

WEC Restatement of Legal Issues).

On August 14, 2002, the Board received “Respondent City of Everett’s Motion to Dismiss Issues Regarding RCW 36.70A” (the **City’s Motion to Dismiss GMA Issues**) and “Respondent City of Everett’s Motion to Dismiss Petitioner Hall, et. al.” (the **City’s Motion to Dismiss Hall PFR**) together with the “Declaration of Catherine A. Drews in Support of City of Everett’s Motion to Dismiss Petitioners Hall, et. al.” (the **Drews Declaration**) attached to which as Exhibit A is a copy of an email communication dated July 15, 2002 from Diane Pratt of the Attorney General (ATG) Everett office to Patricia Lane of the ATG’s Olympia office.

On August 26, 2002, the Board received “Petitioner Hall et. al. Response to Respondent City of Everett’s Motion to Dismiss Petitioner Hall et. al.” (the **Hall Response to City’s Motion to Dismiss PFR**).

On August 29, 2002, the Board received “City of Everett’s Reply to Hall et. al.’s Response to City’s Motion to Dismiss” (the **City’s Reply to Hall’s Response to Motion to Dismiss Hall PFR**).

On September 5, 2002, beginning at 10:00 a.m. in room 1022 of the Financial Center, 1215 Fourth Avenue in Seattle, the Board conducted the prehearing conference in this consolidated matter. Present for the Board were Lois H. North and Joseph W. Tovar, presiding officer. Also present for the Board was legal extern Staci Smith. Representing ESC was Richard A. Smith; representing WEC were David D. Mann and Hilary Franz; representing Tulalip were Marion Morriset and Sharon Hainsely; representing Hall was Jeff M. Hall, *pro se*; representing the City was Eric Laschever; representing Ecology was Thomas J. Young. Also present for the City was Planning Director Paul Roberts. After a discussion of the issues in the case and the schedule, the presiding officer directed the parties to meet and to submit a proposed calendar and any revisions to the legal issues by the close of business on Friday, September 6, 2002.

On September 6, 2002, the Board received from David S. Mann a letter containing a proposed schedule reflecting the discussion and agreement of the parties. Later on this same date, the Board received correspondence from Richard A. Smith indicating that ESC wished to “stand on their pleading” as to their legal issues.

On September 9, 2002, the Board issued a Preliminary Prehearing Order (the **PPHO**). Later this same date, the Board received “Everett Shorelines Coalition’s Motion to Intervene in all Legal Issues” (the **ESC Motion to Intervene**).

On September 10, 2002, the Board received “The City of Everett’s Motion to Dismiss Issues Not Reasonably Related to ESC’s Participation before the City or Ecology” (the **City’s Motion to Dismiss ESC Issues**) together with the “Declaration of Eric S. Laschever in Support of the City’s Motion to Dismiss Issues Not Reasonably Related to ESC’s Participation before the City or

Ecology” (the **Laschever Declaration re: ESC Issues**); “City of Everett’s Motion to Dismiss Issues not Reasonably Related to Tulalip Tribes’ Participation before the City or Ecology” (the **City’s Motion to Dismiss Tulalip Issues**); and “Respondent City of Everett’s Motion to Dismiss Petitioners’ SEPA Issues and APA Standing Claims” (the **City’s Motion to Dismiss SEPA Issues and APA Standing Claims**).

On September 12, 2002, the Board received the following pleadings: “Tulalip Tribes’ Motion to Intervene in Certain Issues Presented by Petitioners Washington Environmental Council and Everett Shorelines Coalition;” “Washington Environmental Council’s Motion to Intervene;” and from Petitioner Hall a pleading captioned “Petitioner Citizens for the Preservation of the Snohomish River Valley Motion to Stand on Pleadings and to Intervene on other Petitioners’ Issues.”

On September 16, 2002, the Board received “The City of Everett’s Response to Petitioners’ Motion to Intervene.” Also on this date, the Board received a letter from counsel for WEC pointing out an apparent error in the PPHO with respect to Final Legal Issue No. 1.

On September 17, 2002, the Board received “Tulalip’s Rebuttal re: Motion to Intervene in Certain Issues Presented by WEC and ESC.”

On September 18, 2002, the Board issued a “Final Prehearing Order, First Order on Motions to Intervene and Order on City’s Motion to Dismiss Petitioner Hall” (the **Final PHO**).

On September 20, 2002, the Board received “1000 Friends of Washington Motion for Amicus Curiae Status” (the **1000 Friends Motion for Amicus Status**) together with “1000 Friends of Washington’s Memorandum in Opposition to City’s Motion to Dismiss GMA issues” (the **1000 Friends Brief re: Motion to Dismiss GMA Issues**).

Also on September 20, 2002, the Board received “State of Washington Office of Community Development’s Motion to File Amicus Curiae Brief” (the **OCD Motion for Amicus Status**) together with “Amicus Curiae Brief of the State of Washington Office of Community Development” (the **OCD Brief re: Motion to Dismiss GMA Issues**).

Also on September 20, 2002, the Board received “ESC’s Response to Everett’s Motion to Dismiss Issues Not Reasonably Related to ESC’s Participation before the City or Ecology” (**ESC’s Response to City’s Motion to Dismiss ESC Issues**) together with the “Declaration of Libby Johnson” (the **Johnson Declaration**).

Also on September 20, 2002 the Board received “Tulalip Tribes’ Response to Respondent City of Everett’s Motion to Dismiss Issues Regarding RCW 36.70A” (the **Tulalip Brief re: Motion to Dismiss GMA Issues**), “Tulalip Tribes Consolidated Response to City of Everett’s Motions to

Dismiss (1) Issues Not Reasonably Related to Tulalip Tribes' Participation before the City of [sic] Ecology; and (2) Petitioners' SEPA Issues and APA Standing Claims" (the **Tulalip Response re: City's Motion to Dismiss Issues**) and "Declaration of Kurt Nelson in Support of Tulalip Tribes Consolidated Response to City of Everett's Motions to Dismiss (1) Issues not Reasonably Related to Tulalip Tribes' Participation before the City of [sic] Ecology; and (2) Petitioners' SEPA Issues and APA Standing Claims" (the **Nelson Declaration**).

Also on September 20, 2002, the Board received "Washington Environmental Council's Response to City of Everett's Motion to Dismiss Petitioners' SEPA and APA Standing Claims" (the **WEC Response to City's Motion to Dismiss SEPA and APA Standing Claims**); "Washington Environmental Council's Response to City of Everett's Motion to Dismiss Issues Regarding RCW 36.70A" (the **WEC Brief re: Motion to Dismiss GMA Issues**), and "ESC's Response to Everett's Motion to Dismiss Petitioners' SEPA Issues and APA Standing Claim" (**ESC's Response to City's Motion to Dismiss SEPA and APA Standing Claims**).

Also on September 20, 2002, at 4:48 p.m., the Board received a telefacsimile pleading from Petitioner Hall requesting to have the deadline for Response to Motions to Dismiss on SEPA and APA Issues and Motions to Dismiss on GMA Issues moved from 4:00 p.m. on Friday, September 20, 2002 to 10:00 a.m. on Monday, September 23, 2002 (the **Hall Motion for Deadline Extension**).^[1]

On September 23, 2002, the Board received "Motion of Washington Public Port Association to File an Amicus Curiae Brief" (the **Port Association Motion for Amicus Status**); "ESC's Response to Everett's Motion to Dismiss Issues Regarding RCW 36.70A" (**ESC's Brief re: Motion to Dismiss GMA Issues**); and "Port of Everett's Motion to Intervene" (the **Port Motion to Intervene**) together with the "Declaration of Robert E. McChesney" (the **McChesney Declaration**). In addition, the Board received from Association of Washington Cities and Washington State Association of Municipal Attorneys (collectively **AWC**) a pleading titled "Association of Washington Cities' and Washington State Association of Municipal Attorneys' Motion for Status as Amicus Curiae Party and to Modify or Clarify Case Schedule" (the **AWC Motion for Amicus Status and to Modify or Clarify Schedule**).

On September 25, 2002, the Board received "City's Reply to Petitioners' Response to Motions to Dismiss for Standing" (the City's Reply to Response to Motions to Dismiss for Standing) and "Respondent City of Everett's Reply to Petitioners' and Amici's Responses to City's Motion to Dismiss GMA" (the **City's Reply to Responses to Motion to Dismiss GMA Issues**).

On September 27, 2002, the Board received a letter from Mr. Laschever with errata correcting lines 15-17 of page 4 of the City's Reply to Responses to Motion to Dismiss GMA Issues.

II. MOTIONS TO INTERVENE

A. Applicable Law

WAC 242-02-270 provides in part:

- (1) Any person at any time may by motion request status as an intervenor in a case.
 - (2) In determining whether a person qualifies as an intervenor, the presiding officer shall apply any applicable provisions of law and may consider the applicable superior court civil rules (CR) of this state. The granting of intervention must be in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings.
 - (3) If the person qualifies for intervention, the presiding officer may impose conditions upon the intervenor's participation in proceeding, either at the time intervention is granted or at any subsequent time. . .

The applicable superior court civil rules provide in part:

- (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
- (b) Permissive Intervention. Upon timely application, anyone may be permitted to intervene in an action: . . . (2) When an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Civil Rule 24. Emphasis added.

B. Discussion

The Port of Everett (the **Port**) presents facts and argument addressed to the Board's Rules for Intervention and the applicable Civil Rules. The Port states that "it has an interest in this appeal since it owns property that will be directly affected by the determination made on the petitioners' appeals." Port Motion to Intervene, at 1. In its motion, and the attached McChesney Declaration, the Port details its ownership and future development interests in the area including the Maulsby Mudflats, Baywood and upriver properties along the Snohomish River. Port Motion to Intervene,

at 2-4; McChesney Declaration, at 1-6.

No objection to the Port's Motion to Intervene was filed by the deadline set forth in the Preliminary Prehearing Order.

C. Conclusions

The Board concludes that the Port Motion to Intervene satisfies the criteria set forth in the statute, and Board's Rules and the Civil Rules for Intervention as Right. Therefore, the Port of Everett Motion to Intervene is **granted**. Pursuant to WAC 242-02-270(3), the participation by Intervenor Port is limited to the submittal of a prehearing response brief, to be submitted at the same time that the Respondent City and WSDOE submit their response briefs. The Port shall submit to the Board an original and four copies of its brief and shall simultaneously serve a copy of its brief on all petitioners, respondents and *amici* in this case.

III. MOTIONS FOR AMICUS STATUS

A. Applicable Law

WAC 242-02-280 provides in part:

- (1) Any person at any time may by motion request status as an amicus in the case.
- (2) In determining whether a person qualifies as an amicus, the presiding officer shall apply the applicable rules of appellate procedure (RAP) of the appellate courts of this state.
- (3) If the person qualifies for amicus, the presiding officer may impose conditions upon the amicus' participation in the proceedings, either at the time that the amicus status is granted or at any subsequent time.

The Rules of Appellate Procedure provide in relevant part:

RULE 10.1

(e) Amicus Curiae Brief. An amicus curiae brief may be filed only if permission is obtained as provided in rule 10.6. If an amicus curiae brief is filed, a brief in answer to the brief of amicus curiae may be filed by a party

RULE 10.2

(f) Brief of Amicus Curiae. A brief of amicus curiae not requested by the appellate court should be received by the appellate court and counsel of record for the parties

and any other amicus curiae not later than 30 days before oral argument in the appellate court, unless the court sets a later date or allows a later date upon a showing of particular justification by the applicant.

(g) Answer to Brief of Amicus Curiae. A brief in answer to the brief of amicus curiae may be filed with the appellate court not later than the date fixed by the appellate court.

(h) Service of Briefs. At the time a party files a brief, the party should serve one copy on every other party and on any amicus curiae, and file proof of service with the appellate court. In a criminal case in which the defendant is the appellant, appellant's counsel shall serve the appellant and file proof of service with the appellate court. Service and proof of service should be made in accordance with rules 18.5 and 18.6.

RULE 10.3

(e) Amicus Curiae Brief. The brief of amicus curiae should conform to section (a), except assignments of error are not required and the brief should set forth a separate section regarding the identity and interest of amicus and be limited to the issues of concern to amicus. Amicus must review all briefs on file and avoid repetition of matters in other briefs.

(f) Answer to Brief of Amicus Curiae. The brief in answer to a brief of amicus curiae should be limited solely to the new matters raised in the brief of amicus curiae.

...

RULE 10.6

(a) When Allowed by Motion. The appellate court may, on motion, grant permission to file an amicus curiae brief only if all parties consent or if the filing of the brief would assist the appellate court. An amicus curiae brief may be filed only by an attorney authorized to practice law in this state, or by a member in good standing of the Bar of another state in association with an attorney authorized to practice law in this state.

(b) Motion. A motion to file an amicus curiae brief must include a statement of (1) applicants interest and the person or group applicant represents, (2) applicants familiarity with the issues involved in the review and with the scope of the argument presented or to be presented by the parties, (3) specific issues to which the amicus curiae brief will be directed, and (4) applicants reason for believing that additional argument is necessary on these specific issues. The brief of amicus curiae may be filed with the motion.

...

(d) Objection to Motion. An objection to a motion to file an amicus curiae brief must be received by the appellate court and counsel of record for the parties and the applicant not later than 5 business days after receipt of the motion.

B. Discussion

1. Positions of the Parties

AWC Motion for Amicus

The Association of Washington Cities (**AWC**) and Washington State Association of Municipal Attorneys (**WSAMA**) state “their members may be substantially affected by the Board’s proceedings in this matter.” AWC Motion for Amicus, at 2. AWC asserts:

A decision adverse to Respondents could significantly limit local governments’ discretion to plan for development in their shorelines and, through the issues related to “best available science,” could also affect local governments that do not have significant shorelines in their jurisdiction.

Id.

In addition to requesting *amicus* status, AWC also asks to alter the October 16, 2002 deadline for the submittal of briefs from *amici*:

Because Petitioners’ arguments will be known only after their briefs are filed, it is appropriate that the response by *amici* in support of Respondents be filed concurrently with Respondents’ briefs on November 1 . . . Modifying or clarifying the Final Schedule to make this change would comport not only with the treatment accorded intervenors in this case, but also with *amicus* practice in Washington’s appellate courts [which call] for *amicus* briefs to be filed . . . well after all briefing is completed by the primary parties.

AWC Motion for Amicus, at 3.

Washington Public Port Association (WPPA) Motion for Amicus

WPPA asks for leave to file a brief addressed to Legal Issues 1, 2, and 3 as set forth in the Final Prehearing Order. WPPA states:

The petitions before this Board raise fundamental questions regarding the appropriate use of shorelines of statewide significance. RCW 90.58.020 specifically identifies ports and shoreline-dependent development as priority uses of shorelines of statewide significance . . . The Board’s ruling on both the general and specific questions [raised by Petitioners] could effect WPPA members throughout the state as other local governments update their shoreline master programs.

WPPA Motion for Amicus, at 2-3.

1000 Friends Motion for Amicus

1000 Friends identifies itself and its interests as follows:

As a statewide non-profit organization that promotes good planning and the effective implementation of the Growth Management Act, 1000 Friends of Washington's interests will be substantially affected by this case. This is one of the first cases addressing issues concerning both the Shoreline Management Act and the Growth Management Act and the interplay between the two as codified in RCW 36.70A and RCW 90.58.

1000 Friends Motion for Amicus, at 3.

OCD Motion for Amicus

The OCD Motion for Amicus asks for leave to file an amicus curiae brief to address a single issue: "Are the Growth Management Hearings Boards authorized to review shoreline master programs for shorelines of statewide significance for compliance with the Growth Management Act?" OCD Motion for Amicus, at 3.

2. Analysis

The Board received no objections to the motions for amicus. The Board concludes that all four motions satisfy the criteria set forth in the statute, WAC 242-02-280, and the applicable Rules of Appellate Procedure. The Board will therefore grant all four motions for amicus status, subject to the conditions and limitations listed below.

C. Conclusions

AWC

The AWC and WSAMA joint motion for Amicus Status and to Modify or Clarify Schedule is **partially granted**, as to amicus status, and as to the filing deadline for the amicus Brief. Pursuant to WAC 242-02-280(3), the participation of Amicus AWC is limited to the submittal of a prehearing brief. Because AWC has asked to file its amicus brief in support of the Respondents, it is appropriate that the deadline for its brief correspond to that of Respondents; therefore the AWC amicus brief shall be submitted by no later than **4:00 p.m. on Friday, November 1, 2002.**

AWC may brief any Legal Issues briefed by Petitioners in their prehearing briefs. AWC shall

submit to the Board an original and four copies of its brief and shall simultaneously serve a copy of its brief on all petitioners, respondents, the intervenor and other amici in this case.

WPPA

The WPPA Motion for Amicus Status is **granted**. Pursuant to WAC 242-02-280(3), the participation of Amicus WPPA is limited to the submittal of a prehearing brief, to be submitted no later than **4:00 p.m. on Friday, November 1, 2002**. WPPA may brief Legal Issues 1, 2, and 3 as set forth in the Final Prehearing Order. WPPA shall submit to the Board an original and four copies of its brief, and shall simultaneously serve a copy of its brief on all petitioners, the respondents, the intervenor and other amici in this case.

1000 Friends

The 1000 Friends Motion for Amicus Status is **granted**. Pursuant to WAC 242-02-280(3), the participation of Amicus 1000 Friends is limited to the submittal of a brief in response to the City's Motion to Dismiss GMA Issues and a prehearing brief, to be submitted by no later than **4:00 p.m. on Tuesday, Nov. 5, 2002**. 1000 Friends may brief the Legal Issues 1 through 6 set forth in the Final Prehearing Order. 1000 Friends shall submit to the Board an original and four copies of its brief, and shall simultaneously serve a copy of its briefs on all petitioners, respondents, the intervenor and other amici in this case.

OCD

The OCD Motion for Amicus Status is **granted**. Pursuant to WAC 242-02-280(3), the participation of Amicus OCD is limited to the submittal of a brief in response to the City's Motion to Dismiss GMA Issues. Because the Board has already received this pleading, the participation by Amicus OCD is now completed.

IV. CITY'S MOTION TO DISMISS GMA ISSUES

A. Applicable Law

1. Shoreline Management Act Provisions

RCW 90.58.190 provides in part:

(1) The appeal of the department's decision to adopt a master program or amendment pursuant to RCW 90.58.070(2) or 90.58.090(4) is governed by RCW 34.05.510 through 34.05.598.

(2)(a) The department's decision to approve, reject, or modify a proposed master program or

amendment adopted by a local government planning under RCW 36.70A.040 shall be appealed to the growth management hearings board with jurisdiction over the local government. The appeal shall be initiated by filing a petition as provided in RCW 36.70A.250 through 36.70A.320.

(b) If the appeal to the growth management hearings board concerns shorelines, the growth management hearings board shall review the proposed master program or amendment for compliance with the requirements of this chapter and chapter 36.70A.RCW, the policy of RCW 90.58.020 and the applicable guidelines, and chapter 43.21C RCW as it relates to the adoption of master programs and amendments under chapter 90.58 RCW.

(c) If the appeal to the growth management hearings board concerns a shoreline of state-wide significance, the board shall uphold the decision by the department unless the board, by clear and convincing evidence, determines that the decision of the department is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.

(d) The appellant has the burden of proof in all appeals to the growth management hearings board under this subsection.

(e) Any party aggrieved by a final decision of a growth management hearings board under this subsection may appeal the decision to superior court as provided in RCW 36.70A.300.

Emphasis added.

The relevant SMA definitions are found at RCW 90.58.030:

(1) Administration:

(a) "Department" means the department of ecology;

...

(2) Geographical:

...

(c) "Shorelines of the state" are the total of all "shorelines" and "shorelines of state-wide significance" within the state;

(d) "Shorelines" means all of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them; except (i) shorelines of state-wide significance; (ii) shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments; and (iii) shorelines on lakes less than twenty acres in size and wetlands associated with such small lakes;

(e) "Shorelines of state-wide significance" means the following shorelines of the state:

(i) The area between the ordinary high water mark and the western boundary of the state from Cape Disappointment on the south to Cape Flattery on the north, including harbors, bays, estuaries, and inlets;

(ii) Those areas of Puget Sound and adjacent salt waters and the Strait of Juan de Fuca between the ordinary high water mark and the line of extreme low tide as follows:

- (A) Nisqually Delta•-from DeWolf Bight to Tatsolo Point,
 - (B) Birch Bay•-from Point Whitehorn to Birch Point,
 - (C) Hood Canal•-from Tala Point to Foulweather Bluff,
 - (D) Skagit Bay and adjacent area•-from Brown Point to Yokeko Point, and
 - (E) Padilla Bay•-from March Point to William Point;
- (iii) Those areas of Puget Sound and the Strait of Juan de Fuca and adjacent salt waters north to the Canadian line and lying seaward from the line of extreme low tide;
- (iv) Those lakes, whether natural, artificial, or a combination thereof, with a surface acreage of one thousand acres or more measured at the ordinary high water mark;
- (v) Those natural rivers or segments thereof as follows:
- (A) Any west of the crest of the Cascade range downstream of a point where the mean annual flow is measured at one thousand cubic feet per second or more,
 - (B) Any east of the crest of the Cascade range downstream of a point where the annual flow is measured at two hundred cubic feet per second or more, or those portions of rivers east of the crest of the Cascade range downstream from the first three hundred square miles of drainage area, whichever is longer;
- (vi) Those shorelands associated with (i), (ii), (iv), and (v) of this subsection (2)(e);

2. Growth Management Act Provisions

RCW 36.70A.280 provides in part:

(1) A growth management hearings board shall hear and determine only those petitions alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

(2) A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; (c) a person who is certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530.

RCW 36.70A.480 provides:

1) For shorelines of the state, the goals and policies of the shoreline management act as set forth in RCW 90.58.020 are added as one of the goals of this chapter as set forth in RCW 36.70A.020. The goals and policies of a shoreline master program for a county or city approved under chapter 90.58 RCW shall be considered an element of the county or city's comprehensive plan. All other portions of the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the county or city's development regulations.

(2) The shoreline master program shall be adopted pursuant to the procedures of chapter 90.58 RCW rather than the procedures set forth in this chapter for the adoption of a comprehensive plan or development regulations.

B. Discussion

1. Positions of the Parties

The City cites RCW 90.58.190 and seeks an order from the Board:

. . . dismissing “Petitioners’ issues that challenge the Everett Shoreline Master Program (“SMP”) as it pertains to shorelines of state-wide significance for noncompliance with chapter 36.70A RCW the legislature has explicitly limited the review of SMPs as they pertain to shorelines of statewide significance to consistency with RCW 90.58.020.

City’s Motion to Dismiss GMA Issues, at 1.

Everett points out that petitioners’ claims focus on “shorelines of state-wide significance”^[2], and argues that the specific language of RCW 90.58.190 limits challenges to the SMP amendments to “the policy of 90.58.020” as opposed to the provisions of RCW 36.70A. City’s Motion to Dismiss GMA Issues, at 2-3. The City requests as relief that the Board:

[D]ismiss those issues pertaining to alleged noncompliance with chapter 36.70A as noted in Exhibits 3-6 and

[I]ssue an order stating that issues pertaining to shorelines of statewide significance will be reviewed only for consistency with the policy of RCW 90.58.020.

City’s Motion to Dismiss GMA Issues, at 4.

WEC responds:

With the SMA and GMA integration, the City's SMP became part of the City's Comprehensive Plan and development regulations. The Board has authority to review the City's Comprehensive Plan and development regulations for consistency with the GMA. Thus, the City's approval and adoption of its SMP, as it concerns shorelines of state-wide significance and as it is part of the City's Comprehensive Plan and development regulations, is subject to the Board's review under the GMA. Any other holding would allow the City to amend its Comprehensive Plan and development regulations without ensuring their consistency with the GMA goals and requirements.

WEC Brief re: Motion to Dismiss GMA Issues, at 8

ESC adopts the brief and argument of WEC. ESC's Brief re: Motion to Dismiss GMA Issues, at 1.

The Tribe argues that the Board should deny the City's Motion to Dismiss Issues regarding RCW 36.70A. The Tribes argue:

The City asserts that RCW 90.58.190 insulates everything in its SMP relating to shorelines of state-wide significance from review under the GMA, RCW Ch.36.70A. This position directly contradicts the SMA's plain language and intent . . . the Board conducts two separate reviews. First, it reviews Ecology's approval of the SMP amendment for consistency with the SMA. Second, it reviews the local government's SMP amendment for consistency with both the SMA and the GMA.

The Tribes also argue:

RCW 90.58.190(2) does not address which statutory provisions the Board applies when reviewing a local government's decision to adopt an SMP amendment. The GMA, however, directly confronts this issue. It expressly requires the Board to review local government's amended SMPs for compliance with both the GMA and the SMA

Tulalip Brief re: Motion to Dismiss GMA Issues, at 4.

1000 Friends agrees with many of the points raised by WEC and the Tribes. 1000 Friends also argues that the City's reliance on *Gilpin* is misplaced, and argues:

The City's memorandum in support of its motion cites only the decision in *Gilpin v. Department of Ecology* for the proposition that Shoreline Master Programs are not subject to review for GMA compliance. . . Both RCW 90.58.190 and *Gilpin* make clear that it is the party, and not the subject, that determines whether a petition for review can raise GMA compliance as an issue. *Gilpin* limits the Board's review of "Ecology's actions," not the subject matter of shorelines of statewide significance.

1000 Friends Brief re: Motion to Dismiss GMA Issues, at 3.

Amicus OCD presents lengthy legislative history, including the Governor's Regulatory Reform Task Force Final Report, in disputing the City's position that the Board lacks jurisdiction to review Everett's SMP for compliance with Chapter 36.70A RCW. OCD asserts:

Prior to 1995, the Growth Management Hearings Boards had authority to review all comprehensive plan provisions and development regulations, including those applying to shorelines, for compliance with the GMA. *See* Final Report, Vol. I, at 53. There is no indication that the legislature intended to limit already existing authority to hear and decide appeals alleging shoreline regulations do not comply with the GMA.

OCD Brief re: Motion to Dismiss GMA Issues, at 10.

In its reply to the petitioners and *amici*, the City asserts:

The Growth Management Act limits the review of Shoreline Master Programs concerning shorelines of state-wide significance to compliance with chapter 90.58 RCW, contrary to the arguments of WEC, the Tribes, and Amicus 1000 Friends of Washington.

Specifically, RCW 36.70A.280(1) provides:

- (1) A growth management hearings board shall hear and determine only those petitions alleging either:
 - (a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, ***chapter 90.58 as it relates to the adoption of the shoreline master programs or amendments thereto***, or chapter 43.21C as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW.

Likewise, RCW 36.70A.300 provides:

- (2) The board shall issue a final order that shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter, ***chapter 90.58 RCW as it relates to adoption or amendment of shoreline master programs . . .***

The emphasized portions of the text instructs this Board to issue a final order on whether a city's adoption or amendment of a shoreline master program is in compliance with the requirements of chapter 90.58 RCW. The language does not authorize the Board to review a city's adoption or amendment of a shoreline master program for compliance with chapter 36.70A RCW.

City's Reply to Responses to Motion to Dismiss GMA Issues, at 4-5. Bold italicized emphasis in City's brief.

The City argues that the plain language of a statute controls where the statute is clear and asserts that the statutes at issue in this case are clear. City's Reply to Responses to Motion to Dismiss GMA Issues, at 1. The City cites a recent State Supreme Court Decision, *State of Washington v. Glas*, No. 71514-9, slip op. (Sept. 19, 2002) for this proposition and argues that, regardless of the policy merits or apparent legislative intent, in such a circumstance the tribunal is compelled by the rules of construction to find for the defendant, no matter how reprehensible his behavior. *Id.*

2. Analysis

RCW 90.58.190 describes the process of appealing decisions of the Department of Ecology whether those decisions concern "shorelines" (sub-paragraph (2)(b)) or "shorelines of state-wide significance" (sub-paragraph (2)(c)). There appears to be no dispute that "shorelines of state-wide significance" are at issue in the present case. The Board agrees with the City that there is no ambiguity about the applicability to 90.58.190(2)(c) to the Department's decisions about shorelines of state-wide significance; this provision limits the Board's review of Ecology's action to "the policy of RCW 90.58.020 and applicable guidelines." However, Everett is incorrect when it contends that 90.58.190(2)(c) limits the Board's review of the *City's* action solely to the provisions of the Shoreline Management Act.

It is significant that only the "department," meaning the Department of Ecology, not local government, is named in RCW 90.58.190. This section of the Shoreline Management Act provides direction to the Board in dealing with appeals of the "department's decisions." The Department of Ecology is the state agency charged with administering the provisions of the Shoreline Management Act. RCW 90.58.030(1)(a). However, Ecology has no mandate or authority to administer the provisions of the Growth Management Act. Therefore, neither the Department of Ecology, nor 90.58.190, provides guidance to the Board in dealing with appeals of the decisions of local governments *as to Growth Management Act goals and requirements*.

This reading of 90.58.190 is buttressed when read in context with the applicable GMA provisions of RCW 36.70A.480 and .280. Everett's argument that, with respect to shorelines of state-wide significance, it is immune from review for fidelity to GMA requirements, was pre-empted by the legislature's actions in 1995, codified in .480. The City's premise seems to be that its "Shoreline Master Program" remains a stand-alone document, separate and independent from its GMA comprehensive plan and GMA development regulations. While that may still be true in a physical sense (*i.e.*, Everett's SMP may be separately bound from the City's plan and zoning code), it is no longer true in a legal sense.

The language of .480 is not *prospective* – it does not provide direction for future local legislative action to integrate local shoreline policies and regulations into local GMA comprehensive plans and development regulations, respectively – rather, .480 is *prescriptive* – the legislature has already taken legislative action to merge the constituent parts (*i.e.*, the goal/policy component and the regulatory component) of every SMP in this region into the GMA-mandated local comprehensive plans and development regulations.

As noted *supra*, the plain language of .480 provides, in relevant part:

The goals and policies of a *shoreline master program for a county or city* approved under chapter 90.58 RCW *shall be considered an element of the county or city's comprehensive plan. All other portions of the shoreline master program for a county or city* adopted under chapter 90.58 RCW, including use regulations, *shall be considered a part of the county or city's development regulations.*

Emphasis added.

The emphasized language makes it clear that a local government's shoreline master program is now part and parcel of the GMA comprehensive plan and development regulations. It is also undisputed that the Board has jurisdiction to review comprehensive plans and implementing development regulations for compliance with the GMA. RCW 36.70A.280.

Therefore, in light of the plain language of .480, it is no longer possible for a local government to amend its shoreline master program without also amending its GMA comprehensive plan and development regulations. When doing so, a local government's action must comply with the goals and requirements of the GMA as well as the SMA. The Board notes that RCW 36.70A.480(2) provides that such amendments shall be done subject to the *procedures* of the Shoreline Management Act, rather than the Growth Management Act. This comports with the Board's reading that local government "shoreline master program amendments" have a duty to comply with the goals and substantive requirements of the GMA, notwithstanding that such amendments will be adopted using the procedures (*e.g.*, public involvement, Ecology review for fidelity to SMA requirements) of the SMA.

C. Conclusions

The Board concludes that the City's adoption of its Shoreline Master Program Amendments must comply with the goals and requirements of the GMA. Therefore, the City's Motion to Dismiss GMA issues is **denied**.

V. CITY'S MOTION TO DISMISS ESC ISSUES

A. Discussion

1. Positions of the Parties

The City contends that ESC's standing is limited to only the issues raised by Libby Johnson on April 24, 2002 and limited testimony of People of Puget Sound and Pilchuck Audubon Society in their individual capacities. It bases this assertion on the Board ruling in *Banigan v. King County* that, "[F]or an organization to have participation standing, a member of that organization **must identify himself or herself as a representative** of the organization **when** that person **attends** the hearing or meeting, **testifies** at a hearing, or **submits** a letter on the subject." (citation omitted) City's Motion to Dismiss ESC Issues, at 2.. "This requirement provides notice 'to the local government that the people before it represent more than individual interest, that they are part of a larger group.' *Bremerton v. Kitsap County*, No. 97-3-0024c (Apr. 22, 1997) (1997 WL 297711)." City's Motion to Dismiss ESC Issues, at 3.

The City agrees that on April 24, 2002, Libby Johnson identified herself as part of ESC when testifying before the Everett City Council. However, it goes on to assert that no other member or individual, before or after that date, testified on behalf of ESC. In addition, because Libby Johnson only identified herself as part of ESC on April 24, 2002, then all her public participation prior to this date does not assert standing for ESC. "Thus, ESC has standing based on Libby Johnson's testimony only, and can only proceed on issues reasonably related to her participation on April 24, 2002." *Id.*

The City continued by stating this Board's rule regarding public participation standing,

To have meaningful public participation and avoid 'blind-siding' local governments, members of the public must explain their land use planning concerns to local government 'in **sufficient detail** to give the government the opportunity to consider these concerns as it weights and balances its priorities and options under the GMA.' *Alpine/Bremerton v. Kitsap County*, Nos. 98-0032c & 95-3-0039c, at 7-8 (Order on Dis. Motions) (Oct. 7, 1998); *Ross v. Kitsap County*, No. 99-3-0014, at *3 (Oct. 1, 1999) (1999 WL 33100214).

City's Motion to Dismiss ESC Issues, at 4.

Based on this, the City asserts that the only issue presented in ESC's PFR that is reasonably related to Libby Johnson's April 24, 2002, testimony is issue 1; therefore, the remaining issues as to ESC should be dismissed. City's Motion, at 4.

The City continues by addressing the extent and content of the testimony by People for Puget Sound (**PFPS**). PFPS submitted two letters on behalf of the organization, as well as Ellen Gray

testified on its behalf on three occasions. The City maintains that this testimony did not raise a concern regarding the need for a public access plan; therefore, that issue should be dismissed as to PFPS. City's Motion to Dismiss ESC Issues, at 6-7.

The City continued its motion by detailing specific issues from the ESC PFR that were not raised in the extensive written and oral comments offered by the Pilchuck Audubon Society (**PAS**). Thus, the City requests these specific issues be dismissed as to the PAS. *Id.*

In Response, ESC maintains that it "has standing where any of its members have individually satisfied standing requirements. *Save a Valuable Environment*, 89 Wn.2d at 866-868. All of the ESC group of petitioners have standing where any single one has standing. *Clinton*, 118 S.Ct. at 2100 n.19." ESC's Response to City's Motion to Dismiss ESC Issues, at 5.

The Coalition continues by asserting that the table and excerpts of record to the Johnson Declaration show that the participation of ESC, People for Puget Sound, Pilchuck Audubon, and Libby Johnson was reasonably related to the issues they jointly raised in their PFR. ESC cited Western Washington Growth Management Hearings Board case, *Butler v. Lewis County*, asserting that "there is no requirement that petitioners make more than a 'brief mention' of the 'geographical areas of subjects of interest to them' for standing purposes," and that the all the "petitioners have done this, and in several cases, made more than a 'brief mention'." (citation omitted) *Id.* at 5.

ESC concludes by asserting that the City's motion is moot. The Coalition bases this argument on the fact that the Board granted the ESC petitioner group intervenor status in all issues raised by all parties in the Final Prehearing Order. The ESC motion requesting intervention had been on behalf of all four of the ESC petitions together; therefore, even if Everett could show that some of the Coalition petitioners lacked standing on particular issues, they would not be dismissed as they were now interveners on all legal issues. ESC's Response to City's Motion to Dismiss ESC Issues, at 7.

2. Analysis

The Board agrees with the City that the appropriate "test" to apply to issue-specific standing challenges such as this was fashioned by this Board in *Alpine/Bremerton*, and cited favorably by the Court of Appeals in *Wells v. Hearings Bd.*, 100 Wn. App. 657, 997 P.2d 405 (2000) (**Wells**). The heart of this test is:

To determine participation standing, the Board reviews the issue as set forth in the Prehearing Order, the PFR, the briefing and the record to ascertain the nature of the petitioner's participation. If the petitioner's participation is ***reasonably related*** to the petitioner's issues as presented to the Board, then the petitioner has standing to raise and argue that issue. If petitioner's participation is not reasonably related to petitioner's issue as presented to the Board, then the petitioner will not have standing

to raise and argue that issue.

Alpine/Bremerton, 10/7/98 Order, at 10. Emphasis added.

In view of the facts and argument presented here, the Board concludes that the participation by ESC was reasonably related to the issues set forth in its PFR. The City makes a hyper-technical argument, but never addresses the question of whether it was made aware of the issues raised by ESC during the process below. Because the City was made aware of the scope and nature of the concerns that ESC members articulated during their collective remarks, it cannot now credibly argue that it was “blind-sided” when those concerns were manifested in the ESC PFR.

Alternatively, the Board agrees with the arguments made by ESC that the City’s Motion to Dismiss ESC Issues has been rendered moot by the grant of issue intervention in the Final Prehearing Order.

B. Conclusions

The City’s Motion to Dismiss ESC Issues is **denied**.

VI. CITY’S MOTION TO DISMISS TULALIP ISSUES

A. Discussion

1. Positions of the Parties

The City began by reiterating and emphasizing that,

To have meaningful public participation and avoid ‘blind-siding’ local governments, members of the public must explain their land use planning concerns to local government ‘in *sufficient detail* to give the government the opportunity to consider these concerns as it weights and balances its priorities and options under the GMA.’ *Alpine/Bremerton v. Kitsap County*, Nos. 98-0032c & 95-3-0039c, at 7-8 (Order on Dis. Motions) (Oct. 7, 1998); *Ross v. Kitsap County*, No. 99-3-0014, at *3 (Oct. 1, 1999) (1999 WL 33100214).

City’s Motion to Dismiss Tulalip Issues, at 2.

The City continued by asserting that several of the issues raised by the Tribe in their PFR are not reasonably related to their public participation before the City or Ecology. *Id.*, at 3. The City asserted the nowhere in the Tribes’ written or oral testimony did they discuss several of the issues

listed in the PFR; therefore, the Board should dismiss those specific issues.

In Response, the Tribe claims that the City was asking the Board to require “issue-specific” standing, a requirement that this Board and the Court of Appeals have outright rejected. *Id.* Tulalip Response re: City’s Motion to Dismiss Issues, at 5. The Tribe contended that the City’s Motion complained that the issues in the Tribes petition were insufficiently specific because they did not parrot the exact language of their written comments. *Id.*

To establish the requirements of participation standing, the Tribe cited to *Wells*, stating that the, “petitioner must show ‘some nexus’ between participation in the county process and the issues raised to the Board. *Id.* at 673.” Tulalip Response re: City’s Motion to Dismiss Issues, at 4. The Tribe continued by maintaining that there were no new matters presented in their PFR without a nexus to fish protection and restoration. “The Tribes met the GMA’s letter and spirit by voicing concerns before the City and Ecology about fish-related matters, and by filing a petition with a ‘detailed statement of issues’ that all ‘reasonably relate’ to fish protection and restoration. *Wells*, 100 Wn. App. At 673.” Tulalip Response re: City’s Motion to Dismiss Issues, at 6.

The Tribes substantially participated in the SMP and SEWIP proceedings with a singular purpose – ensuring that the resulting SMP would meaningfully protect and restore anadromous fish and shellfish habitat in its Treaty-guaranteed fishing and shellfishing areas. The Tribes voiced serious concerns that changed land designations and ensuing development would harm sensitive fisheries. Every single one of the Tribes’ comments, both verbal and oral, addressed this matter. The final SMP was deficient as to fish protection and restoration. Thus, the Tribes filed a petition that raised these very matters, all of which have the requisite “nexus” to the “subject or topic of concern or controversy” raised in its comments. *See Wells*, 100 Wn.App. qt 673. Every single one of the Tribes’ comments and every single issue in the Tribes’ petition ‘reasonable relates’ to fish and shellfish habitation protection and restoration. There is no danger of the City being blind sided by the issues raised in the Tribes petition.

Tulalip Response re: City’s Motion to Dismiss Issues, at 8. Emphasis in original.

The Tribe concluded by asserting that the City’s Motion, “failed to make the requisite showing that any of the Tribes’ issues are not ‘reasonably related’ to the fish and shellfish protection and restoration concerns voiced to the City and Ecology.” *Id.*

2. Analysis

The Board agrees with the City that the appropriate “test” to apply to issue-specific standing challenges such as this was articulated by this Board in *Alpine/Bremerton*, and cited favorably by

the Court of Appeals in *Wells*. The heart of this test is:

To determine participation standing, the Board reviews the issue as set forth in the Prehearing Order, the PFR, the briefing and the record to ascertain the nature of the petitioner's participation. If the petitioner's participation is *reasonably related* to the petitioner's issues as presented to the Board, then the petitioner has standing to raise and argue that issue. If petitioner's participation is not reasonably related to petitioner's issue as presented to the Board, then the petitioner will not have standing to raise and argue that issue.

Alpine/Bremerton, 10/7/98 Order, at 10. Emphasis added.

In view of the facts and argument presented here, the Board concludes that the participation by the Tribes was reasonably related to the issues set forth in its PFR. The City makes a hyper-technical argument, but never addresses the question of whether it was made aware of the issues raised by Tulalip during the process below. Because Everett was made aware of the scope and nature of the concerns that the Tribes articulated, the City cannot now credibly argue that it was "blind-sided" when those concerns were manifested in the Tulalip PFR.

Alternatively, the Board agrees with the arguments made by the Tribes that the City's Motion to Dismiss Tulalip Issues has been rendered moot by the grant of issue intervention in the Final Prehearing Order.

B. Conclusions

The City's Motion to Dismiss Tulalip Issues is **denied**.

VII. CITY'S MOTION TO DISMISS SEPA ISSUES AND APA STANDING CLAIMS

A. Discussion

1. Positions of the Parties

City's Position regarding: SEPA Standing

The City's first contention is that neither Petitioner Hall nor the Tulalip Tribes asserted SEPA standing in their Petitions for Review. The City cites to this Board's holding that "[t]o challenge a SEPA action, a petition for review must assert SEPA standing. *Kelly v. Snohomish County*, No. 97-3-0012c, at *3 (1997 WL 316492)." The City furthers its argument by stating that "[f]ailure to

allege SEPA standing in a petition for review is sufficient to dismiss SEPA issues. *Rural Bainbridge Island v. City of Bainbridge*, 98-3-0030c, at *4 (1998 WL 1045225). Consequently, the Board should dismiss their SEPA issues with prejudice.” City’s Motion to Dismiss SEPA Issues and APA Standing Claims, at 2.

The City’s second contention is that ESC failed to allege facts sufficient to establish injury in fact, therefore, ESC’s SEPA issues should be dismissed. The City begins this argument by stating the requirements for demonstrating SEPA standing. It specifically addresses the requirements for injury in fact as established by *Alpine*. “[A] petitioner must show that the government action will cause him or her specific and perceptible harm; and that the injury will be ‘immediate, concrete, and specific.’” The City continues by clarifying that “if, however, the injury is ‘merely conjectural or hypothetical, there can be no standing. *Trepanier v. Everett*, 64 Wn. App. 380, 382 (1992).” City’s Motion, at 3. It concludes by stating that, “This Board has acknowledged that it is ‘virtually impossible’ for petitioners to meet the *Trepanier* and *Leavitt* SEPA standing test when ‘a nonproject legislative enactment is the underlying SEPA action.’ *Pilchuck et. al., v. Snohomish County*, No. 95-3-0047, at 5 (*Order on Disp. Motions*, Aug. 17, 1995).”

The City continues by claiming that ESC made bald assertions regarding an immediate, concrete, specific injury that are insufficient to establish SEPA standing. “ESC has not presented any, let alone, sufficient evidentiary facts on behalf of itself or its members. . . ESC identifies no specific aspects of the City’s or Ecology’s process that injured or will injure the Petitioners.” City’s Motion to Dismiss SEPA Issues and APA Standing Claims, at 5.

Petitioner Hall’s Position regarding: SEPA Standing

Petitioner Hall did not submit a response to the City’s Motion To Dismiss SEPA Issues and APA Standing Claims.

Tulalip Tribes Position regarding: SEPA Standing

The Tribes contend that they “did assert SEPA standing in their petition by alleging facts sufficient to indicate their interests fall within the zone of interests protected by SEPA and that they suffered an injury in fact.” Tribes’ Response re: City’s Motion to Dismiss Issues, at 14.

The Tribe argues that,

The Board applies a relaxed rule to determine if petitioners sufficiently allege standing in a petition for review: they need only allege facts indicating that they are within the zone of interests protected by SEPA and that they have been injured by the local government’s action. *Hapsmith II*, CPSGMHB 95-3-0075c (June 18, 1996). If a petitioner’s alleged standing is challenged, the petitioner is given the opportunity to

respond and the Board will consider other evidence provided by the petitioner beyond that in the petition itself. *Id.*

Tribes' Response re: City's Motion to Dismiss Issues, at 14.

The Tribe asserts that it did

. . . raise facts sufficient to indicate their interests were within the zone of interests protected by SEPA and they will be injured by the City's action. . . The Tribes' stating interests of protecting fish and wildlife habitat fall clearly within the zone of interests protected by SEPA, which ' concerns brought questions of environmental impact, identification of unavoidable adverse environmental effects, choices between long and short term environmental uses, and identification of the commitment of environment resources. ' (citation omitted). [T]he Tribes not only alleged injury in a petition, they have protectively provided additional facts to prove that they will suffer an injury in fact. Nelson Declaration, incorporated herein.

Tribes' Response re: City's Motion to Dismiss Issues, at 15.

ESC's Position regarding: SEPA Standing

ESC counters the City's assertion that ESC did not establish injury in fact by outlining the "actual" injuries that Libby Johnson has suffered as a result of her "state of concern" regarding the challenged master program update. ESC's Response to City's Motion to Dismiss SEPA and APA Standing Claims, at 3. Specifically, ESC maintains that Ms. Johnson has suffered significant physical, mental and emotional harm, including difficulty sleeping and problems concentrating and thinking about other things. These injuries are a result of Ms. Johnson's view that "the challenged master program update presents a threat of development and destruction of the remaining wildlife and natural places in the shoreline areas that she has enjoyed." *Id.* at 3.

ESC supports its position by citing the Supreme Court holding that,

[T]hat an individual can establish injury in fact by showing a connection to the area of concern sufficiently to make credible the contention that the person's future life will be less enjoyable – that he really has or will suffer in his or her degree of aesthetic or recreational satisfaction – if the area in question remains or becomes environmentally degraded. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 120 S.Ct. 693, 705 (2000).

ESC's Response to City's Motion to Dismiss SEPA and APA Standing Claims, at 4.

ESC continued,

Furthermore, mere threatened injury is sufficient to satisfy the injury in fact requirement. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (“[O]ne does not have to await for the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.”) . . .

ESC’s Response to City’s Motion to Dismiss SEPA and APA Standing Claims, at 5.

ESC concluded its argument by asserting that the City’s motion was moot. It contends that “Even if Everett is somehow correct that ESC lacks standing to raise some particular issue, it simply does not matter because all of the ESC petition group members have intervenor status as to each of the issues in this appeal.” *Id.* at 6.

City’s Position regarding: APA Standing

The City begins by reiterating its previous conclusion that the ESC failed to allege sufficient evidentiary facts that demonstrate a specific and concrete harm that was immediate concrete and specific as required by the Trepanier/Leavitt SEPA standing test. Based on this, the City concludes that because ESC failed to show injury in fact with regard to SEPA, it failed the same requirement with regard to its APA standing. Consequently, the City asserts that ESC’s APA standing claims should be dismissed with prejudice. City’s Motion to Dismiss SEPA Issues and APA Standing Claims , at 7.

With regard to WEC’s APA standing, the City argued that the WEC petition provided “nothing more than generalized and conclusory statements regarding its alleged injuries.” City’s Motion to Dismiss SEPA Issues and APA Standing Claims, at 7. “WEC states its members are *likely* to be injured without providing any factual basis,’ . . . ‘and that its members will be directly impacted by Ecology’s approval of the City’s SMP.’” *Id.* at 8. The City continued by citing this Board’s decision in *Rural Bainbridge Island* that, “This Board has held that vague assertions are insufficient to establish ‘specific and perceptible harm, and do not demonstrate ‘immediate, concrete, and specific injury.’” (citation omitted) *Id.* at 8.

The City asserts that the injuries alleged by WEC are conjectural and hypothetical, and as this Board found no injury in fact based on statements alleging only ‘vague and conjectural injury at some future time in *Friends of Fennel Creek*, so too the Board should find no injury in fact in this case. Therefore, the City maintains that the Board should dismiss WEC’s APA standing claims with prejudice. *Id.* at 8-9.

The City also asserts that the Tulalip Tribes fail to establish injury in fact with regard to APA standing.

Although the Tribes appear to allege an immediate injury, their allegations fall short of the type of allegations required to demonstrate an injury in fact. . . the Tribes' statements of injury are generalized and vague, like the statements this Board found insufficient to confer standing in *Kelly*, *Rural Bainbridge Island*, and *Friends of Fennel Creek*. Because the Tribes have failed to allege an injury in fact, the Board should dismiss the Tribes' APA standing claims with prejudice.

City's Motion to Dismiss SEPA Issues and APA Standing Claims, at 9-10.

The City concludes its motion by contending that the Board cannot fashion a remedy that would substantially eliminate or redress the petitioner's alleged injuries, a requirement under RCW 34.05.530(3). The City's argument is that RCW 90.58 does not impose a duty on the City to amend its Shoreline Master Program in the absence of any applicable guidelines. The City contends that because it prepared its update before the Shoreline Hearings Board invalidated Ecology's Shoreline Guidelines eliminating the City's obligation to update its SMP. "The Board cannot direct the City to conduct such an update, absent a statutory requirement to do so. Consequently, the Board should dismiss the Petitioner's APA standing claims." City's Motion to Dismiss SEPA Issues and APA Standing Claims, at 10.

ESC's Position regarding: APA Standing

ESC discussed its APA and SEPA standing together based on the premise that "the tests for APA standing and SEPA standing are the same, except for the 'zone of interest' analysis. *Rural Bainbridge Island v. City of Bainbridge Island*, CPSGMHB No. 98-3-0030c Order on Dispositive Motions (10/16/98) at *2-*3." ESC's Response to City's Motion to Dismiss SEPA and APA Standing Claims, at 2. ESC contends that Everett does not challenge this aspect of the standing requirements and that ESC clearly met this prong of the test for all its issues. *Id.* at 2. Therefore, ESC's argument countering the City's claim that ESC did not establish injury in fact for APA standing is the same as its counter to the City's claim regarding SEPA standing. *See above: ESC's Position regarding: SEPA Standing.*

With regard to the City's contention that the Board cannot redress the alleged injury, ESC states that Libby Johnson's declaration demonstrated how her injury is redressable. "A Board decision in ESC's favor would mean that Everett would, at some time, have to redo its shoreline master program in a manner that provides more protection for the natural shoreline environment in compliance with the Board's ruling." (citation omitted) ESC's Response to City's Motion to Dismiss SEPA and APA Standing Claims, at 5.

WEC's Position regarding: APA Standing

WEC counters the City's allegation that WEC failed to show injury in fact and therefore is lacking

APA standing by relying on this Board's decision *Hapsmith I* that allows petitioners an opportunity to provide additional evidence in response to a standing challenge. (citation omitted) WEC's Response to City's Motion to Dismiss SEPA and APA Standing Claims, at 7.

WEC states that,

[T]he City of Everett's SMP, as proposed, would have serious adverse impacts on the nearshore environment, including destroying or seriously damaging critical shoreline fish and wildlife habitat through development of shorelines as well as other disturbances. These adverse impact on the shorelines would impact WEC members' use of the shorelines and adjacent waters for hiking, boating, fishing, kayaking and other recreational, educational and aesthetic activities that depend on shoreline protection and restoration.

WEC's Response to City's Motion to Dismiss SEPA and APA Standing Claims, at 9.

WEC discussed and drew similarities between the case at hand and several cases in which injury-in-fact was established and APA standing was granted. Based on this comparison, WEC contends that by including the above narrative in its petition for review and by incorporating by reference and attaching an exhibit in the record below, that it has made the necessary showing of an injury-in-fact. *Id.*

WEC furthers this position by asserting that WEC's written comment letter to Robert J. Fritzen, attached as Exhibit 1 to the Franz Declaration states how "important wildlife estuarine habitat areas, which WEC and its members are committed to protecting and restoring, will suffer concrete and specific injury as a result of the City's SMP." This argument elaborates on specific areas that WEC is concerned about and the injuries that it maintains are concrete and specific. WEC's Response to City's Motion to Dismiss SEPA and APA Standing Claims, at 9-14.

WEC concludes by countering the City's claim regarding the Board's ability to redress WEC's injuries. WEC contends that if it established that the City's SMP is not in compliance with the SMA or GMA, the Board's exclusive remedy is to remand it to the City. This would provide the City the opportunity to remedy the SMP's alleged deficiencies. WEC continues by asserting that if it prevails in this matter, the City's SMP would be invalidated, including the comprehensive plan and the development regulation it incorporates. WEC conclusion is that the Board's possible remedies would "substantially eliminate or redress WEC's alleged injuries, and thus the City's motion to dismiss WEC for standing should be denied." WEC's Response to City's Motion to Dismiss SEPA and APA Standing Claims, at 17.

Tribes' Position regarding: APA Standing

The Tribe counters the City's claim that it lacks APA standing because it fails to establish injury-in-fact by relying on the *Hapsmith* (sic) decision that establishes that "the Board will consider evidence provided beyond that in the petition itself to determine if standing requirements are met." (citation omitted) Tribes' Response re: City's Motion to Dismiss Issues, at 12.

The Tribe discusses the information presented in the Declaration of Kurt Nelson that describes the loss of important salmon habitat and the associated impacts to salmon populations particularly prejudices the Tribes treaty fishing rights. The Tribe asserts that,

Just as in *Bremerton v. Kitsap County*, where the Suquamish Tribe showed injury in fact by discussing the allowable development buildout under a new land designation and linking this with expected losses of impervious surface area and associated decline in salmon habitat, that Tulalip Tribes has met its burden. *See Bremerton*, CPSGMHB No. 95-3-0039 (April 2, 1997). Accordingly, the Board should deny the City's Motion to Dismiss regarding APA claims.

Tribes' Response re: City's Motion to Dismiss Issues, at 13.

The Tribe concludes its argument by countering the City's assertion that their alleged injuries are not redressable by the Board. The Tribe states:

The Board has authority to review petitions alleging that a city plan under the GMA is not in compliance with the requirements of the GMA and the SMA 'as it relates to shoreline master program and amendments thereto.' RCW 36.70A.280(1). In particular, this includes compliance with RCW 90.58.350, which requires that tribal treaty rights not be affected. The Board consequently is able to redress the Tribe's injuries by reviewing the City's amended plan for GMA and SMA requirements and ensuring the plan will not harm Treaty resources.

Tribes' Response re: City's Motion to Dismiss Issues, at 14.

2. Analysis

In a long line of cases involving SEPA challenges, this Board has consistently applied the two-part SEPA standing test, requiring petitioners to demonstrate: (1) a specific and perceptible injury-in-fact that is immediate, concrete and specific; and (2) an interest that falls within the zone of interests protected by SEPA. *See West Seattle Defense Fund v. City of Seattle (WSDF I)* CPSGMHB Case No. 94-3-0016, Order Granting Motion to Dismiss SEPA Claim (1994); (expressly adopting the two-part test set forth in *Leavitt and Trepanier*); *Robison v. Bainbridge Island*, CPSGMHB Case No. 94-3-0025, Order on Dispositive Motions (1995); *Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, Order on County's Dispositive Motion (1995);

Vashon-Maury v. King County, CPSGMHB Case No. 95-3-0008c, Final Decision and Order (1995); and *Alpine v. Kitsap County*, CPGMHB Case No 98-3-0032c, Order on Dispositive Motions (1998).

The Board has acknowledged that it will be difficult for any petitioner to demonstrate the “specific injury” required by *Leavitt* and *Trepanier* when challenging the SEPA sufficiency of non-project actions, such as local government legislative actions adopting amendments to comprehensive plans and development regulations. As the Board has held, *supra*, pursuant to RCW 36.70A.480, Everett’s adoption of its SMP amendments constitutes legislative amendments to its comprehensive plan and development regulations. Therefore, it will likewise be difficult for any petitioner to demonstrate “specific injury” when challenging GMA/SMA actions such as Everett’s.

The Petitioners in this case have made many serious allegations about the City’s compliance with the substantive requirements of the GMA and the City’s and Ecology’s compliance with the procedural and substantive requirements of the SMA. Nevertheless, none of the petitioners have cleared the admittedly high bar that is the threshold for obtaining SEPA standing of legislative GMA/SMA actions. As a consequence, the Board will grant the City’s Motion to Dismiss SEPA Issues and APA Standing Claims. The Board will take up the merits of these allegations in the case-in-chief. Parties are free to cite the SEPA documents in the record to make their case during that phase of the proceedings before the Board.

B. Conclusions

The Board concludes that, for purposes of SEPA, the petitioners have failed to demonstrate a “specific injury” that will be “immediate, concrete and specific.” Therefore, the City’s Motion to Dismiss SEPA Issues and APA Standing Claims is **granted**.

VIII. ORDER AMENDING FINAL SCHEDULE

The Final Schedule set forth in the Preliminary Prehearing Order continues in force and effect, with the exception that deadlines have been added for intervenors and amici, pursuant to the motions granted in sections II and III above. These deadlines are shown in bold on the attached Amended Final Schedule.

IX. SERVICE

All petitioners and respondents shall serve a copy of all future pleadings on Intervenor Port of Everett and *amici* AWC, WPPA and 1000 Friends.

So ORDERED this 1st day of October 2002.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Lois H. North
Board Member

Joseph W. Tovar, AICP
Board Member

<p>AMENDED FINAL SCHEDULE <i>CPSGMHB Consolidated Case No. 02-3-0009c</i> <i>Everett Shorelines Coalition, et. al. v. City of Everett and WSDOE</i></p>
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DATE	EVENT
Fri., July 12, 2002	<i>ESC</i> Petition for Review filed (02-3-0006)
Fri., July 12, 2002	<i>WEC</i> Petition for Review filed (02-3-0007)
Mon., July 15, 2002	<i>Hall</i> Petition for Review filed (02-3-0008)
Mon., July 15, 2002	<i>Tulalip</i> Petition for review filed (02-3-0009)
Mon., July 22, 2002	Board Order of Consolidation and Notice of Hearing issued
Thur., Sep. 5, 2002	Prehearing Conference
Fri., Sep. 6, 2002	Stipulated Schedule filed with the Board
Mon., Sep. 9, 2002	Preliminary Prehearing Order is issued
Tue., Sep. 10, 2002	Deadline for Dispositive Motions (with exhibits)
Thu., Sep. 12, 2002	Deadline Petitioners' Motions to Intervene on Issues
Mon. Sep. 16, 2002	Deadline for Everett and WSDOE responses to Petitioners' Motions to Intervene on Issues
Tue., Sep. 17, 2002	Final Prehearing Order is issued
Fri., Sep. 20, 2002	Deadline for Responses to Dispositive Motions (including Everett's GMA/SMA motion); Deadline for submission of Amicus Briefs addressing Dispositive Motions

Mon., Sep. 23, 2002	Deadline for Motions to Supplement the Record; Deadline for Motions to Intervene (by non-parties)
Wed., Sep. 25, 2002	Deadline for Rebuttals to Response to Dispositive Motions
Mon., Sept. 30, 2002	Deadline for Responses to Motions to Supplement the Record
Tue., Oct. 1, 2002	Order on Motions for Amicus and Intervention, Order on Dispositive Motions and Amending Schedule is issued
Thu., Oct. 3, 2002	Deadline for Rebuttals to Responses to Motions to Supplement the Record
Thur., Oct. 10, 2002	Board Order on Motions to Supplement the Record is due.
Wed., Oct. 16, 2002	Deadline for Petitioners' Prehearing Briefs on the Merits (with exhibits) and Deadline for Intervenor Briefs (with exhibits)
Fri., Nov. 1, 2002	Deadline for Everett's and WSDOE's Response Briefs on the Merits (with exhibits) Deadline for Intervenor Port of Everett's Response Brief on the Merits (with exhibits) Deadline for AWC Amicus Brief (with exhibits) Deadline for WPPA Amicus Brief (with exhibits)
Tue., Nov. 5, 2002	Deadline for Requesting Settlement Extension
Tue., Nov. 5, 2002	Deadline for 1000 Friends Amicus Brief (with exhibits)
Fri., Nov. 8, 2002	Deadline for Petitioners' Reply Briefs on the Merits (with exhibits) Deadline for Responses to all Amicus Briefs (optional)
Tue., Nov. 12, 2002	Hearing on the Merits: 10:00 a.m. to 3 p.m. Suite 1022 of the Financial Center, 1215 Fourth Avenue, Seattle
Thur., Jan. 9, 2003	Final Decision and Order due

[1] The Hall Motion for Deadline Extension was received in the Board's office almost an hour after the deadline set forth in the Final Prehearing Order had passed. The Hall Motion is therefore **denied**.

[2] The City refers to two Attachments for this proposition:
Attachment 1. The SMP's maps of Everett's shoreline confirms shorelines of the City which have been designated as having state-wide significance include: the area of Port Gardner Bay and the Snohomish River and the associated estuary areas, including Steamboat slough and Union Slough, and their shorelands.
Attachment 2.