Supreme Court No. 96755-5

SUPREME COURT OF THE STATE OF WASHINGTON

SUMAS MOUNTAIN COMMUNITY FOR LANDSLIDE AWARENESS and PAUL KENNARD,

Petitioners,

v.

WASHINGTON STATE FOREST PRACTICES BOARD,

Respondent,

and

WASHINGTON FOREST PROTECTION ASSOCIATION,

Intervenor-Respondent.

RESPONDENT WASHINGTON STATE FOREST PRACTICES BOARD'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Advisory guidance does not bind the regulated community and is not enforceable against it. Agencies write advisory guidance in open-ended, permissive terms, and indicate that the document is nonbinding. Such documents cannot be the basis for granting or denying permits, nor can they form the basis for agency enforcement actions or civil penalties.

This case involves such guidance. The Forest Practices Board (Board) approved changes to a 94-page technical document written by geologists entitled *Guidelines for Evaluating Potentially Unstable Slopes and Landforms* that provides pictures, information, options, and ideas for studying areas of concern during the forest practices application process. Appendix A.[1] Sumas Mountain Community for Landslide Awareness and Kennard (Appellants) brought this challenge in part because they found the guidance was written too permissively, and that it provides "a directionless menu of analytical options" rather than dictating specific studies or outcomes. CP 567. Appellants only challenged changes to the guidance itself – this matter involves no on-the-ground proposal or concrete use of the guidance.

[1] A black and white version of Board Manual Section 16, *Guidelines for Evaluating Potentially Unstable Slopes and Landforms*, can also be found at CP 46-139.

Both the superior court and the Court of Appeals reviewed the Board's guidance under *Washington Education Association v. Public Disclosure Commission,* 150 Wn.2d 612, 80 P.3d 608 (2003) *(WEA)*. Both courts followed *WEA* and found that dismissal of Appellants' "other agency action" judicial review petition was appropriate. Under *WEA*, the approval of non-binding guidance has no legal effect and does not constitute an immediately reviewable "agency action." *WEA*, 150 Wn.2d at 615.

This Court should deny further review. The Court of Appeals' unpublished decision properly followed *WEA*, and it established no new legal precedent. This case simply fails to meet the Court's standards for granting review under RAP 13.4(b)(1) or (b)(4).

II. IDENTITY OF RESPONDENT

The Board is an agency of state government established under the Forest Practices Act, RCW 76.09, which has rule-making responsibilities. The Board is a respondent in this matter.

III. COURT OF APPEALS DECISION

The slip opinion is attached to the Petition for Review (PFR).

IV. COUNTERSTATEMENT OF THE ISSUES

1. Did the Court of Appeals correctly affirm the dismissal of this "other agency action" suit under RCW 34.05.570(4) because the adoption of advisory administrative guidance was not "agency action?"

Pursuant to RAP 13.4(d) and 13.7(b), if the Court accepts review and reverses the Court of Appeals' decision, the Board raises the following two issues not decided by the Court of Appeals as alternative bases for dismissal of this case:

2. Does this challenge to advisory administrative guidance create a justiciable controversy?

3. Do Appellants have standing to challenge advisory guidance when they face no actual or imminent harm and courts cannot redress Appellants' alleged injuries?

V. COUNTERSTATEMENT OF THE CASE

A. Regulatory Context.

Forest practices occur in a complex ecological and regulatory environment in Washington. Under the Forest Practices Act (Act), RCW 76.09, the Board has rule-making powers, while the Department of Natural Resources (DNR) provides staff support to the Board, and has enforcement responsibilities. RCW 76.09.030(1)(a); .040(1)(c); WAC 222-08-025(2). In its first rule making under the Act in 1976, the Board provided for a Board Manual to "serv[e] as an advisory technical supplement to these forest practices rules." WAC 222-12-090. This case involves edits to one chapter of the Board Manual.

The forest practices rules span 15 chapters in WAC 222, covering varied topics from threatened and endangered species, to categorizing differently sized streams for purposes of riparian protection, to predicting channel migration patterns 140 years into the future. The Board uses its Manual, organized into a series of chapters, to help illustrate some of the more scientifically complex topics encountered in the forest practices rules. Importantly, no statute or rule dictates the content or extent of the Board Manual's guidance for any particular subject matter.

Forestry operations on or near potentially unstable slopes are an example of a complex topic addressed by the forest practices rules. The *Guidelines for Evaluating Potentially Unstable Slopes and Landforms* offers scientific and technical information, with pictures and illustrations, to help landowners and forest practices practitioners understand the terms and concepts in the Board's rules relating to potentially unstable slopes. Following the Oso landslide in March 2014, the Board updated its unstable slope guidance at its meetings in November 2014, August 2015, November 2015, and May 2016. Each of these four meetings resulted in the posting of a new version of Board Manual Section 16 on the Board's Internet website. The chapter was written by a panel with geologic expertise. CP 563-64.

While the Board Manual provides helpful guidance, DNR can only regulate forest practices under the terms of the statutes and rules. DNR must

provide the rule or statutory basis when it denies approval of a forest practices application. RCW 76.09.050(5). Similarly, DNR's enforcement actions require violations of the Act or rules. RCW 76.09.080(1)(a) (stop work orders); RCW 76.09.090(1)(b) (notice to comply); and RCW 76.09.170(1) (civil penalties). DNR cannot make any permitting decision nor take any enforcement action based solely upon the Board's guidance in any Board Manual chapter.

The rule structure identifies the potentially unstable slope applications (Class IV-Special) that require State Environmental Policy Act (SEPA) review by specifying the types of landforms involved. WAC 222-16-050(1)(d). Those specific landforms also have rule definitions. WAC 222-16-010.[2] When DNR determines an application proposes forest practices on a potentially unstable landform in WAC 222-16-050(1)(d), WAC 222-10-030 discusses additional evaluations that must be addressed by a geotechnical expert as a part of the application process. These studies require evaluations of the potential for

[2] For example, WAC 222-16-050(1)(d)(i) refers to forest practices in "inner gorges," and WAC 222-16-010 defines those as "canyons created by a combination of the downcutting action of a stream and mass movement on the slope walls; they commonly show evidence of recent movement, such as obvious landslides, vertical tracks of disturbance vegetation, or areas that are concave in contour and/or profile." WAC 222-16-010 ("inner gorge"). Definitions also exist in WAC 222-16-010 for other specific terms in WAC 222-16-050(1)(d), such as "convergent headwalls," "bedrock hollows," "deep-seated landslides," and "ground water recharge areas for glacial deep-seated slides."

mass earth movements on or near the site as part of the SEPA analysis for the proposal. WAC 222-10-030(2). Thus, all of the critical components to regulate potentially unstable slopes exist in rules rather than the Board's guidance.

B. Procedural History.

Appellants challenged the Board's May 2016 approval of edits to Board Manual Section 16, as an "other agency action" under RCW 34.05.570(4). CP 558-59. Appellants contended the guidance did not "fully implement the rules," did not include or require analyses that they felt were important, and that the guidance language needed to be more directive. CP 566-69; *Sumas Mountain Cmty. for Landslide Awareness and Paul Kennard v. Wash. State Forest Practices Bd.*, No. 76447-1-I, slip op. at 4, 13 (Nov. 5, 2018) (unpublished). Appellants asked the Court for an order directing the Board to re-write its guidance to address these perceived deficiencies. CP 572. The parties agreed that no administrative record should be filed with the Court until the Board's motion to dismiss was resolved.

The Board moved to dismiss. It argued that the approval of non-binding guidance was not a reviewable "agency action," there was no justiciable controversy, and the Appellants lacked standing. CP 21. The superior court relied upon *WEA* and found that the adoption of guidance had

no "legal effect" and was not "agency action." CP 424-25. The Court of Appeals affirmed in an unpublished opinion. This appeal followed.

VI. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Because Board Manual Section 16 Is Purely Advisory, the Court of Appeals Appropriately Followed *WEA* and There Is No Conflict Under RAP 13.4(b)(1).

The Court of Appeals and the superior court correctly followed *WEA*. By following the Supreme Court's *WEA* decision, the Court of Appeals did not create a conflict with that decision, and there is no basis for further review under RAP 13.4(b)(1).

The guidance at issue here, like the guidance at issue in *WEA*, has no legal effect. As the Court of Appeals noted, the parties agreed that *WEA*'s "legal effects" test was appropriate to determine whether, as a threshold issue, an agency's decision may be "agency action" subject to Administrative Procedure Act (APA) review. *Sumas Mountain*, slip op. at 6.[3] *WEA* considered whether the issuance of guidelines interpreting the meaning of laws and rules was an APA "agency action" subject to judicial review. The Court held that "an agency's written expression of its interpretation of the law *does not implement or enforce the law* and is

[3] If an agency decision *has* a legal effect, a challenging party must still choose the proper form of action. The next section of the brief explains that even if Appellants could establish a "legal effect" under *WEA's* analysis, the proper form of action to challenge a binding, non-rule directive applicable to all regulated entities would be a *rule* challenge, not an "other agency action" challenge.

'advisory only.'" *WEA*, 150 Wn.2d at 619 (emphasis added). The Court found that the Public Disclosure Commission (PDC) "implemented" the public disclosure laws only when it engaged in rule making or when it issued formal declaratory orders. *Id.* at 615 and 619. The key aspect of the Court's analysis in *WEA* concerned the legal effect of the PDC's guidance. "The [PDC's] document is meant only to aid and assist in compliance with the law and does not purport to have the effect of law or regulation." *Id.* at 621.

The Court of Appeals reviewed and applied these standards here. *Sumas Mountain*, slip op. at 6-9. "Like the guidelines in WEA the Board Manual is a guidance document." *Id.* at 9. The Court of Appeals correctly determined that under its statutes, DNR cannot use the Board Manual to regulate permit issuance, and instead must do so only upon the terms of Act statutes and rules. *Id.* at 10-11. RCW 76.09.050(5). Similarly, DNR may only use the Act and rules for enforcement orders. RCW 76.09.080(1)(a); .090(1)(b); and .170(1); *Sumas Mountain*, slip op. at 9 ("the parties agree that [DNR] can take no enforcement action based on the manual.").

WAC 222-12-090 describes the Board Manual as "an *advisory* technical supplement" to the forest practices rules. And importantly, Board Manual Section 16's writing comports with this description. *Sumas Mountain*, slip op. at 8 ("The Board Manual uses advisory, rather than

directive, language.").[4] The Court of Appeals found that "[l]ike the guidelines in WEA, the Board Manual is a guidance document that does not purport to have the force of law . . . ." *Sumas Mountain*, slip op. at 9.

The Court of Appeals correctly determined that the Board's unstable slope guidance "is descriptive, rather than prescriptive, in nature," (*Sumas Mountain*, slip op. at 11), did not have a legal effect, and correctly applied *WEA*. Appellants have therefore not established a basis for review under RAP 13.4(b)(1).

B. Appellants' Legal Effects Claims Do Not Establish That the Court of Appeals' Decision Conflicts With *WEA*.

1. Appellants Incorrectly Assert That Board Manual Section 16 Has Legal Effects.

Most of Appellants' RAP 13.4(b)(1) arguments contend that the Court of Appeals should have distinguished *WEA* by finding that the Board's unstable slope guidance has a "legal effect." PFR at 10-15. The Court of Appeals carefully considered and rejected all of Appellants' contentions that the Board's unstable slope guidance had a legal effect. *Sumas Mountain*, slip op. at 9-12. We focus on three of Appellants' arguments below.

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[4] Appellants claimed that Board Manual Section 16's language is too permissive and fails to provide adequate "direction" to the regulated community. CP 567.

First, Appellants claim that this case is closer to *Muckleshoot Indian Tribe v. Department of Ecology*[5] than *WEA*. PFR at 8-9. The Court of Appeals correctly determined that *Muckleshoot* is unhelpful for the case at bar. *Sumas Mountain*, slip op. at 9-10. The Instream Flow Agreement (IFA) at issue in *Muckleshoot* was intended to widely impact the contracting parties' water rights and limited Ecology's regulatory authority over the Cedar River for 50 years. *Muckleshoot,* 112 Wn. App. at 718. No party in *Muckleshoot* disputed that the IFA had legal effects – the IFA had concrete outcomes that affected the parties' water rights and the amount of water in the river. *Muckleshoot* focused on whether an exception from "agency action" for proprietary decisions applied to the IFA (*Muckleshoot*, 112 Wn. App. at 719-20 and 723), and the case is inapposite because it involved no administrative guidance. On the other hand, the advisory technical guidance at issue here was written in non-binding terms and matched *WEA*'s facts closely. Both *WEA* and this case involve the reviewability of non-binding guidance. The Court of Appeals appropriately determined that "[t]he Board Manual in this case is not like the IFA in Muckleshoot." *Sumas Mountain*, slip op. at 10.

[5] 112 Wn. App. 712, 50 P.3d 668 (2002), *review denied*, 150 Wn.2d 1016 (2003).

Second, Appellants contend that their declarations support the proposition that DNR generally treats the whole Board Manual as mandatory. PFR at 12-13. While the Board disagrees with this characterization, this case is not about the whole Board Manual. Appellants' declarations failed to focus on the challenged May 2016 unstable slope guidance or how it is used.

It is true that post-adoption agency behavior that treats guidance as mandatory may be an indicator of an improper, binding *de facto* rule.[6] But Appellants' declarations contain no examples of any specific statements or representations that either the Board or DNR made about Section 16 after May 2016, when the Board approved the challenged guidance. Appellants' declaratory evidence thus did not impact the analysis of whether the guidance approved in May 2016 had a legal effect, and neither the superior court nor the Court of Appeals erred in disregarding it.

Lastly, Appellants contend that Board Manual Section 16 has a legal effect because it "effectively determines" which forest practices are subject to SEPA review. PFR at 10-11. As noted above, DNR uses WAC 222-16-050(1)(d)(i) and the definitions of specific terms in WAC 222-16-010 to determine how site conditions fit within the rule structure.

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[6] *See, e.g., Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (part of test to determine if guidance is actually a legislative rule under the federal APA); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000) (same).

RCW 76.09.050(5) only allows DNR to deny permits based upon the terms of rules. The Court of Appeals correctly determined, after reviewing the rule structure, that Appellants had not "demonstrated that DNR must refer to or rely on any material in the Board Manual to fully implement any of the forest practice regulations." *Sumas Mountain*, slip op. at 11-12.[7]

Appellants have thus failed to establish any legal effect or consequence that arises from the Board's unstable slopes guidance.

2. Appellants' Claim of Legal Effects From Board Manual Section 16 Does Not Match the Form of Legal Action They Filed.

The Court of Appeals and superior court both noted that Appellants' legal effects arguments are characteristic of a rule challenge even though Appellants did not file this case under RCW 34.05.570(2). *Sumas Mountain*, slip op. at 12-13 ("Sumas Mountain chose not to advance the theory that the Board Manual is a de facto rule and hence invalid."); CP 426 (same). The Board has contended throughout this litigation that Section 16 is written in non-binding terms to match WAC 222-12-090's intent to provide advisory guidance. But Appellants' contrary legal effects arguments required a rule challenge rather than the "other agency action" suit they filed.

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[7] Appellants may contend that the Board Manual somehow modifies the forest practices rules. The Board disputes this, but as explained in the section below, only a rule can modify an existing rule, and a challenge that the Board Manual constitutes an invalid *de facto* rule would need to be brought under RCW 34.05.570(2).

The APA reserves the use of "other agency action" review for those types of decisions not reviewable under the judicial review provisions for rules or agency orders. *See* RCW 34.05.570(4)(a) ("other agency action" review may occur for those actions "*not reviewable under subsection (2) or (3) of this section*") (emphasis added). Thus, if Appellants' "legal effects" claims could have been reviewed under RCW 34.05.570(2), they were required to bring their case as a rule challenge.

Using the definition of "rule" in RCW 34.05.010(16),[8] several Washington cases have found that non-rule administrative directives of general applicability amount to *de facto* rules and have stricken them. *See, e.g., Simpson Tacoma Kraft Co. v. Dep't of Ecology,* 119 Wn.2d 640, 647-49, 835 P.2d 1030 (1992), and *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 398-400, 932 P.2d 139 (1997). Review in these cases occurs under RCW 34.05.570(2). And contrary to Appellants' assertions that only RCW 34.05.570(4) provides for "arbitrary and capricious" review

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[8] The APA defines a rule as an:

> agency order, directive, or regulation of general applicability . . . (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; [or] (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity . . . .

RCW 34.05.010(16). The definition also includes an amendment or a repeal of a prior rule.

(PFR at 18), those words appear directly as one of the available review standards in RCW 34.05.570(2)(c).[9]

RCW 34.05.570(4)(a) unambiguously indicates that "other agency action" review is only available to litigants if they cannot bring their case under other judicial review provisions. The Board strongly contends its unstable slope guidance has no legal effect, but Appellants' legal effect arguments amount to a contention that the Board's guidance is a rule. Appellants failed to tether their "legal effect" claims to the only proper APA-based cause of action they could have used – a rule challenge.

Appellants' "legal effect" claims do not distinguish *WEA* and do not establish that the Court of Appeals' decision conflicted with *WEA* under RAP 13.4(b)(1). The Court of Appeals committed no error in finding the guidance at issue here had no legal effect and was not "agency action."

C. Appellants Have Not Demonstrated a "Substantial Public Interest" Under RAP 13.4(b)(4).

The thrust of Appellants' public interest arguments rests upon claims regarding the importance of the Board Manual's guidance, or that Appellants lack other suitable remedies. PFR at 15-18. These arguments do

[9] The Legislature changed RCW 34.05.570(2) to expressly include the arbitrary and capricious review standard in 1995. *See Wash. Indep. Tel. Ass'n v. Util. & Transp. Comm'n*, 148 Wn. 2d 887, 903-05, 64 P.3d 606 (2003) (discussing this change).

not demonstrate a substantial public interest meriting further review under RAP 13.4(b)(4).

First, as explained above, DNR can make regulatory decisions (i.e., decisions to issue or deny a permit, decisions to issue enforcement orders, or decisions to issue civil penalties) *only* under the Act's statutes or rules. RCW 76.09.050(5); .080(1)(a); .090(1)(b); and .170(1). No authority exists for DNR to rely upon the unstable slope guidance in Board Manual Section 16 to make any of those decisions. Appellants mistakenly assert that the Board's unstable slope guidance involves the "regulation of logging" (PFR at 7). It does not.

Expert witnesses may *use* some of the Board's unstable slope guidance in reviewing a forest practices application proposal by employing certain techniques or methodologies to study the site in question. This is expected and not improper – unused guidance has no point. Agencies offer guidance in various contexts to facilitate their relationships with regulated communities, and this has been legislatively encouraged. *See* RCW 76.09.250; RCW 34.05.230(1); and RCW 43.05.005.[10] Issues regarding the wisdom of certain guidance may arise in the context of a

[10] An important distinction exists between guidance that is useful and that which has legal effects or consequences. *See, e.g., Nat'l Mining Ass'n,* 758 F.3d at 250 (like non-binding guidance, procedural rules under the federal APA do not alter the rights of parties, but may still alter how parties present their viewpoints to the agency).

particular permit. If so, the applicant or other litigants may question experts that used one study rather than another in the context of a permit appeal before the Pollution Control Hearings Board (PCHB). RCW 76.09.205. Parties may seek judicial review of PCHB decisions under RCW 34.05.570(3); RCW 43.21B.180; WAC 371-08-555.

Other avenues for review also exist for Appellants. As discussed above, to the extent Appellants claim that the Board Manual's provisions affect or modify how rules are implemented, Appellants may raise these claims in a rule challenge action under RCW 34.05.570(2). To the extent Appellants find deficiencies in the regulatory structure for forest practices on unstable slopes, they may pursue rule changes either under RCW 34.05.330 (petitions for rule making), or through the Board's statutorily required adaptive management process, applicable to rules that affect "aquatic resources." RCW 76.09.370(6) and (7); RCW 76.09.020(4) (defining "aquatic resources").

Appellants object that the adaptive management process for rule makings related to aquatic resources is "time-consuming." PFR at 5, 18. But the Legislature wrote RCW 76.09.370's language, and its policy choice to require a science-based, collaborative process lies well within its purview. Dissatisfaction with those choices should be directed to the Legislature,

rather than to this Court. Those legislative choices do not constitute a basis for review.

Throughout this litigation, Appellants appear to want the Board Manual's unstable slope guidance to have the binding, directive effect of a rule and to cover new topics not currently in rules without going through the rule-making process. Of course, that desire is inconsistent with statutes (RCW 34.05.570(2) and RCW 76.09.370(6) and (7)), would defeat the APA's public notice and comment processes applicable to rules (RCW 34.05.310-.380), and would open the Board up to future rule challenge suits to invalidate improper *de facto* rules. Appellants' arguments do not create a basis for this Court to exercise its "substantial public interest" review authority.

The Court of Appeals' decision properly applied *WEA*, and Appellants have several other options to pursue their policy goals. No reason exists under RAP 13.4(b)(4) to review the Board's non-binding guidance.

D. Other Undecided Jurisdictional Issues Would Also Result In Dismissal.

The Court of Appeals' decision, by following *WEA* and determining that Board Manual Section 16 was advisory technical guidance that had no legal effect, left unresolved other Board arguments supporting dismissal

under the overlapping doctrines of justiciability and standing. The Board wishes to preserve these issues in case the Court grants review, and so raises them here briefly. RAP 13.4(d) and 13.7(b).

WEA and other courts use justiciability concepts in addition to an "agency action" analysis when considering agency guidance. *WEA,* 150 Wn.2d at 622 (guidance document without legal effects did not present justiciable controversy); *Teamsters Local Union No. 117 v. Human Rights Comm'n,* 157 Wn. App. 44, 48-49, 153 P.3d 858 (2010) (agency's opinion letter nonjusticiable); and *Sudar v. Dep't of Fish & Wildlife Comm'n,* 187 Wn. App. 22, 33, and 36, 347 P.3d 1090 (2015) (agency's internal policy nonjusticiable). Justiciability ensures that courts do not issue advisory opinions. *Walker v. Munro*, 124 Wn.2d 402, 411-12, 879 P.2d 920 (1994). The Board's non-binding guidance presents the same justiciability problem found in *WEA*, *Teamsters*, and *Sudar* because Appellants raise only an abstract, general challenge to Section 16's content, rather than a concrete dispute arising from a specific factual setting, such as a permit appeal.

Similarly, the APA requires appellants to demonstrate standing, and they bear the burden of establishing it. *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 127, 272 P.3d 876, *review denied,* 174 Wn.2d 1007 (2012). Appellants here fail to meet the injury-in-fact requirements because the Board Manual is nonbinding,

and their challenge presents no specific or perceptible harms from the Board's approval of its guidance. *Id.* at 129. They have suffered no injury, and allege only conjectural or hypothetical harms. *Patterson v. Segale*, 171 Wn. App. 251, 258-60, 289 P.3d 657 (2012) (alleged harm from an unspecified, future permitting decision insufficient to impart standing).[11]

These additional arguments would have also merited dismissal if the Court of Appeals reached them.

VII. CONCLUSION

The Court of Appeals' unpublished opinion thoroughly analyzed Appellants' claims and appropriately followed *WEA* in determining that the Board's advisory guidance for potentially unstable slopes had no legal effect and did not constitute "agency action" under the APA. Appellants have not established a conflict with the *WEA* opinion, and no "substantial

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[11] In addition to this "prejudice prong" argument, the Board also raised the redressability prong of the injury-in-fact test, because Appellants ask the Court to dictate the contents of a guidance document where no statute or rule does so.

public interest" would be served by Supreme Court review in this matter. The Board respectfully asks the Court to deny the Petition for Review.

RESPECTFULLY SUBMITTED this 19th day of February, 2019.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on February 19, 2019, as follows:

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I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 19th day of February, 2019, at Olympia, Washington.

Kim L. Kessler

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