

2012 Shoreline Master Program (SMP) Update
Responses to Mayor Pro Tem Jones' Questions

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The responses to Mayor Pro Tem Jones' questions involved input from Chrissy Bailey with the Department of Ecology, and the following City Staff: Todd Stamm Planning Services Manager, Andy Haub Engineering and Planning Supervisor, Tom Morrill City Attorney and Darren Nienaber Deputy City Attorney. Please recognize that these responses are our best efforts within a fairly short timeframe and will likely continue to evolve as this process moves forward.

Staff responses including those of Ms. Bailey are in blue text below.

1. 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.

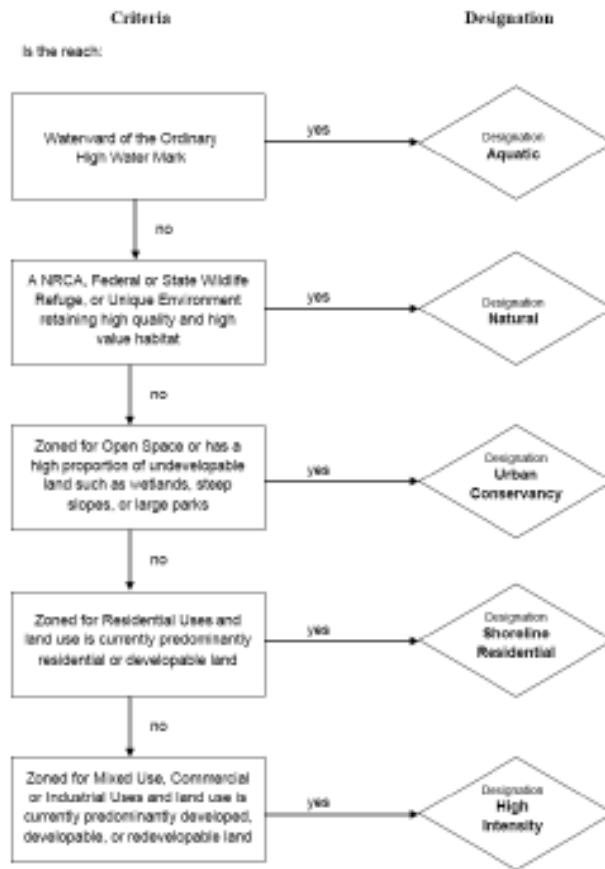
The shoreline inventory and characterization (IC) was prepared by a consultant and was thoroughly reviewed in the development of the staff draft SMP by the Technical Advisory Committee. The City employed this same consultant to work with the Planning Commission in attempting to provide further clarity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

The 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

2. 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.

3. 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**

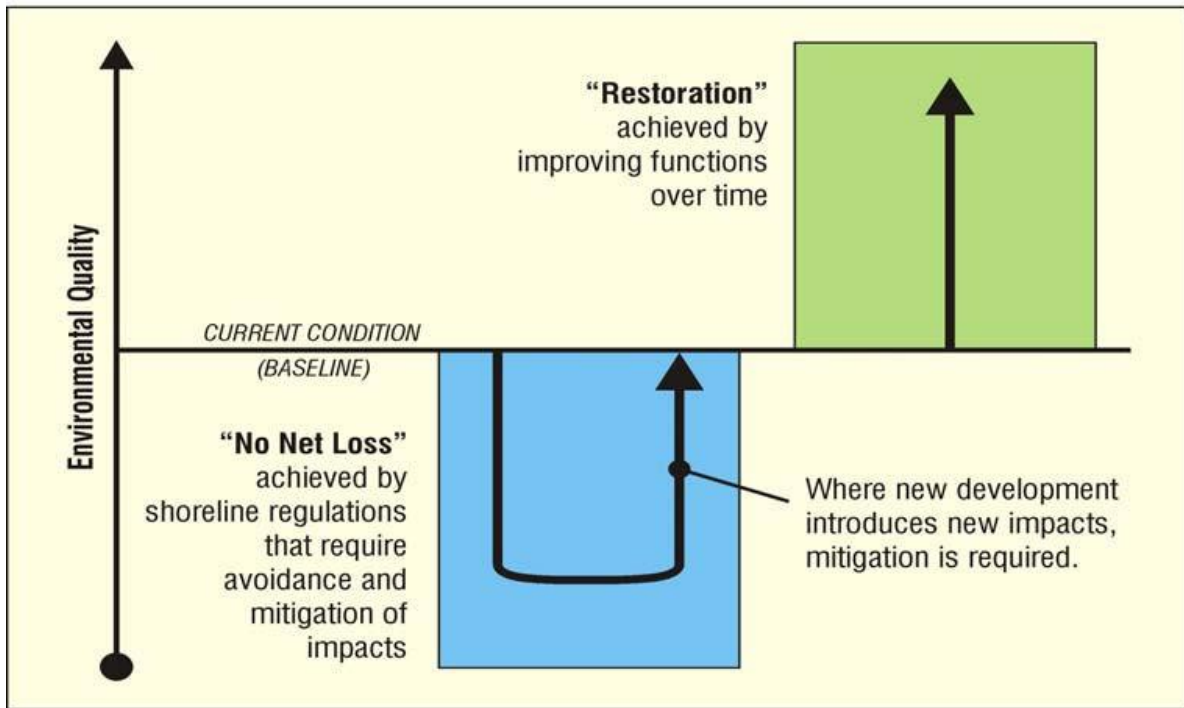
If yes, does our draft SMP contain goals and policies which provide for restoration? At the recent Council study session DOE staff read from a section of the SMA Guidelines which seemed to forbid the SMP from pursuing restoration. What is the role of the SMP relative to restoration and moving beyond 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:

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



- 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).

- 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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 envelopes 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

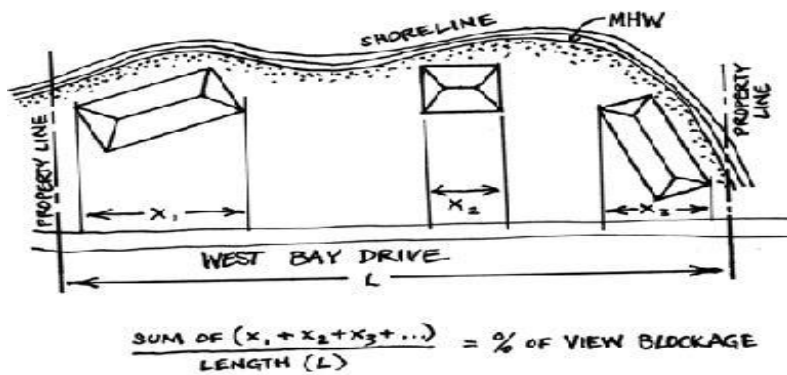
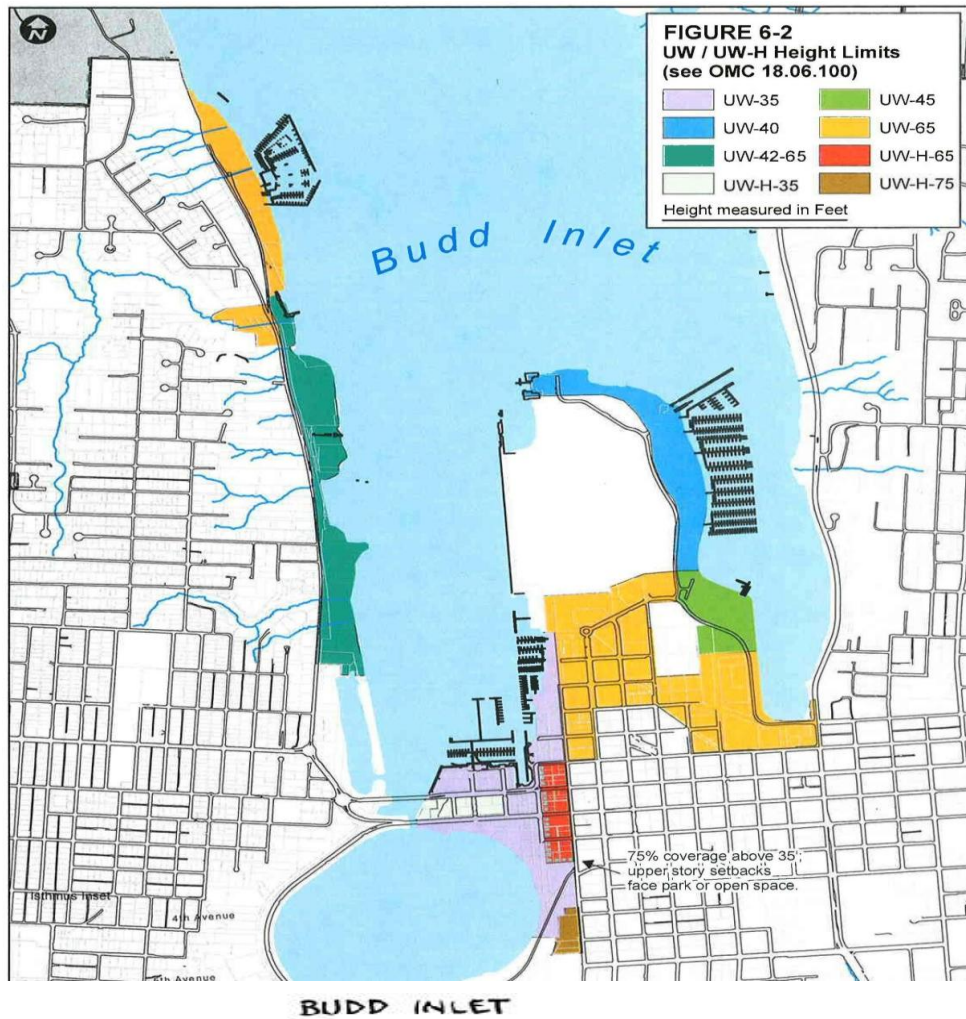


FIGURE 6-2A
Calculating View Blockage in a portion of the Urban Waterfront District along West Bay Drive.

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.

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.”

12. 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\(2\)\(c\)](#).

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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?

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.

21. 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.

22. 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.

23. 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.

24. 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.