BEFORE THE ENVIRONMENTAL AND LAND USE HEARINGS BOARD
STATE OF WASHINGTON

FRIENDS OF GRAYS HARBOR and WASHINGTON ENVIRONMENTAL COUNCIL, Appellants, v. CITY OF WESTPORT, MOX-CHEHALIS LLC, PORT OF GRAYS HARBOR, and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondents.	ELUHB NO. 03-001 (DE NOVO) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Appellants Friends of Grays Harbor (FOGH) and Washington Environmental Council (WEC), challenged the Shoreline Conditional Use Permit approved initially by the City of Westport and issued by the Department of Ecology, Ecology's §401 Certification under the Clean Water Act and Ecology's determination of consistency with the Coastal Zone Management Act (CZMA) for a destination resort project known as the Links at Half Moon Bay. The Environmental and Land Use Hearings Board (Board) conducted a hearing on this de novo portion of the case on August 22-26, 2005, and on September 12, 2005. Counsel Knoll Lowney represented FOGH, counsel Jennifer Joseph and Jennifer Harris represented WEC, counsel 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

represented the Port of Grays Harbor. The Port did not actively participate in the hearing. Administrative Appeals Judge, Phyllis Macleod, presided for the Board comprised of Bill Clarke, chair, William H. Lynch, David W. Danner,[1] Judy Wilson, O'Dean Williamson and Dan Smalley. Kim Otis and Randi Hamilton of Gene Barker and Assoc., Olympia, Washington, recorded the proceedings.

Witnesses were sworn and heard, exhibits were introduced, and the parties presented arguments to the Board. The Board affirms Ecology's CUP under the Shoreline Management Act (SMA) authorizing wetland fill and related mitigation for the golf course, and also Ecology's CZMA consistency determination. While the design of the golf course and the NRMP provide an appropriate basis to meet water quality standards, the Board remands the Clean Water Act §401 determination to Ecology to clarify certain aspects of the Natural Resource Management Plan (NRMP) necessary to meet the standard of reasonable assurance and to determine groundwater levels to provide reasonable assurance that infiltration can indeed occur. Based on the evidence presented, the Board issues the following:

FINDINGS OF FACT

1.

The respondent Mox-Chehalis L.L.C. proposes a project known as the Links at Half Moon Bay, including two hotels, a conference center, a "Scottish Links" style golf course, ocean front condominiums, and supporting commercial development. It is anticipated Phase I of the

[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.

development will include one hotel structure with conference center and some commercial/retail development. Phase I will also include the construction of the 18-hole golf course with all appurtenances including shelters/restrooms, cart paths, bridges, club house, golf maintenance building, and driving range. Utility and transportation infrastructure improvements will also be part of Phase I construction activities. Phase II will include construction of the second 200-room hotel, additional commercial/retail development, and approximately 200 condominium units in eight buildings. (RW-1, WSH00004).

2.

The project site is approximately 355 acres in size and is located in the northwest portion of the City of Westport near Point Chehalis, adjacent to Westhaven State Park and north of Westport Light State Park. The site is located in the Urban Shoreline Environment and is zoned Tourist Commercial. (Ex. RW-12). The property is bordered by the Pacific Ocean to the west and Half Moon Bay to the north, Westport Light State Park to the south, and Forrest Avenue to the east. The site is bisected in the northerly area by Jetty Access Road, which leads to Westhaven State Park and the South Jetty. A pedestrian walkway connecting Westhaven State Park and Westport Light State Park runs north/south along the western portion of the property. A pedestrian walkway also extends along the shore of Half Moon Bay north of the property leading toward a Coast Guard viewing tower and public parking area adjacent to Half Moon Bay. (Ex. RW-1, WSH00004, RW-10). The public areas adjacent to the site contain some of the most frequently visited ocean beaches in the State of Washington. The Pacific Ocean beach and the

Half Moon Bay beach are used by the public for a variety of shoreline uses including surfing, swimming, beachcombing, and picnicking. (Testimony of Arthur Grunbaum and Ex. A-25).

3.

In 1993, the Pacific Ocean breached the South Jetty west of the project site. Significant erosion ensued. The U.S. Army Corps of Engineers developed plans to repair and maintain the jetty as part of its mission to protect the Grays Harbor navigation channel. Part of the work undertaken in response to the jetty breach involved construction of a buried revetment along a portion of the shoreline of Half Moon Bay. In litigation regarding the jetty repair and buried revetment project, the Corps agreed to maintain a beach profile of approximately 1 vertical on 60 horizontal on Half Moon Bay to allow for continued public access to the water. (Ex. A-63). The Corps also built a wave diffraction mound and gravel transition beach on the west end of Half Moon Bay adjacent to the South Jetty. Sandy dredge spoils are placed on the beach and upland area of Half Moon Bay to help avoid future erosion in the area. (RW-17, p. 13).

4.

The major buildings contemplated by the developer for this project are located on uplands north of Jetty Access Road in areas that will not require filling wetlands. The condominium site, however, is on uplands south of the Jetty Access Road near the parking lot for Westhaven State Park. The proposed construction does not directly call for installation of bulkheads, riprap, seawalls, or other shoreline protection structures. (RW-17, p. 14). Utilities will be located in the existing Jetty Access Road right of way to the maximum extent possible. The developer will be required to improve Jetty Access Road to include a sidewalk and bicycle

path, which will improve public access to Westhaven State Park. A pedestrian walkway will be constructed to link the hotel and conference center with the City of Westport waterfront trail in the area. The developer will also be required to install paved access points from the trail to the beach every 660 feet along the trail. (Ex. RW-17, p. 9).

5.

The hotels are proposed on uplands in the northeast portion of the site. The hotels will be visible from the commercial areas near the Westport marina, but they will not block any views of the Pacific Ocean or Half Moon Bay from existing residences. The condominiums are visible from Westhaven State Park and the Westport Light Trail. The condominium buildings, however, are landward of the park and trail property and will not block views from Park property of the Pacific Ocean or Half Moon Bay. After construction of the project, the view looking east from the Westport Light Trail will be different from the existing undeveloped dunal area. (RW 17- p. 8).

6.

The golf course design proposed for the site has been modified a number of times to address concerns over filling and/or impacting wetlands. The designers carefully evaluated if a design could be developed that did not require alteration of wetlands. The conclusion was that such a design could not be used and still allow for play by most average golfers. The pattern of wetlands on the site is very scattered in small pockets with small upland spaces between them, leaving very few areas of any good size to design golf play areas. If the course were designed

with no wetland impacts, it would present a "forced carry"[2] situation on almost every shot, which would not be considered fair or playable by most golfers. Having concluded that some filling would be necessary, the course designers worked diligently to reduce any impacts to wetlands to an absolute minimum while maintaining the integrity of play for the average resort golfer. (Prefiled testimony of Richard Robbins, ¶4).

7.

The course design involves 18 holes and a practice driving range. The course will be open for play by the public and resort guests. Greens fees will be charged. A nine hole course was evaluated, but such a design is not consistent with the type of play desired by the golfing community, and such a course would not have the capacity to handle the amount of play required to service a resort and the public. *Id*, ¶5. The Links at Half Moon Bay design will require maintaining only 52 acres of turf rather than the 80-90 acres typical on average golf courses in the United States. *Id*, ¶3. The Scottish Links style course utilizes the seaside terrain as a feature of the design and incorporates sand dunes and existing vegetation into the overall experience.

8.

The area south of Jetty Access Road is currently comprised of undeveloped coastal dunes and interdunal wetlands extending well into Westport Light State Park. (Ex. A-6). Jurisdictional wetlands within the boundaries of the project site were originally delineated by Ecological Land Services, Inc. in 2000. The delineation showed 170 wetlands on the site, which totaled

---

[2] A "forced carry" is a situation that makes a player hit a shot of some distance over a hazard. These hazards may be 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)

approximately 150 acres. Wetlands at the site are comprised of emergent, scrub-shrub, and forested vegetative communities surrounded by uplands vegetated with European beach grass, Scot's broom, and shore pine. Vegetation in the wetland areas consists of emergent species within the westernmost wetland areas with more heavily dominant shrub and forest species in the middle and easternmost portions of the site. (Ex. RW-8, p.1). The easterly 100 plus acres of the site is a forested wetland with a more diverse habitat than the emergent and shrub areas to the west. (Ex. RW-8, p. 15).

9.

Many areas on the site are heavily impacted by infestations of Scot's broom. Scot's broom covers approximately 50 acres of the site with over 30 percent coverage. Absent human intervention, the proliferation of Scot's broom could double or triple in the next ten years and could interrupt the succession of native plants, diminish native plant diversity, and cause deterioration of wetland habitat. (Ex. RW-17, p. 5 ¶17).

10.

Hydrology at the site is influenced by both surface water and groundwater and is highly variable throughout the year. The majority of the wetland areas are inundated during the winter months and dry during the summer months. Groundwater is generally shallow throughout the site and is expected to match surface water elevations in the larger wetland areas in the center and eastern portions of the site. Surface water at the site generally flows to the north where it eventually enters ditches that drain to a roadside ditch that parallels the western side of Forrest Avenue. From this point, surface water flows beneath Forrest Avenue via a culvert and enters

another ditch system that eventually discharges to Grays Harbor near the airport. (Ex. RW-1, WSH00006). Movement of groundwater on the site and groundwater elevations on the property have not been thoroughly studied. Some fifteen test wells have been drilled on the site, but data has not been collected from them since a preliminary effort in October 2001. (Ex. RW-4, Ex. 8)(Testimony of Horton). That initial testing revealed groundwater levels in October 2001 ranging between 3.0 feet and 5.0 feet. *Id.* It is believed that most groundwater on the site flows to the north and is hydraulically connected to Half Moon Bay. Some groundwater may flow south to areas near the Westport drinking water wells. (Testimony of Kimsey).

11.

Over the years, birds have used the site as habitat primarily for bathing and resting. No evidence was presented establishing the presence of endangered or threatened bird species on the site. The Grays Harbor area is known as an important location on the migration route for north-migrating spring shorebirds. The interdunal environment, such as that located on the site, provides shelter for the migrant birds and fresh water for bathing. Food for shorebirds is available in nearby saltwater mudflats and tidal zones. Significant areas in the Grays Harbor vicinity critical to shorebird use during migration have been specifically protected through federal legislation in 1988, leading to creation of the Grays Harbor National Wildlife Refuge. (Ex. A-142). The project site is not included within the boundaries of the Grays Harbor National Wildlife Refuge.

12.

The parties disputed the nature and extent of any habitat on the site for Coho salmon. Initially, the area was not identified as Coho habitat, but in February 2002, the Washington Department of Fish and Wildlife (WDFW) observed 5-6 Coho smolts in a flooded area along the Fire Road on the south edge of the project property, and 5-6 Coho smolts in the Forrest Avenue ditch along the eastern boundary of the property. (Ex. A-150). Juvenile Coho salmon are known to use flooded coastal wetland habitat for rearing and refuge. To some extent they are also capable of emigrating from flooded wetlands. There is no upstream source for fish to access the project site. (Prefiled testimony of Fisher ¶8). Coho entering the area would have to leave salt water and pass the floodgate located on the Forrest Avenue ditch.

13.

WDFW's findings were based on data obtained by shocking water in the Forrest Avenue Ditch and water near the intersection of the Forrest Avenue Ditch and the Fire Road on the southern border of the property. The remainder of the site was inaccessible on the day of WDFW's site visit due to high water on the Fire Access Road. WDFW was unable to systematically sample the areas within the wetland complex on the site for useable Coho habitat. Dr. Jeffrey Fisher was hired by the applicant to conduct a more complete analysis of the area. He evaluated fish habitat along transects within the interior of the project site. He observed "dendritic" (i.e. capillary-like) channels connected to the Forrest Avenue ditch, which could provide access to the adjacent forested wetland if water levels extended above the elevation of the tops of the channels due to temporary high water. The likelihood of fry/smolts being

stranded on the site by receding waters increases as the fry/smolt stray further from the ingress and egress channels associated with the Forrest Avenue ditch. (Prefiled testimony of Fisher, ¶14). There was no substantial evidence salmonids are actively using wetlands on the site beyond the forested wetland area that is being preserved under the proposed project. (Prefiled testimony of Fisher ¶¶ 14-20).

14.

For many years the Port of Grays Harbor owned the property in question. During that time the area remained largely undeveloped, although there are signs people have used portions of the property for camping, walking, and off-road vehicle use. (Ex. RW-10, p.3). During 1995 and 1996, the Port engaged in a public planning process that culminated in a decision reflected in the Port's Master Plan to encourage the sale of this property to private parties for development as a major destination resort. Development of a destination resort was seen as the central programmatic element in the revitalization and redevelopment of Westport. (Ex. RW-15). The City of Westport updated its Shorelines Master Program and Zoning Code in 1996 to allow for a master planned destination resort on this parcel. *Id.*

HISTORY OF THE PROJECT

15.

Environmental review of the Links at Half Moon Bay destination golf resort development for this site began with the City of Westport issuing a Determination of Significance and Request for Comments on Scoping, which led to a scoping meeting and preparation of a Draft Environmental Impact Statement (DEIS) dated November 1, 2000. A Final Environmental

Impact Statement (FEIS) was issued, dated March 23, 2001. The applicant also applied for a Master Plan Approval for the project and a shoreline substantial development permit (SSDP) and shoreline conditional use permit (CUP).

16.

The City approved the master plan for the Links at Half Moon Bay after the Hearing Examiner held an open record predecision hearing to take testimony regarding the application on May 21 and May 23, 2001. Following a recommendation from the hearing examiner for conditional approval of the application, the City Council approved the Master Plan. The plan approval was challenged by Friends of Grays Harbor in Thurston County Superior Court pursuant to the Land Use Petition Act, Ch. 36.70C RCW. The appellants also challenged the adequacy of the project EIS in that proceeding. On January 29, 2002, the Superior Court issued an oral opinion dismissing the SEPA claims for failure to exhaust administrative remedies. On March 1, 2002, a written order was entered dismissing the SEPA claims made in the LUPA action.

The Superior Court, however, remanded the master plan ordinance to the City of Westport based on an appearance of fairness violation. The City Council again approved a master plan ordinance for the Links at Half Moon Bay after a closed record hearing on September 10, 2002. The City Council proceeded to pass Ordinance 1277 on October 8, 2002, approving the Master Use Plan for the Links at Half Moon Bay. (Ex. RW-13). FOGH appealed the new approval to Thurston County Superior Court and the court upheld the master plan ordinance in an Order dated May 21, 2003. (Ex. RW-14). FOGH did not appeal this decision.

17.

In 2001, the City issued both a SSDP and a shoreline CUP for the project. A CUP was necessary to authorize filling wetlands as part of the golf course construction. The Department of Ecology denied the CUP and appealed the SSDP to the Shorelines Hearings Board (SHB). FOGH intervened in the SHB case. While the case was pending before the SHB, the applicant, the City of Westport, and Ecology engaged in a lengthy series of negotiations regarding revisions to the project plans and conditions. An agreement was ultimately reached, but the project had been modified to the extent that a new SSDP application and shoreline CUP application was deemed appropriate. At the parties' request, the SHB remanded the appeal to the City of Westport for processing of new applications.

18.

Following the Superior Court's approval of the Master Plan ordinance and the SHB remand, the applicant submitted a new Joint Aquatic Resource Project Application (JARPA) for issuance of a SSDP and shoreline CUP. (Ex. RW-1). That application contained the proposal on appeal in the current case. In conjunction with the new JARPA, the applicant filed an addendum to the FEIS addressing changes incorporated since the original FEIS. (Ex. RW-4).

The City of Westport Planning Commission held an open record hearing on the shoreline permits on September 10, 2003. (Ex. R-17, p. 2). The Planning Commission entered Findings of Fact and Conclusions of Law approving the SSDP and CUP on September 30, 2003. FOGH and WEC appealed the approval to the Westport City Council, which held a closed record appeal hearing on October 28, 2003. After refusing to allow supplementation of the evidentiary record

to reflect significant October 2003 erosion events on Half Moon Bay, the Council affirmed the Planning Commission's decision on the SSDP and CUP on October 28, 2003. (Ex. RW-18). The Department of Ecology then approved the shoreline CUP by letter dated December 4, 2003. (Ex. RW-19). FOGH and WEC timely appealed the shoreline decisions to the ELUHB Board in this case.

19.

The case was filed before the ELUHB Board because Mox-Chehalis applied to the State of Washington Office of Regulatory Assistance in July 2003 requesting the Links at Half Moon Bay be designated as a "qualifying project" under the Laws of 2003, Chapter 393, Section 3 (Ch. 43.21L, RCW). The Office of Regulatory Assistance found the project qualified because it was proposed in a "distressed area" as defined by the statute and was designed to provide at least thirty full-time year-round jobs. (RE-21). The Westport and Port of Grays Harbor governments have been looking for economic development opportunities to revitalize the tourist segment of the local economy, since traditional fishing and timber businesses have declined in recent years.

§401 CERTIFICATION

20.

On August 14, 2003, Mox-Chehalis LLC requested a water quality Certification from the State of Washington for the Links at Half Moon Bay project pursuant to the provisions of 33 U.S.C. §1341 (Federal Water Pollution Control Act §401)(§ 401 Certification). Such a Certification is required as a step in obtaining the necessary approval from the Army Corps of Engineers to fill wetlands. Construction of the golf course will require filling certain wetlands to

create the fairways, tees, and greens. On August 13, 2004, Ecology issued Order #1612, granting §401 Certification for the Links project. (Ex. A-134).

The Certification incorporated the Audubon International Natural Resource Management Plan (NRMP) dated August 1, 2001, and the Wetland Mitigation Plan for the Links at Half Moon Bay Westport Golf and Hotel Destination Resort dated February 6, 2002, with identified additions and clarifications. (Ex. A-134, pp. 11, 4 respectively). At hearing, Ecology testified the NRMP incorporated into the §401 Certification was actually a revised version still dated August 1, 2001, but received by Ecology in March 2004.

21.

In evaluating a request for §401 Certification, Ecology must determine whether there is "reasonable assurance" the activity in question will be conducted in a manner that will not violate applicable water quality standards. Ecology utilized a number of experts from within the Department to examine the proposal and review reports submitted by the project proponent's consultants. Ecology was evaluating the adequacy of mitigation for impacts resulting from the filling of wetlands, the likelihood of groundwater contamination, and the potential for pollution of on-site and surrounding surface waters.

22.

Golf courses are considered a high impact use under Ecology's most recent guidance on protecting and managing wetlands. (Ex. A-35, April 2005). This rating reflects the level of human activity typical on a golf course, as well as the common use of pesticides, fertilizers, and other chemicals to maintain a course in optimum playing condition. Most golf courses have a

stormwater collection system to intercept water flow from the highly managed areas of the course such as tees and greens for treatment prior to discharge into surface water. The original design for the Links at Half Moon Bay proposed such a collection system. During the ongoing discussions between the applicant, the City, and Ecology, it was determined that the collection system might not be workable because it would modify the existing hydrology of the wetlands and groundwater on the site, and could result in severe groundwater mounding, flooding, and localized changes in groundwater flow. (Prefiled testimony of Kimsey, p.5).

23.

In response to the problems attending a "collect and treat" type of system, the applicant developed a plan involving infiltration without additional treatment as the method for protecting water quality. The infiltration plan is unique to the site in question and takes into account the sandy soils on the Links property. The use of infiltration, rather than a collect and treat system, would help maintain the existing hydrology of the site. The infiltration plan is contained in the NRMP prepared for the applicant by Audubon International Institute. (Ex. RE-6). Audubon International is a not-for-profit environmental organization that specializes in sustainable natural resource management. The Audubon Signature Program provides comprehensive environmental planning assistance to landowners with projects in the design and development stages. The Signature Program focuses on wildlife conservation and habitat enhancement, water quality management and conservation, waste reduction and management, energy efficiency, and Integrated Pest Management. (Ex. E-6, p. 1-5). The project approvals for the Links at Half Moon Bay require the golf course to maintain an approved status with the Audubon International

Signature Program at the Silver Level. In this case, the Natural Resources Management Plan for the Links at Half Moon Bay focuses on three main components: (1) Prevention, (2) Control, and (3) Detection. (Pre-filed testimony of Peacock, p.3).

24.

Prevention involves careful construction practices, preserving wooded areas and specimen trees to the maximum extent possible, and using the least intrusive methods and machinery for clearing. The NRMP also indicates construction should direct surface and subsurface drainage away from greens over vegetative buffers, through vegetative swales, or into sumps before discharging to water. Fairway drainage also should be routed away from direct input to surface waters. (Ex. RE-6, p. 2-17).

Another prevention strategy is to observe special management zones in an effort to protect resources. In this case, a 25-foot no spray zone has been established around each water body including ponds and wetlands. No pesticides will be used in these areas and only organic fertilizers will be applied. A limited spray zone is also contemplated which will either extend to the entire golf course or will extend over the area beginning 25 feet landward from the normal water elevation and extending 50 feet landward from the normal water elevation. (Ex. RE-6, p. 2-30). The limited spray zone would involve use of a limited set of pesticides and would allow only organic fertilizers or "spoon feeding" of non-organic fertilizers. Equipment to avoid overspray in windy conditions is also required in the limited spray zone (Ex RE-6, p. 2-12). While the evidence indicated the applicant had agreed to make the entire course a limited spray

zone, the NRMP in evidence, and incorporated into the §401 Certification, has inconsistent language regarding that limit. (Compare Ex. RE-6, p. 2-12, Ex. RE-6 pp. 2-30-33.)

25.

A comparison of the details contained in the "revised" 2004 version of the NRMP and the 2001 NRMP showed that the later version did make some additional restrictions on the use of pesticides, but it also made some restrictions more ambiguous and may provide less water quality protection.

Three different management zones are established in both versions of the NRMP to address resource and habitat protection. No Spray Zones are established around each water body[3] 25 feet landward from normal water elevation. Limited Spray Zones are established around each water body beginning 25 feet landward from normal water elevation and extending 50 feet landward from normal water elevation. Bridge crossings are special management zones for constructing the bridges associated with the cart path. The narrative portion of the 2004 NRMP states that "[t]he Links at Half Moon Bay will be treated as a Limited Spray Zone because of the proximity of the golf holes to wetlands." (Ex. RE-6, at 2-12.) When reviewing the detailed recitation of practices for each golf hole, however, there are portions of the course that are not contained within a management zone. (Ex. RE-6, Table 2-4.) Comparing holes 1 and 4, hole 1 has a No Spray Zone and a Limited Spray Zone established for the green, tees, and fairway. Hole 4 only has a No Spray Zone and a Limited Spray Zone established for the green.

[3] Ponds and wetlands.

The tee area and the fairway/landing area for hole 4 are not contained within a management zone. The tee area and the fairway/landing area for hole 4 does not require drainage to pass through at least 50 feet of vegetative filter or into a regulated runoff impoundment. The fairway/landing area for hole 4 does not require the use of lateral swales or elevated fairway edges to direct the water. Likewise, holes 7 and 15 are identical to the management zones and treatment specified for hole 4. Table 2-4 is also confusing because sometimes the management area for a particular hole will include the fairway but not the landing area[4] , sometimes it will include the landing area but not the fairway[5], and other times it will list both the fairway and the landing area.[6] It is unclear to the Board whether the terms "fairway" and "landing area" are meant to be used synonymously in this section, or whether it is intended to exclude additional portions of the course from the management zones. Regardless, it is clear that the detailed recitation of practices for each hole is inconsistent with the narrative in the NRMP that the entire course will be treated as a Limited Spray Zone.

26.

The second element of the resource protection plan involves control. The NRMP views control as providing appropriate management of materials and systems so that environmental problems do not occur. The plan utilizes Best Management Practices and Integrated Pest Management to meet this goal. Best Management Practices identified for the Links include the use of biofilters or vegetated buffer strips to provide filtration before drainage reaches open

---

[4] Hole 1 for example.
[5] Hole 3 for example
[6] Hole 6 for example.

water areas or wetlands. While detention with associated filtration, grassy swales, and dry ponds are mentioned in the plan as possible control practices, the only evidence these devices are actually incorporated into the Links design is the description of practices for each golf hole. (Ex. RE-6, Table 2-4). Although the level of detail is lacking on how these BMPs will eventually be incorporated around each golf hole, the Board believes Ecology will ensure that these are in fact incorporated into the final design and construction of the golf course.

27.

The primary treatment method for stormwater at the Links site is infiltration. Infiltration is a recognized means to manage stormwater identified by the Stormwater Management Manual for Western Washington. (Ex. RE-29). Infiltration was seen as a viable option at the project site because it will mimic the natural conditions. (Prefiled Testimony of Kimsey, p. 7). In order for infiltration to work effectively as a stormwater treatment strategy, all Site Suitability Criteria (SSC) must be met. (Ex. RE-29, p. 3-70). Depth to water table is addressed at SSC-5:

> The base of all infiltration basins or trench systems shall be ≥ 5 feet above the seasonal high-water mark, bedrock (or hardpan) or other low permeability layer. A separation down to 3 feet may be considered if the 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.

Viability of the infiltration system is dependent on adequate separation between the soil surface and the groundwater table. The data submitted to Ecology in connection with this project does not contain groundwater table readings for the wet season occurring from November through March. The only data in support of infiltration treatment reports ground water levels in

October and May. (Testimony of Kimsey). Testimony and photographic evidence indicate the groundwater table is very near the surface during the rainy parts of the year. To support a scientifically valid analysis of the potential for groundwater or surface water contamination on this site, or any limitations necessary to avoid it, adequate data for all seasons is necessary. On the record before the Board, this data has not been collected or analyzed.

28.

Operational issues at the golf course are addressed through a combination of source controls and monitoring. Source controls include the design elements targeted to reduce runoff to wetlands and open waters, as well as the plan for selection and application of pesticides, and fertilizers. A risk assessment was conducted for the use of numerous pesticides[7] at the golf course. The risk assessment, known as a Tier 1, evaluated these pesticides by assuming the "worst case" application and environmental conditions and comparing the resulting maximum anticipated concentrations of the pesticide against acute and chronic toxicity levels for aquatic organisms as well as human health toxicity levels. Under the formula used, if the quotient for the equation was less than one, negligible risk for the pesticide was assumed. If the quotient was greater than one, potential risk for the pesticide was assumed. (Ex. RE-6, at 3-21 – 3-24.) The results of the risk assessment are illustrated in Table 3-9. (2004 NRMP is Ex. RE-6, at 3-25 – 3-27; 2001 NRMP is Ex. RW-6, at 64 – 66.)

[7] Pesticides include fungicides, herbicides, insecticides, and nematicides. A plant growth regulator, triexpac-ethyl was also evaluated.

29.

The Petitioners raise concerns regarding the reclassification of the herbicides bromoxynil and dithiopyr from the potential risk category in Table 3-9 in the 2001 NRMP to the negligible risk category in Table 3-9 in the 2004 NRMP without explanation. (Testimony of Philip Dickey, September 12, 2005). The reclassification of dithiopyr is particularly puzzling because the appendix, which contains the results of the Tier I modeling contains a blank on the last column of the table, and this column pertains to human health. (See Ex. RE-6, Appendix I, Table I-2.) Despite the lack of explanation for the reclassification of these two pesticides, Petitioners' concerns are not well-founded because the 2004 NRMP also prohibits the use of these pesticides on the golf course. (Ex. RE-6, at 3-24; Table 3-10.)

The 2004 NRMP also removed the use of trichlorfon, chlorothalonil, mancozeb, chlorpyrifos, thiopnate-methyl, thiram from the golf course. (Ex. RE-6, at 3-23 – 3-24; Table 3-10.) Trichlorofon is listed as having a potential risk, the other pesticides are listed as having negligible risk. Table 3-10 also lists cyfluthrin as not available for use on the golf course, but this is not listed in the narrative portion of the NRMP. It is also confusing that some pesticides that are banned from use on the golf course appear in the risk assessment results in Table 3-9[8], but other banned pesticides do not appear in this same table.[9] Similarly, the results of the risk assessment for some pesticides are listed in Table 3-9 in the 2001 NRMP[10], but the results of these same pesticides are not listed in Table 3-9 of the 2004 NRMP, and there is no

[8] Bromoxynil, dithiopyr, trichlorfon, chlorothalonil, chlorpyrifos, thiopnate-methyl, and cyfluthrin.
[9] Mancozeb and thiram.
[10] PCNB for example.

accompanying explanation. The Board can only assume that pesticides that are not listed in Table 3-9 of the 2004 NRMP are not approved for use on the golf course, and that even if a pesticide is listed in Table 3-9, it still may not be approved for use on the golf course if the NRMP indicates elsewhere it is not to be used. The NRMP version before the Board will not be the final version incorporated into the §401 Certification. The revised NRMP should ensure there is consistency between Table 3-9, Table 3-10, and the narrative portion of the NRMP.

30.

Pesticides allowed for use within the limited spray zone are more difficult to interpret under the 2004 NRMP. In the 2001 version, only certain products identified with an asterisk on Table 3.9 were authorized for use in the limited spray zone. The corresponding table in the revised NRMP does not contain any asterisks, raising an ambiguity regarding pesticide use in the limited spray zone. A number of pesticides prohibited for use in the older version are now allowed without limitation. These include the herbicides bensulide, bentazon, mecoprop, oxadiazon, and prodiamine, which were specifically restricted in the 2001 NRMP to only one application per year outside the management zones. Similarly,the insecticide lambda-cyhalothrin was prohibited for use within the management zones and was limited to two applications per year. (Ex. RW-6, Table 3-10.) The lack of any explanation in the 2004 NRMP for the unlimited use of these pesticides in management zones is a serious flaw in the NRMP. In addition, halosulfuron, was reclassified as having no data to negligible risk, even though there is no data available on the risk to human health. (Ex. RE-6, Table 3-9; Appendix I-2.)

31.

The NRMP generally states that the application of pesticides should be avoided when "heavy rain" is forecast. (Ex RE-6, p. 2-22.) Although there were references over the course of the hearing regarding no application of pesticides within 48 hours of a storm event, this language is lacking in the NRMP and the §401 Certification. Because the NRMP itself recognizes that "water is the primary movement mechanism for contaminants,"[11] the NRMP needs to provide more specificity regarding the application of pesticides around rainfall events. In addition, the NRMP and §401 Certification are silent about irrigation after the application of pesticides. Irrigation water is also a potential source for moving contaminants on the golf course.

32.

Concerns were raised over the use of fertilizers. The NRMP does address fertilizer applications. The supervisor is responsible under the NRMP for controlling the rate and frequency of fertilizer application. Ex. RE-6, at 3-12. Table 3-3 sets forth the general fertilizer applications for the greens and tees. In this table, different application frequencies are established for nitrogen, phosphorous, and potassium. The roughs are to be fertilized three times a year. Ex. RE-6, at 3-14.

33.

The expert testimony of Ecology Senior Ecologist Thomas Hruby indicated the applicant's mathematical modeling using EPA models GENEEC and SCI-GROW was not

[11] Ex. RE-6, at 2-18.

reliably predictive of pesticide concentrations to be expected in sandy soils with high rainfall such as exist at the Links site. As a result, he recommended additional conditions be placed in the §401 Certification at Condition J., requiring a monitoring program adequate to serve as an early detection system for any unacceptable concentrations of nutrients or pesticides occurring on the site that might pose a risk to water quality. (Pre-filed testimony of Hruby, p.3).

34.

A condition was incorporated in the §401 Certification relating to Dr. Hruby's concern over adequate monitoring, stating:

> Prior to the operation of the golf course the Applicant shall submit to Ecology for its review and written approval a final plan for monitoring the movement into groundwater and adjacent surface water, including wetlands, of each pesticide to be used on the golf course. The first two applications of each pesticide will have to be monitored at a minimum of three separate greens or fairways.

(Ex. A-134 p. 12, Condition J(3)(f)).

35.

The monitoring plan that is contained in the 2004 NRMP does not meet the standards set forth by Dr. Hruby in his testimony or in Condition J(3)(f). The §401 Certification relies upon the applicant submitting a new monitoring plan and the details that will be included on significant elements, such as sampling frequency and capture of peak concentrations, are 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

from pesticide use. The adequacy of the monitoring plan to detect water quality impacts on a site containing 170 separately identified wetlands and important groundwater resources is vital to determining whether reasonable assurance exists that water quality standards will be met during operation of the project.

36.

The monitoring program to protect water quality also lacks a clear standard against which the results are to be compared. Dr. Hruby suggests groundwater should not exceed human health standards and surface water should not exceed the acute or chronic toxicity criteria set by the U.S. Environmental Protection Agency. (Ex. A-134, p.12, Condition J (3)(g)). The testimony showed that EPA criteria for acute or chronic toxicity are not developed for many of the substances in question. The water quality standards required under the §401 Certification are not currently identified with any certainty. Dr. Hruby suggested the registration information or labeling could be used for items without EPA approved toxicity levels. Identification of the precise regulatory standard being required for monitored substances is lacking in the NRMP or the §401 Certification.

37.

In addition, the Board is concerned that no specific monitoring conditions are attached to the use of the nematicide fenamiphos, which has been identified under the risk assessment as having a potential risk to aquatic life and to human health. Although the application of fenamiphos is limited to one application per year on the greens only, there is no recognition of

the potential risks associated with its use in the monitoring provisions. Its use is treated the same as any other pesticide under the monitoring provisions of the NRMP

38.

By relying heavily on monitoring during operations to assure water quality standards are not violated, it becomes critical to define adequate remedial actions required if the monitoring program reveals a pollution problem. The §401 Certification simply provides that a new condition will be placed in the NRMP providing "the Applicant will discontinue the use" of any pesticide whose concentration in groundwater exceeds human health standards or whose concentration in the surface water of adjacent wetlands exceeds the acute or chronic toxicity criteria set by the U.S. Environmental Protection Agency. Detailed provisions for detections below or approaching trigger levels are not contained in the §401 Certification and are not adequately addressed by the NRMP. Expected actions in the case of excessive nutrients revealed by monitoring are also undefined.

WETLANDS

39.

The delineation of wetlands on the project site identified approximately 150 acres of wetlands on the property. (RW-8, p.1). To construct the golf course and associated improvements under the current plan, 9.96 acres of wetland will be filled, 0.23 acres of wetland will be excavated, and 14.63 acres of wetlands will be routinely pruned. There will be wetland buffer impacts of 12.36 acres from the golf course, 1.3 acres from cart paths and other structures associated with the golf course, and .027 acres from the condominiums.

40.

The wetland delineation and rating for the Links project was initially performed by Ecological Land Services, Inc. in a report dated September 2000. The original rating categorized the entire series of interdunal wetlands on the site as Category II wetlands. The wetlands were considered an interconnected mosaic. A later wetland delineation and characterization report was prepared by Ecological Land Services, Inc. in June 2003, which changed the characterization of wetlands on approximately the western third of the site from Category II to Category III. Francis Naglich, wetland biologist and principle of Ecological Land Services, Inc, performed the reclassification.

41.

Mr. Naglich indicated he engaged in this reclassification because:

> After reviewing the previous wetlands classification, it was my professional opinion that the patchwork area of wetlands in roughly the western one-third of the site had the vegetative diversity, habitat features and hydrological characteristics that are typical of Category 3 wetlands. These wetlands are relatively immature and have not had sufficient time to develop into more mature plant communities. Based on my observation they are more typical of Category 3 wetlands. I also reviewed the Dept. of Ecology Wetland Rating Manual (1993) which provides guidance on the categorization of wetlands within a patchwork 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).

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

restore upland areas being impacted by invasive species such as Scot's broom. (Pre-filed testimony of Lund, p. 6).

45.

In evaluating the adequacy of the applicant's proposed wetland mitigation plan, Ecology applied a 2:1 mitigation ratio contained in the Westport Shoreline Master Program. Ecology concluded the mitigation plan meets or exceeds that ratio. (Pre-filed testimony of Lund, p. 7). The evidence demonstrated the combination of mitigation strategies required, including the restoration of particularly important habitat at Firecracker Point, the preservation of Seastrand bog, and preservation of interdunal habitat at Mar Vista, would serve to mitigate the wetland impact generated by filling 9.96 acres of wetlands on the site. Appellant's evidence did not establish that the interdunal wetlands on this site are so unique that their functions and values simply cannot be mitigated through any plan.

46.

Wetland buffer impacts associated with the golf course were quantified by the applicant at 31.27 acres, using a standard of 100-foot buffers from Category II wetlands and 50 foot buffers from Category III wetlands. Buffer averaging in the amount of 18.91 acres was applied as an offset, to derive a net buffer impact of 13.93 acres. The mitigation proposed for these buffer impacts includes 22.32 acres of on-site upland dune restoration at a ratio of 2:1, 5.00 acres of upland dune restoration at Mar Vista at a ratio of 2:1, and 1.13 acres of enhancement and restoration of the remaining upland dune buffer following condominium construction at a ratio of 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

Corps of Engineers buried revetment project in the area. The revetment project required disturbance of a portion of wetland HMB. The Corps' delineation in 1998 was substantially larger than the Ecological Land Services' delineation in 2000. Appellants' expert Sarah Cooke, PhD., testified that the applicant's delineation was incorrect and that the Corps of Engineers delineation in 1998 more accurately reflected the extent of wetland HMB. The Wetland HMB area has been disturbed on more than one occasion and it is not of the same quality and nature as the nearby interdunal mosaic.

Ms. Cooke engaged in a reconnaissance of the site in June 2005, but did not actually perform a formal delineation of wetland HMB. Given the formal delineation of wetland HMB performed by Ecological Land Services and the Corps of Engineers' written acceptance of that delineation, the Cooke evidence, while credible, did not mandate a finding that the factual findings made by the City of Westport and Ecology regarding the size, location, and classification of wetland HMB were unsupported by substantial evidence.

49.

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

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

CONCLUSIONS OF LAW

1.

The Environmental and Land Use Hearings Board has jurisdiction over the parties and the subject matter of this case pursuant to RCW 43.21L.020 which provides, in part:

> The appeal process authorized in this chapter shall, notwithstanding any other provisions of this code, be the exclusive process for review of the decisions made by participating permit agencies on permit applications for a qualifying project.

In this case, the Links at Half Moon Bay project has been certified as a qualifying project by the Washington Office of Permit Assistance and the ELUHB Board is the appropriate forum for all final permit decisions on the qualifying project. This decision deals with those permit decisions subject to de novo review – the §401 Certification, the shoreline CUP, and the CZMA consistency determination.

2.

The scope of review for the ELUHB Board on the §401 Certification and the shoreline CUP is de novo. The burden of proof is on the appealing parties to show by a preponderance of the evidence that relief is appropriate.[12]

3.

In deciding the case, the ELUHB Board is guided by the standards in RCW 43.21L.130:

> (1) The Board shall review the decision record and all such evidence as is permitted to supplement the record for review restricted to the decision record or is required for de novo review under RCW 43.21L.120. The board may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:
>
> (a) The body or officer that made the permit decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

[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.

(b) The permit decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by an 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;

(d) The permit decision is a clearly erroneous application of the law to the facts;

(e) The permit decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The permit decision violates the constitutional rights of the party seeking relief.

(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.

4.

In reviewing Ecology's §401 Certification for the project, the Board recognizes Ecology is the agency charged with issuing §401 Certifications for the State. In doing so, Ecology must determine whether "there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards. 40 C.F.R §121.2(a)(3)." *See, Port of Seattle v. Pollution Control Hearings Board,* 151 Wn.2d 568, 589, 90 P.3d 659 (2004).[13] In this appeal to the ELUHB challenging Ecology's Certification, the Board is determining whether 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.

quality standards will be met. *Id.*, at. 592. In conducting such a review, the Board gives weight to Ecology's interpretation of the laws it administers and due deference to Ecology's technical expertise. *Id.,* at 594.

5.

In order to overturn a §401 Certification, Appellants must establish by a preponderance of the evidence that there is no reasonable assurance the applicable provisions of the Clean Water Act and state water quality standards will be complied with. *Port of Seattle,* 151 Wn.2d, at 592. Preponderance of the evidence means evidence that is more probably true than not true. *Airport Communities Coalition v. Ecology & Port of Seattle,* PCHB No. 01-160, Findings of Fact, Conclusions of Law & Order (2002), citing *In re Sego,* 82 Wn.2d 736, 746, 513 P.2d 831 (1973). Mere speculation or evidence raising only the possibility of an occurrence does not meet the preponderance of the evidence standard. "Reasonable assurance" does not require absolute certainty. The inherent predictive nature of a §401 Certification cannot be avoided; each § 401 Certification must address future events and the likelihood that those events will result in violations of water quality standards. *Port of Seattle,* 151 Wn.2d at 600, citing *Airport Communities Coalition, supra*. The appellants have argued the §401 Certification is in error because it relies on information to be submitted at a later time. The decision in *Port of Seattle,* 151 Wn.2d at 601, acknowledges the validity of relying on additional information in issuing a § 401 Certification: "Yet the need for additional studies, plans and reports does not, by itself, call into question a finding of reasonable assurance." Whether reliance on future submissions is

appropriate depends on whether the implementation and outcome of the studies, plans, and reports meets the reasonable assurance test. *Id.*

6.

The State of Washington has developed its own water quality standards, as permitted by the Clean Water Act 33 U.S.C. §1313. The Washington State Legislature has also provided a standard for water quality policy:

> It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all water of the state.

RCW 90.48.010.

7.

In furtherance of the state's water quality policy and the implementation of the Clean Water Act, Ecology has promulgated specific water quality standards for surface water (Ch. 173-201 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.

§ 401 CERTIFICATION

Water Quality

8.

In evaluating a project's compliance with water quality standards, Ecology must consider whether wastes and other materials and substances proposed for entry into waters of the state have been provided with all known, available, and reasonable methods of treatment prior to entry. This requirement is commonly referred to as AKART.

> Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry.

RCW 90.54.020. *See also,* RCW 90.52.040.

9.

In order to obtain §401 Certification, proposed activities must also comply with the antidegradation provisions of RCW 90.54.020:

> Notwithstanding that standards of quality established for waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served.

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.

WAC 173-201A-070.[14]

10.

The appellants claim Ecology had inadequate assurance that water quality standards would be met because pesticides and fertilizers used on the golf course pose a significant threat to beneficial uses in the on-site wetlands and in the Grays Harbor Estuary. Concern was also expressed over the risk of groundwater contamination impacting the City of Westport's drinking water supply and over failure to require AKART to control and treat stormwater from the golf course.

11.

Ecology concluded the NRMP, the Integrated Pest Management Plan, the Stormwater Plan, and Wetland Mitigation Plan, together, provided adequate protections to assure water quality standards would be met during construction and operation of the project. The applicant has indicated its approach to water quality compliance involves prevention, control, and detection. The primary vehicle for establishing operational conditions designed to implement this strategy is the NRMP.

12.

The NRMP referenced and incorporated into the §401 Certification is "dated August 1, 2001." The testimony at hearing revealed that the correct version of the NRMP was erroneously labeled August 1, 2001, but was actually a modified version received by Ecology in March 2004.

---

[14] Ecology adopted new surface water quality regulations in 2003; however, those regulations have not been fully accepted by the U.S. Environmental Protection Agency. At this time, the prior antidegradation regulation, quoted herein, is controlling.

Yet another version of the NRMP is anticipated, which would incorporate additional requirements set forth by Ecology in the §401 Certification. (Ex. A-134, p. 11). At this point it is unclear what the final NRMP, the mechanism through which water quality will be protected, will actually require.

13.

After Ecology received the initial 2001 version of the NRMP, various experts from within the Department commented on areas that would have to be modified in order to meet reasonable assurance standards. After an exchange of memoranda, Audubon International summarized changes they were planning to incorporate into the NRMP in a memorandum to Bob Berquist dated January 16, 2002. (Ex. A-90). Audubon International proposed to manage the entire golf course as a limited spray zone in response to comments regarding a 100-foot buffer zone around the wetlands. Audubon further indicated applications of fertilizers would be made only when no rain is forecast for 48 hours and air temperatures are in the 60-75 F range.[15] Neither of these criteria is clearly reflected in the revised March 2004 NRMP.

14.

The water quality strategy being implemented for the Links at Half Moon Bay is site specific and does not follow standard practices for managing stormwater from golf courses. While a unique system may be very well suited to this site, deviating from conventional

---

[15] Ecology expert Tom Hruby questioned whether this rain and temperature requirement was viable given the 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).

technology can only meet the standard for §401 Certification if it is done pursuant to a very specific program containing adequate guidance and monitoring to assure water quality will be protected. The NRMP incorporated into the §401 Certification and the infiltration system proposed by the applicant do not meet this standard and cannot form an adequate basis for Ecology to find reasonable assurance water quality standards will be met by the project.

15.

When it approved the §401 Certification, Ecology was lacking information documenting groundwater levels on this site during the seasonal high water period. This data is critical to determining whether the infiltration system will work to treat pesticides and fertilizers on the golf course. If inadequate separation is present, the infiltration strategy will not provide reasonable assurance that water quality standards will be met. This is particularly important given the smaller than average buffers between the golf course and the interdunal wetlands on the course. While the §401 Certification contemplates gathering additional water level information prior to operation of the golf course, no required actions are identified in the event a 3-5 foot separation is not available during parts of the year. Ecology had insufficient data on groundwater separation to make a reasoned decision on whether infiltration alone is adequate to assure water quality compliance on this site.[16]

[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.

16.

The primary protection mechanism in the Links management plan to prevent water quality problems is source control. Important details regarding the source control program are lacking from the NRMP and §401 Certification. Identification of allowable pesticides is inadequate.[17] The 2004 modifications to the 2001 NRMP have made the allowable pesticides less clear. No pre-approval process for newly proposed pesticides is contained in the plan and monitoring protocols are yet to be developed. The NRMP provisions, which will guide golf course operations, do not provide clear direction for day-to-day decisions. Witnesses before the Board were unable to state with any certainty what substances were allowed, at what frequency and in what amounts they could be applied, and what sampling was required under the NRMP. The Board, similarly, had difficulty determining what exactly is allowed and disallowed under the NRMP. It is unlikely that even a trained golf course superintendent would be able to use the NRMP effectively as a guide to proper application and monitoring of pesticides. The Board concludes, the source control program for pesticides in the NRMP is inadequate to provide a basis for Ecology's conclusion that reasonable assurance exists that water quality standards will be met during operation of the golf course.

[17] In this regard, this §401 certification is unique in that the act of filling wetlands is not the water quality concern, 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.

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

course at a minimum of three separate greens or fairways. The §401 Certification further provides that the applicant "will discontinue the use of any pesticide whose concentration in groundwater exceeds human health standards or whose concentration in the surface water of adjacent wetlands exceeds the acute or chronic toxicity criteria set by the U.S. Environmental Protection Agency." (Ex. A-134, p. 12).

20.

Careful monitoring can be part of a meaningful strategy to assure the performance of a novel water quality management approach. In this case, however, many important details of the monitoring plan are unknown. Previous Ecology comments on the project have proposed monitoring designed to analyze runoff from peak flows and to try to capture first flush runoff. The applicant has not incorporated these protections into the NRMP plan. The effectiveness of the monitoring effort to assure compliance with water quality standards will be a function of the rigor of the monitoring plan. The monitoring plan must be scientifically viable and adequate to ascertain with reasonable certainty the existence, nature, and extent of contaminants entering surface and groundwater on, and adjacent to, the site. The plan identified in the §401 Certification fails to meet this standard.

21.

The monitoring plan being required by the §401 Certification uses the exceedance of human health standards in groundwater and the exceedance of acute or chronic toxicity criteria set by the U.S. EPA as the triggers for responsive action. The evidence at hearing indicated many of the substances in question do not have acute or chronic toxicity criteria set by the U.S.

EPA. Ecology indicated labels or registration information for the pesticides could be used as the standard for response under the plan. This may or may not be an adequate standard. However, to assure compliance with water quality standards, the maximum levels protective of beneficial uses on the site must be identified with specificity before monitoring begins. At a minimum, a clear and scientifically supportable standard should be identified in writing for each substance before its use on the golf course. This will allow the Department, or interested members of the public, to determine whether the monitoring is revealing a water quality problem.

Additional monitoring should also be specified for use of the nemiticide fenamiphos because of its potential risk to human health and aquatic organisms. Samples should be taken in surface water and groundwater after each use of fenamiphos, even if sampling after the first three years of operation show no changes in water quality after its use. (*See* Ex. RE-6, at 5-24.) Ecology shall also consider whether it is appropriate to use additional monitoring wells to ensure that groundwater close to the greens where fenamiphos is used appropriately sampled. The proximity of the course to the municipal water supply requires not only a strict application of fenamiphos, but rigorous monitoring provisions associated with its use as well.

22.

Monitoring and adaptive management can properly be relied upon in a §401 Certification "so long as requirements are set forth with specificity, and the future corrective action and outcome are reasonably certain to occur." *Port of Seattle* 151 Wn.2d at 605. The *Port of Seattle* court went on to state: "[S]pecific enforcement requirements must be contained in the §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).

5. Fail to contain an adequate monitoring plan with adequate rigor to provide scientifically necessary information and failure to require sufficient monitoring for the use of fenamiphos.

6. Fail to define adequate responses required if monitoring reveals a need for adaptive management.

Ecology also lacked sufficient information on groundwater separation to reasonably conclude that AKART requirements and water quality standards would be met by this unique infiltration system.

WETLANDS

24.

Wetlands protection for the Links at Half Moon Bay project is a requirement under both the Westport Shoreline Master Program and the State's antidegradation policy. The Washington antidegradation policy has been interpreted to require that there be no net-loss of wetlands. *Airport Communities Coalition v. Ecology & Port of Seattle,* PCHB No. 01-160 (2002); *Okanogan Highlands Alliance v. Ecology*, PCHB No. 97-146 (2000). The WSMP addresses wetland protection at WMC 17.32.065. The WSMP establishes wetland buffers in the urban shoreline of one hundred feet for Category A wetlands and fifty feet for Category B wetlands at WMC 17.32.065(b)(1), and prohibits filling of wetlands at WMC 17.32.065(b)(2). The WSMP provides an exception from the wetland buffer and fill restrictions in certain circumstances:

> (d) Exceptions to Wetland Buffer and Fill Restrictions. (1) Urban Shoreline Environment. Exceptions to wetland buffer requirements and wetland fill prohibitions may be made when necessitated by water-

dependent structures, public use needs, or when joining an existing city road or utility network, pursuant to the additional requirements identified in Section 17.32.055:

(A) Erosion control;
(B) Docks, piers, and other water/land connectors;
(C) Ports and water-related industries;
(D) Shoreline works and structures;
(E) Marinas;
(F) Roads and railroads;
(G) Bridges and water control devices;
(H) Utilities;
(I) Recreation;
(J) Restoration.

WMC 17.32.065(d)(1).

25.

In this case, the City found that the exception for public use needs for recreation applied to the Links at Half Moon Bay project. WMC 17.32.065(d)(1)(I). The proposed golf course meets the definition of recreation contained in WMC 17.32.055:

> (13) Recreation. Recreation is the refreshment of body and mind through forms of play, amusement or relaxation. Water-enjoyment recreation accounts for a very high proportion of all recreational activity 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

course will not be restricted to a discrete group of members or owners. The appellants have argued that the greens fees contemplated for the course will result in only an elite segment of the public having meaningful access to the recreational opportunity it provides. However, fees associated with use of recreational facilities are common. In this case, the payment of a greens fee does not change the proper characterization of the project as public, rather than private, recreation. The Links at Half Moon Bay proposal was properly allowed to proceed under the exception to wetland fill and buffer restrictions contained in WMC 17.31.065(d)(1)(I).[19]

27.

Although the golf course fill project is excepted from the prohibition on wetland filling contained in WMC 17.32.065(c), wetland mitigation is required by WMC 17.32.065(e)(2):

> If a wetland area is filled, as may be authorized in certain instances, wetland mitigation shall be required. This may include a substitution or increase of wetland area, or it may be an enhancement a restoration of wetland functions and values at an existing wetland in accordance with best science available at the time. A mitigation plan shall be prepared that describes how the proposed mitigation will replace the functions and values of the altered wetland.

The Westport Code goes on to identify a replacement ratio of 2:1 for Category B wetlands. WMC 17.32.065(e)(2)(A). Curiously, Category A wetlands are not specifically mentioned, but it can be assumed that these more valuable wetlands would receive at least as much protection as

---

[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.

Category B wetlands. The replacement ratios applied by the City and Ecology were 2:1 for both Category A and B wetlands.

28.

In order for the §401 Certification to be valid, there must be reasonable assurance that impacts to wetlands will be mitigated in accordance with the applicable antidegradation policy. Existing beneficial uses must be maintained and protected, and no further wetland degradation should be allowed. *Port of Seattle,* 151 Wn.2d, at 636. In this case, Ecology reviewed the wetland mitigation proposal and the operational plans for the golf course to evaluate whether the functions and values of the wetlands on this site were being protected or mitigated, and concluded that they were.

29.

The wetland impacts identified in connection with the project include filling 9.96 acres of wetlands. The wetland mitigation associated with this 9.96 acres includes 5.21 acres of on-site interdunal wetland creation or restoration, 7 acres of offsite estuarine wetland restoration at Firecracker Point, 14 acres of bog and forest wetland preservation at Seastrand bog, and 30 acres of off-site interdunal habitat preservation at Mar Vista. The appellants have challenged the adequacy of this mitigation, arguing that it improperly relies on preservation as a component of the mitigation plan. Ecology guidance documents allow credit to be given for preservation, at high ratios, where the wetlands being preserved may be lost due to development. (Prefiled testimony of Lund, p. 9). This standard has been met for the Mar Vista and Seastrand Bog sites. Off-site mitigation has been allowed in order to minimize disruption to the existing dunal

environment. The habitat anticipated at the Firecracker Point site will be very high quality and of particular value to fish during several stages of their life history. The overall package of mitigation proposed for the 9.96 acres of fill is meaningful and will adequately offset the impacts to wetlands caused by golf course fill on the Links site.

30.

The pruning and excavating of 14.86 acres of wetlands on the site is being mitigated by preservation of 107 acres of primarily forested wetland on the easterly portion of the project. This provides over 7 acres of high quality wetland preservation for each acre of pruning or excavation in a wetland. Ecology concluded the ratio was appropriate in this instance given the nature of the wetlands to be preserved and the nature of the impacts. The appellants did not meet the burden of establishing a lack of substantial evidence or error of law in Ecology's conclusion.

31.

While the Westport SMP does not require mitigation for wetland buffer impacts in connection with this project due to the "public use needs" exception, Ecology required the applicant to quantify buffer impacts and mitigate for them because they present indirect impacts to the wetlands the buffers protect. The applicant identified 13.66 acres of buffer impacts arising from the golf course and 0.27 acres resulting from the condominium construction for a total net impact of 13.93 acres. The mitigation to compensate for wetland buffer impacts included 22.32 acres of onsite upland dune restoration, 5.0 acres of upland dune restoration at Mar Vista, 1.13 acres of enhancement/restoration of upland dune buffer following condominium construction. Ecology concluded this mitigation package was adequate to meet any concerns about wetland

buffer impacts under the §401 Certification. While wide buffers may provide better protection for wetlands, the appellants have failed to meet the burden of proving the wetland buffer impacts on this site are not adequately mitigated by the combination of actions identified by the project applicants and accepted by Ecology.

32.

The appellants argue the functions and values of this particular wetland system cannot be adequately mitigated. They contend the wetland mosaic on the site and the expanse of interdunal features is unique and cannot be replaced by smaller wetland areas or restoration projects. While the interdunal area at this site does provide meaningful habitat for shorebirds and terrestrial creatures, the appellants have not established birds and other impacted species will be unable to find adequate habitat in the remaining and restored wetlands on the site, including the 107 acres of forested wetlands on the eastern portion of the property. The spring shorebird migration is being protected, in large part, by the nearby National Wildlife Refuge in Grays Harbor. The appellants presented insufficient evidence of the nature and extent of the impact on spring migrating shorebirds using this particular site to prove they would be irreparably harmed by the modifications proposed. Nearby areas for rest and bathing exist, including the Westport Light Park, the Mar Vista lots, and the Firecracker Point restoration site. The golf course itself might be viable resting and bathing habitat during the limited migration season, because adverse weather conditions may diminish use of the course. The evidence did not support a finding that the wetlands on this site are so unique and valuable that compensatory mitigation could never occur.

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

> approval of conditional uses should also be granted in circumstance where denial of the use would result in a thwarting of the policy enumerated in RCW 90.58.020. In authorizing a conditional use, special conditions may be attached to the permit by the city to prevent any undesirable effects of the proposed use. In accordance with WAC 173-27-160:
>
> (A) Uses which are classified or set forth in Title 17 WMC as conditional uses may be authorized provided the applicant can demonstrate all of the following:
>
> (i) The proposed use will be consistent with the policies of the Shorelines Management Act and the Westport shoreline master program;
> (ii) The proposed use will not interfere with the normal public use of public shorelines;
> (iii) The proposed use is compatible with other authorized uses in the area or uses planned for the area under the city's comprehensive plan and shoreline master program.
> (iv) The proposed use of the site and design of the proposed project will cause no unreasonably adverse effects to aquatic and shorelines areas;
> (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,

and there will be substantial detrimental effects to the public's interest in the area, including use of the shorelines.

37.

The appellants argue the project is inconsistent with the SMA because it is violates the order of preference for development in shorelines of statewide significance contained in RCW 90.58.020:

> The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. The department, in adopting guidelines for shorelines of state-wide significance, and local government, in developing master programs for shorelines of state-wide significance, shall give preference to uses in the following order of preference which:
>
> (1)Recognize and protect the state-wide interest over local interest;
> (2)Preserve the natural character of the shoreline;
> (3)Result in long term over short term benefit;
> (4)Protect the resources and ecology of the shoreline;
> (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.

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); S*ee 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

destination resort proposed by the applicant and the general terms of RCW 90.58.020 do not preclude such an authorized use on this site.[20]

38.

The evidence in the case does not demonstrate that local interest is being served at the expense of statewide interests. The physical access to publicly owned beaches would be enhanced, not diminished by the project. The beaches and dunes adjoining Half Moon Bay and the Pacific Ocean will not be altered or modified during construction of the resort. While the appellants are concerned development of the project will lead to future armoring of the shoreline, the permit approvals do not allow such activity. The interdunal wetlands on the golf course site are the only aspect of the shoreline being modified under the Conditional Use Permit. The fill impacts are being fully mitigated, as discussed above in connection with the wetlands analysis. Accordingly, no inconsistency with the provisions of RCW 90.58.020 has been established.

39.

Filling wetlands on the golf course will not cause unreasonable and adverse impacts to the aquatic and shoreline areas. In light of the protections required under this decision to obtain §401 Certification authorizing the fill, full mitigation of wetland impacts and demonstrable protection of water quality will be in place before the golf course is constructed.

---

[20] The ELUHB is not convinced the provisions of RCW 90.58.020 can never be used to substantively evaluate a 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.

40.

The concern appellants have expressed over the "privatizing" of this shoreline is not a basis for concluding a CUP cannot be granted. The public interest will not be impaired by wetland fill connected with the golf course. The public has no current authorized access to the dunal areas inland of the public shorelines. The property is privately owned and no legal authority has been cited for protecting it as a de facto park. The City of Westport has long planned for this particular property to be developed as a destination resort. The City's Comprehensive Plan and Zoning Code both publicly adopted provisions supporting this use of the property. A golf course is a permitted use under the urban shoreline designation and the applicable Tourist Commercial (TC) zoning. A master plan for the project has been approved by the City and upheld on appeal and the proposed use is compatible with authorized and planned uses in the area.

41.

Appellants suggest that the cumulative effects analysis performed by the City was erroneous. The decision on appeal to the ELUHB is Ecology's approval of the CUP. No evidence was presented, or authority cited, addressing Ecology's consideration of the issue. Conditional use permit approvals are decided on a case-by-case basis on the facts of a given application. The appellants in this case failed to meet the burden of showing the golf course fill project would result in substantial adverse cumulative effects.

42.

Appellants argue that the City of Westport's shoreline map fails to contain a designation for a portion of the project site and that shoreline permits cannot be issued for any undesignated property. While the map may be partially incomplete, the text of the zoning code (incorporated by the WSMP) clearly includes the entire site in the TC zone:

> The tourist commercial zone 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.

WMC 17.21.010. The text of the code controls over the map and shoreline permits can properly be issued for the entire Links project site.

43.

In view of the Board's decision upholding the applicability of WMC 17.32.065(d)(1)(I), the buffer requirements of the WMC pose no barrier to approval of the CUP. Wetland buffer requirements, impacts and mitigation under the §401 Certification are discussed earlier in this decision.

44.

The evidence in this case shows that the City of Westport planned for a destination resort and golf course on this site. The City properly adopted shoreline regulations consistent with the anticipated uses. The wetland fill being authorized by the CUP relates only to the golf course and meets the local and state criteria for granting a CUP. Accordingly, the Ecology decision approving the CUP is affirmed.

45.

The appellants allege the hotel and conference center violate the WSMP because their construction will require filling wetlands, specifically a portion of wetland HMB. Fill to accommodate a hotel/conference center is not allowed under WMC 17.32.065(c). The conditional use permit on appeal in this case, however, relates only to fill necessary for constructing the golf course, so the issue regarding Wetland HMB does not fall within the scope of the issues before the Board on the CUP appeal. Even if the Board were to consider this argument, given the Board's factual finding recognizing the formal delineation of wetland HMB approved by the Corps of Engineers, no violation has been demonstrated.

CZMA CONSISTENCY

46.

During the pre-hearing process, appellants raised two issues challenging Ecology's determination that the project is consistent with the Coastal Zone Management Act. (CZMA). The limited material in the appellants' brief on these issues argued Ecology improperly failed to determine the project's consistency with the Ocean Resources Management Act. (ORMA). The only evidence presented regarding Ecology's CZMA determination indicated that Ecology did not consider the ORMA applicable to this project. The appellants have not provided sufficient authority to support their contention that ORMA was a mandatory element of Ecology's CZMA consistency determination for this project.

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?

ORDER

1. Ecology's decision approving the shoreline CUP for golf course filling for the Links at Half Moon Bay project is AFFIRMED.
2. Ecology's §401 Certification for the Links at Half Moon Bay is remanded to Ecology for modification to areas which the Board concludes Ecology did not have adequate assurance water quality standards would be met:
    A. Protecting water quality by extending the limited spray zone to the full extent of the golf course.
    B. Protecting water quality by identifying pesticides authorized for use on the course prior to their application.
    C. Protecting water quality by establishing restrictions on the application of pesticides close in time to anticipated rainfall events or course irrigation.
    D. Protecting water quality by establishing written and scientifically supportable standards for pesticides in the surface and groundwater prior to their use.
    E. Protecting water quality by requiring a monitoring plan for review prior to Certification that will assure adequate rigor to provide scientifically necessary information to detect any water quality problems and that will require sufficient monitoring for the use of fenamiphos.
    F. Protecting water quality by requiring a defined and adequate response to any water quality issue revealed during the monitoring or adaptive management process.

G. Protecting water quality by obtaining seasonal high water readings showing sufficient separation of groundwater from the surface to support the expected performance of the infiltration system on the golf course prior to construction as well as defined actions if such separation is not available.

All other aspects of the §401 Certification are AFFIRMED.

3. Ecology's finding of CZMA consistency is AFFIRMED.

Dated this 12th day of October 2005

ENVIRONMENTAL AND LAND USE HEARINGS BOARD

BILL CLARKE, CHAIR

WILLIAM H. LYNCH, MEMBER

JUDY WILSON, MEMBER

O'DEAN WILLIAMSON, MEMBER

DAN SMALLEY, MEMBER

Phyllis K. Macleod
Administrative Appeals Judge