

Routine Program Change Analysis of the Shoreline Management Act Updates and Implementing Regulations for inclusion into the Washington Coastal Zone Management Program

I. INTRODUCTION

The Washington State Department of Ecology's Shorelands and Environmental Assistance (SEA) Program seeks approval from the National Oceanic and Atmospheric Administration's (NOAA) Office for Coastal Management (OCM) to incorporate updates to the Washington Shoreline Management Act (SMA) and its implementing regulations (WAC 173-15, 18, 20, 22, 26 & 27) into the Washington Coastal Zone Management Program (WCZMP)¹. Ecology's SEA Program requests OCM's concurrence that the incorporation is a routine program change (RPC) to the WCZMP. As the key authorities of the WCZMP, the SMA and accompanying WACs are the State's primary method of regulating land and water uses in shoreline jurisdiction throughout the State and within the State's coastal zone, which is comprised of the fifteen coastal counties with saltwater influence, and extending three nautical miles off the Pacific Coast.

The following analysis focuses primarily on those SMA and WAC updates that the SEA Program considers to be "enforceable policies" – which the SEA Program will apply, upon OCM's approval, to federal consistency reviews - and explains why their incorporation constitutes a RPC to the WCZMP. This current program change submission is evaluated in light of the five program areas described in 15 CFR 923.84(a) to determine whether a change is substantial, and, if so, would lead that change to be considered a WCZMP "amendment." The accompanying SMA Table lists all sections of the SMA that Ecology considers to be "enforceable." The WAC Table lists enforceable and non-enforceable sections of each WAC with an asterisk and shading indicating those sections that are not considered enforceable.

The analysis also generally describes those updates that, while not considered to be enforceable policies, still should be incorporated into the WCZMP. In sum, all submitted updates are legislative changes to the SMA from September 2000 through June 2015 and administrative changes to the WACs for the same timeframe. In September 2000, Ecology submitted the entire SMA and WACs to then-OCRM, which included all updates to the law and regulations. OCRM approved that version of the SMA and WACs in their entirety as enforceable policies for incorporation into the WCZMP, and no legislative changes have been submitted to OCM since then.

This current submittal includes copies of the most recent version of the SMA and WACs that incorporate all legislative updates through 2014 (the 2015 legislative change to the SMA has not yet been codified, but a copy of the change is included in the submittal package as a separate PDF). When OCRM last approved the SMA and WACs as enforceable policies in 2000, state coastal management programs were not required to specifically identify and list each enforceable policy. To comply with OCM's current requirement, Ecology's SEA Program has identified, on the included SMA Table, every provision in the SMA that meets OCM's definition of an "enforceable policy" for federal consistency purposes. Similarly, the WAC Table identifies the enforceable policies of .WAC 173- 15, 18, 20, 22, 26, and WAC 173-27 has no enforceable policies.

¹ "WCZMP" as used in this Analysis, refers to the 2001 federally-approved CZM Program Document, which includes the six State laws from which are derived the enforceable policies.

II. ANALYSIS

According to federal regulations and OCM guidance, RPCs are the further detailing of a state coastal zone management program that does not result in a “substantial” change to one or more of the five program areas identified in subparts B through F of Part 923 (15 CFR 923.84(a)). Those federal regulations require states to differentiate between a “substantial change” and “routine program changes” in their Coastal Zone Programs’ enforceable policies. 1996 federal guidance calls for states to submit program changes with an explanation of why the change is an RPC and not an amendment; that is, the explanation should describe what elements of the approved program are affected, and explain why the proposed change will not result in a substantial change to one or more of the five program approvability areas.

In reviewing and analyzing all changes to the SMA and WACs since 2000, Ecology has concluded that none of the changes is a “substantial change” to the enforceable policies of the WCZMP’s or its authorities. See Section A below for the analysis.

A. The Coastal Zone Management Act’s Five Program Areas

Again, Ecology has arrived at the conclusion that this current submittal of the SMA/WAC update is an RPC rather than an amendment after evaluating each enforceable policy in light of the five Program Areas below.

1. Uses subject to Management (15 CFR Part 923, Subpart B): There are no changes to: Land and water uses with impacts to coastal waters and how these uses will be managed; the “planning process for energy facilities” within Washington’s coastal zone; the WCZMP’s “method of ensuring that local land and water uses do not unreasonably restrict uses of a regional benefit;” or the “inventory and designation of areas that contain one or more coastal resources of national significance.”

2. Special Management Areas: The State authority for designating Special Management Areas is described in the WCZMP document at Chapter Two, Section D. No updates alter the criteria for designating such areas or change the boundaries or uses of such areas.

Further, the definition of “beach” remains that as described in the WCZMP document, as do those for: “erosion planning processes;” and “procedures for specifying areas that may be designated for preserving or restoring, for CZMA-described values such as conservation, recreational, ecological, historical, or esthetic.”

3. Jurisdictional Boundaries: The SMA and WAC changes apply throughout the entire State, including its coastal zone. This RPC submittal does not result in any alteration, refinement, etc. to the coastal zone area (see pp. 18-19 of the WCZMP for a depiction and legal description).

4. Authorities and Organization: No changes are proposed that significantly affect Ecology’s authority to implement the WCZMP and its organizational structure nor its general techniques for control of land uses and water uses within the coastal zone. Additionally, none affects Ecology’s Coastal Non-Point Program pursuant to section 6217 of CZARA (1990), or the State’s mechanism to ensure that all state agencies will adhere to the program. **However, there were some changes to enforceable policies, both substantive and minor, and they are discussed in section B. below.**

5. Coordination, Public Involvement and National Interest:

The submitted updates contain no changes in any of the following areas:

- The mechanism for consulting and coordinating with local governments, interstate agencies, regional agencies, etc.
- The WCZMP's consideration of the national interest in planning for and siting facilities such as energy facilities which are of greater-than-local interest.
- Public participation procedures and public participation in permitting, consistency determinations, etc.
- Federal consistency procedures.

B. Enforceable Policy Changes to the Shoreline Management Act

1. Substantive changes

As outlined above, Ecology has reviewed all changes to the SMA since 2000 to determine which were changes to enforceable policies (as identified in Table 1) and which were not. For those changes to enforceable policies, Ecology evaluated each to determine whether it was a "substantial" change as defined in the federal regulations. This sub-section describes those enforceable policy changes that are of a more **substantive** nature than others and provides a brief summary of what changed and why the change is not a **substantial** change to the WCZMP.

a. Definitions (.030)

- "Substantial Development:" The minimum value necessary for a shoreline development to be considered a "Substantial Development" rose from \$2500 to \$5000. Also added was an automatic adjustment for inflation by the Office of Financial Management every five years beginning on July 1, 2007 based on changes in the "consumer price index" during that time period. This change includes rules for how this can be accomplished. **This change takes into account the effect of inflation on building materials, etc. and is not substantial, even though it is a change to "Substantial Development" under the SMA. It is merely an attempt to keep up with inflation and provide a reasonable monetary ceiling for those seeking permits. (2002)**
- "Shorelands" or "Shorelands Areas:" Changed to include any areas that local government deems to be "necessary for buffers for critical areas." This means that areas not specifically within the original meaning of the terms (e.g. landward of 200 feet of the OHWM) can be included in SMPs and regulated as shorelands or shorelands areas. **This change is not substantial as it simply allows local government to consider buffers as "shorelands," thus allowing their inclusion in SMPs. An example of a substantial change in this area would be one that significantly changed "shoreline" jurisdiction many feet beyond 200' of the OHWM. (2003)**
- "Floodway:" Expanded from a purely geographic definition (i.e., portions of a river valley) to include those areas identified in a SMP that either have been established in a federal emergency management agency flood insurance rate map or in floodway maps. This provides a clearer, simpler definition for identifying floodways and for which areas fall under an SMP's jurisdiction. Revision also includes additional "floodway indicators" and clarifies that the term applies not only to annual flooding but also flooding with "reasonable regularity." **It is not a substantial change as it just clarifies which areas are "floodways" without adding significant areas under SMP's jurisdictions. (2007)**

- “Substantial Development:” Similar to the above change, the minimum value of docks rose from \$10,000 to \$20,000, thus docks valued at less than \$20,000 are **not** considered “Substantial Developments” and do not require a permit IN FRESH WATERS ONLY. The revision applies to dock replacements that are of equal or lesser square footage and in areas with updated SMPs that are consistent with the guidelines. All other docks in freshwaters retain the \$10,000 threshold. The revised language also adds in the CPI as in above except that requirement does not begin until July 1, 2018. **Not a substantial change for reasons similar to first bullet above. (2014)**

b. New Section (.065): Agricultural Activities on Agricultural Lands

- This new section prohibits the SMA Guidelines and new SMPs from requiring “modification of or limits to agricultural activities occurring on agricultural lands.” New SMPs amended after the effective date of the change must include provisions addressing new agricultural activities on those lands not meeting the definition of agricultural land in the exemptions to “Substantial Development” in .030(3)(e)(iv) (exempts certain agricultural practices/activities).

The section also provides a definition of “agricultural activities” (specific only to the new section) to include everything from producing, breeding, or increasing agricultural products, including maintaining and replacing facilities and equipment. A second new definition, “Agricultural Products,” includes a range of products from flowers, fruits, hops, honey, wine, and Christmas trees to meat, dairy, and upland finfish. Last, “Agricultural Equipment” includes things like shelters, ponds, rearing equipment, fences, farmhouses, and land and roadside stands, etc. **The new section is not a substantial change because it is aimed at addressing new farming practices not originally contemplated or considered in the SMA. (2002)**

c. New Sub-Sections (.270(5) & .270(6)) Nonapplication to certain structures, docks, developments, etc., placed in navigable waters

Given the Washington State Legislature’s recognition of the importance of *“existing floating homes as an important cultural amenity and an element of the state’s maritime history and economy,”* it amended the SMA to clarify the legal status of floating homes and *“to ensure the vitality and long-term survival of existing floating single-family home communities.”* (2011 Washington State Legislature).

- Section .270 provides that the SMA does not apply to certain structures, docks, developments, etc. that are placed in navigable waters. Under this section, the SMA does not allow local governments to require removal of certain structures sitting in navigable waters, even if they are “non-conforming” uses. The new sub-section (5) adds floating homes to the “exemption” and states that they must be classified as **conforming preferred** uses. Specifically added are those “floating homes” permitted or legally established prior to January 1, 2011 as conforming preferred uses, which means SMPs can only impose reasonable conditions and mitigation that will not preclude maintenance, repair, replacement or remodel of existing floating homes and those that are single-family dwelling units constructed on a float that is moored, anchored, or otherwise secured in waters, and is not a vessel (even though it may be capable of being towed).

In 2014 the legislature further intended to *“preserve the existence and vitality of current, floating on-water residential uses; establish greater clarity and regulatory uniformity for these uses; and respect the well-*

established authority of local governments to determine compliance with regulatory requirements applicable to their jurisdiction."

- The new sub-section (6) clarifies that a "floating on-water residence" legally established prior to July 1, 2014, must be considered a conforming use similar to above (but not deemed "preferred"). This means any floating structure other than a floating home (as in above) that is: designed or used as primary residence with detachable utilities and whose owner has held an ownership interest in space in marina or lease prior to July 1, 2014 is a conforming use.

Neither change is substantial as on-water residences, floating homes, etc. are well-established uses in the Puget Sound area, and the 2011 change simply adds "floating homes" to the exempted structures in the section, so they are not viewed as "non-conforming" and therefore subject to removal at the behest of local governments. The 2014 change distinguishes "floating on-water residences" from "floating homes" making the former "conforming uses" but not "preferred" as floating homes are. (2011, 2014)

d. New Sub-Section (.355(2)) Persons not required to obtain certain permits or variances

- Language added exempting from SMA permit requirements, those persons installing site improvements for stormwater treatment in an existing boatyard facility under the terms of a National Pollutant Discharge Elimination System (NPDES) stormwater general permit. Such persons must obtain coverage under the stormwater general permit issued by Ecology, and this simply makes things less cumbersome for the applicant as the general permit addresses many of the same issues as would a shoreline permit. **Not a substantial change as it is merely an attempt to reduce permitting redundancy. (2012)**
- New Sub-Section added .355(3) exempting certain transportation maintenance, safety and/or repair projects for permit requirements. Does not exempt new construction of a new structure or facility or the expansion of an existing structure. **Not a substantial change as its intent is to allow for repairs needed for safety without waiting for a permit. (2015)**

e. New Section (.580) Shoreline restoration projects -- Relief from shoreline master program development standards and use regulations

The Legislative findings are as follows:

"The legislature finds that restoration of degraded shoreline conditions is important to the ecological function of our waters. However, restoration projects that shift the location of the shoreline can inadvertently create hardships for property owners, particularly in urban areas. Hardship may occur when a shoreline restoration project shifts shoreline management act regulations into areas that had not previously been regulated under the act or shifts the location of required shoreline buffers. The legislature intends to provide relief to property owners in such cases, while protecting the viability of shoreline restoration projects."

- The section grants relief from SMP requirements for certain restoration projects. **Allowing such projects to be undertaken without being subjected to SMP requirements in recognition of the importance of such projects does not qualify as a substantial change. (2009)**

2. Non-substantive enforceable policy changes:

Minor changes to the enforceable policies of the SMA are included in the Enforceable Policies Table and noted as "minor clarifications." They are minor word changes, details relating to timing of permitting and appeals, etc.

C. Non-Enforceable Policy Changes to the SMA (sections: 060, 080, 090, 170, 190, and 250)

The majority of the submitted changes to the SMA are not enforceable policy changes, and they are identified with an asterisk in the attached SMA Table. Ecology must submit these changes to OCRM for inclusion into the WCZMP, and they fall into two main categories: 1) *Shoreline Master Program (SMP) adoption and amendment procedures*, which consist of details such as: how and where to appeal Ecology's final decision to approve, or not, a local SMP; when SMPs must be submitted to Ecology and when they are considered "effective;" and 2) *Guidelines*: when they will be adopted and when local governments need to incorporate them into their local SMPs.

These changes do not meet any criteria under the five Program Areas and thus have not been evaluated as potential "substantial changes."

Several other minor changes include:

- Added new section relating to local governments' moratoria authority (which derives from the State Constitution and statutes), and established procedures relating to hearings, findings of fact, effective date, etc.
- The department shall approve the segment of a SMP relating to critical areas as long as it is consistent with the SMA and provides a level of protection of critical areas at least equal to that provided by the local governments' critical areas ordinances. Local governments can add critical area policies/standards in their SMPs as long as they are equal to those in their local ordinances.

D. Washington Administrative Code (WAC) Changes (WAC 173-15, 18, 20, 22, 26 & 27)

Ecology is submitting all provisions of WAC 173-15, 18, 20, and 22 as enforceable policies. Parts of WAC 173-26 are enforceable, and nothing in WAC 173-27 is considered an enforceable policy.

1. WAC 173-15 Permits for Oil or Natural Gas Exploration Activities Conducted from State Marine Waters
Word Clarifications and Housekeeping updates. **(2000)**

2. WAC 173-18 Shoreline Management Act – Streams and Rivers Constituting Shorelines of the State
-044. Removes lists of streams where SMP comprehensive updates have been approved. Per WAC 173-18-044, as comprehensive SMP updates are approved, the lists of streams in the WAC are superseded by maps and text in the approved, updated SMP. **(2011)**
-044. Requires SMPs to include lists of streams constituting shorelines of the state within the jurisdiction of the master program that complies with the requirements of the SMA. Once approved, said list becomes the official list. **(2007)**

-046. Criteria set forth in the SMA & the WAC prevails over that of a SMP where there is a conflict. **(2007)**

3. WAC 173-20 Shoreline Management Act – Lakes Constituting Shorelines of the State

Similar to change in 173-18 above relating to lists of Lakes replaced by updated SMPs – removes lists of lakes where SMP comprehensive updates have been approved. **(2011)**

-040. Corrects source material citations for lake listings and states that the listings are in effect until superseded by an approved SMP as described in subsection -044. **(2007)**

-044. Each SMP shall include a list of lakes constituting shorelines of the state within the jurisdiction of the SMP. Once approved, the list in the SMP shall prevail and is the official list. **(2007)**

-640. Removed "Thomas Lake" from Snohomish County shoreline jurisdiction. (2007)

4. WAC 173-22 Adoption of Designations of Shorelands and Wetlands Associated with Shorelines of the State

-030. Removes definitions no longer needed due to deletion of 173-22-080, which was a detailed wetland delineation methodology. The definitions only applied to section -080. **(2011)**

-030(5): Deletes definition of "Floodway" and states that it has the meaning in RCW 90.58.030. **(2007)**

-035. Deletes reference to wetland delineation methods in -080 and refers to the current version of the manual adopted by Ecology. **(2011)**

-050. Requires SMPs to include a map of shorelands constituting shorelines of the state within the jurisdiction of the SMP that complies with 90.58.030(2) (d). Once the SMP is approved, the list shall supersede other lists. **(2007)**

-055. When a shoreland (previously "wetland") designation shown on the maps adopted according to WAC 173-22-060 or an SMP conflicts with the criteria in the chapter, the criteria shall control. Local governments must amend the SMP to show the new designation within three years of discovery of the discrepancy. **(2007)**

-060. Replaces "wetlands" with "shorelands" to be more comprehensive. **(2007)**

-080. Deletes outdated section and replaces it with reference to the current version of the Ecology wetland manual cited in 173-22-035. **(2011)**

5. WAC 173-26 State Master Program Approval/Amendment Procedures and Master Program Guidelines

Ecology significantly updated 173-26 in January 2004. An EIS was written based on how the updates would affect coastal resources, including endangered species, and the FEIS was issued in 2011. OCRM approved the provisions of the Guidelines/Regulations as enforceable policies in May, 2011 as an amendment to Washington's Coastal Zone Management Program.

While the following discusses changes to both enforceable and non-enforceable policies, Ecology is now submitting only WAC 173-26-010 (Authority and Purpose) and 020 (Definitions) and Parts III (Guidelines) and IV (Ocean Management) as enforceable policies for federal consistency purposes.

The Guidelines/Regulations underwent several updates in 2011 in recognition of the importance of Commercial, as well as non-Commercial, Aquaculture as follows:

-020. Add definitions for "floodway" and "master program" and "Comprehensive Master Program," and "Limited Master Program Amendment" to be consistent with legislative changes to the SMA. Adds definitions for "critical areas" and "critical resource areas" to distinguish between critical areas defined by local Critical Areas Ordinances (CAOs) and those defined under the SMP. Delete definition of "Shoreline Master Program." Adds "Aquaculture" definition.

- 060. Record retention requirements for adopted SMPs are revised to allow the archiving of old SMPs and maintenance of a single, current version of all SMPs.
- 080. Updates list of jurisdictions required to adopt an SMP to reflect annexations and new municipalities.
- 110. Updates requirements for SMP submittals relating to copy submittals.
- 130. Updates SMP appeals process to reflect holding in SHB case # 2395.
- 150. Authorizes pre-shoreline designation of future annexation areas for non-GMA cities.
- 191. Removes listed-out criteria for Comprehensive Planning, referring instead to the specific WAC 365-196-500.
- 201. Process to Prepare or Amend Shoreline Master Programs
 Significant revamp of SMP amendment process for comprehensive and limited updates – focuses on criteria for achieving Ecology approval for limited amendments:
 - Language added that local governments, when reserving areas, should consider areas that are more ecologically intact shoreline areas from the uplands through the aquatic zone (2)(d)(i)
 - Inventory information sources expanded
 - Description of species broadened beyond “priority species”
 - Local governments are required to consider information specific to the aquatic environment for siting in-water uses and development
 - “Large” is deleted from “Woody Debris” definition as woody debris of all sizes is vital to critical areas
 - Deletes Hyporeic functions provision from ecosystems (lakes) section as the process does not exist in lakes
 - Adds “lacustrine” to include lakes in the criteria
 - Recognizes “shellfish areas” and “human health” as needing consideration under the Water Quality and Quantity section
 - Deletes sentence that inappropriately shifted local government focus on planning to individual permits
 - Adds sentence stating that local governments should reserve shoreline space for shoreline preferred uses
 - Clarifies relationship between GMA critical areas and SMA critical resources areas
- 211. Environment Designation System
 - The term “uses” replaces “development” to make the paragraph consistent throughout and to ensure that the language applies to aquaculture, per AAG opinion 2007 No 1 (p.46) (5)(b)(ii)(A)
 - Section added to the Aquatic Environment designation stating that local governments should reserve shoreline space for shoreline preferred uses (p.48) (5)©(ii)(G)
- 221. General Master Program Provisions Amended to conform to HB 1635(2010) which adopts “No Net Loss” in place of “at least equal to Critical Areas Ordinance” test.
 - Adds a statement that local governments should identify additional (beyond what’s already required by the Growth Management Act) shoreline areas that warrant special protection necessary to achieve no net loss of ecological functions (p.53)

- Modifies section on Critical Saltwater Habitat to recognize that the inclusion of commercial aquaculture in the critical saltwater habitat definition does not limit its regulation as a use. Reserving shoreline areas for protecting and restoring ecological functions should be done prior to reserving shoreline areas for uses described in WAC 173-16-201(2) (d) (i-v)
- Under Critical Freshwater Habitat adds lakes to remedy previous oversight

-241. Shoreline Uses Amendments are related to Aquaculture Use section which is expanded:

- Conditional Use Permit required for new and expanded commercial geoduck aquaculture to allow for local and state review. State review will provide an opportunity to increase consistency with the federal Nationwide 48 Permit requirement and state 401 Certification of such aquaculture (p.70)
- “Aquaculture” does not include the state-managed wild geoduck fishery
- Aquaculture is of state-wide interest and can protect the shoreline’s resources and ecology
- Aquaculture should not be permitted in areas where it would result in a net loss of ecological functions
- Local government should ensure proper management of upland uses to avoid degradation of water quality of existing shellfish areas
- New siting and permit conditions
- Applications must address: no net loss, public notice, baseline ecological survey, BMPs, etc.

-360. Ocean Management Address changes and corrects spelling of “archaeological” (adds 2nd “a”)

6. WAC 173-27 Shoreline Management Permit and Enforcement Procedures (all non-enforceable)

-040. Exemptions from Substantial Development Permits (2007 changes)

- Increases monetary threshold for exempted shoreline developments from \$2500 to \$5000 to conform to SMA amendment in 2002 (2)(a)
- Substantially expands fish and wildlife habitat improvement projects exemption by adding conditions and criteria that must apply to meet exemption language

-060. Applicability of the SMA to federal lands and agencies (2007 changes)

- Clarifies applicability of SMA on direct federal action to reflect federal consistency provisions
- Clarifies which counties constitute Washington’s coastal zone
- Asks for local government views on whether or not a federal activity is consistent with the SMP
- Refers to the CZMA and Regulations for consistency provisions

-080. & -090. Civil Penalty language updated per 2010 SHB 2935 Section 39 (2011 change)

CONCLUSION

Ecology looks forward to working with OCM throughout the approval of this RPC package. Every attempt will be made to explain, clarify, and fully discuss each enforceable policy under consideration with OCM during the review period. Following OCM’s approval, Ecology will publish a public notice to inform interested parties of the decision.