BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

WASHINGTON ENVIRONMENTAL COUNCIL, FRIENDS OF THE EARTH, NORTH CASCADES AUDUBON SOCIETY, WHATCOM COUNTY LEAGUE OF WOMAN VOTERS, and FRIENDS OF BOUNDARY BAY, **Appellants,** **v.** **WHATCOM COUNTY, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and JOSEPH M. SHECKTER,** **Respondents.**	**SHB No. 93-68** **SHB No. 93-70** **ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT**
STATE OF WASHINGTON DEPARTMENT OF ECOLOGY and STATE OF WASHINGTON DEPARTMENT OF FISHERIES, **Appellants,** **v.** **JOSEPH M. SHECKTER, ANVIL CORPORATION, and WHATCOM COUNTY,** **Respondents.**	

I

Respondents have moved for summary judgment: 1) to dismiss the appellant environmental groups for lack of standing under RCW 90 58180(1); and 2) to strike the environmental groups' challenge to the validity of the Cherry Point Management Unit

("CPMU") component of Whatcom County's Shoreline Master Program ("WCSMP"). A hearing on the motions was held by telephone on April 1, 1994.

II

The Shorelines Hearing Board ("SHB") was comprised of Robert V. Jensen, Chair, Richard C. Kelley, Vice-Chair; James A. Tupper, Jr., Bobbi Krebs-McMullen, Dave Wolfenbarger and O'Dean Williamson. Robert V. Jensen presided. He and Mr. Tupper served as attorney members.

III

Appellants Washington Environmental Council, Friends of the Earth, North Cascades Audubon Society, Whatcom County League of Woman Voters and Friends of Boundary Bay (hereafter "environmental groups") were represented by attorney Toby Thaler. The State of Washington Department of Fisheries was represented by Assistant Attorney General Neil Wise. The State of Washington Department of Ecology was represented by Assistant Attorney General Rebecca E. Todd. Whatcom County was represented by Chief Civil Deputy Prosecutor for Whatcom County Daniel L. Gibson. Joseph M. Sheckter was represented by attorney Thomas H. Wolfendale.

Randi R Hamilton of Gene Barker and Associates provided court reporting services.

IV

The Board considered the following pleadings and evidence:

1. Respondents Joseph M. Sheckter and Whatcom County's Motion for Summary Judgment of Appeal;

2. Petition Appealing Shoreline Substantial Development Permit;

3. Environmental Appellants' Response to Sheckter and Whatcom County's Motion to Dismiss on Standing;

4 Declaration of Martin Keeley;

5. Declaration of Janet Adams;

6. Declaration of Dave Schmalz;

7. Declaration of Steve Irving;

8. Declaration of Darlene Madenwald;

9. Declaration of George Garlick;

10. Reply Brief in Support of Respondents' Motion for Summary Judgment.

Having reviewed this material and heard argument by counsel, the Board makes the following ruling.

V

We believe that once an appeal under the Shoreline Management Act ("SMA"), RCW Chapter 90.58, has been certified for review by the Department of Ecology or the Attorney General pursuant to RCW 90.58.180(1), the burden of proof shifts to the party opposing standing to show that the certified party does not have standing. Save Lake Sammamish v. King County, SHB No. 93-40 (1994) The certification of an appeal to the Board serves as a screening device. This is evident from the statute which directs certification only where it appears "that the requestor has valid reasons to seek review." In this case the burden of proof as to standing rests with respondents. To prevail, respondents must show more than the absence of facts to support the environmental groups' standing. See Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1992) (declaring that the burden

shifts to the person having the burden of proof at the trial, once the moving party has met its burden of showing that there are no genuine issues of material fact). Respondents have not supported their motion for summary judgment with any evidence regarding the standing of appellants. Nor have respondents challenged the allegations and representations made by appellants in their petition. Rather, respondents rest on the argument that even assuming the petition and subsequently filed declarations are true and accurate, they are insufficient to establish standing under their interpretation of the law. We accordingly assume, for the purposes of deciding this motion, that there is no genuine issue of material fact as to the relevant representations in the petition and the declarations.

VI

Whatcom County issued a shoreline substantial development permit ("SDP") to respondent Sheckter on September 16, 1993. The proposed project will be located on a 385 acre site near Cherry Point in Whatcom County. The proposal contemplates a 3,775 foot ship pier, a 554 foot barge pier together with a 320 acre upland support facility. The ship pier will extend approximately 2,000 feet seaward from the line of extreme low tide and have a pier head of 1,800 feet. In addition to the piers, the proposed project will include truck and rail car loading facilities, conveyors, pipelines, storage areas and a tank farm. The facility is intended for receiving and shipping a wide range of bulk and liquid products. (Petition, pp 6-7)

VII

The Cherry Point area defines a reach of approximately eight miles which is part of a larger reach between Point Whitehorn and Sandy Point. The site of the proposed project includes forest, wetlands and other aquatic resources that serve as wildlife habitat. The vicinity of the project is an important tribal, commercial and non-commercial fishing area.

The waters offshore are heavily used for commercial and non-commercial vessel traffic. There has been extensive, long-term recreational use including boating, camping, picnicking, clamming, walking, nature interpretation, bird watching, fishing and crabbing by the public along the Cherry Point shoreline. (Petition, pp 6-7.) Cherry Point is the only remaining approximation of natural, open ocean shore in Whatcom County with public access. Appellants contend that the magnitude of the proposed project will significantly alter the natural character of the area, impede access, and interfere with the natural processes of beach formation. (Garlick Declaration.)

VIII

Based on these and other allegations the environmental groups contend that issuance of the SDP is inconsistent with the SMA and its implementing regulations, WAC Chapter 173-14, on a number of grounds including interference with public navigation, unreasonable reduction of public rights, a failure to enhance the public interest, a failure to provide for rational and coordinated shoreline planning consistent with the public interest, a failure to recognize state-wide over local interests and a failure to protect the resources and ecology of the shoreline The environmental groups additionally allege that granting the SDP was inconsistent the State Environmental Policy Act ("SEPA"), RCW Chapter 43.21C. (Petition, pp 7-12.)

IX

Each of the environmental groups has established the following interests in the proposed project:

1. Friends of the Earth is a national organization with approximately 900 members in the State of Washington. For fifteen years Friends of the earth has monitored local and state activities which adversely impact wetlands and shorelines of state-wide significance in

Puget Sound. Individual members of Friends of the Earth enjoy a variety of uses of the shorelines, surface waters and associated resources at Cherry Point. Friends of the Earth has participated in Whatcom County's administrative proceedings incident to issuance of the SDP. (Petition, at 3.)

2. Washington Environmental Council ("WEC") is comprised of approximately 2,000 members and over 100 organizational members including the North Cascades Audubon Society and Friends of Boundary Bay. WEC has a stated mission to represent the public interest in protecting natural resources and the environment including shorelines. (Petition, at 2.) WEC takes an interest in any proposal for a major project on a shoreline of state-wide significance. WEC has been active in two prior permit applications for development at the site of the proposed project. WEC was also actively involved in the environmental and permit review for the proposed project. (Madenwald Declaration.) One or more members of the WEC member organizations use the Cherry Point shoreline for recreation and other purposes. Schmalz, Garlick and Irving Declarations.)

3. North Cascades Audubon Society ("NCAS") has 650 members who reside in Whatcom County. (Schmalz Declaration.) The purpose of NCAS includes conservation of and preservation of the natural environment and resources of Whatcom County. NCAS, like WEC, participated in two prior permit applications for development at Cherry Point as well as the subject SDP. In addition, one or more members of NCAS have used Cherry Point for bird watching, beach walking, digging clams and enjoyment of the shoreline. (Schmalz, Garlick and Irving Declarations.)

4. League of Woman Voters of Bellingham/Whatcom County has conducted studies and adopted positions relating to the Cherry Point shoreline. One or more members of

the League have visited and enjoyed the beaches and wetlands at Cherry Point. (Adams Declaration.)

5. Friends of Boundary Bay has 450 members who reside primarily in Whatcom County. Friends of Boundary Bay conduct a number of educational programs related to Boundary Bay. Many of its members live near and enjoy the resources of the Boundary Bay shoreline. Boundary Bay is located north of Cherry Point and shares habitat with Cherry Point for migrating birds. Development of the proposed project could adversely impact Boundary Bay (Kelley Declaration.)

X

Standing to appeal under the SMA must be viewed in the context of the statute's express purpose to preserve and protect shorelines. The policies of the SMA mandate that "the interest of all the people shall be paramount in the management of shorelines of state-wide significance...In implementing this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the maximum extent feasible consistent with the overall best interest of the state and the people generally." RCW 90.58.020. Our Supreme Court has said on several occasions that the SMA must be broadly construed in order to protect the state shorelines as fully as possible. English Bay Enterprises, Inc. v Island County, 89 Wn.2d 16, 20, 568 P.2d 783 (1977); Hama Hama v. Department of Ecology, 85 Wn.2d 441, 446-467, 536 P.2d 157 (1975)("It seems well-nigh irrefutable that these goals and purposes can be effectuated best by giving an expansive rather than restrictive reading to the appeals provisions of the SMA")

XI

The SMA affords a right of appeal to "any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state." As stated above, the certification of an

appeal by the Department of Ecology or the Attorney General functions as a screening device. The test for certification is whether the requestor has valid reasons to request review. RCW 90.58.180(1). The Board has, to our knowledge, only once denied standing to a party whose appeal was certified by Department of Ecology or the Attorney General. Deatley v. Yakima County, SHB No. 89-3 (1989). In that case, The Board's decision was reversed by the Thurston County Superior Court. Deatly, Order Granting Partial Summary Judgment (November 2, 1990). The SHB early ruled that the certification conferred standing. Moore v. City of Seattle and Kingen, SHB No 204, Order on Motion (1976). Later, it affirmed that standing was satisfied by certification, but upheld standing on the alternative ground that the party could demonstrate "injury in fact" or "personal stake in the outcome." Hildahl v. City of Steilacoom and Burlington Northern Railroad, SHB No. 80-33 (1981); Foulks v. King County and Department of Transportation, SHB No. 80-17 (1980). More recently, the Board has additionally held that certification tends to show standing. Clifford v. City of Renton, SHB Nos. 92-52 & 92-53, Order Denying Motions Re· Standing, Filing Service, and Shorelines (January 22, 1993).

XII

We are unaware of any appellate decision interpreting the effect of certification or the meaning of "person aggrieved" under the SMA. In the context of a zoning dispute, our Supreme Court has held that injury in fact exists where one or more members of an organization bringing an appeal lives adjacent to or in the area of a proposed development. Save a Valuable Environment v. Bothell, 89 Wn.2d 862, 868, 576 P.2d 401 (1978). More recently, the Court of Appeals has held that where an organization exists to further the policies of a state environmental statute, in that case the Forest Practices Act, the group has standing to bring an appeal. Snohomish County v. State, 69 Wn. App. 655, 663 (1993). We are

reluctant to take a narrow view of standing because of the far-reaching scope of environmental protections in the SMA. The SMA explicitly grants the right of aggrieved parties to request review of decisions granting or denying shoreline permits. This is distinguishable from a statute which creates substantive duties for government, but does not explicitly grant standing to private parties to mount a legal challenge to specific government decisions. We believe that the command that the SMA be liberally construed on behalf of its objectives and purposes, coupled with the certification process, compel a broad construction of the standing of a certified party before the SHB. This conclusion is bolstered by the language of SEPA which recognizes that each individual in this state "has a fundamental and inalienable right to a healthful environment." RCW 43.21C 020(3). See Leschi Improvement Council v. Washington State Highway Commission, 84 Wn.2d 271, 280, 525 P.2d 774 (1974).

XIII

Respondents argue that standing should be strictly limited to those people that have access to the specific site of the proposed project and have specific plans to return to the site at some time in the future. In support of this proposition respondents rely on Lujan v. Defenders of Wildlife, 112 S Ct. 2130 (1992), where environmental groups were denied standing to challenge Department of Interior regulations limiting interagency consultations under the Endangered Species Act for international actions by federal agencies. The plaintiffs there failed because they could not identify specific plans to return to countries where they claimed foreign aid programs were detrimental to endangered species. Defenders is a fact specific case. A majority of the justices concluded that the plaintiffs had established standing or could have done so by submitting a better record to the trial court. Respondents also rely on Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990), where plaintiffs were

denied standing because they could not establish any use of a 4,500 acre tract of land that was reclassified for mineral and oil extraction by the Bureau of Land Management.

XIV

We conclude that any party who brings legitimate issues of state-wide policy under the SMA before this Board satisfies the required showing of injury in fact. It would be contrary to the intent and purpose of the SMA to deny access for review to parties who are concerned about the consistency of shoreline development with the policies of the statute. It would also be inconsistent with the liberal construction applied to the SMA to otherwise restrict standing. In this matter the League of Woman Voters of Bellingham/Whatcom County, Friends of the Earth and WEC have a long record of concern and involvement in shoreline issues related specifically to Cherry Point. They have each participated in the review of two prior permit applications for the site and had been involved in the administrative proceedings leading to the issuance of the SDP now on appeal.

XV

The environmental groups are additionally entitled to standing under a more restrictive analysis of injury in fact. It may be critical to standing in a case such as Defenders to establish that the plaintiffs have an actual stake in the outcome of events taking place in places such as Sri Lanka. In this matter, however, the environmental groups and many of their members are residents of Whatcom County, have been actively involved in shoreline development issues related to Cherry Point, use and intend to continue using the shoreline at Cherry Point for recreational and other purposes. It is similarly unnecessary for the environmental groups to show use or an intent to continue use of the specific site for the proposed project. Unlike the vast area of land at issue in the National Wildlife case, the matter before the board involves a discrete portion of the shoreline at Cherry Point. The environmental groups represent a

number of members who live in Whatcom County and near Cherry Point. Appellants have more than established that they have good faith concerns about the impact of the proposed project on their use and enjoyment of the shorelines in Whatcom County. See Snohomish County v. State, 69 Wn. App. at 663 (residents with homes on Lake Roesiger have standing to challenge forest practices on private land).

XVI

The appellant environmental groups have accordingly shown a perceptible harm and thus injury in fact by virtue of the size of the proposed project and its significance under the SMA as well as by their particularized and on-going concerns for the environment at Cherry Point. Appellants have also shown by the request for review and the certification by the Attorney General that the alleged injury in fact to their interests falls within the zone of interests protected by the SMA. We accordingly conclude that appellants have standing to maintain this request for review.

XVII

Sheckter and Whatcom County next argue that the Shorelines Hearings Board is without authority to challenge the application of a regulation, in an appeal of a specific permit decision. We disagree. This Board has previously concluded that it has such jurisdiction. RISK v. Island County, SHB No. 86-49 (1987); Hastings v. Island County, SHB No. 86-27 (1987); Friends of the Columbia Gorge v. Skamania County, SHB Nos. 84-57 & 84-60 (1986); CFOG v. Skagit County, SHB No. 84-17 (1985); SAVE v. Koll Company, SHB No. 81-27 (1982); Massey v. Island County, SHB No. 80-3 (1981). The Supreme Court has ruled, that where an appellant's claim challenges not a rule itself, but the application of a rule in the issuance of a specific permit, primary jurisdiction lies with the appropriate quasi-judicial administrative agency. D/O Center v. Department of Ecology, 119 Wn.2d 761, 775, 837

P.2d 1007 (1992) (holding that primary jurisdiction to hear an environmental appeal of waste discharge permit, involving a challenge to an Ecology regulation, lies in the Pollution Control Hearings Board). The Court concluded that Board, which is a sister environmental tribunal to the Shorelines Hearings Board, has the authority to grant declaratory relief. Id. at 119 Wn.2d 777.

XVIII

This conclusion was based on the expertise of the Pollution Control Hearings Board (the members of which comprise one-half of the Shorelines Hearings Board) in matters of the environment. No one has contended that the Board lacks the authority to interpret the statutes and regulations which govern its decisions. Its decisions are obviously not final; however, that does not mean that the courts, under their powers of review, are not interested in having the benefit of these conclusions, when they decide what is the appropriate legal interpretation. It is this reasoning which we believe causes the courts to give deference to the legal interpretations of the administrative agency. The appellate courts have frequently cited this precept in reviewing decisions of the Shorelines Hearings Board. Nisqually Delta Association v. DuPont, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985); English Bay v. Island County, 89 Wn.2d 16, 21, 568 P.2d 783 (1977); Hayes v. Yount, 87 Wn.2d 280, 289, 552 P.2d 1038 (1976); Hama Hama v. Shorelines Hearings Board, 85 Wn.2d 441, 449, 536 P.2d 157 (1975); San Juan County v. Natural Resources, 28 Wn App. 796, 799, 626 P.2d 995 (1981); Eickhoff v. Thurston County, 17 Wn. App 774, 778, 565 P.2d 1196 (1977).

XIX

The Board, in adjudicating permit decisions, is bound by the statutes applicable to those permits. If there is a conflict between the statute and a regulation, such as the master program, the Board is bound by the statute, not the regulation. The Board, therefore,

inherently is required to resolve such conflicts, where the statute and the regulations cannot be read in harmony; subject of course, to judicial review of its decisions under the Administrative Procedure Act. This reading of the SMA is bolstered by the fact that all permit decisions, reviewable by the Board, must be reviewed for consistency, not only with the approved master program, but also the act itself. RCW 90.58.140(2)(b). We conclude that the Board does have the authority to review the relevant master program, as applied, for its consistency with the SMA, in the context of reviewing this shoreline permit decision.

XX

Based on the foregoing analysis, the Board issues this:

ORDER

Respondents' motions for summary judgment of appeal are denied.

DONE at Lacey, WA, this 22nd day of April, 1994.

SHORELINES HEARINGS BOARD

ROBERT V. JENSEN, Presiding

RICHARD C. KELLEY, Member

JAMES A. TUPPER, JR., Member

BOBBI KREBS-MCMULLEN, Member

DAVE WOLFENBARGER, Member

O'DEAN WILLIAMSON, Member

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