

Conducting a Comprehensive Shoreline Master Program Update  
CTP Training,  
Day 1, 9:30 – 10:15 am

# **Shoreline Management Act and Growth Management Act Integration**

Peter Skowlund and Barry Wenger, Ecology Shorelands and  
Environmental Assistance Program

# What the statutes said in the past:

Statutory Relationship - unclear from the beginning:

Original Growth Management Act (RCW 36.70A) made NO MENTION of the Shoreline Management Act (RCW 90.58).

Original Shoreline Management Act of 1971 (RCW 90.58), of course made NO MENTION of the GMA or local planning enabling legislation.

**Finally, some answers!**

Consider EHB 1653...

# EHB 1653: “An act related to clarifying the integration of SMA policies with the GMA”

- Clarifies that CAOs continue to apply in shoreline areas until Ecology approves new SMPs

- Effective 3-18-10
- Retroactive to July 2003 (ESHB 1933)



**publicola**  
SEATTLE'S NEWS ELIXIR

News & Politics

Business & Tech

Arts & Culture

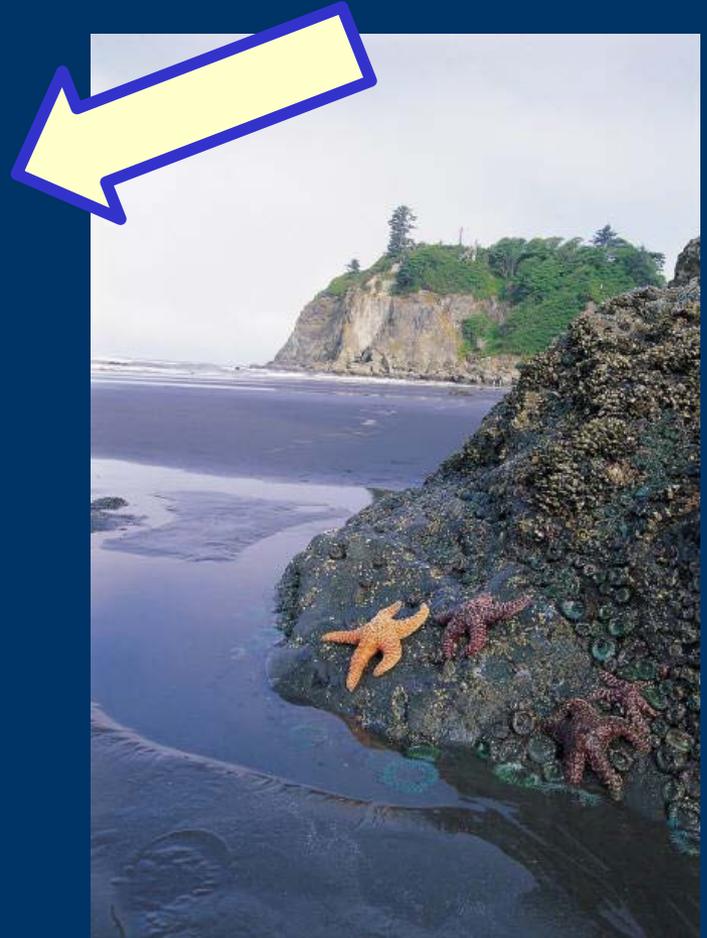
March 2, 2010

## ENVIRONMENTALISTS GET A WIN IN THE LEGISLATURE

What Simpson's bill does is **wonky, but important**: It clarifies a 2003 law setting shoreline protection standards that the state Supreme Court recently weakened with a 2008 ruling that opened the law to local challenges.

# Fixing the Fix: Overview of EHB 1653

- History of SMA-GMA laws, rules, key cases and why we needed EHB 1653
- What the bill changes
- What the bill doesn't change
- What's next



*The past*

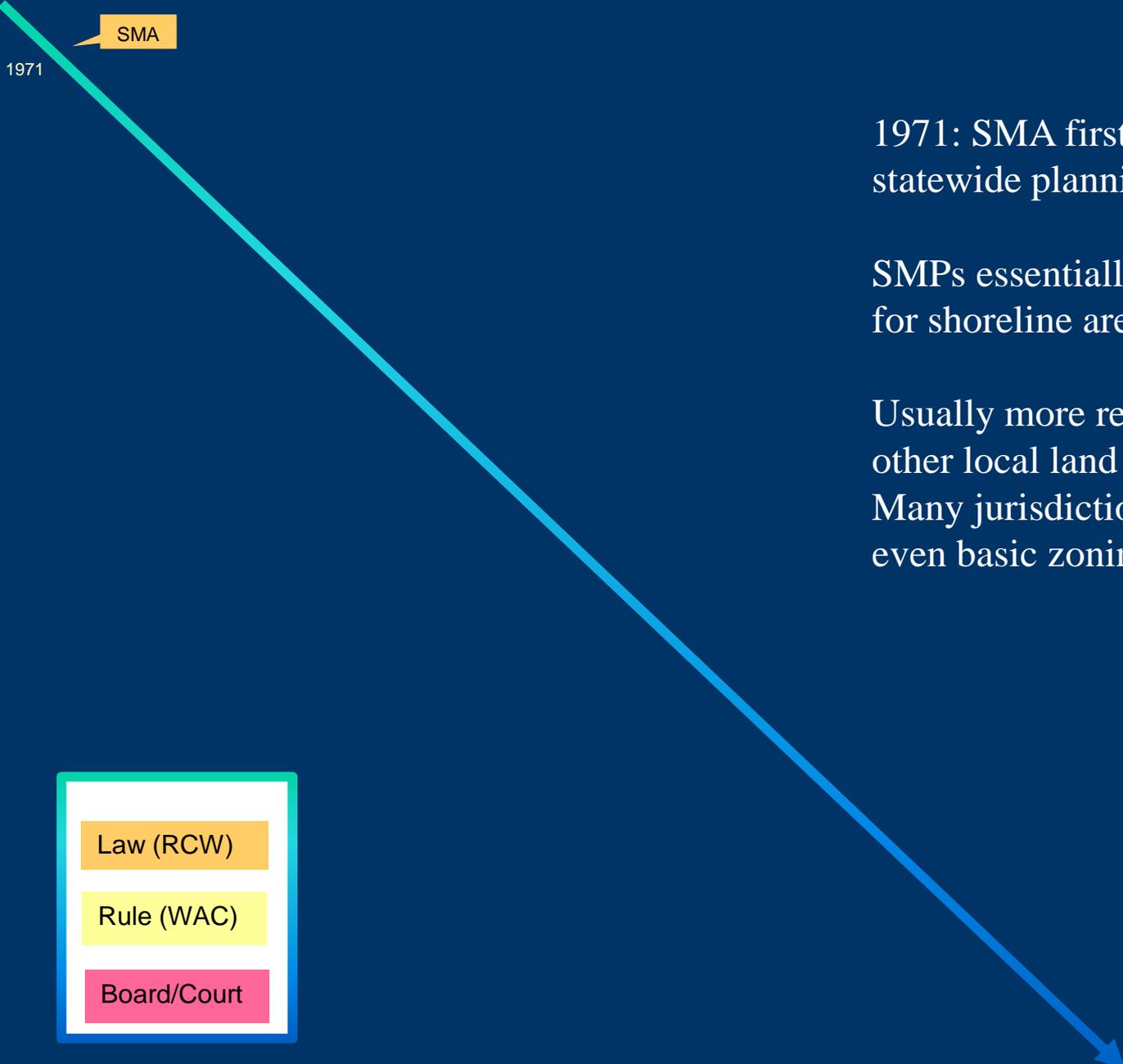
# A brief history of the interplay between Shorelines and Growth Management

Law (RCW)

Rule (WAC)

Board/Court

*The future*



SMA

1971

1971: SMA first mandatory statewide planning law.

SMPs essentially subarea plans for shoreline areas.

Usually more restrictive than other local land use regulations. Many jurisdictions were lacking even basic zoning codes.

Law (RCW)

Rule (WAC)

Board/Court



1990: GMA adopted with no mention of SMA. GMA rules for designating critical areas make no distinction between CA's inside or outside shorelines.

Questions arose: which comes first in shoreline areas? How to integrate?

Reality: most local governments not troubled by overlap. General rule: the most restrictive *regulations* applied (often the newer CAOs). SMPs more specific regarding allowed *uses*, because GMA establishes no shoreline use preference.

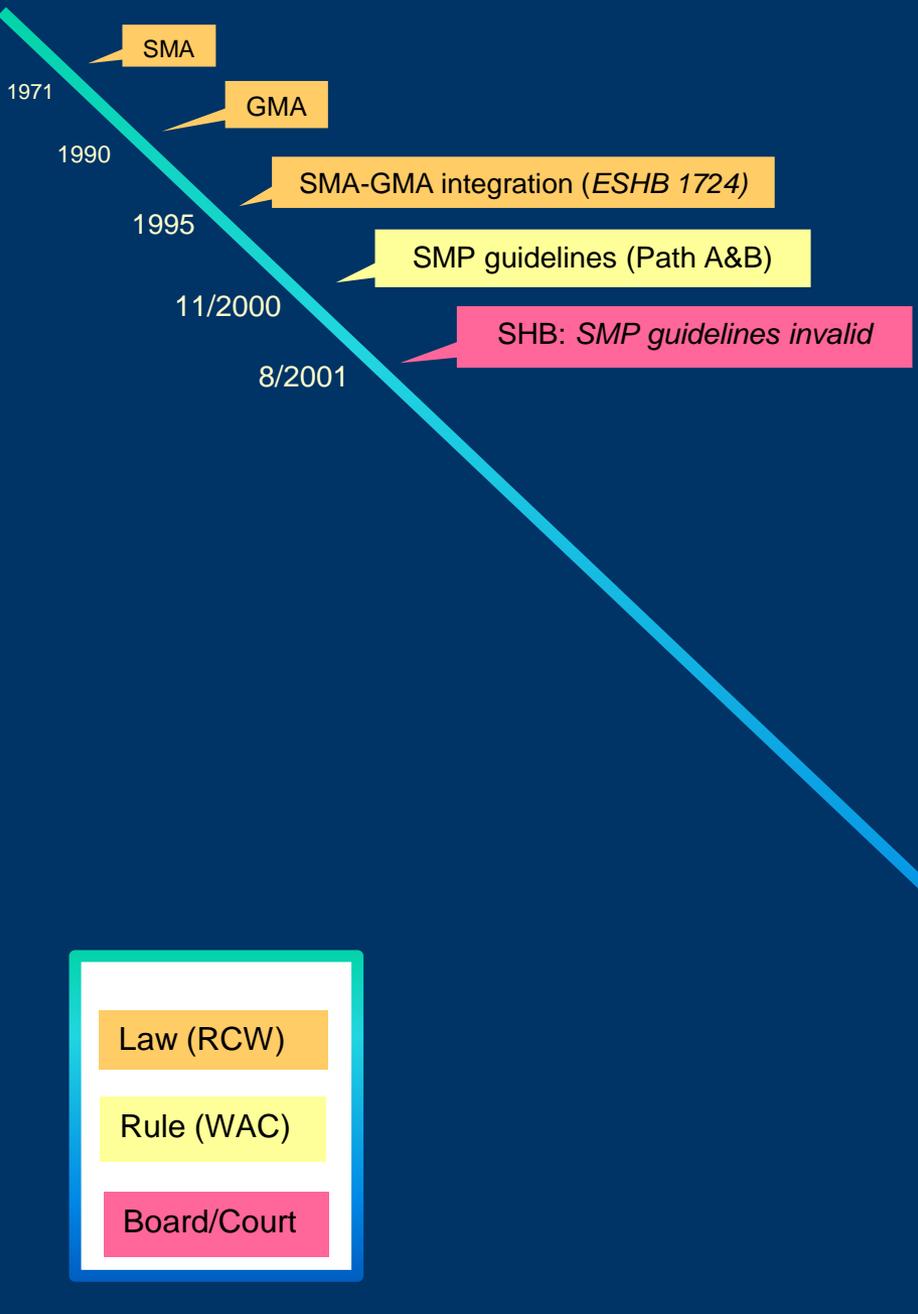
Law (RCW)
Rule (WAC)
Board/Court



### 1995 Regulatory Reform :

- GMA established as the integrating framework for land use planning
- SMPs made an element of GMA comp plans and regs, triggering the GMA “internal consistency” requirement.
- Appeals of SMPs transferred to Growth Mgm’t Hearings Boards
- Added requirement to “include Best Available Science” when updating CAOs. BAS started driving larger buffers in shoreline areas as CAOs were updated.

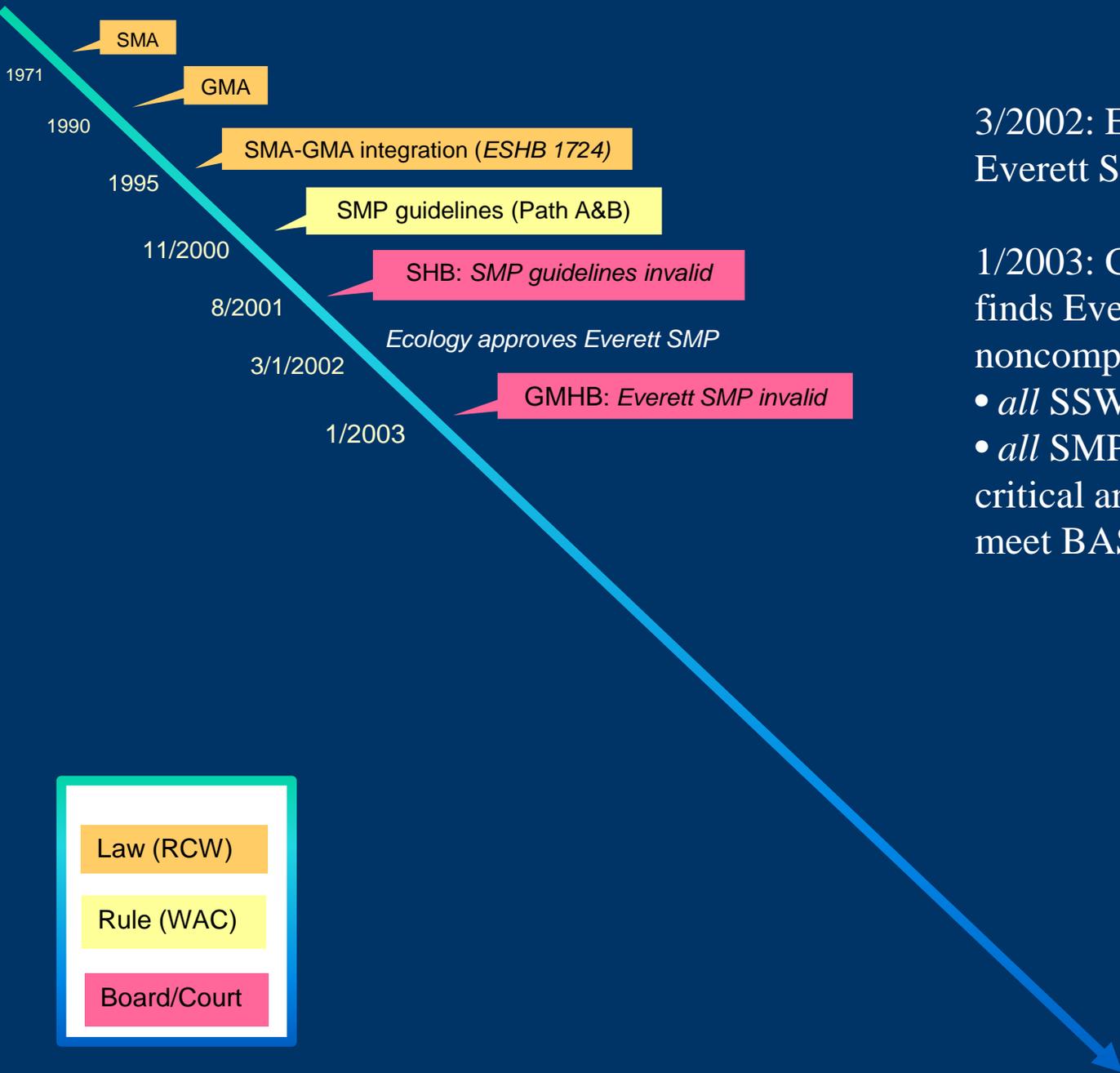
Law (RCW)
Rule (WAC)
Board/Court



11/2000: Ecology adopts updated SMP Guidelines rule

8/2001: Shorelines Hearings Board case *AWB v Ecology*: SMP guidelines invalidated (*Path B exceeds SMA authority by implementing federal Endangered Species Act*)

Law (RCW)
Rule (WAC)
Board/Court

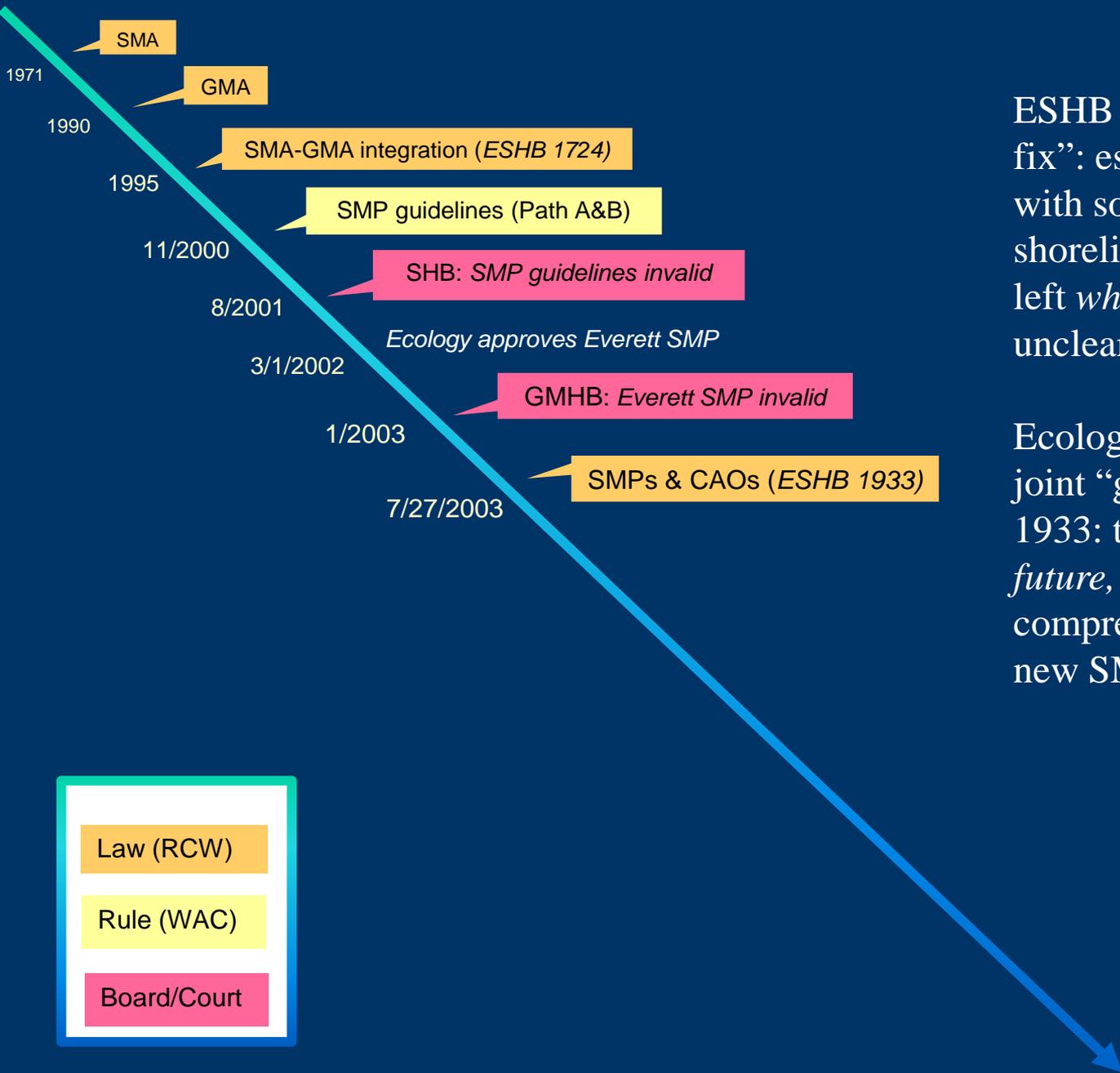


3/2002: Ecology approves Everett SMP

1/2003: Central Growth Board finds Everett SMP noncompliant:

- *all* SSWS are “critical areas”
- *all* SMP regulations are also critical areas regs and need to meet BAS test.

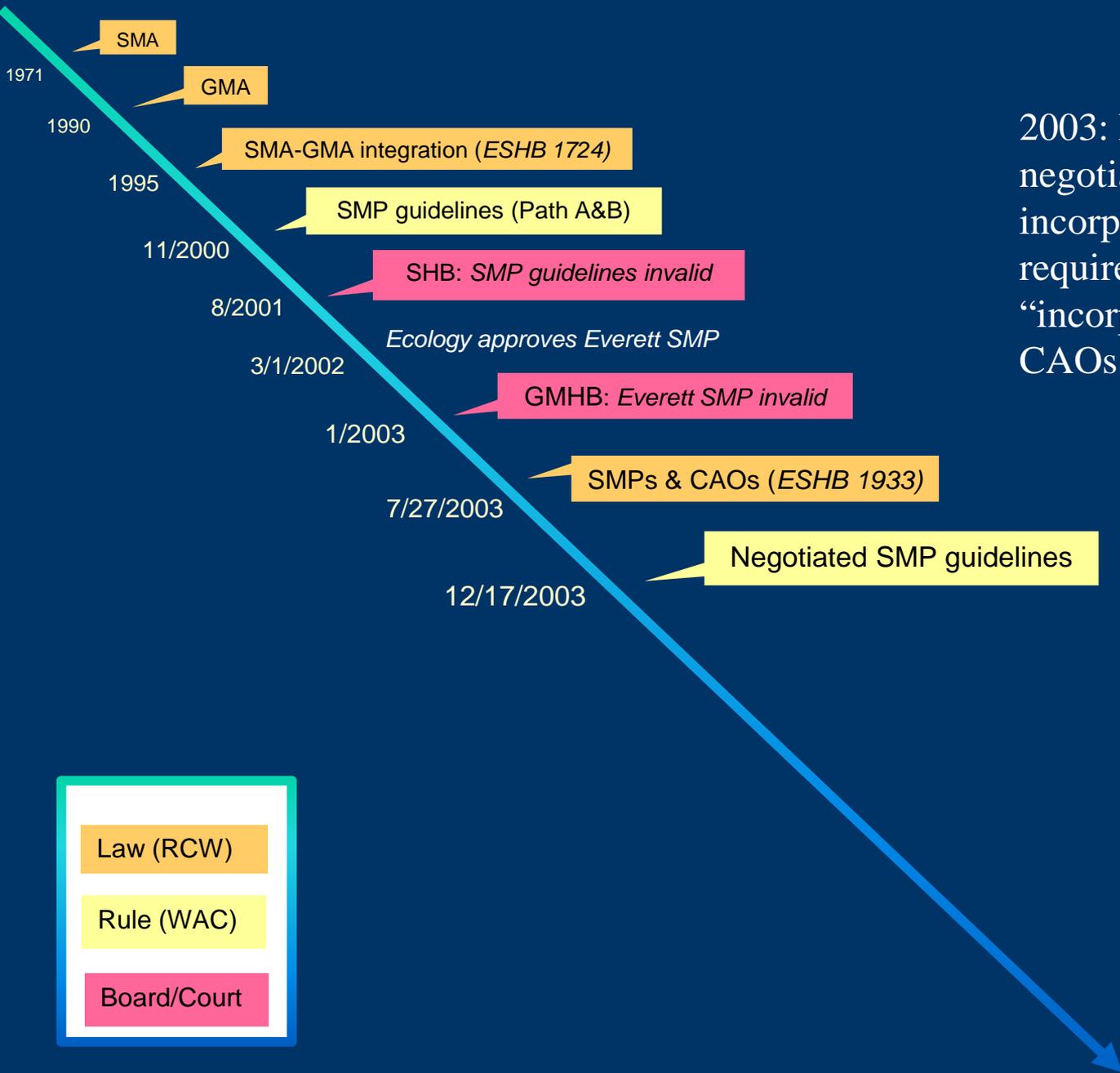
Law (RCW)
Rule (WAC)
Board/Court



ESHB 1933, aka “Everett fix”: established the SMA with sole jurisdiction over shoreline critical areas – but left *when* this transfer occurs unclear.

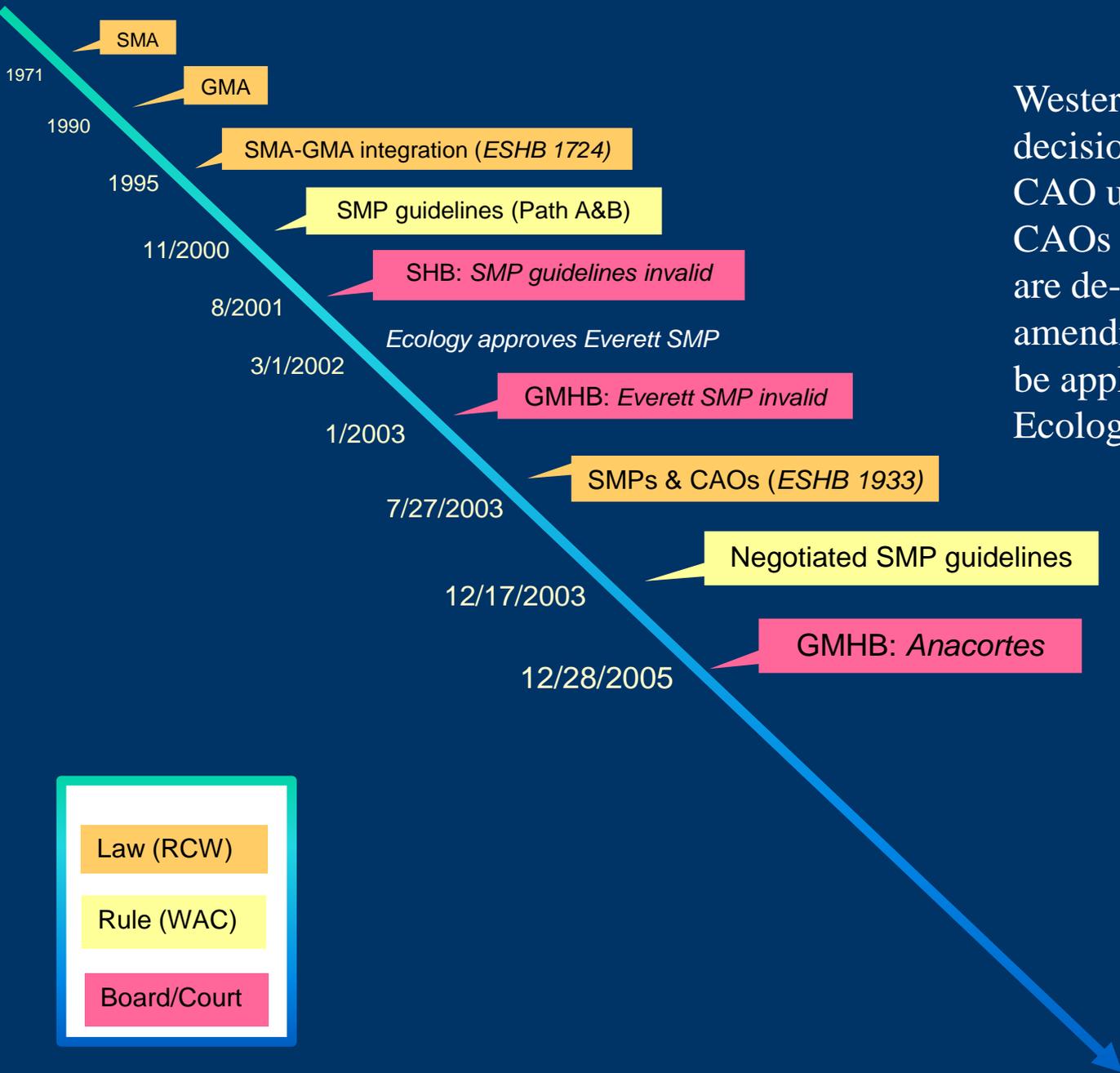
Ecology/Commerce issue joint “guidance” on ESHB 1933: transfer occurs *in the future*, as SMPs are comprehensively updated per new SMP Guidelines

Law (RCW)
Rule (WAC)
Board/Court



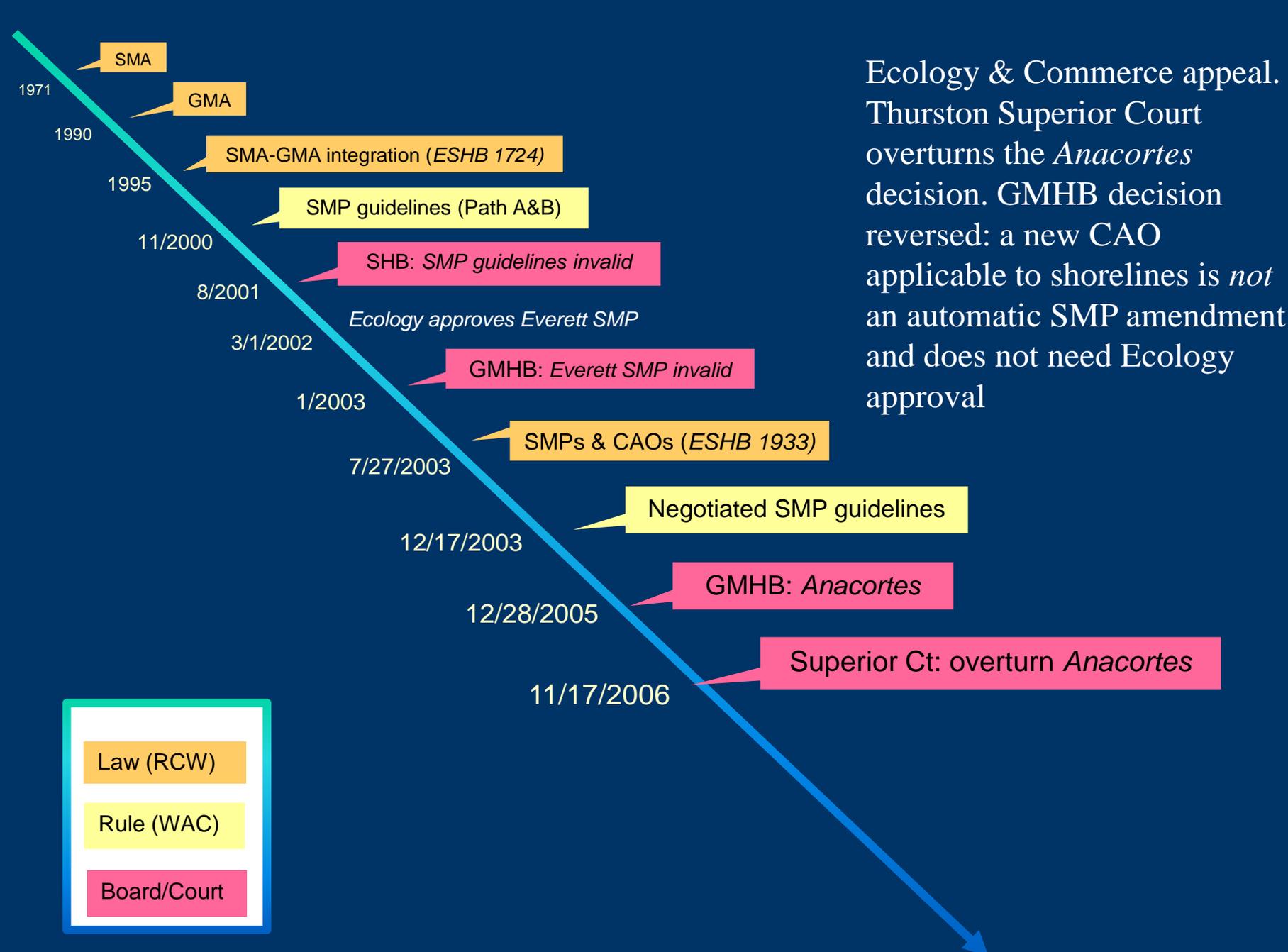
2003: Ecology adopts negotiated SMP Guidelines: incorporates ESHB 1933 requirements, allows “incorporation by reference” of CAOs into SMPs.

Law (RCW)
Rule (WAC)
Board/Court



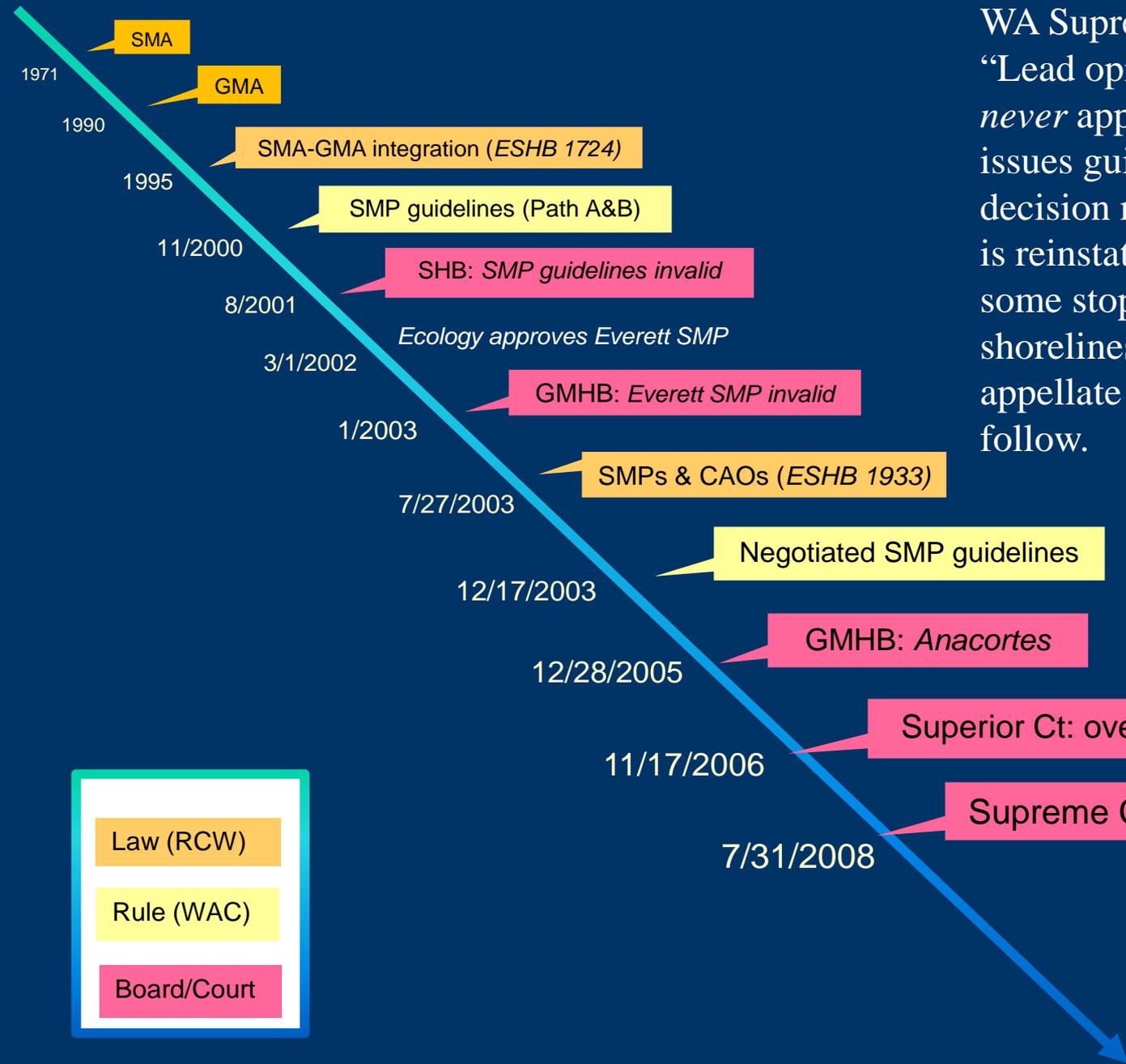
Western Growth Board decision on City of Anacortes CAO update: as of 7/27/03 CAOs that apply in shorelines are de-facto SMP amendments and thus can't be applied until approved by Ecology.

Law (RCW)
Rule (WAC)
Board/Court

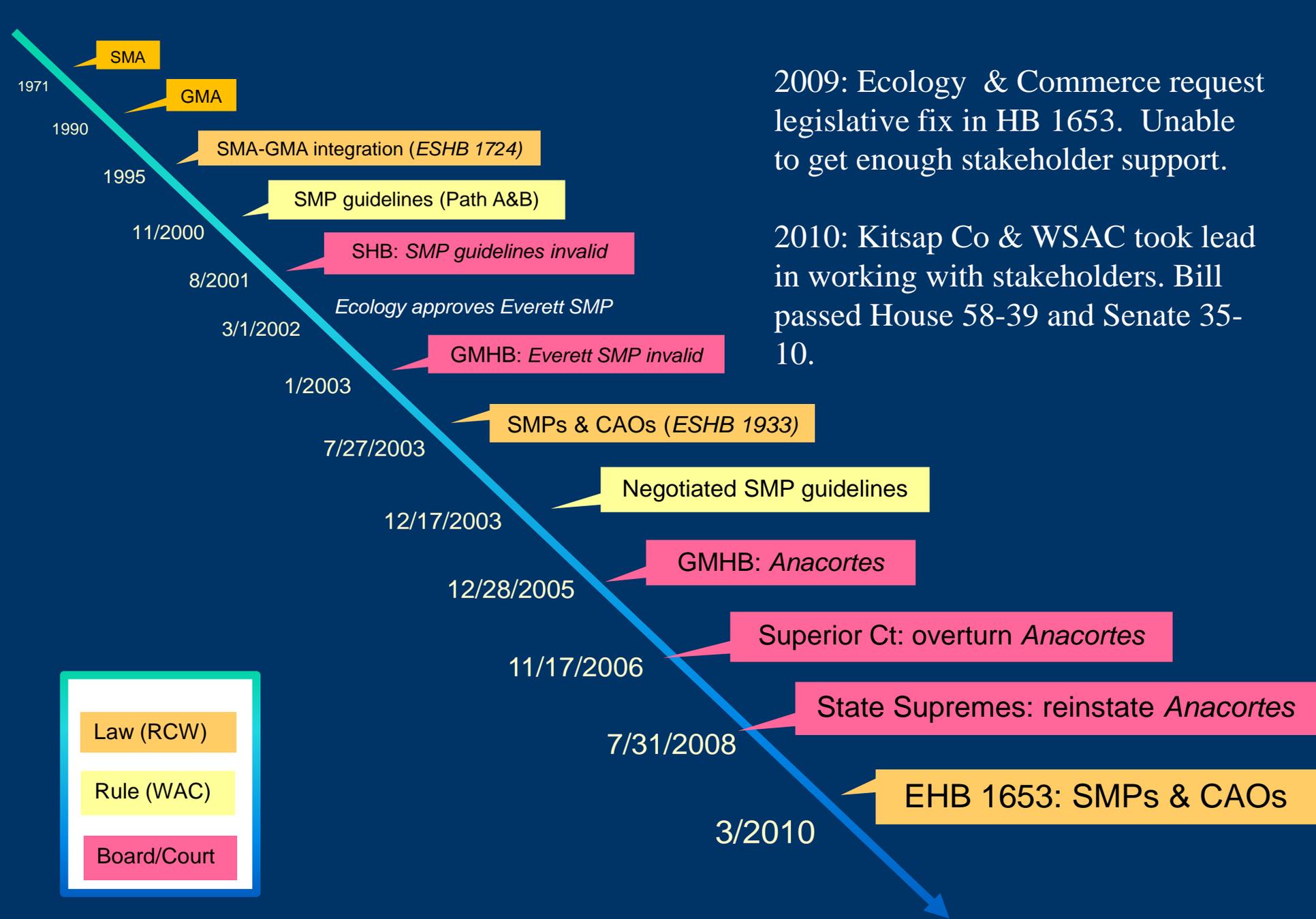


Law (RCW)
Rule (WAC)
Board/Court

WA Supreme Court 4-1-4 decision. “Lead opinion” implies CAOs *never* applied in shorelines. AAG issues guidance that the split decision means the GMHB decision is reinstated. Local response varied: some stop applying CAOs in shorelines. Confusing mix of appellate court/Board decisions follow.



Law (RCW)
Rule (WAC)
Board/Court



Law (RCW)
Rule (WAC)
Board/Court

# EHB 1653: Broad support at legislative hearings

## Pro:

**Government:** Ecology, Commerce, WSAC, AWC, Washington Public Ports

**Environment:** Futurewise

**Farm:** Farm Bureau, WA State Grange

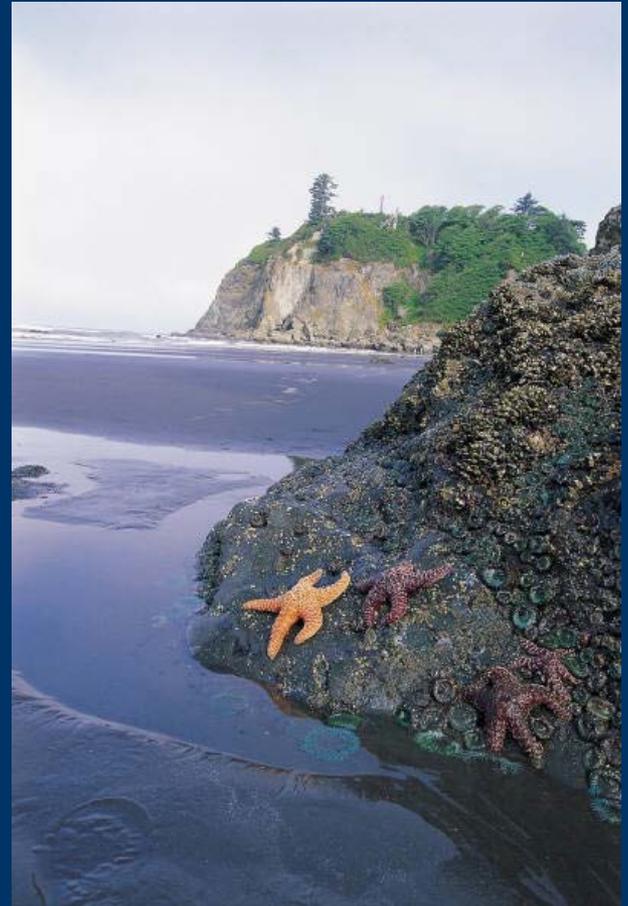
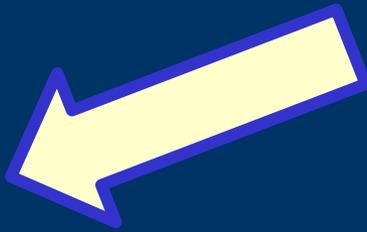
**Business:** Association of Washington Business, Associated General Contractors, WA Aggregates and Concrete Association, Tacoma-Pierce Chamber of Commerce, Port Blakely Company, WA Realtors, National Association of Office and Industrial Properties

## Con:

Building Industry Association of Washington; Kitsap Alliance of Property Owners; D.K. Martin Construction; Citizens Alliance for Property Rights

# Fixing the Fix: Overview of EHB 1653

- History of SMA-GMA laws, rules, key cases and why we needed EHB 1653:
- What the bill changes
- What the bill doesn't change
- What's next



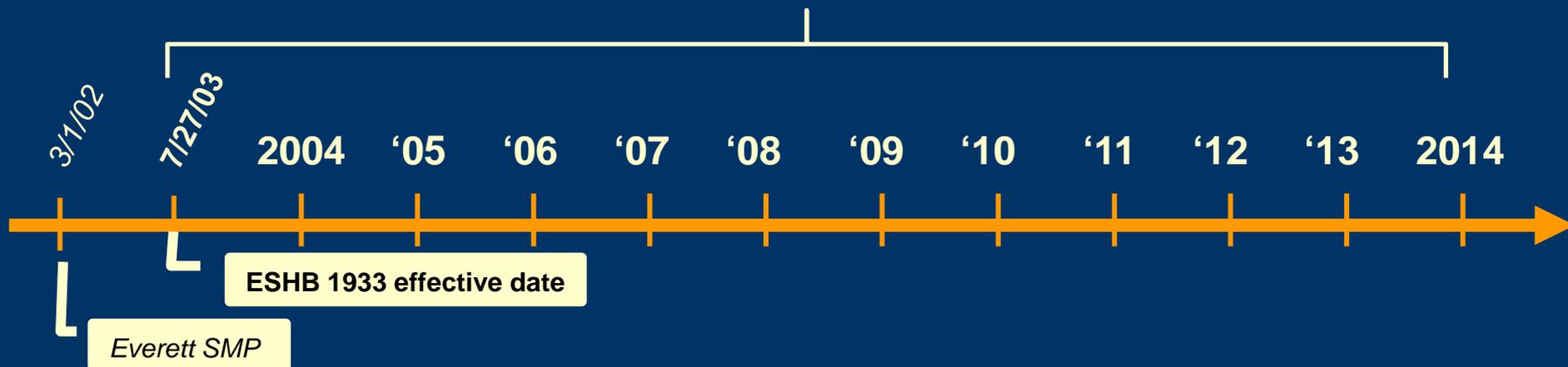
# Legislative Intent Clarified:

- A 2003 law (*ESHB 1933*) was “intended to create greater **operational clarity**” between SMA and GMA.
- ESHB 1933 was the subject of differing and contrary legal opinions.
- CAOs adopted under GMA apply within Shorelines of the State.
- CAO updates are not automatically SMP amendments needing Ecology approval.
- Bill is retroactive to July 27, 2003 to clarify status of past CAO adoptions and decisions .

# Legislative Intent Clarified:

- CAOs apply within shorelines until Ecology approves either:
  - a “**comprehensive**” SMP update prepared consistent with the 2003 SMP Guidelines; *or*
  - a “**segment**” (*or partial*) SMP update adopted to specifically address critical areas.
- Adopting or updating a CAO is *not* a comprehensive or segment SMP update

RCW 36.70A.480(3)(b)



## So, when Ecology approves SMPs...

- Now, the level of protection test for critical areas is that they assure “no net loss of shoreline ecological functions...defined by Ecology’s guidelines.”
- Bill deletes the “no-backsliding” language of ESHB 1933 requiring SMP protections be “at least equal to those provided by the CAO”. *Avoids axle-winding whether this is met. GMA: RCW 36.70A.480(4)*
- Revises SMA definition of “Master Program” to clarify that “comprehensive” SMP updates must fully satisfy Ecology’s SMP Guidelines.

# Fixing the Fix: Overview of EHB 1653

- History of SMA-GMA laws, rules, key cases and why we needed EHB 1653
- What the bill changed
- What the bill does not change
- What's next



# Unchanged: Non-SMP-related Critical Areas

No distinction between some critical area types not normally addressed in shoreline management and those that are.

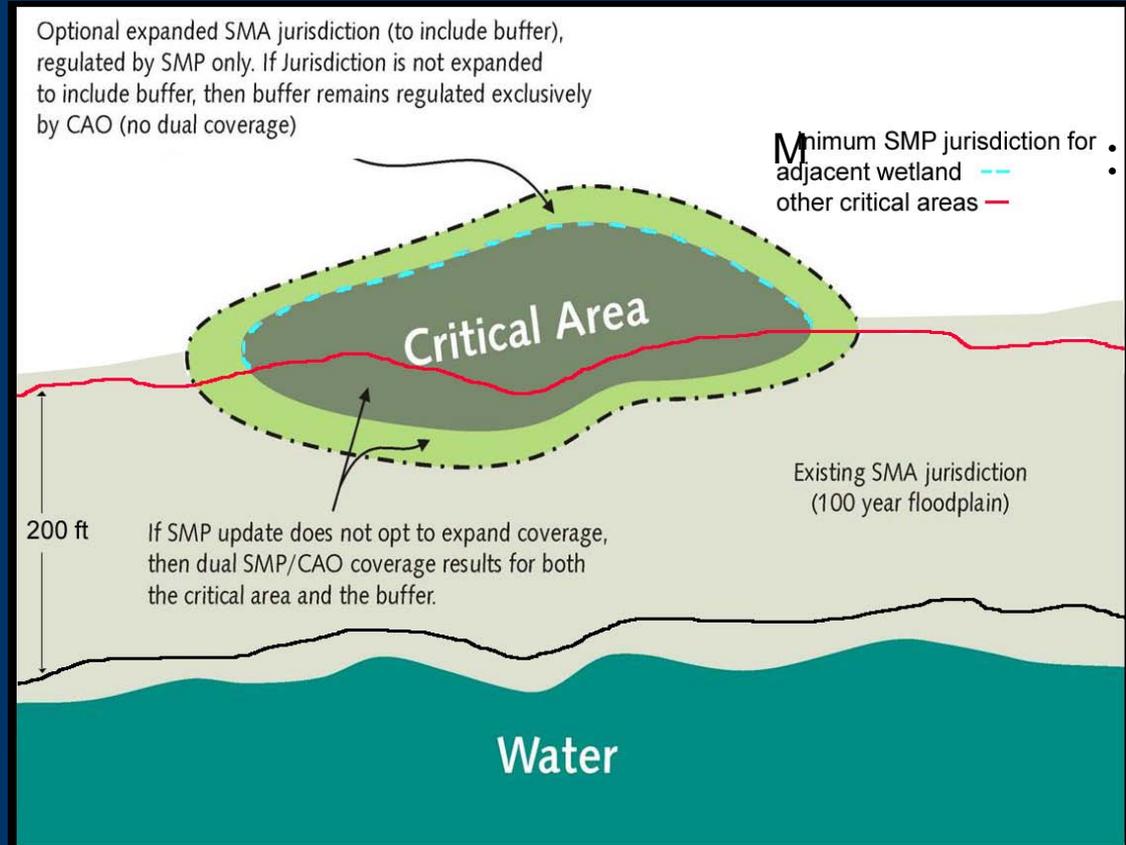
Some critical areas are *not addressed at all by the SMP Guidelines*, such as:

- Some geologically hazardous areas (lahar zones, seismic)
- Critical aquifer recharge areas

Statute seems to assume 100% match between CAO topics and SMP topics – a poor assumption.

# Unchanged: “Land necessary for buffers”

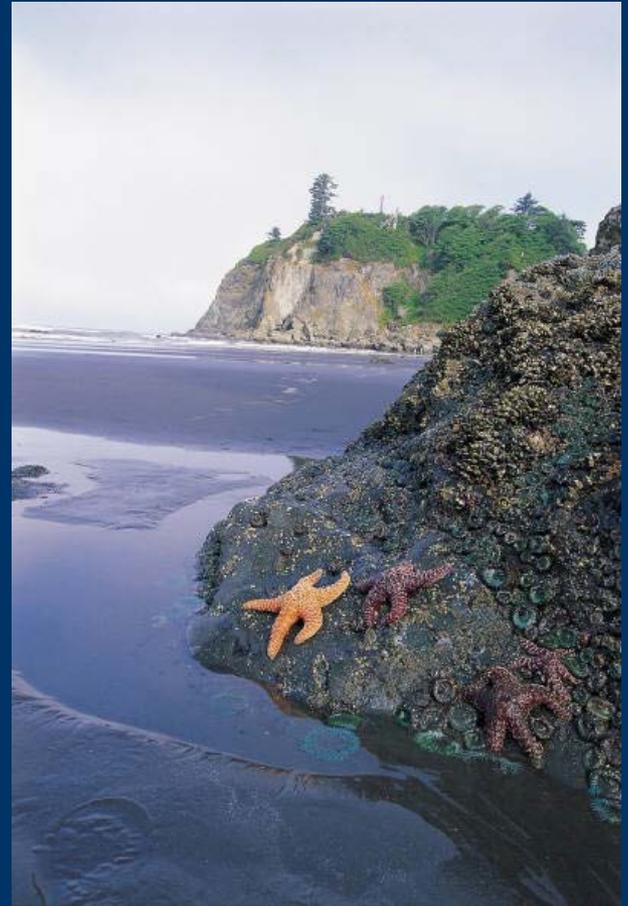
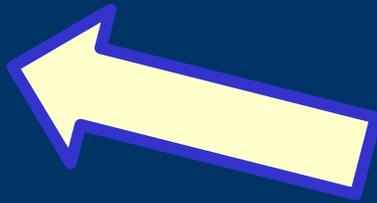
If a new SMP doesn't include optional expanded SMA jurisdiction to include land necessary for buffers for CA's, then the local jurisdiction shall continue to regulate those CA's and their required buffers under GMA as well as SMP (*i.e.*, dual coverage continues).



GMA: RCW 36.70A.480(6)

# Fixing the Fix: Overview of EHB 1653

- History of SMA-GMA laws, rules, key cases and why we needed EHB 1653
- What the bill changed
- What the bill doesn't change
- What's next



# Next steps

## Long-term:

- Update Commerce/Ecology rules (WACs)

## Near-term:

- Notify interested groups: Commerce/Ecology lists
- Scrub Commerce/Ecology websites
- Prepare to answer local government questions.

## Likely local gov't questions: implementing 1653

Q: We are *late* updating our CAO to include BAS. We want to finish the job as soon as possible. Should we include shoreline areas in our CAO?

A: Yes, to the extent that shorelines are designated Critical Areas, they *should* be included in your new CAO. Consider adding nonconforming use provisions from EHB 1653 in your CAO.

# Likely local gov't questions: implementing 1653

Q: We are *late* updating our CAO to include BAS. Can we **delay our CAO update** and combine an upland CAO with an SMP that includes shoreline critical areas?

A: Yes, but you will continue to be noncompliant with GMA until your CAO is updated. We recommend adopting a resolution spelling out timeline for CAO update (*see Island Co. example*).

## EXAMPLE RESOLUTION

**WHEREAS**, GMA required the County to update its CAO by 2006; and

**WHEREAS**, Under SMA, the County is required to amend its SMP on or before Dec 2012; and

**WHEREAS**, Given severe budgetary shortfalls, the County was unable to complete its CAO; and

**WHEREAS**, to make most efficient use of resources, the County has decided to combine the CAO update process with the scheduled update of the SMP; and

**WHEREAS**, Combining these two work programs creates a single public process, and avoids piecemeal decision making;

**THEREFORE, IT IS HEREBY RESOLVED** that the BOCC authorizes the Planning Department to develop a detailed work program for a combined CAO & SMP to finish Dec 2012.

# Likely local gov't questions: implementing 1653

Q: Do we need to change our CAO to add nonconforming use provisions of the bill in the interim, before my SMP is updated?

A: No. There is no explicit requirement to amend your CAO. EHB 1653 supplements what is in your CAO already. The bill offers an optional path forward for redeveloping and modifying uses or structures within buffers.

# Likely local gov't questions: implementing 1653

Q: How do we assure “No Net Loss” when reviewing a project that proposes changes to a grandfathered use (*optional path*)?

A: “No Net Loss” = mitigating impacts of project.

The baseline is existing conditions. Projects must mitigate any new impacts (starting with *avoidance* of impacts, whenever possible).

Ecology can provide examples of how to mitigate (*e.g., Whatcom County*).

# Likely local gov't questions: implementing 1653

Q: We have ***not applied our CAO*** in shoreline areas since the Anacortes Supreme Court decision and have approved projects in CAO buffers. Are any vested rights changed?

A: (informal AAG advice): No. A retroactive law cannot take away vested rights. If a project vested & doesn't meet CAO standards...the project is vested under section 2(3)(c). It should be treated as conforming and may redevelop per the requirements of that section. This avoids depriving vested projects of their rights.

In jurisdictions that did not apply their CAOs in the wake of Anacortes, the "lost ground cannot be made up."

# Likely local gov't questions: implementing 1653

Q: Do the nonconforming use provisions of EHB 1653 apply to SMPs, or just CAOs?

A: The provisions are found in the GMA, and apply to CAO implementation within shoreline areas in the interim until an updated local SMP is approved. However, new SMPs also must address the issue of nonconforming uses, and in practice, SMPs approved so far appear consistent with EHB 1653 (i.e., they authorize modification of existing uses and structures with mitigation).

# Summary of EHB 1653: Key results

- Ends confusion created by conflicting court interpretations of a 2003 law: CAOs *do* apply in shoreline jurisdiction, until Ecology approves a comprehensive SMP. Bill is retroactive to July 27, 2003.
- Provides certainty for grandfathered uses and structures: CAOs cannot be implemented to create nonconforming uses in shorelines.
- Test for new SMPs: demonstration that updated SMPs provide “equal or better” protection as CAOs, is replaced by requirement that CA protections must achieve no net loss of ecological functions.

# So, what do the rules say, about integration?

- Consider the SMP Guidelines (WAC 173-26, Part III)...

# The SMP Guidelines say:

“Integrated and Coordinated” policies, regs, and designations are required. WAC 173-26-186(7); WAC 173-26-211(3)

GMA requires “internal consistency” between Comp Plan elements and implementing regulations (including SMPs)

Consistency “test” – Comp Plan and SMP:

- ✓ Not Preclude One Another
- ✓ Use Compatibility
- ✓ Sufficient Infrastructure

Examples: Whatcom County (zoning vs designations) and Ferndale (Conservancy vs Light Industrial)

# The SMP Guidelines say:

All provisions that make up the complete SMP must be specifically identified, including all local ordinance provisions adopted by reference or located in appendices.

Recognize SMA “adjacent lands policy” (RCW 90.58.340):

- State and local governments shall review administrative and management plans, policies, regulations... “adjacent to the shorelines of the state...to achieve a use policy on said land consistent with the policy of [the SMA], the guidelines, and the master programs...”

# “Incorporation by reference” option:

Local gov'ts may include other locally adopted policies/regulations in their SMPs, PROVIDED, the referenced provisions are also consistent with SMA policy and procedures

References in an SMP, to other related local programs and ordinances are typically of two types:

- Loose references to other local programs, ordinances, etc. for informational purposes only.
- “Incorporation by reference” to a “specific, dated edition” of a local ordinance – required when used to satisfy shoreline management requirements.

# “Incorporation by reference” (continued):

“Incorporation by reference” is accomplished either by:

- Actually “embedding” the other local ordinance language in the SMP itself (preferred approach), or by
- Referencing the specific ordinance sections in the SMP, with the actual ordinance language located in an SMP appendix.

Note: incorporation by reference makes the referenced provisions part of the approved SMP. Future changes to the referenced provisions will require Ecology approval (as an SMP amendment).

Also note: Loose references are not a part of the SMP.

# What in Reality is Common Practice?

Relationship: Comprehensive Plans & SMPs



When “science” intervenes...

Unacceptable CAO provisions in SMPs

# Relationship: Comprehensive Plans & SMPs

## Stand Alone vs Dispersed Approach:

- RCW 36.70.480(1) – SMA Goals/Policies = A GMA Goal
- RCW 90.58.340 - SMA Adjacent Lands Policy
- Internal Consistency – GMA; Guidelines 173-26-191(1)(e)

SMP Goals/Policies = an element of the Comp Plan

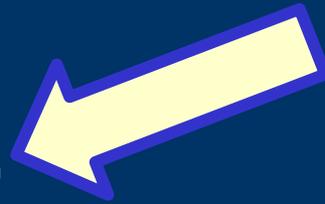
SMP Regulations = local development regs

Note: a local government responsibility to resolve

# What in Reality is Common Practice?

Relationship of Comprehensive Plans to SMPs

When “science” intervenes...



Unacceptable CAO provisions in SMPs

# When “science” intervenes...

SMP standards differ from CAO standards, based on comprehensive assessment of:

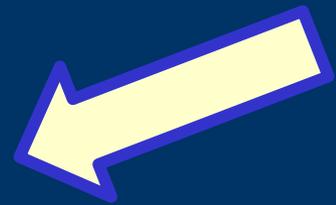
- Shoreline ecological processes and functions
  - Landscape Scale (Eco-system-wide Processes)
  - Localized processes (e.g. Reach Scale)
  - Individual Components (e.g. LWM)
  - Inventory & Characterization
- Existing shoreline development patterns (i.e. land cover/use)
- Future demand for SMA “preferred uses” and public access

# What in Reality is Common Practice?

Relationship of local Comprehensive Plans to  
SMPs

When “science” intervenes...

Unacceptable CAO provisions in SMPs



# Unacceptable CAO Provisions in SMPs:

- Reasonable Use provisions = Shoreline Variance
- Wetland Threshold = in SMP, 100% coverage.
- Unlimited local administrative reductions to SMP standards (e.g. buffers)
- Exceptions, Exempt Uses & Activities
- Administratively Authorized Uses & Activities
- Allowed Outright – Zoning type detailed list of uses
- Nonconforming Uses & Structures – Consistent Only
- CAO Permits, Process, Appeals
- Penalties & Enforcement
- Conflicting Definitions

# SMP-CAO Integration Tips:

Avoid vagueness, ambiguity, fuzziness in:

- References
- Clauses
- Terms and Definitions

Use Criteria and Bookends to Limit Applicability

Check for Conflicts and Inconsistencies

Fallback or Default Position

Provide Consistency and Predictability

# SMP-CAO Integration Tips (con't):

## Strive for Balance Between:

- Easy to Read and Understand – for your Citizens  
(and your Mom)
- Clear and Efficient – for your Administrator
- Legally Defensible – for your Attorney

# Welcome to Shorelines and Growth Management in WA State!

vu sur [YATAHONGA.com](http://YATAHONGA.com)

