

3. Types of Permits

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

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

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

Flowcharts that depict the permit processes are provided in Appendix A.

For more information:

- [RCW 90.58.100\(5\)](#)
- [RCW 90.58.140](#)
- [WAC 173-27-140](#)

Substantial development permits

Substantial development permits (SDPs) are required for all developments (unless specifically exempt) that meet the legal definition of substantial development. Such development is defined in the SMA as:

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

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

Under WAC 173-27-150, SDPs shall be granted only when the proposed development is consistent with policies and procedures of the Shoreline Management Act, Ecology rules, and the local master program. Local government may condition the approval of permits if needed to ensure consistency of the project with the Act and the local master program. Local governments must review and approve or deny applications for SDPs and then send the permit material to Ecology for filing.

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

Forest practices such as building roads, trails and bridges and placing culverts are considered to be development and are regulated under the local

Cumulative impacts

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

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

The factors the Board weighs in considering whether a cumulative impacts analysis is required for an SSDP are listed below:

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

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

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

For more information:

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

Conditional use permits (CUPs)

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

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

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

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

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

Locally approved CUPs shall be sent to Ecology at the end of the local appeal period. Ecology must either approve, approve with conditions, or deny every CUP within 30 days of receiving a complete permit package.

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

Ecology encourages local governments to contact Ecology shoreline permit review staff early in the process of reviewing a conditional use permit application if difficulties are anticipated.

From 2010 through 2016, Ecology approved 969 CUPs and denied 11.

Conditional use permit criteria

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

(1) Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided that the applicant demonstrates all of the following:

(a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;

(b) That the proposed use will not interfere with the normal public use of public shorelines;

(c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;

(d) That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and

(e) That the public interest suffers no substantial detrimental effect.

Cumulative Impacts

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

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

For more information:

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

Variance permits

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

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

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

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

The burden of proof is on the applicant to show that the variance criteria are met. Local governments cannot use a variance to approve a use prohibited by the SMA or a local SMP.

The cumulative impact over time of granting additional permits for like actions must be considered.

A variance may be required even if the proposed use is otherwise exempt from the requirement to obtain an SDP.

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

Locally approved variances must be sent to Ecology at the end of the local appeal period.

Ecology must either approve, approve with conditions, or deny variances within 30 days of receiving a complete permit package.

Ecology encourages local governments to contact Ecology shoreline permit review staff early in the process of reviewing a variance permit if difficulties are anticipated.

From 2010 through 2016, Ecology approved 423 variances and denied 14.

Variance criteria

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

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

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

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

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

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

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

Cumulative impacts

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

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

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

For more information:

WAC 173-27-170

Baldwin, Simon and Taylor v. Pierce County, SHB No. 17-005c (September 1, 2017)

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