

No. 1052162

SUPREME COURT
OF THE STATE OF WASHINGTON

FRIENDS OF GRAYS HARBOR and GRAYS HARBOR
AUDUBON SOCIETY,

Appellants,

v.

STATE OF WASHINGTON, including its agencies the
WASHINGTON STATE PARKS AND RECREATION
COMMISSION and RECREATION AND CONSERVATION
OFFICE, WESTPORT GOLF, INC., CITY OF WESTPORT,
J.D. FINANCIAL CORP., and MOX CHEHALIS LLC,

Respondents.

STATEMENT OF GROUNDS FOR DIRECT REVIEW

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Appellants Friends of Grays Harbor and Grays Harbor Audubon Society (collectively, “FOGH”) file this Statement of Grounds for Direct Review in accordance with RAP 4.2. FOGH respectfully requests that this Court directly review the Thurston County Superior Court’s several orders granting summary judgment to the Washington State Parks and Recreation Commission (“Parks” or “Parks Commission”) and other Respondents and denying FOGH’s Motions for Summary Judgment, Motion for Preliminary Injunction, and Motion to Amend, entered January 22, 2026 and January 23, 2026.

As discussed below, direct review is necessary in part because this case seeks an injunction against multiple state officers and agencies and involves urgent and important issues of first impression in our State. Delaying the ultimate resolution of this appeal will significantly burden taxpayers and the judicial system, and will lead to uncertainty about environmental and property laws with statewide impacts.

I. Nature of the Case and Decision

A. History of the Litigation

The primary question posed by this case is whether the State of Washington can fill some of the last remaining interdunal wetlands in the State to build a luxury private “Scottish Links” golf course within Westport Light State Park and the State Seashore Conservation Area, despite layered environmental protections. Specifically, the wetlands are protected by (1) a judicial settlement that resolved seven years of litigation in exchange for permanent wetland protections; (2) a federal conservation easement exacted by the U.S. Army Corps of Engineers to resolve wetland fill violations; (3) a Shorelines Management Act permit that purports to permanently protect the wetlands; and (4) the laws establishing the Seashore Conservation Area (the “Seashore Conservation Act”). The Superior Court brushed aside all these protections, allowing the State to proceed with a controversial golf course development.

A brief overview of the history of this development shows that a drawn-out appellate process will be both certain and burdensome. The current golf course project (the “Links 2 Project”) follows a previous project called Links at Half Moon Bay (“Links” or “Links Project”), which sought to build a strikingly similar “Scottish Links” course in these same wetlands two decades ago. From 2000-2007, FOGH litigated in multiple venues to protect these wetlands, which comprise the second largest tract of interdunal wetlands in the State. App. 21-22.¹ These wetlands are categorized by the Department of Ecology (“Ecology”) as Category I wetlands—the most valuable category of wetland—and the U.S. Environmental Protection Agency deemed them Aquatic Resources of National Importance. App. 54-67, 228, 293, 329-334. During the early

¹ Some portions of the Appendix have been highlighted by Appellants’ counsel for the Court’s ease of reference, except App. 131-132 was provided in discovery with highlights. Much of the Appendix is composed of excerpted portions of the Plaintiffs’ Factual Record in the underlying Superior Court case.

2000s litigation, FOGH often had the support of both state and federal agencies, including Parks. App. 34-41 (Washington Department of Fish and Wildlife comments), 42-48, (Parks Commission comments), 49-53 (Ecology Shorelines Permit Appeal).

Seven years of exhaustive litigation resulted in hundreds of pages of contested decisions from trial courts and multiple state agencies, and ultimately led to Division II of the Court of Appeals. App. 335-525. After full briefing and argument of that appeal, retired Thurston County Superior Court Judge Daniel Bershauer mediated a global settlement (“Global Settlement”). App. 23.

The Global Settlement allowed the Links Project to proceed, but provided permanent protections for the wetlands, requiring, *inter alia*, (1) redesign of the golf course to avoid *all* wetland fill, and (2) permanently protecting 100+ acres of wetlands with a conservation easement over the property. App. 23, 68-69, 92. The Global Settlement expressly applied to

future golf course designs and future property owners. App. 23-24, 81. The Global Settlement was filed with Division II to resolve the appeal. App. 68.

To facilitate enforcement, the Global Settlement mandated that critical wetland protections be formalized in a Shorelines Management Act (“SMA”) permit and through a formal conservation easement. App. 68-85, 92. A compliant SMA permit was issued in 2007. App. 96-99. However, unbeknownst to FOGH, Mox Chehalis LLC (“Mox”), the developer and property owner at the time, failed to promptly record the required conservation easement.

With permits in hand, Mox cleared and shaped the golf course. However, in doing so, Mox illegally filled wetlands and built ponds on the site, impacts that can still be seen today. App. 100-127, 193, 201, 206, 213.

When the U.S. Army Corps of Engineers discovered the illegal wetland fill, it commenced an enforcement action against Mox for “knowing and willful” violations of the federal Clean

Water Act. App. 100-102. During negotiations to resolve the violation, Mox admitted it never recorded the Global Settlement's conservation easement. App. 131-132. As an express condition of resolving the enforcement action, the Army Corps required Mox to formally execute and record this conservation easement, which Mox did in 2010. App. 129, 134, 166-178.

This federally exacted conservation easement expressly protected over 100 acres of wetlands from development in accordance with the terms of the Global Settlement, App. 171-173, and it applied to future property owners and users. *See id.*; App. 179. Contemporaneous documents from the negotiations show that all parties understood that the federal conservation easement was intended to fulfill the requirements of FOGH's Global Settlement. App. 129-157, 158-163, 179.

Ultimately, that first effort to build a golf course in Westport failed, and in 2015, the State purchased the Links Project property (the "Property") for "habitat conservation" and

to expand state parkland, App. 182, reasoning that the State's purchase would prevent wetlands from being filled for a golf course. App. 180-181. Once in the State's possession, the Property was combined with neighboring Westhaven State Park to form what is now known as Westport Light State Park.

In 2019, in an unexpected reversal, the State decided to revive the Links Project, in partnership with the City of Westport and Westport Golf, Inc. The State now argues that it can fill the interdunal wetlands for the current Links 2 Project, notwithstanding the Global Settlement and associated SMA permit and conservation easement. The State has since attacked these documents, App. 206, and moved forward with the Links 2 Project, despite admitting that its position is "debatable." App. 242-243.

Appellants brought the instant case to enforce the wetland protections already achieved in the Global Settlement, federal conservation easement, and SMA permit, and with the specific goal of avoiding re-litigation of the exact same issues

previously adjudicated from 2000-2007 in connection with the Links Project.

In April 2025, the State and the City of Westport issued a Draft Environmental Impact Statement (“Draft EIS”) for the Links 2 Project proposing two golf course designs. App. 27, 245-260. Both designs violate the wetland protections enshrined in the Global Settlement, SMA permit, and federal conservation easement, including by filling and running roads through the protected wetland areas and by placing the driving range in the protected wetlands. App. 300-328. Indeed, Parks’ two proposals would fill between 35 and 43 acres of wetlands and impact between 118 and 128 acres of wetland buffers. App. 267, 278-279.

The State plans to issue the Final Environmental Impact Statement (“Final EIS”) soon, which will trigger a cascade of permit applications, requiring FOGH to mount challenges to the same permits it previously fought for seven years or else risk losing all the environmental benefits it won two decades ago.

B. The Lawsuit and Superior Court's Decisions

FOGH commenced this action to enjoin the State from pursuing a project that would destroy the interdunal wetlands in direct violation of the Global Settlement and its implementing SMA permit and conservation easement. In addition, FOGH seeks to force the State to abide by the planning and environmental protections of the Seashore Conservation Act, RCW 79A.05.600 *et seq.*, which protects the interdunal wetlands from development.

In lieu of a preliminary injunction, the Superior Court entered a stipulated order to prevent the State from issuing the Final EIS and beginning the permit process until the Court resolved cross-motions for summary judgment. App. 1-6.

Then, in a series of orders, the Superior Court granted summary judgment to the Respondents on all key issues:

First, without any explanation, the Superior Court concluded that the Global Settlement and the SMA permit do

not apply to the Links 2 Project. App. 10. This was erroneous because the Global Settlement’s wetland and environmental protections meet all the standards for a covenant running with the land and are also enforceable as a conservation easement under RCW 64.04.130. Moreover, the SMA permit contains “durable conditions” which apply to future developments on the Property.

Second, in a conclusion of first impression, the Superior Court held that FOGH lacks standing to enforce the federal conservation easement. App. 9. In doing so, the Superior Court ignored binding and persuasive precedent that establishes multiple independent bases for FOGH’s standing to enforce the conservation easement, which expressly implemented FOGH’s settlement. App. 171, 173 (covenant to preserve wetlands “in accordance with the agreement identified under the [Ecology] Revised Shoreline Management Permit” issued pursuant to the Global Settlement).

Finally, again in a matter of first impression, the Superior Court held that FOGH lacks standing to enforce the Seashore Conservation Act. App. 16-17.

The Superior Court provided no findings of fact, detailed legal conclusions, or thorough analysis to support its orders, which pave the way for the State to issue the Final EIS and immediately begin seeking permits for the Links 2 Project. Once that happens, FOGH must appeal every permit granted simply to retain the benefits of its prior settlement.

II. Issues Presented for Review

1. Did the Superior Court err by failing to enjoin Respondents from issuing the Final EIS and seeking permits on the Links 2 Project, which violates (a) the Global Settlement, (b) the resulting federal conservation easement, (c) durable conditions in a prior shorelines permit, and (d) the Seashore Conservation Act?

2. Did the Superior Court err in ruling that the Global Settlement does not apply to the Links 2 Project, despite its

environmental protections meeting all standards for a covenant running with the land and a conservation easement under Washington law?

3. Did the Superior Court err in ruling that FOGH lacks standing to enforce the federal conservation easement, including for the following reasons:

(a) FOGH can enforce as a third-party beneficiary because the Army Corps exacted the federal conservation easement to implement FOGH's Global Settlement;

(b) FOGH can enforce the conservation easement in Westport Light State Park because the Attorney General is seeking to nullify the easement, such that denying standing would leave important public rights unenforceable;

(c) FOGH has standing because its members use and enjoy the wetlands that the State seeks to fill;

(d) FOGH has taxpayer standing; and

(e) Standing is relaxed to protect the public interest, especially where the government agency that would normally

enforce is the one seeking to override the easement to fill wetlands.

4. Did the Superior Court err in failing to enforce the Links Project's SMA Permit's durable conditions, which also required protection of the wetlands through a conservation easement?

5. Did the Superior Court err in holding that FOGH lacked standing to enforce the Seashore Conservation Act?

6. Did the Superior Court err in not granting summary judgment to FOGH on these issues?

7. Did the Superior Court err in refusing to allow FOGH to amend its complaint to pursue claims for tortious interference with the Global Settlement and its conservation easement against the State and therefore failing to provide appropriate remedies for such claims?

8. Was FOGH entitled to recovery of attorneys' fees and costs for enforcing the Global Settlement and resulting conservation easement?

III. Grounds for Direct Review

A. This case seeks an injunction against the State and its officers.

This case independently qualifies for direct review under RAP 4.2(a)(5) because it is fundamentally “[a]n action against a state officer in the nature of ... injunction.” FOGH seeks an injunction against the State of Washington, including the Parks Commission that is leading this project but also as to all of the agencies which are or will be involved in the permitting process.

This case is unusual in the volume of agencies that are involved in this dispute and targeted by the requested injunctive relief. Over a half dozen state agencies were involved in the permitting and litigation over this project when it was first proposed in 2000-2007. App. 22. Then, in 2007, both Ecology and the Environmental Land Use Hearings Office (“ELUHO”) signed the Global Settlement that was lodged with Division II of the Court of Appeals to resolve the dispute. App. 83.

The injunctive relief sought by this case would bind or impact the many state agencies that are or will be involved in the Links 2 Project: the Parks Commission manages Westport Light State Park and the Seashore Conservation Area and is the lead proponent of the golf course project; the Recreation and Conservation Office provided the grants to purchase the land for the State and will need to approve the project; and Ecology, the Department of Fish and Wildlife, and ELUHO will play key permitting roles.

FOGH seeks to enjoin the State of Washington, including all of its agencies and officers, from issuing a Final EIS and pursuing or processing permits for the Links 2 Project, based upon its violation of a recorded conservation easement, binding settlement agreement, durable SMA permit conditions, and statutory protections under the Seashore Conservation Act.

The requested relief would directly restrain the conduct of state officials acting in their official capacity and is thus the type of action contemplated by RAP 4.2's "action against state

officer” provision. *See, e.g., Five Corners Fam. Farmers v. State*, 173 Wn.2d 296, 301-02, 268 P.3d 892 (2011) (granting direct review where claims sought to restrain statewide government action).

B. This appeal presents fundamental and urgent statewide issues of public importance.

This case also merits direct review by this Court under RAP 4.2(a)(4), as “[a] case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.”

1. This case addresses fundamental questions about the State’s compliance with the rule of law.

This litigation raises important questions about the State’s adherence to the laws of Washington. The State is seeking to fill wetlands that are expressly protected by: (1) a federal conservation easement, (2) a settlement signed by multiple state agencies, and (3) permanent conditions of a shorelines permit. The State purchased the property expressly to preserve the wetlands, expand public parkland, and to do the opposite of what

it now seeks to accomplish: to protect the Property from large-scale development. The State's contrary positions throughout the history of this litigation warrant direct review by this Court.

2. The State's blatant disregard for a federal conservation easement raises urgent issues of federal comity.

The key facts are not in dispute: (1) The Army Corps required Mox to formalize and record the Global Settlement's conservation easement permanently protecting 100+ acres of wetlands as a condition of resolving its enforcement action, App. 129-137; and (2) the State proposes to place fill, roads, and golf course features directly within the protected wetlands, App. 300-328, 256.

Federal conservation easements acquired pursuant to an important national policy, such as the Clean Water Act, are enforceable notwithstanding contrary state law. *See, e.g., United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 594-97, 93 S. Ct. 2389 (1973) (state law would have abrogated the explicit terms of a prior land acquisition of the United States under the

Migratory Bird Treaty Act and was thus not applied); *United States v. Albrecht*, 496 F.2d 906, 911 (8th Cir. 1974) (state law barring conveyance of real property was not applicable where it would have hindered a national program of acquiring land for waterfowl production areas). In *North Dakota v. United States*, for example, the Supreme Court upheld negotiated agreements between landowners and the Secretary of the Interior that concerned wetlands on private property, finding that these federal easements took supremacy over state law which would have abrogated them. 460 U.S. 300, 319, 103 S. Ct. 1095 (1983).

Like in *North Dakota*, when the Army Corps required Mox to place a conservation easement over the Property to resolve its federal Clean Water Act violations, it was acting pursuant to a national policy and under its Clean Water Act enforcement authority. App. 101-103, 179. Under U.S. Supreme Court precedent, the federal conservation easement imposed by the Army Corps must be upheld, even if not in perfect compliance with state law.

The State, however, maintains that it is not required to abide by this federal property restriction, and is proceeding with the Links 2 Project as if it does not exist. App. 242-243, 300-328. Such deliberate disregard for a federally exacted conservation easement raises serious questions about the State's cooperation with established federal regulatory schemes when its perceived right to develop may be impacted.

Where, as here, the Army Corps' exacted protection was expressly designed to implement FOGH's settlement, FOGH certainly has an interest in this issue.

This Court should grant direct review to preserve cooperative federalism and the appropriate balance of shared authority between state and federal law here.

3. The Superior Court's decision will result in massive unrecoverable costs to the public and the parties.

The extensive litigation over the Links Project leading to the 2007 Global Settlement demonstrates the enormous costs that the public and the parties can be expected to incur as the Links 2

Project advances. All of the same permits that were litigated in 2000-2007 and led to the Global Settlement will be litigated all over again. Multiple state agencies will be called upon to issue permit decisions, which will be challenged in administrative and judicial forums for years.

Ecology's comments on the Draft EIS stating that the Links 2 Project is un-permittable show that, if anything, the future litigation will be even more prolonged, hard-fought, and expensive to the State of Washington and its taxpayers. App. 293-299; *see also* App. 286-292 (Quinault Indian Nation comments on Draft EIS stating that golf course would infringe on Quinault Nation's treaty rights). This time around, after all, the Parks Commission will be involved in all of the permitting and litigation *as the applicant*. Importantly, since the 2000-2007 litigation, the wetlands have been upgraded to Category I by Ecology, *see* App. 575-579, and brought into the State Park system and Seashore Conservation Area, gaining further protections.

Direct review by this Court will significantly reduce the costs to the taxpayers and the judicial system, as well as to the parties.

4. The appellate decision will impact wetland protections throughout the State.

A prolonged appellate process will result in uncertainty over critical environmental protection tools, including exacted wetland protections, that federal, state, and local governments utilize routinely throughout the State.

If the State can ignore and then successfully defeat the multi-layered wetland protections at issue in this case, it casts doubt on our entire system of exacted wetland protections. State and local governments often require developers to protect wetlands via conservation easements, either as mitigation for development impacts or to resolve alleged environmental violations. These types of conservation easements are referred to as “exacted,” in that they were mandated by a regulatory body. Jessica Owley Lippmann, *Exacted Conservation Easements: The*

Hard Case of Endangered Species Protection, 19 J. ENV'T L. & LITIG. 293, 294-95 n.3 (2004). Under the State's theory, this kind of important mechanism for protecting the environment is not binding on the State and is unenforceable by the public, threatening the entire system.

The uncertainty here also extends to other fundamental tools of wetland protections, all of which the Superior Court effectively set aside: covenants running with the land, conservation easements, durable conditions enshrined in shoreline permits, and the Seashore Conservation Area.

5. This case presents questions of first impression for Washington courts about conservation easements and the Seashore Conservation Act.

Until FOGH brought this case, Washington courts had not considered what constitutes a conservation easement under common law or RCW 64.04.130 and who has standing to enforce such protections. Additionally, no Washington appellate court

has addressed the physical scope of the Seashore Conservation Area and the State's ability to develop therein.²

Both of these issues present questions of broad public importance. First, conservation easements have become increasingly popular as a mechanism for protecting the environment, whether entered into voluntarily or exacted by a regulatory agency in exchange for permission to develop, as was the case with the Links Project. What constitutes a conservation easement under Washington law, as well as who may enforce a conservation easement, are fundamental questions, resolution of which will broadly impact property law in Washington.

² Two Washington Supreme Court decisions have addressed the Parks Commission's authority to regulate vehicle traffic in the Seashore Conservation Area. *See State v. Wright*, 84 Wn.2d 645, 529 P.2d 453 (1974); *Sim v. Wash. State Parks & Recreation Comm'n*, 94 Wn.2d 552, 617 P.2d 1028 (1980). Neither *Wright* nor *Sim* addressed the core issues in this dispute: standing to enforce the Seashore Conservation Act, the physical scope of the Seashore Conservation Area, and the State's ability to develop within the Seashore Conservation Area.

Second, the State seeks to develop a 200-acre private golf course in a public park that lies largely within the Seashore Conservation Area, where “recreational uses must be regulated in order that Washington’s unrivaled seashore may be saved for our children in much the same form as we know it today.” RCW 79A.05.600. Whether the State’s proposed development is allowed under the Seashore Conservation Act will impact the public’s right to access state parks and public beach areas. Moreover, the question of standing to enforce the Seashore Conservation Act raised in the Superior Court will impact the public’s ability to protect the very area that was promised to them by the Legislature to be “preserved in its present state” and “maintained in the best possible condition for public use.” RCW 79A.05.615.

To resolve these fundamental questions of both first impression and broad public import, this Court should accept direct review.

C. Delay in obtaining a resolution is detrimental to all parties and the public interest.

It is urgent to obtain final resolution of the issues in this case as quickly as possible. The State and the City of Westport will publish the Final EIS shortly, which will trigger an immediate influx of permit applications from the State and Westport Golf to the various permitting agencies. It is a near certainty that every single permit, whether granted or not, will be appealed by either FOGH or the Respondents. Each appeal will require a substantial and irreversible commitment of resources from the agencies and regulatory bodies involved, the parties, agency and judicial tribunals, and Washington state taxpayers.

Should the Court find that the Global Settlement, federal conservation easement, shorelines permit, and/or the Seashore Conservation Area apply to restrict the development path of the Links 2 Project, the State will need to go back to the drawing board with a golf course design, effectively wasting any

resources already expended in furtherance of the Links 2 Project. A final decision on the applicability of the Property's underlying wetland protections, and FOGH's ability to enforce them, will further the public interest by ensuring that scarce resources are only expended on a version of the Links 2 Project that is legally permissible, if one exists.

IV. Conclusion

For these reasons, Appellants respectfully request that the Court accept direct review.

I certify that this document contains 3,911 words in
accordance with RAP 18.17(c)(1).

Respectfully submitted this 17th day of April, 2026.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on April 17, 2026, I caused Appellants' Statement of Grounds for Direct Review to be served in the above-captioned matter upon the parties herein via electronically filing the document on the appellate portal:

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SIGNED this 17th day of April, 2026 at Seattle, Washington.



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THURSTON COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

FRIENDS OF GRAYS HARBOR and GRAYS
HARBOR AUDUBON SOCIETY,

Plaintiffs,

v.

STATE OF WASHINGTON, including its
agencies the WASHINGTON STATE PARKS
AND RECREATION COMMISSION and
RECREATION AND CONSERVATION
OFFICE, WESTPORT GOLF, INC., CITY OF
WESTPORT, J.D. FINANCIAL CORP., and
MOX CHEHALIS LLC.

Defendants.

) No. 24-2-01187-34

) Agreed Order on
) Assurances and Briefing Schedule

) *Clerk's Action Required*

NOW COME Plaintiffs Friends of Grays Harbor and Grays Harbor Audubon Society
("Plaintiffs") and Defendants the State of Washington, including its agencies the Washington State
Parks and Recreation Commission ("State Parks") and Recreation and Conservation Office, Westport
Golf, Inc. ("Westport Golf"), the City of Westport, and J.D. Financial Corp.,¹ (collectively,
"Defendants" and together with Plaintiffs, "the Parties"), by and through counsel, and, pursuant to

¹ Defendant Mox Chehalis, LLC has been administratively dissolved and is unrepresented.

AGREED ORDER ON
ASSURANCES AND BRIEFING SCHEDULE - 1

SMITH & LOWNEY, PLLC
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

1 this Court's Order Denying Motion for Special Set and Setting Status Conference Hearing (July 25,
2 2025), propose the following agreed order:

3 WHEREAS, Plaintiffs moved for summary judgment and a permanent or preliminary injunction on
4 July 11, 2025;

5
6 WHEREAS, Plaintiffs moved for a special set for the court to hear the above motions on July 17,
7 2025, and Defendants opposed such motion, requesting that the Court delay hearing Plaintiffs'
8 motions until the Parties could collaborate on a schedule for briefing dispositive motions and the
9 Court could resolve such motions before hearing a motion for an injunction;

10 WHEREAS, the Court struck the hearings on the motions filed by the Plaintiffs in an Order dated
11 July 25, 2025 ("Order");

12
13 WHEREAS, the Court asked Defendants to investigate what assurances they could provide to
14 address Plaintiffs' asserted risk of harm without an injunction;

15 WHEREAS, the Court set a status conference for August 29, 2025, and stated that if the parties reach
16 an agreed order they could request the status conference be stricken;

17
18 WHEREAS, Defendants State Parks and City of Westport offered, and Plaintiffs accepted, the
19 following "Assurances":

20
21 (1) State Parks and the City of Westport will not issue the Final Environmental Impact
22 Statement until the "Assurance Date," which will be the later of (a) January 1, 2026 or (b) the
23 Court's ruling on Plaintiffs' motion for an injunction provided such motion is noted for
24 hearing on or before January 16, 2026.

1 (2) If Westport Golf applies for permits prior to the issuance of the Final Environmental
2 Impact Statement, the City of Westport will not convene a public comment period or hold a
public hearing on the permit applications prior to the Assurance Date.

3 (3) If the Court resolves the parties' cross-motions for summary judgment before the
4 Assurance Date against the Plaintiffs in a manner that renders an injunction unnecessary, the
Assurances will become moot.

5 WHEREAS, the Parties have negotiated the briefing schedule and page limits as set forth below.

6
7 The Court being fully advised, hereby ORDERS:

- 8
- 9 1. The Court approves the Assurances set forth above;
 - 10 2. The Parties shall adhere to the following briefing schedule and page limits:
 - 11 a. Plaintiffs shall file a Motion for Summary Judgment addressing the applicability
12 of the Settlement Agreement entered in the case captioned *Friends of Grays*
13 *Harbor and Washington Environmental Council, Appellants, vs. Mox Chehalis*
14 *LLC, et al., Respondents*, Washington State Court of Appeals Division II Case
15 Number 34113-1-II and the Declaration of Covenants and Restrictions for the
16 Mox Chehalis, LLC Property in Westport, WA to the Defendants by September
17 10, 2025, limited to 35 pages.
 - 18 b. Defendants shall have until October 7, 2025, to respond and/or move and/or cross-
19 move for summary judgment. Briefs shall be limited to 30 pages per Defendant,²
20 with the understanding that the Defendants will endeavor to consolidate briefing
21 where possible to keep the page volume low. To facilitate this consolidation,

22
23
24 ² Plaintiffs reserve the right to seek additional pages from the Court to address such briefing, if
necessary.

1 Defendants will be permitted to refer to and incorporate by reference arguments
2 contained in the briefs of other Defendants.

3 c. Plaintiffs' reply / response to motions or cross-motions shall be due on October
4 31, 2025, and limited to 20 pages, increased to 25 pages if Defendants file a cross-
5 motion on an issue not addressed in Plaintiffs' motion.

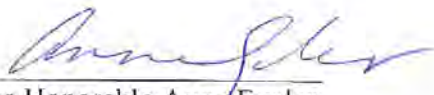
6 d. Defendants' reply on any motion/cross-motions shall be due on November 7,
7 2025, limited to 10 pages per party, again with a commitment to combine where
8 possible.

9 e. The hearing on the motions shall be set for **November 21, 2025**, at 9:00 AM. The
10 Clerk is directed to SET this hearing on the dispositive motions calendar.

11 3. The Clerk is directed to STRIKE the status conference set for August 29, 2025.

12 4. The upcoming case deadlines pertaining to fact and expert witness disclosures are
13 STAYED pending resolution of the Parties' dispositive motions. The fact and expert
14 witness disclosure deadlines will be reset by the Court upon resolution of the Parties'
15 motions.

16
17
18 Dated: Sept. 4, 2025

19
20 
The Honorable Anne Egeler

21 Presented by:

22 **SMITH & LOWNEY, PLLC**

23 /s/ Knoll Lowney

24 Knoll Lowney, WSBA # 23457

AGREED ORDER ON
ASSURANCES AND BRIEFING SCHEDULE - 4

SMITH & LOWNEY, PLLC
2317 EAST JOHN STREET
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(206) 860-2883

1 Katelyn Kinn, WSBA # 42686
Evelyn Mailander, WSBA # 62827
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katelyn@smithandlowney.com
4 evelyn@smithandlowney.com
Attorneys for Plaintiffs

5
6 Nicholas W. Brown
Attorney General

7 /s/ Joe Panesko

8 *[signed per e-mail authorization 8/27/25]*

Joe Panesko, WSBA No. 25289

9 Senior Counsel

Andy Woo, WSBA No. 46741

10 Assistant Attorney General

11 SIRIANNI YOUTZ SPOONEMORE
12 HAMBURGER PLLC

13 /s/ Richard E. Spoonemore

14 *[signed per e-mail authorization 8/27/25]*

Richard E. Spoonemore, WSBA #21833

Ann E. Merryfield, WSBA #14456

15 Special Assistant Attorneys General

Attorneys for Defendant State of Washington

16 *Parks and Recreation Commission*

17
18 Nicholas W. Brown
Attorney General

19 /s/ David B. Merchant

20 *[signed per e-mail authorization 8/28/25]*

David B. Merchant, WSBA #21978

Ryan Singh-Cundy, WSBA #58658

21 Assistant Attorneys General

Attorneys for Defendant State of Washington,

22 *Recreation and Conservation Office*

23 LAW, LYMAN, DANIEL, KAMERRER
24

AGREED ORDER ON
ASSURANCES AND BRIEFING SCHEDULE - 5

SMITH & LOWNEY, PLLC
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

1 & BOGDANOVICH, P.S.

2 /s/ Jeffrey S. Myers

[signed per e-mail authorization 8/27/25]

3 Jeffrey S. Myers, WSBA #16390

4 *Attorney for Defendant City of Westport*

5 PACIFICA LAW GROUP LLP

6 /s/ Ian D. Rogers

[signed per e-mail authorization 8/27/25]

7 Ian D. Rogers, WSBA #46584

8 Meha Goyal, WSBA #56058

Attorneys for Defendant Westport Golf Inc.

9 DEMCO LAW FIRM, P.S.

10
11 /s/ Chris M. MacMillan

Chris M. MacMillan, WSBA #50094

12 *Attorneys for J.D. Financial Corp.*

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FROM:) AGREED ORDER ON
ASSURANCES AND BRIEFING SCHEDULE - 6

SMITH & LOWNEY, PLLC
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

No hearing set

Hearing is set

Date: January 16, 2026

Time: 9:00 am

Judge/Calendar: The Honorable Anne Egeler

IN THE SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

FRIENDS OF GRAYS HARBOR and
GRAYS HARBOR AUDUBON SOCIETY,

NO. 24-2-01187-34

Plaintiffs,

v.

STATE OF WASHINGTON, including the
WASHINGTON STATE PARKS AND
RECREATION COMMISSION and
RECREATION AND CONSERVATION
OFFICE, WESTPORT GOLF INC., CITY OF
WESTPORT, J.D. FINANCIAL CORP, and
MOX CHEHALIS LLC,

ORDER GRANTING
DEFENDANTS' MOTIONS FOR
PARTIAL SUMMARY JUDGMENT
AND DENYING PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND STRIKING
HEARING

AE

*Clerk's Action
Required*

Defendants.

THIS MATTER came before the Court on the Parties' cross motions for summary judgment. The Court has considered the following motions and all papers filed in support or opposition to them:

- Plaintiffs' Motion for Summary Judgment on Global Settlement and Army Corps Covenant ("Plaintiffs' Motion");
- The Declaration of Knoll Lowney with attached exhibits;
- Defendant Washington State Parks and Recreation Commissions' (1) Opposition to Plaintiff's Motion for Partial Summary Judgment, and

] ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT AND DENYING
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT - 1
[Case No. 24-2-01187-34]

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

App.007

1 (2) Cross-Motion for Partial Summary Judgment Against Plaintiffs
2 ("Parks' Motion");

- 3 • The Declaration of Heather Saunders with attached exhibits;
- 4 • The Declaration of Richard E. Spoonemore with attached exhibits;
- 5 • The Declaration of Dawn Jackson with attached exhibits;
- 6 • Defendant Washington State Recreation and Conservation Office's
7 (1) Opposition to Plaintiff's Motion for Summary Judgment, and (2) Cross-
8 Motions for Summary Judgment ("RCO's Motion");
- 9 • The Declaration of Karl Jacobs;
- 10 • Defendant Westport Golf, Inc.'s: (1) Opposition to Plaintiffs' Motion for
11 Partial Summary Judgment, and (2) Cross Motion for Partial Summary
12 Judgment ("Westport Golf's Motion");
- 13 • The Declaration of Ryann Day;
- 14 • The Declaration of Ian D. Rogers with attached exhibits;
- 15 • The Declaration of Mark Merkelbach with attached exhibits;
- 16 • Defendant City of Westport's Response in Opposition to Plaintiff's Motion
17 for Summary Judgment and Cross-Motion for Summary Judgment (the
18 "City's Motion");
- 19 • The Declaration of Randy Lewis;
- 20 • The Declaration of Thomas Cappa with attached exhibits;
- 21 • Plaintiffs' Reply in Support of Motion for Summary Judgment on Global
22 Settlement and Army Corps Covenant and Response to Defendants'
23 Cross-Motions for Summary Judgment;
- 24 • The Declaration of Knoll Lowney in Support of Plaintiffs' Reply and
25 Response with attached exhibits;
- 26 • Defendant City of Westport's Reply;
- The Declaration of Jeffrey S. Myers with attached exhibits;
- Defendant Westport Golf, Inc.'s Reply;

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- Supplemental Declaration of Ryann Day;
- The Supplemental Declaration of Ian D. Rogers with attached exhibits;
- The Declaration of David McLay-Kidd;
- Defendant Washington State Recreation and Conservation Office’s Reply;
- Defendant City of Westport’s Reply; and
- Defendant Washington State Parks and Recreation Commission’s Reply;

The Court has heard argument of counsel and is fully advised on the matter.

It is therefore ORDERED that:

1. Plaintiffs’ Motion is denied; and
2. Parks’ Motion, RCO’s Motion, Westport Golf’s Motion, and the City’s Motion are granted as follows:

A. Plaintiffs’ claims based on the so-called Army Corps Covenant or Declaration are dismissed with prejudice.¹

- i. The Plaintiffs lack standing to enforce the Army Corps Covenant as a matter of law, are not third-party beneficiaries of the Army Corps Covenant, and there is no private right to enforce the Army Corps Covenant.
- ii. There are no genuine issues of material fact regarding the contents of the Army Corps Covenant.
- iii. For the avoidance of doubt, this order is limited to Plaintiffs’ claims in this lawsuit and does not apply to the future permit applications or projects that are not before the Court.

¹ The “Army Corps Covenant” or “Army Corps Declaration” refers to the “Declaration of Covenants and Restrictions for the Mox Chehalis LLC Property in Westport, WA” executed by JD Financial Corp. on or around December 6, 2010, and attached as *Exhibit 8* to Plaintiffs’ First Amended Complaint.

1 B. Plaintiffs' claims based on the so-called "Global Settlement" or "Mox
2 Settlement" are dismissed with prejudice.²

- 3 i. The Mox Settlement is unrecorded and, by its terms, does not
4 apply beyond Mox Chehalis LLC's abandoned project,
5 sometimes referred to as the "Links at Half Moon Bay" (the "Mox
6 Project"). There is no indication in the Mox Settlement of an
7 intention to create a restriction running with the land.
- 8 ii. There are no genuine issues of material fact regarding these
9 issues.
- 10 iii. Having found that the Mox Settlement does not apply, the Court
11 declines to reach the City's alternative argument that the
12 Plaintiffs have violated a contractual dispute resolution clause,
13 on which the Court reserves judgment.

14 C. Plaintiffs' claims seeking to require compliance with conditions
15 contained in any permits or planning documents related to the Mox Project (including
16 the Shoreline Substantial Development Permit, Binding Site Plan, or Master Plan and any
17 amendments or revisions thereto) are dismissed with prejudice.

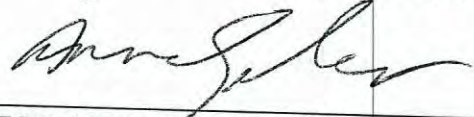
- 18 i. There is no indication in any of these documents of an intention
19 to create a restriction running with the land.
- 20 ii. There are no genuine issues of material fact on this point.
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25 ² The "Global Settlement" or "Mox Settlement" refers to the 2007 Settlement Agreement between
26 Friends of Grays Harbor, Washington Environmental Council, Mox Chehalis LLC, the City of Westport,
and its appendices, including the documents attached as *Exhibits 1, 2, and 3* to Plaintiffs' First Amended
Complaint.

1 D. All claims against Defendant Washington State Recreation and
2 Conservation Office are dismissed with prejudice due to the Washington State Recreation
3 Office's lack of any interest in this case.

4 *E. The Clerk is directed to STRIKE the hearing noted for 1/23/26 regarding the written order*

DATED: January 22, 2026.



THE HONORABLE ANNE EGELER
Superior Court Judge

7 Presented by:

8 NICHOLAS W. BROWN
9 Attorney General

10 /s/ Joe Panesko
11 ANDY WOO, WSBA # 46741
12 Assistant Attorney General
13 JOE PANESKO, WSBA # 25289
14 Senior Counsel

15 /s/ Richard E. Spoonemore
16 RICHARD E. SPOONEMORE, WSBA # 21833
17 ANN E. MERRYFIELD, WSBA # 14456
18 Special Assistant Attorneys General
19 Attorneys for Defendant State of Washington,
20 by and through the Washington State Parks and Recreation Commission

21 NICHOLAS W. BROWN
22 Attorney General

23 /s/ David B. Merchant
24 David B. Merchant, WSBA #21978
25 Ryan Singh-Cundy, WSBA #58658
26 Assistant Attorneys General
Attorneys for Defendant State of Washington,
Recreation and Conservation Office

LAW, LYMAN, DANIEL, KAMERRER
& BOGDANOVICH, P.S.

/s/ Jeffrey S. Myers
Jeffrey S. Myers, WSBA #16390
Attorney for Defendant City of Westport

] ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT AND DENYING
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT - 5
[Case No. 24-2-01187-34]

SIRIANNI YOUTZ
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1 PACIFICA LAW GROUP LLP

2 /s/ Ian D. Rogers

3 Ian D. Rogers, WSBA #46584

4 Meha Goyal, WSBA #56058

5 Attorneys for Defendant Westport Golf Inc.

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-----] ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT AND DENYING
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT - 6
[Case No. 24-2-01187-34]

SIRIANNI YOUTZ
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FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2026 JAN 23 AM 10:08

Linda Myhre Enlow
Thurston County Clerk

No hearing set
 Hearing is set
Date: January 16, 2026
Time: 9:00 am
Judge/Calendar: The Honorable Anne Egeler

IN THE SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

FRIENDS OF GRAYS HARBOR and
GRAYS HARBOR AUDUBON SOCIETY,

NO. 24-2-01187-34

Plaintiffs,

[] ORDER DENYING
PLAINTIFFS' MOTION TO AMEND
COMPLAINT

v.

STATE OF WASHINGTON, including the
WASHINGTON STATE PARKS AND
RECREATION COMMISSION and
RECREATION AND CONSERVATION
OFFICE, WESTPORT GOLF INC., CITY OF
WESTPORT, J.D. FINANCIAL CORP, and
MOX CHEHALIS LLC,

Defendants.

THIS MATTER came before the Court on Plaintiffs' Motion to Amend Complaint. The Court has considered the following motions and all papers filed in support or opposition to them:

- Plaintiffs' Motion to Amend Complaint ("Plaintiffs' Motion"), together with the attached [Proposed] Second Amended Complaint for Declaratory and Injunctive Relief;
- Opposition of Defendants Washington State Parks and Recreation Commission, City of Westport and Westport Golf, Inc. to Plaintiffs' Motion;

[PROPOSED] ORDER DENYING PLAINTIFFS' MOTION
TO AMEND COMPLAINT - 1
[Case No. 24-2-01187-34]

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

1 • Defendant Washington State Recreation and Conservation Office's
2 Response to Plaintiffs' Motion to Amend Complaint;

3 • Plaintiffs' Reply in Support of Motion, if any; and

4 • The remainder of the record
5 • Plaintiffs' oral argument.

6 The Court has heard argument of counsel and is fully advised on the matter.

7 It is therefore ORDERED that Plaintiffs' Motion to Amend Complaint is DENIED.

8 DATED: January 23, 2026.

9 

10 THE HONORABLE ANNE EGELER
11 Superior Court Judge

12 Presented by:

13 NICHOLAS W. BROWN
14 Attorney General

15 /s/ Joe Panesko

16 ANDY WOO, WSBA # 46741

17 Assistant Attorney General

18 JOE PANESKO, WSBA # 25289

19 Senior Counsel

20 /s/ Richard E. Spoonemore

21 RICHARD E. SPOONEMORE, WSBA # 21833

22 ANN E. MERRYFIELD, WSBA # 14456

23 Special Assistant Attorneys General

24 Attorneys for Defendant State of Washington,

25 by and through the Washington State Parks and Recreation Commission

26 LAW, LYMAN, DANIEL, KAMERRER
& BOGDANOVICH, P.S.

/s/ Jeffrey S. Myers

Jeffrey S. Myers, WSBA #16390

Attorney for Defendant City of Westport

1 PACIFICA LAW GROUP LLP

2 /s/ Ian D. Rogers

3 Ian D. Rogers, WSBA #46584

4 Meha Goyal, WSBA #56058

5 *Attorneys for Defendant Westport Golf Inc.*

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[PROPOSED] ORDER DENYING PLAINTIFFS' MOTION
TO AMEND COMPLAINT - 3
[Case No. 24-2-01187-34]

SIRIANNI YOUTZ
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FILED --
SUPERIOR COURT
THURSTON COUNTY, WA
2026 JAN 23 PM 1:52
Linda Myhre Enlow
Thurston County Clerk

1 Hearing date: 1/16/2026
2 Hearing time: 9:00 AM
3 Judge/Calendar:
4 Judge Anne Egeler/Dispositive
5 Motions Calendar

8 **STATE OF WASHINGTON**
9 **THURSTON COUNTY SUPERIOR COURT**

EX PARTE

10 FRIENDS OF GRAYS HARBOR and
11 GRAYS HARBOR AUDUBON
12 SOCIETY,

11 Plaintiffs,

12 v.

13 STATE OF WASHINGTON, including
14 the WASHINGTON STATE PARKS
15 AND RECREATION COMMISSION
16 and RECREATION AND
17 CONSERVATION OFFICE,
18 WESTPORT GOLF INC., CITY OF
19 WESTPORT, J.D. FINANCIAL CORP,
20 and MOX CHEHALIS LLC,

21 Defendants.

NO. 24-2-01187-34

---] ORDER DENYING
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
ON SEASHORE CONSERVATION
AREA AND MOTION FOR
PRELIMINARY INJUNCTION, AND
DISMISSING THE STATE OF
WASHINGTON AND STATE PARKS
FROM THE CASE

22 THIS MATTER came before the Court on Plaintiffs' Motion for Partial Summary
23 Judgment on Scashore Conservation Area and Motion for Preliminary Injunction. The Court
24 has considered the following motion and all papers filed in support or opposition if it:

- 25 • Plaintiffs' Motion for Partial Summary Judgment on Seashore Conservation
26 Area and Motion for Preliminary Injunction, including all cited materials in the
record;
- Defendant Washington State Parks and Recreation Commission's Response to
Plaintiffs' Motion;
- Declaration of Fields and attachments;

] ORDER DENYING PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT ON SEASHORE
CONSERVATION AREA AND MOTION FOR
PRELIMINARY INJUNCTION, AND DISMISSING THE
STATE OF WASHINGTON AND STATE PARKS FROM
THE CASE

- Declaration of Panesko and attachments;
- Defendant Westport Golf Inc.'s Opposition to Plaintiff's Motion;
- Declaration of Merkelbach;
- Declaration of Morris;
- Plaintiffs' Reply In Support of Motion.

- *supplemental declaration of Arthur Grumbine*

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The Court has heard argument of counsel and is fully advised on the matter.

It is therefore ORDERED that:

1. Plaintiffs' Motion for Partial Summary Judgment on Seashore Conservation Area and Motion for Preliminary Injunction are both DENIED.

2. The Court's prior oral ruling dated November 21, 2025, nullified Plaintiffs' causes of action tied to the 2007 Global Settlement Agreement and associated documents, and tied to the Army Corps Covenant. In conjunction with that prior ruling, the denial of this motion removes the last issue stated in the claims for relief against the State of Washington and State Parks in the First Amended Complaint. As a matter of law, no remaining viable claims are stated against the State of Washington or State Parks, and they are hereby dismissed from this case.

DATED: January ²³21, 2026. *Az*



THE HONORABLE ANNE EGELER

1 Presented by:

2 NICHOLAS W. BROWN
Attorney General

3 s/

4 JOE PANESKO, WSBA No. 25289
Senior Counsel

5 ANDY WOO, WSBA No. 46741
Assistant Attorney General

6
7 SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC

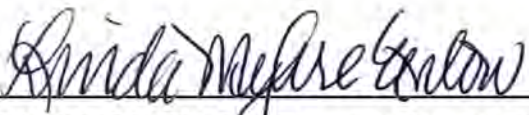
8 s/

9 RICHARD E. SPOONEMORE, WSBA No. 21833
ANN E. MERRYFIELD, WSBA No. 14456

10
11 *Attorneys for Defendant State of Washington,
State Parks and Recreation Commission*

I, LINDA MYHRE ENLOW, County Clerk and Ex-Officio clerk of the Superior Court of the State of Washington, for Thurston County holding session at Olympia, do hereby certify that the following is a true and correct copy of the original as the same appears on file and of record in my office containing **3** page(s).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court.


LINDA MYHRE ENLOW, Thurston County Clerk



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Clerk, you may create and/or sign-in to your Thurston County Clerk Documents account. Only electronically certified documents that were directly ordered through Clerk Documents can be verified using this tool.

Sign-in to Thurston County Clerk Documents:

<https://clerkdocs.thurstoncountywa.gov/verify/>

After you sign-in to your account, enter the following Serial ID.

Serial ID: **d1a52da8-ffba-40ec-1b76-08de62764de8**

This document contains **3** page(s) plus this sheet, and is a true and correct copy of the original that is of record in the Thurston County Clerk's Office. The copy associated with this Serial ID will be displayed by the Clerk.

1 Hearing date: August 8, 2025
2 Hearing time: 9:00 AM
3 Judge / Calendar:
Hon. Anne E. Egeler / Dispositive
Motions

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5
6
7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8 IN AND FOR THURSTON COUNTY

9 FRIENDS OF GRAYS HARBOR, et al.,) Case No. 24-2-01187-34
10)
11 Plaintiffs,)
12 v.)
13 WASHINGTON STATE PARKS AND) DECLARATION OF ARTHUR
14 RECREATION, et al.,) GRUNBAUM
15)
16 Defendants.)
17)
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23)

15 I, Arthur Grunbaum, declare the following on the basis of personal knowledge to which I
16 am competent to testify under penalty of perjury of the laws of the State of Washington:

- 17 1. I am a founder of Friends of Grays Harbor (“FOGH”).
18 2. Since FOGH’s formation in the 1990s, its mission has been to protect the Grays
19 Harbor estuary and ocean coastal environments. FOGH is a 100% volunteer-run tax-exempt
20 501(c)(3) citizens group made up of crabbers, fishers, oyster growers and caring citizens.
21 3. FOGH’s members use Westport Light State Park for recreation, aesthetic
22 purposes, and for personal enjoyment, as further described below. FOGH’s members are also
23

Washington State taxpayers. We have urged the State Attorney General to take on this case,
GRUNBAUM DECLARATION - 1
Case No. 24-2-01187-34

SMITH & LOWNEY, PLLC
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

1 through formal taxpayer notice. Attached as **Exhibit A** is a true and correct copy of the notice.
2 When the Attorney General did not intervene, we amended our complaint to assert taxpayer
3 standing.

4 4. From 2000 through 2010, Mox Chehalis LLC pursued development of a “Scottish
5 Links” style golf course, known as Links at Half Moon Bay (“Links Project”), in Westport,
6 Washington, on a property that contains some of the most rare and sensitive interdunal wetlands
7 in the State of Washington. Due to the sensitivity of the Links Project site (“Property”), the Links
8 Project required extensive permits and regulatory approvals, including shoreline permits, a
9 Section 404 permit to fill wetlands under the federal Clean Water Act, 401 Water Quality
10 Certification, hydraulic project approval, and site plan approval.

11 5. Between 2000 and 2007, FOGH appealed virtually every permit that was issued
12 to the Links Project, often with its allies Washington Environmental Council (“WEC,” now
13 called “Washington Conservation Action”) and Wildlife Forever of Grays Harbor.

14 6. Litigation over the Links Project was an extensive land use battle. It included
15 seven years of permit appeals, lawsuits, and other challenges – in front of the Shoreline Hearings
16 Board, Environmental and Land Use Hearings Board, Thurston County Superior Court, and
17 eventually, Division II of the Washington Court of Appeals. Notable litigation events included a
18 weeklong contested hearing before the Environmental Hearings Office, two separate cases in
19 Thurston County Superior Court, both litigated to judgment, open record and closed record
20 permit appeals, extensive discovery, briefing and arguing numerous dispositive motions, and full
21 briefing and argument before Division II of the Court of Appeals.

22 7. This was a very burdensome case also for the judicial system, since so many
23 appeals were involved.

1 8. These challenges spanned a variety of environmental issues, including the
2 wetlands issues that are at the heart of this case. In addition, the Property is at risk of erosion,
3 contains the City of Westport’s sole source aquifer, and provides valuable habitat for birds,
4 salmonids, rare vegetation, and other species.

5 9. Washington State agencies, including the Department of Ecology and Department
6 of Fish and Wildlife also opposed the Links Project.

7 10. At least six different Washington State agencies were involved in the Links
8 Project permitting and litigation, to differing degrees. Most significantly, the Department of
9 Ecology (“Ecology”) issued major permits and was involved in all seven years of litigation,
10 including bringing the first appeal of the Links Project permit. For years, the Environmental
11 Hearings Office (“EHO”) and the Department of Fish and Wildlife (“WDFW”) conducted
12 numerous contested proceedings, including a week-long contested hearing before the EHO. The
13 Department of Natural Resources (“DNR”) and Washington State Parks and Recreation
14 Commission (“Parks Commission”) submitted extensive comments and were parties to the SEPA
15 proceeding. In addition, Governor Chistine Gregoire, a small agency in her office, and the
16 Washington Legislature got involved in this land use battle, passing special legislation to create a
17 brand-new land use hearings board just to hear FOGH’s appeals of the Links Project permits.

18 11. In addition, numerous local agencies were involved, including the Port of Grays
19 Harbor and City of Westport, which were both involved in most of the litigation over the seven-
20 year period.

21 12. This litigation was well known throughout the State and to the agencies that
22 would eventually lead the State’s purchase of the Property. For example, Kaleen Cottingham, the
23 director of the Recreation and Conservation Office (“RCO”) when it funded the Property

1 purchase, had previously served as the presiding officer for the EHO on one of FOGH’s permit
2 appeal and she issued major rulings on the Links wetland permit appeal. In addition, Steve Hahn,
3 the property acquisition director at the Parks Commission, was closely following the Links
4 Project because the Parks Commission had a goal to purchase the Property if possible.

5 13. Over the course of the Links litigation, we engaged in multiple efforts to settle
6 with Mox Chehalis and the many agencies involved. The first mediation was at the behest of the
7 State EHO. Later, with the blessing of Division II of the Court of Appeals, we had a final
8 mediation before retired Thurston County Superior Court Judge Daniel Berschauer, which
9 resulted in the Global Settlement.

10 14. The Global Settlement was reached after full briefing and argument before
11 Division II. FOGH was in a strong place. We believed that oral argument went well for us, and
12 we had developed a legal strategy to delay the project for years in hopes of eventually defeating
13 it altogether. In our final negotiation letter, we told Mox Chehalis that we “didn’t want to spend
14 six more years on this case,” and “[a]fter much soul searching, [we] decided to let the project go
15 forward provided we were able to negotiate important environmental protections. The proposed
16 settlement provides such environmental protections, while allowing the project to move forward
17 without delay.”

18 15. In settling its permit appeals, FOGH negotiated the wetland protections contained
19 in the Global Settlement and its attachments, which required most of these protections to be
20 incorporated into a shorelines permit and conservation easement, and were in fact incorporated
21 into the revised Shoreline Substantial Development Permit and Army Corps Covenant. The
22 Global Settlement specifically states that it would apply to future golf course owners and
23

1 designs, because at the time of the Global Settlement, there was no fill-free golf course design,
2 and everyone always anticipated that Mox Chehalis would sell or lease the project.

3 16. Another important piece of the Global Settlement, which FOGH fought hard to
4 secure, was designating the City of Westport as the primary responsible party for oversight of
5 compliance with the Global Settlement. The settlement required its protections to be
6 incorporated into a shorelines permit and conservation easement, which the City would monitor
7 and FOGH or anyone else could enforce, if necessary.

8 17. The Settlement was also designed to support the State’s environmental goals, and
9 specifically incorporated Ecology’s water quality standards into the settlement and made them
10 enforceable. The promised redesign of the course to avoid wetland fill removed Ecology’s
11 regulatory role and so the Settlement was the only way to retain Ecology water quality standards
12 for the Links Project.

13 18. From the perspective of the wetlands on the Property, the Links Project and the
14 Links 2 Project are the same – and they are strikingly similar in terms of purpose and design.
15 They both use all the “uplands” in the wetland mosaic for a golf course. Both use an adjacent
16 piece of property for the golf course’s lodging and related amenities. Both are touted as “Scottish
17 Links”-style courses, similar to the golf course in the Bandon Dunes, Oregon, which are
18 designed for championship golf. Both place the driving range in the same location. Indeed, both
19 projects involved the same golf course designer.

20 19. FOGH members have benefitted from the conservation requirements imposed by
21 the Army Corps Covenant because they can observe, recreate around, and enjoy rare wetlands
22 and the species that call them home. Our members hike on the Property and look at birds and
23 wildlife on the Property, for example.

1 20. When the State purchased the Property, everyone knew the history of the Links
2 Project, but it was also obvious on the ground. Filled wetlands had never been restored, and
3 construction debris was visible throughout the Property.

4 21. The Army Corps Covenant can be easily found on the Grays Harbor County
5 Auditor’s website. Attached as **Exhibit B** is a true and correct copy of a screen grab of the Army
6 Corps Covenant as it appears on the website after searching. It takes around 30 seconds to run a
7 name search for “Mox Chehalis” and the Army Corps Covenant comes right up on the list of
8 recorded documents. I have done this several times, and it is basic. Given that the shorelines
9 permit and global settlement required Mox Chehalis to record a conservation easement, I would
10 think anyone buying the property would have conducted this 30-second search.

11 22. We always felt that the wetlands on the Property would be best protected by
12 bringing it into the State Park system. When the Links Project fell through, we threw our support
13 behind the State’s effort to purchase the property. We never would have believed that the State
14 would reverse course and seek to complete the golf course project by its “Links 2” proposal.
15 Links 2 threatens all of our benefits under the Global Settlement.

16 23. When the State purchased the Property in 2015, FOGH supported the transaction,
17 believing that the State, as the new owner of the Property and conservation easements thereover,
18 would be in the best position to continue to protect the Property from development. The State’s
19 stated purpose for purchasing the Property was to expand state parklands and preserve habitat,
20 and FOGH understood at the time that the State would inherit Mox Chehalis’ and JD Financial’s
21 environmental obligations under the Global Settlement and Army Corps Covenant, as a
22 successor. FOGH believed that incorporating the Property into state parklands was the best
23 option for continued preservation and protection of the wetlands on the Property.

1 24. It is hard to overstate the impact of the Links 2 Project on FOGH. The conclusion
2 of the Links Project through the Global Settlement was a victory for the wetlands and the
3 environment, secured over seven years. Now, FOGH has to raise funds and go through the exact
4 battle again simply to preserve our wins. This includes time and money. I and other volunteers
5 have spent hundreds of hours on this effort so far. In addition, we expect that the attorneys' fees
6 and costs will exceed a million dollars to fight out the permit appeals, which will take years. To
7 date, FOGH has incurred over \$250,000 on attorneys' fees and litigation costs and has paid about
8 15% of this figure.

9 25. The State has designed its process to be particularly vexatious. The State
10 officially says it reserves its judgment on Links 2 until after the permits are issued, but it is
11 pouring hundreds of thousands of dollars of staff and attorney time into securing those permits. If
12 we allowed any of those permits to be issued, we would lose our ability to protect the wetlands
13 into the future.

14 26. FOGH is having to expend additional funds, time, and effort travelling to public
15 meetings and informational sessions, drafting and submitting public comments, and monitoring
16 the progress of the Links 2 Project, despite having already secured wetland protections that
17 preclude the Links 2 Project from going forward as designed.

18 27. FOGH's members and supporters are being harmed by the State's proposal
19 because they are forced to spend resources to protect the interdunal wetlands despite having
20 already contracted for such protections in the Global Settlement. FOGH would be harmed by the
21 project's negative impact on the interdunal area, which qualifies as an Aquatic Resources of
22 National Importance ("ARNI"). The project threatens water quality and quantity, water-user
23 experiences (surfing), beach experiences, clean drinking water, and surface waters. In addition,

1 the proposed golf course presents an economic justice issue by requiring the public to pay a
2 greens fee to enjoy public park property.

3 28. FOGH's members have aesthetic, economic, health, and recreational interests in
4 protecting the sensitive wetlands on the Property. The proposed project would harm plaintiffs'
5 members and supporters by negatively impacting Category I interdunal wetlands in Westport
6 Light State Park. The project would imperil unique and rare coastal dune habitat, interrupt
7 quality habitat for a range of avian and wildlife species, impair water quality through pesticide,
8 herbicide, and fertilizer pollution, and limit equitable access to the beach and to Westport Light
9 State Park.

10 29. Despite FOGH suing again to protect their rights under the Global Settlement,
11 Army Corps Covenant, and Revised Shoreline Substantial Development Permit, the Defendants,
12 including the City of Westport, are pushing forward on the Links 2 Project. The City of Westport
13 has designated itself the SEPA Lead Agency and issued the Draft Environmental Impact
14 Statement for the project in April 2025. A Final Environmental Impact Statement is forthcoming.
15 Defendants have indicated no intent to pause or slow down the Links 2 Project, despite serious
16 questions about its legality.

17 EXECUTED in Grays Harbor, Washington on this 10th day of July, 2025


18
19 By: 
20 Arthur Grunbaum

Exhibit A

SMITH & LOWNEY
— PLLC —
ATTORNEYS AT LAW

May 27, 2025

Attorney General Nick Brown
1125 Washington St SE
PO Box 40100
Olympia, WA 98504-0100

Via Fedex and email

Subject: Request for taxpayer enforcement

Attorney General Brown,

I am writing on behalf of our client, Friends of Grays Harbor (“FOGH”), to demand that your office take immediate action to enforce several conservation easements protecting rare interdunal wetlands within Westport Light State Park.

As background, after seven years of litigation between 2000-2007, Friends of Grays Harbor and Washington Environmental Council (now Washington Conservation Action) entered into a global settlement that provided permanent protection for rare interdunal wetlands in a parcel of land in Westport, Washington, and provided that any future golf course would be built without any wetland fill. The EPA identified these wetlands as Aquatic Resources of National Importance. The Washington State Department of Ecology signed off on the settlement.

Those permanent wetland protections were further strengthened through durable conditions of a shorelines permit and a recorded conservation easement that the US Army Corps of Engineers required to resolve illegal wetland filling on the property.

Ultimately, the land in question was purchased by the State of Washington through an RCO grant and it was made part of Westport Light State Park.

Now, the State of Washington is seeking to build a golf course in these wetlands and violate the conservation easements that protect the wetlands. These are rare Category 1 interdunal wetlands within the jurisdiction of the Shorelines Management Act and the Shoreline Conservation Area.



As you may know, an existing lawsuit is brought by FOGH, whose 2007 settlement required permanent protection of the interdunal wetlands. Attached is a copy of the complaint and attachments.

The Attorney General is recognized as an appropriate government representative to protect taxpayers and enforce the public's right in conservation easements. Moreover, the AGO has the duty to "ensure that no uses are made of the shorelines of the state" which conflict with the Shoreline Management Act. RCW 90.58.210; *see also Honeywell v. Dep't of Ecology*, 2 Wn. App. 2d 601, 607, 413 P.3d 41, 45 (2017). The Attorney General is "specifically empowered and directed" to seek injunctive, declaratory, or any other necessary action to protect the State's shorelines through enforcement of the Shoreline Management Act. *Toandos Peninsula Asso v. Jefferson Cty.*, 32 Wash. App. 473, 485, 648 P.2d 448 (1982); *see id.*

The Attorney General's Office is currently litigating on behalf of its agencies to invalidate the conservation easements and to fill the wetlands in Westport Light State Park for a private development project. While we understand that parts of the AGO may have a duty to defend their agencies' actions, Attorney General Brown has an obligation to protect taxpayers and the public by enforcing the conservation easements and ensuring that state funds are not spent on a project that cannot proceed due to the conservation easements.

Due to the apparent conflict of interest within the AGO, we ask that the Attorney General appoint special counsel to represent the public in enforcing the conservation easements and preventing state use of funds that violate the permanent wetland protections provided for by the conservation easements.

We give this notice in anticipation of FOGH and Grays Harbor Audubon and perhaps others seeking taxpayer standing to step into the shoes of a conflicted AGO and, if necessary, litigating the Attorney General's failure to represent the public's interest due to this conflict of interest.

We ask that you immediately commence an action to enforce the conservation easements and prohibit state action that is inconsistent with the easements. This matter is urgent due to the State's asserted plan to close the SEPA process and begin seeking permits for a project that violates the conservation easements. Thus, we may have to bring action on behalf of taxpayers as early as late this week.

Please get in touch if you would like further information or to discuss this matter, or if your office needs additional time to investigate.

Yours very truly,

By: Knoll Lowney
Knoll Lowney
Evelyn Mailander

Enclosure

Cc: Friends of Grays Harbor

Exhibit B

Grays Harbor Self Service
Web

Document Type
Covenants

Recording Date:
12/14/2010 09:38:17 AM

Alt:
2010-12140003

Number Pages:
2

Recording Fee:
\$68.00

Mailback Date:
Fri Dec 17 11:19:12 PST 2010

Original Recording Fee:
\$68.00

Volume/page:

Grantor: MOX CHEHALIS	Grantee: PUBLIC
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Legal Data

Calculated Legal:

Page: 1 of 7

Automatic Zoom

DECLARATION OF COVENANTS AND RESTRICTIONS
FOR THE
Mox Chehalis, LLC Property in Westport, WA

THIS DECLARATION made this 7th day of December, 2010,
by James Daly, 29308 132nd Ave. SE, Auburn, WA 98092 ("Declarant").

RECITALS

1. WHEREAS, Declarant is the owner of the real property described in Exhibits "A" and "B" attached hereto and by this reference incorporated herein as the "Property", and desires to create and preserve thereon wetlands and forested habitat to be maintained in accordance with the provisions made between the declarant, and the Department of Ecology (DOE) and the U.S. Army Corps of Engineers (USACE) for project bearing the Revised Shoreline Management Permit

Screen grab from Grays Harbor County Recorded Document Search Portal, available at <https://ghceagle2.co.grays-harbor.wa.us/web/document/DOC47S3370?search=DOCSEARCH170S2> (last visited July 10, 2025).

COPY



EIS 007478

State of Washington
DEPARTMENT OF FISH AND WILDLIFE

Region 6 Office: 48 Devonshire Road - Montesano, Washington 98563-9618 - (360) 249-4626

December 8, 2000

City of Westport
ATTENTION: Randy D. Lewis
Post Office Box 505
Westport, Washington 98595

RECEIVED

DEC 19 2000

DEPARTMENT OF ECOLOGY
ENVIRONMENTAL REVIEW

Dear Mr. Lewis:

SUBJECT: Draft Environmental Impact Statement; Mox Chehalis L.L.C. Proponent, "Links at Half Moon Bay" Westport Golf and Hotel Destination Resort Project, Pacific Ocean, Half Moon Bay, and Westhaven Cove, Section 01, Township 16 North, Range 12 West, Grays Harbor County, WRIA 22.MARI

The Washington Department of Fish and Wildlife (WDFW) has reviewed the above-referenced Draft Environmental Impact Statement (EIS) document received on November 8, 2000, and offers the following comments at this time. Other comments may be offered as the project progresses.

The project is proposed to be located in one of the more critical areas, in terms of erosion, wetlands, and habitat value, on the Washington Coast. WDFW is very concerned that the project area may not be suitable for this development because of the following issues; erosion, flooding, wetland impacts, impacts to fish and wildlife habitat, and impacts to water quality.

EROSION AND FLOOD ISSUES

This site is located in an area of recent and ongoing erosion that has only been held at bay by massive multi-million dollar interventions by the Federal government. The Coastal Erosion Study, jointly conducted by the USGS and DOE, has identified the mechanism by which this erosion is occurring - the continued export of sand via the ebb jet caused by the Grays Harbor Jetty system. This study has also identified an ongoing and a predictable event, the subduction of the Washington Coast, that occurs regularly in approximately 300 year intervals and last occurred in 1701. This event results in a sudden drop in beach elevation of over six feet, followed 20 minutes later by a tidal wave of over 30 feet which destroys everything in its path. The likelihood that this event will occur within the life span of this project is virtually 100%, making developments of this type in this area ill-advised at best. Furthermore, the Corps of Engineers in their 1997 Long Term Solution to South Jetty and Half Moon Bay Erosion, has identified that even with their coastal erosion methods now in place, that the shoreline may continue to recede between 3,500 and 5,000 feet over the next 50 years. Most of this development is proposed to occur in this predicted erosion area. Any development is therefore at great risk from erosion that will inevitably occur during the life of the project.

Mr. Lewis
December 8, 2000
Page 2

Development in this area will inevitably result in proposals to control erosion. However, there are no practical means to bulkhead or stabilize the ocean; such projects constructed in the past usually fail, and always cause massive damage to and losses of adjacent shoreline areas and shoreline habitat. Of particular concern to WDFW are the upper intertidal areas of the Pacific Ocean beaches fronting the project, which are the most southerly known surf smelt spawning beds in the State. Any erosion control, or any unnatural materials that get on the beach due to erosion, will cause unacceptable loss of these spawning beds. This loss will translate into lowered production for fish and wildlife that utilize these baitfish as a critical forage base. These include a multitude of ESA listed species that frequent the area, including many species of salmonids from Washington, Oregon, and California, and including the brown pelican and marbled murrelet. Of additional concern are the razor clam beds in the lower intertidal area. The beds in the Grayland management unit, where this project is located, are the most productive and frequently harvested in the state. Razor clamming is big business, WDFW sells over a million licenses annually for this activity. This leads directly to economic benefits for the local area. Discharge of contaminants onto the beach from erosion or other causes may eliminate this area from productivity.

The potential for flooding is also relatively high. The whole project is located in a 100 year floodplain, and a portion is also located in an area where flooding is propagated by wave action (pg. 3-4). On Page 3-11, mitigation approaches to flood hazards are said to be addressed in Section 11.0, however no mitigation for flooding is mentioned in section 11.0 at all.

Another significant issue that is not addressed, is the relationship of the portion of the development north of the Westhaven Park road to the erosion protection berm that was installed recently by the COE to protect the Westport sewage treatment plant. The closest development is proposed to occur at 200 ft. from the shoreline (pg. 3-13) and is located in this area, yet the erosion control project is not mentioned. The beach in this area is within Grays Harbor and is critical habitat for migrating juvenile salmonids, including ESA listed species, and as a result the mitigation agreement for the installation of this berm, which is built of sand with a stone core, specifies that sand will be maintained on the beach and face of the structure so that stone is never exposed during critical resource utilization periods, specifically juvenile salmonid outmigration. To facilitate this, a sand storage area is located landward of the berm, that can be accessed and utilized to nourish the beach in this event. This is where condominiums and convention centers are proposed to be installed. This appears to be a problem for the operation of this component of mitigation for the berm project.

By far the best way to avoid these impacts is to predict in advance where erosion of developments will destroy habitat, and avoid developing such areas. The above-referenced studies provide the tools to make this prediction, and their advice should be heeded. Moving the development out of the way of erosion, before any of it impacts the beach, is the only other feasible means of protecting critical habitats, and is the most cost effective after avoidance. Existing developments adjacent to and within the project area, specifically the Westhaven Park

restrooms and parking area, and the Westhaven to Westport Light State Park Trail, are designed to be relocated in the event of erosion. The restroom and parking have already been relocated once. The proposed relocation of the pedestrian walkway closer to the ocean will only hasten its removal and loss. An agreement that removal will be the method of dealing with erosion, as we have with State Parks developments, along with a bond sufficient to accomplish complete removal and restoration, will be necessary given the private nature of this development, could be a component of project mitigation. However, given the inevitability of erosion, avoidance seems the most prudent measure.

WETLAND ISSUES

The site is predominantly wetlands. It contains much more than a number of isolated wetlands as stated on pg. ES-1. It is the largest block of undeveloped single ownership interdunal wetlands in the Westport area. These wetlands are not only critical habitat themselves, but are performing the critical function of infiltration and biofiltration of untreated storm water from adjacent developments. This property, the vast majority (73%) of which is interdunal and early successional forested wetlands, drains into the extensive saltmarsh bordering the City of Westport, which is a tributary itself to the Elk River estuarine system. This system supports an abundant spawning population of herring, which spawn on saltmarsh vegetation and eelgrass, and which are extremely sensitive to water quality impacts. For example, as little as 5 parts per billion of polycyclic aromatic hydrocarbons (a common automobile exhaust byproduct) causes death to herring eggs. This species of baitfish comprises critical forage for pacific salmonids, among them the ESA listed Bull Trout found in adjacent Grays Harbor. Juvenile salmonids also utilize saltmarshes as critical habitat for rearing, feeding, and escape from predators. Macro invertebrates growing in this saltmarsh estuary are important food sources for fish including salmon, and could well be adversely impacted by contaminants, such as fertilizers, herbicides, and pesticides, even at very low levels, escaping from the project area. In addition, shellfish health concerns should be considered for areas where harvesting occurs, as there is significant aquaculture production in this portion of the Elk River estuary that this project drains into. Ecosystem health and not just human health should be evaluated, and toxicity studies should also be completed. Chronic impacts to aquatic life criteria should be used as an indication of impact in addition to the LC50. Methods of sampling and testing similar to those used by the USGS in the Puget Sound should be incorporated to assess the risk to these species, perhaps utilizing those found in "Occurrence of Pesticides in Streams and Ground Water in the Puget Sound Basin, Washington, and British Columbia, 1996-98," by Gilbert C. Bortleson, and James C. Ebbert, the US Geological Survey, Water Resources Division, 1201 Pacific Avenue, Suite 600, Tacoma, Washington 98402. Any activity that has the potential to contaminate or otherwise impact this critical habitat needs to be avoided.

Unfortunately, the project proposes fill of 12 wetland acres, and mowing/maintenance of an additional 18 acres. This is a significant impact in a limited area. WDFW does not feel that the mitigation proposed in the DEIS to cover the wetland impacts is sufficient, especially since the

project has not shown that it has avoided all wetland impacts and is impacting wetlands as a last resort. The first step in wetland mitigation is complete avoidance. The project does propose to excavate approximately 40 acres of uplands and convert them to wetlands, but such projects conducted in the past are notoriously prone to close to 100% failure. We do not consider this type of mitigation feasible, and would instead request that the project proposal be redesigned so that wetland fill is unnecessary.

STORM WATER, SURFACE WATER, AND GROUNDWATER

Presently, the wetlands on this site, and many of the uplands, are serving as the defacto stormwater detention, infiltration, and treatment system for the City of Westport. This is because the city was developed with very few if any stormwater treatment systems, and because much of the city is built on filled wetlands. Furthermore, the topography prevents city drainage during high tide - the outfall for the project area is tide gated to prevent the area from flooding. This is an imperfect solution - the area is frequently flooded anyway when waves produced by severe winter storms inundate the area, and the area simply does not drain at high tide, but there is at present sufficient undeveloped wetland acreage to accommodate the surge from most events. Even so, we have been approached by the City with proposals to maintain the wetland-bisecting ditch that was installed years ago in the native saltmarsh meadow just downstream from this development. The diverse and well vegetated nature of the wetland complex also acts to remove pollutants, through uptake into both emergent and perennial vegetation which covers much of the site.

The project as proposed would radically change all this; the fill of wetlands would remove detention and treatment area, the installation of impervious surfaces and underdraining of the greens and other frequently flooded golf course areas would dramatically decrease infiltration and increase peak flows into the remaining wetlands, and even if area was excavated sufficient to accommodate the additional flow, this area would be large dysfunctional for stormwater treatment due to lack of wetland vegetation. There are not any real workable proposals in the project plan to treat any storm water. The mentioned 25 foot grass filter strips are inadequate for treatment at least 100 feet of grass is necessary to remove pollutants and 200 feet is optimal. The other proposal is to excavate a stormwater detention pond of unspecified size. Where are these stormwater treatment systems going to be installed, assuming that they will be gravity fed? With most of the uplands occupied by either developments or the proposed wetland creation, these will have to go in existing wetlands, which completely negates their net value for treatment and detention. The only solution that is sure to address these concerns is a manufactured stormwater collection and treatment system. Essentially a tertiary treatment facility with a vacuum collection system and subtidal outfall would be the treatment system of choice. This is admittedly an extreme measure, but the only one that has a chance of maintaining water quality.

This is likely to be necessary because of the large amounts of chemicals and nutrients that will be added to the environment as a result of having to keep the non-native and highly sensitive grasses

preferred for golfing green and healthy in this difficult environment. Certainly an attempt will be made to develop BMPs for minimizing chemical use, but emergencies and accidents happen. Moreover, a byproduct of converting this area into lush grass fields with high food value will be the attraction of potentially thousands of Canada geese. These birds produce approximately 2 pounds each of feces per day, a nutrient and coliform input that will be added to the already overloaded system. Control of these geese in an urban setting will not be possible, as hunting within the city limits is not likely to be allowed, and wintering populations will likely contain significant numbers of endangered Dusky Canadas, which will need to be protected from all but selective control methods.

There are additional risks to wetlands proposed to be protected on site from upsetting the delicate hydraulic balance that has evolved in this area. Huge amounts of groundwater are proposed to be pumped from the area for irrigation. This will have an effect on the water table likely to severely depress it in the summer. This will inevitably cause adjacent wetlands to dry up too quickly, impacting fish, wildlife, and wetland ecosystems health and functions. When these wetlands are then subjected to peak storm flows they will become essentially too wet too soon and too often. Wetland ecosystems are delicate, and annual water fluctuations that exceed natural parameters destroy their hydrology and their ability to grow wetland vegetation.

The resulting scenario does not benefit fish and wildlife. Wetland ecosystems on site will be compromised and damaged. Stormwater will be imperfectly detained and treated, leading to contaminated discharge to the adjacent saltmarsh wetlands. These discharges will likely occur during the winter storm season, when herring eggs are in the saltmarsh (January 15 through March 15) and when juvenile salmonids are migrating (as early as February 15). The loss of these fish will lead both directly and indirectly to a take under ESA.

DEFICIENCIES IN THE EIS

This EIS has some major problems in the presentation of impacts. Throughout the EIS, the “No Action” alternative analysis of which is required under SEPA is portrayed as being more impacting than the preferred alternative. Postulating that things like unrestricted commercial or residential development will be automatically authorized if the area is not developed into a golf course. This is not a “No Action”, and all of these activities would be regulated under the Clean Water Act so that no net loss of wetlands occurred. 73% of the project is automatically undevelopable as a result. Other “No Actions” include logging, even though there is no commercially harvestable timber and the area is not forest land, and grazing, even though the area is within the city limits and is not farm land. These are not “No Actions”. Also, frequent reference is made to the desirability of a maintained golf course, which would be free of scotch

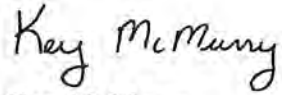
broom, blackberry, gorse, and other invasive species. The statement is made that these species will overtake the natural wetlands if not maintained. These are upland species, and are not growing in the wetlands today for that reason. These plants will not grow in the wetland in the future as a result of "No Action". Moreover, the area of uplands where these plants could grow is dominated by native species adapted to difficult interdunal conditions. What is out there today is the expected condition under "No Action", and should be described and referenced as such in the EIS.

There are admittedly present impacts. There are undeveloped jeep trails throughout the property (not "roads" as indicated in the EIS) and other uses that are unauthorized and dangerous. For example, garbage dumping, campfires, party areas, ORV race courses, and spills from ruptured fuel systems that have developed in the project area due to lack of development or interest by the present owner. These activities have not yet led to environmental or human emergencies, but are likely to if the people accessing the area in this way are left to their own devices. Rather than wait for these to happen, and suffer the expense of legal repercussions, the owner should post the area and block vehicular access.

There are additional impacts to present uses not identified or mitigated in the EIS. Westhaven State Park and the Westport Light State Park are the most frequently visited ocean beaches in the State of Washington. Visitors to these sites are interested primarily in the natural environment and the recreational amenities it offers, particularly fish and shellfish harvest opportunities and wildlife viewing in a relatively undisturbed setting. WDFW cooperates closely with WSPRC and local jurisdictions to provide the best sustainable utilization of and access to these resources. This project, by adding another approximately 4 to 5 thousand visitor trips per day to a facility that will both directly and indirectly reduce the fish and wildlife habitat and populations that present visitors enjoy, will impact and correspondingly interfere with and reduce present use. The present waterfront trail connecting the two State Parks and built with IAC money will be initially relocated and eventually eliminated, if not directly by erosion then indirectly by displacement of the fish and wildlife in their natural habitats that visitors presently enjoy. This displaces visitors, likely as many as would be attracted by the development. A net loss of public use and enjoyment may well be the result. Public uses are required to take precedence over private under SEPA, and this should be especially appropriate in this case, as the property is presently in public ownership.

Thank you for the opportunity to provide this information. If you have any questions, please contact me at (360) 249-4628 Ext. 231

Sincerely,



Key McMurry
Area Habitat Biologist

KM:km: Links to Half Moon Bay, Westport, Comments on Draft EIS

cc: Greg Hueckel, WDFW
Dan Wrye, WDFW
Sue Patnude, WDFW
Bob Burkle, WDFW
Steve Keller, WDFW
Dan Ayres, WDFW
SEPA Coordinator, WDFW
SEPA Coordinator, Ecology
Fred Seavey, USFWS Olympia
Justine Barton, EPA Seattle
Gordy Zillges, NMFS Olympia
Bill Jolly, WSPRC Olympia



STATE OF WASHINGTON

WASHINGTON STATE PARKS AND RECREATION COMMISSION

7150 Cleanwater Lane • P.O. Box 42650 • Olympia, Washington 98504-2650 • (360) 902-8500

Internet Address: <http://www.parks.wa.gov>

TDD (Telecommunications Device for the Deaf): (360) 664-3133



December 14, 2000

City of Westport, Washington
Westport City Hall
506 Montesano Street
PO Box 505
Westport, WA 98595

SUBJECT: Draft Environmental Impact Statement "Links at Half Moon Bay"

Dear Mr. Lewis:

Thank you for the opportunity to review the proposal for "Links at Half Moon Bay, Westport Golf and Hotel Destination Resort." Westport Light State Park¹ is Washington State Parks' most frequented day use facility with beach access. Visitors enjoy a diverse and unique wetland dune habitat in a secluded area in northwest Westport. Washington State Parks supports appropriate economic development, but we have concerns about the location and impacts of the proposed project. Primary concerns are:

- Maintaining public access to the beaches, including those at Half Moon Bay
- Maintaining public use and enjoyment of Westport Light State Park and Westhaven State Park
- Maintaining public use and enjoyment of the Jetty Access Road
- Maintaining the walkway between the two state parks (Westport Light State Park and Westhaven State Park)
- Conserving the unique and diverse habitat and associated wildlife for visitors to enjoy

The Pedestrian Walkway

The relocation of the pedestrian walkway that presently extends from Westport Light State Park and Westhaven State Park is a major concern.

- 1 [▪ Moving the walkway closer to the beach increases the possibility for erosion especially given the unstable nature of the area. Because shoreline buffer would be lost, relocating the walkway is an unacceptable proposal.
- 2 [▪ Relocating the walkway would also significantly change the atmosphere and view of the trail, as it would have a panoramic view of the "two golf course holes that will have a panoramic view of the Pacific Ocean (ES-4)."
- 3 [▪ Relocating the walkway would have a greater impact on the dunes.

¹ Westport Light State Park is the official name of the park (not Lighthouse State Park).

- 4 [If any of the trail realignment takes place on Washington State Parks property, State Parks will need to review the plans and provide approval prior to any work. This is in accordance with condition B of the **Term Use Agreement** that was issued by Washington State Parks to the City of Westport for the development and operation of the trail across Westport Light and Westhaven State Parks.
- 5 [**State Parks administers the seashore conservation area**, which includes the tidelands between the 2 parks (the beach area between extreme low & ordinary high tide). State Parks is charged by law to protect this area for public use in its natural condition (RCW 79A.05.600). If any development is to occur on this property, a land use authorization/agreement will need to be obtained from State Parks.
- 6 [The **Term Use Agreement** Amendment added a condition (K) that the City shall install a 6-inch water main adjacent to the trail to serve Westhaven State Park. This water line needs to be taken into account.
- 7 [If the City received an IAC Grant for this trail, realignment would require mitigation. The City may need to work with the IAC if it is changing alignment or anything else from the scope of work of the grant.
- 8 [In addition, the statement on page 11-12 is misleading: "The existing pedestrian walkway along the Pacific Ocean between Westhaven State Park and Westport Light State Park will likely be relocated closer to the ocean during construction." Where will it be located after construction?

Ecological footprint

This project proposal contains condominiums, a hotel, and other associated commercial retail spaces, which the proposal rightfully calls "structures with large footprints (3-12)."

- 9 [**This project would have a serious impact on the wetlands and other critical habitat areas, which Washington State Parks has an interest in protecting.**
- 10 [No Action Alternative: given the vast area of wetlands, it is unreasonable to conclude that the No Action Alternative would lead to the, "construction of structures with large footprints (e.g., condominium, office complex, amusement park)... (3-12)," at least not to a great extent. The golf holes are strategically placed between wetland areas. Condominiums and other developments of this nature would not be able to avoid major impact and/or destruction of wetland areas and as such would be regulated strictly and/or disallowed by regulating agencies such as the Department of Ecology.
- 11 [Further, the No Action Alternative contains a specious argument that, "...the homeowner could allow livestock to graze in the wetland areas...(5-4)". The project site is located in a tourist commercial zone within the city limits where range farming is not allowed.
- 12 [Concerning timber, it is doubtful that any marketable timber exists on the property, or that the landowner would "apply for a Class III Forest Practices Application (FPA)... (5-4)."

Visitor Access to the Jetty Access Road

4227 more trips a day on the Westhaven State Park entrance road (Jetty Access Road) is significant (10-9). A portion of the Jetty Access Road is granted to Washington State Parks under easement, and a portion of the road is owned and maintained by Washington State Parks (see attached maps, Exhibit A and B).

- 13 [Permission to access the Jetty Access Road in Westhaven State Park would need to be obtained. Please contact our Lands Program for more information: (360) 902-8650, Karl Jacobs.

13 Permission to access the portion of the road that is under easement would need to be obtained from the underlying landowner. Washington State Parks should have an opportunity to review and approve development plans to ensure there will be no interference with park use. Clause 6 of the road easement states that the grantor, "...reserves to itself rights of way for all purposes across, over, and/or under the right-of-way hereby granted; provided, however, that such rights shall be used in a manner that will not create unnecessary interference with the use and enjoyment by the grantee of said right-of-way..." (Exhibit A).

14 If local development regulations do not already call for such improvements, appropriate road upgrades would also need to be made to mitigate the impact of increased road use. These should include sidewalks, walking paths, and bike trails, so that the public may continue to enjoy the road. Additional traffic on the road would make it extremely difficult, if not impossible, for people to participate in certain recreational activities such as jogging, biking, or walking pets. The existing road has narrow shoulders and could not safely accommodate both a major increase in traffic and continued recreational use. An increase in outside traffic would also cause more traffic-related incidents and create more litter, both inside and outside of the park.

15 Any significant increase in operational and maintenance costs due to visitors to the Links at Half Moon Bay should be mitigated, or paid for by the owner.

16 What does the project proposal mean by entrance, "through local streets on the north end of the site (10-9)?" Does this mean that the Jetty Access Road does not need to be used? A clear distinction between the two routes needs to be made on a map. Does this access refer to just the hotel, or to both the "luxury hotel" and the "future development site?"

Noise Levels

The proposal states that, "based on the criteria established by the EPA, noise level increases in the vicinity of the Jetty Access Road would be considered a serious impact."

- 17 A significant increase in noise level will seriously interfere with recreation, use and enjoyment of both Westhaven State Park and the Jetty Access Road.
- This would undermine Clause 6 of the aforementioned road easement and could not be allowed.
- Measures, such as buffers, etc., should be taken to minimize impact to recreational activities.

Increased Maintenance/Increased Number of Visitors

18 The number of visitors to the Links would also increase the number of visitors to the park. How much will traffic and usage increase in Westhaven State Park and Westport Light State Park (estimated daily increase)? These visitors would be using the restrooms, parking in the parking lot, and would create a need for more maintenance. The area would also need to be patrolled more often. Does the Park have the capacity to accommodate such a high volume of visitors? These questions need to be answered.

Public Access and Parking

- 19 This project proposal contains condominiums, a hotel, and other associated commercial retail spaces and the golf course. These types of developments, as stated in the proposal, "would likely impact open space recreational opportunities along the sandy beach at Half Moon Bay...(3-12)." The beach at Half Moon Bay is highly sheltered and protected from the wind of the coast. As such, it is heavily used by the public for picnicing, beach combing,

19 and other activities. Westhaven State Park is a very popular area that offers a diversity of habitat. It is a dynamic area that experiences high winds and waves, and it is used year-round by surfers. Public access to recreational areas in and adjacent to the park should be maintained.

20 ■ Parking will also become limited. Of the additional 4,227 trips per day on the Jetty Access Road, how many of these will follow the road to the end and park at the state park? The proposal states, "Visitors to the resort are expected to take advantage of the existing network of parks and recreational opportunities currently available in the Westport area (11-11)." The parking area at Westhaven State Park currently may not have the capacity to accommodate all of these visitors.

Aesthetics

21 ■ Measures should be taken to create buffers and preserve the aesthetics of the area.

21 ■ The placement of condos adjacent to Westhaven State Park, two one-half million gallon water storage tanks, and an extensive golf course would drastically change the aesthetics of the park areas. Visitors to both State Parks presently enjoy the aesthetics of a secluded dunal wilderness area.

22 ■ Also, it is unclear whether the condos that are mentioned are the same ones that are identified as part of phase 2, or if they are a future development as noted on the foldout map located in the Executive Summary at the front of the EIS?

Sewage and Water Quantity

23 ■ Westport State Park is served by the City of Westport's sewage system. Is the system able to accommodate this new development?

24 ■ Both parks are served by the City of Westport's water system. Is the water system able to accommodate this new development?

Water and Soil Quality

25 ■ Both Westport Light State Park and Westhaven State Park are served by the City of Westport water supply. The quality of that water needs to be protected.

26 ■ There is at least one existing well on the site, which could be adversely impacted by the development (4-3).

27 ■ With the development of a golf course, this area will likely become inundated with Canada Geese. This will make it extremely difficult to control nutrient and fecal coliform levels. Measures should be taken to control Canada Geese and to monitor fecal coliform counts.

28 ■ The Natural Resources Management Plan (Appendix A) should be revised, and adhering to it should be a requirement. It is noted that, "the potential always exists for golf course maintenance activities to produce impacts to air quality through the irresponsible use and application (spraying) of chemicals to maintain proper tee boxes, fairways, and greens. (2-3)" Irresponsible use of chemicals could cause irreparable damage not only to air quality but also to water and soil quality. Strict consequences (monetary) for not following the Natural Resources Management Plan should be devised. Responsible management of the natural resources should be enforced.

29 ■ The use of outflow pipes would need to be regulated by WDFW and would probably not be allowed because of salt-water invertebrate communities.

30 ■ The contamination of water and soil by golf course usage and maintenance is a major concern because of the porosity of the soil type, the shallow depth to ground water and the expectation of chemical use. It is noted in Section 3-2 that the ground water is

30 "occasionally encountered at or near ground surface." If the surface is polluted with fertilizers, pesticides, and hydrocarbons, there is a high potential for ground water contamination by those pollutants. In addition, the soil (sand) is highly porous, which could mean that the aquifer is highly susceptible to contamination even when there is no ground water present at the surface. Thus, aquifer sensitivity should be evaluated.

31 An Integrated Pest Management plan should be established to limit any impact in an aquifer sensitive area, OR

32 The golf course could be managed without the use of chemicals: a green golf course. Water from these wetlands discharges into the Elk River Estuary, where large numbers of herring spawn. This species plays an important role in salmon recovery. Thus, it is important that water from these wetlands be free from quantities of pesticides that could adversely affect the herring or their food source. Water quantity may also affect the estuary and should be evaluated.

33 Swales are not a very effective means of water treatment.

34 Evaluating irrigation rates and chemical usage is not a form of mitigation (4-20). Reducing and/or eliminating irrigation rates and chemical usage is.

Monitoring

35 Monitoring the application of chemicals is an important part of natural resource management. Methods of sampling and testing similar to those used by the USGS in the Puget Sound could be incorporated. An excellent reference is the, "OCCURRENCE OF PESTICIDES IN STREAMS AND GROUND WATER IN THE PUGET SOUND BASIN, WASHINGTON, AND BRITISH COLUMBIA, 1996-98," by Gilbert C. Bortleson, and James C. Ebbert, the U.S. Geological Survey, Water Resources Division, 1201 Pacific Avenue, Suite 600, Tacoma, Washington 98402.

▪ In order to achieve an accurate representation of impact, surface water and ground water samples should be collected when pesticide application is the highest and when runoff and/or recharge is likely to be highest, (e.g., during a rainfall event that corresponds to high chemical application for that season).

▪ More than one sample should be taken in each season.

▪ Samples should be collected in areas that are highly susceptible to (or likely to have) contamination.

▪ More than three pesticides (insecticides/herbicides/fungicides) should be quantified, and those that are the most persistent should be given special attention.

36 Ecosystem health, not just human health, should be evaluated; thus, toxicity studies should also be completed. The chronic aquatic life criteria should be used as an indication of impact in addition to the LC₅₀. Macroinvertebrates are important food sources for fish including salmon.

37 Shellfish health should be considered for areas where harvesting occurs.

Dunal Wetland Preservation

38 Visitors to Westport Light State Park and Westhaven State Park enjoy the unique wildlife, vegetation and habitat of the dunal wetlands. These wetlands have more value because they are rare in the state of Washington. There is concern that the long-term effects of a golf course on dunal wetlands cannot be known or predicted. Methods that have been used to limit the impact of golf courses on other types of wetlands may not be effective in a dunal wetland

38 | area. Can it be proven that the function and maintenance of the golf course will not result in a loss of these valuable wetlands over time?

Wetland Mitigation

39 | This project proposal calls for impact to over 30 acres of wetlands (5-7). Yet there is no clear mitigation plan indicating that the loss of those wetland values and functions could truly be mitigated. In this plan, forested wetlands would be destroyed and emergent wetlands created in place. Emergent wetlands have very different functions than forested wetlands, and forested wetlands are extremely difficult to replace.

- Mitigation measures must be in kind, if the function and value of the wetlands is to be preserved. A clear plan should be drafted to include an analysis of existing wetland values and functions, and an analysis of values and functions under the preferred alternative. The plan should be sure to include all of the wetland areas and connecting channels associated with those wetlands.
- The created wetlands would need to be monitored for efficacy to assure that those functions are being performed and that those values are being preserved. Action would need to be taken if the mitigation was not effective.
- 40 | ▪ "Mowed wetland" grasses are mentioned. Mowing the grasses would reduce available food sources for birds (5-7), and would reduce the ability of the wetland to perform certain functions.
- 41 | ▪ The proposal states that "individual sand dunes will be moved and/or rearranged to construct greens and limited fairways (3-11)." Topography plays an important role in wetlands. The effect of these topographic changes on the wetlands should be evaluated.
- 42 | ▪ Increased water and irrigation into the system may alter the size or characteristics of the wetland area. How will the plant communities change?
- 43 | ▪ No Action Alternative: The argument that invasive species such as scotch broom, Himalayan blackberry, evergreen blackberry and gorse could invade the site is not substantial. Most of the area is wetland. These species do not grow under wet conditions and would not take over any of the wetland areas.

Critical Habitat

44 | Washington State Parks' staff is interested in protecting wildlife resources on its property. The area contains habitat that could be used by snowy plover and habitat that could be used for surf smelt spawning; thus, the area should be surveyed before any action is to occur. There are currently snowy plover nesting just 10 miles south of the property. The project area is also adjacent to Washington's southernmost surf smelt spawning beds. Because these beds produce baitfish, they play a vital role in salmon recovery and need to be protected.

Washington State Parks controls the tidelands between the two parks and is concerned about the loss of potential snowy plover and surf-smelt habitats. Any development plans in this area should demonstrate that there would be no significant loss of habitat necessary for these species.

Public Awareness

45 | Is it possible to use the "bridge crossings" to create an interpretive trail, which would enhance golfers' appreciation of the wetland areas and educate golfers about the environmental impacts of their sport? (Appendix A, pg.11).

Feasibility

- 46 ■ Is there a demand for the golf course?
- 47 ■ What about erosion? The shoreline in this area is predicted by the Corps of Engineers to recede 3500 to 5000 feet in the next half-century (1997 Long Term Solution to South Jetty and Half Moon Bay). Further, erosion control methods usually have adverse impacts on habitat. It would be best to not to develop near any areas that are predicted to erode.
- 48 ■ What about flooding? As the proposal states, "The potential for flood hazards are relatively high (3-4).
- 49 ■ It is not unlikely that an earthquake could cause liquefaction to some extent (3-9).

Urban Sprawl

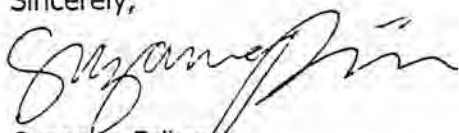
- 50 Commercial businesses associated with the golf course would compete with shopping areas in downtown Westport and may decrease the town revenue. Retail locations would be spread between the golf course and the downtown, instead of being centrally located in downtown Westport.

Public Safety

- 51 The golf course, if built, may attract large populations of tourists. Emergency procedures should be prepared for handling such a large volume of people in the event of a natural catastrophe such as a Tsunami or flooding event.

Thank you for your attention to these concerns. If you have any questions, you may contact Alana Hess or William C. Jolly in Environmental Programs, Washington State Parks: (360) 902-8639, or (360) 902-8641, respectively.

Sincerely,



Suzanna Bräuer
WCC Environmental Specialist

Cc: Paul Malmberg, SW Region Manager, Washington State Parks
Pat Neilson, Park Ranger, Twin Harbors State Park
William C. Jolly, Environmental Program Manager, Washington State Parks
Alana Hess, Environmental Specialist, Washington State Parks
Diane Schwickerath, Grays Harbor Audobon
Perry Lund, WSDOE
Jim Rioux, WSDOH
Craig Zora, WSDNR
Dan Hansen, WSDOT
Key McMurry, WSDFW
Nancy Brennan-Dubbs, USFWS
Jonathan Smith, US Army Corps of Engineers
Richard Clark, US EPA
Matt Lungenberg, National Marine Fisheries Svc.
Tom Hooper, National Marine Fisheries Svc.

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Brady's Oysters

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**SHORELINES HEARINGS BOARD
STATE OF WASHINGTON**

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Appellant,

v.

CITY OF WESTPORT and MOX
CHEHALIS, L.L.C.,

Respondents.

SHB No. 01-023

NOTICE OF APPEAL

I. APPEALING PARTY

The State of Washington, Department of Ecology (Ecology) by and through its attorneys Christine O. Gregoire, Attorney General, and Thomas J. Young, Assistant Attorney General, appeals the City of Westport's grant of a substantial development permit, dated August 9, 2001, to Mox Chehalis, L.L.C. for construction of a project known as the Links at Half Moon Bay. A copy of the permit, permit data sheet, permit application, and Planning Commission Findings and Conclusions are attached hereto.

II. FACTS SUPPORTING APPEAL

1. The property that is the subject of this appeal is located in the City of Westport, Washington in Section 1, Township 16 North Range 12 West. The property is bounded by the

NOTICE OF APPEAL

COPY

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117
FAX (360) 586 6740

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Brady's Oysters

360-268-9828

p. 2

Sep-06-01 02:38P

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1 Pacific Ocean on the west, Half Moon Bay and the Westport Marina District on the north,
2 Forrest Street on the east and Washington State Parks property on the south.

3 2. Portions of the property are located within 200 feet of the ordinary high water
4 mark of Half Moon Bay and the Pacific Ocean and portions are located within the 100 year
5 floodplain of Grays Harbor. The property also contains numerous high quality wetlands that
6 are in hydraulic continuity with the Pacific Ocean. The Pacific Ocean and Half Moon Bay are
7 shorelines of statewide significance.

8 3. The City of Westport's permit data sheet describes the project as:

9 Development of a destination resort consisting of a 200 room luxury hotel with
10 a footprint of 40,000 square feet, a second 200 room budget hotel with a
11 footprint of 40,000 square feet, a convention center with a footprint of 31,000
12 square feet, an 18 hole Scottish Links style golf course with clubhouse and
13 maintenance facilities, and up to 400 condominium units in 40 - 10 unit
14 buildings with a footprint of 2,800 each.

15 Permit data sheet, p. 2.

16 4. According to the Final Environmental Impact Statement (FEIS), the project will
17 impact over 30 acres of wetlands on the site, including 12 acres of fill, 16 acres of "mowing",
18 4.5 acres of excavation and 2 acres of temporary construction impacts.

19 5. The wetlands on the site are rare, high quality, inter-dunal wetlands that provide
20 habitat for birds, amphibians, small mammals and invertebrates. The applicant's conceptual
21 wetland mitigation plan describes the habitat values of the wetlands as follows:

22 Wetlands at the site generally provide better than average functions relative to
23 biological support. Complex vegetative structure, connectivity, diverse habitat types,
24 and a low cover of invasive species contribute to the increased function of the on-site
25 wetlands to contribute to biological support. Generally, biological support functions
26 increase from west to east with the area contributing the highest value being the
forested wetland areas in the eastern portion of the site.

Conceptual Wetland Mitigation Plan, p. 12. In addition, the wetlands constitute a recharge
area for underground aquifers.

NOTICE OF APPEAL

2

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
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FAX (360) 586-6760

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1 6. According to Ecology's Coastal Erosion Study, the ocean beaches in the
2 vicinity of the project are eroding. The project involves construction of structures located
3 close to the beach and future erosion control measures likely will be necessary to protect them.

4 7. The property is designated urban under the City of Westport Shoreline Master
5 Program (SMP). Wetland fill within the urban environment is generally prohibited, with three
6 exceptions allowed under a conditional use permit. The SMP also states:

7 Other in-water landfills and landfills waterward of the line of ordinary high
8 water or the edge of the associated wetland shall not be permitted unless the
9 landfill is both necessary for a water dependent use and the proposed fill sites
are not within the marsh south of the existing airport.

10 SMP, Section 17.32.055.

11 8. The SMP defines shoreline jurisdiction to include the 100 year flood plain in the
12 area of the project. SMP, Section 17.32.020.

13 9. On or about July 25, 2001, the City of Westport Planning Commission issued its
14 decision approving a shoreline substantial development permit and conditional use permit for
15 the project. The permit includes 17 conditions, including the requirement that the applicant
16 submit a final Natural Resources Management Plan, a final golf course layout, a final Wetland
17 Mitigation Plan, a final Stormwater Treatment Plan, and a plan to notify future owners and
18 residents within the project of possible future erosion.

19 **III. GROUNDS FOR APPEAL**

20 1. The project description in the permit and the analysis of environmental impacts
21 in the accompanying documents are too vague to permit meaningful review. For example, the
22 exact location and number of structures is uncertain, as the FEIS indicates:

23 Phase 1 will include the development of one hotel structure with an estimated
24 200 to 400 rooms. The range of room capacity is due to the fact that there may
25 only be one hotel structure, versus two separate structures for the final
26 build-out. The applicant is keeping the option available to determine later
whether or not one structure containing all the proposed room capacity is more
feasible than two separate structures that would provide the estimated full room
capacity of 400. In addition, Phase 1 contains the convention center. Again, the
convention center may be designed within the hotel complex or may be situated
adjacent to the hotel on a separate building pad. This will also be determined

NOTICE OF APPEAL.

ATTORNEY GENERAL OF WASHINGTON
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1 during the design and permitting processes. Phase 1 will also include the
2 construction of the 18-hole golf course and associated clubhouse and
3 maintenance facilities.

4 FEIS, p. 3-1.

5 2. The impacts to the on-site wetlands are not fully described. The mitigation plan
6 and stormwater management proposals contain insufficient detail. The amount of impervious
7 surface is unclear. The ordinary high water mark of Half Moon Bay on the site plans, which
8 was determined without input from Ecology, appears to be erroneous.

9 3. The stormwater management proposal is inadequate. No formal stormwater
10 management plan has yet been submitted. The applicant proposes to construct stormwater
11 detention ponds in the wetlands area but it is unclear how these ponds will function because the
12 ground is saturated to the surface in many areas where the ponds are proposed. The applicant
13 apparently proposes to use the surrounding wetlands as stormwater detention, which is
14 unacceptable under SMP 17.32.065(2) and 17.32.050(13)(H).

15 4. The mitigation plan is inadequate. Claimed mitigation appears to include
16 stormwater management ponds that cannot properly be claimed as mitigation. The proposed
17 mitigation is inadequate to ensure preservation of wetlands functions and values in violation of
18 SMP 17.32.065(5). The scope of the project and the impact on wetlands appears far greater
19 than will be compensated for under the applicant's proposed mitigation plan. Details regarding
20 the applicant's clearing and grading plans and planting plans have not been provided. The
21 proposed use is not a water dependent use and consequently upland alternatives should be
22 evaluated to avoid or minimize impacts to wetlands.

23 5. The SMP requires 100 foot buffers around Class A wetlands and 50 foot buffers
24 around Class B wetlands. SMP, Section 17.32.065. Most of the wetlands on the site are Class
25 A or B, yet no buffers are required in many instances. Inadequate buffers are provided for
26 existing wetlands and wetlands claimed as mitigation. The permit allows buffer averaging
although compliance with the conditions in SMP 17.32.065(5)(A) has not been demonstrated.

NOTICE OF APPEAL

4

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
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Reply To
Attn Of: ECO-083

Colonel Debra M. Lewis, District Engineer
Seattle District, Corps of Engineers
P.O. Box 3755
Seattle, Washington 98124-3755
(Attn: Jim Green, Project Manager)

RE: Public Notice 200301009, Mox Chehalis, LLC (Links at Half Moon Bay), June 15 - July 15, 2004, extended to August 5, 2004.

Dear Colonel Lewis:

This letter is in response to the referenced public notice, which proposes direct impacts from placement of fill material into 9.98 acres of adjacent interdunal wetlands, indirect impacts to 14.63 acres of wetlands from vegetation clearing, and 0.27 acres of impact from excavation. An additional 13.93 acres of direct wetland buffer losses are identified on the public notice. The 14.63 acres of impacts from vegetation clearing and excavation are called "non-jurisdictional" activities. The purpose of the proposed work is to construct a destination resort that would include hotels, a conference center, an 18-hole golf course, condominiums, and supporting commercial development.

The U.S. Environmental Protection Agency (EPA) has significant concerns about this project proposal. EPA has three main areas of concern: (1) impacts to *Aquatic Resources of National Importance* (ARNI), (2) compliance with the Clean Water Act (CWA) Section 404(b)(1) guidelines, and (3) the need for a federal environmental impact statement (EIS) under the National Environmental Policy Act (NEPA). It is EPA's goal to work with the Corps, the applicant and resource agencies to address these issues.

Impacts to Aquatic Resources of National Importance

The wetlands at this 350 acre site represent a diverse habitat mosaic of interdunal emergent, scrub-shrub, and forest wetlands of over 150 acres, which are adjacent to the Pacific Ocean and Grays Harbor. The site is situated in the coastal zone at Half Moon Bay, on "Point Chehalis" at Half Moon Bay, Pacific Ocean's coast and on the southwestern arm of Grays Harbor. This area has been the subject of ongoing coastal erosion (refer to EPA August 21, 2003, comment letter on Public Notice CENWS-OD-TS-NS-21). The site contains some of the last contiguous interdunal wetland habitat in this area and is located at the nexus of two key migratory flyways, critical for the support of a number of migratory birds. Grays Harbor lies

within one of eleven *Globally Important Bird Areas* designated in Washington State, and is one of fourteen internationally significant North American sites within the *Western Hemisphere Shorebird Reserve Network*.

These interdunal wetlands are not only important as habitat and refuge for numerous migratory bird species, but also support a number of mammals, amphibians, and fish. The wetlands are hydrologically connected to Grays Harbor by way of a system of drainage canals. This system provides overwintering and refuge habitat for coho (*Onchorynchus keta*), of which the Lower Columbia River population is a candidate species. The interdunal wetlands also provide important groundwater recharge functions, contributing to the maintenance of the City of Westport's sole source drinking water supply. Based on the importance of these coastal interdunal wetland ecosystems, and their associated functions and values, EPA has concluded that the proposed project poses a substantial and unacceptable risk to *Aquatic Resources of National Importance* (ARNI). The bases for impacts to an ARNI are detailed in Enclosure 1.

404(b)(1) Guidelines Compliance Issues

EPA can not conclude that this project complies with the CWA Section 404 (b)(1) guidelines as currently proposed. This determination is based on our analysis of the project relative to environmental criteria established at 40 CFR Part 230.10(a-d). EPA believes that (a) insufficient information has been provided to demonstrate that there are no practicable, less environmentally damaging alternatives to achieve the purpose(s) of this non-water dependent project, (b) the project will contribute to adverse impacts on water quality, (c) the project poses significant adverse impacts to the aquatic environment, and (d) the proposed compensatory mitigation does not adequately replace the lost functions and values of impacts to the interdunal wetlands. Please refer to Enclosure 1 for our detailed comments and concerns regarding 404(b)(1) Guidelines' compliance.

Need for Federal Environmental Impact Statement (EIS)

Prior to making a decision on this permit, EPA recommends that a full NEPA EIS be developed to fully scope and evaluate the purpose and need for this project relative to its impacts to the human environment. We believe this project poses significant environmental impacts, and is the subject of significant controversy. Issues of concern to the public include (but are not limited to):

- Restriction of access to the coastal zone and privatization of public use areas
- Privatization of the road currently leased by the Army Corps of Engineers to Westhaven State Park
- Fragmentation and degradation of ecologically important interdunal wetlands
- Development that will lead to increased shoreline armoring in a highly active coastal zone
- Impacts to water quality and groundwater recharge
- Impacts to local fisheries and shellfish industries
- Impacts to local and statewide recreational users (including surfers, birders, naturalists, etc.)

- Impacts to cultural resources and traditional use areas

Accordingly, EPA strongly recommends that the Corps fully evaluate this project through a full NEPA EIS process.

Summary

EPA is formally notifying the Corps -- pursuant to Section IV, paragraph 3(a) of the 1992 CWA Section 404(q) Memorandum of Agreement between our agencies-- **that the proposed project may result in substantial and unacceptable impacts to *Aquatic Resources of National Importance*, that significant impacts are likely to occur that warrant the preparation of a federal EIS, and that the project is not in compliance with the CWA Section 404(b)(1) Guidelines. EPA recommends that the Corps not issue a permit for the project as proposed.** For further coordination on this project, please feel free to contact me or have your staff contact Ms. Linda Storm, Wetland Ecologist, at (206) 553-6384 or storm.linda@epa.gov.

Sincerely,



Michelle Pirzadeh, Director
Office of Ecosystems and Communities

Enclosure

cc: Mox Chehalis, LLC
Economic & Engineering Services, Inc.
Nancy Brennan-Dubbs, USFWS
Matt Lungenberg/Tom Hooper, NMFS
Roman Iyer, Chehalis Confederated Tribes
Guy McMinds, Quinault Tribe
Perry Lund, Ecology
Key McMurray, Montesano, WDFW
Craig Zora, WDNR
Susanna Boyer, WDPR

Detailed Bases for Considering Interdunal Wetlands at Point Chehalis as Aquatic Resources of National Importance (ARNI)

I. Washington Coast Interdunal Wetlands: Functions and Values

Interdunal Wetlands Significance

The wetlands at this 350 acre site represent a diverse habitat mosaic of interdunal emergent, scrub-shrub, and forest wetlands of over 150 acres. Interdunal wetlands form in the "deflation plains" and swales of coastal dunes. These dunes form as the result of interaction between sand, wind, water and plants. The dune system immediately behind the ocean beach is very dynamic and can change from storm to storm (Wiedemann 1984). As one moves away from the ocean coast to the interior, later successional stage plant communities of interdunal wetland complexes are represented. Together these interdunal wetland complexes provide a unique opportunity to understand the successional stages and dynamic processes of interdunal wetland complex development (Kumler 1969).

Location of Statewide, National and International Significance

The wetlands at the proposed project site are diverse in terms of their habitat structure and associated functions as a result of these ecological processes. The project site contains some of the last contiguous interdunal wetland habitat in the Point Chehalis area. The Washington Department of Ecology's Revised Western Washington Rating System identifies all interdunal wetlands greater than 1-acre as Category II wetlands, because of the critical habitat they provide (April 2004:10). The site is nested between two State Parks (Westport Light State Park and Westhaven State Park). The site is also within two key migratory flyways along the Pacific Ocean and at the mouth of the Chehalis River at Grays Harbor. The Grays Harbor area is recognized as one of eleven *Globally Important Bird Areas* designated in Washington State, and is one of fourteen internationally significant North American sites within the *Western Hemisphere Shorebird Reserve Network*.

Wildlife Habitat

These interdunal wetlands provide important habitat and refuge for a number of species, including elk, deer, bear, small mammals (river otter, mink, beaver and muskrat), breeding amphibians, and numerous resident and migratory bird species. Resident birds include (but are not limited to) great blue heron, mallard, wood duck, American coot, and common snipe. Raptors that use the area include osprey, bald eagle, northern harrier and others. Grebes, several species of duck, and tundra swans are just a few of the birds that use the ponded wetland habitats through the winter months. The federally threatened western snowy plover (*Charadrius alexandrinus nivosus*) may also use this habitat for nesting and the Corps has determined that this project is

likely to affect this species.

Over-wintering and Rearing Habitat for Coho

The interdunal wetlands at the project site are hydrologically connected to Grays Harbor by way of a drainage canal that discharges into Firecracker Point. Data collected by the Washington State Department of Fish and Wildlife (Economic Engineering Services, Inc 2003: Attachment 5, Figure 1), indicate that the canals connecting this system to Grays Harbor provide access for coho (*Onchorynchus keta*), part of the Southwest Washington runs and possibly related to the Lower Columbia candidate population. Fish access to over-wintering and refuge habitat is important for coho productivity. Seasonal ponding in these coastal depression plain, interdunal wetland complexes provides important over-wintering and rearing habitat opportunities. These wetlands also provide important groundwater recharge functions (Thomas 1995).

Groundwater Recharge & Drinking Water Supplies

Groundwater levels rise with precipitation through the winter and the aquifer is recharged, maintaining the City of Westport's drinking water supply. Though detailed data on the hydrodynamics of this site have not been adequately modeled to date, a study prepared by the U.S. Geological Society (Thomas 1995) provides important insights about how such interdunal wetland systems function. This report addresses how ground-water flows in the Long Beach Peninsula system, what the relationships are between precipitation cycles and ground-water levels (recharge), the influences of tidal waters, and other factors. Water quality in the Long Beach Peninsula interdunal wetland systems are addressed relative to the maintenance of aquifer drinking water supplies.

Interdunal Wetlands as Aquatic Resource of National Importance

The U.S. EPA is concerned with this project's direct, secondary and indirect impacts to this highly sensitive, interdunal wetland complex and its associated aquatic resource and water quality functions. This development is likely to cause significant adverse impacts to these aquatic resources and contribute to cumulative adverse impacts on water quality, groundwater recharge, fish and wildlife habitat support functions, and native plant communities. Based on the importance of these coastal interdunal wetland ecosystems, and their associated functions and values, EPA concludes that the proposed project poses a substantial and unacceptable risk to Aquatic Resources of National Importance (ARNI).

II. Project Does Not Comply with Clean Water Act (CWA) Section 404(b)(1) Guidelines

EPA is further concerned that this project does not comply with the Section 404(b)(1) Guidelines for the following reasons.

A. Alternatives Analysis [40 CFR Part 230.10(a)]

Project Scope

The August 2003 State Environmental Policy Act (SEPA), Environmental Impact Statement (EIS) Addendum to the Draft and Final EIS for "The Links at Half Moon Bay" project addresses revisions to the original project's scope (Economic and Engineering Services, Inc. 2003). Our understanding is that work originally proposed has been somewhat reduced by eliminating 200 of the originally proposed 400 condominiums. The project would be constructed in two phases. Proposed work for Phase 1 includes "the construction of a luxury hotel with 200 rooms and a conference center, some commercial/retail development (no more than 4,000 square feet), an 18-hole golf course and all associated appurtenances (including shelters/restrooms, cart paths, bridges, club house, golf maintenance building, and driving range)" (Economic and Engineering Services, Inc. 2003:2). Phase 1 would also include utility and transportation infrastructure improvements (not described on the public notice). Phase 2 work would involve development of a second hotel with an additional 200 rooms, additional commercial/retail development (of an unspecified footprint), and 200 condominium units. Together both phases would take from 7-12 years to construct (Economic and Engineering Services, Inc. 2003:3).

EPA is concerned that the details and aquatic resource impacts of both phases of work, including road widening, "infrastructure improvements" and the additional unspecified footprint of "commercial/retail" development of Phase 2 work, are not fully accounted for on the Corps public notice. For example required culverts and fill to widen roads, install utility lines, and any structures that would be used to re-route or draw water for irrigation should be evaluated as part of the impacts considered. The location and extent of impervious surface of all development should be evaluated in terms both direct and indirect effects, including coastal erosion, changes in hydrological routing and dispersal, water quality, and habitat fragmentation.

Need for Detailed Alternatives Analysis

Pursuant to the Section 404(b)(1) guidelines at 40 CFR Part 230.10(a) no permit shall be issued for non-water dependent activities if there are less environmentally damaging, practicable alternatives available to meet the overall project purpose. The project is non-water dependent and insufficient information is provided to conclude that there are no other less environmentally damaging, practicable alternatives to meet (a) the overall project purpose, and (b) achieve each of the various independent basic project purposes that are combined to create the overall project as desired by the applicant.

To determine the scope of practicable, less environmentally damaging alternatives to minimize project impacts, we recommend the Corps address the following questions in its detailed alternatives analysis:

- (1) Are there other off-site less environmentally damaging, practicable alternatives that could

meet the overall project purpose, that would have less environmentally damaging impacts on aquatic resources?

(2) Are there ways to further minimize the on-site impacts to aquatic resources and the coastal zone by further modifying this project proposal? For example

(3) Could condominiums already owned/operated by the applicant meet the need for condominiums identified in this project?

(4) If a demonstrated need exists for new condominiums as part of this project, are there alternative sites available, outside of the sensitive coastal zone, where they could be located?

(5) What is the existing hotel space in or near Westport and could this meet some of the hotel needs desired by this project applicant or would one hotel not suffice to meet such need?

(6) How will this development be economically viable year round?

(7) EPA understands that there are other golf courses proposed in the Grays Harbor area. Would these other sites offer a less environmentally damaging practicable alternative?

In terms of the geographic scope of the alternatives analysis for this project, there is not a justification provided for why the project must be located within a certain distance of *two* major cities, or that it must be located near the coast to achieve the project purpose. Could the project be located within some distance of one large city, or some combination of other cities, such as Seattle and Vancouver, B.C.? What is the basis for the 3-hour driving distance in terms of defining the scope of locations for this project? Based on these unanswered questions, we do not see that all potential less environmentally damaging alternatives have been evaluated.

We would like to see a thorough and complete evaluation of all possible off-site alternatives and on-site reconfigurations that would be less environmentally damaging to the aquatic environment and the coastal zone, but be a viable project.

B. Water Quality and Endangered Species Issues [40 CFR Part 230.10(b)]

Water Quality Impacts: Pesticides, Herbicides, Fertilizers, Stormwater and Wastewater Management

Pursuant to the Section 404(b)(1) Guidelines no discharge of dredge or fill material shall be permitted if the project will cause or contribute to violations of applicable state water quality standards. Because Grays Harbor is on the State's 303(d) list and already exceeds state water quality standards, projects which could contribute to additional water quality problems should not be permitted. Interrupting intertidal hydrologic maintenance processes and inputs of herbicides, pesticides and fungicides associated with golf course maintenance, new septic systems or discharges from sewage treatment plants, all pose additional adverse impacts to water quality. Change in the quality of water and infiltration rates to groundwater also pose impacts to groundwater and should be evaluated in terms of the potential to impact aquatic life on-site and discharge to the City of Westport's drinking water supply.

Details of the proposed work (number of condominiums, new roads, parking areas, footprint of development structures, stormwater management, wastewater treatment, use of pesticides, fertilizers and other chemicals to manage the golf course and their effects on adjacent wetlands and ground water quality) have not been fully addressed on the public notice. To evaluate the total impacts of the overall project these details and their associated direct and indirect impacts should be fully evaluated.

Endangered Species

The 404(b)(1) Guidelines state that no project shall be permitted if it will jeopardize the continued existence of species listed as endangered or threatened under the Endangered Species Act. As noted on the public notice, a number of federally listed species are associated with the area (including bald eagle, marbled murrelet, brown pelican, western snowy plover, bull trout, and Oregon silverspot butterfly). We understand from our review of the Corps' files that the Corps has determined the western snowy plover (*Charadrius alexandrinus nivosus*) is likely to be adversely affected by this project, and that there may be an adverse effect on the coastal/Puget Sound bull trout (*Salvelinus confluentus*). The project has the potential to adversely effect both nectar and larval stage plant species used by the Oregon silverspot (*Speyeria zerene hippolyta*). In addition to concerns with impacts to these species, EPA is concerned about impacts to the coho salmon run that utilizes this area. The public notice did not mention the potential to impact coho salmon. However, coho have been collected from the drainage canal that connects the site to Grays Harbor (pers. comm. Key McMurray, WDFW, 2004).

C. Significant Adverse Impacts [40 CFR Part 230.10(c)]

EPA considers the direct and indirect impacts to 24.84 acres of interdunal wetlands and the associated net 13.93 acres of wetland buffers to be significant. Combined with changes in water quality, wetland hydroperiod, habitat fragmentation and edge effects from ongoing management of this golf course and proposed associated development, the overall impacts to wetlands and waters of the U.S. go far beyond the simple footprint of fill.

EPA believes that the direct, indirect and cumulative impacts of this project pose significant adverse impacts to aquatic life, wetlands, migratory birds, groundwater recharge functions, and other functions and values supported by the 150 acres of wetlands on this 350 acre site. We strongly recommend that the Corps evaluate all potential direct, indirect and secondary impacts from this overall project to inform their Section 404 permit decision. For example, more detailed baseline data on winter ponding should be collected to adequately assess the impacts that this project will have on the hydroperiod, groundwater recharge, and the diversity of uses of these habitats during different seasons (including over-wintering fish and wildlife).

Need to Address Indirect and Secondary Impacts from Changes in Hydroperiod and Water Budget

EPA believes that the effects of filling and clearing 24.84 acres of wetlands, removal and alteration of wetland buffers, combined with irrigation of golf greens, construction of pathways and fairways, and the cumulative effects of long-term vegetation management with pesticides, herbicides and fertilizers will add to the overall impacts to wetlands and aquatic life support functions of the 107 acres of "preservation" wetlands. Degradation to both on-site and off-site wetlands that could result from changes in hydrology, water quality, and land-use practices should be fully evaluated (and have not been fully evaluated in the SEPA EIS or its 2003 Addendum). EPA considers the 107 acres of on-site wetlands/uplands to be *at risk* to degradation from the proposed 18-hole golf course and other adjacent land-uses.

Because there is insufficient information on the hydrologic processes of these wetlands we are unable to evaluate the full extent of hydrological alteration that will result from site construction and long term site management. To more fully evaluate the impacts of hydroperiod changes, baseline data on winter ponding (in terms of timing, depths, extent, and rates of groundwater recharge) is needed. This information should then be compared to the proposed use of water for golf course and landscaping irrigation and for hotel, condominium, and other commercial/retail developments' water supplies. A detailed water budget should be provided of current conditions and then compared to modeled post project conditions to fully analyze the impacts of the development.

Incomplete Baseline Data & Under Representation of Severity of Impacts

During our site visit on June 29, 2004, several plant species were observed in the emergent wetland communities that are not reported on the species list for the site in either the June 2003 Delineation Report or the Mitigation Plan, prepared by Ecological Land Services, Inc. These species are important because they add to the diversity of these systems. These species include: *Botrychium multifidum* (grape fern), *Juncus falcatus* (sickle leaved rush), *Plectritus macrocera* (sea blush), *Platanthera dilatata* (an orchid commonly called "bog candle"), and possibly *Zizania aquatica* (Indian rice or wild rice). We believe the wetland consultant's incorrectly identified *Juncus falcatus* as *Juncus ensifolius* as a dominant wetland plant on site. Though grape fern, sea blush and the bog candle were not dominant species, they were present and should have been inventoried, because native plant diversity is an important indicator of the quality of the site.

EPA is further concerned that the full extent of impacts to wetlands and their associated buffers have been under represented by the applicant. This is due to several factors. First, rather than evaluating all the wetlands as one contiguous mosaic, the applicant divided up the site into two separate systems. This resulted in rating the emergent wetland mosaic on the west side of the site as all Category III, and the wetlands in the central and eastern portion of the site as Category II. Ecological Land Services, Inc. (2003) indicates that the basis for this division was that the western most wetlands are a mosaic of "isolated" wetlands with more upland dunal components.

They state that these emergent systems are less “valuable” than the central and eastern forested systems. EPA disagrees with these conclusions.

Aerial photographs show that during winter months water ponds on the site and there is hydrologic exchange between the western, central and eastern wetlands. These systems are, therefore, not technically “isolated.” Though they represent an earlier successional stage of interdunal wetland communities, these emergent wetlands compliment the ecological functions and values of the overall interdunal wetland mosaic. The western emergent wetland/upland system adds to the overall habitat complexity and biological diversity of the site. Thus, they should be considered as part of the whole system and evaluated as such, rather than separately. EPA considers the whole system as one complex mosaic. Rated as one, all of the wetlands within this system would rate as a Category II under both the old and revised Western Washington Rating System.

Second the buffer requirements for Category III wetlands is 50 feet, whereas the buffer width for Category II wetlands is 100 feet. Rating the western wetlands separately and ranking them as Category III, reduces the significance of impacts to these wetlands and their associated buffers. If the whole system had been evaluated together, all of the wetlands would have been rated as Category II and the local jurisdictions’ buffer requirements for all of these wetlands would be 100 feet. By reducing the rating on some wetlands and the required buffer footprint, the full extent of impacts to wetlands and their associated buffers are not fully considered. We feel this approach significantly under represents both the functions and associated values of the interdunal wetlands complex. The western emergent wetlands should be evaluated in the context of the whole interdunal system, because they add to the structural, species, and functional diversity of the overall mosaic of wetlands.

EPA is further concerned about the potential severity of impacts to aquatic resources caused by changes in hydrology and water quality due to golf course maintenance and stormwater management. Identification of the seasonal ponding and hydroperiod of these wetlands and on-site streams, creeks and/or drainage canals that connect these wetlands to Grays Harbor and to wetlands beyond the property perimeter should be considered in the overall impact analysis. Changes in water quality, groundwater recharge, hydroperiod alteration and fish and wildlife support functions should be evaluated. Drainage features (including streams and canals) should be identified as waters of the U.S. and any alteration or modification to them, including culvert placement, weirs, etc. should be identified as additional work in waters of the U.S. and their impacts evaluated in the context of this 404 permit application. The effects of these impacts should be evaluated to assess impacts to local economies, including fish and shellfish industries, passive recreationalists and wildlife enthusiasts (see *Need for Full NEPA EIS* below).

D. Adequacy of Proposed Compensatory Mitigation [40 CFR Part 230.10(d)]

The applicant proposes the following as a package of compensatory mitigation of wetland replacement habitat:

- On-Site ~ *4.30 acres of created interdunal wetlands (from existing uplands)
- *0.91 acres of wetland restoration (by removal of dirt road across site)
- *107 acres of wetland/upland "preservation"
- Off-Site~ *7.0 acres of estuarine restoration at Firecracker Point, Grays Harbor at Westport
- *14.0 acres of out of county, off-site sphagnum bog (5 acres) and forested peat wetland (9 acres) "Seastrand Bog" preservation, Pacific County
- *18.00 acres of wetland preservation in the 30.0 acre off-site interdunal wetland/upland complex at Mar Vista, Grayland, Pacific County

Upland Enhancement & Buffers

- On-Site *22.32 acres of Upland Restoration
 - * 1.13 wetland Buffer "enhancement" at condos by buffer averaging (?)
- Off-Site * 2.90 upland buffer enhancement (but stated as not counted toward total mitigation acreage), Firecracker Point
 - * 5.00 interdunal Upland Restoration & Invasive Plant Control (Mar Vista)

The total area of wetland mitigation includes 151 acres of preservation (minus some unspecified amount of upland at the 107 acre on-site wetland complex), and 12.21 acres of wetland creation and restoration (of which only 5.21 acres is on-site).

EPA does not generally accept preservation alone as mitigation. It is only under very rare circumstances that preservation is considered an appropriate compensatory mitigation tool. These rare circumstances are generally in cases where (a) the impacts are minimal, (b) where there are no other options to avoid, minimize, or compensate impacts through other means (restoration, creation, rehabilitation, enhancement), and (c) the wetlands to be preserved are clearly at risk and of high value. To demonstrate that wetlands proposed as preservation are at risk it should be clear that they would be under imminent threat of development or alteration and that no other mechanisms exist to protect them (local, state or federal laws, etc). When preservation is accepted, the ratios are very high (20:1). If a 20:1 acreage ratio were applied here the total wetland preservation credit would be something less than 7.5:1 in this case.

EPA has a number of concerns with the proposed compensatory mitigation. These include:

- (1) The majority of the proposed mitigation is in the form of "preservation" and lies significantly outside of the project impact area (e.g., is not within Grays Harbor, or Grays Harbor County and is 10 miles away), thereby resulting in a net loss of wetlands in the basin in which the impacts would occur;

- (2) Much of the proposed mitigation is out of kind, resulting in a net loss of important interdunal wetland habitat;
- (3) The Firecracker Point estuarine restoration, while feasible, is in conflict with future construction & location of commercial and industrial development (e.g., a fish processing plant, ferry dock, etc.), posing long term risks to the protection and viability of this site; and
- (4) The proposed on-site creation that would involve scalping down existing upland dunes, which may adversely affect adjacent wetlands because the upland dune topography helps to facilitate the seasonal ponding, routing and dispersal of water to wetlands adjacent to them. We are concerned that modifying the topography could further impact the wetlands dependent on the dune microtopography. Therefore, it is not clear that this proposed on-site mitigation would really offset impacts to the loss of interdunal wetlands.

In essence only 12.21 acres of this total package is *direct* compensation for wetland habitat and functional losses in the form of creation or restoration. Of this 12.21 acres, the on-site, in-kind work could cause or contribute to additional impacts to the interdunal habitat in our view. The 7.0 acres of off-site, out-of-kind estuarine restoration doesn't replace lost functions and values of the interdunal wetlands. As a result we see there would be an overall *net loss* of wetland functions and values as a result of this project, just based on the impacts that have been quantified. When the additional indirect and secondary effects are evaluated, more impact to wetland functions and values would need to be considered in terms of adequately mitigating them.

The combined off-site wetland preservation doesn't offset these impacts, because the sites are located outside of the area of direct impact. The sphagnum bog, while meeting the "preservation criteria" of a high quality wetland, is not at risk as far as we know and it is completely out-of-kind in terms of compensating the functions and values of the impact area. The 30 acre interdunal wetland/upland area at Mar Vista, while potentially similar in habitat type and functions, is a narrow east-west patch of habitat. The preservation benefits of this narrow swath in terms of compensation values is not easily quantified. The on-site preservation may protect some areas of valuable interdunal wetland habitat, but there needs to be an assessment of the indirect and secondary impacts to this 107 acres of interdunal wetland/upland complex in order to conclude that these wetlands should not also be considered part of the indirect impacts for which compensatory mitigation would be required once all means to avoid and minimize impacts were demonstrated.

Based on these concerns (and our detailed analysis of the mitigation plan's performance standards and monitoring requirements) we do not believe the proposed mitigation meets the 404(b)(1) Guideline requirements.

III. Need for Full and Complete NEPA EIS

EPA is concerned about locating the proposed condominiums, hotels and convention center, and "other commercial amenities" to go with the proposed golf course in a severe erosion prone area. While these activities may not involve direct filling in waters of the U.S., the cumulative adverse impacts of locating this development in the coastal zone must be fully evaluated. EPA is concerned about the domino effect of increased shoreline armoring that will occur in attempt to protect these developments from the natural processes of shoreline erosion that occur in this dynamic coastal zone. As we know, the blowout that occurred after protective blocks were placed without a permit in 2003 exemplifies the domino effects that shoreline armoring can have in such a dynamic coastal environment, leading to increased and accelerated erosion in other areas. We strongly recommend that the "domino" effects of placing such development in this sensitive and erosion prone area be evaluated under a full and complete NEPA EIS.

Additional reasons why EPA believes that a full and complete NEPA EIS is warranted, include the need to fully evaluate the purpose and need for this project, to provide a complete economic analysis in terms of costs and benefits to local economies (including impacts to local shellfish industries, passive recreation and existing tourism). Other issues that need to be fully evaluated include the traditional cultural resource uses and cultural resources potential of the Point Chehalis area (see comments below), environmental justice and public access issues, and impacts to water quality, water quantity, and cumulative impacts of the project. Such analyses should include addressing alternatives that could minimize adverse impacts to the aquatic and human environment. Again, a comparison of the different proposed golf course projects in the Grays Harbor area, for example, could help to determine which of them would have the least adverse impact on the environment.

Cultural Resources Potential and Point Chehalis as a Traditional Use Area

The Grays Harbor area has been and remains a place of great importance to Native Americans. Activities of importance include fishing, hunting, gathering plant materials and shellfish, habitation, travel, trade, and social ceremonial and religious uses (James and Martino 1986). Today both the Quinault and Chehalis tribes manage tribal fisheries on fish stocks that rear in the Grays Harbor estuary and use the Chehalis and other rivers to spawn. A Chehalis village site was located where Westport is today (James and Martino 1986). The place name for the village is c xils, c xil s (which means "sand"), the name Euroamerican settlers gave to the Chehalis river and the Chehalis people. The interdunal area at Half Moon Bay and southward along the Pacific Coast where the proposed project would be located, was traditionally used by native peoples as an area for temporary camps, hunting and gathering.

The site has the potential for cultural resources or remains to be disturbed during construction. The Corps public notice indicates that there is a known historic property in the vicinity of the proposed project, but that it does not occur in the permit area. An historic properties investigation was conducted within the permit area (Corps Public Notice p. 2), but the public notice states that no sites were determined to be eligible for listing on the National Register of Historic Places within the permit area. It should be documented how the eligibility determination was made and whether the tribes were directly consulted in the process of making this determination. It should also be noted if the James and Martino reference was referenced in the historic properties investigation report. In considering whether to issue a permit for this project, we request that a full and complete NEPA EIS address all potential impacts to cultural resources and traditional use areas and that the Tribes be consulted with to determine the extent of impact.

Conclusion

In conclusion, the U.S. EPA has determined that this project poses unacceptable adverse impacts to Aquatic Resources of National Importance and the project does not comply with the Section 404(b)(1) Guidelines at this time. Due to the significance of impacts posed by this project, EPA recommends that a NEPA EIS be developed to address its full impacts as addressed above. EPA recommends that the Corps not issue a permit for this project as currently proposed.

References

- Ecological Land Services, Inc. 2003. *Wetland Mitigation Plan for the Links at Half Moon Bay Westport Golf and Hotel Destination Resort, Westport, Washington*. Prepared for Economic and Engineering Services, Inc, and Mox Chehalis, LLC.
- Economic and Engineering Services, Inc. 2003. *EIS Addendum to the Draft and Final Environmental Impact Statement for the Links at Half Moon Bay*.
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- Thomas, Blackemore E. 1995. *Ground-Water Flow and Water Quality in the Sand Aquifer of Long Beach Peninsula, Washington*. U.S. Geological Survey Water Resources Investigations Report 95-4026.
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- Wiedemann, Alfred M. 1984. *The Ecology of Pacific Northwest Coastal Sand Dunes: A Community Profile*. Prepared for the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers. FWS/OBS-84/04.

THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

FRIENDS OF GRAYS HARBOR and
WASHINGTON ENVIRONMENTAL
COUNCIL,

Appellants,

vs.

MOX CHEHALIS LLC, et al.,

Respondents.

NO. 34113-1-II

SETTLEMENT AGREEMENT

Appellants Friends of Grays Harbor and Washington Environmental Council (collectively referred to as "Appellants") and Respondents City of Westport and Mox Chehalis LLC hereby enter into the following Settlement Agreement of the above-referenced matter.

SETTLEMENT AGREEMENT

1. This Settlement Agreement is entered into in order to resolve disputed matters concerning the pending appeals of permits issued for a master planned resort known as the Links at Half Moon Bay within the City of Westport. The development shall include one hotel, a convention center, a Scottish links style golf course, condominiums and retail buildings as set forth in the Master Plan Ordinance No. 1277 adopted by the City of Westport, and more specifically in the Shorelines Substantial Development Permit and Binding Site Plan approved for the project, as modified by this Settlement Agreement (hereafter "Project").

2. Upon satisfaction of the requirements of the scheduling provisions set forth in Section 6(a) below, Appellants agree to drop the pending appeal before the Court of Appeals and allow the

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KAMERRER & BOGDANOVICH, P.S.
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1 project to move forward without further objection or appeal of any subsequent permit decisions or
2 approvals concerning the Project. Respondent agrees to modify the Project by submitting to the City an
3 amended Master Plan and applications for a revised Shoreline Substantial Development Permit and a
4 revised Binding Site Plan Approval consistent with the following:
5

- 6 a. No condominium buildings shall be located south of Jetty Access Road. No buildings
7 will be built south of Jetty Access Road except for shelters and restrooms currently in the
8 golf course plan, a covered area for the driving range and the new Radar Road building
9 discussed in subsection (2)(c). A maximum of 450 residential units (including hotel and
10 condominium units) will be proposed north of Jetty Access Road. The budget hotel will
11 be removed. The development on the site shall be limited to the Project, plus potentially
12 additional retail development as discussed in Paragraph 11 of this Agreement.
13
- 14 b. Height limits for condominiums and the hotel will be as currently approved by the City.
15 The Hotel will only use the maximum height for a distinguishing feature, such as a tower
16 or other architectural element, including but not limited to a restaurant, to maximize
17 views of the ocean, bay and city. The design is intended to reduce its bulk and scale
18 impacts by providing that a significant portion of the hotel will be of a lower height than
19 the maximum approved by the City.
20
- 21 c. **The final design for the golf course project will not include any filling, or development of**
22 **wetlands, except that bridges are allowed to span wetlands.** At least 30 days prior to
23 commencement of construction of the golf course, the applicant shall update the
24 delineation of wetlands and clearly stake the boundaries of wetlands on the site. The City
25 of Westport shall retain a qualified third party to inspect the staked wetland boundaries to
26

1 verify their accuracy. Any disputes shall be resolved by a mutually agreeable third party
2 expert or by other mutually agreeable dispute resolution process. The final staking of
3 wetlands shall remain undisturbed through construction. Wetlands and no spray zones
4 shall be permanently marked at ground level in areas adjacent to the golf course. The
5 existing building at the Radar Road location may be replaced with a small, one-story new
6 building for maintenance, snack bar, and/or comfort station. **The driving range will be**
7 **moved to the current location of the condominiums.** The City will adopt and enforce the
8 following conditions to approval of the Site Plan for the Golf course:
9

- 10 i. The golf course, including the driving range, will not include parking at
11 Westhaven State Park. Appropriate signage shall be posted by Mox Chehalis
12 to discourage such use. Mox Chehalis shall develop a shuttle system to bring
13 such users to and from the driving range from parking facilities located north
14 of Jetty Access Road.
- 15 ii. The hitting area of the driving range and/or associated building will be
16 visually screened from the State Park by a combination of berms, dunes and
17 vegetation, as appropriate. The goal is to make the pad/building visually
18 obscured from the State Park parking lot and the existing public trails.
- 19 iii. The driving range shall protect public safety of vehicles and pedestrians on
20 Jetty Access Road by: a) appropriate angling of the driving range; and b)
21 placement of vegetative screening between the road and driving range.
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- iv. Mox Chehalis shall establish a barrier designed to prevent balls from rolling into the wetlands at the end of the driving range, which may consist of a berm and vegetative screening.
- v. Mox Chehalis shall not collect balls in the wetlands by mechanical means.
- vi. Mox Chehalis shall have an ongoing evaluation program for the driving range, including evaluation of the distribution of balls leaving the boundaries of the range, and shall formulate adaptive management strategies to address any problems identified. The City may require Mox Chehalis to implement appropriate adaptive techniques to address such identified problems, including, but not limited to, alteration of berms and vegetative screening, or conversion to an irons-only range.
- vii. The shelter structure shall be designed to be removable in the event that it is threatened by coastal erosion.
- viii. No artificial lighting or netting shall be established for the driving range or golf course.
- ix. Mox Chehalis shall conduct an initial survey to establish pre-construction conditions for wildlife habitat and populations and shall periodically update such wildlife surveys. Mox Chehalis shall use adaptive management strategies to remedy any significant adverse impacts caused by the Project.
- x. Mox Chehalis shall require that the golf course provide an ongoing evaluation of wet weather playability of the golf course and modify the golf course or play if deemed necessary.

- 1 d. The Amended Master Plan, revised shoreline substantial development permit and revised
2 binding site plan will reflect the Settlement Agreement and will retain existing mitigation
3 requirements, except for the following: 1) the preservation of the Mar Vista property is
4 not required; and 2) the location of on-site mitigation shall be adjusted to reflect the
5 revised no-fill design. These modifications shall be contained in an updated Wetland
6 Mitigation Plan, dated June, 2006, a draft of which is attached as Appendix A. The City
7 shall require compliance with the revised Wetland Mitigation Plan as a condition of its
8 permit approvals.
- 9
- 10 e. The requirement of the SSDP that Mox Chehalis improve Jetty Access Road past the
11 turnoff to the main resort will be deleted, except that Mox Chehalis will be required to
12 repair any damage done to the road during Project construction.
- 13
- 14 f. Building design of the condominiums, hotel, convention center, retail and clubhouse
15 facilities shall be subject to a public design review process incorporating public notice
16 and opportunity to comment prior to application for Building Permits:
- 17
- 18 1. Mox Chehalis will involve the public in a design review process. Mox
19 Chehalis shall hold two meetings at which its architects provide
20 architectural designs and obtain feedback. The meetings shall be at
21 different design stages. Mox Chehalis and its architects will give serious
22 consideration to meritorious public input.
 - 23 2. Mox Chehalis will work towards an architectural design that is consistent
24 with the themes expressed in the City's comprehensive plan, which
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1 minimizes the bulk and scale to the extent possible, varies the rooflines
2 and facades, provides interesting features, and is non-monolithic.

3 **The Settlement NRMP, a draft of which is attached as Appendix B, shall include all**
4 **currently relevant requirements including the corrective measures required by the**
5 **ELUHB in its October 12, 2005 Order. Even though a Water Quality Certification under**
6 **the Clean Water Act is unnecessary as a result of the agreement that no filling of wetlands**
7 **will be proposed for the golf course, nevertheless, Mox Chehalis shall comply with the**
8 **requirements set forth in Appendix C, which identifies the applicable requirements of the**
9 **Department of Ecology Section 401 Certification ("401"), including corrections to**
10 **problems identified by the ELUHB. Such applicable requirements are attached hereto as**
11 **Appendix C and made a part hereof and shall also be attached and made a part of the**
12 **settlement NRMP. The requirements as stated in Appendix C shall be controlling to the**
13 **extent that they may be inconsistent with the description of those requirements in the**
14 **NRMP. The City shall require compliance with the Settlement NRMP as a condition of**
15 **its permit approvals. The City shall be responsible for oversight of all monitoring/**
16 **sampling and reporting required by the Settlement NRMP. All monitoring/sampling and**
17 **reporting shall be conducted by a qualified consultant approved by the City. Mox**
18 **Chehalis shall reimburse the City for reasonable consulting costs needed to perform these**
19 **tasks and to review the same. The City and FOGH shall receive reports and the City shall**
20 **enforce the requirements of the Settlement NRMP. The Applicant shall have an open**
21 **books policy, so FOGH and WEC may examine records relating to water quality issues.**
22
23
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26 g. Applicant shall develop and apply a non-lethal goose control plan.

- 1 h. Mox Chehalis agrees that the golf course will not host tournaments with galleries and
2 paying spectators.
- 3 i. Mox Chehalis will develop and implement a signage plan to direct the public to
4 Westhaven State Park and identify areas of the resort.
- 5 j. Mox Chehalis will establish and maintain a Junior Golf Program for youth in the
6 Westport area.
- 7 k. The City and Mox Chehalis shall negotiate a fair share agreement for school and utility
8 impacts arising from the proposal as revised pursuant to this agreement.
- 9 l. Mox Chehalis agrees to use local workers to the extent that the local workforce is able
10 and willing to provide needed service, and will uphold union standards for safety and
11 quality of work and allow collective bargaining of employees.

12 4. Mox Chehalis will transfer to Smith & Lowney a cash payment of \$150,000. Mox
13 Chehalis shall ensure conveyance of that portion of the Blair Property to Smith & Lowney as further
14 described in Exhibit 1. The Blair Property shall be free from all encumbrances, except for such
15 easements described in Exhibit 1. Mox Chehalis shall provide title insurance on the property transfer.
16 All such funds and a deed to the Blair Property described above shall be placed into escrow within 45
17 days of execution of this Settlement Agreement, except that if necessary Mox Chehalis shall have
18 another 45 days to remove encumbrances on the Blair Property, with escrow costs paid by Mox
19 Chehalis. The moneys and property shall be conveyed upon approval by the City of the permit(s) for
20 the golf course, which are anticipated to include a revised binding site plan and revised shoreline
21 substantial development permit ("golf course permits") and expiration of their appeal periods, unless
22 terminated as provided in Section 6(b).
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1 5. Within one week of the execution of the Settlement Agreement, Mox Chehalis will
2 provide to the Westport Police Department a letter notifying it that the Engvall family is no longer
3 excluded from Mox Chehalis businesses in Westport. A copy shall be provided to Brady Engvall.

4 6. Scheduling Provisions:

5 a. Court of Appeals Proceedings:

6 **The Parties agree to terminate the currently pending litigation before the Court of Appeals** upon
7 approval by the City of Westport of the golf course permits and expiration of their applicable appeal
8 periods, provided no appeal is filed. The Parties agree to immediately seek an order staying Court of
9 Appeals action, No. 34113-1-II, to January 31, 2008, to allow for consideration of the revised binding
10 site plan pursuant to this Settlement Agreement. If the golf course permits are approved by the City and
11 no appeals are filed within the applicable appeal periods, Appellants agree to withdraw the pending
12 appeal within 10 days after expiration of the last appeal period.
13

14 b. Mox Chehalis Right to Terminate:

15 If the golf course permits are denied or any appeals are filed challenging their approval,
16 Respondents may elect to terminate this Settlement Agreement by withdrawing the golf course permit
17 applications and providing written notice to the parties within 30 days after the expiration of the
18 applicable appeal periods. If this Agreement is terminated by Mox Chehalis as provided in this section,
19 escrow shall be instructed that all funds shall be returned to Mox Chehalis and the deed to the Blair
20 Property will not be conveyed and will be returned to the Grantor. Upon such election, the parties shall
21 notify the Court of Appeals and request resumption of the current litigation. Neither execution of this
22 Settlement Agreement, nor any action taken to implement the terms hereof shall in any way prejudice the
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1 rights of any party in the event of such termination of this Settlement Agreement and resumption of
2 litigation before the Court of Appeals.

3 If Mox Chehalis decides to terminate the Settlement Agreement, it must withdraw its
4 applications for the golf course permits. Notwithstanding the provisions of the preceding paragraph,
5 Mox Chehalis may also, upon such termination, thereafter resubmit a further application to the City.
6 FOGH and WEC thereafter may fully participate in any proceedings relating to modified land use
7 permits.
8

9 c. Appellants' Right to Termination

10 Appellants may terminate this Agreement and the parties will be returned to their pre-Settlement
11 positions if:
12

- 13 i. The \$150,000 and deed to the Blair Property are not placed into escrow in
14 compliance with section (4). If Appellants terminate under this paragraph, the
15 parties agree that any modified permits including golf course permits issued by the
16 City pursuant to this Agreement shall be automatically cancelled by operation of
17 law, and that Mox Chehalis shall not rely upon them and shall withdraw the
18 applications for such permits. Mox Chehalis may thereafter resubmit such
19 application(s) to the City, allowing FOGH and WEC to fully participate in any
20 proceedings relating to such applications.
21
- 22 ii. Mox Chehalis fails to submit applications for the golf course permits within 90
23 days of the execution of this Settlement Agreement. In the event this Agreement
24 is terminated by Appellants as provided in Section 6(c)(ii), escrow shall be
25 instructed to convey the \$150,000 and the Blair Property to Smith & Lowney.
26

1 d. Review of Application Documents.

2 1. Mox Chehalis has provided to Appellants the most current versions of the
3 Wetland Mitigation Plan (Appendix A) and Settlement NRMP (Appendix B). The
4 parties recognize that certain maps and other provisions may be subject to minor revisions
5 to reflect the requirements of this Settlement Agreement, including the relocation of the
6 condominiums, relocation of the driving range and redesign of buildings to the north of
7 Jetty Access Road, and certain changes are required by this Agreement. The parties will
8 cooperate in good faith to incorporate such changes.

9 e. **Mox Chehalis shall not remove trees or clear areas identified by the Wetland Mitigation**
10 **Plan (Appendix A) as areas for preservation of wetlands.** Mox Chehalis further agrees not to implement
11 site work pursuant to their existing permits while applications for revised permits are pending before the
12 City, until such revised permits are issued. Notwithstanding the foregoing, Mox Chehalis may remove
13 existing brush piles and do such work as is necessary to accomplish the requirements of this Settlement
14 Agreement.

15 7. **The parties will exercise good faith in the performance of their duties under this**
16 **Settlement Agreement.**

17 8. Dispute Resolution

18 a. For all disputes about 1) the content of permit applications; 2) permit decisions; or
19 3) alleged breaches of this Agreement prior to permits being issued; any party to this
20 Settlement Agreement shall bring such dispute to binding arbitration before the Hon.
21 Daniel Berschauer or another mutually agreeable arbitrator. Any party to this Settlement
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1 Agreement may also use the following arbitration process at its discretion as an
2 alternative to the judicial review provisions set forth in section 8(b) below. Appellants
3 shall pay 33% of the arbitration fee with the remainder being paid by Mox Chehalis. The
4 arbitration process shall be as follows:

- 5
6 1. Appellants shall promptly bring any dispute concerning compliance with the
7 settlements agreements by providing notice of the alleged non-compliance to Mox
8 Chehalis and the City. If the dispute is not resolved between the parties within
9 two business days after receipt of notice thereof, appellants shall file a request to
10 resolve the dispute, together with a list of issues to be resolved, with the arbitrator
11 within three business days from the end of the aforementioned two-day period.
12
- 13 2. If any issue is not resolved between the parties, the party requesting arbitration
14 shall notify the arbitrator within 3 business days, of the issues to be resolved and
15 shall specify the grounds for objections. The arbitrator shall allow such briefing
16 and hearings as the arbitrator deems necessary. If the arbitrator finds a violation of
17 the Settlement Agreement, the Arbitrator shall specify in writing the necessary
18 modifications or remedial steps to be taken. The arbitrator shall make his
19 decision in writing no later than 30 days after receipt of the issues provided for
20 above.
21
22

- 23 b. Judicial Review shall be limited solely to issues arising from the implementation of the
24 following revised permits after issuance by the City: binding site plan approval,
25 shorelines substantial development permit and master plan approval. If the monitoring
26

1 and reporting show impairment to water quality beyond action levels as defined by the
2 Settlement NRMP, FOGH and WEC shall have right to seek enforcement of those
3 sections of the Settlement NRMP triggered by such impairment, including but not limited
4 to the requirement to develop and implement adaptive management, or the reduction of
5 chemical uses. Prior to commencement of judicial review, Appellants must take the
6 following steps:
7

- 8 1. Appellants shall request a meeting with the City and Mox Chehalis to raise any
9 issues of concern with implementation of said permits.
10
- 11 2. If outstanding issues of compliance in implementation remain after the meeting of
12 the parties, Appellants shall provide written notice of their allegations of
13 continued failure of implementation to Mox Chehalis and the City, and shall
14 request enforcement of said permits by the City.
15
- 16 3. The City shall have 14 days to address the enforcement request and shall inform
17 the parties of any enforcement action that is to be taken.
18
- 19 4. If the City fails to fully enforce the permit(s) in question or concludes that no
20 violation has occurred, Appellants may file an action within 60 days thereafter in
21 Grays Harbor County Superior Court to enforce the terms of the permit.
22
- 23 5. A party may bypass the dispute resolution process set forth in this section 8(b)
24 above and proceed directly to Court only for the purpose of obtaining urgent
25 injunctive relief through a temporary restraining order as provided by CR 65,
26 including appropriate financial security, in which case the issuance of the TRO

1 will be followed by compliance with the dispute resolution process set forth in
2 subsection 8(b)(1-4). The parties agree that the Settlement Agreement is
3 enforceable by injunctive relief and that time is of the essence.
4

5 c. Any party who successfully enforces this agreement shall recover its reasonable attorney's
6 fees and costs from the party subject to the enforcement action. If the superior court or
7 arbitrator finds that the appeal was without substantial merit, reasonable attorney's fees
8 and costs shall be awarded to the other parties defending the appeal.
9

10 9. Waiver of Future Appeal Rights.

11 a. Appellants agree not to bring, or to aid or abet any Third Party to bring any Legal
12 Challenge relating to the Project. Appellants' waiver of appeal rights relating to the
13 Project shall include (i) any Amended Master Plan; (ii) any revised Shoreline Substantial
14 Development permit; (iii) any binding site plan; (iv) building permits; or (v) any other
15 land use approval for the Project.
16

17 b. Any alleged breach of this Settlement Agreement may be addressed by any party through
18 the dispute resolution processes set forth in Section 8.

19 10. Retained Appeal Rights

20 Mox Chehalis agrees that notwithstanding the foregoing waiver of appeal rights, if this
21 Settlement Agreement were to be terminated Appellants retain all rights, including but not limited to the
22 following appeal rights:
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- 1 a. In the event the Settlement Agreement is terminated and the permits for the existing
2 Project remain in effect, Appellants retain the right to pursue the current appeal pending
3 before the Court of Appeals under Docket No. 34113-1-II.
4
5 b. In the event the Settlement Agreement is terminated and Mox Chehalis submits an
6 application for an Amended Master Plan, shorelines permits or binding site plan approval.
7 Appellants may participate in permit review proceedings and appeal any such permit
8 decisions.
- 9 11. Notwithstanding any other provision herein, this Settlement Agreement shall not apply to
10 development of future Commercial Areas A, B and C as identified in City of Westport
11 Ordinance 1277. The parties recognize that Mox Chehalis is not currently proposing
12 development in these areas as part of the Project, but reserves the right to propose an
13 Amendment to the Master Plan concerning such areas in the future. Application for
14 development of such commercial areas shall not be included in the applications for the
15 Project. Appellants reserve all rights to contest or oppose any such proposal for future
16 development of Commercial Areas A, B and C.

17
18
19 12. DETAILS.

20 This Settlement Agreement may be executed in counterparts or by facsimile. The parties agree
21 that time is of the essence as to the requirements in this Agreement. This Settlement Agreement
22 represents the entire agreement and any amendment hereto must be agreed to by all parties to the
23 Agreement and executed in writing.

24
25 13. **This Agreement shall apply to and be binding upon the parties to this Agreement, their**
26 **members, member organizations, related entities, successors and assigns.** The undersigned

1 representative of each Party hereby certifies that he or she is fully authorized to enter into this
2 Agreement and to execute and legally bind such party to comply with its terms.

3 14. The Port of Grays Harbor, Department of Ecology and the Environmental and Land Use
4 Hearings Board are named parties in the currently pending appeal before the Washington Court of
5 Appeals. The Port of Grays Harbor, Department of Ecology and the Environmental and Land Use
6 Hearings Board acknowledge the settlement embodied in this Settlement Agreement between the
7 Appellants, Mox Chehalis and City of Westport and by signature of this document consent to the entry
8 of this Settlement Agreement and disposition of the pending appeal as provided herein.
9

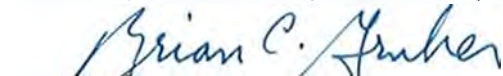
10 DATED THIS 13 day of April, 2007.

11 SMITH & LOWNEY, P.L.L.C.

12  4/11/07

13 Knoll D. Lowney, WSBA No. 23457
14 Attorney for Appellants

15 ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM

16 

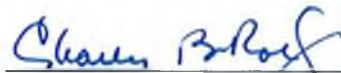
17 Brian C. Gruber, WSBA #32210
18 Attorney for Appellants

19 KALIKOW & GUSA, PLLC

20 

21 Barnett N. Kalikow, WSBA #16907
22 Attorney for Respondent Mox Chehalis LLC

23 PERKINS COIE, LLP

24 

25 Charles B. Roe, Jr., WSBA # 648
26 Attorney for Respondent Mox Chehalis LLC


1 LAW, LYMAN, DANIEL,
2 KAMERRER & BOGDANOVICH, P.S.

3 
4 Jeffrey S. Myers, WSBA #16390
Attorney for Respondent City of Westport


5 INGRAM, ZELASKO & GOODWIN

6 
7 ARTHUR A. BLAUVELT, WSBA # 8260
8 Attorney for Respondent Port of Grays Harbor

9 STATE OF WASHINGTON
10 DEPARTMENT OF ECOLOGY

11 
12 JOAN M. MARCHIORO, WSBA #19250
Assistant Attorney General for
13 Department of Ecology

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15 DEPARTMENT OF ECOLOGY

16 
17 THOMAS J. YOUNG, WSBA #17366
Assistant Attorney General for
18 Department of Ecology

19 STATE OF WASHINGTON
20 ENVIRONMENTAL & LAND USE HEARINGS BOARD

21 
22 BRUCE L. TURCOTT, WSBA #15435
23 Assistant Attorney General
24
25
26

EXHIBIT A

The following described property will be conveyed to Smith & Lowney:

The easterly portions of Tax Parcel 161103420010 as shown on the attached map;

The easterly portions of Tax Parcel 791524300000 as shown on the attached map; and

Tax Parcels: 791500400000, 791523800000, 791500600000, 791501200100,

791501700000, 791502600100, 791502700100, 791502702400 and 791006100000,

subject to a 60 foot wide easement for ingress and egress and utilities across parcels

791523800000 and 791500600000.

The following described property will be retained:

The westerly portions of Tax Parcel 161103420010 as shown on the attached map;

The westerly portions of Tax Parcel 791524300000 as shown on the attached map; and

Tax Parcel 791524200100; together with a 60 foot wide easement for ingress and egress

and utilities across parcels 791523800000 and 791500600000.

KD 4/11/07

LANCO Development

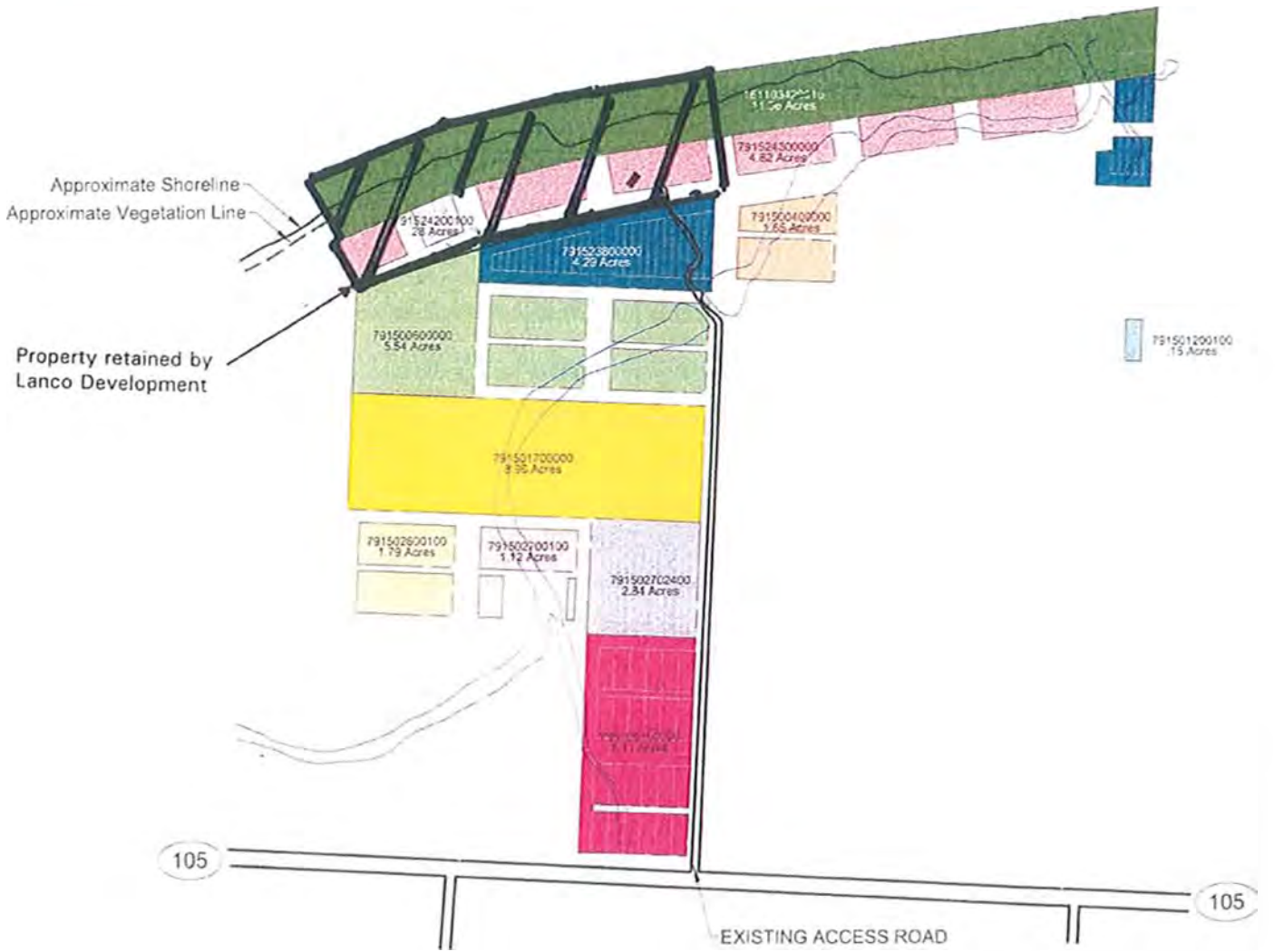
Date: 11/22/2006

Blair Property Grays Harbor, Washington

Color Code	APN	Acres
Green	161103420010	11.36
Red	791006100000	5.11
Orange	791500400000	1.65
Light Green	791500600000	5.54
White	791501200100	0.15
Yellow	791501700000	8.96
Light Yellow	791502600100	1.79
Pink	791502700100	1.12
Light Blue	791502702400	2.84
Dark Blue	791523800000	4.29
Light Blue	791524200100	0.28
Pink	791524300000	4.82

Total Acre 47.91

GRAYS HARBOR



AREA PLAN

SCALE: 1" = 500'-0"



KJ 1/11/07

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THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

FRIENDS OF GRAYS HARBOR and
WASHINGTON ENVIRONMENTAL
COUNCIL,

Appellants,

vs.

MOX CHEHALIS LLC, et al.,

Respondents.

NO. 34113-1-II

SETTLEMENT AGREEMENT

APPENDIX A

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 R.W. JOHNSON RD. TUMWATER, WA 98512
P.O. BOX 11880 OLYMPIA, WASHINGTON 98508-1880
(360) 754-3480 FAX: (360) 357-3511

PFR000067

App'086

WETLAND MITIGATION PLAN

For the
Links at Half Moon Bay
Westport Golf and Hotel Destination Resort
Westport, Washington

Proponent:

Mox Chehalis, L.L.C.
1001 Cooper Point Road SW, Suite 140-395
Olympia, Washington 98502
(360) 790-3398

Prepared For:

HDR, Inc.
626 Columbia Street Northwest, Suite 2A
Olympia, Washington 98501
(360) 352-5090

Prepared By:

Ecological Land Services, Inc.
1157 3rd Avenue, Suite 220
Longview, Washington
(360) 578-1371

June 2006

EXECUTIVE SUMMARY

Mox-Chehalis, L.L.C. (Proponent) has proposed the development of a destination resort on approximately 350 acres of Port of Grays Harbor (Port) property within the city limits of Westport, Washington (Figure 1). The destination resort will include an 18-hole golf course designed in the “Scottish Link” style, which incorporates natural site features such as wetlands, dunes, open waters, and forested areas. **Construction of the golf course will unavoidably impact, but not fill, wetland areas on both a short-term (temporary impacts during construction) and a long-term (permanent impacts) basis.**

The project will include the development of a luxury hotel (200 rooms), a conference center within the footprint of the luxury hotel, some commercial development, and the golf course and all appurtenances (including club house and golf maintenance building). Also proposed is the development of a second hotel (200 rooms), additional commercial development, and 200 condominium units. The duration of building activities is anticipated to last five years.

The proposed project will impact 18.29 acres of wetland by pruning and vegetation maintenance. No wetland fill or excavation will occur. Previous iterations of the development included nearly 10 acres of wetland fill. In order to avoid all wetland fill and excavation impacts, there is a resulting increase in vegetation mowing and pruning impacts, and in net wetland buffer impacts. It is important to remember that although non-fill related impacts have increased on a per-acre basis, the avoidance of nearly 10 acres of wetland fill results in a significant functional improvement for the wetlands within the project area. Avoidance of all wetland fill translates into retention of two important wetland functions- water quality and hydrological – while partially retaining some habitat functions even if vegetation within the wetland areas is pruned or mowed.

Permanent net wetland buffer impacts from mowing and vegetation maintenance will equal 21.87 acres from the golf course and paths, and 0.27 acres from the condominiums. Mitigation for the wetland impacts due to pruning and mowing will include creation of 5 acres of on-site interdunal wetlands and rehabilitation of 7.00 acres of estuarine wetland, for a total net increase of 12 acres of jurisdictional wetland to compensate for this non-fill associated wetland impact. Mitigation for buffer impacts from the golf course and paths will include restoring, through removal of invasive species, 22.32 acres of on-site upland dunes at a 2:1 ratio, and preservation of approximately 54 acres of on-site wetland at a 5:1 ratio. Mitigation for wetland buffer impacts associated with the condominiums (0.27 acres) will be through enhancement/averaging of 1.13 acres of wetland buffer in the vicinity of the condominiums. Exceptional mitigation, above and beyond the compensation previously described includes preserving approximately 53 acres of on-site wetlands and 14 acres of rare sphagnum bog and forested peat wetland.

Therefore, **this project will involve no wetland fill or excavation,** and will provide a net increase of 12 acres of jurisdictional wetland, fully mitigate for all wetland buffer impacts, and provide exceptional mitigation of 67 acres of wetland preservation, 14 acres of which are rare high quality wetlands.

	Upland Buffer Enhancement*	2.90*
Seastrand Bog	Forested/Scrub-Shrub Sphagnum Bog Preservation	9.00
	Sphagnum Moss/Native Cranberry Bog Preservation	5.00
	Total	156.45

* Not counted toward total mitigation acreage.

3.3 Goals and Objectives of Mitigation

The goal of this mitigation plan is to create, rehabilitate, and preserve wetland habitat, rehabilitate and preserve interdunal upland habitat, and preserve sphagnum bog habitat to compensate for unavoidable wetland impacts from proposed site developments. Creation of on-site wetlands will involve converting existing upland into viable Class II wetlands with a mosaic of emergent, scrub-shrub, and forested components. Enhancement of wetland buffers adjacent to the condominiums will provide habitat and screening between the wetlands and adjacent development. Rehabilitation of on-site wetlands will involve removing the old radar road fill and installing native wetland species. Rehabilitation of the off-site estuarine wetland at Firecracker Point will involve dredging and installing native estuarine species, and enhancing the buffer. Preservation of high quality sphagnum bog at Seastrand Bog and interdunal habitat on-site will further maintain existing habitat, forage, and shelter for wildlife.

4.0 ON-SITE MITIGATION

4.1 On-Site Ownership

The entire site is currently owned by the Port of Grays Harbor but will be owned by Mox Chehalis, L.L.C. if the proposed golf course project is approved. **Maintenance and monitoring responsibilities will transfer to future owners as a part of the purchase agreement.**

4.2 On-Site Description

On-site mitigation will include 5.0 acres of wetland creation/rehabilitation, and 107.00 acres of interdunal wetland and upland preservation. There will also be 22.32 acres of upland dune rehabilitation and 1.13 acres of wetland buffer averaging/enhancement adjacent to the condominiums. For a complete description of on-site conditions, please refer to section 3 of this document.

4.3 Ecological Rationale for On-Site Mitigation

The availability of on-site wetland mitigation measures is limited for several reasons:

1. Through the effort to avoid and minimize wetland impacts, golf course fairways have been purposely located in the upland areas. Therefore, these upland areas are not available for wetland creation or other mitigation measures.

2. The layout of the fairways in relation to each other is such that in-between areas consist of overlapping wetland buffers affording little to no room for wetland creation.
3. **The mosaic of interdunal wetlands and uplands is a unique landscape and environmental feature that is only found in the most recent (within 60 years) accreted areas of the Pacific Coast.** The unique quality of the landscape makes it an ideal location for a links style golf course. At the same time, over-utilization of upland areas to create wetlands for mitigation would have the result of creating most or all areas wetland, thereby losing the unique combination of upland dunes adjacent to depressional wetlands. Therefore, dunes in excess of 13 feet elevation above sea level will not be proposed for wetland creation.
4. Any proposed wetland creation areas must be adequately buffered from adjacent development, therefore no such areas can be proposed within 50 feet of a golf course green or tee.
5. Upland dune areas dominated by native plant species and/or that are densely covered with native shrubs and trees are not suited for wetland creation. Disturbing such areas for the sake of creating wetlands does not yield an environmental benefit.

4.4 Proposed On-Site Mitigation

On-site mitigation for wetland and buffer impacts is in three forms (Figures 3 and 4, Appendix A). The first is wetland creation/rehabilitation and upon consideration of the limitations listed above, there are only 5.0 acres of this type available on-site in 23 separate areas. Additional wetland creation/rehabilitation is not available on-site without disrupting additional areas of wetland buffers or upland dune areas with quality native habitat. The largest is the rehabilitation of the radar road area of 0.95 acres. The two smallest areas are wetland creation areas of 0.09 acres. Wetland creation areas are planned in areas dominated by Scot's broom (*Cytisus scoparius*), at elevations under 13 feet above sea level, and lacking significant cover (30 percent or more) of native shrubs and trees. This is to avoid impacts to higher quality upland dune areas. On-site wetland creation/rehabilitation areas will be used to partially mitigate on-site wetland mowing/pruning impacts. Additional mitigation for on-site mowing/pruning impacts requires off-site locations. See Figure 5, Appendix A.

The second on-site mitigation measure is the preservation from future development of 107.00 acres of interdunal upland and wetland habitat. This mitigation measure (54 acres) is to compensate in part for wetland buffer impacts, and the remaining 53 acres is exceptional mitigation over and above what it required.

The third on-site mitigation measure is the rehabilitation of upland dune habitat by removal and suppression of invasive plant species, primarily Scot's broom. This will involve 22.32 acres of upland rehabilitation to partially mitigate the net permanent buffer impact of 21.87 acres from the golf course. An additional 1.13 acres of wetland buffer averaging/enhancement will occur adjacent to the condominiums. Please refer to Objectives D and E in Section 5.5, Performance Standards.

4.5 Performance Standards for On-Site Mitigation

Objective A: Create 4.05 acres of on-site wetland by excavating existing uplands to a depth sufficient to provide hydrology necessary for hydrophytic vegetation to survive and prosper (Figure 3, Appendix A).

- **Performance Standard #1:** By year 1, excavate designated wetland creation areas to the project designed depth of 9 feet msl.
- **Performance Standard #2:** By year 1, install native wetland plant materials as designed.
- **Performance Standard #3:** At the beginning of the first growing season after native plant installation, monitor sites for plant mortality; replant to achieve 100 percent viability.
- **Performance Standard #4:** At the end of the first growing season, replace all dead plants. Total areal cover of native vegetation will be at least 10 percent.
- **Performance Standard #5:** By year 3, total areal cover of native vegetation will be at least 20 percent with an 80 percent survival rate.
- **Performance Standard #6:** By year 5, total areal cover of native vegetation will be at least 40 percent with an 80 percent survival rate.
- **Performance Standard #7:** By year 7, total areal cover of native vegetation will be at least 50 percent with an 80 percent survival rate.
- **Performance Standard #8:** By year 10, total areal cover of native vegetation will be at least 70 percent with an 80 percent survival rate.
- **Performance Standard #9:** For each year of monitoring, total areal cover of undesirable non-native vegetation such as reed canarygrass, Scot's broom, gorse, evergreen blackberry, and Himalayan blackberry will not exceed 10 percent.

Objective B: Rehabilitate 0.95 acres of existing on-site emergent wetlands by removing the old radar road fill and installing native plants.

- **Performance Standard #1:** By year 1, excavate the old radar road fill to the project designed depth of 9 feet msl.
- **Performance Standard #2:** By year 1, install native wetland species as designed.
- **Performance Standard #3:** At the beginning of the first growing season after native plant installation, monitor sites for plant mortality; replant to achieve 100 percent viability.
- **Performance Standard #4:** At the end of the first growing season, replace all dead plants. Total areal cover of native vegetation will be at least 10 percent.
- **Performance Standard #5:** By year 3, total areal cover of native vegetation will be at least 20 percent with an 80 percent survival rate.
- **Performance Standard #6:** By year 5, total areal cover of native vegetation will be at least 40 percent with an 80 percent survival rate.
- **Performance Standard #7:** By year 7, total areal cover of native vegetation will be at least 50 percent with an 80 percent survival rate.
- **Performance Standard #8:** By year 10, total areal cover of native vegetation will be at least 70 percent with an 80 percent survival rate.
- **Performance Standard #9:** For each year of monitoring, total areal cover of undesirable non-native vegetation such as reed canarygrass, Scot's broom, gorse, evergreen blackberry, and Himalayan blackberry will not exceed 10 percent.

Objective C: Rehabilitate 22.32 acres of on-site upland dunes by removing invasive species.

- **Performance Standard #1:** By year 1, remove all Scot's broom and other invasive species by manually pulling small plants and cutting larger plants at ground level.
- **Performance Standard #2:** In year 2, remove all Scot's broom and other invasive species by manually pulling small plants and cutting larger plants at ground level.
- **Performance Standard #3:** In year 3, remove all Scot's broom and other invasive species by manually pulling small plants and cutting larger plants at ground level.
- **Performance Standard #4:** In years 4 through 10, remove all Scot's broom and other invasive species as often as necessary by manually pulling small plants and cutting larger plants at ground level.
- **Performance Standard #5:** For each year of monitoring, total areal cover of invasive species will not exceed 10 percent.

Objective D: Preserve 107.00 acres of on-site interdunal wetland and upland habitat.

- **Performance Standard #1:** By year 1, develop a legally binding "Conservation Easement" on the preservation area.
- **Performance Standard #2:** By year 1, develop a legally binding description of the preservation area prepared by a professional land surveyor and recorded with the Grays Harbor County auditor.
- **Performance Standard #3:** Conduct long-term maintenance to remove undesirable, non-native species such as reed canarygrass, Scot's broom, gorse, evergreen blackberry, and Himalayan blackberry. For each year of monitoring, total areal cover of invasive species will not exceed 10 percent.

Objective E:

- **Performance Standard #1:** Following construction, there is a minimum buffer of 25 feet between condominiums/landscaping and adjacent wetlands. A total of 1.13 acres of total enhanced buffer area is established as shown in Figure 15.
- **Performance Standard #2:** By year 1, install native upland dune species as designed.
- **Performance Standard #3:** At the beginning of the first growing season after native plant installation, monitor sites for plant mortality; replant to achieve 100 percent viability.
- **Performance Standard #4:** At the end of the first growing season, replace all dead plants.
- **Performance Standard #5:** By years 3,5,7 and 10, minimum survival rate is 80 percent.
- **Performance Standard #6:** For each year of monitoring, total areal cover of undesirable non-native vegetation such as reed canarygrass, Scot's broom, gorse, evergreen blackberry, and Himalayan blackberry will not exceed 10 percent.

4.6 Procedures for On-Site Construction and Revegetation

4.6.1 On-Site Wetland Creation

1. Stake or flag the planned construction zone for wetland creation. Construction will take place in mid-summer to early fall, when the site and adjacent wetlands are dry. Silt fencing and other appropriate erosion control measures will be used to prevent silt from entering adjacent wetland areas.
2. Excavate the wetland creation areas to the project designed depth of 9 feet msl. Created wetlands will be constructed concurrently with construction of the golf course to enable soil from created wetland areas to be incorporated into the fairways, tees, and greens. See Figures 6-8, Appendix A.
3. Install native plants according to revegetation specifications outlined in this mitigation plan.
4. Complete maintenance and monitoring according to the schedule outlined in this mitigation plan.

4.6.2 On-Site Wetland Rehabilitation

1. Stake or flag the planned construction zone for wetland rehabilitation. Construction will take place in mid-summer to early fall, when the site and adjacent wetlands are dry. Silt fencing and other appropriate erosion control measures will be used to prevent silt from entering adjacent wetland area. See Figure 7, Appendix A.
2. Excavate the old radar road fill to approximately 9 feet msl to reestablish wetland hydrology.
3. Install native plants according to revegetation specifications outlined in this mitigation plan.
4. Complete maintenance and monitoring according to the schedule outlined in this mitigation plan.

4.6.3 On-Site Interdunal Preservation

1. Establish a legally binding description of the preservation areas prepared by a professional land surveyor and recorded with the Grays Harbor County auditor.
2. Develop a legally binding conservation easement on the preserved areas.
3. Complete maintenance and monitoring according to the procedures outlined in this mitigation plan.

4.6.4 On-Site Interdunal Upland Rehabilitation and Buffer Enhancement

1. Stake or flag the rehabilitation/enhancement area boundaries.
2. Identify the invasive plants to be removed, namely Scot's broom and gorse. Cut large plants at ground level. Manually pull smaller plants. Repeat for a period of three years and up to ten years. At wetland buffer enhancement area, plant native shrubs/trees and specified. See Figures 7 and 8, Appendix A.
3. Burn the invasive plants in a designated area on the mitigation sites.
4. Use approved herbicide if necessary, following specifications of the Department of Natural Resources for Natural Heritage sites.
5. Maintenance and monitoring will be completed according to the procedures outlined in this mitigation plan.

4.7 Revegetation Specifications for On-Site Mitigation

OBJECTIVE A – ON-SITE WETLAND CREATION (4.05 acres)

Quantity	Common Name	Scientific Name	How Established	Spacing
300	Shore Pine	<i>Pinus contorta</i>	container/bareroot	10 ft
300	Sitka Spruce	<i>Picea sitchensis</i>	container/bare root	10 ft
200	Western Crabapple	<i>Malus fusca</i>	container	10 ft
3,700	Hooker Willow	<i>Salix hookeriana</i>	cuttings	5 ft
200	California Wax Myrtle	<i>Myrica californica</i>	container	5 ft
200	Black Twinberry	<i>Lonicera involucrata</i>	container/bareroot	5 ft
200	Douglas Spiraea	<i>Spiraea douglasii</i>	container/bareroot	5 ft
800	Slough Sedge	<i>Carex obnupta</i>	container	3 ft
800	Dagger Leaf Rush	<i>Juncus ensifolius</i>	container	3 ft
400	Pacific Silverweed	<i>Potentilla anserina</i>	container	3 ft

7,100 (1,651 plants per acre = 5 foot average spacing)

OBJECTIVE B – ON-SITE WETLAND REHABILITATION (0.95 acres)

Quantity	Common Name	Scientific Name	How Established	Spacing
50	Shore Pine	<i>Pinus contorta</i>	container/bareroot	10 ft
50	Sitka Spruce	<i>Picea sitchensis</i>	container/bare root	10 ft
750	Hooker Willow	<i>Salix hookeriana</i>	container	5 ft
200	California Wax Myrtle	<i>Myrica californica</i>	container	5 ft
200	Black Twinberry	<i>Lonicera involucrata</i>	container/bareroot	5 ft

1,250 (1,374 plants per acre = 5.6 foot average spacing)

OBJECTIVE C – ON-SITE WETLAND BUFFER ENHANCEMENT (1.13 acres)

Quantity	Common Name	Scientific Name	How Established	Spacing
123	Shore Pine	<i>Pinus contorta</i>	container/bareroot	14 ft
123	Black Twinberry	<i>Lonicera involucrata</i>	container/bareroot	14 ft
246				

Notes: container = 1-2 gallon container

bare root = 1-5 year old plants
cuttings = 2 foot minimum length, 0.25 inch minimum diameter

4.8 Constraints for On-Site Mitigation

Mox Chehalis, L.L.C. or subsequent owners will retain ownership of the on-site mitigation sites. They will provide resources to maintain the on-site and off-site mitigation areas to assure that performance goals are met. Other potential constraints to a successful mitigation include browsing on installed plantings by deer, beaver damage to plantings, and the girdling of plant stems by rodents. Damage by animals will be controlled on an as-needed basis by installing fencing around plantings and wrapping plant stems with metal foil or wire. Mowing will also be implemented to reduce the height of grass surrounding the plantings thereby decreasing the cover for rodents.

5.0 OFF-SITE WETLAND MITIGATION SEARCH PARAMETERS

The previous section dealing with On-Site Mitigation identified a series of mitigation measures that will be implemented on-site to compensate for wetland and buffer impacts. The on-site mitigation measures are not sufficient to mitigate all of the wetland and buffer impacts. Therefore, a search of off-site mitigation properties commenced in the fall of 2001 and was completed in January 2002. The following off-site search parameters were used to generate a list of potential mitigation sites:

- Availability for purchase or lease
- Proximity to the impact site, with a preference for the Grayland Plains coastal sub-cell
- Ease of creation, rehabilitation, enhancement or preservation
- The extent to which the site is ecologically rare
- The relative abundance of similar wetlands
- Size
- Neighboring land uses
- The extent to which it is threatened by imminent development
- Compatibility with shoreline zoning and ease of environmental permitting
- Its use or potential for use by endangered or threatened fish and wildlife species
- The ability to preserve and protect the site from future impacts
- Position in the watershed
- Cost

The off-site wetland mitigation search found 22 potential mitigation sites, located as far south as Willapa Bay, as far north as Iron Springs on the North Beach sub-cell, and as far east as opposite Grays Harbor from Aberdeen at Newkah Creek. The WDOE was informed of the various sites being considered and conducted site visits as well to several of the properties. The final selection of three proposed off-site mitigation locations was reviewed and conceptually approved by the WDOE.

6.0 FIRECRACKER POINT MITIGATION SITE



City of Westport

740 N Montesano St.

P O Box 505

Westport, WA 98595

Phone: 360-268-0131 Fax: 360-268-0921

June 29, 2007

Corrected Copy

Chuck Maples
Managing Partner
Mox Chehalis LLC
802 W. Ocean Ave.
P.O. Box 304
Westport, WA 98595

Re: Revision Request – Links at Half Moon Bay Shorelines Conditional Use Permit

Dear Mr. Maples

On June 8, 2007, the City of Westport received your request for revision of the Shorelines Conditional Use Permit issued on October 30, 2003 for construction of an 18 hole Scottish Links style golf course, with clubhouse, shelters and maintenance facilities. **The request was made to implement the settlement agreement reached with the appellants in *Friends fo Grays Harbor et. al., v. City of Westport, et.al.*, Court of Appeals No. 34113-1-II.**

Upon review of the request for revision of said permit, the City Shorelines Administrator finds:

1. The proposed changes are within the scope and intent of the original permit as defined by WMC 17.32.080(f)(2).
 - a. The proposed revision does not seek additional over water construction.
 - b. The proposed revision does not increase lot coverage or building height by greater than 10% and conforms to applicable height, lot coverage, setbacks and other requirements of the City of Westport Shoreline Master Program.
 - c. The proposed landscaping is consistent with the conditions set forth in the Planning Commission decision issued on September 30, 2003 which were incorporated into the shorelines conditional use permit issued on October 30, 2003.
 - d. The proposed revision does not change the use previously approved.
 - e. The proposed revision was accompanied by an

www.ci.westport.wa.us

city_administrator@ci.westport.wa.us

clerk_treasurer@ci.westport.wa.us

public_works@ci.westport.wa.us

building@ci.westport.wa.us

PFR000120

WESTPORT RFP 003456

June 29, 2007

Re: Revision Request – Links at Half Moon Bay Shorelines Conditional Use Permit
Page 2

addendum to the Environmental Impact Statement for the project, dated June, 2007. The City adopted said Addendum pursuant to WAC 197-11-625 on June __, 2007. Based on said Addendum, the proposed revision will not cause additional significant adverse environmental impacts.

2. The revised golf course design eliminates landfill from the proposal, which required issuance of a shoreline conditional use permit under WMC 17.32.050(a)(6). The elimination of the proposed filling of wetlands also eliminates the need for a permit from the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. §1344. Due to the elimination of the proposed filling of wetlands, it is appropriate to revise the permit from a conditional use permit to a shorelines substantial development permit.

3. The applicant submitted a revised Wetland Delineation Report, dated June 2007, which was prepared by Ecological Land Services, Inc. The City retained Steve Shanewise of the Coot Company to inspect the boundaries of said delineation and verify their accuracy. Based on review of the City's consultant, the City has determined that the revised wetland delineation is accurate and the revised delineation is hereby approved.

4. The applicant has submitted a revised Wetland Mitigation Plan, Revised June 2007, pursuant to the Settlement Agreement which required that it will retain existing mitigation requirements, except for the following: 1) the preservation of the Mar Vista property is not required; and 2) the location of on-site mitigation shall be adjusted to reflect the revised no-fill design. These modifications are included in the June 2007 Revised Wetland Mitigation Plan, which is hereby approved by the City.

5. Following issuance of the shorelines conditional use permit, said permit was timely appealed to the Environmental and Land Use Hearings Board and Washington State Court of Appeals. During the pendency of these appeals, it was reasonable not to pursue construction of the golf course and the applicant did not pursue such construction. The settlement agreement with the appellants provides for dismissal of said appeals following revision of the shoreline permits for the golf course. It is therefore reasonable to commence the five year period for completion of construction of the golf course and associated facilities upon issuance of this revised shoreline conditional use permit.

6. This project is part of a "qualifying project" under Ch. 43.21L

June 29, 2007

Re: Revision Request – Links at Half Moon Bay Shorelines Conditional Use Permit

Page 3

RCW. Jurisdiction over appeals of such projects is vested in the Environmental and Land Use Hearings Board.

Based upon these findings, the request for a revision to the Shorelines Conditional Use Permit for the Links Project issued on October 30, 2003 is hereby approved. The permit is hereby revised as follows:

1. Upon approval of this revision by the Department of Ecology pursuant to WAC 173-27-100, the Conditional Use Permit issued for the Links at Half Moon Bay golf course and associated facilities on October 30, 2003 shall be revised to become a Shorelines Substantial Development Permit for the golf course and associated elements.
2. The expiration of said permit shall be June 29, 2012.
3. **Condition 1 of the permit shall be revised to read as follows:**
 1. **Wetland mitigation shall be provided as set forth in the Wetland Mitigation Plan. Revised June 2007.**
4. Condition 2 of the permit is revised to read as follows.
 2. Prior to the commencement of any construction of the golf course, the applicant shall submit to the City for review and approval a Final Natural Resource Management Plan prepared by Audubon International. The applicant shall comply with the provisions of the Final Natural Resource Management Plan as approved by the City. The 18-hole golf course shall only operate after obtaining and maintaining Audubon International certification under their Signature Program. The applicant shall provide the City with a current copy of this certification, or in the event the Signature Program is discontinued, certification by an equivalent program approved by the City. The application of fertilizers, herbicides and insecticides shall be prohibited in the event certification is denied.
5. Condition 4 of the permit is revised to read as follows:
 4. **The final design for the golf course project shall conform to the Updated General Site Plan Final Golf course Design, dated June 2007, attached hereto as Exhibit I, and shall not include any filling, or development of wetlands, except that bridges are allowed to span wetlands. The applicant shall clearly stake the boundaries of wetlands on the site as**

June 29, 2007

Re: Revision Request – Links at Half Moon Bay Shorelines Conditional Use Permit

Page 4

indicated in Figure 2 of the Wetlands Delineation Report, dated June 2007. The final staking of wetlands shall remain undisturbed through construction. Wetlands and no spray zones shall be permanently marked at ground level in areas adjacent to the golf course. The existing building at the Radar Road location may be replaced with a small, one-story new building for maintenance, snack bar, and/or comfort station.

6. Condition 11 of the permit is revised to read as follows:

11. The applicant shall install frontage improvements to Jetty Access Road as shown in Exhibit A.8.A-D, except that completion of such frontage improvements is not required past the turnoff to the main resort. Mox Chehalis shall repair any damage done to Jetty Access Road during project construction.

7. All other applicable conditions set forth in the Planning Commission Decision of September 30, 2003 shall remain in effect.

This permit revision is submitted to the Department of Ecology and is being provided to all parties of record as required by WMC 17.32.080(f)(5). The revision approved herein shall become effective upon final action of the Department of Ecology as provided in WMC 17.32.080(d)(4). Pursuant to WAC 173-27-100(6), the Department of Ecology will take final action within 15 days and thereafter, the City will provide notice thereof to all parties of record as required by WMC 17.32.080(f)(6). Pursuant to WMC 17.32.080(f)(8) and RCW 90.58.180, this revision may be appealed to the Environmental and Land Use Hearings Board within 21 days of Ecology's final action.

Sincerely,



Randy D. Lewis
City Administrator

Cc: Department of Ecology
Parties of Record

CERTIFIED MAIL



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
SEATTLE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-3755

JUL 17 2008

*Note: Not rec'd
Resent on Aug 4, 08*

Regulatory Branch

Mr. Chuck Maples
Mox Chehalis, LLC
1001 Cooper Point Road Southwest, Suite 140-395
Olympia, Washington 98502

Reference: 200301009
Mox Chehalis, LLC

Dear Mr. Maples:

My staff recently inspected work performed on your property located at Westport, Washington. It appears that you have placed fill material in wetlands adjacent to Grays Harbor, Pacific Ocean, a water of the United States, without a Department of the Army permit for a second time. In a letter from the U.S. Army Corps of Engineers (Corps) dated May 3, 2006, you were advised not to commence construction on the project without a Department of the Army permit. Despite this warning, you commenced construction on the project sometime during 2006.

An inspection by Corps staff in December 2006, revealed that fill material had been placed into jurisdictional wetlands on the site. Because the extent of wetland filling was minor and did not exceed the limits of a Corps Nationwide Permit (NWP), the Corps authorized the work on April 4, 2007, using NWP 18. In the April 4, 2007, letter, you were cautioned that based on the Corps' detailed knowledge of the project site and the extensive mosaic of wetlands that exist throughout the property, we believed that it would be extremely unlikely that you could construct a viable golf course without the further filling of wetlands. You were further cautioned that legal action may be initiated against the parties responsible for any further wetland filling activities that exceed the limits of the NWPs. Any such violation of Federal law would be considered knowing and willful.

The Corps' follow-up inspection of the property on April 8, 2008, revealed that additional wetland filling activities have occurred. The inspection took place on the northern end of the site on Holes 1, 10, and 18. The inspection revealed that fill material had been placed for an access road in Wetland WL-FK near the tee box for hole 10. Numerous unauthorized encroachments were observed in fairway 18. At some locations, roads had been constructed across the wetlands or fill had been allowed to enter the wetlands due to poor maintenance of the silt curtains/construction fencing or the lack of any silt curtain to identify wetland areas. In Wetland WL-AV, a road had been constructed over the wetland. At Wetland WL-KC-B, fill had been placed over a long narrow strip of one edge of the wetland. In other areas of fairway 10, the silt curtain defining the wetlands was inconsistent with the September 6, 2006 wetland delineation map and additional areas of unauthorized fill in wetlands occurred. The unauthorized fill placed in Wetland WL-KC-B was representative of the numerous violations that occurred at the site.

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App.100

JH
6/24/08

I consider this work to be a knowing and willful violation of Federal law. I direct you to do no further work in wetlands at this site. Please read the enclosure entitled *Clean Water Act and Rivers and Harbors Act Extracts and Definitions* which describes laws that may apply to the unauthorized work.

To assist in the evaluation of this violation, I request the following information:

- a. An aerial photograph of the site that can be overlaid with the delineated wetland boundaries of the site confirmed in a letter dated April 4, 2001, and an estimate of the fill that has been placed in wetlands on the entire site.
- b. Who did the work? If a contractor, please furnish name, address, and telephone number.
- c. Date when the work started.
- d. Reasons why the work was started before obtaining a Department of the Army permit.
- e. Property ownership at time of construction.
- f. Primary purpose of the project.
- g. Practicable alternatives available that would not involve filling of wetlands.

The U.S. Environmental Protection Agency (EPA) also enforces Section 404. The EPA will receive a copy of this letter and may provide views and/or recommendations concerning this matter to our office.

Please furnish the requested information within 30 days from the date of this letter. Your comments will be beneficial in resolving this matter. If you have any questions concerning your reply, please contact Mr. Jim Green at (206) 764-6906 or via email at james.d.green@usace.army.mil.

Sincerely,

Michael McCormick
 For Michael McCormick
 Colonel, Corps of Engineers
 District Engineer

KJ 6/25/08
 TONG/OD-RG
AP Martin 6/25/08
 COFFIN/OD-RG
nt 6/25/08
 WALKER/OD-RG
 NELSON/OC
uf 7/16/08
 WALKER/OD-RG

Enclosures

PARKS/OD

GUMAER/XA

CADICAMO/DD

MCCORMICK/DE/s

App.101

OD-RG File

MFR: This letter directs no further filling of wetlands and requests additional information for apparent unauthorized work at the Westport golf course project at Westport, Washington.

cc:

Environmental Protection Agency, ECO-083
ATTN: Michael Szerlog, Unit Manager
1200 6th Ave. MS-ECO-083
Seattle, WA 98101-3188

Environmental Protection Agency, ECO-083
ATTN: Ms. Rebecca Chu
1200 6th Ave. MS-ECO-083
Seattle, WA 98101-3188

Washington State Department of Ecology,
ATTN: Shorelines Enforcement
PO Box 47600
Olympia, WA 98504-7600

INVESTIGATION REPORT and CONCLUSIONS

Reference Number: 200301009

Field Investigation: 8 April 2008

Reference Name: Mox Chehalis, LLC

Investigators: Jim Green, Joe Brock, Gail Terzi

Method of Inspection: X Onsite From Adjacent Property Boat

Description of Prior Permit Activity: Mox Chehalis, LLC submitted a permit application (File No. 2000-01251) on 18 September 2000 to construct a destination resort including hotels, conference center, golf course, condominiums, and supporting commercial development. The project would be located on a site 250-300 acres in size adjacent to the Pacific Ocean at Westport, Washington.

Wetlands on the project site were delineated between February and August 2000. The site contains 167 wetland areas interspersed in a mosaic pattern throughout the site. A total of 148 acres of wetlands were delineated on the site. The wetlands were confirmed by Corps staff in a *Jurisdictional Determination and Wetland Summary* dated 2 April 2001 and a letter dated 4 April 2001 to the owner of the property at the time, the Port of Grays Harbor.

The initial project proposal included the filling of 11.96 acres of wetlands, the clearing of 15.89 acres of wetlands, and the excavation of 0.26 acres of wetlands on the site primarily for construction of the proposed golf course. A revised application was submitted on 26 April 2001 and included the filling of 10.56 acres of wetlands, the clearing of 13.82 acres of wetlands, and the excavation of 4.22 acres of wetlands, again, primarily for construction of the proposed golf course.

The revised application encountered considerable local opposition during the Shoreline permit process conducted by the City of Westport with many citizens in the area and an organized environmental group opposing the project. The local Shoreline Permit process resulted in extensive litigation. In a letter dated January 29, 2003, the Corps canceled the revised permit application pending resolution of the litigation. Mox Chehalis, LLC was advised that cancellation did not preclude the application from being resubmitted at a later date when litigation involving local permits was resolved.

While working on a Settlement Agreement with local groups opposing the project, Mox Chehalis submitted a new permit application to the Corps on 18 August 2003 (File No. 200301009). This new application was similar to the original application but changed the impacts to wetlands. The revised proposal now included the filling of 9.98 acres of wetlands, the clearing of 14.63 acres of wetlands, and the excavation of 0.23 acres of wetlands. In addition, approximately 13.66 acres of wetland buffer impacts would occur from construction of the golf course and cart paths and 0.27 acres from the condominiums.

The revised work was subject of Seattle District Public Notice No. 200301009 dated 15 June 2004. During the initial phases of the permit process, Corps staff met and corresponded with the Applicant's agent numerous times. The Applicant was advised on several occasions that the project would have to be evaluated using the EPA Section 404(B)(1) Guidelines. The Corps repeatedly requested information pertaining to project alternatives as required by the Guidelines. While some information was provided, much of the requested information was never provided. The Applicant was unwilling or unable to provide critical information required by the Corps to determine compliance with the 404(B)(1) Guidelines. In addition, the Corps requested information in order to complete the Endangered Species Act coordination with the U.S. Fish and Wildlife Service (see 3 May 2006 letter). This information also was not provided. Ultimately, the application was canceled on 3 May 2006 due to Mox Chehalis, LLC's failure to submit information required to continue with the processing of the application. In a 3 May 2006 letter, the Corps advised Mox Chehalis, LLC not to commence construction of the project without a permit.

Despite the Corp's letter dated 3 May 2006 advising Mox Chehalis, LLC not to commence construction of the project without a permit, work on the project commenced sometime in 2006. Based on a subsequent 22 June 2007 SEPA EIS Addendum for the project and a 29 June 2007 letter from the City of Westport, the project had been modified and consisted of a golf course without the filling of wetlands.

The site was inspected by Corps staff in December 2006. Large swaths of forested areas of the site had been cut to create fairways for the golf course. This work was non-jurisdictional because it did not constitute the placement of fill material. However, the inspection revealed that fill material had been placed into jurisdictional wetlands adjacent to Grays Harbor, Pacific Ocean. The wetland filling activities involved filling the low areas of an existing road at three separate locations to improve access to the interior of the site and the stockpiling of wood chips from the cutting of trees and the grinding of stumps on the site. The amount of fill placed in wetlands was estimated to be approximately 0.08 of an acre in size. Because of the minor nature of the violation and the fact that the work did not exceed the limits of the Corp's current Nationwide Permit 18, the Corps decided to take no legal action at the time and authorized the work using NWP 18 (see 4 April 2007 letter).

Most importantly, in the 4 April 2007 letter, the Corps advised that based on detailed knowledge of the project site and the extensive mosaic of wetlands that exist throughout the project site, we believed it would be extremely unlikely that a viable golf course could be constructed without the further filling of wetlands. Mox Chehalis, LLC was "cautioned that legal action may be initiated against the parties responsible for any further wetland filling activities that exceed the limits of the Nationwide Permits. Any such violation of Federal law would be considered knowing and willful."

Description of Work: The Corps received two reports that work was continuing. These reports were provided by Corps personnel working in the area. As a result of the reports of ongoing work, an inspection of the Mox Chehalis, LLC project site was conducted on 8 April 2008. Jim Green, Joe Brock, and Gail Terzi of the Corps inspected the site. Also in attendance at the site were Mr. Francis Naglich of Ecological Land Services, Inc., Mr. Randy Lewis of the City of Westport, and Mr. Jarl Priest of Lanco Development Company.

Because the project site is 250-300 acres in size, only a small portion of the site was inspected on 8 April 2008. The inspection took place on the northern end of the site on Holes 1, 10, and 18. The wetland delineation map from the approved 6 September 2006, *Wetland Delineation and Characterization Report* was used during the inspection. In addition, Mr. Naglich provided a color copy of a project site map entitle *Wetland Creation and Upland Dune Rehabilitation Map* dated 9 July 2007. The 9 July 2007 map was generally consistent with the 6 September 2006 map, The 9 July 2007 map was more inclusive of wetland areas because small upland area from the previous delineation were now mapped as wetland.

The inspection revealed that fairways had been carved out of the forested portions of the site and silt curtains were installed throughout much of the site. For most of the inspected area, the silt fence had been installed at the immediate edge of delineated wetland boundary. As a result, for many of the wetland areas the shape of the mapped wetland was consistent with the wetland area as outlined by the silt curtains. However, in some cases, the silt curtains had blown down due to storms and in other locations, the silt curtains were not properly located to protect wetlands from being filled. Much of the area not defined by silt curtains was filled with 2 to 3 feet of sand fill.

The site inspection progressed via a construction road from Jetty Access Road to the vicinity of the T-box for Fairway 10. At this location, the construction access road had been constructed over a section of Wetland WL-FK (see site photos 1 and 2). The inspection then progressed south through the vicinity of Fairway 18 to the location of the abandoned road grade that bisects the site. The wetlands defined with silt curtains were generally consistent with wetland delineation map from the 6 September 2006 wetland report. However, numerous unauthorized encroachments into the delineated wetlands were observed. At some locations, roads had been constructed across the wetlands or fill had been allowed to enter the wetlands due to the poor maintenance of the silt curtains/construction fencing or the lack of any silt curtain to identify wetland areas. In Wetland WL-AV a road had been constructed over the wetland (see site photo 5). At Wetland WL-KC-B fill had been placed over a long narrow strip of one edge of the wetland. The unauthorized fill placed in Wetland WL-KC-B was representative of the numerous violations that had occurred at the site. The individual wetland fills were small, but the indirect wetland impacts associated with the violations was extensive.

At the location where the abandoned road grade bisects Fairway 18 the inspection progressed east to Fairway 10 and then northerly back to the T-box for Fairway 10. The wetlands in Fairway 10 were also outlined by silt curtain to include the very distict hook-shaped Wetland WL-KI. However, in this area the silt curtain-outline wetlands were inconsistent with the delineation map from the 6 September 2006 delineation report and additional areas of unauthorized fill in

wetlands had occurred. The northern portion of Fairway 1 was also inspected. Fairway 1 has three in-line terraced T-box locations. This area also had silt curtain placed immediately on the delineated wetland edges.

According to the construction representative from Lanco, Mr. Priest, all of the sand fill material placed was obtained onsite by excavation and grading. In the area of the proposed driving range, a large excavation occurred and was the source of much of the material utilized onsite. Numerous other excavations occurred throughout the site as a source of sand fill material. These excavated sites contained standing water at the time of the inspection.

Numerous soils pits dug by Corps staff along the edges of the sand fill areas revealed the presence of hydric soils and compacted vegetation (carex). Locations of fill within wetlands per the 6 September 2006 wetland delineation report were verified by the presence of hydrophytic vegetation and hydric soils beneath the fill material. In many areas, particularly at locations of road crossings and cart paths, silt fencing was not installed at all and emergent wetlands were filled. Based on visual observations and soil pits dug by Corps staff, sand fill material was placed in delineated emergent wetlands at many locations in the areas inspected. The precise acreage of wetlands filled would be difficult to quantify without aerial photographs and an overlay of the confirmed wetland delineation but based on field observations, the fill is estimated to far exceed the limits authorized by any Nationwide permit. Aerial photographs would need to be taken to determine the full extent of the alleged violation at the site.

Wetland Summary:

a. Soils: Soils on the site are mapped as *Duneland* and *Yaquina loamy fine sand*. *Duneland* soil is a very deep, excessively drained land type consisting of a ridge of dunes near the ocean shore, an interdune area, and a ridge of dunes inward from the ocean shore. Soil pits dug onsite verified the presence of *duneland* soils. The soil pits revealed sandy soils, typical of *Duneland* Soils, with moderate saturation near the surface.

The other soil on the project site is *Yaquina loamy fine sand*. The onsite inspection did not cover the area mapped as *Yaquina loamy fine sand*. However, this is a very deep, somewhat poorly drained soil in depressional areas between stabilized sand dunes. *Yaquina loamy fine sand* is classified as a hydric soil in the State of Washington. Effective rooting depth is limited by a seasonal high water table that ranges from a depth of 24 inches to the surface from

November to April. Runoff is very slow. Most vegetation in this soil unit is woodland. Common forest understory species include salmonberry, sedges, salal, cascara buckthorn, and skunkcabbage.

b. Hydrology: Work on the project site included extensive excavation with the sandy soil being used as fill material on the low areas of the site where fairways were being constructed. The excavated areas were left with extensive ponding due to the high water table typically found in ocean dunal areas. Soil pits dug onsite revealed moist to saturated soils in the identified wetland areas.

c. Vegetation: Much of the site has been cleared but previously contained shore pine, carex obnupta, and other dunal vegetation. Areas of the fairways that had been cleared revealed shore pine trees cutoff approximately 1-foot above ground level. Much of the unfilled areas contained carex and various dunal grasses. Soil pits dug in suspected wetland fill areas revealed the presence of carex underneath.

Other Information: During the Corps' onsite investigation on 8 April 2008, the wetland biologist for Ecological Land Services, Inc., Mr. Francis Naglich, advised Corps staff that he was present only approximately one day every two weeks during the filling activities. In addition, Mr. Naglich advised that after the forested areas of the site had been carved out through the site, additional wetlands were discovered that were not part of the original delineation confirmed by the Corps.

Corps staff advised Mr. Priest of the Corp's letter dated 4 April 2007 advising that it would be extremely unlikely that Mox Chehalis, LLC could construct a viable golf course without the further filling of wetlands and that they were cautioned that legal action may be initiated against the parties responsible for any further wetland filling activities that exceeded the limits of the Corps' Nationwide Permits. Mr. Priest was advised that a letter would be sent by the Corps to Mox Chehalis, LLC concerning the ongoing work and alleged violation.

CONCLUSIONS

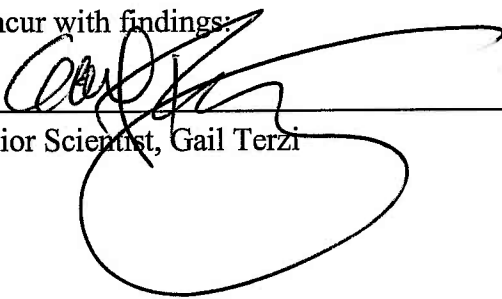
X This work appears to be in violation of the Clean Water Act because:

X The work includes filling activities in jurisdictional wetlands and exceeds the limits of any NWP, Regional General Permit, or exemption. An individual permit is required and none was obtained before the work commenced.

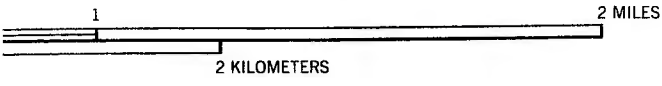
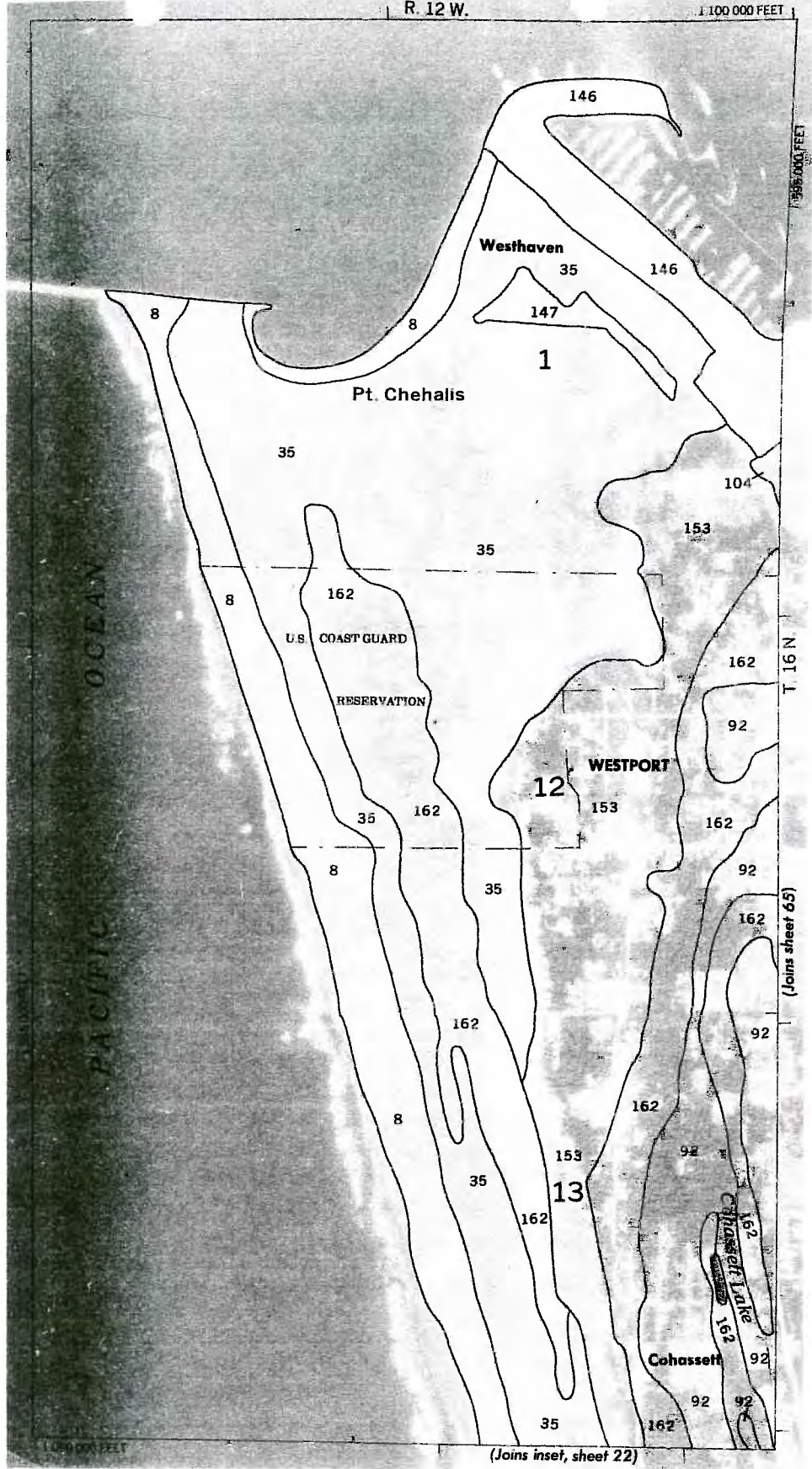
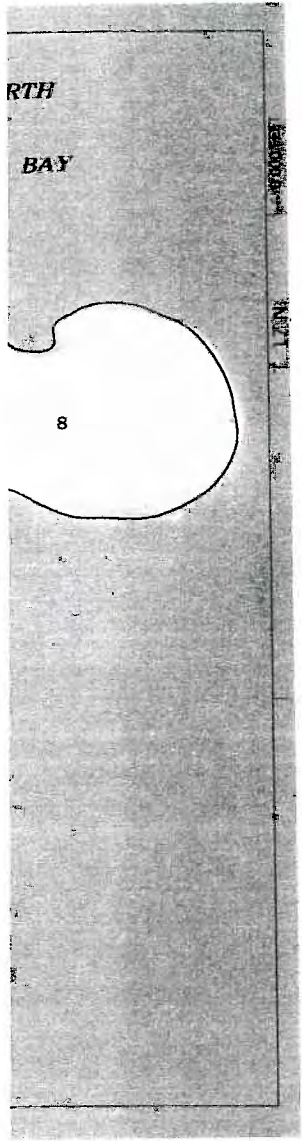
Attachments: Sketch Photos Calculations Other None


Investigator: Jim Green

24 June 2008
Date

Concur with findings:

Senior Scientist, Gail Terzi

25 June 2008
Date



Coordinates and ticks and land division corners, if shown, are approximately positioned. Bath maps are orthophotographs derived by the State of Washington, Department of Natural Resources, from 1977, 1974, and 1976 aerial photography. This text block may not be compiled by the U.S. Department of the Interior, National Wetlands Inventory, and is not intended for use as a substitute for the original data.

sand is at a depth of about 36 inches. Depth to the glacial drift ranges from 20 to 40 inches.

Included in this unit are about 20 percent Mopang soils, 10 percent Hoquiam and Le Bar soils, and 5 percent Nordby soils. Also included is 10 percent Copalis soils that have slopes of less than 30 percent.

Permeability of this Copalis soil is moderate to the dense glacial drift and very slow through it. Available water capacity is moderate. Effective rooting depth is 20 to 40 inches. Runoff is medium, and the hazard of water erosion is moderate. The effect of the drift layer on use and management is similar to the effect of a hardpan.

This unit is used as woodland.

Douglas-fir and western hemlock are the principal forest species on this unit. Trees of limited extent include Sitka spruce, red alder, and western redcedar. On the basis of a 100-year site curve, the mean site index is 165 for Douglas-fir and 159 for western hemlock. On the basis of a 50-year site curve, the mean site index is 126 for Douglas-fir and 113 for western hemlock. Yield tables indicate that the mean annual increment at culmination (CMAI) for Douglas-fir at age 60 is 176 cubic feet per acre per year, and for western hemlock at age 50 it is 252 cubic feet per acre per year.

The main limitation for harvesting timber is steepness of slope. Slope limits the use of wheeled or tracked equipment during harvesting; cable yarding systems are safer and disturb the soil less. Using wheeled or tracked equipment when the soil is wet causes ruts, soil compaction, and damage to tree roots. When wet, unsurfaced roads are soft and generally are impassable. Logging roads require suitable surfacing for year-round use. Rock for road construction is readily available in areas of this unit. Steep cuts and fills erode readily unless a plant cover is established. Steep yarding paths, skid trails, and firebreaks are subject to rilling and gulying unless they are adequately protected by water bars or vegetation.

Seedling establishment is the main concern in producing timber. Reforestation in cutover areas can be accomplished by hand planting Douglas-fir seedlings. If seed trees are present, natural reforestation by western hemlock and red alder occurs readily. If openings are made in the canopy, invading brushy plants can prevent establishment of Douglas-fir seedlings and delay natural regeneration of western hemlock. Because rooting depth is restricted by the underlying dense glacial drift, trees are subject to occasional windthrow.

Common forest understory species include western swordfern, western brackenfern, salal, vine maple, and cascara buckthorn.

This map unit is in capability subclass VIe.

35—Dune land. This very deep, dominantly excessively drained land type consists of a ridge of dunes near the ocean shore, an interdune area, and a ridge of dunes inward from the ocean shore. Dunes

nearer the shore generally form a narrow ridge that is 5 to 30 feet high and is parallel to the coastline. The interdune area is nearly level and has a water table that is at the surface during the rainy season. The dunes inward from the ocean shore form a ridge 20 to 60 feet high. The dunes are constantly shifted by strong coastal winds.

Dune land formed in fine sand. The slope is 0 to 30 percent. The native vegetation is very sparse beachgrass. Elevation is sea level to 60 feet. The average annual precipitation is 60 to 80 inches, the average annual air temperature is about 50 degrees F, the average growing season (at 28 degrees) is 200 to 240 days, and the average frost-free season (at 32 degrees) is 150 to 200 days.

A commonly observed profile of Dune land is grayish brown fine sand to a depth of 60 inches or more.

Included in this unit is about 10 percent Westport soils. Permeability of Dune land is dominantly very rapid. Available water capacity is low. Effective rooting depth is 60 inches or more. Runoff is slow, and the hazard of water erosion is slight. The hazard of soil blowing is very severe.

This unit is used for recreation and as homesites.

This unit is poorly suited to homesite development. The main limitations are the hazard of soil blowing and the high water table in the interdune area. In some places, excavation for houses and access roads exposes material that is highly susceptible to soil blowing. Disturbed areas around construction sites should be revegetated as soon as possible to reduce soil blowing. Shifting sand can be stabilized by planting beachgrass followed by Scotch-broom and shore pine (fig. 15). In summer, irrigation is required for lawn grasses, shrubs, vines, shade trees, and ornamental trees. Mulch, fertilizer, and irrigation are needed to establish lawn grasses. If the density of housing is moderate to high, community sewage systems are needed to prevent contamination of water supplies as a result of seepage.

This map unit is in capability subclass VIIIe.

36—Elochoman silt loam, 1 to 8 percent slopes. This very deep, well drained soil is on broad ridgetops, small plateaus, and shoulders of uplands. It formed in material derived from sandstone. Drainageways generally are more than 1,500 feet apart. The native vegetation is mainly conifers. Elevation is 100 to 1,800 feet. The average precipitation is 70 to 120 inches, the average annual air temperature is about 50 degrees F, and the average growing season (at 28 degrees) is 200 to 240 days.

Typically, the surface layer is very dark brown and dark brown silt loam about 21 inches thick. The subsoil to a depth of 60 inches or more is yellowish brown silt loam.

Included in this unit are about 2 percent Astoria soils, 2 percent Montesa soils, and 2 percent Stimson soils.

(CMAI) for western hemlock at age 50 is 246 cubic feet per acre per year, and for red alder at age 40 it is 92 cubic feet per acre per year.

The main limitation for harvesting timber is muddiness when the soil is wet. Using wheeled or tracked equipment when the soil is wet causes ruts, soil compaction, and damage to tree roots. When wet, unsurfaced roads and skid trails are soft and sticky and generally are impassable. Logging roads require suitable surfacing for year-round use. Rock for road construction is not readily available in areas of this unit. The seasonal high water table restricts the use of equipment to the dry summer months. Careful use of wheeled or tracked equipment reduces disturbance of the protective layer of duff.

Seedling mortality is the main concern in producing timber. Reforestation in cutover areas can be accomplished by hand planting western redcedar seedlings. If seed trees are present, natural reforestation by red alder occurs readily and by western hemlock it occurs periodically. The seasonal high water table reduces root respiration and causes seedling mortality. If openings are made in the canopy, invading brushy plants can delay establishment of planted western redcedar and can delay reforestation by western hemlock. The restricted rooting depth, caused by the high water table, frequently causes windthrow.

Common forest understory species include salmonberry, devilsclub, vine maple, skunkcabbage, and cascara buckthorn.

This map unit is in capability subclass IIIw.

162—Yaquina loamy fine sand. This very deep, somewhat poorly drained soil is in depressional areas between stabilized sand dunes. It formed in slightly weathered beach and dune sand. The slope is 0 to 1 percent. The native vegetation is mainly conifers and hardwoods. Elevation is 10 to 50 feet. The average annual precipitation is 70 to 90 inches, the average annual air temperature is about 50 degrees F, and the average growing season (at 28 degrees) is 200 to 240 days.

Typically, the surface is covered with a mat of needles, twigs, and leaves about 0.5 inch thick. The surface layer is very dark grayish brown and dark reddish gray loamy fine sand about 9 inches thick. The subsoil is dark reddish gray and dark brown fine sand about 15 inches thick. The substratum to a depth of 60 inches or more is olive brown fine sand. In some areas the subsoil has thin, weakly cemented strata.

Included in this unit are about 2 percent Netarts soils and 2 percent Westport soils. Also included in some mapped areas are as much as 5 percent Seastrand soils and as much as 2 percent Orcas and Seastrand Variant soils.

Permeability of this Yaquina soil is moderately rapid. Available water capacity is low. Effective rooting depth is

limited by a seasonal high water table that ranges from a depth of 24 inches to the surface from November to April. Runoff is very slow, and water erosion is not a hazard.

Most areas of this unit are used as woodland. Some areas are used for pasture.

Red alder is the principal forest species on this unit. Trees of limited extent include Sitka spruce, western hemlock, western redcedar, and shore pine. On the basis of a 50-year site curve, the mean site index is 90 for red alder. Yield tables indicate that the mean annual increment at culmination (CMAI) for red alder at age 40 is 101 cubic feet per acre per year.

The main limitation for harvesting timber is muddiness when the soil is wet. Using wheeled or tracked equipment when the soil is wet causes ruts, soil compaction, and damage to tree roots. When wet, unsurfaced roads are soft and generally are impassable. Logging roads require suitable surfacing for year-round use. Rock for road construction is not readily available in areas of this unit. The seasonal high water table restricts the use of equipment to the dry summer months. Careful use of wheeled or tracked equipment reduces disturbance of the protective layer of duff.

Seedling mortality is the main concern in producing timber. Reforestation in cutover areas can be accomplished by hand planting western redcedar and Sitka spruce seedlings. If seed trees are present, natural reforestation by red alder occurs readily. The seasonal high water table reduces root respiration and causes seedling mortality. If openings are made in the canopy, invading brushy plants can delay establishment of planted seedlings. The restricted rooting depth, caused by the seasonal high water table, frequently causes windthrow.

Common forest understory species include salmonberry, sedges, salal, cascara buckthorn, and skunkcabbage.

If this unit is used for pasture, the main limitation is the seasonal high water table. The water table can be lowered by installing tile drains or open ditches if adequate outlets are available.

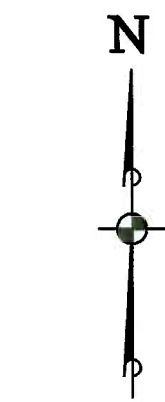
This map unit is in capability subclass IVw.

163—Zenker silt loam, 8 to 30 percent slopes. This very deep, well drained soil is on foot slopes and shoulders of uplands. It formed in colluvium derived from moderately hard sandstone. Drainageways generally are 1,000 to 1,500 feet apart. The native vegetation is mainly conifers. Elevation is 50 to 1,600 feet. The average annual precipitation is 70 to 110 inches, the average annual air temperature is about 50 degrees F, and the average growing season (at 28 degrees) is 200 to 240 days.

Typically, the surface layer is very dark brown silt loam about 11 inches thick. The upper 6 inches of the subsoil

Photos Taken

14



PACIFIC OCEAN

HALF MOON BAY

JETTY ACCESS ROAD

Total Area=16.27 acres

Extent of Study Area












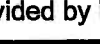
Extent of Study Area

Extent of Study Area

Extent of Study Area

Extent of Study Area

LEGEND:

-  Existing Wetland
-  ELS Wetland Creation Areas (5.0 acres)
-  Upland Dune Rehabilitation Areas (21.34 acres)
-  EDt Wetland Creation Areas (16.27 acres)
-  Pond
-  Greens & Tees
-  Fairways
-  Hole Number & Centerline
-  Golf Cart Trail
-  Golf Cart Bridge Crossing
-  Structures
-  Study Boundary

NOTE: Base map provided by HDR One Company, June, 2007.

WETLAND CREATION AND UPLAND DUNE REHABILITATION MAP
Links at Half Moon Bay
Mox Chehalis, LLC
Grays Harbor County, Washington
Sections 1 & 2, Township 16N, Range 12W, W.M.

DATE: 7/9/07
DWN: MMM/JKJ
REQ. BY: FN
PRJ. MGR: FN
CHK: MMM
APPR:
PROJ#: 1532.01

ECOLOGICAL LAND SERVICES, INC.
1157 3rd Ave., Suite 220 Longview, WA 98632
(360) 578-1371 Fax: (360) 414-9305



04.08.2008 09:46

PFR000204

App.114

Photo #1



04.08.2008 09:46

PFR000205

App.115

Photo #2



04.08.2008 09:53

PFR000206

App. 116

Photo #3



04.08.2008 09:53

PFR000207

App. 117
Photo #4



04.08.2008 09:55

PFR000208

App.118

Photo #5



04.08.2008 10:08

PFR000209

App.119

Photo #6



04.08.2008 10:09

PFR000210

App.120

Photo #7



04.08.2008 10:32

PFR000211

App.121

Photo # 8



04.08.2008 10:32

PFR000212

App.122

Photo # 9



04.08.2008 10:39

PFR000213

App.123

Photo #10



04.08.2008 10:39

PFR000214

App.124

Photo #11



04.08.2008 11:13

FFR000215

App. 125

Photo # 12



04.08.2008 11:13

PFR000216

App.126

Photo #13

THE
LINKS
AT HALF MOON BAY

18 Hole Championship Scottish Links Golf Course

Designed by: Rick Robbins / Managed by: Kempersports

Owner: Mox Chehalis, LLC

Developed By: LANGCO

04.08.2008 12:03

PFR000217

App.127

Photo #14

MFR,

14 Aug 08

Ref: 2003 01009
Mox-Chekalis, LLC

Francis Naglich and Seleva of Ecological Land Services, along with Casey Krahenbuhl of DIMK Golf Design, came in today to discuss the referenced project. David Martin and I met with them.

DIMK has a client interested in purchasing the subject property and is doing due diligence concerning Federal issues on the project. David and I explained the permitting history of the site and advised of the egregious nature of the violation.

Francis Naglich advised of he would be determining the extent of the violation via post and recent aerial photography. We agreed that it would be good to determine and document the extent of the unauthorized work, and upon receiving a response to our Stop Work Letter would then determine course of action. We further advised of EPA's interest in the violation.

DIMK advised of their desire to resolve the violation by removing the unauthorized fill and also they did not believe any further fill would be necessary. DIMK recognizes this could be a 7-month golf course because it would be too wet in the winter. DIMK believes they can successfully plant Fescue and mow the wetlands and create have a successful golf course without any further filling.

MEMORANDUM FOR RECORD

15 MAY 2009

SUBJECT: 200301009 - MOX-CHEHALIS, LLC

1. In response to reports of unauthorized work in wetlands at Westport, Washington, an onsite investigation by Corps staff was conducted at the subject site on 8 April 2008 (see 8 April 2008 *Investigation Report and Conclusions*). As a result of this investigation, a Stop Work Letter was sent by the Corps to Mox-Chehalis, LLC on 17 July 2008 for the unauthorized filling of wetlands. The letter also requested additional information pertaining to the unauthorized work.
2. In response to the Corps' Stop Work Order, Ecological Land Services (ELS), Biological Consultant for Mox-Chehalis, LLC, conducted a comprehensive field survey to determine the extent of unauthorized filling on the 250-acre site and to develop a restoration plan for resolving the violation. In a letter dated 27 October 2008, ELS submitted the requested information including a plan for restoring the subject wetlands. Based on the ELS field survey, 1.43 acres of wetlands adjacent to the Pacific Ocean were filled for construction of a proposed golf course (see attached aerial photos with wetland delineation and unauthorized fill demarcated in pink). In a letter dated 4 December 2008, the Corps concurred with the restoration plan and requested the work be completed by 4 February 2009.
3. On 15 May 2009, Michael Lamprecht and Jim Green met with Mr. Francis Naglich of ELS and Mr. Jurl Priest~~77~~, construction representative, at the subject site. The purpose of the site visit was to inspect the removal of unauthorized fill material placed in wetlands adjacent to the Pacific Ocean. While the inspection did not cover the entire 250-acre site, a great deal of the site was inspected randomly to determine if the unauthorized fill had indeed been removed. The route of the inspection was similar to the route described in the 8 April 2008 *Investigation Report and Conclusions* (see attached photos).

Due to the size of the site, the changed conditions with numerous wetland/upland transitional areas, and the large mosaic of wetlands and uplands through the site, it was difficult at times to determine precisely where you were on the site. Construction workers were also in the process of final fill removal and spreading grass seed throughout the site in order to stabilize the exposed sand.

Based on the inspection, it appeared that the unauthorized fill had been removed satisfactorily. Jim Green requested that an aerial photograph be taken to capture the existing conditions on the site. Michael Lamprecht requested that the extent of impacts to riparian vegetation also be quantified and that the acreage of ponds created and mitigation agreed to in a Court Order with Ecology and Friends of Grays Harbor be documented.

4. Mr. Francis Naglich agreed to submit the requested information in a letter. Upon receipt of the letter, the Corps agreed to review the work, additional impacts, and mitigation completed to date and determine the next course of action.

Jim Green, Project Manager
South Puget Sound Section

Attachments:

Aerial photos with delineated wetlands and unauthorized fills identified
Inspection photos

Green, James D NWS

From: Francis [Francis@eco-land.com]
Sent: Friday, July 24, 2009 12:39 PM
To: Green, James D NWS
Cc: Lamprecht, Michael J NWS; Selene; Chuck Maples; brookm@gmail.com; Jarl Priest
Subject: Status of Links at Westport, Wetland Restoration and Review of Direct/Indirect Impacts

Attachments: image001.jpg



image001.jpg (4
KB)

Jim,

Here is a brief status of on-site conditions, golf course development, and mitigation obligations for the Links golf course project by Chuck Maples and Mox-Chehalis.

Wetland Fill Areas:

ELS has inspected 72 locations where a total of 1.43 acres of inadvertent sand fill had either been placed or blown into wetlands by wind erosion. In all cases, the fill has been removed to non-wetland locations on-site. There is evidence that restoration areas are revegetating naturally. Silt fence has been re-installed where appropriate to help prevent windblown sand from re-entering the wetland.

Wetland Excavation Areas:

ELS has documented 31 locations where sand was removed from wetlands via clean excavation practices (excavator with bucket). The cumulative excavation area is 2.87 acres. All of these excavated areas are undergoing natural revegetation, and were either ponded or saturated in spring of 2009.

Additional Excavation Areas in Uplands:

Numerous areas of non-wetlands were also excavated, essentially creating new wetlands. The exact number of areas and total area affected has not been documented to date, but is estimated by ELS to exceed 7 acres.

Indirect Impacts to Wetlands by Mowing, or Buffer Impacts by Mowing, Grading:

Approximately 20 acres of mowing impacts to wetlands, and 24 acres of buffer impacts were anticipated for the project, and at this time there has been no documentation to confirm the actual indirect impacts. ELS observations are that these numbers appear roughly accurate. This exact total won't be known until the actual golf course is completed.

Status of Mitigation:

By mail I am sending you a copy of the most recent wetland mitigation plan (June 2007). The status of the mitigation elements is summarized as follows:

On-Site Wetland Creation of 5.0 Acres: Likely exceeded with more than 7 acres created, however not documented at this time.] ✓

✓ On-Site Buffer Rehabilitation of 21+ Acres: Not completed.

On-Site Preservation of 107 Acres Wetlands/Uplands: Property still intact but not protected with conservation covenant or deed restriction.

Off-Site Preservation of 14 Acres Category 1, Seastrand Bog: Mox-Chehalis has an agreement with landowner to lease the property in perpetuity, but no legal covenant or deed restriction has been filed.

✓ (Off-Site Restoration of 7 Acres of Category 1 Estuarine Wetland at Firecracker Point: Not completed but Port of Grays Harbor still dedicates 7 acres of land for this proposed use.

Other Additional Mitigation Not Included in Mitigation Plan: The Friends of Grays Harbor (FOGH) were given 40 acres of Ocosta Bay waterfront and \$150,000 cash as part of the settlement agreement.

Golf Course Development Status: No additional work has been done. Mox-Chehalis is still actively pursuing either financing to complete the project or is looking for an interested partner or purchaser.

Jim, we are mailing you a copy of the mitigation plan. Please call or email me if you have any additional questions.

Thanks,

Francis Naglich, MES | President, Wetland Biologist

1157 3rd Avenue, Suite 220 | Longview, WA 98632

P: 360-578-1371 ext. 128 | F: 360-414-9305 | M: 360-431-3990

www.eco-land.com <<http://www.eco-land.com/>> | francis@eco-land.com <<mailto:kari@eco-land.com>>

cid:image001.jpg@01C96115.36DB77D0

Notice: This message (including any attachments) contains confidential information intended for a specific individual and purpose, and is protected by law. If you are not the intended recipient, you should delete this message, and any disclosure, copying, or distribution of this message, or the taking of any action based upon it, is prohibited.

Green, James D NWS

From: Green, James D NWS
Sent: Monday, October 05, 2009 2:17 PM
To: Walker, Michelle NWS
Subject: RE: Project updates for PRB

Attachments: MoxUpdate.doc



MoxUpdate.doc (28
KB)

See attached. Jim

-----Original Message-----

From: Walker, Michelle NWS
Sent: Monday, October 05, 2009 10:48 AM
To: Romano, Olivia H NWS; Green, James D NWS; Brock, Joseph W NWS; Kunz, Kathleen S NWS;
Perry, Randel J NWS; Didenhover, Vicky I NWS
Subject: Project updates for PRB

Need to get an update for the following projects. Need NLT COB 7 October.

Romano - Arco/BP
Brock - Central and Port of Chehalis
Green - Mox-Chehalis
Kunz - Segale
Perry - Great Western
Didenhover - Enclave Security Fence

Thanks,

Muffy Walker
Chief, Regulatory Branch
Seattle District, USACE
(206) 764-6915
(206) 200-9954 cell/blackberry

Mox-Chehalis, LLC - File No. 200301009

In October 2008, Mox-Chehalis, LLC submitted a plan for removing unauthorized fill material that had been discharged in 1.43 acres of adjacent wetlands on the 250-acre site due to sloppy construction, damaged erosion control fences and strong winds. In a letter dated 4 December 2008, the Corps concurred with the fill removal and wetland restoration plan.

In May, 2009, Michael Lamprecht and Jim Green met onsite with the applicant's agents, Mr. Francis Naglich of Ecological Land Services and Mr. Jurl Priest of Lanco to inspect the site for removal of the unauthorized fill. Based on the inspection, it appeared that the unauthorized fill had been removed satisfactorily.

Corps staff requested that the extent of impacts to riparian vegetation also be quantified and that the acreage of ponds created and the mitigation agreed to in a Court Order with Ecology and Friends of Grays Harbor be documented. This information was submitted in August 2009. Staff is currently reviewing submitted information to determine whether to resolve violation or request further additional information. Decision expected in October 2009.

Green, James D NWS

From: Green, James D NWS
Sent: Wednesday, April 07, 2010 2:16 PM
To: Lamprecht, Michael J NWS; Walker, Michelle NWS
Subject: Update on Mox-Chehalis

F.Y.I. Jim

-----Original Message-----

From: Francis Naglich [mailto:Francis@eco-land.com]
Sent: Wednesday, April 07, 2010 8:53 AM
To: Green, James D NWS
Subject: RE: Deed Restriction Examples

Jim-
I just spoke with Jim Daily, who said he will send me funds next week to move forward on this, so it appears we will be getting this done. I hope to have documents for your review no later than April 23. Thanks,

Francis Naglich, MES | President, Wetland Biologist
1157 3rd Avenue, Suite 220 | Longview, WA 98632
P: 360-578-1371 ext. 128 | F: 360-414-9305 | M: 360-431-3990 www.eco-land.com | francis@eco-land.com

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-----Original Message-----

From: Green, James D NWS [mailto:James.D.Green@usace.army.mil]
Sent: Tuesday, April 06, 2010 7:03 AM
To: Francis Naglich
Subject: Deed Restriction Examples

Francis: Thanks for participating in the Mox Chehalis meeting last Friday. Here are four examples of deed restrictions that I said I would send to you. After you develop it to fit the Mox Chehalis project, please submit a draft copy to me for review before recording.

Jim Green, Project Manager
Regulatory Branch
(206) 764-6906

-----Original Message-----

From: Green, James D NWS
Sent: Monday, April 05, 2010 2:40 PM
To: Green, James D NWS
Subject:

Green, James D NWS

From: Francis Naglich [Francis@eco-land.com]
Sent: Tuesday, April 06, 2010 7:51 AM
To: Green, James D NWS
Subject: RE: Deed Restriction Examples

Thanks Jim. I emailed Jim Daily with my approach yesterday and cost estimate to complete the recording work, so I am waiting for his reply. Francis

Francis Naglich, MES | President, Wetland Biologist
1157 3rd Avenue, Suite 220 | Longview, WA 98632
P: 360-578-1371 ext. 128 | F: 360-414-9305 | M: 360-431-3990 www.eco-land.com | francis@eco-land.com

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Jim Green, Project Manager
Regulatory Branch
(206) 764-6906

-----Original Message-----

From: Green, James D NWS
Sent: Monday, April 05, 2010 2:40 PM
To: Green, James D NWS
Subject:

Green, James D NWS

From: Green, James D NWS
Sent: Tuesday, April 06, 2010 7:03 AM
To: 'Francis Naglich'
Subject: Deed Restriction Examples

Attachments: Deed Restriction example 1.pdf; Deed Restriction example 2.pdf; Deed Restriction example 3.pdf; Deed Restriction example 4.pdf



Deed Restriction
example 1.pdf...



Deed Restriction
example 2.pdf...



Deed Restriction
example 3.pdf...



Deed Restriction
example 4.pdf...

Francis: Thanks for participating in the Mox Chehalis meeting last Friday. **Here are four examples of deed restrictions that I said I would send to you. After you develop it to fit the Mox Chehalis project, please submit a draft copy to me for review before recording.**

Jim Green, Project Manager
Regulatory Branch
(206) 764-6906

-----Original Message-----

From: Green, James D NWS
Sent: Monday, April 05, 2010 2:40 PM
To: Green, James D NWS
Subject:

COPY

Recording Requested By And
When Recorded Mail To:

City of Seattle /Department of Parks and Recreati
Property and Acquisition Services
800 Maynard Avenue South
Seattle, WA 98134

CONFORMED COPY

20020821001621

SEATTLE PARKS RCOV 25.00
PAGE 001 OF 008
08/21/2002 14:23
KING COUNTY, WA

RESTRICTIVE COVENANT

Reference #s of Documents Released or Assigned:	none
Grantor:	The City of Seattle
Grantee:	United States of America, Department of the Army, Corps of Engineers, Seattle District
Legal Description (abbreviated):	portions of Sections 1, 2, 11 of Township 25 North, Range 4 East, W.M.
Assessor's Tax Parcel ID#:	portion of 022504 9061

WHEREAS: The City of Seattle requires a permit from the United States of America, Department of the Army, Corps of Engineers, Seattle District, for fill of wetlands, as part of the expansion of the Magnuson Park off-leash area.

WHEREAS: said United States of America, Department of the Army, Corps of Engineers, Seattle District, requires that the wetland and stream areas created, restored, and enhanced as mitigation for work authorized by this permit, shall not be made the subject of a future individual or general Department of the Army permit application for fill or other development, except for the purposes of enhancing or restoring the mitigation associated with this project; and

WHEREAS proof of documentation must be provided to said United States of America, Department of the Army, Corps of Engineers, Seattle District within 60 days of issuance of this permit and prior to construction;

WHEREAS the work herein will be undertaken within an area known as Magnuson Park, being more fully described in Attachments A and B hereby following, and the area of work being in Sections 1, 2 and 11, Township 25 North, Range 4 East, W. M. being more fully shown by those drawings attached herein as Area E1 and Area WC.

NOW, THEREFORE: The City of Seattle hereby covenants that the wetland and stream areas created, restored, and enhanced as mitigation for work authorized by this permit, shall not be made the subject of a future individual or general Department of the Army permit application for fill or other development, except for the purposes of enhancing or restoring the mitigation associated with this project. In addition, a description of the mitigation area identified in the final mitigation plan as approved, and any subsequent permit mitigation area revisions, will be recorded with the King County Recorder's Office, King County, State of Washington.

Dated this 21st day of 2002 August, 2002

The City of Seattle, a municipal corporation of the State of Washington

BY: *Kenneth R. Bounds*
Kenneth R. Bounds
Superintendent of Parks and Recreation

STATE OF Washington)
COUNTY OF King) ss.

I certify that I know or have satisfactory evidence that **Kenneth R. Bounds** is the person who appeared before me, and signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the **Superintendent of Parks and Recreation of The City of Seattle**, a municipal corporation of the State of Washington, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: August 21, 2002

Josette Valentino
NAME (Print) JOSETTE VALENTINO
NOTARY PUBLIC in and for the State of
Washington
My appointment expires 5/29/03



ATTACHMENT A

Magnuson Park Wetlands Description
Area E1

A portion of land commonly known as Magnuson Park, located in Sections 1, 2 & 11, Township 25 North, Range 4 East, WM. Commencing at a monument marked US Navy #10, said point marking an angle point in the property line between NOAA and City of Seattle. Thence S 88°53'01" E along the property line between NOAA and the City of Seattle a distance of 1441.71 feet to a monument designated as #10-4 marking a point on said property line, (originally established as an angle point between Magnuson Park and NOAA), Thence continuing on said property line, S 88°53'01" E a distance of 16.60 feet, Thence S 21°21'51" W a distance of 379.06 feet to the TPOB of this description. Thence continuing S 21°21'51" W a distance of 366.11 feet to the southerly limits of the Dog Off Lease Area and a point of non tangent curvature, Thence easterly on a curve concave to the north, marking the southerly limits of the Dog Off Leash Area, Said curve having a radial bearing of N 23°20'29" E, having a radius of 150.00 feet, a central angle of 42°12'30", an arc length of 110.50 feet to a point of non tangent curve, Thence northerly, leaving the southerly limits of the Dog Off Leash Area on a curve concave to the west having a radial bearing of N 46°09'57" W, having a radius of 150.00 feet, a central angle of 47°47'58", an arc length of 125.14 feet to a point of tangency, Thence N 03°57'55" W a distance of 231.46 feet and the TPOB, Said point bearing N 12°35'36" E and distant 2562.95 feet from the S & W corner monument of Section 2, Twn 25 North, Range 4 East, WM.

Containing 26161.2 sqft/ 0.6 acre



Magnuson Park Wetlands Description
Area WC

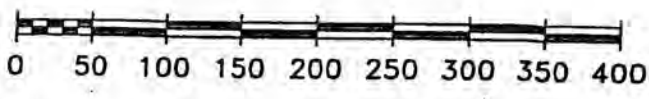
A portion of land commonly known as Magnuson Park, located in Sections 1, 2 & 11, Township 25 North, Range 4 East, WM. Commencing at a monument marked US Navy #10, said point marking an angle point in the property line between NOAA and City of Seattle. Thence S 88°53'01" E along the property line between NOAA and the City of Seattle a distance of 2893.01 feet to a monument designated as #10-3 marking an angle point in said property line, Thence leaving said property line, continuing S 88°53'01" E a distance of 116.00 feet to the TPOB of this description.

Thence S 28°24'19" W a distance of 74.17 feet,
 Thence N 88°26'03" W a distance of 66.24 feet,
 Thence N 59°59'04" W a distance of 86.22 feet,
 Thence N 86°20'49" W a distance of 122.35 feet,
 Thence S 69°14'06" W a distance of 70.71 feet,
 Thence N 70°06'00" W a distance of 66.11 feet,
 Thence N 83°53'14" W a distance of 74.94 feet,
 Thence S 66°09'47" W a distance of 36.13 feet,
 Thence N 80°46'02" W a distance of 100.68 feet,
 Thence S 65°29'18" W a distance of 70.37 feet,
 Thence N 73°58'26" W a distance of 51.72 feet,
 Thence S 41°25'53" W a distance of 24.91 feet,
 Thence S 12°15'43" E a distance of 128.96 feet,
 Thence S 42°17'34" E a distance of 142.05 feet,
 Thence N 85°31'17" E a distance of 195.03 feet,
 Thence N 07°08'06" E a distance of 64.63 feet,
 Thence N 73°50'34" E a distance of 30.12 feet,
 Thence S 29°29'22" E a distance of 59.25 feet,
 Thence S 55°32'50" E a distance of 32.71 feet,
 Thence S 12°35'26" W a distance of 46.65 feet,
 Thence N 77°26'49" E a distance of 67.77 feet,
 Thence N 85°41'40" E a distance of 29.04 feet,
 Thence S 28°51'03" E a distance of 51.82 feet,
 Thence N 80°01'54" E a distance of 134.36 feet,
 Thence N 45°52'44" E a distance of 77.53 feet,
 Thence N 29°06'18" E a distance of 135.18 feet,
 Thence N 31°44'04" E a distance of 187.64 feet,
 Thence N 16°19'24" E a distance of 138.04 feet,
 Thence N 02°47'32" E a distance of 78.68 feet,
 Thence N 13°37'29" W a distance of 44.63 feet,
 Thence N 56°33'07" W a distance of 29.83 feet,
 Thence S 81°15'09" W a distance of 41.84 feet,
 Thence S 51°30'26" W a distance of 50.07 feet,
 Thence S 21°35'35" W a distance of 77.95 feet,
 Thence S 02°23'57" E a distance of 163.45 feet,
 Thence S 28°24'19" W a distance of 29.47 feet to the TPOB,
 said point bearing N 38°30'41" E and distant 3609.13 feet from
 the S ¼ corner monument of Section 2, Twn 25N, R4E, WM.

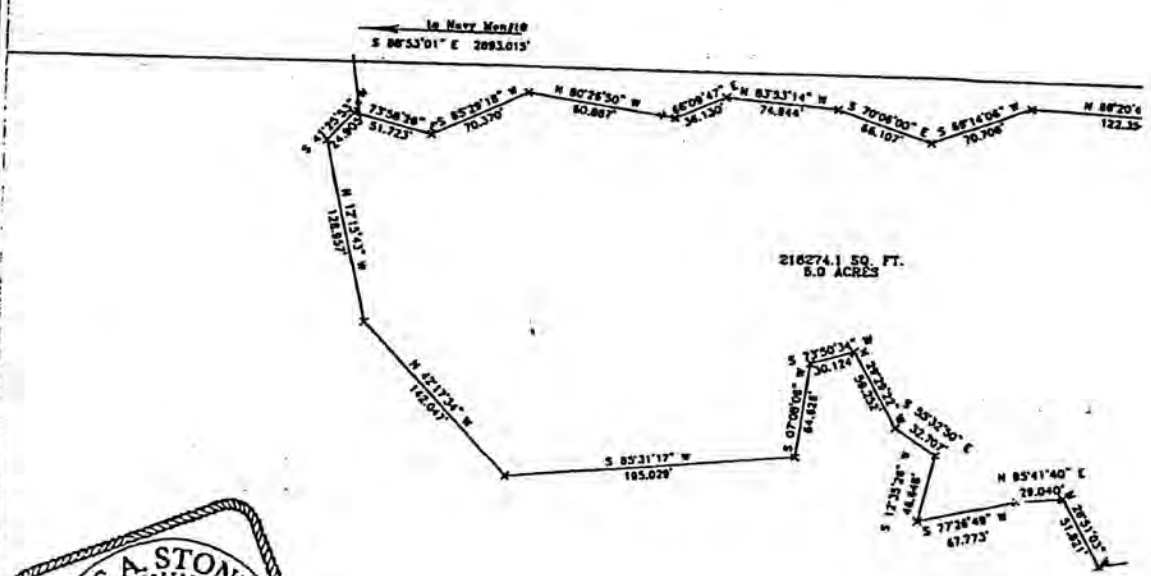
Containing 216274.1 sqft/ 5.0 acres



1A



NOAA



APPROVED FOR ADVERTISING
Dwight Dively
Finance Department Director
SEATTLE WASHINGTON
Contracting Manager

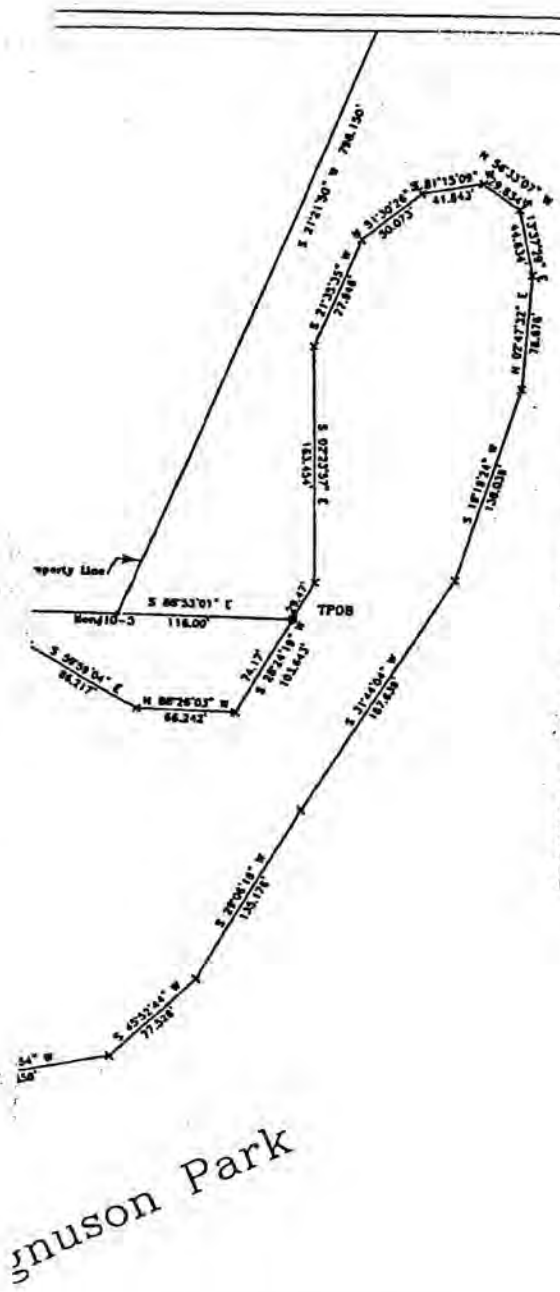
REVIEWED: _____ DATE _____
PARK ENGINEER

RECEIVED: _____ DATE _____
SUPT. OF PARKS & REC.

All work done in accordance with the City of Seattle Standard Plans and Specifications is shown on the data shown above, and authenticated by Special Provisions.

NO.	SCALE
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2A



Magnuson Park Wetlands Description

Area "WC"
 A portion of Magnuson Park, located in Sections 1, 2 & 11, Township 25 North, Range 4 East, W.M. Commencing at a monument marked US Navy #10, said point marking an angle point in the property line between NOAA and City of Seattle. Thence S 88°33'01" E along the property line between NOAA and the City of Seattle a distance of 2893.01 feet to a monument designated as #10-3 marking an angle point in said property line. Thence leaving said property line, continuing S 88°33'01" E a distance of 116.00 feet to the TPOB of this description. Thence S 28°24'18" W a distance of 71.17 feet. Thence N 88°26'03" W a distance of 88.24 feet. Thence N 59°58'04" W a distance of 86.22 feet. Thence N 86°20'49" W a distance of 122.33 feet. Thence S 69°14'08" W a distance of 70.71 feet. Thence N 70°06'00" W a distance of 66.11 feet. Thence N 83°33'14" W a distance of 74.94 feet. Thence S 66°09'47" W a distance of 38.13 feet. Thence N 80°46'02" W a distance of 100.88 feet. Thence S 65°29'18" W a distance of 70.37 feet. Thence N 73°56'26" W a distance of 51.72 feet. Thence S 41°25'53" W a distance of 24.91 feet. Thence S 12°15'43" E a distance of 128.96 feet. Thence S 42°17'34" E a distance of 142.05 feet. Thence N 85°31'17" E a distance of 195.03 feet. Thence N 07°06'00" E a distance of 64.83 feet. Thence N 73°50'34" E a distance of 30.12 feet. Thence S 29°29'22" E a distance of 59.25 feet. Thence S 55°32'50" E a distance of 32.71 feet. Thence S 12°35'28" W a distance of 46.65 feet. Thence N 77°26'49" E a distance of 67.77 feet. Thence N 85°41'40" E a distance of 29.04 feet. Thence S 28°51'03" E a distance of 51.82 feet. Thence N 80°01'54" E a distance of 134.36 feet. Thence N 45°52'44" E a distance of 77.53 feet. Thence N 29°06'16" E a distance of 135.18 feet. Thence N 31°44'04" E a distance of 187.64 feet. Thence N 16°19'24" E a distance of 138.04 feet. Thence N 02°47'32" E a distance of 78.68 feet. Thence N 13°37'29" W a distance of 44.63 feet. Thence N 56°33'07" W a distance of 29.83 feet. Thence S 81°15'09" W a distance of 41.84 feet. Thence S 51°30'26" W a distance of 50.07 feet. Thence S 21°35'35" W a distance of 77.95 feet. Thence S 02°23'57" E a distance of 163.45 feet. Thence S 28°24'18" W a distance of 29.47 feet to the TPOB, said point bearing N 38°30'41" E and distant 3609.13 feet from the S & N corner monument of Section 2, Twp 25N, R4E, W.M. Containing 218274.1ac/1/ 5.0ac

Magnuson Park

CITY OF SEATTLE DEPARTMENT OF PARKS AND RECREATION 300 Broadway Ave S, 3rd Floor (464-7037)		FACTORY TITLE Magnuson Park OLA Wetland Area WC Description		DESIGNED DRAWN CHECKED JAS/one	DATE 7-11-02 DESIGN REVIEW
AS BUILT	DATE	CONTRACT NO.	SCALE 1"=100'	SHEET 1	OF 2

1 B

NOA

US Navy Mon#10

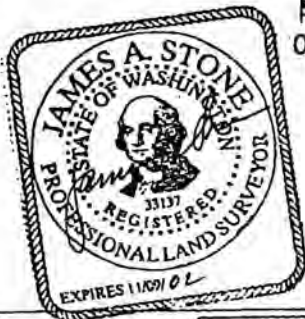
E 88°53'01" E
890.581'

US Navy Mon#8

Magnuson Park Wetlands Description

Area E1

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APPROVED FOR ADVERTISING
Dwight Divaly
Finance Department Director

SEATTLE WASHINGTON _____ 30

Contracting Manager

REVIEWED: _____ DATE _____
PARK ENGINEER

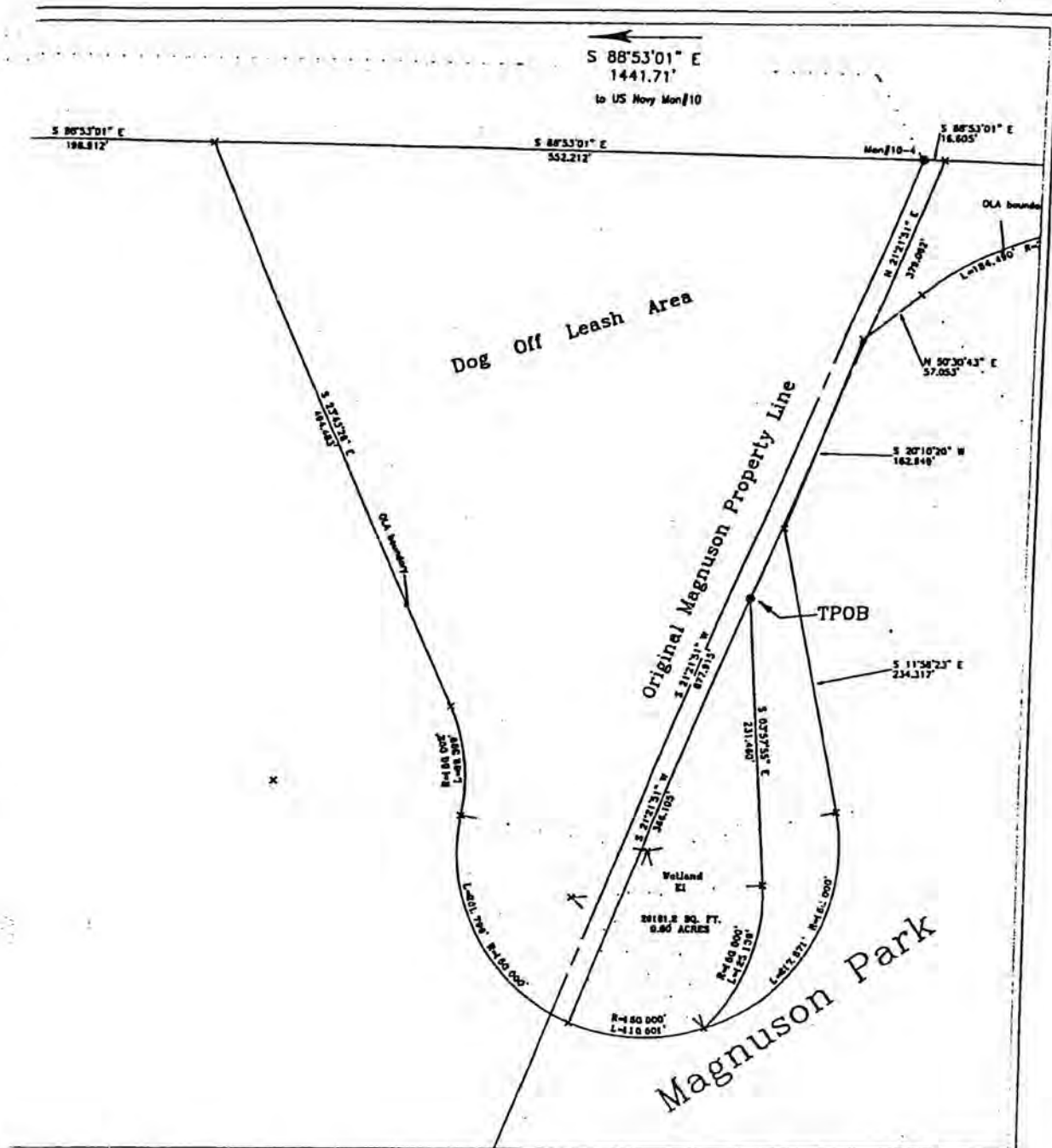
RECEIVED: _____ DATE _____
SUPT. OF PARKS & REC.

All work done in accordance with the City of Seattle Standard Plans and Specifications in effect on the date shown above, and supplemented by Special Provisions.

SCALE

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NO.

23



		CITY OF SEATTLE DEPARTMENT OF PARKS AND RECREATION 2000 Broadway Ave S. 3rd Floor (206-465-7031)		FACILITY TITLE Magnuson Park OLA Wetland Area E1 Description		DESIGNED DRAWN JASTONE CHECKED ORDINANCE NO. CONTRACT NO. SCALE 1"=100'		DATE 7-11-02 DESIGN REVIEW SHEET 2 OF 2	
AS BUILT	DATE								

EXAMPLE
OF A
DEED RESTRICTION



City of Kenmore
P.O. Box 82607
Kenmore, WA 98028



Permit Number: _____

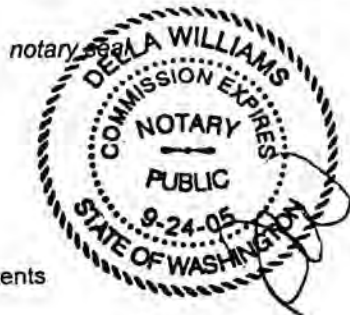
Parcel Number: 0126049004, 0126049106 and 0126049045, more fully described
as (street address) 19722 80th Avenue N.E., Kenmore, WA

This property contains sensitive areas and/or sensitive area buffers, as defined by the City of Kenmore Sensitive Area Ordinance, KCC 21A.24. The provisions of the Sensitive Areas Ordinance apply to this property. Limitation may exist on actions in or affecting the sensitive areas or their buffers present on this property. For further information regarding such limitation, please contact the City of Kenmore or its successor agency. This notice shall run with the land and shall not be removed except upon specific written authorization recorded herein by the City of Kenmore.

I, (print) JUSTIN HARMAN FOR GENERAL INC., hereby certify
that I am the owner of the above-referenced property.

[Signature] D.V.P.
(Owner's Signature)

SUBSCRIBED AND SWORN TO before me this 28TH day of FEBRUARY, 2007



EVERETT WA
Notary public in and for the State of
Washington, residing at
[Signature]

Attachments



City of Kenmore
 P.O. Box 82607
 Kenmore, WA 98028



The South Half of the Southeast Quarter of the Northeast Quarter of the Northeast Quarter and the North half of the Northeast Quarter of the Southeast Quarter of the Northeast Quarter of Section 1, Township 26 North, Range 4 East, W.M., TOGETHER WITH the South 10 feet of the North half of the Southwest Quarter of the Northeast Quarter of the Northeast Quarter of said Section 1, and TOGETHER WITH the South 10 feet of the West 10 feet of the North half of the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of said Section 1, Township 26 North, Range 4 East, W.M., TOGETHER WITH The East 30 feet of the South Half of the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of the Northeast Quarter of the Northeast Quarter of the Northeast Quarter of Section 1, Township 26 North, Range 4 East, W.M.
 (Tax Parcels 0126049004 and 0126049045)

AND The South Half of the North Half of the Southeast Quarter of the Northeast Quarter of Section 1, Township 26 North, Range 4 East, W.M., EXCEPT the East 264 feet thereof, and EXCEPT the South 150 feet of the West 580.80 feet thereof, and EXCEPT the West 30 feet for 80th Avenue Northeast.
 (Tax Parcel 0126049106)

Situated in the City of Kenmore, County of King, State of Washington.

I, (print) JUSTIN WARMAN / GEORGE DC., hereby certify that I am the owner of the above referenced property.

[Signature] DWR
 owner's signature

SUBSCRIBED AND SWORN TO before me this 20th day of FEBRUARY, 2007

EVERETT, WA
 Notary Public in and for the State of Washington, residing at



[Signature]
 (owner's signature)



2050700549

Page: 1 of 4
7/05/2005 3:35 PM
D/RC \$22.00
Whatcom County, WA

Request of: BELCHER, SWANSON, LACKEY

WHEN RECORDED RETURN TO:
BELCHER, SWANSON, LACKEY, DORAN,
LEWIS & ROBERTSON, P.L.L.C.
900 DUPONT STREET
BELLINGHAM, WA 98225

Document Title:	Declaration of Covenant
Declarant:	1) Bakerview Lands, L.L.C.
Beneficiary:	1) Public
Legal Description:	Lot E, Bakerview Lands General and Specific Binding Site Plan
Assessor's Tax Parcel ID#:	380308 416095 0000

DECLARATION OF COVENANT

THIS DECLARATION OF COVENANT (the "Declaration") is made and entered into on the date written below by Bakerview Lands, L.L.C., a Washington limited liability company (the "Declarant"), as follows:

1. PERMIT. This Declaration is made with reference to the Department of the Army, Corps. of Engineer,s permit (NWP) 39 issued September 16, 2004 to Fred and Joanne Ossewarde and bearing reference number 200400153 (the "Permit").

2. PROPERTY. The real property on which the work is authorized by the Permit and which is the subject of the mitigation plan is more particularly described as follows:

THAT PORTION OF THE LAND DESCRIBED BELOW
LYING NORTHERLY OF THE CENTERLINE OF
BAKER CREEK:
LOT E, BAKERVIEW LANDS GENERAL AND
SPECIFIC BINDING SITE PLAN, ACCORDING TO
THE PLAT THEREOF, RECORDED UNDER
AUDITOR'S FILE NUMBER 2010701065, RECORDS
OF WHATCOM COUNTY, WASHINGTON (the
"Property").

3. MITIGATION PLAN. The mitigation plan requires creation of off-channel wetlands adjacent to Baker Creek within the stream corridor as depicted on the attached Exhibit "A" as wetlands A and B together with enhancement of the riparian area at the confluence of the two on-site streams by the removal of blackberries and replanting the area with a combination of native trees and shrubs as depicted on the attached Exhibit "B," all of which is hereby established as a native growth protection area.

4. PROHIBITION ON FUTURE PERMITS. The wetland area created, enhanced and preserved as part of the mitigation plan authorized by the Permit shall not be made the subject of a future individual or general Department of Army permit application for fill or other development, except for the purposes of enhancing or restoring the mitigation associated with the project.

5. COVENANT. This Declaration constitutes a covenant which runs with the Property in perpetuity.

DATED this 30th day of June, 2005.

BAKerview LANDS, L.L.C.

By: Fred Ossewarde
Fred Ossewarde, Manager

STATE OF WASHINGTON)
)ss.
COUNTY OF WHATCOM)

On this 1st day of July, 2005, before me personally appeared FRED OSSEWARDE to me known to be the Manager of BAKerview LANDS, L.L.C., a Washington limited liability company, the company that executed the foregoing instrument to be the free and voluntary act and deed of said company for the uses and purposes therein mentioned, and on oath stated that FRED OSSEWARDE was authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year first above written.



Jack O. Jwa
Notary Public in and for the State of
Washington, residing at Bellingham
My Commission Expires 6/6/07.

EXHIBIT "A"

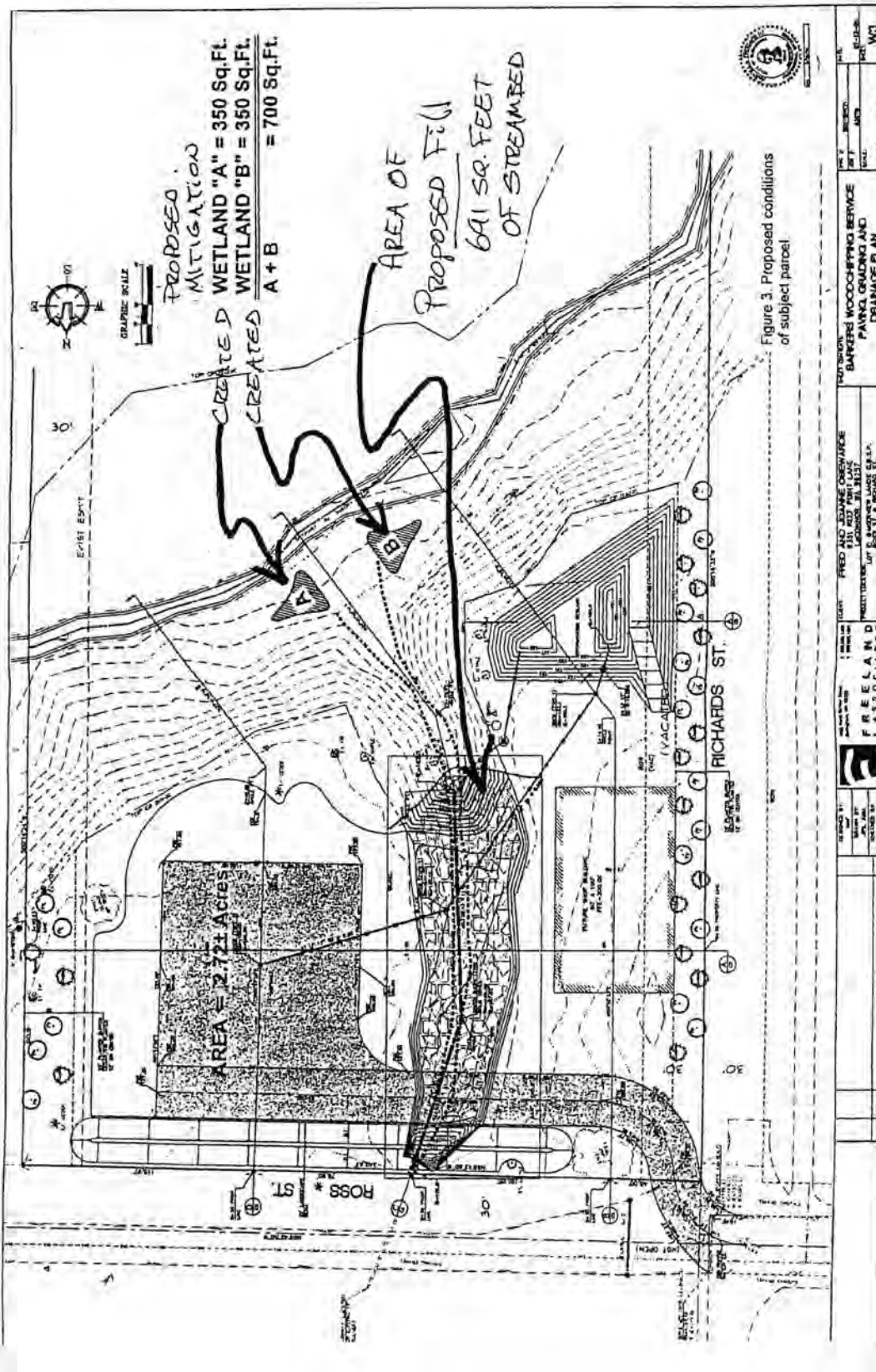


EXHIBIT "B"

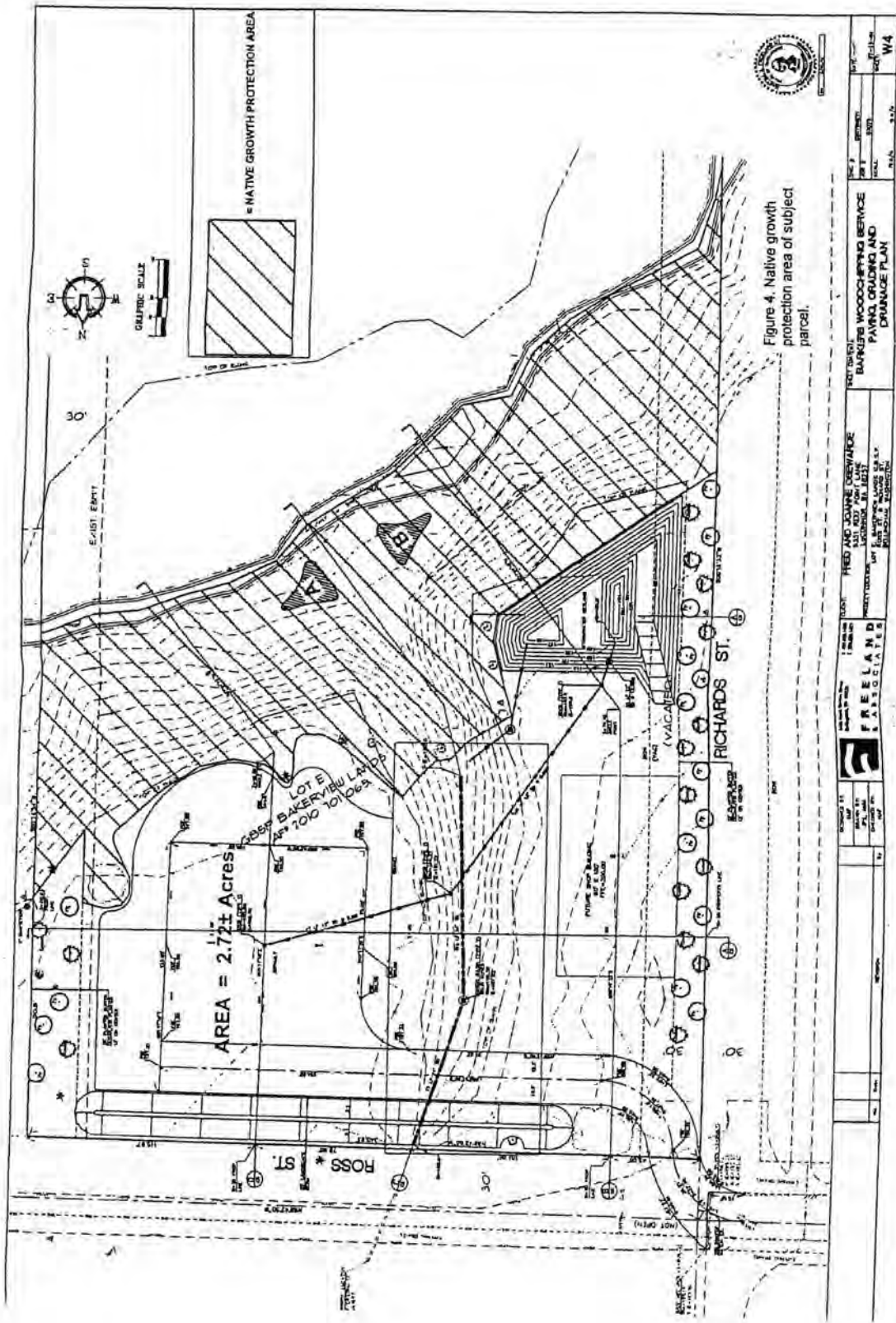
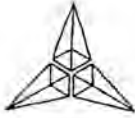


Figure 4. Native growth protection area of subject parcel.

		FRED AND JOANNE GREWANDER ARCHITECTS 1400 N. 10TH ST. SUITE 100 PHOENIX, ARIZONA 85016		BARRETT WOODHEFFER SERVICE PAVING, GRADING AND DRAINAGE PLAN	
DATE:	12/15/2011	PROJECT:	PHOENIX, ARIZONA	SCALE:	AS SHOWN
BY:	BARRETT WOODHEFFER	CHECKED:	BARRETT WOODHEFFER	DATE:	12/15/2011
PROJECT NO.:	11-001	SHEET NO.:	14	TOTAL SHEETS:	14
W/4					



AES
CONSULTANTS, INC.

PROFESSIONAL LAND SURVEYORS

P.O. BOX 950 • 3472 N.W. LOWELL "OLD TOWNE" • SILVERDALE, WA 98383 • 360-692-6400 • FAX 360-692-8927

LEGAL DESCRIPTION

THAT PORTION OF THE SOUTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 25, TOWNSHIP 25 NORTH, RANGE 1 EAST, W.M., IN KITSAP COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:
COMMENCING AT THE SOUTHWEST CORNER OF THE SOUTHWEST QUARTER OF THE NORTHWEST QUARTER OF SAID SECTION 25; THENCE SOUTH 88°29'50" EAST ALONG THE SOUTH LINE THEREOF 70.00 FEET TO THE EAST RIGHT-OF-WAY LINE OF STATE ROUTE 303; THENCE NORTH 1°12'07" EAST ALONG SAID EAST RIGHT-OF-WAY LINE 35.43 FEET; THENCE LEAVING SAID RIGHT-OF-WAY LINE SOUTH 88°29'50" EAST 10.00 FEET TO THE POINT OF BEGINNING; THENCE NORTH 1°12'07" EAST PARALLEL TO SAID RIGHT-OF-WAY LINE 732.93 FEET; THENCE SOUTH 88°47'53" EAST 58.88 FEET; THENCE SOUTH 1°12'07" WEST 242.21 FEET; THENCE NORTH 80°01'03" EAST 234.80 FEET; THENCE SOUTH 7°14'27" EAST 76.84 FEET; THENCE NORTH 62°52'26" EAST 323.35 FEET TO THE WEST LINE OF THE EAST 650.00 FEET OF THE SOUTHWEST QUARTER OF THE NORTHWEST QUARTER OF SAID SECTION 25; THENCE SOUTH 1°18'27" WEST ALONG SAID LINE 61.45 FEET; THENCE SOUTH 62°52'26" WEST 573.38 FEET; THENCE SOUTH 1°12'07" WEST 280.58 FEET; THENCE NORTH 88°29'50" WEST 80.30 FEET TO THE POINT OF BEGINNING.



200307280271
Page: 3 of 4
67/28/2883 81:30P
Kitsap Co, WA
COVEN #22.88
JAMES H ROBINSON

p-2

6670-268-098-1 1-360-692-0789

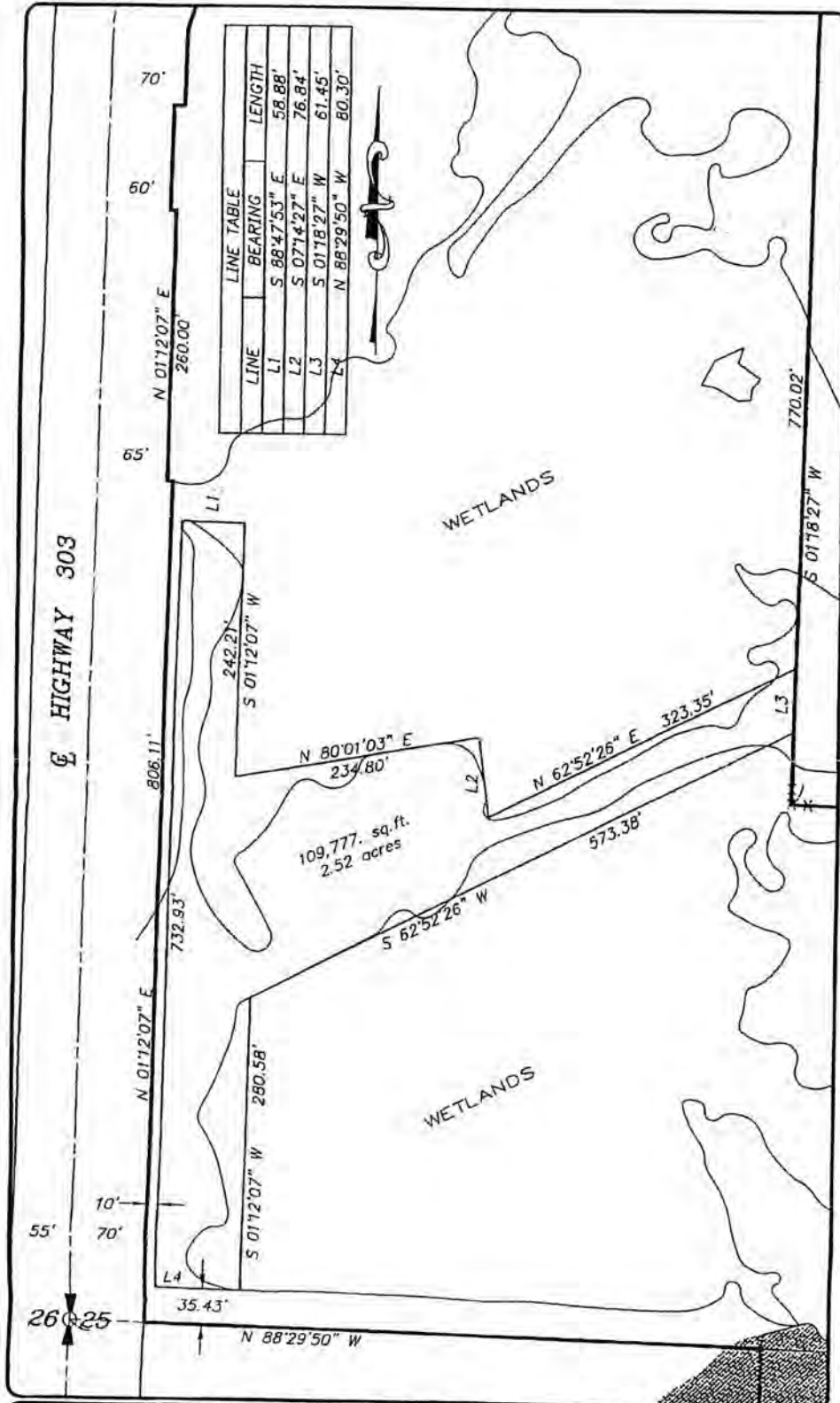
Gary Lindsey

JUL 02 03 12:42P

PFR000244

App.153

PARKS-003684



 AES CONSULTANTS, INC. <small>P.O. BOX 800 - SHELTER GAP, VA 22081 - (703) 972-9400</small>	EXHIBIT MAP		DWN BY:	CHK. BY:
	SEC. 25, TWP. 25N., RG. 1E., W.M. FOR: JAMES ROBINSON		R.L.J.	S.E.O.
		DATE:	JOB No.	
		7/01/03	2712	


 200307280271
 Page: 4 of 4
 07/28/2003 01:38P
 JAMES H ROBINSON COVEN #22.00 Kitsap Co. WA

P. 1 6640-269-0799 1-360-692-0799 Gary Lindsey Jul 02 03 12:42p

PFR000245

App.154

PARKS-003685

Green, James D NWS

From: Francis Naglich [Francis@eco-land.com]
Sent: Thursday, July 29, 2010 8:21 AM
To: Green, James D NWS
Cc: Andrea Aberle
Subject: RE: Mox Chehalis
Attachments: image001.jpg

Hi Jim- Its drafted except for a permit number to tie it to. Plus I've been on vacation and just got back. We have been trying to track down the Shoreline Permit number. Have you assigned a Corps number to it? If so, we can reference it in the restriction and forego getting the shoreline permit number.

Thanks,

Francis

Francis Naglich, MES | President, Wetland Biologist

1157 3rd Avenue, Suite 220 | Longview, WA 98632

P: 360-578-1371 ext. 128 | F: 360-414-9305 | M: 360-431-3990

www.eco-land.com <<http://www.eco-land.com/>> | francis@eco-land.com <<mailto:kari@eco-land.com>>

[cid:image001.jpg@01C96115.36DB77D0](#)

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From: Green, James D NWS [mailto:James.D.Green@usace.army.mil]

Sent: Wednesday, July 28, 2010 1:09 PM
To: Francis Naglich
Subject: Mox Chehalis

Hi Francis: Could you update me on your progress for the deed restriction. Thanks. Jim
Green (206) 764-6906

Green, James D NWS

From: Green, James D NWS
Sent: Wednesday, July 28, 2010 1:09 PM
To: 'Francis Naglich'
Subject: Mox Chehalis

Hi Francis: Could you update me on your progress for the deed restriction. Thanks. Jim
Green (206) 764-6906

Green, James D NWS

From: Green, James D NWS
Sent: Monday, August 30, 2010 12:51 PM
To: 'Francis Naglich'
Subject: RE: Mox Cheh. project

Francis: I reviewed the Declaration and have a few comments on the language. It looks like you are trying to combine this into a State/Corps document that might work with some wordsmithing. Our printers/scanners are all being replaced currently. I will try to fax you my comments later today or tomorrow. Let me know if these changes are acceptable.

Jim Green

-----Original Message-----

From: Francis Naglich [mailto:Francis@eco-land.com]
Sent: Monday, August 09, 2010 2:49 PM
To: Green, James D NWS
Subject: FW: Mox Cheh. project

Jim,

Please review the attached covenant and provide any comments/revisions before we finalize for recording. Sorry for the delay.

Thanks,

Francis Naglich, MES | President, Wetland Biologist

1157 3rd Avenue, Suite 220 | Longview, WA 98632

P: 360-578-1371 ext. 128 | F: 360-414-9305 | M: 360-431-3990

www.eco-land.com <<http://www.eco-land.com/>> | francis@eco-land.com <<mailto:kari@eco-land.com>>

[cid:image001.jpg@01C96115.36DB77D0](#)

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DEPARTMENT OF THE ARMY
 SEATTLE DISTRICT, CORPS OF ENGINEERS
 P.O. BOX 3755
 SEATTLE, WASHINGTON 98124-3755

REPLY TO
 ATTENTION OF

Regulatory Branch

Date: 30 Aug 2010

Number of Pages Faxed (including this page): 5

To: Francis Naglich
 FAX Number: (360) 414 - 9305

From: Jim Green
 Regulatory Branch 6906
 Phone Number: (206) 764-~~3495~~
 FAX Number: ~~(206) 764-6602~~

COMMENTS: _____

**DECLARATION OF COVENANTS AND RESTRICTIONS
FOR THE
Mox Chehalis, LLC Property in Westport, WA**

THIS DECLARATION made this _____ day of _____, 2010,
by James Daly, 29308 132nd Ave. SE, Auburn, WA 98092 ("Declarant").

RECITALS

1. WHEREAS, Declarant is the owner of the real property described in Exhibits "A" and "B" attached hereto and by this reference incorporated herein as the "Property", and desires to create and preserve thereon wetlands and forested habitat to be maintained in accordance with the ~~"Permit" made~~ *provisions* between the declarant and the Department of Ecology (DOE) and the U.S. Army Corps of Engineers (USACE) for project bearing the Revised Shoreline Management Permit #2007-SW-02407-A and USACE Reference Number 200301009 ("Departments");

2. WHEREAS, Declarant desires to provide for the preservation and creation of the wetland values of the Property and for the maintenance and management of the Property and improvements thereon, and to this end desires to subject the Property to the covenants, restrictions, easements and other encumbrances hereinafter set forth, each and all of which is and are for the benefit of the Property. *and preservation of forested habitat*

NOW, THEREFORE, the Declarant declares that the Property shall be held, transferred, sold, conveyed and occupied subject to the covenants, restrictions, easements and other encumbrances hereinafter set forth in this Declaration.

ARTICLE 1 DEFINITIONS

1.1 "Declaration" shall mean the covenants, restrictions, and all other provisions set forth in the Declaration of Covenants and Restrictions.

1.2 "Declarant" shall mean and refer to James Daly, his successors or assigns.

1.3 "Permit" shall mean the final document approved by the Departments that formally establish the wetland mitigation and stipulates the terms and conditions of its construction, operation and long-term management.

1.4 "Property" shall mean and refer to all real property subject to this Declaration, as more particularly set forth in Exhibits "A" and "B" as 114.44 acres total consisting of 107 acres of preservation and 7.44 acres of wetland creation.

ARTICLE 2 PROPERTY SUBJECT TO THIS DECLARATION

The real property which is and shall be held, transferred, sold, conveyed and occupied subject to this Declaration is located within the City limits of Westport, and within Grays Harbor County, Washington, and further located in a portion of Sections 1 and 2 of Township 16 North, Range 12 West, W.M., bordered by the Pacific Ocean to the West, Half Moon Bay and Jetty Access Road to the North, Washington State Park's property to the south and Forrest Avenue to the East. The 114.44 acre Property (conservation area) consists of:

- **7.44 acres of wetland creation** onsite between the fairways and within the historic location of "Radar Road" (~~exceeds the 5.0 acre minimum required under permit~~).
- **107 acres of preservation** onsite (94 acres of forested wetland and 13 acres of forested uplands outside of the active golf course) as depicted on the attached "Exhibit B".

Further, the Property identified by this declaration is located within a 350 acre property owned by Mox Chehalis, LLC and is defined as depicted in "Exhibits A and B".

ARTICLE 3

GENERAL PLAN OF DEVELOPMENT

Declarant currently manages the site for the purposes of golf course development and wetland mitigation. Current management is in accordance with USACE Reference Number 200301009.

This declaration also applies to any future change in use of the property.

ARTICLE 4

USE RESTRICTIONS AND MANAGEMENT RESPONSIBILITIES

The areas identified as Property shall be managed for wetland mitigation purposes in accordance with the agreement identified under the DOE Revised Shoreline Management Permit #2007-SW-02407-A and the USACE Reference Number 200301009. Declarant and all users of the Property are subject to any and all easements, covenants and restrictions of record affecting the Property.

and forested habitat preservation

and all future owners

1. There shall be no removal, destruction, cutting, trimming, mowing, alteration or spraying with biocides of any vegetation in the Property except for maintenance activities and activities designed to achieve mitigation performance standards as detailed in the mitigation plan approved under the DOE Revised Shoreline Management Permit #2007-SW-02407-A nor any disturbance or change in the natural habitat of the Property.
2. There shall be no agricultural, commercial, or industrial activity undertaken or allowed in the Property; nor shall any right of passage across or upon the Property be allowed or granted if that right of passage is used in conjunction with agricultural, commercial or industrial activity.
3. No domestic animals shall be allowed on the Property.
4. There shall be no filling, excavating, dredging, mining or drilling; no removal of topsoil, sand, gravel, rock minerals or other materials, nor any dumping of ashes, trash, garbage, or of any other material, and no changing of the topography of the land of the Property in any manner.

5. There shall be no construction or placing of buildings, mobile homes, advertising signs, billboards, or other advertising material, or other structures on the Property.

ARTICLE 5

RESOLUTION OF DOCUMENT CONFLICTS

~~In the event of any conflict between this Declaration and the agreement identified under the DOE Revised Shoreline Management Permit #2007-SW-02407-A, the DOE permit shall control.~~ *and be resolved jointly by the parties.*

and Corps Ref No. 2003 01009

IN WITNESS WHEREOF, the undersigned being Declarant herein, has executed this instrument this _____ day of _____, 20_____.

(landowner)
 Grays Harbor County, Washington
 By: _____
 Title: _____

STATE OF WASHINGTON)
) ss:
 County of Grays Harbor)

This instrument was acknowledged before me on _____ (date) by _____ as _____ of James Daly property owner of "Property", Grays Harbor County, Westport, Washington.

 Signature of Notarial Officer
 My Commission Expires: _____

Green, James D NWS

From: Green, James D NWS
Sent: Thursday, December 02, 2010 8:48 AM
To: Walker, Michelle NWS
Cc: Bennett, Matthew J NWS
Subject: Mox Chehalis Update
Attachments: MoxUpdate.doc

Mox-Chehalis, LLC - File No. 200301009

Attorney, applicant, and agent for Mox-Chehalis, LLC appear to have agreed with deed restriction language that would preserve 94 acres of existing forested wetland, 13 acres of existing forest upland, and 7.44 acres of created wetlands (Radar Road) from future development (see Exhibit B dated July 2010). Corps staff advised agent to proceed with recording on 1 December 2010. Corps also requested documentation that recording has occurred which would resolve violation.

Green, James D NWS

From: Francis Naglich [Francis@eco-land.com]
Sent: Tuesday, December 21, 2010 1:40 PM
To: Green, James D NWS
Subject: RE: MOX CHEHALIS.pdf

Jim- I know it does not jump out at anyone, but on the bottom of the first page there is a recording stamp by Grays Harbor County with date, time and number of pages along with a bar code. This is the customary recording stamp that all auditor's offices now use.
Thanks,

Francis Naglich, MES | President, Wetland Biologist
1157 3rd Avenue, Suite 220 | Longview, WA 98632
P: 360-578-1371 ext. 128 | F: 360-414-9305 | M: 360-431-3990 www.eco-land.com | francis@eco-land.com

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-----Original Message-----

From: Green, James D NWS [<mailto:James.D.Green@usace.army.mil>]
Sent: Tuesday, December 21, 2010 1:25 PM
To: Francis Naglich
Subject: RE: MOX CHEHALIS.pdf

Francis: Thanks for your email. The one remaining issue I have is the fact that the attached notarized document is simply proof that Mr. Daly signed the document on his own free will. It does not provide proof that the document was recorded at the county against the title. Do you have anything to verify that it was indeed recorded?

Thanks. Have a good holiday season. Jim

-----Original Message-----

From: Francis Naglich [<mailto:Francis@eco-land.com>]
Sent: Monday, December 20, 2010 10:25 AM
To: Green, James D NWS
Subject: FW: MOX CHEHALIS.pdf

Jim,

Happy Holidays! Attached is the recorded deed restriction for Mox-Chehalis "Links" site in Westport. Let me know if you have any questions. If this resolves the violation, please send me a copy of any correspondence stating such. Thanks Much!

Francis Naglich, MES | President, Wetland Biologist
1157 3rd Avenue, Suite 220 | Longview, WA 98632

P: 360-578-1371 ext. 128 | F: 360-414-9305 | M: 360-431-3990

www.eco-land.com <<http://www.eco-land.com/>> | francis@eco-land.com <<mailto:kari@eco-land.com>>

[cid:image001.jpg@01C96115.36DB77D0](#)

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From: Maureen Muller
Sent: Monday, December 20, 2010 10:07 AM
To: Francis Naglich
Subject: MOX CHEHALIS.pdf

Hi Francis,

Attached is the file you requested.

Maureen Muller | Graphics Supervisor, Principal
1157 3rd Avenue, Suite 220 | Longview, WA 98632

P: 360-578-1371 ext. 103 | F: 360-414-9305

www.eco-land.com <<http://www.eco-land.com/>> | maureenm@eco-land.com

[cid:image001.jpg@01C956C6.E9E93D20](#)

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Green, James D NWS

From: Francis Naglich [Francis@eco-land.com]
Sent: Monday, December 20, 2010 10:25 AM
To: Green, James D NWS
Subject: FW: MOX CHEHALIS.pdf
Attachments: MOX CHEHALIS.pdf; image001.jpg

Jim,

Happy Holidays! Attached is the recorded deed restriction for Mox-Chehalis "Links" site in Westport. Let me know if you have any questions. If this resolves the violation, please send me a copy of any correspondence stating such. Thanks Much!

Francis Naglich, MES | President, Wetland Biologist

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[cid:image001.jpg@01C96115.36DB77D0](#)

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From: Maureen Muller
Sent: Monday, December 20, 2010 10:07 AM
To: Francis Naglich
Subject: MOX CHEHALIS.pdf

Hi Francis,

Attached is the file you requested.

Maureen Muller | Graphics Supervisor, Principal

1157 3rd Avenue, Suite 220 | Longview, WA 98632

P: 360-578-1371 ext. 103 | F: 360-414-9305

www.eco-land.com <<http://www.eco-land.com/>> | maureenm@eco-land.com

[cid:image001.jpg@01C956C6.E9E93D20](#)

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DECLARATION OF COVENANTS AND RESTRICTIONS

FOR THE

Mox Chehalis, LLC Property in Westport, WA

THIS DECLARATION made this 7th day of December, 2010,
by James Daly, 29308 132nd Ave. SE, Auburn, WA 98092 ("Declarant").

RECITALS

1. WHEREAS. Declarant is the owner of the real property described in Exhibits "A" and "B" attached hereto and by this reference incorporated herein as the "Property", and desires to create and preserve thereon wetlands and forested habitat to be maintained in accordance with the provisions made between the declarant and the Department of Ecology (DOE) and the U.S. Army Corps of Engineers (USACE) for project bearing the Revised Shoreline Management Permit #2007-SW-02407-A and USACE Reference Number 200301009 ("Departments");

2. WHEREAS. Declarant desires to provide for the preservation and creation of the wetland values and preservation of forested habitat of the Property and for the maintenance and management of the Property and improvements thereon, and to this end desires to subject the Property to the covenants, restrictions, easements and other encumbrances hereinafter set forth, each and all of which is and are for the benefit of the Property.

2010-12140003 12/14/2010 09:38 AM COV
Page 1 of 7 R 68 00 Grays Harbor Co, WA
MOX CHEHALIS

PFR000269

App.171

Westport-00000215

NOW, THEREFORE, the Declarant declares that the Property shall be held, transferred, sold, conveyed and occupied subject to the covenants, restrictions, easements and other encumbrances hereinafter set forth in this Declaration.

ARTICLE 1 DEFINITIONS

1.1 "Declaration" shall mean the covenants, restrictions, and all other provisions set forth in the Declaration of Covenants and Restrictions.

1.2 "Declarant" shall mean and refer to James Daly, his successors or assigns.

1.3 "Permit" shall mean the final document approved by the Departments that formally establish the wetland mitigation and forested habitat preservation areas and stipulates the terms and conditions of its construction, operation and long-term management.

1.4 "Property" shall mean and refer to all real property subject to this Declaration, as more particularly set forth in Exhibits "A" and "B" as 114.44 acres total consisting of 107 acres of preservation and 7.44 acres of wetland creation.

ARTICLE 2 PROPERTY SUBJECT TO THIS DECLARATION

The real property which is and shall be held, transferred, sold, conveyed and occupied subject to this Declaration is located within the City limits of Westport, and within Grays Harbor County, Washington, and further located in a portion of Sections 1 and 2 of Township 16 North, Range 12 West, W.M., bordered by the Pacific Ocean to the West, Half Moon Bay and Jetty Access Road to the North, Washington State Park's property to the south and Forrest Avenue to the East. The 114.44 acre Property (conservation area) consists of:

- **7.44 acres of wetland creation** onsite between the fairways and within the historic location of "Radar Road".
- **107 acres of preservation** onsite (94 acres of forested wetland and 13 acres of forested uplands outside of the active golf course) as depicted on the attached "Exhibit B".

Further, the Property identified by this declaration is located within a 350 acre property owned by Mox Chehalis, LLC and is defined as depicted in "Exhibits A and B".

ARTICLE 3

GENERAL PLAN OF DEVELOPMENT

Declarant currently manages the site for the purposes of golf course development and wetland mitigation. Current management is in accordance with USACE Reference Number 200301009. This declaration also applies to any future changes in use of the property.

ARTICLE 4

USE RESTRICTIONS AND MANAGEMENT RESPONSIBILITIES

The areas identified as Property shall be managed for wetland mitigation and forested habitat preservation purposes in accordance with the agreement identified under the DOE Revised Shoreline Management Permit #2007-SW-02407-A and the USACE Reference Number 200301009. Declarant and all future owners and users of the Property are subject to any and all easements, covenants and restrictions of record affecting the Property.

1. There shall be no removal, destruction, cutting, trimming, mowing, alteration or spraying with biocides of any vegetation in the Property except for maintenance activities and activities designed to achieve mitigation performance standards as detailed in the mitigation plan approved under the DOE Revised Shoreline Management Permit #2007-SW-02407-A nor any disturbance or change in the natural habitat of the Property.
2. There shall be no agricultural, commercial, or industrial activity undertaken or allowed in the Property; nor shall any right of passage across or upon the Property be allowed or granted if that right of passage is used in conjunction with agricultural, commercial or industrial activity.
3. No domestic animals shall be allowed on the Property except for properly controlled service animals as needed by persons with disabilities.
4. There shall be no filling, excavating, dredging, mining or drilling; no removal of topsoil, sand, gravel, rock minerals or other materials, nor any dumping of ashes.

trash, garbage, or of any other material, and no changing of the topography of the land of the Property in any manner.

5. There shall be no construction or placing of buildings, mobile homes, advertising signs, billboards, or other advertising material, or other structures on the Property.

ARTICLE 5
RESOLUTION OF DOCUMENT CONFLICTS

Any conflict between this Declaration and the agreement identified under the DOE Revised Shoreline Management Permit #2007-SW-02407-A and USACE Reference Number 200301009 shall be resolved jointly by the parties.

IN WITNESS WHEREOF, the undersigned being Declarant herein, has executed this instrument this 6th day of December, 2010.

JD Financial Corp. (*land owner*)
Grays Harbor County, Washington

By: *James Daly*

Title: *President*

STATE OF WASHINGTON)

County of King)

ss:

This instrument was acknowledged before me on December 7th, 2010 (date) by James Daly as President of JD Financial Corp., Grays Harbor County, Westport, Washington.

Carmen Joy Ingebrigtsen
Signature of Notarial Officer

My Commission Expires: 06/10/2012

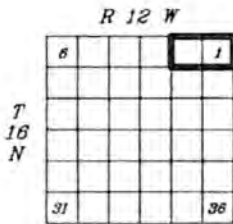


4/13/2007 4:12 PM S:\Grays Harbor-WA\County-Projects\1532-Mox Chehalis, LLC\1532.02-Conservation Covenant Violation Consultation\1532.02-Figures\VICINITY.dwg Jennifer Johnston

WASHINGTON



LOCATION MAP

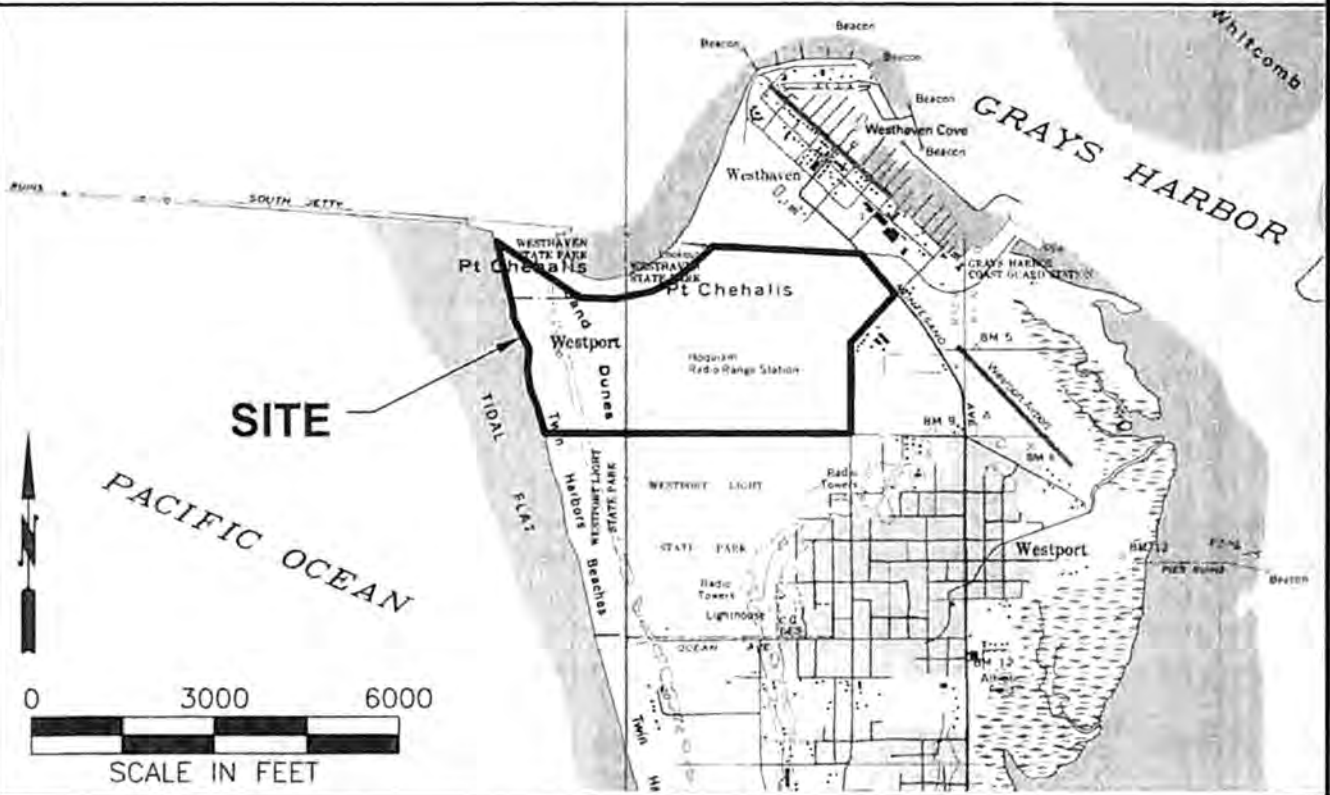


NOTE:

USGS topographic quadrangle map reproduced using MAPTECH Inc., Terrain Navigator Pro software.

SITE

PROJECT VICINITY MAP



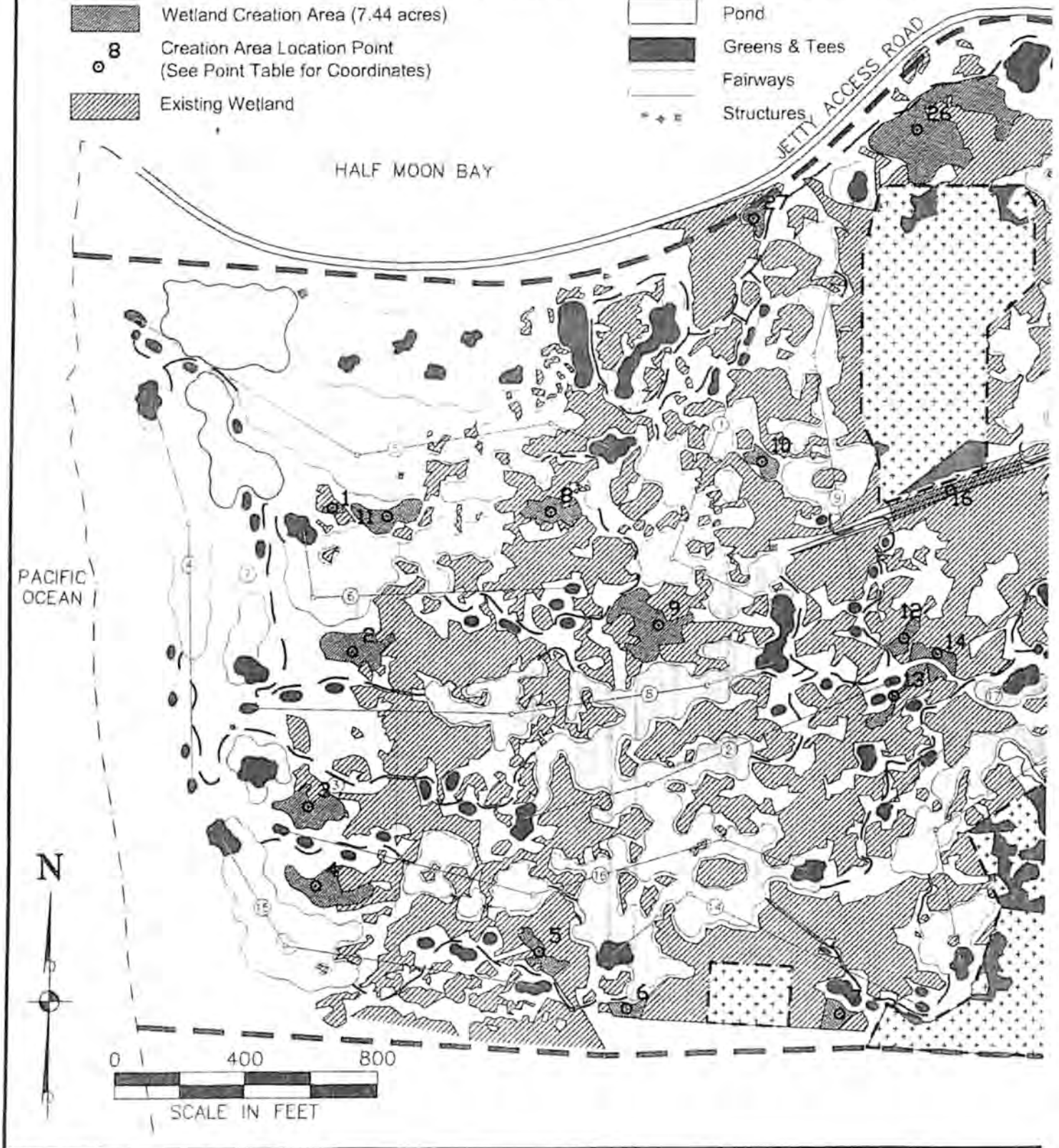
ECOLOGICAL LAND SERVICES, INC.
 1157 3rd Ave., Suite 220 Longview, WA 98632
 (360) 578-1371 Fax: (360) 414-9305

DATE: 12/10/10
 DWN: MMM
 REQ. BY: FN
 PRJ. MGR: FN
 CHK: MMM
 APPR:
 PROJ.#: 1532.01

EXHIBIT A
 Links at Half Moon Bay
 Mox Chehalis, LLC
 Grays Harbor County, Washington
 Sections 1 & 2, Township 16N, Range 12W, W.M.

LEGEND:

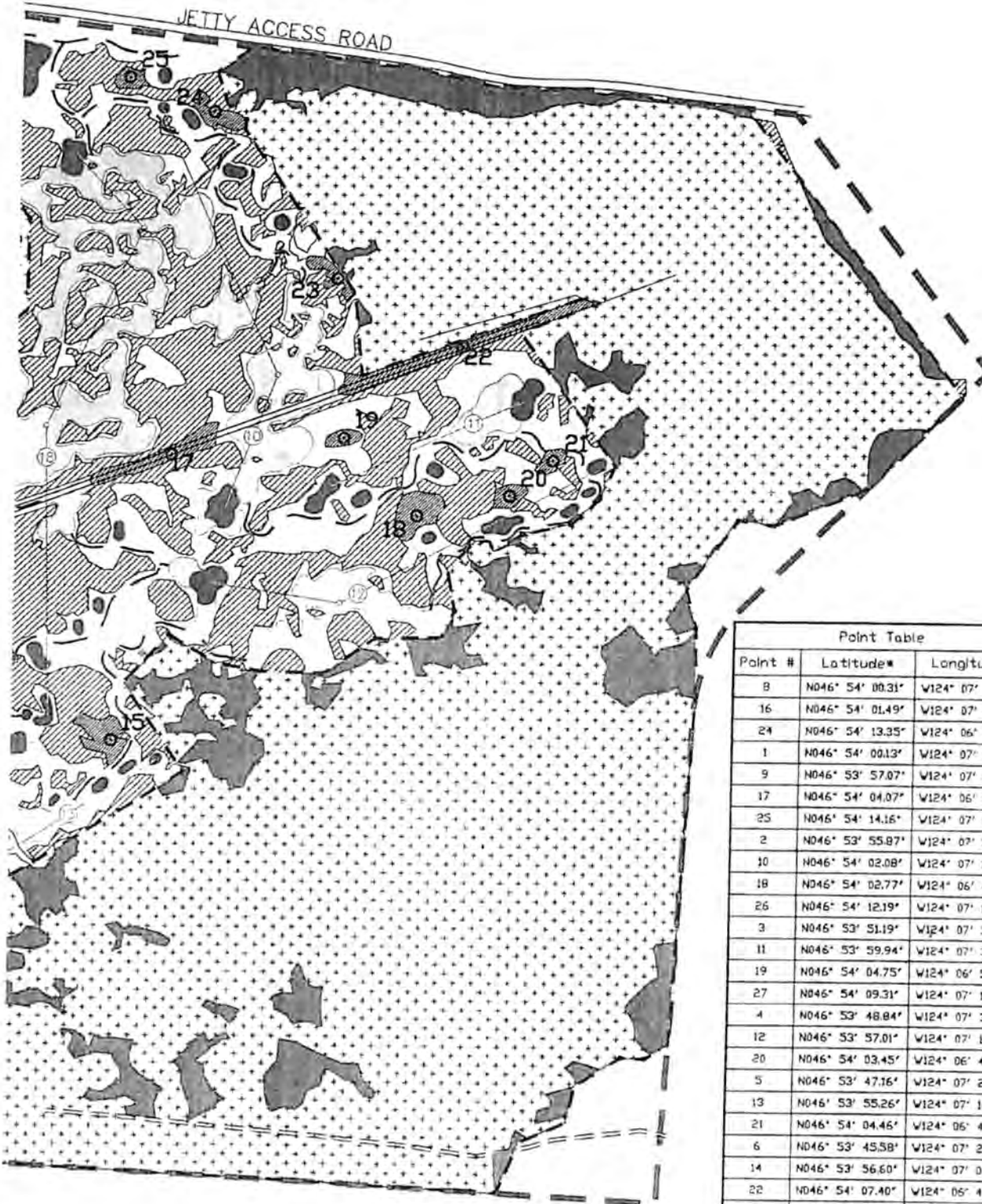
- | | | | |
|---|---|--|--------------------------|
|  | Preservation Area Boundary (107 acres) |  | Site Boundary |
|  | Existing Forested Wetland for Preservation (94 acres) |  | Study Area Boundary |
|  | Existing Forested Upland for Preservation (13 acres) |  | Existing Vegetation Line |
|  | Wetland Creation Area (7.44 acres) |  | Pond |
|  | Creation Area Location Point
(See Point Table for Coordinates) |  | Greens & Tees |
|  | Existing Wetland |  | Fairways |
| | |  | Structures |



NOTES:

1. Base map provided by HDR One Company, June, 2007.
2. Site boundary size and location are approximate.

- ① Hole Number & Centerline
- Golf Cart Trail
- Golf Cart Bridge Crossing




Point Table		
Point #	Latitude*	Longitude*
8	N046° 54' 00.31"	W124° 07' 26.14"
16	N046° 54' 01.49"	W124° 07' 08.67"
24	N046° 54' 13.35"	W124° 06' 58.47"
1	N046° 54' 00.13"	W124° 07' 35.74"
9	N046° 53' 57.07"	W124° 07' 21.17"
17	N046° 54' 04.07"	W124° 06' 59.30"
25	N046° 54' 14.16"	W124° 07' 02.01"
2	N046° 53' 55.87"	W124° 07' 34.53"
10	N046° 54' 02.08"	W124° 07' 17.00"
18	N046° 54' 02.77"	W124° 06' 49.37"
26	N046° 54' 12.19"	W124° 07' 11.00"
3	N046° 53' 51.19"	W124° 07' 36.07"
11	N046° 53' 59.94"	W124° 07' 33.35"
19	N046° 54' 04.75"	W124° 06' 52.49"
27	N046° 54' 09.31"	W124° 07' 17.93"
4	N046° 53' 48.84"	W124° 07' 35.54"
12	N046° 53' 57.01"	W124° 07' 10.38"
20	N046° 54' 03.45"	W124° 06' 45.74"
5	N046° 53' 47.16"	W124° 07' 25.58"
13	N046° 53' 55.26"	W124° 07' 10.69"
21	N046° 54' 04.46"	W124° 06' 44.12"
6	N046° 53' 45.58"	W124° 07' 21.64"
14	N046° 53' 56.60"	W124° 07' 08.87"
22	N046° 54' 07.40"	W124° 05' 47.99"
7	N046° 53' 45.70"	W124° 07' 12.27"
15	N046° 53' 56.31"	W124° 07' 00.98"
23	N046° 54' 09.04"	W124° 06' 53.17"

*NAD 27 Washington State
Planes South Zone US Foot

Wetland Creation.dwg Jennifer Johnston

EXHIBIT B
Links at Half Moon Bay
Mox Chehalis, LLC
Grays Harbor County, Washington
Sections 1 & 2, Township 16N, Range 12W, W.M.

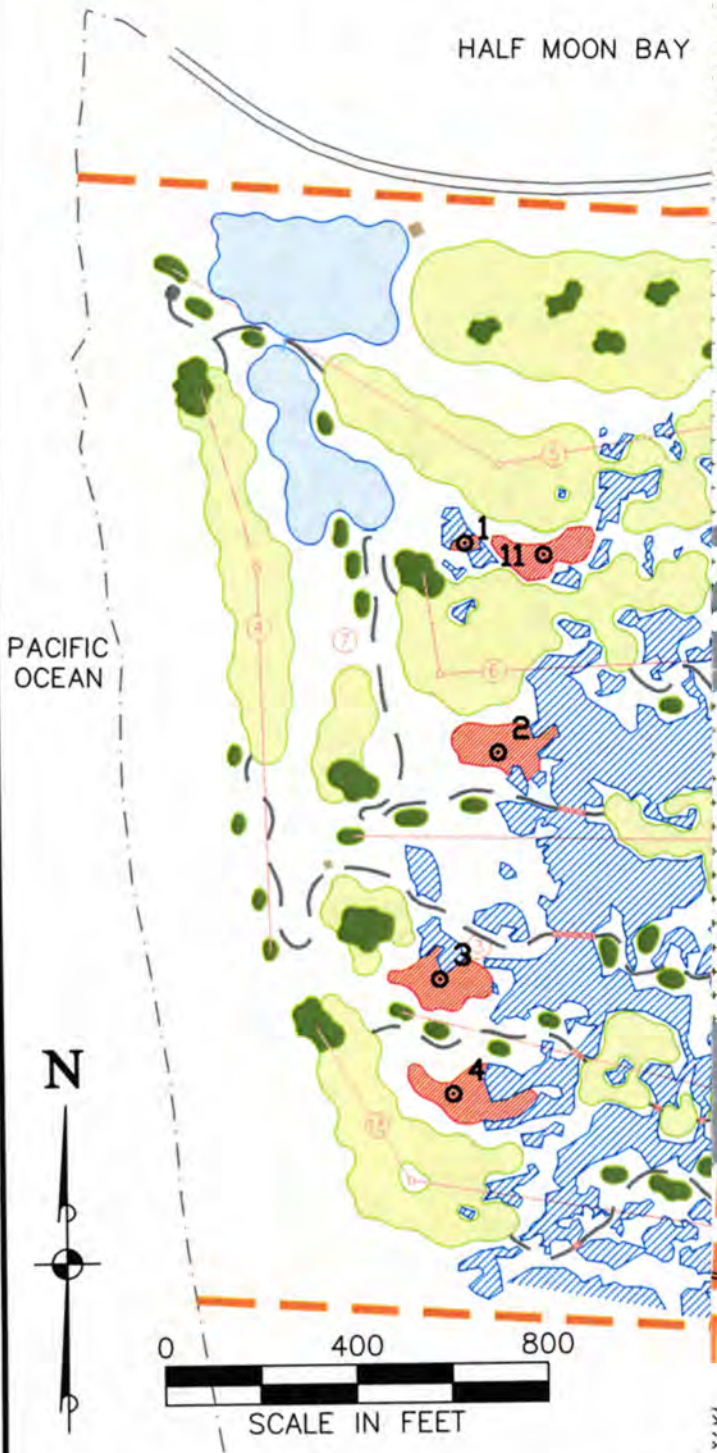
DATE: 12/10/10
OWN: JK/BCB
REQ. BY: FN
PRJ. MGR: FN
CHK: MMM
APPR:
PROJ#: 1532.02

ECOLOGICAL LAND SERVICES, INC.

1157 3rd Ave., Suite 220 Longview, WA 98632
(360) 578-1371 Fax: (360) 414-9305

LEGEND:

-  Preservation Area Boundary (107 acres)
-  Existing Forested Wetland for Preservation
-  Existing Forested Upland for Preservation
-  Wetland Creation Area (7.44 acres)
-  Creation Area Location Point
(See Point Table for Coordinates)
-  Existing Wetland

...d by HDR One Company, June, 2007.
... and location are approximate.



Point Table		
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15	N046° 53' 56.31"	W124° 07' 00.98"
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EXHIBIT B

Links at Half Moon Bay
Mox Chehalis, LLC
Grays Harbor County, Washington
Sections 1 & 2, Township 16N, Range 12W, W.M.

DATE: 4/11/07
DWN: JKJ/BCB
REQ. BY: FN
PRJ. MGR: FN
CHK: MMM
APPR:
PROJ.#: 1532.02

ECOLOGICAL LAND SERVICES, INC.
1157 3rd Ave., Suite 220 Longview, WA 98632
(360) 578-1371 Fax: (360) 414-9305



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
SEATTLE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-3755

Green/56/6906
DEC 2010
Green/Moxchehalis Residual
J 12/22/10

Regulatory Branch

DEC 22 2010

Mr. Chuck Maples
Lanco, LLC
Post Office Box 304
Westport, Washington 98595

Reference: 2003-01009
Mox Chehalis, LLC

Dear Mr. Maples:

On May 15, 2009, my staff inspected your property at Westport, Washington, and observed that you had adequately removed unauthorized fill material placed in 1.43 acres of wetlands adjacent to the Pacific Ocean and that the wetland areas had adequately revegetated. In addition, on December 14, 2010, the required deed restriction for the site was recorded with Grays Harbor County. This document identifies 94 acres of existing forested wetlands, 13 acres of existing forested uplands, and 7.44 acres of created wetlands to be preserved from future development, as required by the Corps of Engineers, to resolve the violation.

We consider your violation to now be resolved. Thank you for your voluntary compliance in resolving this violation. Please be reminded that the remaining unpreserved wetland areas are waters of the United States. As such, you must obtain authorization from the U.S. Army Corps of Engineers and possibly other regulatory agencies before filling, grading, or mechanically clearing these wetlands. If you sell this property, you should inform the new owner of these requirements, as well as the deed restriction preventing future development in the identified preservation areas.

Please be aware that any future violation will be considered knowing and willful and may be referred to the U.S. Attorney for legal action, which could include appropriate penalties. A copy of this letter will be provided to Mr. Francis Naglich, Ecological Land Services, 1157 - 3rd Avenue, Suite 220, Longview, Washington, 98632. If you have any questions, please contact Mr. Jim Green, telephone (206) 764-6906 or via email at james.d.green@usace.army.mil.

Sincerely,

Michelle Walker
Chief, Regulatory Branch

MRB
Renewett/OD-RG/1
for approval/22/10
Reg Br File
App. 179

PFR000285

From: "Hahn, Steve (PARKS)" <Steve.Hahn@PARKS.WA.GOV>

To: "Fields, Nikki (PARKS)" <Nikki.Fields@PARKS.WA.GOV>

Subject: FW: update

Date: Tue, 02 Aug 2016 20:40:28 +0000

Importance: Normal

Attachments: Attachment_C.pdf

Wetland maps are at the end of the attachment.

From: Mike Coverdale [mailto:westportmike@windermere.com]

Sent: Thursday, April 03, 2014 12:58 PM

To: Hahn, Steve (PARKS)

Subject: RE: update

Hi Steve,

I'd be glad to help.

Item 1 is as good as done. I may get some more current shots specific to the 300 acres.

2. I can get all but the "friends" group... which I can not...will not approach. I'm sure there is someone you know who knows FOGH contact. Also you should contact Surfrider Foundation. Kevin Ranker is a state senator now but he used to be the surfrider rep for this area... he would be a great resource.

3. See #4

4. The seller does not have that stuff so I do not have access. I am attaching a packet that may include a fair amount of that info for your review. Also included is a letter from the golf course architect outlining what it would take to dust off the plan that was permitted in the past and move forward... which was prepared for a chinese developer who is still considering the property.

5. There are no local "partner" possibilities I can think of. You may get ahold of Grays Harbor Audubon to see if they would like to do some habitat restoration or wildlife enhancements and/or a trails project through the wetlands. They are in the same category as FOGH as far as my ability or willingness to approach them.

6. No problem for letter and if needed most likely can get the P&S written. I would like to attend and possibly speak.

Mike

From: Hahn, Steve (PARKS) <Steve.Hahn@PARKS.WA.GOV>

Sent: Thursday, April 03, 2014 10:26 AM

To: Mike Coverdale

Cc: Plunkett, Erik (PARKS)

Subject: RE: update

Mike, I have been assigned the lead in preparing the grant presentation for the Westport property to the RCO evaluation committee in about two months. While I consider myself

adept at my normal job doing real estate stuff for the agency, my history as a grant preparer is not so good. I am hoping you have an interest in helping me out with some of the elements that go into a good grant presentation. I have already supplied you with the actual scoring criteria the evaluation panel will use to score our project (so we already know the test questions). Our job is simply to milk as many points out of this project as possible. If your interested, here is some of the things I need help with.

- 1) Pretty pictures and lots of them. Pictures of people on the boardwalk between town and Westport light, people surfing, at the lighthouse, bird watching, in town shopping, salmon derby...
- 2) Letters of support for the project from every friends group, other local organization, city government and anyone else willing to write a letter of support (chamber of commerce, Elks club...)
- 3) Illustrations of what the original project was going to be (golf course and resort conceptual plans/drawings). We need to clearly demonstrate what the alternative to the property becoming a state park is. I know this is a little backwards from how you/I would normally think but you need to put yourself in the shoes of the evaluation panel. (think tree hugger). We need to get the panel thinking the alternative equates to filling wetlands and destroying quality habitat.
- 4) If you can get your hands on the boxes of site information produced from the original project permitting efforts, there will be all types of good information including soils reports, demographics, visitation figures, wetlands, plants and animals...
- 5) Any leg work on getting "partners" to participate in the project. If we can describe any kind of volunteer help from any other groups it equals bonus points.
- 6) Letter stating we have a willing seller. A signed Purchase & Sale Agreement (with all the outs your client needs) scores points. Just need to show a copy of the document.

If interested, you can attend the presentation, speak to the panel... It will at least be educational.

Erik: Give me a call to discuss how we kick Hankinson, Nikki, Lisa Lantz and all the other good grant writers butts on this project. The main thing I will need from you is reasonably solid plan on what we will do with the larger park if we connect Westhaven to Westport Light.

Project #14-1486, Westport Park Connection

Current Status: Application Submitted

Project Details

Primary Sponsor: State Parks & Recreation Commission **Primary Contact:** Steve Hahn
(360) 902-8683
steve.hahn@parks.wa.gov

Funding Program: WWRP - State Parks
Project Type: Acquisition

Project Description

The Westport Park Connection project is a property acquisition of approximately 270 acres located just outside the town of Westport WA. The subject property is bordered on three sides by three different State Parks. The three parks are Westhaven and Westport Light State Parks to the North and South respectively and the Seashore Conservation Area to the West. **The primary goal of this project is to connect these three state park properties and to add a significant amount of new park land including over 2,000 feet of frontage on the Pacific Ocean. The subject property is currently vacant open space and the predominate resource feature is a predominance of pocket wetlands within a coastal dune landscape.**

Project Overall Metrics (Outcomes, Benefits)

Category / Work Type / Metric	Application Answer
--------------------------------------	---------------------------

Community Values

Service Area Radius	100 miles + (2 hours or more)
Management Priority	Mixed-use Park

Economic Benefit

Projected economic benefit provided by the project	The subject property is currently zoned "Tourism" Development plans include two or more highly developed areas for the construction of overnight accommodations (cabins, yurts) Increased public visitation will promote tourism and other economic development within the town of Westport.
--	--

Project Acquisition

Acquisition Primary Purpose	Habitat Conservation
------------------------------------	-----------------------------

Completion Date

Projected date of completion	8/7/2015
------------------------------	----------

Project Funding

Funding Request	Funding %
WWRP - State Parks (FY2016) \$1,905,000	100.00 %
Total Project Funding \$1,905,000	100.00 %

Project Cost Summary	Project %	Admin/A&E %	Maximum for Selected Program
ACQUISITION COSTS			
Land/Incidentals \$1,835,000			
Admin \$70,000		3.81 %	\$91,750 (5%)
Subtotal \$1,905,000	100.00 %		
Total Cost Estimate \$1,905,000	100.00 %		

Worksites and Properties

County: Grays Harbor
Legislative Districts 2012: 19
Congressional Districts 2012: 06
Sections: 01
Township: T16NR12W
Coordinates: 46.89995125
-124.12171712

Worksite #1: Westport Park Connection

Coordinates from Mapped Point:	Latitude: 46.89995125	Longitude: -124.12171712	
Coordinates from Worksite	Latitude: 46.900128	Longitude: -124.120330	

PFR000288

Directions:

Worksite Description: Subject property is just south of the Jetty Haul road in Westport WA. Activity is property acquisition only

Site Access Directions: From the town of Westport WA, drive west on Jetty Haul Road towards Westhaven State Park. Subject property is on your left.

Worksite Address:

- 1 of 6 **Is the worksite(s) located within an existing park, wildlife refuge, natural area preserve, or other recreation or habitat site? If yes, name the area and specify if the land is owned by local, state or federal government.**
No, no
- 2 of 6 **Has the worksite been investigated for historical, archeological, or cultural resources? If yes, when did this occur and what agencies and tribes were consulted? Attach related documents (letters, surveys, agreements, etc.) to your project in PRISM.**
no
- 3 of 6 **Describe existing project site conditions. The answer to this question will be used in cultural resource consultation so please provide detailed information.**
Project site is undeveloped open space. Site is typical coastal dunes and pocket wetlands.
- 4 of 6 **Describe any proposed ground disturbing activities. That is, will a tool(s) be used to move earth (soil, rock, gravel, etc.) as part of this project? This includes hand or mechanized tools, for example: shovel, auger, pick axe, backhoe, etc. The answer to this question will be used in cultural resource consultation so please provide detailed information on the anticipated depth of excavation and the size of area disturbed.**
no
- 5 of 6 **Give street address for this worksite if available.**
na
- 6 of 6 **If buildings or structures (tidegates, dikes, etc.) will be altered, removed, or demolished, provide for each: identifying name, year constructed, year(s) remodeled/renovated. Attach at least one photograph for each to your project in PRISM. If none: N/A The answer to this question will be used in cultural resource consultation so please provide detailed information.**
na

Property for Westport Park Connection Worksite #1: Parcel Number is 616120143001

Activity: Acquisition

Planned Acquire Date: 08/07/2015

Proposed Acres:
270.00

Property Grantor

Ownership

Instrument Type: Deed - Statutory Warranty

Purchase Type: Fee ownership

Landowner Type: Private

Term Length: Perpetuity

Expiration Date:

Note:

Acquisition Metrics (Outcomes, Benefits)

Category / Work Type / Metric	Application Answer	Work Type Costs
Real Property Acquisition		
Land		
Total cost for Land		\$1,800,000.00
Acres by Acreage Type (fee simple) - Uplands	140.00	
Acres by Acreage Type (fee simple) - Wetlands	130.00	
Acres zoned as agricultural land	0.00	
Existing structures on site	No structures on site	
Market value of property improvements	\$0.00	
Date available for public use	8/7/2015	
Incidentals		
Appraisal		
Total cost for appraisal		\$7,000.00
Appraisal Review		
Total cost for appraisal review		\$4,000.00
Closing, Recording, Taxes, Title		
Total cost for Closing, Recording, Taxes, Title		\$3,500.00
Noxious weed control		
Total cost for Noxious weed control		\$20,000.00
Acres treated for noxious weeds by method - Mechanical	100.00	
Signs(Acq)		
Total cost for Signs(Acq)		\$500.00
Number of permanent signs that identify site and funding partners	2	

Administrative Costs (Acq)

Administrative costs (Acq)

PFR000289

App.183

PARKS-000016

Acquisition Questions

- 1 of 3 **Has the applicant requested and/or received a "waiver of retroactivity" from the RCO for the property in question? If yes, what was the sellers name, the approval date, and waiver number?**
no
- 2 of 3 **Are there, or will there be, encumbrances that limit the proposed uses for the site (e.g., additional easements, covenants, lease back, life estate, sharecropping agreement, or other)? If yes, explain:**
no
- 3 of 3 **Does the applicant hold an option agreement on the property? If yes, what date will it expire?**
no

Overall Project Questions

- 1 of 16 **Who will be responsible for administration, design, and/or implementation of this project (i.e. in-house staff, paid consultants, contractors, volunteers, other agency staff, etc.)? Explain.**
WA State Parks staff
- 2 of 16 **Does the project site or project boundary lie within the urban growth area boundary of a city or town with a population of 5,000 or more? If yes, name the community and attach one map called Population Proximity Map under the Attachment Tab in PRISM.**
no
- 3 of 16 **How and when will the site be made open and accessible for public outdoor recreation use (signing, site improvements, parking, etc.)?**
When acquired, public access will be readily available from existing access points (parking lots) at Westhaven and Westport Light State Parks.
- 4 of 16 **Describe the development plans for the site within the next five (5) years. If applicable, describe any plans to phase development.**
Master site planning will be conducted within two years of acquisition
- 5 of 16 **Explain any existing non-recreational or non-public uses that will continue and/or will be allowed within the project area boundary (e.g. life estate, agricultural, grazing leases, etc.).**
none
- 6 of 16 **Will this proposal create a new public park/recreation area where none presently exists? If yes, what will the area be named?**
no, site adds onto existing state park opportunities
- 7 of 16 **Will this proposal renovate or expand an existing public park/recreation area? If yes, what is the name of the existing area?**
yes, site will stimulate future development at Westhaven, Westport Light state parks.
- 8 of 16 **How does this proposal implement goals in your agency's planning document and/or the Statewide Comprehensive Plan (include references)**
Project supports goals 1,3,6,7 from the agencies adopted Transformational Strategy (2012)
- 9 of 16 **Is this project scope part of a larger effort not reflected in the project application? If so, briefly describe the larger effort, funding amount(s) and source(s).**
no
- 10 of 16 **Describe the nature of any rights-of-way, easements, reversionary interests, etc. to the project area.**
site can be accessed by three separate county or state park access roads. Site may also be access through the Seashore Conservation Area (through the beach)
- 11 of 16 **Is there, or will there be, any significant public access or use restrictions? If yes, explain:**
no
- 12 of 16 **Does this application contain state, federal or other grants as part of the "sponsor match"? If "yes," name the grant(s) and date grant will be available.**
no
- 13 of 16 **Does this application contain elements required for mitigation for other project(s)? If yes, explain:**
no
- 14 of 16 **Is this project a subsequent phase to a previously funded RCFB project? If yes, please identify the grant project number(s) if known.**
no
- 15 of 16 **Do plans exist for interim non-public use of the project site? If yes, explain the interim non-public use and whether or not income will be derived through that use:**
No, no
- 16 of 16 **List the date the project was submitted for review to the county or city with jurisdiction over the project area? If submitted, explain which county or city official(s) reviewed the proposal, method of review, which jurisdiction, etc.:**
February, 2014

Project Permits

Applied Received **PER000290** Expiration

App.184

PARKS-000017

Permit Type

None - No permits Required

Date**Date****Date****Permit Number****Permit Questions**

1 of 1

If this project requires a federal permit, will the scope of that permit cover ALL proposed ground disturbing activities included in this project? You may need to request a pre-application meeting with the permitting agency to answer this question.

Yes, yes

Project Attachments

Required Attachments

6 out of 6 done

Authorizing Resolution/Application Authorization	<input checked="" type="checkbox"/>
Landowner acknowledgement form	<input checked="" type="checkbox"/>
Local Jurisdiction Review for Acquisition Projects	<input checked="" type="checkbox"/>
Map: Parcel map	<input checked="" type="checkbox"/>
Photo	<input checked="" type="checkbox"/>
Site Plan: Conceptual Site Plan	<input checked="" type="checkbox"/>

Photos

Attachment Type	Title	Attach Date
Application Review Report	Application Review Report, 14-1486A(rtnd 06/18/14 15:46:14).pdf	06/18/2014
Authorizing Resolution/Application Authorization	2014 WWRP Acquisitions-AppAuth.pdf	04/30/2014
Evaluation: Project presentation - Tech Review Mtg	Westport Connect PowerPoint Presentation.pptx	06/16/2014
Local Jurisdiction Review for Acquisition Projects	Local Jurisdiction Notification Letter.doc	04/30/2014
Map: Parcel map	Westport Dunes parcel.jpg	04/30/2014
Photo	wesport connect.jpg	04/30/2014
Project Application Report	Application Report, 14-1486A (submitted 04/30/14 12:06:32).pdf	04/30/2014
Site Plan: Conceptual Site Plan	Westport Dunes blank.jpg	04/30/2014

Application Status

Application Due Date: 05/01/2014

Status	Status Date	Name	Notes
Application Submitted	08/11/2014	Steve Hahn	
Application Returned	06/18/2014	Karl Jacobs	
Application Submitted	04/30/2014	Steve Hahn	Karl, This box says I need to tell you how much I like you and appreciate your efforts in supporting my grant application. Got a little vomit in my mouth so I need to go now.
Preapplication	04/11/2014		

I certify that to the best of my knowledge, the information in this application is true and correct. Further, all application requirements due on the application due date have been fully completed to the best of my ability. I understand that if this application is found to be incomplete, it will be rejected by RCO. I understand that I may be required to submit additional documents before evaluation or approval of this project and I agree to provide them. (Steve Hahn, 08/11/2014)

Date of last change: 08/11/2014

Appraisal of
JD Financial Property
Located within Westport, Grays Harbor County, Washington



Appraisal Date: September 28, 2015

For: Washington State Parks

Appraiser: Shawn D. Kyes, MAI
Appraisal Reviews Northwest, LLC

APPRAISAL REVIEWS NORTHWEST, LLC
P.O. Box 4052, Tumwater, WA 98501
(360) 888-9922

October 12, 2015

Mr. Steve Hahn
Real Estate Program Manager
Washington State Parks & Recreation
1111 Israel Road SW
Olympia, Washington 98501-2560

Market Value estimates of portions of the JD Financial Corp. Property (Grays Harbor County Tax Parcel #616120143001) lying immediately North of Westport Light State Park, Westport, Grays Harbor County.

Dear Mr. Hahn:

The appraisal you commissioned has been completed, and the results are provided in the following report. Per the Appraisal Scope of Work dated August 4, 2015, the following property rights have been appraised in fee simple interest: a) market value of identified 250+- acre Acquisition Area; b) per acre value of 250+- acre Acquisition Area; c) market value of 10+- acre RCO exclusion area within the 250+- acre Acquisition Area. I have personally inspected the subject on several occasions, as well as the general market area. I have analyzed all the necessary information required to form an opinion of market value for the subject property.

This report, containing 49 pages plus appendix, is an Appraisal Report and is performed to the Uniform Standards of Professional Appraisal Practice Standard 2-2, and the Recreation and Conservation Office (RCO) requirements per RCO Manual 3. It is self-explanatory; however, if you have questions or comments, please contact me.

The analysis and value estimates are based upon the assumptions and limiting conditions detailed in the report. An extraordinary assumption of this report is that the property can be subdivided to accommodate the partial acquisition of the existing tax parcel. If these assumptions and conditions were altered or proved invalid, the analysis and valuation may require adjustment. Based on the enclosed appraisal, it is my opinion that the market value of the subject property, as of September 28, 2015, is:

Scenario A) 250+- Acre Acquisition Area \$1,625,000 or \$6,500 per acre

**Scenario B) 10+- Acre "Exception Area" within the larger Acquisition Area
\$125,000 or \$12,500 per acre**

Sincerely,



Shawn D. Kyes, MAI
Principal Appraiser

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Certification

I certify that, to the best of my knowledge and belief:

- The statements of fact contained in this report are true and correct.
- The reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions and are my personal, impartial, and unbiased professional analyses, opinions, and conclusions.
- I have no present or prospective interest in the property that is the subject of this report and no personal interest with respect to the parties involved. I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment.
- My engagement in this assignment was not contingent upon developing or reporting predetermined results.
- My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
- My analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the *Uniform Standards of Professional Appraisal Practice*.
- I have made a personal inspection of the property that is the subject of this report.
- I have not performed any other professional services on the subject property within the past three years.
- I have the requisite skills, accreditations, working knowledge, and experience to complete the assignment.
- James Nelson, Research Associate provided assistance in locating pertinent documents, GIS/mapping to the person signing this certification.
- The reported analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the requirements of the Code of Professional Ethics & Standards of Professional Appraisal Practice of the Appraisal Institute, which include the Uniform Standards of Professional Appraisal Practice.
- The use of this report is subject to the requirements of the Appraisal Institute relating to review by its duly authorized representatives.
- As of the date of this report, I have completed the continuing education program of the Appraisal Institute.



Shawn D. Kyes, MAI

Certified General Real Estate Appraiser, WA

Summary of Important Facts & Conclusions

Identification of the Property:	A 250-acre potential acquisition of a portion of Grays Harbor County Parcel #616120143001 situated between Westport Light State Park and Westhaven State Park.	
Ostensible Owner:	JD Financial Corporation c/o James R. Daly, President 29308 – 132nd Avenue SE Auburn, WA 98092	
Description of Land/Site:	A 240-acre tract and a separately to-be acquired 10-acre tract, part of the largest privately owned parcel on the Westport Peninsula in Coastal Washington. The site is in the northern portion of the city limits, lying just south of the South Jetty of Grays Harbor, with the western portion bordering the Pacific Ocean and the larger parcel bounded to the east by Forrest Street. The location is less than ¼ mile southwest from the Westport Marina.	
Highest and Best Use:	A phased development likely to include an initial phase of hospitality use ranging from rustic individual lodging to luxury hotel given the lack of newer facilities in this community dominated by the tourism and recreational fishing industry.	
Market Exposure Time Estimate:	Twelve months to eighteen months.	
Final Opinions of Value:	250 acre Overall Acquisition area	\$1,625,000
	10 acre acquisition area	\$125,000
Date of Value Opinion:	September 28, 2015	
Date of Appraisal Report:	October 12, 2015	

Subject Property History Brief

The 300-acre parcel, which includes the overall 250-acre proposed acquisition area (within it a 10-acre “exclusion area”), has had a storied past within the past two decades. The property was originally held by the Port of Grays Harbor. The site was reportedly designated under the 1995 Master Plan as a Destination Resort zone. In 1997 the site was rezoned as Tourist Commercial. Recognizing the zoning, the Port began to entertain interest from developers in the tract and a 40-acre tract directly across the State Park Access Road to the north.

After several years of planning, in 2003 the Port sold both parcels to Mox Chehalis, LLC. Mox Chehalis, LLC proposed developing a Master Planned Destination Resort that was to include 450 hotel/condominium units, retail space, and a 18-hole links style golf course in the initial Phase. Financing was secured from several investors in 2003, including the current owner JD Financial Corporation. A coalition of groups, formed under Friends of Grays Harbor “FOGH”, appealed the permitting of the project. In 2004, WA DOE approved a water quality permit that was necessary in regards to the proposed golf-course development. In late 2005, the State of Washington Environmental & Land Use Hearing Board issued a Final Order allowing development. In June 2006, the owner’s operating under the name Lanco entered into a Construction Development Management Agreement with Kemper. Groundwork including shore-pine removal and water feature enhancements began in 2006.

In 2007 disagreements, and eventual lawsuits were filed between Lanco and Kemper. Work on the site largely stopped, with a subsidiary of Kemper (Landscapes Unlimited), subsequently filing a lien on the property for \$1.46 M in 2008. The city of Westport also filed a smaller lien in 2009 for \$18k for work expended on the project. The property was unsuccessfully marketed for sale in this time period at a price of \$18M. The principal owner of the property also filed for bankruptcy in this time period.

In November 2010, the property was foreclosed upon under a Trustee Sale with amount due of \$649,973 extending from financing secured in 2003. County records provide that the Landscapes Unlimited lien was subsequently extinguished in 2013. The 300-acre parcel, and adjacent 40-acre parcel, have been marketed for sale at a price \$2.4M/each for the past two years. According to the listing broker, all entitlements associated with the previously approved Master Plan have expired.

The broker states there has been some interest by individuals/corporations in the site for potential hospitality, waterpark, and/or amphitheater.

SUBJECT PHOTOS



NORTHWESTERN PORTION OF SITE, FROM ADJACENT WESTHAVEN STATE PARK PROPERTY



NORTHWESTERN PORTION OF SITE, FROM ADJACENT WESTHAVEN STATE PARK PROPERTY



MAN-MADE POND AREA IN NORTHWESTERN PORTION OF SITE



**LOOKING SOUTHERLY INTO WESTERN PORTION OF SUBJECT SITE
(PROXIMATE LOCATION OF 10-ACRE EXCEPTED TRACT)**



INTERIOR VIEW OF SUBJECT FORESTED WETLANDS



INTERIOR VIEW OF SUBJECT DRY WETLAND AREA

AERIAL MAP



PROPERTY DESCRIPTION

Location: The subject represents the largest unimproved tract of privately-owned land within the Westport city limits. The parcel is 300 acres in size, with the subject of this appraisal encompassing a 240-acre tract and a separately to-be acquired 10-acre tract in the northwestern corner (as illustrated below). The site is in the northern portion of the city limits, lying just south of the South Jetty of Grays Harbor, with the western portion bordering the Pacific Ocean and the larger parcel bounded to the east by Forrest Street. The location is less than ¼ mile southwest from the Westport Marina.



Legal Description: The property includes a lengthy metes-and-bounds legal description. The Preliminary Title Report found in the Addenda of this report includes the legal description of the larger parcel. The proposed acquisition areas have not been surveyed and a legal description of these areas was not available.

Size and Shape: The larger parcel is relatively irregular shaped. However given the easternmost portion will be retained by the seller, the acquired tract will be nearly rectangular in shape except for the northerly line that parallels the State Park Access Road. The Grays Harbor County Assessor’s estimate of site size is as follows:

Acquisition Area A	240 acres
Acquisition Area B	10 acres
Area Retained by Seller	<u>50 acres</u>
Total Parcel Size (Parcel #616120143001)	300 acres

My measurements result in an estimated ocean-frontage of 2,220 linear feet.

Access and Visibility: The proposed overall acquisition area (250 acres) has frontage along both the public and private portions of the State Park Access Road. The public portion of this road is a two-lane paved road that extends from Montesano Street in a southwesterly direction to the Westport Coast Guard signal station. The road then turns further in westerly direction, and represents the private portion of the road owned by WA State Parks. The subject is relatively visible from all nearby areas.

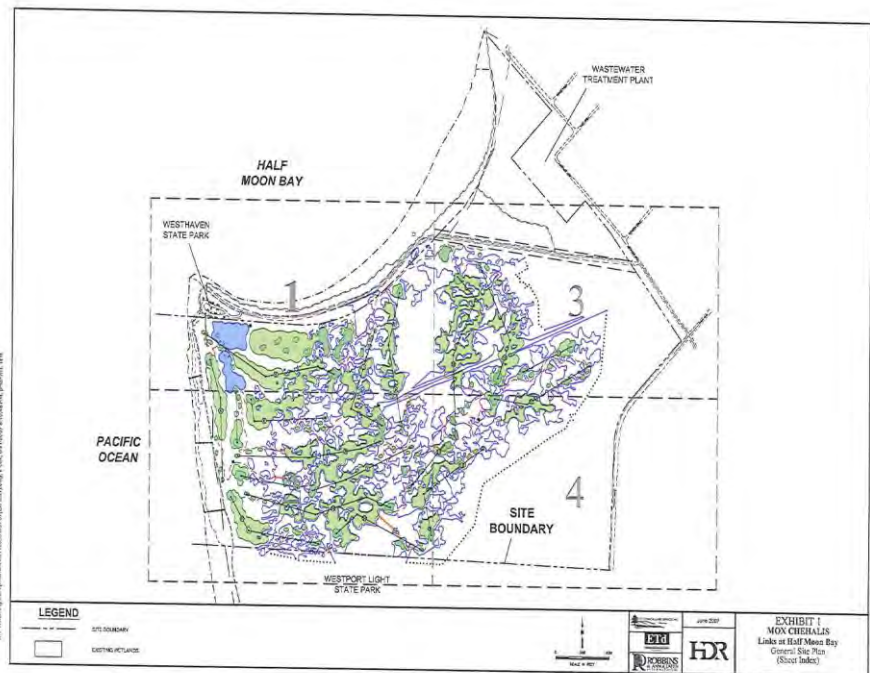
Soils: According to USDA Natural Resources Conservation Service, the primary soils are listed as “dune land” that have a typical profile of fine sand to depths 0-60 inches. A small portion of the proposed acquisition area in the southwestern portion is listed as “Yaquina loamy fine sand” that have a typical profile of loamy sand to 9” depth, and fine sand from 10” to 60 inches deep. A copy of the soil map is provided in the Addenda of this report.

Topography & Wetlands: The site is largely level to moderately undulating. The westernmost portion of the site is best described as a berm strip that separates the interior of the site from the beach and ocean, and this strip includes public use walkway exists running in a north/south manner. This berm appears to be the highest elevation of the tract, and therefore limits visibility of the ocean and beach from much of the subject tract which is 10-15’ below grade of the berm, although the tract legally extends to the coast.

The subject tract has multiple, scattered areas with vegetation and standing water that are likely wetland areas. Previous wetland studies were not provided in full, other than excerpt maps. The USFWS National Wetland Inventory was accessed. The following illustrates the emergent freshwater wetlands from their inventory.



The following is one of the site specific wetland maps provided by the owner's representative.



As evidenced by on-site inspections, and the site specific mapping, the majority of the site is impacted by wetlands and/or wetland buffers. However, there does appear to be scattered areas where some development may be possible on the subject tract.

Flood Zone/Plain: The subject is located on Federal Emergency Management Agency's Flood Panel 530067005C. The subject, as much of the Westport Peninsula, includes areas within Zone A (100-yr flooding), Zone B (between 100-yr & 500-yr floods), Zone V (100-yr coastal flooding), and some area within Zone C (areas of minimal flooding). A flood zone map is included in the Addenda of this report.

Adjoining Land Uses:

North: Across State Park Access Road is the Westhaven State Park parking area and restrooms. Across the public portion of this road, near the center of the subject, is the Westport Coast signal station, and vacant land held by JD Financial Corp. (this 40-acre commercially zoned tract is currently marketed for sale at \$2.4M).

East: Owner's retained 50-acre tract and subsequently across Forrest Street, Holan RV park and mini-storage, and single-family residences.

West: Pacific Ocean.

South: Westport Light State Park State Park.

Utilities: Electricity, telephone & cable services are all reportedly available along Montesano Street and State Park Access Road. City water and sewer service extends along State Park Access Road, with water service extending along the beach trail easement on the subject property. According to city officials, depending upon type of development, upgrades to existing lines may be required to service the subject.

Environmental Concerns or Hazards: An environmental audit was not provided for this assignment. The value estimate herein is predicated on the assumption that there is no such material in, on, or by the property that would adversely impact its value.

Easements & Encroachments: Upon physical inspection, it is apparent there are typical utility, drainage, and roadway easements. A preliminary title policy was reviewed for the larger parcel of this assignment. As noted previously, the subject's ocean-frontage includes a public pedestrian walkway that extends from the Westport Light State Park through the subject and to the adjacent Westhaven State Park. The preliminary title report lists this use as being established in 1992 by a use agreement for an initial term of 25 years. This walkway allows public access along the subject's length of oceanfront, and could be viewed as a nuisance to privacy for the subject tract or a positive in regards to access/exposure.

I have not conducted a forensic study of the recorded easements of record as this would be outside the scope of the appraisal assignment. Overall, the easements of record and that are in-place do not appear to conflict with most possible uses of the property. However, the pedestrian walkway does infringe upon the privacy of the site's ocean-frontage.

Zoning:

The subject property is zoned by the City of Westport as Tourist Commercial. The following is the current zoning code ordinance:

17.21.010 Intent.

The tourist commercial district is intended to provide a zoning designation which would enable the development planned for the Westport property owned by the Port of Grays Harbor and which is identified in the comprehensive plan as the tourist commercial zone. (Ord. 1146 § 2, 1998)

17.21.020 Permitted uses.

The tourist commercial district is designed to provide for a master planned destination tourist resort which may include:

- (1) Residential uses, including one or more hotels, motels, condominiums, apartments, and other forms of residential use for short-term, intermediate-term and long-term residential uses;
- (2) Recreational and gaming facilities, including conference centers, movie and theater facilities, golf courses and other places of public and recreation consistent with state laws and licensing regulations;
- (3) Tourist service commercial, including restaurants, lounges, professional and personal services, commercial retail, and service uses developed in conjunction with the primary uses identified in subsections (1) and (2) of this section. (Ord. 1146 § 2, 1998)

17.21.030 Permitting processes.

- (1) The entire zone shall be planned as a whole, complete with integrated utility, transportation, land use, and landscaping layout and phasing through the master plan development process, Chapter [17.36A](#) WMC. When approved, the master plan, including the land use map, the development standards for the zone, and the phasing plan, shall be adopted by the city as part of the city development regulations and zoning code.
- (2) The city shall process individual building projects through the binding site plan process as provided in Chapter 14.10 WMC. (Ord. 1146 § 2, 1998)

City of Westport Building Official, Mark Davis, was interviewed regarding allowed uses within the zone. Mr. Davis stated that any proposed use of the site would require examination by all city officials prior to approval. Given the storied history of the site, no specific uses were identified as being prohibited nor allowed outright. Of note, the city currently does not have a Critical Areas Regulations as part of it's

zoning ordinance. However, drafts of these regulations are in the works, and likely to be put in place shortly.

Comprehensive land use studies are typically performed by a land use expert; in conjunction with land use planners, engineers, architects, and attorneys. The depth of my analysis correlates directly with the scope of this appraisal assignment and its intended purpose. All applicable items in this regard discovered during my due diligence have been considered and reported. This appraisal is not intended to include an examination of potential or likely Master Planned uses that could or potentially be allowed, as the process and likelihood of permitting all potential uses and the governmental conditions required for approval are beyond the scope of this assignment.

Site Improvements: The site is largely unimproved. In recent years the prior owners had completed some initial site clearing in conjunction with the past proposed golf course development. There is an FAA easement extending into the center in a southwesterly manner from SR 105 that has reportedly been abandoned for several years and all poles and lines extending into the former beacon site have been removed.

Assessed Value and Taxes

The 2014 assessed value for 2015 taxes and assessments for the entire 300-acre parcel are summarized in the following table. The subject of the appraisal is a portion of this tax parcel.

Parcel #	Assessed Land Value	Assessed Improv. Value	Total Assessed Value	2015 Taxes & Assessments
616120143001	\$1,760,000	0	\$1,760,000	\$21,932.56

Grays Harbor County Assessor appraises property on an annual cycle, however due to mass appraisal techniques assessed values are not highly correlated to market value.

Ownership History of Subject Property

The only transfer of the subject within the past five years was the Trustee Sale that occurred in November 2010 of the subject larger parcel and one other parcel. The subject has been marketed for sale the past two years, and WA Parks & Recreation have a reported option to purchase the identified Acquisition Area's identified in this report. This Option Agreement was not provided this appraiser.

HIGHEST AND BEST USE

Highest and Best Use is defined as: “The reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value. The four criteria Highest and Best Use must meet are legal permissibility, physical possibility, financial feasibility, and maximum profitability.”⁶

Highest and Best Use as Vacant

The highest and best use of a site as vacant assumes that the parcel of land is vacant or that it can be made vacant through the demolition of any improvements. Therefore, if the land is vacant, the type of building or other improvements, if any, that should be constructed must be determined. When estimating the highest and best use of land, the appraiser is quite often controlled by government regulations such as zoning ordinances and building codes. The appraiser must also recognize the attitude of typical investors in the marketplace.

Physically Possible: Real estate will usually fall under certain definite development patterns and uses can be classified as agricultural/natural resource, residential, commercial or industrial. In this analysis, I have considered the possibilities of all of these classifications. The subject Acquisition area site’s (250-acres & a 10-acre “Exception Area” within the 250-acre tract), are primarily level and at grade with surrounding land uses. The 250-acre tract has limited exposure to major arterial roads, thus a destination use is most probable. The tract has access to the public portion of State Park Access Road, albeit utilities and roads would need to be extended to the 10-acre tract approximately 2,400’ if access were not provided by the adjacent State Park-owned road. Overall, the subject site can support a variety of residential, commercial or industrial uses. The subject soils likely exclude any productive agricultural or natural resource uses.

Legally Permissible: The legal factors influencing the highest and best use of the subject land are primarily governmental regulations, zoning codes, and environmental restrictions. The subject property is zoned Tourist Commercial District by City of Westport. Key to this designation is that it provides for a multitude of potential uses (residential, hospitality, commercial, service, special purpose, etc.), yet as part of a Master Planned development.

Financially Feasible: The test for financial feasibility involves a comparison of cost associated with land acquisition and construction costs. If the market value of an improved property is greater than the total cost associated with the development, the difference represents entrepreneurial profit or financial feasibility. Due to the site size, shape, wetlands, topography, and dimensional standards for this zoning district, the physical characteristics are conducive for any of the allowed uses noted above (albeit with setbacks from sensitive areas, i.e. wetlands & buffers).

⁶ Appraisal Institute, The Dictionary of Real Estate Appraisal, Third Addition.

As the subject had previously been approved for an 18-hole links style golf course, this is also at first glance given consideration. However, over the past decade the feasibility of developing new golf courses has diminished due to stagnant growth in demand coupled with an oversupply of opportunities both regionally and nationally. The most financially feasible and thus the highest and best use of the subject would be a phased development likely to include an initial phase of hospitality use ranging from rustic individual lodging to luxury hotel given the lack of newer facilities in this community dominated by the tourism and recreational fishing industry. A significant portion of the site could be held for future development and/or wetland mitigation.

If present development would be feasible depends on several factors (supply/demand, permitting, development costs, etc.) that are outside the scope of this appraisal. Such a development would presumably produce the highest net return to the site over the longest period. However, a full feasibility study would be required to analyze the market to determine whether any alternative uses might be in higher demand or be anticipated to perform as well.

SALES COMPARISON APPROACH

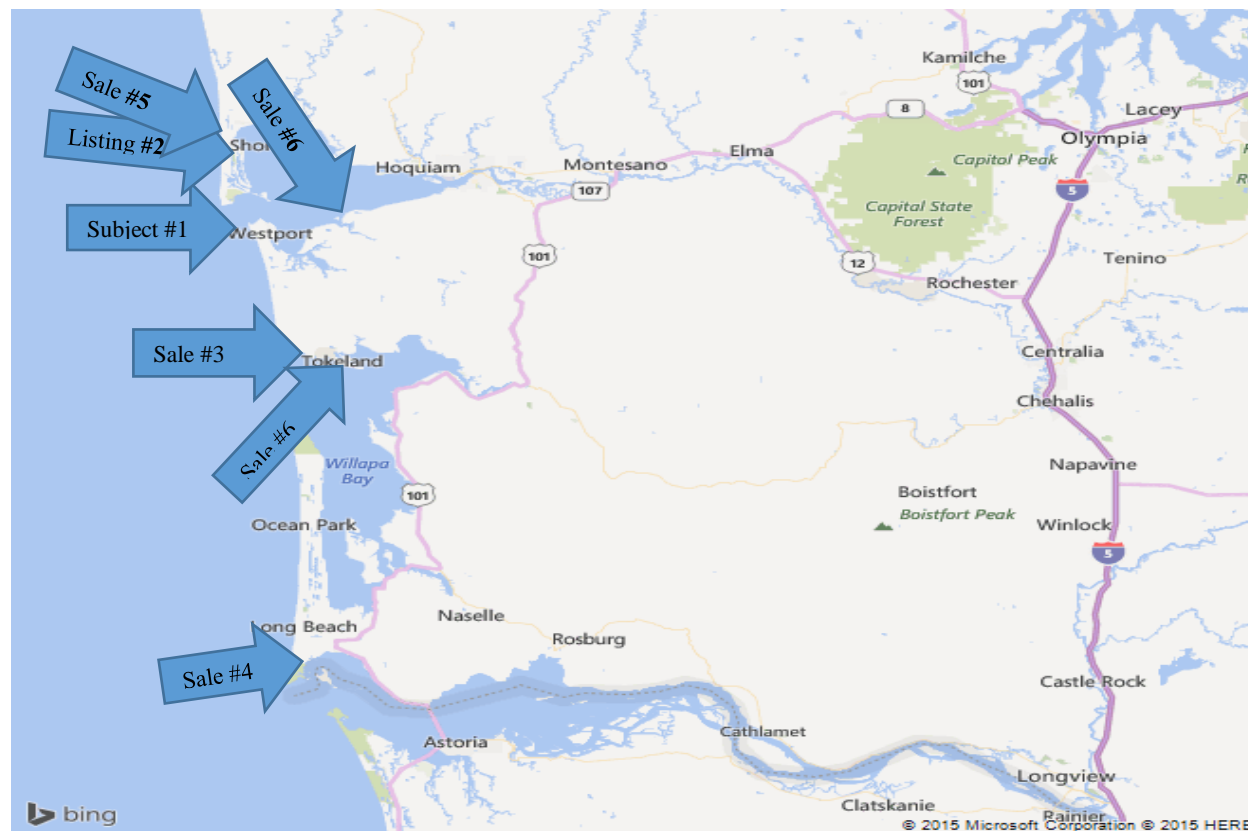
Sales Comparison is an appraisal method based upon the Principle of Substitution the premise that a knowledgeable purchaser would pay no more for a property than the cost of obtaining another equally desirable property of similar functional utility. The appraiser searches the market to ascertain the selling prices of similar property. The appraiser compares the subject property with those that have sold or are offered for sale.

For the overall acquisition tract of 250+- acres, sales research was necessarily expanded from the Westport/Grayland area to other coastal areas of Grays Harbor, Pacific, and Wahkiakum Counties. Also, a review of sales and offerings in coastal areas of Oregon was conducted. Sufficient smaller acreage sales were identified in the Westport/Grayland area for comparison with the subject's 10-acre "exception parcel".

A total of 115 potential sales was investigated. The most applicable in terms of location, legal & physical characteristics, and overall best indicators of value were selected. Five sales and two current listings (including the subject recent market offering) were selected for comparison to the subject's overall acquisition tract. Four sales were considered most applicable for the 10-acre "Exception parcel" following the Large Acreage analysis.

Comparable Sales – Large Acreage

The location of each of the comparable sales and listings is illustrated below, with individual sale write-ups on the following pages:



Large Acreage Listing No. 1 (Subject)

Property Identification	
Address/Location:	W. of State Route 105, between Forrest Street & State Park Access Road, Westport, WA
Parcel #:	616120143001
Abbrev. Legal Desc.:	Portion of Section 1, Township 16N Range, 12 W.M.
Land Characteristics	
Area:	300 Acres
Zoning:	Tourist Commercial District
Improvements:	Largely Unimproved
Utilities:	Public available
Access:	Direct from SR 105 spur & State Park Access Road
Transaction Information	
Date:	Listing – Portion Pending Feasibility
Price:	\$2,400,000
Grantor:	JD Financial Corp.
Grantee:	None – listing only
Terms:	Cash
Deed/Doc:	N/A
Confirmation:	County Records, MLS, Listing Agent (9/2015)
Comments	
<p>Dune Grasses, Evergreens, Ponds, scattered freshwater wetlands throughout 2,220' of Oceanfront (7.4 WFF/acre), a public walkway runs along oceanfront. Initially marketed at \$3.6M in July 2013, price lowered to \$2.4M in April 2014. WA State Parks recently (September 2015) secured an option on a portion encompassing 250 acres.</p>	
Sales Allocation	
<p>Land Price: \$2,400,000 Land Price/Acre: \$8,000 Land Price/WFF: \$1,081</p>	



Source: Grays Harbor County GEODATA

From: <mmerkelbach@greenearthops.com>
Date: October 23, 2021 3:00:45 PM (-07)
To: "AJ Bridges" <AJ@dmkgolfdesign.com>, "David D Dicks (david@plauchecarr.com)" <david@plauchecarr.com>, "Nicholas Schaan (nschaan@dmkgolfdesign.com)" <nschaan@dmkgolfdesign.com>, "Ryann Day" <ryann@westportgolfinks.com>, "David McLay Kidd" <dmk@dmkgolfdesign.com>
Subject: **FW: Deed Restriction GIS Points**
Attachments: creation wetland impact.jpg; creation wetland.dwg;

Folks,

The jpeg shows the "creation" and preservation areas that are mentioned in the deed restriction. This was created by digitizing the map that Parks gave us and using the GPS points to locate the creation areas.

It is kind of a farce that they are getting credit as there is still construction debris littered throughout the site and invasive species are running rampant. Typical, for any type of mitigation, you need to monitor the site to prove that the mitigation actions are being met. DDicks, if they were going to use preservation, don't you think they would needed some type of conservation easement as well? I don't think that was ever done. I think there are plenty of holes to poke with this shoddy agreement.

MARK MERKELBACH, PWS PRINCIPAL
mmerkelbach@greenearthops.com
Office +1 206 323 1865
Cell +1 206 276 9178 USA
3201 1st Ave S., Suite 212, Seattle, WA 98134
www.greenearthops.com

From: Jing Zhou <jzhou@greenearthops.com>
Sent: Friday, October 22, 2021 4:00 PM
To: Mark Merkelbach <mmerkelbach@greenearthops.com>
Subject: RE: Deed Restriction GIS Points

From: Mark Merkelbach <mmerkelbach@greenearthops.com>
Sent: Thursday, October 21, 2021 8:49 PM
To: Jing Zhou <jzhou@greenearthops.com>
Subject: FW: Deed Restriction GIS Points

Here are the GIS point data for those wetland areas. This will help us make sure your digitized locations are accurate.

MARK MERKELBACH, PWS PRINCIPAL
mmerkelbach@greenearthops.com
Office +1 206 323 1865
Cell +1 206 276 9178 USA
3201 1st Ave S., Suite 212, Seattle, WA 98134
www.greenearthops.com

From: Thorpe, Andrea (PARKS) <Andrea.Thorpe@PARKS.WA.GOV>
Sent: Thursday, October 21, 2021 2:54 PM
To: Mark Merkelbach <mmerkelbach@greenearthops.com>
Cc: Moxham, Laura (PARKS) <Laura.Moxham@PARKS.WA.GOV>; Ryann Day <ryann@westportgolfinks.com>
Subject: RE: Deed Restriction GIS Points

Hi Mark,
The layer file for the *approximate* location of the created, protected wetlands as per the deed restriction are located here:
<https://sft.wa.gov/A%20Thorpe/Westport>
login: parksftp
password: NisquallyP4rkFullyFunded@2021!

I also saved a copy of the deed restriction in that folder.

I haven't yet had a chance to discuss the photos with AECOM; I will next time I talk with them.

Andrea

From: Mark Merkelbach <mmerkelbach@greenearthops.com>
Sent: Thursday, October 21, 2021 1:12 PM
To: Thorpe, Andrea (PARKS) <Andrea.Thorpe@PARKS.WA.GOV>
Cc: Moxham, Laura (PARKS) <Laura.Moxham@PARKS.WA.GOV>; Ryann Day <ryann@westportgolflinks.com>
Subject: Deed Restriction GIS Points

External Email

Andrea

Can you forward me the GIS points assuming that Parks has a GIS point file for these protected areas. Can you let me know the status on the wetland photo request from AECOM? Thanks.

MARK MERKELBACH, PWS PRINCIPAL
mmerkelbach@greenearthops.com
Office +1 206 323 1865
Cell +1 206 276 9178 USA
3201 1st Ave S., Suite 212, Seattle, WA 98134
www.greenearthops.com



Westport Light State Park Restoration Feasibility Study

Prepared by
Peter Dunwiddie, Ecological Consultant
Allison Rossman, Resilient Forestry

Washington State Parks and Recreation Commission

November 2021

3. History and existing condition

3.1 Geography and dune geomorphology

Westport Light State Park is located on a peninsula on the west coast of Washington State. The peninsula is surrounded by the Pacific Ocean to the west, Half Moon Bay to the north, and Grays Harbor to the east (Figure 4). The northwesternmost point is Point Chehalis, from which a 1.3-mile jetty extends into the ocean. The small Half Moon Bay is located on the north end of the peninsula east of the jetty. Westport Light State Park occupies the northwestern portion of the peninsula, with the town of Westport to the east. The Westport Lighthouse, built in 1898, is located just southeast of the park on Coast Guard property. A radio range station was constructed in the center of the northern half of the current park in the 1950s and was deconstructed in approximately 2007. An unpaved road runs from the northeastern boundary straight to the radio station.



Figure 4. Westport Light State Park (red outline) and surrounding geography. Map data: Google, Earth Point, USGS.

Westport Light State Park is a sand dune system that has been extensively modified by both human and natural processes. A cross-sectional profile across the park illustrates fundamental aspects of the geomorphology and terrain that strongly influence the dynamics and vegetation on the site (Figure 5). From the ocean, an intertidal beach gradually rises in elevation to 16 feet where it abuts a bluff of sand 6 to 15 feet tall. The bluff is a foredune held in place primarily by European beachgrass (*Ammophila arenaria*), a species that was deliberately introduced to help stabilize the sand dunes that historically were considerably less densely vegetated and subject to movement. Small chunks of sand and roots fall from the foredune onto the beach as it erodes during storms and high tides. The foredune intercepts sand blowing in from the beach (Christy et al. 1998). Atop the foredune is a cement walking path that runs north-south through the park.



Figure 5. Topographic profile of a representative west-east transect across Westport Light State Park. Axes are in feet. Beginning at the ocean, the beach gradually increases in elevation to approximately 16 feet, where the 10-foot high vertical bluff of the stabilized foredune is encountered. Slightly rolling topography atop the foredune includes the cement walking path, east of which the deflation plain begins. Profile created from 2019 Lidar data obtained from WA DNR on 1/28/21.

Behind the stabilized foredune is the deflation plain, an area where wind scours sand until the surface reaches the groundwater (Christy et al. 1998). At Westport, much of the deflation plain has reached this point, where the sand is continuously wet and not further susceptible to wind erosion. These depressions form a series of interdunal wetlands that become inundated annually with freshwater as the water table rises during the winter rainy season. On the west side of the park, the wetlands contain early-seral vegetation communities dominated by herbaceous or shrubby vegetation. The slightly higher areas between the wetlands are occupied by upland vegetation, which is dominated by stands of Scotch broom (*Cytisus scoparius*), shore pine (*Pinus contorta* var. *contorta*), and/or European beachgrass. Eastward, the deflation plain becomes increasingly forested with shore pine, the occasional Sitka spruce (*Picea sitchensis*), and various shrubs, until reaching Forrest Street and the boundary of the park.

3.2 The dynamic coastline

Erosion and accumulation, modified by human activities, are the themes of the dynamic coastline of Westport Light State Park. Historical navigation charts reveal that in the latter half of the 19th century, Point Chehalis was a round headland with shifting sands and ocean depths that made nautical navigation difficult. **During the late 1800s, the shoreline south of the point was rapidly moving westwards, shifting about 1 km between 1860 and 1886 (Figure 6). The Westhaven Jetty was constructed at Point Chehalis from 1898 to 1902 to maintain the depth of**

the channel between Grays Harbor and the Pacific Ocean (Kaminsky et al. 2010). It contributed to the accretion of sand in various places on the peninsula, including where Westport Light State Park lies today (Figure 6). During the decade following completion of the jetty, the shoreline continued to accrete rapidly by another 1 km (see 1898 and 1909 locations in Figure 6), but by 1926 it had retreated eastward again to approximately where it stands today.

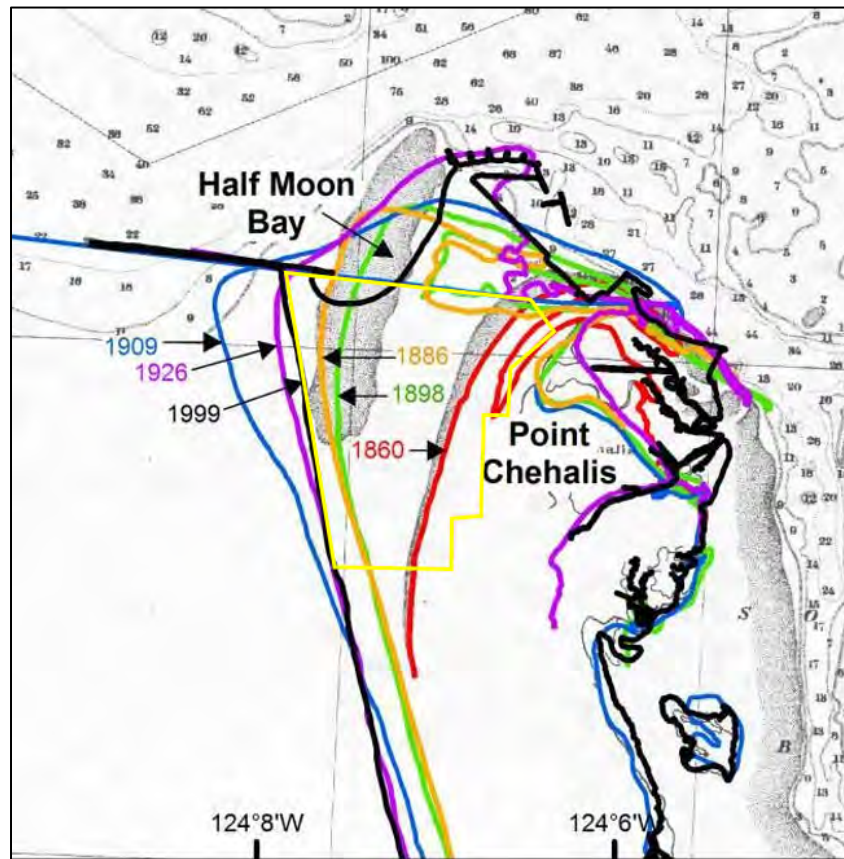


Figure 6. Coastline of the Point Chehalis peninsula in the late 19th and 20th centuries with the approximate boundary of Westport State Park shown in yellow. (From Kaminsky et al. 2010.)

Extensive efforts have been made over the last 150 years to stabilize the sand along the coast. European beachgrass was first introduced along the west coast for this purpose in early 1900s (Seabloom and Weidemann 1994). Subsequently, American beachgrass (*Ammophila breviligulata*) was also introduced (ca. 1935) and has become the dominant beachgrass on foredunes from the Columbia River north to Westport (Seabloom and Wiedemann 1994). Scotch broom and shore pine have also been planted extensively in some areas, including at Westport (Miles Wenzel *pers. comm.* 2-23-21), to further help stabilize dunes and inhibit their movement into developed areas along the coast. While these plantings are unlikely to have significantly affected shoreline locations, they have undoubtedly altered the patterns of sand deposition and erosion, the topography of coastal uplands and swales, as well as competing with the native species that previously occupied these habitats. We further discuss the impacts of these species in “Invasive Plants” below.

Human development and erosion have a shared history on the peninsula. On the north end, docks east of the jetty were installed by 1948, with a marina dredged and installed by 1966. Half Moon Bay began to erode during this time, and experienced considerable erosion between 1966 and 1970. In 1993, this erosion caused the land connection between the peninsula and the jetty to breach. The Army Corps of Engineers repaired the breach by trucking in sand and have continued to conduct emergency repairs regularly (Miles Wenzel *pers. comm.* 2-23-21).

Shoreline locations documented from aerial imagery (Earth Explorer and Google Earth) since the 1970s confirm that the shoreline along the entire western boundary of the park has continued to erode up to today (Figure 7). Retreat was particularly rapid towards the northern end between 1974 and 1985 (ca. 8m/yr), but was relatively stable at the southern park boundary. However, during the period from 1985-2016 the entire shoreline retreated about 2.5m/yr.



Figure 7. Shoreline retreat from 1974-2016 along the western boundary of Westport Light State Park. Red=1974, White=1985, Yellow=2016. Underlying imagery is from 1974 (USGS Earth Explorer).

3.3 Previous golf course development

In 2006, developer Mox Chehalis, LLC began constructing a golf course on the northern half of what is now Westport Light State Park, prior to the 2015 purchase of the land by Washington State Parks. In a short period of time, extensive impacts were made to the site. The developer cut and chipped shore pine, ground stumps, constructed roads and placed fill in and adjacent to wetlands, excavated and graded, scoured surfaces, drove wheeled vehicles over extensive areas, and dug irrigation ponds (Figure 8; USACE 2008). Today, some poles marking the greens and silt fencing remain in place. The two ponds are still intact. Areas that were cleared of trees or filled with excavated sand are dominated by Scotch broom and European beachgrass.

When it was proposed, the development was highly controversial among Grays Harbor conservation groups, such as Friends of Grays Harbor (FOGH). As described in their 63-page objection to the public notice issued by the U.S. Army Corps of Engineers, FOGH's concerns included inadequate wetland protection, inaccuracy in the wetland delineation, impacts to recreation, the effects of chemical runoff on water quality in the wetlands and in Grays Harbor, and many others.

The developer proceeded to begin construction without the necessary permits from the U.S. Army Corps of Engineers (USACE 2008). Between 2006 and 2010, letters were sent and investigations were undertaken that revealed the extent of the violations (Figure 9). Documents obtained by Washington State Parks via a FOIA request provide additional information. A restoration plan to remediate the unauthorized wetland filling and excavation was created in 2008. In 2010, the violation was resolved with a deed restriction on large, undisturbed areas of the site for "wetland mitigation and forest habitat protection" (USACE 2010). The golf course was not completed, and there is no evidence that any planting or other vegetation restoration per the restoration plan was carried out. While flora in wetland areas today are largely comprised of native species, most upland areas are dominated by non-native Scotch broom and European beachgrass.

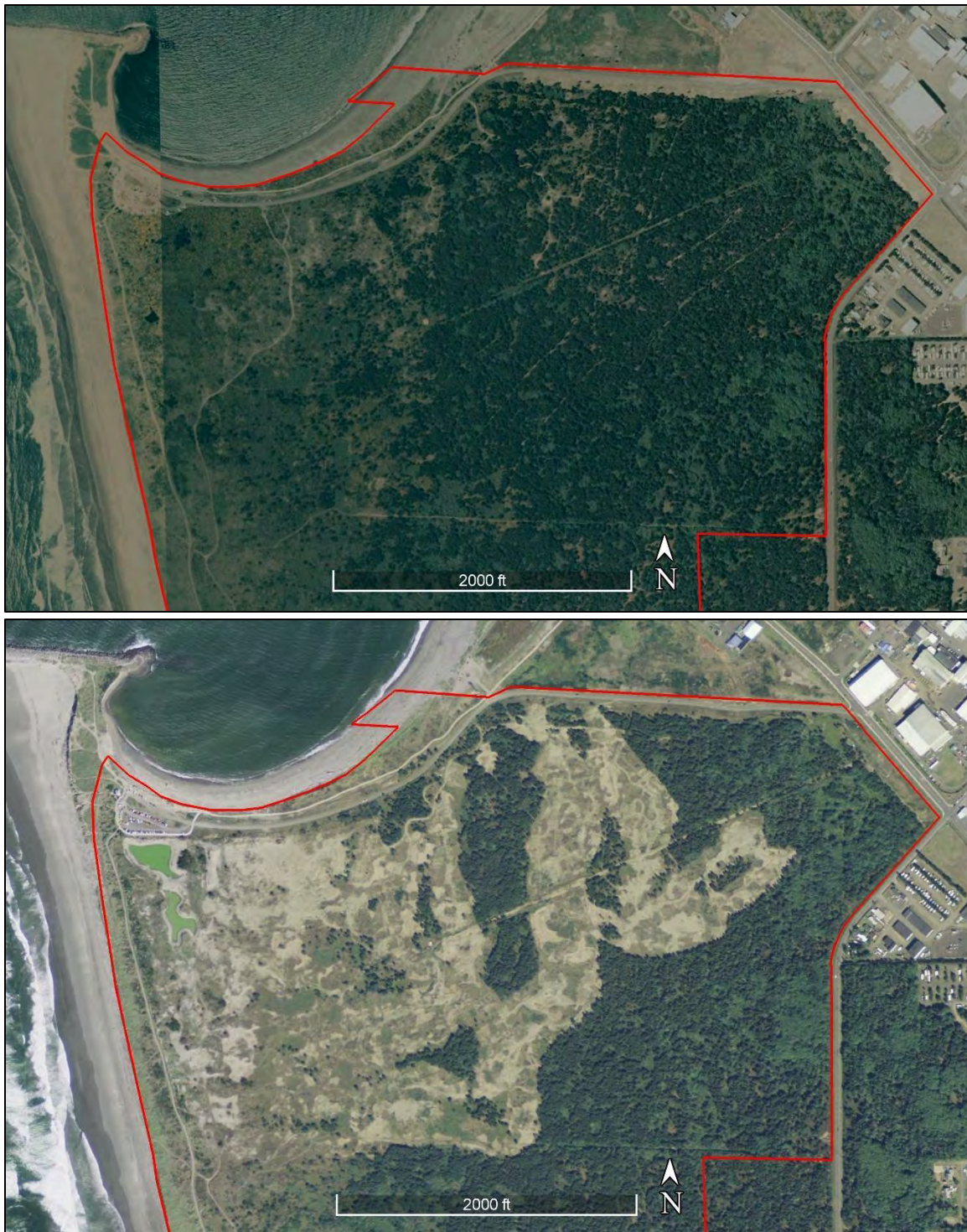


Figure 8. Aerial imagery from before (2006; top) and after (2009; lower) previous golf course development. Vegetation removal, earth moving, surface scouring, and pond installation were among the impacts. Red outline is today's state park boundary. Map data: Google, USGS, USDA Farm Service Agency.



Figure 9. Photo from 2008 investigation report by the U.S. Army Corps of Engineers documenting impacts to the site by the golf course development, including wheel tracks, wetland fill, extensive scouring and sand moving, and tree cutting (USACE 2008).

3.4 Wetlands and hydrology

Freshwater wetlands are ubiquitous across the deflation plain at Westport. They have received much attention over the years because of local and federal regulations that affect potential development. Multiple wetland delineations have occurred in the past, and another was accomplished this year by AECOM (2021a). Delineation is particularly challenging because the sandy soil poorly exhibits hydric indicators, such as colored reduction-oxidation reactions, that are typically used to detect the boundaries of wetlands.

Aboveground hydrologic patterns are characterized by extensive interdunal wetlands that are inundated seasonally. Each winter, many areas of the deflation plain become covered with water up to 3 feet or more deep (Figure 10). The extensive inundation evident in this 1963 image includes areas that are upland dunes today. This likely resulted from the aforementioned erosion that occurred between 1974 and 2016, with corresponding eastward movement of the foredune and associated infilling of sand into portions of the deflation plain. This image, together with the terrain profile depicted in Figure 5, clearly show the surprisingly complex interspersed nature of wetlands and uplands across this relatively flat landscape. Elevational differences of just a few inches can result in the ground surface intersecting the water table during portions of the year, allowing wetland vegetation to dominate. Collectively, these figures underscore the

extremely dynamic and rapidly changing nature of the shoreline, terrain, and vegetation that has characterized the coastal environment at Westport for centuries.



Figure 10. Aerial photo from November 1963, looking west toward the Pacific Ocean and the Westport Jetty, showing winter inundation of the deflation plain in the northern half of Westport Light State Park. The white structure in the center is a radio range station constructed in the 1950s and deconstructed in approximately 2007. Photo from the Jones Photo Historical Collection, Anderson & Middleton Company.

This dynamic nature, as well as the challenges posed by their delineation, can be highlighted by the differences in wetland mappings by different institutions over time. The National Wetlands Inventory (NWI) depicts wetlands on only 30% of the property, primarily in the southern half of the park, while the City of Westport maps roughly twice this in their local wetland inventory (Appendix A-4 of AECOM 2021a). Most recently, AECOM delineated nearly three-quarters of the park as wetland.

AECOM mapped 337 acres of the park as a mosaic of wetlands and uplands (with 68% wetlands), with adjacent contiguous wetlands of 28 acres of coastal willow swamp and 21 acres of red alder/slough sedge wetland (Figure 11; AECOM 2021a). AECOM mapped another 28 individual small wetlands, each up to 0.43 acre, in the northwest section of the park. The two constructed ponds in the northwest corner, created during the previous golf course attempt, are non-jurisdictional wetlands (i.e., not subject to federal regulations). Together, the mosaic and individual wetlands cover 70% of the park. This suite of wetlands is the second largest expanse of interdunal wetlands in Washington (AECOM 2021a).

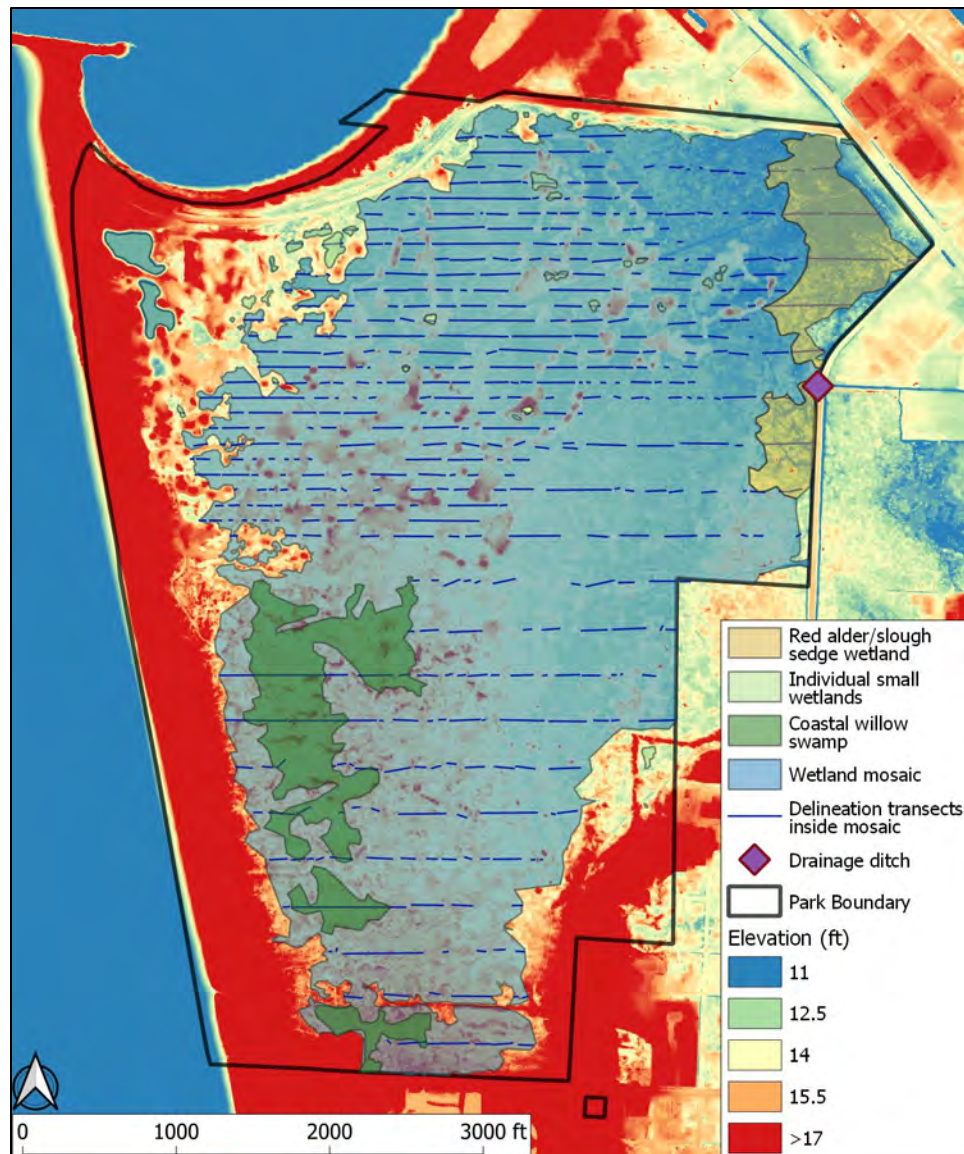


Figure 11. Wetlands delineated by AECOM in 2021 and the drainage ditch on the east side of the property. The wetland mosaic includes 68% wetlands and 32% uplands; the solid portions of the delineation transects show where wetland characteristics were detected. The mosaic, adjacent wetlands, and individual wetlands cover 70% of the park. Wetlands largely correspond with topography evident on underlying Lidar image. Wetland data from Washington State Park and Recreation Commission and Lidar data from Washington Dept. of Natural Resources.

All wetlands appear to be exclusively fresh water and fed primarily by precipitation that accumulates atop the lens of salt water that extends inland underground from the ocean. AECOM (2021a) reported that the primary water inputs to the wetlands are a seasonally high water table, precipitation, and surface runoff. Inundation tends to occur from November through April or longer each year; indeed, aerial imagery shows that the wetlands tend to dry up entirely in most years by mid-summer. The highly-permeable sandy soils result in a quick descent of the water table after precipitation reduces in the late spring.

In their report, AECOM (2021a, c) provided a summary of the functions and conditions of the wetlands and their buffers. They concluded that those in the southern half of the park are in good condition, while those that are disturbed by the previous golf course development are in poor condition. This contrasts somewhat with the vegetation community surveys (see “Vegetation communities”), in which surveyors concluded that many of the previously-disturbed wetlands are in good condition. The wetland report also listed a number of functions provided by the large wetland mosaic, including nutrient removal, high habitat suitability, and native plant richness, and rated its overall habitat function as high due to the diversity of plant structures and species, multiple water regimes, and abundance of dead wood.

No streams flow through the park. A drainage ditch connected to Grays Harbor runs under N. Wilson Ave and intersects the park on the eastern boundary (Figure 11). It appears to direct several natural channels that flow out of the red alder/slough sedge wetland under the road and into Grays Harbor. The surrounding wetland vegetation was mapped within the wetland mosaic.

3.5 Invasive plants

Current patterns of vegetation at Westport are the result of the geomorphic, hydrologic, and disturbance history described above, as well as vegetation processes such as the expansion of beachgrass (*Ammophila* sp.) and shore pine (*Pinus contorta* var. *contorta*) and plant community succession. All plant communities are relatively young, and some are characteristically early-seral – such as the shallow wetlands dominated by herbaceous plants and low shrubs.

The following sections describe the recent history and condition of the vegetation, focusing on features important for restoration considerations.

3.5.1 Beachgrass

Prior to the introduction of beachgrass, the Westport site would likely have consisted largely of hummocky open sand extending inland from the beach. American dunegrass (*Leymus mollis*) would have contributed to stabilizing low foredunes, but extensive areas would have been sparsely vegetated. As a result, this interdunal landscape would have been even more dynamic than it is today, with blowing sand periodically burying vegetation and scouring new swales.

Sand-stabilizing beachgrass was introduced to the Pacific Northwest coast in the 19th and 20th centuries, including at Westport. European beachgrass (*Ammophila arenaria*) was planted widely along the coast in the early 1900s. American beachgrass (*A. breviligulata*), native to the East Coast and Great Lakes of the U.S., was also planted along the coast, though much less extensively: near the mouth of the Columbia River in Oregon and on the south end of Long Beach Peninsula in Washington (Seabloom and Wiedemann 1994). It has now spread all along the southern shoreline of Washington, from the Columbia River to Westport. Both species tend to outcompete the native dunegrass.



Westport Light State Park

Washington State Parks & Recreation Commission
Westport Golf Links, Inc.

Integrated Opportunities & Constraints Analysis

September 2022

HISTORIC SETTING



■ Grays Harbor Lighthouse, Westport, 1910 Photo by Albert Henry Barnes, Courtesy UW Special Collections (Neg. No. Barnes 1771)

Westport is most commonly referred to as Chehalis Point in the context of its historical setting. This name derives from the Native American people of the area who called it "ts-a-lis" or "place of sand." Early explorers pronounced the word "ts-a-lis" Chehalis and gave this name to the river and the people living upriver, who later became the Chehalis Tribal people or "People of the Sands." By the late 1870s, the area was determined to have recreational potential. Because another town to the east claimed the name "Chehalis," the town was officially named "Westport" in 1890 and incorporated in 1914.



■ Donel 184 Image, 1930, Courtesy of Westport Maritime Museum

The lighthouse (Life-Saving Station) was constructed in 1897 with light and fog signals. The U.S. Coast Guard eventually took it over. Visibility of the Grays Harbor lighthouse extended for 23 miles and, along with the newly constructed jetties, was critical in developing the Washington coastal economy. The lighthouse and the jetties created a safer entrance to Grays Harbor from the Pacific Ocean, and with that, local fishermen were able to thrive.



■ Lighthouse to Jetty postcard 1975

Initially, the lighthouse buildings sat along the beach. The sand was unconsolidated, and non-native beach grasses had yet to become established. Sitka spruce and Douglas firs became established at higher elevations.

Construction of the south jetty began in 1898, which resulted in a westward expansion of the existing shoreline through natural sand accretion. European beachgrass (a non-native invasive species) was initially planted in the early 1900s with the intention of stabilizing the coast. Shore pine (a native species in coastal Washington plant communities) was planted in high densities in an attempt to stabilize dunes and inhibit the movement of this sand into developed areas. These plantings have altered the patterns of sand movement and the resulting topography of interdunal uplands and swales on the site. Invasive and planted species have out-competed the native dune open sand species that previously occupied these habitats.

Between 2000 and 2008, developers proposed a destination resort, The Links at Half Moon Bay, on private property that is now the north half of WLSP (approximately 350 acres). The destination resort was to include a golf course, a luxury hotel (200 rooms), a conference center within the footprint of the luxury hotel, commercial development, and golf course infrastructure.

Around 2008, the prospective developer cut and chipped shore pine and ground stumps, placed fill in and adjacent to wetlands, excavated and regraded existing wetlands, scraped surfaces, drove wheeled vehicles over extensive areas, and dug and lined two irrigation ponds in the northern portion of what is now WLSP. Ultimately, the development failed, and much of the



Figure 2. Previous Golf Course Development Scheme

site was abandoned in a partially built condition. This disturbance enabled invasive Scotch broom and European beachgrass to dominate upland areas that were cleared of trees or filled with excavated sand. The developers did not complete the golf course or the broader development, and there is no evidence of native plantings or other vegetation restoration that were part of that project's restoration plan. Even today, the landscape scars of this former project, along with construction debris, are clearly visible in the north half of the park. It should be emphasized that the area where the former development took place was private property at that time, not owned by Washington State Parks. After The Links at Half Moon Bay project failed, State Parks was able to purchase the property and expand the footprint of the original Westport Light State Park.



Figure 3. Overview of Westport

EXISTING CONDITIONS OPPORTUNITIES | CONSTRAINTS

This section summarizes a series of environmental baseline studies commissioned by Parks and conducted predominantly by AECOM to confirm baseline conditions of physical and ecological elements of the site. In addition to describing environmental baseline conditions, the studies considered initial conceptual plans to enhance and expand recreational opportunities on the WLSP site, including a Scottish links-style golf course, in order to evaluate how these proposed land use changes could impact existing environmental conditions within the park.

SUMMARY OF THE EXISTING ENVIRONMENTAL CONDITIONS

As described above, WLSP is a sand dune system that has been extensively modified by both human and natural processes. The western boundary formed by a 20- to 30-ft high foredune slopes downward (to the east) to a deflation plain that characterizes the site at elevations ranging from approximately +10 to +18 feet above mean sea level. A mosaic of wetlands and uplands have formed on the deflation plain as a result of wind erosion on the leeward side of the foredune and seasonal inundation by freshwater during the rainy season (November through April/May) as the groundwater table rises.

A majority of the site contains a wetland mosaic (337 acres). A “mosaic” refers to a landscape where wetland and upland components are too closely associated to be easily delineated. These areas often have complex microtopography, with repeated small changes in elevation occurring over short distances. On the WLSP site, this mosaic is 68 percent wetland which breaks down to approximately 229 acres of wetland and 108 acres of upland. Other wetland communities on the site include coastal willow swamp (28 acres) and red alder/slough sedge wetland (21 acres). Approximately 40% (9.3 acres) of the adjacent 23-acre City of Westport parcel (if acquired for development of golf course infrastructure elements) has also been delineated as wetland. Collectively, these wetlands are rated as Category I interdunal wetlands. Low elevation freshwater wetlands in good to excellent condition in the Pacific Coast ecoregion have a Priority 1 listing for protection under the Washington Natural Heritage Program (WDNR 2022).

The condition of wetlands and buffers (upland areas that surround a wetland and reduce adverse impacts on the wetland) differs between the north and south portions of the site. In the south, wetland communities are relatively intact and in good condition. In the north, large portions were cleared and graded in approximately 2008 to initiate development of a former golf course proposal by others (The Links at Half Moon Bay). This activity left upland areas vulnerable to colonization by invasive species, including noxious weeds. A majority of the site contains the Category 1 mosaic wetland, which extends to the northern park boundary. There is also the occurrence of small pocket wetlands that were individually delineated in the north end. These wetlands were rated as Category III and IV interdunal wetlands.

No fish or wildlife species listed as threatened or endangered under the Federal Endangered Species Act (ESA), nor critical habitat for these species, have been identified on the site, and no prehistoric cultural resources have been recorded within WLSP. The park site is not mapped within a FEMA floodplain; however, the western boundary is exposed to wave erosion that has resulted in a documented history of chronic, long-term shoreline retreat and episodic dune erosion during winter storms. Sea level rise, associated with climate change, may increase the rate of coastal retreat over time.

The most significant planning factors for the development of WLSP are 1) wetland impact avoidance, minimization, mitigation, and restoration; 2) the potential for future sea level rise to increase the rate of coastal retreat; and 3) manual/mechanical control methods needed to remove invasive species and maintain some level of control over these species. Creating sustainable public use areas in the park landscape will require comprehensively addressing these factors and tailoring the development to respond to environmental conditions on the landscape.

TOPOGRAPHY

The WLSP sand dune system has been extensively modified by both human and natural processes. The primary dune east of the beach (foredune) is approximately 20 to 30 feet high in the study area (See Figure 4. Cross Section Profile on page 12.) The average elevation through the site ranges from 12 to 16 feet, with the lowest elevation in the northeast corner. The historic foredune, before construction of the South Jetty, is in the southwest corner of the site and extends off-site to the northeast. This area is the highest elevation within the City of Westport.

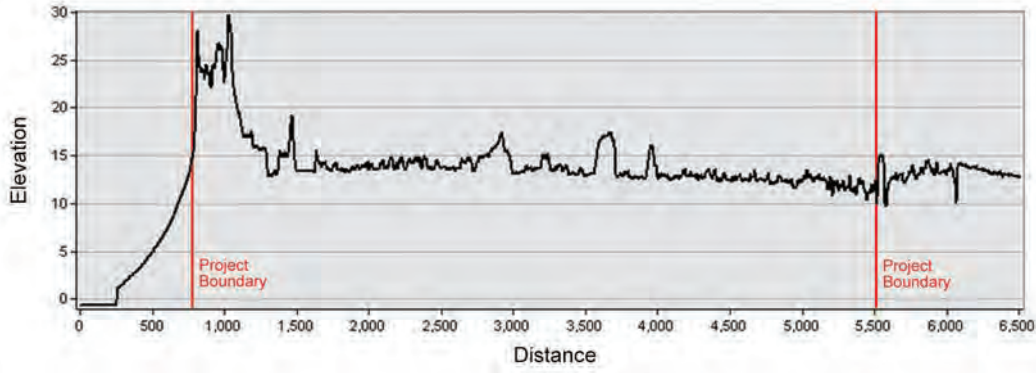


Figure 4. Cross Section Profile

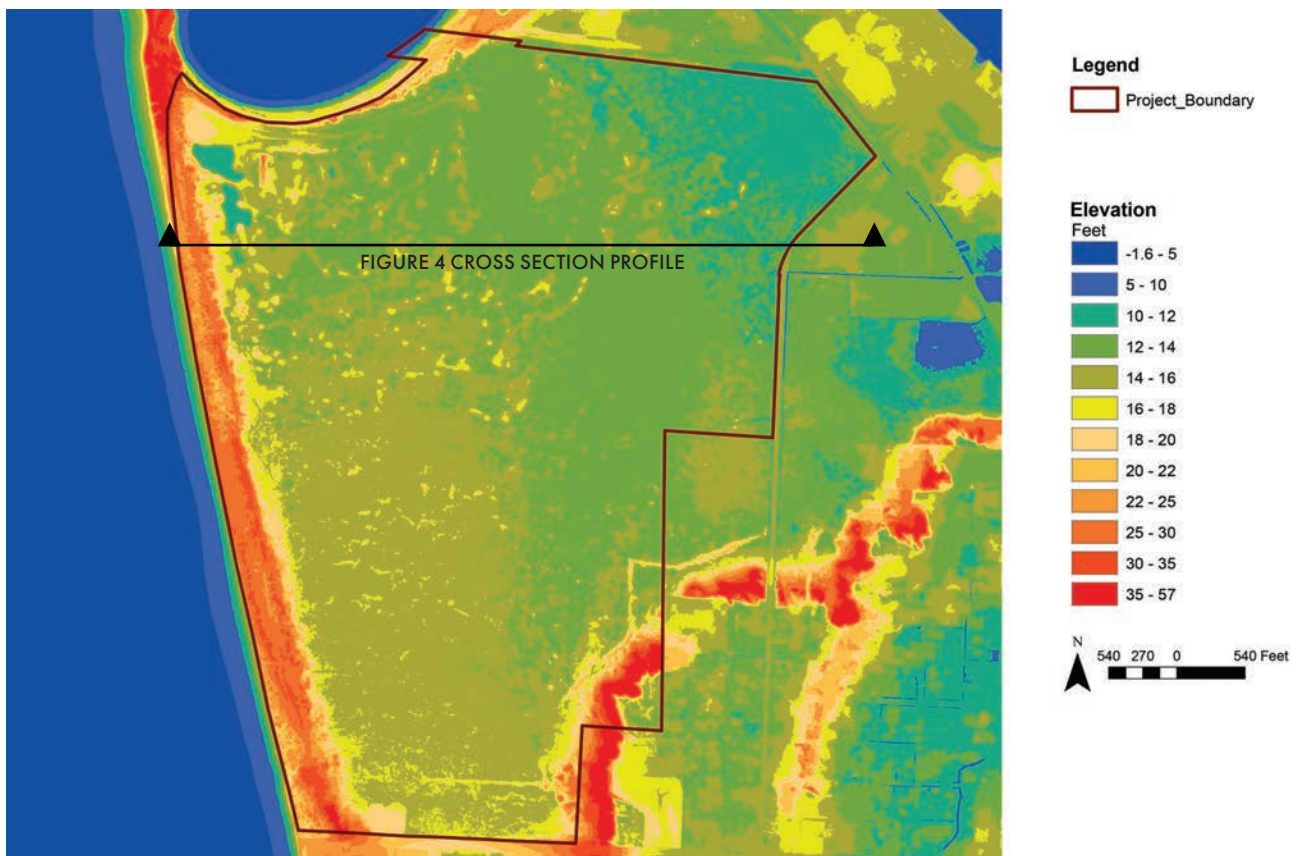


Figure 5. Topographic Map

A cross-sectional profile across the park illustrates fundamental aspects of the geomorphology and terrain that strongly influence the dynamics and vegetation on the site (Figure 5. Topographic Map).

CONSTRAINTS

- Protect the foredune (e.g., the sand ridge that parallels the beach), as it provides critical protection from wave action.
- Avoid (to the maximum extent possible) elevations below 14 feet, as these are likely to contain wetland plant communities.

OPPORTUNITIES

- Plan golf program elements at elevations above 14 feet as these tend to support upland plant communities.
- Utilize 2022 Natural Heritage Program data to help inform concept planning, management, and restoration activities.

WETLANDS

REPORTS

- AECOM. 2021. *Final Wetland Assessment Report, Westport Light State Park*. Prepared for Washington State Parks and Recreation Commission. (August 6, 2021)
- AECOM. 2022. *Wetland Assessment Report, City of Westport Parcel No. 616121212060*. Prepared for Washington State Parks and Recreation Commission. (March 11, 2022)
- AECOM. 2022. *Wetland Discipline Report, Westport Golf Links Westport Light State Park*. Prepared for Washington State Parks and Recreation Commission. (April 5, 2022)

SUMMARY

AECOM assessed wetlands within the park property (603 acres) and adjacent City-owned property (23 acres).

WESTPORT LIGHT STATE PARK SUMMARY

Much of WLSP is best characterized as a mosaic of wetlands and uplands. The wetland mosaic is 337 acres. "Wetland mosaic" means an area with a concentration of multiple small wetlands, in which each patch of wetland is less than one acre; on average, patches are less than 100 feet from each other; and areas delineated as vegetated wetland are more than 50 percent of the total area of the entire mosaic, including uplands and open water¹.

Overall, 68 percent of the mosaic is wetland. Adjacent to the mosaic area, an additional 28 acres is classified as coastal willow swamp, and 21 acres are classified as red alder/slough sedge wetland. The entire 386 acres was considered as one unit (Wetland A) for purposes of wetland rating. This area rates as a Category I interdunal wetland. It has palustrine forested, palustrine scrub-shrub, and palustrine emergent vegetation classes. These wetlands provide high habitat suitability for a range of species. The wetlands and buffers are generally in good condition in the south half of the WLSP. Large portions of the north half of the WLSP were cleared and graded approximately 15 years ago (before this area was part of the park) for a proposed development. Disturbed wetland buffers have been invaded by Scotch Broom, and some of the wetlands continue to show evidence of past clearing and grading.

¹ Source - 15.34 Westport Critical Area Code

In addition to the wetland mosaic area, another 28 interdunal wetlands were delineated as individual wetlands. These are concentrated in the northwest corner of the study area and within mapped upland “peninsulas” that extend into the mosaic area. These wetlands range in size from 0.01 to 0.43 acre. Twenty-one of the wetlands are less than 0.1 acre and rate as interdunal Category IV wetlands. Seven are larger than 0.1 acre and rate as interdunal Category III wetlands. Vegetation includes palustrine forested, palustrine scrub-shrub, and palustrine emergent classes. The smaller wetlands provide few habitat functions. Some of the larger individual wetlands have more habitat features and provide higher levels of habitat suitability. The buffers for most of these wetlands are disturbed and provide few screening or habitat functions.

No streams occur within the WLSP. A roadside ditch along the east edge of Wetland A had wetland characteristics and was included in the delineation of that wetland.

Two constructed ponds occur in the northwest corner of WLSP. They are lined and were constructed prior to 2010 to support a former golf course project (The Links at Half Moon Bay). These are mostly open water with narrow vegetated borders.

The wetlands within the project site occur due to wind erosion on the leeward side of the foredune in the area known as the deflation plain¹. Much of the deflation plain has reached this point at Westport where the sand is continuously wet and is not susceptible to further wind erosion. These depressions form a series of interdunal wetlands that become inundated annually with freshwater as the water table rises during the winter rainy season. Erosion generally occurs at the elevation of the seasonal high water table, as moist sands are less susceptible to erosion, and vegetation is able to colonize these areas. Wetlands also occur in swales between dune ridges, which are remnants of other dune forms, such as successive foredunes².

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- 1 a NWI Class based on vegetation (Cowardin et al. 1979). All wetland systems are palustrine.
- b City of Westport classifies wetlands based on the Washington State Wetland Rating system (Hruby 2014).
- c An asterisk indicates the wetland extends outside of the study area. Only the wetland area occurring within the study area is given. Total area of Wetland A (mosaic) is approximately 395 acres.
- d City of Westport wetland buffer widths are based on wetland category and habitat score, with and without implementation of measures to minimize wetland impacts (Tables 15.34-2 and 15.34-3) (City of Westport 2022).
- 2 Wiedemann, Alfred M. 1984. *The Ecology of Pacific Northwest Coastal Sand Dunes: A Community Profile*. Washington D.C.: US Fish and Wildlife Service FWS/OBS-84/04.

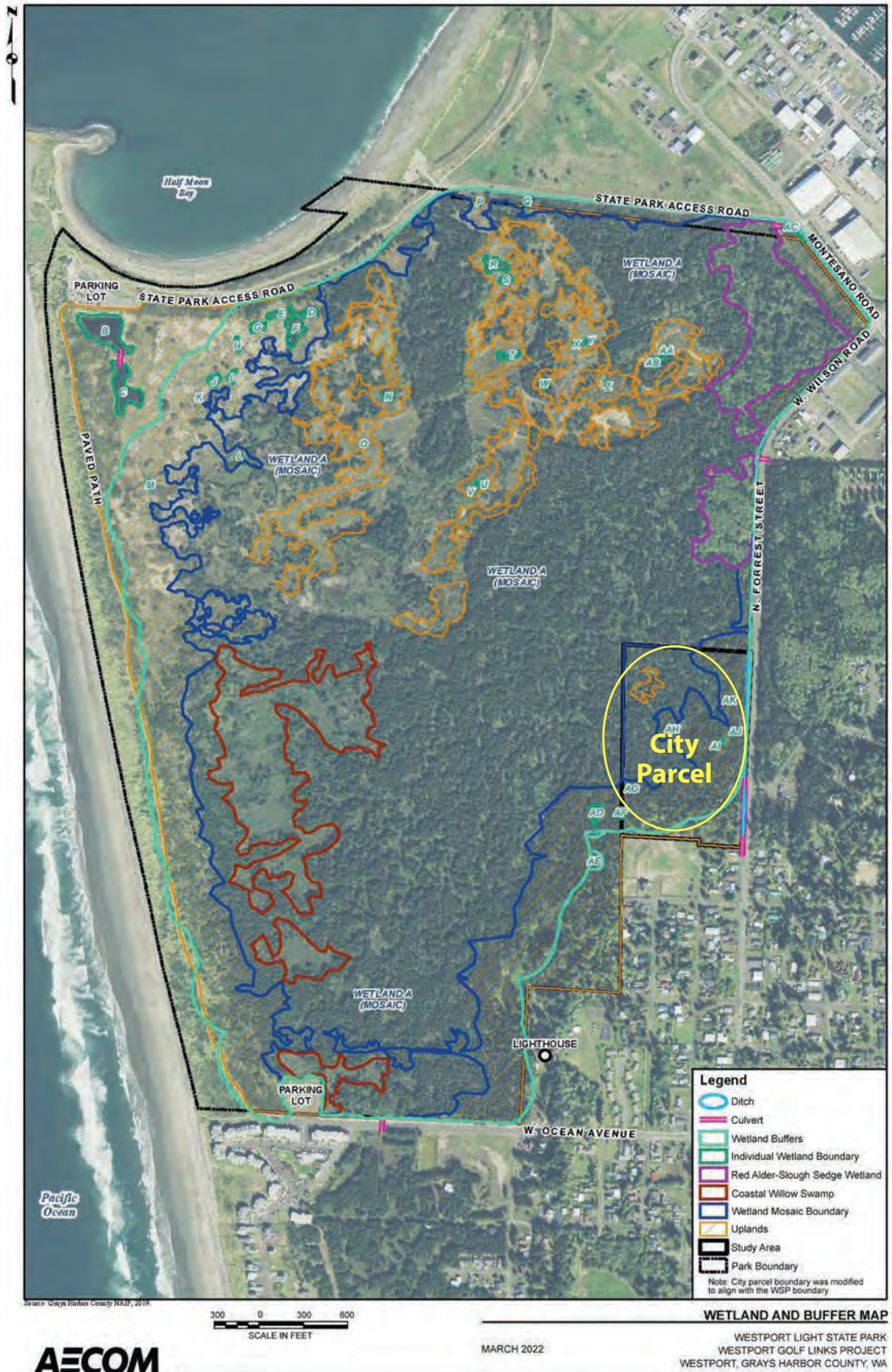


Figure 6. Wetland and Buffer Map

CITY OF WESTPORT PARCEL NO. 616121212060

An adjacent city parcel east of the park is being considered for the location of golf course infrastructure. The wetland assessment prepared by AECOM included an evaluation of the city parcel. It determined that the wetlands on this parcel are a continuation of Wetland A and upland mosaics found within WLSP. The on-site portion of the wetland mosaic (Wetland A) is 9.3 acres. Overall, 59 percent of the mosaic within the city parcel is a wetland. Adding this component to the WLSP Wetland A mosaic leads to an approximate total wetland area of 395 acres within WLSP and on the city parcel, considered one unit for wetland rating purposes in the AECOM report.

“Wetland mosaic” means an area with a concentration of multiple small wetlands, in which each patch of wetland is less than one acre; on average, patches are less than 100 feet from each other; and areas delineated as vegetated wetland are more than 50 percent of the total area of the entire mosaic, including uplands and open water.
15.34 Westport Critical Area Code

This area rates as a Category I interdunal wetland. It has palustrine forested, palustrine scrub-shrub, and palustrine emergent vegetation classes. These wetlands provide high habitat suitability for a range of species. Wetlands and buffers on the city-owned parcel are generally in good condition.

In addition to the wetland mosaic area, another six small interdunal wetlands were delineated as individual wetlands on the city parcel. These wetlands range from 0.01 to 0.06 acre in size and rate as interdunal Category IV wetlands. Vegetation includes palustrine forested and scrub-shrub classes. These very small wetlands provide few habitat functions.

No streams occur within the parcel. A ditch constructed through uplands is present along N. Forrest Street. The ditch is regularly maintained (e.g., cleaned out and mowed).

CONSTRAINTS

- Federal, state, and local wetland regulations require that a proposed project avoid, minimize, and restore in-place wetland impacts to the greatest degree practicable. Only unavoidable wetland impacts may be offset through compensatory mitigation.
- Mapped wetlands cover 70% of the park. Including potential buffers around wetlands, the remaining areas available for golf course development would be highly constrained. It would be necessary to transform a large portion of upland areas into fairways and greens, leaving few upland areas available for restoration opportunities.
- Golf course impacts to most of the large contiguous coastal willow swamps in the southern half of the park should be avoided. This habitat and adjacent upland areas were identified as particularly valuable for riparian-associated birds in the park.

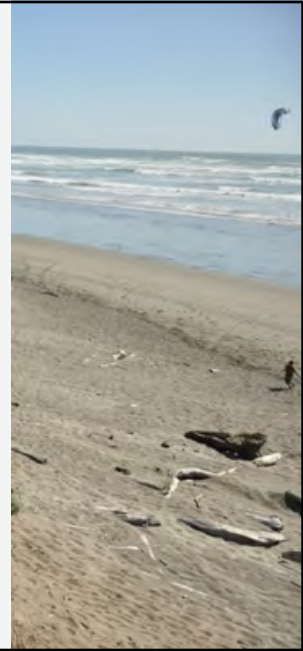
Agency	Potentially Applicable Policy or Regulation	Trigger(s)	Potential Project Triggers	Policy Compliance or Permit Required
WSPRC	Climate Change Adaptation Resolution	State Parks development proposal that may be affected by climate change and sea level rise (SLR)	- Golf course infrastructure and regional recreational elements in WLSP locations that may be affected by SLR in the future	SEPA review
WSPRC	Cultural Resource Management Policy 12-98-1	Presence of historic and/or cultural resources on a State Parks site	- No prehistoric cultural resources were identified in a cultural resource survey conducted for the WLSP site. - No change to historic lighthouse structure.	Policy compliance to be determined by WSPRC.
WSPRC	Critical Areas Policy 73-03-1	Wetlands, aquifer recharge areas, fish and wildlife habitat conservation areas, frequently flooded areas, or geologically hazardous areas within the area of effect of a State Park development proposal	- Golf course infrastructure and recreational development (e.g., trails) that will result in wetland fill - Habitat alteration	Policy compliance to be determined by WSPRC
WSPRC	Natural Resources Management Policy 73-04-01	Human impacts on native plant and animal populations, the communities and ecosystems they comprise, and the processes that sustain them	- Clearing, grading, and wetland fill - Proposal to avoid area of known lichenized fungi occurrence	Policy compliance to be determined by WSPRC
WSPRC	South Beach Area Classification and Management Planning (CAMP)	Level of intensity and types of recreational uses appropriate in different areas of Twin Harbors, Grayland Beach, Westport Light, Bottle Beach, Westhaven Parks, and the Seashore Conservation Area	- Golf course development - Recreational project elements - Foredune improved viewpoints	WSPRC decision re: proposed approaches for addressing the principle natural and recreational resource issues in WLSP; land classification change from Resource Recreation to Recreation Area
WSPRC	Seashore Conservation Area RCW 79A.05.600 – 695	Preservation of seashore areas on State Parks land for recreational use and public enjoyment between the ordinary high tide line and the line of extreme low tide	- Beach access stairs or ramp	Policy compliance to be determined by WSPRC
WSPRC	MOA	Private investment in State Parks amenities to supplement State Parks financial capacity to develop public amenities	Golf course development on State Parks (WLSP) land	Concessionaire Agreement



WASHINGTON STATE PARKS
AND RECREATION
COMMISSION

Westport Light State
Park
Westport Golf Links

Leadership Update



Westport Golf Course Proposal

Project	Scope	Schedule	Budget	Upcoming Milestone
Westport Light State Park				Past due
Summary	<p>The project is an opportunity to create a public-private partnership with minimal investment to conduct a proposal review to develop a Scottish links-style artisanal golf course, associated lodge, and facilities at Westport Light State Park.</p> <p>The project will conduct the environmental analysis and studies to better understand the natural conditions and habitat at Westport Light State Park; conduct site opportunities and constraints analysis, master planning for Westport Light State Park, and will consider a long-term concession agreement with Westport Golf, Inc. to develop, maintain and operate a golf course within the park.</p>			



Just a couple of minutes to give a brief intro, orientation and high-level overview of where we are so that everyone better understands this major planning effort.

A few years ago, State Parks was approached by Ryann Day in January of 2019 regarding an idea to construct a Scottish Links Style golf course with lodging and associated facilities at Westport Light State Park. Since then we have worked in partnership to explore the feasibility of this idea.

Regional Location



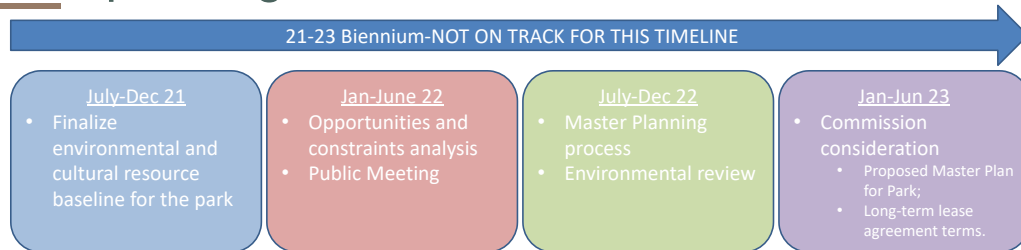
So let's orient you first. Westport Light State Park is located within the City limits of Westport in Grays Harbor County. Westport is 21 miles west of Aberdeen. We also have several other state parks that are located closely south of Westport Light including Twin Harbors and Grayland Beach state parks.

Westport Light Orientation



The park itself is just over 600 acres that is mostly undeveloped. Just a few years ago, this location used to be two different parks, Westhaven to the north and Westport Light State Park on the south end. In 2015 State Parks was able to connect the two parks by acquiring 300 acres using RCO funds, which we now call Westport Light State Park. There are also two parking lots with comfort stations on both ends of the park connected by a 1.3 mile ada compliant dune trail that continues into the City of Westport, shown in bottom right.

Westport Light SP schedule overview



5

After conducting extensive outreach in 2019 with Stakeholders, tribes, and the public we have taken this information back to State Parks with updates to our real estate committee multiple times in addition to participating in work sessions in November of 2019 and January 2020. We then proceeded with a Memorandum of Agreement with Westport Golf, Incorporated that outlined the process we would undergo to properly review and consider whether this proposal was suitable at Westport Light State Park.

The process outlined in the MOA gets to us to a Commission Decision in mid 2023 and sooner, if possible, as presented to the Commission in January 2020. There has been a delay in getting the Opps and Constraints analysis work completed. It has taken much of the 2022 to get a draft in place. There are significant concerns with what we've learned and do not believe we will come to a resolution or agreement on the DRAFT O&C because both partners are working from different roles in terms of our responsibilities and objectives.

MOA Executed in October 2020-

Milestones

Milestone 1: Conducted Environmental Baseline Studies (Oct '20- Dec '21)

- State Parks hired consultants, Westport Golf Paid
- Economic Impacts Analysis- Westport to complete- has not been done yet

Milestone 2: Opportunities and Constraints Analysis (Jan '22- Current)

- Westport Golf hired consultant, Jim Brennan
- Staff concerns on how constraints are characterized and misleading info in report

Milestone 3: Master Planning process (8-12 months)

Milestone 4: Initiate Environmental Review (8-12 months)

Milestone 5: Master Plan Development-Commission Adoption (4-6 months)



6

Milestone 1: Conduct Environmental Baseline Studies – State Parks hired consultants and Westport Golf paid.

Estimated timeline for this milestone was 12 months

- Wetland Delineation
- Hydrologic
- Coastal-including Climate impacts
- Vegetation
- Restoration Feasibility
- Habitat assessment/wildlife assessment

Milestone 2: Opportunities and Constraints Development

Estimated time for this milestone 3-4 months (significant delay)

- Jim Brennan hired by Westport Golf to complete work
 - Draft O&C report received to State Parks in July 2022, staff sent comments (16 pages) July 28, 2022
 - After waiting 5 weeks, draft #2 was sent to staff for review in September 2022, and we've had it for about 3 weeks. We are receiving significant pressure, criticism, to finalize, and present this info to public.
 - Draft concept map was provided for staff review a week after we received V2 DRAFT of O&C. Staff requested an internal impacts memo to aid in our review of the draft concept plan, but we have not received it to date.

- Significant staff concerns on how info presented, mischaracterized, omitted and/or misleading info
- Indicated public meeting at end of this milestone to present the integrated analysis to the public (which is why Westport Golf is pushing so hard for a public meeting)
- We have not agreed on a final O&C
- Meeting scheduled Thursday 10/13/2022 for 4 hours with Westport Golf and consultants to discuss in person at HQ building

Milestone 3: Master Planning Process (8-12 months)

- Once a proposed master plan is ready the scoping of the EIS can be initiated (so there is opportunity for some overlap in Milestone 3 and 4)
- In order to complete a master planning process more info is needed.
- Westport golf to supply us with outline of how they will be proceeding with master plan. Have not yet supplied that to us.
- Westport golf will need to do the following studies which I do not believe have commenced at this time:
 - Traffic Study
 - Stormwater Capacity
 - Water and Sewer Infrastructure
 - Fire Suppression
 - Other

Milestone 4: Initiation of Environmental Review (8-12 months)

- originally State Parks was going to lead the process and Westport Golf would pay for it
- Director made decision in September 2022 that State Parks would pay and conduct the EIS

Milestone 5: Commission decision/s

- Commission Report- Staff to present findings of EIS and a timeline for drafting concession agreement
- Commission RA- Park staff will present the staff recommended Master plan for approval
- Concession Agreement- Staff will work with Westport to draft a concession agreement
- Commission RA- Staff will present primary details of the Concession agreement to the Commission and request that the Commission delegate authority to the Director to sign the agreement upon its completion.

Important to understand – agreement in MOA

- parties would work in good faith
- understood and agreed that the milestones are a demonstration of ability to work collaboratively to preserve and sustain the extraordinary resource that is Westport

Light State Park. Both parties will work to complete their respective milestones by July 31, 2023 or as otherwise agreed. This outcome if successful, will lead directly into negotiation a long-term concession agreement



O&C Staff Concerns

- Not objective
 - Significant wetland impacts- 70% of site is Cat 1 wetland type; potential impacts could be up to 20 acres±
 - Assumptions are being made by Westport Golf; to Twin Harbors as an offsite mitigation option
 - Sea-level rise and coastal erosion impacts are significant
 - Not consistent with multiple Commission policies
 - Regulatory restrictions
 - No avenue right now to build the golf course in the City of Westport's Shoreline Management Plan
 - Deed Restriction (did not acknowledge) that preserves lands on site and limits their ability to utilize onsite mitigation. USACE knows of the restriction and would send to their legal department once an application has been initiated for review of a proposed plan
- Land Classification must be modified-most of the site is Resource Recreation. Golf courses have been historically classified in our park system as Recreation.

Talking points

Identified constraints:

Wetland impacts: Over 70% of the site is high quality/high functioning wetlands. This proposal will impact portions of the site direction from wetland fill but potentially also from changes to hydrology, plant composition, and species composition.

Sea level rise/coastal erosion: The coastal study has indicated that shoreline is retreating. In order to prevent (potentially considerable) erosion from occurring over the length of the golf course lease, substantial shoreline armoring would be necessary that which could substantially modify the natural coast line. This would be

challenging to get through regulatory compliance.

While the plan has not been formally adopted by the Commission, the 2019 climate adaptation plan identifies numerous adaptation actions that are at conflict with this proposal.

Recreational diversity/inclusivity: Does the development of a golf course meet our agency objectives of providing recreational opportunities to a diverse group of people in an inclusive manner? What is the recreational need at Westport? West haven beach is currently one of the most-visited day-use facilities in the entire state park system. Will there be recreational impacts from this proposal on existing user groups?

Regulatory restrictions: Cat I wetland fill is not permissible as per the City of Westport Shoreline Master Plan. The City of Westport will need to update their SMP in order for this project to be considered. The department of Ecology will need to approve that decision/process. There is currently no plan for this update and several constraints to doing so.

Deed restriction: A section of the site was previously encumbered as a mitigation area with a legal covenant on the property title. This was a resulting from the previous golf course developer's violation of their federal permit. This was not disclosed to state parks during escrow. Whether or not the covenant is legally binding

on State Parks is debatable, however it is likely that ACOE will not allow additional mitigation within the mitigation site.

Policy conflicts: The current proposal is at conflict with the following agency policies:

Critical Areas Policy:

Natural Resources Policy:

CAMP- need classification

Next Steps

November Commission Meeting

- Staff update at work session November 16, 2022
- RCA Origin
- Where we've been
- What we've learned from environmental studies
- Policies affected
- Land Classification update
- Economic impacts information (pending Westport Golf providing the report)
- Other, etc.



8

Westport Golf Links Proposal for Westport Light State Park


DRAFT ENVIRONMENTAL IMPACT STATEMENT



City of Westport, SEPA Nominal Lead Agency
Washington State Parks and Recreation Commission, Co-Lead Agency
April 2025

PFR000447



 <p>City of Westport 801 N Montesano St. P O Box 505 Westport, WA 98595 Phone: 360-268-0131 Fax: 360-268-0921</p>	<p align="center">NOTICE OF AVAILABILITY DRAFT ENVIRONMENTAL IMPACT STATEMENT</p>
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Proposal: Westport Golf Links Proposal for Westport Light State Park

Project File Number: 25-COW-EIS-01

Parcel Numbers: Portions of 616120132002, 616120143001, 616121221000 and 106500200000 that comprise Westport Light State Park, and City of Westport Parcel 616121212060.

Description of proposal: Westport Golf Links, LLC (WGL), under a Memorandum of Agreement with the Washington State Parks and Recreation (WSPRC), proposes to enter into a long-term concession agreement with WSPRC to develop, operate and maintain a public Scottish links golf course and associated facilities within Westport Light State Park. A clubhouse, guest lodging, and appurtenant facilities are proposed on a parcel adjacent to the east boundary of the park.

Location of proposal: WLSP is located at the northern end of the Point Chehalis peninsula, on the south side of Grays Harbor. The park is bounded on the west by the Pacific Ocean, on the north by Half Moon Bay, and on the east by the City of Westport in Grays Harbor County, Washington. Township 16 North, Range 12 West of the Willamette Meridian.

Proponent: Westport Golf Links, LLC (WGL)

Lead agency: City of Westport, Washington, SEPA Nominal Lead Agency
 Washington State Parks and Recreation Commission, SEPA Co-lead Agency

Availability of Draft Environmental Impact Statement (DEIS): The City will issue a DEIS for this proposal on April 7, 2025. Starting on that date, electronic files of the DEIS and technical appendices will be posted on the City of Westport webpage at: https://www.ezview.wa.gov/site/alias_2007/37863/library.aspx

A printed copy of the DEIS will be available for review at City Hall and at the Westport Timberland Library.

Request for Written Comments: If you wish to review and provide written comments on the DEIS you may do so through May 23, 2025. This date will be the close of a 45-day comment period (maximum indicated per Washington Administrative Code Section 197-11-455). Comments may be provided in one of the following ways to the City of Westport SEPA Responsible Official, Tom Cappa:

- By email to: wgl.wlsp.deis.comments@gmail.com
- In letter form to:
 City of Westport
 Attention Tom Cappa, SEPA Responsible Official
 P.O. Box 505
 Westport, WA 98595

In your comments, please reference the proposal name and project file number (indicated above in this notice). Also please legibly include your name and address (email and/or mailing address) in order to receive future notifications. Should you have questions, Mr. Cappa's telephone number is 360.268.0131.

Draft EIS Issue Date: April 7, 2025

Draft EIS Comment Deadline: May 23, 2025

SEPA and Permitting Process: The State Environmental Policy Act (SEPA) Guidelines encourage the lead agency to initiate EIS preparation as early as possible in the planning and decision-making process. A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, *and* when the environmental effects can be meaningfully evaluated (WAC 197-11-055[2][a]). The City of Westport and WGL mutually agreed that an EIS would be prepared.

The SEPA process started for the WGL proposal when the City issued a Determination of Significance (DS) on April 20, 2023, requiring preparation of an EIS. The EIS scoping process was initiated on that date. The deadline for providing comments on the scope of the EIS was originally May 18, 2023, subsequently extended to June 13, 2023. A public meeting was held during the EIS scoping period at Ocosta Middle School on May 2, 2023. The Draft EIS (DEIS) has been under preparation since that time.

Upon issuance of the DEIS, affected Tribes, agencies, organizations, and interested individuals will have the opportunity to comment on the accuracy and completeness of the environmental analysis, the methodology used in the analysis, and whether you feel there is a need for additional information and/or mitigation measures, so that this information may be added to the Final EIS (FEIS). Comments received on the DEIS will be considered and responded to in the FEIS. It is unknown at this time when the FEIS will be issued. You will receive notification. Issuance of the EIS does not constitute approval of the proposal. Instead, the EIS will be considered in conjunction with permit applications and other relevant information (policies, regulations, and other documents). The City of Westport may approve, condition, or deny project permits, starting with the required Shoreline permit.

Once the Westport Golf Links/Westport Light State Park FEIS is issued, the City's Shoreline Administrator will prepare a detailed staff report with recommended findings, conclusions, and conditions to submit to the City's Hearing Examiner with the WGL Shoreline permit application. Compliance of the WGL proposal with the City's Shoreline Master Program and Westport Municipal Code will be subject to interpretation by the City of Westport Shoreline Administrator and Hearing Examiner. A public meeting will be scheduled before the City's Hearing Examiner for the decision-making process on the Shoreline permit application, and to consider any appeal of the FEIS. State and Federal regulatory processes are anticipated in addition to City permits.

SEPA Responsible Official: Tom Cappa
Position/Title: City Administrator
City of Westport
P.O. Box 505 (801 N. Montesano Street)
Westport, WA 98595
Start of the DEIS Comment Period: April 7, 2025
Comment Deadline: 5:00 PM May 23, 2025



Tom Cappa, SEPA Responsible Official

Fact Sheet

Project Title:	Westport Golf Links (WGL) Proposal for Westport Light State Park (WLSP)
Brief Description of the Proposal:	WGL proposes to develop, operate and maintain an economically viable public 18-hole Scottish links golf course and ancillary facilities in Westport Light State Park under a long-term lease and concession agreement with the Washington State Parks and Recreation Commission (WSPRC).
Purpose and Objectives:	<p>A detailed list of the purpose and objectives of the WGL proposal is provided in DEIS Chapter 2, Section 2.2.</p> <ul style="list-style-type: none">• Develop an economically viable public 18-hole Scottish links golf course of a caliber that would attract championship play.• Also provide a short course and golf practice range on the WLSP site to diversify opportunities for play by people of different skill levels and to encourage multi-day experiences within the park• Develop ancillary facilities (on- and offsite) to support the golf course within the park.
Principal Alternatives:	<ul style="list-style-type: none">• Alternative 1: Conceptual site plan prepared by David McLay Kidd (DMK) in Spring 2022, evaluated in environmental baseline studies prepared for WSPRC by AECOM. Proposed lease area: 224 acres.• Alternative 2: Conceptual site plan revised by DMK in the fourth quarter of 2023 in response to the findings and recommendations of the environmental baseline studies, to further reduce wetland fill, wetland buffer impacts, and vegetation removal. Proposed lease area: 196 acres.• Alternative 3, No Action: No golf course or ancillary facilities development within WLSP. The park, existing infrastructure, site operations and maintenance would continue in a manner consistent with previous years. The current WSPRC Capital Budget Request and Capital Development Plan identify no recreational development in WLSP in the foreseeable future.
Project Proponent:	Westport Golf Links, LLC Applicant's contact person: Mark Merkelbach, Project Manager Green Earth Operations mmerkelbach@greenearthops.com

Schedule for Implementation: WGL development would begin upon receiving all required permit approvals. Three or more phases of development are proposed over a period of approximately 15 years, with 3 to 5 years between phases.

SEPA Nominal Lead Agency: City of Westport
P.O. Box 505
Westport, WA 98595

City of Westport File Number: 25-COW-EIS-01

Designated SEPA Responsible Official: Tom Cappa, City Administrator
City of Westport

Project Information Contact Person: Tom Cappa
360. 268.0131, ca@ci.westport.wa.us
This e-mail address may be used for questions regarding the SEPA process. Please submit comments on the Draft EIS to the e-mail address indicated below.

SEPA Co-Lead Agency: Washington State Parks & Recreation Commission
Lisa Lantz, Stewardship Director

Permits and Approvals Required: City of Westport permits under the provisions of the City’s Shoreline Master Program (SMP), Critical Areas Ordinance, and Westport Municipal Code. State and possibly Federal regulatory processes are also anticipated. Under the terms of the Memorandum of Agreement with WSPRC, it is WGL’s responsibility to apply for and obtain all required Federal, State, and local permits for the proposed development. Such required permits, along with Commission authorization, are required prior to commencement of the Scottish links proposal within WLSP.

EIS Authors and Principal Contributors: **Vicki Morris Consulting Services**
Vicki Morris, *EIS Primary Author and Editor*

Green Earth Operations
Mark Merkelbach, PWS, Project Manager
*Description of the Proposal and Alternatives;
Wetland Conditions, Impacts, and Mitigation;
Vegetation Communities*

Herrera Environmental Consultants:
Jeff Parsons, PhD, PE
Coastal Processes Discipline Report, Climate Change
George Richotte, PWS and Josh LeClerc, PWS
Wildlife, Habitat, Birds, and Special Status Species
Wayne Watne
Fish

EIS Authors and Principal Contributors, *cont.*

OTAK

Keith Bates, PLA, LEED ap

*Senior Landscape Architect, OTAK Project Manager
Description of the Proposal and Alternatives; Utilities*

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Tyson Hounsel, PE, Stormwater Engineer

Preliminary Stormwater Site Plan Report

Rhys Coffee, Landscape Designer

GIS and Graphics Preparation

Lindsay Martin, Landscape Architect

EnviroLogic Resources, Inc.

Tom Calabrese, LHg, Principal Hydrogeologist

Jason Howard, RG, Senior Hydrologist

Integrated Pest Management Plan

Siskiyou BioSurvey, LLC

Lalita Calabria, Ph.D., Lead Investigator

Field Team: John Villella, Jay Scelza, and

Katherine Glew, Ph.D.

Rare Lichen Survey Report

Cultural Resources Consulting

Genavie Thomas, MS

Morgan Frazier, MA and Jacqueline Cheung, BA

Cultural Resources Inventory Survey

Heffron Transportation:

Marni Heffron, Principal, PE, PTOE

Michelle Brown, Senior Transportation Engineer

Transportation Technical Report

Sieger Consulting, SPC

Annie Sieger

Fiscal and Service Impact Analysis

Draft EIS Date of Issue:

April 7, 2025

Draft EIS Comment Period:

April 7, 2025 through May 23, 2025

Comments may be provided in one of the following ways:

By email to: wgl.wlsp.deis.comments@gmail.com

In letter form to:

City of Westport

Attention Tom Cappa, SEPA Responsible Official

P.O. Box 505

Westport, WA 98595

Availability of Copies of the EIS and Technical Reports to the Public:

If reviewers have questions about accessing the Draft EIS and Technical Reports for review, they may contact Mr. Cappa at:

360. 268.0131, ca@ci.westport.wa.us

Everyone on the Distribution List (Chapter 5) was sent a Notice of Availability of the Draft EIS and Technical Reports. The documents are available in electronic format on the City of Westport website at:

https://www.ezview.wa.gov/site/alias_2007/37863/library.aspx

A printed copy of the Draft EIS is available for review at
Westport City Hall
604 Montesano Street
Westport, WA 98595

Westport Timberland Library:
101 E. Harms Drive
Westport, WA 98595

Next Steps:

The City of Westport will receive written comments on the Draft EIS during the comment period indicated above. Following the close of the Draft EIS comment period, the City will review and respond to all written comments received in the Final EIS. Everyone on the Draft EIS Distribution List and persons who comment on the Draft EIS will receive Notice of Availability of the Final EIS and information regarding where to view electronic files of the document.

Following issuance of the Final EIS, a public meeting will be scheduled before the City of Westport Hearing Examiner to consider the Shoreline permit application and any appeal of the Final EIS.

Additional public meetings will be scheduled before City of Westport decision makers during consideration of other permits required under Westport Municipal Code.

State and Federal permitting processes will likely also include public comment opportunities.

1.0 Summary

1.1 INTRODUCTION

The Washington State Parks and Recreation Commission (WSPRC) established a 34-acre Recreation Concession Area (RCA) in Westport Light State Park (WLSP) in 2016 to create an opportunity for privately-financed development of recreation facilities within the park that would meet the needs of visitors and generate revenue to support the State Park system. RCAs invite the private sector to finance, construct, and operate recreation facilities in appropriate areas within State Parks under a long-term lease and concession agreement with WSPRC. Westport Golf Links, LLC (WGL) initiated discussions with WSPRC in January 2019 with a vision for a larger RCA to accommodate a Scottish links course and ancillary facilities within WLSP.

WGL and WSPRC entered into a Memorandum of Agreement (MOA) in October 2020, for the purpose of conducting a collaborative master planning process for WLSP to fulfill a vision for the park as “... a full-service, year-around destination providing a diverse array of meaningful experiences for people of all ages, background, skills, and recreational interests.” The stated purpose of the MOA is “... to memorialize a mutually agreed-to plan that if successful and in the parties best interest will result in a separate long-term concession contract that at a high level will authorize WGL to construct a Scottish links course, transfer said golf course to State Parks, and then allow WGL to manage and maintain these facilities with a percentage of the revenue generated allocated to State Parks.” WGL retained David McLay-Kidd of DMK Golf Designs (the golf course architect for Bandon Dunes, Oregon, and Gamble Sands in eastern Washington) to develop a golf course layout responsive to existing environmental conditions identified by baseline studies. McLay-Kidd has been designing, building and operating golf course facilities since 1997. WGL has also retained Troon, a professional golf management company to assist with project planning and to manage daily golf operations if the project is approved.

This Environmental Impact Statement (EIS) evaluates the proposed action and alternatives in the context of the affected environment, in accordance with the requirements of the Washington State Environmental Policy Act (SEPA) (Chapter 43.21C RCW) and the SEPA Rules (WAC 197-11). Environmental baseline studies were prepared between 2017 and 2022 for WSPRC. These reports were used to describe the Affected Environment (e.g., existing conditions) within the study area. The area of the park within which project effects may occur, and an adjacent parcel 23 acres in size (Parcel 616121212060) in which golf-related program elements are proposed, comprise the 562-acre project area evaluated in this EIS. Several discipline reports were subsequently prepared by experts in their respective fields between 2022 and 2025 to help inform preliminary design and site plan refinements, and to evaluate the potential impacts of the WGL proposal. Mitigation measures for potential adverse impacts are described based on the recommendations of technical experts and what is currently known about applicable regulations. The titles of the baseline studies and discipline reports are listed at the end of the Draft EIS Table of Contents. These documents are available for review along with the Draft EIS on the City of Westport and Washington State Parks and Recreation Commission websites (see Section 1.3 below).

WSPRC and WGL would enter into a long-term lease agreement that would allow WGL to control activities within the revenue-generating area. The proposed lease area would range in size from approximately 224 to 196 acres depending on the action alternative selected for implementation. WGL proposes to request the maximum lease term allowed under RCW 79A.05.030: 80 years. The lease would be subject to an annual leasehold tax that would be paid by WGL to the State in lieu of property tax on an annual basis. The proposed lease area is defined as park land east of the dune trail, south of Jetty Haul Road and north of W. Ocean Avenue that would contain maintained turf of the 18-hole course and short course



Alternative 1

Proposed WLSP Lease Area: 224 acres
 Unleased WLSP Area: 314 acres



Alternative 2

Proposed WLSP Lease Area: 196 acres
 Unleased WLSP Area: 342 acres

PROPOSED ELEMENTS

- GOLF FAIRWAYS
- ROUGH
- TRAILS
- PROPOSED ACCESS ROAD/ PARKING FOOTPRINT
- PROPOSED BUILDING FOOTPRINT
- LINE-OF-SIGHT CLEARING AREAS
- WESTPORT LIGHT STATE PARK BOUNDARY, 538 ACRES
- LEASE AREAS



- ^b Roughs account for 5.6 acres of the short course total acreage (vegetation management areas not included).
- ^c Under Alternative 1, the maintenance facility would be offsite, in the northern portion of the clubhouse/lodging parcel (see Figure 2.5-1).

The 18-hole Public Course. The goal of a links course is to blend into a coastal landscape. Under the design direction of golf course architect David McLay Kidd (DMK), an 18-hole course is proposed landward of the prominent foredune of WLSP with views of the ocean from select tee boxes and ocean-facing greens (see Figures 2.5-1 and 2.5-2 in Section 2.5 below).

Westport Light State Park is an accretion landform, created by sand deposited by wind and the ocean over the last century. Laid out over sand, a links course typically requires a minimal amount of grading or maintenance. In contrast to a conventional golf course, the links course will require less fertilization, irrigation, and mowing to maintain the turf. Regionally-appropriate fine fescue grass species will be selected to thrive in local weather conditions. Wind and weather will be allowed to dry the fairways in the summer. Appropriate existing native vegetation will be preserved and managed in areas adjacent to fairways (as described in Chapter 3, Section 3.2.4: Vegetation). Any additional plantings beyond grass will utilize native species.

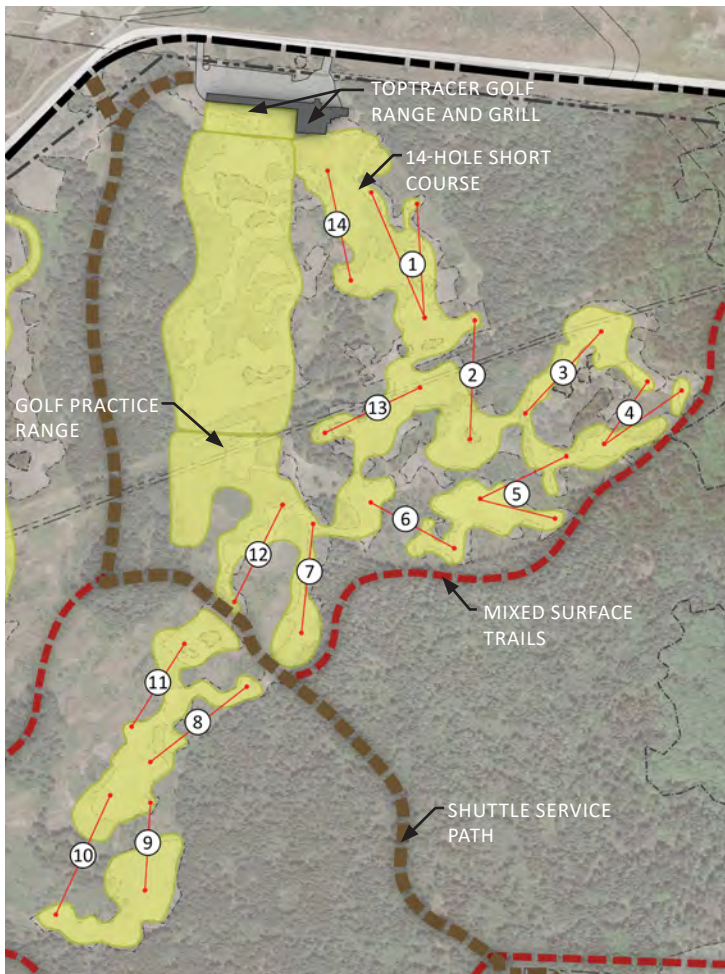
The proposed routing of the 18-hole course will begin in the southeast interior of the park, in the forested area associated with the historic foredune north of the Grays Harbor lighthouse. This point of origin was selected for its proximity to the clubhouse and lodge proposed on Parcel 616121212060 to the east. Golf holes will run westward through uplands, avoiding wetlands to the extent possible, then turn north and parallel the existing paved dune trail (see Figures 2.5-1 and 2.5-2 in Section 2.5 below). The starting and end holes (1 through 3, and 18) will require clearing sections of upland forests (approximately 14 acres).¹² Wetland impacts along this east/west alignment cannot be entirely avoided as a walk-only links course needs to locate golf holes within close proximity to each other. Golf holes 4 and 17 will be routed through wetland areas (approximately 6.6 acres) along the southern edge of the site (see area “K” on Figures 2.5-1 and 2.5-2).

Golf holes paralleling the ocean are proposed primarily in upland shrub vegetation presently dominated by invasive species. The proposal includes removing invasive species within and adjacent to managed golf areas and adjacent to the paved dune trail, and perpetually managing these areas to discourage the regrowth of undesirable species (see the Noxious Weeds Removal and On-going Management Program description in Section 2.4.12 below). At the north end of the park, the proposed course layout creates a loop where walking golfers make “the turn” – typically the transition from the front nine to the back nine – and head southward. A surf shack-type concession stand is proposed in this area to serve golfers, trail users, surfers, and beachgoers (see optional locations on Figures 2.5-1 and 2.5-2). Golf holes on the north half of the site are designed in areas that were previously disturbed by initiation of construction of the former Links at Half Moon Bay project. The back nine parallels the front nine but in the opposite direction taking golfers back toward the lighthouse and eventually to the clubhouse and guest accommodations.

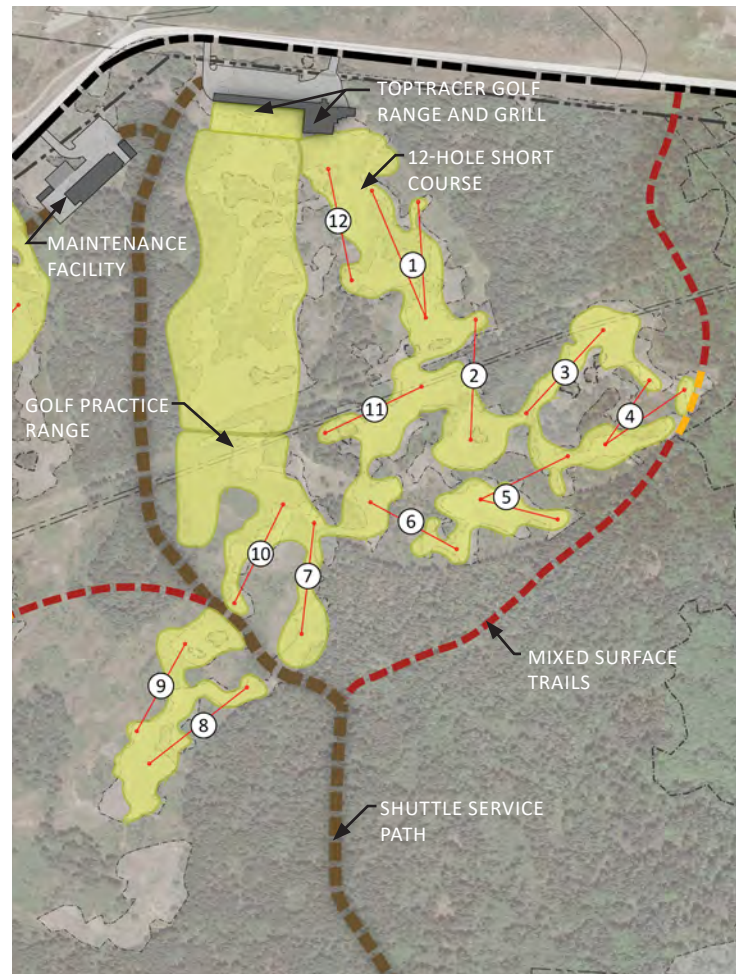
Consideration has been given in the links golf layout to minimize adverse effects and create beneficial opportunities on the site. Sand needed to build up tee boxes and greens will be excavated in formerly disturbed dune area at the north end of the park, creating an opportunity to expand open sand emergent wetlands and the potential to introduce rare dune species (see the description of the Uncommon or Rare Plant Communities Restoration Program in Section 2.4.12 below. Representative public amenities proposed

to this vegetation management would be temporary or result in vegetation transition. For vegetation communities and wildlife habitat types, the area of impact area associated with vegetation management would likely receive forms of restoration.

¹² Quantitative impacts to plant communities are described and illustrated in Chapter 3, Section 3.2.4: Vegetation.



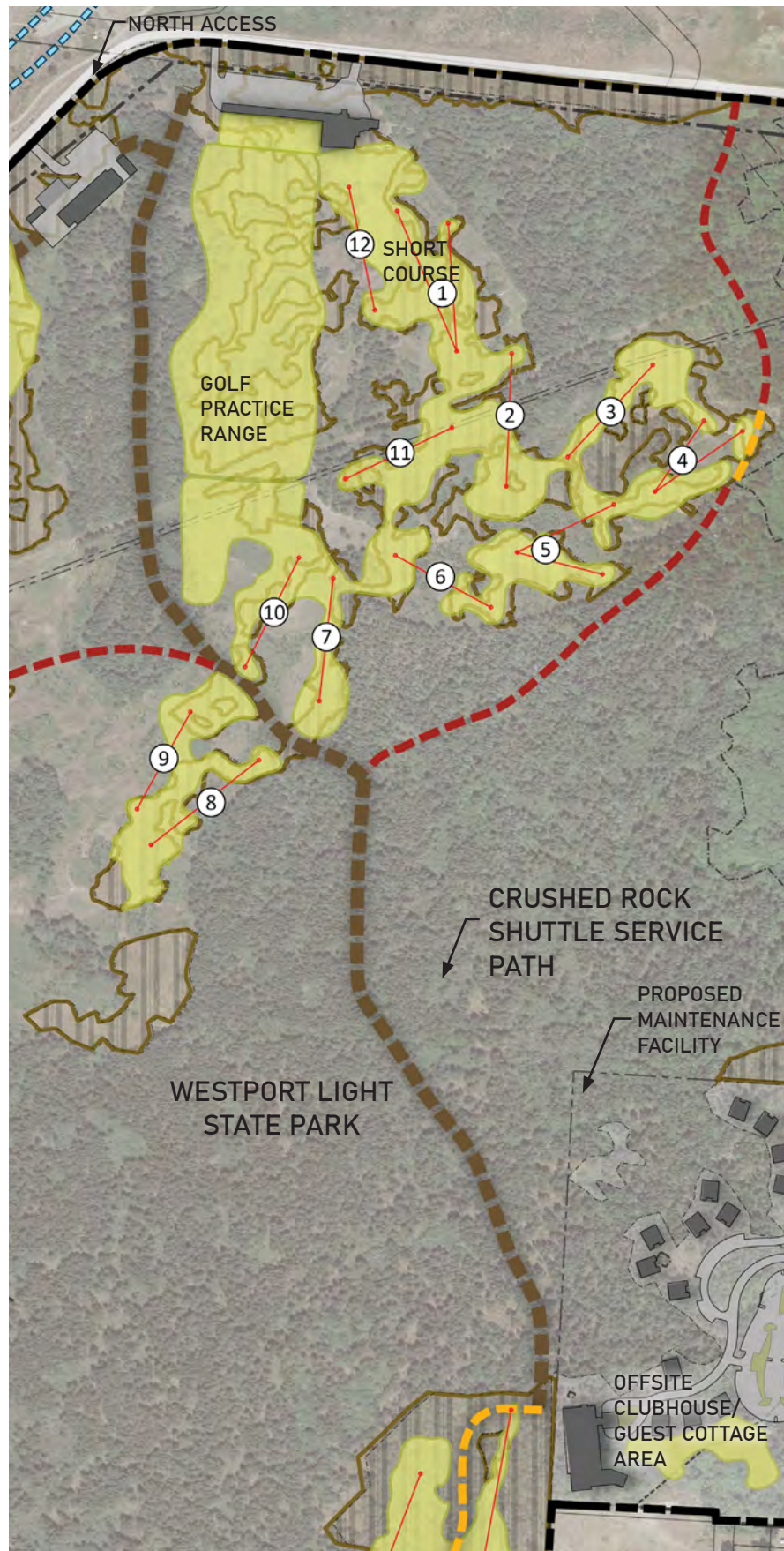
Alternative 1: 14-hole short course.



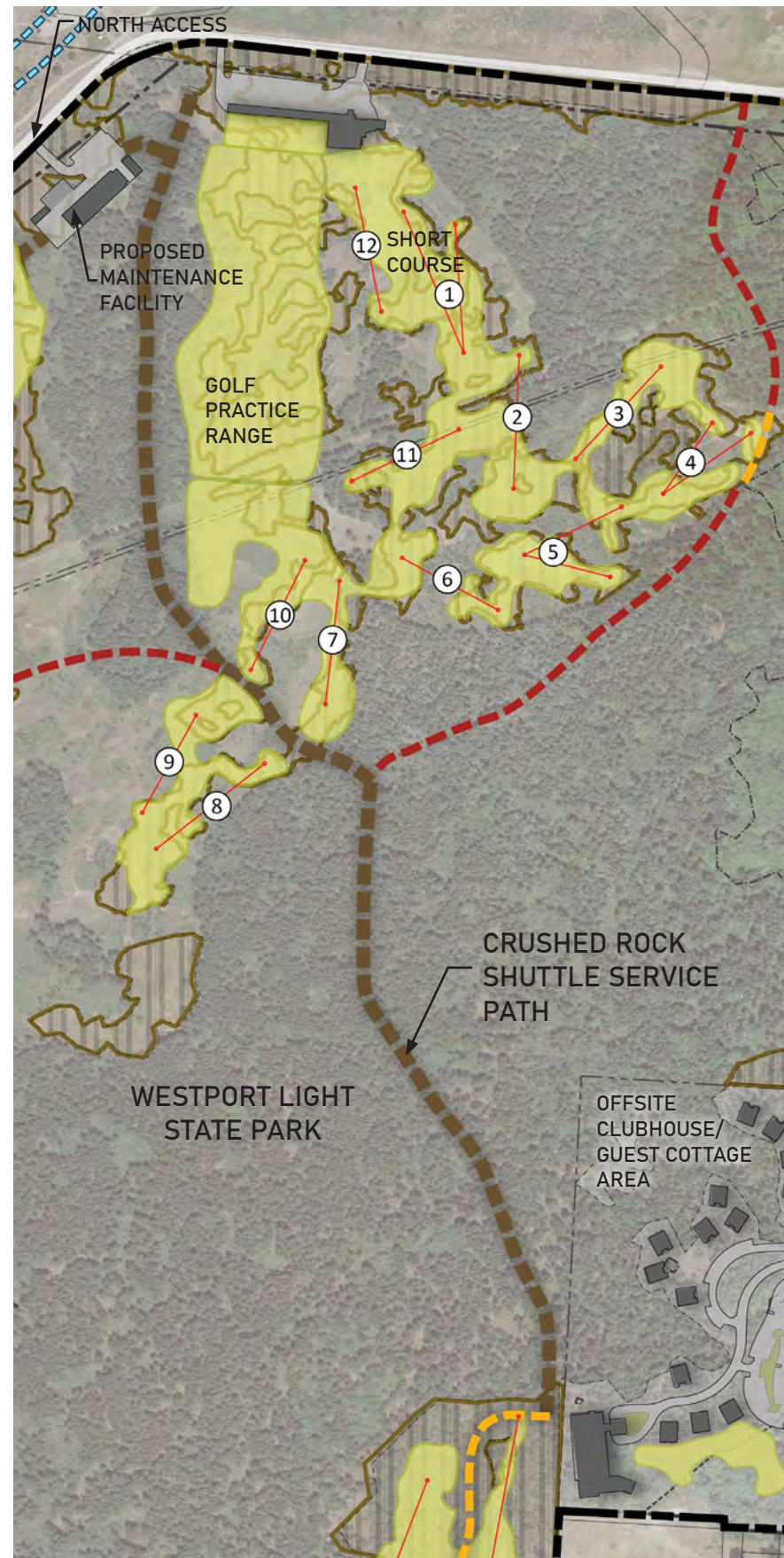
Alternative 2: 12-hole short course.



Example short course.



ALTERNATIVE 1



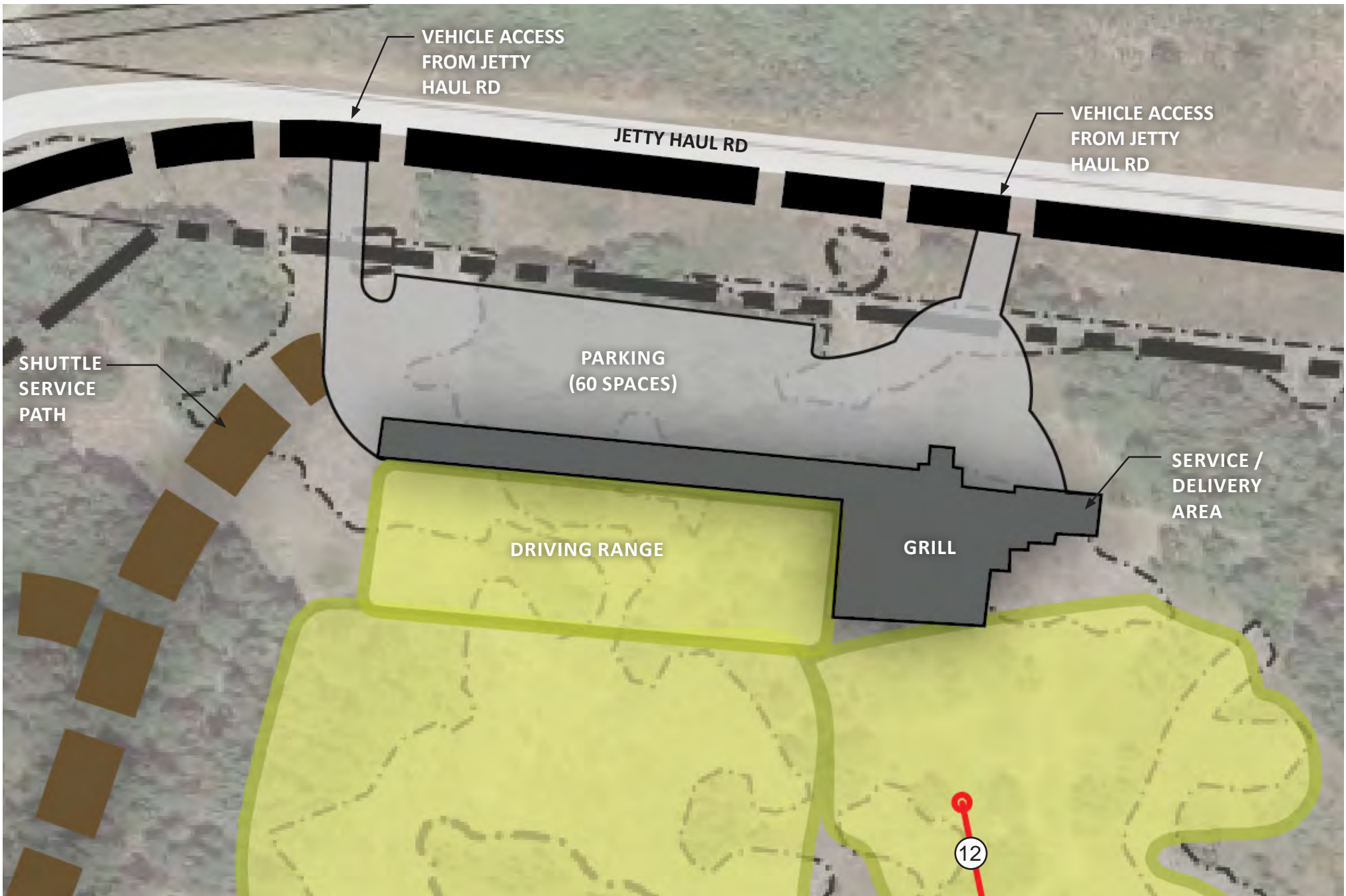
ALTERNATIVE 2



EXAMPLE SHUTTLE CART



CRUSHED ROCK SHUTTLE SERVICE PATH



Operations. Project impacts to traffic, parking, and noise would be related to WGL’s proposed amenities and site operations. For the purpose of the EIS analysis, operational assumptions are based on peak summer months. Proposed operations described below focus on the two primary areas where visitors and employees would enter and leave the project, which are described as the North Access and the East Access (see “H” and “T” respectively on Figures 2.5-1 and 2.5-2 in Section 2.5). Shuttle service and walking paths are proposed to transport golfers and lodging guests between east-end and north-end amenities. The location, operations, and anticipated users of the various WGL features are described below.

WGL Facilities to be Accessed from the East. The East (main) Access to WGL would be from N. Forrest Street, providing access to parking for the clubhouse/lodge, pro shop, 18-hole golf course and short course, guest cottages, and golf practice areas.

- MAIN COURSE (18-HOLES) – The public links golf course would be the main attraction to WGL. Either alternative site plan would locate the 1st and 18th holes in the southeast part of the park near the clubhouse. Website instructions associated with reservation procedures would instruct all golfers to access the site from N. Forrest Street, and park near the clubhouse where they would check in upon arrival. Guests who stay in WGL lodging could walk to and from the main course from their room. A large putting course is proposed near the clubhouse/lodge on Parcel 616121212060¹⁵ (see “P” on Figures 2.5-1 and 2.5-2). A small practice putting green (about one-half the size of a golf-hole green) is proposed near the 1st tee box, west of the clubhouse. The golf practice range is proposed north of the main golf course (see “D” on Figures 2.5-1 and 2.5-2). Golfers could walk or be shuttled to and from this location before their golf round. The course would be designed for daily golfers and for non-spectator type tournaments. All other uses within the WGL development could generally be considered amenities to the main golf course. Key operating parameters assumed for the analysis include:
 - Tee times in the summer would be scheduled from 7:00 A.M. to 6:00 P.M. so that the last golfers can complete their rounds before sunset.
 - Each full round of golf is expected to last about 4.25 hours. Golfers are expected to walk the full course as golf carts would not be allowed.
 - Tee times would be at 10 to 12-minute intervals (maximum of six tee-times per hour to maintain the pace of play and course conditions).
 - Tee time reservations will be required.
 - Troon would limit the number of players per day to about 200 to maintain course conditions. The traffic and parking impact analysis is conservatively based on a peak of up to 240 players per day on the 18-hole course.
- SHORT COURSE – The classic links-style short course would be a smaller course for day-use by locals and for WGL “stay and play” guests. Two alternatives are being evaluated for the short course: 14 holes under Alternative 1, or 12 holes under Alternative 2 (see “G” on Figures 2.5-1 and 2.5-2). Lodging guests may choose to play the main course one day and the short course another day. All short course guests would walk or be shuttled to the short course at the north end of the

¹⁵ WGL proposes to purchase Parcel 616121212060 if the golf course is approved for development within WLSP. This parcel and the clubhouse, guest cottages, associated parking, and putting green proposed on this parcel, would remain within the City limits; e.g., would not be within the park boundary.

Trails to the interior of WLSP are primarily narrow, overgrown game trails or informal social trails through beach grass. These are used by wildlife, bird watchers, and unauthorized campers. There are a few well-used earthen trails 3 to 5 feet wide in the south end of the park: the Fog House Trail and extensions to/from this trail into and out of the USCG campground near the base of the Grays Harbor Lighthouse (Figure 3.2.15-2). There are no developed or maintained WSPRC trails into the interior of WLSP from the dune trail. A Grays Harbor Council of Governments map shows a 3.4-mile Westport Light Trail Loop that includes the paved dune trail along the west boundary of WLSP, east and north along the paved trail adjacent to Half Moon Bay to the observation tower near Westhaven Cove, south and east along Westhaven Drive to N. Wilson Avenue, then south on N. Montesano Street/SR 105 to W. Ocean Avenue, and west to the dune trail (Figure 3.2.15-3).

The 2023 visitation estimate at WLSP was 443,282 people. Day visitors to the park are tallied using a year-around car counter system installed in January 2016 and applying a multiplier of 3.5 to the car count to estimate the person count (personal communication with Anna Gill, WSPRC Southwest Region Superintendent, August 26, 2024). The total visitation estimate includes people accessing the park from the north (Jetty Haul Road) and from the south (W. Ocean Avenue).

Westhaven State Park, described separately in the *South Beach Area Management Plan* (WSPRC, October 2007) is now the northern 290 acres of Westport Light State Park. It was created by the accretion of sand that resulted from construction of the South Jetty. Adjacent to the Pacific Ocean, this area is used for surfing, scuba diving, beach exploration, picnicking, kite flying, fishing, clam digging, and crabbing in Half Moon Bay. There is a 132-space asphalt-paved parking lot at the west end of Jetty Haul Road and an ADA-accessible unisex restroom with outside shower and drinking faucet. Westhaven is a day-use area only, there are no campsites.

Twin Harbors State Park, named for its location between Grays Harbor and Willapa Bay, is 172 acres in size, 3 miles south of Westport on State Route 105 in Grays Harbor County adjacent to the Pacific Ocean. It has a welcome center and park store, and a total of 284 campsites of which 42 are served by utilities, 238 are standard campsites,⁹⁷ and 4 are primitive sites.⁹⁸ Activities include picnicking, beach exploration, hiking, camping, fishing, oyster picking, clam digging, crabbing, shrimping, wildlife viewing, kite flying, kayaking, wind surfing, paddle boarding, swimming, horseshoe pits, natural area interpretation, and boating. The 2023 visitation estimate to Twin Harbors State Park was 190,420 people.

Grayland Beach State Park is 412 acres in size just south of the town of Grayland, approximately 5 miles south of Twin Harbors State Park on State Route 105 in Grays Harbor County. It is a campground rather than a day-use park with 104 camp sites for recreational vehicles, tents and trailers, 58 with full hook-ups and 42 with water and electricity; 4 walk-in campsites, 10 yurts, one residence, 5 comfort stations, 3 primitive sites served by a portable toilet, a single-bay repair shop, pump station, and a contact station with an office. Activities include camping, picnicking, fishing, surfing, skin diving, swimming, clam digging, kite flying, horseback riding, mountain biking, wildlife viewing, beach exploration, walking trails, and natural area interpretation. The 2023 visitation estimate to Grayland Beach State Park was 61,788 people.

⁹⁷ Standard campsites are vehicle-accessible sites for single parties served by nearby domestic water, sink waste, garbage disposal, and a nearby comfort station.

⁹⁸ Primitive campsites have no amenities like bathrooms, picnic tables, trash cans, or any man-made structures.



Westport Golf Links Proposal Draft Environmental Impact Statement

April 17, 2025

Purpose and Objectives of Proposed Action

Westport Golf Links

- Develop public 18-hole Scottish links golf course
- Provide short course and golf practice range
- Develop ancillary facilities to support the golf course



Proposed Elements in Park

- 18-hole golf course
- Short course
- Practice range
- Toptracer golf range and grill
- Surf shack concession stand
- New trail corridor(s)
- New signage



Proposed Elements on Adjacent Land

- Clubhouse/pro shop
- Lodge
- Guest cottages
- Large putting course



Alternatives Analyzed in DEIS

- Alternative 1
- Alternative 2
- No action alternative



DEIS Action Alternatives



Alternative 1

Proposed WLSP Lease Area: 224 acres
 Unleased WLSP Area: 314 acres



Alternative 2

Proposed WLSP Lease Area: 196 acres
 Unleased WLSP Area: 342 acres

PROPOSED ELEMENTS

- GOLF FAIRWAYS
- ROUGH
- TRAILS
- PROPOSED ACCESS ROAD/ PARKING FOOTPRINT
- PROPOSED BUILDING FOOTPRINT
- LINE-OF-SIGHT CLEARING AREAS
- WESTPORT LIGHT STATE PARK BOUNDARY, 538 ACRES
- LEASE AREAS

Alternatives Compared

Alternative 1	Alternative 2
18-hole Scottish links style golf course	18-hole Scottish links style golf course
224-acre WLSP lease area	196-acre lease WLSP area
14-hole short course	12-hole short course
3.5-mile interior trail network	2.3-mile interior trail network
Maintenance facility outside state park	Maintenance facility at north end of park
Comfort station mid-way on dune trail	No new comfort station
43 acres wetland fill in WLSP	35 acres wetland fill within WLSP



No-Action Alternative

- Required by SEPA
- SEPA rules do not define what no-action alternative must look like
- Typically defined as what would most likely happen if proposal did not occur
- Alternate definition = no new government action



Environment, Impacts, Mitigation



Elements of Environment

- Natural Environment
 - Earth
 - Water Resources
 - Climate Change
 - Vegetation
 - Wetlands
 - Wildlife & Wildlife Habitat
 - Birds
 - Fish
 - Special Status Species
- Built Environment
 - Environmental Health
 - Land and Shoreline Use
 - Population, Employment & Housing
 - Light & Glare
 - Aesthetics
 - Recreation
 - Historic & Cultural Resources
 - Transportation
 - Public Services
 - Utilities



Elements of Environment

- Natural Environment

- Earth
- Water Resources
- Climate Change
- Vegetation
- Wetlands
- Wildlife & Wildlife Habitat
- Birds
- Fish
- Special Status Species

- Built Environment

- Environmental Health
- Land and Shoreline Use
- Population, Employment & Housing
- Light & Glare
- Aesthetics
- Recreation
- Historic & Cultural Resources
- Transportation
- Public Services
- Utilities



Coastal Processes/Climate Change

- Dynamic area impacted by:
 - Reduced sediment supply from Columbia River
 - Sea level rise
 - Increasing storm severity



Climate Change Impacts

- Impacts common to all alternatives:
 - Flooding
 - Erosion
 - Ecosystem health and vegetation
 - Wildfire risk



Coastal Erosion Risks by 2050

- Southern end of coastal trail at risk
- Alternative 2 – Hole 15 at risk



Mitigation

- Minimize exposure by siting improvements away from coast
- Bury large woody material in SW corner to slow shoreline erosion (Alt 2)
- Encourage Corps beach nourishment
- Restoration projects to increase ecological resilience and invasive species control
- Use treated wastewater effluent
- Provide emergency responder access and pressurized connections for fire suppression

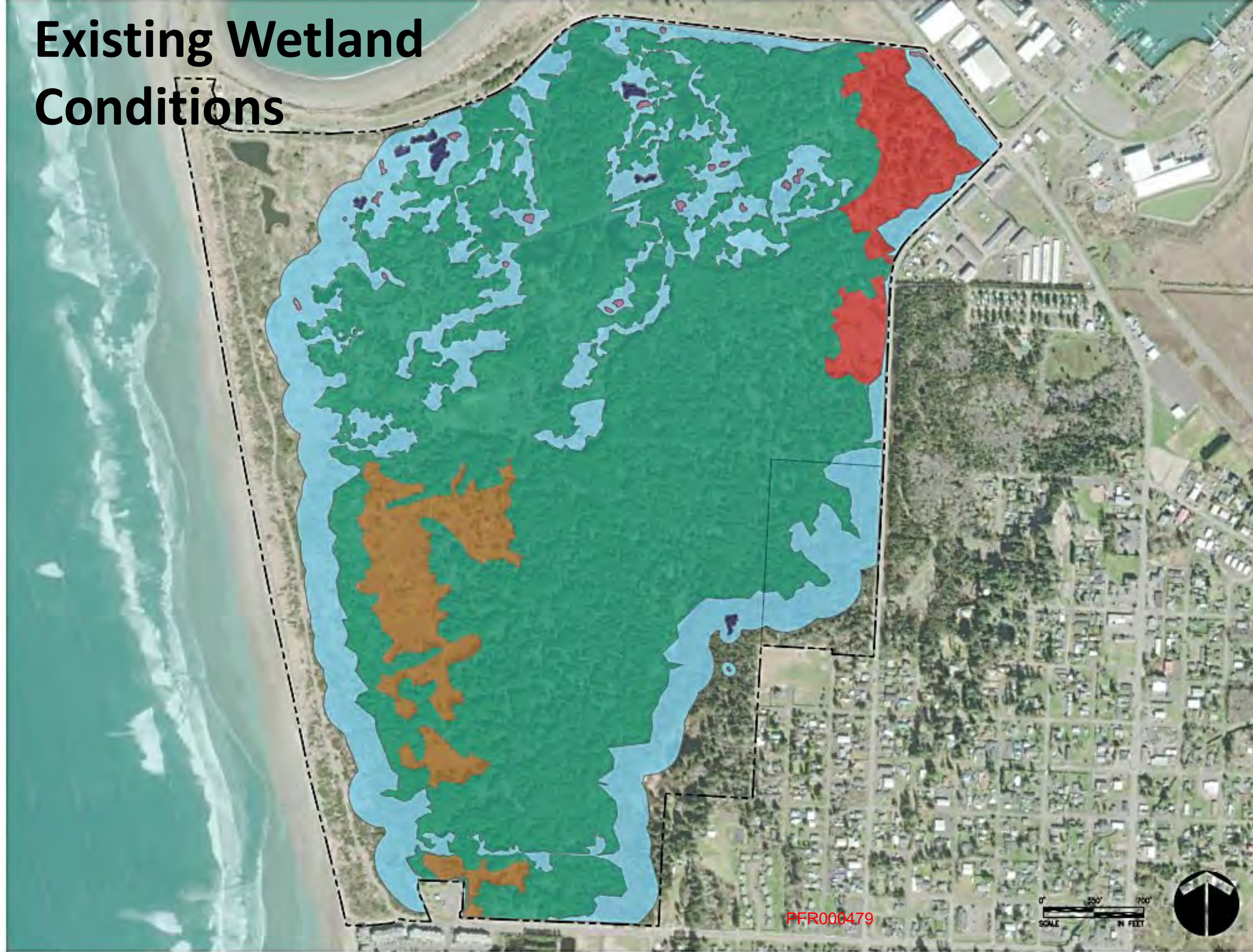


Considerations

- Different coastal analyses
- DEIS analysis focuses on 25-year time horizon
- WGL proposes 80-year lease



Existing Wetland Conditions



WETLAND CATEGORIES

- WETLAND A (MOSAIC)
- RED ALDER - SLOUGH SEDGE WETLAND
- COASTAL WILLOW SWAMP
- WETLAND BUFFERS
- CATEGORY 3
- CATEGORY 4

WETLAND CATEGORIES	TOTAL ACRES
CATEGORY 1	284
WETLAND WITHIN THE WETLAND A MOSAIC	235
RED ALDER-SLOUGH SEDGE WETLAND	21
COASTAL WILLOW SWAMP	28
CATEGORY 3	1.5
CATEGORY 4	1
TOTAL ACRES	286.5

TOTAL MOSAIC WETLAND = 346 ACRES OF WHICH 68% IS WETLAND = 235 ACRES

WETLAND BUFFERS	TOTAL ACRES
WETLAND BUFFERS	123

UPLAND WITHIN THE WETLAND A MOSAIC	111
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PFR000479



Direct Wetland Impacts

Wetland type/Grouping	Total Wetland Acres	Alternative 1 Direct Impacts (ac)	% of Wetland Impacted	Alternative 2 Direct Impacts (ac)	% Wetland Impacted	Impact Difference Between Alternatives 1 and 2 (ac)
Category 1	284	42	15%	33	12%	-8
Wetland A (Mosaic)	235	39	17%	33	14%	-6
Red Alder/Slough Sedge	21	0.05	0.3%	-	-	-
Coastal Willow Swamp	28	2	8%	0.08	0.3%	-2
Category 3	1.5	1	90%	1	87%	-
Category 4	1	1	61%	1	62%	-
TOTAL ACRES	286.5	43	15%	35	12%	-8



Wetland Buffer Impacts

Wetland Buffer Impacts	Alternative 1 Buffer Impact (ac)	Alternative 2 Buffer Impact (ac)	Impact Difference Between Alternatives 1 & 2 (ac)
Golf Holes • Tees, greens, rough, fairway	116	105	-10
Impervious Surfaces • Buildings/structures • Trails • Roads and other paved surfaces	8	8	
Vegetation Conversion Areas • Golf safety line-of-sight clearing	5	5	
Total Wetland Buffer Impacts	128	118	-10



Policy Implications



Critical Areas

- Growth Management Act requires local governments to adopt regulations protecting critical areas. Statute defines five types:
 - Wetlands
 - Areas with critical recharging effect on aquifers used for potable water
 - Fish and wildlife habitat conservation areas
 - Frequently flooded areas
 - Geologically hazardous areas



Critical Areas Policy 70-03-1

“New park facility developments shall not be built in critical areas except where the theme, character, quality or other park planning provides overriding justification for development in such areas, and appropriate mitigation can be provided.”



Critical Areas Policy 70-03-1

“When a new park facility development is justified within a critical area, the development shall be limited such that its assumed life and costs to abandon is an acceptable risk of loss.”



Natural Areas Policy 73-04-1

“State Parks recognizes that rivers, streams, and wetlands within the lands it manages are part of larger watersheds, and as such, the agency will help to protect these habitats by minimizing functional impacts to them and the processes they perform...State Parks will ensure its actions do not contribute to a net loss in the acreage or function of the State’s wetlands. State Parks will limit construction in, or impacts to, wetlands except where consistent with Commission-adopted park plans...or where necessary to provide access to a significant public interpretive or educational opportunity and conditions allow for mitigation of associated impacts.”



EIS Timeline





Quinault Indian Nation

POST OFFICE BOX 189 • TAHOLAH, WASHINGTON 98587 • TELEPHONE (360) 276-8211

June 9, 2025

City of Westport
Attention: Tom Cappa, SEPA Responsible Official
PO Box 505
Westport, Washington 98595
By Email: wgl.wlsp.deis.comments@gmail.com

RE: Draft Environmental Impact Statement for Westport Golf Links (25-COW-EIS-01)

Dear Mr. Cappa:

The Quinault Indian Nation (“QIN”) has reviewed the draft environmental impact statement (“DEIS”) for the proposed Westport Golf Links development (“Project”) from the applicant, Westport Golf, Inc., that includes development within the Westport Light State Park (“WLSP”). QIN is deeply concerned about the impacts of the Project, particularly as it relates to the destruction of critical habitat for fish and aquatic species, and its impacts to QIN’s treaty rights. QIN is also concerned by the City’s lack of consultation with QIN during the early planning phase, and to allow us additional time to provide comments, particularly on the mitigation component. Please accept the following comments.

The Quinault Indian Nation is a federally recognized sovereign Indian Tribe and signatory to the Treaty of Olympia (1856) by which it reserved, among other things, the right of “taking fish, at all usual and accustomed fishing grounds and stations” and the privilege of hunting and gathering on open and unclaimed lands, among other rights, in exchange for ceding lands it historically roamed freely. In a landmark court case known as the “Boldt decision,” a federal court confirmed Quinault’s Treaty fishing rights and established the Nation and other plaintiff tribes as co-managers of off-Reservation fisheries resources entitled to half of the harvestable number of fish returning to Washington waters. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wn. 1974), aff’d 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976)

The “Boldt Decision” recognized the tribes’ rights to harvest fish but also implied that those rights depend on the continued existence of healthy fish populations; fishing rights are meaningless without fish and the habitat they depend on. The Nation has reserved federally guaranteed fishing rights to take fish at its usual and Accustomed (U&As) fishing grounds which include Grays Harbor and its watershed. *United States v. Washington*, 384 F. Supp. 312, 374-375, 459 F.Supp. 1020, 1097 (W.D.

Wash. 1974). Grays Harbor and the tributary streams, rivers and wetlands, provide the freshwater and marine habitat that supports Chinook, chum, and coho salmon and steelhead of critical importance to the Quinault Nation's treaty-protected terminal river fisheries within Grays Harbor.

Treaties are the supreme law of the land. *Breard v. Greene*, 523 U.S. 371, 375, 118 S. Ct. 1352, 1354, 140 L. Ed. 2d 529 (1998). They impose the "highest responsibility" on the government and create a special fiduciary duty and trust responsibility upon all agencies of the United States and states to protect Treaty rights, including fishing rights. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). These rights cannot be abrogated or diminished except by explicit Congressional authorization. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346, 354 (1941).

1. THE PROPOSED PROJECT THREATENS FEDERALLY PROTECTED FISHERIES TREATY RIGHTS

The DEIS contains insufficient information relating to the protection of fish and shellfish. Because fish and shellfish are protected treaty reserved resources, any potential impacts must be clearly identified, thoroughly analyzed, and fully mitigated. The following outline the issues with the analysis to fish and shellfish:

- A. While fish species were included in the DEIS, the analysis was rushed and incomplete. It does not include an assessment of the shoreline habitats that are included in the adjacent Seashore Conservation Area, Half Moon Bay, and Gray Harbor's fragile estuaries. Further, the DEIS fails to mention QIN's own biological observations of juvenile Coho near the Project site (depicted in Figure 3.2.8-1). QIN has communicated this information to the City numerous times.
- B. The DEIS fails to delineate the fish associated wetlands and their respective buffers that are required for the critical areas in the impact assessment. For example, the DEIS claims the proposed guest cottage area is not expected to impact onsite fish habitat (page 272) but fails to provide supporting data. This omission is a significant oversight and renders the fish impact assessment incomplete.
- C. Stormwater runoff impacts are inaccurate and fail to assess the impacts on coho habitat. The DEIS states "no stormwater would be directed to this drainage course feature under either action alternative" (page 272). This is an inaccurate statement as the Threshold Discharge Area 1 is located at the drainage course that provides juvenile coho rearing habitat. *See* Fig. 3.2.19-5, TDA 1.
- D. Crabbing for Dungeness Crab takes place south of the jetty extending down to the lighthouse along the proposed Project site. The DEIS has failed to assess how the proposal could affect crab habitat and populations. Nitrogen and phosphorus runoff, particularly fertilizer runoff, can negatively impact Dungeness crab populations by fueling algal blooms that deplete oxygen in the water. Dissolved oxygen can cause Dungeness Crab to become inactive, cease feeding, negatively impact growth of juvenile crabs, and lead to declines in fish populations. Because of their importance for both commercial and subsistence purposes, the impacts to Dungeness crab populations must be analyzed.

- E. Razor clam beds are adjacent to the Project Site, and yet the DEIS failed to assess how stormwater from the proposed outfall will lead to contamination of razor clams. Razor clams are indicator species and are susceptible to runoff. Stormwater that contains pesticides and other chemicals has the potential to cause impacts to the clams and impacts to public health. Razor clams are an important treaty resource for QIN tribal members. An analysis of impacts to this species is required.
- F. Excess fertilizers that are introduced through stormwater runoff without treatment will cause eutrophication to fragile ecosystems in the Pacific Ocean, Half Moon Bay, and other fragile estuary systems within Grays Harbor. Excess nutrient runoff promotes harmful algal blooms, which can lead to hypoxic and anoxic conditions. These low oxygen conditions can kill fish and eelgrass, degrade critical fish habitat for Chinook, chum, and coho, and contribute to dead zones. Additionally, harmful algal blooms will result in the closure of shellfish beds for extended periods of time, impacting commercial and subsistence harvests. The DEIS needs to address these issues.

2. THE CITY HAS FAILED TO PROPERLY ACCOUNT FOR EROSION AND CLIMATE CHANGE

In 2015, the Washington State Parks and Recreation Commission adopted the Washington State Parks Adaptation Plan which requires agencies to evaluate agency actions in the context of climate change. The first cross-cutting concerns states: “Siting and design of park infrastructure is likely to be affected by climate change, especially at coastal parks threatened by sea level rise and shoreline erosion, and river parks affected by heavier rain events and flooding.” The City has a legal obligation to view this Project and account for foreseeable impacts that will be exacerbated by climate change, especially rising sea levels and shoreline erosion. The Project removes critical areas, causing harm to fragile ecosystems, and has the potential to cause extensive shoreline erosion. It is foreseeable that a major climate change event such as a tsunami and/or an earthquake will happen. The runoff from pesticide and fertilizer-soaked greens coupled with the impacts from climate change such as flooding and storm events could be catastrophic. The DEIS falls short of meeting the direction of the Adaptation Plan and fails to thoroughly evaluate the impacts of climate change using the best available science.

- A. Sea levels will continue to rise, and storms will increase in severity. The shoreline around the Project site is already in a precarious condition. The proposed filling of interdunal wetlands and up to 146 acres of vegetation removal will likely exacerbate soil instability and erosion. Development within interdunal areas that protect against flooding and sea level rise is counterproductive.
- B. The Project includes two coastal discipline reports. The analysis of coastal erosion conducted by Herrera Environmental Consultants only looked at a 25-year timeframe and failed to account for projected sea level rises. The report from Aecom looked at a 100-year timeframe and properly included climate change. The DEIS assessment largely relied upon the report with the shorter time period. The City’s review of the Project should not include cherry-picking which data will paint a light more favorable to this Project, particularly since it fails to include long-term required planning around climate change. This narrow scope is inadequate,

especially in light of the Project's proposed 80-year lifespan. The City must look at the longer timeframe to include probable climate-change issues.

- C. The DEIS states that if coastal erosion occurs, the golf course operator will be responsible for making modifications. This implies that erosion is a known and foreseeable issue and that stabilization measures may be needed. This directly conflicts with the City of Westport's Shoreline Management Plan (6.07.01 Policies), which prohibits new development that would require shoreline stabilization *likely to harm adjacent shoreline areas*. Rather than approve an action that allows a threat by a natural land change process, the City should follow the Washington State Parks Critical Areas Policy, which states that the Agency shall "retreat from that threat rather than construction of protective measures." Washington State Parks Critical Areas Policy 73.03-01.
- D. The Army Corps of Engineers has stated that the Project will increase the value of public park assets, thus, increasing the likelihood of future federal beach nourishment funding. The inclusion of this statement in the DEIS (page 138) is troubling and misdirected and indicates that the Applicant and the City are complacent in a project that will contribute to shoreline loss, so long as this will incentivize the beach nourishment after the damage has been done.

3. WATER RESOURCES WILL BE NEGATIVELY AFFECTED BY THE PROJECT

There are concerns that water quality and fish habitat will be impacted during significant winter storm events, as referenced in Section 3.2 of the DEIS (page 141). There are three threshold drainage areas ("TDA"). As outlined above, the QIN reiterates its concern for impacts to coho bearing streams because of stormwater runoff and significant storm events.

- A. The DEIS states that "the TDA 1 wetland complex provides onsite storage of stormwater runoff that gradually draws down due to infiltration and evaporation during significant winter storm events. Wetland A fills up and overflow drains into an offsite roadside ditch system along N. Forrest Street." This known impact to water resources must be addressed.
- B. The DEIS states that there would be "negligible impacts to surface water movement on the site as a result of implementing Alternative 1 or Alternative 2." However, the Applicant fails to provide hydraulic modeling to substantiate this claim. It remains unclear how the proposed filling of the wetlands has been considered within the hydrological framework. Additional analysis and detailing modeling needs to adequately evaluate and support this conclusion.
- C. The DEIS states that pesticides will be selected based on their safety, efficacy, economic impact, toxicology, and environmental compatibility (page 147), and yet it fails to disclose the types, quantities, and timing of pesticide applications. This fatal flaw does not allow for an informed analysis of the impact to aquatic resources and important treaty protected resources such as salmonids, razor clams, and Dungeness crabs. The Applicant needs to provide a detailed accounting for pesticides and fertilizers that will be used throughout the year, including their frequency and dosage. Absent this information, the impact to fish and aquatic species and water resources cannot be determined.

- D. The Applicant proposes to have a site-specific Water Quality Monitoring Plan prepared to ensure ongoing protection of surface and ground water quality and to implement adaptive management measures (page 148). The Applicant needs to proactively address these adaptive management measures, rather than waiting until a catastrophic event happens.
- E. The DEIS fails to analyze how the Project will impact site runoff/absorption. There is no analysis on how the filling of 43 acres of protected wetlands will change hydrologic conditions and impact runoff/absorption. Wetlands are like sponges that temporarily store floodwaters and retain harmful pollutants. Removing these wetlands will have ramifications. This needs to be assessed using best available science practices.
- F. Likewise, there is no analysis of how the filling of these wetlands will increase flooding onsite and to adjacent areas. Appropriate stormwater storage and treatment designs need to be assessed to determine potential impacts from increased flooding because of climate change.

4. WETLANDS THAT SUPPORT HYDROLOGICAL CONDITIONS AND SUSTAIN DISTINCTIVE WETLAND ECOSYSTEMS MUST BE PROTECTED, NOT REMOVED

Interdunal wetlands represent a rare and ecologically valuable habitat that warrants urgent conservation attention. With their unique formation and role in supporting rare and endangered plant species, they must be protected. In addition to outright habitat destruction, many remaining interdunal wetlands like the ones at the Project site have been severely stressed and degraded. The Project threatens interdunal wetlands and conservation efforts must go beyond preservation of acreage. Temporary and direct impacts have not been adequately provided or correctly quantified in the DEIS.

5. CUMULATIVE IMPACTS WERE NOT ADEQUATELY EVALUATED IN THE DEIS

It is implicit in SEPA that an “agency cannot close its eyes to the ultimate probable environmental consequences of its current action.” *Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 344 (1976). Accordingly, under SEPA, environmental review must include consideration of “direct and indirect impacts caused by a proposal.” WAC 197-11-060(4)(d). The requirement for disclosure of indirect and cumulative impacts is necessary to comply with the mandate that decisions must be based on “complete disclosure of environmental consequences.” *King County v. Washington State Boundary Review Bd. for King County*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1994). “The range of impacts to be analyzed in an EIS (direct, indirect, and cumulative impacts, WAC 197-11-792) may be wider than the impacts for which mitigation measures are required of applicants.” WAC 197-11-060(4)(e). While SEPA itself does not define direct, indirect, and cumulative impacts, NEPA does, and these definitions have been borrowed for use in interpreting SEPA. *See Quinault Indian Nation v. City of Hoquiam*, 2013 WL 6637401 (Shorelines Hearings Board, Dec. 9, 2013) (borrowing NEPA definition of cumulative effects for SEPA analysis of crude-by-rail terminal).

The DEIS fails to adequately address cumulative impacts of the Project. The cumulative impacts neglects to consider the full scope of past, present and foreseeable future actions. This omission undermines the credibility of the analysis and fails to meet the standard required for informed decision-

making. The analysis must include enforceable mitigation measures and address the following impacts on treaty resources:

- A. The cumulative impacts on fish and shellfish from water quality degradation, including increased stormwater runoff and contaminant loading will only exacerbate existing levels of pollution in the soils and waters within the Project site.
- B. Additional analysis is required to substantiate how the Project, in conjunction with the Half Moon Bay Development, will not result in cumulative impacts.
- C. Growth is expected to increase in Westport and Grays Harbor County. The impacts of this projected growth in conjunction with the Project should be thoroughly assessed, along with the associated impacts to fully evaluate impacts to ecological functions.

6. THE PROPOSED ALTERNATIVES ARE INSUFFICIENT AND FAIL TO INCLUDE ALTERNATIVE SITE LOCATIONS WITH LESS ECOLOGICALLY SENSITIVE AREAS

The alternatives listed in the DEIS fail to fully consider the complete range of options, including alternative locations with less ecologically sensitive areas and privately held properties in Westport. The DEIS fails to demonstrate that no suitable alternative locations exist and lacks sufficient detail to show that the proposed development can be safely constructed with minimal environmental impacts. The Project permanently removes critical areas, particularly wetlands. This is contrary to the Washington State Parks Critical Area Policy 73-03-1, which states that “new park facilities cannot be built in critical areas unless there is a compelling reason, and the development can be adequately mitigated.” “Overriding justification” means that no suitable alternative location exists, and the development can be safely built with minimal environmental impact and risk. There is not enough mitigation to compensate for removing these wetlands. Mitigation will do nothing to compensate QIN for the loss of treaty resources within its U&A.

7. THE PROJECT FAILS TO ADDRESS QIN’S ACCESS TO AND THE EXERCISE OF ITS TREATY RIGHTS

The DEIS fails to assess impacts to QIN’s ability to access and exercise treaty rights that may occur from the restriction of access to the coastal zone and privatization of public use areas. This area is directly within QIN’s U&A to access treaty resources. Access must both be provided and maintained for this purpose. The Applicant needs to provide information on how this will be accomplished.

8. CONCLUSION

The amount of time required to adequately review the DEIS was insufficient. QIN requested a 60-day extension for the comment period when it learned of the DEIS, which was not granted by the City. Due to time constraints, QIN staff were only able to perform a cursory review of the proposed mitigation plan. With what has been reviewed, it is clear that mitigation is both lacking and fails to account for

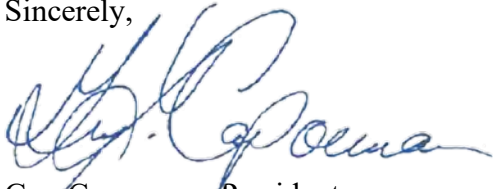
QIN's protected treaty resources. The City's unwillingness to consult with QIN early in the process and its denial of additional time on this important review is concerning.

Also concerning is the pending lawsuit in Thurston County Superior Court on the restrictive deed in the Global Settlement Agreement. The restrictive covenants that protect rare interdunal wetlands on Westport Light State Park run with the land and should protect against harm such as anticipated with the Project.

The Quinault Indian Nation requests the City to take a hard look at the Project and its impacts stemming from the removal of critical areas, as well as impacts to QINs treaty resources. As it is written, the impacts of this Project will be substantially harmful. For that reason, QIN must oppose the Project for the reasons outlined above.

I can be reached at guy.capoeman@quinault.org. I look forward to meeting with you to discuss this critical issue.

Sincerely,

A handwritten signature in blue ink, appearing to read "Guy Capoeman". The signature is fluid and cursive, with the first name "Guy" and last name "Capoeman" clearly distinguishable.

Guy Capoeman, President
Quinault Indian Nation

CC: Diana Dupuis, Director - Washington State Parks and Recreation Commission
Diana.Dupuis@parks.wa.gov



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Southwest Region Office
PO Box 47775, Olympia, WA 98504-7775 • 360-407-6300

June 9, 2025

Thomas Cappa, City Administrator
City of Westport
PO Box 505
Westport, WA 98595

Dear Thomas Cappa:

Thank you for the opportunity to comment on the draft environmental impact statement for the Westport Golf Links Project (25-COW-EIS-01) as proposed by Westport Golf Links, Ilc. The Department of Ecology (Ecology) reviewed the environmental checklist and has the following comment(s):

SHORELANDS & ENVIRONMENTAL ASSISTANCE: Zachary Meyer, (360) 481-9885

Thank you for the opportunity to comment on the draft environmental impact statement for the Westport Golf Links project at the Westport Light State Park. Ecology's Shorelands and Environmental Assistance program has thoughtfully reviewed this proposal with agency experts in wetland regulation/policy, shoreland regulation/policy, and wetland mitigation.

Proposed wetland impacts will require Ecology permitting/approval

The Department of Ecology (Ecology) regulates all waters of the state under RCW 90.48, WA State Water Pollution Control Act, including impacts to wetlands. An Administrative Order from Ecology would be required for proposed wetland impacts that are not covered by a Clean Water Act Section 401 Water Quality Certification. Section 3.4.3 of the draft EIS, which lists regulations from the State of Washington, should be updated to include this. Additionally, the interdunal wetlands onsite are regulated under RCW 90.58, Shoreline Management Act (SMA), through the City of Westport Shoreline Master Program. Permits from the City of Westport and Ecology would be required for the proposed wetland impacts (see more on shoreline permitting below).

Avoidance and minimization of wetland impacts is required to be adequately considered

This project proposes an unprecedented amount of wetland impacts; between 35 and 43 acres of direct impacts to Category I wetlands. The proposed alternatives would equal up to 35 football fields of wetland loss (Table 3.2.5.1 of the draft EIS). Ecology has not authorized an impact that large to any wetlands before, let alone to Category 1 wetlands which include rare, high-quality wetlands in Washington State. The alternatives analyzed by the EIS show wetland impacts from a primary 18-hole golf course, a secondary 12- or 14-hole short course, a golf practice range, another golf practice range associated with a proposed restaurant, a club house, guest cottages,

offices, and associated infrastructure (driveways, parking lots, maintenance facility, shuttle path/trails, etc).

Most impacts are proposed to interdunal wetlands, which are a rare wetland type in Washington state that form in the depressions behind dunes along the coast. They provide unique plant and animal habitat found nowhere else in the state. This includes providing important stopover grounds for migratory shorebirds. Interdunal systems naturally shift on the landscape with the movement of dunes and within a person's lifetime can appear to change considerably. This is a naturally-occurring phenomenon and contributes to their unique and fragile nature. This site contains one of the largest reserves of interdunal wetlands in the state.

The Shoreline Management Act, as well as the Westport Critical Area Ordinance and Westport Shoreline Master Program, require applicants to follow mitigation sequencing for impacts to critical areas. The first step, avoidance, requires a project be designed to avoid impacting wetlands during and after construction. For most types of impacts, wetland laws require applicants to demonstrate that there is no practicable alternative to reasonably accomplish the project's purpose without the impact. Therefore, the impact would be unavoidable.

The applicant has not clearly demonstrated that there is no practicable alternative that would avoid impacts to Category 1 interdunal wetlands and wetlands of high conservation value. In the early 2000s, a different golf course was proposed at this site, and in 2007 the proponent agreed to design the course to avoid all wetland impacts. This previous example demonstrates that there are other configurations possible that are not adequately considered in the draft EIS. It does not appear that avoidance and minimization of wetland impacts were adequately considered for this project.

Ecology strongly emphasizes avoidance of these functionally and geographically rare wetlands. Most projects that initially propose impacts to wetlands with special characteristics are ultimately able to avoid impacts.

Any unavoidable impacts must be appropriately offset through compensatory mitigation as outlined in [ECY/Corps/EPA Wetland Mitigation in Washington State Part 1: Agency Policies and Guidance \(2021\)](#) (Interagency Guidance).

Wetland impacts are not fully accounted

The draft EIS appears to significantly under-calculate indirect impacts to wetlands, which are adverse effects that occur outside the footprint of direct impacts. From Chapter 3.4.5 of the Interagency Guidance, indirect impacts include impacts to habitat functions (removing upland vegetation, human disturbance, adding light and noise pollution without buffer), impacts to hydrological functions (changes to the surrounding land uses and topography, irrigation), and impacts to water quality functions (applying pesticides or fertilizers nearby).

The final EIS should include a calculation of indirect wetland impacts from all development and vegetation removal areas including areas associated with proposed fairways/rough, along with anticipated ongoing maintenance of the course. Any wetland area that has development (including fairways and rough) proposed adjacent (i.e. within 300 feet for Category 1 interdunal) is considered indirectly impacted and will require additional compensatory mitigation. Indirect impacts require compensatory mitigation at half the ratio of direct impacts (see Chapters 3.4.5 "Indirect impacts" and 6B.4.7 "Compensating for indirect impacts" in the Interagency Guidance).

Perimeter buffers required for compensatory mitigation

Compensatory mitigation requires a protective perimeter buffer surrounding lands being used for generating mitigation credit. The draft EIS does not appear to take this buffer area into consideration when quantifying available compensatory mitigation opportunities. To properly assess proposed mitigation opportunities, the final EIS should include perimeter buffers following Chapter 6C (“Determining Buffers for Compensatory Mitigation Sites”, Interagency Guidance).

Preservation as compensatory mitigation has specific requirements

The draft EIS is unclear about how the proposed onsite preservation areas meet the requirements of a compensatory preservation site. All proposed preservation sites need to meet the preservation criteria listed in Chapter 5.2.3.1 of the Interagency Guidance to be considered for credit. As noted above, a perimeter buffer is required for protection from development, human disturbance, property lines, trails, etc. The perimeter buffer for interdunal wetlands with a high level of function for habitat, adjacent to a high intensity use (such as a golf course), is recommended at 300 feet (Table 6C-3. “Recommended perimeter buffer widths needed to protect wetland compensation sites in western Washington,” Interagency Guidance).

Proposed wetland compensatory mitigation appears insufficient

For the wetland impacts that are calculated in the draft EIS, proposed compensatory mitigation does not appear to have sufficient acreage (after discounting perimeter buffers) to meet mitigation ratios for Category 1 interdunal wetlands and wetlands of high conservation value found in the Interagency Guidance. The mitigation outlined in the draft EIS would not offset the impacts identified and would be expected to result in a loss of wetland ecological functions. We recommend the final EIS include additional compensatory mitigation opportunities to ensure no net loss of wetland area and ecological function.

Out of kind mitigation

Out of kind mitigation may not be appropriate to compensate for the proposed impacts to Category 1 interdunal/wetlands of high conservation value (see 6B.5.7 “Interdunal wetlands,” Interagency Guidance). Generally, applicants who propose impacts to interdunal wetlands must provide compensation with other interdunal wetlands.

Regulatory agencies recognize that these wetlands are rare and that compensation options may be limited. When applicants are only able to compensate with a different type of wetland from what was impacted, the agencies will typically increase compensation ratios. Applicants should consult with the applicable agencies in these cases (6B.5, Interagency Guidance). For additional requirements for out of kind mitigation proposals, see Chapter 6D of the Interagency Guidance.

Vegetation communities

The draft EIS frequently describes shore pine, a species native to the Washington coast, as a detrimental species and conflates its presence with invasive species. As the draft EIS notes, shore pine / slough sedge swamp forests are identified as an ecological system native to Washington by the Washington Department of Natural Resources with a conservation status of threatened. Shore pine growth is part of the natural ecological succession of these interdunal wetland ecosystems ([WDNR Ecological Systems of Washington State](#)) and this natural succession should not be

considered to have a negative effect on wetland condition and functions in the analysis of impacts under Alternative 3.

Shoreline permitting considerations

Areas within the jurisdiction of RCW 90.58, Shoreline Management Act, and the Westport Shoreline Master Program (Westport SMP) include lands within 200 feet of the ordinary high water mark of the Pacific Ocean and any associated wetlands. Interdunal wetlands on the outer coast of Washington were determined to be under shoreline jurisdiction due to surface and sub-surface drainage to the ocean (Shoreline Hearings Board No. 93-73). Uses and developments within shoreline jurisdiction are regulated by the Westport SMP and must achieve no net loss of ecological functions.

The Westport critical areas regulations in WMC Chapter 18.01 do not apply in shoreline jurisdiction, as critical areas in shoreline jurisdiction are exclusively protected and regulated by the Shoreline Management Act and the Westport SMP (see RCW 36.70A.480). Section 3.2.11.2.8 of the draft EIS incorrectly describes this relationship, and should be corrected. WMC Chapter 18.01 will apply to portions of the site outside of wetlands and outside of 200 feet from any shoreline waterbody.

A shoreline variance to seek relief from shoreline critical area regulations would be necessary to allow fill in shoreline associated wetlands. Per Westport SMP section 4.04.02.A.6., "Within shoreline jurisdiction, applicants seeking relief from the provisions of SMP Appendix 2: Critical Areas Regulations shall apply for a shoreline variance under SMP Section 7.04.03."

Net losses to ecological function are proposed

As discussed above, Alternatives 1 and 2 analyzed in the draft EIS involve large, unmitigated losses of Category I wetlands with special characteristics. This is inconsistent with a number of policies and regulations of the Westport SMP that require uses and development to be designed and constructed in a manner that assures no net loss of shoreline ecological functions.

Consistency with SMP use regulations

The Westport SMP designates the areas in shoreline jurisdiction within the proposed golf project as Urban Conservancy. The SMP lists commercial uses as prohibited in Urban Conservancy (Westport SMP Table 5-1). This prohibition would apply to any commercial developments proposed in shoreline jurisdiction which would include interdunal wetlands. Prohibited uses cannot be authorized and are not eligible for variances under the Shoreline Management Act.

Coastal evaluations appear inadequate

As presented in the Westport Discipline Report prepared by Herrera Environmental Consultants, Inc., the coastal evaluations indicate that future shoreline erosion would not impede the golf course under Alternative 1 and have small, impacted areas near the southwestern boundary of the project under Alternative 2. The methodology used to estimate the shoreline position in 2050 is based on a linear extrapolation of existing erosion rates. This methodology calculates erosion at an average rate and assumes that the rate will remain constant in the future. This does not consider significant episodic erosional events, potential exacerbations that result from increased

intensity and frequency of coastal storms due to climate change, nor impacts that result from lower elevations of eroded dune features.

Additionally, the EIS suggests the southwestern shoreline is at a high risk of erosion and may develop a crenulated beach profile due to the public access and end effect erosion caused by the adjacent dynamic revetment. While this assumption is not supported, it also does not appear that the formation of a crenulated beach is considered in the erosion rate of the southwestern shoreline. If a crenulated beach were to form, the linear erosion rate would be compounded by the end effect erosion suggested in this report, resulting in more severe erosion.

For these reasons, the evaluation of shoreline erosion appears to be under conservative for this project.

The time horizon considered for coastal erosion by the EIS, 25 years, is also unusually short. The EIS indicates that the development of the golf course would occur in a phased approach over 15 years, meaning that by the time construction is complete, the project will be 15 years into the 25-year period considered for maintenance and re-evaluation of shoreline erosion. The Final EIS should clarify the erosion risks and maintenance considerations relative to the start of construction of the project and the life of the project.

Half Moon Bay erosion should be analyzed

Measured erosion rates within Half Moon Bay are higher compared to rates along the western shoreline of Westport Light State Park. The draft EIS does not consider erosion within Half Moon Bay and the potential impedance of the shoreline into the northern section of the proposed golf course. The final EIS should consider or address potential erosion of the shoreline at Half Moon Bay as it relates to the project.

Buried large woody material not likely to prevent shoreline retreat

The EIS discusses a buried trench of large woody material to be installed under Alternative 2 as a mitigating measure to slow shoreline erosion and provide habitat value. However, the trench is only located along a small portion of the high-risk area and would not provide the intended protection to the most vulnerable areas of the project.

Additionally, natural dunes are comprised of consolidated sand. Excavating sand to place large woody material would introduce void space and destabilize existing dune structures potentially increasing the vulnerability to erosion.

The final EIS should address these concerns related to the large woody material trench.

Assumptions about wind-driven sand movement are unsupported

The EIS indicates that the golf course would have negligible changes to the movement of sand by wind. Evidence to support this conclusion is not provided in the EIS. The replacement of vegetation that traps sand with short fairway grasses would alter the topography and allow sand to move into and impact wetland areas behind the fairways. The Final EIS should further explain why changes to wind-driven sand movement (also known as aeolian transport) are expected to be negligible.

Conclusion

As presented in the Westport Golf Links Proposal for Westport Light State Park Draft Environmental Impact Statement (April 2025), Alternatives 1 and 2 would not meet the necessary permit requirements. Ecology would be unable to approve permits or administrative orders to construct this project under RCW 90.48, Water Pollution Control Act, or to authorize a shoreline variance under the Westport SMP.

For questions, technical assistance, or project coordination, please contact Dept of Ecology Shorelands Technical and Regulatory Lead Zach Meyer at zachary.meyer@ecy.wa.gov or 360-481-9885.

SOLID WASTE MANAGEMENT: Derek Rockett (360) 995-3176

All grading and filling of land must utilize only clean fill. All other materials may be considered solid waste and permit approval may be required from your local jurisdictional health department prior to filling. All removed debris resulting from this project must be disposed of at an approved site. Contact the local jurisdictional health department or Department of Ecology for proper management of these materials.

**WATER QUALITY/General Permit Unit:
Jacob Neuharth (360) 706-4599**

Erosion control measures must be in place prior to any clearing, grading, or construction. These control measures must be effective to prevent stormwater runoff from carrying soil and other pollutants into surface water or storm drains that lead to waters of the state. Discharges must not cause or contribute to a violation of surface water quality standards, groundwater quality standards, sediment management standards, and human health-based criteria. Sand, silt, clay particles, and soil will damage aquatic habitat and are considered to be pollutants.

If there are known soil/ground water contaminants present on site, additional information will be required to be submitted. For contaminated construction sites, contact Evan Wood at evan.wood@ecy.wa.gov, or by phone at (360) 706-4599.

Construction Stormwater General Permit:

The following construction activities require coverage under the Construction Stormwater General Permit:

1. Clearing, grading and/or excavation that results in the disturbance of one or more acres and discharges stormwater to surface waters of the State; and
2. Clearing, grading and/or excavation on sites smaller than one acre that are part of a larger common plan of development or sale, if the common plan of development or sale will ultimately disturb one acre or more and discharge stormwater to surface waters of the State.
 - a) This includes forest practices (including, but not limited to, class IV conversions) that are part of a construction activity that will result in the disturbance of one or more acres, and discharge to surface waters of the State; and
3. Any size construction activity discharging stormwater to waters of the State that
 - a) Determines to be a significant contributor of pollutants to waters of the State of Washington.

Thomas Cappa

June 9, 2025

Page 7

b) Reasonably expects to cause a violation of any water quality standard.

Applicants may apply online or obtain an application from Ecology's website at: <https://ecology.wa.gov/Regulations-Permits/Permits-certifications/Stormwater-general-permits/Construction-stormwater-permit>. Some projects may be eligible for coverage under an Erosivity Waiver. Construction site operators must apply for a permit at least 60 days prior to discharging stormwater from construction activities and must submit it on or before the date of the first public notice.

Ecology's comments are based upon information provided by the lead agency. As such, they may not constitute an exhaustive list of the various authorizations that must be obtained or legal requirements that must be fulfilled in order to carry out the proposed action.

If you have any questions or would like to respond to these comments, please contact the appropriate reviewing staff listed above.

Department of Ecology
Southwest Regional Office

(JKT:202501350)

cc: Zachary Meyer, SEA
Derek Rockett, SWM
Jacob Neuharth, WQ

1 grantor and the Army Corps of Engineers. Exhibit B was sent to the Army Corps in multiple
2 pieces, to facilitate review, but I stitched them back together using basic computer design
3 techniques.

4 3. The depiction of the environmental features on the attached “Exhibit B”
5 accurately reflects those features as shown on the black and white version recorded with the
6 Grays Harbor Auditor and the color version of Exhibit B that the preparer emailed to the Army
7 Corps. These source documents are attached as Exhibits 6 and 7, discussed below.

8 4. Exhibits 2 and 3 to this Declaration show the preservation areas of the Army
9 Corps Covenant on top of the two proposed layouts for the Links 2 Project. I sourced the two
10 proposed layouts for the Links 2 Project from Figure 2.3-2 from the Draft Environmental Impact
11 Statement for the Westport Golf Links Proposal for Westport Light State Parks, dated April 2025
12 (“DEIS”).

13 5. Exhibits 2 and 3 accurately show that elements of the Links 2 Project lie within
14 the Army Corps Covenant’s preservation areas (depicted as blue and orange).


15 6. Exhibits 4 and 5 show that elements of the Links 2 Project lie within the existing
16 wetlands areas depicted in the Army Corps Covenant (depicted as blue cross-hatch).

17 7. Attached as Exhibit 6 is a true and correct copy of the email and attachments sent
18 by Jennifer Johnson to the Army Corps, dated August 27, 2010, which I stitched together to
19 reproduce “Exhibit B,” and the Army Corps’ August 25, 2010, email requesting it. Note that the
20 footer and title block of “Exhibit B” shows that Jennifer Johnston helped create the drawing. I
21 received these documents from Plaintiffs’ counsel, and they are Bates stamped Parks 3638-3644.

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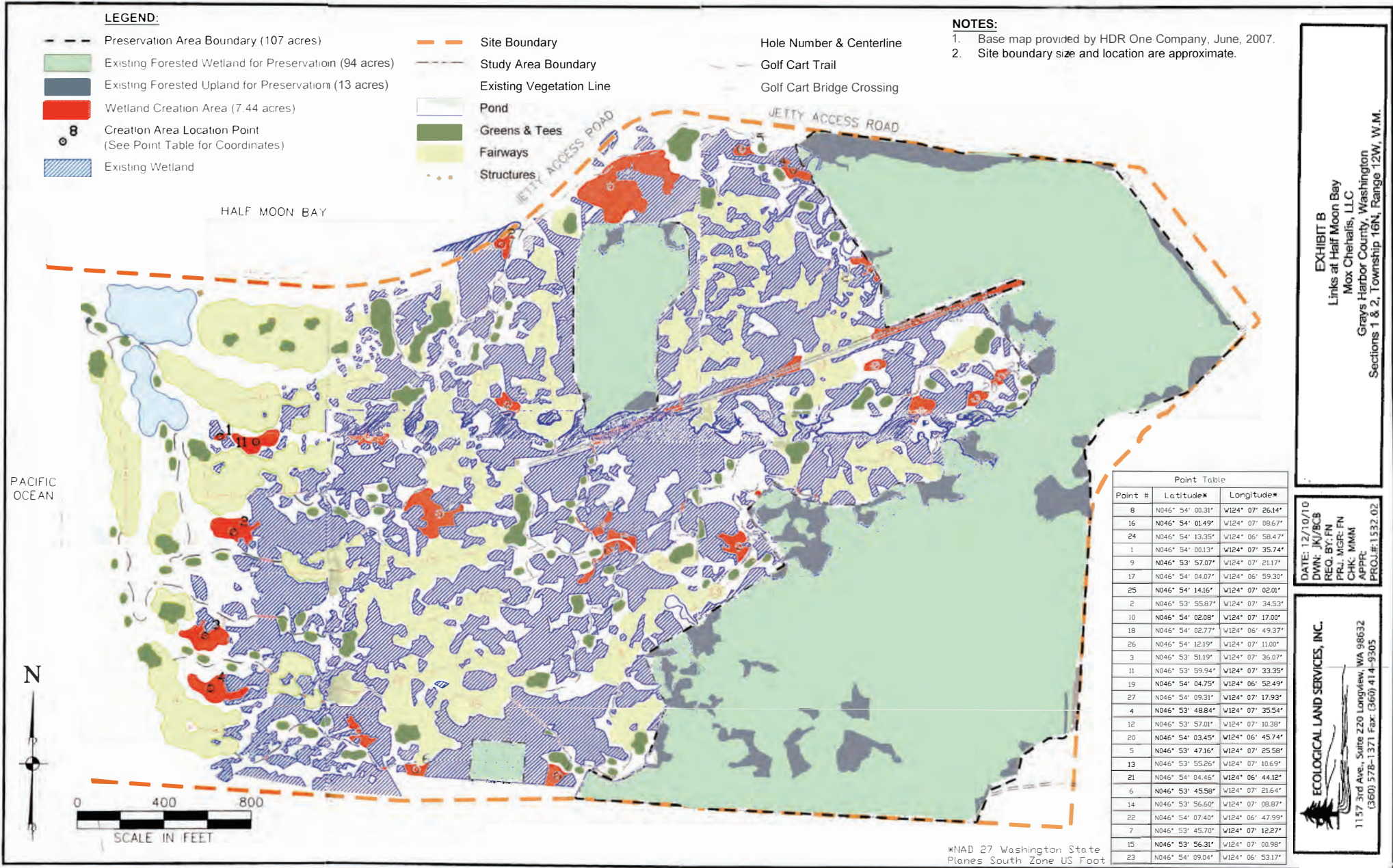
8. Attached as Exhibit 7 is a true and correct copy of the black and white version of Exhibit B, which was recorded with the Grays Harbor Auditor on December 21, 2010. I received this document from Plaintiffs' counsel, and it is Bates stamped Parks 7515-7521.

EXECUTED in Seattle, Washington on this 8th day of July, 2025.

By: 

Danielle Davis

Exhibit 1



LEGEND:

- - - Preservation Area Boundary (107 acres)
- Existing Forested Wetland for Preservation (94 acres)
- Existing Forested Upland for Preservation (13 acres)
- Wetland Creation Area (7.44 acres)
- Creation Area Location Point (See Point Table for Coordinates)
- Existing Wetland
- Site Boundary
- Study Area Boundary
- Existing Vegetation Line
- Pond
- Greens & Tees
- Fairways
- Structures
- Hole Number & Centerline
- Golf Cart Trail
- Golf Cart Bridge Crossing

NOTES:

1. Base map provided by HDR One Company, June, 2007.
2. Site boundary size and location are approximate.

Point Table		
Point #	Latitude*	Longitude*
8	N046° 54' 00.31"	W124° 07' 26.14"
16	N046° 54' 01.49"	W124° 07' 08.67"
24	N046° 54' 13.35"	W124° 06' 58.47"
1	N046° 54' 00.13"	W124° 07' 35.74"
9	N046° 53' 57.07"	W124° 07' 21.17"
17	N046° 54' 04.07"	W124° 06' 59.30"
25	N046° 54' 14.16"	W124° 07' 02.01"
2	N046° 53' 55.87"	W124° 07' 34.53"
10	N046° 54' 02.08"	W124° 07' 17.00"
18	N046° 54' 02.77"	W124° 06' 49.37"
26	N046° 54' 12.19"	W124° 07' 11.00"
3	N046° 53' 51.19"	W124° 07' 36.07"
11	N046° 53' 59.94"	W124° 07' 33.35"
19	N046° 54' 04.75"	W124° 06' 52.49"
27	N046° 54' 09.31"	W124° 07' 17.93"
4	N046° 53' 48.84"	W124° 07' 35.54"
12	N046° 53' 57.01"	W124° 07' 10.38"
20	N046° 54' 03.45"	W124° 06' 45.74"
5	N046° 53' 47.16"	W124° 07' 25.58"
13	N046° 53' 55.26"	W124° 07' 10.69"
21	N046° 54' 04.46"	W124° 06' 44.12"
6	N046° 53' 45.58"	W124° 07' 21.64"
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22	N046° 54' 07.40"	W124° 06' 47.99"
7	N046° 53' 45.70"	W124° 07' 12.27"
15	N046° 53' 56.31"	W124° 07' 00.98"
23	N046° 54' 09.04"	W124° 06' 53.17"

EXHIBIT B
 Links at Half Moon Bay
 Mox Chehalis, LLC
 Grays Harbor County, Washington
 Sections 1 & 2, Township 16N, Range 12W, W.M.

ECOLOGICAL LAND SERVICES, INC.
 1157 3rd Ave., Suite 220 Longview, WA 98632
 (360) 578-1371 Fax: (360) 414-9305

*NAD 27 Washington State
 Planes South Zone US Foot

Exhibit 2



Key:
 Preservation Area per Covenant
 Wetland Creation Areas Preserved per Covenant

Prepared by Danielle Davis
 Cookhouse Design LLC
 May 14, 2025
 Sources:
 Declaration of Covenant and Restrictions, Recorded 12/14/10, and Corps
 correspondence (Parks 3638-3643)
 DEIS for Westport Golf Links Proposal, April 2025

Exhibit 3



Key:
■ Preservation Area per Covenant
■ Wetland Creation Areas Preserved per Covenant

Sources:
 Declaration of Covenant and Restrictions, Recorded 12/14/10, and Corps
 correspondence (Parks 3638-3643)
 DEIS for Westport Golf Links Proposal, April 2025

Prepared by Danielle Davis
 Cookhouse Design LLC
 May 14, 2025

Exhibit 4



Key:

- Preservation Area per Covenant
- Wetland Creation Areas Preserved per Covenant

Sources:
 Declaration of Covenant and Restrictions, Recorded 12/14/10, and Corps
 correspondence (Parks 3638-3643)
 DEIS for Westport Golf Links Proposal, April 2025

Prepared by Danielle Davis
 Cookhouse Design LLC
 May 14, 2025

Exhibit 5



Key:
 Preservation Area per Covenant
 Wetland Creation Areas Preserved per Covenant

Sources:
 Declaration of Covenant and Restrictions, Recorded 12/14/10, and Corps
 correspondence (Parks 3638-3643)
 DEIS for Westport Golf Links Proposal, April 2025
 Prepared by Danielle Davis
 Cookhouse Design LLC
 May 14, 2025

Exhibit 6

August 25, 2010

Jim Green
USACE Seattle District
PO Box 3755
Seattle, Washington 98124-3755



Re: Mox-Chehalis Deed Restriction Figure

Dear Jim:

Enclosed is the deed restriction figure you requested.

If you have any questions or I may be of further assistance, please feel free to contact me at (360) 578-1371.

Sincerely,

Jennifer Johnston

Enclosure

Exhibit B Deed Restriction Figure

-  Site Boundary
-  Study Area Boundary
-  Existing Vegetation Line
-  Pond
-  Greens & Tees
-  Fairways
-  Structures

(94 acres)
13 acres)





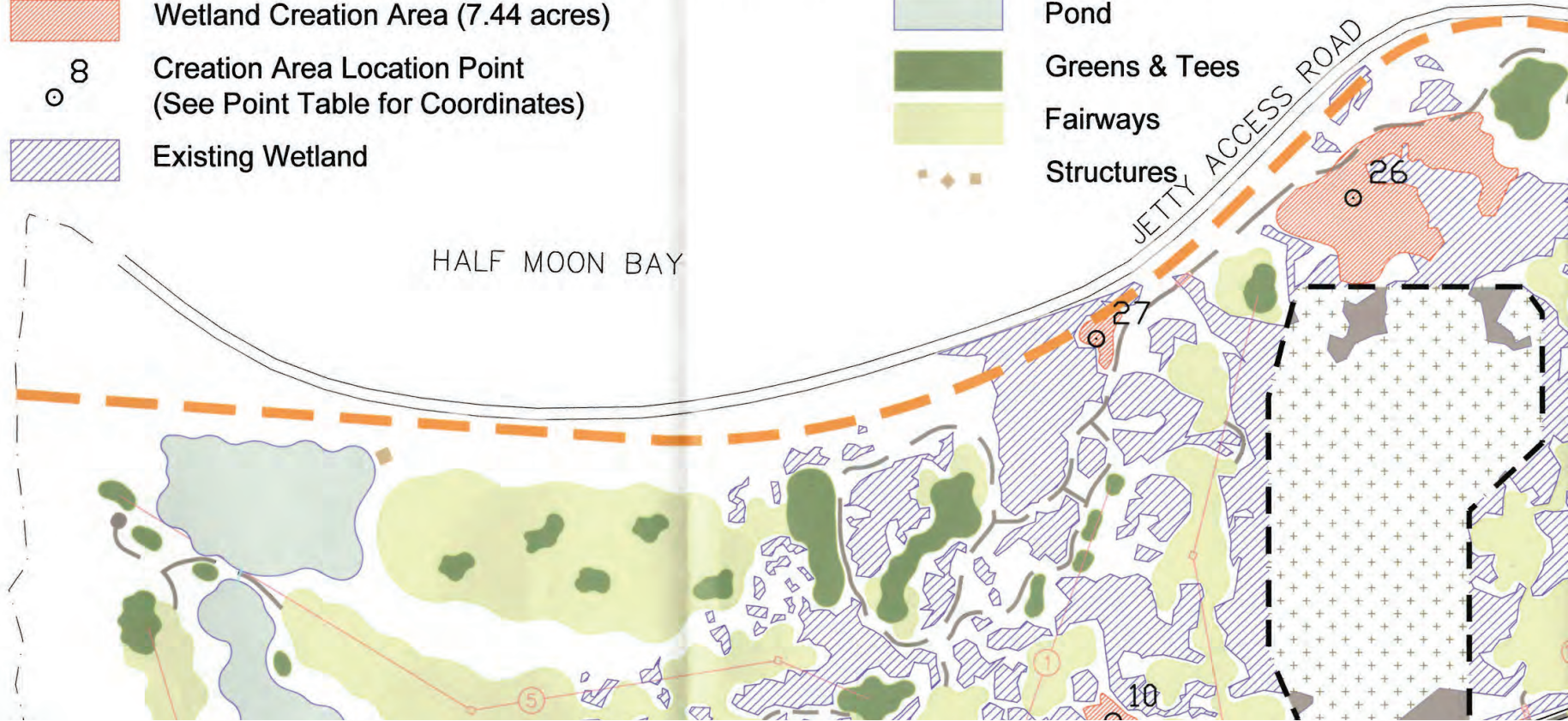
PFR00561

App. 115




PARKS-003639

LEGEND:

- | | | | |
|---|---|---|--------------------------|
|  | Preservation Area Boundary (107 acres) |  | Site Boundary |
|  | Existing Forested Wetland for Preservation (94 acres) |  | Study Area Boundary |
|  | Existing Forested Upland for Preservation (13 acres) |  | Existing Vegetation Line |
|  | Wetland Creation Area (7.44 acres) |  | Pond |
|  | Creation Area Location Point
(See Point Table for Coordinates) |  | Greens & Tees |
|  | Existing Wetland |  | Fairways |
| | |  | Structures |

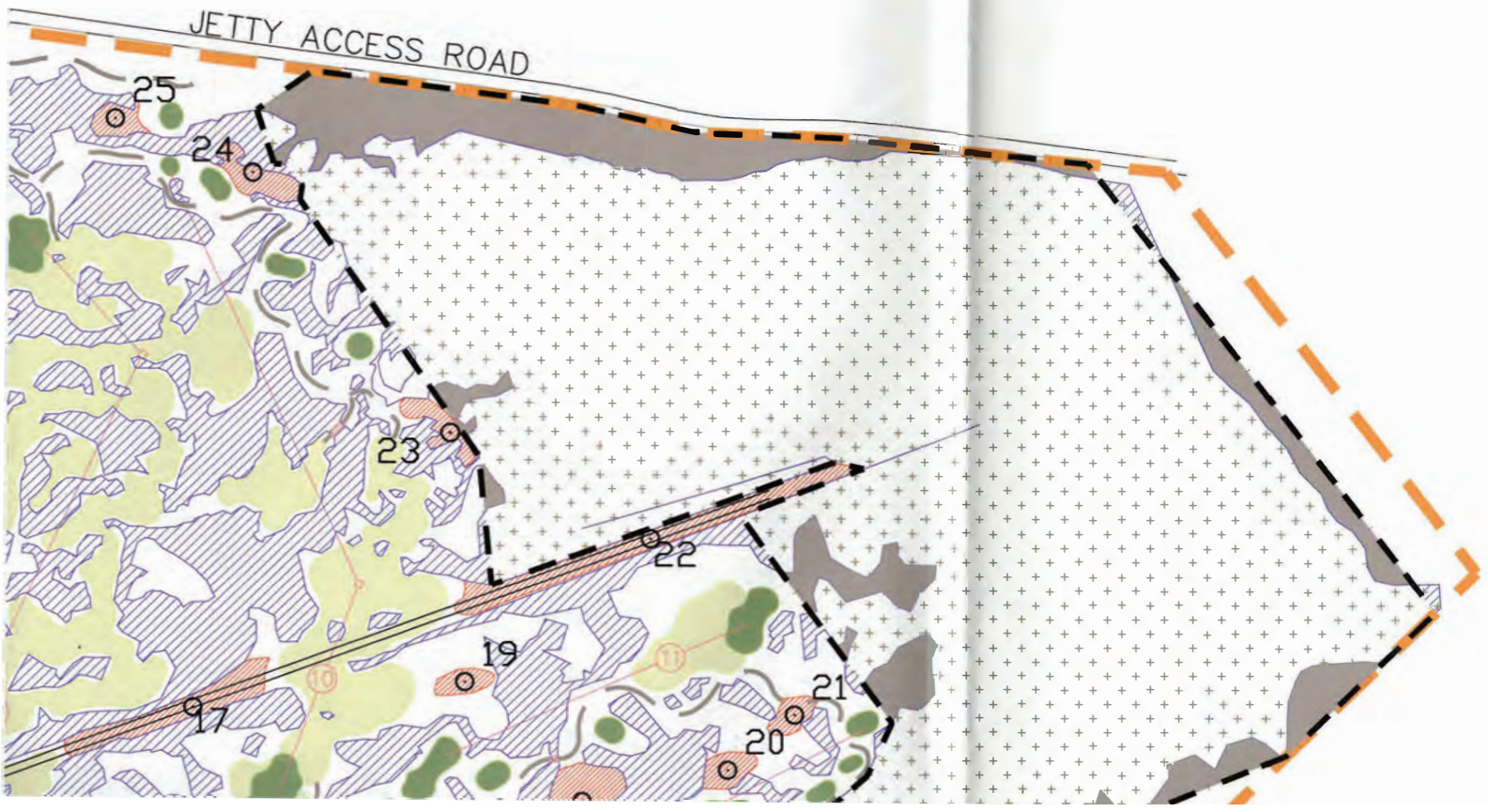


PARKS-003640

-  Hole Number & Centerline
-  Golf Cart Trail
-  Golf Cart Bridge Crossing

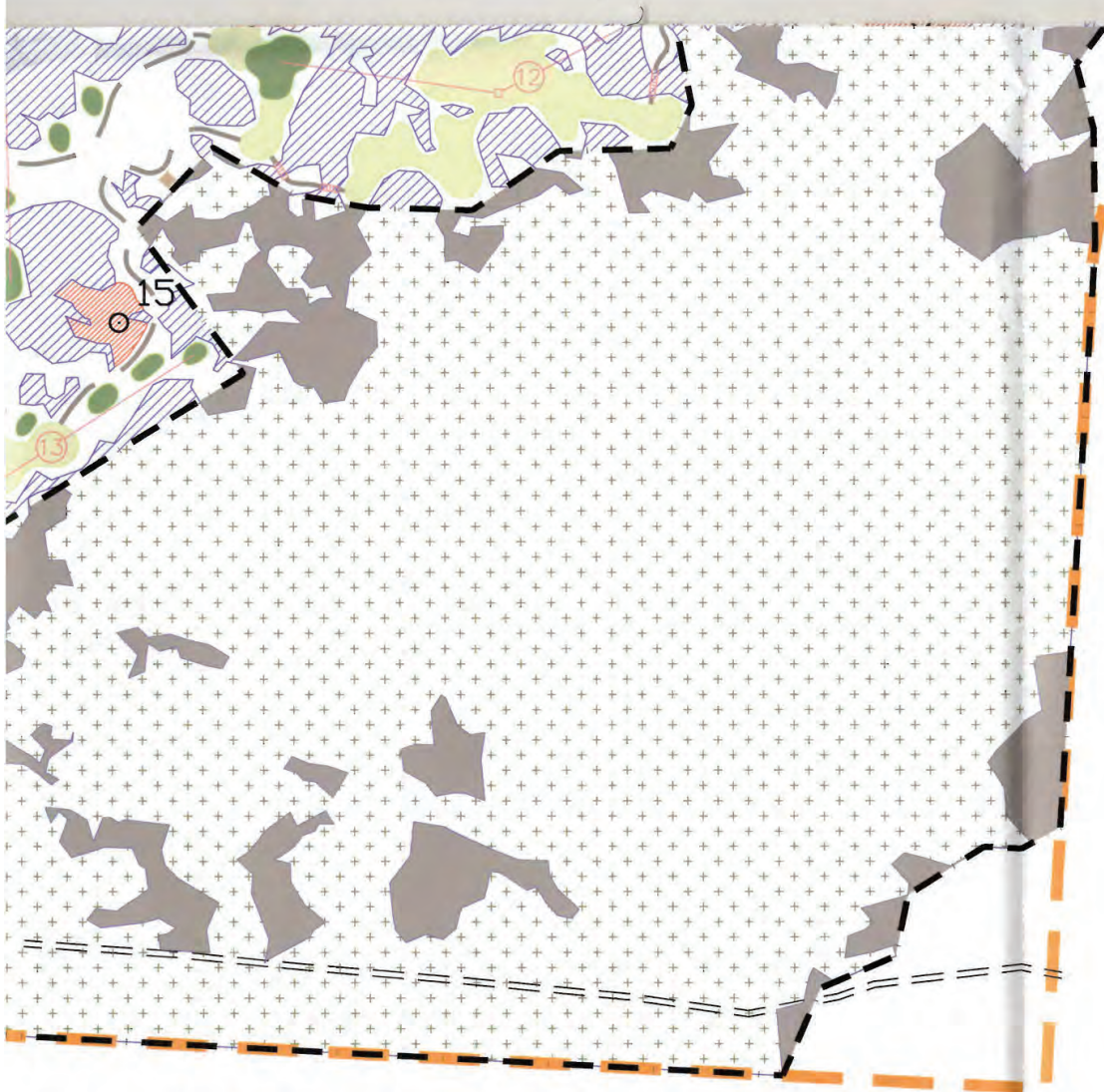
NOTES:

1. Base map provided by HDR One Company, June, 2007.
2. Site boundary size and location are approximate.



PARKS-003641

EXHIBIT B
 Links at Half Moon Bay
 Mox Chehalis, LLC
 Grays Harbor County, Washington
 Sections 1 & 2, Township 16N, Range 12W, W.M.



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23	N046° 54' 09.04"	W124° 06' 53.17"

*NAD 27 Washington State
Planes South Zone US Foot

DATE: 7/7/10
DWN: JKJ/BCB
REQ. BY: FN
PRJ. MGR: FN
CHK: MMM
APPR:
PROJ #: 1532.02

ECOLOGICAL LAND SERVICES, INC.



1157 3rd Ave., Suite 220 Longview, WA 98632
(360) 578-1371 Fax: (360) 414-9305

PARKS-003642

and Creation.dwg Jennifer Johnston

PACIFIC OCEAN

N



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PARKS-003643

PFR000565

App.319

Green, James D NWS

From: Green, James D NWS
Sent: Wednesday, August 25, 2010 10:13 AM
To: 'Francis Naglich'
Subject: Mox-Chehalis

Hi Francis: Thanks for sending in the deed restriction. I finally started looking at it. Given the small scale map in black and white, it is difficult to distinguish the different category of areas. Would you happen to have a larger scale map in color? This would help to answer some likely questions that will be asked.

Jim Green (206) 764-6906

Exhibit 7

**DECLARATION OF COVENANTS AND RESTRICTIONS
FOR THE
Mox Chehalis, LLC Property in Westport, WA**

THIS DECLARATION made this 7th day of December, 2010,
by James Daly, 29308 132nd Ave. SE, Auburn, WA 98092 ("Declarant").

RECITALS

1. WHEREAS, Declarant is the owner of the real property described in Exhibits "A" and "B" attached hereto and by this reference incorporated herein as the "Property", and desires to create and preserve thereon wetlands and forested habitat to be maintained in accordance with the provisions made between the declarant and the Department of Ecology (DOE) and the U.S. Army Corps of Engineers (USACE) for project bearing the Revised Shoreline Management Permit #2007-SW-02407-A and USACE Reference Number 200301009 ("Departments");

2. WHEREAS, Declarant desires to provide for the preservation and creation of the wetland values and preservation of forested habitat of the Property and for the maintenance and management of the Property and improvements thereon, and to this end desires to subject the Property to the covenants, restrictions, easements and other encumbrances hereinafter set forth, each and all of which is and are for the benefit of the Property.

2010-12140003 12/14/2010 09:38 AM COV
Page 1 of 7 R 68.00 Grays Harbor Co, WA
MOX CHEHALIS


NOW, THEREFORE, the Declarant declares that the Property shall be held, transferred, sold, conveyed and occupied subject to the covenants, restrictions, easements and other encumbrances hereinafter set forth in this Declaration.

ARTICLE 1 DEFINITIONS

1.1 "Declaration" shall mean the covenants, restrictions, and all other provisions set forth in the Declaration of Covenants and Restrictions.

1.2 "Declarant" shall mean and refer to James Daly, his successors or assigns.

1.3 "Permit" shall mean the final document approved by the Departments that formally establish the wetland mitigation and forested habitat preservation areas and stipulates the terms and conditions of its construction, operation and long-term management.

1.4 "Property" shall mean and refer to all real property subject to this Declaration, as more particularly set forth in Exhibits "A" and "B" as 114.44 acres total consisting of 107 acres of preservation and 7.44 acres of wetland creation.

ARTICLE 2 PROPERTY SUBJECT TO THIS DECLARATION

The real property which is and shall be held, transferred, sold, conveyed and occupied subject to this Declaration is located within the City limits of Westport, and within Grays Harbor County, Washington, and further located in a portion of Sections 1 and 2 of Township 16 North, Range 12 West, W.M., bordered by the Pacific Ocean to the West, Half Moon Bay and Jetty Access Road to the North, Washington State Park's property to the south and Forrest Avenue to the East. The 114.44 acre Property (conservation area) consists of:

- **7.44 acres of wetland creation** onsite between the fairways and within the historic location of "Radar Road".
- **107 acres of preservation** onsite (94 acres of forested wetland and 13 acres of forested uplands outside of the active golf course) as depicted on the attached "Exhibit B".

Further, the Property identified by this declaration is located within a 350 acre property owned by Mox Chehalis, LLC and is defined as depicted in "Exhibits A and B".

ARTICLE 3

GENERAL PLAN OF DEVELOPMENT

Declarant currently manages the site for the purposes of golf course development and wetland mitigation. Current management is in accordance with USACE Reference Number 200301009. This declaration also applies to any future changes in use of the property.

ARTICLE 4

USE RESTRICTIONS AND MANAGEMENT RESPONSIBILITIES

The areas identified as Property shall be managed for wetland mitigation and forested habitat preservation purposes in accordance with the agreement identified under the DOE Revised Shoreline Management Permit #2007-SW-02407-A and the USACE Reference Number 200301009. Declarant and all future owners and users of the Property are subject to any and all easements, covenants and restrictions of record affecting the Property.

1. There shall be no removal, destruction, cutting, trimming, mowing, alteration or spraying with biocides of any vegetation in the Property except for maintenance activities and activities designed to achieve mitigation performance standards as detailed in the mitigation plan approved under the DOE Revised Shoreline Management Permit #2007-SW-02407-A nor any disturbance or change in the natural habitat of the Property.
2. There shall be no agricultural, commercial, or industrial activity undertaken or allowed in the Property; nor shall any right of passage across or upon the Property be allowed or granted if that right of passage is used in conjunction with agricultural, commercial or industrial activity.
3. No domestic animals shall be allowed on the Property except for properly controlled service animals as needed by persons with disabilities.
4. There shall be no filling, excavating, dredging, mining or drilling; no removal of topsoil, sand, gravel, rock minerals or other materials, nor any dumping of ashes,

trash, garbage, or of any other material, and no changing of the topography of the land of the Property in any manner.

- 5. There shall be no construction or placing of buildings, mobile homes, advertising signs, billboards, or other advertising material, or other structures on the Property.

ARTICLE 5

RESOLUTION OF DOCUMENT CONFLICTS

Any conflict between this Declaration and the agreement identified under the DOE Revised Shoreline Management Permit #2007-SW-02407-A and USACE Reference Number 200301009 shall be resolved jointly by the parties.

IN WITNESS WHEREOF, the undersigned being Declarant herein, has executed this instrument this 6th day of December, 2010.

JD Financial Corp. (*land owner*)
Grays Harbor County, Washington

By: [Signature]

Title: president

STATE OF WASHINGTON)
) ss:
County of King)

This instrument was acknowledged before me on December 7th, 2010 (date) by James Daly as President of JD Financial Corp., Grays Harbor County, Westport, Washington.

[Signature]
Signature of Notarial Officer

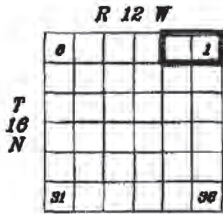
My Commission Expires: 06/10/2012



WASHINGTON



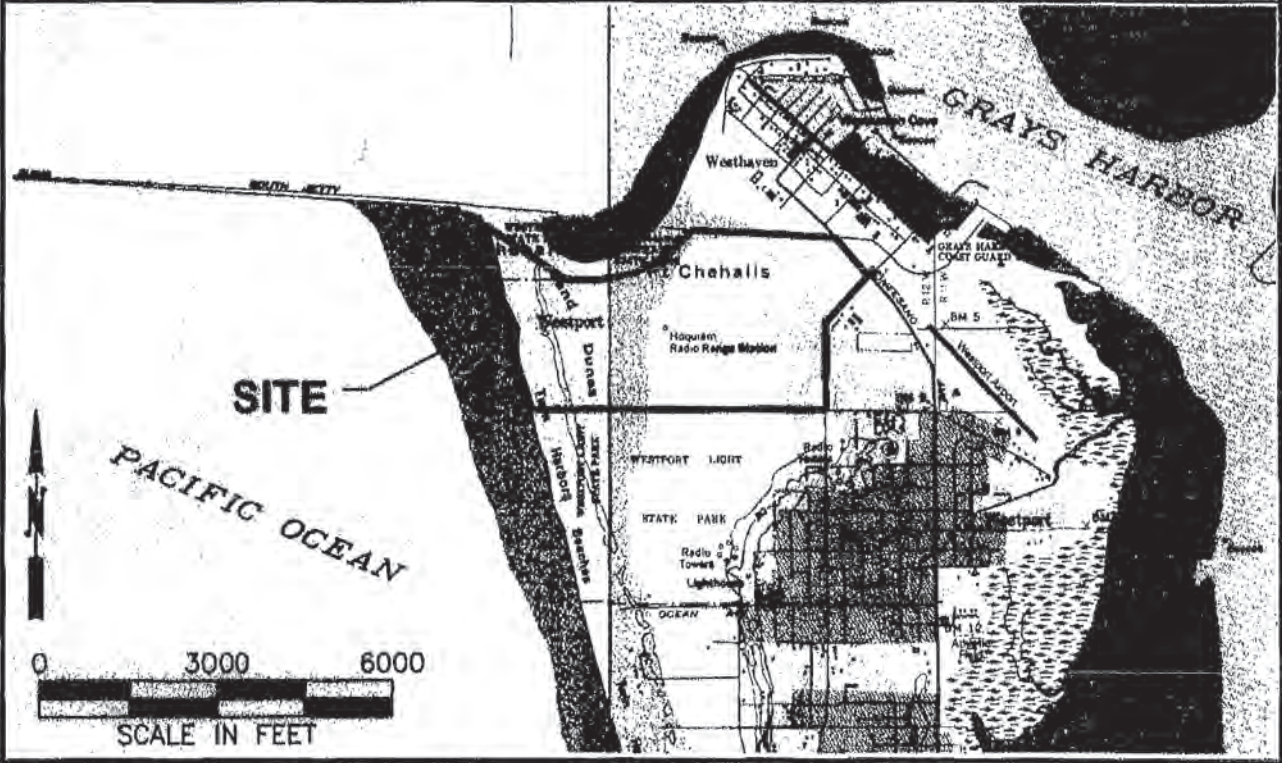
LOCATION MAP



SITE

PROJECT VICINITY MAP

NOTE: USGS topographic quadrangle map reproduced using MAPTECH Inc., Terrain Navigator Pro software.



SITE

PACIFIC OCEAN

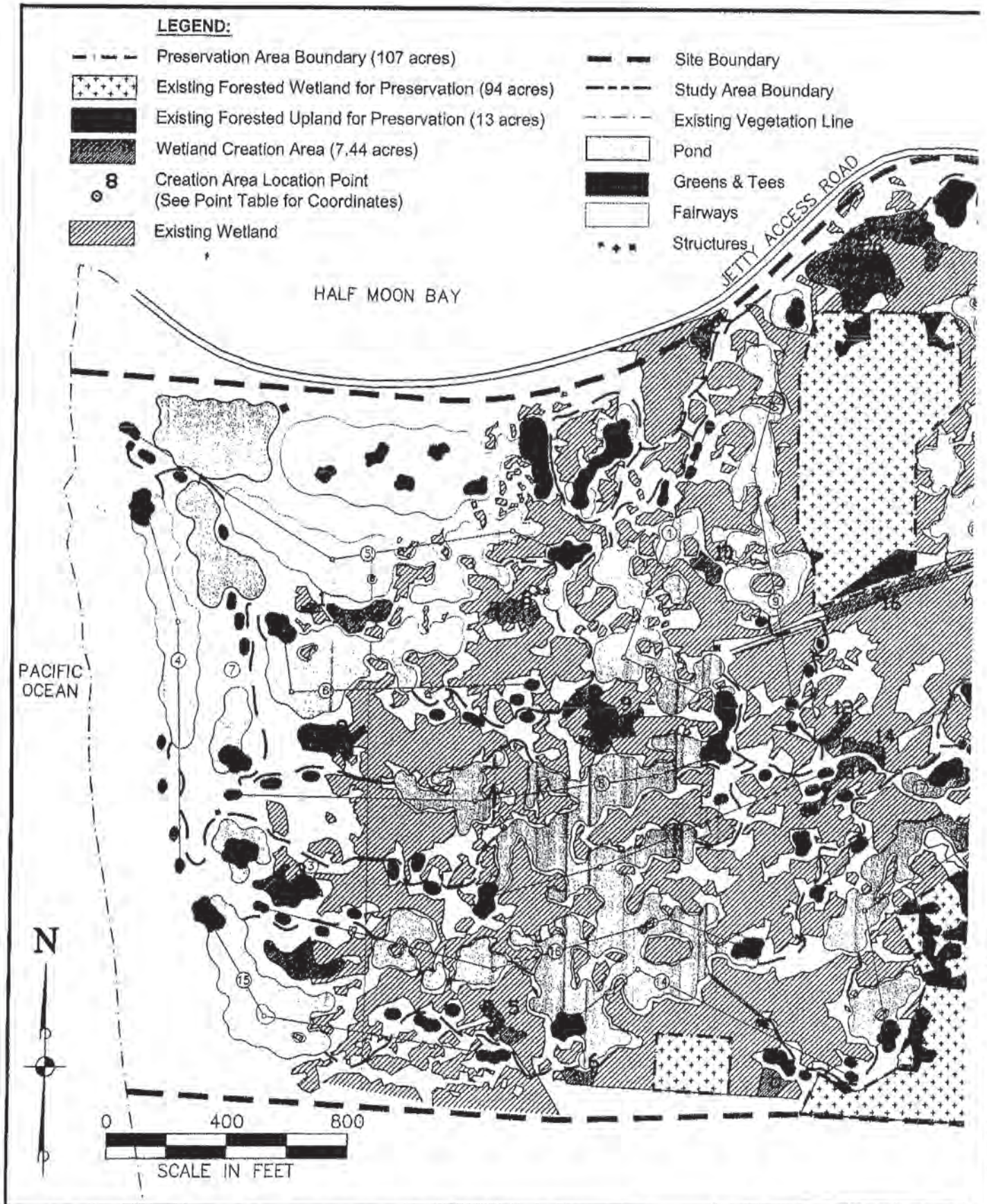


ECOLOGICAL LAND SERVICES, INC.
1157 3rd Ave., Suite 220 Longview, WA 98632
(360) 578-1371 Fax: (360) 414-9305

DATE: 12/10/10
DWN: MMM
REQ. BY: FN
PRJ. MGR: FN
CHK: MMM
APPR:
PROJ.#: 1532.01

EXHIBIT A
Links at Half Moon Bay
Mox Chehalis, LLC
Grays Harbor County, Washington
Sections 1 & 2, Township 16N, Range 12W, W.M.

4/13/2007 4:12 PM S:\Grays Harbor-WA\County-Projects\1532-Mox Chehalis, LLC\1532.02-Conservation Covenant Violation Consultation\1532.02-Figures\VICINITY.dwg Jennifer Johnston

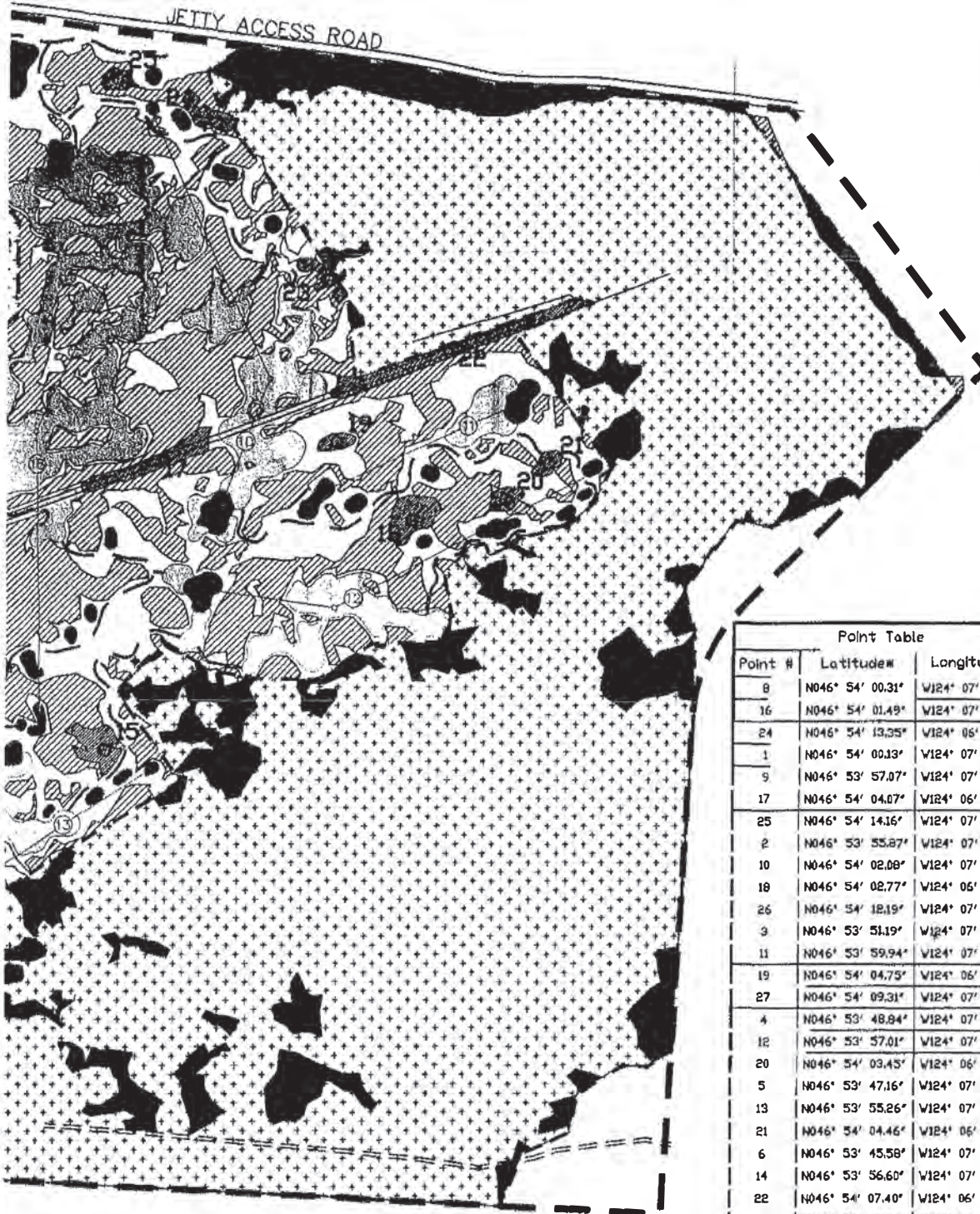


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NOTES:

1. Base map provided by HDR One Company, June, 2007.
2. Site boundary size and location are approximate.

- ① Hole Number & Centerline
- Golf Cart Trail
- Golf Cart Bridge Crossing



Point Table		
Point #	Latitude#	Longitude#
8	N046° 54' 00.31"	W124° 07' 26.14"
16	N046° 54' 01.49"	W124° 07' 08.67"
24	N046° 54' 13.35"	W124° 06' 58.47"
1	N046° 54' 00.13"	W124° 07' 35.74"
9	N046° 53' 57.07"	W124° 07' 21.17"
17	N046° 54' 04.07"	W124° 06' 59.30"
25	N046° 54' 14.16"	W124° 07' 02.01"
2	N046° 53' 55.87"	W124° 07' 34.53"
10	N046° 54' 02.08"	W124° 07' 17.00"
18	N046° 54' 02.77"	W124° 06' 49.37"
26	N046° 54' 12.19"	W124° 07' 11.00"
3	N046° 53' 51.19"	W124° 07' 36.07"
11	N046° 53' 59.94"	W124° 07' 33.35"
19	N046° 54' 04.75"	W124° 06' 52.49"
27	N046° 54' 09.31"	W124° 07' 17.93"
4	N046° 53' 48.84"	W124° 07' 35.54"
12	N046° 53' 57.01"	W124° 07' 10.38"
20	N046° 54' 03.45"	W124° 06' 45.74"
5	N046° 53' 47.16"	W124° 07' 25.58"
13	N046° 53' 55.26"	W124° 07' 10.69"
21	N046° 54' 04.46"	W124° 06' 44.12"
6	N046° 53' 45.58"	W124° 07' 21.64"
14	N046° 53' 56.60"	W124° 07' 08.87"
22	N046° 54' 07.40"	W124° 06' 47.99"
7	N046° 53' 45.70"	W124° 07' 12.27"
15	N046° 53' 56.31"	W124° 07' 00.98"
23	N046° 54' 09.04"	W124° 06' 53.17"

*NAD 27 Washington State Planes South Zone US Foot

EXHIBIT B
 Links at Half Moon Bay
 Mox Chehalis, LLC
 Grays Harbor County, Washington
 Sections 1 & 2, Township 16N, Range 12W, W.M.

DATE: 12/10/10
 DWN: JKJ/BCB
 REQ. BY: FN
 PRJ. MGR: FN
 CHK: MMM
 APPR:
 PROJ.#: 1532.02

ECOLOGICAL LAND SERVICES, INC.

 1157 3rd Ave., Suite 220 Longview, WA 98632
 (360) 578-1371 Fax: (360) 414-9305



Washington State Wetland Rating System

**For Western Washington
2014 Update Version 2.0**

By

Thomas Hruby, PhD and Amy Yahnke, PhD

For the

Shorelands and Environmental Assistance Program

Washington State Department of Ecology

Olympia, Washington

October 2014 (updated July 2023)

Publication 23-06-009



1995; Schouwenaars, 1995; Schrautzer et al., 1996; Mazerolle et al., 2006), water regime (Grootjans & van Diggelen, 1995; Schouwenaars, 1995), and/or water chemistry (Wind-Mulder & Vitt, 2000). In fact, restoration may be impossible because changes to the biotic and abiotic properties preclude the re-establishment of bogs (Schouwenaars, 1995; Schrautzer et al., 1996), although one study (Lucchese et al., 2010) did find that a sphagnum layer did become re-established after 17 years. Furthermore, bogs form extremely slowly, with organic soils forming at a rate of about 1 in. per 40 years in western Washington (Rigg, 1958).

Wetlands with Mature and Old-Growth Forests. Mature and old-growth forested wetlands over 1 ac in size are rated as Category I because these wetlands cannot be easily replaced through compensatory mitigation. A mature forest may require a century or more to develop, and the full range of functions performed by these wetlands may take even longer (reviewed in Sheldon et al., 2005). Placing mature and old-growth forests into a separate category makes it easier to address the temporal losses that accrue when forested wetlands are impacted and mitigation is required.

Wetlands in Coastal Lagoons. Coastal lagoons are shallow bodies of water, like a pond, partly or completely separated from the sea by a barrier beach. They may, or may not, be connected to the sea by an inlet, but they all receive periodic influxes of salt water. This can be either through storm surges overtopping the barrier beach, or by flow through the porous sediments of the beach.

Relatively undisturbed wetlands in coastal lagoons that are larger than $1/10$ ac are placed into Category I. They probably cannot be reproduced through compensatory mitigation (we have no record of restoration or creation of coastal lagoons in Washington), and they are relatively rare in the landscape. No information was found on any attempts to create or restore coastal lagoons in Washington that would suggest that this type of compensatory mitigation is possible. Any impacts to lagoons will, therefore, probably result in a net loss of their functions and values.

In addition, coastal lagoons and their associated wetlands are proving to be very important habitat for salmonids. Unpublished reports of ongoing research in the Puget Sound (Hirschi et al., 2003; Beamer et al., 2003) suggest that coastal lagoons are heavily used by juvenile salmonids.

Interdunal Wetlands Larger than 1 ac and Score High for Habitat. Interdunal wetlands form in the deflation plains and swales that are geomorphic features in areas of coastal dunes. These dune forms are the result of the interaction among sand, wind, water, and plants. The dune system immediately behind the ocean beach (the primary dune system) is very dynamic and can change from storm to storm (Wiedemann, 1984). For the purpose of rating, any wetlands that are located west of the upland boundary mapped in 1889 (western boundary of upland ownership) are considered to be interdunal.

The wetlands that form in the interdunal ecosystem are not well understood and most indicators used to rate the hydrologic and water quality functions of Depressional wetlands are not applicable. As a result, interdunal wetlands cannot be rated using the three-function approach used for freshwater wetlands elsewhere. However, the wetland resource is an important but small part of the total dune system (Wiedemann, 1984), and needs to be protected.

Some of the interdunal wetlands that have developed since 1889 have had time to develop a complex ecosystem with many habitat niches. Interdunal wetlands that score 8 or 9 points for habitat, and are larger than 1 ac, are Category I because they provide critical habitat in this ecosystem. Until we know more about how interdunal wetlands function, we need to provide adequate protection for this resource.

Wetlands That Perform Functions at High Levels. Wetlands scoring 23 points or more (out of 27) on the questions related to functions are Category I wetlands.

Not all wetlands function equally well, especially across the suite of functions performed. The field questionnaire was developed to provide a method by which wetlands can be rated based on their relative performance of different functions. Wetlands scoring 23 points or more were judged to have the highest levels of functions. These wetlands are also relatively rare. Of the 111 wetlands used to calibrate the rating system in western Washington, only 11 (10%) scored 23 points or higher based on their functions.

2.2 Category II

Category II wetlands are difficult, though not impossible, to replace, and provide high levels of some functions. These wetlands occur more commonly than Category I wetlands, but still need a relatively high level of protection. Category II wetlands in western Washington include:

Smaller Estuarine Wetlands. Any estuarine wetland smaller than 1 ac, or those that are disturbed and larger than 1 ac, are Category II wetlands. Although disturbed, these wetlands still provide unique natural resources that are considered to be valuable to society. Furthermore, the questions used to characterize how well a wetland functions cannot be used for estuarine wetlands.

Wetlands That Perform Functions Well. Wetlands scoring between 20-22 points (out of 27) on the questions related to the functions present are Category II wetlands. These wetlands were judged to perform most functions relatively well or performed one group of functions very well and the other two moderately well.

Interdunal Wetlands Larger than 1 Ac or Those in a Mosaic. The wetlands that form in the interdunal ecosystem are not well understood, and most indicators used to rate the hydrologic and water quality functions of Depressional wetlands are not applicable. As a result, interdunal wetlands cannot be rated using the three-function approach used for other freshwater wetlands. However, these wetlands are an important but small part of the total dune system (Wiedemann, 1984) and need to be protected.

Wetlands larger than 1 ac and that score 7 or lower for habitat, or those found in a mosaic of wetlands and dunes larger than 1 ac, are Category II because they also probably provide important habitat in this ecosystem that cannot be rated using the indicators in this method. Since we know so little about them, the precautionary principle was chosen to protect them.

SC 6.0 Interdunal wetlands

Is the wetland west of the 1889 line known as the Western Boundary of Upland Ownership?

Interdunal wetlands form in the deflation plains and swales that are geomorphic features in areas of coastal dunes. These dune forms are the result of the interaction among sand, wind, water, and plants. The dune system immediately behind the ocean beach (the primary dune system) is very dynamic and can change from storm to storm (Wiedemann, 1984). These wetlands provide critical habitat in this ecosystem (Wiedemann, 1984), but many of the more recently formed wetlands cannot be characterized using the questions on the rating form.

Wetlands located west of the 1889 line (also called the Western Boundary of Upland Ownership or WBUO) along the coast are considered interdunal wetlands because they have formed only in the last century or so. These wetlands all have formed as a result of accretions of the beach westward since 1889.

In practical terms, that means the following geographic areas:

- Long Beach Peninsula: Lands west of SR 103
- Grayland-Westport: Lands west of SR 105
- Ocean Shores-Copalis: Lands west of SR 115 and SR 109 (**Annotation:** And Ocean Shores Blvd SW, including lands west of E. Oceans Shores Blvd SW).

Interdunal wetlands greater than 1 ac that rate High for habitat (score 8 or 9 for habitat) are placed in Category I because they provide numerous habitat niches in this ecosystem that is little understood. Other interdunal wetlands that are 1 ac or larger or are in a mosaic that is larger than 1 ac (Fig. 52), are Category II (see section 4.3 for identifying mosaics). Wetlands not in a mosaic between 0.1 and 1 ac are Category III, and smaller ones (<0.1 ac) are Category IV (see Fig. 53). **If the interdunal wetland unit is larger than 1 ac, the Habitat questions on the rating form need to be answered to determine if the wetlands have enough habitat structure to be categorized as a Category I.**

NOTE: Small interdunal wetlands often form a mosaic behind the primary dunes (see Figures 52 and 53). If the interdunal wetlands meet the criteria for wetlands in a mosaic (see section 4.3 and repeated below), then the category should be based on the overall size of the mosaic rather than an individual patch.

- Each patch of wetland is less than 1 ac (0.4 ha), and
- Each patch is less than 100 ft (30 m) apart, on the average, and
- The areas delineated as vegetated wetland are more than 50% of the total area of both the wetlands and dunes.



Figure 52. Interdunal mosaic that is larger than 1 ac. Individual wetland areas within the oval may be smaller than 1 ac, but they form a mosaic that is larger than 1 ac.



Mosaic of wetlands
less than 0.1 ac in size

Mosaic of wetlands
less than 1 ac in size

Figure 53. Interdunal wetlands in mosaics less than 1 ac and less than 0.1 ac in size.

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Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

April 21, 2006

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CASE #: 34113-1-II/Friends of Grays Harbor v WA State Environ & Land Use Hrg Bd

Counsel:

The action indicated below was taken in the above-entitled case.

A RULING SIGNED BY COMMISSIONER SKERLEC:

The motion to dismiss is denied. RCW 34.05.542(6) specifically permits

RECEIVED

APR 21 2006

LAW LYMAN DANIEL
KAMERRER & BOGDANSKI

CASE #: 34113-1-II
Friends of Grays Harbor v WA State Environ & Land Use Hrg Bd

service on a party's attorney. *Union Bay v. Cosmos Dev.*, 127 Wn.2d, 614 (1995), on which respondents rely, was based on an earlier version of the statute that did not contain that provision. Service on the ELUHB was timely even though the Board did not receive the first mailing. See CR 5(b)(2)(B), permitting proof of service by the declaration or certificate of an attorney; and *Sholski v. Commissioner*, 351 F 2d, 485 (3rd Cir. 1965), permitting extrinsic evidence to prove timely mailing when the postmark was illegible.

Respondents' motion for accelerated review is denied. Respondents have not demonstrated good cause for placing this appeal ahead of other cases pending.

Very truly yours,

A handwritten signature in black ink, appearing to read "David C. Ponzoha". The signature is fluid and cursive, with a large loop at the top and a long horizontal stroke at the bottom.

David C. Ponzoha
Court Clerk

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FRIENDS OF GRAYS HARBOR AND
WASHINGTON ENVIRONMENTAL
COUNCIL,

Respondents,

v.

CITY OF WESTPORT, MOX
CHEHALIS, L.L.C.,

Petitioners,

WASHINGTON STATE
ENVIRONMENTAL AND LAND USE
HEARDINGS BOARD, THE
WASHINGTON STATE
DEPARTMENT OF ECOLOGY; and
PORT OF GRAYS HARBOR

Respondents,

No. 34113-1-II

FILED
COURT OF APPEALS
DIVISION II
06 MAR 14 PM 2:46
STATE OF WASHINGTON
BY
DEPUTY

RULING GRANTING REVIEW

This is a motion for direct review of a decision of the Environmental and Land Use Hearings Board, affirming the Shoreline Substantial Development Permit issued by the City of Westport for the Links at Half Moon Bay project. The

prompt determination of such issues would be detrimental to a party and the public interest. RCW 43.21L.140(1)

The superior court must certify such a case unless it determines by clear, cogent, and convincing evidence that (a) the project at issue is not a qualifying project, or (b) it will not provide new employment within the county in which it is located. RCW 43.21L.140(2). This court must accept review of cases certified under this statute unless it finds that the certification was clearly erroneous. RCW 43.21L.140(4).

The Washington Office of Permit Assistance has certified the project as a qualified project, and there is nothing in the record that suggests it will not provide new employment in Grays Harbor County. The requirements of the statute are satisfied.

Friends of Grays Harbor and the Environmental Council question the propriety of the legislative mandate, which they characterize as beneficial only to a select interest group. Such action appears to be constitutional, however.

The 1968 amendment to the state constitution that created the court of appeals provided that its jurisdiction "shall be as provided by statute or by rules authorized by statute." WA. CONST. ART. 4, § 30(2). This court has recognized that the legislature may, by a formal statutory grant, provide jurisdiction to hear appeals made directly from an administrative agency. See *Maple Leaf Inv. Inc. v. Department of Ecology*, 10 Wn. App. 586, 589, review denied, 83 Wn.2d 1012 (1974). Accordingly, it is hereby

1 BEFORE THE ENVIRONMENTAL AND LAND USE HEARINGS BOARD
2 STATE OF WASHINGTON

3 FRIENDS OF GRAYS HARBOR and
4 WASHINGTON ENVIRONMENTAL
5 COUNCIL,

6 Appellants,

7 v.

8 CITY OF WESTPORT, MOX-CHEHALIS
9 LLC, PORT OF GRAYS HARBOR, and
10 STATE OF WASHINGTON,
11 DEPARTMENT OF ECOLOGY,

12 Respondents.

ELUHB NO. 03-001

RECORD REVIEW
DECISION AND ORDER

11 Appellants Friends of Grays Harbor (FOGH) and Washington Environmental Council
12 (WEC), challenged the Shoreline Substantial Development Permit (SSDP) and Binding Site Plan
13 Approval (BSP) issued by the City of Westport for a destination resort project known as the
14 Links at Half Moon Bay. On August 4, 2005, the Environmental and Land Use Hearings Board
15 held a hearing on the record review portion of the case in Grayland, Washington, and made a site
16 visit to the project location and surrounding area. The record review case included the appeal of
17 a shoreline substantial development permit (SSDP) and the appeal of a binding site plan
18 approval. A separate de novo hearing was conducted in ELUHB No. 03-001, which addressed
19 water quality certification under §401 of Clean Water Act, shoreline conditional use permit
20 approval, and Ecology's Coastal Zone Management Act compliance determination.
21

1 During the record review case, counsel Knoll Lowney represented FOGH, counsel
2 Jennifer Joseph represented WEC, counsel Barnett Kalikow and Charles Roe represented Mox-
3 Chehalis, counsel Jeffrey S. Myers represented the City of Westport, Sr. Assistant Attorney
4 General Joan Marchioro and Assistant Attorney General Thomas Young represented Ecology,
5 and counsel Arthur A. Blauvelt III represented the Port of Grays Harbor. Administrative
6 Appeals Judge, Phyllis Macleod, presided for the Board comprised of Bill Clarke, chair, William
7 H. Lynch, David W. Danner,¹ Judy Wilson, O'Dean Williamson and Dan Smalley. Kim Otis of
8 Gene Barker and Assoc., Olympia, Washington, recorded the proceedings.

9 The parties presented written briefs and oral arguments on the record review issues to the
10 Board. Based upon the evidentiary record, the Board determines that the site is appropriate for
11 development of a destination resort project. The entire Board agrees that the hotels, conference
12 center, and golf clubhouse, as proposed, comply with Westport's Shoreline Management
13 Program (SMP) and the Shoreline Management Act (SMA). Three members of the Board
14 determine that the condominiums are also in compliance with the Westport SMP and the SMA.
15 Two members of the Board determine that the condominiums are an appropriate element of the
16 resort project, but that the proposed condominium location does not comply with the Westport
17 SMP or SMA. All members of the Board, however, agree the development of condominiums in
18 the same area as the hotels and conference center would comply with the Westport SMP and the
19 SMA.

20
21 ¹ Board member Danner was present at the hearing and participated in the Board discussion of the case. He is not a signatory to the decision because he accepted appointment to a position in another agency prior to completion of this decision.

1 While FOGH argued that the site is not appropriate for a resort development, Westport
2 adopted local ordinances specifically for this proposed use and its SMP was approved by
3 Ecology. The use of this site for resort development, including residential and commercial
4 development and a golf course is consistent with the concept in the SMA of “planning for and
5 fostering all reasonable uses.” Further, the Board recognizes the designation of this project as a
6 qualifying local economic development project by the Governor’s Office. While such a
7 designation does not change the substantive protections of the SMA, the economic development
8 aspects of the project are a consideration in determining the reasonableness of the proposed use.
9 Finally, the Board determines that the project is subject to a Binding Site Plan.

10 Factual Background

11 Project and Site.

12 The respondent Mox-Chehalis L.L.C. proposes a project known as the Links at Half
13 Moon Bay, including the construction of two hotels, a conference center, a “Scottish Links” style
14 golf course, ocean front condominiums, and supporting commercial development. It is
15 anticipated Phase I of the development will include one hotel structure with conference center
16 and some commercial/retail development. Phase I will also include the construction of the 18-
17 hole golf course with all appurtenances including shelters/restrooms, cart paths, bridges, club
18 house, golf maintenance building, and driving range. Utility and transportation infrastructure
19 improvements will also be part of Phase I construction activities. Phase II will include
20 construction of the second 200-room hotel, additional commercial/retail development, and
21

1 approximately 200 condominium units in eight buildings located near the parking lot for
2 Westhaven State Park.

3 The project site is approximately 355 acres in size and is located in the northwest portion
4 of the City of Westport near Point Chehalis, adjacent to Westhaven State Park and north of
5 Westport Light State Park. The site is located in the Urban Shoreline Environment and is zoned
6 Tourist Commercial. The property is bordered by the Pacific Ocean to the west and Half Moon
7 Bay to the north, Westport Light State Park to the south, and Forrest Avenue to the east. The site
8 is bisected in the northerly area by Jetty Access Road, which leads to Westhaven State Park and
9 the South Jetty. A pedestrian walkway connecting Westhaven State Park and Westport Light
10 State Park runs north/south along the western portion of the property. A pedestrian walkway
11 also extends along the shore of Half Moon Bay north of the property leading toward a Coast
12 Guard viewing tower and public parking area adjacent to Half Moon Bay. The public areas
13 adjacent to the site contain some of the most frequently visited ocean beaches in the State of
14 Washington. The Pacific Ocean beach and the Half Moon Bay beach are used by the public for a
15 variety of shoreline uses including surfing, swimming, beachcombing, and picnicking.

16 In 1993, the Pacific Ocean breached the South Jetty west of the project site. Significant
17 erosion ensued. The U.S. Army Corps of Engineers developed plans to repair and maintain the
18 jetty as part of its mission to protect the Grays Harbor navigation channel. Part of the work
19 undertaken in response to the jetty breach involved construction of a buried revetment along the
20 easterly portion of the shoreline along Half Moon Bay. The Corps also built a wave diffraction
21 mound and gravel transition beach on the west end of Half Moon Bay adjacent to the South Jetty.

1 Sandy dredge spoils are currently being placed on the beach and upland area of Half Moon Bay
2 to help avoid future large-scale erosion.

3 Most major buildings contemplated by the developer for this project are located on
4 uplands north of Jetty Access Road in areas that will not require filling wetlands. The
5 condominium site, by contrast, is proposed on a small piece of upland south of the Jetty Access
6 Road near the parking lot for Westhaven State Park. The proposed construction does not directly
7 call for installation of bulkheads, riprap, seawalls, or other shoreline protection structures, but the
8 appellants are concerned future erosion may result in armoring the shoreline of Half Moon Bay
9 or South Beach to protect constructed improvements. Utilities will be located in the existing
10 Jetty Access Road right of way to the maximum extent possible. The developer will be required
11 to improve Jetty Access Road to include a sidewalk and bicycle path, which will improve public
12 access to Westhaven State Park. A pedestrian walkway will be constructed to link the hotel and
13 conference center with the City of Westport waterfront trail in the area. The developer will also
14 be required to install paved access points from the trail to the beach every 660 feet along the
15 trail.

16 The hotels are proposed on uplands in the northeast portion of the site, closer to the
17 commercial property adjacent to the Westport Marina. The hotels will be visible from the
18 commercial areas near the Westport marina, but they will not block views of the Pacific Ocean
19 or Half Moon Bay from existing residences because there are apparently no residences in the
20 area.

1 The 200 condominium units are designed in 8 buildings, 62 feet in height, located
2 adjacent to the Westhaven State Park parking area and visible from Westhaven State Park, the
3 Westport Light Trail, and the Half Moon Bay trail. The condominium buildings are landward of
4 the trail property and will not block views of the Pacific Ocean or Half Moon Bay from the trails.
5 After construction of the project, the view looking east from the Westport Light Trail will be
6 significantly different from the existing view of undeveloped dunal terrain and an unobstructed
7 horizon. The golf course and the condominiums will be visible from the public trail, and the
8 condominium will cast shadows on areas used by the public.

9 The property south of Jetty Access Road is currently comprised of the small upland area
10 slated for condominium construction, and a large expanse of undeveloped coastal dunes and
11 interdunal wetlands extending well into Westport Light State Park. A delineation of
12 jurisdictional wetlands on the site performed by Ecological Land Services, Inc. in 2000, showed
13 170 wetlands on the site totaling approximately 150 acres. The easterly 100 plus acres of the site
14 is a forested wetland with a more diverse habitat than the emergent and shrub areas that are
15 predominant to the west. The site provides habitat for a number of different types of birds and
16 animals and temporary resting grounds for north spring migrating shorebirds. Some seasonal
17 habitat for fish refuge may be present in seasonally inundated areas connected to the Forrest
18 Avenue ditch.

19 For many years the Port of Grays Harbor owned the property in question. During that
20 time the area remained largely undeveloped, although there are signs people have used portions
21 of the property for camping, walking, and off-road vehicle use. During 1995 and 1996, the Port

1 engaged in a public planning process that culminated in a decision, reflected in the Port's Master
2 Plan, to encourage the sale of this property to private parties for development as a major
3 destination resort. Development of a destination resort was seen as the central programmatic
4 element in the revitalization and redevelopment of Westport. The City of Westport updated its
5 Shorelines Master Program and Zoning Code in 1996 to allow for a master planned destination
6 resort on this parcel. *Id.*

7 HISTORY OF THE PROJECT

8 Environmental review of the Links at Half Moon Bay destination golf resort development
9 for this site began with the City of Westport issuing a Determination of Significance and Request
10 for Comments on Scoping, which led to a scoping meeting and preparation of a Draft
11 Environmental Impact Statement dated November 1, 2000. A Final Environmental Impact
12 Statement (FEIS) was issued, dated March 23, 2001. The applicant also applied for a Master
13 Plan Approval for the project and a shoreline substantial development permit and shoreline
14 conditional use permit.

15 The City approved the master plan for the Links at Half Moon Bay after the Hearing
16 Examiner held an open record predecision hearing to take testimony regarding the application on
17 May 21 and May 23, 2001. Following a recommendation from the hearing examiner for
18 conditional approval of the application, the City Council approved the Master Plan. The plan
19 approval was challenged by FOGH in Thurston County Superior Court pursuant to the Land Use
20 Petition Act, Ch. 36.70C RCW. The appellants also challenged the adequacy of the project FEIS
21 in that proceeding. On January 29, 2002, the Superior Court issued an oral opinion dismissing

1 the SEPA claims for failure to exhaust administrative remedies. On March 1, 2002, a written
2 order was entered dismissing the SEPA claims made in the LUPA action.

3 The Superior Court, however, remanded the master plan ordinance to the City of
4 Westport based on an appearance of fairness violation. The City Council again approved a
5 master plan ordinance for the Links at Half Moon Bay after a closed record hearing on
6 September 10, 2002. The City Council proceeded to pass Ordinance 1277 on October 8, 2002,
7 approving the Master Use Plan for the Links at Half Moon Bay. FOGH appealed the new
8 approval to Thurston County Superior Court and the court upheld the master plan ordinance in
9 an Order dated May 21, 2003.² FOGH did not appeal this decision.

10 In 2001, the City issued both a Shoreline Management Substantial Development Permit
11 (SSDP) and a Shoreline Management Conditional Use Permit (CUP) for the project. A CUP was
12 necessary to authorize filling wetlands as part of the golf course construction. The Department
13 of Ecology denied the shoreline CUP and appealed the SSDP to the Shorelines Hearings Board
14 (SHB). FOGH intervened in the SHB case. While the case was pending before the SHB, the
15 applicant, the City of Westport, and Ecology engaged in a lengthy series of negotiations
16 regarding revisions to the project plans and conditions. An agreement was ultimately reached,
17 but the project had been modified to the extent that a new SSDP application and shoreline CUP

18
19

20 ² The Thurston County Superior Court upheld the Master Plan, but that decision was reached after the City's and the
21 developer's representations that the details of development would be resolved through the binding site plan review
process. See, Thurston County Superior Court Oral Opinion, p. 8, Thurston County Cause No. 02-2-01892-8
(WSH 01631).

1 was deemed appropriate. At the parties' request, the SHB remanded the appeal to the City of
2 Westport for the processing of new applications.

3 Following the Superior Court's approval of the Master Plan ordinance and the SHB
4 remand, the applicant submitted a new Joint Aquatic Resources Permit Application (JARPA) for
5 issuance of a SSDP and shoreline CUP. That application contained the proposal on appeal in the
6 current case. In conjunction with the new JARPA, the applicant filed an addendum to the FEIS
7 addressing changes incorporated since the original FEIS.

8 The City of Westport Planning Commission held an open record hearing on the shoreline
9 permits on September 10, 2003. The Planning Commission entered Findings of Fact and
10 Conclusions of Law approving the SSDP and CUP on September 30, 2003. FOGH and WEC
11 appealed the approval to the Westport City Council, which held a closed record appeal hearing
12 on October 28, 2003. After refusing to allow supplementation of the evidentiary record to reflect
13 significant October 2003 erosion events on Half Moon Bay, the Council affirmed the Planning
14 Commission's decision on the SSDP and CUP on October 28, 2003. The Department of
15 Ecology subsequently approved the shoreline CUP by letter dated December 4, 2003. FOGH
16 and WEC timely appealed the shoreline decisions to the ELUHB Board in this case.

17 On or around November 19, 2003, Mox Chehalis, LLC applied to the City of Westport
18 for a Binding Site Plan Review for the Links at Half Moon Bay Project. The application was
19 referred to the Site Plan Review Board (SPRB) for consideration. The SPRB issued a decision
20 on February 2, 2004, conditionally approving the application for Binding Site Plan Review.
21 FOGH appealed the binding site plan approval to the Westport Hearing Examiner, who held an

1 open record hearing on the appeal April 8-9, 2004. The Examiner took evidence on a number of
2 topics including testimony regarding storm-caused erosion during October-December 2003. The
3 Hearing Examiner issued a decision dated April 21, 2004, upholding certain aspects of the appeal
4 and rejecting others. (BSP 01072-01076).

5 The Examiner rejected arguments raised by FOGH alleging that the application was
6 inadequate, that use of a binding site plan was inappropriate, that the plan did not conform to
7 required setbacks, and that the project was contrary to the public interest. The hearing examiner
8 upheld the FOGH appeal on the claim that the SPRB decision failed to make written findings on
9 the items required by WMC 17.36B.060 and on the argument that actual dedications of
10 easements and land for roads and utilities should have been required. The Hearing Examiner
11 remanded the case to the SPRB for further consideration. The SPRB appealed the Hearing
12 Examiner's decision to the City Council and FOGH cross-appealed.

13 The City Council conducted a closed record appeal of the Binding Site Plan decision on
14 June 16, 2004, and issued a decision dated June 22, 2004, ruling in favor of the SPRB on appeal,
15 and rejecting the appeal arguments raised by FOGH. (BSP 01151-01163). The City Council
16 concluded the project did not need to obtain binding site plan review and therefore the findings
17 required under WMC 17.36B.060 for binding site plan review were unnecessary. The Council
18 further concluded dedications of property for roads and utilities did not need to be made at the
19 time the of BSP approval. The Hearing Examiner's decision to rely on conclusions on setback
20 compliance and public interest requirements reached by the Planning Commission during earlier
21

1 shoreline permit proceedings was affirmed by the City Council. FOGH appealed the City
2 Council's decision on the Binding Site Plan appeal to the ELUHB Board.

3 The appeals of the SSDP and the Binding Site Plan approval were filed before the
4 ELUHB Board because Mox-Chehalis applied to the State of Washington Office of Regulatory
5 Assistance in July 2003, requesting the Links at Half Moon Bay be designated as a "qualifying
6 project" under the Laws of 2003, Chapter 393, Section 3 (Ch. 43.21L, RCW). The Office of
7 Regulatory Assistance found the project qualified because it was proposed in a "distressed area"
8 as defined by the statute and was designed to provide at least thirty full-time year-round jobs.
9 (RE-21). The Westport and Port of Grays Harbor governments have been looking for economic
10 development opportunities to revitalize the tourist segment of the local economy, since
11 traditional fishing and timber industries have declined in recent years.

12 Legal Analysis

13 1.

14 The Environmental and Land Use Hearings Board has jurisdiction over the parties and
15 the subject matter of this case pursuant to RCW 43.21L.020 which provides, in part:

16 The appeal process authorized in this chapter shall, notwithstanding any
17 other provisions of this code, be the exclusive process for review of the
18 decisions made by participating permit agencies on permit applications
19 for a qualifying project.

20 In this case, the Washington Office of Permit Assistance has certified the Links at Half
21 Moon Bay project as a qualifying project and the ELUHB Board is the appropriate forum for all
final permit decisions on the qualifying project. This decision deals with those permit decisions

1 subject to record review--the shoreline substantial development permit and the binding site plan
2 approval.

3 2.

4 The ELUHB considers the SSDP and binding site plan appeals on the basis of the
5 evidentiary record from the local proceedings. No additional evidence was admitted during the
6 ELUHB record review hearing process.³ The burden of proof is on the appealing parties to show
7 by a preponderance of the evidence that relief is appropriate.

8 3.

9 In deciding the case, the ELUHB Board applies the standards in RCW 43.21L.130:

10 (1) The Board shall review the decision record and all such evidence as is
11 permitted to supplement the record for review restricted to the decision
12 record or is required for de novo review under RCW 43.21L.120. The
13 board may grant relief only if the party seeking relief has carried the
14 burden of establishing that one of the standards set forth in (a) through (f)
15 of this subsection has been met. The standards are:

16 (a) The body or officer that made the permit decision engaged in
17 unlawful procedure or failed to follow a prescribed process, unless the
18 error was harmless;

19 (b) The permit decision is an erroneous interpretation of the law, after
20 allowing for such deference as is due the construction of a law by an
21 agency with expertise;

(c) The permit decision is not supported by evidence that is substantial
when viewed in light of the whole record before the board;

19

20

21

³ The appellants made a motion asking that the Board take judicial notice of certain items, but the Board is not granting the motion. The appellants made an inadequate showing of grounds for the Board to take judicial notice of the proffered material.

- 1 (d) The permit decision is a clearly erroneous application of the law to
the facts;
- 2 (e) The permit decision is outside the authority or jurisdiction of the body
3 or officer making the decision; or
- 4 (f) The permit decision violates the constitutional rights of the party
5 seeking relief.
- 6 (2) The board may affirm or reverse each and every permit decision under
7 review or remand the decision for modification or further proceedings
8 involving the permit agencies.

9 BINDING SITE PLAN

10 4.

11 The City Council's decision on appeal overturned the Hearing Examiner's ruling that the
12 Links at Half Moon Bay project was subject to binding site plan review. FOGH and WEC
13 challenge the Westport City Council's conclusion that the Links at Half Moon Bay project did
14 not need binding site plan review because no division of property was being proposed. The
15 appellants also challenge the Council's corollary conclusion that the findings for a binding site
16 plan contained in WMC 17.36B.060 were not required in this case. Finally FOGH and WEC
17 contend the Council interpreted the law erroneously by failing to require concurrent dedication
18 of rights-of-way, easements, and land under WMC 17.36B.080.

19 5.

20 The City Council concluded that WMC Chapter 17.36B, entitled "Binding Site Plans,"
21 actually provides for two separate types of site plan review. The City contends binding site plan
review only pertains to situations involving a division of land in lieu of subdivision approval.

1 Site plan review is apparently a separate process with less detailed and less stringent
2 requirements. The provisions of WMC 17.36B do not make a clear delineation between the
3 requirements and processes applicable to binding site plan review and those applicable to site
4 plan review. An example of this lack of distinction is presented by WMC 17.36B.040, which
5 outlines the required contents for an application. The code section makes no differentiation
6 between binding site plan review and site plan review. By using the words “application for site
7 plan approval,” the language governing application contents would pertain only to site plan
8 review under the City’s argument. The application process for a binding site plan remains
9 undefined. A review of the remainder of WMC 17.36B reveals no other section of the chapter
10 that discusses the contents of an application for “binding” site plan review.

11 6.

12 The body designated to review applications is outlined in WMC 17.36B.050, which states
13 the review board shall review the proposed site plan for “compliance with the provisions of this
14 chapter and other applicable laws and regulations. The board may require additional information
15 necessary for such review. The board shall determine whether the proposed use is served and
16 makes adequate provision for the public health, safety, and general welfare.” The following
17 section, WMC 17.36B.060, indicates a proposed binding site plan cannot be approved unless the
18 board (apparently the same board identified in WMC 17.36B.050) makes written findings on
19 specifically enumerated topics. The City argues that these two sections define the standards
20 governing the consideration of two different types of site plan review. The remaining sections of
21 the chapter 17.36B of the WMC also make inconsistent references to binding site plans and site

1 plans. The amendment procedure mentions only site plans. The duration of approval section
2 mentions only binding site plans. No clear pattern distinguishes between the asserted processes
3 for binding site plan review and site plan review. Construing Chapter 17.36B to create two
4 distinct review processes renders each process incomplete and unworkable.

5 The City's suggested interpretation of WMC Chapter 17.36B is inconsistent with the
6 rules of statutory construction that statutes should be read to give meaning to each part and to
7 avoid absurd or strained consequences. *In re Eaton*, 110 Wn.2d 892, 901, 757 P.2d 961 (1988).
8 Additional rules of statutory construction provide that provisions in a statute are read in the
9 context of the statute as a whole, *Pope v. University of Washington*, 121 Wn. 2d 479, 489, 852
10 P.2d 1055, 871 P.2d 590 (1993), cert. denied, 127 L.Ed. 2d 381 (1994); and that "[a]ll the
11 provisions of an act must be considered in their relation to each other and, if possible,
12 harmoniously construed to insure proper construction of each provision." *Publishers Forest*
13 *Prods. Co. v State*, 81 Wn.2d 814, 816, 505 P.2d. 453 (1973).

14 7.

15 The City's asserted interpretation is also contrary to numerous formal statements
16 contained in its own documents and project decisions. The Master Plan Ordinance for this
17 project, Ordinance 1277, indicates in conditions 1, 8, 14, and 21 that various specific elements of
18 the Links project will be addressed during *binding site plan review*. The zoning code provisions
19 developed specifically to accommodate this type of destination resort development provide for
20 *binding site plan review*:
21

1
2 Based on the Board's conclusion that a binding site plan approval was required for the
3 project, the terms of WMC 17.36B.060 become relevant. The appellants claim the SPRB
4 decision did not specifically make a finding that the public use and interest will be served by the
5 platting of such binding site plan and any dedication. WMC 17.36B.060(2). The Hearing
6 Examiner upheld this challenge to the BSP, but the City Council overturned it on the basis that
7 findings and conclusions under 17.36B.060 were not required because the project did not require
8 a binding site plan approval. The SPRB decision did not explicitly make a finding that the public
9 use and interest would be served by the platting of the binding site plan. In that respect, the
10 decision technically failed to comply with the requirements of WMC 17.36B.060(2). This
11 omission appears to be an oversight since the SPRB did specifically find the Westport City
12 Council approved a Master Plan Development for the project by adoption of ordinance 1277.
13 The Master Plan Development ordinance concluded, "[A]s amended and conditioned, the public
14 interest is served by the approval of the project." (WSH 01606). To achieve compliance with
15 the applicable standards in WMC 17.36B.060, the decision must be remanded for inclusion of a
16 specific finding under WMC 17.36B.060(2). Further, the Board notes that the required public
17 interest determination for the BSP is limited only to considerations under the BSP statute. That
18 is, the public interests at issue are not public interests relating to the shorelines or other
19 environmental issues because the public interest in those subject matters have been considered
20 under different permitting procedures. Rather, the public interest determination under the BSP is
21 related to the adequacy of public works associated with the project.

1
2 FOGH and WEC have also argued the BSP decision was incorrect because it did not
3 require concurrent dedication of rights of way, easements, and land under WMC 17.36.080. The
4 City argued such a conveyance of property was premature and inconsistent with City interests
5 and standard practices. The City prefers to obtain title to such items after construction, so that
6 precise locations and compliance with applicable construction standards can be verified. In the
7 analogous platting process the applicant is not required to comply with final plat requirements at
8 the preliminary plat stage. *Loveless v. Yantis*, 82 Wn.2d 754, 761, 513 P.2d 1023 (1973) Giving
9 deference to the City's interpretation of the statute and its standard practices, the Board
10 concludes that making the binding site plan final approval conditional on dedications, is an
11 acceptable interpretation of WMC 17.36B and other applicable City public works ordinances.

12 SETBACK and LOCATION OF MARRAM GRASS LINE

13
14 Challenges to the location of the marram grass line in the vicinity of the proposed
15 condominiums and to compliance with the applicable setback were argued in both the SSDP case
16 and the BSP case. During the SSDP case, FOGH raised the setback issue, but provided no expert
17 testimony addressing the location of the marram grass line in relation to the proposed
18 condominiums. The Planning Commission reviewed the evidence presented at the hearing and
19 concluded that the appellants failed to contradict the delineation of Ordinary High Water Mark
20 and marram grass line provided by the applicant's consultants, Economic and Engineering
21 Services. The Planning Commission further found the setback requirements required by WMC

1 17.32.050(8) applied to buildings and not to infiltration ponds, roads, or utilities. (Finding of
2 Fact 31).

3 12.

4 During the BSP case, FOGH presented the testimony of Sarah Cooke, PhD., an expert in
5 aerial photography interpretation and in making ordinary high water mark determinations. Ms.
6 Cooke testified the marram grass line had regressed shoreward a considerable distance since
7 2000 and that "as of November 2000, ... there was no longer 200 feet between the projected
8 location of the condominiums and the marram grass line." The Hearing Examiner considered the
9 evidence of erosion and concluded while the marram grass line may have continued to move
10 after the Master Plan and SSDP approvals were granted, such activity is not unexpected. The
11 Examiner found: "The exhibits show the planning commission and city council looked at
12 substantially the same information before arriving at their decision to approve the Links at Half
13 Moon Bay. The evidence shows the setback procedural requirement was satisfied." (BSP
14 01072). ~~The appellants argue that the City improperly used collateral estoppel to resolve the~~
15 ~~issue of whether the 200-foot setback required by the Westport Shoreline Master Program was~~
16 ~~met in the binding site plan review.~~

17 13.

18 The Hearing Examiner considered the substance of the setback argument and observed
19 that the 200-foot setback is a requirement arising from the Westport Shoreline Master Program.
20 ~~The Examiner concluded the 200 foot setback was required by the binding site plan, and the~~
21 ~~shoreline approvals and would be determined on the ground by the building inspector at the time~~

1 the foundation was poured. The Examiner did not consider the location of the line on a map
2 controlling in the situation. The City Council upheld that portion of the Hearing Examiner's
3 decision on appeal.

4 14.

5 The Board finds no error of law or clearly erroneous application of the law to the facts in
6 connection with the setback arguments. The condominiums are required to meet the 200-foot
7 setback at the time they are constructed. That location could change between mapping and
8 construction. The procedure for measuring compliance with the 200-foot setback, however,
9 must conform to the provisions of WMC 17.32.050(8).

10 (8)Setbacks. In OBR and TC zones the building setback shall be two
11 hundred feet from the edge of the marram grass line. The line shall be
12 determined as the average of the marram grass line measured two
hundred feet on either side of the structure to be constructed.

13 The testimony of SPBR member Jim Mankin indicated the City failed to use the average of the
14 marram grass line measured two hundred feet on either side of the condominium structure to
15 determine setback compliance. Instead, a measurement was taken from the front of the
16 condominium to the marram grass line. A protocol averaging the measurements taken 200 feet
17 on either side of the structure is required by the controlling code section and should be adhered
18 to when the setback is measured prior to construction. If necessary to comply with the 200 foot
19 building setback, the building configuration will have to be modified prior to construction.

1 15.

2 Appellants further contend the provisions establishing the "building setback" at 200 feet
3 from the marram grass line should have been applied to improvements such as stormwater
4 ponds, roads, and the utility corridor. The City interpreted their code to require the 200-foot
5 setback only for buildings, not other uses. ~~The Board concludes the appellants have failed to~~
6 ~~show the City's interpretation of the Westport Code on this issue is an error of law or a clearly~~
7 ~~erroneous application of the law to the facts.~~

8 **SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT**

9 16.

10 The City of Westport SSDP decision granted shoreline approval for the luxury hotel,
11 conference center, and economy hotel, located north of Jetty Access Road, and the
12 condominiums located south of Jetty Access Road. The appellants have challenged the project
13 on the grounds that it is inconsistent with the policies of the Shoreline Management Act (RCW
14 90.58.020) and is inconsistent with the public interest due to coastal erosion in the immediate
15 vicinity. The Planning Commission decision found the hotel, conference center, and golf course
16 clubhouse were commercial structures allowed in the TC zone and consistent with the
17 requirements for commercial development in the WMC 17.32.055(1). (Decision ¶132). The
18 Planning Commission analyzed the condominiums as residential uses allowed by WMC
19 17.21.020 and found the buildings are located over 200 feet from the marram grass line along
20 Half Moon Bay to the north and the Pacific Ocean to the west. (Decision ¶13). The Planning
21

1 Commission made findings of fact relating to erosion in the area of the condominiums. The
2 Commission adopted the opinion of Dr. Jeffrey Bradley, which concluded the Half Moon Bay
3 beach configuration would maintain dynamic equilibrium. (Finding of Fact 63). The Planning
4 Commission also cited the opinion of Dr. Phillip Osborne, Pacific International Engineering
5 scientist, who concluded, "it is unlikely that coastal erosion will impact the Links at Half Moon
6 Bay project site in light of the responses already adopted or planned to respond to coastal
7 erosion." (Finding of Fact 62). Dr. Osborne was presumably referring to the action taken by the
8 Army Corps of Engineers to stabilize the South Jetty area.

9 17.

10 The Planning Commission Findings of Fact and Conclusions of Law were affirmed by
11 the City Council in their decision on the closed record appeal of the shoreline SSDP and CUP.
12 (WSH 04452-04453).

13 EROSION

14 18.

15 After the Planning Commission decision in late September 2003, a series of storms
16 caused significant erosion along the Half Moon Bay shoreline. On October 14, 2003, the
17 Westport City Council issued a "Proclamation of Emergency" in Resolution #672 providing in
18 part:

19 WHEREAS, storms of the last week have eroded the remaining shoreline
20 and are now directly impacting a City owned walking trail, and the
21 storms predicted to hit the area within the coming days and weeks pose
an imminent threat to Westhaven State Park; and

1 WHEREAS, damage to or the loss of these facilities will result in a large
2 economic impact to the City, loss of public access to the beaches and
3 surrounding areas, and result in environmental damage from debris being
4 introduced into Half Moon Bay, therefore,

5 BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF
6 WESTPORT, Grays Harbor COUNTY;

7 SECTION 1

8 That the Council agrees with the Mayor's determination that an
9 emergency exists in the Westhaven State Park area of Half Moon Bay
10 due to the loss of dunes which historically protected the state park area,
11 and the predicted weather conditions consisting of high winds, high surf,
12 and tide conditions in the City of Westport. The above pose a direct
13 threat to public safety, and are endangering public infrastructure.

14 SECTION 2

15 That the Council supports the Mayor's authority to direct staff to take
16 necessary steps to protect public safety and safeguard public property
17 and is authorized to exercise powers vested under Section 1 of this
18 resolution in the light of exigencies of an extreme emergency situation
19 without regard to time-consuming procedures and formalities prescribed
20 by law.

21 SECTION 3

Both the Mayor and Council strongly encourage all local, state, and
federal agencies to respond and cooperate fully to resolve the current
situation and protect the Westhaven State Park and South Jetty Beach
area from further damage.

In response to this emergency, on or around October 16, 2005, the City constructed a seawall on
the Half Moon Bay beach in an attempt to protect the public trail, road, and other landward

1 amenities at Westhaven State Park.⁴ Ultimately, this effort proved unsuccessful and a portion of
2 the public trail was lost to erosion.

3 19.

4 Testimony in the BSP case indicated further erosion damage occurred during the
5 remainder of the winter of 2003-2004. In connection with federal court proceedings challenging
6 the Corps of Engineers' proposal to place rock on the shore of Half Moon Bay as an interim
7 stabilization strategy, Dr. Philip Osborne, the City's erosion expert, testified that as of December
8 12, 2003, "It is my opinion that erosion is an imminent threat to the concrete public trail, asphalt
9 road (including jetty access road and points of access to the jetty), utility lines located in the
10 roadway, the parking lot, and the buildings containing bathrooms and changing rooms at
11 Westhaven State Park. (BSP 231) The litigation resulted in the Corps taking the interim
12 measure of placing 27,000 cubic yards of sand on the beach to prevent further destruction of
13 infrastructure."⁵ (BSP 853)

14 20.

15 The appellants argue the City Council erred in failing to consider the proffered evidence
16 regarding erosion and the City's own emergency declaration and actions. Westport argues it had
17 the discretion to allow the testimony or refuse to allow the testimony. Abuse of discretion is a
18 high standard. An abuse of discretion occurs when a decision is based on untenable grounds or

19
20 ⁴ This information was available to the City Council at the time of the closed record review. FOGH offered the
21 material into evidence, but the Council refused to reopen or supplement the record with this new information. The
evidence was allowed into the record of the later binding site plan case.

⁵ The material in this paragraph was part of the record in the binding site plan case, but was not available to the City
Council at the time the SSDP was considered.

1 when discretion is exercised in a manner that is manifestly unreasonable. *State v. Valdobinos*,
2 122 Wn.2d 270, 279, 858 P.2d 199 (1993); *State v. Zunker*, 112 Wn.App. 130, 140, 48 P.3d 344
3 (2002). This situation presents a particularly strong case for allowing supplementation of the
4 record to include newly available evidence. The erosion that occurred during October 2003 was
5 directly relevant to a critical element of the City's decision to approve the shoreline permits.
6 Arguments and other evidence relating to the erosion issue had been made before the Planning
7 Commission. The shoreline decision contained findings and opinions regarding erosion that
8 were inconsistent with the severity of the erosion that occurred on Half Moon Bay in October
9 2003. The information was available to the City Council prior to its final decision on the
10 shoreline permits appeal. To disregard evidence so vital to a proper decision on the
11 condominium portion of the project was not consistent with having the best information
12 available for making an informed decision. However, even if the Board might decide otherwise,
13 the City's refusal to reopen the record was not an abuse of discretion in violation of RCW
14 43.21L140(a).

15 COMPLIANCE WITH SMP AND SMA

16 21.

17 The City concluded the Links at Half Moon Bay project complied with the Westport
18 SMP and the SMA. The City reached this conclusion after the receipt and review of voluminous
19 material evaluating the impacts a project of this type would have on the Westport community.
20 An Environmental Impact Study was required for the project and a detailed analysis of the site
21 and the environmental impacts attending development were included in the FEIS and the EIS

1 supplement. Public comment on the project was sought and included in the FEIS and the
2 Planning Commission record on the shoreline permits.

3 22.

4 After considering all the information before it, the Planning Commission issued a
5 decision addressing the major areas of controversy in the case. The view impacts caused by the
6 project were analyzed and found minimal. (WSH 04400-04401) The setback challenges were
7 considered and rejected for insufficient evidence of error. The hotel, conference center, and golf
8 course clubhouse were found appropriate types of development for location in the TC zone. The
9 City concluded improved public access to the shoreline would result from required
10 improvements to the public trail system, creation of a link from the hotel/conference center to the
11 Westport waterfront trail and upgrades to add a bike lane and sidewalk on Jetty Access Road.

12 23.

13 The City analyzed the controversy over coastal erosion on the site and concluded the 200
14 foot setback from the ordinary high water mark would prevent damage to constructed
15 improvements. The City accepted evidence indicating erosion was being managed and would
16 continue to be managed by the Army Corps of Engineers as part of its ongoing maintenance of
17 the South Jetty area. Past erosion issues, such as the South Jetty breach in 1993, were known to
18 the City throughout its planning process and decision-making on this project.

19
20
21

1 24.

2 The City entered Conclusions of Law on the shoreline permits indicating the proposed
3 resort hotel/conference center, associated condominiums, and golf course are consistent with the
4 Westport SMP and the policies of RCW 90.58.020. The Department of Ecology approved the
5 shoreline CUP and supported the SSDP at hearing. The Board concludes the appellants have
6 failed to establish the City's conclusions were unsupported by substantial evidence, constituted
7 an error of law, or were a clearly erroneous application of the law to the facts.

8 25.

9
10 The appellants' argue the City erred by allowing buildings over 50 feet in height and
11 failing to apply yard setbacks contained in the TC zone. The City contends the Master Plan
12 establishes the zoning and development standards applicable to the project and other more
13 general restrictions are inapplicable. The Master Plan ordinance states it is adopted "to serve as
14 the zoning for the property." (WSH 01607). The Ordinance goes on to indicate the conditions
15 shall apply as development standards for the site. The appellants have failed to show the City's
16 legal interpretation of these provisions constitutes an error.

17 26.

18
19 The appellants' have also argued the SSDP is invalid because it does not recite the
20 required time period for construction. The controlling time period is a matter of law and does
21

1 not have to be recited in the permit document to be effective. Such an omission is not an error of
2 law.

3
4 27.

5 Challenges to the hotel/conference center based on the presence of Wetland HMB were
6 not part of the record case and are discussed in the ELUHB's de novo decision on this project.
7 Wetland and habitat impacts related to the golf course are also addressed exclusively in the
8 shoreline conditional use portion of the de novo case.

9 Based upon the foregoing analysis, the Board enters the following:

10
11 ORDER

12 1. The Binding Site Plan approval for the Links at Half Moon Bay is affirmed with
13 the exception of the City's failure to make a finding under WMC 17.36.060(2). The Binding
14 Site Plan is remanded to the City for further action on this point.

15
16 2. The City of Westport decision approving a Shoreline Substantial Development
17 Permit for the Links at Half Moon Bay project is affirmed.

1 Dated this 12th day of October 2005

2 ENVIRONMENTAL AND LAND USE HEARINGS BOARD

3 See Concurrence and Dissent
4 BILL CLARKE, CHAIR

5 William H. Lynch
6 WILLIAM H. LYNCH, MEMBER

7 See Concurrence and Dissent
8 JUDY WILSON, MEMBER

9 O'Dean Williamson
10 O'DEAN WILLIAMSON, MEMBER

11 Dan Smalley
12 DAN SMALLEY, MEMBER

13 Phyllis K. Macleod
14 Phyllis K. Macleod
15 Administrative Appeals Judge
16
17
18
19
20
21

1 BEFORE THE ENVIRONMENTAL AND LAND USE HEARINGS BOARD
2 STATE OF WASHINGTON

3 FRIENDS OF GRAYS HARBOR and
4 WASHINGTON ENVIRONMENTAL
COUNCIL,

Appellants,

5 v.

6 CITY OF WESTPORT, MOX-CHEHALIS
7 LLC, PORT OF GRAYS HARBOR, and
STATE OF WASHINGTON,
8 DEPARTMENT OF ECOLOGY,

Respondents.

ELUHB NO. 03-001

RECORD REVIEW
DECISION AND ORDER
(Concurrence and Dissent)

10 We concur with the majority opinion that the Links at Half Moon Bay project is subject
11 to the City of Westport's Binding Site Plan approval process, and that as proposed, the hotels,
12 conference center, and golf clubhouse meet the requirements in the Westport Shoreline Master
13 Program (WSMP) and Shorelines Management Act (SMA) for a Shoreline Substantial
14 Development Permit (SSDP). However, there is not substantial evidence supporting Westport's
15 decision that the condominiums comply with the WSMP and SMA, and Westport erroneously
16 interpreted and applied both the WSMP and SMA in approving the condominiums. For these
17 reasons, we respectfully dissent from that portion of the majority decision. While condominiums
18 are an appropriate component of the Links at Half Moon Bay project, they would comply with
19 the WSMP and SMA only if located North of Jetty Access Road, near the other proposed
20 structures.

21 RECORD REVIEW DECISION
CONCURRENCE AND DISSSENT
ELUHB NO. 03-001

(1)

1 condominiums comply with the WSMP and SMP. On appeal to the Westport City Council, this
2 conclusion was affirmed. (WSH 04452-04453). The Board's review of the SSDP is limited to
3 the evidentiary record from the City of Westport's proceedings.

4 **EROSION NEAR CONDOMINIUMS**

5 [3]

6 The Planning Commission made findings of fact relating to erosion in the area of the
7 condominiums. The Commission cited the opinion of Dr. Phillip Osborne, Pacific International
8 Engineering scientist, who concluded, "it is unlikely that coastal erosion will impact the Links at
9 Half Moon Bay project site in light of the responses already adopted or planned to respond to
10 coastal erosion." (WSH04407). This testimony references historical erosion at the site,
11 including a breach between the Pacific Ocean and Half Moon Bay adjacent to the area where
12 condominiums would be built.

13 [4]

14 The majority opinion details the fact that after the Planning Commission decided that
15 erosion would not impact the area and approved the SSDP in September 2003, a series of storms
16 caused significant erosion along the Half Moon Bay shoreline. This resulted in the City adopting
17 a "Proclamation of Emergency," and then building a seawall to protect Half Moon Bay and
18
19
20
21

RECORD REVIEW DECISION
CONCURRENCE AND DISSENT
ELUHB NO. 03-001

(3)

1 *Fork Rural Hills Association v. Clark County*, 92 Wn.App 838, 843-845 (1998). (While appeal
2 from Hearing Examiner to City Council is conducted on the record, consideration of “newly
3 discovered evidence” or remand to the Hearing Examiner may be appropriate.) The erosion that
4 occurred during October 2003 was directly relevant to a critical element of the City’s decision to
5 approve the shoreline permits, and the newly discovered evidence contradicted the evidence in
6 the Planning Commission’s decision.

7 [7]

8 Three months after the Westport City Council decided not to consider recent erosion
9 evidence, a witness on whom the City’s SSDP decision relied expressed a new and different
10 opinion on the risk of erosion near the proposed site of the condominiums. Compare Dr.
11 Osborne’s September 2003 Planning Commission testimony: “[I]t is unlikely that coastal
12 erosion will impact the Links at Half Moon Bay project site in light of the responses already
13 adopted or planned to respond to coastal erosion” with his December 2003 federal court
14 testimony: “erosion is an imminent threat.” Evidentiary decisions are reviewed under the
15 abuse of discretion standard. “An abuse of discretion is present only if there is a clear showing
16 that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or
17 based on untenable reasons.” *Cobra Roofing Service, Inc. v. Department of Labor & Industries*,
18 122 Wn.App 402 (2004) citing *Moreman v. Butcher*, 126 Wash.2d 36, 40 (1995) [other cites
19 omitted]. This is a high standard, and the City of Westport correctly noted in argument that a
20 permitting agency cannot be required to pull back decisions already made whenever new
21 evidence arises.

RECORD REVIEW DECISION
CONCURRENCE AND DISSENT
ELUHB NO. 03-001

(5)

1 **COMPLIANCE WITH WESTPORT SHORELINE MASTER PROGRAM**

2 [9]

3 While condominiums are an appropriate element of this project, and are contemplated by
4 the TC zone and Master Plan, the proposed location for these condominiums is inconsistent with
5 the Shoreline Management Act and the Westport Shoreline Master Program. Under the
6 ELUHB statute, the City is entitled to such deference as is due the construction of a law by an
7 agency with expertise. RCW 43.21L.140(b). Thus, it is entitled to deference in interpretation
8 of its SMP, which it adopted and administers. We agree with the substantial deference given to
9 Westport in other parts of this appeal, including Westport's interpretation of the provision
10 authorizing fill of wetlands for public recreation needs, how Westport accepts dedications, and
11 how it will ensure compliance with the 200-foot setback from the marram grass line. However,
12 deference is not due when an interpretation or application of law is wrong.

13 [10]

14 The Westport SMP Shoreline Management Policies for Accreted Oceanfront Lands
15 states that "... in accreted oceanfront land areas, low-density development is compatible in
16 this area provided the wetland areas in the deflation plains are protected." Westport
17 Comprehensive Plan, Chapter 9, page 42 (WSH01531). Even if the rest of the project site is
18 used to reduce the density calculation, the reality is that the construction of 200 condominiums
19 on a small available footprint, in an undeveloped area next to a state park will not appear as
20 low-density development. Westport's conclusion that the condominiums comply with the
21 policies for the Accreted Oceanfront Lands was in error.

RECORD REVIEW DECISION
CONCURRENCE AND DISSENT
ELUHB NO. 03-001

(7)

1 COMPLIANCE WITH SHORELINE MANAGEMENT ACT

2 [12]

3 Under RCW 90.58.050, the SMA is described as a “cooperative program of shoreline
4 management between local government and the state.” Local governments implement the
5 regulatory portion of the SMA through local master programs, while Ecology’s has “primary
6 emphasis on insuring compliance with the policy and provisions of the SMA.” In 2000, Ecology
7 sent a letter to Westport stating that “The [policies of the SMA] will be used in our evaluation of
8 the merits of this proposal. It is incumbent on the applicant to demonstrate that these conditions
9 are met.” (BSP00399) Ecology’s letter also cites portions of the policies of the SMA contained
10 in RCW 90.58.020.

11 The legislature declares that the interest of all of the people shall be
12 paramount in the management of shorelines of statewide significance.
13 The department, in adopting guidelines for shorelines of statewide
14 significance, and local government, in developing master programs for
15 shorelines of statewide significance, shall give preference to uses in the
16 following order of preference which:

- 17 (1) Recognize and protect the statewide interest over local interest;
- 18 (2) Preserve the natural character of the shoreline;
- 19 (3) Result in long term over short-term benefit;
- 20 (4) Protect the resources and ecology of the shoreline;
- 21 (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline;
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

(BSP00399); RCW 90.58.020.

1 Thus, it was an error of law for Westport and Mox Chehalis to argue that the policies of
2 the SMA did not apply to the project. However, because the City's SSDP Staff Report and
3 Planning Commission decision summarily concluded that the condominium portion of the
4 project complied with the SMA, and the record includes evidence relevant to SMA
5 considerations, it is necessary to review the decision under the Board's standards of review.

6 [14]

7 Westport's decision, however, did not analyze the SSDP under the policies of RCW
8 90.58.020. The Planning Commission decision contains six sections setting forth findings of
9 fact: (1) Application/Background, (2) Shorelines Jurisdiction, (3) Project Description/Site
10 Features, (4) Shoreline Master Program Requirements, (5) Wetland Issues, and (6) Coastal
11 Erosion. There are no factual findings regarding compliance with the policies of RCW
12 90.58.020. Westport's decision reveals no analysis or consideration of the first three policies of
13 RCW 90.58.020 pertaining to shorelines of statewide significance: "(1) Recognize and protect
14 the statewide interest over local interest; (2) preserve the natural character of the shoreline; and
15 (3) result in long term over short term benefit."

16 [15]

17 Though lacking in fact finding or analysis as to compliance with the policies of the SMA,
18 the Planning Commission decision summarily concluded:

19 As conditioned, this proposal is consistent with the purposes of the
20 Shoreline Management Act goals and policies as contained in RCW
21 90.58.020. The proposed resort hotel/conference center with associated
condominiums and golf course preserves, to the greatest extent feasible,
the public's opportunity to enjoy the physical and aesthetic qualities of

RECORD REVIEW DECISION
CONCURRENCE AND DISSENT

ELUHB NO. 03-001

(11)

1 [17]

2 The policies of RCW 90.58.020 include important concepts critical to evaluating a
3 proposal such as the Links at Half Moon Bay. In addition to the policies cited in Ecology's letter
4 to Westport, other policies emphasize the need to protect the public's enjoyment of the
5 shorelines of the state:

6 In the implementation of this policy the public's opportunity to enjoy the
7 physical and aesthetic qualities of natural shorelines of the state shall be
8 preserved to the greatest extent feasible consistent with the overall best
9 interest of the state and the people generally.

10 Despite this clear policy requiring preserving the physical and aesthetic quality of
11 shorelines, Westport's August 2003 EIS Addendum concluded "... matters of aesthetic taste are
12 qualitative and not regulated in the SMA." WSH 00911.

13 [18]

14 Westport's analysis of the condominiums' effect on users of the state park and the public
15 beaches appears to be limited to the fact that "the condominiums will be visible from Westhaven
16 State Park and the Westport Light Trail, as indicated in Exhibits A.22A and A.22E. [the
17 diagrams showing the size of the condos]. The condominiums are oriented so that they are
18 landward of the state park property and will not block views of either the Pacific Ocean or Half
19 Moon Bay." However, the proper consideration under the WSMP and SMA is not only whether
20 a proposal will simply block views from residences. WSMP states:

21 Shoreline uses and activities shall be designed and operated to avoid blocking, reducing,
or adversely interfering with the public's visual access to the water and shorelines.

WMC 17.32.060(4)(B).

RECORD REVIEW DECISION
CONCURRENCE AND DISSENT

ELUHB NO. 03-001

(13)

1 02007-02057). The golf course may encourage some recreation in the shoreline, but the
2 condominiums will not add to the public's recreational opportunities in the shoreline. The
3 condominiums are not dependent on their location on or use of the particular shoreline area, as is
4 contemplated by the SMA policies governing alterations of the natural condition of the shoreline.

5 [20]

6 The application of the policies of the SMA to support reversing or modifying a permit
7 decision is a relatively rare occurrence. In fact, we believe it is preferable to review a project
8 based on more explicit development regulations, rather than on broader policy language. In
9 *Allegra et al. v. Wright Hotels et al.*, SHB No. 99-08 & 99-09 (1999), the Shorelines Hearings
10 Board applied the policies of the SMA and Seattle's SMP in remanding a decision to protect
11 public views of the shoreline. Though part of the Board's decision was later reversed, the
12 Board's application of the policies of the SMA to project level review remains valid. In this
13 case, involving a Shoreline of Statewide Significance, and the most frequently visited
14 Washington State Parks coastal facility in the state, the proposal simply does not comply with the
15 SMA and it was error to conclude otherwise.

16 [21]

17 We believe it is appropriate for the City of Westport to authorize the use of this shoreline
18 area for local economic development in the form of a golf course resort. However, this local
19 interest must be balanced with the provisions in the WSMP and SMA to protect statewide
20 interests embodied by Westhaven State Park, Westport Light State Park, and the natural
21 shoreline of the Pacific Ocean and Half Moon Bay. Locating the condominiums upland,

1 BEFORE THE ENVIRONMENTAL AND LAND USE HEARINGS BOARD
2 STATE OF WASHINGTON

3 FRIENDS OF GRAYS HARBOR and
4 WASHINGTON ENVIRONMENTAL
5 COUNCIL,

6 Appellants,

7 v.

8 CITY OF WESTPORT, MOX-CHEHALIS
9 LLC, PORT OF GRAYS HARBOR, and
10 STATE OF WASHINGTON,
11 DEPARTMENT OF ECOLOGY,

12 Respondents.

ELUHB NO. 03-001
(DE NOVO)

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

13 Appellants Friends of Grays Harbor (FOGH) and Washington Environmental Council
14 (WEC), challenged the Shoreline Conditional Use Permit approved initially by the City of
15 Westport and issued by the Department of Ecology, Ecology's §401 Certification under the
16 Clean Water Act and Ecology's determination of consistency with the Coastal Zone
17 Management Act (CZMA) for a destination resort project known as the Links at Half Moon Bay.
18 The Environmental and Land Use Hearings Board (Board) conducted a hearing on this de novo
19 portion of the case on August 22-26, 2005, and on September 12, 2005. Counsel Knoll Lowney
20 represented FOGH, counsel Jennifer Joseph and Jennifer Harris represented WEC, counsel
21 Barnett Kalikow and Charles Roe represented Mox-Chehalis, counsel Jeffrey S. Meyers
represented the City of Westport, Sr. Assistant Attorney General Joan Marchioro and Assistant
Attorney General Thomas Young represented Ecology and counsel Arthur A. Blauvelt III

FINDINGS OF FACT, CONCLUSIONS
OF LAW and ORDER
ELUHB NO. 03-001

(1)

1 represented the Port of Grays Harbor. The Port did not actively participate in the hearing.
2 Administrative Appeals Judge, Phyllis Macleod, presided for the Board comprised of Bill
3 Clarke, chair, William H. Lynch, David W. Danner,¹ Judy Wilson, O'Dean Williamson and Dan
4 Smalley. Kim Otis and Randi Hamilton of Gene Barker and Assoc., Olympia, Washington,
5 recorded the proceedings.

6 Witnesses were sworn and heard, exhibits were introduced, and the parties presented
7 arguments to the Board. The Board affirms Ecology's CUP under the Shoreline Management
8 Act (SMA) authorizing wetland fill and related mitigation for the golf course, and also Ecology's
9 CZMA consistency determination. While the design of the golf course and the NRMP provide
10 an appropriate basis to meet water quality standards, the Board remands the Clean Water Act
11 §401 determination to Ecology to clarify certain aspects of the Natural Resource Management
12 Plan (NRMP) necessary to meet the standard of reasonable assurance and to determine
13 groundwater levels to provide reasonable assurance that infiltration can indeed occur. Based on
14 the evidence presented, the Board issues the following:

15 FINDINGS OF FACT

16 1.

17 The respondent Mox-Chehalis L.L.C. proposes a project known as the Links at Half
18 Moon Bay, including two hotels, a conference center, a "Scottish Links" style golf course, ocean
19 front condominiums, and supporting commercial development. It is anticipated Phase I of the

20
21 ¹ Board member Danner was present at the hearing and participated in the Board discussion of the case. He is not a signatory to the decision because he accepted appointment to a position in another agency prior to completion of this decision.

1 development will include one hotel structure with conference center and some commercial/retail
2 development. Phase I will also include the construction of the 18-hole golf course with all
3 appurtenances including shelters/restrooms, cart paths, bridges, club house, golf maintenance
4 building, and driving range. Utility and transportation infrastructure improvements will also be
5 part of Phase I construction activities. Phase II will include construction of the second 200-room
6 hotel, additional commercial/retail development, and approximately 200 condominium units in
7 eight buildings. (RW-1, WSH00004).

8 2.

9 The project site is approximately 355 acres in size and is located in the northwest portion
10 of the City of Westport near Point Chehalis, adjacent to Westhaven State Park and north of
11 Westport Light State Park. The site is located in the Urban Shoreline Environment and is zoned
12 Tourist Commercial. (Ex. RW-12). The property is bordered by the Pacific Ocean to the west
13 and Half Moon Bay to the north, Westport Light State Park to the south, and Forrest Avenue to
14 the east. The site is bisected in the northerly area by Jetty Access Road, which leads to
15 Westhaven State Park and the South Jetty. A pedestrian walkway connecting Westhaven State
16 Park and Westport Light State Park runs north/south along the western portion of the property.
17 A pedestrian walkway also extends along the shore of Half Moon Bay north of the property
18 leading toward a Coast Guard viewing tower and public parking area adjacent to Half Moon Bay.
19 (Ex. RW-1, WSH00004, RW-10). The public areas adjacent to the site contain some of the most
20 frequently visited ocean beaches in the State of Washington. The Pacific Ocean beach and the

1 Half Moon Bay beach are used by the public for a variety of shoreline uses including surfing,
2 swimming, beachcombing, and picnicking. (Testimony of Arthur Grunbaum and Ex. A-25).

3 3.

4 In 1993, the Pacific Ocean breached the South Jetty west of the project site. Significant
5 erosion ensued. The U.S. Army Corps of Engineers developed plans to repair and maintain the
6 jetty as part of its mission to protect the Grays Harbor navigation channel. Part of the work
7 undertaken in response to the jetty breach involved construction of a buried revetment along a
8 portion of the shoreline of Half Moon Bay. In litigation regarding the jetty repair and buried
9 revetment project, the Corps agreed to maintain a beach profile of approximately 1 vertical on 60
10 horizontal on Half Moon Bay to allow for continued public access to the water. (Ex. A-63). The
11 Corps also built a wave diffraction mound and gravel transition beach on the west end of Half
12 Moon Bay adjacent to the South Jetty. Sandy dredge spoils are placed on the beach and upland
13 area of Half Moon Bay to help avoid future erosion in the area. (RW-17, p. 13).

14 4.

15 The major buildings contemplated by the developer for this project are located on
16 uplands north of Jetty Access Road in areas that will not require filling wetlands. The
17 condominium site, however, is on uplands south of the Jetty Access Road near the parking lot for
18 Westhaven State Park. The proposed construction does not directly call for installation of
19 bulkheads, riprap, seawalls, or other shoreline protection structures. (RW-17, p. 14). Utilities
20 will be located in the existing Jetty Access Road right of way to the maximum extent possible.
21 The developer will be required to improve Jetty Access Road to include a sidewalk and bicycle

1 path, which will improve public access to Westhaven State Park. A pedestrian walkway will be
2 constructed to link the hotel and conference center with the City of Westport waterfront trail in
3 the area. The developer will also be required to install paved access points from the trail to the
4 beach every 660 feet along the trail. (Ex. RW-17, p. 9).

5 5.

6 The hotels are proposed on uplands in the northeast portion of the site. The hotels will be
7 visible from the commercial areas near the Westport marina, but they will not block any views of
8 the Pacific Ocean or Half Moon Bay from existing residences. The condominiums are visible
9 from Westhaven State Park and the Westport Light Trail. The condominium buildings, however,
10 are landward of the park and trail property and will not block views from Park property of the
11 Pacific Ocean or Half Moon Bay. After construction of the project, the view looking east from
12 the Westport Light Trail will be different from the existing undeveloped dunal area. (RW 17- p.
13 8).

14 6.

15 The golf course design proposed for the site has been modified a number of times to
16 address concerns over filling and/or impacting wetlands. The designers carefully evaluated if a
17 design could be developed that did not require alteration of wetlands. The conclusion was that
18 such a design could not be used and still allow for play by most average golfers. The pattern of
19 wetlands on the site is very scattered in small pockets with small upland spaces between them,
20 leaving very few areas of any good size to design golf play areas. If the course were designed
21

1 with no wetland impacts, it would present a “forced carry”² situation on almost every shot,
2 which would not be considered fair or playable by most golfers. Having concluded that some
3 filling would be necessary, the course designers worked diligently to reduce any impacts to
4 wetlands to an absolute minimum while maintaining the integrity of play for the average resort
5 golfer. (Prefiled testimony of Richard Robbins, ¶4).

6 7.

7 The course design involves 18 holes and a practice driving range. The course will be
8 open for play by the public and resort guests. Greens fees will be charged. A nine hole course
9 was evaluated, but such a design is not consistent with the type of play desired by the golfing
10 community, and such a course would not have the capacity to handle the amount of play required
11 to service a resort and the public. *Id.* ¶5. The Links at Half Moon Bay design will require
12 maintaining only 52 acres of turf rather than the 80-90 acres typical on average golf courses in
13 the United States. *Id.* ¶3. The Scottish Links style course utilizes the seaside terrain as a feature
14 of the design and incorporates sand dunes and existing vegetation into the overall experience.

15 8.

16 The area south of Jetty Access Road is currently comprised of undeveloped coastal dunes
17 and interdunal wetlands extending well into Westport Light State Park. (Ex. A-6). Jurisdictional
18 wetlands within the boundaries of the project site were originally delineated by Ecological Land
19 Services, Inc. in 2000. The delineation showed 170 wetlands on the site, which totaled

20 ² A “forced carry” is a situation that makes a player hit a shot of some distance over a hazard. These hazards may be
21 sand bunkers, water bodies, streams or wetlands. If the golfer does not “carry the shot” far enough, they must count
a 1-stroke penalty and they must replay the shot. (Prefiled testimony of Richard Robbins ¶4)

1 approximately 150 acres. Wetlands at the site are comprised of emergent, scrub-shrub, and
2 forested vegetative communities surrounded by uplands vegetated with European beach grass,
3 Scot's broom, and shore pine. Vegetation in the wetland areas consists of emergent species
4 within the westernmost wetland areas with more heavily dominant shrub and forest species in the
5 middle and easternmost portions of the site. (Ex. RW-8, p.1). The easterly 100 plus acres of the
6 site is a forested wetland with a more diverse habitat than the emergent and shrub areas to the
7 west. (Ex. RW-8, p. 15).

8 9.

9 Many areas on the site are heavily impacted by infestations of Scot's broom. Scot's
10 broom covers approximately 50 acres of the site with over 30 percent coverage. Absent human
11 intervention, the proliferation of Scot's broom could double or triple in the next ten years and
12 could interrupt the succession of native plants, diminish native plant diversity, and cause
13 deterioration of wetland habitat. (Ex. RW-17, p. 5 ¶17).

14 10.

15 Hydrology at the site is influenced by both surface water and groundwater and is highly
16 variable throughout the year. The majority of the wetland areas are inundated during the winter
17 months and dry during the summer months. Groundwater is generally shallow throughout the
18 site and is expected to match surface water elevations in the larger wetland areas in the center
19 and eastern portions of the site. Surface water at the site generally flows to the north where it
20 eventually enters ditches that drain to a roadside ditch that parallels the western side of Forrest
21 Avenue. From this point, surface water flows beneath Forrest Avenue via a culvert and enters

1 another ditch system that eventually discharges to Grays Harbor near the airport. (Ex. RW-1,
2 WSH00006). Movement of groundwater on the site and groundwater elevations on the property
3 have not been thoroughly studied. Some fifteen test wells have been drilled on the site, but data
4 has not been collected from them since a preliminary effort in October 2001. (Ex. RW-4, Ex.
5 8)(Testimony of Horton). That initial testing revealed groundwater levels in October 2001
6 ranging between 3.0 feet and 5.0 feet. *Id.* It is believed that most groundwater on the site flows
7 to the north and is hydraulically connected to Half Moon Bay. Some groundwater may flow
8 south to areas near the Westport drinking water wells. (Testimony of Kimsey).

9 11.

10 Over the years, birds have used the site as habitat primarily for bathing and resting. No
11 evidence was presented establishing the presence of endangered or threatened bird species on the
12 site. The Grays Harbor area is known as an important location on the migration route for north-
13 migrating spring shorebirds. The interdunal environment, such as that located on the site,
14 provides shelter for the migrant birds and fresh water for bathing. Food for shorebirds is
15 available in nearby saltwater mudflats and tidal zones. Significant areas in the Grays Harbor
16 vicinity critical to shorebird use during migration have been specifically protected through
17 federal legislation in 1988, leading to creation of the Grays Harbor National Wildlife Refuge.
18 (Ex. A-142). The project site is not included within the boundaries of the Grays Harbor National
19 Wildlife Refuge.

12.

1 The parties disputed the nature and extent of any habitat on the site for Coho salmon.
2
3 Initially, the area was not identified as Coho habitat, but in February 2002, the Washington
4 Department of Fish and Wildlife (WDFW) observed 5-6 Coho smolts in a flooded area along the
5 Fire Road on the south edge of the project property, and 5-6 Coho smolts in the Forrest Avenue
6 ditch along the eastern boundary of the property. (Ex. A-150). Juvenile Coho salmon are known
7 to use flooded coastal wetland habitat for rearing and refuge. To some extent they are also
8 capable of emigrating from flooded wetlands. There is no upstream source for fish to access the
9 project site. (Prefiled testimony of Fisher ¶8). Coho entering the area would have to leave salt
10 water and pass the floodgate located on the Forrest Avenue ditch.

13.

11
12 WDFW's findings were based on data obtained by shocking water in the Forrest Avenue
13 Ditch and water near the intersection of the Forrest Avenue Ditch and the Fire Road on the
14 southern border of the property. The remainder of the site was inaccessible on the day of
15 WDFW's site visit due to high water on the Fire Access Road. WDFW was unable to
16 systematically sample the areas within the wetland complex on the site for useable Coho habitat.
17 Dr. Jeffrey Fisher was hired by the applicant to conduct a more complete analysis of the area.
18 He evaluated fish habitat along transects within the interior of the project site. He observed
19 "dendritic" (i.e. capillary-like) channels connected to the Forrest Avenue ditch, which could
20 provide access to the adjacent forested wetland if water levels extended above the elevation of
21 the tops of the channels due to temporary high water. The likelihood of fry/smolts being

1 stranded on the site by receding waters increases as the fry/smolt stray further from the ingress
2 and egress channels associated with the Forrest Avenue ditch. (Prefiled testimony of Fisher,
3 ¶14). There was no substantial evidence salmonids are actively using wetlands on the site
4 beyond the forested wetland area that is being preserved under the proposed project. (Prefiled
5 testimony of Fisher ¶¶ 14-20).

6 14.

7 For many years the Port of Grays Harbor owned the property in question. During that
8 time the area remained largely undeveloped, although there are signs people have used portions
9 of the property for camping, walking, and off-road vehicle use. (Ex. RW-10, p.3). During 1995
10 and 1996, the Port engaged in a public planning process that culminated in a decision reflected in
11 the Port's Master Plan to encourage the sale of this property to private parties for development as
12 a major destination resort. Development of a destination resort was seen as the central
13 programmatic element in the revitalization and redevelopment of Westport. (Ex. RW-15). The
14 City of Westport updated its Shorelines Master Program and Zoning Code in 1996 to allow for a
15 master planned destination resort on this parcel. *Id.*

16 HISTORY OF THE PROJECT

17 15.

18 Environmental review of the Links at Half Moon Bay destination golf resort development
19 for this site began with the City of Westport issuing a Determination of Significance and Request
20 for Comments on Scoping, which led to a scoping meeting and preparation of a Draft
21 Environmental Impact Statement (DEIS) dated November 1, 2000. A Final Environmental

1 Impact Statement (FEIS) was issued, dated March 23, 2001. The applicant also applied for a
2 Master Plan Approval for the project and a shoreline substantial development permit (SSDP) and
3 shoreline conditional use permit (CUP).

4 16.

5 The City approved the master plan for the Links at Half Moon Bay after the Hearing
6 Examiner held an open record predecision hearing to take testimony regarding the application on
7 May 21 and May 23, 2001. Following a recommendation from the hearing examiner for
8 conditional approval of the application, the City Council approved the Master Plan. The plan
9 approval was challenged by Friends of Grays Harbor in Thurston County Superior Court
10 pursuant to the Land Use Petition Act, Ch. 36.70C RCW. The appellants also challenged the
11 adequacy of the project EIS in that proceeding. On January 29, 2002, the Superior Court issued
12 an oral opinion dismissing the SEPA claims for failure to exhaust administrative remedies. On
13 March 1, 2002, a written order was entered dismissing the SEPA claims made in the LUPA
14 action.

15 The Superior Court, however, remanded the master plan ordinance to the City of
16 Westport based on an appearance of fairness violation. The City Council again approved a
17 master plan ordinance for the Links at Half Moon Bay after a closed record hearing on
18 September 10, 2002. The City Council proceeded to pass Ordinance 1277 on October 8, 2002,
19 approving the Master Use Plan for the Links at Half Moon Bay. (Ex. RW-13). FOGH appealed
20 the new approval to Thurston County Superior Court and the court upheld the master plan
21 ordinance in an Order dated May 21, 2003. (Ex. RW-14). FOGH did not appeal this decision.

1 17.

2 In 2001, the City issued both a SSDP and a shoreline CUP for the project. A CUP was
3 necessary to authorize filling wetlands as part of the golf course construction. The Department
4 of Ecology denied the CUP and appealed the SSDP to the Shorelines Hearings Board (SHB).
5 FOGH intervened in the SHB case. While the case was pending before the SHB, the applicant,
6 the City of Westport, and Ecology engaged in a lengthy series of negotiations regarding revisions
7 to the project plans and conditions. An agreement was ultimately reached, but the project had
8 been modified to the extent that a new SSDP application and shoreline CUP application was
9 deemed appropriate. At the parties' request, the SHB remanded the appeal to the City of
10 Westport for processing of new applications.

11 18.

12 Following the Superior Court's approval of the Master Plan ordinance and the SHB
13 remand, the applicant submitted a new Joint Aquatic Resource Project Application (JARPA) for
14 issuance of a SSDP and shoreline CUP. (Ex. RW-1). That application contained the proposal on
15 appeal in the current case. In conjunction with the new JARPA, the applicant filed an addendum
16 to the FEIS addressing changes incorporated since the original FEIS. (Ex. RW-4).

17 The City of Westport Planning Commission held an open record hearing on the shoreline
18 permits on September 10, 2003. (Ex. R-17, p. 2). The Planning Commission entered Findings of
19 Fact and Conclusions of Law approving the SSDP and CUP on September 30, 2003. FOGH and
20 WEC appealed the approval to the Westport City Council, which held a closed record appeal
21 hearing on October 28, 2003. After refusing to allow supplementation of the evidentiary record

1 to reflect significant October 2003 erosion events on Half Moon Bay, the Council affirmed the
2 Planning Commission's decision on the SSDP and CUP on October 28, 2003. (Ex. RW-18).
3 The Department of Ecology then approved the shoreline CUP by letter dated December 4, 2003.
4 (Ex. RW-19). FOGH and WEC timely appealed the shoreline decisions to the ELUHB Board in
5 this case.

6 19.

7 The case was filed before the ELUHB Board because Mox-Chehalis applied to the State
8 of Washington Office of Regulatory Assistance in July 2003 requesting the Links at Half Moon
9 Bay be designated as a "qualifying project" under the Laws of 2003, Chapter 393, Section 3 (Ch.
10 43.21L, RCW). The Office of Regulatory Assistance found the project qualified because it was
11 proposed in a "distressed area" as defined by the statute and was designed to provide at least
12 thirty full-time year-round jobs. (RE-21). The Westport and Port of Grays Harbor governments
13 have been looking for economic development opportunities to revitalize the tourist segment of
14 the local economy, since traditional fishing and timber businesses have declined in recent years.

15 §401 CERTIFICATION

16 20.

17 On August 14, 2003, Mox-Chehalis LLC requested a water quality Certification from the
18 State of Washington for the Links at Half Moon Bay project pursuant to the provisions of 33
19 U.S.C. §1341 (Federal Water Pollution Control Act §401)(§ 401 Certification). Such a
20 Certification is required as a step in obtaining the necessary approval from the Army Corps of
21 Engineers to fill wetlands. Construction of the golf course will require filling certain wetlands to

1 create the fairways, tees, and greens. On August 13, 2004, Ecology issued Order #1612,
2 granting §401 Certification for the Links project. (Ex. A-134).

3 The Certification incorporated the Audubon International Natural Resource Management
4 Plan (NRMP) dated August 1, 2001, and the Wetland Mitigation Plan for the Links at Half Moon
5 Bay Westport Golf and Hotel Destination Resort dated February 6, 2002, with identified
6 additions and clarifications. (Ex. A-134, pp. 11, 4 respectively). At hearing, Ecology testified
7 the NRMP incorporated into the §401 Certification was actually a revised version still dated
8 August 1, 2001, but received by Ecology in March 2004.

9 21.

10 In evaluating a request for §401 Certification, Ecology must determine whether there is
11 “reasonable assurance” the activity in question will be conducted in a manner that will not
12 violate applicable water quality standards. Ecology utilized a number of experts from within the
13 Department to examine the proposal and review reports submitted by the project proponent’s
14 consultants. Ecology was evaluating the adequacy of mitigation for impacts resulting from the
15 filling of wetlands, the likelihood of groundwater contamination, and the potential for pollution
16 of on-site and surrounding surface waters.

17 22.

18 Golf courses are considered a high impact use under Ecology’s most recent guidance on
19 protecting and managing wetlands. (Ex. A-35, April 2005). This rating reflects the level of
20 human activity typical on a golf course, as well as the common use of pesticides, fertilizers, and
21 other chemicals to maintain a course in optimum playing condition. Most golf courses have a

1 stormwater collection system to intercept water flow from the highly managed areas of the
2 course such as tees and greens for treatment prior to discharge into surface water. The original
3 design for the Links at Half Moon Bay proposed such a collection system. During the ongoing
4 discussions between the applicant, the City, and Ecology, it was determined that the collection
5 system might not be workable because it would modify the existing hydrology of the wetlands
6 and groundwater on the site, and could result in severe groundwater mounding, flooding, and
7 localized changes in groundwater flow. (Prefiled testimony of Kimsey, p.5).

8 23.

9 In response to the problems attending a “collect and treat” type of system, the applicant
10 developed a plan involving infiltration without additional treatment as the method for protecting
11 water quality. The infiltration plan is unique to the site in question and takes into account the
12 sandy soils on the Links property. The use of infiltration, rather than a collect and treat system,
13 would help maintain the existing hydrology of the site. The infiltration plan is contained in the
14 NRMP prepared for the applicant by Audubon International Institute. (Ex. RE-6). Audubon
15 International is a not-for-profit environmental organization that specializes in sustainable natural
16 resource management. The Audubon Signature Program provides comprehensive environmental
17 planning assistance to landowners with projects in the design and development stages. The
18 Signature Program focuses on wildlife conservation and habitat enhancement, water quality
19 management and conservation, waste reduction and management, energy efficiency, and
20 Integrated Pest Management. (Ex. E-6, p. 1-5). The project approvals for the Links at Half
21 Moon Bay require the golf course to maintain an approved status with the Audubon International

1 Signature Program at the Silver Level. In this case, the Natural Resources Management Plan for
2 the Links at Half Moon Bay focuses on three main components: (1) Prevention, (2) Control, and
3 (3) Detection. (Pre-filed testimony of Peacock, p.3).

4 24.

5 Prevention involves careful construction practices, preserving wooded areas and
6 specimen trees to the maximum extent possible, and using the least intrusive methods and
7 machinery for clearing. The NRMP also indicates construction should direct surface and
8 subsurface drainage away from greens over vegetative buffers, through vegetative swales, or into
9 sumps before discharging to water. Fairway drainage also should be routed away from direct
10 input to surface waters. (Ex. RE-6, p. 2-17).

11 Another prevention strategy is to observe special management zones in an effort to
12 protect resources. In this case, a 25-foot no spray zone has been established around each water
13 body including ponds and wetlands. No pesticides will be used in these areas and only organic
14 fertilizers will be applied. A limited spray zone is also contemplated which will either extend to
15 the entire golf course or will extend over the area beginning 25 feet landward from the normal
16 water elevation and extending 50 feet landward from the normal water elevation. (Ex. RE-6, p.
17 2-30). The limited spray zone would involve use of a limited set of pesticides and would allow
18 only organic fertilizers or "spoon feeding" of non-organic fertilizers. Equipment to avoid
19 overspray in windy conditions is also required in the limited spray zone (Ex RE-6, p. 2-12).

20 While the evidence indicated the applicant had agreed to make the entire course a limited spray
21

1 zone, the NRMP in evidence, and incorporated into the §401 Certification, has inconsistent
2 language regarding that limit. (Compare Ex. RE-6, p. 2-12, Ex. RE-6 pp. 2-30-33.)

3 25.

4 A comparison of the details contained in the “revised” 2004 version of the NRMP and the
5 2001 NRMP showed that the later version did make some additional restrictions on the use of
6 pesticides, but it also made some restrictions more ambiguous and may provide less water
7 quality protection.

8 Three different management zones are established in both versions of the NRMP to
9 address resource and habitat protection. No Spray Zones are established around each water
10 body³ 25 feet landward from normal water elevation. Limited Spray Zones are established
11 around each water body beginning 25 feet landward from normal water elevation and extending
12 50 feet landward from normal water elevation. Bridge crossings are special management zones
13 for constructing the bridges associated with the cart path. The narrative portion of the 2004
14 NRMP states that “[t]he Links at Half Moon Bay will be treated as a Limited Spray Zone
15 because of the proximity of the golf holes to wetlands.” (Ex. RE-6, at 2-12.) When reviewing
16 the detailed recitation of practices for each golf hole, however, there are portions of the course
17 that are not contained within a management zone. (Ex. RE-6, Table 2-4.) Comparing holes 1
18 and 4, hole 1 has a No Spray Zone and a Limited Spray Zone established for the green, tees, and
19 fairway. Hole 4 only has a No Spray Zone and a Limited Spray Zone established for the green.

21 ³ Ponds and wetlands.

1 The tee area and the fairway/landing area for hole 4 are not contained within a management
2 zone. The tee area and the fairway/landing area for hole 4 does not require drainage to pass
3 through at least 50 feet of vegetative filter or into a regulated runoff impoundment. The
4 fairway/landing area for hole 4 does not require the use of lateral swales or elevated fairway
5 edges to direct the water. Likewise, holes 7 and 15 are identical to the management zones and
6 treatment specified for hole 4. Table 2-4 is also confusing because sometimes the management
7 area for a particular hole will include the fairway but not the landing area⁴, sometimes it will
8 include the landing area but not the fairway⁵, and other times it will list both the fairway and the
9 landing area.⁶ It is unclear to the Board whether the terms “fairway” and “landing area” are
10 meant to be used synonymously in this section, or whether it is intended to exclude additional
11 portions of the course from the management zones. Regardless, it is clear that the detailed
12 recitation of practices for each hole is inconsistent with the narrative in the NRMP that the entire
13 course will be treated as a Limited Spray Zone.

14 26.

15 The second element of the resource protection plan involves control. The NRMP views
16 control as providing appropriate management of materials and systems so that environmental
17 problems do not occur. The plan utilizes Best Management Practices and Integrated Pest
18 Management to meet this goal. Best Management Practices identified for the Links include the
19 use of biofilters or vegetated buffer strips to provide filtration before drainage reaches open

20 ⁴ Hole 1 for example.

21 ⁵ Hole 3 for example

⁶ Hole 6 for example.

1 water areas or wetlands. While detention with associated filtration, grassy swales, and dry ponds
2 are mentioned in the plan as possible control practices, the only evidence these devices are
3 actually incorporated into the Links design is the description of practices for each golf hole. (Ex.
4 RE-6, Table 2-4). Although the level of detail is lacking on how these BMPs will eventually be
5 incorporated around each golf hole, the Board believes Ecology will ensure that these are in fact
6 incorporated into the final design and construction of the golf course.

7 27.

8 The primary treatment method for stormwater at the Links site is infiltration. Infiltration
9 is a recognized means to manage stormwater identified by the Stormwater Management Manual
10 for Western Washington. (Ex. RE-29). Infiltration was seen as a viable option at the project site
11 because it will mimic the natural conditions. (Prefiled Testimony of Kimsey, p. 7). In order for
12 infiltration to work effectively as a stormwater treatment strategy, all Site Suitability Criteria
13 (SSC) must be met. (Ex. RE-29, p. 3-70). Depth to water table is addressed at SSC-5:

14 The base of all infiltration basins or trench systems shall be \geq 5 feet
15 above the seasonal high-water mark, bedrock (or hardpan) or other low
16 permeability layer. A separation down to 3 feet may be considered if the
17 ground water mounding analysis, volumetric receptor capacity, and the
design of the overflow and/or bypass structures are judged by the site
professional to be adequate to prevent overtopping and meet the site
suitability criteria specified in this section.

18 Viability of the infiltration system is dependent on adequate separation between the soil
19 surface and the groundwater table. The data submitted to Ecology in connection with this project
20 does not contain groundwater table readings for the wet season occurring from November
21 through March. The only data in support of infiltration treatment reports ground water levels in

1 October and May. (Testimony of Kimsey). Testimony and photographic evidence indicate the
2 groundwater table is very near the surface during the rainy parts of the year. To support a
3 scientifically valid analysis of the potential for groundwater or surface water contamination on
4 this site, or any limitations necessary to avoid it, adequate data for all seasons is necessary. On
5 the record before the Board, this data has not been collected or analyzed.

6 28.

7 Operational issues at the golf course are addressed through a combination of source
8 controls and monitoring. Source controls include the design elements targeted to reduce runoff
9 to wetlands and open waters, as well as the plan for selection and application of pesticides, and
10 fertilizers. A risk assessment was conducted for the use of numerous pesticides⁷ at the golf
11 course. The risk assessment, known as a Tier 1, evaluated these pesticides by assuming the
12 “worst case” application and environmental conditions and comparing the resulting maximum
13 anticipated concentrations of the pesticide against acute and chronic toxicity levels for aquatic
14 organisms as well as human health toxicity levels. Under the formula used, if the quotient for
15 the equation was less than one, negligible risk for the pesticide was assumed. If the quotient was
16 greater than one, potential risk for the pesticide was assumed. (Ex. RE-6, at 3-21 – 3-24.) The
17 results of the risk assessment are illustrated in Table 3-9. (2004 NRMP is Ex. RE-6, at 3-25 – 3-
18 27; 2001 NRMP is Ex. RW-6, at 64 – 66.)

19
20
21 ⁷ Pesticides include fungicides, herbicides, insecticides, and nematicides. A plant growth regulator, triexpac-ethyl was also evaluated.

1
2 The Petitioners raise concerns regarding the reclassification of the herbicides bromoxynil
3 and dithiopyr from the potential risk category in Table 3-9 in the 2001 NRMP to the negligible
4 risk category in Table 3-9 in the 2004 NRMP without explanation. (Testimony of Philip Dickey,
5 September 12, 2005). The reclassification of dithiopyr is particularly puzzling because the
6 appendix, which contains the results of the Tier I modeling contains a blank on the last column
7 of the table, and this column pertains to human health. (See Ex. RE-6, Appendix I, Table I-2.)
8 Despite the lack of explanation for the reclassification of these two pesticides, Petitioners'
9 concerns are not well-founded because the 2004 NRMP also prohibits the use of these pesticides
10 on the golf course. (Ex. RE-6, at 3-24; Table 3-10.)

11 The 2004 NRMP also removed the use of trichlorfon, chlorothalonil, mancozeb,
12 chlorpyrifos, thiopnate-methyl, thiram from the golf course. (Ex. RE-6, at 3-23 – 3-24; Table 3-
13 10.) Trichlorofon is listed as having a potential risk, the other pesticides are listed as having
14 negligible risk. Table 3-10 also lists cyfluthrin as not available for use on the golf course, but
15 this is not listed in the narrative portion of the NRMP. It is also confusing that some pesticides
16 that are banned from use on the golf course appear in the risk assessment results in Table 3-9⁸,
17 but other banned pesticides do not appear in this same table.⁹ Similarly, the results of the risk
18 assessment for some pesticides are listed in Table 3-9 in the 2001 NRMP¹⁰, but the results of
19 these same pesticides are not listed in Table 3-9 of the 2004 NRMP, and there is no

20 ⁸ Bromoxynil, dithiopyr, trichlorfon, chlorothalonil, chlorpyrifos, thiopnate-methyl, and cyfluthrin.

21 ⁹ Mancozeb and thiram.

¹⁰ PCNB for example.

1 accompanying explanation. The Board can only assume that pesticides that are not listed in
2 Table 3-9 of the 2004 NRMP are not approved for use on the golf course, and that even if a
3 pesticide is listed in Table 3-9, it still may not be approved for use on the golf course if the
4 NRMP indicates elsewhere it is not to be used. The NRMP version before the Board will not be
5 the final version incorporated into the §401 Certification. The revised NRMP should ensure
6 there is consistency between Table 3-9, Table 3-10, and the narrative portion of the NRMP.

7 30.

8 Pesticides allowed for use within the limited spray zone are more difficult to interpret
9 under the 2004 NRMP. In the 2001 version, only certain products identified with an asterisk on
10 Table 3.9 were authorized for use in the limited spray zone. The corresponding table in the
11 revised NRMP does not contain any asterisks, raising an ambiguity regarding pesticide use in the
12 limited spray zone. A number of pesticides prohibited for use in the older version are now
13 allowed without limitation. These include the herbicides bensulide, bentazon, mecoprop,
14 oxadiazon, and prodiamine, which were specifically restricted in the 2001 NRMP to only one
15 application per year outside the management zones. Similarly, the insecticide lambda-cyhalothrin
16 was prohibited for use within the management zones and was limited to two applications per
17 year. (Ex. RW-6, Table 3-10.) The lack of any explanation in the 2004 NRMP for the unlimited
18 use of these pesticides in management zones is a serious flaw in the NRMP. In addition,
19 halosulfuron, was reclassified as having no data to negligible risk, even though there is no data
20 available on the risk to human health. (Ex. RE-6, Table 3-9; Appendix I-2.)

1 31.

2 The NRMP generally states that the application of pesticides should be avoided when
3 “heavy rain” is forecast. (Ex RE-6, p. 2-22.) Although there were references over the course of
4 the hearing regarding no application of pesticides within 48 hours of a storm event, this language
5 is lacking in the NRMP and the §401 Certification. Because the NRMP itself recognizes that
6 “water is the primary movement mechanism for contaminants,”¹¹ the NRMP needs to provide
7 more specificity regarding the application of pesticides around rainfall events. In addition, the
8 NRMP and §401 Certification are silent about irrigation after the application of pesticides.
9 Irrigation water is also a potential source for moving contaminants on the golf course.

10 32.

11 Concerns were raised over the use of fertilizers. The NRMP does address fertilizer
12 applications. The supervisor is responsible under the NRMP for controlling the rate and
13 frequency of fertilizer application. Ex. RE-6, at 3-12. Table 3-3 sets forth the general fertilizer
14 applications for the greens and tees. In this table, different application frequencies are
15 established for nitrogen, phosphorous, and potassium. The roughs are to be fertilized three times
16 a year. Ex. RE-6, at 3-14.

17 33.

18 The expert testimony of Ecology Senior Ecologist Thomas Hruby indicated the
19 applicant’s mathematical modeling using EPA models GENEEC and SCI-GROW was not
20

21

¹¹ Ex. RE-6, at 2-18.

1 reliably predictive of pesticide concentrations to be expected in sandy soils with high rainfall
2 such as exist at the Links site. As a result, he recommended additional conditions be placed in
3 the §401 Certification at Condition J., requiring a monitoring program adequate to serve as an
4 early detection system for any unacceptable concentrations of nutrients or pesticides occurring
5 on the site that might pose a risk to water quality. (Pre-filed testimony of Hruby, p.3).

6 34.

7 A condition was incorporated in the §401 Certification relating to Dr. Hruby's concern
8 over adequate monitoring, stating:

9 Prior to the operation of the golf course the Applicant shall submit to
10 Ecology for its review and written approval a final plan for monitoring
11 the movement into groundwater and adjacent surface water, including
12 wetlands, of each pesticide to be used on the golf course. The first two
13 applications of each pesticide will have to be monitored at a minimum of
14 three separate greens or fairways.

15 (Ex. A-134 p. 12, Condition J(3)(f)).

16 35.

17 The monitoring plan that is contained in the 2004 NRMP does not meet the standards set
18 forth by Dr. Hruby in his testimony or in Condition J(3)(f). The §401 Certification relies upon
19 the applicant submitting a new monitoring plan and the details that will be included on
20 significant elements, such as sampling frequency and capture of peak concentrations, are
21 unknown at this time. Under Dr. Hruby's analysis, the monitoring plan is the centerpiece of
water quality protection. Rather than relying on unreliable mathematical modeling to predict
pesticide concentrations on this site, monitoring will be used to carefully track the actual impacts

1 from pesticide use. The adequacy of the monitoring plan to detect water quality impacts on a site
2 containing 170 separately identified wetlands and important groundwater resources is vital to
3 determining whether reasonable assurance exists that water quality standards will be met during
4 operation of the project.

5 36.

6 The monitoring program to protect water quality also lacks a clear standard against which
7 the results are to be compared. Dr. Hruby suggests groundwater should not exceed human health
8 standards and surface water should not exceed the acute or chronic toxicity criteria set by the
9 U.S. Environmental Protection Agency. (Ex. A-134, p.12, Condition J (3)(g)). The testimony
10 showed that EPA criteria for acute or chronic toxicity are not developed for many of the
11 substances in question. The water quality standards required under the §401 Certification are not
12 currently identified with any certainty. Dr. Hruby suggested the registration information or
13 labeling could be used for items without EPA approved toxicity levels. Identification of the
14 precise regulatory standard being required for monitored substances is lacking in the NRMP or
15 the §401 Certification.

16 37.

17 In addition, the Board is concerned that no specific monitoring conditions are attached to
18 the use of the nematicide fenamiphos, which has been identified under the risk assessment as
19 having a potential risk to aquatic life and to human health. Although the application of
20 fenamiphos is limited to one application per year on the greens only, there is no recognition of
21

1 the potential risks associated with its use in the monitoring provisions. Its use is treated the same
2 as any other pesticide under the monitoring provisions of the NRMP

3 38.

4 By relying heavily on monitoring during operations to assure water quality standards are
5 not violated, it becomes critical to define adequate remedial actions required if the monitoring
6 program reveals a pollution problem. The §401 Certification simply provides that a new
7 condition will be placed in the NRMP providing “the Applicant will discontinue the use” of any
8 pesticide whose concentration in groundwater exceeds human health standards or whose
9 concentration in the surface water of adjacent wetlands exceeds the acute or chronic toxicity
10 criteria set by the U.S. Environmental Protection Agency. Detailed provisions for detections
11 below or approaching trigger levels are not contained in the §401 Certification and are not
12 adequately addressed by the NRMP. Expected actions in the case of excessive nutrients revealed
13 by monitoring are also undefined.

14 WETLANDS

15 39.

16 The delineation of wetlands on the project site identified approximately 150 acres of
17 wetlands on the property. (RW-8, p.1). To construct the golf course and associated
18 improvements under the current plan, 9.96 acres of wetland will be filled, 0.23 acres of wetland
19 will be excavated, and 14.63 acres of wetlands will be routinely pruned. There will be wetland
20 buffer impacts of 12.36 acres from the golf course, 1.3 acres from cart paths and other structures
21 associated with the golf course, and .027 acres from the condominiums.

1 40.

2 The wetland delineation and rating for the Links project was initially performed by
3 Ecological Land Services, Inc. in a report dated September 2000. The original rating categorized
4 the entire series of interdunal wetlands on the site as Category II wetlands. The wetlands were
5 considered an interconnected mosaic. A later wetland delineation and characterization report
6 was prepared by Ecological Land Services, Inc. in June 2003, which changed the
7 characterization of wetlands on approximately the western third of the site from Category II to
8 Category III. Francis Naglich, wetland biologist and principle of Ecological Land Services, Inc,
9 performed the reclassification.

10 41.

11 Mr. Naglich indicated he engaged in this reclassification because:

12 After reviewing the previous wetlands classification, it was my
13 professional opinion that the patchwork area of wetlands in roughly the
14 western one-third of the site had the vegetative diversity, habitat features
15 and hydrological characteristics that are typical of Category 3 wetlands.
16 These wetlands are relatively immature and have not had sufficient time
17 to develop into more mature plant communities. Based on my
18 observation they are more typical of Category 3 wetlands. I also
19 reviewed the Dept. of Ecology Wetland Rating Manual (1993) which
20 provides guidance on the categorization of wetlands within a patchwork
21 or mosaic. The guidance states that wetlands that form less than 50
percent of the total area of uplands and wetlands can be categorized
individually. In this case the percentage of wetlands was 33 percent of
the total area and they could therefore be rated independently of the more
mature wetlands in the eastern two-thirds of the site.

(Ex. RM-5, pp. 2-3).

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42.

The most recent guidance publications from the Department of Ecology recommend classifying all interdunal wetlands as Category II due to their unique characteristics and the lack of complete understanding of their function. These documents were not available at the time the decisions on this project were made and were not used by Ecology in analyzing this proposal. (Ex. A 35, A-36). Ecology allowed the applicant to categorize the western wetlands as Category III, based on Ecology’s guidance and the specific characteristics of the site. (Prefiled Testimony of Lund, pp. 11-12). The Board gives deference to Ecology’s application of its own classification guidance to the project in question.

43.

The applicant has developed a wetland mitigation plan that combines onsite wetland creation, restoration and preservation, with offsite restoration and preservation. Mitigation for the wetland fill impacts will include creating and/or restoring 5.21 acres of on-site interdunal wetlands, restoring 7.00 acres of estuarine wetland at Firecracker Point, preserving 14.00 acres of rare sphagnum bog and forested peat wetland at Seastrand Bog, and preserving 30.00 acres of interdunal habitat on the Pacific Coast at Mar Vista. (Ex. RW-5, WSH00950). Mitigation for the pruning or excavating of 14.86 acres of wetlands on the site will be accomplished through preservation of 107.00 acres of on-site upland and forested wetland area. The mitigation ratios applied to the wetland fill mitigation are:

Acres	Site/Type	Ratio	Acres of Mitigation Satisfied
5.21*	On-site interdunal wetland creation/restoration	2:1	2.60
7.00*	Firecracker Point estuarine wetland restoration	1.5:1**	4.66
14.00	Seastrand bog and forest preservation	8:1 for 6 acres bog 10:1 for 8 acres forest	1.55
30.00	Interdunal habitat preserved (Mar Vista Lots 5-7 or 10-12)	10:1	3.00
Total 56.21			11.81 Total***

* Sum of these mitigation activities meets or exceeds no-net-loss of wetlands.

** Ratio less than 2 is appropriate due to restoration of Category I wetland at Firecracker Point for impacts to Category II wetlands.

*** Meets or exceeds fill impacts of 9.96 acres.

(Prefiled testimony of Lund, p. 7).

44.

The areas referred to as Firecracker Point, Mar Vista, and Seastrand Bog are offsite mitigation sites. Firecracker Point is a Category I estuarine wetland located near the Westport marina adjacent to Grays Harbor. The restoration work to be accomplished at the Firecracker Point site is expected to significantly increase the habitat values of the site for fish and other wildlife. The Firecracker Point wetlands provide crucial habitat (e.g., foraging and refugia) for fish during several stages of their life history. Seastrand Bog is a rare, Category I sphagnum peat bog located in the Grayland area. The area is proposed for preservation to prevent logging or cranberry cultivation on the site. Mar Vista is a series of developable lots on the Pacific coast south of the project site that contain interdunal wetlands similar to, but less extensive than, those found on the project site. The applicant will preserve the interdunal wetlands in this area and

1 restore upland areas being impacted by invasive species such as Scot's broom. (Pre-filed
2 testimony of Lund, p. 6).

3 45.

4 In evaluating the adequacy of the applicant's proposed wetland mitigation plan, Ecology
5 applied a 2:1 mitigation ratio contained in the Westport Shoreline Master Program. Ecology
6 concluded the mitigation plan meets or exceeds that ratio. (Pre-filed testimony of Lund, p. 7).
7 The evidence demonstrated the combination of mitigation strategies required, including the
8 restoration of particularly important habitat at Firecracker Point, the preservation of Seastrand
9 bog, and preservation of interdunal habitat at Mar Vista, would serve to mitigate the wetland
10 impact generated by filling 9.96 acres of wetlands on the site. Appellant's evidence did not
11 establish that the interdunal wetlands on this site are so unique that their functions and values
12 simply cannot be mitigated through any plan.

13 46.

14 Wetland buffer impacts associated with the golf course were quantified by the applicant
15 at 31.27 acres, using a standard of 100-foot buffers from Category II wetlands and 50 foot
16 buffers from Category III wetlands. Buffer averaging in the amount of 18.91 acres was applied
17 as an offset, to derive a net buffer impact of 13.93 acres. The mitigation proposed for these
18 buffer impacts includes 22.32 acres of on-site upland dune restoration at a ratio of 2:1, 5.00 acres
19 of upland dune restoration at Mar Vista at a ratio of 2:1, and 1.13 acres of enhancement and
20 restoration of the remaining upland dune buffer following condominium construction at a ratio of
21 4:1. (Prefiled testimony of Lund pp. 12-13).

Acres	Site/Type	Ratio	Acres of Mitigation Satisfied
22.32	On-site upland dune restoration by removal and suppression of Scot's broom	2:1	11.16
5.00	Upland dune restoration at Mar Vista Lots 5-7 (or 10-12) by removal/suppression of Scot's broom and gorse	2:1	2.50
1.13	Enhancement/restoration of remaining upland dune buffer following condominium construction.	4:1	0.27
Total 28.45			13.93 Acres

47.

The width of wetland buffers on the golf course will not meet the standard of 100 feet for Category II wetlands and 50 feet for Category III wetlands in all cases. The adequacy of the buffers will be a function of several items including the sandy nature of the soils on the site and limitations on chemical applications near wetlands. While the 50 and 100-foot standards are not met throughout the course, mitigation has been required to offset the wetland buffer impacts. Much of the habitat generated by mitigation will have superior functions and values compared to current habitat because invasive plant infestations, which are increasingly limiting the diversity and value of existing uplands in the area, will be suppressed. (Ex. RM-5, p. 5).

48.

A wetland denominated HMB (Half Moon Bay) has been identified on the site just north of the Jetty Access Road. Wetland HMB was delineated by Ecological Land Services, Inc., in its original September 2000 report. The U.S. Army Corps of Engineers inspected the property on November 2, 2000, and January 24, 2001, and concurred with the delineation by letter dated April 4, 2001. (Ex. RM-1). Previously, wetland HMB had been delineated in conjunction with a

1 Corps of Engineers buried revetment project in the area. The revetment project required
2 disturbance of a portion of wetland HMB. The Corps' delineation in 1998 was substantially
3 larger than the Ecological Land Services' delineation in 2000. Appellants' expert Sarah Cooke,
4 PhD., testified that the applicant's delineation was incorrect and that the Corps of Engineers
5 delineation in 1998 more accurately reflected the extent of wetland HMB. The Wetland HMB
6 area has been disturbed on more than one occasion and it is not of the same quality and nature as
7 the nearby interdunal mosaic.

8 Ms. Cooke engaged in a reconnaissance of the site in June 2005, but did not actually
9 perform a formal delineation of wetland HMB. Given the formal delineation of wetland HMB
10 performed by Ecological Land Services and the Corps of Engineers' written acceptance of that
11 delineation, the Cooke evidence, while credible, did not mandate a finding that the factual
12 findings made by the City of Westport and Ecology regarding the size, location, and
13 classification of wetland HMB were unsupported by substantial evidence.

14 49.

15 Any Conclusion of Law deemed properly a Finding of Fact is hereby adopted as such.

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

17 CONCLUSIONS OF LAW

18 1.

19 The Environmental and Land Use Hearings Board has jurisdiction over the parties and
20 the subject matter of this case pursuant to RCW 43.21L.020 which provides, in part:
21

1 The appeal process authorized in this chapter shall, notwithstanding any
2 other provisions of this code, be the exclusive process for review of the
3 decisions made by participating permit agencies on permit applications
4 for a qualifying project.

4 In this case, the Links at Half Moon Bay project has been certified as a qualifying project
5 by the Washington Office of Permit Assistance and the ELUHB Board is the appropriate forum
6 for all final permit decisions on the qualifying project. This decision deals with those permit
7 decisions subject to de novo review – the §401 Certification, the shoreline CUP, and the CZMA
8 consistency determination.

9 2.

10 The scope of review for the ELUHB Board on the §401 Certification and the shoreline
11 CUP is de novo. The burden of proof is on the appealing parties to show by a preponderance of
12 the evidence that relief is appropriate.¹²

13 3.

14 In deciding the case, the ELUHB Board is guided by the standards in RCW 43.21L.130:

15 (1) The Board shall review the decision record and all such evidence as is
16 permitted to supplement the record for review restricted to the decision
17 record or is required for de novo review under RCW 43.21L.120. The
18 board may grant relief only if the party seeking relief has carried the
19 burden of establishing that one of the standards set forth in (a) through
20 (f) of this subsection has been met. The standards are:

19 (a) The body or officer that made the permit decision engaged in
20 unlawful procedure or failed to follow a prescribed process, unless the
21 error was harmless;

21 ¹² The appellants made a second motion for judicial notice after the close of hearing. The motion is denied. The appellants made an inadequate showing of grounds for the Board to take judicial notice of the proffered material.

- 1
- 2 (b) The permit decision is an erroneous interpretation of the law, after
- 3 allowing for such deference as is due the construction of a law by an
- 4 agency with expertise;
- 5 (c) The permit decision is not supported by evidence that is substantial
- 6 when viewed in light of the whole record before the board;
- 7 (d) The permit decision is a clearly erroneous application of the law to
- 8 the facts;
- 9 (e) The permit decision is outside the authority or jurisdiction of the body
- 10 or officer making the decision; or
- 11 (f) The permit decision violates the constitutional rights of the party
- 12 seeking relief.
- 13 (2) The board may affirm or reverse each and every permit decision under
- 14 review or remand the decision for modification or further proceedings
- 15 involving the permit agencies.

16 4.

17 In reviewing Ecology's §401 Certification for the project, the Board recognizes Ecology

18 is the agency charged with issuing §401 Certifications for the State. In doing so, Ecology must

19 determine whether "there is reasonable assurance that the activity will be conducted in a manner

20 which will not violate applicable water quality standards. 40 C.F.R §121.2(a)(3)." *See, Port of*

21 *Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004).¹³ In this

22 appeal to the ELUHB challenging Ecology's Certification, the Board is determining whether

23 Ecology's §401 Certification is adequate or inadequate to give reasonable assurance that water

¹³ In this case the §401 certification did not contain language specifically stating that Ecology had reasonable assurance the activity would be conducted in a manner which will not violate applicable water quality standards. Any subsequent §401 certification in this case should comply with this requirement of the federal regulations.

1 quality standards will be met. *Id.*, at. 592. In conducting such a review, the Board gives weight
2 to Ecology’s interpretation of the laws it administers and due deference to Ecology’s technical
3 expertise. *Id.*, at 594.

4 5.

5 In order to overturn a §401 Certification, Appellants must establish by a preponderance
6 of the evidence that there is no reasonable assurance the applicable provisions of the Clean
7 Water Act and state water quality standards will be complied with. *Port of Seattle*, 151 Wn.2d,
8 at 592. Preponderance of the evidence means evidence that is more probably true than not true.
9 *Airport Communities Coalition v. Ecology & Port of Seattle*, PCHB No. 01-160, Findings of
10 Fact, Conclusions of Law & Order (2002), citing *In re Sego*, 82 Wn.2d 736, 746, 513 P.2d 831
11 (1973). Mere speculation or evidence raising only the possibility of an occurrence does not meet
12 the preponderance of the evidence standard. “Reasonable assurance” does not require absolute
13 certainty. The inherent predictive nature of a §401 Certification cannot be avoided; each § 401
14 Certification must address future events and the likelihood that those events will result in
15 violations of water quality standards. *Port of Seattle*, 151 Wn.2d at 600, citing *Airport*
16 *Communities Coalition, supra*. The appellants have argued the §401 Certification is in error
17 because it relies on information to be submitted at a later time. The decision in *Port of Seattle*,
18 151 Wn.2d at 601, acknowledges the validity of relying on additional information in issuing a §
19 401 Certification: “Yet the need for additional studies, plans and reports does not, by itself, call
20 into question a finding of reasonable assurance.” Whether reliance on future submissions is

1 appropriate depends on whether the implementation and outcome of the studies, plans, and
2 reports meets the reasonable assurance test. *Id.*

3 6.

4 The State of Washington has developed its own water quality standards, as permitted by
5 the Clean Water Act 33 U.S.C. §1313. The Washington State Legislature has also provided a
6 standard for water quality policy:

7 It is declared to be the public policy of the state of Washington to
8 maintain the highest possible standards to insure the purity of all waters
9 of the state consistent with public health and public enjoyment thereof,
10 the propagation and protection of wild life, birds, game, fish and other
11 aquatic life, and the industrial development of the state, and to that end
12 require the use of all known available and reasonable methods by
13 industries and others to prevent and control the pollution of the waters of
14 the state of Washington. Consistent with this policy, the state of
15 Washington will exercise its powers, as fully and as effectively as
16 possible, to retain and secure high quality for all water of the state.

17 RCW 90.48.010.

18 7.

19 In furtherance of the state's water quality policy and the implementation of the Clean
20 Water Act, Ecology has promulgated specific water quality standards for surface water (Ch. 173-
21 201 WAC) and groundwater (Ch. 173-200 WAC). Washington's water quality standards consist
of narrative criteria protecting the beneficial uses of state water, numeric criteria for conventional
pollutants and toxic substances, and an antidegradation policy.

1 § 401 CERTIFICATION

2 Water Quality

3 8.

4 In evaluating a project's compliance with water quality standards, Ecology must consider
5 whether wastes and other materials and substances proposed for entry into waters of the state
6 have been provided with all known, available, and reasonable methods of treatment prior to
7 entry. This requirement is commonly referred to as AKART.

8 Waters of the state shall be of high quality. Regardless of the quality of
9 the waters of the state, all wastes and other materials and substances
10 proposed for entry into said waters shall be provided with all known,
11 available, and reasonable methods of treatment prior to entry.

12 RCW 90.54.020. *See also*, RCW 90.52.040.

13 9.

14 In order to obtain §401 Certification, proposed activities must also comply with the
15 antidegradation provisions of RCW 90.54.020:

16 Notwithstanding that standards of quality established for waters of the
17 state would not be violated, wastes and other materials and substances
18 shall not be allowed to enter such waters which will reduce the existing
19 quality thereof, except in those situations where it is clear that overriding
20 considerations of the public interest will be served.

21 Ecology's regulations establishing water quality standards for surface water also address
antidegradation:

Existing beneficial uses shall be maintained and protected and no further
degradation which would interfere with or become injurious to existing
beneficial uses shall be allowed.

1 WAC 173-201A-070.¹⁴

2 10.

3 The appellants claim Ecology had inadequate assurance that water quality standards
4 would be met because pesticides and fertilizers used on the golf course pose a significant threat
5 to beneficial uses in the on-site wetlands and in the Grays Harbor Estuary. Concern was also
6 expressed over the risk of groundwater contamination impacting the City of Westport's drinking
7 water supply and over failure to require AKART to control and treat stormwater from the golf
8 course.

9 11.

10 Ecology concluded the NRMP, the Integrated Pest Management Plan, the Stormwater
11 Plan, and Wetland Mitigation Plan, together, provided adequate protections to assure water
12 quality standards would be met during construction and operation of the project. The applicant
13 has indicated its approach to water quality compliance involves prevention, control, and
14 detection. The primary vehicle for establishing operational conditions designed to implement
15 this strategy is the NRMP.

16 12.

17 The NRMP referenced and incorporated into the §401 Certification is "dated August 1,
18 2001." The testimony at hearing revealed that the correct version of the NRMP was erroneously
19 labeled August 1, 2001, but was actually a modified version received by Ecology in March 2004.

20 ¹⁴ Ecology adopted new surface water quality regulations in 2003; however, those regulations have not been fully
21 accepted by the U.S. Environmental Protection Agency. At this time, the prior antidegradation regulation, quoted
herein, is controlling.

1 Yet another version of the NRMP is anticipated, which would incorporate additional
2 requirements set forth by Ecology in the §401 Certification. (Ex. A-134, p. 11). At this point it
3 is unclear what the final NRMP, the mechanism through which water quality will be protected,
4 will actually require.

5 13.

6 After Ecology received the initial 2001 version of the NRMP, various experts from
7 within the Department commented on areas that would have to be modified in order to meet
8 reasonable assurance standards. After an exchange of memoranda, Audubon International
9 summarized changes they were planning to incorporate into the NRMP in a memorandum to Bob
10 Berquist dated January 16, 2002. (Ex. A-90). Audubon International proposed to manage the
11 entire golf course as a limited spray zone in response to comments regarding a 100-foot buffer
12 zone around the wetlands. Audubon further indicated applications of fertilizers would be made
13 only when no rain is forecast for 48 hours and air temperatures are in the 60-75 F range.¹⁵
14 Neither of these criteria is clearly reflected in the revised March 2004 NRMP.

15 14.

16 The water quality strategy being implemented for the Links at Half Moon Bay is site
17 specific and does not follow standard practices for managing stormwater from golf courses.
18 While a unique system may be very well suited to this site, deviating from conventional

19
20 ¹⁵ Ecology expert Tom Hruby questioned whether this rain and temperature requirement was viable given the
21 climatic conditions in the Westport area. Average temperatures stay below this range during much of the spring,
when fertilizing would typically be contemplated. Rainfall is also quite prevalent during both the spring and fall
seasons. (Ex. A-88).

1 technology can only meet the standard for §401 Certification if it is done pursuant to a very
2 specific program containing adequate guidance and monitoring to assure water quality will be
3 protected. The NRMP incorporated into the §401 Certification and the infiltration system
4 proposed by the applicant do not meet this standard and cannot form an adequate basis for
5 Ecology to find reasonable assurance water quality standards will be met by the project.

6 15.

7 When it approved the §401 Certification, Ecology was lacking information documenting
8 groundwater levels on this site during the seasonal high water period. This data is critical to
9 determining whether the infiltration system will work to treat pesticides and fertilizers on the
10 golf course. If inadequate separation is present, the infiltration strategy will not provide
11 reasonable assurance that water quality standards will be met. This is particularly important
12 given the smaller than average buffers between the golf course and the interdunal wetlands on
13 the course. While the §401 Certification contemplates gathering additional water level
14 information prior to operation of the golf course, no required actions are identified in the event a
15 3-5 foot separation is not available during parts of the year. Ecology had insufficient data on
16 groundwater separation to make a reasoned decision on whether infiltration alone is adequate to
17 assure water quality compliance on this site.¹⁶

18
19
20
21 ¹⁶ Ecology did not review data on groundwater levels throughout the year, even though the site has a number of wells drilled that would have provided the information on whether adequate separation exists for infiltration to succeed.

1
2 The primary protection mechanism in the Links management plan to prevent water
3 quality problems is source control. Important details regarding the source control program are
4 lacking from the NRMP and §401 Certification. Identification of allowable pesticides is
5 inadequate.¹⁷ The 2004 modifications to the 2001 NRMP have made the allowable pesticides
6 less clear. No pre-approval process for newly proposed pesticides is contained in the plan and
7 monitoring protocols are yet to be developed. The NRMP provisions, which will guide golf
8 course operations, do not provide clear direction for day-to-day decisions. Witnesses before the
9 Board were unable to state with any certainty what substances were allowed, at what frequency
10 and in what amounts they could be applied, and what sampling was required under the NRMP.
11 The Board, similarly, had difficulty determining what exactly is allowed and disallowed under
12 the NRMP. It is unlikely that even a trained golf course superintendent would be able to use the
13 NRMP effectively as a guide to proper application and monitoring of pesticides. The Board
14 concludes, the source control program for pesticides in the NRMP is inadequate to provide a
15 basis for Ecology's conclusion that reasonable assurance exists that water quality standards will
16 be met during operation of the golf course.

17
18
19
20 ¹⁷ In this regard, this §401 certification is unique in that the act of filling wetlands is not the water quality concern,
21 but rather, the use of pesticides and fertilizers on the golf course is the concern. Thus, the pollutants of concern in
the § 401 certification are not naturally-occurring pollutants that would be picked up by stormwater runoff, but are
chemicals that would be introduced to the site as an ongoing part of golf course maintenance.

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17.

As to fertilizers, however, the Board concludes that the NRMP does provide sufficient guidance on their use by the course supervisor. The appellants have not met their burden of proof in showing lack of reasonable assurance regarding the use of fertilizers on the course.

18.

The source control, infiltration, and monitoring approach to water quality management is being proffered as meeting AKART in this case. Yet, certain items the applicant has actually offered to incorporate into the plan to provide the needed protection of existing beneficial uses have not been included in the 2004 NRMP. The failure to make the entire golf course a limited spray zone is an important oversight. The suggested limit on applying chemicals if rain is forecast within 48 hours and provisions addressing the concern over irrigation after chemical application are also lacking from the NRMP text. These missing protections are significant source control measures to keep pesticides out of the wetlands on the course.

19.

The evidence established that the mathematical models used in developing the NRMP standards for pesticide application are not considered entirely reliable in predicting pesticide behavior for the site conditions at the Links property. As a result, Ecology is relying heavily on a monitoring program to detect any problems with water quality arising from golf course operations. The §401 Certification requires the applicant to develop a monitoring program for Ecology approval prior to operation of the golf course. (Ex. A-134, p. 12). The new monitoring program must include monitoring the first two applications of each pesticide used on the golf

1 course at a minimum of three separate greens or fairways. The §401 Certification further
2 provides that the applicant “will discontinue the use of any pesticide whose concentration in
3 groundwater exceeds human health standards or whose concentration in the surface water of
4 adjacent wetlands exceeds the acute or chronic toxicity criteria set by the U.S. Environmental
5 Protection Agency.” (Ex. A-134, p. 12).

6 20.

7 Careful monitoring can be part of a meaningful strategy to assure the performance of a
8 novel water quality management approach. In this case, however, many important details of the
9 monitoring plan are unknown. Previous Ecology comments on the project have proposed
10 monitoring designed to analyze runoff from peak flows and to try to capture first flush runoff.
11 The applicant has not incorporated these protections into the NRMP plan. The effectiveness of
12 the monitoring effort to assure compliance with water quality standards will be a function of the
13 rigor of the monitoring plan. The monitoring plan must be scientifically viable and adequate to
14 ascertain with reasonable certainty the existence, nature, and extent of contaminants entering
15 surface and groundwater on, and adjacent to, the site. The plan identified in the §401
16 Certification fails to meet this standard.

17 21.

18 The monitoring plan being required by the §401 Certification uses the exceedance of
19 human health standards in groundwater and the exceedance of acute or chronic toxicity criteria
20 set by the U.S. EPA as the triggers for responsive action. The evidence at hearing indicated
21 many of the substances in question do not have acute or chronic toxicity criteria set by the U.S.

1 EPA. Ecology indicated labels or registration information for the pesticides could be used as the
2 standard for response under the plan. This may or may not be an adequate standard. However,
3 to assure compliance with water quality standards, the maximum levels protective of beneficial
4 uses on the site must be identified with specificity before monitoring begins. At a minimum, a
5 clear and scientifically supportable standard should be identified in writing for each substance
6 before its use on the golf course. This will allow the Department, or interested members of the
7 public, to determine whether the monitoring is revealing a water quality problem.

8 Additional monitoring should also be specified for use of the nemiticide fenamiphos
9 because of its potential risk to human health and aquatic organisms. Samples should be taken in
10 surface water and groundwater after each use of fenamiphos, even if sampling after the first three
11 years of operation show no changes in water quality after its use. (*See* Ex. RE-6, at 5-24.)
12 Ecology shall also consider whether it is appropriate to use additional monitoring wells to ensure
13 that groundwater close to the greens where fenamiphos is used appropriately sampled. The
14 proximity of the course to the municipal water supply requires not only a strict application of
15 fenamiphos, but rigorous monitoring provisions associated with its use as well.

16 22.

17 Monitoring and adaptive management can properly be relied upon in a §401 Certification
18 “so long as requirements are set forth with specificity, and the future corrective action and
19 outcome are reasonably certain to occur.” *Port of Seattle* 151 Wn.2d at 605. The *Port of*
20 *Seattle* court went on to state: “[S]pecific enforcement requirements must be contained in the
21 §401 Certification for implementation in the event that monitoring reveals that water quality

standards are not being met.” *Id.* See also, *Confederated Tribes of the Umatilla v. Ecology*,
P.U.D. No. 1 of Chelan Cy., PCHB No. 03-075 (2004). In this case the corrective action and
enforcement requirements are not adequately addressed by the §401 Certification.

23.

While the respondents at hearing suggested that the Board could add conditions to the
§401 Certification to correct the provisions in need of clarification, the Board is without
authority to add conditions to the §401 Certification, thus a remand is necessary.¹⁸ The evidence
on the project’s use of source control, reliance upon infiltration, and ongoing monitoring is
insufficient to support Ecology’s finding of reasonable assurance that water quality standards
will be met in the following ways:

The NRMP and § 401 Certification:

1. Fail to define the limited spray zone as extending through the entire golf course.
2. Inadequately identify pesticides authorized for use on the course prior to their application.
3. Fail to establish restrictions on the application of pesticides close in time to anticipated rain events or course irrigation.
4. Fail to establish written and scientifically supportable standards for pesticides in the surface and groundwater prior to their use.

¹⁸ Compare RCW 43.21L.130(2) “The Board may affirm or reverse each and every permit decision under review or remand the decision for modification or further proceedings involving the permit agencies,” with *Port of Seattle v. PCHB*, 151 Wn.2d 568, 90 P.3d 659 (2004)(PCHB may condition §401 certifications under certain conditions).

1 dependent structures, public use needs, or when joining an existing city
2 road or utility network, pursuant to the additional requirements identified
in Section 17.32.055:

- 3 (A) Erosion control;
- 4 (B) Docks, piers, and other water/land connectors;
- 5 (C) Ports and water-related industries;
- 6 (D) Shoreline works and structures;
- 7 (E) Marinas;
- 8 (F) Roads and railroads;
- 9 (G) Bridges and water control devices;
- 10 (H) Utilities;
- 11 (I) Recreation;
- 12 (J) Restoration.

13 WMC 17.32.065(d)(1).

14 25.

15 In this case, the City found that the exception for public use needs for recreation applied
16 to the Links at Half Moon Bay project. WMC 17.32.065(d)(1)(1). The proposed golf course
17 meets the definition of recreation contained in WMC 17.32.055:

18 (13) Recreation. Recreation is the refreshment of body and mind
19 through forms of play, amusement or relaxation. Water-enjoyment
20 recreation accounts for a very high proportion of all recreational activity
21 on the Pacific beaches and shorelines. The recreational experience may
be either an active one involving boating, swimming, surfing,
windsurfing, fishing, or hunting or the experience may be passive such
as enjoying the natural beauty of a vista of a lake, river or saltwater area.

WMC 17.32.055(13).

26.

The project also meets the criteria requiring a “public” use need for recreation. Access to
the golf course will be available to members of the public upon payment of a greens fee. The

1 course will not be restricted to a discrete group of members or owners. The appellants have
2 argued that the greens fees contemplated for the course will result in only an elite segment of the
3 public having meaningful access to the recreational opportunity it provides. However, fees
4 associated with use of recreational facilities are common. In this case, the payment of a greens
5 fee does not change the proper characterization of the project as public, rather than private,
6 recreation. The Links at Half Moon Bay proposal was properly allowed to proceed under the
7 exception to wetland fill and buffer restrictions contained in WMC 17.31.065(d)(1)(I).¹⁹

8 27.

9 Although the golf course fill project is excepted from the prohibition on wetland filling
10 contained in WMC 17.32.065(c), wetland mitigation is required by WMC 17.32.065(e)(2):

11 If a wetland area is filled, as may be authorized in certain instances,
12 wetland mitigation shall be required. This may include a substitution or
13 increase of wetland area, or it may be an enhancement a restoration of
14 wetland functions and values at an existing wetland in accordance with
15 best science available at the time. A mitigation plan shall be prepared
16 that describes how the proposed mitigation will replace the functions and
17 values of the altered wetland.

18 The Westport Code goes on to identify a replacement ratio of 2:1 for Category B wetlands.
19 WMC 17.32.065(e)(2)(A). Curiously, Category A wetlands are not specifically mentioned, but it
20 can be assumed that these more valuable wetlands would receive at least as much protection as

21 ¹⁹ The appellants have argued the Comprehensive Plan provisions prohibiting fill on accreted oceanfront lands precludes the project. The City has correctly relied upon the specific regulatory provisions in the WSMP rather than the Comprehensive Plan to determine the allowable development on this site. *See*, Ex. RW-10, pp. 21-23.

1 Category B wetlands. The replacement ratios applied by the City and Ecology were 2:1 for both
2 Category A and B wetlands.

3 28.

4 In order for the §401 Certification to be valid, there must be reasonable assurance that
5 impacts to wetlands will be mitigated in accordance with the applicable antidegradation policy.
6 Existing beneficial uses must be maintained and protected, and no further wetland degradation
7 should be allowed. *Port of Seattle*, 151 Wn.2d, at 636. In this case, Ecology reviewed the
8 wetland mitigation proposal and the operational plans for the golf course to evaluate whether the
9 functions and values of the wetlands on this site were being protected or mitigated, and
10 concluded that they were.

11 29.

12 The wetland impacts identified in connection with the project include filling 9.96 acres of
13 wetlands. The wetland mitigation associated with this 9.96 acres includes 5.21 acres of on-site
14 interdunal wetland creation or restoration, 7 acres of offsite estuarine wetland restoration at
15 Firecracker Point, 14 acres of bog and forest wetland preservation at Seastrand bog, and 30 acres
16 of off-site interdunal habitat preservation at Mar Vista. The appellants have challenged the
17 adequacy of this mitigation, arguing that it improperly relies on preservation as a component of
18 the mitigation plan. Ecology guidance documents allow credit to be given for preservation, at
19 high ratios, where the wetlands being preserved may be lost due to development. (Prefiled
20 testimony of Lund, p. 9). This standard has been met for the Mar Vista and Seastrand Bog sites.
21 Off-site mitigation has been allowed in order to minimize disruption to the existing dunal

1 environment. The habitat anticipated at the Firecracker Point site will be very high quality and
2 of particular value to fish during several stages of their life history. The overall package of
3 mitigation proposed for the 9.96 acres of fill is meaningful and will adequately offset the impacts
4 to wetlands caused by golf course fill on the Links site.

5 30.

6 The pruning and excavating of 14.86 acres of wetlands on the site is being mitigated by
7 preservation of 107 acres of primarily forested wetland on the easterly portion of the project.
8 This provides over 7 acres of high quality wetland preservation for each acre of pruning or
9 excavation in a wetland. Ecology concluded the ratio was appropriate in this instance given the
10 nature of the wetlands to be preserved and the nature of the impacts. The appellants did not meet
11 the burden of establishing a lack of substantial evidence or error of law in Ecology's conclusion.

12 31.

13 While the Westport SMP does not require mitigation for wetland buffer impacts in
14 connection with this project due to the "public use needs" exception, Ecology required the
15 applicant to quantify buffer impacts and mitigate for them because they present indirect impacts
16 to the wetlands the buffers protect. The applicant identified 13.66 acres of buffer impacts arising
17 from the golf course and 0.27 acres resulting from the condominium construction for a total net
18 impact of 13.93 acres. The mitigation to compensate for wetland buffer impacts included 22.32
19 acres of onsite upland dune restoration, 5.0 acres of upland dune restoration at Mar Vista, 1.13
20 acres of enhancement/restoration of upland dune buffer following condominium construction.
21 Ecology concluded this mitigation package was adequate to meet any concerns about wetland

1 buffer impacts under the §401 Certification. While wide buffers may provide better protection
2 for wetlands, the appellants have failed to meet the burden of proving the wetland buffer impacts
3 on this site are not adequately mitigated by the combination of actions identified by the project
4 applicants and accepted by Ecology.

5 32.

6 The appellants argue the functions and values of this particular wetland system cannot be
7 adequately mitigated. They contend the wetland mosaic on the site and the expanse of interdunal
8 features is unique and cannot be replaced by smaller wetland areas or restoration projects. While
9 the interdunal area at this site does provide meaningful habitat for shorebirds and terrestrial
10 creatures, the appellants have not established birds and other impacted species will be unable to
11 find adequate habitat in the remaining and restored wetlands on the site, including the 107 acres
12 of forested wetlands on the eastern portion of the property. The spring shorebird migration is
13 being protected, in large part, by the nearby National Wildlife Refuge in Grays Harbor. The
14 appellants presented insufficient evidence of the nature and extent of the impact on spring
15 migrating shorebirds using this particular site to prove they would be irreparably harmed by the
16 modifications proposed. Nearby areas for rest and bathing exist, including the Westport Light
17 Park, the Mar Vista lots, and the Firecracker Point restoration site. The golf course itself might
18 be viable resting and bathing habitat during the limited migration season, because adverse
19 weather conditions may diminish use of the course. The evidence did not support a finding that
20 the wetlands on this site are so unique and valuable that compensatory mitigation could never
21 occur.

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33.

The wetland mitigation plan approved by the City of Westport and Ecology meets both the provisions of the WSMP and the state antidegradation policy. The functions and values of the wetlands being impacted are protected by the combination of onsite wetlands creation, restoration, and preservation, and offsite restoration and preservation. The appellants have failed to meet their burden of proof to establish Ecology lacked reasonable assurance the functions and values of the on-site wetlands would be retained through implementation of the wetland mitigation plan.

CONDITIONAL USE PERMIT

34.

Any wetland fill allowed by the WSMP must meet the requirements for a conditional use permit. WMC 17.32.050(6). Fill associated with the Links at Half Moon Bay golf course was evaluated by the City under the terms of the WSMP and approved. Since only the wetland fill aspects of the project required a conditional use permit, other aspects of the resort development were considered under the shoreline substantial development permit. After reviewing the Westport decision and considering additional information, Ecology rendered its decision approving the shoreline conditional use permit.

35.

The standards for obtaining a conditional use permit are identified in the WSMP:

- (3) Review Criteria for Shoreline Conditional Uses. The purpose of a conditional use is to allow greater flexibility in varying the application of the use policies of RCW 90.58.020: provided, that

1 approval of conditional uses should also be granted in
2 circumstance where denial of the use would result in a thwarting
3 of the policy enumerated in RCW 90.58.020. In authorizing a
4 conditional use, special conditions may be attached to the permit
5 by the city to prevent any undesirable effects of the proposed use.
6 In accordance with WAC 173-27-160:

7 (A) Uses which are classified or set forth in Title 17 WMC
8 as conditional uses may be authorized provided the applicant can
9 demonstrate all of the following:

10 (i) The proposed use will be consistent with the
11 policies of the Shorelines Management Act and the Westport
12 shoreline master program;

13 (ii) The proposed use will not interfere with the normal
14 public use of public shorelines;

15 (iii) The proposed use is compatible with other
16 authorized uses in the area or uses planned for the area under the
17 city's comprehensive plan and shoreline master program.

18 (iv) The proposed use of the site and design of the
19 proposed project will cause no unreasonably adverse effects to
20 aquatic and shorelines areas;

21 (v) The proposed use will not have substantial adverse
cumulative effects;

(vi) There will not be substantial detrimental effects to
the public's interest in the area, including normal public use of
the shorelines.

WMC 17.32.080(c)(2). *See, also:* Ecology Regulations, WAC 173-27-160.

36.

The appellants contend the project fails to meet the criteria for a shoreline CUP because the activities are inconsistent with the state Shorelines Management Act, the proposed use will interfere with normal public use of the public shorelines, the project will cause unreasonable adverse effects to aquatic and shoreline areas, the cumulative effects were inadequately analyzed,

1 and there will be substantial detrimental effects to the public's interest in the area, including use
2 of the shorelines.

3 37.

4 The appellants argue the project is inconsistent with the SMA because it is violates the
5 order of preference for development in shorelines of statewide significance contained in RCW
6 90.58.020:

7 The legislature declares that the interest of all of the people shall be
8 paramount in the management of shorelines of statewide significance.
9 The department, in adopting guidelines for shorelines of state-wide
10 significance, and local government, in developing master programs for
11 shorelines of state-wide significance, shall give preference to uses in the
12 following order of preference which:

- 13 (1)Recognize and protect the state-wide interest over local interest;
- 14 (2)Preserve the natural character of the shoreline;
- 15 (3)Result in long term over short term benefit;
- 16 (4)Protect the resources and ecology of the shoreline;
- 17 (5)Increase public access to publicly owned areas of the shorelines;
- 18 (6)Increase recreational opportunities for the public in the shoreline;
- 19 (7)Provide for any other element as defined in RCW 90.58.100 deemed
20 appropriate or necessary.

21 The appellants' argument that the project violates the SMA because it is not a water
dependent use is not supported by the language of RCW 90.58.020 or its judicial interpretation.
While a general preference system is outlined in 90.58.020, it does not limit development in the
shorelines area to solely water dependent uses. *Eastlake Community Council v. Seattle*, 64 Wn.
App. 273, 277, 823 P. 2d 1132 (1992); *See also, Department of Ecology v. Ballard Elks Lodge*,
84 Wn2d 551, 557, 527 P.2d 1121 (1974). The WSMP explicitly allows for the type of

1 destination resort proposed by the applicant and the general terms of RCW 90.58.020 do not
2 preclude such an authorized use on this site.²⁰

3 38.

4 The evidence in the case does not demonstrate that local interest is being served at the
5 expense of statewide interests. The physical access to publicly owned beaches would be
6 enhanced, not diminished by the project. The beaches and dunes adjoining Half Moon Bay and
7 the Pacific Ocean will not be altered or modified during construction of the resort. While the
8 appellants are concerned development of the project will lead to future armoring of the shoreline,
9 the permit approvals do not allow such activity. The interdunal wetlands on the golf course site
10 are the only aspect of the shoreline being modified under the Conditional Use Permit. The fill
11 impacts are being fully mitigated, as discussed above in connection with the wetlands analysis.
12 Accordingly, no inconsistency with the provisions of RCW 90.58.020 has been established.

13 39.

14 Filling wetlands on the golf course will not cause unreasonable and adverse impacts to
15 the aquatic and shoreline areas. In light of the protections required under this decision to obtain
16 §401 Certification authorizing the fill, full mitigation of wetland impacts and demonstrable
17 protection of water quality will be in place before the golf course is constructed.

18
19
20 ²⁰ The ELUHB is not convinced the provisions of RCW 90.58.020 can never be used to substantively evaluate a
21 project, as argued by the respondents. Significant authority to the contrary exists in prior decisions of the Shorelines
Hearings Board and the appellate courts. In this case, however, the policies of RCW 90.58.020 do not preclude the
use specifically authorized by the WSMP.

1 40.

2 The concern appellants have expressed over the “privatizing” of this shoreline is not a
3 basis for concluding a CUP cannot be granted. The public interest will not be impaired by
4 wetland fill connected with the golf course. The public has no current authorized access to the
5 dunal areas inland of the public shorelines. The property is privately owned and no legal
6 authority has been cited for protecting it as a de facto park. The City of Westport has long
7 planned for this particular property to be developed as a destination resort. The City’s
8 Comprehensive Plan and Zoning Code both publicly adopted provisions supporting this use of
9 the property. A golf course is a permitted use under the urban shoreline designation and the
10 applicable Tourist Commercial (TC) zoning. A master plan for the project has been approved by
11 the City and upheld on appeal and the proposed use is compatible with authorized and planned
12 uses in the area.

13 41.

14 Appellants suggest that the cumulative effects analysis performed by the City was
15 erroneous. The decision on appeal to the ELUHB is Ecology’s approval of the CUP. No
16 evidence was presented, or authority cited, addressing Ecology’s consideration of the issue.
17 Conditional use permit approvals are decided on a case-by-case basis on the facts of a given
18 application. The appellants in this case failed to meet the burden of showing the golf course fill
19 project would result in substantial adverse cumulative effects.

1 42.

2 Appellants argue that the City of Westport's shoreline map fails to contain a designation
3 for a portion of the project site and that shoreline permits cannot be issued for any undesignated
4 property. While the map may be partially incomplete, the text of the zoning code (incorporated
5 by the WSMP) clearly includes the entire site in the TC zone:

6 The tourist commercial zone is intended to provide a zoning designation
7 which would enable the development planned for the Westport property
8 owned by the Port of Grays Harbor and which is identified in the
9 comprehensive plan as the tourist commercial zone.

10 WMC 17.21.010. The text of the code controls over the map and shoreline permits can properly
11 be issued for the entire Links project site.

12 43.

13 In view of the Board's decision upholding the applicability of WMC 17.32.065(d)(1)(I),
14 the buffer requirements of the WMC pose no barrier to approval of the CUP. Wetland buffer
15 requirements, impacts and mitigation under the §401 Certification are discussed earlier in this
16 decision.

17 44.

18 The evidence in this case shows that the City of Westport planned for a destination resort
19 and golf course on this site. The City properly adopted shoreline regulations consistent with the
20 anticipated uses. The wetland fill being authorized by the CUP relates only to the golf course
21 and meets the local and state criteria for granting a CUP. Accordingly, the Ecology decision
approving the CUP is affirmed.

1 45.

2 The appellants allege the hotel and conference center violate the WSMP because their
3 construction will require filling wetlands, specifically a portion of wetland HMB. Fill to
4 accommodate a hotel/conference center is not allowed under WMC 17.32.065(c). The
5 conditional use permit on appeal in this case, however, relates only to fill necessary for
6 constructing the golf course, so the issue regarding Wetland HMB does not fall within the scope
7 of the issues before the Board on the CUP appeal. Even if the Board were to consider this
8 argument, given the Board's factual finding recognizing the formal delineation of wetland HMB
9 approved by the Corps of Engineers, no violation has been demonstrated.

10 CZMA CONSISTENCY

11 46.

12 During the pre-hearing process, appellants raised two issues challenging Ecology's
13 determination that the project is consistent with the Coastal Zone Management Act. (CZMA).
14 The limited material in the appellants' brief on these issues argued Ecology improperly failed to
15 determine the project's consistency with the Ocean Resources Management Act. (ORMA). The
16 only evidence presented regarding Ecology's CZMA determination indicated that Ecology did
17 not consider the ORMA applicable to this project. The appellants have not provided sufficient
18 authority to support their contention that ORMA was a mandatory element of Ecology's CZMA
19 consistency determination for this project.

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47.

The appellants also raised a number of other legal issues in the pre-hearing process that were not supported by further evidence or argument during the hearing and are therefore, not addressed in this opinion.²¹ Legal Issue No. 18 raised the topic of coastal erosion, which the Board concluded was not relevant to the §401 Certification or shoreline CUP cases. Accordingly, the issue is not substantively addressed in this decision.

48.

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

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

-
- 21 4. Do the stated limitations of the temporal, operational, and geographic scope of the certification violate the requirements of Section 401 of the Clean Water Act and applicable state water quality law?
 - 7. Is there reasonable assurance that the Links at Half Moon Bay Project will not violate §401 and applicable water quality law due to the failure to require AKART for cart paths and pollution generating pervious surfaces?
 - 10. Is there reasonable assurance that contaminated and/or low quality fill material will not cause the Links at Half Moon Bay Project to violate §401 and applicable water quality law?
 - 14. Is there reasonable assurance that the Links at Half Moon Bay Project will not violate Section 401 and applicable state water quality law when Ecology failed to conduct the required alternatives analysis?
 - 15. Is there reasonable assurance that the Links at Half Moon Bay Project will not violate Section 401 and applicable state water quality law when Ecology failed to require mitigation sequencing?
 - 17. Is there reasonable assurance that the Links at Half Moon Bay Project will not violate Section 401 and applicable state water quality law when Ecology failed to require performance bonding?
 - 21. Did Ecology err in failing to conduct its normal two step review process for finding reasonable assurance with regard to the Links at Half Moon Bay application?

1 ORDER

- 2 1. Ecology's decision approving the shoreline CUP for golf course filling for the Links
3 at Half Moon Bay project is AFFIRMED.
- 4 2. Ecology's §401 Certification for the Links at Half Moon Bay is remanded to Ecology
5 for modification to areas which the Board concludes Ecology did not have adequate
6 assurance water quality standards would be met:
- 7 A. Protecting water quality by extending the limited spray zone to the full extent
8 of the golf course.
- 9 B. Protecting water quality by identifying pesticides authorized for use on the
10 course prior to their application.
- 11 C. Protecting water quality by establishing restrictions on the application of
12 pesticides close in time to anticipated rainfall events or course irrigation.
- 13 D. Protecting water quality by establishing written and scientifically supportable
14 standards for pesticides in the surface and groundwater prior to their use.
- 15 E. Protecting water quality by requiring a monitoring plan for review prior to
16 Certification that will assure adequate rigor to provide scientifically necessary
17 information to detect any water quality problems and that will require
18 sufficient monitoring for the use of fenamiphos.
- 19 F. Protecting water quality by requiring a defined and adequate response to any
20 water quality issue revealed during the monitoring or adaptive management
21 process.

1 G. Protecting water quality by obtaining seasonal high water readings showing
2 sufficient separation of groundwater from the surface to support the expected
3 performance of the infiltration system on the golf course prior to construction
4 as well as defined actions if such separation is not available.

5 All other aspects of the §401 Certification are AFFIRMED.

6 3. Ecology's finding of CZMA consistency is AFFIRMED.

7 Dated this 12th day of October 2005

8 ENVIRONMENTAL AND LAND USE HEARINGS BOARD

9 BILL CLARKE, CHAIR

10 WILLIAM H. LYNCH, MEMBER

11 JUDY WILSON, MEMBER

12 O'DEAN WILLIAMSON, MEMBER

13 DAN SMALLEY, MEMBER

14 Phyllis K. Macleod
15 Administrative Appeals Judge



State of Washington
DEPARTMENT OF FISH AND WILDLIFE

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RE: In Re Hydraulic Project Approval No. ST-E8146-05 and Friends of Grays Harbor v. Mox Chehalis, Docket No. 2004-FW-0002
Final Order Pending Further Administrative Review

Dear Parties:

Enclosed is my Final Order. As you will see, I have disposed of some of the Appellant's issues on appeal by summary judgment, though on a different basis than the Initial Order. Because the Appellant has asserted genuine issues of material fact that should have been resolved in a hearing, I am remanding any remaining issues to the Presiding Officer so that they can be resolved in a hearing. This will establish a proper record for any future reviewing body.

At the present time an HPA permit remains in place. Respondent Mox-Chehalis has raised an issue with regard to the Department's HPA jurisdiction to issue this permit. My order addresses the means for resolving this issue in the most expeditious manner.

Sincerely,


Larry Peck

Deputy Director, Department of Fish and Wildlife

cc: Evan Jacoby
Pat Chapman, Appeals Coordinator, WDFW
Michael S. Grossmann, Assistant Attorney General

BEFORE THE
WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE

In Re:

Hydraulic Project Approval
No. ST-E8146-05

Friends of Grays Harbor,
Appellant,

v.

Washington State
Department of Fish and Wildlife,

and

Mox-Chehalis, LLC,
Respondents.

NO. 2004-FW-0002

**FINAL ORDER
PENDING FURTHER
ADMINISTRATIVE REVIEW**

**AFFIRMING SUMMARY
JUDGMENT, IN PART; DENYING
RESPONDENT'S MOTION FOR
RECONSIDERATION; AND
REMANDING MATTER FOR
FURTHER REVIEW**

I. INTRODUCTION

This case involves an appeal of a decision by the Department of Fish and Wildlife to issue a Hydraulic Project Approval (HPA) to the Respondent, Mox-Chehalis. Mox-Chehalis seeks a hydraulic project approval associated with work it will undertake to construct a golf resort in Westport, Grays Harbor County. The matter did not proceed to a hearing, but was the subject of cross motions for summary judgment. Appellant Friends of Grays Harbor sought partial summary judgment on several identified issues. In contrast, Respondent Mox-Chehalis sought summary judgment on all outstanding issues that had been raised by the Appellant with respect to the HPA.

On September 27, 2004, Administrative Law Judge Robert C. Krabill entered an Initial Order in this matter denying Appellant's motion and granting Respondent's motion. This order had the effect of sustaining the Department's issuance of hydraulic project approval, No. ST-E8146-05. Accordingly, the order disposed of the matter on appeal and was treated as an Initial Order requiring final review under RCW 34.05.464.

The Department filed a timely petition for administrative review pursuant to RCW 34.05.464(1) seeking to clarify some of the factual findings that had been made. By letter dated November 4, 2004, Director Koenings notified the parties that no additional oral argument would be provided and established a briefing schedule to give the parties an opportunity to propose a verbatim set of proposed factual findings with respect to the issues raised in the Department's petition. The Department submitted proposed findings. No other briefing was received.

On December 7, 2004, the Director delegated to me the responsibility for reviewing any Initial Order and issuing a Final Order in this matter. On December 17, 2004, I issued an order affirming partial summary judgment in favor of the Department and Respondent Mox-Chehalis on several issues that had been raised by the Appellant both in their appeal and in their own motion for partial summary judgment. However, it appeared that there were genuine issues of material fact that precluded summary judgment on all issues raised by the Appellant. To clarify whether the Appellant was intent on moving forward with a case after it's motion had been denied and summary judgment affirmed on several of its core legal theories, I invited the parties to submit additional briefing on the question of whether there are genuine issues of material fact that remain for hearing.

On December 30, 2004, the Appellant submitted briefing asserting that there are remaining genuine issues of material fact relating to claims they assert about the validity of the HPA. In addition, the Appellant's pleading requested modifications to my prior order affirming summary judgment. It is questionable whether this constitutes a timely

motion for reconsideration.¹ In any event, I decline to make the requested revisions. I find the modifications unnecessary in light of revisions I now make to my prior findings and conclusions.

Respondent Mox-Chehalis did not contest the premise that there are genuine issues of material fact that remain for a hearing. Instead, the Respondent submitted a letter on December 30, 2004, indicating that it intends to proceed with the project that has been proposed, but that it now intends to proceed without an HPA permit on the alleged grounds that no such permit is needed for this project. The letter purports to "withdraw" a previously submitted application and appears to conclude that the submission of such a letter causes the existing HPA permit to vanish, and that either the appeal is rendered moot or any jurisdiction to continue with this appeal is eliminated.²

As Deputy Director of the Department of Fish and Wildlife, I now enter this Final Order Pending Further Review in accordance with RCW 34.05.464 and *Northwest Steelhead and Salmon Council of Trout Unlimited v. Department of Fisheries*, 78 Wn. App. 778, 896 P.2d 1292 (1995).

II. FINDINGS OF FACT

The Findings of Fact contained in my first Interim Final Order are replaced and/or modified as follows:

1. The project site contains wetland areas that are adjacent to state waters. There is an allegation that there is some hydrologic connection between the wetlands and adjacent state waters. Portions of the project site are seasonally inundated. Various allegations exist regarding the presence of fish life within the ditch and the project site.

¹ While my order noted that RCW 34.05.470 did not apply given the interim nature of the Final Order, it also did not anticipate that a request for reconsideration would be lodged and only anticipated added briefing on the issue of whether a hearing was needed to resolve outstanding claims supported by genuine issues of material fact.

² Just prior to issuing this order I also received letter from Appellant's counsel, with copies to all other parties, taking issue with the position taken by Respondent Mox-Chehalis's December 30, 2004 letter.

2. Respondent Mox-Chehalis submitted an HPA application for actions it plans to undertake at the project site and the Department issued an HPA with conditions that it felt were sufficient to address any impacts to fish life from the proposed development activities.

3. No hearing was conducted and no evidence was introduced in the proceedings below. Furthermore, the additional pleadings or submissions submitted in response to my last order contain no agreed set of factual findings. Accordingly, the record from which to draw factual conclusions is extremely limited.

3. The Respondent raises a new issue regarding the need for a permit. Respondent's December 30th letter asserts that Mox-Chehalis has withdrawn its application for an HPA permit. However, it appears that the Respondent intends to move forward with the project and is really asserting that it never needed the permit in the first place. I have no information showing that the Department has withdrawn, rescinded, or otherwise taken action to nullify the permit that it issued. Accordingly, for purposes of the record before me, I can only conclude that the permit remains in place at this time. Furthermore, I have no undisputed facts to ascertain whether there is merit to Respondent Mox-Chehalis' claim that the development proposal does not actually need an HPA. As I pointed out in my previous order, as Reviewing Officer I am precluded from adding to the record and so I am unable to solicit facts that would be necessary to resolve that issue, but will address the procedures available for addressing that issue below.

4. With the original HPA remaining in place, I need to address any factual conclusions that may be made regarding the continuing appeal by the Friends of Grays Harbor. In light of the limited record provided by the proceedings below, I also find myself unable to make any more detailed findings at this time.³ Ultimately, for purposes

³ For these reasons I have also decided that it is premature to rule on the Department's petition regarding factual findings contained in the Initial Order.

of my review of the Initial Order, the question is whether there are any genuine issues of material fact that remain for a hearing after ruling on summary judgment. I incorporate by reference sections II and III of my Interim Final Order discussing the motions filed and the burdens/standards on review. Collectively, the declarations of Cooke, Vreeland, and Stewart that are attached to the Appellant's reply brief in the summary judgment proceedings may reasonably be construed to assert that the full extent of habitat has not been identified and the full extent of required mitigation has not been ascertained. I do not make a finding that supports this assertion and only conclude that the inference has properly been raised by the Appellant within the record for purposes of evaluating the merits of resolving this matter on summary judgment.

5. Appellant's motion on summary judgment attacks the Department's HPA on the basis that the HPA fails, as a matter of law, simply because there is no delineation of the OHWL or the annual flood. As discussed in my Conclusions of Law, this argument has no legal merit because it confuses the jurisdictional reach of the hydraulics code with the substantive mandate - the proper protection of fish life that is needed to address impacts arising from actions taken within the jurisdictional area. However, even if the Appellant's motion for summary judgment fails as a matter of law, the declarations submitted by the Appellant leave open the possibility of a reasonable inference that the full breadth of impacts to fish, and the full breadth of required mitigation, has not been ascertained by the Department. Whether this allegation is borne out and has any legal effect on the permit being appealed remains to be seen. However, the standards on summary judgment compel me to grant the Appellant the benefit of the doubt, at least for the very limited purpose of determining whether this matter can be resolved without a hearing.⁴

⁴ Furthermore, as noted in my Interim Final Order, Respondent Mox-Chehalis submitted no materials or declarations in support of its motion for summary judgment so there would be no legal basis to resolve this matter without a full hearing.

III. CONCLUSIONS OF LAW

A. Summary Judgment Dismissing the Appeal in its Entirety

1. Given the standards that apply to summary judgment, as outlined in my earlier order, the Respondent Mox-Chehalis has failed to meet its initial burden of establishing the absence of any genuine issue of material fact such that it is entitled to judgment as a matter of law. Moreover, because the Appellant is entitled to the benefit of the doubt on any reasonable inferences regarding issues of fact that it brings to bear during summary judgment, I cannot conclude that there are no genuine issues of material fact even if I somehow concluded that the Respondent had met its initial burden of coming forward with facts that support its motion. Based upon the current record, the issues that remain must be resolved in a hearing that allows the resolution of disputed material facts with respect to the outstanding claims.

2. The reasonable inference I make for purposes of summary judgment will not carry over to any hearing. There the Appellant will bear the full burden of establishing its case as outlined in my previous order's discussion of the standards of review and burden of proof on review

B. Partial Summary Judgment

Notwithstanding my conclusion that there are genuine issues of material fact which must be resolved, there are at least three legal issues that can be decided as a matter of law. This relates to the Appellant's allegations that the HPA is fatally flawed, as a matter of law, because either (1) the Department has not mapped the Ordinary High Water Line (OHWL) and/or conducted hydraulic modeling; or (2) the Department's condition 3b requires future submission of plans and specifications. Furthermore, after considering the Appellant's list of issues on appeal, I am prepared to address at least one aspect of those issues relating to the Department's application of technical standards to water crossing structures.

1. Delineation of the Line of Ordinary High Water

a. RCW 77.55.100 embraces two concepts—the scope of the Department’s jurisdiction to issue hydraulic approvals (“work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state”) and the substantive goal to which the Department is directed (“the proper protection of fish life”). In other words, proposed actions affecting the “natural flow” or the “bed” of waters of the state are subject to the hydraulics code. These terms identify certain aquatic areas. When applying the hydraulics code, the goal is to protect fish life that may be affected by proposed actions undertaken within these areas.

b. As the Department’s briefing indicates, the statutory framework specifies that the OHWL is used to identify “beds.” See RCW 77.55.100(8). Land beneath the OHWL is within the scope of the Department’s jurisdiction. However, that is not the full breadth of the Department’s jurisdiction because RCW 77.55.100(1) speaks in terms of projects affecting either the natural flows of state waters or beds of the state’s fresh and salt waters. The hydraulics code applies in both cases.

c. In addition, case law has clarified the Department’s jurisdictional reach with regard to wetlands. The Department has jurisdiction over wetlands adjacent to state waters that affect the natural flow of such waters. See *Northwest Steelhead v. Department of Fisheries*, 78 Wn. App. 778, 787, 896 P.2d 1292 (1995).

d. Ultimately, these statutory terms and legal principles begin by addressing the jurisdictional reach of the hydraulic code. As the Department’s briefing points out, that reach is not directly tied to the presence or absence of fish life or habitat. Instead, the question of fish life and habitat arises in the context of the substantive mandate under the hydraulics code—the proper protection of fish life. Accordingly, to the extent that the Appellant proceeds on the premise that, as a matter of law, the Department must map out the OHWL to protect fish life, they are incorrect. For example, if the Department determines that fish life will not be harmed by actions taken within the

jurisdictional scope of the hydraulics code, or that proposed action within the jurisdictional area will not affect fish life if undertaken in a certain manner (e.g., if undertaken with satisfactory mitigation measures), then the actual location of the OHWL is not material with respect to the protection of fish life within the project area that was evaluated.

e. In terms of the location of the OHWL, there is at most a question of whether the Department's jurisdictional reach has been under-inclusive, or over-inclusive, with respect to any particular project. If the Appellant establishes that certain portions of the project area are within the jurisdictional scope of the hydraulics code, *and* if they can establish that work within such areas impacts fish life, they then have the burden of demonstrating that the Department's HPA fails to properly protect fish life. However, as a matter of law, they cannot condemn the Department's HPA by simply asserting that the actual location of the OHWL has not been mapped because this fails to draw a complete connection between the Department's jurisdictional reach and the ultimate issue regarding the substantive obligation to ensure the proper protection of fish life. The factual question with legal significance is whether fish life has been properly protected within the scope of the Department's HPA authority.

f. The presiding officer concluded that summary judgment was appropriate, as a matter of law, because the Department's use of the project site wetland delineation was an adequate proxy for the OHWL or annual flood.⁵ In arriving at this holding, the presiding officer concluded that that breadth and scope of wetlands will always be greater than either the OHWL or the annual flood, making wetlands a satisfactory proxy for the OHWL in all cases. See Initial Order of September 27, 2004, Conclusions of Law Nos. 5 through 8. I disagree. The Department has promulgated no rule describing the relationship of wetlands and the OHWL or annual flood for purposes of ascertaining

⁵ The area of the annual flood may be used as an alternate basis for evaluating the jurisdictional scope of the hydraulics code where the OHWL can't be located. WAC 220-110-020(57).

the jurisdictional scope of the hydraulics code. The *Northwest Steelhead* case provides some guidance. There is hydraulic code jurisdiction where the wetlands have some affect on, or connection with, adjacent state waters. Accordingly, the relationship of wetlands to the hydraulic code is more accurately described in terms of the hydrologic connection.

g. Moreover, I can conceive of some situations where the annual flood, and the jurisdictional scope of the HPA, might exceed areas in which hydric soils have formed sufficient to constitute a wetland area. Adopting a standard in which the scope of wetlands always fully encompasses the OHWL, or the annual flood, might have the effect of improperly limiting the jurisdictional scope of the hydraulics code.

h. More importantly, because the location of either the OHWL, the annual flood, or wetlands that are hydrologically connected to adjacent state waters, goes to the jurisdictional scope of the code rather than directly addressing the issue of whether there is proper protection of fish life, the analysis is not directly material to the substance of the Appellant's claims—an allegation that this HPA fails to properly protect fish life. As previously discussed, the Appellant cannot rest its case on the simple proposition that the Department has failed to map the OHWL or the annual flood. It is entirely possible for the Department to visit a project site, make an expert determination regarding the extent of impacts that the project will have on fish life, and then specify mitigation conditions to properly protect fish life. An appellant must provide convincing evidence that fish life will be affected by the project, and will not be properly protected by the mitigation conditions imposed under the HPA, or the appeal fails. Whether the Appellant can make that showing with regard to this HPA remains to be seen. If that showing cannot be made by the Appellant under the burden of production it faces, the appeal should be denied.

2. The Specificity of Condition 3b

a. Appellant also argues that Condition 3b is legally defective because it fails to specify conditions that can be reviewed. Specifically, Appellant argues that, as a matter of law, a condition requiring the future submission of plans and specifications is an unspecified future condition and therefore unreviewable.

b. Examining condition 3b in relation to the entire text of conditions 3 and 5 for the Firecracker Point Mitigation site, it appears to me that the Department incorporated specific standards and requirements for the plans that are to be submitted. The opening portion of condition 3 makes specific reference to previously submitted plans and specifications and incorporates them by reference. The conditions relating to the Firecracker Point Mitigation site simply reinforce that the construction work must meet these specifications. As such, conditions 3b and 5 simply represent an opportunity for the Department to review the final plans to ensure that they meet those specifications.

c. I agree that a permit should be supported by specific conditions that are capable of review to ascertain whether mitigation will be sufficient for identified impacts. See, e.g., *Hayes v. Yount*, 87 Wn.2d 280, 295-96, 552 P.2d 1038 (1976). However, where the Department incorporates specific project standards and merely reserves the right to review future plans for conformity with those specifications, there is no legal basis to object to such a condition on the grounds that it is insufficiently specific and incapable of review. The question of whether the proposed mitigation is sufficient to address the proper protection of fish life is a factual question for a hearing, but there is no legal infirmity if a condition simply provides review of future plans based upon specifications whose impact in terms of the proper protection of fish life can be ascertained today.

3. Water Crossing Structures

a. Aside from the three issues discussed in Appellant's motion for partial summary judgment, one other issue is at least partially amenable to summary judgment. Appellant's list of issues asserts that the HPA is defective because it fails to incorporate all of the technical requirements relating to water crossing structures contained in WAC 220-10-170. Summary Judgment Exhibit 8, Request for Formal Appeal, Item 5a, p. 2. Specifically, Appellant seems to assert that the HPA is fatally flawed because some of the footings for the water crossing structures may be located within the OHWL (or that compliance with the technical provisions is impossible without locating the OHWL).

b. As the Department's brief points out, the agency has some discretion with regard to the application of these technical provisions. WAC 220-10-040 envisions that the application of technical provisions may depend upon site characteristics. This makes sense because, as was discussed above, the jurisdictional reach of the HPA and the substantive mandate are not identical and completely overlapping inquiries. The application of technical provisions is made to ensure the proper protection of fish life. Given the Department's discretion to apply technical requirements to achieve the substantive mandate of the hydraulic code, there is no basis to conclude that the HPA is fatally flawed simply because the footings of water crossing structures may be within the OHWL. The ultimate factual question with legal significance is simply whether the conditions imposed within the HPA as they relate to water crossing structures are sufficient to properly protect fish life. In this regard, the regulations provide the Department with significant discretion bounded by the substantive mandate to provide for the proper protection of fish life.

C. Continuing Jurisdiction for the Appeal

1. RCW 77.55.100 specifies those circumstances in which a person proposing to undertake a hydraulic project must secure the approval of the Department prior to undertaking such activity. Section 2(a) specifies that the Department must grant

or deny any approval that has been applied for within a set period of time. Once issued, the approval – an HPA permit - is valid for up to five years. RCW 77.55.100(4). That same section indicates that review of a decision to deny or condition an HPA occurs under the APA. See also WAC 220-110-350 clarifying the procedure for prosecuting an appeal and the procedures to be used in conducting the appeal.

2. The APA itself provides that an adjudicative proceeding *may* be commenced by an agency at any time with regard to a “matter” within its jurisdiction, RCW 34.05.413(1), and *shall* be commenced upon receipt of a timely application from a petitioner when required by law.

3. In this case a permit has been issued *and* a timely application for review was filed. Respondent Mox-Chehalis cannot unilaterally undo the permit. That is an action which can only be undertaken by the Department in the exercise of its discretion as the agency charged with administering the hydraulics code.⁶

4. The Respondent’s letter notes that there is no construction activity currently underway and so no ripe issue for any enforcement proceeding. In this regard I stress that my purpose in addressing this issue is not to raise the specter of any enforcement proceeding. That is an issue that can be addressed at some future point and is not before me in this proceeding. I raise the issue only because the Respondent seems to infer that it can treat the permit that currently remains in place as something to be ignored until an enforcement action takes place. The problem with this reasoning is that a third party appellant exists and an administrative proceeding has been instituted. If this were simply an appeal between the permittee and the Department (for example because the permittee thought the conditions were too severe), a decision by the permittee to ignore the permit and the administrative proceeding they had initiated, might allow for a conclusion that it would be useless to conduct a full hearing. In essence, the failure of the permittee/appellant to appear at the hearing would be the

⁶ Presumably, an adjudicative body would also have the power to invalidate a permit that had been issued.

equivalent of a default and the permit would be sustained. It would then remain for the Department to decide how to enforce the permit. However, where a third party has appealed the permit, and where the Department has not withdrawn the permit, the proceedings would continue with the Department defending the permit regardless of the role the permittee chose to play in the administrative proceeding. That is the case here. Any decision by the permittee to later abide by or ignore the permit that ultimately issued from those proceedings would be an issue to be considered at the time the project development was commenced.

4. It may be prudential in some cases for a reviewing body to dismiss an appeal where a permit applicant affirmatively decides to abandon a project because the permit will not be utilized. Review under those circumstances might be meaningless and a waste of resources. However, those facts are not present here. The Respondent Mox-Chehalis intends to move forward with the original project as proposed. It simply takes the legal position that it never needed the permit in the first instance. That legal claim does not change the fact that a permit was issued, was appealed, and the permit has never been rescinded or canceled by the Department on the record before me.

5. I note that other administrative tribunals have dismissed appeals where either the permit agency withdrew the permit completely, *Bowers v. SWAPCA*, PCHB 96-252 and PCHB 95-106 (October 31, 1996 Orders of Dismissal - agency resolved to lawfully and unconditionally withdraw the order being appealed) or where both the permittee and the permitting agency agreed that the matter should not go forward and the permit was canceled, *Lincoln Creek Landowners Assn., Inc. v Lewis Cy.*, SHB 94-52 (appeal dismissed as moot where the permit was returned and the county resolved to cancel the permit). However, no case exists where the permit holder was unilaterally able to eliminate the existence of a permit and thereby eliminate the continuing administrative appeal by a third party. See also *Bowers v. SWAPCA*, PCHB 95-106

(April 16, 1996 Order Denying Dismissal - permit was changed in an effort to resolve appeal issues but the underlying permit remained in place).

6. I realize that this leaves the question of whether Mox-Chehalis is correct about the Department's HPA jurisdiction. I find it interesting that the Respondent's letter suggests at least some HPA is needed, but that this permit could be issued at a later date. However, I do not have the facts necessary to resolve such issues and cannot go outside the record to obtain the necessary facts. I appreciate that the Respondent Mox-Chehalis may want to seek review of whether it is required to obtain a hydraulic code permit for this project. The Department has jurisdiction to make this determination. See, e.g., *Penick v. Employment Security Dep't*, 82 Wn. App. 30, 38-39, 917 P.2d 136 (1996) (agency tasked with administering a code has the jurisdiction to determine whether the code applies to certain people). As noted above, I am unable to review that issue here as it appears that a factual record would need to be established if that issue is pursued as a matter of law. I will not order that issue to be added to the hearing by the presiding officer at this time. I will leave it up to the Respondent to decide whether to pursue that issue as a part of the underlying appeal. However, I will order the Department to take a hard look at the issues raised in the Respondent's December 30, 2004 letter and to provide a prompt response indicating whether the Department intends to rescind or cancel the permit.

7. If the permit remains in place after this order issues (e.g., if the Department does not subsequently rescind or cancel the permit), and if the Respondent desires to challenge the need for the permit, I believe that as a matter of primary jurisdiction, and perhaps to avoid exhaustion issues, the issue of whether an HPA permit is needed for this project should be addressed as a part of the administrative hearing on remand.

IV. FINAL ORDER PENDING FURTHER REVIEW

In closing, I wish to note that this project is subject to review under the provisions of RCW Chapter 43.21L. That chapter establishes a consolidated permit review process for all final permits associated with certain qualifying economic development projects. I am aware that the Department's HPA is the last permit needed before the Environmental and Land Use Hearings Board established in that chapter can proceed with its review of all consolidated permits. I am sure the parties are anxious to move forward towards a resolution of outstanding appeals. However, I do not believe that it would be appropriate to simply affirm the initial order where I believe that summary judgment was improperly issued in the face of genuine issues of material fact that need to be resolved at a hearing. In this regard I note that RCW 43.21L.120(1) specifies as follows:

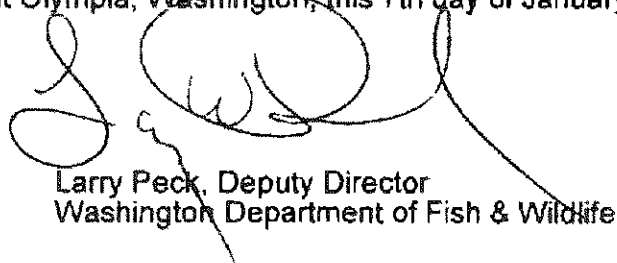
(1) For all permit decisions being reviewed that were made by quasi-judicial bodies or permit agency officers who made factual determinations in support of the decisions, after the conduct of proceedings in which the parties had an opportunity consistent with due process to make records on the factual issues, board review of factual issues and the conclusions drawn from the factual issues shall be confined to the records created by the quasi-judicial bodies or permit agency officers, except as provided in subsections (2) through (4) of this section.

This provision makes it clear that, at least with regard to the Department's HPA, the review conducted by the Environmental and Land Use Hearings Board will be a record review of the factual determinations made during the agency administrative review "in which the parties had an opportunity consistent with due process to make records on the factual issues." Where there are genuine issues of material fact that need to be considered, the current administrative appeal is the time for resolving such issues and establishing a factual record. Failing to establish a proper record for review now simply invites future legal challenges and the potential for both wasted time and effort. Similarly, dismissing the appeal in the face of an existing permit that has been appealed by a third party also seems to invite ancillary litigation or the discovery of a

fatal defect at some later stage in the proceedings. In short, what may appear expeditious now could very well be the start of a much more protracted path to a final resolution of the permits needed for this project.

NOW, THEREFORE, the Initial Order granting summary judgment against the Appellant is affirmed in part, and reversed in part, as outlined in my Conclusions of Law. Appellant's request to re-consider the legal conclusions made in my first Interim Final Order is essentially denied, though I note that the findings and conclusions have been modified from my first order as expressed above. This matter is remanded back to the Presiding Officer to conduct a hearing and to resolve any remaining claims that have been raised with respect to HPA No. ST-E8146-05 so long as that permit remains in place. The Department shall consider the issues raised in the Respondent's December 30, 2004 letter, including the timing of any HPA permit that may be needed for any portion of the project, and shall promptly respond indicating whether the Department intends to cancel or otherwise rescind the existing HPA. This should be undertaken in a manner that allows the parties and the Presiding Officer to make informed decisions about any continued hearing on the permit and the range of issues that should be considered at the hearing if the permit remains in place.

DATED at Olympia, Washington, this 7th day of January, 2005.



Larry Peck, Deputy Director
Washington Department of Fish & Wildlife

AVAILABILITY OF FURTHER RELIEF

Because this order is a final disposition of at least some, or some portion, of the issues on appeal, there is a question as to whether it is a Final Order that triggers the timeline for any petition for reconsideration pursuant to RCW 34.05.470(1). The order has been identified as a Final Order Pending Further Review and should not be considered a completely Final Order. A Final Order will be issued after any required hearing is conducted, and an Initial Order is issued (either resolving the appeal after hearing or dismissing the appeal for other reasons). The Reviewing Officer retains the ability to change this order based upon future submissions, and retains the obligation to review any Initial Orders disposing of the issues on appeal and issue a Final Order based upon those submissions.

CERTIFICATION OF SERVICE

I hereby certify that I have this day served a copy of this document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed with postage paid, to each party to the proceeding and to that party's attorney or authorized agent.

Dated at Olympia, Washington this 7th day of January, 2005.



Representative—Department of Fish and Wildlife

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STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE

IN THE MATTER OF:

Hydraulic Project Approval
No. ST-E8146-05

Friends of Grays Harbor,

Appellant,

v.

Mox Chehalis, LLC,

Permittee/Respondent.

Docket No. 2004-FW-0002

**ORDER ON CROSS-MOTIONS OF
APPELLANT AND RESPONDENT FOR
SUMMARY JUDGMENT**

PROCEDURAL POSTURE

Friends of Grays Harbor (FOGH) has appealed the decision of the Department of Fish and Wildlife (Department) to issue Hydraulic Project Approval ST-E8146-05 (the HPA). Mox-Chehalis, LLC applied for the HPA to cover its intended construction of a golf resort to be called "the Links at Half Moon Bay" in Westport, Grays Harbor County, Washington. The HPA allows Mox-Chehalis to proceed with construction subject to conditions limiting materials, method, and timing.

FOGH filed an informal appeal of the approval February 11, 2004. On April 12, 2004, Gregory J. Hueckel, Assistant Director of the Department's Habitat Program, issued a decision on the informal appeal upholding the approval with a downward revision of the work window to 5 years from the date of issue. FOGH subsequently filed a formal appeal June 4, 2004, and this matter has proceeded to hearing.

Upon a Prehearing Conference, the undersigned encouraged the parties to resolve issues through summary judgment. The original Prehearing Order and subsequent Amended Prehearing Order provided the framework for summary judgments in this matter. Both FOGH and Mox-Chehalis have made motions for summary judgment. The Department has responded to FOGH's motion, and FOGH has responded to Mox-Chehalis' motion. The time for summary judgment motions and responses thereto has passed.

ISSUES PRESENTED

1. Whether FOGH is entitled to judgment as a matter of law under RCW 77.55.100(4) and WAC 220-110-030(12) when (a) the Department used wetland designation as a proxy for the ordinary high water line, (b) fish were actually found on the site, and (c) no study of fish habitat during the wet season has been presented.
2. Whether Mox-Chehalis is entitled to judgment as a matter of law under RCW 77.55.100(4) and WAC 220-110-030(12) when (a) the Department used wetland designation as a proxy for the ordinary high water line, (b) fish were actually found on the site, and (c) no study of fish habitat during the wet season has been presented.

EXHIBITS CONSIDERED

In considering the cross-motions for summary judgment the undersigned Administrative Law Judge considered the following exhibits:

FACTS

1. In 1999, Mox-Chehalis bought a 350-acre parcel (the "Property") in the City of Westport from the Port of Grays Harbor. Half Moon Bay flanks the Property on the north, and the Pacific Ocean flanks it on the west. To the northwest lies Westhaven State Park and to the southwest lies Westport Light State Park. Mox-Chehalis plans to build a world class, Scottish links style golf course and resort called "the Links at Half Moon Bay" on the Property. See Exhibit 13, Joint Aquatic Resource Permit Application (JARPA).
2. Ecological Land Services, Inc. identified numerous wetlands on the Property that were disclosed in Exhibit 14 to the JARPA. *Id.* The Army Corps of Engineers has approved Ecological Land Services' wetlands delineation. See Exhibit 16, Letter to Leonard Barnes from Gail Terzi, April 4, 2001.
3. Mox-Chehalis prepared an Environmental Impact Statement (EIS) covering the project that was eventually approved by the Westport City Council and upheld on appeal to Thurston County Superior Court. See Exhibit 15, transcript of Oral Opinion by Hon. William Thomas McPhee in Thurston County Superior Court Case Number 02-2-01892-8, April 24, 2003. FOGH is currently pursuing appeal of this or a related collateral decision approving the EIS for the project.
4. The Property drains through percolation and surface water run-off into a man-made drainage ditch that runs along the western side of Forrest Avenue. See Exhibit 14, Memorandum from Jeff Fisher, Ph.D. to Marc Horton, June 16, 2003, at p. 1. The ditch runs under Forrest Avenue and continues 1,390' through urban development and empties into a 2' diameter culvert under Montesano Street and through a partially

operational tide gate. *Id.* The tidegate empties into a dendritic channel of Grays Harbor wetland. *Id.* After running 100', the channel passes through a 90' culvert under the Westport Municipal Airport airstrip, and then onward into Grays Harbor. *Id.*

5. The Property has no naturally occurring streambeds. *Id.* at p. 9. However, the eastern portion of the Property near the ditch has two flood channels that drain into the ditch. *Id.* at pp. 5, 9. This eastern portion of the property lies within the large 160 acre habitat buffer that will be preserved, even if the project is built. *Id.* at p. 9.

6. On February 1, 2002, Department agents found coho salmon (*Oncorhynchus kisutch*) pre-smolts in the drainage ditch above the tide gate. *Id.* at p. 2. In June 2003, Dr. Fisher found three-spine stickleback (*Gasterosteus aculeatus*) isolated in a puddle in the drainage ditch. *Id.* at p. 5. Regional Habitat Program Manager for the Department Steve Manlow discovered six 5-6" juvenile coho salmon stranded in a puddle on the Fire Road in the southeast corner of the Property on April 9, 2004. Exhibit 7, Decision on Informal Appeal of Hydraulic Project Approval Log #ST-E8146-03, April 12, 2004, p. 2.

7. Despite no natural watercourse draining the Property, the Department required Mox-Chehalis to obtain an hydraulic permit. Mox-Chehalis did not appeal this requirement, and duly sought an HPA. The Department issued HPA #ST-E8146-05 for the project on January 15, 2004. See Exhibit 5, HPA #ST-E8146-05, January 15, 2004.

8. The HPA conditions approval on (a) timing restrictions on work below the ordinary high water line (OHW), (b) timing and method restrictions on Firecracker Point mitigation work, (c) restrictions on culverts under Forrest Avenue and Montesano Street, (d) design and materials limitations on foot and golf cart bridges, (e) use limitations on the Fire Road, and (f) general construction limitations. *Id.* The HPA

incorporates the EIS Addendum to the Draft and Final Environmental Impact Statements for the project adopted by the City of Westport, August 8, 2003. *Id.* at p. 5.

9. Upon a site inspection, Dr. Fisher opined that "none of the depressional, scrub/shrub or emergent wetland habitats observed within the central and western portions of the [Property] would typically support juvenile or adult salmon, even when inundated due to lack of flow and conditions that provide water velocity cues for orientation/emigration." *Id.* at p. 8. With the exception of the drainage ditch and the two flood channels identified, "the forested wetlands on the eastern half of the property exhibited similar conditions." *Id.* at pp. 8-9. During the wet season, juvenile salmon can and do access the Property through the defective Montesano Street tidegate and up the drainage ditch. *Id.* at p. 9. Because the ditch lacks predatory cover, suitable substrate, adequate water quality, and sufficient rheotactic clues to usher fish out when floodwaters recede, mortality among salmon entering the Property would approach 100%. *Id.*

10. Portions of the Property beyond the ditch and two flood channels including the Fire Road along its southern edge are inundated during storm events. Exhibit 9, Declaration of Brady Engvall, see also Exhibit 18, photographs of the Property and the drainage ditch during the wet season. The Department's photographs show the drainage ditch to be about 2' wide, shallow, and slow-flowing on January 31, 2002 downstream from the Property. Exhibit 18, p 2-3. Mr. Engvall's photographs I and J show water in the culvert under Forrest Avenue to be 31" deep. Exhibit 9, p. 15-16. Mr. Engvall's declaration does not specify when he took the pictures, but the stippling on the surface indicates it was actively raining. *Id.* It does not specify which end of the culvert he photographed, but the pooling suggests he photographed the southern,

upstream end. *Id.*

11. In evaluating harm to fish life, the Department considered wetlands designation equivalent to the OHW.

12. The project will fill 9.96 acres of wetland and excavate 0.23 acres of wetlands. As mitigation, Mox-Chehalis will restore 0.91 acres of on-site wetland, create 4.3 acres of wetland, preserve 107 acres of interdunal wetlands/upland mosaic, restore 7 acres of wetlands at Firecracker Point upstream of the Property, and improve fish access to the drainage ditch, if possible. See Exhibit 13. The Department accepted these proposed mitigation measures as adequate when it granted the HPA.

13. Other than Dr. Fisher's site evaluation, no study of fish habitat has been presented.

14. No other hydraulic study of the Property has been presented.

15. Wetlands expert Sarah Cooke, Ph.D. bases her opinion that the equivalence of OHW with wetlands designation is erroneous on (a) the exclusion of portions of the Fire Road from wetlands designation when Brady Engvall has observed that portions of the Fire Road become flooded during storm events and (b) personal experience that wetlands designation is not always equivalent to OHW. Exhibit 7, Declaration of Sarah Cooke, p. 3. Because Mr. Engvall's observations do not comprehensively show that the entire Fire Road is flooded during storm events, nor that the entire road is connected by surface water flow to the drainage ditch, Dr. Cooke's reasoning is defective. Dr. Cooke's opinion does not exclude the real possibility that she would agree wetlands designation and OHW were consistent in this case upon closer observation.

16. Fisheries expert Robert Vreeland bases his conclusion that sufficient rheotactic cues exist to allow salmon to escape when floodwaters recede upon Mr. Engvall's

amateur calculation of flow through the Forrest Avenue culvert on an unknown flood day. Exhibit 11, Declaration of Robert Vreeland, p. 2. Mr. Vreeland admits groundwater flow contributes to the flow in the ditch. *Id.* Mr. Vreeland's opinion does not exclude the real possibility that strong groundwater flows account for most of the flow observed in the culvert, thereby eliminating evidence for sufficient rheotactic clues to allow reliable fish escape.

17. Based upon speculation that fish access, survive, and leave the Property during the winter, fisheries expert Cleve Steward opined that coho salmon overwinter there. Exhibit 12, Declaration of Cleve Steward, p. 5.

CONCLUSIONS OF LAW

1. **Standard for Summary Judgment.** All hearings conducted under WAC 220-110-350, such as this one, are subject to the Model Rules of Procedure, WAC 10-08 *et seq.* WAC 220-110-350(7). The Model Rules provide for summary judgment when the record shows "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." WAC 10-08-135; cf. *Ellerby v. Dept. of Fish & Wildlife*, 2000 WA ENV LEXIS 69 (WA ENV , 2000), citing *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn. 2d 171, 182, 930 P. 2d 307 (1997).

2. Upon judicial review, agency action may be reversed where the agency has erroneously interpreted or applied the law, the agency's order is not supported by substantial evidence, or the agency's decision is arbitrary and capricious. RCW 34.05.570(3); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77 (2000). The appellant bears the burden of establishing invalidity of agency action. RCW 34.05.570(1)(a); *Postema*, 142 Wn.2d at 77 (2000). By analogy, the same standard applies in administrative review of agency actions. As under CR 56(c) which it recalls,

WAC 10-08-135 requires the appellant to establish a genuine issue of material fact to preclude summary judgment.

3. **Mitigation.** At the time it issued the HPA, the Department was aware that fish life, specifically immature coho salmon could access the site. While Dr. Fisher opines that mortality would approach 100%, he cannot guarantee it. Therefore, some harm to fish life might occur through changes to the Property. Alternatively, development could improve conditions for fish life through removal of the tide gate under Montesano Street and/or the planned mitigation efforts. FOGH's argument relies on the assumption that all change will have a negative impact. Cf. Exhibit 1. That assumption belies an extreme pessimism not borne out by the evidence nor compatible with the principle of mitigation. Applying its expert discretion, the Department determined that the proposed mitigation either improved conditions for fish life or, at least, fully mitigated any harm.

4. FOGH has not come forward with any evidence to suggest the Department's balancing was erroneous. It relies on the alleged error of the Department's treating OHW as equivalent to wetlands.

5. **Ordinary High Water Mark.** WAC 220-110-020(57) defines OHW as follows:

"Ordinary high water line" means the mark on the shores of all waters that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual and so long continued in ordinary years, as to mark upon the soil or vegetation a character distinct from that of the abutting upland: Provided, That in any area where the ordinary high water line cannot be found the ordinary high water line adjoining saltwater shall be the line of the mean higher high water and the ordinary high water line adjoining freshwater shall be the elevation of the mean annual flood."

Like the almost identical definition for "ordinary high water mark" in wetland designation

regulation WAC 173-22-030(11)¹, this definition distinguishes land below the OHW from "upland" and focuses primarily on distinct soils and vegetation. Only secondarily does the OHW definition resort to the elevation of the annual flood. Therefore, where soil or vegetation changes mark the horizon between "upland" and its opposite with reasonable certainty, that line is the OHW without need for reference to mean annual flood.

6. Wetlands, on the other hand, are identified by the presence of three criteria: wetlands hydrology, hydric soils, and hydrophytic vegetation. WAC 173-22-030(19) and 080(3). Wetlands hydrology generally implies poor drainage and necessarily implies the long continued "presence and action of waters" of WAC 220-110-020(57). WAC 173-22-080(3)(c), (9). Hydric soils are soils formed "under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part." WAC 173-22-080(3)(b), *citing* USDA-NRCS 1995, Federal Register, 7/13/94, Vol. 59, No. 133, pp 35680-83. In other words, hydric soils "are marked with a distinct character" by the regular "presence or action of waters" below the OHW of WAC 220-110-020(57). Hydrophytic vegetation is plant life specially adapted to life in saturated soil conditions. WAC 173-22-080(1), (3)(c). Because hydrophytic vegetation marks the regular "presence and action of waters", the presence of hydrophytic vegetation marks both a wetland under WAC 173-22-080 and land below the OHW under WAC 220-110-020(57).

7. If anything, the OHW appears to be more tightly defined than wetlands. Cf.

¹ "'Ordinary high water mark' on all lakes, streams, and tidal water is that mark that *will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland.*" WAC 173-22-030(11) [Emphasis added to indicate language identical to WAC 220-110-020(57).].

WAC 173-22-040. Presence or action of "waters" implies something more than presence or action of "water." "Waters" suggests a body of water, as in the "waters of the United States" in 33 USC 1344 and 33 CFR 382.1, whereas "water" could mean no more than the chemical, water. Because WAC 220-110-020(57) expressly uses "waters", it implies surface communication with a larger body of water not inherent in the definition of "wetland" under WAC 173-22-030 and 080.

8. Because of the parallel criteria of "wetlands" and "ordinary high water mark", using the more expansive definition of wetlands as a proxy for OHW clearly lies within the Department's discretion. The regulatory definitions applicable in this matter allow the Department to rely on wetlands delineation as a proxy for OHW. In fact, the Department's equivalence probably places the OHW at an artificially higher level than would be found with a more rigorous methodology. As a matter of law then, the Department did not err by defining OHW too narrowly in reviewing Mox-Chehalis' permit application.

9. Because FOGH has not created a genuine issue of material fact surrounding the HPA, summary judgment in favor of Mox-Chehalis and the Department is proper on all issues. While FOGH may have grounds to challenge the proposed development of the Property in other fora, it lacks a legal basis here.

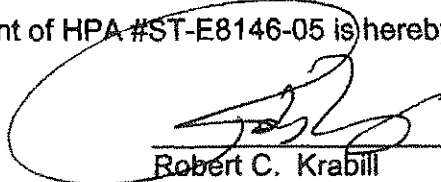
ORDER

Based on the forgoing findings of fact and conclusions of law, IT IS HEREBY

ORDERED:

The Appellant, FOGH, is not entitled to judgment as a matter of law, and its summary judgment motion is DENIED.

1. The Permittee, Mox-Chehalis, is entitled to judgment as a matter of law, and its summary judgment motion is GRANTED as to all issues.
2. The Department's grant of HPA #ST-E8146-05 is hereby affirmed.



Robert C. Krabill
Administrative Law Judge
Office of Administrative Hearings

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STATE OF WASHINGTON

COUNTY OF THURSTON

) ss.

I hereby certify that I have this day served a copy of this document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed with postage prepaid, to each party to the proceeding or his or her attorney or authorized agent.

Dated at Olympia, Washington, this 27th day of Sept., 2004.



Darla Auwiler
Representative, Office of
Administrative Hearings

**BEFORE THE CITY COUNCIL
FOR THE CITY OF WESTPORT**

FRIENDS OF GRAYS HARBOR and
WASHINGTON ENVIRONMENTAL
COUNCIL,

Appellants,

v.

CITY OF WESTPORT PLANNING
COMMISSION,

Respondent,

MOX CHEHALIS, LLC

Applicant,

and PORT OF GRAYS HARBOR,

Owner.

DECISION ON ADMINISTRATIVE
APPEAL OF PLANNING COMMISSION
DECISION APPROVING SHORELINE
SUBSTANTIAL DEVELOPMENT AND
CONDITIONAL USE PERMITS

THIS MATTER came before the Westport City Council on October 28, 2003 to consider the administrative appeal of Friends of Grays Harbor and Washington Environmental Council concerning the September 30, 2003 decision of the City of Westport Planning Commission to approve Shoreline Substantial Development and Shoreline Conditional Use Permits for the proposed master planned resort development known as the Links at Half Moon Bay.

An open record public hearing was held on September 10, 2003 before the City of Westport Planning Commission to consider public testimony on a Joint Aquatic Resource Permit Application (JARPA) filed by Mox Chehalis LLC on July 28 2003. The application proposed development of a luxury hotel / convention center, 18 hole championship golf course, and condominiums on two parcels totaling 355 acres in Westport. The property is owned by the Port of Grays Harbor, who has a contract to sell to Mox Chehalis LLC. This proposal was determined to be a qualifying project pursuant to Chapter 393, Laws of 2003.

On September 30, 2003, the Planning Commission issued a written decision approving the application for Shoreline Substantial Development and Conditional Use Permits. On October 8, 2003, Friends of Grays Harbor and the Washington Environmental Council (hereafter collectively referred to as "Appellants") timely filed an administrative appeal of the Planning Commission's decision approving the permits pursuant to WMC 17.32.090.

Pursuant to Westport Municipal Code 17.32.090, the City Council reviewed the
DECISION - 1

record created at the open record public hearing conducted by the Planning Commission. The Council reviewed the appeal and Statement of Issues submitted by Appellants, a Response filed by Applicant and heard oral argument of the parties.

After reviewing the files and records herein, and being fully advised, the City Council finds as follows:


1. The Findings of Fact set forth in the September 30, 2003 Decision of the Planning Commission are supported by substantial evidence in the record.
2. The Conclusions of Law set forth in the September 30, 2003 Decision of the Planning Commission are not erroneous interpretations of the law and are not a clearly erroneous application of the law to the facts.
3. The procedures used by the Planning Commission in consideration of this matter were consistent with Chapter 17.32 WMC and were lawful. Appellants fail to specifically identify what procedural errors are alleged to have been committed.

In consideration of the foregoing, the City Council hereby AFFIRMS the findings of fact and conclusions of law contained in the September 30, 2003 Planning Commission Decision.

This decision is the final decision of the City of Westport. Any appeal of this decision shall be made to the Environmental and Land Use Hearings Board in accordance with Chapter 393, Laws of 2003.

Passed by the Council of the City of Westport this 28th day of October, 2003

APPROVED:


GAIL MULLVAIN, MAYOR PRO TEM

ATTEST:


MARGO R TACKETT, CMC
CLERK-TREASURER

RECEIVED

MAY 22 2003

LAW, LYMAN, DANIEL
KAMERRER & BOGDANOVICH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

FRIENDS OF GRAYS HARBOR,

Petitioner,

vs.

THE CITY OF WESTPORT,
MOX CHEHALIS, LLC., and PORT
OF GRAYS HARBOR,

Respondents.

COPY

NO. 02-2-01892-8

ORAL OPINION

BE IT REMEMBERED that on the 24th day of April, 2003,
the above-entitled and numbered cause came on for hearing
before the Honorable Wm. Thomas McPhee, Judge, Thurston
County Superior Court, Olympia, Washington.

Kathryn A. Beehler, CCR No. BEEHLKA412KG
Certified Realtime Reporter
Thurston County Superior Court
2000 Lakeridge Drive S.W.
Building 2, Room 109
Olympia, WA 98502
(360) 754-4370

EXHIBIT 2

A P P E A R A N C E S

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I N D E X

Description Page Reference

Oral Opinion of the Court

4

1 April 24th, 2003

Olympia, Washington

2 MORNING SESSION

3 Department 4 Hon. Wm. Thomas McPhee, Presiding

4 Kathryn A. Beehler, Official Reporter

5 --o0o--

6 THE COURT: Please be seated. Good
7 morning, ladies and gentlemen. Here is my
8 decision in this case:

9 I conclude that there is no basis in the
10 law for overturning the City Council's decision
11 as reflected in Ordinance No. 1277. In making
12 this determination, I am guided by the law
13 contained in RCW 36.70C.130, the standards for
14 review in the Land Use Petition Act. And in the
15 process of considering the appeal here, I am
16 guided in large measure by the standards for
17 master plans submitted to the City of Westport
18 set forth in Westport Municipal Code 17.36A.060.

19 I'll consider the issues presented to me
20 and decide them in the order in which they were
21 presented and decided, or in the order in which
22 logic dictates in the consideration of these
23 matters. I'll begin with two procedural issues
24 where an error of law standard is asserted. The
25 first of those is the City's approval of the

1 original project rather than the so-called
2 amended plan.

3 First, the petitioner argues that the City
4 is barred by the doctrine of issue preclusion
5 from considering this application because it
6 entered into a stipulation before the Shorelines
7 Hearings Board that the project would be changed
8 in a manner that petitioner contends is
9 substantial.

10 I conclude that issue preclusion does not
11 apply here. The initial City Council approval of
12 the Master Plan was remanded for reconsideration
13 after violation of the appearance of fairness
14 doctrine had been cured by removing the two
15 council members whose participation in the
16 initial approval had violated that doctrine.
17 This remand did not require that the process be
18 started over; instead, it required that the
19 Council reconsider all steps where the offending
20 members had participated in deliberations or
21 votes.

22 In FOGH 1, the order of remand required
23 the counsel to conduct a second closed record
24 public hearing and to vote to either approve or
25 deny the Master Plan Application. It did not

1 require, and the law does not require, a repeat
2 of the open record public hearing. The process
3 followed by the City Council was correct. There
4 was no procedural grounds for overturning the
5 council action on this issue.

6 Petitioner also contends that the
7 Shoreline Hearings Board stipulation causes the
8 Council's subsequent approval of the Master Plan
9 to violate Westport Municipal Code 17.36A.060
10 and .070. Petitioner contends that the
11 stipulation is binding in some manner on the
12 parties and has so changed the project proposal
13 that consideration of the proposal as it existed
14 before the stipulation is precluded by the
15 doctrine of claim preclusion, or res judicata.

16 I conclude that petitioner has failed to
17 prove all the elements of claim preclusion here.
18 Specifically, there is not the requisite identity
19 in the cause of action. I also considered the
20 argument using the elements for the doctrine of
21 issue preclusion and reached the same result.

22 The corresponding element is that the
23 issue decided in the prior adjudication must be
24 identical to the one presented in the second. It
25 was not. The facts may be similar, even

1 identical, but the issues were different before
2 the City Council than before the Shoreline
3 Hearings Board.

4 I also considered the substance of
5 petitioner's argument without the label of
6 res judicata. I conclude that Westport Municipal
7 Code 17.36A.050 and .060 are not violated by the
8 council's action in considering the proposal
9 addressed at the open record public hearing. The
10 SHB stipulation does not require that
11 Mox-Chehalis be required to start over; and it
12 does not require that the City Council reject the
13 project proposed to the City because of the
14 likelihood that it will be modified in the
15 future.

16 Chapter 17.36A provides for piecemeal
17 permitting. Westport Municipal Code provision
18 17.36A.040(2) provides for, "approval of specific
19 development actions may be appropriate, and as
20 may be phased in the Master Plan." That
21 provision, in the part that I quoted, references
22 both to actions, suggesting specific development
23 actions may be appropriate, and it references to
24 phases in the Master Plan.

25 Chapter 17.36A of the code applies only to

1 a narrow range of categories, to the TC zone or
2 to parcels of property in excess of 25 acres.
3 The master plan step in the permitting process
4 provides for a public process that first
5 determines generally whether the project offends
6 the public interest. It provides four broad but
7 nonetheless specific standards:

8 First, that the project is consistent with
9 the Comprehensive Plan;

10 Second, and I'm paraphrasing here, that
11 public facilities are adequately addressed;

12 Third, that the public interest is served
13 by approval of the project; and

14 Fourth, that the environmental review and
15 documentation is adequate.

16 An approved master plan sets the general
17 development standards, but the process then
18 requires additional steps, including additional
19 public process, to specifically address, and
20 permit if appropriate, additional construction
21 features designed to meet the standards in the
22 master plan.

23 The standards in the master plan may be
24 broad standards. The provisions of Chapter
25 17.36A do not seem to contemplate detailed

1 standards such as would be found in development
2 standards enacted by a City Council as part of a
3 general zoning ordinance applicable to
4 subsequently proposed developments.

5 It is clear that in considering the
6 Mox-Chehalis application, the City Council has
7 created development standards for this unique
8 parcel and this unique project by three devices:

9 First, the Master Site Plan Map was
10 attached and adopted as part of a master plan;

11 Second, the Master Plan Application was
12 attached and adopted as the master plan text.

13 Most of the features in the Master Plan
14 Application that could reasonably be identified
15 as development standards are repeated in findings
16 of fact in Ordinance No. 1277. For example, see
17 the Findings of Fact Nos. 9 through 12.

18 Third, the Ordinance imposes 23 conditions
19 that amend the site plan and the application and
20 provide broad, but nonetheless specific,
21 development standards.

22 The process of review of the master plan
23 in subsequent permitting steps as provided in
24 Chapter 17.36A contemplates both minor and major
25 revisions to the plan and provides for different

1 methods of considering such revisions.

2 In sum, the process is authorized by the
3 enabling ordinance and does not violate
4 Washington law. The process permits enactment of
5 an ordinance containing development standards as
6 part of the approval process for the proposal;
7 and the City Council has acted in a manner
8 consistent with the responsibility imposed upon
9 it by Chapter 17.36A.

10 If that was all there was to this portion
11 of the case, if the events between the order of
12 remand in FOGH 1 and the enactment of
13 Ordinance No. 1277 had not transpired, this
14 fairly straight-forward analysis that I have just
15 given would be concluded. However, the process
16 of appeal to superior court and remand for
17 consideration by less than the full City Council
18 caused a significant length of time between the
19 open record public hearing and the closed record
20 public hearing where Ordinance 1277 was adopted.

21 During that time, all parties entered into
22 the Shoreline Hearings Board stipulation, which
23 petitioner contends so materially changed the
24 proposed project that the City Council should
25 have required a new application and a new public

1 process. In addition, petitioner contends that
2 newly discovered evidence should have been
3 accepted and considered by the council at the
4 time of the closed record public hearing. The
5 effect of this unique factual overlay needs to be
6 addressed.

7 I conclude that the City Council did not
8 err when it proceeded with enactment of Ordinance
9 1277. Chapter 17.36A does not require that all
10 plan changes necessitate a new or amended master
11 plan. Rather, the necessity of an amendment is
12 determined by the Public Works Department and
13 then presumably with appeal to the planning
14 commission and the City Council. Nothing in the
15 ordinance prevented the City Council from
16 considering the master plan proposed at the time
17 of the open record public hearing. The council
18 did not erroneously interpret the law in
19 considering the plan as submitted.

20 It is clear, however, that Chapter 17.36A
21 permits the City, in this case the Council, to
22 require that an amended master plan be submitted
23 and considered when the development plan changes.
24 In this case the council had the discretion to
25 require resubmission of an amended plan to the

1 public process before approval of Ordinance
2 No. 1277. It did not require resubmission, and
3 that decision must be reviewed using the
4 arbitrary and capricious standard.

5 I conclude that the council did not act
6 arbitrarily or capriciously in proceeding to
7 consider the original master plan submission, and
8 the public record generated for that plan. The
9 SHB stipulation is not part of the administrative
10 record, but the City was a party to the
11 stipulation. All parties before the court were
12 parties to that stipulation.

13 This court has also been made aware of the
14 stipulation by all of the parties. I agree with
15 the contention of the City that two factors argue
16 against requiring that the applicant,
17 Mox-Chehalis, submit a new and amended plan to
18 public process at this stage of the proceedings.

19 First, those amendments are not certain,
20 and the form of the amendments are not certain.
21 Second, they are mitigation amendments. Examples
22 are that the condos not to exceed 400 as proposed
23 in the original plan application now, apparently,
24 as a result of the stipulation, will be limited
25 to a figure of not more than 200. Similarly, the

1 convention center, originally a stand-alone
2 building in the original application, will now be
3 not a stand-alone building but will be part of
4 the luxury hotel apparently as part of the
5 Shoreline Hearings Board stipulation.

6 These examples and the other differences
7 that I could find from going through the
8 stipulation and the plan are correctly
9 characterized as mitigation changes, and as I
10 noted, they are not certain, and no specific
11 changes have been applied for in the plan
12 submitted to the City.

13 The City Council did not act arbitrarily
14 and capriciously in permitting the applicant to
15 proceed with the original application. The City
16 clearly retains the power, under the law, to
17 require that any changes to that plan must go
18 through the permitting process, including
19 amendment to the master plan if that's
20 appropriate, either by the administrative process
21 if the changes are minor, or the public hearing
22 process if they are not.

23 The second error alleged by the
24 petitioner, in the group that I have
25 characterized as procedural errors, is the

1 failure of the City Council to admit new evidence
2 offered at the time of the second closed record
3 public hearing. The petitioner contends that
4 this was both error of law, because the council
5 believed it could not admit evidence, and abuse
6 of discretion.

7 I conclude that the City Council's
8 decision in this regard was not error of law.
9 The process created by the Land Use Petition Act
10 and by the other environmental laws that govern
11 consideration of zoning ordinances such as this
12 provide for a single open record public hearing.
13 The law does not contemplate a second time when
14 the record is opened. It does not contemplate
15 that additional evidence may be submitted to the
16 City Council at the time of the closed record
17 public hearing where the council's final decision
18 is made.

19 I don't conclude, however, that the City
20 Council, or anybody sitting in the role that the
21 City Council found itself here, is absolutely
22 precluded from accepting additional evidence
23 under circumstances where it finds that such
24 evidence would be helpful and necessary, and
25 appropriate and fair to all sides, after the

1 close of the open record public hearing.
2 However, if such a right exists, it is a right
3 that would be examined under the abuse of
4 discretion standard, and I do not find that the
5 rejection of the evidence by the City Council
6 judged under the abuse of discretion standard
7 would be an abuse of that discretion.

8 The evidence addressed issues that were
9 considered at the open record public hearing.

10 The evidence that the petitioner sought to
11 introduce at the closed record public hearing
12 where the ordinance was passed added to that body
13 of information, but it was not such information
14 that was clearly persuasive one way or the other.
15 The council did not abuse its discretion in
16 determining that it would not accept that
17 evidence, to the extent that such discretion
18 existed.

19 Now let me turn to the additional errors
20 urged by the petitioner, which I have
21 characterized as substantive errors regarding the
22 actions actually taken by the council in its
23 decision making. Here the petitioner contends
24 that the Master Plan fails to comply with the
25 standards of Westport Municipal Code 17.36A.060,

1 which I have summarized above.

2 The first of the errors that I'll consider
3 relates to the issue of erosion. There are many
4 errors claimed here, including lack of
5 substantial evidence. A review of the record on
6 this subject clearly shows substantial evidence
7 that supports the City Council decision. There
8 was substantial evidence on both sides of this
9 issue, but the only test on appeal is whether
10 there is substantial evidence to support the
11 decision of the council.

12 The court cannot substitute its judgment
13 for that of the council, and implicit in this
14 long-recognized principle is the companion
15 principle that the court in this case cannot
16 substitute the judgment of the Department of
17 Ecology or the Corps of Engineers for that of the
18 council.

19 Review of this issue is conducted under
20 Westport Municipal Code 17.36A.060(A) and (C).
21 Subpart (A) requires that the project be
22 consistent with the Comprehensive Plan.
23 Subpart (C) requires that the public interest be
24 served by approval of the project.

25 I am not persuaded that the City Council,

1 when considering the risk of erosion in the
2 future, erroneously interpreted the law or
3 erroneously applied that law to the facts in
4 determining that the Master Plan is consistent
5 with the Comprehensive Plan and serves the public
6 interest. This is clearly a core issue for the
7 petitioner. They would have the decision maker
8 elevate this risk factor above other factors and
9 urge that doing so shows that the project is
10 inconsistent with both the Comprehensive Plan and
11 public interest. But in this regard, the City
12 Council is the decision maker, not the courts.

13 The findings of the City Council regarding
14 the risk of unchecked catastrophic erosion are
15 supported by substantial evidence. Approval of
16 the Master Plan in light of those findings does
17 not make the plan inconsistent with the
18 Comprehensive Plan. Furthermore, balancing the
19 risk as defined in the findings against the
20 economic benefits to the public is the proper
21 approach under the law. There is no compelling
22 reason to declare that the council erroneously
23 interpreted the law or erroneously applied the
24 law to the facts in determining that the public
25 interest is served by this plan.

1 I have written out a good part of this
2 decision, and in listening to the part that I
3 have just written, I am struck by the way it may
4 sound in one sentence that I stated above, and so
5 I'm going to restate that and explain what I
6 mean. I said,

7 "The findings of the City Council
8 regarding the risk of unchecked catastrophic
9 erosion are supported by substantial evidence."

10 I did not mean to imply there that the City
11 Council found that there was a risk of unchecked
12 catastrophic erosion. Rather, what I meant to
13 imply was that they considered that evidence and
14 found that those were not significant risks,
15 risks that were not such that they outweighed the
16 other factors considered by the council. I want
17 to make that clear in my explanation here.

18 In addition to erosion, the petitioner
19 also contends that the reservation of three
20 commercial development areas violates the
21 standards of the Master Plan Ordinance,
22 specifically subpart (A), because it is not
23 consistent with the Comprehensive Plan.

24 These development areas are place holders.
25 I agree with the characterization offered by

1 Mox-Chehalis here. They are not inconsistent,
2 because Chapter 17.36A permits phased development
3 and phased, or if you will, piecemeal permitting.
4 Mox-Chehalis acknowledges that the Master Plan
5 will need to be amended before permitting
6 commercial development of these reserved areas.

7 Next I turn to the issue of the
8 condominiums. The petitioner contends that the
9 condominiums, as proposed in the Master Plan
10 considered by the City Council, are not
11 consistent with the Comprehensive Plan and are
12 contrary to public interest. Petitioner argues
13 that the Comprehensive Plan requires residential
14 development north of the Jetty Access Road. I do
15 not reach that conclusion from reading the
16 portions of the Comprehensive Plan submitted to
17 me.

18 I conclude that the characterization of
19 the plan and its attached map showing residential
20 development north of the Jetty Access Road is an
21 example and is not a development standard
22 contained in the Comprehensive Plan. Nothing in
23 the Comprehensive Plan requires residential
24 development in the TC zone here to be north of
25 the Jetty Access Road.

1 Second, petitioner contends that the
2 condominiums or the residential development in
3 this zone must be low density and that the plan
4 as submitted does not provide for low density
5 housing. The respondents here, the City and
6 Mox-Chehalis, respond that the plan complies with
7 this provision of the Comprehensive Plan, because
8 in fact, as proposed, the residential areas are
9 low density when the project is considered as a
10 whole.

11 I agree with that analysis and conclusion.
12 I conclude that the Westport Municipal Code
13 permits that type of analysis and conclusion, and
14 I conclude that appellate decisions from other
15 zoning jurisdictions confirm that approach to
16 measuring the density of clustered residential
17 units.

18 Next the petitioner contends under this
19 general heading of "condominiums" that the scale
20 and location are contrary to the general goals of
21 the Comprehensive Plan, and they rely upon the
22 findings and conclusions of the hearing examiner
23 in this regard. The decision before this court,
24 of course, is the decision of the City Council,
25 not the hearing examiner.

1 I conclude that the City Council did not
2 err in concluding that the scale and location of
3 the condominiums as proposed are consistent with
4 the general goals of the Comprehensive Plan.
5 There is ample evidence in the record to
6 understand the reason they reached a different
7 conclusion than did the hearing examiner, and
8 there is no basis for this court to overturn that
9 decision.

10 The next issue addressed is whether the
11 SEPA analysis is inadequate. This is a standard
12 contained in Westport Municipal Code 17.36A.060.

13 This assigned error is analyzed under
14 subpart (D) of the Section .060. The contention
15 here is that the EIS and the EIS process was
16 inadequate. I agree with respondents that the
17 EIS is a planning document that is a tool in
18 decision making. The petitioner here has not
19 demonstrated that it was inadequate.

20 Furthermore, the issue of whether petitioner
21 preserved its rights to appeal these issues by
22 first exhausting its administrative remedies was
23 determined against it in FOGH 1. That decision
24 is barred by the doctrines of claim preclusion
25 and issue preclusion.

1 Finally, we address the standard in .060
2 that addresses adequate public facilities.
3 That's subpart (B) of the code section. Two
4 primary issues were submitted to the court under
5 this subsection, the first being public water.

6 The petitioner contends that the city's
7 finding of adequate water is based upon error of
8 law and is unsupported by substantial evidence.
9 Subpart (B) of the code section requires that the
10 City has, or with proper mitigation can provide,
11 adequate public facilities to serve the project.
12 Adequate mitigation means plans in place and a
13 funding plan capable of accomplishment within the
14 time needed to serve the project.

15 The issue here is the degree of detail
16 required in the Master Plan to satisfy the
17 standard that, "Adequate mitigation means
18 plans in place and a funding plan capable of
19 accomplishment within the time needed to serve
20 the project."

21 The issue is important because petitioner
22 contends that the water supplied from the current
23 source may not be sufficient to supply municipal
24 needs after the project is built. So, the first
25 question is, can the current system meet the

1 future demand.

2 The substantial evidence before the
3 council was that the current system could meet
4 the demand for phase 1 and that Roberts Ranch
5 would satisfy the demand for phase 2. The
6 substantial evidence occurs in many places
7 throughout this record, but a very good summary
8 of the evidence is the letter by Mr. Krautkramer
9 at Administrative Record 02983 through 02990.

10 The second question assumes there is an
11 uncertainty about the answer to the first
12 question, and asks, "Is there a plan in place and
13 a funding plan ...". Here the court must decide
14 the degree of detail appropriate to satisfy that
15 standard.

16 The petitioner seeks significant detail.
17 The respondents argue for a much more general
18 statement: What will the source be and who will
19 pay for it.

20 There clearly is a plan in place. The
21 plan is to open the Roberts Ranch well field.
22 And if the Roberts Ranch well field is not
23 available, then to expand the existing well
24 field. The plan further provides that there will
25 be no expansion of the motel except as phase 2.

1 And the condominiums themselves are required as a
2 phase 2 step in the process of development. So,
3 the City has protected itself with a plan that
4 requires reconsideration, presumably, of some
5 parts of the Master Plan, and certainly the
6 permitting process for construction of these two
7 additional major features that will require
8 public water to serve them.

9 The plan to pay for Roberts Ranch is to
10 have the City pay for that expansion, because as
11 noted in the record, those funds have already
12 been obtained from various grants or funding
13 sources. If the acquisition of the Roberts Ranch
14 well field is not successful, however, then no
15 phase 2 is going to be permitted unless the
16 developer enters into an agreement with the City
17 to share the costs of developing an additional
18 water supply. Furthermore, the plan, as a
19 condition of the Ordinance 1277, is that if
20 existing wells are required to be relocated or
21 repaired because of saltwater intrusion, then
22 that cost will also be borne by the developer.

23 I conclude that there are no standards to
24 determine the degree to which details of these
25 plans are required for the Master Plan. But I

1 have considered the nature of the permitting
2 process evident from reading Chapter 17.36A as a
3 whole. As I indicated earlier, I conclude that
4 the intent of that permitting process is to
5 require a broad, general master plan and to add
6 detail in the subsequent permitting steps
7 required by Chapter 17.36A.

8 When viewed in this light, a general
9 facilities plan is sufficient for the master
10 plan, and I conclude that the plan considered by
11 the City Council and imposed upon the developer
12 by passage of Ordinance 1277 and the conditions
13 included therein are a sufficient plan for public
14 facilities, both to supply the public facilities
15 and to pay for them.

16 I conclude that the City Council did not
17 erroneously interpret the law when it found the
18 public facilities standard satisfied by the
19 Master Plan.

20 As regards the improvement to the Jetty
21 Access Road, which was the second major error
22 asserted under the public facilities subpart of
23 Section .060, the error assigned is violation of
24 that code provision, but the focus is really here
25 on lack of public knowledge concerning the

1 details of the planned improvements for the Jetty
2 Access Road.

3 The response to this claimed error is that
4 the plan to improve the road, by widening, by
5 adding a bicycle lane, and sidewalks, was
6 included in the Master Plan Application and was
7 part of the Draft Environmental Impact Statement.
8 Then the City Council added other features as a
9 condition of approval - apparently at the request
10 of the State Department of Parks.

11 I conclude that there was no error in the
12 action undertaken by the City Council. The
13 respondents' legal contentions are correct in
14 this regard. Barrie v. Kitsap County does not
15 require a public hearing for conditions added to
16 a permit by the City Council. The public notice
17 in the Master Plan Application and the Draft
18 Environmental Impact Statement was sufficient.

19 Gentlemen, that concludes my decision on
20 the issues addressed in this appeal. The
21 respondents are the prevailing party. They
22 should prepare an order consistent with this
23 decision. The matter, if reviewed by a
24 Court of Appeals, will be a review of the City
25 Council decision, not this court's decision.

1 Accordingly, this court is expected to not enter
2 specific findings of fact and conclusions of law.
3 I believe that general principle extends to LUPA
4 cases, as well as other administrative matters.

5 If either side requests that the court's
6 opinion be appended to the order that I will
7 sign, I will grant such a motion, but that's a
8 matter for you to decide, not me. That concludes
9 my decision in this case, ladies and gentlemen.

10 Before I recess, I want to say how much I
11 appreciated the really excellent briefing that I
12 received from both sides in this case. The
13 manner in which it was presented in the briefs
14 was very clear. I appreciated receiving it from
15 both sides and found it very, very useful. I was
16 a little curious about the respondents' brief
17 when I saw that it was a joint brief and wondered
18 if it had been a brief by committee, in which
19 case it often looks like a camel, or whether it
20 was going to be a brief submitted by a single
21 party. I wasn't able to tell that, because it
22 was very well written, as was Mr. Lowney's brief.

23 Thank you. We will stand in recess,
24 ladies and gentlemen.

25 MR. MEYER: Thank you, Your Honor.

MR. LOWNEY: Thank you.

(Conclusion of the April 24, 2003, Proceedings.)

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1 City of Westport; Charles B. Roe, Jr., attorney for Respondent Mox Chehalis LLC; Barnett N.
2 Kalikow, attorney for Respondent Mox Chehalis LLC; Arthur A. Blauvelt III, attorney for
3 Respondent Port of Grays Harbor; Andrew A. Fitz, Assistant Attorney General for Appellant
4 Department of Ecology; and Knoll W. Lowney, attorney for Intervenors, Friends of Grays
5 Harbor and Wildlife Forever of Grays Harbor.

6
7 The Board, having heard from all parties, and being fully advised, HEREBY ORDERS that:

8 1. At the request of the parties, the subject matter of the cause is remanded to the City for
9 further processing of new applications for a Substantial Development Permit and a Conditional
10 Use Permit, which shall seek approval of the project as described in the February 14, 2002
11 Revised Project Description.

12
13 2. In the processing of the project on remand, the City and Ecology shall comply with the
14 procedures of the Westport Shoreline Master Program and the Shoreline Management Act, as
15 applicable, including but not limited the following:

- 16 • Issuing public notice.
- 17 • Conducting a public hearing before the Planning Commission.
- 18 • Complying with SEPA through issuing an Environmental Impact Statement
19 addendum or Supplemental Environmental Impact Statement to reflect changes made
20 to the project since the FEIS was issued.

- Notice of the Planning Commission's decision.
- Opportunity to appeal to the City Council.
- Submittal of the Shoreline Substantial Development Permit and the Conditional Use Permit to the Department of Ecology.

3. The current appeals are dismissed without prejudice, preserving the parties' opportunity to bring any appeal deemed appropriate to this Board if and when the City and/or Department of Ecology act on the permit(s) after remand.

DONE this 8th day of July 2002.

SHORELINES HEARINGS BOARD

Kaleen Cottingham
KALEEN COTTINGHAM, Presiding

William H. Lynch
WILLIAM H. LYNCH, Member

Judy Wilson
JUDY WILSON, Member

MARTIN GARTY, Member

Phyllis Shrauger
PHYLLIS SHRAUGER, Member

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Appellant,

FRIENDS OF GRAYS HARBOR and
WILDLIFE FOREVER OF GRAYS
HARBOR,

Intervenors,

v.

PORT OF GRAYS HARBOR, MOX
CHEHALIS, LLC, AND THE CITY OF
WESTPORT,

Respondents.

SHB No. 01-023, 01-024, 01-025 & 01-026

SUMMARY JUDGMENT ORDER

This matter comes before the Board on cross motions for partial summary judgment.

Respondents City of Westport, Port of Grays Harbor, and Mox Chehalis LLC (Respondents)

jointly filed a motion for partial summary judgment on April 5, 2002. Intervenors Friends of

Grays Harbor and Wildlife Forever (Intervenors) also filed a motion for partial summary

judgment on April 5, 2002.

The Board, comprised of Kaleen Cottingham, presiding, Robert V. Jensen, William H.

Lynch, Judy Wilson, and Phyllis Shrauger heard oral arguments on June 3, 2002, and have

1 reviewed and considered the pleadings and correspondence contained in the Board record,
2 including the following:

- 3 1. Respondents' motion for partial summary judgment;
- 4 2. Respondents' memorandum in support of motion for partial summary judgment,
5 along with the declaration of Jeffrey S. Myers and the stipulation between
6 Respondents and the Department of Ecology (Ecology);
- 7 3. Intervenors' motion for partial summary judgment, along with the declaration of Evan
8 Leonard and Exhibits to the Declaration of Knoll Lowney;
- 9 4. Ecology's response to cross motions for summary judgment, along with the
10 declarations of Loree' Randall and Perry Lund;
- 11 5. Respondents' memorandum in opposition to Intervenors' motion for partial summary
12 judgment, along with the declarations of Robert L. Patrick, Francis Naglich and
13 Richard G. Robbins;
- 14 6. Intervenors' opposition to Respondents' motion for partial summary judgment, along
15 with the second declaration of Knoll Lowney;
- 16 7. Joint reply to Intervenors' opposition to motion for summary judgment;
- 17 8. Intervenors' reply in support of motion for partial summary judgment, along with the
18 third declaration of Knoll Lowney;
- 19 9. Letter dated June 5, 2002, from City of Westport to correct misimpressions; and,
- 20 10. Letter dated June 5, 2002, from Intervenors responding to the letter from the City of
Westport.

Based on this review, the Board enters the following order:

- 1 5. Whether 100-foot buffers are required around all wetlands that the City Council and
2 Planning Commission classified as Category II based upon the applicant's wetland
delineation, because these finds were not appealed and 100-foot buffers are necessary;
- 3 6. Whether buffer width averaging is prohibited because the proposal satisfies none of the
4 three requirements for buffer width averaging set forth in the WSMP; and
- 5 7. Whether the proposed mitigation plan is insufficient because it relies upon preservation as
its primary mitigation strategy.

6 **Background**

7 These appeals center on the shoreline Substantial Development Permit (SDP) and
8 Conditional Use Permit (CUP) issued for a master planned destination resort within the City of
9 Westport known as the Links at Half Moon Bay. The resort includes two hotels, convention
10 center, 18-hole "Scottish Links Style" golf course, and condominiums on a 355-acre parcel of
11 property owned by the Port of Grays Harbor. The property is bounded on the west by the Pacific
12 Ocean, on the north by Westhaven State Park and Half Moon Bay, on the east by a variety of
13 uses including the Westport Wastewater treatment plant, and on the south by Westport Light
14 State Park.

15 The Port of Grays Harbor has developed a comprehensive plan for the development of the
16 property. The Port intends to sell this property to a private developer for economic generation
17 and tourism.

18 The City initiated a rezoning process for this parcel for destination resort uses, including
19 the golf course. This rezone effort included SEPA compliance and issuance of a Determination
20 of Non-Significance (DNS) on November 1996. There was no challenge to the rezoning action.

1 The City also amended its Shoreline Master Program (SMP) and received State approval for this
2 amendment. The property is designated "Tourist Commercial" in the City of Westport's
3 Comprehensive Plan and Zoning Map and designated as "urban shorelines environment" in the
4 Westport SMP. The coastal portion of the property is designated "conservancy" in the SMP.
5 Additionally, there is a dune protection zone along the coast. The uses permitted within the
6 urban shoreline environment are those set forth in the underlying zoning designation (Tourist
7 Commercial). The golf course is a permitted use in the urban environment. Filling of the
8 wetlands, however, is a conditional use.

9 The Port entered into a contract to sell the property to Mox Chehalis, who then proposed
10 the development. Environmental review for this proposal consisted of a public scoping process
11 and the development of Draft and then Final Environmental Impact Statements.

12 The majority of the property consists of a mosaic of interdunal wetlands. A total of 148
13 acres of wetlands were delineated on the property. The majority of the wetlands are rated as
14 Category II and III wetlands using the Washington State Wetland Rating System for Western
15 Washington. The layout of the golf course is such that fairways, greens, paths, bridges, and the
16 driving range require approximately 9.96 acres of fill within delineated wetlands.

17 The property is also in the vicinity of an area with documented coastal erosion and major
18 public works projects to deter such erosion.

19 The Intervenors challenged approval of the master plan for the project under the City
20 zoning code in a judicial appeal brought pursuant to the Land Use Petition Act, Ch. 36.70C RCW

1 (LUPA). In that action, the Intervenor challenged the adequacy of the EIS under SEPA. On
2 January 29, 2002, the Superior Court in Thurston County issued an opinion granting the City of
3 Westport's motion to dismiss the SEPA claims for failure to exhaust administrative remedies.
4 On March 1, 2002, an order dismissing the SEPA claims was entered in the LUPA action.

5 On May 31, 2000, Westport issued a Determination of Significance (DNS) for the
6 project. A draft Environmental Impact Statement (EIS) was published on November 1, 2000.
7 The Final EIS was published on March 23, 2001. On April 6, 2001, the developer submitted its
8 various permit applications, including an application for the Shoreline Substantial Development
9 Permit (SDP). After comments about the need for a Conditional Use Permit (CUP), the
10 developer submitted an amended shoreline application including a CUP on June 5, 2001.
11 Westport issued the Shoreline permits (SDP and CUP) on August 9, 2001. The SDP covered the
12 hotel, convention center, and condominiums. The CUP covered the golf course, clubhouse, and
13 maintenance facilities.

14 On September 4, 2001, Ecology denied the CUP and filed a petition for review with the
15 Board of the SDP. On September 21 and 24, 2001, the Respondents individually filed petitions
16 for review with the Board of the denial of the CUP. These cases were consolidated by the Board.
17 On December 4, 2001, the Board granted intervention status to the two public interest groups.

18 Analysis

19 Summary judgment is designed to do away with unnecessary trials when there is no
20 genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975). In a

1 summary judgment proceeding, the moving party has the initial burden of showing that there is
2 no dispute as to any material fact. *Hiatt v. Walker Chevrolet*, 120 Wn.2d 57, 66, 837 P.2d 618
3 (1992). A material fact is one upon which the outcome of the litigation depends. *Jacobsen v.*
4 *State*, 89 Wn.2d 104, 569 P.2d 1152 (1977).

5 If a moving party does not sustain its burden, summary judgment should not be granted,
6 regardless of whether the nonmoving party has submitted affidavits or other evidence in
7 opposition to the motion. Only after the moving party has met its burden of producing factual
8 evidence showing that it is entitled to judgment as a matter of law does the burden shift to the
9 nonmoving party to set forth facts showing that there is a genuine issue of material fact. *Hash v.*
10 *Children's Orthopedic Hosp.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). In ruling on a motion
11 for summary judgment, the Court must consider all of the material evidence and all inferences
12 most favorably to the non-moving party and, when so considered, if reasonable persons might
13 reach different conclusions, the motion should be denied. *Id.*; *Wood v. Seattle*, 57 Wn.2d 469,
14 358 P.2d 140 (1960).

15 1. WETLANDS

16 Filling of wetlands in shoreline jurisdictions is prohibited, subject to a few limited
17 exceptions. WMC 17.32.065(3). Respondents contend that the filling of the wetlands associated
18 with the golf course is excepted from the wetland fill prohibition and wetland buffers by WMC
19 17.32.065(d)(1)(1). Specifically, the Respondents contend that "public use needs" for recreation
20 are excepted from the wetland fill prohibition and wetland buffers. They further contend that the

1 golf course is a public use. The Intervenor contend the exception is contrary to the Shoreline
2 Management Act (SMA) and, when viewed as a whole, the destination resort does not qualify as
3 a public recreational need. Further, they argue the impacts to wetlands are not necessary to serve
4 the public's golfing needs.

5 Respondents rely on the definition of recreation contained in WMC 17.32.055, which
6 defines recreation as the refreshment of body and mind through forms of play, amusement or
7 relaxation. Respondents contend "public use" of this recreational facility does not hinge on
8 ownership of the facility, but rather whether the facility is "available to the public as a whole"
9 and not limited to "members only" or "residents only." Intervenor agree that golf is a form of
10 recreation, but argue the \$100 green fee and other indicia show that the public won't often utilize
11 this facility and thus it is not truly a public use facility.

12 The Board finds it is a factual determination whether this facility fits within the exception
13 to the wetland fill prohibition or wetland buffer requirements. Specifically, whether this facility
14 is a public use depends on many factors not clearly presented in these motions for summary
15 judgment. Therefore, the Board denies the cross motions for summary judgment on this issue.

16 2. PROJECT MODIFICATIONS

17 The initial appeal of the shoreline permits for this destination resort was filed on
18 September 4, 2001. Shortly thereafter the initial parties to the case began intensive negotiations
19 to resolve the appeals without need for the Board to hear the matter. On December 4, 2001, the
20 Board granted intervention status to two public interest groups. By this time, the initial parties

1 had reached a tentative settlement of the various appeals. The parties, including the Intervenor
2 and with the assistance of a mediator, attempted to reach final settlement. This was ultimately
3 unsuccessful. Prior to the final attempt at settlement, the Parties participated in a pre-hearing
4 conference wherein the initial parties wanted to use the revised proposal as the basis for the
5 challenge in front of the Board, rather than the initial proposal approved by the City of Westport.
6 The initial parties intimated that the revisions were minor and for the benefit of the environment.
7 On that basis, and with the agreement of all the parties, the Board entered a pre-hearing order that
8 stated:

9 At the request of the parties, the original hearing date has been cancelled to allow the
10 parties to pursue settlement discussions, in particular to allow for consideration of a
11 proposed settlement agreed to by some but not all of the parties. This proposed
12 settlement includes a modification of the project, a description of which shall be provided
13 to all the parties no later than February 8, 2002. Should settlement not be achieved, the
14 Board, in its de novo review capacity, shall evaluate the proposed project as modified
15 according to the description referred to above.

16 Subsequent to this pre-hearing order, the description of the revised project was shared
17 with the Intervenor. The Intervenor contend that the project has been substantially changed by
18 the revision and that many of the changes threaten to substantially increase certain environmental
19 impacts. Given the changes, the Intervenor argue that the public and the Planning Commission
20 never had the opportunity to evaluate the current proposal and its impacts and therefore the
21 permits must be remanded to the City for further processing. The Respondents contend any
22 procedural defects are rendered moot by the Board's de novo review capacity.

1 In a case very factually similar to the one before us, the Board set forth the standards for
2 reviewing projects that have been revised by agreement between some of the parties while a case
3 is pending before the Board. See: *Washington Environmental Council v. Douglas County*, SHB
4 86-34 (1988). During the pendency of that matter before the Board, but prior to hearing, the
5 Departments of Transportation and Ecology presented a "Stipulation and Order Re: Modification
6 of Permits". This stipulation was not executed by Appellants. The stipulation incorporated eight
7 additional conditions into the shoreline proposal. The Board considered the eight point revision
8 to the proposal brought about by that stipulation and concluded that the revisions did not alter the
9 "scope or intent of the shoreline application." The Board went on to say the standard of "scope
10 and intent" in this context of changes to a proposal during a proceeding before us is drawn by
11 analogy to the rule allowing administrative revisions to a permit after issuance, WAC 173-14-
12 064 (repealed in 1995 and replaced by WAC 173-27-100). See also: *Holland v. Kitsap County*,
13 SHB No. 86-22 (1987).

14 A permit revision is required "whenever the applicant proposes substantive changes to the
15 design, terms or conditions of a project from that which is approved in the permit. Changes are
16 substantive if they materially alter the project in a manner that relates to its conformance to the
17 terms and conditions of the permit, the master program and/or the policies and provisions of
18 chapter 90.58 RCW." WAC 173-27-100. "Within the scope and intent of the original permit"
19 means all of the following:

- 20 (a) No additional over water construction is involved except that pier, dock, or float
construction may be increased by five hundred square feet or ten percent from the

1 provisions of the original permit, whichever is less;

2 (b) Ground area coverage and height may be increased a maximum of ten percent from
the provisions of the original permit;

3 (c) The revised permit does not authorize development to exceed height, lot coverage,
4 setback, or any other requirements of the applicable master program except as authorized
under a variance granted as the original permit or a part thereof;

5 (d) Additional or revised landscaping is consistent with any conditions attached to the
original permit and with the applicable master program;

6 (e) The use authorized pursuant to the original permit is not changed; and

(f) No adverse environmental impact will be caused by the project revision.

WAC 173-27-100

7 In the matter before us, Intervenors allege that height increases and environmental
8 impacts warrant the need for further review at the local level. The Board is unable to specifically
9 compare square footage and heights from the original permit and the stipulation, as some
10 facilities have been incorporated into others and others have not been identified with the same
11 level of specificity in square footage.

12 The parties have set forth differing factual allegations as to the substance of the changes.
13 This question will be reserved for the hearing on the merits. If, at that time the Board determines
14 the project revision does change the scope and intent of the project, the Board will remand the
15 matter to the City for reprocessing. The prehearing order does not override such a procedural
16 requirement. Therefore, the Board denies the cross motions for summary judgment on this
17 question.

18 3. SEPA CHALLENGES

19 Respondents ask the Board to rule, as a matter of law, the Intervenors' challenge to the
20 adequacy of documents prepared under SEPA is barred by their failure to exhaust administrative

1 appeals to the Westport City Council, and further that Intervenor are collaterally estopped from
2 raising the issue by order of the Thurston County Superior Court. In their memorandum in
3 opposition to the motion for partial summary judgment, the Intervenor state that they do not
4 object to the grant of summary judgment on this issue. The Board construes the Intervenor's
5 statements to be a withdrawal of the two SEPA related issues (Issues number 8 and 9) as set forth
6 in the Second Pre-hearing Order dated April 12, 2002. As a result, these two issues will be
7 removed from these cases and will not be heard further by the Board. Further, the Intervenor in
8 their Opposition to motion for partial summary judgment indicate that they do not object to
9 summary judgment on the issues relating to permit bifurcation (Issue number 6). Again, the
10 Board construes the Intervenor's statements to be a withdrawal of Issue number 6. As a result,
11 this issue will also be removed from these cases and will not be heard further by the Board.

12 4. OCEAN RESOURCE MANAGEMENT ACT

13 Respondents ask the Board to rule, as a matter of law, the Ocean Resource Management
14 Act does not apply to this project. In their memorandum in opposition to the motion for partial
15 summary judgment, the Intervenor state they do not object to the grant of summary judgment on
16 this issue. The Board notes that this issue was eliminated in the final list of identified issues set
17 forth in the Second Pre-hearing Order. This, combined with the construal by the Board of the
18 Intervenor's intention to withdraw this issue from consideration, results in the elimination of this
19 topic from further consideration by the Board.

1 **5. FUTURE EROSION ALONG THE COAST**

2 Respondents ask the Board to rule, as a matter of law, that concerns over future erosion
3 from shoreline protective structures not proposed in this project are not relevant to this matter.

4 The Intervenors ask the Board to deny this motion.

5 The SMA requires all substantial developments to be consistent with the provisions of the
6 SMA, the regulations of Ecology and the shoreline master programs. RCW 90.58.140(1) and (2).

7 *Buechel v. Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994), *Batchelder v. Seattle*, 77 Wn.

8 App. 154, 163, 890 P.2d 25 (1995). In its role in determining whether a proposal is appropriate,

9 the Board is to liberally construe the Shoreline Management Act to give full effect to its

10 objectives and purposes. RCW 90.58.900. This provision has led the Supreme Court to conclude

11 the "SMA is to be broadly construed in order to protect the state shorelines as much as possible."

12 *Buechel v. Department of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994); *English Bay*

13 *Enters., Ltd. v. Island Cy.*, 89 Wn.2d 16, 20, 568 P.2d 783 (1977). The board has been asked in

14 prior cases to evaluate whether future erosion is to be considered in approving or denying a

15 permit. Nearly all of the prior cases are for variances and/or for single or small groups of

16 residential structures. The proposal before the Board today is a major planned destination resort,

17 golf course and associated facilities. It is in an area with a history of coastal erosion.

18 The Washington Coastline is one of the most important environmental resources in the

19 state. The stability of the shoreline in proximity to the proposed destination resort and golf

20 course is a matter within the jurisdiction of the Board, particularly as it relates to the protection

1 of the public interest. Neither party has shown that there is no dispute as to any material fact.
2 *Hiatt v. Walker Chevrolet*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). Whether this proposal is
3 placed in harm's way or may result in future impacts to the shoreline are mixed questions of fact
4 and law. Since the motion and supporting memoranda allow the Board to reach different
5 conclusions as to the long-term stability of the coastline in the general south jetty area, the Board
6 denies the motion for summary judgment on this issue.

7 **Conclusion**

8 As a result of the denials of the motions for summary judgment, along with the
9 withdrawal of certain issues set forth in this decision, the following issues remain to be addressed
10 at the hearing on the merits:

- 11 1. Whether the SDP/CUP contains sufficient detail, both on its face and through supporting
12 and implementing documents (including those developed through discussions with
13 Ecology since these appeals were filed), to determine whether the SDP/CUP is consistent
14 with the Shoreline Management Act (SMA), its implementing regulations, and the City of
15 Westport's Shoreline Master Program (SMP).
- 16 2. Whether the CUP, along with the conditions agreed to by Ecology, is consistent with the
17 SMA, its implementing regulations, and the SMP.
- 18 3. Whether the SDP for the hotel and convention center, as conditioned by the City and with
19 the conditions agreed to by Ecology, is consistent with the SMA, its implementing
20 regulations, and the SMP.
4. Whether the SDP for the condominiums, as conditioned by the City and with the
conditions agreed to by Ecology, is consistent with the SMA, its implementing
regulations, and the SMP.
5. Whether any alleged procedural errors are cured by de novo review by the Shorelines
Hearings Board.

1 6. Whether a new application and local permitting process is required to allow the public
2 and the Planning Commission to participate in the permitting process, given alterations to
the project and the allegedly newly disclosed information.

3 SO ORDERED this 18 day of June 2002.

4 SHORELINES HEARINGS BOARD

5 Kaleen Cottingham
6 KALEEN COTTINGHAM, Presiding

7 William H. Lynch
8 WILLIAM H. LYNCH, Member

9 Robert V. Jensen
10 ROBERT V. JENSEN, Member

11 Phyllis Shrauger
12 PHYLLIS SHRAUGER, Member

13 Judy Wilson
14 JUDY WILSON, Member

FILED

JAN 2 2002

SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

**SUPERIOR COURT OF Washington
IN AND FOR THURSTON COUNTY**

FRIENDS OF GRAYS HARBOR, ET AL,

Petitioners,

vs.

THE CITY OF WESTPORT, ET AL,

Respondents.

NO. 01-2-01641-2

COURT'S OPINION

SEPA Appeal

Respondents have moved to dismiss that portion of petitioners' appeal characterized as the SEPA issues based upon the alleged failure of respondents to exhaust their administrative remedies. Specifically, respondents contend that petitioners failed to appeal the Planning Commission approval of the FEIS, the SSDP and the CUP to the city council, thereby depriving the city council of the opportunity to address the concerns raised in this portion of the petition for judicial review.

The court finds that the city gave notice of petitioners' right to appeal in a manner provided by law and reasonably calculated to reach petitioners. I further find that the petitioners failed to appeal the SEPA issues to the city council. Accordingly, I conclude that they have failed to exhaust their administrative remedies and so pursuant to well-established legal precedent, must have this portion of their appeal dismissed.

Respondents' motion is granted.

1 The procedural history of this permitting process is convoluted. However, after
2 supplemental briefing to aid the court in understanding this record, I find that the
3 following events occurred. Much of the following recitation is lifted verbatim from
4 respondents' supplement brief. After careful consideration of the supporting record, I
5 conclude that most of the Procedural History in the brief was accurate, relevant and
6 uncontested. The portions from the brief that did not meet each of these standards were
7 edited or deleted.¹

8 PROCEDURAL HISTORY

9 This case is a land use appeal under the Land Use Petition Act (LUPA), Ch.
10 36.70C RCW. It contests the approval of a master site plan for a resort, convention
11 center, condominiums and golf course proposed on a single 355 acre parcel owned by the
12 Port of Grays Harbor in the City of Westport. The project is known as the Links at Half
13 Moon Bay.

14 The Links at Half Moon Bay project is proposed in an area subject to shoreline
15 jurisdiction. It requires multiple approvals under the City Shoreline Master Program and
16 zoning code. The zoning code requires the developer to submit a site master plan for
17 review and approval pursuant to Westport Municipal Code (WMC) Ch. 17.36A and
18 thereafter to obtain approval of more detailed binding site plans under WMC Ch. 17.36B.

19 Review of the Links at Half Moon Bay proposal began in May, 2000, when the
20 developer, Mox Chehalis L.L.C. approached the City with a proposal for a master plan
21 development. The developer and City agreed that an environmental impact statement
22 (EIS) would be needed for such a development. On May 31, 2000, the City issued a
23 Determination of Significance and scoping notice for the Links at Half Moon Bay
24 project. A public meeting was held on June 14, 2000, to identify environmental issues to
25 be addressed in the EIS.
26

27
28 ¹ Petitioners may have expressed disagreement with some portions of the recitation adopted by the court, but where they have failed to explain their disagreement and the respondents' contention is well-documented in the record, I have considered those uncontested.

1 On November 1, 2000, a draft environmental impact statement (DEIS) was
2 published and made available for public comment for thirty days. Due to significant
3 interest in the project, the public comment period for the DEIS was extended for an
4 additional 15 days until December 15, 2000. Written comments were received from 38
5 parties, including petitioners FOGH and Wildlife Forever.

6 On March 23, 2001, a final environmental impact statement (FEIS) was published
7 addressing the numerous public comments. Included in the FEIS was a cover memo to
8 interested parties which described the hearing process for the Links at Half Moon Bay
9 project. The cover memo also informed readers of the FEIS how they could appeal and
10 challenge the adequacy of the FEIS. It stated in pertinent part:

11 Pursuant to WMC 17.32.080(d)(3) and WMC 17.48.020(a), the Planning
12 Commission will hold an open record hearing to consider the shorelines permit
13 and master plan application for the project. Public notice of this hearing will be
14 provided as required by WMC 17.32.080(d) and WMC 17.48.030(3). As required
15 by WAC 197-11-535(1), this hearing shall be open to consideration of the
16 environmental impact of the proposal, and will consider available environmental
17 documents, including the FEIS. After conclusion of the open record hearing, the
18 Planning Commission will approve, modify or deny the application for the
19 shoreline permit and will make a recommendation to the City Council on the
20 master plan application.

21 The decision of the Planning Commission on the shorelines permit,
22 together with any procedural issues under SEPA, including the adequacy of the
23 FEIS, may be appealed to the City Council within 10 days of the Planning
24 Commission's determination. The City Council will hold a closed record public
25 hearing to consider the Planning Commission's recommendation on the master
26 plan application, and any timely filed appeals of the shorelines permit or
27 concerning compliance with SEPA.

28 *Cover Memo from Randy Lewis, City Administrator to Interested Persons, March 23,*
2000 (emphasis added by Mr. Myers).

After publication of the FEIS, the City considered permit application materials for
master plan approval and issuance of a shoreline substantial development permit (SSDP)
submitted by the developer on April 6, 2001. The City requested additional information,
which was submitted on April 16, 2001. The City determined that the permit application

1 Any action taken on the Shoreline Management Conditional Use Permit
2 application can be appealed to the Westport City Council under Chapter
3 17.32.080(d)(3) of the Westport Municipal Code. Such appeal must be filed
4 within ten (10) days of the effective date of the decision. In addition, Chapter
5 15.22.220 of the Westport Municipal Code, Westport's State Environmental
6 Policy Act (SEPA) regulations, specifies that any appeal of a Final Environmental
7 Impact Statement (FEIS) and substantive determination on the action must be
8 made to the City Council within ten (10) days of the date the approval is issued.

9 *City of Westport, Washington, NOTICE OF COMPLETE APPLICATION / NOTICE OF PUBLIC*
10 *HEARING, June 8, 2001 (emphasis added by Mr. Myers).*

11 The City reconvened the previously continued open record public hearing for
12 consideration of the CUP on July 9, 2001. The Planning Commission deliberated in
13 public meetings held on July 17 and July 24, 2001. A third public meeting was held by
14 the Planning Commission on July 25, 2001, resulting in issuance of a written decision
15 with findings of fact and conclusions of law. The July 25, 2001, decision approved the
16 applications for the SSDP and the CUP. This decision triggered a ten-day appeal period
17 under WMC 17.32.080(d)(3) and WMC 17.32.090. No appeal was received challenging
18 the Planning Commission approval of the SSDP and the CUP or challenging the
19 adequacy of the FEIS. After expiration of the local appeal period, on August 9, 2001, the
20 City issued a SSDP for the hotel, convention center and condominiums and a CUP for the
21 golf course, clubhouse and maintenance facilities.

22 In the meantime, the City Council received a recommendation from the Hearing
23 Examiner on the Master Plan. The city began its deliberations on this recommendation in
24 a closed record hearing on July 19, 2001. The public was afforded an opportunity to
25 comment about the record created at the open record public hearings (May 21, 23, 2001)
26 and submit legal argument on the approval of the Master Plan. The City conducted
27 additional deliberations at a public meeting on July 31, 2001. After expiration of the
28 appeal period for the shorelines permits (SSDP and CUP) and SEPA determinations
(FEIS), the City Council approved the Master Plan by adopting Ordinance 1254 on

1 August 14, 2001. Twenty-one days later, September 4, 2001, the Petitioners filed and
2 served this LUPA appeal.

3 The Motion to Dismiss asserts petitioners failed to undertake the appeals
4 referenced in the City notices quoted above. Petitioners' response is that:

5 Through either calculation or neglect, the City has created appeal procedures that
6 could not reasonably be followed, even with assistance of counsel. It did this by
7 changing the laws during the course of the permitting, by failing to follow the law
8 on the books, by giving misleading public notices, and by failing to give
9 statutorily required notice.

9 Petitioners' *Supplemental Reply Brief on Motion to Dismiss*, p. 1.

10 **Contention: The City changed the laws.**

11 The City did not change the law during consideration of the permit applications in
12 any way that prejudiced petitioners' rights; nor can it be shown that creation of the office
13 of Hearing Examiner during the notice period for this application so confused the process
14 that plaintiffs were deprived of due process, or even affected. The record establishes³
15 that during all open record hearings conducted for this project, the Planning Commission
16 retained jurisdiction to approve or deny the SSDP and the CUP. The Hearing Examiner
17 had jurisdiction to consider the Master Plan application. The task of conducting the
18 hearing was delegated by the Planning Commission to the Hearing Examiner, but that
19 delegation was explained at the first hearing.

20 **Contention: The City failed to follow the laws.**

21 Petitioners next contend that the City failed to follow the law. The gravamen of
22 this contention is that the City's process for appealing the FEIS would result in
23 simultaneous administrative and judicial appeals. While such a result is not permitted by
24 law, petitioners fail to show here that such a result would occur; in fact just the opposite
25 is the case. Petitioners' contention is premised upon the assertion that a second open
26

27
28 ³ The summary judgment standard of viewing facts and inferences in the light most favorable to petitioners is the appropriate standard.

1 record hearing would be required for FEIS issues, apparently after the Planning
2 Commission approval of the SSDP.

3 This Public Notice [of the open record public hearing on May 21, 2000] clearly
4 indicated that a challenge to FEIS adequacy would *not* occur at the open record
5 hearing.

6 *Petitioners' Opposition to Motion to Dismiss*, p. 19.

7 The record does not support this belief. The Notice mentioned by petitioners (the
8 public notice dated April 20, 2000, described above) clearly does not suggest that the
9 hearing would exclude FEIS issues; rather it schedules a public hearing on the "above-
10 described proposal." Just two short paragraphs above this statement, the notice identifies
11 the FEIS as "prepared for the proposed project," and states the location where it could be
12 reviewed. Furthermore, the memo accompanying the copy of the FEIS sent to several of
13 petitioners' members⁴ (the Lewis memo, dated March 23, 2000) specifically states that
14 the FEIS open record hearing would be the same hearing as the shoreline permit (SSDP)
15 hearing. No reasonable person could conclude that a second hearing would be held.

16 I find that the process undertaken by the City provided for a single open record
17 public hearing that included consideration of SSDP and FEIS (and eventually, POC)
18 issues.⁵ From this it follows that there was time for concluding an appeal of the SSDP
19 and FEIS to the City Council before any deadline for judicial review was passed. The
20 procedure adopted by the City did not require simultaneous administrative and judicial
21 appeals under these undisputed facts.

22 **Contention: The City gave misleading public notice.**

23 Petitioners next contend that the City gave misleading public notices. The City
24 gave four notices relating to appeals. First, the FEIS notice. It did not reference any
25 Westport Municipal Code (WMC) provision but did mirror the provisions of WMC

26 _____
27 ⁴ Petitioners' counsel acknowledges receipt by the members, but explains that the FEIS is usually put aside without
28 being read.

⁵ There is no issue of material fact regarding this finding.

1 17.32.080(d)(3) and .090(2). Second and third, the two open record hearing notices, with
2 identical appeal notices that reference WMC 17.32.080(d)(3). This code provision in
3 turn references WMC 17.32.090(2).

4 Fourth, notice was given to Brady Engvall, a FOGH board member, who inquired
5 about the appeal process after the Planning Commission decision and before the
6 expiration of the 10-day appeal period on August 9, 2001. The precise date of the inquiry
7 is uncertain, but the City's response was faxed to Mr. Engvall on August 6. The fax
8 consisted of a copy of WMC 17.32.090.⁶ Thus all notices mirrored the language of or
9 referred specifically to WMC 17.32.080(d)(3) or .090(2). The substance of the appeal
10 issue in this case – that FEIS and SEPA permit applications approved by the Planning
11 Commission must be appealed to the City Council within 10 days – is contained in both
12 code provisions; §.090(2) is the more detailed.

13 WMC 17.32.090 is not misleading, contradictory or ambiguous. The preamble
14 part divides actions into two categories, "those actions which will be automatically
15 reviewed at the state level, and those which will not be so reviewed." An example of the
16 first category is a shoreline conditional use permit. See RCW 90.58.140(10).⁷ The
17 second category is a catchall, encompassing all actions other than those automatically
18 reviewed by the state. The ordinance cannot be construed provide that actions in this
19 second category may not be appealed to the state; such a construction would be absurd.
20 State law very clearly permits appeals to the Shorelines Hearing Board for matters that
21 are not subject to automatic review. RCW 90.58.180(1) ("any person aggrieved by the
22 granting . . . of a permit on shorelines . . . may seek review from the shorelines hearing
23 board . . .").
24
25

26 ⁶ Petitioners make no claim about any oral conversations that may have occurred at the time of this inquiry. The
27 City responded with declarations about those oral exchanges, but at best they would create material issues of fact
28 only if the City's fax response containing WMC 17.32.090 was found to be misleading. It is not, so the declarations
are superfluous.

⁷ "Any permit for a variance or a conditional use by local government under approved master programs, must be
submitted to the department for its approval or disapproval."

1 The two subsections following the preamble of WMC 17.32.090 define the
2 procedures for: (§§1) appeals to the Shorelines Hearing Board after a final decision by
3 the City;⁸ and (§§2) appeals to the City Council of decisions made by other individuals
4 (administrators) or entities (e.g., the planning commission, see WCC 17.32.080(d)(3))
5 within the City. The last sentence of this subsection addresses further appeal after appeal
6 to the City Council is concluded:

7 Appeals of the action to the City Council are appealable to the State Shorelines
8 Hearings Board within 21 days of the date the final decision was filed, as provided
9 in RCW 90.58.140(b) as described in subsection (1) of this section.

10 I conclude that the City's notice was not misleading.

11 **Contention: The City failed to give statutorily required notice.**

12 Petitioners contend that the City failed to follow the law, WMC 18.32.080(d)(4),
13 by failing to mail notice of the Planning Commission decision to Smith & Lowney,
14 P.P.L.C., in Seattle. To establish violation of the law in this respect, Petitioners must
15 show that the City had a legal obligation to mail the notice to the law firm representing
16 them.

17 It is undisputed that the three board member-spokespersons from the petitioner
18 organizations attended and testified at the May 21, 2001 open record hearing. Msrs.
19 Grunbaum, Engvall and Swickerath each signed in, listed his address, and indicated his
20 intention to testify. Each was sent a written notice of the Planning Commission decision
21 that triggered the appeal period. After the notice was mailed but before the appeal period
22 expired, Mr. Engvall sought information about the appeal process from city staff. He
23 received a fax copy of WMC 32.18.090 and forwarded it to others.⁹

24
25 ⁸ A final decision is one for which there is no further appeal to the City.

26
27 ⁹ A reasonable interpretation of the faxed document and handwritten notes thereon submitted to the court by Mr.
28 Lowney is that the City faxed the material to Brady Engvall on August 6, 2001, at 12:44 p.m. It contained a note to
him signed by staff person "Pat." At 5:40 p.m. on that same day, Mr. Engvall faxed the material to another person
with a handwritten note addressed to "RD". At 7:45 a.m. the following day, the material was faxed from a location
identified as Alaskan Copper & Brass, to an unknown person. There is a handwritten note at the bottom initialed by
"RD". The notation "Knoll" appears at the top of the page in similar handwriting and style to the note from "RD".

1 Mr. Lowney also appeared at the May 21 open record hearing. He did not sign in
2 personally, but the sign-in sheet bears his name in handwriting very similar to Mr.
3 Grunbaum's – and with the same Westport address as Mr. Grunbaum's. On the same
4 date as the hearing, Mr. Lowney authored written comments on the Smith & Lowney
5 letterhead. In that letter, he is clear that his comments are on behalf of his clients, the two
6 petitioners. He did not direct or request any provision for special notice of proceedings.

7 The record is not clear whether the notice of the Planning Commission decision
8 was sent to Mr. Lowney at the Westport address listed in the sign-in sheet.¹⁰ In any
9 event, it did not reach him in Seattle.

10 Upon the undisputed facts above, the issue is thus framed: whether the City's
11 failure to send notice of the Planning Commission decision to Smith & Lowney in Seattle
12 relieves the petitioners from their responsibility to exhaust their administrative appeal to
13 the City Council. I conclude that it does not.

14 The petitioner organizations are entities comprised of individuals, usually
15 members, who act and speak for the organization. Here, three members appeared and
16 spoke for the petitioners. Each received actual notice of the planning commission
17 decision triggering the appeal period. It follows that the organizations (the petitioners)
18 for whom they were acting and speaking received notice through these individuals. An
19 attorney, Mr. Lowney, commented in writing on behalf of the organizations. He did not
20 receive notice, but he is not a petitioner and the organizations for whom he acted received
21 notice by alternative means. The status of an attorney accompanying a member-
22 spokesperson of an organization to a public hearing, or writing on its behalf, is different
23 from the status of an attorney who appears formally in litigation. In the latter status,
24 court rules make the attorney sole spokesperson. The Notice of Appearance invariably
25

26 At some point, the material reached the Smith & Lowney law firm, from whence it was faxed to the court on
27 October 29, 2001.

28 ¹⁰ The record submitted by the City establishes only that the City sent notice to the three members. The declaration
does not address whether notice was sent to Mr. Lowney or other persons who signed up to give testimony. The
City's ordinance would require such notice.

at 11

1 defines that status further by making the attorney the sole conduit for exchanging
 2 pleadings, notices, and even informal communications between the litigants. Imposing
 3 the formality of litigation upon communications between individuals or entities and local
 4 government would impose an unreasonable burden on local government and an
 5 unnecessary impediment to communication between the government and the citizens it
 6 serves.¹¹ The law, specifically RCW 36.70B.130 and WMC 32.18.080(d)(4), does not
 7 require such a limitation; the choice made by the City to communicate notice to
 8 petitioners' member-spokespersons was not in violation of the law and was sufficient to
 9 give notice to the petitioners. This case is not an instance where the organization failed
 10 to receive actual notice; nor is it an instance where the organization or the law firm
 11 involved requested specific notice for the law firm or limited the method of giving notice
 12 to the organization to notice through the law firm. Each of those instances would require
 13 a different analysis.

14 **Misjoinder.**

15 Respondents seek dismissal of the declaratory judgment action or, alternatively,
 16 severance of that claim from the LUPA action. If the alternative remedy is granted,
 17 respondent City seeks transfer of the claim to Grays Harbor County where, it contends,
 18 venue is appropriate.

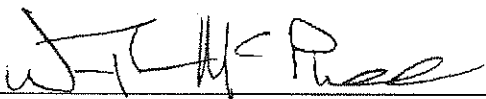
19 The motion to sever the LUPA and declaratory judgment claims is granted. The
 20 authority for this decision springs from CR 2.1. Although entitled, *Misjoinder and*
 21 *Nonjoinder of Parties*, the rule contains the additional provision that "Any claim against a
 22 party may be severed and proceeded with separately." In exercising the court's discretion
 23 to sever these claims, I am guided by the following considerations.

24
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 26
 27
 28 ¹¹ For example, imposing this requirement would prevent the sort of informal communication between Mr. Engvall and the City that Mr. Engvall initiated here on behalf of the petitioners.

1 The court's prior denial of change of venue focused on the LUPA action and
2 found that venue was proper in this county solely because of the presence of Mox-
3 Chehalis as a party respondent. That ruling should not and does not control the court's
4 decision on the motion to change venue for the declaratory judgment after severance.

5 Respondents have prevailed on the matters covered in this Court's Opinion.
6 Counsel for respondents should prepare and present an appropriate order.

7
8 Dated: January 29, 2002.

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11 _____
12 Wm. Thomas McPhee, Judge
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Superior Court of the State of Washington

For Thurston County

Daniel J. Berschauer, Judge
Department No. 1
Paula Casey, Judge
Department No. 2
Richard A. Strophy, Judge
Department No. 3
Wm. Thomas McPhee, Judge
Department No. 4
Richard D. Hicks, Judge
Department No. 5
Christine A. Pomeroy, Judge
Department No. 6
Gary R. Tabor, Judge
Department No. 7



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January 29, 2002

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Re: Friends of Grays Harbor v. City of Westport
Thurston County Cause No. 01-2-01641-2

Dear Counsel:

Enclosed please find the Court's Opinion filed on today's date.

Sincerely,

Trina Wendel
Judicial Assistant, Department 4

/tw