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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

OLYMPIC STEWARDSHIP FOUNDATION, et al., CITIZENS'  
ALLIANCE FOR PROPERTY RIGHTS JEFFERSON COUNTY,  
CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND,  
MATS MATS BAY TRUST, JESSE A. STEWART REVOCABLE  
TRUST, and CRAIG DURGAN, and HOOD CANAL SAND &  
GRAVEL LLC dba THORNDYKE RESOURCE,

Appellants,

v.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE  
HEARINGS OFFICE, acting through the GROWTH MANAGEMENT  
HEARINGS BOARD; STATE OF WASHINGTON, DEPARTMENT OF  
ECOLOGY; and JEFFERSON COUNTY,

Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

**REPLY BRIEF OF PETITIONERS OLYMPIC  
STEWARDSHIP FOUNDATION, et al.**

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## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION .....	1
II. ARGUMENT .....	2
A. Standard of Review.....	2
B. The Board Clearly Erred When it Construed the SMA to Render Property Rights Inferior to the Public’s Interest in Protecting and Enhancing the Environment .....	5
C. The Growth Board Clearly Erred When it Upheld an SMP Provision Requiring Owners to “Restore and/or Enhance” the Shoreline as a Condition of New Development .....	9
D. The Board Clearly Erred When it Upheld a “No Net Loss” Provision Prohibiting Any Use Resulting in Ecological Impacts.....	10
E. Designation of All Marine Shorelines as Critical Areas Is Patently Illegal .....	13
F. The SMP’s Generic Buffers Go Too Far and Violate the SMA .....	15
G. The SMP Imposes Unconstitutional Conditions on New Development .....	19
1. OSF’s Facial Constitutional Claims Are Justiciable... 19	
2. The SMP’s Buffers Are Imposed as Conditions on Development, Are Subject to the Unconstitutional Conditions Doctrine .....	21
3. The Public Trust Doctrine Does Not Create Any Public Ownership in Private Upland Property.....	22
4. The SMP’s “Starting Point” Buffer Scheme Violates <i>Nollan/Dolan/Koontz</i> .....	23
III. CONCLUSION.....	25
CERTIFICATE OF SERVICE AND MAILING .....	26

## TABLE OF AUTHORITIES

### Cases

<i>Biggers v. City of Bainbridge Island</i> , 162 Wn.2d 683, 697, 169 P.3d 14 (2007) (J.M. Johnson, J., lead opinion) .....	8
<i>Buechel v. Dept. of Ecology</i> , 125 Wn.2d 196, 884 P.2d 910 (1994) ..	6, 7, 8
<i>Caminiti v. Boyle</i> , 107 Wn.2d 662, 669, 732 P.2d 989 (1987) .....	22
<i>Chelan Basin Conservancy v. GBI Holdings Co.</i> , No. 33196-2-III, Slip op. at 6-8 (June 14, 2016) .....	22
<i>Citizens Alliance for Property Rights v. Sims</i> , 145 Wn. App. 649, 668, 187 P.3d 786 (2008) .....	24
<i>City of Los Angeles, Calif. v. Patel</i> , ___ U.S. ___, 135 S. Ct. 400, 190 L.Ed.2d 288 (2015) .....	20
<i>Dolan v. Tigard</i> , 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) .....	19, <i>passim</i>
<i>Faben Point Neighbors v. City of Mercer Island</i> , Shoreline Hearings Board No. 98-963, 1999 WL 394737, at * 8 (May 5, 1999) .....	13
<i>Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.</i> , 164 Wn.2d 242, 243, 189 P.3d 161 (2008) (J.M. Johnson, J., lead opinion) .....	8, 27
<i>Guggenheim v. City of Goleta</i> , 638 F.3d 1111, 1117 (9th Cir. 2011) .....	20
<i>Guimont v. Clarke</i> , 121 Wn.2d 586, 606 n.8 (1993) .....	20
<i>Honesty in Env'tl. Analysis Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL)</i> , 96 Wn. App. 522, 534-35, 979 P.2d 864 (1999) .....	4, 21
<i>Hood Canal Environmental Council v. Kitsap County</i> , CPSGMHB No. 06-3-0012c, at 41-44 (Final Decision and Order 2006) .....	14, 15
<i>Illinois Central Railroad Co. v. Illinois</i> , 146 US 387 (1892) .....	23
<i>Kitsap Alliance of Property Owners v. Cent. Puget Sound Growth Management Hearings Board</i> , 160 Wn. App. 250, 263-64, 255 P.3d 696 (2011) .....	21
<i>Koontz v. St. Johns River Water Mgmt. Dist.</i> , 570 U.S. 2588, 133 S. Ct. 2586, 2594-95, 2599, 186 L. Ed. 2d 697 (2013) .....	23, 24
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419, 439, 102 S. Ct. 3164, 73 L. Ed.2d 868 (1982) .....	5
<i>Lund v. State Dept. of Ecology</i> , 93 Wn. App. 329, 969 P.2d 1072 (1998) .....	7, 8
<i>Manufactured Hous. Communities of Wash. v. State</i> , 142 Wn.2d 347, 355, 369-70, 74-75, 13 P.3d 183 (2000) .....	19
<i>Margola Assocs. v. Seattle</i> , 121 Wn.2d 625, 646-47 n.8 (1993) .....	20
<i>McQuarrie v. City of Seattle</i> , Shoreline Hearings Board No. 08-033, 2009 WL 1169254, at *8 (Apr. 27, 2009) .....	13

<i>Nisqually Delta Ass'n v. City of DuPont</i> , 103 Wn.2d 720, 726, 696 P.2d 1222 (1985).....	8
<i>Nollan v. California Coastal Commission</i> , 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).....	19, <i>passim</i>
<i>Olympic Stewardship Foundation v. Western Washington Growth Management Hearings Bd.</i> , 166 Wn. App. 172, 187, 274 P.3d 1040 (2012).....	2
<i>Orion Corp. v. State</i> , 109 Wn.2d 621, 653, 747 P.2d 1062 (1987) .....	21, 22, 23
<i>Overlake Fund v. Shoreline Hearings Board</i> , 90 Wn. App. 746, 761, 954 P.2d 304 (1998).....	8
<i>Peste v. Mason County</i> , 133 Wn. App. 456, 471-72, 136 P.2d 140 (2006).....	19, 20
<i>PPL Montana, LLC v. Montana</i> , 132 S Ct 1215, 1234 (2012).....	22
<i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 50 (1992).....	20
<i>Samson v. City of Bainbridge Island</i> , 149 Wn. App. 33, 202 P.3d 334 (2009) .....	7, 8
<i>San Remo Hotel, L.P. v. City and County of San Francisco</i> , 545 U.S. 323, 340 n.23 (2005).....	20
<i>State, Dep't of Ecology v. City of Spokane Valley</i> , 167 Wn. App. 952, 963, 275 P.3d 367 (2012).....	8
<i>Suitum v. Tahoe Regional Planning Agency</i> , 520 U.S. 725, 736 n.10 (1997).....	20
<i>Swinomish Tribal Community v. WWGMHB</i> , 161 Wn.2d 415, 432, P.3d 1198 (2008).....	17
<i>Webb's Fabulous Pharms., Inc. v. Beckwith</i> , 449 US 155, 164 (1980).....	5
<i>Yee v. City of Escondido</i> , 503 U.S. 519, 534 (1992).....	20

### **Ordinances**

JCC § 18.22.270(6).....	25
JCC § 18.22.350(1).....	25
JCC § 18.22.460.....	25
JCC § 18.25.250.....	9

### **Regulations**

Jefferson County Critical Areas Ordinance .....	13, 16
WAC 173-26-090.....	3
WAC 173-26-186(5).....	5
WAC 173-26-186(8)(b)(i) .....	17

WAC 173-26-186(8)(c) .....	10
WAC 173-26-186(8)(d)(iii) .....	16, 18
WAC 173-26-191(2)(b) .....	13
WAC 173-26-201(2)(a) .....	4, 14
WAC 173-26-211(2)(a); (5)(a)(i)-(iii) .....	12
WAC 173-26-221(2)(c)(i)(D) .....	9
WAC 173-26-241(3)(j) .....	6, 11

**Statutes**

Administrative Procedures Act .....	2
Growth Management Act .....	14, 15
RCW 34.05 .....	2
RCW 36.70A.480(6) .....	15, 16, 17
RCW 90.58.020 .....	1, 5, 6, 11
RCW 90.58.080 .....	3
RCW 90.58.340 .....	3
RCW Chapter 77.55 .....	3
Shoreline Management Act .....	<i>passim</i>

**Other Authorities**

AGO 2016, No.6 (JUNE 3, 2016) .....	3
EVIDENCE OF NEAR-ZERO HABITAT HARM FROM NEARSHORE DEVELOPMENT, D.F. Flora, Ph.D., November 2009 .....	4
EVIDENCE ON HABITAT-NEUTRAL BULKHEADS, FLOATS, AND OTHER INSTALLED “STRESSORS” – A RESPONSE TO A CLUTCH OF DETRACTORS, D.F. Flora, Ph.D., February 2010 .....	4
EVIDENCE ON IMPACT-NEUTRAL BULKHEADS, FLOATS, AND OTHER SHORELINE MODIFICATIONS, D.F. Flora, Ph.D., December 2009 .....	4
Kathleen M. Sullivan, <i>Unconstitutional Conditions</i> , 102 Harv. L. Rev. 1415, 1421-22 (1989) .....	23

## I. INTRODUCTION

Respondents Jefferson County and Department of Ecology do not address the Growth Board's two key failures. First, the Board concluded that, when developing an SMP Update, the government must treat property rights as "secondary" interests to the Shoreline Management Act's ("SMA") "primary" goal of protecting the shoreline environment. Decision at 31, 80. Second, the Board concluded that a "no net loss" standard not found in the SMA policies (RCW 90.58.020) imposes a substantive requirement that each permit applicant provide for the "maintenance, protection, restoration, and preservation" of the shoreline environment. Decision at 31-34.

Together, those two conclusions affected the Board's review of the underlying challenges, resulting in a decision erroneously upholding an SMP Update that imposes mandatory 150-foot generic buffers (and 10-foot setbacks) unsupported by adequate science and mandatory restoration requirements, as well as reclassifying substantial residential-zoned properties as "natural shorelines." The fact that none of the Respondents even attempt to support the Board's key failures is telling – there is no justification for the Board's conclusions, which colored and rendered clearly erroneous every subsequent decision.

The Growth Board's decision to uphold the SMP, despite these manifest errors, must be reversed.

## II. ARGUMENT

### A. Standard of Review

Jefferson County incorrectly argues that the Growth Board's decision should be subject to "multiple levels of deference," rather than the well-settled standards set forth by the Administrative Procedures Act, RCW 34.05 ("APA"). Jeff. Co. Resp. Br. at 12-15. In essence, the County would have this Court isolate and grant deference to each government decision made throughout the entire legislative and adjudicative process. *Id.* Not only would such a standard be impossible to apply, it is not the law. *See Olympic Stewardship Foundation v. Western Washington Growth Management Hearings Bd.* 166 Wn. App. 172, 187, 274 P.3d 1040 (2012).

Deference also does not mean that Ecology and the County can ignore the facts and law that do not suit their purpose.<sup>1</sup> This attitude is most prevalent in the position taken on OSF's assertion that the SMP and its onerous buffers must be justified. OSF does not dispute the authority to update an SMP. That is, however, a starting point, not an ending point, since justification for new regulations is required. There is both a procedural and constitutional component to this term.

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<sup>1</sup> For example, Ecology relies upon the "clear and convincing evidence" standard but makes no mention of OSF's supplemental evidence except to say (with no specification) that a "...substantial number of the statements in the declarations filed by OSF lack sufficient foundation or are irrelevant." Ecology Resp. Br., p.7, n.4.

Procedurally, WAC 173-26-090 addresses the elements of necessity. *See* OSF Opening Br., pp.24, 30-31. No one is saying the County must prove that its shoreline has been substantially degraded since the previous SMP was enacted in 1998. The Guidelines speak in terms of changing local circumstances, new information or improved data. The SMA requires the County to follow the SMP Guidelines, RCW 90.58.340. Contrary to the Jefferson County assertion, Resp. Br., p.17, the cited regulation is not applicable only to a “mid-cycle update.” For one, that term is not found in the regulation. Two, the SMA Time Table (RCW 90.58.080) establishes periodic updates which must comply with the current WAC Guidelines. WAC 173-26-090 specifically references RCW 90.58.080. As set out below, p.19, the WAC Standards require consideration of the beneficial aspects of existing regular laws. None of the scientific studies examined the efficacy of existing regulations which protect the shoreline environment, *e.g.*, maximum site disturbance limits, steep slope setbacks, on-site stormwater infiltration requirements, necessity for other governmental permits, such as hydraulic project approvals,<sup>2</sup> etc.

Substantively, the State and Federal constitutions require

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<sup>2</sup> Ecology is wrong in criticizing Rob Cousins’ explanation as to hydraulic project approvals required by RCW Chapter 77.55. Declaration of Rob Cousins dated February 19, 2016, ¶ 21 (Ex.B). Ecology Resp. Br., p.16, N.15. An HPA does apply to upland activities that would affect the waters of the state. *See* AGO 2016, No.6 (June 3, 2016).

governmental entities to evaluate contrary science, not just what they assess is “best science.” *Honesty in Env'tl. Analysis Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL)*, 96 Wn. App. 522, 534-35, 979 P.2d 864 (1999). In regard to waterfront homes, the science confirmed that “[i]n and of itself, residential development probably does not have major adverse effects on shoreline resources.” AR 5652 Correlation between residential development (and common appurtenances) and actual impacts on the marine environment was not made, so resort was made to generalized literature from other contexts. *See infra*, pp.18-19. Based upon the state of the science, Dr. Don Flora advised the County that no evaluation or analysis was made of the problems that buffers might cure or mitigate,<sup>3</sup> but he was ignored. Identification of the problems should have been followed by an evaluation and analysis of various possible solutions considering cost and effectiveness, again a point discarded. *See also* WAC 173-26-201(2)(a) (requiring government to consider the “context, scope, magnitude, significance, and potential limitations of the scientific information”).

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<sup>3</sup> EVIDENCE OF NEAR-ZERO HABITAT HARM FROM NEARSHORE DEVELOPMENT, D.F. Flora, Ph.D., November 2009 (AR000003898-3910); EVIDENCE ON IMPACT-NEUTRAL BULKHEADS, FLOATS, AND OTHER SHORELINE MODIFICATIONS, D.F. Flora, Ph.D., December 2009 (AR000003911-3914); EVIDENCE ON HABITAT-NEUTRAL BULKHEADS, FLOATS, AND OTHER INSTALLED “STRESSORS” – A RESPONSE TO A CLUTCH OF DETRACTORS, D.F. Flora, Ph.D., February 2010 (AR000003915-3923).

**B. The Board Clearly Erred When it Construed the SMA to Render Property Rights Inferior to the Public's Interest in Protecting and Enhancing the Environment**

At issue in this appeal is the Growth Board's conclusion that, in all circumstances, private property rights (including priority development rights) must be treated as inferior to the public's interest in protecting the environment. Decision at 31, 80. That conclusion is plainly wrong. As a matter of black-letter law, the government cannot declare a fundamental right subordinate to a legislative goal,<sup>4</sup> as Ecology's SMP Guidelines confirm. See WAC 173-26-186(5).

Respondents avoid OSF's argument in regard to the Growth Board's conclusion that property rights are "secondary" to the SMA's "primary" goal of protecting the shoreline environment. Jeff. Co. Resp. Br. at 15-17; Ecology Resp. Br. at 7-10. Ecology merely states that OSF's objection "is not directed to any particular SMA provision." Ecology Resp. Br., p.7. To the contrary, see OSF's Opening Brief, pp.20-21, citing RCW 90.58.020 provisions including, "...while, at the same time, recognizing and protecting private property rights...." In this regard, OSF is not contending that the SMA mandates residential use with no consideration. Indeed, the

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<sup>4</sup> See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439, 102 S. Ct. 3164, 73 L. Ed.2d 868 (1982) ("The government does not have unlimited power to redefine property rights."); *Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 US 155, 164 (1980) (The state, "by ipse dixit, may not transform private property into public property without compensation.").

SMA mandates coordinated planning. Placing miles of shorelines, however, in no build buffers is way beyond coordinated planning.

OSF does not dispute that protecting the shoreline environment is one of the enumerated goals of the SMA – but so, too, is the goal of “fostering all reasonable and appropriate uses.” (RCW 90.58.020) and that “single-family residences and their appurtenant structures [shall be given priority].” RCW 90.58.020; *see also* WAC 173-26-241(3)(j). Indeed, all of the parties to this appeal (including the agency with authority to interpret the SMA) agree that the Act – which is the product of compromise between multiple interests, including property rights and the environment—is properly interpreted to require that local and state government balance the Act’s “multiple goals” when developing an SMP. Jeff. Co. Resp. Br. at 16-17; *see also* Ecology Resp. Br. at 7-10 (priority development is one of the three “primary goals”).

Contrary to Respondents’ arguments, *Buechel v. Dept. of Ecology*, 125 Wn.2d 196, 884 P.2d 910 (1994), did not elevate any one goal above the others during the process of developing an SMP. Nothing in the *Buechel* opinion states that, when developing an SMP, property rights (including priority development rights) must be treated as “secondary” to the “primary” goal of protecting the environment. *Buechel* did not involve a challenge to the adoption of an SMP. Instead, *Buechel* concerned a variance

application to build a house on a lot where residential use was prohibited. 125 Wn.2d at 199-200, 208-09. Further, the variance sought permission to build on top of a deteriorating bulkhead and in violation of the local SMP's shoreline setback and minimum lots size requirements. *Id.* The Court did not address the SMA's property rights goal because the Court concluded that the variance denial did not deprive the landowner of his investment-backed expectations – he could still make other reasonable uses of the small lot, consistent with zoning and neighboring uses. *Id.* at 208-09.

Similarly, the Board's citation to *Lund v. State Dept. of Ecology*, 93 Wn. App. 329, 969 P.2d 1072 (1998), is misplaced. That case involved an appeal from Ecology's denial of a conditional use permit to build a new over-water residence where the local SMP prohibited such development. *Id.* at 332. In discussing the criteria for issuing a conditional use permit, the Court adopted the same standard *Buechel* had applied to variances. *Id.* at 336-37. Again, nothing in the opinion speaks to legislative balancing of the Act's multiple goals.

Finally, Jefferson County's reliance on *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 202 P.3d 334 (2009), as "confirming" that property rights are inferior to the public's interest in the environment is misplaced. Jeff. Co. Resp. Br. at 15-16. First, the portion of the opinion the County relies on is merely the Court's summary of the government's argument – it is not

part of the Court's ruling. *See Samson*, 149 Wn. App. at 47-49. And second, the Court held that private docks do not constitute a priority development right under the Act. *Id.* at 50. Thus, *Samson* did not address the issue at hand relating to development and use of single-family homes.

The fact that *Buechel* and *Lund* speak only to the criteria for reviewing variance and condition use permit decisions is confirmed by a large body of binding precedent holding that, in the context of legislative actions, the SMA embraces both the environment and property rights goals, specifically providing for priority development and use of the shorelines. *See, e.g., Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 697, 169 P.3d 14 (2007) (J.M. Johnson, J., lead opinion); *Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring); *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985); *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 243, 189 P.3d 161 (2008) (J.M. Johnson, J., lead opinion); *Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 761, 954 P.2d 304 (1998); *State, Dep't of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 963, 275 P.3d 367 (2012).

The Board's conclusion that the SMA renders property rights a "secondary" interest was clearly erroneous and must be reversed.

**C. The Growth Board Clearly Erred When it Upheld an SMP Provision Requiring Owners to “Restore and/or Enhance” the Shoreline as a Condition of New Development**

Respondents do not answer OSF’s argument that the Growth Board failed to acknowledge and address various SMP provisions imposing a mandatory restoration requirement on all new development. *See* Decision at 50. As indicated in OSF’s opening brief, JCC § 18.25.250 states, in relevant part: “(1) When shoreline development or redevelopment occurs, it **shall include restoration and/or enhancement** of ecological conditions if such opportunities exist.” (Emphasis supplied). The condition is mandatory.<sup>5</sup> (When would such opportunities not exist?)

It is true that WAC Chapter 173-26 requires local government to adopt regulations designed to achieve “no net loss”—which is a “protection” standard. *See, e.g.*, WAC 173-26-221(2)(c)(i)(D) (“Master programs shall contain requirements for buffer zones around wetlands. Buffer requirements shall be adequate to ensure that wetland functions are **protected and maintained** in the long term.”) (emphasis supplied). But neither the Board (which ignored this argument without analysis) nor any of the Respondents have shown where the SMA requires landowners to enhance or restore

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<sup>5</sup> Both Ecology and the County attempt to rehabilitate this broad requirement by arguing that the provision is only applicable where mitigation is deemed necessary to offset the unavoidable impacts of a proposed development. *See* Jeff. Co. Resp. Br. at 24; Ecology Resp. Br. at 11-12. The provision contains no such limiting language. If that is truly their intent, then this provision must be remanded for further legislative action.

previously degraded shorelines. Indeed, the SMP Guidelines’ requirement that local governments include policies and programs that contribute to the restoration of previously degraded shorelines does not direct local governments to impose a substantive restoration/enhancement requirement on individual permit applicants. *See* WAC 173-26-186(8)(c); *see* Jeff. Co. Resp. Br. at 24; Ecology Resp. Br. at 11-12. Instead, the provision directs local governments to “make real and meaningful use of established or funded **nonregulatory policies and programs** that contribute to restoration of ecological functions[.]” *Id.* (emphasis supplied).

The Board’s interpretation of “no net loss” goes too far by requiring restoration and, therefore, directly conflicts with the SMA

**D. The Board Clearly Erred When it Upheld a “No Net Loss” Provision Prohibiting Any Use Resulting in Ecological Impacts**

OFS’s position before the Board and this Court is consistent: “no net loss” cannot be imposed as a substantive standard that (1) trumps the SMA’s “minimization” requirement; (2) alters the balance inherent in the SMA (3) changes provisions for preferred uses or (4) imposes a mandatory restoration standard. Decision, at 31-34.

It is the SMA “minimize” standard that must control – not the

Board's construction of "no net loss."<sup>6</sup> If the Board is not reversed, then the SMP's "no net loss" provision will be interpreted to prohibit all new development that does not expressly fit within the requirement for protection (instead of minimization) and also provide for restoration of past impacts to the shoreline.

Neither the County nor Ecology address OSF's contentions that the SMP is erroneously based on the presumption that any use/development will cause NNL and that the County desired to regulate to achieve more than NNL – a net gain. OSF Opening Br., pp.12-13.

Ecology contends that "no net loss" accords with SMA policies "... so long as the end result is that ecological functions are maintained." Ecology Resp. Br., p.10. This is not so. The word "maintain" means "to cause (something) to exist or continue without changing" or "to keep in an existing state" (<http://www.merriam-webster.com/dictionary/maintain>). The SMA, however, provides that "[a]lterations of the natural conditions of the shorelines and shorelands **shall be** recognized by the department." RCW 90.58.020 (emphasis supplied). Single-family homes are expressly recognized as a priority use of the shorelines, which falls within allowed alterations. RCW 90.58.020; WAC 173-27-241(3)(j). After all, the SMA

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<sup>6</sup> Both Ecology and the County agree with OSF (and amicus curiae Pacific Legal Foundation), arguing that the SMA allows property owners to mitigate for unavoidable impacts to the environment. See Jeff. Co. Resp. Br. at 23-24; Ecology Resp. Br. at 1.

was proposed as a law that allowed use of the shorelines and changes thereto for “appropriate development,” such as single-family homes. *See* Pacific Legal Foundation Amicus Brief, p.5.

As noted above, the Board’s ruling that the “no net loss” standard requires “restoration” (and its conclusion that property rights are “secondary”) is preclusive. For instance, it affected its resolution of OSF’s challenge to the County’s decision to classify 41% of its shorelines (most of which had previously been zoned for rural residential uses) as “Natural Shorelines,” due to the land’s capacity to “return to near natural conditions.” Neither the Board, nor any of the Respondents, address the criteria for reclassifying rural residential zoned properties “Natural Shorelines.” Ecology’s contention that an “extensive inventory” occurred (Ecology Resp. Br., p.16) belies that the SMP Guidelines, WAC 173-26-211(2)(a), (5)(a)(i)-(iii), impose criteria specific to existing land use patterns, the biological and physical character of the shorelines, and the Comprehensive Plan. All of these show (and envision) measured residential rural growth and use in Jefferson County. It is noteworthy that Respondents make no mention of the Comprehensive Plan and related criteria. Nor do they show how the decision to subject those properties to “the highest level of protection possible” achieves the balancing required by the SMA (and its minimization standard) plus its fostering reasonable and appropriate uses

such as single-family homes. AR 5716. The Board's failure to meaningfully review or reverse this over-designation also constituted error.

**E. Designation of All Marine Shorelines as Critical Areas Is Patently Illegal**

The Growth Board clearly erred when it upheld the Jefferson County Critical Areas Ordinance ("CAO") provisions incorporated by reference into the Update. Decision at 20.

It is noteworthy that Ecology and the County do not answer OSF evidence submittals which show the Jefferson County CAO does not designate all marine shorelines as fish and wildlife "Habitat Conservation Areas." (See Cousins Decl., ¶ 20), yet contends the CAO justifies the blanket designation.

Ecology contends that "blanket incorporation" of a CAO is common. Ecology Resp. Br., pp.14-15. However, what is "common" is irrelevant. The law requires that all regulations incorporated into an SMP be actually reviewed for compliance with the SMA and WAC SMP Guidelines. WAC 173-26-191(2)(b); *McQuarrie v. City of Seattle*, Shoreline Hearings Board No. 08-033, 2009 WL 1169254, at \*8 (Apr. 27, 2009); see also *Faben Point Neighbors v. City of Mercer Island*, Shoreline Hearings Board No. 98-963, 1999 WL 394737, at \* 8 (May 5, 1999). None of the Respondents answer this challenge, nor do they point to any evidence

in the record indicating that the required review occurred.

The required review is more than a matter of procedure. It has real substantive impacts. One, the SMA allows alteration for single-family homes. Two, the Growth Management Act employs a less stringent science requirement, allowing local government to adopt precautionary critical area regulations based on incomplete science. In fact, that was the reason why the Growth Board approved the oversized buffers in the *KAPO* case, *Hood Canal Environmental Council v. Kitsap County*, CPSGMHB No. 06-3-0012c, at 41-44 (Final Decision and Order 2006).

One of the issues in that case was whether, under the GMA, the County could lawfully rely on science developed for freshwater streams to impose buffers on marine shorelines – particularly where the science itself warned that its applicability to marine shorelines was uncertain. The Board upheld the County’s decision under what it coined “the immature science dilemma” rule. That rule allowed government to impose precautionary buffers until such time as the science matured enough to be certain, while ignoring scientific conclusions cautioning that the study may not be applicable as common “caveats” not worth considering – the SMA, by contrast, requires analysis of such data gaps. WAC 173-26-201(2)(a)(ii). In adopting its “immature science dilemma” rule, the Board acknowledged that precautionary buffers would likely take more land than necessary to protect

the environment, but found support for such a result in the GMA regulations.

Unlike the GMA, the SMA contains no “precautionary principle” regulation – to the contrary, the SMA requires that the government show that its buffers are necessary to protect existing conditions. RCW 36.70A.480(6). Thus, the buffers in this case must be supported by direct evidence of necessity and effectiveness, not the more lenient GMA standards, plus meet SMA policies for reasonable and appropriate growth in hand with minimization of impacts. Relying on *KAPO* to approve the same body of “immature” science circumvents the requirement that government update and improve its science. By contrast, the SMA requires local government show that its buffers “shall provide a level of protection to critical areas ... **necessary** to sustain shoreline natural resources.” RCW 36.70A.480(6). Like the Growth Board, Respondents fail to respond to this argument.

**F. The SMP’s Generic Buffers Go Too Far and Violate the SMA**

The Respondents fail to meaningfully answer the substance of OSF’s challenge to the Update’s generic buffers. None of the Respondents disagree that the science was extremely generalized, recommending buffers ranging anywhere from 50 to 450-feet in width depending on a variety of local conditions. Nor do they disagree that Jefferson County selected a preset 150-foot buffer without regard to local conditions, *e.g.* the extremely slow rate of rural growth and the overall condition of the shoreline. OSF

Opening Br., p.13. Indeed, science was a backdrop, not a driver. *See* OSF Opening Br., p.28, N. 21 (150-foot buffer chosen for policy reasons of uniformity (“consistency”) with actions of other jurisdictions, the CAO and to serve as a “model” for other jurisdictions).

Further, Respondents do not contest that in regard waterfront homes, the science confirmed that “residential development probably does not have major adverse effects on shoreline resources.” AR 5652. Nor do they address the statutory requirement that the County and Ecology show that the generic buffers “shall provide a level of protection to critical areas ... **necessary** to sustain shoreline natural resources.” RCW 36.70A.480(6). The Growth Board’s failure to address this standard in light of those unchallenged facts was reversible error. In particular, it was the Board’s failure to address the terms “necessary” and “protect,” combined with no consideration of the existing regulatory regime required by the WAC Guidelines (WAC 173-26-186(8)(d)(iii)), that render its decision clear error.

Here, as demonstrated above, the Board erroneously interpreted the SMA as supporting the WAC’s (1) “no net loss” standard and (2) a requirement to “restore” the shorelines (Decision at 31-34), then concluded that (3) the generic buffers satisfied “no net loss.” Decision at 44-45, 69-70. The Board, therefore, was operating under an incorrect standard and did not review the generic buffer requirement to determine if it was

*necessary to protect* shoreline ecology based upon actual conditions, including existing regulations. RCW 36.70A.480(6); *see also* WAC 173-26-186(8)(b)(i) (“regulations and mitigation standards” must be designed and implemented “in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property.”).

The prejudice of such an error is readily apparent: a buffer that is large enough to restore or enhance previously degraded areas will be larger than necessary to maintain existing conditions. Jefferson County’s claim that no court has ever found a standardized buffer unlawful is demonstrably false,<sup>7</sup> and provides no basis upon which to uphold buffers that have not been reviewed under the correct standard or actual conditions.

There is new information, of course, on shoreline conditions and studies of buffers, as Ecology contends. Ecology Resp. Br., p.13 However, the information is not sufficiently detailed to monitor impacts over time to assess “no net loss.”<sup>8</sup>

OSF’s complaint is with the (1) quality and depth of the information, (2) the failure to acknowledge the lack of study of actual impacts combined with ignoring studies that show no documented correlation between perceived impacts and actual condition, and (3) no consideration in the

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<sup>7</sup> *See Swinomish Tribal Comm’ty v. WWGMHB*. 161 Wn.2d 415, 432, P.3d 1198 (2008).

<sup>8</sup> *See* Declaration of Leann Ebe McDonald dated February 19, 2016, ¶¶ 12, 14, 15.

scientific studies to the efficacy of existing regulations. *See* WAC 173-26-186(8)(d)(iii). Without such, the information is not truly new or improved, but merely cumulative.

On the first, the fact remains that the County adopted its generic buffers based on a limited record, which was only intended to “characterize, in a general manner, the ecosystem processes that shape and influence conditions along each reach of the County’s shoreline.” Final Shoreline Inventory and Characterization Report – Revised (2008) (“Inventory”), at 1-2; AR 00003464-65. Indeed, due to gaps in data and the general nature of the characterization study, the Inventory cautioned that, “in many cases,” determining the actual conditions of a shoreline property “will require additional, site-specific/time-specific data and/or analyses.” *Ibid.*

Addressing the second, what Ecology reads as “confirmation” that freshwater science applies to marine areas because the functions between the two systems – freshwater and marine – are the same, is in fact an unproven, “working hypothesis.” *See* Declaration of Kim Schaumberg dated March 15, 2016, ¶ 4. When tested, that hypothesis is not true because the functions of the two types of shorelines differ remarkably (*Ibid.*, ¶¶ 27-36) and there are significant gaps in the studies (*Id.*, ¶ 16, ¶ 23). The absence of an original study on marine shorelines (*Ibid.* ¶ 12), and reliance on synthesized science with its limits (*Id.*, ¶¶ 14-19) is telling and not cured by

how many studies are cited, many totally out of context (e.g., Midwest feed lot studies), AR 000003855, AR 000002909-10.

Turning to the third contention, Ecology says OSF cites “no authority for the proposition that a justification can meet its SMA obligations by deferring to non-SMA regulations.” Ecology Resp. Br., p.12. That is not OSF’s position. The SMP WAC Guidelines require analysis of the effectiveness of the existing regulatory regime – which neither Ecology nor the County completed. It is inconceivable that the involved government entities believe they can impose 150-foot buffers without considering if existing, less onerous regulations can protect shoreline functions and values over time.

**G. The SMP Imposes Unconstitutional Conditions on New Development**

1. OSF’s Facial Constitutional Claims Are Justiciable

OSF has properly raised a justiciable facial constitutional challenge to the SMP under the special application of the doctrine of unconstitutional conditions as set forth in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).<sup>9</sup> A facial challenge

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<sup>9</sup> Jefferson County’s confusion about “as-applied” and “facial” takings arises from the fact that those terms have been used to denote both the posture of the case and the categories of tests that will be applied. Properly used (and as used herein), those terms refer to the procedural posture of a claim. See *Peste v. Mason County*, 133 Wn. App. 456, 471-72, 136 P.2d 140 (2006). But, over the years, Courts have also used the term “facial” when it should say “categorical,” and used “as applied” for the proper term “partial” or “ad hoc,” which terms refer to the specific legal tests under which a court must adjudicate a takings claim. See *Manufactured Hous. Communities of Wash. v. State*, 142 Wn.2d 347,

alleges that the ordinance, on its face, cannot be applied constitutionally under any set of facts. *Robinson v. City of Seattle*, 119 Wn.2d 34, 50 (1992). Facial regulatory takings claims ripen immediately when the challenged ordinance is enacted. *See, e.g., Guimont v. Clarke*, 121 Wn.2d 586, 606 n.8 (1993); *Margola Assocs. v. Seattle*, 121 Wn.2d 625, 646-47 n.8 (1993); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 340 n.23 (2005); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)). The “final decision” requirement “has no application” to a facial claim because “a facial challenge by its nature does not involve a decision applying the statute or regulation.” *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1117 (9th Cir. 2011); *see also Peste*, 133 Wn. App. at 472-74 (reaching merits of landowner’s facial takings challenge while declining to consider his as-applied challenge as unripe because there was no final decision).

The facial nature of OSF’s challenge does not minimize the importance or justiciability of the issue. *See City of Los Angeles, Calif. v. Patel*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 400, 190 L.Ed.2d 288 (2015) (Courts regularly rule on facial challenges under a diverse array of constitutional provisions.). And contrary to Respondents’ claims, Washington courts have

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P.2d 1 (1993). Here, all parties agree that OSF’s claim is “facial” in posture, asserting a challenge under the well-recognized *Nollan* and *Dolan* regulatory takings tests.

long-recognized the viability of a facial takings claims brought under *Nollan* and *Dolan*. See, e.g., *Margola Assocs. v. Seattle*, 121 Wn.2d 625, 647, 854 P.2d 23 (1993) (analyzing facial takings claim under *Nollan*); *Orion Corp. v. State*, 109 Wn.2d 621, 653, 747 P.2d 1062 (1987) (same); *Kitsap Alliance of Property Owners v. Cent. Puget Sound Growth Management Hearings Board*, 160 Wn. App. 250, 263-64, 255 P.3d 696 (2011) (reaching merits of facial *Nollan/Dolan* challenge in Growth Management appeal).

2. The SMP's Buffers Are Imposed as Conditions on Development, Are Subject to the Unconstitutional Conditions Doctrine

Respondents' argument that the SMP's buffers do not qualify as development conditions subject to *Nollan* and *Dolan* is baseless. This very issue has been decided against them on multiple occasions. See *Dolan*, 512 U.S. at 393-94 (invalidated a stream buffer as an unconstitutional condition); *KAPO*, 160 Wn. App. at 273 (Holding that a critical area buffer imposed as a mandatory condition on a development permit "must comply with the nexus and rough proportionality tests."); *HEAL*, 96 Wn. App. at 533, (Critical area regulations "must comply with nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications."). Moreover, none of the Respondents have an answer for the fact that the buffer requirement demands that property owners surrender a recognized, valuable interest in real property

as a condition for permit approval, nor do they respond to case law holding that a dedication can be achieved through restrictions on a public document. *See Nollan*, 483 U.S. at 833 n.2; *id.* at 859 (Brennan, J., dissenting) (dedication achieved via a deed restriction). The SMP's mandatory buffer requirement constitutes a textbook exaction.

3. The Public Trust Doctrine Does Not Create Any Public Ownership in Private Upland Property

The suggestion that the public trust doctrine vests ownership of private upland property in the public – not the owners – is absurd. Broadly stated, the public trust doctrine recognizes that certain waters must remain open to the public for commerce, navigation, fishing, bathing, and related activities, regardless of who owns the submerged land. *PPL Montana, LLC v. Montana*, 132 S Ct 1215, 1234 (2012); *see also Caminiti v. Boyle*, 107 Wn.2d 662, 669, 732 P.2d 989 (1987). Historically, the public rights established by the doctrine have ended at the water's edge. *Orion Corp.*, 109 Wn.2d at 639 (Holding that the geographical scope of the public trust doctrine extends at least to the tidelands and shorelands that the state held title to at the time of statehood); *Caminiti*. 107 Wn.2d at 666-67 (same); *see also Chelan Basin Conservancy v. GBI Holdings Co.*, No. 33196-2-III, Slip op. at 6-8 (June 14, 2016) (same). There is simply no authority supporting the claim that the doctrine should be extended beyond that well-settled demarcation line, creating

public entitlements to private upland property. *Orion Corp. v. State*, 109 Wn.2d at 660-62, 640 n.9 (1987) (Recognizing that a regulation expanding the public trust beyond its historic scope could give rise to a taking).

Moreover, the doctrine is inapplicable here. The doctrine operates to preserve the public's rights by placing limits on the sovereign's authority to transfer its interest in submerged or submersible lands into exclusive private ownership. *Illinois Central Railroad Co. v. Illinois*, 146 US 387 (1892).

4. The SMP's "Starting Point" Buffer Scheme Violates Nollan/Dolan/Koontz

Ecology's argument that the SMP imposes its standard 150-foot buffers as a "starting point" directly implicates – and subverts – the purpose of the nexus and proportionality tests. First, a violation of the unconstitutional conditions doctrine occurs at the moment the government makes an unlawful demand of the permit applicant. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 390; *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1421-22 (1989) (The unconstitutional conditions doctrine is violated "when government offers a benefit on condition that the recipient perform or forego [sic] an activity that a preferred constitutional right normally protects from government interference."). Second, as explained in *Koontz*, requiring the government to demonstrate nexus and proportionality at the time a demand is made is essential to how the doctrine protects an

individual's rights. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 2588, 133 S. Ct. 2586, 2594-95, 2599, 186 L. Ed. 2d 697 (2013).

As written, the SMP circumvents this constitutional safeguard by imposing oversized buffers as a “starting point” exaction on all new development without first showing nexus and proportionality between the standard buffer and the proposed development. If an owner objects to the size of the buffer, the SMP requires the landowner to carry the burden (and cost) of proving that a smaller buffer will mitigate for any impacts. This burden-shifting strategy violates *Nollan* and *Dolan*. Just as the government cannot extinguish property rights by legislative fiat, it cannot enact an ordinance offloading its constitutional burden onto landowners. Indeed, a violation of the unconstitutional conditions doctrine occurs the moment the demand is made, thus government must satisfy nexus and proportionality *before* imposing an exaction.

The fact that the SMP allows for minor variances<sup>10</sup> in the buffer size does not defeat the facial nexus and proportionality challenge. In *Citizens Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 668, 187 P.3d 786 (2008), King County imposed a mandatory condition on all new

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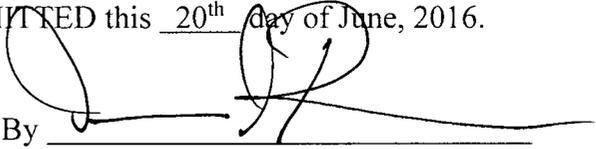
<sup>10</sup> The alleged “flexibility” is not meaningful. See Declaration of Dennis A. Schultz dated February 19, 2016, ¶¶ 17-23. See also Declaration of Barbara Blowers dated February 26, 2016, ¶¶ 7-9 (Ex.A); Declaration of Leann Ebe McDonald dated February 19, 2016, ¶¶ 23-27.

development requiring that rural landowners set aside vegetation conservation areas of between 35%-65% of their lot size. . Regardless of the variability in size, the Court held that the condition violated the rough proportionality test because the conservation area was imposed based on factors unrelated to the impacts of the proposed development. The same holds true here. If a landowner seeks to vary the generic buffer, the SMP only allows for minimal adjustments to the prescriptive buffers, and reductions are permitted without regard to nexus and proportionality (which burden is unlawfully placed on the homeowner). JCC § 18.22.270(6), JCC § 18.22.350(1), JCC § 18.22.460.

### III. CONCLUSION

This Court should reverse the Decision approving the SMP Update and award attorney fees under the Equal Access to Justice Act, RCW 4.84.350.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of June, 2016.

By 

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**CERTIFICATE OF SERVICE AND MAILING**

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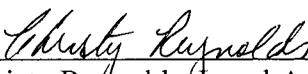
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Declared under penalty of perjury under the laws of the State of  
Washington at Bainbridge Island, Washington this 20<sup>th</sup> day of June, 2016.

  
\_\_\_\_\_  
Christy Reynolds, Legal Assistant



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June 20, 2016

By Priority U.S. Mail

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Washington State Court of Appeals – Div. II  
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Tacoma, WA 98402-4454

Re: *Olympic Stewardship Foundation, et al. v. Washington State Department of Ecology, et al.* (Jefferson County Superior Court, Cause No. 15-2-00084-4)  
Court of Appeals Case No. 47641-0-II

Dear Clerk:

Enclosed for filing in the above-captioned matter please find the original of **Reply Brief of Petitioners Olympic Stewardship Foundation, et al.** Also enclosed is a face sheet to be conformed and returned in the stamped, self-addressed envelope provided. Thank you..

Sincerely,

DENNIS D. REYNOLDS LAW OFFICE

Christy A. Reynolds  
Legal Assistant

cc: All Counsel (by email and mail)

DDR/cr

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