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**Supreme Court Case No. 101618-2
(Court of Appeals Case No. 84019-3-I)**

SUPREME COURT OF THE STATE OF WASHINGTON

FRIENDS OF GRAYS HARBOR and FUTUREWISE,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY; GRAYS HARBOR COUNTY; and the STATE
OF WASHINGTON, SHORELINES HEARINGS BOARD,

Respondents.

**THE FRIENDS OF GRAYS HARBOR'S AND
FUTUREWISE'S PETITION FOR REVIEW**

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I. IDENTITY OF PETITIONERS

The Petitioners are Futurewise and the Friends Of Grays Harbor (collectively FOGH), two Washington State nonprofit corporations. Both were appellants before the Shoreline Hearings Board and the Court of Appeals.

II. CITATION TO THE COURT OF APPEALS AND SHORELINES HEARINGS BOARD DECISIONS

The Petitioners seek review of the following decisions:

1. *Friends Of Grays Harbor and Futurewise v. State of Washington, Department of Ecology; Grays Harbor County; and the State of Washington, Shorelines Hearings Board, Court of Appeals Case No. 84019-3-I, Unpublished Opinion filed on December 12, 2022. A copy of this opinion is enclosed as Appendix A.*

2. *Friends Of Grays Harbor and Futurewise v. State of Washington, Department of Ecology; and Grays Harbor County, Shorelines Hearings Board (SHB) No. 20-006, Findings of Fact, Conclusions of Law and Order ordered on*

November 19, 2021. A copy of this order is enclosed as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. Where RCW 90.58.100(2)(h) and WAC 173-26-176(3)(g) require the “prevention and minimization of flood damages,” without regard to the cause of flooding, can the SMP irrationally address flooding from certain causes (riverine, rain), but omit consideration of flooding caused by sea level rise?
2. Do RCW 90.58.020, RCW 90.58.100(2)(h), and WAC 173-26-176(3) require SMP updates to include policies and regulations to address the impacts of sea level rise, where it is undisputed that sea level rise will impact flooding and other mandatory SMP elements?
3. Do RCW 90.58.100(1) and WAC 173-26-201(2)(a) require SMPs to address the adverse impacts of sea level rise based on an analysis incorporating the most current, accurate, and complete scientific or technical information available,

where the SMP update already incorporates evidence regarding flooding from other causes but not from sea level rise?

IV. STATEMENT OF THE CASE

A. Although sea level rise will impact flooding in Grays Harbor County and other mandatory SMP elements, and was raised in the SMP update, the final SMP failed to address sea level rise.

The unrefuted science shows that sea level rise will have a substantial and increasing impact on flooding, which is a mandatory element that must be addressed by the SMP update.¹

The State of Washington Department of Ecology (Ecology) concluded that “[s]ea level rise and storm surge will increase the frequency and severity of flooding, erosion, and seawater intrusion—thus increasing risks to vulnerable communities, infrastructure, and coastal ecosystems.”² Rising seas will cause the “hazards associated with coastal areas” to “grow.”³ A peer-

¹ RCW 90.58.100(2)(h). Key relevant statutes and regulations are included in Appendix C.

² Certified Record (CR) 000444.

³ CR 000445.

reviewed journal article estimated that at least 8,018 people in Grays Harbor County will be at risk of adverse impacts from sea level rise by 2100.⁴ This is the largest population at risk of any Washington or Oregon county.⁵ People are not the only populations at risk. According to Ecology “Grays Harbor and Willapa Bay will likely experience the greatest loss of key habitats” for fish and wildlife due to sea level rise.⁶

In 2012, the National Research Council concluded that global sea level had risen by about seven inches in the 20th Century.⁷ *Projected Sea Level Rise for Washington State* projects that for a low emission scenario there is a 50 percent probability that sea level rise will reach or exceed 1.1 feet by 2100 for the area around Copalis Beach in unincorporated

⁴ CR 002766. This is a peer-reviewed journal. CR 002772 – 73.

⁵ CR 002766.

⁶ CR 002372. This document was reviewed by advisory groups. CR 002304.

⁷ CR 002812, CR 002885, CR 002891, CR 002945. This document was peer-reviewed. CR 002786.

Grays Harbor County.⁸ *Projected Sea Level Rise for Washington State* also projects that for a higher emission scenario there is a 50 percent probability that sea level rise will reach or exceed 1.5 feet by 2100 for this area.⁹ The location of Copalis Beach is shown on Map 2 North of the *Inventory Mapfolio*.¹⁰ Projections are available for all of the marine shorelines of the county.¹¹ The project sea level rise can be seen on the NOAA Sea Level Rise Viewer¹² and the Nature Conservancy's Flood and Sea Level Rise maps.¹³ On many marine shorelines in Grays Harbor County sea level rise will extend beyond the flood plains mapped by the Federal Emergency Management Agency (FEMA).¹⁴

⁸ CR 002267.

⁹ CR 002269.

¹⁰ CR 001800.

¹¹ CR 002053.

¹² CR 002995-3009.

¹³ CR 003326-51.

¹⁴ CR 003326-51; CR 001816-17.

“Sea level rise will exacerbate existing risks and vulnerabilities, such as shoreline and coastal bluff erosion, storm surge, flooding, and groundwater intrusion.”¹⁵ Ecology agrees writing “[s]ea level rise and storm surge[s] will increase the frequency and severity of flooding, erosion, and seawater intrusion—thus increasing risks to vulnerable communities, infrastructure, and coastal ecosystems.”¹⁶

The Nature Conservancy mapping shows that Grays Harbor has large areas of estuarine habitat that are vulnerable to sea level rise.¹⁷ Terrestrial habitats are also vulnerable to sea level rise.¹⁸ Unless wetlands and shoreline vegetation can migrate landward, their area and ecological functions will decline.¹⁹ According to Ecology “[d]evelopment of coastal areas and shoreline armoring (e.g., bulkheads, seawalls) prevent habitat

¹⁵ CR 002049.

¹⁶ CR 002394.

¹⁷ CR 003322.

¹⁸ CR 003324.

¹⁹ CR 002228, CR 002232. This journal is peer-reviewed. CR 006878.

areas from reestablishing inland.”²⁰ Vegetation loss will also deprive marine shorelines of the vegetation that protects property from erosion and storm damage.²¹ The vegetation and habitats in Grays Harbor also provide this protective function.²² These losses will also harm the environment including fish and wildlife.²³

For these reasons, sea level rise was an issue during the update of the SMP.

[A] diverse group of Grays Harbor County citizens was organized as a “Shoreline Planning Committee” and met scores of times to review and provide input on the updated draft plan. This group, which included a broad spectrum of perspectives, agreed that the potential impacts of sea level rise are a serious concern to the property and residents of Grays Harbor County. As such, sea level rise was addressed 14 times in the last draft that the committee reviewed and approved. In the current draft that is being proposed for approval, “sea level rise” is only mentioned once ... under goals. All policies that had “sea level

²⁰ CR 002372.

²¹ CR 002223-24. This journal is peer-reviewed. CR 002226.

²² CR 003322-25.

²³ CR 002372, CR 002390.

rise” language were either replaced with weaker language or removed.²⁴

Ecology approved the SMP even with these changes.²⁵ In the approved SMP, the only mention of sea level rise is to note that the public raised the issue at the Pacific Beach open house.²⁶

The SMP update was a comprehensive periodic update.²⁷ Therefore the SMP update was required to comply with the policy of the Shoreline Management Act (SMA) and the Shoreline Master Program (SMP) Guidelines.²⁸ Several mandatory elements are integrally impacted by sea level rise and cannot be credibly addressed without addressing sea level rise. This most obviously includes flooding – with unrefuted science showing that sea level rise will have a substantial and growing impact on the extent, frequency, and impact of

²⁴ CR 002244.

²⁵ CR 004650-82.

²⁶ CR 002075-76.

²⁷ CR 001335.

²⁸ RCW 90.58.080; RCW 90.58.090.

floods.²⁹ Other mandatory elements, including the circulation, use, and conservation elements are also impacted by sea level rise.³⁰

B. Procedural Posture

The State of Washington Shorelines Hearings Board's (SHB) Order concluded there is no requirement for local governments to plan for sea level rise in SMP updates.³¹ The SHB Order also concluded that because there is no requirement for local governments to plan for sea level rise, Grays Harbor County did not need to base its SMP update on an analysis incorporating the most current, accurate, and complete scientific or technical information available on sea level rise.³² For these and other reasons, the SHB Order affirmed Ecology's approval of the Grays Harbor County SMP update.³³

²⁹ CR 000444; CR 003326-51.

³⁰ RCW 90.58.100(2); CR 002036; CR 002372.

³¹ CR 008186, CR 008190, and CR 008193.

³² CR 008192-94.

³³ CR 008194.

The Court of Appeals opinion affirmed the SHB.³⁴ The Court of Appeals concluded “[t]he plain language of the SMA and Guidelines do not require SMPs to address sea level rise beyond the flood hazard regulations.”³⁵ The Court of Appeals also concluded the SMP complied with the flood hazard regulations.³⁶ The Court of Appeals concluded that the County’s Shoreline Analysis Report discussed sea level rise and included some recommendations.³⁷ The Court of Appeals concluded that not all of the recommendations need to be incorporated into the SMP, only that it be used to develop the SMP. The court of appeals concluded that the SMP update met the requirements of WAC 173-26-201(2)(a).³⁸

³⁴ *Friends Of Grays Harbor v. State of Washington, Department of Ecology*, Court of Appeals Case No. 84019-3-I, Slip Opinion p. 17 (Dec. 12, 2022) in Appendix A.

³⁵ *Id.* at p. 6.

³⁶ *Id.* at pp. 6-8.

³⁷ *Id.* at 13.

³⁸ *Id.* at p. 15.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This appeal presents three important legal questions that should be answered by the State of Washington Supreme Court.

Ecology concluded that “[s]ea level rise and storm surge will increase the frequency and severity of flooding, erosion, and seawater intrusion—thus increasing risks to vulnerable communities, infrastructure, and coastal ecosystems.”³⁹ Rising seas will cause the “hazards associated with coastal areas” to “grow.”⁴⁰ These threats to Washington State raise three important legal questions that the State Supreme Court should address:

1. Where RCW 90.58.100(2)(h) and WAC 173-26-176(3)(g) require the “prevention and minimization of flood damages,” without regard to the cause of flooding, can the SMP irrationally address flooding from certain

³⁹ CR 000444.

⁴⁰ CR 000445.

causes (riverine, rain), but omit consideration of flooding caused by sea level rise?

2. Do RCW 90.58.020, RCW 90.58.100(2)(h), and WAC 173-26-176(3) require SMP updates to include policies and regulations to address the impacts of sea level rise, where it is undisputed that sea level rise will impact flooding and other mandatory SMP elements?
3. Do RCW 90.58.100(1) and WAC 173-26-201(2)(a) require SMPs to address the adverse impacts of sea level rise based on an analysis incorporating the most current, accurate, and complete scientific or technical information available, where the SMP already includes evidence regarding flooding from other causes but not from sea level rise?

The FOGH respectfully request the State Supreme Court to accept review of this case and decide these important legal questions. This is necessary to help protect Washington's communities, residents, landowners, and the environment.

B. Standard of Review.

Rule of Appellate Procedure (RAP) 13.4(b)(4) applies here:

“(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.”⁴¹

C. Issue 1: Where RCW 90.58.100(2)(h) and WAC 173-26-176(3)(g) require the “prevention and minimization of flood damages,” without regard to the cause of flooding, can the SMP irrationally address flooding from certain causes (riverine, rain), but omit consideration of flooding caused by sea level rise?

Issue 2: Do RCW 90.58.020, RCW 90.58.100(2)(h), and WAC 173-26-176(3) require SMP updates to include policies and regulations to address the impacts of sea level rise, where it is undisputed that sea level rise will impact flooding and other mandatory SMP elements?

As seas continue to rise and inundate more land more frequently, whether the SMA requires SMPs to address sea level rise is an issue of substantial public interest that should be determined by the State Supreme Court.

The SMA’s “primary purpose ... is ‘to protect the state shorelines as fully as possible.’ *Lund*, 93 Wn. App. at 336 – 37,

⁴¹ RAP 13.4(b)(4).

969 P.2d 1072 (quoting *Buechel*, 125 Wn.2d at 203, 884 P.2d 910).”⁴² “The SMA “is to be broadly construed in order to protect the state shorelines as fully as possible. See RCW 90.58.900.”⁴³ The policy of the SMA in RCW 90.58.020 “is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest.” This includes “the statewide interest in the prevention and minimization of flood damages”⁴⁴

Although the SMP Guidelines are called “guidelines,” they are binding state agency rules and SMP updates must comply with these rules.⁴⁵ WAC 173-26-176(3), one of the SMP

⁴² *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334, 342 (2009) review denied 166 Wn.2d 1036, 218 P.3d 921 (2009).

⁴³ *English Bay Enterprises, Ltd. v. Island County*, 89 Wn.2d 16, 20-21, 568 P.2d 783, 786 (1977).

⁴⁴ RCW 90.58.100(2)(h).

⁴⁵ RCW 90.58.030(3)(b) & (c); RCW 90.58.080(1) & (7); *Olympic Stewardship Found. v. State Env't & Land Use Hearings Off. through W. Washington Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 680, 399 P.3d 562, 567 (2017) review

Guidelines, provides that the SMA’s “policy of protecting ecological functions, fostering reasonable utilization and maintaining the public right of navigation and corollary uses encompasses the following general policy goals for shorelines of the state: ... (g) Prevention and minimization of flood damages.” This policy goal was included to address the requirements of RCW 90.58.100(2).⁴⁶ WAC 173-26-186(3) provides in full that “[a]ll relevant policy goals must be addressed in the planning policies of master programs.” WAC 173-26-020(28) provides that “[m]ust’ means a mandate; the action is required.”

RCW 90.58.100(2)(h), WAC 173-26-176(3)(g), and WAC 173-26-186(3) require that SMPs “must address” “the statewide

denied *Olympic Stewardship Found. v. State Dep’t of Ecology*, 189 Wn.2d 1040, 409 P.3d 1066 (2018) cert. denied *Olympic Stewardship Found. v. State of Washington Env’t & Land Use Hearings Off.*, 139 S. Ct. 81, 202 L. Ed. 2d 25 (2018). While this case involved appeals of a SMP from the Growth Management Hearings Board, the same standards apply to appeals from the SHB. RCW 34.05.570(3).

⁴⁶ WAC 173-26-176(3)(g).

interest in the prevention and minimization of flood damages
....”⁴⁷ RCW 90.58.100(2)(h) and WAC 173-26-176(3)(g) do
not limit flooding to any particular source. The requirements are
not limited to riverine flooding or any other source. They apply
to flooding from all sources including sea level rise.

The Court of Appeals wrote “[t]he plain language of the
SMA and Guidelines do not require SMPs to address sea level
rise beyond the flood hazard regulations.”⁴⁸ But RCW
90.58.100(2)(h) and WAC 173-26-176(3)(g) require the
“prevention and minimization of flood damages[.]” This means
all flood damages regardless of their source. These
requirements do not exclude flooding due to sea level rise. And
as will be documented below, the FEMA flood plain
regulations do not address flooding from sea level rise. The
Court of Appeals and SHB read an exclusion into RCW

⁴⁷ RCW 90.58.100(2)(h).

⁴⁸ *Friends Of Grays Harbor v. State of Washington, Department of Ecology*, Court of Appeals Case No. 84019-3-I, Slip Opinion p. 6 (Dec. 12, 2022).

90.58.100(2)(h) and WAC 173-26-176(3)(g) that does not exist.⁴⁹

Ecology's *Shoreline Master Program Handbook Appendix A: Addressing Sea Level Rise in Shoreline Master Programs* states that "SMPs must address flood hazards and seek to reduce the damage caused by floods. Goals and policies addressing flood hazards are another opportunity to address sea level rise and the increased threat from flooding that will accompany it."⁵⁰

Ecology also writes that "[s]ea level rise and storm surge[s] will increase the frequency and severity of flooding, erosion, and seawater intrusion—thus increasing risks to vulnerable communities, infrastructure, and coastal ecosystems."⁵¹ Further, Ecology writes that:

An important consequence of higher sea level will be increased frequency of high-tide flooding and the potential for storm damage. A rise in sea level

⁴⁹ *Id.*; CR 008185-86.

⁵⁰ CR 002041 hereinafter *Handbook Appendix A*.

⁵¹ CR 002394.

of one foot might lead to as much as a tenfold increase in the frequency of any particular flood event. This means that events that currently occur only once every decade may become annual events, increasing the severity and frequency of flood and storm-related damages to coastal development (Shipman, 2009). These events could pose an increasing threat to coastal development and infrastructure.⁵²

The Nature Conservancy mapped sea level rise using NOAA’s mid-level sea level rise projections.⁵³ A six foot “rise in sea levels could result in the flooding of 9,300 homes in Grays Harbor and 1,700 homes in Pacific County even without the additional factors of a high tide or storm event. The resulting damage to homes and other infrastructure from this level of flooding would be over a billion dollars over the course of the next century.”⁵⁴ The Nature Conservancy’s mapping shows sea level rise adversely affecting the Pacific Beaches, coastal estuaries, the North and South Bays of Grays Harbor,

⁵² CR 002036.

⁵³ CR 003317.

⁵⁴ CR 003319.

the inner harbor, and the Chehalis River floodplain between Aberdeen and Montesano in unincorporated Grays Harbor County.⁵⁵

The *Projected Sea Level Rise for Washington State* projects that for a low emission scenario there is a 50 percent probability that sea level rise will reach or exceed 1.1 feet by 2100 for the area around Copalis Beach.⁵⁶ The assessment also projects that for a higher emission scenario there is a 50 percent probability that sea level rise will reach or exceed 1.5 feet by 2100 for the same area.⁵⁷

Even though “[s]ea level rise and storm surge[s] will increase the frequency and severity of flooding,”⁵⁸ the SMP does not include any policies, programs, or regulations to address the flooding caused by sea level rise.⁵⁹

⁵⁵ CR 003326-51.

⁵⁶ CR 002267.

⁵⁷ CR 002269.

⁵⁸ CR 002394.

⁵⁹ CR 002074-221.

“SEPA requires that the laws of the State, including the SMA, be interpreted and administered in accordance with the policies of SEPA. RCW 43.21C.030.”⁶⁰ Similarly, the *Dairy Federation* decision concluded that “Ecology maintains a responsibility to consider the impacts of climate change under SEPA to the extent that it must interpret its rules and statutes consistently with SEPA’s mandates.”⁶¹ The Pollution Control Hearings Board’s “decision was contrary to law when it dismissed this issue on summary judgment because climate change must be considered to some extent.”⁶² Here, the SHB and Court of Appeals ruled that SMPs do not need to address an impact of climate change, sea level rise.⁶³ This Court should

⁶⁰ *Olympic Stewardship*, 199 Wn. App. at 737-38, 399 P.3d at 594-95.

⁶¹ *Washington State Dairy Fed'n v. State*, 18 Wn. App. 2d 259, 309, 490 P.3d 290, 317 (2021).

⁶² *Id.*

⁶³ CR 002034; CR 002057; CR 008186, CR 008190, and CR 008193; *Friends Of Grays Harbor v. State of Washington, Department of Ecology*, Court of Appeals Case No. 84019-3-I, Slip Opinion p. 6 (Dec. 12, 2022).

take review of this case and reverse the conclusions there is no requirement for SMP updates to address sea level rise.

The SMP Flood Hazard Reduction policies in Section 3.4 do not apply to areas that will become flood prone areas due to sea level rise because the flood plain regulations only consider past events.⁶⁴ This is made clear by Policy 3.4.1J which states “[c]onsider and use available data relating to past flood events and monitor its potential influence on increasing flood hazards along estuarine and coastal shorelines.”⁶⁵ Policy 3.4.1J originally required the County and Ecology to “[c]onsider and use available data relating to sea level rise . . .,” but the County deleted “sea level rise” and substituted “past flood events.”⁶⁶ The County and Ecology will only consider past flood events and the potential of past flood events to increase flood hazards.

⁶⁴ CR 002101-03.

⁶⁵ CR 002101 underlining added.

⁶⁶ CR 004612.

It will not consider the existing data on flooding caused by sea level rise. Ecology approved the SMP with this change.⁶⁷

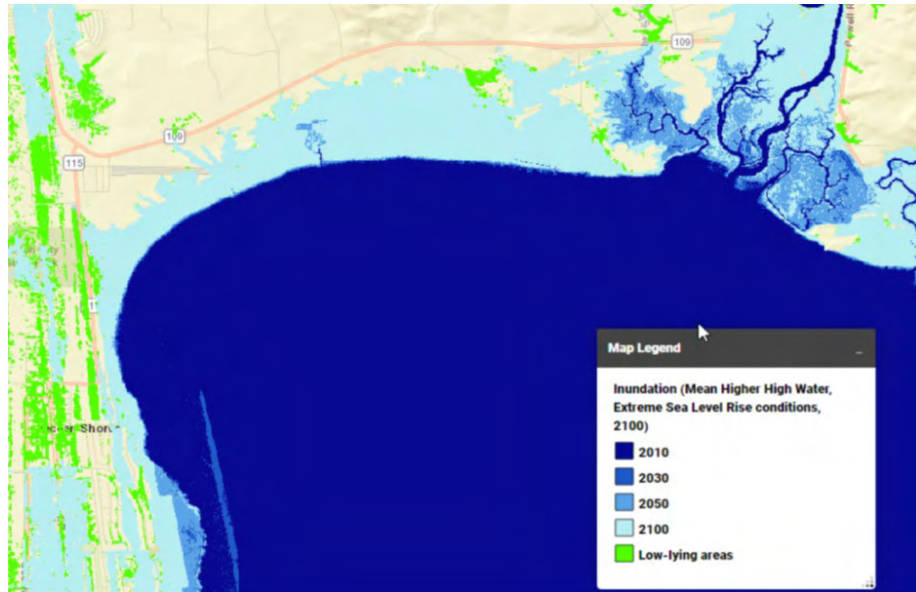
While the areas subject to inundation due to sea level rise are flood-prone, the extent of these hazards are not identified by the FEMA's flood insurance studies and maps. As *Projected Sea Level Rise for Washington State* states

we emphasize that sea level rise projections are different from the coastal flood risk assessments performed in a typical Federal Emergency Management Agency (FEMA) study. Specifically: (1) The current study concerns future changes in sea level, whereas FEMA flood maps are based on historical observations and assume no long-term change in risk, and (2) FEMA studies are focused on one specific event - the 100-year coastal flood - and do not address water levels during normal tides or other storm intensities. Our projections, in contrast, concern the long-term change in sea level, affecting the height of the water surface at all tidal elevations as well as during storm events.⁶⁸

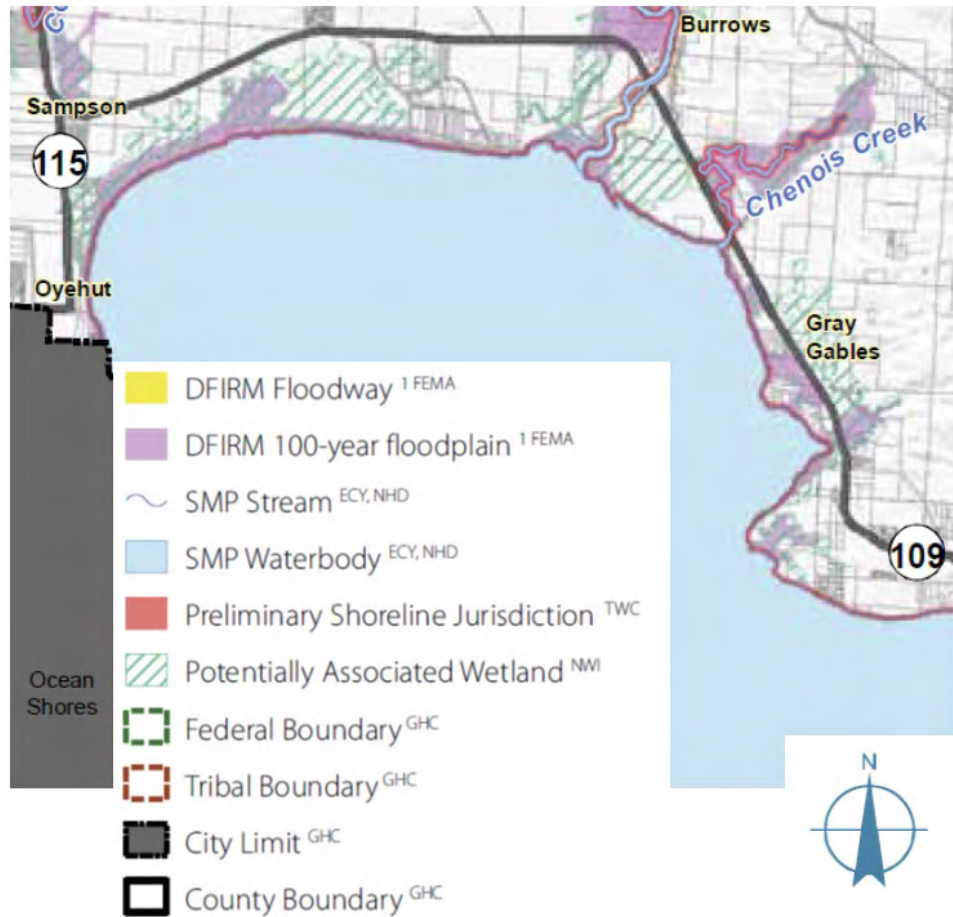
⁶⁷ CR 004650-82.

⁶⁸ CR 002055.

The following maps compare sea level rise in the North Bay with the FEMA mapped flood plain. As can be seen, sea level rise extends beyond the mapped flood plain.



CR 003336



CR 001817

For these reasons, the flood plain regulations adopted to comply with the Federal Flood Insurance Program do not address all of the flooding caused by sea level rise. These policies and regulations do not address sea level rise or fully comply with RCW 90.58.100(2)(h) and WAC 173-26-176(3)(g)

which require SMP updates to address the “[p]revention and minimization of flood damages.”

As the evidence documents, sea level rise will result in significant flood damage. Whether the SMA and SMP Guidelines that require promoting and enhancing the public interest including the “the statewide interest in the prevention and minimization of flood damages ...” require SMPs to address sea level rise is an issue of substantial public interest that should be determined by the State Supreme Court.⁶⁹

D. Issue 3: Do RCW 90.58.100(1) and WAC 173-26-201(2)(a) require SMPs to address the adverse impacts of sea level rise based on an analysis incorporating the most current, accurate, and complete scientific or technical information available, where the SMP update already incorporates evidence regarding flooding from other causes but not from sea level rise?

Whether RCW 90.58.100(1) and WAC 173-26-201(2)(a) require SMPs to address flooding caused by sea level rise is an issue of substantial public interest that should be determined by

⁶⁹ RCW 90.58.020; RCW 90.58.100(2)(h); WAC 173-26-176(3)(g); WAC 173-26-186(3).

the State Supreme Court. RCW 90.58.100(1) requires that “the department and local governments shall to the extent feasible: ... (e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data[.]” To implement RCW 90.58.100(1), WAC 173-26-201(2)(a) required the County to “base master program provisions on an analysis incorporating the most current, accurate, and complete scientific or technical information available.” “Base” means “to make or form a foundation for”⁷⁰

These requirements will become meaningless if they only address flooding caused by some factors while ignoring flooding caused by sea level rise. The cause of the flooding is of little concern when an existing home or new development is inundated by floodwaters.

⁷⁰ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 180 (2002).

The court of appeals upheld regulations limiting mining in the Jefferson County SMP because there was scientific evidence in the record showing the regulations were needed to protect “salmonid habitat, salt marshes, and lagoons, erosive and/or hazardous slopes, and commercial shellfish beds.”⁷¹ This information was in reports used in the preparation of the Jefferson County SMP.⁷²

Like the Jefferson County reports, the *Shoreline Analysis Report for Shorelines in Grays Harbor County (Shoreline Analysis Report)* identifies salmonid habitats, salt marshes, and commercial shellfish beds among other important fish and wildlife habitats in the shorelands.⁷³ While the Jefferson County SMP included mining regulations based on the analysis, the adopted Grays Harbor County SMP contains no policies or regulations to address sea level rise despite evidence in the

⁷¹ *Olympic Stewardship*, 199 Wn. App. at 741, 399 P.3d at 596.

⁷² *Olympic Stewardship*, 199 Wn. App. at 741-42, 399 P.3d at 596-97.

⁷³ CR 001489-99, CR 001515.

record showing that sea level rise and the human responses will harm fish and wildlife habitats.⁷⁴ The adopted SMA also rejected the few recommendations related to sea level rise in the *Shoreline Analysis Report*.⁷⁵ The report identified protecting low-lying shorelines and coastal lands vulnerable to erosion through acquisition or easements to limit land use conflicts and increase coastal resilience to sea level rise and other climate-related changes as a restoration opportunity.⁷⁶ The SMP does not propose using land or easement acquisition to address sea level rise.⁷⁷ In sum, unlike the Jefferson County SMP which was based on the science in the studies Jefferson County prepared, the Grays Harbor County SMP ignores the evidence of sea level rise and its impacts and disregarded even the limited recommendations for addressing sea level rise in the

⁷⁴ CR 002074-221.

⁷⁵ CR 002074-221; CR 002036-37.

⁷⁶ CR 001635; CR 001641.

⁷⁷ CR 002121, CR 002074-221.

Shoreline Analysis Report. This violates RCW 90.58.100(1) and WAC 173-26-201(2)(a).

The County and Ecology also failed to consider other relevant evidence as required by RCW 90.58.100(1) and WAC 173-26-201(2)(a). The County failed to consider the considerable evidence that “[s]ea level rise and storm surge[s] will increase the frequency and severity of flooding, erosion, and seawater intrusion—thus increasing risks to vulnerable communities, infrastructure, and coastal ecosystems.”⁷⁸ The County also disregarded the scientific and technical evidence showing that:

The prospect of more flooding, erosion, and storm damage may lead communities and property owners to seek to build seawalls, dikes, and tidal barriers. The construction and placement of these structures will have a direct and immediate impact on natural shoreline environments. These structures will also lead to the progressive loss of beach and marsh habitat as those areas are squeezed between the rising sea and a more intensively engineered shoreline. Predicted decreases in size or transitions in tidal marshes,

⁷⁸ CR 002394.

salt marshes, and tidal flats will affect the species these habitats support. It is predicted that while some species may be able to locate alternate habitats or food sources, others will not (Glick, 2007).

Shellfish, forage fish, shorebirds, and salmon are among those identified as examples of species at risk (Glick, 2007).⁷⁹

Nothing in the SMP addresses the increased flooding or the increased pressure to armor shorelines and “the progressive loss of beach and marsh habitat as those areas are squeezed between the rising sea and a more intensively engineered shoreline.”⁸⁰

Ecology’s *Handbook Appendix A* also includes scientific and technical recommendations that were not included the SMP.⁸¹

For example, Ecology writes “[i]n conducting the shoreline use analysis, take into account the effects of rising sea levels on

⁷⁹ CR 002036-37.

⁸⁰ CR 002036; CR 002074-221.

⁸¹ CR 002074-221.

existing and projected development.”⁸² This the County did not do.⁸³

WAC 173-26-201(2)(a) provides that when Ecology has “relevant information ... available and unless there is more current or specific information available, those technical assistance materials shall constitute an element of scientific and technical information as defined in these guidelines and the use of which is required by the act.” So, the SMP Guidelines in WAC 173-26-201(2)(a) required the County to use *Handbook Appendix A* as it was available, current, and in the record.⁸⁴ The County’s failure to use these materials to update the SMP violates the SMA.⁸⁵

The Court of Appeals concluded that not every aspect of the analysis or all of the data had to be incorporated into the SMP.

⁸² CR 002039.

⁸³ CR 001642-1720.

⁸⁴ CR 002034-44.

⁸⁵ WAC 173-26-201(2)(a).

But as was documented above, the SMP includes no policies, programs, or regulations addressing sea level rise.⁸⁶

The Court of Appeals pointed to WAC 173-26-186(9) to support the County’s and Ecology’s decision to not address sea level rise.⁸⁷ WAC 173-26-186(9) provides:

(9) To the extent consistent with the policy and use preference of RCW 90.58.020, this chapter (chapter 173-26 WAC), and these principles, local governments have reasonable discretion to balance the various policy goals of this chapter, in light of other relevant local, state, and federal regulatory and nonregulatory programs, and to modify master programs to reflect changing circumstances.

Any balancing of policy goals by local governments must be “consistent” with chapter 173-26 WAC including WAC 173-26-201(2)(a). Balancing cannot justify failing to comply with WAC 173-26-201(2)(a).

⁸⁶ CR 002074-221.

⁸⁷ *Friends Of Grays Harbor v. State of Washington, Department of Ecology*, Court of Appeals Case No. 84019-3-I, Slip Opinion pp. 14-15 (Dec. 12, 2022).

In concluding the SMP complied with the SMA, the SHB first erred in concluding that there is no requirement to address sea level rise for the reasons argued in Issue 1.⁸⁸ Second, RCW 90.58.100(1) and WAC 173-26-201(2)(a) contain independent requirements to address “issues of concern.” Sea level rise was an issue of concern in the SMP update.⁸⁹ Issues of concern are not limited to issues identified in other SMA policies or requirements.⁹⁰

The SHB concluded the *Olympic Stewardship* decision was not relevant because the SMP Guidelines explicitly require SMPs to address mining.⁹¹ But *Olympic Stewardship* was not based on the SMP mining guidelines, it was based on RCW 90.58.100(1) and WAC 173-26-201(2)(a).⁹²

⁸⁸ CR 008193.

⁸⁹ CR 002244.

⁹⁰ WAC 173-26-201(2)(a).

⁹¹ CR 008193.

⁹² *Olympic Stewardship*, 199 Wn. App. at 739-42, 399 P.3d at 595-97.

The SHB erred in concluding that since there was no requirement to address sea level rise the County did have to base the SMP on the evidence of sea level rise and its impacts.⁹³ The County failed to base the SMP on an analysis of the most current, accurate, and complete scientific or technical information available as RCW 90.58.100(1) and WAC 173-26-201(2)(a) require.

Whether RCW 90.58.100(1) and WAC 173-26-201(2)(a) require SMPs to address sea level rise is an issue of substantial public interest that should be determined by the State Supreme Court.

VI. CONCLUSION.

FOGH respectfully requests that the State Supreme Court accept review and make the following legal holdings:

1. RCW 90.58.100(2)(h) and WAC 173-26-176(3) require the “prevention and minimization of flood damages,”

⁹³ CR 008193.

without regard to the cause of flooding including sea level rise.

2. RCW 90.58.020, RCW 90.58.100(2)(h), and WAC 173-26-176(3) require SMPs to include policies and regulations to address the impacts of sea level rise.
3. RCW 90.58.100(1) and WAC 173-26-201(2)(a) require SMPs to address the adverse impacts of sea level rise based on an analysis incorporating the most current, accurate, and complete scientific or technical information available.
4. Either conclude that the County SMP update did not comply with these requirements or remand the matter to the SHB to determine whether the SMP update complied with these requirements in the light of the Court's holdings.

This document contains 4,967 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated: January 10, 2023, and respectfully submitted.

s/ Tim Trohimovich

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 10th day of January 2022, he, she, or they caused the following document to be served on the persons listed below in the manner shown: the Friends Of Grays Harbor’s and Futurewise’s Petition For Review in Court of Appeals Case No. 84019-3-I.

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Signed and certified on this 10th day of January 2023,

s/ Tim Trohimovich

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FRIENDS OF GRAYS HARBOR and
FUTUREWISE,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY; GRAYS
HARBOR COUNTY; and the STATE OF
WASHINGTON, SHORELINES
HEARINGS BOARD,

Respondents.

No. 84019-3-I

DIVISION ONE

UNPUBLISHED OPINION

HAZELRIGG, J. — Friends of Grays Harbor and Futurewise appeal an order from the Shorelines Hearings Board approving the Grays Harbor County Shoreline Master Program update. Because the appellants fail to meet their burden under the Administrative Procedure Act¹ to demonstrate that the Shorelines Hearings Board either based its order on an erroneous interpretation or application of law, or the order is unsupported by substantial evidence, we affirm.

¹ Ch. 34.05 RCW.

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FACTS

In 2013, Grays Harbor County (the County) began the process of updating its Shoreline Master Program (SMP) as required by RCW 90.58.080(2)(a)(vi). In September 2018, the County submitted their draft SMP to the Department of Ecology (the Department) for approval. After a public comment period, the Department approved the SMP, contingent on required changes. The County made the required and additional recommended changes and the Department gave final approval. During the public comment period, Friends of Grays Harbor and Futurewise (collectively, FOGH), along with the Surfrider Foundation,² submitted comments supporting the SMP update, but gave suggestions for improvements. The County agreed with several of these suggestions and proposed changes to the SMP in accordance. FOGH then challenged the final SMP, petitioning for review before the Shorelines Hearings Board (Board) under the Shoreline Management Act of 1971 (SMA).³ The Board upheld the SMP. FOGH timely petitioned for judicial review in Thurston County, and later moved to transfer the case to the Court of Appeals. The motion was granted.

ANALYSIS

The SMA governs the development of shorelines to “promote and enhance the public interest.” RCW 90.58.020. The SMA requires that each county “adopt and administer a local shoreline master program, which regulates uses and development on shorelines located within the county.” Citizens for

² Surfrider Foundation was not a party to the hearing before the Shorelines Hearings Board and is not a party to this appeal.

³ Ch. 90.58 RCW.

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Rational Shoreline Plan. v. Whatcom County, 172 Wn.2d 384, 387, 258 P.3d 36 (2011). SMPs are “a combination of planning policies and development regulations.” Olympic Stewardship Found. v. Env’t & Land Use Hr’gs Off., 199 Wn. App. 668, 680, 399 P.3d 562 (2017). Counties have “substantial discretion” in adopting SMPs “that reflect local circumstances,” but the SMP must be approved by the Department before becoming effective. Id. (quoting WAC 173-26-171(3)(a)). The Department also sets and periodically updates administrative rules governing SMPs (Guidelines). RCW 90.58.060(1). The Department’s role is primarily a supportive one, reviewing SMPs and “providing assistance to local government,” as well as “insuring compliance with the policy and provisions of this chapter.” RCW 90.58.050.

A party who challenges the Department’s decision to approve or reject a master program may appeal to the Board. RCW 90.58.190(3)(a). The appealing party bears the burden of proof and must demonstrate “by clear and convincing evidence that the decision of the department is noncompliant with the policy of RCW 90.58.020 or the applicable guidelines, or chapter 43.21C RCW as it relates to the adoption of master programs and amendments under this chapter.” RCW 90.58.190(3)(d), (c).

This court reviews a decision by the Board under the Administrative Procedure Act (APA). Pres. Our Islands v. Shorelines Hr’gs Bd., 133 Wn. App. 503, 514-15, 137 P.3d 31 (2006). The party challenging a ruling bears the burden of showing the decision is invalid. Olympic Stewardship Found., 199 Wn. App. at 685. We will grant relief only if the appealing party demonstrates one of

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the nine criteria in RCW 34.05.570(3) is met. Id. Here, FOGH asserts invalidity under RCW 34.05.570(3)(d) and (e): that the agency “erroneously interpreted or applied the law” and that the order is not supported by substantial evidence. A challenge under sub-section (d), that the agency “erroneously interpreted or applied the law” is reviewed de novo. Olympic Stewardship Found., 199 Wn. App. at 686. We defer to “an agency interpretation of the law where the agency has specialized expertise in dealing with such issues, but we are not bound by an agency’s interpretation of a statute.” Pres. Our Islands, 133 Wn. App. at 515 (internal quotations omitted) (quoting Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr’gs Bd., 154 Wn.2d 224, 233, 110 P.3d 1132 (2005)). We also “uphold an agency’s interpretation of its own regulations as long as that interpretation is plausible and not contrary to legislative intent.” Samson v. City of Bainbridge Island, 149 Wn. App. 33, 45, 202 P.3d 334 (2009).

A challenge under sub-section (e), that the order is not supported by substantial evidence, is reviewed “to determine if there is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order,” viewing “the evidence in the light most favorable to the party which prevailed in the highest forum that exercised fact-finding authority.” Olympic Stewardship Found., 199 Wn. App. at 686. Where the Board and the Department agree on a particular question, the reviewing court is “loath to override the judgment of both agencies,” as their “combined expertise merits substantial deference.” Port of Seattle v. Pollution Control Hr’gs Bd., 151 Wn.2d 568, 600, 90 P.3d 659 (2004).

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With this standard of review in mind, along with Washington jurisprudence mandating deference to the Board and the Department, we address each of FOGH's assignments of error.

I. No requirement that the SMP address sea level rise

FOGH first argues the Board erred by concluding that no law or Guideline mandates the SMP address rising sea levels. It contends that because the SMA and Guidelines "require promoting and enhancing the public interest including 'the statewide interest in the prevention and minimization of flood damages,'" SMPs are required to specifically address flooding caused by sea level rise. In response, the Department argues this language is insufficient to create a mandate, stating that sea level rise is never specifically mentioned in the statute or regulations, and because the SMP conforms to flood regulations, it need not address sea level rise separately.

The Department is correct that the SMA contains no mention of sea level rise, and the Guidelines mention sea level rise only once stating, "[l]ocal governments are encouraged to consult department guidance for applicable new information on emerging topics such as sea level rise." WAC 173-26-090(1). "The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature." King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 142 Wn.2d 543, 555, 14 P.3d 133 (2000) (quoting Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). We determine legislative intent by investigating the plain language of the statute. Id. However, in interpreting a statute, "a court must not add words where the

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legislature has chosen not to include them.” Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003). We apply rules of statutory construction when interpreting administrative rules and regulations. Am. Fed’n of Tchrs., Local 1950 v. Pub. Emp. Relations Comm’n, 18 Wn. App. 2d 914, 922, 493 P.3d 1212 (2021).

The plain language of the SMA and Guidelines do not require SMPs to address sea level rise beyond the flood hazard regulations. To add requirements not explicitly present would be contrary to the rules of statutory interpretation. Likewise, FOGH’s proposed interpretation is contrary to WAC 173-26-186(9), which provides that “local governments have reasonable discretion to balance the various policy goals of this chapter, in light of other relevant local, state, and federal regulatory and nonregulatory programs, and to modify master programs to reflect changing circumstances.” Without more, FOGH has not met its burden to demonstrate that the Board “erroneously interpreted or applied the law” as required by RCW 34.05.570(3)(d).

II. The SMP meets requirements for flood hazards

FOGH next assigns error to the Board’s conclusions that FOGH failed to identify any instance where the SMP does not meet minimum requirements for flood hazards, and that the local government could lawfully rely on Federal Emergency Management Agency (FEMA) maps and local flood regulations when applying flood protection regulations. It alleges these conclusions are based on an erroneous interpretation or application of the law or are unsupported by substantial evidence. FOGH essentially argues that SMP policies and

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regulations addressing flooding are based on data from past flood events, but because sea level rise is a future event, the SMP inadequately protects against flooding. Likewise, the SMP standards are based on the FEMA flood studies and maps, which are based on past flood events. FOGH contends by utilizing past data only, instead of projections and estimates for future rising sea levels, the SMP violates RCW 90.58.100(2)(h) and WAC 173-26-176(3)(g).

RCW 90.58.100(2)(h) states that “[t]he master programs shall include, when appropriate . . . [a]n element that gives consideration to the statewide interest in the prevention and minimization of flood damages.” (Emphasis added). WAC 173-26-176(3)(g) states that one of the policy goals of the Guidelines governing SMPs is “[p]revention and minimization of flood damages” based on the language from RCW 90.58.100(2)(h). As the Department notes, the SMA explicitly allows SMPs to identify floodways based on FEMA maps. RCW 90.58.030(2)(b) states:

“Floodway” means the area, as identified in a master program, that either:

- (i) Has been established in federal emergency management agency flood insurance rate maps or floodway maps; or
- (ii) consists of those portions of a river valley lying streamward from the outer limits of a watercourse upon which flood waters are carried during periods of flooding that occur with reasonable regularity, although not necessarily annually.

Here, the Grays Harbor County SMP includes “an element that gives consideration to the statewide interest in the prevention and minimization of flood

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damages,”⁴ and properly relies on FEMA maps to identify floodways. FOGH’s contention that the SMP should go a step further is not supported by the plain language of any of the Guidelines or the SMA. The SMP is only required to include “an element” “when appropriate” that “gives consideration” to minimizing and preventing flood damages. See RCW 90.58.100(2)(h). FOGH’s requested interpretation would be more burdensome than the plain language of the Guidelines permits and therefore the Board correctly interpreted and applied the law. FOGH does not discuss how the Board’s order on this issue is unsupported by substantial evidence, and mere conclusory statements are not sufficient to meet its burden under the APA. As such, FOGH has failed to carry its burden on the substantial evidence challenge to the Board’s order. The Board did not err as to its conclusions regarding the requirements for flood hazards.

III. The SMP achieves no net loss as defined by the Guidelines

FOGH argues that SMP policies and regulations must achieve no net loss of ecological functions, which includes no net loss from the impacts of sea level rise and the impacts of developments that contribute to or amplify the impacts of sea level rise. It avers the Board’s conclusion that the SMP properly minimizes cumulative impacts is unsupported by substantial evidence or, alternatively, erroneously interprets or applies the law. The Department counters that “there is no obligation under the Act to require the sweeping development prohibitions that FOGH seeks.” It contends that “the same requirements that protect shoreline ecological functions from the impacts of development will also serve to protect

⁴ RCW 90.58.100(2)(h).

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against the impacts of sea level rise.” In reply, FOGH states its proposed interpretation would require the SMP to “consider[] . . . whether a development proposal is located or designed so it will not interfere with the migration of wetlands and aquatic vegetation, will achieve no net loss, and not be flooded.” FOGH’s reading of WAC 173-26-186(8)(b) “is that master program policies and regulations are to ‘achieve no net loss of those ecological functions’ period,” as opposed to no net loss requirements only applying to developments.

In reviewing a statute, this court first analyzes whether the “meaning is plain on its face,” based on “the language of the statute and related statutes.” O.S.T. v. Regence BlueShield, 181 Wn.2d 691, 696, 335 P.3d 416 (2014).

WAC 173-26-186(8)(b) states:

Local master programs shall include policies and regulations designed to achieve no net loss of those ecological functions.

(i) Local master programs shall include regulations and mitigation standards ensuring that each permitted development will not cause a net loss of ecological functions of the shoreline; local government shall design and implement such regulations and mitigation standards in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property.

(ii) Local master programs shall include regulations ensuring that exempt development in the aggregate will not cause a net loss of ecological functions of the shoreline.

“[W]e do not analyze individual subsections in isolation from the other sections of the statute when doing so would undermine the overall statutory purpose.” State v. Reis, 183 Wn.2d 197, 209, 351 P.3d 127 (2015). Additionally, “[u]nder the doctrine of ejusdem generis, ‘specific words or terms modify and restrict the interpretation of general words or terms where both are used in sequence.’”

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Wash. Fed. Sav. & Loan Ass'n v. McNaughton Grp., 179 Wn. App. 319, 330, 319 P.3d 805 (2014) (quoting State v. Reader's Dig. Ass'n, Inc., 81 Wn.2d 259, 279, 501 P.2d 290 (1972)). While this rule is generally applied to words “in a pattern such as ‘[specific], [specific], or [general]’ or ‘[general], including [specific] and [specific]’,”⁵ we apply the principle in determining the plain meaning of the rule: the specific language in subsections (i) and (ii) operates to limit the general statement in (b). Thus, SMPs are required to achieve no net loss of ecological functions stemming from development planning and permitting (including exempt development), rather than broadly achieving no net loss of ecological functions.

This interpretation is consistent with the legislature’s goals of minimizing damage to shorelines while still “provid[ing] an opportunity for substantial numbers of the people to enjoy the shorelines of the state.” RCW 90.58.020. The statement of legislative policy in RCW 90.58.020 explicitly allows “limited instances” of shoreline development, including “single-family residences and their appurtenant structures, ports, shoreline recreational uses” as well as “industrial and commercial developments which are particularly dependent on their location on or use of the shorelines.” FOGH again provides only conclusory statements that the SMP could have done more to protect against sea level rise; it fails to identify any requirement in law that it must do so. Based on the plain language of WAC 173-26-186(b), the Board did not erroneously interpret or apply the law by concluding that the SMP is required to prevent no net loss from development, rather than from sea level rise itself.

⁵ Wash. Fed. Sav. & Loan Ass'n, 179 Wn. App. at 330 (alterations in original) (internal quotation marks omitted) (quoting Sw. Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County, 100 Wn.2d 109, 116, 667 P.2d 1092 (1983)).

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While FOGH devotes a substantial amount of its briefing to discussing the detrimental impacts of sea level rise, it does not provide any authority to support its contention that the SMP must do more than meet the “no net loss standard” by addressing sea level rise independently. FOGH’s argument evolves throughout the briefing, eventually transforming into one suggesting that without considering the impacts of sea level rise, the SMP cannot achieve the requirement of “no net loss” under WAC 173-26-186(b). In turn, the Department spends a significant portion of its briefing supporting its contention that the SMP meets the “no net loss” requirement, relying on the Board’s findings. However, FOGH fails to challenge the Board’s findings that the SMP meets the “no net loss” requirement generally.⁶ “Unchallenged findings are verities on appeal.” Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002). As such, FOGH does not meet its burden to demonstrate the Board’s conclusion was unsupported by substantial evidence or that it was based on an error of law.

IV. The Cumulative Impacts Analysis and SMP comply with the law

FOGH next contends the SMP does not comply with WAC 173-26-201(2)(a) because the Cumulative Impacts Analysis (CIA) “did not evaluate the impacts of sea level rise on the built or natural environments including flooding impacts.” The Department counters that nothing in the Guidelines requires the CIA to demonstrate no net loss from sea level rise, and alternatively, the CIA

⁶ While this statement is labelled a “conclusion of law,” it operates as a finding of fact. The statement reads: “the Guidelines provide limitations and restrictions for development in the shoreline. The SMP tracks with these provisions by requiring measures that address the impacts of development and that will result in no net loss.”

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illustrates that the impacts of sea level rise are addressed by the SMP's restrictions on development.

As part of the requirement that SMP "regulation of development shall achieve no net loss of ecological function," local governments should conduct "[a]n appropriate evaluation of cumulative impacts on ecological functions" considering factors listed in WAC 173-26-186(8)(d)(i) through (iii) as well as "unregulated activities, development and uses exempt from permitting." WAC 173-26-201(3)(d)(iii). WAC 173-26-186(d) in turn states that in adopting SMPs, local governments "shall evaluate and consider cumulative impacts of reasonably foreseeable future development on shoreline ecological functions," including "[c]urrent circumstances affecting the shorelines and relevant natural processes." WAC 173-26-186(d), (d)(i). FOGH argues sea level rise is a "current circumstance affecting the shorelines and . . . is also a relevant natural process" that should have been evaluated and considered under the Guidelines.

Washington case law is clear that this court defers to the expertise of the Department and the Board, particularly, as here, where they agree. See Port of Seattle, 151 Wn.2d at 600. As the appealing party before the Board, and now this court, FOGH bears the burden to demonstrate not just that the SMP could have greater protections against sea level rise, but that the law required it to do so. Without more, FOGH fails to meet this burden and we conclude the Board did not err.

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V. The SMP identified and assembled required data

Next, FOGH argues the Board erred by concluding the SMP identified and assembled the applicable current, accurate, and complete scientific and technical information available, because the County and the Department failed to identify and assemble information applicable to sea level rise. This argument centers around four documents not included in the original record submitted to the Board by the Department. However, the Board expressly found that the four documents “were submitted to the County during the SMP review process” and this finding was not challenged by FOGH. Again, “[u]nchallenged findings are verities on appeal.” Robel, 148 Wn.2d at 42. FOGH alternatively avers that the County failed to utilize the data as required by RCW 90.58.100(1)(e), but it provides no argument about what information the County failed to utilize or how the information should have been utilized in the SMP. FOGH bears the burden to demonstrate the Board’s conclusions are unsupported by substantial evidence or that the Board erroneously interpreted or applied the law, rather than providing mere conclusory statements. The Board did not err on this issue.

VI. The SMP was based on an analysis incorporating the required data

FOGH argues the SMP ignores evidence of sea level rise and its impacts which violates RCW 90.58.100(1) and WAC 173-26-201(2)(a). FOGH contends the County’s Shoreline Analysis Report (SAR) discussed and made recommendations related to sea level rise, but these were not incorporated in the final SMP. The Department counters that the Guidelines do not require the SAR or the County’s Shoreline Restoration Plan (SRP) to be fully incorporated under

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WAC 173-26-201(2)(a). It additionally argues the requirements under WAC 173-26-201(2)(a) are met because the County completed and considered the SAR while adopting the SMP, which contains a section devoted to climate change, including sea level rise.

WAC 173-26-201(2)(a) requires counties to “base master program provisions on an analysis incorporating the most current, accurate, and complete scientific or technical information available.” When interpreting a statute or rule, “[w]e may use a dictionary to discern the plain meaning of an undefined statutory term.” Nissen v. Pierce County, 183 Wn.2d 863, 881, 357 P.3d 45 (2015). “Base,” as a verb, is defined as: “to make or form a foundation for.”⁷ Black’s Law Dictionary defines “base” as “[t]o make, form, or serve as a foundation for . . . [t]o establish . . . to place on a foundation; to ground . . . [t]o use (something) as the thing from which something else is developed.” BLACK’S LAW DICTIONARY 185 (11th ed. 2019).

Using this definition of “base,” WAC 173-26-201(2)(a) requires the local government to: (1) create “an analysis incorporating the most current, accurate, and complete scientific or technical information available,” and (2) use that analysis to develop the SMP. This interpretation does not necessarily require the entire SAR be incorporated, nor that all the pieces of the analysis explicitly be mentioned in the final SMP, but only that the SAR is used to develop the SMP. This is also consistent with WAC 173-26-186(9), which states that “local governments have reasonable discretion to balance the various policy goals of

⁷ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 180 (2002).

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this chapter.” Here, FOGH does not dispute that the SAR contains a section on sea level rise, but rather asserts that the SMP failed to incorporate the analysis and recommendations contained in the SAR. The SMP meets the requirements of WAC 173-26-201(2)(a).

FOGH additionally argues the County failed to consider evidence that sea level rise will increase the frequency and severity of flooding, erosion, and seawater intrusion. However, the SAR notes that “there will be a net rise in the sea level in Grays Harbor County,” and that “[a]s sea levels rise, shorelines will be exposed to higher water levels and thereby subject to greater potential for erosion.” The SAR also references a National Research Council article on Sea-Level Rise for the Coasts of California, Oregon, and Washington: Past, Present, and Future and a report from the University of Washington and the Department on Sea Level Rise in the Coastal Waters of Washington State. WAC 173-26-201(2)(a) does not require the local government to collect currently nonexistent data, but to compile available data. FOGH does not provide any authority for the contention that every potentially applicable piece of scientific or technical data must be incorporated and used.

FOGH failed to meet its burden to demonstrate the Board erred in interpreting or applying the law, or that its conclusions were unsupported by substantial evidence.

VII. Appendix A does not require the SMP to address sea level rise

FOGH alleges the Board erred in concluding that the Department’s guidance document, Appendix A: Addressing Sea Level Rise in SMPs (Appendix

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A), does not mandate SMPs to address sea level rise. It argues that Appendix A states governments are required to use current, accurate, and complete scientific and technical information regarding sea level impacts and this statement is mandatory. The Department counters that Appendix A is a technical assistance document, not a binding rule. In reply, FOGH contends that Appendix A is current scientific or technical information that the SMP must not only consider, but also be based upon, under WAC 173-26-201(2)(a).

FOGH does not contest the fact that Appendix A is a technical assistance document rather than a binding agency rule. Because it is not a binding rule, Appendix A cannot mandate the content of SMPs. FOGH provides only conclusory statements that Appendix A constitutes current scientific and technical information and that there was not “more current or specific information available.” See WAC 173-26-201(2)(a). This is not sufficient to meet its burden under the APA. The Board did not err.

VIII. The SMP incorporates required protection provisions

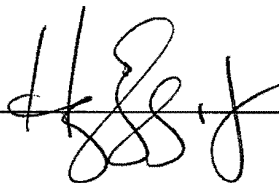
Finally, FOGH argues the Board erred because the SRP, incorporated into the SMP, does not include land or easement acquisition recommendations as projects. The Department counters that the SRP is a guide, not a regulatory document, and nothing requires the entire plan be incorporated into the SMP. FOGH does not address this argument in reply. Because FOGH provides no statute, rule, or case law requiring the SRP be incorporated into the SMP, it fails to meet its burden to demonstrate the Board made an error of law.

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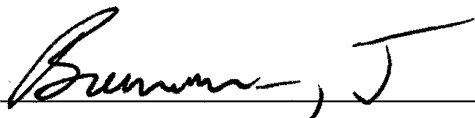
FOGH also alleges the Board's conclusion that the SMP properly incorporated provisions protecting low-lying shorelines, coastal areas, and estuary habitats through acquisition or easement efforts is unsupported by substantial evidence. The SMP states that one policy of the section is to encourage "entities to aid in implementing restoration projects identified through the Grays Harbor County Shoreline Restoration Plan." Land or easement recommendations appear in the SRP as "actions" rather than "projects." Again, we review a substantial evidence challenge "to determine if there is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order," viewing "the evidence in the light most favorable to the party which prevailed in the highest forum that exercised fact-finding authority." Olympic Stewardship Found., 199 Wn. App. at 686. Viewing the evidence in the light most favorable to the Department, "projects" refers not to a category under the SRP, but instead refers to activities delineated in the SRP. Based on our deferential standard of review, we elevate substance over form and conclude the order is supported by substantial evidence.

Affirmed.



WE CONCUR:

Díaz, J.



**SHORELINES HEARINGS BOARD
STATE OF WASHINGTON**

FRIENDS OF GRAYS HARBOR and
FUTUREWISE,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY; and
GRAYS HARBOR COUNTY,
Respondents.

SHB No. 20-006

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

I. INTRODUCTION

On September 11, 2020, Friends of Grays Harbor and Futurewise (collectively FOGH) filed an appeal with the Shorelines Hearings Board (Board) of the Department of Ecology's (Ecology) approval of the Grays Harbor County Shoreline Master Program Update (SMP). Attorney Tim Trohimovich represented Appellants FOGH and Futurewise. Assistant Attorney General Sonia Wolfman represented Respondent Ecology. Prosecuting Attorney Norma Tillotson represented Respondent Grays Harbor County.

Pursuant to WAC 461-08-500(1), the parties submitted briefing supported by exhibits contained in the index of the record. The Board conducted a hearing over Zoom videoconference on July 30, 2021, in which the Board heard argument on behalf of the parties. The Board was comprised of Presiding Member Neil L. Wise and Members Michelle Gonzalez, Carolina Sun-Widrow, John Bolender, Allen Estep, and Jennifer Gregerson.

Having fully considered the record, the Board enters the following:

II. FINDINGS OF FACT

[1]

In enacting the Shoreline Management Act (SMA), the Legislature found that “the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation.” RCW 90.58.020. Accordingly, “coordinated planning” between state and local governments is necessary to prevent the inherent harm in an uncoordinated and piecemeal development of the state’s shorelines. *Id.* To that end, the SMA requires local governments to “develop or amend a master program for regulation of uses of the shorelines of the state consistent with the required elements of the guidelines adopted by” Ecology. RCW 90.58.080(1). After a local government adopts a SMP, it is submitted to Ecology for review. Ecology reviews the SMP for consistency with RCW 90.58.020 and Ecology’s SMA Guidelines, which are codified at WAC 173-26.¹ RCW 90.58.060. A SMP is not effective until it has been approved by Ecology. RCW 90.58.090(2), (7); *Citizens for Rational Shoreline Planning v. Whatcom Cty.*, 172 Wn.2d 384, 392–93, 258 P.3d 36 (2011); *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 697, 169 P.3d 14 (2007).

[2]

Grays Harbor County (County) does not fully plan under the Growth Management Act (GMA) because of the population thresholds enumerated in RCW 36.70A.040. AR 17. Prior to the comprehensive update at issue in this appeal, the County regulated its shorelines with a master program developed in 1975. AR 10. Under RCW 90.58.080(2)(a)(vi), the County was required to complete a comprehensive update to its SMP by December 2014. The County

¹ Although they are commonly referred to as “guidelines,” the rules set forth the minimum requirements that a local government is required to follow for its comprehensive SMP update. RCW 90.58.030(3)(b), (c); RCW 90.58.060(1); RCW 90.58.080(1), (7); WAC 173-26-171; *Olympic Stewardship Found. v. W. Washington Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 680, 399 P.3d 562 (2017).

Commission appointed a 15-member citizen shoreline planning committee to carry out the update process. AR 2113-19.

[3]

The County retained The Watershed Company and BERK to prepare the SMP's supporting documents as required by WAC 173-26-110 and -210(3). The supporting documents prepared were a Shoreline Analysis Report dated January 2015 (AR 493-830), Shoreline Restoration Plan dated June 2015 (AR 992-1081), and Cumulative Impacts Analysis dated February 2017 (AR 902-991).

[4]

Sea level rise was identified as a topic of concern during the update process. Petitioners and other interested parties such as the Nature Conservancy provided comments and other information regarding sea level rise during the public comment process. AR 3796-3832, 12559-74. The County held a special meeting on the topic, at which the Nature Conservancy provided a presentation. AR 5840. Additionally, the County's Marine Resources Committee hosted a forum by top scientists working on coastal erosion, coastal flooding, and sea level rise. AR 6219.

[5]

The planning committee voted to recommend adoption of a draft SMP to the Board of County Commissioners (BOCC) in April 2017. AR 11, 2113-18. The draft forwarded to the BOCC contained multiple references to sea level rise. During review by the BOCC, most of the references to sea level rise were changed to different terminology such as "natural disasters" and "flood events." AR 3920, 10654. The final version of the SMP that was submitted to and approved by Ecology largely reflects these changes by the BOCC. Ecology Resp. Br. at 7-9. The County has indicated its intention to continue to address sea level rise as more information and guidance becomes available. AR 66, 86.

[6]

On April 9, 2018, the BOCC adopted a resolution to submit the SMP to Ecology. AR 2119, 2237. The County submitted the SMP to Ecology on September 14, 2018. AR 2237; *see also* AR 2238 (list of submittals), AR 2239 (Resolution 2018-034). Ecology determined that the SMP submittal was complete on October 9, 2018. AR 2584. The state comment period for the SMP ran from October 29 through December 3, 2018. AR 19. On February 19, 2019, the County provided its responses to the comments received during the public comment period. *Id.*, AR 224–37. On December 18, 2019, Ecology conditionally approved the SMP with specific required and recommended changes. AR 8. Accompanying Ecology’s conditional approval were Ecology’s Findings and Conclusions, Required Changes, Recommended Changes, and Response to Comments. AR 10–22; AR 23–26; AR 27–31; AR 32–40; AR 41–59. On July 24, 2020, the County informed Ecology it was in agreement with all of Ecology’s required and recommended changes. AR 3; *see also* AR 4-5 (Ord. No. 453 adopting SMP). On July 28, 2020, Ecology issued its final approval of the SMP. AR 1.

[7]

On November 13, 2020, Ecology submitted an Index to the Record to the Board for this matter. On November 30, 2020, FOGH moved to supplement the record with documents referenced in comments submitted by Petitioners and others during the update process. Respondents’ Resp. to Pet’r’s Mot. on Suppl. Material for the Index of the Record. The motion was not opposed and the record was supplemented with the documents proposed in FOGH’s motion.

[8]

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, the Board enters the following:

CONCLUSIONS OF LAW

[1]

The Board has jurisdiction over the subject matter and parties in this case pursuant to RCW 90.58.190 and WAC 461-08-315(2)(c). The Board reviews the issues raised in an appeal de novo. WAC 461-08-500(1).

[2]

The Appellants have the burden of proof. RCW 90.58.190(3)(d); WAC 461-08-500(1)(b). Because the SMP includes shorelines of statewide significance, clear and convincing evidence is required to overturn Ecology’s decision for those shorelines. RCW 90.58.190(3)(c), AR 3004. Clear and convincing evidence “requires that the trier of fact be convinced that the fact in issue is ‘highly probable,’ ” which means “clear, positive, and unequivocal in [its] implication” *Colonial Imports, Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993) (citations omitted).

As a legislative act, the County’s SMP Ordinance is presumed valid. *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009); *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 561, 29 P.3d 709 (2001); *Eastlake County. Council v. City of Seattle*, SHB Nos. 90-08 & 90-09 (Oct. 5 1990) (Order on Partial Summ. J.). The SMA and SMA Guidelines allow local governments broad discretion to adopt SMPs that reflect local circumstances, preferences, and priorities. *Olympic Stewardship Found. v. State Env’t & Land Use Hearings Off. through W. Washington Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 680, 399 P.3d 562 (2017); WAC 173-26-171(3), -186(9).

[3]

The parties disagreed as to whether Ecology’s interpretation of the SMA and the SMA Guidelines is entitled to deference. FOGH argues that unlike the GMA, which directs the Growth Management Hearings Board to grant deference to local governments, the SMA does

not contain a similar requirement to give deference to Ecology under the SMA. While the Board reviews questions of law de novo, the Board will grant deference to an agency's interpretation of the law where the subject matter is within the agency's specialized expertise. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 90 P.3d 659 (2004). This is no less true in the SMA context. *Samson v. Bainbridge Island*, 149 Wn. App. 33, 45, 202 P.3d 334 (2009); *May v. Robertson*, 153 Wn. App. 57, 73, 218 P.2d 211 (2009). Therefore, the Board will grant deference to Ecology as described above.

[4]

The issues before the Board are as follows:

1. Did the State of Washington, Department of Ecology's (Ecology) and Grays Harbor County's approval of the Grays Harbor County Shoreline Master Program violate RCW 90.58.020, RCW 90.58.100(2), RCW 90.58.030(3)(b) & (c), RCW 90.58.080(1) & (7), WAC 173-26-176, WAC 173-26-186, WAC 173-26-201, WAC 173-26-221, WAC 173-26-231, WAC 173-26-241, or WAC 365-190-110(2) and were unjust and unlawful because Ecology or the County did not inventory, identify, or designate areas subject to inundation, flooding, erosion, or other damage caused by sea level rise, wetland migration and changes to aquatic and shoreline vegetation caused by sea level rise, or Ecology and the County did not incorporate policies and regulations to address sea level rise or its impacts?
2. Did the Ecology's and Grays Harbor County's approval of the Grays Harbor County Shoreline Master Program violate RCW 90.58.020, RCW 90.58.100(1), RCW 90.58.030(3)(b) & (c), RCW 90.58.080(1) & (7), WAC 173-26-090(1), and WAC 173-26-201(2) because the Grays Harbor County failed to identify and assemble the most current, accurate, and complete scientific and technical information available and the shoreline master program failed to comply with the requirements that its provisions shall be based on the most current, accurate, and complete scientific and technical information and management recommendations when Ecology and the County did not inventory, identify, or designate areas subject to inundation, flooding, erosion, or other damage by sea level rise, wetland migration and changes to aquatic and shoreline vegetation caused by sea level rise, or incorporate policies and regulations to address sea level rise or its impacts?

[5]

Issue 1: Sea Level Rise and Flooding

FOGH argues that the SMA's purpose is to protect shorelines as fully as possible and that the mandate that the Act be construed broadly means that local governments are required to plan for sea level rise in their SMP comprehensive updates. FOGH alleges the County's SMP fails to protect shorelines as fully as possible because it does not protect against flooding caused by sea level rise and allows development that will not achieve no net loss. FOGH Opening Br. at 8. urges the Board to interpret the SMA's mandate to protect against flood damages as requiring local governments to address sea level rise in their SMPs. *Id.* at 9. FOGH points to Ecology's *SMP Handbook Appendix A: Addressing Sea Level Rise in Shoreline Master Programs* to bolster their assertion that sea level rise is required to be addressed in SMP updates. FOGH Opening Br. at 9-10.

[6]

Sea level rise was not mentioned in the SMA Guidelines until 2017, when Ecology amended the Guidelines pertaining to periodic reviews. Ecology's Resp. Br. at 13-14. At that time, Ecology added a provision encouraging local governments to consult with Ecology regarding new information for "emerging topics" such as sea level rise, but not mandating a sea level rise planning requirement. WAC 173-26-090(1). Ecology decided not to include sea level rise planning requirements based on stakeholder input and a determination that planning for sea level rise is better addressed under a more comprehensive planning framework. AR 1125-27.

[7]

Ecology encourages local governments to plan for sea level rise in their SMPs by providing information and informal guidance for those local governments that choose to do so. Appendix A to Ecology's *SMP Handbook* is an example of Ecology's informal guidance in which Ecology describes how the planning requirements in the SMA Guidelines can address

sea level rise. AR 1087-97. However, Appendix A plainly acknowledges that “[t]he Shoreline Management Act (SMA) and the Shoreline Master Program Guidelines contain no requirements for SMPs to address climate change or sea level rise.” AR 1088. Ecology has consistently maintained the position that planning for sea level rise is a matter of local discretion. AR 1126-27; Ecology’s Resp. Br. at 15. Ecology additionally points to failed legislation from the 2021 legislative session that would have made planning for sea level rise a requirement to further bolster its argument that sea level rise planning is not required. Ecology’s Resp. Br. at 15.

[8]

The Board does not find the failed legislation cited by Ecology to be persuasive evidence of legislative intent regarding sea level rise planning. However, the Board concludes there is currently no law that requires SMPs to address sea level rise. Accordingly, we review FOGH’s arguments against the minimum requirements in the SMA Guidelines as written and will not add language to the Guidelines that does not currently exist. *See e.g., Protect the Peninsula’s Future v. Growth Mgmt. Hr’gs Bd.*, 185 Wn. App. 959, 970, 344 P.3d 705 (2015).

[9]

FOGH asserts that the County’s SMP fails to include policies, programs, or regulations to address flood damage and health and safety impacts from sea level rise. FOGH Opening Br. at 12. The SMA Guidelines require an SMP to have a flood hazard reduction component so that shoreline development and modifications do not increase flood hazards. WAC 173-26-221(2)(a), (b), -221(3). The goal of the SMP’s flood provisions is to “promote public health, safety, and general welfare by minimizing the location of development and uses within flood-prone areas that required the need for future structural hazard reduction measures.” AR 3022 (SMP 3.4.1). Consistent with WAC 173-26-221(3)(c)(ii), the SMP contains a requirement that structural flood hazard reduction measures shall be consistent with the comprehensive flood hazard management plan. AR 3024 (SMP 3.4.3.D). As required by the Guidelines, the SMP

only allows new structural flood hazard reduction measures in shoreline jurisdiction when it can be demonstrated by a scientific and engineering analysis that they are necessary to protect existing development, nonstructural measures are not feasible, and impacts to ecological function and priority species and habitats can be mitigated to assure no net loss. AR 3024 (SMP 3.4.3B); WAC 173-26-221(3)(c)(ii). Consistent with WAC 173-26-221(3)(c)(iii), the SMP requires structural flood hazard reduction measures to be located landward of associated wetlands and buffers, unless no other alternative exists to reduce flood hazard to existing development, as documented by a geotechnical analysis. AR 3024 (SMP 3.4.3.C). The SMP also prohibits residential development in floodplains and channel migration zones where structural shoreline stabilization will be necessary in the future, as contemplated by WAC 173-26-231(a)(iii)(A) and WAC 173-26-241(2)(j)(iii). AR 3046 (SMP 4.11.3C). The SMP contains the requirement that “[d]evelopment in floodplains should not significantly or cumulatively increase flooding hazards. New development or new uses in shoreline jurisdiction, including the subdivision of land, should not be established when it would be reasonably foreseeable that the development or use would require structural flood hazard reduction measures within the channel migration zone or floodway.” AR 3022 (SMP 3.4.2.A). This language in the SMP is taken verbatim from the Guidelines. WAC 173-26-221(3)(c)(i). The Board concludes that FOGH fails to identify any instance where the SMP fails to meet a minimum requirement of the Guidelines. Contrary to FOGH’s assertions, the SMP directly addresses flood damage and associated health and safety impacts, consistent with the minimum requirements in the Guidelines.

[10]

FOGH takes issue with the SMP’s flood provisions because they rely on regulations adopted to comply with the Federal Emergency Management Agency’s (FEMA) flood control requirements for the National Flood Insurance Program (NFIP). FOGH argues that reliance on the minimum requirements for the NFIP is inadequate to address sea level rise because the

FEMA studies and maps only consider past flood events and do not account for future projections of sea level rise. FOGH Opening Br. at 13-15. FOGH also argues that the SMP must not only regulate the 100-year floodplain, but must also protect all flood-prone areas.

[11]

Ecology points out that the SMA sets jurisdictional limits on the areas that can be regulated under its requirements. The minimum area that a local government must regulate is defined in RCW 90.58.030(2)(d) (defining “shorelands”). Shoreline jurisdiction includes all floodways, as well as those contiguous floodplains that extend 200 feet from the floodway. The term “floodway” is defined in the SMA as the floodway as established by FEMA.² RCW 90.58.030(2)(b)(i). The SMA Guidelines define “floodplain” as “synonymous with one hundred-year flood plain” and “means that land area susceptible to inundation with a one percent chance of being equaled or exceeded in any given year. The limit of this area shall be based upon *flood ordinance regulation maps* or a reasonable method which meets the objectives of the act.” WAC 173-26-020(19) (emphasis added). Thus, the SMA authorizes a local government to use the FEMA definitions and maps developed as part of the National Flood Insurance Program (NFIP) when determining the extent of shoreline jurisdiction. The SMA *optionally* authorizes local governments to extend its shoreline jurisdiction to include the entire floodplain (i.e., that portion that extends beyond 200 feet of the floodway), but does not require a local government to do so. RCW 90.58.030(2)(d)(i). The Board concludes that the County appropriately exercised its prerogative to limit its shoreline jurisdiction to the floodplain that is 200 feet landward from the floodway, as defined by the FEMA maps. RCW 90.58.030(2)(d)(i); AR 3004, 3102.

² Alternatively, a local government can determine a floodway by identifying “those portions of a river valley lying streamward from the outer limits of a watercourse upon which flood waters are carried during periods of flooding that occur with reasonable regularity, although not necessarily annually” RCW 90.58.030(2)(b)(ii).

[12]

Under state flood management statutes, a local government that elects to participate in the NFIP is required to adopt and implement floodplain regulations that meets the minimum requirements for participation in the NFIP. RCW 86.12.200, RCW 86.16.020, WAC 173-158-040. For consistency, the Guidelines contemplate that the SMP's flood regulations will be integrated with other local regulatory programs, including flood management plans and critical areas regulations, that regulate flood hazards outside of the SMA jurisdictional zone. WAC 173-26-221(2)(a)(i), WAC 173-26-221(3)(a), 173-26-221(3)(b)(iii). Contrary to FOGH's argument, the Board concludes that a local government is entitled to rely on the FEMA maps and local flood regulations for applying its flood protection regulations in the master program.

[13]

Issue 2: No Net Loss

Next, FOGH contends that the County's SMP does not assure no net loss of shoreline ecological functions and systems because sea level rise and human responses to sea level rise will cause declines in coastal habitat and the SMP contains "no policies or regulations to address either cause of the loss of net ecological functions." FOGH's Opening Br. at 17. FOGH's concern is that if wetlands and shoreline vegetation are unable to migrate landward due to development, those areas and ecological functions will decline. *Id.* at 17-18. FOGH's proposed solution to this potential problem is to have the SMP prohibit fill, bulkheads, sea walls, and other shoreline stabilization structures that will lead to loss of beach and marsh habitat as sea level rise is anticipated to occur. *Id.* at 19. As Ecology points out, FOGH essentially argues that a local government is required to protect areas that may, at some point in the future, become important habitat area due to sea level rise. Ecology's Resp. Br. at 20. Ecology also argues that by meeting the minimum requirements in the Guidelines, not only

does the SMP meet the no net loss requirement, but also that these same measures will address impacts related to sea level rise as contemplated in Appendix A.

[14]

There is no requirement in the Guidelines that mandates prohibitions based on sea level rise. The Guidelines require a local government to prevent loss from development, not sea level rise itself. WAC 173-26-186(8)(b)(i). Contrary to FOGH's assertion, the Guidelines do not require broad prohibitions on shoreline stabilization structures or prohibitions on the placement of bulkheads in buffer areas based on anticipated sea level rise. Rather, the Guidelines provide limitations and restrictions for development in the shoreline. The SMP tracks with these provisions by requiring measures that address the impacts of development and that will result in no net loss. For example, the SMP requires buffers and setbacks, limits the location and circumstances in which shoreline modifications (i.e. bulkheads and fill) can be built, requires mitigation sequencing, and contains shoreline environmental designations that restrict development in certain areas. AR 3019-20 (SMP 3.3.3), 3023-33 (SMP 3.4.3.B, .C), 3028 (SMP 3.6.2.B), 3042-43 (SMP 4.8), 3050 (SMP 5.2), 3054-55 (SMP 5.6), 3059-63 (SMP 5.9), 3072 (SMP 7.2).

Further, the County developed a Shoreline Restoration Plan that anticipates opportunities to restore areas with impaired shoreline ecological functions. The Restoration Plan includes projects that will increase resilience to impacts from sea level rise, such as the restoration of tidal marshes. AR 992-1081, 1083-40. The Board concludes that FOGH fails to provide clear and convincing evidence of any inconsistency between the no net loss requirements in the Guidelines and the SMP. *Compare* WAC 173-26-231(3)(a)(iii) *with* AR 3042, 3059-63, 3008, 3060-61.

[15]

Issue 3: Cumulative Impacts

FOGH alleges the County's SMP update does not adequately address cumulative impacts due to sea level rise. FOGH Opening Br. at 25-29. It asserts that the SMP contains no policies, programs or regulations that will address adverse cumulative impacts from sea level rise. *Id.* at 28-29. Ecology responds to FOGH's arguments by pointing out that the SMA does not require local governments to address the cumulative impacts of sea level rise. Ecology further points out that the Cumulative Impacts Analysis (CIA) developed by the County does describe the impacts caused by anticipated future development to natural processes, and these are the same natural processes that are impacted by sea level rise. Ecology reasons that the SMP and CIA identify measures that will address the impacts of development and that these measures will also help ameliorate impacts to ecological functions due to sea level rise, as contemplated in Appendix A. Ecology's Resp. Br. at 26-27; AR 902-976 (CIA).

As the Board already concluded, the County was not required to address sea level rise in its SMP update. FOGH fails to identify a specific requirement in the Guidelines pertaining to cumulative impacts that the SMP does not address or comply with. The Board concludes that provisions in the County's SMP regarding cumulative impacts are consistent with the requirements in the Guidelines and will minimize cumulative impacts. AR 957-58, 3059-60, AR 3061-63.

[16]

Issue 4: The Proper Information was Identified and Assembled

FOGH alleges the County's SMP update does not comply with the SMP Guidelines because the County did not identify and assemble the most current, accurate, and complete scientific and technical information related to sea level rise. FOGH Opening Br. at 32-34. FOGH bases its argument in part on the fact that certain documents were not included in the initial index of the record prepared by Respondents. However, the record was supplemented by Petitioners without objection by Ecology or the County. Ecology points out that the supplemented materials, including those alleged by FOGH to not have been considered by the

County, were submitted to the County during the SMP review process. Ecology Resp. Br. at 31-32; AR 4-5. The Board concludes that FOGH fails to present clear and convincing evidence that the information submitted was not considered. Based on the agreed-upon documents submitted for the record for this appeal, and the supplemental materials provided by FOGH, the Board concludes that the proper information was identified and assembled as required by RCW 90.58.100(1) and WAC 173-26-201(2)(a).

[17]

Issue 5: The SMP Was Based on the Proper Information

FOGH also argues that the County violated RCW 90.58.100(1) because it did not “base” its decision on the most current, accurate, and complete scientific and technical information available. FOGH Opening Br. at 34. It alleges that recommendations from the Shoreline Analysis report were rejected and not included in the updated SMP. *Id.* at 35-37. It also suggests the County failed to consider “other relevant evidence” as required by RCW 90.58.100(1) and WAC 173-26-210(2)(a), related to sea level rise. *Id.* at 37-40.

[18]

WAC 173-26-201(a) requires local governments to “[f]irst, identify and assemble the current, accurate, and complete scientific and technical information available that is applicable to the issues of concern.” Then, they are to base SMP provisions on an analysis incorporating that assembled information. As indicated above, the County’s SMP was based on the proper information. As required by WAC 173-26-201(3)(d)(ii), the County prepared a Shoreline Analysis Report in 2015. AR 493-830. The recommendations from this report were carried forward into a Shoreline Restoration Plan completed in 2015. AR 992-1081. For example, on the Pacific Coast shoreline, the Report identifies the protection of “low-lying shorelines and coastal lands vulnerable to erosion through acquisitions or easements to limit land use conflicts and increase coastal resilience to sea level rise and other climate-related changes.” AR 669. This is an action that is carried forward into the Shoreline Restoration Plan. AR 1036.

Similarly, for the Grays Harbor Estuary, the Report identifies the need to reclaim developed estuary habitat, the replacement and removal of tidegates and restoration of tidal marshes, and the need to protect low-lying lands in the harbor through acquisitions or easements to allow space for uplands to transition to tidelands due to sea level rise. AR 675. This action too, is carried forward into the Shoreline Restoration Plan. AR 1033. FOGH alleges that none of these measures are identified in the SMP itself, but that is incorrect. The SMP has a separate section for “shoreline habitat restoration and enhancement projects.” AR 3057–59 (SMP 5.9). This section includes a policy that “[e]ncourage[s] property owners, community groups, local, state, federal, and tribal entities to aid in implementing restoration projects identified in the Grays Harbor County Shoreline Restoration Plan.” AR 3057 (SMP 5.8.2.A). The Board concludes that FOGH fails to provide clear and convincing evidence that the SMP is not based on the proper information.

[19]

FOGH argues that the information considered by the County was deficient because it did not address sea level rise. However, as stated above, there is no current requirement for local governments to plan for sea level rise in SMP updates. Local governments have discretion to develop requirements and balance policy goals for their jurisdictions, including whether to address sea level rise in their SMP updates. WAC 173-26-186(9). FOGH argues that the Jefferson County SMP case dictates the outcome here, where the court affirmed the SMP’s limits on mining, based on information in the record about mining impacts. FOGH Opening Br. at 40 (citing *Olympic Stewardship Found. v. W. Washington Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 680, 399 P.3d 562 (2017)). The Jefferson County SMP case is not relevant here, because the Guidelines contain provisions that explicitly require SMPs to address mining, including a provision in the flood hazard reduction section. WAC 173-26-221(3)(c)(i); *see also* WAC 173-26-211(5)(b)(ii)(A); -211(e)(ii); -241(3)(h). There is no similar requirement for a local government to address sea level rise. The Board concludes that

the County's SMP provisions are generally consistent with the record, the Shoreline Analysis Report, the Shoreline Restoration Plan, and Ecology's SMP Handbook, Appendix A.

[20]

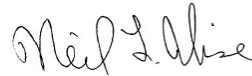
The Board concludes that FOGH failed to provide clear and convincing evidence that Ecology's and Grays Harbor County's approval of the Grays Harbor County Shoreline Master Program violates the SMA and the SMA Guidelines.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such. Having so found, the Board enters the following:

ORDER

The Department of Ecology's approval of the Grays Harbor County Shoreline Master Program update is **AFFIRMED**.

So ordered this 19th day of November, 2021.



NEIL L. WISE, Presiding Member



MICHELLE GONZALEZ, Member



CAROLINA SUN-WIDROW, Member



JOHN BOLENDER, Member



ALLEN ESTEP, Member



JENNIFER GREGERSON, Member

Appendix C: Key Relevant Statutes and Regulations

PDF

RCW 90.58.020

Legislative findings—State policy enunciated—Use preference.

The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. The department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:

- (1) Recognize and protect the statewide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline;
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single-family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. Alterations of the natural condition of the shorelines and shorelands of the state shall be recognized by the department. Shorelines and shorelands of the state shall be appropriately classified and these classifications shall be revised when circumstances warrant regardless of whether the change in circumstances occurs through man-made causes or natural causes. Any areas resulting from alterations of the natural condition of the shorelines

Appendix C: Key Relevant Statutes and Regulations

and shorelands of the state no longer meeting the definition of "shorelines of the state" shall not be subject to the provisions of chapter **90.58** RCW.

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

[1995 c 347 § 301; 1992 c 105 § 1; 1982 1st ex.s. c 13 § 1; 1971 ex.s. c 286 § 2.]

NOTES:

Finding—Severability—Part headings and table of contents not law—1995 c 347: See notes following RCW **36.70A.470**.

Appendix C: Key Relevant Statutes and Regulations

PDF

RCW 90.58.100

Programs as constituting use regulations—Duties when preparing programs and amendments thereto—Program contents.

(1) The master programs provided for in this chapter, when adopted or approved by the department shall constitute use regulations for the various shorelines of the state. In preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible:

(a) Utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts;

(b) Consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact;

(c) Consider all plans, studies, surveys, inventories, and systems of classification made or being made by federal, state, regional, or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state;

(d) Conduct or support such further research, studies, surveys, and interviews as are deemed necessary;

(e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data;

(f) Employ, when feasible, all appropriate, modern scientific data processing and computer techniques to store, index, analyze, and manage the information gathered.

(2) The master programs shall include, when appropriate, the following:

(a) An economic development element for the location and design of industries, projects of statewide significance, transportation facilities, port facilities, tourist facilities, commerce and other developments that are particularly dependent on their location on or use of the shorelines of the state;

(b) A public access element making provision for public access to publicly owned areas;

(c) A recreational element for the preservation and enlargement of recreational opportunities, including but not limited to parks, tidelands, beaches, and recreational areas;

(d) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other public utilities and facilities, all correlated with the shoreline use element;

(e) A use element which considers the proposed general distribution and general location and extent of the use on shorelines and adjacent land areas for housing, business, industry, transportation, agriculture, natural resources, recreation, education, public buildings and grounds, and other categories of public and private uses of the land;

(f) A conservation element for the preservation of natural resources, including but not limited to scenic vistas, aesthetics, and vital estuarine areas for fisheries and wildlife protection;

(g) An historic, cultural, scientific, and educational element for the protection and restoration of buildings, sites, and areas having historic, cultural, scientific, or educational values;

(h) An element that gives consideration to the statewide interest in the prevention and minimization of flood damages; and

(i) Any other element deemed appropriate or necessary to effectuate the policy of this chapter.

(3) The master programs shall include such map or maps, descriptive text, diagrams and charts, or other descriptive material as are necessary to provide for ease of understanding.

(4) Master programs will reflect that state-owned shorelines of the state are particularly adapted to providing wilderness beaches, ecological study areas, and other recreational activities for the public and will give appropriate special consideration to same.

(5) Each master program shall contain provisions to allow for the varying of the application of use regulations of the program, including provisions for permits for conditional uses and variances, to insure

Appendix C: Key Relevant Statutes and Regulations

that strict implementation of a program will not create unnecessary hardships or thwart the policy enumerated in RCW 90.58.020. Any such varying shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect. The concept of this subsection shall be incorporated in the rules adopted by the department relating to the establishment of a permit system as provided in RCW 90.58.140(3).

(6) Each master program shall contain standards governing the protection of single-family residences and appurtenant structures against damage or loss due to shoreline erosion. The standards shall govern the issuance of substantial development permits for shoreline protection, including structural methods such as construction of bulkheads, and nonstructural methods of protection. The standards shall provide for methods which achieve effective and timely protection against loss or damage to single-family residences and appurtenant structures due to shoreline erosion. The standards shall provide a preference for permit issuance for measures to protect single-family residences occupied prior to January 1, 1992, where the proposed measure is designed to minimize harm to the shoreline natural environment.

[2009 c 421 § 9; 1997 c 369 § 7; 1995 c 347 § 307; 1992 c 105 § 2; 1991 c 322 § 32; 1971 ex.s. c 286 § 10.]

NOTES:

Effective date—2009 c 421: See note following RCW 43.157.005.

Finding—Severability—Part headings and table of contents not law—1995 c 347: See notes following RCW 36.70A.470.

Findings—Intent—1991 c 322: See note following RCW 86.12.200.

Project of statewide significance—Defined: RCW 43.157.010.

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WAC 173-26-176 General policy goals of the act and guidelines for shorelines of the state. (1) The guidelines are designed to assist local governments in developing, adopting, and amending master programs that are consistent with the policy and provisions of the act. Thus, the policy goals of the act are the policy goals of the guidelines. The policy goals of the act are derived from the policy statement of RCW 90.58.020 and the description of the elements to be included in master programs under RCW 90.58.100.

(2) The policy goals for the management of shorelines harbor potential for conflict. The act recognizes that the shorelines and the waters they encompass are "among the most valuable and fragile" of the state's natural resources. They are valuable for economically productive industrial and commercial uses, recreation, navigation, residential amenity, scientific research and education. They are fragile because they depend upon balanced physical, biological, and chemical systems that may be adversely altered by natural forces (earthquakes, volcanic eruptions, landslides, storms, droughts, floods) and human conduct (industrial, commercial, residential, recreation, navigation-al). Unbridled use of shorelines ultimately could destroy their utility and value. The prohibition of all use of shorelines also could eliminate their human utility and value. Thus, the policy goals of the act relate both to utilization and protection of the extremely valuable and vulnerable shoreline resources of the state. The act calls for the accommodation of "all reasonable and appropriate uses" consistent with "protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life" and consistent with "public rights of navigation." The act's policy of achieving both shoreline utilization and protection is reflected in the provision that "permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, in so far as practical, any resultant damage to the ecology and environment of the shoreline area and the public's use of the water." RCW 90.58.020.

(3) The act's policy of protecting ecological functions, fostering reasonable utilization and maintaining the public right of navigation and corollary uses encompasses the following general policy goals for shorelines of the state. The statement of each policy goal is followed by the statutory language from which the policy goal is derived.

(a) The utilization of shorelines for economically productive uses that are particularly dependent on shoreline location or use.

RCW 90.58.020:

"The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration and preservation."

"It is the policy of the state to provide for the management of the shorelines by planning for and fostering all reasonable and appropriate uses."

"Uses shall be preferred which are. . .unique to or dependent upon use of the state's shoreline."

"Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single-family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shore-

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lines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state."

RCW 90.58.100:

"(2) The master programs shall include, when appropriate, the following:

(a) An economic development element for the location and design of industries, transportation facilities, port facilities, tourist facilities, commerce and other developments that are particularly dependent on their location on or use of the shorelines of the state;. . .

(d) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other public utilities and facilities, all correlated with the shorelines use element.

(e) A use element which considers the proposed general distribution and general location and extent of the use on shorelines and adjacent land areas for housing, business, industry, transportation, agriculture, natural resources, recreation, education, public buildings and grounds, and other categories of public and private uses of the land;. . ."

(b) **The utilization of shorelines and the waters they encompass for public access and recreation.**

RCW 90.58.020:

"The public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally."

"Alterations of the natural conditions of the shorelines of the state, in those limited instances when authorized, shall be given priority for. . .development that will provide an opportunity for substantial numbers of people to enjoy the shorelines of the state."

RCW 90.58.100:

"(2) The master programs shall include, when appropriate, the following:

(b) A public access element making provisions for public access to publicly owned areas;

(c) A recreational element for the preservation and enlargement of recreational opportunities, including but not limited to parks, tidelands, beaches, and recreational areas;. . ."

"(4) Master programs will reflect that state-owned shorelines of the state are particularly adapted to providing wilderness beaches, ecological study areas, and other recreational activities for the public and will give appropriate special consideration to same."

(c) **Protection and restoration of the ecological functions of shoreline natural resources.**

RCW 90.58.020:

"The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization protection, restoration, and preservation."

"This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life. . ."

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"To this end uses shall be preferred which are consistent with the control of pollution and prevention of damage to the natural environment."

"Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area. . ."

RCW 90.58.100:

"(2) The master programs shall include, when appropriate, the following:

(f) A conservation element for the preservation of natural resources, including but not limited to scenic vistas, aesthetics, and vital estuarine areas for fisheries and wildlife protection;

(g) An historic, cultural, scientific, and educational element for the protection and restoration of buildings, sites, and areas having historic, cultural, scientific, or educational values; . . ."

(d) **Protection of the public right of navigation and corollary uses of waters of the state.**

RCW 90.58.020:

"This policy contemplates protecting. . .generally public rights of navigation and corollary rights incidental thereto."

"Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, . . .any interference with the public's use of the water."

(e) **The protection and restoration of buildings and sites having historic, cultural and educational value.**

RCW 90.58.100:

"(2) The master programs shall include, when appropriate, the following:

(g) An historic, cultural, scientific, and educational element for the protection and restoration of buildings, sites, and areas having historic, cultural, scientific, or educational values; . . ."

(f) **Planning for public facilities and utilities correlated with other shorelines uses.**

RCW 90.58.100:

"(2) The master programs shall include, when appropriate, the following:

(d) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other public utilities and facilities, all correlated with the shoreline use element."

(g) **Prevention and minimization of flood damages.**

RCW 90.58.100:

"(2) The master programs shall include, when appropriate, the following:

(h) An element that gives consideration to the statewide interest in the prevention and minimization of flood damages."

(h) **Recognizing and protecting private property rights.**

RCW 90.58.020:

"The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; . . .and, therefore coordinated planning is necessary. . .while, at the same time, recognizing and protecting private rights consistent with the public interest."

(i) **Preferential accommodation of single-family uses.**

RCW 90.58.020:

Appendix C: Key Relevant Statutes and Regulations

"Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single-family residences and their appurtenant structures. . ."

RCW 90.58.100:

"(6) Each master program shall contain standards governing the protection of single-family residences and appurtenant structures against damage or loss due to shoreline erosion. The standards shall govern the issuance of substantial development permits for shoreline protection, including structural methods such as construction of bulkheads, and nonstructural methods of protection. The standards shall provide for methods which achieve effective and timely protection against loss or damage to single-family residences and appurtenant structures due to shoreline erosion. The standards shall provide a preference for permit issuance for measures to protect single-family residences occupied prior to January 1, 1992, where the proposed measure is designed to minimize harm to the shoreline natural environment."

(j) **Coordination of shoreline management with other relevant local, state, and federal programs.**

RCW 90.58.020:

"In addition. . ." the legislature ". . . finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state."

". . . and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state. . ."

"There is, therefor, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines."

RCW 90.58.100:

"In preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible:

(a) Utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts;

(b) Consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact;

(c) Consider all plans, studies, surveys, inventories, and systems of classification made or being made by federal, state, regional, or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state;

(d) Conduct or support such further research, studies, surveys, and interviews as are deemed necessary;

(e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data;

(f) Employ, when feasible, all appropriate modern scientific data processing and computer techniques to store, index, analyze, and manage the information gathered."

[Statutory Authority: RCW 90.58.060 and 90.58.200. WSR 04-01-117 (Order 03-02), § 173-26-176, filed 12/17/03, effective 1/17/04.]

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WAC 173-26-201 Process to prepare or amend shoreline master programs. (1) **Applicability.** This section outlines the process to prepare a comprehensive shoreline master program adoption or update. This section also establishes approval criteria for shoreline master program amendments.

(a) All master program amendments are subject to the minimum procedural rule requirements of WAC 173-26-010 through 173-26-160, and approval by the department as provided in RCW 90.58.090.

(b) Comprehensive master program adoptions and updates shall fully achieve the procedural and substantive requirements of these guidelines.

(c) Master program amendments may be approved by the department provided:

(i) The proposed amendment will not foster uncoordinated and piecemeal development of the state's shorelines;

(ii) The amendment is consistent with all applicable policies and standards of the act;

(iii) All procedural rule requirements for public notice and consultation have been satisfied; and

(iv) Master program guidelines analytical requirements and substantive standards have been satisfied, where they reasonably apply to the amendment. All master program amendments must demonstrate that the amendment will not result in a net loss of shoreline ecological functions.

(2) **Basic concepts.**

(a) **Use of scientific and technical information.** To satisfy the requirements for the use of scientific and technical information in RCW 90.58.100(1), local governments shall incorporate the following two steps into their master program development and amendment process.

First, identify and assemble the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern. The context, scope, magnitude, significance, and potential limitations of the scientific information should be considered. At a minimum, make use of and, where applicable, incorporate all available scientific information, aerial photography, inventory data, technical assistance materials, manuals and services from reliable sources of science. Local governments should also contact relevant state agencies, universities, affected Indian tribes, port districts and private parties for available information. While adequate scientific information and methodology necessary for development of a master program should be available, if any person, including local government, chooses to initiate scientific research with the expectation that it will be used as a basis for master program provisions, that research shall use accepted scientific methods, research procedures and review protocols. Local governments are encouraged to work interactively with neighboring jurisdictions, state resource agencies, affected Indian tribes, and other local government entities such as port districts to address technical issues beyond the scope of existing information resources or locally initiated research.

Local governments should consult the technical assistance materials produced by the department. When relevant information is available and unless there is more current or specific information available, those technical assistance materials shall constitute an element of scientific and technical information as defined in these guidelines and the use of which is required by the act.

Second, base master program provisions on an analysis incorporating the most current, accurate, and complete scientific or technical

Appendix C: Key Relevant Statutes and Regulations

information available. Local governments should be prepared to identify the following:

- (i) Scientific information and management recommendations on which the master program provisions are based;
- (ii) Assumptions made concerning, and data gaps in, the scientific information; and
- (iii) Risks to ecological functions associated with master program provisions. Address potential risks as described in WAC 173-26-201 (3)(d).

The requirement to use scientific and technical information in these guidelines does not limit a local jurisdiction's authority to solicit and incorporate information, experience, and anecdotal evidence provided by interested parties as part of the master program amendment process. Such information should be solicited through the public participation process described in WAC 173-26-201 (3)(b). Where information collected by or provided to local governments conflicts or is inconsistent, the local government shall base master program provisions on a reasoned, objective evaluation of the relative merits of the conflicting data.

(b) **Adaptation of policies and regulations.** Effective shoreline management requires the evaluation of changing conditions and the modification of policies and regulations to address identified trends and new information. Local governments should monitor actions taken to implement the master program and shoreline conditions to facilitate appropriate updates of master program provisions to improve shoreline management over time. In reviewing proposals to amend master programs, the department shall evaluate whether the change promotes achievement of the policies of the master program and the act. As provided in WAC 173-26-171 (3)(d), ecology will periodically review these guidelines, based in part on information provided by local government, and through that process local government will receive additional guidance on significant shoreline management issues that may require amendments to master programs.

(c) **Protection of ecological functions of the shorelines.** This chapter implements the act's policy on protection of shoreline natural resources through protection and restoration of ecological functions necessary to sustain these natural resources. The concept of ecological functions recognizes that any ecological system is composed of a wide variety of interacting physical, chemical and biological components, that are interdependent in varying degrees and scales, and that produce the landscape and habitats as they exist at any time. Ecological functions are the work performed or role played individually or collectively within ecosystems by these components.

As established in WAC 173-26-186(8), these guidelines are designed to assure, at minimum, no net loss of ecological functions necessary to sustain shoreline natural resources and to plan for restoration of ecological functions where they have been impaired. Managing shorelines for protection of their natural resources depends on sustaining the functions provided by:

- Ecosystem-wide processes such as those associated with the flow and movement of water, sediment and organic materials; the presence and movement of fish and wildlife and the maintenance of water quality.
- Individual components and localized processes such as those associated with shoreline vegetation, soils, water movement through the soil and across the land surface and the composition and configuration of the beds and banks of water bodies.

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The loss or degradation of the functions associated with ecosystem-wide processes, individual components and localized processes can significantly impact shoreline natural resources and may also adversely impact human health and safety. Shoreline master programs shall address ecological functions associated with applicable ecosystem-wide processes, individual components and localized processes identified in the ecological systems analysis described in WAC 173-26-201 (3)(d)(i).

Nearly all shoreline areas, even substantially developed or degraded areas, retain important ecological functions. For example, an intensely developed harbor area may also serve as a fish migration corridor and feeding area critical to species survival. Also, ecosystems are interconnected. For example, the life cycle of anadromous fish depends upon the viability of freshwater, marine, and terrestrial shoreline ecosystems, and many wildlife species associated with the shoreline depend on the health of both terrestrial and aquatic environments. Therefore, the policies for protecting and restoring ecological functions generally apply to all shoreline areas, not just those that remain relatively unaltered.

Master programs shall contain policies and regulations that assure, at minimum, no net loss of ecological functions necessary to sustain shoreline natural resources. To achieve this standard while accommodating appropriate and necessary shoreline uses and development, master programs should establish and apply:

- Environment designations with appropriate use and development standards; and
- Provisions to address the impacts of specific common shoreline uses, development activities and modification actions; and
- Provisions for the protection of critical areas within the shoreline; and
- Provisions for mitigation measures and methods to address unanticipated impacts.

When based on the inventory and analysis requirements and completed consistent with the specific provisions of these guidelines, the master program should ensure that development will be protective of ecological functions necessary to sustain existing shoreline natural resources and meet the standard. The concept of "net" as used herein, recognizes that any development has potential or actual, short-term or long-term impacts and that through application of appropriate development standards and employment of mitigation measures in accordance with the mitigation sequence, those impacts will be addressed in a manner necessary to assure that the end result will not diminish the shoreline resources and values as they currently exist. Where uses or development that impact ecological functions are necessary to achieve other objectives of RCW 90.58.020, master program provisions shall, to the greatest extent feasible, protect existing ecological functions and avoid new impacts to habitat and ecological functions before implementing other measures designed to achieve no net loss of ecological functions.

Master programs shall also include policies that promote restoration of ecological functions, as provided in WAC 173-26-201 (2)(f), where such functions are found to have been impaired based on analysis described in WAC 173-26-201 (3)(d)(i). It is intended that local government, through the master program, along with other regulatory and nonregulatory programs, contribute to restoration by planning for and fostering restoration and that such restoration occur through a combination of public and private programs and actions. Local government should identify restoration opportunities through the shoreline inven-

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tory process and authorize, coordinate and facilitate appropriate publicly and privately initiated restoration projects within their master programs. The goal of this effort is master programs which include planning elements that, when implemented, serve to improve the overall condition of habitat and resources within the shoreline area of each city and county.

(d) **Preferred uses.** As summarized in WAC 173-26-176, the act establishes policy that preference be given to uses that are unique to or dependent upon a shoreline location. Consistent with this policy, these guidelines use the terms "water-dependent," "water-related," and "water-enjoyment," as defined in WAC 173-26-020, when discussing appropriate uses for various shoreline areas.

Shoreline areas, being a limited ecological and economic resource, are the setting for competing uses and ecological protection and restoration activities. Consistent with RCW 90.58.020 and WAC 173-26-171 through 173-26-186, local governments shall, when determining allowable uses and resolving use conflicts on shorelines within their jurisdiction, apply the following preferences and priorities in the order listed below, starting with (d)(i) of this subsection. For shorelines of statewide significance, also apply the preferences as indicated in WAC 173-26-251(2).

(i) Reserve appropriate areas for protecting and restoring ecological functions to control pollution and prevent damage to the natural environment and public health. In reserving areas, local governments should consider areas that are ecologically intact from the uplands through the aquatic zone of the area, aquatic areas that adjoin permanently protected uplands, and tidelands in public ownership. Local governments should ensure that these areas are reserved consistent with constitutional limits.

(ii) Reserve shoreline areas for water-dependent and associated water-related uses. Harbor areas, established pursuant to Article XV of the state Constitution, and other areas that have reasonable commercial navigational accessibility and necessary support facilities such as transportation and utilities should be reserved for water-dependent and water-related uses that are associated with commercial navigation unless the local governments can demonstrate that adequate shoreline is reserved for future water-dependent and water-related uses and unless protection of the existing natural resource values of such areas preclude such uses. Local governments may prepare master program provisions to allow mixed-use developments that include and support water-dependent uses and address specific conditions that affect water-dependent uses.

(iii) Reserve shoreline areas for other water-related and water-enjoyment uses that are compatible with ecological protection and restoration objectives.

(iv) Locate single-family residential uses where they are appropriate and can be developed without significant impact to ecological functions or displacement of water-dependent uses.

(v) Limit nonwater-oriented uses to those locations where the above described uses are inappropriate or where nonwater-oriented uses demonstrably contribute to the objectives of the Shoreline Management Act.

Evaluation pursuant to the above criteria, local economic and land use conditions, and policies and regulations that assure protection of shoreline resources, may result in determination that other uses are considered as necessary or appropriate and may be accommoda-

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ted provided that the preferred uses are reasonably provided for in the jurisdiction.

(e) **Environmental impact mitigation.**

(i) To assure no net loss of shoreline ecological functions, master programs shall include provisions that require proposed individual uses and developments to analyze environmental impacts of the proposal and include measures to mitigate environmental impacts not otherwise avoided or mitigated by compliance with the master program and other applicable regulations. To the extent Washington's State Environmental Policy Act of 1971 (SEPA), chapter 43.21C RCW, is applicable, the analysis of such environmental impacts shall be conducted consistent with the rules implementing SEPA, which also address environmental impact mitigation in WAC 197-11-660 and define mitigation in WAC 197-11-768. Master programs shall indicate that, where required, mitigation measures shall be applied in the following sequence of steps listed in order of priority, with (e)(i)(A) of this subsection being top priority.

(A) Avoiding the impact altogether by not taking a certain action or parts of an action;

(B) Minimizing impacts by limiting the degree or magnitude of the action and its implementation by using appropriate technology or by taking affirmative steps to avoid or reduce impacts;

(C) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(D) Reducing or eliminating the impact over time by preservation and maintenance operations;

(E) Compensating for the impact by replacing, enhancing, or providing substitute resources or environments; and

(F) Monitoring the impact and the compensation projects and taking appropriate corrective measures.

(ii) In determining appropriate mitigation measures applicable to shoreline development, lower priority measures shall be applied only where higher priority measures are determined to be infeasible or inapplicable.

Consistent with WAC 173-26-186 (5) and (8), master programs shall also provide direction with regard to mitigation for the impact of the development so that:

(A) Application of the mitigation sequence achieves no net loss of ecological functions for each new development and does not result in required mitigation in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions and not have a significant adverse impact on other shoreline functions fostered by the policy of the act.

(B) When compensatory measures are appropriate pursuant to the mitigation priority sequence above, preferential consideration shall be given to measures that replace the impacted functions directly and in the immediate vicinity of the impact. However, alternative compensatory mitigation within the watershed that addresses limiting factors or identified critical needs for shoreline resource conservation based on watershed or comprehensive resource management plans applicable to the area of impact may be authorized. Authorization of compensatory mitigation measures may require appropriate safeguards, terms or conditions as necessary to ensure no net loss of ecological functions.

(f) **Shoreline restoration planning.** Consistent with principle WAC 173-26-186 (8)(c), master programs shall include goals, policies and actions for restoration of impaired shoreline ecological functions. These master program provisions should be designed to achieve overall

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improvements in shoreline ecological functions over time, when compared to the status upon adoption of the master program. The approach to restoration planning may vary significantly among local jurisdictions, depending on:

- The size of the jurisdiction;
- The extent and condition of shorelines in the jurisdiction;
- The availability of grants, volunteer programs or other tools for restoration; and
- The nature of the ecological functions to be addressed by restoration planning.

Master program restoration plans shall consider and address the following subjects:

(i) Identify degraded areas, impaired ecological functions, and sites with potential for ecological restoration;

(ii) Establish overall goals and priorities for restoration of degraded areas and impaired ecological functions;

(iii) Identify existing and ongoing projects and programs that are currently being implemented, or are reasonably assured of being implemented (based on an evaluation of funding likely in the foreseeable future), which are designed to contribute to local restoration goals;

(iv) Identify additional projects and programs needed to achieve local restoration goals, and implementation strategies including identifying prospective funding sources for those projects and programs;

(v) Identify timelines and benchmarks for implementing restoration projects and programs and achieving local restoration goals;

(vi) Provide for mechanisms or strategies to ensure that restoration projects and programs will be implemented according to plans and to appropriately review the effectiveness of the projects and programs in meeting the overall restoration goals.

(3) **Steps in preparing and amending a master program.**

(a) **Process overview.** This section provides a generalized process to prepare or comprehensively amend a shoreline master program. Local governments may modify the timing of the various steps, integrate the process into other planning activities, add steps to the process, or work jointly with other jurisdictions or regional efforts, provided the provisions of this chapter are met.

The department will provide a shoreline master program amendment checklist to help local governments identify issues to address. The checklist will not create new or additional requirements beyond the provisions of this chapter. The checklist is intended to aid the preparation and review of master program amendments. Local governments shall submit the completed checklist with the proposed master program amendments.

(b) **Participation process.**

(i) **Participation requirements.** Local government shall comply with the provisions of RCW 90.58.130 which states:

"To insure that all persons and entities having an interest in the guidelines and master programs developed under this chapter are provided with a full opportunity for involvement in both their development and implementation, the department and local governments shall:

(1) Make reasonable efforts to inform the people of the state about the shoreline management program of this chapter and in the performance of the responsibilities provided in this chapter, shall not only invite but actively encourage participation by all persons and private groups and entities showing an interest in shoreline management programs of this chapter; and

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(2) *Invite and encourage participation by all agencies of federal, state, and local government, including municipal and public corporations, having interests or responsibilities relating to the shorelines of the state. State and local agencies are directed to participate fully to insure that their interests are fully considered by the department and local governments."*

Additionally, the provisions of WAC 173-26-100 apply and include provisions to assure proper public participation and, for local governments planning under the Growth Management Act, the provisions of RCW 36.70A.140 also apply.

At a minimum, all local governments shall be prepared to describe and document their methods to ensure that all interested parties have a meaningful opportunity to participate.

(ii) **Communication with state agencies.** Before undertaking substantial work, local governments shall notify applicable state agencies to identify state interests, relevant regional and statewide efforts, available information, and methods for coordination and input. Contact the department for a list of applicable agencies to be notified.

(iii) **Communication with affected Indian tribes.** Prior to undertaking substantial work, local governments shall notify affected Indian tribes to identify tribal interests, relevant tribal efforts, available information and methods for coordination and input. Contact the individual tribes or coordinating bodies such as the Northwest Indian Fisheries Commission, for a list of affected Indian tribes to be notified.

(c) **Inventory shoreline conditions.** Gather and incorporate all pertinent and available information, existing inventory data and materials from state and federal agencies, individuals and nongovernmental entities with expertise, affected Indian tribes, watershed management planning, port districts and other appropriate sources. Ensure that, whenever possible, inventory methods and protocols are consistent with those of neighboring jurisdictions and state efforts. The department will provide, to the extent possible, services and resources for inventory work. Contact the department to determine information sources and other relevant efforts. Map inventory information at an appropriate scale. The department may provide an inventory of shoreline conditions to the local jurisdiction.

Local governments shall be prepared to demonstrate how the inventory information was used in preparing their local master program amendments.

Collection of additional inventory information is encouraged and should be coordinated with other watershed, regional, or statewide inventory and planning efforts in order to ensure consistent methods and data protocol as well as effective use of fiscal and human resources. Local governments should be prepared to demonstrate that they have coordinated with applicable interjurisdictional shoreline inventory and planning programs where they exist. Two or more local governments are encouraged to jointly conduct an inventory in order to increase the efficiency of data gathering and comprehensiveness of inventory information. Data from interjurisdictional, watershed, or regional inventories may be substituted for an inventory conducted by an individual jurisdiction, provided it meets the requirements of this section.

Local government shall, at a minimum, and to the extent such information is relevant and reasonably available, collect the following information:

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(i) Shoreline and adjacent land use patterns and transportation and utility facilities, including the extent of existing structures, impervious surfaces, vegetation and shoreline modifications in shoreline jurisdiction. Special attention should be paid to identification of ecologically intact blocks of upland vegetation, developed areas with largely intact riparian vegetation, water-oriented uses and related navigation, transportation and utility facilities.

(ii) Existing aquatic and terrestrial wildlife habitats; native aquatic vegetation; riparian and associated upland plant communities; and critical areas, including wetlands, aquifer recharge areas, fish and wildlife habitat conservation areas, geologically hazardous areas, and frequently flooded areas. See also WAC 173-26-221.

(iii) Altered and degraded areas and sites with potential for ecological restoration.

(iv) Areas of special interest, such as priority habitats, ecologically intact late successional native plant communities, developing or redeveloping harbors and waterfronts, previously identified toxic or hazardous material clean-up sites, dredged material disposal sites, or eroding shorelines, to be addressed through new master program provisions.

(v) Conditions and regulations in shoreland and adjacent areas that affect shorelines, such as surface water management and land use regulations. This information may be useful in achieving mutual consistency between the master program and other development regulations.

(vi) Existing and potential shoreline public access sites, including public rights of way and utility corridors.

(vii) General location of channel migration zones, and flood plains.

(viii) Gaps in existing information. During the initial inventory, local governments should identify what additional information may be necessary for more effective shoreline management.

(ix) If the shoreline is rapidly developing or subject to substantial human changes such as clearing and grading, past and current records or historical aerial photographs may be necessary to identify cumulative impacts, such as bulkhead construction, intrusive development on priority and critical habitats, and conversion of harbor areas to nonwater-oriented uses.

(x) If archaeological or historic resources have been identified in shoreline jurisdiction, consult with the state historic preservation office and local affected Indian tribes regarding existing archaeological and historical information.

(xi) Information specific to the aquatic environment for siting in-water uses and development, such as sediment contamination, intertidal property ownership, aquaculture operations, shellfish beds, shellfish protection districts, and areas that meet department of health shellfish water quality certification requirements.

(d) **Analyze shoreline issues of concern.** Before establishing specific master program provisions, local governments shall analyze the information gathered in (c) of this subsection and as necessary to ensure effective shoreline management provisions, address the topics below, where applicable.

(i) **Characterization of functions and ecosystem-wide processes.**

(A) Prepare a characterization of shoreline ecosystems and their associated ecological functions. The characterization consists of three steps:

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(I) Identify the ecosystem-wide processes and ecological functions based on the list in (d)(i)(C) of this subsection that apply to the shoreline(s) of the jurisdiction.

(II) Assess the ecosystem-wide processes to determine their relationship to ecological functions present within the jurisdiction and identify which ecological functions are healthy, which have been significantly altered and/or adversely impacted and which functions may have previously existed and are missing based on the values identified in (d)(i)(D) of this subsection; and

(III) Identify specific measures necessary to protect and/or restore the ecological functions and ecosystem-wide processes.

(B) The characterization of shoreline ecological systems may be achieved by using one or more of the approaches below:

(I) If a regional environmental management plan, such as a watershed plan or coastal erosion study, is ongoing or has been completed, then conduct the characterization either within the framework of the regional plan or use the data provided in the regional plan. This methodology is intended to contribute to an in-depth and comprehensive assessment and characterization.

(II) If a regional environmental management plan has not been completed, use available scientific and technical information, including flood studies, habitat evaluations and studies, water quality studies, and data and information from environmental impact statements. This characterization of ecosystem-wide processes and the impact upon the functions of specific habitats and human health and safety objectives may be of a generalized nature.

(III) One or more local governments may pursue a characterization which includes a greater scope and complexity than listed in (d)(i)(B)(I) and (II) of this subsection.

(C) Shoreline ecological functions include, but are not limited to:

In rivers and streams and associated flood plains:

Hydrologic: Transport of water and sediment across the natural range of flow variability; attenuating flow energy; developing pools, riffles, gravel bars, nutrient flux, recruitment and transport of large woody debris and other organic material.

Shoreline vegetation: Maintaining temperature; removing excessive nutrients and toxic compound, sediment removal and stabilization; attenuation of high stream flow energy; and provision of woody debris and other organic matter.

Hyporheic functions: Removing excessive nutrients and toxic compound, water storage, support of vegetation, and sediment storage and maintenance of base flows.

Habitat for native aquatic and shoreline-dependent birds, invertebrates, mammals; amphibians; and anadromous and resident native fish: Habitat functions may include, but are not limited to, space or conditions for reproduction; resting, hiding and migration; and food production and delivery.

In lakes:

Hydrologic: Storing water and sediment, attenuating wave energy, removing excessive nutrients and toxic compounds, recruitment of large woody debris and other organic material.

Shoreline vegetation: Maintaining temperature; removing excessive nutrients and toxic compound, attenuating wave energy, sediment removal and stabilization; and providing woody debris and other organic matter.

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Habitat for aquatic and shoreline-dependent birds, invertebrates, mammals; amphibians; and anadromous and resident native fish: Habitat functions may include, but are not limited to, space or conditions for reproduction, resting, hiding and migration; and food production and delivery.

In marine waters:

Hydrologic: Transporting and stabilizing sediment, attenuating wave and tidal energy, removing excessive nutrients and toxic compounds; recruitment, redistribution and reduction of woody debris and other organic material.

Vegetation: Maintaining temperature; removing excessive nutrients and toxic compound, attenuating wave energy, sediment removal and stabilization; and providing woody debris and other organic matter.

Habitat for aquatic and shoreline-dependent birds, invertebrates, mammals; amphibians; and anadromous and resident native fish: Habitat functions may include, but are not limited to, space or conditions for reproduction, resting, hiding and migration; and food production and delivery.

Wetlands:

Hydrological: Storing water and sediment, attenuating wave energy, removing excessive nutrients and toxic compounds, recruiting woody debris and other organic material.

Vegetation: Maintaining temperature; removing excessive nutrients and toxic compound, attenuating wave energy, removing and stabilizing sediment; and providing woody debris and other organic matter.

Hyporheic functions: Removing excessive nutrients and toxic compound, storing water and maintaining base flows, storing sediment and support of vegetation.

Habitat for aquatic and shoreline-dependent birds, invertebrates, mammals; amphibians; and anadromous and resident native fish: Habitat functions may include, but are not limited to, space or conditions for reproduction, resting, hiding and migration; and food production and delivery.

(D) The overall condition of habitat and shoreline resources are determined by the following ecosystem-wide processes and ecological functions:

The distribution, diversity, and complexity of the watersheds, marine environments, and landscape-scale features that form the aquatic systems to which species, populations, and communities are uniquely adapted.

The spatial and temporal connectivity within and between watersheds and along marine shorelines. Drainage network connections include flood plains, wetlands, upslope areas, headwater tributaries, and naturally functioning routes to areas critical for fulfilling life history requirements of aquatic and riverine-dependent species.

The shorelines, beaches, banks, marine near-shore habitats, and bottom configurations that provide the physical framework of the aquatic system.

The timing, volume, and distribution of woody debris recruitment in rivers, streams and marine habitat areas.

The water quality necessary to maintain the biological, physical, and chemical integrity of the system and support survival, growth, reproduction, and migration of individuals composing aquatic, riverine and lacustrine communities.

The sediment regime under which aquatic ecosystems evolved. Elements of the sediment regime include the timing, volume, rate, and character of sediment input, storage, and transport.

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The range of flow variability sufficient to create and sustain lacustrine, fluvial, aquatic, and wetland habitats, the patterns of sediment, nutrient, and wood routing. The timing, magnitude, duration, and spatial distribution of peak, high, and low flows, and duration of flood plain inundation and water table elevation in meadows and wetlands.

The species composition and structural diversity of plant communities in river and stream areas and wetlands that provides summer and winter thermal regulation, nutrient filtering, appropriate rates of surface erosion, bank erosion, and channel migration and to supply amounts and distributions of woody debris sufficient to sustain physical complexity and stability.

(E) Local governments should use the characterization and analysis called for in this section to prepare master program policies and regulations designed to achieve no net loss of ecological functions necessary to support shoreline resources and to plan for the restoration of the ecosystem-wide processes and individual ecological functions on a comprehensive basis over time.

(ii) **Shoreline use analysis and priorities.** Conduct an analysis to estimate the future demand for shoreline space and potential use conflicts. Characterize current shoreline use patterns and projected trends to ensure appropriate uses consistent with chapter 90.58 RCW and WAC 173-26-201 (2)(d) and 173-26-211(5).

If the jurisdiction includes a designated harbor area or urban waterfront with intensive uses or significant development or redevelopment issues, work with the Washington state department of natural resources and port authorities to ensure consistency with harbor area statutes and regulations, and to address port plans. Identify measures and strategies to encourage appropriate use of these shoreline areas in accordance with the use priorities of chapter 90.58 RCW and WAC 173-26-201 (2)(d) while pursuing opportunities for ecological restoration.

(iii) **Addressing cumulative impacts in developing master programs.** The principle that regulation of development shall achieve no net loss of ecological function requires that master program policies and regulations address the cumulative impacts on shoreline ecological functions that would result from future shoreline development and uses that are reasonably foreseeable from proposed master programs. To comply with the general obligation to assure no net loss of shoreline ecological function, the process of developing the policies and regulations of a shoreline master program requires assessment of how proposed policies and regulations cause and avoid such cumulative impacts.

Evaluating and addressing cumulative impacts shall be consistent with the guiding principle in WAC 173-26-186 (8)(d). An appropriate evaluation of cumulative impacts on ecological functions will consider the factors identified in WAC 173-26-186 (8)(d)(i) through (iii) and the effect on the ecological functions of the shoreline that are caused by unregulated activities, development and uses exempt from permitting, effects such as the incremental impact of residential bulkheads, residential piers, or runoff from newly developed properties. Accordingly, particular attention should be paid to policies and regulations that address platting or subdividing of property, laying of utilities, and mapping of streets that establish a pattern for future development that is to be regulated by the master program.

There are practical limits when evaluating impacts that are prospective and sometimes indirect. Local government should rely on the

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assistance of state agencies and appropriate parties using evaluation, measurement, estimation, or quantification of impact consistent with the guidance of RCW 90.58.100(1) and WAC 173-26-201 (2)(a). Policies and regulations of a master program are not inconsistent with these guidelines for failing to address cumulative impacts where a purported impact is not susceptible to being addressed using an approach consistent with RCW 90.58.100(1).

Complying with the above guidelines is the way that master program policies and regulations should be developed to assure that the commonly occurring and foreseeable cumulative impacts do not cause a net loss of ecological functions of the shoreline. For such commonly occurring and planned development, policies and regulations should be designed without reliance on an individualized cumulative impacts analysis. Local government shall fairly allocate the burden of addressing cumulative impacts.

For development projects and uses that may have unanticipatable or uncommon impacts that cannot be reasonably identified at the time of master program development, the master program policies and regulations should use the permitting or conditional use permitting processes to ensure that all impacts are addressed and that there is no net loss of ecological function of the shoreline after mitigation.

Similarly, local government shall consider and address cumulative impacts on other functions and uses of the shoreline that are consistent with the act. For example, a cumulative impact of allowing development of docks or piers could be interference with navigation on a water body.

(iv) **Shorelines of statewide significance.** If the area contains shorelines of statewide significance, undertake the steps outlined in WAC 173-26-251.

(v) **Public access.** Identify public access needs and opportunities within the jurisdiction and explore actions to enhance shoreline recreation facilities, as described in WAC 173-26-221(4).

(vi) **Enforcement and coordination with other regulatory programs.** Local governments planning under the Growth Management Act shall review their comprehensive plan policies and development regulations to ensure mutual consistency. In order to effectively administer and enforce master program provisions, local governments should also review their current permit review and inspection practices to identify ways to increase efficiency and effectiveness and to ensure consistency.

(vii) **Water quality and quantity.** Identify water quality and quantity issues relevant to master program provisions, including those that affect human health and safety. Review data and information specific to shellfish areas. Identify measures to protect water quality for human health as described in WAC 173-26-221(6). At a minimum, consult with appropriate federal, state, tribal, and local agencies.

(viii) **Vegetation conservation.** Identify how existing shoreline vegetation provides ecological functions and determine methods to ensure protection of those functions. Identify important ecological functions that have been degraded through loss of vegetation. Consider the amount of vegetated shoreline area necessary to achieve ecological objectives. While there may be less vegetation remaining in urbanized areas than in rural areas, the importance of this vegetation, in terms of the ecological functions it provides, is often as great or even greater than in rural areas due to its scarcity. Identify measures to ensure that new development meets vegetation conservation objectives.

(ix) **Special area planning.** Some shoreline sites or areas require more focused attention than is possible in the overall master program

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development process due to complex shoreline ecological issues, changing uses, or other unique features or issues. In these circumstances, the local government is encouraged to undertake special area planning. Special area planning also may be used to address: Public access, vegetation conservation, shoreline use compatibility, port development master planning, ecological restoration, or other issues best addressed on a comprehensive basis.

The resultant plans may serve as the basis for facilitating state and local government coordination and permit review. Special area planning shall provide for public and affected Indian tribe participation and compliance with all applicable provisions of the act and WAC 173-26-090 through 173-26-120.

(e) **Establish shoreline policies.** Address all of the elements listed in RCW 90.58.100(2) and all applicable provisions of these guidelines in policies. These policies should be reviewed for mutual consistency with the comprehensive plan policies. If there are shorelines of statewide significance, ensure that the other comprehensive plan policies affecting shoreline jurisdiction are consistent with the objectives of RCW 90.58.020 and 90.58.090(4).

(f) **Establish environment designations.** Establish environment designations and identify permitted uses and development standards for each environment designation.

Based on the inventory in (c) of this subsection and the analysis in (d) of this subsection, assign each shoreline segment an environment designation.

Prepare specific environment designation policies and regulations.

Review the environment designations for mutual consistency with comprehensive plan land use designations as indicated in WAC 173-26-211(3).

In determining the boundaries and classifications of environment designations, adhere to the criteria in WAC 173-26-211(5).

(g) **Prepare other shoreline regulations.** Prepare other shoreline regulations based on the policies and the analyses described in this section as necessary to assure consistency with the guidelines of this chapter. The level of detail of inventory information and planning analysis will be a consideration in setting shoreline regulations. As a general rule, the less known about existing resources, the more protective shoreline master program provisions should be to avoid unanticipated impacts to shoreline resources. If there is a question about the extent or condition of an existing ecological resource, then the master program provisions shall be sufficient to reasonably assure that the resource is protected in a manner consistent with the policies of these guidelines.

(h) **Submit for review and approval.** Local governments are encouraged to work with department personnel during preparation of the master program and to submit draft master program provisions to the department for informal advice and guidance prior to formal submittal.

Local governments shall submit the completed checklist, as described in WAC 173-26-201 (3)(a), with their master program amendments proposed for adoption. Master program review and formal adoption procedures are described in Parts I and II of this chapter.

[Statutory Authority: Chapter 90.58 RCW. WSR 17-17-016 (Order 15-06), § 173-26-201, filed 8/7/17, effective 9/7/17. Statutory Authority: RCW 90.58.120, 90.58.200, 90.58.060 and 43.21A.681. WSR 11-05-064 (Order 10-07), § 173-26-201, filed 2/11/11, effective 3/14/11. Statutory Au-

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thority: RCW 90.58.060 and 90.58.200. WSR 04-01-117 (Order 03-02), § 173-26-201, filed 12/17/03, effective 1/17/04.]

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Comments:

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