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NO. 101618-2

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 PETITION FOR REVIEW**

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I. INTRODUCTION

In 2004, the Legislature required that all shoreline jurisdictions update their shoreline master programs by 2014 to be consistent with the Department of Ecology's Shoreline Master Program Guidelines. Ecology's approval of the comprehensive update of the Grays Harbor County Shoreline Master Program represents the culmination of a seven-year process that included a thorough consideration of the impacts of sea level rise. The draft Program contained numerous references to the term "sea level rise" that the County replaced with synonymous words during its final approval process. However, the substantive provisions of the Program did not change, and the Program includes measures that will help address sea level rise.

Petitioners Friends of Grays Harbor and Futurewise (collectively FOGH) challenged the update, alleging that the Program does not go far enough in addressing sea level rise. The Shorelines Hearings Board and the Court of Appeals

rejected FOGH's challenge. The Court of Appeals decision does not warrant further review. The decision faithfully follows the plain language of the Shoreline Management Act, which does not mention sea level rise, and the Shoreline Management Act Guidelines, which simply state that local governments should consult with Ecology on this "emerging topic." The Board and the Court of Appeals correctly found that the Act and Guidelines do not require a Program to address sea level rise beyond the existing flood standards in the Guidelines, and that the approved Program complies with the Act and the Guidelines.

FOGH has not shown an issue of substantial public interest warranting this Court's review under RAP 13.4(b)(4).

II. STATEMENT OF THE ISSUES

1. Whether the Court of Appeals correctly concluded that the Grays Harbor County Shoreline Master Program complies with the Shoreline Management Act and the Guidelines, where neither the Act nor the Guidelines require

Shoreline Master Programs to address sea level rise beyond compliance with the Guidelines' flood hazard reduction standards?

2. Whether the Court of Appeals correctly concluded that the Grays Harbor County Shoreline Master Program is based on an analysis of incorporating current scientific and technical information, as required by the Shoreline Management Act and Guidelines?

III. STATEMENT OF THE CASE

A. Shoreline Master Programs Under the Shoreline Management Act

The Shoreline Management Act establishes a coordinated planning policy that prioritizes water dependent uses and public access to the shoreline, while simultaneously “protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life” RCW 90.58.020.

Consistent with the Act’s mandate “to prevent the inherent harm in an uncoordinated and piecemeal development

of the state’s shorelines,” the Act provides a cooperative program between local governments and the state in regulating shoreline uses. RCW 90.58.020, .050. Local governments develop policies and regulations to govern land use in the shoreline, i.e., a shoreline master program.

RCW 90.58.030(3)(c). Ecology reviews these programs for consistency with RCW 90.58.020 and Ecology’s Shoreline Management Act Guidelines, which are codified at WAC 173-26. Although they are referred to as “Guidelines,” they provide the minimum requirements a program must meet to comply with the Act. RCW 90.58.030(3)(b), (c), RCW 90.58.060, (1), RCW 90.58.080(1), (7); *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 680, 399 P.3d 562 (2017) (*Olympic*).

As long as they meet the Guidelines’ minimum requirements, local governments have broad discretion to consider local circumstances, preferences, and priorities. WAC 173-26-186(9); *Olympic*, 199 Wn. App. at 680. After

approval by Ecology, local shoreline master programs become part of the state shoreline master program. They also become an element of a local government's comprehensive plan and part of local development regulations required by the Growth Management Act. RCW 90.58.030(1)(d), RCW 36.70A.480(1).

After Ecology finalized a major update to the Guidelines in 2004, the Legislature set a timetable by which all shoreline jurisdictions were required to comprehensively update their programs to comply with the Guidelines. RCW 90.58.080.

Local governments are required to revisit their program every eight years thereafter, in order to consider "changing local circumstances, new information or improved data." WAC 173-26-090(1); RCW 90.58.080(4). Grays Harbor County is one of the last jurisdictions to comprehensively update its program.

CR 4605.¹

¹ References to "CR" are to the Certified Record (bates numbers appear in the center bottom margin of record documents).

B. The Act and the Guidelines Do Not Contain Sea Level Rise Requirements

The Act contains no reference to sea level rise, and until recently, the Guidelines did not either. In 2017, Ecology amended the section in the Guidelines that addresses the eight-year periodic reviews. RCW 90.58.080(4); WAC 173-26-090 through -130. During the rulemaking, FOGH acknowledged that the Guidelines did not require programs to address sea level rise and urged Ecology to add sea level rise requirements. CR 4281–82, 4244–45. After consulting many stakeholders, Ecology concluded that:

“Our local partners that have been most actively engaged in comprehensive planning to address sea level rise argued persuasively that the challenge of addressing sea level rise transcend the geographic limits and authority of the [Act]. . . . While they agree [shoreline master programs] will be among the suite of authorities to address sea level rise, new state rules tied to periodic reviews are not the proper vehicle to drive a comprehensive response.”

CR 4170. Thus, rather than impose specific sea level rise requirements, Ecology added a provision to the Guidelines that encourages local governments to consult with Ecology during

the periodic review process regarding “new information on emerging topics such as sea level rise.” WAC 173-26-090(1). This is the only reference to sea level rise in the Guidelines.

Due to the narrow geographic scope of shoreline jurisdiction under the Act (which extends only 200 feet landward from the ordinary high water mark),² addressing sea level rise will require a variety of coordinated strategies under various authorities, including local comprehensive plans, local building and zoning codes, flood ordinances, hazard mitigation plans, and stormwater management plans. An overall sea level response strategy necessarily implicates long-range planning. CR 3467.

There are also considerable challenges and trade-offs for a community to consider, such as the protection of existing infrastructure, the importance of waterfront development to a

² The Act applies to all marine waters, all segments of streams in excess of 20 cubic feet per second, and all lakes greater than 20 acres. RCW 90.58.030(2)(d), (e).

variety of community stakeholders, and private property interests. To that end, Ecology has been providing technical assistance and planning guidance, program coordination, and other non-regulatory support (such as grant funding) to local governments that choose to incorporate sea level rise planning in their programs. CR 4170–71. Ecology also prepared a guidance document on sea level rise that discusses how existing tools can be used to address sea level rise. CR 4136–46

(Shoreline Master Program Handbook, Appendix A: Addressing Sea Level Rise in Shoreline Master Programs)
(Appendix A).

C. Sea Level Rise Was Considered During Development of the Grays Harbor Shoreline Master Program

The topic of sea level rise received considerable attention during the development of the Grays Harbor Shoreline Master Program. There were meetings and workshops devoted to the topic, which included information regarding local sea level projections. CR 5805–09, 2285–2300, 3317–51, 5823–38. As part of the required planning process, the County prepared a

shoreline inventory and characterization and a use analysis (Shorelines Analysis Report or Report), a restoration plan, and a cumulative impacts analysis. WAC 173-26-110(10), -201(2)(f); -201(3)(c), (d).

Referencing data from the National Oceanic and Atmospheric Administration and a joint paper prepared by the University of Washington Climate Impacts Group and Ecology, the Report acknowledges the anticipated impacts of climate change and sea level rise, including the predictions for sea level rise on the Central Washington Coast. *Friends of Grays Harbor v. Dep't of Ecology*, No. 84019-3-I, slip op. at 15 (Dec. 12, 2022); CR 3687–88; *see also* CR 3672–73 (destabilization of river channels), CR 3681 (impacts to coastal and estuarine ecosystems). The Report identifies potential restoration opportunities, including measures that will help address sea level rise. CR 3719– 3813.

The Shoreline Restoration Plan includes the restoration measures identified in the Report. *Compare* CR 3719–3813

(Report) *with* CR 5313–49 (Plan). The goals of the Shoreline Restoration Plan are to protect natural watershed processes, conserve habitat, and “promote ecosystem resilience in the face of future changes.” CR 5311. The Restoration Plan acknowledges that “[p]rojected sea level rise and hydrologic alterations with climate change could alter the existing distribution of habitats in the county.” CR 5350. It identifies a key study being conducted by the Nature Conservancy to “understand what habitats may be most at risk, and to identify strategic locations to protect from development in order to accommodate habitat diversity under future climate scenarios” that will help identify actions to maximize ecological benefits. *Id.* The Restoration Plan prioritizes actions that address the potential loss of habitats due to climate change, including reclamation and restoration of disconnected marsh habitats and floodplains. CR 5317–39, 5345–49.

The Cumulative Impacts Analysis acknowledges that sea level rise may result in increased need for shoreline

stabilization structures such as bulkheads (i.e., sea walls), and identifies the Program provisions that will ensure no net loss of ecological functions from this type of development. CR 4011–13. These provisions include restrictions and conditions that determine where and when such structures can be built, as well as mitigation requirements. *Id.*, CR 6779–83 (SMP 5.9).

The draft Program contained policies that mentioned sea level rise, but during the final stages of local approval, the references to sea level rise were replaced with different terms such as “natural disasters” and “flood events.” For example, the Program’s Shoreline Residential Policy “[e]ncourage[s] locating structures along the Pacific Ocean and the Grays Harbor Estuary as far landward as feasible to minimize potential danger from coastal storm surge, flooding, and tidal influences and natural disasters [~~sea level rise~~].” CR 6728,

5795, 5812 (SMP 2.5.3.B).³ Sea level rise was retained as a planning goal for Pacific Beach. CR 6717 (SMP Preface).

The County “fully acknowledges that sea level rise is an important, long-term issue that will impact future development along coastal shorelines,” and determined that the terms used by the Program are adequate while it waits for “actionable standards.” CR 3467, 4684–85. The County has also stated that it will continue to address sea level rise during the Program’s eight-year periodic review. CR 5845. This will allow the County time to develop a comprehensive sea level response strategy—beyond the limited geographic scope of the Act—and to avail itself of developing guidance and technical assistance. CR 3467, 5845.

Ecology approved the Program as amended. No changes were made to weaken the substantive provisions of the Program, which will afford some protection against the impacts

³*See also* CR 4611–13 (text of all amended policies).

of sea level rise. For example, through the adoption of a 200-foot buffer on the Pacific Coast shorelines, the Program (with some limited exceptions) restricts new residential development throughout the full extent of shoreline jurisdiction on the coastal shoreline. CR 3417.

D. Current Legislative Efforts To Address Climate Change and Sea Level Rise

During the 2021 and 2022 legislative sessions, the Legislature considered bills that would amend the Growth Management Act, the Shoreline Management Act, and RCW 86.12 (Flood Control by Counties) to add climate change and sea level rise requirements. Engrossed Second Substitute H.B. 1099, 67th Leg., Reg. Sess. (Wash. 2021).⁴ Those bills did not pass, but similar bills have been introduced in the current 2023 session. H.B. 1181, 68th Leg., Reg. Sess. (Wash. 2023);

⁴ See <https://lawfilesexternal.wa.gov/biennium/2021-22/Pdf/Bills/House%20Bills/1099-S2.E.pdf?q=20230125163051>;
<https://app.leg.wa.gov/bills/bills/BillNumber=1099&Year=2021&Initiative=false>.

S.B. 5203, 68th Leg., Reg. Sess. (Wash. 2023).⁵ In the meantime, the Legislature appropriated more than \$3.2 million in the 2021–23 operating budget for the Department of Commerce to develop climate change and sea level rise guidance in collaboration with Ecology and other agencies and stakeholders. Engrossed Substitute S.B. 5092, 67th Leg., Reg. Sess. at 74–75 (§ 129, ¶ 126) (Wash. 2021).⁶ This effort is expected to include updated guidance for shoreline master programs.

E. Procedural Background

FOGH appealed the Grays Harbor Shoreline Master Program to the Shorelines Hearings Board. *See* RCW 90.58.190(3)(a). The Board ruled that neither the Act nor the Guidelines require a local government to take specific

⁵*See* <https://lawfilesexternal.wa.gov/biennium/2023-24/Pdf/Bills/House%20Bills/1181.pdf?q=20230125163300>; <https://lawfilesexternal.wa.gov/biennium/2023-24/Pdf/Bills/Senate%20Bills/5203.pdf?q=20230125163423>.

⁶ *See* <https://lawfilesexternal.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5092-S.SL.pdf?q=20230125163625>.

action to address sea level rise in their master programs. The Board also found that the Program meets the minimum flood requirements in the Guidelines, and that the Program complies with RCW 90.58.100(1) and WAC 173-26-201(1)(a).

CR 8186–94 (Board Order, CL 9, 14, 18, 19). FOGH appealed the Board decision to Thurston County Superior Court and then the parties mutually agreed to transfer the case to the Court of Appeals, pursuant to RCW 34.05.518(1)(a). The Court of Appeals concluded that FOGH failed to meet its burden under the Administrative Procedure Act (RCW 34.05) to demonstrate the Board erroneously interpreted or applied the law, or that the Board’s Order is unsupported by substantial evidence.

IV. REASONS WHY REVIEW SHOULD BE DENIED

This Court’s review is not warranted under RAP 13.4(b)(4). The Court of Appeals faithfully followed principles of statutory construction in concluding that neither the Shoreline Management Act nor the Guidelines require a shoreline master program to address sea level rise beyond the

specific flood requirements in the Guidelines, which the Grays Harbor Shoreline Master Program complies with. While sea level rise is undeniably an issue of public importance, the Court of Appeals' well-supported legal conclusion is not, in light of the absence of any mention of sea level rise in the Act combined with the absence of sea level requirements in the Guidelines. Given the geographic scope of its impacts and broad implications for local planning, sea level rise is more appropriately addressed through legislative efforts and the coordinated planning currently underway. Review by this Court is not warranted and the Court should deny FOGH's Petition for Review.

A. The Court of Appeals Correctly Concluded That Neither the Act Nor the Guidelines Impose Sea Level Rise Requirements Beyond the Guidelines' Flood Hazard Provisions

The Shoreline Management Act requires all shoreline master programs to have an element "that gives consideration to the statewide interest in the prevention and minimization of flood damages." RCW 90.58.100(2)(h); WAC 173-26-

176(3)(g). The flood element is met through compliance with the flood hazard reduction provisions in the Guidelines, which are found primarily in WAC 173-26-221(3). In a detailed analysis, the Shorelines Hearings Board compared the Program against the Guidelines' minimum requirements for the flood element, and correctly determined that the Program complied with them all. CR 8186–87 (Board Order, CL 9).

Rather than identifying a specific standard that the Program fails to meet, FOGH argues more generally that the reference to the public interest in RCW 90.58.020, and the flood element requirement in RCW 90.58.100(2)(h) and WAC 173-26-176(3)(g), requires master programs to include additional measures to address sea level rise—what measures they do not say.⁷ The Court of Appeals properly rejected this argument, noting that “[t]he plain language of the [Act] and

⁷ At one point, FOGH commented that the Program should prohibit all new development in areas that could be inundated by the year 2100. CR 2247.

Guidelines do not require [master programs] to address sea level rise beyond the flood hazard regulations. To add requirements not explicitly present would be contrary to the rules of statutory interpretation.” Slip. op. at 6. The Court of Appeals decision is consistent with the Guidelines’ statement that the provisions in WAC 173-26-221 (which includes the flood standards) address the elements required in RCW 90.58.100(2) and “implement the principles established in WAC 173-26-186.” WAC 173-26-221. The Court is correct that nothing more is required.

FOGH argues that the Program’s flood provisions are inadequate to address sea level rise because they are based in part on Federal Emergency Management Agency (FEMA) flood studies and maps, which only look at past flood data and may not capture future sea level rise. However, FOGH overlooks the provision in the Act that authorizes a local government to rely on the FEMA maps and data. RCW 90.58.030(2)(d) (defining “[s]horelands” as “floodways

and contiguous floodplain areas landward two hundred feet from such floodways.”), RCW 90.58.030(2)(b)(i) (defining “[f]loodway” as the area that “[h]as been established in [FEMA] flood insurance rate maps or floodway maps.”).⁸ See also WAC 173-26-020(19) (defining “[f]loodplain” as “that land area susceptible to inundation with a one percent chance of being equaled or exceeded in any given year. The limit of this area shall be based upon flood ordinance regulation maps or a reasonable method which meets the objectives of the act.”).

By incorporating the FEMA definitions and the maps developed by FEMA as part of the National Flood Insurance Program (NFIP), the Act authorizes a local government to rely on them for its flood provisions. Flooding is subject to an

⁸ A local government can opt to map the floodway by identifying “those portions of a river valley lying streamward from the outer limits of a watercourse upon which flood waters are carried during periods of flooding that occur with reasonable regularity, although not necessarily annually” RCW 90.58.030(2)(b)(ii). Grays Harbor County, like most local governments, uses the established FEMA floodway. CR 6822.

overlapping set of requirements from different levels of government, all of which rely on federal flood data. For example, local governments rely on FEMA maps for flood management regulations. RCW 86.12.200, 86.16.051.⁹

Similarly, the Grays Harbor County Critical Areas Ordinance, which has been incorporated into the Program to protect critical areas in shorelines, defines “frequently flooded areas” as those areas identified in the flood insurance rate maps published by FEMA for Grays Harbor County and used for participation in the NFIP. WAC 173-26-221(2)(a)(ii); CR 6721, 4828–29.

The Guidelines require shoreline master programs to be based on “applicable watershed management plans, comprehensive flood hazard management plans, and other

⁹ Comprehensive flood management plans are developed by local governments under RCW 86.12 and must be consistent with the minimum requirements for participation in FEMA’s National Flood Insurance Program. RCW 86.12.200. *See also* RCW 86.16.041(1) (requiring municipalities to adopt floodplain management ordinances that meet the minimum requirements of the NFIP).

comprehensive planning efforts” and encourages local governments to integrate master program flood provisions with other flood regulations such as stormwater management plans, floodplain management regulations, critical areas ordinances, and the NFIP. WAC 173-26-221(3)(b)(ii), (iii). Accordingly, the County appropriately adopted a consistent approach to flood management across the programs it administers by relying on the FEMA maps.

It is important to note that the Program’s substantive flood provisions go beyond FEMA requirements, which focus on construction specifications. For example, the Program prohibits new structural flood hazard reduction measures (such as levees, floodwalls, revetments) anywhere in the shoreline unless it can be demonstrated that they are necessary to protect existing development, and only when nonstructural measures are not feasible, and if there will be no net loss of ecological functions. CR 6743–44 (SMP 3.4.3B); WAC 173-26-221(3)(c)(ii). The Program also prohibits residential

development in floodplains and channel migration zones where shoreline stabilization measures (e.g., retaining walls) will be necessary in the future. CR 6766 (SMP 4.11.3.C); WAC 173-26-231(3)(a)(iii)(A), -241(3)(j)(iii). In sum, the Program mirrors the Guidelines' flood requirements that limit development in flood hazard areas and prioritizes restoration of natural processes. WAC 173-26-221(3)(b). These measures will avoid and minimize damage to property and the environment, whatever the cause.

The *Dairy Federation* case, relied on by FOGH, does not require reversal of the Court of Appeals decision. Petition at 20 (citing *Wash. State Dairy Fed'n v. Dep't of Ecology*, 18 Wn. App. 2d 259, 490 P.3d 290 (2021)).¹⁰ In that case, because Ecology issued a water quality permit that did not

¹⁰ The *Dairy Federation* decision was issued immediately prior to the filing of FOGH's Reply Brief at the Board. FOGH did not refer to the case in its Reply, nor did it file a Statement of Additional Authorities. FOGH referenced the case during oral argument at the Board, but the Board did not address SEPA in its decision.

comply with Ecology’s water quality requirements, the court determined that Ecology “also failed to act in accord with SEPA’s underlying policies.” *Id.* at 309. Here, the Program satisfies the Shoreline Management Act’s requirements. Further, unlike the permit at issue in *Dairy Federation*, the record plainly demonstrates that the impacts of climate change were considered during the development of the Program. *See* Section III.C, *supra*; *see also* CR 2285–2300, 3317–51, 3467, 3625–27, 5317–39, 5345–49, 5805–09, 5823–38, 5845.

As the Court of Appeals accurately observed, the Act requires a flood element that “gives consideration” to minimizing and preventing flood damages “when appropriate.” Slip op. at 8 (citing RCW 90.58.100(2)(h)). The Court correctly interpreted the Act and the Guidelines in concluding that the Program complies with RCW 90.58.020, RCW 90.58.100(2)(h), and WAC 173-26-176(3)(g).

This case does not present an issue of substantial public interest where FOGH cannot show that the decision is

inconsistent with the Act or the Guidelines. Moreover, given the broad range of issues implicated by sea level rise, policymakers have determined that sea level rise is best addressed through a coordinated planning strategy.

B. The Court of Appeals Correctly Concluded That the Grays Harbor County Shoreline Master Program Is Based on the Required Analysis of Scientific Information

In developing a master program, RCW 90.58.100(1)(e) requires, “to the extent feasible...[utilization of] all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data.” The Guidelines implement this requirement through WAC 173-26-201(2)(a), which requires a local government to “base master program provisions on an analysis incorporating the most current, accurate, and complete scientific or technical information available.” As discussed above, sea level rise was considered during the development of the Program. FOGH’s complaint is that the Program does not do enough to address it.

FOGH alleges that the Program is not based on the Shoreline Analysis Report. The Report was developed to meet the Guidelines' requirement for a shoreline inventory and characterization, and a use analysis. WAC 173-26-201(3)(c), (d). It identifies current land use patterns and estimates future demand for shoreline space and potential use conflicts to ensure the Program is planning for appropriate uses consistent with the Act. *See* CR 3632–3957 (Report); WAC 173-26-201(3)(d)(ii). The Report provides information to ensure the Program appropriately assigns the shoreline environment designations that apply to distinct shoreline areas and determine the types of uses allowed in a particular area. *Id.*; *see also* WAC 173-26-211. The Report also informs the Shoreline Restoration Plan, by identifying restoration opportunities in different shoreline areas. CR 3719–3813; WAC 173-26-201(3)(c)(iii), -201(3)(d)(i)(A)(III). Thus, in accordance with the Guidelines, the Report informs the Program's development but is not part of the Program itself.

Relying on the *Olympic* case, FOGH argues that the Program must include sea level rise requirements because the Report identifies important habitat. Petition at 27–29. *Olympic* involved a challenge to a mining prohibition in certain shoreline areas. 199 Wn. App. at 735. The court determined that the prohibition complied with RCW 90.58.100(1) and WAC 173-26-201(2)(a), where the scientific analysis demonstrated that the shoreline areas were ecologically valuable and vulnerable to activities associated with mining. *Olympic*, 199 Wn. App. at 740–42. *Olympic* is distinguishable because, unlike sea level rise, the Guidelines require master programs to “include policies and regulations for mining.” WAC 173-26-241(3)(h)(ii). Further, as explained below, the record demonstrates that the information in the Report was utilized as required by the Act and Guidelines.

For example, the restoration opportunities identified in the Report are carried forward into the Shoreline Restoration Plan, including land acquisitions and other projects that will

increase the County’s resilience to sea level rise. CR 8192–93 (Board Order, CL 18); *see also* CR 5301–95 (Restoration Plan). A restoration plan is a non-regulatory document that identifies current and future opportunities to restore and improve shoreline ecological functions and guides shoreline restoration efforts by providing information about opportunities to restore shoreline ecological functions as reflected in the Program’s goals and policies. WAC 173-26-186(8)(c), -201(2)(f).

Like the Report, the preparation of a restoration plan is part of the planning process, but WAC 173-26-201(2)(a) does not require a restoration plan to be fully incorporated into the Program, nor would this be appropriate. The Program cannot command land acquisitions—instead the County must rely on voluntary efforts. *See, e.g.*, WAC 173-26-186(5) (“The policy goals of the act . . . may not be achievable by development regulation alone. Planning policies should be pursued through the regulation of development of private property only to an

extent that is consistent with all relevant constitutional and other legal limitations”).

The Program refers to the Restoration Plan in a section on “Shoreline Habitat Restoration and Enhancement Projects.” CR 2136 (SMP 5.8). This section requires the County to “[e]ncourage property owners, community groups, local, state, federal, and tribal entities to aid in implementing restoration projects identified through the Grays Harbor County Shoreline Restoration Plan.” *Id.* (SMP 5.8.2.A). This policy ensures that shoreline restoration activities will be guided by and consistent with the Restoration Plan.

The record demonstrates that the Report informed the development of the Program and the Restoration Plan as required by the Guidelines. The Court of Appeals was correct in concluding that FOGH failed to prove the Program is not “based on” the Report. Slip op. at 13–15.

FOGH also asserts that Ecology’s sea level rise guidance requires the Program to address sea level rise. *See* CR 4136–46.

(Appendix A). Ecology has never considered Appendix A to be mandatory, nor does Appendix A direct local governments to take any particular action. As Appendix A itself states, “[t]he Shoreline Management Act (SMA) and the Shoreline Master Program (SMP) Guidelines contain no requirements for [master programs] to address climate change or sea level rise.”

CR 4137. FOGH attempts to characterize Appendix A as mandatory by tying it to the separate requirement that analyses be based on current and accurate information. However, Appendix A was not promulgated as a rule, and as the Court of Appeals correctly concluded, “[b]ecause it is not a binding rule, Appendix A cannot mandate the content of [master programs].” Slip op. at 16. *See also Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wn.2d 640, 647, 835 P.2d 1030 (1992) (policies intended to be binding must be adopted pursuant to APA rulemaking procedures).

Even though Appendix A is not mandatory, the Program reflects many of its recommendations. For example,

Appendix A states that shoreline buffers are “one way to ensure that future development is not threatened by sea level rise. Buffers and setbacks along with restrictive building standards near low lying or erosion prone shorelines will help reduce flooding and the need for shoreline armoring.” CR 4144. The Program imposes a 200-foot buffer on the Pacific Ocean shorelines, as well as any shorelines designated “Natural.” CR 6739–40 (SMP 3.3.3.E.(ii), (iv), (vi), (viii)). This restrictive buffer prohibits all new development on the marine shorelines, with the exception of water dependent uses and some uniquely situated single-family residences. *Id.*

Regarding shoreline structural stabilization, Appendix A “encourage[s] softer armoring techniques where appropriate.” CR 4144. The Program’s policies and regulations include, among other restrictions previously discussed, a preference for soft armoring techniques (such as the use of vegetation and soil) over the construction of hard shoreline stabilization structures (such as large rock or concrete walls). CR 6779

(SMP 5.9.2) Appendix A encourages the incorporation of sea level rise planning into permit conditions. CR 4144. To this end, the Program has policies that require the County to consider data related to tidal influences, storms, and flood events, which are all natural processes affected by sea level rise. These policies apply to all critical areas (including frequently flooded areas such as floodplains), residential development, transportation and parking, utilities, shoreline stabilization, beach and dune management, fill and excavation, and shoreline habitat restoration and enhancement projects.¹¹ CR 6739 (SMP 3.3.2(H)), CR 6766 (SMP 4.11.2(F)), CR 6767 (SMP 4.12.2(L)), CR 6768 (SMP 4.13.2(E)), CR 6771 (SMP 5.3.2(F)), CR 6774 (SMP 5.6.2(B)), CR 6777 (SMP 5.8.2(B)), CR 6780 (SMP 5.9.2(H)).

¹¹ None of the policies listed above use the phrase “past flood events.” One of the policies in the flood hazard section of the Program references “past flood events.” CR 6742 (SMP 3.4.2.J). However, any proposed development in a floodplain will also be subject to other applicable policies (e.g., residential) that are not limited to “past flood events.”

Appendix A also recognizes that “a restoration plan provides an excellent opportunity to implement sea level rise adaption measures. Restoration plans may identify restoration actions that improve resilience to sea level rise.” CR 4144–45. Consistent with Appendix A, the Shoreline Restoration Plan includes the Report’s recommendations that address sea level rise.

The County has stated its intention to consider sea level rise during its periodic review after more guidance is available. CR 5845. At this time, the Guidelines require nothing more. Meanwhile, the Legislature recognizes that sea level rise warrants a coordinated strategy, and has provided funding for the development of guidance addressing climate change and sea level rise in local planning, which should include updated guidance for shoreline master programs.

The Court of Appeals decision is well-reasoned, conforms to the plain language of the Act and the Guidelines, and is consistent with the APA standards of review. The public

interest does not warrant this Court's review where FOGH fails to show that the Court of Appeals decision is inconsistent with the Act or the Guidelines.

V. CONCLUSION

For the reasons stated, Ecology respectfully requests that the Court deny FOGH's Petition for Review.

This document contains 4,953 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 9th day of
February, 2023.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on February 9, 2023, I caused to be served Respondent Department of Ecology's Answer in the above-captioned matter upon the parties herein via the Appellate Court filing portal as indicated below:

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