



## ***Shoreline Management Act at 50+ Years***

### **Shorelines Study**

**2022**



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## List of Abbreviations

CUP	conditional use permit
CWA	Clean Water Act
CZMA	Coastal Zone Management Act
CZMP	Coastal Zone Management Program
DNR	Department of Natural Resources
DNS	determination of nonsignificance
DS	determination of significance
EIS	environmental impact statement
EPA	Environmental Protection Agency
FEMA	Federal Emergency Management Agency
GMA	Growth Management Act
GMHB	Growth Management Hearings Board
HPA	Hydraulic Project Approval
JARPA	Joint Aquatic Resources Permit Application
LWV	League of Women Voters
LWVWA	League of Women Voters of Washington
MDNS	mitigated determination of nonsignificance
NEPA	National Environmental Policy Act
NWP	nationwide permit
OHWM	ordinary high-water mark
RCW	Revised Code of Washington
SDP	substantial development permit
SED	shoreline environmental designation
SEPA	State Environmental Policy Act
SHB	Shorelines Hearings Board
SMA	Shoreline Management Act
SMP	Shoreline Master Program

USACE	U.S. Army Corps of Engineers
WAC	Washington Administrative Code
WDFW	Washington Department of Fish and Wildlife
WEC	Washington Environmental Council

## Executive Summary

This study concerns Washington state's Shoreline Management Act (SMA, also called "the Act" throughout), RCW 90.58 and its implementation. The SMA was enacted over 50 years ago and was one of the first environmental regulations adopted in the state of Washington. The Act has been supplemented by other environmental laws and regulations over the years, but it remains a primary regulation for protecting shorelines. The statute defines *shorelines* as coastal shorelines, shorelines of rivers and streams with a mean annual flow of 20 cubic feet per second (cfs), shorelines of lakes that are 20 acres or greater in size, and their associated wetlands. The SMA applies landward 200 feet from the shoreline's ordinary high-water mark (OHWM).

In conducting this study, a committee of the League of Women Voters of Washington (LWVWA) studied the Act, implementing regulations, and related court and administrative decisions concerning the SMA. The committee also met with officials from the Washington State Department of Ecology ("Department of Ecology") who are responsible for implementing the Act and overseeing local government implementation. Finally, the committee interviewed 18 individuals with varying experience with the SMA in differing aspects of its application, including local government planners and elected officials, state agency representatives, bulkhead builders, port officials, environmental groups, property rights groups, shellfish industry persons, tribal government representatives, and others.

The committee identified 14 issues that impede the Act's ability to achieve its intended goals and its ability to respond to ever increasing challenges, including, among other factors, climate change, and population growth:

1. Updates and periodic reviews are required to address changes in the law and other circumstances, but there is no mechanism to look back and check on how the Shoreline Master Program is working.
2. There are questions regarding the policy basis for certain exemptions and whether local governments are consistent in granting exemptions.
3. An evaluation of how the balancing of shoreline policy goals should be weighted is warranted.
4. In determining whether no net loss is being achieved, quantitative standards are not being applied consistently among jurisdictions.
5. Habitat restoration needs to be a higher priority, with more incentives and funding.
6. Public involvement could be improved.
7. Concerns about industrial aquaculture are not being addressed.
8. More robust monitoring programs and adaptive management are needed.

9. Public access for future needs is a concern.
10. The existing law does not fully address climate change impacts.
11. Department of Ecology oversight of local programs is critical to ensure consistency in how local plans are implemented.
12. Enforcement programs need to be funded and they need to be stricter.
13. Training of staff, legal staff, and elected officials is critical.
14. Incentives for restoration projects must be prioritized.

The LWVWA uses an established consensus process in developing positions on studies. This study is the first step in that process. Next, local Leagues will meet to develop consensus on the issues raised in the study, and then adopt a written statement of position on the issues, which the LWVWA Board approves.

## Introduction

At the LWVWA Convention in 2019, Washington state League members voted to undertake a new study on shorelines. The proposal stated: “A new study is needed to extend the 2001 work on p. 26 of PIA [Program in Action] 2017-2019. The study should gather data on current shoreline conditions, projections, and issues.” This report is the culmination of that study.

Shorelines, that dynamic and fragile place where land and water meet, were the focus of this study. We set out to examine current shoreline conditions, projections, and issues. Are the approximately 28,204 miles of shoreline in Washington state being protected adequately through existing policies and agencies, or are additional safeguards required?



Figure 1. The Washington Coast

The importance of protecting shorelines is not a new idea. It grew out of a recognition that shorelines are unique and important in so many ways. Among the most scenic yet ever-changing landscapes, they provide habitats for a diverse array of species, from crustaceans and amphibians to birds, fish, and mammals. Shorelines are also a locale for many different kinds of human activity, including commercial enterprises, transportation, recreation, and the siting of both public and private buildings.

Many ecological processes and functions, both marine and freshwater, operate in coastal and shoreline ecosystems. Shorelines provide structural integrity to the water's edge, protecting it from erosion, while tree roots and other plants help stabilize banks. Along river shorelines, logs, sticks, and branches (large woody debris) form river and stream habitats. Wood breaks up salt marshes to form patches of habitat for birds and

mammals. River currents cause natural shoreline dynamics, as currents create erosion along one bank and sedimentation along another. Sediments eroding from river shorelines travel downstream into freshwater and estuarine deltas and nearshore habitats. Sediments in estuaries create sloughs, braided channels of protected habitat for juvenile salmon and other marine life.

Additionally, shorelines preserve water quality and store nutrients. Shorelines also reduce pollution by filtering suspended material and cleaning stormwater runoff before it hits the water, where it impacts the downstream ecosystem. Wetlands and marshes provide critical habitat and transitional zones for young salmon and many other species of birds, fish, and mammals. Saltwater estuaries with mud flats, sloughs, and freshwater marshes historically were dominant parts of the Puget Sound landscape. They provided a buffering function when heavy storms threatened erosion and flooding.

The value of shorelines in the environment and the fact that human activity place so many demands on them led Washington state in 1970 to become one of the first states in the nation to recognize the importance of protecting shorelines and their functions. After citizens proposed a new law regulating shoreline use and development, the SMA was adopted. Washington's SMA, unusually broad in scope, concerns not merely "coastal" areas but also shorelines of bodies of water of virtually every description, including lakes, streams, and tributaries. The Act also applies to dry land areas abutting shorelines and their associated wetlands.<sup>1</sup> This study looks at how the Act has been achieving its goals over the last 50 years.

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<sup>1</sup> As described in more detail later, shorelines regulated under the Act include water areas of the state and their associated wetlands, with exceptions based on size; see RCW 90.58.030(e). This includes marine coasts, rivers, lakes, streams, and wetlands.

## Part 1: History of the Shoreline Management Act and the LWVWA

In the 1960s, several environmental disasters made it clear that human impact was harming our natural environment. People were seeing firsthand environmental catastrophes nationwide on television and in the media. Images of the Cuyahoga River on fire in 1969 spurred concern about water pollution, and the Santa Barbara oil spill the same year, and the deaths of thousands of seabirds and other marine life, received prominent media coverage and engendered public outrage. It was time for stronger laws to protect the environment. Although the federal Environmental Protection Agency (EPA) and the National Environmental Policy Act (NEPA) were established, they did not provide environmental protection everywhere; states needed to fill in the gaps.

In December 1969, the Washington Supreme Court handed down a seminal decision in *Wilbour v. Gallagher*, the “Lake Chelan case.”<sup>2</sup> Shoreline issues took a dramatic jump in the priority list. In this case, the court applied the public trust doctrine by ordering a private property owner to remove fill from the lake because it interfered with navigation. The court said: “The public has a right to go where the navigable waters go.” In a footnote, the *Wilbour* Court noted that it was “with reluctance” ordering the fill to be removed because it was concerned with the absence of the state, county, or city in the proceeding, saying “all of whom would seem to have some interest and concern” in private property owners filling a waterway.<sup>3</sup> This footnote is generally thought to have inspired the Shoreline Management Act of 1971 and the public trust doctrine forms the basis for some SMA policy goals.<sup>4</sup>

Citizen environmentalists began to come together to protect the ancient forests, wild rivers, lakes, mountains, and coastal and inland waters. In many places, they were successful in drafting legislation and passing laws to defend these valuable natural resources. League of Women Voters (LWV) members were among them, with LWVWA President Joan Thomas at the forefront in Washington state.

Joan was president of the LWVWA from 1966 to 1969. In 1968, she helped found the Washington Environmental Council (WEC). Both organizations were early advocates for establishing environmental presence and influence in our state capital. That influence led to the passage of the SMA.

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<sup>2</sup> 77 Wn.2d 306 (1969).

<sup>3</sup> *Wilbour v. Gallagher*, 77 Wn.2d 306, 316 n.13, 462 P.2d. 232 (1969).

<sup>4</sup> Ralph W. Johnson et al., “The Public Trust Doctrine and Coastal Zone Management in Washington State,” 67 Wash. L. Rev, 521, 537 (1992).



In 1970, the WEC filed Initiative 43, titled “Regulating Shoreline Use and Development” with the Washington State Legislature. Under the Constitution of the State of Washington, the legislature has three options in dealing with an initiative: approve, reject, or modify.<sup>5</sup> In this case, the legislature chose to modify the initiative, passing alternative measure No. 43B, which became effective on June 1, 1971.

In the case of legislative modification, the proposed initiative and the modified measure had to be presented to the voters in the next general election; the modified version was chosen in 1972. The principal legislative modifications to Initiative 43 included reducing shoreline jurisdiction from 500 feet to 200 feet from the Ordinary High Water Mark and making local governments responsible for implementing the Act with state oversight rather than at the state level only. The SMA was thus enacted.

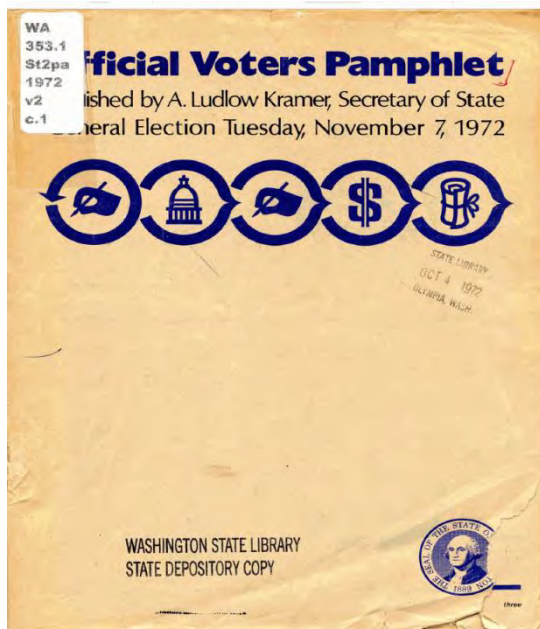


Figure 2. 1972 voter’s pamphlet for state initiatives.

In 1983, the LWWWA partnered with the Department of Ecology to evaluate public perception of the SMA. Through a survey of 806 Washington residents, they found that eight out of 10 people regularly visit a shoreline in the state. The survey also found that most Washington residents use the shorelines for recreational activities, and they value the shorelines for their scenic beauty and serenity as well. Not only is visiting the beach important to our state’s citizens, but so is visual access to the water. The most important

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<sup>5</sup> Wash. Const. Art. II, §19. Washington state has two types of initiatives: “to the people” and “to the legislature.” An initiative to the people goes directly on the ballot if enough signatures are gathered. An initiative to the legislature, however, gives the legislature three options prior to placing it on a ballot.

SMA goals to Washington residents had to do with minimizing ecological damage to the shoreline, preserving public access to the shoreline, and encouraging citizen participation in shoreline planning.

In response to recommendations from the Governor's Task Force on Regulatory Reform, in 1995 the legislature enacted a law that made a variety of changes to the SMA and directed the Department of Ecology to update the shoreline guidelines. The Department of Ecology created an extensive public process to review the guidelines and established a Shoreline Guidelines Commission, which included Ann Aagaard as the LWVWA representative. In November 2000, revised shoreline guidelines were adopted but were promptly appealed to the Shorelines Hearings Board (SHB) by the Association of Washington Business (representing a coalition of business organizations, cities, and counties). Ultimately, there were over 80 parties to the case, including the LWVWA. In *Association of Washington Business, et al. v. Department of Ecology et al.*,<sup>6</sup> the SHB held that portions of the Department of Ecology's updated guidelines were either not authorized under the SMA or the process violated the Administrative Procedure Act. At the end of 2001, Governor Gary Locke and Attorney General Christine Gregoire convened mediation aimed at ending litigation and developing a set of shoreline guidelines that would be acceptable to the diverse interests. The mediation effort lasted most of a year and culminated in a unique and important consensus around a new set of guidelines endorsed by the parties involved. In 2003, they reached an agreement and adopted updated rules.

The LWV of Bellingham/Whatcom County supported a moratorium in Whatcom County on bulk coal terminals:

"The League's position has long been that use of the port and of industrial land at Cherry Point should support economic development for the benefit of our whole community, providing high-paying long-term jobs while also protecting our ecosystems and aquatic life, and our fisheries and tourism industries."

In its first 20 some years, the SMA was subject to relatively few amendments. The SMA is implemented through administrative rules (Washington Administrative Code, or WAC) by the Washington State Department of Ecology. The WACs commonly refer to the shoreline regulations as "shoreline guidelines," but they have the force of regulation. Although the Act has changed little since its adoption, the mediation process extensively updated the WACs in 2003 to reflect emerging science.

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<sup>6</sup> *Ass'n of Wash. Bus. v. Ecology*, SHB No. 00-037 (Aug. 27, 2001), Order Granting and Denying Appeal.

The 2003 shoreline guidelines required local governments to prepare Shoreline Master Programs (SMPs) that include an inventory and characterization of their shorelines and an analysis of cumulative effects. The guidelines also set an environmental standard to prevent any further “net loss of ecological functions” along freshwater and marine shorelines.

The guidelines require local governments to develop and implement plans to begin restoring degraded shorelines. Protecting shoreline vegetation and new agriculture is subject to master program requirements. Bulkheads with fish-friendly erosion control standards, greater restrictions on docks and piers, and new directions for shoreline environment designations (SEDs), which are similar but not the same as zoning, are required.

The League continues to participate in shoreline issues associated with the SMA, and League members have been involved in appeals, reviews, and revisions over the years. In 2017, League members testified regarding proposed changes to the guidelines, including opposing proposals to weaken the no net loss provision and supporting the addition of climate change impacts and sea level rise to the SMA. At the 2019 LWVWA Convention, members adopted a proposal for this two-year study on current shoreline conditions, projections, and issues.

## Part 2: Study Purpose, Objectives, and Methodology

The initial scope for the study was challenging because the program statement is quite broad and a multitude of approaches could be taken. The LWVWA Study Committee decided to narrow the focus of the study to the implementation of the 50-year-old SMA.

We set out to interview as many people as possible who had experience with the SMA, and in as many different contexts as possible. The interviewees included representatives from state and local government, ports, aquaculture industries, building industries, tribes, and environmental organizations. Committee members also met several times with Tim Gates and Misty Blair, representatives of the Department of Ecology's Shorelands and Environmental Assistance Program. (For a complete list of interviewees, see [Appendix A](#).)

In order to evaluate the statute's impact over the past 50 years, each person interviewed was asked the same 10 carefully formulated questions. The following questions were designed to elicit responses about whether the SMA is achieving its goals:

1. How well has the Act served the people of Washington over the past 50 years?
2. Have we successfully protected our shoreline resources? Have we lessened the threat of incompatible development along the shoreline?
3. Is the partnership with local governments working? Should it be rebalanced, and if so, how?
4. Are all the provisions of the SMA as applicable today as they were 50 years ago?
5. Are there areas in which the Act could be changed to provide better protection of ecological functions while still allowing reasonable shoreline use?
6. What aspects of implementation, if improved, make the greatest difference in better outcomes (for protection or effectiveness of this Act)?
7. What are the roadblocks to better implementation or effectiveness of this Act?
8. Have we secured adequate public access to our water and shoreline areas?
9. Is the SMA equipped to deal with the next 50 years?
10. Are there provisions in the Act that we would just as soon not have today?

For a summary of interviewees' responses, see [Appendix B](#).

For a detailed list of interviewees' responses, see the separate document, [Details of Interviewee Responses to Questions](#).

In addition to interviews, the LWVWA Study Committee also conducted research. Jessica Converse, a graduate student at The Evergreen State College, assisted with a literature review. The review revealed abundant information about the state of

Washington's shorelines, including the fact that, although the SMA has been in place for 50 years, development and pollution have impacted the natural ecosystems of the upland, intertidal, and subtidal areas. While the literature review helped inform the committee, this study is based primarily on the interviews with the various groups mentioned and did not include research such as collecting data.

### Part 3: SMA Substance and Structure

The SMA is partially based on a common law principle called *jus publicum* or the “public trust doctrine.” The public trust doctrine dates to Roman times and has been judicially enforced and applied by the courts. In essence, the public trust doctrine is the principle that certain natural and cultural resources are preserved “in trust” for public use, and that the government owns and must protect and maintain these resources for the public's use.

Due to the “need to protect public access to and use of such unique resources as navigable waters, beds, and adjacent lands,” courts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny “as if they were measuring that legislation against constitutional protections.”<sup>7</sup> Different states have applied this doctrine in various ways. Washington state courts have applied the public trust doctrine only to the surface of the water and not to the upland or other public resources. Other states have expanded the doctrine, and with the continuing reduction in the protection and quantity of our resources, this may also eventually occur in Washington.<sup>8</sup> The SMA parallels this doctrine in its strong policy promoting public access to and protection of shorelines. While the SMA protects shorelines for the public, it does recognize the property right of private owners to exclude others.

Washington state has approximately 28,204 miles of shoreline.

The basic premise of the SMA is that “shorelines of the state are among the most valuable and fragile of its natural resources” and that coordinated planning is necessary in order “to prevent the inherent harm in an uncoordinated and piecemeal development of the state’s shorelines.”<sup>9</sup> The SMA is to promote three, sometimes conflicting, policies that are not ranked:

- Protecting against adverse effects to the public health and the environment, the land and its vegetation and wildlife, and the waters of the state and their aquatic

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<sup>7</sup> Johnson, 67 Wash. L. Rev. *supra*, at 525-527 (1992).

<sup>8</sup> Frank, Richard M., *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 UC Davis L. Rev. 665 (2012). Examples of the application in other states: Nevada: rivers and dry riverbeds; Wisconsin, Ohio, Michigan: beds and banks of lakes; New Jersey: access across dry sand areas to water from nearest road; North Dakota: consumptive water rights; Hawaii: groundwater. Other areas that the doctrine might cover include air and water quality and fish and wildlife resources.

<sup>9</sup> RCW 90.58.020.

life, while protecting generally public rights of navigation and corollary rights incident thereto.

- Promoting public access to shorelines.
- Planning for and fostering all reasonable and appropriate uses, with preference to water-dependent uses.

The legislature specified that the public interest in shorelines must be paramount: "In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally."<sup>10</sup>

### **SMA and Guidelines**

As its name implies, the SMA applies to shorelines of certain lakes, rivers, and saltwater areas of the state as described in more detail below. Generally, the Act regulates any use or modification of the shoreline area as well as promotes public access to shorelines. In Washington state, a strong premise exists that land use decisions should be made at the local level, that is, by a city or county because the local governing bodies have the closest ties to their citizens and know local needs best. It also means these governments must fund their land use review processes with local funds. Usually these funds come primarily from permit fees.

The SMA is jointly implemented by the Department of Ecology and local governments. The Department of Ecology has oversight over local programs, and 259 local cities and counties plan for and regulate shoreline use through what are called Shoreline Master Programs that consist of a comprehensive local shoreline plan, maps, and implementing use regulations.<sup>11</sup> Collectively, the local SMPs constitute the state SMP. Local governments are required to review and update their SMPs, if necessary, every eight years.

In addition to the Act, the Department of Ecology has adopted regulations in the WAC to ensure local compliance with the SMA. The Department of Ecology has two sets of comprehensive regulations, termed *guidelines* for local government plans and regulations, WAC 173-26 sets forth substantive and procedural requirements for local master programs and WAC 173-27 covers permit and enforcement procedures.

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<sup>10</sup> RCW 90.58.020.

<sup>11</sup> Some jurisdictions call their program "Shoreline Master Plans" or "Shoreline Management Plans."

Shorelines are defined as “all of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them.”<sup>12</sup> The SMA distinguishes between “shorelines” and “shorelines of statewide significance.”

Shorelines that are regulated under the SMA include marine shorelines, rivers, reservoirs, lakes, streams, and their associated wetlands. Not every small drainage way is regulated, only where the mean annual flow is 20 cfs or more; and lakes must be 20 acres or more in size to come within the regulations. Shorelines of statewide significance are areas where statewide interests take priority and specific uses are preferred. These encompass the Pacific coastline, including harbors, bays, estuaries and inlets and other specific areas in the Puget Sound and Strait of Juan de Fuca, including portions of the Nisqually Delta, Birch Bay, Hood Canal, Skagit Bay, and Padilla Bay as well as all areas waterward of the extreme low tide.

#### *Determining Shoreline Jurisdiction*

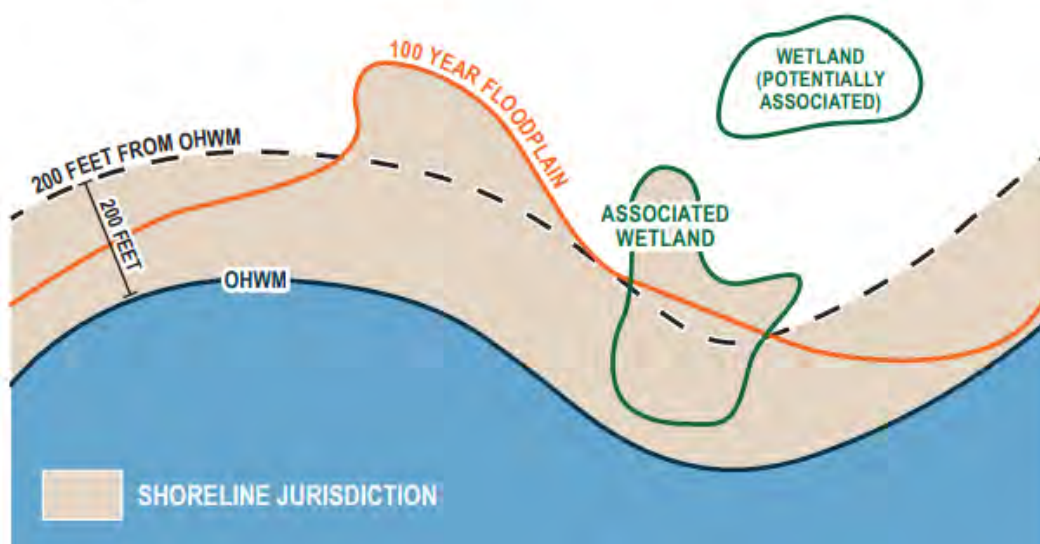


Figure 3. Graphic of shoreline jurisdiction (courtesy of Island County, Planning & Community Development).

Shorelines of statewide significance also include large rivers as well as lakes larger than 1,000 acres.<sup>13</sup> The Act sets forth a hierarchy of preferences for considerations that apply

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<sup>12</sup> RCW 90.58.030(2)(e).

<sup>13</sup> Rivers that constitute shorelines of statewide significance vary depending on whether they are east or west of the Cascades. See RCW 90.50.030(2)(g).



to shorelines of statewide significance, the foremost being “recognizing and protecting the statewide interest over local interest.”<sup>14</sup>

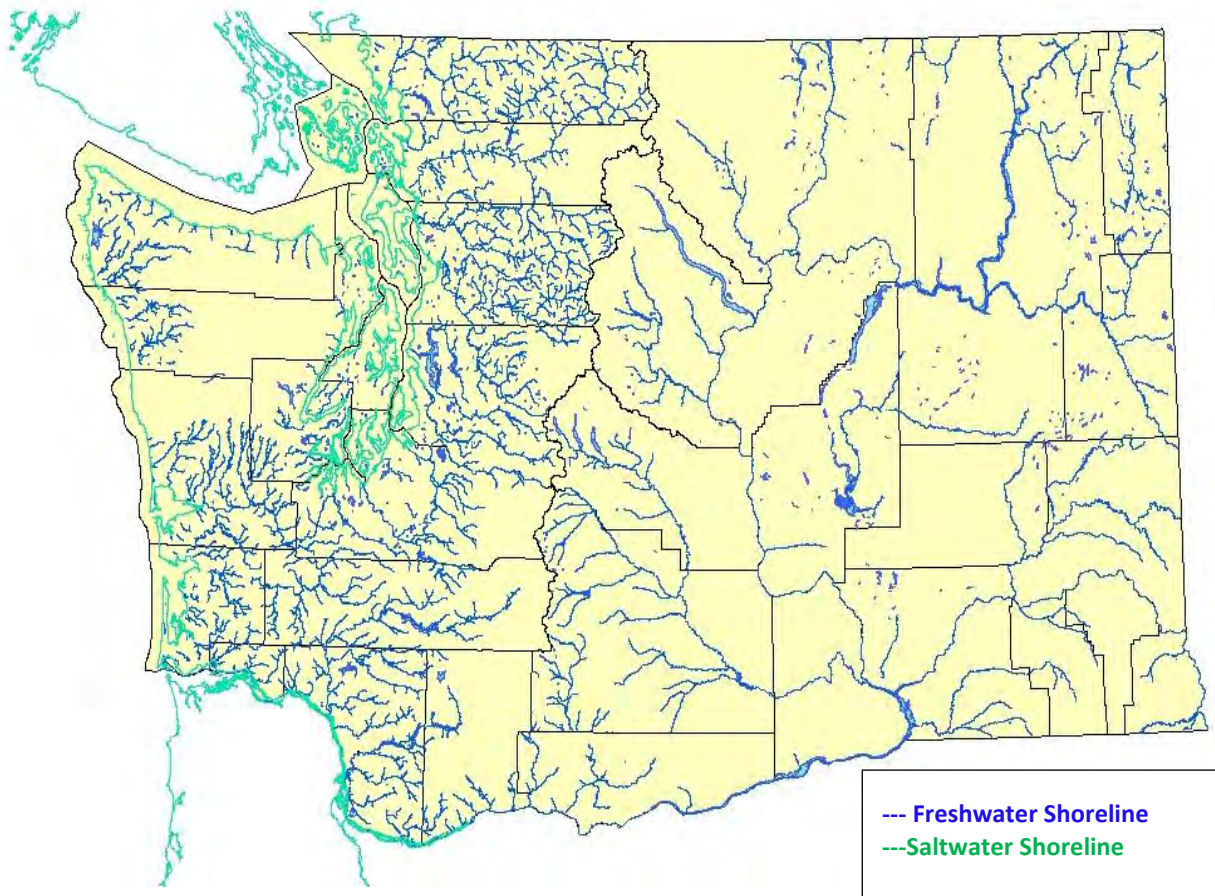


Figure 4. SMA jurisdiction map (courtesy of Department of Ecology).

The legislature stated that preferred uses are those that are “consistent with control of pollution and prevention of damage to the natural environment or are unique to or dependent upon the use of the state’s shoreline.”<sup>15</sup> Priority must be given to single-family residences and their associated structures, ports, and shoreline recreational uses. These uses include, but are not limited, to parks, marinas, piers, and other improvements facilitating public access to state shorelines, industrial and commercial developments that are particularly dependent on their location or use of the state’s shorelines, and other development that will provide an opportunity for substantial

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<sup>14</sup> RCW 90.58.020

<sup>15</sup> RCW 90.58.020.

numbers of people to enjoy the state's shorelines. The SMA applies generally to shorelines extending 200 feet from the OHWM.

### ***Shoreline Master Programs***

SMPs are both planning and regulatory documents that implement SMA policies on local shorelines. An SMP consists of a comprehensive use plan, use regulations, maps, diagrams or other descriptive material, a statement of desired goals, and standards for state shorelines.<sup>16</sup> SMPs are based on state laws and rules and tailored to local geographic, cultural, and environmental conditions and existing development patterns.

A local SMP must include goals and policies that address land use, environmental issues, public access, and archaeological and historic resources.<sup>17</sup> It must include a map and description of the SMA environmental designations, which generally include aquatic, shoreline residential, rural conservancy, natural and other designations. These designations are developed after the local government has conducted an inventory and characterization of all shoreline areas within its jurisdiction, and they must be consistent with the land use designations in the comprehensive plan. The SMA requires that these designations “shall be appropriately classified and these classifications shall be revised when circumstances warrant regardless of whether the change in circumstances occurs through man-made causes or natural causes.”<sup>18</sup> The SMA also requires the use of all available information regarding “hydrology, geography, topography, ecology, economics, and other pertinent data” in developing master plans.<sup>19</sup>

The plan must include policies and regulations addressing any shoreline modification, including shoreline stabilization; piers and docks; fills; breakwaters, jetties, groins and weirs; beach and dunes management; dredging and dredge material disposal; and shoreline habitat and natural systems enhancement projects. A plan also must include use policies and regulations for a variety of activities, including agriculture, aquaculture, boating facilities, commercial development, forest practices, industry, in-stream structures, mining, recreation, residential, transportation, and utilities. Each plan must also provide that all proposed uses and development occurring within a shoreline jurisdiction must conform to the SMA.

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<sup>16</sup> RCW 90.58.030(3)(b).

<sup>17</sup> This also includes critical areas, flood hazard areas, public access, shoreline vegetation conservation, water quality, storm water, and nonpoint pollution.

<sup>18</sup> RCW 90.58.020.

<sup>19</sup> RCW 90.58.100(1)(e).

### *Inventory and Characterization*

Before the SMP's policies are adopted, the local jurisdiction must conduct an "inventory and characterization" of its shorelines. The characterization is the description of the ecosystem wide and shoreline processes, shoreline functions, and opportunities for restoration, public access and shoreline use. This inventory provides the basis for (1) assigning SEDs, which will determine the allowed uses; (2) creating a generalized baseline to inform application of the "no net loss" standard; (3) identifying opportunities for improving public access; (4) identifying development for a cumulative impact analysis, and (5) identifying opportunities for restoration.



Figure 5. A variety of shoreline uses in Olympia (photo courtesy of Department of Ecology).

### *Cumulative Impact Analysis*

"Cumulative impacts" are impacts on the environment that result from the incremental impact of various foreseeable development when added to other past, present, and reasonably foreseeable future actions. According to the Department of Ecology's *Shoreline Master Programs Handbook*, cumulative impact analysis should:

- Use the information in the shoreline inventory and characterization report as the baseline or "current circumstances affecting the shorelines" for the analysis.

- Assess cumulative impacts on shoreline functions from “reasonably foreseeable future development” that would be allowed by the draft SMP. Reasonably foreseeable development is development likely to occur during the next 20 years (roughly) based on the proposed SEDs, proposed land use density and bulk standards, and current shoreline development patterns.
- Demonstrate how the draft SMP policies, regulations, and environment designations will achieve no net loss of shoreline functions over time.<sup>20</sup>

The cumulative impact analysis is a tremendously important component of the SMP and is used to ensure no net loss.

### *No Net Loss*

As noted, the shoreline guidelines were extensively revised in 2003 through a long, contested process. The 2003 guidelines included an important concept called “no net loss” to be applied in implementing the SMA’s legislative policies through local SMPs. No net loss means shoreline ecological functions should not be reduced from their existing condition throughout implementation of the SMP. The no net loss standard, according to the Department of Ecology, is designed to halt the introduction of new impacts to shoreline ecological functions resulting from development. Since most, if not all, shoreline development produces some impact to ecological functions, both protection and restoration are necessary to achieve no net loss.

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<sup>20</sup> Department of Ecology, *Shoreline Master Programs Handbook*, publication no. 11-06-010, Dec. 2009, chap. 17, pg. 2 (quoting WAC 173-26-186(8)(d) [Shoreline Master Programs Handbook \(wa.gov\)](http://www.wa.gov)).



## SMP updates: Achieving no net loss of ecological function

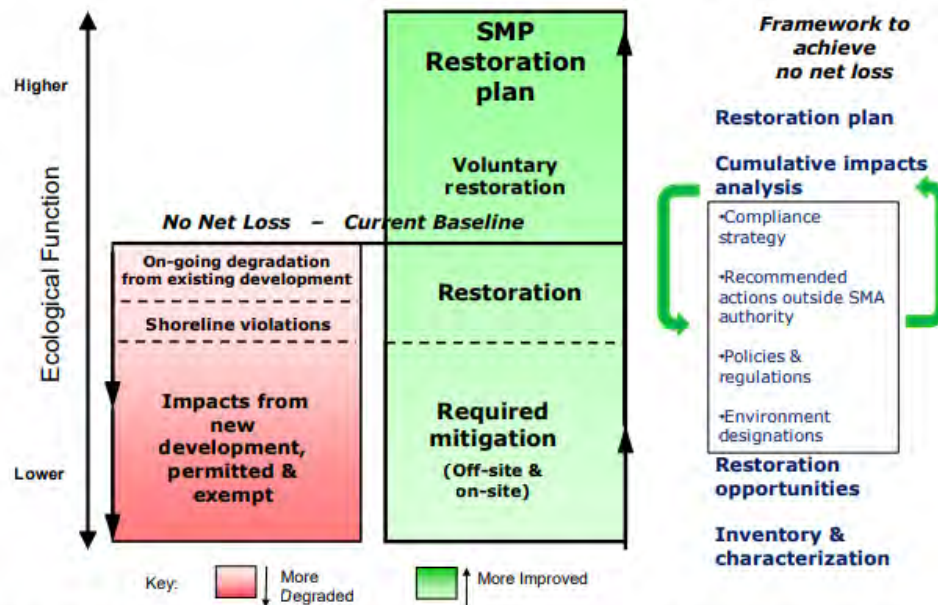


Figure 4-1: During the SMP update process, local governments should use existing shoreline conditions as the baseline for measuring no net loss of shoreline ecological functions.

Figure 6. Analyzing no net loss (illustration courtesy of the Department of Ecology).

Local governments must include policies and regulations designed to achieve no net loss of ecological functions in their SMPs. Local governments demonstrate no net loss through the comprehensive SMP update planning process, and during project review and permitting processes.<sup>21</sup> The 2003 guidelines direct that master programs must include regulations and mitigation standards ensuring that each permitted development will not cause a net loss of ecological functions of the shorelines.<sup>22</sup> No net loss principles involve first avoiding, then minimizing and compensating for ecological impacts.

In its 2009 *Shoreline Master Programs Handbook*, the Department of Ecology developed a list of 15 potential no net loss indicators for SMPs to track the status of shoreline functions. These indicators are under review and will change with additional information and science. The *Shoreline Master Programs Handbook* provides direction to local SMA planners on how to evaluate these indicators to assess whether there is loss or impairment to shoreline ecological functions.<sup>23</sup> The Department of Ecology is

<sup>21</sup> RCW 90.58.040(a).

<sup>22</sup> WAC 173-26-186(8)(b)(i).

<sup>23</sup> Department of Ecology, *Shoreline Master Programs Handbook*, publication no. 11-06-010, Dec. 2009, chap. 4, pg. 8. [Shoreline Master Programs Handbook \(wa.gov\)](http://www.wa.gov)

developing guidance for tracking how well regulations achieve no net loss through permit implementation compliance, consistent with interagency guidance on monitoring and adaptive management for critical areas.<sup>24</sup> Some indicators of no net loss include:

- Forest cover
- Shoreline stabilization
- Piers, docks, and floats
- Roads and road crossings
- Water quality
- Shellfish closures
- Levees and dikes

Recently, some have argued that the state's current no net loss approach to environmental standards has failed and it is time to institute a "net ecological gain" standard. A net gain standard would require an improvement to existing ecological functions with new development. There have been legislative attempts to establish net ecological gain as a policy to apply across identified land use, development, and environmental laws.<sup>25</sup> In 2020, a budget proviso instructed the Washington Department of Fish and Wildlife (WDFW) to contract with the Washington State Academy of Sciences to evaluate a policy shift in state law that would create a new standard of net ecological gain in lieu of the current no net loss standard. The WDFW report is expected to be complete in the second half of 2022.

#### *Comprehensive Updates and Periodic Reviews*

SMPs must be reviewed and updated, and the Department of Ecology must approve all initial SMPs and updates. After the 2003 guidelines were adopted, all local SMPs were required to undergo a comprehensive update to comport with the new WACs. Local jurisdictions had until 2014 to complete this comprehensive update, but as of August 2021, 23 jurisdictions out of 259 still had not done so.<sup>26</sup> After the comprehensive update is completed, local governments are required to periodically review the SMPs at least every eight years. Updates and reviews must be consistent with the SMA and comport with the Department of Ecology rules in WAC § 173-26. Once a plan is adopted, it can be

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<sup>24</sup> Department of Ecology's guidance will build on the Washington State Department of Commerce, *Critical Areas Handbook*, June 2018, ch. 7.  
<https://deptofcommerce.app.box.com/s/3s5d5or3tdn21i7lhf9y22v8hgogpodu>

<sup>25</sup> See HB 2550 (2020) and HB 1117 (2021).

<sup>26</sup> Tim Gates, Policy and Operations Manager, Department of Ecology Shorelands and Environmental Assistance Program, personal communication, email, Aug. 16, 2021.

challenged before the Growth Management Hearings Board (GMHB) or the SHB. The board's review must be based on the SMA requirements and policies, the SMP guidelines, the Growth Management Act (GMA) internal consistency requirements for comprehensive plans and development regulations, or State Environmental Policy Act (SEPA) compliance.

### ***Shoreline Permitting***

SMPs include development regulations that must be followed for activities and development in the shoreline jurisdiction. Local ordinances regarding shoreline permits must be approved by the Department of Ecology and be consistent with WAC 173-27. All development within the state's shorelines must be consistent with the SMA.

Development includes any project of a permanent or temporary nature that interferes with the normal public use of the surface waters overlying lands subject to the SMA at any stage of water level.

There are three types of shoreline permits: substantial development permits (SDPs), conditional use permits (CUPs), and variances. An SDP is a development with a fair market value over a certain dollar threshold (\$7,047 in 2017) or any development that materially interferes with the normal public use of the shoreline or water. These permits are administered by local governments and can only be issued if the project is consistent with the SMA, the Department of Ecology rules, and the local SMP. CUPs are for projects that normally would not be allowed, but can be allowed if modified by "conditions" to make them consistent with the SMA and compatible with the environment. Unless otherwise mandated by the guidelines, it is up to local governments to determine what types of developments require a CUP. Both local government and the Department of Ecology must approve CUPs.

A variance is used to allow a project to deviate from the SMP's dimensional requirements, such as setback, height, or lot coverage. Variances can only be granted when there are "extraordinary circumstances relating to the physical character or configuration of property such that the strict implementation of the master program will impose unnecessary hardships on the applicant or thwart the policies of set forth in [the SMA]."<sup>27</sup> Both the local government and the Department of Ecology must approve a variance.

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<sup>27</sup> WAC 173-27-170.

## *Exemptions*

The SMA provides for a number of exceptions and/or exemptions, sometimes from the entire Act and other times from various permit requirements. The following uses are included in exemptions:

- Agricultural activities
- Drought emergency projects
- Forest practices
- Certain energy facilities
- Environmental excellence program projects
- Fish habitat enhancement projects
- Remedial action under the Model Toxics Control Act
- Boatyard stormwater treatment upgrades
- Certain Washington State Department of Transportation facilities

The definition of “substantial development permit” also carves out a number of exemptions, including:

- Normal maintenance or repair of existing structures
- Protective bulkheads for single-family residences
- Emergency construction necessary to protect property
- Navigational aids and channel markers
- Construction by an owner, lessee, or contract purchaser of a single-family residence for their own use
- Construction of a dock or community dock under a certain size and dollar value.<sup>28</sup>

The SMA is liberally construed to protect the state’s shorelines, but exemptions must be narrowly construed to minimize their application. A local jurisdiction issues a “letter of exemption” for uses and projects that are exempt from obtaining an SDP. Exempt uses and projects must still comply with SMA goals, policies, and regulations. A letter of exemption may include conditions to ensure compliance but there is no requirement for public notice as for other types of permits. Letters of exemption are not appealable to the SHB but may be appealed to a county superior court under the Land Use Petition Act, RCW 36.70C.

A common exemption is for shoreline armoring or bulkheads, but this is only granted when necessary to protect an existing residence. The armoring must be installed at or

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<sup>28</sup> RCW 90.58.030(3)(e).



near the OHWM and use less than one cubic yard of fill per linear foot. Some local jurisdictions prohibit bulkheads in the natural shoreline environment and may require a CUP in areas. Some beach nourishment and bioengineered erosion control projects may be considered as exempt bulkheads, but these must comply with the standards and approved by the WDFW.

Some projects that enhance the environment are also exempt from SDP requirements. One is the control of certain aquatic noxious weeds. Others include certain fish or wildlife habitat improvements, shoreline restoration projects resulting in a change in shoreline jurisdiction (i.e., a change in flow pattern or rise of water level), and watershed restoration projects. Certain emergency construction projects are exempt, for example, when time is of the essence to repair a sewer line. No new permanent protective structures are allowed under the emergency exemption without obtaining an “after-the-fact” permit. The placement and/or construction of navigational aids required by the U.S. Coast Guard are also exempt.

Another common exemption is “normal maintenance or repair” of preexisting, lawful structures. This exemption cannot be used for any project that would alter the footprint of the original structure or expand the existing use. Construction of a single-family home is exempt from an SDP, within limits. Construction must be by the owner, lessees, or contract purchaser; “spec homes” are not exempt. The home cannot exceed 35 feet in height and must meet all other codes and regulations. Construction commonly secondary to a home, such as garage or a deck, is also exempt unless it is proposed below the OHWM. Multifamily homes, such as duplexes or apartments, do not meet this exemption.

Even if a letter of exemption is granted, the applicant must still comply with the SMA. In granting a letter of exemption, local governments need to ensure that the activities proposed still comply with the SMA and be wary of “piecemeal” exemptions, that is, a series of small project exemptions that when taken together would not be exempt.

Permits (but not exemptions) may be appealed within 21 days. If the local government provides an appeal process, an appeal will first go through the local process. If not, the appeal would go to the state SHB.

### **The Shoreline Management Act and the Growth Management Act**

As noted, the SMA was adopted 50 years ago. Other local planning was done by cities and counties, subject to the procedures set by state statutes. Twenty years after adopting the SMA, the state adopted the GMA (RCW Ch. 36.70A). The GMA was intended to provide substantive requirements for land use planning, including local

comprehensive plans and zoning ordinances. Local plans and ordinances are required to, among other things:

- Designate and protect critical areas
- Designate and protect natural resource lands
- Set urban growth areas, to limit urban sprawl
- Protect and preserve rural areas

The GMA sets forth 13 goals, unranked and sometimes conflicting, that local governments must strive to fulfill in their local planning efforts. The SMA legislative policy goals are now considered to be a 14th goal of the GMA.

Unlike the SMA, there is no state oversight for local GMA land use plans. The state Department of Commerce issues guidance for local plans and regulations and can challenge plans before the GMHB, but it does not “approve” local plans. Initially, the SMA and the GMA were implemented and administered independently. However, the two statutes overlap regarding standards for critical areas and shoreline areas. The GMA defines “critical areas” as: (a) wetlands, (b) areas with a critical recharging effect on aquifers used for potable water, (c) fish and wildlife habitat conservation areas, (d) frequently flooded areas, and (e) geologically hazardous areas.<sup>29</sup> Any of these critical areas may exist in shoreline areas and thus subject to both the GMA and the SMA, particularly wetlands and fish and wildlife conservation areas. The application of the two guidelines sometimes causes confusion among both planners and property owners.

In 1995, the legislature took action to integrate local SMPs with GMA comprehensive plans.<sup>30</sup> The SMA’s goals and policies are now considered the “14th goal” of the GMA, again without priority. SMPs are also considered to be an element of the local government’s GMA plan. However, since this legislative amendment occurred prior to the updated shoreline guidelines in 2003, confusion remained about the regulation of critical areas and shorelines. In 2010, the legislature amended the GMA to clarify that critical areas within shoreline jurisdiction would be governed by the local Critical Area Ordinance *until* the local government updated its SMP to meet the 2003 Shoreline Guidelines. At that time, local governments have the option whether to include GMA critical areas within their SMPs.<sup>31</sup>

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<sup>29</sup> RCW 36.70A.030(6).

<sup>30</sup> RCW 36.70A.480.

<sup>31</sup> RCW 90.50.030(2)(d)(ii).

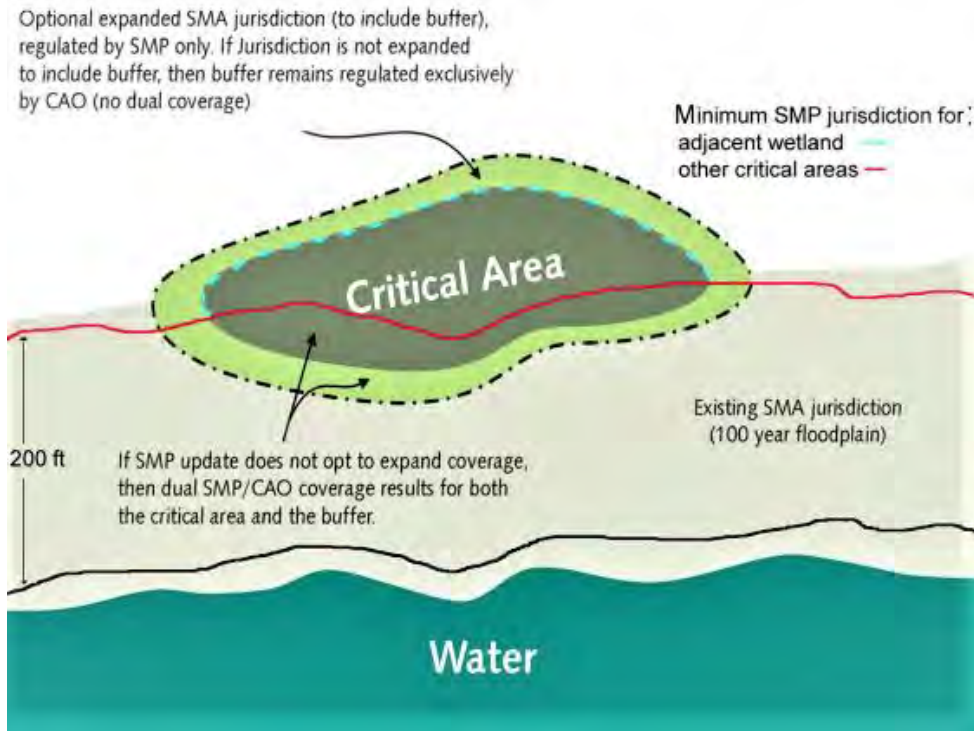


Figure 7. Options for regulating critical areas (from the *Department of Ecology SMP Handbook*).

### State Environmental Policy Act

SEPA (RCW 43.21C) applies to any governmental actions, local or state, including the adoption of SMPs and the issuance of permits. SEPA contains both procedural and substantive requirements. A SEPA checklist is required for any governmental action; from that, a “determination of significance” (DS), a “determination of nonsignificance” (DNS), or a “mitigated determination of nonsignificance” (MDNS) is issued. A DS requires the preparation of an environmental impact statement (EIS), while a DNS requires no further environmental review. An MDNS, typically issued in connection with project permits, allows the project to continue without an EIS if certain mitigation actions are taken. The SEPA rules, WAC 197-11, contain exemptions that may apply to some shoreline construction or fill. Unless otherwise exempted from SEPA, most planning and permitting actions require a SEPA review.

### Other Related Laws

Numerous other environmental laws and regulations may apply in shoreline areas. On the federal level, the National Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1465, authorizes states with approved Coastal Zone Management Programs to review

projects where the proposal is in, or has the potential to affect, a state's coastal zone, and the project has a federal nexus, that is, "federal action," which includes federal funding. A federal action includes a federal agency's proposal for development projects or other activities with reasonably foreseeable coastal effects; an application for a federal license or permit or other form of federal authorization that Washington's Coastal Zone Management Program (CZMP) lists as subject to review; or a state or local application for a form of federal financial assistance for a project with reasonably foreseeable coastal effects that the CZMP lists as subject to review.<sup>32</sup> The CZMA was enacted the year after Washington state adopted the SMA, and Washington's SMA program constitutes part of its CZMP. The 1990 federal Coastal Zone Act Reauthorization Amendments Section 6217 requires states with approved CZMPs to develop a Coastal Nonpoint Pollution Control Program that is also implemented by the Department of Ecology.

NEPA applies if a federal action or permit is involved.<sup>33</sup> The federal Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters.<sup>34</sup> It covers a variety of actions on the shorelines, ranging from point and nonpoint source discharges to dredge-and-fill activities. It is generally administered by the EPA but some portions have been delegated to the state for administration. In Washington state, the Department of Ecology administers Section 401 water-quality certifications, which provide reasonable assurance that the applicant's project will comply with state or federally approved water-quality standards and other aquatic resources protection requirements. The Department of Ecology also administers the National Pollutant Discharge Elimination System programs under Section 402, which includes permits for construction and stormwater runoff. The U.S. Army Corps of Engineers (USACE) administers Section 404 permits under the CWA. These permits are necessary for any work, including construction, dredging, and aquaculture in the nation's navigable waters. Recently, some significant court decisions have concerned Section 404 permitting. In *Sound Action v. U.S. Army Corps of Engineers*, the federal district

The Clean Water Act establishes the basic structure for regulating discharges of pollutants into the waters of the United States.

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<sup>32</sup> Department of Ecology, *Washington Coastal Zone Management Program Enforceable Policies*, publication no. 20-06-013, Sept. 2020.

<sup>33</sup> 42 U.S.C. §§ 4321 *et seq.*

<sup>34</sup> 33 U.S.C §§ 1251 *et seq.*

court for the Western District of Washington determined that the USACE was applying the wrong definition of *high tide* in determining jurisdiction.<sup>35</sup> The corps was ordered to begin using ordinary high water, rather than mean higher high water as the benchmark, which means that the corps now is responsible for reviewing proposed bulkhead and shoreline armoring.<sup>36</sup> In 2020, the same court vacated a Corps general nationwide permit (NWP) #48 for aquaculture activities.<sup>37</sup> An NWP sets general standards for certain activities that are similar in nature and will likely have a minor effect on jurisdictional waters and wetlands of the state. So long as the operator or owner does the activity within the prescribed limits of the NWP, no other permit is needed after a preconstruction notice is filed. NWP #48 covers commercial shellfish and mariculture activities, and was vacated by the court because the USACE had not documented or justified its finding of no significant environmental impact. Since then, the Ninth Circuit Court of Appeals has affirmed the ruling, and the USACE has issued a revised NWP #48, which has also been challenged in court. Section 401 of the CWA prohibits federal agencies from issuing a license or permit before there is a determination on the water-quality impacts. In Washington state, authority to issue Section 401 certifications has been delegated to the Department of Ecology.

Finally, Section 10 of the Rivers and Harbors Act of 1899 prohibits the unauthorized obstruction or alteration of any navigable water of the United States.<sup>38</sup> This section

The Washington State Department of Natural Resources is the steward of more than 2.6 million acres of state-owned aquatic lands.

provides that the construction of any structure in or over any navigable water of the United States, or the accomplishment of any other work affecting the course, location, condition, or physical capacity of such waters, is unlawful unless the work has been recommended by the USACE Chief of Engineers and authorized by the

Secretary of the Army. The secretary's approval authority has since been delegated to the chief of engineers.

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<sup>35</sup> *Sound Action v. U.S. Army Corps of Eng'rs*, Case No. C18-0733JLR (W.D. Wash. Oct. 30, 2019).

<sup>36</sup> The ordinary high water is a rather complex determination, and the Department of Ecology has issued a 230-page guidance document for determining it. In simple terms, however, it requires a visual examination, as the "mark" left by high tides that makes soil and vegetation distinct from upland areas. The mean higher high water is the average height of the highest tide recorded at a tide station each day during the recording period.

<sup>37</sup> *Center for Food Safety v. U.S. Army Corps of Engineers*, Case No. 17-1209 (W.D. Wash. June 11, 2020).

<sup>38</sup> 33 U.S.C. § 403

At the state level, other agencies are also involved with projects on or near shorelines. Hydraulic Project Approvals (HPAs) are permits issued by the WDFW for projects on or near the state waters under RCW 77.55. HPAs are required, unless exempt, for projects that “use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state.”<sup>39</sup> Most uses or projects within shoreline jurisdictions will fall within the scope of HPA requirements. One exception, however, are geoduck farms, where geoducks are planted in PVC tubes in tideland areas. In 2007, the state attorney general issued an opinion stating that geoduck farms are not subject to HPAs because of statutory language attributing sole responsibility to the state Department of Agriculture. While attorney general opinions are not binding on the courts, they are considered persuasive. In 2021, the Washington State Court of Appeals upheld this interpretation in *Protect Zangle Cove v. Washington Department of Fish and Wildlife*.<sup>40</sup>

The Washington State Department of Natural Resources (DNR) is the steward of more than 2.6 million acres of state-owned aquatic lands. Through its aquatic lands program, DNR is directed by statute to manage state-owned aquatic lands to meet the following goals:

- Encourage direct public use and access
- Foster water-dependent uses
- Ensure environmental protection
- Provide opportunities for utilization of renewable resources
- Generate income from use of aquatic lands, when consistent with the previous goals.<sup>41</sup>

DNR generates revenue by selling the rights to harvest renewable resources, such as wild geoducks and other shellfish, and from leasing and licensing state-owned aquatic lands. The leases include terms and conditions that have the force of law.

On the local level, shoreline uses are sometimes regulated through “view protection ordinances” to protect access to water views.<sup>42</sup> Many local jurisdictions also use the state’s Joint Aquatic Resources Permit Application (JARPA) form to process shoreline permit applications. A JARPA covers USACE permits, HPAs, floodplain development permits, shoreline permits, and aquatic lands use authorization.

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<sup>39</sup> RCW 77.55.011.

<sup>40</sup> Washington State Court of Appeals, Division Two, No. 52906-8-II (slip opinion June 8, 2021).

<sup>41</sup> RCW 79.105.030.

<sup>42</sup> See e.g., Olympia Municipal Code §§ 18.20.500; Kitsap County Code § 22.400.135.

Finally, tribal treaty rights must be considered in permitting and use of the shorelines. In 1974, the Boldt Decision affirmed the treaty rights for Washington state tribes to harvest salmon and other fish in their “usual and accustomed” areas of subsistence.<sup>43</sup> The Boldt Decision held that tribes are entitled to half of the fisheries and are co-managers of the resource, and established conservation standards. In 1994, the Rafeedie Decision concluded that tribes have a right to harvest half of the shellfish in their usual and accustomed areas.<sup>44</sup>

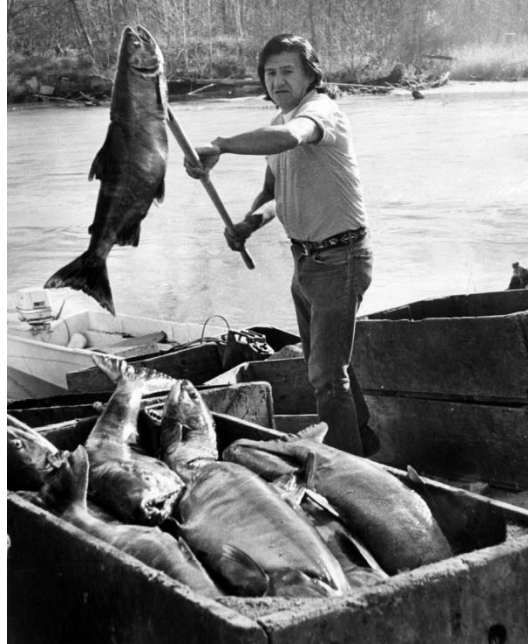


Figure 8. In 1974, the Boldt Decision affirmed the right of tribes to fish in their usual and accustomed places. (Photo courtesy of Northwest Indian Fisheries Commission.)

In 2013, a subsequent case held that the state has a duty to protect salmon habitat and ordered the state to remove salmon-blocking culverts.<sup>45</sup> Hence, habitat protection and restoration are part of tribal treaty rights.

Tribal treaty rights need to be considered in any decision affecting the shorelines. Recently, the USACE disapproved a permit application from the WDFW for a boat ramp in Kitsap County based on tribal objections that it would interfere with tribal treaty rights.

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<sup>43</sup> *United States v. State of Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) aff'd 520 F.2d 676 (9th Cir. 1975).

<sup>44</sup> *United States v. State of Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994).

<sup>45</sup> *United States v. State of Washington*, No. CV 70-9213, 2013 WL 1334391 (W.D. Wash. March 29, 2013)



## Part 4: Results

The LWVWA Study Committee conducted extensive research, met with Department of Ecology staff several times, and conducted more than 18 interviews of professionals and interested organizations regarding the SMA. This section presents the results of this investigation, including how the Act and its implementation have affected our shorelines. First, this study considers the Act in general and summarizes the conclusions based on interviews, meetings, and research. Second, the study will discuss specific issues that arose regarding shoreline protection and achieving the legislative policy goals underlying the Act.

### General Observations Regarding the Act

This section evaluates the interview responses in terms of two overarching questions: (1) has the SMA benefited our shorelines? and (2) are the SMA policies being achieved?



Figure 9. Padilla Bay (photo courtesy of the Department of Ecology).

### ***The SMA Has Benefited Our Shorelines***

Every person the committee spoke to believed the SMA has benefited shoreline ecological functions. Had the SMA not been adopted when it was, we would be seeing more development on the shorelines, including such things as overwater restaurants and hotels, residential developments, and other projects that greatly impact shoreline functions. One such proposed development was discussed in the seminal case of *Orion*



*Corp. v. State of Washington*.<sup>46</sup> In *Orion*, the development corporation purchased up to 80% of the tidelands in Padilla Bay prior to the adoption of the SMA. The corporation planned a “Venice of the Northwest” residential development covering over half the bay, with supporting retail, commercial, and recreational facilities throughout, and would result in being the largest city in Skagit County. The Orion Corporation would have created this community by combined dredge-and-fill operations and each lot would be on the waterfront. While the corporation had firm plans, it had not applied for a permit before Padilla Bay was designated a shoreline of statewide significance under the Act. Thus, the project was not vested and permits were denied pursuant to the SMA. These types of activities have been controlled by the SMA, preventing irreversible and permanent harm to sensitive shoreline environments. Subsequently, the Orion Corporation filed a takings claim against the state, which was denied on the basis of the public trust doctrine.<sup>47</sup> The court’s decision held that the state retains sovereignty and dominion over the waters protected by the public trust doctrine, and thus the Orion Corporation lacked a full property right to be taken. As Ralph Johnson noted in 1992: “Any state official who is acting responsibly, when issuing a substantial development permit under the Shoreline Management Act, must make an effort to protect the public trust interests.”<sup>48</sup>

The Shore Friendly program offers guidance to shoreline property owners on how to protect the shorelines in Puget Sound.

Other specific examples of SMA policies and regulations that have benefited our shorelines include, among others, the areas of shoreline armoring and local enforcement. In the 50 years since its adoption, local programs have been established to assist private property owners in enhancing the protection of the shorelines. For

example, the Shore Friendly program offers guidance to shoreline property owners on how to protect the shorelines in Puget Sound. It is a joint effort by the WDFW and the DNR, with funding through the EPA. It supports local programs around Puget Sound that offer free workshops and site evaluations for waterfront homeowners and, in some cases, provides funding to assist in removing or softening bulkheads to restore drift cell

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<sup>46</sup> *Orion Corporation v. State of Washington*, 103 Wn.2d 441, 693 P.2d 1369 (1983).

<sup>47</sup> A “takings claim” is a claim that the government has taken property from a private property owner without just compensation, in violation of the constitution. A “takings” can occur through a physical taking of the land or where regulations are so onerous they deprive an owner of the use of the land.

<sup>48</sup> Ralph Johnson, *The Public Trust Doctrine in Washington State: Proceedings of the Symposium*, Nov. 18, 1992, pg. 22.

benefits to shoreline beaches.<sup>49</sup> Such programs are making small inroads toward providing more protection, but shoreline armoring continues to have negative impacts. Lorraine Loomis, former chair of the Northwest Indian Fisheries Commission, writing about the Northwest Indian Fisheries' Commission's 2020 *State of Our Watersheds* report, said:

Shoreline armoring continues to threaten salmon and forage fish spawning and rearing habitat throughout Puget Sound. Of the total 2,460 miles of shoreline within Puget Sound, 715 miles—about one-third—is armored with bulkheads and other structures. Between 2015 and 2018 there was a net reduction of about one mile of armoring. This small gain is a positive sign, but we must increase it and restore the damage caused by past shoreline armoring practices.<sup>50</sup>

Additional legislation has helped as well. In 2021, the legislature passed SSB 5273, which requires the use of the least impacting bank protection alternative for protecting fish life when replacing marine armoring. The alternatives, in order of preference, include removing the structure, installing native vegetation, using other soft techniques, and hard armoring only as a last option.

Joint administration of the SMA by the Department of Ecology and local governments has provided benefits, particularly in difficult permitting situations. The Department of Ecology's oversight offers a layer of protection for local planners against local politics. The level of oversight and protection can vary with situations, personalities, pressure groups, and administrations. The mandatory eight-year periodic review of SMPs should provide information about whether no net loss of ecological function is being achieved and whether the initial cumulative impacts analysis was correct. This information must be based on monitoring, and programs should be adaptively managed according to the results of such monitoring.

Some of our interviewees said oversight of the program historically has been uneven, but current Department of Ecology shoreline program management has made it a priority to improve communication between the state and local governments and to establish a database of shoreline permits (CUPs and variances) that can be documented

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<sup>49</sup> Drift cells are the areas of a shoreline in which sand and gravel naturally move to create beaches.

<sup>50</sup> Lorraine Loomis, "Being Frank: Tribal Watersheds Report Shows Little Improvement; But Hope Remains," *Sequim Gazette* (Oct. 14 2020). The Northwest Indian Fisheries Commission 2020 *State of Our Watersheds* report can be accessed at: <http://files.nwifc.org/sow/2020/state-of-our-watersheds-sow-2020-final-web.pdf#page=1>

and accessed. An effective feedback loop can ensure that permits and exemptions are properly administered as well as strengthen enforcement efforts.

### ***Achieving the Act's Policy Goals***

In 1971, the legislature recognized a “clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.”<sup>51</sup> In the Act, the legislature set out three major state policies: (1) protecting health, land, vegetation, terrestrial and aquatic wildlife while planning for and fostering all reasonable and appropriate uses, (2) promoting public access and enjoyment of the state's shorelines, and (3) giving priority to uses that require a shoreline location.<sup>52</sup> The following sections discuss those policies in light of our research.

#### ***Policy Goal 1: Protecting health, land, vegetation, terrestrial and aquatic wildlife***

This protection includes the environment, the land and its vegetation and wildlife, and the state's waters and aquatic life, while protecting generally public rights of navigation and resulting rights.

All of our interviewees agreed that the SMA has provided significant benefits. However, they also agreed that, in spite of the positive benefits, much of the shoreline ecological function is still in decline. Significant development on the shorelines has still taken place, changing the shoreline environment and not always in accordance with best practices. The policy of “protecting against adverse effects” and the admonition against piecemeal development in planning under local SMPs has slowed, but certainly not stopped, the decline of ecological functions in the shoreline environment. Reasons given for this decline were varied. Despite the updated guidelines in 2003 requiring no net loss, use of best available science, cumulative impact analyses, and restoration planning, a significant number of local jurisdictions in sensitive areas still have not updated their SMPs. The lack of any penalties for local jurisdictions who are out of compliance with the SMA is definitely a challenge to achieving SMA policy goals. The Department of Ecology has the statutory authority to complete local plans but has never used it. Local

In spite of the positive benefits of the SMA, significant development on the shorelines has still taken place.

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<sup>51</sup> RCW 90.58.020.

<sup>52</sup> RCW 90.58.020

jurisdictions are given the responsibility to balance their shoreline priorities, and deference is given to these priorities of local jurisdictions in appeals to the hearing boards. Unfortunately, local balancing may not be consistent with the best available science and/or the current need to accommodate the impacts from climate change. And then there are exemptions from the Act, which are difficult to understand, to administer, or for the public to follow since there are no public notification requirements.

The respondents generally agreed that the 2003 guidelines substantially strengthened the shoreline rules with new requirements and new science. Local governments were required to update the local SMPs to comply with the guidelines by December 2014, but some jurisdictions still have not done so. Unfortunately, however, jurisdictions incur no penalties for missing the statutory deadline, and some jurisdictions are still operating under pre-2003 SMPs. While those jurisdictions apply their critical areas ordinance standards to shoreline areas until they update, the shoreline guidelines contain important provisions that are omitted. In 2011, the legislature enacted additional requirements for SMP review and updates to be conducted every eight years. For those jurisdictions meeting these deadlines, their shorelines are seeing more protection.

While the goal of protecting shoreline functions has been described as “overarching,” its application coincides with the goal of fostering all reasonable and appropriate uses. Theoretically, a use should only be permitted if “health, land, vegetation, terrestrial and aquatic wildlife” are adequately protected.<sup>53</sup> Nevertheless, most respondents thought too much development has been allowed to go forward. A majority of respondents stated they believed the Act’s exemptions and preferences for certain uses helped facilitate more development than would have occurred otherwise.

#### *Policy Goal 2: Promoting public access and enjoyment of the state’s shorelines*

Many, but not all, of our interviewees opined that public access to our state’s shorelines is adequate. Even some of those who thought access is currently adequate expressed concerns that access may soon be more limited given our burgeoning population growth. A Department of Ecology study of marine shorelines found that of the 3,065 miles of coastline, only 1,016 miles are publicly owned and have public access.<sup>54</sup> This does not include freshwater shorelines, however, such as lakes and rivers.

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<sup>53</sup> RCW 90.58.020.

<sup>54</sup> Department of Ecology, *Washington Marine Shoreline Public Access Project*, publication no. 09-03-019, May 2009, [Marine Shoreline - 5-26-09 \(wa.gov\)](http://www.wa.gov)

Several people interviewed noted that a major factor frustrating the lack of public access is the state historically selling much of its tidelands to private owners—by 1971, the state had sold 60% of its tidelands and 30% of its shorelines.<sup>55</sup> Some interviewees suggested that the public trust doctrine, on which the SMA is partially based, should be extended to upland areas abutting shorelines. The doctrine reserves a public property interest, the *jus publicum*, in tidelands and the waters flowing over them, despite the sale of these lands into private ownership.<sup>56</sup> In *Caminiti v. Boyle*, the court fully embraced the doctrine, stating: “The sovereignty and dominion over this state’s tidelands and shorelands, as distinguished from *title*, always remains in the State, and the State holds such dominion in trust for the public.”<sup>57</sup> It is this principle which is referred to as the ‘public trust doctrine’<sup>58</sup> Although not always clearly labeled or articulated as such, the committee’s review of Washington law establishes that the

Of the 3,065 miles of coastline in Washington state, only 1,016 miles are publicly owned and have public access.

doctrine has always existed in the state of Washington. In *Caminiti* the court recognized recreational use of the waters as protected by the public trust. This principle has been applied by Washington courts but limited to the surface of the water. Thus, at high tide, there may be access to

certain areas by boat, but when the tide is out, access on privately owned tidelands would be considered trespass. Some states have extended the public trust doctrine to tidelands, riverbeds, and upland areas, as well as for access to shorelines, but Washington courts have not extended the doctrine and no decisions have yet addressed the geographical scope of the doctrine in Washington.<sup>59</sup> Washington has recognized the public use of ocean beaches through the “doctrine of custom” but only for lands under state ownership or control.<sup>60</sup>

Some respondents noted that we lack enough public boat ramps or marinas for the population. One person noted that while there is a proliferation of private docks, it would be better to see those uses transitioned to joint-use marinas. The Department of

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<sup>55</sup> *Caminiti v. Boyle*, 197 Wn.2d 662, 666, 732 P.2d 989 (1987) (citing Kenan R. Conte, “The Disposition of Tidelands and Shorelands, Washington State Policy, 1889-1982” (master’s thesis, The Evergreen State College, 1982)).

<sup>56</sup> Johnson, *supra* at 524.

<sup>57</sup> *Caminiti*, 197 Wn.2d 622.

<sup>58</sup> *Caminiti* at 669.

<sup>59</sup> *Raleigh Ave Beach Assoc. v. Atlantis Beach Club*, 185 N.J. 40 (2005).

<sup>60</sup> See RCW 79A.05.600; 1970 AGO No. 27.

Ecology guidelines recommend that local SMPs require joint-use docks for new development, but there is no absolute requirement and there is a tendency for private waterfront owners to put in individual docks.<sup>61</sup>

We heard from planners that it is difficult to require public access in connection with development due to constitutional limitations on the “taking” of private property. We also heard that where public access has been located near or within a private development, it must be monitored, as surrounding property owners sometimes encroach or otherwise limit the access. Some said that government jurisdictions should play a more active role in acquiring public access sites.

*Policy Goal 3: Giving priority to uses that require a shoreline location*

The SMA includes this policy goal, and it is tempered by the legislative finding stating that “unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest.”<sup>62</sup> The legislative findings also confer “priority” status on a myriad of uses of shorelines, including for: “single-family residences and their appurtenant structures.”<sup>63</sup> It also includes “ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.”<sup>64</sup>

In the Act, single-family homes are the first in this long list of priorities, including appurtenant structures. The 2003 guidelines, however, set forth a required prioritization scheme for preferred uses in the following order:

- Protection and restoration of ecological functions
- Water-dependent and associated water-related uses
- Mixed-use developments that include and support water-dependent uses
- Water-related and water-enjoyment uses
- Single-family residential uses, where appropriate<sup>65</sup>

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<sup>61</sup> WAC 173-26-231(3)(b).

<sup>62</sup> RCW 90.58.020.

<sup>63</sup> RCW 90.58.100(6). “Appurtenant structures” means garages, sheds, and other legally established structures. It does not include bulkheads and other shoreline modifications or overwater structures.”

<sup>64</sup> RCW 90.58.020.

<sup>65</sup> WAC 173-26-201(2)(d).

Thus, while all local SMPs are required to follow this prioritization scheme, interviewees voiced concerns about inconsistent implementation. While restoration projects are given priority and do not generally require a permit, several respondents stated there should be even more incentives for such projects. One person commented that it was frustrating to have worked on a restoration project when shoreline property nearby was later granted a permit for development, undermining the restoration efforts. We heard from many respondents that there should be no preference or exemption for single-family homes. The basis for such a preference or exemption is questionable, since single-family homes on shorelines are generally available only to the affluent, as are private docks.<sup>66</sup>

The 2003 guidelines require all local governments to “reserve appropriate areas for protecting and restoring ecological functions.”

The 2003 guidelines require all local governments to “reserve appropriate areas for protecting and restoring ecological functions”<sup>67</sup> Local SMPs generally include restoration plans, and some, but not all, identify areas that are in need of restoration. Beyond that, actual restoration is not mandatory. In 2014, the organization Futurewise conducted a study looking at various incentives for restoration but acknowledged that funding was a primary barrier for such programs.<sup>68</sup> Nevertheless, most of the respondents agreed that more incentives for shoreline protection areas needed.

A water-dependent use is defined as “a use or portion of a use which cannot exist in a location that is not adjacent to the water, and which is dependent on the water by reason of the intrinsic nature of its operations.”<sup>69</sup> Common water-dependent uses include shellfish growing and other aquaculture activities and commercial shipping facilities, including port districts. Residential docks have been deemed to be water-dependent as well.

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<sup>66</sup> Christopher Flavelle, “Why Coastal Living Is Becoming Affordable for Only the Rich,” *Insurance Journal*, April 24, 2018, <https://www.insurancejournal.com/news/national/2018/04/24/487144.htm>. Flavelle notes a number of reasons why waterfront property is unaffordable, including property prices, property taxes, insurance rates, and maintenance costs.

<sup>67</sup> WAC 173-26-201(2)(d)(i).

<sup>68</sup> Dean Patterson, Heather Trim, and Tim Trohimovich, *A Practical Guide: Incentives to Help Meet Priority Shoreline Restoration and Protection Objectives*, Futurewise, Aug. 2014, [https://wdfw.wa.gov/sites/default/files/2019-03/incentives\\_toolkit\\_for\\_shoreline\\_restoration.pdf](https://wdfw.wa.gov/sites/default/files/2019-03/incentives_toolkit_for_shoreline_restoration.pdf).

<sup>69</sup> WAC 173-26-020(41).



While aquaculture is a preferred water-dependent use, the committee heard concerns from some respondents about the “industrialization” of some aquaculture facilities, particularly geoduck farms. Large corporate geoduck farms have replaced many smaller shellfish farms and growers along the shorelines, bringing a visual blight of plastic tubes and nets at low tide. They also voiced concern that the operations of these large farms result in the destruction of adjacent eelgrass beds, despite buffers.<sup>70</sup> On the whole, however, most of the respondents were not as concerned about shellfish operations as they were about other types of development.

Ports and harbors are recognized in Article XV of our state’s constitution, and there are 75 public ports throughout the state. While ports are vital to the economy, they also come with impacts, particularly dredging and the loss of estuarine habitats. The Department of Ecology recommends that local governments ensure ports follow baseline requirements. Nevertheless, the committee heard no complaints from respondents about port operations, and some ports have implemented restoration projects.

### **Conclusion Regarding the Effectiveness of the Act**

To summarize our review of the legislative’s SMA policy goals, we found Washington state was a leader in protecting the shorelines in the early 1970s. The SMA’s policy goals helped to limit shoreline development and to preclude extremely damaging development. But balancing of the policy goals can be difficult. The Department of Ecology guidelines recognize this potential for conflict:

The policy goals for the management of shorelines harbor potential for conflict. The act recognizes that the shorelines and the waters they encompass are "among the most valuable and fragile" of the state's natural resources.... Unbridled use of shorelines ultimately could destroy their utility and value. The prohibition of all use of shorelines also could eliminate their human utility and value. Thus, the policy goals of the act relate both to utilization and protection of the extremely valuable and vulnerable shoreline resources of the state.<sup>71</sup>

Theoretically, once an SMP is adopted and approved, compliance with its provisions should ensure that the policy goal of protecting ecological functions is carried out, but

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<sup>70</sup> DNR requires 10-foot buffers on 2,100 acres leased for geoduck aquaculture.

<sup>71</sup> WAC 173-26-176(2).



that result is not guaranteed. Local jurisdictions have considerable discretion when balancing the goals. The guidelines provide:

To the extent consistent with the policy and use preference of RCW 90.58.020, [chapter 173-26 WAC], and these principles, *local governments have reasonable discretion to balance the various policy goals of this chapter*, in light of other relevant local, state, and federal regulatory and nonregulatory programs, and to modify master programs to reflect changing circumstances [emphasis added].<sup>72</sup>

Several respondents suggested that the goal to protect ecological functions should have more weight than the other goals, and/or that it should be more explicitly stated in the Act and guidelines. It was also noted that local jurisdictions are not consistent in how they administer their SMPs—some are very protective while others not so much. The job of local permitting planners is to issue permits, and the goal to make the property owner satisfied may outweigh other considerations.<sup>73</sup> Even when conditions are attached for ecological protection, once the work is completed, a property owner or local government can ignore further implementation or maintenance of required conditions. Local funds are limited, and site visits and enforcement actions are too often the first things to be cut when budgets get tight.

There is some good news on this front. In 2021, the Department of Commerce offered a series of Adaptive Management and Monitoring workshops. These workshops included information from the Department of Ecology on shoreline, wetlands, floodplains and the WDFW about how to use its website for valuable information and how to utilize a new tool, high-resolution GPS technology, for accessing shoreline vegetation conditions. The Department of Ecology has also created a grant program for local jurisdictions to pay for training programs. While such training is not mandated, it is being offered at reduced or no cost if the jurisdictions take advantage of these grant opportunities.

### **Issues that Impact the Efficacy and Application of the SMA**

This section sets forth areas of concern identified by more than one respondent. On many issues, the committee heard many respondents voice similar concerns. On other issues, a respondent raised a concern that the committee believed the study should

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<sup>72</sup> WAC 173-26-186(9).

<sup>73</sup> In many jurisdictions, the staff that develop plans and regulations are in separate divisions from “current planners” who issue permits. This dichotomy sometimes creates a situation where interpretations may be different, and the actual implementation of a plan is different from what others envisioned.

note. If a single respondent raised an issue, it may not be addressed due to consensus of the committee. Below we address 14 issues, in no particular order of importance.

### **1. Updates and Periodic Reviews**

After the shoreline guidelines were substantially updated in 2003, all local SMPs were required to be updated to comply with the new guidelines by 2014.<sup>74</sup> It is concerning that several jurisdictions subject to the Act have never updated their SMPs to comply with the 2003 guidelines. The guidelines set forth standards that are now almost 20 years old. This means that 20 years of development have occurred on shorelines that may not have been subject to no net loss and other important standards. While the Department of Ecology has the authority to step in and write a jurisdiction's SMP for it, it has never done so. Unlike the sanctions provided under the GMA, there is really no effective mechanism to force local jurisdictions to comply. In 2017, the Department of Ecology amended WAC 173-26-090 to outline the procedures for the statutorily required periodic reviews to SMPs every eight years. The scope for a periodic review is much more limited than was necessary for the update required with the 2003 guidelines. The periodic review must include:

- Assuring consistency of the SMP with its GMA comprehensive plan and development regulations, and if applicable, and other local requirements.
- Bringing SMPs into compliance with the requirements of the act that have been added or changed since the last review and for responding to changes in guidelines adopted by the department, together with a review for consistency with amended comprehensive plans and regulations.
- Local governments should also incorporate amendments to reflect changed circumstances, new information, or improved data. The review ensures that SMPs do not fall out of compliance over time through inaction.<sup>75</sup>

The shoreline guidelines specifically state: "There is no minimum requirement to comprehensively revise shoreline inventory and characterization reports or restoration plans."<sup>76</sup> The Act, however, clearly states that "Shorelines and shorelands of the state shall be appropriately classified and these classifications shall be revised when

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<sup>74</sup> The legislation created a staggered schedule for cities and counties ranging from 2005 to 2014, depending upon the jurisdiction. Those jurisdictions that have not updated yet continue to administer programs that do not include a no net loss requirement.

<sup>75</sup> WAC 173-26-090(2)(d)(i).

<sup>76</sup> WAC 173-090(2)(d)(iii).

circumstances warrant regardless of whether the change in circumstances occurs through man-made causes or natural causes.”<sup>77</sup>

The study committee heard concerns that periodic reviews are too limited in scope. No net loss is presumed after the Department of Ecology approves the comprehensive update to comply with the 2003 shoreline guidelines. But that also presumes that every change in a shoreline was done according to the local SMP and does not necessarily account for other changes that may have occurred. CUPs and variances require consideration of cumulative impacts, but the rules for when such permits are required vary greatly among local jurisdictions.<sup>78</sup> With no requirement that the state of the shorelines be revisited after the first SMP is completed, will a jurisdiction really know whether its SMP is working as planned?

The presumption that an approved SMP is a mechanism to assure no net loss is only valid if the program considers all new data *and* it considers if its policies and implementation have allowed for loss of habitat or function. Respondents voiced concerns that the presumption of no net loss with the approval of an SMP once should not be unending.

## **2. Exemptions**

As noted, there are numerous exemptions and exceptions in the Act. Exceptions usually mean that a use is not subject to the SMA, but this may vary with the particular exception. Exemptions, on the other hand, mean that while the use or structure does not require an SDP it must still comply with SMA requirements, such as setbacks, buffers, and other requirements. Exempt proposals are not required to obtain a permit, and the decision that a project is exempt is not appealable. Some of the most common exemptions include single-family homes, bulkheads, and noncommercial docks.

The Act and guidelines clearly mandate that exempt projects are subject to SMA requirements.<sup>79</sup> However, the interpretation of what constitutes an exemption may vary by jurisdiction. In an early treatise on the SMA, Geoffrey Crooks wrote:

Even though the exemptions are rather narrowly drawn, their applicability to any given situation may often be difficult to determine. Indeed, one prosecutor has suggested, after a year's experience administering the Act, that "interpreting the applicability of the several exemptions. . . is as

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<sup>77</sup> RCW 90.58.020.

<sup>78</sup> WAC 173-27-160.

<sup>79</sup> WAC 173-27-040(1)(b).

difficult as, or more difficult than, determining whether a permit should be granted for a project which requires a permit.”<sup>80</sup>

While the shoreline guidelines help in explaining exemptions with more specific language, they remain subject to interpretation. The term *exemption*, in common parlance, means “free or released from some liability or requirement to which others are subject.”<sup>81</sup> Some respondents expressed concern that inexperienced local planners will assume that exempt means that no review is necessary, when in fact, SMA requirements must still be met. While local governments are encouraged to document all exemptions through a letter of exemption, it is only required to be sent to the Department of Ecology in cases where a USACE permit or a Clean Water Act Section 404 permit is needed.<sup>82</sup> Therefore, despite the guidelines and Department of Ecology training, there is not as much oversight on exemptions as there could be.

Finally, it can be difficult to understand the public policy reasons underlying the exemptions. For some, such as restoration projects, it is clearly an incentive. But for many, such as single-family homes, docks, and bulkheads, it is not clear. Since the Act was adopted, science has shown that man-made structures have damaged critical aquatic habitat, so it may be time to reconsider exemptions for uses that should be discouraged. At the very least, removing the exemption would provide more documentation, transparency and oversight by the Department of Ecology.

The committee found almost unanimous agreement among the respondents that the exemption for single-family dwellings is a problem. The exemption for bulkhead replacement was also mentioned by many as being problematic. Department of Ecology staff responded that since these developments remain subject to SMA requirements, there should be no problems. Others believe that such projects would be subject to more thorough review if they were not exempt. For similar reasons, the exemption for agricultural activities was also cited as creating the potential for lesser protections to shorelines adjacent to agricultural projects. The requirement of going through the SMP permit review represents an added level of attention, as well as oversight, which will yield additional protections and should be reconsidered.

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<sup>80</sup> Geoffrey Crooks, “The Washington Shoreline Management Act of 1971,” 49 Wash. L. Rev. 423, at 445 (1974).

<sup>81</sup> “Exempt,” *Merriam-Webster.com Dictionary*, [Exempt Definition & Meaning - Merriam-Webster](https://www.merriam-webster.com/dictionary/exempt).

<sup>82</sup> WAC 173-27-050.



Figure 10. Bulkheaded beach in Anacortes (photo by Hugh Shipman courtesy of the Department of Ecology).

### **3. Balancing Legislative Policy Goals**

A law or regulation results from recognizing a need to manage an activity or resource for the good of the public. Its crafting and implementation engender compromise and balancing. The SMA attempts to incorporate different levels of government and bring many voices into its implementation. This has been interpreted as requiring a balance between environmental protection and accommodating property rights in shoreline property.

Most respondents recognized that while the SMA has influenced the types and locations of development, it has not necessarily slowed the pace of development. Furthermore, when principles of ecological protection are weighed against approvals for land modification, the process may be more slanted toward getting to approval. This result is partially due to the inherent nature of land use review. It must be done based on the specific project that is before a regulator rather than considering the entire shoreline area. Presumably, an SMP and its implementing regulations should remedy that phenomenon through its cumulative impacts analysis, but a planner reviewing permits may not be looking at a permit in relation to other actions. The tension to make good equitable decisions for all while operating an efficient and timely permit process creates challenges for local decision-makers in reviewing development proposals. That is where having the backstop of the Department of Ecology in an oversight role is key.

Several of the respondents believe that the “balancing” under the SMA should be weighted more toward protecting our shorelines. An argument can be made that the SMA already indicates that in several policy goals, but the guidelines seem to say otherwise. On the other hand, at least one respondent felt that the SMA puts too much weight on environmental issues at the expense of property owners, particularly those who own pre-SMA developments that do not meet current standards.

#### **4. Measuring No Net Loss**

The SMA requires each local jurisdiction to initially prepare an “inventory and characterization” of the local shorelines. The inventory and characterization catalogues ecosystem processes and functions of the shorelines based on current conditions. This information is the foundation for the SMP and is the basis for SEDs. Characterization information is used to identify areas for future development, protection, restoration, and mitigation. It is also used to articulate a generalized baseline for measuring no net loss or net gain of ecological structure and function of the shorelines.

As noted earlier, the inventory and characterization report is required for the initial SMP and the required update to meet the 2003 guidelines. As of 2021, several jurisdictions have not yet updated their SMPs to meet the 2003 guidelines. Several respondents noted that the Department of Ecology should be stronger in enforcing the SMA. There is

Many respondents raised questions about whether the baseline [permit] information, often from many years ago, is fine-grained or accurate enough.

also a potential for confusion about the resulting level of information collected and used, and the frequency of those baseline evaluations when an SMP takes longer than three years to finalize. This time lag alone could cause significant problems regarding whether the program assures no net loss of ecological structure or function.

Monitoring permit conditions and use of the WDFW High Resolution Change Detection technology may offer an opportunity to ascertain whether the baseline conditions from the cumulative impact analysis were correct and whether the no net loss or an anticipated net gain from restoration projects in the SMP is being achieved.

Many respondents raised questions about whether the baseline information, often from many years ago, is fine-grained or accurate enough. Concerns were raised that such baseline data is not clear or quantified, and subsequently not used by local governments. This problem, combined with the fact that periodic reviews do not require any review of whether no net loss is being achieved, creates considerable uncertainty as to whether the “presumptions” are still true many years later. The requirement for collecting baseline data used to evaluate no net loss should be revisited.

In a time when new data and collection methodologies about shoreline ecology and function are increasingly refined and available, some question whether updated information should be used to measure no net loss. Each SMP update might incorporate more current and relevant baseline data. Use of updated data could help judge if a shoreline's level of degradation from land use changes over time and whether its status has changed. There is currently no requirement to continually update shoreline baseline data and characterization information, nor is there any process to assure that SMP implementation will always result in no net loss of ecological functions.<sup>83</sup>

## **5. Habitat Restoration**

In the 2020 legislative session, several bills were proposed to explicitly revise law and regulatory guidance to require incorporating Salmon Recovery Plan actions into SMPs. While those bills were not successful, several respondents raised this same idea. Recognizing the large scope of the restoration work needed, formally acknowledging the list of actions in the Salmon Recovery Plans, and other watershed plans is an important start to directing scarce restoration funding to actions that have been identified as critical for salmonid and other watershed functional recovery. As the Northwest Indian Fisheries Commission noted:

At the urging of the tribes, Washington Gov. Jay Inslee in late 2019 directed his state natural resource agencies to develop uniform, science-based management for riparian (streamside) habitat. Tribal and state natural resources managers have been meeting to develop a joint work plan for the effort because riparian habitat is among the most important to salmon in all life stages. It's clear that the only way we are going to recover salmon is by restoring and protecting their habitat. Only properly functioning habitat can support the natural salmon production we need for recovery. Unfortunately, we continue to lose that habitat faster than we can restore and protect it. That has to change, and Gov. Inslee's cooperative approach can help us do that."<sup>84</sup>

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<sup>83</sup> For example, GMA requires some local jurisdictions to measure growth periodically through a Buildable Lands Report. This report looks back at development that has occurred and measures it against the comprehensive plan goals and policies to determine if they are being met.

<sup>84</sup> Northwest Indian Fisheries Commission, *2020 State of Our Watershed Report*, accessed at: <https://nwifc.org/publications/state-of-our-watersheds/>



Some respondents identified aspects of natural and human-made features (channel migrations zones, railroad shoreline protective armoring) that affect shoreline function but that SMPs do not always address.



Figure 11. Railroad tracks along the shoreline (photo courtesy Jim Simmonds, King County Water & Land Resources Division)

Human-made features, such as the extensive hardening along the long-established railroad corridors on our shorelines, are not likely to be removed or softened. Recognizing these areas as lost or severely modified habitat should be considered in overall restoration or mitigation requirements formulated regionwide. Such an effort could be an opportunity to aggregate mitigation requirements having greater impact in an area rather than just requiring site-specific mitigation for some projects. Work on this has started in the Puget Sound area under the Puget Sound Partnership and the National Estuary Program.

## **6. Public Involvement**

Many respondents indicated that while there were often opportunities to comment on draft SMPs, the process for reviewing and incorporating public comments is not always transparent. It is not always clear how, if public comments are received and considered, why decisions are made not to include or omit the issues raised regarding plan revisions. Comments and testimony are taken and may be “acknowledged” but are otherwise ignored. The committee also noted that because the cost of administrative fees has risen sharply in the past decade, fewer opportunities exist for the general public to contest certain permits in many jurisdictions. The committee heard some



concerns that where the primary role of local planners is to issue permits, they tend to consider permit applicants and developers as the “stakeholders,” giving their views more weight, or at least the appearance that is so.

## **7. Industrial Aquaculture**

The SMA states a preference for shoreline uses “that are consistent with the control of pollution and prevention of damage to the natural environment or are unique to or dependent upon uses of the state’s shoreline areas.”<sup>85</sup> Aquaculture is a water-dependent use that is noted as “a statewide interest.”<sup>86</sup> Aquaculture is one of the fastest growing, rapidly privatized, food production industries in ocean waters globally. According to the Puget Sound Partnership, 245,000 acres are managed for commercial shellfish harvest in Puget Sound alone.<sup>87</sup> Shellfish harvest is both culturally and economically significant in our state and Washington is a leader in shellfish production.

Many small-scale shellfish businesses were unable to keep up with the costs of regulation and thus were selling out to larger, more industrialized operations.

Shellfish harvest does not come without potential environmental problems. The committee heard some concerns regarding the “industrialization” of shellfish aquaculture, particularly geoduck farms. Commercial shellfish harvesting has taken place in Washington since the 1800s and remains an important element of the Washington economy, although harvesting methods have changed greatly.<sup>88</sup> Historically, shellfish aquaculture has consisted of small-scale enterprises akin to family farms. We also heard that many small-scale shellfish businesses were unable to keep up with the costs of regulation and thus were selling out to larger, more industrialized operations.

When first marketed in the 1970s, geoducks sold for as little as 25 cents per pound. The value of geoduck clams increased dramatically in the 1990s when the Asian market exploded, and by 1994, the price of Washington state geoducks had risen above \$4 per

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<sup>85</sup> WAC 173-26-241(2)(a)(i).

<sup>86</sup> WAC 173-26-241(3)(b)(i)(A).

<sup>87</sup> Puget Sound Partnership, “*Puget Sound Innovation Stories: Shellfish*,” [Shellfish | Puget Sound Innovation Stories \(wa.gov\)](https://www.pugetsoundpartnership.org/innovation-stories/shellfish)

<sup>88</sup> Washington Sea Grant, *Shellfish Aquaculture in Washington State: Final Report to the Washington State Legislature*, Dec. 2015.

pound. In 2013, sales from 6.2 million pounds of Washington geoduck were valued at \$70.5 million, with at least 90% ending up in China.<sup>89</sup>

Given this lucrative market, geoducks today are grown in intertidal “farms” in which PVC pipes are set in the tideland and geoduck spat are “planted” in the tubes for harvest once grown. There can be as many as 48,000 tubes per acre, each covered with netting; sometimes the entire area is covered with netting to prevent predators from reaching the geoduck. The two main geoduck growers in Washington state are Taylor Shellfish Farms in Shelton and Seattle Shellfish in Olympia, and together they make up 75% or more of the state’s total harvest.<sup>90</sup> There are some concerns that the burgeoning industry has outpaced the regulatory agencies’ ability to manage the additional environmental and human health threats that are emerging.

Wild geoduck harvesting involves diving in the subtidal area and dislodging geoducks with pressurized water (liquefaction) and is exempt from shoreline permits. The harvesting of wild geoducks is allowed through leases with the DNR and brings in revenue for the state. Private industry and tribes harvest wild geoducks. In 2013, DNR started a “pilot program” for geoduck aquaculture farming on state-owned tidelands, which is subject to the SMA. As of this writing, under the program, the state has leased two locations totaling 6.183 acres for geoduck aquaculture, bringing in a total of \$26,733 in annual rent.<sup>91</sup>

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<sup>89</sup> David B. Williams, “A History of Puget Sound’s ‘Boss Clam,’” *Salish Sea Currents*, March 13, 2020, [A history of Puget Sound's 'boss clam' | Encyclopedia of Puget Sound \(eopugetsound.org\)](https://www.eopugetsound.org/history-of-puget-sounds-boss-clam/)

<sup>90</sup> GSGislason & Associates, *The Market for Geoducks*, report prepared for Canada Fisheries & Oceans (Jan. 2012).

<sup>91</sup> Cailan Nealer, Aquatic Land Manager, Aquatic Resources Division, DNR, personal communication by email (Aug. 23, 2021).



Figure 12. Geoduck farm near Totten Inlet between Shelton and Olympia (photo courtesy of KBCS 91.3 Community Radio).

Geoduck farms in the intertidal areas are subject to the SMA and require permits. Only new commercial geoduck farms are required to obtain CUPs, and conversion of other types of aquaculture to geoduck permitting is at the discretion of the local government.<sup>92</sup> The committee heard concerns about plastic pollution from the PVC tubes and nets as well as concerns about the dangers of monocultures, the loss of walking and boater access to beaches, and reduced land values.<sup>93</sup> Finally, we heard concerns about impacts on habitat, including for eelgrass, which in turn affects salmon and orcas. The sheer scale and growth of the geoduck farming industry adds to these concerns: the industry has grown dramatically as the monetary value of geoducks has risen and hence more incentive for more farms.

On the other hand, others, particularly industry representatives, assert that shellfish aquaculture provides net environmental benefits by removing excess nutrients and improving water quality. We also heard that aquaculture provides living wage jobs in

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<sup>92</sup> WAC 173-26-241(3)(b)(iv).

<sup>93</sup> See also, C. M. Ryan et al., “Digging Deep: Managing Social and Policy Dimensions of Geoduck Aquaculture Conflict in Puget Sound, Washington,” *Coastal Management* 45, no. 1 (Dec. 2016), 73-89, [Digging Deep: Managing Social and Policy Dimensions of Geoduck Aquaculture Conflict in Puget Sound, Washington: Coastal Management: Vol 45, No 1 \(tandfonline.com\)](https://doi.org/10.1080/08920459.2016.1218888).

rural communities such as Pacific and Mason Counties. One respondent noted that the smaller shellfish farms provide local fresh foods to their communities, but as noted, some said that smaller shellfish farms are being sold out to the larger geoduck farms that primarily serve an Asian market.

## **8. Monitoring Programs and Adaptive Management**

The committee heard from both Department of Ecology managers and respondents that monitoring is key to improving compliance with the SMA. Shoreline protection efforts can improve by learning from implementation successes and challenges. These efforts can also assist local jurisdictions to be more consistent in permitting and enforcement under their own SMPs. The guidelines state: “Local governments should monitor actions taken to implement the master program and shoreline conditions to facilitate appropriate updates of master program provisions to improve shoreline management over time.”<sup>94</sup> The Department of Ecology worked with the Department of Commerce to create a *Critical Areas Handbook* that outlines three types of monitoring that jurisdictions should be incorporating into the implementation of their shoreline programs:

- **Effectiveness monitoring:** Effectiveness of and consistency in implementing the jurisdiction’s SMP. Surveying permits are issued to determine if permit writers are consistently implementing the SMP requirements.<sup>95</sup>
- **Permit monitoring:** Monitoring to track permit conditions have been implemented and enforcement when those are not undertaken.
- **Validation monitoring:** Evaluate whether mitigation measures have been successful at protecting or improving conditions. Use results in adaptive management to change or revise permit conditioning in the future.

Some programs (e.g., the City of Kirkland) have begun to execute implementation and permit monitoring with a feedback loop to hone and improve their program. Kitsap County recently secured a grant to create a computer tracking system necessary to track permits and conditions.

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<sup>94</sup> WAC 173-26-201(2)(b).

<sup>95</sup> This type of monitoring is related to Department of Ecology oversight; see [Section 11](#), “Oversight of Local Programs” below.





Figure 13. Beach profiling (photo courtesy of Melissa Fleming, Stillwaters Environmental Center).

These efforts will result in making data and information available to support better permit writing and better ecological outcomes, but they will also require additional funding and staff time to implement. In 2021, the Department of Ecology teamed up with the Department of Commerce and the WDFW to present technical workshops to planners on critical areas and shorelines, which included a workshop on Adaptive Management and Monitoring. In addition, the Department of Ecology recently issued guidelines for SMP competitive fundings grants for local governments to improve permit monitoring and adaptive management. There were still concerns that, unless it is strictly required and funded, not all jurisdictions will prioritize these efforts.

## **9. Public Access**

We heard from respondents that while public access areas are available and located appropriately, the rising population using those access points is causing increased pressure on the adequacy of existing public access areas.



Figure 14. Discovery Park in Seattle (photo courtesy of the Department of Ecology).

As noted, assuring public access to the shoreline and the waters of Washington state is one of the important goals in the SMA. While some jurisdictions have multiple locations for accessing the shoreline, others are limited. With increasing population, existing points are experiencing more use, with the potential for overuse and resulting degradation of the shoreline functions. One respondent shared an example in which a boat launch was so heavily used that its expansion was proposed, but the expansion was expected to cause significant harm to the area's ecology. However, the difficulty in finding an alternative site to add a boat launch was considered so difficult and time-consuming that the ecological damage was allowed as an acceptable trade-off to the access enhancement. If more sites were available for other access alternatives, this trade-off might not have been necessary.

Some respondents mentioned the potential for mitigation or other public/private partnerships that could leverage creating additional access points. While the guidelines suggest several ways a local jurisdiction can create additional public access through development permits, it is only mandated in cases where a public entity is seeking an SMP, and then with caveats.<sup>96</sup> The lack of any requirement for such opportunities to be identified represents a potentially missed opportunity for public access. Increasing or improving access in the locations the least injurious to shoreline ecology is a primary goal.

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<sup>96</sup> WAC 173-26-221(4)(d).

A regional public access opportunity plan might assist in targeting the best locations to protect resources and enhance public access. One respondent offered this suggestion and others echoed the sentiment. SMP guidelines clearly require that jurisdictions identify the locations where public access is available to the shoreline and where it could logically be called for as project mitigation. However, there is no explicit requirement for a jurisdiction to inventory shoreline access types and availability to determine opportunities to consider for development when the need arises.

## **10. Climate Change Impacts**

When the SMA was enacted over 50 years ago, it acknowledged humanity's impact on the shorelines. But at that time, there was limited understanding of the far-reaching effects humans were having on our climate. In the last 10 years alone, science has indicated multiple changes to climate systems that sustain our water quality, air quality, and ecological system. Changes include heat, declining water supplies, drought, insect outbreaks, and reduced agricultural yields. These effects are already being experienced in the form of more intense weather events, changes in rainfall frequency and intensity, and water-quality effects on all waterbodies, particularly temperature and chemical effects. These changes are affecting ecological cycles of all flora and fauna.<sup>97</sup>



Figure 15. The effects of climate change on shorelines (photo courtesy of Jim Simmonds, King County Water and Land Resources Division).

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<sup>97</sup> See Intergovernmental Panel on Climate Change, *AR6 Climate Change 2021: The Physical Science Basis*, Aug. 2021, <https://www.ipcc.ch/report/ar6/wg1/>. The “Summary for Policymakers” states: “It is unequivocal that human influence has warmed the atmosphere, ocean and land.”



These changes affect shoreline habitats in many ways. Sea levels are rising as ice melts in the polar regions. Seasonal storm intensities and storm surge inundation increases are affecting marine shoreline sediment transport, riverine and stream water elevations, and marine predator/prey cycles. In 2021, the Pacific Northwest experienced a “heat dome” that caused soaring temperatures. The extreme heat coincided with low tides, and millions of exposed shellfish and other intertidal organisms perished. Increased wildfires are occurring throughout the state due to climate change. One respondent also noted that fire protection strategies requiring vegetation removal may eclipse requirements for vegetative buffers, critical for erosion control, water temperature reduction, and stormwater runoff management. A critical look at this conflict is something that might need to be explored. Ocean acidification is also a concern. The actual area subject to SMA jurisdiction is bound to change throughout the state as a result of climate change. In coastal areas, sea level rise may drastically change the OHWM, while in arid areas, shoreline jurisdiction may shrink.

Seventeen of the 18 respondents said the SMA is not adequately equipped to address climate change.

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Tools now exist to predict some of these effects on our shorelines. Studies taking place offer added information to use in evaluating the impacts of climate change. The Washington Coastal Resilience Project used science to develop localized sea level rise projections and develop community resilience objectives.

SMPs are required to include “an element that gives consideration to the statewide interest in the prevention and minimization of flood damages,” another probable impact of climate change.<sup>98</sup> This element must include standards for development in flood plains. Further, in order for a property owner to obtain flood insurance through the Federal Emergency Management Agency (FEMA) National Flood Insurance Program, the local jurisdiction must have approved ordinances to address building in flood areas. However, the FEMA program cannot substitute for addressing climate change impacts.

The Department of Ecology has offered guidance on how jurisdictions should incorporate the effects of climate changes into their SMP updates, Appendix A of the Department of Ecology’s SMP handbook provides guidance to local governments in addressing sea level rise in their programs. In July 2021, the Department of Ecology issued a study, “Lessons Learned from Local Governments Incorporating Sea Level Rise

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<sup>98</sup> RCW 90.58.100(2)(h).



in Shoreline Master Programs.”<sup>99</sup> The Department of Ecology’s 2021 competitive grant funding was available to local jurisdiction that want to address sea level rise.

The Department of Ecology’s guidance on climate change are merely recommendations. In 2020, legislation was proposed that would have explicitly required local SMPs to address sea level rise, but it did not pass. Grays Harbor County’s comprehensive update of its SMP, approved in 2020, was appealed on the basis that the county failed to address climate change. The SHB issued a letter decision on September 13, 2021, denying the appeal and holding that the county was not required to address sea level rise under the SMA.

It is indisputable that climate change is occurring rapidly and affecting shorelines, particularly sea level rise. Some local jurisdictions have recognized this and used the SMP to incorporate this issue. All but one of the respondents noted climate change was something the SMA needs to address in the coming years.

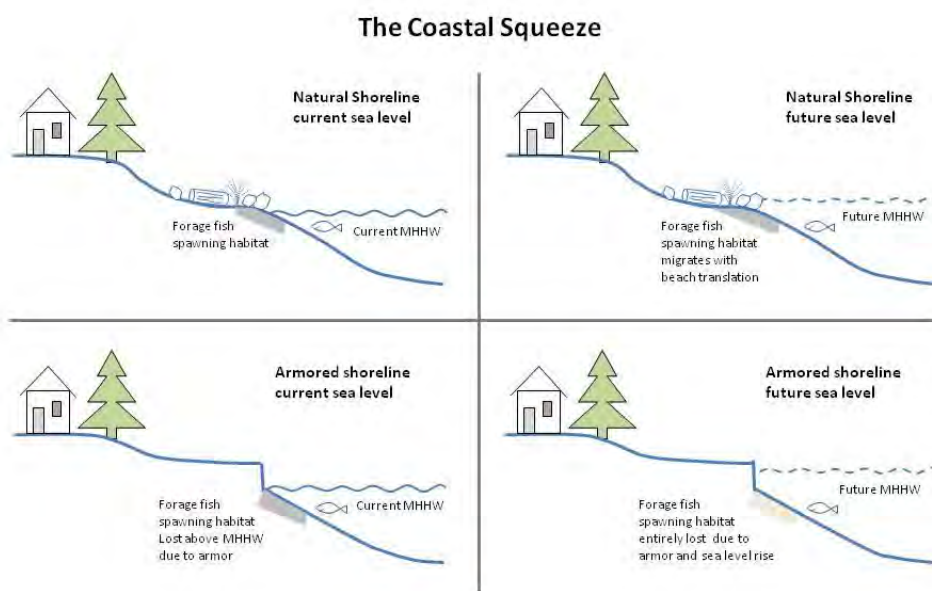


Figure 16. The effects of climate change and bulkheads on shoreline habitat (adapted from <https://www.eopugetsound.org/magazine/armoring-san-juans>).

<sup>99</sup> Department of Ecology, *Lessons Learned from Local Governments Incorporating Sea Level Rise in Shoreline Master Programs*, July 2021, <https://apps.ecology.wa.gov/publications/SummaryPages/2106014.html>

## ***11. Oversight of Local Programs***

One important aspect of the SMA that many respondents mentioned involves sharing implementation aspects between the Department of Ecology and local jurisdictions. The Department of Ecology is responsible for setting policy and writing regulations by which the SMPs are written and judged for their sufficiency and effectiveness. Local jurisdictions review development using their approved SMP and write permits based on the SMP's requirements.

In addition to these cooperative processes, the level of oversight established in the SMA and its regulations places the Department of Ecology in the position of reviewing major projects such as conditional uses and variances. Since this review requires significant staff time, it appears that this part of the oversight has not been consistent over time or in every jurisdiction. Furthermore, the use of CUPs and variances by local jurisdiction is quite variable: some jurisdictions classify most uses as simple SDPs, while others consider many uses to be CUPs. One respondent suggested that many, if not all, uses in the shoreline area should require a CUP, particularly due to the unique and complex nature of shoreline systems, which would also provide more oversight. Another suggested that the Department of Ecology should perform periodic effective monitoring, such as an audit of permits and exemptions. The committee heard from some that granting exemptions should be tracked more closely.

Some respondents indicated that Department of Ecology support on difficult issues is extremely helpful, as pressure on local governments to issue permits expeditiously is high. Others suggested that the Department of Ecology's oversight has weakened, and problematic permits may slip through the cracks. As noted earlier, Department of Ecology management informed the committee that they are making it a priority to strengthen the feedback loops with local governments, and the trainings with the Department of Commerce in 2021 reflect that goal.

## ***12. Enforcement Programs***

A common observation from many respondents was that enforcement of the SMA or permit conditions is not always a priority. The inconsistency of tracking permit requirement fulfillment and the monitoring of conditions over time has led to problems with violators. It has also led to lost opportunities to collect data and hold permit holders accountable for commitments and environmental damage. A report by King

County<sup>100</sup> observed that over the course of five years, 284 changes in shoreline condition occurred associated with clearing of vegetation, installment/repair of stairs, retaining walls and houses; less than half of those changes (40%) were observed to have no obvious physical or ecological effects. The King County report found that there was a net increase of 364 feet of new shoreline armoring, and compliance with local permits across jurisdictions was only 42%.

Enforcement requires staff time, computer systems, and data management; it also often requires legal staff time. The need to have attorney and paralegal staff time allocated to initial proceedings and possible appeals, and coordination with legal resources from the Department of Ecology or other state agencies, is often overlooked in staffing regulatory programs. Having adequate legal resources is critical to having a credible program.

Even when there is enforcement, it generally means that the property owner seeks a proper permit and perhaps does some mitigation. Local governments sometimes go to great lengths to assist the property owner to become “legal,” sometimes granting permits that would have been denied through the proper process. But rarely can any damage be “undone.” Unfortunately, during times of budget cuts, enforcement efforts are often the first area cut. The Department of Ecology recently added a staff position to its program solely for enforcement, which is a good sign, but many local jurisdictions still lack adequate resources for enforcement.

### **13. Staff Training**

All respondents noted that having educated and trained staff to interpret SMP requirements is critical to an effective permitting program. Also, since elected officials are part of the decision-making process for large complex permits, it is important for them to have training and background on the SMP.

Training staff, particularly where there is high staff turnover, can be time-consuming and requires budgeting funds. The Department of Ecology and the Department of Commerce

Local jurisdictions need to adequately budget for and make training a priority for staff.

have periodically offered free trainings or grants for training and, as noted above, in 2021, the Department of Ecology, the Department of Commerce, and the WDFW teamed up to provide an 11-week training session on critical areas,

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<sup>100</sup> Higgins, K. *The WRIA 9 Marine Shoreline Monitoring and Compliance Project Phase 2 Final Report* (No. 16-06822) King County Department of Natural Resources and Parks (2019). [WRIA 9 Marine Shoreline Monitoring and Compliance Project Phase 2, Final Report \(kingcounty.gov\)](https://kingcounty.gov/depts/dnr/pdfs/WRIA9MarineShorelineMonitoringandComplianceProjectPhase2FinalReport.pdf)

shorelines, monitoring, and adaptive management. The webinar series was attended by 315 individuals employed by 114 local governments.<sup>101</sup> The workshops provided detailed information regarding monitoring and adaptive management for shorelines, which, if implemented at the local level, may strengthen the SMA's impact. While participation numbers are high, less than half of the jurisdictions that plan under the SMA attended. Mandatory attendance might be considered.

But even with these state-level efforts, local jurisdictions need to adequately budget for and make training a priority for staff; furthermore, this critical training must be implemented. This is a constant challenge for all levels of government. Without prioritizing ongoing training, refresher training, and sharing new information on the effectiveness of mitigation measures, the program can lose credibility and not achieve its goals. Mandatory training could be helpful to ensure more consistency among jurisdictions.

#### ***14. Incentives for Restoration***

Many respondents commented on the importance of streamlining or reducing regulatory burdens on certain types of projects, that is, restoration or mitigation projects. Some residential shoreline owners are starting to recognize the benefits and value of improving the environment with restoration or enhancement efforts. They recognize the opportunity to reduce or eliminate armoring on their shoreline, or to improve the vegetative buffering in their buffer or shoreline zone. These projects should not be delayed or burdened with long review times if their effect can be demonstrated as a net gain of ecological structure or function.

Some respondents noted opportunities exist to create public/private partnerships to go over and above the benefits achievable by one or the other party alone. Lessening regulatory requirements may be possible in some cases. There was wide support among respondents for creating incentive programs for projects that demonstrate some enhanced level of restoration or environmental improvement.

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<sup>101</sup> Tim Gates, Department of Ecology Manager, personal communication, email August 16, 2021.



Figure 17. Seahurst Park in Burien, Washington, before the seawall, *left*, was removed and after the beach and wetland, *right*, were restored. (Photos courtesy of the Department of Ecology.)

Several counties are part of the Shore Friendly program, which has been an effective motivation for positive actions. Respondents also mentioned the possibility of tax incentives to encourage projects beneficial to shorelines, similar to how Conservation Futures Programs work. State and local governments could leverage many opportunities if agencies and elected offices would begin to see incentive programs as a tool for extending the SMA's effectiveness. In the 2021-2023 biennium, the legislature appropriated over \$15.7 million dollars to restoration programs, administered by the WDFW Estuary and Salmon Restoration Program. The commitment of those funds includes over \$2.4 million for Shore Friendly programs in 12 counties and the Swinomish Reservation.<sup>102</sup> A Shore Friendly Accelerated Landowner Incentives Package at just under \$2 million is designated as an alternate project for funding, among several others.

Several counties have established a marine resources committee, whose mission is to "address, utilizing sound science, the needs of the marine ecosystem local to the county initiating the marine resources committee."<sup>103</sup> These committees can be utilized to make recommendations on restoring shorelines and to educate the public on shoreline issues.

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<sup>102</sup> See WDFW, "Estuary and Salmon Restoration Program, 2021-2021 Final Investment Plan," June 2021, [updated 2021 funded esrp fact sheet 1.pdf \(wa.gov\)](#).

<sup>103</sup> RCW 36.125.010(2).

## Conclusion

There was widespread agreement among respondents interviewed and the committee that Washington state is fortunate in enacting the SMA when it did. We have had 50 years of providing more protection for our shorelines. Over those 50 years, however, population growth, development, and diminishing resources throughout the state, particularly salmon, have occurred. At the same time, our understanding of the science of shorelines and environmental protection has increased. Major strides have been made to clean up pollution, establish sanctuaries, and respect tribal treaty rights. But a number of problems remain. SMPs must involve the harmonization of many divergent interests: local governments, tribal governments, property owners, sport and commercial fishing, other maritime industries, the tourism industry, the aquaculture and shellfish industries, boaters, and people who just like to walk by the water. One thing is certain: all those interests need healthy shorelines.

Through this process, the committee found that everyone agreed the SMA has been a significant force in protecting Washington's shorelines. The Act has also increased and preserved the public's access to shorelines. From our interviews and meetings, the committee identified 14 areas of concern to help the Act achieve its intended goals and to respond to ever increasing challenges, including, among other factors, climate change and population growth, that League members may want to consider regarding positions and advocacy:

1. Evaluating [updates and periodic reviews](#) to local SMPs to determine whether no net loss is being achieved.
2. Reevaluating the effects of allowing certain [exemptions](#).
3. Evaluating whether balancing of the [legislative policy goals](#) should be weighted for more environmental protection.
4. Recommending quantitative standards developed to [measure no net loss](#).
5. Making increased [habitat restoration](#) a priority and providing more incentives.
6. Improving [public involvement](#) in some areas.
7. Focusing more on the proliferating expansion of [industrial aquaculture](#).
8. The need for more robust [monitoring programs and adaptive management](#).
9. Giving more attention to [public access](#) for the future.
10. Addressing [climate change impacts](#) that the existing law does not fully address.
11. Making ecology [oversight of local programs](#) critical.
12. Focusing more attention on [enforcement programs](#), with adequate funding and consistent follow-through.
13. Highlighting the importance of [training](#) for staff, legal staff, and elected officials.



#### 14. Prioritizing incentives for restoration projects.

The LWVWA has been involved with the SMA since its inception in 1971. In a 1991 symposium on the Act, former League president Joan Thomas considered the first 20 years of the SMA:

This has been a long trip down memory lane. Now I'm going to put my two cents worth in on the next 20 years. First of all, I do think we made the right choices in 1971 and 1972. The SMA would not be what it is if the WEC had not written I-43 and obtained the signatures to put it before the Legislature. I believe the concept of local administration within a state framework is a good one. I have also seen local governments get stronger and smarter before my very eyes. I have also seen the wearing away of the strong state framework. How can we get back on track?

We can rededicate ourselves on the 20th anniversary—citizens, planners, regulators, legislators, and the executive branch. Let's put the public trust doctrine to work...we need to find ways to make a scarce resource a shared resource—nothing is more central to our quality of life.

Let's restore the eminence of shorelines of statewide significance—the Nisqually Delta and the shoreline from Tatsolo Point to Dewolfe Bight—protected from uses that do not provide the optimum implementation of the policy of the act to satisfy the statewide interest.... Let's protect access and not settle for a walkway around or a seat within a restaurant or a yacht club. And let's identify water access and let's plan corridors that maximize visual and physical access to the shoreline.<sup>104</sup>

What Joan Thomas said in 1991 remains applicable today and we must continue our work to protect our shorelines. There is still much work to do.

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<sup>104</sup> Joan Thomas, Shoreline Management Symposium Proceedings, p. 14 (December 13-14 (1991)). Accessible at [washu91002.pdf \(uri.edu\)](https://www.washu.edu/~w91002.pdf)

## Appendix A: List of Interviewees

Titles are those in effect at the time of the interview

**Jim Bolger**, Environmental & Community Services Section Manager, King County  
Department of Natural Resources and Parks

**Patty Charnas**, Department of Community Development Director, Jefferson County (now  
Operations Manager, JWW Group)

**Jeff Davis**, Habitat Program Director, Washington Department of Fish & Wildlife (now  
Director of Conservation Policy)

**Randall Gaylord**, Prosecuting Attorney, San Juan County

**Robert Gelder**, Kitsap County Commissioner; Shorelines Hearings Board member; past  
President, Washington State Association of Counties

**Laura Hendricks**, Coalition to Protect Puget Sound

**Brian Hodges**, Senior Attorney, Pacific Legal Foundation

**Eric Johnson**, Executive Director, Port of Tacoma

**Mark Kulaas**, City of Wenatchee Council Member; former Land Services Director, of  
Douglas County

**Jay Manning**, Partner, Cascadia Law Group; former Department of Ecology Director

**Rachael Osborn**, Center for Environmental Law & Policy (CELP); co-founder and former  
CELP Executive Director

**Margaret Pilaro**, Pacific Coast Shellfish Growers Association Executive Director (now  
Port of San Diego Program Manager)

**Samuel (“Billy”) Plauché**, Partner and Environmental Attorney, Plauché & Carr,  
represents shellfish industry and the State of Louisiana on shoreline issues

**Scott Redman**, Science and Evaluation Program Director, Puget Sound Partnership

**Jenny Rotsten**, Sealevel Bulkhead Builders Chief Operating Officer

**Amy Trainer**, Environmental Policy Director, Swinomish Indian Tribal Community

**Tim Trohimovich**, Futurewise Director of Planning and Law

**David Troutt**, Natural Resources Director, Nisqually Indian Tribe



## **Appendix B: Summary of Responses to Interview Questions**

This appendix provides a summary of the responses the committee received to our 10 questions. For more in-depth answers, see the separate document, *Details of Interviewee Responses to Questions*.

### **1. How well has the Act served the people of Washington over the past 50 years?**

Virtually everyone thought the SMA had done a good job at controlling development. Many responded that they would hate to see how our shorelines would look today without the Act. Generally, there was consensus that the Act was well written and had strong potential, but that implementation has historically been inconsistent.

### **2. Have we successfully protected our shoreline resources? Have we lessened the threat of incompatible development along the shore?**

We received mixed responses to this question. Some were concerned that there had been too much loss of basic ecological functions, such as the interruption of drift cells, which are difficult to repair. One commentator suggested that this has caused a “death by 1,000 cuts.” Because no net loss is determined at the planning level, and it is difficult to quantify, there were several concerns about cumulative impacts not being considered appropriately. Concerns about riparian habitat and eelgrass beds were raised.

Others felt that much had improved after the 2003 guidelines were updated, but damage had been done. Some noted that the industrialization of certain aquaculture (e.g., geoducks) has had more impacts but is still a preferred use. It was noted there remains abundant pressure to develop on shorelines, ranging from the construction of homes and industry to adding pleasure docks and repairing or installing shoreline armoring. It is difficult for local governments to say No to permits.

On the other hand, many noted that the use of shoreline armoring had improved, and that programs providing incentives to remove were working well. Several people suggested that we need more incentives for restoration and avoidance.

### **3. Is the partnership with local governments working? Should it be rebalanced, and if so, how?**

Generally, the interviewees thought the structure was good. Several people believed there should be stronger state oversight and control, and a number of people thought there was too much inconsistency among local jurisdictions. One person suggested that regular state audits might help the inconsistency problems. We received mixed reactions about problems with politics impacting both local and state levels. Several

people thought that having local control was vital, as local governments know their areas best. One commentator thought that science should drive the program at a watershed, rather than political jurisdictional level. The issues of staff turnover and training also arose in response to this question. Two people said that it was unfortunate that many issues must be decided through litigation. Two people said that they felt that the Department of Ecology was not always helpful when needed most (appeals and enforcement).

**4. Are all the provisions of the SMA as applicable today as they were 50 years ago?**

Again, we had several comments about the exemptions, suggesting repealing them entirely. At least two people suggested that restoration projects should merit exemptions and other regulatory relief, however. Many people thought that restoration should be required, or that it should be integrated with state or private activities. Several people believed there should be more quantification of no net loss and ecological functions. Many people thought that the Act should include more incentives for good projects, restoration, or avoidance. Others noted that while the provisions of the Act are still applicable, many other issues have arisen, such as Endangered Species Act listings and climate change, that are not addressed.

**5. Are there areas in which the Act could be changed to provide better protection of ecological functions while still allowing reasonable shoreline use?**

We received many comments on the single-family exemption with this question; many believed it was no longer relevant and should not be exempt, and several people said that all exemptions should be removed. A couple of people expressed that the preference for industrial aquaculture should be repealed. Several people spoke of the need for a weighted balancing of the priorities, with ecological function protection given more weight. The agencies typically view fostering uses, public access, and protecting the environment as three independent goals, which are unranked. Some interviewees believed that protecting the environment should outrank the other goals. Two people said that the state and county should work closer with the tribes.

**6. What aspects of implementation, if improved, make the greatest difference in better outcomes (for protection or effectiveness of this Act)?**

Better monitoring was repeatedly noted as something that should be done. Permit conditions should be monitored to ensure they are implemented and working. A local jurisdiction's exemption process should be monitored. Education was also a theme we heard, including education of property owners, planners, and local elected officials.

Several people thought that the updates should include more analysis regarding inventory and characterization and no net loss.

**7. What are the roadblocks to better implementation or effectiveness of this Act?**

Major themes in response to this question include funding, staff training, and staff turnover. Planning has become more technical over the years and many local planners may lack the expertise to evaluate plans and permits scientifically. The issue of incentives came up again, with some people noting that it was as difficult to permit a good project than one with major impacts.

Two people said that there should be more uses designated as conditional, which would help provide more analysis and better oversight. On the other hand, some people said that the current permit structure is too complex. Some said there were too many agencies involved, while others referenced that the WDFW should be more involved.

**8. Have we secured adequate public access to our water and shoreline areas?**

Many respondents believed that access is adequate, although several noted that with population growth and more public use, it could be a problem. Some people noted that obtaining more access will be difficult for two reasons: 1) The fact that the state sold most of the tidelines into private ownership and 2) The difficulty of requiring access as a permit condition. One person noted that visual access should also be considered.

**9. Is the SMA equipped to deal with the next 50 years?**

The overwhelming majority thought it is not equipped—primarily due to the threat of climate change. Climate change brings many things that are not yet addressed in SMPs, including sea level rise, ocean acidification, and wildfires. Wildfire control includes brush clearing, which could impact buffers and habitat. Population growth and emerging science and technology were also noted as things that need to be addressed. One person said there needs to be a better way to address septic systems in shoreline areas.

**10. Are there provisions in the Act that we would just as soon not have today?**

Again, many people talked about exemptions and whether it is beneficial to have them. A commitment to improving ecological functions, rather than simply preventing degradation, is needed. Two people talked about the need to reevaluate preferred uses and water-dependent uses.

## Appendix C: Glossary

**Adaptive management:** A systematic approach for continually changing (adapting) and improving management policies and practices by monitoring operational programs.

**Aquaculture:** The culture and/or farming of food fish, shellfish, and other aquatic plants and animals in fresh water, brackish water, or saltwater areas. Aquaculture practices may include, but are not limited to, hatching, seeding or planting, cultivating, feeding, raising, or harvesting of planted crops or natural crops so as to maintain an optimum yield, as well as processing of aquatic plants or animals.

**Bulkhead:** Refers to a solid or open pile wall of rock, concrete, steel, timber or other materials, or a combination of these materials, erected generally parallel to and near the ordinary high-water mark. Bulkheads that are exempt under the SMA are only for protective purposes, that is, for the purpose of protecting adjacent wetlands and uplands from waves or currents.

**Climate change:** A long-term shift in global or regional climate patterns. Often climate change refers specifically to the rise in global temperatures from the mid-20th century to present.

**Conditional Use Permit:** A permit that applies to a use that is not permitted outright but may be permitted if conditions can be applied to ensure that the use is compatible with the neighboring area.

**Critical areas:** Areas that cities and counties planning under the Growth Management Act designate for protection from development. These include: 1) wetlands, 2) areas with a critical recharging effect on aquifers used for potable water, 3) fish and wildlife habitat conservation areas, 4) frequently flooded areas, and 5) geologically hazardous areas.

**Cumulative impact analysis:** An evaluation of the current plus any reasonably foreseeable future disturbances to ecological functions that can be impacted by both development subject to and not subject to shoreline permits.

**Ecological functions:** The work performed, or role played by the physical, chemical, and biological processes that contribute to the maintenance of the aquatic and terrestrial environments that constitute the shoreline's natural ecosystem.

**Exemption:** This generally means freed from an obligation, duty, or liability to which others are subject. For the purposes of the SMA, a project is exempt if it does not require a substantial development permit.

**Inventory and characterization:** A study of the existing shoreline that serves as a basis for program planning. The inventory describes existing shoreline conditions and development patterns, including attributes of a healthy ecosystem. .

**Mean higher high water:** The mean higher high water is the average height of the highest tide recorded at a tide station each day during the recording period.

**Nationwide Permit:** A type of general permit issued by the Army Corps of Engineers which authorizes activities on a nationwide basis unless specifically limited. A nationwide permit covers specific activities and includes terms and conditions for those activities. If an activity complies with all applicable, a prospective permittee may assume authorization under a nationwide permit.

**No net loss:** For the purposes of the SMA, “no net loss of ecological functions” is a standard that local SMPs need to achieve. The no net loss standard is designed to halt the introduction of new impacts to shoreline ecological functions resulting from new development. Both protection and restoration are needed to achieve no net loss. Restoration activities also may result in improvements to shoreline ecological functions over time.

**Ordinary High Water Mark (OHMW):** The “mark” left by high tides that makes soil and vegetation distinct from upland areas. The ordinary high water is a complex visual determination, and the Department of Ecology has issued a 230-page guidance document for determining it, [Determining the Ordinary High Water Mark for Shoreline Management Act Compliance in Washington State](#)

**Policy goals:** The policies and goals set by the legislature for shoreline management, as set forth in [RCW 90.58.020](#).

**Public trust doctrine:** The principle that certain natural and cultural resources are preserved for public use, and that the government owns and must protect and maintain these resources for the public's use.

**Shorelines:** All of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them. Excludes shorelines of statewide significance, shorelines on segments of streams upstream of a point where the mean annual flow is 20 cubic feet per second or less and the wetlands associated with such upstream segments, and shorelines on lakes smaller than 20 acres and wetlands associated with such small lakes.

**Shoreline master program (SMP):** Refers to the comprehensive use plan and regulations for a described area, together with maps, diagrams, charts, or other

descriptive material and text; a statement of desired goals; and standards developed in accordance with the policies enunciated in the SMA.

**Shorelines of the state:** The total of all shorelines and shorelines of statewide significance within the state.

**Shorelines of statewide significance:** Shorelines of statewide significance refers the shorelines of the state as outlined in [RCW 90.58.030](#).

**Tidelands:** The beds and shores of navigable tidal waters lying between the line of ordinary high tide and the line of extreme low tide.