POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

TAHOMA AUDUBON SOCIETY, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and, PARK JUNCTION, LLC, Respondents.	PCHB No. 21-057 ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

Appellant Tahoma Audubon Society (Audubon) filed an appeal with the Pollution Control Hearings Board (Board) on September 13, 2021, challenging the State of Washington, Department of Ecology (Ecology) decision granting an extension of the development schedule for Water Rights permit no. G2-29199. The parties agreed that, as the water right permit holder, Park Junction, LLC (Park Junction) should be joined as a party. On August 1, 2022, Park Junction filed a motion to dismiss against Audubon for lack of standing.

The Board deciding this matter was comprised of Chair Carolina Sun-Widrow, and members Neil L. Wise (Presiding) and Michelle Gonzalez. Attorney Robert E. Mack represented Audubon. Assistant Attorney General Clifford H. Kato appeared on behalf of Ecology. Attorney Margaret Y. Archer appeared on behalf of Park Junction.

In ruling on the Motion, the Board considered the following materials:

1. Appeal of Decision to Extend the Development Schedule for Water Right Permit No. G2-29199 (*Audubon Appeal*);
2. Park Junction's Motion to Dismiss Appeal (*Motion*);
3. Declaration of Margaret Archer in Support of Park Junction's Motion to Dismiss Appeal, with attached Exhibits A-H (*Archer Decl.)*;
4. Memorandum in Opposition to Park Junction's Motion to Dismiss Appeal (*Response*);
5. Declaration of Kirk Kirkland, with attached Exhibits (Exs.) 1-2 (*Kirkland Decl.*);
6. Declaration of Robert E. Mack, with attached Exhibits 1-5 (*Mack Decl.*);
7. Declaration of Clare Duncan McCahill (*McCahill Decl.*)
8. Park Junction's Reply in Support of Motion to Dismiss Appeal (*Reply*);
9. Second Declaration of Margaret Archer in Support of Park Junction's Motion to Dismiss Appeal, with attached Exhibits I-J (*Second Archer Decl.*); and,
10. The Board's file in this matter.

Based on the written arguments and evidence before the Board on the motion, the Board enters the following decision.

II. BACKGROUND

Park Junction owns a 440-acre site, located near the western entrance to Mt. Rainier National Park. On this site, Park Junction has proposed to construct the Park Junction Resort. The resort will include a lodge, golf course, vacation home and condominium sites, several restaurants, cabins, retail space, a train station, and an interpretive center. *Tahoma Audubon Society v. Park*

Junction, 128 Wn. App. 671, 674-5, 116 P.3d 1046 (2005); *Archer Decl., Ex. C (Ecology Report of Examination), p. 2*; *Ex. F (Pierce Co. Staff Report), p. 1.* The resort would be a Master Planned Resort as allowed under the Growth Management Act and Pierce County 1994 Comprehensive Plan. *Archer Decl., Ex. C, p. 2.* Pierce County issued a final environmental impact statement pursuant to the State Environmental Policy Act (SEPA) on September 16, 1999. The final environmental impact statement was appealed by Audubon. *Id.*

To provide water for the resort, Park Junction applied for a groundwater permit on March 3, 1995. On April 20, 1995, Ecology issued a preliminary permit to Park Junction, allowing the installation and testing of up to five wells. On July 23, 2001, Park Junction submitted a revised proposal requesting an instantaneous withdrawal rate of 250 gallons per minute (gpm) and an annual maximum withdrawal of approximately 250-acre feet per year (afy). The water would be pumped from a maximum of three water supply wells. *Id.* Ecology's Report of Examination recommended the issuance of a water right permit in the amount of 250 gpm and 275 afy, 153 afy for the irrigation of 117 acres, and 122 afy for multiple domestic supply. The recommended period of use for domestic purposes was year-round, and April 15 to October 15 for irrigation use. *Id., p. 6.* On May 3, 2002, Ecology issued a Ground Water Permit (G2-29199) to Park Junction, adopting the recommendations of the Report of Examination. *Archer Decl., Ex. B (Groundwater Permit*).

Due in part to legal challenges,[1] the resort remains unbuilt aside from logging in 2004, and construction of wetland mitigation in 2020. *Archer Decl., Ex. F, p. 1.*

[1] For example, Audubon appealed the original Pierce County hearing examiner's decision to Thurston County Superior Court, whose decision was appealed to the Court of Appeals. *See Tahoma Audubon Society v. Park Junction Partners*, 128 Wn. App. 671 (2005). Litigation over the project continues to the present. *Archer Decl., Exs. A, E-H.*

The Revised Code of Washington (RCW) 90.03.320 requires that actual construction work be commenced on a project subject to a water right within a reasonable time as determined by Ecology and prosecuted with diligence and completed within the time set by Ecology. When establishing the deadlines, Ecology shall take into consideration the cost and magnitude of the project, the engineering and physical features involved, and the public welfare and public interests affected. RCW 90.03.320.

For good cause, Ecology shall extend the deadlines and shall grant such extensions as may be reasonably necessary. When making these decisions, Ecology shall have due regard for the good faith of the applicant and the public interests affected. If the applicant does not comply with the terms of the extension, Ecology may cancel the water right permit. *Id.*

In summary, the applicant estimates the time needed to actually apply appropriated water to beneficial use. Then Ecology will establish a time period for that application and extensions may be available depending on the circumstances. A final certificate of water right will be issued upon a showing that the appropriation has been perfected. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 591-92, 957 P.2d 1241 (1998).

Pursuant to RCW 90.03.320, Ecology granted a five-year extension of the development schedule for Park Junction's water right on August 19, 2021. Ecology based the extension on the following factors: construction delays caused by Covid-19 and local permitting appeals, which meant the Park Junction was unable to proceed with the project. Ecology determined that progress had been made on the development: the water system plan had been approved by the Washington State Department of Health, a wetland mitigation plan was ready for submittal, and construction

plans for several aspects of the project were complete. Construction was scheduled to begin in April 2021, but was stopped by Pierce County's revocation of a necessary permit. Ecology concluded that an extension was necessary to complete project infrastructure and build the hotel and annex units. *Archer Decl., Ex. A, p. 1.*

Audubon appealed Ecology's development extension to the Board on September 13, 2021.

III. ANALYSIS

A. SUMMARY JUDGMENT STANDARD[2]

Summary judgment is a procedure available to avoid unnecessary trials where there is no genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 675-76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d 1004 (1991).

A moving party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." CR 56(c); *See, Magula v. Benton Franklin Title Co., Inc.,* 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

[2] Park Junction's pleading is captioned as a motion to dismiss. Because the parties relied on evidence outside of the pleadings (declarations and exhibits), the Board considers the request under a summary judgment standard. *See* CR 12(b), (c).

Summary judgment is subject to a burden shifting scheme. If the moving party satisfies its burden, then the nonmoving party must present evidence demonstrating that material facts are in dispute. *Atherton Condo Ass'n v. Blume Dev. Co*., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). When determining whether an issue of material fact exists, all facts and inferences are construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co*., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). However, bare assertions concerning alleged genuine material issues do not constitute facts sufficient to defeat a summary judgment motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014). A nonmoving party cannot rely on speculative statements or conclusory allegations to defeat summary judgment. *Seiber v. Poulsbo Marine Center, Inc*., 136 Wn. App. 731, 736, 150 P.3d 633 (2007).

Once it is determined that no genuine issues of material fact exist, the court then analyzes which party is entitled to judgment as a matter of law. *Skagit Hill Recycling v. Skagit Co*., 162 Wn. App. 308, 318, 253 P.3d 1135 (2011).

B. LEGAL ISSUES

This case presents the following legal issues:

1. Whether the TAS has standing to challenge Ecology's decision to extend the development schedule for Water Right Permit No. G2-29199.
2. Whether Ecology lawfully extended the development schedule for Water Right Permit No. G2-29199 under the terms of RCW 90.03.320, other applicable statutes, regulations, and guidelines.

    2A. Whether granting the development extension of the water right was consistent with the State Environmental Policy Act, its Guidelines, and related environmental standards.

    2B. Whether the granting of the extension of the water right violated other legal provisions and policies, including those found in the Pierce County comprehensive

plan and development regulations, the Upper Nisqually Community Plan, and tribal consultations and agreements.

2C. Whether in granting the extension for the water right, Ecology performed any required public interest analysis and was obliged to do so.

2D. Whether Ecology properly applied its own guidelines and policies in granting the extension of the development schedule.

2E. Whether the water right to which the development schedule was extended is in good standing in other material respects, and qualified to be considered for an extension.

Prehearing Order, pp. 2-3.

C. LEGAL ISSUE 1

The Motion is limited to Legal Issue 1: Whether Audubon has standing to appeal Ecology's extension of the development schedule for Water Right Permit No. G2-29199.

Audubon has the burden of proof to demonstrate that it has standing to bring this appeal. This is a jurisdictional issue as the Board cannot hear an appeal unless the parties have standing to pursue their claims. *Thompson v. Dep't of Ecology,* PCHB No. 11-027, p. 11 (August 17, 2011); RCW 43.21B.230(1) ("[u]nless otherwise provided by law, any person with standing may commence an appeal to the pollution control hearings board by filing a notice of appeal with the board within thirty days from the date of receipt of the decision being appealed."). The Board requires a party to meet three requirements to demonstrate standing: (1) actual or imminent injury-in-fact that is concrete and particularized; (2) the injury must be within the zone of interests protected by the statute at issue; and (3) the Board must have the ability to impose a remedy that will redress the injury. In addition, the Board requires that the injury be caused by the challenged action of the government agency. *Thompson,* PCHB No. 11-027, p. 11-12. *See also, Green v. Dep't of Ecology,* PCHB No. 07-012, pp. 8-9 (August 22, 2007).

Park Junction argues that Audubon lacks standing to appeal Ecology's decision to extend the permit development schedule. Park Junction contends that it is not sufficient to establish standing to challenge Ecology's original approval of the water right permit, or any of Pierce County's land use approvals and decisions. *Motion, p. 2.* To support its argument, Park Junction cites to Audubon's answers to interrogatories and a lack of evidence that the extension itself caused any injury to Audubon sufficient to establish standing. *Id., pp. 9-14.*

In its Response, Audubon claims that the organization and its members have standing under the Administrative Procedures Act, ch. 34.05 RCW, the Water Code, ch. 90.03 and ch. 90.45 RCW, and SEPA, ch. 43.21C RCW. *Response, pp. 3-8.* Further, Audubon argues that it has been injured by the development schedule extension and that this injury is within the zone of interests protected by the applicable statutes. *Id., pp. 10-15.*[3] Audubon also provides a copy of amended responses to the interrogatories referenced in Park Junction's Motion. *Mack Decl., Ex. 1.*

In its Reply, Park Junction questions the timing of the amended interrogatory responses and argues that "a challenge to an extension decision does not provide an opportunity to revisit the original water right permit decision." *Reply, pp. 1-4.* Park Junction also states that the water right in question is exempt from SEPA and that statute cannot be used to support Audubon's standing. *Id., pp. 8-9. See also* WAC 197-11-800(4) (appropriations of 2,250 gallons per minute or less of groundwater for any purpose is categorically exempt from SEPA).

[3] In its Response, Audubon also claims that Park Junction itself lacks standing to bring its motion due to changes in the relevant legal entity since the first water right application. *Response, pp. 15-16.* For the reasons stated in Park Junction's Reply, pp. 9-10, the Board rejects this claim.

Audubon's responses to Park Junction's interrogatories warrants further discussion. In answer to the question "Do you contend that the Permit Extension has or will cause an immediate, concrete and specific injury to the Tahoma Audubon Society and/or one or more of its members," Audubon originally responded with "The Society does not claim that it would be immediately, concretely, and specifically injured by the extension." *Archer Decl., Ex. D, pp. 9-10.* Audubon then amended its answer and states that the "former Answer was incorrect," and lists members of Audubon allegedly injured by the extension, including Kirk Kirkland and Clare Duncan McCahill.[4] *Mack Decl., Ex. 1., p 10.*

As noted by Park Junction in its Reply, the standing issue was first established in the Board's Prehearing Order, dated December 2, 2021, the discovery deadline was July 18, 2022, the dispositive motion deadline was August 1, 2022, and the amended answers were provided on August 15, 2022. *Reply, pp. 1-2.* Audubon did not provide a reason for filing its amended answer after receiving Park Junction's dispositive motion. Although submitted late in the proceedings, the amended interrogatory answers were considered by the Board. However, the circumstances surrounding the amended answers undermine Audubon's position that it has shown injury in-fact.

In order to establish standing, Audubon submitted declarations from two of its members, Kirk Kirkland and Clare Duncan McCahill. Kirkland alleges injuries from increased traffic on State Route 706, development of the project site, increased numbers of tourists, use of Park Junction's water right, and impacts to local elk herds. *Kirkland Decl., pp. 5-7, 11.* McCahill and

[4] The Board recognizes the distinction between Audubon as an association suffering injury and its members suffering injury as referenced in Park Junction's first set of interrogatories. However, as analyzed below, neither Audubon as an association nor its individual members has shown the requisite injury-in-fact.

her husband own a 90-acre organic farm in the vicinity of the proposed resort. She alleges injury from nutrient and pesticide runoff from the golf course, traffic and congestion on State Route 507, and the general development of the project site. *McCahill Decl.*

In *KS Tacoma Holdings, LLC v. Shorelines Hearings Board,* 166 Wn. App. 117, 272 P.3d 876 (2012)[5], the Court of Appeals affirmed a Shoreline Hearings Board (SHB) decision granting summary judgment in favor of the respondent permittee, where the SHB concluded that KS Tacoma Holdings, LLC (KS Tacoma) did not have standing to appeal a permit revision granted to the respondent permittee for a development in Tacoma. KS Tacoma had not appealed the original shoreline permit issued in 2007, nor a revision to the shoreline permit in 2008 (2008 revision). The City of Tacoma (City) approved a revision to the shoreline permit in 2009 (2009 revision) and KS Tacoma appealed that revision. The SHB dismissed the case for lack of standing, holding that it considered only alleged injuries from the 2009 revision because KS Tacoma did not appeal either the original 2007 permit or the 2008 revision. The SHB concluded that KS Tacoma's alleged injuries from the 2009 revision were insufficient to establish standing. *Id.* at 121-124.

Before the Court of Appeals, KS Tacoma argued that the permittee could not proceed under the 2007 shoreline permit if the 2009 revision were voided and the permittee would then have to apply for a new permit. KS Tacoma claimed that this result supported its standing claim because the Court should consider injuries from the 2007 permit and any subsequent revisions. The Court rejected this argument. The Court of Appeals limited its review to KS Tacoma's alleged injuries

[5] *Review denied,* KS Tacoma Holdings, LLC v. Shorelines Hearings Bd., 174 Wn.2d 1007, 278 P.3d 1112 (2012).

from the 2009 permit revision. The Court held that KS Tacoma could not satisfy the injury-in-fact test and therefore did not have standing to appeal the 2009 revision. Therefore, the Court affirmed the SHB's summary judgment order dismissing KS Tacoma's claim for lack of standing. *Id.* at 129, 130, 137, 140.

KS Tacoma and *Concerned Neighbors of Lake Samish v. Washington State Department of Ecology,* PCHB Nos. 11-126, 11-127, pp. 7-8 (March 26, 2012) (recognizing that a challenge to an extension decision does not provide an opportunity to appeal the original, unchallenged water right permit decision) are instructive here. Audubon's Response makes a similar argument to the one rejected in *KS Tacoma* – that the permit development extension relates back to the original water right permit and therefore, the Board can consider claimed injuries from the original development, and not just claimed injuries from the permit development extension itself. Consistent with *KS Tacoma* and *Concerned Neighbors,* the Board rejects the argument and considers only claimed injuries from the 2021 development schedule extension. The injuries alleged in the declarations above stem from the original water right permit approval and not the 2021 extension. The declarants have not sufficiently shown any injury in-fact from the extension.

Also, the injury-in-fact element requires both a demonstration of a specific injury and a nexus to the government action on appeal. *Suquamish Indian Tribe v. Kitsap County,* 92 Wn. App. 816, 829-30, 965 P.2d 636 (1998). Again, the action challenged here is Ecology's decision to extend the development schedule. Audubon has not proven the required nexus.

Despite their references to the water right extension, several of the legal issues in this case relate to the validity of the original water right permit and the proposed resort development. For

example, since the water right permit is categorically exempt from SEPA, Legal Issue 2A would have to be a challenge to the SEPA review of the resort development.[6] As there are no Pierce County plans or regulations governing Ecology's water right extensions, Legal Issue 2B would necessarily relate to the proposed project itself. Legal Issue 2E asks whether the original water right remains in good standing in other material respects.

No evidence has been presented that Audubon appealed the original water right approval and Audubon cannot now use the development extension as an avenue to challenge Ecology's 20-year old water permit decision. Audubon may have had standing to challenge the original water right permit, but that does not equate to having standing to challenge any subsequent development schedule extensions.

In summary, Audubon has not met its burden of showing actual or imminent, concrete and particularized injury-in-fact directly caused by Ecology's extension of the development period for Park Junction's groundwater right. As Audubon has failed to demonstrate the first element of standing, the Board does not reach the remaining two elements (zone of interests and redressability).

Based on the above analysis, the Board concludes that Audubon has not met its burden to establish standing to challenge the water right development extension; therefore, the Board lacks jurisdiction over this case and must grant Park Junction's motion to dismiss.

[6] This conclusion is further supported by Audubon's appeal, which alleges "enough time has elapsed since environmental analysis of the *project*, so that additional environmental review is warranted. [Ecology] has relied on outdated and misleading environmental analysis of the *project's impacts*." *Appeal of Decision to Extend the Development Schedule for Water Right Permit No. G2-29199, p. 5 (emphasis added).*

IV. ORDER

The Board **GRANTS** Park Junction's Motion to Dismiss Appeal. This case is **DISMISSED**.

SO ORDERED this 22nd day of November, 2022.

POLLUTION CONTROL HEARINGS BOARD

NEIL L. WISE, Presiding Member

CAROLINA SUN-WIDROW, Chair

MICHELLE GONZALEZ, Member