CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

EVERETT SHORELINES COALITION, *et. al.*, Petitioners,	)	**Case No. 02-3-0009c**
v.	)	**CORRECTED**
	)	
CITY OF EVERETT and WASHINGTON STATE DEPARTMENT OF ECOLOGY,	)	**FINAL DECISION AND ORDER**
Respondents.	)	
and	)	
PORT OF EVERETT,	)	
Intervenor.	)	

TAble of contents

TAble of contents 1

I. case synopsis 3

II. PROCEDURAL HISTORY 3

III. STANDARD OF REVIEW/BURDEN OF PROOF 9

A. GMA 9
B. SMA 10

IV. board jurisdiction, Abandoned and dismissed issues, ...
and dismissal of hall pfr 11

A. BOARD JURISDICTION 11
B. ABANDONED AND DISMISSED ISSUES 11
C. DISMISSAL OF HALL PFR 11

V. LEGAL ISSUES –GENERAL DISCUSSION 11

A. PREFATORY NOTE 11
B. GMA/SMA: THE TOTAL STATUTORY SCHEME 13

1. Legislative Intent to integrate GMA/SMA land use decision-making..... regimes..... 14
2. GMA/SMA: managing land use differently in different landscapes..... 15
3. The Interplay of GMA/SMA goals, objectives and purposes..... 17
a. The Growth Management Act: Balancing Goals and Mandates..... 18
b. The Shoreline Management Act: Balancing Goals and Mandates..... 19
c. GMA/SMA: Integrating Goals and Mandates..... 21
4. Ecology and Ecosystems: the Role of Science in Shoreline Plan-Making..... and Regulations..... 23
5. Procedures for Adoption of Shoreline Elements and Regulations..... 27

Vi. specific legal issues..... 28/

A. CRITICAL AREAS, "BEST AVAILABLE SCIENCE," AND RESTORATION..... 28
B. DEVELOPMENT STANDARDS AND PROCEDURES..... 43
C. SMP DESIGNATIONS..... 45
D. NATURAL ELEMENT and PUBLIC ACCESS ELEMENT..... 59
E. TREATY RIGHTS..... 62
F. COMPLIANCE WITH APPLICABLE GUIDELINES..... 63

viI. invalidity..... 65

vIIi. order..... 66

APPENDIX A - FINDINGS OF FACT..... 68

APPENDIX B - GMA PROVISIONS..... 71

APPENDIX C - SMA PROVISIONS..... 75

APPENDIX D - LEGAL ISSUES IN FINAL PREHEARING ORDER..... 84

APPENDIX E – GLOSSARY OF ABBREVIATIONS..... 88

FIGURE 1 - Integrating sma into the gma via local plans..... 89
FIGURE 2 - integrating sma into the gma via local regs..... 90
FIGURE 3 - THE TOTAL GMA/SMA STATUTORY SCHEME..... 91

I. case synopsis

Petitioners Everett Shorelines Coalition, Washington Environmental Council and the Tulalip Tribes challenged the City of Everett's adoption of amendments to its Shoreline Master Program, and the Washington State Department of Ecology's approval of those amendments. This is the first case in which the Board has evaluated the compliance of a local government with the total

statutory scheme of the Growth Management Act (**GMA**) **and** the Shoreline Management Act (**SMA**).

The Board concluded that Everett's amendments meet or exceed the requirements of state law in several areas, and set a high standard for other local governments engaged in updates to their shoreline policies and regulations. Particularly exemplary was the City's rigorous public involvement process and its exhaustive site-specific, science-based inventory of the environmental conditions and restoration opportunities in the Snohomish River Estuary. Nevertheless, the Board concluded that the City's amendments, when measured against the total statutory scheme of the Growth Management Act and the Shoreline Management Act, failed to meet three fundamental duties. The first is a duty to recognize that all Shoreline Master Program policies and regulations for "shorelines of state-wide significance" are also critical areas policies and regulations and thus are subject to the substantive requirements of the Growth Management Act, including the use of Best Available Science. The second is a duty to adopt critical areas regulations for shorelines of state-wide significance that will *assure* no net loss of the functions and values of shoreline ecosystems. The third duty is to adopt shoreline policies that, through their implementation, will *assure* actual restoration, over time , of ecosystem values and functions, including those necessary to sustain anadromous fish.

In addition, the Board upheld the Shoreline Designation assigned to the Mainstem of the Snohomish River and the decision to defer a final Shoreline Designation for the Maulsby Mudflats. However, the Board found that certain Shoreline Designations for the Marshlands and Smith/North Spencer areas do not meet the requirements of the SMA. Finally, the Board noted that the Simpson site is beyond the jurisdiction of the SMA.

The Board has remanded the amendments to the City and directed that legislative action be taken to bring the Shoreline Amendments into compliance. Because of the unusual scope and complexity of this case, the Board has invited the City to propose for the Board's consideration an alternative schedule for compliance.

II. PROCEDURAL HISTORY

On July 12, 2002, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the Everett Shorelines Coalition, People for Puget Sound, Pilchuck Audubon Society and Libby Johnson (collectively **Everett Shorelines Coalition** or **ESC**). The ESC PFR seeks Board review of City of Everett (**Everett** or the **City**) Ordinance No. 2600-02 and the subsequent approval of that Ordinance by the Washington State Department of Ecology (**WSDOE** or **Ecology**). The ESC PFR alleges that the Ordinance does not comply with the goals and requirements of the Growth Management Act (**GMA**) and certain provisions

of the Shoreline Management Act (**SMA**). The ESC also seeks Board review of the City's and WSDOE's review under the State Environmental Policy Act (**SEPA**). ESC PFR, at 2. The matter was assigned Case No. 02-3-0006, and captioned *Everett Shorelines Coalition, et al., v. City of Everett and WSDOE*.

Also on July 12, 2002, the Board received a PFR from the Washington Environmental Council (the **WEC**). The WEC PFR seeks Board review of Everett's adoption, and WSDOE's subsequent approval of, the City's Shoreline Master Program. The WEC alleges that the Everett Shoreline Master Program does not comply with the goals and requirements of the GMA and the SMA. WEC PFR, at 2. The matter was assigned Case No. 02-3-0007, and captioned *Washington Environmental Council v. City of Everett and WSDOE*.

On July 15, 2002, the Board received a PFR from Jeff M. Hall, Karen Williams, Gail Chism and Joann Carlson (collectively **Hall**). Hall seeks Board review of Everett's adoption of, and WSDOE's subsequent approval of, Everett's Shoreline Master Program. Hall PFR, at 1 and 5. Hall alleges that the Shoreline Master Plan, and the subsequent approval by WSDOE, does not comply with the goal and requirements of the SMA and SEPA. Hall PFR, at 2-5. The matter was assigned Case No. 02-3-0008, and captioned *Hall, et al., v. City of Everett and WSDOE*.

Also on July 15, 2002, the Board received a PFR from the Tulalip Tribes of Washington (**Tulalip** or the **Tribes**). The Tulalip PFR seeks Board review of Everett Ordinance Nos. 2600-02, 2812-01 and 2512-01. Tulalip PFR, at 1. The Tribes allege that the challenged ordinances, and the subsequent approval by WSDOE, do not comply with the goals and requirements of the GMA and the SMA. Tulalip also seeks Board review of the City and WSDOE's review under SEPA. Tulalip PFR, at 2. The matter was assigned Case No. 02-3-0009, and captioned *Tulalip Tribes v. City of Everett and WSDOE*.

On July 22, 2002, the Board issued an Order of Consolidation and Notice of Hearing (the **Order of Consolidation and Notice**), which consolidated the four petitions for review and directed the four petitioners to this consolidated matter to submit re-statements of their legal issues by August 12, 2002.

On July 23, 2002, the Board's Administrative Officer, Susannah Karlsson, received a telephone call from counsel for ESC inquiring about alternative dates for the prehearing conference. Ms. Karlsson directed counsel to contact the other parties to the case and to propose a stipulated alternative date to the Board for consideration.

Also on July 23, 2002, the Board received "City of Everett's Notice of Appearance" which identified Eric Laschever and Catherine A. Drews as counsel for respondent City of Everett.

On July 24, 2002, the Board received a Notice of Appearance from Thomas J. Young and Jay D.

Geck, legal counsel for the respondent Washington State Department of Ecology.

On July 31, 2002, after receiving agreement from the parties regarding a new date for the prehearing conference, the Board issued "Order Re-Scheduling Prehearing Conference and Revising Tentative Schedule."

On August 1, 2002, the Board received "Re-Statement of Legal Issues of Petitioners Everett Shorelines Coalition, People for Puget Sound, Pilchuck Audubon Society, and Libby Johnson."

On August 12, 2002, the Board received from Petitioner Tulalip Tribes a "Restatement of Legal Issues;" and from Petitioner Hall, *et al.*, a "Re-Statement of the Legal Issues for Petitioners Hall, Chism & Carlson," and "Washington Environmental Council's Restatement of Legal Issues" (the **WEC Restatement of Legal Issues**).

On August 14, 2002, the Board received "Respondent City of Everett's Motion to Dismiss Issues Regarding RCW 36.70A" (the **City's Motion to Dismiss GMA Issues**) and "Respondent City of Everett's Motion to Dismiss Petitioner Hall, et. al." (the **City's Motion to Dismiss Hall PFR**) together with the "Declaration of Catherine A. Drews in Support of City of Everett's Motion to Dismiss Petitioners Hall, et. al." (the **Drews Declaration**) attached to which, as Exhibit A is a copy of an email communication dated July 15, 2002 from Diane Pratt of the Attorney General (**ATG**) Everett office to Patricia Lane of the ATG's Olympia office.

Also on August 14, 2002, the Board issued "Order Partially Granting Motion for Extension of Time to File Ecology's Index of the Record and Second Order Revising Tentative Schedule."

On August 22, 2002, the Board issued "Order Regarding Dates for Filing Responses to Dispositive Motions and Third Order Revising Tentative Schedule."

On August 26, 2002, the Board received "Petitioner Hall et. al. Response to Respondent City of Everett's Motion to Dismiss Petitioner Hall et. al." (the **Hall Response to City's Motion to Dismiss PFR**).

On August 29, 2002, the Board received "City of Everett's Reply to Hall et. al.'s Response to City's Motion to Dismiss" (the **City's Reply to Hall's Response to Motion to Dismiss Hall PFR**).

On September 5, 2002, beginning at 10:00 a.m. in room 1022 of the Financial Center, 1215 Fourth Avenue in Seattle, the Board conducted the prehearing conference in this consolidated matter. Present for the Board were Lois H. North and Joseph W. Tovar, presiding officer. Also present for the Board was legal extern Staci Smith. Representing ESC was Richard A. Smith;

representing WEC were David S. Mann and Hilary S. Franz; representing Tulalip were Mason D. Morisset and Sharon I. Haensly; representing Hall was Jeff M. Hall, *pro se;* representing the City was Eric A. Laschever; representing Ecology was Thomas J. Young. Also present for the City was Planning Director Paul Roberts. After a discussion of the issues in the case and the schedule, the presiding officer directed the parties to meet and to submit a proposed calendar and any revisions to the legal issues by the close of business on Friday, September 6, 2002.

On September 6, 2002, the Board received from David S. Mann a letter containing a proposed schedule reflecting the discussion and agreement of the parties. Later on this same date, the Board received correspondence from Richard A. Smith indicating that ESC wished to "stand on their pleading" as to their legal issues.

On September 9, 2002, the Board issued a Preliminary Prehearing Order (the **PPHO**). Later this same date, the Board received "Everett Shorelines Coalition's Motion to Intervene in all Legal Issues" (the **ESC Motion to Intervene**).

On September 10, 2002, the Board received "The City of Everett's Motion to Dismiss Issues Not Reasonably Related to ESC's Participation before the City or Ecology" (the **City's Motion to Dismiss ESC Issues**) together with the "Declaration of Eric S. Laschever in Support of the City's Motion to Dismiss Issues Not Reasonably Related to ESC's Participation before the City or Ecology" (the **Laschever Declaration re: ESC Issues**); "City of Everett's Motion to Dismiss Issues not Reasonably Related to Tulalip Tribes' Participation before the City or Ecology" (the **City's Motion to Dismiss Tulalip Issues**); and "Respondent City of Everett's Motion to Dismiss Petitioners' SEPA Issues and APA Standing Claims" (the **City's Motion to Dismiss SEPA Issues and APA Standing Claims**).

On September 12, 2002, the Board received the following pleadings: "Tulalip Tribes' Motion to Intervene in Certain Issues Presented by Petitioners Washington Environmental Council and Everett Shorelines Coalition;" "Washington Environmental Council's Motion to Intervene;" and from Petitioner Hall a pleading captioned "Petitioner Citizens for the Preservation of the Snohomish River Valley Motion to Stand on Pleadings and to Intervene on other Petitioners' Issues."

On September 16, 2002, the Board received "The City of Everett's Response to Petitioners' Motion to Intervene." Also on this date, the Board received a letter from counsel for WEC pointing out an apparent error in the PPHO with respect to Final Legal Issue No. 1.

On September 17, 2002, the Board received "Tulalip's Rebuttal re: Motion to Intervene in Certain Issues Presented by WEC and ESC."

On September 18, 2002, the Board issued a "Final Prehearing Order, First Order on Motions to Intervene and Order on City's Motion to Dismiss Petitioner Hall" (the **Final PHO**).

On September 20, 2002, the Board received the following 13 documents:

1, 2. "1000 Friends of Washington Motion for Amicus Curiae Status" (the **1000 Friends Motion for Amicus Status**) together with "1000 Friends of Washington's Memorandum in Opposition to City's Motion to Dismiss GMA issues" (the **1000 Friends Brief re: Motion to Dismiss GMA Issues**).

3, 4. "State of Washington Office of Community Development's Motion to File Amicus Curiae Brief" (the **OCD Motion for Amicus Status**) together with "Amicus Curiae Brief of the State of Washington Office of Community Development" (the **OCD Brief re: Motion to Dismiss GMA Issues**).

5, 6. "ESC's Response to Everett's Motion to Dismiss Issues Not Reasonably Related to ESC's Participation before the City or Ecology**"** (**ESC's Response to City's Motion to Dismiss ESC Issues**) together with the "Declaration of Libby Johnson" (the **Johnson Declaration**).

7, 8, 9. "Tulalip Tribes' Response to Respondent City of Everett's Motion to Dismiss Issues Regarding RCW 36.70A" (the **Tulalip Brief re: Motion to Dismiss GMA Issues**), "Tulalip Tribes Consolidated Response to City of Everett's Motions to Dismiss (1) Issues Not Reasonably Related to Tulalip Tribes' Participation before the City of [sic] Ecology; and (2) Petitioners' SEPA Issues and APA Standing Claims" (the **Tulalip Response re: City's Motion to Dismiss Issues**) and "Declaration of Kurt Nelson in Support of Tulalip Tribes Consolidated Response to City of Everett's Motions to Dismiss (1) Issues not Reasonably Related to Tulalip Tribes' Participation before the City of [sic] Ecology; and (2) Petitioners' SEPA Issues and APA Standing Claims" (the **Nelson Declaration**).

10, 11, 12.
"Washington Environmental Council's Response to City of Everett's Motion to Dismiss Petitioners' SEPA and APA Standing Claims" (the **WEC Response to City's Motion to Dismiss SEPA and APA Standing Claims**); "Washington Environmental Council's Response to City of Everett's Motion to Dismiss Issues Regarding RCW 36.70A" (the **WEC Brief re: Motion to Dismiss GMA Issues**), and "ESC's Response to Everett's Motion to Dismiss Petitioners' SEPA Issues and APA Standing Claim" (**ESC's Response to City's Motion to Dismiss SEPA and APA Standing Claims**).

13. A telefacsimile pleading from Petitioner Hall requesting to have the deadline for

Response to Motions to Dismiss on SEPA and APA Issues and Motions to Dismiss on GMA Issues moved from 4:00 p.m. on Friday, September 20, 2002 to 10:00 a.m. on Monday, September 23, 2002 (the **Hall Motion for Deadline Extension**)

On September 23, 2002, the Board received "Motion of Washington Public Port Association to File an Amicus Curiae Brief" (the **Port Association Motion for Amicus Status**); "ESC's Response to Everett's Motion to Dismiss Issues Regarding RCW 36.70A" (**ESC's Brief re: Motion to Dismiss GMA Issues**); and "Port of Everett's Motion to Intervene" (the **Port Motion to Intervene**) together with the "Declaration of Robert E. McChesney" (the **McChesney Declaration**). In addition, the Board received from Association of Washington Cities and Washington State Association of Municipal Attorneys (collectively **AWC**) a pleading titled "Association of Washington Cities' and Washington State Association of Municipal Attorneys' Motion for Status as Amicus Curiae Party and to Modify or Clarify Case Schedule" (the **AWC Motion for Amicus Status and to Modify or Clarify Schedule**).

On September 25, 2002, the Board received "City's Reply to Petitioners' Response to Motions to Dismiss for Standing" (the City's Reply to Response to Motions to Dismiss for Standing) and "Respondent City of Everett's Reply to Petitioners' and Amici's Responses to City's Motion to Dismiss GMA" (the **City's Reply to Responses to Motion to Dismiss GMA Issues**).

On September 27, 2002, the Board received a letter from Mr. Laschever with errata correcting lines 15-17 of page 4 of the City's Reply to Responses to Motion to Dismiss GMA Issues.

Also on September 27, 2002, the Board received "Ecology's Objection to WEC and Tulalips' Motions to Supplement."

On September 30, 2001, the Board received the "City's Response to Petitioners' Motions to Supplement and Cross Motion to Supplement."

On October 1, 2002, the Board issued "Order on Motions for Amicus and Intervention, Order on Dispositive Motions, and Order Amending Final Schedule" (the **Order on Motions for Amicus and Dispositive Motions.**)

On October 3, 2002, the Board received "Tribes Rebuttal to Responses to Petitioner's Motions to Supplement the Record" and "WEC's Reply to Response to WEC's Motion to Supplement the Record" together with the "Declaration of Hillary Franz in Support."

On October 10, 2002, the Board issued an "Order on Motions to Supplement the Record."

On October 16, 2002, the Board received "Tulalip Tribes' Prehearing Brief" (the **Tribes' PHB**),

"ESC's Prehearing Brief on the Merits" (the **ESC PHB**); and "Washington Environmental Council's Prehearing Brief: (the **WEC PHB**). The Board did not receive a pleading from Petitioner Hall.

On November 1, 2002, the Board received "Respondent City of Everett's Prehearing Brief" (the **City's PHB**); "Ecology's Hearing Brief" (the **Ecology PHB**) together with "Errata and Correction to Ecology's PHB;" and Intervenor/Respondent Port of Everett's Brief" (the **Port PHB**). Also on this date, the Board received "Amicus Brief of Association of Washington Cities and Washington State Association of Municipal Attorneys" (the **AWC/WSAMA Amicus Brief**); and "Amicus Brief of Washington Public Ports Association" (the **WPPA Amicus Brief**).

Also on November 1, 2002, the Board issued "Order Revising Starting Time for Hearing on the Merits, Changing Hearing Location and Setting Forth Schedule for Oral Argument."

On November 5, 2002, the Board received "City of Everett's Errata."

On November 6, 2002, the Board received "1000 Friends of Washington Amicus Brief."

On November 8, 2002, the Board received "Tulalip Tribes' Reply to Amici" (the **Tribes Reply to Amici**).

On November 12, 2002, from 9:00 a.m. to 3:30 p.m., the Board conducted the Hearing on the Merits in the conference room of the Washington State Office of Administrative Hearings located on the fifteenth floor of One Union Square, 600 University Street, Seattle, Washington. Present for the Board were Edward G. McGuire, Lois H. North and Joseph W. Tovar, presiding officer. Also present for the Board was Staci Smith, the Board's legal extern. Representing WEC were David D. Mann and Hilary S. Franz; representing ESC was Richard A. Smith; representing the Tulalip Tribes were Mason D. Morisset and Sharon I. Haensly; representing the City were Eric A. Laschever and Catherine A. Drews; representing WSDOE was Thomas J. Young. Also present for the City was Paul Roberts, Planning Director. Brenda Steinman of Mills & Lessard, Inc. of Seattle provided Court reporting services. No witnesses testified. A transcript (the **Transcript**) of the proceedings was ordered.

On November 14, 2002, the Board received from the City a copy of the City's repealed Shoreline Master Program that addressed the Maulsby Mudflats.

III. STANDARD OF REVIEW/BURDEN OF PROOF

Due to the unique nature of the challenged action as both a local action under the GMA (*i.e.*, Everett's adoption of its SMP Amendments) and a state action under the SMA (*i.e.*, Ecology's

approval of the SMP), the Board must employ two different standards of review to reach a final decision.

A. GMA

As discussed, *infra*, the City of Everett is the only respondent in this case subject to the goals and requirements of the GMA, and thus the Board's review of the City's action is governed by RCW 36.70A.320. Pursuant to that standard, comprehensive plans and development regulations, and amendments thereto, adopted pursuant to the Act, are presumed valid upon adoption. The burden is on the Petitioners to demonstrate that the City's action adopting its Shoreline Master Program amendment is not in compliance with the Growth Management Act.

The Board "shall find compliance with the [Growth Management] Act, unless it determines that the [City's] action[s are] clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the [GMA]." RCW 36.70A.320 (3). For the Board to find the City's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646, 658 (1993).

Pursuant to RCW 36.70A.3201 the Board will grant deference to Everett in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. As the State Supreme Court has stated, "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board* (***King County***), 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). Division II of the Court of Appeals further clarified, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA." *Cooper Point Association v. Thurston County*, No. 26425-1-II, 108 Wn.App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001).

In affirming the *Cooper Point* court, the Supreme Court recently stated:

> Although we review questions of law *de novo*, we give substantial weight to the Board's interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed "[I]t is well settled that deference [to the Board] is appropriate where an administrative agency's construction of statutes is within the agency's field of expertise . . .

Thurston County v. Western Washington Growth Management Hearing Board, Docket No. 71746-0, November 21, 2002, at 7.

B. SMA

Both Everett's and Ecology's actions must be consistent with the goals and requirements of the Shoreline Management Act. However, because Ecology must approve a local government action in order for it to take effect, the Board here focuses on the applicable standard of review for Ecology's actions. In this instance the Board's review of Ecology's action is governed by RCW 90.58.190(2) because the shorelines at issue here are "shorelines of state-wide significance." RCW 90.58.190(2) provides in part:

> (c) If the appeal to the growth management hearings board concerns a shoreline of state-wide significance, the board shall uphold the decision by the department unless the board, by clear and convincing evidence, determines that the decision of the department is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.
> (d) The appellant has the burden of proof in all appeals to the growth management hearings board under this subsection.

IV. board jurisdiction, Abandoned and dismissed issues, and dismissal of hall pfr

A. BOARD JURISDICTION

The Board finds that the Petitions for Review filed by ESC, WEC, Hall and the Tribes were timely filed, pursuant to RCW 36.70A.290(2); ESC, WEC, the Tribes and Hall participated in the City's public process and have participation standing to appear before the Board, pursuant to RCW 36.70A.280(2) and RCW 90.58.190; and pursuant to RCW 36.70A.280(1)(a), the Board has subject matter jurisdiction over the challenged actions (Everett Ordinance Nos. 2600-02, 2812-01 and 2512-01) which amends the City's Shoreline Master Program and, *de jure*, Comprehensive Plan and development regulations. RCW 36.70A.480(1).

B. ABANDONED AND DISMISSED ISSUES

Although 28 Legal Issues were set forth in the Final PHO, none of the Petitioners addressed Legal Issues Nos. 20, 21, 23, 24, 25 and 26. Pursuant to WAC 242-02-570, issues or portions of issues not briefed are deemed abandoned. Therefore, Petitioners have **abandoned** the Legal Issues 20, 21, 22, 23, 24, 25 and 26 as set forth in the Final PHO. The Board therefore need not and will not address them. Legal Issue No. 22 alleged noncompliance with Chapter 43.21C RCW (SEPA), and was dismissed by the Board in the Order on Motions for Amicus and

Intervention, at 29.

C. DISMISSAL OF HALL PFR

The deadline for submittal of opening briefs was October 16, 2002. Order on Motions for Amicus and Order on Dispositive Motions, at 30. The Board did not receive pleading of any sort from Petitioner Hall either by the deadline or at any subsequent time, nor did he appear at the Hearing on the Merits. Transcript, at 5. Pursuant to WAC 242-02-720(4), the Board, on is own motion, **dismisses** the Hall PFR for failure by that party to comply with the deadline set forth in the Order on Motions for Amicus and Intervention.

V. LEGAL ISSUES –GENERAL DISCUSSION

A. PREFATORY NOTE

The Board commends the City of Everett and the Department of Ecology for daring to proceed with an update to the City's Shoreline Master Program absent the guidance of Ecology's Shoreline Guidelines, and very little guidance on how the SMA and GMA are to be integrated. We also commend all of the parties for presenting the Board with excellent briefing, and the opportunity to voice our views on how these important statutes work together.

This is a case of first impression for this Board. There is no question that local governments have a duty to comply with both the GMA and the SMA. What has been unclear thus far, and lies at the root of much of the current controversy, is how a local government can simultaneously meet those dual duties when there appear to be redundancies, ambiguities, and even points of conflict between the statutes.[1] In this situation, the Board is compelled to "harmonize" the SMA and GMA in a fashion that gives meaning to each. The Washington State Supreme Court has previously examined the need to harmonize the provisions of the Growth Management Act with another important land use planning statute, the Planning Enabling Act. The Court stated:

> The Planning Enabling Act, RCW 36.70, was enacted 'to provide the authority for, and the procedures to be followed in, guiding and regulating the physical development of a county' . . . The Planning Enabling Act and the Growth Management Act are two related statutes which should be ... *read together to determine legislative purpose to achieve a harmonious total statutory scheme ... which maintains the integrity of the respective statutes.*

Whatcom County v. Brisbane, 125 Wn.2d 345, 354, 884 P.2d 1326, 1332 (1994) (footnote omitted) (emphasis added).

Here, the Shoreline Management Act and the Growth Management Act are the related statutes

that the Board must "read together to determine legislative purpose to achieve a harmonious total statutory scheme which maintains the integrity of the respective statutes." As detailed below, after analyzing the apparent commonalities as well as the alleged divergences between these two statutory schemes, the Board concludes that various provisions of these two statutes can be read to clarify, amplify and give meaning to one another.

The examination of Everett's compliance with the SMA and the GMA begins with a comparison of the corresponding provisions in the two statutes and their interplay. Based upon this analysis, the Board sets forth its views of how the relevant SMA/GMA provisions establish a "harmonious total statutory scheme." In Section VI, *infra*, the Board then applies this harmonious total statutory scheme to the legal issues surrounding the City's compliance with the SMA and GMA. Finally, the Board will address the matter of Ecology's compliance with its duty under the SMA.

B. GMA/SMA: THE TOTAL STATUTORY SCHEME

The task before the Board is not simply construing the meaning of the bare words of the SMA or the GMA. Rather, the task is to construe the meaning of the SMA *in light of the goals and requirements of the GMA, and vice-versa*. The thirty years of SMA case law and 10 years of GMA case law is illuminating as to the meaning of various provisions of these two laws, or how a reviewing tribunal should construe them. For example, courts have consistently stated that the SMA is to be broadly construed to protect state shorelines "as fully as possible."[2] Nevertheless, in evaluating the applicability or weight to assign to cases cited by the parties, the Board must be mindful of several factors.

First, all of the cases cited were either GMA cases or SMA cases, but none were combined GMA/SMA cases. Second, to the extent that the cited SMA cases also implicated the Shoreline Guidelines (WAC 173-16), they were colored by administrative rules that no longer exist.[3] Third, all of the Shorelines Hearings Boards cases cited by respondents involved review of permit decisions, not legislative amendments to shoreline master programs.[4] Finally, the only appellate case addressing GMA "best available science," (**BAS**) is *HEAL v. CPSGMHB*, 96 Wn. App. 522, 530, 979 P.2d 864, 869 (1999) is not directly on point with the facts and issues here.[5]

Virtually all of the 28 issues raised in this case[6] involve the interplay of several key sections of the both the GMA (including RCW 36.70A.020, .030, .170, 172, and .480) and the SMA (including RCW 90.58.020, .030, .090(4), .100).

To fully understand how these key sections interact and further clarify GMA/SMA integration as

a harmonious total statutory scheme, the Board groups its analysis and conclusions into five topical areas: (1) Legislative intent to integrate the GMA/SMA land use decision-making regimes; (2) GMA/SMA: managing land use differently in different landscapes; (3) the Interplay of GMA/SMA goals, objectives and purposes; (4) Ecology and Ecosystems: the Role of Science in Shoreline Plan-making and Regulations; and (5) Procedures for Adoption of Shoreline Elements and Regulations. Each of these topic areas is discussed separately below.

1. Legislative intent to integrate GMA/SMA land use decision-making regimes

The geographic and subject matter scopes of the GMA and SMA overlap. The land areas governed by the provisions of the GMA include the entirety of all four counties in Central Puget Sound region. RCW 36.70A.040(1). The areas within the Central Puget Sound region which are governed by the provisions of the SMA are the "shorelines of the state." Generally, this area includes all the water areas and uplands, or "*shorelands*," within 200' of the ordinary high water mark.[7] While extensive, these shorelines of the state represent a geographic sub-set of all lands within the four-county Central Puget Sound region.

The starting point for the Board's analysis is RCW 36.70A.480. As the Board discussed in its October 1, 2002, Order on Motions for Amicus and Intervention, at 17[8]; the Legislature integrated the SMA and GMA in 1995 when it enacted RCW 36.70A.480. This section of the GMA provides:

> (1) For shorelines of the state, the *goals and policies of* the shoreline management act as set forth in *RCW 90.58.020 are added as one of the goals of this chapter as set forth in RCW 36.70A.020*. The *goals and policies of a shoreline master program* for a county or city approved under chapter 90.58 RCW *shall be considered an element of the county or city's comprehensive plan*. *All other portions of the shoreline master program* for a county or city adopted under chapter 90.58 RCW, *including use regulations, shall be considered part of the county or city's development regulations.*
> (2) The shoreline master program shall be adopted pursuant to the procedures of chapter 90.58 RCW rather than the procedures set forth in this chapter for the adoption of a comprehensive plan or development regulations.

RCW 36.70A.480 (emphasis added). Simply stated, this section means: 1) the provisions of RCW 90.58.020 are the 14th Goal in the GMA; 2) the goals and policies contained in a shoreline master program (**SMP**) itself become an element[9] of a GMA comprehensive plan (*see* Figure 1 following Appendix E); 3) other provisions of an SMP, including the SMP use regulations, are considered as GMA development regulations (*see* Figure 2 following Appendix E); and 4)

adoption procedures for an SMP are governed by the SMA – *i.e.*, requiring Ecology approval.

Integrating the SMA and GMA, through the adoption of RCW 36.70A.480, leads the Board to conclude that **the legislature intended the GMA and the SMA to be integrated into a unified and coordinated land use decision-making regime as it applies to the areas of geographic overlap between the SMA and GMA jurisdictions.**

2. GMA/SMA: managing land use differently in different landscapes

The legislative findings for both statutes identify "uncoordinated and unplanned growth" and "unrestricted construction on the privately owned and publicly owned shorelines" as threats to our environment and contrary to the public interest. These same legislative findings also call for "cooperation and coordination in land use planning" and "coordinated planning is necessary to protect the public interests associated with the shorelines of the state." *Compare* RCW 36.70A.010 and RCW 90.58.020. It is not surprising that both statutes feature the word "Management" in their titles. Just reading the titles suggests that the GMA requires growth to be managed; and the SMA requires that our shorelines be managed. But what exactly does "management" mean?

The City argued that the legislature's choice of this word is significant in both statutes, pointing out that the legislature called for "management" of growth rather than its "stoppage." Transcript, at 70. While the Board would agree with the City that neither GMA nor SMA requires "stoppage" of growth or development *per se*, none of the petitioners asserted that such was the case. However, rather than dismiss the City's point as merely rhetorical, it is useful to examine the meaning of the word "management."

The Board notes that "management" is not defined in either statute. From the dictionary definition[10] it is clear that the most apt meaning of "management" is "the act, manner or practice of controlling"[11] or its derivative "controls."[12] In a land use planning and regulation context, these "controls" are applied *differentially* to lands by means of development regulations and accompanying maps, which in turn, are guided by comprehensive plans.[13] This notion of "differentiation" is simply that different types or degrees of development are more or less appropriate in different places, depending upon certain attributes of the land use or of the land itself. Designating different land uses in different places is perhaps the most basic organizing concept of all land use planning and regulation, dating from the U.S. Supreme Court's landmark 1926 zoning case *Village of Euclid v. Ambler Realty, Co.*[14]

The GMA planning regime follows this constitutionally sanctioned concept by requiring local

governments to *differentiate* the landscape into one of three fundamental types: urban lands, (*i.e.*, within urban growth areas,) designated pursuant to RCW 36.70A.110; rural lands, designated pursuant to RCW 36.70A. 070(5), and resource lands, designated pursuant to RCW 36.70A.170. [15] The SMA planning regime differentiates between "shorelines" and "shorelines of state-wide significance," pursuant to RCW 90.58.030, then directs local governments to further differentiate lands into various "use districts" (*e.g.*, conservancy, urban, *etc*.).

Nature also differentiates the landscape. GMA critical areas and SMA shorelines are found in all three fundamental land use types (urban, rural and resource lands). When this occurs, the inherent natural attributes of the critical areas and shorelines will affect, and may limit, or prohibit, development of certain land uses in such areas. With respect to the inherent attributes of critical areas, the Board has stated "the land speaks first,"[16] which is to say that certain environmental attributes of the land make certain land uses more or less appropriate.

These inherent natural attributes place constraints on the development of land that are typically eliminated, minimized or mitigated if development proceeds. Nonetheless, the inherent natural attributes of the land must be given substantial weight in differentiating the fundamental land use types and the compatibility of various land uses, improvements and activities.

Once the appropriateness of different land uses has been determined as a matter of policy (*i.e.*, in the comprehensive plan, including the shoreline master program element[17]), the implementation of that policy is effectuated through development regulations,[18] capital budget decisions and other planning activities. RCW 36.70A.040 and .120.

To sum up, it is overstating matters to contend that these Acts advocate either the "stoppage" of growth or unbridled growth. What these laws contemplate, separately and collectively, is the coordinated planning for, and control of the use of land to achieve articulated state-wide goals, objectives and purposes. The Board concludes that **the "management" contemplated by both the GMA and the SMA is coordinated planning and the differential *control of the use of land* to achieve state-wide goals, objectives and purposes. Management is achieved through local comprehensive plans, including the shoreline master program element, development regulations and public spending priorities. In this management scheme, substantial weight must be given to the *inherent natural attributes of the land* in differentiating the fundamental land use types and the compatibility of various land uses, improvements and activities.**

3. The Interplay of GMA/SMA goals, objectives and purposes

RCW 90.58.900 states that "this chapter is exempted from the rule of strict construction, and it shall be liberally construed to give full effect to the *objectives and purposes* for which it was enacted." (Emphasis added).[19] The courts have interpreted this section of the SMA to require "an expansive rather than a restrictive reading" of the Act.[20] The over-arching policy "objectives and purposes" of the SMA and the "goals" of the GMA, respectively, are enshrined in RCW 90.58.020[21] and RCW 36.70A.020.[22] In keeping with the legislature's intent that these schemes be integrated, the Board examines the interplay between these statutory goals and how each sheds light on the other to illuminate the "Integrated goals, objectives and purposes" at the core of the total GMA/SMA statutory scheme.

A basic disagreement between the parties in this case is whether the SMA is, in essence, an environmental protection statute, or a "balancing" statute. Implicit in the respondents' position is that the SMA requires development as well as environmental protection and that this "balancing" is further compelled by the "growth accommodation" mandate of the GMA. To answer these very basic questions, it is instructive to first examine the premise that GMA is a regime that "balances" goals and mandates; then examine whether the SMA constitutes such a regime; and finally, discern how the concept of "balance" fits within the "total GMA/SMA scheme."

a. <u>The Growth Management Act: Balancing Goals and Mandates</u>

In contrast to the SMA, the GMA directs a balancing of statutory goals and a larger degree of deference to local decisions. First, the preamble to the GMA goals section indicates that "The following goals are *not listed in order of priority* and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." *See* RCW 36.70A.020 (emphasis added).[23] Second, RCW 36.70A.3201 provides, in relevant part: "Local comprehensive plans and development regulations require counties and cities to *balance priorities and options* for action in full consideration of local circumstances." (Emphasis added).[24]

Both the Board and the courts have observed that there is a wide range of directiveness in the active verbs of GMA goals. *See King County v. CPSGMHB.* Many of the GMA's goals begin with the verb "encourage,"[25] however, some of the most directive and unequivocal verbs used among the GMA goals are found at .020(8) and (10). They direct that local government plans are to "**Maintain** and **Enhance** natural resource-based industries, including fisheries" and "**Protect** the environment," respectively. These goals combine to provide strong direction to comprehensive plans to "protect, maintain and enhance" environmental resources and natural resource industries, including fisheries.[26]

The Board notes that all the GMA goals are directed to local governments (as opposed to state or federal resource agencies.) Therefore, the Board construes the language of RCW 36.70A.020(8) to "enhance the fisheries industr[y]" as well as the language of RCW 36.70A.172(1) to "give special consideration to . . . measures necessary to preserve or enhance anadromous fisheries" to mean that comprehensive plans and implementation measures are directed by the GMA to *preserve or enhance* ***habitat*** *for anadromous fish*. The Board reaches this conclusion because local land use policies have direct and profound influence on habitat, yet local governments have little role or authority regarding the harvest of anadromous fish, nor for that matter, hydro or hatcheries.

In reviewing how local governments have balanced the GMA goals, while complying with various duties under the Act, the Board has identified and consistently upheld a "growth accommodation mandate" as one of the hallmarks of the Act.[27] However, the Board has also consistently harmonized the GMA's "growth accommodation mandate" with its "critical areas protection" mandate.[28] The Board has observed that the GMA duty to protect critical areas makes no distinction between urban land and rural lands (*Pilchuck II*, at 23), and has clarified that where "critical areas are large in scope, with a high rank order value and complex structure and function" they justify much lower land use intensities than would be required on non-environmentally constrained urban land. (*LMI/Chevron*, at 25.) Simply put, the GMA does not require that *all* portions of *all* urban growth areas be developed to a uniform density or intensity. Likewise, as noted *supra*, the inherent natural attributes of the land [including critical areas] place constraints on the development of land that are typically eliminated, minimized or mitigated if development proceeds. Perhaps the most succinct explanation of how this regime operates to meet both mandates is the language from *Bremerton* cited *supra*:

> [A] fundamental axiom of growth management [is]: "the land speaks first." Only after . . . critical areas . . . are identified and protected, is it then possible and appropriate to determine where, on the remaining land, urban growth should be directed . . .

Bremerton, at 31-32 (footnote omitted).

b. <u>The Shoreline Management Act: Balancing Goals and Mandates</u>

The heart of the SMA is 90.58.020, and the heart of that section is the very first sentence, which provides:

> The legislature finds that the shorelines of the state are among the most *valuable* and *fragile* of its *natural resources* and that there is *great concern* throughout the state

> relating to their *utilization, protection, restoration,* and *preservation.*

(Emphasis added).

Parsing this sentence is illuminating. The legislature's first "finding" states that "shorelines of the state are among the most *valuable* and *fragile* of its *natural resources.*" (Emphasis added). This is significant because it most clearly indicates just ***what*** the SMA is designed to address: the "valuable and fragile natural resource" that shorelines represent. The second phrase is cautionary language expressing "great concern" relating to shoreline "utilization, protection, restoration and preservation." The words "protection, restoration and preservation," all suggest strong concern that the "valuable and fragile natural resource" not be imperiled by inappropriate "utilization"[29] of the shoreline. Of these three environmental duties (*i.e.*, to protect, to preserve, to restore) it would appear that the last sets the highest bar for shoreline management – not only to prevent the loss of that which presently exists, but to bring back (*i.e.*, to restore) a prior level of environmental functionality.

In contrast to the GMA, neither the words "balancing" nor "balance" appear in the SMA, nor are local government decisions accorded as much deference as under the GMA. *Compare* RCW 36.70A.3201 and RCW 90.58.020 (recognizing and protecting state-wide interests over local interests). Instead, RCW 90.58.020 clearly declares, "It is the policy of the state to provide for the management of the shorelines of the state by *planning for and fostering all reasonable and appropriate uses.*" Thus, the SMA is not intended to prohibit any reasonable and appropriate use of the shorelines. However, the same section of the SMA then goes on to articulate what are reasonable and appropriate uses *in order of preference*.

> (1) Recognize and protect state-wide interest over local interest;
> (2) Preserve the natural character of the shoreline;
> (3) Result in long term over short term benefit;
> (4) Protect the resources and ecology of the shoreline;
> (5) Increase public access to publicly owned areas of the shoreline;
> (6) Increase recreational opportunities for the public in the shoreline;
> (7) Provide for any other element as defined in RCW 50.98.100[30] deemed appropriate or necessary.

RCW 90.58.020 (footnote added).

The Board agrees with the respondents that the SMA does contemplate land uses such as marinas and port facilities. However, it is significant that the very SMA language that identifies such uses as appropriate "alterations to the natural condition of the shorelines of the state" (*See* the

"implementation" portion of RCW 90.58.020) is preceded by qualifying language stating that such alterations will occur only in "limited instances."[31]

Moreover, as the petitioners pointed out, mention of "recreational" uses (*e.g.*, marinas) or other waterfront commercial uses (*e.g.*, industry) does not even appear until the sixth and seventh rank order preference in the "policy" portion of RCW 90.58.020. Read together, these provisions reveal a clear legislative intent that, while such uses have been and will be permitted, it will be under *limited* circumstances. The Board therefore rejects the notion that the SMA contemplates shoreline development of marinas, port facilities or other industrial uses as a legislative priority on a par with the other listed use preferences.

c. GMA and SMA: Integrating Goals and Mandates

Review of the SMA use preferences indicates to the Board that preservation of the natural character of the shorelines, protection and restoration of the resources and ecology of the shorelines, recreational and public access to the shoreline are weighted more heavily than, and take priority over, other various and sundry uses that would fit within the seventh level of preferences listed. This is the essence of the "14th" GMA goal. How then does this goal fit within the GMA's "non-priority" listing of goals? Is the 14th goal "diluted" by integration into the GMA? The Board answers this question with an emphatic NO.

Black's[32] law dictionary defines "balance" as "[t]o measure competing interests and offset them appropriately."[33] These competing interests are each weighted accordingly. The GMA's 14th goal comes with over thirty years of SMA planning, implementation and case law and extensive explanation in the text of RCW 90.58.020. This goal is not uniform or on par with the GMA's 13 original goals; each of which are comprised of one or two sentences and are typically weighed according to directiveness of the action verbs used.[34] The Board accords the 14th goal substantial weight. Moreover, as discussed *supra*, the most directive of the original thirteen GMA goals[35] do not undermine or contradict the 14th goal; rather, they buttress the SMA direction to "preserve, protect, and restore" shorelines.

The primary and paramount policy mandate that the Board gleans from a complete reading of RCW 90.58.020, particularly within the context of the goals and overall growth management structure of Chapter 36.70A RCW, is one of **shoreline preservation, protection, enhancement, and restoration**.

This reading of the total statutory scheme is informed by an understanding of how the SMA

regime of shoreline preservation, protection and restoration nests within the portion of the GMA framework that mandates the "protection of critical areas," and the "enhancement" of the fisheries industry (*i.e.*, habitat), even when those areas occur within urban growth areas. *See* the discussion of *LMI/Chevron* and *Litowitz, supra.* This reading comports with the legislature's recognition that the shorelines of the state are among the "most valuable and fragile of its natural resources"(RCW 90.58.020) and the Supreme Court's opinion that the SMA was designed to protect state shorelines "as fully as possible.[36]

The evidence in this record chronicles and quantifies the degradation of ecosystem functions in the Puget Sound region generally and the Snohomish Estuary specifically.[37] This degradation has progressed to the point that several species, including several anadromous fish, have been listed by state and federal agencies as threatened or endangered.[38] This dramatic ecosystem degradation and alarming decline of species has continued in the watersheds and waters of Puget Sound *in spite* of three decades of well-intended efforts to "manage" the shorelines of the state relying on the separate and heretofore "un-integrated" authorities of the SMA and the GMA.

Few would disagree that this region's relentless march toward ecosystem degradation and species extinction must be halted, and ultimately reversed. To achieve this outcome, all levels of government, as well as the private sector, must recognize that the integration of the SMA into the GMA does not quicken the pace of that march – to the contrary, it mandates the opposite outcome and informs state and local governments *how* and *where* to achieve both vital growth accommodation *and* essential environmental protection. The "total statutory scheme of GMA/SMA" strives to achieve these state-wide statutory purposes through the comprehensive plans, implementing development regulations, capital budgets and permit decisions of local governments. (*see* Figure 3 following Appendix E).

From a review of the interplay between the relevant provisions of the two statutes, the Board concludes that, while development will continue to be permitted within the shorelines of the state, the primary and paramount goal, objective and purpose of the GMA/SMA total statutory regime is to preserve, protect, enhance, and restore the resources, ecology and ecosystem functions of the shorelines of the state, with special consideration paid to habitat for anadromous fish.

4. Ecology and Ecosystems: the Role of Science in Shoreline Plan-making and Development Regulations.

Both the SMA and the GMA address the natural environment. *Compare* the SMA focus on **ecology** (RCW 90.58.020(4) "Protect the *ecology* and resources of the state," with the GMA focus on **ecosystems** (RCW 36.70A.030(5) "Critical areas include the following areas and

ecosystems." Though neither term is defined in statute, it is clear both from a dictionary[39] and common sense perspective that they are closely related, if not synonymous terms. Equally telling is that the definition of "ecology" conveys that it is a "science,"[40] a body of knowledge that, in this instance, informs and guides policies and implementing measures for protection and restoration of environmentally sensitive areas.

Moreover, a close examination of the GMA "critical areas" terminology shows remarkable similarities to the SMA language. For example, the definitions of "wetlands" in the GMA and in the SMA are **identical**. *Compare* RCW 36.70A.030(20) and RCW 90.58.030(2)(h). Wetlands are included in the GMA definition of critical areas, most of which are hydrological "ecosystems."[41] In addition to wetlands, such "ecosystems" include "areas with a critical recharging effect on aquifers used for potable water," "fish and wildlife habitat conservation areas,"[42] and "frequently flooded areas." These features collectively constitute the component parts of the hydrologic ecosystems that are "*shorelines of state-wide significance*."[43]

Indeed, it is difficult to imagine a shoreline ecology, that is the subject of the SMA planning regime, that **does not** consist of "ecosystem" values and functions defined by wetlands, critical aquifer recharge areas, fish and wildlife habitat conservation areas and frequently flooded areas. These two regulatory schemes plainly address the same natural landscape, the same natural attributes, and the same natural processes. It is an inescapable conclusion that SMA "shorelines of state-wide significance," are critical areas that are "large in scope, complex in structure and functions, and of a high rank order value." *See Litowitz* and *LMI/Chevron, supra*. In short, **the Board concludes that shorelines of state-wide significance are critical areas subject to both the GMA and the SMA**.[44]

Both the SMA and GMA rely upon science and the scientific process, or method, to protect the fragile critical areas within the shoreline ecosystem. In the SMA, RCW 36.70A.100(1) provides:

> *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 preparing the master programs, and any amendments thereto, the department and local government, shall to the extent feasible:
>
> (a) *Utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts*;
> (b) Consult with and obtain the comments if any federal, state, regional, or local

> agency having any special expertise with respect to any environmental impact;
> (c) *Consider all plans, studies, surveys, inventories and systems of classification made or being made by federal, state, regional or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state*;
> (d) Conduct and support such further research, studies, surveys and interviews as are deemed necessary;
> (e) *Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data*;
> (f) *Employ, when feasible, all appropriate, modern scientific data processing and computer techniques to store, index, analyze, and manage the information gathered*.

(Emphasis added).

In the GMA, RCW 36.70A.172(1) provides:

> *In designating and protecting critical areas under this chapter*, counties and cities *shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas*. In addition, counties and *cities shall give special consideration to conservation and protection measures necessary to preserve or enhance anadromous fisheries*.

(Emphasis added).

The SMA science based requirements of RCW 90.58.100 enlighten and inform the best available science requirement of RCW 36.70A.172. Additionally, the Washington State Department of Community, Trade, and Economic Development (**DCTED**) has adopted guidelines to further clarify the "best available science" requirement of the GMA. *See*: WAC 365-195-900 through 925. The provisions of the DCTED Guidelines further illustrate the scientific process to be used by local governments for identifying, designating and protecting critical areas. In particular WAC 365-195-905(5) provides:

> Scientific information can be produced only through a valid *scientific process*. To ensure that the best available science is being included, a county or city should consider the following:
>
> (a) In the context of critical areas protection, a valid scientific process is one that produces *reliable information useful to understanding the consequences of a local government's regulatory decisions and in developing critical areas policies and development regulations that will be effective in protecting the functions and values*

> *of critical areas*. [The characteristics of a valid scientific process (peer review, scientific methods, logical conclusions and reasonable inferences, quantitative analysis, context and references) are each discussed and displayed in matrix form.]

(Emphasis added).

While not identical, the two statutory provisions and the DCTED guidelines, articulate the components, and importance of using a scientific process in the preparation of regulations to protect the critical areas and shorelines of the state. Read together, these statutory provisions are harmonious and bolster each other. The protection and regulation of "shorelines of state-wide significance" [a critical area and ecosystems] is to be based upon the *scientific method* derived from the supportive and harmonious provisions of RCW 90.58.100 and RCW 36.70A.172.

The Board notes that in prior GMA cases, it has identified a "no net loss" requirement with regard to the value and function of critical areas and ecosystems.[45] However, in shorelines of the state, the additional weight of the 14th Planning Goal, has elevated the bar above "protect and preserve" to "enhance and restore."

The Board concludes that all "shorelines of state-wide significance" designated under Chapter 90.58 RCW are "critical areas" pursuant to RCW 36.70A.030(5). Therefore, the shoreline master program element of comprehensive plans, and all designations and development regulations that purport to control the use of land in such areas, are subject to the requirements of RCW 36.70A.060 and .172. Consequently, all shoreline master program element plan provisions and development regulations designed to govern shorelines of state-wide significance must: 1) be guided substantively by the protect, preserve, enhance and restore goals of RCW 36.70A.020(8), (10) and (14); and 2) utilize the scientific method derived from RCW 90.58.100 and RCW 36.70A.172.

5. Procedures for Adoption of Shoreline Elements and Regulations

In the preceding sections, the Board examined the interplay between the GMA and the SMA to discern the *substantive* requirements of that "total statutory scheme." No parallel analysis was necessary to "harmonize" the different GMA and SMA procedures for adoption, because the legislature plainly stated that the latter alone are applicable. The Board has observed:

> . . . RCW 36.70A.480(2) provides that such amendments shall be done subject to the *procedures* of the Shoreline Management Act, rather than the Growth Management Act. This comports with the Board's reading that local government "shoreline master

> program amendments" have a duty to comply with the goals and *substantive requirements of the GMA*, notwithstanding that *such amendments will be adopted using the procedures (e.g., public involvement, Ecology review for fidelity to SMA requirements) of the SMA.*

Order on Motions for Amicus and Dispositive Motions, at 17.

The most important distinction between the GMA adoption process and the SMA adoption process is the role played in the latter by the Department of Ecology. In contrast to GMA adoption, amendments to SMP master programs are not "valid upon adoption" by a local government, but only upon the subsequent approval by Ecology. RCW 90.58.090(1). Therefore, in keeping with the Board's discussion, *supra*, amendments to the "Shoreline" Element of a local comprehensive plan or to shoreline development regulations only become "valid" after the approval by Ecology.

The Board also observed that the SMA public involvement requirements of RCW 90.58.130 would control rather than the GMA public participation provisions of RCW 36.70A.020(11), .035 and .130 or .140. Thus, adoption or amendment to the Shoreline Element of the comprehensive plan and development regulations must be done in conformance with RCW 90.58.130. While there are some differences between the two "public involvement/participation" schemes, the essence of the SMA procedure is very similar to that of the GMA.[46]

The Board notes that no claim was made in the present case that the City or Ecology failed to comply with RCW 90.58.130. Indeed, the record demonstrates that **Everett and Ecology did an excellent job of communicating with, encouraging, and involving all interested individuals, groups, tribes, state and federal agencies in preparation of the Shoreline Master Program amendments.**

VI. SPECIFIC LEGAL ISSUES

A. CRITICAL AREAS, "BEST AVAILABLE SCIENCE," AND RESTORATION

Legal Issue No. 1. ***Does Ecology's approval of the City's SMP enacted by City Ordinance No. 2600-02, effective May 3, 2002 (referred to collectively herein as the Update), fail to comply with RCW 90.58.020, RCW 90.58.090(4), WAC 173-26-200, RCW 36.70A.020(8)(10), RCW 36.70A.040(3), RCW 36.70A.060 and RCW 36.70A.172?***

Legal Issue No. 11. ***Is the Update inconsistent with the SMA, RCW 90.58.020 and RCW 90.58.100, applicable guidelines, and the GMA, RCW 36.70A.020(10), in permitting a full***

build-out scenario that would result in the direct loss of approximately 500 acres of wetlands within shorelines of state-wide significance?

Legal Issue No. 12. ***Is the Update inconsistent with the SMA, RCW 90.58.020 and RCW 90.58.100, applicable guidelines, and the GMA, RCW 36.70A.020(7), RCW 36.70A.020(10), RCW 36.70A.060(2), and RCW 36.70A.172(1), in failing to assure restoration of shorelines of state-wide significance, and instead adopting restoration goals and requirements only in conjunction with individual, site-specific development proposals?***

Legal Issue No. 18. ***Is the Update inconsistent with the SMA, RCW 90.58.020, RCW 90.58.100, and RCW 90.58.180, applicable guidelines, and the GMA, RCW 36.70A.020(10), RCW 36.70A.060(2), and RCW 36.70A.172(1), because it relies on a critical areas ordinance that is out of date and inadequate to protect the functions and values of critical areas and habitats and because it removes critical components of the Master Program from the SMA's review and appeal process?***

1. Applicable Law

The GMA provisions at issue under this heading are RCW 36.70A.020(8) and (10), RCW 36.70A.040(3), RCW 36.70A.060(2), and RCW 36.70A.172.[47] The SMA provisions at issue under this heading are RCW 90.58.020, RCW 90.58.090(4), RCW 90.58.100, and RCW 90.58.180.[48]

2. Discussion and Analysis

a. Critical Areas

The Board has determined that shorelines of state-wide significance pursuant to Chapter 90.58 RCW are also critical areas pursuant to Chapter 36.70A RCW. Consequently, any development regulations adopted by the City to "protect critical areas" (*i.e.* the regulatory component of the City's SMP) must be adopted as critical area regulations which are subject to the best available science requirements of RCW 36.70A.172. Likewise, any policies (*i.e.*, the shoreline master program element of the City's Plan) that purport to provide direction to the development regulations, as well as capital spending for shoreline priorities, must be adopted as part of the

City's comprehensive plan and are also subject to the BAS requirements of RCW 36.70A.172. The City therefore had a duty to adopt its SMP policies and regulations as "critical areas" policies and regulations subject to BAS.

While the City, and Ecology, have achieved much in the SMP update, and "pushed the envelope" in the use of science in support of shoreline management, it is clear from the record and the briefing that the City has not yet complied with the BAS requirements for critical areas. The City argued that the SMP Amendments were not subject to the requirements of the GMA, much less the BAS requirements of RCW 36.70A.172. *See generally* City's Motion to Dismiss GMA Issues and footnote 8, *supra*. The City also flatly stated its position that shorelines of state-wide significance are not GMA critical areas.[49] The City is mistaken on both counts. Shorelines of state-wide significance **are** GMA critical areas and the SMP amendments **are** subject to the BAS requirements of the GMA. The inescapable conclusion therefore is that the City has breached a fundamental duty under the "total statutory GMA/SMA scheme."

Why does the Board believe this is an inescapable conclusion? The City incorporates and relies on its critical areas regulations [Sensitive Areas Ordinance] to implement various development standards, such as buffers, mitigation and compensatory mitigation provisions, in its SMP.[50] This action basically affirms the effectiveness of its existing critical areas regulations by incorporating them into its SMP. However, these regulations were indisputably not adopted pursuant to the explicit BAS requirements set forth in RCW 36.70A.172. Further, the SMP includes shoreline regulations and provisions also dealing with buffers and mitigation, but separate and apart from those embodied in the City's critical areas regulations. *See* SMP Update, at 3-30 through 3-42. These provisions, ~~are~~ likewise, have not been reviewed and evaluated for consistency with the GMA's BAS requirement. Given these facts, the Board cannot allow regulations that have not been reviewed and evaluated for consistency with the GMA's BAS requirements to stand as significant implementing tools for the SMP. To allow such a scheme would undermine both the GMA and SMA and the total statutory scheme outlined *supra* and potentially permit a dual and conflicting regulatory regime for development within shorelines.

Some might suggest that this critical areas/BAS noncompliance is essentially a procedural error that can be quickly cured with proper notice and re-adoption. Others might suggest that, having found this fundamental noncompliance, the Board should end its inquiry and simply remand the entirety of the SMP Amendments. The Board rejects both suggestions.

First, while proper notice, both pre-adoption and post-adoption, is an essential part of what must be done on remand, it is a mistake to characterize the critical areas/BAS process as purely

procedural. As detailed below, the Board concludes that much of what the City has done, particularly the Snohomish Estuary Wetland Integration Plan (**SEWIP**), demonstrates the scientific method at its most rigorous, cogent and illuminating. If SEWIP does not constitute BAS, it is hard to imagine what does. The Board finds that it does provide sufficient scientific support for certain of the City's shoreline use designations. Nevertheless, the Board does not reach the same conclusion about the Salmon Overlay to the Snohomish Estuary Wetland Inventory Integration Plan (**SOSEWIP**) and Pentec Report. On remand, the City must augment these documents if it wishes to meet the bar set by BAS.

Second, the Board concludes that it would be inappropriate to stop at this point and simply remand the entirety of the SMP amendments without further evaluation and comment on the many other issues in this case. All of the parties deserve as much of an answer as the Board can provide about how the City and Ecology's efforts comply with the "total statutory scheme." Therefore, in order to further coordinated GMA/SMA planning and regulation, the Board will proceed with its analysis**.**

b. Best Available Science

It is important to understand that the City never contended, or asserted, that it had amended its critical areas regulations [Sensitive Areas Ordinance], therefore, in its view, the BAS requirements of the GMA were not applicable at this juncture in the City's process. Also, the City never suggested it would not review its critical areas regulations in light of BAS when it was required to do so – by December 1, 2004. Nonetheless, the City did include buffering and compensatory mitigation measures as regulations in its SMP amendments – *see supra* and Section VI.B, *infra*. Therefore, in order to provide some guidance for the City's future efforts, the Board offers the following discussion of BAS.

Before a document can be evaluated with regard to the BAS requirement set forth in RCW 36.70A.172, it must first be established that the document contains valid science obtained through the scientific process. As stated above, WAC 365-195-905(5) establishes that scientific information can be produced only through a valid *scientific process* which generally includes the opportunity for critical peer review, scientific methods that are clearly stated and are replicable, logical conclusions and reasonable inferences drawn from the data gathered, quantitative analysis where appropriate, the information is placed in the proper context and references are cited. The goal of this scientific process is produce reliable information that is useful to decision-makers and effective in protecting the functions and values of important ecosystems and critical areas.

The City considered three core documents in formulating its SMP. These three documents, the SEWIP, SOSEWIP, and the Pentec Report,[51] were the focus of comment and criticism throughout the record, much of the briefing and at the hearing on the merits. The Board, in

evaluating whether these documents meet the requirements of science and BAS, relied on some of the key characteristics set forth in WAC 365-195-905(5). Specifically, was the document created through the scientific method, does it come to logical conclusions and reasonable inferences based upon the data gathered, and is the information and document being used in the correct context.

(i.) **SEWIP –** Snohomish Estuary Wetland Integration Program

The first of the core scientific documents used in Everett's SMP is the Snohomish Estuary Wetland Integration Program, SEWIP. Ecology states that, "Petitioners appear to concede that SEWIP constitutes BAS." Ecology PHB, at 23. In support of this statement, the Board notes that none of the issues argued by the petitioners in their prehearing briefs challenged the validity of the SEWIP scientific method, its conclusions and inferences, or the context in which the information was applied. Specifically, ESC discussed SEWIP as follows,

> Prepared jointly by Everett, Ecology, EPA, and the Puget Sound Water Quality Authority (now called the Puget Sound Water Quality Action Team), the SEWIP was 'a proposal to integrate the wetland regulatory frameworks of federal, state and local agencies into one process on the basis of an agreed-upon plan. The products and outcomes of this effort are a scientifically based inventory of the functions and values of study area wetlands and a framework, agreed upon by all the regulatory agencies, for expediting review of development proposals through the federal, state, and local permit processes. SEWIP (Att. B) at 1.

ESC PHB, at 20.

As the above quote suggests and the Board's review of the record supports, not only did the Petitioners not challenge the SEWIP document, the agencies that jointly prepared the inventory including the Environmental Protection Agency, Department of Ecology, Puget Sound Water Quality Authority, as well as individuals from the Corps of Engineers, the Natural Resource Conservation Service, Washington Fish and Wildlife Department, Snohomish County Surface Water Management, Snohomish County Public Works, the City of Everett Public Works Department, and the City of Everett supported the methodology behind the document as well as its content.

Ecology proclaimed that SEWIP represented a very detailed inventory/analysis effort that "represents considerably more work/detail than we will probably obtain from 99 percent of the local governments." Ecology PHB, at 33, *citing* AR 18164.

Given Ecology's affirmative statements about SEWIP, the lack of argument presented by

petitioners, and the long list of agencies and individuals affiliated with other agencies who support the work done by the City, the Board believes that the interdisciplinary and multi-jurisdictional approach, the scientific methodology and detailed evaluation of ecosystem values, functions, conditions and opportunities for restoration all within the context of the shorelines of the state is exemplary. SEWIP provides a sound scientific basis for making certain policy and regulatory decisions in the Snohomish River Estuary. But for the fundamental critical areas/ BAS error discussed, *supra*, the Board would find that SEWIP complies with RCW 90.58.100(1) and constitutes BAS [RCW 36.70A.172] in support of certain of the City's SMP use designations.

(ii) **SOSEWIP –** Salmon Overlay to the Snohomish Estuary Wetland Integration Plan

The second core scientific document Everett relied upon for its SMP, is the SOSEWIP, the Salmon Overlay to the Snohomish Estuary Wetland Integration Plan. "The revised mission and focus of this phase of SEWIP was to develop a "Salmon Overlay" to address these changed circumstances and respond to the listing of anadromous salmonids under ESA." SOSEWIP, at 1-2, AR 8692.

A review of SOSEWIP demonstrates that the document has some of the same strengths as SEWIP; however it also contains some deficiencies with regard to the characteristics of the scientific process.

Despite Ecology's statement that, "There is no question that SEWIP and SOSEWIP together meet the requirements of RCW 90.58.100 that the City use a 'systematic interdisciplinary approach' and 'all available information" in developing its SMP.'" Ecology PHB, at 13, the petitioners were highly critical of SOSEWIP.

WEC stated,

> Several agencies challenged the model used in the SOSEWIP. AR 1492-93, 7307-08, 8967-9020, 18070-18073. NMFS, for example, stated that:
>
> This qualitative model is based, in part, on a series of value judgments. Although these value judgments are made by professionals, and therefore are believed to be informed judgments, they nevertheless introduce subjectivity and uncertainty into the model. The effects of the model approach, the questions selected, and data quality and error on the model outcomes must be evaluated.

WEC's Reply, at 14.

ESC echoed WEC's statements,

> Several experts, including scientists with Snohomish County, the Tulalip Tribes, and petitioner People for Puget Sound, have pointedly criticized the methods and outcome of the SOSEWIP. *Id.* at appendices; AR 1503-1511. Early in its review process, Ecology's wetland scientists also expressed strong opposition to use of the SOSEWIP instead of the SEWIP as the basis for the master program update.

ESC's PHB, at 21.

Ecology specifically addressed each point made in the petitioners' briefs regarding SOSEWIP.

First, Ecology addressed its initial opposition to SOSEWIP stating that, "Petitioners rely heavily on negative comments by Ecology and other agency reviewers but fail to point out . . . that the comments were addressed in the final document." Ecology PHB, at 13.

Ecology specifically addressed the negative comment made by NMFS cited by WEC. "This statement, however, falls short of establishing that SEWIP or SOSEWIP were inappropriate for the City to use in developing its SMP. The statement simply expresses a desire for greater certainty in an admittedly complex undertaking. *See, e.g.*, AR 1493." Ecology PHB, at 24.

With regard to the statement that SOSEWIP was "the City's attempt to reverse or discard the findings of SEWIP," Ecology stated that the, "purpose of SOSEWIP was not to reverse SEWIP but was to build upon SEWIP and address more specifically salmonid restoration in response to the ESA listings." Ecology PHB, at 23.

Ecology concluded that, "The City's SMP complies with this requirement[52] because it is based on the extensive inventory work done in conjunction with SEWIP and SOSEWIP." Ecology PHB, at 23 (footnote added).

Although Ecology addresses the Petitioners' criticisms of SOSEWIP point for point, in reviewing the Record, the Board found deficiencies with the scientific process of the document. First, regarding the logical conclusions and reasonable inferences within the document, the Board notes that the question
s the City considered "excellent questions," regarding fish migration and habitat, remain data gaps within the document. *See* SOSEWIP, Comments and Responses, Letter from Snohomish County, at 11, Response 23, AR 8981. Data gaps inhibit logical conclusions and reasonable inferences, as the chain of vital information is apparently incomplete.

In addition, in contrast to SEWIP, the agencies and individuals (the Committee or SSOTAC) who contributed to SOSEWIP, which was primarily created by the City and its hired consultant Pentec Environmental, do not consider the content of the report a consensus of the Committee. A letter from Snohomish County commenting on SOSEWIP stated, "In the report as a whole, conclusions and recommendations should not imply Committee endorsement or consensus if there was none." *Id*. at. 14, AR 8984. The letter continued to request that the text of the document that referred to the role of the Committee be changed to accurately reflect the agreements regarding the representations of the Committee's role and opinions. *Id*.

The City did modify the text of SOSEWIP in response to this above comment. The text discussing the Committee's role in the Salmon Overlay process and methods reads as follows,

> SSOTAC members included representatives from the City of Everett, and wetland and fishery biologists from the state Department of Ecology, Washington Department of Fish and Wildlife, Snohomish County, and The Tulalip Tribes. Their participation in this process does not imply an acceptance of this document by their respective organizations. . . . While SSOTAC reviewed all aspects of this document, the City of Everett and their consultant prepared the document with significant contributions from DOE staff, which drafted the restoration site analysis and prioritization. Although consensus was reached on major portions of the document, there was a lack of agreement on certain aspects of the model and the compensatory mitigation policies.

SOSEWIP, at 2-1, pg. 9, AR 8701.

The City's response to SSOTAC's comments about SOSEWIP, specifically stating, "[T]here was a lack of agreement on certain aspects of the model and the compensatory mitigation policies," does not show the same strong support for the scientific process used in SEWIP. *Id.* Quite contrary, this comment, made by several of the same agencies that contributed to SEWIP, coupled with the above discussion clouds the scientific process used in SOSEWIP.

While the record and comments about SEWIP provided overwhelming information and consensus supporting the conclusion that it is a BAS document, the same cannot be said for SOSEWIP. The Board acknowledges that the SOSEWIP is an effort to "give special consideration to conservation and protection measures necessary to preserve or enhance anadromous fisheries," and to the extent the SOSEWIP built upon and incorporated the SEWIP and analyzed restoration site potential it is sound science that complies with RCW 90.58.100(1) and is a basis for supporting the City's SMP use designations.

However, based on the lack of consensus reflected in petitioners' arguments, Ecology's and the

City's responses, and the entire record, regarding logical conclusions, reasonable inferences and the proper context to apply the SOSEWIP regarding compensatory mitigation measures, the Board **does not** have the same degree of confidence in concluding that the SOSEWIP constitutes BAS. As the City proceeds in its efforts the Board is confident that the deficiencies of the SOSEWIP can be erased to produce a consensus BAS document regarding compensatory mitigation measures that can be relied upon to understand the consequences of the City's eventual regulatory framework.

(iii) **Pentec Report –** *Use of Best Available Science in City of Everett's Buffer Regulations*

The third core scientific document utilized by the City for its SMP is the *Use of Best Available Science in the City of Everett's Buffer Regulations*, prepared by Pentec Environmental (**Pentec Report**). Unlike the SEWIP and SOSEWIP, which primarily inventory and evaluate the function and values of the Snohomish Estuary ecosystem and provide a basis for the City's SMP use designations, the Pentec Report addresses the development regulations for the SMP, specifically the buffer and mitigation ratios.

The criticisms of the Pentec Report challenged the motives behind the Report as well as the scientific validity of the Pentec Report. The Petitioners, as well as several of the same agencies that weighed in on SEWIP and SOSEWIP challenged the scientific validity and process of the Pentec Report.

WEC contends that all available science provided by NMFS, Ecology, WDFW, and Puget Sound Water Quality was overwhelmingly in opposition to the science that WEC alleges the City "went out and developed in its Pentec Report." WEC Reply, at 7. The Tribes joined in this view, arguing that the Pentec report is neither BAS, nor science at all, but rather a "political apology for Everett's actions."[53] With respect to buffers, specifically, the Tribes argue:

> As BAS for buffers, the City cites (not surprisingly) a report by its very own consultant, Pentec. The Pentec report's overriding theme is to justify greatly cutting Ecology and DFW's standard recommended buffers, and to substitute diminutive buffers from the City's antiquated Sensitive Areas Ordinance.

Tribes' Reply to Amici, at 4-5.

An individual Department of Ecology scientist expressed the following regarding the Pentec Report,

> The tone of the report suggests that its authors started with the premise that the

> existing buffer requirements are adequate and set about trying to demonstrate that, without thoroughly examining all available research on the functions of wetland buffers. . .”

AR 18465-66.

This statement made by an Ecology scientist describes a method that is inconsistent with the accepted scientific method. Defined by *Black’s*, the scientific method “is an analytical technique by which a hypothesis is formulated and then systematically tested through observation and experimentation.”[54]

The Department of Ecology stated,

> Ecology will provide comments on the [City’s BAS] report in the near future. There are some corrections that will be necessary in the report before it can meet best available science test. . . . what the City is doing in their BAS document: they are taking scientific studies and in some cases, inaccurately interpreting the results of credible scientific documents.

WEC Reply Brief, at 13, fn 19, *citing*, AR 18258-61.

This statement asserts that the Pentec Report fails the characteristic of the scientific process of making logical conclusions and reasonable inferences.

Ecology also expressed extensive concern and criticism of the Pentec Report in a January 16, 2002, memorandum regarding Ecology’s final recommendations for Everett’s submitted SMP (**Memo**).[55] In addition to listing eight key deficiencies, in the Memo, Ecology reiterated comments from its August 17, 2001, letter identifying corrections that would be necessary before it [the Pentec Report] could meet the best available science test. The Memo included the City’s response to the August 2001 letter and made the following statement in regarding that response, “The City has not adequately addressed Ecology’s concerns regarding the report, and how the City is applying ‘best available science’ to support its existing regulations.” Memo, at 7.

Ecology argues that the City addressed the comments made by Ecology in the Memo. During the hearing on the merits, counsel for Ecology detailed point for point how the City had incorporated Ecology’s comments. Transcript, at 121-128. However, at no time did Ecology identify where the City addressed the comments that the Report did not meet the BAS requirement; in addition, at no time does Ecology assert that the Report constitute BAS.

To say the least, the logical conclusions and reasonable inferences contained in the Pentec Report appear questionable and clearly lack the consensus support of qualified reviewers. In light of the criticisms offered regarding its scientific validity and the lack of response to these comments and concerns, which go to the actual regulatory measures to be applied *within the various shoreline use designations,* **the Board again is not confident that it can conclude that the Pentec Report constitutes BAS**. Just as the Board believes the SOSEWIP will be revised to meet BAS, so too can the Pentec Report be refined to provide the City with a solid scientific basis that can be relied upon to understand the consequences of the regulatory framework the City eventually embraces.

c. Restoration

As noted in Section V.B.3, *supra*, the GMA/SMA total statutory scheme contains a substantive duty to "preserve, protect, enhance, and *restore*" the ecosystems of shorelines of state-wide significance. The City has defined the term "restoration" as follows:

> Return of an ecosystem to a close approximation of its previously existing condition (modified from NRC 1992). For example, building a wetland on a non-upland site where a wetland previously existed would be considered restoration. SEWIP, Glossary page 7.

The term "restoration" has been defined by Ecology as follows:

> "Restoration" or "ecological restoration" means the significant reestablishment or upgrading of ecological shoreline functions through measures such as revegetation, removal of intrusive shoreline structures and removal or treatment of toxic materials. Restoration does not necessarily imply returning the shoreline area to aboriginal or pre-European settlement conditions." WAC 173-26. *Supp. Ex. No. 1*, at 9.

Everett's SMP adopts a series of goals, policies, objectives and regulations addressed to "restoration." Among these are:

> [Goal 2] To promote and enhance the public interest by protecting, enhancing, *restoring*, and preserving *ecological functions and ecosystem-wide processes*, while allowing development in Everett's Urban Growth Boundary.
> . . . .
> [Goal 5] It is the short-term goal that there be no net loss of the acreage or functional values of shoreline habitat. The long-term goal is an *increase in the acreage and functional values of shoreline habitat* .
> . . . .

> [Objective 1] Implement area-wide and watershed-based studies and management plans cooperatively with other local, state, and federal resource agencies and the Tulalip Tribes. Identify areas which should be preserved, enhanced, or *restored* to protect and *restore ecological functions and ecosystem-wide processes, and* ***prohibit or severely restrict development in those areas***.
>
> . . . .
>
> [Objective] 7] *Program funds for the* preservation, *restoration* and/or beautification *of valuable shoreline resources as a part of the Capital Improvement Program* to apply towards projects that will result in a net increase in ecological functions.
>
> [Policy 3] Highest priority should be given to the protection and restoration of fish and wildlife conservation areas as defined in EMC 19.37. These include:
>
> - Habitats of primary association (A critical component(s) of the *habitats of federally or state-listed endangered, threatened, candidate, sensitive, priority, or monitored wildlife or plant species*, which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long term.
> - Riparian corridors . . .
>
> . . . .
>
> [Policy 13] The City should encourage and actively *seek funding for the restoration of properties identified as high priority for restoration* in the Snohomish Estuary Wetland Integration Plan.
>
> . . . .

SMP, at 103–111 (emphasis added).

The SMP Amendments incorporate by reference a series of documents, including the SEWIP and SOSEWIP. SMP, at 11. The SMP uses the "Management and Restoration Plan" found in Chapter 6 of the SOSEWIP. That document states, in part:

> The ultimate goal of estuary management for recovery of listed salmonids are to preserve remaining natural ecosystem components and processes that provide for salmonid habitat productivity, and to restore and enhance those processes that have been lost or degraded to the extent necessary for recovery . . .
>
> . . . .
>
> This plan also recognizes that ecosystem protection, enhancement, and restoration must be balanced with the need for future economic development and redevelopment within appropriate sites in the UGAs of municipalities in the planning area.

SOSEWIP, at 122.

The SOSEWIP contains a series of "management goals," discusses models and scenarios used to identify "restoration potentials" in the estuary, and reviews how the "restoration plan" can be included in other resource recovery efforts undertaken by WRIA 7 jurisdictions. SOSEWIP states that implementation of the restoration plan should be pursued through a variety of measures, both regulatory and non-regulatory. It provides:

> The SEWIP restoration plan needs to be implemented. In order to accomplish this, governments with jurisdiction in the study area need to work together to *seek funding for restoration projects* and to coordinate their regulatory activities to reduce or eliminate stressors on the resources. Funding for acquisition of properties with restoration potential, and the *conversion of these properties to realize their potential, should be given high priority*. Federal, state, and local funds could be dedicated to this effort, which could well produce the significant increase in salmon habitat that is desired for this subarea of the WRIA. Likewise, the coordination of policies and regulations to reduce or eliminate stressors will add to the quality and productivity of the habitat in the study area. Federal, state, and local governments need to address this issue, and the SEWIP Salmon Overlay provides a basis to accomplish this task.

Id., at 143 (emphasis added).

In extensive briefing, the petitioners dispute the methodologies and assumptions of the City's BAS, particularly the SOSEWIP and the Pentec report. They also contend that the City breaches its duty to protect or restore important ecosystems because the SMP lacks effective implementation. WEC complains that even the best inventory of restoration opportunities will not assure implementation, and argues:

> All SEWIP and SOSEWIP do is rank by importance restoration sites in the Snohomish River estuary. *The SEWIP and the Salmon Overlay, however, have no regulatory authority: they have* ***no teeth***. SEWIP and SOSEWIP are adopted as "inventory" documents only. SMP p. 2.2-2.3. As Ecology stated, the SMP provides "the legitimate implementation vehicle for SEWIP." AR 18213. The City has provided the Board with seven binders revealing the work that went into developing the SEWIP and SOSEWIP. All this scientific work on assessing and analyzing the Estuary ecosystem carries no value if there is *no substantive requirement to implement at least some of the restoration*. Ecology recognized this. AR 18213.

WEC Reply, at 37 (emphasis added).

WEC further argues that, although not expressly stated, the SMP "certainly guarantees that

restoration is not going to occur" because it does not assure that mitigation will actually work. Transcript, at 47. WEC points out that the City has conceded that it has administratively reduced minimum buffer dimensions but virtually never enlarged them. WEC, joined by the Tribes, contends that the administrative buffer reduction authority that the SMP grants to city staff will therefore inevitably result in further ecosystem degradation. *Id.*

The Tribes concurred that the most credible science and laudable restoration goals are of no avail if there is no effective implementation. The Tribes stated:

> The City in, I believe the Salmon Overlay, has designated a number of restoration sites that will be restored to provide historically working wetland functions. The problem is that there are no teeth to that. It would be great it if happened, but there was no mandatory requirement in the plan that those areas be restored."

Transcript, at 60.

The Tribes contend that the SMP cannot be relied upon to achieve restoration objectives because it relies on faulty mechanisms, such as the wetland mitigation program, and lacks a schedule or benchmarks to monitor progress. The Tribes argue:

> The SMP emptily promises, "As properties develop, the SMP Update will result in . . . restoration of the shoreline."[56] It, however, mistakenly banks on the fact that allowed losses to palustrine and tidal wetland will be adequately compensated through restored tidal wetlands.[57] Yet the SMP fails to ensure success in offsetting these impacts because it (1) does not explicitly include restoration sites in the body of the SMP, (2) does not establish a schedule or a goal to increase habitat acreage by a given amount, and (3) addresses mitigation only on a site•specific basis.

Tribes PHB, at 27.

Ecology contends that restoration presents constitutional limitations if the SMP mandated restoration of private property in the absence of any nexus or proportionality to development impacts.[58] However, Petitioners counter that this statement ignores the fact that "the City and Port own considerable acreage within the universe of 'restoration sites.'" AR 18207. *WEC Reply*, at 37. WEC's briefing continued,

> WEC is arguing that, with the City and Ecology having acknowledged the need for restoration of these shorelines, t*he City's Master Program must identify an overall*

> *plan (a "road map") on how the City will reach the SEWIP restoration goal plus the specific commitments* the City will make to achieve an appropriate level of restoration, rather than leave the fulfillment of the restoration goal to ad hoc, site by site mitigation decisions subject to excessive administrative discretion.[59]

Id., at 37-38 (emphasis added).

In response, the City and Amicus AWC raised concerns about "regulatory takings."[60] Ecology responded that the City and Port themselves "own a considerable acreage within the universe of 'restoration sites' in the Estuary," making a concrete restoration plan workable.[61] Tribes PHB, at 24.

It is apparent to the Board that both the City and Ecology understand and embrace the restoration component of shoreline planning and regulation. The City and its SEWIP partner organizations deserve accolades for the extensive and rigorous scientific process that resulted in the detailed identification of restoration potential in the Estuary. The City is to be further commended for adopting specific goals, objectives and policies to direct efforts to restore degraded ecosystems. The portion of the SMP that constitutes a local government comprehensive plan is the appropriate place to address lands, both public and private, and provide direction to capital budgets and development regulations. *See* RCW 36.70A.120 and .040, respectively. *See also* Figure 3 following Appendix E. The GMA/SMA total statutory scheme, therefore, requires that local government comprehensive plans include shoreline policies, which are based on BAS and which, over time, will *assure* implementation through a variety of budgetary and regulatory measures. A chief aim of these policies is to identify and promote efforts in which shoreline ecosystems generally, and habitat for anadromous fish specifically, will be restored.

Notably, the petitioners do not appear to challenge the SMP restoration goals or objectives – the focus of their criticism is on the perceived lack of "teeth" to give some reasonable assurance that implementation will actually occur.

The Board agrees that the petitioners have raised a valid concern. The high rank order importance of shoreline restoration demands that policies must be fashioned in such a way as to give a high degree of confidence that, over time, measurable improvement of ecosystem functions will occur. This means that future development in the shoreline areas must halt further ecosystem degradation (*i.e.*, no net loss), a concept embodied in SMP Objective 1.[62] It also means that affirmative steps must be taken to **assure** that actual improvement of ecosystem conditions is achieved on an ecosystem-wide basis, and there must be some way to measure successful implementation over time.

Without (1) specific timetables and benchmarks to measure system improvements, (2) land use policies that assure that shoreline development result in no net loss of ecosystem functions,[63] and (3) credible commitments of public resources to restoration purposes on public lands, even the most scientifically sound restoration inventory and policies ring hollow. The Board concludes that the total GMA/SMA statutory regime requires these three components as indispensable to a compliant restoration program. Upon remand, the Board looks to the City to take appropriate action directed to these ends.

3. Conclusions

Regarding the critical areas regulations that are incorporated into the SMP as shoreline management implementing regulations, and the separate shoreline regulations within the SMP, the Board concludes that it cannot allow these regulations that have not been reviewed and evaluated for consistency with the GMA's BAS requirements to stand as significant implementing tools for the SMP.

But for the critical areas/BAS error discussed, *supra*, the Board would find the following regarding the City's core scientific documents: 1) that the SEWIP complies with RCW 90.58.100 (1) and constitutes BAS [RCW 36.70A.172] in support of certain use designations established by the City's SMP; 2) that concerning the compensatory mitigation measures in the SOSEWIP, the Board does not have the same degree of confidence in concluding that the SOSEWIP constitutes BAS; and 3) regarding the actual regulatory measures to be applied within the various shoreline use designations, the Board again is not confident that it can conclude that the Pentec Report constitutes BAS.

Regarding restoration, the Board concludes that portions of the City's SMP contain goals, objectives, and policies
~~that~~ comply with the restoration requirements of the total GMA/SMA statutory scheme. The Board also concludes that the inventory, specifically the SEWIP, that supports the SMP restoration goals, objectives and policies meet the standard of best available science. However, the Board concludes that the City's SMP's restoration provisions do not comply with the total GMA/SMA statutory scheme because they do not assure that ecosystem restoration will actually occur. In order to do so, the SMP needs to include: (1) specific timetables and benchmarks to measure system improvements, (2) land use policies that assure that shoreline development result in no net loss of ecosystem functions and (3) credible commitments of public resources to restoration purposes on public lands.

B. DEVELOPMENT STANDARDS AND PROCEDURES[64]

The following discussion addresses Legal Issues Nos. 2, 3, 4, 6, 13, 14, 15 and 16, which are set forth in full at Appendix D.

1. Applicable Law

The GMA provisions at issue under this heading include RCW 36.70A.020(8), and (10), RCW 36.70A.040(3), RCW 36.70A.172(1) and RCW 36.70A.060 and .060(2).[65] The SMA provisions at issue under this heading include RCW 90.58.020, RCW 90.58.090 and .090(4), RCW 90.58.100, RCW 90.58.110(1).[66] The WAC provisions at issue under this heading include 365-195-900 to 920.

2. Discussions and Analysis

The Board will examine in Section VI.C, *infra*, the degree to which SEWIP and SOSEWIP provide BAS support for the SMP designations. Here, the focus is on the development standards and procedures on which the City relies to meet its duties to "protect" its shoreline of state-wide significance and examines the science upon which these regulations are based. Those development standards are set forth in the SMP Conservancy Element at P. 3-30 to 3-42 and the SAO. SMP, p. 11

As noted above, the City must adopt its shoreline development regulations as critical areas supported by BAS. None of the development regulations contained in the SMP, nor the City's SAO, were adopted pursuant to the critical areas provisions of RCW 36.70A.172. Even if that were the case, the sole source of scientific support for the City's buffers appears to be the Pentec Report. As discussed, *supra*, the Board cannot conclude that this report constitutes BAS. Therefore, the development standards and procedures at issue have yet to be supported by BAS, and must be evaluated on remand in light of this fact.

The Board reiterates its understanding that the City has not represented that it has used BAS. Nevertheless, in view of the extensive effort the City has expended in devising its proposed regulatory scheme, the Board also is compelled to offer further comment. The City's fundamental approach to permitted uses and the total "development footprint" is predicated upon an elaborate development permission/ecosystem mitigation system. This approach permits intensive development in a number of the shoreline environments (*e.g.*, mixed use, industrial, urban maritime*)* on what appears to be a large scale. The development permission/mitigation system adopts specific "replacement ratios" and a system for "replacing" certain ecosystem

functions either off site or out of kind.

While the Board does not now rule on the GMA/SMA compliance of the "development footprint" or the specifics of the proposed "development permissions/mitigation scheme", due to the fundamental critical areas/BAS flaws discussed at length *supra*, the Board would caution the City against interpreting the lack of an independent finding about the footprint and the mitigation scheme to be tacit approval.

As discussed, *supra*, the SMP must assure that future development in shorelines of state-wide significance must halt further ecosystem degradation. Frankly, the Board is not persuaded by the information in this record that sound science supports ratios as small as the City proposes. Likewise, the Board will not reach the question of the administrative discretion afforded to city staff to adjust buffer sizes, but reminds the City that its comprehensive plan, including its implementing measures such as permit approval processes, must *assure* that there will be no net loss of ecosystem functions.

In defending its approach, the City understandably relied on a prior Board ruling in *Tulalip Tribes v. Snohomish County*, wherein the Board articulated the "no net loss" concept. That decision provided in part:

> The Board holds that the Act's **requirement** to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the values and functions of such ecosystems must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded *sparingly* and carefully for good cause, and in no case result in a net loss of the value and functions of such ecosystems within a watershed or other functional catchments area.

Tulalip Tribes v. Snohomish County, CPSGMHB Case No. 96-3-0029, FDO, January 8, 1997, at 11. (Underlining and strikethroughs in original omitted). Emphasis added.

The Board notes that the *Tulalip* decision was entered in 1997, two years before the 1999 listing of certain species of anadromous fish in the Puget Sound region as threatened. *See* FOF 4. Although the legislature's action integrating SMA into GMA occurred prior to *Tulalip*, the present case is the first time that this Board has described the total GMA/SMA statutory scheme with respect to ecosystem protection and restoration. Consequently, *Tulalip*, a GMA-only case, must be viewed in a significantly different light. For example, ecosystems of shorelines of state-wide significance must be "protected" and "restored." This clarifies that the words "must be maintained" in the *Tulalip* holding must be construed to mean that "such maintenance must be **assured**."

Moreover, local government must be mindful of the caution in *Tulalip* that the flexibility to allow localized impacts or even loss of critical areas should only be wielded *sparingly*. A regulatory scheme that uses such an approach in a wholesale fashion cannot be described as "sparing" use, and, given the ongoing controversy about the long-term viability of wetland replacement, would potentially place the ecosystem resource at an unacceptable risk of continued degradation.

In Section VI. B, *supra*, the Board has already concluded that the critical areas regulations that are incorporated into the SMP as shoreline management implementing regulations and the separate shoreline regulations, cannot stand as significant implementing tools for the SMP since they are not based upon BAS. Likewise, the separate shoreline regulation provisions (which rely upon the City's critical areas regulations, the SEWIP and SOSEWIP) for the Conservancy Element included in the SMP Update at 3-30 through 3-42 cannot stand, as they too must be based upon BAS.

3. Conclusions

The City never contended it amended its Critical Area regulations (City's SAO) as part of its SMP update. As discussed previously, this is a fatal flaw in the City's action. Consequently it is undisputed that the City's shoreline implementing regulations, including its critical areas regulations and the shoreline regulations in the SMP (*i.e.* SMP at 3-30 through 3-42), were not adopted as critical areas regulations pursuant to RCW 36.70A.060, nor were they supported by best available science pursuant to RCW 36.70A.172.

Moreover, the Board concludes that critical area regulations must assure no net loss of the functions and values of shorelines of state-wide significance. In this instance, the Board concludes that the City's SMP does not meet this duty.

Therefore, the Board concludes that the City's action was **clearly erroneous** and will be remanded for legislative action to correct this noncompliance.

C. SMP DESIGNATIONS

The following discussion addresses Legal Issues Nos. 1, 5, 8, 9, 10, 19 and 28, which are set forth in full at Appendix D.

1. Applicable Law

The GMA provisions at issue under this heading are RCW 36.70A.020(8), (9), (10), and (11), RCW 36.70A.035, RCW 36.70A.040(3), RCW 36.70A.060 and .060(2), RCW 36.70A.172

and .172(1).[67] The SMA provisions at issue under this heading are RCW 90.58.020, RCW 90.58.090, RCW 90.58.090(4), RCW 90.58.130, RCW 90.58.100(1), RCW 90.58.110(2).[68] The WAC provision at issue under this heading is WAC 173-26-200.

2. Discussion and Analysis

Much of the Petitioners' arguments under these legal issues focus on five of Everett's SMP designations in the Snohomish Estuary: (a) Maulsby Mudflats; (b) Snohomish River Mainstem; (c) Marshlands; (d) the Simpson-Lee site; and (e) Smith/Spencer Islands. Petitioners question whether the land use designations of these five areas adequately protect the shoreline[69] and follow the goals explicitly stated within the GMA and SMA.

To address the Petitioners' arguments regarding the designations *infra*, it is necessary to revisit the Board's conclusion that all "shorelines of state-wide significance" are critical areas, as defined by RCW 36.70A.030, are governed by RCW 36.70A.172 and .060. The Board's conclusion, *supra* [70], continued to establish that the SMP element of comprehensive plans and all development regulations that control shorelines of state-wide significance must utilize the scientific method derived from RCW 90.58.100 and RCW 36.70A.172 in the designation and protection of these critical areas.

Compliance with this requirement is a three-step process, first jurisdictions must gather BAS. Second, they must utilize their BAS in assigning use designations, and third, through development regulations, protect these critical areas (shorelines of state-wide significance). Specifically, RCW 36.70A.172 establishes that development regulations based on BAS are to be used to designate and protect (pursuant to RCW 36.70A.060) critical areas. " Development regulations" are defined as "the controls placed on development of land use activities by a county or city, including, but not limited to, zoning ordinances, critical area ordinances, shoreline master programs . . ." RCW 36.70A.030(7).

In turn, reading the GMA and SMA together, this process regarding utilizing BAS to designate and protect critical areas must be completed by establishing development regulations. These development regulations must work in conjunction with the provision of the SMA, that mandates the use preferences for all shorelines, (RCW 90.58.020) in order to preserve, enhance, protect and restore the shorelines of the state. Moreover, the use preferences, which establish the uses allowed on the shorelines are the first opportunity for the City to protect these critical areas.

Thus, the questions to be addressed when reviewing land use designations within an SMP include first establishing that BAS was gathered <u>and</u> utilized in developing municipality zoning

ordinances, critical area ordinances, shoreline master programs, and other development regulations. Then, it is necessary to review the land use designations to ensure their consistency with the use preferences established in RCW 90.58.020 and the charge to preserve, protect, enhance and restore the shorelines found in these two pieces of legislation.

To facilitate answering the questions stated above, and in turn determine if the five challenged land use designations within Everett's SMP Amendments meet the overall statutory GMA/SMA scheme, the Board analyzed the pertinent information in a step-by-step process relying heavily on the science provided by the City in its SEWIP. As the Board concluded *supra*, this document would satisfy and exceed the BAS requirement established in the GMA as well as the science requirement established in RCW 90.58.100 of the SMA.

Having determined that the City gathered BAS in the SEWIP, the Board must address whether the City utilized the SEWIP in making its land use designations, while following and utilizing the use preferences set forth in 90.58.020 to protect these areas.

The Board relied heavily on five key figures (maps) within SEWIP. The Board relied on the information regarding the Wetland Complex Wildlife Scores[71] and Wetland Complex Water Quality Scores of the various areas within the Snohomish Estuary[72]. In addition, the Board relied on the Snohomish Estuary Restoration Goals Criteria Questionnaire[73], and the SEWIP Complexes with Highest Potential for Tidal Restoration[74] and SEWIP Complexes with Highest Potential for Non-Tidal Enhancement[75]. Together these maps include the scientific inventory of the water and habitat quality of the various areas within the Estuary, as well as identify which areas are best suited for enhancement and restoration.

a. Maulsby Mudflats [*Urban Maritime Interim*]

The Maulsby Mudflats are the area west of Marine View Drive with a westward boundary of the Harbor/Pierhead Line. The approximate southern boundary is 9th Street[76] and the approximate northern boundary is just south of the most western point of Jetty Island.[77] The uses allowed in the Urban Maritime Interim designation include the following: aquaculture; boating facilities; commercial including: water-dependent, water-related, water-enjoyment; forest practices[78]; industry; log storage and rafting[79]; parking; recreational development; signs; solid waste collection facilities; transportation facilities; and utilities and utility facilities. SMP Table 5.1 Shoreline Use Table, at 5-2 to 5-3, at AR 211-213.

Petitioners argue that the designation of the Maulsby Mudflats as Urban Maritime Interim zone is inconsistent with the requirements of the GMA and SMA. Each of the petitioners argues that the Mudflats are of high value for birds and salmonids. In their arguments, the petitioners cite comments made by several agencies regarding the designation of the Mudflats. The Tribes point out that, "The National Marine Fisheries Service ("NMFS") asserted that any development resulting in loss to, or fragmentation of, the Maulsby Mudflats "may be an adverse modification of critical habitat, which is necessary for the survival and recovery of Puget Sound Chinook salmon."[80] Tribes PHB, at 9.

WEC states,

> Neither the City nor Ecology challenge WEC's charge that the Interim Urban Maritime Designation for the Maulsby Mudflats fails to give the highest level of protection to this extremely rare resource that provides extensive benefits to fish and wildlife and which Ecology (AR 7593-7601, 18032, 18070-71), NMFS (AR 1493), WDFW (AR 7602-06), and Puget Sound Water Quality Team all agreed was necessary. Ecology even concedes that the Petitioners are correct that the Maulsby designation could be problematic for the reasons Petitioners stated in their brief.[81]

WEC Reply, at 31.

In addition to echoing several of the arguments asserted by WEC and the Tribes, ESC also asserts that,

> Perhaps in response to the various agencies' vigorous opposition to the Urban Maritime designation, the Port requested that the designation be made temporary, by calling it "interim," and agreeing to further evaluate the designation as part of a subarea planning process. AR 18169. Although this request was granted and the designation is labeled as "interim," there is no mechanism to ensure that the subarea planning process will take place before a specific development proposal is made or, if such a planning process does take place, that it would be considered a further master program update subject to public review and opportunity for appeal.

ESC PHB, at 28.

The City supported use of subarea planning for the Mudflats by stating that, ". . . RCW 36.70A specifically recognizes subarea plans as a tool." Transcript, at 88. The City also clarified that, "... there are seven different owners in the EU. And that's, again, one of the things that lends itself to

subarea planning, because one of the big questions I showed you deal with the private property owners that are still in the mix there." Transcript, at 85.

During the Hearing on the Merits, the City responded at length to the assertion that "there is no mechanism to ensure that the subarea planning process will take place before a specific development proposal is made. . ." ESC PHB, at 28.

The City discussed the policies that were included in the SMP. "The first line of protection is something the City proposed early on, which is that they would not approve anything in the interim that foreclosed reasonable alternatives." Transcript, at 88-89. Counsel for WEC argued during the hearing, "what does reasonable alternative mean? Does it mean . . . the most protective category? *Id*. The City responded by citing the SEPA definition of "reasonable alternative," stating that "it must further the objective of the action you're taking." Interpreting this definition with the objectives of the management policies for Maulsby, the City indicated that it means to consider the full spectrum, development where it is appropriate, all the way to the "end of the spectrum." Transcript, at 89.

The City also discussed the Ecology policy that was included. The policy states, "we [Ecology] will use our authority under 401, section 401 of the Clean Water Act, we will use our authority under the Coastal Zone Management Act Consistency to make sure that there is no injury to the resources values of Maulsby." Transcript, at 90. The City contended that there was no likelihood of development in the Maulsby mudflat in the interim, arguing:

> Let's not forget that because it is subject to - - any development in the water is going to be a Corps [of Engineers] approval, but you also have the National Marine Fisheries Service joining the party. Bottom line is there is not going to be development in the swamp during the -- in the mudflat in the interim that has significant impacts, as we who have practiced in this area understand them to be after NMFS, Ecology, the Corps, WDFW weigh in, and they all will.
>
> Transcript, at 90-91.

The Board's review of SEWIP Figures 4.1, 4.2, 5.1, 5.2A and 5.2B for the Maulsby Mudflats does not lead it to conclude that the interim designation is inappropriate while the subarea planning occurs. Based on the entire record before it, the Board is satisfied that there are sufficient safeguards to protect the area from any inappropriate or environmentally detrimental development during the *interim* designation, while the subarea planning process takes place. This designation is consistent with the SMA (RCW 90.58.020).

b. Snohomish River Mainstem [*Urban Industrial*]

The Snohomish River Mainstem refers to the west side of the Snohomish River, beginning adjacent to the southwest point of Jetty Island and continuing along the south bank of the river to Hewitt Avenue, less a small area[82] (south west of Weyco Island). "The waterward boundary is the ordinary high water mark. The landward boundary is 200 feet from the ordinary high water mark."[83] The Urban Industrial designation assigned to this area in the City's SMP allows the following uses: aquaculture; boating facilities; commercial including: water-dependent, water-related, water-enjoyment, nonwater-oriented; forest practices[84]; industry; log storage and rafting [85]; parking; recreational development; signs; solid waste collection facilities; solid waste transfer facilities[86]; transportation facilities; and utilities and utility facilities. SMP Table 5.1 Shoreline Use Table, at 5-2 to 5-3, at AR 211-213.

Petitioners argue that the designation of the Mainstem of the Snohomish River as 'urban industrial' fails to protect "important aquatic resources"[87] and is inconsistent with the policy of the SMA by failing to recognize and protect the Mainstem as it is the essential migratory corridor for salmonids.[88] They also contend that the designation fails the SMA policy of "optimum implementation" for strong protection and restoration for those sections of the Mainstem where ecological functions remain or have potential for recover, planning for public access to publicly owned properties and limiting industrial designation to areas that may be needed for projected growth.[89] ESC PHB, at 36.

Ecology's response to the petitioners' argument, adopted by the City,[90] defends the designation of the Mainstem of the Snohomish River as urban industrial states. Ecology states "This argument ignores the reality that this area has been, and will continue to be in the future, used by heavy industry. *See* SMP, pp. 4-11, 4-12. The vision statement for this area developed by the SMP Advisory Committee states:

> This traditionally heavy manufacturing area should continue to be used for heavy industrial purposes. Lands adjacent to the river . . . shall be reserved for water-dependent uses and water related activities while other lands within the area may be used for non-water dependent uses.

Ecology PHB, at 10, *citing*, SMP, pp. 4-11, 4-12.

A review of the key figures from SEWIP discussed *supra* by the Board, shows that the SEWIP supports the designation of the Mainstem as "urban industrial." The Wetland Complex Wildlife Scores and Water Quality Scores[91] for the Mainstem area are low, and the SEWIP figures showing the areas for high potential tidal restoration and non-tidal enhancement[92] show no potential along the Mainstem area.

In addition, as the Board concluded, *supra*, some degree of development will continue to be permitted within the shorelines of the state, particularly within areas where a strongly developed *land use pattern*[93] of such uses exists. Here, the Board finds that the existing *pattern* of water-oriented development uses along the Snohomish River Mainstem (*e.g.* port, marina, and water dependant industry facilities) is permitted by 90.58.020. Because this portion of Everett's shoreline is among the most substantially altered, it has relatively less importance for shoreline restoration and thus is an appropriate location to respond to the economic development objectives of RCW 36.70A.020(5) and 90.58.100(2)(a). This means that continued operation, and even redevelopment[94] of such committed sites (*i.e.*, lands where such an intensive pattern exits) is consistent with the SMA (RCW 90.58.020). Nevertheless, even in such "degraded" environments, the SMA's preservation/restoration imperative applies because even impaired habitats continue to provide ecosystem functions. For example, the record shows that the Snohomish River is a fish migration corridor.

The Board finds that the City's designation as Urban Industrial for the Snohomish River Mainstem was appropriate and is consistent with the SMA (RCW 90.58.020). The well-established and prevalent pattern of industrial uses along the Mainstem of the Snohomish River, and the science used to support this designation indicates a relative lack of restoration potential in this area. *But for* the fact that the City did not make this designation pursuant to the GMA's "critical areas/BAS" requirements, the Board would find that this designation complies with the total statutory scheme of the GMA/SMA.

c. Marshlands [*Urban Conservancy* and *Urban Conservancy Recreational*]

The Marshlands area refers to all of the Park and Agriculture zoned floodway/floodplain south of Lowell and the Snohomish River within the Everett City limits. The east boundary is the City limit, "the western boundary is 200 feet from the edge of the floodplain or the boundary with the Shoreline Residential designated properties, whichever is less." The majority of the Marshlands is designated Urban Conservancy Recreational, which allows the following uses: agriculture; boating facilities; water-dependent, water-related, water-enjoyment, and nonwater-oriented

commercial permitted only in Public Parks for concessions; forest practices permitted only in agriculture zones; conditional use of industry permitted only in agricultural zones for activist such as food processing; parking; recreational development; signs; solid waste collection facilities; transportation facilities; and utilities and utility facilities. SMP Table 5.1 Shoreline Use Table, at 5-2 to 5-3, at AR 211-213.

The remaining area of the Marshlands, specifically, the land east of Rotary Park and north of Lowell-Larimer Road, the Spane wetland mitigation site, and the forested marsh are designated Urban Conservancy.[95] The Urban Conservancy designation allows the following uses: recreational development limited to only minor public access improvements; signs used for only interpretive and public access; utilities and utility facilities, and transportation faculties - conditional on a use permit for expansion of the railroad. SMP Table 5.1 Shoreline Use Table, at 5-2 to 5-3, at AR 211-213.

Petitioner ESC speaks to the City's SMP designation of the Marshland area:

> The Marshland area is a large floodplain area, substantial portions of which have been used for agriculture after diking and control of tidal influence. It has great potential for restoration. The SMP update designates most of the Marshlands area as Urban Conservancy Recreational, with the balance designated as Urban Conservancy. Update (Att. D) at 4-23. As described below, Everett has a vision of intensive recreational development in the Marshlands area that is facilitated by this designation. The designation is inconsistent with the SMA because it puts recreational use above restoration of the natural environment and because it does not represent 'optimum implementation' of use preferences and policies for shorelines of state-wide significance. RCW 90.58.020 and .090(4). It also makes no sense because of the area's high susceptibility to flooding.

ESC PHB, at 33.

Petitioner WEC adds:

> The Marshland area prior to conversion for agricultural uses, under conservative estimates, 'would have provided more rearing capacity for Coho and Chinook than the total rearing capacity of all remaining off-channel habitat within the Snohomish River floodplain between the head of the Ebey Slough and the confluence of the Snoqualmie and Skykomish rivers.' *See Ecosystem Restoration Opportunities in the Snohomish River Valley, Washington*, dated February 2001, p.8, Am. Ind. Exh. 8. A significant first step to restoring the Marshland would be to retrofit (or remove) a

> pump station that blocks access to habitat within the floodplain and twenty-two small streams and tidegates to allow fish access to adult and juvenile salmonids. Dikes could also be breached along the Snohomish River, and Wood Creek could be placed back in its historic channel. *Id.* The SMP has this area designated as 'Urban Conservancy – Recreational,' which allows golf courses and active recreation facilities on this land. The Puget Sound Water Quality Action Team recommended restoration of tidal influence to as much of the area as possible given its potential for restoration. *Letter from Puget Sound Water Quality Action Team to Honorable David Simpson, dated February 21, 2001*, p. 4-5. AR 7611-7616."

WEC PHB, at 75.

Respondent Department of Ecology replies that the Urban Conservancy – Recreational designation for the Marshlands site is consistent with the SMA because it fosters public access.

> ESC argues that the designation for the Marshlands allowing recreational uses is not optimal implementation of the SMA because it precludes a significant restoration opportunity inherent in this site. ESC Brief, at 34. The SMA, however, places a substantial priority on using shorelines for public access and enjoyment. The designation recognizes that state-wide interest, preserves the natural character, and results in long term benefits in terms of public access and use, and conservancy of the ecology of the area. *See* RCW 90.58.020 (1) – (6). The high quality wetlands on the site are protected by the Urban Conservancy designation and the restrictive buffers required by Ecology in its approval document. AR 1063; *see also* SMP, Figure 4.20."

Ecology PHB, at 8.

Everett responds:

> First, ESC's argument that it is illegal to put recreational use above restoration of the natural environment fails to acknowledge that the SMP designates the Marshland's highest quality wetlands as Urban Conservancy, rather than Urban Conservancy Recreation. Therefore, the City has applied designations to specific areas of the Marshlands that reflect the resource values of those areas. This is precisely the type of coordinated planning required by RCW 90.58.020."

City PHB, at 30.

Both Respondents pointed out that the Salmon Overlay (SOSEWIP) rated restoration of the

channel salmonid habitat functions as technically difficult at this site, due to existing infrastructure. AR 1298. A power line, the railroad, and operation of the Marshland pump station were specifically named.

Petitioner ESC rebuts the respondents position, arguing:

> Designation of the Marshland area as Urban Conservancy Recreational to facilitate an extensive recreational complex, anticipated to include a golf course, ball fields, volleyball courts, a climbing rock, an archery range, a BMX track, a skateboard park, picnic sites, an off-leash dog area, an amphitheater, and other constructed amenities, is even more short-sighted. Att. I. It is likely that all of these improvements would be literally wiped out by floodwaters within a matter of years. AR 4593; 5064; 5067 – 68; 5320; 5635; 6473. The Marshland area presents extremely promising restoration potential that would be substantially lost or ignored under the Update's designation. Att. G at 8; Att. O at 4; AR 18031; 18043."

ESC Reply, at 11.

The Board takes note of the use considerations of the SMA spelled out in RCW 90.58.020. While public access and recreation rank fifth and sixth in the hierarchy of use preferences, natural resource protection ranks second. Preservation and restoration of fish and bird habitat in the Snohomish River estuary is important to help ensure the continued long term viability of the Snohomish River basin populations of salmonids and the multitude of bird populations that depend on the estuary for crucial physiological adjustment between salt and fresh water environments or for nesting habitat.

Review of the key SEWIP figures leads the Board to conclude that the City has appropriately designated the highest quality wetlands in this area as Urban Conservancy. However, the majority of the Marshlands has been designated Urban Conservancy Recreational. The SEWIP figures do not support the "urban conservancy recreation" designation for this portion of the Marshlands area. The Board notes that much of this area is in public ownership and conceptual plans for East Everett Park (Attachment I of ESC's PHB) indicate that it would be an extensive complex of recreational facilities and additional constructed amenities. The Board observes that none of the activities proposed for the East Everett Park are strictly water or shoreline dependent. Consequently, the Board finds that the Urban Conservancy Recreation designation for the Marshlands **area is not consistent with the SMA (RCW 90.58.020)**.

d. Simpson [*Urban Multi-use*]

The Petitioners are challenging the designation of the central 45 acres of the Simpson Property,

asserting that the land use designation assigned by Everett's SMP "is contrary to the policy of the SMA and clearly in error. The central 45-acres are owned by the City of Everett and should be used for the public's benefit in a manner consistent with the high ecological value of the surrounding wetlands." ESC PHB, at 29.

The disputed area of the Simpson site, the central 45 acres, known as the development pad, was designated by Everett's SMP as "urban multi-use," while much of the approximately 90 acres surrounding the pad is designated with the much more restrictive designations "urban conservancy" and "urban conservancy recreational." The uses allowed on the central 45 acres under the Urban Multi-use designation include: aquaculture; boating facilities; commercial including: water-dependent, water-related, water-enjoyment, nonwater-oriented; forest practices [96]; industry[97]; parking; recreational development; residential development; signs; solid waste collection facilities; transportation facilities; and utilities and utility facilities. SMP Table 5.1 Shoreline Use Table, at 5-2 to 5-3, at AR 211-213.

The City stated that the so-called central 45 acres or the development pad "is comprised of over 650,000 cubic yards of fill material it is not a wetland, or any other critical area." City PHB, at 31. The City went on to point out that the island of fill material is beyond 200 feet from the high-water mark of the Snohomish River. *Id.* at 30. Based on this second statement, the Board must conclude that the development pad portion of the Simpson site is outside the jurisdiction of the SMA. Additionally, review of the SEWIP figures provides little support for any designation, since it is not evaluated in several of the maps. This too supports the conclusion that the site is outside the jurisdiction of the SMA.

Nevertheless, the Board understands that the City's restoration strategy includes certain sites with restoration potential, such as the adjacent wetland area to the north of the central 45-acre island Simpson property.[98] Therefore, it would be appropriate to describe the designation of the central 45 acres as a policy affecting lands within the City's Shoreline Plan Element.

e. Smith/Spencer Islands [*Urban Mixed Use Industrial*]

The areas of Smith and Spencer Islands that the Petitioners are challenging include the areas of both islands located "west of the I-5 city limits and north of the City-owned Langus Riverfront Park, but excluding the Port of Everett mitigation site."[99] The waterward boundary is the ordinary high water mark. The western boundary is the City's Urban Growth Boundary." SMP 4.6 Area Designations, at 4-13, AR 135. The uses allowed in these areas under the "urban mixed use industrial" designation assigned by the City's SMP include: agriculture; aquaculture; boating

facilities; commercial including: water-dependent, water-related, water-enjoyment, nonwater-oriented; forest practices[100]; industry; log storage and rafting[101]; parking; recreational development; signs; solid waste collection facilities; conditional use solid waste transfer facilities; transportation facilities; and utilities and utility facilities. SMP Table 5.1 Shoreline Use Table, at 5-2 to 5-3, at AR 211-213.

Petitioners challenge of the Urban Mixed Use Industrial land use designation for sections of the Smith/North Spencer Islands asserts that this designation violates "the policies of the SMA and GMA because it ignores the long term, state-wide interesting the restoration potential of these sites." ESC PHB, at 37 (citation omitted).

The Tulalip Tribes echoed ESC's argument identifying several restoration opportunities on both Smith and North Spencer Islands, among there are the "most promising tidal marsh restoration sites in the [emergent forested transition] zone." *Id*. at 37. The Tribes continue by asserting that the area is inappropriate for a development-oriented designation because they lack adequate surface access and have scant infrastructure service. *Id*.

WEC added to this argument that by maintaining the section of West Smith Island along Steamboat Slough is the largest undeveloped diked property within the lower estuary (citation omitted). "It is one of the most promising tidal marsh restoration sites in the emergent forested transition zone because many of the other sites are substantially constrained . . ." WEC PHB, at 54. At another section of West Smith Island, there is an unnamed slough that historically bisected Smith Island connecting Union Slough and the Snohomish River. Restoring tidal action to an undeveloped site adjacent to the channel mouth on the northern end would increase habitat quantity and quality. *Id.*

ESC asserts that, "It would better serve the state-wide public interest in conservation, including particularly restoration for the benefit of salmon recovery, to protect more, if not all, of Smith and North Spencer Islands with a Conservancy or other restoration-oriented designation, rather than to designate it for industrial development." ESC PHB, at 38.

Everett replies that, "The City's designations for Smith and North Spencer Island reflect detailed attention to the SEWIP and Salmon Overlay; consideration of historic, present, and future potential uses; and restoration opportunity. AR 1270-1276. Ecology based its decision to approve these designations on the City's detailed explanation of four subareas within these islands and how the City determined the designation for each of these subareas." City PHB, at 31-32.

Arguing that the challenged designations for Smith and North Spencer Islands are appropriate, Ecology states that the "Petitioners do not explain why they are erroneous, except to argue that

the area lacks infrastructure and has restoration value." *Id.* at 10.

This statement made by Ecology demonstrates that although the City gathered and utilized BAS in making this land use designation, the City did not follow though to ensure that its land use designations not only followed the use preferences set forth in 90.58.020, but furthered the charge of the GMA/SMA statutory scheme – to preserve, protect, enhance, and restore the shorelines.

Based on a review of the record, although the City's primary focus was on buffer requirements, it is clear that the City made a thorough inventory of these areas. The Board's review of the key figures within SEWIP, show that areas of both Smith and North Spencer Islands have medium and high scores for wetland complex wildlife and water quality.[102] The figures also reflect that both contain high potential for tidal restoration and non-tidal enhancement[103].

The Board finds that the City's designation of a blanket Urban Mixed Use Industrial for the parts of Smith and North Spencer Islands that are within the city limits ignores areas of sensitive and important habitat. The wetlands with in this area are rated well for wildlife habitat and restoration value, these areas provide critical wildlife functions within the central part of the Snohomish Estuary that are not present along the west bank of the river. New and additional industrial uses would adversely impact this habitat, if not displace these values altogether.

As the Board discussed in its analysis of the land use designation of the Mainstem, some degree of development will continue within the shorelines of the state, particularly within areas where a strongly developed *land use pattern* of such uses exists, including areas on both Smith and North Spencer Islands. However along with continued operation comes redevelopment[104] of committed sites that is consistent with the SMA. As part of any redevelopment, the City is required, to some degree, to take affirmative steps toward restoring the functions of a specific site or the overall ecosystem.

To be consistent with the policy of the SMA and the specific preferences for uses in shorelines, the use designations on Smith and North Spencer Islands should be further refined. Existing uses and committed lands should be designated appropriately – consistent with the SMA, GMA and the overall statutory scheme. At the same time, the refinement of the land use designations in this area should utilize the information gathered by the City to identify both publicly and privately owned lands with restoration and enhancement potential.

With regard to privately owned lands, the City can assign a land use designation that limits the number of new permitted uses, while still ensuring that the designation does not violate any Constitutional takings provisions. *See HEAL*. In addition, while the City cannot force private

citizens to take part in restoration, it can encourage and reward landowners who engage in restoration efforts on their property through a variety of incentive programs.[105]

As for publicly owned lands, the City not only has to follow the use preferences in RCW 90.58.020 and take steps to further the overarching statutory goals, but must also comply with the capital budget requirements set forth in RCW 36.70A.120.[106] *See* Figure 3, following Appendix E. In assigning land use designations under its SMP, the City has the opportunity to meet these requirements and further the statutory goals. For Smith and North Spencer Islands, the City, in following use preferences one and three, long-term over short-term goals and state interests over local, must assign a land use designation that limits the number of permitted uses that may have a negative impact on the ecosystem. By refining the designations applied to these areas, the City could meet all the above stated requirements and the overall health, functionality, and sustainability of its natural resources.

The Board finds that the land use designation of urban mixed use industrial for Smith and North Spencer Islands is inconsistent with the policies and requirements of the SMA (RCW 90.58.020) and the SMA/GMA statutory scheme. The designation permits too many uses in areas that have high complex wetland and wildlife scores, as well as tidal restoration and non-tidal enhancement potential. The designation does not further the protection, preservation, enhancement, and restoration of the shorelines. Instead, it poses possible degradation of these critical areas.

3. Conclusions

The Board concludes that the petitioners have failed to carry the burden of proof to show, by clear and convincing evidence, that the designations of “Urban Maritime Interim” for the Maulsby site, “Urban Conservancy” for the Marshlands site, or “Urban Industrial” for the Snohomish River Mainstem are inconsistent with the policy of RCW 90.58.020. The Board concludes that the petitioners have carried the burden of proof to show, by clear and convincing evidence, that the designations of “Urban Conservancy Recreational” for the Marshlands site and “Urban Mixed Use Industrial” for the Smith/Spencer Islands site are inconsistent with the policy of RCW 90.58.020. Finally, the Board concludes that the Simpson site in not within the jurisdiction of the SMA.

D. NATURAL ELEMENT and PUBLIC ACCESS ELEMENT

Petitioners challenge the City’s update for lacking a natural element [Issue 10 – briefed by WEC [107]] and public access element [Issue 17 – briefed by ESC[108]].

Issue 10. Is the update inconsistent with the SMA, RCW 90.58.020 and RCW 90.58.100, and applicable guidelines for failing to designate as "natural" or otherwise protect from development those shorelines deserving a natural designation?

Issue 17. Is the update inconsistent with the SMA, RCW 90.58.020 and RCW 90.58.100, and applicable guidelines and RCW 36.70A.020(9), because it fails to provide a shoreline public access plan with identified shoreline public access sites?

1. Applicable Law

RCW 90.58.100(2) specifies the "elements' to be included in the shoreline master program, it provides in relevant part:

> The master programs shall include, where appropriate, the following:
> (a) An economic development element. . .
> (b) *A public access element*. . .
> (c) A recreation element. . .
> (d) A circulation element. . .
> (e) A use element. . .
> (f) *A conservation element for the preservation of natural resources, including but not limited to scenic vistas, aesthetics, and vital estuarine areas for fisheries and wildlife protection*;
> (g) An historic, cultural, scientific and educational element. . .
> (h) An element that gives consideration to the state-wide interest in the prevention and minimization of flood damages; and
> (i) Any other element deemed appropriate and necessary to effectuate the policy of this chapter.

(Emphasis supplied).

RCW 36.70A.020(9), the GMA's open space and recreation goal, provides, "Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities."

2. Discussion and Analysis

a. <u>Natural Element</u>

WEC argues that "The SMA was designed to protect the shorelines of the state "as fully as possible" (citation omitted) and "preserve the natural character of the shoreline" and "protect the

resources and ecology of the shoreline" indicate a high priority for the protection of natural environment (citing RCW 90.58.020). WEC PHB, at 48. WEC then construes the policy provisions and use preferences as mandating a "natural element" wherein protection and preservation of natural areas are spelled out within a master program. Further, specific designations given in the SMP do not adhere to protection and preservation of the natural environment. WEC PHB, at 49-58.

The City argues that: 1) many of the City's shorelines are "altered" and no longer in a natural state; 2) *neither* RCW 90.58.020 *nor* .100, *nor* the invalid SMA guidelines establish any obligation for the City to designate any areas as "natural;" and 3) the update's designations (conservancy) place between 3,000 and 4,000 acres in protective categories. City Response, at 40-42. Ecology adds that their comments [on the update] "did not recommend a natural designation, but instead recommended a conservancy designation. [Which the City ultimately adopted.] Ecology PHB, at 10-12.

The Board agrees with the City and Ecology. RCW 90.58.100 does not obligate the City to include a "natural element" within its SMP. Further, the Update includes a "Conservation Element" that "addresses the protection, preservation, enhancement and restoration of Everett's natural shoreline resources, including scenic vistas, parkways, wetlands, estuarine areas, fish and wildlife habitat, beaches, geologically hazardous areas and other valuable natural and aesthetic features." SMP Update, Index 1-394, at 3-25. For all intents and purposes, the City's "conservancy element" encompasses the "natural element" attributes that Petitioners take issue with. Further, the City uses "aquatic," "aquatic **conservancy**," "urban conservancy" and "urban conservancy recreational" to designate appropriate use categories for different areas within this broader "conservancy" label. Elsewhere in this Order the Board discusses the parameters of the City's duty to protect, preserve, enhance and restore shorelines of the state. Nonetheless, **the Board concludes that Everett is not required to include a "natural element" in its SMP update; further, the City's SMP update, which includes a conservancy element and conservancy use designations, complies with the master program "elements" required by RCW 90.58.100 and .020.**

b. <u>Public Access Element</u>

ESC argues that the SMP update does not comply with the SMA's public access requirements "because it makes no provision for access to a substantial portion of the public shoreline property owned by Everett and the Port of Everett and because it includes no cogent plan for improving or expanding public access." ESC PHB, at 44. Further, ESC contends "Improved public access is . . . held hostage by unspecified future development proposals, with the result that there can and will be no improved access unless development in the shoreline area is given a green light. The public access element includes no affirmative public access plan to accomplish public access

goals or objectives with respect especially to publicly owned shoreline areas or otherwise. ESC PHB, at 45.

In response, Ecology states, "Petitioners argue that the SMP [update] does not provide for sufficient public access because it relies on a permit-by-permit approach rather than an overall public access plan. Petitioners, however, fail to consider the difficulties inherent in mandating public access to private property. Petitioners also appear to be inconsistent in demanding greater public access while at the same time criticizing some of the public access provisions in the SMP [update] because of the impacts upon habitat. Ecology PHB, at 29. Ecology then cites to specific SMP provisions (SMP update, Section 3.7) that it contends, comply with the requirements of RCW 90.58.100. Ecology PHB, at 29-31. Ecology also notes that the "urban conservancy recreation" designation addresses Petitioners concerns. Ecology PHB, at 8. The City joins Ecology's argument and further argues that the City "identifies several public access plans that already exist and notes that the City will be updating and incorporating them into our plan." City's PHB, at 68.

In reply, ESC suggests "To ensure that public access requirements are satisfied, the Board should mandate that a comprehensive public access plan be incorporated into or appended to a master program so that it can be subject to review as part of the master program." ESC Reply, at 25.

The Board notes that the SMP update includes a "Public Access Element," Section 3.7, at 3-16 through 3-23. An Objective within this element provides:

> Develop (a) citywide public access plan(s) that identifies(y) potential shoreline public access project such as park acquisition and development; observation and view points; interpretive displays for areas of significant historic, cultural, educational, or scientific value; trails, including trails connecting public access areas; and other appropriate means of providing public access to the shoreline. The plan(s) should include a list of public access improvements and design standards that provide direction for public and private improvements. Adopt the plan as an element of the Comprehensive Plan. Include appropriate public improvements in the Capital Facilities Element of the Comprehensive Plan.

SMP update, Section 3.7, at 3-16 to 3-17. This provision, coupled with the City's response, essentially provides the relief requested by ESC. The City has committed to identifying shoreline public access improvements and incorporating them into its GMA Comprehensive Plan and including appropriate improvements in the Capital Facilities Element of the Comprehensive Plan. These actions would be subject to Board review. Consequently, **the Board concludes that the SMP update includes a "public access element" as required by RCW 90.58.100, and the City has committed to including specific shoreline public access improvements in the**

Capital Facilities Element of its Comprehensive Plan.

3. Conclusions

The City is not required to include a "natural element" in its SMP update; further, the City's SMP update, which includes a conservancy element and conservancy use designations, complies with the master program "elements" required by RCW 90.58.100 and .020. The Board concludes that the Petitioners have failed to carry the burden of showing that the City's action and Ecology's approval of this portion of the Update is inconsistent with RCW 90.58.020.

The Board concludes that the SMP update includes a "public access element" as required by RCW 90.58.100, and the City has committed to including specific shoreline public access improvements in the Capital Facilities Element of its Comprehensive Plan. Neither the City's approach, nor Ecology's approval of this portion of the Update is inconsistent with RCW 90.58.020.

E. TREATY RIGHTS

Issue 27. Is the update inconsistent with RCW 90.58.350, because it fails to properly consider and protect rights established by the Tribe's treaty with the United States?

1. Applicable Law

RCW 90.58.350 provides, "Nothing in this chapter [Shorelines Management Act] shall affect any rights established by treaty to which the United States is a party."

2. Discussion and Analysis

The Tribe acknowledges "[The Board] does not interpret or determine the scope of the Treaty of Point Elliot." However, the Tribe contends that RCW 90.58.350 means that, "[The SMP update] cannot impede, and in fact must promote, salmon habitat preservation, restoration and enhancement." The Tribe further contends that the update "adversely" affects the Tribe's fishing rights. Tribes' PHB, at 32-33.

The City responds that the Tribe has failed to demonstrate that the SMP update interferes with any of the Tribes usual and accustomed fishing areas, and that until a specific project level proposal is presented, it is practically impossible to determine any affect. Additionally, the City notes that "the Tribes well know that the courts have not clearly ruled on what obligations the federal government has with regard to habitat protection. The Tribes are pursuing this issue in

federal court litigation, but it is completely premature to argue that it is established law." City's PHB, at 68-69.

Ecology argues that "Because the SMP [update] establishes salmonid recovery as a goal, and it s establishes mitigation and restoration requirements to achieve salmonid recovery, it does not impair tribal fishing rights." Ecology PHB, at 32.

There is no question that this Board **does not** interpret or determine the scope of any tribal treaty rights established in any treaty; this question is simply beyond the Board's jurisdiction. Whether or not a right to habitat protection exists is not for this Board to decide. However, the Board notes that, on a general level, the City's SMP update does provide for habitat restoration. Further, as the City notes, until a project proposal is presented to the City, the proposal's affect on habitat cannot be ascertained. The Board agrees with the City and Ecology. The Tribe has failed to meet its burden of proof on this issue.

-

3. Conclusion

Regarding whether the SMP update "adversely affects" the Tribes fishing rights, the Board concludes that the Tribe has **failed to meet its burden of proof** on this issue.

F. COMPLIANCE WITH APPLICABLE GUIDELINES

Issue 7. For all the above stated issues [issues 1-6], is the Update inconsistent with any applicable guideline and/or factual findings and conclusions of law made by Ecology during the promulgation of previous shoreline guideline amendments, and therefore inconsistent with the SMA?

Issues 7 though 19 and 28 also refer to any DOE "applicable guidelines" for the SMA. These issues are included in the following discussion.

1. Applicable Law

RCW 90.58.060 provides in part:

> The department [of Ecology] shall periodically review and adopt guidelines consistent with RCW 90.58.020, containing the elements specified in RCW 90.58.100 for:

(a) Development of master programs for regulation of the uses of shorelines; and

(b) Development of master programs for regulation of the uses of shorelines of state-wide significance.

2. Discussion and Analysis

The "applicable guidelines" referred to in Legal Issues Nos. 7 through 19 and 28 are the WACs adopted by the Department of Ecology pursuant to RCW 90.58.060. As noted, *supra*, the Guidelines adopted by Ecology as Chapter 173-26 WAC were invalidated by the Shoreline Hearings Board, and the preceding Guidelines of WAC 173-16 were repealed by Ecology. Therefore, there are no "Applicable Guidelines" in effect at the present time.[109]

3. Conclusions

The Board concludes that there are no "applicable guidelines" pursuant to RCW 98.58.060. Therefore, those portions of Legal Issues Nos. 7 through 19 and 28 that allege a noncompliance with "applicable guidelines" of the SMA, are **dismissed.**

G. ECOLOGY'S COMPLIANCE

The following discussion addresses Legal Issues Nos. 1 through 19, 22, 24, 25, 27 and 28, which are set forth in full at Appendix D.

The focus of the Board's review throughout this Order has been whether the City of Everett's adoption of its Shoreline Master Program amendments comply with the "total statutory scheme" of the GMA and SMA. Ecology's approval of the SMP Update occurred pursuant to RCW 90.58.090. "A master program or amendment to a master program takes effect when and in such form as approved or adopted by the department." RCW 90.58.090(4).

As noted in Section III of this Order, the Board applies a different standard of review for Ecology's action of approving a Shoreline Master Program or amendment. "[T]he board shall uphold the decision by the department unless the board, by clear and convincing evidence, determines that the decision of the department is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines." RCW 90.58.190(2).

2. Discussion and Analysis

In previous sections of this Order, the Board has determined that the City of Everett has failed to meet three fundamental duties of the GMA/SMA total statutory scheme. The first is a duty to recognize that all Shoreline Master Program policies and regulations for "shorelines of state-wide significance" are also critical areas policies and regulations and thus are subject to the substantive requirements of the Growth Management Act, including the use of Best Available Science in protecting the function and values of critical areas and giving special consideration to conservation and protection measures necessary to preserve or enhance anadromous fisheries. The second is a duty to adopt critical areas regulations for shorelines of state-wide significance that will *assure* no net loss of the functions and values of shoreline ecosystems. The third duty is to adopt shoreline policies that through their implementation will *assure* actual restoration, over time
, of ecosystem values and functions, including those necessary to sustain anadromous fish. These deficiencies are essentially beyond the scope of Ecology's review and approval process under the SMA. Consequently, the Board need not, and will not, reach the question of whether Ecology's "approval" of these aspects of Everett's SMP was consistent with RCW 90.58.020.

However, Ecology's approval of the use designations for the Marshlands (Urban Conservancy Recreational), and North Spencer and Smith Islands (Urban Mixed Use Industrial) is not consistent with the policies of RCW 90.58.020.

3. Conclusions

The Board concludes that Ecology's approval of the use designations for the Marshlands (Urban Conservancy Recreational), and North Spencer and Smith Islands (Urban Mixed Use Industrial) is not consistent with the policies of RCW 90.58.020.

viI. <u>invalidity</u>

The Board has found that Everett's Shoreline Master Plan Amendments do not comply with various provisions of Chapter 36.70A. RCW and Chapter 90.58 RCW, and has remanded them to the City for appropriate legislative action. Pursuant to RCW 36.70A.302 and the Board's Rules, the Board may, upon request of a petitioner, or upon its own motion, enter a determination of invalidity for noncompliant actions. None of the petitioners, either in their PFRs or their pleadings, requested that the Board enter such a finding.

With a sincere respect both for the magnitude and quality of the City's accomplishments thus far, as well as the work that remains to be done, the Board concludes that a determination of

invalidity is not appropriate. The Board has given the City the flexibility to take the time needed to achieve complete compliance with the GMA/SMA total statutory scheme, and the Board is hopeful that the City will return as soon as practical with the needed legislative cures to the errors identified in this Order.

vIIi. order

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1. Everett's adoption of amendments to its SMP by Ordinance Nos. 2600-02, 2812-01, and 2512-01, **does not comply** with the requirements of RCW 36.70A.172 and RCW 90.58.020 and **was not guided by** RCW 36.70A.020(8), (10) and (14); the City's action was **clearly erroneous.**

2. Ecology's approval of Everett's SMP with respect to the designations for the Smith/ Spencer and Marshlands areas was **not consistent** with the policy of RCW 90.58.020.

3. The Board **remands** the SMP Update to the City of Everett to take necessary legislative action to comply with the requirements of the GMA and SMA as set forth in this Order and to submit its subsequent revised SMP Update to the Department of Ecology for review and approval pursuant to the SMA.

4. The Board establishes **4:00 p.m.** on**, July 9, 2003,** as the deadline for the City of Everett to take legislative action to bring Ordinance Nos. 2600-02, 2812-01, and 2512-01 into compliance with the requirements of the GMA and the SMA as interpreted in this Order.

5. By **July 23, 2003**, at **4:00 p.m**., the City shall submit to the Board, with a copy to the other parties, an original and four copies of its Statement of Actions Taken to Comply (the **SATC**). Attached to the SATC shall be a copy of any legislative action taken in response to this Order.

6. By **July 30, 2003**, at **4:00 p.m.**, Petitioners shall submit to the Board, with a copy to the City, an original and four copies of any Response to the SATC.

7. By **August 5, 2003**, the City shall submit to the Board, with a copy to the other parties, an original and four copies of any Reply to the Responses to the SATC.

8. The Board schedules a **Compliance Hearing** in this matter for **10:00 a.m.** on **August 22, 2003**. The Compliance Hearing will be held in the building conference room on the ground

floor of the Bank of California building, 900 Fourth Avenue, in Seattle.

9. The Board concludes that this case is of unusual scope and complexity and that the City may need more than the typical 180 days to achieve compliance. Therefore, pursuant to RCW 36.70A.300(3)(b), the Board invites the City to propose an Alternative Compliance Schedule (**ACS**), provided that in no case will the date for compliance be later than December, 2004. If the City wishes to propose an ACS, it shall submit a copy to the Board, together with a Memorandum in Support of ACS, with a copy to all parties, by no later than **March 31, 2003**. Any party wishing to comment on the Alternative Compliance Schedule may submit a Comment on the ACS to the Board, with copies served on all other parties, within two weeks of the filing date of the ACS. The Board will respond to the proposed ACS and the Comments by subsequent Order.

So ORDERED this 9th day of January, 2003.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____

Edward G. McGuire, AICP
Board Member

_____

Lois H. North
Board Member

_____

Joseph W. Tovar, AICP
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration.

APPENDIX A - FINDINGS OF FACT

1. The Snohomish River basin is the second largest Puget Sound drainage basin (1, 780

square miles). A Historical Analysis of Habitat Alterations in the Snohomish River Valley, Washington, Since the Mid-19th Century, Implications for Chinook and Coho Salmon, Haas and Collins, (February 2001), p. 2, Am. Ind. Exh. 4.

2. The Snohomish River and its tributaries support a large number of anadromous fish as well as commercial and recreational salmon fishery.

3. Anadromous fishes include multiple stocks of four Pacific salmon [Chinook (*Oncorhynchus tshawytscha)*, coho (*Oncorhychus kisutch*), chum (*Oncorhynchus keta*), pink (*Oncorhynchus gorbuscha*)], trout [cutthroat ((*Oncorhynchu clarki*), steelhead], and char [Dolly Varden (*Salvelinus malma*), and bull trout (*Salvelinus confluentus*)]. Resident freshwater fish include trout [cutthroat ((*Oncorhynchus clarki*), rainbow ((*Oncorhynchus mykiss*)], char [brook trout (*Salvelinus alpinus*), bull trout, Dolly Varden], mountain whitefish (*Prosopium Williamson*) and many others. Am. Ind. Exh. 4, p. 4.

4. Puget Sound Chinook salmon was listed as a threatened species under the Endangered Species Act in May 1999, and bull trout char in December 1999. *Id.* Coho has been proposed as a candidate species for federal listing. *Id*. The Snohomish River basin contains four coho stocks: Snohomish, Skykomish, South Fork Skykomish and Snoqualmie. *Id*. The Snohomish coho stock status is listed as depressed. *Id*. All stocks in jeopardy use the main-stem Snohomish downstream of the confluence during multiple life stages (e.g., adult and juvenile migration, spawning, rearing). *Id.*

5. The Snohomish River estuary provides essential habitat for juvenile Chinook as they make the physiological transition from fresh water to salt water, and for adult Chinook salmon as they transition back to fresh water for spawning. *NMFS letter to Ecology, dated June 22, 2001, AR* 1492.

6. Prior to development, the estuary could support approximately 2.6 million Chinook smolts. Am. Ind. Exh. 4, p. 38. Current Chinook salmon production capacity is estimated at 1.0 to 1.6 million smolts, a decrease of 40 to 61 percent. *Id.*

7. The estuary wetland habitats function regionally, nationally, and internationally as a stop-over and wintering area in the Pacific Flyway for migratory waterfowl, including ducks, geese, and swans; and neotropical migrants, such as certain passerines and raptors. SOSEWIP, p. 43.

8. Of the 62 “wetland associated” priority species listed by the state, approximately 40 occur in the estuary (Priority Habitat and Species Program, WDFW 1993). The status of these species ranges from federally endangered or threatened to state monitored (surveillance of a given species).” *Id.*

9. Observed species in the estuary also include "red-breasted mergansers, loons, goldeneyes, scoters, western grebes, cormorants, pigeon guillemots, brants, eagles, ospreys, peregrine falcons, merlins, gulls, and terns (Carroll and Pentec 1992)." *Id*. at 44.

10. Much of the lower Snohomish River has been converted from pristine intertidal wetland for channel modifications including dredging, harbor construction, diking and bank armoring, as well as for more permanent losses from industrial development, municipal sewage treatment, waste disposal, and infrastructure. *Ecosystem Restoration Opportunities in the Snohomish River Valley, Washington,* Andrew Haas (February 2001), p. 22-23, Am. Ind. Exh. 8.

11. The greatest loss in production potential for Chinook salmon has occurred in the emergent/ forested transition (EFT) zone with a loss of 56 percent. Am. Ind. Exh. 4, p. 45.

12. The areas within the City, which are in the EFT zone, include Smith Island along Steamboat Slough and North Spencer Island between I-5 and State Route 529. Am. Exh. 8, p. 3-4; Figure 1; see also SOSEWIP, Figure 3.1; p. 24-25.

13. The next greatest loss in production potential for Chinook salmon is in the estuarine emergent marsh (EEM) zone followed by the forested riverine/tidal (FRT) zone. Am. Ind. Exh. 4, p. 45.

14. The FRT zone within the City includes the Simpson Lee mill site. Am. Ind. Exh.8, p. 3-4; Figure 1.

15. Coho salmon production potential in the FRT zone, which includes the Simpson Lee mill site, has decreased by approximately half. Am. Ind. Exh. 4, p. 45.

16. For habitat type, the greatest loss has occurred in blind tidal channel networks, where Chinook salmon molt production has decreased by 68 percent. *Id*.

17. The Langus Park slough reconnection is a blind tidal channel. Am. Ind. Exh. 8, p. 4-5; Figure 1.

18. The City adopted its initial shoreline master program (SMP) in 1976. Prior to the City's most recent adoption of its SMP update, the City's SMP had not been revised since 1976. SMP, p. 1-8.

19. The Snohomish Estuary habitats function locally as a corridor and refuge within the lower Snohomish River watershed for small mammals, herptiles (reptiles and amphibians), and invertebrates and function regionally in the extended Snohomish River basin for medium and large mammals and birds. Snohomish Estuary Wetland Integration Plan (**SEWIP**), at 3-12.

20. Mammals documented using the estuary include river otter, mink, muskrat, weasel, beaver, coyote, raccoon, deer, sea lion and harbor seal. *Id.*, at 3-15.

21. Compared to other Puget Sound estuaries, the Snohomish Estuary is one of the most diverse in habitat types and wildlife species. *Id*. at 3-12.

22. The Estuary is 9 miles long and 3 to 4.5 miles broad at its widest point, encompassing six major islands within its 19.5 square miles. *Id.* at 3-1.

APPENDIX B - GMA PROVISIONS

RCW 36.70A.020 provides:

> The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:
>
> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
>
> (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
>
> (3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.
>
> (4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.

(5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

(6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

(7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.

(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

(9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

(11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

(13) Historic preservation. Identify and encourage the preservation of lands, sites, and structures that have historical or archaeological significance.

RCW 36.70A.030 provides in part:

> 5) "Critical areas" include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.
>
> . . . .
>
> (7) "Development regulations" or "regulation" means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.
>
> . . . .
>
> 20) "Wetland" or "wetlands" means areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from non-wetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from non-wetland areas created to mitigate conversion of wetlands.

RCW 36.70A.040(3) provides in part:

> Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall designate critical areas, agricultural lands, forest lands, and mineral resource lands, and adopt development regulations conserving these designated agricultural lands, forest lands, and mineral resource lands and protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; (d) if the county has a population of fifty thousand or more,

> the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan on or before July 1, 1994, and if the county has a population of less than fifty thousand, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan by January 1, 1995, but if the governor makes written findings that a county with a population of less than fifty thousand or a city located within such a county is not making reasonable progress toward adopting a comprehensive plan and development regulations the governor may reduce this deadline for such actions to be taken by no more than one hundred eighty days. Any county or city subject to this subsection may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the department of community, trade, and economic development of its need prior to the deadline for adopting both a comprehensive plan and development regulations.

RCW 36.70A.060(2) provides:

> Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. For counties and cities that are required or choose to plan under RCW 36.70A.040, such development regulations shall be adopted on or before September 1, 1991. For the remainder of the counties and cities, such development regulations shall be adopted on or before March 1, 1992.

RCW 36.70A.172 provides:

> (1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries. (2) If it determines that advice from scientific or other experts is necessary or will be of substantial assistance in reaching its decision, a growth management hearings board may retain scientific or other expert advice to assist in reviewing a petition under RCW 36.70A.290 that involves critical areas.

APPENDIX C - SMA PROVISIONS

RCW 90.58.020 provides:

[FINDINGS PORTION]

The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever-increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

[POLICY PORTION]

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner, which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of state-wide significance. The department, in adopting guidelines for shorelines of state-wide significance, and local government, in developing master programs for shorelines of state-wide significance, shall give preference to uses in the following order of preference which:

(1) Recognize and protect the state-wide interest over local interest; (2) Preserve the natural character of the shoreline; (3) Result in long term over short term benefit; (4) Protect the resources and ecology of the shoreline; (5) Increase public access to publicly owned areas of the shorelines; (6) Increase recreational opportunities for the public in the shoreline; (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

[IMPLEMENTATION PORTION]

In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. Alterations of the natural condition of the shorelines and shorelands of the state shall be recognized by the department. Shorelines and shorelands of the state shall be appropriately classified and these classifications shall be revised when circumstances warrant regardless of whether the change in circumstances occurs through man-made causes or natural causes. Any areas resulting from alterations of the natural condition of the shorelines and shorelands of the state no longer meeting the definition of "shorelines of the state" shall not be subject to the provisions of chapter 90.58 RCW.

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

RCW 90.58.030 provides in part:

As used in this chapter, unless the context otherwise requires, the following definitions and concepts apply:

. . . .

(2) Geographical:

(c) "Shorelines of the state" are the total of all "shorelines" and "shorelines of state-wide significance" within the state;

(d) "Shorelines" means all of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them; except (i) shorelines of state-wide significance; (ii) shorelines on segments of streams RCW 90.58.030 provides in

part:

(i) The area between the ordinary high water mark and the western boundary of the state from Cape Disappointment on the south to Cape Flattery on the north, including harbors, bays, estuaries, and inlets;

(ii) Those areas of Puget Sound and adjacent salt waters and the Strait of Juan de Fuca between the ordinary high water mark and the line of extreme low tide as follows:

(A) Nisqually Delta -- from DeWolf Bight to Tatsolo Point,

(B) Birch Bay -- from Point Whitehorn to Birch Point,

(C) Hood Canal -- from Tala Point to Foulweather Bluff,

(D) Skagit Bay and adjacent area -- from Brown Point to Yokeko Point, and

(E) Padilla Bay -- from March Point to William Point;

(iii) Those areas of Puget Sound and the Strait of Juan de Fuca and adjacent salt waters north to the Canadian line and lying seaward from the line of extreme low tide;

(iv) Those lakes, whether natural, artificial, or a combination thereof, with a surface acreage of one thousand acres or more measured at the ordinary high water mark;

(v) Those natural rivers or segments thereof as follows:

(A) Any west of the crest of the Cascade range downstream of a point where the mean annual flow is measured at one thousand cubic feet per second or more,

(B) Any east of the crest of the Cascade range downstream of a point where the annual flow is measured at two hundred cubic feet per second or more, or those portions of rivers east of the crest of the Cascade range downstream from the first three hundred square miles of drainage area, whichever is longer;

(vi) Those shorelands associated with (i), (ii), (iv), and (v) of this subsection (2)

(e);

(f) "Shorelands" or "shoreland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all wetlands and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology. Any county or city may determine that portion of a one-hundred-year-flood plain to be included in its master program as long as such portion includes, as a minimum, the floodway and the adjacent land extending landward two hundred feet therefrom;

. . .

(h) "Wetlands" means areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from non-wetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from non-wetland areas to mitigate the conversion of wetlands. upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments; and (iii) shorelines on lakes less than twenty acres in size and wetlands associated with such small lakes;

(e) "Shorelines of state-wide significance" means the following shorelines of the state:

(i) The area between the ordinary high water mark and the western boundary of the state from Cape Disappointment on the south to Cape Flattery on the north, including harbors, bays, estuaries, and inlets;

(ii) Those areas of Puget Sound and adjacent salt waters and the Strait of Juan de Fuca between the ordinary high water mark and the line of extreme low tide as follows:

(A) Nisqually Delta -- from DeWolf Bight to Tatsolo Point,

(B) Birch Bay -- from Point Whitehorn to Birch Point,

(C) Hood Canal -- from Tala Point to Foulweather Bluff,

(D) Skagit Bay and adjacent area -- from Brown Point to Yokeko Point, and

(E) Padilla Bay -- from March Point to William Point;

(iii) Those areas of Puget Sound and the Strait of Juan de Fuca and adjacent salt waters north to the Canadian line and lying seaward from the line of extreme low tide;

(iv) Those lakes, whether natural, artificial, or a combination thereof, with a surface acreage of one thousand acres or more measured at the ordinary high water mark;

(v) Those natural rivers or segments thereof as follows:

(A) Any west of the crest of the Cascade range downstream of a point where the mean annual flow is measured at one thousand cubic feet per second or more,

(B) Any east of the crest of the Cascade range downstream of a point where the annual flow is measured at two hundred cubic feet per second or more, or those portions of rivers east of the crest of the Cascade range downstream from the first three hundred square miles of drainage area, whichever is longer;

(vi) Those shorelands associated with (i), (ii), (iv), and (v) of this subsection (2)(e);

(f) "Shorelands" or "shoreland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all wetlands and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology. Any county or city may determine that portion of a one-hundred-year-flood plain to be included in its master program as long as such portion includes, as a minimum, the floodway and the adjacent land extending landward two hundred feet therefrom;

. . .

(h) "Wetlands" means areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from non-wetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from non-wetland areas to mitigate the conversion of wetlands.

RCW 90.58.090(4) provides:

The department shall approve those segments of the master program relating to shorelines of state-wide significance only after determining the program provides the optimum implementation of the policy of this chapter to satisfy the state-wide interest. If the department does not approve a segment of a local government master program relating to a shoreline of state-wide significance, the department may develop and by rule adopt an alternative to the local government's proposal.

RCW 90.58.100 provides:

1) 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 preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible:
(a) Utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts; (b) Consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact; (c) Consider all plans, studies, surveys, inventories, and systems of classification made or being made by federal, state, regional, or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state; (d) Conduct or support such further research, studies, surveys, and interviews as are deemed necessary; (e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data; (f) Employ, when feasible, all

appropriate, modern scientific data processing and computer techniques to store, index, analyze, and manage the information gathered.

(2) The master programs shall include, when appropriate, the following:

(a) An economic development element for the location and design of industries, industrial projects of state-wide significance, transportation facilities, port facilities, tourist facilities, commerce and other developments that are particularly dependent on their location on or use of the shorelines of the state; (b) A public access element making provision for public access to publicly owned areas; (c) A recreational element for the preservation and enlargement of recreational opportunities, including but not limited to parks, tidelands, beaches, and recreational areas; (d) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other public utilities and facilities, all correlated with the shoreline use element; (e) A use element which considers the proposed general distribution and general location and extent of the use on shorelines and adjacent land areas for housing, business, industry, transportation, agriculture, natural resources, recreation, education, public buildings and grounds, and other categories of public and private uses of the land; (f) A conservation element for the preservation of natural resources, including but not limited to scenic vistas, aesthetics, and vital estuarine areas for fisheries and wildlife protection; (g) An historic, cultural, scientific, and educational element for the protection and restoration of buildings, sites, and areas having historic, cultural, scientific, or educational values; (h) An element that gives consideration to the state-wide interest in the prevention and minimization of flood damages; and (i) Any other element deemed appropriate or necessary to effectuate the policy of this chapter.

(3) The master programs shall include such map or maps, descriptive text, diagrams and charts, or other descriptive material as are necessary to provide for ease of understanding.

(4) Master programs will reflect that state-owned shorelines of the state are particularly adapted to providing wilderness beaches, ecological study areas, and other recreational activities for the public and will give appropriate special consideration to same.

(5) Each master program shall contain provisions to allow for the varying of the application of use regulations of the program, including provisions for permits for conditional uses and variances, to insure that strict implementation of a program will not create unnecessary hardships or thwart the policy enumerated in RCW 90.58.020.

Any such varying shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect. The concept of this subsection shall be incorporated in the rules adopted by the department relating to the establishment of a permit system as provided in RCW 90.58.130 (3).

(6) Each master program shall contain standards governing the protection of single-family residences and appurtenant structures against damage or loss due to shoreline erosion. The standards shall govern the issuance of substantial development permits for shoreline protection, including structural methods such as construction of bulkheads, and nonstructural methods of protection. The standards shall provide for methods that achieve effective and timely protection against loss or damage to single family residences and appurtenant structures due to shoreline erosion. The standards shall provide a preference for permit issuance for measures to protect single family residences occupied prior to January 1, 1992, where the proposed measure is designed to minimize harm to the shoreline natural environment.

RCW 90.58.180 provides:

> (1) Any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state pursuant to RCW 98.58.140 may seek review from the shorelines hearings board by filing a petition for review within twenty-one days of the date of filing as defined in RCW 90.58.140(6).
>
> Within seven days of the filing of any petition for review with the board as provided in this section pertaining to a final decision of a local government, the petitioner shall serve copies of the petition on the department, the office of the attorney general, and the local government. The department and the attorney general may intervene to protect the public interest and insure that the provisions of this chapter are complied with at any time within fifteen days from the date of the receipt by the department or the attorney general of a copy of the petition for review filed pursuant to this section. The shorelines hearings board shall schedule review proceedings on the petition for review without regard as to whether the period for the department or the attorney general to intervene has or has not expired.
>
> (2) The department or the attorney general may obtain review of any final decision granting a permit, or granting or denying an application for a permit issued by a local government by filing a written petition with the shorelines hearings board and the appropriate local government within twenty-one days from the date the final decision was filed as provided in RCW 90.58.140 (6).
>
> (3) The review proceedings authorized in subsections (1) and (2) of this section are subject to the provisions of chapter 34.05 RCW pertaining to

procedures in adjudicative proceedings. Judicial review of such proceedings of the shorelines hearings board is governed by chapter 34.05 RCW. The board shall issue its decision on the appeal authorized under subsections (1) and (2) of this section within one hundred eighty days after the date the petition is filed with the board or a petition to intervene is filed by the department or the attorney general, whichever is later. The time period may be extended by the board for a period of thirty days upon a showing of good cause or may be waived by the parties.

(4) Any person may appeal any rules, regulations, or guidelines adopted or approved by the department within thirty days of the date of the adoption or approval. The board shall make a final decision within sixty days following the hearing held thereon.

(5) The board shall find the rule, regulation, or guideline to be valid and enter a final decision to that effect unless it determines that the rule, regulation, or guideline:

(a) Is clearly erroneous in light of the policy of this chapter; or

(b) Constitutes an implementation of this chapter in violation of constitutional or statutory provisions; or

(c) Is arbitrary and capricious; or

(d) Was developed without fully considering and evaluating all material submitted to the department during public review and comment; or

(e) Was not adopted in accordance with required procedures.

(6) If the board makes a determination under subsection (5)(a) through (e) of this section, it shall enter a final decision declaring the rule, regulation, or guideline invalid, remanding the rule, regulation, or guideline to the department with a statement of the reasons in support of the determination, and directing the department to adopt, after a thorough consultation with the affected local government and any other interested party, a new rule, regulation, or guideline consistent with the board's decision.

(7) A decision of the board on the validity of a rule, regulation, or guideline shall be subject to review in superior court, if authorized pursuant to chapter 34.05 RCW. A petition for review of the decision of the shorelines hearings board on a rule, regulation, or guideline shall be filed within thirty days after the date of final decision by the shorelines hearings board.

APPENDIX D - LEGAL ISSUES IN FINAL PREHEARING ORDER

#	FINAL LEGAL ISSUES
1.	Does Ecology's approval of the City's SMP enacted by City Ordinance No. 2600-02, effective May 3, 2002 (referred to collectively herein as the **Update**), fail to comply with RCW 90.58.020, RCW 90.58.090(4), WAC 173-26-200, RCW 36.70A.020(8)(10), RCW 36.70A.040(3), RCW 36.70A.060 and RCW 36.70A.172?
2.	Does the Update fail to comply with RCW 90.58.020, RCW 90.58.090(4), RCW 90.58.100, RCW 90.58.110(1), RCW 36.70A.020(8) and (10), RCW 36.70A.040 (3), RCW 36.70A.172(1) and RCW 36.70A.060 because it overly relies on off-site mitigation to mitigate development impacts?
3.	Does the Update fail to comply with RCW 90.58.020, RCW 90.58.090(4), RCW 90.58.100, RCW 36.70A.020(8) and (10), RCW 36.70A.040(3), RCW 36.70A.172 (1) and RCW 36.70A.060 because it overly relies on out-of-kind mitigation to mitigate development impacts?
4.	Does the Update fail to comply with RCW 90.58.020, RCW 90.58.090(4), RCW 90.58.100, RCW 36.70A.020(8) and (10), RCW 36.70A.040(3), RCW 36.70A.060, and RCW 36.70A.172(1), and WAC 365-195-900 to 920, because the City's SMP, including its compensatory mitigation and critical areas policies and requirements, is not supported by best available science?
5.	Does the Update fail to comply with RCW 90.58.020, RCW 90.58.090, RCW 90.58.100 (1), RCW 90.58.110(2), RCW 90.58.130, RCW 36.70A.020(8) and (10), RCW 36.70A.040(3), RCW 36.70A.060, and RCW 36.70A.172(1), because the City's SMP Places an interim Urban maritime designation on the Maulsby Mudflats while the City conducts a subarea planning process to determine a subarea plan and/ or shoreline use regulations for this area that will later be incorporated into the City's SMP?
6.	Does the Update fail to comply with RCW 90.58.020, RCW 90.58.090, RCW 90.58.100 (1), and the GMA critical areas requirements (RCW 36.70A.020(8), RCW 36.70A.040(3), RCW 36.70A.060, and RCW 36.70A.172(1)) and GMA requirements to preserve and enhance anadromous fisheries (RCW 36.70A.172(1)), because it grants the City excessive administration discretion and fails to assure restoration of shorelines of state-wide significance?

7.	For all of the above-stated issues, is the Update inconsistent with any applicable guideline and/or factual findings and conclusions of law made by Ecology during the promulgation of previous shoreline guideline amendments, and therefore inconsistent with the SMA?
8.	Did the Update designate the following shorelines in a manner that provides inadequate protection, allows inappropriate uses, and/or is otherwise inconsistent with the Shoreline Management Act ("SMA"), RCW 90.58.020 and RCW 90.58.100, and applicable guidelines (which hereinafter shall refer also to previous findings of Ecology in rulemaking), and fails to be guided by the Growth Management Act ("GMA") open space and recreation goal, RCW 36.70A.020(9), the goal of protecting the environment and enhancing water quality, RCW 36.70A.020(10), RCW 36.70A.060(2)'s requirement that development regulations are to protect critical areas, the requirement that policies and regulations must incorporate best available science, RCW 36.70A.172(1), and the requirement to give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries, RCW 36.70A.172(1), because they would allow adverse impacts to the environment and shorelines of state-wide significance?
9.	Is the Update inconsistent with the SMA, RCW 90.58.130, applicable guidelines and the GMA, RCW 36.70A.020(11) and RCW 36.70A.035 because it assigns an “interim” designation to the Maulsby Mudflats coupled with an unspecified subarea planning process that does not include adequate provisions for public involvement?
10.	Is the Update inconsistent with the SMA, RCW 90.58.020 and RCW 90.58.100, and applicable guidelines for failing to designate as "natural" or otherwise protect from development those shorelines deserving a natural designation?
11.	Is the Update inconsistent with the SMA, RCW 90.58.020 and RCW 90.58.100, applicable guidelines, and the GMA, RCW 36.70A.020(10), in permitting a full build-out scenario that would result in the direct loss of approximately 500 acres of wetlands within shorelines of state-wide significance?
12.	Is the Update inconsistent with the SMA, RCW 90.58.020 and RCW 90.58.100, applicable guidelines, and the GMA, RCW 36.70A.020(7), RCW 36.70A.020(10), RCW 36.70A.060(2), and RCW 36.70A.172(1), in failing to assure restoration of shorelines of state-wide significance, and instead adopting restoration goals and requirements only in conjunction with individual, site-specific development proposals?

13.	Is the Update inconsistent with the SMA, RCW 90.58.020 and RCW 90.58.100, applicable guidelines, and the GMA, RCW 36.70A.020(10), RCW 36.70A.060(2), and RCW 36.70A.172(1), because the Update fails to include standards to adequately mitigate adverse impacts to shorelines of state-wide significance and the environment?
14.	Is the Update inconsistent with the SMA, RCW 90.58.020 and RCW 90.58.100, applicable guidelines, and the GMA, RCW 36.70A.020(10), RCW 36.70A.060(2), and RCW 36.70A.172(1), in failing to preserve and protect shorelines of state-wide significance through adequate buffers and setbacks?
15.	Is the Update inconsistent with the SMA, RCW 90.58.020 and RCW 90.58.100, applicable guidelines, and the GMA, RCW 36.70A.020(10),RCW 36.70A.060(2), and RCW 36.70A.172(1), because it fails to protect shorelines of state-wide significance from cumulative impacts of development?
16.	Is the Update inconsistent with the SMA, RCW 90.58.020, RCW 90.58.090, and RCW 90.58.100, applicable guidelines, and the GMA, RCW 36.70A.020(10), RCW 36.70A.060(2), and RCW 36.70A.172(1), because it fails to protect shorelines of state-wide significance with through adequate standards and compliance regulations?
17.	Is the Update inconsistent with the SMA, RCW 90.58.020 and RCW 90.58.100, applicable guidelines, and RCW 36.70A.020(9), because it fails to provide a shoreline public access plan with identified shoreline public access sites?
18.	Is the Update inconsistent with the SMA, RCW 90.58.020, RCW 90.58.100, and RCW 90.58.180, applicable guidelines, and the GMA, RCW 36.70A.020(10), RCW 36.70A.060(2), and RCW 36.70A.172(1), because it relies on a critical areas ordinance that is out of date and inadequate to protect the functions and values of critical areas and habitats and because it removes critical components of the Master Program from the SMA's review and appeal process?
19.	Is the Update inconsistent with the SMA, RCW 90.58.020 and RCW 90.58.090, and applicable guidelines because it fails to provide optimum implementation of the state-wide interest for shorelines of state-wide significance, as the challenged Update components are examples of lack of optimum implementation?

20.	Did Everett and Ecology fail to comply with the State Environmental Policy Act, Ch. 43.21C RCW, because they relied on a determination of nonsignificance for the Update?
21.	Is the Update inconsistent with the City of Everett's GMA Comprehensive Plan and together regarding the designations of uses allowed inconsistent with neighboring jurisdictions' (such as Snohomish County) GMA plans and policies pursuant to RCW 36.70A.070, RCW 36.70A.100 and RCW 36.70A.130?
22.	Does the Department of Ecology's approval of the Everett Shoreline Plan Update violate RCW 43.21C.020, RCW 43.21C.030, RCW 43.21C.095, WAC 197-11-330 (3), RCW 90.58.020, RCW 90.58.090(4), RCW 36.70A.060, RCW 36.70A.172(1) and WAC 365-195-900 through 925 due to the Shoreline Plan Update's lack of reliance on best available science?
23.	Is the Update compliant with and reflective of stated Growth Management Goals, RCW 36.70A.020(8), (9), (10)?
24.	Did the Department of Ecology's approval of Everett's Shoreline Plan Update violate RCW 90.58.090(4), RCW 43.21C020, & RCW 43.21C.030 by allowing implementation procedures and policies that are clearly not sufficient to achieve the legislative intent of RCW 90.58.020 and RCW 44.28, WAC 365-195-705, WAC 365-195-800 and WAC 365-195-805?
25.	Did the Department of Ecology's approval of the Everett Shoreline Plan Update violate RCW 90.58.020, RCW 90.58.100(1), RCW 36.70A.172(1), RCW 43.21C.030, and RCW 43.21C.034 due to the lack of protection for listed salmonid species under the Federal Endangered Species Act?
26.	Did the Department of Ecology's approval of Everett's Shoreline Master Plan Update violate RCW 43.21C.030, RCW 43.21C.095, WAC 197-11-330, RCW 90.48.080, RCW 36.70A.070(1) due to the lack of serious and meaningful consideration of the water quality impacts that will occur as a result of implementation.
27.	Is the Update inconsistent with RCW 90.58.350, because it fails to properly consider and protect rights established by the Tribes' treaty with the United States?

28.	Did the Update designate the following shorelines in a manner that provides inadequate protection, allows inappropriate uses, and/or is otherwise inconsistent with the Shoreline Management Act ("SMA"), RCW 90.58.020 and RCW 90.58.100, and applicable guidelines (which hereinafter shall refer also to previous findings of Ecology in rulemaking), and fails to be guided by the GMA's open space and recreation goal, RCW 36.70A.020(9), the goal of protecting the environment and enhancing water quality, RCW 36.70A.020(10), RCW 36.70A.060 (2)'s requirement that development regulations are to protect critical areas, the requirement that policies and regulations must incorporate best available science, RCW 36.70A.172(1), and the requirement to give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries, RCW 36.70A.172(1), because they would allow adverse impacts to the environment and shorelines of state-wide significance?

APPENDIX E – GLOSSARY OF ABBREVIATIONS

AR	Administrative Record
AWB	Association of Washington Business
AWC	Association of Washington Cities
BAS	Best Available Science
CPSGMHB	Central Puget Sound Growth Management Hearings Board
DCTED	Department of Community, Trade and Economic Development
EEM	Estuarine Emergent Marsh
EFT	Emergent Forested Transition
EMC	Everett Municipal Code
ESA	Endangered Species Act
ESC	Everett Shorelines Coalition
FOF	Finding of Fact
FDO	Final Decision and Order
FRT	Forested Riverine/Tidal
GMA	Growth Management Act
HEAL	Honesty in Environmental Analysis and Legislation
KCRP	Kitsap Citizens for Rural Preservation
LMI	Lawrence Michael Investments
NMFS	National Marine Fisheries Service
PFR	Petition for Review
PHB	Prehearing Brief

RCW	Revised Code of Washington
SAO	Sensitive Areas Ordinance
SEWIP	Snohomish Estuary Wetland Integration Plan
SHB	Shoreline Hearings Board
SMA	Shoreline Management Act
SMP	Shoreline Master Program
SOSEWIP	Salmon Overlay to the Snohomish Estuary Wetland Integration Plan
UGA	Urban Growth Area
WAC	Washington Administrative Code
WDFW	Washington Department of Fish and Wildlife
WEC	Washington Environmental Council
WRIA	Water Resource Inventory Area
WSAMA	Washington State Association of Municipal Attorneys
WSDOE	Washington State Department of Ecology
WWGMHB	Western Washington Growth Management Hearings Board

FIGURE 1
Integrating SMA into the GMA via local Comprehensive Plans

Added in 1995 by RCW 36.70A.480

Mandatory Plan Elements
(RCW 36.70A.070 and .480)

(8) Parks and Recreation

(7) Economic Development

WAC 365-195-345
CTED Recommended

Design
Environmental Protection
Natural Resources
(2) Subarea Plans
(1)(c) Recreation
(1)(b) Solar Energy
(1)(a) Conservation

(6) Transportation
(5) Rural

(counties only)

(4) Utilities
(3) Capital Facilities
(2) Housing
(1) Land Use

PLAN

Optional Plan Elements
RCW 36.70A.080

FIGURE 2

Integrating SMA into the GMA via local Development Regulations

Development regulations

Added in 1995 by
RCW 36.70A.480
Defined at RCW 36.70A.030(7)

Critical areas Ordinances

Official Controls

Binding Site Plan Ordinances

Subdivision Ordinances
Zoning
Ordinances

REGULATIONS

FIGURE 3 - THE TOTAL GMA/SMA STATUTORY SCHEME

SHORELINE PERMITS
RCW 90.58.140
PLANNING ACTIVITIES
RCW 36.70A.120
CAPITAL BUDGET DECISIONS
RCW 36.70A.120

"Vertical" Consistency
RCW 36.70A.040

PROJECT PERMITS
Zoning, subdivision, building, *etc.*
RCW 36.70B.020(4)

PLAN
Internal Consistency
RCW 36.70A.070

REGS
Internal Consistency

"Vertical" Consistency
GMA GOALS & REQUIREMENTS
Ch. 36,70A RCW

---

[1] A host of inter-twined GMA/SMA questions arise from the briefing. For example, is the primary mandate of the SMA one of "environmental protection and restoration" or of "balanced growth?" Is the "growth accommodation" mandate of the GMA at odds with SMA duties to "preserve" or "restore?" Conversely, does the GMA direction to "give special consideration to anadromous fisheries" conflict with the SMA direction to accommodate economic activities in certain shoreline environments? Are "shorelines of state-wide significance" under the SMA also "critical areas" under the GMA, and, if so, what significance does that have? What is the role of "science" in designating and regulating lands under either statute and what, if any, conflicts does that create?

[2] *State v. Buechel*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994); *Lund v. Department of Ecology*, 93 Wn. App. 329,

337, 969 P.2d 1072 (1998); *Bellevue Farm Owners Association v. Shoreline Hearings Board*, 100 Wn. App. 341, 351, 97 P.2d 380 (2000).

[3] Ecology's most recent attempt to update and amend the shoreline management guidelines [Chapter 173-26] was invalidated by the Shoreline Hearings Board. Pursuant to WAC 242-02-660(2), the Board takes official notice of *Association of Washington Business, et al., v. Department of Ecology, et al.*, (***AWB v. Ecology***) Shoreline Hearings Board Case No. 00-37, Order Granting and Denying Appeal, 2001, at 16.

[4] For example, *Overlake Fund*, 90 Wash.App. 746, 954 P.2d 304 (Div. I, 1998) (***Overlake Fund***) was an appeal of a Shorelines Hearing Board decision involving a shoreline permit for a hotel in the City of Bellevue.

[5] Significantly, the **only** claim before the Board, and the Court, in *HEAL* was a .172 claim. The petitioner in that case did not allege that Seattle's regulations failed to protect critical areas as mandated by RCW 36.70A.060, but simply that the City's policies and regulations did not "include best available science" pursuant to .172. Because the critical areas at issue in that case were Seattle's steep slopes, rather than the watershed scale hydrological ecosystems at issue here, *HEAL* did not implicate the SMA in any way. Therefore, for better or for worse, *HEAL* is of limited value in this case.

[6] *See*: Appendix D.

[7] The definition of "Shorelines of the state" includes both "Shorelines" and "Shorelines of state-wide significance." All these terms, as well as "shorelands," are set forth in Appendix C.

[8] The City sought to dismiss all Legal Issues involving GMA compliance and argued that its SMP amendments need only be consistent with chapter 90.58 RCW and that the Board's review was limited to that inquiry. In denying the City's Motion to Dismiss GMA Issues, the Board stated:

> [RCW 36.70A.480] makes it clear that a local government's shoreline master program is now part and parcel of the GMA comprehensive plan and development regulations. It is also undisputed that the Board has jurisdiction to review comprehensive plans and implementing development regulations for compliance with the GMA. RCW 36.70A.280.
>
> Therefore, in light of the plan language of .480, it is no longer possible for a local government to amend its shoreline master program without also amending its GMA comprehensive plan and development regulations. When doing so, a local government's action must comply with the goals and requirements of the GMA as well as the SMA.

[9] RCW 36.70A.480(1) directs that "The goals and policies of [a] shoreline master program . . . shall be *considered an element of the . . . plan*." Emphasis added. Local governments would have the option of labeling such an "element of the plan" as a "Shoreline Element" or a "Shoreline Sub-Element" of an element with a broader scope, such as "Natural Resources Element" or "Environment Element."

[10] The courts have found that, when a term is undefined in a statute, meaning may be gleaned from a dictionary definition. *See Thurston County, et al., v. WWGMHB*, Washington State Supreme Court Slip Op. 71746-0, Nov. 21, 2002, at 6.

[11] "Management" is defined as: 1. The act, manner, or practice of managing, supervising or **controlling**. The root word "manage" is defined as: 1.To direct or **control the use of**. 2. to exert control over. *Webster's II New Riverside University Dictionary*, 1988, page 721-722 (emphasis added).

[12] Development regulations are frequently referred to as "land use controls." *See* RCW 36.70A.030(7).

[13] Under GMA, plans not only guide regulations, but also **control** them due to the consistency requirements of RCW 36.70A.040 and .120. The Board has consistently commented on the important role of plans relative to regulations and permits:

> Comprehensive plans do not control the issuance of permits nor directly control the use of land. Rather, comprehensive plans are directive to development regulations and capital budgeting decisions.

Vashon-Maury et al., v. King County, CPSGMHB Case No.95-3-0008c, Corrected Order Finding Partial Noncompliance and Partial Invalidity, November 8, 2000, at 9. Footnote omitted. *See also, KCRP, et al., v. Kitsap County*, CPSGMHB Case No. 94-3-0005, Final Decision and Order, October 25, 1994.

[14] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed 303 (1926).

[15] This differentiated landscape of urban, rural and resource lands, has been described as "one of the fundamental building blocks of GMA planning." *Forster Woods, et al., v. King County*, CPSGMHB Case No. 001-3-0008c, Final Decision and Order, November 6, 2001, at 14, fn. 4.

[16] *Bremerton, et al., v. Kitsap County (**Bremerton**)*, CPSGMHB Case No. 95-3-0039c, Final Decision and Order, Oct. 6, 1995, at 31-32 (footnote omitted).

[17] *See* Figure 1 following Appendix E.

[18] *See* Figure 2 following Appendix E.

[19] The Board notes that the GMA does not have a similar "liberal construction" provision.

[20] *Hama Hama Co. v. Shoreline Hearings Board*, 85 Wn.2d 441, 447, 536 P.2d 157, 161 (1975).

[21] The entirety of RCW 90.58.020 is set forth in Appendix C. Because this section does not explicitly enumerate paragraph or section numbers, for ease of reference the Board has described the three main sections of .020 as the "Findings Portion," the "Policy Portion" and the "Implementation Portion."

[22] The entirety of RCW 36.70A.020 is set forth in Appendix B.

[23] Nonetheless, plan or regulatory provisions that substantially interfere with the fulfillment of these goals is a basis for invalidating the noncompliant Plan or regulatory provisions. *See* RCW 36.70A.302.

[24] However, as noted in Section III, *supra*, at 9, "Local discretion is bounded by the goals and requirements of the GMA."

[25] *See*: RCW 36.70A.020(1), (3), (4), (5), (9), (11) and (13).

[26] Pursuant to WAC 242-02-660, the Board takes official notice of "*Extinction is Not an Option: State-wide Strategy to Recover Salmon*" issued by the Governor's Salmon Recovery Office, September 1999. Listed therein, pp. IV-41-80, are the four "Four H's" that affect anadromous fish population: Harvest, Hydro, Hatcheries and Habitat.

[27] *See e.g., City of Edmonds, et al., v. Snohomish County*, CPSGMHB Case No. 93-3-0005, October 4, 1993, at 28-

29; *Benaroya, et al., v. City of Redmond*, CPSGMHB Case No. 95-3-0029, March 25, 1996, at 21; *Forster Woods, et al. v. King County* [*Maple Valley Portion*], CPSGMHB Case No. 01-3-0008c, November 6, 2001, at 32. *Hensley v. City of Woodinville*, CPSGMHB Case No. 96-3-0031, FDO, February 25, 1997, at 9.

[28] *See Pilchuck v. Snohomish County* [***Pilchuck II***], CPSGMHB Case No. 95-3-0047c, FDO, December 6, 1995; *Litowitz v. Federal Way*, CSPGMHB Case No. 96-3-0005, FDO, July 22, 1996; *LMI/Chevron v. Town of Woodway* [***LMI/Chevron***], CPSGMHB Case No. 98-3-0012, January 8, 1999.

[29] Though not defined by statute, "utilization" is a derivative of the verb "utilize" which is defined as "To put to use." *Webster's II New Riverside University Dictionary*, 1988, page 1272. The Board construes "utilization" in the SMA context to refer to "how land is used" rather than "development" *per se*.

[30] RCW 90.58.100(2) requires that the SMP include the following elements: a) economic development, b) public access, c) recreation, d) circulation, e) [land] use f) conservation g) historic, cultural, scientific and education, h) flood damage prevention and minimization, and I) other appropriate and necessary elements.

[31] RCW 90.58.020 [Implementation portion] provides in part:

> *Alterations of the natural condition of the shorelines of the state, in those* ***limited*** *instances when authorized*, shall be given priority for single family residences and their appurtenant structures, *ports*, shoreline recreational uses including but not limited to parks, *marinas*, piers, and other improvements facilitating public access to shorelines of the state, *industrial and commercial developments* which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.

Emphasis added.

[32] *Black's Law Dictionary 138 (7th Ed. 1990).*

[33] AWC cites the Court of Appeals decision in *Overlake Fund* to support its argument that the SMA is a balancing statute. *AWC/WSAMA Amicus Brief*, at 9, *citing*, *Overlake Fund, 90 Wash.App. at 762, 954 P.2d at 312*Significantly, *Overlake* was review of a *permit* decision rather than review of a legislative action for fidelity to the SMA, let alone the GMA. The Board acknowledges and agrees with the Court's language in *Overlake* that the SMA mandates balance between development, public access, preservation of shoreline habitat and private property. However, the Board does not agree with AWC's interpretation that *Overlake* stands for the proposition that the SMA accords equal weight to all uses in that balancing. In contrast, a reading of this statement within the context of the SMA, its goals, objectives and purposes and in conjunction with the definition of balance cited *supra*, clarifies that the mandate for balancing within the SMA does not place development on a par with protection, preservation and restoration. Rather, it simply requires jurisdictions to *weigh* all the *public interests* and *offset* them **based on the use preferences listed in 90.58.020.**

[34] The Board notes that many of the GMA goals set forth at RCW 36.70A.020 have companion requirements in subsequent sections. For example, RCW 36.70A.020(1) and (2) are implemented through the specific requirements of RCW 36.70A.110.

[35]RCW 36.70A.020(8) (**enhance** natural resource industries . . . including fisheries) and RCW 36.70A.020(10) (**protect** the environment) (emphasis added).

[36] *State of Washington v. Buechel*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994).

[37] *See* Finding of Fact Nos. 1, 4, 6, 8, 10, 11, 12, 13, 14, 15, and 16.

[38] This fact has been acknowledged in several actions and documents: listing by the National Marine Fisheries Service (NMFS) of several species in the Snohomish Estuary as threatened (FoF 4); Washington Department of Fish and Wildlife documentation of 40 priority Habitat and Species in the Estuary that are federally endangered or threatened or state monitored (FoF 8); *See also* "Extinction is not an Option," *supra.*

[39] "Ecology" means 1. The science of the relationships between organisms and their environment; 2. The relationship between organisms and their environment. "Ecosystems" means an ecological community with its physical environment, regarded as a unit. *Webster's II New Riverside University Dictionary*, 1988, page 416, 417.

[40] "Science" means 1.a. The observation, identification, description, experimental investigation and theoretical explanation of natural phenomena. *Id.*, page 1045. The related term "scientific method" is defined as: An analytical technique by which a hypothesis is formulated and then systematically tested through observation and experimentation. *Black's Law Dictionary*, at 1347.

[41] RCW 36.70A.030(5) provides:

> "Critical areas" include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

[42] The Board notes that DCTED published guidelines for classifying critical areas address "fish and wildlife habitat conservation areas." Included in the definition of such areas are "areas with which endangered, threatened, and sensitive species have a primary association" and all "waters of the state." WAC 365-19-080(5).

[43] It is undisputed in this case that the Everett SMP only involves "shorelines of state-wide significance."

[44] The conclusion that SMA shorelines of state-wide significance are also GMA critical areas does not preclude development within 200 feet of the ordinary high-water mark. The Board has held:

> [The GMA] requires that critical areas be protected. As long as that mandate is met, other, non-critical portions of land can be developed as appropriate under the applicable land use designation and zoning requirements. Furthermore, development of critical areas is not absolutely prohibited as long as those areas are adequately protected.

Association to Protect Anderson Creek v. Kitsap County, CPSGMHB Case No. 95-3-0053c, FDO, Dec, 26, 1995, at 19.

[45] In an early case, the Board stated:

> The Board holds that the Act's requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the values and functions of such ecosystems must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the value and functions of such ecosystems within a watershed or other functional catchments area.

Tulalip Tribes v. Snohomish County, CPSGMHB Case No. 96-3-0029, FDO, January 8, 1997, at 11. (Underlining

and strikethroughs in original omitted).

[46] *Compare* - "Make reasonable efforts to inform the people of the state . . . actively encourage participation by all person and private groups and entities showing an interest . . ." RCW 90.58.130(1) with "Encourage the involvement of citizens in the planning process . . ." RCW 36.70A.020(11) and ". . . provid[e] for early and continuous public participation in the development and amendment of . . . plans and development regulations . . ." RCW 36.70A.140.

[47] These GMA provisions are set forth in Appendix B.

[48] These SMA provisions are set forth in Appendix C.

[49] Transcript, at 106.

[50] The SMP adopts by reference the City's "Environmentally Sensitive Areas" [Everett Municipal Code (**EMC**) 19.37] and Applicable Definitions [EMC 19.04] in the SMP Update, at 11, *see* Appendix A.

[51] The Board notes that the City included discussion of SEWIP and SOSEWIP throughout their deliberations and incorporated it into the SMP update, they chose SEWIP and SOSEWIP as a scientific basis for the SMP update and used SEWIP and SOSEWIP in a substantive way in making decisions about SMP use designations. However, the Pentec Report was not specifically incorporated into the SMP update as a basis for its decisions.

[52] "The SMA instead requires local governments to use "all available information regarding hydrology, geology, topography, ecology, economics and other pertinent data." RCW 90.58.100(1)(e)." Ecology's PHB, at 23.

[53] Tulalip Tribes Reply Brief, at 12.

[54] *Black's Law Dictionary*, 1347 (7th Ed. 1999).

[55] Department of Ecology Memorandum Final Recommendations to Gordon White on City of Everett SMP Submittal January 16, 2002.

[56] AR 6265.

[57] AR 1291. ([T]he total loss of 532 acres to the HDS would be compensated with 568 acres of tidal habitat.)

[58] Ecology PHB, at 27.

[59] Apart from the strategy of regulatory incentives for restoration, there are a variety of non-regulatory measures that an SMP can set and local government can achieve

./ These measures could include the dedication of public lands and funds to restoration projects and/or acquisition; tax credits, deferments or incentives for passive open space or active restoration; and public education programs. A variety of public funding sources could be pursued including federal, state, tribal and local.

[60] AR 18225.

[61] AR 18225.

[62] SMP Objective 1 provides, in part:

> Implement area-wide and watershed-based studies and management plans cooperatively with other local, state, and federal resource agencies and the Tulalip Tribes. Identify areas that should be preserved, enhanced, or *restored* to protect and *restore ecological functions and ecosystem-wide processes, and* ***prohibit or severely restrict development in those areas***.

[63] Ecology stated "City planning staff acknowledged during a meeting that they are not aware of a single instance in which buffers have been increased beyond the "minimum," but rather that buffer reduction is relatively common." WEC PHB, at 11, citing AR 18466-468.

[64] Included in this heading are issues related to buffers, off-site mitigation, in-kind and out-of-kind mitigation, and administrative discretion.

[65] These GMA provisions are set forth in Appendix B.

[66] These SMA provisions are set forth in Appendix C.

[67] These GMA provisions are set forth in Appendix B.

[68] These SMA provisions are set forth in Appendix C.

[69] City PHB, at 29.

[70] *See* Section 4: Ecology and Ecosystem: the Role of Science in Shoreline Plan-making and Development Regulations.

[71] *See* SEWIP Figure 4.1, at AR 8465.

[72] *See* SEWIP Figure 4.2, at AR 8469.

[73] *See* SEWIP Figure 5.1, at AR 8491.

[74] *See* SEWIP Figure 5.2A, at AR 8493.

[75] *See* SEWIP Figure 5.2B, at AR 8495.

[76] *See* http://maps.yahoo.com, map of address: 19th Street at Broadway Everett, WA 98201.

[77] *See* SMP 4.4A Area Designated, at 4-9, AR 131. *See also*, SMP Figure 4.3, at AR 165.

[78] "Forest Practices are allowed in any environment when completed as part of a public access or mitigation/ restoration proposal." *See* SMP, at pg. 5-3, at AR 213.

[79] "New log storage activities are prohibited, except on dry land. Expansions of existing areas is prohibited where grounding will occur and in the Aquatic Environment." *See* SMP, at pg. 5.3, at AR 213.

[80] AR 1493.

[81] Ecology PHB, at 6.

[82] *See* SMP Figure 4.19

[83] *See* SMP 4.5 Area Designations 1, at AR 133.

[84] "Forest Practices are allowed in any environment when completed as part of a public access or mitigation/ restoration proposal." *See* SMP, at pg. 5-3, at AR 213.

[85] "New log storage activities are prohibited, except on dry land. Expansions of existing areas is prohibited where grounding will occur and in the Aquatic Environment." *See* SMP, at pg. 5.3, at AR 213.

[86] "Conditional Use." *See* SMP, at pg. 5.3, at AR 213.

[87] ESC PHB, at 23.

[88] ESC PHB, at 35.

[89] ESC PHB, at 36.

[90] City PHB, at 39.

[91] SEWIP Figures 4.1 & 4.2

[92] SEWIP Figures 5.2A & 5.2B

[93] Based on previous Board decisions, "land use pattern" refers to the number, location or configuration of lots or the mix of uses and physical forms in a specific area. *See Vashon-Maury, et al., v. King County*, CPSGMHB Case No. 95-3-0008c, FDO, Oct. 23, 1995, at 68 (density); *Charlie Burrow, Linda Cazin, and KCRP v. Kitsap County*, CPSGMHB Case No. 98-3-0018, *Order on Compliance in a portion of Alpine and Final Decision and Order in Burrow*, March 29, 2000, at 18-24 (intensity).

[94] Redevelopment of such sites may even result in more intensive land use activities. For example, new technologies, new building practices, innovative and creative site and structural design all could result in a net increase in the active uses to which such developed shorelines may be put.

[95] *See* SMP 4.9 Area Designations 5, at 4-23, AR 145. *See also*, SMP Figure 4.20, AR 199; and SEWIP Complex Numbers, at AR 8537.

[96] "Forest Practices are allowed in any environment when completed as part of a public access or mitigation/ restoration proposal." *See* SMP, at pg. 5-3, at AR 213.

[97] "Permitted in the multi-use zones along the riverfront. However, industrial uses are limited to high tech, office-park-type, non-warehouse type activities." *See* SMP, at pg. 5-3, at AR 213.

[98] The SEWIP recognizes that the adjacent area north of the central 45-acre island has restoration potential. *See* SOSEWIP, Fig. 4.16, at AR 8795. This is due in part to the high rankings for Wetland Complex Water Quality (SEWIP Fig. 4.2), water quality and wildlife attributes (SEWIP Fig. 4.3), and aesthetics (SEWIP Fig. 4.5) of the

northern adjacent property that has been property designated "urban conservancy."

[99] *See* SMP 4.6 Area Designations, at 4-13, AR 135, *see also* Figure 4.7, at AR 173.

[100] "Forest Practices are allowed in any environment when completed as part of a public access or mitigation/ restoration proposal." *See* SMP, at pg. 5-3, at AR 213.

[101] "New log storage activities are prohibited, except on dry land. Expansions of existing areas is prohibited where grounding will occur and in the Aquatic Environment." *See* SMP, at pg. 5.3, at AR 213.

[102] *See* SEWIP Figures 4.1 and 4.2.

[103] *See* SEWIP Figures 5.2A and 5.2B.

[104] Redevelopment of such sites may even result in more intensive land use activities. For example, new technologies, new building practices, innovative and creative site and structural design all could result in a net increase in the active uses to which such developed shorelines may be put.

[105] Real estate or other tax credits or deferments are one way in which the federal, state or local governments have provided incentives for open space or conservation actions by property owners.

[106] "Each county and city that is required or chooses to plan under RCW 36.70A.040 shall perform its activities and make capital budget decisions in conformity with its comprehensive plan." RCW 36.70A.120.

[107] The other Petitioners incorporate WEC's arguments.

[108] The other Petitioners incorporate ESC's arguments.

[109] The Board notes, however, that there is pending litigation and ongoing settlement negotiations regarding the "invalidated" SMA guidelines [Chapter 173-26 WAC]. Ultimately, a new round of rulemaking by Ecology will occur in the future to fill the void created by the invalidation of the previous SMA guidelines. However, there remain no Ecology SMA guidelines at the time of the writing of this Order.