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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.

MEMORANDUM OF *AMICUS CURIAE* QUINAULT INDIAN NATION IN SUPPORT OF REVIEW

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INTRODUCTION

Quinault Indian Nation supports Petitioners' request for discretionary review to protect the Tribe's interest in coordinated government planning for sea level rise and coastal flooding due to climate change and to correct the Court of Appeals' unduly narrow view of the Shoreline Management Act ("SMA").

For Quinault, climate change is a present-day crisis with devastating impacts. Harms to infrastructure and housing, including increased flooding, have already begun. In the face of sea level rise and increased coastal flooding, the Tribe is relocating its entire Lower Taholah village inland because of coastal vulnerability.

Taholah village, Quinault Indian Nation Reservation.

The lands and waters of Washington's coast are essential to the Tribe's economic, cultural, and spiritual survival. Sea level rise poses risks to the natural resources—particularly salmon, shellfish, and native plants—upon which the Tribe depends for its lifeways. Environmental impacts caused by climate change, including rising sea levels and hydrologic and ecological changes to river systems and coastal shorelines that have sustained the Tribe's ancestors since time immemorial, strike at the heart of what it means to be a tribe and tribal member.

While drafts of the Grays Harbor Shoreline Master Program ("SMP") discussed sea level rise, Grays Harbor County deleted all but one passing mention of sea level rise before finalizing the SMP. The Department of Ecology approved the SMP, despite Ecology's own handbook acknowledging sea level rise's impacts on planning and recommending that local governments consider sea level rise in SMPs.[1]

The Court of Appeals ruled that Ecology had not erred in approving the Grays Harbor SMP, as the SMA did not explicitly use the phrase "sea level rise," and Ecology's Guidelines mentioned sea level rise only once as an example of an emerging topic. *FOGH v. Ecology*, No. 84019-3-1, slip op. at 5 (Wash. Ct. App. Dec. 12, 2022). The appellate court also noted governments' discretion to reflect local conditions in

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[1] SMP Handbook Appendix A, https://apps.ecology.wa.gov/publications/parts/1106010part19.pdf.

their SMPs, *id.* at 3, but ignored Ecology's approval role for statewide issues, such as sea level rise.

The Court of Appeals read the language of the SMA too narrowly, focusing only on the absence of the words "sea level rise," and not on the overarching shoreline preservation purpose of the Act and the Act's specific language requiring SMPs to utilize all available and pertinent data, give appropriate consideration to the prevention and minimization of flood damages, and ensure no net loss of shoreline functions when considering current and future uses alongside natural conditions. Far from "add[ing] words where the legislature has chosen not to include them," *id*. at 5–6, this ruling allows Ecology to ignore a statewide shoreline issue linked directly to prevention and minimization of flood damages. For these reasons, the Tribe respectfully requests that this Court grant discretionary review to address the important question of whether the purpose and mandates of the SMA require Ecology to disapprove the Grays Harbor SMP for failing to address the

reality of sea level rise, increased marine flooding, and coastal transformation that climate change is bringing.

THE IDENTITY AND INTEREST OF QUINAULT INDIAN NATION

Since time immemorial, the Tribe has occupied and used lands and waters in Washington to fish, hunt, gather, and support their way of life. As detailed in its *amicus* motion, the Tribe has reservation lands located along the Pacific coast within Grays Harbor County. Quinault signed the 1856 Treaty of Olympia, reserving its right to fish, hunt and gather within its traditional areas, including all of Grays Harbor County.

ARGUMENT

I. Climate Change Endangers Coastal Washington.

Climate change threatens all Washington coastal shorelines. The scientific consensus is that greenhouse gas emissions from human activities are warming the climate,

causing changes in temperature, storm events, ocean acidification, and sea level rise.[2]

Sea level rise—which may reach 20 inches by 2050 along the central and southern coast of Washington—will flood portions of the Quinault Reservation and the shorelines in Grays Harbor County where the Tribe exercises its treaty rights. Sea level rise will cause coastal and estuarine ecosystems to experience habitat loss, increased flooding, and altered sedimentation patterns, all of which may be exacerbated by human development and activity along the shore.[3]

Washington has been a leader in its commitment to addressing the causes of climate change. *See, e.g.,* RCW

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[2] G.S. Mauger et al, State of Knowledge: Climate Change in Puget Sound, Executive Summary at 1–5 (2015), https://cig.uw.edu/wp-content/uploads/sites/2/2021/12/ps-sok_cover_and_execsumm_2015.pdf.

[3] Meghan Dalton et al., Climate Change Vulnerability Assessment for the Treaty of Olympia Tribes 7, 9, 195 (Feb. 2016), https://quileutenation.org/wp-content/uploads/2017/02/Climate_Change_Vulnerablity_Assessment_for_the_Treaty_of_Olympia_Tribes.pdf.

70.235.020 (2008 legislative goals for the reduction of greenhouse gas emissions). The state is already experiencing adverse impacts from climate change that are greater than predicted and forecasted to be worse in the future.[4] A decade ago, Ecology concluded that "[s]ea level rise and storm surge will increase the frequency and severity of flooding, erosion, and seawater intrusion—thus increasing risks to vulnerable communities, infrastructure, and coastal ecosystems."[5] Proactive and inter-governmental shoreline management are essential to mitigate the impacts of sea level rise and increased coastal flooding and to maintain the values shorelines provide

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[4] Dep't of Ecology, Washington Greenhouse Gas Emission Reduction Limits ix–x (Dec. 2019), https://apps.ecology.wa.gov/publications/documents/1902031.pdf.

[5] Dep't of Ecology, Preparing for a Changing Climate: Washington State's Integrated Climate Response Strategy 82 (Apr. 2012), https://apps.ecology.wa.gov/publications/documents/1201004.pdf.

to the Quinault and all Washingtonians.[6] In Washington, this type of planning should occur under the SMA.

II. The Court Should Grant Review of This Statewide Issue of SMA Interpretation.

Ecology has the authority and obligation under Washington law to require SMPs to address sea level rise and increased coastal flooding caused by climate change.

A. The SMA Prioritizes Statewide Interests and Must Be Broadly Interpreted to Ensure Protection of Shorelines.

The Washington Legislature enacted the SMA to protect Washington's fragile shorelines from the mounting pressure of development and to ensure coordination in their management. *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994). The Legislature found that shorelines "are among the most valuable and fragile of [Washington's] natural resources," and that "there is great concern throughout the state

[6] U.S. Army Corps of Eng'rs., PNW Shoreline Management Study vi (Feb. 2022), https://www.iwrlibrary.us/#/document/947cb4b7-656b-40c2-ec14-d0c6001a0813.

relating to their utilization, protection, restoration, and preservation." RCW 90.58.020. The SMA's policies contemplate "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." *Id.* The law also assigns preference for protection of the natural character of shorelines, shoreline resources, and shoreline ecology, as well as long-term over short-term benefits. *Id*.

The SMA is "liberally construed to give full effect to the objectives and purposes for which it was enacted." RCW 90.58.900. SMPs must similarly be construed. *Harrington v. Spokane Cty.*, 128 Wn. App. 202, 214, 114 P.3d 1233 (2005). The SMA assigns priority protections for shorelands and shorelines, making protection of statewide interest (as opposed to local interest) of paramount importance. Grays Harbor County's shorelines are Shorelines of Statewide Significance. RCW 90.58.030(2)(f)(i).

In interpreting a statute, the Court's "fundamental purpose is to ascertain and carry out the intent of the legislature." *Quinault Indian Nation v. Imperium Terminal Servs.*, 187 Wn.2d 460, 468, 387 P.3d 670 (2017) (citations omitted). Additionally, "[i]f the statute at issue … incorporates a relevant statement of purpose, our reading of the statute should be consistent with that purpose." *Matter of Adoption of T.A.W.*, 186 Wn.2d 828, 840, 383 P.3d 492 (2016) (citations omitted). As this Court has consistently held, "when passing laws that protect Washington's environmental interests, the legislature intended those laws to be broadly construed to achieve the statute's goals." *Quinault Indian Nation*, 187 Wn.2d at 470.

B. Sea Level Rise and Coastal Flooding Are Statewide Interests of Paramount Importance.

The SMA provides "that the interest of all of the people shall be paramount in the management of shorelines of statewide significance." RCW 90.58.020. Washington courts have held that the Act, "though dealing with a limited area of

the environment, is as vigorous as SEPA in declaring a policy aimed at the preservation of our natural resources." *Merkel v. Port of Brownsville*, 8 Wn. App. 844, 848–49, 509 P.2d 390 (1973); *accord Olympic Stewardship Found. v. Env't and Land Use Hearings Off.,* 199 Wn. App. 668, 689, 399 P.3d 562 (2017) (SMA policy is "informed" by SEPA's recognition of "the responsibilities of each generation as trustee of the environment for succeeding generations" and that "each person has a fundamental and inalienable right to a healthful environment and … a responsibility to contribute to the preservation and enhancement of the environment").

Existing and planned shoreline infrastructure will be affected by sea level rise, and will in turn affect how ecosystems respond to sea level rise. Sea level rise is happening *now*, while efforts to address its impacts lag behind.

King tides in January 2022 overwhelmed the seawall in Taholah, forcing evacuations.

Quinault's Taholah relocation efforts began in 2014 and will likely take 25 years to complete.[7] Waiting for shoreline planning to happen outside the bounds of the SMA, as the County aims to do, serves neither the purposes of the SMA nor the public. And neither will passing the buck, with the County waiting for guidance from Ecology,[8] and Ecology claiming the

[7] PNW Shoreline Management Study, *supra* note 6, at 29–30.

[8] Letter from County to Ecology at 8 (Feb. 19, 2019), https://fortress.wa.gov/ecy/ezshare/SEA/SMP/GraysHarborCo/GHCRespComm.pdf.

SMA and SMPs are not "proper vehicle[s]" for sea level rise planning.[9]

Quinault laws provide regulatory protections of its shorelines, and its Tribal Hazard Mitigation Plan addresses sea level rise on its reservation lands. But lands within Grays Harbor County where the Tribe exercises its treaty rights are threatened by Grays Harbor's failure to address sea level rise. This situation implicates a concern expressed soon after the SMA's enactment, that "each local governmental entity might plan merrily for its own shorelines without regard to either contiguous shorelines outside its jurisdiction or to the overall interest of the state as a whole."[10] Ecology's approval mandate in the SMA gave it the "opportunity to deal with multiple use planning which is unsuited to the character of particular

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[9] Ecology Answer at 6–7.

[10] Geoffrey Crooks, *The Washington Shoreline Management Act of 1971,* 49 Wash. L. Rev. 423, 439 (1974).

shorelines."[11] Yet Ecology failed to use its authority here. This petition asks how the SMA governs shoreline protection and management in the face of sea level rise and increased coastal flooding. That question deserves consideration by this Court to provide statewide guidance on a statewide issue.

C. The Court of Appeals' Interpretation of the SMA Irrationally Excluded Sea Level Rise and Coastal Flooding from SMA Considerations.

The appellate court held that the SMA's plain language did not require local governments to affirmatively address and plan for sea level rise in their SMPs, nor require Ecology to disapprove SMPs that fail to address sea level rise and increased coastal flooding. To the contrary, the overarching purpose of the SMA, plus its explicit language on the hazards of flooding, RCW 90.58.100(2)(h), and the need to ensure no net loss of shoreline functions when considering current and future uses, RCW 90.58.140, *see also* WAC 173-26-186,

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[11] *Id.*

compels considering all factors that influence shorelines, including sea level rise. Indeed, Ecology itself has previously concluded that sea level rise should be part of the shoreline planning process, although the agency refused to make such planning a requirement.[12]

Moreover, the SMA requires that "all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data" be used "to the extent feasible" when developing a master program. RCW 90.58.100(1)(e). That requirement counsels *in favor* of including inarguably pertinent considerations about sea level rise. This Court has recognized that, even where a specific environmental condition is not expressly or primarily targeted within the Act's language, such conditions may be "vital consideration[s] in land use planning under the SMA." *Weyerhaeuser Co. v. King Cnty.,* 91 Wn.2d 721, 734, 592 P.2d

[12] SMP Handbook App. A, *supra* note 1, at 2.

1108 (1979) (water quality relevant to SMA planning). The SMA's legislative findings and policy section provides that shorelines *"shall* be appropriately classified and these classifications *shall* be revised when circumstances warrant regardless of whether the change in circumstances occurs through man-made causes or natural causes." RCW 90.50.020 (emphasis added). Ecology's own guidelines, echoing that language, *require* thorough and up-to-date scientific evaluation to create SMPs that can validly determine the health of and adverse impacts upon ecological functions. WAC 173-26-201(3)(d). And inevitable changes due to sea level rise will affect *which* areas are subject to SMA jurisdiction (such as those determined with reference to the "ordinary high water mark," RCW 90.58.030(c)), and consequently, how localities manage those areas. The appellate court erred, and this Court

should accept review to clarify that the statute is not unreasonably narrow or outdated.[13]

Since the Act's adoption, legal scholars have stressed the importance of SMPs to the purpose of shoreline protection. "Since the master programs, when effective, 'shall constitute use regulations for the various shorelines of the state,' and will thus form the basis for subsequent decisions on permit applications, their content and method of preparation are of prime importance."[14] In its opposition to discretionary review, Ecology argued precisely the opposite: that SMPs should not be required to tackle sea level rise because even broader planning is required.[15] This position undercuts the SMA's purpose as a

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[13] Ecology asked this Court to glean legislative intent from an unenacted 2021 bill. Answer at 15. This Court has disavowed speculation on what the *failure* to enact a particular bill means. *State v. Conte*, 159 Wn.2d 797, 813, 154 P.3d 194 (2007). Legislative "inaction lacks persuasive significance" in most circumstances. *Pension Benefit Guaranty Corp. v. LTV Corp.,* 496 U.S. 633, 650, 110 S. Ct. 2668, 110 L.Ed.2d 579 (1990).

[14] Crooks, *supra* note 10, at 437.

[15] Answer at 6.

comprehensive shoreline planning tool and the fact that SMPs achieve that goal because master programs must provide for "comprehensive" use plans and regulations. *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 448, 54 P.3d 1194 (2002).

Federal planners have recognized that "PNW coastal tribes are also among the most proactive communities in the region in planning for [sea level rise], flooding, and tsunamis. … Erosion and [sea level rise] can threaten cultural resources and infrastructure and reduce tribal land area."[16] Allowing other governments to choose whether to address the current, scientific reality of sea level rise and increased coastal flooding means vulnerable communities, like Quinault, will shoulder the burden of planning ahead *and* the burden of dealing with the consequences others ignored.

[16] PNW Shoreline Management Study, *supra* note 6, at 28.

CONCLUSION

The Court of Appeals promoted an interpretation of the SMA that undermines its purpose by allowing governments to ignore, rather than proactively plan for, sea level rise and coastal flooding in a changing climate. Without guidance from this Court, Washington's shorelines will suffer from patchwork planning in the face of sea level rise and increased coastal flooding as governments proceed with their future SMP updates. Quinault Indian Nation asks the Court grant discretionary review.

This document contains 2,495 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 10th day of March, 2023.

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I certify under penalty of perjury under the laws of the state of Washington that on this 10th day of March, 2023, I caused to be served Memorandum of Amicus Curiae Quinault Indian Nation in Support of Review in the above-captioned matter upon the parties herein via the Washington Appellate Courts efiling and service system as indicated below:

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