

**EXH. RJR-9  
DOCKET UG-230393  
WITNESS: RONALD J. ROBERTS**

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,**

**Complainant,**

**v.**

**PUGET SOUND ENERGY,**

**Respondent.**

**Docket UG-230393**

**EIGHTH EXHIBIT (NONCONFIDENTIAL) TO  
THE PREFILED DIRECT TESTIMONY OF**

**RONALD J. ROBERTS**

**ON BEHALF OF PUGET SOUND ENERGY**

**MAY 25, 2023**

**SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON**

THE PUYALLUP TRIBE OF INDIANS,

Petitioner,

v.

CITY OF TACOMA, PUGET SOUND  
ENERGY, PORT OF TACOMA, and  
WASHINGTON STATE DEPARTMENT  
OF ECOLOGY,

Respondents.

SHB No. 16-002

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER

On January 20, 2016, the Puyallup Tribe of Indians (Tribe) filed an appeal with the Shorelines Hearings Board (Board) requesting review of a shoreline substantial development permit issued by the City of Tacoma (Tacoma) to Puget Sound Energy (PSE) for the construction and operation of a proposed liquefied natural gas (LNG) facility.

The Board held a hearing in this matter on May 9-13, 2016, at its office in Tumwater, Washington. Board Chair Joan M. Marchioro presided for the Board, joined by Board Members Lily Smith and John Bolender.<sup>1</sup> Attorneys Scott M. Missall, Nicholas G. Thompson and Lisa A.H. Anderson represented the Tribe. Deputy City Attorney Jeffrey H. Capell represented Tacoma. Attorneys Rita V. Latsinova, Erin L. Anderson and Sara A. Leverette represented PSE. Attorney Carolyn A. Lake represented the Port of Tacoma.<sup>2</sup>

<sup>1</sup> A three-member panel is hearing this case pursuant to RCW 90.58.185.

<sup>2</sup> Respondent Washington State Department of Ecology (Ecology) did not participate in the litigation.

1 The Board received the sworn testimony of witnesses, admitted exhibits, and reviewed  
2 the arguments on behalf of the parties. Written closing arguments were filed on May 27, 2016.  
3 The Board also viewed the site of the proposed development and mitigation. Having fully  
4 considered the record, the Board enters the following:

5 **FINDINGS OF FACT**

6 1.

7 PSE proposed to construct and operate a small-scale LNG liquefaction and storage  
8 facility (the Project) at the Port of Tacoma. Ex. R-2 at 140.<sup>3</sup> As originally proposed, the Project  
9 would produce LNG to fuel marine vessels and to provide LNG to industries through bunkering  
10 barges and tanker trucks. *Id.* LNG would be distributed directly to Totem Ocean Trailer Express  
11 (TOTE) at its facility on the Blair Waterway for use as maritime transportation fuel, thus  
12 enabling TOTE to meet new emission standards for maritime vessels established for the North  
13 American Emission Control Area. Exs. R-4 at 588, R-19. The Project would also have the  
14 capability to convert LNG to natural gas for reinjection into PSE's natural gas distribution  
15 system at times of high demand. Ex. R-4 at 587-88.

16 2.

17 The Project would be constructed at existing industrial sites on the peninsula between the  
18 Blair and Hylebos Waterways in the Tacoma Tideflats and would involve construction in both  
19 waterways, which are shorelines within the City. Ex. R-4 at 610 and 617. The Blair and  
20 Hylebos Waterways were excavated from Commencement Bay tidelands, with adjacent tidelands

21 <sup>3</sup> Some, but not all, exhibits were Bates stamped. For those exhibits that are Bates stamped, the pinpoint citation is to the Bates number; for all other exhibits, the pinpoint citation is to the document page number.

1 filled to create the upland portion of the peninsula. The upland, marine tidal, and subtidal  
2 habitats have been actively developed, managed and maintained for industrial uses and  
3 commercial shipping. *Id.*, at 707-08. The baseline conditions of the aquatic habitat at the Project  
4 site “are severely degraded as a result of anthropogenic changes.” Ex. R-2 at 309.

5 3.

6 As initially proposed, the main components of the proposed Project consisted of: (1) an  
7 upland LNG processing facility on the Hylebos Waterway; (2) a TOTE marine vessel LNG  
8 fueling facility on the Blair Waterway; and (3) a barge fueling facility on the Hylebos Waterway.  
9 Ex. R-2 at 138-39. The Project site is zoned “S-10” Shoreline District-Port Industrial and “S-13”  
10 Shoreline District – Marine Waters of the State. Ex. R-1 at 3. The Blair-Hylebos peninsula is  
11 highly developed with the majority of the shoreline comprised of riprap and timber bulkheads.  
12 Ex. R-2 at 312.

13 4.

14 The LNG facility site on the Hylebos Waterway consists of approximately 30.16 acres of  
15 uplands and approximately three acres of submerged lands. Ex. P-91 at 1. Nearly all of the  
16 upland area is developed, paved, or graveled. Ex. R-2 at 139. There are two creosote-treated  
17 timber piers extending into the Hylebos Waterway from the shoreline. The site has sparse  
18 shoreline vegetation, with some weedy vegetation growing at the top of the shoreline bank.  
19 Along the shoreline there are small, scattered patches of salt marsh, as well as macroalgae  
20 species. *Id.*, at 310. Aquatic vegetation is also sparse, with sea lettuce, sugar kelp and  
21 *Ceramium spp.* observed during a December 2012 biological survey. Ex. R-4 at 739. The

1 subtidal substrate in the Hylebos Waterway is a combination of riprap, small cobbles, or other  
2 fine-grained sediments comprised of sand, silty sand, and organic sediments entering the  
3 waterway from Hylebos Creek. Ex. R-2 at 310. Hylebos Creek supports runs of Chinook, coho,  
4 pink, and chum salmon and steelhead trout. There are numerous constructed habitat mitigation  
5 and restoration sites in Hylebos Creek and the Hylebos Waterway. Ex. R-27 at 3; Ladley  
6 Testimony.

7 5.

8 The TOTE fueling facility would be located at TOTE's existing facility and in the Blair  
9 Waterway. The site has several existing in-water structures, including a timber T-pier, three  
10 concrete piers, and a breasting dolphin. Ex. R-2 at 138. The site is developed with loading and  
11 unloading ramps, a few buildings, and a paved trailer yard. *Id.*, at 139. Upland and aquatic  
12 vegetation along the Blair Waterway is sparse. *Id.*, at 311. The intertidal shoreline of the Blair  
13 Waterway is steeply sloped and armored with riprap. Aquatic vegetation is scant, with  
14 macroalgae along the shoreline consisting solely of sea lettuce. Sea lettuce, sugar kelp,  
15 *Gracilaria spp.*, and *Ceramium spp.* are present near the surface. The subtidal substrate of the  
16 Blair Waterway contains a mixture of riprap, small cobbles and fine sediments, with sand, silt,  
17 and other organic sediments discharged into the waterway from Wapato Creek. *Id.* Wapato  
18 Creek supports limited runs of coho and chum salmon, and steelhead trout. Ex. R-27 at 3;  
19 Ladley Testimony. The intertidal, shallow subtidal and subtidal habitats at the TOTE facility are  
20 degraded, providing limited habitat for out-migrating juvenile salmonids. Ex. R-27 at 14-15.

1 6.

2 The Project site is within the Tribe's usual and accustomed treaty area, which includes  
3 the entire Puyallup River basin and Commencement Bay. The Tribe has a treaty-protected right  
4 to fish and shellfish within that area. Naylor Testimony; Ladley Testimony. "Anadromous fish  
5 are intricately tied to the Tribe's culture and have been for thousands of years. [The Tribe has]  
6 spiritual, cultural, ceremonial, and economic connections to salmonid fishes." Ladley  
7 Testimony. The Tribe has a recognized interest in the quality of the aquatic environment of  
8 usual and accustomed treaty area, as well as an interest in protecting that environment from  
9 contamination and/or degradation. Ladley Testimony; Ex. P-5. The Tribe is engaged in  
10 mitigation and restoration projects intended to improve fish habitat on the Puyallup River.  
11 Ladley Testimony.

12 7.

13 The Tribe owns property, both held in trust by the United States and in fee, on the  
14 Hylebos Waterway across from the Project site. *Id.*; Exs. P-5, P-183. The property is  
15 maintained in conservancy status to provide essential fish habitat. Naylor Testimony; Ex. P-5.  
16 Approximately 75 percent of the Tribe's 5,000 members live on or near the Tribe's reservation  
17 boundary. Naylor Testimony. The Tribe also owns property on the Blair Waterway, southeast  
18 of the TOTE facility. Naylor Testimony; Ex. P-183.

19 8.

20 On August 7, 2014, PSE informed the City of its intent to proceed with the Project and  
21 obtain required permits, including an SSDP, for the proposed developments on the shorelines of

1 the Blair and Hylebos Waterways. Ex. R-11 at 2382-84. On September 12, 2014, the City,  
2 acting as lead agency under the State Environmental Policy Act, ch. 43.21C RCW, issued a  
3 Determination of Significance stating that an Environmental Impact Statement (EIS) was  
4 required in order to assess the potential environmental impacts of the project. *Id.*, at 3289-90.  
5 At the same time, the City notified the public of the start of the 30-day EIS scoping process. The  
6 City accepted written comments on the scope of the EIS through October 13, 2014, and held a  
7 public scoping meeting on September 24, 2014. *Id.*

8 9.

9 A Draft EIS was prepared for the Project. On July 7, 2015, the City issued a Notice of  
10 Availability of the Draft EIS. The Notice stated that written comments on the Draft EIS would  
11 be accepted until August 6, 2015, and that a public meeting on the proposal would occur on July  
12 16, 2015. Ex. R-7. The City received 27 written comments from various stakeholders, including  
13 the Tribe, the United States Environmental Protection Agency (EPA) and Ecology. Ex. R-4 at  
14 942-1074.

15 10.

16 On November 21, 2014, PSE submitted a Joint Aquatic Resources Permit Application  
17 (JARPA) to the City requesting a shoreline substantial development permit for the Project. Ex.  
18 R-2. PSE revised the JARPA in March 2015. *Id.* The City deemed PSE's application to be  
19 complete on May 6, 2015. Exs. P-2, P-5. Public notice of the shoreline permit application was  
20 issued by the City on May 12, 2015, with a 30-day comment period provided through June 11,  
21 2015. *Id.*

1 11.

2 In order to construct the in-water elements of the Project, PSE must also obtain permits  
3 from other government agencies with jurisdiction over those proposed activities. Ex. R-2 at 157.  
4 PSE needs a Clean Water Act Section (CWA) 404 Permit (404 Permit) and Rivers and Harbors  
5 Act Section 10 Permit (Section 10 Permit) from the Army Corps of Engineers (Corps), a CWA  
6 Section 401 Certification (401 Certification) and Section 402 stormwater discharge permit  
7 (NPDES Permit) from Ecology, and a Hydraulic Project Approval from the Washington  
8 Department of Fish and Wildlife (WDFW). *Id.* Through its JARPA, PSE requested those  
9 permits from the pertinent agencies. *Id.*

10 12.

11 The City considered the comments submitted by EPA and Ecology on the Draft EIS to  
12 also be applicable to the SSDP, in particular comments regarding contamination in the Hylebos  
13 Waterway. Ex. R-1 at 5-6 and 55. EPA initially noted that the Blair Waterway had been  
14 removed from the National Priorities List and its sediment is assumed to be cleaner than the  
15 sediment in the Hylebos Waterway. EPA stated that the agency's main concerns with the  
16 proposal were related to Project components in the Hylebos Waterway, which is the subject of a  
17 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cleanup.  
18 Ex. R-1 at 14. According to EPA, characterization of sediments ten centimeters below the  
19 mudline in some areas of the Hylebos Waterway has not been done. Through its CERCLA  
20 coordination with the Corps, in June 2015 EPA asked PSE and the Port to provide existing  
21 Hylebos Waterway sediment characterization data and a draft sampling and analysis plan for



1 sediment characterization. As of the date of EPA's letter, the requested information had not been  
2 provided. *Id.* Expressing concern that contaminated sediments could be released in the  
3 demolition of in-water structures such as piles, Ecology commented that EPA should be  
4 consulted regarding all in-water construction in the "Hylebos Waterway problem area." Ex. R-1  
5 at 88.

6 13.

7 At the same time the City was processing the SSDP, the Corps was considering PSE's  
8 request for 404 Permits for the Project's proposed in-water components. As noted in its  
9 comment letter on the Draft EIS, EPA was engaged in CERCLA coordination with the Corps on  
10 those permits. Ex. R-1 at 14. On September 11, 2015, EPA sent the Corps its CERCLA  
11 Coordination Comments on the 404 Permit for the proposed LNG structures and mitigation in  
12 the Blair and Hylebos Waterways. Exs. P-102 at 382-84, R-1 at 14. Reiterating its comments on  
13 the Draft EIS, EPA stated that it had no concerns with the proposed work in the Blair Waterway  
14 and that its standard CERCLA condition would suffice. Ex. P-102 at 382-83. As for the  
15 Hylebos Waterway, EPA stated that the Project components in that location were of particular  
16 concern from a CERCLA and sediment quality perspective. Because environmental  
17 characterization of the sediments in the Hylebos Waterway had not been conducted, EPA  
18 provided the Corps with general conditions and reserved its concurrence on in-water Project  
19 components in the Hylebos Waterway until sediment data are available. *Id.* Among other  
20 things, EPA's conditions precluded in-water work in the Hylebos Waterway without the  
21 agency's concurrence, required sediment characterization, and stated that the results of the

1 characterization may result in design or sequencing changes. *Id.*, at 383-84. EPA’s conditions  
2 would become conditions of the Corps’ 404 Permit. Warfield Testimony.

3 14.

4 The Corps’ issuance of permits for the Project constitutes a federal action requiring  
5 compliance with the federal Endangered Species Act (ESA), 16 U.S.C. § 1531, and the  
6 Magnuson-Stevens Fishery Conservation and Management Act of 1996 (MSA), 16 U.S.C. §  
7 1801. In support of its request for permits from the Corps, PSE prepared a Biological Evaluation  
8 (BE) to demonstrate the Project’s compliance with both statutes. Ex. R-2 at 267-441. The BE  
9 evaluated the Project’s potential effects on species listed as threatened or endangered under the  
10 ESA and any designated critical habitat for those species. Ex. R-2 at 277. Addressing whether  
11 the Project complied with the MSA, the BE also analyzed whether the Project would adversely  
12 affect Essential Fish Habitat (EFH). *Id.* The species covered by the BE were Puget Sound  
13 Chinook salmon, Puget Sound steelhead, Puget Sound/Georgia Basin yelloweye rockfish, canary  
14 rockfish, and bocaccio, North Pacific southern resident killer whale, humpback whale, marbled  
15 murrelet, and streaked horned lark. *Id.*, at 278-79. The BE found that the Project “may affect,  
16 but is not likely to adversely affect” those listed species or their designated critical habitats. Ex.  
17 R-2 at 331-36. The BE also found that the Project “will not adversely affect” EFH for Pacific  
18 salmon, groundfish, and coastal pelagic species. *Id.*, at 435-41.

19 15.

20 Pursuing informal consultation under Section 7(a)(2) of the ESA, the Corps requested  
21 written concurrence from the National Marine Fisheries Service (NMFS) that the Project is not

1 likely to adversely affect species listed as threatened or endangered under the ESA. Ex. R-35 at  
2 1. On July 14, 2015, NMFS provided the Corps with a response to the request. In its response,  
3 NMFS stated that the Corps had made determinations of “may affect, not likely to adversely  
4 affect” for Puget Sound Chinook salmon, Puget Sound steelhead, Puget Sound/Georgia Basin  
5 yelloweye rockfish, canary rockfish, and bocaccio, southern resident killer whale, and humpback  
6 whale. *Id.*, at 3. After describing its analysis, NMFS concluded that it concurred with the Corps  
7 that “the proposed action is not likely to adversely affect the subject listed species and designated  
8 critical habitats.” *Id.*, at 6. NMFS further concluded that the Project “would adversely affect  
9 EFH by creating short term, localized, adverse water quality conditions through increased sound  
10 energy.” *Id.*, at 7. Because NMFS found that EFH would be adversely affected, the agency  
11 provided the Corps with a conservation recommendation necessary “to avoid, mitigate or offset  
12 the impact of the proposed action: When possible, to further minimize sound effects, use only a  
13 vibratory hammer for piling installation.” *Id.*

14 16.

15 The Corps also engaged in informal consultation under the ESA with the United States  
16 Fish and Wildlife Service (USFWS) regarding the federally listed marbled murrelet, bull trout,  
17 and designated bull trout critical habitat. Ex. R-36. Based on its analysis of the information  
18 provided, USFWS concluded that any effects would be “insignificant or discountable” and  
19 concurred with the Corps’ “may affect, not likely to adversely affect” determinations. *Id.*, at 5.

17.

2 On November 9, 2015, the City issued the Final EIS for the Project. Ex. R-1. The Final  
3 EIS evaluated the Project's potential impacts on the environment, including impacts to water,  
4 sediments and anadromous fish. Ex. R-4 (Sections 3.3, 3.4). For those impacts that cannot be  
5 avoided, the Final EIS includes proposed mitigation conditions. Ex. R-4 (Sections 3.3.6, 3.4.6).  
6 Addressing the removal of creosote-treated piles, the Final EIS first noted that the policy of  
7 federal resource agencies, including NMFS and USFWS, is to require replacement of such piles  
8 with steel or concrete piles where possible because creosote is a carcinogen. Ex. R-4 at 713.  
9 With respect to potential water quality impacts associated with pile removal, the Final EIS stated  
10 that, while the removal of piles would temporarily disturb sediment on the seafloor and had the  
11 potential to re-suspend background concentrations of polycyclic aromatic hydrocarbons (PAHs)  
12 (including creosote),

13 any increase is expected to be short term, and elevated  
14 concentrations are likely to be greatly diminished within one or  
15 two tide cycles after the completion of the removal and installation  
16 activities. Moreover, the long-term consequences of this action  
17 would be qualitatively beneficial, improving sediment and water  
18 quality, by removing the creosote source from the environment.

19 *Id.*, at 927. The Final EIS identified several construction BMPs to mitigate for potential impacts  
20 associated with pile removal and installation, including potential impacts to salmonids and other  
21 fishes. *Id.*, at 723 and 755. The BMPs are intended "to reduce the potential risk of increased  
turbidities and sedimentation impacts to habitat that supports local salmonid populations." One

1 such BMP is the restriction of in-water work to defined time period, or fish window, when  
2 juvenile salmonids are absent, or present in very low numbers. *Id.*, at 755.

3 18.

4 On November 19, 2015, the City issued its Notice of Decision approving PSE's  
5 application for an SSDP for the Project, subject to conditions. Ex. P-6. The City determined that  
6 the Project was generally consistent with the policies of the Shoreline Management Act (SMA)  
7 and applicable provisions of the City's Shoreline Master Program (TSMP). Ex. R-1 at 55-57.  
8 The City also concluded that the proposed compensatory mitigation met the TSMP's marine  
9 shoreline mitigation requirements. *Id.*, at 57. In reaching its determination, the City gave  
10 substantial weight to project review conducted by Shannon Brenner, Environmental Specialist  
11 and subject matter expert for the City's Planning and Development Services Department. Ex. R-  
12 1 at 53. Ms. Brenner, evaluating the Project for compliance with the critical area policies and  
13 regulations of the TSMP, determined that the Project had "minimized impacts and provided  
14 appropriate compensatory mitigation that should result in no net loss of ecological functions."  
15 *Id.*, at 77. Among the conditions imposed in the SSDP are the requirement that PSE (1) follow  
16 the best management practices (BMPs) and construction techniques outlined in the JARPA  
17 throughout demolition and construction; (2) comply with restrictions and criteria approved by  
18 WDFW for all work waterward of the ordinary high water mark/line; and (3) as required by the  
19 TSMP, TMC 13.10.6.4.3.B, revegetate the 50-foot marine buffer on the portion the Project's  
20 Hylebos Waterway shoreline not needed for direct water access. Ex. R-1 at 57-58.

1 19.

2 The Tribe timely requested reconsideration of the City's decision. Ex. R-1 at 17-28. On  
3 December 30, 2015, Tacoma's Director of Planning and Development Services issued Order  
4 Partially Granting Reconsideration and Modifying Conditions of Approval. Ex. R-1 at 1-16. In  
5 the decision, the Director affirmed the original SSDP and modified the conditions of approval.  
6 The modifications included the requirement that (1) before development permits can be issued  
7 by the City, PSE must first secure all other agency permits or demonstrate that such permits are  
8 not required; (2) work within the Hylebos Waterway cannot proceed until PSE demonstrates that  
9 further sediment testing has been completed and the Project will comply with water quality  
10 regulations; and (3) PSE shall provide the mitigation described in the mitigation plan and any  
11 modification of the proposed mitigation must be reviewed and approved by the City. Ex. R-1 at  
12 9. The Tribe timely appealed the City's decision to issue the SSDP to the Board contending,  
13 among other things, that the SSDP violated the SMA and TSMP by failing to require PSE to  
14 perform sediment characterization and approving a mitigation plan that did not provide for no net  
15 loss of ecological functions.

16 20.

17 On January 28, 2016, PSE filed Stipulation Restricting SSDP Re In- and Over-Water  
18 Work in Hylebos Waterway (Stipulation) with the Board and the City. Ex. P-90.<sup>4</sup> In the  
19 Stipulation, PSE stated that it would restrict its in- and over-water work in the Hylebos

20 \_\_\_\_\_  
21 <sup>4</sup> Although used at the hearing without objection, Exhibit P-90 was not among the exhibits noted as admitted into evidence. Because its failure to be offered into evidence appears to have been an oversight, the Board now admits Exhibit P-90 into evidence in this case.

1 Waterway to those activities related to the improvement of three existing stormwater outfalls and  
2 the removal of 4,973 square feet of overwater decking. *Id.* Larry Tornberg, PSE's permit  
3 coordinator for the Project, testified that the purpose of the Stipulation was to address the Tribe's  
4 concerns by eliminating work in the Hylebos Waterway. Tornberg Testimony. PSE revised the  
5 JARPA (Revised JARPA) to reflect the Project's reduced scope. Tornberg Testimony; Ex. R-26.  
6 To address issues raised by the Tribe's mitigation expert, Tad Deshler of Coho Environmental,  
7 regarding the different depths of habitat being impacted as compared to the mitigation area, PSE  
8 revised the In-Water Mitigation Plan for Tacoma LNG (Revised Mitigation Plan) to increase the  
9 amount of overwater decking that would be removed. Tornberg Testimony; Ex. R-27. The  
10 Revised JARPA and Revised Mitigation Plan are both dated April 25, 2016. Exs. R-26, R-27.  
11 City staff testified that the reduction in the scope of work would be captured by not approving  
12 development permits for that activity and placing notice on the parcel that in-water construction  
13 cannot take place. Schultz Testimony; Brenner Testimony.

14 21.

15 The scope of the Project reviewed by the Board, as set forth in the Revised JARPA and  
16 Revised Mitigation Plan, reflects PSE's Stipulation eliminating in-water portions of the Project  
17 previously planned for the Hylebos Waterway. *Id.* Accordingly, the components of the Project  
18 within shoreline jurisdiction on the Blair Waterway include a portion of the underground  
19 cryogenic pipeline, underground/aboveground pipeline transition point, a concrete trestle,  
20 loading platform and loading arm, a grated catwalk, and one breasting dolphin. Exs. R-26, R-1  
21 at 49. An existing creosote-treated timber trestle with 24 creosote-treated timber piles will be

1 removed from the Blair Waterway. Ex R-26 at 12. In-water construction in the Blair Waterway  
2 will consist of the installation of 5,751 square feet of overwater decking and 48 steel piles (158  
3 square feet net benthic coverage). Exs. R-26, R-27 at 14. Project components with shoreline  
4 jurisdiction on the Hylebos Waterway include the demolition of an existing structure located  
5 within the 50 foot marine buffer, removal of 4,973 square feet of overwater decking, and  
6 improvement of three existing stormwater outfalls. Exs. R-26 at 12, R-27 at 4.

7 22.

8 The Revised Mitigation Plan is intended to compensate for the unavoidable impacts  
9 resulting from the installation of 48 new steel piles and the creation of 5,751 square feet of new  
10 over-water coverage through the construction of the proposed pier and loading platform, trestle,  
11 catwalk, and breasting dolphin at the TOTE facility on the Blair Waterway. Ex. R-27. As  
12 compensatory mitigation, PSE initially proposed to remove (1) 4,973 square feet of creosote-  
13 treated over-water decking from the Hylebos Waterway and (2) 24 creosote-treated wood pilings  
14 and 671 square feet of creosote-treated over-water decking from the Blair Waterway. Ex. R-27  
15 at 11-13.

16 23.

17 Concerns were raised by the Tribe regarding the loss of benthic habitat from pile  
18 installation and the differences in depth at the Hylebos Waterway mitigation site as compared to  
19 the new in-water structures being constructed on the Blair Waterway. Deshler Testimony;  
20 Tornberg Testimony; Ex. R-27 at 13. To address those concerns and meet the TSMP's no net  
21 loss standard for benthic function, the Revised Mitigation Plan now includes the removal of



1 2,500 square feet of over-water decking, 24 creosote-treated pilings, underlying detritus and  
2 concrete blocks in the intertidal and benthic habitat at Sperry Ocean Terminal in Commencement  
3 Bay. Ex. R-27 at 13-15; Boyle Testimony. Sperry Ocean Terminal is a site where mitigation of  
4 intertidal mudflats can be performed to compensate for unavoidable impacts elsewhere in  
5 Commencement Bay. Boyle Testimony; Tornberg Testimony. The removal of piles and  
6 overwater decking at the Sperry Ocean Terminal site will continue beach restoration at that  
7 location and provide valuable nearshore habitat. Ex. R-27 at 14. The compensatory mitigation  
8 proposed by the Revised Mitigation Plan produces a decrease in intertidal overwater coverage of  
9 1,473 square feet over existing conditions. *Id.*, at 16.

10 24.

11 The Revised Mitigation Plan also describes the BMPs PSE will employ to minimize the  
12 impacts of Project construction, demolition of in-water structures, and pile removal and  
13 installation. *Id.*, at 8-11. The BMPs are current through EPA Region 10's BMPs for Pile  
14 Removal and Replacement in Washington State. Tornberg Testimony; Ex. R-33. PSE's Water  
15 Quality Protection and Monitoring Plan, recently submitted to Ecology for its review and  
16 approval, provides for instrumented monitoring of pile removal. Tornberg Testimony. Mr.  
17 Tornberg testified that changes to the plan to provide for increased monitoring frequency and  
18 instrumented monitoring were made to address concerns raised by the Tribe and communicated  
19 to Ecology. *Id.*

1 25.

2 To minimize impacts to anadromous fish, PSE will only perform in-water work during a  
3 defined fish window. Ex. R-27 at 9. The fish window for the portion of Commencement Bay  
4 where the work will take place is July 1 through February 14. Tornberg Testimony. In  
5 consultation with NMFS, PSE will restrict in-water pile removal and installation to a shorter fish  
6 window of between August 15 and February 1415. *Id.*; Ex. R-27 at 9.

7 26.

8 The SSDP requires PSE to revegetate the portions of the 50-foot marine buffer at the  
9 Project site on the Hylebos Waterway that is not needed for direct marine access. Ex. R-1 at 58.  
10 The City considers revegetation of the shoreline to constitute mitigation for project impacts.  
11 Brenner Testimony. According to Ms. Brenner, revegetation of the shoreline provides several  
12 environmental benefits by providing detritus to feed benthic organisms and invertebrates for  
13 salmon to eat, as well as providing basic water quality treatment for stormwater runoff and  
14 erosion control. *Id.* The Tribe's witnesses agreed that revegetation of the shoreline constituted a  
15 mitigation measure. Naylor Testimony; Ladley Testimony; Deshler Testimony.

16 27.

17 As part of the Project, PSE will upgrade the existing stormwater system at the LNG  
18 facility site. Hogan Testimony; Moore Testimony. The existing buildings at the site have lead  
19 paint or asbestos siding. Hogan Testimony. Stormwater at the site is currently routed to catch  
20 basins, which provide limited treatment, before being discharged into the Hylebos Waterway  
21 through one of ten existing outfalls. Moore Testimony. During construction, zero stormwater

1 will be discharged from the existing outfalls. Instead, all stormwater will be collected and routed  
2 to settling tanks before being discharged into the City's sanitary sewer. *Id.* Following  
3 construction, stormwater will be sent to rain gardens or modular wetlands for enhanced treatment  
4 and then discharged through one of the three outfalls that will remain operational. Hogan  
5 Testimony. In order to meet more stringent stormwater requirements, in-line check valves will  
6 be installed in the three remaining outfalls. Ex. R-26 at 9.

7 **Sediments and Surface Water Quality**

8 28.

9 At hearing, the Tribe asserted that the SSDP violated the SMA and TSMP by failing to  
10 require sediment characterization in the Blair Waterway. According to the Tribe, because the  
11 Blair Waterway provides ecological functions and was previously degraded, the City should  
12 have required PSE to perform sediment testing in the Project footprint before engaging in any in-  
13 water construction. Absent that information, it is possible that contaminants in the sediments  
14 could be disturbed during construction and entrained in the water column. Cherry Testimony;  
15 Knox Testimony. The Tribe also asserted that the Project is likely to have adverse impacts on  
16 water quality in violation of the TSMP. Knox Testimony.

17 29.

18 In support of its position, the Tribe presented the testimony of its expert Janet Knox, an  
19 environmental geochemist with Pacific Groundwater Group. Ex. P-110. The Tribe asked Ms.  
20 Knox to review a series of reports, including the Final EIS, and to identify any adverse impacts  
21 from a project such as PSE's proposal. In Ms. Knox's opinion, the potential adverse impacts of

1 the Project had not been fully evaluated and it was likely that there will be adverse impacts to  
2 sediments, surface water and stormwater. Knox Testimony.

3 30.

4 With regard to sediments, Ms. Knox testified that PSE should be required to characterize  
5 the sediments at the TOTE facility before removing or installing piles. Ms. Knox gathered  
6 information on ten contaminants from Ecology's Environmental Information Management  
7 System (EIM), a database for environmental monitoring data, and from dredge data for the  
8 TruGrit, Gypsum, and Pier 4 sites on the Blair Waterway. Ms. Knox used that data to evaluate  
9 whether there are any contaminants in the Blair and Hylebos Waterways that exceeded levels  
10 that are protective of human health and the environment. Applying screening level criteria that  
11 she drew from the Record of Decision for the Lower Duwamish Waterway cleanup, the Natural  
12 Resource Damage Assessment (NRDA) for the Hylebos Waterway, and Ecology regulations,  
13 Ms. Knox plotted the location of each contaminant exceeding the selected screening level on  
14 aerial maps. Knox Testimony; Exs. P-166 – P-175. None of the contaminants identified by Ms.  
15 Knox exceeded her selected screening levels in the vicinity of the proposed pile removal and  
16 installation work at the TOTE facility on the Blair Waterway. *Id.*

17 31.

18 Ms. Knox testified that the proposed Water Quality Protection and Monitoring Plan she  
19 reviewed was insufficient to protect water quality as it did not require instrumented monitoring  
20 for turbidity or monitoring for toxics. Knox Testimony; Ex. P-176. As for stormwater, Ms.  
21 Knox opined that it was likely that stormwater from the construction site will be contaminated

1 and will add to existing contaminated stormwater discharged into Commencement Bay. Ms.  
2 Knox testified that during construction stormwater will be exposed to new materials, such as  
3 PVC, vinyl and galvanized steel. The contaminants from these materials will be picked up by  
4 the stormwater and would contribute to increased contaminant loading in the stormwater. Knox  
5 Testimony; Ex. P-177.

6 32.

7 The Tribe also presented the expert testimony of Shane Cherry, a consulting scientist.  
8 Ex. P-107. The Tribe asked Mr. Cherry to review the permit documents and determine whether  
9 there were deficiencies. Cherry Testimony. Mr. Cherry concurred with Ms. Knox that sediment  
10 characterization should be required before PSE can engage in pile removal and installation in the  
11 Blair Waterway. Mr. Cherry further testified that the City should require PSE to perform a scour  
12 study in order to evaluate the potential impacts of the placement of new piles in the Blair  
13 Waterway. Mr. Cherry estimated that mean total volume of the tide in the Blair Waterway was  
14 100 million cubic feet of water, with an extreme high and low tidal volume of 200 million cubic  
15 feet. Cherry Testimony; Ex. P-140. According to Mr. Cherry, if the sediments are  
16 contaminated, the extraction and installation of piles, as well as the presence of the new piles,  
17 could result in the mobilization and redistribution of those contaminants. Mr. Cherry also  
18 testified that he had not worked on a project where a scour study was required only for pile  
19 scour. Cherry Testimony.

1 33.

2 The City asserts that it lacks authority to require sediment characterization, that it has  
3 never included such a requirement in a shoreline permit, nor has it previously required a scour  
4 study prior to issuing a shoreline substantial development permit. Schultz Testimony; Brenner  
5 Testimony. A recent shoreline substantial development permit issued by the City involving the  
6 dredging of sediments and installation of 555 new piles on the Blair Waterway did not require  
7 the applicant to characterize the sediment or perform a scour study. *Id.*; Exs. R-22, R-23. There  
8 are approximately 9,400 piles located on properties owned by the Port in the Blair Waterway.  
9 Warfield Testimony. The Port has a programmatic pile maintenance program, approved by the  
10 Corps, WDFW and the City, under which it repairs and replaces piles as necessary. The Port has  
11 never received a request from the Corps, EPA or Ecology to perform a sediment characterization  
12 or scour study for its pile maintenance program. *Id.*

13 34.

14 The SSDP requires PSE to use BMPs during pile removal and installation. Ex. R-1 at 57.  
15 PSE has committed to using EPA's most current BMPs for pile removal and installation.  
16 Tornberg Testimony; Ex. R-33. If followed, BMPs are effective at minimizing impacts from  
17 those activities, particularly the release of turbidity into the water column and containing  
18 creosote that is on the removed piling. Moore Testimony; Cherry Testimony. Any resuspension  
19 of sediments is expected to be short term, lasting one or two tide cycles. Ex. P-48 at 927. In  
20 addition, to avoid conducting work when juvenile salmonids may be present, PSE will restrict its  
21 in-water work to a shortened fish window of August 15 through February 14. Tornberg

1 Testimony. PSE's expert biologist, Matthew Boyle of Grette Associates, testified that the fish  
2 window for Commencement Bay is highly effective in protecting anadromous fish. Boyle  
3 Testimony; Ex. R-56.

4 35.

5 Shirley Schultz, a principal planner in the City's Planning and Development Services,  
6 testified that a shoreline substantial development permit is not a "development" permit as used in  
7 the City's municipal code because it does not authorize development in the shoreline. Rather, it  
8 tells the applicant that it may now seek development permits, such as building or demolition  
9 permits, for the work proposed to occur within the shoreline. Schultz Testimony. In addition to  
10 other City permits, shoreline projects also require permits from other agencies, such as the  
11 Corps, Ecology and WDFW. Brenner Testimony. The SSDP provides that, before the City will  
12 issue development permits for the Project, PSE must secure all other agency permits or  
13 demonstrate that such permits are not required. Ex. R-1 at 9. The City relies on the experts in  
14 those agencies to use their authority to impose appropriate conditions to address potential  
15 sediment contamination. Schultz Testimony.

16 36.

17 With regard to the issue of scouring, witnesses for the Port and PSE testified that water  
18 moves slowly through the Blair Waterway. Warfield Testimony; Hooton Testimony; Moore  
19 Testimony. While the end of the Hylebos Peninsula is subject to wind and wave forces, the  
20 TOTE facility is approximately 3,000 feet from the mouth of the Blair Waterway where the wave  
21 energy is greatly dissipated. The replacement of 24 existing piles with 48 new piles will serve to

1 dissipate wave energy and discourage erosion. The new piles will also help stabilize the  
2 shoreline bank. Moore Testimony.

3 37.

4 In response to Ms. Knox's testimony regarding existing sediment contamination in the  
5 Blair Waterway, PSE presented the expert testimony of Rick Moore, an associate environmental  
6 geologist with GeoEngineers. Ex. R-57. Mr. Moore conducted an assessment of sediment data  
7 in the Blair Waterway. In contrast to Ms. Knox's analysis, Mr. Moore used data from the last ten  
8 years in order to reflect current conditions and applied standards from Ecology sediment cleanup  
9 regulations and guidance documents to further screen the data. Moore Testimony; Exs. R-50, R-  
10 55. The results of Mr. Moore's analysis showed the presence of contaminants at significantly  
11 fewer locations in the Blair Waterway and no contaminants at or near the TOTE facility. *Id.*

12 38.

13 Mr. Moore also disagreed with Ms. Knox's criticisms of the Water Quality Protection  
14 and Monitoring Plan. Mr. Moore testified that he participated in the preparation of the Plan and  
15 that it requires intensive instrumented monitoring. Moore Testimony. Mr. Tornberg testified  
16 that PSE revised the Water Quality Protection and Monitoring Plan to address the Tribe's  
17 concerns and recently submitted the revised Plan to Ecology for its review and approval. The  
18 Plan will become part of the 404 Permit decision issued by the Corps for in-water construction.  
19 Tornberg Testimony.



1 39.

2 Responding to Ms. Knox's testimony concerning stormwater, Mr. Hogan described the  
3 measures PSE will take to control and improve the quality of stormwater discharged from the  
4 LNG facility site. On-site measures will be implemented so that zero stormwater is discharged  
5 during construction. Revisions will be made to the existing stormwater system, with stormwater  
6 routed to rain gardens for enhanced treatment before being discharged to the Hylebos Waterway.  
7 Hogan Testimony; Moore Testimony. The number of stormwater outfalls will be reduced, with  
8 in-line check valves installed in the three remaining outfalls to meet more stringent stormwater  
9 requirements. Ex. R-26 at 9. The demolition of existing buildings with lead paint and asbestos  
10 siding will remove a source of stormwater contamination. Hogan Testimony.

11 40.

12 The Board finds that the evidence presented did not establish the presence of sediment  
13 contamination at the TOTE facility or demonstrate that the measures PSE is required to  
14 implement during in-water construction will not protect water quality and anadromous fish. The  
15 monitoring data from contaminated sites presented showed that contaminants were found at  
16 locations within the Blair Waterway; however, data was not presented that showed contaminants  
17 in the vicinity of the TOTE facility. Exs. P-166 through P-175, R-50; Knox Testimony; Moore  
18 Testimony. While EPA and Ecology expressed concerns regarding in-water work in the Hylebos  
19 Waterway, no similar concerns were raised with respect to the Blair Waterway. Exs. R-1 at 14-  
20 15, 87-91; P-102 at 382-84.

1 41.

2 The Board finds that the SSDP requires PSE to implement measures during construction  
3 that are protective of water quality and anadromous fish. The baseline conditions of the aquatic  
4 habitat at the Project site are degraded and provide little to no fish habitat. Brenner Testimony;  
5 Deshler Testimony; Ex. R-2 at 309. The parties agree that removal of creosote-treated piles  
6 provides an environmental benefit by eliminating a source of PAHs, which leach into the water.  
7 Naylor Testimony; Deshler Testimony; Brenner Testimony; Tornberg Testimony. The parties  
8 also agree that BMPs, if properly implemented, are useful in minimizing impacts of in-water  
9 construction activity such as the proposed pile removal and installation. Naylor Testimony;  
10 Deshler Testimony; Thornton Testimony; Moore Testimony. Likewise, fish windows are a  
11 recognized means of minimizing potential impacts to anadromous fish moving through the Blair  
12 Waterway and Commencement Bay. Boyle Testimony; Deshler Testimony. The Final EIS's  
13 conclusion that any resuspension of sediments caused by pile removal would dissipate within  
14 one to two tide cycles was not controverted. Ex. P-48 at 927. Finally, the evidence established  
15 that the zero discharge of stormwater during construction and upgrading the existing stormwater  
16 system currently discharging to the Hylebos Waterway will serve to protect surface water and  
17 improve the quality of the post-construction stormwater discharge. Hogan Testimony; Moore  
18 Testimony.

1 **No Net Loss and Mitigation**

2 42.

3 The Tribe presented the testimony of Mr. Deshler in support of its assertion that PSE's  
4 compensatory mitigation for in-water impacts does not meet the TSMP's no net loss of  
5 ecological function standard. Based on his document review, Mr. Deshler testified that he  
6 believed that the Project will impact habitat value in the Blair Waterway. Specifically, the  
7 habitat will be impacted by construction of the trestle on the Blair Waterway and its potential to  
8 create overwater shading. According to Mr. Deshler, shading has the potential to reduce prey  
9 species and plants they feed on. Shading may also create a barrier to migration of juvenile  
10 salmonids as they do not like to travel under large, shaded structures. Juvenile salmonids may  
11 mill around the end of the dock delaying their migration or they may travel around the structure  
12 and be subjected to increased predation. Conversely, Mr. Deshler testified that the removal of  
13 overwater decking on the Hylebos Waterway would have a potentially negative impact on  
14 habitat value as it could encourage fish to swim along the shoreline near PAH contaminated  
15 sediments. Deshler Testimony.

16 43.

17 Mr. Deshler testified that the compensatory mitigation for the Project is insufficient to  
18 meet the no net loss standard as it fails to account for the different habitat values being impacted.  
19 Mr. Deshler used a habitat equivalency analysis (HEA) model to assess the adequacy of the  
20 mitigation. Under HEA, values are assigned to different types of habitats, allowing for the  
21 comparison of the value of the habitat being impacted to the value of the habitat at the mitigation

1 site. HEA was originally created under NRDA regulations for evaluating compensatory  
2 restoration of hazardous waste sites. Mr. Deshler used a simplified version of the HEA model  
3 created for NRDA use in the Hylebos Waterway. Deshler Testimony.

4 44.

5 In his HEA analysis, Mr. Deshler calculated the square footage of the area being  
6 impacted and the mitigation area. Those areas were then multiplied by an initial habitat value  
7 and a final habitat value, to arrive at an initial weighted habitat area and a final habitat weighted  
8 area. Deshler Testimony; Exs. P-153, P-185. In his final HEA Scenario 4, which adjusted for  
9 various factors not considered in his previous scenarios, Mr. Deshler calculated an initial  
10 weighted habitat area of 2,037 square feet and a final habitat weighted area of 1,660 square feet.  
11 Ex. P-185. According to Mr. Deshler, “to be a sufficient offset or sufficient mitigation, I think  
12 the final habitat weighted area should be larger than the initial, or at least equal to.” Deshler  
13 Testimony. While Mr. Deshler’s Scenario 4 accounted for PSE’s changes to its proposed  
14 activities in the Hylebos Waterway, it did not include the additional mitigation being provided at  
15 the Sperry Ocean Terminal. Ex. P-185. Based on the results of his HEA analysis, Mr. Deshler  
16 concluded that the proposed mitigation fails to compensate for the potential impacts to the Blair  
17 Waterway. Deshler Testimony.

18 45.

19 In response, the Respondents asserted that the mitigation outlined in the Revised  
20 Mitigation Plan more than compensates for the Project’s impacts to the Blair Waterway. The  
21 Project is being constructed at an existing industrial site in a highly altered environment. The

1 shoreline of the Blair Waterway is steeply sloped and is heavily armored with riprap. Ex. R-27  
2 at 14; Brenner Testimony. The intertidal, shallow subtidal and subtidal habitats at the TOTE  
3 facility are degraded, providing limited habitat for out-migrating juvenile salmonids. Ex. R-27 at  
4 14-15. Ms. Brenner testified that, due to its industrial nature, fish habitat in the Blair Waterway  
5 is poor. Brenner Testimony. Mr. Deshler agreed that the salmonid habitat in the Blair Waterway  
6 was marginal, having very little riparian habitat and no significant eelgrass beds. Deshler  
7 Testimony. Because there is no opportunity for on-site mitigation at the TOTE facility, the  
8 mitigation will occur within the Commencement Bay watershed at locations that are beneficial to  
9 the species being impacted. Brenner Testimony; Ex. R-27.

10 46.

11 Ms. Brenner testified that she evaluated the proposed mitigation to determine whether it  
12 met the critical area policies and regulations of the TSMP. As required by the TSMP, the  
13 mitigation plan followed the mitigation sequence of avoidance, minimization and compensation.  
14 Brenner Testimony; TMC 13.10.6.4.2.D.4.a. Minimization measures included the application of  
15 BMPs during demolition and construction, and the restriction of in-water work to a defined fish  
16 window. Brenner Testimony. Because the Project includes a water-dependent component  
17 requiring direct access to the Blair Waterway, all impacts to the marine waters could not be  
18 avoided and thus required compensatory mitigation. *Id.* The TSMP also provides that activities  
19 within a waterbody used by anadromous fish are to be given special consideration to the  
20 preservation and enhancement of anadromous fish habitat. TMC 13.10.6.4.4.B. Ms. Brenner  
21 testified that the use of BMPs designed to protect anadromous fish, adherence to the fish

1 window, mitigation of adverse impacts and conditions in the SSDP constituted the special  
2 consideration required under the TSMP. Brenner Testimony.

3 47.

4 The TSMP provides that “[s]horeline use and development shall be carried out in a  
5 manner that prevents or mitigates adverse impacts so that no net loss of existing ecological  
6 functions occurs[.]” TMC 13.10.6.4.2.A. Ms. Brenner testified that no net loss is measured  
7 from baseline conditions that currently exist at the site and that SMP guidance provides that one  
8 method to measure no net loss and determine the sufficiency of mitigation is by documenting the  
9 square footage of in-water structures. Ms. Brenner used that approach in her evaluation of PSE’s  
10 proposed mitigation, comparing the square footage of the proposed in-water structures to the  
11 structures being removed. Brenner Testimony; Ex. P-122 at 81-82. Ms. Brenner testified that in  
12 her no net loss evaluation, she also considered the revegetation of the marine shoreline that was  
13 required by the TSMP and the environmental benefits of the removal of creosote-treated  
14 materials from the water. Brenner Testimony. Based on her analysis, Ms. Brenner concluded  
15 that the proposed compensatory mitigation met the TSMP’s no net loss standard. Brenner  
16 Testimony; Ex. P-122. Ms. Brenner testified that, while she considered the initial mitigation  
17 sufficient to meet the TSMP’s no net loss standard, the addition of mitigation at the Sperry  
18 Ocean Terminal gave her more assurance that the mitigation will achieve no net loss of  
19 ecological functions. Brenner Testimony.

1 48.

2 The Respondents challenged Mr. Deshler's use of the HEA model in this context. Ms.  
3 Brenner testified that the City has not previously accepted the use of HEA for shoreline  
4 mitigation purposes. Brenner Testimony. On cross-examination, Mr. Deshler testified that he  
5 has never performed a shoreline substantial development no net loss analysis or used an HEA  
6 model for shoreline permitting. Deshler Testimony. Mr. Deshler also testified that he did not  
7 conduct a site visit to evaluate the habitat being impacted or the areas where mitigation will  
8 occur, relying instead on a review of documents and photographs. Deshler Testimony. The  
9 HEA model used by Mr. Deshler contains a disclaimer stating that it was created for use in the  
10 Hylebos Waterway and may not be applicable to other sites or other contexts. Deshler  
11 Testimony.

12 49.

13 The Respondents asserted that the habitat values Mr. Deshler assigned to the intertidal  
14 habitat on the Blair Waterway and the habitat reduction applied to the Hylebos Waterway were  
15 too high. Boyle Testimony. According to the Respondents, Mr. Deshler's HEA analysis was  
16 deficient as it failed to account for the removal of the existing catwalk, the additional mitigation  
17 at the Sperry Ocean Terminal, and the revegetation of the shoreline on the Hylebos Waterway.  
18 Brenner Testimony; Boyle Testimony. Addressing Mr. Deshler's criticism concerning the lack  
19 of analysis of habitat value, PSE's Revised Mitigation Plan includes a comparison of habitat  
20 zones, with the impacted and mitigation areas broken down into the square footage of the  
21 intertidal, subtidal and shallow subtidal zones. Ex. R-27 at 14; Boyle Testimony. With the

1 addition of the proposed mitigation at Sperry Ocean Terminal, the Revised Mitigation Plan  
2 provides for 8,144 square feet of overwater mitigation as compared to 5,751 square feet of  
3 overwater impacts. *Id.* The Respondents contend that the Project, as conditioned by the SSDP  
4 and mitigated pursuant to the Revised Mitigation Plan, meets the TSMP's no net loss standard.  
5 Brenner Testimony; Boyle Testimony.

6 50.

7 The Board finds that the City employed its standard approach to evaluate PSE's proposed  
8 compensatory mitigation. Brenner Testimony. Under the Revised Mitigation Plan, PSE will  
9 remove existing creosote-treated piles from the Blair Waterway and Sperry Ocean Terminal, and  
10 remove creosote-treated overwater decking from the Hylebos Waterway and Sperry Ocean  
11 Terminal.<sup>5</sup> Ex. R-27. The Board finds that the evidence presented establishes that the removal  
12 of creosote-treated materials will benefit surface water quality and salmonid habitat by removing  
13 a source of contamination. Naylor Testimony; Brenner Testimony; Boyle Testimony.

14 51.

15 While their analytical methods may vary, both Mr. Deshler and the City use the same  
16 metric, square footage, to assess the adequacy of the proposed mitigation. Brenner Testimony;  
17 Deshler Testimony. The compensatory mitigation provided by the Revised Mitigation Plan, with  
18 the inclusion of the mitigation activities at the Sperry Ocean Terminal, exceeds the net results of  
19 Mr. Deshler's HEA analysis. Exs. P-185, R-27. In addition, it satisfies Mr. Deshler's criteria

20 \_\_\_\_\_  
21 <sup>5</sup> The revegetation of the marine buffer on the shoreline of the Hylebos Waterway is a condition of the SSDP. Ex.  
R-1 at 58. It is not included as part of the Revised Mitigation Plan as compensatory mitigation and was not  
considered as such by the Board.



1 that the final habitat area equal or surpass the initial habitat area, with the mitigated area  
2 exceeding the impacted area by some 2,393 square feet. Ex. R-27 at 14. The Board finds that  
3 the record contains substantial evidence that the Revised Mitigation Plan adequately  
4 compensates for the impacts of the Project and achieves no net loss of ecological functions.  
5 Finally, the Board finds that in addition to the compensatory mitigation, the SSDP's conditions  
6 requiring that PSE use BMPs and a fish window for its in-water work satisfied the TSMP's  
7 requirement to give special consideration to the preservation and enhancement of anadromous  
8 fish habitat. TMC 13.10.6.4.4.B.

9 52.

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

11 Based upon the foregoing Findings of Fact, the Board enters the following:

12 **CONCLUSIONS OF LAW**

13 1.

14 The Board has jurisdiction over this matter pursuant to RCW 90.58.180(1). WAC 461-  
15 08-315(2)(a). Both the scope and standard of review for this matter are *de novo*. WAC 461-08-  
16 500(1). The Tribe has the burden of proving that the SSDP issued to PSE is inconsistent with the  
17 requirements of the SMA or the TSMP. RCW 90.58.140(7); WAC 461-08-505(1)(c).

18 2.

19 The following issues were identified for resolution in the Prehearing Order:

- 20 1. Whether the SSDP for the Project is defective or noncompliant with the  
21 Applicable Shorelines Requirements regarding the SSDP's analysis, in whole or  
in part, for the following matters:

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21

- a. Blair Waterway operational impacts and the effect thereon to waters, shorelines, sediments and habitats that will be affected by the Project?
  - b. Hylebos Waterway demolition and operational impacts and the effect thereon to waters, shorelines, sediments and habitats that will be affected by the Project?
  - c. TSMP and TMC moorage facilities standards?
  - d. Cumulative impacts related to permitting and future operation of a nearby methanol plant?
  - e. Anadromous fish habitat impacts related to construction and/or ongoing Project operations?
  - f. Sediment impacts in the context of demolition, construction and/or ongoing operation of the Project?
2. Whether the SSDP for the Project is defective or noncompliant with Applicable Shorelines Requirements for reasons related to delegation and/or deferral of sediment impacts analysis to subsequent permitting reviews and/or entities other than the City of Tacoma?
3. Whether the SSDP for the Project is defective or noncompliant with Applicable Shorelines Requirements because the SSDP:
- a. Allows activities and impacts that do not comply with the ‘no net loss’ requirements and standards of the Applicable Shorelines Requirements?
  - b. Does not address and/or fails to make affirmative findings that the Project will not violate ‘no net loss’ requirements and standards of the Applicable Shorelines Requirements?
  - c. Does not make affirmative findings that the Project is consistent with the Applicable Shorelines Requirements?
4. Whether the SSDP for the Project defective or noncompliant with Applicable Shorelines Requirements because the application documents are unclear or internally inconsistent?

- 1           5.     Whether the SSDP for the Project is defective and noncompliant with Applicable  
2           Shorelines Requirements because the specified mitigation conditions for the  
3           Project:
- 4           a.     Are inadequate to address impacts arising from the Project?
- 5           b.     Are based on inadequate and/or defective analysis and data?
- 6           6.     Whether the Hylebos Waterway stipulation unilaterally issued by PSE (“PSE  
7           Stipulation”) is ambiguous, inconsistent with the SSDP, and/or undermines or  
8           invalidates the SSDP because:
- 9           a.     The status and enforcement of the PSE Stipulation are questionable due to  
10           the fact it was issued in the context of an appeal and after issuance of the  
11           SSDP?
- 12           b.     The duration of the PSE Stipulation is unstated?
- 13           c.     The PSE Stipulation does not state and define its exact scope and effect on  
14           the currently permitted Project, including effects on overall operations and  
15           on fueling methods, procedures, equipment, and activities?
- 16           d.     The PSE Stipulation does not state whether, when, or how PSE and/or the  
17           City of Tacoma may subsequently retract, alter, waive or change the PSE  
18           Stipulation?
- 19           e.     The PSE Stipulation does not state whether future retraction, waiver, or  
20           alteration thereof can result in resurrection or reestablishment of the  
21           Hylebos component of the Project, whether such action would require  
            additional permitting review, and whether such action would then be  
            required to comply with Applicable Shorelines Requirements?
- f.     The PSE Stipulation has the effect of avoiding scrutiny of the Hylebos  
            portion of the Project by the Board in this case?
- g.     The PSE Stipulation does not define its effects on the related Project  
            permitting reviews by other agencies?
- h.     The PSE Stipulation comprises a substantial change in the configuration  
            and elements of the Project as presented to and analyzed by the City of  
            Tacoma, and upon which the SSDP was predicated?

1 7. Whether the City’s decision to issue the SSDP was appropriate under applicable  
2 laws

3 8. Whether the Petitioner has standing to bring this petition for review?

4 9. Whether Petitioner timely filed and served its petition for review?<sup>6</sup>

5 **A. Tribe’s Standing to Appeal (Issue 8)**

6 3.

7 The Shoreline Management Act (SMA) allows any person aggrieved by the granting,  
8 denying, or rescinding of a permit on shorelines of the state pursuant to RCW 90.58.140 to seek  
9 review from the Shorelines Hearings Board. RCW 90.58.180(1). In order to maintain an appeal,  
10 a party must show that he or she is a “person aggrieved” within the meaning of RCW 90.58.180.  
11 The term “person aggrieved” has been interpreted to include anyone with standing to sue under  
12 existing law. *Anderson v. Pierce County*, 86 Wn. App. 290, 299, 936 P.2d 432 (1997). This  
13 requires a party to show that he or she has suffered an injury in fact within the zone of interests  
14 protected by the statute and that the Board has authority to redress the injury suffered. *CORE v.*  
15 *Olympia*, 33 Wn. App. 677, 657 P.2d 790 (1983); *Alexander v. City of Port Angeles*, SHB Nos.  
16 02-027 & 02-028 (Summary Judgment, March 13, 2003).

17 4.

18 “To show an injury in fact, the plaintiff must allege specific and perceptible harm.”  
19 *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 829, 965 P.2d 636 (1998). The  
20 “injury in fact” test requires more than an injury to a cognizable interest. It requires that the

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21 <sup>6</sup> No evidence was presented or argument advanced that the Tribe’s appeal was untimely. The Board, therefore, considers Issue 9 to have been abandoned.

1 party seeking review be among the injured. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563,  
2 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). A party asserting general enforcement of a statute  
3 does not have standing unless he or she is “perceptibly affected by the unlawful action in  
4 question.” *Id.*, at 566. Moreover, no standing is conferred to a party alleging a conjectural or  
5 hypothetical injury. *Trepanier v. Everett*, 64 Wn. App. 380, 382, 824 P.2d 524, rev. denied 119  
6 Wn.2d 1012, 833 P.2d 386 (1992). The party asserting standing bears the burden of establishing  
7 each of these elements. *Coalition to Protect Puget Sound Habitat v. Thurston County*, SHB No.  
8 13-006c (Order on Motions, Aug. 6, 2013) citing *Center for Environmental Law & Policy v.*  
9 *Ecology*, PCHB No. 96-165 (1997).

10 5.

11 In their written closing arguments, the City and the Port asserted that the Tribe lacks  
12 standing to challenge the SSDP.<sup>7</sup> Conceding that the Tribe satisfies the zone of interest and  
13 redressability prongs, the City and the Port argue that the Tribe did not demonstrate that it will  
14 suffer an injury in fact. According to the City and the Port, the Tribe’s witnesses testified to  
15 potential, as opposed to concrete and immediate, injury. Because the Tribe lacks standing, the  
16 City and the Port assert that the appeal must be denied.

17 6.

18 The Tribe presented evidence establishing a significant and active interest in maintaining  
19 and improving the environmental health of Commencement Bay in general and the Hylebos and  
20 Blair Waterways in particular. Naylor Testimony, Ladley Testimony. The Project site is within

21 \_\_\_\_\_  
<sup>7</sup> PSE did not challenge the Tribe’s standing.

1 the Tribe's usual and accustomed treaty area. *Id.* The Tribe is actively engaged in mitigation  
2 and habitat restoration projects in Hylebos Creek, the Hylebos Waterway, and Wapato Creek.  
3 Ladley Testimony; R-27 at 3. Permitting of insufficiently mitigated development and/or use of  
4 substandard construction practices threatens to further reduce available habitat for fish and  
5 shellfish, which the Tribe has a treaty protected right to harvest. Naylor Testimony, Ladley  
6 Testimony.

7 7.

8 The objectives of the SMA are broad and the types of interests protected are diverse. The  
9 policies of the SMA contemplate "protecting against adverse effects to the public health, the land  
10 and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting  
11 generally public rights of navigation and corollary rights incidental thereto." RCW 90.58.020.  
12 The potential impacts described by the Tribe's witnesses are the type of alleged injury sufficient  
13 to confer standing under the broad construction the Board has given the SMA. *Friends of the*  
14 *San Juans v. San Juan County*, SHB No. 13-001 (Order Granting and Denying Summary  
15 Judgment, May 15, 2013). This liberal interpretation of standing is consistent with the Board's  
16 past decisions addressing the standing of parties bringing legitimate environmental interests  
17 before it. *Nicholson v. City of Renton*, SHB No. 10-016, pp. 13-14 (Order on Summary  
18 Judgment, Dec. 22, 2010). It is based on the Legislature's directive in RCW 90.58.900, which  
19 requires the SMA to be "liberally construed to give full effect to the objectives and purpose for  
20 which it was enacted."

1 8.

2 In their arguments, the City and the Port conflate standing with burden of proof. A  
3 challenge to a permit for future construction is, by its nature, forward looking and raises  
4 questions of potential project impacts. The issue for hearing is whether the Tribe met its burden  
5 to prove that the City erred in granting the permit. The Board finds and concludes that the Tribe  
6 has identified a potential injury sufficient to confer standing and it should be afforded the  
7 opportunity to present its case concerning the impacts of the Project on the environment through  
8 this appeal. Accordingly, the Board concludes that the Tribe has standing to appeal the SSDP  
9 and rejects the request to deny the appeal on that ground.

10 **B. Delegation and/or Deferral (Issue 2)**

11 9.

12 The Tribe argues that the SSDP fails to comply with applicable shoreline requirements  
13 because the City deferred any sediment impact analysis to future permits issued by entities other  
14 than the City. Relying on a partial reading of TSMP 13.10.5.5.A and the SMA's policy  
15 statement in RCW 90.58.020, the Tribe contends that the City should have required PSE to  
16 characterize the sediment in the Blair Waterway before construction could begin. According to  
17 the Tribe, because contaminants have been found at some locations in the Blair Waterway and  
18 the status of the sediments at the TOTE facility are unknown, those sediments should be tested in  
19 order to protect existing ecological functions and to restore ecological functions in a degraded  
20 area. The Tribe rejects the City's reliance on future permits issued by state or federal agencies to  
21

1 cure any shortcomings in the SSDP, asserting that it does not absolve the City of performing its  
2 SMA duty. Tribe's Closing Argument at 2-8.

3 10.

4 The City asserts that it lacks the legal authority to require sediment testing and has never  
5 imposed such a condition in a shoreline substantial development permit. Schultz Testimony;  
6 Brenner Testimony. According to the City, the SSDP is not a development permit; rather, it  
7 signifies that the Project can be constructed in the shoreline and that PSE must obtain necessary  
8 authorizations from state and federal agencies before it can pursue additional City permits  
9 needed to construct the Project. Schultz Testimony; Ex. R-1 at 7. Prior to receiving a City  
10 building permit, PSE must secure permits from the Corps, Ecology, and WDFW. Because it  
11 lacks the authority to require sediment testing, the City relies on the state and federal agencies  
12 with the legal authority and expertise to address those issues. Schultz Testimony. The City  
13 argues that the policy of the SMA contemplates a multi-jurisdictional approach to shoreline  
14 development between federal, state and local governments in order to prevent the harm caused  
15 by the uncoordinated development of the state's shorelines. City's Closing Argument at 3. PSE  
16 and the Port concur with the City's position.

17 11.

18 The Board has jurisdiction to determine whether a shoreline permit issued by the City  
19 complies with the SMA and the TSMP. WAC 461-08-505(1)(c). A shoreline substantial  
20 development permit may be granted only if the proposed development is consistent with both the  
21 policies and procedures of the SMA, its implementing regulations, and the applicable local



1 master program. WAC 173-27-150. While the Board gives substantial weight to a local  
2 government's interpretation of its own master program and related shoreline policies, the Board  
3 is not required to accord a legal interpretation by the local government any particular deference  
4 under its *de novo* standard of review. *Buechel v. Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910  
5 (1994). The concept of substantial weight means only that an interpretation by a local  
6 government of its own master program and related policies is relevant and important for the  
7 Board to consider in any appeal. The Board accords substantial weight to a local government's  
8 longstanding and consistent interpretation of its regulation. *Foreman v. City of Bellevue*, SHB  
9 No. 14-023 (2015).

10 12.

11 The Project location is designated as a High-Intensity Environment under the TSMP.  
12 "The purpose of the 'high-intensity' environment is to provide for high-intensity water-  
13 dependent and water-oriented mixed-use commercial, transportation, and industrial uses while  
14 protecting existing ecological functions and restoring ecological functions in areas that have been  
15 previously degraded." TMC 13.10.5.5.5.A. Building and other permits cannot be issued until  
16 the local government issues the necessary shoreline permits. "No development may occur on a  
17 shoreline of the state unless it is consistent with the policy of the SMA and a [shoreline] permit is  
18 first obtained." *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 448, 54 P.3d 1194  
19 (2002); WAC 173-27-140(1).

1 13.

2 Other state and federal agencies share complementary responsibilities over in-water work  
3 in the Blair and Hylebos Waterways, and may require additional analysis and permits before PSE  
4 may construct the Project. Among the authorizations PSE is required to obtain are (1) a 404  
5 Permit from the Corps for the removal and installation of piles, 33 U.S.C. § 1344; (2) a CWA  
6 401 Certification and NPDES Permit from Ecology for the protection of water quality, 33 U.S.C.  
7 §§ 1341, 1342; and (3) a Hydraulic Project Approval from WDFW for the protection of fish life,  
8 RCW 77.55.021(1). The status of Commencement Bay as a Superfund site requires EPA to  
9 engage in CERCLA coordination with the Corps to confirm the Project's consistency with  
10 CERCLA laws and regulations. Ex. P-102. Through the CERCLA coordination, EPA requested  
11 that PSE and the Port provide sediment characterization data only for the Hylebos Waterway.  
12 EPA also provided the Corps with CERCLA conditions to include the 404 Permit. *Id.* Finally,  
13 because ESA listed species may be present in the Project area, the Corps is required to consult  
14 with NMFS and USFWS to ensure that those species and their critical habitat are not adversely  
15 affected. Exs. R-35 and R-36. In the ESA consultation, both NMFS and USFWS concurred  
16 with Corps' determination that the Project may affect, but is not likely to adversely affect listed  
17 species or their critical habitat. *Id.*

18 14.

19 The SMA recognizes the concurrent jurisdiction of multiple agencies over shoreline  
20 resources. "There is, therefore, a clear and urgent demand for a planned, rational, and concerted  
21 effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in

1 an uncoordinated and piecemeal development of the state’s shorelines.” RCW 90.58.020. The  
2 TSMP also acknowledges the fact of concurrent jurisdiction over shoreline projects.  
3 “[D]evelopments and activities regulation by this Master Program may also be subject to . . .  
4 various other provisions of local, state and federal law[.]’ TMC 13.10.1.7.1. This concept is  
5 carried through to the SSDP, which conditions the issuance of development permits on PSE’s  
6 demonstration that “no additional federal or state permits are necessary, or shall provide copies  
7 of the approved permit(s) to the City prior to the issuance of the necessary development permit.”  
8 Ex. R-1 at 9.

9 15.

10 The Board concludes that the City did not err in relying on the expertise and authority of  
11 state and federal agencies to address potential sediment contamination at the Project site. In this  
12 case, the Board gives deference to the City’s interpretation of the TSMP and related shoreline  
13 policies regarding the inclusion of sediment characterization as part of the SSDP. The evidence  
14 presented demonstrated that EPA and Ecology, the agencies with jurisdiction over contaminated  
15 sites, provided their opinions about the potential for contaminated sediments to be found at the  
16 proposed in-water work sites. Exs. P-102; R-1 at 88. Neither agency expressed a concern with  
17 regard to the Blair Waterway. *Id.* Data collected from the EIM system, regardless of the  
18 screening level employed, showed no contamination in the vicinity of the TOTE facility on the  
19 Blair Waterway. The Board finds and concludes that, by conditioning PSE’s in-water work on  
20 the implementation of BMPs and observation of a fish window, the SSDP complies with the

1 TSMP's requirement concerning on contaminated sediment management. TMC  
2 13.10.7.6.2.A.5.b.

3 16.

4 The City has not required sediment characterization in any previous shoreline substantial  
5 development permit and asserts that the TSMP does not provide the necessary authority to  
6 require testing. Brenner Testimony; City's Closing Argument at 4-5; Exs. R-22 and R-23. The  
7 Board accords substantial weight to the City's longstanding and consistent interpretation of its  
8 TSMP in this regard. *Foreman v. City of Bellevue*, SHB No. 14-023 (2015). The Board  
9 concludes that the City did not violate the SMA or TSMP by deferring the issue of sediment  
10 characterization to other agencies with concurrent jurisdiction over PSE's Project.

11 **C. Project's Compliance With Applicable Shoreline Requirements (Issues 1, 3, 5 and 7)**

12 17.

13 As required by the SMA, the TSMP includes shoreline environment designations  
14 prescribing "different sets of environmental protection measures, allowable use provisions, and  
15 development standards for each of these shoreline segments." WAC 173-26-191(1)(d); TMC  
16 13.10.5. The environmental designations "reflect the type of development that has occurred, or  
17 should take place in a given area." TMC 13.10.5.1. The TSMP classification system consists of  
18 six shoreline environments. As noted above, the Project is located in the High-Intensity  
19 Environment. TMC 13.10.5.5.5.B. Shoreline areas are designated "high-intensity" if they  
20 "currently support high-intensity uses related to commerce, transportation or navigation; or are  
21 suitable and planned for high-intensity water-oriented uses." TMC 13.10.5.5.5.C. The

1 management policies governing the High-Intensity Environment require, among other things,  
2 that “[p]olicies and regulations shall assure no net loss of shoreline ecological functions as a  
3 result of new development. Where applicable, new development shall include environmental  
4 cleanup and restoration of the shoreline to comply with relevant state and federal law.” TMC  
5 13.10.5.5.5.D.3. The management policies are implemented through the TSMP’s use regulations  
6 and development standards. TMC 13.10.5.5.

7 18.

8 Regulations governing shoreline use are contained in Chapter 6 of the TSMP. “Shoreline  
9 use and development shall be carried out in a manner that prevents or mitigates adverse impacts  
10 so that no net loss of existing ecological functions occurs[.]” TMC 13.10.6.4.2.A.1. Ecology’s  
11 Shoreline Master Program Guidelines define “ecological functions” as “the work performed or  
12 role played by the physical, chemical, and biological processes that contribute to the  
13 maintenance of the aquatic and terrestrial environments that constitute the shoreline’s natural  
14 ecosystem.” WAC 173-26-020(13). If modification to a marine shoreline is unavoidable, “all  
15 adverse impacts from a development proposal or alteration shall be mitigated so as to result in no  
16 net loss of shoreline and/or critical area functions or processes.” TMC 13.10.6.4.2.C.1.

17 19.

18 A project proponent is required to follow the mitigation sequence of avoidance,  
19 minimization and compensation. TMC 13.10.6.4.2.C.2; Brenner Testimony. A project  
20 proponent can compensate “for the adverse impact by replacing, enhancing, or providing similar  
21 substitute resources or environments[.]” TMC 13.10.6.4.C.2.e. Preference shall be given to

1 mitigation projects located within the City. TMC 13.10.6.4.C.3.a. For projects within the High-  
2 Intensity Environment, “[t]he preference for compensatory mitigation is for innovative  
3 approaches that would enable for concentration of mitigation into larger habitat sites in areas that  
4 will provide greater critical area or shoreline function.” TMC 13.10.6.4.C.3.c.i.

5 20.

6 The Tribe has the burden of proving the SSDP’s inconsistency with the SMA and/or  
7 TSMP. WAC 471-08-500(3). The Board concludes that the Tribe failed to carry its burden in  
8 this case. As discussed in the Findings of Fact above, the record contains substantial evidence  
9 the Project’s impacts were sufficiently analyzed in the Final EIS and SSDP permitting process.  
10 Through construction measures being employed by PSE and the conditions of the SSDP, the  
11 Project will result in a no net loss of ecological functions. PSE will protect water quality by  
12 discharging zero stormwater during construction, upgrading the existing stormwater system at  
13 the LNG facility site, and demolishing buildings that constitute sources of stormwater  
14 contaminants. Hogan Testimony; Moore Testimony. Under the Water Quality Protection and  
15 Monitoring Plan, instrument monitoring will be used during pile removal. Tornberg Testimony.  
16 Removal of creosote-treated piles and overwater decking will also remove a source of surface  
17 water contamination. Naylor Testimony; Deshler Testimony; Brenner Testimony; Tornberg  
18 Testimony. The use of BMPs and a fish window during construction will minimize impacts to  
19 anadromous fish and minimize the resuspension of sediments in the water column. Brenner  
20 Testimony; Exs. R-27 and R-33.

1 21.

2 The record also contains substantial evidence that the Revised Mitigation Plan meets the  
3 TSMP's no net loss standard and compensatory mitigation requirement. As required by the  
4 TSMP, PSE engaged in mitigation sequencing. Brenner Testimony. The Revised Mitigation  
5 Plan provides sufficient mitigation to compensate for the Project's unavoidable impacts.  
6 Brenner Testimony; Boyle Testimony; Ex. R-27. The mitigation sites are within the City and, as  
7 preferred under the High-Intensity Environment Zone, the Sperry Ocean Terminal site  
8 concentrates mitigation at a larger location that will provide greater shoreline function.<sup>8</sup> Boyle  
9 Testimony; Tornberg Testimony; Ex. R-27.

10 **D. Application (Issue 4)**

11 22.

12 Under RCW 90.58.180, the Board has jurisdiction over the granting, denying, or  
13 rescinding of a permit issued under the SMA. This includes a determination of whether an  
14 application for a shoreline substantial development permit is complete. *See Friends of Seaview*  
15 *v. Pacific County*, SHB No. 05-017 (Order Granting Summary Judgment, Oct. 19, 2005);  
16 *Laccinole v. City of Bellevue*, SHB No. 03-025 (2004). For a shoreline substantial development  
17 permit to be deemed complete it must "contain sufficient detail to enable the local government  
18 and the Board to determine consistency" with the policies of the SMA and its implementing  
19 regulations. *Hayes v. Yount*, 87 Wn.2d 280, 295-96, 552 P.2d 1038 (1976); *North Park*  
20 *Neighbors v. City of Long Beach*, SHB No. 05-030 (Findings of Fact, Conclusions of Law and

21 \_\_\_\_\_  
<sup>8</sup> The Tribe provided no evidence on Issues 1.c or 1.d. The Board deems those issues to have been abandoned.

1 Order, Sept. 28, 2006). Determination of whether an application meets applicable statutory  
2 requirements is based on the record developed below and before the Board. *Eklund v. San Juan*  
3 *County*, SHB No. 99-029 (2000). The Board uses a harmless error standard in reviewing the  
4 completeness of a shoreline development application. *North Park at 11 (COL VI)*.

5 23.

6 The Board finds that the record establishes that the information gathered by City staff  
7 during its initial review of the application through final decision contained sufficient detail to  
8 enable the local government and the Board to determine consistency with the SMA and TSMP.  
9 The Board concludes that the Tribe failed to present evidence to support its claim that the SSDP  
10 did not comply with applicable shoreline regulations because the application materials were  
11 unclear or internally inconsistent.

12 **E. Stipulation (Issue 6)**

13 24.

14 Through the Stipulation, PSE notified the Board and the City that it would not pursue its  
15 planned in-water development in the Hylebos Waterway approved under the SSDP. Ex. P-90;  
16 Tornberg Testimony. The Tribe objected to the Stipulation on various grounds, as noted in Issue  
17 6. However, the Tribe failed to present evidence in support of its claims.

18 25.

19 The Stipulation provides that PSE will not engage in

20 [a]ny in-water or over-water construction, dredging or fuel  
21 bunkering in the Hylebos Waterway authorized by SSDP No. SHR  
2015-40000246123 other than (a) work to improve three existing



1 storm water outfalls to meet new, more stringent storm water  
2 requirements and (b) removal of 4,973 square feet (approximately  
3 37%) of overwater decking from the existing pier (pilings to  
4 remain in place).

5 Ex, R-90. The environmental impacts of those activities were analyzed in the Final EIS. Ex. R-  
6 4. The activities were also part of the SSDP application reviewed by the City for compliance  
7 with the SMA and TSMP. Brenner Testimony; Schultz Testimony; Ex. R-1. PSE's Revised  
8 JARPA and Revised Mitigation Plan, submitted to the remaining permitting agencies, reflect the  
9 reduced scope of the Project. Exs. R-26 and R-27; Tornberg Testimony.

10 26.

11 As the Board concluded above, PSE presented sufficient information in its application for  
12 the City and the Board to evaluate the Project for consistency with the SMA and TSMP. The  
13 evidence presented at the *de novo* hearing before the Board further substantiated the Project's  
14 compliance with the SMA and TSMP. The changes to the SSDP prompted by the Stipulation do  
15 not meet the requirements for a permit revision under WAC 173-27-100. The Board concludes  
16 that the Tribe did not meet its burden of proof on Issue 6.

17 27.

18 Any Finding of Fact deemed to properly be a Conclusion of Law is hereby adopted as  
19 such.  
20  
21

1 Having so found and concluded, the Board enters the following:

2 **ORDER**

3 The City of Tacoma's Shoreline Substantial Development Permit, SHR2014-  
4 40000246123, as limited by the Stipulation and mitigated for under the In-Water Mitigation Plan  
5 for Tacoma LNG, dated April 25, 2016, is AFFIRMED.

6  
7 SO ORDERED this 18th day of July, 2016.

8  
9 **SHORELINES HEARINGS BOARD**

10  
11 JOAN M. MARCHIORO, Presiding

12  
13  
14 LILY SMITH, Member

15  
16 JOHN BOLENDER, Member  
17  
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19  
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