

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 CITIZENS FOR RATIONAL SHORELINE
4 PLANNING and RONALD T. JEPSON,

5 Petitioners,

6
7 v.

8 WHATCOM COUNTY and WA STATE
9 DEPARTMENT OF ECOLOGY,

10 Respondents,

11
12 And

13 BUILDING INDUSTRY ASSOCIATION OF
14 WHATCOM COUNTY,

15
16 Intervenor.
17

Case No. 08-2-0031

ORDER ON DISPOSITIVE MOTION

18 THIS Matter comes before the Board upon the motion of Whatcom County and the
19 Washington State Department of Ecology (collectively, the "Respondents") to dismiss Issues
20 2, 3, 5, and 7 from this appeal based on lack of subject matter jurisdiction and Issue 6
21 because it is time barred.¹ Petitioners, Citizens for Rational Shoreline Planning and Ronald
22 T. Jepson ("CRSP"), oppose the motion to dismiss these issues.²
23

24 On January 6, 2009, Ecology sought leave to file a Reply Memorandum of Law in support of
25 its original Motion to Dismiss. On January 7, 2009 Petitioners filed a Motion to Strike the
26 Reply Memorandum. Reply memoranda are not typically provided for or allowed by the
27 Board, except in preparation for a Hearing on the Merits. As a result, Ecology's reply
28 memorandum will not be considered.
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¹ Respondents' Memorandum of Law in Support of Substantive Motions (Respondents' Motion), at 2.

² Petitioners' Memorandum In Opposition to Respondent's Motion to Dismiss (Petitioners' Response).

1 In this Order the Board GRANTS the Respondents' Motion to Dismiss Issues 2, 3, 5, and 7
2 from this appeal and DENIES Respondents' Motion to Dismiss Issue 6.

3
4 **DISCUSSION**

5 **A. Motion to Dismiss for Lack of Subject Matter Jurisdiction**
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7 Issues 2, 3, 5, and 7, as stated in the Board's December 3, 2008 Prehearing Order read:
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9 2. Was the County's and the Department's adoption of the Shoreline
10 Management Program inconsistent with the requirements of the Shoreline
11 Management Act Guidelines, including WAC 173-26-186 and 173-26-176(3)(i),
12 where SMP 23.90.13 imposes uniform shoreline setbacks on shoreline property
13 owners without requiring the County to show that the setback is reasonably
14 necessary as a direct result of the landowner's proposed development or that the
setback satisfies the required nexus and proportionality tests?

15 3. Was the County's adoption of the Shoreline Management Program
16 inconsistent with RCW 82.02.020 and *Citizen's Alliance for Property Rights v.*
17 *Sims*, 145 Wash. App. 649, 187 P.3d 786 (2008)?

18 5. Was the County's and the Department's adoption of the Shoreline
19 Management Program inconsistent with the requirements of the Shoreline
20 Management Act Guidelines, including WAC 173-26-176(3)(i) and 173-26-186,
21 where SMP 23.50.07.K substantially restricts the size of the "building area" that
22 may be developed on "non-conforming lots" without requiring the County to show
23 that this restriction is reasonably necessary as a direct result of the landowner's
24 proposed development or that the setback satisfies the required nexus and
proportionality tests?

25 7. Was the County's adoption of the Resolution arbitrary and capricious where
26 the County Council clearly failed to understand the scope and effect of said
27 Resolution, including whether or how passage of the Resolution would affect (1)
28 a shoreline property owner's ability to rebuild a structure that is destroyed by fire
29 or other catastrophe, (2) a shoreline property owner's ability to expand a
30 nonconforming structure, and (3) the buildable area allowed on "nonconforming
31 lots;" and where the County Council clearly failed to understand the effect of
32 creating numerous nonconforming uses and structures, and the scope and effect
of the Department's required revisions to the Shoreline Management Program?

1 Respondents argue the Board should dismiss these issues on two grounds: (1) the Board
2 does not have jurisdiction to hear constitutional claims, and (2) the Board does not have
3 jurisdiction to determine compliance with statutes other than the Growth Management Act
4 (GMA), the Shoreline Management Act (SMA), and the State Environmental Policy Act
5 (SEPA).³
6

7 **1. Board Jurisdiction to hear Constitutional Claims**
8

9 Respondents argue the Board does not have jurisdiction over Petitioners' claims that
10 provisions of the County's Shoreline Master Program (SMP) do not satisfy constitutional
11 "nexus and proportionality" tests, as alleged in Issues 2 and 5.⁴ Respondents point out that
12 the Growth Management Hearings Boards (GMHBs) are statutorily created administrative
13 bodies whose authority is limited by the Legislature and are without inherent or common law
14 powers.⁵ According to Respondents, by statute, the GMHBs exist to review claims that
15 comprehensive plans or development regulations do not comply with the GMA, the SMA, or
16 SEPA.⁶ Respondents argue that whether uniform setbacks (Issue 2) or restrictions on
17 building areas for nonconforming lots (Issue 5) conform to the "required nexus and
18 proportionality tests" are constitutional questions for which the GMHBs do not have the
19 jurisdiction to entertain.
20
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22 In response, Petitioners argue that with Issues 2 and 5 it is not bringing constitutional
23 claims, but instead the nexus and proportionality language relates to the SMP's alleged
24 violation of RCW 82.02.020, which is incorporated by reference via the SMA guidelines,
25 WAC 173-26.⁷
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30 ³ Respectively, RCW 36.70A, RCW 90.58, RCW 43.21C

31 ⁴ Respondents' Motion at 2-5.

32 ⁵ Respondents' Motion, at 2 (citing to *Skagit Surveyors v. Friends of Skagit County*, 135 Wn.2d 542, 565 (1998)).

⁶ Respondents' Motion, at 2 (citing RCW 36.70A.280)

⁷ Petitioners' Response, at 2.

1 Petitioners' argument begs the question: To what was the Court of Appeals referring to with
2 regard to the nexus and rough proportionality test if not to the test of a constitutional taking?
3 The phrase "nexus and proportionality" does not appear in the GMA, the SMA, SEPA, or
4 even in RCW 82.02.020, but instead come from constitutional takings jurisprudence. More
5 specifically, the phrase comes from U.S. Supreme Court opinions analyzing the
6 *unconstitutional* taking of private property.⁸
7

8 In fact, the case cited by Petitioners - *Citizens Alliance* - relies directly on the U.S. Supreme
9 Court's landmark constitutional takings case of *Dolan v. City of Tigard* for the proposition
10 that "rough proportionality" is required between dedication and impact of proposed
11 development.⁹ Likewise, the "nexus" requirement was established as a principle of
12 constitutional law by the U.S. Supreme Court.¹⁰
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14
15 Issues 2 and 5 ask the Board to apply the Constitutional takings standard of "nexus and
16 rough proportionality" to the County and Ecology's actions in relationship to the SMP. By
17 long established precedent, all three of the Growth Management Hearings Boards have
18 consistently declined to consider constitutional issues and Petitioners apparently concede
19 the well-established precedent.¹¹ This Board continues to follow this precedent and Issues
20 2 and 5 are therefore dismissed.
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27 ⁸ See e.g., *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512
28 U.S. 374 (1994).

29 ⁹ *Citizens Alliance*, at 665, fn. 42.

30 ¹⁰ See, *Dolan*, 512, at 386.

31 ¹¹ See e.g. *Dudek/Bagley v. Douglas County*, EWGMHB Case No. 07-1-0009, Order on Motions (Sept.
32 26, 2007), *Roth, et al v. Lewis County*, WWGMHB Case No. 04-2-0014c, Order on Motions (Sept. 10,
2004), *Gutschmidt v. Mercer Island*, CPSGMHB Case No. 92-3-0006, Final Decision and Order (March
16, 2003). Western Board decisions have also specifically stated that the Board does not have
jurisdiction to determine whether an unconstitutional taking has occurred, see e.g. *Achen v. Clark County*,
WWGMHB Case No. 95-2-0067, Final Decision and Order (Sept. 20, 1995), *Beckstrom v. San Juan*
County, WWGMHB Case No. 95-2-0081, Final Decision and Order (Jan. 3, 1996).

1 **Conclusion:** With Issues 2 and 5, Petitioners are requesting the Board to determine
2 whether provisions of the County's SMP satisfy the constitutionally-required "nexus and
3 proportionality" test. The Board finds and concludes that the Legislature has granted it no
4 authority to consider constitutional issues. Therefore, Respondents' Motion to Dismiss
5 Issues 2 and 5 as to the assertion of a constitutional violation is GRANTED.
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7 **2. Board Jurisdiction to Hear Claims that the SMP violates statutes other than the**
8 **GMA, SMA, or SEPA.**

9 Respondents note that the jurisdiction of the Board is limited by RCW 36.70A.280(1)(a)
10 which provides:
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12 (1) A growth management hearings board shall hear and determine only those
13 petitions alleging either:

14 (a) That, except as provided otherwise by this subsection, a state agency,
15 county, or city planning under this chapter is not in compliance with the
16 requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of
17 shoreline master programs or amendments thereto, or chapter 43.21C RCW as it
18 relates to plans, development regulations, or amendments, adopted under RCW
19 36.70A.040 or chapter 90.58 RCW. Nothing in this subsection authorizes a board
to hear petitions alleging noncompliance with RCW 36.70A.5801;

20 And by RCW 36.70A.290(2) which provides, in part:
21

22 (2) All petitions relating to whether or not an adopted comprehensive plan,
23 development regulation, or permanent amendment thereto, is in compliance with
24 the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW
25 must be filed within sixty days after publication by the legislative bodies of the
county or city.

26 Respondents argue Issues 2, 3, and 5 challenge the SMP's compliance with RCW
27 82.02.020, a statute other than the GMA, SEPA, or the SMA.¹² Respondents note that
28 these issues, in claiming that the SMP requires the County to show that the setbacks are
29 "reasonably necessary as a direct result of the landowners' proposed development," are
30 based not on GMA, SEPA or SMA language, but language from RCW 82.02.020. Thus,
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¹² Respondents' Memorandum of Law in Support of Substantive Motions at 6.

1 Respondents argue that because these issues challenge compliance with a statute outside
2 of the Board's statutory authority, the Board lacks jurisdiction to hear them.¹³

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4 Respondents note that while these issues seek to draw in claims beyond the GMA, SEPA,
5 and the SMA via an alleged violation of WAC 173-26-185(5), which provides that the
6 regulation of private property should be limited by constitutional and other legal limitations,
7 such as RCW 82.02, that provision of the WAC does not have the force of a legislative
8 enactment. Therefore, Respondents assert, the Department of Ecology cannot, through
9 that administrative regulation, expand the legislature's grant of jurisdiction in RCW
10 36.70A.280(1)(a).¹⁴

11
12 In response, Petitioners argue that the County and Ecology read the GMA's grant of
13 authority too narrowly. They note that RCW 90.58.190(2)(b) instructs the Board to "review
14 the proposed master program or amendment solely for compliance with the requirements of
15 this chapter, the policy of RCW 90.58.020 and the applicable guidelines", (emphasis
16 added). Likewise, RCW 90.58.190(2)(c) instructs the Board to determine if "the decision of
17 the department is inconsistent with the policy of RCW 90.58.020 *and the applicable*
18 *guidelines.*"(emphasis added). Because WAC 173-26-186(5) incorporates RCW 82.02 by
19 reference, Petitioners argue that the Board thereby has jurisdiction to review a shoreline
20 master plan for consistency with RCW 82.02.020.¹⁵

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23 The WAC section in question provides:

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25 (5) The policy goals of the act, implemented by the planning policies of master
26 programs, may not be achievable by development regulation alone. **Planning**
27 **policies should be pursued through the regulation of development of private**
28 **property only to an extent that is consistent with all relevant constitutional**
29 **and other legal limitations (where applicable, statutory limitations such as**
30 **those contained in chapter 82.02 RCW and RCW 43.21C.060) on the regulation**
31 **of private property.** Local government should use a process designed to assure
32 that proposed regulatory or administrative actions do not unconstitutionally infringe

¹³ Id. at 7.

¹⁴ Id. at 4.

¹⁵ Petitioners' Response at 4.

1 upon private property rights. A process established for this purpose, related to the
2 constitutional takings limitation, is set forth in a publication entitled, " *State of*
3 *Washington, Attorney General's Recommended Process for Evaluation of Proposed*
4 *Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private*
5 *Property* ," first published in February 1992. The attorney general is required to
6 review and update this process on at least an annual basis to maintain consistency
with changes in case law by RCW 36.70A.370. (Emphasis added)

7 The Board notes that this section references not only RCW 82.02 but "all relevant
8 constitutional and other legal limitations". Were the Board to accept Petitioners' reasoning
9 there would be no limit on the scope of the Board's review when a SMP is appealed. The
10 Board will not attempt to extend its jurisdiction beyond the limitations imposed by the
11 Legislature in RCW 36.70A.280(1)(a). As this Board held in the past:
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13 This Board has only that authority that the legislature has expressly conferred upon
14 it. See *Skagit Surveyors and Engineers v. Skagit County*, 135 Wn.2d 542, 565, 958
15 P.2d 962, 1998 Wash. LEXIS 473 (1998). The statute limits the authority of the
16 boards to determining the compliance with the GMA, SEPA or the Shoreline
17 Management Act of comprehensive plans, development regulations and
18 amendments to them. RCW 36.70A.280 and 36.70A.290. The GMA does not confer
upon the boards the authority to determine constitutional claims.¹⁶

19 The Board disagrees with Petitioners' assertion that the Board's grant of jurisdiction should
20 be read broadly. It is true that when reviewing a challenge to a SMP both the GMA and the
21 SMA authorize the Board to utilize the SMA guidelines which, as noted *supra*, state that
22 SMP planning policies should be consistent with other legal limitations, such as RCW
23 82.02.020. The problem with the Petitioners' argument is that the Supreme Court has
24 previously held the GMA is not to be liberally construed and a broad read would counter
25 these holdings.¹⁷
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32 ¹⁶ *Roth v. Lewis County*, WWGMHB No. 04-2-0014c, Order on Motion to Dismiss at 6.

¹⁷ *Woods v. Kittitas County*, 162 Wn.2d 597, 614 (2005)(Citing *Skagit Surveyors v. Friends of Skagit County*, 135 Wn.2d 542, 565 (1998)); *Thurston County v. WWGMHB*, 164 Wn.2d 329, 342 (2008).

1 In addition, an administrative agency, such as Ecology, cannot by rule or regulation, expand
2 the authority that was granted to it, or to the Boards, by the Legislature. This was recently
3 stated in *H&H Partnership v. Ecology*.¹⁸

4 An administrative agency cannot modify or amend statute by regulation. Indeed,
5 a rule that conflicts with a statute is beyond an agency's authority and invalidation
6 of the rule is proper.

7 Thus, Ecology has no authority to expand the Board's jurisdiction – that is for the
8 Legislature to do and the Legislature has created explicit limitations on the Board's
9 jurisdiction. Pursuant to RCW 36.70A.480, the Board is to utilize the SMA guidelines to
10 determine whether a SMP has complied with the SMA and applicable guidelines but the
11 incorporation of another statute by parenthetical reference does not broaden the Board's
12 jurisdiction.

13
14
15 Finally, in the matter of *Citizens Alliance v. Sims*, the Court's review of King County's
16 clearing and grading limitations for compliance with RCW 82.02.020 as an "in-kind" tax was
17 not limited to just that statute but also tested the ordinance on the basis of the constitutional
18 provisions of nexus and proportionality. And, as noted *supra*, the Board has no jurisdiction
19 over constitutional claims.
20

21 The Board has already concluded, above, that Issues 2 and 5 must be dismissed in that
22 they raise Constitutional issues beyond the Board's jurisdiction. In addition, these issues,
23 as well as Issue 3, ask for a determination of whether the County and Ecology violate RCW
24 82.02.020. As with constitutional issues, the GMHBs have historically held that they have
25 no authority to determine compliance with any statute other than those set forth in RCW
26 36.70A.280(1)(a).¹⁹ RCW 82.02 is not one of the statutes referenced in .280(1)(a).
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31 ¹⁸ 115 Wn. App. 164, 171 (2003)(citing to *Bird Johnson Corp v. Dana Corp.*, 119 Wn.2d 423, 428 (1992)
32 which held: An administrative agency, however, cannot modify or amend a statute by regulation. When
exercising its rule-making authority, an agency may draft only those rules which fit within the framework
and policy of the applicable statute).

¹⁹ See e.g. *Abenroth v. Skagit County*, WWGMHB Case No. 97-2-0060, Order on Motions (Oct. 16,
1997), *Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, Final Order
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1 Therefore, the Board concludes that it does not have jurisdiction to address Issues 2, 3, and
2 5 and these issues are dismissed.

3
4 **Conclusion:** With Issues 2, 3, and 5, Petitioners either explicitly or through reference to
5 statutory language request the Board determine if the County's SMP complies with RCW
6 82.02.020. The Board finds and concludes that it has jurisdiction to determine claims
7 alleging a violation of the GMA, the SMA, or SEPA and not RCW 82.02.020. Therefore,
8 Respondents' Motion to Dismiss Issues 2, 3, and 5 as to the allegations asserting a violation
9 of a statute outside of the Board's jurisdiction is GRANTED.
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11 **3. Board Jurisdiction to Hear Issue 7**

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13 Respondents claim that Issue 7 raises a matter beyond the Board's jurisdiction because it
14 does not allege a violation of the GMA, SEPA, or the SMA. Respondents argue that
15 because the Board's review under RCW 36.70A.280 is different from that of a court
16 reviewing agency action under RCW 34.05.570(4)(c)(iii), the Board does not have
17 jurisdiction to determine if the action of the County was arbitrary and capricious.²⁰
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19 In response, Petitioners argue that the Board should not dismiss Issue 7 simply because
20 they did not recite the same statutory and regulatory provisions contained in Issue 1 as
21 those citations were included in the original Petition for Review, but were removed in an
22 effort to simplify, clarify and consolidate similar issue statements. Petitioners refer to their
23 original issue statements contained in Issues 3.5 and 3.8.²¹
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26 The record does not support Petitioners' argument. Issues 3.5 and 3.8, as presented in the
27 original Petition for Review bear no resemblance to Issue 7. Issue 7, as stated in the
28 original Petition for Review stated:
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32 and Decision (Aug. 10, 2005), *Assoc. to Protect Anderson Creek v. Bremerton*, CPSGMHB Case 95-3-0053c, Order on Motions (Oct. 18, 1995).

²⁰ Id. at 9.

²¹ Petitioner's Response at 7.

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1 “Was the County’s adoption of the Resolution arbitrary and capricious where the
2 County Council did not fully understand the scope and effect of said
3 Resolution?”²²

4 A very similar formulation of the issue was contained in the First Amended Petition for
5 Review.²³ Petitioner makes no allegation of a violation of the GMA, SMA, or SEPA, or, in
6 fact, any statute at all. They cite no provision that directs the Board to review whether the
7 County “failed to understand the scope and effect” of its action. The GMA is clear in that an
8 issue statement needs to be detailed and the Board’s Rules of Practice and Procedure
9 further state that the necessary statutory citations are to be included.²⁴ This is not an
10 instance where, as Petitioner argues, applicable citations to the law were removed in an
11 attempt to consolidate similar issue statements.²⁵ Instead, Issue 7 as stated in the Petition
12 for Review, the First Amended Petition for Review, the Clarified Issue Statements, and the
13 Prehearing Order failed to allege violation of a statute over which this Board has jurisdiction.
14 The Board notes Petitioner made several attempts drafting issue statements and yet still
15 failed to properly articulate Issue 7. In addition, the Board finds no reference in either the
16 GMA or SMA as to whether or not the Board may determine if a local government’s action is
17 arbitrary and capricious. Accordingly, Issue 7 is dismissed.
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21 **Conclusion:** Petitioner makes no allegation of a violation of the GMA, SMA, or SEPA. The
22 GMA is clear in that an issue statement needs to be detailed and the Board’s Rules of
23 Practice and Procedure further state that the necessary statutory citations are to be
24 included. Therefore, Issue 7 is dismissed.
25

26 **B. Motion to Dismiss Due to Untimely Filing**

27 Issue 6, as stated in the Prehearing Order reads:
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29

30 ²² Petition for Review at 4, Issue 3.10. (current Issue 7).

31 ²³ When stated in the First Amended Petition for Review, the issue was stated as:

32 “Was the County’s adoption of the Resolution arbitrary and capricious where the County Council clearly failed to understand the scope and effect of said Resolution as demonstrated by the record?”

²⁴ RCW 36.70A.290(2); WAC 242-02-210(2)(c).

²⁵ Petitioners’ argument that Issue 7 is directly related to Issue 1 is likewise unpersuasive. Issue 1 is a public participation challenge.

1 6. Was the County's and the Department's adoption of the Shoreline
2 Management Program inconsistent with the requirements of RCW 36.70A.480
3 where the County has designated all shorelines as critical areas?

4 Pursuant to RCW 36.70A.290(2), all petitions challenging a jurisdiction's actions must be
5 filed within 60 days of publication. If filed after this deadline, the Board must dismiss the
6 petition as untimely. Respondents contend Issue 6 alleges a violation of the County's
7 Critical Areas Ordinance (CAO) which was adopted by Ordinance 2005-0068 and published
8 in 2005. Therefore, Respondents argue, the statutory limitation for filing of a petition has
9 long expired.
10

11 Petitioners argue review by the Board was not available until Ecology reviewed the County's
12 CAO as it applied to the shoreline areas, which did not occur until 2008, so the appeal
13 deadline for the CAO regulations and designations is the same as for the SMP. Petitioners
14 contend the Board's holding in the *Anacortes* case is directly applicable to this matter.²⁶
15 Petitioners contend the current matter is similar to the *Anacortes* case in that the County's
16 CAO, as it relates to the shorelines, has never been reviewed and approved by Ecology
17 and, therefore, Petitioners were precluded from filing an appeal based on the CAO's
18 amendatory impacts until now.
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21 From the wording of the issue statement and the limited briefing received by the Board, it is
22 difficult for the Board to ascertain the extent of Petitioners' claims. Without additional
23 briefing and evidence on how the adoption of the SMP may violate RCW 36.70A.480, the
24 Board is unable to determine whether Petitioners' claim is untimely.
25

26
27 **Conclusion:** Due to the ambiguity of the Petitioners' issue statement and the limited record
28 before the Board, dismissal of Issue 6, without allowing for further development of the facts
29

30 _____
31 ²⁶ Petitioner's Response, at 8-10 (citing *Evergreen Islands, et al v. Anacortes*, WWGMHB Case No. 05-2-
32 0016, Final Decision and Order (Dec. 27, 2005)). The Board notes that this case has been reviewed by
the Supreme Court, Docket No. 80396-0. The Court issued its decision in the matter on July 31, 2008.
Reconsideration was requested by CTED and Ecology on Aug. 20, 2008. As of the date of this Order,
the Court has not ruled on CTED/Ecology's request.

1 and supporting argument, is not appropriate at this time. Therefore, Respondents' Motion to
2 Dismiss Issue 6 is DENIED.

3
4 **ORDER**

5 Based on the foregoing, Respondents' Motion to Dismiss is GRANTED in part. Issues 2, 3,
6 5, and 7 of the Petition for Review as stated in the Prehearing Order are hereby
7 DISMISSED.
8

9
10 The Respondents' Motion to Dismiss in regards to Issue 6 is DENIED. The parties shall
11 submit further briefing on the Respondents' assertion as to the timeliness of this issue within
12 their Prehearing Briefs submitted for the March 4, 2009 Hearing on the Merits.

13
14 DATED this 16th day of January, 2009.
15
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17 _____
18 James McNamara, Board Member

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20 _____
21 Holly Gadbow, Board Member

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24 William Roehl, Board Member
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