Letter from Peter W. Powell to Hearing Examiner, dated December 9, 2010, RE: ORDER FOR SUBMISSION OF ADDITIONAL EVIDENCE
- Letter from Assistant Attorney General Deborah L. Cade to Hearing Examiner, dated December 10, 2010, regarding Fairweather Basin Boat Club letter of December 1, 2010
- Letter from Michael Heijer to Hearing Examiner, dated December 16, 2010, objecting to a January 5, 2011, continued hearing date
- Letter from Attorney John C. McCullough to Hearing Examiner, dated December 22, 2010, objecting to a January 5, 2011, continued hearing date
- Letter from Attorneys Dennis J. Dunphy and Aaron M. Laing to Hearing Examiner, dated December 22, 2010, objecting to a January 5, 2011, continued hearing date; with Declaration of Dennis J. Dunphy, and
 - 1957 Plat, Decl. Dunphy, Tab 1
 - 1957 Protective Restrictions, Decl. Dunphy, Tab 2
 - 1994 Protective Restrictions, Decl. Dunphy, Tab 3
 - Hearing Examiner Findings, Conclusions and Decision, Town of Hunts Point, Jones, No. HEA 09-02, dated February 9, 2010, Tab 4
- Hearing Examiner Order RE: Hearing Date, Town of Hunts Point, WSDOT SSCUP, No. 10-04, dated December 23, 2010
- Letter from Attorney John C. McCullough to the Hearing Examiner, dated January 20, 2011, regarding remaining issues

The Hearing Examiner enters the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record hearing:

FINDINGS

Background

Project Overview

- 1. The proposed project was previously part of the State Route (SR) 520 [Evergreen Point Floating] Bridge Replacement and HOV Project. On June 18, 2008, the Federal Highway

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Administration (FHWA) authorized the Washington State Department of Transportation (WSDOT) (Applicant) to develop the SR 520, Medina to SR 202: Eastside Transit and HOV Project (SR 520 Project) as an independent project. *Exhibit 3, Supplemental Memorandum, page 1.* The SR 520 Project is located in the communities of Medina, Hunts Point, Clyde Hill, Yarrow Point, Kirkland, Bellevue, and Redmond. The project includes completion of the high-occupancy vehicle (HOV) system between Lake Washington and 108th Avenue NE, and restriping the existing HOV lanes from the outside lanes to the inside between the 108th Avenue NE interchange and SR 202 in Redmond. The project would provide six lanes (four general-purpose lanes and two HOV lanes) from just west of Evergreen Point Road to SR 202. New construction between Evergreen Point Road and I-405 would add a new eastbound HOV lane and provide standard 10-foot wide shoulders both eastbound and westbound. The limits of the SR 520 Project extend approximately 8.8 miles along SR 520 from the east shore of Lake Washington just west of Evergreen Point Road to the interchange with SR 202 in Redmond.³ *Exhibit 24, Summary, page 1-2.*

2. The SR 520 Project is currently proceeding under a "design-build" contracting method. In a design-build scenario, WSDOT completes a preliminary design before bringing on a design-builder to finish the design while portions of the project are constructed. This is in contrast to a "design-bid-build" contracting method where a project would be completely designed prior to construction. According to WSDOT, the design-build approach limits some of the available information on construction methods and timing, as well as details of the design because these issues are left to the discretion of the design-builder.⁴ *Exhibit 3, Supplemental Memorandum, page 1.* Thirty percent of the project engineering was complete when WSDOT released the project for design-build bids. The selected design-build firm would be responsible for the final plan preparation and construction. The Staff Report states, "Plans presented for the Shoreline Substantial Development Conditional Use Permit are conceptual at this point, with final grades and plant placement to be determined during the course of construction."⁵ *Exhibit 1, Staff Report, page 2.*

³ In 2009, the Washington State legislature authorized all-electronic tolling on the Evergreen Point Bridge. No tolling would be required for vehicles using the SR 520 between Medina and Redmond. *Exhibit 24, EA, pages 1-4 to 1-5.*

⁴ WSDOT prepared a Request for Proposal, containing requirements, restrictions and other information about the proposed project. WSDOT prepared a table of relevant sections to the proposed activities within the Hunts Point shoreline jurisdiction. *Exhibit 30.a; Exhibit 30.b.*

⁵ Exhibit 3.b (Existing Utilities, Sewer, Water Plan); Exhibits 4.a -f; Exhibit 19; Exhibit 20; Exhibit 31.a; Exhibit 31.b; Exhibit 31.d; Exhibit 32.a; Exhibit 32.b; Exhibit 32.c; Exhibit 32.d; and Exhibits 36a-c are marked either "Preliminary Not For Construction;" "Preliminary, For Information Only, Subject to Change without Notification;" or "Conceptual, Draft - This sketch only depicts the idea. Engineering, operations and environmental analysis required."

3. Daniel Babuca, WSDOT, Engineering Manager, requests a Shoreline Substantial Development Conditional Use Permit (SCUP) to construct portions of an expansion of SR 520 with a noise wall and pedestrian/bike trail improvements, and a stormwater treatment facility with an outfall at Fairweather Bay,⁶ within the shoreline jurisdiction of the State Shoreline Management Act (SMA) and the Town of Hunts Point Shoreline Master Program (Town SMP).⁷ Proposed project features relevant to the Town's shoreline jurisdiction between a SR 520 expanded westbound lane and Fairweather Bay to the north include: an 18-foot high noise wall; a 14-foot wide regional bike/pedestrian path; a 6-foot 6-inch high screened wall; a substantial drop down to a 14-foot wide planting area and utility relocation area; a stormwater facility storage area with wetland planting; a 6-foot high stormwater perimeter fence; a 15-foot non-motorized local access connector and maintenance road; a 3-foot 6-inch high railing, and forested screening northward to Fairweather Bay and residential lot property lines. *Exhibit 1, Staff Report, page 1; Exhibit 2; Exhibit 3; Exhibit 32.d.*
4. The Town received the SCUP application on May 4, 2010 and determined that the application was complete on October 19, 2010. The Town published notice of the SCUP application, the State Environmental Policy Act (SEPA) Determination of Nonsignificance (DNS), and the associated open record hearing in the *Seattle Times* and mailed to federal and state agencies, Indian Tribes, and all property owners within the Fairweather Basin neighborhood on October 21, 2010. The Town also posted notice at mailbox pagodas throughout the Town. *Exhibit 1, Staff Report, page 7; Exhibits 12.a - d.*

Project Location

5. The proposed portions of the SR 520 Project within the Town of Hunts Point are located between the southern portion of Fairweather Bay and the SR 520 right-of-way. The City of Medina lies to the west and Fairweather Place, which runs north and south, lies to the east. *Exhibit 3.b; Exhibit 32.a.*
6. Fairweather Bay is a small inlet of Lake Washington between Evergreen Point and Hunts Point. The bay is a man-made water feature that is periodically dredged and maintained by adjacent property owners. The bay is relatively shallow, typically less than 16 feet, with the southern end generally less than 10 feet deep. *Exhibit 26, BA page 39; Exhibit 32.a.*

⁶ Fairweather Bay is a part of Lake Washington. WSDOT documents and figures describe the narrow southern-most channel as Fairweather Basin. *Exhibit 3.a; Exhibit 32.a; Exhibit 32.b; Exhibit 32.c.*

⁷ The subject property includes WSDOT State Route 520 Right-of-Way and former King County Tax Assessor Parcel Nos. 247270055 and 247270060. *Exhibit 1, Staff Report, page 1.*

7. Fairweather Creek⁸ drains the watershed south of Fairweather Basin. The creek runs north, crosses under SR 520, then turns northwest and enters the southeast corner of Fairweather Bay. The Department of Ecology has placed Fairweather Creek on the federal Clean Water Act 303(d) list because the creek exceeds water quality criteria for fecal coliform, dissolved oxygen, and temperature. With the proposed project, highway runoff would be discharged to Fairweather Bay, rather than Fairweather Creek. *Exhibit 3.c; Exhibit 4, page 3.*

Environmental Review

8. On December 3, 2009, WSDOT and the FHWA issued an Environmental Assessment (EA) under the federal National Environmental Policy Act (NEPA) for the SR 520 Project. *Exhibit 22, Environmental Assessment, Executive Summary, page 1.* An updated EA was issued in May of 2010. *Exhibit 24.* The EA estimated 806 million vehicle miles traveled on SR 520 without the project and 805 million vehicle miles with the project based on 2030 projections. The proposed project would produce 209,000 metric tons of carbon dioxide equivalent emission during construction. Greenhouse gas emissions for SR 520 operation were estimated as similar for the Build Alternative and the No Build Alternative. *Exhibit 24, EA, pages 5-43 to 5-48.* As required under NEPA, the FHWA reviewed the EA and other documents and attachments. Randolph Everett, Major Projects Oversight Manager, FHWA, determined that because the proposed SR 520 Project would have no significant impact on the environment an environmental impact statement is not required and issued a Finding of No Significant Impact (FONSI) on May 17, 2010. *Exhibit 25, FONSI, page iii.*
9. The FHWA FONSI lists project mitigation commitments, including Best Management Practices (BMP). No mitigation is proposed for air quality, geology and soils, cultural resources, energy, economics, relocation, social elements, transportation, and groundwater impacts. WSDOT would implement a Soil and Groundwater Management Plan and Spill Prevention Control and Countermeasures Plan as mitigation of hazardous materials impacts. Impacts to wildlife and habitat within the shoreline jurisdiction would be minimized by limiting construction to a small area adjacent to SR 520 and installing noise walls to minimize noise disturbance. WSDOT would obtain a National Pollutant Discharge Elimination System (NPDES) construction permit. The FONSI concludes that no additional measures are needed to avoid or minimize adverse indirect or cumulative effects. *Exhibit 25, FONSI, Attachment 4, pages 1-15.*
10. WSDOT acted as lead agency and analyzed the environmental impact of the entire SR 520 Eastside Project, including those portions of the project within the Town of Hunts Point, as required by the State Environmental Policy Act (SEPA), Ch. 43.21C RCW, WAC 197-11-924. Allison Hanson, Director of Environmental Services, WSDOT,

⁸The Staff Report refers to Fairweather Creek. *Exhibit 1, Staff Report, page 7.* WSDOT documents and figures describe both Fairweather Bay Creek and Fairweather Creek. *Exhibit 3.c; Exhibit 7, page 8; Exhibit 26, BA, p. 103.* This decision will refer to Fairweather Creek.

reviewed the Applicant's environmental checklist⁹ and other information on file with the lead agency and determined that the proposal would not have a probable significant adverse impact on the environment. WSDOT issued a Determination of Nonsignificance (DNS) on December 1, 2009. *Exhibit 1, Staff Report, page 3; Exhibit 5.*

11. On July 20, 2010, the Washington Department of Fish and Wildlife (WDFW) issued a Hydraulic Project Approval (HPA) for the entire SR 520 Project. The HPA ensures protection of fish and fish habitat with provisions for a designated time period for work below the ordinary high water line (OHWL); installation of any new stormwater outfall structures above the OHWL; and limitations on any back filling of the existing bulkhead along the Fairweather Bay shoreline. The HPA also includes provisions containing best management practices that apply to all areas. WSDOT identified the following provisions as relevant to activities in the shoreline area: Provisions 5-9, 11-17, 19-21, 23 and 25. *Exhibit 8; Exhibit 23, pages 2 and 3.*
12. HDR, as lead author, prepared a Biological Assessment (BA) under the federal Endangered Species Act for the Applicant, dated June 2009. The BA states:

This Biological Assessment (BA) addresses three fish species listed under the Endangered Species Act (ESA), as amended, that occur in the Project Area, including Chinook salmon (*Oncorhynchus tshawytscha*), steelhead trout (*Oncorhynchus mykiss*), and bull trout (*Salvelinus confluentus*), all of which are listed as a threatened species. This BA also addresses designated critical habitat for Chinook salmon and bull trout. Lake Washington is designated critical habitat for Chinook salmon and bull trout; however, none of the streams in the Project Area are designated critical habitat for Chinook salmon or bull trout. Critical habitat has not been designated for steelhead trout. This BA also addresses Essential Fish Habitat (EFH)."

Exhibit 26, BA, page 2.

13. The Biological Assessment addresses impacts from the proposed stormwater facility. Facilities to manage stormwater runoff for water quality and water quantity (detention) would be designed based on the 2008 Highway Runoff Manual (HRM) (WSDOT 2008) and the WSDOT Hydraulics Manual. The stormwater facility would provide enhanced treatment. Flow control facilities are not proposed because discharge would flow directly to Lake Washington, which is a flow control exempt water body. *Exhibit 26, BA, page 11.* The Design-

⁹The DNS states that an Environmental Checklist was reviewed as part of the SEPA DNS decision. However, a Federal Highway Administration and WSDOT Environmental Assessment prepared as part of the NEPA review substituted for the Environmental Checklist. *Exhibit 1, Staff Report, page 3; Exhibit 5; Exhibit 24, page 1-1; Exhibit 25, page 16.*

Builder Contractor would be responsible for the final design of the outfall feature and bulkhead. The stormwater facility would discharge to Fairweather Bay via a pipe and outfall. Approximately 15 feet of an existing bulkhead would be removed to construct the outfall. WSDOT would maintain, repair and replace the remaining bulkhead as needed to maintain shoreline area stability.¹⁰ *Exhibit 4; Exhibit 26, BA, pages 11 and 12.*

14. The National Marine Fisheries Service (NMFS) issued a joint Biological Opinion (BO) and Incidental Take Statement on October 22, 2009, in accordance with Section 7(b) of the federal Endangered Species Act (ESA). NMFS concluded that the proposed action is not likely to jeopardize the continued existence of Puget Sound Chinook salmon and is not likely to destroy or adversely modify designated Puget Sound Chinook salmon critical habitat. *Exhibit 27, BO, page 10.* The proposed project would result in an increased loading of dissolved copper. *Exhibit 4, page 2.* The NMFS identified discharges of dissolved copper and zinc that would injure Puget Sound Chinook salmon "through olfactory inhibition or displacement from their preferred habitat. The estimated extent of habitat affected by the injurious levels of dissolved copper and zinc represents the extent of take from the stormwater discharges." *Exhibit 27 BO, page 12.* The incidental take statement describes reasonable and prudent measures NMFS considers necessary or appropriate to minimize incidental take associated with this action. *Exhibit 27, BO Cover Letter, page 1.* The NMFS BO also reviewed the effects of future state or private activities, not involving Federal activities that are reasonably certain to occur within the action area of the Federal action. No such non-Federal actions were identified. *Exhibit 27, BO, pages 1 and 10.*
15. The U.S. Fish and Wildlife Service (USFWS) issued a Letter of Concurrence that the WSDOT information in the BA will not result in take of listed species under the jurisdiction of USFWS. *Exhibit 28.*
16. The Washington Department of Ecology issued a Section 401 Water Quality Certification (WQC)¹¹ for the SR 520 Project on May 27, 2010. With WQC conditions, the proposed project would comply with applicable state water quality standards and other appropriate requirements of state law. *Exhibit 6.* WSDOT identified the following WQC conditions containing best management practices

¹⁰ In its October 6, 2010 letter, WSDOT noted that the original outfall design described in the BA, with water flowing over a notch in the existing bulkhead onto a rip-rap pad, has been modified in the permit application to eliminate the rip-rap. *Exhibit 4.* A constructed rock lined ditch/channel to the outfall described in the BA has now been replaced by a pipe. *Testimony of Mr. White.*

¹¹ WSDOT has applied to the U.S. Army Corps of Engineers for a federal Clean Water Act Section 404 permit for the discharge of dredged or fill material. Water Quality Certification from the affected state is required prior to the issuance of any Section 404 permit. *Exhibit 6.*

as relevant to the portion of the project within Hunts Point: Conditions C.1-C.8; D.1-D.8, E.1-E.3; F.1-F.5; H.1-H.2; and I.1 – I.2. *Exhibit 23, page 3.*

Comprehensive Planning and Zoning

17. The Town's Comprehensive Plan has a primary goal to "maintain the existing land use pattern in recognition of the fact that Hunts Point is a mature, fully developed community." *Town of Hunts Point Comprehensive Plan, Land Use Section, page 9 (2004).* According to the Comprehensive Plan:

The Town of Hunts Point is a residential community, three quarters of which is a wooded, narrow peninsula. The building density of the greatest area of the Town has been planned to avoid overcrowding on generally narrow lots, eliminate fire hazard and to protect the suburban, sylvan character of the town while permitting simultaneous safe access for each residential lot to both waterfront and arterial service. *Town of Hunts Point Comprehensive Plan, page 6 (2004).*

The Comprehensive Plan's Transportation Element recognizes an expanded SR 520 with a preference for a six-lane configuration with noise walls. *Town of Hunts Point Comprehensive Plan, page 12 (2004); Exhibit 1, Staff Report, page 7.*

18. The stormwater facility and outfall to the southwest corner of Fairweather Bay would be constructed on two former residential lots acquired by WSDOT. The residential lots, formerly within the within the Fairweather Basin Addition, are no longer subject to Town zoning because they are under WSDOT ownership. These former lots are surrounded by the SR 520 right-of-way to the south; the City of Medina to the west; residential properties within the Town to the north and east; and Fairweather Bay to the immediate north. Residential properties to the north are zoned R20-Residential 20,000 sq. ft. lot. Residential properties to the east are zoned R20A – Residential 12,000 sq. ft. lot. *Town of Hunts Point Zoning Map (updated August 2007); Exhibit 1, Staff Report, pages 1-3.*

Shoreline Substantial Conditional Use Permit Review

Shoreline Master Program

19. The State Shoreline Management Act (SMA)¹² and the Hunts Point Shoreline Master Program (SMP) govern work within 200 feet of the Lake Washington ordinary high water mark. *Town of Hunts Point SMP; RCW 90.58.030(2)(f).* Any "substantial development" within the shoreline requires approval of a Shoreline Substantial Development Permit. Substantial development is any development in which the total cost or fair market value exceeds \$5,718.00, or any development that materially interferes with the normal public use of the water or shorelines of the state. *RCW*

¹² The Washington Department of Ecology approved the Town of Hunts Point Shoreline Master Program, dated June 15, 1975, or August 12, 1975. (Chapter 173-19 WAC). *HPMC 16:10.010.*

90.58.030(3)(e).¹³ The proposed outfall, most of the proposed stormwater facility and a portion of the SR 520 HOV, regional trail, and noise wall lie within the 200 feet shoreline jurisdiction for Fairweather Bay. *Exhibit 1, Staff Report, page 3; Exhibit 3.c.*

20. The primary goal of the Town SMP is "to preserve the shoreline of Hunts Point for the primary use as a single family residential/recreational property, consistent with the preservation of the natural amenities." *Town SMP, Section V.A, page 4.* The Town SMP's Residential/Recreational element states that "residential development along the shoreline of Hunts Point is attractive, unique, and worthy of preservation as it constitutes some of the more scenic charm of the waterfront of Lake Washington." Goals include recognizing existing residential and accessory uses and subjecting new development to town ordinances. Water dependent recreational activities should be available to the public where appropriate. *Town SMP, Section V.B.1, page 4.* The goal of the Conservation Element is to preserve and protect features necessary for the support of wild and aquatic life and fragile shoreline areas. *Town SMP, Section V.B.2, page 5.* The goal of the Public Access Element is to increase public access to and along public shoreline areas. *Town SMP, Section V.B.3, page 6.* The Circulation Element recognizes SR 520 with a goal of maintaining the present Hunts Point transportation system with any necessary expansion kept to a minimum. *Town SMP, Section V.B.5, page 7.*
21. The Town SMP designates the proposed project area Residential-Natural Environment. *Exhibit 1, Staff Report, page 1.* The objectives within the Residential-Natural Environment include preserving the natural features of the area, continuing the existing low density development pattern, promoting good design in shoreline development, discouraging visually undesirable development, preserving a scenic open space for long-range benefits, and fully implementing the Town of Hunts Point Comprehensive Plan. *Town SMP, Section IX.A, page 10.*

Shoreline Impacts -SR 520

22. The SR 520 Project would provide six lanes (four general purpose and two HOV lanes) from just west of Evergreen Point Road to SR 202. New construction between Evergreen Point Road to the west and I-405 to the east will add a new eastbound HOV lane to connect with the existing HOV lane and provide standard 10-foot-wide shoulders both eastbound and westbound. *Exhibit 24, EA, page 4-23.* The Applicant would place 46,464 cubic yards of fill in the Hunts Point shoreline environment to provide for the roadway embankment.¹⁴ *Exhibit 23, page 4.*

¹³ "Development" includes construction of structures; filling; removal of any sand, gravel, or minerals; bulkheading; and driving of pilings. *RCW 90.58.030(3)(d).*

¹⁴ WSDOT has preapproved pit sites and material source providers for obtaining approved material. *Exhibit 23, page 4.*

Shoreline Impacts - Path/Trail Improvements

23. The SR 520 Project would construct a bicycle/pedestrian regional path on the north side of SR 520 to provide a continuous, non-stop route between 108th Avenue NE on the east and the Evergreen Point Bridge on the west. The regional path would be 14-foot wide and have no grades greater than 5 percent. Support walls would be required to keep the regional path slope at less than a 5-percent grade and noise walls will be installed between the regional path and SR 520 in some places. The existing Points Loop Trail¹⁵ within the north SR 520 right-of-way would be relocated to the south of SR 520. *Exhibit 26, BA, page 17; Exhibit 32.a.*

Shoreline Impacts - Noise Wall

24. The SR 520 Project would add noise walls for approximately two miles between Evergreen Point Road and Bellevue Way NE through Hunts Point. The noise walls average 8 to 14 feet in height with 18-foot high walls in the area of shoreline jurisdiction. The noise walls would be continuous, except for breaks at the proposed highway lids at Evergreen Point Road, 84th Avenue NE, and 92nd Avenue NE where the noise walls will be integrated with the lids.¹⁶ *Exhibit BA, page 17.* WSDOT analyzed noise level changes within the shoreline jurisdiction due to the proposed project. There would be a noticeable decrease in noise levels and these levels would be below noise abatement criteria. *Exhibit 24, EA, page 5-63, Ex. 5-21.*

Shoreline Impacts - Stormwater Facility and Outfall

25. The Applicant proposes to construct a stormwater wetland facility (Facility I3) in an upland area to the south of Fairweather Bay. The stormwater facility would have a surface area of 30,784 square feet and a volume of 74,087 cubic feet. *Exhibit 30.a, Request for Proposal, Appendix M1 Vol. 1, Sheet DR03 (Drainage Plan - "Preliminary, not for Construction.") dated July 1, 2010.* The Applicant estimates that 59,381 cubic yards of material would be removed from the shoreline environment in order to construct the stormwater facility.¹⁷ *Exhibit 23, page 4.* The preliminary drawings show a pre-settling cell in the eastern portion of the proposed stormwater facility and a wetland cell making up a majority of the facility to the west. A proposed outflow is shown in the southwest corner of Fairweather Bay. *Exhibit 31.a (sheet 2).* The stormwater facility would comply with the Highway Runoff Manual guidelines and would be designed to capture 80 percent of total suspended solids prior to discharge. *Exhibit 23, page 4.* WSDOT would inspect the stormwater facility on an annual basis. Annual maintenance

¹⁵ Points Loop Trail is a 5.4-mile trail linking Medina, Hunts Point, Clyde Hill, and Yarrow Bay. In the project area, the Points Loop Trail is located completely within the WSDOT right-of-way parallel to SR 520. *Exhibit 24, EA, pages 5-122 and 5-123, Ex. 5-38, page 5-121.*

¹⁶ WSDOT provided additional details on the retaining and noise barrier walls in Appendix M1 of the RFP documents. *Exhibit 30.a.*

¹⁷ WSDOT contractors would dispose of excavated material at approved locations. *Exhibit 23, page 4.*

activities would last a day or two and would include the use of a vactor truck, small excavator or bobcat and a small dump truck. *Exhibit 4, page 1.* The north side of the stormwater facility would be ringed by a berm that would also serve as maintenance access. The ponds would be approximately five to ten feet deep and would only have standing water immediately after rainfall events. *Exhibit 1, Staff Report, page 2.*

26. The west portion of Hunts Point is located within Threshold Discharge Area (TDA) 3 (Fairweather Creek Basin). The east portion of Hunts Point is located within TDA 2 (Cozy Cover Creek Basin). *Exhibit 26, BA, Appendix E, Ex. 2, page 89.* Stormwater runoff from SR 520 would flow into catch basins to capture runoff and associated larger sediments before being routed into a water quality facility. *Exhibit 23, page 4.*
27. Runoff from TDA 3 would not be detained and would discharge to Lake Washington following treatment for water quality in Facility I3. *Exhibit 26, BA, Appendix E, page 94.* Runoff from TDA 2 would also be treated in Facility I3. Enhanced treatment would be provided for the mainline of SR 520 in a separate constructed stormwater wetland located to the west in Medina (Facility J). Facility J would join discharge flow from Facility I3 and be discharged at a single outlet directly to Lake Washington at Fairweather Bay. *Exhibit 26, BA, Appendix E, pages 96 and 97.*

Shoreline Impacts - Landscaping and Access

28. WSDOT provided a tree survey, dated December 8, 2010, identifying 63 six-inch-caliper trees or larger that would be removed within the Hunts Point project area. *Exhibit 31.d (Preliminary not for Construction, Tree Inventory, Sheet 1 of 1).* WSDOT provided a revised Planting Concept dated January 2011. *Exhibit 32.c.*
29. On January 13, 2011, the Applicant submitted a memorandum and updated design. The Applicant provided additional details regarding railing and fencing design and location; lighting placement and shielding; and wall colors and finishes. *Exhibit 32.* The Fairweather Basin – Permit Features depicts a six-foot high stormwater perimeter fence to the south of the stormwater facility maintenance access road; a three-foot six-inch high pedestrian safety railing to the north of the stormwater facility maintenance road; retaining wall colors; illumination restrictions, including no street lights at the south end of Fairweather Place; additional landscaping details; stormwater treatment facilities details, including WSDOT responsibility for facilities maintenance; and depiction of utility relocation area for underground utilities. *Exhibit 32.b.*
30. The Applicant would remove existing docks and existing concrete paving/sidewalk and boat tie up cleats south of an existing bulkhead along the southern portion of Fairweather Bay. The Applicant would post "No Trespassing" signs along the bulkhead and now proposes to re-align the Points Loop Trail from the north side to the south side of SR 520. *Exhibit 32.b.*

31. WSDOT calculated that the Town's shoreline jurisdiction within the project area now includes 0.793 acre (34,556 square feet) of total impervious area and 1.305 acre (56,831 square feet) of pervious area. The proposed project would result in 0.719 acre (31,332 square feet) of impervious area; 0.487 acre (21,204 square feet) of pervious area; and 0.892 acre (38,851 square feet) of pond area. *Exhibit 31.b.*
32. The Applicant provided a drawing showing a proposed local access route from Fairweather Place, along the stormwater facility access road, to 80th Avenue NE. The local access would be between nine and 15-feet wide, with asphalt paving. This local access would continue west through Medina with a minimum 12-foot width of asphalt paving to link to the proposed regional bicycle/pedestrian path approximately 500 feet east of the Evergreen Point lid. The Applicant would provide a screening barrier six feet six inches in height from finished elevation along the regional bicycle/pedestrian path running from 80th Avenue NE to approximately 450 feet west of 84th Avenue NE. *Exhibit 32; Exhibit 32.b.*
33. The project-site is within the "usual and accustomed" fishing area of the Muckleshoot Indian Tribe. *Exhibit 24, EA, page 5-35.* The Muckleshoot Indian Tribe Fisheries Division submitted comments on the SCUP application stating that the design lacks details for review. The Tribe requested the opportunity to review future details under the design-build approach. *Exhibit 18.* WSDOT provided an updated Project Summary - Fairweather Basin Vicinity map; Fairweather Basin - Permit Features; Fairweather Basin Planting Concept; Fairweather Basin Cross Sections; and Fairweather Basin Perspectives A, B, and C, dated January 2011. *Exhibits 32.a - d; Exhibits 36.a - c.*

Summary of Testimony - December 1, 2010 Hearing

34. Mona Green, Town Planner, testified that WSDOT submitted an initial proposal to the Town in late 2009 to early 2010. WSDOT submitted an amended proposal in May 2010. WSDOT responded with additional information in October, 2010. She corrected the Staff Report (Exhibit 1) by noting on page 3 that the National Marine Fisheries Service issued a Biological Opinion, while the U.S. Fish and Wildlife Service issued a Letter of Concurrence regarding compliance with the Federal Endangered Species Act. She clarified that the three proposed Town conditions are to read "shall" rather than "should." She requested that a stormwater map be added to the record as Exhibit 19. *Testimony of Ms. Green.*
35. Daniel Babuca, WSDOT, Engineering Manager, testified for the Applicant. He provided a Conceptual Fairweather Basin Planting Concept Plan, dated November 2010, which was marked Exhibit 20. He testified that Exhibits 3.a. - 3.b. are adequate to determine the exact dimension of project construction. He testified that the Design-Builder has discretion to work within the technical requirements of the WSDOT contract. Each of the various contract sections provide technical requirements as contractual obligations that the Design-Builder must meet. In addition, the contract requires the Design-Builder to comply with all permit conditions imposed on the project. If changes are proposed that

are outside the pre-approved permit conditions, the Design-Builder can to re-consult with the Town on those conditions. Such changes may entail a public process if appropriate or required. The Town would have an opportunity to review and comment on the designs submitted. *Testimony of Mr. Babuca.*

36. Scott White, WSDOT, Permit Team Lead, testified for the Applicant that fill material would be obtained from an approved material provider. He testified that details of the fill material to be used were provided as part of Exhibit 4. He provided a hard copy of the Executive Summary of the NEPA Environmental Assessment (EA) marked as Exhibit 21, with the EA (December 2009) and Endangered Species Act Biological Assessment (June 2009) on a CD marked as Exhibit 22. *Testimony of Mr. White.*
37. Mike Cotten, WSDOT, Design Build Director, testified that WSDOT provides performance specifications rather than proscriptive specifications. However, the contractor must comply with environmental standards. If the contractor cannot comply with these mandatory standards, the contractor must notify WSDOT and the permitting agency for approval. The permitting agency would determine if the Town would be involved. *Testimony of Mr. Cotten.*
38. Mr. Babuca and Mr. White testified to express concern about proposed condition No. 3, which would require improvements to Fairweather Creek outside of the shoreline jurisdiction. Assistant Attorney General Deborah L. Cade stated that WSDOT can only spend money on highway construction and not on unrelated projects. *Testimony of Mr. Babuca; Testimony of Mr. White; Statement of Ms. Cade.*
39. Attorneys Aaron M. Laing and Dennis L. Dunphy represented the Fairweather Basin Boat Club. Mr. Laing requested that WSDOT provide additional details concerning the proposed conceptual project including the Request for Proposals; the Design-Build contract and conditions; the discretion of the Design-Builder; and the number of trees to be removed. Attorney John C. McCullough represented Rodney and Janice Olson and requested plans showing topography; heights/contours of all walls; identification of fill to be placed as part of the highway construction; and the Biological Assessment. *Statements of Attorneys Laing, Dunphy, and McCullough.*
40. Rod Olson testified and requested that the hearing be held after a WSDOT Yarrow Point hearing. Peter Powell testified and requested information regarding the amount of sediment that would be discharged from the proposed outfall into Fairweather Bay. *Testimony of Mr. Olson; Testimony of Mr. Powell.*¹⁸

¹⁸ At the conclusion of the December 1, 2010 hearing, the Hearing Examiner determined that there was a need for additional testimony and evidence. *Hearing Examiner Order for Submission of Additional Evidence, Town of Hunts Point, WSDOT SSDCUP, No. 10-04, dated December 6, 2010.* In response, the Applicant provided Exhibits 23-31 on December 10, 2010.

NOTE: At the conclusion of the December 1, 2010, hearing, the Hearing Examiner determined that additional information was needed from the Applicant before he could make a decision on the application. The specific information requested was detailed in an order issued by the Hearing Examiner on December 6. The Applicant responded to that order by providing the additional information requested in a timely manner.

Summary of Testimony – January 20, 2011 Hearing

41. Susan Wessman, WSDOT Landscape Architect consultant, testified concerning the landscape drawings and planting plan in Exhibits 32 and 36. The planting plan shows a landscaped area to the north of the stormwater facility maintenance road, and to the west and east of the stormwater facility. This would help buffer Fairweather Bay and the residential properties to the north from the visual impacts of the noise wall. The landscaped area would be planted with shrubs and smaller trees between five and ten feet high. In addition, seventeen 20-foot tall trees and four 25-foot tall trees would be planted in this area. Ms. Wessman identified where 20-foot tall trees would be planted to improve visual coverage of the noise wall. She testified that Boston ivy would be planted as wall landscaping. *Exhibit 32.c; Testimony of Ms. Wessman.*
42. Ms. Green submitted a packet of written public comments (Exhibits 33.a – c; Exhibit 34). The Fairweather Basin Boat Club's comments, dated January 14, 2011, request detailed design changes including increased landscape planting; reduced width of the proposed walking/access path connecting 80th Avenue to the regional bike path with the use of crushed gravel instead of asphalt; reduced light/glare; and planting of a hedge buffer along lots 11 and 12 acquired by WSDOT. *Exhibit 33.a.* Dan Niles, in an email dated January 19, 2011, opposed the project due to concerns regarding lack of details and the location of underground utilities along the base of the retaining wall, which he states may prohibit the planting of large trees for screening. *Exhibit 33.b; Exhibit 33.c.* Pal and Annie Ottesen's letter requests additional screening for the retaining wall, as well as installation of security cameras. *Exhibit 34.* Ms. Green testified that the Town will carry out a technical review of any proposed design changes and will sign a separate agreement with WSDOT for processing major/minor modifications that arise due to design changes. She testified that the proposed project would be consistent with the shoreline substantial development conditional use permit criteria. *Testimony of Ms. Green.*
43. Attorney Jack McCullough requested that the Applicant strike "proposed" from Note 31 to Exhibit 32, so as to read "Re-alignment of Points Loop Trail." The Town and WSDOT agreed with this request. Attorney McCullough requested that a condition be added to clarify that WSDOT would maintain all landscaping for the life of the proposed project. Attorney McCullough also submitted a letter dated January 20, 2011, on behalf of Rodney and Janice Olson arguing that the SCUP criteria preclude the construction of a 50-foot concrete wall with no visual buffer. *Statement of Attorney McCullough; Letter from Attorney John C. McCullough, dated January 20, 2011 (Pleadings).*

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44. Attorney Laing argued that application approval would violate restrictive covenants of plat under RCW 58.17.215 regarding alternation of plats. He asserted that because WSDOT acquired two residential parcels, and did not condemn them, the lots remain subject to restrictive covenants. He also argued that the proposal is not authorized by the Hunts Point SMP because it incorporates the Town's Zoning Code, which does not authorize stormwater facilities within the residential zone. Finally, he asserted that the proposed landscaping does not adequately buffer the noise/retaining wall. Attorney Laing requested that WSDOT dredge Fairweather Basin after completion of the stormwater facility and that public access to WSDOT property from Fairweather Basin be restricted. *Statement of Attorney Laing.*
45. Debra Cade, Assistant Attorney General, argued that RCW 47.01.260 preempts local zoning and restrictive covenants within subdivisions;¹⁹ that WSDOT cannot commit to ongoing dredging; and that WSDOT agrees that public access is not appropriate, but that it would be damaging to the environment to remove the entire bulkhead. *Statement of Ms. Cade.*
46. Scott White submitted a chronology of events since the December 1, 2010 hearing (Exhibit 35), as well as updated view simulations (Exhibits 36.a – c). Mr. White testified that the stormwater facility is designed to meet the State Highway Manual and Department of Ecology stormwater manual requirements to remove 80 percent of sediment. *Testimony of Mr. White.*
47. Mr. Babuca testified that stormwater would enter a pre-settling cell on the east side of the facility where sediment would settle before moving to the west cell for water quality treatment. An underground pipe would convey overflow to the outfall pipe for discharge into Fairweather Basin. He testified that WSDOT now planned to move the Points Loop Trail to the south side of SR 520 to allow more planting near Fairweather Basin. He described the maintenance access road shown on Exhibit 32.b as available for local access by the neighborhood. He testified that WSDOT would not acquire a private parcel to the east of the stormwater facility. He clarified that although Exhibit 32.b states that it is preliminary for information only and is subject to change without notification, WSDOT intends to follow the permit features notes on this exhibit. He testified that minor modifications would be reviewed for approval by the Town, while substantial modifications would receive public review. *Exhibit 3.c; Exhibits 32a.-d; Testimony of Mr. Babuca.*
48. Mr. Babuca noted natural gas, water, electric as well as phone/internet cable utilities are proposed to be placed underground adjacent to and parallel to the noise wall. He testified against moving utilities to the north of the stormwater facility because it would move

¹⁹ The Hearing Examiner made a verbal ruling at the January 20, 2011 hearing that restrictive covenants are not relevant to the Shoreline Conditional Use Permit criteria. This issue is preserved in the event of an appeal.

development closer to the shoreline and closer to an existing sewer line. He stated, however, that WSDOT was not opposed to columnar trees in the utility corridor for additional landscaping if utilities agree. *Testimony of Mr. Babuca.*

49. Mr. White testified that runoff from SR 520 now discharges directly into Fairweather Creek; that the stormwater facility is designed to remove 80 percent of sediment; and that the outfall is only one factor in Fairweather Bay sediment levels. He testified that the remainder of the bulkhead where the proposed outfall to Fairweather Bay is stable and would remain in place, as habitat would be disturbed by removal. He testified that safety lighting for SR 520 would be directed toward the highway and away from the basin. *Testimony of Mr. White.*
50. David Radabaugh, Department of Ecology, Regional Shoreline Planner, testified that public access to the shoreline is required, either through physical access or visual access.²⁰ *Testimony of Mr. Radabaugh.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction to hear and decide requests for Shoreline Substantial Development Conditional Use Permits. *Ch. 2.35 Town of Hunts Point Municipal Code (HPMC); HPMC 11.10.210(2); HPMC 11.10.130(1).*

Criteria for Review

Chapter 90.58 RCW, the Washington State Shoreline Management Act of 1971 (SMA), establishes a cooperative program of shoreline management between the local and state governments with local government having the primary responsibility for initiating the planning required by the chapter and administering the regulatory program consistent with the Shoreline Management Act. *RCW 90.58.050.* The Town of Hunts Point Shoreline Master Program provides goals and policies for ensuring that development within the shorelines of the state is consistent the policies and provisions of Chapter 90.58 RCW.

Applicable policies of the Shoreline Management Act (SMA) include those to foster "all reasonable and appropriate uses;" protect against adverse effects to the public health, the land and its vegetation and wildlife; and give priority to single family residences and appurtenant structures in authorizing alterations to the natural condition of the shoreline. Permitted shoreline uses must be designed to "minimize, insofar as practical, any resultant damage to the ecology

²⁰ WAC 173-26-221(4)(b)(iii) requires shoreline master programs: "To the greatest extent feasible consistent with the overall best interest of the state and the people generally, protect the public's opportunity to enjoy the physical and aesthetic qualities of shorelines of the state, including views of the water." According to the Town SMP, "At the present time [1975] there are no publicly owned shoreline areas within the Town, however, visual access to the scenic charm of the natural and wooded shorelands and uplands of Hunts Point is enjoyed by many from the water." *Town SMP, Section V.B.3, page 6.*

and environment of the shoreline area and any interference with the public's use of the water." RCW 90.58.020.

The Department of Ecology shoreline regulations are located in Chapters 173-26 and 173-27 of the Washington Administrative Code (WAC). Chapter 173-26 sets forth procedures and guidelines for local adoption of shoreline master programs that are not applicable to the Applicant's permit request. Chapter 173-27 sets forth permitting procedures and permit criteria.

To be approved by the Hearing Examiner, the use or development must be determined to be consistent with the policy and provisions of the Shoreline Management Act and the master program. RCW 90.58; HPMC 16.10.010, *adopting the Town of Hunts Point Master Program dated June 15, 1975*; WAC 173-27-140.

WAC 173-27-160 provides, "The purpose of a conditional use permit is to provide a system within the master program which allows flexibility in the application of use regulations in a manner consistent with the policies of RCW 90.58.020. In authorizing a conditional use, special conditions may be attached to the permit by local government or the department to prevent undesirable effects of the proposed use and/or to assure consistency of the project with the act and the local master program."

WAC 173-27-160(3) provides, "Other uses which are not classified or set forth in the applicable master program may be authorized as conditional uses provided the applicant can demonstrate consistency with the requirements of this section and the requirements for conditional uses contained in the master program."

The requirements of the WAC are as follows:

- (a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;
- (b) That the proposed use will not interfere with the normal public use of public shorelines;
- (c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;
- (d) That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and
- (e) That the public interest suffers no substantial detrimental effect.

WAC 173-27-160(1).

WAC 173-27-210 provides, "Pursuant to RCW 90.58.100(5) and 90.58.140(3), the criteria contained in WAC 173-27-160 and 173-27-170 for shoreline conditional use and variance permits shall constitute the minimum criteria for review of these permits by local government and the department. Local government and the department may, in addition, apply the more restrictive criteria where they exist in approved and adopted master programs."

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In addition, "In the granting of all conditional use permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the total of the conditional uses shall also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial adverse effects to the shoreline environment." WAC 173-27-160(2).

RCW 36.70B.040 requires consistency with Town development regulations or the appropriate elements of the comprehensive plan, considering:

- a. The type of land use;
- b. The level of development, such as units per acre or other measures of density;
- c. Infrastructure, including public facilities and services needed to serve the development; and
- d. The characteristics of the development, such as development standards.

RCW 36.70B.040.

Conclusions Based on Findings

1. **With conditions, the proposal will be consistent with the policies of the Shoreline Management Act and Town Shoreline Master Program.** Applicable policies of the Shoreline Management Act (SMA) include those to foster all reasonable and appropriate uses; protect against adverse effects to the public health, the land and wildlife; and give priority to single family residences and appurtenant structures in authorizing alterations to the natural condition of the shoreline. Permitted shoreline uses must be designed to "minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water." RCW 90.58.020. Although the proposed use of two former residential lots for a stormwater facility does not give priority to single family residences, SR 520 is an existing state highway and the proposed expansion is a reasonable and appropriate use consistent with the policies of the SMA. The proposed project would provide stormwater treatment and upgrades to a state highway. Nearshore areas of Lake Washington adjacent to the subject property contain Chinook salmon and associated habitat. Federal and State resource agencies have reviewed the project and determined that no adverse impacts would occur to endangered species. Other than the stormwater outfall and associated bulkhead removal, no in-water or shoreline work is proposed. The proposed stormwater facility would provide water quality treatment for highway runoff that now enters Fairweather Bay untreated. Hydraulic Project Approval and Water Quality Certification include conditions to limit pollution, control waste, protect fish and control erosion in Lake Washington that may result from the proposed project.

Although the primary goal of the Town SMP is to preserve the shoreline as single family residential/recreational property, the Town Circulation Element in its SMP recognizes SR 520 and states as a goal that the present transportation system of Hunts Point "is to be maintained as it now exists with any necessary expansion kept to a minimum." Town SMP, Section V.B.5. The proposed project would provide additional HOV lanes and

regional bicycle/pedestrian path within the SR 520 right-of-way. The Town SMP notes that activities on the shoreline or within the drainage basins may adversely affect water quality. Long range planning should seek to minimize such adverse impacts. *Town SMP, Section V.B.2.* Untreated stormwater runoff from SR 520 currently enters Fairweather Bay and Lake Washington. The proposed stormwater facilities, while replacing single family residences, would be consistent with the Town SMP by minimizing adverse stormwater runoff impacts.

The Town provided public notice of the application, DNS, and the open record hearing on the shoreline permit application. Town staff relied on the Applicant's compliance with all HPA and WQC conditions to recommend approval of this application. The proposal is consistent with Ch. 173-27 Washington Administrative Code (WAC) and the SMA-implementing regulations. Compliance with the HPA and WQC conditions, and any conditions of approval imposed by state and federal agencies, would ensure that the proposal minimizes damage to the ecology and environment of the shoreline area and any interference with the public's use of the water resulting from the proposed project. Conditions are required to ensure that WSDOT and the Town enter into an agreement to review changes and modifications to during the design-build process; that construction access be limited to the SR 520 right-of-way; and that WSDOT provide additional tree plantings in the utility corridor. *Findings 1-3, 8-21, 22-33, 41-43, 47-50.*

2. **The proposed use will not interfere with the normal public use of public shorelines.** The property within the shoreline jurisdiction between Fairweather Bay and the SR 520 right-of-way consists of two residential parcels without public access. WSDOT has acquired these parcels for the construction of a stormwater facility that includes a 15-foot wide non-motorized local access connector and maintenance road. No public access to Fairweather Bay would be provided. The project will result in the relocation of the Points Loop Trail from north of SR 520 within the shoreline jurisdiction to south of SR 520. Concern was expressed that leaving the bulkhead in place in the vicinity of the proposed outfall would allow unwanted access from boats in Fairweather Bay. WSDOT proposes to place "No Trespassing" signs along the shoreline to discourage entry from Fairweather bay onto WSDOT property. In addition, WSDOT will provide a telephone contact number to call should any resident observe inappropriate behavior on the property. These actions should be sufficient to prevent unauthorized use of the subject property. *Findings 1-3, 8-21, 22-33, 41-43, 47-50.*

3. **With conditions, the proposed use of the site and design of the project will be compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program.** The Town's Comprehensive Plan's Transportation Element recognizes an expanded SR 520 with a preference for a six-lane configuration with noise walls. The area to the west and east of Fairweather Bay consists of single-family residences. The Town SMP designates the shoreline environment surrounding Fairweather Bay as Residential-Natural. The proposed design includes a noise wall that would provide a noticeable decrease in noise

levels below noise abatement criteria within the shoreline jurisdiction. Conditions are required to ensure that WSDOT and the Town enter into an agreement to review changes and modifications to the design-build process; that construction access be limited to the SR 520 right-of-way; and that WSDOT provide additional tree plantings in the utility corridor. *Findings 1-3, 8-21, 22-33, 41-43, 47-50.*

4. **With conditions, the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located.** The proposed SR 520 expansion project would include a stormwater facility designed to treat highway stormwater runoff. In addition, a noise wall that would provide a noticeable decrease in noise levels within the shoreline jurisdiction from the adjacent SR 520. Conditions are required to ensure that WSDOT and the Town enter into an agreement to review changes and modifications to the design-build process; that construction access be limited to the SR 520 right-of-way; and that WSDOT provide additional tree plantings in the utility corridor. *Findings 1-3, 8-21, 22-33, 41-43, 47-50.*
5. **The public interest will suffer no substantial detrimental effect.** Improvements to SR 520 are estimated to result in a slight decrease in annual vehicle miles traveled based on 2030 projections. A new regional bike and pedestrian path along the north side of SR-520 and relocation of the Points Loop Trail to the south side of SR-520 would improve non-motorized travel in the region. The stormwater facility, while located within the shoreline jurisdiction, would provide stormwater treatment for runoff from SR-520. Landscaping would be planted to help reduce the visual impact of the noise wall and to improve the shoreline area between the stormwater facility and Fairweather Bay. No cumulative impacts from similar or conditional use permits were identified. *Findings 1-50.*
6. **The proposed project will be consistent with the comprehensive plan and development regulations of the Town of Hunts Point, to the extent required by law given that the Applicant is a state agency.** Therefore, the requirements of RCW 36.70B.040 have been satisfied. *Findings 1, 3-4, 17-33, 42, 45.*

DECISION

Based on the preceding Findings and Conclusions, the request for a Shoreline Substantial Development Conditional Use Permit to construct portions of an expansion of SR 520 with a noise wall and pedestrian/bike trail improvements, and a stormwater treatment facility with an outfall at Fairweather Bay within the Town of Hunts Point, Washington is **APPROVED**²¹, with

²¹ WAC 173-27-200(1) provides: "After local government approval of a conditional use or variance permit, local government shall submit the permit to the department for the department's approval, approval with conditions, or denial. The department shall render and transmit to local government and the applicant its final decision approving, approving with conditions, or disapproving the permit within thirty days of the date of submittal by local government pursuant to WAC 173-27-110."

WAC 173-29-190 (1) provides, "Each permit for a substantial development, conditional use or variance, issued by local government shall contain a provision that construction pursuant to the permit shall not begin

the following conditions:²²

1. Construction access to the site shall be limited to direct access from the SR 520 right-of-way, avoiding Town of Hunts Point streets.
2. Privacy and safety concerns for the residents of Fairweather Basin Addition shall be respected by restricting visual access and eliminating physical access to the Fairweather Basin Addition from the regional bicycle/pedestrian trail.
3. All work, including construction contracts, shall proceed in conformance with drawings found in Exhibits 32.a -d, and Exhibits 36.a - c. WSDOT and the Town shall agree to a written process for reviewing any minor/major project design changes. If the proposed change is major, the Town shall notify the public of a proposed revision to the Shoreline Substantial Conditional Use Permit and hold at least one hearing prior to agreeing to the proposed major revision.
4. WSDOT shall seek approval of utilities that have utility installations within the basin and seek consent of those utilities for planting within the utility corridor. WSDOT shall revise the planting plan and include additional landscaping (including columnar evergreen trees) within the utility corridor as agreed to by the affected utilities.
5. WSDOT shall maintain all landscaping for the life of the project.
6. WSDOT shall provide a local telephone contact number for residents of Fairweather Basin to contact in the event of any matter that may require attention on the WSDOT property within the basin area.

Decided this 2nd day of February 2011.



THEODORE PAUL HUNTER
Hearing Examiner
Sound Law Center

and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140 (6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140(5)(a) and (b).²² This provision provides that notice.

²² This decision includes conditions designed to mitigate impacts of this proposed project as well as conditions required by Town Code.

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STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Northwest Regional Office • 3190 160th Avenue SE • Bellevue, Washington 98008-5452 • (425) 649-7000

February 15, 2011

Scott White
Washington Department Of Transportation
600 Stewart St, Suite 520
Seattle, WA 98101

Re: Town of Hunts Point Permit No. 10-04
Washington Department of Transportation - Applicant
Conditioned Shoreline Conditional Use Permit 147

Dear Mr. White:

On February 7, 2011 the Department of Ecology (Ecology) received the Hunts Point decision on your Shoreline Conditional Use Permit for the widening of state route (SR) 520, construction of a bicycle trail, soundwalls and visual barriers, a stormwater quality treatment pond, and a stormwater outfall directly to Fairweather Bay in Lake Washington in a Residential - Natural shoreline environment.

By law, Ecology must review Conditional Use Permits for compliance with:

- The Shoreline Management Act (Chapter 90.58 RCW)
- Ecology's Conditional Use Permit approval criteria (Chapter 173-27-160 WAC)
- The Hunts Point Local Shoreline Master Program

After reviewing Conditional Use Permits for compliance, Ecology must decide whether to approve, approve with conditions, or disapprove a Conditional Use Permit.

After reviewing Conditional Use Permits for compliance, Ecology must decide whether to approve, approve with conditions, or disapprove them.

Our Decision:

Ecology approves your Conditional Use Permit provided your project complies with the conditions required by Hunts Point and the following Ecology conditions:

- The applicant hereby authorizes Ecology staff and their designates to have access to the subject property for the purposes of compliance inspection and monitoring. Such right of access shall begin from the date of the receipt of this letter, during construction, and extend for a period of five years following project completion. Ecology staff must provide reasonable verbal notice to the applicant or their designate prior to coming onto the site.



Scott White
 February 15, 2011
 2 of 3

2. The connector trail identified in Notes 23 through 25 on Exhibit 32b shall be available for public access. Any access signage shall identify the bicycle trail as being available for public access. Condition 2 of the Hearing Examiner's decision shall be implemented as follows:

Privacy and safety concerns for the residents of Fairweather Basin Addition shall be respected by restricting visual access and ~~eliminating physical access to the Fairweather Basin Addition from the regional bicycle/pedestrian trail.~~

3. Note 27 on Exhibit 32b shall be revised as follows:

Install signage indicating that bicycles should be walked, rather than rode, on the maintenance drive adjacent to the stormwater quality pond feature to discourage bicycle travel along the local access connector trail. Provide public local access signage.

Please note, however, that other federal, state, and local permits may be required in addition to this shoreline permit.

What Happens Next?

Before you begin activities authorized by this permit, the law requires you to wait at least 21 days from the "date of receipt" - the date you receive this letter or the date Hunts Point receives their copy of this letter. Date of receipt is defined in RCW 43.21B.001 as follows:

- (1) "Business days" means Monday through Friday exclusive of any state or federal holiday.
- (2) "Date of receipt" means:
 - (a) Five business days after the date of mailing; or
 - (b) The date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence. The recipient's sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the agency, shall constitute sufficient evidence of actual receipt. The date of actual receipt, however, may not exceed forty-five days from the date of mailing.

This waiting period allows anyone (including you) who disagrees with any aspect of this permit, to appeal the decision to the state Shorelines Hearings Board. You must wait for the conclusion of an appeal before you can begin the activities authorized by this permit.

The Shorelines Hearings Board will notify you by letter if they receive an appeal. We recommend you contact the Shorelines Hearings Board before you begin permit activities to ensure no appeal has been received. They can be reached at (360) 664-9160 or <http://www.eho.wa.gov>.

Scott White
February 15, 2011
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If you want to appeal this decision, you can find appeal instructions (Chapter 461-08 WAC) at the Shorelines Hearings Board website above. They are also posted on the website of the Washington State Legislature at: <http://apps.leg.wa.gov/wac>.

If you have any questions, please contact David Radabaugh at (425) 649-4260.

Sincerely,



Geoff Tallent, Section Manager
Shorelands and Environmental Assistance Program

By certified mail 7010 0290 0000 8205 2225

Enclosure

cc: Mona Green, Town of Hunts Point
Daniel Babuca, Department of Transportation
David Radabaugh, Department of Ecology

RECEIVED
APR 25 2011

ENVIRONMENTAL
HEARINGS OFFICE

BEFORE THE SHORELINE HEARINGS BOARD
FOR THE STATE OF WASHINGTON

PETER POWELL, individually, and
PATRICK A.T. JONES, individually,

and

FAIRWEATHER BASIN BOAT CLUB,
INC., a Washington corporation,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, WASHINGTON
STATE DEPARTMENT OF ECOLOGY and
TOWN OF HUNTS POINT,

Respondents.

SHB NOS. 11-007 & 11-008

DECLARATION OF KEN L. FISHER IN
OPPOSITION TO RESPONDENT
WSDOT'S MOTION TO DISMISS

I, Ken L. Fisher, hereby declare and state as follows:

1. I am the President of Petitioner Fairweather Basin Boat Club, Inc. ("FBBC"),

I am over the age of 18, and I am competent to testify in a court of law as to the matters asserted herein. I have personal knowledge of the facts and circumstances set out in this declaration.

2. On April 5, 2011, I reviewed the Town of Hunts Point's records showing its receipt by mail of the Department of Ecology's February 15, 2011 approval letter addressed to Town Planner Mona Green for Town of Hunts Point Permit 10-04. Attached hereto as

DECLARATION OF KEN L. FISHER IN OPPOSITION
TO WSDOT'S MOTION TO DISMISS- 1

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206.622.1711 Fax 206.292.0460



1 Exhibit A are true and correct copies of: the confirmation from the United States Postal
2 Service online "Track & Confirm" service ([http://www.usps.com/shipping/trackandconfirm.](http://www.usps.com/shipping/trackandconfirm.htm?from=home_header&page=trackandconfirm)
3 [htm?from=home_header&page=trackandconfirm](http://www.usps.com/shipping/trackandconfirm.htm?from=home_header&page=trackandconfirm)) that matches the certified mail number on
4 the February 15, 2011 envelope addressed to Town of Hunts Point, care of Mona Green,
5 from the Department of Ecology; a copy of the envelope in which the letter arrived; and a
6 copy of the enclosed letter for Conditioned Shoreline Conditional Use Permit 147. This
7 shows that the letter was mailed on February 24, 2011 and received on February 28, 2011 at
8 11:46 a.m. The certified mail number on page 3 of the letter is not the same as the one on the
9 envelope.
10

11 3. Using the USPS online "Track & Confirm" service, I attempted to obtain the
12 date of receipt of the Department of Ecology's February 15, 2011 approval letters addressed
13 to Scott White of the Washington Department of Transportation, based on the certified mail
14 tracking numbers shown in the letters. Attached hereto as Exhibit B is a true and correct
15 copy of the confirmation from the United States Postal Service online "Track & Confirm"
16 service ([http://www.usps.com/shipping/trackandconfirm.htm?from=home_header&page](http://www.usps.com/shipping/trackandconfirm.htm?from=home_header&page=trackandconfirm)
17 [=trackandconfirm](http://www.usps.com/shipping/trackandconfirm.htm?from=home_header&page=trackandconfirm)) that matches to the certified mail number, 7010 0290 0000 8205 3328,
18 on the second page of the February 15, 2011 letter addressed to Mr. White from the
19 Department of Ecology that refers to Shoreline Substantial Development Permit 485. This
20 shows that the letter was received on February 16, 2011 at 9:39 a.m. Attached hereto as
21 Exhibit C is a true and correct copy of the confirmation from the United States Postal
22 Service online "Track & Confirm" service ([http://www.usps.com/shipping/trackandconfirm.](http://www.usps.com/shipping/trackandconfirm.htm?from=home_header&page=trackandconfirm)
23 [htm?from=home_header&page=trackandconfirm](http://www.usps.com/shipping/trackandconfirm.htm?from=home_header&page=trackandconfirm)) that matches to the certified mail number,
24
25
26

DECLARATION OF KEN L. FISHER IN OPPOSITION
TO WSDOT'S MOTION TO DISMISS- 2

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206.622.1711 Fax 206.292.0460

1 7010 0290 0000 8205 2225, on the third page of the February 15, 2011 letter addressed to
2 Mr. White from the Department of Ecology that refers to Conditioned Shoreline Conditional
3 Use Permit 147, a true and correct copy of which letter is part of Exhibit A. According to
4 U.S. Postal Service records, there is no record of this letter having been sent or received.

5
6 4. I personally attended both the December 1, 2010 and January 20, 2011 public
7 hearings on this matter before the Town of Hunts Point Hearing Examiner. At the close of
8 the hearing on January 20, 2011, WSDOT called a person named David Radabaugh from the
9 Department of Ecology as a witness. Mr. Radabaugh's testimony, on behalf of WSDOT,
10 was basically elicited by WSDOT in order to provide a basis for physical and visual public
11 access to the project area, which are among the issues of greatest concern to Petitioner
12 FBBC. Mr. Radabaugh's testimony was adverse to FBBC. The two revised conditions in
13 Ecology's February 15, 2011 letter regarding Conditioned Shoreline Conditional Use Permit
14 147 reduced the protections that the Hearing Examiner provided as to the physical and visual
15 public access to our neighborhood.
16

17 5. The two February 15, 2011 letters that Ecology sent to WSDOT and to the
18 Town make no mention whatsoever of any transmittal or service by email or other means.
19 They only refer to transmittal by certified mail. There is no record that WSDOT received the
20 mailed copy of the letter from Ecology that approved Conditioned Shoreline Conditional Use
21 Permit 147.
22

23 6. The first I learned of the two February 15, 2011 letters that Ecology sent to
24 WSDOT and to the Town was by an email dated February 24, 2011 from Town Clerk Sue
25
26

DECLARATION OF KEN L. FISHER IN OPPOSITION
TO WSDOT'S MOTION TO DISMISS- 3

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206.622.1711 Fax 206.292.0460

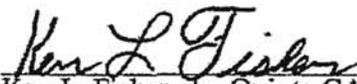
1 Israel, which was part of an email string dating to February 22, 2011. There was no mention
2 of any prior email or other electronic transmittal.

3 7. The first I learned that the two February 15, 2011 letters that Ecology sent to
4 WSDOT had been emailed to WSDOT on February 15, 2011 was when I received a copy of
5 WSDOT's motion to dismiss FBBC's appeal and the supporting declaration of Mr. White.
6

7 8. Based on the notice I received from the Town on February 24, 2011, I
8 believed that the Town had first received copies of the two February 15, 2011 letters that
9 Ecology sent to WSDOT on February 23, 2011. This was reasonable, given that if the letters
10 were mailed on February 15th, and the Town was closed on Friday the 18th and Monday the
11 21st (the President's Day holiday), they might not be picked up by the Town until after the
12 holiday.
13

14 I declare under penalty of perjury under the laws of the State of Washington that the
15 foregoing is true and correct to the best of my knowledge and belief.
16

17 Dated this 22 day of April, 2011.

18
19 
20 Ken L. Fisher, La Quinta CA

21
22
23
24
25
26
DECLARATION OF KEN L. FISHER IN OPPOSITION
TO WSDOT'S MOTION TO DISMISS- 4

PDX/122937/178984/AAL/7399177.1

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206.622.1711 Fax 206.292.0460

Exhibit A

Exhibit A



[Track & Confirm](#)

[FAQs](#)

Track & Confirm

Search Results

Label/Receipt Number: **7010 1060 0000 7466 4189**
Service(s): **Certified Mail™**
Status: **Delivered**

Your item was delivered at 11:46 am on February 28, 2011 in BELLEVUE, WA 98004.

Track & Confirm

Enter Label/Receipt Number.

Notification Options

Track & Confirm by email

Get current event information or updates for your item sent to you or others by email.

[Site Map](#)

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[FOIA](#)

Postal Inspectors
Preserving the Trust

Inspector General
Promoting Integrity



State of Washington
 DEPARTMENT OF ECOLOGY
 3190 160th Ave SE
 Bellevue, WA 98008-5452

CERTIFIED MAIL



7010 1060 0000 7466 4189



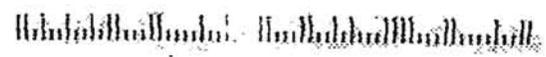
02 1A
 0064856036
 \$ 05.54
 FEB 24 2011
 MAILED FROM ZIP CODE 98008

*leave
 for
 Monday
 2-28*

**TOWN OF HUNTS POINT
 ATTN: MONA GREEN
 3000 HUNTS POINT ROAD
 HUNTS POINT WA 98003**

RETURN RECEIPT
 REQUESTED

9800481121





STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Northwest Regional Office • 3190 160th Avenue SE • Bellevue, Washington 98008-5452 • (425) 649-7000

February 15, 2011

Scott White
Washington Department Of Transportation
600 Stewart St, Suite 520
Seattle, WA 98101

Re: Town of Hunts Point Permit No. 10-04
Washington Department of Transportation - Applicant
Conditioned Shoreline Conditional Use Permit 147

Dear Mr. White:

On February 7, 2011 the Department of Ecology (Ecology) received the Hunts Point decision on your Shoreline Conditional Use Permit for the widening of state route (SR) 520, construction of a bicycle trail, soundwalls and visual barriers, a stormwater quality treatment pond, and a stormwater outfall directly to Fairweather Bay in Lake Washington in a Residential - Natural shoreline environment.

By law, Ecology must review Conditional Use Permits for compliance with:

- The Shoreline Management Act (Chapter 90.58 RCW)
- Ecology's Conditional Use Permit approval criteria (Chapter 173-27-160 WAC)
- The Hunts Point Local Shoreline Master Program

After reviewing Conditional Use Permits for compliance, Ecology must decide whether to approve, approve with conditions, or disapprove a Conditional Use Permit.

After reviewing Conditional Use Permits for compliance, Ecology must decide whether to approve, approve with conditions, or disapprove them.

Our Decision:

Ecology approves your Conditional Use Permit provided your project complies with the conditions required by Hunts Point and the following Ecology conditions:

- The applicant hereby authorizes Ecology staff and their designates to have access to the subject property for the purposes of compliance inspection and monitoring. Such right of access shall begin from the date of the receipt of this letter, during construction, and extend for a period of five years following project completion. Ecology staff must provide reasonable verbal notice to the applicant or their designate prior to coming onto the site.



Scott White
 February 15, 2011
 2 of 3

2. The connector trail identified in Notes 23 through 25 on Exhibit 32b shall be available for public access. Any access signage shall identify the bicycle trail as being available for public access. Condition 2 of the Hearing Examiner's decision shall be implemented as follows:

Privacy and safety concerns for the residents of Fairweather Basin Addition will be respected by restricting visual access and eliminating physical access to the Fairweather Basin Addition from the regional bicycle/pedestrian trail.

3. Note 27 on Exhibit 32b shall be revised as follows:

Install signage indicating that bicycles should be walked rather than rode, on the maintenance drive adjacent to the stormwater quality pond feature to discourage bicycle travel along the local access connector trail. Provide public local access signage.

Please note, however, that other federal, state, and local permits may be required in addition to this shoreline permit.

What Happens Next?

Before you begin activities authorized by this permit, the law requires you to wait at least 21 days from the "date of receipt" - the date you receive this letter or the date Hunts Point receives their copy of this letter. Date of receipt is defined in RCW 43.21B.001 as follows:

- (1) "Business days" means Monday through Friday exclusive of any state or federal holiday.
- (2) "Date of receipt" means:
 - (a) Five business days after the date of mailing; or
 - (b) The date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence. The recipient's sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the agency, shall constitute sufficient evidence of actual receipt. The date of actual receipt, however, may not exceed forty-five days from the date of mailing.

This waiting period allows anyone (including you) who disagrees with any aspect of this permit, to appeal the decision to the state Shorelines Hearings Board. You must wait for the conclusion of an appeal before you can begin the activities authorized by this permit.

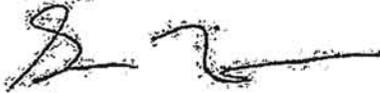
The Shorelines Hearings Board will notify you by letter if they receive an appeal. We recommend you contact the Shorelines Hearings Board before you begin permit activities to ensure no appeal has been received. They can be reached at (360) 664-9160 or <http://www.eho.wa.gov>.

Scott White
February 13, 2011
3 of 3

If you want to appeal this decision, you can find appeal instructions (Chapter 461-08 WAC) at the Shorelines Hearings Board website above. They are also posted on the website of the Washington State Legislature at: <http://apps.leg.wa.gov/wac>.

If you have any questions, please contact David Radabaugh at (206) 572-1200.

Sincerely,



Geoff Tallent, Section Manager
Shorelands and Environmental Assistance Program

By certified mail 7010 0290 0000 8205 2225

Enclosure

cc: Mona Green, Town of Hunts Point
Daniel Babuca, Department of Transportation
David Radabaugh, Department of Ecology

Exhibit B

Exhibit B

Track & Confirm

Search Results

Label/Receipt Number: 7010 0290 0000 8205 3328
Status: Delivered

Your item was delivered at 9:39 am on February 16, 2011 in SEATTLE, WA 98101. A proof of delivery record may be available through your local Post Office for a fee.

Additional information for this item is stored in files offline.

Track & Confirm

Enter Label/Receipt Number.

Go >

[Restore Offline Details >](#)

[Return to USPS.com Home >](#)



Exhibit C

Exhibit C



Track & Confirm

Search Results

Label/Receipt Number: 7010 0290 0000 8205 2225

There is no record of this item.

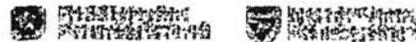
Why Are You Receiving This Message?

1. Event information may not be available if your item was mailed to an unrecognizable address.
2. The number was entered incorrectly. Be sure to enter all of the letters and numbers as they appear on your mailing label or receipt.

Track & Confirm

Enter Label/Receipt Number.

Go >



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by:

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<input type="checkbox"/>

U.S. Postal Service, ordinary first class mail
 U.S. Postal Service, certified or registered mail,
 return receipt requested
 hand delivery
 facsimile
 electronic service
 other (specify) _____

Kristi Richards

 Kristi Richards

CERTIFICATE OF SERVICE - 2



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Northwest Regional Office • 3190 160th Avenue SE • Bellevue, Washington 98008-5452 • (425) 649-7000

February 15, 2011

Scott White
Washington Department Of Transportation
600 Stewart St, Suite 520
Seattle, WA 98101

Re: Town of Hunts Point Permit 10-04 - Approved
Daniel Babuca - Applicant
Shoreline Substantial Development Permit 485

Dear Mr. White:

On February 07, 2011 the Department of Ecology received notice that Hunts Point approved your application for an SDP. Your permit is for the widening of state route (SR) 520, construction of a bicycle trail, soundwalls and visual barriers, a stormwater quality treatment pond, and a stormwater outfall directly to Fairweather Bay in Lake Washington in a Residential - Natural shoreline environment.

By law, local governments must review all SDPs for compliance with:

- The Shoreline Management Act (Chapter 90.58 RCW)
- Ecology's Substantial Development Permit approval criteria (Chapter 173-27-150 WAC)
- The Hunts Point Local Shoreline Master Program

Local governments, after reviewing SDPs for compliance, are required to submit them to Ecology. Your approved SDP has been received by Ecology.

What Happens Next?

Before you begin activities authorized by this permit, the law requires you wait at least 21 days from the "date of receipt" – the date you receive this letter. Date of receipt is defined in RCW 43.21B.001 as

(1) "Business days" means Monday through Friday exclusive of any state or federal holiday.



Scott White
February 14, 2011
2 of 2

(2) "Date of receipt" means:

- (a) Five business days after the date of mailing; or
- (b) The date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence. The recipient's sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the agency, shall constitute sufficient evidence of actual receipt. The date of actual receipt, however, may not exceed forty-five days from the date of mailing.

This waiting period allows anyone (including you) who disagrees with any aspect of this permit, to appeal the decision to the state Shorelines Hearings Board. You must wait for the conclusion of an appeal before you can begin the activities authorized by this permit.

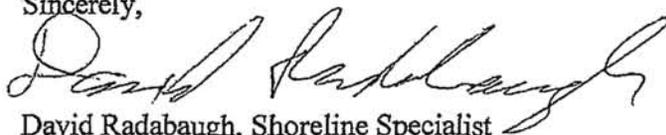
The Shorelines Hearings Board will notify you by letter if they receive an appeal. We recommend you contact the Shorelines Hearings Board before you begin permit activities to ensure no appeal has been received. They can be reached at (360) 664-9160 or <http://www.eho.wa.gov/>

If **you** want to appeal this decision, you can find appeal instructions (Chapter 461-08 WAC) at the Shorelines Hearings Board website above. They are also posted on the website of the Washington State Legislature at: <http://apps.leg.wa.gov/wac>.

Other federal, state and local permits may be required in addition to this shoreline permit.

If you have any questions about this letter, please contact David Radabaugh at (425) 649-4260.

Sincerely,



David Radabaugh, Shoreline Specialist
Shorelands and Environmental Assistance Program

By certified mail 7010 0290 0000 8205 3328

cc: Daniel Babuca, Department of Transportation
Mona Green, Town of Hunts Point

RECEIVED

MAR 24 2011

ENVIRONMENTAL
HEARINGS OFFICE

**SHORELINES HEARINGS BOARD
FOR THE STATE OF WASHINGTON**

PETER POWELL, individually and PATRICK
A.T. JONES, individually,

and

FAIRWEATHER BASIN BOAT CLUB, INC.,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION and WASHINGTON
STATE DEPARTMENT OF ECOLOGY,

Respondents.

NO. 11-007 and 11-008

DECLARATION OF SCOTT WHITE

SCOTT WHITE declares as follows:

1. I am the regulatory compliance manager for the SR 520 Bridge Replacement
and HOV Program being carried out by the Washington State Department of Transportation.

My responsibilities include developing applications for environmental permits and working
with permitting agencies in obtaining environmental permits for the SR 520 Eastside High
Occupancy Vehicle Lane project (Eastside Project). These permits include a shoreline
substantial development conditional use permit required to be obtained from the Town of

1 Hunts Point, with a shoreline conditional use permit to be subsequently approved by the
2 Washington Department of Ecology.

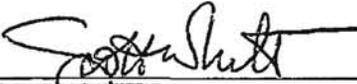
3 2. The Town of Hunts Point approved the shoreline substantial development and
4 conditional use permit for the Eastside Project on February 2, 2011. This permit was then
5 forwarded by the Town of Hunts Point to the Washington Department of Ecology for its
6 review and approval.

7
8 3. Although the Town of Hunts Point chose to issue both the substantial
9 development and conditional use elements of the underlying action as a single permit, Ecology
10 chose to issue two separate permits for the underlying action: a shoreline substantial
11 development permit and shoreline conditional use permit. These two permits were issued on
12 February 15, 2011. I received a copy of these two permit decisions by e-mail from David
13 Radabaugh, Ecology's permit reviewer, on February 15, 2011. I responded back to Mr.
14 Radabaugh by e-mail that day that I had received the decisions.

15
16 4. Attached is a true and correct copy of the shoreline conditional use permit
17 decision that I obtained from Mr. Radabaugh by e-mail received on February 15, 2011, and the
18 e-mail correspondence from Mr. Radabaugh to which the permit decision was attached.

19 I declare under penalty of perjury under the laws of the State of Washington that the
20 foregoing is true and correct.

21
22 DATED 3/23/11 at Seattle, Washington.

23
24 
25 _____
26 SCOTT WHITE



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Northwest Regional Office • 3190 160th Avenue SE • Bellevue, Washington 98008-5452 • (425) 649-7000

February 15, 2011

Scott White
Washington Department Of Transportation
600 Stewart St, Suite 520
Seattle, WA 98101

Re: Town of Hunts Point Permit No. 10-04
Washington Department of Transportation - Applicant
Conditioned Shoreline Conditional Use Permit 147

Dear Mr. White:

On February 7, 2011 the Department of Ecology (Ecology) received the Hunts Point decision on your Shoreline Conditional Use Permit for the widening of state route (SR) 520, construction of a bicycle trail, soundwalls and visual barriers, a stormwater quality treatment pond, and a stormwater outfall directly to Fairweather Bay in Lake Washington in a Residential - Natural shoreline environment.

By law, Ecology must review Conditional Use Permits for compliance with:

- The Shoreline Management Act (Chapter 90.58 RCW)
- Ecology's Conditional Use Permit approval criteria (Chapter 173-27-160 WAC)
- The Hunts Point Local Shoreline Master Program

After reviewing Conditional Use Permits for compliance, Ecology must decide whether to approve, approve with conditions, or disapprove a Conditional Use Permit.

After reviewing Conditional Use Permits for compliance, Ecology must decide whether to approve, approve with conditions, or disapprove them.

Our Decision:

Ecology approves your Conditional Use Permit provided your project complies with the conditions required by Hunts Point and the following Ecology conditions:

- The applicant hereby authorizes Ecology staff and their designates to have access to the subject property for the purposes of compliance inspection and monitoring. Such right of access shall begin from the date of the receipt of this letter, during construction, and extend for a period of five years following project completion. Ecology staff must provide reasonable verbal notice to the applicant or their designate prior to coming onto the site.



Scott White
 February 15, 2011
 2 of 3

2. The connector trail identified in Notes 23 through 25 on Exhibit 32b shall be available for public access. Any access signage shall identify the bicycle trail as being available for public access. Condition 2 of the Hearing Examiner's decision shall be implemented as follows:

Privacy and safety concerns for the residents of Fairweather Basin Addition shall be respected by restricting visual access ~~and eliminating physical access to the Fairweather Basin Addition from the regional bicycle/pedestrian trail.~~

3. Note 27 on Exhibit 32b shall be revised as follows:

Install signage indicating that bicycles should be walked, rather than rode, on the maintenance drive adjacent to the stormwater quality pond feature to discourage bicycle travel along the local access connector trail. Provide public local access signage.

Please note, however, that other federal, state, and local permits may be required in addition to this shoreline permit.

What Happens Next?

Before you begin activities authorized by this permit, the law requires you to wait at least 21 days from the "date of receipt" - the date you receive this letter or the date Hunts Point receives their copy of this letter. Date of receipt is defined in RCW 43.21B.001 as follows:

- (1) "Business days" means Monday through Friday exclusive of any state or federal holiday.
- (2) "Date of receipt" means:
 - (a) Five business days after the date of mailing; or
 - (b) The date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence. The recipient's sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the agency, shall constitute sufficient evidence of actual receipt. The date of actual receipt, however, may not exceed forty-five days from the date of mailing.

This waiting period allows anyone (including you) who disagrees with any aspect of this permit, to appeal the decision to the state Shorelines Hearings Board. You must wait for the conclusion of an appeal before you can begin the activities authorized by this permit.

The Shorelines Hearings Board will notify you by letter if they receive an appeal. We recommend you contact the Shorelines Hearings Board before you begin permit activities to ensure no appeal has been received. They can be reached at (360) 664-9160 or <http://www.eho.wa.gov>.

Scott White
February 15, 2011
3 of 3

If you want to appeal this decision, you can find appeal instructions (Chapter 461-08 WAC) at the Shorelines Hearings Board website above. They are also posted on the website of the Washington State Legislature at: <http://apps.leg.wa.gov/wac>.

If you have any questions, please contact David Radabaugh at (425) 649-4260.

Sincerely,



Geoff Tallent, Section Manager
Shorelands and Environmental Assistance Program

By certified mail 7010 0290 0000 8205 2225

Enclosure

cc: Mona Green, Town of Hunts Point
Daniel Babuca, Department of Transportation
David Radabaugh, Department of Ecology

From: [Scott White](#)
To: [Radabaugh, David \(ECY\)](#)
Subject: RE: SR 520 Hunts Point Permit Approval Letter Attached
Attachments: [image001.jpg](#)
[Image003.jpg](#)

Dave-

This email is confirm receipt of this permit. Thank you for doing it so quickly.

Scott

Scott White | 425.345.7685
Principal Environmental Planner, Partner
www.confenv.com

From: Radabaugh, David (ECY) [mailto:DRAD461@ECY.WA.GOV]
Sent: Tuesday, February 15, 2011 4:56 PM
To: Scott White
Subject: SR 520 Hunts Point Permit Approval Letter Attached

Scott,

I am going to do this again. The email record dropped the attachments showing what this was all about

The purpose of this email is to provide you notice of the Department of Ecology approval of Shoreline Conditional Use Permit 147 and Shoreline substantial Development Permit 485. Your email receipt of this email will start the 21 day appeal period.

David Radabaugh
Regional Shoreline Planner
Department of Ecology
Northwest Regional Office
3190 - 160th Avenue SE
Bellevue, WA 98008-5452
(425) 649-4260
david.radabaugh@ecy.wa.gov

RECEIVED

APR 25 2011

ENVIRONMENTAL
HEARINGS OFFICE

BEFORE THE SHORELINE HEARINGS BOARD
FOR THE STATE OF WASHINGTON

PETER POWELL, individually, and
PATRICK A.T. JONES, individually,

and

FAIRWEATHER BASIN BOAT CLUB,
INC., a Washington corporation,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, WASHINGTON
STATE DEPARTMENT OF ECOLOGY and
TOWN OF HUNTS POINT,

Respondents.

SHB NOS. 11-007 & 11-008

DECLARATION OF AARON M. LAING
IN OPPOSITION TO RESPONDENT
WSDOT'S MOTION TO DISMISS

I, Aaron M. Laing, hereby declare and state as follows:

1. I am an attorney of record for Petitioner Fairweather Basin Boat Club, Inc. in the captioned matter. I am over the age of 18, and competent to testify in a court of law as to the matters asserted herein. I have personal knowledge of the facts and circumstances set out in this declaration

2. Attached hereto as Exhibit A is a true and correct copy of an email dated February 14, 2011, from Scott White to David Radabaugh.

DECLARATION OF AARON M. LAING IN OPPOSITION TO
WSDOT'S MOTION TO DISMISS - 1

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206.622.1711 Fax 206.292.0460



1 3. Attached hereto as Exhibit B is a true and correct copy of an email dated
2 February 14, 2011, from David Radabaugh to Scott White.

3 4. Attached hereto as Exhibit C is a true and correct copy of an email string
4 dated February 15, 2011, between David Radabaugh and Scott White.

5 5. Attached hereto as Exhibit D is a true and correct copy of an email dated
6 February 15, 2011, from David Radabaugh (Dept. of Ecology) to Mona Green (Town of
7 Hunts Point) (excluding two attachments).

8 6. Attached hereto as Exhibit E is a true and correct copy of an email string
9 dated from February 22 through February 23, 2011, among Scott White, David Radabaugh,
10 and Mona Green.

11 7. Attached hereto as Exhibit F is a true and correct copy of an email mail string
12 dated from February 22 through February 24, 2011, among Scott White (WSDOT), David
13 Radabaugh, Mona Green, and Jack McKenzie (Town of Hunts Point).

14 8. Attached hereto as Exhibit G is a true and correct copy of an email string
15 dated March 9, 2011, among Scott White, Mona Green, and David Radabaugh.

16 9. Attached hereto as Exhibit H is a true and correct copy of an email are
17 excerpts from Ecology's Responses to Petitioner Fairweather Basin Boat Club's Initial
18 Discovery Requests to WSDOT, DOE and Town of Hunts Point: Answers to Interrogatory
19 No. 7, Answer to Interrogatory No. 8, and Answer to Interrogatory No. 10.

20 10. Attached hereto as Exhibit I are true and correct copies of printouts from,
21 respectively, the websites for the Department of Ecology (www.ecy.wa.gov) and WSDOT
22
23
24
25
26

1 (www.wsdot.gov) that show their office hours as 8:00 a.m. to 5:00 p.m., Monday through
2 Friday.

3 11. Attached hereto as Exhibit J is a true and correct copy of a printout from the
4 Town of Hunts Point's website (www.huntspoint-wa.gov) that shows the Town's hours of
5 operation as 8:00 a.m. to 5:00 p.m., Monday through Thursday. Also attached is a true and
6 correct copy of Hunts Point Municipal Code Chapter 2.45, Office Hours, which sets these
7 same hours.

9 12. Attached hereto as Exhibit K is a true and correct copy of an April 6, 2011
10 letter from Assistant Attorney General Laura J. Watson, Ecology's counsel, to all legal
11 counsel in this matter confirming the parties' agreement to accept electronic service of
12 documents. This agreement is reflected on page 7 of Presiding Judge Brown's April 6, 2011
13 Pre-Hearing and Consolidation Order, which states, *inter alia*, that the date of "filing" is "the
14 date/time email filings are received by the Board" and further states that "E-filings received
15 by the Board after 5:00 p.m. on a business day will be considered filed on the next business
16 day."

18 13. Attached hereto as Exhibit L is a true and correct copy of the March 17, 2011
19 letter from Presiding Judge Brown to the parties and the enclosed informational brochure
20 from the Washington State Shorelines Hearings Board Environmental Hearings Office titled
21 "Your Right to Be Heard." On the third page of the letter, there is a certification stamp
22 affirming under penalty of perjury that the letter was sent by United States mail to the
23 attorneys of record. On the second page, first column, third paragraph of "Your Right to Be
24 Heard," under the section titled "When to File a Petition for Review," the brochure states:
25
26

DECLARATION OF AARON M. LAING IN OPPOSITION TO
WSDOT'S MOTION TO DISMISS - 3

PDX/122937/178984/AAL/7397249.1

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206.622.1711 Fax 206.292.0460

1 "Where a project involves both a substantial development and a conditional use or variance
2 permit, the latest applicable date of receipt may be used in filing the petition for review."

3 14. I have reviewed all of the responses to Petitioner Fairweather Basin Boat
4 Club's Initial Discovery Requests to WSDOT, DOE and Town of Hunts Point by the three
5 aforementioned responding parties, including all supplemental responses. As of 5:00 p.m. on
6 Thursday, April 21, 2011, no responding party has provided any written agreement to accept
7 electronic service of the Decisions, nor has any party responded to any interrogatory
8 indicating that such an agreement existed on or before February 15, 2011.
9

10
11 I declare under penalty of perjury under the laws of the State of Washington that the
12 foregoing is true and correct to the best of my knowledge and belief.

13
14 Dated this 22nd day of April, 2011.

15
16 
17 _____
18 Aaron M. Laing, Seattle, WA
19
20
21
22
23
24
25
26

Exhibit A

Exhibit A

White, Scott (Consultant)

From: White, Scott (Consultant)
Sent: Monday, February 14, 2011 10:59 AM
To: Radabaugh, David (EGY)
Subject: minimum wall height for regional path

Dave-

Per our conversation on Friday, the minimum safety standard wall height for a shared use pathway (bike and pedestrian) is 54 inches (4.5 feet).

I believe that was the only additional info you asked for, but if I missed something please let me know.

Thanks!

Scott

Scott White
Regulatory Compliance Manager
SR 520 Bridge Replacement and HOV Program
Washington State Department of Transportation
206-770-3632 direct | 206-770-3500 main | 425-345-7685 cell
600 Stewart Street, Suite 520 | Seattle, WA 98101

Visit us at our web site: <http://www.wsdot.wa.gov/projects/sr520bridge/>

Exhibit B

Exhibit B

White, Scott (Consultant)

From: Scott White [Scott.White@confenv.com]
Sent: Thursday, April 14, 2011 6:55 AM
To: White, Scott (Consultant)
Subject: FW: Draft Conditions - Not Yet Approved



Scott White | 425-345-7685
 Principal Environmental Planner, Partner
 www.confenv.com

From: Radabaugh, David (ECY) [mailto:DRAD461@ECY.WA.GOV]
Sent: Monday, February 14, 2011 11:24 AM
To: Scott White
Subject: Draft Conditions - Not Yet Approved

Draft Conditions:

1. The applicant hereby authorizes Ecology staff and their designates to have access to the subject property for the purposes of compliance inspection and monitoring. Such right of access shall begin from the date of the receipt of this letter, during construction, and extend for a period of five years following project completion. Ecology staff must provide reasonable verbal notice to the applicant or their designate prior to coming onto the site.
2. The connector trail identified in Notes 23 through 25 on Exhibit 32b shall be available for public access. Any access signage shall identify the bicycle trail as being available for public access. Note 27 on Exhibit 32b shall be eliminated. Condition 2 of the Hearing Examiner's decision shall be implemented as follows:

Privacy and safety concerns for the residents of Fairweather Basin Addition shall be respected by restricting visual access and eliminating physical access to the Fairweather Basin Addition from the regional bicycle/pedestrian trail.

David Radabaugh
 Regional Shoreline Planner
 Department of Ecology
 Northwest Regional Office
 3190 - 160th Avenue SE
 Bellevue, WA 98008-5452
 (425) 649-4260
david.radabaugh@ecy.wa.gov

Exhibit C

Exhibit C

White, Scott (Consultant)

From: Scott White [Scott.White@confenv.com]
Sent: Thursday, April 14, 2011 6:55 AM
To: White, Scott (Consultant)
Subject: FW: SR 520 Hunts Point Permit Approval Letter Attached
Attachments: image001.jpg; image002.jpg



CONFLUENCE
 ENVIRONMENTAL COMPANY

Scott White | 425.345.7685
 Principal Environmental Planner, Partner

www.confenv.com

From: Scott White
Sent: Tuesday, February 15, 2011 5:08 PM
To: 'Radabaugh, David (ECY)'
Subject: RE: SR 520 Hunts Point Permit Approval Letter Attached

Dave-

This email is confirm receipt of this permit. Thank you for doing it so quickly.

Scott:



CONFLUENCE
 ENVIRONMENTAL COMPANY

Scott White | 425.345.7685
 Principal Environmental Planner, Partner
www.confenv.com

From: Radabaugh, David (ECY) [mailto:DRAD461@ECY.WA.GOV]
Sent: Tuesday, February 15, 2011 4:56 PM
To: Scott White
Subject: SR 520 Hunts Point Permit Approval Letter Attached

Scott,

I am going to do this again. The email record dropped the attachments showing what this was all about

The purpose of this email is to provide you notice of the Department of Ecology approval of Shoreline Conditional Use Permit 147 and Shoreline substantial Development Permit 485. Your email receipt of this email will start the 21 day appeal period.

David Radabaugh
 Regional Shoreline Planner

Department of Ecology
Northwest Regional Office
3190 150th Avenue SE
Bellevue, WA 98008-5452
(425) 649-4260
david.radabaugh@ecy.wa.gov

*** eSafe1 scanned this email for malicious content ***
*** IMPORTANT: Do not open attachments from unrecognized senders ***

Exhibit D

Exhibit D

SmartZone Communications Center

mhgreen@comcast.net

± Font size -

SR 520 permits

From : David Radabaugh (ECY) <DRAD461@ECY.WA.GOV>
Subject : SR 520 permits
To : Mona Green <mhgreen@comcast.net>

Tue Feb 15 2011 5:04:05 PM

2 attachments

David Radabaugh
Regional Shoreline Planner
Department of Ecology
Northwest Regional Office
3190 - 160th Avenue SE
Bellevue, WA 98008-5452
(425) 649-4260
david.radabaugh@ecy.wa.gov

 Scott White_Department of Transportation_Town of Hunts Point Permit No. 10-04_Conditioned Shoreline
Conditional Permit No. 147_2-15-11.pdf
254 KB

 Scott White_Department of Transportation_Town of Hunts Point Permit No. 10-04_Approved_2-15-11.pdf
170 KB

Exhibit E

Exhibit E

SmartZone Communications Center

mhgreen@comcast.net

± Font size ±

RE: permit approval notice

From : Scott White (Consultant) <WhiteS@consultant.wsdot.wa.gov>

Wed Feb 23 2011 2:59:23 PM

Subject : RE: permit approval notice**To :** Mona Green <mhgreen@comcast.net>

Will that affect the timing of the appeal period?

From: Mona Green [mailto:mhgreen@comcast.net]**Sent:** Wednesday, February 23, 2011 2:49 PM**To:** White, Scott (Consultant)**Subject:** Re: permit approval notice

Hi Scott, It will be e-mailed and/or mailed to all parties of record tomorrow.

— Original Message —

From: "Scott White (Consultant)" <WhiteS@consultant.wsdot.wa.gov>**To:** "Mona Green" <mhgreen@comcast.net>**Sent:** Wednesday, February 23, 2011 11:57:46 AM**Subject:** Re: permit approval notice

Just to clarify, did that happen when the permit first came out?

Thanks,

Scott

On Feb 23, 2011, at 10:56 AM, "Mona Green" <mhgreen@comcast.net> wrote:

Scott,

I forwarded Dave's earlier message to the Town Administrator and requested that all parties of record be sent the two decisions.

Mona

— Original Message —

From: "Scott White (Consultant)" <WhiteS@consultant.wsdot.wa.gov>**To:** "Mona Green" <mhgreen@comcast.net>**Sent:** Wednesday, February 23, 2011 10:27:56 AM**Subject:** Fwd: permit approval notice

Mona-

Just to verify, did Hunts Point publish a notice?

Thanks,

Scott

Begin forwarded message:

From: "Radabaugh, David (ECY)" <DRAD461@ECY.WA.GOV>**Date:** February 23, 2011 8:30:13 AM PST**To:** "White, Scott (Consultant)" <WhiteS@consultant.wsdot.wa.gov>**Cc:** "Mona Green" <mhgreen@comcast.net>**Subject:** RE: permit approval notice

Scott,

Ecology notifies the applicant and the local government of a substantial development permit filing or a shoreline conditional use permit decision. Check out WAC 173-27-200(3), which states:

Local government shall provide timely notification of the department's final decision to those interested persons having requested notification from local government pursuant to WAC 173-27-130.

Ecology relies on the local government to notify parties of record.

David Radabaugh
Regional Shoreline Planner
Department of Ecology
Northwest Regional Office
3190 - 160th Avenue SE
Bellevue, WA 98008-5452
(425) 649-4260
David.Radabaugh@ecology.wa.gov

From: White, Scott (Consultant) [mailto:WhiteS@consultant.wsdot.wa.gov]
Sent: Tuesday, February 22, 2011 9:32 AM
To: Radabaugh, David (ECY)
Subject: permit approval notice

Dave-

Good morning! I hope you had a restful holiday weekend...

Question: Did Ecology post their conditional use approvals to notify the public of the 21 appeal period on your website?

Thanks!

Scott

Scott White
Regulatory Compliance Manager
SR 520 Bridge Replacement and HOV Program
Washington State Department of Transportation
206-770-3632 direct | 206-770-3500 main | 425-345-7685 cell
600 Stewart Street, Suite 520 | Seattle, WA 98101

Visit us at our web site: <http://www.wsdot.wa.gov/projects/sr520bridge/>

Exhibit F

Exhibit F

Sue Israel

pm: Sue Israel [suei@huntspoint-wa.gov]
Sent: Thursday, February 24, 2011 10:44 AM
To: 'MIKE KENYON'; 'Cade, Deborah (ATG)'; 'Whites@consultant.wsdot.wa.gov'; 'Babuca, Daniel'; 'arichardson@enviroissues.com'; 'ALaing@schwabe.com'; 'KWalter@muckleshoot.nsn.us'; 'Ken Fisher'; 'Stella Robertson'; 'Dunphy, Dennis'; 'Tedf@integrity.com'; 'Fred McConkey'; 'Jack McCullough'; 'Halsted, Jesse (Consultant)'; 'Peter Powell'; 'Jill Heijer'; 'gillyspencernzus@gmail.com'; 'gslotnik@comcast.net'; 'jesse@mhseattle.com'
Subject: FW: permit approval notice
Attachments: Scott White_Department of Transportation_Town of Hunts Point Permit No. 10-04_Approved_2-15-11.pdf; Scott White_Department of Transportation_Town of Hunts Point Permit No. 10-04_Conditioned Shoreline Conditional Permit No. 147_2-15-11.pdf

From: Jack McKenzie [mailto:jackm@huntspoint-wa.gov]
Sent: Wednesday, February 23, 2011 9:46 AM
To: Sue Israel
Subject: FW: permit approval notice

For distribution to parties of record (and other interested people).

From: Mona Green [mailto:mhgreen@comcast.net]
Sent: Wednesday, February 23, 2011 9:06 AM
To: Jack McKenzie
Subject: Fwd: permit approval notice

Jack,

The Ecology permit decisions will need to be mailed to the parties of record. Please see Dave Radabaugh's instructions below. I've attached the two decisions.

Mona

— Forwarded Message —

From: "David Radabaugh (ECY)" <DRAD461@ECY.WA.GOV>
To: "Scott White (Consultant)" <WhiteS@consultant.wsdot.wa.gov>
Cc: "Mona Green" <mhgreen@comcast.net>
Sent: Wednesday, February 23, 2011 8:30:13 AM
Subject: RE: permit approval notice

Scott,

Ecology notifies the applicant and the local government of a substantial development permit filing or a shoreline conditional use permit decision. Check out WAC 173-27-200(3), which states:

Local government shall provide timely notification of the department's final decision to those interested persons having requested notification from local government pursuant to WAC 173-27-130.

Ecology relies on the local government to notify parties of record.

David Radabaugh
Regional Shoreline Planner
Department of Ecology
Northwest Regional Office
3190 - 160th Avenue SE
Bellevue, WA 98008-5452
(425) 649-4260
david.radabaugh@ecy.wa.gov

From: White, Scott (Consultant) [<mailto:WhiteS@consultant.wsdot.wa.gov>]
Sent: Tuesday, February 22, 2011 9:32 AM
To: Radabaugh, David (ECY)
Subject: permit approval notice

Dave-

Good morning! I hope you had a restful holiday weekend...

Question: How does Ecology post their conditional use approvals to notify the public of the 21 appeal period? Do you simply put it on your website, or do you post in a newspaper as well?

Thanks!

Scott

Scott White
Regulatory Compliance Manager
SR 520 Bridge Replacement and HOV Program
Washington State Department of Transportation
206-770-3632 direct | 206-770-3500 main | 425-345-7685 cell
600 Stewart Street, Suite 520 | Seattle, WA 98101

Visit us at our web site: <http://www.wsdot.wa.gov/projects/sr520bridge/>

Exhibit G

Exhibit G

SmartZone Communications Center

mhgreen@comcast.net

± Font size ±

RE: Shoreline permit appeals period

From : Scott White (Consultant) <WhiteS@consultant.wsdot.wa.gov>

Wed Mar 9 2011 1:50:46 PM

Subject : RE: Shoreline permit appeals period**To :** Mona Green <mhgreen@comcast.net>, David Radabaugh <DRAD461@ECY.WA.GOV>

Mona and Dave-

I was actually concerned about his.

Dave, how do you want to handle the fact that WSDOT maintains the appeal period is over, per our communication with Ecology?

Scott

From: Mona Green [mailto:mhgreen@comcast.net]**Sent:** Wednesday, March 09, 2011 1:44 PM**To:** White, Scott (Consultant)**Cc:** David Radabaugh**Subject:** Re: Shoreline permit appeals period

Hi Scott,

Actually, the official end of the appeal period will be March 21. Ecology followed up with a certified, return receipt letter to the Town that arrived on 2/28. The Town was not aware that it was required to send out the Ecology notice to all parties, but once informed of this, the Town contacted all parties of record with the Ecology decision. So March 21 it is. I am not aware of any comments, either verbal or written, regarding an appeal.

Mona

*Mona Green
Hunts Point Town Planner
435.890.2197*

— Original Message —

From: "Scott White (Consultant)" <WhiteS@consultant.wsdot.wa.gov>**To:** "Mona Green" <mhgreen@comcast.net>**Sent:** Wednesday, March 9, 2011 1:38:34 PM**Subject:** Shoreline permit appeals period

Mona-

The shoreline permit appeals period expired yesterday. Did we receive any comments or appeals?

Thanks, and I hope all is well!

Scott

Scott White
Regulatory Compliance Manager
SR 520 Bridge Replacement and HOV Program
Washington State Department of Transportation
206-770-3632 direct | 206-770-3500 main | 425-345-7685 cell
600 Stewart Street, Suite 520 | Seattle, WA 98101

Visit us at our web site: <http://www.wsdot.wa.gov/projects/sr520bridge/>

Exhibit H

Exhibit H

RECEIVED

APR 15 2011

Schwabe Williamson
& Wyatt

BEFORE THE SHORELINE HEARINGS BOARD
FOR THE STATE OF WASHINGTON

PETER POWELL, individually, and
PATRICK A.T. JONES, individually,

and

FAIRWEATHER BASIN BOAT CLUB,
INC., a Washington corporation,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION, WASHINGTON
STATE DEPARTMENT OF ECOLOGY and
TOWN OF HUNTS POINT,

Respondents.

SHB NOS. 11-008 & 11-008

**ECOLOGY'S RESPONSES TO
PETITIONER FAIRWEATHER BASIN
BOAT CLUB'S INITIAL DISCOVERY
REQUESTS TO WSDOT, DOE AND
TOWN OF HUNTS POINT**

Per the telephonic prehearing conference of April 4, 2011, and consistent with WAC 461-08-410(11), Petitioner Fairweather Basin Boat Club, Inc. hereby submits the following limited discovery requests:

TO: Respondent, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, and Deborah L. Cade, WSBA # 18329;

TO: Respondent, WASHINGTON STATE DEPARTMENT OF ECOLOGY, and Laura J. Watson, WSBA # 28452;

AND TO: Respondent, TOWN OF HUNTS POINT, and Margaret King, WSBA #34866.

**RESPONSES TO PETITIONER FAIRWEATHER BASIN
BOAT CLUB'S FIRST DISCOVERY REQUESTS - 1**

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206.622.1711 Fax 206.292.0460

1 **RESPONSE:** No responsive documents.

2 **INTERROGATORY NO. 7:** Please identify the date and manner upon which you
3 first transmitted written notice of the Washington State Department of Ecology February 15,
4 2011 Conditioned Shoreline Conditional Use Permit 147 to any person:

- 5 a) The name, address and phone number of the specific person(s) who
6 received such notice;
- 7 b) The form of the notice (e.g., U.S. Mail, email, facsimile, etc.); and
- 8 c) Any confirmation you received that the person(s) to whom you
9 transmitted such notice received such notice.

10 **ANSWER:** Ecology transmitted the decision by U.S. Mail and email on February 15, 2011
11 to:

- 12 a) Scott White, 146 N. Canal Street, Suite 111,
13 Seattle, WA 98103, 206-397-3741.
- 14 b) U.S. Mail and email.
- 15 c) Email confirmation and return receipt confirmation.

16 Mona Greene was copied by U.S. mail.

17 **REQUEST FOR PRODUCTION NO. 6:** Please produce a copy of any and all
18 documents that mention, concern, relate to or support your answer to the preceding
19 Interrogatory.
20

21 **RESPONSE:** All responsive documents are being provided in electronic format.

22 **INTERROGATORY NO. 8:** Please identify the date and manner upon which you
23 first transmitted written notice of the Washington State Department of Ecology February 15,
24 2011 Shoreline Substantial Development Permit 485 to any person:

- 25 a) The name, address and phone number of the specific person(s) who
26 received such notice;

- 1 b) The form of the notice (e.g., U.S. Mail, email, facsimile, etc.); and
 2 c) Any confirmation you received that the person(s) to whom you
 3 transmitted such notice received such notice.

4 **ANSWER:** Ecology objects to this interrogatory because it erroneously assumes that
 5 Ecology issued or approved the substantial development permit. In fact, Ecology does not
 6 have an approval role for substantial development permits. Instead, Ecology provides
 7 written notice to the applicant that it has received the local government's decision on the
 8 substantial development permit.

9 Subject to and without waiving its objection, Ecology responds that it transmitted
 10 notice by U.S. Mail and email on February 15, 2011 to:

- 11 a) Scott White, 146 N. Canal Street, Suite 11,
 12 Seattle, WA 98103, 206-397-3741.
 13 b) U.S. Mail and email.
 14 c) Email confirmation and return receipt confirmation.

15 Monà Greene, 3000 Hunts Point Road, Hunts Point WA 98004, 425-890-2197, was
 16 copied by U.S. Mail.

17 **REQUEST FOR PRODUCTION NO. 7:** Please produce a copy of any and all
 18 documents that mention, concern, relate to or support your answer to the preceding
 19 Interrogatory.
 20

21 **RESPONSE:** All responsive documents are being provided in electronic format.

22 **INTERROGATORY NO. 9:** Please identify the date and manner upon which you
 23 first transmitted written notice of the Town of Hunts Point February 2, 2011 Shoreline
 24 Substantial Development Conditional Use Permit No. 10-04 to any Petitioner:
 25
 26

- 1 a) The name, address and phone number of the specific person(s) who
 2 received such notice;
- 3 b) The form of the notice (e.g., U.S. Mail, email, facsimile, etc.); and
- 4 c) Any confirmation you received that the person(s) to whom you
 5 transmitted such notice received such notice.

6 **ANSWER:** Ecology provides no response based on its understanding that Ecology
 7 need not respond to this interrogatory (per April 4, 2011, and April 5, 2011, e-mail exchange
 8 between Ecology's counsel and counsel for the Fairweather Basin Boat Club).

9 **REQUEST FOR PRODUCTION NO. 8:** Please produce a copy of any and all
 10 documents that mention, concern, relate to or support your answer to the preceding
 11 Interrogatory.

12 **RESPONSE:** No responsive documents.

13 **INTERROGATORY NO. 10:** Please identify the date and manner upon which you
 14 first transmitted written notice of the Washington State Department of Ecology February 15,
 15 2011 Conditioned Shoreline Conditional Use Permit 147 to any Petitioner:

- 16
- 17 a) The name, address and phone number of the specific person(s) who
 18 received such notice;
- 19 b) The form of the notice (e.g., U.S. Mail, email, facsimile, etc.); and
- 20 c) Any confirmation you received that the person(s) to whom you
 21 transmitted such notice received such notice.

22 **ANSWER:** Ecology did not transmit the letter to any petitioner.

23 **REQUEST FOR PRODUCTION NO. 9:** Please produce a copy of any and all
 24 documents that mention, concern, relate to or support your answer to the preceding
 25 Interrogatory.

CERTIFICATION OF COMPLIANCE WITH CR 26(g)

I certify that I have read the responses to the foregoing interrogatories and requests for production and to the best of my knowledge believe that those responses comply with the requirements of CR 26(g).

EXECUTED this _____ day of _____, 2011 at

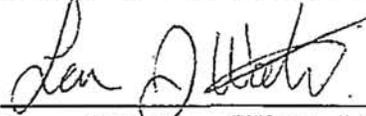
_____, Washington.

ATTORNEY GENERAL OF WASHINGTON.

Deborah L. Cade, WSBA # 18329
Attorneys for Respondent WSDOT

EXECUTED this 14 day of April, 2011 at Olympia, Washington.

ATTORNEY GENERAL OF WASHINGTON.



Laura J. Watson, WSBA # 28452
Attorneys for Respondent WDOE

EXECUTED this _____ day of _____, 2011 at

_____, Washington.

KENYON DISEND, PLLC.

Margaret J. King, WSBA #34866.
Attorneys for Respondent Town of Hunts Point

VERIFICATION

STATE OF WASHINGTON)
COUNTY OF King) ss.

GEOFF TALLENT, having been first duly sworn upon oath, deposes and says: That he/she is a representative of the Defendant, that he/she has read the within and foregoing answers and responses to Petitioner Fairweather Basin Boat Club Inc.'s First Discovery Request, that he/she knows the contents thereof, and that he/she believes the same to be true.

DATED this 14th day of April, 2011.

[Signature]
GEOFF TALLENT [Print Name]
Respondent, SHORELANDS SECTION MANAGER [Title]

SUBSCRIBED AND SWORN to before me this 14 day of April, 2011.

[Signature]
Susanne M Winter [Print Name]

NOTARY PUBLIC in and for the State of Washington
Residing at King Co., WA.
My commission expires December 19, 2012.



Exhibit I

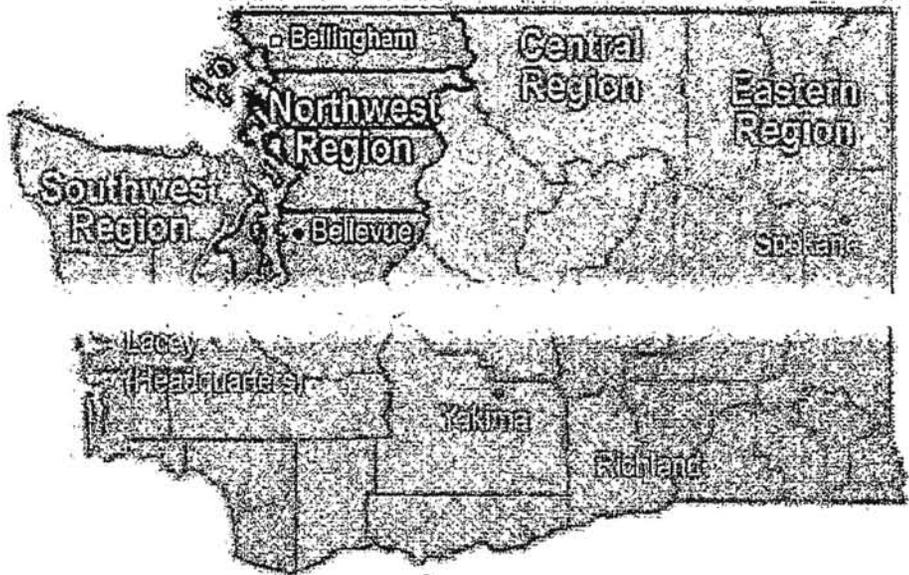
Exhibit I

[Ecology home](#) > [About Us](#) > [Contact Us](#) > [Directory](#) > Northwest Regional Office

Directory - Northwest Regional Office

(Island, King, Kitsap, San Juan, Skagit, Snohomish, and Whatcom counties)

Report a spill: 1-425-649-7000



3190 - 160th Ave. SE
Bellevue, WA 98008-5452

Information and receptionist:
425-649-7000

FAX number:
425-649-7098

Office hours:
8 AM - 5 PM

Persons with hearing loss can call 711 for Washington Relay Service.
Persons with a speech disability can call 877-833-6341.

(Local map and driving instructions)

Northwest Regional Office

Director	<u>Jeannie Summerhays</u>	425-649-7010
Communications Manager	<u>Larry Altose</u>	425-649-7009
Public Records / Public Disclosure Coordinator	<u>Sally Perkins</u>	425-649-7190
Regional Business Administrator	<u>Susanne Winter</u>	425-649-7011

Air Quality	<u>Doug Brown</u>	AP - 122	425-649-7082
Hazardous Waste & Toxics Reduction	<u>Julie Sellick</u>		425-649-7053
Shorelands & Environmental Assistance	<u>Geoff Tallent</u>		425-649-7096
Solid Waste & Financial Assistance	<u>Peter Christiansen</u>		425-649-7076
Spills	<u>Howard Zorzi</u>		425-649-7130
Toxics Cleanup	<u>Bob Warren</u>		425-649-7054
Water Resources	<u>Jacque Klug</u>		425-649-7270
Water Quality	<u>Kevin Fitzpatrick</u>		425-649-7033
Bellingham Field Office			
Manager	<u>Richard Grout</u>		360-715-5200
Communications Manager	<u>Katie Skipper</u>		360-715-5205
Spills	Receptionist		360-715-5200

1440 - 10th Street, Suite 102
 Bellingham, WA 98225
 ([local map and driving instructions](#))

FAX: 360-715-5225

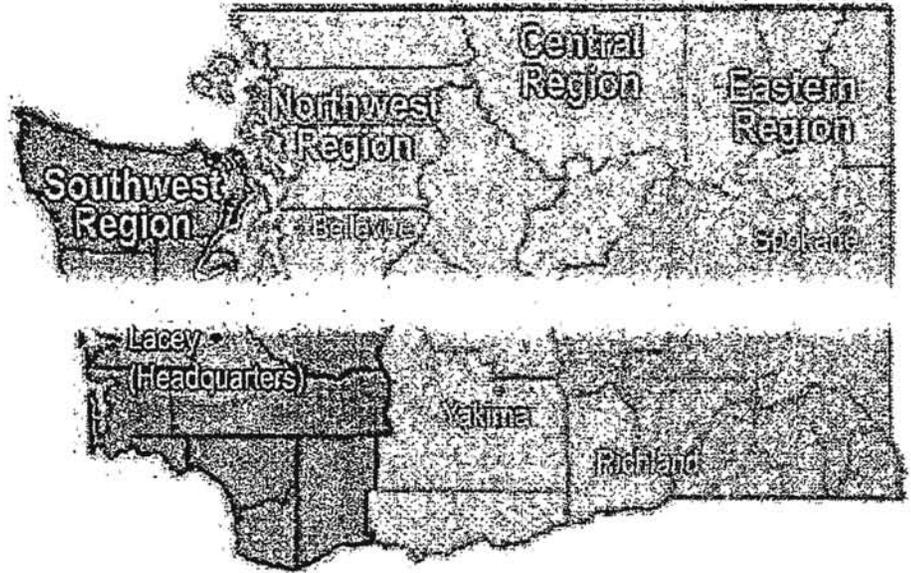
Note: For a listing of all staff at any of the above locations, go to the [Ecology Directory](#) and Search using the **City** as the search criterion.

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[Ecology home](#) > [About Us](#) > [Contact Us](#) > [Directory](#) > Headquarters Office

Directory - Headquarters Office

(All counties)



Mailing address:
 PO Box 47600
 Olympia, WA 98504-7600

Physical address:
 300 Desmond Drive SE
 Lacey, WA 98503

Information and receptionist:
 360-407-6000

FAX number:
 360-407-6989

Office hours:
 8 AM - 5 PM

Persons with hearing loss can call 711 for Washington Relay Service.
 Persons with a speech disability can call 877-833-6341.

(Local map and driving instructions)

Ecology Headquarters

Ecology Director	<u>Ted Sturdevant</u>	360-407-7001
Deputy Director	<u>Polly Zehm</u>	360-407-7011
Special Assistant - Climate Change	<u>Janice Adair</u>	360-407-0291

Special Assistant - Puget Sound	<u>Josh Baldi</u>	AP - 124	360-407-6829
Special Assistant - Water Resources	<u>Evan Sheffels</u>		360-407-7015
Senior Advisor - Tribal & Environmental Affairs	<u>Tom Laurie</u>		360-407-7017
Director of Office of Columbia River	<u>Derek Sandison</u>		509-457-7120
Director of Governmental Relations	<u>Karen Terwilleger</u>		360-407-7003
Director of Communication and Education	<u>Dave Workman</u>		360-407-7004
Director of Human Resources	<u>Chris Parsons</u>		360-407-6218
Chief Financial Officer Budget Info	<u>Patricia McLain</u>		360-407-7005
Director of Administrative Services	<u>Carol Fleskes</u>		360-407-7012
Environmental Programs			
Air Quality Program Manager Program Contacts (Email link)	<u>Stu Clark</u>		360-407-6880
Environmental Assessment Program Manager Program Contacts	<u>Rob Duff</u>		360-407-6699
Laboratory (local map and driving instructions) 7411 Beach Drive East, Port Orchard, WA 98366-8204			360-871-8800
Laboratory Accreditation Unit P.O. Box 488, 2350 Colchester Drive, Manchester, WA 98353-0488			360-895-6145
Hazardous Waste & Toxics Reduction Program Manager Program Contacts	<u>K Seiler</u>		360-407-6702
Nuclear Waste Program Manager Program Contacts	<u>Jane Hedges</u>		509-372-7905
Also see Richland Field Office			
Shorelands & Environmental Assistance Program Manager Program Contacts	<u>Gordon White</u>		360-407-6977
Padilla Bay National Estuarine Research Reserve Breazeale-Padilla Bay Interpretive Center 1043 Bay View-Edison Road, Mt. Vernon WA 98273			360-428-1558

Spills Program Manager
| [Program](#) | [Report a Spill](#) |

[Dale Jensen](#)

AP - 125

360-
407-
7450

Toxics Cleanup Program Manager
| [Program](#) | [Contacts](#) |

[Jim Pendowski](#)

360-
407-
7177

Waste 2 Resources Program Manager
| [Program](#) | [Contacts](#) |

[Laurie Davies](#)

360-
407-
6103

Water Quality Program Manager
| [Program](#) | [Contacts](#) |

[Kelly Susewind](#)

360-
407-
6405

Water Resources Program Manager
| [Program](#) | [Contacts](#) |

[Ken Slattery](#)

360-
407-
6602

Contact Us

We are committed to improving communication with the public. We respond to inquires from the public by e-mail, as well as by telephone and postal mail. In this age of convenience, it is even more important that the information and resources we provide are useful.

Answers to your questions

Find answers to frequently asked questions . Check out our Traffic Team page for answers to traffic questions in your area.

WSDOT programs and services

Find a listing of contacts and Web sites for the most commonly requested programs and services.

WSDOT offices

Find addresses and phone numbers for our offices .

WSDOT employees

Find the phone number or e-mail address for a WSDOT employee .

Feedback to us

- General questions , comments, compliments or complaints
- Web site questions or comments
- Washington State Ferries questions
1-888-808-7977 or 206-464-6400
- *Good To Go!* questions
1-866-936-8246
- WSDOT Headquarters Receptionist
360-705-7000
Staffed 8 a.m.-5 p.m., Monday-Friday except state holidays
- WSDOT Headquarters Customer Service
hqcustomerservice@wsdot.wa.gov
360-705-7438
- WSDOT Headquarters Mailing Address
Washington State Department of Transportation
310 Maple Park Avenue SE
P.O. Box 47300
Olympia, WA 98504-7300

Persons who are hard of hearing may call Washington State Telecommunications Relay Service (TTY) at 711.

[⏪](#) Back to top

Exhibit J

Exhibit J



Contact Us

Last Update: 18 February 2010

AP - 128

Town Hall Hours of Operation:

Monday - Thursday 8am -noon, 1pm -5pm

Friday Closed

Contact Information:

Telephone 425-455-1834

Postal Address 3000 Hunts Point Road
Hunts Point, WA 98004-1121

FAX 425-454-4586

E-Mail [Town Hall](#)

Town Council

Boards and Commissions

Permit Center Building Dept Zoning Map

Laws & Regulations Municipal Code

History

General Info Newsletters What's New New Town Hall Clean Up Day 84th Ave Lid Zip Code

Lookup FAQs

Emergency Preparedness

Block Watch General Info Medina PD Info

Proposed Tree Ordinance

Wetherill Nature Preserve

Home

Contact Us

Town Hall Staff:

Town Administrator [Jack McKenzie](#)

Deputy Clerks [Sue Israel](#)
[Sue Ann Spens](#)
[Linda Longmire](#)

Police Chief [Jeff Chen](#)
425-454-1332

Building Official/ [Steve Wilcox](#)
Building Inspector (contact through Town Hall)

Town Planner [Mona Green](#)
(contact through Town Hall)

Town Engineer [Joe Willis](#)
(contact through Town Hall)

Town Arborist [Scott Baker](#)
(contact through Town Hall)

Town Attorney [Mike Kenyon](#)

2.45.010

Chapter 2.40

BOARD OF ADJUSTMENT

(Repealed by Ord. 407)

Chapter 2.45

OFFICE HOURS

Sections:

2.45.010 Town Hall office hours.

2.45.010 Town Hall office hours.

Town Hall shall remain open for the transaction of business Monday through Thursday, from 8:00 a.m. to 12:00 p.m., and from 1:00 p.m. to 5:00 p.m. Town Hall shall be closed Friday, Saturday and Sunday. [Ord. 470 § 1, 2008; Ord. 443 § 1, 2005; Ord. 420 § 1, 2003; Ord. 389 § 1, 2001]

Exhibit K

Exhibit K



Rob McKenna
ATTORNEY GENERAL OF WASHINGTON

Ecology Division

2425 Bristol Court SW 2nd Floor • Olympia WA 98502

PO Box 40117 • Olympia WA 98504-0117 • (360) 586-6770

April 6, 2011

Marianne K. Jones
 Jones Law Group, PLLC
 11819 NE 34th Street
 Bellevue, WA 98005

Deborah L. Cade
 Transportation & Public Construction Division
 P.O. Box 40113
 Olympia, WA 98504-0113

Dennis J. Dunphy
 Aaron M. Laing
 Schwabe, Williamson & Wyatt
 1420 5th Avenue, Suite 3400
 Seattle, WA 98101

Margaret King
 Michael Kenyon
 Kenyon Disend, PLLC
 11 Front Street
 Issaquah, WA 98027-3820

RE: *Powell, et al. v. Town of Hunts Point, et al.*
 SHB Nos. 11-007 & 11-008

Dear Counsel:

This confirms the agreement by the parties that documents filed in the above-referenced matter will be served on the parties by electronic mail.

For purposes of official service on Ecology and Transportation, please serve all documents at the following office email addresses:

ECYOLYEF@ATG.WA.GOV
TPCEF@ATG.WA.GOV

Please also serve the following email addresses:

Laura.Watson@atg.wa.gov
 DeborahC@atg.wa.gov

TanyaR@atg.wa.gov
 JennahW@atg.wa.gov

The e-mail addresses I have for each of you are:

margaretk@kenyondisend.com
 alaing@schwabe.com
 mlaw@joneslawgroup.com

mike@kenyondisend.com
 ddunphy@schwabe.com

Please let me know immediately if you have a different understanding of the agreements described in this letter or if the email address listed for you is incorrect.

Sincerely,

LAURA J. WATSON
 Assistant Attorney General
 (360) 586-4614

Exhibit L

Exhibit L

Pollution Control Hearings Board
Shorelines Hearings Board



Telephone: (360) 664-9160
FAX: (360) 586-2253
Email: eho@eho.wa.gov
Website: www.eho.wa.gov

STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

Mailing Address: PO Box 40903, Olympia, WA 98504-0903

Physical Address: 1111 Israel Rd. SW, Tumwater, WA 98501

March 17, 2011

Marianne Jones
Jones Law Group PLLC
11819 NE 34th St
Bellevue WA 98005

Dennis Dunphy/Aaron Laing
Schwabe, Williamson & Wyatt
1420 5th Ave Ste 3400
Seattle WA 98119

Mary Sue Wilson
Sr. Asst. Attorney General
Ecology
PO Box 40117
Olympia WA 98504-0117

Daniel Babuca
WSDOT
600 Stewart St Ste 520
Seattle WA 98101

Margaret King
Kenyon Disend PLLC
11 Front St S
Issaquah WA 98027-3820

RECEIVED

MAR 21 2011

SCHWABE, WILLIAMSON & WYATT

Re: SHB Nos. 11-007 and 11-008\
**PETER POWELL; PATRICK A.T. JONES; FAIRWEATHER BASIN BOAT
CLUB, INC. v. TOWN OF HUNTS POINT; WSDOT; EOCLOGY**

Dear Parties:

This letter explains the initial process for the appeals filed with the Shorelines Hearings Board on March 14, 2011.

Pre-Hearing Conference April 4, 2011, at 9:30 a.m. *(If this date or time poses a problem, please confer with the other parties and contact Ms. Debbie Joblonski of our office to reschedule).* The presiding officer will conduct the Pre-Hearing Conference to discuss the legal issues and establish the schedule for the appeal. By March 31 you must file an original and one (1) copy of your proposed legal issues and preliminary lists of witnesses and exhibits with the Board. You must also serve these lists on the other parties in the case. You may file these lists by fax, but they must be mailed on the same day.

To participate in the pre-hearing conference you will need to call the following telephone number and enter the pin code:

Telephone Number 1-800-704-9804
Pin Code 24917864#



SHB Nos. 10-007 & 10-008
March 17, 2011
Page 2

After the Pre-Hearing Conference, the presiding officer will issue a Pre-Hearing Order that will govern the remainder of the appeal.

Hearing Dates **July 20-22, 2011**

The hearing is a formal, trial-like proceeding at which parties present their case through opening statements and closing arguments, questioning of witnesses, introduction of exhibits, and the offer of other relevant evidence.

Hearing Location

The location for the hearing has been tentatively set for 9:00 a.m. in the Board's hearing room in Tumwater, Washington. Another location can be discussed at the pre-hearing conference with consideration given to finding a central, easily accessible location for all parties.

Settlement

The Board encourages the parties to explore informal resolution of this appeal. The parties should contact each other early in the appeal process to discuss settlement and inform the Board in writing of the status of settlement possibilities by **June 20, 2011**.

Mediation

The Environmental Hearings Office provides free mediation services by a trained mediator to assist parties with their settlement efforts. Material describing Board-sponsored mediation is enclosed for your review. If you are interested in pursuing mediation, please contact the Environmental Hearings Office at 360-664-9160.

Procedural Assistance

The Environmental Hearings Office also offers free procedural assistance to parties to help them understand the requirements of the appeal process. If you would like procedural assistance, please call 360-664-9160 and your request will be directed to the appropriate person.

Interpreters and Reasonable Accommodations

If a party or a necessary witness requires an interpreter, or qualifies for reasonable accommodation as an individual with disabilities, that person must notify the presiding officer at least three weeks before the hearing or any other part of the proceedings for which they seek assistance.

SHB Nos. 10-007 & 10-008

March 17, 2011

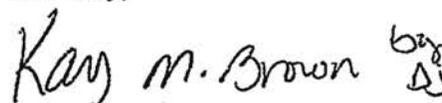
Page 3

Further Information on the Appeal Process

Enclosed is an informational brochure about the Shorelines Hearings Board. This information can also be found on our website at <http://www.eho.wa.gov>. Also on our website are *The Environmental Hearings Office Handbook, Sample Forms*, and prior Board decisions (under EHO Decisions). The Board's procedural rules are in the Washington Administrative Code.

If you have questions about any of the above, please call the Environmental Hearings Office staff at 360-664-9160.

Sincerely,

Handwritten signature of Kay M. Brown in cursive, with initials "b" and "DJ" written to the right.

Kay M. Brown
Administrative Appeals Judge, Presiding

KMB/dj/S11-007 & 11-008

Enc.

Cc: Don Bales, Ecology
Town of Hunts Point

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through State Consolidated Mail Services to the attorneys of record herein.

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

DATED March 17, 2011, at Tumwater, WA.

Handwritten signature in cursive, appearing to be the name of the certifier.

WASHINGTON STATE SHORELINES HEARINGS BOARD
ENVIRONMENTAL HEARINGS OFFICE

Physical address:

Environmental Hearings Office
1111 Israel Rd. SW, Ste 301
Tumwater WA 98501

RECEIVED

MAR 21 2011

SCHWABE, WILLIAMSON & WYATT

Web Address: <http://www.eho.wa.gov>E-Mail: eho@eho.wa.govMailing address:

Environmental Hearings Office
PO Box 40903
Olympia WA 98504-0903

"Your Right To Be Heard"

Board Members

Andrea McNamara Doyle, Chair
William H. Lynch, Member
Kathleen D. Mix, Member
Simon Kihia, Designee, Commissioner of Public Lands
Tim Farrell, Representative, Washington Association of Counties
Mary Alice Burleigh, Representative, Association of Washington Cities

Administrative Appeals Judges

Phyllis K. Macleod
Kay Brown

Hearings Coordinator

Debbie Joblonski

Administrative Assistant

Robyn Bryant

Secretary

Janet Buechler

This is your informal guide to your rights and responsibilities in an appeal. It is not exclusive and does not have force and effect of state law or regulation. More detailed information is contained in the Washington Administrative Code WAC 461-08 and the Shorelines Management Act, RCW 90.58, which can be accessed through the Environmental Hearings Office website: <http://www.eho.wa.gov>. For more detailed information, please open up on the web page the *Environmental Hearings Office Handbook* and the *Sample Forms*. ALTERNATE FORMAT AVAILABLE UPON REQUEST.

YOUR RIGHT TO BE HEARD

The Shoreline Management Act, (SMA) Chapter 90.58 RCW, which was adopted by a vote of the people, provides for the management of development along the state's shorelines. Local government administers and issues shoreline substantial development, conditional use, and variance permits. Approvals by local government of shoreline conditional use and variance permits must be reviewed by the State Department of Ecology (Ecology), which then issues the final decision. Local government and/or Ecology can also issue fines, which may include regulatory orders under the Shoreline Act.

The Shorelines Hearings Board (Board) hears appeals (which are called petitions for review) from these permit decisions, and from those shoreline penalty orders jointly issued by local government and Ecology, or issued by Ecology alone.

The Board's sole function is to give you, and all other litigants in a disputed matter, an opportunity for a full and complete hearing, as promptly as possible, followed by a fair and impartial written decision based on the facts and the law.

The Shoreline Management Act created this independent, quasi-judicial Board to give you an opportunity to appeal a shoreline permit or penalty. The Board is an independent agency, not affiliated with any other state government, regulatory agency, or local unit of government.

Three of the Shorelines Hearings Board members are full time employees, appointed by the governor and confirmed by the senate. At least one member is an attorney. The full-time members also serve as the Pollution Control Hearings Board. The three other members of the Shorelines Hearings Board, who serve part time are: (1) the State Land Commissioner or designee, (2) a representative from the Washington State Association of Counties, and (3) a representative from the Association of Washington Cities.

In petitions for review involving a single family residence or certain structures serving a single family residence, or in other cases designated by the Chair of the Board, the case may be heard by a panel of three board members, at least one and not more than two of whom shall be members of the Pollution Control Hearings Board.

DO YOU NEED AN ATTORNEY?

An attorney may represent you, but the law does not require one. Consider this very carefully before deciding to represent yourself. The appeal process can be complicated and significant rights may be at stake. The hearings are conducted more like court trials, instead of city council meetings.

WHEN TO FILE A PETITION FOR REVIEW

The deadline for filing your petition for review with the board varies according to the type of permit or government action you are appealing.

SHORELINES PERMITS: If you are appealing the grant, denial, or rescission of a shorelines permit of any type, your petition must be filed within 21 days of the "date of receipt" as defined in RCW 43.21B.001. The "date of receipt" is the trigger date for when the twenty-one day appeal period begins to run. It is important to recognize that the "date of receipt" varies according to the type of permit you are appealing.

If you want to appeal a local government's decision approving, denying, or rescinding a substantial development or a local government's denial of a variance or conditional use, the "date of receipt" is the date that the applicant receives written notice from Ecology that it has received the local government's decision.

If you want to appeal a conditional use or variance permit which has been approved by a local government, and either approved or denied by Ecology, the "date of receipt" is the date the local government or applicant actually receives Ecology's written decision.

Where a project involves both a substantial development and a conditional use or variance permit, the latest applicable date of receipt may be used in filing the petition for review.

For example:

If you are appealing a substantial development (either approved or denied) and a locally approved conditional use or variance permit, the "date of receipt" for both permit appeals is the conditional use/variance date; i.e., the date that Ecology transmits its final decision or order on the conditional use or variance permit to the local government or applicant.

However, if you are appealing a substantial development (either approved or denied) and the local government denial of a conditional use permit or variance permit, the "date of receipt" for both permits is the date the local government or applicant actually receives Ecology's written decision.

SHORELINE PENALTIES: If you are appealing a penalty assessed against you, your appeal must be filed with the board within thirty (30) days of the date you actually receive the penalty notice.

FOR ANY TYPE OF APPEAL: In preparing any appeal for the Board, it is important to refer to the statute that authorizes the appeal, sets the appeal deadline, and sets forth other requirements. For shoreline permit appeals, please refer to RCW 90.58.180. For shoreline penalty appeals, please refer to RCW 90.58.210.

WHERE AND HOW TO FILE A PETITION FOR REVIEW

No fee is required for filing an appeal.

Your appeal must be filed with EACH of the following parties:

The original with

- Shorelines Hearings Board

Physical address:

1111 Israel Rd. SW, Ste 301
Tumwater, WA 98501

Mailing address:

PO Box 40903
Olympia WA 98504-0903

Within seven days of filing any petition for review with the Board pertaining to a decision of local government the petitioner shall SERVE copies of the petition on:

- State Department of Ecology, 300 Desmond Drive PO Box 47600 Olympia, WA 98504-7600
- State Attorney General, Ecology Division, 2425 Bristol Court SW 2nd Floor., PO Box 40117, Olympia, WA 98504-0117
- the local government making the decision.

The petition should also be served on:

- the permit applicant, if you are not the applicant.

Service on all parties shall be by personal service or by mail. Service by mail is effective on the date of mailing; however, filing with the Board is only effective on actual receipt by the Board.

CONTENT OF THE PETITION FOR REVIEW

You need to supply the Board, in writing, with:

- A copy of local government's and/or Ecology's final decision on the permit (or a copy of the penalty order).
- A copy of the shoreline permit application.
- Your name and address (mailing and legal, if different) and, if applicable, the name and address of your representative.
- A daytime phone number.
- A brief statement why you are appealing.
- The relief you seek.
- A statement, signed by you or your representative, attesting the content of the petition is true.

Whenever you write to the Board, you have to send a copy to the other parties, and show this on your letter, such as by a "cc." If you want to talk with the Board, the other litigants should be present or on the

telephone. The Board members and presiding officers act as judges and are not allowed to hear from one side only.

IF YOUR PERMIT HAS BEEN APPEALED

Perhaps you have been granted a shoreline development permit by local government, but another party has appealed. You have a right to defend the permit and are automatically a respondent in the appeal before the Board. All subsequent sections in this publication apply to you as well as to the petitioner.

HEARING DATES

When a petition for review is filed, the Board will assign a date for hearing the case. The Board's calendar is crowded and litigants have to wait their turn for a hearing. The Board typically takes a site visit of the permit site on the first day. If more than one hearing day is required, the hearing is likely to be continued in the Board's office.

THE PRE-HEARING CONFERENCE

Soon after the appeal is filed, the pre-hearing conference is scheduled with the Presiding Officer. The conference is usually held within 4-6 weeks of the filing of the petition for review, and is generally conducted by telephone. The scheduling letter will provide you with a phone number and pin code for you to call in for the pre-hearing conference at the designated time. This conference is not for the purpose of arguing your case. The conference has three purposes: to discuss interest in settlement, including use of the Board's no-cost mediation program, to determine the legal issues, and to set a schedule for preparing the case for hearing if settlement is not reached. Prior to the pre-hearing conference each party is required to submit a preliminary list of legal issues, proposed witnesses and exhibits. After the pre-hearing conference, a written pre-hearing order will be mailed to the parties. It will include the hearing date, the list of legal issues, hearing preparation deadlines, and other important procedural information.

CAN THIS DISPUTE BE SETTLED?

Litigation is time and energy-consuming for the parties. Each party needs to think about possible compromise. For settlement to be reached, each side needs to offer something. Parties are encouraged to begin settlement talks, without waiting for Board participation.

The Board also has a no-cost mediation program to assist parties in reaching settlement. It is a voluntary program offered to the parties without charge. All parties must agree to mediate before a mediation can be scheduled. A trained Administrative Appeals Judge will work with the parties to resolve the case.

If the parties settle directly or through mediation, a written document containing the settlement terms will ultimately be signed by all, and filed with the Board, which will dismiss the appeal if the settlement conforms to the law.

BEFORE THE HEARING

Before the hearing you will want to prepare. You have the right to review the agency's file of their decision. Contact it to arrange a time and place to see the file.

You and the other parties have the right to find out in advance what witnesses and other evidence will be used at the hearing. This may be provided to you without formal procedures, such as by telephone, email, regular mail, or by looking at public records. If done formally, this discovery is best accomplished with the assistance of a lawyer. Examples of formal discovery are: **Deposition**-questioning witnesses before the hearing, under oath with a court reporter present. **Interrogatory**-presenting written questions to the other side. There are formal rules applying to discovery. These are described or referenced in the Board's regulations.

MOTIONS

Any party may file a motion. A motion is a request by one of the parties asking the Board, or the Presiding Officer to rule on a particular issue.

A motion may be dispositive or non-dispositive. A dispositive motion may be based on an issue or issues, or the whole case. A non-dispositive motion is a request for relief, which does not decide an issue or issues or the whole case. An example of a non-dispositive motion is a

motion in limine. A motion in limine asks the Board, in advance of the hearing to exclude certain evidence. Dispositive motions are decided by the full Board. An example of a dispositive motion is a motion for summary judgment. A motion for summary judgment is typically based on sworn statements of fact from a person having personal knowledge of the facts alleged. A sworn statement may be either a declaration or an affidavit. An example of a declaration may be found on our website at <http://www.cho.wa.gov>. After you have opened to the home page, click on the "Forms" button on the left side of the page then on "EHO Samples and Forms."

A declaration or affidavit may also identify and attach documents as exhibits. This is the format of the declaration contained in the sample forms on the website.

Dispositive Motions

The scheduling of dispositive motions is set forth in the pre-hearing order. Please file with the Board an original and sufficient copies of the dispositive motion for each Board member and the Presiding Officer, if the Presiding Officer is not a Board member. A copy should be served simultaneously on the date the motion is filed, on each party in the case.

Any party opposing the motion will typically have 14 days from the day it received the motion, to file an original and the requisite copies of a response with the Board, and serve a copy on each of the other parties. The moving party generally will have 10 days from the date it receives the response, to file an original and the requisite copies of a reply with the Board, and serve a copy on each of the other parties. Any party may request an oral hearing from the Presiding Officer on the motion. The Presiding Officer determines whether to grant or deny the request. If the request is granted, the parties will typically personally appear and present their oral argument to the Board at its hearing room in Tumwater, Washington.

Non-dispositive Motions

The deadlines for responding and replying to non-dispositive motions will generally be shorter than the above deadlines for dispositive motions. Additionally, most non-dispositive motions will be reviewed and decided solely by the Presiding Officer. In those situations, the parties

need only supply an original and one copy of the pleadings to the Board.

HEARING

At the hearing, it is important to be on time. A party's failure to appear may result in default.

You will have your full opportunity to present your side of the case, but there is a judicial procedure to be followed, so all sides can be heard in an orderly manner.

The Presiding Officer for the Board manages the proceedings. A court reporter will record what is said. The petitioner usually has the obligation to present its case first. Then, the respondent will present its case. In a penalty case, the agency assessing the penalty is required to present its case first.

Each side has the right to make an opening statement, briefly outlining what its evidence will be. After the opening statements, the parties with the burden of proof will present its evidence. In a penalty or regulatory action, the agency has the burden of proof and will call witnesses first. In a permit appeal, the appealing party has the burden of proof and presents its witnesses first at the hearing. Next, the Board and parties may conduct a site visit. Parties are requested to limit communication with the Board during the site visit. It is appropriate to point out physical landmarks, to help the Board later, at the hearing, but a court reporter is not present during the site visit, and it is not the time to present evidence or argue your case.

After the site visit, we return to the hearing. Witnesses who are sworn to tell the truth, testify from their personal knowledge in response to questions from the party calling them to testify. After this direct testimony, the witness answers questions asked by the other parties during "cross-examination." The Board members may also ask questions.

Persons essential to your case need to be present at the hearing to testify as witnesses. The "hearsay" rule prevents you from testifying for them or relating what they know or what they have said. Parties with important knowledge are to be sworn and testify themselves.

Exhibits, such as letters, maps, etc. may be offered as evidence. Before the hearing, number your exhibits and prepare an exhibit list. At the hearing, you will need to have the original and copies for each

member of the Board, the Presiding Officer, if not a Board member, and for the other parties. If you have multiple exhibits, please place them in a binder.

After all the evidence has been presented, litigants can summarize their arguments in closing statements. The record is then closed and the hearing ends.

THE BOARD'S DECISION

The Board will deliberate on the testimony, exhibits, and final arguments, before issuing a written decision.

The written decision called "Findings of Fact, Conclusions of Law, and Order" is prepared and mailed to all litigants. With certain exceptions, decisions on cases must be issued within 180 days of the filing date.

YOU MAY APPEAL THE FINAL ORDER

The Board's decision may be appealed to superior court within 30 days from the date the **ORDER** is mailed, or you may file a petition with the Board for a reconsideration within 10 days of the mailing of the **ORDER**. You may appeal the Board's final actions on a petition for reconsideration within 30 days from the date the order is mailed. Please note, if the Board fails to act on the petition within 20 days of its filing, it is deemed denied. In certain cases raising urgent statewide or regional issues or involving significant precedential matters, a procedure for direct review by the Court of Appeals may be available.

FREQUENTLY USED TERMS

BOARD: The Washington State Shorelines Hearings Board.

DISMISSAL: Dismissal is an order entered by the Board terminating the appeal, canceling the hearing, and ending the Board's consideration of the case.

DISPOSITIVE MOTION: Motions concerning matters that are central to the case (such as a motion for summary judgment or a motion to dismiss) are called "dispositive" motions because they can "dispose of" (or end), all or part of the appeal.

ECOLOGY: The Washington State Department of Ecology.

INTERVENOR: A third party asking to be heard in an appeal.

PARTY: A person who is an appellant, respondent, or intervenor.

PERSON: An individual, partnership, corporation, association, organization, governmental subdivision, agency, or entity of any character.

PETITION FOR REVIEW: An appeal of a shoreline permit decision by Ecology or the local government, or an appeal of a civil penalty issued by Ecology, or jointly by Ecology and the local government.

PETITIONER: A person or entity bringing the appeal.

PRESIDING OFFICER: A member of the Board or an Administrative Appeals Judge who is assigned to conduct a conference or hearing by the chair or vice-chair.

RESPONDENT: A person or entity on the other side of the dispute from the petitioner.

SHORELINES OF THE STATE: Includes saltwater areas of the state, reservoirs, streams with more than 20 cubic feet per second of mean annual flow, lakes equal to or greater than 20 acres in size, and their associated wetlands.

STIPULATION: An agreement between the parties.

SUBSTANTIAL DEVELOPMENT: Any development where the total cost or fair market value is greater than \$5000, or which materially interferes with the normal public use of the water or shorelines of the state.

The Environmental Hearings Office does not discriminate in employment or any of its services against persons with disabilities, and will make reasonable accommodations for any citizen who needs assistance to participate in our hearings or other activities. At least 10 days advance notice is needed to provide special accommodation services. If a party or a witness requires an interpreter, or qualifies for reasonable accommodations, that person shall notify the presiding officer at least three weeks before the hearing or situation for which assistance is needed.

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SCHWABE, WILLIAMSON & WYATT

ENVIRONMENTAL HEARINGS OFFICE

Mediation Program

The Shorelines Hearings Board, Pollution Control Hearings Board, and the Forest Practices Appeals Board believe that mediation can help parties reach consensual resolution of many cases coming before the Boards. Settlement early in the case can provide a cost effective and flexible way to resolve disputes to the satisfaction of all concerned.

Mediation at the Environmental Hearings Office

Mediation is assisted negotiation. It is a voluntary process in which an impartial, neutral party helps the parties negotiate a solution that is acceptable to them. The mediator does not render a decision, as does an arbitrator in an arbitration process and the mediator has no authority to impose a settlement.

The Environmental Hearings Office mediation program provides mediating services free of charge on cases pending before the Boards. The mediation program uses trained and experienced Administrative Appeals Judges from the Office as mediators. The discussions with the mediator are strictly confidential and will not be shared with any member of the Board or the Presiding Officer. If the mediation does not resolve all of the issues in the case, the mediator will take no part in any further proceedings.

Selecting Cases

As each case is reviewed, the Presiding Officer will make an initial assessment as to whether mediation may be appropriate. A number of factors will guide the Presiding Officer in making this initial determination. If the Presiding Officer considers mediation appropriate, the issue will be raised at the Pre-hearing Conference to see if the parties are interested in trying mediation.

If a case is not identified by the Presiding Officer for possible mediation, parties may jointly or separately approach the Board to request mediation. In any event, whether the Presiding Officer recommends mediation or a party requests it, mediation is voluntary. All parties must agree to try the process before a mediation session is actually scheduled.

Should the Case be Mediated?

Not all cases are good candidates for mediation. Some may involve issues of such important principle that for some parties defeat is preferable to compromise. In others one or another of the parties may be concerned with creating a precedent. Often, one party is concerned with settling the issues while others would prefer the conflict continue. Some basic questions should be addressed when considering the use of mediated negotiations:

- ◆ Are you and your organization willing to consider a compromise?
- ◆ Do you have room for flexibility?
- ◆ Why do you want to end the dispute?
- ◆ Has the conflict reached the point where issues have been defined and joined and you know who the parties at interest are?
- ◆ Do all parties have some reason to bargain? Does each have the ability to frustrate or make prohibitively costly the unilateral actions of the other(s)?
- ◆ Is the outcome uncertain?
- ◆ Is there some sense of urgency to settle the conflict?

- ◆ Do you have the support of your organization to explore possible mediation? Do they understand the implications of such an effort?
- ◆ Ask yourself the same questions regarding the other parties.¹

Procedures

The procedures governing each mediation will vary depending upon the circumstances of the case and the complexity of issues and parties. In most cases the parties will be expected to be represented at the mediation by all persons necessary to reach an agreement. Mediation is presented as an opportunity to resolve as many issues as possible in the action. To accomplish that, each party must bring every person to the mediation who must approve any substantive decision in the litigation, or send persons who are fully authorized to bind the party. Parties will need to consider well in advance of the mediation who can best represent them and evaluate the case in some detail.

Most mediations will begin with opening remarks by the parties outlining their views of the topics to be discussed, some background on the facts, and their goals for the process. A combination of joint sessions and meetings between the mediator and one side (caucuses) may follow until agreement is reached or further efforts appear futile.

Confidentiality

All discussions at the mediation, including any statement made by any party, attorney or other participant, shall, in all respects, be privileged and not reported, recorded, placed in evidence, used for impeachment, made known to the Board or construed for any purpose as an admission. No party shall be bound by anything done or said at the conference unless a settlement is reached, in which event, the agreement upon a settlement shall be reduced to writing and shall be binding upon all parties to that

¹ Cormick, Gerald W., "Where, When & How to Use Mediated Negotiations: A checklist for the Potential Participant." Canadian Environmental Mediation Newsletter, York University, Toronto, Volume 3, No. 1, 1988, pp. 7-9.

Environmental Hearings Office

agreement. Washington Court Rules regarding the confidentiality of settlement discussions will apply to all discussions during a mediation. Also, since the *ex parte* contact rules generally applicable to decision makers are not applicable to mediations, you may direct questions to the mediator before, during or after a mediation session.

Settlement Agreements

In mediation, parties have greater control of the decision making process and maximum flexibility in developing a resolution addressing all parties' interests. Settlement agreements resulting from a mediation will be presented to the Board for approval in connection with dismissal of the case. If an agreement violates state law it will not be approved, but otherwise the dismissal will be granted.

Benefits

The Board hopes that this mediation process will help parties to reach more creative and flexible outcomes than they might achieve in litigation and at considerably less expense and delay. The mediators will work with the parties to tailor the mediation process to the particular dispute.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April, 2011, I caused to be served the foregoing *Declaration of Aaron M. Laing in Opposition to Respondent WSDOT's Motion to Dismiss* on the following parties at the following addresses:

<p>Marianne K. Jones Jones Law Group 11819 NE 34th Street Bellevue, WA 98005-1235 Fax: 425.576.9898 Email: mLaw@joneslawgroup.com <i>Attorneys for Peter Powell and Patrick A.T. Jones</i></p>	<p>Margaret J. King Michael Kenyon Kenyon Disend PLLC 11 Front Street South Issaquah, WA 98027-3820 Fax: 425.392.7071 Email: margaretk@kenyondisend.com; MIKE@kenyondisend.com <i>Attorneys for Town of Hunts Point</i></p>
<p>Laura J. Watson Attorney General's Office 2425 Bristol Court SW Olympia, WA 98502-6003 Fax: 360.586.6760 Email: ecyolyef@atg.wa.gov; laura.watson@atg.wa.gov; tanyar@atg.wa.gov <i>Attorney for State of Washington – Department of Ecology</i></p>	<p>Deborah L. Cade Office of the Attorney General 7141 Cleanwater Drive SW Olympia, WA 98501 Fax: 360.586.6847 Email: DeborahC@atg.wa.gov; tpcef@atg.wa.gov; tiffanyg@atg.wa.gov <i>Attorney for Washington State Department of Transportation</i></p>
<p>Administrative Appeals Judge Kay M. Brown Environmental Hearings Office PO Box 40903 Olympia, WA 98504-0903 Phone: (360) 664-9160 Fax: (360) 586-2253 Email: eho@eho.wa.gov ALSO VIA FACSIMILE & US MAIL</p>	

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CERTIFICATE OF SERVICE - 1

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U.S. Postal Service, ordinary first class mail
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 electronic service
 other (specify) _____



Kristi Richards

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JUN 09 2011

SCHWABE, WILLIAMSON & W.

SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

PETER POWELL; PATRICK A. T. JONES;
FAIRWEATHER BASIN BOAT CLUB,
INC.,

Petitioners,

v.

TOWN OF HUNTS POINT;
WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION; ECOLOGY,

Respondents.

SHB NOS. 11-007 & 11-008
(Consolidated case)

ORDER GRANTING SUMMARY
JUDGMENT TO WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION

Peter Powell, Patrick Jones, and Fairweather Basin Boat Club (collectively Petitioners) filed petitions for review of the Town of Hunts Point (Town) and Washington State Department of Ecology's (Ecology) approval of a Shoreline Substantial Development Permit (SSDP) and Shoreline Conditional Use Permit (SCUP) for part of the construction of the SR 520 Eastside HOV Project. Washington State Department of Transportation (WSDOT), the applicant on the project, is moving to dismiss the petitions based on their argument that the appeals were untimely. The Board considering this matter was comprised of Andrea McNamara Doyle, Chair, William H. Lynch, Kathleen D. Mix, Peter Philley, and O'Dean Williamson. Administrative Appeals Judge Kay M. Brown presided for the Board.

In rendering its decision, the Board considered the following submittals:

1. Peter Powell and Patrick A.T. Jones, Petition for Review, with attachments;
2. Fairweather Basin Boat Club, Inc's Petition for Review with attachments;

- 1 3. WSDOT's Motion to Dismiss Petitions for Review and Declaration of Scott White,
with attachments;
- 2 4. Petitioners' Joint Response in Opposition to Respondent WSDOT's Motion to
Dismiss Petitions for Review, Declaration of Aaron M. Laing in Opposition to
3 Respondent WSDOT's Motion to Dismiss with attached Exhibits A through L, and
Declaration of Ken L. Fisher in Opposition to Respondent WSDOT's Motion to
4 Dismiss with attached Exhibits A through C; and,
- 5 5. WSDOT's Reply in Support of its Motion to Dismiss Petitions for Review

6 Based upon the records and files in the case, the evidence submitted, and the written legal
7 arguments of counsel, the Board enters the following decision.

8 BACKGROUND

9 WSDOT applied to the Town for a SSDP and SCUP, which it needed for construction of
10 the SR 520 Eastside HOV Project (Project). The Town approved the SSDP and SCUP in a
11 single decision on February 2, 2011. The Town then forwarded the decision to Ecology.
12 Ecology issued two separate permit letters dated February 15, 2011. Ecology approved the
13 SCUP with additional conditions, and acknowledged receipt of the SSDP. *Powell and Jones,*
14 *Petition for Review, attached Feb. 15, 2011 letter on SSDP; White Decl., ¶¶3, 4, and attached*
15 *February 15, 2011 letter on SCUP.*

16 Ecology sent the SSDP and SCUP letters by electronic mail (e-mail) to WSDOT Scott
17 White on February 15, 2011. WSDOT confirmed receipt of the permits in a reply e-mail. On
18 the same day, Ecology also sent the SSDP and SCUP letter decisions by separate e-mail to Town
19 Planner Mona Green. On February 24, 2011, the Town forwarded the SSDP and SCUP letters to
20 the Petitioners. *Laing Decl., Exs. C, D, E, and F; White Decl., ¶¶3, 4.*

1 The Petitioners filed their petitions for review at the Shorelines Hearings Board on March
2 14, 2011. WSDOT moves for dismissal¹ of these consolidated appeals on the basis that the
3 Petitioners filed their petitions late, and therefore the Shorelines Hearings Board does not have
4 jurisdiction.

5 ANALYSIS

6 A. Summary Judgment Standard

7 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
8 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
9 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152, 1155 (1977). The party
10 moving for summary judgment must show there are no genuine issues of material fact and the
11 moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co.,*
12 *Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307, 313 (1997). A material fact in a summary judgment
13 proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d
14 451, 456, 824 P.2d 1207, 1210 (1992).

15 The trier of fact must construe the evidence and consider the material facts and all
16 reasonable inferences therefrom in the light most favorable to the nonmoving party. *Weatherbee*
17 *v. Gustafson*, 64 Wn. App. 128, 131, 822 P.2d 1257 (1992). If the moving party is a Respondent
18 and meets this initial showing, then the inquiry shifts to the party with the burden of proof at
19

20 ¹WSDOT calls their motion a motion to dismiss. However, because factual materials outside of the
21 pleadings are relied upon, the motion will be treated as one for summary judgment and disposed of as
provided in Civil Rule 56.

1 trial. If, at this point, the non-moving party fails to make a showing sufficient to establish the
2 existence of an element essential to that party's case, and on which that party will bear the burden
3 of proof at trial, then the trial court should grant the motion. *Young v. Key Pharmaceuticals,*
4 *Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182, 187 (1989).

5 Here, the Board concludes that there are no contested issues of material fact, and
6 therefore the Board may appropriately decide this matter on summary judgment.

7 B. Timeliness

8 The Shoreline Management Act (SMA) sets out the time period for an appeal of a SSDP
9 and SCUP to the Shorelines Hearings Board. RCW 90.58.180(1)² states:

10 Any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of
11 the state pursuant to RCW 90.58.140 may, except as otherwise provided in chapter
12 43.21L RCW, seek review from the shorelines hearings board by filing a petition for
review within twenty-one days of the date of receipt of the decision as provided for in
RCW 90.58.140(6).

13 RCW 90.58.140(6) states:

14 With regard to a [shoreline substantial development permit], "date of receipt" as used
15 herein refers to the date that the applicant receives written notice from the department
16 that the department has received the decision. With regard to a permit for a variance or a
conditional use, "date of receipt" means the date a local government or applicant receives
17 the written decision of the department . . . For the purposes of this subsection, the term
"date of receipt" has the same meaning as provided in RCW 43.21B.001.

18 RCW 43.21B.001 defines "date of receipt" as:

19 (a) Five business days after the date of mailing; or

20 (b) The date of actual receipt, when the actual receipt date can be proven by a
preponderance of the evidence. The recipient's sworn affidavit or declaration indicating

21 ² The Legislature amended both RCW 90.58.140 and RCW 90.58.180 in the 2011 session. See 2011 Wash. Laws, Ch. 277 §§3, 4. These changes are not effective until July 22, 2011.

1 the date of receipt, which is unchallenged by the agency, shall constitute sufficient
2 evidence of actual receipt. The date of actual receipt, however, may not exceed forty-five
3 days from the date of mailing.

4 The Pollution Control Hearings Board, in a recent decision, concluded that the date of
5 actual receipt is the controlling date if it can be established. *Central Washington Asphalt, Inc. v.*
6 *Washington State Department of Ecology*, PCHB No. 10-122 (Order Granting Summary
7 Judgment, April 15, 2011). Only if the date of actual receipt cannot be established, can the
8 alternate date five days after mailing be allowed as a surrogate. In this case, therefore, the key
9 question is when either the applicant or the local government actually received the decisions
10 from Ecology.

11 Here, it is undisputed that WSDOT, the applicant on the project, received both the SSDP
12 and SCUP permit letters from Ecology on February 15, 2011, by e-mail. Therefore, if February
13 15, 2011, is considered the "date of receipt," Petitioners would have had to file their Petitions for
14 Review within 21 days of February 15, 2011, which would be March 8, 2011, to be timely. The
15 actual date of filing was March 14, 2011, so the petitions for review were late.

16 Petitioners' primary argument for timeliness is that delivery by e-mail was not an
17 acceptable method for Ecology to deliver the decisions to WSDOT. They base their argument on
18 the fact that electronic service is not authorized under the Superior Court Civil Rules, the
19 Administrative Procedures Act, or the Shorelines Hearings Board's rules of procedure, absent an
20 express agreement from the recipient. But this argument by analogy is not persuasive. Delivery
21 of a shoreline permit decision to an applicant is not subject to the type of formal service
obligations applicable to litigation under the Civil Rules, the APA, or the Shorelines Hearings

1 Board's rules of procedures, and Petitioners provide no authority for why we should read such a
2 requirement into the SMA when it is plainly not there.³

3 An additional problem with Petitioners' argument is that any objection to the method of
4 transmittal⁴ of the decision to WSDOT would have to come from WSDOT itself. Here, WSDOT
5 affirmatively accepted the transmittal by e-mail with a return electronic mail stating "This e-mail
6 is [to] confirm receipt of this permit." *Laing Decl., Ex. C.* WSDOT's compliance manager for
7 the project submitted a declaration in support of WSDOT's motion to dismiss, stating that he
8 received a copy of the two permit decisions on February 15, 2011. *White Decl., ¶¶3, 4.* There
9 can be no dispute that WSDOT actually received the permit decisions on February 15, 2011.

10 The answer to the question of when the Town received the permit documents, or whether
11 they had any objection to receiving the decisions by e-mail, is not as straight forward. Ecology
12 e-mailed the Town Planner Mona Green the two decisions on February 15, 2011. *Laing Decl.,*
13 *Ex. D.* Petitioners argue that the e-mail was sent to Mona Green's private e-mail address, that
14 Mona Green was not the Town Administrator and therefore not the correct person to receive the
15 transmittal of the decisions for the Town, and that the e-mail was sent after hours. There is
16 nothing in the record on summary judgment from the Town regarding their receipt of the permits
17 on February 15, 2011. However, the date the Town received the permits is not material to this

18 ³ Petitioners' reliance on RCW 43.21B.001 is misplaced, as the Board's definition of "date of receipt" does not, as
19 Petitioners contend, purport to prescribe that mailing is the exclusive means of transmitting a shoreline permit
20 decision. Rather, it merely provides two alternative ways of fixing the date of receipt, one of which is based on
21 when the decision was mailed, and the other based on when it was actually received without regard to how it was
transmitted.

⁴ Ecology's shoreline management rules provide the following definition of "transmit." "Transmit" means to send
from one person or place to another by mail or hand delivery. The date of transmittal for mailed items is the date that
the document is certified for mailing or, for hand-delivered items, is the date of receipt at the destination. WAC
173-27-030(16). None of the parties address this rule in their briefing.

1 motion because RCW 90.58.140(6) states the appeal period begins to run based on receipt by the
2 applicant *or* the local government.⁵

3 The result under the statutes is clear: the appeal period began to run when WSDOT
4 actually received the permits from Ecology on February 15, 2011, albeit by e-mail, and ended 21
5 days later on March 8, 2011. The petitioners' did not file until March 14, 2011, and therefore
6 they were not timely.

7 C. Fairness

8 Petitioners argue that dismissal of their appeal is unfair and contrary to the purposes of
9 the SMA, and therefore the Board should rely on the doctrine of equitable tolling to avoid this
10 result. While the Board agrees with Petitioners that the result here is unfortunate, the Board does
11 not think it is unfair or inconsistent with the purpose of the SMA.

12 A primary purpose of the SMA is to protect the shorelines of this state. *Buechel v. State*
13 *Dept. of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910, 915 (1994). To achieve this end, the SMA
14 is unusual in that it provides by statute an automatic stay of all construction until the appeal
15 period has run, or if an appeal is filed, until all review proceedings before the Shorelines
16 Hearings Board are terminated. RCW 90.58.140(5). As described by this Board in *R.J. Brooks*
17 *v. City of Issaquah*, SHB No. 89-1 (Order Affirming Motion to Dismiss, March 28, 1989).

18 [A]n appellant, without the necessity for posting a bond or doing more than making his
19 objections known, can stop a project in its tracks for a considerable time solely as a
20 procedural matter.

21 ⁵ In fact, for the SSDP, the only trigger for starting the appeal period running is receipt by the applicant of notice
from Ecology that Ecology has received the local government's decision on the SSDP. See RCW 90.58.140(6).

1 To balance this aggressive stay provision, there is also a need for a bright line
2 establishing when the appeal period starts and ends. *Id.* Here, the bright line established by the
3 statute is 21 days from the date of receipt by the applicant or the local government. The 21-day
4 period began to run on February 15, 2011, and ended on March 8, 2011. The Petitioners
5 received copies of the decisions on February 24, 2011, 12 days before the end of the appeal
6 period. It was incumbent on the Petitioners to take action to protect their opportunity to appeal.
7 They failed to do so until March 14, 2011, twelve days after receiving copies of the decisions
8 and six days after the end of the appeal period. It is not unfair to conclude that the Petitioners
9 missed their opportunity to have this matter reviewed by the Board.

10 Petitioners argue that the Board should apply the principles of equitable tolling and deny
11 WSDOT's motion to dismiss. Even if the Board could exercise this type of authority, this is not
12 a situation where it would choose to do so. To meet the requirements for the exercise of
13 equitable tolling, there must be evidence of bad faith, deception, or false assurances by the
14 defendant and the exercise of diligence by the plaintiff. *Thompson v. Wilson*, 142 Wn. App. 803,
15 814, 175 P.3d 1149, 1154 (2008). Here, taking all of the facts in Petitioners' favor as required
16 on a summary judgment motion, there has been no evidence offered of bad faith, deception, or
17 false assurances by WSDOT. The fact that Ecology communicated its decision by e-mail to the
18 applicant and the local government on the same day, and then relied on the local government to
19 communicate the decision to the petitioners, is not evidence of bad faith. *See* WAC 197-27-200
20 (3)(requiring local government to provide timely notice of Ecology's decision to interested
21 persons). Further, the Petitioners have not satisfied the second prong of the test, exercise of

1 diligence by the party advocating for the application of equitable tolling. There is no evidence in
2 the record that the Petitioners made any inquiries prior to receiving the e-mail from the Town on
3 February 24, 2011, regarding whether or when Ecology had acted, nor did this e-mail trigger any
4 inquiries from them regarding the appeal period.

5 The Petitioners had notice in sufficient time to protect their opportunity for review by the
6 Board. They failed to do so. Therefore, the Board lacks jurisdiction to hear this appeal.

7 Based on the above analysis, the Board enters the following order:

8 **ORDER**

9 WSDOT's motion to dismiss is granted and this consolidated appeal is dismissed with
10 prejudice.

11 SO ORDERED this 7th day of June, 2011.

12 **SHORELINES HEARINGS BOARD**

13 Andrea M. Doyle
14 ANDREA MCNAMARA DOYLE, CHAIR

15 William H. Lynch
16 WILLIAM H. LYNCH, Member

17 Kathleen D. Mix
18 KATHLEEN D. MIX, Member

19 See Partial Dissent
20 PETER PHILEY, Member

21 O'Dean Williamson
O'DEAN WILLIAMSON, Member

Kay M. Brown
Kay M. Brown
Administrative Appeals Judge

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SCHWABE, WILLIAMSON & WYATT

SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

PETER POWELL; PATRICK A. T. JONES;
FAIRWEATHER BASIN BOAT CLUB,
INC.,

Petitioners,

v.

TOWN OF HUNTS POINT;
WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION; ECOLOGY,

Respondents.

SHB NOS. 11-007 & 11-008
(Consolidated case)

PARTIAL DISSENT

Although I agree with the majority that the shoreline substantial development permit (SSDP) issued by the Town of Hunts Point (the Town) should be dismissed, and I agree with them that the principles of equitable tolling do not apply, I disagree with my colleagues that the Washington State Department of Transportation's (DOT's) "Motion to Dismiss Petitioners for Review" (DOT's Motion to Dismiss) should be completely granted. I would deny that portion of DOT's Motion to Dismiss involving the conditional use permit (CUP) issued by the Department of Ecology (DOE). Therefore, I partially dissent.

Summary

I agree with the majority of the Board that the Petitioners failed to timely appeal the Town's issuance of the SSDP within twenty-one days of DOT's actual receipt of mailed notice from DOE that DOE had received notice that the Town had issued the SSDP.

PARTIAL DISSENT
SHB Nos. 11-007 & 11-008

1 2) On February 2, 2011, the Town's hearing examiner approved both DOT's SSDP and
2 CUP applications and forwarded them to DOE. The DOT Motion to Dismiss, at 2, line 7 and
3 attached Declaration of Scott White (**White Declaration**), at 2, paragraph 2.

4 3) On February 7, 2011, DOE received the approved permits from the Town. *See* February
5 15, 2011, DOE CUP approval letter from Geoff Tallent attached to White Declaration; *see also*
6 February 15, 2011, SSDP receipt letter from Geoff Tallent attached to the Petition for Review.

7 4) On February 15, 2011, Geoff Tallent, Section Manager for DOE's Shoreline and
8 Environmental Assistance Program, drafted a letter (the **CUP approval letter**) addressed to
9 Scott White at DOT regarding CUP No. 147. Mr. Tallent informed DOT that its CUP had been
10 approved subject to three conditions. Tallent did not refer to the SSDP at all within this letter.¹

11 The letter indicated "By certified mail" and including a lengthy tracking number, the last four
12 digits ending in -2225.² Attachment to White Declaration. Mr. White is DOT's "regulatory
13 compliance manager" for the State Route (SR) 520 Bridge Replacement and HOV Program.

14 White Declaration, at 1, Paragraph 1. In response to Interrogatory No. 7, DOE's attorney
15 indicated that:

16 Ecology transmitted the [CUP approval] decision by U. S. Mail and email on February
17 15, 2011 to:

19 _____
20 ¹ In other Shorelines Hearings Board cases DOE has both acknowledged receipt of a local government's SSDP and
announced its CUP decision in the same letter. In this case, DOE elected well within its discretion to issue two
letters, one for each permit.

21 ² During oral argument, DOE disclosed that it routinely sends official notice by certified mail. The beauty of that
form of transmission is that anyone can track on-line the date of delivery of that piece of mail as long as the tracking
number is known.

1 a) Scott White. Exhibit H to Laing Declaration, at 16.

2 In response to the question "Any confirmation you received that the person(s) to whom
3 you transmitted such notice received such notice," DOE's attorney responded:

4 c) Email confirmation and return receipt confirmation.

5 DOE's response also indicated that Mona Green was copied by US mail. Exhibit H to
6 Laing Declaration, at 16. Furthermore, Mr. Tallent verified under oath that he believed DOE's
7 interrogatory answers to be true. Exhibit H to Laing Declaration, at 25.

8 However, the United States Postal Service (USPS) "Track and Confirm" form for
9 document -2225 indicated:

10 There is no record of this item.

11 Furthermore, Ken Fisher declared that "... there is no record of this letter having been
12 sent or received." Fisher Declaration, at 3, line 4. Fisher also declared that:

13 ... There is no record that WSDOT received the mailed copy letter from Ecology that
14 approved Conditioned Shoreline Conditional Use Permit 147. Fisher Declaration, at 3,
Paragraph 5.

15 5) Also on February 15, 2011, Mr. Tallent sent a second letter to Mr. White at DOT
16 regarding SSDP No. 485 (the SSDP receipt letter) notifying DOT that DOE had received the
17 Town's SSDP and stating:

18 On February 7, 2011 the Department of Ecology received notice that Hunts Point
19 approved your application for an SDP.

20 This letter also indicated "By certified mail" and listed a tracking number ending in -
21 3328. Attachment to Petition for Review.

1 6) At 4:56 p.m. on February 15, 2011, David Radabaugh, a DOE Regional Shoreline
 2 Planner identified by Scott White as the DOE permit reviewer, sent an email to White at DOT
 3 presumably attaching both of Mr. Tallent's letters. The relevant portion of Radabaugh's e-mail
 4 stated:

5 The purpose of this e-mail is to provide you notice of the Department of Ecology
 6 **approval** of Shoreline Conditional Use Permit 147 and Shoreline Substantial
 7 Development Permit 485. Your email receipt of this email will start the 21 day appeal
 8 period.³ [Bolding added.]

9 Attachment to Declaration of Scott White and Exhibit C attached to "Declaration of
 10 Aaron M. Laing in Opposition to Respondent WSDOT's Motion to Dismiss" (the Laing
 11 Declaration). See also White Declaration, at 2, paragraph 3.

12 7) At 5:04 p.m. on February 15, 2011, DOE's Radabaugh sent an email to Mona Green that
 13 presumably included both Tallent's CUP approval letter and his SSDP receipt letter of the same
 14 date. Exhibit D attached to Laing Declaration. Although sent to what appears to be her personal

15 ³Unlike with a CUP, DOE is not required to review a SSDP for compliance. Instead, local governments are simply
 16 required to submit an issued SSDP to DOE. See WAC 173-27-130. See also Interrogatory No. 8 in which DOE's
 17 attorney responded:

18 Ecology objects to this interrogatory because it erroneously assumes that Ecology issued or approved the
 19 substantial development permit. In fact, Ecology does not have an approval role for substantial
 20 development permits. Instead, Ecology provides written notice to the applicant that it has received the
 21 local government's decision on the substantial development permit. Exhibit H to Laing Declaration, at 16-
 17.

Therefore, despite Mr. Radabaugh's email to the contrary, I assume that DOE approved only the CUP. My
 conclusion is consistent with RCW 90.58.140(10) and the fact that Mr. Tallent's CUP approval letter explicitly
 indicated that DOE had *approved* the CUP while his SSDP receipt letter explicitly indicated only that DOE had
 received the SSDP. Therefore, Mr. Radabaugh's email was incorrect in stating that DOE also "approved" the SSDP.
 See also White Declaration, at 2, Paragraph 3 where Mr. White also indicates that "... Ecology chose to issue two
 separate permits..."

1 email address, Ms. Green is a Town employee and planner. *See* Laing Declaration, at 2,
2 paragraph 5 and Petitioners' Response Brief, at 4, line 5.⁴

3 8) At 5:08 p.m. on February 15, 2011, DOT's White sent an email to Radabaugh at DOE
4 confirming receipt of "this permit." Attachment to White Declaration and Exhibit C to Laing
5 Declaration.

6 9) On February 16, 2011, DOT received the certified letter that had been mailed by DOE
7 with tracking number ending in -3328. Exhibit B to Fisher Declaration. Mr. Fisher's
8 Declaration indicates that this mailing contained the second February 15, 2011, the SSDP receipt
9 letter from DOE. Fisher Declaration, at 2, paragraph 3. A copy of the SSDP receipt letter was
10 attached to the Petition for Review filed in this case.

11 10) On February 23, 2011, Ms. Green, the Town's planner, forwarded an email to Jack
12 McKenzie, the Town's Administrator, containing DOE's two February 15, 2011, letters. Exhibit
13 F to Laing Declaration.

14 11) On February 24, 2011, Ken L. Fisher, President of Petitioner Fairweather Basin Boat
15 Club, first learned of the two letters written by DOE's Tallent when he received an email from
16 the Town's Clerk, Sue Israel about them. Fisher Declaration, at 3 and 4, paragraph 6.

17 12) Also, on February 24, 2011, DOE mailed its February 15, 2011, CUP approval letter to
18 the Town by certified mail with tracking number ending in -4189. *See* mailing envelope attached
19 to Fisher Declaration as part of Exhibit A. *See also* Fisher Declaration at 1-2, Paragraph 2.

20 _____
21 ⁴ Ms. Green apparently uses a personal email address for her business communications. *See* Exhibit F to the Laing Declaration which shows a February 23, 2011, email from Ms. Green's personal email address to Jack McKenzie at his official Town email address. Mr. McKenzie is the Town Administrator. Exhibit J to Laing Declaration.

1 13) On February 28, 2011, the Town received via certified, return receipt mail, DOE's
2 February 15, 2011, CUP approval letter written by Mr. Tallent. Exhibit G attached to Laing
3 Declaration: a March 9, 2011, email from Ms. Green, the Town's planner, to DOT's White. *See*
4 *also* Exhibit A to Fisher Declaration, the USPS "Track & Confirm" form for the certified letter
5 with a tracking number ending in -4189.

6 14) On March 14, 2011, the Petitioners filed Petitions for Review in this case.

7 Summary of Key Facts

- 8 • DOE *emailed* its CUP approval letter and SSDP receipt letter to DOT on February 15,
9 2011.
- 10 • DOE also *emailed* its CUP approval letter and SSDP receipt letter to the Town on
11 February 15, 2011.
- 12 • DOE may have mailed its CUP approval letter to DOT on February 15, 2011, by certified
13 mail (ending in tracking number -2225). However, the parties dispute the contention that
14 the letter was ever mailed.
- 15 • DOT never received DOE's CUP approval certified letter (ending in tracking number -
16 2225) in the mail.
- 17 • DOE also mailed a certified SSDP receipt letter to DOT on February 15, 2011 (ending in
18 tracking number -3328).
- 19 • DOT received DOE's SSDP receipt letter (ending in tracking number -3328) on February
20 16, 2011.

- 1 • DOE sent by certified mail the CUP approval letter (ending in tracking number -4189) to
- 2 the Town on February 24, 2011.
- 3 • The Town received the certified mail CUP approval letter (ending in tracking number -
- 4 4189) from DOE on February 28, 2011.

5 Analysis

6 DOT applied to the Town for a SSDP and a CUP in order to construct an Eastside High
 7 Occupancy Vehicle (HOV) Project along SR 520. The Town approved both applications.
 8 However, a CUP application must also be ultimately approved by DOE before construction can
 9 begin. Both permits are discussed in the Shoreline Management Act (SMA) codified in Chapter
 10 90.58 RCW.

11 RCW 90.58.140, entitled "Development permits — Grounds for granting —
 12 Administration by local government, conditions — Applications — Notices — Rescission —
 13 Approval when permit for variance or conditional use," states in relevant part:

14 (1) A development shall not be undertaken on the shorelines of the state unless it is
 15 consistent with the policy of this chapter and, after adoption or approval, as appropriate,
 the applicable guidelines, rules, or master program.

16 (2) A substantial development shall not be undertaken on shorelines of the state without
 17 first obtaining a permit from the government entity having administrative jurisdiction
under this chapter.

18 ...

19 (10) Any permit for a variance or a conditional use by local government under approved
 20 master programs must be submitted to the department [of ecology] for its approval or
disapproval. Emphasis added.

1 Once a decision has been made, procedures exist within the SMA to appeal permit
2 decisions. RCW 90.58.180, "Appeals from granting, denying, or rescinding permits — Board to
3 act — Local government appeals to board — Grounds for declaring rule, regulation, or guideline
4 invalid — Appeals to court," provides in relevant part:

5 (1) Any person aggrieved by the granting, denying, or rescinding of a permit on
6 shorelines of the state pursuant to RCW 90.58.140 may, except as otherwise provided in
7 chapter 43.21L RCW, seek review from the shorelines hearings board by filing a petition
8 for review within twenty-one days of the date of receipt of the decision as provided for in
9 RCW 90.58.140(6).

10 In turn, RCW 90.58.140(6) discusses the process for appealing a SSDP, CUP or variance as
11 follows:

12 Any decision on an application for a permit under the authority of this section, whether it
13 is an approval or a denial, shall, concurrently with the transmittal of the ruling to the
14 applicant, be transmitted to the department and the attorney general. A petition for review
15 of such a decision must be commenced within twenty-one days from the date of receipt
16 of the decision. With regard to a permit other than a permit governed by subsection (10)
17 of this section, "date of receipt" as used herein refers to the date that the applicant
18 receives written notice from the department [of ecology] that the department has received
19 the decision. With regard to a permit for a variance or a conditional use, "date of receipt"
20 means the date a local government or applicant receives the written decision of the
21 department [of ecology] rendered on the permit pursuant to subsection (10) of this
section. For the purposes of this subsection, the term "date of receipt" has the same
meaning as provided in RCW 43.21B.001. Emphasis added.

 Since DOE does not review (i.e., does not make the ultimate decision about but only
receives) an SSDP, the period for appealing the SSDP began on the date the DOT received
notice from DOE that DOE had received the Town's SSDP application decision.

 Since DOE does review a CUP and variance, the period for appealing the CUP began on
the date the Town or the DOT received DOE's written CUP decision.

1 RCW 90.58.140(6) does not specify a method for how DOE must transmit its notice of
 2 receipt of a local government's SSDP decision or how it must transmit its written CUP decision.
 3 However, the last sentence of RCW 90.58.140(6) refers to the definition of "date of receipt"
 4 provided in RCW 43.21B.001. Subsection (2) defines "date of receipt" as follows:

5 (a) Five business days after the date of mailing; or

6 (b) The date of actual receipt, when the actual receipt date can be proven by a
 7 preponderance of the evidence. The recipient's sworn affidavit or declaration
 8 indicating the date of receipt, which is unchallenged by the agency, shall
 constitute sufficient evidence of actual receipt. The date of actual receipt,
 however, may not exceed forty-five days from the date of mailing. Emphasis
 added.

9 The definition quoted above of "date of receipt" does not refer to *email* communications.
 10 Both subsections refer only to "mailing." The Legislature is aware of the difference between
 11 electronic communications and delivery of hard copy letters by the mail. If the Legislature had
 12 intended to allow transmission by *email*, it would have so specified. Therefore, I interpret
 13 RCW 43.21B.001 to require that DOE send its written notice by US mail. My interpretation
 14 is consistent with DOE's own regulations. WAC 173-200, "Department review of conditional
 15 use and variance permits," states:

16 (1) After local government approval of a conditional use or variance permit, local
 17 government shall submit the permit to the department for the department's approval,
 approval with conditions, or denial. The department [of ecology] shall render and
 18 transmit to local government and the applicant its final decision approving, approving
 19 with conditions, or disapproving the permit within thirty days of the date of submittal by
 local government pursuant to WAC 173-27-110.

20 (2) The department shall review the complete file submitted by local government on
 21 conditional use and variance permits and any other information submitted or available
 that is relevant to the application. The department shall base its determination to approve,

1 approve with conditions or deny a conditional use permit or variance on consistency with
2 the policy and provisions of the act and, except as provided in WAC 173-27-210, the
criteria in WAC 173-27-160 and 173-27-170.

3 (3) Local government shall provide timely notification of the department's final decision
4 to those interested persons having requested notification from local government pursuant
to WAC 173-27-130. Emphasis added.

5 Accordingly, DOE is required to "transmit" its decision to the underlying local
6 government and to the applicant. WAC 173-27-030(16) defines "transmit" as follows:

7 (16) "Transmit" means to send from one person or place to another by mail or hand
8 delivery. The date of transmittal for mailed items is the date that the document is certified
for mailing or, for hand-delivered items, is the date of receipt at the destination;
9 Emphasis added.

10 As a result of DOE's definition of "transmit" and the regulation requiring it to "transmit"
11 a CUP decision to the local government and the applicant, I conclude that DOE's own
12 regulations did not authorize sending by *email*.

13 The SSDP

14 DOT contends that it received DOE's CUP approval letter and DOE's SSDP receipt letter
15 on February 15, 2011, when it received both letters attached to an *email*. White Declaration, at
16 2, Paragraphs 3 and 4. Thus, DOT contends that the date it actually received the *email* from
17 DOE controls in starting the appeals period clock, i.e., February 15, 2011. Accordingly, DOT
18 argues that an aggrieved party had twenty-one days from February 15, 2011, to appeal – making
the appeal deadline March 8, 2011.

19 Although I agree in result with the majority, I reach that result by a different route. DOT
20 did not actually receive DOE's SSDP receipt letter in the mail until February 16, 2011,
21

1 makes no mention of receipt by mail. Moreover, since the Town did not participate in the
2 motion, it did not provide the Board any documentation whatsoever.

3 Significantly and compellingly, the record indicates that much more likely than not, the
4 CUP approval letter was never mailed on February 15, 2011. The record reveals not only that
5 DOT never received this mailed CUP approval letter but, according to the USPS, the letter never
6 existed within its records. Fisher Declaration, at 3, Paragraph 3.

7 One can only speculate as to why DOT never received the certified letter DOE claims to have
8 sent. These are just some of the possibilities:

- 9 • The letter listed the correct tracking number but it was never actually dropped off with or
10 picked up by the USPS;
- 11 • A standard boilerplate letter was used but the drafter forgot to change the certified mail
12 tracking number from what was on the template the last time the form letter was used;
- 13 • The USPS lost the certified letter so that it was never delivered.

14 We may never know precisely what happened. All the Board knows for certain from the
15 record is that the White Declaration only mentions receiving the DOE letter by *email*. No
16 document submitted to the Board indicates that DOT ever received a mailed version of the CUP
17 approval letter. In addition, the USPS tracking number for the CUP approval letter ending in -
18 **2225** reveals not only that the letter was never delivered to DOT but that it did not exist; in
19 contrast, the letter ending in **-3328** to DOT about the SSDP was delivered; and the one ending in
20 **-4189** about the CUP was actually delivered to the Town.

21 It is clear that DOT never received DOE's CUP approval letter in the mail. A plain reading
of RCW 90.58.140(6) repeatedly refers to the "date of receipt" as simply meaning the date an
entity actually receives a document. As such, if the only relevant statute were RCW

1 90.58.140(6), I would conclude that DOT never actually received legally required mailed notice
2 from DOE and therefore, the appeal period could not begin. However, because RCW
3 90.58.140(6) also cites to RCW 43.21B.001, one must turn to the definition in that statute.

4 RCW 43.21B.001(2)(a) defines "date of receipt" as "Five business days after the date of
5 mailing." The parties dispute whether DOE ever mailed the CUP approval letter in the first
6 place. Because this is a material fact, I would treat DOT's Motion to Dismiss as if it were a
7 motion for summary judgment. Since a material fact is in dispute, I would deny the motion.⁵

8 Alternatively, assuming for the sake of argument that DOE actually did mail its CUP
9 approval letter on February 15, 2011, the appeal period started five business days later. RCW
10 43.21B.001(2)(a). Since Monday, February 21, 2011, was the President's Day holiday, the fifth
11 business day was on February 23, 2011. Aggrieved parties have twenty-one days to appeal from
12 that date. RCW 90.58.180. Therefore, an appeal had to be filed by March 16, 2011. Since
13 Petitioners filed their appeal on March 14th, they timely appealed the CUP.

14 In addition, as a different alternative, pursuant to RCW 90.58.140(6) and RCW
15 43.21B.001(2)(b), another controlling date is the date either the applicant or the local
16 government actually received the DOE written decision in the mail. Although DOT never
17 received DOE's mailed notice, the record also reveals that on February 28, 2011, the Town
18

19 ⁵ Based on the evidence before the Board at this time, I would conclude that the Fisher Declaration and the three
20 attached USPS "Track and Confirm" exhibits are more compelling than DOE's interrogatory answers. Two of the
21 three certified letters at issue in this matter were shown by the USPS as having been delivered. However, the CUP
approval letter does not even exist according to USPS records. Neither DOE nor DOT submitted any documents to
the Board to dispute the USPS records, such as a declaration of mailing. Thus, weighing the evidence presently
before the Board, I would conclude that DOE never mailed its CUP approval letter and therefore the appeal period
never began.

1 received via certified, return receipt mail, DOE's February 15, 2011, CUP approval letter.
2 Exhibit G attached to Laing Declaration: Mona Green email to Scott White indicating that the
3 Town received the CUP letter on February 28, 2011. *See also* Exhibit A to Fisher Declaration,
4 the USPS "Track & Confirm" form for the certified letter with a tracking number ending in -
5 4189 also showing February 28, 2011.

6 Therefore, based on the date the Town actually received the CUP approval letter, February
7 28, 2011, is the starting date of the twenty-one day appeal clock for the CUP appeal. Petitioners
8 had until March 21, 2011, to file their appeal. Petitioners appealed on March 14, 2011, well
9 ahead of that deadline.

10 For the reasons listed above, I would **deny** DOT's Motion to Dismiss the CUP portion of the
11 case and allow that portion of the appeal to proceed.

12 DATED this 7th day of June, 2011.

13
14 M. Peter Philley
15 PETER PHILLEY, Member
16
17
18
19
20
21

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of June, 2011, I caused to be served the foregoing *Administrative Procedure Act, RCW Chapter 34.05, Petition for Review of Final Order of the Shoreline Hearings Board* on the following parties at the following addresses:

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<p>Administrative Appeals Judge Kay M. Brown Environmental Hearings Office P.O. Box 40903 Olympia, WA 98504-0903 Phone: (360) 664-9160 Fax: (360) 586-2253 Email: eho@eho.wa.gov <i>ALSO VIA HAND DELIVERY AND FACSIMILE</i></p>	

by:

- U.S. Postal Service, ordinary first class mail
- U.S. Postal Service, certified or registered mail, return receipt requested
- hand delivery
- facsimile
- electronic service



Kristi Richards, Administrative Assistant

Case No. 68532-5-I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

PATRICK A.T. JONES, individually and as assignee of all right, title, and
interest of the chose in action of PETER POWELL,

APPELLANT,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,
WASHINGTON STATE DEPARTMENT OF ECOLOGY, and THE TOWN
OF HUNTS POINT, a
Municipality,

RESPONDENTS.

PROOF OF SERVICE

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2012 JUN -8 PM 3:26
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

I hereby certify that I caused to be served a true and correct copy of Jones Opening Brief on this 8th day of June, 2012, on the following pursuant to e-service agreement:

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Marc Worthy: marcw@atg.wa.gov

DATED this 8th day of June, 2012.

/s/ Marianne K. Jones
MARIANNE K. JONES