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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

OLYMPIC STEWARDSHIP FOUNDATION, et al., CITIZENS'
ALLIANCE FOR PROPERTY RIGHTS JEFFERSON COUNTY,
CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND,
MATS MATS BAY TRUST, JESSE A. STEWART REVOCABLE
TRUST, and CRAIG DURGAN, and HOOD CANAL SAND &
GRAVEL LLC dba THORNDYKE RESOURCE,

Appellants,

v.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE
HEARINGS OFFICE, acting through the WESTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD; STATE OF
WASHINGTON, DEPARTMENT OF ECOLOGY; and JEFFERSON
COUNTY,

Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

**OPENING BRIEF OF PETITIONERS OLYMPIC
STEWARDSHIP FOUNDATION, et al.**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal raises important questions of statewide significance concerning the implementation of the Shoreline Management Act (SMA), Ch. 90.58 RCW. This Court should overturn the decision of the Growth Management Hearings Board (“Growth Board”) approving Jefferson County’s Shoreline Master Plan update (the “Update”). The decision warrants judicial relief pursuant to RCW 34.05.570(3), including because the Update goes well beyond statutory limits placed on shoreline regulations and imposes constitutionally invalid exactions on private land not subject to the public trust doctrine.

The Legislature crafted the SMA to allow residential development and use of shoreline properties so long as adverse environmental impacts are minimized. RCW 90.58.020 (“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.”). Rather than prohibit development, the Legislature chose to encourage preferred uses while “stressing the need that such future development be carefully planned, managed, and coordinated in keeping with the public interest.” *State Dep’t of Ecology v. Ballard Elks Lodge No. 827*, 84 Wn.2d 551, 557, 527 P.2d 1121 (1974). Development of single-family homes is a preferred “reasonable and

appropriate” use of the shorelines. WAC 173-26-241(3)(j); RCW 90.58.020.

Despite the SMA’s policy of balance, Jefferson County enacted – and the Department of Ecology approved – an Update that (1) severely restricts any future development of private shoreline property based on *presumptions* about the range of *potential* impacts that may or may not occur if residential development is allowed (2) without regard to the efficacy of existing regulations which were already in place to control residential impacts¹ – under which the shorelines remained in good overall condition. Nonetheless, the Update restrictions include a uniform and preset 150-foot buffer, plus a 10-foot construction set aside, on all shoreline properties, regardless of whether the parcel is located in the middle of a built area or along a stretch of untouched rural land. Jefferson County Code (“JCC”) § 18.25.270(4)(d)(e). This increases the size of shoreline buffers

¹ *E.g.*, a 50-foot buffer required by the old SMP, growth management restrictions on the creation of new urban-sized lots in rural areas (AR 2466), limits on creation of new impervious surface areas (JCC § 18.30.050, Table 6.1, 10%-25% limit) (**Appendix A-1**), and stormwater controls that require infiltration of runoff. *See* Department of Ecology Stormwater Manual for Western Washington, Vol. III, §§ 3.1, 3.3.5, 3.10-3.11, Vol. V at pp.5-33 through 5-43 (2014), excerpts, Chapters 1, 3, attached to Declaration of Jon Brenner (“Brenner Decl.”), dated February 21, 2016, ¶ 11, Exs. J, K and L. The Brenner Declaration (and other referenced declarations) are found in the Olympic Stewardship Foundation’s (“OSF”) Evidence Submittal re Constitutional Issues filed and served contemporaneously with this Opening Brief. The Jefferson Code requires compliance with the Manual. *See* JCC § 18.30.070 (**Appendix A-2**). Conversion of pervious surface to impervious surface in Jefferson County has been gradual, with an increase in the 10-year period between 1991 and 2001 of only 0.2% (2.8% to 3.0%). Cumulative Impacts Analysis (AR 000005656 at 8, Table 1.

by as much as 300% despite lack of any showing that environmental conditions supported this increase.

Finally, the Update treats the entire shoreline as a “critical area” – despite a Critical Areas Ordinance limiting that designation to certain shorelines – and imposes no-build, vegetation retention restrictions that encompass 80% of the area within the 200-foot SMA upland jurisdiction line, significantly impacting the development rights and value of approximately 3,544 shoreline properties and 1,480 inland shoreline parcels. *See* AR 000007384 (**Appendix A-3**). The area required to be set aside (14.49 square miles) is considerably larger than the City of Port Townsend, which is 9.5 square miles!² Since the County announced its decision to adopt this Update, the value of shoreline properties have decreased 18.5% while all other properties have maintained their value.³

The Growth Board upheld the Update based on its erroneous conclusion that private property rights are “secondary” to the SMA’s “primary” purpose of protecting the environment. Final Decision and Order (“Decision”), at 80.⁴ Based on that conclusion, the Board misinterpreted several statutory and regulatory provisions to advance only environmental

² *See* Declaration of Eugene (Gene) Farr (“Farr Decl.”) dated February 19, 2016, ¶¶ 9-11.

³ *Id.* at ¶ 15.

⁴ *See* **Appendix A-3**. For the Court’s convenience, cites are to the Decision found in the Appendix. The Decision is in the Record (AR 000007453-7565).

interests (Decision at 31), and relieve the County of the requirement that it demonstrate that any new restrictions are necessary and effective. (Decision at 21, 24). The new buffer conditions also are constitutionally invalid. The Board's ruling is an erroneous interpretation of the SMA and Ecology's regulatory guidelines, exceeds its authority, is unsupported by substantial evidence, violates constitutional principles, and must be reversed under RCW 34.05.370(3).

II. ASSIGNMENT OF ERROR AND ISSUES PERTAINING THERETO

Appellants assign the following errors to the Growth Board's March 16, 2014 Final Decision and Order erroneously dismissing the appeal and affirming Jefferson County's SMP Update.⁵

Error 1. The Growth Board interpreted RCW 90.58.020 as establishing state policy that property rights are "secondary" to the "primary" goal of protecting, restoring, and enhancing the environment. Decision at 31, 80.

⁵ The Growth Board made no formal conclusions of law and entered no findings of fact to which Appellants can assign error. RCW 34.05.461(3) ("final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record . . ."). OSF assigns error to language denominated as "Finding," Decision at p. 20 line 7; p. 21, lines 21, 23, 25; p. 24, line 14; p. 25, line 17; p. 26, line 4; p. 31, line 9; p. 32, line 20; p. 34, line 3; p. 35, line 18; p. 43, line 17; p. 45, line 22; p. 49, line 4; p. 50, line 26; and p. 52, line 3. OSF raised as issues before the Board the lack of evidence supporting the Update, including the new marine buffer. See Petition, AR 000000025-519, p. 12 (Paragraph 6.3, AR 000000036, Issues Nos. 1, 88, 91-94, 170-186, among others, AR 000000048, 000000056-58).

Issue 1. Whether under a *de novo* standard of review, the Growth Board erroneously interpreted the SMA to declare private property rights “secondary” to the SMA’s “primary” purpose of protecting the environment.

Error 2. The Growth Board interpreted the phrase, “no net loss,” as used in both the Guidelines and Update, to prohibit all new development impacts. Decision at 31-34; 50, 52.

Issue 2. Whether under a *de novo* standard of review, the Growth Board erroneously interpreted the phrase “no net loss” to prohibit all new development impacts, rather than requiring that the landowner minimize or avoid them in so far as practicable.

Error 3. The Growth held that Jefferson County could require forced restoration of conditions not caused by a proposed shoreline development. Decision, at 50, 52

Issue 3: Whether under a *de novo* standard of review, the Growth Board erroneously interpreted the phrase “no net loss” to authorize local governments to require landowners to restore and/or enhance already degraded shorelines as a condition of permit approval.

Error 4. The Growth Board determined that Jefferson County was not required to follow the update requirements set out in WAC 173-26-186 and WAC 173-26-201, and as required by RCW 90.58.020 and RCW

90.58.080(1). As a result, the Board failed to review the Update for compliance with those requirements, and failed to review the County and Ecology's underlying findings and conclusions. Decision at 19-26, 31, 38-42, 44-45, 49.

Issue 4. Whether under a *de novo* and substantial evidence standards of review, the Growth Board erroneously interpreted the policy of RCW 90.58.020 to provide that (a) the County was not required to comply with the regulatory provisions requiring that local government demonstrate the necessity and effectiveness of new restrictions before updating an SMP; and (b) Ecology's agency action ensures implementation of the SMA "coordinated planning" directive.

Error 5. The Growth Board dismissed as waived several arguments that had been raised, briefed, and/or incorporated by reference in OSF's briefs below. Decision at 12-14.

Issue 5. Whether under a *de novo* standard of review, if not harmless error, the Growth Board erroneously applied the law, engaged in unlawful procedure, failed to follow prescribed procedure or failed to decide all issues requiring resolution when it refused to review issues actually raised and briefed.

Error 6. The Growth Board concluded that the County’s critical areas ordinance, as incorporated by reference into the Update, satisfied the requirements of the SMA and Guidelines. Decision at 48-49.

Issue 6. Whether under the *de novo* and substantial evidence standards of review the Growth Board erred by concluding that the County’s critical areas ordinance, incorporated by reference into Update, satisfied the update requirements set out in the SMA and Guidelines.

Error 7. The Growth Board affirmed a 41% expansion of the Natural Shoreline designation.

Issue 7. Whether the Growth Board erred in upholding the Natural Shoreline designation expansion.

Error 8. The Board entered a Final Decision and Order upholding Ecology’s approval of the Update.

Issue 8. Whether the Board erred in concluding that the Update was compliant with the Shoreline Management Act and WAC Chapter 173-26, the Implementing Guidelines for the Update.

Error 9. Whether OSF’s claim that the Update imposed mandatory conditions on new development permits in violation of the unconstitutional conditions doctrine dismissed by the Board for want of jurisdiction should be affirmed on appeal. Decision at 6-7, 45. This claim is now properly before the Court.

Issue 9. Whether the Update violates the takings clauses of the Washington and United States Constitution by allowing the County to exact conservation buffers and public access easements as a mandatory condition of permit approval when such conditions violate the unconstitutional conditions doctrine because the exactions are (a) imposed in a preset and uniform manner, and (b) wholly unrelated to the actual impacts of the proposed developments.

Issue 10. Whether this Court should award Appellants attorney fees under the Equal Access to Justice Act.

III. STATEMENT OF THE CASE

A. Owners of Shoreline Property Hold Several Well-Recognized and Constitutionally Protected Property Rights.

This case involves a government decision to adopt severe regulatory restrictions on the use and enjoyment of private property. A brief overview of the rights inherent in shoreline property ownership begins with the general proposition that the term “property” refers to the collection of protected rights inhering in an individual’s relationship to his or her land. *United States v. General Motors Corp.*, 323 U.S. 373, 378, (1945). Among these are the rights to possess, use, exclude others, and dispose of the property. *Id.* In addition, shoreline property owners hold several “special

rights' with regard to the water and foreshore."⁶ *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl. Prot.*, 560 U.S. 702, 707-08 (2010); Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: the Rights of Littoral Owners in the Twenty-First Century*, 83 N.C. L. Rev. 1427, 1439 (2005). These additional rights include the rights of access to the water, to use the water for certain purposes, to receive accretions and relictions, and to defend one's property against the elements. *See, e.g., Stop the Beach*, 560 U.S. at 708; *Cubbins v. Mississippi River Comm'n*, 241 U.S. 351, 363-64 (1916). Many of those rights are recognized by the SMA, which includes the "preferred" right to build a single family residence and appurtenant structures; the right to make recreational use of the shoreline; and the right to protect one's home against damage or loss due to erosion. RCW 90.58.020; RCW 90.58.100(6). Each of these rights is protected by the constitution. *Manufactured Hous. Comm'ties of Wash. v. State*, 142 Wn.2d 347, 355, 13 P.3d 183 (2000) (A

⁶ In Washington, the State owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore (the land between the low-tide line and the mean high-water line). Wash. Const., Art. XVII, Sec. 1; *Caminiti v. Boyle*, 107 Wn.2d 662, 669, 732 P.2d 989 (1987). The area subject to the "public trust" does not include lands above the high water mark. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894); *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 570, 103 P.3d 203, (2004) ("No Washington case has applied the public trust doctrine to terrestrial wildlife or resources."); *see also* Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 585 (1992) (An attempt to expand the public trust to upland properties may give rise to a claim for an uncompensated taking).

“regulation [that] destroys one or more of the fundamental attributes of ownership” will violate the Takings Clause).

B. The SMP Update

In February 2014, Ecology approved Jefferson County’s comprehensive SMP update. CP 11 (OSF Petition 11).⁷ Despite many public comments and public meetings and hearings, the new SMP is actually the product of a small group of agency regulators and Jefferson County Department of Community Development staff. Many comments pointed out that this group had a narrow, predetermined focus to stop development and force restoration.⁸ *See, e.g.*, AR 000005418. Staff did not even consider the old SMP or compare its provisions to the new SMP regulations. Staff commenced the update using an unadopted 2000 draft (Res. No. 77-09, AR 000002562) and the Whatcom County draft SMP as a template. (AR 000004670-4709).

The County prepared only a very limited scientific record to support the Update, which record is summarized in the Cumulative Impacts Assessment (CIA) (AR 000005645-5721) and *Final Shoreline Inventory*

⁷ The SMP is codified in the Code as JCC Chapter 18.25. *See Appendix A-5* hereto. The record cite to the Update is AR 00000065-337. The County’s Critical Areas Ordinance is codified as JCC Chapter 18.22. *See Appendix A-6* hereto.

⁸ The Chair of the Jefferson County Planning Commission pointed out the Staff predisposition to the Growth Board of County Commissioners and that as a result, **meaningful comment** on the SMP did not occur. *See* AR 000003140-47.

and Characterization Report – Revised (2008) (Inventory). (AR 000003451-3720). The County conceded that the Inventory was only intended to “characterize, in a general manner, the ecosystem processes that shape and influence conditions along each reach of the County’s shoreline.” Inventory at 1-2; AR 000003464-65. Indeed, due to gaps in data and the general nature of the analysis, the Inventory cautioned that, “in many cases,” determining the actual conditions of a shoreline property “will require additional, site-specific/time-specific data and/or analyses.”⁹ *Ibid.*

Relying on the “general recommendations,” the County concluded that a generic 150-foot marine buffer standard (and 10-foot setback) would be large enough to ensure that *if* a shoreline property is providing any of the potential benefits to the marine environment, the benefits will be protected. That conclusion, however, only takes into account the alleged, general needs of the environment – it does not consider how *little* land would be needed to protect existing conditions from adverse environmental impacts. WAC 173-26-201(2)(e)(ii)(A) (Regulations must “not result in required mitigation in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions.”).

⁹ The Inventory was only intended as general guidance, reporting significant differences in the ecological conditions throughout the County—which is to be expected, given that an inlet along Hood Canal is very different from the Pacific coast.

Despite the SMA mandate for “coordinated planning” (RCW 90.58.020), and the Guidelines’ mandate to assess the beneficial aspects of the existing regulatory regime before developing an Update (WAC 173-26-186(8)(d)(iii)), neither the County nor Ecology analyzed the effectiveness of existing shoreline regulations as part of its update process and the Growth Board erred in upholding this oversight.¹⁰ *See* Decision at 20. *See also* OSF Evidence Submittal, Declaration of Robert F. Cousins dated February 18, 2016 (“Cousins Decl.”), ¶¶ 5, 6, 16, 21, setting out the current regulatory regime. Instead, the Update was adopted based on the assumption that “any use/development that would cause a net loss of ecological functions or processes” must be prohibited. (CIA at 2; AR 000005650). Thus, the County and Ecology viewed only potential “loss” without consideration of the benefits of existing regulations or differences in discrete shoreline parcels and development proposals. *Ibid.*

The reason for this one-sided inquiry is made clear by the record. The County expressed a desire to “go beyond” the “minimum” required by the SMA to provide for a “net gain” (rather than “no net loss”) for important shoreline ecological processes and functions by requiring new properties to

¹⁰ The Inventory further cautioned that it was not intended to provide a “full evaluation of the effectiveness of the SMA or the County’s existing shoreline policies or regulations.” AR 000003464.

be redeveloped "... in accordance with the new policies and regulations." AR 000005650 (CIA); AR 000002566 (Res. No. 77-09).

C. Documented Local Circumstances Were Ignored

The County's justification for tripling the size of the buffers on properties mostly zoned large lot (one dwelling unit per five acres) was ostensibly for the protection of general shoreline functions. Decision, at 42-43. Yet, the County's analysis of its shorelines reported that they were in overall good condition, and most of the pollutant loading identified was due to upland agricultural (manure and fertilizer), public uses (wastewater treatment), and stormwater runoff, which are largely beyond the reach of SMA jurisdiction. See AR 000005678, 000005697 (CIA at 30, 49); AR 000002578 (Res. No. 77-09). As for marine waterfront homes the CIA concluded that "[i]n and of itself, residential development probably does not have major adverse effects on shoreline resources." AR 000005652 (CIA at 4). Further, any platting of new lots was "less than one percent in most cases" (CIA at 42, AR 000005609) and creation of new impervious surface between 1991 to 2001 was 0.02% (AR 000005666).

D. Impact of the New Regulations

The Update massively expanded regulatory restrictions on the development and use of shoreline property. The County deemed all privately owned property adjacent to a shoreline "critical areas." Decision

at 20 (“Jefferson County has designated its marine shorelines ... as critical areas.”). Under the prior SMP and current CAO, however, shoreline critical areas (and buffers) were limited to important spawning areas, steep or hazardous slopes, and wetlands or associated wetlands.

The 1998 SMP contained five environmental designations: Urban, Suburban, Conservancy, Natural, and Aquatic. AR 000002463-64. Most of the County shorelines were mapped Conservancy or Suburban, permitting low density residential and recreational use “provided those activities do not significantly degrade or deplete resources and respect limiting environmental conditions.” *Ibid.* The new SMP severely restricts those development rights by enlarging the “Natural” Shoreline Environment – an area subject to “the highest level of protection possible” (AR 000005716 (CIA at 68)) – from eleven percent (11%) of the County’s shorelines to forty-one percent (41%).¹¹ AR 000002463.

The 1998 SMP only required a 50-foot buffer on shoreline properties. But the new SMP requires a 150-foot buffer plus a 10-foot building setback which “...shall be retained in the natural condition” except for “minor pruning.” JCC§ 18.22.270(5)(a)(iii); JCC § 18.25.270(4)(d) and

¹¹ In the former SMP, the only shoreland areas classified as all “Natural” were the tidal flats at the northwest corner of Suquamish Harbor, and some of the sand spits and islands. Other areas were classified as Mixed Natural and Conservancy or Suburban. These included areas with marshes, estuaries, or feeder bluffs where the Natural classification ended at the High Water Mark or the top of the bluff. AR 000002463-64.

JCC § 18.25.270(e)(i)-(iii). In tandem with its “no build” 150-foot marine buffer, the JCSMP imposes a severe vegetation set aside. JCC § 18.25.310 sets a 20% limit on vegetation removal within “the required buffer area or 15 linear feet of the water frontage, whichever is greater.”

The record is replete with testimony that the onerous new buffer and setback requirements severely impact residential home development and use. *See, e.g.*, OSF Exhibits OSF-12, 15, 17, 21, 22, 24, 25, 27, 29, 34, 37, 38, 40, 41, 43, 44 (40% reduction in value), 46 (loss of view), 48, 51, 64, 71 (no room to build), 73, 87 (no room to build), 94, 123, 145, 146, 156 (no room to build), 156 (1000 square feet buildable area out of 250,000 square feet owned), 220 (most lots in Port Ludlow Master Community not 150 feet deep), 289, 299, 300, 317, 332, and 354 (AR 000002734, 2739, 2758, 2762, 2763, 2766, 2767, 2770-71, 2788, 2814, 2818-19, 2819-20, 2821, 2828, 2829, 2831-32, 2834, 2845, 3100-102, 3123-24, 3126, 2127, 3130, 3134-35, 3166, 3198-99, 3445-50, 3835, 3836, 3943-44, 3947) (Summary of Comments). AR 000005750-5845; *See also* OSF Evidence Submittal, Declaration of Dennis Schultz dated February 19, 2016 (“Schultz Decl.”), ¶ 16.

The Code provisions allowing for minimal adjustments to the prescriptive buffers are not effective. JCC §§ 18.22.270(6), .350(1), .460. First, the standard buffer can only be decreased by 25%. JCC

§ 18.22.270(6)(b). Second, when allowed for the marine buffer, in most contexts it is for unpermitted work on already developed lots. Declaration of Leann Ebe McDonald dated February 19, 2016 (“McDonald Decl.”), ¶ 17, Ex. B. Third, it is very expensive. McDonald Decl., ¶¶ 28-29. Fourth, the required mitigation, which authorizes the County to demand that the owner go beyond a “no net loss” standard and provide for restoration and enhancement of the shoreline, is costly. *Ibid.* See JCC § 18.22.350(1). Fifth, lot size and configuration preclude possible reduction in many instances. Schultz Decl., ¶¶ 17-24.

E. Proceedings Below

OSF¹² challenged the Update before the Growth Board. AR 000000025-519. OSF contended that the County and Ecology failed to follow the statutory and regulatory rules for developing and adopting a new SMP. AR 000002461-62; AR 000002467-74. Specifically, OSF argued that the County’s record did not support its decision to impose a uniform 150-foot buffer on all new marine development. AR 000002484-86. OSF also argued that the County’s SMP violates the nexus and rough proportionality standards as set out by the U.S. Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. Tigard*,

¹² Appellants J. Eugene Farr, Wayne and Peggy King, Anne Barton, Bill Eldridge, Bud and Val Schneider, and Ronald Holsman are members of OSF. OSF Petition, p.2, CP 2.

512 U.S. 374 (1994). AR 000002482-84. It challenged the blanket designation of marine shorelines as “critical areas,” as well as the “conservancy” and “natural” designations. AR 000002486-91; AR 000002493-94.

The Growth Board rubber-stamped Ecology’s approval of the SMP, dismissing many of OSF’s arguments without citation to facts or law. The Board placed no burden on Ecology or the County to show their work (affirming buffer size without any analysis of local conditions. In fact, the Board outright rejected the argument that the SMA and Guidelines required the County and Ecology to justify the new SMP regulations, concluding that a *required* SMP update is exempt from the rules governing all other SMP updates. Decision at 19-20. This administrative appeal (CP 1-182) is now before this Court upon a transfer from the Jefferson County Superior Court pursuant to RCW 34.05.518.

IV. STANDARD OF REVIEW

This Court reviews the Decision pursuant to the standards set forth in RCW 34.05.570(3) of the Administrative Procedure Act (APA). *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). Under the APA, “a court shall grant relief from an agency’s adjudicative order if it fails to meet any of nine standards delineated in RCW 34.05.570(3).” *Lewis County v. W. Wash. Growth Mgmt.*

Hearings Bd., 157 Wn.2d 488, 498, 139 P.3d 1096 (2006). Here, OSF contends that the Growth Board’s decision is in violation of constitutional provisions; the Growth Board engaged in unlawful procedure or decision-making process; the decision is based on erroneous interpretation or application of the law; the decision is not supported by substantial evidence; the Board did not decide all issues on appeal; and the decision is arbitrary or capricious. RCW 34.05.570(3)(a), (c), (d), (e), (f), (i).

Challenges under subsections (a), (b), (d), and (f) raise questions of law and are reviewed de novo. *See City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998). Errors alleged under subsection (e) are mixed questions of law and fact, where the reviewing court determines the law independently, then applies it to the facts as found by the Board. *Id.* For the purposes of subsection (i), arbitrary and capricious actions include “willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.” *Id.* Additionally, because the Board failed to include factual findings in its decision and order as required by RCW 34.05.461(3), all issues concerning lack of substantial evidence should be resolved in OSF’s favor. *See Weyerhaeuser Co. v. Department of Revenue*, 16 Wn. App. 112, 114-15, 553 P.2d 1349 (1976) (When facts are not in

dispute, an appellate court is required to make a *de novo* review independent of agency's decision.).

V. ARGUMENT

OSF joins the challenge by Citizens' Alliance for Property Rights that the Update is invalid for the reasons set out in its Brief.

A. **Because SMA Requires that Local Government Balance the Environment and Property Rights, the Board Erred When It Approved the Update on the Ground that Private Property Rights Are "Secondary" to Protection of the Environment.**

The Growth Board's decision is tainted by its erroneous conclusion that under the SMA, private property rights are "secondary" to the "primary" purpose of protecting the environment.¹³ Decision at 80. As a result, the Board misconstrued several statutory provisions and regulatory guidelines as advancing the goal of environmental protection without regard to property rights. Not only is the Growth Board's interpretation of the SMA contrary to the plain language and policy of the statute, it conflicts with decisions of our Supreme Court. Under the APA, this Court must reverse an agency decision that is based on an erroneous interpretation of the law, or is outside of the agency's authority.¹⁴ RCW 34.05.570(3); *Diehl*

¹³ This Court reviews an agency's interpretation of a statute *de novo*, with the objective of giving effect to the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002); *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004).

¹⁴ This will not be the first time the Growth Board must be corrected for failure to apply SMA policy. In 2003, the Growth Board ruled that "the primary and paramount policy mandate that the board gleans from a complete reading of RCW 90.58.020 ... is one of

v. Western Wash. Growth Mgmt. Hearings Bd., 153 Wn.2d 207, 213, 103 P.3d 193 (2004).

The Growth Board's error is clear. It selectively quoted the pro-environment terms from the legislative findings and statement of policy in RCW 90.58.020 to make it appear that the Legislature intended that environmental interests will trump private property rights:

[T]he Board finds that RCW 90.58.020 establishes a state policy to manage shorelines with an emphasis on the maintenance, protection, restoration, and the preservation of "fragile" shoreline "natural resources," "public health," "the land and its vegetation and wildlife," "the waters and their aquatic life," "ecology," and "environment."

Decision at 31. This attempt to reset state policy fails. The Legislature's intent for balancing is plain and unequivocal. The SMA states that "[i]t 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.**" RCW 90.58.020 (emphasis supplied). The provision explains that "coordinated planning is necessary in order to protect the public interest

shoreline preservation, protection, enhancement and restoration." *Shorelines Coalition et al. v. City of Everett, et al.*, CPSGMHB Case No. 02-3-0009C, Final Decision and Order, p.15 (Jan. 9, 2003). After issuance of the Board's decision, the Legislature intervened, enacting Chapter 321 of the Laws of 2003. Therein, the Legislature stated that the SMA shall be: "... read, interpreted, applied, and implemented as a whole consistent with decisions of the shoreline hearings board and Washington courts prior to the decision of the Central Puget Sound Growth Management Hearings Board in *Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology.*"

associated with the shorelines of the state **while, at the same time, recognizing and protecting private property rights** consistent with the public interest.” *Id.* (emphasis supplied). The balance envisioned by the SMA anticipates that there will be some impact to shoreline areas by development or continued use, repair and maintenance of existing structures or developments: “[a]lterations of the natural conditions of the shorelines and shorelands **shall be** recognized by the department.” RCW 90.58.020 (Emphasis supplied.) Single-family homes are expressly recognized as a priority use of the shorelines, which falls within allowed alterations. RCW 90.58.020; WAC 173-27-241(3)(j).¹⁵ SMPs shall “insure that strict implementation of a program will not create unnecessary hardships or thwart the policy” of “fostering all reasonable and appropriate uses.” (RCW 90.58.100(5)).

The SMA does contain qualifications to the effect that uses shall be preferred which are “consistent with the control of pollution and prevention of damages to the natural environment” RCW 90.58.020. The language then continues: “... or are unique to or dependent upon the use of the state’s shorelines.” *Id.* The Legislature in proposing the SMA made the policy

¹⁵ The SMA was adopted by the people as an Initiative submitted by the Washington Legislature. See Jeffrey Crooks, THE WASHINGTON SHORELINE MANAGEMENT ACT OF 1971, Washington Law Review, Volume 29, No.2, February 1974, p.424. The Voters Pamphlet assured citizens that the SMA if adopted would not prohibit development or exact public rights for a “tranquil environment.” AR 000007224-337.

choice that “single-family residences and their appurtenant structures [shall be given priority].” RCW 90.58.020. Yet, the Growth Board focused solely on the words “control” and “prevention,” ignoring the word “priority,” and preference accorded to water-dependent waterfront homes. This is error. The term “priority” is defined as: “something that is more important than other things and that needs to be done or dealt with first; ... something given or meriting attention before competing alternatives.”¹⁶

In addition, the Board’s interpretation of state policy directly conflicts with binding case law, holding that, while the SMA emphasizes protection of natural shorelines, it simultaneously allows for development, expressing the intent to protect private property rights and to foster all reasonable and appropriate uses of the shorelines.

The SMA embodies a legislatively-determined and voter-approved balance between protection of state shorelines and development. ... As part of our careful management of shorelines, property owners are also allowed to construct water-dependent facilities such as single-family residences, bulkheads, and docks.

Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 697, 169 P.3d 14 (2007) (J.M. Johnson, J., lead opinion); *Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring); *see also Nisqually Delta Ass’n v. City of*

¹⁶ <http://www.merriam-webster.com/dictionary/priority>.

DuPont, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985); *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 243, 189 P.3d 161 (2008) (J.M. Johnson, J., lead opinion); *Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 761, 954 P.2d 304 (1998); *State, Dep't of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 963, 275 P.3d 367 (2012) (noting that protecting private property is an express policy of the SMA). The Board's error is manifest and must be reversed. *King Cty.*, 142 Wn.2d at 555 (Where the Supreme Court has interpreted a statute, its interpretation is final and binding).

B. RCW 90.58.080 Does Not Allow Unfettered Discretion to Adopt New Shoreline Regulations

The Board was mandated to ensure that the Update was compliant with SMA policies and the Guidelines for updating shoreline master programs, consistent with the policy of fostering appropriate development. *See* RCW 36.70A.480(3)(a); RCW 90.58.080(1). The Board failed to fulfill that mandate, and its decision must be reversed.

The Guidelines allow changes to an SMP *only* if Ecology and the County can show that they are "...deemed **necessary** to reflect changing local circumstances, new information or improved data."¹⁷ WAC 173-26-

¹⁷ The term "necessary" is defined as: "so important that you must do it or have it; unable to be changed or avoided; absolutely needed; of an inevitable nature." *See* <http://www.merriam-webster.com/dictionary/necessary>. The same qualifier applies as to imposition of buffers to protect critical areas. *See* RCW 36.70A.480(6).

090 (emphasis supplied); *see Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 54-56, 202 P.3d 334 (2009) (Guidelines provide that local government may amend a SMP when necessary to reflect changing local circumstances, new information or improved data). The Guidelines require that, as part of the process of determining whether additional regulations are necessary, the government should consider the “[b]eneficial effects of any established regulatory programs under other local, state, and federal laws.” WAC 173-26-186(8)(d)(iii). Further, the Guidelines state that, “Before establishing specific master program provisions, local governments **shall** analyze the information gathered ... and as necessary **to ensure effective shoreline management provisions**, address the topics below, where applicable.” WAC 173-26-201(3)(d) (emphasis supplied). This requires that “regulations and mitigation standards” must be designed and implemented “in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property.” WAC 173-26-186(8)(b)(i).

Without discussing WAC 173-26-186(8) and WAC 173-26-201, the Growth Board concluded that “Jefferson County does not need to ‘justify adoption of a new SMP’ as OSF’s Issue No. 1 alleges.” Decision at 20. *See also* Decision at 19 (“The Board concludes that neither the SMA nor the Guidelines require an analysis of how an existing regulatory scheme would

protect shorelines as compared to an amended SMP.”). According to the Board, those WAC provisions are only applicable to *voluntary* updates, not *mandatory* updates – a conclusion unsupported by the SMA.

In addition, the Board concluded that the County complied with the Guidelines, without making any factual findings to support its conclusion, and despite the evidence in the record to the contrary. Thus, the conclusion is not supported by substantial evidence. The County’s CIA contains no explicit consideration of the effectiveness of existing regulations (including its former 50-foot buffer). Nor could the CIA draw any conclusion about the effectiveness of the 150-foot buffer requirement because a buffer’s functionality will vary widely based on a variety of site specific conditions: “[t]he effectiveness of riparian buffers for protecting water quality depends on a number of factors, including soil type, vegetation type, slope, annual rainfall, type and level of pollution, surrounding land uses, and sufficient buffer width and integrity. Soil stability and sediment control are directly related to the amount of impervious surface and vegetated cover.” AR 000005679 (CIA, p.31).

Simply, the old SMP was approved as SMA-compliant under SMA policies that have not changed. Some reason – other than the mere passage of time – is required in order to replace the old, effective regulatory program with an entirely new set of regulations.

1 The Record Does Not Support Designating All Marine Shorelines as “Critical Areas”

The Board’s refusal to review the Update under the requirements of WAC 173-26-186 also resulted in a conflict between the County’s shoreline regulations and critical areas ordinance (CAO), in violation of the SMA’s coordination goal. The Update purports to both incorporate the CAO by reference and designate all shorelines as “critical areas” subject to the generic 150-foot buffer. *See* Decision at 20. The County’s CAO, however, does not include a blanket “critical areas” designation for marine shorelines. *See* Cousins Decl., ¶ 20; Brenner Decl., ¶ 14, Exs. B-E. Instead, consistent with the Legislature’s clarifying amendments to the SMA and GMA,¹⁹ the CAO lists a series of factors that must be found present for a shoreline to qualify for protection.²⁰ JCC § 17.22.200.

This inconsistency persisted because the Board failed to enforce the rule that all regulations incorporated into an SMP be actively reviewed for compliance with the SMA and Guidelines. WAC 173-26-191(2)(b); *McQuarrie v. City of Seattle*, Shoreline Hearings Board No. 08-033, 2009

¹⁹Ecology did not appeal the CAO in this regard, so its designation is binding under the doctrine of finality and cannot be collaterally attacked. *See Samuel’s Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002).

²⁰ RCW 36.70A.480(5) (“Shorelines of the state shall not be considered critical areas under this chapter except to the extent that specific areas located within shorelines of the state qualify for critical area designation based on the definition of critical areas provided by RCW 36.70A.030(5) and have been designated as such by a local government pursuant to RCW 36.70A.060 (2)”)

WL 1169254, at *8 (Apr. 27, 2009); *see also Faben Point Neighbors v. City of Mercer Island*, Shoreline Hearings Board No. 98-963, 1999 WL 394737, at * 8 (May 5, 1999) (Ecology’s duty to review and approve provisions incorporated by reference into an SMP update is “a duty to approve knowingly” – it cannot simply rubber-stamp laws incorporated by reference.).

Ecology offered no argument or evidence that it independently reviewed the CAO’s designation of all shorelines as “critical areas” or the buffer provisions for compliance with the SMA, and the Growth Board cited no evidence of such a review. Decision at 48-49. That is because Ecology did not engage in the required review. This requirement is not just a matter of procedure. Ecology will concede that the County’s CAO was based on a record compiled in 2000, under the GMA’s less stringent science requirement, and before the GMA criteria for designation of “critical areas” was modified in 2010 to ensure focus only on “truly important” habitat as Fish and Wildlife Conservation Areas. AR 000002487.

The Growth Board’s decision to uphold a blanket critical areas designation directly conflicts with the SMA, which calls for a multitude of uses on the shorelines – from the very protected natural areas to the heavily utilized urban areas (which may include terminals and a host of water dependent, water oriented uses). If all shorelines were designated critical

areas with mandatory buffers, the State would be unable to achieve its legislative policy for shorelines: “to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses.” RCW 90.58.020. The Board’s approval of the SMP without the required CAO review was unlawful and must be reversed.

2 The Record Does Not Support Expanded Buffers on Shoreline Properties

The Growth Board’s erroneous view of state policy also resulted in a failure to properly analyze the County’s buffer requirement under the standards set out in the SMA and Guidelines. As the Board noted in its decision, the County chose to impose a uniform 150-foot marine buffer on all shoreline development, despite science recommending buffers ranging anywhere from 50 to 450-feet in width depending on a variety of local conditions.²¹ Decision at 44-45, 69-70. The Board generally referenced the Inventory and CIA as justification for the County’s decision without any substantive analysis of the report – let alone, any analysis under the requirements of WAC 173-26-186 and WAC 173-26-201, *e.g.*, the positive

²¹ Science is a pretext. The 150 foot buffer chosen for Jefferson County was actually a policy choice unrelated to science *per se*. It was picked because Whatcom County had used this size. The Director of Ecology stated that that Whatcom County SMP was “the template” for Jefferson County. *See* AR 000004166. Ecology told the public it does “not require 150 foot buffers.” AR 000005440-41. The buffers are ostensibly justified by: (1) “safety” (loss of homes) (*see* AR 000004010-4011); (2) consistency with the Jefferson County Critical Areas Ordinance which imposes a 150-foot buffer on select shorelines; (3) the fact that Whatcom County adopted a 150-foot buffer (*see* AR 000005440-41); and (4) because Ecology wanted this buffer to serve as a model for other jurisdictions (*see* AR 000003167-3172 and AR 000004670-4709, among others).

effect of current regulations. *Id.* Instead, the Board concluded that application of a generic buffer would achieve “no net loss.” *Id.* The Board’s decision is an erroneous interpretation and application of the law (as discussed above) and is not supported by substantial evidence.²²

OSF does not ask this Court to resolve a debate among scientists. Instead, reversal is necessary because the County: (1) relied on generalized science to impose overly broad restrictions; (2) imposed buffers without regard to statutory/regulatory limitations on mitigation; (3) failed to critically evaluate the buffer against the term “necessary;” and (4) accepted as evidence legal argument that the County was monitoring permit success is lieu of actual evidence. *See* Decision at 25, N.85.

OSF’s Supplemental Evidence Submittal sets out that the science relied upon (freshwater riparian studies) is inapplicable to most marine environments since a true “marine riparian zone” does not exist in most cases because of the effects of bluffs and other shoreline features. *See* Schaumburg Report. The key studies are in fact “syntheses of syntheses.” Essentially, an unofficial marine riparian workshop “group” has blessed the

²² On review, this Court must determine whether substantial evidence supports the Growth Board’s decision when viewed in light of the whole record. *May v. Robertson*, 153 Wn. App. 57, 74 (2009). Under this standard, generalizations about potential environmental impacts are not sufficient to qualify as substantial evidence. *See May*, 153 Wn. App. at 92-94 (refusing to vacate shoreline permit on the basis of “generalities” not tied to fact-based evidence). *See also Biggers*, 162 Wn.2d at 695, 218 P.3d 211 (Undocumented presumptions, hypotheticals or narrow agency perspective to “regulate at all cost” is not a legally sufficient basis to preclude common shoreline development, *e.g.*, bulkheads.).

concept that freshwater science should be used to support marine buffers, with no public or peer review of that conclusion or the resulting buffer recommendations. *See Preserve Responsible Shoreline Management et al. v. Bainbridge Island and Ecology*, Case No. 14-3-00012, p.36 (Final Decision and Order dated April 6, 2015). The group's recommendations were made in isolation without consideration of the positive effect of current regulations. The studies offered a variety of buffer recommendations, ranging from 50 to 450 feet in width, depending on several site-specific factors (such as slope, soil type, existing development, neighboring uses, etc.). In sum, the compilation of science for the Update as to the buffer included only eight papers with no explicit marine shoreline study. AR 000007204-08. Decision at 69-70. The "cause-and-effect" of marine development is highly disputed. *See* Flora studies, AR 000003898-3923.

The County's buffers – incorporated from its CAO – were adopted pursuant to RCW 36.70A.480(6), which provides that SMPs "shall provide a level of protection to critical areas ... **necessary** to sustain shoreline natural resources." (Emphasis supplied). Consistent with that directive, the Guidelines allow changes to an SMP *only* if Ecology and the County can show that they are "...deemed **necessary** to reflect changing local

circumstances, new information or improved data.”²³ WAC 173-26-090 (emphasis supplied). The Board, however, held that those provisions did not apply to the Update and refused to address whether the new buffers are necessary.

Such review is both required and warranted – particularly where the CIA concludes that shorelines remained in overall good condition with significantly smaller buffers and that residential development will not adversely impact ecological function. *See infra*, p.13. By focusing solely on whether the buffers fell within the range recommended by science, the Board answered the wrong question. At issue was whether the County and Ecology made the required showing of *necessity* taking into account all factors, not just “the science.”

As one example, the science emphasizes the need for a buffer to treat stormwater runoff assessing infiltration rates provided by intact vegetation of various types. The CIA reported that “[t]he effectiveness of riparian buffers for protecting water quality depends on a number of factors, including soil type, vegetation type, slope, annual rainfall, type and level of pollution, surrounding land uses, and sufficient buffer width and integrity. Soil stability and sediment control are directly related to the amount of

²³ The term “necessary” is defined as: “so important that you must do it or have it; unable to be changed or avoided; absolutely needed; of an inevitable nature.” *See* <http://www.merriam-webster.com/dictionary/necessary>.

impervious surface and vegetation cover.” How can the County seriously impose extensive buffers for perceived water quality protection, ostensibly based upon science, without factoring in already existing local BMPs policies found in the CAO, surface water management regulations, zoning code 25% maximum site disturbance or clearing limits, the one dwelling unit per five acres maximum residential density under GMA rural zoning, and the fact that very few shoreline parcels can be replatted? The Board’s failure to answer this question constitutes reversible error.

Presumably, Ecology and the County will contend that “no net loss” justifies the policy choice to impose greatly expanded new buffers. However, key to the “no net loss” standard is the requirement that each local government determine the existing condition of its shorelines at the time the SMP is enacted in order to provide a baseline from which the parties can determine whether a development proposal will or will not impact ecological functions. *E.g.*, WAC 173-26-201(2)(a), -201(3). Without such a baseline, there is no way to accurately determine whether mitigation proposals go far enough or go too far, as expressly required by the SMA and Guidelines. The record shows that the major scientific symposium convened by “Marine Riparian Experts” deemed the “most desired management tool”(over buffers) was a “shoreline mapping system that would include both biological and physical attributes” AR 000002956.

The Growth Board’s decision to uphold the Update violates the letter and policy of the SMA and must be reversed.

The baseline development process consists of three demanding steps: (1) identify the ecological processes and functions; (2) assess them; and (3) identify specific measures necessary to protect and/or restore the ecological functions and ecosystem-wide processes.²⁴ WAC 173-26-201(2)(d)(A)(i)-(iii). Minimum requirements for the shoreline inventory are set out in the Guidelines.²⁵ WAC 173-26-201(3)(d)(i)(v) requires collection of information as to the extent of existing structures and shoreline development, **existing conditions and regulations** which could affect shorelines, and an evaluation of the information gathered. WAC 173-26-201(3)(d). This information **must** be gathered before a SMP can be updated. *Id.* Added to the requirements specified above, a local government **must** “...prepare a characterization of functions and ecosystem-wide process....” WAC 173-26-201(3)(d)(A).

²⁴ The functions to be identified and assessed are found in WAC 173-26-201(2)(d)(1)(C).

²⁵ The Board knows what is required. It stated in *Bainbridge Island*: “The City’s fine-scale 2004 Battelle Nearshore Habitat Characterization, Ex. 147, and 2010 Coastal Geomorphic/Feeder Bluff Mapping, Ex. 117, gave the City specific documentation and mapping of shoreline geomorphic conditions – drift cells, feeder bluffs, shoreline slopes, landslide hazards – and biological resources – eelgrass meadows, forage fish spawning areas, shellfish beds, and other critical habitats. This properly informed the SMP regulation of docks and other over-water structures.” *PRSM v. Bainbridge Island and Ecology*, Final Decision and Order, p.83. The City of Bainbridge Island reports are found in the Declaration of Jon Brenner, ¶ 10, Exs. H-I.

The Guidelines state the characterization “may” be of a generalized nature. However, the Inventory and CIA in this case are not just generalized – they are incomplete, lacking analysis of the conditions observed against actual shoreline development and uses *as regulated* under the “existing” regulatory regime.²⁶ Without the latter, only impacts are considered, *but not* the “net effect.”

Although the Inventory (in Section 1.0) is touted as documenting the “inventory” and “analysis” required by WAC 173-26-201(3), it is basically a description. Section 4.0 has the misleading title “Reach Inventory **and Analyses**” but there is no specific analysis. AR 000003563 (emphasis supplied) There is characterization to an extent in the Report, but no analysis of cause-and effect, that is the required “evaluation.” The Inventory does not contain the required specification or evaluation of the ecosystem or functions. It is “at the broad watershed scale.” AR 000003478.²⁷

The Inventory is incomplete and flawed in other respects. Critical, necessary information has not been gathered, in particular, to evaluate the impact of new regulations on private property owners. The Inventory acknowledges that its maps are for “informational purposes only,” without

²⁶ See AR 000002465.

²⁷ Ecology states that the Report is the “foundation” of the SMP Update. AR 000003999. The County’s Consistency Analysis is highly critical of the Report. AR 000002659-61 (Consistency Analysis, pp.25-27).

any detail as to existing development or conditions. AR 000003465. Zoning and land use and critical areas are not shown. The “...effects on shoreline function and process are not analyzed at either a shoreline segment or ecosystem scale” (*Id.*, p.28), and such processes are characterized only “...in a general manner.” AR 000003464. Generally, according to the Consistency Analysis, the Inventory does not address shoreline vegetation, *Id.* p.29, and “the Report does not include a comprehensive discussion of habitat function or processes at an ecosystem scale.” *Id.* p.29. The Inventory needs a “landscape assessment.” *Id.*, AR 000002663. Table 2 of the Consistency Analysis takes 38 pages to list all of the needed changes to the Inventory. Without accurate information, it is impossible to measure gains against losses to determine “net loss.”

C. The Board Erroneously Approved Ecology’s and the County’s Application of “No Net Loss.”

The Board upheld the County’s use of the phrase, “no net loss,” as imposing a substantive requirement that each permit applicant provide for the “maintenance, protection, restoration, and preservation” to ensure no adverse impacts to the shoreline environment. Decision at 31-34; *see also* JCC § 18.25.270(2)(b) (“Uses and developments that cause a net loss of ecological functions and processes **shall be prohibited....**”) (emphasis

supplied).²⁸ Again, the Board goes too far. Contrary to the Update, which demands “no resulting adverse impacts on ecological functions or processes,” the “no net loss” standard must be interpreted consistent with the SMA policy of fostering appropriate development by allowing for mitigation and other measures which minimize impacts “insofar as practical.” *See* RCW 90.58.020. The Board’s approval of a “no impacts” standard conflicts with the letter and policy of the SMA and must be reversed.

The phrase “no net loss” is not defined by the SMA, and does not appear in the Legislature’s statement of policy.²⁹ RCW 90.58.020, .030. Properly construed, “no net loss” is a regional concept gauged over time; otherwise, the term would be misapplied as “no loss,” which is how the County defines the terms but then misapplies to individual permit decisions. *Compare* JCC § 18.25.100(14)(e) to JCC § 18.25.270(2)(b).

²⁸ In this circumstance, to read “no net loss” as a criterion for permit approval – rather than a legislative goal – is to impose an arbitrary and irrational standard on landowners, a result outside of the Board’s and Ecology’s authority. RCW 34.05.570(3)(b), (d). Simply put, if a buffer is too large, then it is demanding more land than is necessary to achieve “no net loss.” *See Swinomish Indian Tribal Comty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 42, 166 P.3d 1198 (2007) (A regulatory standard calling for protection of existing conditions does not impose a requirement to enhance or restore already degraded critical areas.). Therefore, before finally deciding what size buffer will achieve the “no net loss” standard, it is incumbent on the County to actually identify the existing ecological functions that will be threatened if use of the property is allowed. *Id.* at 430. This it failed to do.

²⁹ In fact, only one provision of the SMA explicitly mentions “no net loss” in the context of a discreet use or development but that section only applies to redevelopment or modification of legally established homes deemed conforming. RCW 90.58.600.

Instead, Ecology adopted the phrase, “no net loss,” as a guiding principle when considering whether or not to approve local government shoreline regulations. WAC 173-26-186 (“Governing principles of the guidelines”). The Guidelines explain that “no net loss” is a compromise between the needs of the environment and development. On the one hand, the Guidelines mandate that an SMP must “...assure, at a minimum, no net loss of ecological functions to sustain shoreline resources...” WAC 173-26-201(2)(a)(i). While on the other hand, the Guidelines require that “regulations and mitigation standards” must be designed and implemented “in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property.” WAC 173-26-186(8)(b)(i). Moreover, the Guidelines explain that “[t]he concept of ‘net’ . recognizes that any development has potential or actual, short-term or long-term impacts” and that mitigation measures can “assure that the end result will not diminish the shoreline resources and values as they currently exist.” WAC 173-26-201(2)(c). “No net loss” recognizes that development *will* occur, and so will impacts. It relies on appropriate planning – not prohibitions – to minimize or mitigate those impacts. *Id.* WAC 173-26-186(1); WAC 173-26-201(2)(i) (allowance of impacts to ecosystems “necessary to achieve other objectives of RCW 90.58.020”).

D. The SMP Impermissibly Requires Restoration as a Mandated Condition of Development

The Growth Board erred when it dismissed OSF's argument that the SMP unlawfully required property owners to restore – not protect – shorelines. Decision at 50. The Board ruled on this claim without mention of any SMP language cited by OSF, insisting that that the SMP merely provided for a general policies of shoreline restoration. Nothing could be further from the truth. JCC § 18.25.250 states, in relevant part “(1) **When shoreline development or redevelopment occurs, it shall include restoration and/or enhancement of ecological conditions** if such opportunities exist.” (Emphasis supplied). Restoration is also specifically required for approval of new or expanded float plane facilities (JCC § 18.25.350(6)(k)(iii)) and marinas (JCC § 18.25.350(7)(a)(iii)). The new SMP further “encourages” use of nonregulatory methods to protect, enhance and restore ecological functions in the context of residential development. JCC § 18.25.500(1)(j). This permitting standard, which clearly goes beyond the requirements of the SMA's “minimize impacts” standard, unduly burdens existing development rights in violation of WAC 173-26-186, which limits on mitigation to project impacts. It also violates the SMA policy of protecting private property rights, RCW 90.58.020, and was beyond the authority of Ecology to approve. The Growth Board's

failure to address this argument constitutes error and must be reversed pursuant to RCW 34.05.570(3)(b), (d), and (f).

Indeed, the County's desire to impose a restoration standard on private property owners also drove it to classify 41% of its shorelines (most of which had previously been zoned for rural residential uses³⁰) as "Natural Shorelines," due to the land's capacity to "return to near natural conditions with minimal or no restoration activity" if development is severely restricted. In its CIA, the County claimed that this massive reclassification was intended to achieve "no net loss" by subjecting properties capable of being returned to natural conditions to "the highest level of protection possible." AR 000005716. Addressing Issue No. 8, this criterion is neither in the SMA nor Guidelines, nor does it reflect actual conditions in Jefferson County.³¹ AR 000002493. In addition, supposedly the areas must be "mostly ecologically intact." AR 000005683 (CIA, p.35). Further, the local circumstances obviate any need for an expanded "natural" shoreline designation. This is particularly so in Jefferson County. Approximately 77%

³⁰ Here, it is undisputed that the existing pattern presented by the Jefferson County CMA Comprehensive Land Use Plan is residential zoning (RR) at one dwelling unit per five acres. *See* Schultz Decl., ¶ 22, Exs. A, B, C (Zoning Maps).

³¹ The State Guidelines mandate that the environmental designation system "**shall be based** on the existing land use pattern, the biological and physical character of the shoreline, and the goals and aspirations of the community as expressed through the comprehensive plans as well as the criteria in this section." *See* WAC 173-26-211(2)(a) (emphasis supplied.) *See also* WAC 173-26-211(3) (Consistency between shoreline environment designations and the local comprehensive plan).

of the County land is comprised of Olympic National Park or United States Forest Service land off limits to residential development. AR 000002474. The Board's refusal to review or reverse this over-designation constituted error.

E. The SMP's Buffer and Public Access Provisions Violate the Doctrine of Unconstitutional Conditions

The County's decision to use the permit process to compel all shoreline property owners to (1) set aside large tracts of property in generic buffers and (2) dedicate public access easements must satisfy the nexus and proportionality tests set out by the U.S. Supreme Court in *Nollan, Dolan*, and *Koontz v. St. Johns River Water Mgmt. Dist.*, ___ U.S. ___, 133 S. Ct. 2586, 2594-95, 2599, 186 L. Ed. 2d 697 (2013). *See Dolan*, 512 U.S. at 393-94 (invalidated a stream buffer as an unconstitutional condition); *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (KAPO)*, 160 Wn. App. 250, 273, 255 P.3d 696 (2011) (Holding that a critical area buffer imposed as a mandatory condition on a development permit "must comply with the nexus and rough proportionality tests."); *Honesty in Env'tl. Analysis Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL)*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999) (Critical area buffers "must comply with nexus and rough proportionality

limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications.”).

The nexus and rough proportionality tests are important safeguards of private property rights subject to land-use permitting. *Koontz*, 133 S. Ct. at 2599; *see also Nollan*, 483 U.S. at 833 (“[T]he right to build on one’s own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a ‘governmental benefit.’”). The tests protect landowners by recognizing the limited circumstances in which the government may lawfully condition permit approval upon the dedication of a property interest to the public: (1) the government may only require a landowner to dedicate property to a public use where the dedication is necessary to mitigate for the negative impacts of the proposed development on the public; and (2) the government may not use the permit process to coerce landowners into giving the public property that the government would otherwise have to pay for. *Koontz*, 133 S. Ct. at 2594-95; *see also Dolan*, 512 U.S. at 385 (“[G]overnment may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit [that] has little or no relationship to the property.”). The heightened scrutiny demanded by *Nollan* and *Dolan* is essential because landowners “are especially vulnerable to the type of coercion that the unconstitutional

conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take.” *Koontz*, 133 S. Ct. at 2594 (“Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”).

Together, the nexus and proportionality tests, which constitute a special application of the doctrine of unconstitutional conditions, hold that the government cannot condition approval of a land-use permit on a requirement that the owner dedicate private property to the public, unless the government can show that the dedication is necessary to mitigate impacts caused by the proposed development. *Koontz*, 133 S. Ct. at 2594-95, 2599. The County cannot satisfy its burden under these, and made no attempt to do so in the record. *Dolan*, 512 U.S. at 391 (the burden of showing that a condition satisfies nexus and proportionality is placed on the government, not the landowner). Under the nexus test, the County was required to “show that the development . . . will create or exacerbate the identified public problem.” *Burton v. Clark County*, 91 Wn. App. 505, 521, 958 P.2d 343 (1998); *see also Nollan*, 483 U.S. at 836-37. If the County was able to establish a nexus, it must next “show that its proposed solution to the identified public problem is ‘roughly proportional’ to that part of the

problem that is created or exacerbated by the landowner's development.” *Burton*, 91 Wn. App. at 523; *see also Dolan*, 512 U.S. at 391 (A condition must be “related both in nature and extent to the impact of the proposed development.”). Stated another way, the “‘rough proportionality’ test measures the relationship between the conditions placed on the use of property and the negative impacts of that use that would justify the denial of the proposed use in the first instance.” *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 676, 935 P.2d 555 (1997). The purpose of these tests is to determine whether the government is taking advantage of the permit to force “some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Proper application of these tests is essential to ensure that the purpose of the constitutional doctrine is met. In *Nollan*, the Court held that a public access condition was invalid because it lacked an “essential nexus” to the alleged public impacts that the Nollans’ project caused. *Id.* at 837. The Court found that because the Nollans’ home would have no impact on public beach access, the Commission could not justify a permit condition requiring them to dedicate an easement over their property. *Id.* at 838-39. Without a constitutionally sufficient connection between a permit condition and a project’s alleged impact, the easement condition was “not a valid

regulation of land use but an ‘out-and-out plan of extortion.’ ” *Id.* at 837 (citations omitted).

In *Dolan*, the Court defined how close a “fit” is required between a permit condition and the alleged impact of a proposed land use. Even when a nexus exists, there still must be a “degree of connection between the exactions and the projected impact of the proposed development.” *Id.* at 386. There must be rough proportionality – *i.e.*, “some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Id.* at 391. The *Dolan* Court held that the city had not demonstrated that the conditions were roughly proportional to the impact of Dolan’s expansion and invalidated both permit conditions. *Id.*

1. The Buffer Dedication.

The County’s generic buffer requirement constitutes an exaction subject to *Nollan* and *Dolan* because it conditions permit approval upon the transfer of well-recognized interests in property to the public. *KAPO*, 160 Wn. App. at 273. Indeed, Washington state property law expressly recognizes that a conservation buffer is a valuable interest in real property: “A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect . . . or conserve for open space purposes . . . constitutes and is classified as real property.” RCW

64.04.130; *see also Klickitat County v. Wash. State Dep't of Revenue*, 2002 WL 1929480, at *5-6 (Bd. Tax App. June 12, 2002) (An open space area constitutes property and the holder of the conservation interest must pay property taxes unless an exemption applies). Under both Washington state property law and federal constitutional law, a public dedication of a property interest can be achieved via notice on a binding public document, such as a site plan, which is the method employed by the County's CAO. *See, e.g., Richardson v. Cox*, 108 Wn. App. 881, 884, 890-91, 26 P.3d 970 (2001); *Nollan*, 483 U.S. at 833 n.2; *id.* at 859 (Brennan, J., dissenting) (dedication achieved via a deed restriction).

Incorporating the County's critical areas ordinance by reference, the SMP requires that, as a mandatory condition on all new permit approvals, shoreline property owners must designate a buffer on a legally binding document and/or execute a conservation easement. JCC § 18.22.270(9), (10). Thereafter, the conservation area must be "retained in [its] natural condition." JCC § 18.22.270(5)(a).

The County cannot satisfy its burden of demonstrating nexus and proportionality because it has admittedly imposed uniform and preset buffers based on generalized presumptions, not the actual conditions on any given property. Here, nexus requires that the government identify the actual impacts that a proposed development will have on the shoreline ecology. It

cannot satisfy that requirement. To the contrary, its CIA states that “[i]n and of itself, residential development probably does not have major adverse effects on shoreline resources.” Nor can the County demonstrate that its uniform generic buffers satisfy proportionality where its CIA concluded that “[t]he effectiveness of riparian buffers for protecting water quality depends on a number of factors, including soil type, vegetation type, slope, annual rainfall, type and level of pollution, surrounding land uses, and sufficient buffer width and integrity. Soil stability and sediment control are directly related to the amount of impervious surface and vegetated cover.” AR 000005679 (CIA, p.31).

Indeed, the very idea that one generic buffer will be sufficiently tailored to mitigate for any adverse impacts in every circumstance – without demanding more land than is necessary – is undone by a fundamental dissonance resonating throughout the SMP. The science recognizes there is significant differences in development and ecological conditions on the various shorelines, ranging from areas of high intensity development, to areas of suburban and rural residential development, to areas of little to no development. The idea that every stretch of shoreline property has identical development and environmental conditions, and will suffer identical impacts from any new development or use, is refuted by the County’s science – not to mention common sense. The County’s strategy to

overcome its lack of the necessary information is to place the burden on permit applicants to fund scientific studies sufficient to establish how much mitigation may be necessary to offset the impacts of development. That, however, violates one of the essential protections of the unconstitutional conditions doctrine: the burden of justifying an exaction is on the government, not the individual. The County's buffer demands violate the doctrine of unconstitutional conditions.

2. The Public Access Easement.

The SMP requires that landowners dedicate a public access easement across their land as a mandatory condition on certain development applications. *See* JCC § 18.25.290(2)(l). *See also* JCC § 18.25.500(1)(i) (multi-family residential development); JCC § 18.25.500(4)(g) (subdivisions); JCC § 18.25.470(1)(d). The SMP also requires a public access as a condition on the approval of applications for beach access structures (Art 7.1.A.11); new docks or boating facilities JCC § 18.25.350(1)(f); among others.

As established by *Nollan*, a permit condition requiring a public access easement constitutes an exaction subject to the nexus and proportionality requirements. 483 U.S. at 831, 834. The County cannot satisfy either test. Indeed, the stated basis for the County's demand – to provide the public with more opportunities to access and enjoy the waterfront – is wholly unrelated to the affected development permits. JCC

§ 18.25.290. The County's public access demands violate the doctrine of unconstitutional conditions and must be invalidated.

F. The Board's Legal or Procedural Error on "Waiver" of Legal Argument Appears Harmless But if Not Requires Reversal

The Growth Board committed a legal or procedural error that requires reversal but appears harmless because (1) OSF made its arguments below and raises them now to this Court, (2) the Growth Board responded to the arguments and (3) the Growth Board has certified the issues on appeal as needing an answer from this Court because of their public importance. Specifically, the Board "refused" to consider several of OSF's arguments below based on the Board's erroneous conclusion that OSF had "waived" them by failing to cite certain RCW and WAC provisions in its opening brief. Certainly, OSF's opening brief presented several arguments in a succinct manner, but that was neither error nor waiver – it was a result of the Board's instructions. Despite the size of the County's SMP update and a voluminous legislative record, the Growth Board imposed a strict 30-page limit on the opening briefs and encouraged the parties to incorporate the arguments of other parties by reference. AR 000002168. In addition, the Board redrafted the parties' statement of issues to further abbreviate the arguments. AR 000002161. Thus, to avoid repetition and/or duplication, OSF's opening brief below specifically mentioned and incorporated the

other petitioners' briefs by reference and a "run" of the statutory citations alleged "not mentioned" in fact shows that all but a few were cited and argued, but in the order OSF through rational.

G. OSF Should be Awarded its Reasonable Attorney Fees and Costs Under the Equal Access to Justice Act and RAP 18.1

Washington's Equal Access to Justice Act directs the courts to award reasonable attorney fees and costs to a prevailing party who filed suit to oppose unlawful agency action, unless the court finds the agency action "was substantially justified or that circumstances make an award unjust." RCW 4.84.350; *HEAL*, 96 Wn. App. At 535 (WEAJA is applicable to the Growth Board). If OSF prevails, an award of attorney's fees to OSF is warranted because the Board has been repeatedly admonished that it lacks authority to set policy,³² and has previously been admonished by the Legislature for misinterpreting the policy of the SMA.³³

VI. CONCLUSION

The Update is an unsupported, unlawful and unconstitutional expansion of regulatory control in violation of RCW 36.70A.300(1) and

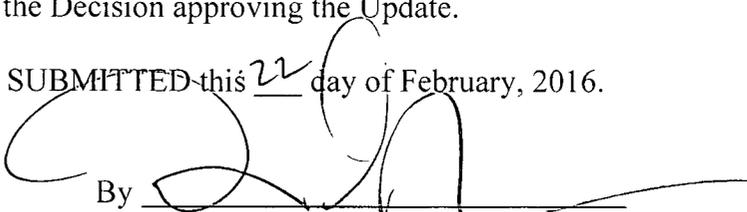
³² *Thurston County v. Western Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 358, 190 P.3d 38 (2008) and *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005).

³³ See Engrossed Substitute House Bill (ESHB) 1933 Laws of 2003, ch. 321 § 1 (codified at RCW 90.58.030 and RCW 36.70A.480).

should be invalidated pursuant to RCW 36.70A.300 and RCW 36.70A.302.

This Court should reverse the Decision approving the Update.

RESPECTFULLY SUBMITTED this 22 day of February, 2016.

By 

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2016, I caused the document to which this certificate is attached to be hand-delivered for filing:

Clerk of Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402
(253) 593-2970, tel

I further certify that on this date, I caused a copy of the document to which this certificate is attached to be delivered to the following via e-mail and Priority U.S. mail as follows:

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Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 22nd day of February, 2016.


Jon Brenner
Paralegal

**APPENDICES TO
OSF OPENING BRIEF**

- Appendix A-1:** JCC § 18.30.050, Table 6.1
- Appendix A-2:** JCC § 18.30.070
- Appendix A-3:** Final Decision and Order, GMHB Case No. 14-2-0008c (March 16, 2015)
- Appendix A-4:** AR 000007384 (illustrative exhibit)
- Appendix A-5:** JCC Chapter 18.25 *excerpts*
- Appendix A-6:** JCC Chapter 18.22 *excerpts*

OSF Opening Brief

APPENDIX A-1

Principal Arterial	50	50	50	50	50 ¹	50	50	50	50	50	50	50	50	50	50	50	50	50	50
Special Setback from Resource Lands	A special setback is required from the adjacent resource land or use as specified in Chapter <u>18.15 JCC</u> .																		
Minimum Rear and Side Setbacks ^{5,6} (feet)	5	5 ²	5 ²	5 ²	5 ^{3,12}	5 ^{3,12}	5 ^{3,12}	5 ^{3,12}	5 ^{3,4}	5 ^{3,4}	5 ^{3,4}	5 ^{3,4}	5 ^{3,4}	5 ^{3,4}	10 ^{3,4}	10 ^{3,4}	10 ^{3,4}	10 ^{3,4}	100
Maximum Building Dimensions																			
Building Height ^{7,8} (feet)	35	35	35	35	35	35	35	35	35	35	35	35	35	35 ¹⁶	IBC Std.				
Area of Impervious Surface Coverage ¹⁵ (%)	10	10	10	10	25	25	25	60	60	60	60	60	60	55	Per JCC <u>18.30.07</u>				
Area of Building Coverage ¹³	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	60	60	60	60	N/A
Maximum Building Size ¹⁴ (sq. ft.)	Subject to Department of Health on-site septic and water constraints, lot size and all other applicable requirements																		
					20,000	15,000	10,000	7,500	10,000	None Specified	20,000 (L) ¹⁶	15,000 (C) ¹⁷	10,000 ⁸	None Specified	None Specified	None Specified	None Specified	None Specified	None Specified

NOTES:

- To implement the intent of LNG 19.0 of the Comprehensive Plan to protect the forest corridor and tree canopy in the Glen Cove area, the setback from the right-of-way of SR 20 shall be 50 feet on each side of the highway (comprised of a 30-foot buffer and a 20-foot setback from the buffer), for new development, from the intersection of Old Fort Townsend Road and SR 20 to the incorporated boundary of the city of Port Townsend.
- Except if subject to the special setbacks required from adjacent resource lands as specified in Chapter 18.15 JCC.
- Special Rear and Side Setbacks.
 - Wherever a residential use is proposed to abut a commercial use or zone, and vice versa, the setback shall be 35 feet.

- Wherever a residential use is proposed to abut a light industrial use or zone, and vice versa, the setback shall be 25 feet, unless otherwise specified in this code.
- Wherever a residential use is proposed to abut a heavy industrial use or zone, and vice versa, the setback shall be 100 feet, unless otherwise specified in this code.
- 4. Wherever a commercial use is proposed to abut an industrial use or zone, and vice versa, the setback shall be 20 feet, unless otherwise specified in this code.
- 5. Fences are exempt from setback requirements, except in the jurisdiction of the Shoreline Master Program (SMP) or when impairing safe sight lines at intersections, as determined by the county engineer.
- 6. Setbacks do not apply to mailboxes; wells; pump houses; bus shelters; septic systems and drainfields (except in the SMP); landscaping (including berms); utility apparatus such as poles, wires, pedestals, manholes, and vaults. No other structures or accessory uses shall be located in the front setback area unless approved by the administrator. The administrator may reduce the minimum road setbacks if the strict application of such setback would render a legal lot of record unbuildable under the provisions of this code.
- 7. Chimneys, smokestacks, fire or parapet walls, ADA-required elevator shafts, flagpoles, utility lines and poles, skylights, communication sending and receiving devices, HVAC and similar equipment, public water towers or tanks, and spires associated with places of worship are exempt from height requirements.
- 8. Propane fuel storage tanks and containers shall maintain setbacks and separations pursuant to the currently adopted International Fire Code.
- 9. Approved subarea plans may establish different bulk and dimensional requirements for those areas.
- 10. "N/A" = Not Applicable.
- 11. Road Classifications. To clarify the setbacks for development activities consistent with the requirements of this chapter, the following road designations shall apply:
 - Principal arterials: US 101, SR 104, SR 20.
 - Minor arterials: SR 19 (Beaver Valley Road, Rhody Drive, and Airport Cutoff).
 - Major collectors: SR 116 (Ness' Corner Road, Oak Bay Road to Flagler Road and Flagler Road), Center Road, Chimacum Road, Irondale Road, Quinault-South Shore Road, Upper Hoh Road.
 - Minor collectors: Anderson Lake Road, Bee Mill Road, Cape George Road, Clearwater Road, Cooke Avenue Extension, Coyle Road, Dabob Road, Dabob P.O. Road, Dosewallips Road, Duckabush Road, E. Quilcene Road, Four Corners Road, Eaglemount Road, Hastings Avenue West, Hazel Point Road, Larson Lake Road, Oak Bay Road, Paradise Bay Road, Penny Creek Road, Point Whitney Road, S. Discovery Road, Thorndyke Road, South Point Road.

12. The special side and rear setbacks provided in Table 6-1 shall also apply to outbuildings for residential or agricultural uses such as detached garages, storage sheds or tool sheds, except for existing lots of record less than five acres wherein the minimum rear and side yard setbacks for outbuildings shall be five feet.
13. Maximum area of building coverage is measured by the percentage of total lot area occupied by the footprints of all structures.
14. Maximum building size is measured as the area occupied by the footprint of each individual structure. A parcel may contain more than one structure of the maximum building size.
15. Pre-existing legal lots of record less than one acre in size in rural residential districts are subject to the stormwater requirements in Chapter 18.30 JCC and must meet the "Area of Impervious Surface Coverage" to the maximum extent practicable as determined by the administrator.
16. In the Glen Cove light industrial/commercial (LI/C) district, the 20,000-square-foot building size and the 35-foot building height for all "Yes" uses may be exceeded up to a maximum building size of 40,000 square feet (total interior floor space not to exceed 80,000 square feet) and a maximum building height of 50 feet pursuant to the Type III review process contained in Chapter 18.40 JCC and consistent with the conditional use criteria contained in Chapter 18.40 JCC.
17. In the Glen Cove light industrial/commercial (LI/C) district, the 1,500-square-foot building size for all "Associated Commercial" uses may be exceeded up to a maximum building size of 3,000 square feet pursuant to the Type III review process contained in Chapter 18.40 JCC and consistent with the conditional use criteria contained in Chapter 18.40 JCC.
18. In the Glen Cove light industrial (LI) district, the 10,000-square-foot building size and the 35-foot building height for all "Yes" uses may be exceeded up to a maximum building size of 20,000 square feet and a maximum building height of 50 feet pursuant to the Type III review process contained in Chapter 18.40 JCC and consistent with the conditional use criteria contained in Chapter 18.40 JCC.
19. Impervious surface requirements do not apply to public purpose facilities.

[Ord. 10-12 § 1; Ord. 8-06 § 1]

OSF Opening Brief

APPENDIX A-2

18.30.070 Stormwater management standards.

All new development and redevelopment must conform to the standards and minimum requirements set by the most current version of the Washington Department of Ecology Stormwater Management Manual for Western Washington (SMM) and obtain a stormwater management permit if required by subsection (5) of this section. The administrator may require additional measures as indicated by the environmental review or other site plan review.

(1) Definitions. For the purposes of this section, the definitions at Section I-2.3 of the SMM shall apply:

(a) "New development" includes land-disturbing activities, including Class IV general forest practices that are conversions from timber land to other uses; structural development, including construction or installation of a building or other structure; creation of impervious surfaces; and subdivision, short subdivision and binding site plans as defined and applied in Chapter 58.17 RCW. Projects meeting the definition of redevelopment shall not be considered new development.

(b) "Redevelopment" includes, on a site that is already substantially developed (i.e., has 35 percent or more of existing impervious surface coverage), the creation or addition of impervious surfaces; the expansion of a building footprint or addition or replacement of a structure; structural development including construction, installation or expansion of a building or other structure; replacement of impervious surface that is not part of a routine maintenance activity; and land-disturbing activities.

(c) "Impervious surface" means a hard surface area that either prevents or retards the entry of water into the soil mantle as under natural conditions prior to development, a hard surface area which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions prior to development. Common impervious surfaces include, but are not limited to, roof tops, walkways, patios, driveways, parking lots or storage areas, concrete or asphalt paving, gravel roads, packed earthen materials, and oiled, macadam or other surfaces which similarly impede the natural infiltration of stormwater. Open, uncovered retention/detention facilities shall not be considered as impervious surfaces for purposes of determining whether the thresholds for application of minimum requirements are exceeded. Open, uncovered retention/detention facilities shall be considered impervious surfaces for purposes of runoff modeling.

(d) "Land-disturbing activity" is any activity that results in movement of earth, or a change in the existing soil cover (both vegetative and nonvegetative) and/or the existing soil topography. Land-disturbing activities include, but are not limited to, clearing, grading, filling, and excavation. Compaction that is associated with stabilization of structures and road construction shall also be considered a land-disturbing activity. Vegetation maintenance practices are not considered land-disturbing activity.

(2) Exemptions. Commercial agriculture, road maintenance activities, and forest practices regulated under WAC Title 222, except for Class IV general forest practices and COHPs (see JCC 18.20.160), pursuant to SMM Section I-2.2, are exempt from the provisions of the minimum requirements.

(3) Development and Redevelopment Minimum Requirements. Development and redevelopment meeting the criteria of subsection (1)(a) of this section shall be required to control erosion and sediment during construction and to permanently stabilize soil exposed during construction. Such development shall:

(a) Comply with the minimum requirements for development of small parcels in Section I-2.5 of the SMM;

(b) Applicants for all development and redevelopment meeting the criteria for subsection (1)(a) of this section, except for detached single-family residences and duplexes creating or adding less than 2,000 square feet and land-disturbing activities of less than 7,000 square feet, shall prepare a stormwater site plan (or show on other diagrams being prepared for the project, if appropriate) showing:

- (i) Vicinity map;
- (ii) Location of the structure and its access;
- (iii) All applicable setback requirements;
- (iv) Location of all applicable erosion and sediment control BMPs; and
- (v) Existing site features and sensitive areas.

(4) New Development Minimum Requirements.

(a) All new development and redevelopment shall be required to comply with Minimum Requirement No. 2 (Construction Stormwater Pollution Prevention) as contained in the SMM.

(b) New development that includes: (i) the creation or addition of 2,000 square feet, or greater, of new, replaced, or new plus replaced impervious surface area; or (ii) has land-disturbing activities of 7,000 square feet or greater shall comply with Minimum Requirements Nos. 1 through 5 as contained in the SMM.

(c) New development that includes: (i) the creation or addition of 5,000 or more square feet of impervious surface; or (ii) converts three-quarters acre, or more, of native vegetation to lawn or landscaped areas; or (iii) converts 2.5 acres, or more, of native vegetation to pasture shall comply with Minimum Requirements Nos. 1 through 10 as contained in the SMM.

(d) Redevelopment that includes: (i) new, replaced, or total of new plus replaced impervious surface of 2,000 square feet or more; or (ii) 7,000 square feet or more of land-disturbing activity shall comply with Minimum Requirements Nos. 1 through 5 as contained in the SMM.

(e) Stormwater Site Plan. Stormwater site plans shall be developed to the standards of Volume I, Chapter 3 of the SMM, and include:

- (i) Project overview;
- (ii) Plot plan, including the elements of subsection (3)(b) of this section;
- (iii) Locations of structures and other impervious surfaces;
- (iv) Locations of stormwater runoff treatment and flow control facilities;
- (v) Road rights-of-way and easements;
- (vi) Preliminary conditions summary;
- (vii) Analysis of off-site water quality impacts (including groundwater) resulting from the project, and mitigation measures;

(viii) Analysis and design of proposed stormwater runoff control facilities, including flow control, treatment, and source control BMPs (cf. Volume I, Section I-4 of the SMM, which provides a list of and selection process for BMPs);

(ix) Construction stormwater pollution prevention plan;

(x) Special reports and studies;

(xi) Stormwater and drainage system maintenance specifications.

(f) Commercial and industrial developments, subdivisions or other projects requiring stormwater management facilities including collection, conveyance, treatment, detention, and infiltration facilities shall enter into a stormwater management facility maintenance agreement with Jefferson County to operate and maintain the facilities as per the approved plans. The public works department will prepare the agreement after approval of the project stormwater site plan and submit it to the applicant. The applicant shall file the agreement with the Jefferson County auditor prior to final project approval by Jefferson County.

(5) Stormwater Management Permit and Plan Review. All grading of 500 cubic yards or more (not exempted under subsection (5)(b) of this section), land-disturbing activities of 7,000 square feet or more, or creation of 2,000 square feet or more of impervious surface shall be subject to a stormwater management permit. Prior to issuance of a stormwater management permit, the applicant shall submit the required stormwater management plans to the administrator for review and approval. The administrator shall issue the stormwater management permit consistent with a Type I permit process (as specified in Chapter 18.40 JCC) only upon a finding that the proposed use or activity meets all applicable requirements of JCC 18.30.060 and this section, and any other applicable requirements of this code.

(a) Applications for grading projects or land-disturbing activities which require a stormwater management permit shall include the following information. The administrator may waive specific submittal requirements determined to be unnecessary for review of the application.

(i) Source of fill material and deposition of excess material;

(ii) Physical characteristics of fill material;

(iii) Proposed methods of placement and compaction consistent with the applicable standards in of the International Building Code;

(iv) Proposed surfacing material;

(v) Proposed method(s) of drainage and erosion control;

(vi) Methods for restoration of the site;

(vii) Demonstration that in-stream flow of water will remain unobstructed;

(viii) Demonstration that erosion and sedimentation from outflow channels will be minimized by vegetation or other means; and

(ix) Demonstration that pond runoff will be controlled to protect adjacent property from damage. [Ord. 8-06 § 1]

OSF Opening Brief

APPENDIX A-3

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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

HOOD CANAL SAND & GRAVEL LLC DBA
THORNDYKE RESOURCE, OLYMPIC
STEWARDSHIP FOUNDATION, J. EUGENE
FARR, WAYNE AND PEGGY KING, ANNE
BARTOW, BILL ELDRIDGE, BUD AND VAL
SCHINDLER, RONALD HOLSMAN,
CITIZENS' ALLIANCE FOR PROPERTY
RIGHTS JEFFERSON COUNTY, CITIZENS'
ALLIANCE FOR PROPERTY RIGHTS LEGAL
FUND, MATS MATS BAY TRUST, JESSE A.
STEWART REVOCABLE TRUST, AND
CRAIG DURGAN,

Petitioners,

v.

JEFFERSON COUNTY AND WASHINGTON
STATE DEPARTMENT OF ECOLOGY,

Respondents.

Case No. 14-2-0008c

FINAL DECISION AND ORDER

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I. SYNOPSIS

Petitioners challenge the Shoreline Master Program (SMP) adopted by Jefferson County under Ordinance 07-1216-13 and the Department of Ecology's (Ecology) approval of the County's SMP. The Board concludes Petitioners failed to demonstrate the decisions of Jefferson County and Ecology violated RCW 90.58, RCW 36.70A and WAC 173-26. This appeal is denied and Case No. 14-2-0008c is dismissed.

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II. PROCEDURAL HISTORY

On April 14, 15, and 18, 2014, the Board received three Petitions for Review filed by Hood Canal Sand & Gravel, LLC, dba Thorndyke Resource (Hood Canal); the Olympic Stewardship Foundation, J. Eugene Farr, Wayne and Peggy King, Anne Bartow, Bill Eldridge, Bud and Val Schindler, and Ronald Holsman (collectively, OSF); and the Citizens' Alliance for Property Rights, Jefferson County chapter, Citizens' Alliance for Property Rights Legal Fund, Mats Mats Bay Trust, Jesse A. Stewart Revocable Trust, and Craig Durgan (collectively, CAPR). Petitioners challenge the Shoreline Master Program (SMP) adopted by Jefferson County under Ordinance 07-1216-13 and the Department of Ecology's (Ecology) approval of that SMP. The Board consolidated the petitions into Case No. 14-2-0008c entitled Hood Canal Sand & Gravel, LLC v. Jefferson County and Department of Ecology.

On May 1, 2014, the presiding officer requested that Petitioners meet to discuss rephrasing, editing, and reorganizing their issue statements prior to the Prehearing Conference. Restatements of the issues were received on May 12 and 13, 2014.

A Prehearing Conference was held telephonically on May 14, 2014. On May 19, 2014, the parties jointly requested a 90-day extension of the case schedule for the purpose of exploring settlement. The Board issued a Prehearing Order and Order Granting Settlement Extension on May 23, 2014.

On May 30, 2014, Ecology filed a Motion to Amend Dispositive Motion Deadlines. An Amended Prehearing Order, Order Granting Settlement Extension, and Order Amending Dispositive Motion Deadlines was issued on June 4, 2014.

1 On June 12, 2014, Hood Canal Coalition (Intervenor) requested intervenor status.
2 No responses or objections were received and the Board granted the motion to intervene on
3 June 26, 2014. Also on June 26, 2014, the Board issued an Order Granting Motion for
4 Extension of Time to Submit Motions to Supplement the Record in response to Petitioners'
5 Request to Extend Time to Submit Motion to Supplement the Record filed June 18, 2014.
6

7 OSF filed a Motion for Discovery on June 27, 2014. Ecology and Jefferson County
8 responded on July 3 and 8, and OSF replied on July 14. The Board issued its Order
9 Denying Motion for Discovery and Denying Motion to File a Response to Reply on July 16,
10 2014.

11 On July 11, 2014, OSF filed a Motion to Supplement the Record. Respondents filed
12 a joint response to the motion on July 21, 2014, and the Board granted the motion on July
13 29, 2014. On August 8, 2014, the parties filed status reports as requested by the Board.
14

15 Ecology filed a Motion for Partial Summary Judgment on August 15, 2014. On
16 August 19, 2014, the Board met with the parties in Olympia, Washington to discuss
17 proposed revisions of the issue statements, the remaining case schedule and dispositive
18 motions, and other procedural matters. The parties subsequently filed a Second Request
19 for Settlement Extension on August 25, 2014, and OSF responded to the Motion for Partial
20 Summary Judgment on August 29, 2014. The Board issued a Second Amended
21 Prehearing Order, Order Granting Second Settlement Extension, and Order on Dispositive
22 Motion on September 5, 2014. A Clarification of Second Amended Prehearing Order,
23 Settlement Extension, and Order on Dispositive Motion was issued September 29, 2014, in
24 response to OSF's September 12, 2014, Motion for Clarification or in the Alternative Motion
25 for Reconsideration.
26

27 An Emergency Joint Motion of Petitioners to Alter Briefing Schedule was filed on
28 November 10, 2014. On November 12, 2014, the Board issued an Order Granting Motion
29 to Alter Briefing Schedule.
30

31 The parties subsequently filed prehearing briefs and exhibits as follows:

- 32
- Hood Canal Opening Brief, filed November 21, 2014;
 - CAPR Brief, filed November 21, 2014 ;

- 1 • OSF Prehearing Brief on the Merits, filed November 21, 2014;
- 2 • Errata Sheet to OSF's Prehearing Brief on the Merits, filed December 16, 2014
- 3 (OSF Errata);
- 4 • Jefferson County Prehearing Brief, filed January 5, 2015 (County's Brief);
- 5 • Ecology's Prehearing Brief, filed January 7, 2015 (Ecology's Brief); and
- 6 • Intervenor's Response Brief, filed January 7, 2015 (Intervenor's Brief);
- 7 • OSF Reply Brief, filed January 16, 2015 (OSF Reply Brief);
- 8 • CAPR's, Reply Brief filed January 16, 2015 (CAPR's Reply Brief).
- 9 • OSF filed Specifications of Exhibits Designated by OSF Petitioners, January 16,
- 10 2015.
- 11
- 12

13 On January 9, 2015, the presiding officer sent a letter to Dennis Reynolds (Attorney
14 for OSF), with copies to the Parties, noting that a relatively small number of the documents
15 attached to OSF's November 21, 2014, Prehearing Brief were cited in his brief.¹ In
16 accordance with WAC 242-03-520 and WAC 242-03-620 the Board retained the documents
17 submitted, but will limit the evidence in this case to those exhibits cited in the parties' briefs
18 and attached thereto or allowed as exhibits pursuant to motions to supplement. The Board
19 accepts OSF's Specification of Exhibits Designated to assist the Board in determining which
20 exhibits to consider.²

21
22 The Hearing on the Merits (HOM) was convened on January 21, 2014, at the
23 Harborside Inn in Port Townsend, Washington. Present for the hearing were Board
24 Members Nina Carter, presiding officer, and William Roehl. Board Member Cheryl Pflug
25 was unable to attend in person, but studied the full transcript of the proceedings along with
26 supplementary and illustrative exhibits. Hood Canal was represented by James C. Tracy;
27 Paul J. Hirsch appeared for CAPR; and Dennis D. Reynolds represented OSF. Jefferson
28 County was represented by David Alvarez and Mark Johnsen, and Sonia A. Wolfman
29 appeared for the Ecology. David Mann represented Intervenor, but selected not to present
30 any oral argument. The hearing provided the Board an opportunity to ask questions
31
32

¹ See Appendix A to this Final Decision and Order.

² OSF, Specification of Exhibits Designated by OSF Petitioners, January 16, 2015.

1 clarifying important facts in the case and a better understanding of the parties' legal
2 arguments. At the hearing, Jefferson County provided the Board with handouts and
3 enlarged maps of their shorelines showing designations for Shorelines and Shorelines of
4 Statewide Significance (SSWS). The Board takes official notice of these materials clarifying
5 shoreline designations.³

6
7 At the Hearing on the Merits, OSF moved to supplement the record with four
8 documents. Respondents and Intervenor had no objections to materials offered by Olympic
9 Stewardship. The Board took official notice of two documents submitted by Olympic
10 Stewardship:

- 11 • Washington State's 1972 Official Voters Pamphlet;
- 12 • *The Washington Shoreline Management Act of 1971* by Geoffrey Crooks,
- 13 Washington Law Review, Volume 49 (1973-1974);
- 14

15 The Board admitted two additional documents to the record attached as Appendix D and E:

- 16 • Illustrative Exhibit #1 at HOM: Buffer Acres Plus Setback;
- 17 • Errata to Reply Brief of OSF.
- 18

19 III. BOARD JURISDICTION

20 **The Board finds** the Petitions for Review were timely filed, pursuant to RCW
21 90.58.190(2)(a) and RCW 36.70A.290(2)(c).

22 **The Board finds** the Petitioners have standing to appear before the Board, pursuant
23 to RCW 36.70A.280(2)(b). In response to Ecology's Motion for Partial Summary Judgment,⁴
24 Petitioners stated they wished to preserve their constitutional claims for further appeal and
25 thus brought the constitutional claims to the Board in order to exhaust their administrative
26 remedies.⁵

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31 ³ See attached Appendix B Shorelines Diagram distributed by the Board at the HOM and Appendix C
32 Ecology's Marine Shorelines of Statewide Significance (SSWS), Three Delineation Schemes (handout at
HOM); WA Dept. of Ecology, 2014, Jefferson County Shorelines of Statewide Significance, Figure 1;
Jefferson County Shoreline Map Folio, June 2008.

⁴ Ecology's Motion for Partial Summary Judgment (August 15, 2014) at 4-6.

⁵ Petitioners' Response to Motion for Partial Summary Judgment (August 29, 2014) at 4-6.

1 In the Board's Second Amended Prehearing Order it clarified the Board was a quasi-
2 judicial body of limited jurisdiction with no inherent or common law powers.⁶ Thus, as
3 discussed during the August 19, 2014 meeting with all parties, the Board again states it
4 lacks jurisdiction to address constitutional claims.⁷ As described in the Board's Second
5 Amended Prehearing Order, the Board lacks jurisdiction to hear constitutional issues raised
6 generally by all Petitions and specifically by Petitioner Citizens Alliance for Property Rights
7 Nos. 8.26 – 8.34 and 8.36 – 8.37. Those issues were dismissed in the Second Amended
8 Prehearing Order. In regards to CAPR Issue 8.35, although not raising a constitutional
9 claim, it asserts the violation of RCW 43.21H, a statute not within the Board's jurisdiction or
10 statutory authority. Issue 8.35 was also dismissed in the Second Amended Prehearing
11 Order.⁸

12
13 **The Board finds** it has jurisdiction over the subject matter of all remaining issues in
14 the Petitions pursuant to RCW 90.58.190(2) and RCW 36.70A.280(1)(a).

15 16 **IV. BURDEN OF PROOF AND STANDARD OF REVIEW**

17 Appeals of SMPs are governed by the Shoreline Management Act (SMA) and are
18 adjudicated by the Growth Management Hearings Board.⁹ The Board is charged with
19 adjudicating Growth Management Act (GMA) compliance and, when necessary, invalidating
20 noncompliant plans and development regulations.¹⁰ The Board also reviews shoreline
21 master programs or amendments for compliance with the requirements of the SMA,¹¹
22 Ecology's applicable guidelines,¹² the internal consistency requirements of RCW 35.63.125,
23 35A.63.105, 36.70A.040(4), and 36.70A.070, and chapter 43.21C RCW (SEPA) as it relates
24 to the adoption of master programs and amendments under chapter 90.58 RCW.¹³
25
26
27

28 ⁶ *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 565, 958 P.2d 962 (1998) (citing
29 RCW 36.70A.280(1) and .290).

⁷ RCW 36.70A.280 and RCW 36.70A.300(1).

⁸ Second Amended Prehearing Order, Order Granting Second Settlement Extension, and Order on Dispositive
30 Motion (September 5, 2014) at 3-4.

⁹ RCW 90.58.190(2).

¹⁰ RCW 36.70A.280 and RCW 36.70A.302.

¹¹ RCW 90.58.190(2).

¹² RCW 98.58.200, 98.58.060, and WAC 173-26-171 through WAC 173-26-251.

¹³ RCW 90.58.190(2)(b) and (c).

1 The appellant has the burden of proof in an appeal of an SMP.¹⁴ RCW 90.58.190(2)
2 addresses the scope of review and the burden of proof in an appeal of a shoreline master
3 program. It also distinguishes the different review standards for "Shorelines" and
4 "Shorelines of Statewide Significance."

5 **RCW 90.58.190**

6 (2)(a) The department's decision to approve, reject, or modify a proposed
7 master program or amendment adopted by a local government planning
8 under RCW 36.70A.040 shall be appealed to the growth management
9 hearings board with jurisdiction over the local government. The appeal shall
10 be initiated by filing a petition as provided in RCW 36.70A.250 through
11 36.70A.320.

12 (b) If the appeal to the growth management hearings board concerns
13 **shorelines**, the growth management hearings board shall review the
14 proposed master program or amendment **solely for compliance with the**
15 **requirements of this chapter, the policy of RCW 90.58.020 and the**
16 **applicable guidelines, the internal consistency provisions of RCW**
17 **36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and chapter**
18 **43.21C RCW** as it relates to the adoption of master programs and
19 amendments under chapter 90.58 RCW.

20 (c) If the appeal to the growth management hearings board concerns a
21 **shoreline of statewide significance**, the board shall uphold the decision by
22 the department unless the board, by **clear and convincing evidence**,
23 determines that the decision of the department is inconsistent with the **policy**
24 **of RCW 90.58.020 and the applicable guidelines.**

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

27 (e) Any party aggrieved by a final decision of a growth management
28 hearings board under this subsection may appeal the decision.
29 (emphasis added)

30 Thus, the burden is on the Petitioners to prove that Ecology's decision to approve
31 Jefferson County's SMP is inconsistent with the requirements of the SMA, Ecology's
32 shoreline master program guidelines, the internal consistency requirements, and SEPA as
it relates to the adoption of master programs and amendments under chapter 90.58 RCW.¹⁵

**For this case, the Board examined the County's SMP under both scopes of
review and applicable burdens of proof because Jefferson County's shorelines are**

¹⁴ RCW 90.58.190(2)(d).

¹⁵ RCW 90.58.190(2)(b) and (c).

1 comprised of both SSWS as well as "Shorelines" as defined in RCW 90.58.190(2)(b)
2 and (c). Respondents requested the Board only apply the higher standard for SSWS to the
3 County's Shoreline Master Plan, but from County maps provided at the Hearing on the
4 Merits and the ensuing discussion by the parties and the Board, it is clear Jefferson
5 County's shorelines consist of both SSWS and shorelines. At the HOM, the Board
6 augmented the County's maps with an illustrative drawing to facilitate discussion of the
7 applicable standard and scope of the Board's review.¹⁶

9 As stated above, the Board has jurisdiction to review proposed shoreline master
10 programs for compliance with the "applicable guidelines." The parties disagree as to
11 which guidelines are "applicable." The Board is directed to review SMA challenges
12 related to "shorelines":

13 . . . solely for compliance with the requirements of this chapter, the policy of
14 RCW 90.58.020 and **the applicable guidelines**, the internal consistency
15 provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105,
16 and chapter 43.21C RCW as it relates to the adoption of master programs
17 and amendments under chapter 90.58 RCW.¹⁷

18 and RCW 90.58.190(2)(c) as applied to "shorelines of statewide significance":

19 . . . the board shall uphold the decision by the department unless the board,
20 by clear and convincing evidence, determines that the decision of the
21 department is inconsistent with the policy of RCW 90.58.020 and **the**
22 **applicable guidelines**.¹⁸

23 Petitioners argue the applicable guidelines are **all** of chapter 173-26 WAC while
24 Respondents contend the guidelines are only those set forth in Part III, entitled
25 "Guidelines" at WAC 173-26-171 through and including WAC 173-26-251.

27
28 ¹⁶ See Appendix B and C.

29 ¹⁷ RCW 90.58.190(b): "If the appeal to the growth management hearings board concerns shorelines, the
30 growth management hearings board shall review the proposed master program or amendment **solely for**
31 **compliance with the requirements of this chapter, the policy of RCW 90.58.020 and the applicable**
32 **guidelines, the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and**
35A.63.105, and chapter 43.21C RCW as it relates to the adoption of master programs and
amendments under chapter 90.58 RCW."

¹⁸ RCW 90.58.190(2)(c): "If the appeal to the growth management hearings board concerns a **shoreline of**
statewide significance, the board shall uphold the decision by the department unless the board, by **clear and**
convincing evidence, determines that the decision of the department is inconsistent with the **policy of RCW**
90.58.020 and the applicable guidelines."

1 RCW 90.58.060(1) directed the Department to adopt guidelines. The most recent
2 complete iteration of those guidelines became effective on January 17, 2004. Chapter
3 173-26 WAC includes four Parts and as stated in WAC 173-26-010:

4 In order to facilitate this process, Part I of this chapter [chapter 173-26 WAC]
5 establishes a recordkeeping system for the department and defines the
6 contents of the state master program. Part II sets forth procedures for
7 approving and adopting master programs and amendments thereto. Part III
8 comprises the guidelines pursuant to RCW 90.58.060 and provides
9 **guidance for developing the content of shoreline master programs**. Part
10 IV - addresses the requirements of the state Ocean Resources Management
11 Act. (emphasis added)

11 "Guidelines" are defined by WAC 173-26-020(21) to mean:

12 . . . those standards adopted by the department to implement the policy of
13 chapter 90.58 RCW for regulation of use of the shorelines of the state prior to
14 adoption of master programs. Such standards shall also **provide criteria for**
15 **local governments** and the department in developing and amending master
16 programs. (emphasis added)

17 Part III's first section is WAC 173-26-171 and states in part:

18 (1) Authority. RCW 90.58.090 authorizes and directs the department to adopt
19 "guidelines consistent with RCW 90.58.020, containing the elements
20 specified in RCW 90.58.100" for development of local master programs for
21 regulation of the uses of "shorelines" and "shorelines of statewide
22 significance" . . .

23 (2) Purpose. . . . In keeping with the relationship between state and local
24 governments prescribed by the act, the guidelines have three specific
25 purposes: To assist local governments in developing master programs; to
26 serve as standards for the regulation of shoreline development in the
27 absence of a master program along with the policy and provisions of the act
28 and, to be used along with the policy of RCW 90.58.020, as criteria for state
29 review of local master programs under RCW 90.58.090.

30 (3) Effect.

31 (a) The guidelines are guiding parameters, standards, and review criteria for
32 local master programs. The guidelines allow local governments substantial
discretion to adopt master programs reflecting local circumstances and other
local regulatory and nonregulatory programs related to the policy goals of
shoreline management as provided in the policy statements of RCW
90.58.020, WAC 173-26-176 and 173-26-181. The policy of RCW 90.58.020
and these guidelines constitute standards and criteria to be used by the
department in reviewing the adoption and amendment of local master

1 programs under RCW 90.58.090 **and by the growth management**
2 **hearings board** and shorelines hearings board adjudicating appeals of
3 department decisions to approve, reject, or modify proposed master
4 programs and amendments under RCW 90.58.190. (emphasis added)

5 Beyond that, WAC 173-26-201(1)(a) incorporates **“the minimum procedural rule**
6 **requirements of WAC 173-26-010 through 173-26-160” included in Parts I and II.**

7 Consequently, the Board determines neither the Petitioners’ nor the
8 Respondents’ positions are completely accurate. The Board concludes the “applicable
9 guidelines” referenced in RCW 90.58.190(2)(b) and (c), the statutes which set forth the
10 scope of the Board’s review jurisdiction for SMP challenges, are included in Part III of
11 chapter 173-26 WAC, but the Board’s scope of review also includes “the minimum
12 procedural rule requirements of WAC 173-26-010 through 173-26-160” due to the
13 **referenced incorporation.** Any violation allegations not included within those
14 parameters are beyond the Board’s jurisdictional purview.
15

16 17 **V. PRELIMINARY MATTERS**

18 **The Record**

19 RCW 36.70A.290(4) requires the Board to make its decision on the record developed
20 by Jefferson County and Ecology. In this matter, two records were developed, one by
21 Jefferson County and a second by Ecology. Jefferson County’s Index of Record¹⁹ consists
22 of 139 pages referencing hundreds of documents. Ecology’s Index of Record is even more
23 extensive, consisting of over 700 pages, and listing items which total many thousands of
24 pages.²⁰ The record indices list all material used by Jefferson County and Ecology in
25 adopting the Ordinance challenged herein. In this matter, petitioner OSF submitted 354
26 exhibits with its prehearing brief, consisting of thousands of pages. However, only a limited
27 number of those exhibits were cited in OSF’s brief.²¹
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31 ¹⁹ WAC 242-03-510 requires a respondent to file with the Board an index listing all material used in taking the
32 action which is the subject of the petition for review, the Index of Record. The index of Record is just that; it is
not the actual documents.

²⁰ Both indices of the record were filed on May 30, 2014.

²¹ As stated by counsel for OSF in correspondence dated January 13, 2015, he was “. . . obligated to
designate exhibits for later review for those issues outside of Board jurisdiction.”

1 While RCW 36.70A.290(4) requires the Board to base its decision on the record
2 developed by the County and the state agency, typically some, if not most, of the
3 documents from a jurisdiction's record are not relevant to issues raised in a petition for
4 review.²² Consequently, the rules clarify that evidence which a party wishes the Board to
5 consider must be submitted to the Board (and other parties) with their Hearing on the Merits
6 briefs (WAC 242-03-620) and that the evidence in the case consists solely of the exhibits
7 attached to and cited in the briefs (WAC 242-03-520).²³ Based on RCW 36.70A.290(4) and
8 the Board's rules, WAC 242-03-520 and WAC 242-03-620, the Board's decision has been
9 constructed solely on evidence from the record which was cited in and submitted to the
10 Board with the briefs of the parties. In regards to OSF's prehearing and reply briefs, the
11 Board relies on the exhibits specified by OSF in their January 16, 2015 Specification Of
12 Exhibits Designated.²⁴

13 Abandoned Issues

14 The Board's Rules of Practice and Procedure provide:

15 WAC 242-03-590

16 **Briefs.**

17 (1) A petitioner ... shall submit a brief addressing each legal issue it expects
18 the board to determine. **Failure by such a party to brief an issue shall**
19 **constitute abandonment of the unbrieffed issue.** Briefs shall enumerate
20 and set forth the legal issue(s) as specified in the prehearing order.
21 (emphasis added)

22 The Board's September 5, 2014 Second Amended Prehearing Order states clearly,
23 "Pursuant to WAC 242-03-590(1), failure of a party to brief an issue in the opening brief is
24 deemed abandonment of that issue."²⁵ Further, the Board has held "[a]n issue is briefed
25 when legal argument is provided; **it is not sufficient for a petitioner to make conclusory**

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32 ²² WAC 242-03-210(2)(c) requires that a Petition for Review include a detailed statement of the issues presented for resolution by the Board specifying the provisions of the act allegedly violated.

²³ OSF's counsel acknowledges that fact in his correspondence of January 13, 2015.

²⁴ Specification of Exhibits Designated by Petitioner, Olympic Stewardship Foundation, January 16, 2015.

²⁵ Second Prehearing Order, September 5, 2014 at 8.

1 statements, without explaining how, as the law applies to the facts before the Board,
2 a local government has failed to comply with the Act."²⁶ In this case, Petitioners'
3 Prehearing Briefs often make conclusory statements or do not reference, with legal
4 argument, specific statutes they allege have been violated. In those issues statements
5 where Petitioners have not provided specific legal argument for citations listed in their issue
6 statements, and specify which provisions of the law they claim are violated, the Board will
7 deem those citations abandoned. The alleged violation will not be considered. Thus, the
8 Board deems the following abandoned:²⁷

10 **OSF's General Issue 1:** Violations of the following statutes alleged in OSF General
11 Issue 1 but were not supported by argument in the Petitioners' prehearing brief and are
12 deemed **abandoned**.

- 13 • RCW 90.58.080
- 14 • RCW 90.58.100
- 15 • RCW 90.58.620
- 16 • WAC 173-26-211

17
18 **OSF General Issue 2:** Violations of the following statutes alleged in OSF General
19 Issue 2 but were not supported by argument in the Petitioners' prehearing brief and are
20 deemed **abandoned**.

- 21 • RCW 90.58.050
- 22 • RCW 90.58.065
- 23 • RCW 90.58.090
- 24 • RCW 90.58.100(6)
- 25 • RCW 90.58.130
- 26 • RCW 90.58.250
- 27 • RCW 90.58.270
- 28 • RCW 90.58.340

29 ²⁶ *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and
30 Order, (Jan. 8, 1997), at 7. See also *City of Bremerton v. Kitsap County*, CPSGMHB Consolidated Case No.
04-3-0009c, Final Decision and Order (Aug. 9, 2004), at 5.

31 ²⁷ See *North Clover Creek v. Pierce County*, GMHB Case No. 10-3-0015: An issue was abandoned when
32 other than repeating these statutes in the statement of Legal Issue 3 petitioners have made no argument tied
to these provisions. WAC 242-02-570(1) provides in part "Failure to brief an issue shall constitute
abandonment of the unbriefed issue." An issue is briefed when legal argument is provided. It is not enough to
simply cite the statutory provision in the statement of the legal issue. Final Decision and Order (May 18, 2011)
at 11.

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- RCW 36.70A.480
- WAC 173-26-176
- WAC 173-26-221
- WAC 173-26-191

OSF General Issue 3: Violations of the following statutes were alleged in OSF General Issue 3 but were not supported by argument in the Petitioners' prehearing brief and are deemed **abandoned**.

- RCW 90.58.020
- RCW 90.58.100
- WAC 173-26-090
- WAC 173-26-192(sic)
- WAC 173-26-231
- WAC 173-26-241
- WAC 173-26-251

OSF General Issue 6: Violations of the following statutes were alleged in OSF General Issue 6 but were not supported by argument in the Petitioners' prehearing brief and are deemed **abandoned**.

- WAC 173-26-191

OSF General Issue 8: Violations of the following statutes were alleged in OSF General Issue 8 but were not supported by argument in the Petitioners' prehearing brief and are deemed **abandoned**.

- RCW 90.58.020
- RCW 90.58.030
- RCW 90.58.065
- RCW 90.58.090
- RCW 90.58.100(6)
- RCW 90.58.130
- RCW 90.58.250
- RCW 90.58.270
- RCW 90.58.340
- RCW 90.58.620
- RCW 90.58.710
- WAC Chapter 173-26

1 **Applicable Laws**²⁸

- 2 • RCW 90.58.020
- 3 • WAC 173-26-186²⁹
- 4 • WAC 173-26-191
- 5 • WAC 173-26-201

6 **Position of the Parties**

7 *Petitioners*

8 OSF charges that RCW 90.58.020 requiring coordinated planning was violated
9 because Respondents adopted the SMP in isolation of other planning or regulatory
10 processes and did not coordinate SMP amendments with other existing processes.³⁰ Citing
11 WAC 173-26-201(2)(c), OSF argues the County merely has an obligation to achieve No Net
12 Loss (NNL) of shoreline ecological functions. Further, OSF maintains that pursuant to WAC
13 173-26-201(3)(d) the County must analyze data gathered for Jefferson County's Final
14 Shoreline Inventory and Characterization Report (SI),³¹ but while the County prepared the
15 Report, it only **described** the shoreline data rather than **analyzed** the "causes and effects"
16 between ecological stressors and development impacts.³² Without this analysis, OSF
17 claims the County violated WAC 173-26-201(3)(d). Further, OSF claims data in the Report
18 were not field tested along the County's shoreline.³³
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24 ²⁸ For lack of legal argument, the following are considered abandoned: RCW 90.58.080; RCW 90.58.100;
25 RCW 90.58.620; WAC 173-26-211. See *North Clover Creek v. Pierce County*, GMHB Case No. 10-3-0015:
26 An issue was abandoned when other than repeating these statutes in the statement of Legal Issue 3,
27 petitioners have made no argument tied to these provisions. WAC 242-02-570(1) provides in part "Failure to
28 brief an issue shall constitute abandonment of the unbrieffed issue." An issue is briefed when legal argument
29 is provided. It is not enough to simply cite the statutory provision in the statement of the legal issue. Final
30 Decision and Order (May 18, 2011), at 11.

31 ²⁹ Although WAC 173-26-186 was not listed in OSF Issue 1 statement, it is cross-referenced in WAC 173-26-
201(2)(c). The Board accepts review of WAC 173-26-186 in Issue 1.

32 ³⁰ OSF Prehearing Brief at 11.

33 ³¹ OSF Ex. 124 and ECY003927. *Jefferson County Final Shoreline Inventory and Characterization Report (SI)*
– Revised November 2008 See reference in OSF Prehearing Brief(November 21, 2014) at 8.

³² WAC 173-26-201(3)(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."

³³ *Id.* at 8-10 for reference to lack of data; reference to cause and effect is on 13; reference to field verification
is on 10.

1 Likewise, OSF maintains the Cumulative Impact Analysis (CIA)³⁴ failed to assess the
2 "benefits provided by then-existing regulations and project mitigation imposed under the
3 SMA permitting and State Environmental Policy Act (SEPA) authority." OSF argues WAC
4 173-26-186(8)(d)(iii) describes information necessary for a CIA, but the County did not apply
5 the requirements from WAC 173-26-186(8)(d)(iii).³⁵ OSF concludes "there was no
6 documentation of harm, thus demonstrating that the existing regulatory systems were doing
7 the job."³⁶ OSF gives examples of how homes and docks could be built under current
8 regulations and using the prior SMP, while still protecting the shoreline. OSF concludes the
9 County's lack of analysis of existing regulatory systems is in violation of WAC 173-26-
10 186(8)(a)³⁷ for marine environments and WAC 173-26-186(d)(iii) for established regulatory
11 programs.³⁸

12
13 Finally, OSF reads WAC 173-26-191(2)(a)(ii)(B)³⁹ and WAC 173-26-201(2)(b) to
14 require periodic evaluation and monitoring of cumulative environmental effects of projects in
15 relation to changes in SMP policies.⁴⁰ OSF alleges Jefferson County is without a
16 mechanism to monitor NNL as a result of implementing the new SMP and cites an SMA
17 Guideline on monitoring: "Local governments should monitor actions taken to implement
18 their master program and shoreline conditions."⁴¹
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25 ³⁴ OFS Ex. 350 and ECY 000082. Jefferson County -- Shoreline Master Program Update -- *Cumulative*
26 *Impacts Analysis* (CIA) (February 2010) and referenced in OSF Brief at 10-11.

27 ³⁵ OSF Brief at 10-11 and see also WAC 173-26-186(8)(d)(iii): "Local master programs shall evaluate and
28 consider cumulative impacts. . . To ensure no net loss of ecological functions and protection of other shoreline
29 functions and/or uses, master programs shall contain policies, programs, and regulations that address adverse
30 cumulative impacts and fairly allocate the burden of addressing cumulative impacts among development
31 opportunities. Evaluation of such cumulative impacts **should consider: (iii) Beneficial effects of any**
32 **established regulatory programs under other local, state, and federal laws.**"

³⁶ OSF Brief at 11.

³⁷ *Id.* at 12.

³⁸ *Id.* at 10.

³⁹ WAC 173-26-191(2)(a)(ii): "Master program regulations. . . (B) Include environment designation regulations
that apply to specific environments consistent with WAC 173-26-210."

⁴⁰ OFS Prehearing Brief (November 21, 2014) at 14; see also WAC 173-26-191(2)(a)(ii)(B): "Include
environment designation regulations that apply to specific environments consistent with WAC 173-26-210."

⁴¹ *Id.* at 14-15.

1 *Respondents*

2 The County responds that RCW 90.58.080(2)(a)(iii) required Jefferson County to
3 update its SMP to meet new Ecology guidelines. The County states OSF "conflates the
4 criteria which must be met . . . to periodically amend its SMP" with the legislative update
5 mandate.⁴² The County asserts it is not required to prove its shorelines had or had not been
6 degraded, nor how existing regulations could substitute for an updated SMP. Rather, it was
7 satisfactory for the County to "recognize the scientific literature identifying the risks to
8 shorelines posed by inappropriate use and development, and to take reasonable measures
9 to avoid harmful impacts, in compliance with RCW 90.58 and WAC 173-26."⁴³ The County
10 relied on "abundant" scientific information to document risks to their shorelines; for example,
11 one risk is habitat depletion for endangered species and the need to preserve undeveloped
12 shorelines for those species.⁴⁴ The County refers to over 600 scientific reports in its
13 bibliography of scientific and technical information as sources of data about the ecological
14 state of their shorelines.⁴⁵

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17 The County also points out there are no requirements, in either case law or the SMA,
18 that each shoreline parcel be walked and field tested. Instead, the County relied on
19 accurate aerial photography and GIS technology which "have evolved to the point where
20 they can provide an accurate characterization of shorelines and uses thereon."⁴⁶

21 Finally, in regards to monitoring requirements, the County stated at the Hearing on
22 the Merits that WAC 173-26 Guidelines for SMP updates do not specifically require
23 monitoring of the shoreline, but the County will monitor shoreline development as permits
24 are issued.⁴⁷

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31 ⁴² Jefferson County Brief (January 6, 2015) at 9.

32 ⁴³ *Id.* at 10.

⁴⁴ *Id.* at 11 and 12.

⁴⁵ *Id.* at 11 and ECY 008189 Jefferson County Ordinance # 07-1216-13, Jefferson County SMP Update, Ex. B
Bibliography of Scientific and Technical Information Considered.

⁴⁶ Respondent Jefferson County's Prehearing Brief at 13.

⁴⁷ Transcript from Hearing on the Merits, January 21, 2015 at 99-101.

1 Ecology concurs with Jefferson County's analysis and states many of OSF's issues
2 should be dismissed because OSF only cites WAC 173-26-201 and makes a passing
3 reference to RCW 90.58.020.⁴⁸
4

5 **Board Discussion, Analysis, and Conclusion**

6 Statutory and administrative code violations cited in OSF's General Issue 1 which
7 were not argued are deemed abandoned.⁴⁹ OSF's remaining arguments claim the SMP
8 violates RCW 90.58.020, WAC 173-26-186, WAC 173-26-191, and WAC 173-26-201. OSF
9 presents claims about WAC 173-26-186 even though it was not specifically listed in Issue 1
10 however it is cross-referenced in WAC 173-26-201.⁵⁰ Thus, the Board considers OSF's
11 argument on WAC 173-26-186.
12

13 Jefferson County's prior SMP was adopted in 1974, and amended most recently in
14 1998.⁵¹ The County adopted its comprehensive plan in 1998 and amended it in 2004.⁵²
15 Since the County's adoption of its most recent amendment, Jefferson County has adopted a
16 critical areas ordinance (2008) pursuant to the GMA.⁵³ GMA requirements necessitating
17 careful review include the need to ensure consistency between a jurisdiction's
18 comprehensive plan policies.⁵⁴ SMA policies are considered to be comprehensive plan
19 policies.⁵⁵ Consequently, the Board's analysis of OSF's alleged violations will be
20 considered in light of the fact Jefferson County needed to update its SMP to insure it
21 complied with both the requirements of the SMA and Ecology's Guidelines. Importantly,
22 Jefferson County does not need to "justify adoption of a new SMP" as OSF's Issue No. 1
23 alleges. The question the Board must address is whether, in adopting the required SMP, the
24 County failed to comply with RCW 90.58.020, and WAC 173-26-186, -191 and -201.
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29 ⁴⁸ Ecology Brief at 15.

30 ⁴⁹ The following are abandoned: RCW 90.58.080; RCW 90.58.100; RCW 90.58; WAC 173-26-191; WAC 173-
26-211.

31 ⁵⁰ OSF Prehearing Brief at 10 and 12.

32 ⁵¹ Resolution No. 77-09. p. 4, ¶¶ 5 & 6, ECY 000233.

⁵² Resolution No. 77-09. p. 4, ¶ 10, ECY 000233.

⁵³ Resolution No. 77-09. p. 4, ¶ 13, ECY 000233.

⁵⁴ RCW 36.70A.070.

⁵⁵ RCW 36.70A.480(1).

1 Regarding RCW 90.58.020, OSF makes a brief comment about the County's lack of
2 coordination with other planning processes such as the GMA or watershed planning. OSF
3 makes conclusory statements, but provides no argument explaining how the County
4 violated RCW 90.58.020. The Board notes that the Ordinance,⁵⁶ the SI,⁵⁷ and CIA⁵⁸ contain
5 evidence of coordination and cross-referencing between the SMP, GMA, and other planning
6 and regulatory processes. **The Board finds** OSF failed to prove the County did not comply
7 with RCW 90.58.020.
8

9 Regarding WAC 173-26-201(3)(d), OSF claims the County failed to collect and
10 analyze information pertaining to existing development and existing conditions or
11 regulations which could affect shorelines.⁵⁹ OSF argues the SI has the "deceptive title
12 *Reach Inventory and Analyses* (emphasis in original) [and there is] characterization to an
13 extent, but no analysis of cause-and effect."⁶⁰ These allegations are made in tandem with
14 OSF's suggestion that the County was not required to update its SMP as "there was no
15 documentation of harm," "buffers were unnecessary," and "vegetation and trees were
16 already protected by steep slopes or eagle protection regulations."⁶¹ OSF asks the Board to
17 determine whether the County met WAC 173-26-201(3) requirements to sufficiently analyze
18 existing conditions showing cause and effect of shoreline development and its impact on
19 ecological functions.⁶²
20

21 The Board determines that neither the SMA nor the Guidelines require an analysis of
22 how an existing regulatory scheme would protect shorelines as compared to an amended
23 SMP. Claiming this analysis was required harkens back to OSF's reference to the
24 underlying "base inquiry" of whether "it was 'necessary' for the County to adopt a new SMP
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28 ⁵⁶ ECY 008189 Jefferson County Ordinance # 07-1216-13, Jefferson County SMP Update at 1, 4, 5, 30, 33,
29 40, 46, 47.

30 ⁵⁷ OSF Ex. 124 and ECY003927. *Jefferson County Final Shoreline Inventory and Characterization Report (SI)*
31 -- Revised November 2008 at Ch. 1 at 1-4, Ch. 4 at 4-1 and 4-2.

32 ⁵⁸ OFS Ex. 350 and ECY 000082. *Jefferson County -- Shoreline Master Program Update -- Cumulative*
Impacts Analysis (CIA) (February 2010) at 1, 3, 38, 56, 57, 59, 60, 62, 64, 66, 68.

⁵⁹ OSF Prehearing Brief at 8.

⁶⁰ *Id.* at 9.

⁶¹ *Id.*, at 11.

⁶² *Id.* at 9.

1 in lieu of making discrete amendments to the original SMP.⁶³ RCW 90.50.080 required the
2 County to update its SMP to comply with Ecology's SMP Guidelines.

3 The "analysis" standard to which the County is being held is found in WAC 173-26-
4 201(3)(c) requiring an inventory of shoreline conditions by gathering "all pertinent and
5 available information, existing inventory data and materials." Once the County collects the
6 information, it is required to:

7
8 (d) **Analyze shoreline issues of concern.** Before establishing specific
9 master program provisions, local governments shall analyze the information
10 gathered in (c) of this subsection and as necessary to ensure effective
11 shoreline management provisions, address the topics below, where
12 applicable.

13 When analyzing "issues of concern," a jurisdiction must begin with characterizing
14 eco-system functions, estimate future demands for shoreline space, and analyze cumulative
15 impacts of SMP policies pursuant to WAC 173-26-201(3)(d). Subsection (d) does not
16 require, as OSF claims, an analysis of "various shoreline studies with intent to correlate the
17 'cause-and-effects' scientific link between the ecological stressors and the degree of
18 development impacts."⁶⁴ Instead, the Board determines that the County completed the
19 steps to amend their SMP as required in WAC 173-26-201(3).

20 Specifically, the Board found the County completed requirements in WAC 173-26-
21 201(3)(c) to "inventory shoreline conditions" and in WAC 173-26-201(3)(d) to "analyze
22 shoreline issues of concern." The Board found the SI⁶⁵ and the CIA⁶⁶ to be comprehensive
23 and informative in addressing these WAC requirements. In reviewing the County's SI and
24 CIA, the Board finds the County completed the following steps which were also documented
25 in Ordinance # 07-1216-13:⁶⁷
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30 ⁶³ *Id.* at 3.

31 ⁶⁴ OSF Brief at 8-9 and 13.

32 ⁶⁵ OSF Ex. 124 or ECY 003927 and also Jefferson County Ordinance # 07-1216-13 Ex. E to Locally Approved
SMP, *Jefferson County Final Shoreline Inventory and Characterization Report (SI)* (Revised November 2008)
at Ch. 1, 2, 3, and 4.

⁶⁶ OSF Ex. 350 or ECY 000082 *Jefferson County --Shoreline Master Program Update --Cumulative Impacts
Analysis(CIA)*(February 2010).

⁶⁷ ECY 008189 Jefferson County Ordinance # 07-1216-13.

- 1 • Procured professional services from a qualified consulting firm and a science
- 2 laboratory, established two citizen/stakeholder groups as a technical and policy
- 3 advisory committees, and compiled and reviewed "the most current, accurate and
- 4 complete scientific and technical information available" per WAC 173-26-
- 5 201(2)(a).⁶⁸
- 6
- 7 • Hosted numerous public meetings to verify and assess the work of staff and
- 8 advisory committees.⁶⁹ In accordance with WAC 173-26-201(2)(a) and (3)(a-f),
- 9 the County prepared an SI, a restoration plan, CIA to assess the collective effects
- 10 of the SMP.⁷⁰
- 11 • Described limitations of the inventory including limitations to field verification,⁷¹ the
- 12 scope of its inventory,⁷² and the limits of evaluating all shoreline policies and
- 13 regulations.⁷³
- 14
- 15 • Assessed shorelines for impaired shoreline functions and the value of shorelines
- 16 and created a tool by which policy makers could determine future uses.
- 17
- 18 • Inventoried each Water Resource Inventory Area (WRIA) to "build on the
- 19 watershed overviews in Chapter 3 and describe conditions directly adjacent to
- 20 individual shoreline segments (or reaches)." Specifically, in accordance with
- 21

22 ⁶⁸ *Id.* at 7 and references to advisory committees are throughout the Ordinance.

23 ⁶⁹ *Id.* at 2, 13, 15-17.

24 ⁷⁰ *Id.* at 19-20.

25 ⁷¹ *Jefferson County Final Shoreline Inventory and Characterization Report (Revised November 2008)* at 1-2
 26 "Although the scope of this effort did not include field verification of shoreline conditions, considerable effort
 27 was put forth to ensure that the information presented is complete and accurate as of the date of publication.
 28 This included soliciting information from numerous reliable sources and requesting peer review from local,
 29 state, and federal agency representatives, tribes, and non-governmental organizations with knowledge of the
 30 local shoreline conditions."

31 ⁷² *Id.* at 1-2. "It also characterizes, in a general manner, the ecosystem processes that shape and influence
 32 conditions along each reach of the County's shoreline. A goal of the watershed or landscape-scale analysis is
 to determine which of the key shoreline-influencing processes have been altered or impaired, even if the
 factors contributing to the impairment occur outside or beyond the jurisdiction of the SMA."

33 ⁷³ *Id.* at 1-2 and 1-3. "Finally, this report is not intended as a full evaluation of the effectiveness of the SMA or
 County's existing shoreline policies or regulations. Alterations and impairments described in this report could
 be the result of actions that occurred prior to the adoption of the SMP, actions that are exempt from SMP
 regulation as dictated by the Act, illegal actions, and/or actions that occurred outside shoreline jurisdiction.
 That said, the inventory and characterization information can serve as a valuable tool for determining how
 future use and development might affect shoreline resources, where there are opportunities to restore or
 rectify past impacts, and where there are valuable or unaltered areas that need protection."

1 WAC 173-26-201(3)(c), Chapter 4 analyzes existing physical characteristics of
2 every "reach" including land use patterns, transportation, utilities, impervious
3 surfaces, vegetation, critical areas, degraded areas, channel migration zones, and
4 archeological resources.

- 5 • Analyzed its shorelines, reach by reach, to understand ecological systems.⁷⁴
6 Section 3.3.2 described causes and examples of changes to its shorelines, such
7 as nutrient loading,⁷⁵ landslides,⁷⁶ climate change, and their effects on
8 shorelines.⁷⁷
- 9 • Reviewed conditions and regulations in shorelands and adjacent areas that affect
10 shorelines, such as surface water management and land use regulations.⁷⁸
- 11 • Recommended environmental designations for uses along the shorelines.⁷⁹

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15 ⁷⁴ *Id.* at 3-1. "This chapter describes the ecosystem-wide processes that influence and shape shoreline
16 functions, in accordance with WAC 173-26-210(3)(d). Information is presented at a coarse scale and provides
17 a basis for understanding shoreline management in the context of the broader landscape. Details on individual
18 shoreline reaches are provided in Chapter 4."

19 ⁷⁵ *Id.* at 3-30. "Nutrient loads from streams and rivers entering the nearshore are affected by the magnitude of
20 river discharge, as well as watershed land uses. Major human sources of nutrients from upland areas include
21 agricultural operations (animal manure, fertilizers), wastewater treatment plants, and stormwater runoff from
22 residential landscapes (Embrey and Inkpen, 1998 as cited in Fagergren, 2004). Major anthropogenic sources
23 of nutrients in Hood Canal include human sewage, stormwater runoff, chum salmon carcasses from hatchery
24 returns, agricultural waste, and forestry (Fagergren et al., 2004)."

25 ⁷⁶ *Id.* at 3-34. "The erosion of glacial and non-glacial sedimentary deposits has created high-elevation, often
26 unstable bluffs along the shores of much of eastern Jefferson County. According to Ecology's recently digitized
27 slope stability mapping (based on the 1970s Coastal Zone Atlas), 83 historic landslides were identified in the
28 Jefferson County study area. Recent landslides were mapped at 327 locations."

29 ⁷⁷ *Id.* at 3-37. "The Intergovernmental Panel on Climate Change predicts that between 1990 and 2100,
30 average global surface temperature could increase from 2.5 to 10.4°F, and global sea level could rise between
31 4 and 35 inches, depending on both the rate of natural changes and the response of the climate system to
32 greenhouse gas emissions now and in the future (IPCC, 2006 as cited in King County, 2006). Increasing
temperatures and sea levels are likely to impact shorelines of Jefferson County in multiple ways, as described
below." *Id.* at 3-38. "Projected average flows in the Quinault River after 2040, for example, are 4,000 to
5,000 cubic feet per second (cfs) higher in December than current average flows, while average flows in June
after 2040 may be 3,000 to 4,000 cfs lower than current average flows. Moderate floods are also expected to
increase in basins dominated by transient snow zones, though large floods are expected to occur at
approximately the same frequency as they do today (Casola et al., 2005a)."

⁷⁸ *Id.* at 4-1. Chapter 4.0 Reach and Inventory Analysis *Jefferson County Final Shoreline Inventory and
Characterization Report* (Revised November 2008) The Board notes that every reach within the County's
Water Resource Inventory Area (WRIA #16) contains information about Nearshore Reaches, Biological
Resources, Land Use and Zoning (the land use regulations for the reach), Shoreline Modifications, Public
Access, and Restoration Opportunities.

⁷⁹ OSF Ex. 124 and ECY003927. *Jefferson County Final Shoreline Inventory and Characterization Report* (SI)
– Revised November 2008 at Ch. 5.

1 The Board determined the County completed all steps required in WAC 173-26-
2 201(3)(c) and (d), but the Board also reviewed these WACs to determine if OSF's claim that
3 a cause and effect analysis of existing regulations on current or future shoreline
4 development must be completed. The Board found no such requirement. Rather, it found
5 WAC 173-26-201(3)(c) and (d) mandated some actions,⁸⁰ but the Guidelines are also
6 permissive and allow flexibility as a jurisdiction develops an SMP.⁸¹ The County's SI and
7 CIA demonstrate the County prepared amendments to the SMP in accordance with WAC
8 173-26-201(3)(c) and (d) by having the public participate in the SMP process, by
9 inventorying their shorelines and by analyzing shoreline issues of concern. Further, the
10 County's CIA identified, inventoried, and documented "current and potential ecological
11 functions provided by affected shorelines" and proposed policies and regulations to achieve
12 no net loss of those functions as required in WAC 173-26-186(8).⁸² **The Board finds OSF**
13 failed to prove the County did not comply with WAC 173-26-201, and by reference, WAC
14 173-26-186.
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19 ⁸⁰ WAC 173-26-201(3)(c). "Inventory shoreline conditions. Local governments **shall be prepared** to
20 demonstrate how the inventory information was used in preparing their local master program amendments. . .
21 Local government shall, at a minimum, and to the extent such information is relevant and reasonably available,
22 collect the following information."

23 WAC 173-26-201(3)(d). "Analyze shoreline issues of concern. Before establishing specific master program
24 provisions, local governments **shall analyze** the information gathered in (c) of this subsection and as
25 necessary to ensure effective shoreline management provisions, address the topics below, where applicable."
26 (emphasis added)

27 ⁸¹WAC 173-26-201(3)(c). " Ensure that, **whenever possible**, inventory methods and protocols are consistent .
28 . . ." "Local government shall, at a minimum, **and to the extent such information is relevant and reasonably**
29 **available**, collect the following information: (v) Conditions and regulations in shoreland and adjacent areas
30 that affect shorelines, such as surface water management and land use regulations. This information **may be**
31 **useful** in achieving mutual consistency between the master program and other development regulations."

32 WAC 173-26-201(3)(d)(i). "(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." (emphasis added)

⁸² OFS Ex. 350 and ECY 000082. Jefferson County -- Shoreline Master Program Update -- *Cumulative*
Impacts Analysis (CIA) (February 2010) at 3-5 See also WAC 173-26-186(8)(d). "To ensure no net loss of
ecological functions and protection of other shoreline functions and/or uses, **master programs shall contain**
policies, programs, and regulations that address adverse cumulative impacts and fairly allocate the burden
of addressing cumulative impacts among development opportunities. Evaluation of such cumulative impacts
should consider: (i) current circumstances affecting the shorelines and relevant natural processes; (ii)
reasonably foreseeable future development and use of the shoreline; and (iii) beneficial effects of any
established regulatory programs under other local, state, and federal laws."(emphasis added)

1 The Board next considers allegations that the County violated WAC 173-26-191
2 because the County's SMP lacks a monitoring program to determine effects of the SMP
3 amendments.⁸³ OSF claims SMA Guidelines require mechanisms documenting shoreline
4 projects and evaluating cumulative effects including "monitoring impacts of approved
5 projects." OSF cited WAC 173-26-191(2)(a)(ii)(B) as the requirement for monitoring. The
6 Board disagrees with OSF's interpretation. The WAC requires local jurisdiction to "include
7 environment designation regulations that apply to specific environments consistent with
8 WAC 173-26-210." This is not a monitoring requirement. The Board notes that monitoring
9 requirements in the SMA and SMA Guidelines are generally targeted toward mitigation
10 projects, ocean uses, and aquaculture projects, not general development. (See footnote
11 below on monitoring requirements in WAC 173-26-201.⁸⁴) In addition, at the Hearing on the
12 Merits, the County explained that neither the SMA nor the Guidelines require the type of
13 monitoring alluded to by OSF. Rather, the County will monitor impacts of shoreline projects
14 through the County permitting process on a "permit-by-permit basis and a watershed-by-
15 watershed basis."⁸⁵ **The Board finds** OSF failed to prove the County did not comply with
16 WAC 173-26-191.
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21 ⁸³ OSF Brief at 14. "The State Guidelines require that a "mechanism" be in place in the SMP for documenting
22 all project review actions in shoreline areas. Local governments are required to identify a process for
23 "periodically evaluating" cumulative facts, which includes monitoring impacts of approved projects. See WAC
24 173-26-191(2)(a)(ii)(B). There is not an explicit mechanism for this process set out in the New SMP to monitor
25 NNL over time, a glaring oversight equal to the absence of a baseline."

26 ⁸⁴ WAC 173-26-201(2)(e)(i)(F): "Monitoring the impact and the compensation projects and taking appropriate
27 corrective measures." WAC 173-26-221(2)(c)(i)(F)(III): Wetlands...Compensatory mitigation. . . . Monitoring
28 (III) Establishment of **long-term monitoring** and reporting procedures to determine if performance standards
29 are met. WAC 173-26-201(2)(c)(iii)(B). "Comprehensive saltwater habitat management planning **should**
30 **Identify methods for monitoring** conditions and adapting management practices to new information; WAC
31 173-26-241(3)(b)(i)(D) (iv) Conditional use permits for commercial geoduck aquaculture. . . (I) Local
32 governments should establish monitoring and reporting requirements necessary to verify that geoduck
aquaculture operations are in compliance with shoreline limits and conditions set forth in conditional use
permits and to support cumulative impacts analysis." See also 173-26-360 Ocean management.

⁸⁵ Hearing on the Merits Transcript (January 21, 2015) at 96-101 MR. JOHNSEN: "I'm happy to stand on the
position that we've taken, that there's no requirement under the guidelines that we have a monitoring system
that's been identified in the SMP in place, there is no such requirement." (Transcript at 101) MR. JOHNSEN:
"We've tried to evaluate on a permit-by-permit basis and a watershed-by-watershed basis how we're
mitigating. Are we succeeding or not? How many estuarine acres do we have that are in good condition now?
How many coastal wetlands acres are there? How much shoreline vegetation is there? Do the aerial photos
show compared to what it was in 2009, etc.?" (Transcript at 98).

1 For General Issue 1, OSF has not met its burden to establish the County failed to
2 meet requirements in the SMA or Guidelines regarding changed local circumstances,
3 collecting and monitoring scientific information or no net loss of ecological functions.

4 **For General Issue 1, the Board finds and concludes OSF failed to prove the**
5 **County did not comply with RCW 90.58.020, WAC 173-26-186, WAC 173-26-191, and**
6 **WAC 173-26-201.**

7
8 **General Issue No. 2**

9 Whether the SMP criteria are excessive and inconsistent with the SMA and the State
10 Guidelines. *(Discussing OSF Issues Nos. 2, 4, 5, 7 and 8 in Second Amended Order)*

11
12 2. Did Ordinance No. 07-1216-3 fail to comply with SMA policies RCW 90.58.020,
13 .030, .065, .090, .100(6), .130, .250, .270, .340, .620, and/or .710; the State
14 Guidelines (WAC Chapter 173-26), the Growth Management Act goals and
15 requirements, RCW 36.70A.480(3)(a) and (5) including internal consistency and
16 consistency with the Comprehensive Plan because the SMP unduly emphasized
17 aesthetics; did not balance reasonable uses; failed to address beneficial uses; failed
18 to balance SMA values; failed to protect property rights; etc.?

19 4. Did Jefferson County's adoption of Ordinance No. 07-1216-13 fail to comply
20 with the provisions set forth in RCW 90.58.020, .030(3)(e), .100 and/or WAC 173-26-
21 176(2), WAC 173-26-221(5)(b), WAC 173-26-186(4) and (8)(C), WAC 173-26-
22 191(2)(a)(iii)(A) because the showings required to obtain permits for common
23 shoreline facilities as beach access structures, boating facilities, and armoring, as
24 well as any development in flood-prone areas are beyond those required?

25 5. Did Jefferson County's adoption of Ordinance No. 07-1216-13 fail to comply
26 with the requirements of RCW 90.58.020, .030(3)(e) and .050 because the SMP
27 permitting requirements are too restrictive and/or impermissibly shift the burden of
28 proof to an applicant?

29 7. Whether Respondents' failure to treat existing shoreline homes as conforming in
30 violation of RCW 90.58.620 is clearly erroneous?

31 8. Whether "no net loss" is a concept inapplicable to individual permitting decisions
32 except for expansion and/or remodel of conforming structures as specified in RCW
90.58.620 and, if not, whether no net loss is satisfied by a property owner complying
with mitigation sequencing set out in the SMA and the balancing policies found in
RCW 90.58.020? Stated differently, do the referenced policies control designation

1 and regulation of critical areas located in SMA jurisdiction as mandated by RCW
2 90.58.160 and RCW 36.70A 480?

3 **Applicable Laws**⁸⁶

- 4
- 5 • RCW 90.58.020
 - 6 • WAC 173-26-090

7 **Position of the Parties**

8 *Petitioners*

9 OSF complains the County's SMP criteria are excessive and inconsistent with SMA
10 and SMP Guidelines, specifically WAC 173-26-090.⁸⁷ OSF makes the following assertions:

11 First, OSF argues local circumstances are the determinative factor for a jurisdiction's
12 decision to amend its SMP.⁸⁸ WAC 173-26-090 requires amending an SMP when necessary
13 to reflect changing local circumstances. OSF argues there have been no changed local
14 circumstances to warrant amending the SMP. In addition, it suggests the intensity of land
15 use and frequency of development should dictate the level of regulation.⁸⁹

16 Second, OSF claims the concept of "no net loss" (NNL) is not an SMA policy, is not
17 defined in the SMA and the County cannot use NNL to "trump the SMA balancing policies
18 found in RCW 90.58.020." OSF also claims the County and Ecology use different
19 definitions of NNL and neither definition is consistent with the SMA balancing priorities in
20 RCW 90.58.020.⁹⁰

21 Third, OSF asserts a well-established, site-specific permit process employing
22 SMA/SEPA requirements is in place to balance the needs of shoreline development and
23 protection. OSF contends "there is an obvious prejudice by Respondents against use of the
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28 ⁸⁶ For lack of legal argument, the following are considered abandoned: RCW 90.58.050, .065, .090, .100(6),
29 .130, .250, .270, .340, .480, .710; WAC 173-26-176(2), -221(5)(b), -191(2)(a)(iii)(A).

30 ⁸⁷ OSF Brief at 15 and WAC 173-26-090. "Periodic review—Public involvement encouraged—Amendment of
31 comprehensive plans, development regulations and master programs. Each local government should
32 periodically review a shoreline master program under its jurisdiction and make amendments to the master
program deemed necessary to reflect changing local circumstances, new information or improved data."

⁸⁸ In OSF's Summary of Arguments at 3, OSF claims WAC 173-26-090 requires SMP amendments only if the
County and Ecology can show changed circumstances necessitating SMP amendments. The Board
addresses the argument of local or changed circumstances here in Issue 2.

⁸⁹ *Id.* at 15.

⁹⁰ *Id.* at 17-18.

1 existing permit system, but this system must be used" in accordance with RCW 90.58.140.⁹¹
2 OSF adds "the SMP applies permitting standards impossible to meet."⁹²

3 Fourth, OSF argues the County's application of the term "nonconforming" to over 900
4 shoreline parcels will result in a "wholesale determination that all existing uses and
5 developments encompassed within the new 150-foot generic buffer are now nonconforming"
6 and will conflict with the County's Comprehensive Plan.⁹³
7

8 *Respondents*

9 Although Jefferson County asserts OSF abandoned any claim of inconsistency under
10 General Issue 2's argument, the Board notes those arguments were presented under
11 General Issue 8 and will address those claims in Issue 8 below.
12

13 Jefferson County observes the County is required to follow statutory directives and
14 Ecology's guidelines, both of which required the County to update its SMP regardless of the
15 changed or unchanged nature of growth in the County. Local circumstances are to be
16 considered in the SMP including new scientific information available since the last SMP
17 update. The County must use new information to implement the law and guidelines
18 regardless of the changed or unchanged nature of growth in Jefferson County. The fact that
19 Jefferson County's shorelines are "relatively healthy" only places greater importance on
20 preserving them.⁹⁴
21

22 The County responds that OSF provided no legal argument for using the permit
23 process to implement the SMA on a case-by-case basis as opposed to coordinated
24 planning pursuant to an SMP. The County cites *OSF v. WWGMHB* in which the Court of
25 Appeals affirmed a Board decision to reject a "permit only" process to implement the GMA.
26 The County urges the Board to reject OSF's claim that SMA requirements can be
27 implemented through permits.⁹⁵
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31 ⁹¹ *Id.* at 20.

32 ⁹² *Id.* at 20.

⁹³ *Id.* at 21.

⁹⁴ Jefferson County Brief (January 5, 2015) at 16.

⁹⁵ *Id.* at 17 and *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 274 P.3d 1040, 2012 Wn. App. LEXIS 129 (Wash. Ct. App. 2012).

1 The County explains that creating "nonconforming uses" is a long-standing planning
2 practice in Washington State and the designation does not deprive an owner of legal uses
3 of their property.⁹⁶ The County explains that responding to new information regarding the
4 need to, and best methods for, protecting the environment without depriving a property
5 owner of existing legal uses has long been done in Washington by allowing uses, which in
6 the future will be non-conforming to continue. The practice is intended to respond to
7 petitioners' concerns while enabling the County to regulate future development such that
8 environmental concerns are addressed.
9

10 The County points to SMP Article 10.6 which states existing uses not meeting SMP
11 standards may still continue as long as they meet certain criteria. The County explains the
12 SMP allows existing uses to expand if conditions are met. And, as with the prior issue
13 statement, the County says OSF cited no legal authority supporting its claim that the
14 nonconforming use doctrine violates the SMA.⁹⁷
15

16 The County rejects OSF's complaint about balancing RCW 90.58.020 requirements
17 arguing the SMA does not require an economic impact statement and its foremost priority is
18 protection of the natural environment, and that "development should be allowed only when
19 consistent with the control of pollution and prevention of environmental damage."⁹⁸ The
20 County necessarily considered economic factors along with other goals and policies as well
21 as applying the SMA concept of protecting the environment "where feasible."⁹⁹
22

23 Respondent Ecology observes OSF overstates the "balancing function of the SMA" in
24 regards to its NNL argument. Ecology explains RCW 90.58.900 requires a local SMP to be
25 broadly construed to protect the State's shorelines as fully as possible and an SMP's NNL
26 policy implements the statutes and the guidelines.¹⁰⁰ Ecology explains that "NNL is
27

28 ⁹⁶ Jefferson County Brief at 17. "The argument flies in the face of decades of Washington case law, which has
29 consistently recognized and affirmed the right of local jurisdictions to apply the "nonconforming use"
30 classification to structures and uses which were approved under previous zoning and environmental
31 regulations, but which are no longer consistent with updated regulations. *See, State ex rel. Miller v. Cain*, 40
32 Wn.2d 216, 218, 242 P.2d 505 (1952); *Development and Entitlement Services v. King County*, 177 Wn.2d 636,
643, 305 P.3d 240 (2013)."

⁹⁷ Jefferson County Brief at 18.

⁹⁸ RCW 90.58.020.

⁹⁹ *Id.* at 18-19.

¹⁰⁰ Ecology Brief at 16.

1 achieved at the planning level through the SMP's establishment of shoreline designations,
2 SMP policies and regulations, and restoration planning. Sole reliance on the permitting
3 process is insufficient to ensure NNL.¹⁰¹ Ecology cites WAC 173-26-186(8)(b) to
4 substantiate its argument that NNL must be achieved through both an SMP and
5 permitting.¹⁰²
6

7 Board Discussion, Analysis, and Conclusion

8 As with the previous issue OSF fails to support many of the alleged violations in
9 General Issue 2.¹⁰³ Alleging a violation of statute or rule without presenting argument
10 constitutes abandonment of the issue. Alleged violations of those RCW and WAC sections
11 are dismissed. Next, OSF asks the Board to determine whether the SMP criteria are
12 "excessive and inconsistent" with the GMA, the SMA and the State Guidelines. Finally,
13 allegations regarding inconsistencies are addressed under General Issue 8 below.
14

15 Local Circumstances

16 The essence of OSF's argument is that there have been no changes that would
17 trigger the WAC 173-26-090 directive to: ". . . make amendments to the master program
18 deemed necessary to reflect changing local circumstances, new information or improved
19 data".¹⁰⁴ OSF failed to consider the requirement of RCW 90.58.080(2)(a)(iii) which directed
20 Jefferson County to amend its master program on or before December 1, 2011.¹⁰⁵ In
21
22

23
24 ¹⁰¹ *Id.* at 19. WAC 173-26-186(8). This is also true for exempt development. WAC 173-26-191(2)(a)(iii)(A)
25 ("The Shoreline Management Act's provisions are intended to provide for the management of all development
26 and uses within the jurisdiction, whether or not a shoreline permit is required.").

27 ¹⁰² See WAC 173-26-186(8). ". . . The principle regarding protecting shoreline ecological systems is
28 accomplished by these guidelines in several ways, and in the context of related principles. These include . . .
29 (b) Local master programs shall include **policies and regulations** designed to achieve no net loss of those
30 ecological functions. (i) Local master programs shall include regulations and mitigation **standards ensuring**
31 **that each permitted development will not cause a net loss** of ecological functions of the shoreline; local
32 government shall design and implement such regulations and mitigation standards in a manner consistent with
33 all relevant constitutional and other legal limitations on the regulation of private property. (emphasis added)

¹⁰³ For lack of legal argument, the following are considered abandoned: RCW 90.58.050, .065, .090, .100(6),
130, .160, .250, .270, .340, .480, .710; WAC 173-26-176(2), -221(5)(b), -191(2)(a)(iii)(A).

¹⁰⁴ OSF Brief at 15.

¹⁰⁵ RCW 90.58.080(2)(a). ". . . each local government subject to this chapter shall develop or amend its
master program for the regulation of uses of shorelines within its jurisdiction according to the following
schedule: (iii) . . . On or before December 1, 2011, for . . . Jefferson . . . counties and the cities within those
counties."

1 regards to OSF's argument that changing conditions should govern when an SMP is
2 updated, the Board found that WAC 173-26-090 states a local jurisdiction *should*
3 periodically review an SMP to reflect changing conditions and *shall* review an SMP to "to
4 comply with the requirements of RCW 90.58.080 and any applicable guidelines issued by
5 the department."¹⁰⁶ Ecology issued new guidelines after the County's last SMP, thus the
6 County was required to update its SMP by 2011. OSF's "base inquiry" that the SMP need
7 not have been updated based on changing local circumstances reflects a misunderstanding
8 of the law. **The Board finds** OSF has failed to meet either burden of proof to establish the
9 County did not meet requirements in WAC 173-26-090.

11
12 *No Net Loss*

13 OSF argues "no net loss" (NNL) is not an SMA policy nor defined in the SMA and
14 cannot be used to "trump the SMA balancing policies found in RCW 90.58.020." Ecology
15 counters by pointing to WAC 173-26-186(8)(b) which states NNL must be achieved through
16 both an SMP and permitting.¹⁰⁷

17
18 In this case, the Board finds that RCW 90.58.020 establishes state policy to manage
19 shorelines with an emphasis on the maintenance, protection, restoration, and preservation
20 of "fragile" shoreline "natural resources," "public health," "the land and its vegetation and
21 wildlife," "the waters and their aquatic life," "ecology," and "environment."¹⁰⁸ The
22 Legislature added the concept of NNL in RCW 90.58.620 by authorizing changes in
23 occupancy or residential structures **only** if changes are consistent with the SMP, "including
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28 ¹⁰⁶ WAC 173-26-090 Periodic Review.

29 ¹⁰⁷ See WAC 173-26-186(8) ".....The principle regarding protecting shoreline ecological systems is
30 accomplished by these guidelines in several ways, and in the context of related principles. These include . .
31 .(b) Local master programs shall include **policies and regulations** designed to achieve **no net loss** of those
32 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. (emphasis added)

¹⁰⁸ 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.

1 requirements for **no net loss of** shoreline ecological functions.”¹⁰⁹ To implement these
2 policy directives, RCW 90.58.060 authorizes Ecology to adopt Guidelines consistent with
3 RCW 90.58.020 and Ecology adopted WAC 173-26 to do just that. Part III of WAC 173-26
4 are the “Guidelines” developed to assist local governments update SMPs. (See subsections
5 WAC 173-26-171 through WAC 173-26-251 as the “Guidelines”) Within the Guidelines,
6 WAC 173-26-186(8) establishes the governing principles of the Guidelines, and sets forth
7 the No Net Loss standard that applies to SMPs. See WAC 173-26-186(8):
8

9 Through numerous references to and emphasis on the maintenance,
10 protection, restoration, and preservation ...the act makes protection of the
11 shoreline environment an essential statewide policy goal consistent with the
12 other policy goals of the act. ...The principle regarding protecting shoreline
13 ecological systems is accomplished by these guidelines in several ways, and
14 in the context of related principles. These include:

14 (a) Local government is guided in its review and amendment of local
15 master programs so that it uses a process that identifies, inventories, and
16 ensures meaningful understanding of current and potential ecological
17 functions provided by affected shorelines.

17 (b) Local master programs **shall include policies and regulations**
18 **designed to achieve no net loss of those ecological functions.**

19 Jefferson County was correct to include the concept of no net loss in its SMP as it is
20 required in WAC 173-26-186(8) which in turn is authorized by the SMA. **The Board finds**
21 OSF was unable to carry its burden to establish a violation of to RCW 90.58.020.
22

23 *SMA Permitting*

24 The Board agrees with the Respondents that the SMA provides for the protection of
25 shorelines through development of SMPs, as opposed to solely through a case-by-case
26 permitting system. The SMA was adopted to create a jurisdiction-wide planning process to
27 outline long-range goals to prevent further degradation of shorelines. WAC 173-26-186(8)
28 establishes the principle that “protecting shoreline ecological systems is accomplished by
29
30

31 ¹⁰⁹ RCW 90.58.620 New or amended master programs — Authorized provisions. (1) New or amended master
32 programs approved by the department on or after September 1, 2011, may include provisions authorizing . . .
(b) Redevelopment, expansion, change with the class of occupancy, or replacement of the residential structure
if it is consistent with the master program, **including requirements for no net loss of shoreline ecological
functions.**

1 these guidelines in several ways" including "a process that identifies, inventories, and
2 ensures meaningful understanding of current and potential ecological functions provided by
3 affected shorelines" as well as containing "policies and regulations designed to achieve no
4 net loss of those ecological functions." SMPs are to include "regulations and mitigation
5 standards ensuring that each **permitted** development will not cause a net loss of ecological
6 functions of the shoreline."¹¹⁰ Thus, an SMP must include policies, regulations and a
7 permitting process to implement the SMA and the SMA guidelines.¹¹¹ RCW 90.58 and
8 WAC 173-26 intend local governments to implement the goals of the SMA through a
9 combination of policies and regulations expressed in the SMP and permits for individual
10 projects.¹¹²
11
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13

14 ¹¹⁰ WAC 173-26-186(8)(b)(i).

15 ¹¹¹ WAC 173-26-186(8): "Through numerous references to and emphasis on the maintenance, protection,
16 restoration, and preservation of 'fragile' shoreline 'natural resources,' 'public health,' 'the land and its
17 vegetation and wildlife,' 'the waters and their aquatic life,' 'ecology,' and 'environment,' the act makes
18 protection of the shoreline environment an essential statewide policy goal consistent with the other policy
19 goals of the act. It is recognized that shoreline ecological functions may be impaired not only by shoreline
20 development subject to the substantial development permit requirement of the act but also by past actions,
21 unregulated activities, and development that is exempt from the act's permit requirements. The principle
22 regarding protecting shoreline ecological systems is accomplished by these guidelines in several ways, and in
23 the context of related principles. These include:

24 (a) Local government is guided in its review and amendment of local master programs so that it uses a
25 process that identifies, inventories, and ensures meaningful understanding of current and potential ecological
26 functions provided by affected shorelines.

27 (b) Local master programs shall include policies and regulations designed to achieve no net loss of those
28 ecological functions.

29 (i) Local master programs shall include regulations and mitigation standards ensuring that each permitted
30 development will not cause a net loss of ecological functions of the shoreline; local government shall design
31 and implement such regulations and mitigation standards in a manner consistent with all relevant constitutional
32 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."

¹¹² RCW 90.58.020. "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."

RCW 90.58.080. "1) Local governments shall **develop or amend a master program** for regulation of uses of
the shorelines of the state consistent with the required elements of the guidelines adopted by the department
in accordance with the schedule established by this section."

WAC 173-26-030(1). "Chapter 90.58 RCW requires all local governments with shorelines of the state within
their boundaries to **develop and administer a shoreline master program.**"

WAC 173-26-191(1)(a). "The results of shoreline planning are summarized in shoreline master program
policies that establish broad shoreline management directives. **The policies are the basis for regulations
that govern use and development along the shoreline.**"

1 OSF's claim that the County could protect shorelines though permitting alone is
2 unfounded. The Board identifies law and administrative codes which support both planning
3 and permitting as the method to protect and manage shorelines. **The Board finds** OSF was
4 unable to carry its burden to establish a violation of RCW 90.58.020 or WAC 173-26-090.
5

6 *Non-Conforming*

7 OSF cites no legal authority to substantiate its claim that non-conforming
8 designations for land parcels are "contrary to law."¹¹³ Nor does OSF explain how a non-
9 conforming designation in the SMP, which protects non-conforming uses and allows them to
10 be replaced or expand, "conflicts with the Comprehensive Plan."¹¹⁴ OSF asserts the SMP
11 does not allow replacement of a destroyed non-conforming structure and the SMP "imposes
12 too many requirements . . . provides uncompensated view easements to adjacent
13 properties, which is illegal."¹¹⁵
14

15 The Board first examines SMP Article 6: *General Policies and Regulations* and Article
16 10: *Administration and Enforcement* which contains policies guiding non-conforming
17 uses.¹¹⁶ Existing uses and buildings not meeting SMP standards are allowed to continue as
18 non-conforming. If uses or buildings change, the SMP provides discretionary requirements
19 for non-conforming uses. For example, Article 6.1.A. contains language about views stating
20 "Single-family residential development on non-conforming lots **should** not substantially
21 impair the view of the adjacent residences."¹¹⁷ This is **policy** language and OSF does not
22 demonstrate how it results in a violation.¹¹⁸ Next, the SMP provisions protect critical areas
23 by requiring that a parcel constrained by critical areas or buffers "shall not be subdivided to
24 create parcels that . . . would be considered non-conforming."¹¹⁹ The Board understands
25 that OSF does not like the label "non-conforming," but OSF does not provide legal argument
26
27
28

29 ¹¹³ OSF Brief at 21.

30 ¹¹⁴ *Id.*

31 ¹¹⁵ *Id.*

32 ¹¹⁶ ECY 008189, Jefferson County Ordinance # 07-1216-13; Ex. A Jefferson County SMP Update at 6-2- 6-7,
10-6.

¹¹⁷ *Id.* at 6-2.

¹¹⁸ The goals and policies of an SMP constitute elements of a jurisdiction's comprehensive plan. RCW
36.70A.480(1). It is the development regulations which implement comprehensive plan policies.

¹¹⁹ *Id.* at 6-4.

1 to support its contention that the County should not impose restrictions on subdividing within
2 critical areas that would result in creating new non-conformities. Such restriction is in
3 keeping with the purpose of protecting the functions and values of critical areas as stated in
4 the County's Critical Area Ordinance and incorporated into the County's SMP.¹²⁰

5 In addition, SMP Article 10 describes how non-conforming developments may
6 continue with normal maintenance and repair, replacement, re-location and expansion even
7 though they have been designated as "non-conforming."¹²¹ Another source of flexibility in
8 the SMP for non-conforming lots is found in Article 10.6.E. which may allow new single-
9 family residential development outside the standard shoreline buffer without a variance if
10 they comply with non-conforming provisions in Article 6.1.¹²² OSF provided no legal
11 analysis showing how the SMP's permissive and flexible non-conforming policies violate the
12 SMA or the Guidelines.

13
14 For General Issue 2, OSF has not met its burden to establish the County failed to
15 meet requirements in the SMA or Guidelines regarding local circumstances, no net loss of
16 ecological functions, SMA permitting or nonconforming classifications.

17
18 **For General Issue 2, the Board finds and concludes OSF has failed to carry its**
19 **burden proving the County did not comply with RCW 90.58.020 or WAC 173-26-090.**

20
21 **General Issue No. 3**

22 Whether the SMP's new shoreline buffers, vegetation conservation area and setbacks are
23 illegal. (*Discussing OSF Issue No. 6*)

24
25 6. Whether the shoreline buffers, vegetation conservation areas and setbacks
26 required by the SMP (see Art. 6.1.D.4, 5, Art. 5(3)(A), p.5-2, Art. 6(3)(A)(11), p.6-16,
27 Art. 6(4) (a)(1), p. 6-18, Art. 6(5)("Vegetation Conservation"), pp.6-18 to 6-22, Art.
28 7(1)(A)(6), p.7-1, SMP. Art. 8(8)(A)(2), p.8-36, inter alia) are excessively large when
29 evaluated against the requirements of RCW 90.58.100(1), (1)(a), (d), (e), 2(a), and
30 WAC 173-26-090, 201(2), 221(2), (5), 192(2)(a); 231(2), 241(2), (3), and 251(3) and
31 otherwise are inconsistent with the balancing policies of RCW 90.58.020?

32
¹²⁰ *Id.* at Appendix B – JCC 18.22 Critical Areas Ordinance.

¹²¹ ECY 008189, Jefferson County Ordinance # 07-1216-13, Ex. A Jefferson County SMP Update at 10-6.

¹²² *Id.* at 10-6 Art. 10.6.E. New single-family residential development on lots whose dimensions do not allow a residence to be constructed outside the standard shoreline buffer **may be allowed without a variance** in accordance with the provision in Article 6 section 1 (Nonconforming Lots).

1 Applicable Laws¹²³

- 2 • WAC 173-26-221

3
4 Position of the Parties

5 OSF contends the SMP buffers, vegetation conservation areas and setbacks are
6 illegal, violate WAC 173-26-186(5),¹²⁴ contain inadequate scientific evidence and thus, the
7 SMP should be found invalid. Citing WAC 173-26-221(2)(a) and (c), OSF criticizes the
8 County for inappropriately applying buffers to freshwater habitats arguing the Guidelines
9 only require buffer areas around wetlands within shoreline jurisdiction but not for critical
10 freshwater habitat or nearshore marine areas.¹²⁵ Regarding scientific studies used in
11 developing the SMP, OSF contends the County selected scientific studies to justify using a
12 buffer width adopted in Whatcom County because Ecology suggested this size.¹²⁶ OSF
13 promotes scientific expertise on buffers from Dr. Michael Dosskey, which it contends the
14 County could have relied upon but did not.¹²⁷ Overall, OSF argues the County did not
15 demonstrate "problems" necessitating a new SMP nor did the County justify 150-foot buffers
16 and conservation vegetation found in the SMP.¹²⁸ In its reply brief, OSF argues not all of
17 the County shorelines are critical areas and thus do not warrant the application of the CAO
18 in the SMP.¹²⁹

19
20
21 The SMP includes standard 150-foot buffers from shores and rivers and 100-foot
22 buffers from lakeshores. Jefferson County explains the SMP buffer and vegetation
23

24
25 ¹²³ For lack of legal argument, the following are considered abandoned: RCW 90.58.020; RCW 90.58.100;
WAC 173-26-090, -192(sic), -231, -241, -251.

26 ¹²⁴ OSF's Issue 6 does not allege a violation of WAC 173-26-186(5). The Board is precluded from issuing
27 advisory opinions. See RCW 36.70A.290 (1): All requests for review to the growth management hearings
28 board shall be initiated by filing a petition that includes a detailed statement of issues presented for resolution
29 by the board. The board shall render written decisions articulating the basis for its holdings. **The board shall
30 not issue advisory opinions on issues not presented to the board in the statement of issues, as
31 modified by any prehearing order.** WAC 242-03-210. "A petition for review shall substantially contain: . . .
(2) (c) A detailed statement of the issues presented for resolution by the board that specifies the provision(s) of
the act or other statute allegedly being violated and, if applicable, the provision(s) of the document that is
being appealed."

32 ¹²⁵ OSF Brief at 22.

¹²⁶ *Id.* at 25.

¹²⁷ *Id.* at 26.

¹²⁸ *Id.* at 24.

¹²⁹ OFS Reply Brief at 14 (January 16, 2015).

1 requirements are consistent with WAC 173-26-221(2) and (5) which allow for the adoption of
2 such conservation measures. The SMA allows local jurisdictions flexibility to adopt
3 regulatory requirements as long as they are grounded in scientific evidence. The County
4 offers scientific evidence from its Inventory and Cumulative Effects Analysis to explain why it
5 selected the 100- and 150-foot buffers.¹³⁰ Contrary to the allegations, it states the buffers
6 do not impose a "blanket no touch" restriction on all properties. Instead, it allows up to 20%
7 of the shoreline (or 15 linear feet, if greater) to be altered. Saltwater areas have been
8 designated as critical areas under the CAO because listed species are found in nearshore
9 habitats and along marine shorelines and those shorelines have been designated as Fish
10 and Wildlife Habitat Areas under the CAO. Similarly, many freshwater areas have been so
11 designated. Both fresh and marine shorelines are designated as they overlap with GMA-
12 designated critical areas.¹³¹ The County explains the SMP buffers are the same as those
13 adopted in the County's GMA-compliant Critical Area Ordinance, but they were
14 independently derived by analyzing scientific data and shoreline conditions. The County
15 clarifies it did not designate CAOs when it adopted the SMP, but CAO buffers were
16 consistent with SMP buffers based on scientific analysis.¹³² Finally, Ecology reviewed the
17 County's scientific analysis, the requirements for vegetation conservation and buffers and
18 found them in compliance with SMA policies and guidelines.¹³³ Ecology defers to the
19 County's arguments regarding General Issue 3.¹³⁴
20
21
22

23 Discussion, Analysis, and Board Conclusion

24 OSF fails to cite and argue several alleged violations in General Issue 3. Alleged
25 violations of statute or rule without presenting legal argument constitute abandonment of the
26 issue. Alleged violations of those RCW and WAC sections are dismissed.¹³⁵
27
28
29

30 ¹³⁰ Jefferson County Brief at 21.

31 ¹³¹ *Id.* at 22.

32 ¹³² *Id.* at 21-22

¹³³ *Id.* at 22.

¹³⁴ Ecology Brief, p. 20.

¹³⁵ For lack of legal argument, the following are considered abandoned: RCW 90.58.020; RCW 90.58.100;
WAC 173-26-090; -201; -192(sic), -231, -241, -251.

1 OSF presents three confusing arguments around the concept of applying the existing
2 County CAO to the SMP and establishing regulations for shoreline buffers and conserving
3 vegetation. They argue buffers are excessive, the science used by the County was
4 incomplete and the buffer and vegetation conservation requirements are not proportionate
5 to developments' impacts.¹³⁶
6

7 *Excessive Buffers*

8 A significant portion of OSF's argument under General Issue 3 appears to relate to
9 allegations of violations of WAC 173-27-186 and related constitutional claims.¹³⁷ Beyond
10 that, OSF alleges the SMP inappropriately applies buffers to all shorelines, including critical
11 freshwater habitats and nearshore marine areas, and so violates WAC 173-26-221(2)(c).
12

13 OSF states:

14 The State Guidelines make it clear that SMP's "shall contain requirements for
15 buffer area zones around wetlands within shoreline jurisdiction," (WAC 173-
16 26-221(2)(a)(ii)(D)), but they contain no such mandatory requirement for
17 "critical freshwater habitats" including larger lakes or streams, or the
18 nearshore marine area.¹³⁸

19 Apparently, OSF's argument is that without a similar directive applicable to lakes,
20 streams, and nearshore marine areas, the County was precluded from adopting buffers and
21 vegetation conservation provisions.¹³⁹
22

23 The six elements required to be addressed in an SMP by WAC 173-26-221 are
24 archaeological and historical resources; **critical areas**; flood hazard areas; public access;
25
26
27

28 ¹³⁶ OSF Brief at 22.

29 ¹³⁷ OSF Brief, p.23, 24: "The protection mechanisms are applied to private properties without adherence to
30 nexus, proportionality and reasonable necessity limits on government." "The OSF Petitioners focus more on
31 the reasonably necessary test rather than "nexus" or the "roughly proportional to the problem created by the
32 development" test" "The error inherent in the New SMP is that it imposes mitigation in the form of buffers
(environmental easements or servitudes) on all shorelines. . . ." As noted above, violations of WAC 173-27-
186 were not alleged. Consequently, the Board is precluded from addressing them under this issue.
Furthermore, the Board has no jurisdiction to consider constitutional issues.

¹³⁸ OSF Brief at 22.

¹³⁹ *Id.* at 22.

1 **shoreline vegetation conservation**; water quality, storm water, and nonpoint pollution¹⁴⁰
2 (emphasis added). The SMP must address, for each category, where that element applies,
3 as well as specific principles and standards. (WAC 173-26-221).

4 For example, for critical areas the **“application”** is that “shoreline master programs
5 must provide for management of critical areas,” including a provision of no net loss to
6 shoreline ecological functions.¹⁴¹ There are five **“principles”** which must be implemented
7 for critical areas including using “scientific and technical information” and applying planning
8 principles to protect existing ecological functions.¹⁴² The **“standards”** by which the County
9 implements its SMP for critical areas includes four sub-categories relating to critical areas:
10 (i) wetlands, (ii) Geologically hazardous areas; (iii) critical saltwater habitats; and (iv) critical
11 freshwater habitats.¹⁴³ OSF complains WAC 173-26-221 does not mandate buffers for
12 critical saltwater and freshwater habitats, but the SMP applies buffers anyway.¹⁴⁴

13
14 The answer to OSF’s argument that applying buffers to all shorelines, including
15 critical freshwater habitats and nearshore marine areas violates WAC 173-26-221 is
16 included in the rule itself. WAC 173-26-221(2)(a) specifically allows a city or county to
17 “include in its master program **land necessary for buffers for critical areas** (as defined in
18
19
20
21

22 ¹⁴⁰ WAC 173-26-221 contains six categories: archaeological and historical resources; critical areas; flood
23 hazard areas; public access; shoreline vegetation conservation; water quality, storm water, and nonpoint
24 pollution.

25 ¹⁴¹ WAC 173-26-221(2) “Critical Areas (a) Application. Pursuant to the provisions of RCW 90.58.090(4) and
26 36.70A.480(3) as amended by chapter 107, Laws of 2010 (EHB 1653), shoreline master programs must
27 provide for management of critical areas designated as such pursuant to RCW 36.70A.170 (1)(d) located
28 within the shorelines of the state with policies and regulations that: (i) Are consistent with the specific
29 provisions of this subsection (2) critical areas and subsection (3) of this section flood hazard reduction, and
30 these guidelines; and (ii) **Provide a level of protection to critical areas within the shoreline area that
31 assures no net loss of shoreline ecological functions necessary to sustain shoreline natural
32 resources.**”

33 ¹⁴² WAC 173-26-221(2)(b) “Principles (i) Shoreline master programs **shall adhere to the standards
34 established in the following sections**, unless it is demonstrated through scientific and technical information
35 as provided in RCW 90.58.100(1) and as described in WAC 173-26-201(2)(a) that an alternative approach
36 provides better resource protection . . . (iv) The planning objectives of shoreline management provisions for
37 critical areas **shall be the protection of existing ecological functions and ecosystem-wide processes
38 and restoration of degraded ecological functions and ecosystem-wide processes.** The regulatory
39 provisions for critical areas **shall protect** existing ecological functions and ecosystem-wide processes.”

40 ¹⁴³ WAC 173-26-221(2)(c) [Critical Area] Standards.”

41 ¹⁴⁴ OSF Brief at 22.

1 chapter 36.70A RCW) occurring within shorelines of the state. . . .¹⁴⁵ Jefferson County has
2 designated its marine shorelines and much of its freshwater shorelines as critical areas:

3 The shoreline buffers and vegetation conservation areas included in the SMP
4 are supported by science and by safety considerations and are consistent
5 with Jefferson County's CAO. The treatment of saltwater shorelines as
6 critical areas in the CAO is justified because the shorelines in Jefferson
7 County have been found to provide habitat for listed species and therefore
8 qualify as critical areas, i.e., Fish and Wildlife Habitat Conservation Areas
9 under the CAO. (See, SI, pp. 3-6 through 3-22; SMP Article 6, p. 6-5; JCC
10 18.22.270). Both freshwater and marine shorelines, as determined by SMA,
11 overlap with GMA-designated fish and wildlife habitat critical areas. The
12 independent application of separate definitions, nomenclature and criteria
13 yield nearly-identical results for the location of natural resources in need of
14 protection.¹⁴⁶

13 The internal references in that quote include one to the Final SI¹⁴⁷ at pages 3-6
14 through 3-22. Those pages list the types and locations of threatened and endangered
15 species and habitats, both nearshore and freshwater habitats and species as well as
16 terrestrial habitats and species.

18 3.2.1 Threatened and Endangered Species and Critical Habitats

19 Jefferson County is home to several state and/or federally listed and
20 proposed threatened and endangered species and critical habitats.¹⁴⁸

21 3.2.1.1 Salmonids

22 Salmonids (including both federally listed and non-listed species) use
23 streams, rivers, and nearshore habitats throughout Jefferson County.¹⁴⁹

24
25 ¹⁴⁵ WAC 173-26-221(2)(a): "As provided in RCW 90.58.030 (2)(f)(ii) and 36.70A.480, as amended by chapter
26 321, Laws of 2003 (ESHB 1933), any city or county **may also include in its master program land**
27 **necessary for buffers for critical areas**, as defined in chapter 36.70A RCW, that occur within shorelines of
28 the state . . . If a local government does not include land necessary for buffers for critical areas that occur
29 within shorelines of the state, as authorized above, then the local jurisdiction shall continue to regulate those
30 critical areas and required buffers pursuant to RCW 36.70A.060(2). . . . In addition to critical areas defined
31 under chapter 36.70A RCW and critical saltwater and freshwater habitats as described in these guidelines,
32 local governments should identify additional shoreline areas that warrant special protection necessary to
achieve no net loss of ecological functions."

¹⁴⁶ Jefferson County Brief, p. 22; See also SMP Appendix B, the County's Critical Areas Ordinance at JCC
18.22.270.

¹⁴⁷ OSF Ex. 124 and ECY003927. *Jefferson County Final Shoreline Inventory and Characterization Report*
(SI) – Revised November 2008 at 3-6 through 3-22.

¹⁴⁸ *Id.* at 3-6.

1 3.2.2 Nearshore Habitats and Species

2 Key nearshore marine habitats in Jefferson County include eelgrass and kelp
3 beds; shellfish beds; forage fish spawning areas; marine mammal habitats
4 (seal and sea lion haulouts); seabird/waterfowl concentration areas;
5 estuaries and other intertidal wetlands/marshes, and nearshore riparian
6 habitats.¹⁵⁰

7 In addition, WAC 173-26-221(2)(c)(iii) and (iv) requires jurisdictions to address two specific
8 types of critical areas: critical saltwater and critical freshwater habitats. The former are
9 defined as:

10 Critical saltwater habitats include all kelp beds, eelgrass beds, spawning and
11 holding areas for forage fish, such as herring, smelt and sandlance;
12 subsistence, commercial and recreational shellfish beds; mudflats, intertidal
13 habitats with vascular plants, and areas with which priority species have a
14 primary association. Critical saltwater habitats require a higher level of
15 protection due to the important ecological functions they provide. Ecological
16 functions of marine shorelands can affect the viability of critical saltwater
17 habitats. Therefore, effective protection and restoration of critical saltwater
18 habitats should integrate management of shorelands as well as submerged
19 areas.

20 The location of many critical saltwater habitats, including shellfish beds, mudflats, intertidal
21 habitats with vascular plants, and areas with which priority species have a primary
22 association are included in the County's Final SI.¹⁵¹

23 The Board further notes that WAC 173-26-221(2)(c)(iv) contains specific principles
24 and standards to protect critical freshwater habitats.¹⁵² These include regulating uses and

25 ¹⁴⁹ *Id.* at 3-8.

26 ¹⁵⁰ *Id.* at 3-9.

27 ¹⁵¹ *Id.* at Section 4.0 *Reach Inventory and Analysis*.

28 ¹⁵² WAC 173-26-221(2)(c)(iv) **Critical freshwater habitats** "A. Principles... Many ecological functions of lake,
29 river and stream corridors depend both on continuity and connectivity along the length of the shoreline and on
30 the **conditions of the surrounding lands** on either side of river channel and lake basin. Environmental
31 degradation caused by development such as improper storm water sewer or industrial outfalls, unmanaged
32 clearing and grading, or runoff from buildings and parking lots within the watershed, can degrade ecological
33 functions in lakes and downstream.... gradual destruction or loss of riparian and associated upland native
34 plant communities, alteration of runoff quality and quantity along the lake basin and stream corridor...
35 Therefore, effective management of lake basins and river and stream corridors depends on: ...

(II) **Regulating uses and development** within lake basins and stream channels, associated channel migration
36 zones, wetlands, and the flood plains, **to the extent such areas are in the shoreline jurisdictional area, as
37 necessary to assure no net loss of ecological functions, including where applicable the associated
38 hyporheic zone, results from new development."**

1 developments to assure no net loss of ecological functions. To meet this requirement, the
2 County chose to apply buffers to all critical areas, marine shorelines and freshwater
3 shorelines, in compliance with WAC 173-26-221.¹⁵³ As the County states, it has the
4 discretion to protect ecological functions "through a variety of measures including . . .
5 setbacks and buffer standards . . . and a substantial degree of discretion is afforded to the
6 local jurisdiction" in establishing buffers.¹⁵⁴ **The Board finds** OSF has not carried its burden
7 of proof demonstrating the County is non-compliant with WAC 173-26-221(2) in regards to
8 the application of buffers to critical freshwater habitats including larger lakes or streams, or
9 the nearshore marine area.

11
12 *Vegetation Conservation*

13 OSF also takes issue with the SMP's vegetation conservation regulations. However,
14 that concern was not argued in OSF's Prehearing Brief other than to include the following
15 statement:

16 The OSF Petitioners' contentions are three-fold: (1) imposition of generic
17 buffers or vegetation protection area set asides are "default" regulatory
18 devices which are illegal under SMA balancing policies and priorities; (2) they
19 violated WAC 173-27-185¹⁵⁵

20 Notwithstanding OSF's use of conclusory statements in lieu of legal argument, the Board
21 references the following portions of WAC 173-26-221(5)(b) which clearly require
22 jurisdictions to address vegetation conservation:

23 The intent of vegetation conservation is to protect and restore the ecological
24 functions and ecosystem-wide processes performed by vegetation along
25 shorelines. Vegetation conservation should also be undertaken to protect
26 human safety and property, to increase the stability of river banks and
27

28 ¹⁵³ SMP Article 4.1.A "The provisions of this Program shall apply to all shorelines of the state in unincorporated
29 Jefferson County including all **freshwater and saltwater shorelines**, shorelines of statewide significance and
30 all shorelands as defined in Article 2 and RCW 90.58.030. These areas are collectively referred to herein as
31 'shorelines'. See also SMP Article 6.1.D.5 Regulations – Critical Areas and Shoreline Buffers for Marine
32 Shores. **Standard Buffer:** The standard buffer shall be measured landward in a horizontal direction
perpendicular to the ordinary high water mark (OHWM) of the shoreline water body, and is a three dimensional
space that includes the airspace above, as follows: I. **Marine shores.** A minimum buffer of 150 feet shall be
maintained in all shoreline environments. See also SMP Article 7 at 7.19-20 and Article 8 at 8-31.

¹⁵⁴ Jefferson County Prehearing Brief at 20.

¹⁵⁵ OSF Brief, at 22.

1 coastal bluffs, to reduce the need for structural shoreline stabilization
2 measures, to improve the visual and aesthetic qualities of the shoreline, to
3 protect plant and animal species and their habitats, and to enhance shoreline
4 uses.

5 Master programs shall include: Planning provisions that address vegetation
6 conservation and restoration, and regulatory provisions that address
7 conservation of vegetation; as necessary to assure no net loss of shoreline
8 ecological functions and ecosystem-wide processes, to avoid adverse
9 impacts to soil hydrology, and to reduce the hazard of slope failures or
accelerated erosion.

10 Local governments should address ecological functions and ecosystem-wide
11 processes provided by vegetation as described in WAC 173-26-201 (3)(d)(i).

12 Local governments may implement these objectives through a variety of
13 measures, where consistent with Shoreline Management Act policy, including
14 clearing and grading regulations, setback and buffer standards, critical area
15 regulations, conditional use requirements for specific uses or areas,
16 mitigation requirements, incentives and nonregulatory programs.

17 **The Board finds** OSF has not carried its burden of proof demonstrating the County is non-
18 compliant with WAC 173-26-221(2) in regards to vegetation conservation.

19
20 *Science Flawed*

21 OSF generally complains the County selectively chose scientific evidence to justify its
22 100- and 150-foot buffers¹⁵⁶ and that "agency personnel had a narrow perspective of
23 'protecting' the environment" which led policy-makers to believe they had to factor in
24 "science alone without regard to statutory, social, legal, constitutional and economic
25 considerations."¹⁵⁷ OFS then states "mere citation to scientific studies is not enough; there
26 must be actual analysis and application to local circumstances."¹⁵⁸ The Board does not find
27 OSF's conclusory statements persuasive in the absence of case citations/legal argument
28 explaining how the County failed to meet any of the statutes or rules cited in General Issue
29
30
31
32

¹⁵⁶ OSF Brief at 25.

¹⁵⁷ *Id.* at 26.

¹⁵⁸ *Id.* at 27.

1 3 (OSF Issue No. 6) regarding applying scientific information to establish buffers or
2 vegetation conservation.

3 On the contrary, the Board found the SMP, the SI, and the CIA replete with scientific
4 evidence demonstrating how the County met legal requirements to establish buffers and
5 address vegetation conservation. Specifically, WAC 173-26-201(3)(c) requires local
6 jurisdictions to inventory their shoreline conditions and collect information on, among other
7 things, shoreline and land use patterns, aquatic and terrestrial wildlife habitats, altered and
8 degraded areas and sites among many other requirements. This information educated the
9 County about cumulative impacts from development allowing it to design vegetation
10 conservation methods ensuring protection of ecological functions.¹⁵⁹

11 In this case, Jefferson County's SI compares buffer information from other
12 jurisdictions to inform policy-makers of methods other jurisdictions use to apply scientific
13 data in Washington State. The Inventory also cites a decision by the Central Puget Sound
14 Growth Management Hearings Board upholding a 150-foot marine shore buffer. Next, the
15 Inventory cites various studies regarding buffer sizes including buffers up to 300-450 feet for
16 marine shorelines depending on certain factors, 288-foot buffers for wildlife habitat
17 requirements, and the effectiveness of buffers for water quality when they vary from 50 feet
18 to 300 feet.¹⁶⁰ Similarly, the Cumulative Impact Analysis provides the County with
19 information about the effects of development impacts to its shorelines over time. The
20 analysis documents current conditions, likely future development and recommends actions
21 required in RCW 90.58 to ensure "no net loss of ecological functions and protection of other
22 shoreline functions."¹⁶¹

23 OSF's skeletal arguments about a "justification for buffers chosen,"¹⁶² or "ignoring
24 reports which supported reasonably smaller buffers,"¹⁶³ or "mere citation to scientific studies
25

26
27
28
29
30 ¹⁵⁹ WAC 173-26-201(3) Steps in preparing and amending a master program. See specifically WAC 173-26-
31 201(3)(d)(iii) Addressing cumulative impacts in developing master programs and (viii) Vegetation
32 conservation.

¹⁶⁰ *Id.* at 5-7.

¹⁶¹ OFS Ex. 350 and ECY 000082, Jefferson County -- Shoreline Master Program Update -- *Cumulative
Impacts Analysis (CIA)* (February 2010) at 3.

¹⁶² OFS Brief at 28.

¹⁶³ *Id.* at 29.

1 is not enough: there must be actual analysis and application to the location
2 circumstances¹⁶⁴, are not substantiated with legal analysis showing how the County
3 violated statute or administrative code. Rather, the Board finds the County's scientific
4 analysis extensive and intensive as it assembled over 600 scientific reports, analyzed
5 impacts of various policies and finally adopted an SMP which accommodates a variety of
6 shoreline uses and provides exemptions and conditional uses for landowners and
7 businesses.¹⁶⁵ Specifically, SI Chapter 6 cites twenty pages of scientific articles which were
8 discussed publicly and reviewed and approved by Ecology to satisfy the inventory
9 requirements in WAC 173-26.¹⁶⁶ SMP Article 6 allows buffer reductions, averaging and
10 alternative protections via stewardship plans thus allowing the County flexibility when
11 assisting shoreline property owners to develop their land.¹⁶⁷

14 *Nexus and Proportionality*

15 As the Board stated in its Second Amended Prehearing Order, the Board lacks
16 jurisdiction to address constitutional issues and will not address OSF's claims regarding
17 nexus, proportionality, and reasonable necessity limits on government.

19 For General Issue 3, OSF has not met its burden to establish the County failed to
20 meet requirements in the SMA or Guidelines regarding excessive buffers, vegetation
21 conservation, or flawed science.

22 **For General Issue 3, the Board finds and concludes OSF has not carried its**
23 **burden of proof demonstrating the County is non-compliant with WAC 173-26-221(2).**

25 General Issue No. 4

26 Whether incorporation of the Jefferson County Critical Areas Ordinance ("CAO") into the
27 SMP by reference is illegal? (Discussing OSF Issue No. 9 in Second Prehearing Order)

29 ¹⁶⁴ *Id.* at 27.

30 ¹⁶⁵ OSF Ex. 124 and ECY004177, Ch. 6, *Jefferson County Final Shoreline Inventory and Characterization*
31 *Report (SI) – Revised November 2008*; and OFS Ex. 350 and ECY 000082, *Jefferson County -- Shoreline*
32 *Master Program Update -- Cumulative Impacts Analysis (CIA) (February 2010)*. See also Article 6 from the
SMP as adopted by Ord. 07-2126-13 for a discussion of policies governing critical areas and vegetation
conservation.

¹⁶⁶ OSF Ex. 124 and ECY003927, *Jefferson County Final Shoreline Inventory and Characterization Report (SI)*
– *Revised November 2008* at Ch. 6.

¹⁶⁷ SMP Article 6 – General Policies & Regulations at 6-6.

1 9. Whether the SMP's incorporation by reference of provisions of Jefferson
2 County's Critical Areas Ordinance, and the resultant use of Growth Management Act
3 standards found in the CAO in lieu of Shoreline Management Act policies regulating
4 development and uses in or near designated critical areas within shoreline areas, is
5 outside of the authority granted by the SMA?

6 **Applicable Laws**

7 OSF's Issue statement lacks specific statutory citations, but asserts incorporation of
8 the CAO into the County's SMP was "illegal". Ecology elected to reply to OSF's arguments
9 and OSF included argument of alleged statutory and rule violation in their prehearing brief
10 regarding General Issue 4 (OSF Issue 9). Consequently, the Board will consider two legal
11 citations debated by the parties:

- 12 • WAC 365-190-080
- 13 • WAC 365-190-130
- 14 • RCW 36.70A.030
- 15 • RCW 36.70A.060
- 16 • RCW 36.70A.480(5)
- 17 • RCW 90.58.020

18
19 **Position of the Parties**

20 OSF argues incorporating the CAO into the SMP violates the SMA. It states Ecology
21 has no authority to approve a CAO but that by approving the SMP by default it approved the
22 CAO.¹⁶⁸ In *KAPO*,¹⁶⁹ OSF argues the court held that only one system may be in effect at
23 any one time. Allowing the "blanket incorporation" of the CAO into the SMP ignores "the law"
24 by failing to maintain two separate regulatory systems. Incorporating 150-foot buffers from
25 the CAO into the SMP, without analyzing consistency with the SMA, is "clear legal error."¹⁷⁰
26 The County ignored Ecology's 2010 regulations in WAC 365-190 and instead used
27 outdated 2009 CAO requirements.¹⁷¹ Lastly, OSF contends the County violated RCW
28 36.70A.480(5) and WAC 365-190-030 when it incorporated CAOs into the SMP¹⁷² because
29
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31 ¹⁶⁸ OSF Prehearing Brief at 27.

32 ¹⁶⁹ *Kitsap Alliance of Property Owners v. CPSGMHB*, 152 Wn. App. 190, 217 P.3d 365 (2009) (*KAPO I*).

¹⁷⁰ *Id.* At 28.

¹⁷¹ *Id.* At 29.

¹⁷² *Id.* at 32.

1 (1) imposing a CAO 150-foot buffer on Jefferson County's shorelines is illegal because the
2 County has no authority to implement the Endangered Species Act, (2) imposing the 150-
3 foot buffer because the shorelines could be ESA species habitat is illegal and not supported
4 by the record, (3) the County has not established that all marine areas and associated
5 uplands are critical for fish and wildlife to warrant an "over-inclusive critical area buffer."¹⁷³

6
7 Respondent Ecology explains legislative actions and court decisions have clarified
8 the role of CAOs in SMPs. Briefly stated, the 2010 Legislature amended RCW 36.70A.480
9 to explain that CAOs, adopted under GMA, apply in a shoreline jurisdiction until Ecology
10 approves a "comprehensive update under the SMA Guidelines, at which time the critical
11 areas in shorelines will be regulated exclusively under the SMA."¹⁷⁴ Incorporation is allowed
12 by Ecology as long as the CAO meets the No Net Loss requirement in RCW 36.70A.480
13 (4).¹⁷⁵ Ecology states it does not review and approve CAOs for compliance with the GMA.
14 Rather, Ecology's role is to ensure a CAO provides a "level of protection to critical areas
15 located within the shorelines of the state that assures no net loss of shoreline ecological
16 functions . . . pursuant to RCW 90.58.060."¹⁷⁶ As outlined in *Kitsap Alliance of Property*
17 *Owners v. CPSGMHB*, incorporating the CAO into the SMP "perfects the transfer of the
18 protection of critical areas [in the shoreline] from the GMA to the SMA."¹⁷⁷ Next, Ecology
19 explains the SMP buffers are not in conflict with the CAO buffers because the SMP does not
20 rely solely on CAO buffers. Instead, the SMP 150-foot buffer was independently
21
22

23 ¹⁷³ *Id.* at 31.

24 ¹⁷⁴ Ecology Brief at 21.

25 ¹⁷⁵ RCW 36.70A.480 (4) "Shoreline master programs shall provide a level of protection to critical areas located
26 within shorelines of the state that assures no net loss of shoreline ecological functions necessary to sustain
27 shoreline natural resources as defined by department of ecology guidelines adopted pursuant to RCW
90.58.060."

27 ¹⁷⁶ Ecology Brief at 23.

28 ¹⁷⁷ *Id.* at 22-23 See also Ecology's n. 124 describing the differences between KAPO I and KAPO II: IR
29 ECY008920; *Lake Burien Neighborhood v. City of Burien*, CPSGMHB No. 13-3-0012, at 11 (Jun. 16, 2014); IR
30 ECY007296-97 (SMP Art. 6.1.D.). **OSF is incorrect in stating that this approach is inconsistent with the**
31 **court's decision in *Kitsap Alliance of Property Owners v. CPSGMHB*, 160 Wn. App. 250, 255 P.3d 969**
32 **(2011) (KAPO II).** In *KAPO II*, the court upheld the retroactivity of the amendment to RCW 36.70A.480,
clarifying that the GMA was to regulate critical areas in shorelines until the SMP is updated. More likely OSF
meant to refer to *KAPO I* in which the court stated that "only one plan—the SMA plan—can be in effect at one
time." *Id.* at 198. The court was referring not to incorporation of CAO provisions into a SMP, but rather the
regulation of shoreline critical areas under the SMA versus the GMA. The SMP is consistent with *KAPO I* as it
regulates critical areas solely under the SMA, in part by incorporating the CAO into the SMP and also by
including supplemental provisions in the SMP.

1 established by the County based on a review of science and existing conditions in the
2 County.¹⁷⁸ In addition, some alterations to the buffer requirement may be made for water-
3 dependent and water-related structures.¹⁷⁹ Ecology notes that, to the extent OSF makes a
4 collateral attack on the CAO, the deadline for such a challenge is well past.¹⁸⁰
5

6 Discussion, Analysis, and Board Conclusion

7 A jurisdiction's CAO applies to critical areas within SMA jurisdiction until DOE either
8 approves a comprehensive SMP update consistent with the Guidelines, or a segment
9 (limited) SMP amendment specifically addressing critical areas. Following DOE approval of
10 the SMP it alone provides critical area protection within shoreline jurisdiction. Jefferson
11 County's decision to incorporate its CAO into the SMP was proper and appropriate. WAC
12 173-26-191(2)(b) addresses that option for meeting SMA requirements:
13

14 **Including other documents in a master program by reference.**

15 Shoreline master program provisions sometimes address similar issues as
16 other comprehensive plan elements and development regulations, such as
17 the zoning code and **critical area ordinance**. For the purposes of
18 completeness and consistency, **local governments may include other**
19 **locally adopted policies and regulations within their master programs.**
20 **For example, a local government may include its critical area ordinance**
21 **in the master program to provide for compliance with the requirements**
22 **of RCW 90.58.090(4), provided the critical area ordinance is also**
23 **consistent with this chapter.** This can ensure that local master programs
24 are consistent with other regulations. (emphasis added)

25 Contrary to OSF's argument, Ecology did not **approve** the County's CAO when it
26 approved the SMP which in turn had incorporated the CAO. Instead, DOE simply assured
27 through its review that the incorporated CAO met the "no net loss of ecological functions"
28 requirements for SMPs prescribed in RCW 90.58.060 and as referenced in RCW
29 36.70A.480(4).
30
31
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¹⁷⁸ *Id.* at 23.

¹⁷⁹ *Id.* at 24 and IR ECY 007389 (SMP Article 8.8.D.2).

¹⁸⁰ *Id.* at 25.

1 For General Issue 4, OSF has not met its burden to establish the County failed to
2 meet requirements in the SMA or Guidelines regarding incorporation of the County's Critical
3 Area Ordinance into the SMP.

4 **For General Issue 4, the Board finds and concludes OSF has not carried its**
5 **burden of proof to establish any violation of the SMA, the applicable guidelines or the**
6 **applicable sections of the GMA.**
7

8 **General Issue No. 5**

9 Whether the SMP illegally requires mandatory restoration as a condition of approval of a
10 shoreline permit application? (Discussing OSF Issue No. 11 in the Second Prehearing
11 Order)

12 11. Does the SMP impermissibly require restoration as a cost or condition of
13 approving shoreline developments or uses (e.g. Art. 1(3)(G)(6), Art. 3(1)(B)(30(4)) in
14 conflict with RCW 90.58.020 and/or WAC 173-26-186(4) and (8)(C)?
15

16 **Applicable Laws**

- 17 • RCW 90.58.020
- 18 • WAC 173-26-186

19 **Position of the Parties**

20 OSF contends the County over-emphasizes the need to restore ecosystem functions
21 at the expense of property owners. The SMP, in OSF's opinion, violates the balancing
22 requirements in the SMA (90.58.020) and the governing principles in the administrative
23 codes because the SMP contains so many references to "restore or restoration."¹⁸¹ OSF
24 argues the SMP also imposes "illegal hurdles on shoreline permitting" in violation of private
25 property rights and preferred uses under the SMA.¹⁸²
26
27

28 Respondent Ecology states OSF relies on an overly simplistic view of the SMP. The
29 number of times the words "restore or restoration" are used does not warrant a finding of
30 non-compliance. Nor do the goals, in alphabetical order, deserve a finding of non-
31 compliance. Ecology explains SMA guidelines require jurisdictions to identify "policies and
32

¹⁸¹ OSF Brief at 32. "This is made abundantly clear by searching the enactment for the terms "restore" and "restoration." There are 141 hits throughout the text!"

¹⁸² OSF Brief at 33.

1 programs that contribute to the restoration of impaired ecological functions.”¹⁸³ Finally,
2 Ecology explains “there is a regulatory backstop to ensure that the County implements
3 these requirements so as to “not unconstitutionally infringe on private property rights or
4 result in an unconstitutional taking of private property.”¹⁸⁴
5

6 Discussion, Analysis, and Board Conclusion

7 Substituting its own determination of what is “balanced” or “permissible” for that of the
8 Legislature, Ecology, and the County Commission does not make OSF’s arguments
9 compelling or suffice to demonstrate violations of RCW 90.58.020 or WAC 173-26-186. To
10 the contrary, one of the Guideline sections OSF asserts was violated **requires** the County to
11 include restoration and enhancement goals:
12

13 For counties and cities containing any shorelines with impaired ecological
14 functions, master programs **shall include** goals and policies that provide for
15 restoration of such impaired ecological functions. These master program
16 provisions **shall identify** existing policies and programs that contribute to
17 planned restoration goals and identify any additional policies and programs
18 that local government will implement to achieve its goals. WAC 173-26-
186(8)(c)

19 The County complied in SMP Article 3.6 by stating its goals are to “reestablish, rehabilitate
20 and improve impaired shoreline ecological functions, values and/or processes.”¹⁸⁵ This is
21 not a violation of law, rather it implements the law. The number of times the SMP contains
22 the words “restore” or “restoration” fails to constitute a violation of the law.
23

24 For General Issue 5, OSF has not met its burden to establish the County failed to
25 meet requirements in the SMA or Guidelines regarding restoration of ecological functions.

26 **For General Issue 5, the Board finds and concludes OSF failed to carry its**
27 **burden of proof to show the County violated RCW 90.58.020 or WAC 173-26-186.**
28

29 General Issue No. 6

30 Whether the SMP impermissibly over designates shorelines as “natural” and “conservancy?”
31 (Discussing OSF Issue No. 12 in Second Prehearing Order)
32

¹⁸³ Ecology Brief at 26.

¹⁸⁴ IR ECY007227 (SMP Art. 1.3.D).

¹⁸⁵ SMP, Article 3 at 3-4.

1 12. Whether the SMP over-designates shorelines and lands as "Natural" and
2 "Conservancy" in violation of WAC 173-26-211(3)(a), WAC 173-26-191(1)(e), WAC
3 173-26-211(5)(a)(1), WAC 173-26-211(5)(a)(iii), and WAC 173-26-211(5)(b)(1)

4 **Applicable Laws**¹⁸⁶

- 5 • WAC 173-26-211

7 **Position of the Parties**

8 OSF argues the County over-designated Natural Shoreline Designation to include
9 41% of the County's shorelines. OSF states the SMA Guidelines require designation to be
10 based on existing land use patterns and other criteria from WAC 173-26-211(2)(a) and the
11 designations must be consistent with comprehensive land use plans as stated in WAC 173-
12 26-211(3). Respondent Jefferson County explains it developed appropriate criteria for each
13 environmental designation using the SMA Guidelines and criteria from WAC 173-26-211
14 (5)(a) for "Natural" areas.
15

17 **Discussion, Analysis, and Board Conclusion**

18 OSF does not provide legal argument demonstrating how the County violated the
19 processes and criteria in the SMA Guidelines. OSF cites no authority to bolster its claim
20 that the County "over-designated" natural areas. The SMP criteria used to designate
21 shorelines are from WAC 173-26-211 and are required to be consistent with the County's
22 comprehensive plan:
23

24 2. Shoreline Environment Designations – Purpose and Criteria

25 A. Shoreline environment designations have been developed as a part of
26 this Program **in accordance with WAC 173-26-211**. The designations
27 provide a systematic, rational, and equitable basis upon which to guide
28 and regulate use and development within specific shoreline planning
29 areas.¹⁸⁷

29 B. Shoreline environment designations are based on the following
30 general factors, not listed in order of priority. . .

31 3. Existing and planned development patterns, including County
32 Comprehensive Plan designations; and

¹⁸⁶ For lack of legal argument, WAC 173-26-191 is considered abandoned.

¹⁸⁷ SMP Article 4 at 4-2.

1 4. The County Comprehensive Plan goals for shorelines¹⁸⁸

2 In reviewing SMP Article 4, the Board determines the County's SMP meets SMA Guideline
3 requirements. **For General Issue 6, the Board finds and concludes OSF failed to make**
4 **a compelling argument that natural or conservancy areas are over designated and**
5 **failed to carry its burden of proof to show the County violated WAC 173-26-211.**
6

7
8 **General Issue No. 7**

9 Whether the SMP was adopted under illegal procedures or process? (Addressing OSF
10 Issue No. 10 Second Prehearing Order)

11 10. Whether Ecology and the County violated mandated processes for approval of a
12 new SMP including but not limited to (a) the quality and timing of its Final Cumulative
13 Impact Assessment and SI and (b) the requirement to foster meaningful comment
14 and reasonably consider public comment?

15 **Applicable Laws**

16 None cited by OSF.
17

18
19 **Position of the Parties**

20 OSF Petitioners defer to the arguments in Hood Canal's Issue 2 on procedural error
21 issues. However, OSF makes several claims regarding staff comments and attitudes during
22 the SMP adoption process and about Ecology staff playing an "inappropriate role" to obtain
23 a "staff version" of the SMP and staff opinions. OSF accuses Ecology of providing policy
24 directives rather than technical assistance.¹⁸⁹ Jefferson County does not reply to the claims
25 about staff. Respondent Ecology states OSF complaints are "not within the scope of the
26 legal issues identified for appeal, nor is it an accurate description of the update process."¹⁹⁰
27
28

29 **Discussion, Analysis, and Board Conclusion**

30 OSF claims about staff attitudes or comments are not within the scope of the Board's
31 jurisdiction. Neither has OSF made any compelling legal arguments showing how staff work
32

¹⁸⁸ *Id.* at 4-2.

¹⁸⁹ OSF Prehearing Brief at 35-36.

¹⁹⁰ Ecology Brief at 24.

1 or attitudes violated any statute or administrative code. As for the public involvement and
2 comment process conducted by Respondents, the Board directs the reader to Hood Canal
3 Issue 2.

4 **For OSF General Issue 7, the Board finds and concludes OSF failed to carry its**
5 **burden of proof to establish any SMA violation.**
6

7 **General Issue No. 8**

8 Is the SMP internally inconsistent and inconsistent with the Jefferson County
9 Comprehensive Plan? (*Discussing OSF Issue No. 2 in Second Prehearing Order*)
10

11 2. Did Ordinance No. 07-1216-3 fail to comply with SMA policies RCW 90.58.020,
12 .030, .065, .090, .100(6), .130, .250, .270, .340, .620, and/or .710; the State
13 Guidelines (WAC Chapter 173-26), the Growth Management Act goals and
14 requirements, RCW 36.70A.480(3)(a) and (5) including internal consistency and
15 consistency with the Comprehensive Plan because the SMP unduly emphasized
16 aesthetics; did not balance reasonable uses; failed to address beneficial uses; failed
to balance SMA values; failed to protect property rights; etc.?

17 **Applicable Laws**¹⁹¹

- 18 • RCW 36.70A.070
 - 19 • RCW 36.70A.480
 - 20 • RCW 90.58.190(2)(b)
- 21
22

23 **Position of the Parties, Discussion, Analysis, and Board Conclusion**

24 OSF's General Issue 8 alleges the SMP violates the SMA and the Guidelines, but
25 focuses its argument solely on what are described as "inconsistencies." OSF correctly
26 observes internal inconsistency is required and that Board review includes jurisdiction to
27 consider such claims pursuant to the provisions of RCW 36.70A.070 (preamble) and RCW
28 36.70A.040(4). OSF cites RCW 90.58.190(2)(b) and RCW 36.70A.480(3):
29

30 RCW 90.58.190(2)(b) If the appeal to the growth management hearings
31 board concerns shorelines, the growth management hearings board shall
32 review the proposed master program or amendment solely for compliance

¹⁹¹ For lack of legal argument, the following are considered abandoned: RCW 90.58.020; RCW 90.58.030;
RCW 90.58.065; RCW 90.58.090; RCW 90.58.100(6); RCW 90.58.130; RCW 90.58.250; RCW 90.58.270;
RCW 90.58.340; RCW 90.58.620, RCW 90.58.710(sic); and WAC Chapter 173-26.

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with the requirements of this chapter, the policy of RCW 90.58.020 and the applicable guidelines, the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and chapter 43.21C RCW as it relates to the adoption of master programs and amendments under chapter 90.58 RCW.

RCW 36.70A.480(3)(a) The policies, goals, and provisions of chapter 90.58 RCW and applicable guidelines shall be the sole basis for determining compliance of a shoreline master program with this chapter except as the shoreline master program is required to comply with the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105.

Two of the statutes referenced above, RCW 35.63.125 and 35A.63.105, are applicable to cities and towns not planning under RCW 36.70A.040. RCW 36.70A.040(4) applies solely to counties which chose to conform to GMA requirements. Jefferson County is not one of those counties; it was **required** to conform.¹⁹² Consequently, the Board's consideration of OSF's inconsistency claims are to be reviewed pursuant to RCW 36.70A.070 (preamble) and RCW 36.70A.480(1):

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. **The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.** A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140. (emphasis added)

RCW 36.70A.480(1) For shorelines of the state, the goals and policies of the shoreline management act as set forth in RCW 90.58.020 are added as one of the goals of this chapter as set forth in RCW 36.70A.020 without creating an order of priority among the fourteen goals. **The goals and policies of a shoreline master program for a county or city approved under chapter 90.58 RCW shall be considered an element of the county or city's comprehensive plan.** All other portions of the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the county or city's development regulations. (emphasis added)

¹⁹² RCW 36.70A.040.

1 OSF reads those statutes to mean “. . . that a SMP must be consistent with
2 Comprehensive Plan policies.”¹⁹³ However, OSF’s interpretation leaves out a significant
3 qualifier: it is the goals and policies of the SMP that must be consistent with the
4 comprehensive plan goals policies under RCW 36.70A.070. OSF completes that quoted
5 sentence with the statement “. . . and its own [the SMP] provisions must be internally
6 consistent.” That statement is accurate if, and only if, the word “provisions” refers to the
7 SMP’s policies. Consistency between comprehensive plan policies (including SMP policies)
8 and a jurisdiction’s development regulations is not a requirement covered by RCW
9 36.70A.070’s preamble.¹⁹⁴ In this case it is necessary to show that no goal or policy of the
10 challenged SMA precludes the achievement of a comprehensive plan goal or policy or vice
11 versa.¹⁹⁵

12
13 Further, based on the alleged violations in OSF’s General Issue 8 and the briefing
14 submitted, the inconsistency claims raised are within the Board’s jurisdiction only when they
15 are raised in relationship to shorelines, not shorelines of statewide significance. RCW
16 90.58.190(2)(b) and (c).¹⁹⁶ The Board examined OSF’s specific examples of alleged
17 inconsistencies as follows:
18

19
20 ¹⁹³ OSF Brief, p. 37.

21 ¹⁹⁴ The goals and policies of a SMP are considered an element of the County’s comprehensive plan. Other
22 portions of an SMP are considered to be development regulations. RCW 36.70A.480(1).
23 *Weyerhaeuser v. Thurston County*, GMHB Case No. 0-2-0020c, AFDO, p. 15 “RCW 36.70A.070 requires the
24 internal consistency of comprehensive plan policies, not consistency between a comprehensive plan and
25 development regulations. An RCW 36.70A.070 (Preamble) claim cannot rest on inconsistency with the
26 County’s “critical area regulations”. AFDO 6/17/11.

27 ¹⁹⁵ Under the GMA, a comprehensive plan must be “an **internally consistent document** and all elements
28 shall be consistent with the future land use map.” RCW 36.70A.070 (emphasis added). This requirement
29 means that differing parts of the comprehensive plan “must fit together so that no one feature precludes the
30 achievement of any other.” WAC 365-196-500(1). *Brinnon Grp. v. Jefferson County*, 159 Wn. App. 446, 476-
31 477 (Wash. Ct. App. 2011).

32 WAC 365-196-500. “Internal consistency. (1) Comprehensive plans must be Internally consistent. This
requirement means that differing parts of the comprehensive plan must fit together so that no one feature
precludes the achievement of any other.” See also *Brinnon Group v. Jefferson County*, GMHB Case No. 08-2-
0014, FDO, at 20 (Sept. 15, 2008). “Consistency means that no feature of the plan or regulation is
incompatible with any other feature of the plan or regulation; no feature of one plan may preclude achievement
of any other feature of that plan or any other plan.”

¹⁹⁶ RCW 90.58.190(2)(b). “If the appeal to the growth management hearings board concerns shorelines, the
growth management hearings board shall review the proposed master program or amendment solely for
compliance with the requirements of this chapter, the policy of RCW 90.58.020 and the applicable guidelines,
the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and
chapter 43.21C RCW as it relates to the adoption of master programs and amendments under chapter 90.58

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- OSF states the SMP criteria are “inconsistent with the SMA, and the State Guidelines.”¹⁹⁷
- The County and Ecology use “different definitions of NNL” and “none of these definitions are consistent with SMA balancing policies found in RCW 90.58.020.”¹⁹⁸
- “The Plan has strong policies to protect existing lots of record and property rights.” “The new SMP’s treatment of nonconforming uses and existing lots of record is inconsistent with the Comprehensive Plan in some major respects.”¹⁹⁹
- “The New SMP has a strong prejudice against any commercial uses in SMA regulated areas. However, the Comprehensive Plan provides for policies to protect legally existing uses, home based businesses, and cottage industries . . .” citing the plan provisions for preservation of rural character and promotion of rural lifestyle, including the opportunity to live and work in rural areas.²⁰⁰
- The Comprehensive Plan seeks to preserve marine trades, agriculture, and natural resource jobs. “Yet, the New SMP does nothing to promote these traditional industries.”²⁰¹
- “The CP encourages affordable housing.” In contrast, OSF states the SMP’s use of buffers, and vegetation “set asides” conflicts with that policy.²⁰²
- The CP includes a goal to improve the climate for economic development, including the recruitment of industry, retention of existing businesses and

RCW.”
RCW 90.58.190(2)(c). “If the appeal to the growth management hearings board concerns a shoreline of statewide significance, the board shall uphold the decision by the department unless the board, by clear and convincing evidence, determines that the decision of the department is noncompliant with the policy of RCW 90.58.020 or the applicable guidelines, or ch. 43.21C RCW as it relates to the adoption of master programs and amendments under this chapter.”

¹⁹⁷ OSF Brief at 15 and 18.
¹⁹⁸ OSF Brief at 18.
¹⁹⁹ OSF Brief at 37.
²⁰⁰ *Id.*
²⁰¹ *Id.*
²⁰² *Id.*

1 promoting tourism. On the other hand, OSF states the SMP "unduly restricts
2 construction of facilities which promote access to the waters of the state ..."²⁰³

- 3 • The new SMP expands restrictive shoreline designations and, when considered in
4 relationship to the Use Matrix, new commercial development will be precluded.²⁰⁴

5 The first two allegations set forth above do not raise internal inconsistency arguments
6 under RCW 36.70A.070 (preamble). Neither inconsistency "with the SMA, and the State
7 Guidelines" nor the definition of NNL constitute allegations regarding goals or policies. The
8 remaining allegations could possibly raise internal inconsistencies, but OSF falls far short of
9 establishing that any "feature precludes the achievement of any other"²⁰⁵ when it fails to
10 cite any mutually exclusive provisions. Mere conclusory statements alleging inconsistency
11 without substantial evidence, are insufficient to meet a petitioner's burden. Rather, it is
12 imperative to show how a specific goal or policy is thwarted by some other specific goal(s)
13 or policy(ies). OSF has not met that standard. **For General Issue 8, the Board finds and
14 concludes OSF has failed to meet its burden of proof to establish any internal
15 inconsistencies under RCW 36.70A.070 or RCW 36.70A.480.**
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19 **B. Citizen Alliance for Property Rights (CAPR)**

20 **First General Issue**

21 Respondents failed to adequately "[u]tilize a systematic interdisciplinary approach which will
22 insure the integrated use of the natural and social sciences and the environmental design
23 arts" as required by RCW 90.58.020, 100(1) and 100(2), and .620, and WAC 173-26-
24 201(2), 211, 221(2), 231(2), 241(2), (3), and 251(3). The SMA requires that respondents
25 "[c]onduct or support such further research, studies, surveys, and interviews as are deemed
26 necessary." *Id.* CAPR argues that this was not done and thereby the SMP is flawed by
27 respondents' failure to: 1. Buttress their regulatory prescriptions by physical and biologic
28 science; and 2. Adequately take into account the social sciences, particularly economics.
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²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Brinnon Grp. v. Jefferson County*, 159 Wn. App. 446, 476-477 (Wash. Ct. App. 2011).

1 **Applicable Laws**²⁰⁶

- 2 • RCW 90.58.020
- 3 • RCW 90.58.100(1) and (2)
- 4 • RCW 90.58.620
- 5 • WAC 173-26-201(2)
- 6 • WAC 173-26-211
- 7 • WAC 173-26-221(2)
- 8 • WAC 173-26-231(2)
- 9 • WAC 173-26-241(2) and (3)
- 9 • WAC 173-26-251(3)

10 **Position of the Parties**

11 In its opening brief, CAPR fails to address its Issue 1 alleged violations of WAC 173-
12 26-211, WAC 173-26-221(2), WAC 173-26-231(2), WAC 173-26-241(2) or WAC 173-26-
13 251(3).²⁰⁷ Merely alleging a statute or rule was violated without presenting argument
14 constitutes abandonment of the issue. Allegations of violations of those WAC sections are
15 dismissed. Additionally, CAPR's Issue 1 argument alleges violations of WAC 173-26-
16 186(8)(a),²⁰⁸ a WAC not identified within CAPR's First General Issue, including the
17 "[p]articular issues to be argued under First General Issue".²⁰⁹ WAC 242-03-210(2)(c)
18 requires a petitioner to include in a Petition for Review "[a] detailed statement of the issues
19 presented for resolution by the board that **specifies the provision(s) of the act or other**
20 **statute allegedly being violated** and, if applicable, the provision(s) of the document that is
21 being appealed."²¹⁰ (Emphasis supplied.) The alleged violation of WAC 173-26-186(8)(a)
22 will not be considered.
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27 ²⁰⁶ For lack of legal argument, the following are considered abandoned: WAC 173-26-211, WAC 173-26-
28 221(2), WAC 173-26-231(2) and WAC 173-26-251(3).

29 ²⁰⁷ The section of CAPR's opening brief addressing Issue 1 concludes with: "Upon the arguments here
30 advanced, the SMP violates RCW 90.58.020, 100(1) and 100(2), and .620, and WAC 173-26-201(2), 211,
31 221(2), 231(2), 241(2), (3), and 251(3)." CAPR Brief, p. 15. Yet the argument in the brief fails to reference
32 WAC 173-26-211, WAC 173-26-221(2), WAC 173-26-231(2), WAC 173-26-241(2) or WAC 173-26-251(3).

²⁰⁸ CAPR Brief, p. 13.

²⁰⁹ See Prehearing Order and Order Granting Settlement Extension, May 23, 2014, p. 24-25.

²¹⁰ RCW 36.70A.290(1): The board shall not issue advisory opinions on issues not presented to the board in
the statement of issues, as modified by any prehearing order. *Samson v. City of Bainbridge Island*, Case No.
04-3-0013, p. 5, Order on Motions; *Hood Canal v. Kitsap County*, Case No. 06-3-0012c, FDO, August 28,
2006, p. 25; *Cotton v. Jefferson County*, Case No. 98-2-0017, Amended FDO, April 5, 1999, p. 4.

1 CAPR's remaining argument related to this issue has two facets: alleged failures to
2 incorporate economic analysis as well as inadequate scientific support for many of the
3 regulatory measures, particularly those affecting residential shoreland property owners.
4

5 **A. Economic Analysis**

6 CAPR specifically cites RCW 90.58.100(1) and (2), which it notes includes a directive
7 for local government to use economics in crafting SMPs and to include an economic
8 development element in the document.
9

10 RCW 90.58.100(1)(a) and (2)(a):

11 (1) The master programs provided for in this chapter, when adopted or
12 approved by the department shall constitute use regulations for the various
13 shorelines of the state. In preparing the master programs, and any
14 amendments thereto, the department and local governments shall to the
15 extent feasible: (a) Utilize a systematic interdisciplinary approach which will
16 insure the integrated use of the natural and social sciences and the
17 environmental design arts . . . (e) Utilize all available information regarding
18 hydrology, geography, topography, ecology, economics, and other pertinent
19 data;

20 (2) The master programs shall include, when appropriate, the following: (a)
21 An economic development element for the location and design of industries,
22 projects of statewide significance, transportation facilities, port facilities,
23 tourist facilities, commerce and other developments that are particularly
24 dependent on their location on or use of the shorelines of the state;

25 This petitioner complains there is no analysis anywhere in the record addressing the
26 economic impact of "increased buffers . . . greater permitting hurdles . . . creation of
27 nonconforming uses and structures" on "property values, property insurance rates,
28 opportunities for financing and refinancing, or costs of regulatory compliance."²¹¹ CAPR
29 contends the County failed to either identify or incorporate the social science of
30 economics.²¹² In support of that allegation, CAPR observes the *Bibliography of Scientific*
31 *and Technical Information Considered* includes no reference to economics, that concerns
32 about economic impacts were raised repeatedly, yet the County only provided "a repetitive

²¹¹ CAPR Brief, p. 6.

²¹² *Id.*, p. 7.

1 collection of patently inadequate responses²¹³ and, finally, that the County's "dismissive
2 attitude" was evidenced by its failure to take advantage of the RCW 90.58.620's allowance
3 for classifying structures, which would be nonconforming under the new SMP as legally
4 conforming.²¹⁴

5 CAPR expresses concern that the SMP regulations' economic impact on property
6 owners was an issue raised repeatedly to Jefferson County's Planning Commission and
7 Board of County Commissioners. The record is replete with comments addressing those
8 impacts, including the County's decision to not authorize categorizing use locations as
9 conforming solely because they were in compliance with applicable regulations when
10 constructed, as allowed by RCW 90.58.620.²¹⁵ As some of the petitioners have noted, the
11 SMA seeks to **balance** accommodation of shoreline use and access with protection of
12 environmental resources. "[U]ses shall be preferred which are consistent with control of
13 pollution and prevention of damage to the natural environment, or are unique to or
14 dependent upon use of the state's shorelines."²¹⁶ Thus, for example, single-family
15 residences are a preferred use, but all uses, including preferred ones, also must be
16 regulated so as to protect shoreline natural resources, including ". . . the land and its
17 vegetation and wildlife, and the water of the state and their aquatic life. . . ."²¹⁷

18
19
20 As the County points out, it opted to strike the required balance by allowing various
21 uses in specific Shoreline Environment Designations (SEDs) and by authorizing other uses
22 pursuant to the conditional use permit process (CUP). Economic feasibility of regulatory
23 compliance was factored in to many of the County's goals and regulations through
24 consideration of "feasibility". For example, "feasible alternative" is defined in part as an
25 alternative that "can be accomplished at a reasonable cost."²¹⁸ That and similar words and
26 phrases are included throughout the SMP's goals and regulations. Examples include the
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31 ²¹³ *Id.*, pp. 6, 7.

32 ²¹⁴ *Id.*, pp. 8, 9.

²¹⁵ RCW 90.58.620.

²¹⁶ RCW 90.58.020.

²¹⁷ *Id.*

²¹⁸ Article 2, p. 2-16.

1 public access regulations,²¹⁹ flood control structures,²²⁰ provision of parking at marinas, and
2 shoreline armoring.²²¹ Returning to RCW 90.58.620(1), the County had the option to use
3 the provisions of that statute, but was not required to do so.²²² The law is not violated when
4 the jurisdiction chooses not to exercise every option it **could** exercise.

5
6 **B. Lack of Science**

7 CAPR argues the SMP's regulatory framework is unsupported by adequate science.
8 It states the County's CIA and Final SI are incomplete, lacking "field verification, and a
9 thorough analysis of existing conditions," being "based only upon photos and literature."²²³

10 CAPR cites RCW 90.58.100(1)(d) and WAC 173-26-201(3)(c) which provide:

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

15 (d) Conduct or support such further research, studies, surveys, and
16 interviews as are deemed necessary; RCW 90.58.100(1)(d)

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

19 (i) Shoreline and adjacent land use patterns and transportation and utility
20 facilities, including the extent of existing structures, impervious surfaces,
21 vegetation, and shoreline modifications in shoreline jurisdiction. Special
22 attention should be paid to identification of ecologically intact blocks of
23 upland vegetation, developed areas with largely intact riparian vegetation,
24 water-oriented uses and related navigation, transportation and utility facilities.
25 WAC 173-26-201(3)(c).

26
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28 ²¹⁹ Article 6, p. 6-17.

29 ²²⁰ Article 7, p. 7-22.

30 ²²¹ Article 7, p. 7-30.

31 ²²² RCW 90.58.620. "(1) New or amended master programs approved by the department on or after
32 September 1, 2011, may include provisions authorizing: (a) Residential structures and appurtenant structures
that were legally established and are used for a conforming use, but that do not meet standards for the
following to be considered a conforming structure: Setbacks, buffers, or yards; area; bulk; height; or density;
and (b) Redevelopment, expansion, change with the class of occupancy, or replacement of the residential
structure if it is consistent with the master program, including requirements for no net loss of shoreline
ecological functions."

²²³ CAPR Brief, p. 12.

1 It contends the SI is merely "a list of what is on the shorelines of Jefferson County . . .
2 [and] is not an analysis and consideration of the trade-offs explicit in the Shoreline
3 Management Act's call to 'utilize a systematic approach, which will ensure the integrated
4 use of the natural and social sciences . . .'"²²⁴ It states the SI lacks sufficient detail
5 regarding actual conditions and instead the SMP "places the burden on property owners ...
6 to assess impacts and identify the shoreline environment."²²⁵ The CIA is also criticized,
7 CAPR stating it fails to adequately consider the effectiveness of existing regulatory systems
8 and current conditions.²²⁶ CAPR argues the CIA assumes impacts without actually
9 documenting them.
10

11 Finally, it contends there is no science in the record justifying the establishment of
12 150-foot buffers. CAPR observes the prior SMP included 30-foot shoreline setbacks, that
13 the CIA stated the existing shoreline conditions were "good," and that the County merely
14 cited technical literature but ultimately made a policy decision in adopting 150-foot buffers,
15 one unsupported by the science.²²⁷ Essentially, the argument is that the County just
16 assembled a bibliography of scientific information and then adopted regulations which failed
17 to correlate with the assembled scientific information.²²⁸
18

19 Both Ecology and the County address CAPR's Issue 1 arguments. Ecology
20 responds, stating that no economic analysis of the type CAPR envisions is required by the
21 SMA or the Guidelines. It cites RCW 90.58.100, which provides that Ecology and local
22 governments, "shall to the extent feasible . . . utilize a systematic interdisciplinary approach,
23 which will ensure the integrated use of the natural and social sciences and the
24 environmental design arts."²²⁹ It states that statute's language merely provides the context
25 for a jurisdiction's planning for water-dependent uses. Rather than requiring economic
26 analysis, as argued by CAPR, Ecology states RCW 90.58.100's provisions are implemented
27 primarily through the reservation of appropriate shoreline areas for water-dependent and
28
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31 ²²⁴ CAPR Reply Brief, p. 2.

32 ²²⁵ CAPR Brief, p. 13.

²²⁶ *Id.*, p. 13.

²²⁷ *Id.*, p. 15.

²²⁸ CAPR Reply Brief, p. 4.

²²⁹ Ecology Brief, p. 27.

1 water-related uses, citing WAC 173-26-201(2)(d)(i) through (v). The required SI, the CIA,
2 and a "use analysis", states Ecology, are the methods a local jurisdiction uses to plan for
3 shoreline economic development.²³⁰

4 While Ecology suggests no detailed economic analysis is required, the County
5 asserts the record clearly establishes that it did in fact consider economic impacts on
6 property owners of the shoreline regulations. It states SMP Article 3.2 sets forth goals for
7 economic development. Beyond that, it references the SMP at pages 2-15 and 2-16, where
8 it included feasibility, as well as other factors, when considering whether a proposed action
9 or permit requirement can be accomplished at a reasonable cost.²³¹ The County states
10 consideration of economics is also reflected in its description of shoreline areas for
11 commercial, industrial, and residential development, including higher-density residential.
12 Further recognition of economics is illustrated by the SMP's allowance of various uses,
13 including residential, through the use of conditional use permits (CUPs) to accommodate
14 site-specific use allowance.²³²

15
16
17 The County disputes CAPR's assertion of inadequate science. It contends there is no
18 SMA requirement to verify its SI by visually inspecting/verifying all of its shorelines and,
19 beyond that, it observes CAPR failed to point to any specific property or areas which were
20 mischaracterized in the SI. The County references what it describes as "detailed analyses"
21 of its shorelines contained in the *Ecosystem Characterization and Ecosystem-Wide*
22 *Processes, Reach Inventory and Analyses*, and *Final Inventory and Characterization* map
23 folio.²³³

24 25 26 **Discussion, Analysis and Board Conclusions**

27 CAPR alleges a violation of RCW 90.58.620. The Board notes that particular statute
28 merely provides an option to local governments:

29
30 New or amended master programs approved by the department on or after
31 September 1, 2011, **may include provisions** authorizing: (a) Residential

32 ²³⁰ *Id.*, pp. 28, 29

²³¹ Jefferson County Brief, p. 28.

²³² *Id.* p. 29.

²³³ *Id.* p. 30.

1 structures and appurtenant structures that were legally established and are
2 used for a conforming use, but that do not meet standards for the following to
3 be considered a conforming structure: Setbacks, buffers, or yards; area; bulk;
4 height; or density (emphasis added)

5 **The Board finds** the County's decision not to take a discretionary action is not a violation of
6 the authorizing statute. (In its reply, CAPR even concedes this point.)²³⁴

7
8 **A. Economic Analysis**

9 The Board agrees with the position taken by Ecology; neither the SMA nor the
10 Guidelines require the type of economic analysis suggested by CAPR. Although CAPR
11 states it is not arguing the County was required to prepare something along the lines of an
12 economic impact statement that appears to be in actuality what it is advocating:

13 Yet, in the approximately 30,000 pages of the administrative record
14 produced by respondents, counsel for the CAPR petitioners has found no
15 economic analysis of how this SMP, with its increased buffers, its greater
16 permitting hurdles, and its creation of nonconforming uses and structures,
17 will affect residential property values, property insurance rates, opportunities
18 for financing and refinancing, or costs of regulatory compliance (e.g., expert
19 reports required to meet such new requirements as no net loss standards
20 and mitigation requirements). How, in turn, will changes in residential
21 property values affect property tax collections and the distribution of the tax
burden across the entire county's tax base?²³⁵

22 The statutes referenced by CAPR, RCW 90.58.100(1) and (2), do not include such a
23 mandate:

24 RCW 90.58.100(1): In preparing the master programs, and any amendments
25 thereto, the department and local governments shall to the extent feasible ...
26 (a) Utilize a systematic interdisciplinary approach which will insure the
27 integrated use of the natural and social sciences and the environmental
design arts . . .
28 (d) Conduct or support such further research, studies, surveys, and
29 interviews as are deemed necessary [and]
30 (e) Utilize all available information regarding hydrology, geography,
31 topography, ecology, economics, and other pertinent data . . .
32

²³⁴ CAPR Reply Brief, p. 3.

²³⁵ CAPR Reply Brief, p. 6.

1 RCW 90.58.100(2): [t]he master programs shall include, when appropriate,
2 the following:(a) An economic development element for the location and
3 design of industries, projects of statewide significance, transportation
4 facilities, port facilities, tourist facilities, commerce and other developments
5 that are particularly dependent on their location on or use of the shorelines of
6 the state

7 Neither does WAC 173-26-201(2)(a)'s directive "to identify and assemble the most current,
8 accurate, and complete scientific and technical information available that is applicable to the
9 issues of concern" require an economic analysis of the type CAPR envisions.

10 Clearly RCW 90.58.100(2) mandates the inclusion of an **economic development**
11 **element** in an SMP. As that statute provides, that particular element must address ". . . the
12 location and design of industries, projects of statewide significance, transportation facilities,
13 port facilities, tourist facilities, commerce and other developments that are particularly
14 dependent on their location on or use of the shorelines of the state" Jefferson County's
15 SMP includes that element in Article 3, Section 2 where one finds a purpose statement and
16 overall economic development goals:
17

18 Economic Development

19 A. Purpose

20 As required by RCW 90.58.100(2)(a), **the economic development goals**
21 **address the location and design of industries, transportation facilities,**
22 **port facilities, tourist facilities, commerce and other developments that**
23 **are particularly dependent on their location on or use of the shorelines.**

24 B. Goals

- 25 1. Encourage viable, orderly economic growth through economic activities
26 that benefit the local economy and are environmentally sensitive. Such
27 activities should not disrupt or degrade the shoreline or surrounding
28 environment.
- 29 2. Accommodate and promote water-oriented industrial and commercial uses
30 and developments, giving highest preference to water-dependent uses.
- 31 3. Encourage water-oriented recreational use as an economic asset that will
32 enhance public enjoyment of the shoreline.
4. Encourage economic development in areas already partially developed
with similar uses when consistent with this Program and the Jefferson
County Comprehensive Plan.²³⁶ (emphasis added)

²³⁶ SMP, Article 3, pp. 3-1, 3-2.

1 Those goals are implemented by the general policies and regulations in the SMP's
2 Article 6 and the more specific policies and regulations in Articles 7 and 8. Article 4's
3 Shoreline Environment Designations (SED) include guides and regulations for development
4 within the various types of shorelines. For example, recreational opportunities are provided
5 for within the Conservancy SED, single family/high density residential uses within the
6 Shoreline Residential SED, and within the High Intensity area, commercial, industrial and
7 similar uses are allowed.²³⁷

9 The Use Table at Article 4, pages 4-6 through 4-8 specifically lists allowable locations
10 for the various types of uses.²³⁸ The regulations in subsequent Articles include additional
11 location and design criteria. The Land Use Element's provisions reflect the requirements of
12 WAC 173-26-201(2)(d).²³⁹

14
15 ²³⁷ SMP Article 4, pp. 4-2 through 4-5.

16 ²³⁸ *Id.* pp. 4-6 through 4-8.

17 ²³⁹ WAC 173-26-201(2)(d). "Preferred uses. As summarized in WAC 173-26-176, the act establishes policy
18 that preference be given to uses that are unique to or dependent upon a shoreline location. Consistent with
19 this policy, these guidelines use the terms 'water-dependent,' 'water-related,' and 'water-enjoyment,' as
20 defined in WAC 173-26-020, when discussing appropriate uses for various shoreline areas. Shoreline areas,
21 being a limited ecological and economic resource, are the setting for competing uses and ecological protection
22 and restoration activities. Consistent with RCW 90.58.020 and WAC 173-26-171 through 173-26-186, local
23 governments shall, when determining allowable uses and resolving use conflicts on shorelines within their
24 jurisdiction, apply the following preferences and priorities in the order listed below, starting with (d)(i) of this
25 subsection. For shorelines of statewide significance, also apply the preferences as indicated in WAC 173-26-
26 251(2).

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

32 (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.

1 The Board's role is not to second-guess policy decisions made by local jurisdictions.
2 Determinations of the proper balance to strike between the allowance of "all reasonable and
3 appropriate uses" and their locations with the mandate to "control ... pollution" and prevent
4 "damage to the natural environment,"²⁴⁰ lie with the elected legislative bodies of local
5 jurisdictions, provided the ultimate decisions comport with the requirements of the SMA and
6 the guidelines. In this instance, CAPR has not met its burden to establish the balance set by
7 Jefferson County violates RCW 90.58.020, RCW 90.58.100(1) and (2), RCW 90.58.620,
8 WAC 173-26-201(2) or WAC 173-26-241(3).
9

10 **The Board finds** CAPR has failed to meet either burden of proof to establish
11 violations of RCW 90.58.020, RCW 90.58.100(1) and (2), RCW 90.58.620, WAC 173-26-
12 201(2) or WAC 173-26-241(3) in regard to the consideration of the social sciences,
13 specifically economics.
14

15 **B. Lack of Science**²⁴¹

16 One of CAPR's arguments, also made by OSF, is that the CIA did not adequately
17 consider and assess the benefits provided by the prior SMP or protections provided by other
18 laws and regulations. A detailed analysis of CAPR's argument regarding the failure to
19 consider the benefits of the prior SMP or other applicable regulations is unwarranted as that
20 allegation is addressed thoroughly under OSF's Issue No. 1. It is sufficient to state RCW
21 90.58.080 required Jefferson County to develop a new SMP, in compliance with the SMA
22 and the Guidelines.
23

24 In the portion of its arguments related to a lack of scientific support for the SMP's
25 regulations, CAPR argues there are violations of RCW 90.58.100(1)(a) and (d) as well as
26 WAC 173-26-201(3)(c). The former provides as follows:
27

28
29
30 Evaluation pursuant to the above criteria, local economic and land use conditions, and policies and regulations
31 that assure protection of shoreline resources, may result in determination that other uses are considered as
32 necessary or appropriate and may be accommodated provided that the preferred uses are reasonably
provided for in the jurisdiction."

²⁴⁰ RCW 90.58.020.

²⁴¹ As stated above, CAPR argues violations of WAC 173-26-186(8)(a). The Board has not addressed that
allegation as it was not included within the alleged violations set forth in CAPR's PFR nor in the Board's
Prehearing Order First General Issue or the particular sub issues.

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

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

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

11 CAPR asserts the County failed to meet the requirements of that statute, stating the
12 County's CIA and its SI are incomplete. Like OSF, CAPR complains those documents lack
13 field verification as well as a complete analysis of existing conditions as they were only
14 based upon photographs and literature. CAPR points out that the SI acknowledges it makes
15 no representation as to the exact ownership of specific areas of the County shoreline.

16 As discussed in OSF Issue 1, there is nothing in the SMA nor in the applicable
17 Guidelines which requires field verification of existing conditions. Nor is there any
18 requirement to show specific ownership of properties. CAPR provides no support for those
19 allegations. The use of aerial photographs is specifically referenced in WAC 173-26-
20 201(2)(a) as one of the methods for assembling relevant information:

21 At a minimum, make use of and, where applicable, incorporate all available
22 scientific information, **aerial photography**, inventory data, technical
23 assistance materials, manuals and services from reliable sources of science.
24 (emphasis added)

25 The Board notes that the breadth of information assembled by the County is
26 voluminous. The SI's Section 3, entitled *Ecosystem Characterization and Ecosystem-Wide*
27 *Processes*, provides an overview of the key species and habitats within the County,
28 including threatened and endangered species, analysis of nearshore and freshwater
29 habitats/species, and ecosystem-wide processes, which includes hydrogeologic settings,
30 shoreline processes, process-intensive areas and alterations. Section 4 of the SI, entitled
31 *Reach Inventory and Analyses*, includes 118 pages covering every shoreline reach within
32 the County. The map folio, Exhibit C to the SI, includes more than 30 detailed maps. Those

1 maps show all of the County's "shorelines of the state," marine and freshwater shoreline
2 planning areas, and stream flows (CFS) for the County's rivers and streams. Other maps
3 indicate soil types, channel migration zones, and floodplains. Modifications of the County's
4 shorelines are indicated as are critical areas and critical shoreline habitats. There are maps
5 which show the locations of aquatic vegetation, shoreline use patterns, shellfish harvesting
6 areas, forested areas as well as those with impervious surfaces.
7

8 WAC 173-26-201(3)(c) requires that, "to the extent such information is relevant and
9 reasonably available," a jurisdiction is to gather information regarding, among other things,
10 shoreline and adjacent land use patterns, transportation and utility facilities, existing aquatic
11 and terrestrial wildlife habitats, critical areas, and altered and degraded areas with the
12 potential for restoration.²⁴² The SI includes that information.
13

14 What appears to be one of the underlying bases of CAPR's concerns is the SMP's
15 imposition of a standard 150-foot buffer on all marine shorelines. CAPR states there is no
16 scientific justification in the record for that buffer width. To the contrary, the SI includes
17 summary references to numerous scientific studies which address varying buffer width
18 recommendations. Those studies focused on the effectiveness of various buffer widths in
19 protecting water quality and the provision of wildlife habitat and travel corridors. In almost all
20 instances, the studies recommend buffers consisting of ranges. For example, the SI refers
21 to a 2001 analysis from Levings and Jamieson which suggested buffers of 300 to 450 feet
22 for marine shores. Other studies considered the effectiveness of different buffer widths in
23 the removal of sediments (82- to 300-foot buffers would remove approximately 80% --
24 Brennan & Culverwell; a minimum of 98 feet -- May) and, various pollutants including
25 nitrogen (27 feet to reduce by 60%, 200 feet to reduce by 80% -- Desbonnet; Pentec),
26 metals, and organic chemicals, agricultural runoff (minimum of 79 feet for 20% slopes and
27 160 feet with 30% slopes with slight erosion -- Brennan & Culverwell), and fecal coliform
28 from septic systems (115 feet -- Young; Pentec).²⁴³ Recommendations for wildlife are
29 significantly wider; the average width for wildlife habitat was 288 feet (Knutson & Naef).²⁴⁴
30
31
32

²⁴² WAC 173-26-201(3)(c)(i)-(iii).

²⁴³ SI, p. 5-7.

²⁴⁴ *Id.*, p. 5-8.

1 Exhibit 2960-1822 is an illustration summarizing recommended buffer widths and clearly
2 depicting the ranges: 15 feet to 450 feet for various purposes.

3 Beyond that accumulated science, it is significant that the SMP's adopted 150-foot
4 buffer width is identical to the County's GMA compliant critical areas ordinance buffer width,
5 width that comports with the GMA's Best Available Science requirement for protection of
6 critical areas (RCW 36.70A.172(1)).²⁴⁵

7
8 The County was required to adopt an SMP that assures no net loss. WAC 186-26-
9 186(8)(b).²⁴⁶ In crafting the SMP, it assembled a considerable amount of scientific
10 information, including information related to buffer widths. The County has the latitude to
11 adopt buffer widths which lie within the range of widths recommended by the assembled
12 scientific information. Those widths when applied in conjunction with other applicable SMP
13 regulations must assure NNL. CAPR is correct that the decision to adopt 150-foot marine
14 buffers was a "policy" decision but the parameters of the County's policy choice were
15 established by the science it assembled, reviewed, and considered.

16
17 CAPR did not meet its burden to establish a violation of WAC 173-26-201(3)(c).
18 Neither did CAPR establish a violation of RCW 90.58.100(1)(a) and (d): a failure to employ
19 an interdisciplinary approach in development of the SMP or the need for the County to
20 conduct any further research.

21
22 **For CAPR General Issue One, the Board finds and concludes CAPR has failed**
23 **to meet either burden of proof to establish violations of the policy of RCW 90.58.020,**
24 **or violations of RCW 90.58.100(1)(a) and (d), RCW 98.58.100(2), or WAC 173-26-201(2)**
25 **and (3)(c), in regards to whether the assembled physical and biological sciences**
26 **support the SMP's regulations, including buffer widths.**

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31 ²⁴⁵ RCW 36.70A.480(3) mandates that: Shoreline master programs shall provide a level of protection to
32 **critical areas located within shorelines of the state that assures no net loss of shoreline ecological**
functions necessary to sustain shoreline natural resources as defined by department of ecology guidelines
adopted pursuant to RCW 90.58.060.

²⁴⁶ Local master programs shall include policies and regulations designed to achieve no net loss of those
ecological functions.

1 **Second General Issue**

2 Respondents failed to employ proper procedures in their adoption of the SMP in violation of
3 RCW 36.70A.480(3)(a) and (5); RCW 90.58.050, .090(2); WAC 173-26-090, 100, 110, and
4 120; and WAC 173-26, Part III.

5 CAPR, in support of this issue, incorporates the briefing of OSF and Hood Canal. The
6 arguments involve whether or not a new SMP was required rather than revisions to the prior
7 1989 SMP document (OSF) as well as whether improper procedures were included in the
8 adoption process (Hood Canal).
9

10 **Discussion, Analysis and Board Conclusion**

11 As stated above in the OSF analysis,²⁴⁷ the Board finds RCW 90.50.080 required the
12 County to update its SMP to comply with Ecology's SMP Guidelines. Jefferson County does
13 not need to "justify adoption of a new SMP" as OSF's Issue No. 1 alleges and CAPR alleges
14 here in Issue 2.
15

16 **For CAPR General Issue 2, the Board finds and concludes CAPR has failed to**
17 **meet either burden of proof to establish violations of RCW 36.70A.480(3)(a) and (5);**
18 **RCW 90.58.050, .090(2); WAC 173-26-090, 100, 110, and 120; and WAC 173-26, Part III.**
19

20 **Third General Issue**

21 The vagueness of the SMP results in an excessive delegation of discretion to the regulators
22 thereby violating RCW 90.58.020, RCW 90.58.030(3)(c), RCW 90.58.900 and WAC 173-26-
23 176 and 191.

24 **Applicable Laws**

- 25
- 26 • RCW 90.58.020
 - 27 • RCW 90.58.900
 - 28 • WAC 173-26-191

29 The argument in CAPR's opening brief only addresses alleged violations of RCW
30 90.58.900 and WAC 173-26-191. Here, as in Issue 1, CAPR has merely alleged
31
32

²⁴⁷ See above at p.19 under OSF General Issue #1 Discussion, Analysis and Board Conclusion.

1 violations²⁴⁸ but failed to relate the specific language of the SMP to the requirements of a
2 particular statute or rule, thus abandoning those allegations.²⁴⁹ Allegations of violations of
3 RCW 90.58.030(3)(c) and WAC 173-26-176 will be dismissed.
4

5 Positions of the Parties

6 CAPR argues the SMP grants excessive regulatory discretion to County
7 administrators. Characterizing the SMP as "essentially a zoning code" CAPR asserts the
8 County must provide sufficient clarity so that citizens can determine "what is allowed and
9 what is prohibited."²⁵⁰ The SMP's lack of clarity, argues CAPR, is compounded by Article
10 1.8:
11

12 This Program is exempt from the rule of strict construction; therefore this
13 Program shall be liberally construed to give full effect to its goals, policies
14 and regulations. Liberal construction means that the interpretation of this
15 document shall not only be based on the actual words and phrases used in it,
16 but also by taking its **deemed** or stated purpose into account. Liberal
17 construction means an interpretation that tends to **effectuate the spirit** and
18 purpose of the writing. For purposes of this Program, liberal construction
19 means that the administrator shall interpret the regulatory language of this
20 Program in relation to the broad policy statement of RCW 90.58.020, and
21 make determinations which are in keeping with those policies as enacted by
22 the Washington State Legislature.²⁵¹ (emphasis added)

23 CAPR contends use of words such as "deemed" and "spirit" included in the cited
24 article exacerbate the lack of clarity of the policies and regulations and constitute an "open
25 invitation to [regulatory] overreach."²⁵² It states that while the SMA is subject to liberal
26 construction (RCW 90.58.900), local jurisdictions have no similar authority to apply that
27 standard of construction.

28 ²⁴⁸ The section of CAPR's opening brief addressing Issue 3 concludes with: "Upon the arguments here
29 advanced, the SMP violates RCW 90.58.020, RCW 90.58.030(3)(c), RCW 90.58.900, WAC 173-26-176 and
30 WAC 173-26-191." CAPR Brief, p. 20. Yet the argument itself fails to even reference RCW 90.58.030(3)(c) and
31 WAC 173-26-176.

32 ²⁴⁹ That failure also appears in relation to CAPR's argument regarding WAC 173-26-191. However, the WAC is
referenced in the opening brief and sufficient argument was presented in support of a violation of that rule. It is
incumbent upon a petitioner to relate SMP language to a statute or rule. What does the statute or rule state
and how was it violated?

²⁵⁰ CAPR Brief at 16.

²⁵¹ Article 1.8, p. 1-5.

²⁵² CAPR Brief, p. 18.

1 CAPR cites the following as examples of the SMP's vague language: Articles 6.3.A.6,
2 8.3.F.2, 8.5.A.4, 8.8.D.5, 8.8.D.6, 8.8.D.8, and 9.8.3.A.5. It contends those sections include
3 language stating that those applying for development permits are "encouraged" to offer
4 public access and that such language will lead to coercion by local administrators, in effect
5 mandating public access.

6 CAPR also references Article 3.7.B.10 which it states will be used to require property
7 owners to address potential adverse effects of global climate change and sea level rise.
8 Finally, it suggests the "mitigation" requirements will lead to arbitrary and capricious
9 regulation.
10

11 Again, both Ecology and the County address CAPR's argument. The County
12 contrasts CAPR's Issue 3 with Issue 4. It suggests that in Issue 3 CAPR argues the
13 regulations provide too much discretion while in Issue 4, the regulations are so inflexible as
14 to result in a prohibition of shoreline development. The County suggests the SMA and its
15 regulations endorse flexibility, citing RCW 90.58.100(5) and WAC 173-26-201(2)(e) and (f).
16 Ecology first observes CAPR's opening brief arguments under Issue 3 failed to address how
17 any of the statutes or rules referenced in Issue 3 are violated.²⁵³ While the County disputes
18 the allegation of vagueness in provisions applicable to public access and climate change, it
19 states that regulations regarding public access are in fact required by the SMA guidelines.
20 The County also argues the climate change policy (Article 3.7.B.10) is one of 10 Shoreline
21 Use goals and does not constitute a development regulation, and references WAC 173-26-
22 221(4) and (5) as well as WAC 173-26-191(1)(a).
23
24

25 In its Reply Brief, CAPR sets forth WAC 173-26-191(2)(a)(ii) which provides:

26 In order to implement the directives of the SMA, master program regulations
27 shall:

28 (A) Be sufficient in scope and detail to ensure the implementation of the
29 Shoreline Management Act, statewide shoreline management policies of this
30 chapter, and local master program policies.

31 CAPR contends the SMP's failure to meet the "sufficient in scope and detail" requirement
32 will subject development applicants to *ad hoc* interpretations of the SMP.

²⁵³ *Id.*, p. 30.

1 **Discussion, Analysis, and Board Conclusion**

2 The essence of CAPR's argument regarding Issue 3 is that the language in the SMP
3 "fails to attain the level of clarity required" in violation of WAC 173-26-191(2)(a)(ii)'s
4 directive that SMP regulations "be sufficient in scope and detail to ensure implementation of
5 the" SMA.

6 CAPR argues Jefferson County lacks the legal right to include the "liberally construe"
7 clause, yet cites no authority to support that assertion. Beyond that, CAPR opines that
8 "vague" and liberally construed language of the SMP will lead to arbitrary and capricious
9 interpretation and application of the regulations. As examples of vague language CAPR
10 references numerous sections of the SMP. Of those, Sections 6.3.A.6²⁵⁴ and 8.5.A.4²⁵⁵ are
11 policies while 8.3.F.2, 8.8.D.5, 8.8.D.6 and 8.8.D.8 constitute regulations.²⁵⁶

12
13 The goals and policies of an SMP constitute elements of a jurisdiction's
14 comprehensive plan. RCW 36.70A.480(1).²⁵⁷ It is the development regulations which
15 implement comprehensive plan policies. Thus the Board must decide whether the
16 development regulations are overly vague in violation of WAC 173-26-191(2)(a)(ii). The
17 regulations challenged by CAPR state:

18
19 8.3.F.2 A use or development shall not be considered water-dependent,
20 water-related or water-enjoyment until the County determines that the
21 proposed design, layout and operation of the use/development meet the
22 definition and intent of the water-dependent, water-related or water-
23 enjoyment designation.

24 8.8.D.5 New multi-unit residential development, including subdivision of land
25 into more than four (4) parcels, shall provide public access/open space for
26 use by development residents and the public. The County may alter the
27 recommended area threshold per constitutional limits or waive this
28 requirement if public access is infeasible due to incompatible uses, safety,
29 impacts to shoreline ecology or legal limitations. The County may require

30 ²⁵⁴ Single-family residential developments with four (4) or fewer lots/units should not be required to provide
31 public access.

32 ²⁵⁵ Industrial and port uses located in shoreline jurisdiction should provide public access in accordance with
Article 6 section 3 (Public Access) of this Program.

²⁵⁶ CAPR also references 9.8.3.A.5 but there does not appear to be any such paragraph.

²⁵⁷ In *Barrie v. Kitsap County*, 93 Wn.2d 843, 849, 613 P.2d 1148 (1980), the court held "comprehensive plans generally are not used to make specific land use decisions." A comprehensive plan is a "guide" or "blueprint" to be used when making land use decisions.

1 alternatives to on-site physical access if on-site physical access is infeasible
2 for the reasons noted.

3 8.8.D.6 As per Article 6 of this Program, new or expanded subdivisions and
4 planned unit developments comprised of four (4) or more lots or units shall
5 provide public access to publicly owned shorelines or public water bodies
6 unless:

7 The site is designated in a shoreline public access plan for a greater
8 component of public access; or

9 The public access is demonstrated to be infeasible or inappropriate.

10 8.8.D.8 When required for multi-lot/multi-unit residential development, the
11 amount of public access/open space area shall be determined by site
12 analysis per constitutional limits. The County may waive this requirement if
13 public access is infeasible due to incompatible uses, risks to health or safety,
14 impacts to shoreline ecology or legal limitations. In such cases, the County
15 may require alternatives to on-site physical access if on-site physical access
16 is infeasible for the reasons noted.

17 CAPR's arguments regarding these regulations is that property developers will be
18 "encouraged" (interpreted by CAPR as "coerced") to provide public access.²⁵⁸ However, the
19 Board fails to find the word "encouraged" (or any language that would lead to inappropriate
20 "encouragement") anywhere in the cited regulations; it does not even appear in the two
21 referenced policies. Nor can the Board conclude the regulations "fail to attain the level of
22 clarity required." CAPR neglects to indicate any specific language that could be interpreted
23 as lacking required clarity. Article 8.3.F.2 requires a determination that a use or
24 development meets certain definitions included in Article 2. Articles 8.8.D.5 and 8.8.D.6 are
25 also very specific: they state "New multi-unit residential development, including subdivision
26 of land into more than four (4) parcels, shall provide public access/open space" (8.8.D.5)
27 and "new or expanded subdivisions and planned unit developments comprised of four (4) or
28 more lots or units shall provide public access" (8.8.D.6). Beyond that, WAC 173-26-
29 221(4)(iii) requires jurisdictions to:

30 Provide standards for the dedication and improvement of public access in
31 developments for water-enjoyment, water-related, and nonwater-dependent
32

²⁵⁸ CAPR Brief, p. 19.

1 uses and for the subdivision of land into more than four parcels. In these
2 cases, public access should be required.

3 The foregoing requirement is subject to specific exemptions, including infeasibility and
4 constitutional limitations. By including public access regulations, the Board finds that
5 Jefferson County was meeting the requirements of WAC 173-26-221(4)(iii).

6 CAPR also refers to Article 3.7.B.10, a Goal which provides: "Encourage all use and
7 development to address potential adverse effects of global climate change and sea level
8 rise."²⁵⁹ Again, this is a Goal, not a regulation. As Ecology observes, the SMA Guidelines
9 include the following:

10
11 The policy goals of the act, implemented by the planning policies of master
12 programs, may not be achievable by development regulation alone. Planning
13 policies should be pursued through the regulation of development of private
14 property only to an extent that is consistent with all relevant constitutional
15 and other legal limitations (where applicable, statutory limitations such as
16 those contained in chapter 82.02 RCW and RCW 43.21C.060) on the
17 regulation of private property. Local government should use a process
18 designed to assure that proposed regulatory or administrative actions do not
19 unconstitutionally infringe upon private property rights. A process established
20 for this purpose, related to the constitutional takings limitation, is set forth in a
21 publication entitled, "*State of Washington, Attorney General's Recommended*
22 *Process for Evaluation of Proposed Regulatory or Administrative Actions to*
23 *Avoid Unconstitutional Takings of Private Property*," first published in
24 February 1992. The attorney general is required to review and update this
25 process on at least an annual basis to maintain consistency with changes in
26 case law by RCW 36.70A.370.

27 Finally, CAPR suggests without supporting argument that the mitigation requirements
28 "will lead to arbitrary and capricious regulation of land." Mitigation sequencing has been an
29 accepted practice for decades. For example, the Washington State Environmental Policy
30 Act (SEPA) (Chapter 43-21C RCW), administered by Ecology, and Section 404 of the
31 federal Clean Water Act, administered by the Corps and EPA, both require application of
32 mitigation.²⁶⁰ CAPR does not show how the County's provision for mitigation sequencing,

²⁵⁹ *Id.* at 3-5.

²⁶⁰ WAC 197-11-768 (SEPA) sets forth the definition of "Mitigation":

"Mitigation" means:

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

1 generally employed to make otherwise prohibited development permissible, will achieve
2 arbitrary and capricious regulatory results.

3 Mere allegations that the SMP will be administered arbitrarily or capriciously are
4 insufficient to meet a petitioner's burden of proof. Mere allegations of vagueness, or a failure
5 to "attain the level of clarity required," similarly fails to meet a petitioner's burden of proof.
6

7 **For CAPR General Issue Three, the Board finds and concludes CAPR has failed**
8 **to meet either burden of proof to establish the SMP fails to attain the level of clarity**
9 **required or results in an excessive delegation of discretion to regulators, in violation**
10 **of RCW 90.58.020, RCW 90.58.900 or WAC 173-26-191(2)(a)(ii).**

11
12 **Fourth General Issue**

13 The particular showings required to obtain permits for such common shoreline facilities as
14 beach access structures, boating facilities, and armoring, as well as any development in
15 flood-prone areas, result in a de facto prohibition of these facilities in violation of RCW
16 90.58.020, RCW 90.58.100(6); and WAC 173-26-201(2)(d) and 221(3)(c)(i).

17 **Applicable Laws**

- 18
- 19 • RCW 90.58.020
 - 20 • RCW 90.58.100(6)
 - 21 • WAC 173-26-201(2)(d)
 - 22 • WAC 173-26-221(3)(c)(i)

23 **Position of the Parties**

24 CAPR argues the permitting requirements for various shoreline facilities are so
25 onerous as to result in a prohibition. It contends those requirements were adopted without
26 regard to science relating allowance of those facilities to negative shoreline environmental
27 effects. CAPR references the CIA which observed the "marine shorelines are in relatively
28

- 29
-
- 30 (2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation, by using
31 appropriate technology, or by taking affirmative steps to avoid or reduce impacts;
32 (3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
(4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of
the action;
(5) Compensating for the impact by replacing, enhancing, or providing substitute resources or environments;
and/or
(6) Monitoring the impact and taking appropriate corrective measures."

1 good condition ecologically," yet the County chose to replace 30-foot marine shoreline
2 setbacks with a standard 150-foot buffer. In support of its assertion regarding a failure to
3 scientifically correlate negative shoreline impacts with a particular development, CAPR cites
4 information from the record authored by Donald J. Flora.²⁶¹

5 Specifically, CAPR addresses beach access stairs, setting forth SMP policies and
6 regulations which subject public and private access structures to a conditional use permit
7 (CUP) process in five of the six SEDs.²⁶² CAPR argues the permitting process shifts the
8 burden to property owners to show allowance of beach access stairs would have no
9 negative environmental effect. It observes single-family residences are a preferred shoreline
10 use and that beach access structures are an integral part of the enjoyment of such a use.

11 CAPR also cites similar regulations applicable to other shoreline uses such as boat
12 launches, docks, piers, floats, lifts, marinas, mooring buoys, and armoring. Finally, it
13 addresses SMP policies addressing public access and limitations of development in flood
14 prone areas.
15

16 The County focuses its argument on SMA and WAC guidelines directing it to
17 evaluate impacts and to ensure no net loss of ecological functions, citing WAC 173-26-
18 201(2)(c), (e) and (f), and WAC 173-26-221(2). It disputes the allegations of a de facto
19 prohibition of the various shoreline uses and developments listed by CAPR, contending its
20 SMP achieves a balance between protection and development.
21

22 Ecology disputes CAPR's implication that protective regulations are unnecessary. It
23 states the record establishes shoreline development has detrimental impacts.²⁶³ It also
24 disputes the suggestion the regulatory structure results in a de facto prohibition. It points to
25 areas where some of CAPR's listed uses are allowed. For those uses in areas where CUPs
26 are required, it states the regulations are tailored to ensure no net loss in compliance with
27 the guidelines, that historically a small percentage of CUPs are denied, and finally, that
28
29
30
31

32 ²⁶¹ CAPR Brief, p. 21.

²⁶² Private beach access structures accessory to single-family residential development are prohibited in the Natural SED.

²⁶³ Ecology Brief, p. 32.

1 CAPR has ignored the mitigation sequencing provisions which allow a project to proceed if
2 impacts are mitigated.

3
4 **Discussion, Analysis, and Board Conclusion**

5 In its opening brief, CAPR spends approximately three pages addressing what it
6 states is a failure of the County to base its regulatory SMP scheme on an adequate
7 "scientific base."²⁶⁴ However, the specific violation alleged in Issue 4 is that the regulations
8 are so onerous that various types of shoreline uses (beach access stairs, boating facilities,
9 development in flood prone areas and shoreline armoring/protection) will be prohibited. The
10 statutes and rules CAPR argues were violated include the policies of RCW 90.58.020, RCW
11 90.58.100(6)'s mandate that SMPs include "standards governing the protection of single-
12 family residences and appurtenant structures against damage or loss due to shoreline
13 erosion," the WAC section on preferred shoreline uses (WAC 173-26-201(2)(d)) and finally,
14 the WAC section on flood-prone area development (WAC 173-26-221(3)(c)(i)). The need for
15 a "scientific base" is not implicated in those statutory sections/rules.
16

17
18 CAPR's Issue 4 focuses specifically on an alleged de facto prohibition of some
19 potential shoreline uses. The question posed and the one which the Board must address is
20 whether the SMP regulations cited by CAPR constitute a prohibition and whether they
21 violate the cited statutes and rules.

22 As an example, CAPR cites SMP Article 6.3.A.9. First of all, this a **policy**, not a
23 regulation. As a policy, it does not impose any requirements. Secondly, public access to
24 publicly owned areas is a required element of an SMP and the WACs mandate promotion
25 and enhancement of public access.²⁶⁵ The specific **regulations** CAPR challenges include
26

27
28 ²⁶⁴ CAPR Brief, p. 23. CAPR states the County's failure to tailor regulations to specific property conditions
violated WAC 173-26-186 (5), an allegation not contained in Issue 4.

29 ²⁶⁵ RCW 90.58.100(2)(b); WAC 173-26-221(4)(b): "Principles. Local master programs shall:

30 (i) Promote and enhance the public interest with regard to rights to access waters held in public trust by
the state while protecting private property rights and public safety.

31 (ii) Protect the rights of navigation and space necessary for water-dependent uses.

32 (iii) To the greatest extent feasible consistent with the overall best interest of the state and the people
generally, protect the public's opportunity to enjoy the physical and aesthetic qualities of shorelines of the
state, including views of the water.

(iv) Regulate the design, construction, and operation of permitted uses in the shorelines of the state to
minimize, insofar as practical, interference with the public's use of the water."

1 those applicable not only to beach access structures (Article 7.1) but also to various types of
2 boating facilities (Article 7.2)²⁶⁶, armoring (Article 7.8), and flood control structures (Article
3 7.5).

4 Review of the SMP indicates beach access structures accessory to single-family
5 residential development are allowed landward of the ordinary high water mark (OHWM)
6 pursuant to an administrative conditional use permit process (Article 4, p. 4-5, Table 1) in
7 the Conservancy, Shoreline Residential, and High Intensity SEDs. They are prohibited only
8 in the Natural SED. Prohibition in natural areas comports with the purpose of that SED
9 designation: "The purpose of the 'natural' environment is to protect those shoreline areas
10 that are relatively free of human influence or that include intact or minimally degraded
11 shoreline functions intolerant of human use."²⁶⁷ These systems require that only very low
12 intensity uses be allowed in order to maintain the ecological functions and ecosystem-wide
13 processes.²⁶⁸ While CAPR is correct in stating single family residential use is one of the
14 preferred uses under the SMA,²⁶⁹ the Board does not accept the implication that the County
15 may not restrict any appurtenant structures or uses on residential property. As the Court of
16 Appeals held in *Samson v. Bainbridge Island* ". . . private property rights are secondary to
17 the SMA's primary purpose, which is 'to protect the state shorelines as fully as possible.'"²⁷⁰
18
19

20 Similarly, residential boat launch facilities are either permitted or allowed as a
21 conditional use permit (administrative) in all SEDs other than Priority Aquatic. Residential
22 docks, piers, floats, and lifts are permitted in the Aquatic, Shoreline Residential, and High
23 Intensity SEDs and by administrative conditional use in the Conservancy SED.
24

25 CAPR also references Article 7.5.A.1 in its concerns regarding flood control
26 structures. That **policy** states "The County should prevent the need for flood control works
27

28 ²⁶⁶ Boat launches, docks, piers, floats, lifts, marinas, and mooring buoys.

29 ²⁶⁷ WAC 173-26-211(5)(a)(i). See also WAC 173-26-211(5)(a)(iii)(C) which states, in part, "Generally, but not
30 necessarily, ecologically intact shorelines are free of structural shoreline modifications, structures, and
31 intensive human uses."

32 ²⁶⁸ WAC 173-26-211(5)(a)(i).

²⁶⁹ "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. . . ."
RCW 90.58.020.

²⁷⁰ *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49 (Wash. Ct. App. 2009). In which the court quoted
Lund v. Ecology, 93 Wn. App. 329, at 336-37 (quoting *Buechel*, 125 Wn.2d at 203).

1 by limiting new development in flood-prone areas." CAPR argues this sentence is another
2 "example of the regulatory overreach" of the SMP. Article 7.5.A.1 states a policy goal, one
3 which addresses principles and directives included in WAC 173-26-221(3)(b) and (c):

4 Over the long term, the most effective means of flood hazard reduction is to
5 prevent or remove development in flood-prone areas, to manage storm water
6 within the flood plain, and to maintain or restore river and stream system's
7 natural hydrological and geomorphological processes. . . Applicable
8 shoreline master programs should include provisions to limit development
9 and shoreline modifications that would result in interference with the process
10 of channel migration that may cause significant adverse impacts to property
11 or public improvements and/or result in a net loss of ecological functions
12 associated with the rivers and streams. WAC 173-26-221(3)(b):

13 New development or new uses in shoreline jurisdiction, including the
14 subdivision of land, should not be established when it would be reasonably
15 foreseeable that the development or use would require structural flood
16 hazard reduction measures within the channel migration zone or floodway.
17 WAC 173-26-221(3)(c).

18 Those code sections require local jurisdictions to adopt SMPs that address
19 development in flood-prone areas and the allowance of flood control structure uses. Those
20 regulations, Article 7.5.B.1-6 and Article 7.5.C.1-12, implement the policy of Article 7.5.A.1.
21 A review of Article 7.5.B.1-6 indicates flood control structures are subject to allowance
22 through a discretionary conditional use process in all SEDs other than the Natural.

23 CAPR's allegations that most of the uses are subject to conditional use permit (CUP)
24 processes are accurate. However, requiring consideration of impacts through a conditional
25 use permit process is a valuable tool for accommodating shoreline uses while providing for
26 control of pollution and preventing damage to the natural environment. It is also a tool
27 specifically recognized and, in some instances required, by the Guidelines. See WAC 173-
28 26-191(2)(a)(iii)(B):

29 Conditional use and variance provisions.

30 RCW 90.58.100(5) states:

31 **"Each master program shall contain provisions to allow for the varying**
32 **of the application of use regulations of the program, including**
provisions for permits for conditional uses and variances, to insure that
strict implementation of a program will not create unnecessary

1 hardships or thwart the policy enumerated in RCW 90.58.020. Any such
2 varying shall be allowed only if extraordinary circumstances are shown
3 and the public interest suffers no substantial detrimental effect. The
4 concept of this subsection shall be incorporated in the rules adopted
5 by the department relating to the establishment of a permit system as
6 provided in RCW 90.58.140(3)."

7 All master programs shall include standards for reviewing conditional use
8 permits and variances which conform to chapter 173-27 WAC.

9 WAC 173-26-201(3)(d)(iii) refers to the CUP process as a method for ensuring uncommon
10 impacts are addressed so as to insure no net loss.

11 While the conditional use permit process may indeed be burdensome for some
12 property owners, CAPR has not met its burden to show the use of those processes will
13 result in a *de facto* prohibition of the various shoreline uses it references. A primary goal of
14 the SMA is to "prevent the inherent harm in an uncoordinated and piecemeal development
15 of the state's shorelines," described in RCW 90.58.020 as a "clear and urgent demand". The
16 policies included in that statute include prioritizing uses that require a shoreline location,²⁷¹
17 the promotion of public access and enjoyment opportunities,²⁷² and the protection of the
18 environmental resources of state shorelines.²⁷³ The use of conditional use permit
19 processes provides a method to ensure compliance with the policies of RCW 90.58.020,
20 allowing for various human uses, while protecting the shorelines of the state and its waters.

21 Nor has CAPR met its burden to establish a violation of RCW 90.58.100(6).²⁷⁴ The
22 County's SMP includes standards for the protection of single-family residences and their
23
24

25
26 ²⁷¹ "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. . . ." RCW 90.58.020.

27 ²⁷² "This policy contemplates protecting. . . public rights of navigation and corollary rights incidental thereto."
28 "Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize,
29 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." RCW 90.58.020.

30 ²⁷³ "... . . . 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." RCW 90.58.020.

31 ²⁷⁴ RCW 90.58.100(6). "Each master program shall contain standards governing the protection of single-family
32 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

1 appurtenant structures. As referenced above, those standards govern the issuance of
2 substantial development permits for shoreline protection. CAPR has not shown the
3 regulations fail to achieve effective and timely protection against loss or damage to single-
4 family residences.²⁷⁵ See SMP Article 7.8, pp. 7-29 through 7-36.

5 **For CPR General Issue Four, the Board finds and concludes CAPR has failed to**
6 **meet either burden of proof to establish the regulations applicable to beach access**
7 **structures, boating facilities, development in flood-prone areas or shoreline armoring**
8 **result in a de facto prohibition of those uses, in violation of RCW 90.58.020, RCW**
9 **90.58.100(6), WAC 173-26-201(2)(d) and 221(3)(c)(i).**

10
11
12 **C. Hood Canal Sand and Gravel, LLC (Hood Canal)**

13 **Issue No. 1**

14 Must contentions as to the violation of constitutionally protected private property rights be
15 considered pursuant to WAC 173-26-186(5)?

16 **Applicable Law**

- 17
18 • WAC 173-26-186(5)

19 **Positions of the Parties**

20 Petitioner Hood Canal applied for a permit to construct a marine transport facility for
21 aggregate materials. They contend their application is a vested property right and a portion
22 of the vested application is water dependent.²⁷⁶ If their application is approved by the
23 County's hearing examiner and other authorities, the challenged SMP will apply a non-
24 conforming status on the project, thus compromising financing, expansion, replacement, or
25 repairs. Hood Canal asserts this designation deprives them of their constitutional property
26 rights. Hood Canal made their objections known to the County during the SMP adoption
27 process, but the County did not meaningfully analyze constitutional issues raised as
28 required in WAC 173-26-186(5). Hood Canal argued the County's analysis conducted under
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32 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."

²⁷⁵ See SMP Article 7.8, pp. 7-29 through 7-36.

²⁷⁶ Hood Canal Brief, November 21, 2014 at 6.

1 the Attorney General's memorandum on constitutional private property rights "has posited
2 merely a conclusory, 'illustrative only' and on its face 'brief and general' analysis . . ."277 The
3 legal review on takings was inadequate to give the public or decision-makers a foundation
4 to analyze or determine compliance with RCW 36.70A.020(6) (GMA Goal on Property
5 Rights). Petitioner asks the Board to determine whether the County and Ecology
6 substantively and reasonably engaged in the process required in WAC 173-26-186(5).278
7

8 Respondent Jefferson County explained it conducted a thorough analysis, "some of
9 which was in the form of attorney-client communications which need not be made a part of
10 the SMP record. RCW 36.70A.370(4)."279 The County states it relied upon the Attorney
11 General's 2006 *Advisory Memorandum on Avoiding Unconstitutional Takings* and produced
12 an analysis from its Prosecuting Attorney to insure that limitations in SMP Article 1.3.D on
13 regulation of private shoreline property were constitutional.280
14

15 Respondent Ecology explains that simply because the SMP renders a use
16 nonconforming does not mean WAC 173-26-186(5) has been violated. WAC173-26-186(5)
17 does not "dictate a particular outcome, nor does it preclude provisions that result in
18 nonconformities."281 Instead, Ecology argues, local government must consider constitutional
19 limitations in enacting shoreline regulations. Ecology clarifies that private property takings
20 analysis is not subject to public comment, and neither the SMA nor the SMA Guidelines
21 contemplate substantive review of the takings analysis by the Board.282 Ecology cites RCW
22 36.70A.370(4) which allows the review under WAC 173-26-186(5) to be protected by
23 attorney-client privilege. Ecology states the record demonstrates the County conducted a
24 takings analysis in accordance with the Attorney General's memorandum and WAC 173-26-
25 186(5).283
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29 ²⁷⁷ *Id.* at 6.

30 ²⁷⁸ *Id.* at 8.

31 ²⁷⁹ Jefferson County Brief, January 5, 2015 at 3

32 ²⁸⁰ *Id.* at Ex. 2960-2570, Questions and Answers from Jefferson County and Ex. 2960-2595 *Advisory Memorandum: Avoiding Unconstitutional Takings on Private Property.*

²⁸¹ Ecology Brief, January 7, 2015, at 8-9.

²⁸² Nor do the SMA Guidelines require that the SMP itself contain a "constitutional analysis" as Petitioner claims. Hood Canal Brief at 7.

²⁸³ IR ECY000162-64; ECY018915-918.

1 **Discussion, Analysis, and Board Conclusion**

2 The Board reviews the question of whether the County complied with WAC
3 173-26-186(5) by completing the analysis required in the Attorney General's
4 Memorandum. Jurisdictions are required to comply with the following:

5 WAC 173-26-186(5)

6 Local government should use a process designed to assure that proposed
7 regulatory or administrative actions do not unconstitutionally infringe upon
8 private property rights. A process established for this purpose, related to the
9 constitutional takings limitation, is set forth in a publication entitled, "State of
10 Washington, Attorney General's Recommended Process for Evaluation of
11 Proposed Regulatory or Administrative Actions to Avoid Unconstitutional
12 Takings of Private Property," first published in February 1992.

13 Jefferson County completed its analysis under the Attorney General memorandum
14 which was then summarized for the public in two documents. The first document lists
15 questions and answers from the AG analysis.²⁸⁴ The second, a memorandum from
16 Prosecuting Attorney David Alvarez, is a more in-depth response from the County to
17 questions arising from review of the SMP.²⁸⁵ The Alvarez memorandum explains in great
18 detail how and why the County can legally adopt the SMP, the court decisions supporting
19 SMP regulations and County responses to five questions in the AG memorandum. The
20 responses in the latter memorandum are protected under attorney-client privileges.²⁸⁶ The
21 Board finds and concludes from the record that the County did analyze and respond to the
22 AG memorandum and thus completed the required steps in WAC 173-26-186(5). That
23 Petitioners are dissatisfied with the County's decision is not dispositive.
24
25

26 **For Hood Canal Issue One, the Board finds and concludes Hood Canal has**
27 **failed to meet the burden of proof to establish the County did not meet requirements**
28 **in WAC 173-26-186(5).**
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²⁸⁴ Ecology Brief, Ex. ECY 000162-64.

²⁸⁵ Jefferson County Brief at Ex. 2690-2570.

²⁸⁶ *Id.* at 12-13 in Ex. 2960-2570.

1 **Issue No. 2**

2 Did Jefferson County ever hold a public hearing on a proposed SMP which included all of
3 the SMP's required objectives and components including compliance with RCW 90.58 .020,
4 RCW 90.58.100 and WAC 173-26-201 (2) (a)?

5 **Applicable Laws**

- 6
- 7 • RCW 90.58.020
 - 8 • RCW 90.58.100
 - 9 • WAC 173-26-201

10 **Position of the Parties**

11 Hood Canal alleges the County failed to follow procedures in the SMA and the
12 Guidelines to develop the SMP and the final SMP contained defects which were not
13 corrected by the County.²⁸⁷ They assert the SMP does not have an economic development
14 element or an explanation about why it was omitted.²⁸⁸ Next, Hood Canal emphasizes the
15 "record is devoid of any evidence of contact with Petitioners regarding significant scientific
16 and technical information . . . prepared in relation to the vested [Hood Canal] application."²⁸⁹
17 Hood Canal argues the County's Cumulative Impact Analysis was adopted after the SMP
18 and did not contain "reference to the then-pending application by [Hood Canal]" although
19 the CIA contained information on other pending applications.²⁹⁰ For these reasons, Hood
20 Canal requests the Board to find Respondents failed to comply with RCW 90.58.020, .100
21 and WAC 173-26-201(2)(A).²⁹¹

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24 Respondent Ecology clarifies the SMA does not require "public review of the CIA" nor
25 does Ecology "approve non-regulatory documents" as part of developing an SMP. The CIA
26 is intended to inform decision-makers about the effects of an SMP and is part of an iterative
27 process as the SMP evolves from one draft to the next. The County accepted public
28 comments before adopting the final CIA in mid-2011. Commenting on Hood Canal's
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31 ²⁸⁷ Hood Canal Brief at 14; *See also*, Hood Canal Brief, Ex. 5; ECY 002139.

32 ²⁸⁸ *Id.* at 14.

²⁸⁹ *Id.* at 15.

²⁹⁰ *Id.* at 15.

²⁹¹ *Id.* at 16.

1 proposed project application, Ecology explained the Environmental Impact Statement for
2 Hood Canal's project was not completed until after the SMP was adopted.²⁹²

3 Respondent Jefferson County states Hood Canal Issue 2 was abandoned because
4 no legal arguments were presented demonstrating non-compliance with the SMA. In
5 addition, the County contends Hood Canal did not argue the issue as presented to the
6 Board: whether the County held a "public hearing on a proposed SMP which included all of
7 the SMP's required objectives."²⁹³ In response to allegations in the issue statement, the
8 County describes numerous public hearings, public participation processes, and public
9 comments received.²⁹⁴ The County concludes by asking the Board to dismiss Issue 2.²⁹⁵

12 Discussion, Analysis, and Board Conclusion

13 The Board agrees with Respondents. Hood Canal provides no legal argument about
14 how the SMA was violated as their brief simply lists sections of the law followed by
15 statements about lack of "adequately utilizing a required process," that "defects were never
16 corrected" or that Petitioners were not contacted.²⁹⁶ The Respondents offered the public
17 years of review and opportunities to comment on proposed amendments to the SMP. The
18 record establishes Respondents followed guidance in WAC 173-26-201(3)(b)(i) by ensuring
19 "that all persons and entities having an interest in the . . . master programs . . . are
20 provided with a full opportunity for involvement in both their development and
21 implementation. . . ." (emphasis in original) The County established committees with
22 technical and public policy expertise to review ideas and comments from the public.²⁹⁷

27
28 ²⁹² Ecology Brief at 10-11 See also ECY 000146 Cumulative Impact Analysis (February 2010) showing a table
of developments or activities and associated impacts.

29 ²⁹³ Jefferson County Brief at 4.

30 ²⁹⁴ *Id.* at 4-5.

31 ²⁹⁵ *Id.* at 6.

32 ²⁹⁶ Hood Canal Brief at 13-15.

²⁹⁷ Jefferson County Ordinance No. 07-1216-13 at 2 "WHEREAS, the DCD formed and worked with two
citizen/stakeholder groups, the **Shoreline Technical Advisory Committee** ("STAC") and the **Shoreline
Policy Advisory Committee** ("SPAC"), during the initial phase of project work from 2006 to 2008 to assist
development of new proposed SMP goals, policies, environment designations, and use/development
regulations contained in a Preliminary Draft SMP."

1 Numerous public workshops and meetings were hosted by the County and Ecology to learn
2 about public concerns, address those concerns, and modify drafts of the SMP.²⁹⁸

3 As for Hood Canal's complaints about the timing of the Cumulative Impact Analysis,
4 WAC 173-26-201(3)(a) allows local governments to "modify the timing of the various steps,
5 integrate the process into other planning activities, add steps to the process. . . ." Together,
6 the County and Ecology planned and carried out a complex series of processes which
7 invited public comments and discussion offering the County Commissioners a wide variety
8 of commentary about SMP amendments. Ordinance 07-1216-13 contains extensive
9 descriptions of the public processes and comments including web-links to documents
10 showing major changes to the drafts of the SMP.²⁹⁹ The Board finds the County
11 Commissioners accepted some comments and rejected others; they did so by explaining
12 their rationale in the adopted Ordinance.³⁰⁰ This is their prerogative. Hood Canal's list of
13 complaints are not legal arguments and do not demonstrate how the SMA or the Guidelines
14 were violated.
15

16
17 **For Hood Canal Issue 2, the Board finds and concludes Hood Canal has failed**
18 **to meet either burden of proof to establish the County did not meet requirements in**
19 **RCW 90.58.020, RCW 90.58.100 or WAC 173-26-201.**
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25 ²⁹⁸ *Id.* at 3-38.

26 ²⁹⁹ Jefferson County Ordinance No. 07-1216-13 Ordinance FF #34 at 8 Exceeding the requirements in RCW
27 36.70A.140, RCW 90.58.130 and WAC 173-26-201, the County put extraordinary effort into informing and
28 engaging stakeholders and the general public in this SMP update project. The actions taken to invite and
29 actively encourage people, groups, entities, agencies and tribes to participate were started early and made
30 often throughout the multi-year process. See, e.g., Jefferson County Preliminary Draft SMP November 2008 at
[http://www.co.jefferson.wa.us/commdevelopment/PDFS/SMPupdate/PDSMP/Summary%20of%20major%20ch
anges%20since%20rCWD_FINAL.pdf](http://www.co.jefferson.wa.us/commdevelopment/PDFS/SMPupdate/PDSMP/Summary%20of%20major%20changes%20since%20rCWD_FINAL.pdf).

31 ³⁰⁰ *Id.* at 3 "Whereas, the BoCC considered the public comments during their 27 hours of review and
32 deliberation of the PC Final Rec and directed DCD staff to make document revisions to the PC Final Rec, and
prepare the October 22, 2009 DRAFT Locally Approved SMP for further review; and
Whereas, the BoCC further deliberated, requested final document revisions to the October 22, 2009 DRAFT
Locally Approved SMP and directed DCD staff to prepare a final proposed document and subsequently took
action on December 7, 2009 (Resolution 77-09) to locally approve the proposed SMP for submittal to Ecology
for the state's final review and approval. The document was titled the *Locally Approved SMP* ('LA-SMP'). . . ."

1 **Issue No. 3**

2 Does the content of the JCSMP adopted by Ecology substantively violate RCW
3 36.70A.370(1) and (2) and WAC 173-26-186(5) and WAC 173-26-020(6) and (32), and
4 WAC 173-26-186?

5 **Applicable Laws**

- 6
- 7 • RCW 36.70A.370
 - 8 • WAC 173-26-020
 - 9 • WAC 173-26-186

10 **Position of the Parties**

11 Hood Canal alleges the County's decision to prohibit marine transportation of
12 aggregate materials was not supported by scientific or technical evidence pursuant to RCW
13 90.58.020(1) and (3).³⁰¹ Hood Canal also contends the County did not consider how this
14 prohibition conflicts with Jefferson County's Comprehensive Plan which allows mining on
15 adjacent uplands.³⁰² In addition, the County allowed salmon net pens after Ecology found
16 no evidence in the record to prohibit them. Hood Canal argues the record similarly contains
17 no evidence to prohibit mining, yet the County prohibits mining. The Hood Canal petitioners
18 assert that salmon net pens and mining are both water dependent and thus should be
19 treated the same.³⁰³ Asserting that RCW 90.58.020 "clearly and emphatically establishes
20 water dependent uses as a priority," Petitioners complain that Ecology provided inconsistent
21 statutory interpretations for salmon net pens and aggregate materials transportation in
22 violation of RCW 90.58 and WAC 173-26-186.³⁰⁴

25 Ecology responds that Issue 3 should be dismissed because Hood Canal does not
26 argue the same statute and code citations in their brief as those cited in Board's Second
27 Amended Prehearing Order and constitutional claims are beyond this Board's jurisdiction.³⁰⁵
28 However, if the Board considers Hood Canal's arguments, Ecology argues Hood Canal
29

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31 ³⁰¹ Hood Canal Brief at 18.

32 ³⁰² *Id.* at 18.

³⁰³ *Id.* at 18-19.

³⁰⁴ *Id.* at 19.

³⁰⁵ Second Amended Prehearing Order, Order Granting Second Settlement Extension, and Order on Dispositive Motion (September 5, 2014) Appendix A.

1 mischaracterizes the transportation of aggregate materials as "water dependent" because
2 Hood Canal's mining operations would not be isolated from land transportation options
3 because the "Pit-to-Pier" mining proposal by Hood Canal is on the mainland.³⁰⁶ In the
4 instant case, Ecology argues "this fact-based inquiry focuses on the extent the project
5 requires a "land-surface interface," such as whether the mining site is located on an
6 island."³⁰⁷ Ecology explains the SMP allows mining in High Intensity shoreline designations
7 and it is thus "not correct to point to a single master program provision precluding or limiting
8 a preferred use and argue that it is inconsistent with the SMA simply because it is a
9 preclusion or limitation."³⁰⁸ Ecology clarified the difference between requiring the County to
10 allow salmon net pens while precluding mining on a mainland site was that the County had
11 not allowed **any** areas for net pens, but pursuant to WAC 173-26-201(2)(d)(ii), the County
12 was required to do so.³⁰⁹ Thus, the County was required by Ecology to find some areas of
13 the shoreline in which net pens would be authorized.³¹⁰
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15

16 The County made similar arguments to those proffered by Ecology, but added that
17 simply because salmon net pens are treated differently than mining operations does not
18 mean the SMP is non-compliant.³¹¹ The County states Hood Canal's non-compliance
19 argument is flawed because it "is based on its assertion that 'salmon net pens' (aquaculture)
20 must be treated in the same fashion as 'transportation of aggregate materials' because, it
21 believes, both are 'water-dependent' uses."³¹² Only the salmon net pens are water
22 dependent whereas the mining operation has access to land transportation. The County
23

24 ³⁰⁶ Ecology Brief at 12.

25 ³⁰⁷ *Preserve Our Islands*, 133 Wn. App. at 526-27.

26 ³⁰⁸ *Id.* at 13.

27 ³⁰⁹ WAC 173-26-201(2)(d)(ii). "Reserve shoreline areas for **water-dependent** and associated water-related
28 uses. Harbor areas . . . should be reserved for water-dependent and water-related uses that are associated
29 with commercial navigation unless the local governments can demonstrate that adequate shoreline is reserved
30 for future water-dependent and water-related uses and unless protection of the existing natural resource
31 values of such areas preclude such uses. . . . This isn't to say that all jurisdictions within the state must
32 reserve appropriate areas for net pen aquaculture, as there may be some jurisdictions in which such areas do
not exist. As Ecology noted, the provisions in each SMP are contingent on local conditions, and Jefferson
County has large and diverse shorelines in which there are likely to be some areas where this activity could be
sited consistent with protection of the shoreline." IR ECY018403-04.

³¹⁰ IR ECY007612 Ecology Brief at 14 "Ecology required the County "to develop an approach of limited
allowance for net pens with effective protections for ecological resources."

³¹¹ Jefferson County Brief at 7.

³¹² *Id.*

1 concludes it is not an island, thus, this case is more like *Ecology v. Hama Hama* in which
2 the Shorelines Hearings Board (SHB) held that prohibition of a sand and gravel pier on
3 Hood Canal was appropriate under the SMA.³¹³ Because the Hama Hama Company mine
4 in Jefferson County was not located on an island, and ground transportation was a viable
5 alternative, the proposed use was deemed not "water-dependent" by the SHB.³¹⁴
6

7 Discussion, Analysis, and Board Conclusion

8 First, the Board dismisses alleged violations of WAC 173-26-020(6) and (32)
9 because Hood Canal does not provide legal argument on this statute. Nor will the Board
10 rule on alleged definition violations because the Board has long ago decided definitions
11 themselves do not prescribe GMA requirements (or in this case SMA requirements).
12 Rather, the Board looks to how the definition is connected to other parts of the law and then
13 rule on how those definitions were used in the context of the law.³¹⁵
14

15 Second, the Board will not rule on alleged violations of RCW 36.70A.370(1) and (2)
16 because these are constitutional claims which are not addressed by this Board. Previously,
17 the Board addressed constitutional claims in its Second Amended Prehearing Order.³¹⁶
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23 ³¹³ Jefferson County Brief at 8; Compare *Pres. Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 137
24 P.3d 31, 2006 Wn. App. LEXIS 1280 (Wash. Ct. App. 2006) with *Ecology v. Hama Hama Co.*, SHB No. 115
(Final Findings, etc., July 21, 1976), 1976 WA ENV LEXIS 87.

25 ³¹⁴ *Id.* at 8 and *Ecology v. Hama Hama Co.*, SHB No. 115 (Final Findings, etc., July 21, 1976), 1976 WA ENV
LEXIS 87

26 ³¹⁵ *Leon S. Savaria v. Yakima County*, GMHB Case No. 11-1-0002: RCW 36.70A.030 provides statutory
27 definitions of various terms used in the GMA and as such, does not prescribe GMA requirements. Thus,
28 alleged violations of RCW 36.70A.030 cannot by itself constitute GMA non-compliance, without coupling the
29 definition with another section of the GMA containing a requirement. Order Granting Motion to Dismiss (May 4,
30 2011), p. 2; *Friends of the San Juans v. San Juan County*, GMHB Case No. 13-2-0012c: [[Responding to an
31 argument that a regulation's definition was vague and susceptible to multiple interpretations resulting in a lack
32 of sufficient guidance to County staff administering the CAOs, the Board found]: "**In the Board's view, the
question is not the definitions but rather how those definitions are used in the CAO's regulatory
scheme. One cannot view the definitions in isolation but must relate them to the regulations
themselves.** It is not a requirement that a definition include adequate standards for appropriate, consistent
administration. The GMA requires those standards to be included somewhere in the regulations." Final
Decision and Order (September 8, 2013), at 93.

³¹⁶ Second Amended Prehearing Order, Order Granting Second Settlement Extension, And Order On
Dispositive Motion GMHB Case No. 14-2-0008c (September 5, 2014).

1 Third, the Board notes Hood Canal Issue 3 alleges a violation of WAC 173-27-186,
2 but the brief is devoid of legal argument about how it is violated. Absent legal argument, the
3 issue is abandoned.

4 Fourth, the Board looks at Hood Canal's claim that the SMP treats salmon net pens
5 and mining operations differently because both are "water dependent." In accordance with
6 the definition of "water-dependent,"³¹⁷ Hood Canal's proposed mining operation is not
7 "dependent on the water by reason of the **intrinsic nature** of its operations" because it has
8 the option of road transportation for aggregates. This is in contrast, for example, the
9 *Preserve Our Islands* case in which mining operations on Maury Island was indeed
10 dependent on water transportation because the operation was on an island. The Court of
11 Appeals agreed the County could issue a substantial development permit and a shoreline
12 conditional use permit for mining:
13

14 Glacier's mine is located on a small island without viable large-scale ground
15 transportation options and cannot operate consistent with its designated
16 principal use without barging. The barge-loading facility is thus an integral
17 part of the principal use, and the entire facility must use the shorelines to
18 operate consistent with its County zoning. The Board correctly concluded the
19 barge-loading facility is water dependent. Substantial evidence supports the
20 Board's conclusion that Glacier's mitigation measures and the Board's
21 conditions make the facility consistent with shoreline management policies.
22 We affirm the Board's order requiring the County to issue Glacier's
23 permits.³¹⁸

24 In *Ecology v. Hama Hama* the Shoreline Hearings Board (SHB) differentiated
25 between water-dependent and water-related uses for a gravel mine in Jefferson County.³¹⁹

26 ". . . [A] water-dependent commerce or industry, to which priority should be
27 given, is one which cannot exist in any other location and is dependent on

28 ³¹⁷ WAC 173-26-020. "Definitions (39) 'Water-dependent use' means a use or portion of a use which cannot
29 exist in a location that is not adjacent to the water and which is dependent on the water by reason of the
30 intrinsic nature of its operations. . . (43) 'Water-related use' means a use or portion of a use which is not
31 intrinsically dependent on a waterfront location but whose economic viability is dependent upon a waterfront
32 location because: (a) The use has a functional requirement for a waterfront location such as the arrival or
shipment of materials by water or the need for large quantities of water; or (b) The use provides a necessary
service supportive of the water-dependent uses and the proximity of the use to its customers makes its
services less expensive and/or more convenient."

³¹⁸ *Pres. Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 137 P.3d 31, 2006 Wash. App. LEXIS
1280 (Wash. Ct. App. 2006).

³¹⁹ *Ecology v. Hama Hama Co.*, SHB No. 115 (Final Findings, July 21, 1976), 1976 WA ENV LEXIS 87

1 the water by reason of the intrinsic nature of its operations. A water-related
2 industry or commerce is one which is not intrinsically dependent on a
3 waterfront location but whose operation cannot occur economically without a
4 shoreline location."

5 Applying the above definition to the uses proposed by the Company leads
6 to the conclusion that they are not water-dependent. At the most, they are
7 arguably water-related.

8 In reviewing both *Preserve Our Islands* and *Ecology v. Hama Hama*, the Board finds
9 the SMP correctly classifies mining in Jefferson County as "water-related." Mining in
10 Jefferson County, however, is not completely prohibited. It is conditionally allowed in High
11 Intensity Areas and in Article 8 of the SMP, the County explains its policies and regulations
12 governing mining.³²⁰

13 **The Board finds and concludes Hood Canal has failed to meet its burden of**
14 **proof to establish the County did not meet requirements in RCW 36.70A.370(1) and (2)**
15 **and WAC 173-26-020(6) and (32).**

16 VII. ORDER

17 Based upon review of the Petitions for Review, the briefs and exhibits submitted by
18 the parties, the Shoreline Management Act, the Growth Management Act, prior Board
19 Orders and case law, having considered the arguments of the parties, and having
20 deliberated on the matter, the Board, concludes Petitioners failed to provide clear and
21 convincing evidence demonstrating the challenged action, as it pertains to Shorelines of
22 Statewide Significance, was inconsistent with the policy of RCW 90.58.02 and the
23 applicable guidelines in WAC 173-26. The Board also concludes that Petitioners were
24 unable to show the challenged action, as it pertains to shorelines, failed to comply with
25 policy of RCW 90.58.020 and the applicable guidelines, or the internal consistency
26 provisions of RCW 36.70A.070, 36.70A.040(4). This appeal is denied and Case No. 14-2-
27 0008c is dismissed.
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³²⁰ IR ECY00007289 (SMP Art. 4.3.A. Table 1); ECY007381-82 (SMP Art. 8.6.).

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DATED this 16th day of March, 2015.


Nina Carter, Board Member


William Roehl, Board Member


Cheryl Pflug, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.³²¹

³²¹ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1); WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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Table of Appendices

Appendix A	January 9, 2015, Letter to Dennis Reynolds
Appendix B	Shorelines Diagram
Appendix C	Ecology's Marine Shorelines of Statewide Significance (SSWS), Three Delineation Schemes (handout at HOM); WA Dept. of Ecology, 2014, Jefferson County Shorelines of Statewide Significance, Figure 1; Jefferson County Shoreline Map Folio, June 2008.
Appendix D	Illustrative Exhibit #1 at HOM: Buffer Acres Plus Setback
Appendix E	Errata Sheet to OSF Petitioners Prehearing Brief on the Merits (December 16, 2014)
Appendix F	Errata to Reply Brief of Petitioners OSF, et al. (January 20, 2015)

Appendix A



STATE OF WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD
1111 Israel Road SW, PO Box 40953, Olympia, WA 98504-0953
Office (360) 664-9170 – Fax (360) 586-2253 – www.eluho.wa.gov

January 9, 2015

Dennis D. Reynolds
The Law Offices of Dennis D. Reynolds
200 Winslow Way West #380
Bainbridge Island, WA 98110

Re: Hood Canal Sand & Gravel, LLC, et al. v. Jefferson County and Department of Ecology, GMHB Case No. 14-2-0008c

Dear Mr. Reynolds:

The Board has received and read OSF Petitioners' Prehearing Brief filed November 21, 2014. It has also received six (6) three ring binders' worth of documents presumably taken from the Record. A relatively small number of those documents are cited in your brief and thus constitute exhibits. WAC 242-03-520 requires that "evidence in a case shall consist of the **exhibits cited in the briefs or as exhibits allowed pursuant to a motion to supplement . . .**" Further, the Board's Handbook on page 14 explains that "Exhibits are documents presented with briefs or motions to show the Board the facts **supporting the party's argument**. It is up to each party to identify and present to the Board, as Exhibits, copies of each document the party believes **supports its case**." Furthermore, I refer you to the controlling Second Amended Prehearing Order of September 5, 2014, which states at page 7:

VI. EVIDENCE

The Index to the Record lists the documents that may be introduced as exhibits but those documents do not become evidence until they are referenced in a brief and submitted to the Board as exhibits to that brief.

Exhibits – The evidence before the Board shall consist of the exhibits attached to briefs and presented to the Board. The briefs must cite the exhibits and explain how the exhibits support the arguments in the briefs. The exhibits should contain the Index number(s) from which they are drawn.

The parties shall tab each exhibit and submit a Table of Exhibits for briefs filed with the Board and with other parties. Exhibits shall be filed at the same time as hearing briefs and served on all parties but may not be served electronically. If the brief is filed and/or served electronically, the exhibits to that brief will be deemed timely filed if they are placed in the U.S. mail postage paid on the same day. See WAC 242-03-240.

Letter Re: Petitioners' Prehearing Brief
GMHB Case No. 14-2-0008c
January 9, 2015
Page 2

None of the record items submitted by Petitioners but not cited in the Brief constitute exhibits. They will not be considered by the Board in this matter and shall be made available for you to pick up at the ELUHO office in Tumwater, WA. Please advise by January 21, 2015, whether you wish to pick them up or, alternatively, have Board staff recycle them.

By January 16, 2015, please submit to the Board the Table of Exhibits required by the Prehearing Order, that is, a table reflecting the items from the record actually cited in your prehearing and reply briefs.

Sincerely,

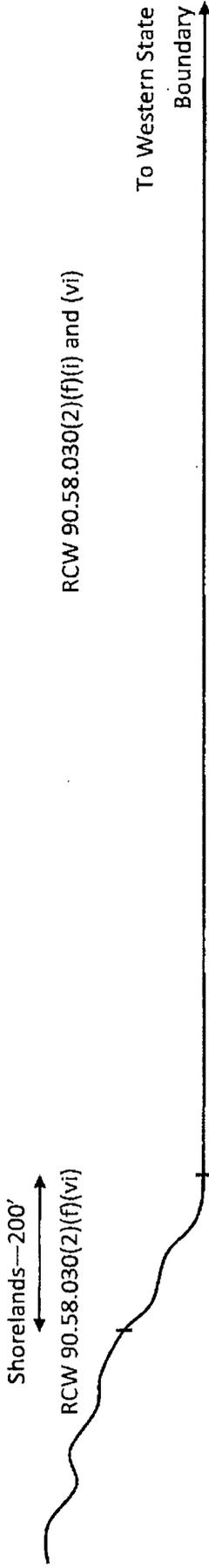
A handwritten signature in cursive script that reads "Nina Carter". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

Nina Carter
Presiding Officer

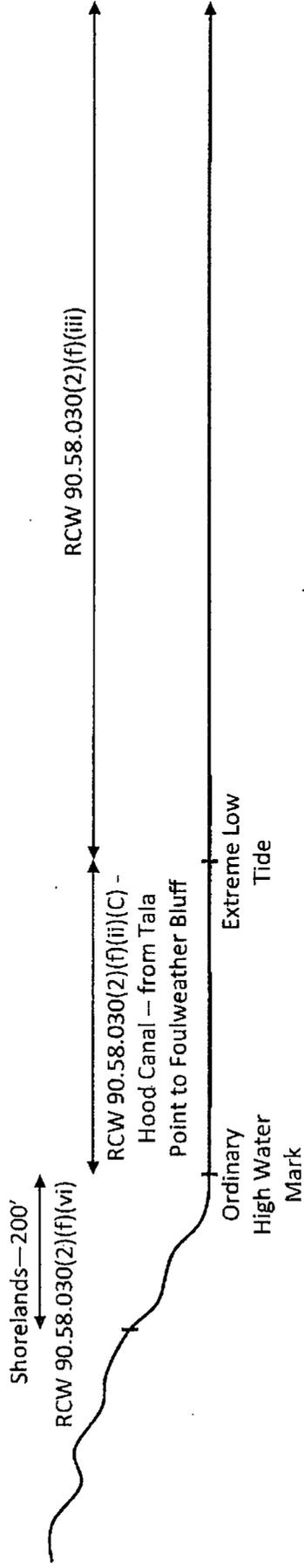
cc: James C. Tracy
Paul J. Hirsch
David Alvarez
Mark Johnsen
Sonia A. Wolfman
David Mann

Appendix B

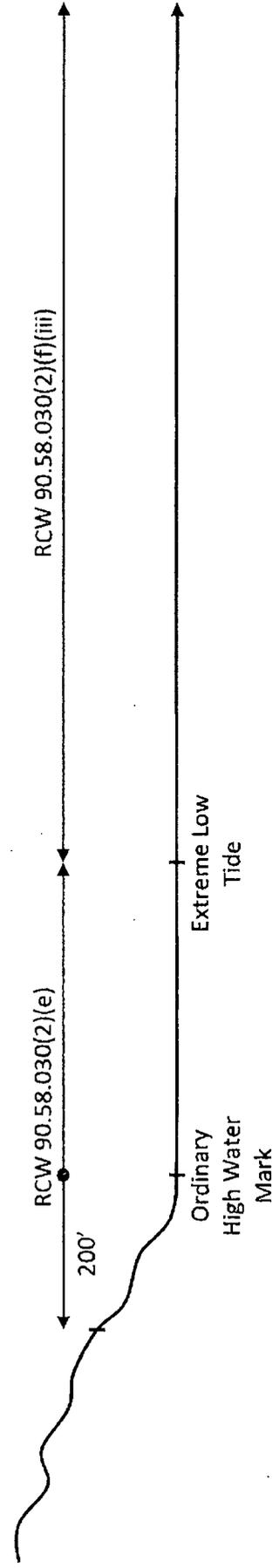
Shorelines of Statewide Significance — Pacific Ocean



Shorelines of Statewide Significance — Hood Canal



All Other Shorelines



RCW 90.58.030 Definitions and concepts

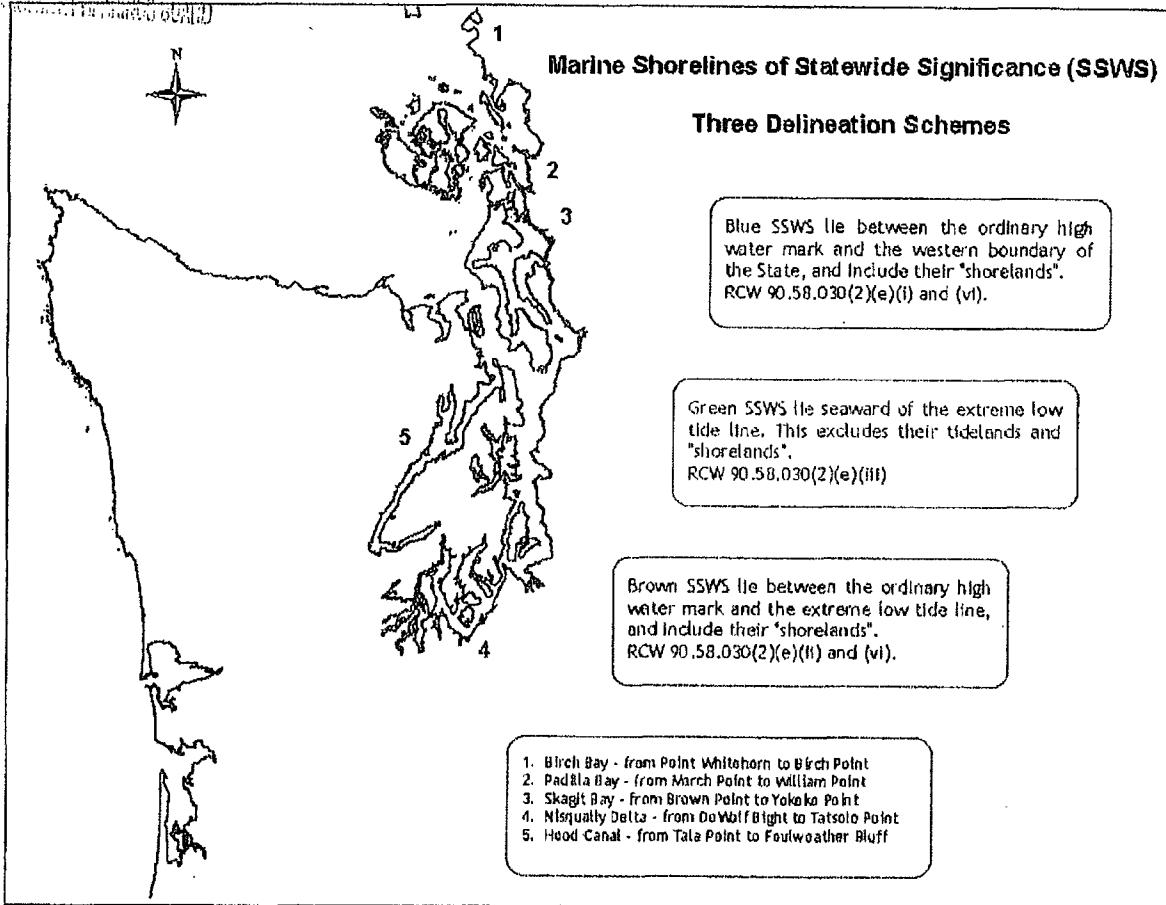
(2) Geographical:

- (a) "**Extreme low tide**" means the lowest line on the land reached by a receding tide;
- (c) "**Ordinary high water mark**" on all lakes, streams, and tidal water is that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971, as it may naturally change thereafter, or as it may change thereafter in accordance with permits issued by a local government or the department: PROVIDED, That in any area where the ordinary high water mark cannot be found, the ordinary high water mark adjoining salt water shall be the line of mean higher high tide and the ordinary high water mark shall be the line of mean high water;
- (d) "**Shorelands**" or "**shoreland areas**" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all wetlands and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology.
- (i) Any county or city may determine that portion of a one-hundred-year-flood plain to be included in its master program as long as such portion includes, as a minimum, the floodway and the adjacent land extending landward two hundred feet therefrom.
- (ii) Any city or county may also include in its master program land necessary for buffers for critical areas, as defined in chapter 36.70A RCW, that occur within shorelines of the state, provided that forest practices regulated under chapter 76.09 RCW, except conversions to nonforest land use, on lands subject to the provisions of this subsection (2)(d)(iii) are not subject to additional regulations under this chapter;
- (e) "**Shorelines**" means all of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them; except (i) shorelines of statewide significance; (ii) shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments; and (iii) shorelines on lakes less than twenty acres in size and wetlands associated with such small lakes;
- (f) "**Shorelines of statewide significance**" means the following shorelines of the state:
 - (i) The area between the ordinary high water mark and the western boundary of the state from Cape Disappointment on the south to Cape Flattery on the north, including harbors, bays, estuaries, and inlets;
 - (ii) Those areas of Puget Sound and adjacent salt waters and the Strait of Juan de Fuca between the ordinary high water mark and the line of extreme low tide as follows:
 - (A) Nisqually Delta -- from DeWolf Bight to Tatsolo Point,
 - (B) Birch Bay -- from Point Whitehorn to Birch Point,
 - (C) Hood Canal -- from Tala Point to Foulweather Bluff,
 - (D) Skagit Bay and adjacent area -- from Brown Point to Yokeko Point, and
 - (E) Padilla Bay -- from March Point to William Point;
 - (iii) Those areas of Puget Sound and the Strait of Juan de Fuca and adjacent salt waters north to the Canadian line and lying seaward from the line of extreme low tide;
 - (iv) Those lakes, whether natural, artificial, or a combination thereof, with a surface acreage of one thousand acres or more measured at the ordinary high water mark;
 - (v) Those natural rivers or segments thereof as follows:
 - (A) Any west of the crest of the Cascade range downstream of a point where the mean annual flow is measured at one thousand cubic feet per second or more,
 - (B) Any east of the crest of the Cascade range downstream of a point where the annual flow is measured at two hundred cubic feet per second or more, or those portions of rivers east of the crest of the Cascade range downstream from the first three hundred square miles of drainage area, whichever is longer;
 - (vi) Those shorelands associated with (f)(i), (ii), (iv), and (v) of this subsection (2);
 - (g) "Shorelines of the state" are the total of all "shorelines" and "shorelines of statewide significance" within the state.....

Appendix C

JAN 21 2015

COPIES OF THIS DOCUMENT ARE AVAILABLE



Appendix D

Buffer Acres Plus Setback

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 GROWTH MANAGEMENT HEARINGS BOARD

Buffer Acres Plus Setback

	Water frontage	Depth	Sq. Ft.	Buffer Plus 10 ft. Setback				
				200 + 10	150 + 10	115 + 10	100 + 10	75 + 10
One Acre	200	218	43,560	96%	73%	57%	51%	39%
Average lot	50	100	5000	210%	160%	125%	110%	85%
	50	200	10000	105%	80%	63%	55%	43%
	100	200	20000	105%	80%	63%	55%	43%

Appendix E

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GROWTH MANAGEMENT HEARINGS BOARD

BEFORE THE ENVIRONMENTAL AND LAND USE HEARINGS OFFICE
(GROWTH MANAGEMENT HEARINGS BOARD –
WESTERN WASHINGTON REGION)

HOOD CANAL SAND & GRAVEL, LLC,
DBA, THORNDYKE RESOURCE, OLYMPIC
STEWARDSHIP FOUNDATION, J. EUGENE
FARR, WAYNE AND PEGGY KING, ANNE
BARTOW, BILL ELDRIDGE, BUD AND
VAL SCHINDLER, RONALD HOLSMAN,
CITIZENS' ALLIANCE FOR PROPERTY
RIGHTS JEFFERSON COUNTY, CITIZENS'
ALLIANCE FOR PROPERTY RIGHTS
LEGAL FUND, MATS MATS BAY TRUST,
JESSE A. STEWART REVOCABLE TRUST,
AND CRAIG DURGAN,

Petitioners,

v.

JEFFERSON COUNTY and STATE OF
WASHINGTON DEPARTMENT OF
ECOLOGY,

Respondents,

and

HOOD CANAL COALITION,

Intervenor.

Case No. 14-2-0008c

ERRATA SHEET TO OSF PETITIONERS
PREHEARING BRIEF ON THE MERITS

Olympic Stewardship Foundation, J. Eugene Farr, Wayne and Peggy King, Anne
Bartow, Bill Eldridge, Bud and Val Schindler, and Ronald Holsman ("The OSF Petitioners")
submit this Errata Sheet for their Prehearing Brief on the Merits. This Errata Sheet corrects

1 several typographical errors or incorrect word usage and adds a few additional (cumulative)
2 citations to the State Guidelines.

3 1. Page 3, line 19-20. The following citation should be added at the end of the
4 paragraph: "See also RCW 90.58.020, 90.58.080(1) (SMP must be consistent guidelines)."

5 2. Page 3, line 24-25. The following citation should be added after "RCW
6 90.58.020:" "WAC 173-26-176(3)(h)."

7 3. Page 8, line 8. Should read "no net loss" rather than "not net loss."

8 4. Page 11, line 2. At the end of the first sentence that ends with (emphasis
9 supplied), should be added "See also *Argument, infra*, p. 8 (Report)."

10 5. Page 11, line 11-12. At the end of the sentence "should be placed" should read
11 "should be safely placed."

12 6. Page 11, line 12-13. After "See Ex. 58," there should be added: "See also
13 JCC § 18.22.170(9) (Geotechnical Report)."

14 7. Page 13, line 12-13. Phrase "at the least" should read "at the most."

15 8. Page 15, line 18. After "changed circumstances," should be added "except
16 enactment of GMA Rural Zoning."

17 9. Page 18, line 1. The first word should be "NNL" not "NLL."

18 10. Page 19, line 6. On the line after the quotation should be added the following
19 citation to the SMP: "(SMP Art. 2, pp. 2-29, 2-30)."

20 11. Page 19, line 18. The word "eliminate" should instead read "no impacts to."

21 12. Page 21, line 24. After "adjacent properties" should be added the following
22 citation: "SMP Art. 10, Section 6(F)(1), p. 10-7."

23 13. Page 23, line 12-13. After "(obligation to protect property rights)," the
24
25
26

1 following citation should be added in: "*See also* WAC 173-26-176(3)(i)."

2 14. Page 27, line 4. The words "no demonstration" should read "no explicit
3 demonstration."

4 15. Page 28, line 20-21. The words "designation of critical areas" should read
5 "designation (not regulation) of critical areas."
6

7 16. Page 33, line 1. At first of page the following citation should be added: "and
8 WAC 173-26-221(5)(6)."

9 17. Page 35, line 2. At end of sentence should be added "as expressed in the
10 Comprehensive Plan."

11 18. Page 35, line 20. The words "the Commissioners" should read "the Planning
12 Commissioners."
13

14
15 RESPECTFULLY SUBMITTED this 16 day of December, 2014.

16 DENNIS D. REYNOLDS LAW OFFICE

17
18 By 

19 Dennis D. Reynolds, WSBA #04762
20 *Attorneys for Petitioners Olympic Stewardship
21 Foundation, J. Eugene Farr, Wayne and Peggy
22 King, Anne Bartow, Bill Eldridge, Bud and Val
23 Schindler, and Ronald Holsman*
24
25
26

Appendix F

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GROWTH MANAGEMENT HEARINGS BOARD

HEARING ON THE MERITS: JANUARY 21, 2015

BEFORE THE ENVIRONMENTAL AND LAND USE HEARINGS OFFICE
(GROWTH MANAGEMENT HEARINGS BOARD –
WESTERN WASHINGTON REGION)

HOOD CANAL SAND & GRAVEL, LLC,
DBA, THORNDYKE RESOURCE, OLYMPIC
STEWARDSHIP FOUNDATION, J. EUGENE
FARR, WAYNE AND PEGGY KING, ANNE
BARTOW, BILL ELDRIDGE, BUD AND
VAL SCHINDLER, RONALD HOLSMAN,
CITIZENS' ALLIANCE FOR PROPERTY
RIGHTS JEFFERSON COUNTY, CITIZENS'
ALLIANCE FOR PROPERTY RIGHTS
LEGAL FUND, MATA MATS BAY TRUST,
JESSE A. STEWART REVOCABLE TRUST,
AND CRAIG DURGAN,

Petitioners,

v.

JEFFERSON COUNTY and STATE OF
WASHINGTON DEPARTMENT OF
ECOLOGY,

Respondents.

Case No. 14-2-0008c

ERRATA TO REPLY BRIEF OF
PETITIONERS OLYMPIC
STEWARDSHIP FOUNDATION,
J. EUGENE FARR, WAYNE AND
PEGGY KING, ANNE BARTOW, BILL
ELDRIDGE, BUD AND VAL
SCHINDLER, AND RONALD HOLSMAN
("OSF Petitioners")

In the Reply Brief of the OSF Petitioners filed on Friday, January 16, 2015, the sentence on page 8 starting at line 16 which reads "Factually, the County is wrong because adjacent tidelands or shorelands along the Strait of Juan de Fuca are not shorelines of statewide significance" should read as follows: "Factually, the County is wrong because adjacent tidelands or shorelands along the Strait of Juan de Fuca and Puget Sound are not shorelines of statewide significance."

ERRATA TO OSF REPLY BRIEF - 1 of 4
[90049-2]

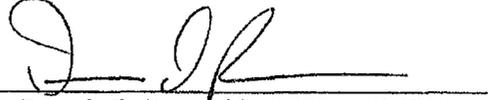
DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

ORIGINAL

1 RESPECTFULLY SUBMITTED this 20th day of January, 2015.

2 DENNIS D. REYNOLDS LAW OFFICE

3
4 By



Dennis D. Reynolds, WSBA #04762

5 *Attorneys for Petitioners Olympic Stewardship*
6 *Foundation, J. Eugene Farr, Wayne and Peggy*
7 *King, Anne Bartow, Bill Eldridge, Bud and Val*
8 *Schindler, and Ronald Holsman*

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**BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION**

Case No. 14-2-0008c

Hood Canal Sand & Gravel LLC, et al v. Jefferson County, et al

DECLARATION OF SERVICE

I, Lynn Truong, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Office Assistant for the Growth Management Hearings Board. On the date indicated below a copy of the FINAL DECISION AND ORDER in the above-entitled case was sent to the following through the United States postal mail service:

James C. Tracy, P.S
Attorney at Law
21106 President Pt Rd NE
Kingston WA 98346

Dennis D. Reynolds
The Law Office of Dennis D. Reynolds
200 Winslow Way West #380
Bainbridge Island WA 98110

Paul J. Hirsch
Hirsch Law Office
PO Box 771
Manchester WA 98353

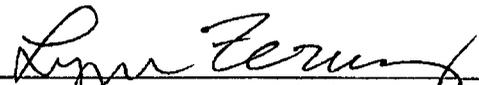
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Seattle WA 98104-7055

David S. Mann
Gendler & Mann
615 Second Ave Ste 560
Seattle WA 98104

Sonia A. Wolfman
Assistant Attorney General
PO Box 40117
Olympia, WA 98504-0117

DATED this 16th day of March, 2015.


Lynn Truong, Administrative Assistant

OSF Opening Brief

APPENDIX A-4

Buffer Acres Plus Setback

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WATER MANAGEMENT HEARINGS BOARD

Buffer Acres Plus Setback

	Buffer Acres Plus Setback				Buffer Plus 10 ft. Setback				
	Water frontage	Depth	Sq. Ft.	200+10	150+10	115+10	100+10	75+10	
One Acre	200	218	43,560	96%	73%	57%	51%	39%	
Average lot	50	100	5000	210%	160%	125%	110%	85%	
	50	200	10000	105%	80%	63%	55%	43%	
	100	200	20000	105%	80%	63%	55%	43%	

OSF Opening Brief

APPENDIX A-5

EXCERPTS**Chapter 18.25
SHORELINE MASTER PROGRAM**

Sections:

Article I. Introduction

- 18.25.010 Purpose and intent.
- 18.25.020 Applicability.
- 18.25.030 Governing principles of this master program.
- 18.25.040 Title.
- 18.25.050 Adoption authority.
- 18.25.060 Critical areas regulations adopted by reference.
- 18.25.070 Relationship to other plans and regulations.
- 18.25.080 Liberal construction.
- 18.25.090 Severability.

Article II. Definitions

- 18.25.100 Definitions.

Article III. Master Program Goals

- 18.25.110 Purpose.
- 18.25.120 Conservation.
- 18.25.130 Economic development.
- 18.25.140 Historic, archaeological, cultural, scientific and educational resources.
- 18.25.150 Public access.
- 18.25.160 Recreation.
- 18.25.170 Restoration and enhancement.
- 18.25.180 Shoreline use.
- 18.25.190 Transportation, utilities and essential public facilities.

Article IV. Shoreline Jurisdiction and Environment Designations

- 18.25.200 Shoreline jurisdiction and mapping.
- 18.25.210 Shoreline environment designations – Purpose and criteria.
- 18.25.220 Uses allowed in each shoreline environment designation.

Article V. Shorelines of Statewide Significance

- 18.25.230 Adoption of policy.
- 18.25.240 Designation of shorelines of statewide significance.
- 18.25.250 Use preference.

Article VI. General Policies and Regulations

- 18.25.260 Applicability.
- 18.25.270 Critical areas, shoreline buffers, and ecological protection.
- 18.25.280 Historic, archaeological, cultural, scientific and educational resources.
- 18.25.290 Public access.
- 18.25.300 Shoreline setbacks and height.
- 18.25.310 Vegetation conservation.
- 18.25.320 Water quality and quantity.

Article VII. Shoreline Modifications Policies and Regulations

- 18.25.330 Applicability – Purpose.
- 18.25.340 Beach access structures.
- 18.25.350 Boating facilities – Boat launches, docks, piers, floats, lifts, marinas, and mooring buoys.
- 18.25.360 Dredging.
- 18.25.370 Filling and excavation.
- 18.25.380 Flood control structures.
- 18.25.390 In-stream structures.
- 18.25.400 Restoration.
- 18.25.410 Structural shoreline armoring and shoreline stabilization.

Article VIII. Use-Specific Policies and Regulations

- 18.25.420 Purpose.
- 18.25.430 Agriculture.
- 18.25.440 Aquaculture.
- 18.25.450 Commercial use.
- 18.25.460 Forest practices.
- 18.25.470 Industrial and port development.
- 18.25.480 Mining.
- 18.25.490 Recreation.
- 18.25.500 Residential.
- 18.25.510 Signs.
- 18.25.520 Transportation.
- 18.25.530 Utilities.

Article IX. Permit Criteria and Exemptions

- 18.25.540 Substantial development permit criteria.
- 18.25.550 Exemptions from shoreline substantial development permit process.
- 18.25.560 Exemptions listed.
- 18.25.570 Statements of exemption.
- 18.25.580 Variance permit criteria.

.100(14)(e)

(q) *Motel* means a commercial building or group of buildings in which lodging is provided to transient guests, offered to the public for compensation, and in which access to and from each room or unit is through an exterior door.

(r) *Motor home* means a motor vehicle originally designed, reconstructed, or permanently altered to provide facilities for human habitation, which include lodging, cooking, and sewage disposal, and enclosed within a solid body shell with the vehicle, but excluding a camper or similar unit constructed separately and affixed to a motor vehicle (RCW 46.04.305).

(s) ***Must* means a mandate; the action is required.

(t) *Multifamily dwelling* means a single building, or portion thereof, designed for or occupied by three or more families living independently of each other in separate dwelling units on one lot of record and, for the purpose of this program, includes triplexes, fourplexes, apartment buildings, and residential condominiums.

(14) N Definitions.

(a) *National Register of Historic Places* means the official federal list, established by the National Historic Preservation Act, of sites, districts, buildings, structures and objects significant in the nation's history and prehistory, or whose artistic or architectural value is unique.

(b) *Native vegetation* means plant species that are indigenous to Jefferson County.

(c) *Nearshore* means the estuarine delta/marine shoreline and areas of shallow water from the top of the coastal bank or bluffs to the water at a depth of about 10 meters relative to mean lower low water.

(d) *Net pens* are finfish culturing systems that generally consist of two nets – an interior net to keep fish in and an exterior net to exclude predators. Net pens are typically anchored to the waterbody floor and suspended from the surface with a floatation structure; the netting continues above the water to a degree to stop fish from jumping out. Fish pen structures solely and directly established and managed for purposes of salmon enhancement and/or restoration are not considered net pens for purposes of this program.

→ (e) *No net loss (NNL)* means the maintenance of the aggregate total of the county shoreline ecological functions over time. The no net loss standard contained in WAC 173-26-186 requires that the impacts of shoreline use and/or development, whether permitted or exempt from permit requirements, be identified and mitigated such that there are no resulting adverse impacts on ecological functions or processes.

(f) *Noise* means any sound not occurring in the natural environment which causes or tends to cause an adverse psychological or physiological effect on humans. This includes sounds arising from the amplification of noises generated by expected or permitted uses of a lot or structure.

[Ord. 7-13 Exh. A (Art. IV § 3)]

Article V. Shorelines of Statewide Significance

18.25.230 Adoption of policy.

(1) In accordance with RCW 90.58.020, the county shall manage shorelines of statewide significance in accordance with this section and in accordance with this program as a whole. Preference shall be given to uses that are consistent with the statewide interest in such shorelines. Uses that are not consistent with this section or do not comply with the other applicable policies and regulations of this program shall not be permitted on shorelines of statewide significance.

(2) In managing shorelines of statewide significance, Jefferson County shall:

- (a) Recognize and protect the statewide interest over local interest;
- (b) Preserve the natural character of the shoreline;
- (c) Seek long-term benefits over short-term benefit;
- (d) Protect the resources and ecology of the shoreline;
- (e) Increase public access to publicly owned areas of the shoreline;
- (f) Increase recreational opportunities for the public in the shoreline; and
- (g) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

[Ord. 7-13 Exh. A (Art. V § 1)]

18.25.240 Designation of shorelines of statewide significance.

In accordance with RCW 90.58.030(2)(e), the following Jefferson County shorelines are designated shorelines of statewide significance:

- (1) Shorelines of natural rivers or segments thereof, including portions of the Bogachiel, Clearwater, Hoh, and Quinault Rivers, downstream from a point where the mean annual flow equals 1,000 cubic feet per second or more; and
- (2) The waters of Hood Canal between the ordinary high water mark and the line of extreme low tide south of the line between Tala Point and Foulweather Bluff; and
- (3) Those areas of Puget Sound and the Strait of Juan de Fuca and adjacent salt waters north to the Canadian line and lying seaward from the line of extreme low tide. [Ord. 7-13 Exh. A (Art. V § 2)]



18.25.250 Use preference.

To ensure that statewide interests are protected over local interests, the county shall review all development proposals within shorelines of statewide significance for consistency with RCW 90.58.030, this program, and the following, which are not listed in priority order:

- (1) When shoreline development or redevelopment occurs, it shall include restoration and/or enhancement of ecological conditions if such opportunities exist;
- (2) State and federal resource agencies, co-managers, and tribes, shall be consulted for development proposals that affect anadromous fish, shellfish, marine birds, and other shoreline resources;
- (3) Areas that are subject to commercial timber harvest pursuant to the Forest Practices Act and RCW 90.58.150 should be reforested as soon as possible and in accordance with the Forest Practices Act and the Forest and Fish Report;
- (4) Uses that are sustainable, that do not deplete natural resources, and that are compatible with other approved uses shall be preferred over uses that do not have these qualities;
- (5) Uses that provide long-term benefits shall be preferred over uses that provide only short-term gains;
- (6) Uses that preserve aesthetic qualities shall be preferred over uses that impact aesthetic qualities;
- (7) Uses that require a shoreline location shall be preferred over non-water-related uses. Non-water-related uses should be located outside the shoreline jurisdiction or in areas where they will not interfere with or displace preferred uses or public access;
- (8) Commercial shellfish beds, areas that support recreation and tourism, and other economic resources of statewide importance shall be protected;
- (9) Uses that have the potential to cause significant erosion and sedimentation due to excavation, land clearing, or other activities shall be strictly regulated to prevent adverse impacts to shoreline functions and processes;
- (10) All public access and recreation use and development shall be designed to protect the ecological resources upon which such activities depend; and
- (11) Public and private development shall be encouraged to provide trails, viewpoints, water access points and water-related recreation opportunities where conditions are appropriate for such uses. [Ord. 7-13 Exh. A (Art. V § 3)]

Article VI. General Policies and Regulations

18.25.260 Applicability.

The policies and regulations in this article apply to all uses and developments in all shoreline environments. The policies and regulations are not listed in order of priority. These policies and regulations:

- (1) Help to implement the master program goals in Article III of this chapter; and
- (2) Are informed by the governing principles in Article I of this chapter; and
- (3) Work in concert with all the other policies and regulations contained in this program; and

(4) Are based on the state shoreline guidelines (Chapter 173-26 WAC). [Ord. 7-13 Exh. A (Art. VI)]



18.25.270 Critical areas, shoreline buffers, and ecological protection.

(1) Policies.

(a) All shoreline use and development should be carried out in a manner that avoids and minimizes adverse impacts on the shoreline environment. Uses and developments that may cause the future ecological condition to become worse than current condition should not be allowed. Use and development in areas that are ecologically valuable, hazardous, and/or possess rare or fragile natural features should be discouraged.

(b) In assessing the potential for new uses and developments to cause adverse impacts, the county should take into account all of the following:

(i) Effects on ecological functions and ecosystem processes; and

(ii) Effects that occur on site and effects that may occur off site; and

(iii) Immediate effects and long-term effects; and

(iv) Direct effects of the project and indirect effects; and

(v) Individual effects of the project and the incremental or cumulative effects resulting from the project added to other past, present, and reasonably foreseeable future actions; and

(vi) Compensatory mitigation actions that offset adverse impacts of the development action and/or use.

(c) The county should recognize and honor buffers and setbacks established by existing plats, preliminary plats, issued permits, binding site plans (BSPs) and site plan approval advance determinations (SPAADs), and by development agreements that are consistent with Chapter 36.70B RCW.

(d) The county should work with other local, state, and federal regulatory agencies and resource management agencies to ensure that mitigation actions carried out in support of this program are likely to be successful and achieve beneficial ecological outcomes. This includes assisting applicants/proponents in planning, designing and implementing mitigation.

(e) Single-family residential development on nonconforming lots should not substantially impair the view of the adjacent residences.

(2) Regulations – No Net Loss and Mitigation.

(a) All shoreline use and development, including preferred uses and uses that are exempt from permit requirements, shall be located, designed, constructed, conducted, and maintained in a manner that maintains shoreline ecological processes and functions.

- (b) Uses and developments that cause a net loss of ecological functions and processes shall be prohibited. Any use or development that causes the future ecological condition to become worse than current condition shall be prohibited.
- (c) Proponents of new shoreline use and development shall employ measures to mitigate adverse impacts on shoreline functions and processes.
- (d) Mitigation shall include the following actions in order of priority:
- (i) Avoiding the impact altogether by not taking a certain action or parts of an action;
 - (ii) 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;
 - (iii) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
 - (iv) Reducing or eliminating the impact over time by preservation and maintenance operations;
 - (v) Compensating for the impact by replacing, enhancing, or providing substitute resources or environments;
 - (vi) Monitoring the impact and the compensation projects and taking appropriate corrective measures.
- (e) Mitigation actions shall not have a significant adverse impact on other shoreline uses fostered by the policies of the Shoreline Management Act.
- (f) When compensatory mitigation measures are required, all of the following shall apply:
- (i) The quality and quantity of the replaced, enhanced, or substituted resources shall be the same or better than the affected resources; and
 - (ii) The mitigation site and associated vegetative planting shall be nurtured and maintained such that healthy native plant communities can grow and mature over time; and
 - (iii) The mitigation shall be informed by pertinent scientific and technical studies, including but not limited to the Shoreline Inventory and Characterization Report (Final – Revised November 2008), the Shoreline Restoration Plan (Final October 2008) and other background studies prepared in support of this program; and
 - (iv) The mitigation shall replace the functions as quickly as possible following the impacts to ensure no net loss; and
 - (v) The mitigation activity shall be monitored and maintained to ensure that it achieves its intended functions and values. The monitoring timeframes shall be consistent with JCC 18.22.350(3)(h).

- (vi) The county shall require the applicant/proponent to post a bond or provide other financial surety equal to the estimated cost of the mitigation in order to ensure the mitigation is carried out successfully. The bond/surety shall be refunded to the applicant/proponent upon completion of the mitigation activity and any required monitoring.
- (g) To encourage shoreline property owners to remove bulkheads and perform other beneficial shoreline restoration actions in advance of shoreline development or redevelopment, the county may give mitigation credit to any beneficial restoration action that occurred within five years of the proposed development/redevelopment activity; provided, that:
 - (i) The applicant/property owner can provide conclusive evidence of the pre- and post-restoration conditions using photographs, reports, plans, affidavits, or similar evidence;
 - (ii) The county can confirm via site inspection, photographs, affidavits or other evidence that the restoration actions have improved shoreline conditions; and
 - (iii) The applicant/property owner provides assurances that the restoration area will be maintained in perpetuity. The assurance can be in the form of a notice on title, conservation easement, or similar mechanism.
- (h) Compensatory mitigation measures shall occur in the vicinity of the impact or at an alternative location within the same watershed or appropriate section of marine shoreline (e.g., reach or drift cell) that provides greater and more sustainable ecological benefits. When determining whether off-site mitigation provides greater and more sustainable benefits, the county shall consider limiting factors, critical habitat needs, and other factors identified by the locally adopted shoreline restoration plan (October 2008 or as updated), or an approved watershed or comprehensive resource management plan. The county may also approve use of alternative mitigation practices such as in-lieu fee programs, mitigation banks, and other similar approaches, provided they have been approved and sanctioned by the Department of Ecology, the Puget Sound Partnership, the Department of Fish and Wildlife or the Army Corps of Engineers.
- (i) Land that is constrained by critical areas and/or buffers shall not be subdivided to create parcels that are only buildable through a shoreline variance or would be considered nonconforming.

(3) Regulations – Cumulative Impacts.

- (a) The county shall consider the cumulative impacts of individual uses and developments, including preferred uses and uses that are exempt from permit requirements, when determining whether a proposed use or development could cause a net loss of ecological functions.
- (b) The county shall have the authority to require the applicant/proponent to prepare special studies, assessments and analyses as necessary to identify and address cumulative impacts including, but not limited to, impacts on fish and wildlife habitat, public access/use, aesthetics, and other shoreline attributes.

- (c) Proponents of shoreline use and development shall take the following factors into account when assessing cumulative impacts:
- (i) Current ecological functions and human factors influencing shoreline natural processes; and
 - (ii) Reasonably foreseeable future use and development of the shoreline; and
 - (iii) Beneficial effects of any established regulatory programs under other local, state, and federal laws; and
 - (iv) Mitigation measures implemented in conjunction with the proposed project to avoid, reduce and/or compensate for adverse impacts.
- (d) The county shall prohibit any use or development that will result in unmitigated cumulative impacts.
- (4) Regulations – Critical Areas and Shoreline Buffers.
- (a) Critical areas provisions of Chapter 18.22 JCC, dated March 17, 2008 (Ordinance No. 03-0317-08), and further amended in May 2009 (Ordinance No. 06-0511-09), and August 2010 (Ordinance No. 04-0809-10) are incorporated by reference; however, the following exceptions shall prevail for actions occurring within shoreline jurisdiction:
- (i) All provisions listed in subsections (4)(b) through (l) and (5)(a) through (d) of this section (e.g., building setback, buffers, CASPs, reasonable use, nonconforming lots, water-oriented use/development) and provisions found in JCC 18.25.660 (i.e., nonconforming development), shall be governed by this program and not Chapter 18.22 JCC; and
 - (ii) Sections of Chapter 18.22 JCC, Article II of this chapter and other sections of JCC Title 18 regarding permit process, administrative, nonconforming use, appeal, and enforcement provisions within shoreline jurisdiction shall be governed by this program and not Chapter 18.22 JCC.
- (b) In the event development or performance standards in Chapter 18.22 JCC are inconsistent with standards and requirements in this program, this program shall govern.
- (c) Unless otherwise specified in this program, a buffer zone shall be established landward of all shorelines of the state to protect and maintain ecological functions and processes and to minimize risks to human health and safety. All buffers shall be maintained in a predominantly natural, undisturbed, undeveloped, and vegetated condition. Buffers shall not extend across lawfully established paved roads or hardened surfaces to include areas which are functionally isolated from the shoreline or critical area.
- (d) Building Setback. As established in Chapter 18.22 JCC, all new uses and developments, including preferred uses and uses exempt from shoreline permit requirements, shall be located landward of the standard buffer plus a 10-foot-wide building setback unless otherwise specified in this program.

- (e) Standard Buffer. The standard buffer shall be measured landward in a horizontal direction perpendicular to the ordinary high water mark (OHWM) of the shoreline water body, and is a three dimensional space that includes the airspace above, as follows:
- (i) Marine Shores. A minimum buffer of 150 feet shall be maintained in all shoreline environments.
 - (ii) Lake Shores. A minimum buffer of 100 feet shall be maintained in all shoreline environments.
 - (iii) Stream/River Shores. A minimum buffer of 150 feet shall be maintained in all shoreline environments.
- (f) The county shall recognize and apply a buffer or setback established by an existing plat, preliminary plat, issued permit, binding site plan (BSP), site plan approval advance determination (SPAAD), or a development agreement that is consistent with Chapter 36.70B RCW.
- (g) Multiple Buffers. In the event that buffers for any shorelines and/or critical areas are contiguous or overlapping, the landward-most edge of all such buffers and setbacks shall apply.
- (h) Buffer Condition. The area within a required shoreline buffer shall be kept in a sufficiently vegetated condition so as to ensure it protects and maintains the existing ecological functions. Existing native vegetation shall be retained, and planting of native vegetation is preferred.
- (i) Buffer Usage. When located to avoid areas of noted sensitivity and habitat, an area shall be permitted for "active use" within an approved buffer, provided the area does not exceed 20 percent of the required buffer area or is configured to span at least 15 linear feet of the water frontage, whichever is greater. This regulation shall not apply retroactively to existing uses except when new use or development is proposed.
- (j) Buffer Reduction or Averaging. Proposals that request a decrease in the standard shoreline buffer of this program shall not require a shoreline variance if all of the approval criteria in JCC 18.22.270(6) and (7) are met. All other shoreline buffer reduction or shoreline buffer averaging proposals shall require a shoreline variance.
- (k) Increased Buffers. An increase in buffer width shall be required upon determination that the development would be:
- (i) Susceptible to severe erosion resulting in adverse impacts to the shoreline; or
 - (ii) Susceptible to health and safety risks caused by stream or river channel migration; or
 - (iii) Susceptible to health and safety risks caused by flooding – from sea, river/stream; or
 - (iv) On steeply sloped (greater than 25 percent) land adjacent to the ordinary high water mark.
- (l) Alternative Protection via Critical Areas Stewardship Plans (CASPs). If a proponent of a shoreline use or development proposes to modify the buffer width requirement of an SMA-regulated waterbody

using the CASP standards described in Article IX of Chapter 18.22 JCC, such buffer modification shall require a shoreline variance. If the proposed CASP buffer modification is for a wetland or habitat conservation area that is physically separated from the SMA-regulated waterbody, no shoreline variance shall be required.

(5) Regulations – Exceptions to Critical Area and Shoreline Buffer Standards.

(a) Nonconforming Lots – Development Allowed without a Variance (Modest Home Provision). New single-family development on any legal lot in shoreline jurisdiction that is nonconforming with respect to the required buffer standards may be allowed without a shoreline variance when:

(i) The depth of the lot (distance from the ordinary high water mark to the inside edge of the frontage setback) is equal to or less than the standard shoreline buffer as indicated in subsection (4)(e) of this section; and

(ii) The building area lying landward of the shoreline buffer and interior to required sideyard setbacks is not more than 2,500 square feet and the driveway is not more than 1,100 square feet. The building area means the entire area that will be disturbed to construct the home, normal appurtenances (except drainfields), and landscaping; and

(iii) All single-family residences approved under this section shall not extend waterward of the common-line buffer; and

(iv) Appropriate measures are taken to mitigate all adverse impacts, including using low impact development measures such as pervious pavement for driveways and other hard surfaces; and

(v) Opportunities to vary the side yard and/or frontage setbacks are implemented to reduce the nonconformity when doing so will not create a hazardous condition or a condition that is inconsistent with this program and Chapter 18.30 JCC; and

(vi) The residence is located in the least environmentally damaging location relative to the shoreline and any critical areas; and

(vii) There is no opportunity to consolidate lots under common ownership that will alleviate the nonconformity; and

(viii) The lot is not subject to geologic hazards; and

(ix) All structures are as far landward as possible and not closer than 30 feet from the ordinary high water mark; and

(x) At least 80 percent of the buffer area between the structures and the shoreline and/or critical area is maintained in a naturally vegetated condition.

(b) Nonconforming Lots – Common Line Buffer. For the purpose of accommodating shoreline views to be adequate and comparable to adjacent residences, but not necessarily equivalent, the

administrator may reduce the standard buffer for a new single-family residence on nonconforming lots consistent with the following criteria:

(i) The proposed residence must be located within 300 feet of an adjacent legally established single-family residential primary structure constructed prior to adoption of this program that encroaches on the standard buffer. The mere presence of nearby shacks, sheds or dilapidated buildings does not constitute the existence of a residence, nor can such structures be used to determine a common line buffer. The nearest corners of the adjacent residences are those closest to the side-yard property line of the proposed residence.

(ii) Existing Homes on Both Sides. Where there are existing residences adjacent on both sides of the proposed residence, the buffer shall be determined as the greater of either (A) a common line drawn between the nearest corners of each adjacent residence (see Figure 18.25.270(1)), or (B) a common line calculated by the average of both adjacent residences' existing setbacks (i.e., $(y+z)/2=x$ buffer; see Figure 18.25.270(2)).

(iii) Existing Home on One Side. Where there is only one existing residence adjacent to the proposed residence, the common line buffer shall be determined as the greater of either (A) a common line drawn between nearest corner of the foundation for the adjacent residence and the nearest point of the standard buffer on the adjacent vacant lot (see Figure 18.25.270(3)), or (B) a common line calculated by the average of the adjacent residence's setback and the standard buffer for the adjacent vacant lot (i.e., $(y+z)/2=x$ buffer; see Figure 18.25.270(4)).

(iv) Figures 18.25.270(1) through (4) illustrate examples of the common line buffer allowance. When discrepancy between the text and the graphic exists, the text shall govern. Graphics are for illustration only, buffer shall be measured perpendicularly from the ordinary high water mark as per this section.

Figures 18.25.270(1) – (4)

Figure 18.25.270(1)

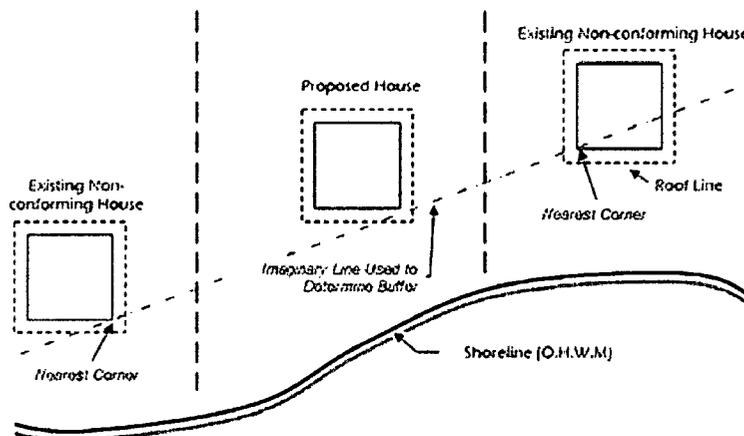


Figure 18.25.270(2)

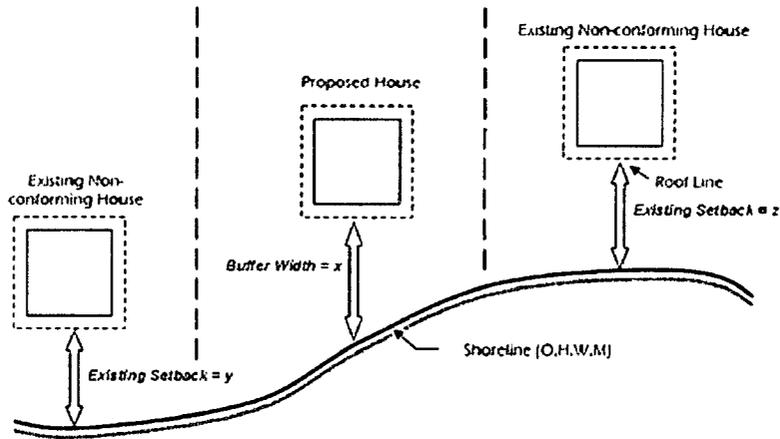


Figure 18.25.270(3)

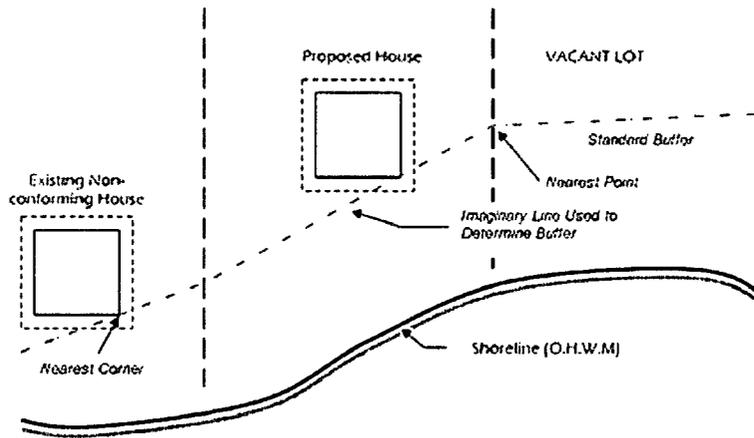
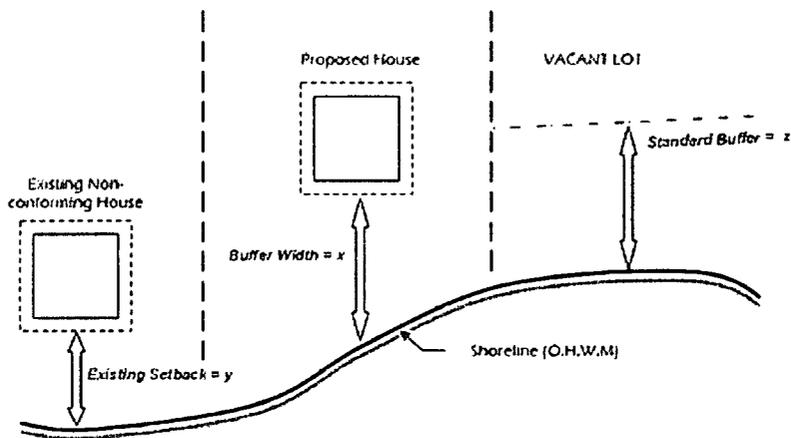


Figure 18.25.270(4)



(c) Nonconforming Lots – Development Requiring a Variance. Development on nonconforming lots that do not meet the requirements of subsection (5)(a) or (b) of this section require a shoreline variance.

(d) Water-Oriented Uses/Development. When otherwise consistent with this program and Chapter 18.22 JCC, the following water-oriented uses/developments may be permitted within a shoreline buffer without a shoreline variance. The amount and extent of buffer modification shall be the minimum needed to accommodate the allowed use/development. This allowance for water-oriented uses/developments within shoreline buffers without a shoreline variance may apply to the primary use and/or to the following accessory uses/structures:

(i) Primary uses and structures that meet the definition of a water-dependent or water-related use/development as defined in Article II of this chapter.

(ii) Boating facilities accessory to a single-family residential development including rails, docks, piers and floats;

(iii) Boathouses accessory to a single-family residential development; provided, that all of the following are met:

(A) The boathouse is used to store watercraft and shall not be used as or converted to a dwelling unit. The county shall require a notice on title indicating such; and

(B) The boathouse has a maximum footprint of 300 square feet and a maximum height of 15 feet above average grade; and

(C) The primary doorway/entryway faces the water; and

(D) The structure is located entirely landward of the ordinary high water mark.

(iv) Public or private beach access structures accessory to residential, commercial, industrial, port or other allowed uses/development; and

(v) Public access structures, including but not limited to docks, piers, floats; and

(vi) Certain utilities and essential public facilities as specified in JCC 18.25.530. [Ord. 7-13 Exh. A (Art. VI § 1)]

18.25.280 Historic, archaeological, cultural, scientific and educational resources.

(1) Policies.

(a) Historic, archaeological, cultural, scientific and educational (HACSE) sites and resources should be protected, preserved, and where possible, restored. All use and development on sites containing HACSE resources should be planned and carried out so as to prevent adverse impacts to the resource(s).

- (e) Where public access is provided to any private or publicly owned building or structure of historic, archaeological or cultural significance, a public access management plan shall be developed in consultation with the Washington State Department of Archaeology and Historic Preservation, affected tribes and/or other agencies, to address the following:
- (i) The type and/or level of public access that is consistent with the long-term protection of both historic resource values and shoreline ecological functions and processes; and
 - (ii) Types and location of interpretative signs, displays and other educational materials; and
 - (iii) Site- and resource-specific conditions, including hours of operation, interpretive and/or directional signage, lighting, pedestrian access, and/or traffic and parking.
- (f) If any phenomena of possible historic, archaeological and/or cultural interest are inadvertently discovered during any new shoreline use or development, the proponent shall immediately stop work and comply with all of the following:
- (i) Notify the county department of community development, Washington State Department of Archaeology and Historic Preservation, affected tribes, and other appropriate agencies;
 - (ii) Prepare a site assessment pursuant to this section to determine the significance of the discovery and the extent of damage to the resource;
 - (iii) Distribute the site assessment to the Washington State Department of Archaeology and Historic Preservation and affected tribes for a 30-day review to determine the significance of the discovery;
 - (iv) Maintain the work stoppage until the county determines that the site is considered significant by the above listed agencies or governments, or if the above listed agencies or governments have failed to respond within the applicable review period following receipt of the site assessment; and
 - (v) Prepare a CRMP pursuant to this section if the county determines that the site is significant.
- (g) Upon inadvertent discovery of human remains, the county sheriff, coroner, and State Department of Archaeology and Historic Preservation (DAHP) must be immediately notified.
- (h) In the event that unforeseen factors constituting an emergency as defined in RCW 90.58.030 necessitate rapid action to retrieve or preserve historic, archaeological and/or cultural resources, the project may be exempted from the requirement to obtain a permit. The county shall notify the State Department of Ecology, the State Attorney General's Office, potentially affected tribes, and the State Department of Archaeology and Historic Preservation of such a waiver within 30 days of such action. [Ord. 7-13 Exh. A (Art. VI § 2)]



18.25.290 Public access.

(1) Policies.

- (a) Providing public access to public shorelines is a primary goal of the Shoreline Management Act. Jefferson County actively supports public and private efforts making better use of existing facilities/opportunities. Strategic efforts to find and fund new shoreline public access are encouraged to meet increasing demands by a growing populace. Increasing all types of public access is a priority for the county.
- (b) The county should prepare a comprehensive shoreline public access plan in cooperation with appropriate local, state, tribal and nongovernmental agencies/organizations, and the general public.
- (c) The county should work with appropriate agencies and individuals to acquire lands that can provide physical access to public waters for public use.
- (d) Shoreline development by public entities, such as local governments, port districts, state agencies, and public utility districts, should provide public access as part of each development project, unless such access is shown to be incompatible with this program due to reasons of safety, security, or adverse impacts to shoreline functions and processes.
- (e) Shoreline development by private entities should provide public access when the development would either generate a demand for one or more forms of such access, and/or would impair existing legal access opportunities or rights.
- (f) Single-family residential developments with four or fewer lots/units should not be required to provide public access.
- (g) Public health and safety concerns associated with public access sites should be adequately mitigated and appropriate precautions taken to prevent adverse impacts on shoreline ecological functions and/or processes.
- (h) Efforts to implement the public access provisions of this section should be consistent with all relevant constitutional and other legal limitations on regulation of private property.
- (i) Public access requirements on privately owned lands should be commensurate with the scale and character of the development and should be reasonable, effective and fair to all affected parties including but not limited to the landowner and the public.
- (j) Where feasible, providers of shoreline public access should:
- (i) Locate and design public access improvements in a manner that is compatible with the natural shoreline character and avoids adverse impacts to shoreline ecological functions and processes; and
 - (ii) Ensure public access improvements and amenities are safe, respect individual privacy, and avoid or minimize visual impacts from neighboring properties; and
 - (iii) Provide maps and orientation information to inform the public of the presence and location of privately held tidelands, especially those adjacent to public access and recreational areas; and

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(iv) Incorporate programs, signage and informational kiosks into public access locations, where appropriate, to enhance public education and appreciation of shoreline ecology and areas of historical or cultural significance.

(2) Regulations.

(a) Single-family residential developments consisting of four or fewer residential lots or dwelling units shall not be required to provide public access.

(b) Opportunities to provide visual and/or physical public access shall be considered during the review and conditioning of all proposed commercial and industrial shoreline developments and residential developments involving more than four residential lots or dwelling units.



(c) Physical public access shall be incorporated into all development proposals on public lands, all public and private commercial and industrial uses/developments, and all residential subdivisions of greater than four lots unless the project proponent demonstrates that any of the following conditions exist:

(i) Unavoidable public health or safety hazards exist and cannot be prevented through reasonable means; or

(ii) The use/development has inherent security or cultural sensitivity requirements that cannot be mitigated through reasonable design measures or other solutions; or

(iii) The cost of providing the access, easement or an alternative amenity is disproportionate to the total long-term cost of the proposed development; or

(iv) The public access will cause unacceptable environmental impacts that cannot be mitigated; or

(v) The access would create significant, undue, and unavoidable conflicts with adjacent uses that cannot be mitigated.

(d) To be exempt from the public access requirements in subsection (2)(c) of this section, the project proponent must demonstrate that all feasible alternatives have been considered, including, but not necessarily limited to:

(i) Regulating access through means such as maintaining a gate and/or limiting hours of use; and

(ii) Separating uses and activities (e.g., fences, terracing, use of one-way glazing, hedges, landscaping, etc.).

(e) When physical public access is deemed to be infeasible based on considerations listed in subsection (2)(c) of this section, the proponent shall provide visual access to the shore or provide physical access at an off-site location geographically separated from the proposed use/developmental (e.g., a street end, vista, or trail system).

(f) Public access shall be located and designed to be compatible with the natural shoreline character, to avoid adverse impacts to shoreline ecological functions and processes, and to ensure public safety.

(g) When otherwise consistent with this program, public access structures shall be exempt from the shoreline buffer requirements of this program, meaning that such structures shall be allowed to encroach into the shoreline buffer when necessary to provide physical and/or visual access to the water's edge.

(h) Public shoreline access provided by public road ends, public road rights-of-way, public utilities and rights-of-way shall not be diminished by the county, neighboring property owners, or other citizens, unless the property is zoned for industrial uses in accordance with RCW 36.87.130.

(i) Public access sites shall be directly connected to the nearest public street and shall include improvements that conform to the requirements of the Americans with Disabilities Act (ADA) when feasible and appropriate.

(j) Opportunities for boat-in public access and access to primitive shorelines not accessible by automobile shall be provided where feasible and appropriate.

(k) When required for public land, commercial, port or industrial use/development as per subsections (2)(b) and (c) of this section, public access sites shall be fully developed and available for public use prior to final occupancy of such use or development.

(l) Public access easements and permit conditions shall be recorded on the deed of title and/or the face of a short or long plat as a condition running, at a minimum, for a period contemporaneous with the duration of the authorized land use. Recordation shall occur at the time of final plat approval or prior to final occupancy.

(m) The location of new public access sites shall be clearly identified. Signs with the appropriate agency's logo shall be constructed, installed and maintained by the project proponent in conspicuous locations at public access sites and/or along common routes to public access sites. The signs shall indicate the public's right of access, the hours of access, and other information as needed to control or limit access according to conditions of approval. [Ord. 7-13 Exh. A (Art. VI § 3)]

18.25.300 Shoreline setbacks and height.

(1) Policies.

(a) Standards for density, setbacks, height, and other provisions should ensure no net loss of shoreline ecological functions and/or processes and preserve the existing character of the shoreline consistent with the purpose of the applicable shoreline environment designation.

(b) Proponents of a development on no-bank or low bank marine shorelines are encouraged to locate the bottom of a structure's foundation higher than the level of expected future sea-level rise.

(2) Regulations.

- (a) A building setback of 10 feet shall be established on the landward edge of the shoreline buffers required by this program.
- (b) Sideyard setbacks shall be measured from all property lines that intersect the shoreline side of a lot or tract. Five feet of the total required sideyard setbacks may be provided on one side and the balance on the other side.
- (c) Pursuant to RCW 90.58.320, no permit may be issued for any new or expanded building or structure more than 35 feet above average grade level when such a height will obstruct the view of a substantial number of residences on or adjoining such shorelines. Height is measured according to the definition in Article II of this chapter. The project proponent shall be responsible for providing sufficient information to the administrator to determine that such development will not obstruct views as described.
- (d) Power poles and transmission towers associated with allowed uses and developments are not subject to height limits but shall not be higher than necessary to achieve the intended purpose. [Ord. 7-13 Exh. A (Art. VI § 4)]



18.25.310 Vegetation conservation.

(1) Policies.

- (a) Maintaining native shoreline vegetation is an important goal of this program. The policies and regulations of this section are intended to ensure well-vegetated, stable shorelines that provide habitat and other ecological benefits and resemble natural, unaltered shorelines.
- (b) New uses and/or developments should be designed to preserve native shoreline vegetation to maintain shoreline ecological functions and processes and prevent direct, indirect and/or cumulative impacts of shoreline development.
- (c) New uses and/or developments should establish native shoreline vegetation such that the composition, structure, and density of the plant community resemble a natural, unaltered shoreline as much as possible.
- (d) Maintaining well-vegetated shorelines is preferred over clearing vegetation to create views or provide lawns. Limited and selective clearing for views and lawns may be allowed when slope stability and ecological functions are not compromised, but landowners should not assume that an unobstructed view of the water is guaranteed. Trimming and pruning are generally preferred over removal of native vegetation. Property owners are strongly encouraged to avoid or minimize the use of fertilizers, herbicides and pesticides.
- (e) Shoreline landowners are encouraged to preserve and enhance native woody vegetation and native groundcovers to stabilize soils and provide habitat. Maintaining native plant communities is

preferred over nonnative ornamental plantings because native plants have greater ecological value. Nonnative vegetation that requires use of fertilizers, herbicides and/or pesticides is discouraged.

(f) Prior to granting a shoreline permit or determining that a proposed use/development is exempt from permitting, the county should evaluate site plans to determine the extent to which the vegetation is conserved. As needed, the county may require special reports regarding vegetation and shall condition approval of new developments to ensure the following:

- (i) Native plant communities on marine, river, and lake shorelines are preserved; and
- (ii) Overhanging trees along shorelines are kept intact to provide shading and other ecological functions; and
- (iii) Established areas of native plants are preserved to maintain slope stability and prevent surface erosion; and
- (iv) Structures and associated development are placed in areas that avoid disturbance of established native plants, especially trees and shrubs; and
- (v) Clearing and grading near bluff edges and other erosion- or landslide-prone areas are minimized to prevent slope instability; and
- (vi) Shoreline development proposals should incorporate provisions for removing invasive or nonnative species and planting native species when doing so would improve ecological functions and processes.

(2) Regulations.

(a) Unless otherwise specified, all shoreline use and development, including preferred uses and uses exempt from permit requirements, shall comply with the buffer provisions of this program and Chapter 18.22 JCC to protect and maintain shoreline vegetation.

(b) Proponents of all new shoreline uses or developments shall demonstrate that site designs and layouts are consistent with the policies of this section to ensure shoreline functions, values, and processes are maintained and preserved. A shoreline permit or written statement of exemption shall not mandate, nor guarantee, unobstructed horizontal or lateral visibility of the water, shoreline or any specific feature near or far.

(c) View Maintenance. Proponents of all new shoreline uses or developments shall use all feasible techniques to maximize retention of existing native shoreline vegetation while allowing for shoreline views.

- (i) Vegetation Trimming. Techniques shall include selective pruning, windowing and other measures that preserve native plant composition and structure. No more than 25 percent of a single tree's leaf bearing crown may be removed and no more than 25 percent of the canopy cover of any stand of trees may be removed for view preservation. If additional trimming is

requested in subsequent years, the cumulative removal may not exceed 25 percent. Limbing or crown thinning shall comply with Tree Care Industry Association pruning standards, unless the tree is a hazard tree as defined by this program. Tree topping is prohibited when main stem/trunk is over three inches diameter at breast height (DBH).

(ii) Vegetation Removal. All vegetation removal within the buffer area must comply with JCC 18.25.270(4)(h). In no instance shall vegetation removal exceed 20 percent of the required buffer area or 15 linear feet of the water frontage, whichever is greater. Outside the buffer, vegetation removal shall be the minimum necessary for maintaining shoreline views from the primary structure and to provide lawns or ground cover, and must comply with other applicable requirements such as clearing and grading, forest practices, and protection standards for fish and wildlife habitat.

(iii) The administrator may deny a request or condition approval of vegetation management proposals for view maintenance if it is determined the action will result in an adverse effect to any of the following:

- (A) Slope stability;
- (B) Habitat value;
- (C) Health of surrounding vegetation;
- (D) Risk of wind damage to surrounding vegetation;
- (E) Nearby surface or ground water; or
- (F) Water quality of a nearby water body.

(d) Proponents of all new shoreline uses or developments shall maintain existing native shoreline vegetation to the maximum extent practicable, except that the following activities shall be exempt from this requirement:

- (i) Existing and ongoing agricultural activities on agricultural lands enrolled in the open space tax program for agriculture or on lands designated as agricultural lands of long-term commercial significance on the official map of Comprehensive Plan land use designations;
- (ii) Buffer enhancement by removal of noxious weeds, based on consultation with the Jefferson County noxious weed board, and/or planting native vegetation;
- (iii) Maintenance of existing residential landscaping, such as lawns and gardens, pursuant to JCC 18.22.070(13);
- (iv) Maintenance trimming of the limbs or branches on a tree or shrub that has a main stem less than three inches in diameter at breast height (DBH);

- (v) Construction of pervious surface trails for nonmotorized use, provided the trail is no wider than five feet and the vegetation trimming is limited to five feet on either side of the trail except where an arborist report indicates that additional vegetation trimming or removal is required for safety reasons;
 - (vi) Harvest of wild crops that does not significantly affect the viability of the wild crop, or adversely affect shoreline functions of the area;
 - (vii) Removal of a hazard tree, as defined in Article II of this chapter, where trimming is not sufficient to address the hazard. In such cases, the downed tree shall be retained on site to provide wildlife habitat and enhance in-stream or marine habitat if present. The location of retained materials placed on site shall reflect firewise program guidance for defensible space and fire safety. Where not immediately apparent to the administrator, the hazard tree determination shall be made after review of a report prepared by an arborist or forester.
- (e) The county may impose conditions on new shoreline use and/or development as needed to prevent the introduction and spread of aquatic weeds. Aquatic weed removal and disposal shall occur in a manner that minimizes and mitigates adverse impacts to native plant communities and shoreline ecological functions.
- (f) When restoring or enhancing shoreline vegetation, proponents shall use native species approved by the county that are of a similar diversity, density, and type to that occurring in the general vicinity of the site prior to any shoreline alteration. The vegetation shall be nurtured and maintained to ensure establishment of a healthy and sustainable native plant community over time.
- (g) The vegetation conservation regulations of this program do not apply to commercial forest practices as defined by Article II of this chapter when such activities are covered under the Washington State Forest Practices Act (Chapter 76.09 RCW). Where such activities are associated with a conversion of forest lands to other uses or other forest practice activities, the vegetation conservation requirements shall apply.
- (h) Vegetation conservation standards shall not apply retroactively to existing uses and developments, although property owners are strongly encouraged to voluntarily improve shoreline vegetation conditions over the long term.
- (i) Vegetative debris shall be properly managed by mulching/leaving in place as habitat and soil amendment, composting on-site, or removing and disposing of off-site. The dumping of vegetative debris, including grass clippings and yard waste, in shoreline areas is strongly discouraged, especially when slope stability and water quality would be threatened.
- (j) Vegetative debris in the buffer that creates a fire hazard to existing structures may be reduced by chipping if the chipped material is returned to the original location. Fallen tree trunks may not be removed or chipped. [Ord. 7-13 Exh. A (Art. VI § 5)]

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(k) Prior to approving a permit for a beach access structure, the county shall require the project proponent to demonstrate that the project is consistent with this program. Information to be provided by the proponent will include, but not be limited to:

- (i) Existing conditions at the site related to erosion, slope stability, drainage, vegetation, and coastal processes; and
- (ii) Probable effects of the access structure on the stability of the site over time; and
- (iii) Potential effects of the access structure on shoreline processes such as net-shoreline drift, sediment transport, mass wasting, and erosion; and
- (iv) Methods for maintaining the structure over time that will preclude the need for a bulkhead or other type of stabilization in the future; and
- (v) Potential effects on fish and wildlife habitats and other shoreline ecological functions; and
- (vi) Measures needed to ensure/maintain slope stability, maintain coastal processes, and prevent erosion in the long term.

(l) The county may require proposals for pedestrian beach access structures to include geotechnical analysis prepared by a licensed professional engineer or geologist and/or biological analysis prepared by a qualified biologist. [Ord. 7-13 Exh. A (Art. VII § 1)]



18.25.350 Boating facilities – Boat launches, docks, piers, floats, lifts, marinas, and mooring buoys.

(1) Policies.

- (a) Boating facilities as defined in Article II of this chapter should be located, designed, constructed and operated with appropriate mitigation to avoid adverse effects on shoreline functions and processes and to prevent conflicts with other allowed uses.
- (b) Boating facilities should not be located or expanded where they would:
 - (i) Impact critical habitats; or
 - (ii) Substantially interfere with currents and/or net-shoreline drift; or
 - (iii) Cause significant adverse effects on aquatic habitat, biological functions, water quality, aesthetics, navigation, and/or neighboring uses.
- (c) Docks and piers should not be allowed where shallow depths require excessive overwater length.
- (d) The county should protect the natural character of the shoreline and prevent adverse ecological impacts caused by in-water and overwater structures by limiting the number of new docks/piers/floats and by controlling how they are designed and constructed and where they are located. Wood coated or treated with toxic materials should not be allowed.

- (e) To prevent the impacts associated with private docks, piers, floats, lifts and launch ramps and rails accessory to residential development:
- (i) Mooring buoys are generally preferred over docks, piers or floats; and
 - (ii) Shared docks/piers/floats serving multiple properties are preferred over single-user docks/piers/floats serving a single property or parcel; and
 - (iii) Public boat launches are preferred over private launch facilities. Rail and track launch systems are preferred over ramps.
- (f) Boating facilities associated with commercial, industrial, or port uses, residential subdivisions and multifamily housing should include public access and contribute to the public's ability to view, touch, and travel on the waters of the state in accordance with JCC 18.25.290 (Public access).
- (g) The county should identify areas that are suitable for development and/or expansion of marinas and public boat launches and prevent them from being developed with non-water-dependent uses having less stringent site requirements. This should be accomplished in a timely manner.
- (h) Development of new marinas and public boat launch facilities should be coordinated with public access and recreation plans and should be co-located with port or other compatible water-dependent uses where feasible. Affected parties and potential partners should be included in the planning process.
- (i) When reviewing proposals for new or expanded marinas and public boat launches, the county should seek comment from public recreation providers, adjacent cities/counties, port districts, Washington State Parks, and the Washington State Departments of Ecology, Fish and Wildlife, Health, and Natural Resources, and area tribes to ensure that local as well as regional recreation needs are addressed.
- (j) The county should support the use of innovative and effective methods for protecting, enhancing, and restoring shoreline ecological functions and processes during the design, development and operation of new or expanded boating facilities. Such methods may include public facility and resource planning, education, voluntary protection and enhancement projects, and incentive programs.

(2) Shoreline Environment Regulations.

(a) Priority Aquatic.

- (i) Boat Launches – Nonresidential. Only public and private launches serving water-dependent commercial, industrial, port or other primary uses may be permitted if the primary use is permitted in the adjacent upland shoreline environment subject to the provisions of this program.
- (ii) Docks, Piers, Floats and Lifts – Nonresidential. Only public and private docks, piers, floats and lifts serving water-dependent commercial, industrial, port or other primary uses are allowed

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(c) The length, width and height of nonresidential docks, piers and floats shall be no greater than that required for safety and practicality for the primary use.

(d) New and substantially expanded nonresidential docks, piers and floats shall be constructed of materials that will not adversely affect water quality or aquatic plants and animals over the long term. Materials for any portions of the dock, pier, float, framing, or decking that come in contact with water shall be approved by applicable state agencies for use in water. For example, wood treated with creosote, pentachlorophenol or other similarly toxic materials is not allowed.

(e) To minimize adverse effects on nearshore habitats and species caused by overwater structures that reduce ambient light levels, the following shall apply:

(i) The width of docks, piers and floats shall be the minimum necessary. Materials that will allow light to pass through the deck may be required where width exceeds four feet; and

(ii) Grating to allow light passage or reflective panels to increase light refraction shall be used on walkways or gangplanks in nearshore areas; and

(iii) The maximum structure height above water shall be employed, consistent with safety and usability.

(f) Commercial, industrial, port or public recreational docks, piers and floats shall be spaced and oriented to shoreline in a manner that avoids or minimizes:

(i) Hazards and obstructions to navigation, fishing, swimming and pleasure boating; and

(ii) Shading of beach substrate below; and

(iii) Any "wall" effect that would block or baffle wave patterns, currents, littoral drift, or movement of aquatic life forms. A north-south orientation is generally optimal.

(g) Fill waterward of OHWM shall be limited to the minimum necessary to match the upland with the elevation of the nonresidential dock or pier when consistent with JCC 18.25.370 (Filling and excavation).

(h) Dredging shall be limited to the minimum necessary to allow boat access to a nonresidential dock or pier when consistent with JCC 18.25.360 (Dredging).

(i) Covered moorage associated with nonresidential docks, piers, and floats shall be prohibited.



(6) Regulations – Docks, Piers, Floats and Lifts – Accessory to Residential Development.

(a) Docks, piers, floats and lifts accessory to residential development/use shall only be allowed when:

(i) Ecological impacts are mitigated in accordance with this program; and

(ii) The moorage platform is designed for access to private watercraft; and

- (iii) The cumulative effects of dock, pier, float and lift proliferation have been identified and shown to be negligible.
- (b) If allowed under this program, no more than one dock/pier and one float and one boat/ski lift may be permitted on a single lot owned for residential use or private recreational use.
- (c) In-water fixed platform structures supported by piles that do not abut the shoreline shall be prohibited.
- (d) If permitted, new docks, piers, floats, lifts accessory to residential development/use shall be:
 - (i) Designed and constructed to avoid or, if that is not possible, to minimize shading and other impacts on nearshore habitats and processes; and
 - (ii) Constructed of materials that will not adversely affect water quality or aquatic plants and animals over the long term. Materials for portions of the dock, pier, float, framing and decking in contact with water shall be approved by applicable state agencies for use in water. For example, wood treated with creosote, pentachlorophenol or other similarly toxic materials is not allowed; and
 - (iii) Spaced and oriented to shoreline in a manner that minimizes hazards and obstructions to navigation, fishing, swimming, and pleasure boating; and
 - (iv) Designed to avoid the need for maintenance dredging. The moorage of a boat larger than provided for in original moorage design shall not be grounds for approval of dredging; and
 - (v) Spaced and oriented to minimize shading and avoid a "wall" effect that would block or baffle wave patterns, currents, littoral drift, or movement of aquatic life forms. A north-south orientation is generally optimal.
- (e) The length of docks and piers accessory to residential use/development shall be the minimum demonstrated necessary for safety and practicality for the residential use. The maximum length for residential docks or piers shall be limited to 100 feet as measured horizontally from the ordinary high water mark.

The administrator may approve a different dock or pier length when needed to:

- (i) Avoid known eelgrass beds, forage fish habitats, or other sensitive nearshore resources; or
 - (ii) Accommodate shared use.
- (f) Floats accessory to residential use shall not exceed 200 square feet in area or three feet in height as measured from the mean lower low water (MLLW).
- (g) Floats shall only be used where there is sufficient water depth to prevent grounding at low tide. The county may require the use of stoppers or other measures to ensure compliance with this standard.

subject to policies and regulations of this program if the primary use is permitted in the adjacent upland shoreline environment.

(iii) Boat Launches, Docks, Piers, Floats, and Lifts – Residential. Single-user docks, piers, floats, lifts and boat launches accessory to residential or private recreational development are prohibited. Shared boating facilities accessory to residential or private recreational development may be permitted.

(iv) Marinas are prohibited.

(v) Moorage used for float planes is prohibited.

(vi) Mooring buoys are allowed subject to the adjacent upland shoreline designation and the policies and regulations of this program.

(b) Aquatic.

(i) Public and private boat launches are allowed subject to policies and regulations of this program if allowed in the adjacent upland shoreline environment.

(ii) Public and private docks, piers, floats, and lifts are allowed if allowed in the adjacent upland shoreline environment.

(iii) Marinas are allowed subject to policies and regulations of this program if allowed in the adjacent upland shoreline environment.

(iv) Moorage used for float planes may be allowed with a conditional use permit if permitted in the adjacent upland designation.

(v) Mooring buoys are allowed subject to the adjacent upland shoreline designation and the policies and regulations of this program.

(c) Natural.

(i) Boat launches for hand launching of small watercraft (such as kayaks, small sailboats, and other nonmotorized watercraft) may be allowed with a conditional use permit, subject to policies and regulations of this program, if materials and design are compatible with the site.

(ii) A public dock, pier or float for recreational use may be allowed with a conditional use permit.

(iii) Mooring buoys that are accessory to water-dependent uses such as aquaculture may be allowed with a conditional use permit (C(a)).

(iv) All other boating facilities, including boating facilities accessory to residential development, are prohibited.

(d) Conservancy.

- (i) Boat launches may be allowed with a conditional use permit subject to policies and regulations of this program.
 - (ii) Docks, piers, floats and lifts may be allowed with a conditional use permit subject to policies and regulations of this program, except industrial piers are prohibited.
 - (iii) Marinas may be permitted as a conditional use.
 - (iv) Moorage used for float planes may be permitted as a conditional use.
 - (v) Mooring buoys are allowed with a conditional use permit (C(a)) subject to policies and regulations of this program.
- (e) Shoreline Residential.
- (i) Boat launches are allowed subject to policies and regulations of this program.
 - (ii) Docks, piers, floats and lifts are allowed subject to policies and regulations of this program, except industrial piers are prohibited.
 - (iii) Marinas may be permitted as a conditional use.
 - (iv) Moorage used for float planes may be permitted as a conditional use.
 - (v) Mooring buoys are allowed with a conditional use permit (C(a)) subject to policies and regulations of this program.
- (f) High Intensity. All boating facilities are allowed subject to policies and regulations of this program.
- (3) Regulations – Boat Launches – Public.
- (a) Public boat launches may be permitted when they are located, designed and constructed in a manner that minimizes adverse impacts on coastal or fluvial processes, biological functions, aquatic and riparian habitats, water quality, navigation, and/or neighboring uses. Rail and track systems shall be preferred over concrete ramps or similar facilities.
 - (b) When permitted, public boat launches shall be:
 - (i) Located in areas where there is adequate water mixing and flushing action;
 - (ii) Designed so as not to retard or reduce natural shoreline flushing characteristics;
 - (iii) Designed and constructed using methods/technology that have been recognized and approved by state and federal resource agencies as the best currently available;
 - (iv) Designed so that existing or potential public access along beaches is not blocked or made unsafe, and so that public use of the surface waters is not unduly impaired; and

- (v) Developed and maintained to support waterfront access for watercraft. In those limited instances where separate or associated uses are permitted, other than restrooms and/or sewer/septic facilities, only uses that are water-dependent and/or afford public access uses shall be approved.
 - (c) Public boat launches on river shores shall be located downstream of accretion shoreforms, or on stable banks where no or minimal current deflections will be necessary.
 - (d) Public boat launches shall provide adequate restroom and sewage and solid waste disposal facilities in compliance with applicable health regulations.
 - (e) When overwater development is proposed in association with a public boat launch facility, it may be permitted only where such use requires direct water access, and/or where such facilities will significantly increase public opportunities for water access.
 - (f) Public boat launches shall be located and designed to prevent traffic hazards and minimize traffic impacts on nearby access streets.
 - (g) Public boat launch sites shall include parking spaces for boat trailers commensurate with projected demand and shall comply with the transportation provisions of this program.
- (4) Regulations – Boat Launches (Ramps and Rails) – Private.
- (a) Private boat launches shall be allowed only when public boat launches are unavailable within a reasonable distance.
 - (b) When permitted, private boat launches including launches accessory to residential development shall be designed and constructed using methods/technology that have been recognized and approved by state and federal resource agencies as the best currently available. Rail and track systems shall be preferred over concrete ramps or similar facilities.
 - (c) No more than one private boat launch facility or structure shall be permitted on a single parcel or residential lot.
- (5) Regulations – Docks, Piers and Floats – Nonresidential.
- (a) Docks, piers and floats, as defined in Article II of this chapter, associated with commercial, industrial, port or public recreational developments should only be allowed when ecological impacts are mitigated in accordance with this program, and:
 - (i) The dock/pier/float is required to accommodate a water-dependent use; and/or
 - (ii) The dock/pier/float provides opportunities for the public to access the shoreline.
 - (b) New commercial, industrial, port or public recreational docks, piers and floats shall be designed and constructed to avoid or, if that is not possible, to minimize the impacts to nearshore habitats and processes.

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(6) Regulations - Docks, Piers, Floats and Lifts - Accessory to Residential Dev.

(h) To avoid and minimize adverse effects on nearshore habitats and species caused by overwater structures that reduce ambient light levels, the following shall apply:

(i) The width of docks and floats shall be the minimum necessary. Materials that will allow light to pass through the deck may be required where width exceeds four feet; and

(ii) Grating to allow light passage or reflective panels to increase light refraction shall be used on walkways or gangplanks in nearshore areas; and

(iii) The maximum structure height above water should be employed, consistent with safety and usability.

(i) Residential developments with more than four lots or dwelling units may be granted permits for community docks that are shared by at least one other owner. No more than one dock/pier or float may be permitted for each three adjoining waterfront lots, with necessary access easements to be recorded at the time of permitting.

(j) Single-user docks, piers and floats for individual residential lots may be permitted in existing subdivisions approved on or before January 28, 1993, only where a shared facility has not already been developed. Prior to development of a new single-user dock/pier/float for a single residential lot, the applicant shall demonstrate that:

(i) Existing facilities in the vicinity, including marinas and shared moorage, are not adequate or feasible for use; and

(ii) On marine shorelines alternative moorage, such as one or more mooring buoys or a buoy in combination with a small dock sized to accommodate a tender vessel, are not adequate or feasible.

(k) Single-user moorage for private/recreational float planes may be permitted as a conditional use where construction of such moorage:

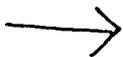
(i) Is limited to the smallest size necessary to accommodate the float plane.

(ii) Will not adversely affect shoreline functions or processes, including wildlife use.

(iii) Includes ecological restoration, in addition to mitigation, to compensate for the greater intensity of use associated with the float plane moorage.

(l) Covered moorage associated with single-family residential development shall be prohibited, except that the county may allow a small covered area up to 100 square feet in size, maximum height of 10 feet, and with vertical walls on up to three sides on the overland portion of a dock/pier only.

(m) Single-user docks/piers/floats shall be located within side yard setbacks for residential development (both onshore and offshore); provided, that a shared dock/pier may be located adjacent to or upon a shared side property line upon filing of an agreement by the affected property owners.



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- (n) Fill waterward of OHWM shall be limited to the minimum necessary to match the upland with the elevation of the residential dock or pier when consistent with JCC 18.25.370 (Filling and excavation).
- (o) Dredging for construction or maintenance of docks, piers and floats accessory to residential use shall be prohibited waterward of OHWM.
- (p) No single-user or shared dock/pier/float may be constructed to within 200 feet of OHWM on the opposite shoreline of any lake or semi-enclosed body of water such as a bay, cove, or natural channel.
- (q) Boating facilities shall be marked with reflectors, or otherwise identified to prevent unnecessarily hazardous conditions for water surface users during day or night. Exterior finish shall be generally nonreflective.
- (r) Boating facilities shall be constructed and maintained so that no part of them creates hazardous conditions nor damages other shoreline property or natural features during flood conditions.
- (s) No dock, pier, float, or watercraft moored thereto shall be used for a residence.
- (t) Storage of fuel, oils, and other toxic materials is prohibited on residential docks, piers and floats except in portable containers that have secondary containment.

(7) Regulations – Marinas.

(a) Marinas may be permitted on marine and river shorelines when they are consistent with this program and when the proponent demonstrates to the county's satisfaction that all of the following conditions are met:

- (i) The proposed location is the least environmentally damaging alternative; and
 - (ii) Potential adverse impacts on shoreline processes and ecological functions are mitigated to achieve no net loss; and
 - (iii) The project includes ecological restoration measures to improve baseline conditions over time; and
 - (iv) The area has adequate water circulation and flushing action; and
 - (v) The proposed location will not require dredging or excavation/filling of wetlands; and
 - (vi) Suitable public infrastructure is available or can be made available to support the marina.
- (b) Marinas shall be prohibited in all of the following locations:
- (i) Lake shores; and
 - (ii) River point and channel bars or other accretional beaches; and

(c) Natural. Forest practices may be allowed with conditional use approval, subject to the policies and regulations of this program.

(d) Conservancy. Forest practices may be allowed subject to the policies and regulations of this program.

(e) Shoreline Residential. Forest practices may be allowed subject to the policies and regulations of this program.

(f) High Intensity. Forest practices may be allowed subject to the policies and regulations of this program.

(4) Regulations.

(a) Timber harvesting and forest practices activities that do not meet the definition of development in Article II of this chapter shall be conducted in accordance with the Washington State Forest Practices Act (Chapter 76.09 RCW), WAC Title 222, and the 1999 Forest and Fish Report, and any regulations adopted pursuant thereto.

(b) Except as provided in subsections (4)(c) and (d) of this section, timber harvesting and forest practices activities that do not meet the definition of development in Article II of this chapter shall not be regulated by this program and shall not require a shoreline permit.

(c) Selective commercial timber cutting on shorelines of statewide significance shall not exceed 30 percent of the merchantable trees in any 10-year period as required by RCW 90.58.150. The county may allow exceptions to the 30 percent limit with a conditional use permit in accordance with WAC 173-26-241(3)(e).

(d) Forest practices roads on slopes that exceed 35 percent shall require a conditional use permit.

(e) Other activities associated with timber harvesting, such as filling, excavation, and building roads and structures, that meet the definition of development shall be regulated according to the general provisions (Article VI of this chapter), shoreline modification provisions (Article VII of this chapter) and/or the other applicable use-specific provisions (this article) of this program and shall require a shoreline substantial development permit or conditional use permit as specified in this program.

(f) Conversion of forest land to nonforestry uses (Class IV Conversion Forest Practices Permit) shall be reviewed in accordance with the provisions for the proposed nonforestry use and the general provisions in Article VI of this chapter and shall be subject to any permit requirements associated with the nonforestry use. [Ord. 7-13 Exh. A (Art. VIII § 4)]

18.25.470 Industrial and port development.

(1) Policies.

- (a) In securing shoreline locations for industrial or port development, preference should be given first to water-dependent industrial or port development, then to water-related industrial or port development.
- (b) Restoration of impaired shoreline ecological functions and processes should be encouraged as part of industrial and port development.
- (c) Industrial and port development should be visually compatible with adjacent noncommercial properties.
- (d) Industrial and port uses located in shoreline jurisdiction should provide public access in accordance with JCC 18.25.290 (Public access).
- (e) Shorelines suitable for deep-water harbors with access to adequate rail, highway and utility systems should be reserved for water-dependent or water-related industrial and port development.
- (f) Port facilities should be designed to allow the public to view harbor areas and should provide public facilities that do not interfere with port operations or endanger public health and safety.
- (g) Where feasible, transportation and utility corridors serving industrial and port uses should be located away from the water's edge to minimize ecological impacts and to reduce the need for waterfront signs and other infrastructure.
- (h) Industrial or port development at deep-water sites should be limited to those uses that produce long-term economic benefit and minimize environmental impact.
- (i) Industrial and port development should be protected from encroachment or interference by incompatible uses such as residential or commercial uses, which have less stringent siting requirements.
- (j) Private and public entities should be encouraged to cooperatively use piers, cargo handling, storage, parking and other accessory facilities in waterfront industrial/port areas.
- (k) Log storage is not a desired use of the county's shoreline and should be allowed only when adequate measures are taken to minimize adverse impacts. Upland log storage is preferred over in-water storage.

(2) Shoreline Environment Regulations.

- (a) Priority Aquatic. Industrial/port use and development are prohibited.
- (b) Aquatic. Water-dependent and water-related industrial/port use and development may be allowed as a conditional use, subject to the use and development regulations of the abutting upland shoreline environment designation. Uses and developments that are not water-dependent or water-related are prohibited.
- (c) Natural. Industrial/port use and development are prohibited.

- (e) New recreational use/development shall be located landward of the shoreline buffers required by this program except that components of the recreational use or development that are water-dependent or water-related may be allowed within the shoreline buffer.
- (f) Signs indicating the public's right to access shoreline areas shall be installed and maintained in conspicuous locations at recreational facility points of access and entrances.
- (g) When a public recreation site abuts private property/tidelands, signs and other similar markers shall also indicate geographic limits of public access to minimize conflicts with adjacent use/development.
- (h) Where appropriate, recreational development proposals shall include provisions for nonmotorized access to the shoreline (e.g., pedestrian, water access and bicycle paths).
- (i) Proposals for recreational use and development that involve any clearing, grading or impervious surface shall include a landscape plan that uses species approved by the county. Native, self-sustaining vegetation shall be used as often as possible. The removal of on-site native vegetation shall be limited to the minimum necessary for the development of campsites, selected viewpoints or other permitted structures or facilities and shall be subject to JCC 18.25.310 (Vegetation conservation).
- (j) Proposals for recreational development shall include adequate facilities for water supply, sewage and garbage disposal, and recycling commensurate with the intensity of the proposed use. Remotely located sites shall encourage visitors to implement best management practices (BMPs) such as the tread lightly and leave no trace principles of low impact recreation.
- (k) Recreational use and development shall incorporate appropriate mitigation to minimize light and noise impacts on adjoining land uses. Such measures shall include, but not be limited to, fencing, screening, and related measures. [Ord. 7-13 Exh. A (Art. VIII § 7)]

18.25.500 Residential.

(1) Policies.

- (a) Residential use is not water-dependent but is a preferred use of the shorelines when such development is planned and carried out in a manner that protects shoreline functions and processes to be consistent with the no net loss provisions of this program.
- (b) All residential use and development should be planned, designed, located, and operated to avoid adverse impacts on shoreline processes, aquatic habitat, biological functions, water quality and quantity, aesthetics, navigation, and neighboring uses.
- (c) All residential use and development should be properly managed to avoid damage to the shoreline environment and prevent cumulative impacts associated with shoreline armoring, overwater structures, stormwater runoff, septic systems, introduction of pollutants, and vegetation clearing.

(d) New residential development should be limited to densities that are consistent with the Jefferson County Comprehensive Plan goals and policies, zoning restrictions, and this program. The density per acre of development should be appropriate to local natural and cultural features.

(e) Low impact development practices and clustering of dwelling units and accessory structures should be implemented as appropriate to preserve natural features, minimize physical impacts and reduce utility and road construction and maintenance costs.

(f) New residential development should be planned and built in a manner that avoids the need for structural shore armoring and flood hazard reduction in accordance with JCC 18.25.380 (Flood control structures) and 18.25.410 (shoreline stabilization) of this program and other applicable plans and laws.

(g) Residential development should be designed to:

(i) Maintain or improve ecological functions and processes; and

(ii) Preserve and enhance native shoreline vegetation; and

(iii) Control erosion; and

(iv) Protect water quality; and

(v) Preserve shoreline aesthetic characteristics; and

(vi) Minimize structural obstructions to public views and normal public use of the shoreline and the water.

(h) Creation of new residential lots through land division should be designed, configured and developed to ensure that no net loss of ecological functions and processes occurs from the plat or subdivision, even when all lots are fully built-out.

→ (i) Residential developments are encouraged, but not required, to provide public access to the shoreline. New multi-unit residential development, including subdivision of land into more than four parcels, is strongly encouraged to provide public access/open space area equal to at least 30 percent of the total development/subdivision area for use by development residents and the public.

→ (j) Whenever possible, nonregulatory methods to protect, enhance, and restore shoreline ecological functions should be encouraged for residential development.

(2) Uses and Activities Prohibited Outright.

(a) In-water, overwater or floating residences or accessory dwelling units, including structures located in or on marshes, bogs, swamps, lagoons, tidelands, ecologically sensitive areas or open water areas, are prohibited.

(b) Residential development that can be reasonably expected to require structural shore armoring during the useful life of the structure or within 100 years, whichever is greater, is prohibited.

(c) Residential development within a channel migration zone or floodway that can be reasonably expected to require structural flood protection during the useful life of the structure or within 100 years, whichever is greater, is prohibited.

(d) Land division and boundary line adjustments in shoreline jurisdiction are prohibited when such actions will result in lot configurations that are likely to require:

(i) Significant vegetation removal;

(ii) Structural shore armoring;

(iii) Shoreline modification for erosion control;

(iv) Flood hazard protection; or

(v) Result in a net loss of shoreline ecological functions and processes at the time of development of the subdivision and/or during the useful life of the development or within 100 years, whichever is greater.

(3) Shoreline Environment Regulations.

(a) Priority Aquatic. Residential development is prohibited.

(b) Aquatic. Residential development is prohibited.

(c) Natural. Residential development consisting of one single-family residence per existing legal lot of record may be allowed as a conditional use. Accessory dwelling units shall be prohibited.

(d) Conservancy. Single-family and duplex development may be allowed subject to policies and regulations of this program. All other residential development may be allowed as a conditional use.

(e) Shoreline Residential. Residential development is allowed subject to the policies and regulations of this master program.

(f) High Intensity. Residential development is allowed subject to the policies and regulations of this master program.

(4) Regulations – Primary Residences and Property Subdivision.

(a) Residential use and development shall be planned, designed, located, and operated to avoid adverse impacts on shoreline processes, aquatic habitat, biological functions, water quality, aesthetics, navigation, and neighboring uses.

(b) The buffer requirements in Article VI of this program apply to residences, normal appurtenances, and accessory dwelling units, except that docks, floats, and beach access structures and other water-

dependent and water-related structures accessory to residential use may be permitted to encroach into the buffer in accordance with the applicable provisions of this program. Accessory structures must be sited and designed to not require shoreline armoring within 100 years.

(c) Cluster development and appropriate low impact development practices shall be required for development sites constrained by critical areas and/or shoreline buffers.

(d) When zoning regulations allow, proposals for multi-story residential development greater than 35 feet above average grade must include an analysis of how the structure would impact the views of surrounding residents. If the proposed residence would block or significantly compromise the view of a substantial number of residences on adjoining areas, the county shall limit the height to 35 feet, or require design revisions or relocation to prevent the loss of views to neighboring properties.

(e) New multi-unit residential development, including subdivision of land into more than four parcels, shall provide public access/open space for use by development residents and the public. The county may alter the recommended area threshold per constitutional limits or waive this requirement if public access is infeasible due to incompatible uses, safety, impacts to shoreline ecology or legal limitations. The county may require alternatives to on-site physical access if on-site physical access is infeasible for the reasons noted.

(f) As per Article VI of this chapter, new or expanded subdivisions and planned unit developments comprised of four or more lots or units shall provide public access to publicly owned shorelines or public water bodies unless:

(i) The site is designated in a shoreline public access plan for a greater component of public access; or

(ii) The public access is demonstrated to be infeasible or inappropriate.

→ (g) New or amended subdivisions, except those for lot line adjustment and lot consolidation purposes, shall provide public access as required in Article VI of this chapter.

(h) When required for multi-lot/multi-unit residential development, the amount of public access/open space area shall be determined by site analysis per constitutional limits. The county may waive this requirement if public access is infeasible due to incompatible uses, risks to health or safety, impacts to shoreline ecology or legal limitations. In such cases, the county may require alternatives to on-site physical access if on-site physical access is infeasible for the reasons noted.

(i) The type and configuration of public access required for multi-unit/multi-lot residential development shall depend on the proposed use(s) and the following criteria:

(i) Subdivisions within shoreline jurisdiction that have views of water areas shall at a minimum provide an area from which the public can view the shoreline.

(ii) Subdivisions adjacent to public waterways or tidelands shall provide physical access to public waters/tidelands that are accessible at low tide or low water.

OSF Opening Brief

APPENDIX 6

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or noxious plant species. In cases where approved chemical applications occur as part of a forest practices application or farm plan, proper reporting procedures shall be followed. Chemical storage shall not be permitted within a FWHCA or its buffer. [Ord. 3-08 § 1]

18.22.265 Habitat management plans – When required.

When a development proposal is located on lands which may contain a habitat for a protected species other than bald eagle nesting territories, or when the applicant proposes to alter, decrease or average the standard buffer, a habitat management plan (HMP) shall be required, consistent with the requirements of JCC 18.22.440. [Ord. 3-08 § 1]

→ **18.22.270 Protection standards.**

(1) General. Application for a project on a parcel of real property containing a designated FWHCA or its buffer shall adhere to the requirements set forth in this section.

(2) Drainage and Erosion Control. An applicant submitting a project application shall also submit, and have approved, a drainage and erosion control plan, as specified in this chapter.

(3) Grading. An applicant submitting a project application shall also submit, and have approved, a grading plan, as specified in this chapter.

(4) Vegetation Retention. The following provisions regarding vegetation retention shall apply:

(a) All trees and understory lying outside of road rights-of-way and utility easements shall be retained (except for hazard trees) during clearing for roadways and utilities; provided, that understory damaged during approved clearing operations may be pruned.

(b) Damage to vegetation retained during initial clearing activities shall be minimized by directional felling of trees to avoid critical areas and vegetation to be retained.

(c) Retained trees, understory and stumps may subsequently be cleared only if such clearing is necessary to complete the proposal involved in the project application.

(5) Buffers – Standard Requirements. The administrator shall have the authority to require buffers from the edges of all FWHCAs in accordance with the following:

→ (a) Buffers Generally.

(i) Buffers shall be established for activities adjacent to FWHCAs as necessary to protect the integrity, functions and values of the resource, consistent with the requirements set forth in Tables 18.22.270(1) and 18.22.270(2) of this section.

(ii) A building setback line of five feet is required from the edge of any buffer area; however, nonstructural improvements such as septic drain fields may be located within setback

areas.

→ (iii) Buffers shall be retained in their natural condition; however, minor pruning of vegetation to enhance views or provide access may be permitted as long as the function and character of the buffer are not diminished.

(iv) Lighting shall be directed away from the FWHCA.

(b) Prescriptive FWHCA Buffers.

(i) The standard buffer widths required by this article are considered to be the minimum required to protect the stream functions and values at the time of the proposed activity. When a buffer lacks adequate vegetation to protect critical area functions, the administrator may deny a proposal for buffer reduction or buffer averaging.

(ii) The standard buffer shall be measured landward horizontally on both sides of the stream from the ordinary high water mark (OHWM) as identified in the field. Nevertheless, the required buffer shall include any adjacent regulated wetland(s), landslide hazard areas and/or erosion hazard areas and required buffers, but shall not be extended across paved roads or other lawfully established structures or hardened surfaces. The following standard buffer width requirements are established; provided, that portions of streams that flow underground may be exempt from these buffer standards at the administrator's discretion when it can be demonstrated that no adverse effects on aquatic species will occur.

Table 18.22.270(1): Stream Buffers*

Stream Type	Buffer Requirement
Type "S" – Shoreline Streams	150 feet
Type "F" – Fish Bearing Streams	150 feet
Type "Np" – Non-Fish Bearing Perennial Streams	75 feet
Type "Ns" – Non-Fish Bearing Seasonal Streams greater than or equal to 20% grade	75 feet
Type "Ns" – Non-	50 feet

Fish Bearing Seasonal Streams less than 20% grade	
*Note: (a) The buffers set forth above shall apply to culverted streams; though in limited circumstances, a variance may be made in the application of stream buffers under Article IX of Chapter 18.40 JCC. (b) Stream type shall be determined using the criteria set forth in WAC 222-16-030.	

(iii) Buffers for Other FWHCAs. The administrator shall determine appropriate buffer widths for other FWHCAs based on the best available information. Buffer widths for nonstream habitat conservation areas shall be as follows:

Table 18.22.270(2): Buffers for Other FWHCAs

FWHCA Type	Buffer Requirement
Areas with Which Federally Listed Species Have a Primary Association	Buffers shall be 150 feet; provided, that local and site specific factors shall be taken into consideration and the buffer width based on the best available information concerning the species/habitat(s) in question and/or the opinions and recommendations of a qualified professional with appropriate expertise.
Commercial and Recreational Shellfish Areas	Buffers shall extend 150 feet landward from ordinary high water mark of the marine shore.
Kelp and Eelgrass Beds	Buffers shall extend 150 feet landward from ordinary high water mark of the marine shore.
Surf Smelt, Pacific Herring, and Pacific Sand Lance Spawning Areas	Buffers shall extend 150 feet landward from ordinary high water mark of the marine shore.
Natural Ponds and Lakes	Ponds under 20 acres – buffers shall extend 50 feet from the ordinary high water mark; Lakes 20 acres and larger – buffers shall extend 100 feet from the ordinary high water mark; provided, that where vegetated wetlands

	are associated with the shoreline, the buffer shall be based on the wetland buffer requirements.
Natural Area Preserves and Natural Resource Conservation Areas	Buffers shall not be required adjacent to these areas. These areas are assumed to encompass the land required for species preservation.
Locally Important Habitat Areas	The buffer for marine nearshore habitats shall extend landward 150 feet from the ordinary high water mark. The need for and dimensions of buffers for other locally important species or habitats shall be determined on a case-by-case basis, according to the needs of the specific species or habitat area of concern. Buffers shall not be required adjacent to the wildlife corridor. The administrator shall coordinate with the Washington Department of Fish and Wildlife and other state, federal or tribal experts in these instances, and may use WDFW PHS management recommendations when available and applicable.



(6) The administrator shall have the authority to reduce buffer widths on a case-by-case basis; provided, that the specific standards for avoidance and minimization set forth in JCC 18.22.350(1) shall apply, and when the applicant demonstrates to the satisfaction of the administrator that all of the following criteria are met:

(a) The buffer reduction shall not adversely affect the habitat functions and values of the adjacent FWHCA or other critical area.

(b) The buffer shall not be reduced to less than 75 percent of the standard buffer.

(c) The slopes adjacent to the FWHCA within the buffer area are stable and the gradient does not exceed 30 percent.

(7) The administrator shall have the authority to average buffer widths on a case-by case basis; provided, that the specific standards for avoidance and minimization set forth in JCC 18.22.350(1) shall apply, and when the applicant demonstrates to the satisfaction of the administrator that all the following criteria are met:

(a) The total area contained in the buffer area after averaging is no less than that which would be contained within the standard buffer and all increases in buffer dimension are parallel to the FWHCA.

(b) The buffer averaging does not reduce the functions or values of the FWHCA or riparian habitat, or the buffer averaging, in conjunction with vegetation enhancement, increases the habitat function.

(c) The buffer averaging is necessary due to site constraints caused by existing physical characteristics such as slope, soils, or vegetation.

(d) The buffer width is not reduced to less than 75 percent of the standard width.

(e) The slopes adjacent to the FWHCA within the buffer area are stable and the gradient does not exceed 30 percent.

(f) Buffer averaging shall not be allowed if FWHCA buffers are reduced pursuant to subsection (6) of this section.

(8) Buffer Marking. The location of the outer extent of required buffers shall be marked in the field as follows:

(a) During Construction. Buffer perimeters shall be marked with temporary signs at an interval of one per parcel or every 100 feet, whichever is less. Signs shall remain in place prior to and during approved construction activities. The signs shall contain the following statement: "Buffer – Do Not Remove or Alter Existing Native Vegetation."

→ (9) In the case of short plat, long plat, binding site plan, and site plan approvals under this code, the applicant shall include on the face of any such instrument the boundary of the FWHCA.

→ (10) The applicant may also choose to dedicate the buffer through a conservation easement or deed restriction that shall be recorded with the Jefferson County auditor. Such easements or restrictions shall, however, use the forms approved by the prosecuting attorney. [Ord. 3-08 § 1]

18.22.280 Conditions.

(1) General. In granting approval for a project application subject to the provisions of this article, the administrator may require mitigating conditions that will, in the administrator's judgment, substantially secure the objectives of this article.

(2) Basis for Conditions. All conditions of approval required pursuant to this article shall be based upon either the substantive requirements of this article or the recommendations of a qualified professional utilizing best available science, contained within a special report required under this

enhancement:

(1) Type 1 Noncompensatory Enhancement. Type 1 noncompensatory enhancement projects involve the filling, draining, or excavating of a regulated wetland. All applications for Type 1 noncompensatory enhancement projects shall be accompanied by an enhancement plan prepared in accordance with subsections (1)(a) and (1)(b) of this section, which demonstrates that the proposed activities will result in an increase in wetland functions and values.

(a) The enhancement plan must be submitted for review, and approved by the administrator.

(b) The enhancement plan must either be prepared by a qualified wetlands consultant or accepted in writing by the U.S. Fish and Wildlife Service, the Washington Department of Fish and Wildlife, or the Washington Department of Ecology.

(2) Type 2 Noncompensatory Enhancement. Type 2 noncompensatory enhancement projects involve wetland alterations that do not include the filling, draining, or excavating of a regulated wetland. Such projects might involve the removal of nonnative plant species or the planting of native plant species. All applications for Type 2 noncompensatory enhancement projects shall be accompanied by an enhancement plan prepared in accordance with subsections (2)(a) through (2)(c) of this section, which demonstrates that the proposed activities will result in an increase in wetland functions and values.

(a) The enhancement plan shall be submitted for review, and approved, by the administrator.

(b) The enhancement plan must include a detailed description of the activity including the following information:

(i) The goal of the enhancement project;

(ii) What plants, if any, will be removed or planted;

(iii) How the activity will be conducted, including the type(s) of tools or machinery to be used; and

(iv) The qualifications of the individual who will be conducting the enhancement activity.

(c) The enhancement plan must either be prepared by a qualified wetlands consultant or accepted in writing by the U.S. Fish and Wildlife Service, the Washington Department of Fish and Wildlife, or the Washington Department of Ecology. [Ord. 3-08 § 1]



18.22.350 Mitigation.

The overall goal of mitigation shall be no net loss of wetland function, value, and acreage.

→ (1) Mitigation Sequence. Mitigation includes avoiding, minimizing, or compensating for adverse impacts to regulated wetlands or their buffers. When a proposed use or development activity poses potentially significant adverse impacts to a regulated wetland or its buffer, the preferred sequence of mitigation as defined below shall be followed unless the applicant demonstrates that an overriding public benefit would warrant an exception to this preferred sequence.

- (a) Avoiding the impact altogether by not taking a certain action or parts of actions on that portion of the site which contains the regulated wetland or its buffer;
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- (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 during the life of the action; or
- (e) Compensating for the impact by replacing, enhancing, or providing substitute resources or environments.

(2) Compensatory Mitigation – General Requirements. As a condition of any permit or other approval allowing alteration which results in the loss or degradation of regulated wetlands, or as an enforcement action pursuant to Chapter 18.50 JCC, compensatory mitigation shall be required to offset impacts resulting from the actions of the applicant or any code violator.

(a) Except persons exempt under this article, any person who alters or proposes to alter regulated wetlands shall restore or create areas of wetland equivalent to or larger than those altered in order to compensate for wetland losses. The following table specifies the ratios that apply to creation or restoration that is in-kind, on-site, and is accomplished prior to or concurrently with alteration:

Table 18.22.350

Required Replacement Ratios for Compensatory Wetland Mitigation

Category and Type of Wetland Impacts	Re-establishment or Creation	Rehabilitation Only ¹	Re-establishment or Creation (R/C) and Rehabilitation (RH) ¹	Re-establishment or Creation (R/C) and Enhancement (E) ¹	Enhancement Only ¹
All Category	1.5:1	3:1	1:1 R/C and 1:1 RH	1:1 R/C and 2:1 E	6:1

Habitats (1979); species composition of vegetation communities, including presence and percent cover; existing soils; and existing hydrologic conditions including inflow/outflow, source of water within the system, relative water quality, and seasonal changes in hydrology, if applicable;

(vii) A detailed analysis of wildlife species use of the wetland and its buffer;

(viii) A detailed analysis of the existing wetland buffer including species composition and percent coverage, whether the buffer is disturbed or not, and the functional value of the buffer in relation to the regulated wetland;

(ix) If the development activity would eliminate all or part of a regulated wetland then a detailed compensatory mitigation plan as outlined in subsection (4) of this section must be provided.

(4) Mitigation Plan Contents. All wetland restoration, creation, and enhancement projects required by this code, either as a condition of project approval or as the result of an enforcement action, shall follow a mitigation plan prepared by a qualified specialist as defined herein and conducted in accordance with the requirements described in this code. The applicant or violator must receive written approval of the mitigation plan by the administrator prior to commencement of any wetland restoration, creation, or enhancement activity. [Ord. 3-08 § 1]

Article IX. Alternative Protection Standards – Critical Area Stewardship Plans (CASPs)

→ 18.22.460 Critical area stewardship plans (CASPs) – Generally.

Property owners may elect to develop site-specific critical area stewardship plans (CASPs) as an alternative to the prescriptive requirements of Articles VI (Fish and Wildlife Habitat Conservation Areas (FWHCAs)) through VII (Wetlands) of this chapter. At a minimum, the CASP must provide equal or greater protection of critical area functions and values than the prescriptive standards of buffers and setbacks. The property owner shall be responsible for developing these plans in consultation with a qualified professional meeting the applicable requirements of Article VIII of this chapter. When available, qualified Jefferson County staff may assist landowners with these submissions. The administrator shall be responsible for reviewing and approving submitted plans. The administrator may, at his/her discretion, seek technical assistance from the Jefferson County conservation district, Washington Department of Fish and Wildlife or the Washington Department of Ecology when reviewing CASPs for approval. [Ord. 3-08 § 1]

18.22.461 Applicability and limitations.

The following provisions define the applicability and limitations of the CASP:

(1) CASPs apply to only residential development, related activities and appurtenances, including