

ESA: Concerns about receiving protection from liability / The state cannot implement the federal ESA

Why must the guidelines satisfy ESA concerns at all? Nothing in SMA legislation, which preceded the ESA listing, requires ESA compliance. Local governments will work individually and in their respective river basins to develop plans which address ESA requirements to the satisfaction of NMFS (and the threat of citizen lawsuits to enforce ESA). Why subject local governments' ESA plans to a second level of review and approval? If we satisfy NMFS on ESA issues, shouldn't that be sufficient? Additional review under SMA adds costs, delays, and uncertainty to local governments. And what if Ecology staff requires different actions than NMFS staff?

This state agency rule should not be attempting to implement the federal ESA. Ecology's recommendations for shoreline use based on threats to ESA species should not be made before NMFS & USF&WS have completed scientific studies.

Most of the bad parts of the rule are the ESA fish habitat enhancements which are not part of the SMA and should not be in the rule. Fish will eventually be restored at which point the fish regulation should level off. But since the GMA now includes the SMA requirement and the GMA has proved almost impossible to ratchet downward, we can be forever stuck with the onerous ESA fish requirements. ESA fish protections should be adopted under a separate legislative act with its own amendment process.

The ESA is to help restore healthy numbers of endangered species. Once that is accomplished restrictions should be eased. These guidelines do not provide for easing the restrictions.

DOE claims that it entered exclusive negotiations with NMFS and the U.S. Department of Fish & Wildlife (USDFW) in order to garner immediate ESA take liability protection for local jurisdictions following Path B. DOE, as a state agency, is in no way responsible to implement federal law, nor should it force local jurisdictions to enforce the ESA through local regulations. In fact, DOE fails to explain why adoption of Path B removes a local jurisdiction from a separate Section 7 consultation.

The Tenth Amendment prohibits Congress from requiring state and local governments to utilize their regulatory authority to implement the ESA.

Governor Locke and Ecology are pleasing the federal government because

ESA means money, and without the ESA there is millions of dollars that won't come to this state. He could use this agency and the Fish and Wildlife agency and the other agencies at his discretion to stand up and do studies and help the people of this state, not to pander to the federal agencies.

Ecology's effort to develop guidelines for the SMA has been a dynamic process that seems to have concentrated on protecting fish in response to ESA. Until June 2000 there was only one path to accomplish this. Path B now accomplishes this goal, yet Path A continues to be focused on the fish issue, when SMA has a much broader mandate. The purpose of creating the two paths should be to provide cities and counties a real choice between a flexible and broad implementation of the SMA mandates and the increased level of regulation for ESA purposes. Ecology should take a step back now and, instead of slightly modifying the path that was initially developed to address ESA (now Path A), completely rewrite Path A to focus on implementing the broader goals of RCW 90.58.020 (not ESA).

There is an important distinction between the state agency acting to implement federal ESA restrictions through its SMA guidelines and the federal agency's own actions under the ESA. Congress designed the ESA to limit pre-development approval by government agencies to a select few instances. The vast majority of projects do not require expensive and time-consuming pre-activity government review, but simply hold actors liable for the consequences of any actions that "take" listed species. By writing federal ESA standards into the SMA guidelines, DOE has turned this carefully crafted federal scheme on its ear. Most development under the SMA requires a shoreline development permit prior to beginning work. Because ESA standards have been written into the guidelines, the state's implementation of federal ESA standards becomes more burdensome than when these standards are enforced by the federal government.

The ESA prohibits "take" of a listed specie by any person. Based on a disputed legal theory - that state and local regulatory programs are liable for a take if a permitted activity or project results in a take DOE unilaterally determined that the new guidelines must comply with federal fish recovery provisions. Legislators have not yet had an opportunity to determine whether or how state land use laws will assist in protecting and recovering species. Nor have any state or federal courts in Washington

ruled that state or local permitting programs must comply with ESA.

DOE should not compel local governments to implement the regulatory requirements of the ESA through their SMPs. We believe that the federal ESA does not and could not require state and local agencies to use their regulatory powers to enforce the federal "take" prohibitions. Some may not agree, but DOE should take care not to prejudice those important legal issues. If DOE takes the position that state and local agencies and officials can be held liable for failing to prevent take by the parties they have authority to regulate, whatever statements DOE makes on that point could be used in litigation, putting the Attorney General's office and local government attorneys in the awkward position of repudiating or discrediting statements made by DOE officials.

Further, if DOE assumes that state and local agencies and officials might be liable for failing to take such regulatory actions and the courts subsequently reject that theory, as we believe they will, then the DOE guidelines could be subject to legal and political challenges on the grounds that they were adopted under a fundamental misunderstanding about the legal obligations of state and local agencies. Of course landowners and other project sponsors must comply with federal law as well as state law and, if there ever were an irreconcilable conflict federal law would control. But DOE's job is to administer the SMA. DOE should not claim or assume that the federal ESA gives it any additional authority or imposes on it any additional obligations with respect to the shoreline guidelines—even if many DOE officials believe that to be true..

✘ *The guidelines implement the SMA, not the ESA. Many local governments asked Ecology to develop the Guidelines in a way that would garner ESA liability protection. Part IV carries out the policy of the SMA but it does with a degree of specificity necessary to provide the Federal Services with the certainty they require for consideration of liability protection.*

The choice of Path B is strictly optional for local government. Any local government not affected by ESA or choosing to seek liability protection directly from the Services may comply with the SMA by using Path A.

The general policy of the SMA "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[.]” The Supreme Court has held that the SMA must be broadly construed to protect the state shorelines as fully as possible. *Beuchel v. Dept. of Ecology*, 125 Wn.2d 196 (1994). The rule simply recognizes that species which are so depressed as to be threatened or endangered require special attention if they are to be protected “as fully as possible.” Ecology is under statutory obligation to update the Guidelines. Future updates of the Guidelines will take into account any new scientific information. Changes in circumstances with regard to listed species can be accommodated in future updates.

Local governments that adopt a master program under Path B (Part IV) will be covered under a programmatic Incidental Take Statement (ITS). Ecology anticipates that Section 7 consultation for these programs will be handled as a routine matter (see response to comments immediately below).

Regarding the basic question of liability, both local governments and state agencies have been found liable under the ESA for take based on the exercise, or failure to exercise, their regulatory authority. *Strahan v. Cox*, 127 F.3d 155 (1st Cir. 1997), cert. Denied, ___ S. Ct. ___ (1998) and *Loggerhead Turtle v. County Council of Volusia County, Florida*, 148 F.3d 1231 (11th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3470 (U.S. Jan. 14, 1999)(No. 98-1137). If a local government disagrees with these court cases, it may follow Path A (Part III).

ESA: Concerns about receiving protection from liability/ No “certainty” under Path B

Will DOE apply for coverage under the 4(d) urban development take limitation? Will DOE petition NMFS to amend the 4(d) rule to include SMPs and SDPs approved under Washington’s SMA? Will DOE propose the SMA Guidelines as a habitat conservation plan and apply for a programmatic incidental take permit issued by NMFS and FWS?

Have the Services (NMFS and USFWS) approved Part IV of the proposed rules and guaranteed to exempt jurisdictions which implement Part IV from the take provisions under 4(d) rules?

The current 4(d) rule does not provide a take limitation for the SMA guidelines, SMPs approved under the guidelines, or substantial development permits approved under the guidelines and/or SMPs. Before Part IV can be effective or implemented, NMFS and FWS should take actions necessary to provide ESA compliance

assurances. Until those assurances are in place, SMA guideline Part IV should not be adopted or made effective.

The Guidelines in no way offer certainty of ESA compliance. When questioned, DOE refers to letters it received from NMFS and USDFW. These letters are not guarantees, nor are they included in the Guidelines. Before final adoption of the rules DOE must receive notification from the NMFS that Path B actually results in liability protection for local governments.

The guidelines are flawed in their structure: They provide 2 paths both mandatory and optional. The optional plan is somewhat less stringent and onerous than the mandatory plan but with no assurance that it will ever meet ESA standards.

NMFS recently adopted final rules under which it can approve local ordinances, including SMPs, as “limits” on (exceptions to) its prohibition against “take” of species it has listed as threatened under the ESA. The purpose and intent of Path B is to establish a framework for those local governments that choose to seek such approval. We believe the Guidelines should make clear that local governments can elect Path B on the condition that NMFS does in fact approve their master program as a 4(d) limit and that compliance with the master program continues to be considered sufficient to comply with the ESA with respect to species NMFS has listed as threatened. Thus, for local jurisdictions making such an election, Path B would be implemented only if and when the master program was recognized as a 4(d) limit and Path A would be implemented at any other times.

This would make the election more meaningful for all concerned. Otherwise, what incentive would NMFS have to ever approve a Path B master program as a 4(d) limit, and therefore what incentive would a local government ever have to pursue Path B? The concept of an election assumes meaningful consequences of making one choice over the other. An election to pursue Path B on a contingency basis, with implementation dependent on recognition of the master program as a 4(d) limit, would have appropriate consequences for all stakeholders.

I would like a guaranty of immunity from third party lawsuits. I know you can’t guarantee that we won’t be sued, but if we are in good faith following Path B, setting out all the parameters that Ecology has set, then if we are sued by a third party, I would like Ecology to take on that lawsuit and the attendant costs and leave the city out of the loop.

The major justification for Path B is to allow local governments to avoid liability for take. We should also exempt the general citizen.

✘ Ecology does currently plan to apply for coverage under the 4(d) urban development take limitation and, given that the 4(d) is currently under challenge, Ecology does not anticipate that NMFS will be entertaining amendments to the rule in the near future. However, Ecology anticipates that comprehensive liability protection will be forthcoming in the near-term for Part IV of the guidelines.

The guidelines are subject to a Section 7 consultation under the ESA based on the guidelines’ role in the state’s coastal zone management program. Ecology anticipates that the Services will issue incidental take statements for Part IV of the Guidelines as a result of the Section 7 consultation.

An incidental take statement issued for a federal decision on a state rule allows parties other than the federal agency to engage in incidental takes so long as the actions causing the takes are consistent with the statement. *Ramsey v. Kantor*, 96 F.3d 434, 437 (9th Cir. 1996). Thus, an incidental take statement for Part IV would exempt from the ESA’s Section 9 take prohibitions activities carried out pursuant to a valid shoreline substantial development permit issued by a local jurisdiction with a Part IV master program.

Arguably, all activities (except those specifically called out by the ITS such as agriculture) undertaken in conformance with the provisions of a SMP approved under a Part IV would garner take protection, including activities which do not require substantial development permits such as the construction of single family homes.

Until the Services issue incidental take statements for Part IV there is no “guarantee” of ESA liability protection. Until Ecology actually adopts the guidelines rule, NMFS cannot determine with certainty that the guidelines provide protection from ESA. In addition, NMFS must complete its own required public processes before granting such protection. However, Ecology is confident that, given the content of Part IV and indications received from the Services, such incidental take statements will be issued.

ESA: Concerns about receiving protection from liability / “endangered” species

Does DOE realize that the 4(d) rule does not provide ESA compliance assurances for large areas of the State with endangered species? We understand protection from 3rd party

suits does not apply to endangered species, only to threatened species. These rules do not adequately protect endangered species.

Consider that take limitations being negotiated for inclusion in the 4(d) rule apply only to species listed as threatened under the ESA. Even if Ecology is able to sort out with NMFS how and when ESA protections will attach, local governments, businesses, and citizens are still at risk of ESA liability for other fish species listed as endangered, because the 4(d) take limitations do not apply to species listed as endangered. For instance Upper Columbia Chinook, Upper Columbia Steelhead, and Snake River Sockeye are listed as endangered. In these areas of the state, even Path B of the proposed guidelines carries no guarantee of ESA compliance – and in fact has already been deemed insufficient for purposes of ESA compliance. Under USFWS regulations, 4(d) take limitations are also not available for bull trout, which is listed in a large portion of the state.

Does DOE realize that FWS does not have a 4(d) rule for bull trout that offers any opportunity for ESA assurances covering SMA-regulated actions? The Guidelines are silent as to the USFWS process and potential bull trout coverage, leaving large areas of the state without ESA protection.

✘ Ecology anticipates that the incidental take statement (ITS), and the protection afforded by the ITS, will extend to endangered species as well as bull trout. USFWS is currently writing a 4(d) rule for bull trout.

ESA: Concerns about receiving protection from liability / Other means besides Path B

Compliance with the NMFS 4(d) rule can be achieved in a number of ways, as indicated by NMFS. However, as a practical matter, the proposed rule presumes Path B as the only real means of compliance with NMFS 4(d) rule and salmon habitat protection.

Has DOE considered whether Part IV and DOE involvement in assuring ESA compliance are unnecessary when SMPs receiving approval by DOE will also be reviewed by NMFS before 4(d) coverage is granted? For each municipality undertaking the extensive requirements of preparing a new SMP under Part III or IV, it is more expedient and flexible for the municipality to apply directly to the Services for 4(d) coverage under a take limitation without the added delay and burden of DOE review. In addition, DOE assumes a task of reviewing SMPs that will be costly and properly is the burden of NMFS.

✘ Ecology does not believe that Part IV is the only way to achieve ESA liability protection and salmon restoration. Ecology has attempted to build enough flexibility into Part III of the Guidelines that alternative approaches to shoreline protection may be accommodated, including those approved by NMFS under a 4(d) exception or a Section 10 HCP.

Ecology is under statutory duty to update the guidelines and local governments are required to update their master programs according to the new guidelines. RCW 90.58.080

ESA: Concerns about receiving protection from liability / Path A

Has DOE considered whether 4(d) coverage and SMA Guideline Part IV are unnecessary because Washington's SMA guidelines and SMPs must receive approval from the National Ocean and Atmospheric Administration and EPA for purposes of federal funding under the Coastal Zone Management Act ("CZMA") and such CZMA funding and approval is a federal action requiring consultation under Section 7 of the ESA so that Part III must be found to be in compliance with the ESA and any take incidental to Part III must be covered by an incidental take statement?

Both the state Guidelines and local SMPs must receive approval from the National Ocean and Atmospheric Administration (NOAA) and the Environmental Protection Agency (EPA) for purposes of federal funding under the Coastal Zone Management Act (CZMA). CZMA funding and approval is a federal action requiring consultation under Section 7 of the ESA. Thus, both Paths must be compliant with ESA. Why would a local jurisdiction impose the extreme costs and draconian land restrictions of Path B if it provides no more certainty or relief than Path A? DOE is misleading local jurisdictions in believing that Path B, albeit painful, is the only option for timely federal review and subsequent ESA take liability protection.

The ESA expresses a number of different standards regarding species protection, including: Section 4(d): "Regulations necessary and advisable for the conservation of such species;" Section 7: Actions shall not "jeopardize the continued existence of [listed species] or result in the destruction or adverse modification of habitat..." Section 9: "It is unlawful for any person to ... take any such [listed] species." Take occurs only when an action "actually kills or injures wildlife." *Sweet Home v. Babbitt*, 515 U.S. 687, 700 n. 13 (1996). The restoration and recovery

standards required in Path A and Path B go beyond the intent of the SMA and go beyond the "conservation," "no jeopardy," and "no take" standards of the ESA. However, nowhere in the Guidelines or in the 4(d) rule issued by National Marine Fisheries Service is ESA compliance and liability protection guaranteed. Ecology should not adopt a legal standard through guidelines that (1) violates state law and (2) meets ESA standards without gaining any credit for ESA compliance. Since Path B is currently considered consistent with ESA requirements, by implication Path A is not, yet few local governments have embraced Path B. The Guidelines should assist local governments in ESA compliance, rather than creating a structure that provides ESA compliance for only a few.

The SMA program and individual SMPs in the coastal zone are considered a qualifying state management program under the CZMA. As a result, SMA planning and permitting activities are funded in part with federal CZM monies. In addition, federal activities and all local government activities receiving federal assistance funds must be consistent with the approved CZMP. Since the SMA program and individual SMPs receive federal funding, planning and permitting activities carried out under individual SMPs constitute federal actions that are subject to section 7 of the ESA. Section 7 requires that any actions that may adversely modify critical habitat must go through consultation. Therefore the state SMA, the federal and state CMZ program and the ESA are all intertwined.

If SMPs are developed under Path A and do not include any measurable standards that are based on PFC, each permitted action that may adversely modify critical habitat and that is subject to special management consideration should be subject to the section 7 consultation requirement. Section 7 requires that any actions that may adversely modify critical habitat must go through consultation. Therefore the state SMA, the federal and state CMZ program and the ESA are all intertwined. If SMPs are developed under Path A and do not include any measurable standards that are based on PFC, each permitted action that may adversely modify critical habitat and that is subject to special management consideration should be subject to the section 7 consultation requirement.

Local jurisdictions that opt for path A and citizens utilizing this permit process would face significantly different and more onerous individual permit processing requirements. NMFS would be unable to prepare a programmatic biological opinion for a SMP as a whole. Instead, the permittee or local government would have to prepare a Biological Assessment for each proposed

activity and the permitted activity would have to undergo an individualized section 7 consultation. Ecology should also clarify in its rule development documents that Path A will not provide an automatic 4(d) exemption for activities covered by the SMP.

Instead each Path A SMP will require specific review and approval by federal regulatory agencies. Absent assurance that a Path A SMP includes measurable standards that will achieve PFC for listed species, the Federal agencies may not approve the SMP for 4(d) coverage. Local jurisdictions may desire the increased flexibility of Path A; however they will face a more onerous regulatory process and will still need to meet PFC habitat standards in order to satisfy ESA requirements.

☒ Ecology anticipates receiving a programmatic incidental take statement from the Services for Part IV.

Part III (Path A) is not “ESA non-compliant.” Part III is, however, more flexible and less specific than Part IV (Path B). This flexibility was consciously built into Part III for local governments who do not have shoreline fish and wildlife species that are depressed and for local governments who wish to propose alternative approaches to shoreline protection from the specific approaches outlines in Part IV. However, because it is more flexible, Part III is unlikely to garner up-front liability protection through a programmatic incidental take statement.

Part III master programs for jurisdictions located in the coastal zone will have to undergo a Section 7 consultation. The Section 7 process for Part III master programs will take place much later in time than the programmatic incidental take statement for Part IV. Ecology expects that such consultations will occur after those master programs have been approved by Ecology and forwarded to NOAA’s National Ocean Service for inclusion in the State’s Coastal Zone Management Program. How long individual consultations on Part III master programs will take to process will be a function of staffing and resources at the Services and NOS.

ESA: Concerns about receiving protection from liability / Section 7

The proposed Shoreline Guidelines are a missed opportunity to develop a take limitation that local governments fully understand, support, and are funded to implement. While Part IV includes the promise of a take limitation within the Section 4(d) rule, few local governments

have expressed support for this option. Even so, the Section 4(d) rule states that: “...alternatively, a local jurisdiction seeks inclusion in a limitation of the take prohibition by adopting this model program, NMFS expects to address the potential ‘take’ issues associated with the shorelines program through an ESA section 7 consultation with the National Ocean Service in the coming months. This may obviate the need for a 4(d) limit for shoreline-related activities under the authority of the Department of Ecology.” 65 Fed. Reg. 42422. A jurisdiction choosing Path A (Part III) could gain ESA compliance through an incidental take statement issued through ESA Section 7 consultation. And, another jurisdiction choosing Path B (Part IV) may have to go through Section 7 consultation even though Path B may receive a take limitation. Simply the fact that these uncertainties exist demonstrate that significant issues relating to ESA compliance still exist and should be resolved with absolute certainty prior to the adoption of the proposed guidelines.

☒ Ecology agrees that the Section 7 consultation may obviate the need for a 4(d) exception from NMFS. Ecology anticipates that Section 7 consultation for Part IV master programs will be a pro forma exercise and that the protection offered by the incidental take statement will be in effect before and during the consultation.

ESA: Concerns about receiving protection from liability / defending against take claims

Assume a jurisdiction has an approved SMP under Path B, a permit is issued and a take claim is filed. Will DOE and the Feds provide local government with legal services to defend against the claim? If the Feds and DOE do not provide a full defense, Island County would like to know what “insulation” Path B provides.

☒ The legal process should be short if suit was filed alleging take. Unless the plaintiff attacked the ITS itself, the case should be able to be disposed of on motion by pointing out to the judge that, given the scope of the ITS, activity carried out consistent with an approved Path B SMP cannot be considered a prohibited take. The operative word, of course, is “consistent.” A permit issued by the County which is inconsistent with the County’s SMP, and/or a project which is carried out in a manner inconsistent with the SMP would both be outside the scope of the ITS and subject to enforcement, penalties and citizen suits under the ESA. As to Ecology’s role

in such litigation, we would be there. First, because Ecology would almost certainly be named as a defendant by anyone suing the County, but also because Ecology is committed to preserving the integrity of the ESA liability protection afforded by Path B. As for the federal government, only they can speak to their participation in such a lawsuit.

ESA: Concerns about receiving protection from liability / defending against take claims

Under Path A, can the County choose to not adopt any more regulations that are intended to protect federally listed endangered species in lieu of including a condition in every project approval within the shoreline jurisdiction that it is the property owner’s responsibility to achieve compliance with ESA? Currently, the County takes this approach with respect to a number of federal and state agencies that regulate aspects of a project that the County does not currently oversee. Examples include DFW requirements for Hydraulic Project Approval, USACOE requirements, DNR requirements related to public use of subtidal lands and others.

In these circumstances, the County merely conditions permits by informing applications that they must contact these agencies for the purpose of obtaining the appropriate permit. Please provide reasons why this approach can not be implemented. This would shift a liability of a property taking from the County to the agency passing and enforcing the regulations. If the County was the enforcement agency the potential of taking claims that could be filed would be a great strain on the County’s fiscal condition. Island County does not believe that defending taking claims by individual property owners is a fair and just use of tax dollars that are collected county-wide.

☒ Under the SMA a local government must have a master program approved under either Part III or Part IV of the Guidelines. If a local government wishes to place a disclaimer on its permits, it may do so, however the legal effect (or lack thereof) should be discussed with the local government’s legal advisor.

ESA: Concerns about receiving protection from liability / Path B does not extend to certain activities
Ecology still has liability under ESA for approving plans for actions on shorelines

that are not covered either by law or policy. The letters from NMFS and FWS make clear that activities within the scope of the guidelines would provide for conservation of listed species. However, the guidelines do not address the full range of shoreline activities — including exemptions and existing uses. Activities conducted pursuant to existing uses and exemptions have effects on water quality and ESA-listed species, on a cumulative and sometimes on an individual basis. SMPs must address existing as well as future shoreline uses. Ecology's approval of SMPs that do not adequately address the environmental impacts of these activities leaves some liability with the Department.

Ecology should not just focus on government, but also on the constituents and citizens that are in the state and looking at whether they are also free from liability under the Path B. If this rule says existing practices are okay, then if my local government adopts this regulation, will I be free from liability from "take" even if I till to the water's edge? I don't believe the federal agencies will accept this.

Since it is anticipated that these rules will be reviewed by the National Marine Fisheries Service as part of a Section 7 consultation, it is our belief that NMFS cannot programmatically accept these rules as protective of salmon if agriculture is exempt. The Shorelines Rules, with this exemption, cannot past muster as being compliant with the Endangered Species Act.

☒ Generally speaking, Ecology cannot retroactively regulate existing uses under the SMA. Such uses, if they were legal when established, are referred to as legal nonconforming uses. The law generally allows such uses to continue. A change in the use, such as the remodel of an existing house, is required to comply with current land use laws and regulations.

The guidelines address new agriculture, however the Services and the state are attempting to resolve the range of environmental issues associated with agriculture through the "Agriculture, Fish and Water" forum (AFW). The Services have stated that ESA liability protection under these guidelines will not extend to ongoing agricultural practices.

ESA: Concerns about receiving protection from liability

We would like assurance from DOE that local agreement with the federal services regarding compliance of our programs and plans with ESA requirements will also mean compliance with SMA requirements insofar as they relate to the ESA.

☒ Ecology cannot provide such assurance without submittal of an updated SMP. The SMA is a different law than the ESA and has its own process for ensuring compliance.

ESA: Concerns that Path B "over-regulates"

The guidelines could force landowners to implement habitat restoration projects without compensation, which is not a requirement of the ESA.

☒ The rule carries out the policy of the SMA to protect and, where appropriate, restore the state's shorelines. The rule has been drafted to avoid regulatory takings.

ESA: Concerns that Path B "over-regulates"

The one-size-fits-all concept does not take into account rural communities where ESA rules will not apply: There are no threatened or endangered fish outside of State Parks in Grays Harbor County.

☒ Rural areas without listed species may proceed under Part III of the Guidelines.

ESA: Concerns that Path B "over-regulates"

I would like the rule to recognize some of the limited authorities and abilities that we have in local government. Path B provides for a definition of properly functioning conditions, that we need to understand even before trying to restore is possible. There are some things within the definition of properly functioning conditions that are beyond our control, such as minimum in-stream flows, possibly water quality issues, water temperature issues. Add a provision in the rule that identifies, or recognizes that we have those kinds of limitations and that it's beyond local resources and capabilities to achieve that in all cases.

☒ The guidelines apply only to those issues within the jurisdiction of the Shoreline Management Act.

ESA: Ecology should postpone action

These guidelines should be placed on hold until the ESA guidelines are in place. This could save time and money by insuring the new guidelines are compatible with the ESA.

The only purpose served by hasty adoption of these landmark regulations is to carve indefensible federal policies into state stone. This is not a speculative or hypothetical problem. Creation of the ESA was the Carter Administration's final gasp.

Its strained application should not be Clinton's final gasp, an administrative gasp that can be just as easily administratively corrected, unlike the legislative adoption of federal law. Application of that law should be negotiated with the new administration, not insulated from such negotiations by a panicked state bureaucracy whose constituency seeks to insulate rejected applications by adopting them as state measures.

New state inspired policy revolutions should not be launched during the waning moments of a lame duck federal administration, at least not when the catalyst is federally imposed. Administrative relief is well within the realm of probability, as calmer heads are placed in control. Legislative relief is a distinct possibility. Why do the current administration's bidding? Why squander the opportunities for relief? Why run the risk of alienating an electorate that very well may reject the current administration's environmental constituency?

The "listing" has been challenged in the federal courts, raising serious questions regarding both procedural and substantive defects believed to exist in the federal listing. The state should not launch revolutionary initiatives until the courts have spoken.

The new regulations for restoration and recovery exceed the "no take" or "shall not jeopardize the continued existence" language and should not be implemented unless or until they assist local government in reaching compliance with the ESA taking rules.

The State is not positioned to be the most effective party to lead the consensus-based approach necessary to resolve ESA-related issues. The federal government is best suited to fill this role. Ocean commercial fishing practices, statewide recreational and commercial fishing practices, and seal population impacts are equally as important as shoreline land use in addressing the ESA and state efforts to improve the number of fish and the quality of their riparian corridors. The federal government has the motivation and the resources to thoroughly analyze adverse impacts from all these practices, and the ability to encourage participation by the affected parties towards an equitable solution. RCW 90.58.024 states that DOE, in adopting guidelines for shorelines of state-wide significance, shall give an order of preference to uses which recognize and protect the state-wide interest over local interest. A case can be made that this issue is of such importance that federal interests are paramount to state interests. We would encourage the State of Washington to pursue this approach and suspend the update of WAC 173-26.

✘ Ecology is under statutory obligation to update the Guidelines. Future updates of the Guidelines will take into account any new scientific information.

Ecology believes that the SMA provides the policy basis and tools necessary to justify a restoration policy on its own. However, the intent of Part IV is to also provide ESA implementation.

ESA: Concerns that Path B “over-regulates”

Part IV is unlawful because it is not reasonable and reasonably related to the concerns prompting the regulation.

Ecology surrendered state & county sovereignty by acceding to NMFS’ demands in Path B.

Path B affords little recourse for individuals, small business, local government, or regional government to disagree with federal or state government or obtain changes in the local SMP, regardless of need or science presented.

Path B is simply too complex and prescriptive to be useful to an entity wishing to plan its shorelines.

Path A’s flexibility would threaten local jurisdictions with ESA “take” retaliation. Local government will be coerced into Path B. Path A is not a viable option for jurisdictions with listed fish because they have to go to NMFS anyway.

✘ The Legislature in 1995 directed Ecology to review and update the guidelines consistent with the policy of RCW 90.58.020. We believe the proposed rule is reasonably related to these concerns.

Path B is an optional approach. Local governments are free to choose their own path (see Section WAC 173-26-105).

ESA: Concerns that Path B “over-regulates”

If you look at Pacific County, we’ve lost 200 people, OFM tells us, in the last year. We lost some more the last year. We were stable the year before that. We’re 85 percent forested. Under the Forest and Fish Bill, if we do absolutely nothing we are revegetating massive buffers in 85 percent of the streams in this county. No action means tremendous action by — on your part. So what I would ask you to do is recognize that Path A really should be ratcheted back to the existing guidelines and we will negotiate with U.S. Fish and Wildlife and NMFS on our own.

✘ Even where population is not growing, new development occurs, particularly in desirable shoreline areas. The existing guidelines are not consistent with existing law, and current

scientific understanding of shoreline resource protection needs.

ESA: Concerns that Path B “over-regulates”

There has been a specific lack of public participation in the formulation of this two path approach. Path B as written appears unworkable. PSE does not support the two path approach, and firmly believes that the Path B alternative provides unreasonable restrictions to our ability to operate our energy systems in a safe and reliable manner

✘ Ecology’s public participation process in development of the rule is well documented and includes literally years of outreach to the full range of interested parties. Ecology’s public participation process has greatly exceeded minimum legal requirements.

ESA: Concerns that Path B “over-regulates”

While the decision to give options to jurisdictions must have been hard fought and we’re sure there are political reasons we can’t begin to understand, there is little in Path “B” that gives us hope of economic viability - neither for the cities that have to fund it, nor the businesses that must comply. We understand that while there is some protection promised for ESA compliance, protection against third party lawsuits is a thin veil at best, as one cannot contract away one’s legal liabilities. Where, please, are the economic impacts of these decisions for both jurisdictions and those who are regulated?

✘ Please see the Cost/Benefit Analysis conducted for the proposed rule.

ESA: Concerns that Path B “over-regulates”

The most serious flaw in this approach, however, is that it effectively ends the notion of shoreline classifications and a balancing of shoreline uses. The protection levels inherent within the Path B approach will have the effect of making all shoreline areas “natural” or “conservancy”. While it is possible to imagine this approach working in an area that is already classified in this manner, it is impossible to imagine this approach working on an urban, developed or intensively-used shoreline.

✘ The recommended six environment designations are intended to be applied equally in either path. In Path B, “urban, developed or intensively-used shoreline” areas are accommodated within the “high-intensity”, “urban conservancy” and “shoreline residential” environment designations.

ESA: Concerns that Path B “over-regulates”

This approach exceeds the law, and is realistically unworkable. The Path B approach goes far beyond any of the environmental protection requirements contained in the SMA, and the cumulative burdens it would place on any local government who adopts it make it unworkable on anything except a very narrow scale. The SMA causes friction and argument from time to time, yet remains a model law for the way it balances competing public goals and devolves planning authority. The Path B approach effectively turns the Shoreline Management Act inside-out by imposing an impossibly broad protection standard (protection and restoration of PFC) on an unnecessary and unrealistic range of species (PTE species).

The definition of PFC is overly broad, and would place an unrealistic burden of protection and restoration on any jurisdiction, however large, who adopted it. Path B couples a pie-in-the-sky protection goal with a list of fifty-five species that includes sea mammals, land mammals, birds, reptiles, amphibians, and one butterfly. The habitat inventory requirements alone for this range of species would buckle the knees of even a large resource agency. No city or county could do it, let alone develop a protection and restoration scheme based on it.

✘ More focused Path B inventory requirements are established in section 300(3)(c) “For those shorelines that affect PTE species...”. No list of fifty-five species is listed in the guidelines. Protecting and restoring PFC is a requirement of the ESA that is compatible with the policy of the SMA. Ecology believes Path B is fully within the statutory authority of the SMA as established in RCW 90.58.020.

ESA: Concerns that Path B “over-regulates”

The Path B approach inappropriately exceeds the authority and legislative intent of SMA by placing the goal of achieving Properly Functioning Conditions (PFC) above all other SMA objectives. The Port of Seattle strongly disagrees that this particular outcome is somehow required by the Endangered Species Act (“ESA”). There are many ways that a local government agency could adapt its shoreline management program in order to obtain 4(d) protection under the ESA, and Path B is only one option (and probably the most extreme one). Even if Path B were squarely within the statutory authorities of SMA and ESA, it is simply not possible to effectively implement

Path B in an urban, industrial context. We therefore reject Path B as a viable option.

✘ Ecology agrees that there are many ways that a local government agency could adapt its shoreline management program in order to obtain protection under the ESA. This approach is accommodated through Path A. However, if the local government wants up-front certainty of protection from ESA liability, then it may choose to implement Path B. Path B is fully within the statutory authority of the SMA as established in RCW 90.58.020.

ESA: Path A is a not a real choice

DOE privileges its own technical assistance materials as the source documents for scientific and technical information which local governments should consult when developing their own standards under Path A. If these documents contain similar provisions to the requirements of Path B or of the WDFW Management Recommendations, there will be still less possibility for a local government to “justify” its deviation from such standards — even under the less restrictive Path A — in a manner that would enable DOE approval of its SMP.

✘ The requirement to “consult” does not prescribe a mandatory outcome.

ESA: Path A is a not a real choice

Substantive and performance standards contained within the paths will likely result in almost identical “on-the-ground” restrictions. One example might be the issue of buffers, known as “vegetation conservation requirements” in the current rule. Path B requirements set specific standards, such as one site-potential tree height on streams where trees naturally grow, which would likely average about 200 feet. While Path A does not contain a specific standard, it directs that local SMPs “shall contain provisions to protect vegetation needed to sustain the ecological functions and ecosystem-wide processes.”

It then goes on to state that “Master Programs should be directed toward achieving the vegetation characteristics described in the Management Recommendation for Washington’s Priority Habitats, prepared by the Washington State Department of Fish and Wildlife.” In that document, the recommended width for a riverine buffer is either 200 or 250 feet. Given the definition of “should” above, local programs under Path A not “directed toward achieving” this buffer will be rejected by the agency.

The substantive standards contained in the different paths vary only slightly. In many cases the only difference is use of the verb “should” (Path A) in place of “shall” (Path B). “Should” is defined as “the particular action is required unless there is a demonstrated, compelling reason, based on policy of the Shoreline Management Act and this chapter, against taking the action.” The definition of “shall” is “a mandate; the action must be done.”

As one can see from these definitions, the difference between “should” and “shall” is a matter of mere semantics, with negligible distinction, since it is Ecology, in reviewing local master programs, that will decide whether a local government has “demonstrated a compelling reason” — based on “the policy” of the SMA — against taking the “required” action. Given that DOE has already interpreted “the policy” of the SMA to maximize the agency’s own power and discretion, this precedent indicates it is unlikely local government interpretations of the “policy” of the SMA supporting their deviation from the proposed guideline standards will be given much deference.

✘ Ecology believes that Path A does include greater flexibility in choosing means to address the requirements for vegetation conservation and other performance standards. Jurisdictions vary greatly in terms of the environment and species that may use their shorelines. Our experience indicates that local governments are creative in meeting this type of objective and that SMP provisions will vary significantly among communities while remaining consistent with the guidelines. Also note that vegetation conservation areas are not necessarily equivalent to buffers in all cases.

ESA: Path A is a not a real choice

It appears that option B is really going to be mandatory because that is what NMFS will accept and it’s easier to accept something they’ve already looked at than it is to get them to go through and look at option A, providing the community even has the money to go through with option A. It seems to me basically it’s defacto that that’s what we’ll all end up having to do. It disturbs me that that’s generated around the 4D rule. There are communities, particularly here in the upper Columbia, that were beyond 4D. We have listed endangered species that we have to deal with and so we’re beyond that point. We’re living with them every day.

While these rules appear to give local governments a choice in the level of restrictions to apply to their shorelines, we

believe this choice is an illusion. While a local government could choose Path A, developing its own regulation system and seeking approval from NMFS, this is likely to be beyond the resources of many local jurisdictions. Most local governments will be forced to choose Path B.

✘ Local governments have substantial latitude to craft SMP measures to meet the performance standards of Path A. For those jurisdiction with T & E species, Path A provides a basis for crafting protective regulations either as a stand alone or in combination with other regulations and actions. Path B provides the certainty required for the Federal Services to approve the approach at the guidelines level. At the SMP level other approaches may well provide a similar level of certainty.

ESA: Time lag / Interim protections

While USFWS has indicated that the current “Path B” proposal will provide adequate protection and will be incorporated into future agency rules, NMFS has refused to offer the same guarantee. In fact, no local government will receive any protection from potential ESA liability until after they have updated their shoreline master plan. Under current state law, local jurisdictions have 24 months to update plans after DOE’s rule adoption. However, to our knowledge, the agreements with NMFS and USFWS do not recognize this planning time lag. DOE’s contention that the rule must be adopted now is specious at best, because local governments will not have any more relief from ESA liability one day after adoption as one day before adoption.

✘ The commentor is correct in stating that ESA liability protection for Part IV master programs will not go into effect until the Part IV master program is approved by Ecology. However, this does not alter the fact that Ecology is under a statutory duty to update the guidelines.

ESA: Time lag / Interim protections

A recent news article reported that, between the time when the Forest and Fish report was approved and rules to implement the report were adopted by the Forest Practices Board, over 500 forest practices applications were filed by industrial timber owners under the old rules. More than 800,000 acres of timberland are covered by these timber harvest permits. This land area therefore will not be protected by the new rules that were developed to implement ESA habitat protections on timberlands. This gold rush

phenomenon is also likely to occur for SMA permits.

Tom Fitzsimmons of Ecology has encouraged this phenomenon by reminding the public that the more restrictive provisions of Path B are not yet in effect and people can still get permits under the easier existing rules. Under current law local government has two years to develop SMPs to comply with the new guidelines. Mr. Fitzsimmons also has indicated that the state administration may ask the legislature to allow local governments more time to develop the new SMPs, thereby giving permit applicants up to five years to apply for SMA permits under current rules.

It is likely that a significant amount of land will be subdivided and a substantial number of new developments will be permitted while SMPs are being developed under the new guidelines. As a result, the development rights attached to those permits will vest and a significant amount of shoreline habitat will be adversely impacted before the new SMA program is in place. There is a high risk that the habitat goals of the proposed regulations will be undercut by changed circumstances before the new SMPs are implemented.

Interim safeguards should be implemented. Such an action could take the form of an emergency rule or executive order. Interim, conservative safeguards would not only protect what existing fish habitat remains, but also serve as an incentive for local governments to revise their SMPs in a timely manner. Once a jurisdiction's revised SMP is approved by Ecology the interim measures would sunset.

✘ The provisions of the SMA limit Ecology's ability to address this issue. It would require a change in the statute. The current statutory requirements are that a local government must adopt an SMP in compliance with the guidelines within two years of state adoption. However, there is no provision for interim measures and even if the local government fails to adopt in the time required, the existing master program continues in effect until a new program is adopted. The only recourse available to the state is the adoption of a master program for a non-compliant jurisdiction.

Realistically, the long term interests of the shoreline are better served by a process allowing careful consideration and thorough public involvement at the local level than a rush to simply comply. Ecology is intending to propose legislation allowing 3, 4 or 5 years for local jurisdictions to comply based on a specific schedule. We believe this is a reasonable schedule given the difficulty of the task and the resources available.

ESA: Time lag / Interim protections

Planning and permitting actions under the SMA are federal actions subject to the section 7 consultation requirements of the ESA. SMA permits issued since the listing became final must avoid adverse impacts on critical habitat. Therefore the granting of a SMA permit after the listing of Puget Sound Chinook without a valid section 7 consultation violates the ESA. If SMA permitting does not constitute federal action for section 7 purposes, state and local officials cannot authorize the incidental take of listed species without a section 10 permit, once section 9 prohibitions go into place, *Strahan v. Coxe*, 127 F.3d 155 (9th Cir. 1997). The 4(d) rule for Chinook and other species will be in effect by the end of this year and therefore existing permitting processes will then become subject to section 9 take prohibitions.

The 4(d) rule does allow the exception of SMP permitted activities from the section 9 take prohibition under the MRCI exception, 50 CFR 223.203 (b)(12). However this exception only applies after the SMP is approved by NMFS. Therefore, ESA take prohibitions will apply to the SMA program until the SNP are developed and approved by NMFS. However, NMFS has already determined the existing program does not satisfy the ESA. Therefore, between the time the section 9 prohibitions go into place and new SMPs are approved, local governments will have no legal authority to issue SMA permits that violate the ESA. The proposed rule package does not present a strategy or provide guidance to local jurisdictions on interim protections for listed species.

✘ Ecology is aware of the provisions of the ESA. It is not within the scope of this rule to address these issues as they apply to permits applied for prior to adoption of the guidelines and the local SMPs.

ESA: Concerns about consistency with other ESA compliance efforts

Local governments in the Tri County (King, Pierce, Snohomish) area issue more shoreline substantial development permits than any other area of the state. This region is currently involved in negotiations with NMFS and USFWS on take limitations to be included in the Section 4(d) rule. Many of the substantive provisions of the proposed guidelines differ greatly from concepts being discussed in the Tri County negotiations. Based on Ecology response at public hearings, there seems to be little understanding of how the guidelines relate to take limitations currently being negotiated with the federal services. For instance, could

local governments within the Tri County region follow Part III of the guidelines but utilize the Tri County process to receive a take limitation? Or, if a local government chose to follow Part IV of the proposed guidelines, would the Tri County take limitation involve new requirements for shorelines not currently included in Part IV.

A more obvious question is this: If Part IV of the proposed guidelines represents the federal services' bottom line on how local governments must manage marine and freshwater shorelines and adjacent areas, do other take limitation negotiations even need to address these issues? Or, if a local government chose to follow Part IV of the proposed guidelines, would the Tri County take limitation involve new requirements for shorelines not currently included in Part IV?

King County is a participant in the Tri-County ESA Response, which is working towards an agreement with NMFS and JSFWS on regulations for land development that would be approved by NMFS as an exception under its recently adopted Section 4(d) rule. Those regulations will apply to nearly all riparian areas in the county, including all shorelines of the state. King County would like to be able to use one regulatory scheme to comply with the ESA 4(d) rule and the SMA. The proposed rules do allow a local government to incorporate its critical areas regulations into its SMP. However, the shoreline guidelines are not clear on how Ecology will respond to local government development regulations that have been approved by NMFS as complying with the ESA 4(d) rules.

Although the purpose of the SMA is not, and should not be, to respond to the ESA listings, the proposed guidelines may actually make it more difficult and costly for urban cities to work with NMFS under the recently issued 4(d) rule to craft local ordinances that address salmon protection in the urban context. The urban cities have made significant progress in working on an urban centered approach with NMFS after Ecology developed the "two path" approach in the guidelines. The guidelines need to provide an easy and secure method for local governments to work directly with NMFS without being constrained by Ecology's two-path approach. Two possible solutions suggest themselves: first, a third Path "C" which reflects the final agreement reached by NMFS and the urban caucus; or second, Ecology amend Path A to provide specific recognition of an urban or "built area" plan which is acceptable to NMFS. We ask for a commitment from Ecology to continue their work with NMFS on solutions for highly developed areas, which must rely on the Path A approach, to ensure their success in achieving approved updated programs that

meet the directives of the Endangered Species Act. We also urge some clarification within the language of the rule itself. It is important to explicitly state that either Path A or Path B can result in a state-approved plan that will provide an acceptable level protection for salmonids. For instance, while Path B details highly prescriptive standards and procedures that have been pre-approved by NMFS, there have also been a substantial amount of dialogue between NMFS and cities within the Tri-County group and the City of Portland seeking a more manageable 4d rule for urban areas. Having worked with NMFS in the development of the "Built Areas Option", we believe that such an approach would be acceptable to Ecology as well.

At a minimum, language could be added to Path A that embraces a built areas approach, i.e., one that is not rigid and prescriptive and relies on a site-specific impact-based analysis. References in the rule to provisions for habitat conservation plans, WRIA subarea management plans, or collaborative work done in a watershed can better define expectations for local jurisdictions who are likely to use Path A to revise their SMPs. It must be emphasized that the Built Areas Option is consistent with the Path A approach and that NMFS generally accepts that flexibility is needed in urban areas. We understand that for either the Built Areas Option or the Path A approach, NMFS will be reviewing not only a jurisdiction's shoreline regulatory programs for consistency with the limited take exemption option, but other components of a jurisdiction's proposed regulatory and investment plan. We are encouraged by NMFS's receptivity to the Built Areas Option and are comfortable that we can make it work.

✘ Ecology has attempted to build enough flexibility into Part III of the Guidelines that alternative approaches to shoreline protection may be accommodated, including those approved by NMFS under a 4(d) exception such as the one Tri County is pursuing.

ESA: Concerns about consistency with other ESA compliance efforts

The Forests and Fish program, with significant participation by DOE, already has been approved in concept in the NMFS 4(d) rules. State forest practices rules are expected to provide such a "limit" for forest practices even in local jurisdictions that do not seek NMFS approval for their SMPs. Thus, nothing more should be required with respect to forest practices in those local jurisdictions electing the "ESA-compliant" path. The NMFS and USFWS have agreed

in principle to exempt forest practices conducted under the Forests & Fish program from the federal prohibitions against "take" of ESA-listed species.

This recognizes that the Forests & Fish program will help recover threatened and endangered fish species and that failure to provide such assurances could lead to more rapid conversion of commercial forestlands to uses less likely to contribute to recovery. Those assurances could be severely undermined if local governments believe they must or should impose more stringent conditions on commercial forestry operations not associated with conversions to non-forest uses.

✘ The rule specifically requires local governments to rely on the Forest and Fish Report and the Forest Practices Board rules in drafting master program provisions regarding forest practices. Additional requirements in the rule regard conversion of forestlands to non-forest practice uses.

ESA: Concern about future listings

The draft guidelines to the Proposed Shoreline Rule Amendments place strong emphasis on habitats of what the guidelines refer to as "Proposed, Threatened or Endangered (PTE) Species." The guidelines go into great detail regarding the planning processes for, and standards of, habitats where these species are located. The guidelines fail to take into consideration the immense practical difficulty in implementing such standards. The science regarding the necessary habitat elements for individual species, as well as overall ecosystem function, is rapidly expanding and changing. The number of species, which will be designated as PTE in the future, will increase as well. Currently, there is no ongoing linkage between new listings, new scientific information, and the provisions which are contained within each jurisdiction's Shoreline Code and SMP. Without this linkage, the proposed guidelines solve the "problem of the moment" (compliance with the 4(d) rules for the listed salmonids), but allow for ongoing ESA liability in the future.

As science changes and new species, such as coho salmon, bottomfish, rock cod/sea bass, pacific herring, etc are listed, there needs to be a linkage between these two issues and a jurisdiction's Shoreline Code and SMP. With each new listing, the ESA liability is re-established. Such an overt linkage between Federal and State law is lacking in the Shoreline WACs or the Act itself. It is difficult for a local jurisdiction to "track" these changes in listings and scientific information, and we would suggest

that Ecology's role in administration of the SMA should include forging this link between the Federal government and local governments who implement the SMA and its provisions. More succinctly, the rule should discuss not only the current listings and the recommendations associated with the salmonid species that have been listed, but should discuss also new scientific information and new listings of additional species how this new information should be integrated into local Shoreline codes and master programs

✘ Ecology will endeavor to provide guidance on newly listed species through the SMP Guidebook. At the least, the five-year updates of the Guidelines will take into account new listings.

ESA: Path A is not adequate to protect listed species

Ecology received many comments to the effect that Path A is inadequate to protect listed fish species. For example:

Delete Part III and make Part IV mandatory. Part III should be eliminated because it does not recognize ecosystem dynamics and ignores the big picture. Remove Path A or allow it only where there are no ESA species.

Part IV is preferred over Part III because it will provide greater environmental benefits. Path A is vague and risky and does not establish the standards necessary to protect our shorelines, salmon and water. Path A is risky for fish and local governments who would be subject to the ESA. DOE will have to accept & approve SMP's too loose to genuinely support CWA standards or ESA requirements.

There are no standards in Path A. Therefore, no assurance that local plans adopted under path A will protect salmon, shorelines or water. Path A fails to articulate measures that can be utilized by either the local jurisdiction or DOE to ascertain when path A SMP's achieve compliance with the SMA. Path A is essentially "business as usual", permissive and fuzzy rather than 'flexible', and fails of the protective goal of the Act. If you set minimums, you get minimums.

Implementation of Path A as an option represents an explicit decision to disregard the protection of endangered and threatened species in managing our shoreline resources, while Path B includes critical elements such as default vegetation buffer standards and stricter enforcement provisions.

It is difficult to avoid the impression that Path A is less likely to provide adequate protection for endangered species and their habitats than Path B. If the guidelines laid

out in Path B are adequate to satisfy NMFS and USFWS requirements for protecting these habitats, then there doesn't seem to be a need for any alternate set of guidelines — unless these alternate guidelines represented a hidden attempt to circumvent the intent of these laws. For example, given that a buffer width of one site-potential tree height is required to protect shoreline habitat under Path B, why shouldn't the same buffer width be required under Path A? I seriously doubt that the "flexibility" of Path A would lead to buffer widths that are LARGER than this.

Local jurisdictions with PTE's and environments may interpret the flexible language of Path A as latitude for selective compliance with the SMA. Some jurisdictions capable of Path B management will choose Path A to avoid Path B's more rigorous and costly adaptive management responsibilities. The stated purpose for Part IV is to provide more flexibility for local governments to come up with creative approaches which provide the same level of protection for the resource. We believe that this flexibility is already present in Part IV of the rule. That section of the rule has few numeric standards, no set buffer requirements for example, and almost without exception distinguishes between and sets different standards for jurisdictions with listed species and those which have none. There is still tremendous, in fact too much flexibility in that section of the rule.

Path A concedes too much to those who are most in need of direction to protect our salmon and shoreline environments. It contains inferior provisions, it more or less contradicts two principal objectives of the guidelines (to protect against adverse impacts and ensure protection and restoration of ecological functions), and will likely result in unnecessary confusion and delay in implementing needed changes.

Path A is unenforceable and it is probably unequal treatment under the law to have two levels of environmental protection. Path A is an alligator pit and you're going to be in there wrestling the alligators if you do it. One of the basic principles of democracy is equal justice under the law, and I think you're going to have a terrible lot of problems trying to have to maintain two systems.

Ecology says that the substantive standard is the same in both A and B, but only B gives enough insurance according to NMFS that it will actually protect the salmon and meet the ESA. My question is, why authorize half measures that are destined to fail? Why go halfway? Why waste the public's money and later wring our hands and wonder why we failed? We keep pushing the costs off on the environment and pushing them off on future generations, and that is irresponsible.

Path A does not list any requirements to gather data when none is available. Furthermore, local governments are not required to conduct inventories. The DOE statewide monitoring and regulatory response oversight program is not included in Path III. Some jurisdictions fully capable of Path B management will choose Path A, to avoid Path B's more rigorous (and costly) adaptive management responsibilities and to minimize compliance oversight.

The terms "may" and "should" are used throughout the rule, making it unclear what the outcome will be. For that reason, this section of the rule amounts to little more than a guidance document as opposed to a regulation with clear standards. Path A is full of admonitions and it has few requirements. As such, it is not consistent with the purposes of the act and it allows elevation of the private interest over the public interest that the act is designed to serve.

✘ The SMA confers broad procedural and substantive authority on Ecology with regard to the development and approval of locally prepared SMP's. Possible approaches to updating the guidelines range from providing a flexible approach with almost no guidance to aid local governments in drafting a consistent SMP, to an extremely prescriptive approach with no room for local governments to adjust for regional characteristics and needs. Past experience in shorelines management shows that flexibility is needed to carry out SMA objectives given the range of shoreline conditions and environments that exist throughout the state, and the fact that the SMA applies to areas with ESA listed species as well as to areas with no listed species. Hence, a two path approach is proposed.

The two paths may yield different local SMP structure and content, but both will fully comply with SMA requirements. Path A sets mandatory minimum procedures and performance based standards, but allows local governments the flexibility, within the specific criteria and guidance provided, to decide how to achieve the performance standards. Path A should not result in lesser environmental benefits to shorelines of the state. Regarding risk, Ecology in partnership with local governments, are obliged to demonstrate under either path, that approved SMP's comply with the requirements of the SMA.

There are a variety of methods available to satisfy the requirements of the federal ESA with regard to shoreline uses and activities. These include specific reference to the guidelines in the

section 4(d) rule ultimately adopted by the federal services (NMFS and USFWS), which can grant an exception from the definition of "take." Any shoreline use or activity that creates a take will be illegal unless allowed by a 4(d) rule exception or alternatively, through an incidental take statement issued after completion of a section 7 consultation with the federal services.

The services and Ecology are committed to pursuing these approaches (see letters to Ecology Director Tom Fitzsimmons from both services dated May 22nd, 2000) to ensure that shoreline uses and activities conducted in accordance with SMP's updated consistent with the new guidelines will be insulated from liability under the ESA. The services believe Path B can provide the up-front certainty needed to ensure protection from ESA liability. The services believe that the geotechnical report is one method (there may be others) to ensure satisfaction of ESA requirements.

Path A contains standards to protect and restore ecological functions. Ecology believes that where ecological functions are protected and restored salmon, shorelines and water will be protected and restored. Procedures and standards required under Path A are the "measures" to determine SMA compliance.

ESA: Path A is not adequate to protect listed species

We know that many jurisdictions which will opt for this approach will do so to avoid the "higher bar" in Part IV. We cannot imagine, however, how a jurisdiction could do less than what is outlined in Part IV and still comply with the ESA. If the Department approves an SMP in a jurisdiction with listed species which falls below the standards established in Part IV, then we believe the Department will, itself, be liable under the take provisions of the ESA. Eliminate this section of the rule or, at the very least, restrict its application to jurisdictions which do not have listed species within their borders.

Path A should not be an option, we need uniform rules that apply to everybody. Path A will result in further loss of habitat. They will result in lenient rules and time-consuming lawsuits. Under Path A the public will be subject to inconsistent and overlapping legal requirements, as the local agencies will be implementing regulations that may not assure compliance with federal requirements implemented under the Endangered Species Act. Landowners and

local governments could very easily find themselves in compliance with local regulations but subject to either federal or citizen enforcement under the Endangered Species Act.

✘ All SMP updates must comply with the requirements of the SMA and there are a variety of methods available to satisfy those requirements. ESA compliance certainty is the main difference between Paths A and B. If local governments when updating their SMP's, want also to satisfy federal ESA requirements with regard to shoreline development and uses, then they have the option to chose Path B. It is not within the authority of the SMA to require ESA compliance. The Services believe that Path B provides the up-front certainty needed to ensure protection from ESA liability. State (Ecology) and local protections from ESA liability will likely come in a variety of forms.

These protections may be provided through the up-front "programmatic" approach offered by Path B or by case-by case review with the Services through individual section 7 consultations for Path A SMP's in the coastal zone. Non-coastal jurisdictions will have to seek individual 4(d) exception or Habitat Conservation Plan approval from the Services to gain liability protection. Regardless of the Path taken by local government, Ecology (and local governments) is/are obliged to secure input from interested parties, which include the Services, and consider the liability implications as part of the SMP approval process.

ESA Path B is not adequate to protect listed species

The complex and detailed requirements and restrictions contained within the proposed rule (particularly Path B) include no guarantee that they will achieve their goal — the recovery of fish — nor a method for judging whether that goal has been obtained. All of the restrictions contained in the new guidelines are geared toward achieving "ecological functions" and "properly functioning conditions." They are not geared towards preserving or restoring a certain number of fish. The assumption is that protecting and restoring "habitat" will restore depleted salmon runs. Because these regulations are not linked to specific numerical goals for "recovery" of certain species, there is no way to determine whether these drastic regulations are having their intended result, and thus when local governments might move toward less restrictive land use regulations. The Path B

requirements should not be adopted at all — but if adopted, should include provisions that would repeal them upon achieving a specified numerical recovery goal for "proposed, threatened and endangered" species.

In general, Path B incorporates the concept of properly functioning conditions (PFC) in relation to habitat conservation goals. In theory this should be a measurable standard. In order to achieve successful implementation there must be more than a set of new regulatory standards; there must be a thoughtful sequence of actions that assure a positive outcome. In order to measure the effectiveness of the Path B approach, the rule should incorporate the following strategy elements: 1) PFC must be developed into a measurable standard to evaluate effectiveness of new rules. This could take the form of Habitat Productivity Standards that are tied to production targets throughout various life history stages of targeted species. 2) There must be a comprehensive monitoring program to test actual outcomes against the standards used as the target for shoreline protection. This monitoring function must be fully funded by the implementing governments. 3) A critical response pathway must be developed to direct the reactions to the monitoring data. Management flexibility may evolve from successfully achieving productivity standards while more restrictive or more aggressive implementation would be required of jurisdictions that miss their targets.

Provisions such as baseline inventories and vegetation conservation management standards must be strengthened to meet the stated goal of compliance with the ESA.

✘ Path B is not limited only to protection of fish species. It also equally applies to the broader "priority species" as defined and the even broader range of ecological functions and processes upon which they depend. It would likely be impossible to set meaningful numerical standards for this broad a range of objectives. If the regulations indeed prove too drastic, this will surface when Ecology conducts its required five-year review of the guidelines. The standards can be adjusted at that time (if not earlier) as needed. Further, since prevention of future impacts is an objective of the SMA, it is difficult to envision a circumstance where wholesale repeal of the guidelines would be appropriate.

While measurable production targets throughout various life history stages of targeted species should assist in monitoring PFC for listed species, listed species, even in Path B, are not the only fish and wildlife protected under the SMA. The existing monitoring and adaptive management provisions

contained in section 300(2)(b)(i)(c) do require local governments to set measurable performance criteria to maintain and restore PFC, monitor performance, identify funding and responsively adjust shoreline management activities accordingly.

Ecology believes the inventory and vegetation conservation provisions of the rule are adequate to protect and restore ecological functions. The Services have stated that, based on their initial review of the Guidelines, they believe that Part IV meets the standard necessary for up front protection from take liability.

ESA Path B is too focused on listed species

The guidelines under Path B are focused on salmonids and may not adequately address other species, particularly marine and terrestrial species. Although the Path B guidelines are likely to have direct and indirect benefit to protection of habitat for other species, it would be preferable to develop one set of guidelines that protect and restore properly function conditions in shorelines for the protection of all species, with the goal of avoiding future listings.

A major flaw in these amendments is the narrow scope of regulation in Part IV, sections 270-350 that provide for protection of "ecological functions" and properly functioning conditions (PFC) only for proposed, threatened and endangered species. We believe this is wrong for a number of reasons. First, the shorelines management act was never intended to provide protection only for species on the brink of extinction. The shorelines of the state were intended to be protected for, among other things, all anadromous fish. The narrow focus that you have chosen provides only limited protection for steelhead, coho, pinks, and chums throughout most of Puget Sound. This is not only bad public policy, but bad environmental policy as well. Second, elimination of adequate protection for species other than Chinook places a disproportionate burden on fishers, and in particular on Tribal fishers, dependent on robust salmon stocks of all species.

The amendments, as proposed, will result in less protection for a variety of species. WDOE has chosen to favor the economic and social interests of others at the expense of Tribal fisheries dependant on these other stocks. We believe this is wrong, and is unfair to Tribal and non-Indian commercial fishers, as well as recreational fishers. This policy ignores basic ecological principles and salmon life history that have demonstrated that all parts of a watershed are connected, and that activities upstream

can have significant, damaging impacts downstream. As Chinook are found mostly in lower elevation, larger watercourses, little protection will be provided to smaller shorelines of the state. We believe that WAC 173-26 should not isolate only PTE species for special protection, but should provide equivalent protection to all salmon species.

In comparison to Path A, the environment designation system in Path B places additional emphasis on protecting PTE species. For example, management policies for the natural environment (WAC 173-26-310(4)(a)(ii)(A), page 111) state that “any use that would substantially degrade the ecological functions, particularly PFC for PTE species, or natural character of the shoreline area shall be prohibited.” In emphasizing protection of ecological functions for PTE species, the policy could actually result in decreased protection of ecological functions in habitats not associated with PTE species. The policy needs to make clear that ecological functions for PTE species are not the primary purpose of the policy, and that ecological functions not tied to PTE species need to receive an equivalent level of protection.

It may be useful to make it clear in the guidelines that salmon recovery is only one piece of a strategy to implement the SMA policy to protect against adverse effects to the waters of the state and their aquatic life. Salmon protection measures would not take precedence over other measures to protect waters of the state, but would be given special emphasis in addition to other measures

☒ Both paths address the needs of other species through the requirement to protect and contribute to the restoration of shoreline ecological functions and processes.

Path B is not limited only to protection of T&E species. It also equally applies to the broader “priority species” as defined and the even broader range of ecological functions and processes upon which they depend.

The rule is not intended to elevate protection for listed species at the expense of non-listed species. The rule does explicitly recognize that listed species are, by definition, in need of greater attention than non-listed species. Ecology has attempted to draft Part IV in a way which highlights the needs of listed species while still providing the necessary protection for non-listed species. Such protection are found, among other places, in policies and use regulations relating to ecological functions and priority species.

ESA: Neither Path A or B are adequate to protect listed species

State water quality standards, state fishery protection standards should be **higher** than the Endangered Species Act, which is the safety net. When everything else fails is when we should be getting to the ESA. And we should have regulations, we should have incentives — the whole litany of options that we do have to prevent ESA listings. We should not be Path B — you’re saying Path B is tougher and it’s going to meet the ESA. Well, no. You should only be offering a path that exceeds whatever the feds may come up with, which is the safety net.

Parts III and IV fail to meet the requirements of the ESA and its regulations. Neither Parts III nor IV provide for measurable criteria and standards. For some of the standards, language such as “where feasible” is used in the application of a particular requirement. As a result; the implementation of these Guidelines will reduce the likelihood of survival and recovery of listed species and the wild. A major problem with the draft Shoreline Guidelines Rule is that it proposes to adopt two different approaches for local governments to comply with the Rule and leaves it up to local government to decide which approach they will use. The approaches are very different and without additional guidance will lead to a piece-meal approach to salmon recovery, both within the same WRIA and between WRAs. We do not believe that such an approach will lead to the recovery of salmon within a watershed or throughout an ESU, particularly if Part III, the less stringent approach, is chosen by one or more local governments. Also, the specific exemptions for agriculture and forestry in Parts III and IV will foster site-specific and cumulative impacts to fish, shellfish, wildlife and their habitats.

How will these two options work between adjacent local governments, particularly if each has chosen to follow different options? An ecosystem approach would call for addressing issues at the watershed scale. Since individual local governments adopt individualized SMPs, this is a difficult task. The difficulty may be compounded by the provision of the two options

The regulation as proposed by DOE does not provide a means to audit the scientific methodology used in determining the setback and other restrictions on property.

☒ Part III and Part IV implement the SMA’s directive to protect the state’s shorelines as fully as possible.

Ecology believes the guidelines provide effective mechanisms for protection and restoration of fish and wildlife across jurisdictional boundaries.

Inter jurisdictional coordination and watershed-wide planning is strongly encouraged (see sections 200(3)(b) and (c) and sections 300(3)(b) and (c).

Individuals who disagree with the approach taken by an approved master program may appeal Ecology’s decision to approve the master program to the Growth Management Hearings Board.

ESA: The state should use other methods to recover fish populations / SMA rule won’t help fish

Many commentors suggested that Ecology should not develop a rule addressing habitat protection until the state resolved other effects on salmon, such as harvest, hydropower, or hatcheries. Examples include:

You should not be attacking private property rights to protect salmon until you first address salmon harvesting. Commercial fishing maybe needs to be cut back. If they’re endangered, why would you not put a moratorium on them for a period.

No real energy is expended on correcting all the obvious outrages committed on our salmon runs by sea otters, Caspian terns, trolling nets, and 400 Columbia River nets.

There are nets in the rivers. You’re seeing seals at the mouths of the rivers keeping salmon from going up. Sea lions competing with endangered species. There’s drift nets in the open ocean, desecrating salmon runs, and yet you’re asking the people on the waterfront in Puget Sound to save those salmon. Why do we have to pay for that?

Take the mess out of the rivers along with the seals. Control the discharges of mills and plants of industry that pollute with chemicals damaging to fish and aquatic life. Quit killing and destroying our hatchery fish. 94 percent of Grays Harbor County is in timber. A little 6 percent includes all of our farms all of our cities, all of our beaches, and all of our roads. That little bit of farmland isn’t contributing to the salmon problem.

If you want to save fish, why don’t you figure out a way to make a soluble bag that you can put some baby salmon in and tell us when they’re ready and we’ll all go plant them. People that live along the rivers.

County trucks and timber companies spray pesticides that are toxic to aquatic vertebrates alongside the roads and ditches, which lead to streams. How many hundreds of thousands of gallons of herbicides and pesticides do they spray?

The rule incorporates onerous federal ESA language and threshold criteria. It is hard to assume the hypothesis that undisturbed stream setbacks are going to

induce fish to return when federal agencies condone killing of endangered runs of fish by setting harvest levels.

Salmon enhancement efforts will do no good if salmon do not return from the sea. We do not need further interference in property rights by Ecology or environmental groups who are misguided by inaccurate information.

Instead of tree cover to cool the water, instead of that would have been, say, if you cut down trees that would just move the natural shading and thereby the water would warm up instead of restricting the property owner through not removing, being able to remove trees. A lot of the property owners have developed cooler water equivalently through refrigeration. Why not? And food for the fish, for the bugs that would fall from the trees, do like the fisheries do. Give feeders.

Healthy salmon are reared in fish hatcheries with no tree coverings, no natural stream beds. I propose the property owners be allowed the option to replace the fish that would be lost or harmed through development of their properties with fish that are reared in individual or joint hatcheries.

The proposed guidelines will result in local governments devoting already inadequate resources toward new planning, assessment, and monitoring. Rather than prioritizing enforcement, the proposed guidelines create the near surety that improved enforcement will not occur.

✘ The State of Washington has an overall strategy for salmon recovery that addresses harvest issues as well as habitat, hatcheries and hydropower. This strategy is entitled *Extinction is Not an Option* and is available at www.governor.wa.gov/ESA/strategy/sstrategy.htm or by writing the Governor's Salmon Recovery Office, PO Box 43135, Olympia, WA 98504-3135. Available evidence indicates that loss of habitat is a significant contributor to the decline of these species. The State's strategy is to address all aspects of the problem rather than single out one. Adoption of these guidelines has been identified in the plan as an appropriate action to address habitat issues.

While the guidelines have been identified within the plan, the statutory mandate of the SMA is much broader. Adoption of the guidelines will improve management of the shorelines overall not just with regard to endangered salmon, steelhead and trout habitat issues. The history of SMA implementation indicates that it will take several years for all local governments to adopt SMP's that reflect the new guidelines and many more years for the intended benefits to the environment to

be realized. Therefore it is important that the guidelines be adopted now to begin this long process.

ESA: The state should use other laws to recover fish populations

Shoreline rules are not as comprehensive (they omit mid-size and smaller streams) as growth management and critical areas ordinances, and so are not the most effective means of guiding fish population recovery.

DOE has consistently attempted to promote its shoreline regulations as the primary environmental policy to achieve fisheries recovery in Washington. Shoreline rules are neither the most comprehensive regulatory framework (shorelines jurisdiction does not include mid-size and smaller streams), nor are they the most efficient tool to achieve salmon recovery. Growth Management Act (GMA) comprehensive plans and development regulations, along with critical areas ordinances, have much broader jurisdiction (an entire city or county), and integrate better into other land use policy development in Washington. However, the alteration of shoreline rules is the only administrative mechanism that can be exercised by DOE.

In the Salmon Recovery Act of 1998 and Salmon Recovery Funding Act of 1999 significant legislation was passed and enacted to implement salmon recovery in Washington State. House Bill 2496 and Senate Bill 5595 established the State's response to salmon recovery, with the primary component being bottoms-up, community-based salmon restoration and enhancement. The State Salmon Recovery Funding (SRF) Board and a local, science based process to identify and prioritize salmon restoration projects and activities were created. The Legislature established a program to identify limiting factors to salmon health in each watershed. Finally, the Legislature, together with the federal government, has dedicated millions of dollars to salmon restoration and enhancement projects. This proposal creates a separate, completely uncoordinated program that duplicates the efforts of the SRF Board. The Legislature was very specific in its intent to create a program to implement salmon restoration projects and activities including the provisions of RCW 75.46.050. Although the DOE serves as a non-voting member of the SRF Board, there is no statutory authority in any of the salmon recovery laws for DOE to commence its own salmon restoration program as part of the SMA. Therefore, all requirements compelling restoration as part of local Master Programs should be deleted.

The state's salmon strategy, "Extinction is Not An Option" prioritized numerous activities, and expressed a number of overriding goals, objectives, and themes. Many of the priorities and goals in the Governor's Salmon Strategy have simply been forgotten or ignored. A main objective in the plan was to "collaborate with tribes, local governments, and the private sector to integrate local knowledge with flexibility and control at the local level into quantifiable state and regional salmon recovery plans." The creation of the proposed Shoreline Guidelines has been anything but collaborative. The proposed guidelines also fail to create or further any "incentive-based approaches to recover salmon." The guidelines are a purely regulatory, disincentive-based program.

✘ The SMA provides a strong policy basis and jurisdiction to address planning for protection of fish habitat together with planning for preferred and priority uses, and protection of the public trust.

The intent of the guidelines is that local government coordinate with and consider all related plans and programs and bring together a comprehensive strategy for their local area. The SMA has existed since 1971 with this policy and intent.

ESA: Rule should recognize/encourage restoration projects

In the next decade there will be many projects undertaken to enhance shorelines. The rules don't speak to allowing or promoting beneficial actions on shorelines. They should be sufficiently flexible and should promote restoration and enhancement.

RCW 90.58.147 requires that salmon enhancement projects that are implemented by public and private, non-profit organizations be given expedited permit review and approval by a variety of state agencies. Such projects are exempt from substantial development permits when they have been approved by the Department of Fish and Wildlife and have received a hydraulic permit. The rule must be amended to recognize the expedited process, but should also be amended to completely exempt salmon restoration and enhancement projects from regulation under local SMPs. This is one area where the DOE could introduce significant regulatory reform, in order to ensure projects that have as their sole purpose salmon restoration or enhancement are implemented with a minimum of regulatory burden and delay.

Ecology is in violation of State RCW 75.46.060, that states in part, "No project

included in a habitat restoration project list shall be considered mandatory in nature and no private land owner may be forced or coerced into participation in any respect.”

☒ Ecology has added a new section on “shoreline habitat and natural systems enhancement projects” (330(3)(g)). The section reads: “Shoreline habitat and natural systems enhancement projects include those activities proposed and conducted specifically for the purpose of establishing, restoring, or enhancing habitat for priority species in shorelines. Master programs should include provisions fostering habitat and natural system enhancement projects. Such projects may include shoreline modification actions such as modification of vegetation, shoreline stabilization, dredging, and filling, provided that the primary purpose of such actions is clearly restoration of the natural character and ecological functions of the shoreline. Master program provisions shall assure that the projects address legitimate restoration needs and priorities.”

Concerning provisions of RCW 90.58.147, see WAC 173-27-040(2)(o) and (p). It would be needlessly duplicative to incorporate provisions of law or regulation that exist and are not being changed by the proposed regulation

Concerning the provisions of RCW 75.46.060, there is nothing in the guidelines that is in conflict with that law (which has been recodified as RCW 77.85.050)

ESA: Rule should recognize/encourage restoration projects

To halt the decline and promote recovery in these resources habitats must be restored and enhanced which should be stated in the purpose of all State Shoreline Guidelines and within all pertinent sections. I am hoping that there is some way in this plan that we will be able to finally address these types of degradation that have gone on over the last 25 years by private land owners. So this is my first concern is that there be some form of restoration and also some form of retribution to the surrounding property owners who have had severe degradation such as flooding, degradation to the wetland that are behind their house, loss of habitat, loss of species diversity. I am just hoping there is a way that we can hold cities and local jurisdictions accountable for these things.

☒ Comment Noted.

ESA: Financial incentive program

The state should approach the ESA in a more positive mode for the citizens of our state by helping to clarify ESA language, identifying how property takings will be compensated, and developing public assistance programs to help finance streamside improvements.

☒ The ESA is a federal statute and therefore cannot be “clarified” by this state agency rule. However, it is expected that master programs adopted pursuant to Path B will be ESA compliant. As to compensation for property takings, we do not agree that implementation of these guidelines will result in takings. Establishment of a compensation fund and the financing of streamside improvements are beyond the scope of this rule.

ESA: Preserve Path A

The Path A approach is the fastest, surest route for saving salmon and salmon habitat. We will go with Path A because we intend to do what’s best for salmon ecosystem by ecosystem and reach by reach and tailor our response to each situation using science and adaptive management. We understand the rationale behind Ecology’s desire to prepare this rule to include Path B, a very prescriptive approach that may have some limited application to certain portions of the State. To the extent that this gives jurisdictions a choice, that is fine. It is critical to preserve a viable Path A approach in this rulemaking for those jurisdictions who believe that they can meet the intent of the Shoreline Management Act by revising their Master Program and development regulations to meet Path A Standards. .

☒ Ecology agrees. The final rule preserves Path A as an option.

GMA/SMA: Concerns about SMA trumping GMA

A number of commentors expressed concerns that Ecology’s rule does not properly integrate the SMA and the GMA. For example:

The tenor of the proposed rule in essence seeks to place shoreline regulations over GMA and other regulatory strictures. We urge DOE to restrict the scope of the proposed rule. We request that DOE explain thoroughly why it believes that it has the legal authority to trump the GMA and other legislation which give other entities regulatory oversight and rulemaking power. The SMA establishes shoreline jurisdiction over the area 200 feet landward of ordinary high water, and includes associated wetlands and flood plains. The GMA governs land use

planning and critical area regulations throughout a city or county. The GMA was modified in 1995 to clarify that SMPs are a unified development ordinance, subject to compliance with GMA requirements, and not the reverse. A local SMP must comply with local growth management comprehensive plan goals and policies, not vice versa.

DOE has struggled to find a way to expand shoreline jurisdiction beyond the 200 feet limit, and to assert primacy over local GMA planning. The proposed rule repeatedly directs local governments to review their comprehensive plan policies and development regulations to ensure mutual consistency with the proposed rule. DOE does not have the authority to mandate that local governments submit their GMA adopted plans and regulations to DOE for its scrutiny and approval. It is cumbersome at best to require local government plans and ordinances that were developed and adopted under the authority of Chapter 36.70A RCW, and were subject to review and approval by the Growth Management Hearings Boards, to undergo additional review, when DOE has no legal authority over GMA land use planning.

CAOs have been painfully and laboriously developed at a local level for several years, many undergoing intense legal challenge. Much of this challenge has reflected the local government obligation to balance local needs with environmental protections. However, these CAOs will be trumped by the new shoreline Guidelines for any and all critical areas within the expansive shoreline zone. Even if existing CAOs are incorporated into the local SMP by reference, the CAO must be consistent with the Guidelines. The Guidelines aim for restoration and use of state documents, clearly beyond the scope and intent of the GMA, let alone the SMA.

The sole legislative policy power delegated by the GMA was made to local governments. It provides that GMA comprehensive plans will be “binding” upon state agencies, the only specific legislative pronouncement on the division of power between state agencies and the locals, a pronouncement that defies DOE’s proposed revolution. The fact that the GMA delegation extends to SMA plans is reinforced by the legislative pronouncement that the SMA plan is to be a part of the local GMA comprehensive plan. DOE’s unenforceable mandatory proposals invert the legislative hierarchy the legislature created. The responsibilities, while similar, are distinct.

In 1995 the legislature passed reg reform that placed the GMA as the overall encompassing planning legislation. The draft guidelines creates a situation where the shoreline section of a jurisdiction’s CAO will

be dictating how other critical areas are regulated, and attempts to override the entire GMA planning process. Where local governments are constrained to establish “urban growth areas” to favor high-density development, your regulations intrude into those areas to discourage any development. Local governments are required to consider and balance multiple GMA requirements, all of which are ignored by your regulations.

ESHB 1724 was developed and passed in order to provide greater coordination between the Growth Management Act, State Environmental Policy Act, SMA, and the local permitting process. It was also intended to streamline land use and environmental review. This proposal will significantly increase the redundancy between the SMA and GMA, inappropriately increases DOE’s oversight of GMA requirements that apply to shorelines, and will inevitably further burden local and state review and approval of permits in shoreline areas.

The proposed guidelines force local critical areas ordinances adopted under the Growth Management Act to obtain Ecology approval. This additional process disrupts the balance between state and local governments set by the legislature when it adopted the GMA, is inconsistent with the 1995 regulatory reform directive to integrate land use law into the GMA, and ultimately will slow local governments in their efforts to adopt ESA related measures.

The GMA has no restoration and recovery language for critical areas: These rules create an additional set of regs for GMA critical areas. If critical area ordinances or other local regulatory tools are included in the SMP, by reference or direct inclusion, they will be required to meet the higher restoration or recovery standards and subject to state review and approval. Thus, many local plans and ordinances, although GMA-compliant, may be deemed non-compliant with the SMA. Jurisdictions that have been successful defending their CAOs before a Growth Management Hearings Board, County Superior Court, etc. may now have their CAOs ruled to be invalid by a State Agency.

✘ The GMA requires that shoreline master programs’ goals and policies shall be considered an element of the county or cities’ comprehensive plan, and all other parts of the master program shall be considered development regulations. The GMA further requires that a county or cities’ comprehensive plan and development regulations shall be internally consistent. The guidelines provide mechanisms for local governments to integrate their master program with their comprehensive plan and development regulations. Local governments are

responsible for ensuring internal consistency.

The GMA does not “trump” the SMA. The GMA states that nothing in the GMA should be “construed to authorize a county or city to adopt regulations applicable to shorelands . . . that are inconsistent with the provisions [of the SMA]. RCW 36.70A.481

ESHB 1724 made local SMPs an element of GMA comprehensive plans, but it did not change the statutory requirement that Ecology must approve amendments to SMP’s before they can be effective. Ecology cannot change the statutory requirement in a rule.

Under the SMA Ecology must review every master program update for compliance with the policy of the SMA and the new guidelines. If a local government wishes to utilize its CAO to fulfill all or part of its master program, Ecology must still use the same standard in reviewing the submitted update. The GMA makes clear that master programs are to be adopted pursuant to the procedures of the SMA, not the GMA.

Ecology does not agree that the guidelines are duplicative and poorly coordinated regarding critical areas ordinances under the GMA. Local governments can either incorporate their CAO by reference in the SMP to partially fulfill the SMA requirements, or can develop separate policies and regulations that will address those areas within SMA jurisdiction. Only those critical area regulations which local governments integrate into their SMPs will be subject to review and approval by Ecology.

When a Critical Area Ordinance (CAO) has been incorporated into a SMP and the CAO is later amended, the SMP is not automatically amended at the same time. SMP’s have a separate amendment process that needs Ecology’s approval before the SMP amendment becomes effective.

Regarding the comment that Ecology seeks to expand shoreline jurisdiction beyond the 200 feet limit, nothing in the guidelines can extend the statutorily-defined jurisdiction of the SMA. Where Shoreline Management Act jurisdiction overlaps Growth Management Act jurisdiction then both sets of regulations must be applied

GMA/SMA

The mandate to incorporate the SMA into the GMA in ESHB 1724 can be accomplished by DOE without a complete rewrite of the rule and without proposing two inconsistent standards under Path A and

Path B. Proposing new categories, new requirements for vegetation management, new dock and pier placement guidelines, new erosion control requirements, new public access criteria, etc., was not the mandate the Legislature gave to DOE. Ecology is substituting their own criteria and judgement for legislative intent stated in EHSB 1724.

✘ Ecology’s actions are governed by the SMA. The plain language of the statute requires Ecology to update the guidelines to be consistent with the policy of the SMA. While the revised guidelines do provide numerous mechanisms for the integration of GMA and SMA planning and administration, the SMA neither limits nor allows Ecology to update the guidelines only to provide consistency with GMA.

GMA/SMA

The Legislature intended through its 1995 amendments to establish RCW 36.70A.470 as the future amendment process to ensure a full and comprehensive process if followed in addressing major land use issues and concerns consistent with RCW 90.5 8.060(1). On October 31, 1996 repealed four rules and adopted two new rules, one of which was Chapter 173-26, in order to make all the procedural changes required by ESHB 1724. Ecology noted changes were needed to make the Shoreline Management Act (SMA) procedurally consistent with the Growth Management Act (GMA) as intended by the Legislature.

✘ The language of the GMA does not support the contention that GMA “established RCW 36.70A.470 as the future amendment process to ensure a full and comprehensive process if followed in addressing major land use issues and concerns consistent with RCW 90.5 8.060(1).” With regard to the guidelines, the GMA plainly states that master programs are to be adopted pursuant to the procedures of the SMA, not the GMA. See RCW 36.70A.480(2).

GMA/SMA

The scope of the proposed rule exceeds the intent of the legislature as expressed in the 1995 regulatory reform legislation. The rule does not adequately address the consolidation of the Shoreline Management Act (SMA) into the Growth Management Act (GMA) using GMA as the platform as the legislature intended. Rather, the proposed rule appears to be intended to authorize DOE to assert jurisdiction over GMA for the purposes of regulating environmentally sensitive areas such as “critical areas” set forth in GMA. The proposed rule appears to expand the

jurisdiction of the SMA without legislative authorization and places salmon recovery as the primary purpose of the SMA to the exclusion of other purposes.

✘ The requirement to use state's wetland rating system assures that wetlands associated with the shorelines of the state are regulated on the same basis statewide which assures protection of shoreline resources in accordance with the policy of the SMA. This requirement applies only to wetlands in SMA jurisdiction.

GMA/SMA

The guidelines prefer the use of state documents to establish critical area standards. With regard to wetlands alone, the revised guidelines state, "local governments should consult the Washington State Wetland Rating System." ("Should" means that the action is required unless there is a documented, compelling reason otherwise.) Notably, in a 1998 CTED report, 70% of counties and 83% of cities do not use the state model guidelines for wetlands and buffers. This shows the importance of local control and decision making for actual application of critical area protections.

✘ Ecology does believe that the directive that local governments should consult the Washington State Wetland Rating System is particularly onerous.

GMA/SMA

The draft implies the burden of proof for local compliance is on local government. This is inconsistent with the GMA. Full integration of SMP's into local comp plans and development standards should follow the same presumption of validity standards as specified by the GMA. Perhaps a distinction may be made between path A and B with the latter requiring a higher burden of proof in order to secure ESA assurances.

✘ It is consistent with GMA as the provisions of RCW 36.70A.480 state that "the shoreline master program shall be adopted pursuant to the procedures of chapter 90.58 RCW rather than the procedures set forth in this chapter for the adoption of a comprehensive plan or development regulations." The criteria for review of SMPs by Ecology is contained in RCW 90.58.090.

GMA/SMA

The proposed guidelines do not recognize the distinction between shorelines located in urban and rural areas. The GMA requires intense use of urban areas. That policy should be reflected in the Department's draft guidelines. Regulatory measures that

may be appropriate in rural areas where parcels of land are measured in acres, not in square feet, are not necessarily appropriate or even effective in urban areas. The current guidelines fail to recognize adequately the policy distinction embodied in the GMA with respect to the development and use of urban land.

The rule should be used to help implement the GMA urban growth policy. Too often the draft guidelines seem to assume that new urban development should be kept to low densities or prohibited, even within urban growth boundaries. We believe this is shortsighted, and that high-density development within the urban growth boundaries can better serve the SMA goals than returning to more sprawling development patterns. The GMA requires that local governments plan to accommodate their share of projected growth. To the extent shoreline guidelines and master programs restrict growth in urban growth boundaries, urban growth boundaries may have to be expanded to accommodate more growth elsewhere. Although urban growth boundary expansions might not directly include additional shoreline areas, sprawling development patterns are not as likely to achieve SMA policies as allowing carefully managed, well designed, high density development in shorelines within the current urban growth boundaries.

Shorelines and adjacent areas can and should play important roles in achieving the GMA vision, disproportionately to the actual area involved. The GMA seeks to change the Northwest lifestyle and culture in ways that, while good for the environment, could meet considerable consumer resistance unless more dense development patterns are made attractive by nearby amenities. Water and shoreline areas are attractive amenities for many people. Proximity to water and well-managed shorelines could help make higher density developments more attractive and thus help build consumer and political support for the GMA policies. It is important that the aquatic environment be attractive for salmon and other biological resources, but it also is important that shorelines also attract relatively high density development to absorb demand that otherwise might result in greater sprawl and more loss of quality habitat in rural areas.

The rule will indefinitely delay redevelopment of undeveloped urban lands in SMA jurisdiction. Yet the GMA encourages growth on such lands. The regulatory uncertainties of this rule make it unclear how much must be invested in to meet the DOE & NMFS requirements. These rules are contradictory to the GMA and will likely result in growth pressure on

rural lands upstream from the rivers and streams in Renton's jurisdiction.

The intent of the GMA is to focus new growth and development into already existing urban areas. For cities like Renton, which have considerable shoreline areas in their jurisdiction, the amount of growth in those shoreline areas will be significantly reduced by the proposed rule, which will increase the pressure to develop semi-urban and rural areas with no shorelines.

✘ Ecology believes that the guidelines are consistent with the policy of the GMA as well as the SMA. Numerous specific and general provisions recognize the concepts of the GMA including concentration of growth in urban growth areas and limiting of density in rural areas. However the policy of the SMA must also be recognized and implemented. Under the SMA uses of the shoreline are to be limited primarily to certain specified uses and all uses are required to protect shoreline resources. The guidelines recognize the distinction between urban and rural areas through the environment designation system

GMA/SMA

This particular regulation will move, in my estimation, towards less efficiency because you're going to have GMA rules, you're going to have the shoreline rules, and I think the shoreline rules in many senses will conflict with what you have in the GMA. You essentially had taken things like critical areas and you want similar standards for what counties finally have in the Critical Areas Ordinance. These may not be the same. It's going to lead to confusion on local levels, and least — maybe not with the regulators — but at least with regard to the public and what I hear is going to happen is you will end up having the public confused, more permits being needed, not less permits being needed. And you will end up with less efficiency rather than more efficiency.

The SMA is one of our state's oldest and most important environmental protection and land use planning laws. It is not the only such law, however. All shoreline and water-based activities and development proposals must also comply with a host of other state and federal habitat and water-quality protection measures. These Guidelines should contain some reference to these laws and programs, and indicate that complete protection of all current and future aspects of shoreline protection does not rest solely on the shoulders of the local SMP. Be clear that the SMP exists within a regulatory context, and that each level of government and each

agency serves a role within this context. The Guidelines should state clearly that SMPs can, and should, account for and rely upon other existing regulatory programs for some aspects of environmental management.

✘ There is nothing in the proposed guidelines that would preclude full integration of GMA and SMA programs, plans and development regulations. Provisions encouraging efficiency through integration are specifically addressed in sections 190(2) and 290(2) of the rule. With regard to conflicts, our experience since passage of the GMA suggests that there are few if any direct conflicts in implementing the two statutes. The goals and objectives of the GMA and SMA are quite compatible.

The rule attempts to recognize other laws, particularly the Growth Management Act. The scope of the guidelines is driven by only one thing - the policy of the SMA. Other regulatory programs exist, but do not necessarily supplant the role of the SMA.

GMA/SMA

We need to have integration and coordination between local entities and neighboring states.

✘ The Shoreline Management Act requires, and these guidelines reiterate, coordination between state and local governments and tribes. Please see RCW 90.58.050, 90.58.100, 90.58.110, and 90.58.130. However, it would be beyond the scope and intent of the Shoreline Management Act for the guidelines to mandate integration and coordination with other states or countries.

GMA/SMA

GMA mandated concurrency applies primarily to local transportation facilities, although it can be expanded to other public facilities. The SMA does not require concurrency in shoreline jurisdiction because the Act's goal is the protection of shorelines, not the provision of infrastructure. Conveniently, the Guidelines seem to include GMA principles only if they can be used to stop development on shorelines, as concurrency does.

To the extent that Shorelines are part of, or need to be consistent with GMA, the rules would be inconsistent with many of the GMA goals; specifically the GMA goals regarding housing, infrastructure, economic development, and property rights.

✘ The rule does not pick and chose principles from the GMA. The principles in the guidelines are derived from the policy of the SMA. Where these

principles also appear in the GMA the rule notes this fact.

GMA/SMA

Chapter 90.58 RCW gives DOE the authority to rewrite its shoreline rules. However, with the passage of the GMA, shoreline regulations have become a subset of the overarching GMA framework. Hence, new shoreline rules must be compatible with the thirteen GMA goals codified in RCW 36.70A.020. Hence, we want DOE to explain how the proposed rule will advance all of these goals. In particular, we want DOE to address how goal 3 (transportation) will be fostered since the restrictions imposed by this proposed rule likely will conflict with currently adopted comprehensive plans and their transportation priorities. Similarly, we want DOE to explain how goals 4 and 5 (housing and economic development) will be promoted. We pose this question because the imposition of significant new land use restrictions would appear to limit housing choices and constrain economic development.

Likewise, we want DOE to explain how goal 7 (permits) will be fostered. While this goal seeks to ensure timeliness and predictability in the permitting process, it will be difficult for local governments to translate the broad, complicated mandates in the proposed rule into concrete standards. Hence, we believe that it is incumbent upon DOE to articulate how this proposed rule will facilitate a timely and fair permit process.

✘ The fact that a particular use is not allowable or is constrained in shoreline jurisdiction does not render the entirety of a local government's comprehensive plan void. By their definition, comp plans deal with the entire land area of a city or county, not just the area within shoreline jurisdiction. For example, the guidelines provide that where other options are available and feasible, new roads or road expansion should not be built within shoreline jurisdiction. This provision does not preclude the comprehensive plan from dealing with roads outside shoreline jurisdiction, and does not conflict with the overall goals of the GMA.

Ecology disagrees that local governments will not be able to translate the guidelines into concrete standards. However, to assist in this task, Ecology in the coming months will be producing a new version of the Shoreline Management Guidebook as an aid to planning professionals responsible for master program updates.

GMA/SMA

The Growth Management Act does not distinguish between PTE and other salmon species, but states that special consideration shall be provided to all anadromous fish. Therefore, there is a basic inconsistency between GMA and the Shorelines program as proposed.

✘ The guidelines implement the policy of the SMA, not the GMA. The Supreme Court has held that the SMA must be broadly construed to protect the state shorelines as fully as possible. *Beuchel v. Dept. of Ecology*, 125 Wn.2d 196 (1994). The rule simply recognizes that species which are so depressed as to be threatened or endangered require special attention if they are to be protected "as fully as possible."

GMA/SMA

Because shoreline management is to be a GMA ordinance, the 'enhanced' public participation requirements of GMA apply.

✘ The development of the guidelines has been a five year process including numerous stakeholder groups, public hearings, workshops and other opportunities for involvement. The entire document, including path B, is the subject of the current round of public involvement which exceeds the requirements for adoption of the guidelines contained in the SMA.

GMA/SMA

Would appeals of SMPs go to the Growth Management Hearings Board or the Shoreline Management Board? I would like to see the rules made a little bit more specific in identifying procedures for plan adoption and appeal process.

✘ Under Chapter 90.58.190(2), appeals of Ecology decision to adopt or amend a local SMP are heard by the Growth Hearings Board for jurisdictions planning under GMA, and by the Shorelines Hearings Board for jurisdictions not planning under GMA.

Process & Procedure – Public involvement in Path B

County officials have been virtually barred from any involvement in this process. The document was designed behind closed doors with NMFS and USF&WS.

The proposed Path B (Part IV) was apparently negotiated without public involvement between the DOE, NMFS, and the USF&WS. Although DOE is required by RCW 90.58.260 to represent the state's

interest before federal agencies, the law also states that "Where federal or interstate agency plans, activities, or procedures conflict with state policies, all reasonable steps available shall be taken by the state to preserve the integrity of its policies." By conducting the negotiation out of public view, and without a thorough comparison of the existing state standards to the federal protective standards, it is difficult, if not impossible, to determine whether DOE has satisfied the requirements of RCW 90.58.260.

In fact, Path B may unnecessarily expose local governments to increased liability under the ESA. In addition, the only rule development process in Washington State that has been included in the final NMFS 4(d) rule for salmon protection, is the Forest and Fish Report, which involved broad stakeholder participation and approval. DOE should withdraw the current proposal, and use the Forest and Fish process as a model for developing a substitute rule.

The SMA is a partnership between state and local government. The state provides guidance on shoreline policy and limited oversight of shoreline management; local governments develop plans and implement regulations. During the past few months, DOE has negotiated with NMFS and USFWS behind closed doors. Repeated requests by local government associations and elected officials for inclusion in these critical discussions were unheeded. Thus, local officials, the entities responsible for implementing shoreline regulations, did not have an opportunity to work with their partner, DOE, in crafting practical and workable shoreline management guidelines.

It is troubling that the public was barred from the negotiations that resulted in Path B.

During late 1999, the National Marine Fisheries Service and U.S. Fish & Wildlife Service produced a so-called gap analysis that listed a number of provisions required by the federal services in order for the Guidelines to be eligible for a take limitation under Section 4(d) of the ESA. The list of requirements in the gap analysis was nearly identical to the list of provisions that numerous local governments stated they would be unable or unwilling to implement, many of which were clearly beyond the authority of the Shoreline Management Act. Thus, Ecology produced the current Path A/Path B approach, with Path B including the provisions required for a take limitation under Section 4(d) of the ESA.

Ecology has made no attempt to develop a consensus process to address the difficult issues surrounding the development of revised Shoreline Guidelines, integration with GMA, and compliance with the federal Endangered Species Act. The proposed guidelines are the product of negotiations

between Ecology and NMFS that lacked the participation of the very parties most concerned about ESA liability and that will be most affected by the proposed guidelines, namely, private landowners, businesses, and local governments.

✘ Ecology does not believe local governments will be exposed to increased liability under the ESA through the process that Ecology conducted in developing Path B. The stakeholder participation used in development of the shorelines rule was either equal to or exceeded that which was used for development of the Forest and Fish Report.

The public was not barred from development of Path B. Advance copies of Path B documents were circulated to interested local governments and other parties accompanied by briefings, prior to Ecology releasing the formal draft proposal. At that point, formal public involvement activities commenced consistent with Administrative Procedures Act and SMA requirements.

Process & Procedure - Public involvement in Path B

The previous shoreline guidelines commission did not address any issues related to the Endangered Species Act. In fact, the commissions were convened and concluded before any Endangered Species Act listings were really considered in relationship to the shoreline guidelines. So comments that are based on the fact that there have been previous commissions already and we need to go ahead and adopt these, one, they're false, and two, I think there are more important issues at stake that we need to take the time to do this right. Secondly, numerous groups have gotten up and spoken in support of Path B. It is interesting to look at the fact that the people who wrote Path B were basically Department Ecology and National Marine Fisheries Service. Path A is the version of the guidelines that's been around for a year or so that's received some public comment. The Path B version has really had little public input from anyone, whether it would be the environmental groups or tribes, business groups like ourselves or folks from the agricultural community. So I think it is very problematic to look at Path B with a lot of groups who say they support the guidelines and they support Path B.

✘ The Shorelines Guidelines Commission did recognize and address issues related to the ESA. The February 16, 1999 Final Report of the Shorelines Guidelines Commission references

direction given to the Commission from the Governor's Joint Natural Resource Cabinet "to prioritize revisions related to salmon recovery" (page 1, Introduction). The report recognizes "a premise of the Governor's Salmon Recovery Strategy is to use existing laws to comply with the ESA. Since salmon depend on many areas and resources within the jurisdiction of the SMA for their survival, the guidelines need to show how local master programs can help implement the strategy to recover salmon and their habitat" (pages 2-3, Reasons for Updating the Guidelines). The report also acknowledges a theme of guidelines update is to "provide clear guidance on how Shoreline Master Programs can be used as one tool among many for ESA response." (page 3, Themes in the Draft Guidelines).

Process & Procedure - Public involvement/hearings

A number of commentors took issue with Ecology's public involvement procedures. For example:

Ecology has failed to "show its work" as required by GMA. The legal deficiency is as follows: GMA requires early and continuous public participation. Local governments throughout Washington are mandated to follow "enhanced public participation procedures" when developing GMA land use policies. Given that local Shorelines Master Programs (SMPs) are considered a GMA ordinance, DOE should commit to meet the same high standard for public review.

The Hearings Boards have ruled repeatedly that satisfying this requirement requires the opportunity for "meaningful" public participation. For the public's participation to be meaningful", agencies must "show their work" that supports the proposed rule, not just show the proposed rule itself. Citizens have the legal right to see the agency's "work" BEFORE the opportunity for public testimony. Otherwise, the opportunity for testimony is inadequate (not meaningful) as a matter of law. No amount of public hearings, opportunities for written comment or "dog and pony shows" can cure this defect. Only the agency's action to "show its work" PRIOR to the opportunities for public participation is sufficient.

Ecology should meet with each local jurisdiction required to implement the Shoreline regulations to review the draft guideline and the requirements for compliance before the official public comment period and guideline adoption. The current process of publishing and distributing a complex regulatory document for comment is

inadequate and leads to confusion and misunderstandings. DOE may be underfunded, understaffed, etc., but the local governments that will be required to implement them have even less staff and less funding. We will be required to not only totally revise our Shoreline Master Programs, but to enforce these State regulations upon all future development. We should understand the guidelines and their ramifications, before they are adopted.

More public meetings should be scheduled in the rural counties. Two months with only eight public meetings is far too few for the majority of affected property owners to understand the full meaning of the new draft of proposed shoreline guidelines. Eight public hearings around the State of Washington are not enough to make sure all affected property owners fully understand the impacts of these proposed changes. The public meetings left out the areas of Mason, Kitsap, Jefferson and Clallam counties. With only a 60-day comment period for over 150 pages of detailed requirements, DOE is likely to have adopted the guidelines before citizens and local governments have been able to fully analyze their impacts. 5 hearings occurred when government & landowners were busy: Asso. Of Counties Convention & 4th of July holiday.

We request that Ecology withdraw the proposed rule and commence a negotiated rulemaking under RCW 34.05.310, in order to provide broad stakeholder participation in developing a new, more rational proposal. During this time, the DOE may choose to test facets of the existing proposal utilizing a pilot program under RCW 34.05.310 and 34.05.313, in one jurisdiction, in coordination with the negotiated rulemaking process.

The guidelines really reflect the process that's been used to get there. The business community including the Realtors' Association did not participate. There have been previous attempts at shoreline guidelines. The reason for the lack of participation from the business community was simply that the process was not a consensus process. It was a consensus driven by Ecology with other groups involved, but not based on consensus. And so for that reason the business community felt that, lacking consensus, there was not a reason to participate.

✘ Ecology believes the agency has done the necessary work to prepare the rule. Ecology has endeavored to engage all interested parties in a meaningful way from the earliest rounds of rule development. Activities included focus groups in Everett, Longview, Moses Lake and Tacoma and preparation of a statewide shoreline management public opinion survey in 1996; discussions

involving the full range of interests on the Shorelines Policy Advisory Group in 1996; the Land Use Study Commission Workgroup in 1997; the Shorelines Guidelines Commission in 1998/99; countless presentations before citizens, professionals and legislators; and two complete and formal rounds of rule review in 1999 and 2000. Over these years, Ecology believes that it has involved the public substantially in the rule development process. Ecology believes "broad stakeholder participation" did occur consistently throughout the five years it took to draft this rule.

Concerning the comment that citizens have the legal right to see the agency's work before the public comment period, the legal framework for public involvement is established by the Administrative Procedures Act (APA). The APA requires review and comment during a formal hearing and comment process. Ecology typically exceeds that and allows informal review prior to filing, and we did that in this case. Ecology met all requirements of the APA and the SMA in adopting the guidelines, including nine public hearings in urban and rural areas statewide in 1999, and in 2000, eight public hearings.

Under the SMA, sixty days is mandatory and eight hearings is double the minimum requirement. RCW 90.58.060(2)(a) and (b) state in relevant parts: "Comments shall be submitted in writing to the department within sixty days from the date the proposal has been published in the register. 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."

In setting hearing locations, Ecology tried to reach both major population centers and other areas that have demonstrated particular interest. We did our best to schedule hearings around other dates that could pose a conflict. For those that could not attend hearings, there was opportunity to provide written testimony.

Many people contacted us over the multi-year effort to prepare this rule and reviewed documents, as well as downloading them from our Website. Even path B, although it was prepared toward the end, was circulated informally before the rule was filed.

GMA hearing and adoption requirements apply to cities and counties

planning under the Growth Management Act, not to state agencies adopting an administrative rule. State agencies are governed by the Administrative Procedures Act (RCW 34.05) and in this case, the SMA.

The APA does not require an agency proposing a rule to meet individually with all local governments affected by a rule. That would be an inefficient way of seeking comments on the rule. The public hearing and public comment process, while not perfect, does provide a consistent way of obtaining review and comment – and is the process required under the law.

Process & Procedure

The question and answer portion of these meetings are not recorded. They should be recorded.

✘ The principle purpose of the question and answer period is to educate interested parties as to the content of the subject proposal, such that they may better provide informed comment and testimony at the formal public hearing. A question and answer period is not required by law nor is it required to be recorded. However, the Q&A periods for a number of hearings were taped by TVW and aired on public access television and are available on the Internet at www.tvw.org

Process & Procedure

While there was some tribal participation in earlier efforts to revise the Shoreline rules, the most recent Path A and Path B options were developed in a rush by Ecology and Federal representatives Tribal comments were submitted to the earlier efforts to revise Shoreline rules but these recommendations were disregarded in both the earlier and the current rule development effort. While NWIFC staff attended many of the negotiation sessions, tribal policy representatives were not provided a substantive opportunity to review and comment on Path B while it was under development. The failure to consult occurred because of the short time frame and because Ecology was unwilling to release copies of the draft regulations for review by persons who were not participating in the negotiations until the negotiations were substantially complete.

The tribes are co-managers of many of the species of fish and wildlife whose habitat is addressed by these rules. As co-managers of the resource, the Tribes are due a more substantive consultative role while the regulations were being developed. Tribal fisheries knowledge and experience would have improved rule language and provided

credibility for the resulting rule package. Significant initiatives such as the current rule proposal should not be developed in haste. Where an initiative impacts treaty resources, full and meaningful tribal consultation should be a prerequisite.

☒ Throughout Ecology's process of drafting the rule we have endeavored to fully engage tribal representatives throughout the state. From our earliest rounds of rule development, tribal representation was provided on the Shorelines Policy Advisory Group (1996), the Land Use Study Commission Workgroup (1997) and the Shorelines Guidelines Commission (1998/99). In Ecology's weekly discussions with the federal services (NMFS and USFWS) that occurred in February through May 2000, tribes were invited to all the meetings. Several tribal representatives attended early on and a NWIFC representative was in attendance at all but one meeting. More recently, Ecology staff together with Services staff, have consulted Tribal representatives regarding the guidelines in Mount Vernon on May 11th, on May 18th at a day long session at NWIFC headquarters in Olympia, and again on September 6th and 26th, 2000.

Process & Procedure

Ecology stated that farm groups that had an opportunity to put input in this plan as it was developed in the early stages. I have been president of the Washington Cattlemen's association for my second year, and I checked with the past president who had been president for two years prior to that, and it was news to both of us. So I want to enter that into the record that I don't think that agriculture groups have actually been represented.

☒ Agricultural representatives (through the WA State Farm Bureau and Grange) were invited to participate in all the advisory committees Ecology set up to help draft the rule. Mr. Franklin Hanson represented agricultural interests on the Shorelines Policy Advisory Group in 1996, and Mr. Dan Wood represented agricultural interests on the Land Use Study Commission Workgroup in 1997. In response to Ecology's invitation, in a June 29, 1998 letter to Director Tom Fitzsimmons, the following statement was made by Steve Appel of the Farm Bureau and Bob Joy of the Grange: "The Washington State Farm Bureau and Washington State Grange are declining to nominate anyone from our organizations to represent agriculture on the department's Shorelines Guidelines Commission."

The letter continues "The Washington Cattlemen's Association has informed us that they also declined to nominate a member from their organization. For your information, our three organizations have broadcast our decision to the Presidents of other agricultural organizations in the state. We have requested that they honor our decision and also decline to participate in the process."

Process & Procedure – Timeline

It will take more than 2 years to develop new SMP's and I support Ecology's request for extending that timeline. Local governments will not be able to update their master programs within this statutory timeframe. Local governments are already engaged in a wide variety of planning and management efforts to meet ESA and other mandates..

There needs to be a phased process for DOE to review SMPs across the state and within regions, because all the documents for a county and region need to be compatible.. There needs to be a phased process for the larger entities, those with lengthy and complex shorelines. There needs to be a way for DOE to review docs in process, to catch obvious errors in the Plan which has to be drafted before the Regs. A time should be set for component parts - Plan and Regs. If a County were to be required to have text within a year, there could be a budget established for the legislature to fund for that year. If a County had not designated its shorelines in the past (Skagit County did so designate), then that component could be budgeted for also. Once the draft is complete, then the public process begins. Is this SMA process the same as a GMA process?

There ought to be a relationship between Whatcom County (which controls the Upper Skagit), Snohomish and Island counties (which are impacted by the Lower Skagit), and Skagit County. In addition, Seattle is apparently claiming that its fish obligations will be taken care of in the Upper Skagit area. Who expects that these negotiations can be done easily or quickly? Even if the public were left out entirely — an unacceptable idea — negotiations take time and DOE approval traditionally takes even longer.

Two years to revise and adopt a SMP is an unacceptably lengthy period to achieve SMA and ESA compliance.

☒ Gaining more time to comply with the deadlines for updating SMP's (currently two years from Ecology's adoption of new guidelines), will require action of the Legislature to amend the SMA. For both efficient workload and effectiveness reasons Ecology has always supported a time extension. For the last

two sessions, Ecology has supported and/or sponsored statutory amendments that would extend local governments time deadlines up to five years from adoption of new guidelines. Such legislation has not been approved by the Legislature. Agency (Ecology) request legislation requesting such time extensions will again be forwarded to the Legislature for consideration in the 2001 session.

Process & Procedure – Timeline

The two year time frame that's included in the rule begin when that funding is provided, and not at the outset of the rule adoption.

☒ The 2-year time frame is set in the SMA (90.58 RCW). Ecology does not have authority to change the deadline through a rule.

Process & Procedure – Timeline

Everett is requesting DOE delay publication of a rule until: 1) discussions are held with representatives of the Tri-County Urban Caucus and NMFS; 2) discussion address the Urban Built Proposal responding to NMFS 4(d) rule; 3) DOE gives more complete consideration to the comments on the rule; and 4) the extension of shoreline jurisdiction is more fully discussed.

☒ Ecology has met directly with Tri-County officials and staff on multiple occasions during development of the rule to hear their concerns, which Ecology is obliged to respond to in this rule development process. It is not within our discretion to further delay the process.

Process & Procedure – Timeline

From the perspective of local government, I would hate to be put in the position of having Ecology adopt a rule that is then appealed, and we are not sure whether we should proceed, assuming that rule is going to be upheld, or we should wait, see what the outcome of that appeal might be, and then miss out on the two year time frame that we have been given to comply with the rules. So if that happens, I'd like to see some recognition be put in there to cover that.

☒ The current language of the statute does present this possibility, however Ecology cannot alter through rule either the appeal provisions or the time frame for local government compliance.

Process and Procedure – Small Business Economic Impact Analysis:

The Department of Ecology (DOE) has failed to develop a Small Business Economic Impact Statement (SBEIS) in accordance with the state Administrative Procedures Act (APA) and Regulatory Fairness Act (RFA), Sections 34.05.320 (1) (k) and 19.85.030 RCW, respectively. Primary justification for failing to provide an SBEIS is based on an exemption provided by RCW 19.85.025 (3), which exempts from the requirement to provide an SBEIS the “adoption of a rule described in RCW 34.05.310 (4). This provision exempts, per RCW 34.05.310 (4): “Rules relating only to internal government operations that are not subject to a violation by a non-government party.”

Although the proposed rule does include significant requirements for “internal government operations” which must be implemented by local governments when updating their respective Shorelines Master Programs (SMP), it is also clear that the proposed rule includes substantive requirements that must be adopted as regulations by local governments. Those regulatory features of the proposed rule will be imposed on, and therefore “subject to a violation”, non-government parties. This is especially true when considering the rule in light of the DOE’s Master Program review and approval requirements in RCW 90.58.090 which requires that the DOE review and approve all local master programs, segments of a master program, or amendments to a master program

The regulatory reform requirements do apply to the guidelines even though in the preamble the guidelines conclude that RCW 34.05.328 does not apply to rule adoption. However, the guidelines also state that the rules are significant under RCW 34.05.328 and that DOE has voluntarily conducted the additional analysis required under RCW 34.05.328. If the rules are significant, as DOE concludes and as they must be under RCW 34.05.328(5), they are subject to Regulatory Reform requirements and any analysis pursuant to RCW 34.05.328 is not voluntary. Therefore, the analysis should have been completed in conjunction with the rulemaking process and made available to the public. However, the voluntary analysis was not made available through the proposed rule notice and it has not been incorporated in the DEIS for the proposed guidelines. This analysis should be completed and made available for public comment before adoption of the guidelines.

The discussion in Ecology’s CR-102 form of why an SBEIS has not been prepared states that: “It is clear that the process will

affect private businesses and individuals, but the nature of those impacts will depend on the specific choices made by each jurisdiction as it complies with these guidelines. Further, that process will involve significant public involvement at the local level, during which these concerns can be raised and addressed.” There is however, no statutory provision exempting a state agency from preparing an SBEIS based on the local rule adoption process, which means that DOE is still required to prepare an SBEIS.

Since DOE has failed to include an SBEIS as required by RCW 34.05.320 (k) it has failed to meet the requirements of RCW 34.05.375 which states that “No rule proposed after July 1, 1989, is valid unless it is adopted in substantial compliance with RCW 34.05.310 through 34.05.395.” Therefore this proposal, if adopted, will not survive legal challenge and should be withdrawn until a Small Business Economic Impact assessment is conducted and an SBEIS developed in accordance with the APA and RFA.

The proposed rule contradicts this statement because any proposed mining use is seriously undermined. An economic impact (not minor) WILL occur as a direct result of these regulations. These required actions would be the sole cause for significant costs to be incurred and in terms of businesses of fifty employees or less, (a significant portion of our industry especially in smaller rural counties); this is a significant economic impact.

✘ Ecology does not agree with the contention that an SBEIS was required. As stated in the CR-102: “RCW 19.85.025(3) provides, ‘This chapter does not apply to the adoption of a rule described in RCW 34.05.310(4).’ One of the categories of rules referenced by the above is ‘Rules relating only to internal governmental operations that are not subject to violation by a nongovernmental party.’ In this case, the regulated community consists of local governments required to prepare and implement SMPs by the Shoreline Management Act. It is clear that this process will affect private businesses and individuals, but the nature of those impacts will depend on the specific choices made by each local jurisdiction as it complies with these Guidelines. Further, that process will involve significant public involvement at the local level, during which these concerns can be raised and addressed.”

Process and Procedure – Cost Benefit Analysis

The Regulatory Reform Act of 1995 requires a cost benefit analysis. We believe that such

an analysis should identify and address costs and benefits to local governments, owners and developers of shoreline properties and projects, and the public generally, including likely effects on property values and state and local tax revenues.

An economic impact analysis should have been released before or concurrent with the rule. The rule places heavy financial burdens on local government & landowners. However, it is hard to estimate the costs, and by July 25, 2000, the agency still had not engaged in the pre-adoption cost-benefit analysis of the proposed rule required under the administrative procedure act, RCW 34.05.328(c).

DOE claim DEIS requires no socioeconomic or cost-benefit analysis is incorrect. WAC language indicating SEPA requires no socioeconomic or cost-benefit analysis is in substantial conflict and inconsistent with SEPA requirements, language, and intent, and with WAC definition of NEPA as “like SEPA at the federal level”, thus SEPA (and NEPA) intent must be followed.

Public comment deadline date precedes DOE release of “Evaluation of Probable Benefits and Probable Costs” - referenced and incorporated on DEIS page 8 - in violation of WAC 197-11-425(5),(6), thus Ecology bears legal obligation to extend public comment period. We request that the public comment be extended for a period of 60 days from the publication of the cost-benefit analysis.

✘ There has been some confusion about what Ecology is required to do in terms of economic analysis and benefit-cost analysis. A benefit-cost analysis is required by the Administrative Procedures Act (in RCW 34.05.328(1)(c)). This analysis is used by agencies as they make their decisions on whether to adopt a rule and the content of the rule. The analysis is used to determine whether the “probable benefits of the rule outweigh the probable costs” (RCW 34.05.328(1)(c)). The analysis is not required to consider all conceivable outcomes of every aspect of the regulations.

The APA only requires the analysis to be completed prior to rule adoption (RCW 34.05.328(2)), which is the date the Director of the Department of Ecology signs the rule. Ecology has prepared a benefit-cost analysis as required by the APA and is part of the public record relating to this rule making activity. Thus, Ecology rejects the notion that the comment deadline be extended until the benefit-cost analysis is completed, as it is not a requirement of state law that the analysis be completed within the public comment period.

Other work is being done to update estimates of the costs of the rule on local government that were prepared summer 1999. This work will be done in conjunction with the county and city associations, and will be conducted during fall 2000. In terms of the impact of the rule on local property values, we refer you to the Shoreline Management Act, RCW 90.58.290, which states: "The restrictions imposed by this chapter shall be considered by the county assessor in establishing the fair market value of the property." Shoreline property in general has continued to appreciate in value since the SMA was adopted, and we expect that trend to continue.

Process and Procedure - SEPA

SEPA requires a governmental agency whether state or local to analyze the environmental impacts of its major actions. The same basic rules apply whether the proposed action is legislative in nature, or as in adopting an ordinance or responding to a permit application. One of the basic requirements of SEPA is the preparation of an EIS if the governmental agency determines that a proposed major action will have probable significant adverse environmental impacts. The agency then makes the determination through the threshold determination process. If probable impacts are determined to be significant, an EIS must be prepared. As a result of this time consuming and expensive process, it is not unusual and more the norm for the applicant to address specific mitigation's either before the project is proposed or during the threshold process.

The revisions as proposed especially for the "mining" have superceded this process, made the determinations that any and all impacts are not able to be successfully mitigated and essentially provided denial of the application before it has even been contemplated. The ability for predetermination to deny outright without opportunity to propose such a project is NOT within Ecology's authority in this or SEPA statutes. The rules as proposed would even require hydrogeological and biological studies without regard to necessity. This and the provision for facilities that have extracted minerals to conduct such studies in order to continue would violate existing permit conditions, and dismisses out of hand earlier EIS, SEPA, and GMA satisfactory determinations legally concluded and made in accordance with state law and local government ordinance.

☒ The guidelines and subsequent SMPs provide the framework within which the environmental consequences of a project

are considered. They also provide a reasonable basis for looking at the overall and cumulative impacts of development which no one project permit process can adequately address.

Process and Procedure - SEPA

SEPA: ESHB 1724 included provisions that provided that certain land use decisions made in the GMA comprehensive plans and development regulations COULD NOT BE REVISITED during project review. In addition, a city or county planning under the GMA may determine that SEPA's requirements for the analysis and mitigation for the specific adverse environmental impacts of a project action have been adequately addressed in the jurisdictions comprehensive plan and development regulations. While the local government decisions made through GMA are subject to review and comment by state agencies they are NOT approved by the state.

☒ The commentor is correct in that local governments do have the ability under the Local Project Review Act (RCW 36.70B) and under SEPA (RCW 43.21C) to make those determinations. However, that ability does not supercede Ecology's responsibilities to review and approve SMP's, and Ecology's role in reviewing local permits issued under the SMA. Those requirements in the SMA were unchanged by ESHB 1724.

Process and Procedure - SEPA

SEPA: The proposed rule and related EIS fails to address the fact that a local government's existing valid master program or the fact that it was adopted and was determined by the state to be consistent with the Legislative intent of RCW 90.58.

☒ An assertion is made that proposed rule does not address the fact that the previous master program was found consistent with the SMA and approved by the state. Approval of a prior master program under previous state rules does not negate the responsibility to update a master program when state rules are revised. See RCW 90.58.080.

Process and Procedure - SEPA

SEPA: The plan and EIS failed to address or review specific local governments' existing comprehensive land use plans, existing land use regulations and the social and economic impacts relating to the cost of implementation or the economic long-term effects of the results of implementation

within specific counties and Washington State. The EIS failed to specifically note any area of local government's master program that was not consistent with RCW 90.58.

☒ It is clearly the responsibility of local governments to evaluate their own plans and regulations. See RCW 90.58.020, 90.58.050, 90.58.080, and 90.58.090, at a minimum.

Process and Procedure - SEPA

SEPA: It appears that the proposed regulations may remove and replace the authority and protections of SEPA, making piece-meal of a currently uniform policy. Processes and safeguards are in place through SEPA that can fulfill the requirements mandated by the proposed regulations. However, SEPA allows decisions at the local level, whereas the proposed regulations will move the requirements and decisions to state level. If more protection is required for the ESA listed species, it may be more appropriate to address the need through SEPA enhancement than an overlapping, undermining, and, in many cases, redundant regulation. Doing so may cause confusion at the least and conflict at the most between requirements of the State of Washington.

☒ Ecology does not agree with the assertion that "...the proposed regulations may remove and replace the authority and protections of SEPA..." SEPA is an information gathering tool designed to provide information on potential environmental impacts to decision-makers who are taking "actions" as defined by SEPA. There also is substantive authority (the ability to condition or deny proposals based on the authority of SEPA) inherent in SEPA, in certain specific instances. See RCW 43.21C.020, 43.21C.030, and 43.21C.060, at a minimum. Nothing in this rule will change how SEPA is administered, nor affect SEPA's substantive authority.

Process & Procedure - Implementation plan

Ecology is required to prepare an "implementation plan" for the rule. RCW 34.05.328(3). Among other things, the implementation plan should describe how the agency will implement and enforce the rule, including the resources it will rely on to implement the rule. The implementation plan should also be included in the rulemaking file made available to the public before rule adoption. The implementation plan requirement is highly relevant to the proposed SMA guidelines where it is highly unclear how DOE will implement Path B to

provide ESA assurances promised under the proposed guidelines. The implementation plan requirement for a disclosure of necessary resources is also important in considering whether the proposed rules are excessively costly, inefficient, or impose unfunded mandates. The proposed guidelines are lacking any sort of implementation plan as required by the regulatory reform laws, thus the affected public has little idea about the implementation or impacts of the rule.

Given the drastic impacts on local and state agency resources, let alone the general public, an implementation plan as required under RCW 34.05.328(3) should be available for public review and comment prior to rule adoption.

✘ By the date of adoption, Ecology is required to prepare an implementation plan that shows how we will implement the rule. This implementation plan is in Ecology's rule-making file. Regarding the disclosure of necessary resources, the requirement in the APA is that the implementation plan address the agency's resources, not all resources of all agencies. Thus, it only addresses resources that Ecology is using to implement the plan.

Process & Procedure - Concise Explanatory Statement

We look forward to reading the response to these comments indicating how the final rule (should the agency adopt it) reflects DOE's consideration of these comments, or explaining why the agency failed to do so, as required by RCW 34.05.325(6)(a)(iii). We request a sufficiently detailed response from DOE, both in defending its policy preferences and explaining the scientific basis for many of its most restrictive provisions, to permit both the Legislature and the people of Washington to have a clear understanding of the basis for the agency's action.

✘ Ecology believes the responses in this document provide the details requested by this comment, and meet the requirements of the APA.

Process & Procedure - Least Burdensome Alternative Analysis

You indicated that the changes will eliminate burdens and outdated regulations, clarify state interest in shorelines, and incorporate more efficient and effective regulatory reform measures. You haven't indicated how the current rules are less burdensome than what we have now.

According to the Administrative Procedure Act this is for all agency rule-making. RCW 34.05, the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives of the statutes that the rule is to implement. So I think we need to make that clear. I think this is quite descriptive and very restrictive.

You say that Path A is the minimum to meet SMA, the underlying law that gives you the direction and ability to adopt shoreline guidelines, that's already been in existence. You have approved many plans as meeting that law. Why, since there has been a minor amendment to the SMA - since then, what has changed? Wouldn't the minimum be to leave the guidelines alone?

✘ Determinations regarding the least burdensome alternative are included in the Environmental Impact Statement and the Benefit/Cost Analysis prepared for the guidelines rule.

Since the current guidelines were drafted in 1972 there has been both enormous change to the shoreline environment in this state and great advancement in the science of understanding shoreline processes and functions. The guidelines take into account these changes and advancements.

Process & Procedure - Least Burdensome Alternative Analysis

Site-specific measures to protect salmon could effectively be implemented through elimination of State Environmental Permit Act (SEPA) exemptions in the shoreline jurisdiction, rather than implementing a one-size-fits-all set of rules that impose harsh regulations on streams that have never seen a fish. RCW 34.05.328(d) requires the Department of Ecology determine "the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives [of the statute that the rule implements]." These complex, highly restrictive, proscriptive rules cannot meet this requirement. These rules impose similar (though not identical) standards on streams that have never seen a fish as on prime salmon habitat.

Although DOE has denied that such a system would be less burdensome, the system would clearly be less onerous for both property owners and local governments. An environmental checklist similar to a SEPA checklist could be developed by the department, and property owners whose development would result in certain specified impacts would be required to mitigate for those impacts. The flexibility of this

regulatory system would result in increased compliance, and would result in both greater protection for fish and greatly enhanced options on the part of the landowner.

And while the DOE has claimed "consideration of alternatives that are not within our authority to adopt is inconsistent with the provisions of the APA" (Aaland e-mail, cited above), certainly if DOE can spend years developing a highly complex and technical proscriptive regulatory system, it could just as easily have developed a permit system similar to the SEPA system for shorelines. The time and effort invested could have been used in developing specific checklists which might vary on a watershed, or even stream, basis, and training local government SMA administrators in evaluating such checklists and imposing site-specific mitigation conditions.

✘ Under ESHB 1724, passed by the 1995 legislature, the Local Project Review Act (RCW 36.70B) was created and SEPA was amended to clarify that review at the plan level is preferable to review at the project level. See intent and findings for RCW 36.70B.030; RCW 43.21C.240. In addition to these basic statements of legislative intent, consideration of alternatives that are not within our authority to adopt is inconsistent with the provisions of the Administrative Procedures Act (RCW 34.05.328(d)). The alternative which you propose would require the action of the legislature.

We would note that the change you propose appears to impose far greater burden on both local government and individual project proponents to achieve the same level of protection of shoreline resources. The open ended requirement for identification of environmental values, evaluation of probable impacts and development of appropriate mitigation of those impacts on a piecemeal, case by case basis is inherently less fair, less efficient, less effective and more costly to local government and individual project proponents than the programmatic approach envisioned by the SMA.

Process and Procedure - Adoption By Reference

The APA allows agency rules to incorporate by reference any code, standard, rule, or regulation that has been adopted by, inter alia, an agency of the United States or this state. RCW 34.05.365. Adoption connotes a final rule, regulation, or standard that has been formally adopted through a rulemaking process and not a proposed (but unadopted) rule or a policy or guideline that has not been formally adopted through due process such as notice and comment under the state or

federal APAs. The SMA guidelines reference and incorporate several external standards that are not in accord with this requirement.

✘ Ecology cannot respond to this comment. No particular references were provided other than "several external standards," and we are unaware of what standards the commentor is referring to.

Process and Procedure - Federal Involvement

It is our understanding that Ecology must conduct NEPA review of the proposed rules. Did the Services (NMFS and/or USFS) provide financial contributions to Ecology to prepare the proposed rules? Has NEPA review been initiated? What notice was provided to local jurisdictions?

Lead agency for proposal is US Environmental Protection Agency via powers granted in "Environmental Performance Partnership Agreement Between the Washington State Department of Ecology and the United States Environmental Protection Agency", thus proposal is subject to NEPA and Small Business Regulatory Flex Enforcement Act.

Because the Environmental Protection Agency is lead on this rule you are subject to the federal Small Business Regulatory Fairness Act and the federal Regulatory Flexibility Act.

✘ The Washington State Department of Ecology is the lead for this proposed rule adoption. The EPA is not. The two federal laws cited do not apply to this state rule adoption process. NEPA review of the proposed rule is not required. This rule is a state action taken for the purpose of implementing a state law, the Shoreline Management Act. Pursuant to the State Environmental Policy Act (SEPA), Ecology is the lead agency on this project and Ecology has promulgated a Draft Environmental Impact Statement analyzing the environmental impacts of the proposal.

The document referenced in this comment, the "Environmental Performance Partnership Agreement" between the Washington Department of Ecology and the United States Environmental Protection Agency, is simply a work plan agreement relating to how Ecology will carry out EPA-funded projects. It does not establish EPA as the lead agency for projects carried out by Ecology. Further, the Shoreline Management Act is not mentioned in the agreement.

Process & Procedure - respond to comments on earlier drafts

The current draft rule does not respond to the substantive comments offered on earlier drafts in any meaningful way. Ecology seems intent on accomplishing sweeping changes in the direction and structure of shoreline regulation in this state without the inconvenience of allowing the legislature or the citizens of the state to fulfill their proper role. We believe this course of action is both ill-advised and counter-productive. If we are to establish rules that effectively regulate the impacts of human activities on the environment, it is essential that both the substance of those rules and the process by which they are adopted are accepted by a majority of our society. We do not believe that the proposed guidelines meet this test. We would request that the Department withdraw these guidelines and start over.

The public record for the April 1999 draft be reentered, reviewed, and responded to, and made an official part of this current record.

Our comments are not reflected in this new document. We have all heard many instances of deceit and underhanded tactics by the DOE right here tonight. But think of the arrogance of anyone to remove public comments in the past proposal so they would not have to respond. Imagine the arrogance of the individual who would do that. These people can't be trusted. And don't let them sit here and tell you this is all about saving salmon, bull trout, cutthroat, or any other endangered species, because this all about gaining control of every inch of rural America, and we have to stop this proposal right now or we're in deep doo.

✘ The current proposal is the product of a five-year process of public and interested party involvement and includes changes in response to comments submitted concerning the proposal from 1999 as well as the "working draft" produced prior to the current adoption process. Response to specific comments on the 1999 draft would be meaningless in this process as those comments do not address this proposal and thereby could not be reasonably applied to the current proposal.

Process & Procedure - delay adoption of rules

: Rule adoption is premature. These guidelines will have a tremendous impact on rural Washington landowners and economies; impacts that have not been fully identified or discussed. Delay adoption of the guidelines until after the legislature has had

an opportunity to review the proposed rule, discuss policy changes that are necessary to implement the guidelines, and fund the master plan updates.

✘ Ecology does not concur that adoption of the guidelines is premature. The guidelines have been studied and developed for nearly five years. A draft was circulated during the 2000 legislative session, and presented to various legislative committees. No action was taken by the legislature to amend our mandate to adopt new guidelines. Future sessions of the state legislature will be able to consider policy changes to the SMA if deemed necessary.

Process & Procedure - do not delay adoption of rules

Move forward on the update of the Shoreline Guidelines. The guidelines are now 29 years old and badly outdated. Recent salmon listing across the state have underscored the fact that we are not managing these areas well. Beaches and shorelines are an important public resource that the state should protect.

✘ Ecology has adopted the guidelines rule and will be working diligently with local governments in the months and years ahead on local master program updates.

Process & Procedure

You folks are missing I think a real basic element here, a real basic piece of the puzzle. If you lose the confidence of the people that you serve, you have lost everything. Bureaucrats only have the power that the people will give them. I urge you to start from the bottom up. Don't try to dictate policies, laws, behavior, because the only true way to get to the behavior that we all need, and we all want to preserve the environment, is to work together.

✘ Comment noted.

Process & Procedure

How many employees do you have at the Department of Ecology? The other question I would like a written response to is your 1,000 employees were not able to write the shoreline drafts as we have seen them. And I understood that Mr. John Owen has been paid to write, revise, and write again the shorelines thing, at the cost of all of our tax payers, ladies and gentlemen. One thousand employees couldn't put this together so they went out and they hired a consultant and he has had three tries at it. Doesn't that make you feel good? I would like to know how much money the Department of Ecology has spent on that laborious effort.

✘ Ecology employs more than one thousand people. The commentor is correct that consultant services were retained by Ecology to assist in drafting the subject rule. The contractor was hired through a competitive selection process and brings unique experience and expertise to the project that is not available from in-house staff. No funding to hire Ecology staff was provided from the Legislature to implement the statutory mandate to update the guidelines. Ecology's Fiscal office includes records that would indicate the total amount spent on the project.

Process & Procedure

If you want to make the rules more efficient, and for the life of me, I don't understand how these rules are going to become more efficient. If you want efficiency, what you need to do is move toward what we started several years ago in Washington State and try to get one land use code. The LUSC tried to do that. They ultimately gave up in failure. But you want efficiency. You need to get everything under one umbrella.

✘ What is suggested is beyond the scope of this effort.

Process & Procedure

Local agencies that choose the path B option will be delegated with authority that is similar or duplicative to WDFW. An example is the requirement under this option to identify properly functioning conditions and implement regulatory standards and management policies for these areas under shoreline jurisdiction. This is a substantial task that would be expected of local agencies to carry out. Do local agencies have the expertise and staff to identify and manage these jurisdictional areas? A closer look should be given to the overlap in jurisdiction that is being proposed under path B and that which is vested under WDFW

✘ While local governments are encouraged by these guidelines to coordinate planning with other resource agencies, the SMA ultimately places responsibility for developing SMPs on local governments. Ecology supports increased funding for local governments to carry out the planning required by these guidelines.

Process & Procedure

A group should be formed to draft a model program that could be used by local jurisdictions. The model should address all the major issues so that each local jurisdiction could use this to update their existing Shoreline Programs. This would

assist local jurisdictions in maintaining a common framework for their programs and also reduce costs.

✘ Ecology intends to use the suggested approach in updating the Shoreline Management Guidebook.

Process & Procedure

At the meetings five years ago, the DOE was told to make minimum changes if there was to be public acceptance. Salmon requirements have altered that possibility, but it is entirely unclear whether every jurisdiction has to start from scratch.

✘ Starting from "scratch" is a relative term. If a local government has periodically reviewed and updated its master program over the years, less effort may be necessary to bring the program into compliance with the updated guidelines. Also, many local governments have addressed shoreline issues in their local critical areas ordinances required by the GMA. In such cases, local governments are allowed and encouraged to use such regulations (through reference in the SMP) to also, where applicable, satisfy the requirements of the SMA and the guidelines.

Process & Procedure

The summary matrix should compare the proposed rule with the current rule, not the "working draft".

✘ Ecology's environmental impact statement makes this comparison.

Process & Procedure

What happens to the guidelines after the end of the comment period? Could you put your answer as a "timeline" on your web page? If we buy a house in Kitsap County will we be able to add a patio or sunroom if it is within one site potential tree height of the shoreline?

✘ Following the comment period, Ecology reviewed the comments, made necessary changes to the rule consistent with the SMA to address the comments, responded to all interested parties, completed a cost/benefit analysis, a FEIS, assembled related materials required by the SMA and APA and adopted the revised rule within 180 days of its publication in the state register. These actions will be documented on our web site. Local development restrictions will ultimately depend upon the specific requirements of the updated county SMP.

Process & Procedure

It is requested and recommended that DOE either develop several pilot project SMP's or step back, convene a task force, and work with the legislature to develop a viable program that is affordable and workable for local government, especially for small municipalities.

✘ It is likely that Ecology will engage in "pilot project SMP's" with willing local governments (especially small jurisdictions) during the process of updating the Shoreline Management Guidebook and related technical assistance materials.

Process & Procedure

Until the discussion regarding the urban counties and cities purchasing mitigation lands is settled these proposed regulations should not be adopted. To the general public these mitigation measures appear to be a way for urban areas to 'buy their way out' of the proposed regulations. If these proposed regulations are adopted before the end of this discussion, DOE will have tampered with the market value of those lands affected by these new regulations. The more prosperous counties and cities can then step in and buy cheaper mitigation land.

✘ It is highly unlikely that the single act of purchasing "mitigation lands," even if successful, would adequately address the range of shoreline ecological functions and processes required to be protected and restored by the SMA (see policy directives in RCW 90.58.020). The requirements of the SMA and the guidelines apply equally to "urban counties and cities" and rural counties and cities in Washington state.

Process & Procedure

The guidelines should require local governments to accept public input during the local SMP development process.

✘ This is an explicit requirement of the Shoreline Management Act. Please see RCW 90.58.130 and WAC 173-26-090.

Property Rights & Taking

Many commentors wrote with concerns that the rule violated property rights. For example

Restrictions, setbacks, and development requirements in the rule undermine property rights, threaten economic development, and will cause unconstitutional "taking" of private property and land owners should be compensated.

Under RCW 90.58.020 the agency was supposed to balance other goals of the Shorelines Act with the goal of "recognizing

and protecting private property.” This has obviously been disregarded since implementation of the proposed guidelines would result in taking of large areas of private land.

RCW 90.58.020 establishes an appropriate balance between economic and environmental needs. The proposed rule fails to strike a balance between environmental protection and private property rights. The rule should allow for a balance of development, industrial use, and protection of the environment. Increased standards severely limit or prohibit development, including new single-family homes and additions to existing homes. New development not only provides homes for citizens, but it also provides a tax base for local governments. In addition, taking away rights to build on land creates a threat to local government of costly regulatory takings battles in court.

The proposed rule includes no provision defining property rights or describing the limits of police power local government should observe.

This proposal focuses on limiting economic activity and development in shoreline areas and uplands. The proposal also unfairly limits the ability of rural communities to diversify and expand economic opportunities in areas suitable for development of natural resource related industries, as envisioned in RCW 36.70A.365.

✘ Ecology does not agree that implementation of these guidelines will result in any taking of private property. Government has the authority and responsibility to regulate or limit the use of property to protect the public health, safety and welfare. While the intricacies of takings law are beyond the scope of this responsiveness summary, in general, a regulation constitutes a “taking” only if it fails to advance a legitimate state interest, deprives the landowner of all economically viable uses of his property, or destroys a fundamental property right. In addition, a specific permit condition may constitute a taking if it imposes a burden on the property owner that is not roughly proportional to the public impact sought to be mitigated. Here, implementation of these guidelines advances the legitimate state interest in the preservation and restoration of state shorelines.

This public interest is strongly stated in the Shoreline Management Act’s opening section. See RCW 90.58.020. Also, implementation of these guidelines will not deprive landowners of all economically viable uses of their property. Many uses and structures are expressly permitted by these guidelines

and others may be permitted if certain conditions are met. Indeed, implementation of these guidelines will have many positive economic impacts because shoreline areas will be protected from inappropriate development. In addition, implementation of these guidelines will not deprive landowners of any fundamental attributes of ownership or result in any disproportionate burdens. Mitigation under these guidelines is expressly limited to mitigation for the adverse impacts of the specific development proposal.

The scope of private property rights and the limits of local government police powers are delineated elsewhere in state law and are not within the scope of this rule.

These guidelines attempt to balance a number of competing interests, including promoting environmental protection while allowing appropriate development. The guidelines do not prohibit all development.

Property Rights & Taking

“Take” & “Takings” should be defined in the rule.

✘ This is a federal constitutional issue elucidated by United States Supreme Court decisions handed down during the preceding two centuries. It is not appropriate to address this issue in a state agency rule.

Property Rights & Taking

There are serious legal questions as to whether development permits can be conditioned on “exactions” requiring mitigation for adverse effects of prior projects or actions of unrelated parties. See, for example, the U. S. Supreme Court decisions commonly referred to as Nolan and Dolan and subsequent exaction cases in this state and other states. The fine points of exaction law are beyond the scope of these comments, but we urge DOE to consult with the Attorney General’s office on this subject. The draft guidelines, if adopted in their current form, probably would cause considerable litigation relating to improper exactions for redevelopment projects, at considerable cost to local governments and the state. Although most of those costs probably would fall on local governments, local governments may seek indemnity from the state to the extent the DOE guidelines require them to demand unlawful exactions.

✘ Ecology does not agree that implementation of these guidelines will result in any “exactions” of property. The Nollan/Dolan cases you cite are

limited to required dedications of private property. These guidelines do not require any such dedications and instead give local governments flexibility in how they achieve the established goals.

Property Rights & Taking

Has DOE reviewed the rules for consistency with the Attorney General’s takings checklist? Where is the budget to provide compensation? The majority of the counties do not have enough budget to provide compensation if they are required to implement the proposed guidelines- Does DOE have money set aside to pay for the property taken through implementation of the guidelines?

✘ These rules have been reviewed for consistency with the Attorney General’s Advisory Memorandum for Evaluation of Proposed Regulatory or Administrative Actions To Avoid Unconstitutional Takings of Private Property (1995). In that document, five “warning signals” are specified: (1) Does the regulation or action result in a permanent physical occupation of private property? (2) Does the regulation or action require a property owner to dedicate a portion of property or to grant an easement? (3) Does the regulation or action deprive the property owner of all economically viable uses of the property? (4) Does the regulatory action have a severe impact on the landowner’s economic interest? and (5) Does the regulation or action deny a fundamental attribute of ownership?

For the reasons stated elsewhere in this responsiveness summary, we do not believe that these guidelines trigger any of these “warning signals.” As to compensation, the establishment of such a fund is beyond the scope of this rule and would require legislative action.

Property Rights & Taking

If this proposed rule is adopted as written and local jurisdictions are forced to amend their SMPs accordingly, aggrieved landowners/developers will seek redress through the court system. Consequently, DOE needs to articulate why it believes the proposed rule, and the accompanying local SMP amendments, will pass constitutional muster. In particular, DOE needs to address how takings and substantive due process claims will be handled. Substantive due process claims may be especially difficult to refute. We would remind DOE that the courts have laid out the following test for such claims: Whether the regulation is aimed at achieving a legitimate public purpose; Whether it uses means that are reasonable

necessary to achieve that purpose; and Whether it is unduly oppressive on the property owner. [Guimont v. Clark, 121 Wn.2d 586, 854 P.2d 1 (1993). Cf. Presbytery of Seattle v. King County, 114 Wn.2d 320, 787 P.2d 907 (1990).] The third prong of this test is the most problematic.

✘ For the reasons stated above, Ecology does not believe that implementation of these guidelines will result in any taking of private property, nor do we believe that these guidelines violate substantive due process. As noted elsewhere, these guidelines advance the state's legitimate interest in the protection and restoration of state shorelines. Further, these guidelines are not unduly oppressive because they do not deprive landowners of all economically viable uses of their property and they confer economic benefits by ensuring that only appropriate uses are made of state shorelines.

Property Rights & Taking

The Guimont court laid out the following nonexclusive factors that should be considered: On the public's side - 1. the seriousness of the public problem; 2. the extent to which the property contributes to it; 3. the degree to which the regulation solves it; and 4. the feasibility of less oppressive solutions. On the property owner's side: 5. the amount and percentage of value loss; 6. the extent of remaining uses, past, present, and future; 7. the temporary or permanent nature of the regulation; 8. the extent to which the property owner should have anticipated the regulation; and 9. the feasibility of altering present or currently planned uses. At this juncture, DOE needs to answer the question of how Best Available Science justifies the proposed rule in light of the first four factors. In addition to documenting better the need for this proposed rule, DOE must address why less oppressive solutions are inadequate.

✘ The first four factors cited, and the question of how best available science justifies these guidelines in light of those factors, are addressed in the draft and final environmental impact statements prepared in connection with these guidelines. The EIS documents the extent of degradation of state shorelines, the inadequacy of current master programs to address that degradation, and the feasibility of other alternatives.

Property Rights & Taking

In answering this question, we request that DOE restrict its response to the authority that it possesses under Chapter 90.58 RCW and not hide behind Governor Locke's

salmon recovery strategy. We also would note that the proposed rule as drafted will make it very difficult for landowners to know how local jurisdictions will implement the rule, since much of the rule contains opaque language that likely will engender amorphous local standards.

✘ The authority granted under RCW 90.58 is very broad. Ecology believes these guidelines fit well within that authority. The rule is designed to give local jurisdictions flexibility in how they achieve the goals stated in the guidelines.

Property Rights & Taking

We want DOE to answer why the proposed rule does not discuss a viable use exception for takings issues. Fixed rules that do not allow for variation will be deemed to constitutionally infirm. In short, we believe that DOE may be "whistling past the graveyard" if it does not reconsider the seriousness of the constitutional challenges that this rule may engender. One example which highlights this point is Isla Verde v. City of Camas, Cause No. 23225-1-II. This case which was decided by Division II of the Court of Appeals late last year. In this instance, a set-aside ordinance was determined to constitute an unconstitutional taking because it did not meet the "rough proportionality" test. The specter of "rough proportionality" is likely to pose a serious hurdle, especially if local jurisdictions must implement standards that address cumulative impacts. Consequently, we want DOE to answer how the proposed rule (especially that part which addresses cumulative impacts) will meet the "takings" test articulated in Dolan v. City of Tigard, 512 U.S. 374 (1994).

✘ Ecology does not believe these guidelines require local governments to violate the rough proportionality test. With regard to cumulative impacts, the rule expresses a preference for addressing such impacts at the planning stage rather than on a case-by-case basis. Because the rule requires that master programs be based on the most current, accurate and complete scientific and technical information available, it is anticipated that master programs will impose requirements that are reasonably related to the projected impacts of particular development proposals and thereby avoid violating the rough proportionality test. In addition, we note that regulation of shoreline property is supported by background principles of law including the SMA itself, the Public Trust Doctrine, and other state and federal laws.

Property Rights & Taking

How does DOE intend to address the "liability" holding in Orion Corporation v. State of Washington, 109 Wn.2d 621, 747 P.2d (1987), viz., when local land use regulations are adopted under the direction and control of the state and do not take effect until they are approved by the state, the local government is the agent of the state and the state alone is liable for any damages resulting from the regulations. In particular, we want to know what action DOE intends to take when local governments are sued as a result of modifying their SMPs to conform to this proposed rule. Put another way, will DOE pay for the cost of defense when local governments are sued by disgruntled landowners/developers?.

✘ Under existing caselaw, when the local government is acting as the agent of the state in administering the SMA, the state is responsible in some situations for costs associated with legal challenges. See Orion Corporation v. State of Washington, 109 Wn.2d 621, 747 P.2d (1987).

Property Rights & Taking

I am worried about the rough proportionality test under takings. Last year from Division 2 there was a case from the city of Camas where a set-aside was thrown out. If we in local government write specific rules, I am fearful that unless we can justify those we will be on the hook or our state government will be on the hook. In particular what worries me is all of the discussion in the proposed rule with regard to cumulative impacts. Cumulative impacts are not defined. They are difficult to deal with. It's not to say that they aren't there, but without knowing how we would regulate that my fear is we've got takings problems. Similarly there is a statement that if you don't know enough information the test should be "write stronger rules." Well, it seems to me legally if you're going to write stronger rules you have to have a good justification for that. Now, I'm not saying that justification isn't there, but you need to clearly delineate what that justification is. And so what I am asking for is when you go through and relook at this, that you lay out for every standard that you have what the science is, not simply dealing with the citation to a study, but discuss what is in that study to deal with.

✘ As noted elsewhere in this responsiveness summary, it is anticipated that local governments will use the most current, accurate, and complete scientific information available in writing their master programs. Ecology is committed to making that information available to local

governments to the maximum extent feasible. A detailed discussion of the scientific literature, however, is beyond the scope of this responsiveness summary.

Property Rights & Taking

The WA Const., Art I, Sect. 16 says “No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner...” and Art I, Sect. 12 says “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” If “just compensation” is not granted to individual private landowners when Shoreline Management Rules affect the aforementioned rights to sell, use, or give away their property in a way consistent with their current property developments and land use activities and expectations.

Such as, but not necessarily limited to, the loss of resale value, mortgage or financing value assessments, value of currently ongoing negotiations for real-estate sale; or any other loss of value or usages that may void contracts (i.e., wills, mortgages, loans, partnerships, etc.), or create financial ruin or otherwise jeopardize the economic futures of the aforesaid individual private property owner, or the economic futures of family members who may be dependant upon them or their potential inheritance etc. Or, if tax assessments do not reflect any and all possible loss of real-estate resale values that may result from Shoreline Management determinations or rules that render future use or resale of current developments impossible or depreciated; Or if while lowering tax assessment values, the wealthy, corporations, or other special interest groups and/or individuals, or classes of individuals are favored in any way over and above the lowered assessments of average individual private landowners.

☒ For the reasons stated elsewhere in this responsiveness summary, we do not believe that implementation of these guidelines will result in any taking of private property.

Property Rights & Taking

Many citizens wrote with concerns about the effect of the guidelines on property rights and economic development in general and on particular circumstances in their communities. The rest of the comments under the category of “Property Rights & Taking” capture all the major themes in these letters.

I am opposed to the unilateral “taking” of an additional 65 ft setback that would seriously damage the value of the waterfront view property that I recently purchased.

☒ These guidelines do not mandate a 65 ft. setback. Various vegetation conservation zones are allowed in these guidelines depending on a variety of factors, including location of the property and path chosen by the local government.

Property Rights & Taking

The guidelines would result in the taking of up to 200-foot buffers on streams, shorelines, rivers etc. In addition, the Channel Migration Zone is wherever the flood plain of the river is or has been within the last 100 years. The most conservative estimate is that the guidelines would take more than 1300 sq. miles of property, an area larger than Thurston and Clark Counties combined.

☒ These guidelines do not mandate a 200 ft. buffer. Local governments planning under Path A of these guidelines have a variety of options for achieving vegetation conservation along shorelines. Under Path B, local governments are given similar flexibility, except in regard to shorelines that affect threatened or endangered species, where more specific vegetation conservation areas are required. See WAC 173-26-320(5)(d)(iv). We do not agree that the establishment of a vegetation conservation zone or a channel migration zone constitutes taking of private property.

A landowner whose property includes such a zone will not be deprived of all use of his or her property by virtue of the zone and such zones can have positive economic impacts. Also, the establishment of such zones is consistent with background principles of law including the SMA itself, the Public Trust Doctrine, and other state and federal laws. The establishment of such zones is in furtherance of the legitimate state goal of preserving state shorelines as fully as possible, and protecting the public from flood hazards.

Property Rights & Taking

I own about 200 acres, with approximately two miles of stream on them. You would take one third of my land away from me, including about \$80,000 worth of timber that I’ll never be able to harvest. That’s a good share of my retirement.

☒ This rule does not prohibit the harvest of timber within shoreline jurisdiction. Such harvest generally is governed by the provisions of the Forest

and Fish Report and the Department of Natural Resources Forest Practices Rules.

Property Rights & Taking

The proposed rule does not recognize the landowner-vested rights for development or economic activity. The rule does not clearly identify what types of existing uses are allowed to continue and how the new rules affect those uses. Throughout the hearing process, citizens have been greatly confused about whether their vested rights for development of currently platted lots or existing agricultural activity will be affected.

☒ This rule applies only to development proposals made after the local government adopts a master program in conformance with these guidelines. The rule does not effect currently vested rights or existing uses but could effect expansions, alterations, repairs or changes in use depending on the nature of the proposal.

Property Rights & Taking

Will this Act preclude us from leaving our estate, which includes shoreline property, to our children?

☒ The rule will not preclude any property owner from leaving their estate to their children. The SMA does not determine, control, or regulate the ownership of land or water.

Property Rights & Taking

The rule will result in a loss of developable property including property for future marine industrial development.

☒ Pursuant to the SMA’s directive, these guidelines favor development of water dependent uses on state shorelines.

Property Rights & Taking

Any landowner in the vast shoreline jurisdiction (according to DOE, this mounts to over 20,000 miles), will see an immediate impact to the value of his or her shoreline property. Regardless of the date of local SMP adoption, the land will be deemed by all potential buyers as restricted or even unbuildable. Under the new Guidelines, a vast amount of existing shoreline development, including homes, will become nonconforming uses. Other costs to shoreline property owners will result from the limited ability to develop, divide, and sell land; difficulties in renovating or improving property (diminishing resale value); redundant permitting requirements; expansive mitigating conditions; and costly

and lengthy environmental studies and reports.

✘ The costs and benefits of these guidelines were analyzed by the department as required by RCW 34.05.328. This cost-benefit analysis will be released to the public prior to the adoption of these guidelines.

Property rights & Taking

There needs to be a system in place (grandfathering clause) which allows existing private property owners some financial and usage protection of their property and investments. Individual private landowners must be granted "grandfather rights" to use, sell, or give away the resources and developments of their property. It appears that the individual private land owner is not maintained or protected in his or her individual rights to own, use, or sell his or her legally obtained property in a way consistent with his or her expectations and beliefs when such are not a provable health hazard, nor a dangerous, oppressive, or malicious threat to other citizens of the state. It appears that these Shoreline Management laws are aimed at granting new rights to the general public and wealthier special interest groups at the expense of the inherent traditional rights of individual landowners.

✘ There is a system in place that allows existing private property owners financial and usage protection of their property and investments. The provisions of new SMPs adopted pursuant to the guidelines will not apply retroactively to existing uses and development.

Property Rights & Taking

Washington State has allowed people in the Puget Sound to build down to the water's edge for years and destroy the so-called habitat. Now rural counties don't have the same opportunity. That's discrimination and a taking.

✘ These guidelines do not discriminate between counties but apply equally to all local governments planning under the SMA. The guidelines do not prohibit shoreline development in rural counties.

Property Rights & Taking

Is the agency willing to establish a fund for payment to aggrieved farmers for the loss of their land? Even with compensation, the loss of a significant portion of their land would force many rural county agricultural enterprises to close.

✘ This rule has no effect on existing, ongoing agriculture.

Property Rights & Taking

We have been purchasing land recognized as having high quality aggregates on it over the last 20 years for aggregate mining within the 100-year flood plain. Since mining is currently allowed and encouraged, within the 100-year flood plain, is Ecology prepared to "buy us out" of the flood plain, in order to meet these regulations?

✘ Purchasing private property is beyond the scope of this rule. To the extent you have vested rights to engage in mining activity, this rule does not effect those rights.

Property Rights & Taking

The rules do not recognize the historical development in such waterfront communities on salt water canals or provision for allowing continued development along established patterns. Under the new rules a property owner who has not yet built a house on a waterfront lot would be prevented from doing what his neighbor has done, i.e. build a single family residence with a bulkhead and/or dock. Such manmade saltwater environments have no significant history of wildlife or fish habitat and it is unreasonable for government to require restoration of conditions that never existed."

✘ The evolution of the law and science regarding shoreline protection in this state leaves us with older developments which are not conducive to healthy shorelines, public access, navigation or any of the other goals of the SMA. However, the presence of these so-called "non-conforming uses" does not justify or allow further destructive development. That said, the guidelines do not prohibit the construction of single family residences on the state's shorelines.

Property Rights & Taking

On Ocean Shores the lots are not deep enough to accommodate the required setbacks. The impact could be really difficult for us because we just put in a \$30 million sewer system that's just being completed. All of the houses on Ocean Shores are serviced and all of the areas hook onto sewer systems now, but someone has to pay off the debt for this, and we're counting on future growth as well as current growth, current people who are hooked onto the system. There has been a projection that if people can't build on these that they would turn the lots back to the city, and we would be stuck with a lot that someone had bought because the costs were too high for them. Why would they keep the lot if they can't build on them? And so we — that is a concern for us. How are we going to

pay off the debts for the infrastructure we are putting in?

✘ Under Path A, these guidelines do not mandate any particular setbacks. In the event existing lots are too small to accommodate setbacks required by a particular local government, variances may be available if the variance criteria are met.

Rural v Urban - unfair restrictions on rural areas:

The proposed rule treats urban and rural areas differently. Under the proposed rule, rural areas are restricted far more than urban areas. Although the prescriptions for each designation (natural, rural conservancy, urban) are the same in rural and urban jurisdictions, the percentage distribution of land into more restrictive designations is far greater for rural jurisdictions. Additionally, under Path B, the development restriction on rural land inside the channel migration zone severely restricts future economic diversity; no similar restriction exists in urban areas.

Rural counties have been good stewards of the environment. After fouling your environment, you now want to decide how to protect ours? We find this completely illogical. This is a classic "do as I say, not as I do" situation. Many of you have been to our counties and seen other environment. We have a shorelines plan. We have a comprehensive plan. We have numerous permit processes to protect our environments and our people. We have an economic development and an economic recovery plan. Please allow us to guide our futures by ourselves without your direction. Please allow us to show you how to protect and manage the environment. Why are loggers and farmers blamed for the demise of salmon? The city is the problem. Loggers and farmers do have a burden to bear. At least there are still trees, grass, and clean water there. Up here there is only pavement and structures. Can you blame rural counties for saying they will not comply with your shoreline document when it mandates rural counties shoulder the whole load for salmon recovery?

Do these guidelines apply equally to all counties in this state? I don't believe I will ever see a 200-foot setback in King or Snohomish Counties. Or Pierce County, for that matter. And here they want to setback not only the streams that exist but where they used to exist, which is asinine.

This shoreline update is pure hypocrisy. If the goal was really about saving our environment, the dirtiest, most polluted place, Puget Sound, would be cleaned up first. This is discrimination against rural Washington and is a taking of private

property without compensation. These rules will bring an even bigger divide between urban and rural Washington. Get Seattle as clean as Pacific County, and then we'll talk.

The proposed rule will punish rural counties that have limited shoreline development by restricting the future development of their shorelines. The rule will limit expansion of trade and water dependent activities that would generate jobs, improve the economy, and protect our resources.

We oppose the shoreline rules for the rural part of Washington State.

I support emphasis on addressing problems associated with urban growth.

I find it extremely interesting that the urban population centers are exempted from these guidelines.

The rules are not fair. Why should rural and farm areas be treated differently from urban areas? We resent the fact that people who have no clue of the complexity of the situation are making decisions for us regarding our property.

The rule is not about saving the salmon – it is all part of a movement to take control of rural America.

The rule is not about improvement or upholding higher environmental standards for all people who reside in Washington. The issue at hand relates to unlimited power, force, and restraint against American citizens with an emphasis on discrimination towards rural Washington.

The economic and financial costs of this new regulation must be borne equitably by all areas in the state. Under the proposed rule, rural areas are restricted far more than urban areas. Although the prescriptions for each environment designation are the same the percentage distribution of land into more restrictive designations is far greater for rural jurisdictions. Development restrictions on rural land inside the channel migration zone also severely restrict future economic diversity; no similar restriction exists in urban areas.

There has been no building on my stream for a long, long time. You're coming up with ordinances and regulations that are totally irrelevant to what's happening in rural areas.

This rule is a silver bullet. You're trying to cure everybody's disease with chemotherapy. You know, I've got a cold, she's got the flu, she's got cancer. You know, you're going to cure all of us with chemotherapy and that's a poor way to go about this. This is a unique area. We've got a huge watershed. We have a tremendous amount of flushing.

✘ The guidelines do reflect the policy of the GMA that development should be concentrated in areas that are already developed. This policy is clearly consistent with the policy of the SMA

also. However, Ecology does not believe that the guidelines discriminate against rural areas of the state.

The guidelines recognize local growth management plans that are presumed to accommodate reasonably projected growth and development for all GMA communities and also recognize that not all areas of the state are covered by GMA and make equivalent provision for those communities. However, as with the GMA, the SMA requires that valuable environmental resources be protected regardless of where they are found.

The shorelines are among the most valuable and fragile of our resources and regardless of whether they exist in rural or urban areas they do, or are capable of, providing a rich diversity of habitat, open space and aesthetic enhancement to our communities and the state as a whole. It is not any one segment of the community that has created the problem with salmon or other fish and wildlife populations, it is all of us.

While these guidelines cannot solve all of these problems, the loss of shoreline habitat to development has been identified as a primary contributor to the problem and these guidelines provide one tool for addressing this issue. All communities must address protection of shoreline resources in a manner that implements the policy of the SMA and the guidelines.

Rural v Urban - rule doesn't acknowledge reality of rural development

The draft guidelines fail to recognize that the physical characteristics of most urban areas in Western Washington are functionally different from rural areas with respect to stream habitat requirements. All significant urban areas within the Puget Sound Basin are located in the lowlands around the Sound. Streams and rivers flowing through these urban areas – even if unaltered by development – typically have a significantly different morphology from stream sections at higher elevations. The lowland portions of these streams also serve a different role as habitat for various fish species. Many of the regulatory measures that would be required of local governments by the proposed guidelines are designed to deal with stream habitat requirements that are not applicable to or that are significantly less important for the stream sections flowing through lowland urban areas.

The proposed guidelines fail to recognize this fundamental and important distinction. Further, regulatory measures that are designed to preserve and improve fish habitat

in streams at higher elevations may have no functional purpose along marine and lacustrine shorelines. To the extent that the final guidelines promulgated by the Department include policies that effectively require local governments to adopt regulatory measures designed to protect and enhance fish habitat, those guidelines should acknowledge and reflect both the policy and the physical distinctions that apply to urban and rural areas in the Puget Sound area.

✘ The guidelines do address the differences in several ways including environment designation provisions, vegetation management provisions, and the ecological characterization process which asks local governments to account for the differences mentioned in the comment. See sections 200 and 300.

Rural v Urban - natural designation

The guidelines direct ecologically intact areas to be designated natural, and therefore off limits for development. Areas within cities can be designated for industrial, commercial, residential and/or mixed-use development. Subdivision or development of land in shorelines is not allowed if it would require structural flood hazard reduction measures in the Channel Migration Zone, unless the land is located in a city or urban growth area.

If Pacific County submits its shoreline plan to the DOE, DOE can force them to change it, or it goes to the Growth Management Act. Therefore, Pacific County will be designated highly regulated land use. It has been said that property is more valuable, so a sacrifice will be made in the tri-county and urban area also. I guess if rules and regulations are adopted like this, rural counties will never see the full potential of their land. It will be regulated unusable. With that in mind, there is nothing to keep the DOE from designating most of Pacific County in a natural designation.

✘ The guidelines allow limited residential development and commercial forestry within the natural environment. Ecology and local governments have been able to reach mutually agreeable solutions on SMP decisions in the past. We hope and expect this tradition to continue.

Statutory Authority & Legislative Intent

Ecology received many comments to the effect that the rule exceeds Ecology's SMA authority; attempts to implement Ecology's goals or policies, not the legislature's; and attempts to implement the ESA without

authority. The comments below capture the range of comments on this area, except for questions of statutory authority that have been addressed elsewhere in detail.

DOE bases its authority to enact such restrictive and narrowly focused rules on a single sentence of the legislative findings and policy statement contained in the SMA at RCW 90.58.020 “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.” This statement “contemplates” the protection of vegetation, wildlife, and aquatic life, but it does not direct the agency to enact a detailed and highly restrictive code of land use regulations. Certainly if the Legislature had intended for the agency to engage in extremely detailed regulation of local land uses through an administrative rule, the Legislature would have stated so in more certain terms.

Ecology is responsible for “assisting” local governments in implementing their SMPs. It is not the department’s prerogative to use the SMA as a vehicle for imposing federally mandated land use restrictions on Washington’s citizens. The agency has no authority to do this. The citizens of Washington, acting through their elected representatives, should determine the restrictions on use of these citizens’ lands located near shorelines — not a state agency, and even less a state agency acting as the willing agent of the federal government.

To be sure, the Department’s goals may be laudable. It very well could be that this state should alter the direction of its policies regarding shoreline uses from one of managing and balancing productive uses of the shorelines to one of protecting and restoring natural habitat along the shorelines. That choice should, however, not be made by well-meaning public servants but, rather, should be made by the legislature or the citizens themselves. Before the state changes its policy with regard to the use of shorelines, a public debate about the need for such change and the substance of such change should take place. That is what took place in 1971 when the Shoreline Management Act was adopted. That is what should take place now.

The SMA guidelines exceed the statutory authority for the rule provided by the SMA. In particular, inclusion of concepts and requirements implementing other state and federal statutes (e.g., the Endangered Species Act) are without legislative authority and will contribute to regulatory overlap and duplication. (Duplication is also to be avoided under the

requirements of regulatory reform, RCW 34.05.328).

The purpose of the SMA was to balance the many uses of the shorelines of the state for the good of all. Path B clearly selects fish and wildlife habitat as the primary goal of the SMA and subordinates all other uses. This is outside the authority granted in the SMA.

✘ The SMA requires Ecology to adopt and periodically update guidelines which implement the policy of the Act. That policy is enunciated in RCW 90.58.020 and has been refined and interpreted by dozens of opinions of the supreme court, court of appeals and shorelines hearings board.

The general policy of the SMA “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[.]” The Supreme Court has held that the SMA must be broadly construed to protect the state shorelines as fully as possible. *Beuchel v. Dept. of Ecology*, 125 Wn.2d 196 (1994). Ecology believes the guidelines are consistent with the policy of the SMA, and that the terms and concepts included in the guidelines implement the Act’s overall purpose.

With regards to protection of habitat for declining fish populations, the rule simply recognizes that species which are so depressed as to be threatened or endangered require special attention if they are to be protected “as fully as possible.” Ecology is under statutory obligation to update the Guidelines and to do so in conformity with the policy enunciated above.

At the request of local governments Part IV of the guidelines was drafted to implement the SMA and, simultaneously, garner ESA liability protection. Ecology did not exceed its statutory authority in drafting Part IV, but rather it achieved the added benefit of ESA liability protection by adding detail above what is present in Part III. The more detailed approach of Part IV is optional.

Statutory Authority & Legislative Intent – Role of the State

The legal foundation of the SMA rests on the balance of three interrelated concepts: protection of shoreline ecosystems, preference for water-dependent uses, and provision for public access. GMA comprehensive plans require a careful local balancing of additional social and economic considerations. HB 1724 integrated SMPs into GMA comprehensive plans. Unfortunately, the legislature did not

specify exactly how this integration was to occur. Shoreline guideline updates were to provide administrative guidance on how this integration would happen on the state and local level. DOE’s current rule revision goes far beyond this limited intent.

I would like a response to how you feel that this is a response to the requirement for enhanced public participation. You have hidden behind this mandate in 1724 to rewrite these rules to protect salmon when you were never given permission. I would like a response to that and I think as the document — particularly the EIS — says, “We beg to differ.” Well, you don’t just beg to differ. If you have a debate as to the intent of legislation, you go to the legislative record and you review that. I have heard testimony from several legislators that you have gone beyond the legislative intent. I would like an official review of the legislative record, legal analysis of that, and comment more than “we beg to differ.”

RCW 90.58.050 encourages cooperation between local governments and the Department of Ecology to manage shorelines. The statute grants primary authority for shoreline planning and regulation to local governments. The Department’s role is correctly characterized as a supportive one, to provide technical expertise. Yet, contrary to legislative intent, the Guidelines dictate prescriptive regulations that one would associate with a statute where the legislature has preempted local authority. The DOE was given authority to review and revise the Guidelines in an effort to merge the SMA with the long-range planning requirements of the GMA. Under the GMA, local governments take the lead in implementing statewide growth management obligations. Therefore, the fundamental GMA tenet of deference to local decision-makers should control, yet the reverse is imposed by Ecology’s proposals.

RCW 90.58.050 encourages cooperation between local governments and DOE to manage shorelines. The statute further grants primary authority for shoreline planning and regulation to local governments. The Department is relegated to a supportive, watchful role, not one of finite control over local shoreline regulation. Contrary to this legislative intent, the Guidelines are exceedingly prescriptive, heavily laced with the words “should” and “shall”. Although seemingly flexible, “should” means “the particular action is required unless there is a demonstrated, compelling reason ... against taking the action.” Given that DOE was given authority to review and revise the Guidelines in an effort to merge the SMA into the Growth Management Act (GMA), the fundamental GMA tenet of local deference should control.

✘ The plain language of the statute requires Ecology to update the guidelines to be consistent with the policy of the SMA. While the revised guidelines do provide numerous mechanisms for the integration of GMA and SMA planning and administration, the SMA neither limits nor allows Ecology to update the guidelines only to provide consistency with GMA.

Statutory Authority & Legislative Intent – Role of the State

Ecology's role is to supervise the enactment and adoption of these regulations and to ensure consistency of local SMPs with the requirements of the Shoreline Management Act. The voters of this State had a clear choice when they adopted the Shoreline Management Act by referendum in 1971. They could have chosen to adopt the Shoreline Protection Act which would have granted centralized authority to Ecology to adopt and enforce regulations on the use of the state's shorelines. The voters chose not to grant this power to a state agency; but, rather, to grant this power to their local governments instead. The draft guidelines proposed by the Department would change the fundamental structure of shoreline regulation established by the citizens of this state.

As originally enacted, the SMA contemplated "joint" action by DOE and local governments, requiring local adoption of local master plans, delegating adoption power over those initial plans by DOE if local governments failed to do so. All local governments complied. When the legislature amended the SMA to require periodic review of the state guidelines, it did not see fit to extend master plan adoption power to DOE. What DOE cannot do directly it cannot do indirectly, and this administrative effort to coerce local governments is beyond its delegated authority. Its sole remaining remedy to impose its will is through administrative tribunals and the courts, a forum where local governments can test the non-existent power. DOE, by its "mandatory" requirements, in both Path A and Path B, grabs power that the legislature denied.

✘ The guidelines adhere to the statutory framework for management of the shorelines established in 1971: Ecology adopts rules (the guidelines) which guide local governments in the task of drafting (or updating) master program. Ecology then reviews and approves or denies the programs.

Statutory Authority & Legislative Intent – Role of the State

SMA guidelines should be policy guidelines and procedural minima, and not prescriptive or performance standards. RCW 90.58.050 directs DOE to work cooperatively with local governments to coordinate planning through recommendations and guidelines. The proposed SMA guidelines, contrary to the intent of the law and without deference to local governments, are excessively prescriptive. See, definitions of shall, should, and section -190(2) (guidelines are mandatory), and WAC 173-26-210 (shall include environmental designations and related provisions).

✘ The SMA states that the guidelines shall be consistent with the policy of the SMA (RCW 90.58.060) and sets forth a minimum set of elements that must be addressed (RCW 90.58.100). The SMA does not set forth a maximum level of detail which the guidelines may not exceed. That said, the guidelines, in order to be consistent with the policy of the SMA, must be more detailed than the previous 30 year old guidelines given the dramatic changes to the state's shorelines and advances in science. Indeed, the SMA specifically states that master programs shall be based on up-to-date science. RCW 90.58.100(1).

Statutory Authority & Legislative Intent – Role of the State

You say you're going to clarify the state's interest. The concern that I have is 90.58 of the RCW talks about the SMP as being a joint partnership between state and local interests. What happened to the local? What happened to the counties and cities? Counties and cities have interest in the SMP in addition to the state. So why was the word "state's interest?" Why haven't we said anything with regard to its policy trying to incorporate towns and locals?

✘ The guidelines do not change the structure of the local-state partnership set forth in the SMA. The policy of the SMA is directed toward protecting the public interest.

Statutory Authority & Legislative Intent – Role of the State

The RCWs regarding Shorelines talk about "state and local" interests, not just "state" interests. But these proposed rules state they are intended to further "state" interests, ignoring the interests of local government.

As a result, they are inconsistent with the state statute.

✘ The policy of the SMA does not address protection of local interests specifically. The structure of the Act allows local government to address local interests so long as such interests are not in conflict with the policy of the SMA.

Statutory Authority & Legislative Intent - Restoration

The proposed guidelines exceed the legislative intent and authority of the Shoreline Management Act. The intent of the SMA is to protect the shorelines of the state. Both Path A and Path B of these proposed guidelines require significant restoration of shorelines. While we support shoreline restoration where appropriate, placing such goals as mandates within the shoreline guidelines is akin to trying to shove a square peg into a round hole.

The SMA does not authorize restoration requirements. 90.58.020 contains no statement of restoration policy. 90.58.020 expresses state policy in terms of fostering all reasonable and appropriate uses. The concept of restoration is included only in a statement of "concerns" in the first sentence. Ecology's creative rewording of the statutory language in the draft rule does not provide the necessary legislative authority for this requirement. Unfortunately the restoration requirement permeates the proposed rule. DOE has transformed this statement of concern, without looking further at legislative intent, into the backbone of the rule.

The SMA requires preservation of shorelines; it does not authorize DOE to require restoration and enhancement of shorelines as a condition of shoreline development. Even federal agencies are required by the ESA to develop a "Recovery Plan" for listed species separate from the "Protective Regulations" required by Section 4(d) of the ESA. To combine both regulatory protection and recovery in one rule is onerous at best, and serves to confuse incentive based restoration and enhancement programs as envisioned in Section 4 (f) of the ESA.

The emphasis on restoration of already degraded shorelines throughout the new guidelines is beyond any measure of reasonable statutory authorization. While the Legislature found that there was "great concern" regarding the "restoration" of shorelines, it did not even "contemplate" such restoration as a mandate to the agency. Even a preliminary review of Webster's Dictionary shows that "protection" is not the same as "restoration," and the agency's claims that statutory authority to engage in

the former is authority to mandate the latter is clear error.

Not only does the rule's required restoration go beyond the SMA, Part IV increases this standard to include "recovery of proposed, threatened, and endangered species." The restoration and recovery objectives create strict development standards including setbacks and expensive mitigation requirements. The definitions of "restoration" and "recovery" are sufficiently vague, and the extent to which recovery will be guaranteed by a single development is sufficiently ambiguous to create and additional uncertainty for the development.

Requiring landowners to restore land that they did not degrade may be unlawful under the statutory SMA framework. Habitat improvement may be required of projects that impact habitat, but we will achieve restoration largely through public investment and capital improvement projects. It would be helpful if the rule made it explicitly clear impacts shall be mitigated and that habitat enhancement cannot be required unless a site-specific analysis indicated the need for mitigation necessary to offset project-specific impacts.

The Legislature has already demonstrated that the restoration of degraded shorelines is a public good through establishment of the Salmon Recovery Funding Board. This program should be the mechanism for restoring the state's degraded shorelines, rather than government-mandated, "off-budget" restoration, which is little more than government-mandated extortion. And because the restoration requirements are mandated under both paths, the "takings" compensation required will be an additional cost to the local governments and the state.

Under the proposed guidelines, the burden of restoring an "ecologically degraded" shoreline seems to fall entirely upon the affected property owner wishing to redevelop or expand present development. If such a landowner's development will have no further impact to the "degraded" condition of the shoreline, why does the Department of Ecology seek to place the burden of restoring the shoreline on the property owner? If this is a "public good" — and certainly DOE's previously expressed interpretation of the SMA implies that "ecologically functional" shorelines are a public good — then the burden of paying for this good should be shared equally by all members of the public.

How does DOE justify placing this burden on a landowner who may have had no part in "degrading" shorelines he or she owns? Why should the sins of the past be visited upon innocent present owners? As the United States Supreme Court stated in *Armstrong v. United States*, 364 US 40, 49 (1960), the purpose of the takings clause is

"to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Because the Guidelines state that restoration requirements are not retroactive, the costs of shoreline restoration and salmon recovery will be forced on new shoreline homeowners and those seeking to remodel or expand an existing home. The agency places the burden of paying for such restoration solely on the developer/redeveloper, regardless of whether redevelopment will have any additional impact on the degraded site. These requirements constitute a taking of property without just compensation in violation of the Fifth Amendment of the United States Constitution, under the Nollan/Dolan line of exaction/development condition cases. These cases require a proposed condition of approval of development — such as a requirement to restore a degraded shoreline in order to get a substantial development permit — be roughly proportional to an impact of the proposed development. By definition, redevelopment rarely further impacts already degraded sites, unless the development includes a feature like a large increase in impervious surface area.

In 1995 the Legislature severely curtailed the ability of DOE (and most other state agencies) to adopt rules based on general statutory statements of intent or purpose. Under RCW 43.21A.080, DOE rule-making is now limited as follows: *The director of the department of ecology is authorized to adopt such rules and regulations as are necessary and appropriate to carry out the provisions of this chapter: PROVIDED, That the director may not adopt rules after July 23, 1995, that are based solely on a section of law stating a statute's intent or purpose, on the enabling provisions of the statute establishing the agency, or on any combination of such provisions, for statutory authority to adopt the rule.*

Ecology needs explicit legislative direction to revise Shoreline Guidelines in light of ESA demands and in consideration of integration with GMA. Without such legislative direction, the promulgation of new shoreline rules is a violation of RCW 43.21A.080

The SMA does not authorize or command regulation to restore shoreline areas. Related statutes and regulations [e.g., the State Environmental Policy Act (SEPA); and critical areas ordinances under the Growth Management Act (GMA)] are also limited to requiring mitigation of impacts on the existing environment, not restoration of previously developed areas to historic conditions.

✘ The first sentence of the SMA reads "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." Unlike other statutes, the SMA is exempt from the normal rules of statutory construction and must be liberally construed to effectuate its purposes. RCW 90.58.900. In 1971 the focus of the state and local agencies implementing the SMA was to stem the tide of rampant and egregious shoreline destruction. Although long overdue, Ecology is now giving effect to the language of the Act through the guidelines' restoration provisions. To not require some form of restoration in the guidelines would be to render superfluous that portion of the Act's policy which refers to restoration.

The act clearly states that "protecting against adverse affects to...the waters of the state and their aquatic life" is a fundamental policy of the act. This policy is more than adequate to base the restoration provisions of the guidelines. Numerous species of aquatic life are in decline due to the loss of habitat as well as other factors. Simply preventing further loss of habitat will not protect these species against adverse affects.

The guidelines address restoration requirements in several ways. The broadest guidance is contained in 173-26-200 (Path A) and 300(Path B). These provisions state that restoration requirements should result from analysis of the shoreline ecological system and that such analysis should be used: "...to prepare master program provisions to protect and contribute to the restoration of the ecosystem wide processes and individual ecological functions on a comprehensive basis over time. This does not necessarily require that each development or action on the shoreline individually improves ecological functions." In addressing critical areas the guidelines state in 173-26-220(2)(b)(iv) and 320(2)(b)(iv) that: "In protecting and restoring critical areas within shoreline jurisdiction, consider the full spectrum of planning and regulatory measures, including the comprehensive plan, interlocal watershed plans, local development regulations, and state, tribal, and federal programs.

The SMP is a planning as well as a regulatory document. Restoration is to be approached as a part of the overall planning for the shoreline and can and should be addressed through the full range of tools available to local

government including the use of any federal, state, local or tribal programs available to provide restoration as well as through the regulatory program where feasible and appropriate. Permitting under the SMA, and under any future SMPs adopted pursuant to these guidelines, is governed by the same rules that apply to all permitting activities of state and local government generally. Under this system it is not anticipated that costs of restoration would fall disproportionately on those proposing shoreline development.

Statutory Authority & Legislative Intent - PFC

The SMA makes no reference to PFC, nor does it reference salmon recovery. Also, the ESA does not require attainment of PFC, but rather a "conservation," "no jeopardy," or "no take" standard. PFC is a policy generated by NMFS relating to pristine or pre-European settlement conditions. Such a standard is unrealistic and would be more appropriate for consideration under DOE water quality rules, rather than the state's SMA.

In many cases, NMFS bases evaluation of PFC on strict numerical standards. For instance, the PFC for stream temperature is 50-57°F, for sediment-turbidity <12% fines in gravel, and for pollutant contamination levels, compliance with Section 303 (d) of the Clean Water Act. There is no basis in the SMA for requiring attainment of these fixed standards, especially when they relate to regulatory programs outside of the SMA. In addition, these standards simply cannot be met in many salmon streams through the regulation of future shoreline uses, given the existing impacts of stormwater runoff, historic vegetation removal, and periodic low flows. This is one of the many reasons that the Legislature created an incentive based restoration program to restore properly functioning condition, and to compliment the regulatory programs established to protect existing salmon habitat

✘ The guidelines utilize the term "PFC," however the definition of the term has been reworded to clarify that attainment of PFC does not mean a return to pre-European conditions.

PFC, as defined in the guidelines, is not tied to determinations by NMFS. Like many other concepts in the guidelines, PFC will be determined by local governments based on an evaluation of their shoreline resources and current scientific and technical information.

Statutory Authority & Legislative Intent - Public Trust Doctrine

Washington Courts have consistently construed the SMA as a legislative undertaking to implement the common law "Public Trust" doctrine. A plain reading of the SMA results in that conclusion. As you know, the ESA did not exist at the time that common law doctrine was formulated. The legislature did not include such policies within the SMA, preferring, instead, to subsequently delegate such power to state Fish and Wildlife agencies. Even though ESA listings have included shoreline dependent species during the long life of the SMA the legislature has never seen fit to amend the SMA to serve the federal purpose. It has not done so for salmon, either. Moreover, DOE and local governments have never recognized the use of SMA policy power as a tool of ESA implementation.

The emperor has no clothes, which is just another way of saying that DOE has not been delegated the power that it purports to use. The legislative mandate is to implement the "public trust," as articulated and applied in the existing SMA. You cannot do what you propose to do without additional legislative delegation, a delegation that, if it existed, would be of questionable constitutional integrity.

✘ It is not accurate to say that the courts have determined the SMA as a simple codification of the public trust doctrine. While the courts have recognized that the impetus for the SMA grew out of the Supreme Court's opinion on public trust in *Wilbour v. Gallagher* ("the Lake Chelan case"), 77 Wn.2d 306, 462 P.2d 232 (1969), they have not limited the SMAs scope to that of the Lake Chelan case. The Supreme Court has held that the SMA must be broadly construed to protect the state shorelines as fully as possible. *Beuchel v. Dept. of Ecology*, 125 Wn.2d 196 (1994). The rule simply recognizes that species which are so depressed as to be threatened or endangered require special attention if they are to be protected "as fully as possible." At the request of local governments Part IV of the guidelines was drafted to implement the SMA and, simultaneously, garner ESA liability protection. Ecology did not exceed its statutory authority in drafting Part IV, but rather it achieved the added benefit of ESA liability protection by adding detail above what is present in Part III. The more detailed approach of Part IV is optional.

Statutory Authority & Legislative Intent - no authorization for substantial rule revisions

The new guidelines are a complete rewrite and are not the legislatures intended result of HB 1724.

Under the Shoreline Management Act and also under the directive from the legislature in 1995, it stated the department may propose amendments for 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. Nowhere in the directive did it say to change the Shoreline Management Act substantively.

ESHB 1724 directed Ecology to conduct a minor procedural rewrite of the Shorelines Guidelines to comply with Growth Management Act (GMA) administrative procedures. The draft rule is substantive in nature, imposing development policies with far-reaching effects on rural economic development. This conflicts head-on with express legislation (GMA) governing development throughout the state.

As justification for adoption of these guidelines, the Department of Ecology claims that HB 1724, passed in 1995, requires DOE to review and update the guideline every five years. However, HB 1724 does not require DOE to adopt a new rule within five years. The major objective of HB 1724 was to streamline land use permitting and planning processes. The intent was to require closer coordination of the requirements under the Growth Management Act, the State Environmental Policy Act, and the Shorelines Management Act. Viewed in this context, the SMA guideline update was intended to integrate GMA and SMA planning requirements. The bill did not anticipate significant changes for shoreline management policy.

What was intended as a simple technical update has been transformed, by the agency, into a complete overhaul. There was no direction from the Legislature to use the Shoreline Management Act guidelines to implement federal Endangered Species Act standards in Washington. The direction to update the guidelines predated the listing of Washington salmon and trout species as "threatened," and in fact the SMA itself preceded enactment of the ESA. Thus, despite DOE's repeated claims to the contrary, it is simply not possible that the Legislature granted DOE the authority to incorporate ESA standards into Washington administrative regulations.

In 1995, through ESHB 1724, the Legislature directed the Department of Ecology to "periodically review and adopt

guidelines consistent with RCW 90.58.020" (the Legislative Findings and enunciation of State Policy regarding shorelines). The Legislature instructed DOE to conduct such a review at least once every five years. The department has erroneously interpreted this mandate as a requirement to adopt new guidelines during the summer of 2000.

1724 instructed Ecology to conduct a review at least once every 5 years. Ecology has inappropriately interpreted this as a mandate to adopt during the summer of 2000.

There is no mandate to adopt the rule in August. There is more flexibility in the schedule than Ecology suggests. While DOE is operating under legislatively imposed time constraints to adopt new SMA "guidelines," it is under no such time constraints to adopt this "incarnation" of its rules. The existing regulations may not need any changes in order to implement the policies of the SMA, or may be changed modestly, given the lack of any legislative action.

✘ ESHB 1724 amendments required Ecology to review and adopt guidelines consistent with the policies of the SMA contained in RCW 90.58.020. Close inspection of the breadth and depth of these policies and the changes that have occurred in shoreline development, related laws and advancements in science over the last thirty years resulted in the need to comprehensively rewrite the guidelines.

Specifically, the subject proposal is an amendment to Washington Administrative Code, not the SMA. 1995 amendments to the SMA contained in RCW 90.58.060 state "The department shall periodically review and adopt guidelines consistent with RCW 90.58.020,..." , which the policy of the act. In order to satisfy this directive to update the guidelines consistent with the policy of the act, a substantive review of the guidelines rule is required.

The plain language of the statute requires Ecology to update the guidelines every five years to be consistent with the policy of the SMA. There is no mention in the statute of a "simple" or "minor" update. The SMA makes clear that the guidelines must implement the policy of the SMA. The Supreme Court has held that the policy of the SMA must be broadly construed to protect the state shorelines as fully as possible. *Beuchel v. Dept. of Ecology*, 125 Wn.2d 196 (1994). The rule simply recognizes that species which are so depressed as to be threatened or endangered require special attention if they are to be protected "as fully as possible." At the request of local governments Part IV of the guidelines

was drafted to implement the SMA and, simultaneously, garner ESA liability protection. Ecology did not exceed its statutory authority in drafting Part IV, but rather it achieved the added benefit of ESA liability protection by adding detail above what is present in Part III. The more detailed approach of Part IV is optional.

The plain language of the statute is clear. The language of RCW 90.58.060(3) as amended by ESHB 1724 requires that "[a]t least once every five years [Ecology] shall conduct a review of the guidelines pursuant to the procedures outlined in subsection (2) of this section." A cursory review of the section reveals that subsection (2) is the adoption procedure for amendments to the Guidelines. A review consistent with subsection (2) is, therefore, a review which includes amendments. Thus, when the two subsections are read together the language reads, in practical terms, "[a]t least once every five years the department shall conduct a review of the guidelines [and adopt amendments] pursuant to the procedures outlined in subsection (2) of this section."

Statutory Authority & Legislative Intent - no authorization for substantial rule revisions

In response to letters from concerned citizens, you suggested that the rule was proposed because "House Bill 1724 instructed the Department to rewrite the Guidelines in order to integrate the requirements of the Growth Management Act and the Shoreline Management Act." July 5, 2000 Letter to Tom Leaman. This assertion is highly misleading. Nothing in House Bill 1724 directs Ecology to revise its SMA guidelines to conform to the requirements of the Growth Management Act (GMA). Instead, the Legislature created the Land Use Study Commission which was charged with the task of studying "the integration and consolidation of the state's land use and environmental laws into a single, manageable statute." HB 1724 Section 801. Although the Commission reported back to the Legislature several years ago, no legislation requiring integration of SMA and GMA guidelines has ever been enacted.

✘ The guidelines do not attempt to integrate the SMA and GMA in a legal sense. However, the guidelines do provide various mechanisms for local governments to integrate their comprehensive plans and development regulations with their shoreline master

programs. These provisions are in response to changes made to the GMA which related to the SMA. The GMA requires that shoreline master programs' goals and policies shall be considered an element of the county or cities' comprehensive plan, and all other parts of the master program shall be considered development regulations. The GMA further requires that a county or cities' comprehensive plan and development regulations shall be internally consistent. Local governments are responsible for ensuring internal consistency.

Statutory Authority & Legislative Intent - terms

Ecology has written new definitions and expanded definitions that are not in the SMA.

The proposed rule incorporates critical federal definitions of ecological processes such as "channel migration zone" and "properly functioning conditions." DOE has no statutory basis for including these definitions in the guidelines. Inclusion of these definitions inappropriately subjects local shoreline master plans to federal regulation.

✘ Ecology is charged under the SMA with writing and updating the guidelines. Ecology has used the terms and definitions that appear in the statute in a manner wholly consistent with the statute. In order to implement the policy of the SMA, Ecology has found it necessary to use additional terms and definitions in both the old guidelines and the new rule. Statutes are, by their nature, general in scope and detail. It is well settled law that an agency may utilize additional definitions and concepts in a rule when necessary to carry out the mandate of the statute under which the rule is promulgated.

The terms used in the guidelines are based on current science and, as such, are often used in other setting by other agencies. The fact that Ecology uses the same term in its rule does not subject any person to the jurisdiction of another agency.

Process & Procedure - Submit rule to Legislature

The department should submit the proposed guidelines to the people's representatives in the Legislature. Such a drastic change in public policy can only have legitimacy with legislative approval.

These rules have not been approved by the voters of this state and they are draconian in nature. Something this

significant and far reaching should be put to a vote of the people to make sure this is what the people want.

The timing of these various guidelines is very interesting. The '99 guidelines came after the legislature, and that made everyone so mad that you rewrote them in December right before the 2000 legislature. And then magically after the 2000 legislature went away, new June ones came out. And magically they're cleared to be adopted before the next legislative session.

✘ The rule adoption process mandated by state law does not provide for direct adoption of a rule by the legislature. There is no existing mechanism under state law for putting an administrative rule to a vote of the people.

Statutory Authority & Legislative Intent – Single family homes

DOE may not diminish the priority shoreline use status of residential structures that is granted by the SMA. The SMA identifies single-family residential housing as a preferred use in the shoreline environment, and exempts single-family construction from permitting requirements. The proposed guidelines attempt to restrict both the preferred use status of residential development and limit its exempt status.

In Section 240(3)(j) and 340(3)(j), the rule degrades the priority status of single-family homes by only allowing priority status “when consistent with control of pollution and prevention of damage to the natural environment.” This makes priority status subject to all provisions of the Guidelines. Thus, if a proposed home is in any way inconsistent with any provision in the 157 pages of shoreline regulations promulgated by DOE, it is not a priority use. So long as single-family homes prevent environmental damage, the SMA deems them to be a preferred priority use. By severely restricting single-family homes and their appurtenant structures, the Guidelines undermine local flexibility and threaten private property rights.

In Section 240(3)(j) and 340(3)(j), the proposed rule identifies single-family residences as a priority use only when consistent with the control of pollution, and prevention of damage to the natural environment. The proposed rule states that mitigation will be required for single-family lot development on existing lots if “significant vegetation removal” results. Single-family residences, should be specifically exempt from the shoreline use provisions. Other types of residential construction, such as duplexes and apartment complexes, are generally commercial in nature and therefore should be

subject to more detailed mitigation review. Single-family residential structures create minimal environmental impacts to shoreline areas.

The proposed rule uses the concept of “cumulative impacts” to restrict the preference for, and exemption of, single-family homes. (a) In Section 190(2)(e)(iii)(D), Local governments must create a process to document and evaluate cumulative impacts of development (including impacts from SFR)? (b) In 200(3)(d), the proposed rule requires local government to ensure protection of shoreline processes, and to account for “risks” to the environment from “incremental impacts” associated with allowed development (including the construction of single-family residences). How does this restriction comport with the statutory language in Chapter 90.58 RCW that gives SFR preferred-use and exempt status? (c) The proposed rule also requires local government to project “full build out” potential (presumably from single-family residences). Essentially, local governments will be required to “address cumulative adverse impacts caused by incremental development, such as residential bulkheads, residential piers, or runoff from newly developed properties, and . . . to assess, minimize, and mitigate cumulative impacts.” Mitigation for construction of single-family homes may require mitigation for speculative impacts projected to occur some time in the future, when “full build out” occurs. How does this restriction comport with the statutory language in Chapter 90.58 RCW that gives SFR preferred-use and exempt status? (d) In Section 210(4)(b)(ii)(D), the rural conservancy section (the rural conservancy designation will apply to the bulk of many rural counties), the proposed rule mandates that residential development standards “should” prevent significant cumulative adverse impacts to the shoreline environment. The term “should” is defined as being “required unless there is a demonstrated, compelling reason, based upon the policy of the SMA and this chapter against taking this action.” This definitional juggernaut will likely put a severe damper on residential construction. How does this restriction comport with the statutory language in Chapter 90.58 RCW that gives SFR preferred-use and exempt status? The proposed guidelines would require local governments to prevent supposed significant, adverse cumulative impacts of SFRs in the conservancy designation (the majority of Lewis County) using conditional use permits. The guidelines, therefore, would change the statutory status of SFRs from an exempt activity to a conditional use (requiring DOE approval).

How do all these restriction comport with the statutory language in Chapter 90.58 RCW? How can Ecology regulate SFR construction when the relevant statute explicitly constrains Ecology’s authority? We request that Ecology specifically delineate the Best Available Science that supports the proposed requirements..

✘ The guidelines do not change the status of single family houses. The exemption for single family residences is only an exemption from the requirement to obtain a permit, not from the substantive standards in an SMP. See response to comments on Section - 190(2)(e)(iii)(A).

The sentence in RCW 90.58.020 which begins “[a]lterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures...” has often been misinterpreted to mean that the Act’s primary purposes was to protect property rights – specifically an individual’s desire to build a house on his/her shoreline property. The courts have rejected this argument, holding that the protection of private property rights is a secondary policy to the primary policy of the Act, which is to protect the shorelines as fully as possible. *Lund v. Dept. of Ecology*, 93 Wn.App 329 (1998).

Statutory Authority & Legislative Intent

If I could get a total outline of the legislative authority that the legislature gave you authority to do this act this far with the update, and how it’s possible that Pacific County is going to afford such an update.

✘ As noted in this responsiveness summary, the guidelines carry out the policy of the SMA in light of current conditions and science. Funding matters are beyond the scope of the rule, but Ecology supports additional appropriations to assist local governments in the task of updating their master programs.

Unfunded Mandate

Ecology received many comments complaining that the rule is an unfunded mandate & a huge financial burden for local governments & land owners. For example:

Working with local jurisdictions, DOE must provide an updated cost estimate to legislative consideration. Now is the time for the Governor’s request budget to reflect his commitment and adequately fund shoreline planning. The legislature needs to provide

funds to Ecology and local government for SMP development and implementation.

The implementation costs themselves will be huge. Under both paths local governments are required to inventory shoreline conditions, including all legal restrictions affecting shoreline development, along with all land use patterns (broadly defined to include structures, impervious surfaces, vegetation and shoreline modifications), all archeological, historic, public access, channel migration zones and bank full-width limits, degraded areas with potential for restoration. Gaps in existing information also must be inventoried. In addition, under Path B specific baselines for a very detailed list of items must be collected for use in the "adaptive management" process. This will be a very expensive undertaking for local municipalities.

Under both Path A and B, ecological restoration is a high priority. The County can condition or project to require ecological restoration but monitoring it and ensuring its' success is extremely difficult. Will DOE and/or the Services be providing funding and/or resources required to monitor such projects?

To implement this rule in Pend Oreille will require 5 FTE's for 2 years. Ecology's legislative request for \$3.47 million was inadequate. How can one determine the outcome from this voluminous document that, on its face, requires more cash than the retail sales tax on Burlington's 3 million sq. ft of retail space (\$3.47 million)? Every single taxpayer will have to pay for the cost of the plan, the cost to implement, the cost to enforce, the cost to defend, the cost for property tax shifts and valuation changes, not to mention regulatory takings.

Enforcement of ESA requirements will be an extreme financial burden. Under Path A or B, is the State and/or Federal government prepared to allocate significant funding to aid the burden experienced by the County for the purposes of enforcement?

Added to the unfunded mandates and impairments to revenue are the increased risk of litigation against municipalities implementing SMPs because of restrictive conditions on and denials of substantial development permits under the performance standards mandated by the SMA guidelines. Municipalities can expect an increase in appeals and court litigation related to the SMA, SMPs, and claims for compensation under RCW 64.40 or the State and Federal Constitutions.

Local governments will be confronted with regulatory takings claims, property tax fluctuations (devalued shoreline property may create a property tax shift), and enforcement costs.

Previously, Ecology estimated that the cost of the new guidelines would be \$18.6

million, though many felt this number was far to low. Now, given the increased complexity of the guidelines, and the numerous additional requirements added by Part IV, the funding requirements will be much higher. Considering the Legislature's unwillingness to provide funding in the past, it is likely that local governments will need to dig into their own pockets to pay for updates to SMPs. Upon adoption, local governments will need to assess their budgets and figure out which programs must be cut in order to provide the savings needed to pay for SMP updates. Thus, the adoption of the proposed guidelines will cause immediate irreparable harm as local government cut into existing programs and services to provide the funds needed to comply with the new Shoreline Guidelines.

RCW 43.135.060(1) provides: After July 1, 1995, the legislature shall not impose responsibility for new programs or increased levels of service under existing programs on any political subdivision of the state unless the subdivision is fully reimbursed by specific appropriation by the state for the costs of the new programs or increases in service levels. Reimbursement by the state may be made by: (a) A specific appropriation; or (b) increases in state distributions of revenue to political subdivisions occurring after January 1, 1998. The Washington State Association of Counties and Association of Washington Cities estimate that updates of SMPs within two years of the adoption of SMA guidelines will cost at least \$18.6 million (probably more) that has not been appropriated by the state.

The inventory requirements for preparing a SMP, even under "Path A," are enormous. There is little chance that Pacific County will be able to inventory and document the quality of its shorelines within two years, and certainly cannot do so without funding. The funding proposed by Governor Locke and DOE may support the potential costs of conducting an environmental inventory and of rewriting local SMPs. Nevertheless, the costs of defending these regulations in court and of administering them once they are adopted will be enormous. The cost of administering these rules in Pacific County is estimated at \$75,000 per year. Without full support from the state, the County would be forced to divert resources from law and justice programs or other vital services. DOE appears to be violating its responsibility to fund state mandated programs as specified in initiative Nos. 62 and 601 (see Chapter 43.135 RCW).

If the proposed Guidelines are adopted, local governments must immediately begin planning to update SMP's, and achieve SMP revision and approval within two years. Because the Legislature has not provided

funds for these planning efforts and required analysis, local governments will be forced to redirect monies away from critical programs such as public safety, transportation, social services and parks and recreation

☒ Ecology has in the past and will in the future continue to fully support local governments need for adequate funding for SMP updates. Last Fall Ecology worked closely with local government to assess their funding needs in detail, including the cost of inventories, and did reach agreement on a cost estimate of \$18.8 million statewide for update of SMP's. Accordingly, Ecology and the Governor requested such funding from the Legislature. Unfortunately, the legislature did not approve the request for funds. Ecology is committed again to revisiting the cost estimates and working in harmony with local governments to request needed funding in upcoming sessions.

Gaining more time to comply with the deadlines for updating SMP's (currently two years from Ecology's adoption of new guidelines), will require action of the Legislature to amend the SMA. For both efficient workload and effectiveness reasons Ecology has always supported a time extension. For the last two sessions, Ecology has supported and/or sponsored statutory amendments that would extend local governments time deadlines up to five years from adoption of new guidelines. Such legislation has not been approved by the Legislature. Agency (Ecology) request legislation requesting such time extensions will again be forwarded to the Legislature for consideration in the 2001 session.

Unfunded Mandate

Given the limited resources of local governments today, we think we should rely on the numerous environmental permits and development regulations already on the books to protect shorelines and salmon.

☒ Existing permitting requirements and development regulations can be directly referenced to help meet guidelines requirements. It is unlikely that existing permitting requirements and development regulations alone will satisfy the full breadth of needs related to implementing shoreline management in today's world.

Unfunded Mandate

How do you have authority to require something when there aren't the funds. So I want a specific answer to that question as to how you can promulgate this when there

isn't any discussion with regard to what the funding mechanism is going to be.

✘ The statutory directive to update the guidelines is independent of funding questions. It is within the sole authority of the legislature to appropriate funds.

Unfunded Mandate

Restoration and recovery objectives create strict development standards (applied through permits and "letters of exemption"), including setbacks and expensive mitigation requirements. These standards may make development or re-development practically and/or financially impossible for landowners and prove to be costly for local jurisdictions through enforcement.

✘ There will always be costs in complying with federal, state and local land development requirements. Ecology and the Attorney Generals Office have reviewed the rule to ensure that it does not make shoreline development impossible for landowners.

Unfunded Mandate

Local governments will be updating GMA comprehensive plans and development regulations, including CAOs, by 2002. Local planning and public participation processes for both GMA and SMP updates create significant costs. Further, the new guidelines require countless inventories and analyses, including current shoreline and upland uses, future land use demands, cumulative impacts at full build-out, shoreline ecological conditions, and habitats of proposed and listed species. Under Part IV, local governments will be required to issue letters of exemption, track all permits issued, and enforce permits with post-construction site visits.

The planning staffs and budgets of many local governments have been severely strained by work done under the GMA, to address ESA-listings of salmon and other species, and to respond to surges of economic growth. DOE should take care not to impose unreasonable or unnecessary costs on local governments during this time when their resources are already stretched so thin.

✘ If local governments want the up-front certainty of protection from liability under the ESA, they must accept the associated costs. Part IV is optional.

Unfunded Mandate

In jurisdictions where planners are paid by fees, the burden for planning tasks will shift to the taxpayer rather than fee payers because of I-695 (votes are required to increase fees). Is there a method for

establishing fees of permanence through the legislature?

✘ This request is outside the scope of the guidelines and Ecology's authority.

Unfunded Mandate

What will it cost Ecology to implement this rule over time?

✘ Ecology currently estimates a need for 10 FTEs, in addition to the existing 4 FTEs presently on staff, to meet the requirements (primarily in providing technical assistance, review and approval of local SMPs) generated by adoption of updated guidelines. The 10 FTE would include 4 SMP reviewers, 3 technical staff, 2 compliance monitoring staff, and 1 support position at a approximate total cost of \$1 million per year. A request for these resources will be before the Governor and the Legislature this Fall.

Unfunded Mandate

In order to restore at risk species and their habitats, protect other species, and prevent further listings we should be using the best available science, providing technical assistance, and helping local government develop and implement the new SMPs. There are requirements for such things as: shoreline inventories, baseline and post construction monitoring, monitoring reports, hydrogeological analysis, geotechnical analysis, cumulative impact analysis, bank full determinations, channel migration zone analysis, properly functioning conditions (PFC) assessment, floodplain determinations, wetland category ratings; technical assistance for ecosystem restoration measures, etc.

Who is going to do this? Local jurisdictions? Maybe larger ones but what about the smaller jurisdictions? WDFW staff are already overworked with technical assistance requests, and most do not have all the skills to perform all the above tasks. WDFW and other state agencies are mentioned repeatedly in this draft rule as who to work with but will they have the staff to provide the necessary technical assistance? Not only should they be funding made available for local jurisdictions to comply with the new guidelines but also for agencies to help fill the technical assistance requests that will be made.

Money spent on the rule is money not available for other important local responsibilities. The guidelines will impose costs on the region that will not result in much benefit to salmon. By their nature, the regulations are overbroad and will impact areas that provide little or no value to

salmon. Thus, the guidelines could very well be a poor investment in salmon recovery.

✘ Under the SMA, local governments, with support from state agencies, are required to comply with the minimum requirements of the guidelines.

Unfunded Mandate

Path B does not seem to recognize the importance of local differences in growth, industrial development, and ecology. Path B's goal is to guide local jurisdictions in developing long-term shoreline plans that will ensure that shoreline activity will not result in a taking of listed species. However, if resources are unavailable for planning or the regulations are so rigid that local variations are not considered, Path B does not work for all local governments.

✘ Path B is optional and Ecology does not expect that it will work for all local governments.

Unfunded Mandate

While Path B may provide protection from ESA liability, the greater up-front costs associated with this approach may make it unattainable for local governments. In fact, the higher costs of Path B may place it beyond the reach of smaller jurisdictions. DOE's process to identify and fund local government costs must insure that large, medium and small jurisdictions may select either path.

✘ Because the SMA applies to the full range of jurisdictions, cost estimates for updating local SMPs must recognize the full spectrum of large, medium and small sized local governments.

Unfunded Mandate

These costs will go beyond merely the direct costs for implementation. There will be the ongoing costs resulting from requirements for adaptive management. There will be liability for constitutional takings of property by local governments when implementing these regulations, including both "total takings" (under the Lucas decision) and "exaction takings" (under the Nollan/Dolan decisions), particularly in regard to the restoration requirements in the guidelines. There will be "hidden costs," such as the economic impact of these new guidelines on property values in shoreline jurisdictions, particularly to those rural property owners who will be able to make little, if any, use of their property under the new guidelines.

✘ The costs related to implementation of the guidelines are addressed by Ecology through a variety of means, including but not limited to

consideration of the Benefit/Cost Analysis, cost estimates prepared by local governments themselves, and Ecology's own staffing estimates prepared as fiscal notes to the Legislature. These estimates include within them consideration of the costs of on-going monitoring and adaptive management. See also response 1869.

Unfunded Mandate

The proposed changes include a significant difference in what constitutes shoreline jurisdiction, from the current 200-feet as measured from the ordinary high water mark to the potential boundaries of the entire floodplain area as noted in full bank width and channel migration zone. Some cities are located within the floodplain, which will result in the need to research, assess, and prepare data for use in the review of development proposals within the newly-expanded shoreline area. This will far exceed the level of any current municipal data.

✘ The guidelines do not expand SMA jurisdiction.

Unfunded Mandate

A great percentage of the proposed rule involves the influence of the GMA upon the administration of the SMP. Funding for environmental data collection is usually limited to those jurisdictions that plan under the GMA, so non-planning jurisdictions are especially handicapped in being able to complete the research required by the rules.

✘ Funding provided for update of local SMPs will in any event be based on consideration of need and will not be limited to GMA jurisdictions.

Unfunded Mandate

It is nearly unthinkable that Ecology would impose on local governments a new land use planning requirement without any funding assistance. This unfunded mandate is a clear violation of RCW 43.135.060, which states: "After July 1, 1995, the legislature shall not impose responsibility for new programs or increased levels of service under existing programs on any political subdivision of the state unless the subdivision is fully reimbursed by specific appropriation by the state for the costs of the new programs or increases in service levels. Reimbursement by the state may be made by: (a) A specific appropriation; or (b) increases in state distributions of revenue to political subdivisions occurring after January 1, 1998."

✘ Ecology is not imposing on local governments a new land use planning requirement without funding. Ecology is

doing what it was directed to do by the Washington State Legislature (in ESHB 1724), and that was, to update the guidelines.

Unfunded Mandate

Businesses and citizens will also suffer immediate, irreparable harm from the adoption of the guidelines. Land owned by businesses and citizens within the shoreline jurisdiction (the size of which is unlawfully increased by these guidelines), will be subject to restricted uses. Under the guidelines, many homes and businesses within the shoreline jurisdiction would immediately become non-conforming uses. The basis for this non-conformity is simply existence within the shoreline zone. Nonconforming uses and uses limited to existing footprints are increasingly difficult to finance, refinance, improve, or even sell. Thus, the adoption of the guidelines will have an immediate, irreparable impact on private landowners, both citizens and businesses.

✘ Adoption of the guidelines alone cannot create immediate nonconforming uses. The existing SMP will remain in effect until such time as the local government submits to Ecology an updated SMP. Such SMP will not take effect until approved by Ecology. Only then are nonconforming uses established on the ground through the master program. In the inventory, analysis and application of environment designations conducted during update of the SMP, local governments are obliged to consider existing land use patterns so as to reduce the creation of large numbers of nonconforming uses.

General – Boating regulations

The rule should note there are times and places when restrictions (type, size, speed, etc.) on boating are needed.

It is extremely important to assess the impact of boat and jet ski wakes on beach erosion. During the summer months in the South Sound, when the tide comes in naturally, it does so very gradually almost imperceptibly. Many times during the summer, substantial artificial wave action is created by boats and jet skis as they traverse the water. The wakes from these vessels is similar to constant storm-wave action and causes the tide to come in with ocean-type waves instead of the gradual creep that occurs naturally. This substantial artificial wave action from boats and jet skis may be eroding the beach at a faster rate than would occur with the natural incoming tides. This unnatural wave action has most likely caused "ecologically altered shorelines" in

some locations. This cause of unnatural wave action should be evaluated to determine how much it accelerates the normal rate of beach erosion, and what the private beachowner can do to mitigate this situation. Mitigation should not cause an undue burden on the property owner.

✘ The Washington State Supreme Court affirmed that local governments have several other laws and legal theories with which they may regulate boating. Please see the Court's decision in *John Weden II et al v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998).

While it is clear that boat wakes have some impact, there is not yet sufficient evidence that this impact is significant on a statewide basis to justify a regulatory approach on a statewide basis. Local government can and has regulated boating activities based on localized impacts.

General - Enforcement

ENFORCEMENT: A rule is only good if it's enforced. I urge that we maintain the state authority to monitor and carry out surveillance of shorelines.

The rule allows for varying levels of enforcement. All shorelines deserve the same level of strong regulation and enforcement.

If you are going to make these changes then end the hypocrisy of exempting native populations from these rules. What's good for the environment has nothing to do with who is impacting the environment. The rules should apply to all.

Will all of the proposed rules apply to Indian reservations of which there are considerable within the areas that these rules would normally apply?

✘ The enforcement provisions of the SMA and WAC 173-27 are not being changed by these provisions. All local governments with shorelines are required to enforce the provisions of the locally adopted SMP and the SMA. Those local governments choosing to adopt a Path B compliant SMP will be required to establish enforcement requirements beyond the minimum requirements in order to provide the certainty of implementation required by NMFS and USFWS.

The applicability of state law to federal lands, including tribal lands, is a matter of federal constitutional law beyond the scope of these guidelines, the SMA, and the state as a whole.

General - Rule not based on science / rule not needed

I looked in the rule for policies that would say that you're looking at real risks, not perceived risks. Now just keep that in mind. Real risks to the environment, not perceived risks – risks based upon the application of scientific and economic methodology. Nowhere could I find where it should reflect the cost commensurate with the benefits that would be achieved. I would think that all direct and indirect costs should be evaluated when you do this project. Also I would say, put in that principal — if you're going to have a problem, distribute the cost of environmental protection and compliance among those who contribute to the problem rather than sticking it to everybody.

☒ A benefit/cost statement has been prepared in connection with the rule and is available to anyone who wishes to obtain a copy. Based on this document, Ecology found that the probable benefits of the rule outweighed the probable costs.

General - Rule not based on science / rule not needed

What is the real purpose of these guidelines? Is it to protect fish or control people? It's not obvious that these rules are all supported by science and that any or all would improve salmon or herring production, both of which I'm all for. A more critical item may be water discharge on properties. It could well be that treated water for all discharge is more important than the proposed shoreline controls. There is a reason why salmon, herring and orcas are all declining. Where is the evidence that these controls in the written material here will improve that condition, and I do see you have something on water discharge. I'm not at all that familiar with it. Unbridled growth with untreated water discharge including runoff on all hard surfaces may be more critical than the shoreline controls.

☒ The rule addresses impervious surfaces and stormwater to the extent those activities occur within shoreline jurisdiction.

General - Rule not based on science / rule not needed

Shoreline planning has been in place since 1972. All affected jurisdictions have SMP's developed under the SMA and accepted by DOE. And many newer land use laws and

regulations have come into effect since the SMA was enacted.

☒ Many counties and cities went without master programs until well into the 1980's. Most recently incorporated cities have not adopted a master program. Many master programs have never been updated. Other land use regulations do not address all the same issues nor contain the same policy guidance as the SMA.

General - Rule not based on science / rule not needed

The SMA should be abolished because it has outlived its justification, with years of federal, state, county, and city purchases of private property for public good. If not abolished it should provide incentives for land owners to comply with the guidelines and for not developing. The public benefits of this law should not be the burden of the property owner to bare. If development is done all necessary technical experts should be provided to property owners at public expense, no the other way around. Property deemed undevelopable by the government should be leased by the government for that purpose. No taxes should be expected for undeveloped land. If the whole state benefits from the SMA then the whole state should bare the financial burden of the SMA, not the individual land owner.

☒ Comment noted.

General - Rule not based on science / rule not needed

We need no new laws concerning land use restrictions. The current laws, particularly concerning sewage treatment, are adequate and anything more than this is overkill.

Just what is it that we are trying to fix? We believe the present shoreline regulations are serving the public just fine.

There is no justification for arbitrary establishment of setbacks up to 200 ft if the SMA and existing SMP's are complied with and enforced. Rather than promulgate new rules why not insist that local governments and Ecology properly administer the local and state rules already in place? The environment of our state would be better served by ensuring local governments pay closer attention to the things that ruin the environment: Failing septic and sewer systems, improper stormwater collection & disposal, unlawful tree cutting and vegetation removal, burning on beaches, improper boat & ship disposal of garbage and pollutants, etc.

☒ As indicated by the decline of fish populations generally, the damage to property and loss of human life due to flooding and landslides, and the closing of shellfish beds to harvest, the current regulations are not adequately protecting the shoreline resources in a manner consistent with the policy of the act.

General - Rule not based on science / rule not needed

The current guidelines do not need amending and the rule goes far beyond the intent of the people's vote in 1971. It would be in the best interest of the public to omit DOE from the administration of this program and place the policies and enforcement with the local governments.

☒ The legislature and governor may amend the SMA to transfer control to another agency, but until such amendment occurs Ecology has a statutory duty to administer the Act.

General - Rule not based on science / rule not needed

Use the numerous environmental permits and development regulations already in place to protect shorelines and salmon.

☒ The guidelines use the existing permit process of the SMA as established in 1971.

General - Rule not based on science / rule not needed

You guys have a faith and a trust problem here, because I don't think there is anybody in this room that has a faith or trust in which any of your science that you bureaucrats will make a correct interpretation of these rules.

☒ Comment Noted.

General - Rule not based on science / rule not needed

The requirements for large, woody debris in streams interferes with stream navigability and with the, quote, normal public use of the surface of the waters, which is a direct quote from the Shoreline Management Act, large woody debris is a significant hazard to floaters and boaters.

☒ The Act contemplates "protecting generally the public rights of navigation." Provisions relating to large woody debris implement the Act's

policy of protecting the shoreline as fully as possible.

General - Rule not based on science / rule not needed

We talk about clear cutting and how it's causing erosion and causing this, but mother nature also causes clear cutting. It's called forest fires. And when you take all the people out of an area and you remove the roads, you are setting yourself up for big fires. You take the roads, where we can't get in there and fight on the ground against fires, you're going to lose huge water sheds. Forest land needs to be managed so that we have good water and we can pit ourselves against fire.

☒ The rule does not require the removal of roads necessary to combat forest fires.

General - concerns about unintended consequences of new requirements

We are very concerned about the effects of these regulations on current developments that are existing developments as well as future developments in Ocean Shores. Ocean Shores has 52 miles of shoreline. Only approximately 33 percent of our shoreline is developed in Ocean Shores, and this would have a very negative both on existing development as well as on proposed development in many areas, particularly along the canals and on the Lake. Almost all of these lots, 3460 platted lots, and only 33 percent of these are developed, so almost all of those are in private hands at this point. A particular concern that we have is that it will be difficult to make repairs on many of these lots given the regulations and we have about \$250 million value already in development along the shorelines in Ocean Shores.

The other particular concern is vegetation buffers. And for many of the lots that are not yet developed, if we look at the size of the lots along the canals, it would mean that with the setback that is required, there would only be in a best-case scenario 30 feet allowed for the depth of development the way our lots are current low platted in Ocean Shores. So it would put a very onerous burden on private property owners who have this property and intend to build on it at some point.

☒ As an established incorporated city, the guidelines should not drastically alter uses or development in the City of Ocean Shores. The guidelines make provision to assure that existing platted lots are reasonably usable.

General - concerns about unintended consequences of new requirements

DOE needs to review some of the policies in local jurisdictions before coming out with a blanket proposal such as this. There are many cases of city officials requiring absurd changes in order to allow the project and not listening to those who are environmentally aware. In some cases storm-water runoff is worse because of local requirements and the cost is considerably more. Officials sometimes cause more damage than would have been caused had proposed projects been allowed to go as proposed. This even happens to SFR's and is driving the cost of housing out of the reach of many of our citizens.

☒ Ecology must review and approve every master program update before it becomes effective at the local level.

General - concerns about unintended consequences of new requirements

The current draft does not adequately create a vision for shoreline management that would help reconcile competing needs and help local governments, state agencies and other stakeholders understand what kinds of developments and uses should and will be encouraged. The draft guidelines often focus on the negative - what will be prohibited or restricted - rather than on opportunities to better manage shoreline resources so they can better serve our society's needs and goals. In actual practice, the role of master programs is to "signal" to private investors and public agencies what types of land use and development will be allowed and what conditions are likely to be imposed on them.

Relatively few shoreline permit applications are denied because project sponsors, both private and public, read those "signals" and do not invest time and money in potential projects that are unlikely to be approved or are likely to be unreasonably delayed or burdened by conditions if they are allowed. Thus, the real effects of the shorelines are largely hidden: by influencing or controlling the content of master programs, the guidelines determine what kinds of projects and land uses will be proposed for public review and regulatory decisions.

We urge DOE to adopt a more positive approach specifying as much as possible the kinds of shoreline development and types of shoreline use that will best serve the SMA policies. The Guidelines should encourage desirable development and uses, not just discourage or prevent undesirable ones. Encouraging new investment in desirable uses is the best way to assure that people have vested interests in continuing those

uses and not converting shorelines to other, less desirable, uses. Such a positive and proactive approach is fully consistent with the SMA. The very first master program "element" listed in the act is found in RCW 60.58.100(2)(a). The best way to assure that facilities are not constructed at undesirable locations is to have the underlying social needs met by facilities at appropriate locations. SMPs can and should affirmatively encourage socially desirable developments at appropriate shoreline locations.

☒ Ecology believes that the rule implements the policy of the SMA by delineating what type of development is and is not appropriate for a given type of shoreline.

General - concerns about unintended consequences of new requirements

I think that we need to do something that is going to be consistent, that is going to work. The interpretation can't keep being changed. We figured out this wonderful river restoration project, and we got the buy-off on everybody including our most environmentally aware council member, who, you know everybody thought it was a perfect thing, and at the last minute, NMFS jumps in at the last minute and says no, the only way you can do this is to use material that is totally degradable. Well, except that if you use this material that's totally degradable the project is just going to fall in the water, so, and they did it at the last minute.

☒ If a local jurisdiction adopts a Part IV master program, Ecology anticipates that a programmatic incidental take statement will be issued by NMFS and USFWS. See response at line 1689. The ITS working in conjunction with Part IV master programs should bring substantial consistency to such matters.

General - concerns about unintended consequences of new requirements

The guidelines often seem to assume that redevelopment should be severely restricted and conditioned on restoration of pre-European settlement conditions or natural ecosystem functions. In actual practice such a policy would prove counter-productive. Virtually all development (including redevelopment) serves human needs that, if not met in one location, probably will be met at others. To the extent the guidelines discourage redevelopment, they necessarily will shift development pressures to other locations, both developed and undeveloped.

This is particularly true for water-dependent and water-related uses: by their nature they must be or likely will be in or near shorelines. If they cannot be accommodated by redeveloping shorelines that were previously developed, most likely they will be accommodated by initial development of other shorelines.

Discouraging redevelopment is likely to have other perverse effects. If the guidelines make it difficult to redevelop shorelines that have been intensively developed for uses no longer in high demand, those areas are likely to fall into disrepair and pose greater threats to water quality and aquatic habitat. Areas with falling property values, vacant or underused facilities, and few prospects for near-term redevelopment often contribute to environmental as well as social problems. Generally aquatic habitat would best be protected and improved by encouraging redevelopment rather than allow developed shorelines to become occupied by dilapidated facilities and turned into slum-like conditions.

Usually, of course, redevelopment can and will be accompanied by some improvements in habitat condition. But this is an area in which good intentions can easily become the enemy of good results: policies that burden redevelopment projects with unreasonably high costs to restore natural conditions or “mitigate” for habitat losses attributable to prior or unrelated developments easily can discourage people from proposing projects that would provide lesser but still significant benefits.

Also, the guidelines should recognize that many shoreline redevelopment projects are sponsored and funded by state and local agencies and non-profit organizations. They serve the public interest in many ways and should not be unreasonably discouraged or impeded.

Throughout the entire section identified as Part III, there are a number of provisions that suggest or require that shoreline restoration should be required wherever possible. While this may be appropriate and encouraged, regulations should be clear to not adversely impact the future viability of the use by restoring the area to such an extent that future activities are prohibited because of the success of the restoration. Encouragement of restoration should not be counterproductive to the future use of the property, otherwise voluntary efforts are not likely. Success of the restoration is obviously important, but property owners who participate in this effort, and are successful in their restoration efforts should not be penalized in the future by not allowing flexibility in the ability to rebuild, replace or expand structures.

☒ Ecology has clarified in the rule that restoration does not mean a return to

pre-European conditions. The guidelines do allow development consistent with the policy of the SMA.

General - concerns about unintended consequences of new requirements

What is the fiscal impact to the counties caused by restriction on the amount of available land? Some counties are very limited in available lands, and the remaining parcels will be much more expensive (the less land, the higher the price is going to be).

There will be the unintended economic consequences from the new guidelines. There will be unintended “wealth shifts,” as the regulations privilege those who have already developed their property at the expense of those who have not yet done so, and rural areas once again end up subsidizing the environmental concerns of more densely populated urban areas. This will naturally destroy rural property values while sending the property values of developed shoreline areas skyrocketing. Even in urban and developed areas, use of an “adaptive management” strategy results in little regulatory certainty for landowners and businesses in the shoreline jurisdiction, and this could have a drastic influence on property values.

Markets, including markets setting the value for land, hate uncertainty, particularly with regard to government regulation. Finally, there will be property tax shifts within counties, particularly rural counties. The lowering of property values on shorelines due to excessive government regulation will result in a property tax shortfall, forcing rural counties to increase property taxes elsewhere to make up the difference, or reduce funding for needed local services.

At the same time the SMA guidelines will impose heavier fiscal burdens, they will also devalue or retard the growth in assessed property values, which reduces the revenue generating capacity of each local jurisdiction. See RCW 90.58.290 (restrictions on land use under SMA shall be considered to lower assessed values of property). SMA guidelines will also delay and hinder economic development for the purpose of ecological restoration, but this will slow and prevent economic activity that would otherwise increase the revenues of cities and counties through sales taxes, property taxes and other growth-driven revenue sources.

☒ Research and Washington-specific data and information relating to property value issues and fiscal impacts caused by restrictions on available lands are being reviewed and collected. Ecology’s Benefit/Cost Analysis will attempt to address, as part of the costs of

this proposal, both foregone development or use values and distributional shifts resulting from the proposal. The Benefit/Cost Analysis must be completed prior to adoption of the rule, per the requirements of RCW 34.05.328(1).

General - concerns about unintended consequences of new requirements

Property tax issues have yet to be examined. Mason County has a tremendous amount of waterfront property on the tax roles. Until the issues surrounding the possible value changes of the affected lands have been discussed, these regulations should not be adopted. Issues such as will mitigation lands purchased be kept on the tax roles or will they be removed? Will these regulations cause tax shifts within taxing districts (school, fire, library and hospitals) because property values decline on land because of a surrender of use? Will these regulations force tax shifts to already developed waterfront homes as they become more exclusive and literally tax many people out of their homes?

☒ Ecology does not believe that any more specific analysis or study of the questions raised is required by state law nor is necessary.

General - concerns about unintended consequences of new requirements

Having a Path A & B will result in ambiguity that will create inaction in the permit process. Projects will never be denied, just put on perpetual hold.

☒ Permits will be processed under the existing SMP until a new one is adopted by the local government with jurisdiction. Once a new master program is adopted, it will be clear whether it is a Path A or B SMP and permits will be reviewed pursuant to that SMP.

General - concerns about unintended consequences of new requirements

WSDOT is in the process or has already established environmental standards consistent with ESA for many transportation related activities. Examples include the WSDOT maintenance manual (4d rule) and programmatic BA’s. WSDOT is concerned about potential duplicative requirements that the path B option may create that may be contradictory to these programs. As an applicant for transportation projects throughout the state, WSDOT

benefits from consistency and predictability in the permitting process. We are concerned that the proposed rule with both options will create great disparity between the regulatory requirements of local agency SMP's throughout the state - those choosing path B versus those choosing path A. The proposed rules will make it difficult for WSDOT to anticipate the local agency requirements and effectively "plan ahead" for maintenance and construction projects.

✘ The structure and policy of the SMA leaves a great deal of latitude to local government to craft specific measures to address the policy interests of the Act as expressed through the guidelines. While it is understood that for an agency operating statewide, uniformity among the regulations of local government would be beneficial, the SMA does not provide a basis for Ecology to make such a requirement.

General – Local control

Ecology says local governments will control master program development. But locals must follow state guidelines and get Ecology's approval so there is no local control.

The rule doesn't define standards. Local governments will have to rely on the interpretation of Ecology, which gives unfettered discretion at the state level when this is supposed to be more of a locally implemented approach.

Local authorities should have flexibility and latitude in creating and revising their administrative provisions and permit review procedures. Within the new draft there are indications that the State may take primary control and that the local authorities would not have the same autonomy as before. When a DOE decision rejects or overrides that of the local authority, it would be helpful to all involved if that decision were accompanied by a finding of fact based on site specific information and strict construction of the SMA regulations and guidelines.

✘ The SMA is, and has been since 1971, a system of shared authority and responsibility. Neither the state nor the local government have full control of the system. Ecology writes guidelines for the local SMPs, local governments develop the SMP as they see fit in accordance with the guidelines. When the program is submitted to Ecology its review is based on a strict legal standard of consistency with the guidelines and SMA. If local government disagrees with the decisions of Ecology it may be appealed to the Growth Management Hearings Boards (GMA jurisdictions) or the Shoreline Hearings Board (Non-GMA jurisdictions). Further

disagreement can be carried to the Courts. The act describes the relationship between local and state government as intended to be "cooperative". At its best it is.

When local and state government work together, the outcome is far more likely to meet the needs of both. Development occurs even when no population growth is occurring. The legislature directed that we review and update the guidelines. The guidelines as drafted in 1972 clearly do not address the issues relevant to shoreline management today in a manner consistent with our understanding of the shoreline resources. Pacific County is part of the state and clearly, on a statewide basis, shoreline resources have not been adequately protected by the current regulations.

General – Local control

The rule is centralized government planning. We know our area better than government agencies and we'll take good care of it.

✘ The SMA is a cooperative program between state and local government. It requires local government to address statewide issues while developing local plans that suit local circumstances.

General – Local control I

Duck Lake was man-made, the canals are man-made, but they are listed on the Shorelines of Statewide Significance. Duck Lake is — and the canal is off of Duck Lake. Those shorelines did not naturally have any endangered species in them. But let me just read to you a sentence from the city manager's testimony: With the ESA about to declare the cutthroat trout endangered, we face more unknowns regarding our ability to develop our lakefront lots. It is my understanding that Ecology will not differentiate between hatchery and native trout. That said, the cutthroat trout in our lake were planted there by the Department of Fish and Wildlife without our request or permission. What better way to control development of waterfront properties?

✘ Part IV is optional for local governments. If a local government wished to address listed species through an approach different than that outlined in Part IV, it may proceed under Part III. That said, a distinction should be drawn between the SMA and the ESA. The SMA requires all fish and wildlife species to be protected. The ESA concerns itself with listed species. WDFW or NMFS should be consulted to determine whether the species in Duck Lake is proposed for listing.

General - maintenance & repair / exemptions

The existing Shoreline Management Act regulations allow repair and maintenance of existing serviceable structures to proceed without obtaining a new shoreline permit. This sensible policy avoids a great deal of unnecessary regulatory process, and allows local governments to focus scarce time on projects where significant impacts may occur. The new Guidelines must be equally clear that this policy remains in effect unchanged. Shoreline structures, by their nature, often exist in a dynamic and high-energy environment. They frequently incur damage from storms, slides, floods, accidents and weather. The pending era of salmon protection and recovery efforts will increase the time and resource burden on all levels of government, and it makes no sense to "layer on" process burdens for maintenance and repair activities that have little - if any - marginal impact on the shoreline environment.

✘ The existing provisions in the statute for normal maintenance and repair of existing developments are not changed by the provisions of the guidelines.

General - maintenance & repair / exemptions

Will other state agencies be exempt from doing repairs on bridges that go over these streams? Over these rivers? Or not? And also, such as like when the flex bridge up in Seattle fell in, if this goes through, what happens then? The bridge just lays there in the water?

✘ The provisions of the SMA specifically require compliance by state agencies. This has been the requirement since 1971.

General – temporary structures

We seek a clarification in the rule on temporary structures. There are some temporary structures, which, due to their temporary nature, do not have shoreline related impacts. As long as these types of structures meet the intent of the Shoreline Management Act, we believe they should be exempted from shoreline substantial development permits. This is an appropriate distinction to be made in an amendment to local SMPs, which Ecology would be asked to review, but the guidelines could be clearer in their position on such an issue. In particular, temporary structures for special events could be recognized and defined, and the definition of structures narrowed to include only temporary structures with shoreline impacts.

✘ The SMA makes no specific provisions related to temporary structures. Exemption from the permit requirements of the act is beyond the scope of this regulation and would require legislative action.

General - Implementation Concerns

I doubt the state has enough qualified personnel to realistically review every development (including single family residences) that will occur in the next five years on shorelines. I also doubt that the personnel responsible for the reviews would be knowledgeable as to what the ecological function would really be like (without human interference over the last 200 years) for each location within a county. In my opinion these rules will allow only those with the financial resources to hire environmental consultants to develop our shoreline.

✘ Ecology has limited staffing to assist local governments with their SMP updates. We will do what we can to assist. We do not agree that only those who can hire consultants can develop their property; much of this work will be done by the city or county at the SMP amendment level in advance of property owners applying for permits.

General - Implementation Concerns

In those instances where the municipality, for whatever reason, marches to a different drummer and shoreline and shoreland issues, use issues, are decided in a manner which compromise or ignore the ecological considerations, what can the concerned citizen do to bring that government back into line with mandates of environmental policy? We know that DOE does not have the manpower in the field to fulfill an adequate monitor and inspection program. Does DOE have any plans for how to mobilize sufficient field personnel to respond to the complaints and information provided by those concerned citizens? If DOE doesn't respond to the citizens, you will lose their support.

✘ Under the SMA, Ecology is in a support and review capacity, with local governments being the prime implementers. We currently respond to citizen complaints and work with the particular local government in resolving them. We will continue to do so under the new guidelines. We are also asking for 9 new FTE's to help implement the new guidelines. In addition, if we do not believe a particular local government is responding appropriately, there are limitations on what we can do. We have review and approval/denial authority

for conditional uses and variances. For substantial development permits, we are limited to appealing permits we do not agree with to the Shorelines Hearing Board. In all those cases, we try and work with the local government, but our formal role is limited.

General - Implementation Concerns

To adopt rules doesn't really save anything. It's the actual implementation of those rules on a daily basis. It's not even adopting the master program; it's how the permits are written and what conditions are contained in those permits, and having the staff and the capacity at the most local level to insure that the permits are complied with. There is no guarantee that if the rule is put into place that Ecology will put the emphasis on reviewing and permit assistance. Once the plans are in place, rather than - today it seems the emphasis is on looking at permits once they've actually been issued, and then making determinations on whether you appeal it or deny or let the permit go through. The emphasis needs to be shifted so that when you get — the local government, who is the partner in this, that the department has its feet firmly planted on the ground in the local community, needs help at the front end, not the back end, and this does nothing to help with that either.

✘ Ecology agrees that it is important to assist local governments in the front end – as they prepare their updated SMP's. To this end, we are asking for new FTE's to help us provide that type of support. We will also continue to look at permits as we do today, since we believe there is still value in performing that function.

General - Implementation Concerns

We are concerned that once we would successfully prepare a master program we'd have the resources to implement that program over time. As I read the guidelines they're complex, they're detailed, they take a high degree of understanding, more understanding and training I believe than the average local land use planner has. Communities are going to, through necessity, have to retain biologist and other people with scientific training in order to carry out day-to-day implementation of the act or guidelines.

✘ Ecology acknowledges that the proposed guidelines require a greater level of technical information than many local planners typically have. We intend to provide technical guidance documents, workshops, and other information, as well as working more

directly with local governments as they prepare their SMP updates. The extent to which we can do this is dependent upon legislative funding.

General - Implementation Concerns

What good are all those new regulations when nothing — not enough money is being spent to carry out the regulations we've got. Let's continue with what we've got. Make it better, stick with it, and stay the course.

✘ Ecology believes the current guidelines, and thus current SMP's, are largely inadequate and need to be updated. The guidelines have not been reviewed in nearly thirty years (since their adoption in 1972), and many changes have occurred: a large population increase in Washington state, the passage of additional laws including the Growth Management Act, and the listing of species of salmon under the Endangered Species Act, to name but a few.

General - Implementation Concerns

My question is how many counties would be exempt under this or if not exempt, how many are you not going to be fighting with? It's going to go to the courts between the county and ecology and I as taxpayer am going to be paying both ends. If you can't do better than this I suggest you just cancel it and start again.

✘ No counties are exempt from the requirement to review their master program to assure it is consistent with the guidelines.

General - Implementation Concerns

The rule is fundamentally flawed. If enacted as it is and local jurisdictions adopt SMPs, we're going to be moving toward not rule making but adjudication. What I mean by that and what I fear, is rather than having a rule that we can apply across the board - it would be the same for everybody - there is too much that is going to become murky and we'll end up dealing with permits case-by-case. That's not efficient. Local governments don't have the resources to fight every single case, and unless we can have some rules that make sense and are reasonable, it's going to be an impossible burden. Not just in terms of the actual cost of doing a shoreline inventory or whatever else - those are significant - just the day-in and day-out costs of trying to administer this program. I want a program that can be reasonable for local governments to work with, rather than one we've got to apply because the local citizenry doesn't like

it, and we don't know what it means and we don't have the staff to regulate it.

✘ Ecology does not agree that the proposed guidelines are fundamentally flawed. We believe local governments will be able to implement them in a logical and consistent manner, and we will assist local governments to the extent possible in doing so.

General - Implementation Concerns

We're going to create an entirely new criminal - grandmas and grandpas who want to add on to their house, standing there with the title of their property and American flag and wondering how on Earth in America could this happen. And you'll use the courts as your weapon of choice, and you'll force local law enforcement to be the arm of bureaucratic nonsense. If the DOE or anybody else thinks that passing the WAC or regulations or rules is going to make this easy, I have news for you. If it comes down to standing between you and the people in my community, between you and the people who live there, pay taxes there, pay my salary, between you and the Constitution of the United States, I am standing with my community. These rules and regulations that you are passing will not be without consequences. I urge you to reconsider.

✘ Ecology does not agree with this characterization of how the guidelines will be implemented.

General - Implementation Concerns

If the state does not grant individual private landowners their rights to a trial by a local jury of their peers when fines or punishments are levied against them, which may potentially result in depriving them of Life, Liberty, Property or financial sustenance; or results in classing them as Felons: Such a trial should be conducted granting the accused their rights to face their accusers, including all witnesses, agency personnel, environmental specialists, and others whom may have responsibility in depriving the aforesaid of their most vital God-given rights.

✘ Nothing in these guidelines affects the ability to have such a trial.

General - Implementation Concerns

If penalty fees are charged or punishments levied without due consideration for and in proportion to the individual private landowner's ability to pay fines or serve restitution in a reasonable way, without the total loss of their property and/or livelihood;

and such penalty fees and/or punishments are collected or exacted in a manner so as to jeopardize the economic, social, developmental (of children), or educational futures of the aforesaid property owner's dependents; or, if penalties and fines are levied against corporations, large businesses, developers, and/or other wealthier classes of citizens and/or groups of citizens with disproportionately lesser fines and punishments imposed upon them compared to individual private landowners who are poor, or of average social status and income, thus with average financial ability to pay.

In other words, citizens are fined and punished unfairly in proportion to their income when compared to the total income of a corporation, or certain class of citizen or group of citizens who may be wealthier or have a different status in society above the average citizen, this would be against WA Const., Art I, Sect. 12 and 14, and provisions of the US Const.

✘ Comment Noted.

General - Implementation Concerns

If property is inspected and/or otherwise investigated to consider SMA rule compliance (and the potential results of non-compliance is severe enough to render a felony judgment and/or fines and punishments that jeopardize life, liberty, or property and financial sustenance or the sustenance of dependants) and the investigation is not done in a manner that reflects due process of law such as: The state should issue notices of intent or warrants that give all due respect to the individual private landowner's ability and intentions to attend such inspections personally and/or send a representative and/or professional environmental specialist for the same purpose of attendance. Provisions should be made to provide the individual property landowner with independent technical assistance if they believe such is necessary to avoid bias expert determinations that may favor the state determinations unfairly, or in a way contrary to the most current, sound science or proven methods in this area of expertise.

✘ Ecology does not agree that the state is obligated to provide assistance to those who do not agree with the results of legal state inspections to determine compliance with the SMA.

General - Implementation Concerns

If individual private landowners are not entitled equal access to grants, technical assistance, and exceptions that are available to corporations, large businesses, developers,

or wealthier members and/or special interest groups of citizens of the community - due to the individual private landowner's condition of poverty, inability to hire expert environmental counsel, or perform needed developments in order to comply with DOE conditions. Assistance should be made available to poorer individuals to enable them to comply with DOE demands (and thus qualify for DOE grants or assistance and exceptions) when it is apparent that such demands are above the individual private landowner's ability to comply. Reasonable standards should be formulated to ensure equity in these matters. The aforesaid corporations, large businesses, etc. should not have fines, fees, and/or punishments levied against them that are not proportional to their ability to pay when compared to less wealthy individual citizens.

If the extremely poor are not granted provisions to allow them use of their property and water along the shoreline as a means of sustenance for their family's most basic needs i.e., garden produce, water, firewood, etc. If these needs are classed as inferior to the needs of the general public, corporations, or any other class of citizens i.e., recreational, environmental, sporting, hunting, or fishing enthusiasts. Under such adverse circumstances of individual private property ownership, described in this statement of public comment, many individuals would hesitate to buy shoreline properties, since they will not be sure they can afford the risk and/or expense involved in developing and using them.

Furthermore, they would not be sure that they will be able to enjoy the privacy that they once thought could be enjoyed by the ownership of rural lands near a shoreline - due to the increased access rights that are given to the general public, compounded by the "swarms of officers [sent hither] to harass our people, and eat out their substance."

✘ To the extent possible, Ecology assists individual private landowners in providing information and assistance. However, if we understand your comment, with some limited exceptions Ecology is not able to financially assist private landowners in developing their property. The limited exceptions have to do with programs such as cost-share funding provided to local conservation districts. We are not sure we understand your comment about "exceptions that are available to corporations, large businesses, developers, or wealthier members and/or special interest groups of citizens of the community..." Any property owner, including small, "extremely poor" property owners, can apply for a variance from the standards of the local SMP, and go through the

process to determine if they meet the criteria for granting such a variance.

General - Implementation Concerns

Such adverse implementation of the SMA would make it a law favoring the wealthier landowners. In such a case, the properties of many rural folks would go down in value, wealthier developers and/or businessmen who could afford to modify their shorelines to comply with the new rule would be favored with grants and approval for their development plans. While wealthier land owners and developers will be capable of receiving grants for this purpose, the average citizen will be left with no other choice but to sell their property at low values, sometimes to these very same wealthier developers, who are better able to comply with the new rules and easily pay the fees associated with "expert approval" of their proposed developments - thus the end result of these shoreline laws would violate the spirit and intent of the "equal treatment under the law" clause in the US CONSTITUTION, as well as "eminent domain" laws in the WA CONSTITUTION (WA Const., Art I, sect. 16.)

Thus favoring the rich in the exercise of their rights to own and develop land while neglecting to maintain and protect the individual rights of the poorer private landowner. Furthermore, if farming and business families, who are not unduly wealthy, are left without protection for their heirs' property rights or the rights of a prospective real-estate purchaser to use developments that are in use on their property at the time of sale, economic discrimination has occurred again. And the poorest of our free citizens will suffer the greatest loss of their right to equal opportunity in the economic sector.

☒ Ecology would be extremely surprised if the guidelines resulted in the scenario described by this comment. Shoreline property has historically appreciated at a much rapid pace than other properties, and we see no reason that would change. And we do not agree that implementation of the guidelines will have this result.

General - Implementation Concerns

What are the penalties to cities and counties for not complying with these guidelines?

☒ See RCW 90.58.070. If a local government fails to adopt a master program in accordance with the time frames provided in the 90.58.080 (within two years after adoption of guidelines)

Ecology must adopt a master program for that jurisdiction.

General - Implementation Concerns

Redevelopment of brownfield sites in shorelines, shorelands, and associated wetlands brings a benefit to both citizens and wildlife that use these unique resources. However, the way that the proposed SMP regulations are written leaves so much uncertainty with regards to level of clean-up, restoration, and enhancement of these affected areas, that the already expensive clean-up operations necessary to redevelop these sites will become financially infeasible for many developers and jurisdictions. The result is that brownfield sites that could be cleaned up to more healthy levels for human use and wildlife habitat will remain undeveloped or underdeveloped with continued leaching of contaminants into the aquatic habitats that the SMP guidelines are supposed to protect.

☒ Ecology supports the redevelopment of contaminated sites and does not believe that the Guidelines will discourage well-conceived brownfields projects.

General - vague terms/unclear language

These rules are very general — definitions and each word makes sense, each sentence makes sense, but when you put it all together, it's hard to understand how this actually would be transmitted into concrete rules. You must provide examples of what you mean by a lot of these vague definitions. You don't have any. The difficulty you're going to have and local government will have, is trying to read these. Actually write some real rules that have teeth in them. What you have here is preparatory language, which makes sense at a very broad level. But when you have to translate that down into concrete rules that local governments will have to enforce, that's going to be very difficult to do. It would be very helpful if you could put in more examples of what you mean by this general language.

The other thing that would be very helpful you have to keep going back and forth trying figure out how this section matched with that section. When you read the definitions and read the language, they don't always match up.

The definitions (and in particular the application of the definitions to the "regulations") are so vague that: (A) local governments cannot reasonably be expected to figure out how to comply from reading the face of the rule, and equally important (B) applicants are denied both substantive and

procedural due process because they do not know the standards (not aspirations, but standards) by which their application will be judged. In this regard, there are two fundamental notions of fairness that are paramount: (i) Applicants have a right to know the standards by which their application will be judged, and (ii) Applicants are entitled to have a clear standard applied to their specific facts, rather than inferring the standard from the applicant's facts.

Throughout the draft document the language is unclear and very open to differing interpretations. These ambiguities will guarantee differences of opinion between the local governments that issue permits and the Department of Ecology in their permit reviews, this will force many simple projects to go before the Shoreline Hearings Board. Wording such as the following are used throughout the document: "all reasonable efforts," "where feasible," "should be given priority"

The most current draft of the Shoreline Regulations is replete with vague language that presents few requirements for local programs. An argument presented for using the language in the current draft is to allow for flexibility. However this flexibility will result in local programs that will provide minimal protection if any, and will create conditions across the state where innumerable requirements are established causing confusion and enforcement nightmares.

One goal of the GMA is to provide certainty in local planning. A number of terms in the guidelines are vague and undefined, contrary to GMA policy.

We are concerned about guidance language that would allow local planners to designate where these conditions have been achieved without clear standards to define what constitutes "properly functioning conditions". Throughout the rule, standards must be made more specific. Requirements to "maintain ecological functions" are good, however are not terribly meaningful unless further defined. Local planners are not biologists and require far better guidance. There is a need to define, clarify and specify terms and concepts to prevent local governments from making a too loose interpretation of the State guidelines when developing their own Shoreline Management Plans. Few local Planning Offices have the science staff necessary to make biological and ecological assessments of the shorelines within their jurisdiction. Therefore, it is necessary that as much of the guesswork as possible is removed from the local planning jurisdiction.

The proposed guidelines are at times vague and at other times too specific and detailed. The format is confusing and very

difficult to follow. For instance, there are numerous "definitions" within the body of the guidelines that need to be moved to the definition section. If these guidelines are to be adopted as WACs, then significant technical editing is needed to reduce redundancy, eliminate inconsistencies and create a usable and defensible document.

At those meetings, we warned that WAC 173-26 had to be clearly written for the public. I am well educated and can read most of it, but the language is sophisticated and legal. There is nothing wrong with that, *per se*, but such levels will prolong the education and public process. The public distrusts government in general and has no trust at all in language it does not understand.

Throughout the document overlapping terms are utilized. Why is PTE specifically called out in Path B when it is already included in the definition of priority species? Other examples of overlapping terms being utilized in the documents include the definition of Ecological Function, and in the Shoreline Uses - Mining Standards Section (page 151 h(ii)) where it states that destruction of PTE or priority species habitat is prohibited.

Anything that can be done to simplify the language in the final rule to make it more understandable to the average person is encouraged. The rule will need to be supported with a readable non-technical guidance manual that can also assist local governments with their public education and participation efforts. Ecology staff will need to be assigned and readily available to work closely with local decision makers and community members as they update their SMP's. Training programs, workshops, and other educational opportunities are necessary for building local capacity for effective shoreline management.

✘ Every effort has been made to use terms and phrases in a specific manner and to achieve clarity. However, the guidelines are the product of a collaborative process involving numerous interests and parties and thereby, as a means of coming to agreement or acceptance, sometimes uses vague terms. The guidelines also apply statewide in a wide variety of circumstances, settings and environments. Because of this it is appropriate to use general terms that may well mean one thing in one setting and something else in another. Finally, the guidelines are, as specified in the SMA, guidelines. They are not regulations but requirements for development of regulations by local government. This means that it is specifically intended that local government have latitude to develop regulations appropriate for their setting

within as broad a framework as is possible while assuring implementation of the law.

The overall policy of the SMA is the primary guidance to interpretation of the guidelines and standard rules of statutory and regulatory interpretation are applicable. The dictionary and the definitions section must be used and reasonable judgement applied. The SMA and GMA provide processes to allow issues to be discussed, debated and decided with broad public participation as a part of the process of crafting and adopting an SMP. Where disagreement persists, there is recourse to the SHB, GMHBs, and the courts. Over time, interpretations will become settled in law.

General - vague terms/unclear language

Throughout the rule standards must be made more specific. There is a need to define, clarify, and specify terms and concepts to prevent local governments from making too loose interpretation of the state guidelines when developing their own SMP's. As much of the guesswork as possible must be removed from the rule.

The entire Part IV contains redundancy and inconsistency in the usage of the terms "properly functioning conditions for proposed threatened and endangered species". Significant work is needed on this section to provide a clear and concise interpretation of the goals of these rules.

✘ The provisions of the guidelines are intended to be specific enough to implement the policy of the SMA while allowing local government the latitude to craft an SMP that is appropriate for local circumstances. A rigid set of guidelines would have a short shelf life in terms of its ability to react to new information and conditions and may be counterproductive to protection of resources based on new information. The SMA incorporates a system of checks and balances that assure implementation in a manner that is consistent with the policy of the SMA.

General - complexity of rule

The proposed regulations are quite complex. If guidance and regulations are not easily understood, local government decision-making is made more difficult and open to challenge. We would support any effort to continue to simplify Path A, to provide more certainty and predictability on behalf of all stakeholders. Moreover, we would appreciate Ecology's commitment to help us work

through the implementation of these complex rules in a timely manner as we update our program in the near future.

One of the difficulties that you have in trying to write law is to cover everything you need to cover, but on the other hand to make it understandable, not only to the ordinary person, but to the policymaker in the county who is going to advise staff on how to write SMPs. At this point I can't tell you how Pacific County would write a SMP to effectuate these rules.

✘ Ecology will be rendering assistance to local governments in the implementation of the new guidelines, starting with the publication of a completely new version of the Shoreline Management Guidebook.

General - complexity of rule

I would like to see the intent of the Shoreline Management Act implemented and to do that I would prefer, rather than to see this very complicated regulatory scheme, to see a moratorium on development within 150 feet of sensitive shorelines. I would also like to see it expanded to include agricultural practices because it has been proven that those are some of the most destructive that are going on.

Can another, more simplified, less demanding approach be provided for jurisdictions with primarily residential shorelines like Burien? We suggest a much simplified, state-prescribed, prescriptive, third path.

✘ Simple approaches can be accommodated by Path A. However, Ecology does not believe a prescriptive approach is appropriate as a statewide minimum, given the diversity of local governments.

General - complexity of rule

How do the various regulations for storm water management, the 4d rule and the ESA, critical areas under GMA, flood hazard protection ordinances for FEMA, the Clean Water Act, Forest Practice Rules, and other environmental regulations relate to one another? Is there consistency in these regulations? Are there common terminology and definitions being used? As a local government, we are on the front line when it comes to regulating private property in our jurisdiction. How do we explain these complex rules to the public in a manner that makes sense?

✘ There are a large number of laws that govern development. Ecology has attempted to provide mechanisms for

integrating some aspects of GMA comprehensive plans and development regulations with shoreline master programs. The rule attempts to avoid confusion over terminology, but some terms are based in science and, thus, are used somewhat differently by different agencies.

General – complexity of rule

Separate sets of definitions should be provided for Path A and Path B to eliminate the confusion of terms not utilized in a particular path. The need for overlapping and slightly different new terms or concepts should be re-evaluated to ensure that the degree of difficulty imposed in their implementation is significantly outweighed by greater effectiveness in shoreline and habitat protection.

✘ If the term is not used in the path in question, it is not applicable and there is no overlap. In the majority of cases, the definitions are used in each path, are therefor applicable and for regulatory purposes should be consistently applied to be most effective and uniformly understood. We believe using separate sets of definitions would be redundant and only increase confusion.

General – complexity of rule

Path A and Path B present some issues that concern King County. To begin with, the way the rule is structured makes it difficult to easily discern the differences between the two options. There are many provisions that appear in both sections. In some instances, these provisions are identical. However, in others, there are differences in wording. In such cases, it is hard to determine if the differences are intentional and have meaning. It would be preferable to have a set of base regulations that apply to both options and then provide those additional provisions necessary to comply with Path B.

✘ Ecology has made many changes to the public comment version of the rule to make the language identical in both Path A and Path B where the meaning is the same. These changes are shown in the underline and ~~striketrough~~ version of the rule published as part of this responsiveness summary (see next section). Ecology will prepare additional technical assistance materials to help local governments compare the two paths and make it easier to discern the differences between the two options.