DEPARTMENT OF ECOLOGY
State of Washington

Shoreline Permitting Manual

Guidance for local governments

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Shoreline Permitting Manual

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Shorelands and Environmental Assistance Program

Washington State Department of Ecology

Lacey, Washington

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1. Introduction to shoreline permits

Washington's Shoreline Management Act (SMA) establishes a local/state partnership in administering shoreline permits. Local governments have the primary responsibility for initiating the planning required by the act and administering the regulatory program. The Department of Ecology's role is twofold:

- Act primarily in a supportive and review capacity, with an emphasis on providing assistance to local governments.
- Ensure compliance with the policies and provisions of the SMA by reviewing and approving permits and enforcing shoreline regulations.

Most developments within shorelines of the state must be consistent with the policies of the SMA and the requirements of the local Shoreline Master Program (SMP), WAC 173-22 and 173-27, other local government rules and regulations, and state and federal rules and regulations.

The SMA establishes three types of shoreline permits: Substantial development permits, conditional use permits, and variance permits. Most developments that meet a specific dollar threshold are considered substantial developments and require a **substantial development permit** (SDP). Certain kinds of development are **exempt** from substantial development permit requirements. More information about these permits is provided in Chapter 3 and exemptions are discussed in Chapter 4.

This *Shoreline Permitting Manual* provides an overview of the shoreline permit process. Developed to provide guidance to local government planners, the manual also may be helpful to other state and federal agency staff and project applicants. It covers important definitions for shoreline permitting, types of permits, permit conditions and permit time periods. It addresses exemptions to the requirements for a substantial development permit, a topic that often causes confusion for permit applicants and local planners. Nonconforming uses and development are also discussed.

2. Definitions

In the shoreline management world, some terms are exclusive, and others have definitions that are different from what they are elsewhere. Knowing these definitions is critical to effective and accurate implementation of local Shoreline Master Programs (SMP) through shoreline permits. This chapter provides a review of important definitions.

Development

Under the Shoreline Management Act (SMA), **development** means a use consisting of:

- Construction or exterior alteration of structures.
- Dredging.
- Drilling.
- Dumping.
- Filling.
- Removal of any sand, gravel, or minerals.
- Bulkheading.
- Driving of piling.
- Placing of obstructions.
- Any project of a permanent or temporary nature that **interferes with the normal public use of the surface of waters** overlying lands subject to the SMA at any stage of water level.

Figure 2-1: Dredging is considered development under the Shoreline Management Act.

All developments within the shorelines of the state must be consistent with the policies of the SMA and the requirements of the local SMP. However, only substantial developments require a substantial development permit.

Development does not include dismantling or removing structures if there is no other associated development or redevelopment. For example, when a structure is moved or dismantled, i.e., unbolted without causing any of the actions listed as development, a substantial development permit may not be required. Demolition or removal of structures may constitute development where the act of demolition alters the exterior of a structure; involves filling, dredging, drilling, excavation, placing of obstructions or materially interferes with public use of the shorelines.

For more information:

- RCW 90.58.030(3)(e)
- WAC 173-27-030(6)

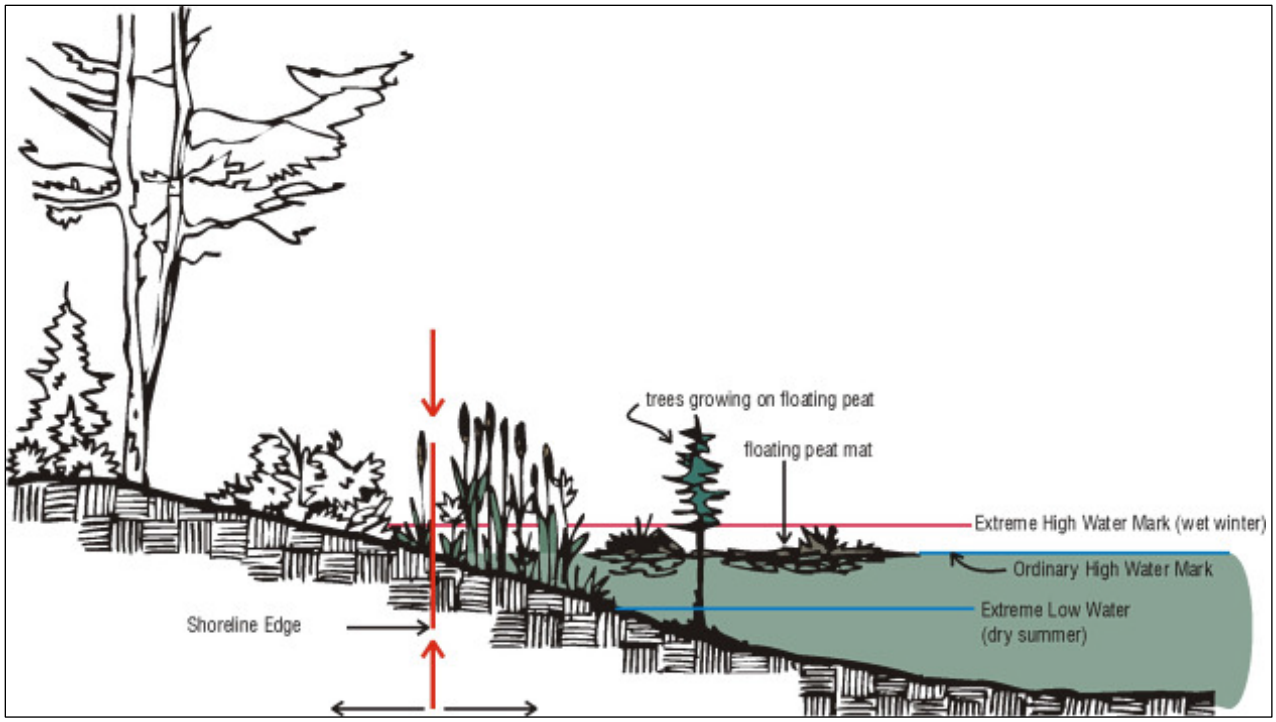

Figure 2-2: The location of the ordinary high water mark (OHWM) in relation to extreme high and extreme low water varies from site to site. At any given site, the OHWM will vary over time depending on wind, waves, fetch, erosion, accretion, soils, substrates, vegetation, land use changes, runoff, groundwater, the presence of peat, the constancy of pool elevations, and the activities of beavers and other organisms.

Ordinary high water mark

The **ordinary high water mark** (OHWM) is "that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation" [RCW 90.58.030(2)(c)]. The OHWM is not a fixed elevation – it can change over time. It is used to determine shoreline jurisdiction, implement regulations and establish shoreline buffers and setbacks.

For more information:

- RCW 90.58.030(2)(c)
- *Determining the Ordinary High Water Mark for Shoreline Management Act Compliance in Washington State* (2016)

Public Trust Doctrine

The **Public Trust Doctrine** is a legal principle derived from English Common Law. The essence of the doctrine is that the waters of the state are a public resource owned by and available to all citizens equally for the purposes of navigation, conducting commerce, fishing, recreation, and similar uses, and that this trust is not invalidated by private ownership of the underlying land. The doctrine limits public and private use of tidelands and other shorelands to protect the public's right to use the waters of the state.

The Public Trust Doctrine does not allow the public to trespass over privately owned uplands to access the tidelands. However, it does protect public use of navigable water bodies below the ordinary high water mark. Protection of the trust is a duty of the State, and the Shoreline Management Act is one of the primary means by which that duty is carried out.

There are few bright lines, however, as the Public Trust Doctrine is common law, not statutory law. The extent of its applicability can be determined only by state court decisions. To date, no published appellate or Supreme Court decisions in Washington State have ruled on whether walking on the beach or wading in the water on privately owned beaches, streambanks and tidelands is a right under the Public Trust Doctrine.

For more information:

- The *Public Trust Doctrine and Coastal Zone Management in Washington State*. Publication No. 93-054 by Ralph W. Johnson, Craighton Goepple, David Jansen, and Rachel Pascal, 1991.

- *Putting the Public Trust Doctrine to Work, 2nd Ed., The Application of the Public Trust Doctrine To the Management of Lands, Waters and Living Resources Of the Coastal States* by David Slade, June 1997. Available from online retailers.

- *Portage Bay v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 593 P.2d 151.

Residences on water

Residences on the water defined in the SMA include floating homes and floating on-water residences. For both of these definitions, the legislature included dates by which these residences needed to be established in order to be considered a conforming use. However, only floating homes that meet the date requirements are a preferred use. These definitions do not apply to residences built over (above rather than on) the water such as those built on pilings or cantilevered out over the water.

Floating home

A **floating home** is a single-family dwelling unit constructed on a float that is moored, anchored, or otherwise secured in waters. It is not a vessel, although it may be capable of being towed. Floating homes are typically attached to sewer and water utilities. A floating home permitted or

legally established prior to January 1, 2011, must be classified as a conforming preferred use [RCW 90.58.270(5)(ii)].

Floating on-water residence

A **floating on-water residence** is any floating structure other than a floating home that is designed or used primarily as a residence on the water and has detachable utilities. The owner or primary occupant of the floating on-water residence must have held an ownership interest in space in a marina, or held a lease or sublease to use space in a marina, prior to July 1, 2014. A floating on-water residence permitted or legally established prior to July 1, 2014, must be considered a conforming use [RCW 90.58.270(6)(a)].

For more information:

- RCW 90.58.270(5 and 6)
- WAC 173-26-030(3)(d)(17) and (18)
- WAC 173-26-241(3)(j)

Shorelines of the state

The geographic areas where the Shoreline Management Act applies are the **shorelines of the state**. These include:

- All marine waters.
- Segments of streams where the mean annual flow is more than 20 cubic feet per second.
- Lakes and reservoirs 20 acres and greater in area.
- Associated wetlands.
- Shorelands adjacent to these water bodies. This is typically the land area within 200 feet of the water body, and may include part or all of a floodplain.

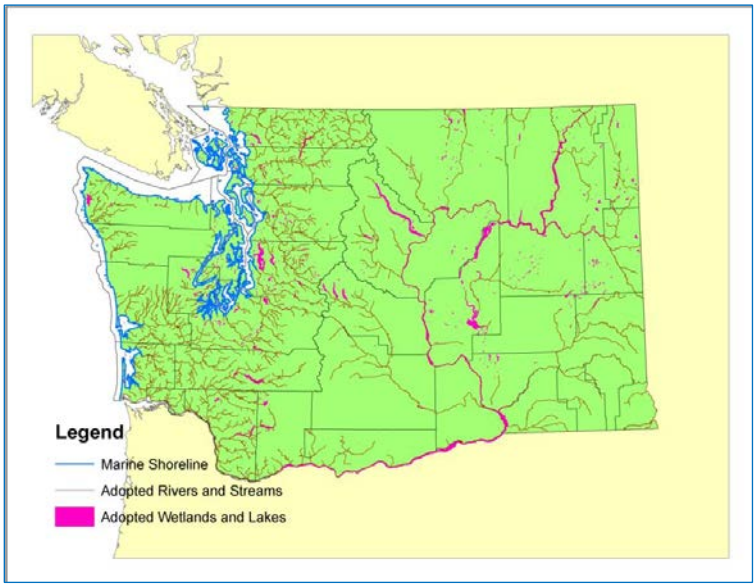

Figure 2-3: Shorelines of the state include all marine waters, water bodies and streams of a certain size, their upland areas called shorelands that are within 200 feet of the ordinary high water mark, and associated wetlands.

For more information:

- RCW 90.58.030(2)(e, f and g)

Shorelines of statewide significance

The SMA defines a special category of shorelines where specific priority uses are preferred. SMPs should identify the **shorelines of statewide significance**, if any. Shorelines of statewide significance include marine areas, streams and rivers, and lakes.

Figure 2-4: The Snake and Grand Ronde rivers shown at their confluence and Banks Lake are all shorelines of statewide significance. (Washington Coastal Atlas photos.)

Lakes

Lakes over 1,000 acres in area and all associated shorelands are shorelines of statewide significance.

Marine areas

There are three different delineation schemes for marine areas of statewide significance:

- The **Pacific Ocean coastline** (from Cape Disappointment to Cape Flattery), including harbors, bays, estuaries, and inlets, seaward from the ordinary high water mark and all shorelands associated with these waters;

- Specific **estuarine areas** (Nisqually Delta, Birch Bay, Hood Canal, Skagit Bay, and Padilla Bay) between the ordinary high water mark and line of extreme low tide and all associated shorelands; and

- All **other areas of Puget Sound and the Strait of Juan de Fuca** and adjacent salt water areas lying **waterward of the line of extreme low tide line** (*but not* including the adjacent tidelands or shorelands).

Streams and rivers

Streams and rivers, or segments thereof, and their associated uplands that meet one of the following criteria are shorelines of statewide significance:

a. **West of the crest of the Cascades:** Rivers with a mean annual flow of 1,000 cubic feet per second or greater.

b. **East of the crest of the Cascades**: Rivers that have either:
   i. A mean annual flow of 200 cubic feet per second or more, *or;*
   ii. The portion downstream from the first 300 square miles of drainage areas

For more information: RCW 90.58.030(2)(f)

State Environmental Policy Act (SEPA)

The **State Environmental Policy Act** (SEPA) is a state law intended to ensure that state and local agencies consider environmental values during decision-making. SEPA rules direct agencies to consider environmental information; evaluate potential impacts, alternatives and mitigation measures; encourage public involvement, prepare clear and concise environmental documents, and integrate SEPA with agency activities at the earliest possible time. The SEPA environmental review process is design to work with other regulations in order to provide a comprehensive review of a proposal.

For more information:

- RCW 43.21C, State Environmental Policy
- WAC 197-11, SEPA Rules
- SEPA – Environmental review

Structure

A **structure** is "a permanent or temporary edifice or building, or any piece of work artificially built or composed of parts joined together in some definite manner, whether installed on, above, or below the surface of the ground or water, except for vessels.

For more information:

- WAC 173-27-030(15)

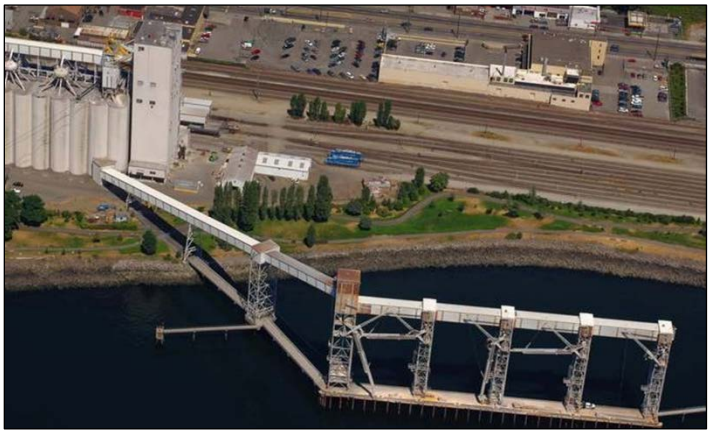

Figure 2-5: The grain terminal on Elliott Bay in Seattle is a structure for shoreline management purposes. (Washington Costal Atlas Photo)

Substantial development

Substantial development is defined in RCW 90.58.030(3)(e). Substantial development is that which exceeds a specific cost or fair market value threshold or is "any development which materially interferes with the normal public use of the water or shorelines of the state." The State

Office of Financial Management adjusts the initial threshold of $5,000 for inflation every five years, with the first adjustment occurring in 2007. As of September 2017, the threshold is $7,047. The fair market value of the proposed development does not include the cost of permits.

Note that some kinds of development are not considered substantial development even if they meet the cost threshold. These developments are exempt from the requirement to obtain a substantial development permit. Exemptions are scattered throughout RCW 90.58 and may be changed by the Legislature. Exemptions are discussed in Chapter 4.

For more information: RCW 90.58.030(3)(e)

Vessel

The definition of vessel includes ships, boats, barges, or other floating craft designed and used for navigation and that do not interfere with the normal public use of the water.

For more information:

- WAC 173-27-080(18)

3. Types of Permits

The Shoreline Management Act (SMA) establishes three types of shoreline permits: substantial development permit, conditional use permit, and variance permit. Proposals for development and activities within shoreline jurisdiction may require one, two or all of those permits – or none at all.

All development must meet the criteria in WAC 173-27-140. These criteria require uses and development on shorelines to be consistent with the SMA and the Shoreline Master Program (SMP) and meet the height restriction of not more than 35 feet above average grade level, unless the SMP states otherwise.

Make sure the permit and public notices clearly state the combination of permits being considered. Failure to specify the permit type(s) is a common reason for Ecology to return permits to local governments for proper notice and processing. Permit processes for the three shoreline permits are similar; two or three permits for the same project can be handled together as long as clear and separate decisions are made on each permit.

Appendix A includes flowcharts that depict the permit processes.

For more information:

- RCW 90.58.100(5)
- RCW 90.58.140
- WAC 173-27-140

Substantial development permits

Substantial development permits (SDPs) are required for all developments (unless specifically exempt) that meet the legal definition of substantial development. The SMA defines such as:

> any development of which the total cost or fair market value exceeds five thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state. The dollar threshold established in this subsection (3)(e) must be adjusted for inflation by the office of financial management every five years, beginning July 1, 2007, based upon changes in the consumer price index during that time period [RCW 90.58.030(3)(e)].

As of September 2017, the dollar threshold has been adjusted to $7,047. Fair market value includes the market value of free things – any donated, contributed, or found labor, equipment, or materials.

Under WAC 173-27-150, SDPs shall be granted only when the proposed development is consistent with policies and procedures of the Shoreline Management Act, Ecology rules, and the local master program. Local government may condition the approval of permits if needed to

ensure consistency of the project with the Act and the local master program. Local governments must review and approve or deny applications for SDPs and then send the permit material to Ecology for filing.

Timber cutting: A forest practice consisting of only timber cutting is not considered development and does not require an SDP.

Forest practices such as building roads, trails and bridges and placing culverts are development and regulated under the local SMP as well as the Forest Practices Act (RCW 76.09).

Cumulative impacts

Ecology rules do not require an assessment of cumulative impacts for projects that require only SDPs, as they do for conditional use permits and variances (see discussion below). However, the Shorelines Hearings Board has stated in several appeals decisions that a local government should have considered addressing cumulative impacts for an SDP.

For example, in *Coalition to Protect Puget Sound Habitat v. Pierce County,* SHB No. 13-016c (January 22, 2014), the Board reversed approval of the SDP and addressed the petitioner's position that a cumulative impacts analysis should have been required for a proposed subtidal geoduck farm in Henderson Bay. The Board's language states:

> The factors the Board weighs in considering whether a cumulative impacts analysis is required for an SSDP are listed below:
>
> 1. Whether a shoreline of statewide significance is involved;
> 2. Whether there is potential harm to habitat, loss of community use, or a significant degradation of views and aesthetic values;
> 3. Whether a project would be a "first of its kind" in the area;
> 4. Whether there is some indication of additional applications for similar activities in the area;
> 5. Whether the local SMP requires a cumulative impacts analysis be completed prior to the approval of an SSDP; and
> 6. The type of use being proposed, and whether it is a favored or disfavored use. (Pages 54-55.)

The Board's decision in the *Coalition* case has been upheld by the Superior Court and state Court of Appeals. The Court of Appeals decision states, "Because the consideration of a cumulative impact analysis prior to approval of the permit is consistent with the purpose of the SMA and clearly furthers the goal of the SMA to prevent 'uncoordinated and piecemeal development,' the SHB did not err in concluding consideration should be given to preparing a cumulative impacts analysis" (*Darrell de Tienne and Chelsea Farms, LCC v. Shorelines Hearings Board*, 197 Wn. App. 248, 290-91, 391 P.3d 458 (2016)).

In *Baldwin, Simon and Taylor v. Pierce County,* SHB No. 17-0005c (September 1, 2017), the Board repeated the factors in the bulleted listed above. In this case, the Board overturned an SDP for a pier-ramp-float structure.

For more information:

- RCW 90.58.030(3)(e)
- WAC 173-27-150
- *Coalition to Protect Puget Sound Habitat v. Pierce County, SHB No. 13-016c*
- *Darrell de Tienne and Chelsea Farms, LCC v. Shorelines Hearings Board, 197 Wn. App. 248, 290-91, 391 P.3d 458 (2016)*

Conditional use permits (CUPs)

Conditional use permits (CUPs) allow greater flexibility in applying use regulations of a Shoreline Master Program. A CUP is needed if a proposed use is listed as a conditional use in a shoreline environment designation, or if the SMP does not address the use. For example, if boat lifts are not listed in the SMP, a CUP would be required.

From 2010 through 2018, Ecology approved 1,282 CUPs and denied 14.

A CUP may be required even if a proposed use is otherwise exempt from the requirement to obtain a substantial development permit. Some proposals may require both a substantial development permit and a conditional use permit.

- Local government staff must prepare a written analysis of how the proposal complies with conditional use criteria.

- A local government cannot use a CUP to approve a use that is specifically prohibited in the master program**.** For example, if a master program prohibits overwater residential uses and appurtenances except piers, an overwater deck would not meet conditional use criteria.

- Local planners must consider the cumulative impacts of approving conditional uses.

- Local governments must send approved CUPs to Ecology at the end of the local appeal period. Ecology must either approve, approve with conditions, or deny every CUP within 30 days of receiving a complete permit package.

SMPs may include additional general or use-specific criteria for conditional uses. Examples of conditional uses from several SMPs include water-oriented commercial development in a High Intensity environment, bed-and-breakfast inns or restaurants within a Rural Conservancy environment, and mining within a channel migration zone in shoreline jurisdiction.

Local governments should contact Ecology shoreline permit staff early in the process of reviewing a conditional use permit application if difficulties are anticipated.

Conditional use permit criteria

A proposal must meet criteria found in WAC 173-27-160 (just below) and be consistent with other local requirements.

> (1) Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided that the applicant demonstrates all of the following:
>
> (a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;
>
> (b) That the proposed use will not interfere with the normal public use of public shorelines;
>
> (c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;
>
> (d) That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and
>
> (e) That the public interest suffers no substantial detrimental effect.

Cumulative Impacts

In reviewing CUP applications, local governments must consider the cumulative impact over time of granting additional permits for like actions in the area. If comparable development proposals are likely and were to be permitted by CUP in the area where similar circumstances exist, the total of the conditional uses also must be consistent with the SMA and must not produce substantial adverse effects to the shoreline environment [WAC 173-27-160(2)].

For example, a CUP for a bulkhead and fill for one site may not have substantial adverse effects by itself. However, a series of bulkheads and fills around a bay could significantly affect the shoreline ecosystem. The initial CUP request could be denied based on future cumulative impacts. One of the greatest strengths of the CUP process is the ability to deal with cumulative impacts, encouraging foresight and planning. The Washington Supreme Court addressed the regulation of cumulative impacts in *Hayes v. Yount*, 87 Wn.2d 280, 287-88, 552 P.2d 1038 (1976). In this decision, the court states, "Logic and common sense suggest that numerous projects, each having no significant effect individually, may well have very significant effects when taken together."

For more information:

- WAC 173-27-160
- *Hayes v. Yount, 87 Wn.2d 280, 287-88, 552 P.2d 1038 (1976)*

Variance permits

Variance permits are used to allow a project to deviate from an SMP's dimensional standards (e.g., setback, height, or lot coverage requirements). A variance proposal must meet variance criteria found in WAC 173-27-170 and be consistent with other local requirements.

Variances can be granted only where there are "extraordinary circumstances relating to the physical character or configuration of property such that the strict implementation of the master program will impose unnecessary hardships on the applicant or thwart the policies set forth in RCW 90.58.020" [WAC 173-27-170].

From 2010 through 2018, Ecology approved 570 variances and denied 14.

For example, Ecology approved a variance to allow a house partially within a 25-foot setback in Island County. The lot size was just under 1,900 square feet, and the lot was 34 feet wide at the shoreline. The road frontage, within the street setback, included the septic system and driveway. The historic development pattern in this area included houses platted prior to adoption of the Shoreline Management Act that are now within the shoreline setback. Without a variance, the applicants would not have been able to have reasonable use of their lot.

Applicants should not assume they have a right to a variance. It is an exception from the regulations for which a justifiable need and extraordinary circumstances must be demonstrated. A variance is intended to assure fair treatment of someone with special property circumstances (not personal circumstances) and not to grant special privilege.

- The burden of proof is on the applicant to show that the variance criteria are met.
- Local governments cannot use a variance to approve a use prohibited by the SMA or a local SMP.
- The cumulative impact over time of granting additional permits for like actions must be considered.
- A variance may be required even if the proposed use is otherwise exempt from the requirement to obtain an SDP.
- Local government staff must prepare a written analysis of how the proposal complies with the variance criteria.
- Locally approved variances must be sent to Ecology at the end of the local appeal period. Ecology must either approve, approve with conditions, or deny variances within 30 days of receiving a complete permit package.

Local governments should contact Ecology shoreline permit staff early in the process of reviewing a variance permit if difficulties are anticipated.

Variance criteria

Under state rules found in WAC 173-27-170, upland developments (developments that are landward of the ordinary high water mark and wetlands regulated by the SMA) may be granted variances if the applicant demonstrates all of the following:

> (a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes, or significantly interferes with, reasonable use of the property;
>
> (b) That the hardship described in (a) of this subsection is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions;
>
> (c) That the design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program and will not cause adverse impacts to the shoreline environment;
>
> (d) That the variance will not constitute a grant of special privilege not enjoyed by the other properties in the area;
>
> (e) That the variance requested is the minimum necessary to afford relief; and
>
> (f) That the public interest will suffer no substantial detrimental effect.

The criteria for allowing variances for developments proposed below the OHWM or in wetlands include those in (a) through (f), above, and the following

> (a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes all reasonable use of the property;
>
> (b) That the proposal is consistent with the criteria established under subsection (2)(b) through (f) of this section; and
>
> (c) That the public rights of navigation and use of the shorelines will not be adversely affected.

The "unnecessary hardship" of the criteria recognizes that all regulations may cause some degree of hardship in their application. Variances should be granted only where the specific facts of the case indicate that the hardship is unnecessary when considering the purposes (policy basis) for which the specific standards were originally adopted.

The types of circumstances that may justify granting the variance include a lot that was legally created prior to adoption of the SMP; a common setback line established prior to adoption of the SMP; or a lot whose slope requires placing the building closer to the OHWM in order to have the least overall shoreline impact.

Note that the shoreline jurisdiction area is not a setback requirement for which a variance can be issued. If a use is prohibited within a shoreline environment designation but allowed by the applicable zoning regulations, a variance cannot be used to reduce shoreline jurisdiction or to allow the use. A use that is prohibited is prohibited.

Cumulative impacts

For all variance applications, consideration shall be given under the variance permit review process to the cumulative impact over time of granting additional permits for like actions in the area. In other words, if comparable developments were granted variances in the area where similar circumstances exist, the total of the developments must also be consistent with the SMA and must not produce substantial adverse effects to the shoreline environment.

For example, a variance for the size and length of a dock on a narrow slough for one site may not have a substantial adverse effect by itself, but a series of such docks could make navigation on the slough very difficult. The initial variance request then could be denied based on future cumulative impacts. The State Supreme Court addressed the regulation of cumulative impacts in *Hayes v. Yount*, 87 Wn.2d 280, 287-88, 552 P.2d 1038 (1976).

If a significant number of variances are granted from the same provisions of the master program in similar circumstances, it may be time to consider amending the master program.

For more information:

- WAC 173-27-170
- *Baldwin, Simon and Taylor v. Pierce County, SHB No. 17-005c (September 1, 2017)*
- *Hayes v. Yount*, 87 Wn.2d 280, 287-88, 552 P.2d 1038 (1976).

4. Exemptions

The Shoreline Management Act (SMA) provides for exceptions or exemptions from some or all SMA requirements for various developments and activities. This chapter first reviews exceptions, which in some cases absolve a development from any Shoreline Master Program (SMP) requirements, and then discusses exemptions from the requirements to obtain a substantial development permit (SDP).

Exceptions for specific activities and projects

There are several specific use exceptions in the SMA. The language of the SMA or other state laws varies for these exceptions. In some cases, the SMA does not apply, while in other cases, the uses or activities must be consistent with the SMA and Shoreline Master Program, but shoreline permits are not required. Check the cited RCW section for particulars. Below are brief descriptions.

Agricultural activities

Under RCW 90.58.065, the guidelines adopted by Ecology and master programs developed or amended by local governments under RCW 90.58.080 shall not require modification of or limit agricultural activities occurring on agricultural lands.

Drought emergency projects

Expedited permits and exemptions exist for water supply, fish passage, and boat launch projects under certain drought emergency conditions [RCW 43.83B.410(1)(b), RCW 90.58.370].

Figure 4-1: Some agriculture activities in shoreline jurisdiction are exempt from requirements for a shoreline substantial development permit.

Forest practices

Under RCW 90.58.030(2)(d)(ii), any city or county may also include in its master program land necessary for buffers for critical areas, provided that forest practices regulated under RCW 76.09, except conversions to non-forest lands, are not subject to additional regulations under the SMA. (The development of roads, trails and bridges and placement of culverts associated with forest practices are typically considered to be substantial development and require substantial development permits.)

Energy Facility Site Evaluation Council

Under RCW 90.58.140(9), a holder of an energy facility certificate under RCW 80.50 shall not be required to obtain a permit. Also see WAC 173-27-045(2).

Environmental excellence program

Under RCW 90.58.045, any legal requirement under the SMA is superseded and replaced in accordance with the terms and provisions of an environmental excellence program agreement [RCW 43.21K]. Also see WAC 173-27-045(1).

Fish habitat enhancement projects

Local governments may not require permits or charge fees for fish habitat enhancement projects that meet the requirements of RCW 77.55.181.

Remedial action

SMA requirements for shoreline permits or letters of exemption do not apply to any person conducting remedial action at a facility pursuant to a consent decree, order or agreed order under the Model Toxics Control Act [RCW 70.105D], nor do they apply to Ecology when it conducts a remedial action under this law. Ecology must ensure compliance with the substantive requirements of the SMA through the consent decree, order or agreed order [RCW 90.58.355(1)].

Site improvements for boatyard storm water treatment

SMA requirements for shoreline permits or letters of exemption do not apply to any person installing site improvements for storm water treatment in an existing boatyard facility to meet requirements of the NPDES stormwater general permit [RCW 90.58.355(2)]. Ecology must ensure compliance with the substantive requirements of the SMA through the review of engineering reports, site plans and other documents.

Transportation maintenance, repair, and replacement

Washington State Department of Transportation projects for maintenance, repair, and replacement within the roadway prism of a state highway or other facilities and that meet the requirements of RCW 90.58.356 do not need shoreline permits, letters of exemption, or other review by local governments [RCW 90.58.356].

Exemptions from substantial development permit

The SMA establishes a variety of exemptions from the requirement to obtain a substantial development permit [RCW 90.58.030(3)(e)]. Exemptions are to be narrowly construed.

Development exempt from the requirement to obtain an SDP must still comply with the applicable goals, policies, and regulations of the local SMP and the policies of the SMA. *Putnam v. Carroll*, 13 Wn. App. 201, 534 P.2d 132 (1975) affirms that developments must be consistent

with applicable regulations and the policy of the Shoreline Management Act of 1971 in order to qualify for a permit exemption.

- A proposed development may be exempt from requirements for an SDP but may still require a variance and/or conditional use permit.

- The burden of proof that a proposed development is exempt from requirements for an SDP is on the applicant. Also, note that if any part of a proposed development is not eligible for exemption, a permit is required for the entire proposal.

WAC 173-27-140(1)(a): *Only those developments that meet the precise terms of one or more of the listed exemptions may be granted exemption from the substantial development permit process.*

- Local governments may attach conditions to approvals for exemptions. This is a common practice.

- A local decision that proposed development is exempt cannot be appealed to the Shorelines Hearings Board, but can be appealed to Superior Court under the Land Use Petition Act [RCW 36.70C].

The follow types of development are exempt from requirements for a substantial development permit.

Agricultural activities

In addition to the general limitations on regulating agriculture mentioned above (RCW 90.58.065), the SMA addresses agricultural and irrigation activities in RCW 90.58.030(3)(e) (below). Ecology rules clarify that construction of a barn or similar agricultural structure is also exempt under WAC 173-27-040(2)(e).

> (iv) Construction and practices normal or necessary for farming, irrigation, and ranching activities, including agricultural service roads and utilities on shorelands, and the construction and maintenance of irrigation structures including but not limited to head gates, pumping facilities, and irrigation channels.
>
> A feedlot of any size, all processing plants, other activities of a commercial nature, alteration of the contour of the shorelands by leveling or filling other than that which results from normal cultivation, shall not be considered normal or necessary farming or ranching activities. A feedlot shall be an enclosure or facility used or capable of being used for feeding livestock hay, grain, silage, or other livestock feed, but shall not include land for growing crops or vegetation for livestock feeding and/or grazing, nor shall it include normal livestock wintering operations;
>
> (viii) Operation, maintenance, or construction of canals, waterways, drains, reservoirs, or other facilities that now exist or are hereafter created or developed as a part of an irrigation system for the primary purpose of making use of system waters, including return flow and artificially stored ground water for the irrigation of lands;

(x) Operation and maintenance of any system of dikes, ditches, drains, or other facilities existing on September 8, 1975, which were created, developed, or utilized primarily as a part of an agricultural drainage or diking system [RCW 90.58.030].

For more information:

- RCW 90.58.030(3)(e)
- RCW 90.58.065
- WAC 173-27-040(2)(e) and (k)

Bulkheads

The SMA exempts construction of the "normal protective bulkhead common to single-family residences" from SDP procedural requirements. Under state rules, a "normal protective" bulkhead is exempt only if the bulkhead would be:

- Installed at or near the ordinary high water mark, and

- Built for the sole purpose of protecting an existing single-family residence and/or appurtenant structures from loss or damage by erosion.

When a vertical or near-vertical wall is being constructed or reconstructed under this exemption, not more than one cubic yard of fill per one linear foot of wall may be used as backfill.

Bulkheads proposed for undeveloped property are not covered under this exemption and require a permit. Neither is a bulkhead exempt if it would be constructed for the purpose of creating dry land. For example, a proposal for a bulkhead that would extend waterward of the ordinary high water line and then be backfilled to create a recreation area would not be exempt.

When an existing bulkhead is being repaired by construction of a vertical wall waterward of the existing wall, it must be constructed no farther waterward of the existing bulkhead than is necessary for construction of new footings.

If a bulkhead has deteriorated to the point that it is not functioning and the OHWM has moved landward, the replacement needs to be located at or near the OHWM. If it is still functioning, repair may be appropriate.

Although a bulkhead may be exempt from SDP procedural requirements, that does not mean bulkheads are allowed everywhere on the shoreline or do not need any permits. For example,

Figure 4-2: Normal protective bulkheads common to single-family residences, such as these in Island County, are exempt from requirements for a substantial development permit. (Washington State Coastal Atlas photo.)

some SMPs prohibit hard shoreline stabilization in the Natural shoreline environment and require a conditional use permit in other shoreline environments.

Note: Review both the maintenance and repair exemption and bulkhead exemption when considering whether a proposed bulkhead or bulkhead repair is exempt from requirements for an SDP. Check the shoreline stabilization and environment designation sections of the SMP to see if bulkheads are prohibited in some environments or require a CUP.

For more information:

- RCW 90.58.030(3)(e)(ii)
- WAC 173-27-040(2)(b) and (c)

Beach nourishment and bioengineered erosion control projects

Beach nourishment and bioengineered erosion control projects may be considered normal protective bulkheads when any structural elements are consistent with the above requirements and when the project has been approved by the state Department of Fish and Wildlife.

For more information:

- WAC 173-27-040(2)(c)
- *Soft Shoreline Stabilization: Shoreline Master Program Planning and Implementation Guidance* (2014)

Docks

This exemption refers to "construction of a dock, including a community dock, designed for pleasure craft only, for the private noncommercial use of the owner, lessee, or contract purchaser of single and multiple family residences" [WAC 173-27-040(2)(h)].

This exemption applies:

A. In **salt waters**, if the fair market value of the dock does not exceed $2,500.

B. In **fresh waters**, if the fair market value of the dock does not exceed: (1) $20,000 for docks that are constructed to replace existing docks, are of equal or lesser square footage than the existing dock being replaced, and are located in a county, city, or town that has updated its SMP consistent with the master program guidelines (173-26 WAC); or (2) $10,000 for all other docks constructed in fresh waters.

However, if subsequent construction occurs within five years of completion of the prior construction, and the combined fair market value of the subsequent and prior construction exceeds the amount specified in either (A) or (B) above, the subsequent construction shall be considered a substantial development.

Docks, not decks! The WAC defines a dock as "a landing and moorage facility for watercraft." The exemption from SDP requirements does not extend to overwater recreation spaces such as decks. Decks are considered a residential appurtenance and must be located landward of the OHWM or the perimeter of a wetland in order to be exempt.

For more information

- RCW 90.58.030(3)(e)(vii)
- WAC 173-27-040(2)(h)

Environmental projects

The SMA exempts several classes of environmentally beneficial projects from SDP requirements. They include aquatic noxious weed control, fish or wildlife habitat improvement, and shoreline and watershed restoration.

Aquatic noxious weed control

In RCW 90.58.030(3)(e)(xii), the SMA exempts the process of removing or controlling aquatic noxious weeds such as spartina and purple loosestrife and other aquatic noxious weeds as defined in RCW 17.26.020. The control methods (whether herbicide or other treatment methods) must be those recommended by a final environmental impact statement published by the state Department of Agriculture or the Department of Ecology jointly with other state agencies under RCW 43.21C.

Fish or wildlife habitat improvement

A public or private project designed to improve fish or wildlife habitat or fish passage is exempt from the SDP requirements when the criteria in RCW 90.58.147 are met. For example, the Buckmire Slough restoration project (Figure 8) near Vancouver Lake in Clark County was determined to be exempt under this provision. The project included re-contouring a bank, removing fill across the slough and a culvert from the slough, and building a bridge over the slough for pedestrians and maintenance vehicles.

Shoreline restoration that affects jurisdiction

Under RCW 90.58.580(3) and WAC 173-27-215(4), an SDP is not required on land within urban growth areas (as defined in RCW 36.70A.030) that is brought under shoreline jurisdiction due to a shoreline restoration project that creates a landward shift in the ordinary high water mark. SMP regulations still apply.

Figure 4-3: The Buckmire Slough restoration project near Vancouver Lake in Clark County was exempt from requirements for a substantial development permit. (Photo: *The Columbian*.)

Some developments are built on land partially within shoreline jurisdiction and partially outside shoreline jurisdiction. If an SDP is required for land within shoreline jurisdiction, and a restoration project puts additional land within shoreline jurisdiction, an SDP would be required for all portions of the project within shoreline jurisdiction.

Local governments also may grant relief from SMP development standards and use regulations in urban growth areas when specific criteria apply. See "Shoreline restoration projects – relief from standards" later in this chapter.

Watershed restoration projects

Under RCW 90.58.515, watershed restoration projects as defined in RCW 89.08.460 are exempt from the requirement to obtain an SDP.

Local governments are required to review the projects for consistency with the locally adopted Shoreline Master Program in an expeditious manner and issue their decision along with any conditions within 45 days of receiving a complete consolidated application form from the applicant. Local governments may not charge a fee for accepting and processing applications for watershed restoration projects.

For more information:

- RCW 90.58.030(3)(e)(xii)
- RCW 90.58.147
- RCW 90.58.515
- RCW 90.58.580(3)

Emergency construction

For the purposes of determining SDP exemptions, an emergency is "an unanticipated and imminent threat to public health, safety, or the environment which requires immediate actions within a time too short to allow full compliance" [WAC 173-27-040(2)(d)]. The exemption applies only if the construction is necessary to protect property from damage by the elements.

Emergency construction **does not include building new permanent protective structures** where none previously existed. If a local government determines that a new protective structure is the appropriate means to address the emergency situation, the applicant must obtain a permit to retain the structure after the emergency situation is over.

All emergency construction must be consistent with the policies of the SMA and the local master program.

If a project proponent has not obtained a permit due to lack of proper planning, it does not constitute an emergency. An example of an emergency is a ruptured oil or sewage line that needs to be repaired or removed immediately or emergency repair of a dike during a flood. As a general matter, flooding or other seasonal events that can be anticipated, but are not imminent, are not considered an emergency.

Ecology considers the extension of boat launches or removal of accumulated rocks and gravel at boat launches due to declared drought conditions to be emergency construction. Thus, this work is appropriately exempted from the requirement for a shoreline substantial development (SDP) permit.

For more information:

- RCW 90.58.030(3)(e)(iii)
- WAC 173-27-040(2)(d)

Navigational aids and marking property lines

Construction or modification of navigational aids such as channel markers and anchor buoys, by or under the authority of the Coast Guard or a designated port management authority, are exempt from permit requirements. This exemption covers those lights, markers, buoys, etc. usually placed in accordance with Coast Guard standards, if not actually placed by the Coast Guard, that provide directions and other information necessary for safe navigation.

Moorage structures such as buoys or dolphins are not considered "navigational aids" and would require a substantial development permit.

The marking of property lines or corners on state-owned lands, when such marking does not significantly interfere with normal public use of the surface of the water, is exempt from substantial development permit requirements. This limited exemption is applicable only on state-owned lands when it does not materially interfere with normal public use of the water.

In addition, narrow interpretation of this provision would mean that even on state-owned land, it would apply only to the marking of existing property lines, not to the establishment of new property lines that occurs with subdividing and short platting. Subdivisions and short plats are not exempt under this exemption for marking of property lines, as they are not usually on state-owned lands. However, subdivisions and short plats are not considered to be development under the SMA unless required infrastructure improvements are part of the approval of a subdivision or short plat.

For more information:

- WAC 173-27-040(2)(f) and (j)

Normal maintenance or repair

This exemption authorizes maintenance or repair of existing lawful structures and developments when they are subject to damage by accident, fire, or the elements. **Normal maintenance** includes those usual acts to *prevent* a decline, lapse, or cessation from a lawfully established condition.

Normal repair means to restore a development or structure to a state comparable to its original size, shape, configuration, and external appearance. Repair must occur within a reasonable period of time after the decay or partial destruction. Replacement of the development or structure (comparable to the original) may be exempted where that is the common method of repair. Neither repair nor replacement should be exempted where such action would cause substantial adverse effects to shoreline resources or the environment.

Beware of projects called "maintenance" that actually constitute an expansion in use. Following are some examples:

- Local road projects that are actually expansions (such as extra lanes) do not constitute normal maintenance. Note that "capital improvements" usually need permits.

- Flood-control projects should not be considered normal repair or maintenance if they raise the top or enlarge the footprint of a dike beyond where it was originally constructed. Installation or repair of tide gates, flap gates, and any other flood-control structures should be carefully scrutinized to assure that they simply restore a pre-existing lawful condition.

- New construction that includes walls and impervious surface such as patios and paved terraces.

- Maintenance of agricultural drainage ditches may be exempt, but dumping the material dug out of the ditches in a shoreline area is filling and may require a permit.

- Dredging to restore pre-existing contours within a designated and authorized navigation channel or basin is considered normal maintenance. If operations expand the channel or basin, a permit is required even if the marina or similar project has been operating for years. Consider how the dredged material is to be disposed of--picking up mud may be maintenance but putting it down may be filling, requiring a permit. Dredging is maintenance only where there is a designated and authorized facility such as a federal navigation channel or a berth authorized by permit. The fact that a formerly navigable area has changed such that it is not now navigable is not sufficient.

Replacing piling and decking on docks is normal maintenance and repair, but adding deck area, floats, sheds, or other expansion is not. Some SMPs specify that replacing a certain percentage, such as up to 50 percent, of decking, pilings or bulkheads qualifies as normal maintenance and repair. More than that would constitute new construction for these SMPs.

For more information:

- WAC 173-27-040(2)(b)

Single-family residences

The SMA creates an exemption for construction of single-family residences on shorelands. Construction must be by owners, lessees, or contract purchasers for their own use or for the use of their family. Several court decisions have taken a strict view of the meaning of this provision.

Figure 4-4: Construction of a single-family home by an owner, lessee, or contract purchaser for his or her own use or for family use is exempt from the requirement for a substantial development permit. However, a variance or conditional use permit may be required. (Washington Coastal Atlas photo.)

(For example, *Ecology v. Pacesetter* (89 Wn.2d 203 (1977). Houses constructed on speculation ("spec houses") are not exempt.

To meet the exemption, the law requires that the residence:

- Not exceed a height of 35 feet above average grade level, and
- Meet all other state and local requirements.

State rules clarify that "single-family residence" means a detached dwelling designed for and occupied by one family and includes those structures and developments that are a normal appurtenance within a contiguous ownership.

Appurtenant structures

An appurtenance must be connected to the use and enjoyment of a single-family residence. To meet the exemption criteria, appurtenances must be located landward of the ordinary high water mark and the perimeter of associated wetlands. Overwater structures are not exempt from the requirement to obtain a substantial development permit. For example, applications for a gazebo or deck on a dock would not be exempt from shoreline permit requirements.

On a statewide basis, normal appurtenances include:

- A garage
- Deck
- Driveway
- Utilities
- Fences
- Installation of a septic tank and drainfield
- Grading that does not exceed two hundred fifty cubic yards and that does not involve placement of fill in any wetland or waterward of the ordinary high water mark. Grading is the moving of earth that exists on the site and does not include importing of fill.

Local SMPs may add interpretations of normal appurtenances to their Shoreline Master Program.

Grading

Grading is defined as movement or redistribution of the soil, sand, rock, gravel, sediment, or other material on a site in a manner that alters the natural contour of the land. Grading is included on the list of appurtenances for exempt single-family residences. To be exempt, grading must meet the following requirements:

- Not exceed 250 cubic yards
- Not involve placement of material in any wetland or waterward of the ordinary high water mark

The exemption for grading is for moving earth that exists on the site, and does not include importing of fill.

The exemption for 250 cubic yards of grading is in addition to the grading and/or filling needed to construct the single-family residence or other appurtenant structures, such as a driveway or drain field.

For more information:

- RCW 90.58.030(3)(e)(vi)
- WAC 173-27-040(2)(g)
- *Ecology v. Pacesetter* (89 Wn.2d 203 (1977)

Site investigation

Site exploration and investigation activities performed in preparation for applying for a development authorization are exempt from permit requirements if such activities are consistent with all of the following:

- The activity does not interfere with the normal public use of the surface waters.
- The activity will have no significant adverse impact on the environment, including fish, wildlife, fish or wildlife habitat, water quality, and aesthetic values.
- The activity does not involve the installation of a structure, and upon completion of the activity, the vegetation and land configuration of the site are restored to conditions existing before the activity.
- A private entity seeking development authorization first posts a performance bond or provides other evidence of financial responsibility to the local jurisdiction to ensure that the site is restored to pre-existing conditions.
- The activity is not subject to the permit requirements of the SMA's oil and gas exploration requirements found in RCW 90.58.550.

An example of a site investigation activity that may be exempt, if it meets the above parameters, is a geotechnical investigation to determine the nature of the substrate for proposed tower construction and footing design.

For more information:

- RCW 90.58.030(3)(e)(xi)
- RCW 90.58.550
- WAC 173-27-040(2)(m)

Administering exemptions

Shoreline planners have more questions about the exemption provisions than any other single section of the Shoreline Management Act. Most activities that are exempt from requirements for

an SDP must still comply with all development standards (for example, setbacks and other regulations in the local SMP).

Exempt activities may require variances or conditional use permits. For example, construction of a single-family residence by an owner, lessee, or contract purchaser for their own use or for the use of their family is exempt from requirements for an SDP. However, a residence proposed within the shoreline buffer or setback would require a variance.

- The burden of proof that a development or use is exempt from the permit process is on the applicant.

- Exemptions must be narrowly construed. Under state rules, "only those developments that meet the precise terms of one or more of the listed exemptions may be granted exemption from the substantial development permit process" [WAC 173-27-040 (1)(a)]. If there is doubt whether a project meets the precise terms of a listed exemption, then a permit is required. Ecology's shoreline permit reviewer serving your town, city, or county can help with this.

- Conditions may be added to exemptions, just as they may be added to permits.

- If any part of a proposal requires a substantial development permit, an exemption should not be granted. An SDP would be required for the entire project.

- Activities exempt from SDP permit requirements may need other permits. Construction cannot legally begin until all other local, state, and federal permits have been obtained.

- Exemptions should be granted only after meaningful review under SEPA, unless the proposed project is categorically exempt under SEPA.

Be alert to incremental exemptions for activities that in sum would require a permit. Activities such as clearing and grading that typically precede development should be included in the SEPA review and shoreline permit review for a development proposal. This applies if the individual activities are below the substantial development dollar threshold or, if conducted as a total project, are otherwise exempt. A shoreline permit should authorize the future intended use and associated design of a site prior to any grading, filling, dredging, or other shoreline modification and prior to any subdivision of a site.

Letter of exemption

All proposals for activities that are exempt from the SDP process should be documented with an exemption letter that spells out what is included as part of the exemption and includes development conditions, if any. Site plans should be included. Documenting exemptions allows for tracking and follow-up of development and activities on the shoreline. Local governments are encouraged to send all exemptions to Ecology.

The letter must indicate the specific exemption provision from WAC 173-27-040(2) being applied to the development and provide a summary of the local government's analysis of the consistency of the project with the master program and the SMP.

Local governments are **required** to send exemption letters to Ecology and the applicant if one or both of the following federal permits are required:

- A U.S. Army Corps of Engineers **Section 10 permit** under the Rivers and Harbors Act (projects on or over navigable waters).
- A **Section 404 permit** under the Clean Water Act (projects involving discharge of dredge or fill material to water or wetlands).

The letter must state the specific exemption provision from WAC 173-27-040 applied to the development and provide a summary of the local government's analysis of the consistency of the project with the SMP and the SMA.

Ecology reviews these exemptions and must concur that the exemption is appropriate prior to granting Coastal Zone Management consistency in the 15 Western Washington counties that fall under the Coastal Zone Management Act.

For more information:

- WAC 173-27-040(2)
- WAC 173-27-050
- Coastal zone management federal consistency review

SEPA categorical exemptions

Categorical exemptions under the State Environmental Policy Act (SEPA, RCW 43.21C) are not identical to the substantial development permit exemptions of the SMA. Many small projects will be exempt from both SEPA and the SDP permit requirements, but this is not always true. For example, a residential structure of four dwelling units is usually categorically exempt under SEPA, but is a substantial development under the SMA. In such cases, the local government should demonstrate compliance with SEPA by attaching a statement of categorical exemption to the permit submittal package.

For more information:

- RCW 43.21C
- WAC 197-11-305
- SEPA Frequently Asked Questions

5. Other Permitting Issues

Local and Ecology planners sometimes deal with other shoreline management issues such as those discussed in this chapter.

Shoreline vegetation removal

This section discusses shoreline vegetation removal that is not part of a development proposal. Vegetation removal alone is not development unless it interferes with normal public use of the surface of the waters. Therefore, a substantial development permit is not required and an exemption is not appropriate.

Shoreline vegetation removal occurs for various reasons – to create or maintain views, eliminate hazardous trees, or reduce fire hazards, for example. Local planners should carefully review proposals to remove vegetation, because doing so can result in a loss of shoreline ecological functions.

Examples of vegetation removal include:

- Selective pruning, topping trees and cutting back shrubs to enhance shoreline views. Local shoreline regulations generally prohibit topping trees because it may result in tree mortality.

- Removing trees that constitute a hazard along a public road.

- Removing vegetation in the coastal dunes to reduce fire hazards. Dune grass fires have burned homes and threatened others in recent few years.

- Removing vegetation for safety and health reasons at the site of homeless encampments.

It's not development

Vegetation removal alone is not development per the definition of development – RCW 90.58.030(3)(e) and WAC 173-27-030(6), unless it interferes with normal public use of the surface of the waters. Therefore, a substantial development permit is not required. An exemption is not appropriate, because exemptions pertain to requirements for an SDP. Vegetation removal that includes grubbing or root removal may constitute grading, defined in WAC 173-26-020(22), and should be considered development.

An SMP may require a conditional use permit for shoreline vegetation removal, even if an SDP is not required. Or, some jurisdictions may consider vegetation management as an unspecified use, thereby triggering a conditional use permit.

Consistency with Guidelines and SMP

Vegetation removal must be consistent with WAC and SMP standards regarding vegetation conservation in order to achieve no net loss of shoreline ecological functions.

> WAC 173-26-221(5)(b) Principles…Master programs shall include: Planning provisions that address vegetation conservation and restoration, and regulatory provisions that address conservation of vegetation; as necessary to assure no net loss of shoreline ecological functions and ecosystem-wide processes, to avoid adverse impacts to soil hydrology, and to reduce the hazard of slope failures or accelerated erosion…Local governments may implement these objectives through a variety of measures, where consistent with Shoreline Management Act policy, including clearing and grading regulations, setback and buffer standards, critical area regulations, conditional use requirements for specific uses or areas, mitigation requirements, incentives and nonregulatory programs.
>
> (c) **Standards.** Master programs shall implement the following requirements in shoreline jurisdiction.
>
> Establish vegetation conservation standards that implement the principles in WAC 173-26-221 (5)(b). Methods to do this may include setback or buffer requirements, clearing and grading standards, regulatory incentives, environment designation standards, or other master program provisions. Selective pruning of trees for safety and view protection may be allowed and the removal of noxious weeds should be authorized.
>
> Additional vegetation conservation standards for specific uses are included in WAC 173-26-241(3).

Review SMP and apply standards

Local planners should analyze a proposal to remove vegetation for consistency with the SMP, including the policies and regulations for conserving vegetation and achieving no net loss of shoreline ecological functions. If neither an SDP nor a CUP is required, the following options are available.

- Apply SMP regulations through another permit such as a clearing and grading permit or building permit. These types of permits may allow vegetation removal. If so, also review the proposal for consistency with the SMP. Attach conditions that address the regulations of the SMP to these permits.

- Authorize the vegetation removal through an administrative determination. Shoreline administrators usually have authority to make certain decisions, as outlined in the SMP. Note than an administrative determination is not a permit such as those described in the Shoreline Management Act. The administrative determination should advise the proponent whether the proposal is approved and if so, what actions are required for consistency with the SMP. Consider whether administrative determinations can be appealed at the local level, as they cannot be appealed to the Shorelines Hearings Board.

Illegal removal can result in enforcement

Activities within shoreline jurisdiction must be consistent with the SMP, which should be clear about the amount of vegetation that can be removed. If vegetation removal is not consistent with the SMP, local jurisdictions and Ecology can follow up with an enforcement action. See WAC 173-27-240 to 300 for enforcement standards and the publication, *Enforcing the Shoreline Management Act*, for guidance regarding enforcement actions.

For example, on San Juan Island, about 200 yards of hillside along the shoreline, including 80 trees, were cleared to the water's edge. The SMP in place at the time allowed clearing and grading only if it was associated with an approved shoreline development and conducted landward of the building setback. The SMP prohibited removal of trees beyond what is required for construction of a single family residence without the submission of a tree removal plan for trees that were 3 inches and greater in diameter.

Both the County and Ecology issued fines. Ecology based its fine of $55,000 on the value of the trees that were removed. The fine has been upheld by the Shorelines Hearings Board and Court of Appeals. The Washington State Supreme Court denied a request to review the Court of Appeals decision.

Examples

Examples of language in SMPs that address vegetation removal and the authority of the shoreline administrator are included in the SMPs listed below. Please check the particular SMP, available at Ecology's "State approved Shoreline Master Programs" webpage.

Bainbridge Island Municipal Code

Chapter 16.18 Land Clearing, 16.18.030 Applicability: Requires a clearing permit for trimming, removing, clearing, or damaging vegetation or trees in critical areas, shoreline areas or buffers. *16.18.040* does not require a permit for routine maintenance activities on road and utility rights-of-way.

Port Townsend SMP

View Protection/Aesthetics, DR-6.4.17: Addresses protection of public views of the shoreline and states that view protection does not justify excessive removal of vegetation.

9.3 Alteration of Natural Landscape: Clearing, Grading and Vegetation Removal: States that clearing and vegetation removal are regulated, even though they may not always be considered to be development that triggers a substantial development permit. Describes when alteration of the natural landscape is allowed. Grants the shoreline administrator the authority to waive the landscape plan requirement. Provides criteria for trimming of trees and vegetation without a landscape plan.

Mason County SMP

M.C.C. 8.52.110.D.2.i: Grants the administrator the authority to determine that an imminent threat from danger trees exists to public health or safety, or safety of private or public property.

Island County SMP

17.05A.090 Shoreline Use and Development Regulations

Requires shoreline vegetation to be maintained in a predominately natural and undisturbed condition. Prohibits topping of trees. Defines what's allowed regarding selective pruning or thinning of trees for safety, view protection or maintenance. Grants the shoreline administrator the authority to deny or condition proposals for vegetation management or removal.

Shoreline restoration projects – relief from standards

Local governments may grant relief from SMP development standards and use regulations **only within urban growth areas** (including incorporated cities) when a shoreline restoration project causes or would cause a landward shift in the ordinary high water mark (OHWM). The Legislature in 2009 recognized that restoration projects that shift the location of the OHWM could create hardships for property owners and approved such relief to protect the viability of shoreline restoration projects.

Local governments may grant this relief only when the landward shift in the OHWM will result in:

1. Additional area within shoreline jurisdiction, or

2. Additional regulatory requirements apply due to a shift in the shoreline buffer or other SMP regulations; and

3. Application of the SMP regulations would preclude or interfere with use of the property, presenting a hardship to the project proponent.

A project proponent must file an application for relief with local government as part of a required permit (such as a shoreline permit, or a building permit if no shoreline permit is required.) The application for relief must meet the following criteria:

- The proposed relief is the minimum necessary to relieve the hardship.

- After granting the proposed relief, there is net environmental benefit from the restoration project.

- Granting the proposed relief is consistent with the objectives of the shoreline restoration project and consistent with the local Shoreline Master Program.

This relief process does not apply where a project applicant improves shoreline habitat as required mitigation for project impacts.

After taking action, the local government must submit the request for relief to the Department of Ecology for approval or disapproval. Ecology will review the application as part of its review of

a shoreline permit. If a shoreline permit is not required, Ecology will conduct its review when the local government provides a copy of a complete application and supporting information.

Ecology will conduct a minimum 20-day public notice period prior to taking action. Ecology must act within 30 days of the close of the public notice period or within 30 days of receipt of the proposal if public notice is not required. The 20-day public notice requirement does not apply if an updated SMP or shoreline restoration plan identifies the specific restoration project or a shoreline reach where relief is appropriate. The SMP or restoration plan needs to address the nature of the relief and why, when and how it would be applied in order for the public notice requirement to be waived [RCW 90.58.580(2)].

For more information:

- RCW 90.58.580
- WAC 173-27-215

6. Permit Process

The permit process starts with the applicant's initial inquiry with local government and continues to final approval of conditional use permits (CUPs) and variances by Ecology and filing of substantial development permits (SDPs). It also may include an appeal with the Shorelines Hearings Board and the court.

Consider the local planner as the portal to all permits the applicant needs. These may include zoning, grading and building permits, among others. Communication and coordination are key to a smooth and efficient process. Keeping other local departments apprised about the shoreline permit and gathering information about relevant requirements regarding stormwater, impervious surface limits, transportation and utilities, for example, will help to avoid problems and delays.

When deciding whether a proposed action will be consistent with the law, consider the broad policies and the specific regulations of both the Shoreline Management Act (SMA) and the local Shoreline Master Program (SMP). The SMA includes a liberal construction clause that exempts the law from the rule of "strict construction," a close or narrow reading and interpretation [RCW 90.58.900].

This section provides guidance for local planners who review shoreline permits and includes topics such as the permit application, SEPA, public notice, permit review and submittal to Ecology, and Ecology permit review. Flowcharts that depict the permit process are provided in the Appendix.

Pre-application meeting

Many jurisdictions hold a pre-application meeting with the staff and applicant, and often include other agencies with jurisdiction over the proposed development, e.g., Ecology, the Army Corps of Engineers and Washington Department of Fish and Wildlife. This meeting provides an opportunity for an informal exchange of information about the proposal and for local government or agency staff to request specific application information or suggest modifications or mitigating measures for the proposal.

Some suggested agenda items:

- The application and review process, with expected timelines
- Description of the preliminary proposal
- Applicable policies and regulations
- Type and extent of information necessary to properly and expeditiously process the application

- Modifications or mitigating measures that will improve the chance that the application will move smoothly through the process

Permit application

Shoreline permit applications must define the proposal and the site with as much detail as possible. Ecology staff (and at other resource agencies) may not be familiar with a site or have talked with the applicant. Therefore, they will be relying solely on the information contained in the permit, at least initially.

Requirements for a complete permit application are found in WAC 173-27-180. These minimum requirements include the name and contact information for the applicant, the applicant's representative and the property owner; location of the property, including address if available, and section, township and range; identification of the shoreline water body and location of the ordinary high water mark; description of the property; vicinity of the property; and detailed site development plans. Local governments may require additional information.

The Joint Aquatic Resources Permit Application (JARPA) combines application requirements for different permits from several agencies for work in, on and around waters of the state. In addition to Ecology, agencies that use JARPA include the U.S. Army Corps of Engineers, U.S. Coast Guard, and Washington Department of Natural Resources, as well as many local governments.

For more information:

- RCW 90.58.140
- WAC 173-27-180
- Introduction to JARPA (Governor's Office for Regulatory Innovation and Assistance)

SEPA notice and comments

Every shoreline permit must be accompanied by demonstration of compliance with the State Environmental Policy Act (SEPA). Compliance with SEPA, including all review or waiting periods, is required before a decision on an application can be made. The shoreline permit application and SEPA analysis should identify future uses intended for the site to avoid the possibility of piecemeal or inappropriate phasing of development.

SEPA establishes a detailed administrative process for assuring that environmental impacts are recognized, evaluated, and mitigated. Some projects will require a determination of significance (DS) and an environmental impact statement (EIS); others will require a determination of nonsignificance (DNS) or mitigated determination of nonsignificance (MDNS) and environmental checklist, or a determination of categorical exemption.

The SEPA process is intended to mesh with other permits, approvals, and/or licenses. Compliance with SEPA must be verified on all shoreline permits and on other shoreline-related activities, such as amendment of an SMP. Equally important, the SEPA process provides a major

avenue for public comments on a proposed project, to be solicited and addressed by the agency with oversight. The SEPA process is described in RCW 43.21C and WAC 197-11.

Some tips on SEPA and shorelines

The SEPA process interacts with the shoreline management process in several ways. Compliance with SEPA is required for issuance of a shoreline permit. Adding conditions to or denying a shoreline permit is authorized under SEPA rules (WAC 197-11-660). The SEPA checklist must identify all local, state, and federal permits or approvals that may be required. An EIS should include an evaluation of the project's consistency with existing plans, policies (e.g., the local SMP), and zoning regulations. For these reasons, it is important to remember that the umbrella of SEPA compliance extends over the whole shoreline administration process.

When a shoreline permit is required, the local jurisdiction will typically be the lead agency for SEPA, but not always. The most notable exception is when a project is proposed by a governmental unit such as a special purpose district, city, county, or state agency. The proposing unit of government is always the lead agency for a governmental project.

Here are a couple examples:

1. A private corporation proposes to build a marina. The local jurisdiction would be the lead agency for SEPA, issue the SEPA determination, and manage development of an EIS, if it determines an EIS is necessary. The local jurisdiction also would approve or deny the shoreline permit. (If the shoreline permit is a CUP or variance, Ecology also must approve or deny the permit.)

2. A sewer and water district proposes to build a new sewage treatment plant. The district would be the lead agency for SEPA. However, the local jurisdiction would approve or deny the shoreline permit, with Ecology weighing in as mentioned above.

In other circumstances on privately proposed projects, other agencies may assume the lead agency responsibilities. Check SEPA rules for information about lead agency status.

It is important to track a project's separate compliance with the different review periods and public notice requirements stipulated under SEPA and the SMA. Never issue the shoreline permit until the SEPA review periods are complete (14-day review for a DNS; seven-day waiting period for a final EIS). Failure to observe the review periods could lead to remanding of the permit by the Shorelines Hearings Board, if the decision is appealed.

Require that a site plan and as much detailed information as you can obtain be part of the SEPA checklist. Local shoreline administrators can use SEPA as a preliminary assessment of permits. Requesting site plans and detailed information will also help Ecology staff evaluate the proposal and provide useful comments earlier in the process. Most SEPA documents are filed with Ecology, and projects identified as requiring shoreline permits are reviewed by shoreline staff.

For more information:

- SEPA- Environmental review
- RCW 43.21C

- WAC 197-11

National Environmental Policy Act

Federal agencies are required to consider the environmental impacts of agency-sponsored developments, permit decisions, and grants under processes defined by the National Environmental Policy Act (NEPA). Like SEPA, NEPA requires full disclosure of environmental impacts and their consideration by an agency prior to a decision. Under NEPA, agencies prepare an environmental assessment (EA), and use it to determine whether an EIS is required. For projects not requiring an EIS, a finding of no significant impact is issued. NEPA requires examination of some economic and technical considerations that are excluded from SEPA.

For example, a project that required environmental review under both SEPA and NEPA is the Vancouver Waterfront Park. Both an SDP and CUP, as well as other permits, were required for this project.

As with SEPA, environmental review under NEPA must be completed before a local government issues a shoreline permit or letter of exemption.

For more information:

- National Environmental Policy Act, U.S. EPA

Public notice of permit

The SMA gives local government discretion to structure its permit process around a set of minimum requirements established in the Act and in state regulations [RCW 90.58.140 and WAC 173-27(110)]. Local administrators should generally follow the procedures for permit processing described in the local master program or permit ordinance. However, should there be a conflict between the provisions of the master program or permit ordinance and the provisions of the Act or WAC 173-27, the provisions of the Act and regulations in WAC 173-27 must be followed as a minimum. A master program provision that requires more than the minimum process specified in the SMA is not in conflict as long as the minimum provisions are incorporated.

WAC 173-27-110 requires local governments to notify the public, Ecology, and other agencies with jurisdiction about applications within 14 days after the application is determined to be complete. Other notice requirements include:

- Dates of application, notice of completion, and notice of application.

Public notice: The SMA requires local governments to notify the public of all applications for shoreline permits by one of the following three methods: Mailing notice to property owners within 300 feet of the proposed development; posting the notice on the property where the project is proposed; or any other manner deemed appropriate by the local authorities. Requiring both the first and second notifications, or requiring mailing to property owners within 500 feet, would not conflict with the SMA requirements because the minimum requirements would be met.

- Description of the proposed action and list of project permits included in the application.
- Identification of other permits not included in application.
- Identification of existing environmental documents that evaluate the proposal.
- Statement of the public comment period, which must be a minimum of 30 days.
- The date, time, place, and type of hearing, if applicable.
- Statement of the preliminary determination of the development regulations that will be used for project mitigation, if known at the time of notice.

The SMA does not require public hearings for shoreline development proposals, but many local master programs require hearings. Hearings can assure that interested citizens are apprised of the development proposal and will have an opportunity to comment on it.

The importance of following correct procedures in processing permits cannot be overemphasized. Failure to follow the processes outlined in the SMA, WAC 173-27, and the local master program may result in the invalidation of a decision. Local planning and zoning requirements for public notice may differ from the SMA. If you are trying to combine these processes, you must be sure that you meet the SMA's requirements, or the shoreline permit process could be invalidated. Far more appeals and court decisions are decided on procedural grounds than on substantive issues.

For more information:

- RCW 90.58.140
- WAC 173-27(110)

Local review and approval of shoreline permits

When reviewing permit applications, local government staff should consider the description of the proposed development and its consistency with the SMA and local SMP. Decisions should be legally defensible. Do not deny a permit just because the proposal is unpopular.

Following are questions to ask when reviewing a permit application.

What kind of development is it?

- Is the proposal development?
- Is it substantial development?

What is the nature of the shoreline that is potentially affected?

- What SMA water body is the development in, on, under, or adjacent to?
- Is it in or on a Shoreline of Statewide Significance? If so, are the statewide significance priorities satisfied?

- Is it in a wetland, floodway, or 100-year floodplain?
- Is shoreline jurisdiction, including the ordinary high water mark, clearly identified in the application?
- Are cultural resources present on the site? Is there evidence of Native American use or occupation? Have you consulted with local tribal governments? Are historic structures present?

What aspects of the local SMP apply to the proposed project?

- What is the site's environment designation? Is the proposal consistent with requirements of the applicable environment designation?
- How do general policies and regulations apply to the proposal?
- Does the application describe the appropriate SMP use category or categories (e.g., commercial, residential, recreational, or aquaculture)? If not, what use categories of the SMP apply?
- Does the proposal require an SDP, variance, and/or CUP?
- If the proposal requires a CUP or variance, does it meet all the criteria in WAC 173-27-160 and 170, respectively?
- What are the public notice and hearing requirements for the particular type of shoreline permit?
- Is the project proposed within the shoreline buffer or setback? Does the SMP allow the proposed use in the buffer or setback?

Are other permits, authorizations, or processes required?

- Has SEPA been complied with and documented?
- Are other permits required? What permit actions have already been taken?

Did you conduct a site visit?

Key components of effective permit review are the applicant's site plans and application materials. Site plans can sometimes misrepresent actual conditions. Therefore, Ecology recommends that local government staff conduct site visits to understand how the proposal might affect the shoreline environment and adjacent property.

There are several reasons to visit the site:

1. Application materials can misrepresent site conditions. The OHWM may be inaccurate on the site plan. A stream may be missing from the site plan.

2. The application materials may not show adjacent properties and roads. You will want to know how the proposed development will affect these.

3. There may be critical areas both onsite and offsite. It is important to know where these are in relation to the proposed development and how they may be impacted.

4. Descriptions on the application can be confusing. The site visit provides an opportunity to find out what that description really means.

5. Visiting the site can help if you are testifying at an appeal hearing. When asked if you have been to the site and viewed the site conditions, you want to be able to say "yes."

6. The site visit provides an opportunity to take measurements for later reference, such as when checking to make sure that permit conditions are carried out or during enforcement action.

An Ecology planner's experience supports our recommendation to visit the site. The planner visited the site of a proposed shoreline variance to allow a second story and new roofline on an existing house. He saw a new house being built on the site where the variance application materials indicated a second story would be added. The new house was under construction before Ecology had approved the proposed variance for the second story. Ecology denied the variance and pursued enforcement against the property owner.

Local government action (approve, approve with conditions, or deny)

Following public notice and review, the local government may take action to approve, approve with conditions, or deny the application. Any action taken prior to the expiration of the comment period may be voided by the failure to comply with the public comment requirement.

Many jurisdictions provide for a local appeal period after issuance of a decision, with appeals heard by a hearing examiner, planning commission, or city or county council. A permit may need to be amended as a result of the hearing process.

Construction is not authorized until 21 days after the "date of filing" (see below) or until all review proceedings (upon appeal) are terminated, whichever is later.

Mailing a permit to Ecology

After all local appeal periods have expired and appeals have been resolved or exhausted, local governments must mail the permit to the appropriate Ecology regional office and the Office of the Attorney General.

- Ecology regional offices
- Washington State Office of the Attorney General, Ecology Division
  PO Box 40117
  Olympia, WA 98504-0117
  Phone: 360-586-6770

Mailing must be accomplished using return receipt requested mail. Local governments also must notify in a timely manner those interested parties who have requested notification of the decision [RCW 90.58.140].

The permit and documentation of the final local decision should be mailed together with:

- The complete permit application
- A staff report with findings and conclusions
- A permit data form (cover sheet in WAC 173-27-990)
- Any applicable SEPA documents

The staff report -- with findings and conclusions -- establishes the basis for the decision. It should identify the shoreline environment designation, the applicable master program policies and regulations, and include an analysis of the consistency of the project with applicable review criteria for the type of permit(s).

For more information:

- RCW 90.58.140
- RCW 90.58.180
- WAC 173-27-990

Ecology review of permits

Ecology has two duties relative to permits. Ecology is the repository of all locally approved and denied shoreline permits for the state. Ecology conducts also substantive review on CUPs and variances to check for compliance with the policies and regulations of the local SMP and the SMA and must approve or deny these permits. Ecology files substantial development permits but does not take action (approve or deny) on SDPs.

Ecology's substantive review

Ecology asks the following questions during its review of local shoreline CUPs and variances:

- Is the proposal development?
- Is the proposal substantial development?
- What is the shoreline environment?
- Is the proposal in a wetland, floodway, or 100-year floodplain?
- Is the proposal in or on Shorelines of Statewide Significance?
- Did the local government submit all required shoreline permits for the proposal (SDP, CUP, or variance)?
- Did the local government submit all required permit materials?
- If the application is for a CUP or variance, does it meet the criteria?
- Was the proposal assigned the proper SMP use category or categories?
- Does the proposal comply with the SMA and all applicable SMP regulations?

Appeal period starts with the date of filing

The 21-day appeal period is defined in RCW 90.58.140(6) and starts with the date of filing:

- SDPs: The date that Ecology receives the local government's decision.
- CUPs and variances: The date that Ecology’s decision is transmitted to the local government.
- An SDP mailed to Ecology simultaneously with a CUP or variance: The date that Ecology’s decision on the CUP or variance is transmitted to the local government.

Appeals must be filed with the state Shorelines Hearings Board within the 21-day appeal period. If no appeal is filed, the applicant may begin the permitted activity.

Procedures at the end of the appeal process

If a shoreline permit is appealed, Ecology rules require specific steps at the end of the appeal process [WAC 173-27-130(11]. The following steps ensure that the local and state files are complete and accurate, and prevent new opportunities for further appeals:

- If the project has been modified during the legal review proceeding, Ecology shall provide plans or text to the local government that clearly indicate the final approved plan.
- Ecology must send a copy of the final order to the local government.
- The local government must reissue the permit accordingly and submit a copy of the reissued permit and supporting documents to Ecology for completion of the file on the permit.

For more information:

- RCW 90.58.140(6)
- WAC 173-27-130(11)
- Shorelines Hearings Board

7. Adding conditions to permits and exemptions

Many permits are issued with conditions that are needed to ensure the project is consistent with the Shoreline Management Act (SMA) and the Shoreline Master Program (SMP). Conditions also may be added to projects that are exempt from requirements for a substantial development permit (SDP). Local jurisdictions often apply conditions under powers granted by SEPA in order to mitigate the environmental impacts of a proposal. Ecology may add conditions to conditional use permits and variances. The SMA authorizes conditions that are necessary to mitigate impacts to shoreline resources [RCW 90.58.020].

When permit approval is based on conditions, the conditions must be satisfied prior to occupancy or use of a structure or prior to commencement of a non-structural activity, unless an alternative compliance schedule is a condition of approval [WAC 173-27-090(4)].

Don't confuse the placing of conditions on a permit with conditional use permits. The adding of conditions to a substantial development permit does not make it a conditional use permit (CUP). All permits--SDPs, CUPs and variances--may have conditions.

Tracking conditions

Conditions imposed on shoreline permits run with the property even if ownership changes. Therefore, conditions must be complied with for the life of the development or beyond if the circumstances warrant such an interpretation. Ecology recommends that certain conditions be recorded on the title, particularly those that commit a property owner to maintain habitat or public access, or include prohibitions, such as prohibiting construction of a bulkhead. Recording conditions such as vegetated buffers, habitat mitigation areas (including submerged sites), public access points, trails, parks, and flood-control measures will alert future property owners of the commitment for maintenance of such areas in perpetuity.

As a general practice, many local governments avoid incorporating non-shoreline-related permits or conditions into shoreline permit conditions. Keeping issues separate may help with appeals and processing.

Common conditions

Common conditions attached to a shoreline permit may address:

- Landscaping
- Screening and berms
- Hooded lighting
- Limited operating hours
- Public access
- Monitoring of water quality or other environmental parameters

- Modifications of proposed structures to limit obstruction of shoreline views

Under WAC 197-11-660 (SEPA), conditions or mitigating measures must be "reasonable and capable of being accomplished." The Shorelines Hearings Board has determined that the test for reasonableness of the conditions imposed by a local government for a permit is whether the conditions further the policy of the SMA or aid the implementation of the master program. See *Robert H. Green v. City of Bremerton and Department of Ecology*, SHB Case No. 81-37.

For more information:

- WAC 173-27-090
- WAC 197-11-660
- *Robert H. Green v. City of Bremerton and Department of Ecology,* SHB Case No. 81-37 (1981)

8. Time requirements of permits

Local governments have some flexibility to adopt appropriate time limits for completing work under substantial development, conditional use, or variance permits. Time limits must be reasonably related to the time actually necessary to complete the project that is being permitted, and/or are necessary for the protection of shoreline resources. Time limits must be consistent with the policies and provisions of the local Shoreline Master Program (SMP) and the Shoreline Management Act (SMA). Ecology must approve time requirements for conditional use and variance permits, other than the default time limits discussed below.

Aquaculture operations, maintenance dredging and surface mining are examples of development activities that may be granted shoreline permits for more than five years.

If a local government has not established specific time limits on permits, the following default time limits apply.

Figure 8-1: Aquaculture operations, such as geoduck harvesting shown above, are typically granted shoreline permits for longer than five years. (Ecology staff photo.)

Start-up period

Construction (or other actions approved under a shoreline permit) must begin within two years of the effective date of a shoreline permit. Before the end of the two years, the local government may grant a single extension of up to one year to this time limit, based on "reasonable factors" [WAC 173-27-090(2)]. Ecology and interested parties of record must first be notified.

Completion period

Shoreline permits are valid for five years -- the construction or any development activity must be complete during that period Before the five years end, local government may grant a single extension of up to one year based on “reasonable factors,” and if Ecology and parties of record are notified [WAC 173-27-090(3)]. Local government may issue permits that expire in less than five years as an option.

Note that conditions placed on permits run with the land and are in effect even after the project has been built and the five-year permit authorization has expired. New owners of a project must

Figure 8-2: An artist's rendering shows the Port of Vancouver's Terminal 1 waterfront conceptual development plan. The City of Vancouver shoreline conditional use permit allows for a 20-year construction period.

comply with any conditions placed on a permit (e.g., for public access), because the project has been approved based on those conditions.

Effective date

The effective date of a shoreline permit shall be the date of the last action required for the shoreline permit and all other government permits and approvals that authorize the development to proceed. This includes all administrative and legal actions on any such permit or approval.

The applicant is responsible for informing the local government of the pendency of other permit applications filed with agencies other than the local government and of any related administrative and legal actions on any permit or approval. If applicants do not provide notice of the pendency of other permits or approvals to the local government prior to the date established by the shoreline permit or the provisions of this section, the expiration of a permit shall be based on the shoreline permit.

For more information:

- RCW 90.58.143
- WAC 173-27-090

9. Nonconforming uses and development

Nonconforming uses and development are those that were **lawfully** established or constructed but do not conform to present Shoreline Master Program (SMP) regulations. These nonconforming uses and developments may continue as legal, nonconforming uses and developments.

Most local governments have adopted their own nonconforming use and development regulations in their SMPs**.** If your SMP has nonconforming use and development regulations, you can rely on those. The state rule for nonconforming uses and development applies **only if** local governments have not adopted their own master program provisions.

If your SMP does not have nonconforming use and development regulations, the state rule applies. Note that Ecology has amended this rule, WAC 173-27-080, effective September 2017. These amendments distinguish between nonconforming uses and nonconforming development or structures, define nonconforming lots, and clarify when nonconforming development may be expanded.

Definitions

The revised WAC 173-27-080 establishes the following definitions for nonconformities:

- Nonconforming use: "An existing shoreline use that was lawfully established prior to the effective date of the act or the applicable master program, but which does not conform to present use regulations due to subsequent changes to the master program." An example is a commercial use in a shoreline environment designated for residential use.

- Nonconforming development or nonconforming structure: "An existing structure that was lawfully constructed when it was built but is no longer fully consistent with present regulations such as setbacks, buffers or yards; area; bulk; height or density standards due to subsequent changes to the master program." A common example along shorelines is a single-family residence that does not meet current buffer or setback standards.

- Nonconforming lot: "A lot that met dimensional requirements of the applicable master program at the time of its establishment but now contains less than the required width, depth or area due to subsequent changes to the master program."

Nonconforming uses

A nonconforming use may be **enlarged or expanded** only with approval of a conditional use permit, unless the SMP has other, more specific regulations.

Nonconforming structures

Nonconforming structures that are used for a conforming use may be maintained and repaired. For example, a house in a Shoreline Residential environment is a conforming use; if it is built within the shoreline buffer, it is a nonconforming structure.

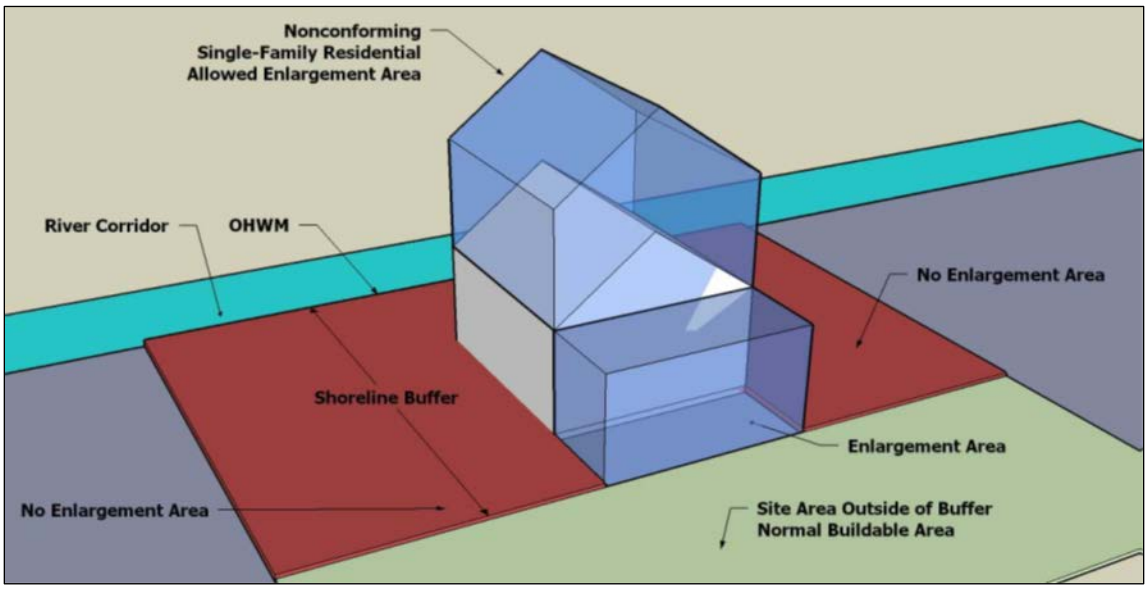

Figure 9-1: This graphic from the City of Spokane SMP shows that expansion or enlargement of the main nonconforming structure is allowed with addition of space above the building footprint or onto or behind the side that is farthest from the ordinary high water mark (OHWM).

Nonconforming structures may be enlarged or expanded if the enlargement meets the applicable provisions of the SMP. Some SMPs set specific requirements for expansion, such as allowing expansion of up to 500 square feet without the need for a variance or CUP.

If the SMP does not have specific regulations for expansion, the proposed expansion shall not increase the extent of nonconformity by extending into areas where new construction would not be allowed without a shoreline variance.

Nonconforming single-family residences that are located landward of the ordinary high water mark may be enlarged or expanded in conformance with applicable bulk and dimensional standards by the addition of space to the main structure, or by the addition of normal appurtenances, with approval of a CUP.

Abandoned uses

Nonconforming uses are considered **abandoned** if they are discontinued for more than twelve consecutive months or for twelve months during any two-year period. The nonconforming rights expire regardless of the owner's intent to abandon or not.

Any subsequent use must conform to the requirements of the SMA and SMP, unless re-establishing the use is authorized through a CUP. The owner must apply for the CUP within the two-year period. Similarly, a nonconforming use may not be changed to another nonconforming use or moved any distance within the shorelines of the state.

Note: Water-dependent uses should not be considered discontinued when they are inactive due to dormancy, or where the use includes phased or rotational operations as part of typical operations. For example, aquaculture operations typically include periods of dormancy. These dormant times may extend beyond a typical period for abandonment.

Damaged nonconforming development

If a nonconforming development is damaged to an extent not exceeding 75% of the replacement cost of the original structure, it may be reconstructed to those configurations that existed immediately prior to the time the structure was damaged. The applicant must apply for permits needed to restore the development within two years of the date the damage occurred.

Substandard lots

An existing lot or parcel that is substandard with respect to lot size or density requirements may be developed provided it meets the other requirements of the SMA and SMP and other land use regulations. A reasonable use of the property should be allowed based on the characteristics of the site. Easing of standards other than lot size or density (for example, building setbacks) would require a variance permit.

Approved variances

A structure for which a variance has been issued shall be considered a legal nonconforming structure. The requirements of WAC 173-27-080 shall apply as they apply to existing nonconformities.

Changing uses of nonconforming structures

Sometimes a structure is used for a nonconforming use, and the property owner wants to change the use to another nonconforming use. An example would be changing from a commercial to an industrial use in an area where both these uses are nonconforming. A conditional use is required for this change, and **may be approved only if both of the following apply**:

- No reasonable alternative conforming use is practical.
- The proposed use will be at least as consistent with the SMP and SMA and compatible with uses in the area as the existing use.

In addition, conditions may be attached to the permit to assure compliance with the master program and to assure that the use will not become a nuisance or a hazard. The purpose of this

section is to provide reasonable use of a legally existing nonconforming building when no conforming use can be practically expected to make use of the structure. This exception, under limited circumstances, is necessary to assure that regulations do not either overly compromise policy in order to accommodate some particular situation, or overregulate and result in a "taking" of private property.

Moving a nonconforming structure

A nonconforming structure that is moved any distance must be brought as closely as practicable into conformance with the applicable master program and the Act.

Determining the age of a development

Determining exactly when a development was initially built can be a difficult task. While technically it is the applicant who must prove compliance with the regulation, the practical situation is that usually the local government must look into this to be sure of the situation. Evidence such as assessor's records, recorded deeds or other documents, historical photos, other permit records (e.g., building, HPA, short or long plat) or testimony from contractors, neighbors, officials, or others can be crucial in proving the date of construction or initial use.

Existing uses

Existing legally established shoreline uses or development that predates the SMA or a current SMP are typically allowed to continue. That means they can continue to exist, be used, and be maintained and repaired. That’s the case even if the updated SMP includes regulations that would not allow new uses or development to be configured or built exactly as existing ones. Shoreline permits are required only if new substantial development is proposed.

When the use consists of ongoing development activities, such as a gravel mine, the project requires an active (unexpired) shoreline substantial development permit throughout the life of the project. For a proposal to change the use of an existing development, the new use must be consistent with the SMP. If the proposed use is a conditional use in the master program, a conditional use permit is required whether or not new development is required to establish the use.

Structures placed in navigable waters before 1969

In RCW 90.58.270, the SMA specifically recognizes one class of pre-existing use. This section declares, "Nothing in this statute shall constitute authority for requiring or ordering the removal of any structures, improvements, docks, fills, or developments placed in navigable waters prior to December 4, 1969." The Legislature approved this language in response to the State Supreme Court's decision in *Wilbour v. Gallagher,* 77 Wn.2d 306 (1969), in which the Court held that fill placed in Lake Chelan violated the public's right of navigation under the public trust doctrine.

For more information:

- RCW 90.58.270
- WAC 173-27-080
- *SMP Handbook*, Chapter 14, "Legally Existing Uses and Development"

10. Permit revisions and time extensions

A revision to an approved permit is required "whenever the applicant proposes **substantive changes** to the design, terms or conditions of a project from that which is approved in the permit…" [WAC 173-27-100].

Changes must be within the **scope and intent** of the original permit. Revisions may be authorized after expiration of the permit as long as the proposed change does not constitute substantial development.

Substantive changes

Substantive changes are those that materially alter the project in a manner that relates to its conformance to the terms and conditions of the permit, the applicable Shoreline Master Program (SMP) criteria, and/or the policies and provisions of the Shoreline Management Act (SMA).

If the proposed revision is not substantive, a permit revision is not necessary.

Scope and intent of the original permit

Local governments may approve a revision if the proposed changes are within the scope and intent of the original permit and consistent with the SMP and the SMA. Scope and intent are defined in WAC 173-27-100(2) as:

- No additional over-water construction except that a pier, dock, or float may be increased by 500 square feet or 10%, whichever is less.
- Ground area coverage and height may be increased by a maximum of 10%.
- The revision will not authorize exceedance of dimensional standards (height, lot coverage, setback) except as authorized by a variance granted with the original permit.
- Revised landscaping is consistent with SMP and permit conditions.
- There is no change in use from that authorized by the original permit.
- No adverse environmental impacts will occur.

If the original permit involved a CUP or variance, Ecology must also approve the revision.

If the sum of the revision and any previous revisions exceed the revision criteria, a new permit is required [WAC 173-27-100(4)].

The Shorelines Hearings Board has determined that the intent of a permit relates to the type of land use authorized, while the scope of the permit relates to the actual substantial development(s) which may be constructed (*Ecology v. Island County and Nichols Brothers Boat Builders, Inc.*, SHB No. 216). The scope of the original permit is defined as the development described in

sufficient detail in the permit itself, in accompanying documents, or on the accompanying site plans.

For more information:

- WAC 173-27-100
- *Ecology v. Island County and Nichols Brothers Boat Builders, Inc.*, SHB No. 216 (1976)

Time limits on revised permits

Since a project approval and permit authorizes the finished development indefinitely, an application for permit revision may be considered at any time, even after the five- (or six-) year permit expiration. However, the revision procedure may not be used to extend the original time limit for completing the project, but rather as a means to make modifications to the already completed project. This means that if the work necessary to accomplish the revision constitutes substantial development, a new SDP is required if the original permit has expired.

There is no limit on the number of revisions allowed for a project. However, the sum of all of the revisions must remain within the scope and intent of the original permit.

Submitting revised permits to Ecology

Within eight days of the final local government decision, the local government shall send to Ecology and the state Attorney General the revised permit (including a revised site plan and text) and an analysis explaining how the revision is consistent with WAC 173-27-100.

Unless appealed within 21 days of receipt by Ecology, the decision by local government on the revision automatically stands.

If the revision to the original permit includes a CUP or variance, local government is required to submit the revision to Ecology for its approval, approval with conditions, or denial. Ecology shall make its decision and transmit it to local government and the applicant within 15 days of the date of receipt of the revision.

Effective date and appeals

The revised permit is effective immediately upon final action by local government or, when a variance or conditional use is involved, upon final action by Ecology [WAC 173-27-100(7)].

Appeals shall be based only upon questions of noncompliance with what constitutes "within the scope and intent" of the original permit and not the merits of the original permit itself.

Construction undertaken based on the revision and not authorized in the original permit is at the applicant's own risk until the expiration of the appeals deadline and all appeals have been

decided. If an appeal determines that the revision was not within the scope and intent of the original permit, the decision shall have no bearing on the original permit [WAC 173-27-100(8)].

Appeals must be filed within 21 days of Ecology's receipt of the revision or, if a variance or conditional use is involved, within 21 days of the date of transmittal of Ecology's final decision to the local government and the applicant.

Notification to parties of record

A revised permit does not require new public notice. However, local governments must notify parties of record in the original decision of their permit action (or Ecology's decision) within eight days. If the changes are not within the original scope and intent, then a new permit application must be filed and new public notice proceedings initiated [WAC 173-27-100(4)].

Permit time extensions

The permit time clock starts after all needed permits and approvals are received from all agencies, including that of the issuing jurisdiction. For example, a city issues a shoreline permit, but another city permit and a federal permit are yet to be approved. The time clock would start when the applicant receives the additional permit from the city and the permit from the federal government.

A permit's timeframe is usually five years but may be longer. Construction must commence within two years; a single one-year extension may be granted. Permitted development must be completed within the five-year (or other) permit timeframe; a single one-year extension may be granted.

Local governments may authorize different time limits as part of action on a permit. They should prepare a finding of good cause, based on requirements and circumstances of the proposed project.

Local governments may revise a permit after its expiration. However, such a revision may not be used to extend the original permit time requirements or to approve a substantial development after the time limits of the original permit.

For more information:

- RCW 90.58.143
- WAC 173-27-090
- WAC 173-27-100(4)

Rescinding a permit

Local governments may rescind permits upon a finding that the permittee has not complied with permit conditions. The local government must provide notice to the permittee and the public, and hold a public hearing.

Ecology can also independently petition the Shorelines Hearings Board to rescind a permit the agency believes is in noncompliance. Ecology must first provide written notice to the local government that the noncompliance exists and wait 30 days for the local government to have the opportunity to rescind the permit. Within 15 days after the end of the 30-day period and upon written notice to the permittee and local government, Ecology may petition the SHB to rescind the permit.

Please also note that violation of the terms of a permit is also subject to civil penalties and orders from the local government and/or Ecology.

For more information:

- RCW 90.58.140(8)

11. Permit appeals

Appeals of shoreline permits may occur at both the local and state level. Both processes, as well as remands of permits back to local government by the Shorelines Hearings Board, are discussed in this section.

Local appeal process

Shoreline Master Programs (SMP) or other sections of the local permit code usually contain provisions for a local appeal process. The local appeal process may address appeals of the permit action (granting, denial, rescission) and appeals of interpretations of SMP rules and policies. Local appeals must be exhausted before a permit is sent to Ecology and before appellants can appeal to the state Shorelines Hearings Board.

State appeal process

Any person or organization may appeal the approval, denial, or rescission of a shoreline permit to the Shorelines Hearings Board (SHB). The Board's website provides detailed guidance on how to file a request for review. See the document "Your Right to Be Heard."

The Legislature created the SHB as a quasi-judicial body to hear appeals by aggrieved parties on permits and appeals of Ecology decisions on SMPs. (The Growth Management Hearings Board now hears appeals of Ecology decisions on SMPs for jurisdictions fully planning under the Growth Management Act.) The SHB is composed of six members: three members of the state Pollution Control Hearings Board, one member representing the Association of Washington Cities, one member representing the Washington State Association of Counties, and a representative of the Commissioner of Public Lands. The Board's rules of practice are established in WAC 461-08.

The request for review of shoreline permits must be filed within 21 days of the "date of filing" as defined in RCW 90.58.140(6).

- Date of filing for SDPs is the date that Ecology receives the local government's SDP decision.

- Date of filing for CUPs and variances is the date that Ecology's decision on the permit is transmitted to the local government.

- For combined permits with an SDP and CUP or variance, or both, the date of filing is the date that Ecology's decision on the permit is transmitted to the local government.

Appeals procedures are similar to but less formal than court actions. Ecology and the Attorney General have the right to appeal local permit decisions to the Board at their discretion; all such

appeals are also heard by the Board. Ecology and the Attorney General may also intervene in any SHB case to represent the interests of the state and protect the integrity of the SMA.

SHB decisions are based on the facts of the case. For example, the Board may have upheld a local approval of an SDP in one location and denied a local approval of an SDP for a similar project in a nearby location, based on the facts of the case, e.g., location, proposal, recreational or other use of the water, and potential environmental and cumulative impacts.

What types of projects are appealed?

Shoreline permits for a variety of proposed developments, large and small, are appealed to the Shorelines Hearings Board. For example, within the past few years, permits that authorized the following projects have been appealed:

- Single-family residences
- Piers and docks
- Boat lift
- Bulkheads
- Demolition and transport of a bridge
- Marina redevelopment
- Aquaculture operations
- Expansion of a water terminal on port property
- Public trail
- Industrial development

Property owners and applicants have appealed denial of permits for a private residential shoreline access trail and single-family residences. At times, property owners and applicants who have been granted permits have appealed the permit conditions.

Remanding permits

The SHB may remand (send back) a permit that it has reviewed. This occurs generally under one of two possible circumstances: a remand for reconsideration or a remand for reissuance.

Remand for reconsideration (requiring a new permit)

A remand for reconsideration is unusual for the SHB because of its "de novo" (anew, starting over) process of permit review. However, in some circumstances, the Board will determine that the local process was flawed in such a way that the best solution is for the local process to be repeated and a new decision made by local government.

Remand for reissuance (revising conditions of a permit)

More commonly, the Board will determine that changes in the project or the terms and conditions of the original permit are necessary in order to conform to the SMA and local SMP. In

such circumstances the Board will usually remand the permit to local government with instructions to issue a new shoreline permit consistent with the order.

The SMA and its implementing regulations do not provide a great deal of specific guidance to local governments on procedures to follow in the event a permit is remanded for reissuance. However, the 2009 Board decision in *Friends of the San Juans v. San Juan County and Woodman,* SHB 09-010, addressed how the "law of the case doctrine" applied to appeals of remanded permits. The Board reviewed previous SHB and court decisions and determined that:

- All permits remanded by the SHB to local government for further action must be re-issued.
- Public notice and comment periods are not required where the re-issued permit complies with the Board's final order.
- The re-issued permit must be mailed to Ecology and parties of record. The permit material should include the re-issued permit (noted as such) and any documents or plans required as a result of the board's final order or referenced in the re-issued permit.
- The time limit for appealing a re-issued permit is twenty-one days from the date the permit is filed with the department.
- Subsequent appeals of a reissued permit are limited to whether it complies with the SHB decision. Original issues of the case cannot be re-opened.

For more information:

- Shorelines Hearings Board
- RCW 90.58.140(6)
- RCW 90.58.180
- WAC 173-220
- WAC 461-08
- *Friends of the San Juans v. San Juan County and Woodman,* SHB No. 09-010

12. Sources

This publication is part of a significant agency action under RCW 34.05.272. To meet the law, the sources of information used to support this action are identified. The required 11 types of sources are listed below by number. Each reference is followed by a bracketed number that indicates the source type.

1. Peer review is overseen by an independent third party.
2. Review is by staff internal to Department of Ecology.
3. Review is by persons that are external to and selected by the Department of Ecology.
4. Documented open public review process that is not limited to invited organizations or individuals.
5. Federal and state statutes.
6. Court and hearings board decisions.
7. Federal and state administrative rules and regulation.
8. Policy and regulatory documents adopted by local governments.
9. Data from primary research, monitoring activities, or other sources, but that has not been incorporated as part of documents reviewed under other processes.
10. Records of best professional judgment of Department of Ecology employees or other individuals.
11. Sources of information that do not fit into one of the other categories listed.

Revised Code of Washington

Capital improvements, RCW 43.83B.410(1)(b) [5]

Construction projects in state waters, RCW 7.55.181. [5]

Control of spartina and purple loosestrife, RCW 17.26.020. [5]

Environmental excellence program agreements, RCW 43.21K. [5]

Forest practices, RCW 76.09 [5]

Growth management – planning by selected counties and cities, RCW 36.70A.030. [5]

Hazardous waste cleanup--Model toxics control act, RCW 70.105D. [5]

Judicial review of land use decisions, RCW 36.70C [5]

Reclamation, soil conservation and land settlement, RCW 89.08.460. [5]

Shoreline Management Act of 1971, RCW 90.58. [5]

State environmental policy, RCW 43.21C. [5]

Washington Administrative Code

Shoreline management permit and enforcement procedures, Chapter 173-27 WAC. [7]

State master program approval/amendment procedures and master program guidelines, Chapter 173-26 WAC [7]

Practice and Procedures – Review of the granting, denying or rescinding of substantial development permits – hearings, Chapter 461-08 WAC. [7]

SEPA rules, Chapter 197-11 WAC [7]

Technical references

Determining the Ordinary High Water Mark for Shoreline Management Act Compliance in Washington State, Publication No. 16-06-029, *by Paul S. Anderson, Susan Meyer, Dr. Patricia Olson and Erik Stockdale* (2016). [2, 3]

Enforcing the Shoreline Management Act: *Guidance for Local Government Administrators.* Publication No. 95-101, by Huckell/Weinman Associates, Inc. for the Washington Department of Ecology (revised 1998). [2]

Putting the Public Trust Doctrine to Work, 2nd Ed., The Application of the Public Trust Doctrine To the Management of Lands, Waters and Living Resources Of the Coastal States by David Slade, June 1997. [11]

Shoreline Master Programs Handbook, Chapter 14, "Legally Existing Uses and Development." [2]

Soft Shoreline Stabilization: Shoreline Master Program Planning and Implementation Guidance. Publication No. 14-06-009 by Kelsey Gianou (2014). [2, 3]

The Public Trust Doctrine and Coastal Zone Management in Washington State. Publication No. 93-054 by Ralph W. Johnson, Craighton Goepple, David Jansen, and Rachel Pascal, 1991. [2]

Shorelines Hearings Board and court cases

Shorelines Hearings Board cases

Shorelines Hearings Board (SHB) cases can be found at the Environmental & Land Use Hearings Office website.

Baldwin, Simon and Taylor v. Pierce County, SHB No. 17-0005c (2017). [6]

Coalition to Protect Puget Sound Habitat v. Pierce County, SHB No. 13-016c (2014). [6]

Ecology v. Island County and Nichols Brothers Boat Builders, Inc., SHB No. 216 (1976). [6]

Robert H. Green v. City of Bremerton and Department of Ecology, SHB No. 81-37 (1981). [6]

Friends of the San Juans v. San Juan County and Woodman, SHB No. 09-010 (2009). [6]

Court cases

Darrell de Tienne and Chelsea Farms, LCC v. Shorelines Hearings Board, 197 Wn. App. 248, 290-91, 391 P.3d 458 (2016). [6]

Ecology v. Pacesetter, 89 Wn.2d 203 (1977). [6]

Hayes v. Yount, 87 Wn.2d 280, 287-88, 552 P.2d 1038 (1976). [6]

Portage Bay v. Shorelines Hearings Bd., 92 Wn.2d 1, 593 P.2d 151 (1979). [6]

Putnam v. Carroll, 13 Wn. App. 201, 534 P.2d 132 (1975). [6]

Wilbour v. Gallagher, 77 Wn.2d 306 (1969). [6]

Web pages

Coastal zone management federal consistency review [11]

ePermitting – home of the JARPA (Governor's Office for Regulatory Innovation and Assistance) [11]

National Environmental Policy Act, U.S. EPA [11]

Shorelines Hearings Board [11]

State Environmental Policy Act [11]