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May 10, 2010

By E-Mail (jeff.stewart@ecy.wa.gov) and Express Overnight Mail
Jeffree Stewart, Shoreline Specialist
Washington State Department of Ecology
P.O. Box 47775
Olympia, WA 98504-7775

Re: Jefferson County Proposed SMP Amendment (Res. No. 77-09)

Dear Mr. Stewart:

I represent The Olympic Stewardship Foundation ("the OSF"). The OSF's membership includes a broad array of citizens, property owners and business owners in Jefferson County. The OSF is a non-profit organization dedicated to representing the voice of rural landowners. Its members support the shared belief that citizens, particularly those who live on their land, are capable of providing the very best care and management for the environment in which they live. The core of the OSF's founding members have a demonstrated record of maintaining and improving on-the-ground conservation in Jefferson County.

The OSF submitted a detailed comment letter on the revised Draft Shoreline Master Program ("SMP Draft") dated January 21, 2009 to the Jefferson County Planning Commission and September 8, 2009 to the Board of County Commissioners. Both letters had attachments. The purpose of this letter is to focus on the proposed final SMP draft delivered to the Department of Ecology by Jefferson County for its review ("the Amended SMP"). The OSF will not repeat all comments made in its two prior letters, which are already part of the record Ecology is charged to consider. The OSF urges the Department and the Director to review these comment letters and their attachments, as well as the comments set out herein.

The OSF respectfully requests that you remove yourself from review of the Amended SMP. This would include assessing public comments or making recommendations to the Director as to the proposed Jefferson County Amended SMP. The OSF believes that with your inappropriate "guidance and encouragement" through your position as "Shoreline Specialist," the County proposes unprecedented regulation which skews the historic balance for shoreline regulation, ignores the beneficial effect of existing regulatory systems, including the shoreline permit system, and cedes too much local control to State agencies. There is no basis for the prejudice against the existing permit system shown in the proposed SMP Amendment, which was adopted by the County with your active participation and encouragement. Based upon your active participation, and for other reasons set out, OSF believes your removal from the SMP review process will serve the Department and the public because a fresh and unbiased review is required.

The County has found no direct cause and effect relationship between the potential impacts and development of shoreline characteristics. Yet, it presumes impacts, and imposes onerous regulations (or outright prohibitions) for common shoreline uses and developments. This approach exposes the basic flaw of regulation by assumption. For example, imposition of a generic, blanket 150-foot buffers is a "default" regulatory device. The OSF believes that regulations should be based on a predetermined need, not on assumptions that are proven right or wrong down the road. In those few instances where unanticipated impacts might occur, the County can rightfully place the burden of proof on the applicant and the property owner would be required to assure no net loss through a site-specific analysis. However, experience shows that this would be the exception, not the rule.

The OSF supports balanced regulation of shoreline use and development, and a regulatory system which encourages voluntary enhancement and restoration efforts. As for regulation, the OSF has faith in citizens and property owners, and in the existing shoreline permit process. The permit process through the years has adequately protected the shorelines of Jefferson County via site specific imposition of necessary project mitigation to ameliorate development impacts. Thus, enactment of onerous new prescriptive regulations or no development set asides, such as large shoreline buffers, or outright prohibitions of or undue restriction on common shoreline development and uses is unnecessary.

KEY POINTS

Substance. The OSF believes that the proposed revised Jefferson County Shoreline Master Program (SMP) (1) is overly broad, (2) is unreasonably restrictive of common shoreline uses and developments, (3) conflicts with the general laws of the state in that it prohibits or unduly restricts preferred or exempt uses and structures, (4) shows undue reliance upon conditional use permits, (5) is internally inconsistent and inconsistent with the Comprehensive Land Use plan, and (6) is in violation of the state law mandate to regulate shoreline areas exclusively under the Shoreline Management Act (SMA). The proposed SMP also imposes requirements which violate constitutionally protected property rights and affects a regulatory taking through imposition of numerous prohibitions of common shoreline uses and structures. The Department needs a consistency analysis from its legal counsel in this regard, as the County conclusionary three-page document is wholly inadequate.

A much simpler process is available, which is to establish "no significant net loss" as a performance standard, and allow property owners/applicants to demonstrate how they will achieve that standard through a site specific analysis as part of the local permitting process with consideration of reasonable project mitigation. This SMP Amendment acknowledges the "no net loss" standard, but then prevents shoreline owners the opportunity to demonstrate compliance via imposition of regulatory standards which have the effect of prohibitions. These prohibitions take many forms, from outright preclusions in certain shoreline environments, to design or location requirements that are virtually impossible to meet. The County must start over because this approach is inconsistent with the Shoreline Management Act ("SMA").

Process. Just as importantly, the County's process is flawed in at least six ways: (1) reliance upon an insufficient Shoreline Inventory and Cumulative Impacts Analysis; (2) the absence of needed information to make informed decisions; (3) the absence of "cause and effect" analysis; (4) the illegal integration of the Critical Areas Ordinance and the SMP; (5) the undue involvement of the Department of Ecology ("the DOE") in the approval process such that Jefferson County concluded the DOE's views must control without regard to local circumstances; and (6) insufficient time allowed for meaningful comment to the Board of Commissioners on the Planning Commission and Staff drafts, combined with delivery of certain products (*e.g.,* final Cumulative Impact Statement) after the close of the comment period set by the Board of County Commissioners.

INADEQUACY OF BASE DOCUMENTS, ABSENCE OF KEY ANALYSIS, ILLEGAL INTEGRATION AND DECISION-MAKING BIAS

Base Information to Make Informed Decisions is Lacking. The County Final Shoreline Inventory and Characterization Report (Revised) dated June 2008 ("the Report) is incomplete. It lacks both field verification and a thorough description and analysis of existing conditions, since it is based only upon literature (published and unpublished) which does not pertain to Jefferson County. (Study, pp.1-18). Thus, the County violates the State Guidelines for revision or adoption of a new SMP set out in WAC Chapter 173-27. WAC 173-26-201(37)(c) requires "actual specification" of the extent of existing structures and shoreline development and an evaluation of the effectiveness of the existing shoreline regulatory system. This information **must** be gathered before a SMP can be updated. However, the Report does not contain such specification or evaluation. In this regard, the Report concedes it is "not intended as a full evaluation of the effectiveness of the SMA existing shoreline policies or regulations." (Study, p.1-3). Under the section for Mapping in 1.2.1, the Report states that "[it] makes no representation as to the exact ownership (public or private) of specific areas of the County shoreline or adjacent tidelands, except for noting the general location of public parks and other public access points." The Report also acknowledges that its maps are for "informational purposes only," and no detail as to existing development or conditions is provided. Thus, critical and necessary information has not been gathered. To compensate for this flaw, the proposed SMP Amendment places the burden on property owners and applicants to assess cumulative impacts, and to identify the shoreline environment where a proposed use will be sited.

The final Cumulative Impacts Assessment ("Assessment" or "CIA") is likewise flawed, since it fails to (1) meaningfully evaluate the effectiveness of existing regulatory systems or (2) evaluate current conditions. The State Guidelines mandate a CIA "... that **identifies, inventories** and ensures meaningful understanding of the current and potential ecological functions provided by affected shorelines.") WAC 173-26-186(8)(a) (emphasis supplied). A compliant CIA **must** be completed before a new SMP can be adopted. The Assessment is lacking, impermissibly assuming impacts without documentation. The CIA also fails to meaningfully consider and assess the benefits provided by existing regulations and project mitigation imposed under the SMA permitting and State Environmental Policy Act (SEPA)

authority. On this last point, the State Guidelines for revisions of a SMP require a cumulative impact analysis which includes such analysis, along with an evaluation of reasonably foreseeable future development:

> Local master programs shall evaluate and consider cumulative impacts of reasonably foreseeable future development on shoreline ecological functions and other shoreline functions fostered by the policy goals of the act . . . Evaluation of such cumulative impacts should consider: (i) **Current circumstances** affecting the shorelines and relevant natural processes; (ii) Reasonably foreseeable future development and use of the shoreline: and (iii) **Beneficial effects** of any established regulatory programs under the other local, state, and federal laws.

WAC 173-26-186(8)(d) (emphasis supplied). This CIA does not meet this standard.

The County's CIA goes on to identify "cumulative impacts" associated with common shoreline uses and developments such as armoring, dock and pier construction, creation of lawns (which actually provides excellent filtration for surface water run-off), water recreational activity, vegetation clearing and other common shoreline developments. It does so without identifying the positive effects of current regulatory law, and fails to mention the State Hydraulic Code when setting out regulations for protective bulkheads. Final CIA, p.58 (Table 9).

The CIA talks in generalized terms of the need to prevent adverse impacts "on near shore drift, beach formation, juvenile salmonids migratory habitat and other shoreline functions." Final CIA, p.41. It also refers to impacts on eel grass and other critical fish habitat. Yet, the Department of Fish and Wildlife's regulations implementing the State Hydraulic Code, WAC 2220-110-285 provide for all of these concerns. These include having the waterward face of a new bulkhead be located at or above the ordinary high water mark. *See* WAC 220-110-285(2) (included as **Attachment 1** hereto). The literature demonstrates that bulkheads located at or above the ordinary high water mark have few, if any, of the impacts set out in the CIA. *See also*, specific comments, *infra*, pp.43-44. For instance, forage fish spawning does not occur at or above the ordinary high water mark, but much further down the beach. Timing restrictions which preclude construction during certain periods protect Pacific Herring, Surf Smelt, Pacific Sandlance, and Rock Sole spawning beds and activities, and juvenile salmonid out-migration. *See, infra*, p.43, n.11.

The OSF strongly opposes adoption of a new SMP until Jefferson County complies with the State Guidelines and prepares a proper Shoreline Inventory and Cumulative Impacts Analysis. Thus, the current submittal should not be deemed complete. WAC 173-26-120(1). Sound regulatory choices cannot be made without essential base information. The proposed SMP Amendment impermissibly assumes impacts, ignoring actual experience. It then imposes prohibitions and restrictions based upon unsupported presumptions and assumptions. The

absence of documentation is not excused by imposing prohibitions or unduly restrictive prescriptions, because such enactments offend applicable SMA regulatory standards. *See* Discussion, *infra,* SMA Standards, pp.16-18. The proper approach is to maintain the status quo unless significant impacts are demonstrated, which is not the case in Jefferson County. New regulations must be based upon actual facts and circumstances, not surmise.

No Cause and Effect Analysis. There is no "direct cause-and-effect" analysis to support new regulations. For instance, the Draft proceeds on the fundamental misperception that shoreline armoring activities have created significant adverse impacts to the shoreline environment of Jefferson County. There is no basis for this assumption. The Department of Ecology and other researchers commented that the effects of bulkheads have not been documented. *See* Attachment 1 to OSF letter, September 8, 2009, Introductory Comments of Peter Ruggiero, Oregon State University ("However, it has not been confirmed in the field or the laboratory whether currents and sediment transport rates will increase or decrease in front of the hardened bulkhead as compared to an unarmored section of beach, and whether the sedimentary environment would be significantly modified".) *See also* Attachment 2 to OSF letter, September 8, 2009, and comments of Department of Ecology official Mr. Hugh Shipman as to the "limited amount" of science that has been done in Puget Sound on the effects of armoring.

The City of Bainbridge Island has conducted an extensive review and inventory of the shoreline. The Battelle Institute was commissioned to do the study, titled "Bainbridge Island Nearshore Habitat Characterization and Assessment, Management Strategy Prioritization, and Monitoring Recommendations." Dr. Don Flora, at the request of the general shoreline owners group, has reviewed the Bainbridge Study, to correlate the "cause-and-effects" scientific link between the ecological stressors identified and the degree of development impacts. Dr. Flora's final analysis is annexed hereto as **Attachment 2**. As the Department can see, there is no direct cause-and-effect correlation between identified ecological stressors and perceived development impacts. In other words, the Bainbridge Island Study does not demonstrate significant impacts associated with shoreline developments such as docks, shoreline armoring, and near shore residential development.

Generalized Concerns is Not Science. Exhibiting impermissible predisposition and bias, the Department of Ecology in a comment letter dated June 17, 2009 stated that the work of the Jefferson County Planning Commission on buffers was "not supported by science," but this is incorrect. The Department cannot ignore the science that it does not like. See, *e.g.*, Port Townsend's science which justifies 50-foot buffers, even in a highly intense urban development. *See also* Dr. Kenn Brook's Supplementary Best Available Science submitted previously to the County for the Critical Area Ordinance Update, and by request to be made part of the SMP Amendment record.

As set out in the OSF's initial comment letter dated January 21, 2009, pp.18-20, Attachments 1-5, there is no current scientific study of marine riparian zones which supports imposition of large "no build" buffers to deal with low intensity rural residential growth. The

OSF is at a loss to understand what "science" the County (and the Department) relies upon to justify the large generic buffers proposed in the SMP Amendment.

The science is flawed when the technical scientific review process is tainted. The Technical and Policy Advisory Committees were made up largely of government and tribal representatives, with 12 members each plus alternates. It is noted that Dr. Kenn Brooks was not requested to serve on the SPAC. Only one citizen was selected to represent the perspective of the waterfront property owners on the SPAC and a representative of the building industry was not included. After the Planning Commission had spoken, based upon receipt of substantial public comment, Jefferson County Staff and the Board of Commissioners effectively invalidated the voice of the public by overriding essentially all of its recommendations. The question must be asked whether a proposed SMP Amendment should be a technical document written by regulators, or a document which reflects the values and desires of Jefferson County citizens and property owners and the legal standards and science which actually documents cause-and-effect relationships. An SMP is to be updated to "reflect changing circumstances, new information or improved data." WAC 173-26-090. This proposed SMP Amendment meets none of these standards. The document is a regulators' "wish list," unsupported by information justifying wholesale changes to the current SMP.

Illegal Integration. The OSF generally refers the Department to its comments found in its letter of September 8, 2009, p.8. The OSF has reviewed engrossed House Bill 1653. It views this law as a stop gap measure to "create greater operational clarity" between the SMA and the GMA as to regulation in critical areas. The law keeps in place GMA development regulations of critical areas "until the Department of Ecology approves" a comprehensive Shoreline Master Program update. Such an update must be undertaken pursuant to the SMA and it must be consistent with the SMA, not the GMA. As set out in comments below, the Jefferson County CAO is adopted under different procedures, with different goals and objectives than the SMA. Thus, its wholesale integration into the proposed SMP Amendment is inappropriate. If any sections of the CAO are to be considered as part of the SMP, they must undergo full review and analysis for consistency with the SMA and the SMP guidelines. This has not occurred in Jefferson County. The public was not made aware of which sections of the County's GMA Critical Areas Ordinance would be part of the SMP until after close of the public review and comment. Without a consistency analysis of the sections sought to be incorporated, Jefferson County's filing is incomplete and it should be returned to the County.

It appears the County presumes that regulation of marine areas is allowed under both the GMA and the SMA because a new SMP is to provide a level of protection "at least equal" to the level of protection by the local government's CAO. However, the GMA separates shoreline use regulation from critical areas regulation. *See* RCW 36.70A.480(2) Washington's shorelines may contain critical areas, but the shorelines are not critical areas simply because they are shorelines of state-wide significance. *See* Department of Ecology Directive, "Questions and Answers on ESHB 1993," p. 2.

The terms "at least equal" do not equate to a wholesale integration of a CAO. What "at least equal" means is that there be "no net loss" of shoreline processes, that is, we do not go materially backwards. The goal of shoreline regulation is "no net loss to shoreline ecological functions." *See* WAC 173-26-186(8)(6). As used in the State Guidelines, the terms "ecological functions" mean "...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." WAC 173-26-020(11). This does not mean "just use the CAO." The functions of shorelines, especially marine areas and beaches, differ from upland critical areas. Also, all shorelines cannot be classified as "critical areas." Use of generic shoreline buffers is identical to protecting all upland areas as "critical areas," when shoreline areas obviously are not uplands.

Inappropriate public agency influence and bias. The OSF refers the Director to Ecology's letter of June 17, 2009, and related communications. In the June 17, 2009 Ecology letter, the author chides the Planning Commission for "changing" the shoreline buffer for the Shoreline Residential and High Intensity Designated shoreline areas from 150 to 50 feet. According to the author of the letter, this change is "inappropriate" because it does not provide an accompanying scientific rationale, nor is it "consistent with" the Critical Areas Ordinance. Many of the communications from Ecology to the County include words such as "this is a significant change we do not believe this is consistent with the guidelines ...." The Ecology contact, who is also the contact for public communications to the Department on the proposed SMP Amendment, then inappropriately states that because of this, unless the proposed Draft SMP is changed, it will not be approved by Ecology: "Ecology will not approve the SMP as currently written for the reasons noted." In response to this strong arm tactic, the Commissioners proposed a 150-foot generic buffer.

Ecology's comments to the County are not appropriate and constitute illegal predisposition and bias. Guidelines for review of SMPs specify that Ecology is to provide assistance to local governments, not dictate a substantive result. The official charged to approve the Shoreline Master Program is the Director of the Department of Ecology, not lower ranking Staff. Ecology must follow the law as to the primacy of the SMA over the GMA and consider all SMA goals and objectives, but its June 17, 2009 letter fails to do so. Adoption of an amended Jefferson County Shoreline Master Program must include a balancing of numerous factors, wherein local circumstances can dictate different results from jurisdiction to jurisdiction, but the Department Staff ignored these standards in favor of personal views offered as "agency position," to Jefferson County officials. There is no "model" SMP, and different jurisdictions can approve regulations which still comply with SMA mandates, but differ from Ecology Staff preferences based upon local circumstances. Ecology's approach inappropriately took the public out of the process and ignored SMA standards. Thus, it must be discarded by the Director. The OSF urges a fresh look without Mr. Stewart's involvement.

SUMMARY OF COMMENTS

Illegal Integration. The Planning Commission and Staff propose to essentially designate as "critical areas" all marine near shore areas, and impose extreme "no development" buffers via wholesale "integration" of the existing Jefferson County Critical Areas Ordinance, JCC Chapter 18.22 ("the CAO") with the proposed SMP Amendment. This approach is illegal and not supported by the record. Shoreline areas are exclusively regulated under SMA, not under CAOs adopted pursuant to the GMA. Further, there is no showing that all marine or shoreline areas in Jefferson County are "critical areas," or that unless regulations for uplands are imposed, shoreline areas are inadequately protected.

Overdesignation. A major over-designation is the expansion of the Natural Shoreline Designation to 41% of the shoreline. The areas so designated ostensibly have the capacity to "return to near natural conditions with minimal or no restoration activity." This criteria is not in the WAC Guidelines, nor does it reflect actual conditions. Designating nearly half the shorelines of Jefferson County in the "natural" category is onerous because all development within this category, including single-family homes, will be subjected to the Department of Ecology oversight via use of conditional use permits, which could result in an outright prohibition.

Jefferson County appears to have determined that every inch of Jefferson shorelines are critical areas requiring a 150-foot buffer by virtue of "primary association" with ESA listed species. If so, this approach is illegal.[1] First, there is no authority for Jefferson County or the Department to implement the Threatened and Endangered Species Act ("ESA"). The Shoreline Hearings Board ("SHB") so ruled in 2001 when striking down Ecology's first attempt to enact new guidelines to control the development of new or revised SMPs.

Second, the County's own studies do not show that the entire shoreline is a critical area. The proposal to make all marine areas and associated uplands a "critical area buffer" is over-inclusive and not supported by the record. Under relevant criteria enacted by the Washington Department of Community, Trade and Economic Development, not all near shore areas are "critical" fish and wildlife areas. Such areas must exhibit truly high functions and value for fish and wildlife to qualify for such a designation.

And third, the County is out of step with other jurisdictions. For instance, the proposal treats all bluffs as critical areas because they "feed" materials to the environment. No other jurisdiction has reached this conclusion. Bainbridge Island considers 11% of its bluffs as important "feeder bluffs" and even then allows "hybrid" bulkhead structures to protect homes located on these bluffs and does not prohibit beach access stairs.

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[1] The Central Board and the Washington State Attorney General have concluded that blanket treatment of SMA regulated shorelines as critical areas under the GMA is not appropriate. *See, Tahoma Audubon Society v. Pierce County*, CPSGMHB No. 05-3-0004c, Final Decision and Order (July 12, 2005) and AGO 2006 No. 2 at 4 (Jan. 27, 2006) ("The Legislature explicitly repudiated the Board's conclusion that shorelines of statewide significance are categorically critical areas which must be protected both under the SMA and GMA.")

Restoration Cannot Be Mandated and Coordination is Required. The County's support for large marine buffers appears to be based upon the perceived need to "protect **and** restore the shoreline," tied into the recommendations of an inter-agency working group which has no official status. *See* Comments, *infra*, pp.14-15. If so, this approach is unsupported by the law. *See* OSF September 8, 2009 comment letter, p.10. As to "restoration," the Western Washington Growth Management Hearings Board has rejected an approach to mandate restoration of the built environment via use of prescriptive buffers. *Swinomish Indian Tribal Community et al. Skagit County* (WW6MHB Case No. 02-2-0012c), p. 1-22 (Dec. 8, 2003). At page 24, the Board states that "[W]e find that RCW 36.70(A).060(2) and .040(1) do not require buffers on every stretch of every watercourse containing or contributing to a watercourse bearing anadromous fish, to protect the existing functions and values of FWHCAs." Further, at page 26, the Board states that "we also find that the requirement to consider conservation and protection measures necessary to protect, or enhance anadromous fisheries does not mean that all these measures must be regulatory." The proposed SMP Amendment needs to be reconciled with the law in this regard.

The Role of the Puget Sound Partnership ("PSP") Is Not Considered by The County When Seeking to Maintain "No Net Loss." When considering how to maintain "no net loss, the County's proposed SMP gives no consideration for the beneficial implementation of PSP's restoration plan. PSP is an independent agency of State government. The PSP is to be responsible to the Governor, the Legislature and the public for leading the recovery of Puget Sound and achieving results. It exists to identify and fund discrete restoration projects, and to facilitate and coordinate collective efforts for restoration of Puget Sound. Towards this end, the PSP is to define a "strategic, basin-wide plan" that sets priorities to restore Puget Sound. To set priorities for restoration, the Legislature specified that a strategic science program be developed, and a biennial science "work plan" be prepared. In addition, the PSP is to create and maintain a repository for data, studies, research, and other information relating to Puget Sound health, and "to encourage the interchange of such information...." The PSP is also to establish a monitoring program, including baselines, protocols, guidelines and quantitative performance measures. If the PSP is successful in its restoration efforts, the "doom and gloom" CIA is off-base and the County's proposed regulatory scheme is unduly protective.

The Existing Regulatory System is Working. There is no proof that the existing State Environmental Policy Act ("SEPA") review process combined with the SMA permit system established under the current SMP, together with State and Federal regulatory systems, have not adequately protected marine critical areas from significant harm.[2] These regulatory programs are set out in the Comprehensive Land Use Plan, Table 8.2, pp. 8-3, 8-4. There is no analysis in the

[2] The Department of Ecology recently adopted in-stream management rules which will further restrict and control future development along streams subject to regulation under the SMA and Jefferson County. These proposed regulations were not adequately taken into account in the proposed amended SMP, even though the County is required to consider "eco-system system wide processes." These new regulations obviate the need to layer on under the SMP proposal yet another regulatory system of generic buffers.

record that the existing regulatory system is inadequate, thereby requiring adoption of a new SMP which is over three times the length of the existing document and contains many new proscriptions and prescriptions. It is submitted that the County and the Department should have confidence that its existing environmental review and permitting systems will prevent harm to the aquatic environment absent documentation to the contrary.

Generic Buffers And Set Asides Are Illegal. The Courts have struck down generic set asides, such as large buffer and vegetation zones. *CAPR v. Sims*, p.22-23. The current approach which proposes to utilize these regulatory devices will involve Jefferson County and the Department in needless litigation which, in my opinion, it cannot win.

Unique Local Circumstances. Jefferson County has unique local circumstances. Over 77% of Jefferson County's total land area is Olympic National Park, Olympic National Forest and State Forestland. Comprehensive Plan, p. 3-1. There is very little private ownership or use of shorelines in the West End, but 80% private ownership of shorelines in the East End. Jefferson County has "large lot" zoning under the GMA, so intensive new development on the shoreline is already precluded. Why have these local circumstances not been factored into the proposed SMP Amendment?

The Department of Ecology has issued a report titled, "What Does No Net Loss Mean in the 2003 Guidelines?" In its report, Ecology states: "It is recognized that methods to determine reasonably foreseeable future development may vary according to local circumstances, including demographic and economic characteristics in the nature and extent of the local shoreline." For the Jefferson County SMP proposed update, there has been no meaningful assessment of local circumstances or socio-economic forces that will drive future development. There is only an unsupported and false assumption that as surely as development has occurred elsewhere, it will happen at more or less the same rate in Jefferson County. It is nonsensical to presume that the circumstances are equal between highly developed and under developed or slow growth counties.

The OSF suggests that the Department secure building permit activity over approximately the last ten years in shoreline areas for homes, docks, beach access stairs, bulkheads, etc. The statistics will demonstrate that very few new homes (or appurtenant structures) are being built on the shorelines in rural Jefferson County.

RECOMMENDATIONS

Upon review, the OSF urges the minimum actions from the Department set out below. Some will not apply if the SMP Amendment filing is deemed incomplete and returned to the County.

- Declare the County's filing is incomplete and defer the adoption of the proposed SMP Amendment until completion of a compliant Shoreline Inventory and Cumulative Impact Analysis.

- Insist that the County revise the Cumulative Impact Analysis to adequately assess the effectiveness of the existing regulatory regime and to identify impacts reasonably foreseeable caused by allowed future development and use under GMA rural zoning and local circumstances and allow local comment on the final product.

- Reject the integration of the existing CAO whole cloth into the new SMP and insist upon a consistency analysis under the SMA for any GMA CAO provisions the County believes should be part of the Amended SMP. SMA standards alone should be used to decide the required level of protection for marine and shoreline areas. In this regard, compliance with the "no net loss standard" as properly interpreted applied ensures the same level of protection of critical areas under the GMA.

- Reject the imposition of generic marine shoreline buffers, in favor of retention of the existing 30 foot setback for single-family residential found in JCC § 18.25.410(4)(J), (or the Planning Commission suggested 50-foot buffer but for all shoreline environments).

- Mandate establishment of marine buffers on a case-by-case basis for new commercial and industrial development, and large subdivisions, through the existing SEPA and SMA permit processes.

- Reject designation or treatment of near shore marine areas as "critical" simply because of periodic juvenile salmonoid use during the March to June outmigration.

- Reject establishment of new buffers on already highly developed shorelines in the Shoreline Residential and High Intensity environments which would create non-conforming uses and developments.

- Reject expansion of the Natural Shoreline Environment and encourage adoption of new shoreline environments labeled "rural" and "semi-rural" which allow reasonable shoreline use and development commensurate with a moderately built environment.

- Enter a finding pursuant to WAC 173-26-120(7) that project specific mitigation and SEPA compliance with the "no net loss" standards will provide acceptable protection of critical areas located within the SMA jurisdiction, and thus, the proposed SMP Amendment's numerous prohibitions, and reliance upon CUPs for other uses and developments, which severely restrict shoreline use and development, including single-family residential homes, bulkheads and docks, cannot be approved. This should also include the proposed 150-foot buffer and vegetation requirements and protections. *See* detailed comments, *infra.*

- Prepare its own regulatory taking analysis.

MISINTERPRETATION AND MISAPPLICATION OF "NO NET LOSS"

The OSF believes that Jefferson County misinterpreted and misapplied State Guidelines as to "no net loss." Permeating the proposed SMP Amendment is the presumption that in order to faithfully comply with the SMA, the County must "ensure, at a minimum, no net loss of shoreline ecological functions and processes ..." which is described to prevent insignificant and even theoretical impacts. Proposed Amendment, Article I- Purpose and Intent, Subparagraph A(3), Draft p.1-2. This ties into the final CIA analysis, where the County states it intends to "go beyond" the "minimum" to provide for a "net gain" for important shoreline ecological processes and functions:

> Additional development will occur as envisioned by the SMA, but the new policies and regulations will require development to be located well landward of the ordinary high water mark such that vegetated buffers are left in place to stabilize slopes, provide habitat, shade the nearshore beaches, provide organic nutrients, and reduce the potential for erosion which results in the need for shoreline armoring. Over time, the LA-SMP, other regulations, and voluntary restoration efforts will prevent a net loss of shoreline ecological functions from existing baseline conditions. Taken together, the LA-SMP and Shoreline Restoration Plan are expected to have a net beneficial effect on shoreline ecological processes and functions as restoration actions are implemented to improve degraded shorelines and as new properties are developed and existing properties redeveloped in accordance with the new policies and regulations.

CIA, p.2.

The CIA/Proposed Amendment coordinate in terms of working off an assumption that "any use/development that would cause a net loss of ecological functions or processes" must be expressly prohibited. Final CIA, p.2. This proceeds on the further presumption that the County is required in the proposed amended SMA to be "more protective of a shoreline environment than the existing SMP." Final CIA, p.1. Both assumptions are off-base. Because they are fundamental, the entire document must be deemed incomplete and returned to the County.

There is no actual analysis, including cause-and-effect analysis, that the existing SMP has somehow let down the marine environment. In fact, the CIA states that Jefferson County's shorelines are in reasonably good shape in terms of existing ecological processes. But the CIA considers normal developments "threats," and presumes that if developments are allowed there will be impacts without regard to the efficacy of project mitigation. It then takes "no net loss" from a performance standard to be obtained by good permitting decisions, to permission to impose generic buffers, proscriptions and prohibitions on what have been traditional shoreline

uses and development in Washington State. While lip service is given to project mitigation, there is a prejudice against its use which is simply not explained in any of the findings entered by the Board of County Commissioners or Staff analysis.

The County's approach is a perversion of the SMA and the SMP Guidelines, in OSF's opinion. The undersigned litigated and helped strike down the SMA Rules before the Shoreline Hearings Board in 2001. He also participated in appeals and negotiations which led to promulgation and adoption of the new SMP guidelines embodied in WAC Chapter 173-26. There is nothing in the SMA, including the legislation to revise and update SMPs, requiring that regulation be "more protective than in the past." The Legislature provided no such performance standard to Ecology, and none is provided in the SMP Guidelines. Most importantly, the "no net loss" standard set out in the SMP guidelines is not intended to prevent all impacts from shoreline use and development. That standard would be impossible to attain, and is violative of SMA standards set out both in the guidelines, WAC Chapter 173-26 and the case law (*see* discussion, *infra*, pp.16-18), which require a balance. The SMA standards require an owner or developer to minimize impacts to the extent possible or feasible, for water dependent and other uses that require the shoreline, or have been traditionally allowed on the shoreline, including single-family residential development.

As interpreted and applied by Jefferson County, the proposed SMP violates the SMP Guidelines because they go too far. Specifically, after explicitly requiring site-specific mitigations, as noted below, the SMP Amendment precludes many common shoreline uses and developments, and over-regulates those few new developments that are allowed:

> The LA-SMP also prevents cumulative impacts from occurring by requiring each shoreline use or development to mitigate adverse environmental impacts according to the standard mitigation sequence of first avoiding, then minimizing, then compensating for impacts or providing replacement resources. This means that each proposed development is responsible for identifying potential impacts and implementing specific measures to offset those impacts such that the post development condition is no worse than the predevelopment condition.

Final CIA, p.2.

The proposed Jefferson County SMP provides standards and procedures to evaluate individual uses or developments for the potential impact on shoreline resources on a case-by-case basis through the permitting process. The numerous generic proscriptions in the proposed SMP Amendment should be rejected in favor of the existing permitting system, combined with SEPA review plus the beneficial aspects of other regulatory systems imposed by State and Federal agencies. If the Department concurs with Jefferson County's approach, then the OSF puts Ecology on notice that it will challenge the SMP Guidelines "no net loss" standard, as

interpreted and applied to the County's SMP, as well as any approval of the proposed SMA Amendment in its current form.

MISINTERPRETATION AND MISAPPLICATION OF CUMULATIVE IMPACTS CRITERIA

For programmatic SMA planning, cumulative impacts must be considered, but the CIA correctly states that the impacts that "commonly occur in planned development" are properly assessed at the planning stage "without reliance on an individualized cumulative analysis." Final CIA, p.5. The problem is that the County, under the guise of implementing "no net loss" in the context of cumulative impacts, actually prohibits or severely restrains commonly occurring, traditional shoreline planned development, including single-family homes, protective bulkheads and docks. To use one example in the context of these general statements, the draft SMP proposes a "natural" shoreline designation for approximately 40% of the total shoreline in east Jefferson County. Within this designation, most common shoreline uses are prohibited, and a single-family home (which is an exempt activity) is made a conditional use approval. This is total over-kill, and not faithful to the SMP Guidelines as they were actually intended to be used and interpreted, nor the SMA. The Guidelines consider single-family homes and appurtenant uses as "water dependent" uses. These preferred uses are not appropriately prohibited under the guise of implementing "no net loss." This is a perversion of the SMA and its intended purpose, as interpreted by the courts.

The OSF strongly urges that the Department (and the Director) reject the restrictive approach found in the draft SMP, and have confidence in the permitting and mitigation systems set out in both this proposed SMP, and existing laws and regulations. In doing so, the Department should take into account the local circumstances set out in the record. For example, the CIA indicates that Jefferson County is sparsely populated and there has been little inappropriate shoreline development. Conversion of pervious surface to impervious surface in Jefferson County has been gradual, with an increase between 1991 to 2001 of only 2.8% to 3.0%. CIA, p.8 (Table 1). During the same period, the County's total population grew by 25% and the number of housing units increased by 65%. Obviously, growth is not happening disproportionately along shoreline rural areas. And existing regulatory systems are sufficiently protecting vegetation. Overall, "Jefferson County's shorelines are in relatively good condition ecologically compared to more developed areas of the Puget Sound Basin." CIA, p.10.

While the CIA considers bulkheads "potential threats," it concedes that only about 10% of the marine shoreline in East Jefferson County is armored with bulkheads and a visual estimate of aerial photos suggests that "most of the major feeder bluffs are unarmored." CIA, p.10 (Figure 2). In addition, most of the land available in rural areas has already been platted, and so creation of a significant number of new buildable lots is not expected. Thus, the positive effects of "large lot" GMA zoning is demonstrated. Past trends are the logical basis for foreseeable future trends, except now, the GMA prevents intensive urban growth on rural shorelines. CIA, p.34. *See also*, CIA, p.41 (Table 6) ("... Estimates and past trends suggest that subdivision of

land is not expected to create a large number of new parcels ...." The CIA concedes that "in and of itself, residential development probably does not have major adverse effects on shoreline resources." Final CIA, p.45.

INAPPROPRIATE AND UNDUE RELIANCE ON INTER-AGENCY GUIDELINES WITH NO LEGAL FORCE

The County is asking the Department to bless its proposed SMP Amendment as "required" in protecting shoreline functions and values because the proposals set out in the amended SMP will "compare favorably" to recommended shoreline protection strategies offered by the Aquatic Habitat Guidelines Working Group. CIA, pp.68-69. If one looks at the website for the "working group," it states that the agencies involved in the multi-agency project "do not necessarily endorse any of the information provided by these links," which include the guidelines the Working Group favors. If one reads further, it is acknowledged that the guidelines are based upon the Working Group's personal perception of "ecological values" and their assumptions about how ecosystems function, and "our priorities for protecting aquatic systems." The Working Group's membership includes no policy-maker. The Working Group's guidelines are not adopted as rules and regulations under the Administrative Procedures Act, RCW 34.04. Further, none of its member guidelines involve any analysis for consistency with SMA policies, nor protection or consideration of private property rights. This is truly a group of public employees pushing an agenda which has not seen the light of day through public review and comment via consideration or adoption of rules and regulations. Under the Washington Administrative Procedures Act, "general policies" (if the guidelines could be so considered) are illegal and unenforceable unless adopted as a rule or regulation which includes a public review and comment process. *See* RCW 34.05.010(16); RCW 34.05.375. The OSF strongly urges the Department to reject the flawed Jefferson County approach to implement the goals and objectives of an essentially unofficial multi-agency working group.

WHY IT IS IMPORTANT TO ACT UNDER THE SMA

Washington State has separate regulatory systems for critical areas located within shoreline jurisdiction. This approach has a sound basis in the law, public policy and common sense. Uplands which are remote from shoreline and marine areas (regulated under the GMA) have different environments. In addition, while upland uses can be sited in many areas, water dependent uses and development have no choice but to use the shorelines, so must be allowed with site-specific mitigation. Thus, the SMA and GMA provide legal standards that differ significantly. The GMA standard for determining consistency or validity of a local regulation promulgated as part of a CAO is essentially whether the adopted law "protects" critical areas, a preclusive standard. *See* RCW 36.70A.060(2). But the SMA standard is one which allows development with project mitigation for preferred uses.

To expand on the last point, although the SMA does have strong policies relating to the protection and preservation of shoreline areas, the law allows "alterations" to the shoreline, (especially for water dependent uses) with imposition of "practical" or "feasible" mitigation.

The SMA also provides for permitted uses in the shorelines of the state, and sets priorities for certain shoreline uses and developments. *Id.* Thus, the SMA standards are very different from "protecting" an area, since they allow measured alteration, use and development, and mandate that water development uses have a priority for development, although mitigation is required to protect shoreline functions and values.

In other words, while the GMA "protects" areas from development and use (that is, largely precludes uses in critical areas and buffers), the SMA seeks "a balance" between that protection and the allowable development and use, therefore allowing uses which have no choice but to be on or near the shoreline. This approach is consistent with the Jefferson County Comprehensive Land Use Plan ("Planning enhances our ability to weigh competing needs in our community and make judicious allowances for each. It affords us the opportunity to balance the demands of development with benefits of economic development and environmental protection."). Plan, pp. 1-2.

The OSF wants to be certain that its position is clear to the Department. The OSF is **not** stating that there should be unrestricted development or use of the shorelines. What the OSF is saying is that the CAO adopted under the GMA is all about precluding or preventing uses in upland critical areas and associated buffers. The SMA, however, is about allowing priority and preferred uses in the shorelines.[3] Thus, under the SMA, there can be mitigated development which may be precluded in upland CAO areas. At the same time, any development allowed along the shoreline must have adequate site-specific mitigation to meet the "no net loss standard" properly interpreted and applied. It is OSF's opinion that if the no net loss standard is met, then the protection is the "same as accorded under the GMA", even though some measured (and mitigated) development and use of the shorelines is allowed which may be precluded in GMA upland areas. Accomplishing "the same protection" can be done through the SMA permitting process with project specific mitigation without resort to prescriptive generic regulations (large buffers) or prohibitions.

In short, the CAO standard is one of "protection," which is largely implemented under the GMA by precluding development and use. The SMA standard is one of allowance of necessary and preferred structures and uses on the shorelines, with project mitigation to ameliorate impacts. The thrust of the two system are radically different and must be recognized by the Department.

THE SMA STANDARDS FOR REGULATION

Since the SMA controls, to aid the Department's and Director's deliberation, the OSF briefly summarizes the law on shoreline use and development. The State Guidelines for revising

[3] The SMA, RCW Chapter 90.58, unequivocally allows "construction on shorelands by an owner...of a single-family residence...for his or her own use...." RCW 90.58.030(3)(e)(vi). The term "shorelands" includes "...**all wetlands**...associated with tidal waters...." RCW 90.58.030(2)(d) (emphasis supplied).

SMPs acknowledge that there is a "balance" in the SMA regarding the use and development of the shorelines:

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

WAC 173-26-176(2).

The quoted language from the State Guidelines is based upon a long series of cases which have construed the SMA as allowing reasonable use and development of the shorelines of the state. As a general matter, the SMA declares that it "is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses." *See* RCW 90.58.020. According to this State's highest court,

> The SMA *does not prohibit development of the state's shorelines*, but calls instead for "coordinated planning . . . recognizing and protecting private property rights consistent with the public interest."

Nisqually Delta Ass'n v. City of DuPont, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985) (emphasis added); *see also* RCW 90.58.020.

A key focus of the SMA is on preventing "unrestricted" use or development of the shorelines or "uncoordinated development." RCW 90.58.020. Before enactment of the GMA, the only tool to address this focus was a SMP; now, however, the GMA and its planning and zoning provisions have been added to the mix of regulation. In terms of controlling unrestricted development of the shorelines, the GMA solves many concerns. For one, in the rural areas which comprise much of Jefferson County, the GMA has significantly "down zoned" land, thereby limiting future development intensity in accordance with SMA prohibitions on "piecemeal development" of the shorelines. *See* Comprehensive Plan, p. 3-4, Table 3-2, p. 3-5. Two, in combination with other laws, such as SEPA, regulatory systems are now consolidated to avoid the need for new duplicative regulations. The fear of unrestricted or uncoordinated piecemeal development of the shoreline has largely, if not totally, been resolved by enactment of a GMA compliant comprehensive land use plan and implementing regulations. Thus, enactment of preclusive regulations (especially prohibitions) is not necessary, particularly without an affirmative showing that the existing regulatory system is inadequate. Such a showing is not made in the record submitted to the Department by Jefferson County.

PROPER USE OF SCIENCE

(1) Standards

For an SMP update, "scientific information" must be considered and assessed. *See* RCW 90.58.100. This standard does not equate to GMA "best available science." *See Swinomish Indian Tribe v. Skagit County.*

When considering what may be supportive science for the SMP update under RCW 90.58.100, OSF urges that undue weight not be given to the views of the state agencies expressed in "guidance documents," in particular, when the science is non-specific to marine habitats, lacks peer review, or is offered by working groups without official status.

The OSF has already addressed the status of the Working Group and its suggested guidelines. Turning to the State of Washington Department of Ecology's manuals on wetlands and wetlands regulation, and the State of Washington Department of Fish and Wildlife ("WDFW") polices for protection for certain wildlife habitat, these have not been adopted as rules and regulations pursuant to the Administrative Procedures Act, Chapter 34.04, RCW. Therefore, these policies do not have the force of law nor have they been peer reviewed. They are skewed by a narrow perspective, from regulation only, rather than balanced by consideration of statutes and constitutional limitations on agency authority. *See* Dr. Kenneth M. Brooks, *Supplemental Best Available Science Supporting Buffer Widths in Jefferson County*, Washington, p. 3 (2007). *See* OSF comment letter, September 8, 2009, pp.17-18.

(2) Application of Standards

To the extent science is a factor, imposition of generic buffers is not based upon "best available science", because the GMA "best available science" requirement does not apply to update of an SMP.[4] When updating its SMP, the County was required to use the "most current available scientific information." The County appears to urge the Director to accept wholesale GMA based science standards for upland environments used for the Critical Area Ordinance update. This information is based upon fresh water conditions.[5] There is a vast difference between the shore marine areas and isolated upland wetlands or freshwater systems. Thus, the science is not on point. The marine science is not conclusive that large riparian buffers are needed. *See* discussion, OSF September 8, 2009 comment letter, p.19-22.

The most on point scientific study on marine riparian buffers appears to be *Marine and Estuarine Riparian Habitats and Their Role in Coastal Ecosystems, Pacific Region*, which concludes that the science is insufficient to support uniformly applied large buffer areas:

> [T]here are insufficient data in the scientific literature to recommend generic or region-wide setback distance . . . in marine riparian habitats. Further research is needed to determine buffer widths for various vegetation units that compose the marine riparian zone. In addition to research on biological functions such as fish food supply (e.g. for juvenile salmon rearing) and spawning (e.g. surf smelt and sandlance), studies need to be conducted on physical factors such as soil integrity . . .
>
> . . . [B]ecause of the variation in potential damage, the dimensions of the setback may have to be modified by site specific conditions such as slope stability . . . Not all types of back shore habitat have the potential to act as sediment corridors through the marine riparian zone. In addition, not all industrial developments have the potential to create disruptive sediment supplies through the marine

[4]The Comprehensive Plan mandates that buffers for fish and wildlife habitat areas "be consistent with the best available science for habitat protection." Plan, p. 8-29, p. 8-24 (Policy ENP 5.1). Best available science, however, does not equate to superficial or incomplete analysis, nor does it excuse compliance with the State Guidelines in terms of securing required information. There is no definitive inventory in Jefferson County which determines what shorelines justify the "critical area" designation proposed by County Staff, and the general scientific literature is not on point for local conditions. A compliant inventory identifies discrete areas that need protection from development and assesses the extent and impacts of current development and the presence of important shoreline ecological functions. *See* WAC 173-26-201(3)(c).

[5] To the extent the CAO is considered, it is not the size of the buffer that "must be equal," but the level of protection. The standard is "no net loss," which the SMA says can be achieved through "regulatory" and "non-regulatory means." One of the regulatory means is the SMA permitting process which imposes site specific mitigation to protect shoreline functions and values. If this regime or process is factored in, the CAO buffers do not need to be imposed in the opinion of the OSF. Restoration is handled through voluntary programs.

> riparian zone. Index 1363 at 14. That is because research "on the importance of marine riparian habitat . . . are virtually absent from the peer reviewed literature" – which is one of the ... requirements for a study to qualify as best available science.

An important question is what to do with the near shore areas where young salmon reside and migrate for three months per year (March 15-June 15). Existing regulations preclude virtually any new in-water development or construction during this period. *See* State Hydraulic Guidelines, WAC Chapter 220-110. There is no science stating extensive buffers are required to protect this species' sporadic use of the near shore area, especially where the existing condition is large lot rural zoning which does not allow intensive new residential development. The Puget Sound studies show young salmons' diet is on average comprised of one or two percent terrestrial insects, although for a short period of time in localized areas the upland contribution can be higher. Thus, the supposed "critical relationship" between uplands, upland vegetation and salmon feeding and use is not established. Taking into account local circumstances, and the science, extensive new shoreline buffers are not justified.

Science is a tool but does not dictate a substantive result. While the justification for a blanket buffer for all shoreline is a perceived need to protect critical habitat for salmon, no detailed marine shoreline inventory or ranking of areas according to their "quality" as habitat for fish is contained in the record submitted by the County. In *Tahoma. v. Pierce County*, the Central Board rejected a wholesale designation of marine shorelines[6] as critical areas and commented favorably on the work the County consultants did distinguishing "high value" and "low value shorelines." *Id.* At 44. Notably, the record in that case included a detailed marine shoreline inventory and ranking of areas according to their quality as habitat for salmon in response to a listing of Chinook Salmon under the Endangered Species Act. *Id.* At 53. Jefferson County's generalized Shoreline Inventory and Characterization report is an insufficient base to impose any new marine buffers, let alone the proposed 150 foot setback.

A comparison to Pierce County's approach, which at least tried to use science and meet legal standards, may be helpful. Pierce County was faced with the same task as Jefferson County. *See, Tahoma Audubon et al. v. Pierce County*, CPSGMHB No. 05-3-0004c, Order

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[6] The Attorney General reached similar conclusions to those in the *Tahoma* case in response to a recent legislative inquiry. The Attorney General concluded: (1) that blanket treatment of SMA shorelines as critical areas was not sufficient, and (2) that in passing ESHB 1933, the Legislature intended local governments to engage in a more detailed and discriminatory process to identify what is critical about a shoreline as part of its review criteria before designating the SMA regulated shoreline as a critical area. AGO 2006 No. 2 (Jan. 27, 2006).

> [A]t least since the 2003 amendments to the SMA and GMA, it is clear that no shoreline of the state, including shorelines of statewide significance, is to be treated as automatically qualifying for critical area designation under the GMA. Rather, each jurisdiction is expected to evaluate its shorelines to determine the extent to which they contain areas meeting the "critical area" definitions set forth in RCW 36.70A.030(5).

AGO 2006 No. 2 at 4.

Finding Compliance (Jan. 12, 2006). On a remand order from the Central Board, Pierce County was tasked with revising its marine shoreline buffers and critical area designations. *Id.* Unlike Jefferson County, Pierce County used a "scientific study which included data collection, field observations, and a recognized methodology . . . that can be replicated" to identify "stretches of marine shoreline with high habitat values for salmon." *Id.* at 4. Using a scientifically replicable method, Pierce County was able to identify and designate approximately 20 miles of its 179-mile of shoreline as salmon habitat justifying a 100-foot buffer. *Id.* at 2. While the OSF believes a 100-foot buffer is too much, Pierce County's approach at least tried to consider science, legal requirements, property rights and common sense.

GENERIC BUFFERS ARE ILLEGAL

RCW 82.02, and constitutional standards, establish that generic buffers and associated "vegetation preservation" set asides are illegal. *See* discussion, *infra,* pp.35-36. In the *Citizens Alliance* case, the Court of Appeals held that King County failed to meet its burden to show that limits on land clearing to a maximum of 50 percent of site coverage was not an illegal tax, fee or charge on development of land as prescribed by RCW Chapter 82.02. The Appeals Court held not only that the vegetation clearing limit was a "tax, fee, or charge" but that there was no showing that the generic standard was reasonably necessary to ameliorate impacts directly related to a proposed site development and also that its effect was disproportionate to any possible impacts caused by clearing rural lands. Thus, the limitation was struck down. *Citizens Alliance for Property Rights, et al v. Sims, et al,* 145 Wn. App. 649, 187 P. 3d 786(2008). *See also, Isla Verde Int'l Holdings v. City of Camas*, 146 Wn. 2d 740, 49 P. 3d 867 (2002). The State Supreme Court has recently declined to review the Court of Appeals decision, so it is precedent and on point for Jefferson County's rural shorelines.

The County seems to urge that RCW 82.02 does not apply to its proposed SMP Amendment, because it will be ultimately adopted as a rule and regulation by a state agency, the Department. It alludes to a ruling in a Skagit County Superior Court case. With due respect to the County's position, in the amended SMP, it seeks to integrate wholesale substantial portions of its GMA CAO. This includes the buffer requirements for "critical areas." While OSF believes that RCW 82.02, as well as constitutional limitations, apply to the Department of Ecology for its rule making activity, approving an SMP, the County's GMA regulations are of the same type considered and struck down in *Sims v. King County.*

INCONSISTENCY WITH THE GENERAL LAWS OF THE STATE, INTERNAL INCONSISTENCY, AND INCONSISTENCY WITH THE COMPREHENSIVE PLAN

Review of a new or revised SMP is measured against compliance with the policies and requirements of the SMA and the Shoreline Guidelines (WAC Chapter 173-26) and the "internal consistency" provisions of RCW 36.70A.070, RCW 36.70A.040(4), RCW 35.63.125 and RCW 35A.63.105. *See* RCW 90.58.190(2)(b); RCW 36.70A.480(3). What this means is that a SMP must be consistent with Comprehensive Plan policies and its own provisions must be

internally consistent. An SMP must also not conflict with the SMA. The proposed SMP Amendment submitted by the County fails to meet the stated requirements.

Commencing with the general laws of the State, the GMA imposes affirmative obligations to encourage economic development, promote economic opportunity for all citizens of the state, and encourage growth in areas such as Jefferson County which are experiencing insufficient economic growth.[7] RCW 36.70A(5); Comprehensive Plan, p. 1.9. The GMA also provides significant protections for private property rights. Not only must private property rights not be taken for public use without just compensation, but the rights of land owners "shall be protected from arbitrary and discriminatory actions." RCW 36.70A.020(6); Comprehensive Plan, p. 1.9. The proposed SMP Amendment conflicts with these GMA policies as set out herein.

Turning to another general law of the State, the SMA, this law allows uses of the shorelines for residential homes, appurtenant structures and exempt structures and uses, but the proposed SMP Amendment precludes and/or unduly restricts these uses and developments, as specified in more detail in OSF's comments on the Draft's specific provisions. *See,* discussion, *infra.*

Addressing consistency with the Comprehensive Plan, it states:

> This Comprehensive Plan has been crafted to incorporate the lessons learned in a difficult planning process. It is the intent of this Plan to accept and build on the difficulties of the past; identify appropriate solutions consistent with relevant laws, decisions, adopted policies, and community involvement; and propose a responsible strategy with which the County can effectively face the future.

Plan, p. 1.1.

There are many inconsistencies between the proposed SMP Amendment and the Comprehensive Plan. The Plan acknowledges that there will be only moderate growth in Jefferson County over the next 20 years. The Plan projects a total county-wide growth of 13,804 new citizens, although the most recent OFM population update shows that not even moderate growth has been achieved. The unincorporated rural and resource areas will accommodate 4,149 new citizens. Comprehensive Plan, p. 3-3. The proposed SMP Amendment does not accord

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[7] Jefferson County has strong Plan policies to enhance the rural economy:

> To ensure that Jefferson County can accommodate new economic development opportunities, policies are contained within this plan which encourage developing the necessary land base and rural infrastructure and services to accommodate modern economic activities; promote the County's natural environment as a basis of economic activities that are tourist or recreation-oriented; encourage and provide incentives for business to create "family wage" employment opportunities; and ensure that the County's quality of life is preserved as it is enhanced.

Plan, p. 1-13.

with the obligation of the GMA to accept some new growth, and accommodate it in both urban and rural areas, nor does it promote economic development in rural areas.

The Plan has strong policies to protect existing lots of record and property rights. Plan, pp. 3-4, 3-17. The OSF discusses these policies in more detail, when commenting upon and criticizing the proposed SMP Amendment's criteria for nonconforming uses. The OSF believes that the proposed SMP's treatment of nonconforming uses and existing lots of record is inconsistent with the Comprehensive Plan in some major respects, as well as recent State law, EHB No. 1653. The Plan recognizes existing lots of record as "legal lots," but the proposed SMP's imposition of generic buffers, and other requirements to maintain vegetation effectively constrain development on existing lots of record, if not outright preclude it. This is an inconsistency.

The proposed SMP has a strong prejudice against any commercial uses in SMA regulated areas. However, the Comprehensive Plan provides for policies to protect legal existing uses, home based businesses, and cottage industries to provide for "the economic viability of businesses that are not included in designated commercial areas." Plan, p. 3-17. In terms of rural character, the Plan provides that preservation of the rural character and promotion of the rural lifestyle which includes the "opportunity to live and work in rural areas." Plan, Goal LNG18.0, p. 3-61.

Marine trades is also one of the targeted industry programs in EDG3.0 (p.7-5) of the Comprehensive Plan. In the Economic Development Element narrative preceding the goals and policies in the Plan is a section titled "Future Economic Development Prospects for Jefferson County." The Plan goes on to say:

> Addressing trends that are relevant to our county such as but not limited to marine trades, building industry, natural resources, fisheries/aquaculture, technology, agriculture, value-added products and tourism/agritourism/native tourism ensure that the economy is stable, diversified, and competitive.

As the Department can see, preservation of marine trades, agriculture, and natural resource jobs are all expressed community values in the Comprehensive Plan Vision Statement. Yet, the proposed SMP Amendment has a strong prejudice against promoting these traditional industries. Once again, this is an internal conflict and inconsistency which must be reconciled if the proposal is to be approved by Ecology and/or survive legal challenge.

The proposed SMP Amendment is wanting in other ways. For instance, the Comprehensive Plan encourages affordable housing. The Comprehensive Plan also has strong policies that developmental regulations and procedures intended to protect environmental quality minimize the "economic impact on the development of housing." Plan, p. 5-13 (Polices, HSP 2.1). The proposed SMP's use of generic buffers and vegetation set asides directly conflicts

with the stated policies. There are other provisions of the proposal which conflict with these policies, including those which severely limit exemptions for the repair and maintenance of existing facilities, construction of new single family protective bulkheads, the stated bias against private recreational docks, and many other provisions which are set out in the OSF's detailed comments below.

Turning to economic development in more detail, the Plan stipulates that "the County must develop an approach to create a climate for economic development that facilitates the recruitment of industry and the retention and strengthening of existing businesses." Plan, p. 7-1. The Plan strives to achieve a "balance between social needs, the environment and the economy," that is, "sustainable economic development." Plan, p. 7-2. Tourism is one of the targeted industry programs. Goal EDG 3.0, Plan, p. 7-5. In the opinion of the OSF, the proposed SMP Amendment conflicts with the stated policies, by unduly restricting construction of facilities which promote access to the waters of the state, *e.g.* docks, marinas and boat launches.

The Plan has a goal, EDG 8.0, to "promote the development of tourist and tourist related activities as a provider of employment and business opportunities in Jefferson County." This includes an implementing policy, EDP 8.4, Plan, p. 7-8, to "encourage public access to water bodies ...." As set out below in its detailed comments, the OSF believes that the proposed SMP Amendment unduly restricts creation of new accesses and facilities to the waters of the State, including boat launches, private and public docks and piers, and mooring buoys. Once again, the proposal is internally inconsistent with the Comprehensive Plan Policies.

As set out in its detailed comments on the proposed SMP Amendment, Article 4, the County's submittal significantly expands restrictive shoreline designations, and creates new designations which in conjunction with the Use Matrix preclude virtually any new commercial development or use, even those that would provide important new access to the waters of the State for the public and promote tourism. The proposal's huge expansion of what is considered to be the Natural Shoreline Designation cannot be reconciled with any of the Comprehensive Plan policies for encouragement and facilitation of economic opportunities and the encouragement and support of economic development for rural lands. *See* Plan, Goal EDG 5.0; EDG 6.0, p. 7-6.

The Comprehensive Plan has well thought out goals and policies to protect the environment, including the marine environment. Those goals are **balanced** with land use goals and policies for economic development, existing uses, legal lots of record, and rural economic development. The Plan states that:

> RURAL RESIDENTIAL LAND USE
>
> GOAL:
>
> LNG 2.0 Establish land use goals and policies in the Land Use Element of this plan that are internally consistent with and

> reflective of the goals and policies of all other elements of the Plan.

Plan, p. 3-47.

The proposed SMP Amendment unduly emphasizes environmental protection and preservation over all other goals and objectives. Significant redrafting is required if the County is to adopt a revised SMP that is internally consistent and consistent with the goals and objectives of the Comprehensive Land Use Plan. Much work is needed before the proposed SMP Amendment will be consistent with the goals and policies of the Comprehensive Plan.

Overall, the OSF believes the County's proposal is too much about preservation of the shorelines, and not enough about allowance of new development and use or retention of existing uses and developments. Once again, this is an inconsistency because the Comprehensive Plan states:

> GOAL:
>
> ENG 5.0 Allow development along shorelines which is compatible with the protection of natural processes, natural conditions, and natural functions of the shoreline environment.

Plan, p. 8-24.

There are also numerous internal inconsistencies in the proposed SMP. The major one is the over emphasis on preclusion of common and accepted shoreline uses and developments. On the one hand the proposal requires substantial reports and analysis from applicants, assessing and demonstrating potential impacts, and has well thought out and comprehensive provisions for mitigation, but on the other hand, it simply ignores those portions in favor of preclusion. The prescriptive approach is over-broad, and reads out of the proposed SMP Amendment its provisions for detailed information and project applications, insistence upon professional analysis and reports, etc. There are also internal inconsistencies in the proposal as it refers to the protection of private property rights, being fair and equitable, and sharing the burden of preventing adverse impacts, while taking a proscriptive approach. Essentially, this SMP shuts off any reasonable use and development of the shorelines upon its enactment or approval by the Department. Existing uses and developments will be allowed to remain as nonconforming but very little new use and development will be allowed. The entire burden of cumulative impacts is placed upon those property owners who have decided for one reason or another not to develop their shoreline lots at this point in time. All of these consequences represent internal inconsistencies. Another internal inconsistency is the sections on exemptions which take away many exempt uses – for example, requiring a conditional use permit for single-family homes in the natural shoreline environment.

GENERAL COMMENTS ON SMA REGULATION

(1) The SMA is Not Against Property Rights.

The Department must assess the impact of the proposed SMP Amendment on property rights. The right to own and use private property is protected by state constitution. *See* U.S. Const. amend. V; Wash. Const. art. I, § 16; *Mfr'd Housing Cmtys. of Wash. v. State*, 142 Wn.2d 347, 368 (2000) (Property rights consist of the fundamental rights of possession, use, and disposition). While property rights, like other fundamental rights, are subject to regulation, that regulation must follow reasonable standards. *State v. Vander Houwen*, 163 Wn.2d 25, 36 (2008); *Mfr'd. Housing*, 142 Wn.2d at 354-55.

It is not enough to generally cite "the science" and act upon guesses or fears, as the County has done to date with its SMP update. Hypothetical impacts – "[are] not enough to deny private property owners fundamental access to the application review process, or protection and use of their property." *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683 at 687 (J.M. Johnson, J., lead opinion). In that case, the City of Bainbridge Island's decision to impose an outright prohibition based on theoretical harm according to the Supreme Court served to exacerbate the "mistaken belief that protecting the environment and private property rights are mutually exclusive interests." *See Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring) ("Done right, master plans can serve both needs.")

Outright prohibitions against private docks, beach access, stairs, bulkheads and other common shoreline developments and uses, are contrary to the SMA's policy of balancing the efficient use of shoreline resources with a property owner's right to use and enjoy his own property. *Biggers*, 162 Wn.2d at 687 (J.M. Johnson, J., lead opinion); *Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring). In *Biggers*, the Supreme Court concluded that shoreline property owners have a right, under the SMA, to have their land use permits accepted and reviewed by local government to determine whether the proposal is consistent with the SMA. *Biggers*, 162 Wn.2d at 687 (J.M. Johnson, J., lead opinion); *Biggers*, 162 Wn.2d at 702-03 (Chambers, J., concurring).

Nothing in the SMA requires local government to impose outright prohibitions on shoreline development. *See Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 726 (1984) (RCW 90.58.020 does not prohibit shoreline uses). Instead, the SMA calls for "coordinated planning . . . recognizing and protecting private property rights consistent with the public interest." RCW 90.58.020. Our Courts have repeatedly recognized this policy of balancing property rights and the environment:

> The SMA embodies a legislatively-determined and voter-approved balance between protection of state shorelines and development. The state has developed shorelines through improvement of parks and ramps, construction of bulkheads, ferry docks, etc. As part of our careful management of shorelines, property owners are also

> allowed to construct water-dependent facilities such as single-family residences, bulkheads, and docks.

Biggers, 162 Wn.2d at 697 (J.M. Johnson, J., lead opinion); *Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring); *accord Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 243 (2008) (J.M. Johnson, J., lead opinion) ("The SMA meant to strike a balance among private ownership, public access, and public protection of the State's shorelines."); *Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 761 (1998) (The purpose of the SMA "is to allow careful development of shorelines by balancing public access, preservation of shoreline habitat and private property rights through coordinated planning . . .").

For the past 30 years, local governments have achieved the balance between property rights and the environment largely through the permit process, where a proposal's consistency with the policies of the SMA can be determined on its own merits. The SMA provides more than sufficient guidance to have this determination made on a permit-by-permit basis without the need for blanket prohibitions found throughout the proposed SMP Amendment. Indeed, the SHB regularly reviews permit applications for private docks for their potential impacts to views, navigation, and ecological resources. *See, e.g., Fladseth v. Mason County*, Shorelines Hearings Board (SHB) No. 05-026, Conclusions of Law 13-16 (May 2007); *May v. Robertson*, SHB No. 06-031, Conclusions of Law 16-18 (Apr. 2007); *Close v. San Juan County*, SHB No. 99-021, Conclusion of Law 4 (Jan. 2000); *Genotti v. Mason County*, SHB No. 99-011, Conclusion of Law 12 (Oct. 1999). Our Courts have similarly reviewed appeals of permit applications for private development of the shoreline for compliance with the SMA on a case-by-case basis. *See, e.g., Buechel v. State Dep't of Ecology*, 125 Wn.2d 196, 203-05 (1994) (reviewing shoreline permit decision for compliance with the SMA); *Bellevue Farm Owners Ass'n v. Shorelines Hearings Bd.*, 100 Wn. App. 341, 355-62 (2000) (upholding Shorelines Hearings Board decision denying permit to construct a dock based on aesthetic and cumulative impacts).

The well-established practice of using the permit process to balance the needs of the shoreline environment with property rights is embodied in the SMA's "no net loss" policy, under which local government is required to consider a proposal's consistency with the SMA by measuring a project's impacts against potential mitigation to determine whether the proposed use would result in a net loss of existing shoreline functions. *See, e.g., Sollar v. City of Bainbridge Island*, SHB Nos. 06-024, 06-027, Finding of Fact 10 (Sept. 2007); *Friends of Grays Harbor v. City of Westport*, Environmental and Land Use Hearings Board No. 03-001, Conclusion of Law 24 (Oct. 2005).

The OSF submits that the imposition of blanket prohibitions on development combined with generic buffers violates the SMA's fundamental policy of "recognizing and protecting private property rights consistent with the public interest," and warrants review. RCW 90.58.020. Such prohibitions also effectuate regulatory takings. The Department must not adopt the proposed SMP as drafted, because it contains numerous illegal prohibitions and restrictions

which are unduly violative of constitutionally protected private property rights. *See* discussion, Office of Attorney General Guidelines for Regulatory Taking, which states:

> In general, zoning laws and related regulation of land use activities are lawful exercises of police powers that serve the general public good. However, the state and federal constitutions have been interpreted by courts to recognize that regulations purporting to be a valid exercise of police power still must be examined to determine whether they unlawfully take private property for public use without providing just compensation. This relationship between takings laws and regulation is sometimes explained as looking at whether a regulation has the effect of forcing certain landowners to provide an affirmative benefit for the public, when the burden of providing that benefit is one that should actually be carried by society as a whole.

(p.7).

The County submits to the Department a superficial two-page analysis as to whether or not the proposed Amended SMP unconstitutionally infringes upon private property rights. OSF strongly disagrees with the County's analysis that the proposed Amendment satisfies the "nexus" and "rough proportionality" test set out in the case law by both state and federal courts. More fundamentally, the County's analysis ignores the many ways in which the proposed SMP mandates that property owners give up use of their land to provide a benefit to the public, under the guise of better protection for shoreline functions and values. The analysis does not address the generic 150-foot buffer combined with the draft SMP's requirement to protect vegetation, which would virtually create a "no build zone" for most of the upland portions of any property within SMA jurisdiction. The analysis fails to discuss Washington State's provisions for private property rights which are considerably more protective than those set out in federal law, interpreting the United States Constitution's property rights clause. In a superficial ways, the analysis mixes tests, discussing whether the proposed draft violates substantive due process protections. The question for a regulatory taking is not the validity of the regulation under constitutional due process protections, but whether the regulation "goes too far" to effectuate a taking of property. The criteria for the substantive due process versus regulatory taking tests differ substantially, and the County completely misses this in its analysis. The OSF strongly urges the Department to complete its own consistency analysis under the December 2006 AGO's Advisory Memorandum.

SPECIFIC COMMENTS

The OSF's comments on the proposed Amended SMP are grouped for ease of review by the Department to follow the outline of the proposed SMP. These comments are in addition to

the comments the OSF and/or its members will provide from an individual property owner/citizen perspective.

Article 1. Introduction

1. Purpose and Intent.

It is commendable that the County believes the "governing principles of this master program" require that its actions "must be consistent with all relevant legal limitations including constitutional limitations." The County is correct that its proposal cannot "unconstitutionally infringe on private property rights or result in unconstitutional taking of private property." Draft, p.1-4. However, as set out herein, the proposal does violate constitutional and statutory requirements and effectuates a regulatory taking in numerous contexts, thus making the document internally inconsistent. It also fails to integrate and coordinate with the policies of the Jefferson County Comprehensive Plan.

The purpose to "plan for restoring shorelines that have been impaired and degraded in the past" is a worthy goal. Draft, pp.1-2. At times in the proposed SMP Amendment, this goal is stated as a voluntary or non-regulatory item. Yet, at other times, for example in the use regulations for boating facilities, the requirement is set out in what appears to be mandatory terms. *See* Draft, p.1-5, Subparagraph 3.6.6, Policy 10. The SMA cannot be construed as imposing a mandatory requirement to restore shorelines, so all mandatory requirements for shoreline restoration found in the proposed SMP Amendment must be stricken. "No net loss" does not demand or equate to enhancement or restoration, except when compensatory mitigation is the only option.

2. Applicability.

The proposed SMP Amendment's provisions for administration and approval of exemptions, as set out in more detail below, go well beyond the bounds of the law. *See also* comments, *infra*, Article 9, Draft, pp.9-1 to 9-6. The County does not have the authority to "regulate" exemptions to shoreline substantial development permits in a way to effectively treat exemptions as permits. The proposed SMP deals with exemptions as permits by imposing use regulations or requirements when, in fact, issuance of an exemption is a ministerial act. For instance, the proposed SMP Amendment provides in several sections that shoreline exemptions must be "consistent with this program." Draft, pp.1-2, Article I, Subsection B.1 (p.1-3). This language appears to mandate compliance with all provisions of the SMP, including its use regulations, not just policies. The Shoreline Hearings Board struck down a similar procedure when it invalidated the SMA Rules originally proposed by Ecology. *See* SHB Case No. 00-337, 2001 WL 1022097 (2001). The OSF reasserts its objections to adoption of the County's Critical Areas Ordinance by reference as set out in the draft proposal, page 1-5.

3. Governing Principles.

Subsection 3.B, pp.1-4, 1-5, is generally well written, including the acknowledgement that the SMP must be consistent with the statute, and that the SMA controls. The problem, as set out in the OSF's detailed comments below, is that there are a significant number of inconsistencies with the Draft and the SMA as written and interpreted, especially out-right prohibition (and near prohibition) of exempt activities. The proposed SMP's approach is systematically one of over-regulation, with an undue emphasis on "protection" of shoreline functions and values via prohibitions. Once again, the SMA allows "alterations" to the shorelines, and those alterations will have some impact although significant impacts can be mitigated. The SMA in this regard states that impacts are to be minimized "in so far as practical."[8] The goal is not to prevent all impacts, but to mitigate significant or meaningful impacts to as far as practicable or feasible to avoid "net loss" of important shoreline ecological processes, that is to "minimize" down to unmeasurable, although some impact will always occur.

Sub-section 3.D, p.1-4, correctly sets out the law as to constitutional protections of private property; the problem is that the Draft as written will and does result in many unconstitutional takings, an internal inconsistency. The proposed SMP Amendment assumes impacts (which is not allowed), and mandates restrictions on private property for a public benefit without a showing of significant impact associated with a particular use or development of the shoreline. A regulatory taking must be compensated under the Washington State Constitution, Article I, § 16. There is a compensable taking if shoreline property owners alone must bear the cost of creating no-development fish and wildlife conservation buffers. The Washington State Office of Attorney General in this regard states:

> The federal and state constitutions do not require the government to compensate landowners for every decline in property value associated with regulatory activity. However, government action that tends to secure some affirmative public benefit rather than preventing some harm, or that is extremely burdensome to an individual's legitimate expectations regarding the use of property, or that employs a highly burdensome strategy when other less burdensome options might achieve the same public objective, raises the possibility that the action may be a taking of private property. A useful way to approach this principle is to consider whether there is any substantial similarity between a proposed regulatory action and the traditional exercise of the power to condemn property. When government regulation has the effect of appropriating private property for a public benefit rather than to prevent some harm, it may be the functional equivalent of the

[8]See Definitions, "Feasible," p. 2-15.

> exercise of eminent domain. In those cases the payment of just compensation will probably be required.

Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property (December 2006).

While the proposed SMP states that it is "fairly allocating the burden of preventing cumulative impacts among development opportunities," (p.1-5), nowhere in the document does it explain how that is occurring. By expanding the "natural" designation so precipitously, almost all the burden is being placed upon rural shoreline owners in less developed areas and on new development. A more fair approach would be to establish several less onerous shoreline designations such as "rural" and "semi-rural." The "natural" designation should be reserved only for areas that are truly pristine. Instead, the County uses this as a backhanded way to prevent development, including residential development.

In subsection F, Adoption by Reference, pp.1-5, 1-6, Jefferson County assumes that by adopting its CAO by reference in the SMP, it has complied with the law. This is not correct, as set out below.

4. Critical Areas Regulations Adopted by Reference

This subsection is patently illegal. The public may properly ask, "What is the point of revising the SMP, if the Jefferson County CAO regulations are adopted by reference, and the most restrictive requirements apply?" Once again, the standards and circumstances for upland critical area regulation differ substantially from SMA regulations for marine areas. There is no showing in any of the documents prepared to date by Jefferson County, including the Shoreline Inventory, that all areas regulated by the SMA are "critical areas" as those terms are defined by the GMA for freshwater and upland areas.

8. Liberal Construction

Subsection 8, Draft, p.1-6, liberal construction, goes too far, beyond what RCW 90.58.900 allows. *See also* Definitions, p. 2-25. The standard " . . . but also taking its deemed or stated purpose into account" is too subjective. It presumes ambiguity in language, which is not allowed under the rules of construction established by the Courts. The SMA Administrator does not adopt the SMP, but is impermissibly empowered to decide what the "deemed purpose" is, thereby effectively legislating. This is undue discretionary authority given to a non-elected official, in the opinion of the OSF.

Article 2. Definitions.

OSF's comments on definitions are tied into specific comment in other sections of the proposed SMP Amendment, as set out herein.

Article 3. Master Program Goals

Article 3, subparagraph 1-B, Conservation, sets out goals that include enhancement and promotion of restoration and enhancement of shoreline areas such as native shoreline vegetation. OSF does not believe that these goals can be implemented through mandatory, prescriptive regulations. Further, the goals are extremely broad and vague. At minimum, it suggests that the words "consistent with the SMA and the specific use policies set out herein in this SMP" should be added as qualifiers.

In the Economic Development Goal (10), Draft, p.3-1, the statement is made that activities "should not disrupt or degrade the shoreline or surrounding environment." Subparagraph 2-B. The OSF agrees with this standard, with insertion of the words "materially" or "substantially." *See also* Definition, "Adverse Impact (p.2-2). This basic comment applies to many sections of the proposed SMP Amendment, which fail to use qualifiers mandated by the law and common sense. As set out in the *King County Boundary Review* case, all land development use will have some impact, and the purposes of state laws (including the SMA, SEPA and the GMA) are to prevent significant impacts through use of reasonable mitigation and good planning. If no impact can occur, no new development or use could ever happen, but this State's land use and environmental laws have not and do not impose a moratorium on all new development. Thus, it is inappropriate to suggest that immeasurable impacts be prevented when the law assumes such impacts will occur and mitigated development is allowed. Over-regulation is a disincentive to encouraging voluntary efforts to both mitigate impacts and enhance and restore the shorelines.

The restoration and enhancement goals (Subsection 6), Draft, p.3-4, are excellent, particularly the goal to provide "fundamental support to restoration work by various organizations by identifying shoreline restoration priorities, and by organizing information on available funding sources for restoration implementation." The problem, as set out above, is that the County's work to date on the Shoreline Inventory is superficial. Without a well thought out and documented shoreline inventory which serves as the base for the restoration plan, it seems that the language regarding restoration and enhancement has insufficient substance.

Turning to Subsection 7, Shoreline Use, pp. 3-4, 3-5, the OSF has reservations with Goal B-1, "compatible with the ecological functions and values of shoreline processes" and "avoid disruption of natural shoreline processes." The concept of "significant" and "important processes" needs to be factored in, plus the concept of "unmitigated disruption". Adequate project mitigation is required under the permitting process which ensures there will be no "unmitigated disruption" of important natural shoreline processes. If adequately mitigated, the "no net loss" standard is achieved.

Goal 5, Draft, p.3-5, which requires that all new development be "consistent with" the Land Use and Rural Element and other pertinent sections of the Comprehensive Plan and the Growth Management Act is good, in that it mandates low intensity rural shoreline use. But why

is this local circumstance not factored into the Draft's use regulations, which presume extensive new development, and thus, imposes a highly prescriptive approach? Once again, the Draft is internally inconsistent.

The reference to "encourage uses allowed for or include restoration so that areas affected by past activities or catastrophic events can be improved" is unclear. Is the County requiring shoreline property owners to ameliorate the impacts of natural phenomena, for example, mud flows or slides, that cover fish spawning habitat? This should be clarified between the Department and the County.

Article 4. Shoreline Jurisdiction and Environmental Designations and Use Matrix

The Use Matrix, Table 1, Draft, pp.4-6 through 4-8, is extremely onerous. Under the Matrix, many common shoreline uses are either prohibited outright, or made conditional uses. For example, new residential family homes and normal appurtenances are made conditional uses in the Natural Environment, and bulkheads are prohibited outright, and made conditional uses in every other shoreline environment. These standards conflict with the SMA for exempt structures.

The OSF has significant concerns with the proposed "official shoreline map." It is obvious that Jefferson County is enacting new shoreline designations, including Priority Aquatic, which have use regulations that severely restrict shoreline use and development. Thus, what areas constitute the more restrictive shoreline environments, including Priority Aquatic, Conservancy and Natural, becomes of utmost importance. The State Guidelines do not mention a "Priority Aquatic" shoreline environment, so the basis for this new designation is unknown. Such basis, if any, should be explained to the public so meaningful comment is possible.

The shoreline designations must be based upon "existing and planned development patterns." Article 4, Subsection 2.B.3, Draft, p.4-2. According to the cumulative impacts analysis, seventy-percent of Jefferson County shorelines have already been developed, most pre-GMA zoning. Thus, future trends will not match historic patterns, but in fact, will be low intensity residential development. Therefore, there is no need to expand highly restrictive shoreline designations such as the Natural designation based upon these local circumstances. After all, the most dense rural zoning category is one dwelling unit per five acres, (1DU/5A) with some at 1DU/10A or 1DU/20A.

According to the Draft, the Natural Environment is one which contains "shoreline areas that are intact, have minimally degraded functions and processes, or are relatively free of human influence," (Draft, p.4-3), a standard not found in the SMP Guidelines. In reviewing information in the record, under the existing SMP, 97,754 lineal feet of shoreline is designated "Natural." The OSF believes that the increase in the Natural Shoreline Environment is not consistent with the State Guidelines, WAC 173-26-211. The Natural designation is extremely restrictive, making most development subject to a CUP approval, if not outright prohibited. This cedes

much future regulation to the Department of Ecology via CUP approvals for benign shoreline uses and developments and ignores actual circumstances. The OSF urges the Director to carefully look at the proposed new shoreline maps and substantially cut-back the proposed "Natural" designation.

Once again, the OSF urges that Ecology consider and direct Jefferson County to enact additional shoreline designations which better reflect general factors set out at page 4-2 of the plan, subsection 2, Shoreline Environment Designation – Purpose and Criteria. Existing development patterns in eastern Jefferson County would more appropriately fit into "rural" or "semi-rural" categories, where moderate use and growth consistent with GMA large lot zoning is allowed.

Article 5. Shorelines of Statewide Significance

Some context is in order before providing specific comments. It has been this advocate's experience that the concept of "shorelines of statewide significance" has been misunderstood by local planners and decision-makers. The Director understands that all areas of Puget Sound and the Straits of Juan de Fuca between the ordinary high water mark and the line of extreme low tide are deemed "shorelines of statewide significance." RCW 90.58.030. This designation does not change the balance of the SMA in terms of reasonable use and development of shorelines, however. This point was made by the Supreme Court in *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985).

Under the SMA and cases construing its policies, designating a shoreline as of state-wide significance only "provides greater procedural safeguards;" it does not prohibit "alteration of the natural shorelines" for reasonable and appropriate shoreline uses, especially the preferred water-dependent uses such as private residential docks and piers. *Nisqually Delta Ass'n v. City of DuPont, supra*, at 726. RCW 90.58.020; *see also* WAC 173-26-176(2); *Buechel v. State Dept. of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994); *State Dept. of Ecology v. Ballard Elks Lodge No. 827*, 84 Wn.2d 551, 557 P.2d 1121 (1974).

Subsection 3 of Article 5, Use Preferences, Draft, p.5-2, contains concepts that are not supportable in the opinion of the OSF. For one, Sub item A(1) states that "when shoreline development or redevelopment occurs, it shall include restoration and/or enhancement of ecological conditions as such opportunities exist ...." The problem with this section is that it is stated in mandatory terms. As set out above, restoration and/or enhancement of ecological conditions cannot be mandated under the SMA.

Article 6. General Policies and Regulations

The OSF has significant concerns with Article 6, starting at p.6-1 of the Draft. Article 6 is of importance, because according to the Draft, the "policies and regulations in this article apply to all uses and developments in all shoreline environments."

Under Subsection 1, Critical Areas, Shoreline Buffers, and Ecological Protection, the first policy (B.1) states that "uses and developments that may cause a future ecological condition to become worse than current conditions should not be allowed." *See also* subsection B(2). The "may cause" concept is too vague. At a minimum, regulation should be based upon reasonably foreseeable consequences, not conjecture, and be tied into "significant unmitigated impacts". Further, it is not the ecological condition *per se* that is the concern of the SMA regulation, but rather, truly critical shoreline functions and values. The language appears to read out of the law the opportunity to mitigate impacts. It is best that this language is simply stricken in favor of the next subsection (B), "Regulations, No Net Loss in Mitigation," Draft, p.6-2. Policy B.2, Draft, p.6-2, which only needs qualification, such as insertion of the words "significant" or "important."

In terms of the proposed mitigation standards found at p.6-2 of the Draft, nexus and proportionality are not addressed. Without incorporation of these standards, the proposal violates both RCW Chapter 82.02 and constitutional standards.

RCW 82.02.020 prohibits counties from imposing a "tax, fee, or charge, either direct or indirect, on ... the development, subdivision, classification or reclassification of land" unless "reasonably necessary as a direct result of the proposed development or plat." As set out below in the comments on residential development (open space and mandatory vegetation protection or set-asides), the proposed SMP Amendment violates this statutory prohibition, in particular, its incorporation of the CAO.

Washington's courts have interpreted RCW 82.02.020 to contain a statutory requirement that local government establish a "nexus" between a restriction on the property and the identified impact, as well as a limitation that the developer's required contribution to the solution of the problem be proportionate to his contribution to the problem itself. *See Citizens Alliance, supra.*[9]

To meet RCW 82.02.020's "reasonably necessary" requirement, or nexus, an ordinance or land use decision containing a development condition or exaction must be tied to a specific, identified impact of a development on a community. *Unlimited v. Kitsap Cy.*, 50 Wn. App. 723, 727 (1988). *Cobb v. Snohomish County*, 64, Wn. App. 451, 467-68 (Agid J., concurring and dissenting in part) (Internal citations modified); *see also Isla Verde Int'l Holdings, Inc. v. City of*

[9] RCW 82.02.020 places the burden on the local government to demonstrate nexus. *See Isla Verde*, 146 Wn.2d 755056; *Home Builders Ass'n of Kitsap County v. City of Bainbridge Island*, 137 Wn. App. 338, 340 (2007). To do so, a local government "must show that the development . . . will create or exacerbate the identified public problem." *Burton v. Clark County*, 91 Wn. App. 505, 521 (1998). This means that a local government must demonstrate a nexus between the condition and the impact caused by development to legally impose project mitigation. *Nollan*, 483, U.S. 837 (1987). *See also* R. S. Radford, *Of Course a Land Use Regulation That Fails to Advance Legitimate State Interests Results in a Regulatory Taking*, 15 Fordham Envtl. L. Rev. 353, 390 (2004) (local government must demonstrate "a close casual nexus between the burdens imposed by the regulations and the social costs that would otherwise be imposed by the property's unregulated use.") "It is the requirement of a cause-effect nexus, not a means-end fit, that offers real protection against the imposition of unjustified or disproportionate burdens on individual property owners." R.S. Radford, IId. at 391.

Camas, 146 Wn.2d 740, 761 (2002); *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 242-44 (1994).

Addressing constitutional standards, case law establishes rigorous requirements for nexus and proportionality which have been set forth by the United States Supreme Court and elaborated upon in Washington. *See. e.g., Nollan v. Cal. Coastal Comm'n, supra.; Dolan v. City of Tigard, supra.*; *Benchmark Land Co. v. City of Battleground*, 103 Wash. App. 721, 14 P.3d 172 (2000), *aff'd on other grounds in Benchmark Land Co. v. City of Battle Ground,* 146 Wn.2d 685, 695, 49 P.3d 860 (2002)*; Burton v. Clark County*, 91 Wn. App. 505, 520, 958 P.2d 343 (1998) (County conditioning of approval of a three-lot short plat on the landowner's dedication of road right-of-way constitutes unconstitutional taking). The reason for requiring the municipality to demonstrate the impact of the development is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). If this standard is not met, a compensable regulatory taking occurs. *See* discussion, *infra.*

The OSF believes Jefferson County does not have any authority to require a shoreline property owner to remove existing bulkheads. *See* Draft, p.6-3 (Subsection B.7). Under SMA exemptions for repair and maintenance of existing structures, existing bulkheads that were legally permitted, and other developments legally permitted or which predate adoption of the SMA in 1971, can be repaired and maintained. While the County may be able to "encourage" shoreline property owners to remove such structures through a redevelopment process, it cannot be mandated. In other portions of the draft SMA, the County uses the terms "strongly encourage" property owners to take actions such as removal of existing bulkheads. It is hoped that in practice, the concept of "strongly encourage" does not become a mandate. It is urged that this language be stricken, since bulkheads are allowed exempt structures.

The OSF has other concerns with Subsection C, "Regulations – no net loss and mitigation." First, the requirement that even exempt structures be located, designed, constructed in a manner that maintains shoreline ecological processes and functions may not be fully workable and applied literally violates the SMA. The question becomes one of protecting property and persons versus the environment. The Washington Legislature has already made this choice in terms of allowing exempt activities, including development of single family homes on shorelines, and protection through bulkheads of homes constructed before January 1, 1992. *See* RCW 90.58.100(6). Where is RCW 90.58.100(6) in the proposed SMP Amendment?

Second, in Subsection C, "Cumulative Impacts," it is stated that "the County shall prohibit any use or development that will result in unmitigated cumulative impacts." (Draft, p.6.4). Without a much better Shoreline Inventory and Cumulative Impacts Analysis than prepared to date, this language when implemented will likely preclude future use and development. If a property owner demonstrates, through a site specific analysis pursuant to Subsection C.2, that there is no net loss to significant shoreline functions and values, then the

County should as a matter of policy agree that cumulative impacts are not an issue, because no meaningful impacts are created requiring "cumulative analysis."

Stating as much, the OSF questions the need for a cumulative impact analysis from an applicant for common shoreline uses and developments. Ecology has issued a report on its Guidelines for "no net loss," which states in part:

> For such commonly occurring and planned development, policies and regulations should be designed without a reliance on an individualized cumulative impact analysis. Local government shall fairly locate the burden of addressing cumulative impacts.
>
> For development projects that may have un-anticipated or uncommon impacts that cannot be reasonably identified at the time of master program development, the master program policies and regulations should use the permitting or conditional use permitting processes to ensure that all impacts are addressed and that there is no net loss of ecological function of the shoreline after mitigation.

Subsection 6.1.C(1), Draft, p.6-4, states that the County "should consider the cumulative impacts of individual uses . . .". This contradicts Ecology's guidance set out above for implementation of its own guidelines for SMP updates. As written, the proposed policies and regulations fail to recognize and implement exempt preferred uses, thereby unduly restraining if not outright prohibiting traditional and common shoreline uses and developments. This section requires a substantial rewrite in the opinion of the OSF.

Turning to Subsection D, "Regulations, Critical Areas, and Shoreline Buffers" (Draft, p.6-4), the OSF repeats its objections to integration of JCC Chapter 18.22, and its incorporation by reference. The CAO is based on freshwater conditions. The OSF also repeats its objections to the generic shoreline buffers established in Subsection 6, p.6-5. There is no factual, scientific, or legal basis for a "minimum buffer" of 150 feet on all shoreline environments, nor the restrictive vegetation retention policies found at p. 6-5 of the Draft, Subsection 9, Buffer Conditions.

It appears that the proposed SMP Amendment does not provide for a reasonable use exception, or, at a minimum, the Draft is confusing on this point. It states that if a proposal requires a reasonable economic use variance of the provisions of JCC § 18.22.090, it "shall be processed as a shoreline variance according to the provisions of this program at WAC 173-27." Does this mean that the shoreline variance criteria apply, or the criteria for a reasonable use set out in the CAO? This needs to be clarified. If the intent is the former, a shoreline variance is extremely difficult to attain, so in the opinion of the OSF there is effectively no reasonable use exception for shoreline use or development. This needs to be factored into the consideration, and is another reason to discount Jefferson County's superficial regulatory taking analysis.

Turning to the policies on non-conforming lots, Article 6, Subsection E, these are unduly onerous and an issue because of imposition of the large generic buffers. The OSF has read self-serving "questions and answers" on the County's SMP Update website, assuring the public that the 150-foot buffer and vegetation set asides, among other regulatory requirements, are not going to affect existing development or property values. It also states that shoreline property values have gone up in the past, so there is no need to worry about a diminishment in land values. With due respect, this is disingenuous and not supported by citizen comments or those of real estate professionals. The proposed SMP Amendment has significant restrictions, as the OSF sets out below, as to nonconforming uses, developments and lots. In determining property values, the most fundamental requirement is to assess "comparables." There is nothing comparable in the old SMP compared to the new in terms of proscriptions and limitations, including the 150-foot generic buffer. The shoreline is an amenity. It is reasonable to expect that the value of a shoreline lot is greater if it can be protected by a bulkhead from loss of land (if not imminent risk to the structures), and to have beach access stairs, and/or a private dock/mooring buoy. It is also reasonable to expect that the value is enhanced if meaningful development can occur close to the slope to enhance views, on the one hand, and to have some vegetation management on the other, such to provide for normal amenities such as a front yard, play areas, etc. All of these are severely constrained by the new SMP.

Turning to specifics, small lots could easily be precluded from development under Subsection ii, Draft, p.6-6. For example, it is entirely possible that a driveway could be more than 1100 square feet if a lot is long and narrow.

The approach set out in this section of the proposed SMP Amendment is inconsistent with Comprehensive Plan policies. Planning decisions must be "consistent with the intent of the Comprehensive Plan." Plan, p. 1-16. The Plan protects non-conforming uses and allows them to be replaced or expanded. Plan, Goal LNG 8.0, Plan, p. 3-54. According to the Comprehensive Plan, "a legal nonconforming use may change to a different non-conforming use of equal or less intensity." Policy LNP 8.7, Plan, p. 3-55.

Addressing Subsection 24, Vegetation Conservation, Draft, p.6-18, the OSF repeats its remarks already made. First, the science does not support imposition of large vegetation buffers on marine areas. Second, the SMA does not provide a mandate or authority to "preserve native vegetation" or compel new uses or developments to establish "new native vegetation such that the composition, structure, and density of the planned community resemble a natural unaltered shoreline as much as possible." Further, the OSF does not believe that the County has authority to mandate that existing shoreline homeowners maintain vegetation as a "preference" over clearing vegetation to create views or provide lawns. Once again, these generic set-asides violate RCW 82.02. *See Citizens Alliance v. King County.*

Jefferson County should certainly have a goal of maintaining native shoreline vegetation to the extent possible. However, the imposed mandates of a 150 foot generic buffer, and 80%

vegetation retention, are much more than a goal – they are preclusive and regulatory in violation of RCW 82.02.

The OSF supports the sections of the proposed SMP Amendment requiring that shoreline property owners use innovative techniques where feasible to maintain existing native shoreline vegetation and the provisions for view maintenance, Draft, p.6-18, Policies, Goal 5. However, the OSF supports none of the suggested changes for this subsection, including the onerous performance standards for approval of "view maintenance" under Subsection 8, Regulations. Prohibiting "tree topping" poses a threat to public health and safety. Requiring a dead or dangerous tree once cut-down to remain on-site for "wildlife habitat" is over-regulation. There are sufficient downed, dead and dangerous trees in existence on public lands. To require a property owner to maintain a hazard to human safety goes too far.

In Subsection 25, Water Quality and Quantity, Draft, p.6-22, the policies and regulations are reasonably well thought out and drafted. The OSF believes that water quality and quantity can be protected through existing storm water management controls and regulations, "green development" techniques, and other measures without the need to impose large generic buffers or vegetation retention or restoration requirements. *See* Integration Study. *See also* Comprehensive Plan, Stormwater Management Policies, pp.3-25, 3-26; pp.3-66, 3-67; Table 8-1, p.8-2.

Article 7. Shoreline Modification Policies and Regulations

The OSF has concerns with numerous sections of this article. Its policies and regulations apply to "all types of shoreline modification" and are applied along with specific standards defined for each shoreline environment. These are in addition to use-specific policies and regulations set out in **Article 8**.

Commencing with beach access structures, Section 1, Draft, p.7-1, the County prohibits these benign structures on "marine feeder bluffs in all shoreline designations." Draft, p.7-2. These terms are defined so broadly as to essentially include all bluffs. *See* Definitions, Draft, p.2-16. Thus, applied literally, for all practical purposes beach access stairs would be prohibited. As this does not appear to be the intent, redrafting is required. One solution is to require a site specific analysis and drop all references to prohibitions.

Access stairs are not built to stabilize a slope, so the natural processes and sediment deposition and transport operate independently of the stairs. *See* Attachment 6, OSF September 8, 2009 comment letter. Access stairs do not keep soil from reaching the beach. Contractors build stairs to follow the natural slope of the bank and the work can be done by hand tools without using heavy equipment. Thus, impacts to slopes will not occur.

The OSF strongly objects to the over use of a conditional use permit for shoreline access structures such as access stairs and many other structures or developments. *See* Subsection C, Shoreline Environmental Regulations, Draft, p.7-2, for all the shoreline designations. Shoreline

access devices are not of such consequence that a conditional use permit is justified. Access stairs are a normal appurtenance to a single-family home and should be exempt, so a prohibition is totally out of order.

Addressing Policy 2, Draft, p.7-1, while Jefferson County claims to recognize a balance between access and fragile ecosystems, the OSF believes the Draft policies unfairly burden and take away from an applicant/private property waterfront owner the right to have access stairs. The record demonstrates that in Jefferson County there were four building permits issued from January to July of 2009 for new stairs to the beach. There was a total of four permits in 2008 and five in 2007. Beach access stairs are very low in square footage with the average being around 200 square feet. Other jurisdictions commonly allow beach access stairs, many by allowing them as exempt appurtenances to a single family home.

Turning to the regulations for beach access stairs, Subsection D.5, Draft at p.7-2, the standards of five-foot width and 12-foot vertical height above the bank or slope appear unworkable. Apparently the County's concern is that access stairs should not be allowed to protrude excessively from the slope and thus negatively affect the view/aesthetics of the shorelines. An appropriate standard is to have the 12-foot height be measured at the top of the bluff. A sensible width standard is seven feet, not five feet, according to the record. Limiting the width to only five feet would not allow a property owner to have a sufficient landing.

The prohibition on beach access stairs if other available public beach access is available within 500 feet is an arbitrary preclusion. Regulation No. 10, Draft, p.7-3, prohibiting beach access stairs for "adverse impacts to a critical area or marine feeder bluff, etc." should include qualifiers such as "significant adverse impacts" or "significantly increased landslide or erosion hazards."

The regulations provide for a site specific study, which is good, if the County is willing to be bound by the study and allow beach access stairs if there is no net loss. Imposition of a site specific study obviates the need for prohibitions, such as those applicable to a feeder bluff.

In sum, the County's approach to beach access stairs ignores the preferential accommodation to single-family uses set out in RCW 90.58.020 and local circumstances which in Jefferson County include a large number of banks on shorelines which require some form of beach access. Beach access stairs are limited to certain areas where site-specific conditions work for these structures and in those circumstances they are vitally important and necessary to allow people with disabilities or young children to connect to the shoreline for recreational uses.

Subsection 22, Boating Facilities, Etc., Draft, p.7-4, includes boat launches, docks, piers, floats, lifts, marinas and mooring buoys. There are significant problems with this section. Found within these provisions are important policy choices which must be carefully considered by the Department. For one, the draft proposes that docks and piers should not be allowed where shallow depths require "excessive over water length." Subsection 22.A.3. There is no standard

for what is deemed "excessive." Without some redrafting, this section could preclude docks and piers on most if not all shallow bays or lakes located within Jefferson County. This would conflict with state exemptions for these structures.

The OSF in general does not have a difference with Policy A-4 as to controlling the number of new docks/piers/floats, through design and location standards. In part, these are already mandated as the Army Corps of Engineers requires compliance with its design standards to attain a Section 404 permit. In addition, the WDFW has design and location standards for salt water piers, pilings, docks, floats, rafts, ramps, boat houses, house boats, and associated moorings, set out in WAC 220-110-300. In *Samson v. City of Bainbridge Island*, the courts approved an SMP amendment which prohibited new private dock construction in a small bay where a public dock and two neighbor community docks were allowed. Thus, tools already exist to deal with docks though not in a heavy handed fashion, since these water dependent facilities promote public recreation. In this regard, the OSF urges that the Department read these sections of the SMP along with how the County proposes to regulate new marinas. The OSF submits that the County's approach toward marinas is very restrictive. There must be some give and take here. If new marina construction or expansion is going to be severely restricted, then more consideration needs to be given to allowance of private docks. If private docks are going to be curtailed to an extent in the future, then given public demand for access to the waters, reasonable and necessary boating facilities must be enhanced by encouraging new marina construction. There is no SMA mandate that says the public can only access the water through public parks. On the last point, the public park system is stressed because of current economic conditions. Private marinas and private dock facilities can help at least in the sense of alleviating some pressure through provision of alternative facilities for some shoreline owners and users.

Overall, the draft exhibits a bias against docks, piers, floats, boat launches, marinas and mooring buoys. This is wrong. These structures are preferred water dependent uses under the SMA, RCW 90.58.020, and promote access to the waters of the state. This approach is not consistent with the SMA. The courts have ruled that private facilities which provide access for private individuals meet SMA priorities for public access to the waters of the state, since private property owners "are part of the public." *See*, *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 589-90, 870 P.2d 987 (1994). *See also, Caminiti v. Boyle*, 107 Wn.2d 662, at 673-74, 732 P.2d 689 (1987):

> *[O]ne of the many beneficial uses of public tidelands and shorelands abutting private homes is the placement of private docks on such lands so homeowners and their guests may obtain recreational access to navigable waters.* No expression of public policy has been directed to our attention which would encourage water uses originating on public docks, as they do, while at the same time discouraging any private investment in docks to help promote the use of public waters.

(Emphasis added).[10]

The balance envisioned by the SMA anticipates that there will be some impact to shoreline areas by development (*e.g.*, new facilities can be observed), because alterations of the natural conditions of the shorelines must be recognized by Ecology. RCW 90.58.020. *See, Biggers*, P.3d at 22 ("The SMA embodies a legislatively determined and voter-approved balance between protection of the state shorelines and development .... As part of our careful management of shorelines, property owners are also allowed to construct water-dependent facilities such as single-family residences, bulkheads, **and docks**."). (Emphasis supplied)

It is noted that in the Shoreline Environmental Regulations, almost all of the facilities are handled as conditional uses. Once again, except for perhaps a marina, there is no point to have single-use docks, moorages, boat launches and so forth denominated as conditional uses. This approach is an expansion of regulation and in the opinion of the OSF unduly delegates the local permitting process to the Department of Ecology because of undue concern over "cumulative impacts." Once again, docks are an accepted part of the marine environment. There is no showing that when the voters in 1971 approved the SMA as a mandate from the Washington State Legislature, private docks would be expected to be precluded if impacts were mitigated. The CIA notes that in many portions of eastern Jefferson County, there are steep bluffs and docks are simply not feasible. What should also be taken into account is the huge expense to obtain permits for docks, and related construction expenses. It is obvious that the County did not consider any of these factors in its proposed regulations for new private docks, but the Department should take these into consideration.

Some perspective is in order here. Private and public docks, boat launches, etc. provide significant access to the waters of this state for the public. Boat launches, docks, piers, floats, marinas and mooring buoys all encourage recreational use and access. It is acknowledged that there will be some impacts with construction and use of these facilities, but under modern regulatory requirements, these are minimal. *See* Pentech Study, OSF comment letter dated January 19, 2009, attached to the September 8, 2009 OSF comment letter. The SMA encourages alterations to the shoreline for priority uses, which include recreational use and access and mandate protection only to the extent "practical" or "feasible."

The Draft substantially over-regulates mooring buoys, as policies on their use exist promulgated by the State of Washington Department of Natural Resources. The State of Washington Department of Fish and Wildlife also requires a Hydraulic Use Approval for these devices. The County should simply be prepared to issue a shoreline exemption consistent with WDFW state guidelines. To require mooring buoys to be permitted subject to a conditional use permit in any shoreline environment is excessive over-regulation.

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[10] The DOE Guidelines similarly recognize docks and piers associated with a single-family home as water dependent preferred uses: "as used here, *a dock associated with a single-family residence is a water dependent use* provided that it is designed and intended as a facility for access of watercraft and otherwise complies with the provisions of this section." WAC 173-26-231(b).

Turning to private residential dock regulations, Subsection F, Draft, p.7-9, under local conditions, the 60-foot limitation in length is arbitrary and will preclude many shoreline owner from reaching "blue water." If approved, it should be expected that boats would routinely ground and the facilities would be useable only for certain periods of the year under favorable tide conditions. A better approach is to allow docks to extend to a certain mathematical point in relation to the line of extreme low tide minus 4.5 feet, such as four feet below -4.5. Other jurisdictions, such as the City of Bainbridge Island, utilize this approach.

Modern regulatory standards for design of docks, and location and design of bulkheads, and other appurtenances commonly associated with single family development, combined with SEPA and the SMA permitting system, ensure that there will be no significant adverse impacts.

The OSF has significant concerns with Subsection 8 of Article 7, commencing at p.7-29, entitled "Structural Shoreline Armoring and Shoreline Stabilization." It is noted that Policy No. A-1 states that "... the County should take active measures to preserve natural unarmored shorelines and to prevent the proliferation of bulkheads and other forms of shoreline armoring." This view skews the SMA policies, elevating one policy over others, including those which allow the alteration of the shoreline to provide benefits associated with priority or uses. It also exhibits a strong prejudice against shoreline armoring without analysis as to whether existing regulatory systems adequately protect the environment or if the presumed "problems" are in fact demonstrated.[11] Once again, the County's proposed SMP must allow protection of structures

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[11] The OSF requests that the Department take into account that modern systems which mandate better location of bulkheads and shoreline armoring prevent the horror stories seen in the past, where large fills and seawalls were allowed well below the ordinary high water mark, with attendant adverse impacts:

> First, some historical perspective, based on my 18 years as a marine fish biologist and fishery manager with Washington Department of Fisheries, is useful. Prior to the discovery of upper intertidal (mostly in the +6 to +10 foot MLLW elevations) spawning by surf smelt, Pacific sandlance, and rock sole in sand/pea gravel substrates in reaches of many shorelines in the 1970s and 80s, many bulkheads were built over this intertidal zone without much general public regard for the value of the intertidal to salmonids or forage species that depend on this zone. Many shoreline residents did not, not only to protect property, but also to increase dry land. Regulations and policies were appropriately promulgated to severely restrict indiscriminant construction of marine bulkheads. This was especially true below the Mean High Water (MHW) elevations on beaches with documented forage fish spawning. It is my understanding that the waterward edge of the proponents' proposed bulkhead is sited well above the MHHW elevation, near or above the Ordinary High Water Mark (OHWM).
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> A rock bulkhead will not eliminate overhanging vegetation, shade, availability of terrestrial insects, or leaf litter. This is evident from other sites I have visited, where the bulkhead is landward of the MHHW tidal elevation. As woody material breaks off in high wind or dies and rots, it will fall down over the top of the bulkhead. The new bulkhead would allow more vegetation to grow and actually save the trees (valuable for bald eagle perching) at this site. I have seen many other examples of stabilized riparian trees overhanging rock bulkheads covering the upper intertidal zone. The proposed bulkhead will not result in "coarsening" of this beach. Because of the setting (vertical concrete bulkheads on either side), it will remain a "pocket beach" that continues to collect sand.

Report, April 8, 2008, Mark G. Pedersen (former WDFW employee), Kitsap County Hearing Examiner, Case No. 07-45866.

built before January 1, 1992. Where is this mandate taken into account? OSF does not see it, thus the Draft is in conflict with the SMA.

Because the SMA allows single family owners a protective bulkhead where necessary, it is unclear under what authority the County urges that the Department approve a policy that new structural armoring is allowed only when other alternatives are "infeasible." Policy A-3, Draft at p.7-30. This same statement applies to Policy 13, which reads:

> Where feasible, any failing, harmful, unnecessary, or ineffective structural shoreline armoring should be removed, and shoreline ecological functions and processes should be restored using non-structural methods.

Draft, p.7-31. Restoration cannot be mandated.

As the OSF understands the SMA, however, it does not believe that Jefferson County can mandate that other options, such as beach nourishment or "soft bank" measures, be considered to the exclusion of a "hard" rock protective bulkhead nor can the County exclude armoring for new land subdivisions. For some sites with high wave energy and long fetches, the existing literature demonstrates that "soft bank" facilities or techniques are not feasible, *See, e.g. Alternative Bank Protection Methods for Puget Sound Shorelines* (Zelo, et al., 2000). If the report shows compliance with the "no net loss standard," a bulkhead should be allowed.

The OSF requests the justification for the prohibitions on armoring private property in the Aquatic, Aquatic and Natural shoreline environment found at p.7-31 of the SMP Draft, Subsection B, Shoreline Environmental Regulations. In addition, there is no need to require a conditional use permit for these facilities in the other shoreline environments, particularly the Shoreline Residential and High Intensity environments. There is also a conflict. The proposed use regulations appear to prohibit shoreline armoring to "protect new residential developments", and severely limit maintenance of existing structures (Subsection C, Regulations, Draft, p.7-33). However, the SMP allows such devices under the exemptions. In this regard, the SMA provides that the construction of a "normal protective bulkhead common to single family residences" is not considered a substantial development but exempt. RCW 90.58.030(3)(e)(ii). *See also*, RCW 90.58.030(e)(i) (maintenance).

Jefferson County's approach as to residential bulkheads appears to be based in part on concerns as to "what might happen." The regulatory approach is based on theoretical harm and serves to exacerbate the mistaken belief that protecting the environment and private property rights are mutually exclusive interests. *See Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring) ("Done right, master plans can serve both needs."). Our Courts have repeatedly recognized this policy of balancing property rights and the environment:

> The SMA embodies a legislatively-determined and voter-approved balance between protection of state shorelines and development.

> The state has developed shorelines through improvement of parks and ramps, construction of bulkheads, ferry docks, etc. As part of our careful management of shorelines, property owners are also allowed to construct water-dependent facilities such as single-family residences, bulkheads, and docks.

Biggers, 162 Wn.2d at 697 (J.M. Johnson, J., lead opinion); *Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring); *accord Futurewise v. W. Wash. Growth Mgmt. Hearings Board*, 164 Wn.2d 242, 243 (2008) (J.M. Johnson, J., lead opinion) ("The SMA meant to strike a balance among private ownership, public access, and public protection of the State's shorelines."); *Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 7612 (1998) (The purpose of the SMA "is to allow careful development of shorelines by balancing public access, preservation of shoreline habitat and private property rights through coordinated planning ....").

The County's treatment of protective bulkheads also appears to proceed upon a presumption that land, in contrast to structures, is not worthy of any protection. The County's approach effectively is a *de facto* moratorium on bulkhead development, one which prefers that property owners lose land and structures for perceived benefits to the nearshore environment such as materials eroding from slopes to provide "natural" beach nourishment. In *Biggers v. City of Bainbridge Island*, this approach was struck down:

> The ultimate subject of this lawsuit is the construction of shoreline structures designed to protect the land of shoreline property owners. These structures are, by definition, improper subjects for City-issued moratoria because inaction leaves all shoreline property defenseless against erosion. *See, e.g.,* RCW 90.58.020 (calling for effective and timely protection for the shorelines of single-family residences.). Despite the clear violation of property owners' rights, the City embraced the moratoria as a means to refuse consideration of any permit applications, thereby deferring difficult development decisions.
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> Under the City's scheme, suspension of the application process left private property owners to bear the costs associated with this denial of process (including property erosion and economic loss). *See W. Main Assocs. v. City of Bellevue*, 106 Wash.2d 47, 51-52, 720 P.2d 782 (1986) (noting the costs to society where property owners cannot plan development with reasonable certainty). Clearly, the City's procrastination resulted in a physical degradation of those private owners' property without any direct cost to the City.
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> * * *

> The SMA embodies a legislatively-determined and voter-approved balance between protection of state shorelines and development. The state has developed **shorelines** through improvement of parks and ramps, construction of **bulkheads**, ferry docks, etc. As part of our careful management of **shorelines**, property owners are also allowed to construct water-dependent facilities such as single-family residences, **bulkheads**, and docks. Imposition of a total moratorium conflicts with this regulatory system established by the SMA.
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> The SMA also recognized there is an important function performed by structures that protect shorelines. The legislature's 1992 amendments to the SMA further emphasized the need for certain shoreline structures to provide for the protection of shorelines. This conclusion is illustrated by the SMA's provisions requiring prompt adoption of SMPs and shoreline structure permit processing.
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> The SMA contains an express "preference" for issuing such permits. RCW 90.48.100(6). Thus, the SMA also requires that all SMPs contain methods to achieve "effective" and "timely" protection for shoreline landowners. *Id.* SMPs must provide for "the issuance of substantial development permits for **shoreline** protection, including structural methods such as construction of **bulkheads** ...." *Id.* Permit application to local governments must be processed in a timely manner. *See Id.*
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> **A permit for substantial development on shoreline "shall be granted" when development is consistent with the applicable SMP and provisions of the SMA.** RCW 90.58.140(2). This is a mandatory provision included in each city-adopted SMP before Ecology approves: "[e]ach master program *shall* contain standards governing the protection of single-family residences and appurtenant structures against damage or loss due to shoreline erosion." RCW 90.58.100(6) (emphasis added).

162 Wn.2d at 685, 697-98 (emphasis supplied).

The objective is to minimize, not eliminate, impacts. A "no impact" standard is impossible to meet and is not required under the law. *See* Argument, *infra.*, SEPA. *See also*, *Cougar Mountain Associates*:

> Finally, the Council pointed to the adverse impacts on land use that would result from Cougar Mountain's proposal. The Council stated the obvious – that the addition of 90 new homes to the area would result in an impact on the existing land use. However, the only concern raised by the Council involved the potential conflict between traffic to the development and slow-moving agricultural traffic currently using the roads near the site of the proposed development. Council cannot merely state that a proposed development will have an impact on existing land use in an area. If this was the case, no development could occur in rural areas.

Cougar Mountain Associates v. King County, 111 Wn.2d 742, 756 P.2d 264 (1988). It is impossible to construct a bulkhead without some impact or change to the environment. The law allows this. If the law was to the contrary, "no change in land use would ever be possible." *Maranatha Mining v. Pierce County*, *supra*, at 804. *See also*, *Cougar Mountain Associates* at 753 ("SEPA seeks to achieve balance, restraint and control rather than preclude all development whatsoever.").

The SMA requires each local master program to protect "single family residences and appurtenant structures against damage or loss due to shoreline erosion." The provisions of any SMP ". . . *shall* provide for methods which achieve *effective and timely* protection against loss or damage to single family residences and appurtenant structures due to shoreline erosion." RCW 90.58.100 (6) (emphasis added), especially structures built before 1991. Where are such provisions in the proposed draft? It appears to the OSF that supportive language to protect older homes is missing.

The regulations for existing structural armoring are over preclusive and would not survive legal challenge in the opinion of the OSF. These regulations start at p.7-31 of the Draft. The OSF believes that the County is spot-on when limiting replacement or new bulkheads such to not encroach waterward of the ordinary high water mark of the existing structure unless the residence was occupied prior to January 1, 1992 or there are overriding environmental or safety concerns. However, the OSF opposes the regulation that a new bulkhead to protect a new platted lot where no primary use or structure presently exists "shall be prohibited." The SMA allows protection of both structures and land, as discussed in the *Biggers* case.

Other requirements apply, including that the replacement structure be designed, located, sized and constructed to assure no net loss of ecological functions. As noted, these provisions conflict with the SMA requirements for repair and maintenance of existing structures, which is exempt from SMA regulation in terms of a shoreline substantial development permit approval. The provisions are not consistent with the State Guidelines. WAC 173-26-231(3)(a)(iii)(c). Nor are they internally consistent with the exemptions found in the Draft at page 9-3.

It is noted that the Draft, p. 7-32, also seeks to prohibit use of a bulkhead revetment or similar shoreline armoring to protect a platted lot where no primary use or structure presently exists. If the County is asserting that there are public benefits to allow land to erode to the point of nothing, then this language effectuates a regulatory taking. It is also inconsistent with Comprehensive Plan policies for legal lots of record.

In the Draft, structural shoreline armoring is absolutely prohibited on all lakes in Jefferson County and "other low energy environments such as bays, in accreting marine shores." The OSF questions this preclusive approach without demonstration that other techniques will be adequate to protect land and property. In the record submitted to date, such a showing is not made. Further, residential bulkheads are exempt and allowed.

Going on, Subsection E, Regulations-New or Expanded Shoreline Armoring, states that when allowed, new structural shoreline armoring is permitted only to protect a lawfully established primary structure, such as a residence, that is in "imminent danger of loss or substantial damage from erosion caused by tidal action, currents, or waves." Draft, p.7-32. The regulatory standard in the SMA does not have such preclusive language, allowing "normal protective bulkheads" common to single-family residences. It is not common to wait to protect a home or property until the risk is "imminent."[12] The State Guidelines use the terms "significant possibility of damage." WAC 173-26-23(3)(a)(iii)(D), and defer to a geotechnical engineer to make the call. The definition of "imminent danger" is very subjective. Must the bank recede to the point of only five or ten feet from the primary structure before the subjective "imminent danger of loss" standard is considered met? The problem with this approach, as geotechnical engineers will support, is that loss of a bank or slope is episodic. In Puget Sound or the Straits of Juan de Fuca, an existing bank can slab off in portions of more than five or ten feet. The best approach is simply to stay with the language in the SMA for exemptions, the "protective" language. The subjective "imminent danger of loss" should be eliminated.

The OSF totally opposes language that a "hard" bulkhead is not allowed without first showing that other alternatives are "infeasible or insufficient." The Comprehensive Plan at most establishes a preference for non-structural methods. Plan, p. 8-24. Those terms have been interpreted by some jurisdictions as a mandatory requirement that other techniques first be utilized, then demonstrated to fail, before a hard protective bulkhead is allowed. This is a

[12] The common legal dictionary definition of "imminent" is "near at hand; mediate rather than immediate; impending; threatening; or perilous." BLACK'S LAW DICTIONARY 676 (5th ed. 1979). The common non-legal definition is similar: "about to occur, impending." AMERICAN HERITAGE COLLEGE DICTIONARY 679 (3d ed. 1993). There is nothing in the definitions that suggests that "imminent" means "within a certain time frame." Indeed, something that is imminent could be about to happen within seconds or even years. For example, the City of Seattle recognized that "global warming represents a clear and increasingly imminent danger to the economic and environmental health of the world, and to specific qualities of life for the Seattle area. . . ." *See Okeson v. City of Seattle*, 159 Wn.2d 436, 440, 150 P.3d 556 (2007) (in reference to a City ordinance mitigating effects of greenhouse gas emissions). If global warming presents imminent danger, a rapidly retreating shoreline does as well. Thus, the term "imminent" more appropriately describes something "certain to happen," *See, e.g., Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995) (finding that some actions may constitute a taking because they pose high risks of *certain or imminent* injury).

dangerous and expensive approach. A better approach is to encourage hybrid structures and defer to a site specific report if it justifies the need for a new "hard" structural bulkhead. In this regard, the Draft SMP, p.7-33, requires extremely detailed information from an applicant, which if used negates the need for many of the proposed regulations.

The design standards at p.7-33 are good, except the public access requirement goes too far. The language here actually conflicts with Article 6, Section 3 of the Draft.

The conflict between the proposed SMP Amendment and the SMA is most obvious as to bulkheads. As an exempt development, a protective bulkhead must be approved if it complies with provisions in the County's Shoreline Master Program ("SMP"). RCW 98.58.140(1); *see also, Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 697-98, 169 P.3d 14 (2007). This is a mandatory provision. *Id. See also Advocates For Responsible Dev. v. Johannessen and Mason County*, SHB No. 05-014 at *9 (2005), citing RCW 90.58.030(3)(e)(ii) and WAC 173-27-040(2)(c).

Article 8. Use Specific Policies and Regulations

The OSF has significant concerns with Article 8, Draft, p.8-1, starting with the agricultural use policies. The OSF notes that "new" agricultural use and development should preserve and maintain native vegetation between tilled lands and adjacent water bodies. Section 1.A.4. The OSF repeats its concerns with generic set asides and buffers. It questions why new agricultural activity should be prohibited in the Natural Shoreline environment, except low intensity. *See* Draft, p.8-2. RCW 90.58.065 provides that existing agricultural uses on agricultural land cannot be restricted. "New agricultural activity" is vague enough that it could include rotation of crops, which OSF trusts is not the intent. By incorporation of the CAO, the County is not allowed to amend the proposed SMP Amendment under SB 5248 related to agricultural activities and its exemptions on new regulations. Thus, no new use regulations can be enacted at this time for agriculture.

Going on with comments on agricultural use, the Draft, at p.8-2 under Subsection C (Regulations), imposes essentially the same buffers as set out for all other uses. *See* Subsection C.2.iii. This language conflicts with the policy set out above for "variable" buffers. The requirement that new agriculture conform to the 150-foot buffer standards in Article 6 will inhibit the achievement of widely held community values of sustainability and local food production. It also does not follow the directive of Policy 1.A.3, encouragement "to use best management practices to prevent erosion, runoff, and associated water quality impacts."

Currently, Jefferson County uses BMP's to mitigate the adverse impacts of existing agriculture, achieving improved water quality with smaller, better designed and/or enhanced buffers. There is no reason this approach cannot also work for "new" agricultural practices. The BMPs developed by the Conservation District have proven through monitored performance standards that agriculture can be conducted with small buffers without significantly impacting

stream functions, yet the County prefers to impose 150-foot buffers based on generic studies with no proven rate of success and no consideration given to the DOE's new Water Management Rules.

The Vision Statement in the County Comprehensive Plan describes a "healthy, diversified, and sustainable local and regional economy ... which is compatible with and complementary to the community." Another principle encourages "a degree of flexibility and autonomy for local communities to address their own unique needs." Fostering local agriculture is a significant community value in Jefferson County. Residents are encouraged to support the Farmers Market and, in turn, local farmers, yet the proposed SMP Amendment makes this activity impractical in prime growing regions. In the section of the Vision Statement entitled "The Comprehensive Plan and Our vision," it states: "The Comprehensive Plan which follows is a statement about the future. We, the Board Commissioners, in adopting this Plan, are projecting a future in which the essence of the rural nature of Jefferson County is retained, while accommodating new growth and development in traditional community setting and specific designated areas."

There is nothing more essential to retaining the traditional rural essence of Jefferson County than its history of agriculture. New agriculture is the future. The restrictions on new agriculture in the proposed SMP Amendment run counter to Jefferson County's community goals as envisioned through its comprehensive planning process. The same can be said for the agricultural policies and requirements, Subsection A. These conflicts with the Comprehensive Plan must be resolved.

Turning to the specific use regulations for commercial uses, which start at p.8-8 of the Draft, Subsection 3, these are overly broad – particularly for the High Intensity Shoreline Environment – and conflict with Comprehensive Plan policies. There is no necessity to apply a policy that commercial development "should be located, designed and operated to avoid or minimize adverse impacts on shoreline ecological functions and processes." For the highly built environment within Jefferson County's rural areas, relocation is not a viable choice. The marine and natural resource industries **should be** fostered because they are water dependent.

The OSF does not understand the approach in the Policies (Section A) to try to set priorities which mandate that water-related commercial uses should not displace existing water-dependent uses, and water enjoyment commercial uses should not displace existing water-related or existing water-dependent uses. So long as the proposed commercial use relies upon the water for its viability or utility, these choices should be reserved to individual property owners. The OSF sees no way to require under the SMA that commercial development "should be visibly compatible with adjacent non-commercial properties." The SMA is not a design review process, nor is the Shoreline Hearings Board a Design Review Commission. This language should be stricken.

The proposed environmental regulations essentially prohibit any meaningful commercial use in the Priority Aquatic, Aquatic, and Natural Shoreline environments. In the Conservancy Environment, non water-dependant and non water-related commercial uses/developments are prohibited, except for very small scale low intensity recreational/tourist development uses which may be allowed with a conditional use permit. In the other shoreline environments, only water-oriented use and development is permitted; non water-oriented commercial uses are only allowed as a conditional use. In the opinion of the OSF, these requirements are overly restrictive and inconsistent with the Comprehensive Plan. In lieu of prohibitions, the OSF urges allowance of commercial uses with careful environmental analysis and study.

Turning to the specific use regulations for water-oriented use/development, Draft at p.8-10, the OSF does not believe that the County has authority to mandate that on parcels where existing water oriented commercial uses are located, "any undeveloped and substantially unaltered portion of the waterfront not devoted to water dependent use shall be maintained for water-related use." Draft, p .8-10. This also conflicts with Comprehensive Plan polices for legal lots of record.

There are a myriad of problems with the regulations for non water-oriented use/ development under the heading "Commercial Uses," Subsection F. For one, the OSF does not believe that at least in the High Intensity shoreline environment, non water-oriented commercial uses can be outright prohibited, unless the property owner provides a "significant public benefit in the form of public access and/or ecological restoration." The OSF also believes that the requirement for a mixed use development, Draft at p.8-11, that 80% of the shoreline buffer area be restored to provide shoreline ecological functions and processes, is not legally supportable.

Addressing the Forest Practice specific use policies and regulations, Draft at p.8-11, the OSF questions whether the County has authority under the Forest Practices Act to impose a 30% limit on the harvest of merchantable timber over any ten-year period in the natural and conservancy shoreline designations. *See* Subsection D, Regulations (3), Draft, p.8-12. The OSF does not believe that the County can require a conditional use permit for forest practices in the Shoreline Residential and High Intensity environments if it exceeds the 30% limit in any ten-year period standard.

The specific use regulations for industrial and port development, Subsection 5, have a number of problems. Starting with policy No. 3, Draft at p.8-13, the OSF does not believe that the County has authority to require that industrial and port development "should be visibly compatible with adjacent non-commercial properties." This standard is impractical and probably impossible to meet. In addition, the term "visibly compatible" is vague. Under the specific use regulations, industrial and port development is prohibited in the Priority Aquatic, Aquatic and Natural environments. This may be overly restrictive. In the other environments, such use is allowed as a conditional use. For these types of development, the OSF agrees that a conditional use approval is the appropriate approach, in lieu of a shoreline substantial development permit. However, the OSF does not understand why uses and development that are not water-dependent

or water-related are prohibited if they occur in conjunction with an industrial or port development. In particular, there may be industrial uses that are not water-dependent *per se*, but must be located in close proximity to the water either to send or receive product and materials.

Addressing the residential use policies, Section 8, Draft at p.8-24, the OSF disagrees that residential use is not a water-dependent, but only a preferred use of the shorelines. The Draft does not consider residential use a preferred use unless it is "planned and carried out in a manner that protects shoreline functions and processes to be consistent with the no net loss provisions" of the SMP. Essentially, this approach makes single-family residential use a regulated use, when it is exempt from SMA permitting requirements. Under the County's approach, any new shoreline construction by the owner of a shoreline lot for his or her own use would have to demonstrate that the proposed home "maintains and preserves" and "improves or enhances" shoreline functions and values. There are no such requirements in the SMA.

It appears the County believes it can require that residential use and development be "properly managed to avoid and prevent cumulative impacts associated with shoreline armoring, over water structures, shoreline runoff, septic system introduction of pollutants, and vegetation clearing." Policy 3, Draft, p.8-24. Once again, this simply takes exempt activity and essentially makes it subject to SMA permitting requirements under the guise of "administering" shoreline exemptions. As set out above, the Shoreline Hearings Board rejected this approach when invalidating the SMA Rules.

The OSF does not believe that Jefferson County can require a conditional use permit for construction of a single-family residential home in the Natural Shoreline Environment. This provision conflicts with the SMA sections which exempt such development. In this regard, the OSF believes that "exempt is exempt." Thus, the general prohibition on single-family residential development by a lot owner unless approved as a conditional use in the Natural designation is illegal.

The OSF concedes that WAC 173-26-211 specifies that "single-family residential development should be allowed as a conditional use in the natural environment if such use is limited as necessary ...." One may ask, therefore, is the proposal not consistent with the State Guidelines? The OSF believes that this inquiry begs the question. Its objection is to making 41% of the shoreline designated as Natural, thereby automatically subjecting single-family development to a conditional use permit and Department of Ecology oversight, per WAC guidelines. This approach presents a conflict between the State Guidelines and SMA which must be resolved by the courts. The conflict should be avoided by not increasing the Natural Environment, and establishing new "Rural" and "Semi-Rural" categories.

Turning in more detail to the regulations for primary residences found in the Draft starting at p.8-25, the OSF can find no language in the SMA giving the County authority to prohibit residential development under circumstances where it can "be reasonably expected to

require structural shoreline armoring during the useful life of the structure or one hundred (100) years, whichever is greater," as urged by Staff. This language should not be accepted.

Article 9. Permit Criteria and Exemptions.

The OSF has significant concerns with the County's approach and the proposed SMP Amendment treatment of exemptions from Shoreline substantial development permits (Draft, pp.9-1 to 9-6) but these have largely been set out above in its detailed comments. The major point is that under the SMA, the County cannot require that an exempt facility be "consistent with the policies **and** provisions of this program." The provisions of the SMP include use regulations. By applying the use regulations, Jefferson County impermissibly turns an application for an exemption into a permit. The "statements of exemption," Subsection 4, Draft, p.9-6, are nearly identical to requirements invalidated by the SHB in 2001.

Turning to specifics, the OSF has concerns with the exemption for repair or maintenance of residential bulkheads. In the Draft, page 9.2, it stipulates that if a bulkhead is deteriorated such that "an ordinary high water mark has been established by the presence and action of water landward of the bulkhead, then the replacement bulkhead must be located at or near the actual ordinary high water mark." In practice, this commentator has seen this type of standard applied under circumstances where a bulkhead immediately fails. It is inappropriate to have a bulkhead fail, then have regulators take the position that the "New" ordinary high watermark is much further up the beach.

The OSF has significant concerns as to the Variance Permit criteria, Subsection 5. For one, no allowance for variation or change of use is allowed. (Draft, pg 9-7) Two, any alteration or expansion of non-conforming structures, including single family residential homes, is handled under the variance procedure. For exempt facilities such as single family homes, alterations should be allowed. Third, reasonable use exceptions are handled as variances. This is inappropriate. This approach will simply expose the County to regulatory taking claims, since the variance criteria are so strict. The County must enact in the SMP a standalone provision for issuance of reasonable use exceptions.

There is an overuse of CUPs. These devices are anything but flexible, and involve layers of governmental review, since Ecology makes the final decision. Goal 7 of the GMA requires timely permitting, as does RCW 36.70B. Use of CUPs detract from achieving this goal in the opinion of OSF.

Article 10. Administration and Enforcement

The OSF recommends that the Hearing Examiner not be given authority to approve, condition or deny shoreline substantial development permits. These should be handled administratively by the County, with an appeal provided to the Examiner.

The OSF notes that the minimum permit application requirements set out in pp. 10-3, 10-4 of the Draft, Subsection 45, are extremely onerous. In particular, it would be expensive for applicants to provide information as to existing land use contours and intervals "sufficient to accurately determine the existing character of the property." *See* 10.3.A.9. In addition, provision of a description of the "existing ecological functions and processes effecting, maintaining, or influencing the shoreline at/near the project site" will be expensive.

The OSF is very concerned that the burden of proof will be placed on the applicant throughout the permit process, to determine what environmental designation their property is to be regulated under. This would be a complex and expensive site-specific scientific judgment process, all for the privilege of finding out what uses are or are not allowed. Staff should provide this information at the pre-application conference.

The County's approach to burden of proof, in the opinion of the OSF, demonstrates everything that is wrong with the proposed SMP Amendment and contemporary regulatory philosophy as expressed by the regulators. State guidelines require a sufficient shoreline inventory and cumulative impacts analysis. However, instead of bearing the cost to prepare these studies, Jefferson County asks that its own citizens do the work. Absent the necessary information, the County proceeds on assumptions without direct cause-and-effect relationships between the impacts of development and shoreline characteristics, the "precautionary approach." The imposition of a generic, blanket 150-foot buffer is a default regulatory admission that the County is unable to determine what protective measures are necessary on a site-specific basis, thereby either (1) prohibiting development, or (2) placing the entire burden on the applicant to prove a negative.

Turning to non-conforming development and uses, Section 46, Draft, p.10-6, this is a key provision, since under the draft proposal, essentially all of the built shoreline environment in Jefferson County will be turned into a non-conforming development if the 150 foot marine buffers and vegetation set asides are adopted.

The Department needs to factor in Engrossed House Bill 1653. There are many shoreline uses and structures legally located within the shorelines of Jefferson County that were established or vested before the effective date of the County's adoption of development regulations to protect critical areas. These uses continue as "conforming," not "nonconforming," and may be redeveloped or modified if consistent with the local government's master program, and a site-specific determination is made that the proposed redevelopment or modification would result in "no net loss of shoreline ecological functions." This provision demonstrates a strong legislative intent to not turn vested or established uses into "nonconforming uses or developments." Nothing precludes the Department from rejecting the County's approach which is one of essentially a wholesale determination that all uses and developments encompassed within the new proposed 150-foot generic buffer are nonconforming. And yes, the nonconforming label is a taint. The Department has already heard from many citizens that it is more difficult to sell homes or land with such a label, or obtain refinancing for redevelopment or

reconstruction. The County continues to impose regulations that a use or structure is essentially lost if discontinued or abandoned for a period of more than two years. Draft, p.10-6.

It is noted that non-conforming structures can be rebuilt, but cannot cause "adverse effects to the shoreline environment" or "adjacent properties." Draft, p.10-7. The latter provides uncompensated view easements to adjacent properties, which is illegal. The former is subjective and could deny the right to rebuild because where enlargements, expansions or additions are allowed to existing single-family homes, they cannot extend water-ward of the "existing residential foundation walls." Draft, p.10-8.

The Comprehensive Plan has a goal, LNG 8.0, to "support the continued existence and economic viability of legally established land uses which become nonconforming...." Plan, p.3-54. Existing commercial and industrial uses "should be allowed to expand or be replaced ...." Policy LNP 8.3, Plan, p. 3-54. The proposed SMP Amendment violates these provisions. Policy LNP 8.9 allows replacement of a destroyed non-conforming structure, but the proposed SMP Amendment does not, imposing too many requirements. The alterations or additions which extend into "critical areas" require a CUP. If the new buffers are imposed, these are deemed critical areas, thereby precluding any expansion or alteration of any existing single-family homes. Once again, there is an inconsistency.

CONCLUSION

The OSF commends the hard work of the County on its draft SMP. It also respects the commitment of the Department of Ecology employees who have worked on the Draft, but respectfully believes that the assigned Shoreline Specialist has stepped over the line in terms of mandating changes which are more appropriately reserved for review and decision by the Director.

Every Washington State citizen values the shorelines. The shorelines, however, are not there just as a picture to be looked at, but are intended to support important uses and required water dependent or preferred uses and developments. To turn substantial portions of the shorelines, or the waters of the state, into "no touch" or "no development or use" zones goes too far in the opinion of the OSF, and is not faithful to the SMA as it was understood in 1971 when approved by the voters of the State. Most importantly, while some circumstances have changed, and perhaps more is known as to shoreline functions and values and the potential impacts caused by development, the SMA itself has not been changed since 1971 in any material respects as reflects upon the proposed Draft SMP and shoreline regulation. Many regulators appear to believe that the SMA needs to be changed in order to elevate protection and preservation over all other policies. If this should occur, which the OSF would oppose, it can only be done by the Washington Legislature, not under the guise of "updating" a local master program.

Thank you for your kind attention to these comments and the enclosures.

Very truly yours,
DENNIS D. REYNOLDS LAW OFFICE

Dennis D. Reynolds

Attachments

cc: OSF Executive Board
OSF Advisory Board

DDR/cr

ATTACHMENT 1

WAC 220-110-285 No agency filings affecting this section since 2003

Single-family residence bulkheads in saltwater areas.

Single-family residence bulkheads shall not result in the permanent loss of critical food fish or shellfish habitat.

The following provisions apply to bulkhead projects in saltwater areas on single-family residence property. Except as expressly provided for in this section, construction of single-family residence bulkheads shall comply with technical provisions and timing restrictions in WAC 220-110-240 through220-110-271 .

(1) Critical food fish and shellfish habitats pertaining to single-family residence bulkheads as identified in RCW 75.20.160 are those habitats that serve an essential function in the developmental life history of fish or shellfish. These habitats include but are not limited to the following:

(a) Pacific herring, surf smelt, Pacific sand lance, and rock sole spawning beds;

(b) Intertidal wetland vascular plants (except noxious weeds);

(c) Eelgrass (Zostera spp);

(d) Kelp (Order laminariales);

(e) Lingcod settlement and nursery areas;

(f) Rockfish settlement and nursery areas;

(g) Juvenile salmonid migration corridors and rearing and feeding areas.

(2) The waterward face of a new bulkhead shall be located at or above the ordinary high water line. Where this is not practicable due to geological, engineering, or safety concerns, the waterward face of the new bulkhead shall be located only as far waterward of the ordinary high water line as necessary to excavate for footings or place base rock for the structure and under no conditions shall the waterward face of the bulkhead be located more than six feet waterward of the ordinary high water line. In addition, the waterward face of any bulkhead shall be located as close to the toe of the bank as possible.

(3) The waterward face of a replacement bulkhead shall be located no further waterward than the face of the existing, functioning bulkhead except where removal of the existing bulkhead would result in environmental degradation (e.g., release of deleterious material) or removal problems due to geological, engineering, or safety concerns. Where removal of an existing bulkhead is not practicable for the above reasons, the replacement or repair bulkhead shall be placed waterward of and directly abutting the existing structure. The least impacting type of structure and method of construction shall be utilized in these instances.

(4) Construction work on a bulkhead project under this section shall be subject to the timing restrictions in WAC 220-110-271 if the department determines that the project may affect a critical food fish or shellfish habitat described above. To determine if a timing constraint is appropriate for a bulkhead project under this section the department shall consider the particular location of the project and characteristics of habitats that may be affected by the project, and may include an inspection of the project site to evaluate the particular habitats near the project. The timing constraints listed in WAC 220-110-271 shall be imposed only if the department determines in the particular case that the constraint is necessary to protect a critical food fish or shellfish habitat. In addition, the timing constraints

under this section shall meet the following requirements:

(a) When a project under this section may affect more than one critical habitat, the department shall apply the more protective timing constraint.

(b) Timing conditions to protect nearshore juvenile salmonid migration, rearing, and feeding areas shall not be required if:

(i) The excavation for footings or placement of base rock is located at or above MHHW and all construction work is conducted from the landward side of the project; or

(ii) The waterward face of the bulkhead and all work areas and corridors, including stockpile areas, but excluding the area occupied by a grounded barge, are at or above MHHW; or

(iii) The waterward face of the bulkhead is at or above MHHW and the bed of the project site does not contain substantial amounts of silt, clay, or fine grained sediments, so long as the project also meets the following conditions:

(A) If the bulkhead is to be constructed of rock, then work shall be limited to daylight hours in a twenty-five-foot wide corridor immediately waterward of the new bulkhead face (excluding the area occupied by a grounded barge) and construction work shall not occur if tidal waters are within thirty feet of the new bulkhead face or within the stockpile area, whichever is greater. The department may permit rock to be stockpiled within fifty feet of the new bulkhead face.

(B) If the bulkhead is to be constructed of concrete, timber, steel, or material other than rock, work shall be limited to daylight hours in a fifteen foot wide corridor immediately waterward of the new bulkhead face (excluding the area occupied by a grounded barge) and construction work shall not occur if tidal waters are within twenty feet of the new bulkhead face.

(c) Timing conditions to protect surf smelt spawning beds shall be imposed if a bulkhead project is located on or where it may affect a surf smelt spawning area and the surf smelt spawning season for that location is less than six months. If the surf smelt spawning season for the project location is six months or longer, then work may be permitted if it commences within forty-eight hours after the location is inspected by a department representative or biologist acceptable to the department and it is determined that no spawn is occurring or has recently occurred. The project may be further conditioned to require completion within a particular time.

(d) When required by the habitat characteristics of a particular case, location, or project, the department may impose appropriate timing constraints to protect a critical habitat pursuant to WAC 220-110-271(5).

(5) Project activities shall not occur when the project area including the work corridor (excluding the area occupied by a grounded barge), is inundated by tidal waters.

(6) Removal or destruction of overhanging bankline vegetation shall be limited to that necessary for construction of the bulkhead.

(7) All natural habitat features on the beach larger than twelve inches in diameter including trees, stumps, logs, and large rocks shall be retained on the beach following construction.

(8) Excavated materials containing silt, clay, or fine grained soil shall not be stockpiled below the ordinary high water line.

(9) When stockpiling of sand, gravel, and other coarse material is allowed below the ordinary high water line, it shall be placed within a designated work corridor waterward of the bulkhead footing or base rock. All excavated or stockpiled material shall be removed from the beach within seventy-two hours of bulkhead construction.

(10) If sand, gravel and other coarse material is to be temporarily placed where it will come into contact with tidal waters, this material shall be covered with filter fabric and adequately secured to prevent erosion and/or potential entrainment of fish.

(11) All trenches, depressions, or holes created in the beach area shall be backfilled prior

to inundation by tidal waters. Trenches excavated for footings or placement of base rock may remain open during construction, however, fish shall be prevented from entering such trenches.

(12) Placement of appropriately sized gravel on the beach area shall be required following construction of bulkheads in identified surf smelt spawning areas.

[Statutory Authority: RCW 75.08.080. 94-23-058 (Order 94-160), § 220-110-285, filed 11/14/94, effective 12/15/94.]

ATTACHMENT 2

November 2009

EVIDENCE OF NEAR-ZERO HABITAT HARM FROM NEARSHORE DEVELOPMENT

D. F. FLORA, PhD

A well-known Northwest contract-research firm has shown that a broad array of man-caused features along tidewater shores have no meaningful impact on "ecosystem functions".

Despite an obviously vigorous and fairly complex effort, a relationship between human-installed "stressors" and habitat factors was not found. Statistical analyses of the studies' data show that little of the variation in ecosystem (habitat) functions can be explained by a large basket of stressors. The correlation of multiple stressors with the welfare of nearshore habitats is not significantly different from zero (Bainbridge Island) or extremely low (East Kitsap County).

The link beyond habitats to nearshore-dependent creatures was not explored because, the analysts explained, science is not available to do so. Overall, then, no significant correlation was found between human-caused nearshore features and marine life on Puget Sound.

These results are consistent with other research that is summarized here.

The results are quite damaging for notions of the need for nearshore restoration and its prioritization.

These are results of nearshore assessments of Bainbridge Island[1] and easterly Kitsap County[2]. Some 700 shore segments were analyzed. More than 20 human-imposed "stressors" were rated, from buoys to bulkheads, from paths to piling, for each shore segment. Also rated were estimates of habitat extent and welfare, based on 3 to 16 factors.

Bainbridge Island

Each of 201 beach segments ("reaches") was scored for both human-installed stressors' presence and their presumed effects. This was done by repackaging stressors as "Controlling Factors", wherein wave energy, sediment supply, hydrology, and six other nearshore phenomena were weighted by the extent and intensity of the stressors impacting each reach, as well as the natural character of the reach. An example is a Controlling Factor called physical disturbance, whose score was derived from stressor data on number of buoys (their dragging chains), floats, and boats upon the beach. Controlling Factor scores were then summed to yield a total Controlling Factor score for the reach.

A habitat rating ("Ecological Functions score") was also assigned to each reach based on its estimated utility for ten organisms including forage fish, seaweeds, eelgrass, and overhanging vegetation.

I calculated the "coefficient of determination" (r^2) between the Controlling Factors and Ecological Functions as a group, using data provided in the study for the 201 reaches. r^2 is the proportion of variability in Ecological Functions that is explained by Controlling Factors. **It is 0.016, virtually at the bottom of possible values between 0 and 1.**[3]

The authors displayed plots of the 201 values and also a subset of that data for 31 'low-bank' reaches. They are Figures B-72 and B-74, attached. Because the low-bank plot suggests some correlation, I calculated r^2 for those reaches. **It is still extremely low.**

These figures do not demonstrate significant relationships. In general a coefficient of determination less than 0.66 is considered insignificant.

The Bainbridge report alludes repeatedly to causality between Controlling Factors and habitats, and correlation between Controlling Factors and Ecological Functions.[4] To examine further the correlations, which the analysts regarded as corresponding to causation, I calculated a number of regression equations using the report's data.[5]

The factors assumed to stress habitats explained only 0.06 percent of variation in Ecological Functions across the 201 reaches. That percentage is not significantly different from zero.[6]

What about the low-bank reaches by themselves? Controlling Factors explain only 0.14 percent of variation in Ecological Functions.

Easterly Kitsap County

In this shoreline assessment each of East Kitsap's 518 beach reaches ("sites") was scored for stressors. The rest of the analytical process was similar to the Island's, except that "Controlling Factors" were joined by a companion set of "Dominant Physical Processes", the latter having in common the results of water movement. For instance, wave energy and depth/slope [profile change] are Controlling Factors, as with Bainbridge. Sediment transport and wave erosion are Dominant Physical Processes.

Habitat impacts were scored for reaches for which data was available. Impacts were based on the extent of eelgrass, wrack, driftwood, lower-beach flats, and the character of backshore vegetation including its overhang. Other factors were added for pocket estuaries.

I calculated, for those reaches, the correlation of stressor levels with habitats along East Kitsap beaches, as done above for Bainbridge. It appeared logical to merge the scores for Factors and Processes as the authors did in their graphics (Figure 15, attached). There is a very low level of correlation, with only 12 percent of variability explained by Controlling Factors and Physical Processes combined.

In short, none of these supposed stressors has demonstrated a significant effect on habitats. The low correlation measures can only be construed as excusing the inventoried human-built stressors from the list of factors actually affecting habitats.

Harm May Be Wrongly Attributed to Bulkheads

As with many index-number systems, the use of Controlling Factor and Dominant Physical Process scores in policy-making requires decomposing them to determine specific effects of their many components.

The most pervasive input into these composite ratings was the presence and extent of bulkheads. Bulkheads appear as causal stressors in five of the nine factors affecting Bainbridge Island Controlling Factor scores; in two of five Controlling Factors and

all of the six Physical Process factors applied to East Kitsap.

Not only did bulkheads enter frequently, the scores were "primarily affected" by 'armoring' in East Kitsap[7]; around Bainbridge "high rates of shoreline armoring..., armoring encroachment..., and point modifications...have significantly changed the historic composition of substrate and depth-slope contours along Bainbridge Island shorelines."[8] Perhaps. At any rate, bulkheads stand large among the presumptive sources of nearshore harm, with no substantiating research demonstrating the tie.

What does ground truth tell us?

It is possible to separate out bulkhead scoring from the Bainbridge Island basket of stressors included in Controlling Factors. Likewise for components of the Ecological Function index.[9] In four regression equations bulkhead intensity was the explanatory variable of special interest. The dependent variables were eelgrass density, extent of overhanging vegetation, presence of sandlance spawning, and presence of surf smelt spawning[10], with these conclusions: **There is no evidence of a statistically valid relationship between reaches' bulkhead lengths and eelgrass welfare, overhanging vegetation's extent, nor forage-fish (surf smelt and candlefish) spawning-ground expanse.**[11]

The Bainbridge report deals as well with 'encroaching' bulkheads - those that are somewhere out on the beach. Their distances from the bank are not indicated, just the percentage of shoreline in each reach that has that condition. Briefly, encroaching bulkheads are no harder on eelgrass than bulkheads generally: statistically insignificant, with only 0.2 percent of variation explained. Results for sand lance and surf smelt spawning and for overhanging vegetation are similar.

The East Kitsap report also has an eelgrass component and a "vegetation" index in its Ecosystem Functions (habitat) basket, though for only 12 reaches. The vegetation index includes measures of the above-beach vegetation for 225 feet inland as well as overhanging veg.

Readers are reminded that the East Kitsap sites were selected by the analysts, not chosen randomly nor in some systematic fashion. Of the 14 validation sites, 6 do not have bulkheads at all and 2 of the others have no eelgrass, leaving only 6 sites out of 518 as thin gruel for estimating the incremental effects of bulkheads on eelgrass. In any case, **Bulkheads had a demonstrated**

significant effect on neither of these purported habitat factors.[12]

Another set of numbers on bulkheads as stressors: All 201 Bainbridge reaches' bulkhead data were regressed against the aggregate index for the Ecological Functions (habitat) group. The adjusted R-squared was abysmal, 0.0008. For East Kitsap a similar regression was run: Ecosystem Functions (habitat) against bulkhead length, for the 14 follow-up reaches. The adjusted R-squared was very low, 0.06. **Bulkheads clearly play a statistically trivial role in nearshore habitat welfare.**

The authors clearly regard bulkheads as hostile to eelgrass. Yet Bainbridge Island shoreline maps reveal the considerable coexistence of eelgrass with bulkheads. About half the Island's eelgrass is in front of bulkheads; about two-fifths of bulkheads are fronted by eelgrass.

At a 2009 conference on bulkheads, a well-known researcher said, "it has not been confirmed in the field or the laboratory whether currents and sediment transport rates will increase or decrease in front of a hardened shoreline, as compared to a non-armored section of beach, and whether the sedimentary environment will be significantly modified."[13]

That the sedimentary environment was not affected was shown in a study of Thurston County beaches, where profiles of bulkheaded sections were compared with nearby non-bulkheaded profiles. Following adjustment of an analytical glitch, no statistically significant beach changes were shown.[14]

Two studies purport to show effects of bulkheads on surf smelt egg survival.[15] In fact they compare treeless (and bulkheaded) unshaded shores with treed (non-bulkhead) shaded places.

Two studies[16] have shown no difference in subsurface fauna in front of bulkheaded versus unprotected shores, so this part of the habitat issue also seems moot.

Not one of the 40-odd references cited in the Bainbridge analysis nor the score of fish-habitat citations in the East Kitsap report contain research showing ecosystem decline (much less 'destruction') caused by residential bulkheads in Puget Sound.

Other conjectural inclusions in the stressor indexes, such as the roles of piling, residential docks, stormwater outfalls, upshore impervious area, and upshore woodland coverage are seemingly dubious.

Three Conclusions

Singly and together these reports suggest no effect of the nearshore built environment on habitats.

The authors analyzed a broad array of *human-built* nearshore 'stressors' in their search for relevant nearshore habitat stressors. Investigators must now presumably look to *natural* factors not embraced in these two assessments. Natural drivers are known to include water temperatures, invertebrate dynamics, beach profiles' shoreward migration, upland ecology, and the perennial conflicts and interplay of nearshore organisms among themselves and their environment.

Meanwhile the argument that habitats and their occupants require "restoration", implying conversion of nearshore areas to some seemingly natural state, is not supported by these analyses. More discussion of restoration is below.

About Harm

The low correlations also press forward the issue of *harm*. In these studies harm was presented in terms of effects on habitats, not their inhabitants, despite sidebar references to salmon and forage fish. Stopping short of trying to guess effects of various levels of habitat quality on classes of marine life was, I think, a good idea, given the authors' perception that "Biotic variables, such as fish abundance or benthic community composition, are not used as metrics...because scale-appropriate information of this type is currently lacking for the study region".[17]

So harm was gauged at the habitat level. And only harm, not benefits, despite the welfare gains to animals, plants, and people from some of the "stressors". Many of the "stressors" are themselves habitats; bulkheads may ease the rate of burial of upper-beach habitat, and, by slowing landward bank erosion, retard the downward-and-landward displacement of beach profiles. The recreational and economic benefits of docks and floats have been known and appreciated for thousands of years. Floats are shaded refuges for small fish. Culverts and outfalls will be indispensable unless stormwater routes to aquifers can somehow be devised. Meanwhile stairs to the beach seem unlikely stressors; beach access predated arrival of Europeans by more than a little.

The kinds of harm imputed by the analysts are not a strong basis for alarm, partly because of their dubious nature. Forage fish spawning beaches are listed, for instance, yet there are unused spawning beaches. Eelgrass is affected by a number of things, but their sensitivity to bulkheads has never been demonstrated for any of the 700+ reaches in these reports, nor at other Puget Sound residential places. Intertidal seaweed's importance and sensitivity to "stressors" have not been quantified. Certain reasons for encouraging overhanging vegetation are vacuous, as I have shown elsewhere. And so on. There is no scientific evidence that bulkheads, stairs, and other 'stressors' measurably harm nearshore habitats. Puget Sound's alleged peril surely does not reside in these matters.

About Conjecture

Most technical discussions of nearshore stressors and their impacts carefully include hedges such as "may", "might", or "in some places". These two reports treat linkage as near-absolute despite the widely deplored absence of research findings. Causality is generously presumed.[18] The analysts' models are "scientifically defensible"[19] (though they differ). Their normative estimates of degrees of impact are said to be based on best available science and best professional judgment.[20] The maps, inventories, and analytical process are intricate and interesting. But given the general paucity of relevant science (which the reports acknowledge), the burden on conjecture and hence credibility is considerable.

Implications for a Restoration Program

The reports are said to be driven partly by a need for "a method for prioritizing restoration projects".[21] The authors cite an earlier paper, co-authored by the Bainbridge report's senior writer, concluding that

> "...the strategies of restoration, enhancement, and creation should be applied depending on the degree of disturbance of the site and the landscape. This theory assumes that historical conditions represent the optimal habitat conditions for a particular site."[22]

A similar doctrine comes with the Bainbridge report:

> "...<u>restoration of controlling factors [is] the key to successful and long-term sustainability</u>." [Underlining by

the authors][23]

"Demolition" is nowhere mentioned, but it looms beyond. As when bulkhead removal is proposed as a "most obvious opportunity".[24] However there is presented no case for restoration, no estimates of costs, and no array of alternatives toward the same ends.

The authors' arguments for restoration are predicated on strong causal relations between stressors and habitats. Causation almost always generates high correlations. Correlations in these nearshore assessments are remarkably low. *QED*.

I have commented elsewhere on the formidable problems of knowing where we want to go in restoration and then getting there. **The point here is that without a correlation between supposed stressors and presumed problems, any rationale for removing the human-installed stressors disappears.**

NOTES

1. Williams, G. D., et al. 2004. *Bainbridge Island Nearshore Habitat Characterization & Assessment, Management Strategy Prioritization, and Monitoring Recommendations.* Sequim: Battelle Marine Sciences Laboratory.

2. Borde, A. B., et al. 2009. *East Kitsap County Nearshore Habitat Assessment and Restoration Prioritization Framework.* Sequim: Battelle Marine Sciences Laboratory.

3. Known to biostatisticians as r^2, the coefficient of determination is the percentage of variance of y explained by x, where y is drawn from a cluster of habitat factors and x is an amalgam of human-installed stressors.

4. For example, *Bainbridge Island Nearshore...* p. 30.

5. If we want an equation showing how well Controlling Factors (X) explain Ecological Functions (Y), Controlling Factors is the explanatory variable. In an equation $Y = 2 + 3X$, X is the explanatory variable.

Reported here are "adjusted R-squareds" (values range between 0 and 1) and "F" values for the equations. R^2 (the "adjusted coefficient of determination" for the equation) is based on the ratio of X-explained variation (technically "variance") to total variation in Y.

F is based on the ratio of X-explained variation to as-yet-unexplained variation in Y. F relates to a "null" hypothesis that Controlling Factors have no incremental effect on Ecological Functions; the equation's slope coefficient is not significantly different from zero. That is, as Controlling Factors intensify, there is no significant change in Ecological Functions.

For large data sets an F value over about 4 indicates less than a 5 percent probability that the null hypothesis should be accepted. Five percent is a customary level of acceptable probability.

6. This because F is only 0.88.

7. *East Kitsap County Nearshore...* p. 27, 28.

8. *Bainbridge Island Nearshore...* p. 32.

9. Readers should understand that all the indexes involve heavy doses of conjecture and hence normative (arbitrary) structures and values.

10. The report's text is unclear as to whether spawning has happened in these places, or they only appear suitable for spawning. Sound-wide there is more seemingly suitable beach than is actually used.

11. On Bainbridge Island an increase in bulkhead length is associated with no statistically significant reduction in:

	Adjusted R^2	F
Eelgrass welfare	0.5 percent	0.009
Overhanging vegetation	0.6 percent	2.17
Sand lance spawning	0.5 percent	0.0001
Surf smelt spawning	0.4 percent	1.82

12. On East Kitsap reaches an increase in bulkhead length is associated with no statistically significant reduction in:

Eelgrass welfare	27 percent	5.07
Vegetation	17 percent	3.73

(The F significance threshold is 5 because of the small sample.)

13. Ruggiero, Peter. 2009. Impacts of shoreline armoring on sediment dynamics. In: [Abstracts of] Puget Sound shorelines and the impacts of armoring: State of the science. Alderbrook Inn, 13 May 2009. US Geological Survey http://wa.water/usgs.gov/SAW/

14. Herrera Environmental Consultants. 2005. Marine shoreline sediment survey and assessment, Thurston County, Washington. Seattle.

15. Rice, Casimir A. 2006. Effects of shoreline modification on a northern Puget Sound beach: Microclimate and embryo mortality in surf smelt. Estuaries and Coasts 29(1):63-71; The same single-site 5-day comparison appears as a chapter in his University of Washington PhD thesis. Although this study

was said to cover 'shoreline modification', the 2-site design recognized only a bulkhead and shade trees, and it was not possible to separate bulkhead effects, if any, from those of trees.

Tonnes, Daniel M., 2008. Ecological functions of marine riparian areas and driftwood along north Puget Sound shorelines. Master's thesis, School of Marine Affairs, University of Washington.

16. Sobocinski, Kathryn L. 2003. The impact of shoreline armoring on supratidal beach fauna of central Puget Sound. Master's thesis, School of Aquatic and Fishery Sciences, University of Washington.

Tonnes, Daniel M. 2008, above.

17. *Bainbridge Island Nearshore...* p. 20.

18. As at page 99 in the Bainbridge report.

19. *East Kitsap County Nearshore...* p. i; *Bainbridge Island Nearshore...* p. 17.

20. *Bainbridge Island Nearshore...* p. 20, 22.

21. *East Kitsap County Nearshore...* pp. I, ii, 2, 30. Also "Bainbridge Island Nearshore..." p. iii, 15

22. *East Kitsap County Nearshore...* p. 29.

23. *Bainbridge Nearshore...* p. E-6.

24. *Bainbridge Nearshore...* p. 34

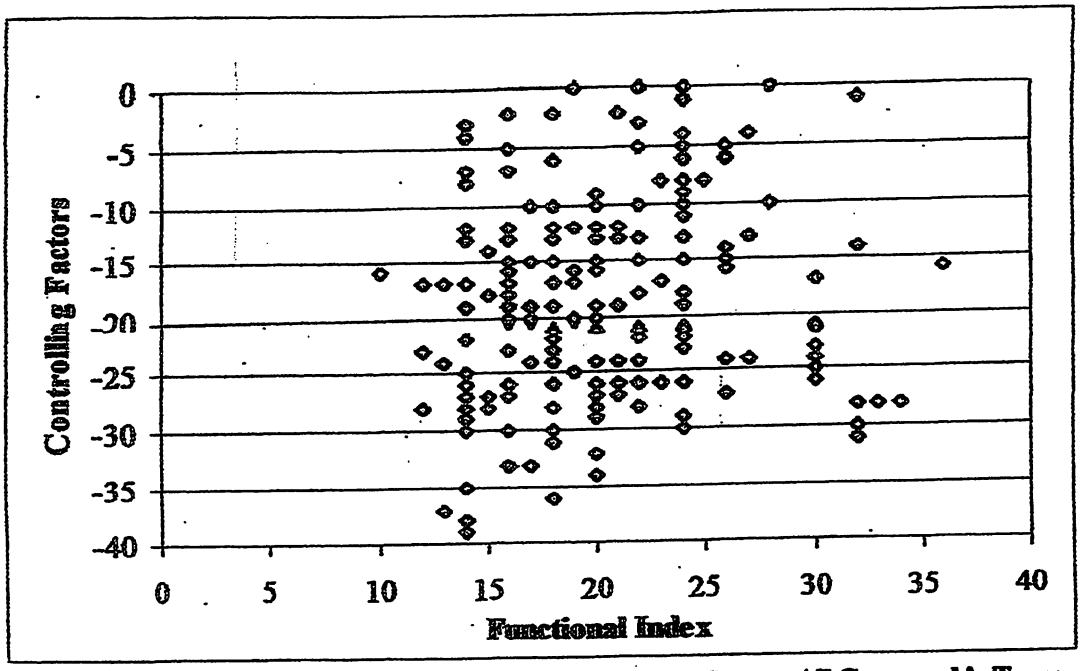


Figure B-72. Controlling Factors versus Functional Index Scores, All Geomorphic Types.

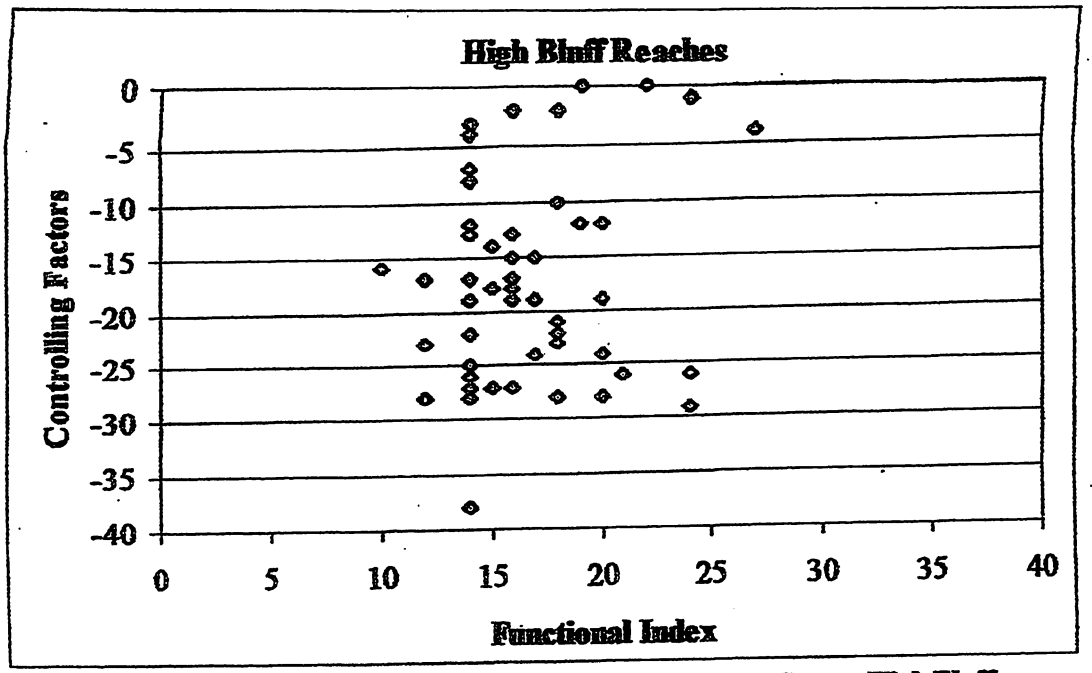


Figure B-73. Controlling Factors versus Functional Index Scores, High Bluff.

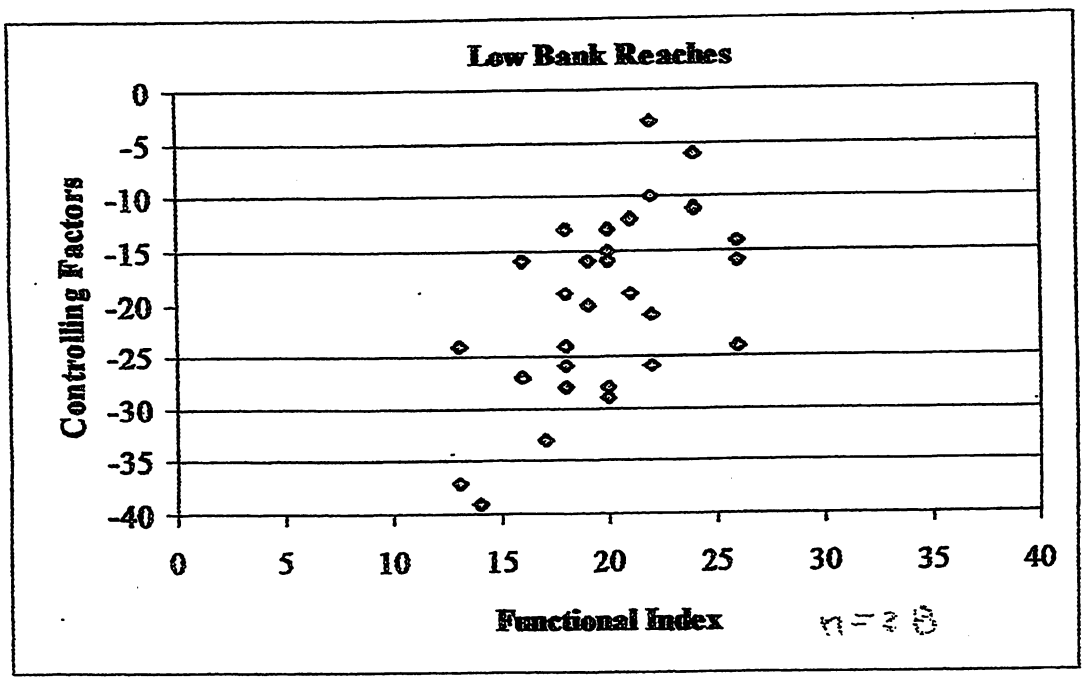


Figure B-74. Controlling Factors versus Functional Index Scores, Low Bank.

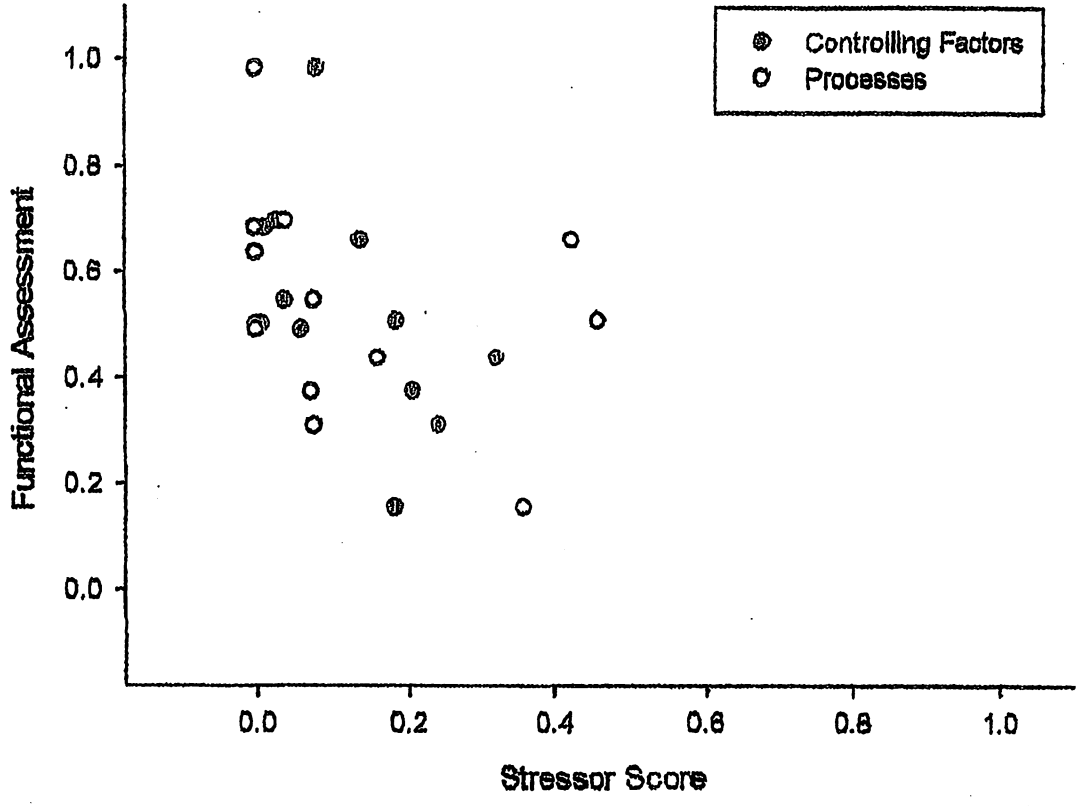


Figure 15. Functional assessment scores vs. GIS-based stressor scores for 14 NAUs.

December 2009

EVIDENCE ON IMPACT-NEUTRAL BULKHEADS, FLOATS, AND OTHER SHORELINE MODIFICATIONS

D. F. Flora

With the help of a shoreline inventory and modeling by a major consultancy[1] , I've shown that bulkheads have little relationship to the welfare of eelgrass, forage fish spawning areas, and other nearshore habitats. This is important because of the tremendous amount of energy that has gone into berating bulkheads. It's important to you because shoreline reach-oriented inventories are about the best data sets we have concerning nearshore stress.

In support of its coming Shoreline Master Program update, Bainbridge Island did a shoreline inventory of human-installed 'stressors' and habitats. Fifty miles of shoreline were divided into 201 'reaches', with data collected and reported from each reach.

The structure scores included measures of

- bulkhead extent
- encroaching bulkhead extent
- floating structures, ramps
- outfall density
- marina/fish farm presence
- upshore vegetation extent
- artificial shade
- sediment sources
- upshore impervious area

The habitat scores included measures of

- eelgrass welfare
- overhanging vegetation
- surf smelt spawning beaches
- candlefish spawning beaches
- herring spawning sites
- geoduck beds
- salt marsh presence
- seaweed and kelp beds

Analysts for the city combined the structure scores into a composite stressor score for each reach. A composite habitat score was also compiled for each reach.

imposed "stressors", whatever their bulk and intensity, are not associated, singly nor collectively, with variations in nearshore habitats.

This for Bainbridge Island. What about elsewhere? Virtually the same results emerged from easterly Kitsap County, where "stressor" data was collected on 500-plus reaches.[2] However fewer than a score were assessed for habitat welfare, so this conclusion is not firm.

The results are consistent with a similar cross-sectional study of bulkhead effects in Thurston County.[3] It remains to be seen whether multi-year monitoring with repeated measurements at same sites will alter the conclusions.

1. Williams, G. D., et al. 2004. *Bainbridge Island Nearshore Habitat Characterization & Assessment, Management Strategy Prioritization, and Monitoring Recommendations.* Sequim: Battelle Marine Sciences Laboratory.

2. Borde, A. B., et al. 2009. *East Kitsap County Nearshore Habitat Assessment and Restoration Prioritization Framework.* Sequim: Battelle Marine Sciences Laboratory.

3. Herrera Environmental Consultants. 2005. Marine shoreline sediment survey and assessment, Thurston County, Washington. Seattle.

FIGURE 2.

Habitat Relationship to Bulkheads in 201 Bainbridge Island Reaches

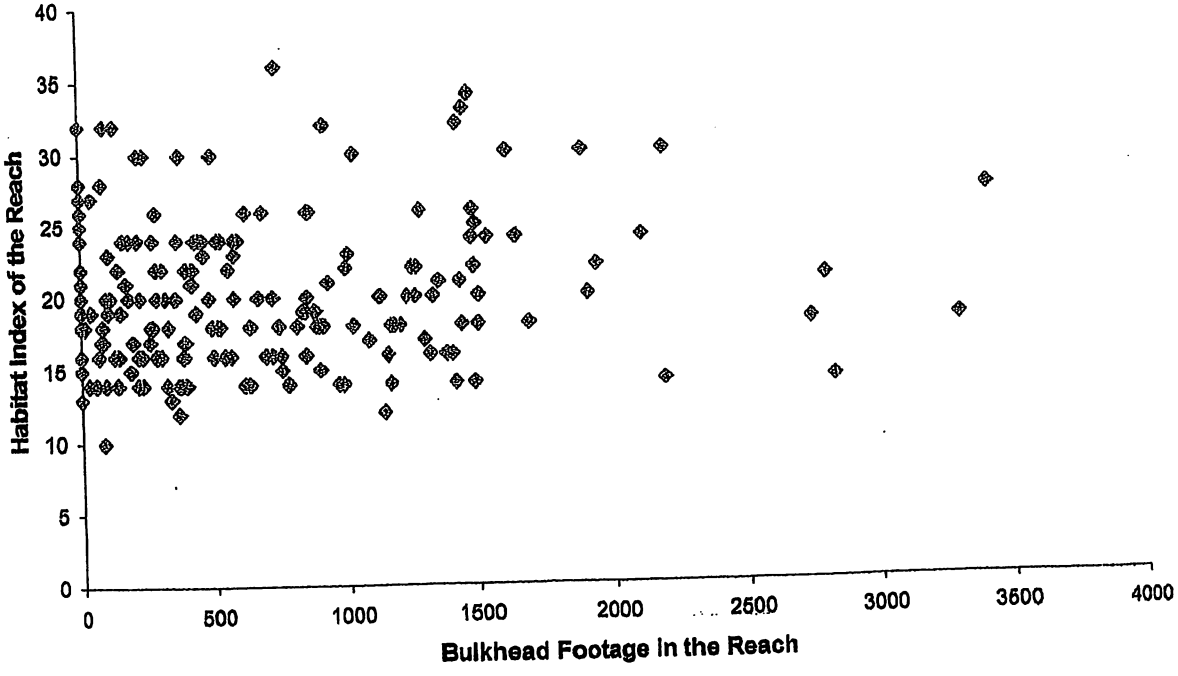
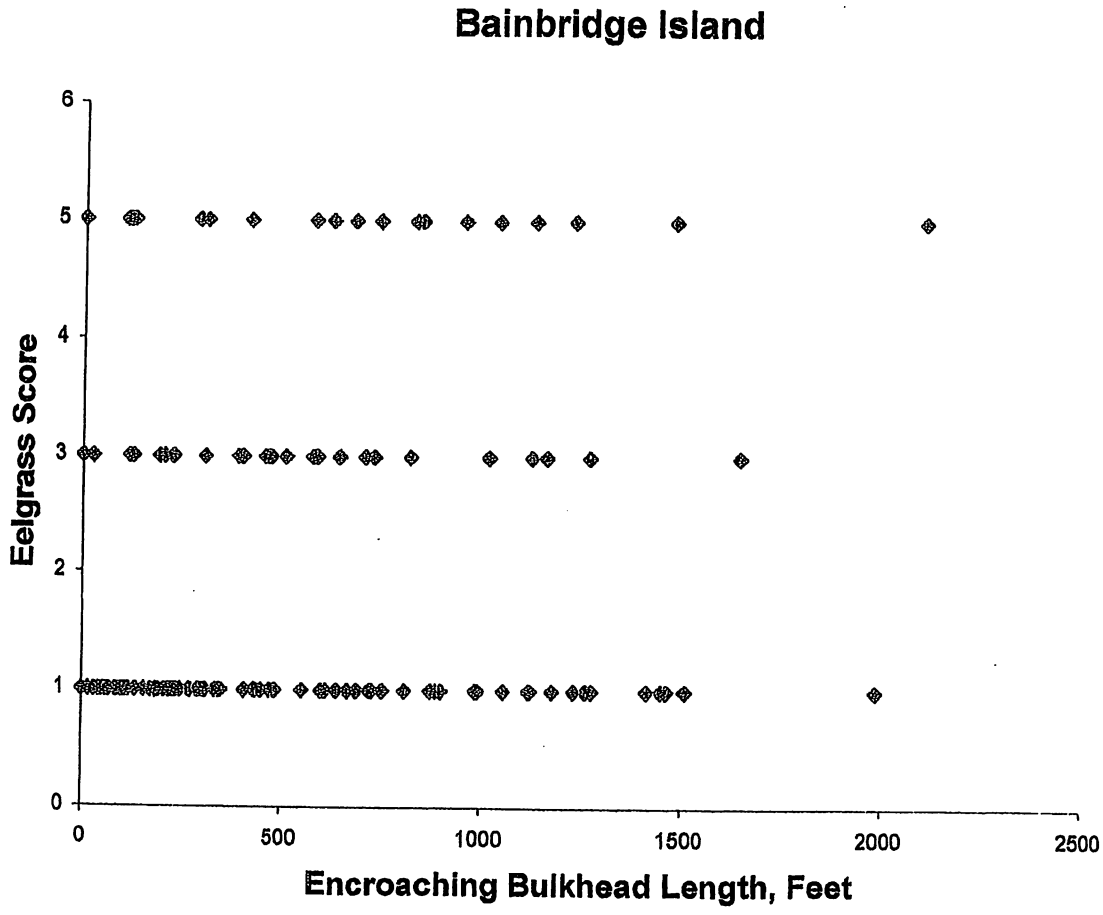


FIGURE 9


Bainbridge Island
Eelgrass Score
0
1
2
3
4
5
6
0
500
1000
1500
2000
2500
Encroaching Bulkhead Length, Feet

February 2010

EVIDENCE ON HABITAT-NEUTRAL BULKHEADS, FLOATS, AND OTHER INSTALLED "STRESSORS"

A RESPONSE TO A CLUTCH OF DETRACTORS

D. F. Flora, PhD[1]

Overview

With the help of two shoreline inventories and modeling by a major research consultancy, I've written a paper showing that bulkheads and other human-installed nearshore structures have little relationship to the welfare of eelgrass, forage fish spawning areas, and other nearshore habitats.[2]

Although results are specific to Bainbridge Island and eastern Kitsap County, they have triggered immediate alarm in a portion of the Puget Sound technical community because the findings run counter to common suppositions. A critical letter signed by a troupe of 14 technical people has been circulated widely. This is a response to that letter and other comments made by members of the troupe.

In general, the criticism is unfounded. I start with a summary of what I actually did and the results. Next I address our points of agreement; then the conjectured faults and incorrect statements presented by the troupe.

Background

As Washington shoreline jurisdictions update their shoreline plans they are prodded by the Department of Ecology to inventory their nearshores. Inventories are taking various forms. Bainbridge Island and Kitsap County divided their shorelines into 'reaches', with data collected for each reach on installed structures and other indicators of human occupation, and on measures of habitat presence and density.

The data was used and published by a well-known Northwest contract-research firm as they identified priorities for shoreline 'restoration'.[3]

The analysts also compiled composite indexes of what I will call

'stressors' (the human-installed things) and, separately, conditions I will call 'habitat welfare'. These for each reach.

At the time of my analysis habitat data for Kitsap County was limited to less than a score of reaches, so the rest of this discussion relates to Bainbridge Island, although I got similar results for the small Kitsap data set.

What I Did

The consultants plotted the composite habitat scores against stressor scores, and I followed their lead. In Figure 1, attached, each dot reflects a single reach. Notice (1) the wide scatter of the dots, indicating little if any correlation between the basket of stressors and basket of habitats. And (2) the absence of a trend downward from left to right. If present that trend would have indicated that an increase in stressor levels is associated with a decrease in habitat abundance. It wasn't there, as you can see in the figure.

It is possible that composite scores obscure the effects of individual stressors. Bulkhead intensity is of special interest because the analysts clearly assumed the badness of shore protection. Figure 2 plots reaches' habitat indexes on reaches' bulkhead footage. Again there is no correlation and no trend.

I plotted many combinations of individual habitats on individual stressors, as well as the composite habitat index on single stressors, with the same general result: no correlation and no trend.

Next, to add analytical rigor (the troupe's term, see below) I did a series of statistical analyses, addressing the hypothesis that there is no correlation between habitats and human-created supposed stressors, individually nor collectively. Almost invariably the conclusion was that the relationships are not significantly different from zero.[4]

This is not scientific opinion nor professional judgement. It is concrete analytical findings using impeccably sourced data and standard, basic statistical computations. The results have been peer reviewed and can be replicated readily by anybody with a basic technical degree.

On Natural Stressors

An obvious question is, What other factors out there control the welfare of nearshore habitats? Presumably they are natural, not human-installed.

The troupe of fourteen who reviewed the study provided the answer: We don't know. The relevant Puget Sound science, they say, is limited. "All acknowledge that more careful, well thought-out local research...is necessary."[5] Their view was echoed at the recent Puget Sound conference on shore protection, mentioned by the troupe. A lead speaker said, "The workshop confirmed...the limited scientific research that has been done on the impacts of armoring on either geologic or ecologic processes, and ...the difficulty of applying the science that has been done elsewhere to Puget Sound given the unique aspects of our system."[6]

The relevance of "elsewhere" science from ocean nearshores has been questioned by a well-known shoreline geologist,[7] and I have explained that extrapolation from stream science is folly in a number of instances[8].

So the troupe of 14 plus a number of researchers and I agree completely that marine science is scant for the Sound, and that the Sound has unique features not likely represented by studies of the ocean, streams, and the "other parts of the world" that are mentioned vaguely by the troupe.[9]

By extension, we appear to agree that marine science relevant to Puget Sound is inadequate for intelligent nearshore policy making.

The Troupe's Derogation

Much of the troupe's criticism comes from their incorrect perception that I wrote for a technical audience. The paper was intended for an audience of nontechnical people including planners who may not have a marine science background.

The troupe says the work lacks "rigor". That word is straight from The Graduate Student's First Book of Phrases. The statement may be offensive to the 20-some people, including scientists, who conducted the overall enterprise with detailed study plans, data

accession, modeling, calculations, and analyses of the results. My (subsequent) role was merely to expand the consultants' graphic analysis, form hypotheses, and examine correlations.

The troupe wrongly claims that I pursued a case for "conclusive evidence of 'no harm'". They read what was not there. In fact I only made a case for a null hypothesis based on no correlation, which was not refuted.

The troupe noticed that I made no mention of cumulative effects. It is hard to conceive effects accumulating, within or among shoreline reaches, if there are no effects to put into the pile in the first place. And near-zero association of habitat welfare with stressors suggests that increasing, say, bulkheads won't increase their effects. I made similar points relative to restoration and no net loss.

The troupe claims wrongly that the linear regression part of my statistical analyses was inappropriate because the "...variables are unlikely to have followed a normal probability distribution". In fact that problem is of minor concern.[10] Indeed, no alternative analytical approach was suggested by the troupe.

It is significant that the troupe mentions little of their own research, nor puts forward any "more-correct" analysis of the data I used; nor did they provide data from some other source that would refute (or support) what I did.

I invite readers to replicate my analysis; the data is in the public domain[11] and the methods are standard and well-known to those with even first-year knowledge of statistical analysis.[12] Even better would be analysis of data from a different part of Puget Sound. Meanwhile the Bainbridge 201-reach data set may be the best nearshore stressor-habitat array we have for Puget Sound.

Incidentally

Support for my no-harm hypothesis comes from the neighborhood of one of my analysis' sharpest critics. Eelgrass has declined abruptly in formerly prolific Westcott Bay, 7 miles from the Friday Harbor university laboratory. An early hypothesis there, based apparently on doctrine and soon refuted, blamed installed fixtures, including bulkheads. No significant correlation was found between structures and eelgrass welfare. So the causation premise was replaced by a new hypothesis involving low-tide summer-time tidewater temperature, a wholly natural phenomenon.

Elsewhere,

The Thurston County (Herrera) study[13], about bulkhead effects on beach profiles, could well be repeated elsewhere. However a glitch developed in the indoor phase that resulted in greatly overstating the effects on profiles. I offer a flagon of Ivar's clam nectar, perhaps even lunch, to the first troupe member who can find the glitch.

The Rice study purported to estimate the effects of a bulkhead and tree shade on dessication of beach-laid surf smelt eggs. Guess which of these two factors actually caused the dessication.[14]

Tonnes did an excellent analysis of driftwood in the North Sound, that might lead to a book. I can suggest ten chapter titles. Contrary to the troupe's wrong assertion, Tonnes did conclude that surf-smelt egg mortality rose where beach temperatures were high, and that was where shade was reduced. His is one of the two sources I mentioned that show equality of subsurface fauna in front of bulkheaded versus unprotected shores.[15]

Unfortunately certain of the local studies mentioned by the troupe encountered confounding factors that I concluded, after visiting study sites, had compromised the studies' conclusions.

The Grand Slam

A troupe member has said that my report "would not be considered publishable by any journal". She may be surprised. She derided my peer reviews, which in fact were helpful. She warned that my paper must be "fought off". She said my report does not contain "facts". Perhaps graphics and statistical correlations are not "facts". The director of programs for People for Puget Sound has said that while my paper "is being cited at some local government meetings" it is too large [13 pages] for him to pass around. The troupe says it's too short. One blogger applauded my objectivity; another questioned it.

All because correlation is absent from 201 data sets.

NOTES

1. 12877 Manzanita Road, Bainbridge Island, WA 98110. 206-842-0709.

2. Flora, D. F. 2009. *Evidence of Near-Zero Habitat Harm from Nearshore Development.* Bainbridge Island.

3. Williams, G. D., et al. 2004. *Bainbridge Island Nearshore Habitat Characterization & Assessment, Management Strategy Prioritization, and Monitoring Recommendations.* Sequim: Battelle Marine Sciences Laboratory.

Borde, A. B., et al. 2009. *East Kitsap County Nearshore Habitat Assessment and Restoration Prioritization Framework.* Sequim: Battelle Marine Sciences Laboratory.

4. Contrary to the critique's claim, I examined the matters of normality and heteroscedasticity. However, again contrary to the troupe's complaint, normality is of little concern in correlation and regression analyses like these.

5. An undated "Comment on Evidence of near-zero habitat harm from nearshore development". This heading echoes the title of my November, 2009, analysis.

6. Shipman, Hugh. 2009. From an email to Puget Sound Shoreline Planners, published 14 August, 2009 on Bainbridge Shoreline Homeowners web site.

7. Finlayson, David. 2006. *The Geomorphology of Puget Sound Beaches.* Puget Sound Nearshore Partnership Report 2006-02. Seattle: Washington Sea Grant.

8. Flora, Don. 2009. *A Perspective on Shoreline Policy, Technical Issues, Some Studies at Hand, and the Research Void.* Bainbridge Island. Available from the author.

9. One wonders how many of the troupe are doing personal, quantified research on reaction of habitats or creatures to natural or imposed stressors in accord with peer-reviewed study plans.

10. See, for example, Zar, Jerrold H. 2003. *Biostatistical Analysis.* A more common concern is heteroscedasticity, which is not present in these data sets.

11. The total data set that I used corresponds to a score of columns with just over 700 rows. The data are on the Web. In cover letters I have offered to help with data and their analysis.

12. Some alternatives, if preferred by the reviewers, could be nonlinear or nonparametric analyses. However the relevant conclusions are apparent from the scatter plots: Habitat welfare varies widely for any stressor level, and increasing stressor levels does not increase impacts.

13. Herrera Environmental Consultants. 2005. Marine shoreline sediment survey and assessment, Thurston County, Washington. Seattle.

14. Rice, Casimir A. 2006. Effects of shoreline modification on a northern Puget Sound beach: Microclimate and embryo mortality in surf smelt. Estuaries and Coasts 29(1):63-71; The same single-site 5-day comparison appears as a chapter in his University of Washington thesis.

15. Tonnes, Daniel M., 2008. Ecological functions of marine riparian areas and driftwood along north Puget Sound shorelines. Master's thesis, School of Marine Affairs, University of Washington.

FIGURE 1

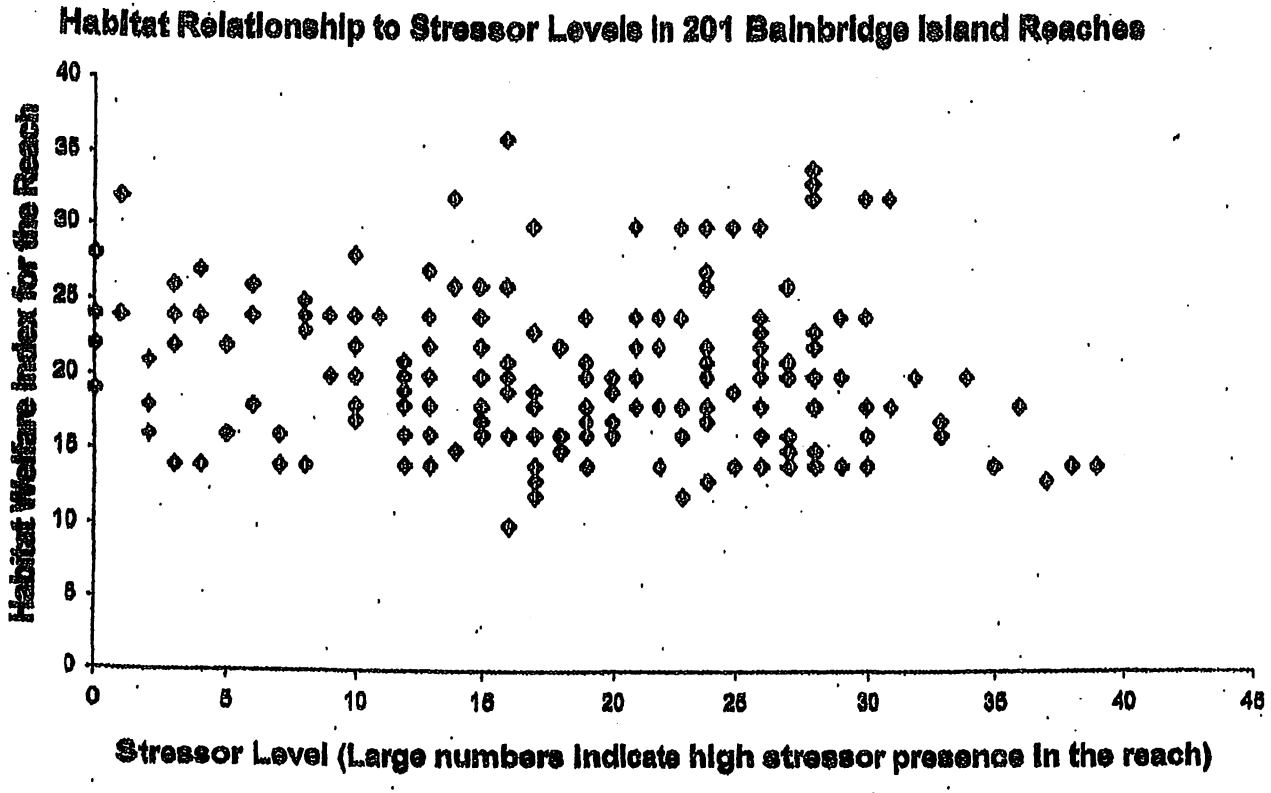
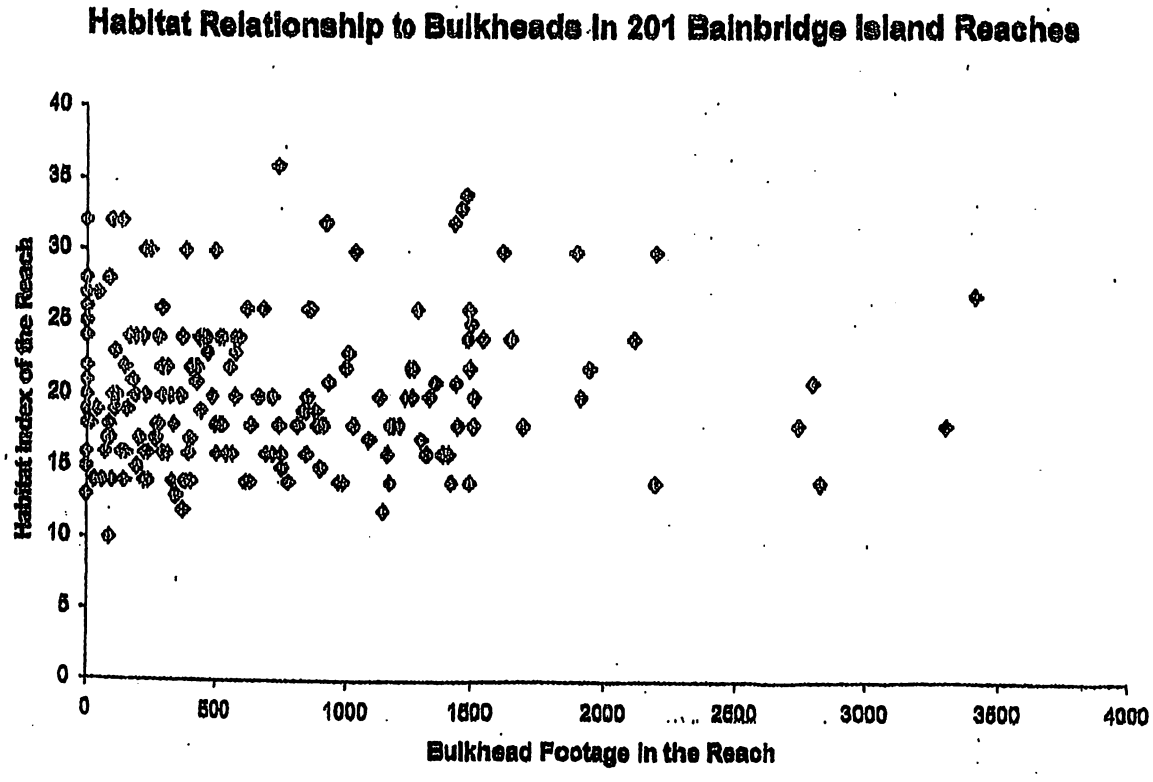

Habitat Relationship to Stressor Levels in 201 Bainbridge Island Reaches
Habitat Welfare Index for the Reach
0
5
10
15
20
25
30
35
40
45
Stressor Level (Large numbers indicate high stressor presence in the reach)

Figure 2.


Habitat Relationship to Bulkheads in 201 Bainbridge Island Reaches
Habitat Index of the Reach
40
35
30
25
20
15
10
5
0
0
500
1000
1500
2000
2500
3000
3500
4000
Bulkhead Footage in the Reach