BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
EASTERN WASHINGTON REGION
STATE OF WASHINGTON

FUTUREWISE, SPOKANE RIVERKEEPER, THE LANDS COUNCIL, AND TROUT UNLIMITED, Petitioners, v. SPOKANE COUNTY AND WASHINGTON STATE DEPARTMENT OF ECOLOGY, Respondents.	Case No. 13-1-0003c **FINAL DECISION AND ORDER**

I. SYNOPSIS

Petitioners appeal the January 8, 2013, decision by the Washington State Department of Ecology to give "Final Ecology Approval of Spokane County Shoreline Master Program Comprehensive Update." Petitioners presented six legal issues for review by the Growth Management Hearings Board relating to critical areas-wetlands, fish and wildlife habitat, trails, on-site sewage systems, channel migration zones, and public access. As to Legal Issues 1, 2, 3, 5, and 6, the Board upholds the decision by the Department of Ecology. As to Legal Issue 4 relating to on-site sewage systems, the Growth Management Hearings Board reverses the Department of Ecology's decision approving Spokane County's 2013 Shoreline Master Program Update and remands this matter to the Department of Ecology and Spokane County for the purpose of complying with the Shoreline Management Act consistent with this Final Decision and Order and in accordance with the schedule provided.

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II. PROCEDURAL HISTORY

On March 25, 2013, two Petitions for Review were filed with the Growth Management Hearings Board relating to Spokane County's 2013 Shoreline Master Program Update.

On August 15, 2013, the Presiding Officer granted two Motions to Supplement the Record respectively filed on July 18, 2013, by (1) Respondent Washington State Department of Ecology ("Ecology") and (2) Petitioners Futurewise, Spokane Riverkeeper, The Lands Council, and Trout Unlimited.

On, November 19, 2013, a Hearing on the Merits was conducted at the Gonzaga University School of Law in Spokane, Washington. The Eastern Washington Panel hearing this appeal was comprised of Raymond L. Paolella, Presiding Officer, and Board Members Charles Mosher and Margaret Pageler. Petitioner Futurewise appeared through its attorney, Tim Trohimovich. Petitioners Spokane Riverkeeper, The Lands Council, and Trout Unlimited appeared through their attorney Rick Eichstaedt. Respondent Spokane County appeared through its attorney Alexander Mackie. Assistant Attorney General Sonia Wolfman appeared on behalf of Respondent Washington State Department of Ecology.

At the Hearing on the Merits, the Presiding Officer granted Petitioners' November 6, 2013, Motion for Extension of Time to file Reply Brief and Spokane County's October 21, 2013, Motion to use four GIS Maps as Illustrative Exhibits.

III. BURDEN OF PROOF/SCOPE OF REVIEW

The statutory provisions for appealing a Shoreline Master Program Amendment to the Growth Management Hearings Board (GMHB) are found in RCW 90.58.190(2), RCW 36.70A.280, and RCW 36.70A.290. The appellant has the burden of proof in all appeals to the GMHB under RCW 90.58.190(2).[1]

[1] RCW 90.58.190(2)(d).

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RCW 90.58.190(2)(b) provides:

> If the appeal to the growth management hearings board concerns **shorelines**, the growth management hearings board shall review the proposed master program or amendment solely for compliance with the requirements of this chapter, the policy of RCW 90.58.020 and the applicable guidelines, the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and chapter 43.21C RCW as it relates to the adoption of master programs and amendments under chapter 90.58 RCW.[2]

RCW 90.58.190(2)(c) provides:

> If the appeal to the growth management hearings board concerns a **shoreline of statewide 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.[3]

Under these two different subsections of RCW 90.58.190(2), the scope of review by the Growth Management Hearings Board is different based on whether the appeal concerns "shorelines" or concerns "shorelines of statewide significance."[4] The terms "shorelines" and "shorelines of statewide significance" have mutually exclusive definitions.

Under RCW 90.58.030(2)(c), "Shorelines of the state" are the total of all "shorelines" and "shorelines of statewide significance" within the state. The statutory term "shorelines" is defined in RCW 90.58.030(2)(d) to include all of the water areas of the state and their associated shorelands except "shorelines of statewide significance." The term "shorelines of statewide significance" is defined in RCW 90.58.030(2)(e).

In appeals concerning a Shoreline of Statewide Significance, the Legislature has: (1) narrowed the scope of GMHB review by excluding GMA internal consistency and SEPA as potential bases for compliance review, and (2) prescribed a high evidentiary standard –

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[2] Emphasis added.
[3] Emphasis added.
[4] As a creature of statute, the power and authority of the GMHB is limited to review of those matters expressly delegated by statute – the GMHB has only those powers expressly granted or necessarily implied by statute. *Viking Properties, Inc. v. Holm,* 155 Wn. 2d 112, 129 (2005); *Skagit Surveyors and Engineers, LLC v. Skagit County,* 135 Wn. 2d 542, 564 (1998).

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"clear and convincing evidence."[5] Although the GMHB has been delegated general authority to find a state agency, county, or city either "in compliance" or "not in compliance" with the requirements of the GMA or Chapter 90.58 as it relates to the adoption or amendment of shoreline master programs, that general review authority has been circumscribed by the specific provisions of RCW 90.58.190(2)(c) for appeals concerning a Shoreline of Statewide Significance. In contrast, for appeals concerning Shorelines, the GMHB has been delegated broader review authority that includes GMA internal consistency and SEPA compliance.

In the present appeal, Petitioners' six legal issues concern both Shorelines and Shorelines of Statewide Significance.[6] The record indicates that Petitioners challenge particular SMP provisions that apply uniformly to shorelines of the state located in Spokane County, without differentiating between Shorelines and Shorelines of Statewide Significance. Therefore, under the unique facts of this case, the Board's scope of review will be based upon provisions of RCW 90.58.190(2)(c) – i.e., the Board shall uphold the decision by Ecology unless the Board, by clear and convincing evidence, determines that Ecology's decision is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.[7]

The Shoreline Management Act "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." RCW 90.58.900. "The Shoreline Management Act of 1971 is to be broadly construed in order to protect the state shorelines as fully as possible." *English Bay Enterprises, Ltd. v. Island County*, 89 Wn.2d 16, 20 (1977).

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[5] For appeals concerning Shorelines of Statewide Significance, the scope of GMHB review is narrower and the evidentiary standard is enhanced, consistent with the enhanced protection of the statewide interest over the local interest. *See* RCW 90.58.020 legislative findings and policies.

[6] *See* WAC 173-18-360(3) which applies the definition of "shorelines of statewide significance" in RCW 90.58.030(2)(e).

[7] RCW 90.58.060(1) requires Ecology to adopt guidelines for the development of Shoreline Master Programs (SMPs) for the regulation and uses of shorelines. The SMP Guidelines are codified at WAC Chapter 173-26.

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IV. STATUTORY FRAMEWORK AND CHALLENGED DECISION

A. SMA/GMA Statutory Framework

In enacting the Shoreline Management Act, the Legislature found 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." Accordingly, "coordinated planning" between the state government and local governments is necessary in order to protect the public interest and to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.[8] RCW 90.58.020.

Local government has the primary responsibility for initiating SMA-required planning. RCW 90.58.050. While the statutory scheme provides for coordinated authority between the state and local government, the state reserves ultimate control and primary authority to manage shoreline development.[9]

RCW 90.58.080(1) provides that local governments "shall develop or amend a master program for regulation of uses of the shorelines of the state consistent with the required elements of the guidelines adopted by" the Department of Ecology. RCW 90.58. 060(1) requires Ecology to adopt guidelines for the development of Shoreline Master Programs (SMPs) for the regulation and uses of shorelines. The SMP Guidelines are codified at WAC Chapter 173-26, and these SMP Guidelines are binding state agency rules.[10]

Although the SMA directs each local government to develop and administer its SMP, the State Department of Ecology has a pervasive, state-mandated role in the development, review, and approval of local SMPs.[11] Our Supreme Court has ruled that the local government acts as an agent of the state in developing the SMP – the city/county acts at

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[8] The SMA is to be broadly construed in order to protect the state shorelines as fully as possible. *Buechel v. Dep't of Ecology,* 125 Wn.2d 196, 203 (1994).
[9] *Biggers v. City of Bainbridge Island,* 162 Wn.2d 683, 687 (2007); *Citizens for Rational Shoreline Planning v. Whatcom County,* 155 Wn. App. 937, 946 (2010).
[10] RCW 90.58.030(3)(c); RCW 90.58.080(1) & (7); RCW 90.58.090(3) & (4); RCW 90.58.190(2)(b) and .190(c).
[11] *Citizens for Rational Shoreline Planning v. Whatcom County,* 155 Wn. App. 937, 943 (2010).

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the instance of and, in some material degree, under the direction and control of the state.[12] Ecology's statutorily-mandated involvement in the process of SMP development is considerable and, ultimately, determinative – a local SMP becomes effective only upon approval by Ecology.[13] Locally-developed and Ecology-approved SMPs are the product of state regulation and constitute land use regulations for the various shorelines of the state.[14]

The GMA defines "Development Regulations" as "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** . . . ."[15] Much of the SMP, including use regulations, "shall be considered a part of the county or city's development regulations."[16]

For shorelines of the state, the statutes provide that the goals and policies of the SMA as set forth in RCW 90.58.020 are added as one of the goals of the GMA as set forth in RCW 36.70A.020 without creating an order of priority among the 14 goals; the goals and policies of a SMP "shall be considered an element of the county or city's comprehensive plan."[17]

B. Challenged Decision

On December 11, 2012, Spokane County passed Resolution No. 12-1039[18] and adopted a comprehensive update to Spokane County's Shoreline Master Program, which was originally adopted on January 15, 1975.[19] On January 8, 2013, Ecology Director Ted Sturdevant made the decision to give "Final Ecology Approval of Spokane County Shoreline

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[12] *Orion Corp. v. State,* 109 Wn.2d. 621, 643-44 (1987) [SMA created an agency relationship with state as principal and local government as agent].
[13] RCW 90.58.090(1); *Citizens for Rational Shoreline Planning v. Whatcom County,* 155 Wn. App. 937, 943 (2010).
[14] RCW 90.58.100(1); *Citizens for Rational Shoreline Planning v. Whatcom County,* 155 Wn. App. 937, 945 (2010).
[15] RCW 36.70A.030(7). Emphasis added.
[16] RCW 36.70A.480(1).
[17] *Id.*
[18] Resolution No. 12-1039, Board of County Commissioners of Spokane County, Washington (December 11, 2012), attached as Ex. A to Petition for Review of Spokane Riverkeeper (September 20, 2013).
[19] Spokane County Shoreline Master Program (Effective January 22, 2013), attached as Ex. C to Petition for Review of Futurewise (March 25, 2013).

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Master Program Comprehensive Update."[20] On January 22, 2013, the Washington Department of Ecology Notice of Adoption of Spokane County's Comprehensive Shoreline Master Program Update was published.[21]

V. DISCUSSION OF THE ISSUES

A. ISSUE 1: CRITICAL AREAS-WETLANDS. Does the adoption of the provisions for critical areas protection violate RCW 90.58.020, RCW 90.58.030(2)(d)(ii), RCW 90.58.030(3)(b) & (3)(c), RCW 90.58.065, RCW 90.58.080, RCW 90.58.090, RCW 90.58.610, RCW 36.70A.480, WAC 173-26-186(8)(b), WAC 173-26-191(2), WAC 173-26-201(2)(c), and WAC 173-26-221(2) because the County did not expand its shoreline jurisdiction to include the necessary buffers and other protections and the master program provides that "[c]ritical areas within shorelines of the state in Spokane County are managed exclusively through the provisions of this Shoreline Master Program?" *See* Spokane County Shoreline Master Program § 8.4 p. 88 (Effective: January 22, 2013) in Exhibit C of the Futurewise PFR and the other policies and regulations applicable to critical areas protection.[22]

Applicable Law

RCW 90.58.030(2)(g):

> "Shorelines of the state" are the total of all "shorelines" and "shorelines of statewide significance" within the state.

RCW 90.58.030(2)(d):

> "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.

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[20] Department of Ecology Letter to Board of County Commissioners of Spokane County (January 8, 2013), attached as Ex. A to Petition for Review of Futurewise (March 25, 2013).

[21] Notice of Final Ecology Approval of Spokane County Shoreline Master Program Comprehensive Update, attached as Ex. B to Petition for Review of Spokane Riverkeeper et al. (September 20, 2013).

[22] The Board deems subissues relating to RCW 90.58.065 and WAC 173-26-201 as abandoned since Petitioners' briefs contain no argument as to these provisions. Failure by a party to brief an issue shall constitute abandonment of the unbriefed issue. WAC 242-03-590(1).

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RCW 90.58.030(2)(h):

> "Wetlands" means areas that are inundated or saturated by surface water or groundwater 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 nonwetland 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 nonwetland areas to mitigate the conversion of wetlands.

WAC 173-22-010:

> Pursuant to RCW 90.58.030(2)(f), the department of ecology herein designates the wetland areas associated with the streams, lakes and tidal waters which are subject to the provisions of chapter 90.58 RCW.

WAC 173-22-030(1):

> "Associated wetlands" means those wetlands which are in proximity to and either influence or are influenced by tidal waters or a lake or stream subject to the Shoreline Management Act.

RCW 90.58.030(2)(d)(ii):

> Any city or county may also include in its master program land necessary for buffers for critical areas, as defined in chapter 36.70A RCW, that occur within shorelines of the state, provided that forest practices regulated under chapter 76.09 RCW, except conversions to nonforest land use, on lands subject to the provisions of this subsection (2)(d)(ii) are not subject to additional regulations under this chapter.

RCW 36.70A.480(3)(d):

> Upon department of ecology approval of a shoreline master program or critical area segment of a shoreline master program, critical areas within shorelines of the state are protected under chapter 90.58 RCW and are not subject to the procedural and substantive requirements of this chapter, except as provided in subsection (6) of this section.

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RCW 36.70A.480(6):

> If a local jurisdiction's master program does not include land necessary for buffers for critical areas that occur within shorelines of the state, as authorized by RCW 90.58.030(2)(f), then the local jurisdiction shall continue to regulate those critical areas and their required buffers pursuant to RCW 36.70A.060(2).

RCW 90.58.090(4):

> The department shall approve the segment of a master program relating to critical areas as defined by RCW 36.70A.030(5) provided the master program segment is consistent with RCW 90.58.020 and applicable shoreline guidelines, and if the segment provides a level of protection of critical areas at least equal to that provided by the local government's critical areas ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2).

WAC 173-26-221(2)(a):

> **Applicability.** Pursuant to the provisions of RCW 90.58.090(4) and 36.70A.480(3) as amended by chapter 107, Laws of 2010 (EHB 1653), shoreline master programs must provide for management of critical areas designated as such pursuant to RCW 36.70A.170(1)(d) located within the shorelines of the state with policies and regulations that:
>
> (i) Are consistent with the specific provisions of this subsection (2) critical areas and subsection (3) of this section flood hazard reduction, and these guidelines; and
>
> (ii) Provide a level of protection to critical areas within the shoreline area that assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources.
>
> The provisions of this section and subsection (3) of this section, flood hazard reduction, shall be applied to critical areas within the shorelines of the state. RCW 36.70A.030 defines critical areas as:
>
> "*"Critical areas" include the following areas and ecosystems:*
>
> *(a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable waters; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.*"
>
> The provisions of WAC 365-190-080 through 365-190-130, to the extent standards for certain types of critical areas are not provided by this section and subsection (3) of this section flood hazard reduction, and to the extent consistent with these guidelines are also applicable to and provide further definition of critical area categories and management policies.

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> As provided in RCW 90.58.030 (2)(f)(ii) and 36.70A.480, as amended by chapter 321, Laws of 2003 (ESHB 1933), any city or county may also include in its master program land necessary for buffers for critical areas, as defined in chapter 36.70A RCW, that occur within shorelines of the state, provided that forest practices regulated under chapter 76.09 RCW, except conversions to nonforest land use, on lands subject to the provision of WAC 173-26-241 (3)(e) are not subject to additional regulations. If a local government does not include land necessary for buffers for critical areas that occur within shorelines of the state, as authorized above, then the local jurisdiction shall continue to regulate those critical areas and required buffers pursuant to RCW 36.70A.060(2).
>
> In addition to critical areas defined under chapter 36.70A RCW and critical saltwater and freshwater habitats as described in these guidelines, local governments should identify additional shoreline areas that warrant special protection necessary to achieve no net loss of ecological functions.

WAC 173-26-221(2)(c)(i)(D):

> **Buffers.** Master programs shall contain requirements for buffer zones around wetlands. Buffer requirements shall be adequate to ensure that wetland functions are protected and maintained in the long term. Requirements for buffer zone widths and management shall take into account the ecological functions of the wetland, the characteristics and setting of the buffer, the potential impacts associated with the adjacent land use, and other relevant factors.

Board Discussion and Analysis

In this Issue 1, Petitioners challenge the Department of Ecology's approval of Spokane County's Shoreline Master Program (SMP), which in § 8.4A contains the following language:

> Critical Areas within shorelines of the state in Spokane County are managed exclusively through the provisions of this Shoreline Master Program.[23]

Petitioners assert that the failure to expand SMP jurisdiction to include the necessary buffers, coupled with the exclusive reliance on the SMP with its narrow jurisdiction to protect

[23] Spokane County Shoreline Master Program, § 8.4 *Application of the Critical Area Ordinance and Flood Damage Protection Ordinance Regulations within the Shorelines of the State*, p. 88 (January 22, 2013).

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critical areas, constitute clear, cogent, and convincing evidence of violations of the policy of RCW 90.58.020.

Under the SMA cities and counties may, at their option, include in their master program land necessary for buffers for GMA-designated critical areas[24] that occur within shorelines of the state.[25] Regarding "critical areas that occur within shorelines of the state," the statutes establish a dichotomy between regulation under the SMA and regulation under the GMA for these shoreline critical areas, and each city or county may choose which set of regulations will apply:

SMA Regulations: If the County chooses to include in its master program land necessary for buffers for critical areas within shorelines, then those critical areas are protected under the SMA, not the GMA.[26]

GMA Regulations: Alternatively, if the County chooses not to include in its master program land necessary for buffers for critical areas that occur within shorelines, then the County must regulate those critical areas and their required buffers pursuant to their GMA Critical Areas Ordinances.[27]

Spokane County chose not to include in its master program land necessary for buffers for GMA-designated critical areas that occur within shorelines of the state.[28] Instead Spokane County decided to adopt by reference a number of Critical Areas Ordinance sections into the SMP "as use regulations of the SMP." For example, Spokane County adopted by reference specific Critical Areas regulations on Wetlands, Fish and Wildlife Habitat and Species Conservation Areas, and Critical Aquifer Recharge Areas, among other CAO provisions, as "use regulations" of the SMP.[29]

In addition, § 8.4 of the SMP states *inter alia* as follows:

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[24] RCW 36.70A.030(5); RCW 36.70A.060(2); and RCW 36.70A.480(5).
[25] RCW 90.58.030(2)(d)(ii); WAC 173-26-221(2)(a).
[26] RCW 36.70A.480(3)(d); WAC 173-26-221(2)(a).
[27] RCW 36.70A.480(6); WAC 173-26-221(2)(a).
[28] Ecology's Response Brief, Ex. E001729, Letter from Sara Hunt (Ecology) to John Pederson (Spokane County), p. 1 (March 21, 2013).
[29] Spokane County Shoreline Master Program, § 8.4 *Application of the Critical Area Ordinance and Flood Damage Protection Ordinance Regulations within the Shorelines of the State*, p. 88 (Effective January 22, 2013).

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- The provisions of the Spokane County Critical Areas Ordinance and Flood Damage Protection Ordinance, as adopted into this Shoreline Master Program, shall apply to any use, modification or development within jurisdiction of this master program.
- No development on shorelines of the state shall be constructed, located, extended, modified, converted, or altered without full compliance with the provisions of the Critical Areas Ordinance and Flood Damage Protection Ordinance adopted as use regulations of this Shorelines Master Program.
- Any use, modification, or development within two or more critical area types shall adhere to the standards that are most protective of the ecological functions of the subject shoreline or critical area.
- The purpose of this section [8.4] is to clarify that incorporating segments of the critical areas regulations and flood damage protection regulations as use regulations in this shoreline master program, ensures that no net loss of ecological functions of critical areas within shorelines of the state in Spokane County will result from implementing the master program.[30]

The Board understands Petitioners' argument that on its face the page 88 SMP sentence "Critical areas within shorelines of the state in Spokane County are managed exclusively through the provisions of this Shoreline Master Program" appears inconsistent with the state law requirement that the County "shall continue to regulate those critical areas and their required buffers pursuant to [GMA Critical Areas Ordinances]." In this regard, that SMP sentence on page 88 was not artfully written, and it has resulted in some confusion among Spokane County staff and the public.[31] However, when this sentence is read in context together with the other provisions and requirements of SMP § 8.4, it is apparent that the County is regulating those critical areas and buffers under the GMA Critical Areas Ordinances, which have been incorporated and "adopted as use regulations" in the SMP.

Spokane County's SMP use regulations [including the incorporated and adopted Critical Areas Ordinances] "shall apply to all applicable shorelines and shorelands in

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[30] Spokane County Shoreline Master Program, § 8.4 *Application of the Critical Area Ordinance and Flood Damage Protection Ordinance Regulations within the Shorelines of the State*, pp. 87-89 (Effective January 22, 2013).

[31] According to Futurewise, Spokane County developers have already argued that the "Shoreline trumps the CAO and whenever there is a shoreline buffer it applies and the wetland is ignored." Spokane Co. Bates Page No. 0015829 in Tab 15827 – 29 of Futurewise's Reply Brief (Nov. 7, 2013), Jeremy Sikes, Ecology, email to Tammy Jones, Spokane County (Oct. 26, 2010).

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Spokane County."[32] The statutory terms "shorelines' and "shorelines of statewide significance" both include within their definitional scope "associated shorelands."[33]

The Board notes Petitioner's concern and assertion that there might be a "gap" in regulations concerning buffers to protect associated wetlands in shoreline jurisdiction, allegedly leaving unprotected those buffer lands that are outside of shoreline jurisdiction.[34] However, as pointed out by the Attorney General's brief, "by definition, the buffer area of an associated wetland is not in shoreline jurisdiction . . . and the CAO will apply to the buffer area of an associated wetland."[35] Further, Ecology Regional Office Section Manager Sara Hunt stated:

> Spokane County has adopted the CAO by reference into the SMP. The CAO regulations governing buffers for the critical areas both within and outside of shoreline jurisdiction are the same, and would provide the same level of protection.
>
> Associated wetlands are considered to be within shoreline jurisdiction, and would be subject to the provisions of the Spokane County SMP. The buffers for the associated wetlands would be subject to the Spokane County CAO, which are identical to the SMP regulations.[36]

Board Findings of Fact

The Growth Management Hearings Board finds that there is clear and convincing evidence in the record as follows:

1. Spokane County chose not to include in its Shoreline Master Program land necessary for buffers for GMA-designated Critical Areas that occur within shorelines of the state.

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[32] Spokane County Shoreline Master Program, § 1.4 *Scope and Application*, p. 2 (Effective January 22, 2013, emphasis added).
[33] RCW 90.58.030(2)(e) and RCW 90.58.030(2)(f)(vi).
[34] Futurewise's Prehearing Brief, p. 8 (Sept. 20, 2013).
[35] Ecology's Response Brief, p. 11 (Oct. 21, 2013).
[36] Ecology's Response Brief, Ex. E001729, Letter from Sara Hunt (Ecology) to John Pederson (Spokane County), p. 1 (March 21, 2013).

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2. Spokane County has incorporated and adopted by reference the Critical Areas Ordinances as binding Use Regulations into the Spokane County Shoreline Master Program.

3. Spokane County regulates Critical Areas that occur within shorelines of the state, together with their required buffers, pursuant to GMA-adopted Critical Areas Ordinances.

4. Spokane County's Shoreline Master Program provides that no development on shorelines of the state (including associated shorelands) shall be constructed, located, extended, modified, converted, or altered without full compliance with the provisions of the Critical Areas Ordinance and Flood Damage Protection Ordinance adopted as use regulations of the Shorelines Master Program.

5. Spokane County's Critical Areas Ordinances regulate the buffer areas of SMA-associated wetlands.

Board Conclusions of Law

1. As to Legal Issue 1, Petitioners have failed to satisfy their burden of proof to show, by clear and convincing evidence, that the decision of the Department of Ecology is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.

2. The Board upholds the decision by the Department of Ecology as to Legal Issue 1.

B. ISSUE 2: FISH AND WILDLIFE HABITAT. Does the adoption of the Spokane County fish and wildlife habitat conservation area regulations by reference, Spokane County Code (SCC) 11.20.060, violate RCW 90.58.020, RCW 90.58.030(2)(d)(ii), RCW 90.58.030(3)(b) & (3)(c), RCW 90.58.080, RCW 90.58.090, RCW 90.58.610, RCW 36.70A.480, WAC 173-26-020(8) and (29), WAC 173-26-186(8)(b), WAC 173-26-191(2), WAC 173-26-201(2)(c), WAC 173-26-221(2), and WAC 173-26-241(2)(a)(ii) where the fish and wildlife habitat conservation area regulations only protect the habitats of priority species that are depicted as "points" in the priority habitats and species GIS databases because the regulations do not protect the habitats of all priority species including the habitats of endangered, threatened, and sensitive species? *See* Spokane County Shoreline Master Program § 8.4 pp. 87 – 89 (Effective: January 22, 2013)

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in Exhibit C of the Futurewise PFR and the other policies and regulations applicable to critical areas protection.[37]

Applicable Law

WAC 173-26-221(2)(a):

> **Applicability.** Pursuant to the provisions of RCW 90.58.090(4) and 36.70A.480(3) as amended by chapter 107, Laws of 2010 (EHB 1653), shoreline master programs must provide for management of critical areas designated as such pursuant to RCW 36.70A.170(1)(d) located within the shorelines of the state with policies and regulations that:
>
> (i) Are consistent with the specific provisions of this subsection (2) critical areas and subsection (3) of this section flood hazard reduction, and these guidelines; and
>
> (ii) Provide a level of protection to critical areas within the shoreline area that assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources.
>
> The provisions of this section and subsection (3) of this section, flood hazard reduction, shall be applied to critical areas within the shorelines of the state.

RCW 36.70A.030 defines critical areas as:

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

WAC 173-26-020(28):

> "Priority habitat" means a habitat type with unique or significant value to one or more species. An area classified and mapped as priority habitat must have one or more of the following attributes:
>
> • Comparatively high fish or wildlife density;
> • Comparatively high fish or wildlife species diversity;
> • Fish spawning habitat;
> • Important wildlife habitat;
> • Important fish or wildlife seasonal range;
> • Important fish or wildlife movement corridor;
> • Rearing and foraging habitat;

[37] The Board deems subissues relating to RCW 90.58.030, RCW 90.58.080, RCW 90.58.090, and WAC 173-26-186 as abandoned since Petitioners' briefs contain no argument as to these provisions. Failure by a party to brief an issue shall constitute abandonment of the unbriefed issue. WAC 242-03-590(1).

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- Important marine mammal haul-out;
- Refugia habitat;
- Limited availability;
- High vulnerability to habitat alteration;
- Unique or dependent species; or
- Shellfish bed.

A priority habitat may be described by a unique vegetation type or by a dominant plant species that is of primary importance to fish and wildlife (such as oak woodlands or eelgrass meadows). A priority habitat may also be described by a successional stage (such as, old growth and mature forests). Alternatively, a priority habitat may consist of a specific habitat element (such as a consolidated marine/estuarine shoreline, talus slopes, caves, snags) of key value to fish and wildlife. A priority habitat may contain priority and/or nonpriority fish and wildlife.

WAC 173-26-020(29):

"Priority species" means species requiring protective measures and/or management guidelines to ensure their persistence at genetically viable population levels. Priority species are those that meet any of the criteria listed below.

(a) Criterion 1. State-listed or state proposed species. State-listed species are those native fish and wildlife species legally designated as endangered (WAC 232-12-014), threatened (WAC 232-12-011), or sensitive (WAC 232-12-011). State proposed species are those fish and wildlife species that will be reviewed by the department of fish and wildlife (POL-M-6001) for possible listing as endangered, threatened, or sensitive according to the process and criteria defined in WAC 232-12-297.

(b) Criterion 2. Vulnerable aggregations. Vulnerable aggregations include those species or groups of animals susceptible to significant population declines, within a specific area or statewide, by virtue of their inclination to congregate. Examples include heron colonies, seabird concentrations, and marine mammal congregations.

(c) Criterion 3. Species of recreational, commercial, and/or tribal importance. Native and nonnative fish, shellfish, and wildlife species of recreational or commercial importance and recognized species used for tribal ceremonial and subsistence purposes that are vulnerable to habitat loss or degradation.

(d) Criterion 4. Species listed under the federal Endangered Species Act as either proposed, threatened, or endangered.

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WAC 173-26-201(3)(d)(i)(C):

> Shoreline ecological functions include, but are not limited to:
>
> In rivers and streams and associated flood plains:
>
> Hydrologic: Transport of water and sediment across the natural range of flow variability; attenuating flow energy; developing pools, riffles, gravel bars, nutrient flux, recruitment and transport of large woody debris and other organic material.
>
> Shoreline vegetation: Maintaining temperature; removing excessive nutrients and toxic compound, sediment removal and stabilization; attenuation of high stream flow energy; and provision of woody debris and other organic matter.
>
> Hyporheic functions: Removing excessive nutrients and toxic compound, water storage, support of vegetation, and sediment storage and maintenance of base flows.
>
> Habitat for native aquatic and shoreline-dependent birds, invertebrates, mammals; amphibians; and anadromous and resident native fish: Habitat functions may include, but are not limited to, space or conditions for reproduction; resting, hiding and migration; and food production and delivery. . . .

Board Discussion and Analysis

A significant SMA policy directive is to protect the ecology and ecosystem-wide processes and to assure no net loss of ecological functions.[38] The Department of Ecology's Master Program Guidelines define the terms "Ecological Functions" and "Ecosystem-wide Processes"[39] as follows:

> "Ecological functions" or "shoreline functions" means the work performed or role played by the physical, chemical, and biological processes that contribute to the maintenance of the aquatic and terrestrial environments that constitute the shoreline's natural ecosystem.
>
> "Ecosystem-wide processes" means the suite of naturally occurring physical and geologic processes of erosion, transport, and deposition; and specific chemical processes that shape landforms within a specific shoreline ecosystem and determine both the types of habitat and the associated ecological functions.

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[38] RCW 90.58.020; RCW 36.70A.480; WAC 173-26-020(8), (13), and (14); WAC 173-26-186(8); WAC 173-26-201(2)(c). "The regulatory provisions for critical areas shall protect existing ecological functions and ecosystem-wide processes." WAC 173-26-221(2)(b)(iv).

[39] WAC 173-26-020(13) and (14).

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Shoreline master programs must provide a level of protection to critical areas within the shoreline area that assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources.[40]

Spokane County has incorporated and adopted by reference the Critical Areas Ordinances, including provisions relating to Fish and Wildlife Habitat and Species Conservation Areas, as binding Use Regulations into the Spokane County Shoreline Master Program.[41]

Petitioner Futurewise alleges these Fish and Wildlife Habitat and Species Conservation Areas provisions in Spokane County Code (SCC) § 11.20.060(A)(1), (B)(1), and (D)[42] only protect habitats for priority species depicted as "points," but fail to protect habitat "lines" and "areas or polygons." In particular, Futurewise asserts the SMP has no regulations to protect Bald Eagle roost habitat.[43] Bald Eagles are considered to be a "priority species" because they are a Washington State listed "sensitive species."[44]

The Board first notes that this case is limited to an appeal of the Spokane County Shoreline Master Program, as approved by Ecology. In this proceeding, Petitioners do not and cannot challenge the Critical Areas Ordinance itself, as it relates to Fish and Wildlife Habitat and Species Conservation Areas.

As stated in the incorporated Spokane County Code (SCC) § 11.20.060, it is a goal of the SMP to:

> Ensure that priority fish and wildlife species, as identified by the Washington Department of Fish and Wildlife, and species of local importance, do not become increasingly imperiled due to land use changes, habitat alteration, and other human activities.[45]

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[40] WAC 173-26-221(2)(a)(ii).
[41] Spokane County Shoreline Master Program, § 8.4 *Application of the Critical Area Ordinance and Flood Damage Protection Ordinance Regulations within the Shorelines of the State*, p. 88 (Effective January 22, 2013).
[42] Spokane County Code (SCC) § 11.20.060 pp. 45, 54, and 57-58.
[43] Futurewise's Prehearing Brief, pp. 15-17 (September 20, 2013).
[44] WAC 173-26-020 (29)(a); Spokane Co. Bates Page No. 23444, *Species and Habitats Identified for Spokane County*.
[45] Futurewise's Prehearing Brief, Attachment CAO, Section 11.120.060, at p. 45 (September 20, 2013).

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Spokane County Code (SCC) § 11.20.060(A)(1) designates Priority Habitats and Species as follows:

> **Washington State Priority Habitat and Species Program.** The priority habitats and species of WDFW Region 1 are identified in Table 11.20.060A and are adopted from the Washington State Priority Habitats and Species Program, or as amended. Due to the dynamic nature of Fish and Wildlife populations and their habitats, the Priority Habitats and Species Program will be revised periodically as species and habitats are added, deleted or redefined. The location of these priority habitats and known point locations such as den or nest site of priority species are depicted on the Spokane County Fish and Wildlife Habitat Conservation Areas Map which is available at the Building and Planning Department.

This code section refers to the location of both "priority habitats *and* known point locations such as den or nest site of priority species." As to the depiction shown on the Fish and Wildlife Conservation Areas Map, the sentence is written in the conjunctive to say that both priority habitats and point locations are mapped. In addition, the Priority Habitat "Riparian" is identified in designation Table 11.20.060A:

> The area adjacent to aquatic systems that contains elements of both aquatic and terrestrial ecosystems which mutually influence each other. In riparian systems, the vegetation, water tables, soils, microclimate, and wildlife inhabitants of terrestrial ecosystems are influenced by perennial or intermittent water. Simultaneously, the biological and physical properties of the aquatic ecosystems are influenced by adjacent vegetation, nutrient and sediment loading, terrestrial wildlife, as well as organic and inorganic debris. Riparian habitat encompasses the area beginning at the ordinary high water mark and extends to that portion of the terrestrial landscape that is influenced by, or that directly influences, the aquatic ecosystem. Riparian habitat includes the entire extent of the floodplain and riparian areas of wetlands that are directly connected to stream courses or lakes.
>
> Criteria: High fish and wildlife density, high fish and wildlife species diversity, important fish and wildlife breeding habitat, important wildlife seasonal ranges, important fish and wildlife movement corridors, high vulnerability to habitat alteration, unique or dependent species.[46]

[46] Spokane County Code (SCC) § 11.20.060 pp. 47-48.

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According to the *Spokane County Proper Functioning Condition Stream Inventory & Assessment Final Report*, "Important wildlife species supported by the riparian habitats included bald eagles, merlins, Great-blue herons, Canada geese, beavers, American dippers, waterfowl, and various neotropical migrants (birds)." [47]

Table 11.20.060A also identifies the Bald Eagle as a designated Priority Species, including "Breeding areas, communal roosts, regular and regular large concentrations, regularly-used perch trees in breeding areas."[48] Thus, Spokane County's Shoreline Master Program explicitly references and protects Bald Eagle nesting sites and roosts.

Futurewise did not satisfy its burden of proof to show, by clear and convincing evidence, that the SMP (1) fails to protect habitat "lines" and "areas or polygons," (2) has no regulations to protect Bald Eagle roost habitat, and (3) fails to provide a level of protection to critical areas within the shoreline area that assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources.

Board Findings of Fact

The Growth Management Hearings Board finds that there is clear and convincing evidence in the record as follows:

1. Spokane County's Shoreline Master Program protects habitat "lines" and "areas or polygons" by incorporating by reference Spokane County Code (SCC) § 11.20.060 which is part of the Critical Areas Ordinance.

2. Spokane County's Shoreline Master Program has regulations to protect Bald Eagle roost habitat.

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[47] Spokane Co. Bates Page No. 602, The Spokane County Conservation District, *Spokane County Proper Functioning Condition Stream Inventory & Assessment Final Report* p. ix (2005). *See also*, *Washington Department of Fish and Wildlife, Management Recommendations for Washington's Priority Habitats – Riparian*, K. Lea Knutson and Virginia L. Naef, p. 6 (December 1997): "Natural riparian corridors are the most diverse, dynamic, and complex biophysical habitats on the terrestrial portion of the earth . . . Wildlife occurs more often and in greater variety in riparian habitats than in any other habitat type."

[48] *Id.* at p. 51.

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Board Conclusions of Law

1. As to Legal Issue 2, Petitioners have failed to satisfy their burden of proof to show, by clear and convincing evidence, that the decision of the Department of Ecology is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.

2. The Board upholds the decision by the Department of Ecology as to Legal Issue 2.

C. ISSUE 3: TRAILS. Does the adoption of the provisions for trail construction that allow trail development in the shoreline buffer for the Rural Conservancy, Urban Conservancy, or Shoreline Residential environment designations violate RCW 90.58.020, RCW 90.58.030(2)(d)(ii), RCW 90.58.030(3)(b) & (3)(c), RCW 90.58.065, RCW 90.58.080, RCW 90.58.090, RCW 90.58.610, RCW 36.70A.480, WAC 173-26-186(8)(b), WAC 173-26-191(2), WAC 173-26-201(2)(c), WAC 173-26-221, and WAC 173-26-241? *See* Spokane County Shoreline Master Program § 5.2.5 pp. 26 – 30 (Effective: January 22, 2013) in Exhibit C of the Futurewise PFR and the other policies and regulations applicable to trail construction.[49]

Applicable Law

RCW 90.58.020:

> The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. The department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:
>
> (1) Recognize and protect the statewide 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.

[49] The Board deems subissues relating to RCW 90.58.030, RCW 90.58.065, RCW 90.58.080, RCW 90.58.090, and WAC 173-26-191 as abandoned since Petitioners' briefs contain no argument as to these provisions. Failure by a party to brief an issue shall constitute abandonment of the unbriefed issue. WAC 242-03-590(1).

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WAC 173-26-221(4)(b):

> Local master programs shall:
> (i) Promote and enhance the public interest with regard to rights to access waters held in public trust by the state while protecting private property rights and public safety.
> (ii) Protect the rights of navigation and space necessary for water-dependent uses.
> (iii) To the greatest extent feasible consistent with the overall best interest of the state and the people generally, protect the public's opportunity to enjoy the physical and aesthetic qualities of shorelines of the state, including views of the water.
> (iv) Regulate the design, construction, and operation of permitted uses in the shorelines of the state to minimize, insofar as practical, interference with the public's use of the water.

WAC 173-26-221(4)(d):

> Shoreline master programs should implement the following standards:
> (i) Based on the public access planning described in (c) of this subsection, establish policies and regulations that protect and enhance both physical and visual public access. The master program shall address public access on public lands. The master program should seek to increase the amount and diversity of public access to the state's shorelines consistent with the natural shoreline character, property rights, public rights under the Public Trust Doctrine, and public safety. . . .
> (v) Assure that public access improvements do not result in a net loss of shoreline ecological functions.

WAC 173-26-221(2)(c)(iv)(C):

> Master programs shall implement the following standards within shoreline jurisdiction: (I) Provide for the protection of ecological functions associated with critical freshwater habitat as necessary to assure no net loss of ecological functions. . . .

WAC 173-26-221(5)(b):

> The intent of vegetation conservation is to protect and restore the ecological functions and ecosystem-wide processes performed by vegetation along shorelines. Vegetation conservation should also be undertaken to protect human safety and property, to increase the stability of river banks and coastal bluffs, to reduce the need for structural shoreline stabilization measures, to improve the visual and aesthetic qualities of the shoreline, to

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protect plant and animal species and their habitats, and to enhance shoreline uses. . . .

Current scientific evidence indicates that the length, width, and species composition of a shoreline vegetation community contribute substantively to the aquatic ecological functions. Likewise, the biota within the aquatic environment is essential to ecological functions of the adjacent upland vegetation. The ability of vegetated areas to provide critical ecological functions diminishes as the length and width of the vegetated area along shorelines is reduced. When shoreline vegetation is removed, the narrower the area of remaining vegetation, the greater the risk that the functions will not be performed. . . .

In the Pacific Northwest, aquatic environments, as well as their associated upland vegetation and wetlands, provide significant habitat for a myriad of fish and wildlife species. Healthy environments for aquatic species are inseparably linked with the ecological integrity of the surrounding terrestrial ecosystem. For example, a nearly continuous corridor of mature forest characterizes the natural riparian conditions of the Pacific Northwest. Riparian corridors along marine shorelines provide many of the same functions as their freshwater counterparts. The most commonly recognized functions of the shoreline vegetation include, but are not limited to:

• Providing shade necessary to maintain the cool temperatures required by salmonids, spawning forage fish, and other aquatic biota.

• Providing organic inputs critical for aquatic life.

• Providing food in the form of various insects and other benthic macroinvertebrates.

• Stabilizing banks, minimizing erosion, and reducing the occurrence of landslides. The roots of trees and other riparian vegetation provide the bulk of this function.

• Reducing fine sediment input into the aquatic environment through storm water retention and vegetative filtering.

• Filtering and vegetative uptake of nutrients and pollutants from ground water and surface runoff.

• Providing a source of large woody debris into the aquatic system. Large woody debris is the primary structural element that functions as a hydraulic roughness element to moderate flows. Large woody debris also serves a pool-forming function, providing critical salmonid rearing and refuge habitat. Abundant large woody debris increases aquatic diversity and stabilization.

• Regulation of microclimate in the stream-riparian and intertidal corridors.

• Providing critical wildlife habitat, including migration corridors and feeding, watering, rearing, and refugia areas.

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WAC 173-26-241(2)(i):

> **Recreational development.** Recreational development includes commercial and public facilities designed and used to provide recreational opportunities to the public. Master programs should assure that shoreline recreational development is given priority and is primarily related to access to, enjoyment and use of the water and shorelines of the state. Commercial recreational development should be consistent with the provisions for commercial development in (d) of this subsection. Provisions related to public recreational development shall assure that the facilities are located, designed and operated in a manner consistent with the purpose of the environment designation in which they are located and such that no net loss of shoreline ecological functions or ecosystem-wide processes results.

Board Discussion and Analysis

Petitioners allege Spokane County and Ecology are clearly and convincingly in error regarding trail provisions within the SMP by creating inconsistent guidelines within the SMP specific to trail development, failing to utilize viable alternatives to trail encroachment into the shoreline buffer areas, allowing trail development resulting in a net loss of ecological functions, and by allowing deference to the development of trails within its jurisdiction.

Petitioners rely on three reports in the record: (1) *Washington Department of Fish and Wildlife (WDFW), Management Recommendations for Washington's Priority Habitats – Riparian*,[50] (2) *Influence of Recreational Trails on Breeding Bird Communities*,[51] and (3) *Minimizing Conflict between Recreation and Nature Conservation*.[52] In particular, Petitioners argue that SMP § 5.2.5.5, relating to trail development, fails to assure no net loss of ecological functions, and allows trails that cause damage to shoreline buffers, as discussed in the three reports cited by Petitioners.

Spokane County SMP § 5.2.5.5 provides in pertinent part as follows;

> Buffers of native plant communities specified in Table 5B of this SMP, measured landward on a horizontal plane perpendicular to the ordinary high water mark, shall be maintained on all shorelines, provided that the following

[50] Prehearing Brief of Petitioners Spokane Riverkeeper (Sept. 20, 2013), Ex. C.
[51] *Id.* at Ex. D.
[52] *Id.* at Ex. E.

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exceptions to this requirement are permitted subject to the mitigation provisions of Section 4 . . .

h. Public non-motorized multi-use equestrian pedestrian/bike trails shall only be allowed in the shoreline buffer for the Rural Conservancy, Urban Conservancy, or Shoreline Residential environment designations when:

i. Accompanied by a Habitat Management Plan meeting the requirements of Section 11.20.060D of the Spokane County Critical Area Ordinance;

ii. Parallel pathways and trails are located at the landward edge of the shoreline buffer with the following exceptions: (1) When physical constraints, public safety concerns, or public ownership limitations merit otherwise, or (2) when the trail will make use of an existing constructed grade such as those formed by an abandoned rail grade, road or utility; or (3) when it can be demonstrated in the Habitat Management Plan that the trail will enhance the shoreline ecological functions of the riparian area;

iii. Perpendicular pathways and trails and river crossings are sited in a location that has the least impact to shoreline ecological functions with mitigation sequencing as specified in Section 4 of this SMP. Previously altered or disturbed locations shall be preferred;

iv. Located, constructed, and maintained so as to avoid, to the maximum extent possible, removal and other impacts to perennial native vegetation, including trees, standing snags, forbes, grasses and shrubs, consistent with the Habitat Management Plan;

v. Alternatives to impervious paving should be considered and are encouraged;

vi. Total trail width inclusive of shoulders will be the minimum width necessary to achieve the intended use and shall not exceed 14 feet.

vii. Disturbed areas (outside of the designated trail and trail shoulders) shall be re-vegetated with native vegetation consistent with the Habitat Management Plan.

i. Public non-motorized multi-use equestrian pedestrian/bike trails shall only be allowed in the shoreline buffer for the Natural environment designation to connect to or from (in phases or otherwise) an existing regional multi-use

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non-motorized trail and only when the conditions listed under Section 5.2.5.5.h are met.

j. Public non-motorized multi-use equestrian/pedestrian/bike trails shall be permitted as a conditional use only if the criteria specified in 5.2.5.5.h and i are met.

Petitioners assert that the SMP allows parallel trail development to occur within the shoreline buffer under some conditions without any "consideration of impacts to ecosystem function."[53] However, SMP § 5.2.5.5(h)(i) does require "Habitat Management Plan meeting the requirements of Section 11.20.060D of the Spokane County Critical Area Ordinance" for all trail developments.[54] Moreover, trails are not allowed in the "Natural Environment" designation except to connect to or from an existing regional multi-use non-motorized trail.

Petitioners rely on three reports for evidence of environmental harm caused by trails. The first is a study of bird nesting patterns specific to ecosystems of Boulder, Colorado.[55] The study showed how bird nesting patterns were altered along the edges of recreational trails in forest and mixed-grass ecosystems, with some species thriving in edge habitat and others repelled. The Board reads this study as supporting Spokane County's requirement of adoption of Habitat Management Plans in connection with recreational trail development in the shoreline.

The second report referenced by Petitioners, "Minimizing Conflict between Recreation and Nature Conservation,"[56] is a useful manual on designing greenways so as to avoid adverse impacts on the ecosystem, with practical suggestions as to alignments, width, path surfaces, and the like.

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[53] Prehearing Brief of Petitioners Spokane Riverkeeper (Sept. 20, 2013), pp. 12-13.
[54] Spokane County Shoreline Master Program, Section 5.2.5 Protecting Shoreline Ecology and Aesthetics, pp. 26-27 (Effective January 22, 2013).
[55] Miller, Knight, and Miller, *Influence of Recreational Trails on Breeding Bird Communities*, 1998, Ex. D to Prehearing Brief of Petitioners Spokane Riverkeeper (Sept. 20, 2013).
[56] Chapter 5 of *Ecology of Greenways: Design and Function of Linear Conservation Areas*, Smith and Hellmund, eds. 1993. Ex. E to Prehearing Brief of Petitioners Spokane Riverkeeper (Sept. 20, 2013).

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Petitioners then cite a WDFW report on riparian habitat in an attempt to show that the SMP does not satisfy the standard for "no net loss of ecological function."[57] However, Petitioners' selected quotes relate to more intensive development scenarios and motorized vehicle use than those contemplated in the County's SMP. Petitioners cite a section of the WDFW report which by its terms applies to "Roads of all types and locations (not including foot trails)" and discusses, in part, "vehicle-related mortality of wildlife."[58] Another cited section of the WDFW report discusses generalized potential impacts in riparian areas from off-road vehicles, recreation trails in backcountry areas, roads, and other openings in forested riparian habitat.[59] A recommendation in the cited WDFW report is to limit "high-impact recreation facilities that attract high densities of people or that involve buildings or vehicles," e.g., "camp and picnic grounds, road access points, boat ramps and marinas, motorized vehicle trails," and "trails that tend to cause significant erosion" such as horse, ORV, and heavy use hiking trails.[60]

In short, none of these documents supports Petitioners' argument that recreational trails should be prohibited in Spokane County shorelines. Rather, the evidence supports the restrictions contained in SMP 5.2.5.5 (h), (i) and (j). The SMP allows "non-motorized equestrian/pedestrian/bike trails" *only* with Habitat Management Plans, avoidance of removal or impacts to native vegetation, alternatives to impervious paving, and alignment with least impact to shoreline ecological function. Thus, the Board finds the particular rules and regulations adopted in SMP § 5.2.5.5 by Spokane County and approved by Ecology for the development of trails satisfy the standard for "no net loss of ecological functions."

Promoting public access to shorelines is a key policy goal of the Shoreline Management Act, and the statute contemplates striking a balance between facilitating public access and protecting the ecology of the shoreline.[61] Spokane County's SMP contains

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[57] *Washington Department of Fish and Wildlife, Management Recommendations for Washington's Priority Habitats – Riparian*, K. Lea Knutson and Virginia L. Naef (December 1997).
[58] *Washington Department of Fish and Wildlife, Management Recommendations for Washington's Priority Habitats – Riparian*, K. Lea Knutson and Virginia L. Naef, p. 52 (December 1997).
[59] *Id.* at p. 75.
[60] *Id.* at p. 109-110.
[61] RCW 90.58.020.

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restrictions on shoreline trail development such as locating trails at the landward edge of the buffer, requiring a Habitat Management Plan and Conditional Use Permit for public trails, and the SMP has provisions to protect shoreline ecological functions.

Petitioners have failed to satisfy their burden of proof to show, by clear and convincing evidence, that the SMP's trail provisions will result in a net loss of ecological functions.

Board Findings of Fact

The Growth Management Hearings Board finds that there is clear and convincing evidence in the record as follows:

1. Spokane County's Shoreline Master Program contains restrictions on shoreline trail development such as locating trails at the landward edge of the buffer, avoiding removal or impacts to native vegetation, encouraging alternatives to impervious paving, and requiring a Habitat Management Plan and Conditional Use Permit for public trails.

2. Spokane County's Shoreline Master Program contains trail provisions that protect shoreline ecological functions.

Board Conclusions of Law

1. As to Legal Issue 3, Petitioners have failed to satisfy their burden of proof to show, by clear and convincing evidence, that the decision of the Department of Ecology is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.

2. The Board upholds the decision by the Department of Ecology as to Legal Issue 3.

D. ISSUE 4: ON-SITE SEWAGE SYSTEMS. Does the adoption of the provisions governing on-site sewage and wastewater systems violate RCW 90.58.020, RCW 90.58.030(2)(d)(ii), RCW 90.58.030(3)(b) & (3)(c), RCW 90.58.065, RCW 90.58.080, RCW 90.58.090, RCW 90.58.610, RCW 36.70A.480, WAC 173-26-186(8)(b), WAC 173-26-191(2), WAC 173-26-201(2)(c), WAC 173-26-221, and WAC 173-26-241 because the SMP Update reduced the previous offsets, deferred approval of sewage and wastewater systems to other agencies, and otherwise weakened previous requirements for on-site sewage and wastewater system development? *See* Spokane County Shoreline Master Program § 5.3.8 pp. 40 – 42

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(Effective: January 22, 2013) in Exhibit C of the Futurewise PFR and the other policies and regulations applicable to on-site sewage and wastewater systems.[62]

Use of Scientific and Technical Information

The Shoreline Management Act and implementing regulations prescribe the use of scientific information in preparing Shoreline Master Programs. In adopting, amending, and approving Shoreline Master Programs, Ecology 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.[63]

The SMP Guidelines require the use of scientific and technical information. Local governments shall "base master program provisions on an analysis incorporating the most current, accurate, and complete scientific or technical information available."[64] This includes identifying "risks to ecological functions" associated with master program provisions.[65] In

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[62] The Board deems subissues relating to RCW 90.58.030, RCW 90.58.065, and RCW 90.58.080 as abandoned since Petitioners' briefs contain no argument as to these provisions. Failure by a party to brief an issue shall constitute abandonment of the unbriefed issue. WAC 242-03-590(1).
[63] RCW 90.58.100(1); WAC 173-26-186(10).
[64] WAC 173-26-201(2)(a).
[65] WAC 173-26-201(2)(a)(iii).

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addressing issues related to Critical Areas located within Shorelines, master programs shall use scientific and technical information.[66]

The Shoreline Master Program must provide a level of protection of Critical Areas at least equal to that provided by the County's GMA-required Critical Areas ordinances.[67] The statutes and regulations together demonstrate the State's consistent policy directive that SMP land use regulations be based on science.

Spokane River and Lake Spokane TMDL

The Clean Water Act establishes a process to identify and clean up polluted waters. Recurring impairments of the beneficial uses and violations of water quality standards resulted in some segments of the Spokane River and Lake Spokane being included in the Department of Ecology's 303(d) list of impaired water bodies. The Department of Ecology has determined that Phosphorus reduction is a key strategy for cleaning up the Spokane River system, implemented by installing more effective wastewater removal treatment technologies, reusing wastewater, eliminating septic tanks, and strategies to control nonpoint sources of pollution.[68]

In February 2010, the Department of Ecology formally adopted a "Dissolved Oxygen Total Maximum Daily Load – Water Quality Improvement Report" for the Spokane River and Lake Spokane. Pertinent excerpts from the TMDL Water Quality Improvement Report are as follows:

> The 303(d) list is a list of water bodies, which the Clean Water Act (CWA) requires states to prepare, that do not meet state water quality standards. The CWA requires that a Total Maximum Daily Load (TMDL) be developed for each of the water bodies on the 303(d) list. The TMDL study identifies pollution problems in the watershed, and then specifies how much pollution

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[66] WAC 173-26-221(2)(b).

[67] RCW 90.58.090(4). Protection of Critical Areas under the GMA requires inclusion of the Best Available Science. RCW 36.70A.172(1).

[68] *Spokane River and Lake Spokane Dissolved Oxygen Total Maximum Daily Load – Water Quality Improvement Report*, Washington State Department of Ecology Publication No. 07-10-073 (Revised February 2010), TMDL Abstract pp. vii and viii – attached as Ex. B to Prehearing Brief of Spokane Riverkeeper (September 20, 2013). In addition, the Board takes official notice of this Department of Ecology TMDL decision in accordance with WAC 242-03-630.

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needs to be reduced or eliminated to achieve clean water. Ecology then develops a plan that describes actions to control the pollution and a monitoring plan to assess the effectiveness of the water quality improvement activities. This Water Quality Improvement Report (WQIR) consists of the TMDL study and a Managed Implementation Plan.

Lake Spokane has a long history of water quality problems. Eutrophication of the lake has been one of the major water quality concerns for the area over the past 40 years. Eutrophication is a process where excess aquatic plant growth occurs in a water body in response to high levels of nutrients (i.e. nutrient enrichment), and this plant growth can reduce the oxygen in the water to levels that are harmful for fish and other aquatic species. Aquatic plants reduce dissolved oxygen levels in a water body in two ways: during the night when they respire and consume oxygen and when they decompose and natural biological processes consume oxygen. Algae blooms also impair aesthetics and recreational uses and have been a recurring problem in Lake Spokane. Outbreaks of toxic blue-green algae were common in the 1970s and still occur. Recurring impairments of the beneficial uses and violations of water quality standards resulted in some segments of the Spokane River and Lake Spokane being included on one or more of Ecology's 1996, 1998, 2004, 2006 and 2008 303(d) lists of impaired water bodies. The Spokane River downstream of Long Lake Dam also fails to meet the Spokane Tribe of Indians' water quality standards for dissolved oxygen.

This TMDL establishes a Managed Implementation Plan to reduce nutrients in the Spokane River and Lake Spokane to prevent low dissolved oxygen, excessive algae blooms, and degradation of downstream water quality. The dissolved oxygen levels in this system are affected by natural variability and human activities that alter the physical, chemical, and biological characteristics of the lake. This TMDL establishes limits for the three pollutants affecting dissolved oxygen in the lake: ammonia (NH3-N), total phosphorus (herein referred to as "phosphorus" or TP), and carbonaceous biochemical oxygen demand (CBOD).

Based on estimates of achievable improvements in nutrient control upstream of the lake, water quality standards cannot be achieved in Lake Spokane unless both the capacity of Lake Spokane is improved (through reductions in nutrients and improvements in in-lake dissolved oxygen) and upstream anthropogenic sources (point and nonpoint sources) are substantially decreased. . . .

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Land use planning activities must consider TMDLs during State Environmental Policy Act (SEPA) and other local land use planning reviews. If the land use action under review is known to potentially impact dissolved oxygen as addressed by this TMDL, then the project may have a significant adverse environmental impact. SEPA lead agencies and reviewers are required to look at potentially significant environmental impacts and alternatives and to document that the necessary environmental analyses have been made. Land use planners and project managers should consider findings and actions in this TMDL to help prevent new land uses from violating water quality standards. Ecology recently published a focus sheet on how TMDLs play a role in SEPA impact analysis, threshold determinations, and mitigation (http://www.ecy.wa.gov/biblio/0806008.html).

Additionally, the TMDL should be considered in the issuance of land use permits by local authorities. Shoreline Master Plans have recently been developed for the city of Spokane and Spokane County. These plans provide a potential means of city and county enforcement in the tributary watersheds to implement best management practices towards meeting the load allocations in Table 6. This will require closer cooperation and participation by the planning units in the city and county in to the TMDL process.[69]

Applicable Law

RCW 90.58.020:

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

(1) Recognize and protect the statewide 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;

[69] *Id.* TMDL Executive Summary pp. v-viii and TMDL p. 70.

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(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.

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. . . .

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 90.58.900:

The Shoreline Management Act 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.

RCW 36.70A.480(4):

Shoreline master programs shall provide a level of protection to critical areas located within shorelines of the state that assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources as defined by department of ecology guidelines adopted pursuant to RCW 90.58.060.

WAC 173-26-201(2)(c):

Protection of ecological functions of the shorelines. This chapter implements the act's policy on protection of shoreline natural resources through protection and restoration of ecological functions necessary to sustain these natural resources. The concept of ecological functions recognizes that any ecological system is composed of a wide variety of interacting physical, chemical and biological components, that are interdependent in varying degrees and scales, and that produce the landscape and habitats as they exist at any time. Ecological functions are the work performed or role played individually or collectively within ecosystems by these components.

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As established in WAC 173-26-186(8), these guidelines are designed to assure, at minimum, no net loss of ecological functions necessary to sustain shoreline natural resources and to plan for restoration of ecological functions where they have been impaired. Managing shorelines for protection of their natural resources depends on sustaining the functions provided by:

• Ecosystem-wide processes such as those associated with the flow and movement of water, sediment and organic materials; the presence and movement of fish and wildlife and the maintenance of water quality.

• Individual components and localized processes such as those associated with shoreline vegetation, soils, water movement through the soil and across the land surface and the composition and configuration of the beds and banks of water bodies.

The loss or degradation of the functions associated with ecosystem-wide processes, individual components and localized processes can significantly impact shoreline natural resources and may also adversely impact human health and safety. Shoreline master programs shall address ecological functions associated with applicable ecosystem-wide processes, individual components and localized processes identified in the ecological systems analysis described in WAC 173-26-201 (3)(d)(i).

Nearly all shoreline areas, even substantially developed or degraded areas, retain important ecological functions. For example, an intensely developed harbor area may also serve as a fish migration corridor and feeding area critical to species survival. Also, ecosystems are interconnected. For example, the life cycle of anadromous fish depends upon the viability of freshwater, marine, and terrestrial shoreline ecosystems, and many wildlife species associated with the shoreline depend on the health of both terrestrial and aquatic environments. Therefore, the policies for protecting and restoring ecological functions generally apply to all shoreline areas, not just those that remain relatively unaltered.

<u>Master programs shall contain policies and regulations that assure, at minimum, no net loss of ecological functions necessary to sustain shoreline natural resources.</u>[70] To achieve this standard while accommodating appropriate and necessary shoreline uses and development, master programs should establish and apply:

• Environment designations with appropriate use and development standards; and

• Provisions to address the impacts of specific common shoreline uses, development activities and modification actions; and

• Provisions for the protection of critical areas within the shoreline; and

• Provisions for mitigation measures and methods to address unanticipated impacts.

[70] Underlining added for emphasis.

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When based on the inventory and analysis requirements and completed consistent with the specific provisions of these guidelines, the master program should ensure that development will be protective of ecological functions necessary to sustain existing shoreline natural resources and meet the standard. The concept of "net" as used herein, recognizes that any development has potential or actual, short-term or long-term impacts and that through application of appropriate development standards and employment of mitigation measures in accordance with the mitigation sequence, those impacts will be addressed in a manner necessary to assure that the end result will not diminish the shoreline resources and values as they currently exist. Where uses or development that impact ecological functions are necessary to achieve other objectives of RCW 90.58.020, master program provisions shall, to the greatest extent feasible, protect existing ecological functions and avoid new impacts to habitat and ecological functions before implementing other measures designed to achieve no net loss of ecological functions.

Master programs shall also include policies that promote restoration of ecological functions, as provided in WAC 173-26-201(2)(f), where such functions are found to have been impaired based on analysis described in WAC 173-26-201(3)(d)(i). It is intended that local government, through the master program, along with other regulatory and nonregulatory programs, contribute to restoration by planning for and fostering restoration and that such restoration occur through a combination of public and private programs and actions. Local government should identify restoration opportunities through the shoreline inventory process and authorize, coordinate and facilitate appropriate publicly and privately initiated restoration projects within their master programs. The goal of this effort is master programs which include planning elements that, when implemented, serve to improve the overall condition of habitat and resources within the shoreline area of each city and county.

WAC 173-26-186(8)(b):

Local master programs shall include policies and regulations designed to achieve no net loss of those ecological functions.

WAC 173-26-186(8)(d):

Local master programs shall evaluate and consider cumulative impacts of reasonably foreseeable future development on shoreline ecological functions and other shoreline functions fostered by the policy goals of the act. To ensure no net loss of ecological functions and protection of other shoreline functions and/or uses, master programs shall contain policies, programs, and regulations

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that address adverse cumulative impacts and fairly allocate the burden of addressing cumulative impacts among development opportunities. . . .

WAC 173-26-221(2)(b)(iv):

The planning objectives of shoreline management provisions for critical areas shall be the protection of existing ecological functions and ecosystem-wide processes and restoration of degraded ecological functions and ecosystem-wide processes. The regulatory provisions for critical areas shall protect existing ecological functions and ecosystem-wide processes.

WAC 173-26-221(6):

Water quality, storm water, and nonpoint pollution.

(a) **Applicability.** The following section applies to all development and uses in shorelines of the state, as defined in WAC 173-26-020, that affect water quality.

(b) **Principles.** Shoreline master programs shall, as stated in RCW 90.58.020, protect against adverse impacts to the public health, to the land and its vegetation and wildlife, and to the waters of the state and their aquatic life, through implementation of the following principles:

(i) Prevent impacts to water quality and storm water quantity that would result in a net loss of shoreline ecological functions, or a significant impact to aesthetic qualities, or recreational opportunities.

(ii) Ensure mutual consistency between shoreline management provisions and other regulations that address water quality and storm water quantity, including public health, storm water, and water discharge standards. The regulations that are most protective of ecological functions shall apply.

(c) **Standards.** Shoreline master programs shall include provisions to implement the principles of this section.

WAC 173-26-241(3)(j):

Residential development. Single-family residences are the most common form of shoreline development and are identified as a priority use when developed in a manner consistent with control of pollution and prevention of damage to the natural environment. Without proper management, single-family residential use can cause significant damage to the shoreline area through cumulative impacts from shoreline armoring, storm water runoff, septic systems, introduction of pollutants, and vegetation modification and removal. Residential development also includes multifamily development and the creation of new residential lots through land division.

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> Master programs shall include policies and regulations that assure no net loss of shoreline ecological functions will result from residential development. Such provisions should include specific regulations for setbacks and buffer areas, density, shoreline armoring, vegetation conservation requirements, and, where applicable, on-site sewage system standards for all residential development and uses and applicable to divisions of land in shoreline jurisdiction.

Board Discussion and Analysis

The Shoreline Management Act enunciates a clear preference for land uses that protect the resources and ecology of shorelines, control pollution, and prevent damage to the natural environment. Permitted land uses must minimize interference with the public's use of the water.[71]

A significant SMA policy directive is to protect the ecology and ecosystem-wide processes and to assure no net loss of ecological functions.[72] The Department of Ecology's Master Program Guidelines define the terms "Ecological Functions" and "Ecosystem-wide Processes"[73] as follows:

> "Ecological functions" or "shoreline functions" means the work performed or role played by the physical, chemical, and biological processes that contribute to the maintenance of the aquatic and terrestrial environments that constitute the shoreline's natural ecosystem.
>
> "Ecosystem-wide processes" means the suite of naturally occurring physical and geologic processes of erosion, transport, and deposition; and specific chemical processes that shape landforms within a specific shoreline ecosystem and determine both the types of habitat and the associated ecological functions.

For all developments and uses in shorelines, master programs must have ***standards*** to prevent impacts to water quality and storm water quantity that would

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[71] RCW 90.58.020.
[72] RCW 90.58.020; RCW 36.70A.480; WAC 173-26-020(8), (13), and (14); WAC 173-26-186(8); WAC 173-26-201(2)(c). "The regulatory provisions for critical areas shall protect existing ecological functions and ecosystem-wide processes." WAC 173-26-221(2)(b)(iv).
[73] WAC 173-26-020(13) and -020(14).

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result in a net loss of shoreline ecological functions.[74] When both shoreline management and public health regulations address water quality, **the regulations that are most protective of ecological functions shall apply**.[75]

While single-family homes are a priority use,[76] the Master Program must ensure proper management of shoreline residential development, as "[w]ithout proper management, single-family residential use can cause significant damage to the shoreline area through cumulative impacts from . . . septic systems . . . ." Master Programs therefore must have specific regulations and ***standards*** for ***on-site sewage systems*** that assure no net loss of shoreline ecological functions will result from residential development and uses.[77]

In this Issue 4, Petitioners challenge Ecology's January 8, 2013 decision to approve Spokane County's recently revised SMP provisions related to on-site sewage systems and impacts to water quality in the Spokane River system.

The 1975 SMP, in § 9.2.11, formerly provided in pertinent part as follows:

> A disposal facility (such as a drainfield or a dry pit) related to an individual treatment facility shall not be located (1) in an area having a history of flooding, or (2) where it will be in hydraulic continuity with a stream or a lake, or (3) where the ground water table rises to or exists within 10 feet of the bottom elevation of the drain field or dry pit, or (4) where it will be within 100 feet of the normal high-water line.[78]

The 2013 SMP, in § 5.3.8, now provides in pertinent part as follows:

> g. Individual or multi-family on-site wastewater treatment systems serving allowed uses in conformance with the SCSMP shall be subject to regulations administered by the Spokane Regional Health District. Such sewage treatment systems shall be located to prevent or minimize entry of nutrients, including phosphorus and nitrogen, or other pollutants, into ground and surface water within jurisdiction of the SCSMP. . . .

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[74] WAC 173-26-221(6).
[75] WAC 173-26-221(6)(b)(ii).
[76] RCW 90.58.020; WAC 173-26-241(3)(j).
[77] WAC 173-26-241(3)(j).
[78] Ecology Memorandum from Doug Pineo to Sara Hunt, p. 9 (September 22, 2009) attached as Ex. F to Prehearing Brief of Spokane Riverkeeper (September 20, 2013).

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> i. All individual and community on-site wastewater treatment systems, also called sewage treatment systems, including septic tanks and drainfields or alternative systems approved and inspected by the Spokane Regional Health District, the Washington State Department of Ecology, or Department of Health, shall be located landward of designated riparian and shoreland buffers within jurisdiction of the SCSMP.
>
> j. In instances where shoreline buffers designated in Table 5B of this SMP are adjusted through the provisions of Section 5.2.5 to measure less than 100 feet, all sewage system components shall be located a minimum of 100 feet from the ordinary high water mark. In limited instances when residential structures are permitted within 100 feet of the ordinary high water mark, tightlines from structures or septic tanks may be located within 100 feet from the ordinary high water mark. . . .
>
> m. Whenever feasible, while meeting Spokane Regional Health District or Washington State Health Department standards, all components of on-site sewage treatment systems, including subsurface soil absorption systems, shall be located landward of the residential structures they serve.[79]

With this 2013 SMP Update, Spokane County took action, approved by Ecology, to eliminate the previous vertical separation standard that prohibited sewage treatment facilities from being located where the ground water table rises to or exists within 10 feet of the bottom elevation of the septic drainfield. The previous vertical separation standard was not replaced with a different standard, and the challenged 2013 SMP now has no vertical separation standard.

Ecology argues that it approved elimination of the 10 foot vertical separation standard because (1) it was "deferring" to Spokane County Health District's regulations, and (2) the Health District's 3 foot vertical separation distance is adequate to address the transport of nutrients, including phosphorus.[80] However, the vertical separation standards in the Department of Health updated On-Site Sewage System (OSS) regulations, which are determined by soil type,[81] are not adopted by reference in the 2013 SMP. Nor are the related Health Department OSS design criteria that establish horizontal dimensions of septic

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[79] Spokane County Shoreline Master Program, § 5.3.8 *Residential*, pp. 40-41 (Effective January 22, 2013).
[80] Department of Ecology Response Brief, p. 16.
[81] WAC 246-272A-0230(2)(f); Table VI of the OSS standards sets vertical separation requirements of 12" to 60" depending on soil type.

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systems, pressure loading, and criteria essential to protection of health and the environment. Indeed, the only septic system **standard** adopted in the SMP is the requirement for location landward of riparian and shoreland buffers and a minimum of 100 feet from the ordinary high water mark.[82] Ecology acknowledges it relies largely on this buffering provision to attenuate phosphorus discharges.[83]

Standards for On-Site Sewage Systems. SMP § 5.3.8(g) states that on-site wastewater systems "shall be subject to regulations administered by the Spokane Regional Health District." In effect, Ecology has approved a transfer of water quality standards and regulatory authority away from the master program and instead relies on State Health Department regulations. But nothing in the SMA's statutory provisions or rules allows such a transfer.

To the contrary, the SMA Guidelines require "specific regulations for . . . on-site sewage system standards" in the Shoreline Master Program.[84] But SMP § 5.3.8(g) has no specific performance standards or design standards except distance from the shore.

Technical analysis in the record indicates phosphorus "breakthrough" from septic drainfields to ground or surface water is a function of soil type and septic system design and location.[85] **Standards** to ensure no net loss of ecological functions due to phosphorus leakage from new residential septic systems might be articulated as **performance standards** or **design standards**. Simply stating that septic system location shall "prevent or minimize entry of . . . phosphorus . . . into ground or surface water" [SMP 5.3.8(g)] does not constitute a performance standard. Ideally, a performance standard would be a numerical limit on phosphorus escape over a given distance in a given time. Both Ecology and Health

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[82] SMP 5.3.8(i), (j), (m).
[83] Ecology Ex. 1918, Response to Comments (January 8, 2013), pp. 12-14.
[84] WAC 173-26-241(3)(j).
[85] In particular, *see, e.g.*, *Spokane County Onsite Sewage Disposal Systems Phosphorus Loading Estimate, Technical Memorandum* prepared for Spokane County Division of Utilities by HDR [hereafter HDR Technical Memorandum], p. 3-17 (June 27, 2007) -- attached as Ex. J to Prehearing Brief of Spokane Riverkeeper (September 20, 2013).

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acknowledge appropriate studies have not yet been conducted on which to base such a performance standard.[86]

Alternatively, the SMP must adopt design standards. As identified in the record, the key components of system design and location for phosphorus attenuation include soil type,[87] depth to saturation zone,[88] location upland of the shore,[89] drainfield extension (loading rates),[90] and pressurized distribution design.[91] The SMP approved by Ecology adopts standards for location upland of the ordinary high water mark but not for any of the other design dimensions indicated.

State law establishes a division of regulatory authority between the Department of Health and the Department of Ecology: State Health Department regulations have a different, narrower focus on protecting public health of the citizens[92] - the Health Department rules address primarily sanitation and treatment of pathogens[93] that affect human health. In contrast, Ecology's SMA regulations have a broader focus on protecting the natural environment, sustaining ecosystem-wide processes, and preventing a net loss of shoreline ecological functions.[94]

Moreover, Ecology's failure to require any vertical separation phosphorus standards or equivalent design specifications in the SMP makes it likely that a net loss of shoreline

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[86] Email from Dave Lenning, Washington Department of Health to Michele Vazquez, Office of Regulatory Assistance (February 27, 2008), attached as Ex. O to Prehearing Brief of Spokane Riverkeeper (September 20, 2013).

[87] See HDR Report, p. 16, concluding, from review of both chemical and physical properties of predominant soils in the Spokane Valley-Rathbun Prairie Aquifer Area: "there is little to no sorptive capacity [for phosphorus] in the soils within the [Spokane River] Sewer Service Area."

[88] Vertical separation is related to soil type: WAC 246-272A-0230(2)(f) and Table VI, requiring vertical separation requirements of 12" to 60" depending on soil type.

[89] Addressed specifically in SMP 5.3.8. (i), (j), (m).

[90] Attachment A: *Findings and Conclusions for the Spokane County Shoreline Master Program Comprehensive Update*, p, 28 (September 21, 2012, Prepared by Sara Hunt) – Ex. 1858 to Ecology's Response Brief (October 21, 2013).

[91] Memo from John Eliasson, Department of Health, to Doug Pineo, Department of Ecology (January 14, 2010) – Ex. 226 to Ecology's Response Brief, p. 2, asserting the 2007 OSS regulations provide significant improvements in pollutant attenuation through drainfield sizing and pressurized distribution.

[92] RCW Chapter 43.20.

[93] Ecology Memorandum from Doug Pineo to Sara Hunt, p. 10 (September 22, 2009) attached as Ex. F to Prehearing Brief of Spokane Riverkeeper (September 20, 2013). See also RCW Chapter 43.20.

[94] RCW 90.58.020; RCW 36.70A.480; WAC 173-26-020(8), (13), and (14); WAC 173-26-186(8); WAC 173-26-201(2)(c); WAC 173-26-221(2)(b)(iv).

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ecological functions will result from residential development and uses, contrary to the Shoreline Management Act and Ecology's own regulations. "Without proper management, single-family residential use can cause significant damage to the shoreline area through cumulative impacts from shoreline armoring, storm water runoff, septic systems, introduction of pollutants, and vegetation modification and removal."[95]

An illustration of this dichotomy in state regulatory authority is the nutrient phosphorus. Excess phosphorus inputs to groundwater will degrade surface water quality because in Spokane County there is hydraulic continuity between groundwater and surface water.[96] A variety of documents in the record discuss the importance of controlling phosphorus exports from land use developments within shoreline areas.[97]

Control of phosphorus exports from all types of sewage systems is a key, overarching strategy of Ecology's TMDL to clean up pollution in the Spokane River system. But there is clear evidence in the record indicating that the Health Department does not specifically regulate phosphorus exports from on-site sewage systems. According to the State Department of Health – "We don't currently have a standard for phosphorus because it does not have public health implications."[98]

Review of State Health regulations in WAC Chapter 246-272A confirms that the Health regulations target for treatment the following sewage constituents: carbonaceous biochemical oxygen demand, total suspended solids, oil and grease, fecal coliform, and nitrogen. But the Health Department regulations do not mention any treatment or standard targeting phosphorus.[99]

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[95] WAC 173-26-241(3)(j).

[96] Ecology Memorandum from Doug Pineo to Sara Hunt, p. 9 (September 22, 2009) attached as Ex. F to Prehearing Brief of Spokane Riverkeeper (September 20, 2013).

[97] *See,* in particular, HDR Report (2007). Ecology objects that the HDR analysis of phosphorus loading from septic systems in the Spokane River Valley was produced before implementation of the new Health OSS standards and therefore by definition addresses a higher percentage of poorly designed systems. The Board understands the different scope and purpose of the HDR Report and reads it primarily for a background analysis of the hydrogeologic processes at issue.

[98] Email from Dave Lenning, Washington Department of Health to Michele Vazquez, Office of Regulatory Assistance (February 27, 2008), attached as Ex. O to Prehearing Brief of Spokane Riverkeeper (September 20, 2013).

[99] WAC 246-272A-0010, WAC 246-272A-0110, WAC 246-272A-0230.

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The 1975 Shoreline Master Program for Spokane County contained specific regulations and standards relating to vertical separation between on-site sewage drainfields and the groundwater table, and those prior regulations prohibited drainfields where the groundwater table rises or exists within 10 feet of the bottom elevation of the drainfield. Instead of adopting a vertical separation standard or alternative appropriate design standard in the 2013 SMP Update to attenuate phosphorus, Ecology "deferred" to the County Health District and eliminated any vertical separation standard from the SMP.[100]

In relinquishing its authority to require vertical separation between on-site sewage drainfields and the groundwater table in shoreline areas, Ecology encouraged the Health District to consider addressing nutrient loading to the Spokane River system:

> Spokane Regional Health District should consider whether additional treatment using more advance technology is required to address phosphorus and nitrogen loading to the Spokane River and Lake Spokane. In addition, the calculations for phosphorus removal impact on the Spokane River and Lake Spokane resulting from the Septic Tank Elimination Program should consider how the approvals of new onsite septic systems affect those calculations.[101]

But the Spokane County Health District's regulations do not target the treatment of phosphorus, and the Health District has no regulations that specifically control phosphorus exports from on-site sewage systems. **Rather, it is the Ecology-approved Shoreline Master Program that must have specific regulations and *standards* for *on-site sewage systems* that assure no net loss of ecological functions will result from residential development and uses.**[102]

SMP § 5.3.8(g) provides sewage treatment systems shall be located to prevent or minimize entry of nutrients, including phosphorus and nitrogen, or other pollutants, into ground and surface water. **But § 5.3.8(g) has no performance standards measuring or**

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[100] Ecology Memorandum from Doug Pineo to multiple recipients (October 26, 2009), Ex. N to Prehearing Brief of Spokane Riverkeeper (September 20, 2013).
[101] Attachment A: *Findings and Conclusions for the Spokane County Shoreline Master Program Comprehensive Update*, page 28 (September 21, 2012, Prepared by Sara Hunt) – Ex. 1858 to Ecology's Response Brief (October 21, 2013).
[102] WAC 173-26-241(3)(j).

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limiting these pollutants, again deferring to and relying on the Health District. The record indicates the Health District has no standards to control phosphorus.

Thus, to the extent that the Ecology Department defers to the Health Department on phosphorus pollution from on-site sewage systems, this is tantamount to leaving phosphorus pollution with no regulatory standard in the Master Program. This is clearly inconsistent with and contrary to the SMA Guidelines which require standards in the Master Program. Deferring to the Health Department regulations is also contrary to the requirement that when there are potentially overlapping water quality regulations from different agencies, the regulations that are most protective of ecological functions shall apply.[103]

Phosphorus Impacts on Shoreline Ecological Functions and Vertical Separation.

On September 21, 2012 Ecology granted conditional approval of the Spokane County Comprehensive Shoreline Master Program Update.[104] In advance of County and Ecology Director final approval of the SMP Update in January 2013, Ecology employee Sara Hunt prepared a document entitled *Findings and Conclusions for the Spokane County Shoreline Master Program Comprehensive Update*, which was attached to the September 21, 2012, conditional approval letter. These September 21, 2012, Findings in part state:

> The WA Department of Health (DOH) provided guidance to Ecology on how the issue of potential nutrient loading from on-site sewage systems (OSS) can be addressed in the Spokane County SMP. DOH provided information on why increasing the vertical separation from the groundwater table to 10 feet will not do much for nutrient control. DOH recommends Spokane Regional Health District continue to administer the current OSS regulations of the State Board of Health (WAC 246-272A), which requires a minimum 3 foot vertical separation, to address the issue of potential phosphorus loading from OSS. . . .
>
> Most of the phosphorus removal occurs in the aerobic zone within the first few feet below the bottom of the drainfield. There are diminishing benefits beyond a vertical separation of 3 feet. Increased phosphorus transport is more likely in coarser texture soil where uniform distribution is not achieved

[103] WAC 173-26-221(6)(b)(ii).
[104] Department of Ecology Letter of Conditional Approval of SMP Update to Spokane County (September 21, 2012) – Ex. 1862 to Ecology's Response Brief (October 21, 2013).

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> and where effluent flow is rapid away from the drainfield. The minimum OSS rules address these risks by requiring timed dosed pressure distribution drainfield designs as well as by requiring proper vertical and horizontal separation.[105]

The Department of Health favored relaxing the prior standard from 10 foot of vertical separation to 3 feet of vertical separation. The Department of Health also recommended that phosphorus be regulated under Health District regulations, not under the Shoreline Master Program. But the Department of Health and the Department of Ecology both failed to analyze how the human health regulations assure no net loss of shoreline ecological functions and failed to establish any phosphorous standards.

During the SMP Update process, a Department of Ecology Shorelands Specialist in Ecology's Eastern Regional Office documented the absence of technical support for eliminating the 10 foot vertical separation standard contained in the then existing SMP:

> Over the past 4 years, I have consistently asked the county to demonstrate how their proposed reference to the Health District's on-site wastewater treatment regulations would be adequate for SMA/SMP jurisdiction. Twice during the comprehensive SMP update process (funded with SMP update money and also a Centennial Clean Water Find grant), the country initiated limited amendment processes for the sole purpose of eliminating the current 10 foot vertical separation (between the bottom of the drainfield trench and top the seasonally high water table) requirement, to satisfy a single property owner with access to one county commissioner and the public works director (both have since left county government).[106]

There is substantial evidence in the record showing that (1) greater vertical separation between drainfields and the water table is more protective of shoreline ecological functions, particularly in the gravelly soils that characterize the Spokane River area, and (2) increased phosphorus inputs to shoreline ecosystems results in a net loss of ecological functions:

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[105] Attachment A: *Findings and Conclusions for the Spokane County Shoreline Master Program Comprehensive Update*, pp. 26-27 (September 21, 2012, prepared by Sara Hunt) – Ex. 1858 to Ecology's Response Brief (October 21, 2013).

[106] Ecology Memorandum from Doug Pineo to multiple recipients (October 26, 2009), Ex. N to Prehearing Brief of Spokane Riverkeeper (September 20, 2013).

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In most soil types, more vertical separation buys more years before ultimate sewage system failure (entry of nitrogen and phosphorus into groundwater and surface waters).[107]

There must be at least 10 feet of aerobic soils below any proposed drain field trench bottom and the onset of any seasonally anaerobic soil or seasonally anaerobic groundwater condition. Such a provision would protect transport anaerobic groundwater from drain field phosphate releases for at least 3.9 years, and may protect groundwater in sandy glacial flood soils for as much at 39 years (see calculations below). Much more protection for Northwest lakes and rivers is necessary, and it should be remembered that individual on site wastewater treatment systems provide only short term detention of phosphate. Drain fields do not remove any phosphate from the environment and simply slow its movement to lakes and streams.[108]

Recent studies have produced results that undermine the commonly held perception that soil effectively removes phosphorus from infiltrating water. Current understanding is that phosphorus is much more mobile than previously thought (McCobb et al. 2003, Cogger, 1995, Richardson, et al., 1988). Today soil is viewed as effectively binding phosphorus until it reaches a sorption capacity; at sorption capacity phosphorus then passes uninhibited through the soil column and into the underlying ground water. . . . Thus, a typical on-site disposal installation with a ten-foot separation between the bottom of the disposal area and the water table, will breakthrough in about 20 years. . . . Reduce that separation to 3 feet and breakthrough will occur in about 6 years. Homes constructed within the next three to four years on shoreline lots under the proposed new rules will begin to degrade Spokane River quality within the 10 year window before wastewater treatment improvements are made. The phosphorus loading from a single residence using an on-site system is equivalent to the allowable discharge of about 240 homes at the 0.05 mg P/L level or 1200 homes at the 0.01 mg P/L level. This means that adding one new home near the Spokane River using the low nutrient removal ability of a three-foot separation between the infiltration system and the water table will offset the benefit of sewering 950 homes.[109]

Considering that drainfields release a high P [total phosphorus] load and that there is a hydraulic connection between drainfields and groundwater, there is increasing recognition and concern about P leaching from onsite sewage

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[107] *Id.* at p. 2.
[108] Ecology Memorandum from Kim Sherwood to Doug Pineo (March 8, 2006), Ex. G to Prehearing Brief of Spokane Riverkeeper (September 20, 2013).
[109] Memorandum from Stan Miller to Jim Falk (July 17, 2007), Ex. H to Prehearing Brief of Spokane Riverkeeper (September 20, 2013).

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> disposal systems and reaching surface waters. These concerns stem from experience with water quality studies where onsite sewage disposal systems were found to be a major contributor of P to surface water.[110]
>
> Water quality can be impacted by direct influx of nutrients from the septic system and associated drainfield. Septic drainfields are designed to treat wastewater using the processes of absorption by soil particles, evaporation, and uptake by plant life. These processes only work in a system that is not saturated with water. If the soil is too wet, the biological breakdown may be incomplete, allowing nutrients to move a much greater distance. A drainfield located too close to a water body puts both groundwater and surface water at risk. . . . Nutrient loading is the result of excessive amounts of phosphorus and nitrogen. It is a contributing factor to the decline of health of streams and the eutrophication of lakes. Nutrient loading has been directly linked with low dissolved oxygen levels, resulting from increased primary productivity seen in the growth of aquatic plants and algal blooms. Low dissolved oxygen can lead to reduced resistance to disease in fishes, and asphyxiation or suffocation i.e. fish kills. . . . The Department of Ecology has been working on TMDL's for Long Lake for several years now, in an attempt to reduce point and non-point sources of phosphorus. Allowing the reduction of standards for septic systems for single-family residences will only serve to again increase non-point as well as point sources of phosphorus, compromising the water quality and fisheries resources of Long Lake.[111]

In the process for adoption of the SMP Update, Department of Health Water Quality Director John Eliasson and, subsequently, Ecology staff opined that the new Health OSS regulations at Chapter 246-272A WAC would provide equivalent or better protection than a 10-foot vertical separation. As previously summarized, components of the OSS standards include depth to water table varying from 12-60 inches based on soil type, additional horizontal extension of drainfields for better management of hydraulic loading, and requirement for pressure distribution systems. Ecology argues the new Health Department design standards taken together are more protective than a vertical separation rule in

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[110] Spokane County Onsite Sewage Disposal Systems Phosphorus Loading Estimate, Technical Memorandum Prepared for Spokane County Division of Utilities, p. 8 (June 27, 2007), Ex. J to Prehearing Brief of Spokane Riverkeeper (September 20, 2013), internal footnotes omitted.

[111] Letter from WDFW Area Habitat Biologist Karin Divens to Spokane County Building and Planning Department, p. 2 (September 13, 2005), Ex. K to Prehearing Brief of Spokane Riverkeeper (September 20, 2013).

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isolation. However, while the Health Department standards are referenced in the SMP Findings, they are not adopted in the SMP to replace the prior vertical separation, and Ecology made no finding that the Health Department rules assure no net loss of ecological functions.

In approving Spokane County's Shoreline Master Program Update without requiring specific regulations and standards in the SMP pertaining to vertical separation between on-site sewage drainfields and the groundwater table, or equivalent design specification, Ecology failed to consider the compelling evidence that phosphorus exports will degrade water quality and result in a net loss of shoreline ecological functions.

Board Findings of Fact

The Growth Management Hearings Board finds that there is clear and convincing evidence in the record as follows:

1. As shoreline land uses intensify, phosphorus nutrient inputs to shoreline ecosystems increase, which results in eutrophication, degraded water quality, and oxygen depletion that is harmful to fish and other aquatic species.

2. Increased phosphorus inputs to shoreline ecosystems results in a net loss of ecological functions.

3. There is a long history of phosphorus exports from on-site residential sewage systems in the Spokane River watershed.

4. A key clean up strategy of the Spokane River TMDL is to reduce phosphorus inputs to the Spokane River system from all types of wastewater treatment systems, including residential on-site sewage systems.

5. The Shoreline Management Act and Ecology's regulations require the SMP contain specific regulations and standards for on-site sewage systems that assure no net loss of ecological functions and prevent impacts to water quality.

6. The 1975 Shoreline Master Program for Spokane County contained specific regulations and standards relating to vertical separation between on-site sewage drainfields and the groundwater table, and those prior regulations prohibited drainfields

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where the groundwater table rises or exists within 10 feet of the bottom elevation of the drainfield.

7. The 2013 Shoreline Master Program Update for Spokane County eliminated the prior (1975) regulations and standards relating to vertical separation between on-site sewage drainfields and the groundwater table.

8. The 2013 Update to the Shoreline Master Program for Spokane County contains no specific regulations and standards relating to vertical separation between on-site sewage drainfields and the groundwater table and no equivalent design criteria or performance standards to control phosphorus release.

9. Spokane County's Shoreline Master Program defers to the Spokane County Health District's regulations for controlling phosphorus exports from on-site sewage systems.

10. Spokane County Health District's regulations do not target the treatment of phosphorus, and the Health District has no regulations that specifically control phosphorus exports from on-site sewage systems.

11. On January 8, 2013, the Department of Ecology approved Spokane County's Shoreline Master Program Update without requiring specific regulations and standards in the SMP pertaining to vertical separation between on-site sewage drainfields and the groundwater table or equivalent design criteria.

12. On January 8, 2013, the Department of Ecology approved Spokane County's Shoreline Master Program Update without requiring standards in the SMP to prevent water quality impacts that would result in a net loss of shoreline ecological functions.

Board Conclusions of Law

1. The Department of Ecology's January 8, 2013, decision to approve Spokane County's Shoreline Master Program Update, without requiring specific regulations and standards relating to vertical separation between on-site sewage drainfields and the groundwater table or equivalent design criteria or performance standards, in order to

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assure no net loss of shoreline ecological functions, failed to comply with the policies of the Shoreline Management Act and the Shoreline Master Program Guidelines.

2. The Department of Ecology's January 8, 2013, decision to approve Spokane County's Shoreline Master Program Update, without requiring standards relating to vertical separation between on-site sewage drainfields and the groundwater table or equivalent design criteria or performance standards, in order to prevent water quality impacts that would result in a net loss of shoreline ecological functions, failed to comply with the policies of the Shoreline Management Act and the Shoreline Mater Program Guidelines.

3. Based on clear and convincing evidence in the record, the Growth Management Hearings Board determines that the January 8, 2013, decision of the Department of Ecology approving Spokane County's Shoreline Master Program Update is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines in WAC 173-26-020; WAC 173-26-186; WAC 173-26-201; WAC 173-26-221, and WAC 173-26-241.

E. **ISSUE 5: CHANNEL MIGRATION ZONES.** Does the adoption of the provisions for channel migration zones violate RCW 90.58.020, RCW 90.58.030(2)(d)(ii), RCW 90.58.030(3)(b) & (3)(c), RCW 90.58.080, RCW 90.58.090, RCW 90.58.610, RCW 36.70A.040, RCW 36.70A.070, RCW 36.70A.480, WAC 173-26-020(7) and (8), WAC 173-26-186(8)(b), WAC 173-26-191(2), WAC 173-26-221(2) and (3), and WAC 173-26-231(3)(c) because the County did not expand its shoreline jurisdiction to include the channel migration zones and the necessary buffers and other protections, and adopt the measures needed to protect people, property, and shoreline functions, and the master program provides that "[c]ritical areas within shorelines of the state in Spokane County are managed exclusively through the provisions of this Shoreline Master Program?" *See* Spokane County Shoreline Master Program § 1.4.1 at p. 2, § 5.2.6 at pp. 31 – 32, § 5.3.15 pp. 47 – 48, § 8.4 pp. 87 – 89 Appendix III & IV Channel Migration Zone Maps pp. 143 – 45 (Effective: January 22, 2013) and Channel Migration Zone Maps 2012 in Exhibit C to the Futurewise PFR and the other policies and regulations applicable to critical areas protection.[112]

[112] The Board deems subissues relating to RCW 90.58.020, RCW 90.58.080, RCW 90.58.090, RCW 36.70A.070, WAC 173-26-020, WAC 173-26-186, and WAC 173-26-231 as abandoned since Petitioners' briefs contain no argument as to these provisions. Failure by a party to brief an issue shall constitute abandonment of the unbriefed issue. WAC 242-03-590(1).

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Applicable Law

RCW 90.58.030(2)(e):

> "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 statewide significance; (ii) shorelines on segments of streams 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.

RCW 90.58.030(2)(g):

> "Shorelines of the state" are the total of all "shorelines" and "shorelines of statewide significance" within the state.

RCW 90.58.030(2)(d):

> "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.

RCW 90.58.030(2)(d)(i):

> 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.

RCW 90.58.030(2)(d)(ii):

> Any city or county may also include in its master program land necessary for buffers for critical areas, as defined in chapter 36.70A RCW, that occur within shorelines of the state, provided that forest practices regulated under chapter 76.09 RCW, except conversions to nonforest land use, on lands subject to the provisions of this subsection (2)(d)(ii) are not subject to additional regulations under this chapter.

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RCW 36.70A.480(6):

> If a local jurisdiction's master program does not include land necessary for buffers for critical areas that occur within shorelines of the state, as authorized by RCW 90.58.030(2)(f), then the local jurisdiction shall continue to regulate those critical areas and their required buffers pursuant to RCW 36.70A.060(2).

WAC 173-26-221(3)(b) provides in pertinent part as follows:

> The dynamic physical processes of rivers, including the movement of water, sediment and wood, cause the river channel in some areas to move laterally, or "migrate," over time. This is a natural process in response to gravity and topography and allows the river to release energy and distribute its sediment load. The area within which a river channel is likely to move over a period of time is referred to as the channel migration zone (CMZ) or the meander belt. Scientific examination as well as experience has demonstrated that interference with this natural process often has unintended consequences for human users of the river and its valley such as increased or changed flood, sedimentation and erosion patterns. It also has adverse effects on fish and wildlife through loss of critical habitat for river and riparian dependent species. Failing to recognize the process often leads to damage to, or loss of, structures and threats to life safety.
>
> Applicable shoreline master programs should include provisions to limit development and shoreline modifications that would result in interference with the process of channel migration that may cause significant adverse impacts to property or public improvements and/or result in a net loss of ecological functions associated with the rivers and streams.

WAC 173-26-221(2)(c)(iv):

> Therefore, effective management of lake basins and river and stream corridors depends on:
>
> (I) Planning for protection, and restoration where appropriate, throughout the lake basin and along the entire length of the corridor from river headwaters to the mouth; and
>
> (II) Regulating uses and development within lake basins and stream channels, associated channel migration zones, wetlands, and the flood plains, to the extent such areas are in the shoreline jurisdictional area, as necessary to assure no net loss of ecological functions, including where applicable the associated hyporheic zone, results from new development.

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Board Discussion and Analysis

Petitioners allege: (1) Channel Migration Zones (CMZs) are critical areas that must be protected as buffers and (2) the failure to expand shoreline jurisdiction to include the CMZs or to update the county's critical areas regulations to manage the CMZs are clear, cogent, and convincing evidence of violations of the mandatory requirements of WAC 173-26-221(2)(a)(ii).

Spokane County's SMP has jurisdiction over shorelines of the state located in Spokane County, as follows:

> 1. Shorelines, which are defined as all of the water areas of the state, including reservoirs, together with the lands underlying them but excepting certain low flow streams and small lakes;
>
> 2. Shorelines of State-Wide Significance;
>
> 3. Shorelands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark;
>
> 4. Floodways and contiguous floodplain areas landward two hundred feet from such floodways; and
>
> 5. Associated wetlands.[113]

Spokane County chose not to exercise its option to include in its master program land necessary for buffers for GMA-designated critical areas that occur within shorelines of the state.[114] Spokane County also chose not to exercise its option to include additional portions of the one-hundred-year-flood plain in its master program. Instead Spokane County decided to adopt by reference a number of Critical Areas Ordinance sections into the SMP "as use regulations of the SMP." For example, Spokane County adopted by reference specific Critical Areas regulations on Wetlands, Fish and Wildlife Habitat and Species Conservation

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[113] RCW 90.58.030(2).

[114] Ecology's Response Brief, Ex. E001729, Letter from Sara Hunt (Ecology) to John Pederson (Spokane County), p. 1 (March 21, 2013).

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Areas, and Critical Aquifer Recharge Areas, together with the Flood Damage Protection Ordinance, among other CAO provisions, as "use regulations" of the SMP.[115]

The SMP is only required to regulate uses and development within lake basins and stream channels, associated channel migration zones, wetlands, and the flood plains, "to the extent such areas are in the shoreline jurisdictional area".[116] The Guidelines only require that the standards for channel migration zones and floodplains be implemented "within shoreline jurisdiction."[117]

Under state statutes, if the County chooses not to include in its master program land necessary for buffers for critical areas that occur within shorelines, then the County must regulate those critical areas and their required buffers pursuant to their GMA Critical Areas Ordinances.[118] Also, if the County chooses not to enlarge its master program jurisdiction with additional portions of the 100-year floodplain, then the County must regulate those non-shoreline floodplain areas pursuant to their GMA Critical Areas Ordinances.

Since Spokane County chose not to enlarge its SMP jurisdiction to include buffers of critical areas and not to include the entire one-hundred-year-floodplain, then the Channel Migration Zones located outside of standard SMA jurisdiction must be regulated under the County's Critical Areas Ordinance and Flood Damage Protection Ordinance, neither of which is the subject of this case. Petitioners cannot challenge the County's Critical Areas regulations at this time.

Board Findings of Fact

The Growth Management Hearings Board finds that there is clear and convincing evidence in the record as follows:

1. Spokane County chose not to enlarge its SMP jurisdiction to include buffers of critical areas and not to include the entire one-hundred-year-floodplain.

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[115] Spokane County Shoreline Master Program, § 8.4 *Application of the Critical Area Ordinance and Flood Damage Protection Ordinance Regulations within the Shorelines of the State*, p. 88 (Effective January 22, 2013).
[116] WAC 173-26-221(2)(c)(iv)(B)(II).
[117] WAC 173-26-221(3)(c).
[118] RCW 36.70A.480(6); WAC 173-26-221(2)(a).

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2. The Channel Migration Zones located outside of standard SMA jurisdiction are regulated under the County's Critical Areas Ordinance and Flood Damage Protection Ordinance, neither of which is the subject of this case.

Board Conclusions of Law

1. As to Legal Issue 5, Petitioners have failed to satisfy their burden of proof to show, by clear and convincing evidence, that the decision of the Department of Ecology is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.

2. The Board upholds the decision by the Department of Ecology as to Legal Issue 5.

F. ISSUE 6: PUBLIC ACCESS. Does the adoption of Section 5.2.8, Public Access, violate RCW 90.58.020, RCW 90.58.030(3)(b) & (3)(c), RCW 90.58.080, RCW 90.58.090, WAC 173-26-191(2), WAC 173-26-221(4), and WAC 173-26-241 because they fail to comply with policies and requirements for public access? See SMP, § 5.2.8 Spokane County Shoreline Master Program pp. 33 – 35 (Effective: January 22, 2013) in Exhibit C to the Futurewise PFR and the other policies and regulations applicable to public access.[119]

Applicable Law

WAC 172-26-221(4) provides guidelines for provision of public access to shorelines in local SMPs, first defining public access in Subsection (a):

> (a) **Applicability.** Public access includes the ability of the general public to reach, touch, and enjoy the water's edge, to travel on the waters of the state, and to view the water and the shoreline from adjacent locations. Public access provisions below apply to all shorelines of the state unless stated otherwise.

Subsection (b) sets forth the principles governing SMP public access provisions which must seek to balance public interest in enjoyment of the water, including water views, with private property rights and public safety:

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[119] The Board deems subissues relating to RCW 90.58.030, RCW 90.58.080, and RCW 90.58.090 as abandoned since Petitioners' briefs contain no argument as to these provisions. Failure by a party to brief an issue shall constitute abandonment of the unbriefed issue. WAC 242-03-590(1).

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(b) **Principles.** Local master programs shall:

(i) Promote and enhance the public interest with regard to rights to access waters held in public trust by the state while protecting private property rights and public safety. . . .

(iii) To the greatest extent feasible consistent with the overall best interest of the state and the people generally, protect the public's opportunity to enjoy the physical and aesthetic qualities of shorelines of the state, including views of the water. . . .

Subsection (c) of the regulation provides an optional public access planning process. The parties acknowledge Spokane County has not undertaken this process. Subsection (d) sets forth the standards which the local SMP should implement:

(d) **Standards.** Shoreline master programs should implement the following standards:

(i) Based on the public access planning described in (c) of this subsection, establish policies and regulations that protect and enhance both physical and visual public access. The master program shall address public access on public lands. The master program should seek to increase the amount and diversity of public access to the state's shorelines consistent with the natural shoreline character, property rights, public rights under the Public Trust Doctrine, and public safety.

(ii) [Requirements for public access in shoreline development by public entities.]

(iii) Provide standards for the dedication and improvement of public access in developments for water-enjoyment, water-related, and nonwater-dependent uses and for the subdivision of land into more than four parcels. In these cases, public access should be required except:

(A) Where the local government provides more effective public access through a public access planning process described in WAC 173-26-221 (4)(c).

(B) Where it is demonstrated to be infeasible due to reasons of incompatible uses, safety, security, or impact to the shoreline environment or due to constitutional or other legal limitations that may be applicable.

In determining the infeasibility, undesirability, or incompatibility of public access in a given situation, local governments shall consider alternate methods of providing public access, such as offsite improvements, viewing platforms, separation of uses through site planning and design, and restricting hours of public access.

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(C) For individual single-family residences not part of a development planned for more than four parcels.

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

(v) Assure that public access improvements do not result in a net loss of shoreline ecological functions.

WAC 172-26-241(3)(j) provides in pertinent part:

> New multiunit residential development, including the subdivision of land for more than four parcels, should provide community and/or public access in conformance to the local government's public access planning and this chapter.

SMP Provisions

Spokane County's SMP provisions for Public Access are contained in Section 5.2.8.[120] The following standards govern public access requirements in connection with privately-owned residential development and subdivision:

> (2) Shoreline development by private entities should provide public access when the development would either generate a public demand for one or more forms of such physical or visual access, or would impair existing legal access opportunities or rights.
>
> (4) Efforts to implement the public access provisions of this section shall be consistent with all relevant constitutional and other legal limitation on regulation of private property and the principles of nexus and proportionality.
>
> (5) Public access requirements on privately owned lands should be commensurate with the scale and character of the development and should be reasonable, effective and fair to all affected parties including but not limited to the landowner and the public.
>
> (7) Opportunities to provide visual and/or physical public access shall be evaluated during the review and conditioning of all proposed commercial and

[120] SMP, pp. 33-34.

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industrial shoreline developments and residential developments involving more than four residential parcels.

(8) Dedicated space for physical public access shall be incorporated into all … private commercial and industrial uses/developments and all residential subdivisions of greater than four (4) parcels unless the project proponent demonstrates that any of the following conditions exist: [listing six considerations]

(10) The public access requirement is met where a single-family residential development of greater than four (4) parcels but less than ten (10) parcels provides community access to the shoreline or to a common waterfront lot/tract for non-commercial recreational use of the property owners and guests within the proposed subdivision. The proponent shall provide visual access to the shoreline via view corridors within the subdivision as illustrated on the final plan and as determined by the Director. Existing lawfully established public access shall be maintained.

(11) When physical public access is deemed to be infeasible based on consideration listed in Sections 5.2.8.8 and 5.2.8.9, the proponent shall provide visual access to the shoreline. . . . or for a residential development, provide community access to the shoreline or to a common waterfront lot/tract for non-commercial recreational use of the property owners and guests within the proposed subdivision.

Positions of the Parties

Petitioners raise two objections to the SMP public access requirements.[121] First, they argue that the SMP does not require multifamily residential developments to provide public access.[122] Second, they object that the SMP allowance for "community access" for single-family residential subdivisions of four to ten lots is inconsistent with the Guidelines.[123]

Ecology and the County respond that multifamily projects are "developments" within the reach of the County's shoreline regulations.[124] They also assert that community access is allowed by the Guidelines and, when applied to single-family subdivisions of four to ten

[121] This issue is raised and briefed by Riverkeepers.
[122] Riverkeepers Brief, at 34; Riverkeepers' Reply, at 7.
[123] Riverkeepers at 35-36.
[124] Ecology Brief, at 27; County Brief, at 21.

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lots, "is proportional to the public access demand that such small divisions of land would create."[125]

Board Discussion and Analysis

Public access to the waters of the state is one of the priorities of the Shoreline Management Act.[126] The Guidelines provide detailed requirements for incorporation of public access protections in local SMPs.[127] These requirements are triggered when development is proposed on public or private lands, including subdivision of land into four or more parcels: "Provide standards for the dedication and improvement of public access in developments for water-enjoyment, water-related, and nonwater-dependent uses and for the subdivision of land into more than four parcels. In these cases, public access should be required except: [exceptions listed]."[128] Thus, the guidelines address both "developments" and "subdivision of land."

Spokane County's SMP defines "residential" as "any building for residential purposes, including . . . multifamily . . . and any subdivision of the land. . . ."[129] "Subdivisions" is also a defined term in the SMP and "means division of land approved by Spokane County pursuant to the Spokane County Subdivision Ordinance and the Washington State Subdivision Statute, RCW 58.17."[130] The public access standards in the SMP require "[d]edicated space for physical public access" to be incorporated into "all public and private commercial and industrial uses/developments and all residential subdivisions of greater than four (4) parcels unless [exceptions listed]."[131] In addition, SMP 5.2.8(2) states "development by private entities should provide public access when the development would . . . generate

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[125] Ecology Brief, at 28-29, citing E001918, at 10; County Brief, at 21-23.
[126] RCW 90.58.020.
[127] WAC 173-26-221(4). While public access is commonly considered to be physical access, public access can also be visual. WAC 173-26-221(4)(a), (b)(iii).
[128] WAC 173-26-221(4)(d)(iii) [underlining added for emphasis].
[129] SMP, Section 11.2, at 103. Residential – any building for residential purposes, including single-family, multifamily, cluster development or planned unit development, and any subdivision of the land for sale or lease (as defined in the Spokane County Subdivision Ordinance).
[130] SMP 11.2, at 105.
[131] SMP 5.2.8(8), p. 34.

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a public demand for one or more forms of such physical or visual access . . . ."[132] The Petitioners allege that the only SMP provision arguably applicable to multifamily development in the absence of subdivision is SMP 5.2.8(2): "Shoreline development by private entities should provide public access. . . ."[133] By contrast, SMP 5.2.8(8) mandates incorporation of "dedicated space for public access" into all commercial and industrial developments but only into "residential subdivisions" of more than four parcels.

The Board notes both Ecology and the County assert the SMP treats multifamily developments like other "developments," regardless of subdivision. The County's Prehearing Brief states "an applicant for a multifamily development is subject to a variety of requirements of Section 5.2.8. . . ." The Attorney General's Response Brief states that the Spokane County SMP requires physical public access for all residential subdivisions of greater than four (4) parcels, including "multifamily" residential development.[134] The SMA Guidelines exempt "individual single-family residences not part of a development planned for more than four parcels" from the public access requirements.[135] There is no exception for multi-family developments. The SMP also requires visual access, which is a recognized form of public access under the SMA.[136]

In addition to requiring public access for <u>development</u>, the Guidelines require public access for the <u>subdivision</u> of land into four or more parcels unless one of the listed exceptions apply.[137] Spokane County's SMP creates a specific standard applicable to single-family residential development of between five and nine parcels, allowing community access rather than dedicated public access. SMP 5.2.8(10) provides:

> (10) The public access requirement is met where a single-family residential development of greater than four (4) parcels but less than ten (10) parcels provides <u>community access</u> to the shoreline or to a common waterfront lot/tract for non-commercial recreational use of the property owners and

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[132] *Id.* at p. 33.
[133] Spokane Riverkeeper Reply at 7.
[134] Ecology's Response Brief at p. 27 (October 21, 2013). SMP Section 5.2.8(8), at 34. This section reflects the exceptions outlined in the Guidelines at WAC 173-26-221(4)(d)(iii). The term "residential" includes "multifamily" residential development. WAC 173-26-241(3)(j); SMP Section 11.2, at 103.
[135] WAC 173-26-221(4)(d)(iii)(C).
[136] WAC 173-26-221(4)(a), (b)(iii).
[137] WAC 173-26-221(4)(d)(iii).

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> guests within the proposed subdivision. The proponent shall provide visual access to the shoreline via view corridors within the subdivision as illustrated on the final plan and as determined by the Director. Existing lawfully established public access shall be maintained.

The Board notes the Guidelines recognize physical public access, visual access and community access. The Guidelines contemplate that community access might satisfy the public access requirements: "[n]ew multiunit residential development, including the subdivision of land for more than four parcels, should provide community and/or public access in conformance to the local government's public access planning and this chapter."[138] SMP 5.2.8(10) requires both community access and visual access for single-family subdivisions between four and ten parcels.[139] Ecology states it approved community access and visual access for those smaller subdivisions based on its belief it is "proportional to the public access demand that such small divisions of land would create." Ecology did not require broader public access because in its judgment this would exceed the impacts caused by no more than ten single-family homes.[140] Petitioners have submitted no evidence to the contrary.

The Board finds Petitioners have failed to satisfy their burden of proof to provide clear and convincing evidence that Ecology's approval of SMP 5.2.8 violated the mandatory provisions of WAC 173-26-221(4) or was clearly erroneous.

Board Findings of Fact

The Growth Management Hearings Board finds that there is clear and convincing evidence in the record as follows:

1. Spokane County's Shoreline Master Program provides standards for the dedication and improvement of public access for land use developments and subdivisions of land into more than four parcels.

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[138] WAC 173-26-241(3)(j).
[139] SMP 5.2.8(10).
[140] Ecology Brief at 28-29, citing E001918, at 10.

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2. Spokane County's Shoreline Master Program requires physical public access for residential developments, including multi-family residential developments, excepting single-family subdivisions of fewer than five parcels, and allowing community access for single-family subdivisions of greater than four parcels but less than ten parcels.

Board Conclusions of Law

1. As to Legal Issue 6, Petitioners have failed to satisfy their burden of proof to show, by clear and convincing evidence, that the decision of the Department of Ecology is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.

2. The Board upholds the decision by the Department of Ecology as to Legal Issue 6.

VI. ORDER

1. As to Legal Issue 4 relating to On-Site Sewage Systems, the Growth Management Hearings Board reverses the Department of Ecology's decision approving Spokane County's 2013 Shoreline Master Program Update and remands this matter to the Department Ecology and Spokane County for the purpose of complying with the Shoreline Management Act consistent with this Final Decision and Order and in accordance with the following schedule.

2. As to Legal Issues 1 (critical areas-wetlands), 2 (fish and wildlife habitat), 3 (trails), 5 (channel migration zones), and 6 (public access), the Board upholds the decision by the Department of Ecology.

3. The following schedule for further proceedings shall apply:

Item	Date Due
Compliance Due	May 23, 2014
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	June 6, 2014
Objections to a Finding of Compliance	June 20, 2014
Response to Objections	June 30, 2014
Compliance Hearing Location to be determined	**July 10, 2014** **10:00 a.m.**

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DATED this 23rd day of December, 2013.

Raymond L. Paolella

Raymond L. Paolella, Board Member

Charles D. Mosher

Charles Mosher, Board Member

Margaret A. Pageler

Margaret Pageler, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[141]

[141] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. **A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.**

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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
EASTERN WASHINGTON REGION

Case No. 13-1-0003c

Futurewise, Spokane Riverkeeper, The Lands Council, and Trout Unlimited v. Spokane County and Washington State Department of Ecology

DECLARATION OF SERVICE

I, LYNN TRUONG, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Office Assistant for the Growth Management Hearings Board. On the date indicated below a copy of FINAL DECISION AND ORDER in the above-entitled cases was sent to the following through the United States postal mail service:

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DATED this 23rd day of December, 2013.

Lynn Truong, Office Assistant

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