



# Responsiveness Summary

## State shoreline master program guidelines WAC 173-26

### Introduction to this document

In November 2000, the Washington State Department of Ecology adopted new Shoreline Master Program guidelines. Ecology prepared this *Responsiveness Summary* to show the public how Ecology responded to comments received during a 60-day public review period. This document is required under the Administrative Procedures Act, the law that guides agency rule-making procedures (*Chapter 34.05.325(6)(a) RCW*).

This document is divided into three sections.

■ **The first section** addresses the requirement to identify the agency's reasons for adopting the rule. This section includes a summary of Ecology's rule development process, a summary of top issues heard during the comment period, and lists of acronyms, laws and regulations found in this document.

■ **The second section** summarizes all written and oral comments received on the proposed rule during the public review period held during Summer 2000. The comments are in *italic type*, and are organized primarily by the sections of the rule. Comments that did not relate to one specific section of the rule are organized by subject area, and can be found at the end of the second section. After each comment, or collection of comments, you will find Ecology's response, indicating how the final rule reflects the agency's consideration of the comment(s) or why it fails to do so. If Ecology's response was to change the rule, the response identifies any differences between the text of the proposed rule as published in the register and the text of the rule as adopted and states the reasons for differences.

This summary includes many direct quotations from letters. In cases where more than one letter made the same comment, Ecology reproduced one or several representative expressions of the comment to capture the full range of perspectives on the issue, but did not reproduce every letter.

■ **The third section** is a "strikethrough" version of the rule comparing the proposed rule as published in the State Register and the text of the final rule as adopted. This version of the rule shows every

change, including editorial changes, that Ecology made to the public comment version. ~~Strikethrough~~ formatting indicates language that was deleted. Underline formatting indicates new language. Many of the editorial changes were made in response to comment letters asking to make Path A and Path B more consistent.

### Distribution of this document

Chapter 34.05.325(6)(b) RCW requires that agencies provide responsiveness summaries (officially called "concise explanatory statements") to any person from whom the agency received comment.

Ecology mailed a copy of this document to everyone who submitted testimony on the rule, if they provided a complete mailing address.

This document is also posted on Ecology's Web site at [www.ecy.wa.gov/programs/sea](http://www.ecy.wa.gov/programs/sea). The Web site also includes other documents related to development of the rule, including a Cost Benefit Analysis and the final report of the Shoreline Guidelines Commission.

For paper copies of this or other documents related to this rule, contact:

#### Shoreline Guidelines

Shorelands and Environmental Assistance Program

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### Reasons for adopting this rule

The purpose of the rule amendments is to update the Shoreline Master Program (SMP) Guidelines that implement the Shoreline Management Act of 1971 (Chapter 90.58 RCW) and establish minimum statewide requirements for local government SMPs. The updated SMP Guidelines replace existing Chapter 173-16 WAC, Guidelines for Development of Shoreline Master Programs, which are repealed. The official title of the rule is "State master program approval/amendment procedures and shoreline master program guidelines," Chapter 17-26 WAC.

The guidelines, originally adopted by Ecology in 1972, have never been comprehensively updated. Engrossed Substitute House Bill 1724 passed by the 1995 State Legislature requires Ecology to update the guidelines. The optional Part IV (or Path B) has been prepared to satisfy requirements of the Shoreline Management Act (SMA) and worded in such a way that the federal Endangered Species Act (ESA) Section 7 consultation on the guidelines will result in a programmatic incidental take statement being issued for Part IV.

*The Report of the Shoreline Guidelines Commission to the Department of Ecology* dated February 16, 1999, states that the guidelines need updating for three principal reasons:

1. *The Legislature has required that the guidelines be updated.* The 1995 regulatory reform legislation, Engrossed Substitute House Bill 1724, stated in Section 1, that the Growth Management Act "...should serve as the integrating framework for all other land-use related laws." ESHB 1724 also established a schedule for local governments to review and update their plans and development regulations, with the next such cycle due September 1, 2002. If master programs are to be integrated in accordance with ESHB 1724 in this cycle, the guidelines need to address integration issues well in advance of that date.

2. *Population growth and changes in the law, planning practice, and use of science since 1971 are significant and require clearer guidance in the rule in order to*

achieve balanced and effective resource management.

In chapter 90.58.020 RCW, 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..." and called for "...coordinated planning ... in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property."

The guidelines need to provide better direction to local governments for effective protection, restoration and preservation of natural resources and utilization of the shorelines, particularly with regard to conflict among uses preferred in the SMA.

3. A premise of the state's Salmon Recovery Strategy is to use existing laws to comply with the Endangered Species Act. Since salmon depend on many areas and resources within the jurisdiction of the Shoreline Management Act for their survival, the guidelines need to show how local master programs can help implement the strategy to recover salmon and their habitat.

## Authority

In adopting the Shoreline Management Act initiative, the legislature and voters declared the following findings and basic state policy:

*RCW 90.58.020—Legislative findings—State policy enunciated—Use preference. The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.*

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

The Shoreline Management Act charges Ecology with responsibility to update the guidelines as follows:

*RCW 90.58.060—Review and adoption of guidelines—Public hearings, notice of—Amendments. (1) The department shall periodically review and adopt guidelines consistent with RCW 90.58.020, containing the elements specified in RCW 90.58.100 for:*

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

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

*(2) Before adopting or amending guidelines under this section, the department shall provide an opportunity for public review and comment as follows:*

*(a) The department shall mail copies of the proposal to all cities, counties, and federally recognized Indian tribes, and to any other person who has requested a copy, and shall publish the proposed guidelines in the Washington state register. Comments shall be submitted in writing to the department within sixty days from the date the proposal has been published in the register.*

*(b) The department shall hold at least four public hearings on the proposal in different locations throughout the state to provide a reasonable opportunity for residents in all parts of the state to present statements and views on the proposed guidelines. Notice of the hearings shall be published at least once in each of the three weeks immediately preceding the hearing in one or more newspapers of general circulation in each county of the state. If an amendment to the guidelines addresses an issue limited to one geographic area, the number and location of hearings may be adjusted consistent with the intent of this subsection to assure all parties a reasonable opportunity to comment on the proposed amendment. The department shall accept written comments on the proposal during the sixty-day public comment period and for seven days after the final public hearing.*

*(c) At the conclusion of the public comment period, the department shall review the comments received and modify the proposal consistent with the provisions of this chap-*

*ter. The proposal shall then be published for adoption pursuant to the provisions of chapter 34.05 RCW.*

*(3) The department may propose amendments to the guidelines not more than once each year. At least once every five years the department shall conduct a review of the guidelines pursuant to the procedures outlined in subsection (2) of this section.*

The SMA in RCW 90.58.200 also states "the department and local governments are authorized to adopt such rules as are necessary and appropriate to carry out the provisions of this chapter."

The 1992 Legislature adopted ESB 6128, amending the Shoreline Management Act. It states:

*RCW 90.58.100 (6) Each master program shall contain standards governing the protection of single family residences and appurtenant structures against damage or loss due to shoreline erosion. The standards shall govern the issuance of substantial development permits for shoreline protection,*

*including structural methods such as construction of bulkheads, and nonstructural methods of protection. The standards shall provide for methods which achieve effective and timely protection against loss or damage to single family residences and appurtenant structures due to shoreline erosion. The standards shall provide a preference for permit issuance for measures to protect single family residences occupied prior to January 1, 1992, where the proposed measure is designed to minimize harm to the shoreline natural environment.*

Amendment of WAC 173-16 to incorporate the provisions of ESB 6128 was originally delayed pending the completion of research into appropriate erosion-control measures, environmental effects, and policy options, and then further delayed to integrate ESB 6128-mandated amendments with those mandated by ESHB 1724.

## Scheduled Date of Adoption/ Scheduled Effective Date

The rule is adopted on the date the Director of the Department of Ecology signs the final rule-making order (CR-103). The rule will take effect 31 days after it is filed with the Office of the Code Reviser.

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## Process used to involve the public in developing the shoreline rule

The following is a summary of how Ecology informed the public and gathered comments on the shoreline master program guidelines.

- **1992 to 1994:** Shorelands Growth Management Project delivers technical assistance to local governments targeted at SMA/GMA integration.
- **February 1996:** Held public focus groups in Everett, Longview, Moses Lake and Tacoma; also conducted local shoreline planner “practitioner” surveys.
- **1996:** Conducted statewide (400 Eastern Washington/400 Western Washington) public opinion survey.
- **July 1996:** First draft SMP Guidelines prepared, circulated to interested parties, and reviewed by Shorelines Policy Advisory Group (SPAG), made of representatives of local, state and tribal governments, ports, and organizations representing general business, water-dependent business, agriculture, forestry, and the environmental community. Held four public meetings.
- **October 1996:** Comments of SPAG responded to in second draft SMP Guidelines, which was circulated for comment to interested parties.
- **January 1997:** further guidelines development put “on hold” to work with Land Use Study Commission; new LUSC work group convened in July 1997 to address SMA/GMA integration issues.
- **July - October 1997:** LUSC work group holds seven public meetings, reaches no consensus, but issues October 1997 report providing detailed direction for more “efficient and effective” shoreline regulations.
- **May 1998:** With endorsement of Governor and Joint Natural Resources Cabinet, Ecology establishes the Shorelines Guidelines Commission with caucuses including cities, counties, tribes, ports, forestry, the environmental community, and water-dependent business.
- **July 1998- January 1999:** Guidelines Commission holds 19 public meetings to advise Ecology on guidelines update, reviews two new draft guidelines rules.
- **February 16, 1999:** Guidelines Commission issues final report advising Ecology to proceed with broader, public rule-adoption process.
- **April 21 - August 4, 1999:** Held nine public hearings as part of public rule-adoption process and received more than 2,500 letters. After review of public comments, Ecology withdraws rule in August to clarify and fine-tune language.

- **December 17, 1999 - March 1, 2000:** Held “informal” public comment period on new “working draft” guidelines, with emphasis on getting reaction from legislators. Mailer sent to interested parties and legislative leaders announcing public comment period. Working draft posted on Internet site. Received approximately 100 comment letters.
- **September 1999 - May 2000:** Met with federal agencies and tribes to prepare the optional “Part IV” of rule for local governments that choose to seek ESA liability protection for their master programs; conducted “informal” review period on draft Part IV with local and state agencies.
- **August 1999 - May 2000:** Met extensively with legislators, local governments and interest groups at meetings, conferences and workshops to present information and gather comments on draft rule.
- **Feb 1996- August 2000:** Sent flyers to interested-parties mailing lists and published *Confluence* newsletter articles describing progress of the rule and advertising opportunities for public involvement; also documented progress of the rule and posted copies of issue papers, drafts of rule, and notices of public involvement opportunities on Ecology’s Web site.
- **June- August 2000:** Published new proposed rule in Washington State Register on June 2, 2000, as WSR 00-11-175, commencing 60-day comment period. Public hearing notices were published in newspapers in every county of the state for three weeks preceding each hearing. A news release announcing the hearings was distributed to media statewide, and hearings were widely covered by newspapers and radio stations. A notice of hearings was sent to an interested-parties mailing list of more than 4,000 people. Hearings were also advertised in Ecology’s *Confluence* newsletter, which is distributed to 9,500 people. Eight hearings were held across the state in Pasco, Spokane, Wenatchee, Olympia, Raymond, Vancouver, Seattle and Bellingham. Several hearings were broadcast on Television Washington (TVW). Ecology received more than 2,000 comment letters during the comment period.
- **July 2000:** Guest editorial column printed in Tacoma, Bellingham, Vancouver, Aberdeen, Spokane and Seattle daily newspapers — explaining that the new guidelines will not apply to existing farming practices or to existing buildings, homes, docks, or bulkheads; describing the human threats and financial costs associated poor shoreline manage-

ment practices; and clarifying that the guidelines need to be updated to meet the standards of the state’s Shoreline Management Act, and not just to satisfy the federal endangered species law.

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## Glossary of laws and rules cited in this document

- **19.85 RCW:** *Regulatory Fairness Act*
- **34.05 RCW:** *The Administrative Procedures Act*
- **36.70A RCW:** *The Growth Management Act*
- **77.12 RCW:** *Department of Fish and Wildlife - Powers and Duties*
- **76.09 RCW:** *Forest Practices Act*
- **78.44 RCW:** *Surface Mine Reclamation Act*
- **90.48 RCW:** *Water Pollution Control Act*
- **90.54 RCW:** *Water Resources Act of 1971*
- **90.58 RCW :** *Shoreline Management Act of 1971*
- **WAC 173-16:** *Shoreline Master Program Guidelines originally adopted in 1972*
- **WAC 173-26:** Part I – *State Master Program*; Part II – *Shoreline Master Program Approval/Amendment*; Part III – *Shoreline Master Program Guidelines (Path A)*; Part IV – *Shoreline Master Program Guidelines (Path B)*
- **WAC 173-22:** *Adoption of Designations of Shorelands and Wetlands Associated with Shorelines of the State*
- **WAC 173-27:** *Shoreline Management Permit and Enforcement Procedures*
- **WAC 197-11:** *State Environmental Policy Act rules*
- **WAC 222:** *Forest Practices Board rules*
- **WAC 365-190:** *Minimum guidelines to classify agriculture, forest, mineral lands and critical areas*
- **WAC 365-195:** *Growth Management Act—Procedural criteria for adopting comprehensive plans and development regulations*

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## Acronyms used in this document

■ **APA:** Administrative Procedures Act, Chapter 34.05 RCW

■ **BFW:** Bank Full Width

■ **CAO:** Critical Area Ordinances

■ **CES:** Concise Explanatory Statement

■ **CR-102:** Proposed Rule Making Form CR-102

■ **CMZ:** Channel Migration Zone

■ **CTED:** Washington Department of Community, Trade and Economic Development

■ **CUP:** Conditional Use Permit

■ **CZM:** Coastal Zone Management

■ **CZMA:** Coastal Zone Management Act

■ **DNR:** Washington Department of Natural Resources

■ **ESA:** Endangered Species Act

■ **ESHB 1724:** Encapsulated Substitute House Bill 1724, a regulatory reform

measured adopted in 1995 amending the SMA, GMA, and SEPA

■ **GMA:** Growth Management Act, Chapter 36.70 RCW

■ **NMFS:** National Marine Fisheries Service

■ **NOAA:** National Oceanic and Atmospheric Administration

■ **NOS:** National Ocean Service

■ **OHWM:** Ordinary High Water Mark

■ **PFC:** Properly Functioning Condition

■ **PTE:** Proposed, Threatened and Endangered

■ **RCW:** Revised Code of Washington (laws)

■ **RMZ:** Riparian management zone

■ **SBEIS :** Small Business Economic Impact Statement

■ **SDP:** Substantial Development Permit

■ **SEPA:** State Environmental Policy Act

■ **SFR:** Single Family Residence

■ **SHB:** Shoreline Hearings Board

■ **SPTH:** Site Potential Tree Height

■ **SMA:** Shoreline Management Act, Chapter 90.58.RCW

■ **SMP:** Shoreline Master Program

■ **SSWS:** Shorelines of state-wide significance

■ **T&E:** Threatened and Endangered

■ **USFWS:** United States Fish and Wildlife Service Service

■ **WAC:** Washington Administrative Code (rules adopted by agencies to implement RCWs.)

■ **WDFW:** Washington Department of Fish and Wildlife

■ **WDOT:** Washington Department of Transportation

■ **WRIA:** Water Resources Inventory Area

■ **WSF:** Washington State Ferries



## Summary of top issues

The following is a summary of the most common themes found in the 2,000 comment letters Ecology received on the draft shoreline master program guidelines. The comments are sorted into three categories: comments about the process Ecology used to write the rule, comments about time and money, and comments on the language of the rule itself.

### Comments about the rule-writing process

- Ecology **didn't include key stakeholders** in developing both paths of the rule (farmers, waterfront property owners, business community, coastal counties).
- **Path B** was developed in **closed-door negotiations** between federal agencies and Ecology, without broad stakeholder participation, in violation of the SMA.
- Ecology should get **approval from the Legislature** before adopting.
- Ecology should withdraw the rule and commence **negotiated rule-making**.
- Ecology didn't prepare a **cost-benefit** or "least burdensome alternative" analysis in time for the public comment period.
- Ecology didn't prepare a **Small Business Economic Impact Statement**.
- Ecology's **DEIS** is inadequate, did not include adequate scoping, etc.
- Concerns about **protection from ESA liability** (Path B provides no certainty for local governments, Path A is not a real choice, etc.).

### Comments about time and money

- Objection to perceived **unfunded mandate** from 21 cities, 22 Counties (10 Eastern, 12 Western Washington).
- Local governments believe the statutory **two-year deadline** is unrealistic given the new requirements (special concern about inventory, assessment steps).
- Environmental groups believe Ecology must put **interim safeguards** in place immediately while local governments are preparing new SMPs.

## Comments about the rule

Rule is too weak, under-regulates	Rule exceeds statutory authority, over-regulates
The rule update is <b>long overdue</b> . Ecology has taken five years and must not delay any longer.	The 1995 law that Ecology cites as authority for revising the rule was intended to implement <b>regulatory reform</b> , not instigate a massive, restrictive, duplicative regulatory effort.
The rule gives <b>too much deference to Growth Management Act (GMA)</b> planning and local decision-making.	The rule is redundant or conflicts with GMA, or attempts to <b>trump GMA</b> - doesn't provide adequate guidance on integrating the two land-use laws.
The rule ( <i>even Path B</i> ) <b>allows too much development</b> - standards for commercial and industrial uses are too weak.	The rule <b>does not balance</b> environmental and economic interests as intended by the Shoreline Management Act (SMA).
The rule should include <b>stronger restoration standards</b> throughout.	Ecology has <b>no authority to require restoration</b> - the SMA only authorizes protection and minimizing harm.
The rule ( <i>esp. Path A</i> ) <b>does not include enough specific requirements for inventory</b> and analysis. Local governments should be required to gather new inventory data. The legislature should fund inventory work.	The rule ( <i>especially Path B</i> ) includes <b>exhaustive, unreasonable, expensive requirements for inventory</b> and analysis. Local governments should not be required to gather new inventory data without full funding.
The rule should include <b>specific protocols</b> for adaptive management and monitoring.	Adaptive management and monitoring provisions <b>erode regulatory certainty</b> and will require constant updating of SMPs.
Ecology should <b>withdraw Path A</b> , or at a minimum, require local governments with listed fish to use Path B. Ecology is legally obliged to protect listed fish under the ESA, so cannot offer an option that isn't adequately protective. Path A is a lower standard than Path B. It is "vague and risky" - it lacks specific performance criteria for setbacks and buffers and will not protect listed species. Local governments don't have the scientific staff or political will to translate the performance standards into adequate protection measures.	Ecology should <b>withdraw Path B</b> . Ecology has no authority to implement the ESA, including requirements for "properly functioning condition." The state attempt to reduce liability is needless over-regulation. The Path B approach is based on a disputed legal theory that state and local governments are liable for permitting actions that might harm fish. ESA only requires "no take," not severe restrictions or bans on everything that might cause a take at some time in the future.
Ecology should <b>include ESA "Candidate"</b> species in the protection standards of Path B.	Ecology must <b>remove ESA "Proposed"</b> species from the protection standards of Path B.
<b>Vegetation conservation</b> measures (especially in Path A) <b>are not specific enough</b> . For example, the buffer requirement in Path B of ½ site potential tree height (SPTH) is not based on science and should be wider. SPTH should be a 200-year tree rather than a 100-year tree, etc.	<b>Vegetation conservation</b> measures (especially in Path B) are not based on good science, are too wide, start at the wrong place, etc. and buffers <b>will cause "taking" of private property</b> without compensation.

## Comments about the rule (*continued*)

Rule is too weak, under-regulates	Rule exceeds statutory authority, over-regulates
New <b>bulkheads</b> should be <b>severely restricted or banned</b> , and Ecology should require stronger standards for repair and replacement.	Provisions for <b>bulkhead construction</b> , repair, and replacement will be <b>costly and may prevent people from protecting their property</b> . The rule ignores SMA policy that favors bulkheads for single family residences.
The rule should <b>not allow proliferation of single-family residences</b> – they have caused enough cumulative harm. For ex., rule should not allow residences in the “natural” environment, and should not include a “shoreline residential” environment.	The rule <b>violates the priority status given to single-family residences</b> . For example, the rule restricts their location to where they don’t cause ecological impact, requires mitigation for vegetation removal, and uses cumulative impacts analysis to limit residential development.
Ecology should <b>not allow wetland mitigation banks</b> . They are risky and unproven. Ecology should place stronger limits on all wetlands compensatory mitigation, as studies show 97% of these projects fail.	Path B places <b>unreasonable restrictions on wetland mitigation banks</b> . They are a promising method to improve wetland regulation. The rule is in direct conflict with Ecology’s pending wetland mitigation banking rule.
The rule weakens the existing guidelines by <b>allowing mining in rural conservancy</b> areas. Ecology caved in to pressure from a powerful multi-national corporation.	Mining is an appropriate use of shoreline areas, yet the rule effectively <b>bans mining</b> in shoreline areas, even with provisions recognizing “Mineral Resource Lands” in rural conservancy areas.
Ecology must <b>not exempt agriculture</b> from regulation under the SMA. Agriculture is the chief source of nonpoint source pollution of rivers.	Ecology has promised that <b>ongoing agriculture</b> is unaffected, but the rule still contains provisions that need clarification.
The rule <b>allows continuation of bad practices in rural lands</b> (forestry, agriculture, and residential development.) For example, the rule allows too much development in the natural environment (by allowing single family residential).	The rule <b>unfairly burdens rural areas</b> with the brunt of regulation. The mandatory criteria for designating “natural” environments are so broad they could apply to virtually all rural areas. Management policies for the natural environment preclude almost all development.
Definition of <b>Channel Migration Zones</b> is <b>not based on good science</b> , will result in too small an area under regulation. The rule should not exclude urban areas that are protected by dikes from being included in the CMZ. Urban areas should be held to the same standards as rural areas.	Ecology has <b>no authority to regulate Channel Migration Zones</b> . Definition of CMZs will expand the jurisdiction of the SMA. The rule bans development or shoreline stabilization in the CMZ in rural areas, but not urban areas. A farmer couldn’t protect his eroding field.
Both Path A and B violate the SMA by allowing <b>non-water-dependent</b> commercial and industrial uses, and by creating allowances for “water-enjoyment” and “water-related” uses.	Path B violates the SMA by placing excessive restrictions on <b>water-dependent</b> uses, such as port activities.
The rule is filled with <b>vague terms</b> and unclear language – which gives too much power to weak-kneed regulators. They will succumb to political pressures and allow unreasonable, irresponsible developments.	The rule is filled with <b>vague terms</b> and unclear language – which gives too much power to unelected autocratic regulators (or obstructionist environmentalist lawyers). This will stop reasonable, responsible development.

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