# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| PACIFIC TOPSOILS, INC., a Washington Corporation,<br><br>Appellant,<br><br>DAVE FORMAN, an individual,<br><br>Plaintiff,<br>v.<br><br>THE WASHINGTON STATE DEPARTMENT OF ECOLOGY, a Division of the State of Washington,<br><br>Respondent. | No. 39691-2-II<br><br>ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION |

On September 8, 2010, appellant Pacific Topsoils filed a motion for reconsideration of this court's opinion filed on August 24, 2010. After a review of the motion, it is hereby

ORDERED that the motion for reconsideration is denied. It is further

ordered that the opinion is amended as follows:

On page 14, paragraphs 1 and 2, and continuing on to page 15, the following text shall be deleted. It shall be noted that footnotes 5 and 6 are retained and for the purpose of this order and are indicated with a † and ††, respectively:

> Here, none of the statutes cited by PTI contains an express prohibition of the DOE's jurisdiction over wetlands under the WPCA. Further, none of the statutes implicitly conflicts with the DOE's jurisdiction over wetlands as "waters of the state" under the WPCA. PTI correctly states that RCW 90.58.030(f) includes wetlands within its definition of "shorelands" under the Shoreline Management Act of 1971. But accepting PTI's contention that RCW 90.58.030(f) requires us to consider wetlands only as land would ignore the DOE's mandate to protect "all waters of the state," including "other surface waters," under the WPCA.† RCW

> 90.48.010, .020.
>
> Likewise, no statutory conflicts arise from an interpretation of shared jurisdiction between the DOE and local authorities over wetlands. The Growth Management Act requires local authorities to create comprehensive plans for land use and development that must include measures protecting "critical areas" such as wetlands. RCW 36.70A.030, .070 (5)(c)(iv). The legislature's requirement that local authorities create critical areas regulations as part of their comprehensive plans does not demonstrate an intent to divest the DOE of wetlands jurisdiction under other statutes. Further, as noted by our Supreme Court, the legislature delegated enforcement power under the Shoreline Management Act of 1971 to the DOE. *Ass'n of Rural Residents v. Kitsap County*, 141 Wn.2d 185, 189 n.1, 4 P.3d 115 (2000); RCW 90.58.140, .300. For all these reasons, we hold that the DOE's jurisdiction over wetlands under the WPCA is harmonious with these statutes.

The following language shall be inserted in its place. To clarify language that has been added, we have bolded the text, however, it should not appear bolded in the opinion.

> Here, none of the statutes cited by PTI contains an express prohibition of the DOE's jurisdiction over wetlands under the WPCA. Further, none of the statutes implicitly conflicts with the DOE's jurisdiction over wetlands as "waters of the state" under the WPCA. PTI correctly states that RCW 90.58.030**(2)(d)** includes wetlands within its definition of "shorelands" under the Shoreline Management Act of 1971. But accepting PTI's contention that RCW 90.58.030**(2)(d)** requires us to consider **all** wetlands only as land or **"shorelands"** would ignore the DOE's mandate to protect "all waters of the state," including "other surface waters," under the WPCA.† RCW 90.48.010, .020.
>
> Likewise, no statutory conflicts arise from an interpretation of shared jurisdiction between the DOE and local authorities over wetlands **in this case**. The Growth Management Act requires local authorities to create comprehensive plans for land use and development that must include measures protecting "critical areas" such as wetlands. RCW 36.70A.030, .070 (5)(c)(iv). The legislature's requirement that local authorities create critical areas regulations as part of their comprehensive plans does not demonstrate an intent to divest the DOE of wetlands jurisdiction under other statutes. Further, as noted by our Supreme Court, the legislature delegated enforcement power under the Shoreline Management Act of 1971 to the DOE **to issue cease and desist orders, require corrective action, or issue penalties if a party undertakes development on a shoreline without a permit.†† *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 449, 54 P.3d 1194 (2004); RCW 90.58.210(1), (2). Here, PTI acted without a permit of any kind. Thus, even assuming that the SMA applied here, the DOE's exercise of authority to issue penalties under the**

**WPCA was harmonious with its authority to issue penalties under the SMA.** For all these reasons, we hold that the DOE's jurisdiction over wetlands under the WPCA **in this case** is harmonious with these statutes.

**DATED** this _____ day of _____, 2010.

Worswick, J.

We concur:

Penoyar, C.J.

Sweeney, J.

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| PACIFIC TOPSOILS, INC., a Washington Corporation,<br><br>Appellant,<br><br>DAVE FORMAN, an individual,<br><br>Plaintiff,<br>v.<br><br>THE WASHINGTON STATE DEPARTMENT OF ECOLOGY, a Division of the State of Washington,<br><br>Respondent. | No. 39691-2-II<br><br>PART PUBLISHED OPINION |

Worswick, J. — Pacific Topsoils, Inc. (PTI) appeals from a Pollution Control Hearings Board (Board) order upholding fines assessed against PTI by the Washington State Department of Ecology (DOE) for filling wetlands without proper permits. PTI argues: (1) the DOE lacks statutory authorization to regulate wetlands under RCW 90.48.080; (2) chapter 90.48 RCW and WAC 173-201A-300 are unconstitutionally vague as to filling wetlands; (3) the DOE's Order 4095 and Penalty 4096 violated due process by failing to provide PTI with proper notice of the basis of the fines; (3) the Board violated PTI's due process rights by enforcing arbitrary time limits during its hearing, thus preventing it from cross-examining witnesses and calling surrebuttal witnesses; and (4) several of the Board's conclusions contain errors of law and substantial

evidence does not support most of its findings. We reject PTI's arguments and affirm the Board's order.

## FACTS

### Procedural Facts

PTI, a soil processing company, owns property on Smith Island in Snohomish County. Smith Island has large areas of historically documented wetlands. A wetland study previously performed on Smith Island described it as a "mosaic of wetlands." Transcript of Proceedings (TP) (Feb. 20, 2008) at 68.

PTI planned to expand its Smith Island operations. As part of its plans, PTI placed approximately 12 acres of fill material on the site without permits of any kind. The fill pile, estimated to be 15 to 17 feet deep and 75,000 to 150,000 cubic yards, would require 15,000 dump truck loads to remove. PTI did not test the fill material for contaminants prior to placing it at the site.

On October 16, 2006, the DOE received a complaint about PTI's activities on Smith Island. The DOE assigned Wetland Specialist Paul Anderson to investigate the complaint. After a site visit on October 27, Anderson determined that PTI had filled wetlands. At the conclusion of his site visit, he informed PTI's Environmental Director, Janusz Bajsarowicz, of his conclusion and requested a wetland delineation. Bajsarowicz informed Anderson that PTI's consulting firm, Parametrix, was preparing a wetland delineation. Over the next four months, the DOE made several requests to PTI for the wetland delineation, but PTI did not provide it.

On March 7, 2007, the DOE issued Order 4095, which stated in pertinent part:

On or before October 17, 2006, approximately 12 acres of fill material was

> discharged into wetlands at the [PTI] facility on Smith Island, Snohomish County. There is no record at the Department or Snohomish County of the submission of a permit application for the placement of said fill, nor a record of any permit for the placement of fill in the wetlands having been issued. Under RCW 90.48.080 and RCW 90.48.160, it is unlawful to discharge polluting matters into waters of the state without a permit. Discharge of such polluting matters into waters of the state is also a violation of the anti-degradation policy, WAC 173-201A-300.

Administrative Record (AR) at 1602. Order 4095 also stated that the DOE issued it under RCW 90.48.120(2) and specified compliance requirements for PTI.

On the same day, the DOE also issued an $88,000 civil penalty to PTI, Penalty 4096. Penalty 4096 provided that the DOE issued it under RCW 90.48.144(3), and it read in pertinent part:

> Prior to January 24, 2006, fill was placed in approximately 12 acres of wetlands at [PTI]'s Smith Island facility without a permit in violation of RCW 90.48.080. Discharge of such polluting matters into waters of the state is also a violation of the anti-degradation policy, WAC 173-201A-300. Fill remains in place in the wetlands. Each and every day the fill remains in the wetlands constitutes a separate and distinct violation of RCW 90.48.080 and 90.48.160, and WAC 173-201A-300.

AR at 1605.

PTI appealed Order 4095 and Penalty 4096 to the Board. The Board's prehearing order, dated May 11, 2007, required the submission of hearing briefs and specified that they not exceed 15 pages. The prehearing order also provided that the parties could obtain relief from the page limit only by motion and set September 6, 2007, as the filing deadline for dispositive motions.

On February 13, 2008, PTI filed a 61 page brief, as well as numerous attachments. The DOE moved to strike the brief for its noncompliance with the prehearing order.

In granting the motion to strike, the Board articulated factors supporting its decision,

including that the brief raised constitutional issues outside its jurisdiction and that PTI had not filed any dispositive motions on the legal arguments raised. The Board also identified the purposes of a hearing brief and found that PTI's brief went beyond those purposes. The Board granted the motion to strike but allowed PTI to submit a hearing brief conforming to the prehearing order's page limits.

The Board originally scheduled one day for the hearing but extended the allotted time to two days at PTI's request. During a prehearing conference call, at PTI's request, the Board agreed to provide six hours of hearing time per day, rather than the normal five and one-half hours. The parties agreed to split the allotted time equally, and the Board used a clock to keep track of the time. PTI made no further requests for additional hearing time before the hearing.

At the hearing, the DOE presented its case first, because it bore the burden of proof, and reserved time for rebuttal. After PTI cross-examined the DOE's witnesses; presented its responsive case; and, on the second day, exceeded its allotted time by 25 minutes, the Board on its own motion granted PTI an additional 45 minutes to present its case "in the interests of trying to make sure this is a fair proceeding that allows sufficient time for [PTI] to finish up its case." TP (Feb. 21, 2008) at 474-75. PTI did not argue that the extra time allotted was insufficient or that it could not present the remainder of its case.

Following presentation of its last witness, PTI rested. PTI did not assert that it needed additional time; instead, it indicated that it would use its remaining time to cross-examine the DOE's rebuttal witnesses. Only after exhausting this remaining additional time did PTI orally request additional hearing time, arguing that it needed this additional time to present surrebuttal

witnesses. The Board denied this oral motion and PTI's subsequent written motion for an extension of the hearing.

Ultimately, the Board fully affirmed Order 4095 and Penalty 4096. PTI then appealed the Board's order to the trial court, which affirmed the Board's order in full. The trial court also denied PTI's due process and vagueness challenges. PTI appeals.

## Substantive Facts

A wetland is a transitional land that lies between terrestrial and aquatic systems where the water table is at or near the surface or where water covers the land. Three indicators confirm the existence of a wetland: (1) hydrophytic vegetation adapted to saturated soil conditions, (2) hydric soils, and (3) hydrology. WAC 173-22-080(1).

The Washington State Wetland Delineation and Identification Manual requires use of the "atypical situations methodology" for wetland delineation to determine the previous existence of a wetland and to decide where a wetland boundary existed in the past when it is no longer obvious in the present due to unauthorized alteration of one or more wetland indicators.[1] Because the presence of unauthorized fill material had altered previous site characteristics and conditions, the manual required the use of the atypical situations methodology. Both Anderson and PTI's consultant, Parametrix, used that methodology in their contemporaneous site investigations. Their investigations found the presence of all three wetland indicators.

[1] PTI's wetlands expert, James Kelley, testified that the manual required use of the "problem area methodology" for delineation of the site's unfilled areas because they were seasonal wetlands and that other background materials called for use of the method because of alteration of the site's hydrology from historical, legal human activity, such as diking. TP (Feb. 21, 2008) at 357. But the DOE presented evidence that Smith Island is not a seasonal wetland area.

First, both the DOE and Parametrix wetland specialists determined that, although the vegetation that existed before the fill replacement was no longer present under the fill, the wetland vegetation surrounding the fill represented what once grew on the filled areas. Specifically, the Parametrix report stated:

> A distinction between vegetative communities present in undisturbed wetland areas and filled wetland areas was not observed in review of aerial photographs, indicating fill areas previously were vegetated with a similar hydrophytic vegetative community found throughout undisturbed portions of the wetland.

AR at 1645. Additionally, the site contained a small, unfilled area situated within a slight depression and surrounded on all sides by fill material. Observations of its plant species regeneration, buried plant material, and native soil layers, as well as review of historic aerial photographs, established that this small area is a wetland and is representative of the adjacent surrounding land under the fill.

Second, the atypical situations methodology requires a description and analysis of the site alteration and its effects on the soils and a characterization of soils that previously occurred, including the buried soils when fill material has been placed over the original soil. Indicators of hydric soils include observations of surface water or saturated soils and the listing of the soil as a hydric soil.

The National Cooperative Soil Survey describes the soils at the site as Puget silty clay loam, a hydric soil. Furthermore, the presence of oxidized rhizospheres along living roots, composed of oxidized iron concentrations, are evidence of current or recent soil saturation. Investigations by the DOE, Parametrix, and PTI's wetlands expert, James Kelley, indicated the presence of oxidized rhizospheres in the soils surrounding living roots. Oxidized rhizospheres on

living plant roots are a primary wetland hydrology indicator. The presence of oxidized rhizospheres on live roots indicates that wetland hydrology is active and present and that hydric soil indicators are a contemporary, not relict, feature. Furthermore, Parametrix's report indicated the presence of hydric soil indicators such as "low chroma colors, presence of redoximorphic features, and high organic content."[2] AR at 1644.

Finally, under the atypical situations methodology, to determine whether wetland hydrology previously occurred on a site, investigators must examine site alterations, the effects of alterations on area hydrology, and characteristics of hydrology that previously existed in the area. Evidence that hydrology existed prior to site alteration satisfies the hydrology criteria. Investigators may rely on indicators such as the presence of oxidized rhizospheres, sediment deposits (including dried algae), surface scouring, and soil survey data indicating positive wetland hydrology.

The DOE and Parametrix investigated the historic record. Although the site had been drained with dikes and ditches in the past for farming, these efforts were never completely successful. Photographic evidence from 1947 on shows the presence of water on the site for many years. The National Wetlands Inventory (Wetlands Inventory) of the United States Department of Fish and Wildlife Services identifies wetlands on much of the site. Additionally, the DOE's investigations indicated the presence of oxidized rhizospheres on live plant roots in the site's soil. Parametrix reviewed aerial photographs in addition to its field observations of inundation, saturation to the surface, oxidized rhizospheres, and landscape hydrologic patterns,

[2] *See also* WAC 173-22-080(7) (defining hydric soil indicators).

and concluded this evidence indicated "a historic continuity of hydrologic regimes between wetland fill areas and undisturbed wetland areas." AR at 1645.

The DOE concluded that PTI had filled wetlands at its Smith Island site. Parametrix reached the same conclusion in its report. Parametrix identified and delineated two wetlands on the site and concluded that approximately 7.81 acres of wetlands were mechanically graded or filled with non-native soils. Although the site's wetlands do not provide high quality habitat, they do provide water quality and hydrologic functions by slowing down the water flow, absorbing pollutants, and decreasing the amount of potential erosion. Additionally, according to PTI's soil expert, the fill compacted the soil beneath it by a minimum of two feet.

## ANALYSIS

### Excluded Evidence

We do not consider appendices that are not part of the administrative record or factual assertions they supported. RAP 10.3(a)(8) ("[a]n appendix [to a brief] may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c)"). Appendices 6 and 24 and one page of appendix 9 to the Appellant's Brief, marked "preliminary," are not part of the administrative record and we do not consider them.

Also, PTI, citing to RCW 34.05.562(1)[3] and a motion before the trial court, contends that

[3] RCW 34.05.562 provides:

> (1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;

the trial court erred when it denied its motion to expand the record to include documents relating to a settlement agreement entered into with Snohomish County after the Board hearing, because these documents undermine several of the Board's findings and conclusions. But the relevant facts relating to the Snohomish County action were before the Board. The trial court did not err in refusing to expand the record to include appendix 8 and we do not consider it here.

## Statutory Authority

### A. Waters of the State

PTI contends that the DOE possesses no statutory authority to impose fines for violations of chapter 90.48 RCW, the Water Pollution Control Act (WPCA), because the WPCA does not expressly include wetlands in its definition of "waters of the state." Appellant's Br. at 17. The DOE responds that it possesses the necessary statutory authority because RCW 90.48.020 includes wetlands as "other surface waters" in its definition of "waters of the state." Resp't's Br. at 18-25. We agree with the DOE.

We review the Board's orders under chapter 34.05 RCW, the Administrative Procedure Act. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 76-77, 11 P.3d 726 (2000). We sit in the same position as the superior court and apply the standards of review in RCW 34.05.570(3) directly to the agency record. *Postema*, 142 Wn.2d at 77. We may grant relief where the agency makes an erroneous interpretation or application of law, substantial evidence does not support the order, or the Board issues the order on an arbitrary or capricious basis.

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(b) Unlawfulness of procedure or of decision-making process; or
(c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

*Postema*, 142 Wn.2d at 77; RCW 34.05.570(3)(d), (e), (i). The party asserting invalidity of agency action bears the burden of establishing such invalidity. *Postema*, 142 Wn.2d at 77; RCW 34.05.570(1)(a).

The error of law standard applies to statutory construction. *Postema*, 142 Wn.2d at 77; RCW 34.05.570(3)(d). Under this standard, we may substitute our interpretation of the law for the agency's interpretation. *Postema*, 142 Wn.2d at 77. Ultimately, it is for the courts to determine the meaning and purpose of a statute. *Postema*, 142 Wn.2d at 77. But because the legislature designated the DOE as the regulating agency for the state's water resources, Washington courts give "great weight" to the DOE's interpretation of relevant statutes and regulations. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

Our fundamental objective in statutory interpretation is to give effect to the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, then we give effect to that plain meaning as an expression of legislative intent. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). We discern plain meaning not only from the provision in question, but also from closely related statutes and the underlying legislative purposes. *Murphy*, 151 Wn.2d 637 at 242. If a statute is susceptible to more than one reasonable interpretation after this inquiry, then the statute is ambiguous and we may resort to additional canons of statutory construction or legislative history. *Campbell & Gwinn,* 146 Wn.2d at 12.

We give effect to all statutory language, considering statutory provisions in relation to

each other and harmonizing them to ensure proper construction. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000). We avoid construing a statute in a manner that results in "unlikely, absurd, or strained consequences." *Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 833, 74 P.3d 115 (2003). Instead, we favor an interpretation consistent with the spirit or purpose of the enactment over a literal reading that renders the statute ineffective. *Glaubach*, 149 Wn.2d at 833. In statutory construction, "includes" is a term of enlargement, while "means" is a term of limitation. *Queets Band of Indians v. State*, 102 Wn.2d 1, 4, 682 P.2d 909 (1984).

In 1945, the legislature enacted the WPCA. Laws of 1945, ch. 216. The purpose of the WPCA is "to maintain the highest possible standards to insure the purity of all waters of the state." RCW 90.48.010. In defining "waters of the state," RCW 90.48.020 provides that the phrase "shall be construed to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington." RCW 90.48.030 grants the DOE "the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the State of Washington."

RCW 90.48.080 further provides that

> [i]t shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the department, as provided for in this chapter.

The legislature authorized the DOE to enforce the WPCA by the issuance of orders and

imposition of penalties for violations of RCW 90.48.080 and "orders adopted or issued pursuant to . . . [this] chapter[]." RCW 90.48.120, .140, .144(3).

> Furthermore, RCW 90.48.035 authorizes and requires the DOE to promulgate
>
> rules and regulations as it shall deem necessary to carry out the provisions of this chapter, including but not limited to rules and regulations relating to standards of quality for waters of the state and for substances discharged therein in order to maintain the highest possible standards of all waters of the state in accordance with the public policy as declared in RCW 90.48.010.

In accordance with the legislative mandates of RCW 90.48.010 and .035, the DOE developed water quality standards for protection of Washington's ground water and surface water. WAC 173-200-010; WAC 173-201A-010. The DOE's water quality standards define "surface waters of the state" to include "lakes, rivers, ponds, streams, inland waters, saltwaters, wetlands and all other surface waters and water courses within the jurisdiction of the state of Washington." WAC 173-201A-020.[4] These water quality standards define "wetlands" as

> areas that are *inundated or saturated by surface water or ground water* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

WAC 173-201A-020 (emphasis added). Both surface and ground water are "waters of the state." RCW 90.48.020.

[4] The DOE's water quality standards are similar to those of the federal government. The federal Clean Water Act (CWA) prohibits the discharge of pollutants into navigable waters. 33 U.S.C. § 1311(a). The CWA defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Federal regulations promulgated by the United States Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) define "waters of the United States" as including "[a]ll interstate waters including interstate wetlands." 33 C.F.R. § 328.3(a)(2); 40 C.F.R. § 122.2(b). Thus, the DOE's water quality standards, like the Corps' and EPA's regulations, identify wetlands as "waters of the state" or "waters of the United States."

RCW 90.48.010 expresses the legislature's intent that the DOE protect "all waters of the state." The legislature indicated the broad scope of this intent by its choice of the enlarging term "include" which modifies the phrase "all other surface waters" in its definition of "waters of the state." RCW 90.48.020. RCW 90.48.035 authorizes and requires the DOE to issue regulations it determines are necessary to protect the quality of "waters of the state." Accordingly, the DOE issued regulations that reflected its determination that wetlands contain "surface water or ground water," that this brings wetlands within the definition of "surface waters of the state" and, therefore, that wetlands must be protected under the WPCA. WAC 173-201A-020. Thus, the plain language of the WPCA clearly indicates that the DOE acts within its statutory authority over "waters of the state" when it regulates wetlands.

B. Other Statutes

PTI next contends that interpreting the WPCA as granting the DOE jurisdiction over wetlands conflicts with legislative grants of jurisdiction over wetlands to local authorities in chapter 36.70A RCW, the Growth Management Act, and chapter 90.58 RCW, the Shoreline Management Act of 1971, and argues that chapters 90.74, Aquatic Resources Mitigation, and 90.84 RCW, Wetlands Mitigation Banking, express the legislature's intent to limit the DOE's jurisdiction over wetlands. PTI also contends that the DOE's interpretation of wetlands as "surface waters of the state" ignores statutory language recognizing wetlands as land, not water. We disagree.

The legislature enacted the WPCA in 1945; it enacted the Shoreline Management Act in 1971, Laws of 1971, 1st Ex. Sess., ch. 286; it enacted the Growth Management Act in 1990,

Laws of 1990, 1st Ex. Sess., ch. 17; it enacted chapter 90.74 RCW in 1997, Laws of 1997, ch. 424; it enacted chapter 90.84 RCW in 1998, Laws of 1998, ch. 248. PTI argues that these later statutes repeal or amend the earlier-enacted WPCA. But the law does not favor repeal by amendment or implication, and there is no repeal or amendment by implication when statutes can be harmonized. *Misterek v. Wash. Mineral Prods., Inc.*, 85 Wn.2d 166, 168, 531 P.2d 805 (1975).

Here, none of the statutes cited by PTI contains an express prohibition of the DOE's jurisdiction over wetlands under the WPCA. Further, none of the statutes implicitly conflicts with the DOE's jurisdiction over wetlands as "waters of the state" under the WPCA. PTI correctly states that RCW 90.58.030(f) includes wetlands within its definition of "shorelands" under the Shoreline Management Act of 1971. But accepting PTI's contention that RCW 90.58.030(f) requires us to consider **all** wetlands only as land **or "shorelands"** would ignore the DOE's mandate to protect "all waters of the state," including "other surface waters," under the WPCA.[5] RCW 90.48.010, .020.

Likewise, no statutory conflicts arise from an interpretation of shared jurisdiction between the DOE and local authorities over wetlands **in this case**. The Growth Management Act requires local authorities to create comprehensive plans for land use and development that must include measures protecting "critical areas" such as wetlands. RCW 36.70A.030, .070 (5)(c)(iv). The legislature's requirement that local authorities create critical areas regulations as part of their

[5] Additionally, as a matter of common sense, the fact that one may consider wetlands as both land and water is inherent in the nature of wetlands. PTI's interpretation would lead to an absurd result.

comprehensive plans does not demonstrate an intent to divest the DOE of wetlands jurisdiction under other statutes. Further, as noted by our Supreme Court, the legislature delegated enforcement power under the Shoreline Management Act of 1971 to the DOE to **issue cease and desist orders, require corrective action, or issue penalties if a party undertakes development on a shoreline without a permit**.[6] ***Samuel's Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 449, 54 P.3d 1194 (2004)**; RCW 90.58.210(1), (2). **Here, PTI acted without a permit of any kind. Thus, even assuming that the SMA applied here, the DOE's exercise of authority to issue penalties under the WPCA was harmonious with its authority to issue penalties under the SMA.** For all these reasons, we hold that the DOE's jurisdiction over wetlands under the WPCA in this case is harmonious with these statutes.

Vagueness

PTI next contends that the WPCA is unconstitutionally vague as applied to placing fill material into wetlands because (1) the statute provides no notice that it includes wetlands as "waters of the state" and (2) it provides no notice that "pollution" includes fill placement. Appellant's Br. at 32-35. It further contends that WAC 173-201A-300, the water antidegradation

[6] PTI also contends that RCW 90.48.260 limits the DOE's wetlands jurisdiction to its role in issuing water quality certification permits as part of the federal CWA. But RCW 90.48.144(3), the WPCA's penalty provision, provides in pertinent part:

> [E]very person who . . . [v]iolates the provisions of RCW 90.48.080, or other sections of this chapter or chapter 90.56 RCW or rules or orders adopted or issued pursuant to either of those chapters, shall incur, in addition to any other penalty as provided by law, a penalty in an amount of up to ten thousand dollars a day for every such violation.

The plain text of RCW 90.48.144(3) indicates that the DOE possesses authority under RCW 90.48.080, independent of any other statute, to regulate waters of the state, including wetlands.

policy, provides no notice that it applies to the filling of wetlands.[7] Again, we disagree.

Washington courts have applied the void for vagueness doctrine to prohibitory land use regulations. *See Burien Bark Supply v. King County*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986). We review a statute's constitutionality de novo. *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 978, 216 P.3d 374 (2009). We presume a statute's constitutionality. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991). A challenger bears the burden of proving beyond a reasonable doubt that a statute is unconstitutionally vague. *Haley*, 117 Wn.2d at 739.

We consider a statute void for vagueness if its terms are "so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application'." *Haley*, 117 Wn.2d at 739 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). But because "[s]ome measure of vagueness is inherent in the use of language," *Haley*, 117 Wn.2d at 740, we do not require "impossible standards of specificity or absolute agreement." *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990). Mere uncertainty does not establish unconstitutional vagueness. *Douglass*, 115 Wn.2d at 179. Given this, a statute meets a vagueness challenge "[i]f persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement." *Douglass*, 115 W.2d at 179.

Furthermore, undefined terms in a statute do not automatically render it unconstitutionally

[7] Neither the Board nor the superior court entered a conclusion of law that PTI violated the antidegradation policy. The Board did conclude that PTI violated the DOE's wetland regulations "as contained in WAC 173-22." AR at 1232.

vague. *Douglass*, 115 Wn.2d at 180. For clarification, citizens may need to resort to other statutes or court opinions, which we consider "'[p]resumptively available to all citizens'." *Douglass*, 115 Wn.2d at 180 (alternation in original) (quoting *State v. Smith*, 111 Wn.2d 1, 7, 759 P.2d 759 (1988)).

First, as we discussed above, RCW 90.48.020 includes "all other surface waters" in its definition of "waters of the state." WAC 173-201A-020 defines wetlands as "areas that are inundated or saturated by surface water or ground water" and includes wetlands within the definition of "surface waters of the state." These statutes and regulations were presumptively available to PTI. Thus, the WPCA's application to wetlands is not unconstitutionally vague.

Second, the WPCA defines pollution in pertinent part to include the

> alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish, or other aquatic life.

RCW 90.48.020. The common definition of "alter" is "to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else." Webster's Third New International Dictionary 63 (2002).

Here, both the DOE and Parametrix wetland specialists determined that the vegetation that existed before PTI placed the fill on the site was no longer present under the fill material. Further, the fill material compressed the soil beneath it by a minimum of two feet. People of ordinary intelligence would understand both facts as alterations of the physical properties of a

wetland. Likewise, such acts, by destroying the vegetation essential for the wetlands' water quality and hydrologic functions, fall within the common understanding of discharge of a solid detrimental to the "legitimate beneficial uses" of this wetland.[8] RCW 90.48.020. Thus, the definition of "pollution" under the WPCA is not vague as applied to placement of fill material into wetlands. RCW 90.48.020.

Finally, the DOE's antidegradation policy provides that it is "guided" by chapters 90.48 and 90.54 RCW. WAC 173-201A-300(1). RCW 90.54.020(3)(b) provides in pertinent part that "[n]otwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof." Furthermore, the antidegradation policy states that it applies "to human activities that are likely to have an impact on the water quality of a surface water" and that part of its purpose, which applies to "all waters and all sources of pollution," is to "ensure existing and designated uses are maintained and protected." WAC 173-201A-300(2)(c), (2)(e)(i).

Again, these other statutes and regulations were presumptively available to PTI. For the reasons we discussed above, a person of ordinary intelligence would understand them and the antidegradation policy, when read together, as applying to the filling of wetlands. Thus, we hold that the antidegradation policy is not unconstitutionally vague as applied to PTI.

A majority of the panel having determined that only the foregoing portion of this opinion will

[8] RCW 90.54.020(1), which declares fundamental principles for "[u]tilization and management of the waters of the state," provides in pertinent part that "[u]ses of water for . . . preservation of environmental and aesthetic values . . . [are] beneficial."

be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.[9]

Due Process

A. DOE's Order and Penalty

PTI contends that (1) Order 4095 and Penalty 4096 did not provide sufficient notice of the factual and legal bases for the DOE's action against PTI, (2) the DOE failed to comply with the notice requirements of RCW 90.48.120(1), and (3) Penalty 4096 did not notify PTI that its previous history of violations was included in calculation of the penalty. The DOE argues that Order 4095 and Penalty 4096 expressly stated the action's legal and factual basis, that due process does not require specification of what permits were required, that Order 4095 and Penalty 4096 were issued properly under RCW 90.48.120(2), and that Penalty 4096's reference to RCW 90.48.144(3) sufficiently notified PTI that its previous history of violations would be considered in penalty calculations. We agree with the DOE.

The United States Constitution prohibits government deprivations of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. A fundamental due process requirement is "'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 617, 70 P.3d 947 (2003)

[9] In the unpublished portion of this opinion, we reject PTI's contention that Order 4095, Penalty 4096, and the Board's hearing procedures violated PTI's due process rights. We also reject PTI's contentions that substantial evidence does not support the Board's findings and that the Board's conclusions of law were erroneous.

(quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)).

First, PTI, citing *Mansour v. King County*, 131 Wn. App. 255, 128 P.3d 1241 (2006), argues that Order 4095 and Penalty 4096 failed to cite the statutory and factual bases for the penalty assessed against it. But in *Mansour*, the challenged order did not cite the ordinance relied on by the state agency at the administrative hearing. 131 Wn. App. at 271. Likewise, the order did not refer to the subject of the hearing, a dog, as "'vicious,'" a necessary finding for invoking the ordinance relied on by the agency at the hearing. *Mansour*, 131 Wn. App. at 271. Accordingly, Division One of this court concluded this lack of notice failed to meet due process requirements.

In contrast, here, both Order 4095 and Penalty 4096 cited RCW 90.48.080 and WAC 173-201A-300, the statute and regulation the DOE relied on at the hearing.[10] Further, both the order and penalty stated that PTI's violations arose from its discharge of fill material into wetlands, waters of the state, at its Smith Island facility.[11] The order and penalty both provided notice of

[10] PTI repeatedly contends that the DOE issued and the Board affirmed the penalty solely on PTI's failure to obtain a "404 permit" from the Corps. Appellant's Br. at 10. But the record reflects that references were made to 404 permits at the hearing for purposes other than establishing the penalty's basis. Further, the Board affirmed the penalty based on its analysis of the DOE's authority under chapter 90.48 RCW and PTI's failure to obtain any form of permit. Finally, the Board's finding PTI cited in support of its contention states only that PTI avoided significant costs by filling wetlands without obtaining appropriate permits, including a 404 permit. PTI's contentions fail.

[11] As part of its argument, PTI contends that the texts of the statutes and regulations cited in the order and penalty failed to provide notice of the charges against it. Essentially, PTI repeats its vagueness argument, which we reject.

the factual and statutory bases for the penalty. Thus, we hold that they satisfied due process requirements.[12]

Second, Order 4095 specified that it was issued under RCW 90.48.120(2), which provides in pertinent part:

> Whenever the department deems immediate action is necessary to accomplish the purposes of this chapter or chapter 90.56 RCW, it may issue such order or directive, as appropriate under the circumstances, without first issuing a notice or determination pursuant to subsection (1) of this section. An order or directive issued pursuant to this subsection shall be served by registered mail or personally upon any person to whom it is directed.

Here, the DOE, through Anderson, notified PTI of its determination that PTI's filling of wetlands violated state law. Four months later, PTI had failed to address the violation by producing the requested wetland delineation. RCW 90.48.120(2) allows the DOE to issue an order without prior notice when it determines that "immediate action is necessary." We hold that the DOE correctly invoked RCW 90.48.120(2).[13]

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[12] PTI also contends that Order 4095 and Penalty 4096 violated its due process rights because they did not specify what permits PTI failed to obtain before discharging pollutants into waters of the state. But RCW 90.48.080 prohibits, without exceptions, the discharge of pollution into waters of the state. The order and penalty clearly identified this as the gravamen of its allegations against PTI. Such notice adequately allowed PTI to prepare defenses, such as proving that the alleged actions did not occur, that the alleged actions did not violate RCW 90.48.080, or that circumstances (such as possession of a permit) exempted its alleged actions from liability under RCW 90.48.080. Thus, the penalty and order provided notice that satisfied due process requirements.

[13] PTI cites *General Electric Co. v. United States Environmental Protection Agency*, 53 F.3d 1324 (D.C. Cir. 1995), in support of its argument. But in that case, the penalty violated due process because the penalized party first learned through the penalty of the agency's interpretation of the statute giving rise to the violation. *Gen. Elec.*, 53 F.3d at 1328. Here, the DOE's pre-enforcement contacts with PTI provided sufficient notice of its interpretation of the relevant statutes and regulations.

Finally, RCW 90.48.144(3) provides in pertinent part that "[t]he penalty amount shall be set in consideration of the previous history of the violator and the severity of the violation's impact on public health and/or the environment in addition to other relevant factors." Penalty 4096 stated that the DOE issued it under RCW 90.48.144(3), which plainly states that penalties consider the previous history of violators. Furthermore, during a deposition prior to the hearing, PTI's counsel asked a DOE employee, "Now when you consider past violations, what past violations are you talking about in this case?" Clerk's Papers at 460. Thus, we hold that Penalty 4096 provided sufficient notice under due process requirements of penalty calculation factors.

B. Hearing Procedures

PTI contends that the Board violated its due process rights by requiring the parties to abide by previously set time limits and by granting the DOE's motion to strike PTI's over-length hearing brief. We disagree.

Trial courts possess considerable latitude in managing their schedules to ensure the orderly and expeditious disposition of cases. *Idahosa v. King County*, 113 Wn. App. 930, 937, 55 P.3d 657 (2002). Thus, we review trial court rulings regarding the amount of time allowed for argument and the striking of briefs for abuse of discretion. *Paxton v. City of Bellingham*, 129 Wn. App. 439, 449, 119 P.3d 373 (2005) (time for argument); *Murphy*, 151 Wn.2d at 239 (striking briefs). We also review a trial court's refusal to admit surrebuttal evidence for abuse of discretion. *State v. Luvene*, 127 Wn.2d 690, 709-10, 903 P.2d 960 (1995). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006).

Here, the record reflects that the Board repeatedly granted additional time for PTI to present its case without any indication from PTI that the time granted was insufficient. PTI raised its claims of insufficient time only at the close of the hearing. PTI was not entitled to a surrebuttal and the Board did not abuse its discretion by denying PTI's motion for additional time.[14]

Likewise, in the 11 months between the pre-hearing order's entry and the filing deadline for hearing briefs, PTI did not file any dispositive motions or motions requesting permission to file an over-length brief. The Board did not abuse its discretion in striking PTI's over-length hearing brief and allowing it to file a new brief conforming with page limits.

[14] PTI cites two cases from other states, *In re Marriage of Goellner*, 770 P.2d 1387 (Colo. App. 1989) and *In re Marriage of Glenn*, 18 Kan. App. 2d 603, 856 P.2d 1348 (1993), in support of its arguments. Even if we considered these cases, they are distinguishable. Unlike the mother in *Goellner*, PTI presented its full case-in-chief within the allotted time. 770 P.2d at 1389. Likewise, in *Glenn*, there was no indication that the trial court had allocated a specific amount of time to each party, and the trial court abruptly ended the hearing during the father's presentation of his case. 86 P.2d at 1350. These cases are not persuasive.

Findings and Conclusions

PTI assigns error to nearly all of the Board's findings of fact and conclusions of law.[15] The DOE counters that PTI impermissibly seeks to relitigate the credibility of evidence and that substantial evidence otherwise supports the Board's findings. We agree with the DOE.

We review the Board's findings of fact for substantial evidence in light of the whole record. RCW 34.05.570(3)(e). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth or correctness of the matter. *Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d at 553. We overturn an agency's factual findings only if they are clearly erroneous and we are "'definitely and firmly convinced that a mistake has been made.'" *Port of Seattle*, 151 Wn.2d at 588 (quoting *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994)). "[W]e do not overturn an agency decision even where the opposing party reasonably disputes the evidence with evidence of 'equal dignity.'" *Ferry County v. Concerned Friends of Ferry County*, 121 Wn. App. 850, 856, 90 P.3d 698 (2004) (quoting *Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 526, 979 P.2d 864 (1999)). And we do not weigh the credibility of witnesses or substitute our judgment for the Board's judgment regarding findings of fact. *Port of Seattle*, 151 Wn.2d at 588.

Application of the law to the facts is a question of law we review de novo. *Port of Seattle*, 151 Wn.2d at 588; *see also Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317,

[15] PTI does not assign error to findings of fact 1, 4, 5, 26, and 30. These unchallenged findings of fact are verities on appeal. *Hilltop Terrace Homeowners' Ass'n v. Island County*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995).

329-30, 646 P.2d 113 (1982) (explaining that mixed questions of law and fact are subject to de novo review, meaning the court must determine the correct law independent of the agency's decision and then apply the law to established facts de novo). We accord substantial weight to the agency's interpretation of the law it administers, particularly when the issue falls within the agency's expertise. *Haley*, 117 Wn.2d at 728; *US West Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 86 Wn. App. 719, 728, 937 P.2d 1326 (1997).

A. Findings of Fact

PTI largely focuses its arguments on the credibility of various expert witnesses who testified before the Board. But credibility determinations are for the Board, not us, so we do not consider these arguments. RCW 34.05.570(3)(e).

PTI, without specifying related findings and conclusions, generally appears to challenge findings of fact 16, 17, 18, 20, and 21 on the basis that substantial evidence does not support that PTI violated RCW 90.48.080 by discharging (1) pollution into (2) waters of the state.

First, evidence in the record establishes that the fill compacted the ground beneath it by a minimum of two feet and that the vegetation that existed before the fill was no longer present under the fill. Testimony established the beneficial effects of this vegetation. These facts demonstrate an alteration of the physical characteristics of the site constituting pollution under RCW 90.48.020. Substantial evidence supports the Board's findings and conclusions that PTI's actions could constitute pollution.

Second, WAC 173-22-035 requires that investigators perform delineations according to Washington State Wetland Identification and Delineation Manual standards and criteria adopted

as mandatory in WAC 173-22-080 and as applied using the remainder of the manual. The DOE presented evidence that the site's wetlands were year-round, not seasonal.[16] And the manual states that the atypical situations methodology applies to sites affected by unauthorized activities, such as alteration or removal of vegetation and placement of fill material over hydric soils. Thus, the atypical situations methodology, as opposed to the problem area methodology, applied. Substantial evidence supports that the DOE and Parametrix used the atypical situations methodology in their investigations and delineations and discovered the presence of all three wetlands indicators at the site. Thus, substantial evidence supports the Board's findings and conclusions that the DOE proved that PTI polluted wetlands, which are waters of the state.

Substantial evidence, such as a previous wetland study of the site and photographic evidence, supports finding of fact 2, concerning the historically documented presence of wetlands and draining efforts on Smith Island.

Substantial evidence, such as the Parametrix report and Anderson's investigations, supports finding of fact 3, concerning PTI's expansion of its Smith Island activities and filling approximately 12 acres of the site with untested fill material.

PTI challenges finding of fact 6, which generally concerns PTI's documents that identified the Smith Island site, prior to PTI's acquisition, as wetlands. But "RAP 10.3 requires an appellant to present argument to the reviewing court as to why specific findings of fact are in error and to support those arguments with citation to relevant portions of the record." *In re Disciplinary Proceeding Against Whitney*, 155 Wn.2d 451, 466, 120 P.3d 550 (2005). PTI

[16] As we have already noted, PTI's wetlands expert testified that the problem area methodology applied to seasonal wetlands.

provides no argument or citation to support its challenge to this finding. Because PTI insufficiently briefed this challenge, we decline to review it and conclude that these findings are verities. *Whitney*, 155 Wn.2d at 467.

PTI challenges findings of fact 7, 8, 9, 10, 11, and 27 on the basis that they "address alleged other bad acts, have no bearing on this case, do not demonstrate that PTI had notice that [the DOE] might impose penalties under WPCA and were introduced into the record without prior notice in violation of due process." Appellant's Br. at 2-3. These findings address Snohomish County's enforcement actions against PTI for its fill activities at the Smith Island site. PTI also contends that substantial evidence does not support these findings.

We addressed PTI's notice and due process arguments above. Regarding substantial evidence, PTI provides no argument or citation to support its challenge to these specific findings. Because PTI insufficiently briefed these challenges, we decline to review them and conclude that these findings are verities. *Whitney*, 155 Wn.2d at 467.

PTI challenges finding of fact 12, generally concerning wetland delineations and when permit approvals require them. But PTI appears to present no argument or citation to the record supporting its challenge. We decline to review it and treat this finding as a verity. *Whitney*, 155 Wn.2d at 467.

PTI challenges finding of fact 13 on the basis that it contains an erroneous definition of hydrophytic vegetation because such vegetation grows in hydric soils, not water, and requires the presence of wetland hydrology and because hydrophytic vegetation is not an indicator of wetland or aquatic processes. But this finding states the definition of hydrophytic vegetation contained in

WAC 173-22-030(7), which provides that such vegetation may grow in water.[17] And hydric soil is an indicator of the existence of a wetland. Substantial evidence supports this finding.

PTI challenges finding of fact 14 based on the Board's finding that Anderson noted the "prolonged inundation of soils" at the site. Appellant's Br. at 53. It also challenges the finding that Anderson visited the site on April 2, 2007. But Anderson testified that during his site visit he observed "obvious redoximorphic features, which indicate prolonged inundation or saturation" during his site visit. TP (Feb. 20, 2008) at 186. Substantial evidence supports this finding. But the record indicates that Anderson visited the site only on October 27, 2006, and August 8 and September 24, 2007. Substantial evidence does not support this finding. Regardless, this incorrect date does not establish that the rest of the Board's findings are "clearly erroneous" and we do not overturn them. *Port of Seattle*, 151 Wn.2d at 588. Likewise, despite this incorrect date, substantial evidence ultimately supports the DOE's order. RCW 34.05.570(3)(e).

PTI challenges finding of fact 15 on the basis that no evidence in the record establishes that Anderson specializes in hydrology identification and the wetland rating system. But Anderson testified that he has undergone advanced hydrology and wetland rating system training and has performed over 100 wetland delineations. Substantial evidence supports this finding.

PTI challenges finding of fact 16 on the basis that the Board erroneously concluded that Anderson performed a wetland delineation of the site. But this finding states only that Anderson

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[17] WAC 173-22-030(7) provides:

> "Hydrophytic vegetation" means the sum total of macrophytic plant life growing in water or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content. When hydrophytic vegetation comprises a community where indicators of hydric soils and wetland hydrology also occur, the area has wetland vegetation.

investigated the site, not that he performed a delineation of it. Substantial evidence supports the finding that Anderson investigated the site using the atypical situations methodology contained within the state wetland delineation manual.

PTI challenges finding of fact 17 on the basis that that Anderson visited the site on April 2, 2007. As we noted, substantial evidence does not support this portion of the finding. PTI also challenges this finding on the basis that the Board erroneously found that Anderson performed a wetland delineation of the site. This finding does state that Anderson performed a delineation of the site, which substantial evidence does not support. Again, though, this is not enough to render the remainder of the Board's findings clearly erroneous and undermine our conclusion that substantial evidence supports the DOE's order. Finally, PTI also challenges this finding on the basis that wetland delineations must be performed during the growing season and the site's growing season was not year-round. But the manual states that investigators must use their professional judgment to determine if the growing season is in progress, the growing season occurs when the predominant plants of the area are growing, and that the growing season in coastal areas may be year-round. Anderson testified that the growing season at the site was year-around. Substantial evidence supports this finding.

PTI challenges finding of fact 18 on the basis that the Board found the existence of wetlands on the site because investigators discovered one or more wetland indicators present on the site. But the finding only lists the three wetland indicators and states that investigators found "one or more" of these indicators on the site. AR at 1219. This finding does not state that the Board concluded wetlands existed on the site based on less than all three of the factors.

Substantial evidence supports this finding.

PTI challenges finding of fact 19 on the basis that reed canary grass and salmonberry do not disclose the presence of a wetland because they are facultative species which also grow in non-wetland areas. But Anderson testified that reed canary grass is hydrophytic vegetation. And Kelley's report indicated that reed canary grasses usually occur in wetlands with a probability between 67 and 99 percent. Substantial evidence supports this finding. PTI also challenges this finding on the basis that no evidence supports that the unfilled area amongst the fill was representative of the area beneath the fill. But under the atypical situations methodology, investigators look at reference sites to determine what vegetation was covered by fill. One such reference site is the unfilled wetland. Substantial evidence supports this finding.

PTI challenges finding of fact 20 on the basis that oxidized rhizospheres are not primary indicators of hydric soils. But PTI mischaracterizes this finding. The finding states that when wetlands are filled, some primary wetland indicators may no longer be present, and investigators must rely on indicators such as oxidized rhizospheres and soil survey data indicating hydric soils. And indicators of the existence of a wetland include observations of surface water or saturated soils and the listing of the soil as a hydric soil. One Corps delineation manual lists oxidized rhizospheres as a primary indicator of wetland hydrology. Substantial evidence supports this finding.

PTI challenges finding of fact 21 on the basis that, because legal human activity altered the hydrologic regime and required use of the problem area delineation methodology, the Board incorrectly relied on oxidized rhizospheres and evidence of prior hydrology to satisfy the

hydrology wetland criterion. But as we discussed, substantial evidence supports the Board's findings requiring use of the atypical situations methodology. That methodology allows evidence of hydrology prior to alteration to satisfy the criterion. And oxidized rhizospheres are an indicator of wetland hydrology. WAC 173-22-080(10)(b)(vii). Substantial evidence supports this finding. PTI also challenges this finding on the basis that the Wetlands Inventory maps do not establish hydrology. But the manual identifies the Wetlands Inventory as a data source and the atypical situations methodology allows usage of historical records. Substantial evidence supports this finding.

PTI challenges finding of fact 22, generally concerning the Parametrix report's identification of wetlands and conclusion that PTI had filled wetlands at the site. But PTI appears to present no argument or citation to the record supporting its challenge. We decline to review it and treat this finding as a verity. *Whitney*, 155 Wn.2d at 467.

PTI appears to challenge finding of fact 23 on the basis that the Board erroneously relied on a preliminary Parametrix report. But the Board determined that the report was credible and that no credible evidence that the report was preliminary existed. We do not determine credibility issues. Substantial evidence supports this finding.

PTI challenges finding of fact 24 on the basis that the capillary fringe for the site's soil was greater than 12 inches. But the DOE presented testimony that the capillary fringe of the site's soil, Puget silty clay loam, is between 14 and 22 inches. Substantial evidence supports this finding.

PTI challenges finding of fact 25, generally concerning the Board's conclusion that the

evidence supports that PTI unlawfully filled and damaged wetlands on the site. But as we discussed above, the evidence supports the Board's conclusion.

PTI challenges findings of fact 28 and 29, but appears to present no argument or citation to the record supporting its challenge. We decline to review them and treat these findings as verities. *Whitney*, 155 Wn.2d at 467.

Conclusions of Law

PTI presents argument and citation supporting its challenges of only conclusions of law 3, 8, 18, and 21. We therefore decline to review PTI's challenges to conclusions of law 1, 4, 5, 6, 7, 9, 10, 11, 12, 13, 16, 17, 19, and 20.

PTI challenges conclusion of law 3 on the basis that the purpose of the wetland delineation manual is to provide methods to allow investigators to make an accurate delineation at any time during the year. But WAC 173-22-080(1) states exactly that. Evidence in the findings supports the Board's conclusion.

PTI challenges conclusions of law 8 and 18 on the basis that filling wetlands with soil does not constitute pollution under RCW 90.48.020. But as we discussed above, it does. We agree with the Board's conclusion.

Finally, PTI challenges conclusion of law 21 because the Board upheld Penalty 4096, which imposed liability on PTI as well as on Dave Forman, an individual. But PTI sought to include this as a new assignment of error before the superior court through an eratta sheet reflecting corrections to its trial brief. RCW 34.05.554 bars parties from raising issues that they

failed to raise below. Furthermore, Forman did not appeal the penalty. Forman has waived the issue and PTI may not raise it here. PTI's challenge fails.

Affirmed.

Worswick, J.

We concur:

Penoyar, C.J.

Sweeney, J.