

SHORELINE MASTER PROGRAM UPDATE The San Juan Islands

San Juan Island Objectives

- Introduce you to the Shoreline Master Program update process
- Educate you on the Shoreline Guidelines, Chapter 173-26 WAC
- Enable you to be a more effective participant/advocate during the coming County process

The Process

- Studies
- Technical Review/Drafts
- Public Hearings
- Final approval—County
- Final approval—City
- Final requirements—WDOE
- Final acceptance by City/County

Substantive Issues

- Purpose of SMA
 - Statute—Chapter 90.58 RCW
 - Guidelines—Chapter 173-26 RCW
- Inventory—the first step
- Designation—the next step
- Regulations
- Permits and Exemptions

Hot Topics

- Designation
- Allowable Uses
- Buffers and Critical Areas (GMA/SMA)
 - Docks and Bulkheads
- Nexus and Proportionality
 - Public Access/Open Space/Buffers

Background

All too often we hear

- SMA designed to protect the environment by preventing shoreline development
- All shorelines are critical areas that must be protected by buffers/open space/special plantings
- All bulkheads will be illegal
- You cannot build new docks
- Such statements have a political constituency, but are not true

"Shoreline Management Act of 1971"

Historical Perspective—Balanced Approach

- Adopted by initiative – three parallel goals
- "It is the policy of the state to provide for the management of the shorelines ... by"
 - "planning for and fostering all reasonable and appropriate uses"
 - "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 ..."
 - "protecting generally public rights of navigation and corollary rights incidental thereto."

RCW 90.58.020

"Nisqually Delta Case"

It's not just the environment

- Case involved a legal challenge to a shoreline permit in DuPont for a large gravel dock adjacent to the Nisqually Delta—Decision by Mr. Justice Dolliver

" it is tempting to rhapsodize about the pristine beauty of the Nisqually Delta. It is also tempting to express the wish that time and human hands not disturb its natural tranquility. This is not, however, the task before this court. ... "

Court Cases Support the "Managed Use" Orientation of Shorelines—Nisqually Delta

- In applying the law, we look first to its overall policy

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." RCW 90.58.010

Nisqually Delta Ass'n v. City of DuPont, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985),

SMA Central Concepts

The shoreline is used and protected

- Balance shoreline use
 - "all appropriate uses"
 - with environmental protection
- Promote "priority uses"
 - 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 that 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 people to enjoy the shorelines of the state

RCW 90.58.020

Statutory Definition

(d) "Shorelands" or "shoreland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and ***contiguous floodplain areas landward two hundred feet from such floodways***; and all wetlands and river deltas associated with the streams, lakes, and tidal waters **which are subject to the provisions of this chapter**; the same to be designated as to location by the department of ecology.

RCW 90.58.030(2)(d)

Planning For and Fostering All Reasonable and Appropriate Uses

- Designations based on physical conditions
 - Variety of designations tied to inventories and special studies
 - Purpose—to segregate the shorelines into those places best left alone, and those places where the private individual or public group may engage and use the shoreline in a variety of uses

Step I—The Inventory

WAC 173-26-201

(c) **Inventory shoreline conditions.**

Gather and incorporate all pertinent and available information, existing inventory data and materials from state and federal agencies, *individuals* and nongovernmental entities with expertise, affected Indian tribes, watershed management planning, port districts and other appropriate sources.

The Inventory

- Map inventory information at an appropriate scale. The department may provide an inventory of shoreline conditions to the local jurisdiction.

WAC 173-26-201

- This is too important to be left to "the consultants." They often work at a scale that fails to recognize local conditions.

Step II Designations (Zoning)

- Designations reflect the different conditions identified in the inventory, from the very developed and intensively used areas to the most environmentally sensitive.
- Details are found at WAC 173-26-211

Designations

(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

Designation

- Old Program
 - Urban Rural Conservancy Natural
- New Program
 - High Intensity
 - Urban Conservancy
 - Shoreline Residential
 - Rural
 - Conservancy
 - Natural
 - Aquatic
- No Requirement to Change

Designations Well Defined

Tied to Physical Conditions and Existing Uses

(5) The designations.

(a) "Natural" environment.

(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. These systems require that only very low intensity uses be allowed in order to maintain the ecological functions and ecosystem-wide processes. Consistent with the policies of the designation, local government should include planning for restoration of degraded shorelines within this environment

Natural Environment

(iii) **Designation criteria.** A "natural" environment designation should be assigned to shoreline areas if any of the following characteristics apply:

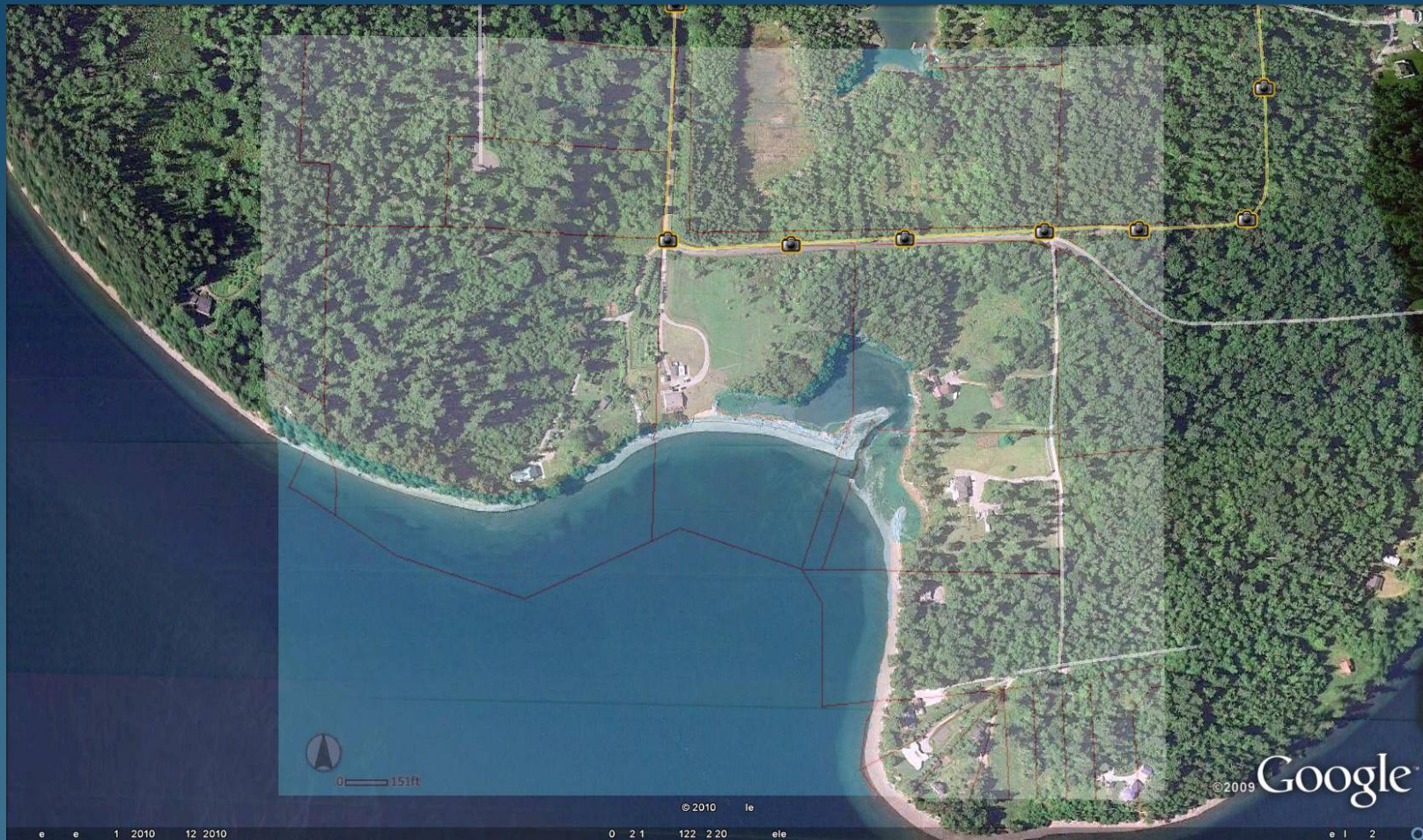
(A) The shoreline is ecologically intact and therefore currently performing an important, irreplaceable function or ecosystem-wide process that would be damaged by human activity;

(B) The shoreline is considered to represent ecosystems and geologic types that are of particular scientific and educational interest; or

(C) The shoreline is unable to support new development or uses without significant adverse impacts to ecological functions or risk to human safety.

The Importance of Scale

Anderson Island – Thompson Cove



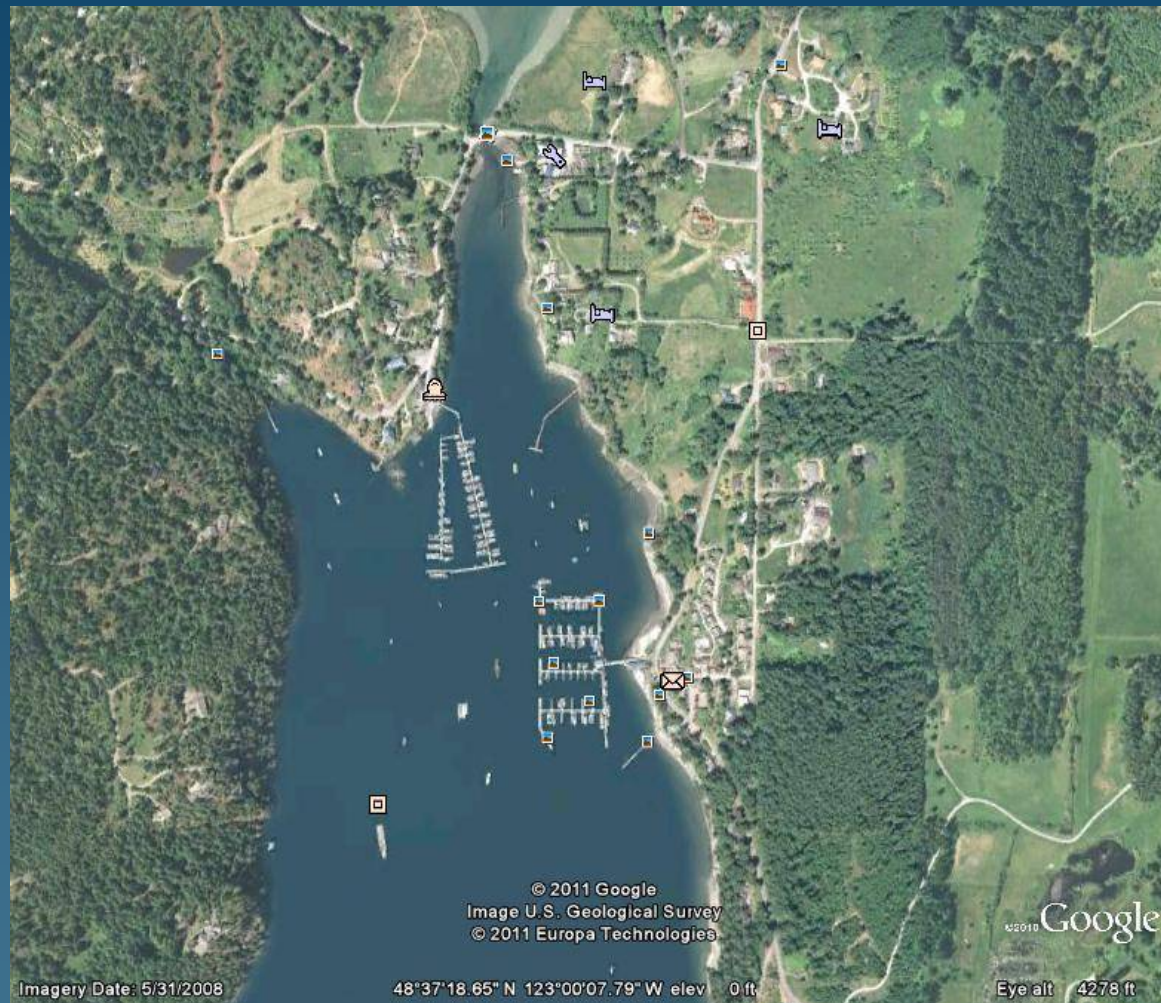
Garrison Bay



Natural Environment in Practice

- Consultant studies tend to be high-level generic
- You can protect yourself with site-specific data

Deer Harbor



High Intensity

(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.

High Intensity

(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," as described by RCW 36.70A.070, if they currently support high-intensity uses related to commerce, transportation or navigation; or are suitable and planned for high-intensity water-oriented uses.

High Intensity

(ii) Management policies.

(A) In regulating uses in the "high-intensity" environment, first priority should be given to water-dependent uses. Second priority should be given to water-related and water-enjoyment uses. Nonwater-oriented uses should not be allowed except as part of mixed use developments. Nonwater-oriented uses may also be allowed in limited situations where they do not conflict with or limit opportunities for water-oriented uses or on sites where there is no direct access to the shoreline. Such specific situations should be identified in shoreline use analysis or special area planning, as described in WAC 173-26-200 (3)(d).

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:

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

Legislative guidelines—RCW 90.58.020

Fostering "All Appropriate Uses"

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

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

RCW 90.58.100(2)

- These are the "water oriented" uses

Fostering "All Appropriate Uses"

(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

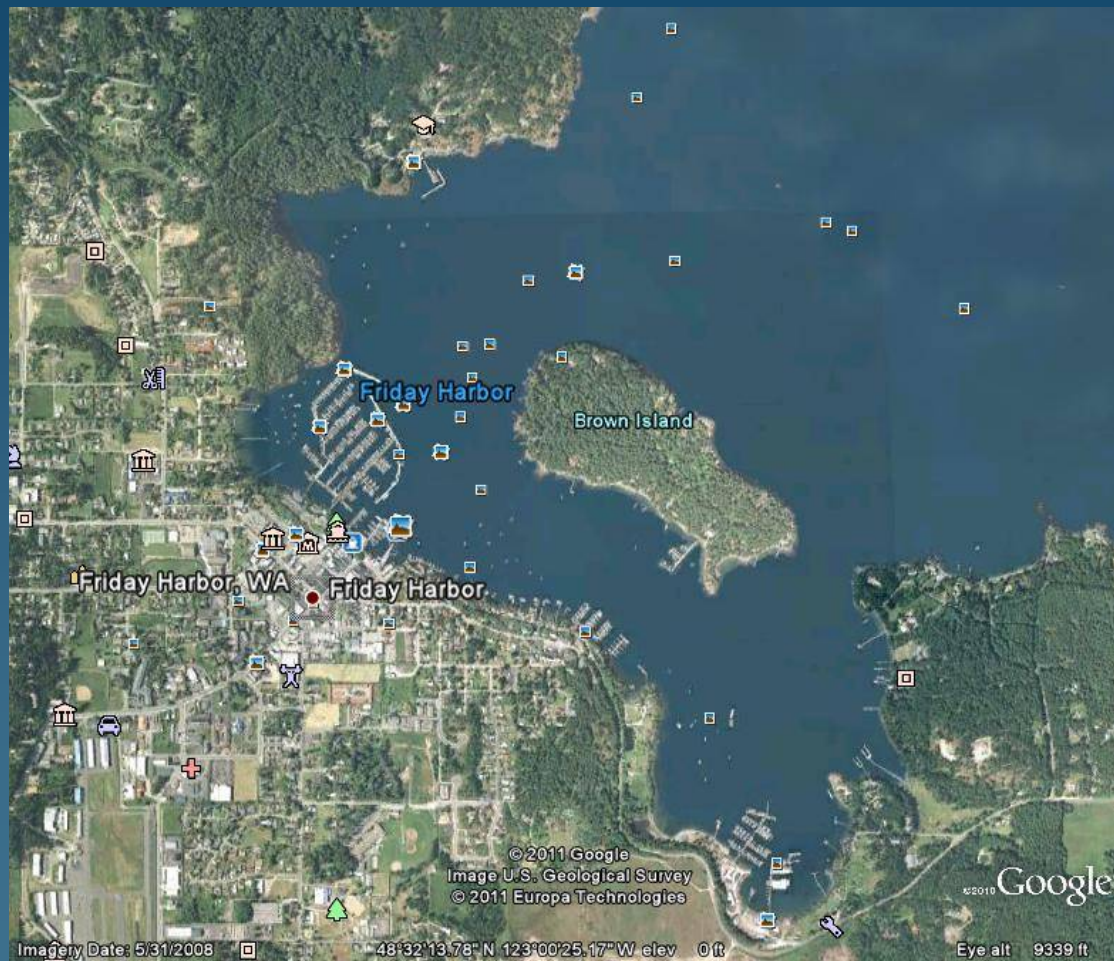
- housing, business, industry,
- transportation, agriculture, natural resources, recreation, education,
- public buildings and grounds, and
- other categories of public and private uses of the land

RCW 90.58.100(2)(e)

- Note: There no legislative limitation on allowing other than water-dependent, water-related or water-enjoyment uses; collectively referred to as "water-oriented uses." Such a prohibition is contrary to Section (e) above so long as an adequate record is made explaining the rationale.

Designations in Practice

Friday Harbor



Shoreline Residential

(f) "Shoreline residential" environment.

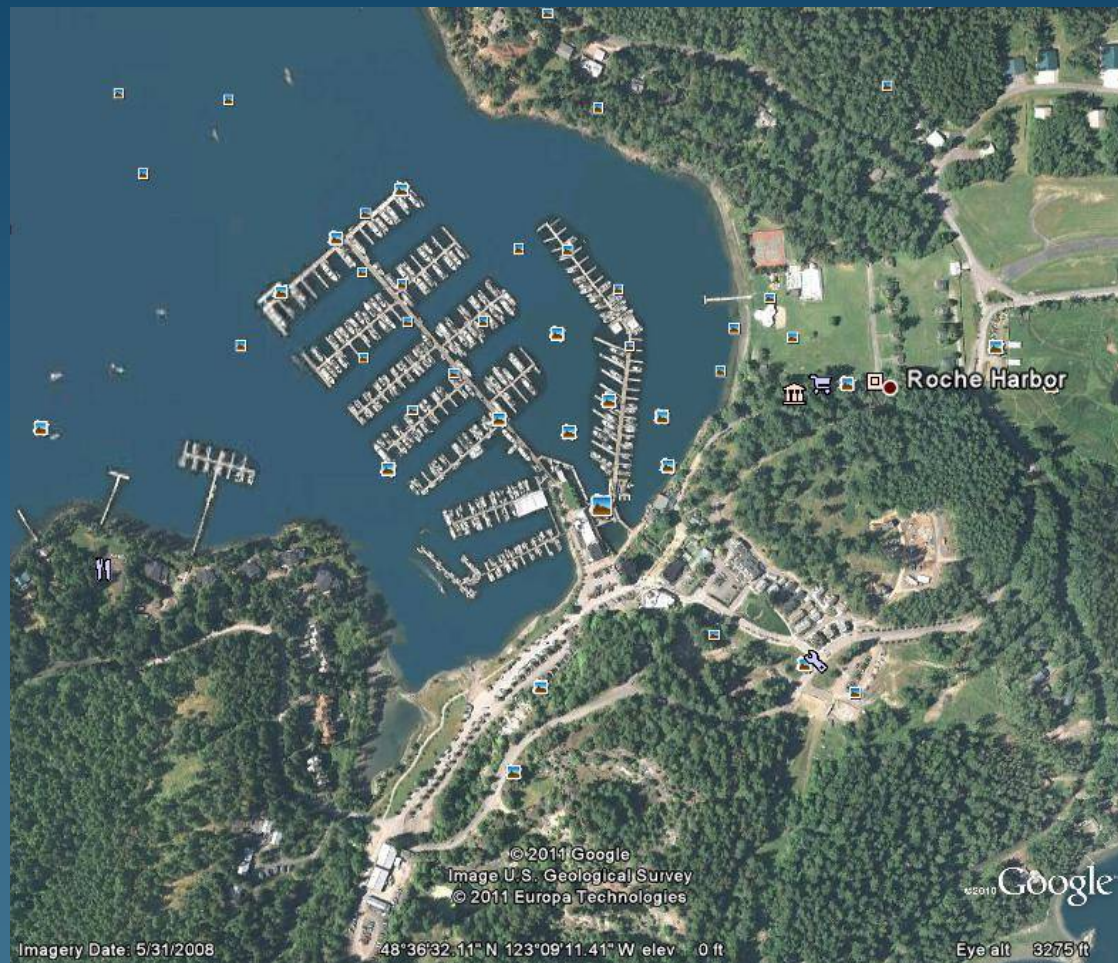
(i) **Purpose.** The purpose of the "shoreline residential" environment is to accommodate residential development and appurtenant structures that are consistent with this chapter. An additional purpose is to provide appropriate public access and recreational uses.

Shoreline Residential

(iii) **Designation criteria.** Assign a "shoreline residential" environment designation to shoreline areas **inside urban** growth areas, as defined in RCW 36.70A.110, 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.

Designations in Practice

Roche Harbor



Rural Conservancy

(b) "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. Examples of uses that are appropriate in a "rural conservancy" environment include low-impact outdoor recreation uses, timber harvesting on a sustained-yield basis, agricultural uses, aquaculture, low-intensity residential development and other natural resource-based low-intensity uses.

Rural Conservancy

(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;

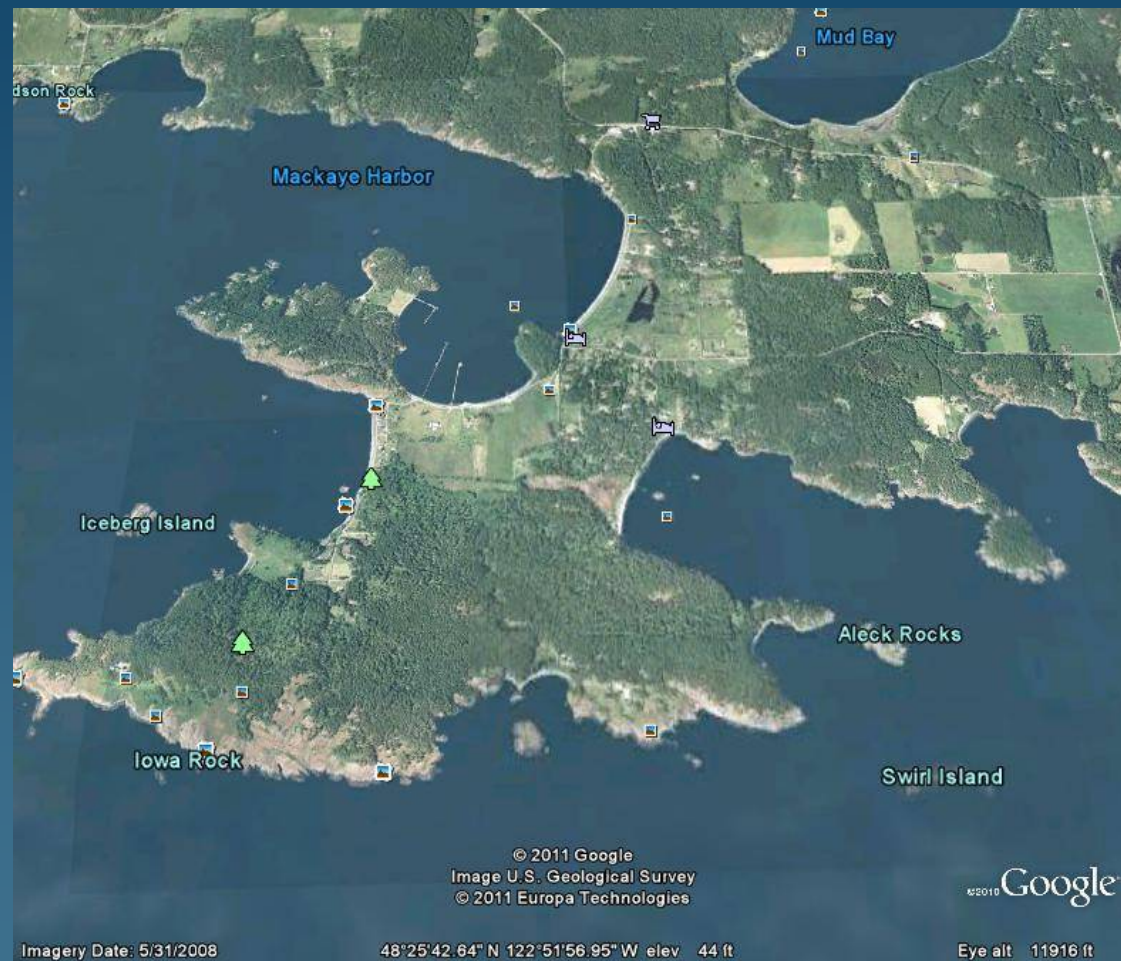
(B) The shoreline is currently accommodating residential uses outside urban growth areas and incorporated cities or towns;

(C) The shoreline is supporting human uses but subject to environmental limitations, such as properties that include or are adjacent to steep banks, feeder bluffs, or flood plains or other flood-prone areas;

(D) The shoreline is of high recreational value or with unique historic or cultural resources; or

(E) The shoreline has low-intensity water-dependent uses.

Rural/Rural Conservancy Lopez Island – South End



Rural Conservancy

- Areas designated in a local comprehensive plan as "limited areas of more intensive rural development," as provided for in Chapter 36.70A RCW, may be designated an alternate shoreline environment, provided it is consistent with the objectives of the Growth Management Act and this chapter. "Master planned resorts" as described in RCW 36.70A.360 may be designated an alternate shoreline environment, provided the applicable master program provisions do not allow significant ecological impacts

Blakely Island Marina



Aquatic

(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.

Aquatic

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

Local governments may designate submerged and intertidal lands with shoreland designations (e.g., "high-intensity" or "rural conservancy") if the management policies and objectives for aquatic areas are met. In this case, the designation system used must provide regulations for managing submerged and intertidal lands that are clear and consistent with the "aquatic" environment management policies in this chapter. Additionally, local governments may assign an "aquatic" environment designation to wetlands.

Aquatic Designed to be Used

(ii) **Management policies.**

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

(B) The size of new over-water structures should be limited to the minimum necessary to support the structure's intended use.

(C) In order to reduce the impacts of shoreline development and increase effective use of water resources, multiple use of over-water facilities should be encouraged.

(D) 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.

Aquatic

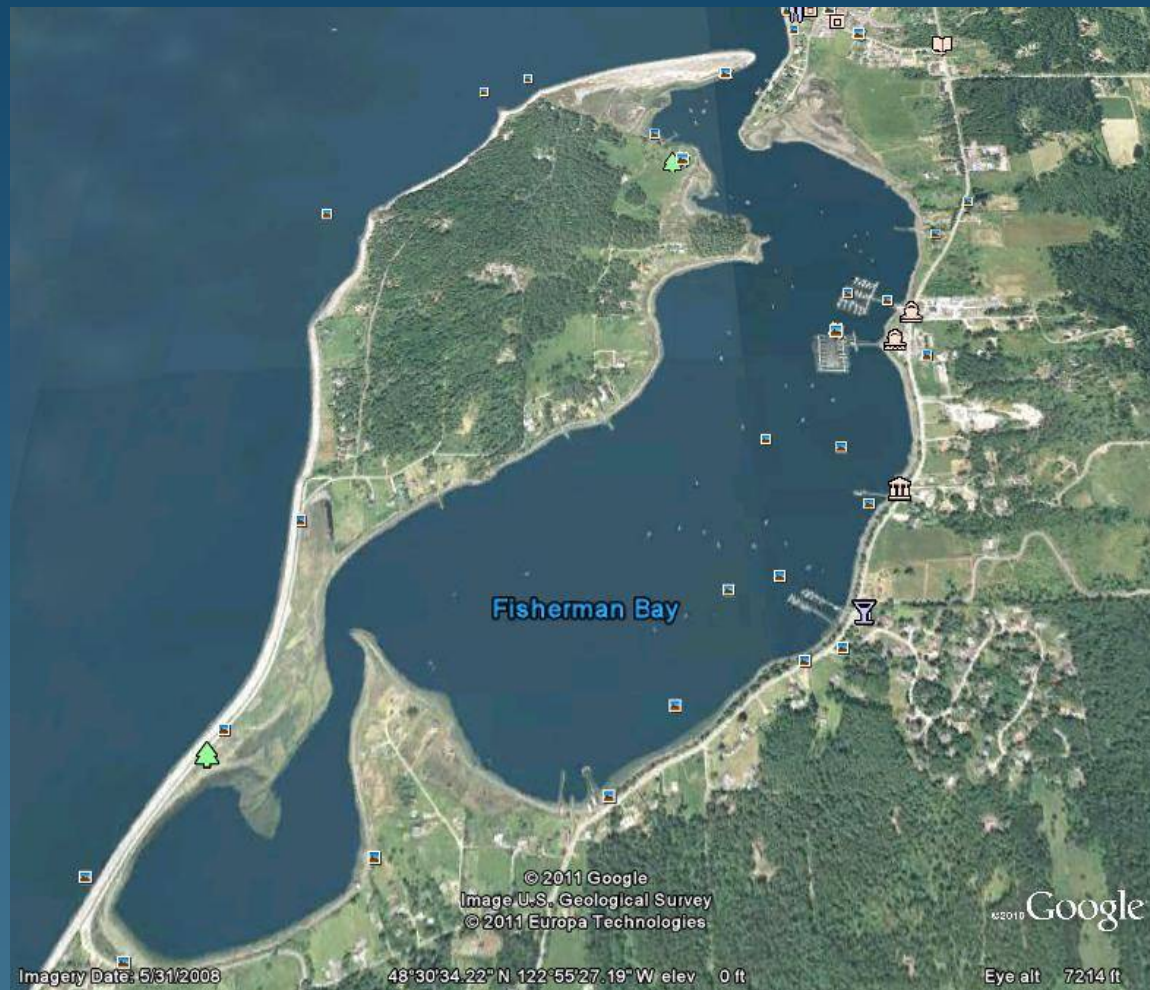
(ii) Management policies. (continued)

(E) Uses that adversely impact the ecological functions of critical saltwater and freshwater habitats should not be allowed except where necessary to achieve the objectives of RCW 90.58.020, and then only when their impacts are mitigated according to the sequence described in WAC 173-26-201 (2)(e) as necessary to assure no net loss of ecological functions.

(F) Shoreline uses and modifications should be designed and managed to prevent degradation of water quality and alteration of natural hydrographic conditions.

(G) Local governments should reserve shoreline space for shoreline preferred uses. Such planning should consider upland and in-water uses, water quality, navigation, presence of aquatic vegetation, existing shellfish protection districts and critical habitats, aesthetics, public access and views

Lopez Island – Fisherman Bay



County Policy on Class I, 2 and 3 Beaches

- "Class I beach" means a beach or shore having dependable, geologically fully developed, and normally dry backshore
- "Class II beach" means a beach or shore having only marginally, geologically partially developed and not dependably dry backshore
- "Class III beach" means a beach or shore having no dry backshore
- How does this pertain to designation criteria?

Once the Designations Are Set the Focus Changes to Uses

- The general regulations are designed to set specific "zoning style" use requirements
- The recent general use requirements may be found at SJC Chapter 18.40

Questions? – Break

- Next—Critical Areas and Buffers

What is a Critical Area?

(4) "Critical areas" include the following:

(a) Wetlands;

(b) Areas with a critical recharging effect on aquifers used for potable water, referred to in this chapter as critical aquifer recharge areas;

(c) Fish and wildlife habitat conservation areas;

(d) Frequently flooded areas; and

(e) Geologically hazardous areas.

WAC 365-190-030

Most Pertinent to Shorelines

(5) "Erosion hazard areas" are those areas containing soils which, according to the United States Department of Agriculture Natural Resources Conservation Service Soil Survey Program, may experience significant erosion. **Erosion hazard areas also include coastal erosion-prone areas and channel migration zones.**

(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.

(b) "Habitats of local importance" designated as fish and wildlife habitat conservation areas include those areas found to be locally important by counties and cities.

What is a Critical "Fish and Wildlife Habitat Conservation Area"?

(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.

WAC 365-190-030(6)(a)

Legislature Shifted Critical Area Protection on Shorelines to the SMA

(d) Upon department of ecology approval of a shoreline master program or critical area segment of a shoreline master program, critical areas within shorelines of the state are protected under chapter 90.58 RCW and are not subject to the procedural and substantive requirements of this chapter [GMA]...

County Critical Areas 18.30.160

Fish and wildlife habitat conservation areas

Article III. Special Overlay District Regulations

18.30.160 Fish and wildlife habitat conservation areas.

5. Marine Habitat Areas. These areas include the following:

- a. All kelp and eelgrass beds;
- b. Priority shellfish areas as follows:
 - i. All public and private tidelands or bedlands which are approved or conditionally approved by the Washington Department of Health for shellfish harvest;
 - ii. Any shellfish protection districts created under Chapter 90.72 RCW; and
 - iii. Areas with all of the following attributes: broad intertidal areas, bays with geographically restricted wave action and circulation, poor or limited flushing, warmer water temperatures, seasonally reduced salinities, and increased potential for algae bloom; and
- c. All identified smelt spawning areas.

*iii too broad for general applicability under SMA

County Critical Areas 18.30.160

Fish and wildlife habitat conservation areas

B. Protection Standards.

1. General Habitat Protection Standards. The following performance standards shall be met for development permits or approvals located inside of or within 300 feet of a habitat classified in this section, except for Upland Category III:

- a. The proposal must mitigate to the maximum extent feasible any significant adverse impacts to habitat functions and values and to habitat buffers. Mitigation actions by an applicant or property owner shall occur in the following preferred sequence, unless the applicant demonstrates that an overriding public benefit would warrant an exception:
 - i. Avoiding the impact by not taking a certain action or parts of actions on that portion of the site which contains the habitat area or its buffer;
 - ii. Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
 - iii. Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
 - iv. Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; or
 - v. Compensating for the impact by replacing or providing substitute resources or environments. This may require preparation of a habitat management plan in accordance with subsection (D) of this section.

The Schedule

Critical Areas Ordinance Update

- Oct. 19 – PC public hearing in Fish & Wildlife Habitat Conservation Areas (FWHCAs)
- Oct. 21 – PC deliberations on FWHCAs
- Oct. 28 – PC deliberations on FWHCAs

Marine Stewardship Area Plan Resolution 27-2007

- Typical overall statement of issues and priorities
- Not sufficient to declare all shorelines critical areas if countered by more property-specific data

Buffers

- Buffers
 - Typical definition—land set aside as a "no touch" area to achieve environmental benefit, synonym open space
 - Key legal requirements
 - Applicable to objective
 - Appropriate to location
 - Reasonably necessary under circumstances

Because all Water is "Habitat"

Are all Shorelines Critical Areas?—No!

Often recommended by agencies:

“Nearshore habitat” means the zone that extends seaward from the marine shoreline to a water depth of approximately 20 meters (66 feet). Nearshore habitat is rich biologically, providing important habitat for a diversity of plant and animal species.

From Whatcom County Code—similar to Marine Stewardship program

* Too broad for critical area designation

All Marine Shorelines are Critical Areas

- Locally important habitat areas
 - The buffer for marine nearshore habitats shall extend landward 150 feet from the ordinary high water mark.

WCC 16.16.740,

**Problem—on what basis is this universally applied?
Resolution 27-2007 may or may not be sufficient**

Problem Is Not With Designation But With Excessive Limits

- Problem: Setbacks/Buffers not related to dual mandate
 - Foster all appropriate uses
 - Achieve "no net loss"
- Excessive setbacks/buffers designed to restore shoreline to predevelopment state
- RCW 90.58.020 requires Ecology to recognize existing development
- Buffers are not reasonably necessary to protect existing shoreline functions and values when no net loss can be achieved by other means

Not All Shorelines Are Critical Areas

(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)*

RCW 36.70A.480(5)

Critical Areas – Key Questions

- Can the County Impose a Universal 150-200' Buffer on Most of County Properties?
 - Factual Questions
 - What is the comprehensive plan?
 - What is the proposed designation?
 - Have the shoreline and shorelands been modified? houses? docks? lawns?
 - What is the critical area to be protected?

Critical Areas – Key Questions

Legal Questions

- Is the buffer necessary in each location to avoid threatening survival of species at each location?
- Is the buffer reasonably necessary to meet the "no net loss test"?
- Where the government wants to impose a buffer or open space, the government has the burden to prove the condition is applicable and appropriate to the location
- *Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002); *Citizens Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008); *Citizens v. Whatcom County*, Supreme Court No. 84675-8 (Aug. 18, 2011)

Critical Areas – Key Questions

- How to protect against such a designation on my property
 - Hire a specialist who can evaluate your property in the context of the guidelines and specific provisions of the BAS report.
 - Typically the BAS reports are regional, not site specific. But you cannot fight the BAS report based on internet science. You need property specific information.
 - *Citizens v. Sims* held that the government cannot impose universal open space based on generic science, but a Kitsap County case said room for two opinions, courts will support the government

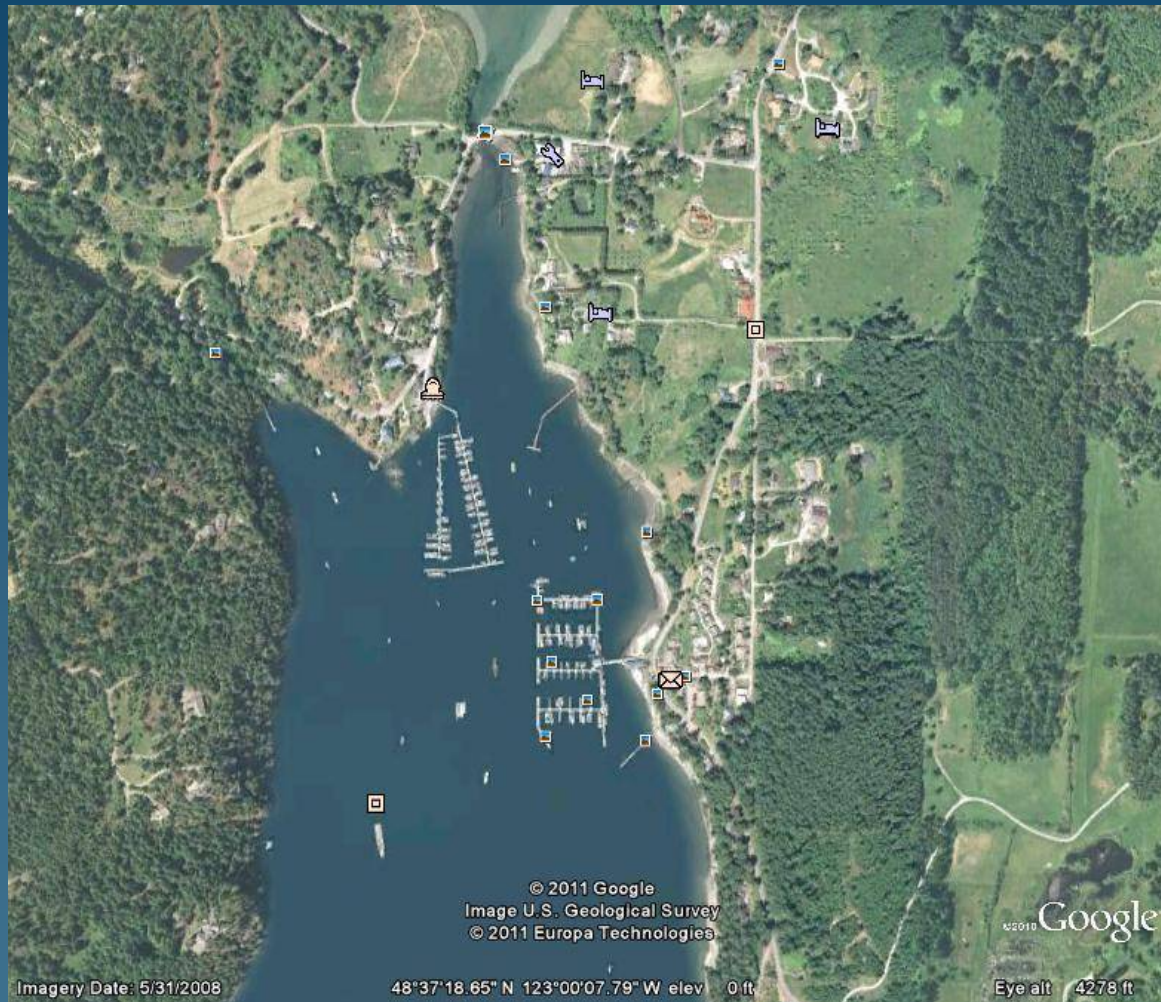
Critical Areas – Key Questions

- What are the impacts to the value and use of my land should our council approve 150-200' shoreline and wetland buffers?
- Depends on County nonconforming use statute
 - Existing structures cannot be expanded
 - Damaged or destroyed buildings may be rebuilt or may be required to comply
 - Both will affect value—may even devalue below mortgage

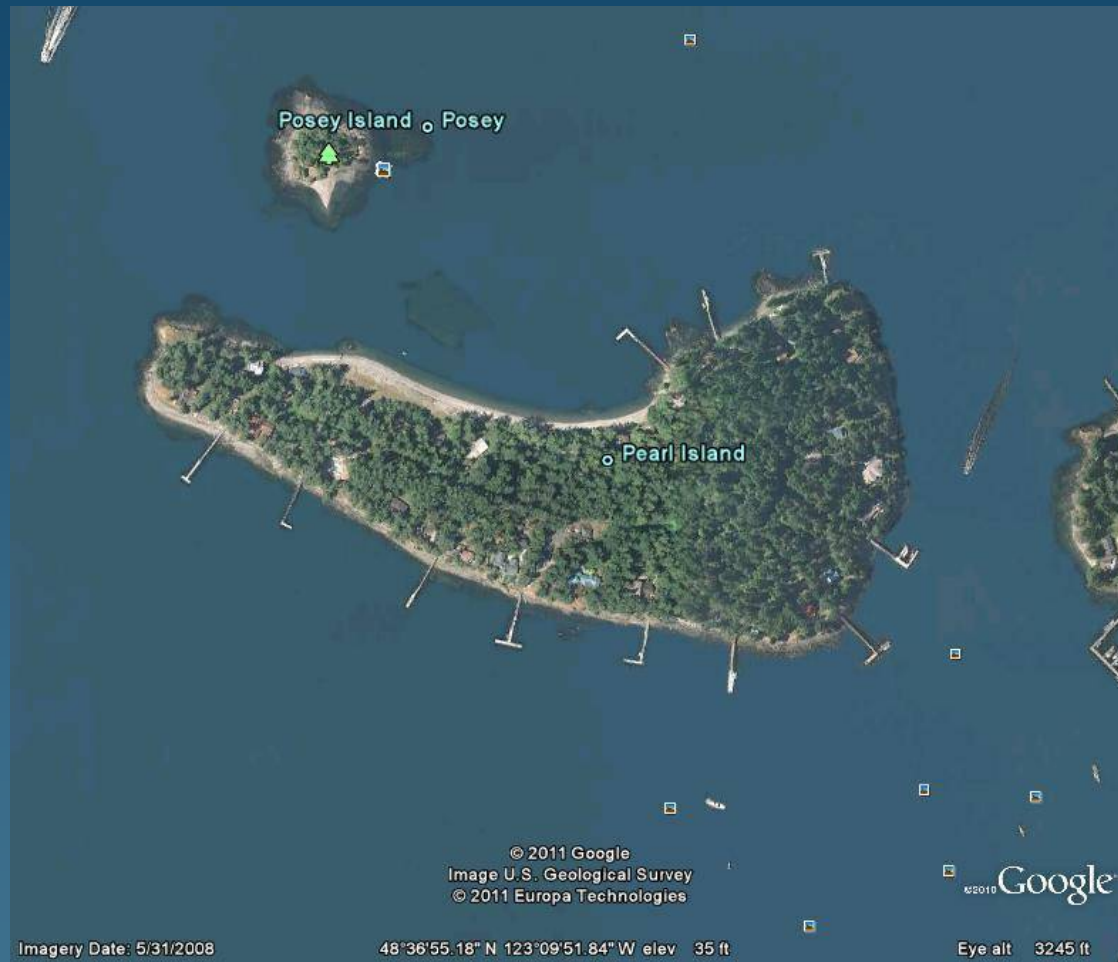
Critical Areas – Key Questions

- How do we convince the Council to not change the setbacks? What we have now is working and not causing damage, but they don't hear us
 - Plan level—targeted on-site science reports on applicability of BAS report to specific conditions at specific sites
 - Project level—reminder that mandatory open space puts the burden on government to prove reasonable necessity

Deer Harbor



Pearl Island



Orcus Island – South End



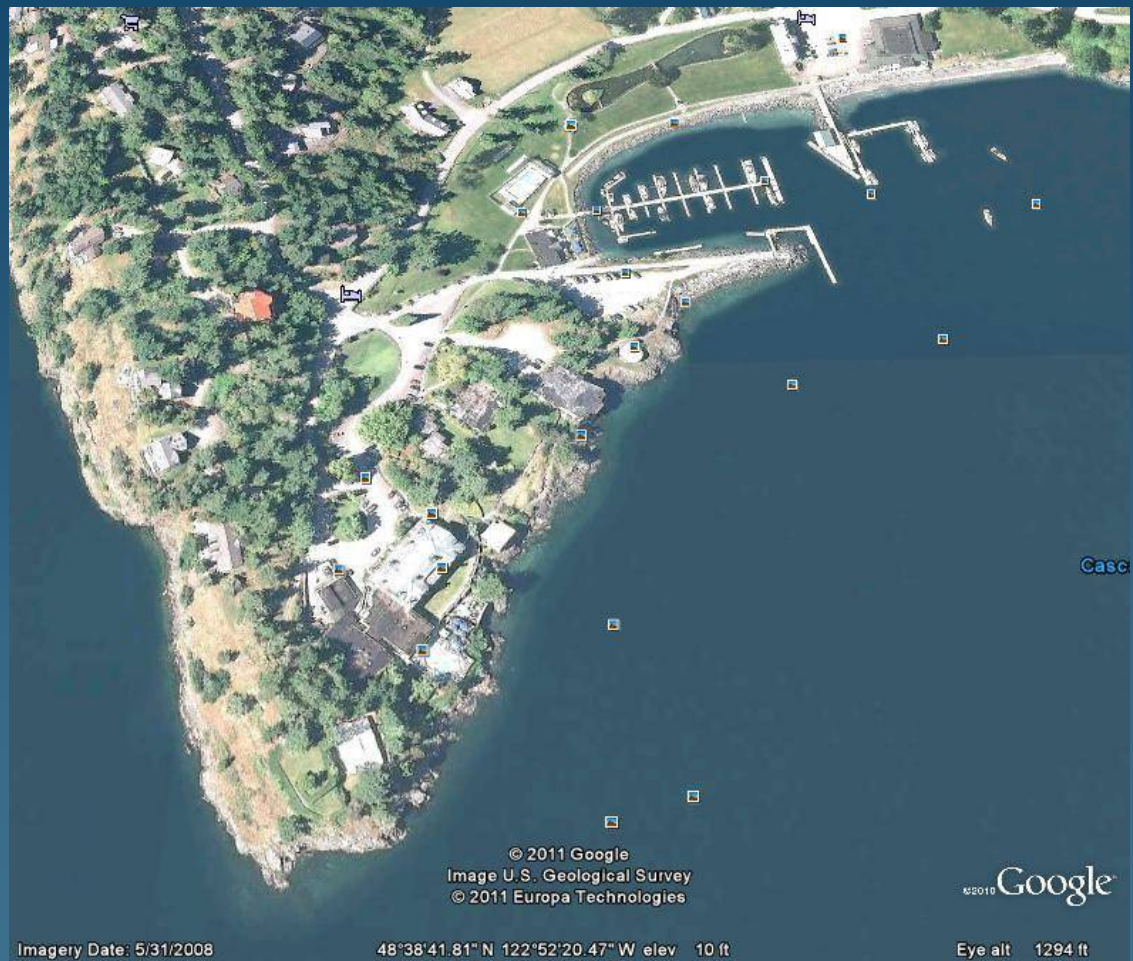
Imagery Date: 5/31/2008

48°36'04.85" N 122°59'02.53" W elev 5 ft

©2010 Google

Eye alt 679 ft

Rosario Close Up



Critical Areas – Key Questions

- If we do not convince the County not to adopt universal big buffers, what steps can we take? How extensive of a process and what will be the cost of obtaining a variance? Many lots are too small and a new setback will hinder any construction
 - Variance requires proof of extraordinary hardship—difficult test
 - Best response—challenge imposition of conditions at the time the condition is specifically imposed
 - *Unlimited v. Kitsap County*, 50 Wn. App. 723, 750 P.2d 651 (1988)—reasonably related to problem caused by project for which permit is requested

Critical Areas – Key Questions

(continued)

- Does the shoreline have some unique condition which if altered affects survival of a species?
- Does the project propose to alter the shoreline?
- Is the condition reasonably necessary to achieve mitigation of a problem caused by the proposed project?
- Did the government carry the burden of proof?
- *Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002)

Critical Areas – Key Questions

- What does the new Whatcom County case mean?
 - Statutory protection under RCW 82.020.020 does not apply to "as written" challenges to shoreline plans
 - Case does not change limitations of underlying constitutional limitations, including limitation that when the government seeks to impose a condition,
 - Is the condition reasonably related to solve a problem caused by the project under review?
 - If the condition is a no touch buffer
 - Did the government prove it was reasonably necessary (applicable and appropriate) to achieve no net loss?
 - If not, cases hold condition is unenforceable

Key Findings Required for a Shoreline Fish and Wildlife Habitat Conservation Area

- ...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*

Notice Similarity to "Natural Area"

(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. These systems require that only very low intensity uses be allowed in order to maintain the ecological functions and ecosystem-wide processes. Consistent with the policies of the designation, local government should include planning for restoration of degraded shorelines within this environment

All Waters are "Aquatic," But Not All "Aquatic" Areas are Critical Areas

(D) 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.

All Waters are "Aquatic," But Not All "Aquatic" Areas are Critical Areas

(F) Shoreline uses and modifications should be designed and managed to prevent degradation of water quality and alteration of natural hydrographic conditions.

(G) Local governments should reserve shoreline space for shoreline preferred uses. Such planning should consider upland and in-water uses, water quality, navigation, presence of aquatic vegetation, existing shellfish protection districts and critical habitats, aesthetics, public access and views.

Aquatic areas designed to be used—incompatible with "which, if altered, may reduce the likelihood that the species will persist over the long term—criteria for critical area"

Enhancement Is Not Required

(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(4)

Two Questions?

- Are all shorelines required to be defined as critical areas?
 - no
- Do all critical areas require buffers to protect critical functions and values?
 - no

Not All Shorelines Are Critical Areas

(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)*

RCW 36.70A.480(5)

Questions? – Break

- Next—Nexus and Proportionality
 - Open space and public access

Mandatory Open Space/Buffers/Public Access

The Holy Grail of Shoreline Management

- The statute
 - (5) Increase public access to publicly owned areas of the shorelines;
 - (6) Increase recreational opportunities for the public in the shoreline;

Priority uses include:

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

RCW 90.58.020

WAC 173-26-186

Governing Principles

(5) The policy goals of the act ... 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* (where applicable, statutory limitations such as those contained in chapter 82.02 RCW and RCW 43.21C.060) on the regulation of private property.

Local government should use a **process** designed to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights.

- Recommend provision requiring written findings on key elements required of any permit

Public Access—Guidelines

WAC 173-26-221(4)

(4) *Public access.*

(a) **Applicability.** Public access includes the ability of the general public to reach, touch, and enjoy the water's edge, to travel on the waters of the state, and to view the water and the shoreline from adjacent locations. Public access provisions below apply to *all shorelines of the state unless stated otherwise.*

(b) **Principles.** Local master programs shall:

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

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

Public Access—Guidelines

(c) Local governments should plan for an integrated shoreline area public access system that identifies specific public needs and opportunities to provide public access. ...The planning process shall also comply with all relevant constitutional and other legal limitations that protect private property rights

WAC 173-26-221(4)

Remember the "Goal" of SMA

Encourage Appropriate Use of Shorelands

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.

RCW 90.58.020

"...opportunity for substantial numbers of the people to enjoy the shorelines of the state"

- Private, but priority use—SF homes
- Private clubs and facilities—private/member only access
 - Elks club/Yacht club (See *State Dept. of Ecology v. Ballard Elks Lodge No. 827*, 84 Wn.2d 551, 527 P.2d 1121 (1974))
- Self contained—limited public access to private areas
 - Restaurant with outside seating
 - Residential development with "private" or controlled access
- Voluntary but limited access—view towers/path to water or other limited access
- Public access to publicly owned shorelines:
 - Public parks, open spaces, and trails

The Right to Regulate Public Waters Does Not Equate to a Right to Command Public Access - *Kaiser Aetna v. U.S.*

- Could the government command public access to private marina as a condition of a Section 10 USACOE permit regulating development in public waters? NO!

In this case, we hold that the “right to exclude,” so universally held to be a fundamental element of the property right, FN11 falls within this category of interests that the Government cannot take without compensation.

[FN 11]. As stated by Mr. Justice Brandeis, “[a]n essential element of individual property is the legal right to exclude others from enjoying it.” [citations omitted] Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond.

Kaiser Aetna v. United States, 444 U.S. 164, 179-180 (1979)

Public Trust Doctrine Does Not Support Upland Conditions Not Related to Navigation

The navigational servitude, which exists by virtue of the Commerce Clause in navigable streams, gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce. ... But none of these cases ever doubted that *when the Government wished to acquire fast lands, [lands above ordinary high water] it was required by the Eminent Domain Clause of the Fifth Amendment to condemn and pay fair value for that interest.*

Kaiser Aetna v. U. S., 444 U.S. at 177

(The decision involved mandating public access as a condition of a permit to dredge navigable waters.)

Public Trust Doctrine Does Not Extend to Upland Access

[Property owner] does not from the mere circumstance that he is the owner of the bank, acquire any special or particular interest in the stream, over any other member of the public, except that, by his proximity thereto, he enjoys greater conveniences than the public generally. To him, *riparian ownership brings no greater rights than those incident to all the public, except that he can approach the waters more readily, and over lands which the general public have no right to use for that purpose.*

U.S. v. Willow River Power Co., 324 U.S. 499, 507-508 (1945) emphasis supplied

Public Trust Doctrine Does Not Extend to Upland Access

According to the public trust doctrine, the State holds state shorelines and waters in trust for the people of Washington, ... [that is] the public has an overriding interest in the **navigable waterways and the lands under them.**

Caminiti, 107 Wash.2d at 668, 732 P.2d 989.

Samson v. City of Bainbridge Island, 149 Wn. App. 33, 202 P.3d 334 (2009).

Public Trust Doctrine Does Not Require Public Access Over Private Property

- Public's interest in navigability applies to "riparian" area = below line of high water and not to "fast lands," which are the lands above ordinary high water
- Biologists identify the shorelands adjacent to the waters as "riparian," but that is for habitat purposes and not a justification for access under the public trust doctrine

Public Access Substantially Furthers a Governmental Purpose—*Not Enough*

Although the outright taking of an uncompensated, permanent, public-access easement would violate the Takings Clause, conditioning appellants' rebuilding permit on their granting *such an easement would be lawful land-use regulation if it substantially furthered governmental purposes that would justify denial* of the permit. *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d. 677 (1987)

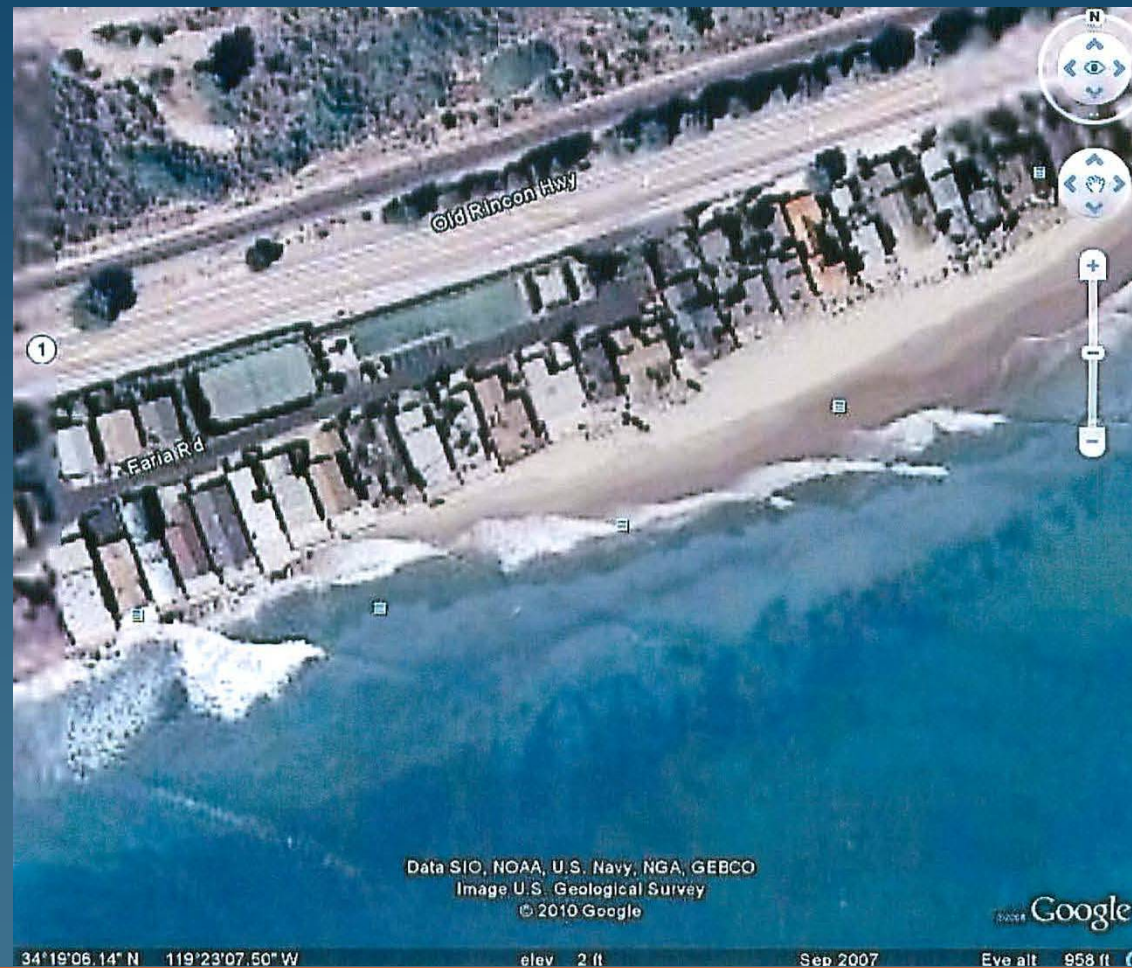
- Syllabus: "The syllabus constitutes no part of the opinion of the Court, but has been prepared by the Reporter of Decisions for the convenience of the reader."

Nollan v. California Coastal Commission

Public Access as a Condition of Development

- California Coastal Commission required a public access trail across the Nollan's property as a condition of rebuilding the home. The trail was justified because of:
 - Public safety
 - Public interest in accessing the water
 - Public interest is traversing from a public park to favorite beach

Nollan and the Role of Nexus



California Argues the Trail Furthers a "Substantial Governmental Purpose"

"The Commission argues that among these permissible purposes are *protecting the public's ability to see the beach*, assisting the public in *overcoming the "psychological barrier" to using the beach* created by a developed shorefront, and *preventing congestion on the public beaches.*"

483 U.S. at 835

Furthering Substantial Governmental Purpose

The question before the Court was how a linear trail across the Nollan's waterfront addressed a problem created by the Nollan's project as opposed to a very legitimate governmental purpose in assuring safe passage between the park to the north and the cove to the south

Authority to Require Linear Trail Not Tied to Problem Created by Project

"Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking."

483 U.S. at 830

Physical Occupation—A Suspect Action

“the right to exclude [others is] ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’ ”

“our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner,”

We think a “permanent physical occupation” has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

483 U.S. at 831-32, emphasis supplied

Mere Recitation of Public Interest Not Sufficient to Warrant Physical Invasion

"We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest."

"We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."

483 U.S. at 841, emphasis supplied

The Substantial Governmental Purpose in Public Access Was Not Enough to Warrant a Public Access Condition

- The problem the Court had in the *Nollan* case was that there was no link between a permit to remodel a house, with the potential for view blockage, and a specific requirements to have the Nollan's dedicate a public easement across their frontage
- The connection requirement is called "nexus"
- Same doctrine applies to 150-200' buffer—not tied to need to mitigate specific problem caused by upland or shoreline development

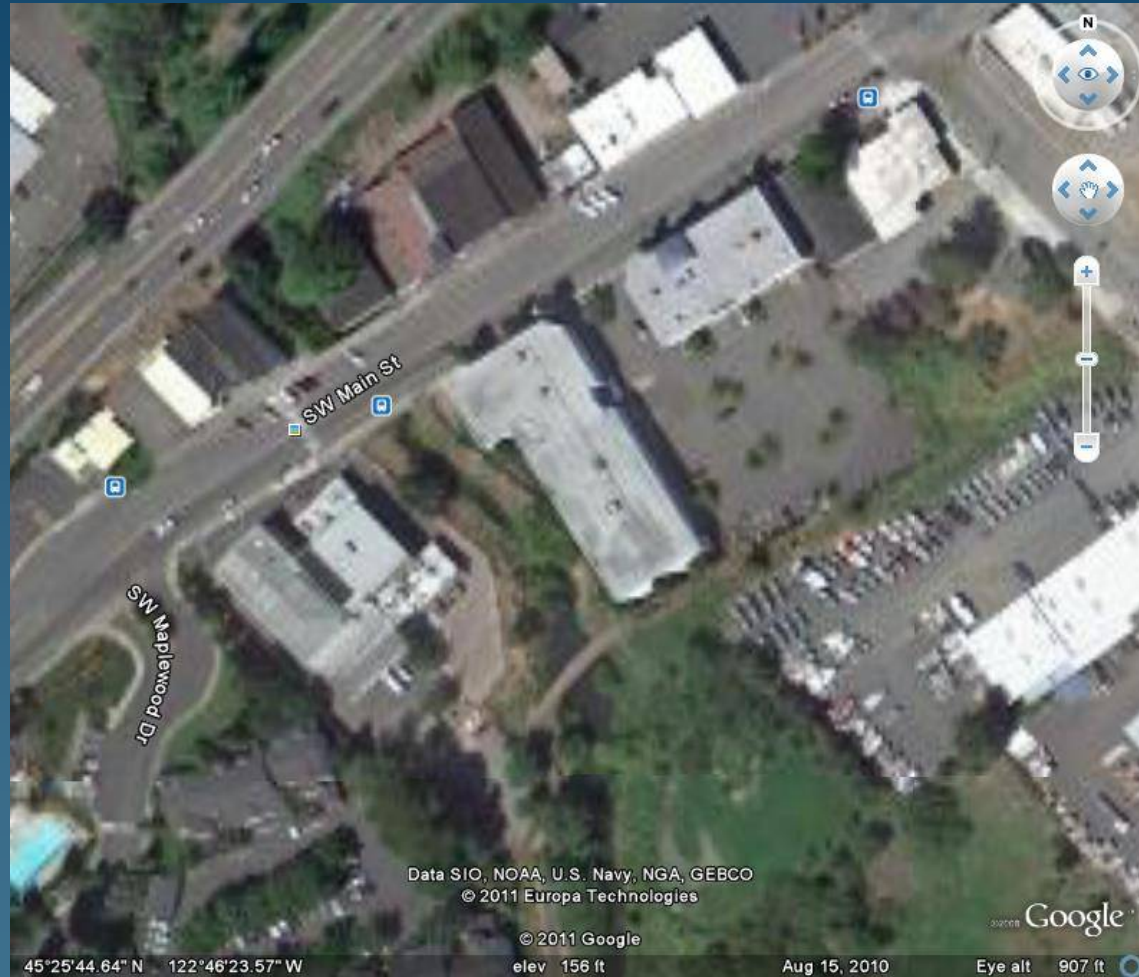
Even Where Connection Exists Response Must Be Proportional to Impact

- In *Dolan v. Tigard*, the City tried to secure a public easement over a stormwater area along Fanno Creek for a public trail

The city contends that the recreational easement along the greenway is only ancillary to the city's chief purpose in controlling flood hazards. It further asserts that unlike the residential property at issue in *Nollan*, petitioner's property is commercial in character, and therefore, her right to exclude others is compromised.

512 U.S. at 393

TIGARD: Fanno Creek



Dolan v. City of Tigard

Proportionality and Burden of Proof

- Even where there is a connection between the impact caused by the project and a need for shoreline access, there must be a reasonable connection between the mitigation required and the impact of the project under review
- This is called "proportionality"

Dolan on Proportionality and Burden of Proof

"No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. ... the burden [of proof] rests on the city."

512 U.S. at 391, emphasis supplied

- If a restaurant has a private patio on the water, how has that increased the need for the general public to access private shorelines? It has not.

Entitlements Under the Guidelines in Connection with Public Access or No Touch Buffers/Open Space —three basic requirements

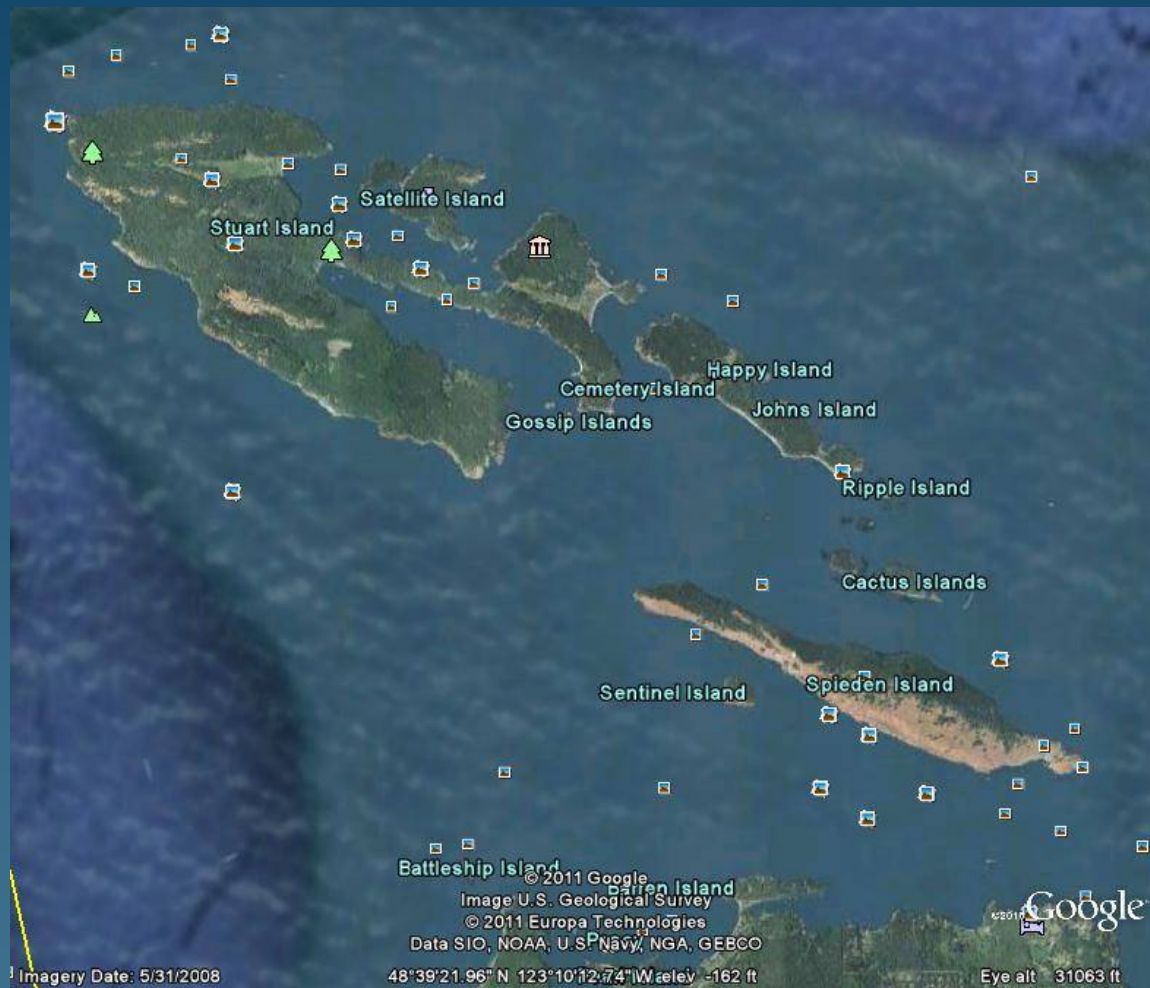
- A statement in the plan recognizing nexus and proportionality are the preconditions of any public access condition on a shoreline permit
- A statement that the local government has the burden of proof to demonstrate nexus and proportionality have been met
- A process that requires written findings
 - On the type of demand on public resources created by the new use and
 - The nexus and proportionality to that demand as a prerequisite to any public access condition on a shoreline permit

Recommended Condition

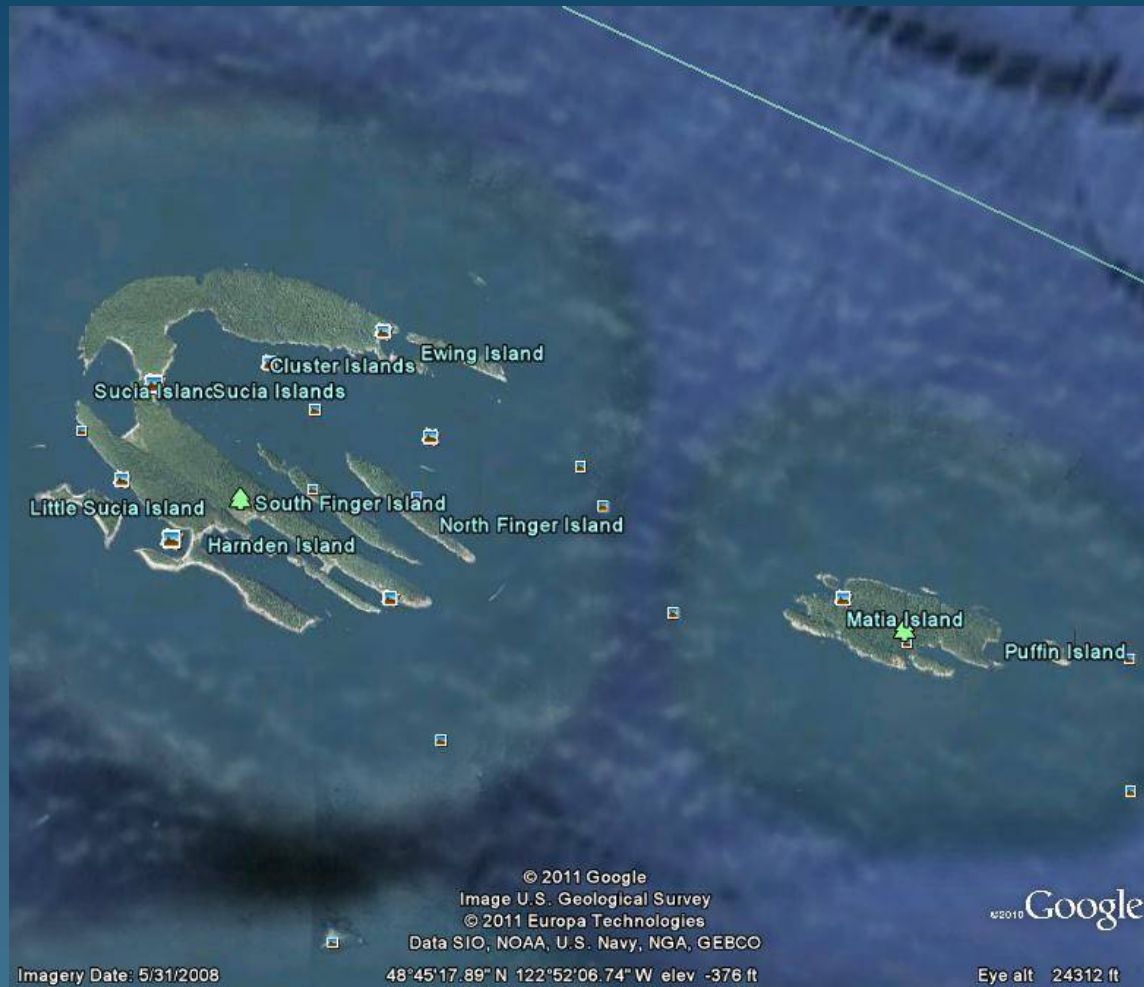
When provisions for public access or open space buffers/mandatory plantings are required as a condition of project approval, the Administrator shall prepare written findings, pursuant to SMP 23.60, demonstrating consistency with the principles of nexus and proportionality and the test stated in SMP 23.90.08.A.2 and SMP 23.50.08.A.

WCC 23.90.080.B.2

Northwest Islands



Sucia and Matia



For copies of this PowerPoint or related articles

- The Shoreline Management Act and Public Access: A Critique of Common Practices
- Limitations on "Furthering Substantial Governmental Purpose" When Considering Public Access Requirements for Washington State Shorelines under the Shoreline Management Act

contact krentz@perkinscoie.com

Presented by

Alexander W. "Sandy" Mackie

Perkins Coie LLP

1201 Third Avenue, Suite 4800

Seattle, WA 98101-3099

206-359-8653

amackie@perkinscoie.com