**From:** Doug Karman
**To:** Andrew Deffobis
**Subject:** FW: Comments - SMP Public Hearing 5-16-2023
**Date:** Sunday, May 14, 2023 7:37:24 PM

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Andy,
This email came back saying your smp@co.thurston.wa.us had a server error.

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**From:** Doug Karman <doug.karman@comcast.net>
**Sent:** Sunday, May 14, 2023 4:19 PM
**To:** 'Gary Edwards' <gary.edwards@co.thurston.wa.us>; 'Carolina Mejia-Barahona' <carolina.mejia@co.thurston.wa.us>; 'Tye Menser' <tye.menser@co.thurston.wa.us>
**Cc:** 'smp@co.thurston.wa.us.' <smp@co.thurston.wa.us.>
**Subject:** Comments - SMP Public Hearing 5-16-2023

To: Thurston County Board of County Commissioners

From: Doug Karman
4108 Kyro Rd SE
Lacey Washington
Date: May 14, 2023

Re: SMP Public Hearing 5-16-2023
Comments for your consideration

Commissioners:

When at all possible, the Planning Commission recommendation should be the one used to move forward. Their recommendation was developed after years of testimony from the public as well as County and State presentations. The Minority report should be given no more credence than any single individual from the public. The 4 Commissioners supporting this minority report were not present for 99% of the work sessions, public testimony and agency presentations on the SMP. Therefore, they were not part of the public process. The majority report/PC recommendation was made by 5 Commissioners who were part of the full public process from the beginning to the end either as a commissioner or as public participant.

The decision matrix you have been provided by staff is extensive and should have been presented to the Planning Commission prior to moving the SMP forward to the BoCC. In addition, the public should have been given an opportunity to comment on the document before the Planning Commission finalized its recommendation. Following are my comments on the Matrix:

1. **Buffers:** Use the Majority Report recommendations which is supported by Ecology. 97% of the shoreline residential classification has already been developed with these buffers. To make them wider makes no sense and would unduly burden the Shoreline Residential property owners without benefit.
2. **Docks/Floats/Buoys in the Natural environment:** If these are not allowed the property owner

will do one of two things – a) build a dock anyway or b) keep removing shoreline vegetation to be able to park their rowboats, kayaks, and other water toys. A dock or float has the least impact on the shoreline ecological function.

3. **Dimensional standards for mooring structures:** Go with the Majority recommendation as approved by Ecology. There was lengthy discussion and testimony that the Minority report sponsors were not a part of.
4. **Referring to nonconforming uses vs conforming uses:** The legislature recognized in 2011 that there would be great concern by the public if their legally established shoreline structure was now classified as nonconforming and required that this be clarified. Ecology briefed the Planning Commission and stated that they did not have a problem with classifying legally established shoreline structures as conforming. I am not sure where the Ecology reference in the matrix came from but there was a county staff member who disagreed with this. Even the county attorney said that it didn't matter if it was called non-conforming, conforming, legally conforming and such. The majority disagrees with the Ecology statement in the matrix especially for the Shoreline Residential classification. 97% of the SR properties are already developed. Not making some concessions here will result in a significant uproar from those residents who own SR properties.
5. **Permit requirement for all bulkheads:** A hearing examiner should not be needed for bulkheads. An Admin CUP should be adequate. Hearing Examiner in this case only adds cost with no benefit.
6. **References to critical areas within the SMP:** Prefer having specifics in the SMP as directed by the CAO.
7. **Allowing bulkheads for eutrophic lakes:** Allowing lakes to die is not what the WAC's say. There are heavy pressures on our shorelines from large waves caused by the new wake boats and by climate change. Not trying to slow down the eutrophication of our lakes is like saying you shouldn't get bypass surgery for your heart or have Chemo therapy for cancer. Aging and illness is a natural process. Does Ecology think we should also let our lakes die as well as our ill citizens? Both are inconsistent with law.
8. **To 11 No comment**
12. **Referencing WAC SDP exemption criteria in existing structures:** Use Staff recommendation 1.
13. **No comment**
14. **Locating structure on constrained lots:** Use Staff recommendation 1.
15. **Mitigation monitoring requirements:** use Staff recommendation 1.
16. **Addressing critical areas:** Use Staff recommendation 1.
17. **Shoreline buffer reductions:** The buffers recommended by the Planning Commission after lengthy discussion and consideration should be utilized.
18. **No comment**
19. **No comment**
20. **Characterization of shoreline setback:** If you remove the statement that the setback is no longer needed after construction except for maintenance essentially says the buffer is 15 ft wider than stated in the document. So, regarding Shoreline Residential the buffer would increase from 50 ft to 65 ft. Keep the Planning Commissions wording.
21. **No comment**
22. **Providing mitigation sequencing context to allowances for decks/platforms in buffers:** Use the Planning Commission recommendation. Properly designed decks and platforms function much like grass in the buffer.
23. **Floating residences:** No comment
24. **Waiver of public access requirements:** Use PC recommendation.
25. **Use of "E", exempt for projects that are exempt from the SDP:** You should at least make an attempt to make it easy for the public to understand. Maintain the PC recommendation.
26. **Permit standards for dredge disposal:** Go with Ecology's recommendation.
27. **To 37. No comment**

38. **Inserting a preamble for nonconforming uses: Use PC recommendation.**
39. **To 47 No comment**
48. **Requiring pervious surface for viewing platforms and decks:** Wood or composite decks are pervious if designed properly as stated earlier in the SMP. The use of the word pervious in the section may be confusing.
49. **To 58 No comment**
59. **Shoreline stabilization – SDP footnote:** There is no need for a Hearing Examiner when shoreline stabilization is under consideration an ADMIN CUP is adequate oversight. Hearing Examiners add time and cost to the process without benefit.
60. **To 68 No comment**

Respectfully submitted,

Douglas J. Karman

64

| | |
|---|---|
| **From:** | hwbranch@aol.com |
| **To:** | SMP |
| **Subject:** | Incoming SMP Comment |
| **Date:** | Sunday, May 14, 2023 11:17:04 AM |

**Your Name (Optional):**
Harry Branch

**Your email address:**
hwbranch@aol.com

**Comment:**
Shoreline buffers need to be increased. Work needs to be science based. Check out: Shoreline Master Program Needs a Metamorphosis at: gardenbayblog.com

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Time: May 14, 2023 at 6:16 pm
IP Address: 73.181.185.227
Contact Form URL: https://thurstoncomments.org/comment-on-the-proposed-shoreline-code-update/

Sent by an unverified visitor to your site.

**From:** Frank Hudik
**To:** SMP; Frank Hudik
**Subject:** SMP comments
**Date:** Sunday, May 14, 2023 9:08:30 PM
**Attachments:** Comments to SMP dated May 2023.docx

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Attached are our comments to the Planning Commission's DRAFT SMP. Please include these comments as public testimony.

Sent from Mail for Windows

Update: 14 May 2023

We live on Lawrence Lake.

- We agree with the provisions of the Planning Commission's: DRAFT Shoreline Master Program (SMP).
- We disagree with the minority report dated 8 August 2022.

Shoreline Buffer. Our home was built in 2006 following on-site inspection from a Thurston County Permit Department Representative/Inspector. The 50 ft buffer required at that time was/is well-documented and approved on our site plan, prior to commencement of home construction. We CONFORMED to the then-policies of Thurston County and any deviation from this CONFORMANCE is viewed as reneging on County Policy, regardless the highly politicized cause celeb: ~~global warming~~ climate change. Buffer widths "increased significantly" (minority report) are functionally unattainable for residences on Lawrence Lake owing to well-established property lines and the concomitant setbacks and other existing SMP limitations. Indeed, many homes could not be constructed on the existing residential lots at Lawrence Lake should the buffers increase beyond the existing 50ft. By extension, existing residences such as ours would be non-conforming if not NON-CONFORMING through no fault of the citizen-homeowner. **We followed the permit process!!!**

Docks. Our shoreline suffers from 100+ years of subsurface organic sediment accumulation largely initiated and subsequently propagated by the re-routing of the Deschutes River into Lawrence Lake circa ~1920. **The river's redirected path into Lawrence Lake was sanctioned by the government.** Given the eutrophic accumulation of sediment and the resulting shallow slope of our shoreline we petitioned and gained approval (Variance) for an 80ft dock length. To somehow renege on that Approved Variance under the cause celeb of ~~Global Warming~~ Climate Change is yet another example of the politization by the minority report.

**It's interesting, if not disparaging, that the minority report extensively focuses this version of their SMP disagreement on the politically motivated, unspecified effects of ~~global warming~~ climate change!**

Attached below is a copy of our 20 October 2021 list of specific disagreements. We never received a response to our position on these issues.

Frank and Heidi Hudik

Citizens

20 October 2021

Below comments are numbered to facilitate communication by reference.

1. Appendix A is not included in the document. Therefore, for the purpose of commenting below it is assumed 16246 Pleasant Beach Drive SE Lawrence Lake, Yelm, WA "is designated in the SEP and Appendix A maps as "*Residential Shoreline".* There are no comments about this designation, merely confirming.

2. We support and hereby endorse comments to the DRAFT SMP document from the Thurston County Shoreline Stakeholders Coalition (Ltr from John H Woodford, Chairman dated 23 September 2021), and comments regarding "Conforming vs. Non-Conforming" dated 31 August 2020. (RCW 90.58.620)
   Accordingly, please include our name as signatories to these referenced comments.

3. 19.100.110 Purpose and Intent /// and /// 19.100.120 Applicability
   All comments included below assume the following stated intent of the DRAFT SMP including its imbedded references such as those listed in 19.400.125:
   *"…the purpose of the Master Program is to guide the future development of the shorelines in Thurston County in a manner consistent with the Shoreline Management Act of 1971, hereinafter the "Act."*
   AND
   *"Proposes any new use…"*
   Citizen input: An important perception of these statements is "future development" and "new use" as opposed to previous development and current state. All comments provided herein assume this intent and relevant enforcement policy, as opposed to retroactively adding new restrictions (resulting in "non-conformance"). When a site-plan, construction permits, inspections, variances etc. were already approved by Thurston County, (SEPA/JARPA/HPA/Variance), often at great expense by the homeowner, why are they now "non-conforming"? This designation conveys the stigma of illegality or potential future actions invoked by the next document version/amendment? This is particularly worrisome for home Sellers.

4. 19.150.600 Normal Repair
   The provisions of this paragraph should apply to the repair of dock/surfaces that have deteriorated with time, often to the point of an unsafe condition including splintering wood surfaces. Dock repairs should be encouraged for safety and aesthetic reasons, not discouraged.

5. 19.300.105 and .110 Ecological Provisions, Conservation

Consistent with the intent and stated mandates of this section (SH-3e, SH-16., etc), Lake Management Districts (LMD) should be explicitly acknowleded in this Plan, strongly encouraged, and fiscally supported by WA State and Thurston County via general fund (**tax**-funded) accounts. Our lakes are County resources! Our lakes are State resources! Our lakes are deteriorating! Fees collected by LMD constituents should be used strictly to fund direct boots-on-the-ground efforts such as invasive weed removal. Other uses of LMD funds (e.g., County Administrative costs) should be explicitly forbidden by this SMP, as it has the weight of law. Bottom line: administrative costs to operate the LMDs should be totally borne by Thurston County (General Fund) as the same LMD fee payers who directly support lake stewardship are also **tax**payers. This Plan specifies treatment of government entities as equal participants in its impact so let's levy quid-pro-quo fiscal responsibility for administering LMDs on the government (**tax**payer), not the LMD **fee** payers.

6. 19.400.120B Buffer Widths
   We vehemently disagree with Residential Buffer changes proposed, struck-through, and re-proposed as an option to the existing 50ft. There appears to be no science presented to change the 50ft buffer rule. Such expansion is particularly restrictive to small lakefront lots that pay a premium in taxes owing to "lakefront" tax-assessment designation. Per the SMP, the buffer expansion implies relegation to "non-conforming" status. The existing 50ft buffer caused us considerable home redesign and construction delay ($$) to ensure compliance!!! Now it's going to be 75? Why not an even 100, 200… What is the science?

7. 19.500.100B. 2 Permits
   We agree with the statement that SDPs should not require public hearing.

8. 19.600.160B Moorings and C Standards
   Again, we agree that Public Hearing should not be required per the note. Also, buoys obstruct water-skiing navigation, effectively making the lake smaller for turning high speed boats. Buoys for mooring should not be encouraged for lakes. The moored boat is an issue, as is the buoy itself. If located in 16ft of water (minimum), the buoy and moored boat will be significantly located in the high-speed-turn path of ski boats.

9. 19.600.160B.l
   Full (100%) dock surface replacement should not require a permit. The 50% rule seems arbitrary and basically results in 2 very different dock surfaces (unsightly) and potentially a temporary safety issue for no apparent gain (except to obtain permit fees). Note: this very issue was recorded in letters from the Lawrence Lake LMD Citizens' Advisory Committee as feedback to the DRAFT SMP, dating back to **8 May 20 11**. Letters are available - upon request from the Commissioners. A response was never received.

10. Agree grating should not be required on lakes with no salmon (Lake Lawrence).

11. Dock pile spacing of 20ft is unreasonable and seemingly not supported by any science. It becomes expensive to span 20ft vs 8ft. Also, a citizen should be able to construct a span of 8ft but 20ft spacing would require expensive contractor work and non-standard material lengths. Also see next comment.
12. It is unclear why the existing 8ft wide dock requirement needs to be lessened to 6ft. Standard dock surface material is typically sold in 16ft lengths so a single piece would cover two x 8ft widths. This restriction did not apply in 2006, what is the new science?

13. 19.600.170B.10 Residential Development
    Change "prevention" to "reasonable reduction": '*Single-family residential uses are a priority use only when developed in a manner consistent with control of pollution and reasonable reduction ~~prevention~~ of damage to the natural environment.*
    Rationale: everything damages the environment during construction.

14. Appendix C.5
    The existence of Lake Management Districts (LMD) does not seem to appear anywhere in the list of resources or funded efforts that are in place, pro-active, and reflective of concerned citizen involvement. These entities, as well as Special Use Districts (SUD) should be acknowledged in the SMP, and fiscally supported by State and County government. See related comment 4.

**From:** diani@plauchecarr.com
**To:** SMP
**Subject:** Incoming SMP Comment
**Date:** Monday, May 15, 2023 2:18:12 PM

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**Your Name (Optional):**
Diani Taylor Eckerson

**Your email address:**
diani@plauchecarr.com

**Comment:**
Dear Thurston County Commissioners,

Thank you for the opportunity to comment on Thurston County's Shoreline Master Program (SMP) update. I am submitting these comments on behalf of Taylor Shellfish Company, Inc. (Taylor). Taylor is a family-owned company headquartered in Shelton, Washington and cultivates oysters, clams, mussels, and geoduck in the Puget Sound and other Washington State shorelines. The Taylor family has grown shellfish on Washington shorelines, including in Thurston County, for over 130 years. We appreciate the updated SMP will play a critical role in guiding future shoreline uses and development in the County, including aquaculture, and have actively participated in the SMP update process over the past several years to ensure the SMP protects the environment and fosters aquaculture as a preferred use of statewide interest consistent with state law and policy.

The draft SMP is the result of hard work by the Planning Commission and County staff over many years, including multiple workshops focused on aquaculture. The draft SMP strikes an appropriate balance in addressing a number of interests, is supported by the best available science and consistent with the Department of Ecology's regulations. We recommend moving forward with the draft SMP as proposed.

Sincerely,

Diani Taylor E.

Plauché & Carr LLP
1218 Third Ave, Suite 2000
Seattle WA 98101
diani@plauchecarr.com
406.498.3229

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Time: May 15, 2023 at 9:18 pm
IP Address: 209.63.32.236
Contact Form URL: https://thurstoncomments.org/comment-on-the-proposed-shoreline-code-update/

Sent by an unverified visitor to your site.

**From:** Meredith Rafferty
**To:** County Commissioners
**Cc:** Andrew Deffobis
**Subject:** Testimony, Hearing on SMP Update May 2023
**Date:** Monday, May 15, 2023 3:53:54 PM
**Attachments:** SMP final hearing 2023 Rafferty.pdf

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To the Thurston Board of County Commissioners:

We are homeowners on salt water waterfront of unincorporated Thurston County. We are submitting the attached letter of testimony for the hearing on the Shoreline Management Program update, May 15, 2023.

Thank you for your consideration.

Meredith & Donovan Rafferty
360-754-8510

May 14, 2023

TO: Thurston Board of County Commissioners

We are homeowners and longtime residents of unincorporated Thurston County.

Our home and those of our neighbors are along Thurston County's salt water waterfront and are deeply affected by the County's Shoreline Master Program (SMP). The 200-foot deep SMP jurisdiction covers nearly our entire properties and therefore details the current and future use of our properties.

Living near our vital Puget Sound, we homeowners have a direct interest and responsibility to carry out the program. Fifty-two years after enactment of the Shoreline Management Act of 1971, homes are now in place all along the Puget Sound. Maps of the Thurston Regional Planning Council* show that we in this County are now dealing with existing homes and not undeveloped land, and therefore the role of shoreline homeowners living on their properties is even more important moving forward.

We have participated in this SMP update from its beginnings in 2014. Throughout, we requested ways to (1) support our legal, daily use of our homes as a "preferred use" under the Shoreline Management Act, and (2) promote our environmentally-protective use of homes and yards.

- **In connection with our continued legal use of our homes, there is an outstanding issue**. We request revision of the "nonconforming" wording in the current 1990 SMP. The issue is that being nonconforming makes us vulnerable to mandatory corrective actions because the wording does not spell out the consequences. We were told that the County would not take action against us but in today's world, where legal precedents are over-ruled, it is not prudent for a homeowner to assume anything.

  Therefore, we support the intent of the wording in the current draft of the SMP to state our conforming status. Or, of the options provided by staff, we support the option of "legally nonconforming" throughout the document and a statement that our legal use can continue. We note the Findings of RCW 90.58.620 which state in (3): *Classifying existing structures as legally conforming will not create a risk of degrading shoreline natural resources." [* ***2011 c 323 § 1.****]*

- **In connection with setting the widths of additional buffers and setbacks,** we support the widths recommended by the Planning Commission and refer the Board of County Commissioners to the State Department of Ecology's own technical assistance, "The SMP Handbook" at https://ecology.wa.gov/Regulations-Permits/Guidance-technical-assistance/Shoreline-Master-Plan-handbook.

  Specifically, on page 27, Ecology explains "Buffer sizes, setbacks and development regulations will vary among jurisdictions because they are tailored to local conditions and

the shoreline ecological functions that are present. A buffer that is appropriate for one shoreline is not appropriate for all shorelines." Ecology distinguishes the opportunities for shoreline protection between undeveloped land and land already in use. Ecology tasks us with taking into account the density of coverage, the depth of the lot, and what is to be gained by a deeper, "no-build" buffer if it includes even more existing structures. The task is to apply a number that reflects the conditions.

**We'd like to acknowledge what has worked about this process:**

- The diligent work of the Planning Commission is deeply appreciated. The SMP is 572 pages of detailed regulations and definitions directing any use within its 200-foot deep jurisdiction. In addition, state regulators had comprehensively changed the basis of the regulations for this update. The Planning Commission's consideration was therefore just as detailed to rebuild the manual from top to bottom. They emphasized taking the time to hear and consider input from everyone. Indeed, the Planning Commission's meetings are the only place where we homeowners can participate and "be at the table".

- A result of "being at the table" is in Appendix B(5). There is now a welcome incentive for homeowners to voluntarily restore their properties and receive consideration toward any future mitigation. It is a common practice to think of incentives for businesses, so why shouldn't homeowners be included?

- Another result is the practicality of such details as landscaping content and the simplification of permit procedures. These details are appreciated by homeowners who are on the front line of complying with all these regulations.

These past years of consideration with the Planning Commission have covered a lot of topics based upon pertinent information in an open and inclusive process. We ask your support of the draft SMP update as approved by the Planning Commission.

Sincerely,

Meredith & Donovan Rafferty
Homeowners, Unincorporated Thurston County
360-754-8510

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*"2017 Land Use" map, Thurston Regional Planning Council
https://trpc.maps.arcgis.com/apps/MapSeries/index.html?appid=c59b4a1579d74a8ab24c9bd977058500

| | |
|---|---|
| **From:** | Joe Rehberger |
| **To:** | SMP; Andrew Deffobis |
| **Cc:** | Morava Nelson |
| **Subject:** | SMP Comments (John and Meloyde Cosley - Green Cove/Eld Inlet) (DOCUMENT ATTACHED) |
| **Date:** | Monday, May 15, 2023 4:11:20 PM |
| **Attachments:** | Ltr to A. Deffobis re Shoreline Designations (05.15.23) .pdf |
| **Importance:** | High |

Re: Comments on Proposed SMP Update
Shoreline Designations - Green Cove
Cosley Property - 3125 46th Ave NE (TPN 1293322040)

Please see attached written comments submitted on behalf of John Cosley and Melodye Cosley, Trustees of the Cosley Family Trust concerning the Board of County Commissioner's consideration of shoreline environmental designations. This comment concerns the Cosleys developed residential property located at 3125 46th Ave NE, Olympia, WA (TPN 12933220400) adjacent to Green Cove and Eld Inlet. We ask that these comments be transmitted to the Board of County Commissioners for consideration prior to and at the public hearing. If you have any questions, or require anything further please do not hesitate to contact me.

Please let me know if you have any difficulty accessing or downloading the attached comment letter. Thank you for your and the County's consideration of this issue.

**Joseph A. Rehberger**
Cascadia Law Group PLLC
606 Columbia St. NW, Suite 212
Olympia, WA 98501
Direct Phone: 360-786-5062
Main Phone: 360-786-5057
Fax: 360-786-1835

*This email message may contain confidential and privileged information and is sent for the sole use of the intended recipient. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message.*

May 15, 2023

Cascadia Law Group
ENVIRONMENTAL ATTORNEYS

*VIA EMAIL TO:*
*smp@co.thurston.wa.us*
*deffoba@co.thurston.wa.us*

Shoreline Master Program Update
Thurston County Community Planning and Economic Development Dept.
Attn: Board of County Commissioners
c/o Andrew Deffobis
3000 Pacific Ave. SE
Olympia, WA 98501

Re: Comments on Proposed Shoreline Master Program Update
Shoreline Designations - Green Cove
Cosley Property – 3125 46th Ave NE (TPN 12933220400)

Dear Board of County Commissioners:

This firm represents John Cosley and Melodye Cosley, Trustees of the Cosley Family Trust (the "Cosleys"). The Cosleys own property located at 3125 46th Ave NE, Olympia, WA (TPN 12933220400) (the "Cosley Property") within Green Cove and Eld Inlet which is currently designated Conservancy. The Cosleys respectfully request the Board adopt the Thurston County staff recommended **Rural Conservancy** designation, in lieu of the unsupported and unsubstantiated recommendation of the Planning Commission proposing to redesignate the Cosley Property as Natural. The Cosleys believe in and support environmental stewardship and are committed to preserving and protecting the environmental values of Eld Inlet and Green Cove. However, the Planning Commission's proposed redesignation of their built residential property is inconsistent with the property's historic and current use, would impose burdensome regulations immediately creating substantial non-conforming uses, and would restrict their private property rights creating irreconcilable and unnecessary conflict, and provide no or limited additional environmental benefit. The Cosleys firmly believe the Rural Conservancy, as proposed by County staff, is the most appropriate designation for their property.

**Shoreline Designation**. The Cosley Property is an approximate 9.3-acre parcel that is substantially improved, including a home which has been on-site

for 60 years, outbuildings, and substantial associated landscaping and improvements. Since at least the 1960s, the property was owned and operated by the Barton family and used as an Arabian horse ranch. The prior owners built the existing house, and a barn, and substantially altered the property from its natural state over the course of five decades. Since the Cosleys acquired the property, they have invested significant resources and worked hard to restore the health of many of the native species of trees and repair the property, all while being protective of the environment, with the goal of remodeling and developing their residence there consistent with the Conservancy designation under the current SMP regulations.

Under the Shoreline Rules, chapter 173-26 WAC, in considering any redesignation of property, the rules instruct that such designations "shall" take into account "the existing use pattern." WAC 173-26-211(2)(a).

In this regard, the purpose of the "Rural Conservancy" environment (as proposed by Staff) is "to protect ecological functions, conserve existing natural resources and valuable historic and cultural areas in order to provide for sustained resource use, achieve natural flood plain processes, and provide recreational opportunities." WAC 173-26-211(5)(b)(i). Examples of uses that are appropriate in a "rural conservancy" environment include low-impact outdoor recreation uses, timber harvesting on a sustained-yield basis, agricultural uses, aquaculture, low-intensity residential development, and other natural resource-based low-intensity uses. *Id*. This is the very use that has been and is currently being made of the Cosley Property. As Staff noted, consistent with the SED Criteria supporting Rural Conservancy, parcels (notably including the Cosley Property) are currently accommodating residential uses and the area is further best suited these residential uses and for "low-intensity water-dependent uses without significant adverse impacts to shoreline functions or processes" given "the existing conditions." As such Staff reasonably concluded that the property constituting the Cosley Property "appear to best meet the Rural Conservancy criteria" and "should retain a designation of Rural Conservancy based on development pattern."[1]

In stark contrast to the above, the Shoreline Rules provide that the purpose of the "Natural" environment designation (as curiously and erroneously recommended by the Planning Commission) "is to protect those shoreline areas that are relatively free of human influence or that include intact or minimally degraded shoreline functions intolerant of human use. These systems require

[1] *See* Memorandum, Shoreline Environment Designation Reviews & Background (Mar. 9, 2022).

that only very low intensity uses be allowed in order to maintain the ecological functions and ecosystem-wide processes. Consistent with the policies of the designation, local government should include planning for restoration of degraded shorelines within this environment." WAC 173-26-211(5)(a)(i). As Staff concluded, and as is evident here, this is not an appropriate designation for the Cosley Property. The Cosley Property is and has been privately owned, is not "relatively free of human influence," is not at all an existing undeveloped area currently performing important or irreplaceable "ecological functions and ecosystem-wide processes" that need to be maintained. As such the proposed redesignation to Natural would create an immediate and irreconcilable conflict between the current property uses and the proposed restrictive designation. This is inconsistent with how the County has addressed these designations elsewhere in this SMP update process.

The property has been used historically (going back over 60 years), with significant modifications for its historic use as an Arabian horse ranch, and its current and proposed use as developed private (low intensity) residential property within the shoreline jurisdiction, where there is already a house and there has been substantial grading, fencing, landscaping, and gardening done. The Cosleys are in the process of remodeling the house and plan to make it their home. While the Cosleys are mindful of and sensitive to environmental impacts, the Natural designation is simply inappropriate for this property. They do recognize that the Staff recommended and proposed **Rural Conservancy** designation also places restrictions on their use and development, restrictions that are designed to protect the environment – and are supportive of and have no objection to such designation.

Further, the Rural Conservancy designation would be entirely consistent with Thurston County Comprehensive Plan. *See* WAC 173-26-186(7); *see also* WAC 173-26-191(1)(e); WAC 173-26-211(2)(a). The Cosley Property is currently zoned rural residential (RRR 1/5 – Rural Residential/Resource) which is consistent with the Comprehensive Plan Existing Land Use Map (Residential) and Future Land Use Map (RRR 1/5). The Rural Conservancy designation is most consistent with the County's Comprehensive Plan.

**Planning Commission Process Concerns and Objections**. In addition to the above, the Cosleys have real and significant procedural and substantive process concerns should the Planning Commission recommendation be maintained. Despite regular engagement with County Staff, the Cosleys were blindsided by the Planning Commission recommendation, which was based on inaccurate factual underpinnings, and moved through without any notice to the Cosleys.

First, the Planning Commission's deviation from the thoughtful and reasoned Staff recommendation was based on inaccurate information. The Planning Commission's deviation was based on a singular comment from a single individual who recommended expanding the Natural designation "to be as protective as possible," and erroneously asserting that the area is currently "wild all the way from the creek to the estuary mouth." This is inaccurate. This individual owns no property within Green Cove and owns no property affected by the designation. Further, based on comments made by certain Planning Commission members, the Planning Commission appeared to incorrectly infer and believe that the Cosley Property may have been public and not privately owned (based on its ownership in a family trust) which appeared to influence its recommendation.

Second, the Planning Commission's actions were fundamentally flawed and failed to afford basic notice and due process to the Cosleys (as affected property owners). The Cosleys received no notice that the Planning Commission was considering any redesignation of the Cosley Property. Failure to provide such notice violated the Cosley's basic and fundamental due process rights. *See cf*. *Chevron U.S.A., Inc. v. Hearings Bd*., 156 Wn.2d 131, 138, 124 P.3d 640 (2005) ("due process rights, including the right to individual notice, may be implicated when a property owner's land is uniquely targeted by the government"). Further, had the Cosleys received actual notice of the proposed redesignation targeting their property, they would have appeared and presented at the Planning Commission stage to correct the above erroneous facts relied upon. Instead, the Cosleys had reviewed the proposed SMP designations and were materially in agreement with them (proposing Rural Conservancy). The Cosleys were given no notice that their property was being considered for a change to a Natural designation and had no opportunity to present to the Planning Commission the reasons why such designation was improper and inappropriate.

Finally, if the County were to maintain the Planning Commission's "Natural" recommendation specifically targeting the Cosley Property without justification, and without due (or any) regard for the historic existing built environment and inconsistent uses, and in deviation from the Shoreline Rules, such action raises significant private property, regulatory taking, and substantive due process concerns.

Based on the above, the Cosleys respectfully request the Board reexamine the proposed designation of the Cosley property and either maintain the recommended **Rural Conservancy** designation or otherwise direct staff to

reevaluate this issue, as appropriate, prior to action by this Board. The Cosleys are committed to sound environmental stewardship of their property and Green Cove, balanced against the current developed nature of their property, and the Rural Conservancy designation best accomplishes these objectives.

Sincerely,

Joseph A. Rehberger
Direct Line: (360) 786-5062
Email: jrehberger@cascadialaw.com
Office: Olympia

Enclosure

cc: John and Melodye Cosley

**69**

**From:** mike beehler
**To:** Andrew Deffobis
**Subject:** SMP Public Hearing- Thurston County- comments
**Date:** Monday, May 15, 2023 5:00:41 PM

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Dear Mr. Deffobis

As a former member (and chair) of the Lacey Planning Commission, and Lake Pattison shoreline owner, I wish to submit my comments regarding the BOCC hearing on the SMP update.

I realize the County has spent some years in attempting to arrive at this point in the update process. Having the opportunity to now comment on the update I suggest that a conservative approach be taken in impacting shoreline residents in the County. Specifically, the earlier County Planning staff briefings/open house sessions were well attended by shoreline owners but over time it appeared that input was not being reflected. Even though county planners now appear to be accepting of reasonable language regarding setbacks, status of existing structures, etc., it still seems there is a need to reiterate the concerns held by many shoreline owners.

My property is mostly “natural” in its adjacency to the Lake. A permitted dock, with a hand built path to the dock is the only manmade object along the 150-foot waterfront, All else is natural and untouched. I care deeply for the quality of the lake environment and its adjacent uplands..

The existing setbacks should be maintained, not increased. Given the geology and topography of the property there is no good reason to extend the existing setback. Keep the lake setback at 50’ .

Structures on the lakeside property that are existing, permitted, and included in the taxable value of the property should be considered as “conforming” in the event the structures are within the setback area. To do otherwise is to penalize actions that were allowed prior to any adjustment in the setback provision.

I support the County Planning Commission’s SMP Recommendation Draft.

Thank you, Mike Beehler

**70**

| | |
|---|---|
| **From:** | jacobsoly@aol.com |
| **To:** | SMP |
| **Subject:** | Incoming SMP Comment |
| **Date:** | Monday, May 15, 2023 9:53:52 PM |

**Your Name (Optional):**
Bob Jacobs

**Your email address:**
jacobsoly@aol.com

**Comment:**
Commissioners:

I write as a former board member of People for Puget Sound.

For too long, local jurisdictions have done the minimum to meet state standards. Please don't do that. We need significant setbacks and retained/restored natural shoreline vegetation.

In the case of tributaries to Puget Sound, the future of the Sound itself and its natural fauna (including Orcas) depend heavily on the provisions of SMPs.

I support all comments submitted by Harry Branch, who is an expert in this subject.

Bob Jacobs
360-352-1346

720 Governor Stevens Ave. SE
Olympia 98501

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Time: May 16, 2023 at 4:53 am
IP Address: 97.113.72.120
Contact Form URL: https://thurstoncomments.org/comment-on-the-proposed-shoreline-code-update/

Sent by an unverified visitor to your site.

**From:** avansw2@gmail.com
**To:** SMP
**Subject:** Incoming SMP Comment
**Date:** Monday, May 15, 2023 10:52:45 PM

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**Your Name (Optional):**
Anne Van Sweringen

**Your email address:**
avansw2@gmail.com

**Comment:**
Thurston Environmental Community Stakeholders (TECS)

Black Hills Audubon Society, Sierra Club South Sound, Thurston League of Women Voters, Thurston Climate Action Team, and Thurston Environmental Voters

Honorable Carolina Mejia
Honorable Gary Edwards
Honorable Tye Menser

May 16, 2023

Dear County Commissioners,
Thank you for the opportunity to comment on the Thurston County Draft Shoreline Master Program (SMP) Update. On behalf of the five environmental groups I represent (listed above), please accept our comments on the Thurston County Planning Commission's SMP Update recommendations to the BoCC.
Our comments conform to the online May 18, 2022 planning commissioners' review of the SMP Update and include responses to commissioners' SMP Update comments during planning commission meetings. Our comments are in two parts:

Part I. TECS comments on the Thurston Shoreline Master Program Update
Part II. TECS responses to planning commissioners' comments

TECS supports the Minority Report. Our comments address points raised in the Minority Report.

Citizens of the Thurston Environmental Community Stakeholder groups ask you to consider, support, and include these comments in the county's plans for the final draft SMP update.
Respectfully submitted,
Anne Van Sweringen, Representative
Thurston Environmental Community Stakeholders

Thurston County Draft Shoreline Master Program Update
Public Hearing

May 16 2023

Part I. Thurston Environmental Community Stakeholders (TECS)
Comments

Legend:
19.400.120.B.1. = Reference SMP location (example)
TECS Comment = Thurston Environmental Community Stakeholders' comments

A. Marine Resources Committee
Have CPED establish a Thurston County Marine Resources Committee. The committee would act as a citizens advisory group that would work closely with state and local officials, while promoting public outreach and education. The mission of the MRC would be to address, using sound science, the needs of Thurston County's marine ecosystem. The MRC's focus would be to make recommendations on restoring and protecting county marine ecosystems, their ecological functions, and natural resources. The MRC's job would be to coordinate efforts to implement restoration and conservation projects, and to educate the public. Clallam, Jefferson, San Juan, Snohomish, Grays Harbor, and Island counties all have established MRCs.

B. No Net Loss
To achieve no net loss, the success of the SMP will depend on how the county improves mitigation in the permitting process. The SMP must require an evaluation of whether no net loss of shoreline ecological functions has been achieved. If no net loss has not been achieved, the SMP should be revised to address that failure. How is the county going to address this statement?

The principle of no net loss must be applied to each shoreline development project and individual industrial aquaculture operation on a site-by-site basis. New and existing aquaculture sites with shoreline armoring should record the armoring as a deficit for calculation of no net Loss. No net loss can only be achieved with restoration of vegetation in buffers.

When conducting mitigation sequencing (a negotiated action involving avoidance, reduction or compensation for possible adverse impacts), the county must encourage net gains over net losses in both programmatic (planning-level decisions) and project (site-specific design detailed) actions. Have mitigation measures been successful at protecting or improving conditions?

To ensure no net loss, the SMP Guidelines require the county to track shoreline permits and exemption (WAC 173-26-191(2)(a)(iii)(D)). The county must track measurable, not just descriptive, gains or losses over time to meet the standard of no net loss of shoreline ecological functions or net gain in shoreline functions.

The Thurston Environmental Community Stakeholders and other stakeholder groups would like to see measured totals for no net loss of shoreline ecological functions and net gain from permitted and other county projects. With the advancement of climate change it is critical measured totals are tracked as data at the county level through permitting and other projects.

C. Net Ecological Gain (NEG)
Make NEG mandatory for all new developments. A clear, transparent process for measuring no net loss and net ecological gain would protect the environment and increase public confidence that the county's shoreline master program is being effectively implemented.

On December 1, 2021, I sent a code amendment TECS wrote for the docket to you. CPED staff agreed it was docket material. Then CPED staff told me, haltingly, they are measuring cumulative impacts on shoreline ecological functions - that they are doing it, so my code amendment would not be in the docket. According to my knowledge, they are not doing it. The BoCC must hold CPED accountable for their statements.

The code amendment supports WDFW's NEG Proviso Report, which says, despite the challenges successful implementation may present, NEG is increasingly well-established in international policy and corporate practice.

The WDFW Proviso report says to establish consistent metrics for biodiversity. The proviso also states if we don't, it will eventually happen through existing regulations. Metrics can be designed to provide developers, planners, and ecologists with a means of assessing changes in biodiversity losses or gains from development. The county should be collecting data related to losses and gains in a standardized format that staff anticipates can be easily collected.

D. Permit Review, Tracking
The success of the SMP's net losses and gains will also depend on how the county improves its permit review and tracking systems. How is the CPED permit tracking system going to offer a systematic review process?

Rather than just encouraging net gains at the project level, the county must develop a set of requirements to see that no net loss and net gains are made. The county must develop the Permit Review Timeline into one that achieves no net loss or net gain. The county must track net changes (gain or loss) over time if it is to meet the standard of no net loss. The no net loss standard is intended to stop habitat loss that has occurred and will occur on the state's shorelines over the years. It can become a systematic permit review process and tracking system.

Inventory and Characterization is only part of baseline data. A tracking system will measure a permit's baseline conditions and track net changes in habitats and natural resources over time. A systematic permit review process can generate an accurate assessment of impacts. It can help to avoid unnecessary and un-mitigable impacts. It can allow for the mitigation of unavoidable impacts through a process that includes monitoring. Will the county require monitoring?

What does permit monitoring include? Are permit conditions being tracked to learn if they are being implemented? Implement a monitoring and feedback system for adaptive management and create a central database for baseline survey data. Such a system will prevent significant impacts and improve accuracy and effectiveness. A more quantitative assessment method of

baseline conditions, more robust monitoring and adaptive management are necessary.

We suggest new Policy SH-XX: Conduct, monitor, and maintain baseline analyses of existing ecological functions for water-dependent and water-related development. Partner with tribes, agencies and universities to conduct regular monitoring and adaptive management to determine the loss of shoreline ecological functions and account for cumulative and secondary impacts.

Have the county use general boilerplate conditions of approval as checks on permit compliance for phased projects. The developer then has an incentive to comply before moving on to the next project. Customized staging conditions can effectively tie compensatory mitigation to stages.

(19.700.112C.4. (p144) Advance Shoreline Mitigation Plan, Baseline conditions):
CPED is currently using subjective descriptive narratives, rather than data, to track losses and gains. Can a project's degree of no net loss or net gain be quantified and tracked using descriptors? Can CPED's descriptions be quantified and tracked to show changes over time?

Does CPED or the PRT have a method to accomplish no net loss or net gain that can be measured over time? Can descriptive narratives be quantified to give actual numbers of shoreline habitat (ecological functions or processes) lost or gained over time?

How will cumulative impacts be determined using descriptive methods? Does the county have policies and regulations that ensure no cumulative effects will cause a net loss of shoreline ecological functions? Is CPED collecting data on Cumulative Impacts so CPED will know if it is making progress on no net loss or net gain? One that gives an accurate assessment of SMP impacts and cumulative impact analyses regarding no net loss and net gain?

Ecology's SMP Handbook explains how the county might collect gain and loss data using no net loss indicators. County staff should be aware Ecology is currently replacing the handbook's 15 no net loss indicators. The reason - many indicators are not tied exclusively to the implementation of SMPs and do not meaningfully inform how well the SMP is performing. CPED should coordinate with Ecology on this. The next SMP update is ten years away and Climate Change is happening all around us now. It is high time the county is held accountable.

More quantitative assessment of baseline conditions is needed, particularly for aquaculture and the geoduck aquaculture industry. It may involve extra work initially for the county, but a streamlined system will far outweigh the benefits to the public, environment, and climate change in the long run.

E. Vegetative Conservation Buffers
We urge the county to protect and maintain buffers on riparian and on salt water shorelines, which are threatened by sea level rise. A lake or stream buffer width is critical.

Buffer requirements must be adequate to ensure that wetland functions are protected and maintained in the long term. Buffer widths should be maximized to account for unforeseen effects, including climate change and sea level rise. Climate change and population growth are reducing the effectiveness of existing buffer widths. Smaller widths are not sustainable.

The county must include in the SMP adequate land necessary for critical areas and their buffers. The Reasonable Use Principle in the Critical Areas Ordinance (19.150.250 CAO) is highly protective of environmental functions. Yet in the SMP, the principle has been replaced by Variances. Uphold the CAO principle. Do not replace the Reasonable Use principle with Variances. Are Thurston County Variances actually sent to Ecology for further review and approval/disapproval?

Buffer widths, particularly riparian and marine buffers, are one of the best ways to protect the county's shorelines amidst growth and development. Buffer widths must be maximized to account for Climate Change, Sea Level Rise and flooding. Buffer widths must be standardized in all Shoreline Environmental Designations. A net gain in buffer width means a net gain in ecological functions for all, including water quality and quantity, habitat, and amelioration of climate change.

The county must use SPTH to establish riparian buffer widths. The county must direct cities and local jurisdictions to do the same. Current buffer widths are thought by some to be too subjective for parcels. WDFW developed an objective method to calculate riparian buffer widths called Site Potential Tree Height (SPTH), which takes into account site productivity.

SPTH is defined as tree height at 200 years of age. SPTH sets the width of a riparian buffer at the edge of a stream, river, lake, or other wetland. Widths are based on whether a stream has fish (is fish-bearing) or not. Widths can be adjusted in one of two ways, whichever is greater: 1) a slope's distance from each side of a stream, or 2) by using the number of a site's tree height (based on tree types and site characteristics) on each side of a fish-bearing stream. SPTH will protect both people and ecological functions from Sea Level Rise, a benefit for generations to come.

TCC 24.25.015 Riparian habitat areas - Do not allow current riparian buffer widths to be reduced. If they must, reduce buffer widths only when using the WDFW SPTH tool.

E. Industrial Aquaculture
Industrial aquaculture expansion on tidelands and in estuaries has occurred at a rapid pace in recent years in Natural, Residential, and Urban Conservancy SEDs. Geoduck farms reduce foraging and feeding opportunities for birds during breeding and migration. We would like to see the county develop regulations that severely limit or restrict the expansion of industrial geoduck aquaculture.

Our recommendations are to create environmentally effective development standards for shellfish aquaculture; and include: 1) avoid plastics and micro-plastics, which cause starvation in birds and marine life; 2) restrict the use of plastics in estuaries; 3) avoid estuaries until aquaculture as a disturbance can be understood in the estuarine landscape; and 4) minimize predator control netting to reduce the risk of birds being trapped. Please refer to Phyllis Farrell's comments for more detail.

The Pacific Coast Shellfish Growers Association's Environmental Codes of Practice (ECOP) is misleading; it is written to convince the public that further regulation of the industry is unnecessary. The industry does not use the best available science. WDFW submitted extensive comments on the codes of practice in 2002; they were ignored. Commercial industrial aquaculture expansion in South Sound continues unabated. The county needs to work with WDFW to see that the shellfish growers' code includes environmental procedures and

practices for Puget Sound shellfish, including oysters and geoducks.

The Army Corps of Engineers writes the general Nationwide permits for Shellfish Aquaculture (now called Mariculture). The Corps' 2017 NWP 48 for shellfish aquaculture lacked regulatory requirements. A 2017 Corps Cumulative Impact Analysis stated aquaculture's current methods violate the Shoreline Management Act. However, the analysis was not included in 2017 NWP 48. Since 2021, shellfish aquaculture permits are reviewed as individual permits. Eelgrass and kelp site maps are finally included, however, there is little to no enforcement, monitoring, or tracking.

The industry is now spread throughout Puget Sound, particularly South Sound. As a result, the county needs to include stricter requirements, particularly for geoducks and oysters, in its SMP NOW. It will be another 8-10 years before there is another chance.

It is the county's responsibility to regulate industrial aquaculture because the statewide interest in water-dependent uses is to protect private uses.

We would like to see the county develop regulations that limit or restrict the expansion of industrial geoduck aquaculture.

19.300.105D. (p37) Critical Areas and Ecological Protection - Policy SH-10 Permitted uses and developments should be designed and conducted in a manner that protects the current ecological condition, and prevents or mitigates adverse impacts. In order to reduce the amount of plastic debris entering water bodies in Thurston County, permitted uses and developments are encouraged to limit the use of plastics. Mitigation measures shall be applied in the following sequence of steps listed in order of priority: …
TECS Comment A severe and growing aesthetic and plastics pollution problem has come with the commercial aquaculture industry. Restrict plastics from estuaries. Phase out marine plastics (pvc and netting) used by aquaculture. Please heed this as an early warning.
TECS Comment should must be shall - Climate change requires changes in development design to reach no net loss now;
TECS Comment Encouraging permitted uses and developments to limit plastics will not stop, or minimize, plastic use. Replace encouraged with required. The use of plastic by the aquaculture industry is pervasive, and will only increase with increased industry expansion.

19.600.115B.3.g. (p100) Application Requirements - 3. An operational plan, which includes the following, when applicable should be included if already part of information submitted for another federal or state agency. Methods for predation control, including types of predator exclusion devices;:
TECS Comment Predator control must not involve deliberate killing or harassment of native birds, invertebrates, or mammals. Predator control equipment must be removed as defined within the approved schedule, but no longer than two years after installation.

19.300.130G. (p42) Shoreline Use and Site Planning - Goal: … Policy SH-31 Potential locations for aquaculture activities are relatively restricted by water quality, temperature, dissolved oxygen content, currents, adjacent land use, wind protection, commercial navigation, and salinity. The technology associated with some forms of aquaculture is still experimental and in formative states. Therefore, some latitude should be given when implementing the regulations of this section, provided that potential impacts on existing uses and shoreline ecological functions and processes should be given due consideration. However,

experimental aquaculture projects in water bodies should include conditions for adaptive management. Experimental aquaculture means an aquaculture activity that uses methods or technologies that are unprecedented or unproven in Washington.
TECS Comment Remove the word "should" - "…provided that potential impacts on existing uses and shoreline ecological functions and processes be given due consideration."
TECS Comment Why would CPED not want potential impacts to be considered, particularly with increasing climate change?
TECS Comment All forms of aquaculture need to include conditions for adaptive management. The commercial aquaculture industry's use of shorelines must be consistent with Best Available Science.

19.300.130I. (p42) Shoreline Use and Site Planning - Goal: … Policy SH-33 Aquaculture should not be permitted where it would result in a net loss of shoreline ecological functions and processes, adversely impact eelgrass and macroalgae,…
TECS Comment Limit expansion of aquaculture sites that threaten forage fish habitat.
TECS Comment Prohibit nearshore disturbance caused by shellfish bed preparation.
TECS Comment Remove the word "should" - why would CPED permit aquaculture where it would result in a net loss of shoreline functions or adversely impact eelgrass and macroalgae? If there is doubt, require initial surveys, baseline monitoring, and adaptive management in permit requirements.

19.600.115.B.2. (p99) Aquaculture, Application Requirements - A baseline description of existing and seasonal conditions, including best available information. Where applicable to the subject proposal, the following should shall be included if already part of information submitted for another federal or state agency.
TECS Comment Remove the word "should" - "…provided that potential impacts on existing uses and shoreline ecological functions and processes be given due consideration." Why would CPED not want potential impacts to be considered, particularly with increasing climate change?

19.600.115C.g. (p101) Development standards - Aquaculture shall not be permitted in areas where it would result in a net loss of shoreline ecological functions, or where adverse impacts to critical saltwater and freshwater habitats cannot be mitigated according to the mitigation sequencing requirements of this Program (see Section 19.400.100(A)).
TECS Comment If a private marine lot on an ecological habitat with functions is leased to a shellfish company, how does the county know to stop such a net loss? Require baseline and subsequent monitoring, along with adaptive management for commercial industrial aquaculture.

F. Geoduck Aquaculture (Aquatic SED)
Industrial aquaculture expansion on tidelands and in estuaries has occurred at a rapid pace in recent years in Natural, Residential, and Urban Conservancy SEDs. Our reasons for concern are its adverse effects on marine and estuarine habitat, functions and processes, aesthetics, and health and safety, all of which are detailed in the Shoreline Management Act and Water Pollution Control Act.

Requirements in the updated nationwide permit (NWP48) for aquaculture will not be incorporated into the Thurston SMP for another 6-8 years, we would like to see the county develop policies and regulations that severely limit or restrict industrial/commercial geoduck aquaculture, a water-dependent use, and its expansion, in South Puget Sound.

At four years in one location, industrial geoduck aquaculture is not a non-permanent use. Since the County is issuing permits with no term of lease, when the harvest occurs, the tideland in use will go through the same cycle for an indefinite period of time, making commercial industrial geoduck aquaculture a “permanent” event.

Washington is spending billions to restore salmon, eelgrass, and forage fish in Puget Sound, yet there is a loss of marine or terrestrial habitat and/or life every time a geoduck farm is established. The short and long term nearshore effects on marine ecosystems are potentially great, including effects on the forage fish, salmon, eelgrass, and marine invertebrates. Geoduck farms could realistically reduce populations of herons, eagles, and seabirds and shorebirds by making it harder to forage amid the dense infrastructure. Seabirds and shorebirds, who eat invertebrates from the sand and mud, are being displaced from prime foraging areas that are critical during migration and breeding. Marine invertebrates and sediments are displaced every time an aquaculture farm is established.

The commercial/industrial shellfish industry not only frequently scrapes the beach before planting, but at harvest dredges entire areas to 3 feet in depth. The impact exists. Without question, based on the SMA itself, commercial/industrial shellfish aquaculture alters the natural condition of the shorelines of the state.

G. APPENDIX B: Mitigation Options
The success of this SMP will depend on improved mitigation in the permitting process. Improvements include more effectively quantifying information from environmental baseline conditions. The potential for mitigation to succeed has to be estimated against a baseline.

To achieve no net loss using mitigation, the county must:
Stand firm on avoiding and minimizing impacts and require effective compensation for any remaining impacts, with complete review of all potential impacts.
Honor the required buffers;
Move structures back from buffers for uses that are not truly water dependent. Protect areas with intact vegetation.
Rarely use variances or exemptions; keep as a rare exception rather than the rule.
Ensure developers provide full compensatory mitigation.

The county can prevent net losses from happening by including the following in the SMP:
Carefully design mitigation to replace all ecological functions lost by development or activities. Good designs avoid more rigorous permit requirement follow-up and the need for enforcement of impacts.
Require high enough replacement ratios so mitigation can replace the functions lost.
Make sure mitigation is located in an area in which it can function, and that it is monitored and maintained until it is fully established.

19.300.130 (41) Shoreline Use and Site Planning Policy SH-35, Upland uses and modifications should be properly managed.
TECS Comment Change to, “Properly manage upland uses and modifications…” Define “properly.” Delete should.

19.600.102.4 (p92) General Shoreline Modification Principles - Assure that shoreline modifications individually and cumulatively do not result in a net loss of ecological functions. This can be achieved by giving preference to those types of shoreline modifications that have

a lesser impact on ecological functions and requiring mitigation of identified impacts resulting from shoreline modifications.
TECS Comment The only way to achieve cumulative information is by establishing a system that is monitored and data collected on-site. Is the PRT set up to handle data? The county needs a way to determine if ecological functions have been lost or gained.

19.600.102.4 (p92) General Shoreline Modification Principles - Plan for the enhancement of impaired ecological functions where feasible and appropriate while accommodating permitted uses. As shoreline modifications occur, incorporate all feasible measures to protect ecological shoreline functions and ecosystem-wide processes.
TECS Comment Delete “where feasible.” Impaired ecological functions must always be mitigated for. How does the developer know what those measures are? The county needs to know what they are, and work with developers.

Keep in-kind mitigation measures in-place. In-kind mitigation is typically the best approach to replicate functions that would otherwise be lost. In rare occasions when in-kind mitigation is not possible, the county must require out-of-kind mitigation that can reverse (mitigate for) the impacts of the new development on the specific ecological function within 200 feet.

To assure project mitigation is accomplished, the county must consider using financial guarantees. Financial guarantees have the advantage of assuring developers will complete the mitigation work and submit monitoring reports. Authorize financial guarantees in the code or other regulations. Require estimates, and a binding clause for access to the property. Write conditions for staging, and tie compensatory mitigation to the stages.

B.2.B (p159) Mitigation Standards for Specific Development Activities - Alternative standards for vegetation clearing. Where it can be demonstrated that intact native vegetation outside of the required buffer provides greater ecological function than previously cleared or developed areas within the buffer, permanent retention of the intact native vegetation outside of the buffer may be allowed as an alternative, consistent with the vegetation replacement ratios listed above. Such areas may require a conservation easement and shall be recorded under a notice to title, and marked with standard buffer signage.
TECS Comment If the buffer was previously cleared, mitigation should focus on reestablishing the buffer. Intact native vegetation outside the buffer should not be used as alternative mitigation. The buffer should be a priority, since it would need to be restored to function effectively.

Thurston County Draft Shoreline Master Program Update
Public Hearing

May 16, 2023

Part II. Thurston Environmental Community Stakeholders' (TECS)
Responses to planning commissioners' comments

Legend:
19.400.120.B.1. = Reference SMP location (example)
PC Comment = Planning Commissions' comments/options
TECS Comment = Thurston Environmental Community Stakeholders' comments

19.400.120.B.1. (p56) Vegetative Conservation Buffers, Buffer widths, Standard Buffer - Each shoreline environment designation shall have a starting, or standard, buffer as measured landward from the OHWM. This buffer shall be adhered to unless otherwise allowed as described in the Reduced Standard Buffer provisions below or other critical area buffers are required. The Standard Buffers for each environment designation are as follows: [See table, original and currently proposed buffer widths].
PC Comment Option for Public Hearing: Consider the use of the originally proposed buffers, in strike-out above.
TECS Comment NO, use WDFW's SPTH, particularly for undeveloped land.
Proposed buffer widths in designated areas, including Shoreline Residential, may not protect landowners from increased floods. With climate change, buffer widths in many designations are not sustainable to support ecological functions. Along with increased flooding, droughts, and population growth, how can the county afford to require buffer reductions?

PC Comment Also see Public Hearing Option language in Appendix B, section B.2.C. regarding parameters for decks to be considered pervious surface.

19.500.075 (p75) Permit Provisions, Review and Enforcement, Permit Types Definitions - Applications for review of permit types or actions listed in Table 24.05-1 TCC shall be subject to a Type I, Type II, Type III, IV, or Type V review process. The application types are classified as follows [A.Type I - E. Type V]:
PC Comment "Planning Commission Option: Consider recommending Substantial Development Permits, Conditional Use Permits and Variances are processed administratively. Staff note: This will require changing paragraph E above, as Type V process would then be more similar to a Type I or Type II, because Type III processes require Hearing Examiner approval in County Code."
TECS Comment Do not change paragraph E. Type V. There needs to be an option for

Ecology's conditions that may be critical and necessary for SDPs, CUPs, or Variances. Do not process all permit types administratively. There needs to be a permit type that involves a Hearing Examiner decision, particularly when a project requires substantial discretion and has broad public interest. The SMA states, "coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest."

19.500.100 B.2. (p77) Permit Application Review and Permits, Substantial Development Permit - A SDP shall be classified as a Type III permit review under Chapter 20.60.020 TCC. Where Administrative SDPs are allowed, they shall be classified as a Type I permit review under Chapter 20.60.020 TCC, or a Type II if SEPA is needed.
PC Comment "Public Hearing Option: Consider making SDPs either a Type I (if SEPA is not required), or Type II permit (if SEPA is required). This option would remove the requirement for SDPs to undergo a public hearing before the Hearing Examiner, though public notification requirements of Type I and II permits would remain. Decisions on SDPs would be made by staff under this option."
TECS Comment Add, after new language (in pink) (from the guidelines): Conditions may be attached to the approval of permits as necessary to assure consistency of the project with [the act and] the master program.
19.600.150A: (p116) Industrial Development, Environment Designations Permit Requirements - Where industrial development is proposed in the following designations, the identified permit requirements shall apply.
PC Comment Note: The Planning Commission is interested in public testimony regarding in which designations industrial development should be allowed. Options under consideration include prohibiting these uses in either or both the Shoreline Residential and Urban Conservancy SEDs (the draft currently allows them), and allowing these uses in the Rural Conservancy SED (the draft currently prohibits them). Industrial development will be subject to development standards in the draft in any designations where it is an allowed use.
TECS Comment Industrial geoduck aquaculture in Shoreline Residential or Urban Conservancy SEDs is not in the general public interest for visual, safety, or protection of reasons. It does not support no net loss of ecological functions.

19.600.160A.1.a. (p119) Mooring Structures and Activities, Environmental Designations Permit Requirements - When mooring structures are proposed in the Aquatic designation and are adjacent to the following upland designations, the identified permit requirements shall apply.
1. Natural: a. Single use and joint/public use docks (marine water): Prohibited
PC Comment Option for Public Hearing: Consider allowing docks in the Natural environment of lakes and marine shorelines.
TECS Comment Docks must continue to be Prohibited in the Natural SED of all lakes and marine shorelines. The Natural SED continues to shrink with each SMP update and periodic review. Adding structures such as docks increases the loss of shoreline ecological functions, thus reducing the size of the county's Natural SED area.

19.600.160B.8. (p120) Mooring Structures and Activities, Application Requirements - In addition to the general permit requirements, proposals for mooring structures shall include the following: Demonstration that alternative types of moorage, including buoys, are not adequate or feasible;
PC Comment Option for Public Hearing: Strike requirement to consider alternative moorage prior to allowing piers and docks.

TECS Comment The August 10 SMP draft wording for moorage is acceptable.

19.600.160C.1.p. (p122) Mooring Structures and Activities, Development Standards - New covered moorage, over-water boat houses, side walls or barrier curtains associated with single family residential moorage are prohibited in the Natural environment. When covered moorage and covered watercraft lifts are replaced, the replacement structures should use transparent roofing materials that are rated by the manufacturer as having 90% or better light transmittance.
PC Comment Option for Public Hearing: Consider whether covered moorage should be permitted for commercial and industrial uses. This would need to be included in the cumulative impacts analysis.
TECS Comment No, prohibit commercial and industrial covered moorage in Natural and Rural Conservancy. Transparent roofing would not allow light to reach the water surface through boats or other impervious structures underneath, severely affecting aquatic vegetation, life, and shoreline functions.

19.600.160C.1.r. (p122) Mooring Structures and Activities, Development Standards - In marine waters and salmon-bearing lakes, functional grating resulting in a total open area of a minimum of 24% must be installed on piers and floats which are new or greater than 50% replacement. This can be achieved by installing grating with 60% open area on at least 40% of the pier or by grating a larger percentage of the pier with grating with openings of less than 60%. Exceptions to these standards may be permitted where need is demonstrated and when approved by the U.S. Army Corps of Engineers.
PC Comment Option for Public Hearing: Strike requirement for grating on lakes that do not contain salmon.
TECS Comment Keep the requirement for grating on lakes. The Hydraulic Code (WAC 220-660-140) (https://apps.leg.wa.gov/wac/default.aspx?cite=220-660&full=true#220-660-140) (3)(iv) says: The department [WDFW] will require residential pier, dock, ramp and float designs to include grating… (2) Fish life concerns: (a) Over-water and in-water structures can alter physical processes that create or maintain habitat that supports fish life. These processes include light regime, hydrology, substrate conditions, and water quality. However, light reduction is a main impact to fish life at critical life stages. Light reduction, or shading, by over-water or in-water structures reduces survival of aquatic plants. Aquatic plants provide food, breeding areas, and protective nurseries for fish life.

19.600.160.C.5. (p126) Mooring Structures and Activities, Development Standards, Floats
PC Comment Option for Public Hearing: Strike requirement for grating on lakes that do not contain salmon.
TECS Comment Keep the requirement for grating on lakes. The Hydraulic Code (WAC 220-660-140) (https://apps.leg.wa.gov/wac/default.aspx?cite=220-660&full=true#220-660-140) (3)(iv)…(see 19.600.160C.1.r. above)

Appendix B.4.C. (p162) Mitigation Options to Achieve No Net Loss…, New and Replacement Overwater Structures… - For dock additions, partial dock replacements, or other modifications in marine waters and salmon-bearing lakes, replace areas of existing solid over-water cover with grated material or use grating on those altered portions of docks if they are not otherwise required to be grated. PC Comments Public Hearing Option: Do not require grating for waterbodies that do not support anadromous fish, such as salmon.
TECS Comment Include all waterbodies. The Hydraulic Code (WAC 220-660-140) (https://apps.leg.wa.gov/wac/default.aspx?cite=220-660&full=true#220-660-140) (3)(iv)

(see 19.600.160C.1.r. above)

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Time: May 16, 2023 at 5:52 am
IP Address: 67.168.186.44
Contact Form URL: https://thurstoncomments.org/comment-on-the-proposed-shoreline-code-update/

Sent by an unverified visitor to your site.

**From:** Linda Wolfe
**To:** Andrew Deffobis
**Subject:** LMD Long Lake
**Date:** Monday, May 15, 2023 8:20:54 PM

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Andrew, I am in favor of the latest changes that the commissioners have seen. I am NOT in favor of most of the Minority report. I am also appalled that the Minority report is still being considered since it was turned in after the deadline. If we would have done that any report would have been thrown at as it was Passed the deadline.
My neighbors have been working hard to take very good care of Long Lake. We live here and want what's best for our front yard, so we always do what's best for us.... which makes a better lake for the whole community..... even though the community does NOT follow the speed rules, causes loud noises and uncivil language, and will litter without a care!
So please vote with the Long Lake Management District.
Thank you for your time.
Linda and Mike Wolfe
7402 20th Ave SE, Lacey, WA 98503

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Linda Wolfe
hm 360-491-7593
cell 360-701-5056

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|---|---|
| **From:** | Esther Grace Kronenberg |
| **To:** | Andrew Deffobis |
| **Cc:** | Tye Menser; Carolina Mejia-Barahona; Gary Edwards |
| **Subject:** | Comments on proposed Shoreline Master Plan |
| **Date:** | Tuesday, May 16, 2023 1:33:19 AM |
| **Attachments:** | Petition to Governor&Att. 42623.pdf<br>CASE-City of Olympia v. Thurston County 2005.pdf |

Dear Thurston County Commissioners and Planning Staff,

We submit the following comments on the Shoreline Master Plan (SMP) as Thurston County residents and Co-Petitioners of a Petition to the Governor asking for the repeal of WAC 197-11-350, the Mitigated Determination of Nonsignificance (MDNS) regulation that the County used here for this SMP, which we have hereto attached and submitted to the record.

Given the available alternatives you are now considering, we urge you to adopt the recommendations of the minority report. A functioning SMP is long overdue. But despite the large amount of work that has been done to put together this SMP, it is not enough. We also urge you to consider the SMP for further review in the Comprehensive Plan update, as it is not based on actual data and there has not been an EIS done to legally identify the impacts from its adoption. An EIS is necessary to analyze the full range of environmental impacts, as noted in RCW 43.21C.

The County is obligated to follow RCW 43.21C and federal law in this regard. 33 USC 1251 states toxic pollutants be eliminated from navigable waters by 1985. Judge Pechman of the United States District Court, Western District at Seattle, recently ruled in Northwest Environmental Advocates vs EPA that the Department of Ecology and the EPA were in violation of the federal Clean Water Act by not enforcing updated water quality standards to protect aquatic life in Puget Sound from toxic chemicals. (Case No C20-1362MJP)

The NPDES permit regarding the Endangered Species Act also notes that impacts from any developments, such as stormwater runoff and sewage must also be considered under cumulative effects.

Neither of these issues is mentioned in the current SMP because it is not based on any analysis of actual scientific data. The County did not even consider changes that have occurred since its own 2013 inventory and characterization of the shoreline in this SMP. Instead it intends to begin baseline monitoring for no net loss upon its adoption, some 52 years after the passage of the Shoreline Management Act.

Does the County not want to know how much of our shorelines and water bodies have already been lost or damaged? The baseline starts **now** for measuring no net loss without accounting for what has happened even in the last 10 years? How does tracking cumulative impacts on a project by project basis, as the County plans to do, conform to the intent of the Shoreline Management Act to "prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines." And is there a dedicated and sufficient funding source and personnel available for this proposed tracking?

RCW 43.21C, the State Environmental Policy Act (SEPA) requires that mitigations be identified by an Environmental Impact Statement (EIS) before an MDNS can be issued. How did the County legally identify the impacts to mitigate here? Where is the data? What environmental factors were considered? Were climate change, species extinction, increased development, pollution and traffic, effects on the strategic groundwater reservation, etc. considered? Did it consider indirect impacts to habitat and water quality? Obviously the answer is no.

RCW 43.21C.031(1) states "An environmental impact statement…**shall** be prepared on proposals for legislation and other major actions having a probable significant, adverse environmental impact.' Clearly,

the SMP, which concerns critical shoreline areas and which includes substantive mitigations, is such a proposal, notwithstanding the contrary statement of the Planning Department..

SEPA requires more than just asserting that future compliance with existing laws and regulations will provide sufficient mitigation. It requires project specific review of impacts, and if the impacts are probably significant, SEPA requires adequate mitigation or further analysis in an EIS. As Earthjustice wrote in its May 5, 2023 Hearing Examiner appeal of the MDNS issued to Bridge Industrial for a large warehouse development in Pierce County, "the City cannot rely on … future regulatory processes to mitigate project specific impacts." (FILE NO. LU21-0125)

The County's procedural process in making this SMP is flawed. It lacks data to factually support any proposed mitigations that are not legally identified in an EIS, effectively putting the "cart before the horse."

If we can see it is wrong, so can the development community and others who are paying for these mitigations that have no legal basis. Will the County's interpretation of SEPA hold up in Court if challenged?

We note that the County has only done one single project level EIS (for the Holroyd mine) since 2005 while issuing over 600 MDNSs in that same time period. Considering the County has not done any EISs, there likely is no one on staff that even knows the process. What are the cumulative impacts of more than 600 MDNS determinations that were not monitored or analyzed for the full range of their cumulative environmental impacts? It is clear the County is subverting the intent of SEPA and the SMA by foregoing the EIS process as stipulated in RCW 43.21C.

The County also acts in contradiction of a 2005 Court of Appeals case to which it was a party - *City of Olympia vs. Thurston County Board of County Commissioners, (87 131 Wn. App. 85 (2005)* - which found that an MDNS, which is a substantive SEPA decision containing mitigations, must be issued **after** a threshold determination and an EIS has been made.

We suggest that the County hire an outside attorney to review its SEPA procedures. Mr. Tunheim's membership in the Chamber of Commerce violates the Appearance of Fairness Act, as noted in *Save a Valuable Environment vs. Bothell, (89 Wn.2d 862 (1978) 576 P.2d 401))* and it appears his legal advice violates SEPA law and sanctions lax development regulations that favor development interests at the expense of the public health and the integrity of our ecosystem.

We attach our Petition to the Governor to repeal the MDNS regulation, WAC 197-11-350, for the record along with the *City of Olympia* case.

Thank you for your consideration.

Esther Kronenberg and Jerry Dierker

Before the Washington State Governor

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|---|---|
| Jerry Lee Dierker Jr., & Esther Grace Kronenberg Petitioners/Appellants; vs. Washington State government, by and through its Department of Ecology (DOE), DOE Deputy Director Heather Barrett, DOE's SEPA Policy Lead Fran Sant, DOE's Program Manager of Shorelines &. Environmental Assistance Joenne McGerr, DOE's unknown named advising attorney of the Attorney Generals Office, Office of Financial Management, and their other unknown named agents, officials, employees, contractors, persons, and/or. organizations acting on behalf of and/or. acting in concert, collusion and/or conspiracy with the above "named" Defendants/Respondents (Bivens), Defendants/Respondents. | Case No. _____<br><br>Petition for Review |

## Introduction

Comes now Petitioners/Appellants Jerry Lee Dierker Jr. and Esther Grace Kronenberg, make this Petition for Review to Governor Jay Inslee, requesting review of certain SEPA Rules, et seq., made by the Defendants/Respondent Department of Ecology, et al. See the administrative Petition for Review of SEPA rules, acting here pursuant to the Washington's State Environmental Policy Act's (SEPA) "Rules" statutes at RCW 43.21C.110(3) and RCW 43.21C.120(2) that reviews of SEPA rules are to be done pursuant to RCW 34.05.240(1) the Washington State Administrative Procedures Act's (APA) "Declaratory Orders - Petitions" statute governing such "adjudicative proceedings" conducted by the supervising Executive of the "Executive Branch" of the Washington State government as noted by the facts and law within the relevant agency record in this case, in our prior-relevant pleading, and in evidence of official and judicial notice supporting our claims.

## Jurisdiction

As noted above, Washington State Governor Jay Inslee has jurisdiction to consider this Petition for Review (a type of Writ of Certiorari under fundamental Common Law rights) by acting pursuant to the State Legislature's wording of Washington's State Environmental Policy Act's (SEPA) "rules review" statutes RCW 43.21C.110(3) and RCW 43.21C.120(2), requiring that reviews of SEPA rules are to be done pursuant to the Administrative Procedures Act's RCW 34.05.240(1) Declaratory

Orders and Petitions governing adjudicative proceedings, for the Governor's conducting of an adjudicative proceeding on our Petition for review of the complained of DOE SEPA rules and DOE's related relevant decisions, actions, and/or failures to properly act, et al.

Further, this Petition for Review also requests direct and/or "appellate" de novo review of DOE's attached relevant SEPA rules decision denying our Petition for Review of DOE's unlawful SEPA rule WAC 197-11-350 Mitigated Determination of Non-Significance (MDNS) and rules review policies, et al., noted herein Petitioners' current and previous pleadings in this matter, where we argued that DOE's SEPA MDNS rule is clearly prohibited by SEPA's Appeal statute RCW 43.21C.075(3)(a) and (b), and argued that DOE's repeatedly false and unlawful ultimatum that the Petitioners' must file their Petition for Review of DOE's MDNS rule under the APA's RCW 34.05.330, under OFM direction, is in direct violation of the wording of SEPA's Rules review statutes.

However, DOE's own later Emails admitted that DOE's decisions under RCW 34.05.330 are merely "advisory" in nature and DOE claims such DOE SEPA Rules decisions and actions, et al., cannot be reviewed by the Courts because DOE claims RCW 34.05.330 is not an adjudicative proceeding because it is not located within the APA's "Adjudicative Proceedings" section of that statute, and thereby, under DOE's legal argument such DOE rules petition decisions can only be a DOE "advisory opinion," and thereby, pursuant to SEPA's Rules statutes' SEPA rules review requirements, and pursuant to the APA's RCW 34.05.240(1), the Governor has jurisdiction to consider our Petition for "appeal" review of DOE's actions and decision denying our previous request that DOE still continues to falsely claim must be inadequately "reviewed" under RCW 34.05.330, especially when DOE admits DOE's decisions under RCW 34.05.330 are not enforceable and DOE provides no procedural administrative due process "adjudicative proceedings" for DOE's consideration of SEPA rule Petitions for Review that DOE falsely forced us to file under RCW 34.05.330, which results in merely an unenforceable "advisory" DOE decision which directly violates SEPA Rule statutes. See also RCW 34.05.330(3); and see DOE's relevant Emails, Decision, etc.

Further, since the complained of improper DOE rules, policies and related actions noted in the Petition here are continuing "issues of law" which continue to harm Petitioners and others now and which will continue to us and others in the future if not stopped by Gov. Inslee, any of our pleadings contesting such continuing issues of law that harm us has no "statute of limitations" preventing our filing and getting proper consideration of our petitions being such issues of law which we can continue to file up to the reconsideration of an U.S. Supreme Court appeal Decision of this decision that we could file in the far future with the U.S. Supreme Court.

Consequently, the Governor has legal and subject matter jurisdiction to consider this Petition for Review of all of these related matters consolidated in this Petition.

**Parties**

The above named Petitioners/Appellants are those parties requesting review of of SEPA rules made by the above noted Defendants/Respondents of the Washington

State Department of Ecology (DOE) who are named in DOE's "agency record" of our and DOE's recorded phone conferences, Voice mails, Emails and DOE's "Snail mailings" to and from the above named Petitioners/Appellants comprising the agency record for DOE's final agency Decision on our prior Petition for review of DOE's SEPA rules noted in this Petition for Review of DOE's relevant decisions and continuing use of unlawful rules and actions noted in the evidence of official and judicial notice within DOE's agency records and noted in and or attached to our inquiries and requests for action to correct DOE's unlawful actions and/or failures to properly act pursuant to the controlling laws that Petitioners/Appellants pleadings have complained about to DOE during this controversy concerning whether or not DOE will follow the wording of the Washington's State Environmental Policy Act's (SEPA) "rules" statutes RCW 43.21C.110(3) and RCW 43.21C.120(2), the SEPA Appeal statute RCW 43.21C.075(3)(a) & (b), the Administrative Procedures Act's RCW 34.05.240(1) Declaratory Orders and Petitions and of the Washington State and U.S. Constitutions as noted by our prior pleadings, incorporated by this reference hereinto these pleadings requesting that the Governor review these matters which are the subject of our claimed controversy which has specially harmed and continues to specifically harm the fundamental, civil and constitutional rights of the Petitioners/Appellants, and also harmed and continues to harm the fundamental, civil and constitutional rights of the public at the same time. This must stop and the Governor must act to protect us and the public from DOE's improper unauthorized actions and/or failures to properly act taken by DOE's direct violations of law noted here, absolutely requiring the Governors' Declaratory Order we are requesting pursuant to RCW 34.05.240(1), which must not be merely some "advisory" order which does not absolutely require DOE to follow the law the way the State Legislature has written those laws, and not based upon any improper DOE actions or failures to legally act, like has occurred in our previous Petition for Review ("Writ of Certiorari") unlawfully denied by DOE on this matter, another subject which must be considered by the Governor when conducting this adjudicative proceeding pursuant to law.

We also include the Office of Financial Management (OFM) as a necessary party under RCW 34.05.240(3) and (7) and Civil Rule 19 since, as DOE's Email from April 18, 2023 notes, OFM created the process to use RCW 34.05.330 for review of SEPA regulations instead of following SEPA statutes RCW 43.21C.110 (3) and RCW 43.21C.120(2) which require review of SEPA rules to be done under RCW 34.05.240, not RCW 34.05.330 as the form that DOE used states.

Consequently, the "named" Defendants/Respondents in this case includes Washington State government, by and through its Washington State Department of Ecology (DOE), DOE Deputy Director Heather Barrett, DOE's SEPA Policy Lead Fran Sant, DOE's Division of Shorelines and Environmental Assistance Program Manager Joenne McGerr, their unknown named attorney from the Attorney Generals Office who DOE's Email falsely advised DOE's agents and officials, OFM, and other unknown named agents, employees, contractors, persons and/or organizations acting in concert, collusion and/or conspiracy with the "named" Defendants/Respondents noted in the

heading of this case above pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, (403 U.S. 388, 91S.Ct. 1999, 29 L. Ed. 2d 619, 1971).

**Request for Relief**

Petitioners request the following relief.

1) That, pursuant to RCW 34.05.240(5)(a), in a Declaratory Order Gov. Inslee must summarily grant in full our Petition for Review finding that SEPA's MDNS rule WAC 197-11-350 has no SEPA statutory basis and it therefore is unlawful and void on its face for this reason, and/or find that the State Legislature's specific wording of SEPA's Appeal statute RCW 43.21C.075(3)(a) & (b) absolutely prohibits SEPA's MDNS rule WAC 197-11-350 and it therefore is unlawful and void on its face for this reason;

2) That, pursuant to RCW 34.05.240(5)(a), Gov. Inslee summarily grants fully our Petition for Review, and find that DOE's unlawful and illegal "policy" that DOE could hound us into filing our prior DOE Petition for Review of SEPA's MDNS rule, WAC 197-11-350, case under the APA's RCW 34.05.330, and find DOE's claims here to be without any SEPA statutory basis and is therefore unlawful and void on their face for this reason alone, and/or find that DOE's claims were false and unlawful since the Legislature's wording of SEPA's Rules statutes at RCW 43.21C.110(3) and RCW 43.21C.120(2) clearly require that such a review of SEPA rules is to be done pursuant to RCW 34.05.240, NOT RCW 34.05.330, and as such, this DOE "policy" is prohibited by SEPA statutes, and this DOE policy therefore is unlawful and void on its face;

3) That the Governor further finds that the pleadings of the Petitioners have noted that numerous other State and Federal rules, statutes, constitutional provisions, and fundamental common law standards on administrative procedural due process petitions submitted to the government for redress of grievances clearly show that the complained of DOE unlawful rules, policies, and actions in this case clearly violate all such provisions of law to unlawfully and unconstitutionally "abridge" our rights to petition the government in a due process proceeding to protect our rights and other property from the harm caused by DOE's unlawful actions complained of here, and;

4) Further, consistent with the findings noted above, the Governor must make a Declaratory Order ordering DOE to remove SEPA's MDNS rule WAC 197-11-350 from the SEPA rules in the Washington State Administrative Code (WAC), order DOE to cease using their unlawful SEPA rule review Petition policy under RCW 34.05.330, require DOE to amend that SEPA rule review policy to make it consistent with SEPA's "rules" statutes RCW 43.21C.110(3) and RCW 43.21C.120(2) and consistent with the APA's RCW 34.05.240, and require DOE under RCW 34.05.240(4) to make proper adjudicative proceedings rules consistent with the APA's RCW 34.05.410 through 34.05.494 for such adjudicative proceedings necessary for a proper consideration of Petitions for Review of SEPA rules in the manner prescribed by law, which must be done within 30 days of the receipt of our Petition under RCW 34.05.240(5)(a).

In the alternative, if Gov. Inslee does not believe such a summary judgment type of decision can be used in this case, pursuant to RCW 34.05.240(5)(b), we request that Gov. Inslee make a procedural scheduling order setting this matter for specified

proceedings to consider our Petition for Review to be held no later than ninety days after receipt of the Petition for proper adjudicative proceedings for consideration of our Petition here, and Gov. Inslee should grant our Petition, the relief noted above and any other appropriate relief he deems necessary and reasonable to relieve the harm caused to us by these complained of actions of the State government official and/or employees , et al., noted herein this case.

**Rules, Statutes, Standards of Review, Application, and Argument**

Pursuant to the Washington's State Environmental Policy Act's (SEPA) "rules" statutes RCW 43.21C.110(3) and RCW 43.21C.120(2), administrative reviews of SEPA rules made by the Washington State Department of Ecology (DOE) are to be conducted pursuant to the Administrative Procedures Act's RCW 34.05.240(1) Declaratory Orders and Petitions governing adjudicative proceedings.

Pursuant to RCW 34.05.240(1), as the supervisory head of all State "executive branch" agencies including DOE, the current Washington State Governor, Jay Inslee, clearly has jurisdiction to consider this Petition for Review of DOE SEPA rule WAC 197-11-350 titled Mitigated Determination of Non-Significance (MDNS), concerning an actual controversy arising from the uncertainty created by DOE's complained of improper actions to create in 1983 and to continue to maintain the false legitimacy of the SEPA MDNS rule as a "third" SEPA "threshold determination" rule directly prohibited by the State Legislature's 1983 adoption and continuing legislative acts supporting this prohibition in subsequent changes to SEPA's Appeal Statute RCW 43.21C.075(3)(a) & (b), despite DOE's continuing unlawful agency actions related to that SEPA rule and the relevant controlling SEPA statutes, and the RCW 34.05.240(1) Declaratory Orders and Petitions governing adjudicative proceedings for review of DOE's agency SEPA rules actions, et seq.

Petitioners' current and previous pleadings in this matter argued DOE's SEPA MDNS rule is clearly prohibited by SEPA's Appeal statute RCW 43.21C.075(3)(a) and (b), and argued that DOE's repeatedly false ultimatum the Petitioners' must make and file their Petition for Review of DOE's MDNS rule pursuant to RCW 34.05.330, when DOE's own Emails show that decisions under RCW 34.05.330 are merely advisory in nature and DOE even claims such decisions cannot be reviewed by the Courts because DOE claims RCW 34.05.330 is not an adjudicative proceeding because it is not located with the APA's "Adjudicative Proceedings" section of that statute, and thereby, under DOE's legal argument, such DOE rules petition decisions can only be a DOE "advisory opinion", pursuant to SEPA's Rules statutes' SEPA rules review requirements and the APA's RCW 34.05.240(1). We only recently learned that a change in state government policy has apparently occurred which OFM is responsible for, according to DOE, which caused DOE to require us to use RCW 34.05.330 instead of RCW 34.05.240 which SEPA rules statutes, RCW 43.21C.110(3) and RCW 43.21C.120(2) require SEPA rules to be reviewed under. Possibly, SEPA's rules statutes require a higher level of due process protection for review of SEPA rules made by the state and/or local agencies. Possibly OFM did not realize that SEPA rules statutes do not allow the use of RCW

34.05.330 for SEPA rule review. While there could be some legitimate reason for not conducting reviews of other agency rules unrelated to SEPA which come from statutes other than SEPA, though SEPA is supposed to be considered when any laws are made in the state, we are unaware at this time of what kind of rule or regulation could be made without going through a SEPA process whose non-project review would be controlled by SEPA's statutes, although there could be some. Clearly, OFM had no authority to require DOE to violate SEPA's rules statutes that use RCW 34.05.240 for reviews of SEPA rules. See DOE's relevant Emails.

Clearly, the above shows that there exists an actual controversy arising from the uncertainty created by DOE's improper actions and order complained of here, which adversely affects the Petitioners, where the adverse effect of this uncertainty on the petitioners far outweighs any adverse effects on others or on the general public that may arise from the order requested here, which we believe show that the Petition here reasonably complies with agency requirements for Petitioners' proper exercise of their fundamental constitutional rights to make such due process petitions to gain redress of grievances which "shall never be abridged" pursuant to Article I Section 4 of the Washington State Constitution and shall not be abridged pursuant to the First Amendment to the U.S. Constitution, as well as under the SEPA's rule review statutes and the APA's RCW 34.05.240(1) here.

However, we do note that though we have attempted to contact both DOE and the Governor about any "additional rules" created under RCW 34.05.240(2) for making this Petition, we have received no proper responses to our requests for this information. Any claim by DOE that Petitioners must file their Petition for Review of DOE's SEPA rules under RCW 34.05.330 does not comply with SEPA's Rules statutes RCW 43.21C.110(3) and RCW 43.21C.120(2), and/or does not comply with fundamental principles of procedural due process to make such due process petitions to gain redress of grievances which "shall never be abridged" pursuant to Article I Section 4 of the Washington State Constitution and shall not be abridged pursuant to the First Amendment to the U.S. Constitution. Obviously, DOE has no authority under SEPA to use RCW 34.05.330 to review SEPA rules, and it would violate SEPA to do so. See In Re Obert Myers, 105 Wn. 2d 257 (1986).

As our previous Petition's pleadings to DOE within DOE's agency record on this matter and those in this Petition clearly show, our arguments concern the applicability to the specific circumstances of a rule or statute enforceable by DOE here showing that uncertainty exists in DOE's relevant actions and decisions complained of here, necessitating resolution of this uncertainty by the Governor since that uncertainty arising from DOE's apparently unlawful or otherwise improper actions and/or decisions have adversely affected the Petitioners in a manner that outweighs any adverse effects on others or the general public that may likely arise from the Governor's Declaratory Order we have requested from the Governor in our current Petition and our prior pleadings showing this controversy.

Further, as noted, this Petition for review of DOE's SEPA MDNS rule also includes a request for the Governor to review the controversy arising from DOE's repeated false claims that Petitioners were required to file such Petition for Review of

DOE's SEPA rule WAC 197-11-350 under RCW 34.05.330 that DOE falsely claims is not an "adjudicative proceeding" which must follow the procedural administrative due process requirements under RCW 34.05's "adjudicative proceedings" section just because RCW 34.05.330 is not in RCW 34.05's "adjudicative proceedings" section, which is absurd in light of the fact that RCW 34.05.240 is also NOT in RCW 34.05's "adjudicative proceedings" section yet RCW 34.05.240(8) specifically states, "A declaratory Order has the same status as any other order entered in an agency adjudicative proceeding". See DOE's relevant attached emails.

Clearly, such false claims by DOE have repeatedly mislead the Petitioners in this case, and DOE has also apparently been misleading the public and others as to our and their statutory rights to file under RCW 34.05.240(1) for a Petition for review of DOE's unauthorized SEPA rules like WAC 197-11-350 in an agency adjudicative proceeding resulting in a Declaratory Order, as required by law pursuant to RCW 43.21C.110(3), RCW 43.21C.120(2), RCW 34.05.240, Article I Sections 3 and 4 of the Washington State Constitution, and the First Amendment of the U.S. Constitution, et seq. et al.

Further, pursuant to SEPA's "rules" statutes RCW 43.21C.110(3) and RCW 43.21C.120(2) and under RCW 34.05.240(1), since DOE has repeatedly falsely claimed up to April 18, 2023 that Petitioners were required to file their Petition for review of DOE's WAC 197-11-350 rule under RCW 34.05.330 despite SEPA's statutes prohibiting such a "non-adjudicative proceeding" for review of DOE's rule and related actions in this case, such fraudulent concealment of DOE's unlawful and unconstitutional actions in this case "tolls" or sets aside any statute of limitations governing our timely filing of such a Petition for review of DOE's rules, et al., for this case under the Doctrine of Fraudulent Concealment, and that statute of limitations will remain "tolled" until DOE stops this fraudulent concealment of their unlawful actions concerning RCW 34.05.330.

Consequently, this Petition for review of our controversy concerning DOE's rule here and DOE's actions that harm Petitioners' fundamental due process rights to petition State government for redress of our grievances noted in this case, also constitutes an "Appeal" Petition for supervisory appellate review of DOE's improper actions and DOE's unlawful March 21, 2023 decision done under RCW 34.05.330, which DOE "perfected" by March 27, 2023 when DOE finally gave Petitioners "notice" of where to "appeal" DOE's March 21, 2023 decision, and this Petition's pleadings also concern DOE's later unlawful decisions made in DOE's Emails concerning our prior Petition sent to DOE for review of WAC 197-11-350, which DOE unlawfully forced Petitioners to file under RCW 34.05.330.

Consequently, pursuant to RCW 43.21C.110(3), RCW 43.21C.120(2), RCW 34.05.240, and the relevant parts of RCW 34.05.330(3), the Governor has both "original" and "appellate" jurisdiction to consider our claims concerning these controversies adversely impacting the Petitioners/Appellants due process rights, etc., that they argued previously and argue herein this Petition for Review in this case, as part of this procedural administrative due process adjudicative proceeding reviewing DOE's SEPA rule noted here, despite any of DOE's clearly false, unlawful,

unsupportable, and/or unconstitutional claims to the contrary. See DOE's relevant attached emails.

As we have argued, DOE's unlawful and/or prohibited rules and/or policies complained of here directly act to violate the Rules of Statutory Construction, the Separation of Powers Doctrine, and the Supremacy Clause Doctrine of law, which prohibit DOE from making or using these SEPA rules or policies for review of SEPA rules which would act to unlawfully "amend" SEPA by DOE's unlawful and unconstitutional exercise of the "Legislative" authority of the State Legislature and/or the Federal government, constituting a DOE theft of those powers, as noted by the State Supreme Court's 1985 findings and decision on the In Re Obert Meyers, 105 Wn. 2d 257 (1986) case, which also prohibits DOE's rule and policies actions complained of in this case.

It is clear from any proper reasonable review of the agency record on these matters that DOE has certain unlawful or improper rules, policies, procedures, habits, and/or business practices, including, but probably not limited to, those complained rules and/or policies noted in this case, and the Governor should act to protect us and others from DOE's unlawful actions, rules, and/or policies noted here. See U.S. Supreme Court's decision in Monel v. The New York City Dept. of Social and Health Services, 436 U.S. 658 (1978).

Further, since the Courts have found that SEPA is a procedural statute that is an "environmental full disclosure law", and since SEPA notes that SEPA uses the disclosure provisions of the Public Records Act RCW 42.56 (formerly a part of the Public Disclosure Act RCW 42.17) as part of its requirements for disclosure of records relevant to SEPA actions, under the State Supreme Court's decision in Fritz v. Gorton, 8 Wn. App. 658, (1973), DOE's rules and policy actions complained of here unlawfully prevent us from having any factual agency record showing impacts found in a SEPA EIS environmental review process, which allows agencies to unlawfully make SEPA decisions containing "mitigations" without any SEPA EIS decision which could legally identify the actual impacts to be mitigated required by an MDNS, and/or which could legally identify the environmental impacts and stormwater impacts leading from the project, when the State, County and City governments charge large fees and/or property taxes for such "impacts" which have never been legally identified by a SEPA EIS process. Consequently, DOE's unlawful MDNS rule and unlawful SEPA rule review policy constitute unreasonable and unlawful prior restraints and unconstitutional abridgments of our U.S. Constitution's First Amendment Rights and our same rights under Article I Sections 3 and 4 of the Washington State Constitution, clearly violating our fundamental civil and constitutional rights here.

Clearly, DOE's WAC 197-11-350 MDNS rule is unlawful, DOE's SEPA Rule review policy is unfulfilled since it unlawfully and improperly uses the APA's RCW 34.05.330 statute, instead of DOE properly acting to use RCW 34.05.240 for reviews of SEPA rules as required by SEPA's Rules statutes RCW 43.21C.110(3) and 43.21C.120(2), and they both unconstitutionally and lawfully abridge our rights to

petition here, and Gov. Inslee must grant our Petition and its requested relief. See also our attached Argument and Memorandum in Support of this Petition.

**Conclusion and Relief**

As noted herein, DOE's complained of unlawful actions and/or failures to properly act pursuant to SEPA's Rules review and Appeal statutes and the APA's RCW 34.05.240 noted above in this pleading, clearly acted to specifically harm Petitioners/ Appellants due process rights to gain redress of our grievances that we have noted in our pleadings on these matters which have been detailing this controversy and harm caused by DOE. Since the Petition form states OFM created it "in accordance with RCW 34.05.330," which would act to amend SEPA's rules statute that requires review of SEPA rules be done under RCW 34.05.240, not RCW 34.05.330, this clearly acts to amend SEPA's rule making review statutes which OFM cannot do, and consequently, the Governor must order OFM to inform DOE and other state and local agencies making SEPA rules that they must comply with the adjudicative proceeding rules for declaratory ruling petitions under the APA's 34.05.240 when reviewing SEPA rules. Consequently, this clearly shows that the Governor must grant our Petition awarding us appropriate relief from the harm we have suffered that was and is continuing to be caused by DOE's and OFM's outrageously unlawful actions noted in this case, and to prevent such harm from continuing to occur to us and others who attempt to gain procedural due process pursuant to SEPA's and the APA's statutes the way the State Legislature specifically worded those statutes.

We swear that the foregoing is true and correct to the best of our knowledge and abilities under laws of perjury in Washington State and the United States.

*//s //*
Jerry Lee Dierker, Jr.

*//s//*
Esther Grace Kronenberg

dated April 26, 2023

BEFORE THE WASHINGTON STATE GOVERNOR

| | |
|---|---|
| Jerry Lee Dierker Jr., & Esther Grace Kronenberg Petitioners/Appellants; vs. Washington State government, by and through its Department of Ecology (DOE), DOE Deputy Director Heather Barrett, DOE's SEPA Policy Lead Fran Sant, DOE's Program Manager of Shorelines &. Environmental Assistance Joenne McGerr, DOE's unknown named advising attorney of the Attorney Generals Office, and DOE's other unknown named agents, officials, employees, contractors, persons, and/or. organizations acting on behalf of and/or. acting in concert, collusion and/or conspiracy with the above "named" Defendants/Respondents (Bivens), Defendants/Respondents. | Case No. _____<br><br>Argument and Memorandum in support of our Attached Petition for Review |

I. Comes now the Petitioners, Jerry Lee Dierker and Esther Grace Kronenberg, who make the following Argument and Memorandum in support of our attached Petition for Review.

Further, we incorporate by reference the agency record, evidence of official and judicial notice and pleadings and legal citations that have been made to the Department of Ecology along with our email and voice mail traffic between us and DOE, which is other evidence of official and judicial notice which are official public records and must be part of the agency record of DOE's decision in this matter that we are contesting and appealing here.

Jurisdiction

As noted in the Petition, the Governor has jurisdiction to consider a Petition for Review of SEPA rules and related agency actions under RCW 34.05.240 - Declaratory Order- Petition, as required

by SEPA's RCW 43.21C.110(3) and RCW 43.21C.120(2) and/or RCW 34.05.330, Petition for adoption, amendment, repeal -Agency action - Appeal, for appealing DOE's improper decision in our Petition for Review filed with DOE, attached to this Petition for Review by Governor Jay Inslee under RCW 34.05.240, as SEPA's RCW 43.21C.110(3) and RCW 43.21C.120(2) require.

II. ISSUES

1) Did DOE act pursuant to state and federal law and legal standards for review of petitions to the government for redress of grievances, including due process law, the right to petition and equal protection of the law without abridgment, pursuant to Washington State Constitution Article 1, Sections 3& 4 and the First Amendment to the US Constitution when they conducted their proceedings and made their decision noted above, which we will detail and support in our pleadings here as the record in this case shows? - NO See RCW 34.05.328(1)(f) and (h)(i)(ii) and (iii)

DOE's decision edited the many issues of our petition down to three, and especially ignored the State Legislature's 1983 creation of RCW 43.21C.075 (3)(a) and (b) when they adopted the Substitute Senate Bill 3006 which provided the legislative intent showing that there could never be a SEPA threshold determination rule that includes mitigation measures because, as even DOE notes in its response to the *City of Olympia v Thurston County Board of Commissioners 87 131 Wn. App. 85 (2005)* case, that an MDNS, which is a substantive SEPA decision containing mitigation measures, must be issued after a threshold determination and EIS have been made that could legally identify the impacts.

Further, mitigations are for impacts which can only be identified by that EIS after it is completed, as SEPA's RCW 43.21.075(3)(a) and (b), WAC 197-11-440 and WAC 197-11-660 note and DOE's decision noted, showing that mitigations are under SEPA's substantive authority, and while WAC 197-11-350 is not consistent with the SEPA Appeal Statute, both of the noted SEPA regulations are consistent with SEPA's Appeal Statute, RCW 43.21C.075(3)(a) and (b), which was ignored completely by DOE's improper and inadequate consideration of our petition under RCW 34.05.240. This apparently was done without any proper procedural regulations for conducting such a proceeding under RCW 34.05.240, thereby corrupting any process DOE followed, and such improper unlawful action does not provide a regulatory basis for DOE's actions in that improper DOE review of SEPA rule WAC 197-11-350, the MDNS SEPA rule we first challenged in our DOE Petition for Review.

2) Were the three issues stated below that DOE claims the Petition argues properly considered by DOE? - NO
(A) Is the SEPA Mitigated DNS rule prohibited by the SEPA Appeal Statute, rules and other law from being a procedural threshold determination under SEPA? - YES
(B) Does the use of an MDNS as a threshold determination contradict the Court of Appeals 2005 decision in the *City of Olympia case?* - YES
(C) Is the MDNS SEPA rule "not consistent with RCW 43.21C, the governing statute, which does not support its use as a threshold determination?" - YES

3) Did Petitioners' Petition for Review argument to DOE contain more issues than DOE claims, constituting a misrepresentation of the petition by DOE? - YES

4) Was DOE's irrelevant case law any legitimate support for DOE's case law arguments made to prove that the MDNS regulation, WAC 197-11-350, is legally authorized by statute's SEPA procedural threshold determination under SEPA when none of the case law citations concern the constitutionality, statutory basis or legality rules of the MDNS WAC 197-11-350 rule as a SEPA threshold determination, and would this DOE argument be considered a misrepresentation of the law? - NO and YES

5) Since DOE's case law arguments are irrelevant as noted above, and since DOE used the same irrelevant case law to support DOE's second improper decision concerning the Appeal Court's decision in *City of Olympia,* does DOE's use of this same irrelevant case law provide any legal support for DOE's legal arguments and in DOE's decision in part (C)? - NO

6)When making the above legal argument for (B), does the record show that DOE considered the SEPA Appeal Statute, RCW 43.21C.075(3)(a) and (b), which prohibits such SEPA threshold determinations from containing such substantive mitigation measures like the SEPA MDNS rule does? - NO

7) Is DOE's argument that WAC 197-11-350 is consistent with all portions of SEPA's governing statute RCW 43.21C, such as 43.21C.075(3)(a) and (b), RCW 43.21C.660, RCW 43.21C.440, etc., and is consistent with the 1983 State Legislature's legislative intent enumerated in ESSB 3006, which created RCW 43.21C.075(3)(a) and (b) that absolutely prohibits any SEPA decision containing mitigation measures from being a SEPA
threshold determination decision?- NO and NO

8) As noted above and here, does DOE's legal and factual arguments in DOE's decision constitute a misrepresentation of both fact and law since DOE failed to consider SEPA's Appeal Statute prohibiting the MDNS rule that was enacted by the 1983 State Legislature based upon the 1983 Report to the Legislature attached as Exhibit A from the Commission on Environmental Policy? - YES

9) Does DOE's own admission that the MDNS rule lacks any statutory basis, where DOE quoted the above noted 1983 Report at page 10 that an MDNS "is not expressly stated in statute," which is the only time it can be consistent with SEPA, constitute an admission by DOE that the MDNS rule has no statutory support or legislative intent from the State legislature to support the SEPA MDNS rule, WAC 197-11-350? - YES

10) In their conclusion of each of the three issues DOE claimed supported their denial of the petition, does DOE rely upon irrelevant case law, misrepresentations of fact and law, and misinterpretations of "suggestions" that DOE believes it has from case law, and do any of DOE's arguments based upon the irrelevant and misrepresented *Wild Fish Conservancy* case and the other cases cited in DOE's denial of our petition actually provide any legal support for any DOE's conclusions made in DOE's decision? - YES, and NO

11) Does the Petitioners' clerical error in our petition by not writing "Headnote 6" next to our claim about the *City of Olympia* case provide a legal basis for DOE to deny our petition by claiming the petition mischaracterizes the case that an MDNS is not a threshold determination when DOE fails to consider RCW 43.21C.075(3)(a) and (b) and other noted SEPA WACs, etc., and does DOE's failure to consider the *City of Olympia* decision in light of SEPA's Appeal Statute RCW 43.21C.075(3)(a) and (b) under RCW 34.05.240 instead of RCW 34.05.330, when the record shows DOE misrepresented, mischaracterized and misinterpreted our petition and our facts and law throughout DOE's improper decision, claims and arguments, provide any legal or factual basis for denial of our petition? - NO and NO

12) In addition, is DOE's claim accurate that our DOE Petition for Review provided no evidence to support its position that WAC 197-11-350 is not consistent with state statutes supported in its decision, when Petitioners repeatedly cited RCW 43.21C.075(3)(a) and (b), WAC 197-11-440 and WAC 197-11-660, and especially when DOE ignored those legal arguments we made and ignored their own evidence of official and judicial notice in their own Exhibit A and ESSB 3006 from 1983 which created RCW 43.21C.075(3)(a) and (b)? - NO

13) And does Exhibit A that provides such official and judicial notice of legislative intent clearly show by the creation of RCW 43.21C.075(3)(a) and (b) that WAC 197-11-350, the MDNS regulation, is actually prohibited by the RCW and the legislative intent in creating the SEPA Appeal Statute in ESSB 3006, and does this again constitute DOE's misrepresentation of fact and law done in order to support their improper decision declining to initiate rule-making in order to repeal WAC 197-11-350? - YES and YES

14) Does DOE's misrepresentations of fact and law, misinterpretations of irrelevant case law and DOE's lack of any procedural rules for conducting proceedings to consider the petition support DOE's decision to decline to initiate rule-making to repeal WAC 197-11-350?- NO

15) Is DOE's decision here proper, or does it even appear to be fair under the Appearance of Fairness doctrine of law? - NO See RCW 42.36 , the Appearance of Fairness doctrine and *Save a Valuable Environment v Bothell, 89 Wash. 2d 862 (1978)*

16) Did DOE ignore the State Supreme Court decision in the case of *In Re Obert Myers 105 Wn.2d 257 (1986)* on rules requiring a statutory basis and fail to comply the rules of statutory construction to which we cited? - YES

17) Is this another part of the Washington State government's system of unlawful prior restraints of our First Amendment rights and our rights under Article 1 of the State Constitution to petition the government to gain due process without abridgment by state government's unconstitutional actions which would violate our fundamental civil and constitutional rights to due process and equal protection of the law, et.seq.? - YES

18) Does the improper use of an MDNS void all stormwater and/or environmental impacts fees that have been collected by the cities and counties without specifically identifying impacts since, as the evidence of official and judicial notice shows, the city of Olympia and Thurston County have not conducted a project level site specific environmental impact statement to identify any impacts for more than 20 years, even after the case of *City of Olympia* as DOE's own webpage listing SEPA decision shows? - YES

19) Did our Petition generally claim and argue that the MDNS regulation WAC 197-11-350 was not (a) authorized; (b) needed; (c) conflicts with and/or duplicates other federal and state laws; (d) alternatives to the rule existed in SEPA that serve the same purpose at less ultimate cost to the

public, etc; (e) the rule does not serve the purpose for which it was unlawfully adopted (f) the increased unreasonable costs of local multiple SEPA appeals fees have been unlawfully imposed by DOE's making of this rule; (g) the rule is unlawfully worded in a confusing manner and unlawfully not clearly and simply stated; (h) the rule is unlawfully different than federal law applicable to the same activity on subject matter without adequate justification; and (i) the rule was unlawfully adopted according to numerous provisions of state and federal rules, statutes and constitutional law? - YES to all

20) Does DOE's admission and the admission by the 1983 Report of the Commission on Environmental Policy that they knew then show there was no statutory authority and in direct violation of the prohibition of RCW 43.21C.075(3)(a) and (b) that prohibits threshold determinations including mitigation measures for the WAC 197-11-350 that created the MDNS unlawfully? - YES

21) Does DOE's creation of WAC 197-11-350 and its maintaining that this WAC is still legal a continuing violation of the fundamental due process rights to petition the government for redress of grievances, equal protection and due process of law enumerated in the United States Constitution, the State Constitution and other state and federal laws, and does this violate DOE's specific duty of care and its duty of conscientious service and its duty to protect the people of the state of Washington after such an inquiry like this petition has been presented to DOE, and does this amount to a failure to protect, a violation of fundamental civil and constitutional rights, violations of their oath of office and their employment and their legal authorities under state and federal law? - YES to all

22) Does DOE's creation of WAC 197-11-350 and its maintaining that this WAC is still legal threaten the sources of financial resources for the state and local governments when no environmental impact statements of a project site specific level have been done to identify stormwater impacts and other environmental impacts for which the State, cities and counties collect fees or property taxes based upon such unidentified and/or unlawfully identified but fraudulently concealed impacts from stormwater and other environmental factors, and would this impact the resources of the state and local governments by violating the terms and conditions of the federal contracts to obtain federal funding through grants, pass-through monies, etc. which require them to follow all state and federal laws, and not exempt them from being followed? - YES

23) Did DOE lie when they told Petitioners that this was not an adjudicative proceeding for rule-making for SEPA when rule-making for all agencies is governed by RCW 34.05.240 which is the declaratory judgements and petitions statute? YES

III. RULES AND STANDARD OF REVIEW

Exhibit A page 160-161 - New Section of ESSB 3006 creating RCW 43.21C.075 - Appeals
RCW 43.21C.075(3)(a) and (b) - (3) If an agency has a procedure for appeals of agency environmental determinations made under this chapter, such procedure:
(a) Shall allow no more than one agency appeal proceeding on each procedural determination (the adequacy of a determination of significance/nonsignificance or of a final environmental impact statement);
(b) Shall consolidate an appeal of procedural issues and of substantive determinations made under this chapter (such as a decision to require particular mitigation measures or to deny a proposal) with a hearing or appeal on the underlying governmental action by providing for a single simultaneous hearing before one hearing officer or body to consider the agency decision or recommendation on a proposal and any environmental determinations made under this chapter,
WAC 197-010 - Authority - rules under WAC 197-11-010 "are promulgated under the State Environmental Policy Act (SEPA), chapter 43.21C RCW
WAC 197-11-300(2) -Deciding whether a proposal has a probable significant adverse impact and thus requires an EIS (the threshold determination)
WAC 197-11-310(5)(a) and (b) - All threshold determinations shall be documented in a DNS or a DS
WAC 197-330 - WAC 197-11-330 Threshold determination process. Under (1)(a)(i) the responsible official shall: "Review the environmental checklist, if used: …indicating the result of its evaluation in the DS, in the DNS, or on the checklist;…"
WAC 197-11-340 - Determination of Nonsignificance
WAC 197-11-360 - Determination of Significance
WAC 197-11-440 - EIS contents
WAC 197-11-660 - Substantive authority and mitigation - provides the guidance needed by local jurisdictions and agencies to include mitigations as part of a SEPA decision. It also clearly states in (1)(a) that "Mitigation measures or denials shall be based on policies, plans, rules or regulations formally designed by the agency (or appropriate legislative body, in the case of local government) as a basis for the exercise of substantive authority and in effect when the DNS or DEIS is issued."

WAC 197-11-797 -"Threshold determination" means the decision by the responsible official of the lead agency whether or not an EIS is required for a proposal that is not categorically exempt
*City of Olympia v. Thurston County Board of Commissioners 87 131 Wn. App. 85 (2005)*
*In Re Obert Myers 105 Wn.2d 257 (1986)* - "[t]he use of the word `shall' creates an imperative obligation unless a different legislative intent can be discerned."
*Fritz v. Gorton 83 Wn.2d 275 (1974)*
*Save a Valuable Environment v Bothell 89 Wn.2d 862 (1978) 576 P.2d 401*
Supremacy Clause of the State Constitution - Only the legislature has the ability to amend or change a state statute.
RCW 34.05.040 - Operation of chapter if in conflict with federal law
RCW 34.05.328 - Significant legislative rules, other selected rules

IV. APPLICATION AND ARGUMENT

Clearly, our Petition claims that DOE's unlawful, unauthorized and statutorily prohibited making of the SEPA MDNS regulation, WAC 197-11-350, was done without legal due process of law which abridged our fundamental civil and constitutional rights to petition the government for redress of grievances pursuant to Article 1, Section 3 and 4 provisions of the Washington State Constitution ("shall never be abridged"), and the last Amendment to the US Constitution ("shall not be abridged"). See also State Supreme Court decision in *Fritz v. Gorton 83 Wn.2d 275 (1974)*.

In *Fritz,* the State Supreme Court found that Washington State Attorney General Slade Gorton by and through his subordinates in the Attorney Generals' office had withheld requested public records from Fritz which the Court's decision found to be a violation of the 1st Amendment of the US Constitution's fundamental rights to have unabridged access to relevant governmental information that is necessary to provide evidentiary support for claims made in our petitions to the government for redress of grievances for harm and damages leading from governmental or others' improper actions, and to provide factual and legal support for our assembling together to act to freely petition, to speak and to write freelance news press reports in local newspapers and radio shows, since DOE's actions on our Petition and DOE's unlawful making of the MDNS abridges our rights here, among numerous violations of other state and federal constitutional

provisions. DOE acted improperly to make the unlawful MDNS regulation and then lied to everyone in a cover up that lasted for 40 years since 1983, claiming falsely the MDNS regulation was "legal" just because DOE and the AGO say so.

Clearly, despite DOE's misstatement and misrepresentation of our Petition,
our Petition really claimed, argued, and was factually supported with evidence of official and judicial notice, much of which was about a related MDNS matter that we had sent to DOE and Ms. Sant during the time DOE had considered our Petition, which showed that cities' and counties' use of DOE's MDNS regulation does not comply with SEPA's Appeal Statute, and does not comply with the Court of Appeal's MDNS decision in *Olympia v Thurston County.* Further, since DOE's decision here made a legal interpretation of the *Olympia v. Thurston County* decision without any consideration of SEPA's RCW 43.21C.075(3)(a) and (b), Petitioners state for the record here that our evidence of official and judicial notice submitted to DOE and Ms. Sant clearly shows that Olympia and Thurston County are NEVER complying with DOE's interpretation of how the MDNS is supposed to be used by such cities and counties in this state. (See attached Emails from Public Records Requests)

Further, our pleadings DID have legal and factual support, and related claims in DOE's decision have no factual support about the use the MDNS regulation by cities, counties and the state agencies. See Petitioners' prior pleadings to DOE.

However, DOE's decision falsely found that the Petitioners provide no evidence to support its position that WAC 197-11-350 is an improperly adopted rule that conflicts with state statutes, because DOE failed to properly consider our submitted relevant evidence of official and judicial notice concerning the City of Olympia's improper use of the MDNS regulation to violate RCW 43.21C.075(3)(a) and (b), SEPA's Appeal Statute, in an unlawful SEPA appeal while DOE's reason in (B) for denying our petition is based upon DOE's interpretation of the *City of Olympia* case which DOE noted was about a SEPA appeal without any DOE consideration of, or even a citation to SEPA's Appeal Statute, RCW 43.21C.075(3)(a) and (b) <u>at all</u>.

Obviously, DOE did not properly consider SEPA's Appeal Statute when falsely finding the MDNS regulation is not a properly adopted rule that conflicts with the statute - since it does conflict with it.

A review of our Petition also shows it alleged more than the 3 claims cited in DOE's decision.

Generally, our Petition claimed and argued that the rule was not (a) authorized; (b) needed; (c) conflicts with and/or duplicates other federal and state laws; (d) alternatives to the rule existed in SEPA that serve the same purpose at less ultimate cost to the public, etc; (e) the rule does not serve the purpose for which it was unlawfully adopted (f) the increased unreasonable costs of local multiple SEPA appeals fees have been unlawfully imposed by DOE's making of this rule; (g) the rule is unlawfully worded in a confusing manner and unlawfully is not clearly and simply stated; (h) the rule is unlawfully different than federal law applicable to the same activity on subject matter without adequate justification; and (i) the rule was unlawfully adopted according to numerous provisions of state and federal rules, statutes and constitutional law.

Clearly, DOE's improper decision only on 3 "issues" in the Petition did not lawfully consider all of our other claims and pleadings made in that DOE Petition et. al.

Further, DOE's decision has no decision, claim or argument or submitted evidence on the "use" of the MDNS.

DOE's only submitted evidence, the several hundred page 1983 report of the Commission on Environmental Policy submitted to the State Legislature, actually only provides factual and legal legislative intent support for our Petition's claims about SEPA's Appeal Statute, RCW 43.21C.075 (3)(a) and (b) that expressed the Legislative intent of the 1983 State Legislature as noted therein, so even DOE's factual legislative intent legal evidence supports our Petition's claims, not DOE's, and shows DOE's ruling and claims made in the DOE decision are false,

unlawful, improper and are misrepresentations of fact and law, and shows that DOE's MDNS rule has no statutory, factual or "legislative intent" support in the record to support DOE's decision of this case, and thereby this DOE decision must be overturned by Governor Inslee here.

Further, the record in this case clearly shows DOE actions here failed to follow the due process procedural rules in RCW 34.05.240 as required by SEPA's Rules Statutes, RCW 43.21C.110(3) and RCW 43.21C.120(3), when considering our adjudicative Petition for rule-making filed under RCW 34.05.330, which allows petitions and appeals of DOE's regulations and the 1983 SEPA WAC 197-11-350, Mitigated Determination of Nonsignificance SEPA "threshold determination" regulation. Petitions and appeals are adjudicative actions under due process standards of law, despite DOE's false claim. (See attached email) This false claim by DOE is a "fatal flaw" in DOE's legal support for DOE's improper actions taken in this case, and appears from DOE's Emails and the notation on DOE's digital form to have been caused by a policy action done by the Office of Financial Management (OFM), which directly violates SEPA Rules Statutes.

The record shows DOE's actions here also failed to comply with any other procedural due process standards of the law governing such adjudicative proceedings, like those in the Civil Rules of the Washington State Superior Court Rules, like CR 8 and CR 59/60 covering "general pleading rules" and "reconsideration and vacation" of a decision (See DOE agency record and DOE emails)

DOE's AG also improperly and fraudulently advised DOE that our petition and our appeal of this DOE's denial of our Petition was not an adjudicative proceeding and that no reconsideration was allowed in this case according to DOE email to us (See attached) The AG is wrong as noted above.

As noted herein, DOE's prior denial of that DOE Petition for Review misrepresented and mischaracterized Petitioners' DOE arguments and claims made in this case in DOE's unlawfully

"edited" manner, completely ignoring and misrepresenting many of our Petition's claims and arguments, including one that shows the 1983 SEPA Appeal Statute, RCW 43.21C.075(3)(a) and (b) prohibited DOE's 1983 creation of SEPA's WAC 197-11-350 that unlawfully made a new SEPA procedural "threshold decision," an MDNS. The 1983 legislative intent enumerated in the SEPA Appeal Statute RCW 43.21C.075(3)(a) and (b), lists all legal SEPA procedural threshold decisions for which at (3)(a) there is statutory authority. This legislative intent expressed by the 1983 SEPA Appeal Statute does not list the MDNS as a SEPA threshold determination, and notes at subsection (3)(b) that SEPA substantive decisions include mitigation measures required to be identified impacts in an EIS.

Consequently, since the SEPA MDNS contains substantive mitigations which can only legally be identified by an EIS as RCW 43.21C.031(1) shows, an MDNS cannot be a SEPA threshold determination as the Headnotes in the *City of Olympia v. Thurston County* case stated, since SEPA's "substantive" MDNS decision contains "mitigation measures" that cannot legally be procedural SEPA threshold determinations under RCW 43.21C.075(3)(a) and (b), and this DOE WAC is void on its face. See also *In Re Obert Myers, 105 Wn 2d 257 (1986)* .

However, as the DOE agency record shows, though our DOE Petition, pleadings and our submitted evidence of official and judicial notice contained numerous claims and arguments concerning RCW 43.21C.075(3)(a) and (b), there was not even a single DOE argument or citation of SEPA's Appeal Statute, RCW 43.21C.075(3)(a) and (b) which statutorily prohibits DOE's making of the MDNS threshold determination or its regulation, and the MDNS and DOE's decision here is null and void since DOE has no statutory basis for the MDNS or for the DOE decision in this case, and DOE and their staff have failed to comply with the provisions of RCW 34.05.330 and failed to comply with the adjudicative proceedings portion of RCW 34.05, the civil court rules in CR 8 and CR 59 and other rules, laws and legal standards of administrative due process procedures.

Clearly, the State Court of Appeals' decisions of the State Government Publisher of the *City of Olympia v. Thurston County* case was correct in Headnote 6 and in the Publisher's Nunc Pro Tunc summation of the decision we cited to in our Petition that a MDNS is not a SEPA threshold determination because it contains mitigation measures, despite DOE's and its AG's improper adjudicative actions in this case.

Obviously, executive branch agencies like DOE, OFM and the AGO do not have any legal "legislative" authority which could create "legislative intent" for DOE's creation and use of the MDNS regulation that is inconsistent with the Legislature's legal "legislative intent" in the Legislature's 1983 SEPA Appeal Statute subsection RCW 43.21C.075(3)(a) and (b), despite the false claims of DOE and its AG and despite OFM's unlawful policy to require SEPA rules reviews to be done under RCW 34.05.330 instead of under RCW 34.05.240 that SEPA Rules Statutes require.

Clearly, as noted above and as DOE's decision noted, our Petition truthfully and correctly argued in at least the three issues mentioned in DOE's denial of our Petition for rule-making to repeal WAC 197-11-350, the MDNS regulation, and the controlling SEPA statutes show DOE lacked all legal "statutory authority" to make the MDNS regulation in violation of the rules of statutory construction and the State Supreme Court's 1985 decision in the case of *In Re Obert Myers, supra* which DOE also ignored. *In Re Obert Myers* found all agency regulations must have specific statutory support within the state statutes to be legal, and when agencies lacking such specific statutory authority to legally make a specific regulations like there is here, or when there is a specific statutory prohibition against the agency to make the specific regulation, like there also is here, the agency's actions to make or fail to repeal such regulation not based upon any state statute makes any such DOE act an "ultra vires" unlawful action which is null and void on its face, even without any legal action by DOE, especially in light of the Court of Appeals decision in *City of Olympia* which DOE mischaracterized or misrepresented and unlawfully and fraudulently concealed over the last 18 years in order to conceal numerous violations of state and federal law and billions of dollars in impacts to the environment and to the due process and equal

protection rights of petitioners and others in this state caused by DOE's unlawful action to create the WAC 197-11-350 MDNS, for which DOE et.seq. are liable. Also, OFM is liable for making the SEPA rules review policy that unlawfully require DOE to conduct SEPA rules reviews under RCW 34.05.330, instead of under RCW 34.05.240 as SEPA Rules Statutes require at RCW 43.21C.110(3) and RCW 43.21C.120(2) as the State Legislature wording of those statutes state, and thereby OFM's policy is unlawful.

Consequently, since 1983, DOE never has had any statutory authority for DOE's thereby unlawful MDNS rule action since there was a statutory prohibition in the Legislature's 1983 RCW 43.21C.075 (3)(a) and (b) that absolutely prohibits DOE's MDNS regulation action, and DOE's decision is still falsely claiming the MDNS is lawful.

Clearly DOE is fraudulently concealing these facts and fraudulently concealing DOE's violations of law, by making false, misleading misinterpretations and misrepresentations of fact and law to "coverup" DOE's violations of law that made the SEPA MDNS regulation banned by SEPA's Appeal Statute, for which DOE never had any factual legal statutory authority to create by a DOE rule-making action, as the Petition noted, preventing the start of any statutes of limitations for filing petitions complaining of these concealed unlawful actions under the Doctrine of Fraudulent Concealment.

DOE had no statutory authority to make the MDNS regulation, and despite OFM's unlawful policy, DOE does not have any statutory authority and jurisdiction to act pursuant to RCW 34.05.330(1) to review SEPA rules like this MDNS regulation, as SEPA Appeal Statute RCW 43.21C.075(3)(a) and (b) absolutely prohibits DOE from making this MDNS regulation despite any form of "qualified quasi-legislative immunity" that DOE or its AAG believes DOE has when DOE does have the legal statutory authority to use RCW 34.05.330 to make regulations consistent with the statutory and constitutional scheme of the statute the regulation is made under. DOE does not have such rule-making jurisdiction or authority in this and other cases where DOE and OFM do not act pursuant to this statute, and thereby DOE can not hide behind a

statutory “wall” or “cloak” of immunity of any kind to gain some sort of statutory immunity for any unlawful DOE and OFM actions noted here, which are not authorized by the underlying controlling SEPA statutes, etc.

DOE’s and OFM’s “qualified immunity” must be based upon DOE and OFM acting lawfully in this matter, which means DOE’s decision has no immunity from quasi judicial procedural due process review requirements, like those DOE fails to follow in this case, due to OFM’s unlawful SEPA Rule Review policy despite our complaints. See First Amendment of the U.S. Constitution, and Article 1, Section 3 and 4 of the Washington State Constitution. This abridges and violates our due process rights to petition the government for redress of grievances, et.seq.

And if this Petition is not part of a DOE “adjudicative proceeding,” why was DOE’s entire legal argument of issues of law in DOE’s denial of our Petition full to the brim with DOE’s citation to irrelevant case law decisions, which were used as a “legal brief” by DOE and its staff and its AG, especially since the Petition forms a controversy where we are contesting DOE’s actions and/or failures to properly act pursuant to law on our Petition for redress of grievances for DOE’s unlawful making of the MDNS regulation WAC 197-11-350, and our Petition requested an administrative judgment from DOE to partly redress our grievances against DOE’s unlawful MDNS regulation creation which has clearly harmed us and the environment, all of which cannot be part of an improper unlawful DOE review of a SEPA rule under RCW 34.05.330, because of OFM’s unlawful policy noted above.

Further, DOE’s AG’s allegation here that because RCW 34.05.330 is not in the “adjudicative proceeding” section of the APA, RCW 34.05, this somehow means that a statute that allows petitions and appeals of a SEPA rule, like RCW 43.21C.075 and other such statutory Appeal Statutes all of which are also not in RCW 34.05’s adjudicative proceedings section, would, under DOE’s AG’s reasoning, also not be considered as “adjudicative proceedings” pursuant to DOE’s absurd legal claims made by one of DOE’s Assistant Attorney General, as noted in a DOE email we received. (See attached emails)

Clearly, these facts and laws along with our and DOE's pleadings, public records and information on this matter show that DOE, OFM and its AG are dead wrong on this issue, and that this was a direct violation of law for which DOE, OFM and the AGO are liable for the flagrant environmental discrimination and attempted theft of our fundamental civil and constitutional rights under the First Amendment and State Article 1, Section 3 and 4, et.seq., for these "abridgments" of our right to petition the government for redress of grievances, due process, equal protection and a "taking" under the US Constitution's 4th Amendment and State Constitution Article 1, Section 3.

Further, this false claim that our petition under RCW 34.05.330 to "appeal" DOE's prior unlawful action to create the MDNS SEPA rule would also act to prevent the "appeal" to the Governor under RCW 34.05.330(3) from being considered an adjudicative proceeding because of OFM, DOE and its AAG's false and absurd policy and claim here, is void on its face.

Clearly, petitions and appeals are always adjudicative proceedings pursuant to many federal and state court decisions, as well as under exemptions to the "public duty doctrine," noted by the relevant decisions of the court in the State Supreme Court's recent case *Delaura and Fred B. Norg v. City of Seattle* decided January 12, 2023 and the US 9th Circuit Court of Appeals decision in *MEZA v. Washington State Department of Social and Health Services 683 F.2d 314 (9th Cir. 1982)*. Washington state governmental agents, official, agencies and attorneys, including state Attorneys General and their AAG assistants, and others are in a legal "special relationship" with people who have sent an "inquiry" to these government agents for lawful action and/or for governmental information, especially when those persons have requested procedural due process served with that information before these persons can file or prosecute an appeal allowed by law. *MEZA* found it would violate the state agents' "duty of conscientious service," when these state agents failed to act to protect these person's fundamental civil and constitutional federal and state created rights to due process proper legal service of legal notice detailing their rights or giving restrictions of their rights to appeal state governmental decisions

those persons were trying to appeal. See *Norg v. Seattle, supra* and *MEZA v. Washington DSHS, supra.*

In our DOE case here, from DOE's March 21, 2023 decision through DOE's later claim in emails made in response to our Petition and our several later inquiries et. al. as to the lack of service of a proper notice of our legal rights to appeal this DOE decision, it did not appear that DOE's part of Washington state government was following standards of due process, and DOE apparently does not have any procedural regulations, like the civil rules for the courts and the appeal notices on most other state and local governments decisions, which can be legally appealed by the specific wording of RCW 34.05.330(3) which grants us a state created fundamental right to appeal DOE's decision here, <u>after</u> DOE has given us proper legal service of that DOE decision which contains a detailed notice of our fundamental rights to appeal that decision that should identify procedural adjudicative proceeding rules consistent with RCW 34.05.240 for conducting proper legal reviews of SEPA rules as required by SEPA's Rules Statutes RCW 43.21C.110(3) and RCW 43.21C.120(2). et. seq.

## V. CONCLUSION

Consequently, since DOE's improper RCW 34.05.330 proceedings and decision in consideration of our DOE Petition for Review of SEPA's MDNS rule failed to comply with basic fundamental procedural administrative due process standards of law for DOE's adjudication of our Petition for Review of this SEPA rule here, DOE's bare denial without allowing any response and reply, and without allowing any reconsideration pleadings, repeatedly acted to abridge and violate Petitioners' rights to have a meaningful opportunity to be heard to respond or reply to DOE's allegations and legal arguments made in DOE's March 21, 2023 decision denying our DOE Petition for Review of SEPA's MDNS rule in an unlawful manner which is inconsistent with both state and federal law.

DOE misrepresented Petitioner's claims, DOE failed to use the relevant statutes, RCW 34.05.240, SEPA's Rules Statutes RCW 43.21C.110(3) and RCW 43.21C.120(2), and RCW 43.21C.075(3) (a) and (b), SEPA's Appeal Statute, in its improper and unlawful consideration of our Petition, and DOE misrepresented the Legislative Intent actually contained in the 1983 Report of the Commission on Environmental Policy, which resulted in the passage of the above mentioned SEPA Appeals Statute which expressly prohibits DOE's SEPA MDNS rule as a SEPA threshold determination.

Consequently, such DOE actions also violate the Appearance of Fairness Doctrine and RCW 42.36, and these actions are unlawful, illegal, unconstitutional and/or unreasonable, constituting an "ultra vires" action for which DOE lacks all legal authority to do, and are actions which the state and federal laws clearly show are done by DOE and OFM, et. al., without and/or in excess of their legal authority or that of their agents, etc., making this DOE decision null and void on its face, and showing OFM's policy for requiring petitions for review of SEPA rules under RCW 34.05.330 is unlawful and is prohibited by SEPA's Rules Statutes at RCW 43.21C.110(3) and RCW 43.21C.120(2), as well as prohibited by other controlling state and federal law.

Clearly, such prima facie evidence of official and judicial notice that DOE's decision was based wholly upon DOE's improper, unlawful petition proceeding done in this case because of OFM's improper, unlawful policy for reviewing SEPA rules noted herein, requires the Governor to overturn this DOE decision and to grant our Petition for Review of SEPA's MDNS rule to remove from SEPA's WAC 197-11, the MDNS WAC 197-11-350, since the MDNS regulation is inconsistent with SEPA's RCW 43.21C.075(3)(a) and (b) et.seq., and OFM's policy here is unlawful et. seq., as our pleadings in support of our petition proves.

We incorporate by reference our prior relevant pleadings in this matter in the agency record here, evidence of official and judicial notice and pleadings and legal citations that have been made by us to the Department of Ecology along with the email and voice mail traffic between us and DOE, which is other evidence of official and judicial notice which are official public records and must be part of the agency record of DOE's decision in this matter and on OFM's policy noted

herein that we are contesting and appealing here. We also include all the information about the SEPA MDNS determination issued for the Green Cove Park Project/Sundberg Gravel Mine toxic waste site that DOE has listed under MTCA which is directly related to our request for the removal of the WAC 197-11-350 creating the MDNS from the SEPA rules. as we have noted to Fran Sant and others at the Department of Ecology over the last several years. We also include the many MDNSs issued by both Thurston County and the City of Olympia that are listed on the Department of Ecology's SEPA website, which shows there has not been a project level EIS done in those jurisdictions in the last 20 years (See attached emails from City of Olympia and Thurston County). Obviously, no one in those jurisdictions has SEPA agency expertise for project level SEPA EIS reviews, as they have not done one in 20 years. Consequently, since there have not been any EISs done that could properly identify environmental impacts, all impact fees levied by these jurisdictions lack sufficient evidence in the record upon which to base their impact fees, stormwater fees and/or mitigation fees, as they were not legally identified under SEPA. This lack of legal basis for assessing impacts under SEPA could result in costing the state and local jurisdictions an enormous amount of money, because the unsubstantiated imposed impact fees would be considered arbitrary and capricious, if not clearly erroneous, due to the lack of evidence in the record, and they therefore lack a legitimate reason to impose such fees, taxes or mitigations. Since Fran Sant is the SEPA lead for the DOE, that information is known to her.

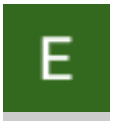
_____//s//_____ _____//s//_____

Jerry Lee Dierker Esther Grace Kronenberg

dated April 26, 2023

# Request to repeal WAC

Olympia politics/Green Cove Park Project/2023/MDNS




Esther Grace Kronenberg <wekrone@gmail.com>

Sat, Mar 25, 6:50 PM

Hello Ms. Sant,

Jerry Dierker has received your response to our Request to Repeal WAC 197-11-350 via mail.

Apparently, you forgot to include the 1983 report to the Legislature by the Commission on Environmental Policy which you reference as Exhibit A in your letter.

I would appreciate your sending me a digital copy of your letter as well as the missing Exhibit A which I could not find on the internet.

Because we have not yet received the complete response, we respectfully ask for ten days from our receipt of this information to submit a Request for Reconsideration.

Thank you.
Esther Kronenberg and Jerry Dierker

Sant, Fran (ECY) <fsan461@ecy.wa.gov>

Mon, Mar 27, 9:04 AM

Hello Esther,

Attached to this email please find the report. I apologize for not sending it out with the letter, that was my oversight. Thank you for brining that to my attention.

Also attached is a digital copy of the letter per your request. I am checking on your request for an additional 10 days and will get back to you on that.

Thank you,

Fran

2
Attachments
- Scanned by Gmail

E | ReplyForward

# Request for additional time for reconsideration

Olympia politics/Green Cove Park Project/2023/MDNS

S

Sant, Fran (ECY) <fsan461@ecy.wa.gov>

Mon, Mar 27, 5:00 PM

Dear Esther Kronenberg and Jerry Dierker,

When Ecology mailed the petition response to you on March 22, 2023 we did not include Attachment A (Ten Years' Experience with SEPA, 1983). I apologize for that oversight.

Today on March 27 2023, I provided you an electronic copy of the petition response and a copy attachment A. As of today you have received the response to the petition and attachment A.

The timing for any reconsideration and/or appeal process will start from the date you received a complete response to the petition, March 27, 2023.

Thank you,

Fran Sant
(she/her)
SEPA Policy Lead
fran.sant@ecy.wa.gov
360-529-6375

# Follow-up information

Olympia politics/Green Cove Park Project/2023/MDNS

S

Sant, Fran (ECY) <fsan461@ecy.wa.gov>

Wed, Mar 29, 12:29 PM

Hi Esther,

I wanted to provide Mr. Dierker with information about petition appeals. The information can be found in RCW 34.05.330 https://apps.leg.wa.gov/rcw/default.aspx?cite=34.05.330. You would need to contact the Governor's office at 360-902-4111 to inquire about their process.

Thank you,

Fran

**RCW 34.05.330**

**Petition for adoption, amendment, repeal—Agency action—Appeal.**

(1) Any person may petition an agency requesting the adoption, amendment, or repeal of any rule. The office of financial management shall prescribe by rule the format for such petitions and the procedure for their submission, consideration, and disposition and provide a standard form that may be used to petition any agency. Within sixty days after submission of a petition, the agency shall either (a) deny the petition in writing, stating (i) its reasons for the denial, specifically addressing the concerns raised by the petitioner, and, where appropriate, (ii) the alternative means by which it will address the concerns raised by the petitioner, or (b) initiate rule-making proceedings in accordance with RCW 34.05.320.

(2) If an agency denies a petition to repeal or amend a rule submitted under subsection (1) of this section, and the petition alleges that the rule is not within the intent of the legislature or was not adopted in accordance with all applicable provisions of law, the person may petition for review of the rule by the joint administrative rules review committee under RCW 34.05.655.

(3) If an agency denies a petition to repeal or amend a rule submitted under subsection (1) of this section, the petitioner, within thirty days of the denial, may appeal the denial to the governor. The governor shall immediately file notice of the appeal with the code reviser for publication in the Washington state register. Within forty-five days after receiving the appeal, the governor shall either (a) deny the petition in writing, stating (i) his or her reasons for the denial, specifically addressing the concerns raised by the petitioner, and, (ii) where appropriate, the alternative means by which he or she will address the concerns raised by the petitioner; (b) for agencies listed in RCW 43.17.010, direct the agency to initiate rule-making proceedings in accordance with this chapter; or (c) for agencies not listed in RCW 43.17.010, recommend that the agency initiate rule-making proceedings in accordance with this chapter. The governor's response to the appeal shall be published in the Washington state register and copies shall be submitted to the chief clerk of the house of representatives and the secretary of the senate.

(4) In petitioning for repeal or amendment of a rule under this section, a person is encouraged to address, among other concerns:

(a) Whether the rule is authorized;

(b) Whether the rule is needed;

(c) Whether the rule conflicts with or duplicates other federal, state, or local laws;

(d) Whether alternatives to the rule exist that will serve the same purpose at less cost;

(e) Whether the rule applies differently to public and private entities;

(f) Whether the rule serves the purposes for which it was adopted;

(g) Whether the costs imposed by the rule are unreasonable;

(h) Whether the rule is clearly and simply stated;

(i) Whether the rule is different than a federal law applicable to the same activity or subject matter without adequate justification; and

(j) Whether the rule was adopted according to all applicable provisions of law.

(5) The *department of community, trade, and economic development and the office of financial management shall coordinate efforts among agencies to inform the public about the existence of this rules review process.

(6) The office of financial management shall initiate the rule making required by subsection (1) of this section by September 1, 1995.

Fran Sant
(she/her)
SEPA Policy Lead
fran.sant@ecy.wa.gov
360-529-6375

Esther Grace Kronenberg <wekrone@gmail.com>

Thu, Mar 30, 11:56 AM

Hello Fran,
The number you gave us goes to a general information line and no one has called back.

Could you please provide us with a direct phone and email contact to a specific person that conducts such appeals for the Governor's office, as we don't have access to that information from the Governor's office.
Mr. Dierker has experience with calling the phone number you provided and has rarely gotten a response.

Mr. Dierker also would like clarification about our filing a reconsideration of Ecology's denial which you mentioned in another email in which you wrote, " The

timing for any reconsideration and/or appeal process will start from the date you received a complete response to the petition, March 27, 2023." This would allow us to file an appeal by April 3.

Please clarify if we need to file again with Ecology or just with the Governor's Office, and if with the Governor, to which specific person or department we should send it to, along with their specific address and phone number.

Sorry for any confusion. Thank you very much for the information.

All the best,
Esther

S

Sant, Fran (ECY)

Mar 30, 2023, 1:07 PM

Hi Esther,

Thank you for your email. I do not have a direct line to call at the governor's office. I was directed to provide you this number by the Rulemaking section manager at Ecology. If you do not have a call back by tomorrow please let me know. I will see what I can do to find a better number for you.

The appeal process is handled solely by the governor's office. The only information I have about the process is found in the law which I emailed you yesterday. You do not have to notify Ecology.

My email sent on March 27 clarified the timing and date of issuance. I did use the word "reconsideration" in reply to your message because you were asking for an additional 10 days for reconsideration. I learned after consultation with our AAG and senior staff that there is no reconsideration process for denial of rulemaking petitions. My colleague and I did discuss that with Mr. Dierker when we returned his call on Tuesday. The section of the Administrative Procedures Act that refers to reconsiderations is in a different section of the law. The APA law focused on

rulemaking and petitions is found under Part 3 APA: Chapter 34.05 RCW: ADMINISTRATIVE PROCEDURE ACT (wa.gov).

Thanks,

Fran

# follow-up to Mr. Dierker's voice mail to Judy Decker

Inbox

S

Sant, Fran (ECY)

Apr 18, 2023, 4:22 PM (6 days ago)

Dear Mr. Dierker and Ms. Kronenberg,

Thank you for contacting Judy Decker with a message for Heather Bartlett about the appeal process for the rulemaking petition. That message has been forwarded to me for a reply.

Ecology received a petition for rulemaking from you and Esther. The requirement for timing and the appeal process for the rulemaking petition process is found in : RCW 34.05.330: Petition for adoption, amendment, repeal—Agency action—Appeal. (wa.gov). Please see a snip of the petition form you completed. Please note the reference to the correct RCW.

**PETITION FOR ADOPTION, AMENDMENT, OR REPEAL OF A STATE ADMINISTRATIVE RULE**

Print Form

In accordance with RCW 34.05.330, the Office of Financial Management (OFM) created this form for individuals or groups who wish to petition a state agency or institution of higher education to adopt, amend, or repeal an administrative rule. You may use this form to submit your request. You also may contact agencies using other formats, such as a letter or email.

The agency or institution will give full consideration to your petition and will respond to you within 60 days of receiving your petition. For more information on the rule petition process, see Chapter 82-05 of the Washington Administrative Code (WAC) at http://apps.leg.wa.gov/wac/default.aspx?cite=82-05.

**CONTACT INFORMATION** *(please type or print)*

Petitioner's Name: Jerry Dierker & Esther Kronenberg

Name of Organization: Green Cove Defense Committee

Mailing Address: 2826 Cooper Point Rd. N.W.

The process that you are referring to RCW 34.05.240: Declaratory order by agency—Petition. (wa.gov) is not related to the rulemaking petition process that you initiated and this section of law is not applicable to these circumstances.

You received a complete response to the petition for rulemaking on March 27, 2023. As previously communicated to on March 29. 2023 please refer to RCW 34.05.330: Petition for adoption, amendment, repeal—Agency action—Appeal. (wa.gov) should you wish to appeal Ecology's decision on the rulemaking petition to the Governor's office.

Thank you,

Fran Sant
(she/her)
SEPA Policy Lead
fran.sant@ecy.wa.gov
360-529-6375

# General Public Records Request :: W034953-021323

Olympia politics/Green Cove Park Project/PDR's

C

City of Olympia <olympiarecords@mycusthelp.net>

Feb 17, 2023, 12:15 PM

--- Please respond above this line ---

February 17, 2023

RE: W034953-021323

Dear Esther Kronenberg:

Upon review, the City of Olympia has no records responsive to this request.

Your request is now closed. If you have any questions you may contact me at (360) 753-8792.

Sincerely,

Lisa Cummings
Community Planning and Development

**On 2/14/2023 3:09:32 PM, Cummings, Lisa wrote:**
**Subject:** General Public Records Request :: W034953-021323

**Body:**

February 14, 2023

RE: W034953-021323

Dear Esther Kronenberg:

The City of Olympia has received your public records request dated February 13, 2023, in which you requested the following records:

*Please provide records for all Determinations of Significance (DS) issued by the City since 2005*

We have begun the process of searching for records responsive to your request. We anticipate that an installment of records (if any) will be available on or before March 3, 2023.

If you have any questions you may contact me at (360) 753-8792.

Sincerely,

Lisa Cummings
Community Planning and Development

For additional information, please refer to the City of Olympia's Public Disclosure Policy at http://www.olympiawa.gov/city-government/public-records-requests.aspx.

To monitor the progress or update this request please log into the Olympia Public Records Center

View Message

**Subject:** [Records Center] Public Records Request :: P022279-030323
**Body:**
April 04, 2023

Esther Kronenberg
3206 36 Ave NW
Olympia, WA 98502

Dear Ms. Kronenberg:

This communication is regarding your public records request, #P022279-030323.

Specifically, you requested:

*Please send all Determinations of Significance issued by Thurston County since 2005*

*Please send all Mitigated Determinations of Nonsignificance issued by Thurston County since 2005*

Staff with the Community Planning and Economic Development (CPED) Department have asked that we reach out to you to inquire if your request might potentially be satisfied via records that are available online at the Department of Ecology's website.

The Department of Ecology has a searchable site of SEPA's going back to 2000.

The website is available here:

https://apps.ecology.wa.gov/separ/Main/SEPA/Search.aspx?SearchFields=All&County=THURSTON&IssueStartDate=01/01/2005&IssueEndDate=03/06/2023&PageSize=10&SortColumn=SEPANumberDescending

On that website, you can filter by document type such as "MDNS" or "DS." You can also filter by date, and by lead agency. If you click into the SEPA #, the documents are available to download at no charge.

It would take County staff significant time and effort to locate these records within our files. For example, County staff used the tool on Ecology's website to identify that there are over 600 MDNS's for the time period you requested. For the county to locate the records, staff would need to identify a project number for each specific one and then look in the AMANDA system to find the MDNS document itself.

If the information on the Department of Ecology website meets your needs, or if you would like to discuss your request further, please let us know.

Our agency wants to ensure that we are providing exactly the records you want, so our attempt to clarify your request is aimed at meeting that objective. With clear direction, we can focus our search efforts in a more efficient manner.

If you have any questions, you may contact me or paralegal Sara Meath at 360-754-4998.

Sincerely,

Karen Horowitz
Senior Deputy Prosecuting Attorney
Thurston County Prosecuting Attorney's Office

Sent by electronic mail on January 4, 2023 to the City of Olympia Planning Department, City Council, Hearing Examiner and DOE

Dear Leonard Bauer and the Hearing Examiner,

We write to again respond to the City's issuance of an MDNS for the Green Cove Park Project. We also submit this as a counterclaim and a Request for Dismissal of the administrative SEPA appeal filed with the City by Green Cove Park LLC appealing the SEPA threshold determination which, in this case, does not exist.

We were just notified of the appeal submitted by Mr. Mahan today in a conversation between Mr. Bauer and Mr. Dierker in which Mr. Bauer stated that he has been issuing MDNS's as a threshold determination for 30 years. He should have been aware of the impropriety of these actions at least since at least 2005 when the use of an MDNS as a threshold determination was explicitly barred by the Washington State Court of Appeals Division Two in a case in which the City appeared as an Appellant (see below).

We now request that the City dismiss the administrative appeal filed by Mr. Mahan's company. The appeal period here is supposed to be for an administrative appeal proceeding of the SEPA "threshold determination" on the MDNS issued for the Green Cove Park Project. Because a threshold determination for this project has not yet been made, which is required for the Hearing Examiner to conduct an appeal, going forward with an appeal would be a waste of time of the Hearing Examiner and the City staff and a waste of taxpayer money and City resources.

We request as a counterclaim that the City make a Determination of Significance (DS) that there are significant adverse environmental impacts leading from the Green Cove Park proposal, which the City's own memorandum found lacks sufficient evidence to show that the mitigation measures proposed would even work to lessen the likely adverse impacts leading from this proposal. Therefore, as relief for our counterclaim, we request a DS be issued for this project.

We are aware of other problems related to the site's use as a toxic dump that have yet to be revealed as well as other missing data necessary for true consideration of a threshold determination, as we have amply detailed in our prior pleadings and in our prior requests for withdrawal of the MDNS and for denial of this project.

Therefore, we join with the City staff memorandum's recommendation that the project be denied and we recommend that a DS be issued, as it must according to the laws and case law stated below.

Attached please find the case of City of Olympia v. Thurston County Board of Commissioners December 2005 131 Wn. App. 85 which is readily available on the website of the Municipal Resource Services Center (MRSC) under Court Decisions on its SEPA page.

In this case, the Court found: (emphasis added)
[6] Environment - SEPA - Mitigated Determination of Nonsignificance - Mitigation Measures - Conditions of Permit Approval - Review - Procedural Track. Where a mitigation measure identified in a mitigated determination of nonsignificance is required as a condition of permit or plat approval, review thereof is conducted according to the procedure for seeking review of the

permit or plat, not according to the procedure for seeking review of the "threshold determination." Under WAC 197-11-797 and WAC 197-11-300 (2), a "threshold determination" under the State Environmental Policy Act (chapter 43.21C RCW) is the decision by local environmental officials regarding whether further environmental review in the form of an environmental impact statement is necessary with respect to a given project proposal. **A mitigation measure is not a threshold determination as defined by WAC 197-11-797 and WAC 197-11-300 (2). A mitigated determination of nonsignificance issued under WAC 197-11-350 does not therefore constitute a "threshold determination" but is, rather, issued after a threshold determination is made that an environmental impact statement is unnecessary.**

Its presence on the MRSC website cites to this case as a precedent for SEPA threshold determinations that obviously conflicts with the issuance and appeal of an MDNS as a SEPA threshold determination. Obviously, the Hearing Examiner cannot hold an appeal hearing for Mr. Mahan's appeal of a decision which is not a SEPA threshold decision. Therefore, the Hearing Examiner can only dismiss the appeal and deny the project as the City asked because he lacks legal and subject matter jurisdiction over the matter since there is no SEPA threshold determination which can be appealed.

It is clear from the sections of WAC 197-11 stated below that a threshold determination is a binary choice. Either the project will have significant adverse environmental impacts or it will not. This is the determination that must be made by City staff, and which clearly has already been made in its staff memorandum by its finding that the proposed mitigations will not assuredly work to prevent serious adverse impacts on local and federal water resources and federally protected habitat of endangered species.

An administrative appeal of SEPA substantive actions, like the creation of an EIS or an MDNS, would have to be appealed with the other substantive decision making of the City staff, after the decision of the Hearing Examiner on any administrative appeal of the SEPA threshold decision. It is a theft of public funds and resources to bring SEPA threshold determination appeal proceedings on cases that have MDNS's and no actual SEPA threshold determination to the Hearing Examiner since he lacks the legal jurisdiction to conduct such an appeal process.

Clearly, we cannot be required by the City to file an administrative appeal of the SEPA threshold determination which does not exist here, and we could not be required to file one on the MDNS because it is not a threshold determination. This is a procedurally flawed "cart before the horse" action. We have no chance to administratively appeal a SEPA threshold determination that does not exist, especially after we urged the City to withdraw the MDNS and thereby fix the mistakes by the City here which failed to follow the law. The City's statement that we needed to file such an appeal to overturn the MDNS is simply fraudulent, and its unlawful appeal fees only serve to limit our civil and constitutional rights to petition the government for equal protection and due process of law.

Threshold determination is defined in WAC 197-11-797:
"Threshold determination" means the decision by the responsible official of the lead agency whether or not an EIS is required for a proposal that is not categorically exempt (WAC 197-11-310 and 197-11-330 (1)(b)).

WAC 197-11-794 Significant.(1) "Significant" as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.

WAC 197-11-736 Determination of significance (DS).
"Determination of significance" (DS) means the written decision by the responsible official of the lead agency that a proposal is likely to have a significant adverse environmental impact, and therefore an EIS is required (WAC 197-11-310 and 197-11-360).

From the above quoted WAC's, it is clear this project presents a significant "likelihood of more than a moderate adverse impact on environmental quality" and as such, "an EIS is required." The City must by law issue a DS for this project.

The MRSC site also includes a FAQ page on SEPA. We quote below:

Q: What is the difference between a Determination of Nonsignificance and a mitigated Determination of Nonsignificance?

A: A mitigated Determination of Nonsignificance (DNS) has had more public process and greater scrutiny because the proposal has likely significant adverse impacts. **The lead agency issues a mitigated DNS in lieu of preparing an EIS when there is assurance that specific enforceable mitigation will successfully reduce impacts to a nonsignificant level.**

In this case, the City staff memorandum lacked evidence that the mitigations would work. Since there is no assurance that they will successfully reduce impacts to a nonsignificant level, an MDNS cannot be issued on this basis, even if a proper DS had been issued prior to the MDNS that would constitute a threshold determination.
In any case, under the City's appeal ordinance the Hearing Examiner can only hear the administrative appeal of a SEPA threshold determination, and in this case, the MDNS does not constitute a threshold determination.

The Department of Ecology also makes clear the appropriate use of an MDNS.
Here is a quote from its website: (emphasis added)

**"**Mitigated DNS - SEPA was designed to reduce or eliminate environmental impacts. **If significant impacts are identified that require an EIS be prepared, the applicant can reduce them by making changes to a proposal or an agency can require mitigation as a condition of approving the project. When changes to the proposal or mitigation measures are identified that will reduce the identified significant adverse impacts to a nonsignificant level, a "mitigated DNS" is issued in lieu of a Determination of Significance and an EIS. "**

Again, we see that besides the fact that the City cannot issue an MDNS at all as an SEPA threshold determination, the City also cannot issue an MDNS when it is not known that the mitigations "will reduce the identified significant adverse impacts to a

nonsignificant level…" In this case, the City freely acknowledges in its staff memorandum that it does not know if the mitigations can do so.

Finally, we point to the City's own Review criteria stated in OMC 17.16.090 which states, (emphasis added)
"The council, hearing examiner and Planning Department shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. The council or hearing examiner shall determine if appropriate provisions are made for, but not limited to, the public health, safety and general welfare, for open spaces, drainageways, streets, alleys, other public ways, water supplies, sanitary wastes, parks playgrounds, sites for schools and school grounds, fire protection and other public facilities, and shall consider all other relevant facts, including the physical characteristics of the site and determine whether the public interest will be served by the subdivision and dedication. If the council or hearing examiner find that the proposed plat makes appropriate provisions for the above, then it shall be approved. **If the council or hearing examiner find that the proposed plat does not make such appropriate provisions or that the public use and interest will not be served, then the council or hearing examiner shall disapprove the proposed plat.**"

Clearly, this project threatens the integrity of our water supplies, the public health, and our safety and general welfare, as noted in the City's own memorandum denying this project.

We again emphasize that these issues do not even begin to address the toxic waste that has been buried on this site 30-60' deep over the last 70 years which has yet to be characterized and mapped, or its impacts determined on the groundwater of this area and on federally protected waters with endangered species that is subject to the federal Clean Water Act, the federal Clean Drinking Water Act, and the federal Endangered Species Act.

Finally, as residents and taxpayers we are rightfully outraged by the City's attempts to circumvent what is clearly the law of the land in order to abet and coddle the desires of Mr. Mahan to profit from this development, no matter what the cost to the community for generations to come.

Let us be clear. We are NOT anti-development radicals and we are NOT NIMBYs and we strenuously object to being characterized and therefore dismissed as such. We totally agree that all Washingtonians deserve safe and affordable shelter, as we told the Governor several years ago when we urged him to declare a homelessness emergency. If there were a proposal for housing that could provide safe and affordable shelter on this site, we might not stand opposed. Mr. Mahan's proposal, however, provides neither. Rather, it endangers the lives and health of any persons on the site and in the area around it that depend on safe, clean drinking water, and it endangers the very essence of what makes Olympia a desirable area for all forms of life.

THIS IS A TOXIC WASTE SITE THAT HAS YET TO BE CLEANED UP ON AN ENVIRONMENTALLY SENSITIVE AREA ON THE HIGHEST HILL OF OLYMPIA FROM WHICH ALL STORMWATER RUNS DOWNHILL.
At this time, it is not suitable, safe, desirable, feasible, or ethical to build houses for families on it, and is unlikely to be so for some time.

We urge the City to deny this project once and for all and instead use its limited taxpayer funded resources to invest in safe and affordable housing for its residents on appropriate sites.

Thank you for your consideration and response.

Esther Kronenberg and Jerry Dierker
Green Cove Defense Committee

Sent by electronic mail to the City of Olympia Planning Department, City Council and DOE on December 19, 2022

Comment on Project !19-0330 and Request for withdrawal of MDNS pursuant to WAC 197-11-340(3)
December 19, 2022

Dear Tim Smith and Cari Hornbein,

We incorporate by reference all of our prior comments about building on top of this unstable toxic waste site. While we agree with the City's determination that the project does not comply with city development standards and with its recommendation to deny the project, we strenuously object to the issuance of a Mitigated Determination of Nonsignificance (MDNS) and ask the **City to withdraw the MDNS and instead require an Environmental Impact Statement (EIS)** at that time in the future when there is enough information to even reasonably consider this project.

As is noted herein and elsewhere, there are many significant and critical "data gaps" which have in the past properly prevented the city from taking any action on this site. The glaring presence of these data gaps has apparently not detracted from the City's consideration of this site under SEPA, since an MDNS written by the Deputy Director of Planning on this project has been issued. This is completely improper since the issuance of such a SEPA determination cannot be done with such prominent data gaps and incomplete information which prevent full consideration of the potential impacts that are foreseeably likely to lead from this project, pursuant to SEPA requirements to which the City is bound under WAC 197-11-080(1) and (2) and WAC 197-11-335. The data gaps in this project do not allow the City to proceed in their absence pursuant to WAC 197-11-080(3), as the means to obtain the information is known and the costs are not being borne by the City.

Further, WAC 197-11-158(3) requires the City to address impacts that have not been adequately addressed in the City's comprehensive plan and/or subarea plan, in this case the Green Cove Basin Watershed Comprehensive Plan. This project came about because of annexation by the City and requires an extension of both water and sewer lines, neither of which were addressed in the Green Cove Comprehensive Plan. The 2020 listing of

this site under the Model Toxics Control Act (MTCA) was also not considered in the Olympia or Green Cove Comprehensive Plan. Therefore, there can be no consideration of this project at this time.

Further, WAC 197-11-055(2) requires that the lead agency prepare its threshold determination and EIS "when the principal features of a proposal and its environmental impacts can be reasonably identified." Because this site has not even begun to be evaluated as a MTCA site and still is under the jurisdiction of DNR for its reclamation permit which requires all non-native materials be removed, the environmental impacts are far from being "reasonably identified." Further, WAC 197-11-055(5) states "If several agencies have jurisdiction over a proposal, they should coordinate their SEPA processes wherever possible." The City has not made any attempts to coordinate its recent action with DNR.

This 4th submission is the latest iteration of a recurring pattern of this Applicant, who since 2005 when the property was bought and specifically annexed into the City for his project to be built, has never provided sufficient information for the City to properly consider the impacts of the annexation or the various building projects that have been proposed over the years. This application represents a change in land use from an industrial toxic waste site to a housing development and therefore requires an EIS.

This application should have been sent back yet again as incomplete before any action was taken. The City has made prior determinations that it could not move forward without such information and previously granted time extensions to file an amended application with the requested information. Since Mr. Mahan has still not come up with the information after 15 years, **the City must, according to its own documents, deny the Application and send back the MDNS.** Clearly, the City knows it is improper to issue a MDNS without this critical data at this time.

Not only has the Applicant failed to provide data, he has repeatedly denied that contamination exists on the site, even after being included on the CSCSL site list by the Department of Ecology (Ecology) under MTCA, and he continues to rebuff any efforts to correctly ascertain the impacts of building on the site to this day by again failing to provide sufficient data to even do a Remedial Investigation of the site even while under a

formal order to do so by Ecology. Ecology's September 7, 2022 draft letter states at the outset in its comments on the Data Gap Report and Remedial Investigation Work Plan submitted by Mr. Mahan "Ecology expected this report to serve as a comprehensive data summary, a data gap report, and a remedial investigation work plan…" (See Attachment #1) It then goes on for the next 17 pages to outline the data gaps that need to be completed. These echo many of the issues we have been pointing to for years, e.g. the lack of testing for toxic chemicals (constituents of potential concern) in groundwater, sediments, wetlands and runoff, the need for monitoring wells for at least one year to determine groundwater flow and the presence of toxics, the need for methane sampling, a complete geotechnical report, and the testing of adjacent areas that were historically known to have been used as waste dumps, including the former Weyerhaeuser log yard which dumped contaminated bark in canyons 40' deep.

In spite of the 15 years Mr. Mahan has snubbed and rebuffed City and State legal requirements that are designed to protect the public health, the City's SEPA official here ignores the City's own prior determinations that no actions can be taken and has issued a MDNS, thereby giving Mr. Mahan a chance to have a hearing in front of the Hearing Examiner system created by the City using a pro-development attorney as the Hearing Examiner, a clear violation of RCW 42.36, the Appearance of Fairness Act.

We remind the City that this site is not just a brownfield, but a blackfield, full of toxic waste from the worst industrial sites at the Port of Olympia commingled with construction and household solid waste, a site never regulated, permitted or monitored overlying the City's critical aquifer recharge area that supplies its residents with drinking water, and which drains into federally protected impaired waters with endangered species. To even consider building houses for families on top of this 70+ year old toxic stew before the site has been properly tested and cleaned up is a serious dereliction of the City's duty to protect the people and the environment.

**The City must send back this MDNS and require an EIS for this project which represents a change in land use from an industrial waste dump to housing families and children.**

As we have noted several times, the Department of Natural Resources (DNR) has issued reclamation permits from 1972 through 2014 requiring the removal of all non-native material, much of which most recently was brought in from other construction sites by Mr. Mahan as can be seen on aerial photos of the site in 2016 where 200 truckloads of fill are clearly visible and where neighbors witnessed 400-500 10 yard dump loads deposited. The current draft remedial investigation/feasibility study issued by Ecology for this toxic waste site requires testing groundwater down to 20' above sea level, below the level of all the waste deposited on site over the last 70 years.

Further reclamation permits on this site that were updated by DNR repeatedly show that the waste was deposited at least 35' deep in the mined out gravel pits, piercing a perched aquifer and exposing the water table, and were refilled on more than 50 acres of this 50 acre site including to the southeast and the northeast plus other areas on and off this site which have to be considered in both the reclamation and in Ecology's toxic cleanup. Based on information from test pits and DNR records, it is conservatively estimated that 325,000 tons of material were dumped here, much of which will have to be removed according to DNR's reclamation permit, and then replaced with clean materials that would be stable enough to support housing.

DNR and Ecology are working together to clean up this CSCSL listed toxic waste dump because of the reclamation permit, but also need to coordinate because the presence of the Weyerhaeuser log yard where trees contaminated with Agent Orange type herbicides were debarked, dumped and covered with sediment, also makes this property a forest practice issue.

Mr. Mahan has exhibited the same gross disrespect for state law designed to protect the public by violating RCW 78.44.081, 78.44.087, 78.44.091, 78.44.151 and 78.44.260, all related to this same property's use as a surface mine. (See Attached DNR documents) He operated without a reclamation permit or performance security, and failed to submit or follow an adequate reclamation plan, making him subject to a gross misdemeanor. One of the requirements set forth in RCW 78.44.091 requires a hydrogeologic analysis, which he has still not provided, for areas that are within critical aquifer recharge areas, as is the Sundberg property.

**Mr. Mahan is a scofflaw and should not be granted the privilege of a public hearing**.

The planned housing project envisions 177 houses. Using the standard formula of water usage of 300 gallons per day per family, the project will use at least 53,000 gallons of City water daily, or 19,345,000 gallons yearly, all to be pumped up, most likely under high pressure, on an extension of the existing water line to the highest hill in the area. At the same time as it uses this prodigious quantity of water, it will be covering up a critical aquifer recharge area for the City that supplies City wells and the Strategic Groundwater Reservation for the State Capital.

Considering recent evidence that in-stream flows in the area are already low and declining, this additional strain to our water supply will likely hasten the demise of our creeks and further deplete our aquifer. The effects of climate change need to be taken into account, as a recent court case in Jefferson County determined in its assessment of a proposed logging project. (See Center for Sustainable Economy and Save the Olympic Peninsula v DNR). In that case Superior Court Judge Keith Harper ruled that DNR had violated the state Environmental Policy Act by failing to consider the impacts of climate change from two timber sales in the county. This proposed project would also have significant impacts on the water supply and water quality of this area, and the impacts of climate change must be considered here as well.

RCW 36.70A.550 requires that cities that rely solely on groundwater aquifers for their potable water source must determine residential densities within aquifer conservation zones in combination with other densities of the city to "be sufficient to accommodate projected population growth under RCW 36.70A.110." There is no indication in the SEPA that the effects on water availability for the Strategic Groundwater Reservation for the State Capital or on City wells have been considered in the evaluation of this project. Neither have the effects of increased pollution from these houses been considered.

RCW 36.70A.172 requires counties and cities to include "the best available science in developing policies and development regulations to protect the functions and values of critical areas," and "shall give special consideration to conservation and protection measures necessary to preserve or enhance anadromous fisheries." The best available science for this property is the Green Cove Basin Comprehensive Plan which specifically

identifies the importance of reducing stormwater and increased tree canopy to maintain the health of the watershed and the salmon who inhabit Green Cove Creek and to prevent flooding.

In its MDNS, the City acknowledges that the project does not meet the requirements for protecting wetlands or flow control. "Wetland F buffer impacts have not been satisfactorily addressed," and "it's unclear if one (engineered energy dissipator) can be installed without impacts to critical areas" in regards to flow control and access for maintenance and repair. Since the City engineer admits he does not know if the suggested mitigation will work, the City must prepare an EIS, as the law clearly states. A MDNS can only be issued when the proposed mitigations are known to actually mitigate the environmental impacts, and not when their actual effects are "unclear." The City cannot presume the project can be mitigated. The MDNS must be based on real evidence of official and judicial notice.

We raise the same objection regarding the noted impacts of stormwater around Wetland F, which are deemed "unavoidable" in the Wetland Report. Again, the proposed alternatives offered by the City are complicated by Ecology's assessment that "earthwork near the seep's outflow may intercept sub-surface flows" requiring state and local permits. There is no information available now on this critical issue to allow the City to go forward with issuing a MDNS at this time. Further, Applicant has failed to update his geotechnical report in relation to the Critical Areas Ordinance, despite the City's and Ecology's repeated requests.

**Again, Mr. Mahan proves himself incapable of working amicably or cooperatively with the City to the detriment of the public. He does not deserve the privilege of a public hearing.**

The City acknowledges that this MDNS is based upon a "**presumption** that this project will be modified to address all mitigation measures identified…" and that "should any mitigation measure be removed, be infeasible, or be held to be invalid or unconstitutional, a new threshold determination **may** be required."

The City cannot “presume” any mitigation for this site before it even knows what exists there. The impacts the City identifies in this MDNS pale in comparison to those they have ignored. The elephant in the room is the extent and nature of the toxic waste from this 70+ year toxic and solid waste dump which have yet to be characterized under a formal order from Ecology and the instability of the ground to support housing above tons of dumped solid, toxic and construction waste which has yet to be removed pursuant to DNR’s reclamation permit.

There is no evidence of official and judicial notice in this MDNS of the likely foreseeable adverse impacts of the toxic waste and its effect on groundwater and neighboring wells, or federally protected waters, endangered species and habitat . Neither is any information available about methane from decomposing organic waste that potentially renders this site unbuildable, or from air and water pollution stemming from the toxic stew on this site. Because the City does not have this data, it cannot presume anything, let alone issue a MDNS.

Further, the process the City uses here is flawed. Since the City staff has already identified several significant impacts already that may not be able to be mitigated and recommended denial of the project, it should have issued a Determination of Significance and a scoping project to evaluate and identify the likely foreseeable adverse environmental impacts.

WAC 197-11-350(2) states:
“After submission of an environmental checklist and prior to the lead agency's threshold determination on a proposal, an applicant may ask the lead agency to indicate whether it is considering a DS. If the lead agency indicates a DS is likely, the applicant may clarify or change features of the proposal to mitigate the impacts which led the agency to consider a DS likely. The applicant shall revise the environmental checklist as may be necessary to describe the clarifications or changes. The lead agency shall make its threshold determination based upon the changed or clarified proposal. If a proposal continues to have a probable significant adverse environmental impact, even with mitigation measures, an EIS **shall** be prepared.”

It is the applicant's responsibility to "clarify or change features of the proposal to mitigate the impacts…" in order to prove that an EIS is not needed. Mr. Mahan has already submitted 3 other proposals for this same project. At this point, the City is required to do as the law says, i.e. "… an EIS **shall** be prepared," not "may."

The purpose of RCW 19.27.020, the State building code, is "to promote the health, safety and welfare of the occupants or users of buildings and structures and the general public by the provision of building codes throughout the state."

This project proposes spreading fill over impervious hardpan beneath the ground and covering it with gravel. Houses would be built on top of 20' pin pilings inserted into the gravel. The result would be water pooling on top of the impervious hardpan underneath the houses. This combined with the pollutant runoff from houses and roads and the lack of an adequate stormwater system, as the City acknowledges, is a recipe for disaster that would foist the consequences of poor building practices on the homeowners in addition to the health hazards posed by living above pools of contaminated water. There have been numerous instances in the country of houses sinking because of shoddy construction on unstable landfills. Mr. Mahan's disregard for following the rules that protect the public must be considered in this regard as well.

**The City must send back this MDNS and require an EIS for this project which represents a change in land use from an industrial waste dump to housing families and children.**

The MDNS does not consider the impacts of the recent clearcut at Cooper Crest just west of the Sundberg gravel pit in its Staff Recommendation. These 2 sites which share the same high pressure aquifer, the same wetlands and the same hillside which are integrally hydraulically connected must be considered as one ecological unit. The fact that the City had originally planned to connect the Parkside and Green Cove Park housing projects to the same water and sewer lines clearly indicates that it considers these two sites connected.

Ms. Hornbein's claim that the City does not need to consider the Cooper Crest clearcut as a connected action of this project because it was a Type III forest practice contradicts the

City's own May 26 letter (See attachment#3) which identified a fish-bearing stream and a second stream with a 150'buffer, evidence of official and judicial notice that was ignored by DNR thereby evading the requirement for a SEPA evaluation pursuant to RCW76.09.050 for forest practices "which have a potential for a substantial impact on the environment and therefore require an evaluation by the department as to whether or not a detailed statement must be prepared pursuant to the state environmental policy act, chapter 43.21C.037 RCW." The City's comments to DNR about the clearcut clearly identified falsehoods in the forest practice application which improperly allowed logging as a Type III forest practice, as the City well knows having submitted detailed maps of critical areas on the site from the Parkside project to DNR.

The failure to consider the combined impacts of the Cooper Crest clearcut and the housing development on the Green Cove Basin violates the following laws.

WAC197-11-060(4) Impacts
(a) SEPA's procedural provisions require the consideration of "environmental" impacts (see definition of "environment" in WAC **197-11-740** and of "impacts" in WAC **197-11-752**), with attention to impacts that are likely, not merely speculative. (See definition of "probable" in WAC **197-11-782** and **197-11-080** on incomplete or unavailable information.)
(b) **In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal's impacts only to those aspects within its jurisdiction**, including local or state boundaries (see WAC **197-11-330**(3) also).
(c) **Agencies shall carefully consider the range of probable impacts, including short-term and long-term effects**. Impacts shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer.
(d) A proposal's effects include direct and indirect impacts caused by a proposal. **Impacts include those effects resulting from growth caused by a proposal**, as well as the likelihood that the present proposal will serve as a precedent for future actions.

WAC 197-11-330(3) In determining an impact's significance (WAC **197-11-794**), the responsible official shall take into account the following, that:
**(c) Several marginal impacts when considered together may result in a significant adverse impact;** and
(e) A proposal may to a significant degree:

(i) **Adversely affect environmentally sensitive or special areas**, such as **loss or destruction of** historic, scientific, and cultural resources, parks, prime farmlands, **wetlands**, wild and scenic rivers, or wilderness;
(ii) **Adversely affect endangered or threatened species or their habitat**;
(iii) **Conflict with local, state, or federal laws or requirements for the protection of the environment;** and
(iv) Establish a precedent for future actions with significant effects, **involves unique and unknown risks to the environment, or may affect public health or safety.**

The City is barred under equitable estoppal from making any claim that they cannot consider impacts from the adjacent site to this project.

Clearly the City has neglected to consider the sum total of impacts from 2 adjacent denuded sites on the highest hill of Olympia, both subject to toxic contamination, flooding and landslides near a stream with endangered species flowing into federally protected impaired tribal waters. Together with the excessive stormwater runoff from the Sundberg site which consistently fails to meet two Core Requirements for wetlands and flow control of the Drainage Design and Erosion Control Manual, the Cooper Crest clearcut significantly increases the risk of irreversible ecological damage to the Green Cove Watershed, City and private wells, and the federally protected waters of Puget Sound and its endangered species. Does the City believe that it is exempt from Federal Clean Water Act requirements for non-impairment of Federally regulated waters? Does it believe it is exempt from the Endangered Species Act which protects the Southern Resident Orcas and the salmon in Green Cove Creek?

**This MDNS, which does not account for this new information, must be sent back and an EIS required for this project which represents a change in land use from an industrial waste dump to housing families and children.**

The City notes that average daily trips on Cooper Point Rd will increase by 1,718 trips. Not only will this increase traffic volumes and intensify traffic conditions, it will further threaten the integrity of Cooper Point Rd itself now that the adjoining property to the west is clearcut.

The City's MDNR does not account for destabilization of the hillside on Cooper Point Rd because of the unlawful logging that was done and for which the City is seeking damages. (See attachment #4).

The City recognizes landslide hazard areas and wetlands on both sides of Cooper Point Rd. The clearcut Cooper Crest site has 5 landslide hazard areas, one of which falls directly on the western edge of Cooper Point Road. The right of way along this western edge was also clearcut, leaving no trees at the top edge of the hill to hold the soil that supports the roadway. The facts show clearcuts cause serious problems, especially downstream.

Consider Thurston County's June 1, 2022 letter to the Board of Natural Resources (See Attachment #5) regarding the Delica cuts above Summit Lake. In it, the County cites recent scientific literature which "shows increased flooding, sedimentation, and phosphorus levels result even from modern, improved clearcutting practices. Additionally, these practices affect groundwater and create streamflow depletion until approximately 45 years after the clearcut."

This highest hill that occupies the Sundberg and Cooper Crest properties has a high pressure aquifer from which springs flow downhill rendering the loose soil more unstable. In addition we can expect a 50%-200% increase in streamflow associated with logging via the clearcut method 5-10 years after cutting, according to a 2017 study by Perry and Jones in "Ecohydrology." The resultant streamflow will pollute Green Cove Creek and Budd and Eld Inlets with sediments from the clearcut and with the contaminated toxic sediments which flow through a culvert under Cooper Point Rd from the Sundberg site every time it rains.

**This MDNS, which does not account for this new information, must be sent back and an EIS required for this project which represents a change in land use from an industrial waste dump to housing families and children.**

WAC 197-11-350 Mitigated DNS gives guidance to agencies making threshold determinations. It allows an applicant to revise the environmental checklist as may be necessary to mitigate the impacts the agency has noted. The agency shall make its

determination based upon the changed or clarified proposal. If the proposal continues to have significant adverse environmental impacts, an EIS must be prepared.

Mr. Mahan has had 4 chances to submit a complete application. He has not yet come close to meeting the requirements required by the City, the state or federal government or the basic respect for the public trust. This 4th submission should never have been accepted by the City, especially after the site was listed under MTCA. With resolution of the toxic cleanup years away, and in light of Mr. Mahan's continued failure to fully cooperate with state and local agencies to unearth relevant data including the DNR reclamation permit which was first issued in 1972 and still has not been completed by Mr. Mahan who has owned the property for 17 years, **the City must return this MDNS and require an EIS, as stated in WAC 197-11-350(2).**

The Sundberg site was platted for housing in the late 19th century by the real estate speculators of the day. More than 100 years later, nothing has been built. This site is not appropriate for housing, which could be accommodated in the hundreds of vacant commercial buildings around the City and County. In its willingness to accommodate a private developer and obtain a new source of tax monies, has the City considered the economic costs of water quality degradation, lost stream base flow and consequent degradation of fish habitat, slope and infrastructure failures, contaminated wells, and depleted aquifers? Has it factored in the economic costs of water and sewer extensions, fire and police protection and future lawsuits for permitting housing families on unstable toxic soils? The answer clearly is NO.

**We urge the City to withdraw this MDNS and require an EIS pursuant to WAC 197-11-340(3).** We are determined to see this area cleaned up so that it no longer poses a threat to our and other creatures' homes and health, and will continue to advocate by whatever means necessary until that objective is accomplished.

Thank you for your consideration.

Esther Kronenberg
Jerry Dierker
Roger Robinson on behalf of the Green Cove Defense Committee

# Affidavit of Prejudice for Mark Scheibmeir

Olympia politics/Green Cove Park Project/2023

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Esther Grace Kronenberg <wekrone@gmail.com>

Mon, Jan 9, 1:38 PM

to Jay, CityCouncil, Leonard, Cari, tsmith

City of Olympia
Box 1967
Olympia, WA 98507
Attn: Hearing Examiner

**Project No. 19-0330**
**Affidavit of Prejudice: Mark Scheibmeir**

We are parties to land use Project No. 19-0330, the Green Cove Park Project.

We file this affidavit of prejudice pursuant to RCW 42.36.080 because we were just recently informed by City Planner Cari Hornbein that Mark Scheibmeir would be the Hearing Examiner in this case. It is reasonable to question the impartiality of Mr. Scheibmeir as a party of and for this proceeding due to conflicts of interest and his own statements. We also question Mr. Scheibmeir's qualifications to review decisions that affect federal resources, as this project does.

Mr. Scheibmeir states in his RFQ that "While my private practice involves some representation of small businesses, **much of my other work involves assisting individuals with their real estate issues.** This other, non-hearing examiner work offers me a unique perspective on the consequences of land use decisions. I fully understand how approving or denying a proposed land use has rippling effects across neighboring properties, neighborhoods and the community as a whole. In particular, I realize that for most individuals their home is their most significant asset and that my decision may affect the value of that asset. **I strive to never forget this.**" (emphasis added)

Mr. Scheibmeir reveals a clear prejudice in favor of private property rights and the "value of that asset" over the rights of the community from adverse environmental impacts. This, in itself, should preclude him from hearing a case that clearly pits one non-resident landowner against an entire community. Any reasonable person reading his comments would recognize this bias.

Evidence of bias is also clear from Mr. Scheibmeir's law firm's membership in the Lewis County Chamber of Commerce, a pro-development organization. It lists land use, zoning, and special use permits and variances as areas of practice, areas which prejudice one towards favoring the developer.

Also, as a member of the Lewis Chamber of Commerce himself, the Hearing Examiner violates RCW 42.36, the Appearance of Fairness statute for land use decisions, the Appearance of Fairness doctrine for common law for all governmental actions embodied in Article 2, Section 30 of the Washington State Constitution, and the state and federal provisions for protection of the rights of due process and equal protection of the law, as found by the State Supreme Court decision in SAVE vs. City of Bothell ( 89 Wn.2d 862 (1978) cited in a law review article at https://elr.info/sites/default/files/litigation/8.20379.htm) This case determined that membership in the Chamber of Commerce by two members of the planning commission violated the appearance of fairness because the Chamber had supported the proposed rezone in question. The case goes even further, stating the the appearance of fairness doctrine:

"prohibits participation in at least quasi-judicial proceedings when such membership demonstrates the existence of an interest which **might** substantially influence the individual's judgment" (Id., p.408) [emphasis added].

In this case, Applicant's own attorney, Heather Burgess, is a principal for PhillipsBurgess Law Group, which is the attorney for the Thurston Chamber and also a member of the Lewis County Chamber of Commerce. The presence of the Chamber of Commerce here in the persons of the Hearing Examiner and the Applicant's attorney clearly violate the appearance of fairness, especially since in this case we are dealing with the sole decision maker, and not just 2 members of a larger planning commission. Ms. Burgess' and Mr. Scheibmeir's shared Chamber association clearly violate the appearance of fairness doctrine. A competent land use attorney would know this association would disqualify him from being a Hearing Examiner or other official dealing with planning actions by a municipality or others, as would a reading of the City's own Municipal Code (OMC - Ord. 7187 §3, 2019; Ord. 5517 §1, 1995).

Also, since the City is in partnership with the local Chamber through its Shared Legislative Agenda, it is barred from employing members of the Chamber because that would put them in conflict by giving the appearance of bias.

The Municipal Resources Service Center addresses the Appearance of Fairness. It defines several areas of personal interest that disqualify a person for lack of impartiality. These include financial gain, property ownership and association or membership ties. Mr. Scheibmeir's expressed bias to protect property owners and to promote development through his membership

in the Chamber of Commerce is an "entangling influence impairing the ability to be or remain impartial." His actions as the registered agent and attorney for several real estate investments LLCs and other pro-development clients where he represents those pro-development clients within the City of Olympia are clearly grounds for violations of the appearance of fairness showing a lack of impartiality. His direct claims clearly show that he is aware of his pro-development bias which he "strives to never forget."

The Appearance of Fairness Doctrine "protects against decision makers who are actually biased or have a pecuniary interest in the proceedings", (Belcher v. Kitsap County, 808 P.2d 750 at 754 (1991), quoting Keever v. LEOFF Retirement Bd., 34 Wash. App. 873, 878, 664 P.2d 1256 (1983). Webster's Ninth New Collegiate Dictionary (1988) further defines "pecuniary" as "of or relating to money". (p.866).

Mr. Scheibmeir is a land use and real estate attorney with pecuniary interests within the City of Olympia, e.g., as the Registered Agent for 14 Limited Liability Corporations, ten of which have as their Governors Heidi and Robert Pehl. Two of the ten LLCs, SSRE Investments LLC and SSRE2 Investments LLC, own property on Cooper Point Road SW. Mr. Scheibmeir must be barred from hearing this case as his representation of landowners whose business is enhanced by increased development clearly presents a conflict of interest.

We note the fact that in his almost 10 years as Hearing Examiner for the City of Olympia, Mr. Scheibmeir has never denied a development permit, including those which faced significant public opposition like the Westman Mills project on Port property, Views on 5th, Parkside on Cooper Point Road, the marine fueling dock at the Port and the West Bay Yards project.

Other case law supports our position. Please see Fleming v. City of Tacoma, 81 Wn. 2d 292, 502 P. 2d 327 (1972), Smith v. Skagit County, 75 Wn. 2d 715, 453 P. 2d 832 (1969); (Buell v. Bremerton, 80 Wn. 2d 518, at 523, 495 P. 2d 1358 (1972); Chrobuck v. Snohomish County, 78 Wn. 2d 858, 480 P. 2d 489 (1971).

We are aware of at least 2 other requests for recusal of Mr. Scheibmeir. Dan Leahy requested his recusal from consideration of the Wellington Heights Subdivision for failing to disclose a business relationship with property owners in the area of Cooper Point Rd. Mr. Scheibmeir claimed he was "at a loss as to any connection," a conclusion which indicates his extremely narrow interpretation of the appearance of fairness doctrine as determined by the SAVE v. Bothell case, and his unwillingness to follow legal precedent.

Notably, California's Political Reform Act of 1974 requires "public officials whose decisions could affect their economic interests…to file economic interest disclosure statements, which are public records. Disclosure serves the two-fold purpose of making assets and income of public officials a matter of public record and reminding those public officials of their economic interests….The Act provides that all state and local officials, who foreseeably may materially affect private economic interests through the exercise of their public duties, must disclose such

interests….In general, an official's statement of economic interests discloses the types of interests in real property, investments, business positions and sources of income and gifts which the public official potentially could affect in his or her official capacity."

Mr. Scheibmeir has not disclosed his economic interests and the City has not required him to do so, even after his concealment of these interests was exposed by Mr. Leahy. The lack of such disclosure reflects poorly on the City, does not satisfy the appearance of fairness doctrine, and certainly does not support the City's action to rehire Mr. Scheibmier, a development action that can be appealed to the Growth Management Hearings Board.

Another request for recusal was submitted by Jim Lazar in File No. 20-3702 Ingersoll Stadium. In it, Mr. Lazar questioned Mr. Scheibmeir's impartiality because "he spoke dismissively of the effects of the (previous Examiner's) 2004 decision, calling it "outdated" and with a "risk of cultural bias." Mr. Lazar states "His gratuitous opinion, unfounded on testimony or facts, addressing an issue not before him in that docket, raises a reasonable question about his impartiality in a docket that is based on the specific objective of overturning that precedent. "

Hearing Examiner Rules of Procedure Section 5(3), states in pertinent part:
The Hearing Examiner should disqualify himself in any proceeding in which his **impartiality might reasonably be questioned,** including, but not limited to, instances in which:
(a) the Examiner has a personal bias or prejudice concerning a party or a proceeding; (emphasis added.)

In both cases, Mr. Scheibmeir refused to recuse himself despite clear evidence of real and/or potential bias and despite his own admission, stated above, that he has this bias.

Mr. Scheibmeir has also failed the standard set by (Buell v. Bremerton, 80 Wn. 2d 518, at 523, 495 P. 2d 1358 (1972) and Smith v. Skagit County, 75 Wn. 2d 715, 453 P. 2d 832 (1969) in his hearing on the Parkside project.

At the beginning of the Parkside hearing, Mr. Scheibmeir told the assembled public witnesses who came to testify he was not interested in hearing the testimony of the opponents, apparently claiming such testimony was not evidence as far as he was concerned.

However, testimony given under oath **IS** evidence, and his flat refusal to grant equal weight to the testimony and evidence from both opponents and proponents of the Project demonstrated his pro-development bias, since he did not give equal consideration to the weak voices of the citizens opposing the project vs. the strong voices of the developers.

In Buell, the State Supreme Court stated that the person or agency making such decisions must be "capable of hearing the weak voices as well as the strong" since "it is important not only that justice be done but that it also appears to be done...". (Buell v. Bremerton, supra).

The hearing is an adversarial process that requires a response to any claims made. At the Parkside hearing, Mr. Scheibmeir did not allow direct cross examination of the Applicant by Mr. Dierker or others, instead requiring all questions for the Applicant and City be routed through

him. Also, there was no cross examination by the Applicants of Mr. Dierker and other opponents, nor did they try to disprove the opponents' claims made under oath. Consequently, this Hearing Examiner violated his duties to act impartially pursuant to the Olympia Hearing Examiner Rules, the Appearance of Fairness doctrine, the adjudication provisions of RCW 34.05, the Administrative Procedure Act, and RCW42.36, all of which violates procedural due process, equal protection and our right to petition the government for redress of grievances.

In Smith, the Court was "particularly disturbed" by that County's "refusal to allow opponents to present their views on certain occasions." (See Smith v. Skagit County, supra). His conduct of the Parkside hearing belies Mr. Scheibmeir's stated claim on his RFQ that "the primary goal (of a hearing) is to ensure that every participant is given a full opportunity to be heard, " as required by Smith.

Finally, though Mr. Scheibmeir states he is knowledgeable about SEPA, the Shoreline Management Act and the Shoreline Master Program, his law firm's website makes clear that his expertise lies in business, contracts and leases, elder law, employment law, estate planning, forestry, general, landlord-Tenant, Municipal, Probate, Real property, and Arbitration and Mediation.

We note Mr. Scheibmeir has no training in environmental law, including federal Clean Water Act and Endangered Species Act Law. Since this project involves drainage to federally protected waters with endangered species, it requires a person with documented expertise in this area of law. Given the tie to tidal waters & Orcas, ALL federal laws must be considered, and all relevant federal agencies (US Army Corps of Engineers, US Fish& Wildlife, EPA, WA Fish & Wildlife, NOAA)) must be notified of the potential for toxic contamination to enter tidal waters, and must submit timely reviews for the file prior to approval. Federal law supersedes all city regulations.

Like a judge, a Hearing Examiner must be impartial, unbiased, and without prejudice, and knowledgeable of all applicable laws that apply. A land use/real estate attorney with membership in a pro-development organization like the Chamber of Commerce, and with no such environmental training clearly does not meet the qualifications to consider this proposal on an extremely sensitive environmental site under a formal order of the Department of Ecology for toxic cleanup, and with direct ties to federally protected water and wildlife resources.

At this time, this affidavit applies only to Mark Scheibmeir, and not to any other person who may be assigned to this docket as Hearing Examiner. It is our understanding that the City has alternative hearing examiners under contract.

Respectfully submitted:

Esther Kronenberg, Jerry Dierker and Roger Robinson
on behalf of Green Cove Defense Committee

# 131 Wn. App. 85, City of Olympia v. Thurston County Bd. of Comm'rs

[No. 32748-1-II. Division Two. December 28, 2005.]

THE CITY OF OLYMPIA , *Appellant* , v. THE THURSTON COUNTY BOARD OF COMMISSIONERS ET AL ., *Respondents* .

[1] Prohibition - Review - Standard of Review. A trial court's grant or denial of a writ of prohibition is reviewed under the abuse of discretion standard.

[2] Prohibition - Review - Factors. When reviewing a trial court's grant or denial of a writ of prohibition, an appellate court considers the character and function of the writ and evaluates all of the facts and circumstances shown by the record.

[3] Prohibition - Application - Test. A writ of prohibition is a drastic remedy that is proper only when (1) an actor or agency is about to act in excess of its jurisdiction and (2) the petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law.

[4] Counties - Ordinances - Construction - Unambiguous Language. A county ordinance that uses plain language and defines essential terms is unambiguous. Where the language of an ordinance is plain and unambiguous, a court may not look beyond that language or consider legislative history but, rather, should glean the legislative intent from the language of the ordinance itself and apply the ordinance as written.

[5] Counties - Ordinances - Construction - Judicial Deference - Ambiguity - Agency Expertise. The county's interpretation of an ambiguous county ordinance that is within the county's area of expertise will be accorded great weight by a reviewing court so long as the interpretation does not conflict with the ordinance.



[6] Environment - SEPA - Mitigated Determination of Nonsignificance - Mitigation Measures - Conditions of Permit Approval - Review - Procedural Track. Where a mitigation measure identified in a mitigated determination of nonsignificance is required as a condition of permit or plat approval, review thereof is conducted according to the procedure for seeking review of the permit or plat, not according to the procedure for seeking review of the "threshold determination." Under WAC 197-11-797 and WAC 197-11-300 (2), a "threshold determination" under the State Environmental Policy Act (chapter 43.21C RCW) is the decision by local environmental officials regarding whether further environmental review in the form of an environmental impact statement is necessary with respect to a given project proposal. A mitigation measure is not a

threshold determination as defined by WAC 197-11-797 and WAC 197-11-300 (2). A mitigated determination of nonsignificance issued under WAC 197-11-350 does not therefore constitute a "threshold determination" but is, rather, issued after a threshold determination is made that an environmental impact statement is unnecessary.

[7] Administrative Law - Judicial Review - Exhaustion of Administrative Remedies - Necessity. Where administrative procedures exist for review of a local agency decision, those procedures must be exhausted before review may be sought in court.

[8] Prohibition - Absence of Remedy at Law - Determination. For purposes of a writ of prohibition, what constitutes a plain, speedy, and adequate legal remedy depends on the facts of the case and rests within the sound discretion of the court in which the writ is sought.

[9] Prohibition - Absence of Remedy at Law - Delay, Expense, Annoyance, or Hardship - Effect. For purposes of a writ of prohibition, a legal remedy is not necessarily inadequate merely because it is attended with delay, expense, annoyance, or hardship. In order for a legal remedy to be inadequate, there must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ.

[10] Prohibition - Absence of Remedy at Law - Administrative Appeal - Test. For purposes of a writ of prohibition, whether an administrative appeal provides a "plain, speedy, and adequate remedy in the ordinary course of law" depends on whether (1) the error is so clear that reversal would be unquestioned if the case were already before the superior court on judicial review and (2) the litigation will terminate once the error is corrected. The fact that the superior court ultimately denies a petition for a writ of prohibition demonstrates that reversal of the administrative decision is not unquestioned.

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[11] Counties - Ordinances - Construction - Judicial Deference - In General. A court will give considerable deference to the construction given an ordinance by those officials charged with its enforcement.

Nature of Action: A city sought a writ of prohibition to bar the local county board of commissioners from hearing a construction company's appeal of a condition of preliminary plat approval requiring the company to pay park fees identified as a mitigation measure in a mitigated determination of nonsignificance issued for the project. The county code required that threshold determinations under the State Environmental Policy Act be appealed directly to the superior court.

Superior Court: The Superior Court for Thurston County, No. 03-2-02252-4, Wm. Thomas McPhee, J., on January 10, 2005, entered a judgment denying the writ.
Court of Appeals: Holding that the mitigation fees identified in the mitigated determination of nonsignificance did not constitute a "threshold determination" that was required to be appealed directly to the superior court and that the city did not lack a plain, speedy, and adequate remedy as required for the issuance of a writ of prohibition, the court *affirms* the judgment.

*Bob C. Sterbank* , City Attorney, and *Darren J. Nienaber* , Assistant, for appellant .

*Alexander W. Mackie* and *Eric S. Merrifield* (of Perkins Coie, L.L.P. ); *Elizabeth Petrich* ; and *Jeffrey G. Fancher* , for respondents .

¶1 VAN DEREN, A.C.J. - Patti Ingersoll, doing business as West Bay Construction (West Bay), filed two preliminary



plat applications in 2002 with Thurston County for the approval of two subdivisions in the city of Olympia (Olympia). At Olympia's request, Thurston County planners conditioned preliminary approval of both plats on West Bay's payment of park fees to Olympia as mitigation for the increased population the subdivisions would create. West Bay appealed the fees to a county hearing examiner who denied its appeal. West Bay then appealed to the Thurston County of Board of Commissioners (Board). Olympia challenged the Board's jurisdiction to hear West Bay's appeals, arguing that West Bay must appeal directly to the Thurston County Superior Court. The Board denied Olympia's challenge, and Olympia responded by seeking a writ of prohibition from the Thurston County Superior Court, barring the Board from hearing West Bay's appeal. The trial court denied the writ and Olympia appealed. We affirm.

## FACTS

¶2 In 2002, West Bay filed preliminary plat applications with Thurston County for the approval of Glenmore Ridge and Boulevard Heights, subdivisions in Olympia's unincorporated Urban Growth Area (UGA). As

part of the preliminary plat application process, Thurston County required that a "threshold determination" be made either by a county official or other responsible official. Thurston County Code (TCC) 17.09.020 adopting WAC 197-11-310 ; TCC 17.09.070. This "threshold determination" decides whether a proposed project has a probable significant adverse environmental impact requiring an environmental impact statement (EIS). WAC 197-11-300 (2). If an EIS is not required, the official issues either a determination of nonsignificance (DNS) or a mitigated determination of nonsignificance (MDNS). WAC 197-11-340 , -350; TCC 17.09.020. The MDNS specifies mitigation measures an applicant must take to reduce the environmental impact of a proposed project. *See* WAC 197-11-350 ; TCC 17.09.090. The approval of the preliminary plat application is thereafter conditioned on satisfaction of the specified mitigation



measures. TCC 17.09.090(G). If an applicant disagrees with the imposed mitigation measures, the applicant may appeal to the Thurston County Hearing Examiner (hearing examiner). TCC 18.10.030(C)(10), .070.

¶3 Thurston County issued a MDNS for Glenmore Ridge and Boulevard Heights, conditioning approval of the preliminary plat applications on payment of fees to mitigate the subdivisions' impact on Olympia's existing and future parks, recreation, and open-space facilities.

¶4 Thurston County issued its Glenmore Ridge MDNS on March 13, 2003. West Bay filed an appeal of the MDNS with the hearing examiner on April 2, 2003. In a consolidated proceeding on July 21, 2003, the hearing examiner addressed both the approval of West Bay's preliminary plat application and West Bay's appeal of the MDNS. The hearing examiner denied West Bay's MDNS appeal and West Bay appealed the decision to the Board.

¶5 Thurston County issued a revised MDNS for Boulevard Heights on August 20, 2002. The revised MDNS estimated mitigation fees but did not set them. Instead, it required that West Bay and Olympia negotiate the fees themselves. Thurston County scheduled a proceeding to evaluate the Boulevard Heights preliminary plat application on

September 3, 2002. September 3, 2002, was also the last day that West Bay could appeal the Boulevard Heights revised MDNS. At the hearing, West Bay did not appeal the revised MDNS. Olympia and West Bay stipulated that the mitigation fees imposed by the MDNS would be treated as conditions of plat approval and not threshold determinations. Both parties also requested more time to clarify unrelated details.

¶6 At the second plat approval hearing on October 15, 2002, the hearing examiner adhered to the revised MDNS for Boulevard Heights, mandating that Olympia and West Bay reach an agreement on mitigation fees but reserving the decision on fees to the hearing examiner in the event the parties could not resolve the issue by agreement. When the parties failed to reach an agreement on the mitigation



fees, the hearing examiner fixed the fees in a decision on reconsideration, dated October 7, 2003.*«1»*

¶7 West Bay appealed the hearing examiner's decisions regarding park mitigation fees for both Glenmore Ridge and Boulevard Heights to the Board. Olympia asserted that the Board did not have jurisdiction to hear West Bay's appeals and asked the Board to determine that West Bay could only appeal directly to Thurston County Superior Court. In a decision dated October 20, 2003, the Board denied Olympia's motion and consolidated West Bay's Glenmore Ridge and Boulevard Heights appeals.*«2»*

¶8 In response to the Board's denial of its objection to the Board's jurisdiction, Olympia petitioned Thurston County Superior Court for a writ of prohibition to prevent the Board from hearing West Bay's appeals. The court initially issued a writ of prohibition but granted West Bay's motion for reconsideration and withdrew the writ of prohibition, allowing the Board to proceed in hearing West Bay's appeals.

¶9 Olympia timely appeals the trial court's denial of its petition for writ of prohibition.

«1»The October 7, 2003 decision on reconsideration upheld an order by the hearing examiner issued at the conclusion of an open record hearing on July 3, 2003.

«2»In denying Olympia's motion, the Board reasoned that:

1. The definition of "threshold determination" in WAC 197-11-756 is the decision by the responsible official of the lead agency whether or not an EIS is required for a proposal.

2. The designation of mitigation measures in a MDNS become conditions of plat approval pursuant to TCC 17.09.090(G).

3. An appeal of a threshold determination must be directly to superior court, but an appeal challenging a condition of a MDNS is an appeal challenging a plat condition.

Clerk's Papers at 55. Therefore, the Board explained, it has jurisdiction to review decisions of the hearing examiner on plats pursuant to TCC 18.10.030(C)(10) and .070(B).

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## ANALYSIS

### I. STANDARD OF REVIEW

*[1, 2]*¶10 The parties agree that we review the trial court's denial of the writ of prohibition under the abuse of discretion standard. When applied to writs of prohibition, this requires us to consider the character and function of the writ of prohibition together with all the facts and circumstances shown by the record. *City of Spokane v. Local #1553, Am. Fed'n of State, County & Mun. Employees, AFL-CIO* , 76 Wn. App. 765 , 768, 888 P.2d 735 (1995).

*[3]*¶11 A writ of prohibition is a drastic remedy that is proper only when: (1) it appears the body to whom it is directed is about to act in excess of its jurisdiction; and (2) the petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law. *City of Moses Lake v. Grant County Boundary Review Bd.* , 104 Wn. App. 388 , 392, 15 P.3d

716 (2001); *City of Spokane* , 76 Wn. App. at 768 ; *Butts v. Heller* , 69 Wn. App. 263 , 266, 848 P.2d 213 (1993).

¶12 In this case, to determine whether the trial court abused its discretion when it denied the writ of prohibition, we must decide (1) whether the Board exceeded its authority by maintaining jurisdiction over West Bay's appeals and (2) whether Olympia had an inadequate remedy without the writ of prohibition.

## II. THE BOARD'S JURISDICTION

### A. Threshold Determinations

¶13 Olympia asserts that the park mitigation fees - conditions on the approval of West Bay's Glenmore Ridge and Boulevard Heights preliminary plat applications - are "threshold determinations" under Washington State's Environmental Policy Act (SEPA) (chapter 43.21C RCW) and must therefore be appealed directly to Thurston County Superior Court under TCC 17.09.160(K).

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*[4-6]*¶14 West Bay responds that while Olympia is correct in its assertion that the TCC requires threshold determinations to be appealed directly to superior court, the mitigation fees at issue are not threshold determinations. Rather, the fees are substantive plat conditions merely identified in the MDNS and are therefore appealable to the Board.*«3»*West Bay is correct.

¶15 WAC 197-11-797 *«4»*defines "threshold determination" as the decision of the responsible official from the lead agency whether an EIS is required for a noncategorically exempt proposal. *See also* WAC 197-11-300 (2). If the responsible environmental official determines that an EIS is not required, then either a DNS or MDNS must issue. WAC 197-11-340 , -350; TCC 17.09.020.

¶16 The plain language of WAC 197-11-797 and 197-11-300(2) states that a SEPA "threshold determination" is the decision by local environmental officials whether further environmental review in the form of an EIS is necessary with respect to a given project proposal. WAC

197-11-340 , 197-11-350, and TCC 17.09.020 make it clear that a MDNS is issued *after* the threshold determination whether an EIS is required. WAC 197-11-350 explains that either the applicant or the local agency may propose mitigating measures to modify the proposal in exchange for the agency's "threshold determination" that an EIS is not required. *See* WAC 197-11-350 (2), (3). And TCC 17.09.090(G) states:

«3»West Bay argues that SEPA threshold determinations are procedural devices to generate information for use by local authorities in evaluating land use applications; they do not create binding requirements. It contends that any mitigating conditions identified in the procedural SEPA review process do not become binding until the local authority incorporates them into a project's application as conditions for approval. In this case, West Bay asserts that the park mitigation fees are not threshold determinations, but rather substantive plat conditions merely identified in the MDNS and that they did not become binding until the hearing examiner incorporated them as conditions on the preliminary plat approval of Glenmore Ridge and Boulevard Heights.

«4»Thurston County has adopted virtually all of the chapter 197-11 WAC provisions implementing SEPA, chapter 43.21C RCW. All cited chapter 197-11 WAC provisions have been incorporated into the TCC. *See* TCC 17.09.020.

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> Mitigation measures incorporated in the MDNS shall be deemed conditions of approval of the permit decision and may be enforced in the same manner as any term or condition of the permit, or enforced in any manner specifically prescribed by the county.

Thus, the mitigation measures listed in a MDNS when an EIS is not required become plat conditions and are treated and enforced as such under the TCC.«5»The applicant must satisfy these mitigation measures before the county will grant final approval of the applicant's proposal.

¶17 Olympia argues that TCC 17.09.090(G) merely prescribes how mitigation measures are enforced but does not state that mitigation measures are in fact plat conditions. Olympia is partly correct in its

reading but ignores the language deeming the mitigation measures plat conditions and errs in its conclusion. TCC 17.09.090(G) mandates that mitigation measures - the conditions Thurston County requires when a threshold determination is made that an EIS is not required - be treated as plat conditions and enforced as such under TCC 18.10.030 and .070.

¶18 Olympia additionally asserts that TCC 17.09.160(K) prescribes the appeals process for "threshold determinations" and that the legislative history of TCC 17.09.160(K) demonstrates the Board's intent to direct environmental appeals to Thurston County Superior Court.

¶19 Where a statute uses plain language and defines essential terms, the statute is not ambiguous. *McFreeze Corp. v. Dep't of Revenue* , 102 Wn. App. 196 , 200, 6 P.3d 1187 (2000). Moreover, if the statutory language is clear, the court may not look beyond that language or consider legislative history but should glean the legislative intent through the language of the statute itself. *Burton v. Lehman* , 153 Wn.2d 416 , 422, 103 P.3d 1230 (2005); *C.J.C. v. Corp. of the Catholic Bishop* , 138 Wn.2d 699 , 708, 985 P.2d 262 (1999). When a statute is plain and unambiguous,

«5»West Bay notably points out that Olympia stipulated during a hearing on September 3, 2002, that the park mitigation fees were plat conditions and not threshold determinations.



the court must apply the statute as written. *Enter. Leasing, Inc. v. City of Tacoma, Fin. Dep't* , 139 Wn.2d 546 , 552, 988 P.2d 961 (1999).

¶20 While a portion of the preamble of TCC 17.09.160(K) states that the final decision on "environmental appeals" for project actions«6»shall be made by the hearing examiner, the plain language of the provision expressly states that:

> The decision of the hearing examiner on an appeal of a *threshold determination* for a project action is final. The hearing examiner shall not entertain motions for reconsideration. The decision of the hearing examiner may only be appealed to Superior Court . . . .

TCC 17.09.160(K) (emphasis added).

¶21 In short, the provision's language is unambiguous. Moreover, even if the provision were ambiguous, the Board has interpreted it to mean that only threshold determinations and not substantive conditions are appealed directly to superior court. Where a statute is ambiguous and a reviewing agency has expertise in the area, courts must accord the agency's interpretation great weight so long as it does not conflict with the statute. *Pub. Util. Dist. No. 1 of Pend Orielle County v. Dep't of Ecology* , 146 Wn.2d 778 , 790, 51 P.3d 744 (2002).

¶22 Finally, Washington cases involving challenges to threshold determinations have focused exclusively on whether the local authorities erroneously issued either a DNS/MDNS or a determination of significance requiring an EIS. Olympia points us to no authority for treating substantive conditions outlined in a MDNS as threshold determinations. Rather, the courts have adhered to the definitions in WAC 197-11-300 (2) and -797 that threshold determinations are decisions whether to require an EIS. *See, e.g.* , *Saldin Secs., Inc. v. Snohomish County* , 134 Wn.2d 288 , 949 P.2d 370 (1998); *King County v. Boundary Review Bd.* , 122 Wn.2d 648 , 860 P.2d 1024 (1993); *ASARCO, Inc. v. Air Quality Coal.* , 92 Wn.2d 685 , 601 P.2d 501 (1979);

*«6»*Both Boulevard Heights and Glenmore Ridge qualify as "project actions" under WAC 197-11-704 (2)(a).

*Lassila v. City of Wenatchee* , 89 Wn.2d 804 , 576 P.2d 54 (1978); *Bellevue v. King County Boundary Review Bd.* , 90 Wn.2d 856 , 586 P.2d 470 (1978); *Sisley v. San Juan County* , 89 Wn.2d 78 , 569 P.2d 712 (1977); *Lakeside Indus. v. Thurston County* , 119 Wn. App. 886 , 83 P.3d 433 (2004); *Moss v. City of Bellingham* , 109 Wn. App. 6 , 31 P.3d 703 (2001).

¶23 Mitigation measures are not threshold determinations as defined by WAC 197-11-300 (2) and -797. TCC 17.09.090(G) and TCC 17.09.160(K) are entirely consistent, the former creating an enforcement scheme for substantive conditions of plat approval, the latter creating a separate appeals process for SEPA threshold determinations made by county officials.

¶24 Thus, we hold that the Board had jurisdiction to hear West Bay's appeals of the park mitigation fees.

B. Administrative Remedies«7»

*[7]*¶25 Alternatively, Olympia argues that West Bay exhausted its administrative remedies if the mitigation fees are not threshold determinations because, within SEPA, the TCC allows only appeals of threshold determinations. In short, Olympia argues that West Bay has no administrative remedy. This argument ignores TCC 17.09.090(G), which treats mitigation measures arising out of SEPA review as plat conditions entitled to two levels of administrative review.

¶26 Conditions of approval for preliminary plat applications are appealable first to the hearing examiner and then

«7»Because we hold that the mitigation requirements are not threshold determinations, we do not address Olympia's arguments on exhaustion and linkage of threshold determinations for purposes of appeal. *See State ex rel. Friend & Rikalo Contractor v. Grays Harbor County* , 122 Wn.2d 244 , 857 P.2d 1039 (1993). Further, Olympia is correct that "there is nothing to link" in this case, but incorrect that West Bay has not advanced an underlying plat appeal. *See Friend & Rikalo* , 122 Wn.2d at 249 -51. Olympia asserts that West Bay is appealing Thurston County's threshold determination. It is not. Rather, West Bay is appealing substantive conditions - specifically the amount of the park mitigation fees - for final plat approval. There does not appear to be a SEPA

appeal here at all, making Olympia's "exhaustion" and "linkage" contentions entirely misplaced.



to the Board. TCC 18.10.070(A), (B).«8»The Board has yet to issue its final decision on whether it will approve the Boulevard Heights and Glenmore Ridge projects. Until the appeals before the Board are final, neither West Bay nor Olympia may seek judicial review. *State ex rel. Friend & Rikalo Contractor v. Grays Harbor County* , 122 Wn.2d 244 , 250-51, 857 P.2d 1039 (1993). Thus, Olympia's argument fails.

## III. PLAIN, SPEEDY, AND ADEQUATE REMEDY

¶27 Olympia also argues that it lacked a plain, speedy, and adequate remedy, the second element necessary for the proper issuance of a writ of prohibition.

*[8-10]*¶28 What constitutes a plain, speedy, and adequate remedy depends on the facts of the case and rests within the sound discretion of the court in which the writ is sought. *Butts* , 69 Wn. App. at 266 . A remedy may be adequate even if attended with delay, expense, annoyance, or some hardship. *Moses Lake* , 104 Wn. App. at 392 . There must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress afforded without issuance of the writ. *Moses Lake* , 104 Wn. App. at 392 . An appeal is an inadequate remedy if: (1) the error was so clear that reversal would be "unquestioned" if the case were already before the superior court on a post-judgment appeal; and (2) the litigation will terminate once the error is corrected. *City of Kirkland v. Ellis* , 82 Wn. App. 819 , 827-28, 920 P.2d 206 (1996).

¶29 The Board's conclusion that it had jurisdiction to hear West Bay's appeals of the park mitigation fees did not constitute error so clear that reversal would be unquestioned if the case were already before the superior court. Indeed, the superior court's ultimate denial of Olympia's petition for a writ of prohibition demonstrates that reversal

*«8»*The Boulevard Heights and Glenmore Ridge projects are considered "Type III" projects under the TCC. *See* TCC 18.10.020(C). Olympia agrees.



of the Board's decision was not unquestioned. Moreover, we have affirmed the Board's jurisdiction over West Bay's appeals.

*[11]*¶30 Olympia challenges the jurisdiction of the Board to review a condition imposed by a MDNS that must be satisfied before final plat approval is granted to West Bay. "It is a well established rule of statutory construction that considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement." *Mall, Inc. v. City of Seattle* , 108 Wn.2d 369 , 377-78, 739 P.2d 668 (1987).

¶31 We hold that Olympia's participation in West Bay's appeal to the Board of preliminary plat conditions imposed under a MDNS for Glenmore Ridge and Boulevard Heights in Olympia's UGA is a plain, speedy, and adequate remedy and that the trial court did not err in denying a writ of prohibition.

¶32 The Thurston County Board of Commissioners has jurisdiction to hear West Bay's appeals. We affirm the trial court's denial of the writ of prohibition.\

HOUGHTON and HUNT , JJ., concur.

**From:** Tim Trohimovich
**To:** SMP; Jamie Caldwell
**Subject:** Comments on SMP Update for BOCC Public Hearing
**Date:** Tuesday, May 16, 2023 9:23:43 AM
**Attachments:** image003.png
Futurewise Coms to Thurston Co on SMP Update May 16 2023.pdf

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Dear Commissioners and Staff:

Enclosed please find Futurewise's comments on the Shoreline Master Program BOCC Public Hearing Draft for the May 16, 2023, Board of County Commissioners Public Hearing. Thank you for considering our comments.

Please let me know if you require anything else.

Tim Trohimovich, AICP (he/him)
Director of Planning & Law


816 Second Avenue, Suite 200
Seattle, WA 98104-1530
206 343-0681 Ex 102
tim@futurewise.org
connect:
futurewise.org

816 Second Ave, Suite 200, Seattle, WA 98104
p. (206) 343-0681
futurewise.org

May 16, 2023

The Honorable Carolina Mejia, Chair
The Honorable Gary Edwards
The Honorable Tye Menser
Board of Commissioners for Thurston County
3000 Pacific Avenue SE
Olympia, WA 98501

Dear Chair Mejia and Commissioners Edwards and Menser:

**Subject: Comments on the Shoreline Master Program (SMP) BOCC Public Hearing Draft for the May 16, 2023, Board of County Commissioners Public Hearing.**
Sent via email to: smp@co.thurston.wa.us; jamie.caldwell@co.thurston.wa.us

Thank you for the opportunity to comment on the Shoreline Master Program (SMP) BOCC Public Hearing Draft for the May 16, 2023, Board of County Commissioners Public Hearing. Futurewise strongly supports the update and appreciates the many improvements in this draft.

The southern resident orcas, or killer whales, are threatened by (1) an inadequate availability of prey, the Chinook salmon, "(2) legacy and new toxic contaminants, and (3) disturbance from noise and vessel traffic."[1] "Recent scientific studies indicate that reduced Chinook salmon runs undermine the potential for the southern resident population to successfully reproduce and recover."[2] A 2018 analysis by the National Oceanic and Atmospheric Administration and the State of Washington Department of Fish and Wildlife ranked the Southern Puget Sound fall Chinook stocks that originate in the Nisqually and Deschutes River systems

[1] State of Washington Office of the Governor, Executive Order 18-02 Southern Resident Killer Whale Recovery and Task Force p. 1 (March 14, 2018) last accessed on May 4, 2023, at: https://www.governor.wa.gov/sites/default/files/exe_order/eo_18-02_1.pdf and enclosed with the paper original of Futurewise's March 6, 2019, letter to Thurston County.
[2] *Id.*

highest in importance as food sources for the southern resident killer whales.[3] The Shoreline Master Program update is an opportunity to take steps to help recover the southern resident orcas, the Chinook salmon, and the species and habitats on which they depend. We support improving protections for these key species such as improved regulations to manage hard shoreline armoring and improved protections for shoreline vegetation.

Therefore, we strongly support the shoreline master program update. We do have suggestions to improve the update discussed below.

Futurewise works throughout Washington State to support land-use policies that encourage healthy, equitable and opportunity-rich communities, and that protect our most valuable farmlands, forests, and water resources. Futurewise has members and supporters throughout Washington State including Thurston County.

## Provisions Futurewise Particularly Supports

The SMP update has many good provisions. We want to highlight some of the best provisions:

- The vegetation conservation goal and policies in proposed 19.300.110. Retaining native vegetation in shorelines jurisdiction is important to maintaining no net loss of shoreline ecological functions.[4]
- Calling for carrying out the Alliance for a Healthy South Sound's (AHSS) South Sound Strategy through the shoreline master program and its implementation. This will better protect water quality and water quantity.
- The vegetation conservation requirements in proposed 19.400.120 especially the improved standards in A.3. Retaining native vegetation in shorelines jurisdiction is important to maintaining no net loss of shoreline ecological functions and to comply with the Shoreline Master Program Guidelines.[5]

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[3] National Oceanic and Atmospheric Administration and the State of Washington Department of Fish and Wildlife, *Southern Resident Killer Whale Priority Chinook Stocks* p. 6 (June 22, 2018) last accessed on May 4, 2023, at: https://www.documentcloud.org/documents/4615304-SRKW-Priority-Chinook-Stocks.html and enclosed with the electronic version of Futurewise's March 6, 2019, letter to Thurston County with the filename: "SRKW-Priority-Chinook-Stocks.pdf."
[4] EnviroVision, Herrera Environmental, and Aquatic Habitat Guidelines Program, *Protecting Nearshore Habitat and Functions in Puget Sound* p. II-39 – II-40 (October 2007, Revised June 2010) last accessed on May 4, 2023, at: https://wdfw.wa.gov/publications/00047/ and enclosed with the paper original of Futurewise's March 6, 2019, letter to Thurston County.
[5] *Id.*

- Proposed 19.400.130B.'s requirement that sites with known or potential archaeological resources require a site inspection by a professional archaeologist. This will significantly improve protections for archaeological resources and save permit applicants time and money because the risk of having their project stopped for archaeological work will be reduced.[6]
- Proposed 19.500.105K.'s monitoring provisions. These provisions are needed to determine if the Shoreline Master Program is achieving no net loss. These provisions are required by the Shoreline Master Program Guidelines.[7]

## Summary of Key Recommendations

- Please correct the descriptions of critical areas and their status under the Shoreline Management Act in proposed 19.100.110. Please see page 4 of this letter for the detailed recommendation.
- Modify Policy SH-18 to maintain water quality as the SMP Guidelines require. Please see page 5 of this letter for the detailed recommendation.
- While we appreciate the improvements to the proposed aquatic buffers, we continue to recommend that the County adopt aquatic buffers in proposed 19.400.120B consistent with Management Recommendations for Washington's Priority Habitats. These buffer widths are necessary to achieve no net loss of shoreline resources. Please see page 6 of this letter for the detailed recommendation.
- Require wider setbacks between development and critical areas and critical areas buffers in areas subject to wildfire danger. Please see page 9 of this letter for the detailed recommendation.
- Please adopt a ten percent impervious surface limit for the Rural Conservancy shoreline environment consistent with the SMP Guidelines to protect shoreline ecological functions. Please see page 10 of this letter for the detailed recommendation.
- Protect people, property, and habitat from sea level rise and increased coastal erosion. Please see page 11 of this letter for the detailed recommendation.

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[6] *See for example* Jeff Chew, *Jefferson PUD sticks with Beckett Point* Connections pp. 8 – 9 (Washington Public Utility Districts Association [WPUDA]: Winter 2008) last accessed on May 4, 2023 at: https://www.yumpu.com/en/document/view/46547248/connections-washington-public-utility-district-association/11

[7] *Friends of the San Juans v. San Juan County and State of Washington, Department of Ecology*, WWRGMHB Case No. 17-2-0009, Final Decision and Order (June 13, 2018), at 34 of 38.

- Prohibit marine net pen aquaculture for nonnative species in the Aquatic environment. Please see page 19 of this letter for the detailed recommendation.
- In the Rural Conservancy environment only allow new structural shoreline stabilization and flood control works where there is a documented need to protect an existing structure as SMP Guidelines require. Please see page 20 of this letter for the detailed recommendation.
- Please modify proposed 19.600.170B.7. to require public access consistent with the SMP Guidelines. Please see page 21 of this letter for the detailed recommendation.
- Require mitigation for all losses of shoreline ecological functions including the adverse impacts of development outside of buffers as required by the SMP guidelines. Please see page 22 of this letter for the detailed recommendation.
- Include all required elements in the Shoreline Restoration Plan. Please see page 23 of this letter for the detailed recommendation.

## Detailed Recommendations

### Please correct the descriptions of critical areas and their status under the Shoreline Management Act in proposed 19.100.110 Purpose and Intent on 5 of 572.

The Shoreline Management Act (SMA), in RCW 90.58.610, provides that "RCW 36.70A.480 governs the relationship between shoreline master programs and development regulations to protect critical areas that are adopted under chapter 36.70A RCW." RCW 36.70A.480(5) provides that the "[s]horelines of the state shall not be considered critical areas under this chapter except to the extent that specific areas located within shorelines of the state qualify for critical area designation based on the definition of critical areas provided by RCW 36.70A.030(5) and have been designated as such by a local government pursuant to RCW 36.70A.060(2)." Proposed 19.100.110 in the third paragraph is unclear as to whether the Growth Management Act (GMA) definitions identify critical areas as RCW 90.58.610 and RCW 36.70A.480(5) require. So, we suggest that the last sentence in the third paragraph of Proposed 19.100.110 be revised to read as follows with our additions double underlined and deletions double struck through.

Although Washington's shorelines may contain critical areas, the shorelines themselves are not critical areas ~~by default as~~ unless they meet the definitions in the ~~defined by~~ GMA.

## Please clarify shoreline master program jurisdiction in proposed 19.100.120D on page 6 of 427.

The shoreline master program applies to all shorelines and shorelands in unincorporated Thurston County.[8] The GMA divides unincorporated Thurston County within the county's jurisdiction into three broad categories: urban, rural, and natural resource lands. We are concerned that proposed 19.100.120D may inadvertently be interpreted as exempting natural resource lands from the jurisdiction of the shoreline master program (SMP). In addition, the SMA allows cities to predesignate lands within their urban growth areas. Once annexed, these predesignations apply to the annexed land. In this case, no amendment is required to apply the city SMP to those areas. But, not all areas in the urban area may be subject to predesignations. So, we suggest that proposed 19.100.120D be revised with our additions double underlined and deletions double struck through.

> D. This Master Program shall apply to all unincorporated ~~rural and urban~~ land~~s~~ within Thurston County until such time as a city incorporates land into their city boundaries through annexation and, if necessary, an SMP amendment.

## Modify Policy SH-18 to maintain water quality as the SMP Guidelines require. See proposed 19.300.115A. on page 43 of 572

The SMP Guidelines, in WAC 173-26-186(8)(b), provides that "[l]ocal master programs shall include policies and regulations designed to achieve no net loss of those ecological functions." Shoreline ecological functions include the "maintenance of water quality."[9] Unfortunately, rather than maintaining water quality, proposed Policy SH-18 provides that shoreline uses should minimize impacts that contaminate surface or ground water. Minimizing contamination will not maintain water quality. We recommend that Policy SH-18 be revised to read as follows with our additions double underlined and our deletions double struck through.

> A. Policy SH-18 Shoreline use and development shall not ~~should minimize impacts that~~ contaminate surface or ground water, cause adverse effects on shoreline ecological functions, or impact aesthetic qualities and recreational opportunities, including, but not limited to, healthy shellfish harvest, swimming, and boating.

[8] RCW 90.58.030(2).
[9] WAC 173-26-201(2)(c) underlining added.

**Please adopt aquatic buffers in proposed 19.400.120B consistent with *Management Recommendations for Washington's Priority Habitats* and the available science for marine buffers. Please see pages 62 – 64 of 572**

To protect species such as the Chinook salmon and the orcas, the policy of the Shoreline Management Act, in RCW 90.58.020, "contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life ...." Also recognizing the need to protect these species, the SMP Guidelines, in WAC 173-26-221(5)(b), require that "[m]aster 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." Shoreline ecological functions include shoreline vegetation and habitat for native aquatic and shoreline-dependent mammals and anadromous and resident native fish, which include Chinook salmon and orcas.[10]

Shoreline "[v]egetation conservation includes activities to protect and restore vegetation along or near marine and freshwater shorelines that contribute to the ecological functions of shoreline areas."[11] Shoreline master programs "shall" "[e]stablish vegetation conservation standards that implement the principles in WAC 173-26-221(5)(b). Methods to do this may include setback or buffer requirements, clearing and grading standards, regulatory incentives, environment designation standards, or other master program provisions."[12]

The SMP Guidelines, in WAC 173-26-221(5)(b), also provide in part that "[i]n establishing vegetation conservation regulations, local governments must use available scientific and technical information, as described in WAC 173-26-201(2)(a). At a minimum, local governments should consult shoreline management assistance materials provided by the department and *Management Recommendations for Washington's Priority Habitats*, prepared by the Washington state department of fish and wildlife where applicable."

The State of Washington Department of Fish and Wildlife has recently updated the priority habitat and species recommendations for riparian areas. The updated management recommendations document that fish and wildlife depend on

[10] WAC 173-26-201(3)(d)(i)(C).
[11] WAC 173-26-221(5)(b).
[12] WAC 173-26-221(5)(c).

protecting riparian vegetation and the functions this vegetation performs such as maintaining a complex food web that supports salmon and maintaining temperature regimes to name just a few of the functions.[13]

To maintain riparian functions, the updated *Riparian Ecosystems, Volume 1: Science synthesis and management implications* scientific report recommends protecting the riparian ecosystem which has a width estimated to be "one 200-year site-potential tree height (SPTH) measured from the edge of the active channel or active floodplain. Protecting functions within at least one 200-year SPTH is a scientifically supported approach if the goal is to protect and maintain full function of the riparian ecosystem."[14] The report defines site-potential tree height (SPTH) as the "average maximum height of the tallest dominant trees (200 years or more) for a given site class."[15] The Washington State Department of Fish and Wildlife has created an easy to use web-based tool to identify the site-potential tree height of specific properties.[16]

We recommend that shoreline jurisdiction be expanded to include the 100-year flood plain[17] and that the buffers for river and stream shorelines be increased to use the newly recommended 200-year SPTH and that this width should be measured from the edge of the channel, channel migration zone, or active floodplain whichever is wider.[18] This will help maintain shoreline functions and Chinook habitat.

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[13] T. Quinn, G.F. Wilhere and K. Krueger, (technical editors), *Riparian Ecosystems, Volume 1: Science Synthesis and Management Implications* pp. 3 – 6 (Habitat Program, Washington Department of Fish and Wildlife, Olympia: 2020. A Priority Habitats and Species Document of the Washington Department of Fish and Wildlife) last accessed on May 4, 2023, at: https://wdfw.wa.gov/publications/01987 and enclosed at this Dropbox Link: https://www.dropbox.com/sh/4l459v8kavtrop2/AADAt7NOEwWIcDm_vMlUWSFRa?dl=0 with the filename: wdfw01987.pdf.

[14] *Id.* at p. 271.

[15] *Id.* at p. 273.

[16] R. Rentz, A. Windrope, K. Folkerts, and J. Azerrad, *Riparian Ecosystems, Volume 2: Management Recommendations* pp. 70 – 77 (Habitat Program, Washington Department of Fish and Wildlife, Olympia: 2020. A Priority Habitats and Species Document of the Washington Department of Fish and Wildlife) last accessed on May 4, 2023, at: https://wdfw.wa.gov/publications/01988 and enclosed at this Dropbox Link: https://www.dropbox.com/sh/4l459v8kavtrop2/AADAt7NOEwWIcDm_vMlUWSFRa?dl=0 with the filename: wdfw01988.pdf.

[17] Authorized by RCW 90.58.030(2)(d)(i).

[18] T. Quinn, G.F. Wilhere and K. Krueger, (technical editors), Riparian Ecosystems, Volume 1: Science Synthesis and Management Implications pp. 271 – 73 (Habitat Program, Washington Department of Fish and Wildlife, Olympia: 2020. A Priority Habitats and Species Document of the Washington Department of Fish and Wildlife).

*Protecting Nearshore Habitat and Functions in Puget Sound* documents marine riparian vegetation is important to maintaining the health of Puget Sound.[19] Removing or disturbing this native vegetation results in reduced ecological functions as does decreasing the width of the vegetated riparian area, reducing plant density, and reducing plan diversity.[20] The widths of marine riparian vegetation necessary to provide the functions listed above vary with the function. To maintain a 100 percent of the delivery of large organic debris is estimated to require approximately 200 feet of marine riparian vegetation.[21] Most of the leaf litter and other organic matter that reaches Puget Sound is from vegetation 100 to 200 feet from the sound.[22] Shading forage fish spawning habitat can require 56 – 125 feet of marine riparian vegetation to maintain 80 percent of the shaded area.[23] *Protecting Nearshore Habitat and Functions in Puget Sound* documents that protecting wildlife habitats requires buffers 240 to 902 feet wide.[24] Removing 99 percent of the sediment for runoff requires 984 feet of riparian vegetation.[25] To effectively perform these functions, the riparian vegetation needs to be undisturbed and undeveloped native vegetation.[26]

"[R]esearch shows that there is no particular impervious area threshold where degradation in stream integrity begins to occur; rather, the relationship is a continuum."[27] "[D]egradation can occur at even low levels of total impervious area

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[19] EnviroVision, Herrera Environmental, and Aquatic Habitat Guidelines Program, *Protecting Nearshore Habitat and Functions in Puget Sound* pp. II-39 – II-40 (October 2007, Revised June 2010) last accessed on May 4. 2023, at: https://wdfw.wa.gov/publications/00047/ and enclosed with the paper original of Futurewise's March 6, 2019, letter to Thurston County.
[20] *Id.* at p. II-43.
[21] Jim Brennan, Hilary Culverwell, Rachel Gregg, Pete Granger, *Protection of Marine Riparian Functions in Puget Sound, Washington* p. 21 (Washington Sea Grant Seattle, WA: June 15, 2009. Prepared for: Washington Department of Fish and Wildlife) last accessed on May 4. 2023, at: http://wdfw.wa.gov/publications/00693/ and enclosed with the paper original of Futurewise's March 6, 2019, letter to Thurston County.
[22] *Id.* at p. 22.
[23] *Id.* at p. 15.
[24] EnviroVision, Herrera Environmental, and Aquatic Habitat Guidelines Program, *Protecting Nearshore Habitat and Functions in Puget Sound* p. III-39 (October 2007, Revised June 2010).
[25] Jim Brennan, Hilary Culverwell, Rachel Gregg, Pete Granger, *Protection of Marine Riparian Functions in Puget Sound, Washington* p. 9 (Washington Sea Grant Seattle, WA: June 15, 2009. Prepared for: Washington Department of Fish and Wildlife).
[26] *Id.* at pp. 39 – 40.
[27] Thurston Regional Planning Council & Thurston County, *Deschutes Watershed Land Use Analysis: Current Conditions Report* p. 106 (Dec. 29, 2015) last accessed on May 4, 2023, at: https://www.co.thurston.wa.us/planning/watershed/docs/deschutes-project-materials/deschutes-

..."[28] The Thurston Regional Planning Council and Thurston County studied the "impacts of planned growth under current plans" in the basins that make up the Deschutes Watershed.[29] Every basin in the watershed will experience moderate or high increases in total impervious area (TIA) at buildout.[30] "The [i]mpacts of [p]lanned [g]rowth" put every basin "[p]ossibly at risk of further impacts" or "[a]t risk of further impacts."[31]

Our recommended buffers will reduce the potential for future adverse impacts to both fresh water and marine shorelines. We urge you to adopt our recommended buffers for non-water dependent uses.

**Require wider setbacks between development and critical areas and critical areas buffers in areas subject to wildfire danger. See proposed 19.400.120B.4. on page 59 of 427**

Setbacks from critical areas buffers provide an area in which buildings can be built, repaired, and maintained without having to intrude in the buffer. So, setbacks cannot be ended after construction. We appreciate and support that the statement "[t]he building setback is to protect the buffer during construction and is no longer required after construction is completed" in proposed 19.400.120B.4. on page 63 of 572 is proposed to be deleted.

Setbacks also allow for the creation of a Home Ignition Zone that can protect buildings from wildfires and allow firefighters to attempt to save the buildings during wildfires. Thurston County averages 63 wildfires per year.[32] The county "can expect at least one fire exceeding 100 acres over the next 25 years."[33] Since a 30-foot-wide Home Ignition Zone is important to protect buildings,[34] we

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current-conditions-report.pdf and enclosed at this Dropbox Link: https://www.dropbox.com/sh/4l459v8kavtrop2/AADAt7NOEwWIcDm_vMlUWSFRa?dl=0 with the filename: "deschutes-current-conditions-report.pdf."

[28] *Id.*

[29] *Id.* at p. 107.

[30] *Id.*

[31] *Id.*

[32] Thurston Regional Council, *3rd Edition Hazards Mitigation Plan for the Thurston Region* p. 4.5-6 (The Emergency Management Council of Thurston County: April 2017) last accessed on May 4, 2023, at: https://www.trpc.org/1100/Plan-Documents.

[33] *Id.*

[34] Nation Fire Protection Association "preparing homes for wildfire" webpage last accessed on May 4, 2023, at: https://www.nfpa.org/Public-Education/By-topic/Wildfire/Preparing-homes-for-

recommend that Shoreline Management Program require a setback at least 30 feet wide adjacent to critical areas and shoreline and critical area buffers in areas at high risk of wildfires. High risk areas are identified on Table 4.5.1 and on Map 4.5.4 of the *3rd Edition Hazards Mitigation Plan for the Thurston Region*. Combustible structures, such as decks, should not be allowed within this setback to protect the building from wildfires.

**Please adopt a ten percent impervious surface limit for the Rural Conservancy shoreline environment consistent with the SMP Guidelines to protect shoreline ecological functions. See proposed 19.400.140 on page 71 – 72 of 572**

Table 19.400.140(A) in Note 3 indicates that Hard Surface thresholds for Shoreline Environmental Designations are in Section 19.400.125. But Section 19.400.125 does not include any hard surface limits. The Thurston County Drainage Design and Erosion Control Manual referenced in Section 19.400.125 calls on project applicants to limit impervious surface to the minimum necessary, but it does not include impervious surface limits.[35]

Impervious surfaces are increasing in some areas of Thurston County outside urban growth areas including within shoreline jurisdiction.[36] "Impervious surfaces increase runoff of contaminants like fertilizers and pesticides to rivers, lakes and the ocean, reducing the amount and quality of water that is available for people, aquatic life and wildlife."[37] The Thurston Regional Planning Council and Thurston County studied the "impacts of planned growth under current plans" in the basins that make up the Deschutes Watershed.[38] Every basin in the watershed will experience moderate or high increases in total impervious area (TIA) at buildout.[39] "The [i]mpacts of [p]lanned [g]rowth" put every basin "[p]ossibly at risk of further impacts" or "[a]t risk of further impacts."[40] Many Thurston County basins

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wildfire and enclosed with the paper original of Futurewise's March 6, 2019, letter to Thurston County.

[35] Thurston County Drainage Design and Erosion Control Manual p. vi (Dec. 2016 Edition).

[36] *2020 State of Our Watersheds: A Report by the Treaty Tribes in Western Washington* p. 154, p. 158, p. 288, p. 292 last accessed on May 4, 2023, at: https://nwifc.org/publications/state-of-our-watersheds/ and enclosed at this Dropbox Link: https://www.dropbox.com/sh/4l459v8kavtrop2/AADAt7NOEwWIcDm_vMlUWSFRa?dl=0 with the filename: "state-of-our-watersheds-sow-2020-final-web.pdf."

[37] *Id.* at p. 288.

[38] *Id.* at p. 107.

[39] *Id.*

[40] *Id.*

already have impervious surfaces greater than ten percent.[41] These include the West Bay, Chambers, Mission Creek, Indian Creek, Percival Creek, Schneider, Capitol Lake, Moxile Creek, Green Cove Creek, Squaxin Passage, Woodard, and Woodland basins.[42] Many basins are likely to be covered by more than five or ten percent impervious surfaces in the coming years.[43]

To prevent adverse impacts on and degradation of shoreline ecological functions, WAC 173-26-211(5)(b)(ii)(D) requires rural conservancy shoreline environments to limit impervious surfaces to ten percent of the lot. The proposed SMP does not include any impervious surface limits for the Rural Conservancy environment. This is inconsistent WAC 173-26-211(5)(b)(ii)(D) and will result in continuing adverse impacts shoreline ecological functions. A ten percent maximum imperious surface limit is required for the Rural Conservancy environment.

## Protect people, property, and habitat from sea level rise and increased coastal erosion. See proposed 19.400.150B on pages 75 – 76 of 572

The Shoreline Management Act and Shoreline Master Program Guidelines require shoreline master programs to address the flooding that will be caused by sea level rise. RCW 90.58.100(2)(h) requires that shoreline master programs "shall include" "[a]n element that gives consideration to the statewide interest in the prevention and minimization of flood damages ..." WAC 173-26-221(3)(b) provides in part that "[o]ver the long term, the most effective means of flood hazard reduction is to prevent or remove development in flood-prone areas ..." Counties and cities should consider the following when designating and classifying frequently flooded areas ... [t]he potential effects of tsunami, high tides with strong winds, sea level rise, and extreme weather events, including those potentially resulting from global climate change ...."[44] The areas subject to sea level rise are flood prone areas just the same as areas along bays, rivers, or streams that are within the 100-year flood plain. As the State of Washington Department of Ecology's (Ecology) *Shoreline Master Program Handbook Appendix A: Addressing Sea Level Rise in Shoreline Master Programs* states "SMPs must

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[41] *South Puget Sound Forum: Environmental Quality – Economic Vitality Indicators Report* p. 4 last accessed on May 4, 2023, at: https://www.trpc.org/ArchiveCenter/ViewFile/Item/68 and enclosed with the paper original of Futurewise's March 6, 2019, letter to Thurston County.
[42] *Id.*
[43] *Id.* at p. 5.
[44] WAC 365-190-110(2) underlining added. This regulation is part of the State of Washington Department of Commerce Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas.

address flood hazards and seek to reduce the damage caused by floods. Goals and policies addressing flood hazards are another opportunity to address sea level rise and the increased threat from flooding that will accompany it."[45]

RCW 90.58.100(1) and WAC 173-26-201(2)(a) also require "that the 'most current, accurate, and complete scientific and technical information' and 'management recommendations' [shall to the extent feasible] form the basis of SMP provisions."[46] This includes the current science on sea level rise.

Sea level rise is a real problem that is happening now. Sea level is rising and floods and erosion are increasing. In 2012 the National Research Council concluded that global sea level had risen by about seven inches in the 20th Century.[47] A recent analysis of sea-level measurements for tide-gage stations, including the Seattle, Washington tide-gauge, shows that sea level rise is accelerating.[48] Virginia Institute of Marine Science (VIMS) "emeritus professor John Boon, says 'The year-to-year trends are becoming very informative. The 2020 report cards continue a clear trend toward acceleration in rates of sea-level rise at 27 of our 28 tide-gauge stations along the continental U.S. coastline.'"[49]

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[45] State of Washington Department of Ecology, *Shoreline Master Program Handbook Appendix A: Addressing Sea Level Rise in Shoreline Master Programs* p. 8 (Publication Number 11-06-010: rev. 12/17) last accessed on May 4, 2023, at: https://apps.ecology.wa.gov/publications/SummaryPages/1106010.html and enclosed with this letter. The appendix is also at this enclosed at this Dropbox Link: https://www.dropbox.com/sh/4l459v8kavtrop2/AADAt7NOEwWIcDm_vMlUWSFRa?dl=0 with the filename: "1106010part19.pdf."

[46] *Taylor Shellfish Company, Inc., et al., v. Pierce County and Ecology (Aquaculture II)*, Final Decision and Order Central Puget Sound Region Growth Management Hearings Board Case No. 18-3-0013c (June 17, 2019), at 10 of 81 footnote omitted.

[47] National Research Council, *Sea-Level Rise for the Coasts of California, Oregon, and Washington: Past, Present, and Future* p. 23, p. 156, p. 96, p. 102 (2012) accessed on May 4, 2023, at: https://www.nap.edu/download/13389.

[48] William and Mary Virginia Institute of Marine Science, *U.S. West Coast Sea-Level Trends & Processes Trend Values for 2020* last accessed on June 18, 2021, at: https://www.vims.edu/research/products/slrc/compare/west_coast/index.php and enclosed at this Dropbox Link: https://www.dropbox.com/sh/4l459v8kavtrop2/AADAt7NOEwWIcDm_vMlUWSFRa?dl=0 with the filename: "U.S. West Coast _ Virginia Institute of Marine Science Trend Values 2020.pdf."

[49] David Malmquist, *U.S. sea-level report cards: 2020 again trends toward acceleration* Virginia Institute of Marine Science website (Jan. 24, 2021) last accessed on June 18, 2021, at: https://www.vims.edu/newsandevents/topstories/2021/slrc_2020.php and enclosed at this Dropbox Link: https://www.dropbox.com/sh/4l459v8kavtrop2/AADAt7NOEwWIcDm_vMlUWSFRa?dl=0 with the filename: "U.S. sea-level report cards_ 2020 again trends toward acceleration _ Virginia Institute of Marine Science.pdf."

"'Acceleration can be a game changer in terms of impacts and planning, so we really need to pay heed to these patterns,' says Boon."[50] The Seattle tide gage was one of the 27 that had an accelerating rate of sea level rise.[51]

The report *Projected Sea Level Rise for Washington State – A 2018 Assessment* projects that for a low greenhouse gas emission scenario there is a 50 percent probability that sea level rise will reach or exceed 1.9 feet by 2100 for Budd Inlet including Boston Harbor.[52] *Projected Sea Level Rise for Washington State – A 2018 Assessment* projects that for a higher emission scenario there is a 50 percent probability that sea level rise will reach or exceed 2.3 feet by 2100 for Budd Inlet including Boston Harbor.[53] Projections are available for all marine shorelines in Washington State. The general extent of the projected sea level rise currently projected for coastal waters can be seen on the NOAA Office for Coastal Management Digitalcoast Sea Level Rise Viewer available at: https://coast.noaa.gov/digitalcoast/tools/slr.html

Projected sea level rise will substantially increase flooding. As Ecology writes, "[s]ea level rise and storm surge[s] will increase the frequency and severity of flooding, erosion, and seawater intrusion—thus increasing risks to vulnerable communities, infrastructure, and coastal ecosystems."[54] Not only our marine shorelines will be impacted, as Ecology writes "[m]ore frequent extreme storms

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[50] *Id.*

[51] William and Mary Virginia Institute of Marine Science, *U.S. West Coast Sea-Level Trends & Processes Trend Values for 2020.*

[52] *Relative Sea Level Projections for RCP 4.5 for the Coastal Area Near: 47.1N, 122.9W* data now available at: https://cig.uw.edu/resources/special-reports/sea-level-rise-in-washington-state-a-2018-assessment/ and enclosed with the paper original of Futurewise's March 6, 2019, letter to Thurston County. The methodology used for these projections is available in Miller, I.M., Morgan, H., Mauger, G., Newton, T., Weldon, R., Schmidt, D., Welch, M., Grossman, E., *Projected Sea Level Rise for Washington State – A 2018 Assessment* p. 8 of 24 (A collaboration of Washington Sea Grant, University of Washington Climate Impacts Group, Oregon State University, University of Washington, and US Geological Survey. Prepared for the Washington Coastal Resilience Project: updated 07/2019).

[53] *Relative Sea Level Projections for RCP 8.5 for the Coastal Area Near: 47.1N, 122.9W* data now available at: https://cig.uw.edu/resources/special-reports/sea-level-rise-in-washington-state-a-2018-assessment/ and enclosed with the paper original of Futurewise's March 6, 2019, letter to Thurston County.

[54] State of Washington Department of Ecology, *Preparing for a Changing Climate Washington State's Integrated Climate Response Strategy* p. 90 (Publication No. 12-01-004: April 2012) last accessed on May 4, 2023, at: https://fortress.wa.gov/ecy/publications/summarypages/1201004.html and enclosed with the paper original of Futurewise's March 6, 2019, letter to Thurston County.

are likely to cause river and coastal flooding, leading to increased injuries and loss of life."[55]

A peer-reviewed scientific study ranked Washington State 14th in terms of the number of people living on land less than one meter above local Mean High Water compared to the 23 contiguous coastal states and the District of Columbia.[56] This amounted to an estimated minimum of 18,269 people in 2010.[57] Zillow recently estimated that 31,235 homes in Washington State may be underwater by 2100, 1.32 percent of the state's total housing stock. The value of the submerged homes is an estimated $13.7 billon.[58] Zillow wrote:

> It's important to note that 2100 is a long way off, and it's certainly possible that communities [may] take steps to mitigate these risks. Then again, given the enduring popularity of living near the sea despite its many dangers and drawbacks, it may be that even more homes will be located closer to the water in a century's time, and these estimates could turn out to be very conservative. Either way, left unchecked, it is clear the threats posed by climate change and rising sea levels have the potential to destroy housing values on an enormous scale.[59]

Sea level rise will have an impact beyond rising seas, floods, and storm surges. The National Research Council wrote that:

> Rising sea levels and increasing wave heights will exacerbate coastal erosion and shoreline retreat in all geomorphic environments along the west coast. Projections of future cliff and bluff retreat are limited by sparse data in Oregon and Washington and by a high degree of

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[55] *Id.* at p. 17.
[56] Benjamin H. Strauss, Remik Ziemlinski, Jeremy L. Weiss, and Jonathan T. Overpeck, *Tidally adjusted estimates of topographic vulnerability to sea level rise and flooding for the contiguous United States* 7 ENVIRON. RES. LETT. 014033, 4 (2012) last accessed on May 4, 2023, at: http://iopscience.iop.org/1748-9326/7/1/014033/article This journal is peer reviewed. Environmental Research Letters "About Environmental Research Letters" webpage accessed on May 4, 2023, at: https://publishingsupport.iopscience.iop.org/journals/environmental-research-letters/about-environmental-research-letters/#peer-review.
[57] *Id.*
[58] Krishna Rao, *Climate Change and Housing: Will a Rising Tide Sink all Homes?* ZILLOW webpage (8/2/2016) last accessed on May 4, 2023, at: http://www.zillow.com/research/climate-change-underwater-homes-12890/.
[59] *Id.*

> geomorphic variability along the coast. Projections using only historic rates of cliff erosion predict 10–30 meters [33 to 98 feet] or more of retreat along the west coast by 2100. An increase in the rate of sea-level rise combined with larger waves could significantly increase these rates. Future retreat of beaches will depend on the rate of sea-level rise and, to a lesser extent, the amount of sediment input and loss.[60]

A recent paper estimated that "[a]nalysis with a simple bluff erosion model suggests that predicted rates of sea-level rise have the potential to increase bluff erosion rates by up to 0.1 m/yr [meter a year] by the year 2050."[61] This translates to four additional inches of bluff erosion a year.

A recent peer-reviewed article estimated that up to 8,017 people in Thurston County will be at risk of adverse impacts from sea level rise in 2100.[62] The time to adopt protective measures is now.

Homes built today are likely to be in use 2100. And new lots created today will be in use in 2100. This is why the Washington State Department of Ecology recommends "[l]imiting new development in highly vulnerable areas."[63]

Unless wetlands and shoreline vegetation can migrate landward, their area and ecological functions will decline.[64] If development regulations are not updated to

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[60] National Research Council, *Sea-Level Rise for the Coasts of California, Oregon, and Washington: Past, Present, and Future* p. 135 (2012).
[61] George M. Kaminsky, Heather M. Baron, Amanda Hacking, Diana McCandless, David S. Parks, *Mapping and Monitoring Bluff Erosion with Boat-based LIDAR and the Development of a Sediment Budget and Erosion Model for the Elwha and Dungeness Littoral Cells, Clallam County, Washington* p. 3 last accessed on May 4, 2023, at: http://www.coastalwatershedinstitute.org/Final%20Report_Clallam%20County%20Bluffs%202014_Final%20revised.pdf.
[62] Mathew E. Hauer, Jason M. Evans, and Deepak R. Mishra, *Millions projected to be at risk from sea-level rise in the continental United States* NATURE CLIMATE CHANGE Letters Advance Online Publication p. 3 (Published Online: 14 March 2016 | DOI: 10.1038/NCLIMATE2961). Nature Climate Change is a peer-reviewed science journal. See the Author Instructions accessed on May 4, 2023, at: http://mts-nclim.nature.com/cgi-bin/main.plex?form_type=display_auth_instructions.
[63] State of Washington Department of Ecology, *Preparing for a Changing Climate Washington State's Integrated Climate Response Strategy* p. 90 (Publication No. 12-01-004: April 2012).
[64] Christopher Craft, Jonathan Clough, Jeff Ehman, Samantha Joye, Richard Park, Steve Pennings, Hongyu Guo, and Megan Machmuller, *Forecasting the effects of accelerated sea-level rise on tidal marsh ecosystem services* FRONT ECOL ENVIRON 2009; 7, doi:10.1890/070219 p. *6 last accessed on

address the need for vegetation to migrate landward in feasible locations, wetlands and shoreline vegetation will decline. According to Ecology "[d]evelopment of coastal areas and shoreline armoring (e.g., bulkheads, seawalls) prevent habitat areas from reestablishing inland" in response to sea level rise.[65] Ecology provides more detailed documentation of these adverse impacts:

> The prospect of more flooding, erosion, and storm damage may lead communities and property owners to seek to build seawalls, dikes, and tidal barriers. The construction and placement of these structures will have a direct and immediate impact on natural shoreline environments. These structures will also lead to the progressive loss of beach and marsh habitat as those areas are squeezed between the rising sea and a more intensively engineered shoreline. Predicted decreases in size or transitions in tidal marshes, salt marshes, and tidal flats will affect the species these habitats support. It is predicted that while some species may be able to locate alternate habitats or food sources, others will not (Glick, 2007).
>
> Shellfish, forage fish, shorebirds, and salmon are among those identified as examples of species at risk (Glick, 2007). Sea level rise will also lead to other changes in coastal ecosystems, such as shifting of stream mouths and tidal inlets, reconfigured estuaries and wetlands, and more frequently disturbed riparian zones.[66]

"Loss of salt marsh and related habitats may be significant in systems constrained by surrounding development."[67] This loss of shoreline vegetation will harm the environment. It will also deprive marine shorelines of the vegetation that protects property from erosion and storm damage by modifying soils and accreting

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Feb. 26, 2021 at: http://nsmn1.uh.edu/steve/CV/Publications/Craft%20et%20al%202009.pdf. Frontiers in Ecology and the Environment is a peer-reviewed scientific journal. Frontiers in Ecology and the Environment Journal Overview webpage last accessed on Feb. 26, 2021, at: https://esajournals.onlinelibrary.wiley.com/journal/15409309. Both enclosed at this Dropbox Link: https://www.dropbox.com/sh/4l459v8kavtrop2/AADAt7NOEwWIcDm_vMlUWSFRa?dl=0 with the filename: "Craft et al 2009.pdf" and "Frontiers in Ecology and the Environment - Journal Overview" respectively.

[65] Washington State Department of Ecology, *Preparing for a Changing Climate: Washington State's Integrated Climate Response Strategy* p. 68 (Publication No. 12-01-004: April 2012).

[66] State of Washington Department of Ecology, *Shoreline Master Program Handbook Appendix A: Addressing Sea Level Rise in Shoreline Master Programs* pp. 3 – 4 (Publication Number 11-06-010: rev. 12/17).

[67] *Id.* p. 4.

sediment.[68] This will increase damage to upland properties. The general extent of wetland migration can be seen on the NOAA Office for Coastal Management Digitalcoast Sea Level Rise Viewer available at: https://coast.noaa.gov/digitalcoast/tools/slr.html

Flood plain regulations are not enough to address sea level rise for three reasons. *Projected Sea Level Rise for Washington State – A 2018 Assessment* explains two of them:

> Finally, it is worth emphasizing that sea level rise projections are different from Federal Emergency Management Agency (FEMA) flood insurance studies, because (1) FEMA studies only consider past events, and (2) flood insurance studies only consider the 100-year event, whereas sea level rise affects coastal water elevations at all times.[69]

The third reason is that flood plain regulations allow fills and piling to elevate structures and also allow commercial buildings to be flood proofed in certain areas. While this affords some protection to the structure, it does not protect the marshes and wetlands that need to migrate.

Because of these significant impacts on people, property, and the environment, "[n]early six in ten Americans supported prohibiting development in flood-prone

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[68] R. A. Feagin, S. M. Lozada-Bernard, T. M. Ravens, I. Möller, K. M. Yeagei, A. H. Baird and David H. Thomas, *Does Vegetation Prevent Wave Erosion of Salt Marsh Edges?* 106 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA pp. 10110-10111 (Jun. 23, 2009) last accessed on May 4, 2023, at: http://www.pnas.org/content/106/25/10109.full and enclosed at this Dropbox Link: https://www.dropbox.com/sh/4l459v8kavtrop2/AADAt7NOEwWIcDm_vMlUWSFRa?dl=0 with the filename: "10109.full.pdf." This journal is peer-reviewed. *Id.* p. 10113.

[69] Miller, I.M., Morgan, H., Mauger, G., Newton, T., Weldon, R., Schmidt, D., Welch, M., Grossman, E., *Projected Sea Level Rise for Washington State – A 2018 Assessment* p. 8 of 24 (A collaboration of Washington Sea Grant, University of Washington Climate Impacts Group, Oregon State University, University of Washington, and US Geological Survey. Prepared for the Washington Coastal Resilience Project: updated 07/2019) last accessed on May 4, 2024, at: https://cig.uw.edu/resources/special-reports/sea-level-rise-in-washington-state-a-2018-assessment/ and enclosed at this Dropbox Link: https://www.dropbox.com/sh/4l459v8kavtrop2/AADAt7NOEwWIcDm_vMlUWSFRa?dl=0 with the filename: "SLR-Report-Miller-et-al-2018-updated-07_2019.pdf."

areas (57%)."[70] It is time for Washington state and local governments to follow the lead of the American people and adopt policies and regulations to protect people, property, and the environment from sea level rise. Therefore, we recommend that the SMP update require that new lots and new buildings be located outside the area of likely sea level rise and if that is not possible, buildings should be elevated above the likely sea level rise. We recommend the following new regulations be added to the SMP update in proposed 19.400.150B on page 76 of 572.

8. New lots shall be designed and located so that the buildable area is outside the area likely to be inundated by sea level rise in 2100 and outside of the area in which wetlands and aquatic vegetation will likely migrate during that time.

9. Where lots are large enough, new structures and buildings shall be located so that they are outside the area likely to be inundated by sea level rise in 2100 and outside of the area in which wetlands and aquatic vegetation will likely migrate during that time.

10. New and substantially improved structures shall be elevated above the likely sea level rise elevation in 2100 or for the life of the building, whichever is less.

Also, to avoid flooding, erosion, and other adverse impacts on shoreline resources, we strongly recommend that the County take a comprehensive approach to adapting to sea level rise and its adverse impacts modeled on the process California's coastal counties and cities use. The process includes six steps.[71]

1. Determine the range of sea level rise projections relevant to Thurston County's shorelines subject to tidal influence. The California Coastal Commission recommends analyzing intermediate and long-term projections because "development constructed today is likely to remain in place over the next 75-100 years, or longer."[72]

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[70] Bo MacInnis and Jon A. Krosnick, *Climate Insights 2020: Surveying American Public Opinion on Climate Change and the Environment Report: Natural Disasters* p. 8 (Washington, DC: Resources for the Future, 2020) accessed on May 4, 2023, at: https://www.rff.org/publications/reports/climateinsights2020-natural-disasters/ and enclosed at this Dropbox Link: https://www.dropbox.com/sh/4l459v8kavtrop2/AADAt7NOEwWIcDm_vMlUWSFRa?dl=0 with the filename: "Climate_Insights_2020_Natural_Disasters.pdf."

[71] *California Coastal Commission Sea Level Rise Policy Guidance: Interpretive Guidelines for Addressing Sea Level Rise in Local Coastal Programs and Coastal Development Permits* pp. 69 – 95 (Nov. 7, 2018) last accessed on May 4, 2023, at: https://www.coastal.ca.gov/climate/slrguidance.html and at this Dropbox Link: https://www.dropbox.com/sh/4l459v8kavtrop2/AADAt7NOEwWIcDm_vMlUWSFRa?dl=0 with the filename: with the filename: "0_Full_2018AdoptedSLRGuidanceUpdate.pdf."

[72] *Id.* p. 74.

2. Identify potential physical sea level rise impacts in Thurston County's shorelines subject to tidal influence.
3. Assess potential risks from sea level rise to the resources and development on the shorelines subject to tidal influence.
4. Identify adaptation strategies to minimize risks. The *California Coastal Commission Sea Level Rise Policy Guidance* includes recommended adaptation strategies to consider.[73]
5. Adopt an updated shoreline master program incorporating the selected adaption strategies.
6. Implement the updated shoreline master program and monitor and revise as needed. Because the scientific data on sea level rise is evolving, the California Coastal Commission recommends modifying "the current and future hazard areas on a five-to-ten-year basis or as necessary to allow for the incorporation of new sea level rise science, monitoring results, and information on coastal conditions."[74]

Based on this proven model, we recommend that the following proposed policy be adopted as part of the shoreline master program periodic update.

> Policy X. Thurston County shall monitor the impacts of climate change on Thurston County's shorelands, the shoreline master program's ability to adapt to sea level rise and other aspects of climate change at least every periodic update and revise the shoreline master program as needed. Thurston County shall periodically assess the best available sea level rise projections and other science related to climate change within shoreline jurisdiction and incorporate them into future shoreline master program updates as needed.

**Prohibit marine net pen aquaculture for nonnative species in the Aquatic environment. Please see proposed Table 19.600.105 Shoreline Use and Modifications Matrix on page 100 – 103 of 572 and proposed 19.600.115 on 105 – 109 of 572**

RCW 77.125.050(1) provides that the State of Washington Department of Natural Resources "may authorize or permit activities associated with the use of marine net pens for nonnative marine finfish aquaculture only if these activities are performed under a lease of state-owned aquatic lands in effect on June 7, 2018.

[73] *Id.* pp. 121 – 162.
[74] *Id.* p. 94.

The department may not authorize or permit any of these activities or operations after the expiration date of the relevant lease of state-owned aquatic lands in effect on June 7, 2018." Consistent with RCW 77.125.050(1), proposed Table 19.600.105 should prohibit marine net pens for nonnative marine finfish aquaculture in the Aquatic environment.

**In the Rural Conservancy environment only allow new structural shoreline stabilization and flood control works where there is a documented need to protect an existing structure. Please see proposed Table 19.600.105 Shoreline Use and Modifications Matrix on page 102 of 572, proposed 19.400.150 on pages 75 – 76 of 572, proposed 19.600 and proposed 19.600.175D on pages 132 – 135 of 572**

WAC 173-26-211(5)(b)(ii)(C), which applies to the Rural Conservancy environment, provides that:

> (C) Construction of new structural shoreline stabilization and flood control works should only be allowed where there is a documented need to protect an existing structure or ecological functions and mitigation is applied, consistent with WAC 173-26-231. New development should be designed and located to preclude the need for such work.

Based on this requirement, we recommend new structural shoreline stabilization only be allowed in the Rural Conservancy environment to protect an existing structure or ecological functions. Recent studies in Puget Sound have documented that structural shoreline stabilization has significant adverse impacts on the local beach on which it is installed and on large areas of Puget Sound.[75] So this change is necessary to maintain shoreline ecological functions.

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[75] Megan N. Dethier, Wendel W. Raymond, Aundrea N. McBride, Jason D. Toft, Jeffery R. Cordell, Andrea S. Ogston, Sarah M. Heerhartz, Helen D. Berry, *Multiscale impacts of armoring on Salish Sea shorelines: Evidence for cumulative and threshold effects* 175 ESTUARINE, COASTAL AND SHELF SCIENCE 106 p. 106 (2016) enclosed with the paper original of this letter. Estuarine, Coastal and Shelf Science is a peer-reviewed scientific journal. Estuarine, *Coastal and Shelf Science Author Information Pack* pp. 9 – 11 (20 Feb 2019) accessed on Feb. 22, 2019 at: https://www.journals.elsevier.com/estuarine-coastal-and-shelf-science and enclosed with the paper original of Futurewise's March 6, 2019, letter to Thurston County.

**Please modify proposed 19.600.170B.7. on page 129 of 572 to require public access consistent with the SMP Guidelines.**

One of the policies of Washington's Shoreline Management Act is to increase public access to publicly owned shorelines.[76] Unfortunately, proposed 19.600.170B.7. does not fully comply with the SMA or the SMP Guidelines.

The SMP Guidelines implement the Shoreline Management Act (SMA) policies by including more specific requirements for public access. These provisions include WAC 173-26-221(4)(d) which requires in part that:

> (iii) Provide standards for the dedication and improvement of public access in developments for water-enjoyment, water-related, and nonwater-dependent uses and for the subdivision of land into more than four parcels. In these cases, public access should be required except:
>
> (A) Where the local government provides more effective public access through a public access planning process described in WAC 173-26-221(4)(c).
>
> (B) Where it is demonstrated to be infeasible due to reasons of incompatible uses, safety, security, or impact to the shoreline environment or due to constitutional or other legal limitations that may be applicable.
>
> In determining the infeasibility, undesirability, or incompatibility of public access in a given situation, local governments shall consider alternate methods of providing public access, such as off-site improvements, viewing platforms, separation of uses through site planning and design, and restricting hours of public access.
>
> (C) For individual single-family residences not part of a development planned for more than four parcels.

Shoreline master programs, including the Thurston County SMP Update, must include public access requirements that are consistent with the SMA and the SMP

[76] RCW 90.58.020.

Guidelines. Thurston County's proposed SMP update does not fully comply with these requirements because proposed 19.600.170B.7. allows joint or community access in place of public access. So, we recommend that proposed 19.600.170B.7. be modified to read as follows with our deletions double struck through:

7. New multi-residential development, including the subdivision of land for five or more parcels, shall provide for ~~joint or community and/or~~ public access, except where demonstrated to be infeasible due to any of the following:

….

~~Public access may be limited to the landowners within the new development. The developer may choose to allow broader access at their discretion. Broader public access may also be required if shoreline access has historically been permitted or otherwise provided at the site.~~

**Require mitigation for all losses of shoreline ecological functions including the adverse impacts of development outside of buffers as required by the SMP guidelines. See Appendix B page 154 of 572**

As the State of Washington Court of Appeals wrote "reasonable and appropriate uses should be allowed on the shorelines only if they will result in no net loss of shoreline ecological functions and systems. *See* RCW 90.58.020; WAC 173-27-241(3)(j)."[77]

Proposed Appendix B B.1.D violates this requirement because it does not require mitigation for development in shorelines jurisdiction but outside buffers. For example, impervious surfaces are increasing in Thurston County including within shoreline jurisdiction.[78] This adversely impacts salmon habitat. Allowing the removal of shoreline vegetation and increased impervious surfaces outside buffers will adversely impact shoreline ecological resources violating the no net loss requirement of the SMP Guidelines. To comply with the SMP Guidelines, the SMP Update must require mitigation vegetation loss and other adverse impacts of developments on shoreline ecological functions both inside and outside buffers.

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[77] *Olympic Stewardship Found. v. State Env't & Land Use Hearings Off. through W. Washington Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 690, 399 P.3d 562, 572 (2017) *review denied Olympic Stewardship Foundation v. State Department of Ecology*, 189 Wn.2d 1040, 409 P.3d 1066 (2018) *certiorari denied Olympic Stewardship Foundation v. State of Washington Environmental and Land Use Hearings Office*, 139 S.Ct. 81, 202 L.Ed.2d 25 (2018).

[78] *2020 State of Our Watersheds: A Report by the Treaty Tribes in Western Washington* p. 154, p. 158, p. 288, p. 292.

One way of making mitigation easier to implement and more effective is to develop a vegetation management manual with minimum requirements for planting plans and mitigation. Bainbridge Island has developed a mitigation manual the county could use as an example.

## Comments on Appendix C. Shoreline Restoration Plan pages 158 – 81 of 427

WAC 173-26-201(2)(f) provides that:

> Consistent with principle WAC 173-26-186 (8)(c), master programs shall include goals, policies and actions for restoration of impaired shoreline ecological functions. These master program provisions should be designed to achieve overall improvements in shoreline ecological functions over time, when compared to the status upon adoption of the master program. The approach to restoration planning may vary significantly among local jurisdictions, depending on:
> • The size of the jurisdiction;
> • The extent and condition of shorelines in the jurisdiction;
> • The availability of grants, volunteer programs or other tools for restoration; and
> • The nature of the ecological functions to be addressed by restoration planning.
> Master program restoration plans shall consider and address the following subjects:
> (i) Identify degraded areas, impaired ecological functions, and sites with potential for ecological restoration;
> (ii) Establish overall goals and priorities for restoration of degraded areas and impaired ecological functions;
> (iii) Identify existing and ongoing projects and programs that are currently being implemented, or are reasonably assured of being implemented (based on an evaluation of funding likely in the foreseeable future), which are designed to contribute to local restoration goals;
> (iv) Identify additional projects and programs needed to achieve local restoration goals, and implementation strategies including identifying prospective funding sources for those projects and programs;
> (v) Identify timelines and benchmarks for implementing restoration projects and programs and achieving local restoration goals;

> (vi) Provide for mechanisms or strategies to ensure that restoration projects and programs will be implemented according to plans and to appropriately review the effectiveness of the projects and programs in meeting the overall restoration goals.

If Appendix C is intended to be the Shoreline Restoration Plan, we are concerned that the requirements of WAC 173-26-201(2)(f)(i), (iii), (iv), and (vi) have not been addressed. We recommend that they be addressed.

Thank you for considering our comments. If you require additional information, please contact me at telephone 206-343-0681 Ext. 102 and email: tim@futurewise.org.

Very Truly Yours,

Tim Trohimovich, AICP
Director of Planning & Law

Enclosures for this letter are this Dropbox Link:
https://www.dropbox.com/sh/4l459v8kavtrop2/AADAt7NOEwWIcDm_vMlUWSFRa?dl=0

**75**

| | |
|---|---|
| **From:** | ssteltzner@squaxin.us |
| **To:** | SMP |
| **Subject:** | Incoming SMP Comment |
| **Date:** | Tuesday, May 16, 2023 9:35:32 AM |

**Your Name (Optional):**
Squaxin Island Tribe- Scott Steltzner

**Your email address:**
ssteltzner@squaxin.us

**Comment:**
The Squaxin Island Tribe Natural Resources Department provides the following comments.

Protecting and restoring Treaty guaranteed natural resources, including fish and shellfish for Tribal members, is one of our fundamental missions at Squaxin Island. The Tribe appreciates this opportunity to provide comments and looks forward to working with the County to produce a scientifically sound document that also protects Treaty guaranteed rights.

State law may require the update of the 1990 Shoreline Master Program (SMP); however, it is also welcome, as new science and information have been developed over the last 32 years that show the critical need to protect and restore our natural resources.

Since the last SMP was approved, it has become clear that the policy of No-Net-Loss has not worked. Much of the environmental degradation documented in this update has occurred since the adoption of the last SMP. The Tribe advocates for the adoption of Net-Ecological-Gain when considering habitat issues. This would, at worst, ensure true No-Net-Loss, and, if implemented correctly, begin the restoration of critical habitats.

There is much to commend within the supporting documents. In most instances, environmental protection has been strengthened. However, in others, regulations designed to protect the environment have been lessened in a way that is in direct conflict with the best available science.
The most egregious example concerns the relaxing of regulations concerning riparian buffers. The science concerning shoreline buffers has advanced considerably since 1990. In all cases that we know of, science calls for, at a minimum, maintaining the existing buffer widths and, in most cases, expanding them considerably. In the update, the County is proposing, in certain cases, to decrease the width of shoreline buffers. This is unacceptable. For all shoreline designations, a minimum of 250 feet should be used. Where this cannot be achieved for a particular site, then meaningful mitigation that leads to Net-Ecological-Gain should be employed.

Another issue concerns piers, docks, and overwater structures. The SMP should explicitly state that in many areas of fresh and marine waters, overwater structures will not be permitted. This can include natural areas, shorelines where few to no overwater structures currently exist, and along forage fish spawning beaches. These areas can be spatially mapped and included in the SMP shoreline designation maps.

The Tribe looks forward to working with the County to adopt and implement a meaningful update to the Shoreline Master Program.

Time: May 16, 2023 at 4:35 pm
IP Address: 216.235.106.129
Contact Form URL: https://thurstoncomments.org/comment-on-the-proposed-shoreline-code-update/

Sent by an unverified visitor to your site.

**From:** MARTY BEAGLE
**To:** Andrew Deffobis
**Subject:** Re: Thurston County SMP Information
**Date:** Tuesday, May 16, 2023 9:58:25 AM

---

Hi again Andrew!
Well I looked at the map of proposed SED categories and would like to make supplication for reconsideration of the "Natural" designation of my property at 4120 Gravelly Beach Loop, parcel # 129 20 33 0000, and parcel # 129 29 22 0100. Currently the SED for my place is Conservancy- this designation essentially wraps around Frye Cove but also includes six lots to the "East" of my property- each of which are about 1 acre or so in size. The proposed Natural SED dos not include these 6 lots, instead the change in SED will occur at my "eastern' property line.
So the proposed "Natural" SED begins at my "eastern" property line that includes a portion of a ravine that is shared with my neighbor at 3918 Gravelly Beach Loop, parcel 12929211400. Why that parcel is not proposed to have the Natural designation isn't clear to me as from an ecological viewpoint it provides nearly identical functions as much of its property includes the ravine, even more so when you consider the buffers that are mandated for such a topographical feature.Is that distinction simply because my property has no bulkhead? I would note the "stream" is of a seasonal nature and often drys up during the warmer weather.
My property lies just to the East of the entrance to Frye Cove and is already "built out" to capacity based on the building codes, as are the four lots to my "west"- they constitute the southern side of the Cove and are also rated 1 unit per 5 acres and currently support residential activities. Beginning sometime around 1900 my property was the homestead for Volney Young and much of the original vegetation within 200' of the bank was long ago altered and is not representative of a "Natural" state. In addition, cultivation of shellfish has occurred on the tidelands for over 75 years, according to Volneys daughter, Mrs. Virginia Chambers.
I don't have experience in debating the finer points of the distinction between Rural Conservancy and Natural Designations and would appreciate exploring that with the appropriate staff at the County so that I understand better the nuances between them. My approach to my property is to ensure any activity on it does not negatively impact the ecology of Eld Inlet or influence it's water quality, and I can assure you that will be the case regardless of what SED settles on it in the future.
thanks again for your work on this!
Marty Beagle
360 866 1914
On 05/15/2023 12:39 PM PDT Andrew Deffobis <andrew.deffobis@co.thurston.wa.us> wrote:

> Hello Marty,
>
> Thanks for your call today. Here is a link to the interactive tool developed to help folks explore current and proposed shoreline environment designations (SEDs).

Here is a link to the Inventory & Characterization report. It discusses the process used to characterize shorelines earlier in the SMP update process. It contains discussion of all waterbodies in the SMP, including Eld Inlet. Appendix A has specific information about each shoreline reach. Your shoreline reach is MEL-06—MEL-07. See page 202 for a list of information used to characterize the reach.

The SED report assigned proposed SEDs to shoreline reaches. The introduction has a discussion of how this work was performed. Your reach is specifically covered on page 111 (use page #s at bottom of page). Page 4 of this document shows the different SEDs and the criteria used to assign them to shoreline reaches.

If you would like to submit written comments, please do so by noon tomorrow. You can email me directly. Please let me know if you would like information on additional methods of making written comment.

It sounds like you're signed up for the Zoom meeting for the public hearing. The hearing begins at 5 PM. Should you wish to attend in person, you can do so by coming to Room 110 of the Thurston County Atrium, 3000 Pacific Ave SE in Olympia.

I hope this information is helpful. Please let me know if you have further questions.

Regards,

Andrew Deffobis, Senior Planner

Thurston County Community Planning and Economic Development Department

3000 Pacific Ave SE

Olympia, WA 98501

Cell Phone: (360) 522-2593

Office Phone: (360) 786-5467

Fax: (360) 754-2939

**From:** Jessie Simmons
**To:** SMP
**Cc:** Angela White
**Subject:** OMB Comments on SMP Update
**Date:** Tuesday, May 16, 2023 11:20:56 AM
**Attachments:** OMB Comments on 2023 Thurston SMP Update.pdf

---

Hello,

Please find comments from Olympia Master Builders on the proposed Shoreline Management Program Updates attached.

Best regards,
Jessie W Simmons
Government Affairs Director
Olympia Master Builders
C: (360) 525-4142
O: (360) 754-0912 ext. 102

OLYMPIA MasterBuilders
FIVE COUNTIES STRONG

**Office:**
1211 State Avenue NE
Olympia, WA 98506

**Phone:** 360.754.0912
**Toll Free:** 800.456.6473
**Fax:** 360.754.7448

**Serving:**
Thurston, Lewis, Grays Harbor,
Pacific, and Mason Counties

May 16, 2023

Thurston County Community Planning & Development Dept.
Attn: Andrew Deffobis, Senior Planner & Board of County Commissioners
3000 Pacific Ave SE
Olympia, WA 98501

Re: Shoreline Master Program Update

Dear Mr. Deffobis and Commissioners:

Olympia Master Builders, and its nearly 500 builder members, are providing input on the proposed changes developed over the timeline of this update project. After reviewing the changes recommended by the planning commission, and now before the BoCC, we believe that the effort was made to find a workable balance between the urgent need for housing and development and protection of our many waterways. Simple allowances were made for development within the critical areas identified by this process and these steps do allow for less complication in developing these areas. However, for every step forward there are some significant steps backwards as well.

First, we commend the following changes to the SMP:

- Clarification of codes and regulations that will make the process less cumbersome and easier to understand.
- Added flexibility provides more options for property owners to rebuild within the existing footprint of their home.
- Options for expanding existing non-conforming structures.
- Allowances for storage structures within buffer zones.
- More tailored buffer restrictions that apply to on the ground specifics.
- Some reductions in buffers.

The previously mentioned changes will ease many barriers for property owners seeking to make their home and property more functional for their intended use. However, we do have some significant concerns with changes to buffers and Shoreline Environmental Designations (SEDs) as well.

Upon review of the provided materials signifying the proposed changes, we found that there is a seemingly excessive amount of added shoreline designation. In fact, your own research provides that 2,160 new parcels be added to the various shoreline designations. These are

parcels that range from having existing homes and structures to previously buildable lands with minimal restrictions. Thus, over 2,000 parcels will now have new obstacles to overcome and new barriers in the way of building. At a time when both the governor and the legislature have recognized that the most immediate crisis facing our communities is a lack of housing, an effort to create more obstacles for more property owners seems to indicate that local government does not agree with what the state government has acknowledged.

The bottom line is that we need more housing, of all types. We need to be making it easier to add doors to our community, not harder. By designating an additional 2,200 parcels as being within SEDs, the county is hindering potential development. We say this with the idea that "all types of housing" includes ADUs, additions, finished basements, and finished garages. Something that the legislature clearly intended to allow with the passage of HB 1337 during the 2023 session. And such creativity is so desperately needed as we can see in the example of the City of Olympia adding a mere 300 of the 700 doors per year that they must add by 2044 to satisfy the need of current and future growth.

Olympia Master Builders is thankful to have been included early on in this process and to have the opportunity to provide further comments here. We believe that some much-needed changes were made to streamline and clarify the overall process for those properties within designated SEDs. However, we also believe that adding another 2,200 parcels to these designated areas creates more barriers for more property owners. At a time when we are at crisis levels of a lack of housing, it seems counter to the needs of the community to make such drastic additions to the SEDs. The truth is we need to be creative in solving the housing crisis. Adding shoreline restrictions to an additional 2,200 properties flies in the face of such creativity and goes against the clear intent of the legislature to make it easier to add needed doors to our communities.

Amid a massive housing crisis, we urge the Thurston BoCC to delay implementation of the proposed changes and updates to the SMP until the process can better be aligned with the intent of recent state legislation and with the realities of what is happening on the ground. Our members want to build strong and livable communities that both conserve natural character and serve as affordable, comfortable, and people centered. Every person deserves a roof over their heads and expanding restrictions on building to an additional 2,200 properties limits our ability to provide that shelter significantly.

For further information or questions please contact our Government Affairs Director, Jessie Simmons, at ga@omb.org or (360)754-0912 ext. 102.

Sincerely,

Jessie Simmons
Government Affairs Director
Olympia Master Builders

**From:** Alex Nielsen
**To:** Andrew Deffobis
**Cc:** SMP
**Subject:** Master Shoreline Plan Comments - Nielsen Pacific Ltd.
**Date:** Tuesday, May 16, 2023 11:34:41 AM
**Attachments:** 2798_001.pdf

---

Dear Andrew,

Please see the attached letter regarding our comments ahead of tonights Shoreline Master Plan hearing.

Alex,

—

Alex Nielsen
Vice President
Nielsen Pacific Ltd.
(253) 720-7030

# NIELSEN PACIFIC LTD.

May 16, 2023

**THURSTON COUNTY BOARD OF COUNTY COMMISSIONERS**
3000 Pacific Avenue Southeast
Olympia, Washington 98501

Dear Thurston County Commissioners:

Nielsen Pacific LTD/Holroyd Company owns property at 828 Old Pacific Highway Southeast, Olympia, Washington 98513. There are six Thurston County Tax Parcels, sharing the same number (09640007000), under our ownership that have all or portions of them proposed to be designated as Rural Conservancy in the preliminary Shoreline Master Program Maps based upon the Thurston County Graphic Information Systems (GIS) February 1996 Flood of Record "mapped" inundation area. These six parcels ("Six Parcels") are addressed under this submittal collectively. The Six Parcels of the Nielsen Pacific Property abut the intersection of Old Pacific Highway Southeast and Durgin Road Southeast, with the northern most tip being at the intersection of Old Pacific Highway Southeast and Durgin Road Southeast. The basis for inclusion of the Nielsen Property is the "1996 Flood of Record" and a flood monument identified on the County's GIS Map. We have not been able to locate any additional County data substantiating this monument elevation. The only documentation online or available through the Washington State Department of Transportation and the Washington State DNR is an aerial photograph with a Resolution of 1:24,000.

I.

We have concerns regarding how the Flood of Record elevation was established and request that the field survey data and any photographs taken from the ground that support Elevation 30.23 NAVD 88 for Flood Reference Monument NS08 on the Face of highline power pole at the intersection of Old Pacific Highway Southeast and Durgin Road Southeast be made available in the public record for the property owners to evaluate. Stephen Nielsen, principal owner of Nielsen Pacific was present on the ground at the time of the 1996 flood event with first-hand knowledge of the flood level during the peak volume and therefore, we disagree with the flood stage elevation set forth by the County.

II.

We also are requesting that a process be developed in advance of adopting the 2023 Thurston County Shoreline Master Program Update for property owners, such as ourselves, to submit ground topographic survey data of our Six Parcels to demonstrate that portions of our land are inappropriately included in the inundation areas of the 1996 Flood of Record (even assuming the County's flood stage elevation is accurate). Therefore, any adopted Shoreline Master Program Mapping can correctly indicate those areas that lie outside the proposed Shoreline Designation.

The southwestern most portion of the County-mapped Flood of Record area on our Six Parcels is clearly included in the flooded area in error. Even assuming the County's Flood of Record Elevation at the intersection of Old Pacific Highway Southeast and Durgin Road Southeast at

elevation 30.23 NAVD 88 is accurate, the hill on our property, a portion of which is included in the 1996 flood area, rises from not less than 30 to an elevation of 60 plus in the designated area which is clearly evident in the County's own GIS mapping online. The Flood of Record area on our Six Parcels has been preliminarily included in the Rural Conservancy Shoreline Designation in the 2023 Shoreline Master Program Update.

Therefore, ***we request that the Commissioners provide direction to County Staff, as part of the review process prior to adoption of the proposed Shoreline Mater Program Update, to accept appropriate documentation, inclusive of survey mapping, from property owners, prior to the adoption of the 2023 Thurston County Shoreline Master Program Update,*** in order that property owners can establish that their land is incorrectly mapped in the proposed "frequently flooded areas" in Thurston County GIS. This will provide for the development of a more accurate mapping of Shoreline Designations in this update.

Thank you for your thoughtful consideration of our requests.

Sincerely,

NIELSEN PACIFIC, LTD.

Stephen Nielsen, President

P.O. BOX 39009 | LAKEWOOD, WASHINGTON 98496 | 253.474.0725 | FAX 253.474.3140

**From:** susandraperRE@gmail.com
**To:** SMP
**Subject:** Incoming SMP Comment
**Date:** Tuesday, May 16, 2023 11:48:43 AM

---

**Your Name (Optional):**
Susan Draper

**Your email address:**
susandraperRE@gmail.com

**Comment:**
My husband and I live on Long Lake waterfront. I grew up in the house next door to the family home we built in 2006 and became a member of the Long Lake Management District soon after. Having followed the long progress of the proposed shoreline code update, it was with relief that the Planning Commissioners were able to present an agreed upon Proposal for Shoreline Code Update that took into account that most lakefront is fully built out with residential properties.

It is my hope that county commissioner will not allow for further changes or amendments based on outside influence of the planning office personel.

BOCC should...

1. Accept and support the Planning Commission SMP Recommendation Draft.
2. Keep Shoreline Residential SED buffers at 50-feet.
3. Keep existing dwellings "our homes" classified as ‘conforming’

Please consider the human factor in the goal of "no net loss".

---

Time: May 16, 2023 at 6:48 pm
IP Address: 67.185.48.114
Contact Form URL: https://thurstoncomments.org/comment-on-the-proposed-shoreline-code-update/

Sent by an unverified visitor to your site.

**From:** halversonloma@hotmail.com
**To:** SMP
**Subject:** Incoming SMP Comment
**Date:** Tuesday, May 16, 2023 2:29:09 PM

**Your Name (Optional):**
Barry Halverson

**Your email address:**
halversonloma@hotmail.com

**Comment:**
Madam Chair, Commissioners, my names is Barry Halverson. I live in southeast Thurston County and have participated in the Shoreline Master Program Review since 2012 as a County Citizen and since January 2022 as a County Planning Commissioner. I have listened to every citizen testimony and every expert's testimony on this program review. I found it interesting that after Planning Commission approval of the DRAFT SMP that staff prepared a decision matrix for you and included many topics that could and should have been brought to the Planning Commission for review/consideration/approval before the DRAFT was sent to you. Many of these topics could and would have been resolved without need for taking your time/effort.
I found the minority report to be disconnected from public testimony over the 12 years this DRAFT was being reviewed and I was personally sitting in the audience listening. One of the biggest areas of public concern was the cost associated with the permit process and the frequency of requiring a costly hearing to obtain a permit for something as simple as building a dock or making needed landscaping changes to their shoreline. Administrative permit procedures should be more widely acceptable and the Planning Commission recognized that.
The other disconnect was in Shoreline Environmental Designations and corresponding Buffer Widths. The minority report suggests that the Planning Commission recommended changes decreased buffer widths by as much as 50%. The truth is the Planning Commission recommendations increased all buffer widths from the 1990 Shoreline Master Program except for Shoreline Residential which it recommended remain the same. This does not results in Loss of Ecological function, but improves upon it. The Minority Reports recommendation to increase buffer widths in all categories even more would have no significant effect on No Net Loss, but would significantly increase costs to impacted home owners through higher permit fees and reduced home values. As shown in the County's cumulative impacts analysis only 3.5% of all county shoreline acreage is designated as Shoreline Residential. You would therefore once again be placing the highest financial burden on the smallest segment of the county's population.
Increasing buffers for Shoreline Residential properties will negatively impact property values. Is the County Assessor prepared to conduct a re-evaluation of all shoreline properties in the County and reduce their property values accordingly thereby impacting county property tax revenue. Placing a Non-Conforming annotation on a persons property tax records will have that affect.
The State Shoreline Management Act (RCW 90-58) clearly states: Residential structures and appurtenant structures that were legally established and are used for a conforming use, but that do not meet standards for the following to be considered a conforming structure: setbacks, buffers, or years; area; bulk; height; or density; and…. Even if you decide to expand the buffer from 50' to 75' the decision to retain the Planning Commissions recommendation that residential structures and appurtenant structures that were legally established be designated

conforming should be retained and not discounted.
Finally, I would like to point out that for years now I have repeatedly told staff that Appendix A to the SMP, the Inventory and Characterization Report that was one of the primary documents used by staff to make Shoreline Environmental Designations is a very inaccurate document. I have specifically pointed to the areas for Lake Lawrence that show salmon, cutthroat trout, winter steelhead residing in the lake. That is impossible given the geography of the lake and the fact that there is no stream, creek, or river that flows into Lake Lawrence and the fact that the Director of Washington State Department of Fish and Wildlife provided a letter to the effect and I provided staff a copy of that letter. This document is widely used by your planning and permits department to make planning and permit decisions and has made permit decisions that have cost Lake Lawrence residents thousands of dollars based on inaccurate information in this report. I have provided staff the details of those decisions.

Thank you for your time and attention to this very important matter.
Barry Halverson
Yelm, WA
253-341-6059

---

Time: May 16, 2023 at 9:29 pm
IP Address: 73.83.34.152
Contact Form URL: https://thurstoncomments.org/comment-on-the-proposed-shoreline-code-update/

Sent by an unverified visitor to your site.

**From:** John Callery
**To:** Andrew Deffobis
**Cc:** Connie Gray; Jeannette Barreca
**Subject:** Green Park Community Club Natural (SED) Designation
**Date:** Tuesday, May 16, 2023 12:24:53 PM
**Attachments:** JC Photography.png

---

Andy:

The Green Park Community Club board agrees with the Natural designation for our portion of the cove.

I plan on viewing the session via Zoom.

Thanks,

John

John Callery
Treasurer
Green Park Community Club

John T. Callery
johntcallery.com
john.callery@mac.com

**From:** Thomasina Cooper
**To:** Daniel Moffett; Andrew Deffobis
**Subject:** RE: Shoreline Master Plan
**Date:** Tuesday, May 16, 2023 3:02:13 PM

Hi Daniel,
Thank you for sharing your comments with Tye. I've cc'd Andrew Deffobis, planning staff member, who will ensure they are added to the record for consideration.

Thank you again,
Thomasina

**Thomasina Cooper**
Executive Aide
Thurston County Commissioner Tye Menser, Dist 3
360-786-5414 (desk)
360-490-2243 (cell)

*Follow Tye on Facebook!*

*This communication is a public record and may be subject to disclosure under the Washington State Public Records Act, RCW 42.56*

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**From:** Daniel Moffett <dmoffett@hotmail.com>
**Sent:** Tuesday, May 16, 2023 2:55 PM
**To:** Tye Menser <tye.menser@co.thurston.wa.us>
**Cc:** Thomasina Cooper <thomasina.cooper@co.thurston.wa.us>
**Subject:** Shoreline Master Plan

Dear Commissioner Menser,

Thank you for the opportunity to share my opinion on the important matter of the Shoreline Master Plan (SMP).
I am a thurston County lake shoreline property owner and voter.

After following this SMP issue for many years and providing input to the planning Commission at several key points along the way, I would like you to take my concerns into consideration:

1. I am significantly concerned about the legal status of existing legally developed and properly used shoreline structures. Whether formerly allowed current shoreline structures may not meet current standards for new development.

For areas that have been assigned a Shoreline Environmental Designation (SED) of "Shoreline Residential", I ask that you designate and approve as conforming any residential structures and appurtenant structures that were legally established and are used for a conforming use, but that do not meet standards to be considered a conforming structure: Setbacks, buffers, or yards; area; bulk; height; or density; and that redevelopment, expansion, change with the class of occupancy, or replacement of the residential structure if it is consistent with the master program, including requirements for no net loss of shoreline ecological functions.

Classifying currently existing structures as legally conforming will not create a risk of degrading shoreline natural resources.

It is in the public interest to clarify the legal status of these structures that will apply after shoreline regulations are updated.

2. Accept, adopt, and support the Planning Commission SMP Recommendation Draft. This seems to be a reasonable path forward toward "no net loss" of ecological function while protecting and balancing homeowner rights and property use.

3. For areas that have been assigned an SED of "Shoreline Residential": Keep Shoreline Residential buffers at 50-feet.

4. Reject provisions of the Planning Commission Minority Report dated August 8, 2022. I do not think the Minority Report accurately accounts for the years of public testimony and work sessions to be fully responsive Thurston County needs and desires.

Thank you for this opportunity.

Dan Moffett

**From:** Jamie Caldwell
**To:** Andrew Deffobis
**Subject:** FW: Shoreline Master Plan
**Date:** Tuesday, May 16, 2023 3:04:12 PM

---

Forwarding in case you didn't receive this.

Jamie Caldwell
Clerk of the Board
Thurston County Commissioners Office
Cell: 360-490-0751
Office: 360-786-5447

---

**From:** Carolina Mejia-Barahona <carolina.mejia@co.thurston.wa.us>
**Sent:** Tuesday, May 16, 2023 3:03 PM
**To:** Jamie Caldwell <jamie.caldwell@co.thurston.wa.us>
**Subject:** Fwd: Shoreline Master Plan

FYI

Get Outlook for iOS

---

**From:** Daniel Moffett <dmoffett@hotmail.com>
**Sent:** Tuesday, May 16, 2023 2:51:40 PM
**To:** Carolina Mejia-Barahona <carolina.mejia@co.thurston.wa.us>
**Subject:** Shoreline Master Plan

Dear Commissioner Mejia,

Thank you for the opportunity to share my opinion on the important matter of the Shoreline Master Plan (SMP).
I am a thurston County lake shoreline property owner and voter.

After following this SMP issue for many years and providing input to the planning Commission at several key points along the way, I would like you to take my concerns into consideration:

1. I am significantly concerned about the legal status of existing legally developed and properly used shoreline structures. Whether formerly allowed current shoreline structures may not meet current standards for new development.

For areas that have been assigned a Shoreline Environmental Designation (SED) of "Shoreline Residential", I ask that you designate and approve as conforming any

residential structures and appurtenant structures that were legally established and are used for a conforming use, but that do not meet standards to be considered a conforming structure: Setbacks, buffers, or yards; area; bulk; height; or density; and that redevelopment, expansion, change with the class of occupancy, or replacement of the residential structure if it is consistent with the master program, including requirements for no net loss of shoreline ecological functions.

Classifying currently existing structures as legally conforming will not create a risk of degrading shoreline natural resources.

It is in the public interest to clarify the legal status of these structures that will apply after shoreline regulations are updated.

2. Accept, adopt, and support the Planning Commission SMP Recommendation Draft. This seems to be a reasonable path forward toward “no net loss” of ecological function while protecting and balancing homeowner rights and property use.

3. For areas that have been assigned an SED of “Shoreline Residential”: Keep Shoreline Residential buffers at 50-feet.

4. Reject provisions of the Planning Commission Minority Report dated August 8, 2022. I do not think the Minority Report accurately accounts for the years of public testimony and work sessions to be fully responsive Thurston County needs and desires.

Thank you for this opportunity.

Dan Moffett

**From:** alexis@deutschers.com
**To:** Andrew Deffobis
**Cc:** junkmail@deutschers.com
**Subject:** Shoreline Master Plan Update
**Date:** Tuesday, May 16, 2023 5:44:32 PM

---

Good afternoon,
I am a homeowner on Long Lake. I would like to share our voice regarding the Shoreline Master Plan update. It is our hope that the committee will:

-Accept and support the planning Commission SMP Recommendation
-Keep Shoreline Residential SED buffers at 50 feet
-Keep our homes classified as “conforming”

Thank you,
Alexis Deutscher
541-331-5901

| | |
|---|---|
| **From:** | Lake Lawrence |
| **To:** | Andrew Deffobis |
| **Cc:** | Carolina Mejia-Barahona; Tye Menser; Gary Edwards |
| **Subject:** | SMP Public Hearing Testimony |
| **Date:** | Tuesday, May 16, 2023 8:13:45 PM |
| **Attachments:** | 2023, 05,16 - Barry"s Testimony SMP Public Hearing.pdf |

Commissioners, as stated by Commissioner Mejia tonight I am forwarding Andrew my testimony as citizens were not allocated sufficient time.
Thank you for that consideration.
Regards,
Barry Halverson
Lake Lawrence Lake Management District Steering Committee
253-341-6059

**Thurston County Shoreline Master Program Public Hearing 16 May 2023, 5 p.m.**

**Testimony of Barry Halverson**

Madam Chair, Commissioners, my names is Barry Halverson. I live at Lake Lawrence, southeast Thurston County and have participated in the Shoreline Master Program Review since 2012 as a County Citizen. I have listened to every citizen testimony and every expert's testimony on this program review. I found it interesting that after Planning Commission approval of the DRAFT SMP that staff prepared a decision matrix for you and included many topics that could and should have been brought to the Planning Commission for review/consideration/approval before the DRAFT was sent to you. The decision matrix was a good idea and should be used in future Planning Commission deliberations involving large and lengthy planning decisions.

I found the minority report to be disconnected from public testimony over the 12 years this DRAFT was being reviewed and I was personally sitting in the audience listening to all but a few of the 81 work sessions held on this subject over the past 6 years. One of the biggest areas of public concern was the cost associated with the permit process and the frequency of requiring a costly hearing to obtain a permit for something as simple as building a dock or making needed landscaping changes to their shoreline. Administrative permit procedures should be more widely acceptable and the Planning Commission recognized that and incorporated changes in the DRAFT SMP to address it.

The other disconnect was in Shoreline Environmental Designations and corresponding Buffer Widths. The minority report suggests that the Planning Commission recommended changes decreased buffer widths by as much as 50%. The truth is the Planning Commission recommendations increased all buffer widths proportionally from the 1990 Shoreline Master Program except for Shoreline Residential which it recommended remain the same. This does not result in loss of ecological function, but improves it. What I believe the Minority Report was comparing buffers to was the DRAFT SMP created by staff for discussion, not the buffers currently in effect with the 1990 SMP (see attachment #1). After listening attentively to hundreds of citizens testimony over the years it was apparent that changing the buffers to any large degree was not acceptable. The Minority Reports recommendation to increase buffer widths in all categories even more would have no significant effect on No Net Loss, but would significantly increase costs to impacted home owners through higher permit fees and reduced home values. As shown in the County's cumulative impacts analysis only 3.5% of all county shoreline acreage is designated as Shoreline Residential. You would therefore once again be placing the highest financial burden on the smallest segment of the county's population.

Increasing buffers for Shoreline Residential properties will negatively impact property values. Is the County Assessor prepared to conduct a re-evaluation of all shoreline properties in the County and reduce their property values accordingly thereby impacting county property tax revenue. Placing a Non-Conforming annotation on a persons property tax records will have that impact.

The State Shoreline Management Act (RCW 90.58.620 – New or amended master programs – Authorized provisions) clearly states: Residential structures and appurtenant structures that were legally established and are used for a conforming use, but that do not meet standards for the following to be considered a conforming structure: setbacks, buffers, or years; area; bulk; height; or density; and.... Even if you decide to expand the buffer from 50' to 75' the decision to retain the Planning Commissions

recommendation that residential structures and appurtenant structures that were legally established be designated conforming should be retained and not discounted.

Finally, I would like to point out that for years now I have repeatedly told staff that Appendix A to the SMP, the Inventory and Characterization Report that was one of the primary documents used by staff to make Shoreline Environmental Designations is a very inaccurate document. I have specifically pointed to the areas for Lake Lawrence that show salmon, cutthroat trout, winter steelhead residing in the lake. That is impossible given the geography of the lake and the fact that there is no stream, creek, or river that flows into Lake Lawrence and the fact that the Director of Washington State Department of Fish and Wildlife provided a letter to that effect and I provided staff a copy of that letter. This document is widely used by your planning and permits department to make planning and permit decisions. This cannot be allowed to continue. We have at least three parcels on Lake Lawrence alone that have been financially impacted by this false information. I have provided staff with the specifics on those parcels and it was confirmed by staff that erroneous information from the Inventory and Characterization Report was used by Permits Section to make an incorrect decision costing shoreline property owners thousands of dollars. I checked the county planning and SMP website prior to coming to the meeting tonight just to confirm that document had not been changed. It hasn't.

Thank you for your time and attention to this important program,

Regards,

Barry Halverson

253-341-6059

1 Attachment – Current & Proposed Shoreline Environmental Designation (SED) Buffers of the Shoreline Master Program (SMP) Flyer, Undated

# Current & Proposed
# Shoreline Environmental Designation (SED) Buffers
## of the Shoreline Master Program (SMP)

| Marine Buffers in ft. (Puget Sound) | | | | |
|---|---|---|---|---|
| SED | NOTES | Current | Option A | Option B |
| Shoreline Residential | The 2021 SMP draft proposes 2 options: A & B | 50 | 50 | 85 |
| Urban Conservancy | | 250 | 125 | 250 |
| Rural Conservancy | | 250 | 150 | 250 |
| Natural | | 250 | 200 | 250 |

| Lakes Buffers in ft. (Fresh Water) | | | | |
|---|---|---|---|---|
| SED | NOTES | Current | Option A | Option B |
| Shoreline Residential | The 2021 SMP draft proposes 2 options: A & B | 50 | 50 | 75 |
| Urban Conservancy | | 100 | 125 | 100 |
| Rural Conservancy | | 100 | 150 | 125 |
| Natural | | 100 | 200 | 250 |

| Stream Buffers in ft. (Rivers & Streams) | | | | |
|---|---|---|---|---|
| SED | NOTES | Current | Option A | Option B |
| Shoreline Residential | No changes are being proposed for Streams. | 250 | 250 | 250 |
| Urban Conservancy | | 250 | 250 | 250 |
| Rural Conservancy | | 250 | 250 | 250 |
| Natural | | 250 | 250 | 250 |

## Q: How are SEDs Proposed to Change With the SMP Update?

- Some shorelines are proposed to change designation.
- Some parcels not currently in shoreline jurisdiction may fall under shoreline jurisdiction in the update, based on the most current data regarding location of the ordinary high-water mark, stream flows, and location of associated wetlands and floodplains.
- Some parcels are proposed to be removed based on these same considerations.
- Whether a parcel is subject to the SMP is determined during application review.

## Q: What is the Significance of a Change in SED?

- A change in SED may result in a change in shoreline buffer requirements.
- A change in SED is best understood at the site level because parcels in shoreline jurisdiction may already be protected by the Critical Areas Ordinance (CAO), and there are new proposed flexibility measures in the SMP for rebuilding and expanding legally non-conforming structures.
- Whether a shoreline buffer increases or decreases under the updated SMP depends on how the designation is changing. In some cases, buffers may change even if the SED does not.
- The SED of your property location will affect whether a use is permitted, the type of permit required, and the rules the project must adhere to.

**www.ThurstonPlanning.org**

**From:** bethwilder@comcast.net
**To:** County Commissioners
**Subject:** Fwd: Planning Commission SMP Recommendation Draft
**Date:** Tuesday, May 16, 2023 6:38:45 PM

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---------- Original Message ----------
From: bethwilder@comcast.net
To: "countycommissioners@co.thurston.wa.us"
<countycommissioners@co.thurston.wa.us>
Date: 05/16/2023 6:35 PM PDT
Subject: Planning Commission SMP Recommendation Draft
o: county.commissioners@co.thurston.wa.us
Date: 05/16/2023 6:27 PM PDT
Subject: Planning Commission SMP Draft
**To: Commissioners Carolina Mejia, Tye Menser, Gary Edwards**
Please implement the following in regards to the SMP:

1. **Accept and support the Planning Commission SMP Recommendation Draft**,
2. Keep Shoreline Residential SED **buffers at 50-feet.**
3. Keep existing properties that have been legally built classified as **'conforming'.**

**Sincerely,**
**Beth Wilder**
**7618 Fair Oaks Rd.**
**Olympia, WA 98513**
**I live on Pattison Lake**

**From:** Rebecca Gibson
**To:** County Commissioners
**Subject:** Planning Commission SMP Draft
**Date:** Tuesday, May 16, 2023 6:28:05 PM

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**To: Commissioners Carolina Mejia, Tye Menser, Gary Edwards**
Please implement the following in regards to the SMP:

1. **Accept and support the Planning Commission SMP Recommendation Draft**,
2. Keep Shoreline Residential SED **buffers at 50-feet.**
3. Keep existing properties that have been legally built classified as **'conforming'.**

**Sincerely,**
**Rebecca L. Gibson**
**7618 Fair Oaks Rd SE**
**Olympia, WA 98513**

**From:** Paula R Lowe
**To:** County Commissioners
**Subject:** SMP comments
**Date:** Tuesday, May 16, 2023 4:29:55 PM

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County Commissioners:

I have been following the SMP process for years.

I want to keep the shoreline residential SED buffers at 50 feet. Many of our shoreline properties are narrow and deep, so 50 feet is already a lot of property.

I also want to keep our homes classified as conforming.

Thank you.

Paula Rudberg Lowe
Pattison Lake

88

**From:** PERI MAXEY
**To:** County Commissioners
**Subject:** Shoreline Master Program
**Date:** Tuesday, May 16, 2023 12:16:30 PM

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Thank you for your work on updating the Shoreline Master Plan.
Based on what we have learned from neighbors attending these meetings, we are encouraging you to:

1. Accept and support the Planning Commision's SMP recommendation draft, and
2. Keep the Shoreline Residential SED buffers at the current level of 50 feet, which will keep our homes classified as conforming.

Respectfully submitted,
Timothy and Peri Maxey
8024 Afflerbaugh Ct SE
Lacey, WA 98503

**From:** JAMES BIEHL
**To:** FRANK AND HEIDI Hudik; John Woodford; Barry Halverson; Barry Halverson; Curtis Cleaveland; Gary Edwards; Andrew Deffobis; County Commissioners; Kim Nelson
**Subject:** Re: comments to SMP
**Date:** Tuesday, May 16, 2023 9:03:24 AM

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Well done ,Frank.You captured the sentiments of the LMD and me personally.

> On 05/14/2023 9:17 PM PDT FRANK AND HEIDI Hudik <hudik5@comcast.net> wrote:
>
> Attached are our comments to the DRAFT SMP.
> Frank and Heidi Hudik

**From:** Adam Faussett
**To:** County Commissioners
**Subject:** SMP comments
**Date:** Tuesday, May 16, 2023 12:16:13 AM

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Hello County Commissioners,

I would like to show my support for the Planning Commission SMP Recommendation draft. I have attended many meetings over the past 5 years and appreciate the opportunity to see and be a part of the SMP proposal.
The main concerns I have are keeping our homes classified as conforming as they were that way when built. Changing this classification separates the waterfront owners from everyone else and has been seen as a way to increase fees and taxes to those called out in a different manner in many places across the country. I'm not saying you would do this but future members could. As a Homeowner on Long Lake, we already have imposed taxes upon ourselves and pay by the number of feet of waterfront we own to keep the lake nice for everyone that enjoys it. I also would like for our committee to keep control of the funds so we can limit their use to Long Lake.
The 50 foot water buffer has been in effect for years, changing this would make Holmes Island unlivable/unbuildable/unremodelable. We are boarded by the road and the lake and 50' is already barely possible. I know a bigger buffer could make sense in future development, but most of Long Lake and waterfront property in the county has already been developed.
Thank you for your time and see you Tuesday night

Adam Faussett
7546 Holmes Island Rd SE

Sent from Mail for Windows

**91**

| | |
|---|---|
| **From:** | Lori Loveland |
| **To:** | County Commissioners |
| **Subject:** | SMP |
| **Date:** | Monday, May 15, 2023 4:22:14 PM |

Dear County Commissioners,

I had planned to be at the public hearing tomorrow night but now am unable to be there as my husband and I are in Eastern WA with his mom who is dying from cancer. I hope that my letter can convey what I want to say. We do not live at our cabin on Lake Lawrence. It is a family cabin that my grandparents built in 1942, passed on down to my dad and then passed on down to me. My hope is that I can pass it down to my children and grandchildren but I worry that the changes that the minority report wants to make to the SMP will make it too hard to maintain the cabin and the property around it. We have tried so hard as the years have gone by to update the old structures without disturbing the ecosystem. When tree limbs fell and ruined our dock we did not cut down the trees but we simply replaced what had been damaged without increasing the square footage and then insured the new dock in case it happened again. We have tried to update our cabin without changing the square footage and we have left trees and vegetation intact despite the physical work that it takes to maintain the property. If you make the changes in the minority report you will force us to pay more for permits and adding things we don't want or need and make the cost of maintaining our property too expensive for us. Please do not make changes that will force us either to let our property become an eyesore or force us to sell a family property that our family has had for 80 years. We want to insure that Lake Lawrence stays beautiful for many generations to come. Please do not pass the minority report of the SMP and make this too hard for us to do  Thank you for listening.

Lori Loveland
owner of 17116 Pleasant Beach Dr SE

Sent from Yahoo Mail. Get the app

**From:** don cole
**To:** County Commissioners
**Subject:** Comments about the Shoreline Master Plan
**Date:** Monday, May 15, 2023 12:33:40 AM

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Dear Commissioners,

Please consider these four points during your review of the proposed Shoreline Master Plan:

- <!--[endif]--><u>**Please approve the SMP as recommended by the Planning Commission without any amendments:**</u> Although we are not thrilled about the increased restrictions on existing shoreline properties that in in actuality may provide little benefit to the environment, the proposed draft SMP seems like a reasonable compromise between shoreline management and the practical use of existing properties. The plan aspires to improve ecological function using an approach that is better aligned to our local residential shorelines, which consist predominantly of already developed lots. This draft SMP incorporates the new State requirements and includes local management decisions as was intended by the State. Similar to SMP's for other jurisdictions with developed residential shorelines, the Planning Commission's SMP made a local decision to establish a 50-foot buffer for Shoreline Residential and to increase the buffers in the Natural and Conservancy SEDs. The Planning Commission recognized that environmental impacts have already occurred at the built out residential shorelines, are already highly regulated, and that further regulation would have no appreciable impact on the environment. Furthermore, shoreline residents are often the first stewards of the shoreline with high self-interest in protecting it. For example, Long Lake residents regularly petition to pay a substantial self-imposed annual tax for the formation and operation of a Management District for the purposes of improving the environmental health of their districts with many residents participating in the management of their district. The work by these management districts has provided very effective environmental improvements when compared to the impacts of environmental work by others.

<!--[if !supportLists]-->• <!--[endif]--><u>**Please disregard the Minority Report containing false information presented by Latecomers to the SMP process:**</u> Not appearing until late in the public process, the writers of the Minority Report did not have benefit of information discussed by the many participants throughout the multiyear SMP process. As they self-proclaim, this report was written by a minority group, which did not prevail in the Planning Commission's regular public process. Therefore, please do not give significant weight to their comments. It is my understanding that this is an unprecedented action, which I am pleased to hear because it unfairly circumvents the extensive deliberation of the full public process. This Minority Report contains false statements, which would have been challenged in the full public process. For example, it makes false statements that portions of the SMP "do not meet the WAC" or "would not be approved by Ecology", but these statements are often not cited with code sections or employ erroneous conclusions. Their opinion that shorter buffers would not be approved by Ecology is wrong. To the contrary, Ecology regularly approved reduced buffers at many jurisdictions and even includes such examples within their published literature, specifying reduced buffers at multiple jurisdictions. Such false statements would have been exposed within a full public process.

<!--[if !supportLists]-->• <!--[endif]--><u>**Please be aware that increasing the Shoreline Residential buffer by an additional 25-feet as proposed by the Minority Report creates substantial hardship with negligible ecologic gain:**</u> Should the Commission decide to entertain some of the items within the Minority Report, please maintain the Planning Commission's recommended 50-foot buffer for Shoreline Residential and disregard the 75-foot buffer within the Minority Report. According to the Appendix of the Buffer document published by Ecology, increasing the buffer from 50 feet to 75 feet would only provide an approximate 1% reduction in nitrate removal and sediment removal. However, this buffer increase would result in the majority of existing properties being forced out of

compliance and subject to substantial administrative processes and costs with negligible ecologic gain.

<!--[if !supportLists]-->• <!--[endif]--><u>**Please maintain the Planning Commission recommendations for Mooring Structures:**</u> Maintain the Planning Commission recommendations referencing the science based WDFW hydraulic project approvals and disregard the end around attempt to restore the unwarranted Thurston County development standards.

Thank you for your consideration.

Don and Kari Cole
Long Lake Residents for 19-years

**From:** Debbie
**To:** County Commissioners
**Subject:** Shoreline Master Plan - Planning Commisson Recommendation
**Date:** Friday, May 12, 2023 12:02:33 PM

Dear Commissioners Mejia, Menser and Edwards,

First, allow us to thank you for your service to our community. We recognize there are many important issues that you deal with daily often with competing interests. As 30+ year homeowners on Long Lake (specifically Holmes Island) we have been following the update to the Shoreline Master Plan and have significant concerns regarding the impact certain changes would mean for doing even simple projects to our 60 year old home and property. With that in mind we ask the following:

1**. Accept and support the Planning Commission SMP Recommendation Draft**. The PC has put in a tremendous amount of work and this is a reasonable path forward toward "no net loss" of ecological function while **protecting** homeowner rights and property use.

2. Keep Shoreline Residential SED **buffers at 50-feet**. If buffer widths are increased the new buffer, in most cases, will wrap right around our homes. For what purpose? Why is this necessary? How would this contribute to "no net loss" of ecological function?

3. Keep our homes classified as "conforming". The State of Washington recognizes that such structures are "conforming" in RCW 90.58.620.

We will be attending the meeting on Tuesday and following closely. Thank you for supporting the hard work of the Planning Commission and residents on our waters.

Sincerely,

Darren and Debbie Smith
7502 Holmes Island Rd SE

**94**

| | |
|---|---|
| **From:** | mark bryant |
| **To:** | County Commissioners |
| **Subject:** | SMP |
| **Date:** | Monday, May 8, 2023 11:19:17 AM |

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Dear Commissioners Carolina Mejia, Tye Menser, and Gary Edwards:

As we are unable to attend the hearing regarding the Shoreline management Plan (SMP) on the 16th, we wish to present our input. Updating this plan has been in the works by the Thurston County Planning Commission and has been thoughtfully and thoroughly developed to meet state requirements as well as concerns of property owners. We have been fulltime residents on Lake Lawrence for 20 years in a home built in 1989. As longtime lake owners, we are very cognizant and careful to be good stewards of our special and fragile environment. We are supportive of an updated shoreline management plan and believe the extensive work of the Planning Commission over the years has sufficiently addressed this.

We have several concerns as Shoreline Residential Property owners
1. Our lake properties are nearly fully built out and as such, human environmental impact due to further development is unlikely. Therefore, Shoreline Residential properties should not bear the brunt of the SMP's very restrictive regulations.
2. Maintaining the 50' buffer for lake properties has been established by Ecology as "within the realm of justifiable", has been in place since the 1990 SMP and therefore should be maintained
3. Legally built structures should be maintained as being "conforming". Extensive work done by the Planning Commission with conjunction with ecology agrees upon this point. The State of Washington recognizes that such structures are "conforming" in RCW 90.58.620

Therefore, we urge the acceptance of the Planning Commissions SMP Recommendation of August 3, 2022. This is a very reasonable path toward "no net loss" of ecological function while protecting homeowner rights and property use.

Sincerely,

Mark and Karla Bryant
16646 Pleasant Beach DR SE
Yelm, WA 98597

**From:** Phyllis Farrell
**To:** County Commissioners
**Subject:** SMP comments
**Date:** Thursday, May 4, 2023 6:54:30 PM

Greetings Commissioners, I look forward to meeting with you next week. I have submitted written comments/suggestions via the SMP website, but am including below the comments to you directly… hoping you will see them before our meetings.

I commend the staff and Planning Commission for the extensive research and work in developing the draft. I have followed the process for several years and it has been arduous! Overall, I think the draft has many good provisions and improvements, but there are some areas that need to be addressed.

**Vegetation Buffers:**

The Minority Report states the proposed provisions are not protective enough to meet Shoreline Management Act (SMA) policy goals and prevent net loss.

The Planning Commission recommended Option A to decrease Shoreline Environmental Designation buffers. They also recommended buffers for Rural Conservancy designations to be reduced by 50% or 125 feet. The Minority Report states these recommendations do not "reflect the policy goals of the act" (WAC 173.26.186)

Thurston County SMP buffers need to reflect best available science. **Option B had more protective buffers, especially in marine shorelines (85' Marine Shoreline Residential and 250' in Urban Conservancy, Rural Conservancy and Natural). Buffers are important for maintaining ecological function!**

Projected sea level rise might shorten buffers.

**Reducing buffers will make mitigation and restoration efforts more expensive and complicated.**

Gwen Lentes, WDFW, shared in an e mail10.19.20, WDFW recommends designating riparian buffers as critical areas and using the larger buffer option to more closely align with recent best available science.

The riparian wetlands guidance for fish and aquatic species recommends prioritization of the "pollution removal function when appropriate;" and **adoption of Site-Potential Tree Height (SPTH), based on potential tree height at 200 years, as "a scientifically supported approach if the goal is to protect and maintain full function of the riparian ecosystem."**

The Department of Ecology recommends a Riparian Habitat Area width of 250 feet for Type "S" (Shorelines of the State) and all fish (Type "F") streams regardless of whether they are currently or just potentially used, and whether they flow all year or not. The Draft SMP matches the Ecology guideline of 250 feet only for Type S streams and other streams greater than 20 feet wide. The range

of protection for other fish streams is 150 to 200 feet. **The more protective buffer width of 250' for both Type S and F streams is needed to ensure NNL and account for climate changes in stream temperatures**.

Vegetation requirements should be for mitigation purposes should be native vegetation**; the non native vegetation allowance in the Planning Commission recommendations should be removed.**

No Net Loss can only be achieved with restoration of vegetation in buffers.

**Critical Areas:**

Critical areas are an essential tool of the GMA for preventing loss of environmental function.

The Minority Report states: The SMP should assure that critical areas within the shoreline are protected in a manner consistent with the Critical Areas Ordinance (CAO) of the Growth Management Act (GMA). We are concerned that there is insufficient consideration given to critical saltwater areas. We note that permitting of critical areas is treated differently in the Draft SMP from the CAO in an important respect: the application of the principle of Reasonable Use (which is highly protective of ecological function) is replaced by shoreline variances. Without some revision, the Draft SMP will likely result in net loss of shoreline critical areas and their functions.

Per the Minority Report, it is recommended **to add a Policy (SH-15) "Critical saltwater habitats should be protected and restored according to the principles of WAC 173-26-221"**

**Armoring:**

Armoring (bulkheads and logs/stones to stabilize shorelines) results in loss of shoreline sediment important for habitat for marine organisms. It is estimated that more than 27% of Puget Sound shorelines have armoring adversely affecting forage fish habitat and salmon recovery. The Department of Ecology states that more than 700 miles of Puget Sound's shoreline is armored – with approximately four miles added every two years**. The Puget Sound Partnership recommends reduction of shoreline armoring by 25%, more protective permitting requirements and substituting "soft" or natural armoring for impervious bulkheads.**

The Puget Sound Partnership's Regional Estuary Program Shoreline Armoring Implementation Strategy offers an approach that identifies effective implementation, compliance monitoring and enforcement improvements within and across regulatory agencies in Puget Sound. These efforts will reduce new (and especially illegal) armoring and reduce the impacts of repairs**. The SMP should align with the PSP Regional Estuary Program Shoreline Armoring Implementation Strategy recommendations**.

The Minority Report indicates the draft SMP is not as protective against No Net Loss as it should be.

**The Minority Report recommendations should be inserted in the SMP...incorporating the Ecology SMP Handbook Guidelines, most notably that shoreline designations must be supplemented with consideration of specific shoreline environmental conditions and cumulative impacts.**

With potential sea level rise encroaching on homeowners' vegetation buffers, there will be requests for armoring. **Require "soft" armoring for repairs and limit armoring expansions**; allowing only if the modifications do not result in a net loss of ecological function.

1**. Docks should be prohibited in Natural designations**

**2. Maintain the requirement that docks must be grated to allow light**

**3. Limit new docks and require multi-family or community docks**

**Aquaculture:**

Monitoring, Inspections and Enforcement Current and historical practices have demonstrated a lack of adequate inspection, monitoring and enforcement of aquaculture permits. New procedures and practices are required to minimize environmental impacts. Every site should be inspected at the time of planting, when structural changes occur, such as with removal of nets, and when harvesting occurs. **There must be a mechanism for reporting permit violations by county personnel and citizens and a response by the county.**

Adaptive Management **The principle of Adaptive Management should be applied to aquaculture**. This should include a formal means of observing and reporting information about industry practices and impacts on the environment, as well a formal process to revise regulations as new information emerges.

**No use of plastics** Polyvinyl Chloride (PVC) and High Density Polyethylene (HDPE) plastics are used extensively in aquaculture. They are toxic during their manufacture and use in the marine environment. The toxic elements include mercury, asbestos and/or polyfluoroalkyl substances (PFAS). There is no safe level of PFAS chemicals for humans. **The use of these plastics for aquaculture must be eliminated and sustainable practices required.**

**Non-disruptive harvesting** Current geoduck harvesting techniques involve the liquification of the tidelands to a depth of three feet by the use of high pressure hoses. This damages the benthic environment and reduces biodiversity. Because sites are continuously replanted after each harvest, there is no time for recovery. **Hydraulic harvesting should be prohibited in favor of sustainable techniques.**

Additionally, intensive oyster bag cultivation with plastic bags and netting covers large sections of tideland disrupting naturally occurring flora and fauna. Spacing and buffers based on available science with adaptable management practices should be put in place to protect the tideland environment.

**Individual permits (not consolidated)** Because aquaculture sites can vary greatly even when in close proximity, each site must be evaluated for environmental impacts. The consolidation of multiple adjacent parcels into one permit application prevents proper environmental evaluation and should be prohibited.

Thank you,

Phyllis Farrell

Sunwood Lakes

Sent from Mail for Windows

**From:** Alex Nielsen
**To:** Andrew Deffobis
**Cc:** SMP
**Subject:** Proposed SMP and 1996 Flood of Record Boundaries: Flood Elevation
**Date:** Friday, May 19, 2023 4:18:21 PM

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Dear Mr. Deffobis,

This is Alex Nielsen with Nielsen Pacific, Ltd. I testified at the SMP public hearing on Tuesday, May 16. I understand that a Work Session is scheduled for May 24 and wanted to follow up on our request for the data to be available in the public record relating to the establishment of the flood stage elevation monument (NS08) located at the intersection of Old Pacific Highway Rd SE & Durgen Rd SE.

If there's any additional information other than the aerial photography that's available online, could you please direct me to that?

Thank you,

Alex Nielsen
Vice-President
Nielsen Pacific, Ltd.
253-720-7030
Alexn@holroyd.co

**From:** JAMES BIEHL
**To:** FRANK AND HEIDI Hudik; John Woodford; Barry Halverson; Barry Halverson; Curtis Cleaveland; Gary Edwards; Andrew Deffobis; County Commissioners; Kim Nelson
**Subject:** Re: comments to SMP
**Date:** Tuesday, May 16, 2023 9:03:24 AM

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Well done ,Frank.You captured the sentiments of the LMD and me personally.

> On 05/14/2023 9:17 PM PDT FRANK AND HEIDI Hudik <hudik5@comcast.net> wrote:
>
> Attached are our comments to the DRAFT SMP.
> Frank and Heidi Hudik

**From:** Carolina Mejia-Barahona
**To:** Andrew Deffobis; Jeremy Davis
**Subject:** FW: What I couldn"t address at the hearing (5/16/23)
**Date:** Thursday, May 18, 2023 10:45:19 AM
**Attachments:** image.png

fyi

**From:** heesoon@comcast.net <heesoon@comcast.net>
**Sent:** Wednesday, May 17, 2023 4:18 PM
**To:** Tye Menser <tye.menser@co.thurston.wa.us>; Carolina Mejia-Barahona <carolina.mejia@co.thurston.wa.us>; Gary Edwards <gary.edwards@co.thurston.wa.us>
**Subject:** What I couldn't address at the hearing (5/16/23)

Dear Commissioner, Menser, Commissioner, Mejia, and Commissioner Edwards:

Thank you so much for giving me an opportunity to speak for two minutest at the Hearing last night (5/16/2023). You must be exhausted since you listened to everyone so attentively.

My name is Heesoon Jun and my address is 3100 Sunset Beach Dr. NW. I requested my property should remain conservancy (Rural Conservancy). What I was not able to address yesterday was the fact that we (3 homeowners in the south side of Green Cove and 3 homeowners in the north side of Green Cove) were not notified by Andrew or his staff even though two Planning Commissioners addressed the importance of notifying property owners whose properties are impacted by SED change at the 3/16/2022 Planning Commission Meeting. One Commissioner requested Andrew to do so and he indicated he would.

The other issue at the Planning Commission Meeting on 3/16/22 was the relation of the "citizen" who requested SED "Natural"; one commissioner explored the possibility of the "citizen" being one of us; I believe Andrew said he didn't know. The "citizen" stated in her comment she lives in Eld Inlet, but one of us (6 property owners) emailed the group. He wrote, "I was able to identify the comment that caused the change for MEL 29-30. Unless I am mistaken, it appears to have come from Kirsten Harma. When looking at her name on Thurston County Assessor page, her owned property appears in the City of Olympia, not anywhere along the Eld." Kirsten made the statement based on no site visits, no input from us, and no consideration of constitutional rights of property owners. I am troubled by the fact that her comment was one of the major factors of the SED change while property owners were left in the dark. What was the purpose of keeping us in the dark when two Planning Commissioners addressed the importance of informing us? What had happened to 6 of us seem to go not only against **Thurston County Core Values** but also neglecting SMP's efforts to keep "**harmony** between the needs of the Thurston County homeowners, public access to beaches clean water, salmon,…"

**From:** Virginia Gunderson
**To:** County Commissioners
**Subject:** SMP
**Date:** Wednesday, May 17, 2023 5:41:50 PM

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Good Afternoon,

I attended the meeting last night and was pleased to have had an opportunity to voice my concerns.

I came away with two main ideas.
1. The citizens of Thurston County are concerned about the waterfront and are in approval of the SMP proposal for the most part.
2. I heard over and over again that changing the rules is unacceptable. For homeowners who have complied with the current laws and permits the homes should be designated as COMPLIANT. The homes which have met the current requirements are COMPLIANT. From the issuance of the new SMP the new builds should be subject to the new buffer rules.
It is similar to changing the rules in the middle of the game. Not acceptable.
The existing homes should be grandfathered in.

Thank you for the chance to comment. I hope you listto the citizens and act accordingly. We don't feel we have been heard.

Virginia Gunderson
7136 Holmes Island Road
Olympia, WA

Resident of Thurston County since 1985

Sent from my iPad

**100**

| | |
|---|---|
| **From:** | Michael Fischer |
| **To:** | County Commissioners |
| **Subject:** | SMP - Additional Public Testimony for 5/16 |
| **Date:** | Monday, May 8, 2023 2:58:16 PM |
| **Attachments:** | SMP ltr to BoCC 5.8.2023.docx |

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Dear Commissioners Carolina Mejia, Tye Menser and Gary Edwards,
Thank you each for your time, energy and effort invested in the affairs of our community.
I am writing voice my strong support for all points made exceptionally clear in the attached letter from John Woodford, Chair of our Thurston County Shoreline Stakeholders Coalition on or about May 8,2023.
I, and my Dad, Tom Fischer before me, have been shoreline residents on Lawrence Lake for over 30 years. During that time we have, at our own cost in time and money, worked very hard to maintain our property, protecting the shoreline and the water quality near us from deterioration and toxic chemicals.
We have voluntarily invested countless hours in maintaining the lake itself - initially through community stewardship projects and once it came into being, as sitting members of the Lawrence Lake Management District.
When the developer who clear cut the south end of Lawrence Lake, in clear violation of the legal stipulations for maintaining a certain number of trees on the 40 acres affected, ignoring the then legal requirement to leave a minimum of 200' from the high water point untouched and scoffing at the disruption to then present Eagle nesting areas (which at the time were still a protected species), we were the ones crying out to the county to enforce the rules and laws that were being ignored. Unfortunately, the county did nothing.
Whenever there has been a call for volunteers to protect safe use of the lake for residents and non residents alike - whether it was clearing the 'floating islands' to ensure safe boating, removing toxic invasive species ( such as Yellow Flag Iris) or leading community education efforts to minimize the use of fertilizer etc that contribute to our ongoing battle with toxic algae, we have been there. Every time.
And now after all of these years of effort to do the right thing, I am angered to understand that you are considering decisions that amount to punishing us both financially and in terms of what we can do with property, property that mind you we have been caring for for longer than most of these people have been working for the county or their activist organizations.
I hope you would understand my sentiment should you take the time to put the "shoe on your own foot" that we will be forced to accept by the overly restrictive, exceptionally poorly thought out suggestions make included in:
1. the **PC Minority Report** dated August 8, 2022 by a group whose timing and lack of participation in any shape or form up until that point clearly indicates no vested interest or consideration of the rights of a place and people they are not even a part of
2. The 68 items that make up the **SMP Update - BoCC Decision Matrix** - the questionable intent of which is wholly disappointing in that it wasn't even presented to our Planning Commission. What would motivate them take that course of action?
3. And from the **5 Major Decision Points** companion documents to the above Item 3, Matrix…) the Planning staff's clear miss on Points #1 and 4

**Please, on May 16, accept the Planning Commission SMP recommendation**

**dated August 3, 2022** which represents the most reasonable path forward towards balancing the need for protecting BOTH ecological function and homeowners rights and property use.
Thank you for maintaining the integrity owed the residents of the Lawrence Lake community in this decision.
Michael B Fischer and Lisa J Fischer
16239 Lawrence Lake Rd SE
Yelm WA 98597

# Thurston County Shoreline Stakeholders Coalition

7541 Holmes Island Rd SE, Olympia, WA 98503-4026

May 8, 2023

To: Board of Thurston County Commissioners

From: John H. Woodford, Chair, Thurston County Shoreline Stakeholders Coalition

Re: Coalition comments on SMP Public Hearing

Dear Commissioners Carolina Mejia, Tye Menser and Gary Edwards,

Your Board of County Commissioner's **Public Hearing on the Shoreline Master Plan** is now just over a week away.

## Some background material

The current SMP was adopted in 1990, and Thurston County is way overdue for incorporating State mandated revisions and updates. In general, the newly proposed Planning Commission SMP Recommendation is much more protective of the environment than the 1990 version, especially in areas where there is little to no human development.

Most of us Thurston County shoreline residents live in areas that have been assigned a Shoreline Environmental Designation of “Shoreline Residential." Our SED of Shoreline Residential is the most developed, having had the most human impact. But, our Shoreline Residential SED reflect the fact that quite intense shoreline development has already taken place and our neighborhoods are already built-out. And, as I’ve pointed out many times in the past, the *Cumulative Impacts Analysis of Thurston County’s Shoreline Master Program* acknowledges that **Shoreline Residential SED properties accounts for only 3.5% of the total County shoreline acreage**. The other SEDs are Urban Conservancy (1.1%), Rural Conservancy (63.5%) and Natural (31.9%)…all with considerably less existing development and, appropriately, with more development restrictions. Further, the vast majority of parcels located in Shoreline Residential SEDs are already built out; there are very few vacant parcels available for new development. Our shoreline residential properties should not bear the brunt of the SMP’s very restrictive regulations.

Within the Shoreline Residential SED, we currently have a 50-foot buffer to restrict shoreline development. This buffer regulations impose many restrictions on what can be done within the first 50-feet from the water. After that 50-feet, building and development can happen with fewer restrictions, until you get out to the 200-foot mark where SMP

jurisdiction ends. The development restrictions are all encompassing. They would include things such as buildings and structures, including not just your home, but patios, docks, bulkheads, fire pits, sport courts, fencing, storage sheds, and landscaping. If a shoreline resident wanted to make changes to nearly anything within the buffer, he/she most certainly will be required to obtain a permit…and may have to mitigate the impacts to assure "no net loss" of ecological function. An example might be if that resident wanted to remove 100 square feet of vegetation to install a patio, he/she would then be required to put in 200 square foot of rain gardens or other 'natural' landscaping. Tree removal and trimming for views, or any other reason, is also strictly regulated.

If buffer widths were to be increased, as suggested in the Minority Report (see item 2 below), the Decision Matrix (see item 3 below) and the Staff's Decision Points (see item 4 below), the buffer would extend further inland from the shoreline and, in most cases, wrap right around the shoreline homes. For what purpose? How would this contribute to "no net loss" of ecological function?

The Thurston County Planning Commission (PC) worked for years to develop their new draft of the SMP. Much of what the PC did was to incorporate the new laws that have passed on a state level since 1990 and make some local decisions on how to handle things. Some of the decisions made were to increase the buffers in the Natural and Conservancy SEDs, but to keep the 50-foot buffer in Shoreline Residential. This decision was made because the Planning Commission believes the environmental impacts have already been made, are already highly regulated, and further regulation will have no appreciable impacts for the environment. Shoreline residents are often the first stewards of the lake, marine waters, rivers and streams...with self interest in protecting these waters and their shoreline properties.

## Where we are now

This all leads us to where we are now. The Planning Commission's SMP Recommendation Draft has been forwarded to you, the Board of County Commissioners. You will decide if you want to accept the draft as is, make some changes to it, or throw it out and start over. It appears that you will accept the majority of the PC Draft, but are contemplating some changes. The material before you is and will be (until close of the Public Hearing):

1. The **Planning Commission SMP Recommendation**, August 3, 2022, (this is, in fact, a very reasonable path forward toward "no net loss" of ecological function while protecting homeowner rights and property use),

2. The **PC Minority Report**, August 8, 2022, (presented by 'newbies' on the PC who did not participate in the years of testimony, Work Sessions, etc.),

3. Thurston County **SMP Update - BoCC Decision Matrix** (an unprecedented Staff presentation to you, the BoCC, for your February 22, 2023, SMP Work

Session...with 68 SMP items that staff suggests the BoCC maintain, delete or modify…to get Ecology approval). Why weren't these items presented to the Planning Commission? …and resolved before the move to the BoCC?

4. Planning staff's **5 major Decisions Points** (companion documents to the above Item 3, Matrix…) Decision Points 1 and 4 are the most impactful for shoreline residents.

> **Decision Point 1:** Push to widen buffers…Shoreline Residential from 50' by the PC to 75' for lakes/85' for marine waters. Ecology has said the 50' buffer is, "…within the realm of justifiable…" Also, see my comments in the third paragraph of **Some background material** above. The 50' buffer has been in place since the 1990 SMP.
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> Decision Point 2: Shoreline Modifications in Natural SEDs (Beach stairs, docks floats, buoys). No comment.
>
> Decision Point 3: Development Standards for Mooring Structures (PC referenced WDFW Hydraulic Project Approval…while staff is pushing to restore specific TC development standards). No comment.
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> **Decision Point 4:** Age old battle of "conforming" v "legally nonconforming"…for existing, legally built, homes within the buffer. If this Decision Point were to be coupled with Decision Point 1, almost all of our shoreline homes would become "legally nonconforming" as that buffer wraps around us. Staff now says that Ecology has stated that the use of the word 'conforming,' "…**is inconsistent** with the requirement that the SMP's regulations be of 'sufficient scope and detail' to ensure implementation of the SMA (WAC 173-26-191(2)(a)(ii)(A)) and **is not approvable as drafted.**" I have read and re-read this referenced law and do not see how it is relevant to this labeling of structures. Ms. Sarah Cassal, who was the Shoreline Planner at the Department of Ecology providing input to the Planning Commission during much of the PC's deliberations, said repeatedly that "conforming" was just fine. I have done lot of research on this matter, so, here again are my findings. The State of Washington recognizes that such structures are "conforming" in RCW 90.58.620.
>
> > *RCW 90.58.620*
> >
> > *New or amended master programs—Authorized provisions.*
> >
> > *(1) New or amended master programs approved by the department on or after September 1, 2011, may include provisions authorizing:*
> >
> > *(a) Residential structures and appurtenant structures that were legally established and are used for a conforming use, but that do not meet standards for*

*the following to be considered a conforming structure*: Setbacks, buffers, or yards; area; bulk; height; or density; and*

*(b) Redevelopment, expansion, change with the class of occupancy, or replacement of the residential structure if it is consistent with the master program, including requirements for no net loss of shoreline ecological functions.*

*(2) For purposes of this section, "appurtenant structures" means garages, sheds, and other legally established structures. "Appurtenant structures" does not include bulkheads and other shoreline modifications or overwater structures.*

*(3) Nothing in this section: (a) Restricts the ability of a master program to limit redevelopment, expansion, or replacement of overwater structures located in hazardous areas, such as floodplains and geologically hazardous areas; or (b) affects the application of other federal, state, or local government requirements to residential structures.*

*[ 2011 c 323 § 2.]*

*NOTES:*

*Findings—2011 c 323: "(1) The legislature recognizes that there is concern from property owners regarding legal status of existing legally developed shoreline structures* under updated shoreline master programs. Significant concern has been expressed by residential property owners during shoreline master program updates regarding the legal status of existing shoreline structures that may not meet current standards for new development.*

*(2) Engrossed House Bill No. 1653, enacted as chapter 107, Laws of 2010 clarified the status of existing structures in the shoreline area under the growth management act prior to the update of shoreline regulations. It is in the public interest to clarify the legal status of these structures that will apply after shoreline regulations are updated*.*

*(3) Updated shoreline master programs must include provisions to ensure that expansion, redevelopment, and replacement of existing structures will result in no net loss of the ecological function of the shoreline. Classifying existing structures as legally conforming will not create a risk of degrading shoreline natural resources." [ 2011 c 323 § 1.]*

**The **blue and bold** selected portions of the RCW were so designated by me for emphasis.*

Decision Point 5: Permit Standards for bulkheads…higher standards. No comment.

5. **Public input**, now by letters and emails, and by speaking out May 16 at the **Public Hearing.**

## The SMP Public Hearing

The May 16th **Public Hearing** is the last opportunity for shoreline residents, and others that love the County's waters and shorelines, to make their feeling heard. I cannot stress enough the importance of Item 5, above, **public input**. Please listen attentively to what the public has to say. We care! We understand that we live in a fragile environment! We understand the need for "no net loss" of environmental function! We also value our rights!

And, following the **Public Hearing**, we will be silenced. So, please be attentive during our final chance to address you regarding the SMP.

Respectively submitted,

John H Woodford, AIA, Emeritus Architect

cc: Mr. Andrew Deffobis, Senior Planner, CPED