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CASE NO. 84675-8

**IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON**

CITIZENS FOR RATIONAL SHORELINE PLANNING and
RONALD T. JEPSON,

Appellants,

v.

WHATCOM COUNTY and
WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondents.

PETITIONERS

**SUPPLEMENTAL BRIEF OF APPELLANTS CITIZENS FOR RATIONAL
SHORELINE PLANNING AND RONALD T. JEPSON**

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ORIGINAL

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I. INTRODUCTION

The Court of Appeals decision precludes citizens from seeking timely and consolidated judicial scrutiny, under RCW 82.02.020, of uniform shoreline buffers of as much as 150 feet. Even though the buffers were adopted by Whatcom County (“County”) through an entirely local process and incorporated into local law, the Court of Appeals determined that these local enactments are not “local” regulations and thus not subject to judicial scrutiny under RCW 82.02.020.

The Court of Appeals, in one conclusory sentence, ruled that the County’s Shoreline Master Program (“SMP”) amendments, done with no State of Washington Department of Ecology (“Ecology”) involvement, were not local regulations since they were overshadowed by the “state’s pervasive involvement throughout the entire SMP development process.” *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wash.App. 937, 950, 230 P.3d 1074 (Wash. Ct. App. 2010) *review granted*, 243 P.3d 551 (Wash. 2010).

The Court of Appeals decision that characterized Ecology’s involvement as “pervasive” includes a cursory dismissal of several formally adopted statutory and regulatory provisions providing that local SMPs are indeed local regulations. This cursory dismissal directly included the 1995 Legislature’s express confirmation that local regulations

are local regulations. The Court of Appeals' decision means that the Legislature was trumped by the mythical "pervasive" role of Ecology. The Washington Administrative Code is also trumped. Further, the Court of Appeals decision means that the supposed "pervasive" behavior trumps the 1972 choice of 68% of registered Washington State voters who adopted a local scheme of shoreline management and who rejected a statewide scheme.

II. ISSUES PRESENTED FOR REVIEW

May citizens seek judicial review of regulations adopted by local governments in local shoreline master programs pursuant to RCW 82.02.020 or are they precluded from judicial review because these local enactments have been converted into state regulations by "pervasive" state behavior?

III. STATEMENT OF THE CASE

A. Statement of Facts.

In 2004, the County commenced a comprehensive review of its SMP. CP 102. The County's process of review and updating was extensive; it included numerous local public meetings, local public hearings, local citizen advisory committees, local workshops and expert panel discussions, local public review of draft SMPs, local outreach efforts, and local meetings with key stakeholder groups. *See* Whatcom

County Ordinance No. 2007-017. This process occurred at the County level; Ecology only participated as one member of the master program technical advisory committee. *See* CP 102.

In 2007, after three years of extensive local process, the Whatcom County Council adopted a critical areas ordinance (“CAO”). Chapter 16.16 Whatcom County Code (“WCC”). Rather than develop new regulations for shoreline areas, the County incorporated its CAO into its SMP to comply with recent amendments to the Shoreline Management Act (“SMA”) and Growth Management Act (“GMA”). CP 4 (Complaint); CP 15, 23-24 (Ecology/County Answer).

Shortly after adopting Ordinance No. 2007-017, the County forwarded the package of amendments to Ecology for review and approval. CP 3 (Complaint). Upon review, Ecology identified areas where revision was necessary before Ecology would issue its formal approval. *See* CP 77-91. Ecology did not identify any revisions relating to the provisions challenged in this lawsuit.¹ Instead, it approved these provisions without any changes. *See* CP 77-91. Thus, the challenged provisions are a product of exclusively local effort.

¹ CRSP challenged the buffer zone provision applicable to shoreline lots set forth in *Citizens for Rational Shoreline Planning*, 155 Wash.App. 937, which was subsequently incorporated into the Whatcom County’s SMP. CP 4. CRSP also challenged restrictions with Whatcom County’s SMP limiting the buildable area of non-conforming lots to not more than 2500 square feet. CP 4-5.

B. Procedural Posture.

On October 20, 2008, CRSP and Ronald T. Jepson filed a complaint with the Skagit County Superior Court alleging, *inter alia*, that the uniform shoreline setbacks and the limitation on the buildable area of non-conforming lots prescribed by the County's amended SMP constituted a violation of RCW 82.02.020. CP 1-10.

Pursuant to a 12(b)(6) motion to dismiss filed by the Respondents, the trial court concluded that the County's SMP was not a local regulation, but a state regulation, and thus not subject to the limitations set forth in RCW 82.02.020. CP 113-22; CP 165-66; CP 184. The Court of Appeals affirmed the trial court's decision. *Citizens for Rational Shoreline Planning*, 155 Wash.App. at 937.

IV. ARGUMENT

This court should reverse the decision of the Court of Appeals that local government SMPs are state law rather than local law for the purpose of determining if property owners can seek judicial review pursuant to RCW 82.02.020. It should rule that any "pervasive" level of state involvement cannot trump the 1995 amendments to the GMA, it cannot trump the SMA as it exists in law, it cannot trump a locally oriented shoreline management act that was adopted by a 68% vote of the people, and it cannot trump regulations formally adopted by Ecology.

- A. In the last legally adopted word on this issue, 1995 GMA amendments reiterated that a local government's SMP is a local regulation. The Legislature should not be "trumped" by pervasive agency behavior.**

The Court of Appeals erred in finding that the 1995 amendments to the GMA did not bring SMPs within the reach of RCW 82.02.020. *See Citizens for Rational Shoreline Planning*, 155 Wash.App. at 949. The 1995 amendments, of course, have particular significance in this case because they post-date *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987). *See* Section IV(F), *Id.* .

In 1995, the state legislature made its first attempt at coordinating the SMA and the GMA, chapter 36.70A RCW. *See* Laws of 1995, Ch. 347. As part of these amendments, the legislature added a section to the GMA titled "Shorelines of the state." *See id.* at § 104 (codified at RCW 36.70A.480). The first provision of this section expressly states:

For shorelines of the state, the goals and policies of the shoreline management act as set forth in RCW 90.58.020 are added as one of the goals of this chapter as set forth in RCW 36.70A.020 without creating an order of priority among the fourteen goals. The goals and policies of a shoreline master program for a county or city approved under chapter 90.58 RCW shall be considered an element of the county or city's comprehensive plan. All other portions of the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the county or city's development regulations.

Id. (codified at RCW 36.70A.480(1) (emphasis added)).²

The legislature could not have been clearer: consistent with the intent of the voters in 1972, an SMP is still part of a local government's development regulations.

The Court of Appeals attempts to ignore the Legislature's clear mandate in one sentence: "these [GMA] amendments did not alter the pervasive level of state control and involvement in the development of SMPs." *CRSP*, 155 Wash.App. at 948. Read in the light of day, the Court of Appeals rejects centuries of jurisprudence by lightly dismissing a legislative enactment in favor of pervasive agency behavior.

This Court could correctly write three sentences: "The Court of Appeals erroneously dismissed the Legislature's action due to what it perceived to be a pervasive level of state involvement in the development of SMPs. Any such perception was based on Ecology's aspirations expressed in its briefing. Such a perception is not based on the laws of this state."

² See also Laws of 1995, ch. 347, § 103 (amending the GMA's definition of "development regulations" to expressly include SMPs) (codified at RCW 36.70A.030 (7)). Ecology has also included SMPs in the guidelines' definition of "development regulations." See WAC 173-26-020 (8).

- B. The SMA has always vested local governments, not the state government, with authority to develop their SMPs. Indeed, the two provisions challenged in this case were adopted by Whatcom County long before Ecology gave input on the adopted SMP.**

SMP development is an inherently local activity. The SMA expressly vests the local government with the primary authority to develop its SMP. RCW 90.58.080 (1) ("Local governments shall develop or amend a master program for regulation of uses of the shorelines of the state consistent with the required elements of the guidelines adopted by the department" (emphasis added)). This local control enables the local government to tailor its SMP to local shoreline conditions and circumstances. *See* WAC 173-26-171 (3)(a).

Compared to the local government, under the law, Ecology's role in the development of an SMP is minimal. *See* RCW 90.58.050 ("The department shall act primarily in a supportive and review capacity").

Indeed, the facts of this case demonstrate the local nature of SMP development. The County spent over three years developing its SMP. *See CRSP*, 155 Wash.App. 937. The regulatory provisions set forth in that SMP reflect the policy choices of the County's elected officials. *See id.*

Ecology attempted to provide 13 pages of “required” revisions to the County’s SMP.³ Not one of those revisions, however, modified the County’s shoreline setbacks and building areas—the regulatory provisions at the heart of CSRP’s challenge. *Id.* These provisions were drafted by the County, at the County’s discretion.

These provisions were the product of unfettered County discretion. They were neither prescribed nor drafted by the state. In fact, the SMA and Ecology’s implementing guidelines are silent with respect to the specific width of shoreline setbacks; the decision as to the appropriate level of protection is placed squarely in the hands of local government. *See* RCW 90.58.090(4), RCW 36.70A.480(4), and RCW 36.70A.172.⁴

In addition, the shoreline setbacks prescribed by the County’s SMP are nothing more than a repackaging of the County’s critical area buffers. *See* WCC Table 23.90.13.C (incorporating the County’s critical areas buffers as shoreline setbacks).

³ Ecology’s attempted pervasive behavior is shown by its dictates that it can require revisions to a local SMP. There is no support in the law for such dictatorial power, except in the pronouncement of the Court of Appeals below.

⁴ Consequently, shoreline setbacks can and do vary from jurisdiction to jurisdiction. *Compare* Pierce County Code 20.62.050 (prescribing a 50-foot setback for residential structures in all shoreline environments) *with* Snohomish County SMP (prescribing a 100-foot setback for residential structures within natural and conservancy shoreline environments, a 25-foot setback for residential structures within suburban and urban shoreline environments, and a 50-foot setback for residential structures within the rural shoreline environment), *available at* http://www.co.snohomish.wa.us/documents/Departments/PDS/Commerical_Land_Use/Shoreline/residentialdevelopment.pdf.

Critical area regulations are decidedly local regulations. They are adopted pursuant to the GMA, not the SMA. *See* RCW 36.70A.170, 172. They are effective upon adoption by the county; no state review or approval is necessary to give them the force of law. The Court of Appeals held that they are subject to RCW 82.02.020. *See Citizens' Alliance for Prop. Rights v. Sims*, 145 Wash.App. 649, 670, 187 P.3d 786 (Wash. Ct. App. 2008) (invalidating a portion of King County's critical areas ordinance as contrary to RCW 82.02.020).

C. If “pervasive” agency behavior can make SMP development a matter of state law then agency behavior would be trumping a 68% vote of the voters of the state when they chose a locally oriented SMA.

At the November 1972 general election, two measures for the adoption of a shoreline management plan were submitted to the people. Initiative Measure 43 – the Shoreline Protection Act – which had been proposed to the legislature by the Washington Environmental Council was a state regulatory scheme. Alternative Measure 43B – the Shoreline Management Act – which had been enacted by the legislature in 1971 was a local regulatory scheme. *See Geoffrey Crooks, The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423 (1974). The voters preferred Measure 43B by sixty-eight to thirty-two percent. *Id.*

The 1972 Washington State Voters Pamphlet⁵, made the distinction between the voters' choices clear: the two measures offered voters the choice between local control versus state control. Under rejected Initiative Measure 43, the responsibility for shoreline management of the state was centralized within Ecology. This centralization of responsibility was repeatedly made clear in the voters' pamphlet. The ballot title of Initiative Measure 43 reads as follows:

An ACT relating to the use and development of salt and fresh water shoreline areas, including lands located within 500 feet of ordinary high tide or high water and certain wetlands; requiring the State Ecological Commission, with the advice of regional citizens councils, to adopt a state-wide regulatory plan for these areas; requiring cities and counties to adopt plans to regulate shoreline areas not covered by the state plan; requiring both local and state-wide plans to be based upon consideration of conservation, recreation, economic development and public access; and providing both civil and criminal remedies for violations of the act.

Official Voters Pamphlet, published by A. Ludlow Kramer, Secretary of State, General Election Tuesday, November 7, 1972, 32.

The explanatory comment entitled "Effect of Initiative No. 43 if approved into Law," stated, in part:

The administration of this act would be divided between local governments and the state department of ecology and

⁵ Available at
http://www.sos.wa.gov/library/docs/osos/voterspamphlet66_77/voterspamphlet_1972_2007_001574.pdf

ecological commission with primary responsibility being placed in these state agencies. This act would provide for state development and approval of comprehensive plans for all shoreline areas of the state[.]

Id. at 33.

In stark contrast to control of shoreline management being vested at the state level, statements supporting enacted Measure 43B made it clear that Measure 43B (SMA) placed the primary planning and administrative responsibility on local governments. The ballot title of Measure 43B reads:

An ACT relating to the use and development of certain salt and fresh water shoreline areas including lands located within 200 feet of the ordinary high water mark and certain other adjacent designated wetlands; establishing an integrated program of shoreline management between state and local governments; requiring local governments, pursuant to guidelines established by the state department of ecology, to develop master programs for regulating shoreline uses and providing that if they do not the department will develop and adopt such programs; granting the state's consent to certain existing impairments of public navigational rights; and providing civil and criminal sanctions.

Id. at 34.

The explanatory comment entitled "Effect of Initiative No. 43B if approved into Law," stated, in part:

The administration of the act is divided between local government and the department of ecology. Primary responsibilities of the department of ecology includes the preparation of guidelines for the development of master programs for shoreline use and the review and approval of

such programs when submitted by local governments. The responsibilities of local governments include the preparation of such master programs and of inventories of the regulated areas together with the administration of a permit system pertaining to certain developments in the regulated areas.

Id. at 35.

Offering the clearest description of the difference between the two measures, the voters pamphlet statement in support of Measure 43B read:

State vs. Local

The principal difference between Initiative 43 and the Shorelines Management Act 43B, lies in the delegation of responsibility. Initiative 43 gives the State control while the City and County governments have the major role under 43B.

Local governments are more likely to formulate decisions and provide the flexibility necessary in resolving critical questions within their jurisdiction than State government. The Department of Ecology acts more as a supervisory and review agency maintaining consistency in the implementation of the Act.

Id. at 34 (emphasis added).

The conclusion to be drawn from the differences between Measure 43 and Measure 43B is unmistakable: the locus of responsibility for local SMP development and administration was vested at the state level under Measure 43 and at the local government level under Measure 43B.

D. “Pervasive” Ecology behavior, if it exists, should not trump valid Ecology regulations which dealt explicitly with the issue at hand.

Ecology’s guidelines are unequivocal as to the applicability of RCW 82.02:

The policy goals of the [SMA], implemented by the planning policies of master programs, 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 (where applicable, statutory limitations such as those contained in chapter 82.02 RCW and RCW 43.21C.060) on the regulation of private property. Local government should use a process designed to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights.

WAC 173-26-186(5) (emphasis added).

The 2004 amendments adding this language are consistent with the 1995 Legislature's pronouncement that SMPs are local regulations. *See* section IV(A), *supra*. Both the 1995 statute and these 2004 regulations post-date *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987). *See* section IV(F), *Id.* Although administrative rules cannot amend or change legislative enactments, Ecology's guidelines, by expressly incorporating RCW 82.02, reinforce the intent of the Legislature (which first enacted the SMA and which amended the GMA in 1995) and the 1972 voters that in development of their SMPs, local governments control the SMP process.

The Court of Appeals was correct in opining that Ecology's guidelines do not, in and of themselves, make RCW 82.02.020 applicable where it would not otherwise apply. *CRSP*, 155 Wn. App. at 949.

However, in this instance, the plain and unambiguous language of WAC 173-26-186 merely underscores the SMA, the GMA, and the 1972 vote of the people, all pronouncing that local SMPs are local regulations.

E. The Court of Appeals wrongly created a novel standard of deference which contradicts the adopted laws of the State of Washington. This was based in part on the erroneous view that a pervasive level of state control exists relating to adopting SMPs.

The Court of Appeals created, out of whole cloth, a deference standard that contradicts the SMA's plain language. If allowed to stand, it will create total confusion for all involved in the SMP process. This creation was apparently based on the Court of Appeals erroneous conclusion that the state's pervasive involvement throughout the entire SMP development process is determinative in this case. *CRSP*, 155 Wn. App. at 494.

The Court of Appeals said that in adoption of SMP's any deference or discretion conferred to local governments is only that amount of discretion conferred by Ecology "which good management, intergovernmental civility, and political considerations dictate." *Id.* at 947. To the best of the undersigned's knowledge such a standard exists in no reported decision of any jurisdiction in the United States. Such a standard is not found in Washington statutes, state regulations or reported cases. It was not presented in any briefs below.

To the contrary, Ecology's review and adoption authority is strictly limited by statute. Ecology must approve a local SMP as developed by the local government unless that local SMP is inconsistent with the SMA or SMA guidelines. *See* RCW 90.58.090 (3), (5). *See also* WAC 173-26-191 (1)(e) ("It should be noted that ecology's authority under the [SMA] is limited to review of [SMPs] based solely on consistency with the SMA and these guidelines.").

Ecology argued below that, although CRSP was correct that Ecology must approve a submitted SMP that is consistent with the SMA and SMA guidelines, the determination of whether such compliance exists is entirely within Ecology's discretion. Response Brief of Respondent State of Washington Department of Ecology to Court of Appeals, at 13. This is not a correct statement of the applicable law, however. Perhaps it was this Ecology argument which misled the Court.

Under the SMA, in circumstances where the local government and Ecology find themselves in a dispute regarding an SMP, Ecology does not have blanket authority to adopt its own SMP. *See* RCW 90.58.190(3)(a). In the event of such a dispute, the matter is determined by the Growth Management Hearings Board ("GMHB"). *See* RCW 90.58.190(2)(a) ("The department's final decision to approve or reject a proposed master program or master program amendment by a local government planning

under RCW 36.70A.040 shall be appealed to the growth management hearing board [.]”). Where the appeal to the GMHB concerns shorelines, the GMHB shall review the proposed master program or amendment “solely for compliance with the requirements [of the SMA of 1971], the policy of RCW 90.58.020 and the applicable guidelines[.]” RCW 90.58.190(2)(b).⁶ Thus, for shorelines of the state, the statutory scheme accords Ecology no deference or presumptions.

As noted above, the power to determine an appropriate SMP rests with the GMHB. Indeed, for the shorelines of the state, Ecology’s role in the development of SMPs is statutorily limited to review and technical support. *See* RCW 90.58.050. (“The department shall act primarily in a supportive and review capacity with an emphasis on providing assistance to local government and on insuring compliance with the policy and provisions of this chapter.”); RCW 90.58.090. Similarly, the “general policy goals” section of Ecology’s guidelines states that the “guidelines are designed to assist local governments in developing, adopting, and amending master programs that are consistent with the policy and provisions of the act.” WAC 173-26-176 (1) (emphasis added).

⁶ If the appeal to the GMHB concerns a shoreline of statewide significance, the board shall uphold the decision by Ecology unless the GMHB, by clear and convincing evidence, determines that the decision of the department is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines. RCW 90.58.190(2)(c).

Lastly, the “authority, purpose and effects” section of Ecology’s own guidelines states that the “guidelines allow local governments substantial discretion to adopt master programs reflecting local circumstances and other local regulatory and nonregulatory programs related to the policy goals of shoreline management as provided in the policy statements of RCW 90.58.020, WAC 173-26-176 and 173-26-181.” WAC 173-26-171 (3)(a) (emphasis added). This should come as no surprise given the fact that local SMPs are intended to be tailored to the unique shoreline conditions present in any given jurisdiction.

Those sections of the SMA guidelines that address the specific regulatory requirements of a local government’s SMP do so in a general manner. *See, e.g.*, WAC 173-26-191; WAC 173-26-211 to 241. Of particular consequence to this appeal, the guidelines do not prescribe (or even suggest) the appropriate width for shoreline setbacks. *See, e.g.*, WAC 173-26-241(3)(j) (“Master programs shall include policies and regulations that assure no net loss of shoreline ecological functions will result from residential development. Such provisions should include specific regulations for setbacks and buffer areas . . .”). Rather, this decision is left to the discretion of the local government. Ultimately, provided that the local SMP meets the standards required under the SMA,

Ecology has no authority over the development of that local government's SMP. *See* RCW 90.58.070(2) and WAC 173-26-100.

Ecology argued below that local governments are required to follow Ecology's guidelines in developing their SMPs and that "local governments deviate from the guidelines at their peril." Response Brief of Respondent State of Washington Department of Ecology, Court of Appeals, at 12 (emphasis added). This was a bold argument by Ecology; it may have persuaded the Court of Appeals, but it is not supported by the law.

Of huge import to the Court of Appeals' mistake is that rejection of an SMP by Ecology is not the final word. Ecology is simply a second player. The GMHBs are the umpires. And where the GMHB's made such a determination the statute gives no deference to Ecology. *See* RCW 90.58.190(2).

F. An overly broad reading of *Orion* should not be used to decide a very different case involving citizen access to the courts.

Orion Corp. v. State of Washington, 109 Wn.2d 621, 747 P.2d 1062 (1987), addressed a different issue than is presented here.

Orion is a product of this Court. This Court, unlike the Court of Appeals, certainly has broad jurisprudential latitude to avoid applying concepts from *Orion* in reaching the wrong result in this case. At this

stage, CRSP will leave it to this Court and the justices' wise clerks to determine which of the many avenues this Court might utilize if this Court determines that the correct decision is to find RCW 82.02.020 applicable to locally adopted SMPs.

The clearest basis for distinguishing the 1987 *Orion* opinion is the subsequent 1995 Legislative amendment of the GMA wherein the Legislature said: "All other portions of the [SMP] for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the county or city's development regulations." RCW 36.70A.480(1).⁷ This is discussed at section IV(A), *supra*.

Additional arguments supporting the correct legal decision in this matter, in light of *Orion*, are found in the briefs of CRSP at the Court of Appeals, the brief of BIAWC at the Court of Appeals, and in the supplemental brief to be filed by BIAWC of like date.

V. CONCLUSION

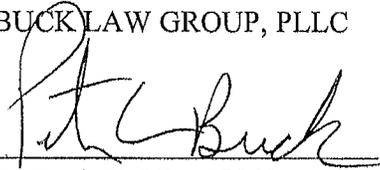
The opinion below denies citizens their right to seek judicial review of locally adopted SMPs pursuant to the grant of judicial authority in RCW 82.02.020. Citizens should not be denied their access to the courts by what is apparently a de-facto "pervasive" involvement of a state

⁷ This is reinforced by post *Orion* regulations of Ecology which expressly called for application of RCW82.02. See Section IV(D), *supra*.

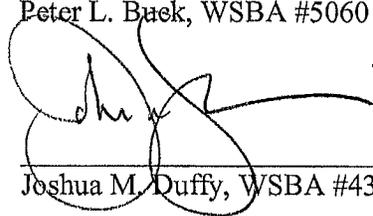
agency. Agency behavior should not be allowed to trump the vote of the people, the laws as adopted by the Legislature, and the regulations validly adopted by Ecology. This court should reverse the Court of Appeals.

Respectfully submitted this 31st day of January, 2011.

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Ronald T. Jepson

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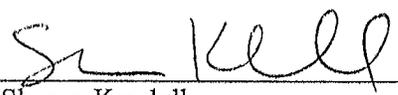
I, Sharon Kendall, declare:

I am not a party to this action. I reside in the State of Washington and am employed by The Buck Law Group, PLLC in Seattle, Washington.

On January 31, 2011, a true copy of the foregoing Supplemental Brief of Appellants Citizens for Rational Shoreline Planning and Ronald T. Jepson, was served on the offices of the following persons in the manner described below.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 31st day of January, 2011 at Seattle, Washington.



Sharon Kendall

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