

NO. 75457-2

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

DAVE AND NANCY HONEYWELL, dba ORCA DREAMS LLC,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent.

**RESPONDENT DEPARTMENT OF ECOLOGY'S
RESPONSE BRIEF**

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I. INTRODUCTION

During the fall and winter of 2013, contractors hired by David and Nancy Honeywell, dba Orca Dreams, LLC (Honeywell or Orca) cleared over an acre of mature riparian forest on a sensitive marine shoreline on San Juan Island. Without obtaining the required approval under the San Juan County Shoreline Master Program, Orca cut down 80 trees that provided many ecological functions in the shoreline, including habitat, water quality, erosion control, shading, and food supply. By all accounts, and as admitted by Orca, the removal of the trees was an egregious violation of the Shoreline Management Act, resulting in significant environmental harm and the potential for long term degradation of the sensitive adjacent marine environment. It is undisputed that the trees will take decades to replace. Meanwhile, Orca now enjoys a special benefit that no other complying landowners are able to obtain.

Because the Act authorizes Ecology to assess \$1000 for each violation, Ecology could have issued a penalty of \$80,000. *See* RCW 90.58.210(2). Instead, Ecology reduced the penalty to \$55,000 based on the relative sizes of the cut trees. As both the Board and the superior court found, the \$55,000 penalty is justified under the circumstances. Ecology asks this Court to affirm the Board's decision in its entirety.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether substantial evidence supports the Board's conclusion that significantly more than 55 trees were cut.
2. Whether Ecology's method of calculating the penalty was arbitrary and capricious.
3. Whether the Board erred in concluding that Ecology had discretion to consider each tree cut as a separate violation.
4. Whether the Board erred in concluding that Ecology can issue a penalty greater than \$1000.
5. Whether the \$55,000 penalty is reasonable.

III. COUNTERSTATEMENT OF THE CASE

In July 2013, David and Nancy Honeywell, through their corporation Orca Dreams, LLC, purchased their retirement property on San Juan Island. The 40-acre site faces Haro Strait on the southwestern shoreline of San Juan Island, adjacent to the entrance of False Bay. Administrative Record¹ (AR) 1578 (FF 1). False Bay is a biological preserve owned by the University of Washington and managed as a Marine Protected Area in cooperation with the Washington Department of Fish and Wildlife.

¹ Citations to "AR" are the Bates numbered pages of the Certified Appeal Board Record which were identified in the Designation of Clerk's Papers and Exhibits. Citations to "RP" refer to the Transcript of Proceedings before the Board, which were also identified in the Designation of Clerk's Papers and Exhibits, and which include the transcript page and line number. Citations to "FF" and "CL" are citations to the Board's Findings of Fact and Conclusions of Law, respectively.

AR 1597-98 (FF 39). The shoreline and waters offshore from the property are designated as a Fish and Wildlife Habitat Conservation Area, with Marine Habitat Areas for kelp, eelgrass, and shellfish, and an area with which endangered, threatened, and sensitive species have a primary association, including Chinook salmon and Orca whales. AR 1597-98 (FF 39). These marine waters are also categorized as a “shoreline of statewide significance” under the Shoreline Management Act (SMA).

RCW 90.58.030(2)(f)(iii); AR 1578 (FF 1).

The site operated as a commercial resort, and at the time of Orca’s purchase it consisted of eight cabins, three larger residences, and various outbuildings. AR 1579 (FF 4). Orca is developing the property into a family compound, which includes the construction of a new 9,247 square foot primary residence and remodeling of some of the cabins. AR 1631. Orca hired the caretaker of the property, Bob Elford,² as their realtor for the purchase. On Orca’s behalf, Mr. Elford requested a site visit with San Juan County “to determine the shoreline setback from the top of the bank” and “document existing nonconforming structure[s].” AR 1864. The site visit occurred in April 2013, prior to Orca’s purchase of the property. County planners Annie Matsumoto-Grah and Julie Thompson attended the site visit along with Mr. Elford, the Honeywells, and the Honeywell’s architect.

² Mr. Elford continues to live on the property in exchange for mowing the grass. RP at 833:6-18.

During the site visit the County staff explained that the existing natural vegetation at the top of the steep shoreline slope determined the location of the shoreline setback. The identification of the shoreline setback was relevant to Orca's plans to renovate the aged cabins. AR 1643, 1908.

Ms. Matsumoto-Grah prepared a written summary of the site visit on July 1, 2013. AR 1581(FF 7). The report referenced the prohibition on the removal of trees greater than three inches in diameter that is contained in the County's Shoreline Master Program (SMP). San Juan County Code (SJCC) 18.50.330(B)(8)³; AR 1581-82 (FF 8). Ms. Matsumoto-Grah emailed the report to Orca's architect, but she had the incorrect email address. AR 1581(FF 7). On July 17, 2013, Ms. Matsumoto-Grah emailed a copy of the report to Mr. Elford. *Id.*, AR 1909. Even though the Honeywells were anxiously awaiting the report so that their architect could "be let loose to plan," Mr. Elford testified that he never opened the email because it was sent after the closing of the property. AR 1581 (FF 7), 1862. Mr. Honeywell testified he did not see the report until after the violations were discovered. AR 1581 (FF 7).

In the fall of 2013, Orca hired a professional tree trimmer, Casey Baisch, to cut down a number of poplar trees in the property's upland area, adjacent to the driveway. AR 1582 (FF 9). Mr. Baisch also limbed up some

³ The County's SMP is codified at SJCC 18.50. The relevant code sections are in the record at AR 2109-22. Courtesy copies are attached hereto as Appendix A.

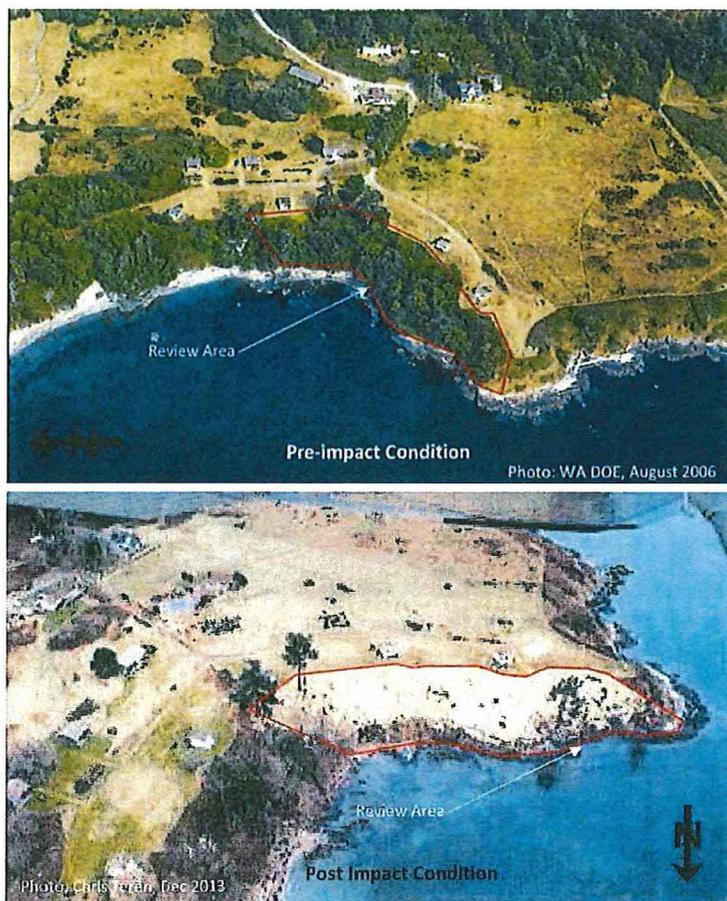
fir trees on the shoreline slope, but as a professional tree trimmer, Mr. Baisch knew about the prohibition on the removal of trees on the shoreline.⁴ RP 718:22-25. Orca instead hired Ben Engle to “trim” the shoreline slope. AR 1583 (FF 11), 1872. Mr. Engle believed that Mr. Honeywell wanted the hillside completely cleared. AR 1603 (CL 8). Beginning in the fall of 2013 and continuing through mid-December, Mr. Engle spent 26 days clearing the steep shoreline slope. AR 1584 (FF 12). Using an excavator, chainsaws, a stump grinder, and a chipper, Mr. Engle and his crew removed all of the brush, vegetation, and trees from over an acre of the slope. AR 1584-85 (FF 14, 15), 1631, 1781-1805, 1898-1900. Mr. Engle left the tree stumps, but hauled the smaller vegetation to a chipper at top of the slope. The vegetative debris that was too big to chip was burned in place on the hillside, in one of ten large burn piles that had been set. RP 750:9-15. These fires burned down to bare mineral soil.⁵ RP 936:23-25, 937: 1-6; AR 1794, 1797, 1868.

Prior to the clearing, the slope contained a densely vegetated and mature riparian forest of Scouler’s willow, red alder, Douglas fir, black hawthorn, and western hemlock, with an understory of elderberry and

⁴ During San Juan County’s investigation of the violation in December, 2013, Mr. Baisch indicated that he had advised Mr. Honeywell about the need for a tree removal permit, but Mr. Baisch later denied this at trial. AR 1871; RP 719:1-25; 720:1-18.

⁵ Orca incorrectly asserts, with no citation to the record, that “[t]here were little to no exposed soils.” Appellant’s Opening Brief at 8. The evidence clearly indicates otherwise. AR 1781-97. Had there been no exposed soils, the erosion control measures such as the placement of straw would have been unnecessary. In the absence of supporting citations, the court should not assume that Orca’s description of these matters is accurate or complete.

salmonberry. AR 1579-80 (FF 4). After the clearing, only a few fir trees remained. AR 1814, 1841-41. Ecology later determined that at least 80 trees had been cut down. Many of the trees were over 20 inches in diameter, and there was at least one which had a single trunk 36 inches in diameter. AR 1940, 1944, 1751; RP at 308:8-17.



AR 1748.⁶

⁶ The bottom photo was taken after a layer of straw was placed on top of the exposed soils at the site in response to the County's emergency order. There are many additional photos of the clearing in the record, including ones that show the site before the straw was applied to stabilize the site. See AR 1781-1857.

The destruction was stopped only when the County went out to investigate the violation on December 13, 2013, in response to a citizen complaint. As evidenced by Orca's subsequent request for approval to remove additional trees immediately north of the cleared area (in front of the remaining cabins), had a citizen not complained it is likely that the clearing would have continued. AR 1957-62.

The County's code enforcement officer, Chris Laws, characterized the violation as "beyond anything I have yet to see in the County." AR 1876. Based on the size and scope of the violation, Mr. Laws took the step of contacting relevant state and federal agencies, including Ecology. AR 1588 (FF 21). The response was one of universal dismay. The Washington Department of Fish and Wildlife (WDFW) biologist who viewed the photos of the clearing stated, "[t]his has to be one of the more egregious shoreline violations I have witnessed in ten years of working along marine shorelines." AR 1888. An assistant division manager for the Department of Natural Resources expressed, "This is distressing—the most egregious destruction of marine riparian habitat I've seen in years." AR 1883. Ecology staff characterized the violation as "the worst violation I have seen in 25 years" and an "extraordinary situation." RP 396:12-18; 432:2-15. In short, Orca's unauthorized clearing of the shoreline was unprecedented.

Orca suggests that Mr. Engle took advantage of the Honeywells by doing unauthorized work during their absence from the property, but there is no evidence in the record to support this assertion.⁷ Instead, as testified by Mr. Honeywell, the Honeywells were disappointed in Mr. Engle's lack of progress because they wanted the work on the slope completed by January 2014, when construction on their primary residence was scheduled to start. RP 1020:14-25. Coincidentally, Mr. Engle's hours markedly increased after Mr. Honeywell's November visit. AR 1904. The Honeywells never contested Mr. Engle's bills, which totaled approximately \$50,000. AR 1583 (FF11); RP 759:6-8.

The Honeywells were not living on the property when the clearing took place, but Mr. Honeywell observed Mr. Engle's work in progress when the Honeywells visited the property in October and again on November 19–23, 2013. AR 1584 (FF13). During the October visit, Mr. Engle asked to use Mr. Honeywell's tractor to pull large pieces of trees up the slope. *Id.* During the November visit, Mr. Honeywell observed Mr. Engle cutting the shoreline vegetation to within a foot of the ground and working the slope with an excavator. RP 1019:17-23; AR 1584 (FF 13), 1899. Significantly, at no time did Mr. Honeywell tell Mr. Engle to stop the clearing or instruct Mr. Engle to limit the scope of his work. AR 1584 (FF 13); RP 1019:24-25, 1020:1-13.

⁷ In fact, Mr. Engle testified that he had "lots of work" during this time. RP 746:15-22.

The Board concluded that Orca was in a position to prevent most of the damage to the shoreline:

Mr. Honeywell saw one of Mr. Engle's crew using an excavator on the shoreline slope. This, if nothing else, should have caused Mr. Honeywell to stop the work on the ground and talk with Mr. Engle about the scope of work for the project. *If Mr. Honeywell had taken this action and if he truly did not intend for the trees to be cut on the site, much of the damage still could have been prevented. He did not and the clearing continued.*

AR 1603 (CL 8) (emphasis added).

The clearing of the shoreline slope created the potential for serious erosion, which was particularly acute because it was the middle of winter. In addition to posting a stop work order on December 13, 2013, the County directed the contractors to stabilize the slope.⁸ AR 1870. As observed by the County and Ecology on subsequent site visits on December 16 and December 19, 2013, initial attempts to stabilize the slope were inadequate. AR 1586 (FF 17), 1589-90 (FF 24-25), 1837-39. Shortly thereafter, Orca Dreams hired a construction contractor, Mike Carlson, to stabilize the slope. Mr. Carlson documented continuing problems with erosion of the historically unstable slope. AR 1592 (FF 29), 1920.

⁸ The County issued an Emergency Order on December 17, 2013, citing violations of the San Juan County Shoreline Master Program (SMP) and the County code provision that requires coverage under the NPDES Construction Stormwater General Permit for land disturbing activity greater than one acre. The County's Emergency Order also required the implementation of best management practices (BMPs) to stabilize the site. AR 1886-1887. The County subsequently issued a \$1,000 penalty to Orca for the removal of the 80 trees. AR 1591-92 (FF 28).

In addition to Ecology's two site visits in December 2013, Ecology visited the site four additional times in 2014, on May 14, May 28, June 10, and June 14.⁹ RP 78:1-25, RP 224:8-12, RP 401:9-14. During these visits, Ecology documented continued erosion of the slope. AR 1847-48; RP 256:1-25, 257:1-17. At the June 10, 2014 site visit, Doug Gresham and Paul Anderson from Ecology's Shorelands and Environmental Assistance Program conducted a site inspection and performed a stump count to determine the size, species, and number of trees that were cut.¹⁰ RP 253:22-24, 254:1-16, 305:13-15, 306:2-8, 307:1-7, 309:5-25, 401:9-14. Their stump measurements revealed the following: 11 trees in the 5-8 inch size class; 20 trees in the 9-12 inch size class; 23 trees in the 13-16 size class; and 26 trees greater than 16 inches. AR 1945, 1947.

On July 7, 2014, Ecology issued a penalty to Orca in the amount of \$55,000 under RCW 90.58.210 for violations of multiple provisions of the SMP.¹¹ AR 1925-1932. Ecology calculated the penalty by assessing a dollar amount for each cut tree based on its size, as follows:¹²

⁹ At these site visits, Ecology took photos of the site condition. AR 1840-44 (May 14, 2014); AR 1675-78 (May 28, 2014); AR 1845-57 (June 10, 2014).

¹⁰ After Ecology issued its penalty, agency staff again visited the site in 2015 to address concerns with the restoration plan that the agency had required Orca to prepare. RP 328:6-11, 382:19-25, 383:1-5.

¹¹ SJCC 18.50.060, 18.50.130, 18.50.240, 18.50.330, and SMP policies 3.4B, 3.2F. AR 1925-27.

¹² With 80 trees cut, the maximum penalty amount was \$80,000. Using the matrix, Ecology arrived at a penalty amount of \$56,000. Ecology then reduced the penalty

TABLE 4

Size Class	Trees (n)	Penalty (\$)/Tree	Penalty (\$)
5-8"	11	250	2,750
9-12"	20	500	10,000
13-16"	23	750	17,250
> 16"	26	1,000	26,000
Total	80		56,000

AR 1947.

The penalty also included a requirement to restore the shoreline. *Id.* Orca appealed the penalty to the Shorelines Hearings Board. The parties filed cross motions for partial summary judgment. AR 1424-25. In the Board's Order on Summary Judgment, the Board rejected Orca's argument that Ecology is precluded from issuing a penalty greater than \$1000.

AR 1438. The Board reserved for hearing the question of whether the cutting of each tree is a separate violation and whether the amount of the penalty was reasonable. *Id.* After a four day evidentiary hearing,¹³ the Board affirmed the penalty. AR 1604. Orca unsuccessfully challenged the Board's decision in superior court, and now Orca seeks review by this Court.

by another \$1000 by crediting the County's penalty to arrive at a final amount of \$55,000. AR 1596 (FF 35).

¹³ The hearing was conducted before a combined panel of the Shorelines Hearings Board and the Pollution Control Hearings Board, as Orca also appealed the issuance of a penalty by Ecology's Water Quality Program. The Pollution Control Hearings Board affirmed in part and reversed in part the water quality penalty and the superior court dismissed the remainder that the Board had affirmed. Ecology did not appeal the decision of the superior court.

IV. STANDARD OF REVIEW

This Court reviews the decision of the Board and not the decision of the superior court. *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994). The standard of review of the Board's order is set forth in the Washington Administrative Procedure Act. RCW 34.05.570(3) provides in relevant part:

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

...

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

....

(i) the order is arbitrary and capricious.

RCW 34.05.570(3) The Board's decision is presumed correct, and Orca bears the burden to prove otherwise. RCW 34.05.570(1)(a).

Under the "error of law" standard of subsection (d), the court engages in de novo review of the agency's legal conclusions. *Franklin Cty. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982).

However, where an agency interprets a law it administers, courts give substantial weight to the agency's interpretation. *Kitsap Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn. App. 863, 871-72, 158 P.3d 638 (2007); *Pres. Our Islands v. Shorelines Hearings Bd.*, 133 Wn.App,

503, 515, 137 P.3d 31 (2006); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004). In this case, where Orca seeks to reverse a decision on which both Ecology and the Board agree, the Court should be “loath to override the judgment of both agencies, whose combined expertise merits substantial deference.” *Port of Seattle*, 151 Wn.2d at 600.

The court will uphold the factual findings of the Board when they are supported by substantial evidence, which has been characterized as “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” *See, e.g. Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995); RCW 34.05.570(3)(e). The substantial evidence test is “highly deferential.” *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). Unchallenged findings of fact are verities on review. *See Patterson v. Superintendent of Pub. Instruction*, 76 Wn. App. 666, 674, 887 P.2d 441 (1994).

The arbitrary and capricious standard under RCW 34.05.570(3)(i) is a very narrow standard and the one asserting it “must carry a heavy burden.” *Pierce Cty. Sheriff v. Civil Serv. Comm’n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). “Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.” *Id.* In considering whether the Board’s order is arbitrary and

capricious, the Court looks at the entire record and the public policy of the Shoreline Management Act, which is to protect the state's shorelines "as fully as possible." *Herman v. Shorelines Hearings Bd.*, 149 Wn.App. 444, 457-59, 204 P.3d 928 (2009); *Buechel v. Dep't of Ecology*, 125 Wn.2d at 201-03.

V. ARGUMENT

A. **The San Juan County Shoreline Master Program Prohibits Tree Removal in the Shoreline Without a Permit**

The Shoreline Management Act was enacted due to the "ever increasing pressures of additional uses [that] are being placed on the shorelines" and impacting this "most valuable and fragile" natural resource. RCW 90.58.020. Consistent with the Act's mandate "to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines," the Act provides a cooperative program between local governments and the state in regulating shoreline uses. RCW 90.58.020; .050. While local governments are responsible for developing local shorelines master programs, the master programs do not become effective until they are approved by Ecology. RCW 90.58.090(2), (7); *Citizens for Rational Shoreline Planning v. Whatcom Cty.*, 172 Wn.2d 384, 392-93, 258 P.3d 36 (2011). Once approved by Ecology, the shoreline master programs constitute use regulations for activities within the shoreline jurisdiction and

also become part of the State Master Program, which is made up of all of the local master programs. RCW 90.58.030(3)(d), .100(1); *Buechel*, 125 Wn.2d at 203-04. The Act grants Ecology authority to enforce violations of the Act, including violations of local master programs. RCW 90.58.210; WAC 173-27-280.

The San Juan County Shoreline Master Program prohibits clearing in the shoreline setback. SJCC 18.50.060. While “normal nondestructive pruning and trimming of vegetation for maintenance purposes” is allowed, a landowner must submit a shoreline tree removal plan application for approval by the County before any trees greater than three inches in diameter at breast height (DBH) can be removed. SJCC 18.50.330(B)(8); AR 1970. In addition, the “removal of smaller trees, brush, and groundcover may be restricted in unstable shorelines.” SJCC 18.50.330(B)(8)(b).

The Shoreline Management Act authorizes penalties of \$1000 for each violation of the Act. RCW 90.58.210(2). “Each permit violation or each day of continued development without a required permit¹⁴ shall constitute a separate violation.” RCW 90.58.210(2). Similarly, WAC 173-27-280(3) states, “[t]he penalty shall not exceed one thousand dollars for each violation. Each day of violation shall constitute a separate violation.”

¹⁴ The term “permit” is defined as “any form of permission required under the act prior to undertaking activity on shorelines of the state.” WAC 173-27-250(1).

In the present case, there is no dispute that Orca failed to submit a tree removal plan before cutting the trees in the shoreline setback. Therefore, Orca's tree removal activities were a violation of the master program. Based on prior established practice and Board precedent, Ecology determined each tree cut in the shoreline without approval was a separate violation under the Act. Both the Board and superior court concluded that this was a correct interpretation of RCW 90.58.210(2). Orca, however, argues that the Board is in error and that regardless of the number of trees cut, the clearing must be considered a single violation. Orca disputes Ecology's tree count, the method that Ecology used to calculate the \$55,000 penalty, and argues that Ecology cannot assess a penalty greater than \$1000 because Orca is not a repeat violator. Last, Orca argues that the penalty is unreasonable. For reasons explained below, Orca's arguments must be rejected. As both the Board and the superior court found, Ecology's interpretation of the RCW 90.58.210 is lawful and the \$55,000 penalty is justified under the circumstances. Ecology asks this Court to affirm the Board's decision.

B. Substantial Evidence Supports the Board's Finding That the Penalty Was Justified Because More Than 55 Trees Were Cut

Orca argues that the Board's "finding that 80 trees were cut in violation of the [SMA]" is not supported by substantial evidence. Br. of

Appellant at 1. Orca both misstates the Board's findings and fails to identify the challenged finding by number in its assignment of error. *See* RAP 10.3(g). The Board did not make a specific finding regarding the number of trees cut. However, the Board concluded, based on the evidence presented, that the penalty was justified because more than 55 trees were cut. AR 1601-02 (CL 5). This conclusion is amply supported by the record. Ecology witnesses testified that approximately 80 trees were cut. RP 305:13-25, 306:1-14, AR 1925. The County also concluded that approximately 80 or more trees were cut. AR 1868. Orca's own expert report indicated that approximately 70 trees were cut. AR 1731. Thus, the Board had substantial evidence to conclude that more than 55 trees were cut.

Orca apparently means to assign error to the Board's Finding of Fact 35. Br. of Appellant at 23. Finding of Fact 35 is a comprehensive explanation of the process by which Ecology calculated the penalty, based on live testimony and exhibits presented by Ecology at the hearing. *Id.* As stated by the Board, Ecology calculated the penalty based on the number of trees cut and their size. Ecology did so because it concluded larger trees warranted a larger penalty based on the greater ecological functions such trees provide. Finding of Fact 35 is supported by the testimony of Paul Anderson, the supervisor from Ecology that performed the stump count and assisted in the calculation of the penalty. RP 305:13-25, 306:1-14, AR 1925.

Finding of Fact 35 accurately summarizes Mr. Anderson's testimony as to how Ecology arrived at the \$55,000 penalty. *Id.* Thus, there is no basis for Orca to challenge that particular finding.

Orca contends that Mr. Anderson was not qualified to conduct a tree count and did not spend enough time on the site to do so. These arguments have no merit. In addition to having a Master of Science degree in Forest Resources, Mr. Anderson is a professional biologist and a certified wetland scientist. AR 2077-79; RP at 232:9-16, 377:9-15. Mr. Anderson is eminently qualified to assess the nature of the ecological damage and restoration requirements. Mr. Anderson was accompanied by another wetland biologist from the agency, Doug Gresham, who is also an experienced restoration ecologist and similarly qualified to assess the damage to the shoreline and consider restoration requirements. RP at 368:22-24. Together, they carefully measured and recorded the size and species of the trees that had been cut. As explained by the Board, Ecology was able to determine the trees that Orca had cut because the cut marks were fresh, and they were distinguishable from trees cut in the distant past.¹⁵ AR 1594 (FF 33). Together Mr. Anderson and Mr. Gresham counted 80 stumps in excess of three inch diameter at

¹⁵ There is no evidence in the record to support Orca's assertion that Ecology included old stumps in its stump count, nor does Orca cite to any. *See* Br. of Appellant at 15. In contrast, the Board made a specific factual finding that Ecology was able to distinguish between old and new cuts, which finding is now a verity on appeal. *See* AR 1994 (FF 33); *Patterson*, 76 Wn. App. at 674.

breast height (DBH). *Id.* Contrary to Orca's assertion, Ecology did not guess how many trees were cut.

Orca also asserts that Ecology misidentified the trees species of the stumps. Br. of Appellant at 15. This is an irrelevant statement because the master program does not distinguish between species. It is also inaccurate, as the testimony indicates that Mr. Anderson and Mr. Gresham were exercising their best professional judgment in identifying some of the cut trees as fir trees.¹⁶

With regard to the length of time Mr. Anderson spent on site, Orca fails to argue why more time was needed or why this disqualifies his testimony. Counting stumps does not necessarily require substantial time. However, Mr. Anderson did not rely solely on his site visit. Mr. Anderson examined historical aerial photographs dating as far back as 1946, and consulted soil site indices that provide information on the expected size of a Douglas fir based on the soil conditions at the site. AR 1594 (FF 33), 1858-

¹⁶ "Q: How did you get nine?

A: Based on the stumps that we saw. They appeared to have barks characteristic of conifer trees. One of the characteristics of Douglas firs is it's got what's called bacon bark. You can scrape it with a knife, and it's got this dark and light pattern. And that's our best guess of what the tree was.

Q: So you're guessing that there were nine fir trees?

A: An educated guess. Doug is an experienced restoration ecologist, and that's what we put down for species." RP at 368:14-24.

1861, 2068-69. Mr. Anderson looked at LiDAR imaging¹⁷ of the shoreline before it was cut to get an estimate of the tallest tree (76 feet) and the average height of trees (39 feet) and that were cut. RP at 264:20-25, 265:1-23. Mr. Anderson also observed the shoreline forest immediately adjacent to the cleared hillside as an indication of what the cut slope looked like before being cleared. *See, e.g.*, AR 1841. Based on all of this information, Ecology determined that the trees Orca cut were part of a mature riparian forest at least 80 years old. AR 1594 (FF 33).

Orca asserts that the Board should have disregarded the evidence presented by Ecology in favor of a report developed by Orca's consultant, Vicki Jackson. Br. of Appellant at 21. In making this argument, Orca fails to identify a basis for reversal of the Board's decision. This Court's review is limited to the bases set forth in the APA, and in particular, whether there is substantial evidence to support the Board's decision. The fact that there may be contrary evidence in the record is not a basis for reversal. *Callegod v. Wash. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997). In any case, the evidence of Orca's consultant actually supports the Board's conclusion. Orca elected not to call Ms. Jackson as a witness at the hearing and relies solely on Ms. Jackson's written report. This report was hearsay

¹⁷ LiDAR is similar to sonar and radar, except that it uses beams of light set at a very high frequency to generate very precise images of topography and elevation. RP at 264:20-25, 265:1-23.

and did not have to be considered by the Board. Regardless, Ms. Jackson's stump count was, as she stated in her own report, "very similar to the WDOE results" AR 1731. Ms. Jackson counted 32 red alder stumps (*Alnus rubra*); 2 black hawthorn stumps (*Crataegus douglasii*); 2 crabapple stumps (*Malus fusca*); 2 Douglas fir stumps (*Pseudotsuga menziesii*); 33 willow stumps¹⁸ (*Salix scouleriana*); and 2 trees of unknown origin. Br. of Appellant at 22. Ms. Jackson also counted an additional 9 oceanspray stumps (*Holodiscus discolor*) and 10 red elderberry stumps (*Sambucus racemosa*). *Id.* Ms. Jackson counted 92 stumps in total. Even when excluding the oceanspray and elderberry, which arguably could be considered shrubs, Ms. Jackson counted a total of 73 tree stumps.

Thus, under either Ecology's count or Ms. Jackson's, Ecology's penalty of \$55,000 is justified, and in fact, substantially less than it could have been, had each tree been assigned a \$1000 value. Ms. Jackson's tree count is reflected in the Board's conclusion that "[b]ased on either the Honeywells own expert's report or Ecology's site visit and calculations, significantly more than 55 trees of regulated size were cut. This is an adequate basis to support the \$55,000 civil penalty based on \$1000 per violation authorized by the statute." AR 1601-02 (CL 5). Orca fails to meet

¹⁸ Orca unsuccessfully argued at hearing and at the superior court that the willows should not be counted as regulated trees, but Orca has abandoned this argument on appeal. Br. of Appellant at 21.

its burden in proving that Finding of Fact 35, and the Board's decision affirming the \$55,000 penalty, is not supported by substantial evidence.

C. The Method by Which Ecology Calculated the Penalty Is Lawful and Within Ecology's Enforcement Discretion

Orca argues that the Board erred in affirming the penalty because this is the first time Ecology had developed a matrix to assess a penalty based on relative tree size. Orca's argument must be rejected because the method by which Ecology determined the penalty amount is lawful and within the agency's enforcement discretion.

Contrary to Orca's argument, this is not the first time Ecology has calculated a penalty based on the finding that each tree cut is a separate violation. Ecology drew from its recent experience with a tree-cutting violation on Liberty Lake near Spokane. *Id.*; RP 305:13-21, 378:12-15, 432:16-25; *see also Frank v. Dep't of Ecology*, No. 11-003, 2011 WL 3398573 (Wash. Shorelines Hearings Bd. July 29, 2011). In *Frank*, Ecology assessed a penalty of \$15,000 for 15 trees cut in the shoreline buffer.¹⁹ Relying on *Frank*, Ecology assessed the Orca penalty based on the number of trees cut. RP 305:13-21, 378:12-15, 432:16-25. However, rather than

¹⁹ During the *Frank* trial, Ecology was unable to prove that all 15 trees were located within the shoreline buffer. *Frank*, 2011 WL 3398573, at *7, 8. The Board also found that Ecology did not consider all the relevant circumstances. *Frank* at *10. For these reasons, the Board reduced Ecology's penalty to \$3,000. While Ecology's penalty was not affirmed in its entirety, the Board did affirm a penalty amount greater than \$1000. Apparently, however, no party challenged Ecology's per tree basis for the penalty. AR 1600 (CL 2, n. 9).

assessing the maximum \$1000 for each tree cut as it did in *Frank*, Ecology developed a matrix based on the size of trees that had been cut, taking into account the fact that smaller trees generally have less ecological value, and take less time to replace. Ecology assessed \$250 for each tree in the 5-8 inch size class (11 trees); \$500 for each tree in the 9-12 inch size class (20 trees); \$750 for each tree in the 13-16 size class (23 trees); and \$1000 for each tree greater than 16 inches (26 trees). AR 1945, 1595-96 (FF 35). Using this tiered approach, Ecology calculated a reduced penalty of \$55,000.²⁰ AR 1595-96 (FF 35).

To prove that Ecology's use of the matrix was arbitrary and capricious, Orca must show that Ecology's actions were willful and unreasoning, without consideration and in disregard of the attendant facts and circumstances. *Herman*, 149 Wn. App. at 459. Contrary to Orca's assertion, Ecology's use of the matrix was the opposite of arbitrary. The matrix was based on the premise that the ecological functions that a tree provides corresponds with its size, and as such the penalty was specifically tailored to the violation. Meanwhile, the temporal impact from the loss of the trees will continue to persist until the trees can be replaced. Based on

²⁰ With 80 trees cut, the maximum penalty amount was \$80,000. Using the matrix, Ecology arrived at a penalty amount of \$56,000. Ecology then reduced the penalty by another \$1000 by crediting the County's penalty to arrive at a final amount of \$55,000. AR 1595-96 (FF 35).

Ecology's uncontroverted testimony, the Board concluded that this will take decades. AR 1599 (FF 40). Ecology's use of the matrix is a lawful exercise of the agency's enforcement discretion, and is consistent with the policy of the Act, which is to protect the shorelines "as fully as possible." *Herman*, 149 Wn.App. at 457-59; *Buechel*, 125 Wn.2d at 201-03.

D. The Board Correctly Affirmed Ecology's Conclusion That Removal of Each Tree Was a Separate Violation

As described above, Ecology based its penalty on the number of trees that Orca cut in the shoreline. In affirming Ecology's approach, the Board considered the provisions in the master program that are related to vegetation and tree removal in the shoreline. AR 1600-01 (CL 3). The master program allows clearing and grading activities in the shoreline only if associated with an approved shoreline development, and only when conducted landward of the setback. *Id.*; SJCC 18.50.060(A). A landowner cannot remove trees beyond what is required to build a single family residence, unless the landowner obtains an approved tree removal plan. *Id.*; SJCC 18.50.330(B)(8). Removal of trees smaller than 3 inches at breast height is allowed unless the shoreline is unstable. *Id.* Orca does not contend that it needed to remove 80 trees in order to construct a single family residence, and there is no dispute that Orca did not submit a tree removal plan. AR 1601 (CL 4). The evidence indicates that the shoreline is unstable.

AR 1602 (CL 7). Accordingly, the Board correctly concluded: “Given these facts, and the applicable SJCMP, Ecology’s conclusion that the removal of each tree greater than three inches was a separate violation of the SJSMP is legally supportable.”²¹ AR 1601 (CL 4).

Orca contends that the Board’s conclusion is contrary to the statute. Orca argues that the cutting down of 80 trees and clearing the shoreline constituted a single act for which Ecology was limited to assessing a \$1000 penalty. Orca’s arguments must be rejected for the reasons stated below.

The Legislature has granted Ecology an “extensive, statutorily mandated role in the development and administration of [shoreline master programs.]” *Citizens for Rational Shoreline Planning v. Whatcom Cty.*, 155 Wn.App. at 943. Such authority includes the ability to enforce master programs through the imposition of civil penalties. RCW 90.58.210 provides, in relevant part:

(1) Except as provided in RCW 43.05.060 through 43.05.080 and 43.05.150, the attorney general or the attorney for the local government shall bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the shorelines of the state in conflict with the provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter.

(2) Any person who shall fail to conform to the terms of a permit issued under this chapter or who shall undertake

²¹ It should also be noted that a penalty in excess of \$1,000 is justified due to the multiple violations of the master program, and the multiple days on which they occurred. *See, e.g.*, AR 1437-38.

development on the shorelines of the state without first obtaining any permit required under this chapter shall also be subject to a civil penalty not to exceed one thousand dollars for each violation. Each permit violation or each day of continued development without a required permit shall constitute a separate violation.

RCW 90.58.210. Ecology promulgated a rule to implement its authority to issue civil penalties under the Act. It provides, in relevant part:

(1) A person who fails to conform to the terms of a substantial development permit, conditional use permit or variance issued under RCW 90.58.140, who undertakes a development or use on shorelines of the state without first obtaining a permit, or who fails to comply with a cease and desist order issued under these regulations may be subject to a civil penalty by local government. The department may impose a penalty jointly with local government, or alone only upon an additional finding that a person:

(a) Has previously been subject to an enforcement action for the same or similar type of violation of the same statute or rule; or

(b) Has been given previous notice of the same or similar type of violation of the same statute or rule; or

(c) The violation has a probability of placing a person in danger of death or bodily harm; or

(d) Has a probability of causing more than minor environmental harm; or

(e) Has a probability of causing physical damage to the property of another in an amount exceeding one thousand dollars.

....

(3) Amount of penalty. The penalty shall not exceed one thousand dollars for each violation. Each day of violation shall constitute a separate violation.

WAC 173-27-280. Ecology's rule also states that "[e]nforcement action by the department or local government may be taken whenever a person has

violated any provision of the act or any master program or other regulation promulgated under the act.” WAC 173-27-260.

It is undisputed that Orca did not have authorization to cut any of the 80 trees. Thus, each tree that Orca cut was in violation of the master program. Orca alleges that the imposition of a separate penalty for each cut tree exceeds the agency’s authority under the Act. However, the Act does not prohibit Ecology from considering each cut tree as a single violation, nor does Ecology’s interpretation conflict with the statute. Accordingly, the agency has discretion to interpret what constitutes a separate violation. This is especially true where the agency’s interpretation is based on administrative precedent and is consistent with its prior interpretations of the Act. *See In re Sehome Park Care Ctr., Inc*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995).

Significantly, Ecology’s implementing rules dictate that “[t]he *choice of enforcement action and the severity of any penalty should be based on the nature of the violation, the damage or risk to the public or to public resources, and/or the existence or degree of bad faith of the persons subject to the enforcement action.*” WAC 173-27-260 (emphasis added).

Consequently, the Board has always considered the nature of the violation in evaluating the amount of the penalty. *See e.g. Correll v. Dep’t of Ecology*, No. 03-023, 2004 WL 839243 (Wash. Shorelines Hearings Bd. Apr. 14,

2004); *Herman*, 2005 WL 1935493; *Kinzel v. Dep't of Ecology*, No. 05-007, 2007 WL 2155479 (Wash. Shorelines Hearings Bd. Jul 20, 2007); *Frank*, 2011 WL 3398573. This weighs heavily in favor of Ecology's interpretation that each tree cut is a separate violation. *In re Sehome*, 127 Wn.2d at 780 ("In interpreting a statute, we accord great weight to the contemporaneous construction placed upon it by officials charged with its enforcement, especially where the Legislature has silently acquiesced in that construction over a long period"). Further, Ecology's interpretation is consistent with the policy directive in the Act to protect the shorelines "as fully as possible." It would be contrary to the policy of the Act to limit Ecology's ability to distinguish between a violator that cuts down a single tree in the shoreline and a violator that cuts down a hundred. Such a constrained interpretation would also be inconsistent with the legislative directive to construe the Act liberally "to give full effect to the objectives and purposes for which it was enacted." RCW 90.58.900.

In summary, the Board did not err in affirming Ecology's interpretation of the Act as authorizing a separate penalty for each tree cut in the shoreline.

E. Orca Incorrectly Contends That Ecology Can Issue a Penalty Greater Than \$1000 Only to Repeat Violators That Ignore Prior Warnings

Orca argues that it was unlawful under the Regulatory Reform Act for Ecology to issue a penalty without first giving Orca a chance to comply, and because Orca is not a repeat violator. Br. of Appellant at 29-32, 39-41. However, Orca's arguments regarding the Regulatory Reform Act should not be considered as Orca raises this issue for the first time on review.²² RAP 2.5(a). In any event, the penalty complies with RCW 43.05.070 and the parallel requirement in WAC 173-27-280(1)(d). Orca's argument that Ecology can only issue a penalty greater than \$1000 to repeat violators must also be rejected.

RCW 43.05.070 allows Ecology to issue a penalty without first issuing a notice of correction if certain circumstances are met. One such circumstance is if "the violation has a probability of causing more than minor environmental harm." RCW 43.05.070(3). Ecology has promulgated a rule implementing RCW 43.05.070, which similarly authorizes the department to impose a penalty without first issuing a notice of correction, upon a finding that a person "has a probability of causing more than minor

²² Orca asserts that RCW 90.58.210 "was born in 1995 when the legislature adopted the Regulatory Reform Act." Br. of Appellant at 29. In fact, the current iteration of RCW 90.58.210(2) has been on the books since 1986. *See* Laws of 1986 Ch. 292, sec 4. RCW 90.58.210(1), which was originally codified in 1971, was amended in 1995 to include the phrase "Except as provided in RCW 43.05.060 –43.05.080 and 43.05.150." *See* Laws of 1995, Ch. 403 Sec 637.

environmental harm.” WAC 173-27-280(1)(d). In its Order on Summary Judgment, the Board concluded that the Orca violations had a “probability of causing more than minor environmental harm.” AR 1437. As the Board restated in its final order, “[r]emoval of a mature riparian forest from a windswept unstable slope with poor soil creates significant environmental harm and results in the potential for long term degradation of the sensitive adjacent marine environment.” AR 1602 (CL 7). The Board’s findings were based on extensive evidence presented by Ecology at the hearing, which Orca did not rebut. Therefore, Ecology lawfully issued Orca a penalty under RCW 43.05.070(3) and WAC 173-27-280(1)(d).

Orca also argues that Ecology can assess a penalty greater than \$1000 only against repeat violators. There is no support for this argument in RCW 90.58.210, RCW 43.05.060, .070, or WAC 173-27-280. While it is true that the agency can assess a penalty without first issuing a notice of correction for repeat violations, it is not the only basis on which the agency can do so. As explained above, and as articulated in WAC 173-27-280(1)(a)-(e), Ecology can issue a penalty without prior notice under other circumstances and without regard to whether the violator is a repeat violator. These include circumstances such as this case, where the violation has a probability of causing more than minor environmental harm. RCW 43.05.070, WAC 173-27-280(1)(d). Nor does the law limit the amount of the

penalty that can be issued under such circumstances, except that the penalty cannot exceed \$1000 for each violation. RCW 90.58.210(2); WAC 173-27-280(3). Orca's arguments that Ecology could not issue a penalty greater than \$1000 must be rejected.

F. The Board Correctly Concluded that the \$55,000 Penalty is Reasonable

The Board conducts a de novo review of penalties that Ecology issues under the Act. WAC 461-08-500. The Board's analysis is based on three primary factors: (1) the nature of the violation; (2) the prior history of the violator; and (3) the remedial actions taken by the penalized party. WAC 173-27-260; *Herman*, 2005 WL 1935493 at *9; *Kinzel*, 2007 WL 2155479, at *9; *Frank*, 2011 WL 3398573, at *9. The Board also considers whether the penalty will influence behavior, promote compliance, and deter future violations, both by the current violator and by others in the same field.²³ *Frank*, 2011 WL 3398573 at *9.

1. The violations were egregious and caused irreparable damage

In this case, the nature of the harm caused by the violations is well-documented, undisputed, and serious. As conceded by Orca, this was not

²³ Orca argues that Ecology should not have considered compliance by others as a factor. Orca Br. at 38. The overwhelming evidence is that the penalty was driven by the environmental damage caused by the violation. RP 453:13-20. *See also* AR 1602 (CL 6) ("Here, the most compelling factor is the nature of the violation.")

normal trimming or pruning.²⁴ AR 1601 (CL 4); Br. of Appellant at 8. Over an acre of mature marine riparian forest was completely razed, and then the shoreline was “put to torch.” AR 1876. The forested slope provided many ecological functions including such water quality functions as thermal cover and microclimate; erosion control; sedimentation control; and food supply for aquatic organisms, including endangered salmon.²⁵ As observed by the Board:

Vegetation slows stormwater runoff, stabilizes soils, provides nutrient uptake, and reduces siltation. An intact forest canopy and forest duff layer intercepts rainfall and dissipates its energy, allowing the rainfall to percolate in the soil. This process removes contaminants from the stormwater and prevents them from washing down the slope and into the water. Removal of vegetation can increase the instability of a slope. Here, the potential for destabilization is even more significant, given that the shoreline slope was already unstable.

...

The forest that was cut was a mature marine riparian forest stand. It had included significant amounts of vegetation overhanging the beach and water. Overhanging vegetation provides shade to the beach and nutrients to juvenile salmon in the form of leaf litter and insects. The removal of overhanging vegetation and exposure of the upper tidal area to solar radiation has been linked to forage fish spawn mortality.

²⁴ In arguing that the penalty is not reasonable, Orca asserts that maintenance brush trimming is not regulated by the County. Br. of Appellant at 32-33. This is irrelevant because the penalty is not based on any brush that was cut. The penalty is based solely on the 80 trees that Orca cut that were of regulated size.

²⁵ A comprehensive discussion of the impacts can be found in Ecology’s Recommendation for Enforcement and the hearing testimony. *See* AR 1943-1945; RP 277-300.

AR 1597-98 (FF 38, 39). It will take many years for these functions to be replaced. AR 1599 (FF 40).

The habitats impacted by the violations underscore its significance. The shoreline and adjacent waters are designated as a Fish and Wildlife Conservation Area with Marine Habitat Areas for kelp, eelgrass, shellfish, and an area with which endangered, threatened, and sensitive species have a primary association, including Chinook salmon and Orca whales. AR 1598 (FF 39). The site is located near the False Bay biological preserve, which is managed as a protected area. *Id.* The marine waters at the bottom of the hillside are shorelines of statewide significance in which the preservation of the natural character of the shoreline is identified as a top priority.

RCW 90.58.020. Thus, the violations here were serious.

2. Orca's failure to stop the violations and the benefit Orca obtained from the violations outweigh Orca's lack of prior enforcement history

There is no dispute that Orca has no prior history of environmental violations. However, as discussed above, Orca was in a position to stop the majority of the damage and failed to do so. This fact outweighs any lack of prior violations. Further, based on constraints in the master program, the extent of the clearing that occurred at the Orca site likely would have never been approved had Orca sought permission. Thus, Orca obtained a benefit no other law-abiding landowner can have.

Under the County's shoreline master program, clearing and grading activities are only allowed in the shoreline if associated with approved shoreline development, and only if conducted landward of the required building setback from shorelines. SJCC 18.50.060(A). Land clearing is allowed only as necessary for the construction for a single family residence. If a property owner wants to remove more trees, a tree removal plan must be submitted. SJCC 18.50.330(B)(8). The master program prohibits excessive removal or topping of vegetation, and restricts vegetation removal on unstable slopes such as this one. SJCC 18.50.140, .330(B)(8). In addition to meeting other requirements of the master program, the tree removal plan is required to show that the existing vegetation will be retained to visually screen structures as viewed from the shoreline, public roads, and adjoining properties. SJCC 18.50.330(B)(8).

The Honeywells' new house is clearly visible from the shoreline, and the Honeywells' residence, as well as some of the cabins, now have an unobstructed view of the water. AR 1775, AR 1840-43. By violating the law, Orca obtained a benefit no other law-abiding landowner can get. As observed by the Board:

The clearing work had the end result of creating unobstructed water views from cabins six, seven, and eight, and from the northwest side of the Honeywells' new house. Intended or not, this was a special benefit to the Honeywells. Real estate with shoreline views is valued at a premium. Other

landowners that comply with the SJSMP will not be able to obtain this type of unobstructed view. One purpose of a shoreline penalty is to level the playing field and encourage compliance with the law. *Herman v. Ecology*, p.19, SHB No. 04-019, citing *Lewis v. Dep't of Ecology*, SHB No. 95-053 (1997); *Pacific Topsoils, Inc. v. Ecology*, p.34, PCHB Nos. 07-046, 07-047 (2008).

AR 1603 (CL 9).²⁶

Contrary to long-standing Board precedent and agency interpretation, Orca argues that a civil penalty is not meant to deter others from unlawful conduct. In support of this position, Orca incorrectly relies on *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). In that case, the issue was whether the plaintiffs had standing to bring a citizen suit under the federal Clean Water Act to seek civil penalties where the facility had subsequently complied with its permit. The court concluded the plaintiffs had standing because the penalties serve to deter future violations. *Friends of the Earth*, 528 U.S. at 186. While the court was focused on the particular facility at issue in the case, the court did not opine one way or another as to the deterrent effect on other violators. In contrast, deterrence of future violations, by the violator and others, is a well-established penalty factor under the Act.

²⁶ These views can be seen in photos at AR 1840-43 and AR 1775.

Further, even assuming for the sake of argument that Orca is correct in its assertion that a civil penalty could only be used to deter the violator against which the penalty is assessed, this makes Ecology's penalty no less appropriate in this case. In *Friends of the Earth*, the court found that a penalty could be issued even after the facility had come into compliance, in order to deter future violations. *Id.* at 186. In the same vein, Ecology's penalty ensures that any subsequent tree removal activities contemplated by Orca will be lawfully conducted.

3. The nature of the harm in this case outweighs all other penalty factors, including Orca's post-violation attempts to restore the shoreline

Two months after the violations were discovered, the County required Orca to prepare a shoreline restoration plan subject to Ecology's approval. AR 1914, AR 1591-92 (FF 28). The evidence demonstrates Orca delayed in hiring a qualified consultant to prepare a shoreline restoration plan. Orca initially relied on Mr. Carlson, the contractor, and Mr. Hanson, who was hired for his expertise regarding golden paintbrush, a small endangered wildflower that lives on the property at the top of the hillside and elsewhere (but not on the cleared hillside). AR 1592-94 (FF 30-32). Neither Mr. Carlson nor Mr. Hanson indicated any intent to fully restore the hillside with appropriately sized trees; that only happened with Ms. Jackson's involvement when she was hired in the early summer of 2014. *Id.*; RP at 321:8-12. At the hearing Ecology testified that a restoration plan typically takes 30 days to prepare. RP at 394:11-18. In this case, Orca

submitted the first draft of its restoration plan to Ecology in August 2014, a full six months after the violations were discovered, and only after Ecology ordered Orca to do so. AR 1597 (FF 37).

While Orca will point out that some of the willows are regenerating, and that grass covers the site, it is undisputed that it will take decades for the shoreline ecological functions to be fully replaced. AR 1599 (FF 40). Where the environmental harms cannot be remedied, this factor alone outweighs consideration of all other penalty factors, and on this basis alone the \$55,000 penalty is justified. *See, e.g., Harmon v. Dep't of Ecology*, No. 05-025, at *5 (citing *Ted Rasmussen Farms, LLC v. Dep't of Ecology*, No. 01-174, 2002 WL 1650496 at *8 (Wash. Pollution Control Bd. June 27, 2002)).²⁷ The Board appropriately concluded that the \$55,000 penalty is reasonable under the facts of this case.

Last, Ecology is compelled to address Orca's assertion that Ecology "vilified" the Honeywells in the news and that Ecology penalized them because they won the lottery. Br. of Appellant at 41. In addition to being irrelevant, Orca's assertions are wholly unfounded and should be disregarded by the Court. "In the absence of clear evidence to the contrary, courts presume that public officers properly discharge their duties . . ." *Kohli v. Gonzales*, 473 F.3d 1061, 1068 (9th Cir. 2007) (internal citations omitted).

²⁷ While these are cases decided by the Pollution Control Hearings Board, the Shorelines Hearings Board considers the same penalty factors. *See Frank*, 2011 WL 3398573, at 17-18 (citing *Douma v. Dep't of Ecology*, No. 00-019, 2005 WL 996167 (Wash. Pollution Control Hearings Bd. Mar. 30, 2005)).

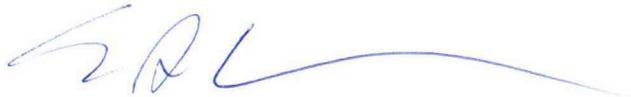
Ecology's policies require the agency to issue a press release for all major penalties and enforcement actions, and this case was no exception. AR 1933. As to Ecology's motivation in issuing the penalty, Ecology manager Josh Baldi testified that the decision to penalize Orca had nothing to do with their winning the lottery and everything to do with the nature of the violation. RP at 452:23-25, 453:1-25, 454:1-6, 455:22-25, 456:1-19. Orca's unfounded allegations are irrelevant and do not warrant reversal of Ecology's penalty.

VI. CONCLUSION

Orca fails to meet its heavy burden in proving that the Board's decision is unlawful. Orca's request to eliminate or reduce the penalty to \$1000 should be rejected. Ecology respectfully requests the Court to affirm the \$55,000 penalty.

RESPECTFULLY SUBMITTED this 26th day of September 2016.

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APPENDIX A

COMPREHENSIVE PLAN

SECTION B, ELEMENT 3

**SHORELINE MASTER PROGRAM
(Goals and Policies)**

February 2002

(Ord. 13-2001 Amendments approved by the Wash. Dept. of Ecology, 2-14-2002)

"Our islands have exceptional natural beauty and healthy diverse ecosystems surrounded by pollution-free marine waters. . . . As careful stewards of these islands, we conserve resources, preserve open space, and take appropriate action to assure healthy land and marine environments. . . . The unique character of our shorelines is protected by encouraging uses which maintain or enhance the quality of the shoreline environment."

ELEMENT 3
SHORELINE MASTER PROGRAM

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3.4.B Clearing and Grading

Purpose:

Clearing and grading are activities associated with developing property for a particular use including commercial, industrial, institutional, recreational, and residential uses. Clearing and grading activities may increase erosion, siltation, runoff/flooding, change drainage patterns, reduce flood storage capacity and damage habitat. Clearing activity that impacts shoreline resources is regulated in order to advance the policies of the SMA.

Policies (3.4.B.1-2):

1. Limit clearing and grading to the minimum necessary to accommodate shoreline development and minimize adverse impacts to water quality and wildlife habitat by means which include but are not limited to site planning, bank stabilization and erosion, sedimentation and drainage control.
2. Design clearing and grading activities with the objective of maintaining density of ground coverage, and natural diversity in species, age, and vegetation.

3.4.C Environmental Impacts

Purpose:

The SMA is concerned with the potential environmental impacts of shoreline uses and modification activities. Shoreline and water quality degradation caused by the introduction of contaminants such as petroleum products, chemicals, solid waste, domestic or industrial wastewater and sediment from erosion are issues which must be addressed.

Policies (3.4.C.1-5):

1. Minimize the adverse environmental impacts of shoreline development.
2. Require that shoreline use and development minimize erosion, siltation, and interference with the natural shoreline geophysical processes.
3. Shoreline use which generates sewage or other waste should have waste disposal facilities of approved design and sufficient capacity to prevent any adverse environmental impacts, particularly on water quality.
4. Provide for the treatment of surface water runoff either on-site or through shared facilities, including the use of setbacks, buffers, or retention/detention ponds.
5. Conduct dredging and filling so as to minimize impacts to water quality consistent with applicable State law and only for the purposes allowed by this Master Program.

3.4.D Environmentally Sensitive Areas

Purpose:

Environmentally sensitive areas are those areas with especially fragile or hazardous biophysical characteristics and/or with significant environmental resources as identified by the County in the Environmentally Sensitive Area Overlay District (*see* Land Use Element Section 2.5.B) or by a scientifically documented inventory accomplished as part of the SEPA/NEPA process or other

- 18.50.230 Dredging.
- 18.50.240 Forest management.
- 18.50.250 Industrial development.
- 18.50.260 Institutional development.
- 18.50.270 Landfills and solid waste disposal.
- 18.50.280 Log transfer sites and facilities and log storage.
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- 18.50.310 Ports and water-related port facilities.
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- 18.50.330 Residential development.
- 18.50.340 Transportation facilities.
- 18.50.350 Utilities.

Article IV. Shoreline Modification Regulations

- 18.50.360 General shoreline modification activities.
- 18.50.370 Shoreline restoration and beach enhancement.

Article V. Severability and Effective Date

- 18.50.380 Severability.
- 18.50.390 Effective date.

Article I. General Provisions

18.50.010 General.

A. Title. This chapter of the Unified Development Code, together with Element 3 of the Comprehensive Plan and SJCC 18.80.110(I)(3), 18.80.110(J)(4) and 18.80.120(D), is the Shoreline Master Program for San Juan County, Washington.

B. Short Title. The short title of this chapter and Element 3 of the Comprehensive Plan is the "SJC Shoreline Master Program" or "SMP."

C. Authority.

1. The provisions of this section are adopted pursuant to RCW 90.58.140(3) and 90.58.200, the Shoreline Management Act of 1971 ("SMA"), Chapters 173-26 and 173-27 WAC, Element 3 of the Comprehensive Plan, and this Chapter 18.50 SJCC, the San Juan County Shoreline Master Program.

2. Liberal Construction. As provided in RCW 90.58.900, the SMA is exempted from the rule of strict construction, and it and the Shoreline Master Program shall be liberally construed to give full effect to the purposes, goals, objectives, and policies for which the SMA and this program were enacted and adopted, respectively.

3. Conflicting Policies or Regulations. The SMA and the Shoreline Master Program comprise the basic state and local law regulating the use of shorelines in the County. Unless specifically provided otherwise, in the event that provisions of the Shoreline Master Program conflict with other applicable state or local policies or regulations, the SMA and Shoreline Master Program shall control. Where the Shoreline Master Program is more restrictive than other applicable state or local policies or regulations, the SMA and Shoreline Master Program shall control. Where other applicable state or local policies or regulations are more restrictive than the SMA and/or Shoreline Master Program, such policies or regulations control.

D. Official Map.

1. A map, known officially as the "San Juan County Designated Shoreline Environments Map," (a.k.a., the "map," "official map") is part of the SJC Master Program. The map shows all areas of San Juan County under the jurisdiction of this master program and the official designated environments as provided by the Shoreline Element of the Comprehensive Plan for all affected lands and waters.

2. There is only one official copy of the map, which is maintained by the San Juan County planning department. Amendments to the map are promptly recorded on the official copy.

3. At the time of adoption of this master program, one copy of the official map will be filed with the County auditor. In addition, at least once every 12 months following the filing of the initial map with the auditor, the planning department will make an additional copy of the official map and file it, with the initial map, in the auditor's office. If the official map has not been amended during the 12-month period, the planning department may file with the auditor a notice to that effect, signed by the planning director, in lieu of a copy of the official map. The purpose of these annual filings is to create an official record of the changes occurring over time in the designated shoreline environments. At no time will the copies of the map filed with the auditor be altered in any way.

F. Archaeological sites located both in and outside the shoreline jurisdiction are subject to Chapter 27.44 RCW (Indian Graves and Records) and Chapter 27.53 RCW (Archaeological Sites and Records) and must comply with Chapter 25-48 WAC (Archaeological Excavation and Removal Permit) as well as the provisions of this code.

G. Archaeological excavations are allowed subject to the provisions of this master program and applicable state laws.

H. Identified historical or archaeological resources must be considered in park, open space, public access, and site planning, with access to such areas designed and managed so as to give maximum protection to the resource. (Ord. 2-1998 Exh. B § 5.4.2)

18.50.060 Clearing and grading.

A. Clearing and grading activities are allowed only if: (1) associated with an approved shoreline development; (2) conducted only landward of a required building setback from shorelines; and (3) disturbed areas not converted to another use within one year are replanted with native species. Replanted areas shall be maintained so that the vegetation is fully reestablished within three years of planting.

B. Normal nondestructive pruning and trimming of vegetation for maintenance purposes is not subject to these clearing and grading regulations. In addition, clearing by hand-held equipment of invasive nonnative shoreline vegetation or plants listed on the state noxious weed list is allowed, provided native vegetation is promptly reestablished in the disturbed area.

C. Tree removal permitted in a development approval is exempt from the regulations in this section.

D. Commercial timber harvest conducted in accordance with an approved forest practices permit is exempt from the regulations in this section. (Ord. 2-1998 Exh. B § 5.4.3)

18.50.070 Environmental impacts.

A. The location, design, construction, and management of all shoreline uses and activities must protect the quality and quantity of surface and ground water adjacent to the site and must adhere to the policies, standards, and regulations of applicable water quality management programs and related regulatory agencies.

K. Herbicides and pesticides may not be applied to or allowed to directly enter water bodies or wetlands unless approved for such use by the appropriate agencies. (Ord. 2-1998 Exh. B § 5.4.4)

18.50.080 Environmentally sensitive areas.

When located in an environmentally sensitive area overlay district or its buffer, shoreline uses and activities must be located, designed, constructed, and managed in accordance with the applicable requirements of SJCC 18.30.110 through 18.30.160; environmentally sensitive areas. (Ord. 2-1998 Exh. B § 5.4.5)

18.50.090 Parking.

A. Parking is prohibited on structures located over water.

B. Parking facilities must be designed and landscaped to minimize adverse impacts upon adjacent shoreline and abutting properties. Landscaping must consist of native vegetation and be planted before completion of the parking area in such a manner that plantings provide effective screening within three years of project completion and through maturity of the species.

C. Parking facilities serving individual buildings on the shoreline must be located landward from the principal building being served, except when the parking facility is within or beneath the structure and adequately screened or where an alternative location would result in a lesser environmental impact on the shoreline.

D. Parking facilities for shoreline activities must provide safe and convenient pedestrian circulation within the parking area and to the shoreline.

E. Parking facilities shall be designed to prevent contamination of water bodies from surface water runoff. Parking facilities must be provided with the best available technologies and include a maintenance program that will assure proper functioning of all drainage facilities to prevent degradation of surface water quality. (Ord. 2-1998 Exh. B § 5.4.6)

18.50.100 Public access.

A. Except as provided in subsections (B) and (C) of this section, shoreline substantial development permits or conditional uses shall provide public access where any of the following conditions are present:

5. Signs not in conformance with performance standards in SJCC 18.40.370 through 18.40.400. (Ord. 2-1998 Exh. B § 5.4.9)

18.50.130 Vegetation management.

A. All shorelines shall be protected from degradation caused by the modification of the land surface within the shoreline area or the adjacent uplands.

B. Development on shorelines that have been identified as unstable or sensitive to erosion in SJCC 18.30.120 is not allowed unless the applicant demonstrates that the development is located a sufficient distance from the shoreline to prevent contributing to its instability.

C. Restoration of any shoreline that has been disturbed or degraded shall be done with native plant materials with a diversity and type similar to that which originally occurred on-site.

D. Commercial nursery stock used in the restoration of disturbed or degraded shorelines shall, at maturity, emulate the previously existing vegetation in size, structure, and diversity.

E. Beach enhancement is prohibited:

1. Within spawning, nesting, or breeding habitat;
2. Where littoral drift of the enhancement materials will adversely effect adjacent spawning grounds or other areas of biological significance;
3. If it will interfere with the normal public use of the navigable waters of the state; or
4. Where the activity is in support of a nonconforming use unless such activities are necessary to maintain shoreline stability and the natural ecology.

F. Aquatic weed control shall only occur when native plant communities and associated habitats are threatened or where an existing water dependent use is restricted by the presence of weeds. Aquatic weed control shall occur in compliance with all other applicable laws and standards.

G. The control of aquatic weeds by hand pulling, mechanical harvesting, or placement of aqua-screens, if proposed to maintain existing water depth for navigation, shall be considered normal maintenance and repair and therefore exempt from the requirement to obtain a shoreline substantial development permit. (See the exemption procedures in SJCC 18.80.110(F).)

H. The control of aquatic weeds by derooting, rotovating, or other method which disturbs the bottom sediment or benthos shall be a substantial development unless it will maintain existing water depth for navigation in an area covered by a previous permit for such activity. In that case, it shall be considered normal maintenance and repair.

I. Use of herbicides to control aquatic weeds shall be prohibited except where no reasonable alternative exists and weed control complies with all state rules and regulations. (Ord. 2-1998 Exh. B § 5.4.10)

18.50.140 View protection.

A. Shoreline uses and activities must be designed and operated to avoid blocking or adversely interfering with visual access from public areas to the water and shorelines except as provided for in SJCC 18.50.130.

B. The vacation of public road ends and rights-of-way which provide visual access to the water and shoreline may be allowed only in accordance with RCW 36.87.130 and local rules.

C. In providing visual access to the shoreline, the natural vegetation shall not be excessively removed either by clearing or by topping.

D. In order to limit interference with views from surrounding properties to the shoreline and adjoining waters, development on or over the water shall be constructed only as far seaward as necessary for the intended use.

E. Development on or over the water must be constructed of materials that are compatible in color with the surrounding area.

F. Visual shoreline access must be maintained, enhanced, and preserved on public road ends and rights-of-way. (Ord. 2-1998 Exh. B § 5.4.11)

18.50.150 Water quality.

A. During and after construction, all shoreline developments shall minimize any increase in surface runoff through control, treatment, and release of surface water runoff so that the receiving water quality and shore properties are not adversely affected. Control measures include dikes, catch basins or settling ponds, oil interceptor drains, grassy swales, planted buffers, and fugitive dust controls. All

surface water shall be retained on site unless discharge to road ditches or other drainage channels is approved in writing by the County engineer.

B. All industrial, institutional, commercial, residential, recreational, and agricultural uses shall adhere to all required setbacks, buffers, and standards for stormwater. (Refer to shoreline use and environment designation regulations for specific limits.)

C. All shoreline development must comply with the applicable requirements of the Stormwater Management Manual for the Puget Sound Basin or a County-approved program that meets or exceeds the requirements of the manual. (See also SJCC 18.60.060(B) and (C) and 18.60.070.) (Ord. 2-1998 Exh. B § 5.4.12)

Article III. Specific Shoreline Use Regulations

18.50.160 General.

A. Uses Not Identified in This SMP. Shoreline uses not specifically identified in this master program and for which regulations have not been developed will be evaluated on a case-by-case basis and shall be allowed only as conditional uses. Such use proposals will be required to satisfy the policies of the Shoreline Management Act, the goals and general policies of this SMP, and to be consistent with the character and management policies of the designated shoreline environment in which they are proposed to be located. A shoreline conditional use permit is required.

B. The use regulations in SJCC 18.50.160 through 18.50.350 specify what will be required of any development located within a shoreline area. These regulations are directly supportive of the adopted policies for each designated environment and use. In the development of the regulations, the special character of each environment has been recognized. The regulations seek to reflect and preserve that character wherever appropriate. To this end, each of the use categories is composed of several regulation sections. In each case, one section contains regulations of general applicability in all environments where the use is allowed. The succeeding sections contain additional regulations required for the conduct of an activity in a specific shoreline environment. (Ord. 2-1998 Exh. B § 5.5.1)

18.50.170 Agriculture.

A. General Regulations.

3. Rural Residential and Rural Farm-Forest. Recreational uses shall be permitted in these environments, subject to the policies and regulations contained in this master program and, except for public parks, only if the use is designed to serve a residential subdivision or multifamily development.

4. Conservancy. Recreational uses of a nature and intensity consistent with the objectives of the conservancy environment shall be permitted in that environment, subject to the policies and regulations contained in this SMP.

5. Natural. Recreational uses of a nature and intensity consistent with the objectives of the natural environment are permitted in that environment, subject to the policies and regulations contained in this SMP. Such uses might include viewpoints and pedestrian trails. However, roads, camping areas, parking areas, restrooms, and similar facilities shall not be located within the shoreline. Golf courses, playing fields, and similar large area uses shall not be permitted. The use of chemical fertilizers, pesticides, and herbicides shall be prohibited. Landscaping, where permitted, shall consist solely of native vegetation.

6. Aquatic. Recreational uses shall be permitted in the aquatic environment, subject to the policies and regulations of this master program and to the regulations by environment applicable to the abutting shoreline area. Where the proposed recreational use would abut more than one shoreline environment, the policies and regulations of the most restrictive abutting environment shall govern.

7. Eastsound Urban, Eastsound Residential, Eastsound Conservancy, and Eastsound Natural. Recreational use and development is limited to outdoor parks for public, passive recreational use and water access, without facilities for overnight camping.

8. Eastsound Marina District. Recreational use and development shall not include facilities for overnight camping.

9. All Shaw Island Environments. Recreational use and development shall be limited to outdoor parks for public, passive recreational use and water access, without commercial facilities for overnight camping. (Ord. 2-1998 Exh. B § 5.5.17)

18.50.330 Residential development.

A. Exemptions. The SMA specifically exempts from the substantial development permit requirements the construction of a single-family residence by an owner, contract purchaser or lessee for his or her own use, or the use of his or her family. Such construction and normal appurtenant structures must

jurisdiction. This is not a minimum lot size, however, and shall not preclude clustering of units within the shoreline jurisdiction; or

b. At least 20 percent of the area within the shoreline jurisdiction shall be designated as common area, and all other common area requirements of subsection (F)(2) of this section shall also be met. A minimum of two acres within the shoreline jurisdiction shall be provided for each unit to be located within the shoreline jurisdiction. This is not a minimum lot size, however, and shall not preclude clustering of units within the shoreline jurisdiction.

7. In all proposed land divisions and multiple-unit and multifamily developments on shorelines the terrain, access, potential building sites, areas appropriate for common ownership, and special features of the site shall be considered in the design of the development. Allowable densities are maximum densities and are not guaranteed. The approved density shall be determined on a case-by-case basis and shall be based on considerations of topography, protection of natural resources and systems, and the intent and policies of the Shoreline Management Act, the State Environmental Policy Act, the Comprehensive Plan, this code, and this Shoreline Master Program.

The allowed density may be reduced below the maximum if SEPA analysis or other evaluation of the site or area-wide conditions demonstrates that adverse effects of development at the maximum density can be mitigated or avoided by a reduction to the approved density, and no appropriate alternative means of mitigation is available.

8. Land clearing, grading, filling, or alteration of wetlands, natural drainage, and topography for residential construction shall be limited to the area necessary for driveways, buildings, and view and solar access corridors. Cleared surfaces not to be covered with gravel or impervious surfaces shall be replanted promptly with native or compatible plants (i.e., groundcovers or other plant materials adapted to site conditions which will protect against soil erosion). This applies to individual construction and shoreline subdivisions.

Existing vegetation shall be used to visually buffer structures as viewed from the shoreline, public roads, and adjoining properties. All applications for new construction and subdivisions shall indicate any trees to be removed. If trees are to be removed beyond those required to construct a single-family residence, then a tree removal plan shall also be submitted. The plan shall:

a. Identify the proposed building areas and driveways and view and solar access corridors; and

b. Demonstrate how existing natural screening will be retained while providing for construction, views, and sunlight.

Removal of trees smaller than three inches in diameter, as measured four feet above grade, shall not be restricted unless there is evidence that the shoreline is unstable. The removal of smaller trees, brush, and groundcover may be restricted in unstable shorelines.

9. All subdivisions and nonexempt residential developments shall have water supplies adequate so that groundwater quality and quantity are not endangered by over-pumping.

10. All new waterfront subdivisions and multifamily residential developments shall prohibit moorage facilities other than mooring buoys, but allow property owners to seek approval of joint-use moorage facilities to serve the entire subdivision or development.

11. Any parcel which constituted a legal building site prior to the adoption of this master program shall continue to constitute a legal building site regardless of the density requirements imposed by this master program. All parcels are subject to all other applicable state and County regulations.

12. Construction of a single-family residence for the use of the owner or beneficial owner and their family is exempt from substantial development permit requirements in accordance with WAC 173-27-040(2)(g) and SJCC 18.50.020(F). Any other single-family residential construction is subject to shoreline permit requirements. For the purposes of this SMP, the beneficial owner is an individual who is a member of a family corporation, trust, or a partnership, and who is related by blood, adoption, marriage or domestic partnership to all other members of the corporation, trust or partnership. In no case shall construction of more than one single-family residence on a single parcel owned by a family be exempt from shoreline permit requirements.

13. Developments on waterfront parcels shall cover no more than 50 percent of the width of the parcel as measured across the seaward face of each building site from side lot line to side lot line. However, on lots less than 80 feet wide at the building line, structures may cover an area up to 40 feet wide as long as a minimum setback of 10 feet from side property boundaries is maintained.

14. The maximum permitted height for residential structures is 28 feet. Residential structures are permitted to exceed this height only when the roof has a minimum 6-in-12 pitch which does not extend beyond a maximum height of 35 feet above the existing grade at the base of the structure. Any residential structure which exceeds a height of 35 feet above existing grade, as measured along a

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 26th day of September 2016, I caused to be served Respondent State of Washington, Department of Ecology's Response Brief in the above-captioned matter upon the parties herein as indicated below:

Stephanie Johnson O'Day	<input checked="" type="checkbox"/>	U.S. Mail
Law Offices of Stephanie Johnson O'Day	<input type="checkbox"/>	State Campus Mail
PO Box 2112	<input type="checkbox"/>	Hand Delivered
540 Guard Street, Suite 120	<input type="checkbox"/>	Overnight Express
Friday Harbor, WA 98250-2112	<input type="checkbox"/>	By Fax
	<input checked="" type="checkbox"/>	By e-mail: sjoday@rockisland.com

the foregoing being the last known address.

DATED this 26th day of September 2016 at Olympia, Washington.



DEBORAH A. HOLDEN, Legal Assistant