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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS and
DAVID STALHEIM, and FUTUREWISE,

Appellants,

and

SQUAXIN ISLAND INDIAN TRIBE and
CENTER FOR ENVIRONMENTAL LAW AND POLICY,

Amici Curiae,

v.

WHATCOM COUNTY and WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD,

Respondents.

PETITIONERS
SUPPLEMENTAL BRIEF OF APPELLANTS

| | |
|---|---|
| NOSSAMAN LLP Jean Melious, WSBA No. 34347 1925 Lake Crest Drive Bellingham, WA 98229 (360)306-1997 jmelious@nossaman.com Attorney for Appellants Eric Hirst, Laura Leigh Brakke, Wendy Harris, and David Stalheim | FUTUREWISE Tim Trohimovich, WSBA No. . 22367 816 Second Avenue, Suite 200 Seattle, WA 98104 (206)343-0681, Ext. 118 tim@futurewise.org Attorney for Appellant Futurewise |
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I. INTRODUCTION

The Growth Management Hearings Board, Western Washington Region (“Board”) found that amendments to Whatcom County’s (“County’s”) Comprehensive Plan “left [the County] without Rural Element measures to protect rural character by ensuring land use and development patterns are consistent with protection of surface water and groundwater resources throughout its Rural Area,”¹ as required by the Growth Management Act (“GMA”).² The Board emphasized that “[t]his is especially critical given the water supply limitations and water quality impairment documented in this case and the intensity of rural development allowed under the County’s plan.”³ The County appealed the Board’s decision to the Court of Appeals, Division I. The court overruled the Board’s decision, holding that the Board erroneously interpreted and applied the GMA.⁴

The Board’s decision should be upheld pursuant to RCW 36.70A.070(5)(c)(iv) and RCW 36.70A.020(10), which require the County to “protect . . . and enhance . . . water quality, and the availability of

¹ AR 1390, *Hirst v. Whatcom County*, Growth Mgmt. Hearings Bd., Western Wash. Region Case No. 12-2-0013, Final Decision and Order (June 7, 2013) (“FDO”) at 43. “AR” refers to the Certified Administrative Record with sequential page numbers prepared by the Growth Management Hearings Board. We omit the preceding zeroes.

² RCW Ch.36.70A.

³ AR 1390, FDO at 43.

⁴ *Whatcom County v. Western Wash. Growth Mgmt. Hearings Bd.*, 186 Wn. App. 32, 40, 344 P.3d 1256 (2015) (“*Whatcom County v. WWGMHB*”).

water,”⁵ including protection of surface and groundwater resources.⁶

The County’s appeal raised two major issues: water availability and water quality. The Board found that the County’s Rural Element fails to protect water availability because it allows the County to issue permits for new developments that rely on permit-exempt wells without GMA-required evidence that water is legally available, even in closed watersheds and where instream flows are frequently not met.⁷

The Court of Appeals’ reversal rested on two erroneous grounds. First, the court held that “cooperation between the County’s exercise of its land use authority and Ecology’s management of water resources”⁸ is sufficient to meet GMA water resource protection requirements, even when cooperation fails to protect water quality and quantity.

The court then erroneously characterized “Ecology’s interpretation of the Nooksack Rule”⁹ as governing law. “Ecology’s interpretation” was set forth for the first time in the Department of Ecology’s (“Ecology’s”) amicus brief. The court found that the amicus brief provided substantial evidence that Ecology did not “intend” to govern permit-exempt wells in 1985, when it adopted the Instream Resources Protection Program for the

⁵ RCW 36.70A.020(10).

⁶ RCW 36.70A.070(5)(c)(iv).

⁷ AR 1387-89, FDO at 40-42.

⁸ *Whatcom County v. WWGMHB*, 186 Wn. App. at 51.

⁹ *Id.* at 60.

Nooksack Basin¹⁰ (“1985 Rule”).¹¹ Amicus Ecology’s mistaken assertion that new permit-exempt wells always have a right to water in Whatcom County,¹² even when in hydraulic continuity to water bodies that are closed or subject to unmet instream flows, resulted in the court’s ruling that the County does not need to require evidence of water availability as mandated by the GMA.

The Court of Appeals thus (1) rewrote the GMA to replace the law’s substantive requirements of “protection” with “cooperation,” a concept that focuses on the appropriate working relationship between Ecology and the County, and (2) interpreted Ecology’s amicus brief as a binding legal determination that permit-exempt wells are always entitled to water, even when they are in hydraulic continuity with closed water bodies and with unmet instream flows. Under the GMA and the interrelated statutory framework governing water rights,¹³ however, the state law of prior appropriation and protection of instream water rights applies to Whatcom County. The Board’s decision applied this relevant

¹⁰ Chap. 173-501 WAC.

¹¹ *Whatcom County v. WWGMHB*, 186 Wn. App. at 58.

¹² *See, e.g., Amicus Curiae Brief of Ecology* (Aug. 29, 2014) at 9-10 (“Ecology interprets the Nooksack Rule, which covers rural Whatcom County, to not govern permit-exempt groundwater use, so the Rule’s closures and minimum flow requirements are not applicable to permit-exempt wells in Whatcom County”).

¹³ *See Kittitas County v. Eastern Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 179, 256 P.3d 1193 (2011) (“*Kittitas*”), which upheld Board consideration of state water law as it informs GMA compliance: “The Board’s conclusion results from connecting the GMA’s mandates to protect water with this court’s interpretation of RCW 90.44.050 in *Campbell & Gwinn*.”

statutory framework and should be affirmed.

With respect to water quality, the Court of Appeals overruled the Board on the ground that the GMA does not require the County to address “preexisting” water pollution.¹⁴ The court erroneously based its ruling on a GMA provision applicable to critical areas – not water quality.¹⁵ The court’s interpretation would grandfather in ongoing sources and types of pollution, contrary to GMA requirements to protect and enhance surface and ground waters. The Board’s decision correctly interprets state law requirements to protect and enhance water quality and should be upheld.

II. ASSIGNMENTS OF ERROR AND ISSUES

Errors are assigned to each issue presented for review in Hirst and Futurewise’s (“Hirst’s”) *Petition for Review*.¹⁶ Each argument heading below references the number of the relevant issue for review.

III. STATEMENT OF THE CASE

The Statement of the Case in Hirst’s *Appellants’ Brief and Brief of Respondents*¹⁷ (“Hirst Appellants’ Brief”) is incorporated by reference.

¹⁴ *Whatcom County v. WWGMHB*, 186 Wn. App. at 68.

¹⁵ *Id.* at 70-71.

¹⁶ *Petition for Review*, Ct. of Appeals Case No. 70796-5-I (March 24, 2015) at pp. 1-3.

¹⁷ *Hirst Appellants’ Brief*, Ct. of Appeals Case No. 70796-5-I (May 16, 2014) at 5-11.

IV. ARGUMENT

A. Standard of Review.

On appeal, the Supreme Court reviews the Board's decision, based on the record made before the Board.¹⁸ The burden of demonstrating that the Board erroneously interpreted or applied the law, or that the Board's order is not supported by substantial evidence, remains on the County as the party asserting the error on the water availability and quality issues.¹⁹ The Court reviews the Board's legal conclusions de novo, giving substantial weight to the Board's interpretation of the GMA.²⁰

B. The County's Failure to Assign Error to the Board's Findings of Fact Makes Them Verities On Appeal. (Issue for Review 2.)

As the Court of Appeals recognized, "RAP 10.3(g) requires a party to assign error to each finding of fact it contends was improperly made . . . Unchallenged findings of fact become verities on appeal."²¹ The court refused to apply RAP 10.3(g), however, relying on inapplicable cases addressing whether judicial review can proceed in the face of a "technical" rules violation.²²

¹⁸ *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133, 138 (2000).

¹⁹ *Id.*

²⁰ *Id.* Hirst's *Appellants' Brief and Brief of Respondents*, Ct. of Appeals Case No. 70796-5-I (May 16, 2014) at pp. 11-14 further describes the standard of review and is incorporated by reference.

²¹ *Whatcom County v. WWGMHB*, 186 Wn. App. at 43-44.

²² *Id.* at 44.

The court was wrong to conclude that noncompliance with RAP 10.3(g) was an insignificant “technical violation.” The court’s failure to consider the Board’s findings of fact as verities contributed to erroneous analyses, including the court’s failure to address substantial evidence showing that “cooperation” alone does not meet GMA water resource protection requirements.²³ We ask the Supreme Court to consider all of the Board’s findings of fact as verities, as required by RAP 10.3(g).

C. The County’s Rural Element Does Not Comply With GMA Requirements to Protect Water Availability. (Issue for Review 1.)

1. The Board Correctly Found that the GMA’s Water Resource Protection Requirements Are Not Limited to “Cooperation” With Ecology.

The County “is required to plan for the protection of water resources in its land use planning”²⁴ because “[t]he GMA requires that counties provide for the protection of groundwater resources and that county development regulations comply with the GMA.”²⁵ Ecology “ought to assist counties in their land use planning to adequately protect water resources.”²⁶ The GMA thus assigns the primary land use planning obligation to the County, while encouraging Ecology “assistance.”

²³ See AR 1370-71, FDO at 23-24 (findings of substantial evidence in the record, under the heading “Evidence Showing Water Quantity and Water Quality Problems”).

²⁴ *Kittitas* at 179 (emphasis added).

²⁵ *Id.* (emphasis added).

²⁶ *Id.* at 180 (emphasis added). See also RCW 90.54.130 (Ecology authorized to provide local governments with advisory recommendations to help protect water resources).

The Board concluded that the County had not met its GMA obligation. The Board found, and the County does not contest, that the County regulations incorporated by reference into Comprehensive Plan Policies 2DD-2.C6 and 2DD-2.C6 do not require the County to obtain evidence that water is legally available before issuing permits for new development that relies on permit-exempt wells.²⁷ Citing substantial evidence of closed watersheds and unmet instream flows subject to impairment by junior permit-exempt wells, the Board found that the County's Rural Element fails to protect surface and groundwater.²⁸ The Board reasoned that, "in making a land use decision that requires a finding that there is adequate water supply to support the proposed development, it is the local government – and not Ecology – that is responsible to make the decision on water adequacy as part of its land use decision, and in particular, with respect to exempt wells."²⁹

The Court of Appeals overruled the Board's decision as an erroneous interpretation of the law.³⁰ Observing that *Kittitas* contemplates a "cooperative relationship,"³¹ the Court found that the mere existence of

²⁷ AR 1387-89, FDO at 40-42.

²⁸ AR 1387, FDO at 40, citing *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 81, 90, 93, and 96, 11 P.3d 726 (2000).

²⁹ AR 1370, FDO at 23. *Kittitas* held that water must be both factually and legally available. *Kittitas*, 172 Wn.2d at 180-81.

³⁰ *Whatcom County v. WWGMHB*, 186 Wn. App. at 49.

³¹ *Id.* at 51.

cooperation between Ecology and the County is sufficient to meet “the laws regarding protection of water resources under the GMA.”³²

The Board, not the Court of Appeals, correctly interpreted the GMA. The GMA, at RCW 19.27.097 and RCW 58.17.110, requires evidence of water availability before the County may issue building permits and subdivision approvals.³³ It does not include the exception that the court effectively reads into the statute: “unless the County is cooperating with Ecology.”

At RCW 36.70A.070(5)(c)(iv) and RCW 36.70A.020(10), the GMA further requires protection and enhancement of water resources. Cooperation between Ecology and the County may provide a means to this end, but cooperation must lead to protection to meet GMA requirements. In this case, the County’s “cooperation” with Ecology does not protect water resources because it results in water withdrawals from closed basins and senior instream flows.

The Court of Appeals also claimed, inaccurately, that the Board “conclu[ded] that the County may not rely on Ecology to assist in this

³² *Id.* See also *id.* at 62.

³³ AR 1369, FDO at 22 (“Additional GMA provisions, codified at RCW 19.27.097 and 58.17.110, require counties to assure adequate potable water is available when issuing building permits and approving subdivision applications”), *citing Kittitas*, 172 Wn.2d at 178-179. See also *Steensma v. Ecology*, PCHB No. 1 1-053, Order Granting Summary Judgment to Ecology (Sept. 8, 2011) at 7-8.

determination [of the availability of water for development].”³⁴ In fact, the Board stated that “Ecology provides technical assistance and model regulations, but County land use plans and regulations are necessary to assure protection of rural character, including water resource protection.”³⁵ The Board also described Ecology’s role in the water availability determination as set forth in RCW 19.27.097.³⁶ Ecology assisted the County during the Comprehensive Plan update process, and the Board carefully considered the evidence that Ecology provided.³⁷ The Board’s decision respects Ecology assistance as contemplated by *Kittitas*.

2. The Board Correctly Interpreted *Postema* and the Law of Prior Appropriation in Determining That the County’s Rural Element Does Not Protect Surface and Groundwater Flows.

The County argued that it does not need to consider water availability when issuing permits for projects relying on permit-exempt wells because the WRIA 1 instream flow rule “does not regulate exempt wells.”³⁸ The Board rejected this argument. Citing RCW 90.44.050, RCW 19.27.097, WAC 35-196-825, AGO 1992 No. 17, and *Postema v. Pollution Control Hearings Board*,³⁹ the Board reasoned that “[w]here a

³⁴ AR 1398, FDO.

³⁵ AR 1370, FDO at 23.

³⁶ AR 1370, FDO at 23, fn. 74, *citing* RCW 19.27.097 and RCW 58.17.110(2). *See also* AR 1387, FDO at 42, fn. 155.

³⁷ AR 1386, FDO at 41 (consideration of Ecology letter to Snohomish County).

³⁸ AR 1355, FDO at 18.

³⁹ 142 Wn.2d 68, 81, 90, 95, 11 P.3d 726 (2000) (“*Postema*”).

development intends to utilize an exempt well, its right to water is junior to other ground and surface water withdrawals in the basin, and junior to instream flows.”⁴⁰ Evidence of water availability therefore is necessary, not only to avoid withdrawals affecting closed basins, but also to prevent impairment of senior instream flows.

The Board’s decision is consistent with state water law. *Postema* held that closure by rule means that water is unavailable and that “a proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity must be denied if it is established factually that the withdrawal will have any effect on the flow or level of the surface water.”⁴¹ *Postema* also addresses instream flows, providing that “*minimum flows*, once established by rule, are *appropriations* which cannot be impaired by subsequent withdrawals of groundwater in hydraulic continuity with the surface waters subject to the minimum flows.”⁴²

Postema cites RCW 90.03.345 and RCW 90.44.030,⁴³ which apply prior appropriation principles to all ground waters, whether permitted or not. Consequently, as the Supreme Court confirmed in *Campbell & Gwinn*, permit-exempt groundwater use “is subject to the basic principle

⁴⁰ AR 1371, FDO at 24, fn. 81.

⁴¹ *Postema*, 142 Wn.2d at 85. Permit-exempt wells “withdraw” groundwater. RCW 90.44.050. See also *Dept. of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 16, 43 P.3d 4 (2002) (“*Campbell & Gwinn*”).

⁴² *Postema*, 142 Wn.2d at 82 (emphasis in original). See also *id.* at 81.

⁴³ *Id.* at 82.

of water rights acquired by prior appropriation that the first in time is the first in right. ‘The first appropriator is entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants’⁴⁴

Because prior appropriation governs permit-exempt wells, the County must meet the GMA’s requirement to obtain evidence that water is legally available for permit-exempt wells in order to avoid impairment of senior water rights, including instream flows.

The Court of Appeals rejected the Board’s discussion of *Postema* on the grounds that *Postema* did not “squarely address” the issue of permit-exempt withdrawals.⁴⁵ The court failed to consider either *Postema*’s citation to RCW 90.03.345 and RCW 90.44.030 or *Campbell & Gwinn*’s clear statement that permit-exempt wells are subject to prior appropriation. The Board, not the County or the Court of Appeals, correctly applied the relevant statutory framework.

The Court of Appeals based its holding on amicus Ecology’s

⁴⁴ 146 Wn.2d 1, 9, 43 P.3d 4, quoting *Postema*, 142 Wn.2d at 79. See also *Swinomish Tribal Community v. Dept. of Ecology*, 178 Wn.2d 571, 593, 311 P.3d 6 (2013) (“*Swinomish v. Ecology*”) (reiterating that “minimum flows and levels established by rule are, like other appropriative water rights, subject to the rule of ‘first in time, first in right.’”). See also *Squaxin Island Tribe v. Washington State Dept. of Ecology*, 177 Wn. App. 734, 737 fn. 3, 312 P.3d 766, 768 fn. 3 (2013). The County made no showing that permit-exempt groundwater withdrawals under the 1985 Rule meet “[t]he narrow exception” found in RCW 90.54.020(3)(a), “which provides that withdrawals of water which would conflict with the base flows ‘shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.’” *Postema*, 142 Wn.2d at 81. See also *Swinomish v. Ecology*, 178 Wn.2d at 576 (requiring “extraordinary circumstances before the minimum flow water right can be impaired”).

⁴⁵ *Whatcom County v. WWGMHB*, 186 Wn. App. at 55-56.

argument that “Ecology did not intend [the 1985] Rule to govern permit-exempt groundwater use under RCW 90.44.050.”⁴⁶ Regardless of Ecology’s intent during rule-making in 1985, state law does not allow water to be withdrawn from closed watersheds.⁴⁷

Nor does the relevant statutory framework allow Ecology to interpret the 1985 Rule as creating a limited or partial senior instream water right that may be impaired by junior permit-exempt wells. As *Postema* held, “even if the WRIA regulations [at issue in the case] could be read as establishing a limited minimum flow right . . . they would be inconsistent with the statutes and invalid.”⁴⁸ *Swinomish v. Ecology* held that “Ecology’s actions on applications for exempt wells are clearly set out in the water code—without any provision permitting a ‘jump to the head of the line’ in priority”.⁴⁹ Under the relevant statutory scheme, the 1985 rule did not create limited instream flows that may be impaired by line-jumping permit-exempt wells, and Ecology’s “intent” does not supersede this governing law.

The Court of Appeals dismissed *Swinomish v. Ecology* on the sole

⁴⁶ *Whatcom County v. WWGMHB*, 186 Wn. App. at 58.

⁴⁷ *Postema*, 142 Wn.2d at 95 (water is unavailable in closed watersheds).

⁴⁸ *Postema*, 142 Wn.2d at 83. *See also id.* at 88, responding to testimony regarding Ecology’s “intent about the nature of the right embodied in the minimum flows (“Nor can there be any serious thought that Ecology intended groundwater withdrawals be allowed to deplete surface streams; Ecology’s aim has been to protect instream flows as required by statute”) and 89: “an instream flow right subject to piecemeal impairment would not preserve flows necessary to protect fish, wildlife and other environmental resources”).

⁴⁹ 178 Wn.2d at 598.

basis that “*Swinomish* involved the Skagit Basin rule.”⁵⁰ This conclusion embodies the court’s mistaken belief that Ecology’s interpretation of its administrative rules constitutes the only relevant law governing permit-exempt wells in each basin. *Postema* already rejected this contention. In *Postema*, parties argued that Ecology’s individual instream flow rules should be interpreted together to establish statewide requirements. The Supreme Court objected that “[t]he parties’ arguments concerning the groundwater regulations largely overlook the relevant statutory scheme.”⁵¹

In this case, the County also denies the applicability of the “relevant statutory scheme,” asserting that each basin’s administrative groundwater regulations, standing alone, govern permit-exempt wells. As *Postema* emphasized, however, “[t]he statutory requirement is that there be no impairment of existing rights, and administrative rules and regulations cannot amend or change statutory requirements.”⁵²

Consistent with this reasoning, the Board recognized that prior appropriation applies across basins.⁵³ During the Comprehensive Plan update process, Ecology assisted the County by providing the County with

⁵⁰ *Whatcom County v. WWGMHB*, 186 Wn. App. at 398.

⁵¹ *Postema*, 142 Wn.2d at 84. The County erroneously asserts that *Postema*’s discussion of basin rules means that instream flow rules may only be interpreted on a basin-by-basin basis, without reference to the governing statutory framework. See *Whatcom County v. GMHB*, 186 Wn. App. at 56-57. In fact, *Postema* states that basin rules do not supersede the relevant statutory framework. The County’s effort to distinguish *Postema* fails.

⁵² *Id.* at 97.

⁵³ AR 1388, FDO at 41, fn. 154 (“While Snohomish County facts differ, the applicable legal principles are the same.”)

a letter that Ecology had prepared for Snohomish County. This was Ecology's only participation in this case prior to the filing of its amicus brief, and the letter to Snohomish County constituted the only source of information before the Board on Ecology's interpretation of water law principles. Ecology told Whatcom County that the letter contained "information that may be of interest and/or helpful to you."⁵⁴

As summarized by the Board, Ecology's letter to Snohomish County stated as follows:

Under RCW 19.27.097 or RCW 58.17.110, it is the applicant's burden to "provide evidence" that water is available for a new building or subdivision. Thus, according to Ecology, the County must deny a permit for a new building or subdivision unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater body hydraulically connected to an impaired surface water body will not cause further adverse impact on flows.⁵⁵

The Court of Appeals failed to explain why this analysis would not apply to Whatcom County. It merely stated that "[t]he letter addresses issues in another basin having nothing to do with the Nooksack Rule. Thus, it is not evidence of how Ecology administers the Nooksack Rule."⁵⁶ The Board did not, in fact, review the letter in order to find "evidence of how Ecology administers the Nooksack Rule." Rather, the Board correctly

⁵⁴ AR 1388, FDO at 41, referencing AR 456, Ex. C-678 at 7 (Ecology, Maia Bellon letter to Clay White, Snohomish County PDS (Dec. 19, 2011)). *See also* AR 809, Ex. R-082 at 4 (Kasey Ignac, Ecology, email to Whatcom County PDS).

⁵⁵ AR 1389, FDO at 42.

⁵⁶ *Whatcom County v. WWGMHB*, 186 Wn. App. at 61.

observed that the Snohomish County facts are different, but the “applicable legal principles are the same.”⁵⁷

Under state law, as the Board recognized, water availability is not protected when new development withdraws groundwater in hydraulic continuity with a water body that is closed or subject to unmet instream flows. The Board correctly interpreted the GMA requirement to protect water resources, and its decision should be upheld.⁵⁸ The Board noted the County had alternatives to bring its comprehensive plan into compliance.⁵⁹

D. Appellate Review Under the Administrative Procedure Act Must Rely on the Evidence Contained in the Record Before the Board, Not on Amicus Brief Evidence. (Issue for Review 3.)

The Board’s decision on water availability is supported by substantial evidence in the administrative record.⁶⁰ The Court of Appeals did not address this substantial evidence. Instead, it overruled the Board’s decision as not supported by “substantial evidence of how Ecology administers the Nooksack Rule.”⁶¹ The court’s ruling violates the

⁵⁷ AR 1388, FDO at 41, fn. 154.

⁵⁸ *Hirst Appellants’ Brief*, Ct. of Appeals Case No. 70796-5-I (May 16, 2014) at 15-33 further discusses this issue and is incorporated by reference.

⁵⁹ AR 1390, FDO at 43.

⁶⁰ *See Hirst Appellants’ Brief*, Ct. of Appeals Case No. 70796-5-I (May 16, 2014) at 15-19.

⁶¹ *Whatcom County v. WWGMHB*, 186 Wn. App. at 63.

Administrative Procedure Act, RCW 34.05.558⁶² and 34.05.570(1)(b),⁶³ because it relies on evidence that was not before the Board.

Stating that “we base our conclusion on the Department of Ecology’s amicus curiae brief in this case,”⁶⁴ the Court of Appeals found that the Board’s decision was “contrary to Ecology’s interpretation of the Nooksack Rule.”⁶⁵ The court dismissed Hirst’s argument that the evidence in the record before the Board did not establish a governing “Ecology interpretation” of the 1985 Rule, holding that Ecology’s amicus brief “confirms” the County’s argument.⁶⁶

The Court of Appeals went so far as to hold that the Board erred by discussing evidence that was contained in the administrative record. The court held that the Board’s decision “was not supported by substantial evidence”⁶⁷ because it considered the only evidence before the Board that had been provided by Ecology: Ecology’s letter to Snohomish County.

This ruling is wrong on three grounds. First, as discussed above, the County’s obligation to protect water availability is a matter of law that

⁶² “Judicial review of disputed issues of fact . . . must be confined to the agency record for judicial review . . .” None of the exceptions in RCW 34.05.562, allowing new evidence to be taken, applies to this case.

⁶³ “The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken” (emphasis added).

⁶⁴ *Whatcom County v. WWGMHB*, 186 Wn. App. at 57.

⁶⁵ *Id.*

⁶⁶ *Id.* at 61.

⁶⁷ *Id.* at 60-61 and 63 (the Snohomish letter was “not substantial evidence of how Ecology administers the Nooksack Rule”).

does not hinge on substantial evidence of Ecology's intent. Second, the Board did not discuss the Snohomish letter as evidence of an "Ecology interpretation." The letter was part of the Board's consideration of state water law as it informs the County's obligations under the GMA.

Finally, even if the Court of Appeals were correct (which it is not) that substantial evidence of Ecology's interpretation of the 1985 Rule is required to uphold the Board's application of the GMA, the evidence that the court cited for this purpose did not even exist until after the Board completed its proceedings. Ecology's amicus brief was not available to the Board. The Court of Appeals violated the APA by basing its ruling on evidence not included in the administrative record.

E. The Board's Decision That the County's Rural Element Measures Do Not Meet GMA Requirements to Protect Water Quality Should Be Upheld. (Issue for Review 5.)

The GMA requires the County to "protect" and "enhance" water quality.⁶⁸ Applying a GMA provision applicable to critical areas⁶⁹ and denying the relevance of the GMA provisions governing water quality, the Court of Appeals erroneously overruled the Board's decision. The court created a new standard that grandfathers in "preexisting" water pollution, on the spurious ground that GMA water resource protection is limited to

⁶⁸ *Swinomish Indian Tribal Community v. Western Wash. Growth Management Hearings Bd.*, 161 Wn.2d 415, 429-30, 116 P.3d 1198.

⁶⁹ *Whatcom County v. WWGMHB*, 186 Wn. App. at 69, citing RCW 36.70A.172(1).

new, future pollution inputs. As discussed further in Hirst's Appellants' Brief,⁷⁰ both the law and the record support the Board's decision.

The Court of Appeals further failed to consider the "general declaration of fundamentals" set forth in RCW Chapter 90.54. RCW 90.54.020 states that "[t]he quality of the natural environment shall be protected and, where possible, enhanced", including ensuring that "[w]aters of the state shall be of high quality."⁷¹ Local jurisdictions "shall whenever possible, carry out powers vested in them in manners which are consistent with the provisions of [chapter 90.54]."⁷²

The Court of Appeals' decision misinterprets local governments' obligation to protect water quality during the adoption of new Rural Elements. With each revision of a Comprehensive Plan, local governments would be allowed to accept a higher baseline of "preexisting" pollution. This result conflicts with state law protection and enhancement requirements.

Equally important, the Court of Appeals' decision fails to acknowledge the substantial evidence establishing that the County's Comprehensive Plan does not protect water quality from the sources and types of pollutants that have in the past, and will continue to, result in

⁷⁰ Hirst's *Appellants' Brief and Brief of Respondents*, Ct. of Appeals Case No. 70796-5-I (May 16, 2014) at 39-41 is incorporated by reference.

⁷¹ RCW 90.54.020 (emphasis added).

⁷² RCW 90.54.090.

water pollution, including pollution from new rural development.⁷³ The line that the court draws between “preexisting” and future pollution simply does not exist from a practical and evidentiary perspective. Existing sources and types of water pollution, combined with the absence of protective measures, will result in future pollution. The Board’s decision is supported by substantial evidence and should be upheld.

F. Two Challenged State Reports Are Part of the Administrative Record. (Issue for Review 4.)

During the course of the first hearing on the County’s GMA compliance, the Board took official notice of two state agency reports.⁷⁴ During the second compliance hearing, Hirst also added these reports to the record.⁷⁵ The County had the opportunity to address the two reports during this proceeding.

The Board found continuing GMA noncompliance, and the County appealed.⁷⁶ The Court of Appeals consolidated the cases.⁷⁷

It is beyond question that the two reports are part of the record. The Court of Appeals nonetheless remanded the case to the Board with an order to reevaluate water quality issues without considering the two

⁷³ AR 1370-75, FDO at 23-28.

⁷⁴ AR 1346, FDO at 9.

⁷⁵ AR 1904 *et seq.* and AR 1841 *et seq.* of the Case No. 72132-1-I record. *See* Hirst’s *Respondents’ Brief* in Ct. of Appeals Case No. 72132-1-I (Oct. 17, 2014) at 22-23.

⁷⁶ Ct. of Appeals Case No. 72132-1-I.

⁷⁷ *Whatcom County v. WWGMHB*, 186 Wn. App. at 42.

reports.⁷⁸ For all of the reasons set forth in Hirst's Appellate Brief⁷⁹ and because the reports are in the record, the remand should be overruled.

G. The Board's Decision Not To Impose Invalidity Should be Overruled. (Issue for Review 6.)

Hirst's arguments set forth in the *Reply Brief of Cross Appellants*⁸⁰ address this issue in full and are incorporated by reference.

V. CONCLUSION

Appellants respectfully request that the Supreme Court uphold the decision of the Board, with the exception of the Board's invalidity determination, which should be reversed and remanded to the Board to apply the correct legal standard. The Court should hold that the measures adopted to comply with RCW 36.70A.070(5)(c)(iv) must actually "protect" "surface water and groundwater resources" as the GMA requires.

Respectfully submitted on this 7th day of August, 2015.

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| NOSSAMAN LLP  | FUTUREWISE  |
| Jean O. Melious, WSBA No. 34347 Attorney for Respondents Hirst <i>et al.</i> | Tim Trohimovich, WSBA No. 22367. Attorney for Respondent Futurewise |

⁷⁸ *Id.* at 67.

⁷⁹ Hirst's *Appellants' Brief and Brief of Respondents*, Ct. of Appeals Case No. 70796-5-I (May 16, 2014) at 41-44.

⁸⁰ Ct. of Appeals, Div. I, Case No. 70796-5-1(July 16, 2014).

DECLARATION OF SERVICE

I, Tim Trohimovich, certify that I am a resident of the State of Washington, residing or employed in Seattle. I am over 18 years of age, and not a party to the above entitled action. I declare that on August 7, 2015, I caused the following documents to be served on the following parties in the manner indicated: Supplemental Brief of Appellants in Case No. 91475-3.

Washington State Supreme Court
415 12th Ave SW
Olympia, WA 98501-2314
Mailing: PO Box 40929
Olympia, WA 98504-0929

Ms. Diane L. McDaniel
Attorney General of Washington
1125 Washington Street SE
PO Box 40110
Olympia, WA 98504-0110
(360)753-2702
Attorneys for the Growth Management
Hearings Board

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| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By E-Mail: Supreme@courts.wa.gov |

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| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By E-Mail (by agreement): dianem@atg.wa.gov |

Ms. Karen Frakes
Senior Deputy Prosecutor
Whatcom County
311 Grand Avenue
Bellingham, WA 98225
(360)676-6784
Attorneys for Whatcom County

Mr. Jay Derr
Mr. Tadas A Kisielius
Mr. Duncan Greene
Van Ness Feldman GordonDerr
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206)623-9372
Attorneys for Whatcom County

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| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email: kfrakes@co.whatcom.wa.us |

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| <input checked="" type="checkbox"/> | By United States Mail postage prepaid |
| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email: jpd@vnf.com ; tak@vnf.com ; dmg@vnf.com |

Ms. Jean Melious
Nossaman LLP
1925 Lake Crest Drive
Bellingham, WA 98229

| | |
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| <input type="checkbox"/> | By United States Mail postage prepaid |
| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email (by agreement): jmelious@nossaman.com |

Mr. Alan Marriner
Assistant City Attorney
City of Bellingham
210 Lottie Street
Bellingham, Washington 98225
Tel: (360)778-8270

| | |
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| <input type="checkbox"/> | By United States Mail postage prepaid |
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| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email: amarriner@cob.org (Courtesy copy only, by agreement) |

The Hon. Robert Ferguson
Attorney General
Mr. Alan M. Reichman
Assistant Attorney General
Office of the Attorney General/
Ecology Division
PO Box 40117
Olympia, WA 98504-0117

Ms. Rachael Paschal Osborn
P.O. Box 9743
Spokane, WA 99209
(509)954-5641

| | |
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| <input checked="" type="checkbox"/> | By Email: Alan.Reichman@atg.wa.gov |

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| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email: rdpaschal@earthlink.net |

Mr. David L. Monthie
DLM & Associates
519 75th Way NE
Olympia, WA 98506
(360)357-8539

Mr. Bill Clarke
Attorney at Law & Government
Affairs
1501 Capitol Way S Ste 203
Olympia, WA, 98501-2200

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| <input checked="" type="checkbox"/> | By Email: dmandassoc@comcast.net |

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| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email: bill@clarke-law.net |

Ms. Sarah Ellen Mack
Tupper Mack Wells PLLC
2025 1st Ave Ste 1100
Seattle, WA, 98121-2100

Ms. Alethea Hart
Snohomish County Prosecutor's
Office
3000 Rockefeller Ave
Everett, WA, 98201-4046

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| <input checked="" type="checkbox"/> | By Email: mack@tmw-law.com |

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| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email: ahart@snoco.org |

Mr. Josh Weiss
WA State Assn of Counties
206 10th Ave SE
Olympia, WA, 98501-1311

| | |
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| <input checked="" type="checkbox"/> | By United States Mail postage prepaid |
| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email: jweiss@wacounties.org |

Mr. Kevin Lyon
Ms. Sharon Haensly
Squaxin Island Legal Department
3711 S.E. Old Olympic Hwy.
Shelton, WA 98584
Attorneys for Squaxin Island Tribe

| | |
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| <input checked="" type="checkbox"/> | By United States Mail postage prepaid |
| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email: klyon@squaxin.us ; shaensly@squaxin.us |

Dan J. Von Seggern
Center for Environmental Law & Policy
911 Western Ave. Suite 305
Seattle, WA 98104

| | |
|-------------------------------------|---|
| <input checked="" type="checkbox"/> | By United States Mail postage prepaid |
| <input type="checkbox"/> | By Legal Messenger or Hand Delivery |
| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input checked="" type="checkbox"/> | By Email: dvonseggern@celp.org |

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| <input type="checkbox"/> | By Federal Express or Overnight Mail prepaid |
| <input type="checkbox"/> | By Email: |

Signed and certified on this 7th day of August, 2015,



Tim Trohimovich

OFFICE RECEPTIONIST, CLERK

To: Tim Trohimovich
Cc: 'dianem@atg.wa.gov'; Karen Frakes; jpd@vnf.com; tak@vnf.com; dmg@vnf.com; 'Jean Melious (jmelious@nossaman.com)'; AMarriner@cob.org; Alan.Reichman@atg.wa.gov; Rachael Osborn; dlmandassoc@comcast.net; 'Bill Clarke (bill@clarke-law.net)'; mack@tmw-law.com; ahart@snoco.org; jweiss@wacounties.org; klyon@squaxin.us; shaensly@sguaxin.us; Dan Von Seggern
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To: OFFICE RECEPTIONIST, CLERK
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Subject: Supplemental Brief of Appellants in Case No. 91475-3 Hirst v Whatcom Co

Dear Sirs and Madams:

Enclosed please find for filing Hirst and Futurewise's Supplemental Brief of Appellants in Washington State Supreme Court Case No. 91475-3, *Hirst v. Whatcom County and Western Washington Growth Management Hearings Board*. A declaration of service is attached to the brief. Please contact me if you require anything else.

Tim Trohimovich, AICP
Futurewise | Director of Planning & Law
816 Second Avenue, Suite 200 | Seattle, Washington 98104
p. 206.343.0681 Ext. 118
Email: tim@futurewise.org

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