



TOWN HALL MEETING II

SHORELINE UPDATE CHECKLIST

Attached are materials addressing key concepts you need to understand in dealing with the shoreline update process. Your ability to understand and use the principles noted will aid you in working to achieve a successful result for your property in the county-wide Shoreline update process.

The materials take you through the logical flow of the process and specific areas of concern:

- Inventory
- Designation
- Uses and Regulations
- Critical Areas and Buffers
- Public Access
- Governing Principles

For Common Sense Alliance
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INVENTORY, WAC 173-26-201

Controls all future decisions

Project Note: The County has produced a large inventory. See draft inventory characterization analysis and Appendix A and B posted 9/7/2011 at <http://sanjuanico.com/smp/smpdocs.aspx>

- Does the County information accurately reflect the conditions at your property and surrounding area?
- All too often the consultant-provided inventory is at too large a scale to accurately reflect your conditions
- You are entitled to be heard and provide specific information
- You can add additional detail to the County records, which may include one or more of the following:
 - Air photographs with a distance scale
 - Ground photographs of the shoreline condition at all stages of the tide, showing natural and developed areas
 - Copies of environmental impact statements about the condition of the area if major projects have been approved (for example ferry terminal upgrade or Roche Harbor improvements over the past decade)
 - Comment from local expert on adequacy and accuracy of the County inventory vis-à-vis your site

Shoreline Guidelines allow you to participate to make sure the County is dealing with accurate information.

(2) Basic concepts

(a) Use of scientific and technical information

- First, identify and assemble the most current, accurate... information
- **At a minimum**, make use of and, where applicable, **incorporate all available scientific information, aerial photography, ...**
- Local governments should also **contact ... [list] and private parties for available information**
- The requirement to use scientific and technical information in these guidelines **does not** limit a local jurisdiction's authority to solicit and incorporate information, experience, and anecdotal evidence provided by **interested parties** as part of the master program amendment process.

DESIGNATION, WAC 173-26-211

Designation is the action of fitting regulatory classifications to the inventory condition. You need to fit the inventory to the classification program in making your case to the County and building your record.

(2) **Basic requirements for environment designation classification and provisions.**

(a) Master programs shall contain a system to classify shoreline areas into specific environment designations. This classification system shall be based on

- the existing use pattern,
- the biological and physical character of the shoreline, and
- the goals and aspirations of the community as expressed through comprehensive plans as well as
- the criteria in this section

Natural

(i) **Purpose.** The purpose of the “natural” environment is to protect those shoreline areas that are

- relatively free of human influence **or**
- that include
 - intact or minimally degraded shoreline functions
 - intolerant of human use.

(iii) **Designation criteria.** A “natural” environment designation should be assigned ...if any of the following characteristics apply:

- ecologically intact and therefore currently performing **an important, irreplaceable function** or ...process that would be **damaged by human activity**;
- ecosystems and geologic types that are of **particular scientific and educational interest**; or
- The shoreline is **unable to support new development or uses** without significant adverse impacts to ecological functions or risk to human safety.

Such shoreline areas include **largely undisturbed portions of shoreline areas** such as wetlands, estuaries, unstable bluffs, coastal dunes, spits, and **ecologically intact shoreline habitats**.

We will come back to this designation in our consideration of critical areas

Rural Conservancy Environment

(i) **Purpose.** The purpose of the “rural conservancy” environment is to

- **protect** ecological functions,
- conserve existing natural resources and
- valuable historic and cultural areas in order to
 - provide for sustained resource use,
 - achieve natural flood plain processes, and
 - provide recreational opportunities

(iii) **Designation criteria.** Assign a “rural conservancy” environment designation to shoreline areas outside incorporated municipalities and outside urban growth areas, as defined by RCW 36.70A.110, if any of the following characteristics apply:

(A) The shoreline is currently supporting

- lesser-intensity resource-based uses, such as agriculture, forestry, or recreational uses, or
- is designated agricultural or forest lands pursuant to RCW 36.70A.170;
- currently accommodating residential uses outside urban growth areas
- human uses but subject to environmental limitations,
 - adjacent to steep banks, feeder bluffs, or flood plains or other flood-prone areas;
- high recreational value or
- unique historic or cultural resources; or
- low-intensity water-dependent uses.

(c) “Aquatic” Environment

(i) **Purpose.** The purpose of the “aquatic” environment is to

- **protect, restore, and manage** the unique characteristics and resources of the areas waterward of the ordinary high-water mark.

(iii) **Designation criteria.** Assign an “aquatic” environment designation to lands waterward of the ordinary high-water mark

- (ii) **Management policies.**

Allow new over-water structures only for water-dependent uses, public access, or ecological restoration.

- All developments and uses on navigable waters or their beds should be located and designed to minimize interference with surface navigation, to consider impacts to public views, and to allow for the safe, unobstructed passage of fish and wildlife, particularly those species dependent on migration.
- Shoreline uses and modifications should be designed and managed to prevent degradation of water quality and alteration of natural hydrographic conditions.

Use of Aquatic areas is presumed and policies are inconsistent with universal critical area designation. Assumption that the area cannot tolerate use without jeopardizing survival of the species.

(d) **“High-Intensity” Environment**

(i) **Purpose.** The purpose of the “high-intensity” environment is to provide for high-intensity water-oriented commercial, transportation, and industrial uses while protecting existing ecological functions and restoring ecological functions in areas that have been previously degraded.

(iii) **Designation criteria.** Assign a “high-intensity” environment designation to

- shoreline areas within incorporated municipalities, urban growth areas, and industrial or commercial “limited areas of more intensive rural development,”
- if they currently support high-intensity uses related to **commerce, transportation or navigation;**
- or are suitable and planned for high-intensity water-oriented uses

Note interaction with the GMA comprehensive plan.

Major resort areas such as Rosario, Deer Harbor, Roche Harbor, Lopez Islander would qualify.

So would smaller marinas and other developed sites meeting the LAMIRD tests, including:

- Existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments.
- A commercial, industrial, residential, shoreline, or mixed-use area
- ...development on lots containing, or new development of, small-scale recreational or tourist uses,
- ...development on lots containing isolated nonresidential uses or new development of isolated cottage industries and isolated small-scale businesses

RCW 36.70A.070(5).

(e) **“Urban Conservancy” Environment**

(i) **Purpose.** Protect and restore ecological functions of open space, flood plain and other sensitive lands ... in urban and developed settings, while allowing a variety of compatible uses.

(iii) **Designation criteria.** Assign an “urban conservancy” environment designation to shoreline areas appropriate and planned for development that is

- compatible with maintaining or restoring of the ecological functions of the area,
- that are not generally suitable for water-dependent uses **and** that
- lie in incorporated municipalities, urban growth areas, or commercial or industrial “limited areas of more intensive rural development” if any of the following characteristics apply:
 - (A) They are suitable for water-related or water-enjoyment uses;
 - (B) They are open space, flood plain or other sensitive areas
 - (C) They have potential for ecological restoration;
 - (D) They retain important ecological functions, even though partially developed; or
 - (E) They have the potential for development that is compatible with ecological restoration.

(f) “Shoreline Residential” Environment

(i) **Purpose.** The purpose of the “shoreline residential” environment is to accommodate

- residential development and appurtenant structures
- **appropriate public access and recreational uses**

(iii) **Designation criteria.** Assign a “shoreline residential” environment designation to shoreline areas

- inside urban growth areas, [and] incorporated municipalities,
- “rural areas of more intense development,” or
- “master planned resorts,” as described in RCW [36.70A.360](#), if they are predominantly single-family or multifamily residential development or are planned and platted for residential development.

Limited use in rural areas

USES AND REGULATIONS—Basic Philosophy I, RCW 90.58.020

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

In developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:

- Preserve the natural character of the shoreline;
- Protect the resources and ecology of the shoreline;
- Increase public access to publicly owned areas of the shorelines;
- Increase recreational opportunities for the public in the shoreline;
- Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.
 - The master programs shall include, when appropriate, the following:
 - (e) A use element which considers the proposed general distribution and general location and extent of the use on shorelines and adjacent land areas for
 - housing,
 - business,
 - industry,
 - transportation,
 - agriculture,
 - natural resources,
 - recreation,
 - education,
 - public buildings and grounds, and
 - other categories of public and private uses of the land

(List from RCW 90.58.100(2)(e))

USES AND REGULATIONS—Basic Philosophy II, RCW 90.58.020

The Shoreline Management Act requires the recognition of the difference between undeveloped or “natural shoreline” conditions and developed shoreline conditions.

Alterations of the **natural condition** of the shorelines of the state, in those limited instances when authorized, shall be given priority for

- single-family residences and their appurtenant structures,
- ports,
- shoreline recreational uses including but not limited to
 - parks, marinas, piers, and other improvements facilitating public access to shorelines of the state,
- industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and
- other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.

Alterations of the natural condition of the shorelines and shorelands of the state **shall be recognized** by the department.

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

CRITICAL AREAS AND BUFFERS I

NOT ALL SHORELINES ARE CRITICAL AREAS

RCW 36.70A.480

(5) Shorelines of the state shall not be considered critical areas under this chapter except to the extent that specific areas located within shorelines of the state

- **qualify for critical area designation** based on the definition of critical areas provided by RCW [36.70A.030\(5\)](#) and
- have been designated as such by a local government pursuant to RCW 36.70A.060(2).

To qualify a critical area under the heading of a “fish and wildlife habitat conservation area” the area must meet the following two-part test from the definitions in GMA:

(6)(a) “Fish and wildlife habitat conservation areas” are areas that

- **serve a critical role in sustaining needed habitats and species for the functional integrity of the ecosystem, and**
- **which, if altered, may reduce the likelihood that the species will persist over the long term.**
- **These areas may include**, but are not limited to, rare or vulnerable ecological systems, communities, and habitat or habitat elements including seasonal ranges, breeding habitat, winter range, and movement corridors; and areas with high relative population density or species richness. Counties and cities may also designate locally important habitats and species.

Chapter 365-190 WAC, Last update: 11/2/10, Minimum guidelines to classify agricultural, forest, mineral lands and critical areas,

CRITICAL AREAS AND BUFFERS II

I said we would come back to the “natural” designation in connection with Shorelines.

(iii) Designation criteria. A “natural” environment designation should be assigned ...if any of the following characteristics apply:

... ecologically intact and therefore currently performing an important, **irreplaceable** function or ...process *that would be damaged by human activity*;

Two key notes for you to consider:

High Intensity, Rural Conservancy and Aquatic Shorelines are all intended to be used for human activity.

If the shoreline is developed and used—or intended to be used under the comprehensive plan—it is not ecologically intact and the human activity anticipated in the other designations (including Aquatic) would likely be inconsistent with preserving the “irreplaceable function.”

In the Aquatic designation the County needs to differentiate between those areas intended for use, including commercial, residential and industrial uses; recreation and public access; and those areas that retain “irreplaceable” functions.

CRITICAL AREAS AND BUFFERS III—Test from GMA, RCW 36.70A.480

No net loss, not restoration, is the test.

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

RCW 36.70A.480

Protection of shorelines does not mean

- “Prohibit use” (1991 GMA amendment)
- “Protect” means “protect,” not enhance
 - *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Bd.*, 161 Wn.2d 415, 166 P.3d 1198 (2007).

Distinguish: **Mitigation**—Solving a problem your project has created

From: **Restoration**—Creating a new condition not related to your project

Reasonable Necessity is a site-specific test required when a government attempts to force open space or restoration as the condition

- Applicable to condition to be protected
 - Shade is good for temperature in some locations, bad for eel grass, bad for salmon (docks)
- Appropriate to the circumstances
 - Buffers require naturally functioning conditions—lawns, houses, swimming pools, tennis courts, patios, roads, parking lots, etc. do not meet BAS test for sites where buffers are appropriate

CRITICAL AREAS AND BUFFERS IV—Nexus and Proportionality

Likely areas where restoration exceeds lawful mitigation.

Revegetation and open space requirements on the front 50-100 feet of your property when the project under review:

- Meets the no net loss test
- Does not alter or change the shoreline condition

Excessive setbacks when:

- Based on matters not appropriate for governmental regulation
- Not reasonably related to the legitimate government purpose
- Causes substantial economic harm and the government purpose can be achieved through less intrusive means

More difficult to prove than when on-site restoration is involved.

PUBLIC ACCESS

Public access is not a mandatory condition of shoreline development.

The right to exclude is a fundamental property right

Kaiser Aetna v. United States, 444 U.S. 164 (1979).

Will only be infringed when the property owner

- Creates a demand for public access
- Interferes with existing public access

Legislative intent section of the SMA provides guidelines

- ...coordinated planning is necessary in order to **protect the public interest** associated with the shorelines of the state while, at the same time, **recognizing and protecting private property rights**:
- Increase public access to publicly owned areas of the shorelines;
- Increase recreational opportunities for the public in the shoreline;
- [Priority uses listed] ... and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.

RCW 90.58.020

A private deck serving a private club provides

“an opportunity for substantial numbers of the people to enjoy the shorelines of the state” *State Dept. of Ecology v. Ballard Elks Lodge No. 827*, 84 Wn.2d 551, 527 P.2d 1121 (1974).

Other uses that meet this test:

Single-family homes

Restaurants with a private deck

Resorts with a private deck

These uses attract customers to the shoreline, but do not create additional demand beyond their members or customers.

Most commercial or industrial uses and waterfront residential developments do not create a demand for the general public to use the waterfront and therefore the mere fact of a shoreline permit request provides no basis for requirement for public access. Requires nexus and proportionality, which is not present if the project does not create additional public demand.

When public access or dedicated open space/vegetative buffers are required on private property, the cases provide the burden is on local government to prove reasonable necessity. The test looks at:

- Cause/nexus—the *Nollan* test
- Scale/proportionality—the *Dolan* test
- Applicability to condition
- Appropriate to circumstances

GOVERNING PRINCIPLES

WAC 173-26-171, Authority, purpose and effects of guidelines.

- (3) Effect.
-
- (a) The guidelines are guiding parameters, standards, and review criteria for local master programs. The **guidelines allow local governments substantial discretion to adopt master programs reflecting local circumstances and other local regulatory and nonregulatory programs** related to the policy goals of shoreline management as provided in the policy statements of RCW 90.58.020, WAC 173-26-176 and 173-26-181.

WAC 173-26-176, Agency filings affecting this section.

General policy goals of the act and guidelines for shorelines of the state

- 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.
 - 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 173-26-186, Governing principles of the guidelines.

- (5) The policy goals of the act, implemented by the planning policies of master programs, may not be achievable by development regulation alone. Planning policies should be pursued through the regulation of development of private property only to an extent that is consistent with all relevant constitutional and other legal limitations
- Local government should use a process designed to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights