Port of Olympia

1. The **Port** has indicated they are not authorized to do **housing** projects on Port property. Please clarify.

   The Port property is comprised of Industrial and Urban Waterfront Zoning. The Industrial Zoning District covers the marine terminal and does not generally allow residential uses. The Urban Waterfront Zoning District covers the balance of the Port's property downtown and does allow a variety of residential uses.

   Provided by the Port: Ports' powers are set forth by the legislature, and include the power to acquire and develop land for marine terminals and harbor improvements, airports, infrastructure and pollution control facilities, commercial and industrial operations, and economic development. See RCW 53.08.010-.020; -.245.

   Although these powers do not explicitly include residential development, as part of their economic development mission, ports can lease port land to developers who own and operate residential development. Commissioners have had several discussions at their regular commission meetings concerning the advisability of Port of Olympia property accommodating residential development rather than commercial and industrial development.

   While the Port Commission has not recently had a specific or formal discussion concerning residential use on Port property, residential is identified as an acceptable use in the East Bay district in the adopted Port Development Guidelines (most recent adopted update occurring on 10/24/11). At this time if residential was identified as a permitted use in a Port Industrial and Maritime designation there would not be an objection. However, the decision to move forward with any development proposal that included residential on Port property would reside exclusively with the Port Commission.

   There are limitations to some of the uses associated with the property that were created under Section 404 of the Federal Water Pollution Control Act permit issued by the US Army Corps of Engineers in 1982. Residential is not identified as one of the acceptable uses in this area.

   The identified acceptable uses are as follows:

Restaurants

Coffee Shops

Boat Sales

Yacht Brokers

Marine Surveyors

Marine Insurance

Sail Loft & Sales

Canvas/Boat Tops and Upholstery

Engine Repairs, Parts & Service

Marine Supplies & Hardware

Boat Repair Facilities

Dry Storage – Open & Covered

Haul-out Facilities

Boating Apparel

Electronic Sales & Services (marine related)

Fishing Supplies

Fuel Facilities

Groceries

Charter Boats & Boat Rentals

Yacht Designers

Naval Architects

Boat Trailer Dealers

Marina Parking

Coast Guard or Police Facilities

Canoe/Kayak Facilities

Shell House – Crew Racing

Laundry Facilities

Restrooms

Public Transit Shelters – not park and ride

Marina Maintenance Building

Marina Administration Building

Port Administration Building

Offices Relating to Maritime Business

Boat Builders

Shipyards Seaplane Landing

Ferry Terminal

Recycling Area for Boaters

Fishing, Viewing Piers & Towers

Boat Shows

Yacht Maintenance & Management

Boat Rental

Boat Appliance Repair

Fish Buyers

Commercial Fish Boat Facilities

Dry Dock

Yacht Deliveries

Oceanographic Mapping/Charting

Boat Salvage

Boat Pump out & Service

Seafood Market Fish Processing – load/unload

Accessory Uses, e.g. Pump Stations, substations, Phone Booths, Signage, etc.

Boat Names – Commercial Painters & Lettering

1. Concerning **the Port** – does the "special recognition" of the Port apply to all uses or activities a Port might propose, or just particular kinds of uses?

   Ports through functioning in their economic development role and support many different uses. Some of these uses are marine dependent and others are not. Only uses that are marine related would be subject any sort of special consideration.

From the Port: The Shoreline Management Act (SMA) speaks in terms of "uses" of the shorelines. Indeed, RCW 90.58.020 states the policy behind the SMA is management of shorelines by "planning for and fostering all reasonable and appropriate uses." However, that same provision goes on to state that for certain uses that are water dependent , alteration (i.e. development) of the shoreline is allowed, with "priority" for (among other things) ports and marinas. In addition, RCW 90.58.100 states that local Shoreline Master Programs have to include locations for port facilities. Ecology's regulations implementing the SMA echo this notion. It is under the section discussing shoreline use priorities that the regulations require local jurisdictions to "work with the Washington state department of natural resources and port authorities to ensure consistency with harbor area statutes and regulations, and to address port plans."

The SMA therefore supports the idea that ports have a priority status under the SMA, or are "priority users," even though the statute speaks more broadly in terms of "uses."

Port Questions:

1. What is the objective to be achieved in classifying the eastern portion of the Port Peninsula Urban Conservancy?

   Limit development and encourage restoration.

2. Will the Port be able to develop any structure within 200 feet of the shoreline at North Point and at the Swantown Marina if Urban Conservancy remains the designation?

   The Planning Commission recommended:

   - 100' setbacks for a boating facilities, commercial uses, roads, railroads, parking lots, utility buildings and accessory structures.
   - 50' setbacks for water dependent and water related recreation.
   - 25' for trails/paths
   - 10' for viewing platforms

3. Will Boatworks and Olympia Area Rowing be considered nonconforming?

   Yes. Proposed setbacks would render these uses nonconforming.

   Is the objective of identifying a structure or property as nonconforming to insure that it eventually goes away and doesn't come back at that location?

   Yes.

4. How much of the Olympia shoreline will be considered nonconforming if the plan is passed as recommended by the Planning Commission?

   Staff is still developing this information and will depend on SEDs and development regulations.

5. What are the impacts of identifying a property as **nonconforming**? Please ask lending, finance, insurance and real estate professionals this question?

Depending on the extent of the nonconformity, additions/expansions may be difficult depending on site conditions. Variances are difficult to obtain. If a structure is damaged over 50% of its value, reconstruction must comply with new standards unless owner seeks variance (planning commission approved an administrative process for such a variance).

In the context of the SMA, restricting waterward expansion offers greater protection of the shoreline. Although Olympia's shorelines are highly altered, increased setbacks will stop construction close to the water's edge and leave room for future restoration or enhancement.

6. What is the purpose of a **setback** and what is the objective in increasing setbacks in this SMP update?

   Generally, setbacks are used to protect environmental health and safety of a community and the natural environment. Setbacks are required minimum distances to create space between buildings to increase available light and air to building occupants, create yards, allow enough room for site grading, utilities, and other infrastructure that support the building(s) on a site.

   The primary objective of increased setbacks is to meet the no net loss requirement by moving development further away from the shoreline. Another objective is to reserve areas for berms or other structures to project Olympia's shorelines during flooding events.

   Chapter 11 ECY Handbook: Consider that buffers and setbacks, in addition to protecting ecological functions, also provide safety and aesthetic benefits. Setting buildings back from the water and from the edge of the bluff and retaining native vegetation, or planting native vegetation if it is lacking, can help to reduce erosion and landslides and the chances of damage to buildings. Buildings that are set back adequately should not need to be protected by bulkheads. Communities on marine waters should consider sea level rise projections when determining structural setbacks for safety.

7. Does removing the ability to commercially develop a piece of property or making the property nonconforming have an impact on the value of the property? If so is it possible to quantify the property value impact of the proposed changes?

   Staff lacks the expertise or resources to respond to this question.

8. What was the rationale behind altering the SMP that was recommended by the Thurston Regional Planning Council? Did the science, characterization of the shoreline conditions or interpretation of the data change?

   The TRPC draft was written as a model SMP for Lacey, Tumwater, and Olympia with the understanding that individual cities would refine to address local conditions and desires. Olympia staff revised the document to address Olympia's unique shoreline conditions.

9. Is there any connection between the proposed SMP and the future decisions regarding Capitol Lake?

The proposed SMP only addresses future development around the lake, e.g., permitted uses, heights, setbacks, etc. Whether the dam is removed is a decision of the Legislature.

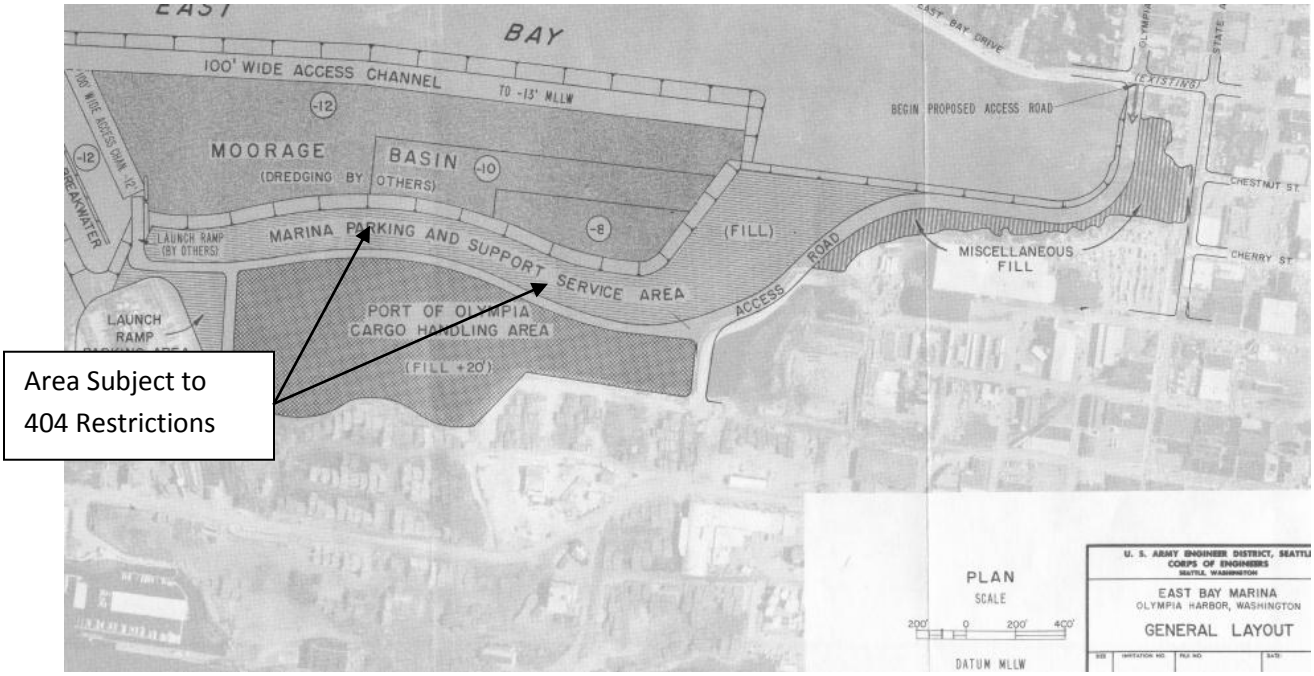
1. It is clear that Washington's Ports are provided special recognition under the SMA. Does that special condition apply to everything a Port does within the shoreline management area or to a specified portion of a Port's activities, such as water dependent uses?

   Ecology interprets the preference to apply to the water oriented uses or operations associated with a Port. This is based on the overall context of the statements the preference for Ports are contained within - see RCW 90.58.100(2)(a), WAC 173-26-176 and 191 (which refer back to the RCW), and WAC 173-26-201 (2)(d) and (3)(d)(ii).

2. The Port has proposed **armoring the marine terminal** area with steel sheet pile to contain leaching and sloughing toxins in this area. How would the June draft SMP respond to this armoring? Would there be a requirement for mitigating actions? Please describe mitigation sequencing.

   A proposal like this would have to comply with the general provisions in the SMP (for example the mitigation sequence) as well as the stabilization provisions, which for water dependent uses would require a geotechnical report to demonstrate that there is definite need to protect the primary structures from damage, and overall that non structural methods are not feasible or sufficient. On a very basic level, compliance with the mitigation sequence would likely entail a description of why impacts cannot be avoided (why any type of stabilization is necessary and what the risk of not doing anything is), how impacts were minimized (why the proposed solution is the best option and how it has been designed or located with minimization in mind to the extent feasible) and what action will be taken to mitigate for the impacts that remain after avoidance and minimization. I am not the scientific expert on ecological functions occurring in this reach, but a quick look at the inventory and characterization indicates functions are currently highly impacted/altered and there are no key habitats present. There may not be as much to mitigate for versus a similar project occurring at a location like Priest Point Park, where there is minimal alteration and multiple key habitats present.

1. I'd appreciate a link to a map which shows those Olympia marine shoreline areas which are subject to the **US ACE Section 404** use restrictions.



This is from the Port's Property Development Guidelines:

Approximately 54 acres of land fill on the Port Peninsula is conditioned with uses that must be consistent with Section 404 of the Federal Water Pollution Control Act permit issued by the US Army Corps of Engineers in 1982. Since a portion of 54 acres of the land was created by filling in waters of the United States, uses on that land must be water dependent to a certain extent, or marina related.

Nonconformities and Impacts on Existing Uses:

1. Where are there areas of **inconsistency or potential conflict** between the SMP goals to promote **recreational uses and the establishment of vegetative buffers**?

   The proposed SMP section 5.9.3 provides for vegetative buffers of 50 feet in the Urban Conservancy and Natural Shoreline Environmental Designations and 20 feet in the Urban Intensity. Section 5.9.4 provides for permitted uses and activities and public recreation trails are included under item 4 when they have been identified in adopted plans.

   The proposed SMP provides for a 25 foot setback in the Urban Conservancy SED and 15 feet in areas designated as Urban Intensity for trails and shared use paths.

   The creation of a blanket vegetation management zone fifty feet in width precludes the full use and enjoyment of our public waterfronts. As an example, this would preclude the development of waterfront walkways within the first 15' or 25' of the OHWM and other multi-purpose play areas such as the recently completed Percival Landing multipurpose field would need to be setback 100 feet. In the case of West Bay Park, some vegetative buffer may be appropriate, but limiting the public's access to the shoreline solely to narrow access pathways will constrain public use of a very valuable park and waterfront. Water enjoyment uses are required to be setback 50 feet.

2. Could any proposed SMP policies or regulations **adversely impact** or affect **City facilities** or interests?

   Yes, the proposed regulations create nonconformities, uncertainty and additional regulatory burdens to install new and maintain existing facilities. The City has numerous utility lines within the Shoreline. The very nature of sewer facilities requires that they be located at low points and these areas generally occur along our shorelines. Significant conflicts with utility lines exists along Capitol Lake reaches as well as Bud Inlet reaches.

   Staff recommends that the definition of utility be drawn broadly including water, sewer, stormwater, and flood protection lines and facilities and that these uses and facilities be clearly allowed within the shoreline and not be required to be setback from the OHWM.

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Staff recommends that the definition of utility be drawn broadly including water, sewer, stormwater, and flood protection lines and facilities and that these uses and facilities be clearly allowed within the shoreline and not be required to be setback from the OHWM.

1. Is it possible or legal that some **non-conforming uses** be grandfathered and others enforced?

   Yes. There are many approaches to dealing with existing uses in the shoreline and identifying which uses are permitted or not permitted within the shoreline is an important part of the regulatory process.

2. If zoning regulations prohibit industrial uses throughout Budd-1 through Budd-3 what would be the **impact to Dunlap Towing or other existing industrial** users, and what recourse would impacted property owners have?

   If the zoning were to change to make industrial uses such as Dunlap Towing a non-conforming use it would become subject to the nonconforming use provisions of the zoning regulations. It could continue to operate in its present configuration with no impacts.

3. Can staff please provide a clear definition of **nonconforming use,** impacts and different approaches?

   Nonconforming uses and buildings entail activities and buildings that were legally established, but are no longer allowed under existing regulations. Coined legally nonconforming, such uses and buildings may continue, but alterations that increase the degree of nonconformity of the use or building are not allowed under proposed regulations. Nonconforming structures may be maintained and repaired. Nonconforming status is lost if use is discontinued for 12 months or more.

   Optional approaches (some discussed in the SMP Handbook):

   - Traditional – described in previous paragraph.
   - Optional
     - SB 5451 added language to RCW 90.58.620 to address nonconforming single family structures:

       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.

- Whatcom County requires a variance for expansion of structure except for single family.
- Require administrative variance to rebuild a structure damaged more than 50% of its value instead of shoreline variance (hearing required) to previous footprint.
- Allow development damaged 100% of its value to rebuild without a variance.

City of Burien:

A. **Existing Single-Family Homes, Appurtenances, and Other Existing Structures**. Single-family homes, appurtenances and other structures that were legally established by Burien - _____ (effective date of this SMP) are considered to be conforming to the SMP. Any addition, expansion or reconstruction beyond the existing footprint of the single-family home, appurtenance or other structure must comply with the SMP. Replacement of any portion of any structure in the Aquatic shoreline designation shall comply with the SMP requirements for materials that come in contact with the water pursuant to 20.30.045 [2.b][Water Quality, Storm Water and Nonpoint Pollution].

City of Spokane:

A. In accordance with the requirements in this section, structures that were legally established prior to the SMP or these Shoreline Regulations, or amendments thereto, and are used for a conforming use but which are nonconforming with regard to setbacks, buffers or yards, area, bulk, height or density may be maintained and repaired and may be enlarged or expanded provided that said enlargement does not increase the extent of nonconformity by further encroaching upon or extending into areas where construction or use would not be allowed for new development or uses.

B. A nonconforming structure which is moved any distance must be brought into conformance with the applicable Shoreline Regulations and the Act.

C. If a nonconforming structure is damaged to an extent not exceeding 75 percent of the replacement cost of the original structure, it may be reconstructed to those configurations existing immediately prior to the time the structure was damaged, provided that application is made for the permits necessary to restore the structure within six months of the date the damage occurred, all permits are obtained, and the restoration is completed within two years of permit issuance, except that nonconforming single-family residences, manufactured homes, and mobile homes may be reconstructed regardless of the extent of damage so long as application is made within the times required by this subsection.

City of Lacey:

- Excludes the footprint of an existing legally established residence located within the shoreline setback from the ordinary high water mark (OHWM) from being labeled as nonconforming, while achieving no net loss of shoreline resources through mitigation as redevelopment or expansion occurs.

Bremerton:

> **Nonconforming development** may continue provided it conforms to requirements in Bremerton Zoning Ordinance Title IX: Nonconformities.

Buxbaum: Please have staff look into **LOTT's concerns about utilities** and pipelines along Capitol Lake and whether currently proposed SEDs would make them prohibited or nonconforming.

There are utilities around Capitol Lake that fall within shoreline and could be effected by required setbacks and vegetation conservation areas. New utilities would be prohibited in CAP 4 and 5 and existing utilities would become nonconforming.

3. How have other jurisdictions treated **covered moorage**? Do other cities have design and maintenance standards for covered moorage that we should consider? If other jurisdictions restrict the use of covered moorage, how have they treated this non-conforming use?

Of the cities I am working with, some allow it and some do not. Most with marine waters are prohibiting new covered moorage. If I recall correctly, in Olympia the focus was on the Yacht Club. My understanding is that they have an aquatic lands lease from DNR, and DNR does not allow new covered moorage in its lease areas. This was why (in addition to some strong personal opinions about aesthetics) the PC chose to prohibit it. You can maintain, replace and repair it, but you can't construct new covered moorage. The language from DNR's stewardship measures document is:

> New covered moorage and boat houses are not allowed. Where existing covered moorage, covered watercraft lifts and boathouses are impacting or occur within important habitats for protected species and their prey, the structures should either be removed by the end of the life of the structure or moved out of the nearshore and littoral areas. In areas not identified as predicted habitat for protected species or their prey, the structures should be replaced or renovated with structures that maximize light transmission. Where covered moorage and covered watercraft lifts are allowed to continue, the replacement structures should be 100 percent translucent or transparent roofing materials that are rated by the manufacturer as having 90 percent or better light transmittance. No side walls or barrier curtains should be allowed."

With regard to permitting, it may also be of interest that the most recent draft Hydraulic Project Approval (HPA) rule language from WDFW (see http://wdfw.wa.gov/licensing/hpa/rulemaking/) allows covered moorage in marinas only if it is more than 50' from the shoreline and in water more than 20' deep, and only when the whole roof is translucent and the walls have windows. The Corps would

require an individual permit for covered moorage, and it can take 1-2 years to get through the ESA consultation process with the Services for those permits.

4. Is it possible or legal that some **non-conforming uses** be grandfathered and others enforced?

   Yes. There are many approaches to dealing with existing uses in the shoreline and identifying which uses are permitted or not permitted within the shoreline is an important part of the regulatory process.

5. Within the context of the SMP, or other development regulations, are there special consideration for those properties in **DNR ownership**?

   They have a whole set of measures that apply in their lease areas. They also designate Harbor Areas under the state constitution, of which Budd Inlet is one. See http://www.dnr.wa.gov/BusinessPermits/Topics/PortMarineBusiness/Pages/aqr_harbor_areas.aspx.

   DRN leasehold properties are subject to the SMP and to the city's permitting authority.

6. Boat moorage and water-side trans-shipment activities present a challenge to shoreline management because they are disruptive to marine habitat. In addition to the impacts of shade, pilings, and potential spills, the Port marine terminal and the six marinas in Budd Inlet will require periodic dredging to maintain their functionality. Marine habitat is critical to the -concept of no-net-loss. **How can the SMP help support the efforts of these aquatic uses to contribute to the preservation of ecological functions?**

   Recall that in the SMP, no net loss is 'measured' against the current baseline. Arguably, temporal losses of the sort associated with ongoing maintenance and operation of existing uses is part of that baseline. This is somewhat recognized by the fact that normal maintenance and repair (and particular to this example, maintenance dredging - "maintaining previously dredged and/or existing authorized location, depth and width") is exempt from having to obtain a substantial development permit. In this case, these are also water dependent uses in a designated harbor area. There are many other laws and permits applicable to these types of facilities aimed at avoiding environmental impacts like spills, maintaining water quality, etc. and best practices that they utilize to operate safely.

   For new uses (water dependent included) following the mitigation sequence requires one to avoid impacts to the extent feasible, take measures to minimize impacts that cannot be avoided, and to provide compensatory mitigation for impacts that remain after avoidance/minimization. Compliance with the mitigation sequence is intended to preserve ecological functions for new uses and expansion of existing uses.

   So yes, maintaining the current level of function in marine habitat area is certainly crucial to achieving NNL; between application of the mitigation sequence for new and expanded projects and the voluntary restoration that is anticipated to occur over time as illustrated in the graphic above, the idea is that water dependent uses can continue while ecological function is preserved. A pretty good summary of no net loss and the interplay with restoration can be found in the last two paragraphs of WAC 173-26-201(2)(c).

Shoreline Environmental Designations:

1. Regarding **Shoreline Environmental l Designations (SED):** The City can develop new, alternative designations if it determines they are appropriate for a given shoreline reach. Can staff provide comments on this option, or perhaps sketch out some conceptual approaches to adding new SEDs? All new SEDs must provide a purpose statement, classification criteria, management policies, and regulations. Areas such as the Port Lagoon or the west side of East Bay may be appropriate for unique shoreline designations given their unique characteristics.

2. Can the City develop **new SEDs** for these and other reaches?

   Yes. The Guidelines allow jurisdictions to establish a different designation system provided it is consistent with the purposes and policies therein (WAC 173-26-211 4 and 5). Each environment designation must still include a purpose statement, classification criteria, management policies, and regulations. They must be assigned consistent with the designation criteria and protect existing ecological functions with the proposed pattern and intensity of development. See also the chapter 13 of the SMP handbook at:

   http://www.ecy.wa.gov/programs/sea/shorelines/smp/handbook/chapter_13_env_designations_411.pdf. Alternative environments are mentioned in a few places, with a more substantive discussion and example on page 15.

7. Have CP&D and the Planning Commission thoroughly **reviewed the shoreline characterization inventory**? This will be the starting place for the identification of cumulative impacts and the baseline from which no-net-loss is calculated, thereby playing a crucial role in future years.

   The shoreline inventory and characterization (IC) was prepared by a consultant and was thoroughly reviewed in the development of the staff draft SMP by the Technical Advisory Committee. The City employed this same consultant to work with the Planning Commission in attempting to provide further clarity around the IC and Shoreline Environmental Designations (SED). Staff's proposed SEDs are based on the IC.

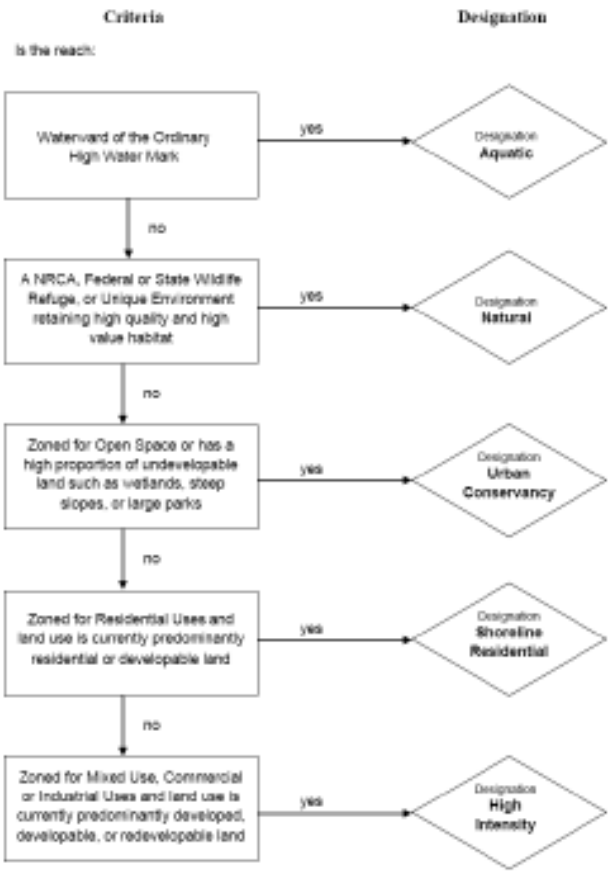
   The attached link provides access to the inventory and characterization that was used to develop the draft SMP. Shoreline Master Program Updates for Lacey, Olympia, and Tumwater

   The Department of Ecology includes in its *SMP Handbook* the following chart to help jurisdictions make decisions about Shoreline Environmental Designations. As you will note, it is from TRPC's work in developing the Staff Draft of the SMP.

Thinking it through

Thinking about your shorelines in a methodical fashion can help to determine appropriate environment designations for shoreline reaches. Using a methodical approach can focus the discussion and steer the decision-making to be consistent with the purpose and designation criteria.

Several local governments have developed decisions trees or flow charts to help connect the shoreline reach to the appropriate environment designation. The flow charts should reflect the designation criteria for each environment designation. Note that zoning as it reflects existing development patterns is only one consideration – shoreline ecological functions and protection and restoration opportunities are also important.



Other methods such as photos can be used to help assign shorelines to environment designations. For example, for the Rural Conservancy designation, photos would show lower intensity resource uses including agriculture and forestry, recreation, residential, floodplains, low-intensity water-dependent uses and other uses listed in the designation criteria. You could then compare land use and ecological functions of a shoreline reach with the photos to see whether the reach fits within the Rural Conservancy designation.

Figure 13-6: A flow chart like this one, developed by the Thurston Regional Planning Council for use by the cities of Lacey, Olympia and Tumwater, can help when making decisions about environment designations. Zoning reflects land use but is not the only consideration. Ecological functions and protection and restoration opportunities are also important

1. I see that other jurisdictions have established **distinct environment designations** for different types of districts, for example:

   LaConner -- (http://www.codepublishing.com/wa/laconner/html/LaConner10/LaConner1010.html#10.10.030)

   Bremerton –

   http://www.ci.bremerton.wa.us/forms/communitydev/shoreline_master_program.pdf

   Please comment on the possibility of **additional designations** for Olympia and conceptual approaches which may be useful in considering adding one or more additional environment designations.

   The Planning Commission's version of the SMP includes a unique SED for the Port Industrial Area. Additional areas could be developed if unique circumstances indicate the need for such. The Department of Ecology has encouraged the City to use to the greatest extent possible the SEDs provided by the State. Additional SEDs may mean additional complexity which may in turn create additional costs and confusion to administer.

   Bremerton uses a general approach of Urban Environment for all of its shorelines and then establishes several sub-designations that align with the designations that are provided by the state but are still unique to Bremerton. They have used Urban Conservancy (same as Olympia's), Urban Residential (same as Olympia's Shoreline Residential), Urban Commercial (similar to Olympia's Urban Intensity), Urban Industrial (similar to Olympia's Port Industrial, and Downtown Waterfront (similar to Olympia's Urban Intensity). One other notable feature of Bremerton's SMP is that regulations such as uses, setbacks and heights are established on a SED basis and not on a reach by reach basis. This approach greatly simplifies their SMP regulations.

Mitigation/Restoration

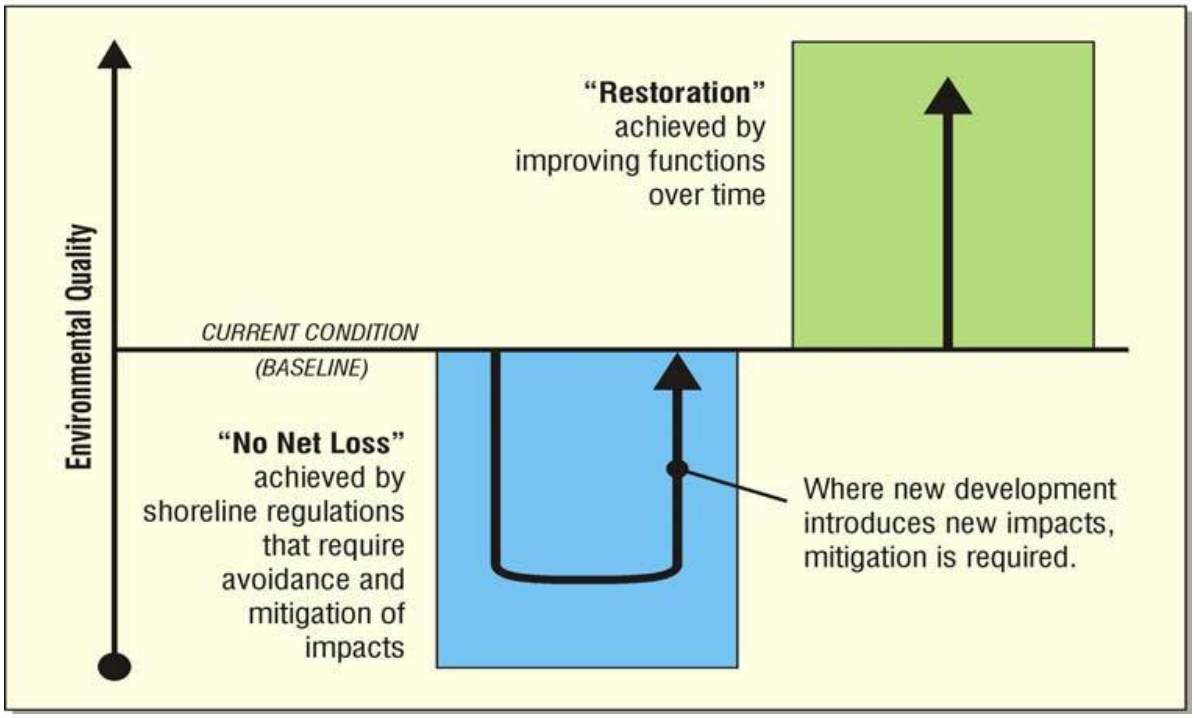
1. How do we rework this document so we **achieve more than the minimum of no net loss** and get to a net gain? How can we do this and yet also achieve social, environmental, and economic needs balance Michael Cade referred to at the September 25th Council workshop?

   The proposed Shoreline Master Program and related State guidelines require shoreline development not result in a net loss, and include a plan for net gain – primarily through implementation of the new Restoration Plan. Generally, private development cannot be required to do more than not have adverse impacts. To get to net gain, the community, including the City and partner agencies, needs to find a means to fund and implement the projects in the Restoration Plan and similar activities. Achieving such lofty environmental goals has been shown to have environmental, social and economic benefits for a community.

   The Shoreline Management Act and the Department of Ecology guidance recognize that achieving this balance is difficult. The WAC states,

   > "(2) The policy goals for the management of shorelines harbor potential for conflict. The act recognizes that the shorelines and the waters they encompass are "among the most valuable and fragile" of the state's natural resources. They are valuable for economically productive industrial and commercial uses, recreation, navigation, residential amenity, scientific research and education. They are fragile because they depend upon balanced physical, biological, and chemical systems that may be adversely altered by natural forces (earthquakes, volcanic eruptions, landslides, storms, droughts, floods) and human conduct (industrial, commercial, residential, recreation, navigational). Unbridled use of shorelines ultimately could destroy their utility and value. The prohibition of all use of shorelines also could eliminate their human utility and value. Thus, the policy goals of the act relate both to utilization and protection of the extremely valuable and vulnerable shoreline resources of the state. The act calls for the accommodation of "all reasonable and appropriate uses" consistent with "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" and consistent with "public rights of navigation." The act's policy of achieving both shoreline utilization and protection is reflected in the provision that "permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, in so far as practical, any resultant damage to the ecology and environment of the shoreline area and the public's use of the water." RCW 90.58.020."

Two Distinct Objectives:
No-Net Loss of Shoreline Ecological Functions and Restoration Over Time



Also see response to Councilmember Hankins' question pertaining to transition periods below.

2. Can we **create a "trust fund"** of some kind to help fund large restoration objectives? Mitigation Fee in Lieu is a concept that staff is exploring and will provide additional information later in the process.

   It is important to note that especially for marine shoreline impacts, fee in lieu programs will require federal and state buyoff. I suspect this level of complexity is why we haven't seen many shoreline-specific programs (any programs?) actually take shape. Thurston County is exploring a pilot in lieu fee program in the Deschutes Basin with the PS Partnership. Cindy Wilson would probably be the best person to contact with questions on the status of that project.

Hankins: Please explain Ecology's reference to the need for a **"transition period"** as we move toward desired future conditions for the shorelines.

Here are two issues a statement like that may have been in reference to. One, that there may be a transition period, since the Comp Plan is also in the update process, before the two documents are consistent (if the new one varies substantially from the existing one, which the draft I read didn't). Two, if the desired future condition of the shoreline in general is more native vegetation, less armoring, trails or other

changes then that isn't going to happen overnight whether the City or a developer is doing the work. In some cases, this could involve larger scale restoration projects done by (for example) the Port or the City. It obviously takes time to plan, permit, and fund these types of projects.

At a project level, the Guidelines will require that an entity wanting a new bulkhead produce a geotechnical report addressing the urgency of the problem and the necessity for hard stabilization. The details associated with the process [outlined in WAC 173-26-231 (3) (a) (iii)] are intended to prohibit hard stabilization structures where they are not absolutely needed and where soft stabilization can achieve the same ends. If someone wants to replace an existing shoreline stabilization structure, they also must demonstrate the need (not necessarily through a geotech report). This process is also geared toward achieving a gradual transition along the shoreline from hard to soft stabilization measures where it makes sense.

Many permitting processes are moving towards disincentives for hard armoring. For example, Ecology is going to require individual 401 water quality certifications for bulkheads, where it used to be a certified activity. Previously, if a project qualified for a Nationwide Shoreline Stabilization Permit from the Army Corps of Engineers, the activity automatically received 401 certification.

8. WAC 173-26-201 (2) (f) says, "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" and WAC 173-26-186 (8) (c) says,

> "For counties and cities containing any shorelines with impaired ecological functions, master programs shall include goals and policies that provide for restoration of such impaired ecological functions. These master program provisions shall identify existing policies and programs that contribute to planned restoration goals and identify any additional policies and programs that local government will implement to achieve its goals."

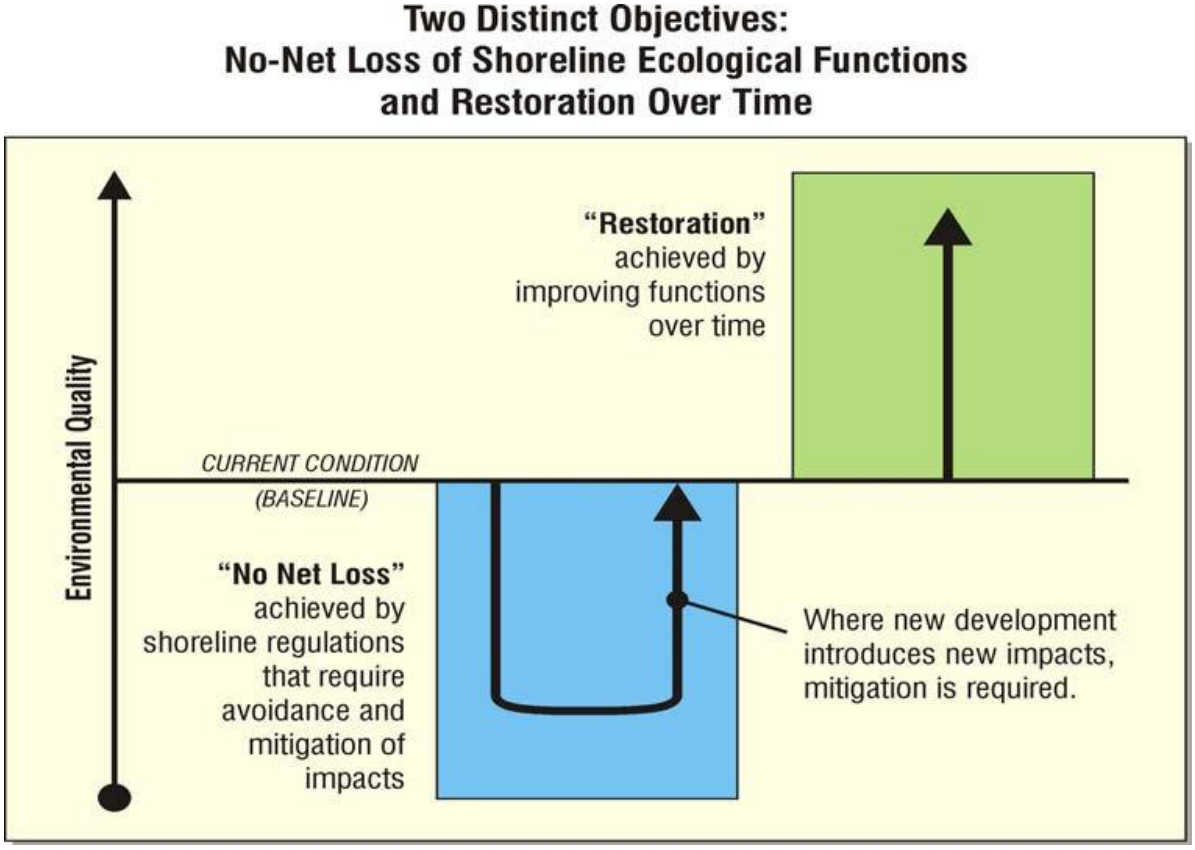
Does Olympia have "shorelines with impaired ecological functions"? YES

If yes, does our draft SMP contain goals and policies which provide for restoration? At the recent Council study session DOE staff read from a section of the SMA Guidelines which seemed to forbid the SMP from pursuing restoration. **What is the role of the SMP relative to restoration and moving beyond no-net-loss?**

I think these statements regarding restoration are best understood in the context of a preceding section of the WAC - 173-26-201(2)(c). That statement is: "Master Programs shall contain **policies** and **regulations** that assure, at minimum, no net loss of ecological functions necessary to sustain shoreline natural resources and meet the standard". Two paragraphs later, this statement is made: "Master programs shall also include **policies** that promote restoration of ecological functions, as provided in WAC 173-26-201 (2)(f)…"

The **bold** text makes the point that the SMP must contain both **policies** and implementing **regulations** geared at achieving NNL but that only **policies** aimed at restoration (above and beyond mitigation) are required. Therefore, there is no requirement for restoration except that we plan for it.

The section of the Guidelines we read at the meeting is 173-26-201(2)(e)(ii). This makes clear that at the project level, we are not to require mitigation in excess of that necessary to achieve no net loss for that project. It doesn't mean the City can't incentivize it or someone can't do it voluntarily. Here is the infamous graphic that attempts to illustrate the difference between the two:



1. Can Olympia set general requirements for shoreline management that include **soft stabilization measures** similar to the work at Percival Landing or Rotary Park?

   The Guidelines require it. It is one of the more prescriptive sections of the Guidelines in fact (the section dealing with shoreline stabilization). Generally, when new shoreline stabilization is authorized a geotechnical analysis will be required, and that analysis must show that there is a real risk of loss or damage from erosion, wind, waves, current, etc. and that soft measures are not feasible.

9. Is there a **template for mitigating actions** for those circumstances when development mitigation is required? Does this template include performance monitoring, milestones and timelines? How will Olympia consistently apply mitigation requirements across varying types of adverse impacts?

   The mitigation sequence is covered in the Guidelines at WAC 173-26-201(2)(e)(i). It outlines that monitoring and appropriate corrective measures (adaptive management) are a part of mitigation. Typically jurisdictions fall back on the monitoring programs (timelines, etc.) established in their CAOs for mitigation in shoreline jurisdiction.

   > **Mitigation sequencing.** A prescribed order of steps taken to reduce the impacts of activities on wetlands. Mitigation sequencing involves:
   >
   > 1. Avoiding the impact altogether by not taking a certain action or parts of an action;
   > 2. Minimizing impacts by limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or by taking affirmative steps, such as project redesign, relocation, or timing, to avoid or reduce impacts;
   > 3. Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
   > 4. Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action;
   > 5. Compensating for the impact by replacing, enhancing, or providing substitute resources or environments; and 6. Monitoring the impact and taking appropriate corrective measures (WAC 197.11.768). See *compensatory mitigation*.

   The City has extensive experience in administering our CAOs. These regulations are administered at a project level and are dependent upon the circumstances of the particular property, the proposed development and the existing environmental conditions.

Environmental Impacts and Regulations:

1. Low impact development methods appear generally advantageous within the shoreline management area. Is the use of **LID methods** on the Port Peninsula advisable, due to the residual impacts of past uses? Low Impact Development is not more or less effected by soil contamination than other approaches to stormwater management. Properties downtown generally only have to deal with treatment of stormwater and not retention because they drain directly to the marine waters. At the time of development, the DOE requires that contamination is addressed regardless of the approach taken with stormwater management.

   In Olympia, low impact techniques are incorporated into development projects regardless of location. In the future, the use of these techniques will increase under new State requirements as well as technological advances. However, we prefer to require the most effective approach to stormwater management for the particular site. The approach may or may not be a low impact technique. We need to be open to implementing the best approach and not assume that it is low impact. This approach is probably especially important for downtown's high intensity uses including the Port. Contaminated soils are a separate issue and are address independently of stormwater management needs.

10. Is **East Bay** currently under some type of **required cleanup**? (I have been told that aerators are operating in the area.) If so, how would this impact the development of reach-specific management measures through the SMP?

    The cleanup of Cascade Pole cleanup is per an Department of Ecology order. The Port continues to operate equipment to assist in the cleanup and will continue to do so. The SMP will not impact this operation.

11. One fundamental tenant of environmental stewardship is the provision of wildlife corridors. Many of our stream corridors currently serve to provide connectivity for wildlife and hyporeic functions. Yet, by containing watershed flows in culverts and we have cut-off important connections between riparian and shoreline areas. Connections for wildlife are lost. Pollution abatement provided by vegetated areas is diminished. And the delivery of valuable nutrients and sediment to the shoreline of Budd Bay from streams and rivulets is degraded. Can the SMP and other development regulatory tools be used to **daylight impaired streams**?

    The SMP only applies to Percival Creek/Black Lake Ditch in Olympia.

    Daylighting impaired streams may be a mitigation or restoration measure. However, daylighting projects are always technically and financially challenging. WA Fish and Wildlife is the key regulatory agency for culvert and fish passage improvements. We follow their lead.

12. What is the viability of constructing **marsh grass areas on the eastern shore of East Bay**, or elsewhere, to improve habitat and bio-remediation? Section 7.4.1.H appears to restrict this potential. Perhaps this is a viable component for the Restoration Plan.

    East Bay was studied extensively by Olympia's Water Resources and State/federal agencies in the mid-1990's. In general, the slopes along the shoreline are steep for salt marsh or other vegetation establishment. The slopes are deeply submerged with higher tides. Some species (pickleweed) have established themselves, but only in a very narrow band. There are one or two areas along East Bay Drive that may have adequate conditions for enhancements. We also looked at either filling the mudflats

or pulling back the shoreline to reduce slopes. These would be big projects with a lot of uncertainty about outcomes. Probably the best thing for East Bay would be to establish trees and shrubs along the existing shoreline.

13. What current **environmental restrictions are in place for the West Bay Lagoon**? Are listed species present? What are the pros and cons of opening the old rail berm to create greater tidal exchange? What are the pros and cons of replacing the berm with an elevated trail structure with a minimal footprint? How would this set of issues and opportunities relate to the SMP?

    The USFWS has a restrictive covenant on the Lagoon……..”the area herein described as Tract 1 shall be kept in its present undeveloped state in perpetuity and its present natural characteristics shall not be altered or changed without the prior written consent of the USFWS…” (Agreement Restricting Use of Land 10-28-1980 – attached).

    From the Port: There is an "Agreement Restricting Use of Land" between the Port and the US Fish & Wildlife Service that allowed the Port to use the West Bay Lagoon as mitigation for the filling of the area that became Swantown. The 1982 Agreement provides that the Port shall maintain the lagoon undeveloped in perpetuity for use as wildlife habitat, and not allow any uses that are consistent with wildlife habitat.

    It also provides, however, that other uses may be allowed if they are first authorized by US Fish & Wildlife. The Agreement also specifically provides that it does not prevent the City of Olympia from constructing or maintaining public streets or roadways across the lagoon, as long as "no fill dirt resulting from such construction" is placed on the lagoon. Any plans for streets or roadways across the lagoon must be approved by US Fish & Wildlife Service in advance, as well.

    The Agreement is a restrictive covenant that has been recorded with the County and runs with the land.

    In addition to the USFWS deed restrictions the area is also subject to our CAO.

    Public Works and the Parks Department are working to develop an approach to studying this area. Such work is outside the scope of the SMP update.

14. What improvements are needed to city-owned stormwater outfalls within the shoreline management area? How can the SMP or other regulatory tools contribute to improved **stormwater management**, including detention, treatment, and outfalls?

    We minimize our work on outfalls to Budd Inlet and the creeks. However, sea level rise would have us installing tide gates, valves, and so forth within the tidal zone of Budd Inlet. The SMP needs to readily facilitate utility work within the shoreline jurisdiction. The utilities and transportation need access to the shoreline jurisdiction.

    The draft SMP suggest that stormwater facilities not be located within the shoreline jurisdiction. The proximity of a well designed and maintained facility to the shoreline should not be any bigger of an issue that other potential uses of the area.

The SMP language says that parcels with shoreline frontage shall provide **vegetative conservation areas and clearing and grading will be restricted** (Vegetation Conservation 5.9.3.A) Would this requirement be tied to new development or is it in force with the adoption of the SMP?

Clearing and grading within established buffers would be limited for both new construction as well as on existing developed parcels.

The existing shoreline regulations presently limit clearing along within 20 feet of the shoreline.

Agreed; however please note that in our view, additional work is necessary on the vegetation conservation provisions in the SMP. Questions relating to the mechanics, the details, applicability to non-residential uses, etc. are some of the topics we need further clarity on and have identified in prior review comments.

2. Within the shoreline protection area, **streams with wetland or riparian ecosystems should be protected with vegetation conservation areas along their extent**.

The relationship between the SMP and the Critical Areas Ordinance is an important one. Any project proposed along the shoreline will be required to demonstrate compliance with the critical areas ordinance.

(b) **Including other documents in a master program by reference.** Shoreline master program provisions sometimes address similar issues as other comprehensive plan elements and development regulations, such as the zoning code and critical area ordinance. For the purposes of completeness and consistency, local governments may include other locally adopted policies and regulations within their master programs. For example, a local government may include its critical area ordinance in the master program to provide for compliance with the requirements of RCW 90.58.090(4), provided the critical area ordinance is also consistent with this chapter. This can ensure that local master programs are consistent with other regulations.

The CAO is adopted by reference in the proposed SMP.

1.7 Critical Area Regulations Adopted by Reference
A. The City of Olympia Critical Areas regulations contained in the Olympia Municipal Code (OMC), Chapter 18.32, are integral and applicable to this Master Program, and are hereby adopted by reference, except that:

1. Nonconforming structures and uses within critical areas shall be subject to the provisions of this Shoreline Program (supersedes OMC 18.37.060).

2. The reasonable use provisions set forth in OMC 18.66.040 shall not be available within the shoreline jurisdiction. Instead, applicants shall apply for a shoreline variance when seeking relief from critical area regulations.

Black Lake Ditch and Percival Creek are SMA waterbodies. The dimensions of the VCAs established in the June 2012 draft SMP are related to environment designation, but the mechanics of non-residential VCAs in terms of how they are managed and how unavoidable impacts will be mitigated within them is not well defined (see above). Critical area provisions will also continue to apply to these streams as well as to any wetlands in shoreline jurisdiction.

The CAO provides: Link to the CAO: Critical Areas Ordinance

18.32.300 Important Habitats and Species - Purpose and Intent

In order to preserve and protect important habitats and important species which are known to occur in Thurston County and which may be found within the City of Olympia, and which are not already protected by another critical area category, appropriate protection shall be provided on lands which lie within one thousand (1,000) feet of an important habitat or species location subject to the standards in OMC 18.32.305 through OMC 18.32.330.

18.32.320 Important Habitats and Species - Buffers

Buffers shall be established on a case-by-case basis as described in an Important Habitats and Species Management Plan per OMC 18.32.325 and 18.32.330.

B. "Important Riparian Areas" means those marine and lake shorelines, as measured from the ordinary high water mark, in the following locations:

1. The eastern shore of Budd Inlet from the southern property line of Priest Point Park northward to the city limits;

2. The western shore of Budd Inlet (in the Port Lagoon) from 4th Avenue NW northward to the extension of Jackson Avenue NW, but not including the BNSF railroad causeway and trestle or their western or eastern shores, West Bay Drive NW, Olympic Way NW, and parcels west of the rights-of-ways of West Bay Drive NW and Olympic Way NW;

3. The western shore of Budd Inlet (north of West Bay Drive) from the extension of 24th Avenue NW northward to the city limits, being approximately six hundred and fifty (650) feet from the end of the fill to the city limits;

4. The eastern shore of Capitol Lake (in the Middle Basin) from the extension of 13th Avenue SE (Olmsted Brothers Axis) southward to the right of way of Interstate 5;

5. The eastern shore of Capitol Lake (in the South Basin) from the right of way of Interstate 5 southward to the city limits; and

6. The western shore of Capitol Lake (in Percival Cove) from the intersection of Lakeridge Drive SW and Deschutes Parkway SW westward to the mouth of Percival Creek (a point due north of the terminus of Evergreen Park Court SW).

A. For streams maintain the existing vegetation along both sides of a stream channel to whichever distance is greater:

1. In ravines greater than ten (10) feet in depth, the existing vegetation within the ravine and within a strip fifty (50) feet from the top of the slope (refer to Figure 3).

2. Where there is no ravine or where a ravine is less than ten (10) feet in depth, the existing vegetation on both sides of the stream for the distance set forth below for the applicable stream type, using the stream rating system in OMC 18.32.410 (refer to Figure 2):

a. Type 1 and 2 streams: 250 feet,

b. Type 3 streams: 200 feet,

c. Type 4 and 5 streams: 150 feet.

B. Maintain a buffer of existing vegetation for "important riparian areas:"

1. 250 feet along the eastern shore of Budd Inlet from the southern property line of Priest Point Park northward to the city limits;

2. 200 feet along the western shore of Budd Inlet (in the Port Lagoon) from 4th Avenue NW northward to the extension of Jackson Avenue NW, but not including the BNSF railroad causeway and trestle or their western or eastern shores, West

Bay Drive NW, Olympic Way NW, and parcels west of the rights-of-ways of West Bay Drive NW and Olympic Way NW;

3. 150 feet along the western shore of Budd Inlet (north of West Bay Drive) from the extension of 24th Avenue NW northward to the city limits, being approximately six hundred and fifty (650) feet from the end of the fill to the city limits;

4. 250 feet along the eastern shore of Capitol Lake (in the Middle Basin) from the extension of 13th Avenue SE (Olmsted Brothers Axis) southward to the right of way of Interstate 5;

5. 250 feet along the eastern shore of Capitol Lake (in the South Basin) from the right of way of Interstate 5 southward to the city limits; and

6. 250 feet along the western shore of Capitol Lake (in Percival Cove) from the intersection of Lakeridge Drive SW and Deschutes Parkway SW westward to the mouth of Percival Creek (a point due north of the terminus of Evergreen Park Court SW).

Incentives:

1. Can we get language from other jurisdictions that has been developed for inclusion in SMPs that would lay out **incentives to develop waterfront trails**, access, etc?

   Other approaches to encourage trail dedication/construction could include decreased setbacks, vegetation management approaches to limit impacts on upland views and even greater heights. The City could also pursue acquisition of a trail easement using its powers of eminent domain.

   There are many complex legal issues involved in these types of cases and the facts would need to be considered on a project basis. The Supreme Court case of Dolan vs. the City of Tigard, OR was decided in 1994 and set the standard for cases involving use of conditions in exchange for discretionary benefits. This case involved:

   > "Petitioner Dolan, owner and operator of A-Boy Plumbing & Electrical Supply store in the city of Tigard, Oregon, applied for a permit to expand the store and pave the parking lot of her store into Gooby's yard. The city planning commission granted conditional approval, dependent on Dolan dedicating land to a public greenway along an adjacent creek, and developing a pedestrian and bicycle pathway in order to relieve traffic congestion. The decision was appealed to the Oregon State Land Use Board of Appeals (LUBA), alleging that the land dedication requirements were not related to the proposed development, and thus constituted an uncompensated taking of her property,

which is disallowed by the Fifth Amendment. LUBA found a reasonable relationship between the development and both conditions of the variance, as the larger building and paved lot would increase runoff into the creek, and the impact of increased traffic justified the requirement for a pathway. The decision was subsequently affirmed by the Oregon State Court of Appeals and the Oregon Supreme Court.

The Supreme Court overturned the state Land Use Board of Appeals and the Oregon appellate courts. The Court held that under the doctrine of unconstitutional conditions, a government agency may not require a person to surrender constitutional rights in exchange for discretionary benefits, where the property sought has little or no relationship to the benefit conferred. A two-prong test was applied: Whether or not there is a "Dolan nexus" between the permit conditions and legitimate state interest, and whether or not the degree of the exactions required by the permit condition bears the required relationship to the projected impact of the proposed development.

In the Dolan case, the Court held that the first condition had been satisfied. However, the Court ruled that the City failed to make an individualized determination that the required dedications are related, in both nature and extent, to the proposed impact. Further, the Court held that the requirement for a *public* greenway (as opposed to a private one, to which Dolan would retain other rights of property owners, such as the right of exclusive access), was excessive, and that the City failed to meet its burden of establishing that the proposed pathway was necessary to offset the increased traffic which would be caused by the proposed expansion."

We have asked the Department of Ecology for information on how other communities have dealt with this issue. See below for additional information on incentives for public access.

15. Please describe alternative approaches to **incentivize shoreline trail** development, please include comment on the applicability and expected effectiveness of such alternatives for Olympia's reaches.

It's hard to predict what a private property owner might do without conducting a fairly rigorous market analysis to compare different development scenarios. To date no developer has constructed anything on the property east of West Bay Drive.

Our current zoning regulations encourage the development of the shoreline trail by providing for expanded development envelops as provided in Section 18.06.100. These regulations do not require the dedication of trail -- they merely encourage it. A developer could choose to develop below these standards and forego the dedication of the trail.

18.06.100 Commercial Districts Development Standards:

c. West Bay Drive building height and view blockage limits.

i. In order to retain public and private view access to Budd Inlet from hillside sites above West Bay Drive, the maximum building height in the West Bay Drive portion of the Urban Waterfront (UW) District labeled " 42'-

65’ “ on Figure 6-2 shall be up to a maximum of 42 feet, except as provided in subsections (iii) and (iv) below.

ii. In order to retain public view access of Budd Inlet from street level in the West Bay Drive portion of the Urban Waterfront (UW) District labeled “ 42’-65’ “ on Figure 6-2, view blockage shall be limited as follows:

(a) Views of the water will be defined as area without obstruction by buildings or major structures measured between 45 and 90 degrees to West Bay Drive, as illustrated in Figure 6-2A.

(b) Said view blockage shall be limited to 45 percent of the views of the water from West Bay Drive by buildings or major structures located between West Bay Drive and the mean high water line.

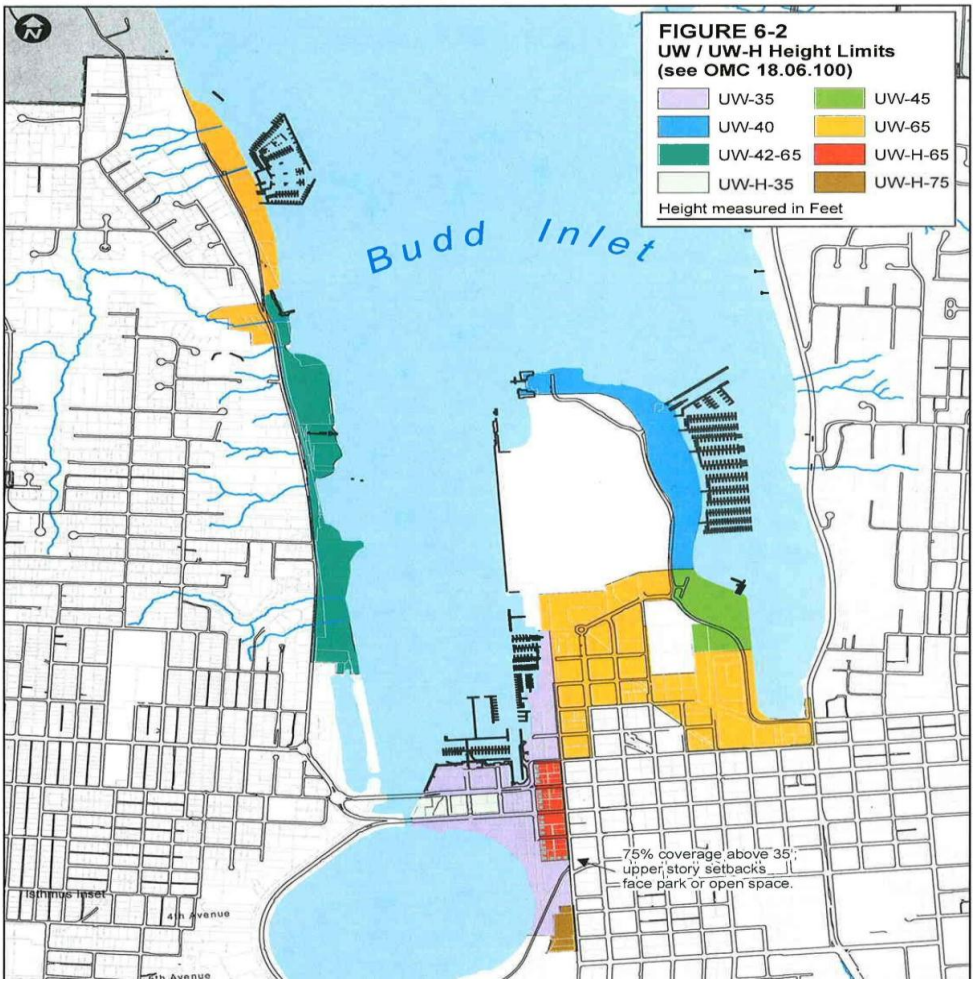
© Exceptions are provided in subsections (iii) and (iv) below.

iii. Development shall be subject to the alternate standards for building height and view blockage, if alternate waterfront view access is provided through public amenities as follows:

Amenity Provided	**Limits on Horizontal View Blockage and Height**
Waterfront Trail	70% up to 42 ft., OR 45% up to 65 ft.
Expanded Waterfront Trail Corridor Facility (or small waterfront park area).	50% up to 42 ft., OR 45% up to 50 ft.
Both	70% up to 65 ft.
Any development over 42 feet shall be required to include a minimum of 20% of the usable building area for residential purposes.	

v. The view blockage rules shall be applied on a project-wide basis and not for each lot or parcel in a project, thus allowing projects providing more views on some lots to have more view blockage on other lots as long as the overall project meets the view blockage requirements.

Figure 6-2 Urban Waterfront and Urban Waterfront Height Limits



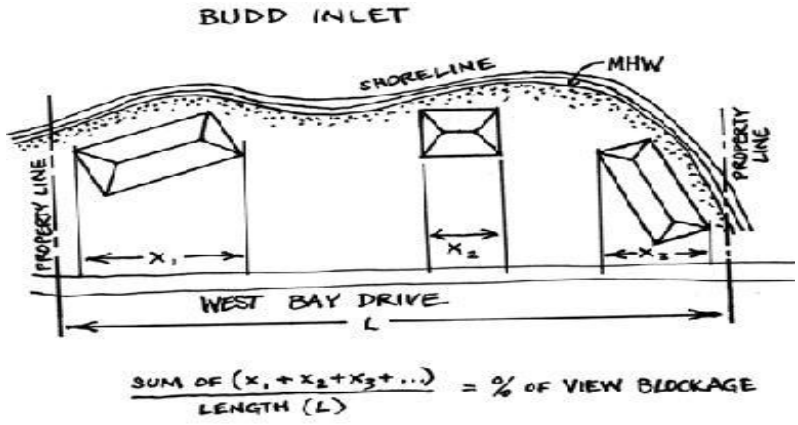


FIGURE 6-2A

Calculating View Blockage in a portion of the Urban Waterfront District along West Bay Drive.

Other approaches to encourage trail dedication/construction could include decreased setbacks, vegetation management approaches to limit impacts on upland views and even greater heights. The City could also pursue acquisition of a trail easement using its powers of eminent domain.

Public Access Incentives from Chelan County:

Table 9-3. Type of Physical Shoreline Public Access and Qualification for Incentives

Type of Shoreline Public Access	Qualification for Incentives
Type 1 Pedestrian Access: Pedestrian access via perpendicular path of minimum 10-foot width to shoreline	Level 1 Public Access Incentives Level 2: Perpendicular access connects to existing public access feature or easement
Type 2 Pedestrian Access: Pedestrian access via parallel path of minimum 10-foot width	Level 2 Public Access Incentives: a perpendicular access connecting to a parallel access along minimum of 75% of shoreline frontage Level 3 Public Access Incentives: a perpendicular access connecting to a parallel access along 100% of shoreline frontage
Type 3 Pedestrian Access: County street end improvement for shoreline public access	Level 2 Public Access Incentives

Type of Shoreline Public Access	Qualification for Incentives
Type 1 Vehicular Access: Minimal vehicular access to public access facility: e.g. parking at right-of-way and minimum 10-foot–wide pedestrian path to shoreline	Level 2 Public Access Incentives
Type 2 Vehicular Access: Vehicular access corridor and turn around to waterfront recreation and parking	Level 3 Public Access Incentives
Type 3 Vehicular Access: 55' foot corridor width and 45' turning radius at turnaround, and parking, providing access to boat launch	Level 3 Public Access Incentives

Table 9-4. Incentives for Public Access

Incentive Level	Residential Incentive	Commercial or Industrial Incentive
Level 1 Public Access Incentives	For up to one site or lot: • Reduction of street-facing yard to 15 feet minimum and/or • Increase of primary building height by up to 5 feet	For up to one site or lot: • Increase of primary building height by up to 5 feet
Level 2 Public Access Incentives	Level 1 Public Access Incentives plus: • Reduction of lot width requirements up to 10% for shoreline frontage lots • Allowance for 1 additional lot. In order to achieve the additional lot, the applicant may reduce the size of other lots. The modification of other lot sizes shall be minimized to the extent feasible to accommodate the additional lot. • Maximum building coverage increase of up to 2.5% for up to 25% of lots	Level 1 Public Access Incentives plus the following for one site: • Maximum building coverage increase of up to 5%
Level 3 Public Access Incentives	Level 1 and Level 2 Public Access Incentives plus the following for one site: • Maximum height for primary structure may be increased by one story or 10 feet maximum Type 2 Vehicular Access: • Reduction of lot width requirements up to 35% for shoreline frontage lots • Allowance for 1 additional lot. In order to achieve the additional lot, the applicant may reduce the size of other lots. The modification of other lot sizes shall be minimized to the extent feasible to accommodate the additional lot. • Maximum building coverage increase of up to 2.5% for up to 35% of lots • Private road access: reduction in required pavement width of up to 4	Level 1 and Level 2 Public Access Incentives plus the following for one site: • Maximum height for primary structure may be increased by one story or 15 feet maximum • Private road access: reduction in required pavement width of up to 4 feet, or not less than 22 feet of pavement

Incentive Level	Residential Incentive	Commercial or Industrial Incentive
	feet, or not less than 22 feet of pavement Type 3 Vehicular Access: • Same as Type 2 Vehicular Access, except that the percentage of lots that may be approved for reduced lot width, or increased building coverage is equal to 50%	

1. There has been discussion of **density incentives** to prompt the dedication of a public trail system on the shoreline. Another potential incentive might be City coordinated shoreline improvements through a mitigation bank. Is it feasible to require mitigation actions on private property owned by others.

   See 11 above. Properties along the shoreline do not presently have density limitations. They are constrained by other property development regulations such as building height, setbacks and coverage limitation, however, there are no dwelling units per acre limitations.

2. What I'm really looking for is additional means (including various forms of **incentives**) which can result in owners providing outcomes which are desired by the City. This may include **restoration, recreation, connectivity, views, and several other identified objectives**.

   In addition to the approaches that I provided in response to your previous questions:

   Other communities have allowed for smaller setbacks if additional mitigation measures are installed.

   The City of Kirkland SMP KMC Shoreline Setbacks includes administrative setback reductions in return for shoreline improvements.

   These standards are flexible. The setback can potentially be reduced to the minimum setback in exchange for improvements such as replacing hard armoring with soft shore protection, building a shoreline cove, or moving the bulkhead away from the water.

   Port Townsend: Restoration/Public Access Incentive Restoration Incentives - The requirement in DR 5.10.4(c)(i) above, regarding dedication of no less than 25% of the total floor area to water-oriented uses, may be waived in whole or in part when the proposal provides restoration of ecological functions, habitat enhancement, and/or provision of public access improvements (e.g., parks, esplanades, etc.) that constitute a significant public benefit beyond that which would be required as mitigation for the development. (Thus allowing for an additional 25% of residential/transient or non-water oriented uses accessible to the general public).

(See attached pages for two additional examples of buffer/setback reductions in exchange for restoration efforts.)

Other incentive approaches:

LAKEWOOD

TABLE III. SHORELINE SETBACK AND BUFFER REDUCTION MECHANISMS

REDUCTION MECHANISM	REDUCTION ALLOWANCE
Water Related Actions	
1) Removal of an existing bulkhead which is located at, below, or within 5 feet landward of the shoreline's ordinary high water mark (OHWM) and subsequent restoration of the shoreline to a natural or semi-natural state, including restoration of topography, beach/substrate (lake bottom) composition and stabilization of areas that have been disturbed by the bulkhead removal with native vegetation.	Bulkhead removal on at least 75% of frontage: 15 feet 50% of frontage: 10 feet 25% of frontage: 5 feet
2) Restoration of natural shoreline conditions (e.g. no bulkhead or other unnatural shoreline feature such as upland impervious surfaces or other structural alternations allowed) within 10 feet of the OHWM, including restoration of native vegetation. This reduction will only be granted if ecological functions would be improved relative to the existing condition.	10 feet
3) Existing hard structural stabilization at or near the ordinary high water mark is removed and new hard structural shoreline stabilization measures are setback from the OHWM between 2 ft, to 4 ft. based on feasibility and existing conditions and are sloped a maximum angle of 3 vertical: 1 horizontal to provide dissipation of wave energy and increase the quality or quantity of nearshore shallow-water habitat. Types of stabilization measures are defined and specific additional standards are provided in Chapter 6, Subsection C(2), Shoreline	5 feet

Stabilization.	
4) Soft structural shoreline stabilization measures are installed waterward of the OHWM on a site currently containing only hard stabilization. Measures may include the use of gravels, cobbles, limited use of boulders in conjunction with other measures, and logs, as well as vegetation. The material shall be of a size and placed to remain stable and accommodate alteration from wind and boat-driven waves and shall be graded to a maximum slope of 1 vertical: 4 horizontal.	5 feet
Upland Related Actions	
5) Restoration of native vegetation (and preservation of existing trees and native vegetation) in at least 75 percent of the reduced (i.e. that portion remaining after reductions are applied) setback area. The remaining 25 percent of the setback area can be comprised of existing non-invasive, non-native vegetation. Up to 10 feet of frontage may be used for improved shoreline access, provided access areas shall be counted as part of the 25 percent non-native area and located to avoid areas of greater sensitivity and habitat value. This incentive cannot be used by any properties that currently have substantial multi-layered vegetation in 75% of the setback area. The reduction will only be granted if ecological functions would be improved relative to the existing condition.	10 feet
6) Restoration of native vegetation (and reservation of existing trees and native vegetation) in at least 25 percent of the reduced setback area. Up to 10 feet of frontage may be used for improved shoreline access, provided access areas shall be counted as part of the 25 percent non-native area and located to avoid areas of greater sensitivity and habitat value. This incentive cannot be used by any properties that currently have substantial multi-layered vegetation in 75% of the setback area. The reduction will only be granted if ecological functions would be improved relative to the existing condition.	5 feet
7) Installation of biofiltration/infiltration mechanisms such as rain gardens, bioswales, created and/or enhanced wetlands,	5 feet

infiltration facilities, ponds or other approved Low Impact Development techniques that treat the majority of surface water run-off from a site and meet or exceed adopted stormwater requirements. (Note: stormwater ponds serving more than one property should be located outside of shoreline jurisdiction if feasible and in accordance with mitigation sequencing).	
8) Installation of at least 500 square feet of "green" roof in accordance with the standards of the LEED Green Building Rating System.	5 feet
9) Installation of a minimum of 1,000 sq. ft. of pervious material for driveway, parking, patio and/or road construction.	5 feet
10) Limiting total impervious surface, e.g. pathways or patios for water access and enjoyment, in the entire reduced setback or buffer area to less than 10% percent, provided the applicant complies with all other development requirements	5 feet
11) Preserving or restoring at least 20 percent of the total lot area outside of the setback or buffer area as native vegetation. No more than 20 percent of the total lot area can be lawn.	5 feet

SAMMAMISH

Table 1: Lake Sammamish Shoreline Setback Reductions
Adopted Alternative

Reduction	Setback Reduction (feet)	Reduction Criteria
		• Reductions from the 50 foot standard setback may be cumulative, but in no case shall the resulting shoreline setback be less than twenty feet from OHWM. Planting shall be installed and maintained in accordance with VEA requirements. • Reductions must be utilized in the following priority order: Reduction 1, Reduction 2 or 3 if a bulkhead is present, Reduction 4*, and Reduction 5. After Reductions 1-5, then Reductions 6, 7, and 8 may be utilized in any order. • Significant trees within the 50 foot setback area shall be retained, with the exception that the minimum necessary significant tree removal may occur for allowed development in order to utilize setback reductions. Removed significant trees shall be replanted at a 2:1 ratio.
1	15 feet	For establishment of a 15 foot vegetation enhancement area landward and immediately adjacent to the OHWM and planting of 250 square feet of additional native vegetation planting area added landward and adjacent to the VEA.
2	15 feet	For removal of an existing bulkhead located at, below, or within five feet landward of the lake's OHWM and subsequent restoration of the shoreline to a natural or semi-natural state, including the restoration of topography, soil composition, and vegetation.
3	10 feet	For creation of a durable inclined fill of gravel/small rock against the waterside of an existing bulkhead and planting, enhancement, or restoration of at least a 5-foot width of native vegetation along the entire inclined fill, as part of an Army Corps of Engineer-approved plan and in compliance with all WDFW and other appropriate agency regulations.
4	5 feet	For a reduction in the active use area, from the allowed 25 percent of the shoreline setback to 15 percent, and additional planting in that area.
5	5 feet	For planting, enhancement, or restoration and subsequent preservation of existing native vegetation, as necessary, in a minimum 5 foot wide near-shore area below the lake's OHWM, excluding the area below the active use area.
6	5 feet	For reduction of impervious surface coverage by 10 percent less than the city standard as allowed by SMC 25.07.080(2)(c) or (d).
7	5 feet	For limiting lawn area to no greater than 20 percent of the shoreline jurisdiction area..
8	5 feet	For preparation of, and agreement to adhere to, a written shoreline vegetation management plan that includes appropriate limitations on the use of fertilizer, herbicides, and pesticides to protect lake water quality.

*This reduction is optional if it would result in an active use area that is less than 15 feet wide.

Buffers and Setbacks:

The **vegetative buffer depths** included in the June draft do not appear to be based upon best available science to protect ecological functions and ecosystem processes. These buffers depths should be tied to the shoreline inventory and respond to the existing environment in a logical way.

The Department of Ecology provides the following guidance for establishing buffers:

General recommendations for buffer width

Following are general recommendations for buffers, based on Ecology's approval of several dozen SMPs.

Undeveloped shorelines with largely intact ecological functions should be protected with buffers of 150 feet to 200 feet. Shorelines with extensive critical areas, or within channel migration zones or floodplains, also will need protective buffers to protect life and property during flooding.

Rural residential development, where houses and appurtenances such as garages and sheds cover about 25 – 35 percent of the ground, some area is landscaped, and the rest is in native vegetation, would likely need buffers of 150 feet to protect existing functions.

Small-lot residential development in highly developed areas provides some ecological functions. Buffers or setbacks with vegetation conservation requirements of roughly 30 to 60 feet may be appropriate. If these areas include critical areas, larger buffers likely will be needed.

Heavily developed waterfront areas with port facilities, water-dependent industry, overwater structures such as docks for containerized shipping or other intensely developed areas may have limited ecological functions. In these areas, buffers or setbacks may not be appropriate. Regulations should address retention of any existing vegetation and encourage restoration where it is appropriate. Busy waterways still harbor fish and other species.

In most cases, a "one-size" buffer applied throughout shoreline jurisdiction will not reflect shoreline ecological functions and local shoreline conditions. Shoreline conditions and ecological functions likely vary enough for most shorelines within local government boundaries that more than one buffer or setback with vegetation conservation will be needed to protect ecological functions.

7. Olympia's **vegetation conservation buffer depths are substantially smaller** than other communities in the region. (see attached) Can you offer some explanation? (I would begin by assigning a 200' depth to Natural and a zero depth to Port Industrial).

See guidance from DOE above. Setbacks and buffers should be based on the unique set of circumstances present in our community.

Vegetation Buffers Comparison with Approved SMP Jurisdictions Residential Buffer Width	
Bainbridge Island (proposed)	Developed 50-115
	Undeveloped 75-150
Whatcom County	150
Jefferson County	150
Anacortes	50
	Urban Conservancy 100
Port Townsend	50
Des Moines	115
Kitsap County (proposed)	High Intensity 50
	Shoreline Residential 85/50
	Urban Conservancy 100/85
	Rural Conservancy 130/100
	Natural 200/150

Generally the communities referenced in the chart above are much more rural or are less intensely developed than Olympia.

Of the communities referenced Port Townsend Port Townsend SMP is the most similar to Olympia. A bit more research is provided below on the approach that Port Townsend took. Setbacks range from 200 feet in the natural SED to 0 feet in the Boat Haven SED for water dependent uses.

> **Shoreline Residential:** Shoreline Setback: Unless otherwise excepted under DR-5.9.8 or DR- 5.9.10, permanent buildings and structures including common appurtenant structures such as garages, decks over 30 inches above grade, and workshops, shall be set back a minimum of **fifty- (50) feet** from the ordinary high water mark. Setbacks are measured landward, on a horizontal plane, perpendicular to the shoreline. Provided that the setback may be further increased to retain a 15-foot setback from a critical areas buffer associated with the presence of a wetland, geologically hazardous area, or critical fish and wildlife habitat area. Critical areas buffers are established in Chapter 6 *Environmental Protection*.
>
> Infill of Existing Platted Lots - Where there are existing dwellings within 50 feet on either side of the proposed building footprint, the setback may be reduced

to the average setback of those dwellings but shall be **no less than 25-feet** from the OHWM (see Figure 5.9.B). In those instances where a single dwelling unit is within 50 feet of one side of the proposed building footprint, the average setback shall be the difference (average) between the required setback and that of the existing structure (see Figure 5.9C) but shall be no less than 25-feet from the OHWM. In both cases, the existing dwellings are construed to be those that are currently occupied. The mere presence of shacks, sheds or dilapidated buildings does not constitute the existence of a dwelling unit.

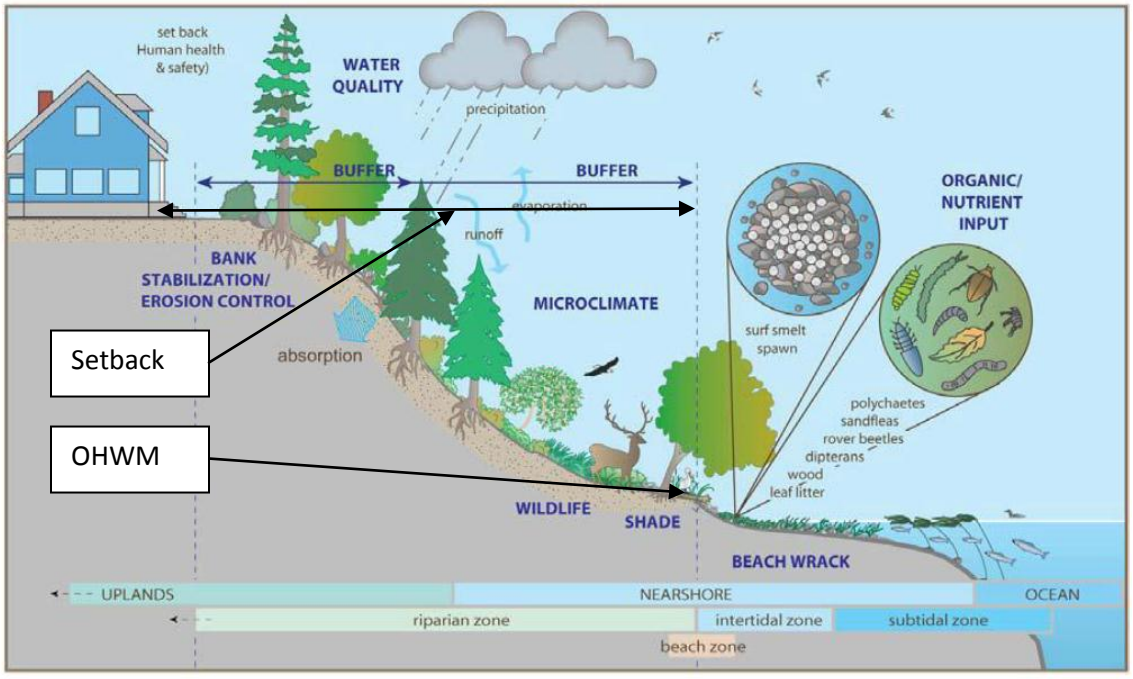
Urban: Permanent buildings and structures shall be set back a minimum of **twenty-five (25) feet** from the ordinary high water. Setbacks are measured landward, on a horizontal plane, perpendicular to the shoreline. Developments associated with water-dependent scientific, historical, cultural, or educational research uses, public access, water-oriented recreation and ecological restoration are not required to meet the setback requirement. However, where such development may be approved within the setback, the placement of structures, storage, and hard surfaces shall be limited to the minimum necessary for the successful operation of the use.

Historic Waterfront: Water-dependent uses require no setback. All other new development shall be **setback a minimum of 25-feet** from the ordinary high-water mark…

Boat Haven: There is **no specific setback** from the ordinary high water mark (OHWM) of the marina. From the OHWM of Port Townsend Bay, the setback shall be a minimum of twenty-five (25) feet for non-water-dependent uses or, as needed to preserve/provide public access whichever is greater.

My understanding of the setback from the ordinary high water level is a horizontal line reaching landward without regard to changes in elevation. The **setback** does not account for surface distance. Is this correct?

June SMP: Shoreline Setback: The horizontal distance required between a structure or improvement and the ordinary high water mark; usually measured in feet. See illustration below.



Chapter 11 ECY Handbook: Consider that buffers and setbacks, in addition to protecting ecological functions, also provide safety and aesthetic benefits. Setting buildings back from the water and from the edge of the bluff and retaining native vegetation, or planting native vegetation if it is lacking, can help to reduce erosion and landslides and the chances of damage to buildings. Buildings that are set back adequately should not need to be protected by bulkheads. Communities on marine waters should consider sea level rise projections when determining structural setbacks for safety.

Use a logical process

Ecology suggests you use a logical process to determine buffer width. Steps in the process include:

1. Use the inventory & characterization report. The inventory and characterization should provide information about shoreline functions, current uses and development, and potential future development. The standard of no net loss of shoreline ecological functions starts with the current conditions discussed in the inventory and characterization. These ecological functions must be protected. What buffer width is necessary to protect them? For example:

o Trees provide shade and woody debris and stabilize banks.
o Vegetation intercepts nutrients and fine sediments, boosting water quality.
o Birds and animals feed and breed in the shrubs and trees that are within shoreline jurisdiction.
o Vegetation shades the water, helping to keep streams and the intertidal area cool.

If the inventory and characterization lacks sufficient information to support these decisions, the SMP regulations should be more protective. "As a general rule, the less known about existing resources, the more protective shoreline master program provisions should be to avoid unanticipated impacts to shoreline resources" [WAC 173-26-201(3)(g)].

2. Review the scientific literature regarding buffers, particularly the documents referenced earlier, to gain an understanding of the value of buffers and the size of buffers needed to maintain ecological functions. How would the recommended buffer widths apply to your shorelines?

3. Consider the CAO as a starting point. It may not address all the requirements of shoreline management such as the SMA preference for water-dependent uses.

o Do the buffers reflect recent scientific literature?
o If Ecology provided comments on the proposed CAO, review the comment letter and see if Ecology supported the CAO for protecting ecological functions.
o Are the CAO buffers consistent with the requirements to provide for preferred uses?
4. Analyze the current development patterns. A majority of our developed shorelines are residential areas. Some are large-lot, rural residential, with limited disturbance of native vegetation and high quality ecological functions. Other areas are highly developed with a large percentage of the shoreline in impervious surfaces. What size buffers or setbacks and other vegetation conservation regulations are needed to protect the remaining ecological functions?

5. Realize that you need to include measures in the SMP to continue to protect these functions and these will likely include buffers, possibly setbacks with vegetation conservation, and mitigation requirements. It's important to discuss this requirement within the framework of the SMA and SMP Guidelines with advisory groups, elected officials and the public.

6. During public participation and community visioning events, get the public's perspective on shoreline aesthetics. Property vegetated with trees, shrubs and groundcover generally is more pleasing to the eye (for most people) than property where the vegetation has been scraped from the ground. Property that is attractive generally has more monetary value than similar property that is not attractive. Buffers and setbacks can help to preserve views. Buildings set closer to the water are likely to block views from buildings set further back. Common line setbacks measured from buildings on adjacent parcels can be part of the buffer and setback equation.

SMP Requirements and Relationship to Comp Plan:

1. **What standards/regulations are required to be in the SMP** as compared to other development regulations? See attached *Issues Summary Matrix* for further information and DOE SMP Checklist for details regarding SMP requirements and other regulations.

(ii) **Master program regulations.** RCW 90.58.100 states:

"*The master programs provided for in this chapter, when adopted or approved by the department shall constitute use regulations for the various shorelines of the state.*"

In order to implement the directives of the Shoreline Management Act, master program regulations shall:

(A) Be sufficient in scope and detail to ensure the implementation of the Shoreline Management Act, statewide shoreline management policies of this chapter, and local master program policies;

(B) Include environment designation regulations that apply to specific environments consistent with WAC 173-26-210;

(C) Include general regulations, use regulations that

address issues of concern in regard to specific uses, and shoreline modification regulations; and

(D) Design and implement regulations and mitigation standards in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property.

(c) "Master program" shall mean the comprehensive use plan for a described area, and the use regulations together with maps, diagrams, charts, or other descriptive material and text, a statement of desired goals, and standards developed in accordance with the policies enunciated in RCW 90.58.020. "Comprehensive master program update" means a master program that fully achieves the procedural and substantive requirements of the department guidelines effective January 17, 2004, as now or hereafter amended

Roe: **How long-term is the long-term vision we are trying to achieve with this SMP?** Is it, for example, 50 years, or is it just until the next update in 8 years? When we are considering the shoreline designations, are we supposed to focus on how they are characterized by existing uses, or should we focus on desired future uses? What's the relationship between the SMP and the Comp Plan?

SMA-GMA integration in 1995 and GMA amendments in 2003 to add shorelines as a GMA goal strengthen the relationship of shoreline planning to comprehensive planning, which plans for a 20 year horizon. SMP's are to be integrated within local comprehensive plans and development regulations; all SMP goals, policies and regulations must be internally consistent with such.

The goals and policies of the SMP are part of the City's Comprehensive Plan. Thus the SMP must be consistent with both the goals of the State's Shoreline Management Act and the City's Comprehensive Plan. That Plan, and thus the SMP, looks forward a minimum of twenty years, but also includes aspects envisioning the community fifty or more years in the future. The shoreline designations are to consider both existing

circumstances, and the long-term vision of the City. And, as noted, the SMP is to be reviewed - and potentially adjusted – every eight years.

16. Following their approval of Olympia's SMP, **does DOE have a role reviewing conditional use permit applications**? If so, is that role essentially the same for all environment designations?

    Yes; the role is the same however the criteria we apply in our review may be different, based on the shoreline environment designation (SED). This is one place where the purpose statement and management policies for each SED really come into play - we would review CUPs against these.

    Shoreline conditional uses are subject to specific criteria in WAC 173-27:

    (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.

2. In addition to the policy clause regarding stream openings (4.3.3.C.6), there are **other policies which I believe should be replicated in all reaches**. These are:

    - The policy clause from Urban Conservancy – regarding public access (4.3.3.C.4) should be replicated in all reaches except Port Industrial.
    - The policy clause from Urban Intensity – regarding clean up and shoreline restoration (4.3.5.C.2) should be replicated in all reaches.

    Because these are policies and not regulatory I believe they are appropriate for this purpose.

    Agree. These can easily be added as policies.

    In addition, if they apply in most or all designations, consider presenting them as goals. Policies would also work, but a lot of repetition can water down the management policies that help distinguish each designation.

Access and Views:

1. Tacoma has required that any shoreline public facility, or even private shoreline property which has received public investment, must provide the **public physical access** to the shoreline (unless there are safety or security concerns). Is this approach

applicable to Olympia? What other innovative tools have cities used to increase physical access to the water?

Chrissy Bailey checked with Kim Van Zwalenburg, who is working with Tacoma and is also the planner putting together a presentation with Tacoma staff for the upcoming APA conference. She thought this may have been stated too broadly, in that she doesn't recall the access having to be physical. In addition, the Guidelines contain the general requirement for public facilities or facilities constructed with public funds to require public access.

As far as innovation, she thought Tacoma's approach was a good example. When she asked other planners for examples from SMPs that they've worked on, she said she didn't get much input. I know that Lacey included a Public Access Incentive Dedication Agreement (equivalent to a TDR program) in its SMP. A landowner can dedicate their shoreline property to the public (City) in exchange for a density bonus on upland portions of the same property (outside of shoreline jurisdiction) or on other property the developer owns throughout the City. The amount of the bonus is based on the capacity of the receiving land as rated under the regional TDR policies they are currently working on as well as their Comp Plan. A response also came from our eastside planners in Spokane County: they were trying to satisfy concerns about addressing nexus and proportionality when considering public access requirements for smaller subdivisions (5 to 9 lots). They apparently finally agreed that community access for those smaller subdivisions would meet that need.

17. Is it possible, within existing regulations, to **raise the elevation of a parcel within the shoreline management area through fill**? What regulatory controls would be applicable to manage this type of action? If SEPA applies, what considerations would be in play? (OSMP Section 7.4)

    Yes, but grading permits are required, SEPA applies to such substantial grading, and applicant must address drainage and other issues associated with re-grading.

    Other considerations:

    - Where bulkheads are proposed filling for the purpose of creating new land is prohibited.
    - Under the proposed SMP, filling for the purpose of increasing finished grade is prohibited.

18. To what extent could completion of a **W-trail** right-of-way improve public safety or provide useful infrastructure, such as protection against sea-level rise or the creation of a new fiber pathway?

    The Big W-trail would primarily be a recreation resource, however, such space is routinely used to locate utilities and could be used for flood protection depending on how it is configured.

9. Language in **View Protection 5.10.3.E is not definitive enough**. The concept of a compelling reason needs greater clarity, such as impacts on shoreline ecological function, navigation, or other primary management objective.

That language is lifted directly from the ECY Guidelines for public access.

> (iv) Adopt provisions, such as maximum height limits, setbacks, and view corridors, to minimize the impacts to existing views from public property or substantial numbers of residences. Where there is an irreconcilable conflict between water-dependent shoreline uses or physical public access and maintenance of views from adjacent properties, the water-dependent uses and physical public access shall have priority, unless there is a compelling reason to the contrary.

Chrissy Bailey writes, "the section of interest is in the portion of the Guidelines dealing with Public Access. Public Access includes the ability of the general public to view the water and the shoreline from adjacent locations. As you pointed out, the sentence that ended up in the SMP is part of a larger standard referencing provisions that can be considered to minimize impacts to existing views. This last sentence gives guidance on how to mesh views with the preferred uses outlined in WAC 173-26-201 (2)(d).

As far as I am aware, other communities have used this more as direction for their planning process than as a regulation. An example of a compelling reason to the contrary could be that a public view of some specific water body is the only public access to that water body. The City could define others, create criteria for what would constitute a compelling reason, or use this as a planning principle rather than a regulation. We need to know how this standard is met in the City's SMP, but it doesn't have to be by including it as a regulation."

We will continue to refine this section as we work towards a final draft.