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SUPREME COURT OF THE STATE OF WASHINGTON

FRIENDS OF GRAYS HARBOR and FUTUREWISE,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; GRAYS HARBOR COUNTY; and the STATE OF WASHINGTON, SHORELINES HEARINGS BOARD,

Respondents.

RESPONDENT DEPARTMENT OF ECOLOGY'S ANSWER TO QUINAULT INDIAN NATION'S AMICUS CURIAE BRIEF

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I. INTRODUCTION

Ecology does not dispute the importance of coordinated sea level rise planning to coastal communities and the Quinault Indian Nation. This is why, in the absence of a mandate in the Shoreline Management Act requiring shoreline master programs to address sea level rise, Ecology has strongly encouraged local governments to address the issue in their shoreline master programs by providing guidance and coordination, technical assistance, and funding. Notwithstanding the lack of a mandate, and consistent with Ecology's guidance, Grays Harbor County gave due consideration to sea level rise during the development of its Shoreline Master Program. This is reflected in the Program and the Shoreline Restoration Plan.

The Court of Appeals correctly interpreted the Shoreline Management Act and the Guidelines when it determined that the Shorelines Hearings Board properly affirmed Ecology's approval of the Grays Harbor County Shoreline Master

Program. Applying principles of statutory construction, the Court of Appeals correctly concluded that neither the Act nor the Guidelines require local governments to take specific action to address sea level rise, beyond meeting the flood hazard provisions in the Guidelines. Both the Petition and the Tribe's Amicus Brief fail to show that the Court of Appeal's interpretation is erroneous.

Similar to Petitioners' argument, the Tribe relies on general language in the Act regarding environmental protection and the statewide interest in addressing flood damage. However, like Petitioners, the Tribe fails to address Ecology's longstanding interpretation of this language as implemented through the specific flood hazard requirements in the Guidelines. A liberal interpretation of the Act, as urged by the Tribe, can only go so far. The Legislature must do the rest.

The Court of Appeals decision does not warrant review, and Ecology respectfully asks this Court to deny the Petition.

II. ARGUMENT

A. Sea Level Rise Planning Must Be Coordinated with Other Planning Efforts To Be Effective

The Tribe appears to misconstrue Ecology's position as if Ecology believes that planning for sea level rise is not appropriate under the Act. Amicus Br. at 12–13. To the contrary, Ecology recognizes that shoreline master programs will be a key component of the statewide climate change strategy.[1]

However, because shoreline jurisdiction is generally limited to 200 feet landward from the ordinary high water mark, in most cases it does not extend landward far enough to incorporate a comprehensive approach to manage natural hazards in coastal areas. As recognized by the Legislature, in order to be most effective, sea level rise planning cannot be

[1] For example, Ecology was a co-lead on the Washington Coast Resilience Project, which was a multi-year effort to develop localized sea level projections to inform coastal risk assessments and local planning. Certified Record (CR) 2045–68 (bates numbers appear in the center bottom margin of the record documents).

done piecemeal–it must be coordinated with comprehensive plans, flood ordinances, and other planning processes.

To this end, and supported by recent funding from the Legislature, Ecology is working with the Department of Commerce to develop a model climate change and resiliency element as a guide for local governments as they develop and implement climate resiliency plans. The model element will include guidance on identifying and addressing hazards from sea level rise. Engrossed Substitute S.B. 5092, 67th Leg., Reg. Sess. at 74–75 (§ 129, ¶ 126) (Wash. 2021).[2] These efforts will inform sea level rise planning under the Act.

B. The Program Reflects the County's Consideration of Sea Level Rise

Similar to the Petition, the Tribe's Amicus Brief is based on the false premise that Grays Harbor County "fail[ed] to address sea level rise." Amicus Br. at 12–13. However, the

[2] Available at: https://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5092-S.SL.pdf?q=20230125163625.

record plainly demonstrates that the County gave due consideration to sea level rise during development of the Program, and that the Program is based on "all available information" as required by RCW 90.58.100(1)(e) and WAC 173-26-201(2)(a). The Program includes numerous measures that will improve the County's resilience to sea level rise. Respondent Department of Ecology's Answer to Petition for Review at 8–12, 21–22, 29–32.

In addition to these measures, the Shoreline Restoration Plan prioritizes the reclamation of estuary habitat and the protection of low-lying lands to allow space for uplands to transition to tidelands due to sea level rise. Identified projects include the removal of shoreline armoring in the floodplain, and the restoration of over five hundred acres of shoreline habitat.

CR 1990–92, 4086. As the Board found, the Program meets the Act's no net loss requirement.[3]

Shoreline master programs are not static, but rather must be updated periodically to ensure consistency with a local government's comprehensive plan and local development regulations. RCW 90.58.080(4)(a)(ii). As more statewide guidance becomes available, the County can amend the Program accordingly. *See* WAC 173-26-090(2)(d)(ii) (requiring amendments to reflect "changed circumstances, new information, and improved data.").

C. The Court of Appeals Properly Interpreted the Act and Guidelines Consistent with Principles of Statutory Interpretation

"In matters of statutory construction, [courts] are tasked with discerning what the law is, not what it should be." *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 421, 334 P.3d 529 (2014). No matter how compelling the Tribe's interests

[3] The Court of Appeals determined that Petitioners did not challenge this finding, and Petitioners do not seek review of that determination.

may be, whether to include a sea level rise mandate in the Act "is the purview of the legislature and should not inform interpretation of the statute." *Assoc. Press v. Wash. State Legislature*, 194 Wn.2d 915, 930, 454 P.3d 93 (2019) (plurality opinion).

The Act makes no mention of sea level rise, and the Guidelines contain a single reference, encouraging local governments to consult on this "emerging topic[]." WAC 173-26-090(1). Following principles of statutory interpretation, the Court of Appeals appropriately refused to read a mandate into the Act requiring shoreline master programs to contain sea level rise requirements beyond the flood hazard standards in the Guidelines. *Friends of Grays Harbor v. Dep't of Ecology,* No. 84019-3-I, slip op. at 5–6 (Wash. Dec. 12, 2022) ("[I]n interpreting a statute, 'a court must not add words where the legislature has chosen not to include them.' ") (citing *Rest. Dev., Inc v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)).

The Court of Appeals did not make its decision in a vacuum, but considered the same arguments that the Tribe now makes regarding the same provisions in the Act relied on by Petitioners. For example, the Court of Appeals carefully analyzed the language in RCW 90.58.100(2)(h), which requires a master program to include "when appropriate . . . [a]n element that gives consideration to the statewide interest in the prevention and minimization of flood damages." Slip op. at 7. The Court of Appeals correctly determined this language is insufficient to create a mandate requiring specific action to address sea level rise, especially given Ecology's implementation of this requirement in the Guidelines. *Id.* at 6–8.

Pursuant to RCW 90.58.060, Ecology implements RCW 90.58.100(2)(h) through numerous provisions in the Guidelines that serve as minimum standards for master programs. *See* WAC 173-26-171(3)(a). WAC 173-26-221 "address[es] certain elements as required by

RCW 90.58.100(2)" and implements the policy goals in WAC 173-26-176. In particular, WAC 173-26-221(3) translates the flood element requirement from RCW 90.58.100(2)(h) and WAC 173-26-176(3)(g) into specific requirements that a master program must meet. There is no dispute that the Grays Harbor Shoreline Master Program meets the standards for flood hazard reduction in WAC 173-26-221(3). The Court of Appeals correctly determined that is all that is required to meet the flood element.

In accordance with this Court's decision in the *Port of Seattle v. Pollution Control Hearings Board* case, the Court of Appeals appropriately gave due deference to Ecology's interpretation of the Act and the Guidelines. Slip op. at 4 (citing *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 600, 90 P.3d 659 (2004)). This deference is warranted in light of the Act's overarching framework, which leaves significant discretion to Ecology to fill in the gaps with rules (i.e., the Guidelines) that dictate the specific minimum

requirements of a shoreline master program. RCW 90.58.060. The Guidelines' flood hazard standards, which are coordinated with non-SMA flood requirements, have been applied to every master program that has been comprehensively updated under RCW 90.58.080 since 2005. The Court should not be persuaded by efforts to disrupt this established regulatory framework under the guise of statutory interpretation.

D. A Liberal Interpretation of the Act Cannot Support A Conclusion That the Act Mandates Sea Level Rise Requirements

Similar to Petitioners, the Tribe argues that the Court of Appeals interpreted the Act too narrowly, asserting that a mandate to address sea level rise can be found in the findings section of the Act, RCW 90.58.020. While RCW 90.58.020 is relevant to determining legislative intent, "[c]ourts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

RCW 90.58.020 articulates the three primary goals of the Act—protecting the shoreline, fostering water dependent development,[4] and enhancing shoreline public access. Even though the Act makes no mention of sea level rise, the Tribe argues that it can nonetheless be inferred. Amicus Br. at 15–16, (citing *Weyerhaeuser Co. v. King Cnty.*, 91 Wn.2d 721, 734, 592 P.2d 1108 (1979)).

In *Weyerhaeuser*, this Court concluded that a local government has the authority to include water quality conditions in a shoreline permit. *Weyerhaeuser* does not support the Tribe's arguments here because the Act plainly expresses a policy of "protecting against adverse effects to . . . the waters of the state and their aquatic life . . . . [U]ses shall be preferred which are consistent with control of

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[4] The Act does not prohibit development in shorelines of statewide significance (SSWS). In addition to those SSWS that are defined in RCW 90.58.030(2)(f), Ecology may designate additional SSWS based on their "special economic, ecological, educational, developmental, recreational, or aesthetic values." RCW 90.58.310.

pollution . . . ." RCW 90.58.020, .020(7). Notably, the Act does not have a similar provision requiring protection against the adverse impacts of sea level rise.

Ecology's comprehensive Guidelines also include provisions that address water quality. *See, e.g.,* WAC 173-26-221(6) (addressing water quality, stormwater, and nonpoint pollution), -241(3)(j)(ii) (requiring master programs to include, where applicable, on-site sewage system standards for residential development).[5] Thus, unlike sea level rise, the regulation of water quality in a master program is required by express language.

The Tribe also argues that the Act should be read more liberally to give effect to the Act's goal of environmental protection. Amicus Br. at 9 (citing RCW 90.58.900). However, the Tribe and Petitioners ignore the many restrictive provisions in the Program that fulfill this goal, including policies that

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[5] The Guidelines went into effect in 2004.

address coastal flooding and sea level rise. Their belief that the Program does not go far enough in addressing sea level rise is insufficient to warrant review, because courts cannot make new law through a liberal interpretation of a statute. "Neither a liberal construction nor a strict construction may be employed to defeat the intent of the legislature, as discerned through traditional processes of statutory interpretation." *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 432, 275 P.3d 1119 (2012) (citation omitted).

Statutory interpretation principles dictate that legislative intent is determined by reviewing "all that the legislature has said in the statute . . . ." *Id*. Where the Act is silent with regard to sea level rise (and climate change), it is impossible to infer that the Legislature intended to require a local government to take specific action to address sea level rise.[6] Due to the

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[6] The Tribe suggests that the Legislature's failure in 2021 to enact a bill adding sea level rise to the Act is irrelevant to an analysis of legislative intent. Amicus Br. at 17 n.13. But the failed bill supports the conclusion that the interpretation of the

significance of the topic, it is inconceivable that the Legislature intended the Act to mandate sea level rise requirements without mentioning it even once. The dictum that "Congress . . . does not . . . hide elephants in mouseholes" is particularly apt here. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001) (citation omitted). Because the Court of Appeals did not err in its interpretation of the Act, review is not warranted by this Court.

III. CONCLUSION

For all of the reasons set forth in Ecology's Answer to the Petition for Review, and the reasons stated above, Ecology respectfully requests that the Court deny the Petition for Review.

Act by Ecology, the Board, and the Court of Appeals is reasonable. As discussed in Ecology's Answer, a similar bill is currently working its way through the Legislature. If it passes, this case will be rendered moot. *See* H.B. 1181, 68th Leg., Reg. Sess. (Wash. 2023), available at: https://lawfilesext.leg.wa.gov/biennium/2023-24/Pdf/Bills/House%20Bills/1181.pdf?q=20230125163300.

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RESPECTFULLY SUBMITTED this 4th day of April, 2023.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on April 4, 2023, I caused to be served Respondent Department of Ecology's Answer to Amicus Brief in the above-captioned matter upon the parties herein via the Appellate Court filing portal as indicated below:

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