

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 WESTERN WASHINGTON REGION
3 STATE OF WASHINGTON
4

5 FRIENDS OF THE SAN JUANS,

6
7 Petitioner,

8 v.

9
10 SAN JUAN COUNTY AND STATE OF
11 WASHINGTON, DEPARTMENT OF
12 ECOLOGY,

13 Respondents.
14

Case No. 17-2-0009

FINAL DECISION AND ORDER

15 **SYNOPSIS**

16 *The Friends of the San Juans (Petitioner) challenged the Department of Ecology's*
17 *(DOE) approval of San Juan County's (County) Shoreline Master Program update, adopted*
18 *with the passage of County Ordinance Nos. 1-2016 and 11-2017. The Board concluded the*
19 *Petitioner demonstrated some elements of San Juan County's Shoreline Master Program*
20 *violated sections of chapters 90.58 RCW, 36.70A RCW, 43.21C RCW, and/or 173-26 WAC.*
21 *The Board remanded the matter to the County to take action to come into compliance with*
22 *the Shorelines Management Act consistent with the Final Decision and Order.*
23
24

25 **I. PRELIMINARY MATTERS**

26 The Board withheld ruling on the Petitioner's February 16, 2018, motion to
27 supplement the record with a public records request it propounded to the County together
28 with the County's response. The Board allowed the Petitioner to submit the documents with
29 its brief, and the Board opted to defer ruling on the motion. At commencement of the
30 Hearing on the Merits, the Presiding Officer announced that the Board had determined the
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1 exhibits would possibly be of substantial assistance and the documents were added to the
2 record. However, the Board notes that neither of the two exhibits were ultimately considered
3 and did not factor into the Board's decision in regards to Issue 7.
4

5 **II. BOARD JURISDICTION**

6 The Board finds the Petition for Review was timely filed, pursuant to RCW
7 90.58.190(2)(a) and RCW 36.70A.290(2). The Board finds the Petitioner has standing to
8 appear before the Board, pursuant to RCW 36.70A.280(2)(a) and (b) and RCW
9 36.70A.210(6). The Board also finds it has jurisdiction over the subject matter of the petition
10 pursuant to RCW 36.70A.280(1) and RCW 90.58.190(2).
11

12 **III. STANDARD AND SCOPE OF REVIEW, BURDEN OF PROOF**

13 Appeals of Shoreline Master Programs (SMPs) are governed by the Shoreline
14 Management Act (SMA) and are adjudicated by the Growth Management Hearings Board.¹
15 The Board is charged with adjudicating Growth Management Act (GMA) compliance and,
16 when necessary, invalidating noncompliant plans and development regulations.²
17

18 Comprehensive plans and development regulations, including shoreline master
19 programs, are presumed valid on adoption.³ This presumption creates a high threshold for
20 challengers, who have the burden to overcome the presumption of validity.⁴
21

22 The Board must grant deference to counties and cities in their planning for growth, so
23 long as such planning is consistent with the requirements and goals of the GMA.⁵ That is
24 because, while local planning takes place within a framework of state requirements, the
25 local community has the responsibility to account for local circumstances.⁶ Deference is also
26 due Ecology's interpretation of certain SMA regulations included in chapter 173-26 WAC
27

28 ¹ RCW 90.58.190(2).

29 ² RCW 36.70A.280 and RCW 36.70A.302.

30 ³ RCW 36.70A.320(1); *Lake Burien Neighborhood v. City of Burien*, GMHB No. 13-3-0012 (Final Decision and
Order, June 16, 2014) at 3.

31 ⁴ *Id.* at 3-5.

32 ⁵ RCW 36.70A.3201.

⁶ *Id.*

1 (Guidelines), which were adopted by Ecology to assist and guide jurisdictions in the
2 development of their master programs.⁷ The SMA “is exempted from the rule of strict
3 construction, and it shall be liberally construed to give full effect to the objectives and
4 purposes for which it was enacted.”⁸ “The Shoreline Management Act of 1971 is to be
5 broadly construed in order to protect the state shorelines as fully as possible.”⁹

6
7 The Board’s review of Ecology’s decision to approve or reject an SMP is governed by
8 RCW 36.70A.320(3) and RCW 90.58.190. The SMA prescribes different levels of Board
9 review for SMP provisions concerning shorelines and those concerning shorelines of
10 statewide significance (SSWS).

11 RCW 90.58.190(2)(b) provides:

12 If the appeal to the growth management hearings board concerns shorelines,
13 the growth management hearings board shall review the proposed master
14 program or amendment solely for compliance with the requirements of this
15 chapter, the policy of RCW 90.58.020 and the applicable guidelines, the
16 internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125,
17 and 35A.63.105, and chapter 43.21C RCW as it relates to the adoption of
master programs and amendments under chapter 90.58 RCW.

18 RCW 90.58.190(2)(c) provides:

19 If the appeal to the growth management hearings board concerns a shoreline
20 of statewide significance, the board shall uphold the decision by the
21 department unless the board, by clear and convincing evidence, determines
22 that the decision of the department is inconsistent with the policy of RCW
23 90.58.020 and the applicable guidelines.

24 Where the challenge concerns shorelines,¹⁰ the Board reviews a master program for
25 compliance with the SMA and the Guidelines, the policy of RCW 90.58.020, the internal
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28 ⁷ *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 86 (2000); RCW 90.58.060(1); *Elizabeth Mooney*
v. City of Kenmore, GMHB No. 12-3-0004 (Final Decision and Order, February 27, 2013) at 5.

29 ⁸ RCW 90.58.900.

30 ⁹ *English Bay Enterprises, Ltd. v. Island County*, 89 Wn.2d 16, 20 (1977).

31 ¹⁰ “Shorelines’ means all of the water areas of the state, including reservoirs, and their associated shorelands,
32 together with the lands underlying them; except (i) shorelines of statewide significance; (ii) shorelines on
segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less
and the wetlands associated with such upstream segments; and (iii) shorelines on lakes less than twenty

1 consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105,
2 and SEPA compliance in master plan adoption. The Board shall find compliance unless it
3 determines that the action is *clearly erroneous* in view of the entire record before the
4 Board.¹¹ To find an action clearly erroneous, the Board must be left with the firm and
5 definite conviction that a mistake has been committed.¹² While deference is due the County
6 under the clearly erroneous standard, it is not unlimited.¹³
7

8 Where the Board's review concerns shorelines of statewide significance (SSWS), the
9 scope of the Board's review "is narrower and the evidentiary standard is enhanced,
10 consistent with the enhanced protection of the statewide interest over the local interest."¹⁴
11 The Board shall uphold Ecology's decision regarding approval of a master program unless
12 the Board determines, by clear and convincing evidence, that the decision is noncompliant
13 with the policy of RCW 90.58.020, the Guidelines, or RCW 43.21C.¹⁵ Clear and convincing
14 evidence "requires that the trier of fact be convinced that the fact in issue is 'highly
15 probable.'"¹⁶ This means that the facts relied upon must be clear, positive, and unequivocal
16 in their implication.¹⁷ Significantly, the Board's scope of review for SSWS does not include
17 GMA consistency considerations.
18

19 For San Juan County, "shorelines" are the tidelands and the shorelands 200 feet
20 landward from the ordinary high water mark together with all of its freshwater lakes 20 acres
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23
24 acres in size and wetlands associated with such small lakes." RCW 90.58.030(2)(e). "Shorelands" in turn are
25 those lands extending landward for 200 feet in all directions as measured on a horizontal plane from ordinary
26 high water mark; floodways and contiguous floodplain areas and associated wetlands. RCW 90.58.030(2)(d).

27 ¹¹ RCW 36.70A.320(3); *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.* 199 Wn. App.
28 668, 685 (2017); *Mooney v. City of Kenmore*, GMHB No. 12-3-0004 (FDO, February 27, 2013) at 4.

29 ¹² RCW 36.70A.320(3).

30 ¹³ *Swinomish Indian Tribal Cmty. v. Western Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 435 n.8
31 (2007).

32 ¹⁴ *Confederated Tribes and Bands of the Yakama Nation v. Yakima County*, GMHB No. 10-1-0011 (Final
Decision and Order, April 4, 2011) at 4 n.8.

¹⁵ RCW 90.58.190(c).

¹⁶ *Colonial Imports, Inc. v. Carlton NW, Inc.*, 121 Wn.2d 726, 735, (1993).

¹⁷ *Id.*

1 or larger.¹⁸ The Board reviews SMP provisions for these areas under the clearly erroneous
2 standard.

3 Shorelines of statewide significance are defined with specificity in RCW
4 90.58.030(2)(f). For San Juan County, the parts of the shoreline which are of statewide
5 significance are “all those areas lying waterward from the line of extreme low tide.”¹⁹ Uses
6 which are located in or extend into marine waters below extreme low tide, such as docks,
7 piers, buoys, and floats, fall within the SSWS. Some uses and shoreline modifications
8 permitted may occur both within shorelines and below extreme low tide in SSWS. To the
9 extent that the Petitioner challenges provisions relating to SSWS, the scope of the Board’s
10 review is narrowed and Petitioner must meet the clear and convincing burden of proof.²⁰
11
12

13 **SMA/GMA Statutory Framework**

14 In enacting the SMA, the Legislature found that “the shorelines of the state are
15 among the most valuable and fragile of its natural resources and that there is great concern
16 throughout the state relating to their utilization, protection, restoration, and preservation.”
17 Accordingly, “coordinated planning” between the state government and local governments is
18 necessary in order to protect the public interest and to prevent the inherent harm in an
19 uncoordinated and piecemeal development of the state's shorelines.²¹
20

21 Local government has the primary responsibility for initiating SMA-required
22 planning.²² While the statutory scheme provides for coordinated authority between the state
23 and local government, the state reserves ultimate control and primary authority to manage
24 shoreline development.²³
25

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27 ¹⁸ Comprehensive Plan Section B, Element 3, Shoreline Master Program, September 19, 2017, at 1.

28 ¹⁹ RCW 90.58.030(1)(f)(iii).

29 ²⁰ See *Hood Canal Sand & Gravel, LLC v. Jefferson County*, GMHB No. 14-2-0008c (Order on
Dispositive Motion, September 5, 2014) at 5.

30 ²¹ RCW 90.58.020. The SMA is to be broadly construed in order to protect the state shorelines as fully as
possible. *Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 203 (1994).

31 ²² RCW 90.58.050.

32 ²³ *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 687 (2007); *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 391 (2011).

1 RCW 90.58.080(1) provides that local governments “shall develop or amend a
2 master program for regulation of uses of the shorelines of the state consistent with the
3 required elements of the guidelines adopted by” the Department of Ecology (DOE). RCW
4 90.58.060(1) requires DOE to adopt guidelines for the development of Shoreline Master
5 Programs for the regulation and uses of shorelines. The SMP Guidelines are codified within
6 WAC Chapter 173-26, and these SMP Guidelines are binding state agency rules.²⁴
7

8 Although the SMA directs each local government to develop and administer its SMP,
9 DOE has a pervasive, state-mandated role in the development, review, and approval of
10 local SMPs.²⁵ The Washington State Supreme Court has ruled that the local government
11 acts as an agent of the state in developing the SMP – the city/county acts at the instance of
12 and, in some material degree, under the direction and control of the state.²⁶ DOE’s
13 statutorily-mandated involvement in the process of SMP development is considerable and,
14 ultimately, determinative – a local SMP becomes effective only upon approval by DOE.²⁷
15 Locally-developed and DOE-approved SMPs are the product of state regulation and
16 constitute land use regulations for the various shorelines of the state.²⁸
17

18 The GMA defines “Development Regulations” as “controls placed on development or
19 land use activities by a county or city, including, but not limited to, zoning ordinances, critical
20 areas ordinances, shoreline master programs”²⁹ Much of the SMP, including use
21 regulations, “shall be considered a part of the county or city’s development regulations.”³⁰
22

23 For shorelines of the state, the statutes provide that the goals and policies of the
24 SMA as set forth in RCW 90.58.020 are added as one of the goals of the GMA as set forth
25

26 ²⁴ RCW 90.58.030(3)(c); RCW 90.58.080(1) & (7); RCW 90.58.090(3) & (4); RCW 90.58.190(2)(b) and
RCW 90.58.190(2)(c).

27 ²⁵ *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn. App. 937, 943 (2010).

28 ²⁶ *Orion Corp. v. State*, 109 Wn.2d. 621, 643-44 (1987) [SMA created an agency relationship with state
as principal and local government as agent].

29 ²⁷ RCW 90.58.090(1); *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn. App. 937, 943
(2010).

30 ²⁸ RCW 90.58.100(1); *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn. App. 937, 945
(2010).

31 ²⁹ RCW 36.70A.030(7).

32 ³⁰ RCW 36.70A.480(1).

1 in RCW 36.70A.020 without creating an order of priority among the 14 goals; the goals and
2 policies of a SMP “shall be considered an element of the county or city’s comprehensive
3 plan.”³¹

4 5 **IV. ANALYSIS AND DISCUSSION**

6 **Issue No. 1**

7 Does the Update’s shoreline environment designations, as reflected in the Comprehensive
8 Land Use and Shoreline Maps, conflict with RCW 36.70A.020 goals 9 and 10, the policies of
9 RCW 90.58.020, the requirements of RCW 90.58.100, the provisions of Chapter 43.21C
10 RCW, and SMP Guidelines for inventorying shoreline conditions and analyzing shoreline
11 issues of concern (WAC 173-26-201(3)(c), -201(3)(d)), for establishing shoreline
12 environment designations (WAC 173-26-201(3)(f), -211), for using the most current,
13 accurate, and complete scientific and technical information available (WAC 173-26-201(2)),
14 and for protecting shoreline ecological functions (WAC 173-26-181, -186(8), -201(2)(c), -
221(2),-221(5))?

15 Issue 1 focuses on the "designation" the County applied to some of its shorelines.
16 Shoreline "physical conditions and development settings" vary widely and, consequently,
17 environmental protection measures, use provisions, and development standards need to
18 take those variances into account.³²

19 The method for local government to account for different shoreline conditions
20 is to assign an environment designation to each distinct shoreline section in its
21 jurisdiction. The environment designation assignments provide the framework
22 for implementing shoreline policies and regulatory measures specific to the
23 environment designation. WAC 173-26-211 presents guidelines for
24 environment designations in greater detail.³³

25 WAC 173-26-211 applies to the establishment of environment designation boundaries
26 and provisions. WAC 173-26-211(2)(a) states that the "classification system shall be based
27 on the existing use pattern, the biological and physical character of the shoreline, and the
28 goals and aspirations of the community as expressed through comprehensive plans as well
29

30 _____
31 ³¹ *Id.*

32 ³² WAC 173-26-191(1)(d).

³³ *Id.*

1 as the criteria in this section".³⁴ WAC 173-26-211(4)(b) suggests the use of the following
2 designation categories: Hi-intensity, shoreline residential, urban conservancy, rural
3 conservancy, natural, and aquatic. WAC 173-26-211(4)(c) authorizes local governments to
4 use different designation systems; the County uses Urban, Rural, Rural Residential, Rural
5 Farm Forest, Ports, Marina and Transportation (PMT), Conservancy, Natural, and Aquatic.³⁵
6

7 It is the Petitioner's contention that the County SMP fails to meet SMA requirements
8 as the County did not apply the "natural" designation for shoreline areas that have been
9 shown to be forage fish spawning areas and feeder bluffs.³⁶ The Petitioner argues that only
10 4% of identified forage fish spawning areas were designated as natural and only 14% of the
11 County's feeder bluffs. The Petitioner states that the Guidelines as well as the County's
12 Comprehensive Plan required it to designate those forage fish and feeder bluff areas as
13 Natural and that the designations it made "do not bear any correlation to the shoreline
14 resource".³⁷ By way of example, it observes that some forage fish spawning beaches,
15 feeder bluffs, and wetlands on Shaw Island were designated Rural Farm Forest and feeder
16 bluffs on Lopez Island were designated Rural Farm Forest or Conservancy.³⁸ The specific
17 concern raised is that neither of those designations prevent the construction of shoreline
18 armoring, citing Ordinance No. 11-2017 at page 56, while a natural designation prohibits
19 armoring.³⁹
20

21 The Petitioner summarizes its argument by stating that the designations did not
22 "include the requisite biological and physical information", did not comply with the
23

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25 ³⁴ WAC 173-26-211(2)(a).

26 ³⁵ Ordinance No. 01-2016 at 8, paragraph III.

27 ³⁶ Shipman, H., MacLennan, A., and Johannessen, J. 2014. Puget Sound Feeder Bluffs: Coastal Erosion as a
28 Sediment Source and its Implications for Shoreline Management. Shorelands and Environmental Assistance
29 Program, Washington Department of Ecology, Olympia, WA. Publication #14-06-016, at iv: Feeder Bluff: An
30 eroding coastal bluff that delivers a significant amount of sediment to the beach over an extended period of
31 time and contributes to the local littoral sediment budget.

32 ³⁷ Petitioner Friends of the San Juans' Prehearing Brief at 11.

³⁸ *Id.* at 11, 12.

³⁹ Ordinance 11-2017 allows both new hard and soft structural stabilization in all designations other than
Natural but such allowance is "Subject to shoreline substantial development permit unless exempt per B
above".

1 Guidelines' requirement to apply the "most accurate, current scientific information", ignored
2 the primary purpose of the SMA to "protect shorelines as fully as possible", as well as the
3 SEPA policies recognizing the rights of all to shoreline preservation and enhancement.⁴⁰ As
4 a result, it is the Petitioner's contention that the SMP fails to comport with the SMA's
5 directive to achieve no net loss (NNL) of shoreline ecological functions through an SMP and
6 permitting.⁴¹
7

8 The Petitioner asserts that the designations the County made resulted from what it
9 characterizes as a flawed Inventory and Characterization (I & C) process, in which the
10 shoreline evaluations were done at an inappropriately large scale, notwithstanding the
11 availability of appropriate scale information.⁴² The scale used by the County, the Petitioner
12 suggests, was based on its failure to characterize the shorelines by "drift cells".⁴³ The
13 Petitioner states these failures reflect the County's desire to ensure designations would be
14 consistent with the "existing land use", "zoning", or "rest of parcel", rather than on the
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17 ⁴⁰ Petitioner Friends of the San Juans' Prehearing Brief at 13.

18 ⁴¹ RCW 90.58.060, WAC 173-26-186(8)(d), WAC 173-26-201(2)(c); WAC 173-26-201(2)(c), in part: Master
19 programs shall contain policies and regulations that assure, at minimum, no net loss of ecological functions
20 necessary to sustain shoreline natural resources. To achieve this standard while accommodating appropriate
21 and necessary shoreline uses and development, master programs should establish and apply:

- 22 • Environment designations with appropriate use and development standards; and
- 23 • Provisions to address the impacts of specific common shoreline uses, development activities and
24 modification actions; and
- 25 • Provisions for the protection of critical areas within the shoreline; and
- 26 • Provisions for mitigation measures and methods to address unanticipated impacts.

27 When based on the inventory and analysis requirements and completed consistent with the specific
28 provisions of these guidelines, the master program should ensure that development will be protective of
29 ecological functions necessary to sustain existing shoreline natural resources and meet the standard. The
30 concept of "net" as used herein, recognizes that any development has potential or actual, short-term or long-
31 term impacts and that through application of appropriate development standards and employment of mitigation
32 measures in accordance with the mitigation sequence, those impacts will be addressed in a manner necessary
to assure that the end result will not diminish the shoreline resources and values as they currently exist. Where
uses or development that impact ecological functions are necessary to achieve other objectives of RCW
90.58.020, master program provisions shall, to the greatest extent feasible, protect existing ecological
functions and avoid new impacts to habitat and ecological functions before implementing other measures
designed to achieve no net loss of ecological functions.

⁴² Petitioner Friends of the San Juans' Prehearing Brief at 13.

⁴³ WAC 173-26-020(12). "Drift cell," "drift sector," or "littoral cell" means a particular reach of marine shore in
which littoral drift may occur without significant interruption and which contains any natural sources of such
drift and also accretion shore forms created by such drift.

1 “existing use pattern, the biological and physical character of the shoreline, and the goals
2 and aspirations of the community”.⁴⁴ The Petitioner contends that, as a consequence, areas
3 that should have been designated as natural, consisting of various forage fish spawning
4 areas and feeder bluffs, were not so designated.

5 One of the first steps in updating an SMP is to inventory existing shoreline conditions
6 and to then characterize shoreline ecosystems and their associated ecological functions,
7 resulting in the Inventory⁴⁵ and Characterization⁴⁶.⁴⁷ The County contracted with Herrera
8 Environmental Consultants, ICF International, and The Watershed Company to craft the I &
9 C. Numerous drafts were prepared over approximately 18 months. Characterization in the
10 County’s I and C used what was described as “a nested system of reaches and
11 management areas”.⁴⁸ The County was divided into 20 management areas that were then
12 used to inventory, analyze, and characterize the shorelines.⁴⁹ As the I & C points out, an
13 inventory would “typically be characterized at a watershed scale (a hydrologic unit).
14 However, as there are no County streams within SMA jurisdiction “management areas were
15 defined based on land use boundaries, the physical landscape and or critical
16 hydrogeomorphic or biological processes”.⁵⁰

17 Segments of the management areas were subsequently divided into “reaches”.⁵¹ The
18 I & C includes an explanation of the methodology employed. While noting that the use of
19 drift cells to delineate shoreline sections is commonly used in Puget Sound, the authors of
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24 ⁴⁵ SMP Handbook, DOE Publication Number 11-06-010, Ch. 7 at 1: The inventory includes existing data,
25 information and descriptions of watershed and shoreline attributes that pertain to existing and emerging
26 problems and issues in a jurisdiction. It describes existing shoreline conditions and development patterns,
27 including attributes of a healthy ecosystem. The inventory is necessary to conduct the characterization.

28 ⁴⁶ *Id.* at 1: The characterization is the description of the ecosystem wide and shoreline processes, shoreline
29 functions, and opportunities for restoration, public access and shoreline use. The characterization identifies the
30 current shoreline conditions, is a key product for developing the SMP, and is the baseline for measuring no net
31 loss of shoreline ecological functions.

32 ⁴⁷ IR 001479.

⁴⁸ IR 001479, Bates 001507.

⁴⁹ *Id.*

⁵⁰ *Id.* Bates 001507-1508.

⁵¹ A “reach” is a “specific segment of shoreline . . . typically distinguished by the relative intensity of land use
development patterns, the physical landscape or critical biological processes.” IR ECY036786.

1 the I & C observed that a significant portion of the County's shorelines are composed of
2 bedrock obviating the ability to map those shorelines into drift cells.⁵² In addition, they
3 observe that other features also made it difficult to use the drift cell model.⁵³ Consequently,
4 the I & C classified the shorelines' reaches into "geomorphic units" which "allowed for a
5 broader scope that better addressed the range of shoreline conditions found in San Juan
6 County than a traditional drift cell-based reach delineation".⁵⁴ The authors acknowledge that
7 other land use aspects were also considered in delineating the reaches, including zoning,
8 parcel density, and existing riparian cover and structures.⁵⁵

10 DOE suggests that the Petitioner "overstates the guidelines' directive, [and] ignores
11 the County's well-reasoned rationale for declining to use drift cells . . .".⁵⁶ It states the
12 Guidelines neither prescribe the specific reach delineation process that must be used in
13 updating an SMP, citing WAC 173-26-201(3)(c), nor do they prescribe the shoreline
14 functions to be considered in scoping the characterization, citing WAC 173-26-
15 201(3)(d)(i)(C).⁵⁷ It concludes that the County's approach was "entirely consistent with
16 Ecology's SMP Handbook, and meets the SMP guidelines' directive to '[map] inventory
17 information at an appropriate scale'".⁵⁸

19 The Board concurs with those observations. Initially, the I & C's explanation for
20 varying from the typical drift cell analysis method is well supported. Beyond that, a low
21 percentage of shorelines designated as natural, or a reduction in such designations from a
22 prior SMP, as argued by the Petitioner, do not establish violations of the SMA statutes or the
23 cited Guidelines alleged to have been violated. While DOE's interpretation of its regulations
24 is entitled to deference, the Board finds and concludes that none of the Guidelines cited and
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28 ⁵² IR 001510.

29 ⁵³ *Id.*

30 ⁵⁴ *Id.*

31 ⁵⁵ *Id.*

32 ⁵⁶ Respondent Department of Ecology's Prehearing Brief at 6.

⁵⁷ *Id.* at 8.

⁵⁸ *Id.* at 8.

1 argued by the Petitioner mandate the application of the natural designation⁵⁹ to all, or a
2 higher percentage of, forage fish spawning areas and feeder bluffs.⁶⁰ As observed by DOE,
3 while WAC 173-26-211(2)(a) sets out basic requirements for designation of the various
4 shoreline areas, that Guideline does not require the County to prioritize any of the listed
5 characteristics over the others.⁶¹ The inventory clearly appears to have collected the
6 information required by WAC 173-26-201(3)(c) and characterized the functions and
7 ecosystem-wide process, specifically the marine water shoreline ecological functions, as
8 directed by WAC 173-26-201(3)(d)(i)(C). Again, while concerns were raised regarding the
9 scale employed in designating the various shoreline reaches, the Petitioner has not shown
10 that the methodology employed violated any of the applicable Guidelines. Finally, a review
11 of the County's Comprehensive Plan sections cited by the Petitioner does not disclose a
12 mandate requiring designation of all or a higher percentage of forage fish spawning areas or
13 feeder bluffs as natural.⁶²
14
15

16 While the Petitioner raises valid concerns regarding potential impacts to forage fish
17 spawning areas and feeder bluffs, the SMA mandate to "assure, at minimum, no net loss of
18 ecological functions necessary to sustain shoreline resources" is accomplished through a
19 combination of the designations and the applicable regulatory scheme. That is, the threat of
20
21

22 ⁵⁹ WAC 173-26-211(5)(a)(iii) A "natural" environment designation should be assigned to shoreline areas if any
23 of the following characteristics apply:

- 24 (A) The shoreline is ecologically intact and therefore currently performing an important, irreplaceable
25 function or ecosystem-wide process that would be damaged by human activity;
26 (B) The shoreline is considered to represent ecosystems and geologic types that are of particular scientific
27 and educational interest; or
28 (C) The shoreline is unable to support new development or uses without significant adverse impacts to
29 ecological functions or risk to human safety.

30 ⁶⁰ WAC 173-26-201(2) and (3), WAC 173-26-211(2) and (5).

31 ⁶¹ WAC 173-26-211(2) Basic requirements for environment designation classification and provisions.

32 (a) Master programs shall contain a system to classify shoreline areas into specific environment designations.
This classification system shall be based on the existing use pattern, the biological and physical character of
the shoreline, and the goals and aspirations of the community as expressed through comprehensive plans as
well as the criteria in this section.

⁶² Comprehensive Plan sections 3.3.F.a, ECY 035948 (Bates 036035) and 3.2.C (Bates 036024). For
example, CP section 3.3.F states that a Natural designation "should" meet one or more of a list of criteria.

1 ecological function loss posed by development, including armoring or overwater structures,
2 cannot be and is not addressed based solely on the designation assigned.⁶³

3 The Board finds and concludes that the Petitioner has failed to meet its burden of
4 proof to establish violations of the SMA and Guideline provisions cited and argued under
5 Issue 1.
6

7 **Issue No. 2**

8 Do the Update's mitigation provisions at 2016 Ordinance New Sections 19-21, which do not
9 require the complete replacement of lost functions and values, or in-kind, on-site
10 compensation, conflict with RCW 36.70A.020 goals 9 and 10, the policies of RCW
11 90.58.020, the requirements of RCW 90.58.100, the provisions of Chapter 43.21C RCW,
12 and SMP Guidelines for mitigation (WAC 173-26-186(8)(b)(i), -201(2)(e), -221(2)(c)(i)(E),-
13 221(2)(c)(i)(F), -221(2)(c)(iii)(C), -221(3)(c)(i), -231(2), -241(3)(b)(i)(C)), for using the most
14 current, accurate, and complete scientific and technical information available (WAC 173-26-
15 201(2)), and for protecting shoreline ecological functions (WAC 173-26-181, -186(8), -
16 201(2)(c), -221(2), -221(5), -221(6))?

17 Any development has the potential to negatively impact shoreline ecological
18 functions. Consequently, the SMA and the Guidelines require SMPs to include regulations
19 and mitigation standards to ensure no net loss (NNL) of those ecological functions.⁶⁴ With
20 Issue 2, the Petitioner alleges the County's SMP violates various applicable Guideline
21 requirements as its mitigation provisions do not require the complete replacement of lost
22 functions and values, or in-kind, on-site compensation.

23 The Petitioner alleges the mitigation regulations fail to ensure NNL as required by
24 WAC 173-26-186(8)(b)(i). It argues that the SMP does not include provisions requiring that
25 proposed individual uses and developments analyze environmental impacts and measures
26 to mitigate environmental impacts not otherwise avoided or mitigated⁶⁵, that the SMP does
27 not manage shorelines to safeguard ecosystem-wide processes like the movement of fish
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⁶³ This Final Decision and Order considers below some portions of that regulatory scheme in its consideration
31 of other issues raised by the Petitioner.

32 ⁶⁴ WAC 173-26-201(2)(c).

⁶⁵ WAC 173-26-201(2)(e).

1 and wildlife as well as individual components and processes such as shoreline vegetation⁶⁶,
2 and allows mitigation other than in the vicinity of the impacted functions, let alone within the
3 same watershed.⁶⁷

4 The Petitioner makes four specific assertions in regards to mitigation. It states the
5 challenged SMP's NNL provisions do not include either the denial of projects that would
6 impact sensitive areas, or the replacement of such areas with the same scale and quality of
7 habitat and ecological function. The Petitioner observes that the SMP merely requires
8 mitigation consistent with the mitigation standards for critical areas, as opposed to mitigating
9 for the impacts to shoreline ecological functions. It also argues that full mitigation is not
10 required. Rather, a project proponent is not required by the SMP to pay more than 115% of
11 the projected mitigation expense, nor the cost of monitoring beyond a five-year period. The
12 SMP merely states that the County may require additional action and extended monitoring.
13 The Petitioner observes there is no mandate applicable in that regard to the County nor are
14 any standards included for the exercise of that discretion.⁶⁸

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16
17 The Petitioner also states that the SMP allows mitigation actions outside of impacted
18 watersheds, contrary to Guideline requirements. Its final argument under Issue 2 references
19 "... the overwhelming rate of failure for marine compensatory efforts". It observes that, due
20 to that high failure rate, the County's Marine Resources Committee stated that, "mitigation
21 for the loss of functions and values of marine habitat areas should not be allowed".⁶⁹
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26 ⁶⁶ WAC 173-26-201(2)(c).

27 ⁶⁷ WAC 173-26-201(2)(e)(ii)(B).

28 ⁶⁸ The Petitioner cites IR 5074, 2015 comments from DOE on the County's critical areas ordinance in which it
29 observed that the draft regulation then being considered by the County be amended to read as follows: "A
30 monitoring schedule. Data collection shall occur at the completion of site construction and planting (Year 0; as
31 built), at Years 1, 3 and 5, and when necessary, Years 7 and 10;" . . . The monitoring schedule is five (5) years
32 when the mitigation involves only the planting of herbaceous species and ten (10) years for mitigation planting
shrubs and trees unless the director makes a written determination that the mitigation is successful,
functioning as designed and the established performance standards have been met;

⁶⁹ Petitioner Friends of the San Juans' Prehearing Brief at 24.

1 In essence, the question presented by Issue 2 is whether the County's SMP
2 mitigation sequencing regulations fail to ensure NNL of ecological functions in violation of
3 the requirements of the aforementioned Guidelines.

4 The Petitioner initially argues that the mitigation approval criteria do not apply to the
5 protection of shoreline functions, but rather only to critical area impacts. (Not all of the
6 County's shorelines are designated as critical areas under RCW 36.70A.170.) The
7 argument is not well taken. As the County observed, the SMP mitigation criteria do apply to
8 shorelines as the definition of "critical area functions and values" specifically includes the
9 following: "within shoreline jurisdiction, shoreline ecological functions and values".⁷⁰ That is,
10 shoreline ecological functions and values are included as critical area functions and values.
11

12 Furthermore, Ordinance 11-2017, Section 10A, provides that "Shoreline
13 development, land uses, structures and activities must meet the no net loss requirement of
14 WAC 173-26-186(8)(b). If a project proposal does not comply with the critical area
15 protections, including the no net loss requirement, a mitigation sequence analysis must be
16 submitted to the County.⁷¹ The first mitigation measure listed in the mitigation sequence is
17 "[avoiding] the impact altogether".⁷² Only when an applicant can demonstrate that avoidance
18 is not feasible, does one proceed to consider the additional mitigation measures.⁷³
19 Ordinance 11-2017 sets forth the mitigation sequencing requirements, and details the
20 specific information that must be included in mitigation plans if impacts are unavoidable.⁷⁴
21
22

23 Whether or not a specific development proposal would be denied would depend first
24 on a determination that the proposal/use was authorized by the County Code, secondly on
25

26 ⁷⁰ SJCC 18.20.030, the definition of "Critical area functions and values".

27 ⁷¹ ECY 035948, Ordinance 11-2017, at 23 (amending Section 19 of Ordinance 1-2016).

28 ⁷² *Id.*, A. Shoreline development, land uses, structures and activities must meet the no net loss requirement of
29 WAC 173-26-186(8)(b). If project proposals do not comply with the critical area protections in Section 18 of
30 Ordinance 1-2016, applicants must submit a mitigation sequence analysis to the department.

31 B. Mitigation measures must be applied in the following sequence. The applicant must demonstrate that each
32 mitigation action is not feasible or applicable before proceeding to the next option or action: 1. Avoiding the
impact altogether by not taking a certain action or parts of an action;

⁷³ ECY 035948, Ordinance 11-2017, Section 10 A, at 23.

⁷⁴ *Id.*, and Ordinance 11-2017, Section 10 A, at 23, (amending Section 20 of Ordinance 1-2016 at 24).

1 whether it met other applicable regulations and permit requirements, and also on whether
2 the proposal met the NNL requirements. A specific proposal would properly be denied by
3 the County if it failed to meet the NNL requirements following application of the mitigation
4 sequencing measures.

5 The Board also rejects Petitioner's arguments that "full mitigation" is capped at 115%
6 of projected costs and that monitoring is limited to a five (5) year period. While it is true that
7 the County's regulations do not specifically require additional payment or extensions of the
8 monitoring period, the regulations provide for same.⁷⁵ The Board assumes the County will
9 administer its SMP so as to ensure that the "goals, objectives and performance standards of
10 the mitigation plan" are met.

11 However, Petitioner's final assertion raises a concern over the geographic location of
12 authorized mitigation, that is, that mitigation is authorized outside of the impacted
13 watershed. WAC 173-26-201(2)(e)(ii)(B) provides:
14

15
16 When compensatory measures are appropriate pursuant to the mitigation
17 priority sequence above, preferential consideration shall be given to measures
18 that replace the impacted functions directly and in the immediate vicinity of the
19 impact. However, alternative compensatory mitigation within the watershed
20 that addresses limiting factors or identified critical needs for shoreline resource
21 conservation based on watershed or comprehensive resource management
22 plans applicable to the area of impact may be authorized. Authorization of
23 compensatory mitigation measures may require appropriate safeguards, terms
24 or conditions as necessary to ensure no net loss of ecological functions.
(emphasis added)

25 Ordinance 11-2017 includes the following:

26 When feasible, adverse impacts are to be mitigated on site. If off-site
27 mitigation is proposed, the mitigation site must be located on the same island,
28 as close as feasible to the development site.⁷⁶

29
30 ⁷⁵ IR 007518, Ordinance 1-2016, Section 21C at 55: If the goals, objectives and performance standards of the
31 mitigation plan are not met, the decision-maker may require additional actions and may extend the monitoring
32 period, financial guarantee and associated agreement.

⁷⁶ ECY 035948, Ordinance 11-2017, Section 10C at 24.

1 Mitigation options may include the use of certified mitigation banks and
2 approved in lieu fee mitigation sites when they are identified and approved by
3 the County Council.⁷⁷

4 While the County's regulations do give "preferential consideration" to mitigation in the direct
5 or immediate vicinity, the WAC does not authorize mitigation "on the same island" (unless
6 that island was within a single watershed) or potentially at an in-lieu mitigation site not within
7 the same watershed. As the Petitioner points out, the San Juan islands include numerous
8 watersheds.⁷⁸ DOE's statement that the Guidelines do not require mitigation within the
9 same watershed is inaccurate.⁷⁹ WAC 173-26-201(2)(e)(ii)(B) clearly provides that location
10 within the same watershed is a fallback from siting mitigation directly or in the immediate
11 vicinity.
12

13
14 **The Board finds and concludes as follows:**

15 1. San Juan County's decision to adopt, and the Department of Ecology's decision to
16 approve, San Juan County's Shoreline Master Program Update, specifically those
17 regulations relating to mitigation for adverse impacts to shoreline ecological functions
18 beyond the watershed of the anticipated impacts, failed to comply with the policies of
19 the Shoreline Management Act and Shoreline Master Program Guidelines.

20
21 2. The Petitioner has met the applicable burdens of proof, whether that be the
22 clearly erroneous standard or the clear and convincing evidence in the record
23 standard. The Growth Management Hearings Board finds and concludes that San
24 Juan County's decision to adopt, and the Department of Ecology's decision to
25 approve, San Juan County's Shoreline Master Program Update, specifically
26 regulations relating to mitigation for adverse impacts to shoreline ecological functions
27 beyond the watershed of the anticipated impacts, fails to comply with the policies of
28 RCW 90.58.020 and the requirements of WAC 173-26-201(2)(e)(ii)(B).
29

30
31 ⁷⁷ ECY 035948, Ordinance 11-2017, Section 11C at 25.

32 ⁷⁸ IR 202815-202817.

⁷⁹ Respondent Department of Ecology's Prehearing Brief at 13.

1 3. The Petitioner has failed to meet its burden of proof to establish any other
2 alleged violations set forth in Issue 2.
3

4 **Issue No. 3**

5 Does the Update's shoreline buffer scheme, incorporated by 2016 Ordinance New Section
6 18 and referenced throughout, conflict with the policies of RCW 90.58.020, the requirements
7 of RCW 90.58.100, the provisions of Chapter 43.21C RCW, and SMP Guidelines for
8 analyzing and conserving shoreline vegetation (WAC 173-26-201(3)(d)(viii), -221(5)), for
9 using the most current, accurate, and complete scientific and technical information available
10 (WAC 173-26-201(2)), and for protecting against site-specific and ecosystem-wide impacts
(WAC 173-26-181, -186(8), -201(2)(c), -201(3)(d)(iii), -221(2), -221(5), -221(6))?

11 Issue 3 focuses on the SMP's regulations applicable to shoreline buffers designed to
12 protect and restore shoreline vegetation. The Petitioner argues that the buffers are too
13 narrow, allow excessive removal of vegetation, and authorize "unnecessary buffer
14 development".⁸⁰ It contends that the buffer scheme fails to reflect scientific
15 recommendations, including a prior recommendation from Ecology.⁸¹ It observes that
16 adoption of the Critical Area Ordinance (CAO) merely required "inclusion" of Best Available
17 Science (BAS) while an SMP must be "based" on BAS.⁸² In support of its contentions, the
18 Petitioner cites WAC 173-26-221(5)(b) which sets forth the numerous functions served by
19 shoreline vegetation. That rule requires jurisdictions to address vegetation conservation and
20 restoration, and include regulatory provisions addressing conservation of vegetation to
21 assure NNL. In doing so, local governments "must use available scientific and technical
22 information, as described in WAC 173-26-201(2)(a). At a minimum, local governments
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28 ⁸⁰ Petitioner Friend of the San Juan's Prehearing Brief at 20-23.

29 ⁸¹ *Id.* at 18.

30 ⁸² RCW 36.70A.172 requires jurisdictions to "include the best available science" while RCW 90.58.100
31 requires local governments to "Utilize a systematic interdisciplinary approach which will insure the integrated
32 use of the natural and social sciences and the environmental design arts" and 'Utilize all available information
regarding hydrology, geography, topography, ecology, economics, and other pertinent data". WAC 173-26-201
then expands on the use of scientific and technical information: "base master program provisions on an
analysis incorporating the most current, accurate, and complete scientific or technical information available".

1 should consult shoreline management assistance materials provided by” DOE and the
2 Washington State Department of Fish and Wildlife.⁸³

3 A jurisdiction's SMP may incorporate other adopted regulations. Incorporated
4 provisions must “provide a level of protection to critical areas located within shorelines of the
5 state that assures no net loss of shoreline ecological functions necessary to sustain
6 shoreline natural resources”.⁸⁴ SMPs must also address “[p]rotecting existing and restoring
7 degraded upland ecological functions important to critical saltwater habitats, including
8 riparian and associated upland native plant communities.”⁸⁵ In this instance, the County’s
9 SMP incorporated its CAO.⁸⁶ The County's CAO includes, among other provisions,
10 regulations applicable to buffer widths, the level of development allowed within buffers, and
11 buffer vegetation retention. Those regulations now apply to the County's shorelines in order
12 to protect shoreline ecological functions and values as the definition of "critical area
13 functions and values" specifically includes shoreline ecological functions and values.⁸⁷
14 Beyond that, a significant percentage of the County’s shorelines have been designated as
15 Fish and Wildlife Habitat Conservation Areas (FWHCAs), as addressed below.⁸⁸

16
17
18 WAC 173-26-221(5)(b) requires jurisdictions to address vegetation conservation and
19 restoration.⁸⁹ SJCC 18.35.130, one of the incorporated CAO regulations, includes site-
20 specific buffer regulations related to aquatic FWHCAs. FWHCAs include shellfish areas,
21 kelp and eelgrass beds, forage fish spawning areas, pocket beaches and feeder bluffs as
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23
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26 ⁸³ WAC 173-26-221(5)(b).

27 ⁸⁴ RCW 36.70A.480(4).

28 ⁸⁵ WAC 173-26-221(2)(c)(iii)(B).

29 ⁸⁶ Some specific CAO regulations were not incorporated as they were determined to be inconsistent with the
30 SMA. See Ordinance 11-2017, Section 9B at 22, amending Ordinance 1-2016, Section 18.

31 ⁸⁷ *Supra* at 14.

32 ⁸⁸ FWHCAs are a type of critical area. See RCW 36.70A.030(5).

⁸⁹ “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.”

1 well as areas having a “primary association” with certain species, including designated
2 stocks of chinook and chum salmon.⁹⁰

3 SJCC 18.35.130’s site-specific buffer regulations include water quality buffers, tree
4 protection zones and, in some cases, coastal geologic buffers.⁹¹ SJCC 18.35.130B sets out
5 a step-by-step process for determining buffer widths⁹² and regulations applicable to their
6 maintenance:
7

8 Structures, Uses and Activities Allowed and Prohibited in and over Aquatic
9 FWHCAs and their Water Quality Buffers and Tree Protection Zones.

10 Development activities, removal of vegetation and other site modifications are
11 limited or prohibited within aquatic FWHCAs and their water quality buffers
12 and tree protection zones. Allowable activities vary depending on whether the
13 activity is within a tree protection zone or a water quality buffer, and are
14 described separately below.

15 1. Tree protection zones are divided into two sections: Zone 1 consists of the
16 first 35 feet adjacent to the water, beginning at the OHWM, or for streams, the
17 bank full width. Zone 2 is the remainder of the tree protection zone.

18 To allow for a view or for fire hazard reduction, minor trimming and pruning of
19 the foliage of trees within both Zone 1 and Zone 2 is permitted provided the
20 health of the trees is maintained, trees are not topped, and all branches and
21 foliage overhanging aquatic FWHCAs are retained. In no case shall more than
22 20 percent of the foliage of a tree be removed during one 12-month period.

23 Within Zone 1, no tree removal is allowed (though pruning is allowed in
24 conformance with the above requirements). Within Zone 2, construction of one
25 primary structure, and/or limited tree removal to allow for a filtered view from
26 the primary structure, are allowed in conformance with all of the following:

27 a. The structure, impervious areas, and areas⁹² where soils will be graded,
28 compacted or where the organic soil horizon will be removed, are located
29 landward of the water quality buffer;

30 ⁹⁰ SJCC 18.35.130.

31 ⁹¹ SJCC 18.35.130 A. Sizing Procedures for Buffers and Tree Protection Zones. This subsection provides a
32 site-specific procedure for determining the size of vegetative buffers and tree protection zones necessary to
protect aquatic FWHCAs. Three separate components are considered: a water quality buffer that applies in all
cases, tree protection zones that apply to areas with trees, and a coastal geologic buffer that applies to areas
subject to erosion caused by currents, tidal action, or waves. For properties with characteristics that vary (e.g.,
a portion of the parcel has trees or a geologically hazardous area, and other areas of the parcel do not), the
size of required buffers and tree protection zones may vary, resulting in buffers and tree protection zones that
are larger in some areas and smaller in others. (Note: SJCC 18.50.540 also contains setback standards for
marine shorelines and lakes over 20 acres.)

⁹² See Appendix A’s SJCC 18.35.130’s Figure 3.1, a flowchart used for determining buffer widths.

- 1 b. Appropriate BMPs are used to minimize erosion, sedimentation, and soil
2 disturbance;
3 c. No more than 40 percent of the volume of trees over six inches dbh are
4 removed in any 10-year period;
5 d. Stocking levels for trees greater than or equal to six inches dbh will not be
6 reduced to less than:
7 i. Softwood stands such as Douglas fir (greater than 66 percent softwood
8 volume): 80-square-foot basal area per acre including the area covered by any
9 structures (approximately equivalent to 21 percent canopy cover);
10 ii. Mixed wood stands (34 to 66 percent softwood volume): 70-square-foot
11 basal area per acre including the area covered by any structures; and
12 iii. Hardwood stands such as maple (less than 34 percent softwood volume):
13 50-square-foot basal area per acre including the area covered by any
14 structures;
15 e. The remaining forest consists of trees that are multi-aged and are well
16 distributed across the tree protection zone;
17 f. All vegetation overhanging aquatic FWHCAs is retained; and
18 g. For primary structures to be located in Zone 2, there is a low probability of
19 increased windthrow of trees within tree protection zones as determined by a
20 qualified professional.⁹³

21 Review of the tree protection zone buffers, together with required water quality
22 buffers⁹⁴, and possible coastal geologic buffers, reflects consideration of the requirements of
23 WAC 173-26-221(5)(b); the SMP addresses vegetation conservation/restoration, and
24 includes regulatory provisions addressing conservation.

25 The Petitioner raised similar objections regarding the assembling, consideration and
26 application of BAS to the County's Critical Areas Ordinance FWHCA buffer scheme in
27 GMHB Case No. 13-2-0012c. In that proceeding it also argued the buffer widths and the
28 activities allowed within FWHCA buffers failed to reflect the inclusion of BAS. While the
29 Board initially found some buffer widths and activities failed to comport with BAS⁹⁵, the
30 County was subsequently found in compliance⁹⁶. In essence, the Petitioner now seeks to

31 ⁹³ SJCC 18.35.130B, in part.

32 ⁹⁴ See Appendix A which includes the methodology for determining applicable buffer widths.

⁹⁵ GMHB No. 13-2-0012c (Final Decision and Order, September 6, 2013) at 63.

⁹⁶ GMHB No. 13-2-0012c (Order Finding Compliance and Continuing Non-Compliance, August 20, 2014) at 18.

1 reargue allegations previously raised and addressed. In ultimately finding the County's
2 scheme GMA compliant in the prior case, the Board concluded that the FWHCA buffer
3 scheme reflected the inclusion of BAS. Finally, it bears repeating that the SMP includes
4 provisions requiring mitigation sequencing if it is determined a project will impact shoreline
5 functions and values so as to ensure NNL.⁹⁷

6
7 The Board finds and concludes that the Petitioner has failed to meet its burden of
8 proof to establish the alleged violations set forth in Issue 3.

9
10 **Issue No. 4**

11 Does the Update's shoreline stabilization provisions at 2016 Ordinance New Sections 41-48
12 and Table X, which authorize actions like the armoring of feeder bluffs and forage fish
13 spawning habitat and unreplaced shoreline vegetation removal, conflict with RCW
14 36.70A.020 goals 9 and 10, the policies of RCW 90.58.020, the requirements of RCW
15 90.58.100, the provisions of Chapter 43.21C RCW, and SMP Guidelines for new shoreline
16 stabilization (WAC 173-26-211(5)(b)(ii)(E), -211(5)(f)(ii)(A), -231(3)(a)(iii)(B),
17 -231(3)(a)(iii)(C), -231(3)(a)(iii)(E)), for using the most current, accurate, and complete
18 scientific and technical information available (WAC 173-26-201(2)), and for protecting
19 against site-specific and ecosystem-wide impacts (WAC 173-26-181, -186(8), -201(2)(c), -
20 201(3)(d)(iii), -221(2), -221(5), -221(6))?

21 The Petitioner asserts in Issue 4 that the County's SMP allows the construction or
22 replacement of both hard⁹⁸ and soft⁹⁹ shoreline stabilization measures in violation of the
23 cited Guidelines. Beach erosion is a natural process and seeking to protect properties from
24 that process is clearly understandable. However, "[t]he impacts of hardening any one
25 property may be minimal but cumulatively the impact of this shoreline modification is

26 ⁹⁷ IR ECY 035948, Ordinance 11-2017, Section 8B at 21; Section 10A at 23.

27 ⁹⁸ "Hard shoreline stabilization measures" means shore erosion control structures and measures composed of
28 hard surfaces, arranged with primarily linear and vertical or near-vertical faces that armor the shoreline and
29 prevent erosion. These measures include bulkheads, riprap, groins, retaining walls and similar structures
30 composed of materials such as boulders, gabions, dimensional lumber, and concrete. Ordinance 01-2016 at
31 138. Bates 007657.

32 ⁹⁹ "Soft shoreline stabilization measures" means shore erosion control structures and measures composed of
primarily natural and semi-rigid or flexible materials, logs and vegetation, organized in a nonlinear, sloping
arrangement, that dissipate wave energy and minimize erosion in a way that is similar to natural shoreline
processes. Ordinance 11-2017 at 67. Bates ECY 036014.

1 significant".¹⁰⁰ The Guidelines and the record set forth the potential negative results of
2 shoreline stabilization.¹⁰¹

3 The County's SMP allows such measures to protect existing primary structures, an
4 accessory dwelling unit, and utilities, driveways and roads which cannot feasibly be
5 relocated.¹⁰² New, replaced, or enlarged hard measures "may be allowed when damage to
6 them¹⁰³ is expected within three (3) years."¹⁰⁴ New, replaced, or enlarged soft measures
7 "may be allowed when there is a significant possibility that development will be damaged as
8 a result of erosion caused by waves and currents".¹⁰⁵

9
10 WAC 173-26-231(3)(a)(iii)(B) provides as follows:

11 New structural stabilization measures shall not be allowed except when
12 necessity is demonstrated in the following manner:

13 (I) To protect existing primary structures:

- 14 • New or enlarged structural shoreline stabilization measures for an
15 existing primary structure, including residences, should not be allowed
16 unless there is *conclusive evidence*, documented by a geotechnical
17 analysis, that the structure is in danger from shoreline erosion caused by
18 tidal action, currents, or waves. Normal sloughing, erosion of steep bluffs,
19 or shoreline erosion itself, without a scientific or geotechnical analysis, is
20 not demonstration of need. The geotechnical analysis should evaluate on-
21 site drainage issues and address drainage problems away from the
22 shoreline edge before considering structural shoreline stabilization.
- 23 • The erosion control structure will not result in a net loss of shoreline
24 ecological functions.

25 (II) In support of new nonwater-dependent development, including single-
26 family residences, when all of the conditions below apply:

- 27 • The erosion is not being caused by upland conditions, such as the loss of
28 vegetation and drainage.

29 ¹⁰⁰ WAC 173-26-231(3)(ii).

30 ¹⁰¹ See WAC 173-26-231(3)(ii); IR 10114-10142; IR 009895-009897.

31 ¹⁰² IR 007518, Ordinance 01-2016 at pages 78, 79.

32 ¹⁰³ The Board interprets use of the word "them" as a reference to primary structures, accessory dwelling units,
etc.

¹⁰⁴ Ordinance 01-2016, Section 41B at 79, Bates 007598. The Board notes that Section 41B does not include
the "significant possibility" qualifier although it does appear in Section 48A3, Bates 007603.

¹⁰⁵ Ordinance 01-2016, Section 41 C at 79. Bates 007598.

- Nonstructural measures, such as placing the development further from the shoreline, planting vegetation, or installing on-site drainage improvements, are not feasible or not sufficient.
- The need to protect primary structures from damage due to erosion is demonstrated through a geotechnical report. The damage must be caused by natural processes, such as tidal action, currents, and waves.
- The erosion control structure will not result in a net loss of shoreline ecological functions. (emphasis added)

The Board observes that the SMP's standards for allowance of new or enlarged¹⁰⁶ stabilization differ significantly from that of WAC 173-26-231(3)(a)(iii)(B). The Guideline states that new or enlarged stabilization measures to protect existing primary structures, whether soft or hard, "should not be allowed unless there is [documented] conclusive evidence that the structure is in danger from shoreline erosion . . .". The SMP, in contrast, allows new, replaced or enlarged hard and soft stabilization when there is a "significant possibility that the development will be damaged".¹⁰⁷ A "significant possibility" standard falls far short of "conclusive evidence" as required by the rule. The Petitioner has met its burden of proof to establish that the Update's shoreline stabilization provisions as specifically addressed above violate WAC 173-26-231(3)(a)(iii)(B).

The Petitioner also contends that the SMP's "soft" structural provisions actually authorize the use of "hard" materials. It cites Ordinance 01-2016, Section 45B, which provides: The soft shoreline stabilization design must include an arrangement of various sizes of gravels, cobbles, logs, and boulders to provide stability and dissipate wave and current energy. . ." The identical language appears in Ordinance 11-2017 at Section 19B. Logs and boulders would appear to qualify as elements of "hard measures" based on the continuum of soft to hard measures set out in WAC 173-26-231(3)(a)(ii).¹⁰⁸ That observation

¹⁰⁶ The SMP treats the enlargement of structural stabilization structures as new structures. Ordinance 01-2016, Section 46, at 83, Bates 007602.

¹⁰⁷ Ordinance 01-2016, Section 41B and C, at 79, Bates 007598; and Section 48 at 84, Bates 007603.

¹⁰⁸ Vegetation enhancement, Upland drainage control, Biotechnical measures, Beach enhancement, Anchor trees, Gravel placement, Rock revetments, Gabions, Concrete groins, Retaining walls and bluff walls, Bulkheads; and Seawalls.

1 is further supported by the SMP's own definition of "Hard shoreline stabilization measures",
2 which includes boulders and dimensional lumber.¹⁰⁹

3 The Petitioner further asserts that the SMP fails to require adequate vegetative
4 replanting following clearing and installation of shoreline armoring as only 75% of the
5 affected frontage is replanted to an average depth of ten (10) feet. While the Petitioner cites
6 studies from the record, it fails to relate the allegation to specific statutory or Guideline
7 requirements.
8

9 Finally, the Petitioner suggests that the SMP allows "hard armoring directly on forage
10 fish spawning habitat and 'soft' armoring anywhere in or near fish spawning beaches".¹¹⁰
11 The Board does not agree with the Petitioner's interpretation that the preclusion of hard
12 stabilization measures "adjacent to documented forage fish spawning areas" allows such
13 measures "on" spawning areas. However, the Petitioner appropriately takes exception to
14 the County's statement that since "forage fish spawning areas are seaward of the OHWM,
15 the SMP does not allow shoreline armoring "on" forage fish habitat". Armoring, whether it is
16 hard or soft, and even when located above the OHWM, can result in impacts to shoreline
17 ecological functions, including forage fish spawning areas, and it is those impacts which the
18 SMA seeks to address.¹¹¹
19

20 As discussed above in addressing Issue 1, the designation applied to the County's
21 shorelines is not the sole method contemplated by the SMA to insure NNL of shoreline
22 ecological functions. Rather, that is accomplished through a combination of the designations
23 and the applicable regulatory scheme. The regulatory scheme must complement and
24 supplement the designations assigned. The methodology employed by the County's
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26
27 ¹⁰⁹ "Hard shoreline stabilization measures" means shore erosion control structures and measures composed of
28 hard surfaces, arranged with primarily linear and vertical or near-vertical faces that armor the shoreline and
29 prevent erosion. These measures include bulkheads, riprap, groins, retaining walls and similar structures
30 composed of materials such as boulders, gabions, dimensional lumber, and concrete. Ordinance 01-2016 at
31 138. Bates 007657. The Board further notes that soft structural measures may use hard elements to "tie in"
32 with hard structures on adjacent properties. Ordinances 01-2016, Section 45A at 82 and 11-2017, Section 19A
at 37. The Board does not intend to indicate that exception violates the Guidelines.

¹¹⁰ Petitioner Friends of the San Juans' Prehearing Brief at 29.

¹¹¹ WAC 173-26-231(3)(a)(ii).

1 consultants to assist the County in designating its shorelines varied from the “drift cell”
2 model often employed throughout Puget Sound, opting instead for consideration of
3 geomorphic units.¹¹² As the I & C acknowledged, the methodology has some
4 weaknesses.¹¹³ Consequently, the regulatory scheme employed to assure NNL takes on
5 greater importance. It is therefore imperative that the regulations be crafted carefully to
6 achieve the NNL requirement¹¹⁴ and that a process for periodically evaluating the
7 cumulative effects, as addressed in Issue 7 below, be included.
8

9 The Board finds and concludes as follows:

10 1. San Juan County’s decision to adopt, and the Department of Ecology’s decision to
11 approve, San Juan County’s Shoreline Master Program Update, specifically those
12 regulations relating to the standards applicable to the allowance of hard and soft
13 shoreline structural modifications and the inclusion of hard materials in soft shoreline
14 stabilization design as addressed above fail to comply with the policies of the
15 Shoreline Management Act and Shoreline Master Program Guidelines.
16

17 2. The Petitioner has met the applicable burdens of proof, whether that be the clearly
18 erroneous standard or the clear and convincing evidence in the record standard. The
19 Growth Management Hearings Board finds and concludes that San Juan County’s
20 decision to adopt, and the Department of Ecology’s decision to approve, San Juan
21 County’s Shoreline Master Program Update, specifically regulations relating to the
22 standards applicable to the allowance of hard and soft shoreline structural
23 modifications and the inclusion of hard materials in soft shoreline stabilization design,
24 fails to comply with the policies of RCW 90.58.020 and the requirements of WAC 173-
25 26-231(3)(a)(iii)(B) and WAC 173-26-231(3)(a)(ii).
26
27

28 ¹¹² IR 001479 at Bates 001510.

29 ¹¹³ IR 001479 at Bates 001512 and 001516.

30 ¹¹⁴ The Board notes that the allowance of both hard and soft shoreline stabilization in all designations other
31 than Natural is subject to obtaining a Shoreline Substantial Development Permit pursuant to the criteria set
32 forth in Ordinance 01-2016, Section 4 and WAC 173-27-150. The Board further observes that the San Juan
County Code includes special protections for Fish and Wildlife Habitat Conservation Areas, which include
feeder bluffs, kelp and eelgrass beds, and forage fish spawning areas. SJCC 18.35.110-18.35.135.

1 3. The Petitioner has failed to meet its burden of proof to establish any other alleged
2 violations set forth in Issue 4.
3

4 **Issue No. 5**

5 Does the Update's overwater structure provisions at 2016 Ordinance New Sections 29-39
6 and Table X, which authorize: (1) overwater structures in eelgrass and kelps; (2) overwater
7 structures that would be expected to interfere with normal erosion-accretion; (3) boating
8 facilities for 5 or more users without ensuring that existing facilities and alternative moorage
9 are not adequate or feasible; and (4) docks instead of marinas if the marinas are more than
10 8 miles away, conflict with RCW 36.70A.020 goals 9 and 10, the policies of RCW 90.58.020,
11 the requirements of RCW 90.58.100, the provisions of Chapter 43.21C RCW, and SMP
12 Guidelines for boating facilities and docks (WAC 173-26-221(2)(iii)(C), -241(3)(c)), for using
13 the most current, accurate, and complete scientific and technical information available
14 (WAC 173-26-201(2)), and for protecting against site-specific and ecosystem-wide impacts
15 to shoreline ecological functions (WAC 173-26-181, -186(8), -201(2)(c), -201(3)(d)(iii), -
16 221(2),-221(5))?

15 The Petitioner alleges that the SMP authorizes the location of docks, mooring buoys
16 and other over-water structures in or over critical habitats such as eelgrass and kelp beds
17 and permits docks that would interfere with the erosion/accretion function of feeder bluffs.¹¹⁵
18 The allegations are not well taken. As the County observes, the SMP requires that "all over-
19 water structures, including new, modifications or replacements of existing facilities must
20 meet the applicable design criteria established by the [Washington Department of Fish and
21 Wildlife] WDFW in WAC 220-660-140 and 220-660-380 relative to materials, siting,
22 disruption of currents, restrictions of tidal prisms, flushing characteristics, and fish passage
23 to the extent that those criteria are consistent with protection of the shore process corridor
24 and its operating systems".¹¹⁶
25

26 The WDFW rules provide, in part:

27
28 (a) The department requires that new structures are designed with a pier and
29 ramp to span the intertidal beach, whenever feasible.

30 (b) The design and location of structures must follow the mitigation sequence
31 to protect salt water habitats of special concern.

32 ¹¹⁵ Petitioner Friends of the San Juans' Prehearing Brief at 32.

¹¹⁶ Citing IR 007518, Ordinance 01-2016, Section 29A.3 at 67. Bates 007584.

1 (i) Design and locate structures to protect juvenile salmonid migration, feeding,
2 and rearing areas.

3 (ii) Design and locate structures to protect documented Pacific herring, Pacific
4 sand lance, and surf smelt spawning beds; and rockfish and lingcod
5 settlement and nursery areas.

6 (iii) The department will require a seagrass/macroalgae habitat survey for all
7 new construction unless the department can determine the project will not
8 impact seagrass and kelp beds, and in herring spawning beds other
9 macroalgae used as spawning substrate. A survey is not required for
10 replacement of an existing structure within its original footprint.

11 (A) Structures must be located at least twenty-five feet (measured horizontally
12 from the nearest edge of the structure) and four vertical feet away from
13 seagrass and kelp beds (measured at extreme low water).

14 (B) In documented herring spawning areas, structures must be located at least
15 twenty-five feet (measured horizontally from the nearest edge of the structure)
16 and four vertical feet from macroalgae beds on which herring spawn
17 (measured at extreme low water).¹¹⁷ (emphasis added)

18 In addition, the SMP includes extensive regulations addressing all types of overwater
19 structures, including mooring buoys.¹¹⁸ Mooring buoys are required to avoid eelgrass beds
20 and other critical habitat unless there is no feasible alternative.¹¹⁹ Nor does the SMP allow
21 interference with the natural functioning of feeder bluffs. The SMP includes the following
22 provision: "Boating facilities that are expected to interfere with the normal erosion-accretion
23 process associated with feeder bluffs are prohibited."¹²⁰ While there are allowances in the
24 SMP for the intrusion of boating facilities, and single family/joint use docks into shoreline
25 critical areas, those allowances must first satisfy extensive criteria.¹²¹

26 The Board finds and concludes that the Petitioner has failed to meet its burden of
27 proof to establish the alleged violations set forth in Issue 5.

28 ¹¹⁷ WAC 220-660-380(3)(a) & (b).

29 ¹¹⁸ IR 007518, Ordinance 01-2016, Sections 29-36.

30 ¹¹⁹ IR 007518, Ordinance 01-2016, Section 35C.

31 ¹²⁰ The County insisted both in its brief and at oral argument that "Boating facilities" includes docks serving four
32 or fewer residences notwithstanding a confusing definition of boating facilities in Ordinance 01-2016 at 130,
Bates 007649, which appears to apply only to docks serving more than four residences. The Board suggests
that the definition be clarified to avoid possible misinterpretation.

¹²¹ IR 007518, Ordinance 01-2016, Sections 30-31, Bates 007587-007589.

1 **Issue No. 6**

2 Does the Update's nonconforming development provisions at 2016 Ordinance New Section
3 14 conflict with RCW 36.70A.020 goals 9 and 10, the policies of RCW 90.58.020, the
4 requirements of RCW 90.58.100, the provisions of Chapter 43.21C RCW, and SMP
5 Guidelines for nonconforming development (WAC 173-26-191(2)(a)(iii)(A)), and for
6 protecting and restoring shoreline ecological functions (WAC 173-26-181, -186(8), -
201(2)(c), -201(3)(d)(iii), -201(2)(f), -221(2), -221(5), -221(6))?

7 Issue 6 raises concerns in regards to the SMP's regulations applicable to
8 nonconforming uses. Specifically, the Petitioner references Section 14 of Ordinance 01-
9 2016 which in part provides:
10

11 A. Except for structural shoreline stabilization measures . . . any use or
12 structure legally located within shoreline jurisdiction that was established
13 before October 30, 2017, may be moved, replaced, redeveloped, expanded, or
14 otherwise modified on the same parcel provided this work is consistent with
the provisions of this section.

15 B. Movement, replacement, redevelopement, expansion or modification of
16 structures may be allowed if the applicant demonstrates that the proposed
action will not:

- 17 1. Result in a net loss of shoreline ecological functions;
- 18 2. Increase adverse impacts on shoreline critical areas;
- 19 3. Create a new nonconformance or increase the degree of
inconsistency with the provisions of this SMP; or
- 20 4. Result in a hazard to people or property.

21 C. The applicant must demonstrate no net loss of shoreline ecological
22 functions based upon an analysis that addresses any:

- 23 1. Increase in the quantity of pollutants from the site;
- 24 2. Increase in the quantity of surface runoff from the site;
- 25 3. Decrease in trees and other vegetation within buffers and tree
protection zones;
- 26 4. Decrease in the stability of the site and other properties; and
- 27 5. Changes to the transport of sediment to and within nearshore areas.

28 It is the conditional allowance of movement, replacement, and expansion of uses and
29 structures to which the Petitioner takes exception; it suggests that allowance fails to address
30 the SMA goal of restoring shoreline health over time through the reduction of non-
31 conforming uses or structures.
32

1 The Guidelines include the following:

2 It is recognized that shoreline ecological functions may be impaired not only by
3 shoreline development subject to the substantial development permit
4 requirement of the act but also by past actions, unregulated activities, and
5 development that is exempt from the act's permit requirements.¹²²

6 While the master program is a comprehensive use regulation applicable to all
7 land and water areas within the jurisdiction described in the act, its effect is
8 generally on future development and changes in land use. Local government
9 may find it necessary to regulate existing uses to avoid severe harm to public
10 health and safety or the environment and in doing so should be cognizant of
11 constitutional and other legal limitations on the regulation of private property.
12 In some circumstances existing uses and properties may become
13 nonconforming with regard to the regulations and master programs should
14 include provisions to address these situations in a manner consistent with
15 achievement of the policy of the act and consistent with constitutional and
16 other legal limitations.¹²³

17 While the County could have disallowed replacement and expansion of
18 nonconforming uses so as to incrementally improve ecological functions, it was not required
19 to do so by any of the cited statutes or Guidelines. The County has the legislative latitude to
20 craft regulations addressing nonconformance so long as those regulations meet SMA
21 requirements. Here, the nonconforming use/structure regulations conditionally authorize
22 replacement or expansion but only upon the applicant's ability to establish compliance with
23 the requirements of Ordinance 01-2016, Section 14 B and C.¹²⁴ Those code sections
24 require the applicant to demonstrate that the proposal will not result in a net loss of
25 ecological functions, increase adverse critical area impacts, or increase the degree of
26 inconsistency with the SMP requirements. While other jurisdictions may elect to address
27 nonconformance differently, the Petitioner is unable to meet its burden of proof to establish
28 that the County's chosen methodology is non-compliant with the requirements of the SMA.
29 The SMA goal of restoration may be accomplished through regulations other than those

30 _____
31 ¹²² WAC 173-26-186(8).

¹²³ WAC 173-26-191(2)(a)(iii)(A).

¹²⁴ IR 007518, at 44-45.

1 affecting nonconforming uses. The Petitioner fails to establish that the County's amended
2 treatment of nonconforming uses and structures violates any applicable statute or
3 Guideline.

4
5 **Issue No. 7**

6 Does the Update's lack of a process for periodically evaluating the cumulative effects of
7 authorized development on shoreline conditions conflict with the SMP Guidelines (WAC
8 173-26-191(2)(a)(iii)(D))?

9 The Petitioner asserts that the County's SMP violates WAC 173-26-191(2)(a)(iii)(D)
10 as it fails to include a process for periodically evaluating the cumulative effects of authorized
11 development on shoreline conditions.

12 The Guidelines, in establishing the principles to be observed in the creation of master
13 plans, require local governments to "evaluate and consider cumulative impacts of
14 reasonably foreseeable future shoreline development."¹²⁵ Further, in laying out the basic
15 requirements of an SMP, the Guidelines describe specific contents that are required to be
16 included in the program. Those mandatory elements include "a mechanism for documenting
17 all project review actions" along with "a process for periodically evaluating the cumulative
18 effects of authorized development."¹²⁶

19
20
21 The Petitioner points out that comments taken during the update process suggested

22
23 ¹²⁵ WAC 173-26-186(8)(d) establishes a guiding principle for master programs, stating in pertinent part:
24 Local master programs shall evaluate and consider cumulative impacts of reasonably foreseeable future
25 development on shoreline ecological functions and other shoreline functions fostered by the policy goals of the
26 act. To ensure no net loss of ecological functions and protection of other shoreline functions and/or uses,
27 master programs shall contain policies, programs, and regulations that address adverse cumulative impacts
28 and fairly allocate the burden of addressing cumulative impacts among development opportunities.

29 ¹²⁶ WAC 173-26-191(2)(a)(iii)(D). (2) Basic requirements. This chapter describes the basic components and
30 content required in a master program. ...

31 (a) Master program contents. Master programs shall include the following contents:

32 (iii) Administrative provisions.

(D) Documentation of project review actions and changing conditions in shoreline areas.

Master programs or other local permit review ordinances addressing shoreline project review shall include a
mechanism for documenting all project review actions in shoreline areas. Local governments shall also identify
a process for periodically evaluating the cumulative effects of authorized development on shoreline conditions.
This process could involve a joint effort by local governments, state resource agencies, affected Indian tribes,
and other parties.

1 ways of tracking and evaluating actions to ensure NNL over time.¹²⁷ For example, WDFW
2 suggested a monitoring and adaptive management program with benchmarks to achieve no
3 net loss “[b]ecause the shoreline environment is extraordinarily complex
4 mitigation/compensation efforts have a high degree of uncertainty.”¹²⁸ The County’s own
5 Cumulative Impacts Analysis identified several methods that could aid in tracking impacts,
6 such as incorporating information into a permit database that could track change in
7 vegetative cover or the dimensions or type of shoreline stabilization.¹²⁹

8
9 However, the County neither included “a mechanism for documenting all project
10 review actions” nor “a process for periodically evaluating the cumulative effects of
11 authorized development,” as required by WAC 173-26-191(2)(a)(iii)(D). In its defense, the
12 County asserts that the “SMA and Guidelines do not require a mechanism to document and
13 periodically evaluate cumulative effects of authorized development,”¹³⁰ and that the
14 evaluation outlined in WAC 173-26-191(2)(a)(iii)(D) occurs as part of the I & C Report and
15 cumulative impacts analysis that are required each time an SMP is updated.¹³¹ The County
16 cites as authority WAC 173-26-201(2)(c), which outlines the process to prepare or amend
17 shoreline master programs, including the requirement that master programs contain
18 “policies and regulations that assure, at minimum, no net loss of ecological functions
19 necessary to sustain shorelines natural resources.”¹³² The County further asserts that WAC
20 173-26-201(3)(d)(E)(iii), which identifies the steps outlined for the preparation or amending
21 of a master program,¹³³ requires that cumulative impacts be addressed programmatically.
22
23
24

25
26 ¹²⁷ Petitioner Friends of the San Juan’s Brief Prehearing Brief at 36.

27 ¹²⁸ IR 005694, Bates 005699 (comment 1).

28 ¹²⁹ IR 003642, Bates 003712 (Excerpt of Cumulative Impacts Analysis).

29 ¹³⁰ Brief of San Juan County, at 20.

30 ¹³¹ *Id.*, at 21.

31 ¹³² *Id.*, at 20.

32 ¹³³ (iii) Addressing cumulative impacts in developing master programs. The principle that regulation of development shall achieve no net loss of ecological function requires that master program policies and regulations address the cumulative impacts on shoreline ecological functions that would result from future shoreline development and uses that are reasonably foreseeable from proposed master programs. To comply with the general obligation to assure no net loss of shoreline ecological function, the process of developing the

1 The County relies on the following language in the Guideline concerning the contents of the
2 programmatic master plan:

3 Complying with the above guidelines is the way that master program policies
4 and regulations should be developed to assure that the commonly occurring
5 and foreseeable cumulative impacts do not cause a net loss of ecological
6 functions of the shoreline. For such commonly occurring and planned
7 development, policies and regulations should be designed without reliance on
8 an individualized cumulative impacts analysis.

9 The problem, of course, is that the County's defense relies on the programmatic
10 action itself, the update of the SMP, to address documentation and evaluation of cumulative
11 impacts. The County concludes that while it must complete the cumulative impacts analysis
12 for the update, there is no requirement for any other evaluation of impacts for the duration of
13 the SMP. The Board does not agree.

14
15 policies and regulations of a shoreline master program requires assessment of how proposed policies and
16 regulations cause and avoid such cumulative impacts.
17 Evaluating and addressing cumulative impacts shall be consistent with the guiding principle in WAC 173-26-
18 186 (8)(d). An appropriate evaluation of cumulative impacts on ecological functions will consider the factors
19 identified in WAC 173-26-186 (8)(d)(i) through (iii) and the effect on the ecological functions of the shoreline
20 that are caused by unregulated activities, development and uses exempt from permitting, effects such as the
21 incremental impact of residential bulkheads, residential piers, or runoff from newly developed properties.
22 Accordingly, particular attention should be paid to policies and regulations that address platting or subdividing
23 of property, laying of utilities, and mapping of streets that establish a pattern for future development that is to
24 be regulated by the master program.

25 There are practical limits when evaluating impacts that are prospective and sometimes indirect. Local
26 government should rely on the assistance of state agencies and appropriate parties using evaluation,
27 measurement, estimation, or quantification of impact consistent with the guidance of RCW 90.58.100(1) and
28 WAC 173-26-201 (2)(a). Policies and regulations of a master program are not inconsistent with these
29 guidelines for failing to address cumulative impacts where a purported impact is not susceptible to being
30 addressed using an approach consistent with RCW 90.58.100(1).

31 Complying with the above guidelines is the way that master program policies and regulations should be
32 developed to assure that the commonly occurring and foreseeable cumulative impacts do not cause a net loss
of ecological functions of the shoreline. For such commonly occurring and planned development, policies and
regulations should be designed without reliance on an individualized cumulative impacts analysis. Local
government shall fairly allocate the burden of addressing cumulative impacts.

For development projects and uses that may have anticipatable or uncommon impacts that cannot be
reasonably identified at the time of master program development, the master program policies and regulations
should use the permitting or conditional use permitting processes to ensure that all impacts are addressed and
that there is no net loss of ecological function of the shoreline after mitigation.

Similarly, local government shall consider and address cumulative impacts on other functions and uses of
the shoreline that are consistent with the act. For example, a cumulative impact of allowing development of
docks or piers could be interference with navigation on a water body.

1 It is a well settled rule of statutory construction that all provisions of a statute or
2 regulation are to be given effect, if possible. Here, the regulation establishing the content of
3 a program is separate from the regulations which govern the development of that program.
4 While the program must be developed in such a way as to ensure NNL, the contents of that
5 program are governed by WAC 173-26-191(2)(a), which includes a requirement for a
6 “mechanism for documenting all project review actions in shoreline areas.” In addition to this
7 mechanism, the Guideline goes on to require local governments to identify “a process for
8 periodically evaluating the cumulative effects of authorized development on shoreline
9 conditions.” Clearly, the County neither identified a mechanism for documenting actions in
10 shoreline areas nor a process for periodic evaluation.
11

12 In finding that the County has not complied with WAC 173-26-191(2)(a)(iii)(D), the
13 Board makes no judgment as to what actions might suffice to meet the County’s
14 responsibilities under this Guideline. Various stakeholders made suggestions during the
15 update process which may be of value to the County, but we do not suggest here that any
16 of those suggestions creates an expectation of how the County will comply. During the
17 hearing on the merits in this case, the County referred to the existence of a permit tracking
18 system and suggested that some documentation of effects of authorized development may
19 be occurring there.
20

21 The Board finds and concludes as follows:

- 22
- 23 1. San Juan County’s decision to adopt, and the Department of Ecology’s decision to
24 approve, San Juan County’s Shoreline Master Program Update, which failed to
25 include a mechanism for documenting all project review actions in shoreline areas
26 and failed to include/identify a process for periodically evaluating the cumulative
27 effects of authorized development on shoreline conditions fails to comply with the
28 policies of the Shoreline Management Act and Shoreline Master Program Guidelines.
 - 29 2. The Petitioner has met the applicable burdens of proof, whether that be the clearly
30 erroneous standard or the clear and convincing evidence in the record standard. The
31 Growth Management Hearings Board finds and concludes that San Juan County’s
32

1 decision to adopt, and the Department of Ecology's decision to approve, San Juan
2 County's Shoreline Master Program Update, which failed to include a mechanism for
3 documenting all project review actions in shoreline areas and failed to include/identify
4 a process for periodically evaluating the cumulative effects of authorized
5 development on shoreline conditions fails to comply with the policies of RCW
6 90.58.020 and the requirements of WAC 173-26-191(2)(a)(iii)(D).
7

8 **Invalidity**

9 In this proceeding, the Petitioner also requests the imposition of invalidity based on
10 alleged substantial interference with Goal 9 (Open space and recreation) and Goal 10
11 (Environment), arguing continued validity of specific sections of the SMP would allow long-
12 term impacts to critical shoreline habitats and interfere with the County's ability to conserve
13 fish and wildlife habitat or protect the environment.¹³⁴ Although the Board has determined
14 that particular sections of the SMP are non-compliant, it declines to find the sections invalid
15 as substantial interference with fulfillment of Goals 9 and 10 has not been shown.
16
17

18 **V. ORDER**

19 Based upon review of the Petition for Review, the briefs and exhibits submitted by the
20 parties, the GMA, prior Board orders and case law, having considered the arguments of the
21 parties, and having deliberated on the matter, the Board finds:
22

- 23 1. As to Legal Issue 2, relating to mitigation for adverse impacts to shoreline
24 ecological functions beyond the watershed of the anticipated impacts, Legal Issue 4
25 relating to the standards applicable to the allowance of hard and soft shoreline
26 structural modifications and the inclusion of hard materials in soft shoreline
27 stabilization design, and Legal Issue 7, relating to the failure to include a
28 mechanism for documenting all project review actions in shoreline areas and
29 failure to include/identify a process for periodically evaluating the cumulative
30

31
32 ¹³⁴ Petitioner Friends of the San Juans' Prehearing Brief at 39, 40.

1 effects of authorized development on shoreline conditions, the Growth
2 Management Hearings Board reverses San Juan County's adoption of and the
3 Department of Ecology's decision approving San Juan County's Shoreline Master
4 Program Update and remands this matter to the Department of Ecology and San
5 Juan County for the purpose of complying with the Shoreline Management Act
6 consistent with this Final Decision and Order.

- 7
- 8 2. As to Legal Issue 1 (designations), Legal Issue 3 (shoreline buffers), Legal
9 Issue 5 (overwater structures and boating facilities), and Legal Issue 6
10 (nonconforming uses), the Board upholds the decision by San Juan County and the
11 Department of Ecology.
- 12 3. As to all alleged violations in Legal Issues 2, 4, and 7 not specifically addressed in
13 Paragraph 1 above, the Board upholds the decisions by San Juan County and the
14 Department of Ecology.
- 15 4. The following schedule for further proceedings shall apply:
- 16
- 17

18

Item	Date Due
Compliance Due	October 11, 2018
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	October 25, 2018
Objections to a Finding of Compliance	November 8, 2018
Response to Objections	November 19, 2018
Telephonic Compliance Hearing 1 (800) 704-9804 and use pin code 7757643#	December 3, 2018 9:00 a.m.

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SO ORDERED this 13th day of June, 2018.

William Roehl, Board Member

Deb Eddy, Board Member

Bill Hinkle, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.¹³⁵

¹³⁵ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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APPENDIX A

Figure 3.1
Procedure for Determining Buffers and Tree Protection Zones for Aquatic FWHCAs

Step 1. Location Relative to Aquatic FWHCAs. Is the proposed development, removal of vegetation or other site modification located in or over an aquatic FWHCA? Is it located within 110 feet of the bank full width (BFW) of a stream as defined in WAC 222-16-010? Is it located within 110 feet of the ordinary high water mark (OHWM) of a lake or pond? Is it located within 200 feet of the OHWM of a marine area designated as a FWHCA?



Step 2. Determination of Need for Coastal Geologic Buffer. If the response to any of the above questions is yes, determine whether a coastal geologic buffer is necessary. If proposed development, vegetation removal, or other site modification is within 200 feet of the OHWM of an erodible marine shoreline (any shoreline that is not bedrock), determine whether the site is a geologically hazardous area, or whether it may provide sediment to an area with eelgrass, shellfish, spawning or holding areas for forage fish, mudflats, or intertidal habitats with vascular plants. If the answer to either question is yes, a qualified professional must prepare a geotechnical report and determine an appropriate coastal geologic buffer and development conditions to prevent increased erosion and allow for natural erosive processes for life of structures (minimum 75 years). In all cases (yes or no response) continue with the buffer/tree protection zone sizing procedure.

If the response to all of the above questions is no, no further action is necessary for compliance with FWHCA protection requirements for aquatic FWHCAs. Proceed to evaluate compliance with protection requirements for other types of FWHCAs in SJCC 18.35.135.

↓
Step 3. Water Quality Buffer. Determine the size of the water quality buffer using Table 3.6 in Step 3 below.

↓
Steps 4 and 5. Tree Protection Zones. For areas with trees, identify tree protection zone(s). If desired, tree protection zones may be averaged.

↓
Step 6. Adjustments. Because they provide limited support of the habitat functions and values of aquatic FWHCAs, existing, lawfully established structures and impervious surfaces are excluded from these areas and are not labeled nonconforming with regard to buffer and tree protection zone requirements. In some cases, buffers are adjusted so they do not cross roads.

↓
Step 7. Proceed to evaluate compliance with protection requirements for other types of FWHCAs (see SJCC 18.35.135).