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CASE NO. 63646-4-I

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

CITIZENS FOR RATIONAL SHORELINE PLANNING and  
RONALD T. JEPSON

Appellants,

v.

WHATCOM COUNTY and  
WASHINGTON STATE DEPARTMENT OF ECOLOGY

Respondents.

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**APPELLANTS' REPLY BRIEF**

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## I. INTRODUCTION

In its response, Ecology overstates its statutorily limited role in the development and adoption of a local government's shoreline master program ("SMP") in an attempt to show that local SMPs constitute state law and are not subject to RCW 82.02.020. In fact, it is the local government that has primary authority to develop its SMP. Moreover, once adopted, the SMP becomes part of the local government's development regulations.

Ecology then attempts to marginalize the local government's development authority by overstating the degree to which its SMA guidelines dictate the substance of the SMP. Contrary to Ecology's claims, however, these guidelines actually provide the local government with considerable latitude as it develops its SMP. As such, local SMPs are the product of considerable local discretion.

Ecology tries to downplay the fact that its own SMA guidelines dictate that local SMPs comply with RCW 82.02 by claiming that that particular provision of the guidelines is meaningless. On the contrary, that provision clearly reflects the fact that SMPs are local laws, subject to RCW 82.02.020.

Finally, Ecology goes to great lengths to distinguish between critical area regulations crafted under the GMA and shoreline master programs crafted under the SMA, while ignoring the fact that the regulations at issue—Whatcom County's shoreline setbacks—are nothing more than the County's critical area buffers.

Because Whatcom County's SMP (particularly the shoreline setbacks provision) constitutes local regulation, not state law, Appellants respectfully request that this Court reverse the Skagit County Superior Court's decision to the contrary and remand the matter for further proceedings.

## II. ARGUMENT

### A. Ecology has overstated its statutorily limited role in the development and adoption of a local SMP in a strained attempt to cast local SMPs as state law.

The issue in this case is whether or not a local government's SMP is a local law. In its response, Ecology argues that Appellants have "marginalize[d] the state's central role in master program adoption as well as the state's substantial responsibilities with regard to shoreline permitting and enforcement." Resp. at 10. Actually, Appellants have just argued that local laws are local laws. The SMA's statutory limitations on Ecology's actions as they relate to the development, adoption, and enforcement of a local government's SMP are simply frosting on the legal cake.

#### 1. The SMA vests the local government with the primary authority to develop its SMP.

SMP development is an inherently local activity. The SMA expressly vests the local government with the primary authority to develop its SMP. RCW 90.58.080(1) ("Local governments shall develop or amend a master program for regulation of uses of the shorelines of the state

consistent with the required elements of the guidelines adopted by the department . . . .” (emphasis added)).<sup>1</sup> This local control enables the local government to tailor its SMP to local shoreline conditions and circumstances. *See* WAC 173-26-171(3)(a). Indeed, as Ecology concedes, the SMA is simply a framework; local circumstances are addressed at the local level. *See* Resp. at 28.

Compared to the local government, Ecology’s role in the development of an SMP is minimal. *See* RCW 90.58.050 (“The department shall act primarily in a supportive and review capacity”); RCW 90.58.080. Indeed, the facts presented by this appeal underscore the local nature of SMP development. Whatcom County spent over three years developing its SMP. *See* Appellants’ Br. at 2–4. The regulatory provisions set forth in that SMP reflect the policy choices of Whatcom County’s elected officials. *See id.* While Ecology may have been involved as a member of the Technical Advisory Committee, that limited role does not supplant Whatcom County’s primary authority to develop its shoreline regulations.

**2. The SMA guidelines provide substantial discretion to the local government as it develops its SMP.**

In an attempt to persuade this Court of its influence over the regulatory provisions of a local government’s SMP (and to counter

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<sup>1</sup> While Ecology may have the authority to develop a local SMP if a local government fails to act, that authority is not implicated on these facts.

Appellants' argument that development of an SMP is comparable to the development of a critical areas ordinance), Ecology states that "local governments are required to follow Ecology guidelines in developing their master programs" and that "local governments deviate from the guidelines at their peril." Resp. at 12. What Ecology fails to mention is that these guidelines actually provide local governments with considerable latitude and discretion as they develop their SMPs.

For instance, the "authority and purpose" section of the SMA guidelines expressly states that "[i]t is the intent of this chapter to provide minimum procedural requirements as necessary to comply with the statutory requirements while providing latitude for local government to establish procedural systems based on local needs and circumstances." WAC 173-26-010 (emphasis added).

Similarly, the "general policy goals" section states that the "guidelines are designed to assist local governments in developing, adopting, and amending master programs that are consistent with the policy and provisions of the act." WAC 173-26-176(1) (emphasis added).

Lastly, the "authority, purpose and effects" section states that the "guidelines allow local governments substantial discretion to adopt master programs reflecting local circumstances and other local regulatory and nonregulatory programs related to the policy goals of shoreline management as provided in the policy statements of RCW 90.58.020, WAC 173-26-176 and 173-26-181." WAC 173-26-171(3)(a) (emphasis added). This should come as no surprise given the fact that local SMPs

are supposed to be tailored to the unique shoreline conditions present in any given jurisdiction.

Those sections of the SMA guidelines that address the specific regulatory requirements of a local government's SMP do so in a general manner. *See, e.g.*, WAC 173-26-191; WAC 173-26-211 to 241. Of particular consequence to this appeal, the guidelines do not prescribe (or even suggest) the appropriate width for shoreline setbacks. *See, e.g.*, WAC 173-26-241 (3)(j) ("Master programs shall include policies and regulations that assure no net loss of shoreline ecological functions will result from residential development. Such provisions should include specific regulations for setbacks and buffer areas . . .").<sup>2</sup> Rather, this decision is left to the discretion of the local government. Accordingly, Ecology's ability to challenge the size of a local government's shoreline setbacks on SMA grounds is questionable.<sup>3</sup>

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<sup>2</sup> Ecology relies on the "no net loss" standard as further evidence of the prescriptive nature of the guidelines. *See Resp.* at 32. That standard, however, can be achieved in a variety of ways and does not necessitate the use of blunt, one-size-fits-all shoreline setbacks.

<sup>3</sup> Ecology could challenge a local government's shoreline setbacks on the ground that they do not provide protection equivalent to that provided by the local government's critical areas regulations, since that standard exists within the SMA and SMA guidelines. RCW 90.58.090(4); WAC 173-26-221. Such a challenge would, however, be limited to determining whether or not the setbacks are consistent with the critical areas regulations, not whether the width of those setbacks is appropriate.

**3. Ecology is limited by statute to a supporting role throughout the SMP development process.**

Ecology claims that it is “deeply involved” in the development of local SMPs. Resp. at 12. That claim, however, finds no support in the text of the SMA.

Indeed, Ecology’s role—at least as far as development is concerned—is statutorily limited to review and technical support. *See* RCW 90.58.050 (“The department shall act primarily in a supportive and review capacity with an emphasis on providing assistance to local government and on insuring compliance with the policy and provisions of this chapter.”); RCW 90.58.090. Unless a local government fails to act, Ecology has no authority over the development of that local government’s SMP. *See* RCW 90.58.070(2).

Ecology cites RCW 90.58.080(5) for the proposition that “local governments are encouraged to engage with Ecology from the earliest stages of master program planning.” That provision, however, simply states that “[l]ocal governments are encouraged to begin the process of developing or amending their master programs early and are eligible for grants from the department as provided by RCW 90.58.250, subject to available funding.” It says absolutely nothing about engaging with Ecology at any point, let alone the earliest stages of SMP planning.<sup>4</sup>

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<sup>4</sup> The SMA guidelines “encourage,” but do not require, engagement. *See* WAC 173-26-100 (noting simply that “consultation with the department is encouraged during the drafting of new or amended master programs”).

Ecology also points to the fact that local governments are required to solicit comments from Ecology before submitting an SMP for review and adoption. Resp. at 12. That the local government is required to solicit comments is simply a reflection of the state's interest in the shorelines. It does not serve to convert the local SMP to state law.

**4. Ecology's limited review and adoption authority does not transform a local SMP into state law.**

In its response brief, Ecology focuses considerable attention upon its review and adoption authority. See Resp. at 11–15. Appellants have never disputed Ecology's power to review and adopt an SMP once it has been developed by the local government. See Appellants' Br. at 10–11. What Appellants dispute is the notion that this limited review and adoption authority somehow transforms a local SMP into state law.

As Appellants pointed out in their opening brief, Ecology's review and adoption authority is strictly limited by statute. Ecology must approve a local SMP as developed by the local government unless that local SMP is inconsistent with the SMA or SMA guidelines. See RCW 90.58.090(3), (5). See also WAC 173-26-191(1)(e) ("It should be noted the ecology's authority under the Shoreline Management Act is limited to review of shoreline master programs based solely on consistency with the SMA and these guidelines.").

Ecology does not dispute this. See Resp. at 13. Instead, it states that Appellants have overlooked the discretion with which Ecology verifies such consistency. See *id.* (noting that "the determination of

whether such compliance exists is entirely within Ecology’s discretion.”). This discretion, however, is restricted by the SMA. Ecology is not entitled to reject a local SMP on any grounds it chooses. Rather, it can only reject an SMP that is inconsistent with the SMA or SMA guidelines. *See* RCW 90.58.090(3), (5).

Ecology argues that its 13 pages of required revisions to the Whatcom County SMP demonstrate its control over the substantive provisions of that SMP. *Resp.* at 13. Not one of those revisions, however, modified Whatcom County’s shoreline setbacks—the regulatory provisions at the heart of Appellants’ challenge. *See* CP 77–89.<sup>5</sup> Those provisions were drafted by the County, at the County’s discretion.

A local SMP does not become state law by virtue of Ecology’s limited review and adoption powers. On the contrary, once a local SMP is adopted, it becomes part of the local government’s development regulations. *See* RCW 36.70A.480. *See also* WAC 173-26-010 (“RCW 36.70A.480 provides that the goals and policies contained in a local shoreline master program shall be considered an element of the local

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<sup>5</sup> With regard to the Whatcom County SMP’s buildable area limitations, WCC 23.50.07(K)(2)—another uniform development regulation that Appellants have challenged as violative of RCW 82.02.020—there appears to be some confusion on Ecology’s part as to Ecology’s actual role in that provision’s formation. At various times throughout its brief, Ecology argues that it “added” or “inserted” this provision. *See* *Resp.* at 2, 9, 32. At other times, it argues that it merely “modified” this provision. *See* *Resp.* at 13–14. In fact, it is the latter. *See* CP 78 (identifying Ecology’s proposed revision to WCC 23.50.07(K)). Moreover, the minor revision (going from “at least 2,500 square feet” to “not more than 2,500 square feet”) appears to do no more than harmonize WCC 23.50.07(K)(2) with the immediately preceding WCC 23.50.07(K)(1). Ecology’s housekeeping revision does not change the fact that this provision was developed by Whatcom County.

comprehensive plan required by the Growth Management Act. All other portions of the local shoreline master program, including the use regulations, are considered a part of the local development regulations required by the Growth Management Act.” (emphasis added)); WAC 173-26-020(8), (30). Such regulations fall squarely within the scope of RCW 82.02.020.

**5. Similarly, Ecology’s limited permit review and approval authority does not convert a local SMP into state law.**

Ecology alleges that Appellants have “substantially diminish[ed] the state’s role with regard to implementation and enforcement of approved master programs.” Resp. at 15. It claims that it has “direct review and final approval authority over two of the three types of permits available for shoreline development.” This review and approval authority is not as significant as Ecology suggests.

Ecology’s review and approval authority is limited to conditional use and variance permits. *See* RCW 90.58.140(10). These permits represent the exception rather than the rule when it comes to shoreline development.

Most shoreline development is permitted under the local government’s substantial development permit program. This program is established and administered by the local government pursuant to the local SMP. RCW 90.58.140(3); WAC 173-27-020. As Appellants discussed in their opening brief, Ecology has no authority whatsoever over the issuance

of substantial development permits. Appellants' Br. at 12–13; *Twin Bridge Marine Park, L.L.C. v. Dep't of Ecology*, 162 Wn.2d 825, 835–36, 175 P.3d 1050, 1054 (2008) (“However, no similar statute gives Ecology direct review authority for local government substantial development permits. . . .”). Ecology does not dispute this. *See* Resp. at 15.

Instead, Ecology mistakenly relies on the fact that it has appeal authority over the local government's decision to issue a substantial development permit in support of its ultimate conclusion that “*all* shoreline permitting decisions . . . receive some degree of vetting by state hands.” Resp. at 15 (emphasis in original). On the contrary, the after-the-fact appeal authority granted by RCW 90.58.180 can hardly be said to confer any meaningful vetting opportunity to Ecology. Once approved by the local government, a substantial development permit is presumptively valid. If Ecology appeals that permit, Ecology bears the burden of demonstrating that the local government issued it in error. *See* RCW 90.58.140(7) (“In any review of the granting or denial of an application for a permit as provided in RCW 90.58.180 (1) and (2), the person requesting the review has the burden of proof.” (emphasis added)). Under these circumstances, Ecology is no better position than any other permit opponent. The fact remains that local governments have sole authority over the issuance of substantial development permits. Ecology's after-the-fact appeal authority does nothing to alter “the legislature's clear division of authority between state and local government.” *Twin Bridge Marine Park, L.L.C.*, 162 Wn.2d at 835–36, 175 P.3d at 1054.

Ecology also claims that Appellants have conflated the local government's "administration" of its SMP with the "development, adoption, implementation, and enforcement of master programs." This claim completely overlooks the fact that the local government develops its SMP, enforces its SMP, and has sole authority over the primary permit issued under the SMP.

In sum, an SMP is developed by the local government, largely at the local government's discretion. While Ecology has the authority to review and adopt the local government's SMP, that authority is limited by statute. Once adopted, the SMP becomes part of the local government's development regulations. The local government then has the sole authority to administer the most common type of development permit available under the SMP. Thus, a local government's SMP is clearly a local regulation, not a state law. It is subject to RCW 82.02.020.

**B. Ecology's SMA guidelines, which expressly incorporate RCW 82.02, are not incompatible with the SMA.**

While Ecology's SMA guidelines grant the local government considerable latitude in the development of its SMP, they are unequivocal as to the applicability of RCW 82.02:

The policy goals of the [SMA], implemented by the planning policies of master programs, may not be achievable by development regulation alone. Planning policies should be pursued through the regulation of development of private property only to an extent that is consistent with all relevant constitutional and other legal limitations (where applicable, statutory limitations such as

those contained in chapter 82.02 RCW and RCW 43.21C.060) on the regulation of private property.

WAC 173-26-186(5) (emphasis added).<sup>6</sup> This provision requires that the regulatory provisions of the local government's SMP be consistent with RCW 82.02.

Despite its plain and unambiguous language, Ecology claims that "WAC 173-26-186 does not 'expressly incorporate' RCW 82.02.020." Resp. at 23. According to Ecology, this guideline "merely states that master program planning is subject to relevant legal limitations." Resp. at 23. Ecology, however, has overlooked the subsequent parenthetical, which identifies RCW 82.02 as one of the "relevant legal limitations." Ecology's abridged reading of this guideline should be dismissed by this Court.<sup>7</sup>

Ecology argues in the alternative that even if WAC 173-26-186 were to incorporate RCW 82.02—which it plainly does—that that incorporation is legally meaningless because Ecology does not have the

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<sup>6</sup> Along similar lines, the subsection that precedes WAC 173-26-186(5) amplifies the fact that local governments cannot use the regulatory provisions of their local SMPs to trample the rights of property owners. *See* WAC 173-26-186(4) ("The planning policies of master programs (as distinguished from the development regulations of master programs) may be achieved by a number of means, only one of which is the regulation of development. Other means, as authorized by RCW 90.58.240, include, but are not limited to: The acquisition of lands and easements within shorelines of the state by purchase, lease, or gift, either alone or in concert with other local governments; and accepting grants, contributions, and appropriations from any public or private agency or individual. Additional other means may include, but are not limited to, public facility and park planning, watershed planning, voluntary salmon recovery projects and incentive programs.").

<sup>7</sup> Ironically, Ecology stated earlier in its brief that "local governments deviate from the guidelines at their peril." Resp. at 12. Ecology's abridged reading of WAC 173-26-186(5) suggests that this standard applies in one direction only.

power to administratively amend the SMA. *See Resp.* at 24. This particular argument is based on an assumption (which is supported by neither the SMA nor the SMA guidelines) that a local SMP is state law. As such, it does little more than beg the ultimate question before this Court.<sup>8</sup>

Assuming for the sake of argument that local SMPs were to constitute state law (and thus fall outside the scope of RCW 82.02.020), Ecology offers no plausible explanation for WAC 173-26-186's incorporation of RCW 82.02. Presumably, that is because a plausible explanation does not exist under those hypothetical circumstances. This absence of a plausible explanation further undermines Ecology's contention that SMPs are state law.

Appellants contend that SMPs have always constituted local regulation, not state law. That said, Appellants would also point out that Ecology's incorporation of RCW 82.02 into the SMA guidelines may be the product of the legislature's 2003 amendments to the SMA, which paved the way for local governments to incorporate purely local critical area regulations—regulations that are subject to RCW 82.02.020—within SMPs.

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<sup>8</sup> Ecology also argues that *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007) is inapposite because “there is no preexisting agency policy involved in this matter.” In fact, there is, and it is set forth in WAC 173-26-186(5) (incorporating RCW 82.02). Because Ecology's current regulatory interpretation (that SMPs are not subject to RCW 82.02) is diametrically opposed to its preexisting policy (that SMPs are subject to RCW 82.02) and clearly a byproduct of this litigation, it should be afforded no deference by this Court. *Sleasman*, 159 Wn.2d at 646, 151 P.3d at 994.

In 2003, the legislature enacted ESHB 1933, thereby amending certain provisions of the SMA and transferring authority over all critical areas within shoreline jurisdiction from the GMA to the SMA. *See* Laws of 2003, ch. 321 (hereinafter referred to as “ESHB 1933”).<sup>9</sup> To ensure that the level of protection remained the same despite this transfer of authority, ESHB 1933 directed Ecology to approve only those SMPs that provide “a level of protection of critical areas at least equal to that provided by the local government's critical areas ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2).” ESHB 1933, § 3(4) (codified at RCW 90.58.090(4)).

Ecology’s guidelines, which were amended shortly after the legislature’s adoption of ESHB 1933, reflect this change in authority. In order to facilitate ESHB 1933’s equivalent level of protection requirement, Ecology’s amended its guidelines in order to allow for the incorporation of the local government’s critical areas regulations within that local government’s SMP. *See, e.g.*, WAC 173-26-191(2)(b) (“Shoreline master program provisions sometimes address similar issues as other comprehensive plan elements and development regulations, such as the zoning code and critical area ordinance. For the purposes of completeness and consistency, local governments may include other locally adopted policies and regulations within their master programs. For example, a local

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<sup>9</sup> The intent behind ESHB 1933 was clear: “The legislature intends that critical areas within the jurisdiction of the [SMA] shall be governed by the [SMA] and that critical areas outside the jurisdiction of the [SMA] shall be governed by the [GMA].” ESHB 1933, § 1(3).

government may include its critical area ordinance in the master program to provide for compliance with the requirements of RCW 90.58.090(4), provided the critical area ordinance is also consistent with this chapter. This can ensure that local master programs are consistent with other regulations.” (emphasis added)); WAC 173-26-221(2).<sup>10</sup>

Local critical areas regulations, which are developed by the local government in response to GMA requirements, are subject to RCW 82.02.020. *See, e.g., Citizens’ Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008).<sup>11</sup> Ecology’s incorporation of RCW 82.02 into its guidelines would appear to be a recognition of that fact.<sup>12</sup>

Whether Ecology’s incorporation of RCW 82.02 signifies the fact that local SMPs are local regulation in their entirety, or only to the extent that they incorporate local critical area regulations, Appellants’ RCW 82.02 challenge to Whatcom County’s SMP should be permitted to move forward.

**C. Ecology’s reliance on *Buechel, Orion, and Bidwell* is misplaced.**

Ecology relies on *Buechel v. Department of Ecology*, 125 Wn.2d 196, 884 P.2d 910 (1994), *Orion Corporation v. State*, 109 Wn.2d 621,

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<sup>10</sup> The incorporation of critical areas regulations was not addressed by Ecology’s prior guidelines. *See* WAC Ch. 173-16.

<sup>11</sup> Ecology does not, and cannot, dispute this. *See* Resp. at 35 (noting that “this Court’s decision in [*Citizens’ Alliance*] did find that ordinances adopted under the GMA’s planning requirements were subject to RCW 82.02.020”).

<sup>12</sup> Ecology’s prior guidelines were silent with respect to RCW 82.02. *See* WAC Ch. 173-16.

747 P.2d 1062 (1987), and *Bidwell v. City of Bellevue*, SHB No. 93-078 (Jan. 23, 1995) for the proposition that local SMPs are state law. Ecology's reliance is misplaced.

**1. Ecology fails to recognize that *Buechel* does not address the question before this Court.**

As Appellants discussed in their opening brief, *Buechel* involved the court's review of a shorelines hearings board decision upholding Ecology's denial of an application for a shoreline variance. *Buechel*, 125 Wn.2d at 198, 884 P.2d at 913. The lone issue before the court was whether or not the board's decision was arbitrary and capricious or clearly erroneous. *Id.* at 201, 884 P.2d at 914. The court was not presented with the question of whether or not a local SMP constitutes state law, let alone whether it is subject to RCW 82.02.020. Accordingly, the court's statement that the SMP at issue had been adopted "as a state regulation" was mere dicta.

Moreover, *Buechel* was decided in 1994, nine years before the legislature's 2003 enactment of ESHB 1933 and Ecology's subsequent revisions to the SMA guidelines, which allowed for the wholesale incorporation of purely local critical areas regulations into SMPs. Ecology's revised SMA guidelines also expressly incorporate RCW 82.02.020, demonstrating that SMPs—or at least the critical areas regulations incorporated within SMPs—are local regulation, not state law.

**2. The *Orion* court's agency analogy is not implicated on these facts.**

As Appellants discussed in their opening brief, the *Orion* court concluded that the state must defend Skagit County's SMP against a takings claim because in developing it, the "County acted at the instance of and, in some material degree, under the direction and control of the state." *Orion*, 109 Wn.2d at 644, 747 P.2d at 1074. Ecology argues that the *Orion* court's agency analogy is equally applicable to this appeal. Resp. at 31–32. According to Ecology, the current SMA guidelines (the guidelines under which Whatcom County developed its SMP) are just as prescriptive as the guidelines in effect when Skagit County developed the SMP on trial in *Orion*. *Id.* Ecology is mistaken.

Unlike the earlier guidelines, which "required the county to give preferences to certain uses" and "suggested that [estuaries] should be left in their natural state," *see* WAC 173-16-040(5) and WAC 173-16-050(5),<sup>13</sup> the current guidelines neither require nor suggest shoreline setbacks of any particular width. Rather, they simply state that shoreline setbacks are to provide a level of protection equal to that provided by the local government's critical area ordinances. *See* WAC 173-26-221(2). This is nothing more than a consistency requirement. The ultimate decision as to appropriate setback width is left to the local government.

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<sup>13</sup> A copy of WAC Chapter 173-16 is attached to Ecology's Response Brief as Appendix C. These regulations can also be found online at [http://www.ecy.wa.gov/programs/sea/sma/laws\\_rules/173-16.html](http://www.ecy.wa.gov/programs/sea/sma/laws_rules/173-16.html).

To bolster its argument that the current regulations are as prescriptive as the earlier regulations, Ecology also cites WAC 173-26-201(2)(c)'s "no net loss" standard and WAC 173-26-221(2)(c)(iii)(B)'s "adequate buffer zones" standard. In fact, these standards are anything but prescriptive. The "no net loss" standard is designed to provide for regulatory flexibility: so long as the local government's regulatory provisions are designed to achieve "no net loss of ecological functions," they satisfy WAC 173-26-201(2)(c). Meanwhile, the "adequate buffer zones" standard simply begs the question: What is adequate? Without more, these standards simply do not provide the level of specificity that Ecology claims.

Furthermore, the *Orion* court's agency analogy has no bearing on this appeal in light of the legislature's 2003 enactment of ESHB 1933 and Ecology's subsequent amendments to its SMA guidelines. Rather than developing shoreline setbacks as part of its comprehensive SMP update process, Whatcom County simply incorporated its preexisting critical areas regulations, WCC Chapter 16.16, into its amended SMP. *See* WCC Table 23.90.13.C (stating that the shoreline setbacks applicable in any given shoreline environment are "Per Whatcom County Critical Areas Ordinance, WCC 16.16 Buffers"). Consequently, Whatcom County's shoreline setbacks—the provisions challenged by Appellants—were not crafted pursuant to the SMA or SMA guidelines. Instead, they were crafted pursuant to the GMA.

Elsewhere in its brief, Ecology argues that there “there can be no serious comparison” between the development and adoption of critical area regulations and the development and adoption of SMPs. Resp. at 35. As Ecology points out, “the GMA does not provide for *any* state oversight of local development regulations, much less final review, modification, and approval . . . .” Resp. at 36 (emphasis in original). Thus, by Ecology’s own admission, the direction and control on which the *Orion* court based its agency analogy is wholly lacking from this case. Whatcom County did not act “at the instance of and, in some material degree, under the direction and control of the state” in developing its shoreline setbacks. Thus, *Orion* is inapposite.

**3. The board’s decision in *Bidwell* was not based on the supposed state law aspect of SMPs.**

Ecology also claims that the shorelines hearings board’s decision in *Bidwell v. City of Bellevue*, SHB No. 93-078 (Jan. 23, 1995), stands for the proposition that an SMP is state law. Resp. at 30. Ecology is wrong.

According to Ecology, the *Bidwell* board concluded that a local Bellevue ordinance must give way to the Bellevue SMP because the SMP is in actuality a state law. While the board did suggest that an SMP “is state law as well as local law,” the board’s decision did not turn on principles of preemption.<sup>14</sup> Rather, it was based on the application of a

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<sup>14</sup> While the board did state that “[a] local master program, once approved and filed by Ecology, is state as well as local law” and that “no local ordinance may override state law,” it is not clear that these statements factored into its ultimate decision.

simple interpretation provision contained within the SMP itself, which expressly stated that “When conflict arises between regulations of the Shoreline Overlay District and underlying land use districts, regulations of the Shoreline Overlay District shall prevail.” *See id.* at Conclusion of Law XII (citing BSMP 20.25E.030). Because the street setback ordinance conflicted with the City’s SMP, the board properly concluded that it had to give way pursuant to BSMP 20.25E.030. *See id.* (concluding that “[i]ncreasing the project’s intrusion into and damage to the wetland in order to reduce the variance the project required from the street setback provisions of other Bellevue land use ordinances was contrary to this provision of the City’s SMP.”).<sup>15</sup> The board’s conclusion had nothing to do with the SMP’s supposed status as a state law.

**D. The shoreline regulations at issue fall squarely within RCW 82.02.020 and related case law.**

Ecology urges this Court to limit the reach of *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002), and *Citizens’ Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008), by excluding local SMPs from the scope of RCW 82.02.020. This Court should do no such thing.

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<sup>15</sup> Even though the board concluded that the street ordinance at issue conflicted with the SMA and the City’s SMP, *see Bidwell*, SHB No. 93-078 at Conclusions of Law VIII and IX, the board went on to state that “[i]f [the City of Bellevue] intends that street aesthetics ordinances and policies should have priority over existing provisions of its Shoreline Master Program, the City must initiate an amendment to the BSMP.” *Id.* at Conclusion of Law XII. This statement, which would seem to suggest that the City could amend its SMP in a manner that was inconsistent with the SMA, further undermines Ecology’s reliance on this case.

Ecology attempts to distinguish *Isla Verde* and *Citizens' Alliance* on the ground that they deal with “purely local” regulations. *See Resp.* at 34–35. As Appellants have argued throughout their briefing, local SMPs *are* local regulations. They are developed by the local government. They are administered by the local government. They are enforced by the local government. As such, they should be subject to the limitations set forth in RCW 82.020.020.

At the very least, this Court should hold that the Whatcom County SMP’s shoreline setbacks and buildable area limitations—the provisions challenged by Appellants—are “purely local” regulations subject to RCW 82.02.020. As discussed in section II.C.2 above, Whatcom County’s shoreline setbacks are actually nothing more than the County’s critical area regulations, which have been incorporated into the SMP by reference. *See WCC Table 23.90.13.C.* Ecology concedes that critical area regulations are developed solely by the local government with no state involvement whatsoever. *See Resp.* at 36 (noting that “the GMA does not provide for *any* state oversight of local development regulations, much less final review, modification, and approval . . . .” (emphasis in original)). Ecology also concedes, as it must, that such regulations are “purely local” and subject to RCW 82.02.020. *See Resp.* at 35–36. *See also Citizens' Alliance*, 145 Wn. App. at 670, 187 P.3d at 797 (invalidating a portion of King County’s critical areas ordinance on RCW 82.02.020 grounds).

While Ecology contends that Whatcom County’s critical areas regulations are immune from RCW 82.02.020 by virtue of the fact that

they were adopted as part of Whatcom County's SMP, Ecology's contention is not supported by the law and runs counter to Ecology's own guidelines. *See* WAC 173-26-186(5). Whatcom County's critical area regulations are not immune from RCW 82.02.020 simply because they have been incorporated within the County's SMP.

Ecology suggests that Appellants' "fall-back" position would "prove inconsistent and unworkable." Resp. at 38. According to Ecology, it would "necessitat[e] the factual untangling of years of planning efforts" in order to determine whether the challenged provision was developed by the local government or "suggested" by the state. *Id.* This case demonstrates the fallacy in Ecology's logic. Whatcom County's shoreline setbacks (its critical area buffers) were developed by the local government as part of its critical area update, not as part of its SMP update. Moreover, Ecology's 13 pages of required revisions make it clear that Ecology left these provisions untouched. *See* CP 77-89. No additional factual untangling is required. Whatcom County developed its shoreline setbacks without any input from Ecology.

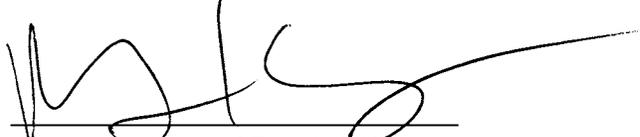
As for Ecology's patchwork argument, it is not implicated on these facts. More importantly, this Court should not exempt Whatcom County's SMP (which incorporates purely local critical area regulations) from RCW 82.02.020 on the hypothetical notion that other jurisdictions' SMPs may be exempt from that statute. Rather, this Court should evaluate Whatcom County's SMP on the facts presented in this appeal.

### III. CONCLUSION

For the foregoing reasons, SMPs constitute local regulation, not state law. As such, they are subject to RCW 82.02.020. Appellants respectfully request that this Court reverse the decision of the Skagit County Superior Court and remand the matter for further proceedings.

DATED this 9th day of December, 2009.

THE BUCK LAW GROUP, PLLC

A handwritten signature in black ink, appearing to be 'P. L. Buck', written over a horizontal line.

Peter L. Buck, WSBA #5060

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