

# Substantive Decision-Making Under the Washington Shoreline Management Act

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## I. INTRODUCTION

Washington's Shoreline Management Act<sup>1</sup> (SMA) arguably regulates a greater proportion of its state's land development than the proportion regulated under the coastal zone management program of any other state except Hawaii. This can be attributed in part to the physical fact of an extensive shoreline that borders the Pacific Ocean, the Strait of Juan de Fuca, and Puget Sound and includes many islands and the Olympic and Kitsap Peninsulas. The expansive nature of SMA jurisdiction also can be credited to the SMA's broad, inclusive definition of shorelines, which includes all marine water areas, all lakes and rivers greater than a certain minimal size,<sup>2</sup> lands lying underneath these areas, and associated wetlands, including all land within 200 feet of the ordinary high water mark of such water areas.<sup>3</sup> This definition encompasses a great deal of the populous half of Washington west of the Cascades, and a substantial portion of the prime development sites in Eastern Washington.

1. WASH. REV. CODE § 90.58 (Supp. 1984).

2. Shorelines, by definition, include shorelines on lakes 20 acres or greater in size and shorelines on segments of streams downstream of a point where mean annual flow is greater than 20 cubic feet per second. WASH. REV. CODE § 90.58.030(2)(d) (Supp. 1984).

3. WASH. REV. CODE § 90.58.030(2)(f) (Supp. 1984). Note that all lands within 200 feet of the ordinary high water mark are technically "wetlands" under the SMA, even if they are in fact quite high and dry. For rivers where the floodway is wider than the area delineated by the ordinary high water marks, the 200 feet may be measured from the floodway margins. See also WASH. ADMIN. CODE R. 173-16-030(17), 173-22-040 (1983).

There are 20,634 linear miles of shorelines under SMA jurisdiction by the Act's definition.<sup>4</sup>

The SMA was among the earliest state statutes to provide comprehensive regulation of the shorelines area. Enacted in 1971, it predates even the federal Coastal Zone Management Act of 1972 (CZMA).<sup>5</sup> It was the foundation of Washington's Coastal Zone Management Program (CZMP), the first such program in the nation to receive federal approval, in June 1976.

An appraisal of regulation under the SMA and Washington's CZMP is therefore of national as well as statewide interest. This survey of the patterns of implementation of the SMA by judicial and quasi-judicial bodies is, however, intended primarily to serve local governments, permit applicants, and permit contestants in their interactions with Washington's shoreline management system. This survey is an attempt to demonstrate the use of simple statistics to explore and evaluate the implementation of a new statutory mandate with a particular permit review and appeal system.

The specific purposes of this Article are twofold: first, an analysis of the SMA is set forth and then used in simple statistical comparisons to evaluate decisions rendered by local governments, superior courts, and the Shorelines Hearings Board (SHB) during the period 1974-1983; second, to present a numerical model that represents the verbal interpretation of the SMA with a simple arithmetical equation using weighted variables.<sup>6</sup> These variables correspond to objectives identified in interpretations of the SMA. Decisions of the SHB and appellate courts during this period are explained in a statistical manner through use of the model. Neither computer<sup>7</sup> nor regression analysis is used, but both the verbal interpretation of the SMA—derived from legal analysis and theory—and the numerical equation—based in theory, but derived somewhat empirically—are substantially validated by the high correlation between the outcomes predicted by the simple model and the decisions rendered by the SHB and appellate courts.

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4. *The Shoreline Management Act of 1971, An Overview of the Trends*, Washington Department of Ecology (WDOE) (February 18, 1984) [hereinafter cited as SMA Trends].

5. 16 U.S.C. § 1451 (as amended 1980).

6. See Appendix B for an explanation of the method and mechanics of this model.

7. Nagel, *Using Microcomputers and P/G% to Predict Court Cases*, 18 AKRON L. REV. 541 (1985).

This Article begins, in Part II, by identifying the objectives of the SMA and Washington's CZMP. The objectives are ascertained in this Article through analysis of the stated SMA policy, the goals that are required under the federal CZMA,<sup>8</sup> and the goals described in the Final Environmental Impact Statement (FEIS), which was filed by the Washington Department of Ecology (WDOE) with its application for federal approval of Washington's CZMP.<sup>9</sup> Appellate court interpretation of the SMA supplements this analysis.

Part III of the Article evaluates fifty decisions of local governments and the SHB according to the SMA objectives identified in Part II. Part III explores decisionmaking trends at different levels of review and appeal for each objective to determine the statistical extent to which each particular objective influenced the decisions of local governments, the SHB, and, when appropriate, superior and appellate courts.

Part IV of this Article presents a numerical model developed by the author to help evaluate and explore substantive decisionmaking under the SMA. The model allows an evaluation of fifty decisions on the basis of a balancing of all of the identified SMA objectives rather than according to each objective taken separately. The model also serves to evaluate and compare all levels of permit review and appeal.

Finally, in Part V, this Article discusses general trends in SMA implementation with respect to the opportunities and relative advantages available to parties involved in the permit process. These parties include governments, private and public developers, and those who contest permits, including the state attorney general's office, adjacent landowners, and citizen groups. A party's opportunities and relative advantages differ significantly according to the level at which the permit is being reviewed.

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8. Technically, a state is merely "encouraged" to develop a CZMP, *see* 16 U.S.C. § 1452(2), but each state is provided with significant financial incentives to do so, and a state cannot gain approval for its CZMP unless its program is consistent with the stated goals of the CZMA. 16 U.S.C. § 1455(c). *See also* 16 U.S.C. § 1452; *infra* note 10.

9. State of Washington Coastal Zone Management Program, Final Environmental Impact Statement, United States Department of Commerce (1976). [hereinafter cited as FEIS]. A draft and final EIS must be prepared for all major federal actions significantly affecting the quality of the human environment, 42 U.S.C. § 4332 (1)(C), such as approval by the United States Office of Coastal Zone Management of a state's CZMP. The FEIS included an Interim Review that was prepared in 1975 by WDOE enforcement staff after the first four years of experience with the SMA.

Three levels of government—federal, state and local— affect shoreline management in Washington. The federal CZMA provides general guidance and substantial funding for planning and administration and authorizes approval of CZMPs prepared by states. Federal approval of a state's CZMP under the CZMA makes the state eligible for significant federal funding and aids the state in regulating its own coastal zone, including the federal activities and private projects in the coastal zone that require one or more permits from federal agencies.<sup>10</sup> It is the intent of the CZMA that most coastal zone regulation be performed by states under the guidance of their federally approved CZMPs.<sup>11</sup>

The Washington State SMA provides authority for state and local government agencies to regulate development and establishes specific goals to guide local planning. The SMA authorizes the WDOE to approve Shoreline Master Programs (SMPs) prepared by local governments<sup>12</sup> (unless a proposed SMP is inconsistent with the policy of WASH. REV. CODE § 90.58.020). Local governments enact SMPs as local ordinances; an SMP contains goal statements, regulations for development, and a separate "zoning" system for shorelines within the juris-

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10. A state with an approved CZMP is eligible for federal funding of up to 80% of the costs of administering the program. Also, a state with an approved CZMP has additional authority to require that federal activities and federally-permitted projects that occur in or directly affect the state's coastal zone be consistent with the state's CZMP. See 15 C.F.R. § 930; *Secretary of Interior v. California*, 464 U.S. 312 (1984).

The definition of coastal zone is different from that of shorelines. See *supra* notes 2-3 and accompanying text. Coastal zone "means the coastal waters (including the lands therein and thereunder) and the adjacent shorelines (including the waters therein and thereunder) . . . [including] islands, transitional and intertidal areas, salt marshes, wetlands and beaches. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters." 16 U.S.C. § 1453(i). Thus, the definition of coastal zone focuses primarily on marine waters, and provides only a descriptive indication of which dry land areas are included within the coastal zone. Reflecting the CZMA's salt-water focus, Washington's CZMP covers only its 15 western-most counties, although the SMA applies to salt and freshwater shorelines statewide.

11. The CZMA states:

[T]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone . . . .

16 U.S.C. § 1451(i). It also states that "[t]he Congress finds and declares that it is the national policy . . . (2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone . . . ." 16 U.S.C. § 1452(2). See generally *Secretary of Interior v. California*, 78 L.Ed.2d 496, 500-01 (1984).

12. WASH. REV. CODE § 90.58.090 (Supp. 1984).

diction.<sup>13</sup> Local governments directly regulate development on Washington's shorelines through administration of a permit system.

The procedure of the permit process itself is fairly straightforward. Persons who wish to make substantial developments<sup>14</sup> on Washington's shorelines must obtain a permit.<sup>15</sup> Substantial development permit applications are reviewed by local governments. The granting or denial of a permit may be appealed<sup>16</sup> for de novo review by the SHB,<sup>17</sup> a state agency acting as a quasi-judicial review board. Further appeal can be made to superior and appellate courts.<sup>18</sup>

At the local government and SHB level, a permit for a proposed project is reviewed for consistency with the local government's SMP and the objectives of the SMA.<sup>19</sup> Further review ostensibly asks whether the SHB's findings, inferences, conclusions, or decisions may have prejudiced the substantial rights of the petitioners because they were clearly erroneous, or arbitrary and capricious,<sup>20</sup> or beyond the SHB's statutory or constitu-

13. The SMA defines "Master Program" as follows: "the comprehensive use plan for a described area, the use regulations together with maps, diagrams, charts, or other descriptive material and text, and a statement of desired goals and standards developed in accordance with the policies enunciated in 90.58.020." WASH. REV. CODE § 90.58.030 (3)(b) (Supp. 1984). Master Programs (SMPs) are similar to zoning ordinances in that they classify lands according to present and intended uses and specify use regulations for development in the different zones. In SMPs, the zones are usually called shoreline environments. Urban, rural, conservancy, and natural are the typical classifications, but the Seattle SMP, for example, provides for 9 different shoreline environments. Like flood plan zoning in other states, SMPs establish a zoning overlay which adds its own classifications and standards to the underlying zoning of the local government.

14. Substantial development means any development for which the total cost or fair market value exceeds one thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state. Several express exceptions are provided. See WASH. REV. CODE § 90.58.030(3) (Supp. 1984). Local governments may also issue, with the approval of WDOE, conditional use permits and variances for development in the shorelines. These are not discussed in this Article and represent only approximately 15% of all shoreline permits issued in Washington. SMA Trends, *supra* note 4.

15. WASH. REV. CODE § 90.58.140(2) (Supp. 1984).

16. WASH. REV. CODE § 90.58.180(1) (Supp. 1984).

17. WASH. REV. CODE § 90.58.180(3) (Supp. 1984); WASH. ADMIN. CODE R. § 461-08-174 (1983).

18. WASH. REV. CODE § 90.58.180(3) (Supp. 1984); WASH. REV. CODE § 34.04 (Supp. 1984); Department of Highways v. King County Chapter, Wash. Envtl. Council, 82 Wash. 2d 280, 510 P.2d 216 (1973).

19. WASH. REV. CODE § 90.58.140(2)(b) (Supp. 1984).

20. See WASH. REV. CODE § 34.04.130(6) (Supp. 1984) for the complete list of grounds for reversal (standard of review).

tional authority.<sup>21</sup>

As a final introductory note, the reader should be aware of this author's disclaimer regarding the process by which specific decisions are compared to specific standards. Whether or not a particular project is inconsistent with a specific standard is a factual question. This author has based his factual conclusions as much as possible on SHB fact-findings, although this unavoidably gives the SHB an advantage in the evaluation conducted in this Article. The author has tried to minimize this subjective element as much as possible through careful review, but a reader should consider that, in any particular case, this reviewer may be describing as a policy inconsistency what may be only a disparity in factual interpretations.

## II. IDENTIFYING THE OBJECTIVES OF THE SMA

In the fifty decisions of the Shorelines Hearings Board examined by this author,<sup>22</sup> the local government's decision regarding approval of a substantial development permit was vacated, reversed, or remanded for significant changes twenty-nine times. Thus, the governing bodies that are most experienced in interpreting the SMA were in agreement, or even substantial agreement, for less than half of the permits reviewed. This fifty-eight percent reversal rate appears to be quite high<sup>23</sup>

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21. See generally Note, *Judicial Review of Shoreline Hearings Board Decisions*, 51 WASH. L. REV. 405, 407-09 (1976).

22. These 50 decisions were selected in a random manner, although without a formally random procedure, from decisions regarding substantial development permits rendered by the SHB during the period 1976-1983. Decisions regarding variances and conditional use permits, and decisions that appeared to be primarily procedural, were not selected for this study. Of 10,901 shoreline permits issued 1971-1983, 84.1% were substantial development permits, with the remainder split approximately equally between conditional use permits and variances. Similarly, for the period 1980-83, 80% of SHB decisions rendered were substantial development permits. SMA Trends. The author is aware of no reasons or information suggesting that these 50 randomly-selected decisions are not or might not be a representative sample of SHB decisions regarding substantial development permits during the period 1976-83. Obviously, the mere fact of their appeal to the SHB distinguishes them in some way from most local government shorelines permit decisions, since only approximately five percent of permit decisions are appealed to the SHB. *Id.*

23. See Kagan, Cartwright, Friedman & Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977); see also Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L. J. 1191 (1978), especially Table 11 of the Appendix, which compares the reversal rates of 16 state supreme courts grouped by the degrees of court discretion regarding appeals. *Id.* at 1217. States with no discretion (appeal of right) averaged a 32% reversal rate; states with "little" discretion, which appeared to mean discretion for appeals on only some kinds of cases, averaged a

for a tribunal to whom appeal is made by right.<sup>24</sup>

One possible explanation is that the stated policies of the SMA are less than clear. As one commentator noted, since the act was a compromise designed to attract broad support—and win voter approval at the polls—“[s]hining phrases can be mined from the statement of policy to support most positions which an attorney, environmentalist or developer may desire to promote.”<sup>25</sup>

By its nature, the SMA is a resource management act rather than single mission legislation; consequently it must accommodate vigorously competing positions and strike a balance between preservation values and growth interests, between immediate economic desires and long-term environmental protection. Its birth in popular referendum makes it doubly certain to reflect a balancing of conflicting interests.<sup>26</sup>

Approval by voters statewide as well as by their legislative representatives, however, placed an official stamp on the balance struck in this legislation, notwithstanding the compromises and ambiguities of draftsmanship. Although the legislative resolution recognizes competing interests, it also pronounces overriding objectives that must govern the balancing of these interests when the SMA is implemented by local governments, the SHB, WDOE, or the courts. Consequently, another possible explanation for the high reversal rate will be explored in Parts III and IV of this Article: were some local governments not enforcing

35% reversal rate; states with substantial discretion (for example, certiorari) averaged approximately 48%. *Id.* at 1217-18. Parties appeal by right from local government decisions to the SHB: *See also* Rothstein, *Judicial Review of Decisions of the Occupational Safety and Health Review Commission—1973-1978: An Empirical Study*, 56 CHI.-KENT L. REV. 607 (1980), which reported that violations found by the Occupational Safety and Health Administration (OSHA) were reversed at an approximate 30-38% rate when appealed to administrative law judges, the Commission of the Occupational Health and Safety Administration, and the Court of Appeals. *See also* Botler, Deuita, Kallas, Ruane & Weisbrot, *The Appellate Division of the Supreme Court of New York: An Empirical Study of its Powers and Functions as an Intermediate State Court*, 47 FORD. L. REV. 929 (1979). This court, with no discretion regarding which cases were appealed to it, reversed or modified decisions approximately only 26% of time, and affirmed 74% of decisions appealed. By any of these standards, the 58% of substantial development permit decisions that were reversed or remanded to local governments by the SHB appears to be quite high. *Id.* at 985-1002.

24. WASH. REV. CODE § 90.58.180(1) (Supp. 1984).

25. Crooks, *The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423, 429 (1974).

26. In November, 1972, Referendum Initiative 43B was approved in a statewide election. *See* Crooks at 424-25, nn. 7, 9-10.



rigorously the goals of the SMA during the 1974-83 period, even though these goals could be inferred from the enumerated objectives of the SMA?

#### A. *The SMA, CZMA, and FEIS*

Since the SMA was first enacted, the United States Congress, WDOE and the Washington judiciary all have added guidance to interpret the language of the SMA. Congress passed the CZMA, establishing management goals and requiring that state CZMPs be consistent with these goals before receiving federal funding for administration and enforcement.<sup>27</sup> The Final Environmental Impact Statement (FEIS) that was filed with Washington's application for federal approval of its proposed CZMP provides the valuable insights of a WDOE enforcement group which had four years of experience implementing the SMA.<sup>28</sup> Finally, the Washington appellate courts have adjudicated several challenges to the SMA's enforcement, and their interpretations provide additional authoritative guidance. Each of these sources helps illuminate the major objectives of enforcement of Washington's CZMP and the SMA.

##### 1. *Promote and Enhance the Public Interest*

The SMA's preeminent mandate is to ensure that "development of these shorelines . . . will promote and enhance the public interest."<sup>29</sup> This language imposes an affirmative duty on all developers of shoreline projects; by way of contrast, most environmental regulation imposes a duty only to avoid unacceptable harm. Rather than simply defining unacceptable limits within which economic enterprises are free to design and perform, the SMA requires users of the shoreline to promote certain goals that are basically denominated in the SMA as the public interest. The affirmative duty to promote and enhance the public interest is imposed on public and private development for all shorelines of the state—that is, for every shoreline under the expansive jurisdiction established by the SMA.<sup>30</sup>

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27. 16 U.S.C. § 1451 (as amended 1980) *See supra* note 10 and accompanying text.

28. *See* FEIS, *supra* note 9.

29. WASH. REV. CODE § 90.58.020 (Supp. 1984).

30. It can be argued that the legislative mandate to ensure that "development of these shorelines [be conducted] in a manner which . . . will promote and enhance the public interest," WASH. REV. CODE § 90.58.020 (Supp. 1984), implies a collective promo-

Does this directive exclude any particular kinds of development? After all, the SMA's policy for shorelines also provides for a "limited reduction of rights of the public in the navigable waters," and "fostering all reasonable and appropriate uses."<sup>31</sup> The provision that allows a limited reduction of public rights necessarily implies that each public right by itself is not an inviolable barrier to development; a development may enhance the public interest on the shoreline even though it limits some public rights. Certain kinds of development, however, are to be excluded from the shorelines because the selection in fostering of "reasonable and appropriate uses" must be limited by the preeminent duty to enhance the public interest. Uses are not appropriate "for the shoreline" if they do not promote the SMA's version of public interest in some way. Shoreline development in Washington is mandated by law, as approved by the legislature and the Governor,<sup>32</sup> the voters and taxpayers,<sup>33</sup> and the courts of Washington,<sup>34</sup> "to promote and enhance" the public interest as distinguished from a private interest.

An essential question in identifying the objectives of the SMA, therefore, is "What is the public interest in the shorelines of the state?" The language of the SMA and the CZMA provides guidance.

Immediately following the policy proclamation to "promote and enhance the public interest," the declaration states, "This policy contemplates protecting . . . 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."<sup>35</sup> The environmen-

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tion of the public interest, rather than an individual enhancement of the public interest by each and every development. A fair reading of the language of the SMA quoted above, SHB decisions and appellate opinions, *see, e.g.*, *Portage Bay v. SHB*, 92 Wash. 2d 1, 5, 543 P.2d 151, 153 (1979); *infra* notes 79-80 and accompanying text, is that the policy of the SMA is designed to ensure that each development on the shorelines promote the public interest. This author found no decisions which reasoned that the SMA's public interest factors need not be applied to a particular development because, somehow, other developments nearby already had promoted the public interest sufficiently so that a "collective" public benefit would exist regardless. SMA's delineation of public interest, however, is sufficiently broad that many kinds of developments can meet the standard.

31. WASH. REV. CODE § 90.58.020 (Supp. 1984).

32. *Id.*

33. *See supra* note 26.

34. *See, e.g.*, *Hayes v. Yount*, 87 Wash. 2d 280, 552 P.2d 1038 (1976); *Merkel v. Brownsville*, 8 Wash. App. 844, 509 P.2d 390 (1973).

35. WASH. REV. CODE § 90.58.020 (Supp. 1984).

tal protection theme is reiterated three more times in this declaration: uses which protect the ecology of the shoreline and uses which preserve the natural character of shorelines are explicitly accorded high preference in management of shorelines of statewide significance (SOSS)<sup>36</sup>; uses on natural shorelines which are consistent with control of pollution and prevention of damage to the environment are to be preferred; and uses on any of the state's shorelines must be designed and managed to minimize, insofar as is practical, any damage to the environment.<sup>37</sup> Protecting the environment is clearly a fundamental part of the public interest as defined in the SMA.

In addition, the policy statement of the SMA declares that in managing SOSS "the interest of all the people shall be paramount."<sup>38</sup> The statement then provides specific attributes of preferred uses in order to delineate this concept of management in the public interest. They are, in order of preference the following:

- (a) *"preserve the natural character of the shoreline";*
- (b) *"result in long term over short term benefits";*<sup>39</sup>
- (c) *"increase public access to publicly owned . . . shorelines";*
- (d) *"increase recreational opportunities for the public in the shoreline;"* and
- (e) *provide for any other element deemed appropriate in a master program that is consistent with this state policy.*<sup>40</sup>

These attributes ostensibly provide guidance only for development of the SOSS; however, they contain clear policy choices

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36. Shorelines of Statewide Significance (SOSS) are defined in WASH. REV. CODE §90.58.030(2)(e) (Supp. 1984). These are shorelines along the larger natural rivers and along natural or artificial lakes greater than 1000 acres surface area, the coastline on the Pacific Ocean, the Strait of Juan de Fuca and Puget Sound seaward of extreme low tide, and certain tidal areas in Puget Sound — Nisqually Delta, Padilla Bay, Skagit Bay, Birch Bay and the Hood Canal.

37. WASH. REV. CODE § 90.58.020 (Supp. 1984).

38. *Id.*

39. Of the five attributes specified, the preference for long-term benefit needs most explanation. The FEIS illuminates this: "[A]pproval of the proposed State Coastal Zone Management Program will restrict local, short term uses of the environment, [but] it will . . . provide long-term assurance that the natural resources and benefits provided by the Washington coast will be available for future use and enjoyment. This theme is central to the State and Federal programs." The FEIS continues, "Without [shoreline] management programs, intense short-term uses and gains, such as provided by residential or industrial development, might be realized. However, such uses would most likely [restrict] long-term benefit." FEIS at 125.

40. WASH. REV. CODE § 90.58.020 (Supp. 1984).

which the Washington legislature used to give substance to the term "interest of all the people." The phrase "interest of all the people" reasonably may be considered to be synonymous with the phrase "public interest." The affirmative duty to promote the public interest is what guides development on all shorelines of the state. Thus, this Article, in determining whether decision-making bodies properly have required project sponsors to promote the public interest on all the shorelines of the state, gives these attributes considerable weight.

Other sections of the policy statement of the SMA provide independent statutory authority for most of the public interest attributes listed above. These sections mandate protection of natural shorelines, use of shorelines for recreational opportunities, and public access to all shorelines of the state.<sup>41</sup> Similarly, recent amendments to the federal CZMA follow this focus of the public interest.<sup>42</sup> The amendments declare, among other objectives, that state coastal zone management "programs should at least provide for the protection of natural resources . . . and public access to the coasts for recreation."<sup>43</sup>

In addition, the SMA's policy declaration specifically states that those uses of natural shorelines that are dependent upon use of the state's shorelines shall be preferred. When alterations of shorelines in a natural condition are permitted, priority is given to single-family residences and shoreline-dependent<sup>44</sup> uses like ports, shoreline recreational uses, parks, marinas, piers, industrial and commercial developments that are "particularly" shoreline-dependent, and "other developments that will help substantial numbers of people enjoy the state's shorelines."<sup>45</sup>

41. WASH. REV. CODE § 90.58.020 (1983). See also Scott, James W. and WDOE Shorelands Divisions; *An Evaluation of Public Access to Washington's Shorelines* (September 1983), pp. 1-2. [hereinafter cited as Public Access].

42. Amendments to Coastal Zone Management Act, Pub. L. No. 94-464, § 3, 94 Stat. 2060 (Oct. 17, 1980).

43. 16 U.S.C. § 1452(2)(A), (D) (1985).

44. The SMA uses the term, "shoreline-dependent." WASH. REV. CODE § 90.58.020 (1983). SHB decisions and SMPs tend to use "water-dependent" and "water-oriented." See *Yount v. Hayes*, SHB 108; see also STATE OF WASHINGTON SHORELINES HEARINGS BOARD, DIGEST OF DECISIONS, pp. 49-52 (1983).

45. WASH. REV. CODE § 90.58.020 (1983). Among the kinds of developments that the Washington legislature deemed would "help substantial numbers of people enjoy the state's shorelines" were single family residences. Although the CZMA does not so include single family residences, see *infra* notes 93-94 and accompanying text, these private residences are part of the vision in Washington of great numbers of people enjoying and having access to the shoreline. They have accordingly been assigned a legislative priority, and consequently are considered for the purposes of this Article to promote the SMA's

The federal CZMA also declares that state CZMPs should provide for priority consideration for coastal-dependent uses and lists several of the same examples found in the SMA.<sup>46</sup> The CZMA likewise encourages states to protect natural resources and locate commercial or industrial developments in or adjacent to areas where such development already exists.<sup>47</sup>

Finally, the SMA also requires protection of public rights of navigation.<sup>48</sup> In many waters of Washington, public rights of navigation are constitutional in origin.<sup>49</sup>

Therefore, the SMA, CZMA, and FEIS do not provide a definition of "public interest" or of "the interest of all of the people" that expressly excludes certain activities. Instead, the SMA expressly and emphatically declares that protection of the environment and protection of natural shorelines are central to the public interest. It emphasizes public access and recreational opportunities, and it declares an express preference for shoreline-dependent uses for areas where development is planned. It requires protection of public rights of navigation and expresses a preference for developments with long-term benefits rather than short-term benefits. The CZMA likewise requires that Washington's CZMP promote protection of natural resources, coastal-dependent development, and public access to the coasts for recreation as conditions to federal funding. Under the Washington CZMP and the SMA, these attributes constitute the public interest that shoreline developments are obliged to promote and enhance.

## 2. *Planning*

The second overriding objective enunciated in the SMA is

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version of the public interest.

46. 16 U.S.C. § 1452(2)(C) (1985) (*e.g.*, fisheries development, ports, recreation facilities).

47. 16 U.S.C. § 1452(2)(A),(C) (1985).

48. WASH. REV. CODE § 90.58.020 (1983).

49. WASH. CONST. amend. XV states, in relevant portion:

The state shall never give, sell or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high water, and within not less than fifty feet nor more than two thousand feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce.

planning: "a planned, rational, and concerted effort."<sup>50</sup> Planning is an end in itself; it is intended to prevent "the inherent harm in an uncoordinated and piecemeal development of the state's shorelines,"<sup>51</sup> and to prevent unrestricted construction, which is "not in the best public interest."<sup>52</sup>

The declared target of planning, however, is unrestricted and uncoordinated development. Development itself is not forbidden.<sup>53</sup> Rather, SMA policy is designed to ensure that the permitted development occurs in a manner designed to promote the public interest.

The FEIS assumes that, as a direct consequence of this distinction, planning under the SMPs of local governments—even when these programs are consistent with the enunciated state policy<sup>54</sup>—will result in some shoreline areas developing more quickly than they would otherwise, as residential or industrial growth is channelled into selected areas.<sup>55</sup> WDOE regulations, issued under the authority of the SMA,<sup>56</sup> provide guidelines for local government SMPs which direct that local governments plan similarly for SOSS: "Where intensive development already occurs, upgrade and redevelop those areas to reduce their adverse impact on the environment and to accommodate future growth . . . ."<sup>57</sup>

The CZMA also focuses on planning as the means by which its enunciated goals shall be achieved; it requires that each state's CZMP contain a plan and standards of sufficient specificity to guide public and private uses.<sup>58</sup> Recent amendments reemphasize the focus of the CZMA on planning and siting.<sup>59</sup>

The SMPs prepared by local governments set forth the focus of planning and the standards by which substantial development permits are reviewed. The preparation of SMPs is the mechanism by which local landowners, local governments, and

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50. WASH. REV. CODE § 90.58.020 (1983).

51. *Id.*

52. *Id.*

53. For a similar analysis, see *Nisqually Delta Association v. Dupont*, 103 Wash. 2d 720, 726, 696 P.2d 1222, 1226 (1985).

54. WASH. REV. CODE § 90.58.090(1). See also WASH. ADMIN. CODE R. § 173-16-040(2)(C) (1983).

55. FEIS at 124.

56. WASH. REV. CODE § 90.58.200 (1983). See also §§ 90.58.020, 90.58.090(2) (1983).

57. WASH. ADMIN. CODE R. § 173-16-040(5)(b)(ii) (1983).

58. *American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 919, *aff'd*, 609 F.2d 1306 (9th Cir. 1979); 16 U.S.C.S. § 1455; 15 C.F.R. § 923.20 (1985).

59. See, e.g., 16 U.S.C.S. § 1452(2)(C).

the WDOE interact to determine prospectively how and to what extent each shoreline area shall be zoned and regulated for the enhancement of the various public rights in the shoreline.<sup>60</sup>

## B. Appellate Review

### 1. Deference to the Shoreline Hearings Board

The Washington appellate courts have also interpreted the SMA; primarily, however, they have adhered to an appellate review system that applies the clearly erroneous standard and allows the SHB to make policy.<sup>61</sup> In practice, Washington's appellate courts have accorded the SHB decisions such deference<sup>62</sup> that in twelve years of decisionmaking under the SMA, the appellate courts have substantially modified only one SHB decision regarding a substantial development permit for a proposed shoreline project.<sup>63</sup> Although deference to SHB decision-making and judicial restraint have characterized appellate review, the appellate courts at the same time have emphasized repeatedly the environmental protection theme of the SMA. In addition, the interstices of SMA policy-making, such as, for example, the consideration of cumulative environmental impacts,<sup>64</sup> have been filled in with constructions of the Act that are consistent with the enunciated goals of promoting the public interest, environmental protection, and employing planning as

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60. WASH. REV. CODE § 90.58.200 (1983). See also §§ 90.58.020 and 90.58.090(2) (1983).

61. See *supra* note 20.

62. See Note, *Judicial Review of Shorelines Hearing Board Decisions—Department of Ecology v. Ballard Elks Lodge No. 827*, 51 WASH. L. REV. at 421-43.

63. In *Skagit County v. Department of Ecology*, 93 Wash. 2d 742, 613 P.2d 115 (1980), the SHB partially vacated a permit for dredge spoil fill that had been granted by Skagit County. The SHB refused to allow fill on 7 of the 11 acres of wetland on which the county had permitted fill. The Supreme Court's decision noted that the area (Padilla Bay) was a unique and valuable wildlife area of particular concern, *id.* at 743-44, and found that the SHB had misread the county's master program procedures in allowing fill on even the remaining four acres, *id.* at 746-47, it remanded with instructions to permit no fill at all, *id.* at 751.

In *Department of Natural Resources v. Thurston County*, 92 Wash. 2d 656, 601 P.2d 494 (1979), the SHB decision under the SMA was actually upheld; that SHB decision reversed the county's denial of a substantial development permit and ordered the permit approved. The Supreme Court, however, reversed the SHB on other grounds when it upheld the county's denial of a preliminary plat on environmental grounds pursuant to authority provided by the State Environmental Policy Act (SEPA), WASH. REV. CODE § 43.21C (1983 Supp.).

64. See *infra* notes 75-78 and accompanying text.

the means for achieving these goals.

## 2. *Environmental Protection*

Environmental concerns have been at issue to some extent in each appellate court consideration of the SMA reviewed herein,<sup>65</sup> and have been the major substantive issue in most of these adjudications.<sup>66</sup> In *Merkel v. Port of Brownsville*, the first appellate review of action under the SMA, the court reinstated a restraining order against the developer and stated, "The Shoreline Management Act of 1971 . . . is as vigorous as SEPA in declaring a policy aimed at the preservation of our natural resources."<sup>67</sup> "To . . . lower the environmental mandates of these acts to the status of mere admonitions . . . would be frustration rather than fulfillment of the legislative intent . . . ."<sup>68</sup> Washington appellate courts thus have confirmed environmental protection as one of the major overriding objectives of the SMA.

## 3. *Planning and Adjacent Uplands*

The court considered the importance of the planning objective of the SMA when it resolved the application of SMA jurisdiction to the lands adjacent to shorelines and to associated wetlands. In *Merkel*, the Port of Brownsville sought to develop land that stretched from the ordinary high water mark of the waters of Burke Bay to beyond the line that marked the landward limit of the shoreline.<sup>69</sup> The development thus would lie partly on the

65. *Skagit County v. Department of Ecology*, 93 Wash. 2d 742, 613 P.2d 115 (1980); *Department of Natural Resources v. Thurston County*, 92 Wash. 2d 656, 601 P.2d 494 (1979); *Portage Bay v. SHB*, 92 Wash. 2d 1, 593 P.2d 151 (1979); *Weyerhaeuser v. King County*, 91 Wash. 2d 721, 592 P.2d 1108 (1979); *Department of Ecology v. Pacesetter Construction Company*, 89 Wash. 2d 203, 571 P.2d 196 (1977); *English Bay Enterprises v. Island County*, 89 Wash. 2d 16, 568 P.2d 783 (1977); *Hayes v. Yount*, 87 Wash. 2d 280, 552 P.2d 1038 (1976); *Department of Ecology v. Ballard Elks*, 84 Wash. 2d 551, 527 P.2d 1121 (1974); *Hunt v. Anderson*, 30 Wash. App. 437, 635 P.2d 156 (1981); *San Juan County v. Department of Natural Resources*, 28 Wash. App. 796, 626 P.2d 995, *cert. denied*, 95 Wash. 2d 1029 (1981); *Eickoff v. Thurston County*, 17 Wash. App. 774, 565 P.2d 1196 (1977); *Merkel v. Port of Brownsville*, 8 Wash. App. 844, 509 P.2d 390 (1973).

66. Of the cases cited in note 65 *supra*, environmental concerns could reasonably be considered a minor issue only in *Portage Bay* and *Ballard Elks*.

67. *Merkel*, 8 Wash. App. at 848-49, 509 P.2d at 394.

68. *Id.* at 851, 509 P.2d at 395.

69. WASH. REV. CODE § 90.58.030(2)(d) (1983). The line which marks the landward limit of the shoreline is usually 200 feet landward of the ordinary high water mark. See *supra* note 3.



shoreline and partly on upland.<sup>70</sup> This case squarely posed the question of the reach and importance of planning under the SMA.

The court of appeals held that the part of the development proposed on the adjacent upland, although arguably beyond SMA jurisdiction for some purposes, could not go forward until a shorelines substantial development permit were granted for those portions of the development located within the shoreline. The court noted the "obvious interrelationship" between the development and the effect on the shoreline and adjacent wetlands and expounded upon the SMA pronouncements against piecemeal development and unrestricted construction.<sup>71</sup> The court concluded that the whole project should be reviewed according to the coordinated planning of the Master Program.<sup>72</sup>

The purposes for which SMA jurisdiction can be extended to lands adjacent to shorelines were defined specifically in *Weyerhaeuser v. King County*:<sup>73</sup> "Direct authority to regulate uses of lands adjacent to shorelines is limited in the SMA, however, to the function of land use planning. Only those developments within the shorelines are subject to regulation [as well as planning]."<sup>74</sup> Thus, although the state's regulatory powers under the SMA are restricted to the boundaries of the shoreline, coordinated planning is such an important objective of the SMA that it is given effect even beyond the geographical bounds of the shoreline in order to assure that development is planned according to the policies of the SMA.

#### 4. Cumulative Environmental Impacts

The courts next confronted the question of whether potential cumulative environmental impacts of possible future development could justify denial of a permit for a development that did not in itself have significant environmental effects. The Supreme Court answered this question affirmatively when it upheld SHB consideration of cumulative impacts in both *Hayes*

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70. *Merkel*, 8 Wash. App. at 847, 509 P.2d at 394.

71. *Id.* at 850-51, 509 P.2d at 395.

72. *Id.*

73. 91 Wash. 2d 721, 592 P.2d 1108 (1979).

74. *Id.* at 736, 592 P.2d at 1117; accord *Dep't of Natural Resources v. Thurston County*, 92 Wash. 2d 656, 666, 601 P.2d 494 (citing WASH. REV. CODE §§ 90.58.140, .180)); see also WASH. REV. CODE §§ 90.58.340, 58.100(2)(e) (1983).

*v. Yount*<sup>75</sup> and *Skagit County v. Department of Ecology*.<sup>76</sup> In *Hayes*, the court found that "the legislature and the people of this state recognized the necessity of controlling the cumulative adverse effect of 'piecemeal development' . . . through 'coordinated planning' of all development."<sup>77</sup> The applicant's inability to control future development by others did not bar the SHB from consideration of cumulative impact. The *Skagit County* court followed *Hayes* and held that consideration of cumulative impact was not inconsistent with the SHB's express finding that the particular development proposed would not significantly affect the total estuary.<sup>78</sup>

The equities in such a decision obviously are arguable, especially from a permit applicant's perspective. It is clear, however, that Washington appellate courts intend to uphold vigorous implementation of the SMA's mandate for environment-conscious planning.

### 5. *The Public Interest Balance*

The courts addressed an additional issue: whether public benefit must outweigh private benefits for each shoreline development. The court in *Portage Bay v. SHB*<sup>79</sup> held that the SMA does not require a comparison of public benefits and private benefits. This holding is correct, although it leaves the proper comparison unstated or unclearly stated. Rather than a weighing of public benefits against private benefits, the comparison that the SMA calls for is the determination of whether the proposed project's enhancement of public interest outweighs the anticipated reduction of public rights; in other words, the proper determination under the SMA is the balancing of *public* benefit versus *public* detriment. The factors the SMA's policy declaration enumerates are all public factors. While a private gain may contribute to the public interest (as public interest is delineated in the SMA), such as when a single-family residence gains access to the shore or when facilities associated with a water-dependent industry are located in a developed part of an urban shoreline, the SMA does not imply that any amount of private benefit jus-

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75. 87 Wash. 2d 280, 552 P.2d 1038 (1976).

76. 93 Wash. 2d 742, 613 P.2d 115 (1980).

77. 87 Wash. 2d 280, 288, 552 P.2d 1038, 1043 (1976).

78. 93 Wash. 2d 742, 750, 613 P.2d 115, 120 (1980).

79. 92 Wash. 2d 1, 5, 593 P.2d 151, 153 (1979).

tifies a project that does not promote and enhance the public interest; nor does the SMA or any judicial or administrative interpretation of the SMA imply that some developments may be built on shorelines without reference to the SMA's public interest factors.

This analysis is consistent with the conclusion drawn from the study of the SMA statement of policy above in Section II.A.1.<sup>80</sup> While shoreline developments are not prohibited absolutely from reducing specific public rights nor required always to advance specific public rights, the SMA does require, on balance, an affirmative promotion of the public interest from each development in the shorelines, according to public interest criteria stated in the SMA. This analysis is also consistent with the result in *Portage Bay*. The site in *Portage Bay* was neither a natural shoreline nor a shoreline of statewide significance. The development (houseboats) did not impede long-term benefits through irreversible changes, and the SHB and the trial court "specifically found no merit" in claims of environmental harm in the form of view intrusion. The project did result in a limited reduction of public rights by lessening navigation. But, as the SHB, the trial court, and the Washington Supreme Court recognized, the public access ordered by the SHB and the intensification of use in the waters of this developed shoreline promoted the public interest sufficiently, on balance, to allow approval of the development under SMA public interest criteria.<sup>81</sup>

Public benefits, therefore, need not equal or surpass private benefits in development under the SMA. Rather, the determination that the SMA requires of local governments and the SHB is that the enhancement of the public interest outweigh the reduction in public rights; the project, on balance, must promote and enhance the public interest. Whether the private benefits of a development appear sufficient from the outset to warrant application for an SMA permit is a decision for the applicant and not an appropriate consideration for governmental or judicial decision-makers under the SMA.

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80. See *supra* notes 29-49 and accompanying text.

81. *Portage Bay*, 92 Wash. 2d at 5, 593 P.2d at 153; see also Department of Ecology v. Ballard Elks Lodge No. 827, 84 Wash. 2d 551, 557, 527 P.2d 1121, 1125 (1974).

III. SUBSTANTIVE DECISIONS IN THE PERMIT REVIEW PROCESS: A  
FACTOR ANALYSISA. *Review of Local Government, SHB, and Trial Court  
Implementation of SMA*

Part II identified the overriding objectives of the SMA: (1) to ensure that any developments within the shorelines promote and enhance the public interest; and (2) to guide development through rational and coordinated planning consistent with the public interest. "Public interest" means favoring uses of the shoreline that are shoreline-dependent and protect the environment and navigation; it also means favoring uses that preserve the natural character of the shoreline, result in long-term benefit, increase public access or recreation, and provide for other uses appropriate to the shoreline.

In this part of the Article, fifty decisions of local governments and the SHB and fifteen superior court decisions will be reviewed for consistency with these overriding objectives and the specific preferred attributes of the public interest.<sup>82</sup>

The analysis in this chapter is empirical and its techniques simple. Its value lies not in analysis of single cases but in the characterization of general trends of substantive decisionmaking under the SMA. It points out the importance of specific attributes of the public interest at different levels in the permit review process.

The first evaluation gauges implementation of the planning objective. This evaluation is achieved by comparing the decision by a local government or the SHB regarding a proposed development to the SHB's factual finding regarding the proposed development's consistency with the local government's master program.<sup>83</sup> These statistics provide an indication of how often a local government's prior planning designations determine their response or the SHB's response to the permit application for proposed development. Because master programs for most local governments had not received state approval until the late 1970s, this first analysis considers only the twenty-five most recent decisions in this survey's fifty decision sample.<sup>84</sup>

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82. See *supra* note 22 and Appendices A and B.

83. The local government's evaluation of proposed development's consistency with the master program was not available to the author on a systematic basis.

84. Most of these decisions (23 of 25) were rendered by the SHB in 1979-1983.

Table 1 - Consistency with Local Shoreline Master Programs

	1A <u>Totals</u>			
	<u>Total Granted</u>		<u>Total Denied</u>	
Local Govs	17		8	
SHB	15		10	
	1B		1C	
	<u>Proposed Development Consistent w/SMP</u>		<u>Proposed Development Not Consistent w/SMP</u>	
	<u>Permit Granted</u>	<u>Permit Denied</u>	<u>Permit Granted</u>	<u>Permit Denied</u>
Local Govs	9	7	8	1
SHB	14	2	1	8

Trends are readily apparent. First, it appears that in reviewing permits, the SHB places great weight on the planning provisions of the SMP. The SHB approved only one permit that it found inconsistent with the local government's SMP<sup>85</sup> and ordered local governments to approve nearly every permit that it found consistent with the SMP.

Second, the local governments, even eight to twelve years after passage of the SMA, grant many permits for plans or applications (eight out of nine) that the SHB finds inconsistent with the local government's own master program. Additionally, of the eight applications for substantial permits initially denied by local governments, seven were found by the SHB to be consistent with the Master Program, and six were ordered granted by the SHB. These data appear to indicate uneven implementation by local governments of the planning program in the permit review process, resulting in frequent correction by the SHB.

Since so few permits (twelve of the fifty-decision sample)<sup>86</sup> initially were denied by local governments, it is of some interest to inquire about what kinds of projects they were. Of the seven that were denied by local governments but later deemed consistent with the local SMP by the SHB, three were public projects

85. See *Skagit County v. Department of Ecology*, 93 Wash. 2d 742, 613 P.2d 115 (1980); see also *supra* note 63. All of the statistics quoted can be ascertained by reference to Appendix A.

86. Table 3A *infra* and Appendix A.

sponsored by the state or some public body other than the reviewing local government. Local governments denied only four of twenty permits sought by private developers, while three of four permits sought by government bodies other than the reviewing body were denied. While this latter figure represents too small a sample to claim any significance for the trend, one might be tempted to hypothesize a home-court advantage in the permit review process of some local governments.

Table 2—Shoreline-Dependent and Other Preferred Development on Natural Shorelines

	2A			
	<u>Totals for "Natural" Sites</u>			
	<u>Total Granted</u>		<u>Total Denied</u>	
Local Govs	14		7	
SHB	9		12	
Superior Courts	7		0	

  

	2B		2C	
	<u>Proposed Shoreline-Dependent Uses on Natural Sites</u>		<u>Proposed Non-Shoreline Dependent Uses on Natural Sites</u>	
	<u>Permit Granted</u>	<u>Permit Denied</u>	<u>Permit Granted</u>	<u>Permit Denied</u>
Local Govs	12	6	2	1
SHB	9	9	0	3
Superior Courts	5	0	2	0

One attribute of the public interest is delineated as follows: for shorelines in a natural condition, the SMA expresses a preference, if it is in the best interest of the state for any development to occur, for uses that are shoreline-dependent, prevent pollution or environmental damage, or are single-family residences (SFRs). Table 2A shows the number of permits granted or denied by the different levels of permit review for all projects proposed on sites in a natural condition,<sup>87</sup> whether or not the

87. SHB findings were used to determine whether or not a site had a natural character. Although degrees of natural character can be said to present a continuum, the variable here is represented as binary—either natural or not natural. "Not natural" obviously implies some degree of development. For Table 2, the non-natural category was formed by combining sites that would be scored either 0 or -1 according to Appendix B ("devel-

projects were shoreline-dependent. Local governments initially granted two-thirds of the proposed developments; SHB review allowed less than one-half. For decisions that were appealed further, the trial courts (in this relatively small subsample) issued decisions that resulted in the granting of every project proposed on natural shorelines.

If the SMA objective of expressing a preference for shoreline-dependent development on natural shorelines were being carried out in the permit process, the data should show that shoreline-dependent projects are approved at a higher rate, or that nonshoreline-dependent projects are at a disadvantage. For the purposes of reviewing implementation of this objective, single family residences and uses that prevent environmental harm are categorized with the shoreline-dependent uses.<sup>88</sup> This categorization unfortunately results in a very small number of proposed nonshoreline-dependent uses, which prevents meaningful statistical review of this set of tables.

Some limited observations are possible, however. First, the fact that only three nonshoreline-dependent cases were proposed for natural shorelines may be significant. One could attribute this in part to the SMA's expansive inclusion of SFRs and pollution prevention uses with recreation and other shoreline-dependent developments as preferred uses. In other words, there may be so few nonpreferred uses simply because many popular uses have been categorized as preferred. Another, and more optimistic, interpretation is that the SMA discourages nonshoreline-dependent development of natural shorelines by its mere existence, independent of enforcement in the permit review process.

Second, the SHB did give full effect to the objective when opportunities were presented; it denied permits to each of the three nonshoreline-dependent uses proposed for natural shorelines, twice vacating permits that had been granted by local governments. Trial courts, however, reversed the SHB twice on appeal, apparently giving little weight to the shoreline-dependent preference. Only one of these decisions was brought for

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oped urban or suburban," or "agricultural, other less-developed," respectively). The natural category was a combination of sites that would be scored -2, -4, or -5, which is a range from "undeveloped (usually wooded) site in area with development" to "pristine area or invaluable habitat."

88. Single family residences, uses that prevent environmental harm, and shoreline dependent uses are all given priority in shoreline development by the SMA policy statement. WASH. REV. CODE § 90.58.020 (1983).

appellate review. There the court reversed the trial court and reinstated the SHB denial of permit.<sup>89</sup> This sequence gains significance only as review of the appeal process for other objectives and attributes reveals a similar pattern.

Table 3—Shoreline-Dependent Development

	3A		3C	
	Totals		Non-Shoreline Dependent	
	<u>Granted</u>		<u>Granted</u>	<u>Denied</u>
Local Govs	38			12
SHB	26			24
Superior Courts	12			3
	3B		3C	
	Shoreline-Dependent		Non-Shoreline Dependent	
	<u>Uses</u>		<u>Uses</u>	
	<u>Granted</u>	<u>Denied</u>	<u>Granted</u>	<u>Denied</u>
Local Govs	18	8	20	4
SHB	19	7	7	17
Superior Courts	8	3	4	0

The stated policy of the federal CZMA differs from the SMA in two significant respects. First, the CZMA places priority on coastal-dependent uses for all areas, rather than just for natural areas, of the coastal zone.<sup>90</sup> An Interim Review of SMA implementation that was performed in 1975 and appended to the FEIS for Washington's CZMP found that minimization of alterations of shorelines and environmental damage had been actively pursued but that "SMA permits . . . show a substantial amount of non-water dependent growth on the shorelines of Puget Sound."<sup>91</sup> Recommendation No. 6 stated that "local governments and the Shoreline Hearings Board should reevaluate their on-shore water-dependent policy in order to discourage the proliferation of non-water-oriented development."<sup>92</sup>

Ten years have passed since the Interim Review, and Table 3C shows that local governments and trial courts during the

89. *Hayes v. Yount*, 87 Wash. 2d 280, 552 P.2d 1038 (1976).

90. 16 U.S.C. § 1452(2)(C) (1984). The policy was last expressed in the 1980 amendments. See *supra* notes 42-43 and accompanying text.

91. FEIS, *supra* note 9, at app. VI at 5-7.

92. *Id.* at 11.



period 1974-1983 approved nearly every proposed nonshoreline-dependent use (twenty of twenty-four, and four of four, respectively). The SHB, however, appears to have implemented this objective vigorously by denying seventeen of twenty-four proposed nonshoreline-dependent uses. This fact appears particularly significant in comparison with the data of Table 3B, which show that the SHB approves developments that are shoreline-dependent at the same or greater rate as local governments and trial courts. Comparison of Tables 3B and 3C suggests that the SHB, unlike local governments and trial courts, assigned great weight to a proposed project's shoreline-dependent nature.

The second significant difference in implementation of this policy is that the CZMA priority, unlike that of the SMA, does not include single-family residences or developments that prevent environmental harm.<sup>93</sup> Indeed, SFR developments are often considered an extremely inappropriate use of the coast in federal coastal zone policy, and the FEIS's Interim Review stated that "single family residences are the primary development in competition with public access and recreation for Puget Sound Shorelines."<sup>94</sup>

The broader preference category of the SMA does little to explain the decisions of local governments and trial courts because those bodies approved all uses, whether preferred or not, at such a high rate. It is interesting to note, however, that of the seven nonshoreline-dependent uses approved by the SHB, four were SFRs or developments that prevent environmental harm (pollution control facilities, in this instance).

This fact would support the argument that the SHB has responsibly implemented the water-dependent priority of the CZMA. Moreover, the SHB does not appear to deviate often from this policy except in deference to the different preferences mandated by the legislative direction of the SMA and, unfortunately, to the occasional trial court orders for reversal.

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93. Compare 16 U.S.C. § 1452(2)(C) (1984) with WASH. REV. CODE § 90.58.020 (1983).

94. FEIS, *supra* note 9, at app. VI at 5-7.

Table 4—Preservation of Natural Shorelines

	4A		4B	
	On Shorelines of		Non-Natural (Developed)	
	<u>Natural Character</u>		<u>Character</u>	
	<u>Granted</u>	<u>Denied</u> <sup>95</sup>	<u>Granted</u>	<u>Denied</u>
Local Govs	14	7	24	5
SHB	7	14	18	11
Trial Cts.	6	1	5	3

Public interest under the SMA includes several additional specific attributes: preserving the natural character of the shorelines, favoring projects with long-term benefits, protection of the environment and navigation, and increased public access to publicly-owned lands.<sup>96</sup> Implementation of these preferences is reviewed in Tables 4-9.

Uses that “[p]reserve the natural character of the shoreline” are given one of the highest preferences.<sup>97</sup> There were only two projects proposed in this study that could be said to preserve the natural character: a state park and a campground.<sup>98</sup> The county commissioners in each jurisdiction denied the permit, but the SHB reversed both denials.<sup>99</sup>

Another means of preserving natural shorelines is by denying developments that are inconsistent with the goal of preservation. Tables 4A and 4B provide a comparison along these lines. Although the local governments’ approval rate is still high on natural shorelines (two-thirds), it appears to be less than their approval rate on nonnatural shorelines (about four-fifths). On appeal, the SHB clearly approved fewer developments on natural shorelines than on non-natural shorelines, and appears to

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95. In Table 4A, the “Denied” category includes two park projects that were actually granted, but which maintained the natural character of the shoreline even after development. The SHB record would be 9-12 and the trial court’s 7-0 if not for this adjustment (see Table 2A).

96. See *supra* note 41 and accompanying text.

97. WASH. REV. CODE § 90.58.020 (1983).

98. Washington Parks & Recreation Comm’n v. Island County, 2 Wash. St. Env. Rep., SHB 79-23 (Book Pub. Co.) (1979); Washington Dep’t of Natural Resources v. Dan James Co., 2 Wash. St. Env. Rep., SHB 79-18 (Book Pub. Co.) (1978).

99. *Id.*

have channelled growth away from natural shorelines and into developed areas, as is intended in both the SMA<sup>100</sup> and CZMA.<sup>101</sup>

## 4C

Preservation of Natural Shorelines of Statewide Significance

	<u>Granted</u>	<u>Denied</u>
Local Govs	11	2
SHB	4	9
Trial Courts	3	0

The CZMA requires that a state CZMP designate areas of particular concern within the coastal zone.<sup>102</sup> The SMA designates shorelines of statewide significance with precision and at great length.<sup>103</sup> These are shorelines designated in the SMA where local governments are directed to recognize and protect the state-wide interest over local interest.<sup>104</sup> The WDOE emphasizes the importance of the SOSS in the planning of SMPs, and proffers much guidance.<sup>105</sup> A recent Washington Supreme Court decision, *Orion Corp. v. State*,<sup>106</sup> placed great emphasis on the effect of the SOSS designation on Orion's ability to develop its land in finding that Orion was not required to exhaust its administrative remedies by appealing through the SMA permit process because, the court reasoned, such appeals would be futile.<sup>107</sup>

Nonetheless, Table 4C indicates that the designation of SOSS has had little impact thus far on the success rate of shorelines permit applicants. Local governments appear to have approved permits for development at a particularly high rate. The SHB, while clearly respecting the importance of the SMA's policy for preserving natural shorelines, appears to have demonstrated approximately the same approval/denial ratio regardless

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100. See WASH. ADMIN. CODE R. § 173-16-040(4)(b)(ii), (iv) (1983).

101. 16 U.S.C. § 1452(2)(A), (C) (1985).

102. 16 U.S.C. § 1454(b)(3) (1985).

103. WASH. REV. CODE § 90.58.020(2)(e) (1983).

104. WASH. REV. CODE § 90.58.020(1) (1983).

105. WASH. ADMIN. CODE R. § 175-16-040(5) (1983). Generally, local governments are required by these regulations and WDOE's approval authority of WASH. REV. CODE § 90.58.090(2) to concentrate development in areas where development already occurs, to protect natural SOSS, and to promote environmental protection, public access, and recreation.

106. 103 Wash. 2d 441, 693 P.2d 1369 (1985).

107. *Id.* at 443-49, 693 P.2d at 1371-74.

of whether the natural shoreline was designated as SOSS (compare SHB in Table 4A and 4C).

Table 5—Long Term Benefit

	5A Long-Term Benefit		5B Short-Term Benefit	
	<u>Granted</u>	<u>Denied</u>	<u>Granted</u>	<u>Denied</u>
Local Govs	3	3	15	7
SHB	6	0	3	19
Trial Court	2	0	5	1

A use that results in long-term, rather than short-term, benefit is accorded the highest priority in the SMA public interest list of preferences. SHB decision-making reflects this in an impressive way: the SHB approved all six projects with long-term benefit, and only three of twenty-two projects characterized by short-term benefit. Data for local governments and trial courts do not reveal any distinctions based on this attribute.

A project with long-term benefit provides assurance of future use and enjoyment of Washington's valuable shoreline natural resources.<sup>108</sup> Examples of such projects include aquaculture,<sup>109</sup> fill for a state fish hatchery,<sup>110</sup> parks,<sup>111</sup> and pollution control facilities.<sup>112</sup> Examples of projects with short-term benefit include some landfills,<sup>113</sup> dredge spoil disposal,<sup>114</sup> and moorages over biologically productive tidelands for shoreline condominiums.<sup>115</sup>

108. See *supra* note 39.

109. See *American Sea Vegetable Co.*, 3 Wash. St. Env. Rep., SHB 82-51 (Book Pub. Co.) (1983).

110. See *Washington Dep't of Fisheries*, 3 Wash. St. Env. Rep., SHB 82-52 (Book Pub. Co.) (1983) (increased hatchery production will also result in long-term benefits to state).

111. See *Island County*, 2 Wash. St. Env. Rep., SHB 79-23 (Book Pub. Co.) (1979) (park will provide for recreational development, which will produce long-term benefits to Island County and State citizens); *Dan James Co.*, 2 Wash. St. Env. Rep., SHB 78-18.

112. See SHB 183 (1976); SHB 173 (1975).

113. See, e.g., *Graham v. Snohomish County*, 3 Wash. St. Env. Rep., SHB 85, (Book Publ. Co.) (1976); SHB 150.

114. See, e.g., *Roderick Timber Co.*, 3 Wash. St. Env. Rep., SHB 80-39, (Book Pub. Co.) (1982); SHB 244.

115. See *Community Services Corp.*, 3 Wash. St. Env. Rep., SHB 82-17 (Book Pub. Co.) (1983).

Table 6—Environmental Protection

	6A		6B	
	<u>Harms Environment</u>		<u>Protects Environment</u>	
	<u>Granted</u>	<u>Denied</u>	<u>Granted</u>	<u>Denied</u>
Local Govs	14	4	6	2
SHB	3	15	7	1
Trial Courts	5	3	1	0
Appeal Courts	0	6	1	0

As Table 6B shows, all levels of review tended to approve permits for developments with positive environmental effects. Examples include state parks,<sup>116</sup> pollution control facilities,<sup>117</sup> and a marina project that replaced old pilings with a floating breakwater and added additional moorages and a pump-out facility to take wastewater from pleasure craft.<sup>118</sup>

Unfortunately, local governments granted permits to environmentally harmful projects at about the same rate as they approved all permits (see Table 3A for background approval rates). The superior courts, collectively, appeared only slightly more sensitive to the statute's expressly stated policy of environmental protection. The appellate courts and the SHB, however, have enforced vigorously the environmental protection attribute of the public interest by denying or conditioning permits for developments that would have harmful effects or by remanding them to local governments for further consideration. Examples of projects considered environmentally harmful include an asphalt batch plant,<sup>119</sup> a pier and barge-loading facility for gravel,<sup>120</sup> landfills of tidelands or wetlands,<sup>121</sup> and dredge spoil disposal sites.<sup>122</sup>

The conclusions regarding local governments and trial courts should be qualified. Most importantly, conditions fre-

116. See *Island County*, 2 Wash. St. Env. Rep., SHB 79-23; *Dan James Co.*, 2 Wash. St. Env. Rep., SHB 78-18.

117. See SHB 80-19 (1981); SHB 183 (1976); SHB 173 (1975).

118. See *Wareham v. San Juan County*, 2 Wash. St. Env. Rep., SHB 79-32 (Book Pub. Co.) (1980).

119. See *Gene Behannon*, 2 Wash. St. Env. Rep., SHB 79-38 (Book Pub. Co.) (1979).

120. See SHB 115 (1976).

121. See *Bruecher*, 2 Wash. St. Env. Rep., SHB 79-18; *Chelan County*, 2 Wash. St. Env. Rep., SHB 78-51 (Book Pub. Co.) (1980); *Graham*, 3 Wash. St. Env. Rep., SHB 85; SHB 159; SHB 153; SHB 150.

122. See *Roderick Timber*, 3 Wash. St. Env. Rep., SHB 80-39; SHB 244 (1977).

quently are attached to permit approvals. The conditions can significantly reduce the environmental harm associated with some of the developments, although other uses are unavoidably harmful and must be sited very carefully if they are to be built. The Interim Review, in a very positive view, stated that "[e]nvironmentally damaging shoreline activity proposals were rarely prohibited by local and state agencies but rather were modified through permit compromises or conditions. As a result, permit modifications have enabled state and local governments to minimize ecological damage without prohibiting growth."<sup>123</sup>

The binary analysis in this study (environmentally harmful/environmentally protective) does not reflect partial environmental improvement unless the project is no longer harmful. Thus, progress may have been made environmentally without appearing in Tables 4A and 4B. Nevertheless, these tables still show that, even after the inclusion of any permit conditions, local governments granted permits to fourteen out of eighteen proposed developments that were considered environmentally harmful by SHB findings or WDOE expertise.

Finally, it should be noted that approximately one-half of the fifty proposed projects in this study were rated environmentally neutral, often after and because of required permit conditions. Also, four of the decisions, treated for convenience herein as denials, were in fact remanded to the local governments to add conditions that would eliminate environmental harm prior to eventual approval.<sup>124</sup> Examples of projects neither environmentally harmful nor protective are SFRs that do not unnecessarily disturb natural shorelines or neighboring aesthetic views,<sup>125</sup> some docks and bulkheads,<sup>126</sup> and office buildings in developed areas.<sup>127</sup>

This analysis suggests that for many proposed projects local governments carry out the environmental protection mandate through conditions added during the permit review process. Yet

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123. FEIS, *supra* note 9, at app. VI at 6.

124. Quilcene Assoc., 3 Wash. St. Env. Rep., SHB 82-7 (Book Pub. Co.) (1980); Island County, 2 Wash. St. Env. Rep., SHB 79-24; Valley West, 3 Wash. St. Env. Rep., SHB 79-24, (Book Pub. Co.) (1979); SHB 228 (1977).

125. See Sircouich, 2 Wash. St. Env. Rep., SHB 80-43 (Book Pub. Co.) (1980); Powers, 3 Wash. St. Env. Rep., SHB 238, (Book Pub. Co.) (1977); SHB 151 (1975).

126. See Ashbough, 3 Wash. St. Env. Rep., SHB 82-54 (Book Pub. Co.) (1983); Connor, 3 Wash. St. Env. Rep., SHB 82-15, (Book Pub. Co.) (1982); Island County, 2 Wash. St. Env. Rep., SHB 79-24.

127. See SHB 158 (1975); SHB 156 (1976).

this effort appears to have fallen short of the intended implementation of the SMA because environmentally harmful projects have been approved at a high rate. The SHB vacated most of the permits granted for environmentally harmful projects but, on appeal, often was reversed by the superior courts. Appellate courts denied permits to many developments that would have frustrated the environmental protection objective and, in reversing trial courts, made consistently strong statements about the environmental mandate of the SMA.<sup>128</sup>

Table 7—Increasing Access or Recreational Opportunity

7A				
<u>Projects Increasing Access to Publicly Owned Shorelines</u>				
	<u>Granted</u>		<u>Denied</u>	
Local Govs	3		2	
SHB	5		0	

  

7B		7C		
<u>Projects Increasing Access</u>		<u>Projects Decreasing Access</u>		
	<u>Granted</u>	<u>Denied</u>	<u>Granted</u>	<u>Denied</u>
Local Govs	13	3	4	0
SHB	15	1	1	3
Trial Courts	5	0	2	0

Increasing public access to publicly owned shorelines is an attribute of a proposed development that, under the SMA<sup>129</sup> and the CZMA,<sup>130</sup> constitutes promotion or enhancement of the public interest. For the five projects proposed on public lands that would increase access, Table 7A shows that the SHB approved all, while local governments had denied two of the permits.

The CZMA, on the other hand, declares that state programs should provide for "public access to the coasts for recreation purposes,"<sup>131</sup> without limiting this policy to lands that are public. The Interim Review of the FEIS condemned the SHB and local governments for poor efforts to implement increased access.

128. See *supra* notes 67-68 and accompanying text.

129. WASH. REV. CODE § 90.58.020 (1983).

130. See *supra* note 43.

131. 16 U.S.C. § 1452(2)(D) (1984).

Public access to the saltwater shorelines of Puget Sound has increased only minimally since enactment of the SMA. Local governments have generally failed to provide public access components when issuing shoreline development permits. Despite the Department of Ecology's active support for increasing public access to Washington State shorelines, they have had limited success in obtaining greater access as SHB decisions have rarely required public access components. In those limited instances when public access has been provided by local government or the SHB, it has been reserved for large-scale developments in urban environments. The failure of local governments to condition shoreline permits upon providing access has curtailed a potentially economical method for increasing recreational use of public saltwater shorelands.<sup>132</sup>

WDOE guidelines now emphasize shoreline access on SOSS for all development and master programs,<sup>133</sup> which is consistent with SMA language encouraging an increase in recreational opportunities in the shoreline.

Table 7B indicates that all three levels of the review process approve nearly every project that increases public access to any shoreline, whether publicly or privately owned.<sup>134</sup> Table 7C suggests that access determinations are indeed important to SHB decisions, but its data also undermine the significance of the high approval rates of local governments in Table 7B. Notwithstanding the Interim Review's critical (and still instructive) comments regarding lost opportunities for increased public access, the data still show that fifteen of the fifty projects in this study—nearly one-third—resulted in increased public access in recreation opportunities on Washington shorelines.

Criticism has been raised more recently, however, regarding the effectiveness of some dedications to public access by private developments.<sup>135</sup> The final conclusions of a 1983 WDOE publication, *An Evaluation of Public Access to Washington's Shorelines*, noted several successful examples of particular public

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132. FEIS, *supra* note 9, at app. VI at 6.

133. WASH. ADMIN. CODE R. § 173-16-040(5)(e)(i)-(ii) (1983).

134. The three projects denied by local governments that would have increased public access were a boat launch, *Port of Allyn v. Mason County*, 3 Wash. St. Env. Rep., SHB 82-32 (Book Pub. Co.) (1983), a state park, *Dan James Co.*, 2 Wash. St. Env. Rep., SHB 78-18, and a campground, *Island County*, 2 Wash. St. Env. Rep., SHB 79-23. The one project denied by the SHB that did increase access was a fast food service on the Methow River. SHB 169 (1975).

135. See generally *Public Access*, *supra* note 41.



accesses but also found that some dedicated public accesses in fact went unused due to obscure, nonexistent or illegal signs, and that others "are of marginal utility as public use features because of inadequate space allowance, no separation of private and public space and . . . design weaknesses."<sup>136</sup>

Table 8—Protection Navigation

Projects that Hinder Navigation

	<u>Granted</u>	<u>Denied</u>
Local Govs	8	2
SHB	5	5
Trial Courts	2	0

Preventing interference with navigation is an explicit attribute of the public interest delineated in the SMA.<sup>137</sup> Ten of the fifty proposed projects that were examined in this study would have interfered with navigation. As Table 8 shows, the local governments granted most of the permits; the SHB granted about one-half, generally as restricted by conditions carefully drawn to reduce interference.

Among the approvals granted in Table 8 that interfered with navigation were projects for aquaculture,<sup>138</sup> marinas,<sup>139</sup> and houseboats.<sup>140</sup> Among the SHB denials were four landfills for nonwater-dependent uses,<sup>141</sup> the denials were consistent with DOE guidelines issued pursuant to the SMA.<sup>142</sup> It appears that the SHB and local governments both permit some degree of infringement upon navigation rights.

### *B. Appellate Review*

The empirical analysis in this Article is less appropriate for appraising appellate review. Although they have recognized the overriding environmental protection focus of the SMA,<sup>143</sup> appel-

136. Public Access, *supra* note 41, at 56-58. An example of an illegal sign is a "Private Property: No Trespassing" sign.

137. See *supra* note 35.

138. American Sea Vegetable, 3 Wash. St. Env. Rep., SHB 82-51.

139. Wareham, 2 Wash. St. Env. Rep., SHB 79-32; Carpenter v. San Juan Co., 2 Wash. St. Env. Rep., SHB 79-5 (Book Pub. Co.) (1980).

140. SHB 194 (1976).

141. SHB 159 (1975); SHB 153 (1975); SHB 150 (1975); SHB 85 (1983).

142. WASH. ADMIN. CODE R. 173-16-060 (14)(d) (1983).

143. See *supra* notes 36-37 and 65 and accompanying text.

late courts only infrequently have considered the substantive factors of the SMA, and more often have resolved cases on procedural grounds or issues of reviewing standards.

Nevertheless, a brief glimpse at appellate review of SHB and trial court decisions is interesting. In thirteen reviews of SHB decisions, a superior court has reversed the SHB five times, generally to lessen permit conditions or to order a permit granted.<sup>144</sup> The appellate courts have reversed superior courts six of twelve times,<sup>145</sup> almost always to restore permit conditions or to deny a permit. In three instances, SHB decisions that imposed environmental conditions or denied permits were reversed by superior courts but reinstated by the appellate courts.<sup>146</sup> No superior court has been upheld on appeal when it reversed an SHB decision.

### C. Summary of Decisions

The comparisons of Part III suggest that treatment of proposed projects differs according to whether the local government, SHB, or trial court performed the review. More specifically, although it demonstrated no deference for the SOSS designation and seemed willing to sacrifice some navigation interests to other goals of the Act, the SHB apparently pursued vigorously and successfully most of the SMA and CZMA goals. In particular, as the SMA and CZMA contemplate, the SHB resisted nonshoreline-dependent development and promoted increased access to all shorelines. It also persistently pursued the goals of long-term benefits, environmental protection and, more recently, Master Program consistency. SHB implementation of

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144. SHB 159; SHB 155; *Weyerhaeuser v. King County*, 91 Wash. 2d 721, 592 P.2d 1108 (1979); SHB 150; SHB 83; *Hayes v. Yount*, 87 Wash. 2d 280, 552 P.2d 1038 (1976); SHB 22; *Department of Ecology v. Ballard Elks*, 84 Wash. 2d 551, 527 P.2d 1121 (1974) (only case of the five in which the Supreme Court reversed the SHB in favor of stricter conditions).

145. *Weyerhaeuser v. King County*, 91 Wash. 2d 721, 592 P.2d 1108 (1979); *Department of Ecology v. Ballard Elks*, 84 Wash. 2d 551, 527 P.2d 1121 (1974); *Merkel v. Port of Brownsville*, 8 Wash. App. 844, 509 P.2d 390 (1973); *Skagit County v. Department of Ecology*, 93 Wash. 2d 742, 613 P.2d 115 (1980); *Department of Natural Resources v. Thurston County*, 92 Wash. 2d 656, 601 P.2d 494 (1979); and *Hayes v. Yount*, 87 Wash. 2d 280, 552 P.2d 1038 (1976), are the six appellate court reversals of trial courts. The six trial court decisions under the SMA that were upheld on appeal can be obtained by comparison with the list in note 65.

146. *Weyerhaeuser v. King County*, 91 Wash. 2d 721, 592 P.2d 1108 (1979); *Department of Ecology v. Ballard Elks*, 84 Wash. 2d 551, 527 P.2d 1121 (1974); *Hayes v. Yount*, 87 Wash. 2d 280, 552 P.2d 1038 (1976). See *supra* notes 143-44.

the goals of preservation of natural areas and of the preference for shoreline-dependent uses when natural areas are altered also was active.

Local governments and superior courts did not yet appear to have adapted to the legislative priorities of the SMA. Permits continue to be issued for reasons more akin to traditional prerogatives of property owners than to the goals of the SMA. The local governments, however, have made progress in implementing the public access policy of the CZMA. They also approved developments for natural shorelines at less than their approval rate for developed areas. But other policies of the SMA, such as growth according to planning, environmental protection, and long-term benefits, have been largely ignored by local governments. Insufficient results prevent an evaluation of superior courts, but about half of the decisions point toward positive SMA implementation, while others are difficult to reconcile with the objectives of the SMA.<sup>147</sup>

#### IV. APPLYING A NUMERICAL MODEL TO SUBSTANTIVE DECISION-MAKING UNDER THE SMA

##### A. *Introduction*

Part II of this Article identified the objectives of the SMA and some of the specific attributes of the SMA's definition of public interest as standards against which implementation of the SMA by local governments, the SHB, and superior courts could be measured. Part III evaluated decisions from the different levels of permit review and appeal according to the identified standards, in simple statistical matrices.

The purposes of Part IV are twofold. The first is to evaluate further the decisions of local governments, the SHB, and superior courts through use of a simple numerical model. The model permits evaluation of all the objectives and public interest attributes at once, rather than attribute-by-attribute. The second purpose of the model is to establish an evaluative framework that corresponds to past SHB decision-making sufficiently to aid the prospective evaluation of the response of the SHB or a local government to a given substantial development permit application.

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147. See, e.g., SHB 159; SHB 150; SHB 85; *Hayes v. Yount*, 87 Wash. 2d 280, 552 P.2d 1038 (1976).

*B. Results of Comparison of the Model with Permit Decisions*

The attribute-by-attribute evaluations of the fifty SHB decisions examined are reproduced in Appendix A. The methodology employed in developing this numerical model is explained in Appendix B. The results of a comparison of the outcomes of this simple model with the decisions rendered by local governments, the SHB, and superior and appellate courts are described here.

Table 9—Decisions Consistent with Model

	Positive-Scored Projects That Were Granted	Non-Positive Scored Projects That Were Denied	Decisions Consistent with Model
Local Gov.	19/24	7/26	26/50
SHB	24/24	23/26	47/50
Trial Courts	6/6	3/9	9/15
Appellate Crts.	4/4	7/7	11/11

*Positive Scores.*—The model resulted in net positive scores twenty-four times, thereby indicating that these twenty-four projects should be issued permits according to the interpretation of the SMA that is incorporated in the model. The local governments initially issued permits to nineteen of these twenty-four projects and had their five denials reversed. The SHB issued permits to all twenty-four. Six of the permits granted were appealed beyond the SHB; superior courts upheld each of those grants, occasionally tightening or loosening permit conditions. Four permits were appealed further; each of those permit grants was also upheld in the appellate courts.

*Non-positive Scores.*—The model resulted in negative scores or scores of zero for twenty-six proposed developments, suggesting that permits should have been denied after consideration of attributes relevant under the SMA. The local governments had denied only seven of these twenty-six proposed developments. They granted the other nineteen of these twenty-six projects originally, and those were nearly all vacated by the SHB, although four were remanded merely for the attachment of mitigating conditions. Of the twenty-six proposed developments assigned negative scores or scores of zero by this model,

the SHB granted three and denied twenty-three.

Superior courts reversed some of the SHB decisions that ordered local governments to deny permits, and issued orders that resulted in the granting of permits to five of these projects with non-positive scores. Superior court orders upheld the denial of only one project with a non-positive score, but enjoined two other projects with non-positive scores that had evaded the SHB process.

Appellate court decisions denied permits to all seven non-positive scores.

In sum, SHB decisions were consistent with the expectations of the model forty-seven out of fifty times (94%). Appellate court decisions (11/11) all were in agreement with expectations of the model. The model suggested results quite different from those produced by local governments and superior courts. The outcomes of the model matched decisions of superior courts nine of fifteen times (60%); the local governments matched only twenty-six of fifty times (52%).

### C. *Conclusions of Analysis Using this Model*

It should be noted that the purpose of this model is *not* to establish a formula that would enable lawyers or laymen to predict legal decisions with precision or certainty. It is not proposed here as a solution to the inconsistent decision-making described in Part III. This author is mindful of the admonition in *Polygon Corp. v. Seattle*<sup>148</sup> that "environmental considerations are not amenable to precise quantification."<sup>149</sup>

What, then, does this model contribute? Based on the data of Table 9, the model can be said reasonably to "fit" with appellate review at the highest level and with administrative results at the agency level. The model was designed to reflect the statutory foundation that underlies administrative and judicial review. Thus, the model has a base in theory as well as in experience.

Consequently, the inconsistency between the model's expectations and local government decisions and, to a lesser degree, superior court decisions, provides a basis for initiating evaluation of SMA implementation. The first issue raised is whether a real disparity exists in the general tendencies of the different

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148. 90 Wash. 2d 59, 578 P.2d 1309 (1978).

149. *Id.* at 66, 578 P.2d at 1313.

levels of permit review. Part III of this Article demonstrates in a simple statistical way, independent of the model and the analysis in Part IV, that analysis of the decisions of local governments, the SHB, and the superior and appellate courts reveals a great divergence in implementation of the SMA among different levels of review and appeal. Part III also demonstrates that some local governments and superior courts have produced results and opinions consistent with those of the SHB, appellate review, and the language of the SMA, while many others have granted permits to projects that seem impossible to reconcile with the SMA's objectives.

In addition, the model provides a way to organize issues under the SMA that could be useful to developers and other permit applicants, as well as to local governments and those who intend to contest a permit. Even without the advantage of SHB findings, many people could give reasonable estimates of the different values. Although numbers are assigned in this model, the values could be assigned with equal practicality as "negative effect," "no effect," "positive effect," and "very positive effect" to most of the attributes and generate similar results. Most individuals, given even a half-hearted attempt at objectivity, could approximate the range of values that the SHB is likely to consider. A particularly difficult estimate is likely to be a controversial case at hearing; this is a sign to applicants or contestants that considerable evidence may have to be marshalled and presented.

The numerical symbols also can be useful as a means of highlighting trouble spots for an applicant or local government. Perhaps a proffered condition or a design modification can remove a negative effect, or some other positive change can be added in order to render the project an "enhancement" of the public interest in addition to being a private benefit.

#### V. INTEREST ANALYSIS: TAKING ADVANTAGE OF THIS INFORMATION

This section briefly suggests some of the common sense implications of this study. It also considers how to increase or decrease an applicant's chances of receiving approval for a permit.

## A. Contestants

At the outset, one additional factor requires brief discussion. Who contests permits? Who contests them successfully?

Table 10—Contestants

Contestant Party	No. of Projects Contested	Successful Contests (No. of Permits Defeated)	Successful Contests When Sole Contestant	Successful Contests When Joined by Other Contestants
State	23	15	9 of 13	6 of 10
Local Gov. Adj.	13	6	3 of 9	3 of 4
Landowner(s)	18	6	1 of 8	5 of 10
Competitor(s)	2	1	0 of 1	1 of 1
Citizens' Group(s)	6	3	0 of 3	3 of 3
Undetermined	3	1	1 of 2	0 of 1

Almost any interested person can gain standing to contest a permit<sup>150</sup> and force the permittee into significant additional expense of time and money. Table 10 shows some clear trends. In the State of Washington, the Attorney General's Office contests the most permits. The State contested nearly fifty percent of the permits in this study by appealing the decision of a local government to the SHB. Adjacent landowners were the next most frequent opponent of developers, in more than one-third of these SHB decisions. Local governments tried to persuade the SHB to uphold local government denials or conditions in about one-fourth of these cases. Citizens' groups, including environmental groups, and competitors each contested twelve percent or less of the permits in this study.

The only significant change over time in this study is that State participation has dropped substantially. After contesting seventeen of the first twenty-five permits (pre-1978) examined here, the State contested about as many permits during the period 1979-83 (roughly one-fourth) as local governments or adjacent landowners.

150. WASH. REV. CODE § 90.58.180(1) (1983) states: Any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state may seek review from the [SHB] by filing a request [with WDOE]. If it appears to [WDOE] or the attorney general that the requestor has valid reasons to seek review, either . . . may certify the request. See *Manasco v. City of Kelso* and Department of Transportation, SHB 78-31, and *Hildahl v. City of Steilacoom* and Burlington Northern Railroad, SHB 80-33; see also State of Washington Shorelines Hearings Board, *Digest of Decisions*, pp. 5-6 (1983).

The State was the most successful contestant by a large margin; in fact, it was the only contestant that won more than half of its cases. (An exception to this is at the superior court level, where the state lost every appeal of substantial development permits, in the cases examined in this study, despite six tries.)<sup>151</sup>

Furthermore, the other classes of contestants—local governments, adjacent landowners, citizens' groups, and competitors—only rarely succeeded in their attempts to prevent permit approvals unless they were joined by other contestants. The State is obviously the most desirable ally (unless one is appealing to superior court and for some reason appealing no further).

## B. *Using This Information*

### 1. *Local Governments*

Planning may be the local government's greatest leverage at the SHB. The SHB approved fourteen out of sixteen permits that it found consistent with the local governments' SMPs, and denied eight out of nine that it found inconsistent.<sup>152</sup> Consistency with planning is often the pivotal factor for approval of small single-landowner projects that do little to promote the public interest but are relatively innocuous environmentally. A foresighted SMP is a major factor in allowing a local government to keep out uses that it finds undesirable. Competent SMPs give local governments significant discretion in determining where and how traditional development rights can be exercised with some reasonable reduction of public rights and where the local government can focus the other primary aims of the SMA.

When the government of a municipality wants to encourage growth in areas that include shorelines, it can do much to ease a developer's way through competent planning. It can designate a particular shoreline area as urban, and provide some rationale as to why and how development corresponds to the municipality's plan for growth.

In such areas where the local government desires growth and would like to grant most permits, it must avoid significant

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151. See Appendix A; *Washington v. Marine Const. & Dredging Inc.*, 3 Wash. St. Env. Rep., SHB 244, (Book Pub. Co.) (1977); *Graham v. Snohomish County*, 3 Wash. St. Env. Rep., SHB 85 (Book Pub. Co.) (1976); *Eickhoff v. Thurston County*, 17 Wash. App. 774, 565 P.2d 1196 (1977); SHB 150; SHB 159.

152. See *supra* Table 1.



conflicts with the goals of the SMA in order to avoid inviting contest by the state. The reduction in permit participation rate by the State in the last several years means that the State must assign priorities in determining which permits to contest with vigor. Local governments can do much to avoid gaining such priority by reasonable administration of the permit review process and by applying conditions where necessary. A local government that wants to affect the outcome of a particular project should recognize that it has maximum control during its review, when it is the permit-issuing authority and has discretionary authority to impose or remove conditions. A local government loses influence rapidly if appeal to the SHB is made because the SHB's de novo review accords the local government's decision no particular deference. Prudent exercise of its power to impose conditions allows the local government or developer during early stages of review to do much to avoid the delay and expense (and possible opposition from the State) that is associated with SHB review.

In cases where the local government would like to avoid development, or where the development proposed is itself undesirable, the implications of Tables 1 and 10 are clear. Enact an SMP that guides growth away from selected areas, and use discretionary authority under the local SMP and SEPA to impose appropriate conditions on the development. A local government also can get help from other parties who are likely to contest permits. Even when the State would not participate, the participation of adjacent landowners or citizens' groups appears to increase a local government's chances of success.

## 2. *Contestants*

The most important fact to contestants is that each of them, except local governments, is more likely to succeed in defeating or conditioning a permit at the SHB level than at the local government level of permit review.<sup>153</sup> This fact can be used as leverage during local government review in order to attach conditions to approval. Moreover, contestants should be aware of the difference when they are deciding to protest a permit approval. The SHB appears to have taken its statutory mandate very seriously.

At the SHB, contestants should be aware that appeal to

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153. See *supra* Table 3A.

superior court (by them or by the permit applicant) is likely to be costly for both and is unlikely to be advantageous for the contestant. (In this study, trial courts did not reverse any permits granted by the SHB; they had eight opportunities to do so.) Contestants, unless they are willing to pay the way through superior court to the Washington Court of Appeals or Supreme Court, should try to reach a satisfactory settlement at the SHB that is unlikely to be appealed. Obviously, the implications of these general statistical trends are only part of the factual basis for the informed judgment of contestants and their lawyers regarding the prospects for success on appeal of a particular case.

Second, like local governments, contestants should try to persuade the State, or other classes of contestants, to join in the negotiations. The odds of success appear to rise significantly when the State participates, and probably even when classes of contestants other than the State join them.<sup>154</sup> An additional advantage of State participation is the expertise of the Departments of Ecology, Fisheries, Game and others, which is given substantial weight at the SHB.

Third, contestants do much better with arguments that are justified by the SMA and supported by some evidence. Public rights are not inviolable: the SMA expressly allows for their limited reduction. Nonetheless, projects are required to provide a net promotion or enhancement of the public interest as defined in the SMA,<sup>155</sup> and the appellate courts have made it clear that environmental degradation will not be allowed.<sup>156</sup> It takes more than an applicant's demonstrated private interest to satisfy this standard.

### 3. *Developers and Other Applicants*

First, developers proposing large projects can do much to streamline permit approval, and avoid expense and delay, by early interaction with the local government and the planning

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154. One highly-respected commentator on Washington environmental law has suggested that a negative impact on adjacent property may be a significant factor in appellate decision-making. R. SETTLE, *WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE* 137 (1983). The empirical data in this study do not support such a conclusion. Professor Settle's remaining conclusions regarding substantive decisionmaking by appellate courts in Washington are all supported by this study. *See id.* at 137, Figure 1.

155. *See supra* notes 79-80 and accompanying text.

156. *See supra* notes 65-68 and accompanying text.

staff that authored the master program. Ideally, planners will recognize potential conflicts early. This would allow developers to respond with considerable flexibility and, possibly, at less expense.

Second, dissemination of information to adjacent landowners, citizens' groups, and other members of the public may allay concerns and even gain allies. Early interaction with the public at least allows the developer of a major project to better anticipate contests and contestants. This knowledge encourages reasonable scheduling based on likely permit approval dates or appeals and, consequently, facilitates financial planning. Preparation can help avoid breached contracts, defaulted loans, and financial debacles.

Third, the developer may want to consider altering the project somehow to alleviate negative concerns, such as through providing inexpensive (or tax-beneficial) positive benefits like public access or environmental improvements. Alterations may be particularly advantageous for the developer if the perceived problems with the project have made its obstruction a high priority for the State, adjacent landowners, or citizens' groups. Perhaps these factors should be considered as early in the process as site-selection.

Finally, a single-family homeowner applicant who wants only a small fill, bulkhead, dock, or new home, can save considerable frustration and expense. Early discussions with the local planners may help avoid unanticipated conflicts with the local government's master program or regulations. If a conflict arises, the planners may be able to tell the applicant how to achieve his or her aims without conflicting with the master program and thereby risking permit denial or appeal. The small business or single-family homeowner applicant should also avoid, appease, or be ready to litigate with, contentious neighbors.

## VI. CONCLUSION

The SHB demonstrated significant consistency with the mandate of the Washington SMA and the federal CZMA in 50 permit review decisions. SHB decisions consistently implemented SMA objectives for advancing environmental protection, increasing public access to the shoreline, and discouraging development that was not consistent with the SMPs of local governments.

Viewed collectively, local governments did not appear to

have adapted to the new statutory system during the period of this survey. Many local government and superior court decisions were inconsistent with the objectives and standards of the SMA. Local governments were reversed or had their decisions remanded at a relatively high rate. Many of them had not yet learned how to advance local goals and interests—whether those interests be oriented towards rapid growth or environmental conservation—through either the SMA's planning or permit review process.

Many different kinds of parties have appeared before the SHB to contest permits and argue for their views of what is required by the SMA. The State has been the most frequent litigant, or class of litigants, to contest decisions of the local government. The Attorney General's Office tended to be highly successful at the SHB and appellate levels. Adjacent landowners also contested permits frequently in this study, but were rarely successful if they were the sole contestants. Environmental groups and competitors were infrequent contestants of permits and were similarly unsuccessful when appealing permits without the aid of the Attorney General's Office. These conclusions and other analyses of contesting party characteristics have implications for the strategies of those who would develop the shoreline and for those who would contest developments.

Finally, a simple mathematical model helps to explore and explain substantive decision-making under the SMA. The model supports the conclusions above regarding the objectives of the SMA because the decisions of the SHB and appellate courts correlate closely with the predicted outcomes of the model, and the model is based on the SMA objectives identified above.

The model also supports the conclusions regarding local government, SHB, and superior court implementation of the identified objectives. The outcomes of the model agree with SHB decisions in forty-seven out of fifty cases (94%), and with final appellate court decisions in eleven out of eleven cases. On the other hand, the model outcomes matched superior court decisions in only nine of fifteen case (60%) and those of local governments in only twenty-six of fifty cases (52%). The model suggests that many permits that were granted by local governments, including several that were reinstated by trial courts reversing SHB reversals, could be expected to be denied by the SHB and appellate courts implementing the objectives of the SMA.

APPENDIX A

CASE	DEVELOPMENT PROPOSED	APPLICANT	CONTESTANT	A	B	C	D	E	F	G	H	TOTAL	LOCAL GVNMT	SHB	TRIAL COURT	APPELLATE REVIEW
83-20 (1983)	Oil transfer and storage	Private	Competitor	0	-1	0	-1	0	2	0	2	2	G	G	-	-
82-54 (1983)	Bulkhead, fill and dock for SFR	Private	Local gov	0	-1	-1	0	0	2	-1	2	1	D	G	-	-
82-52 (1983)	Fill for state fish hatchery	Public	Local gov	-2	-2	2	0	1	2	0	2	3	D	G	-	-
82-51 (1983)	Aquaculture	Private	Citizens	-2	-2	3	0	0	2	-1	2	2	G	G	-	-
82-31 (1983)	Moorage for condominiums	Private	?	0	-1	0	0	1	2	0	2	4	G	G	-	-
82-17 (1983)	Moorage for condominiums	Private	Local gov	-2	0	-1	-1	0	2	0	2	0	D	D	-	-
82-15 (1982)	Dock	Private	Local gov	-2	-2	0	0	0	2	0	2	0	D	G	-	-
82-7 (1983)	Port	Public	Local gov	-1	-1	-1	-1	0	1	1	2	0	D	G	-	-
81-46 (1982)	Develop SFRs	Private	State, adj	0	-1	-1	-1	0	-2	0	2	-3	G	D	-	-
80-43 (1981)	SFR	Private	State	-2	0	-1	0	0	-2	0	2	-3	G	D	-	-
80-39 (1982)	Wood waste fill	Private	State	0	-1	-1	-1	0	-2	0	0	-5	G	D	-	-
80-19 (1981)	Sewer line	Private	Adj	0	0	0	1	0	2	0	2	5	G	G	-	-
80-11 (1981)	Beach access road	Public	Adj	-2	-2	0	0	3	2	0	2	3	G	G	-	-
80-4 (1980)	Condominiums	Private	?	0	0	0	0	0	-2	0	-1	-3	G	R	-	-
79-38 (1980)	Asphalt batch plant	Private	State	0	-1	-1	-1	-1	-1	0	-2	-7	G	D	-	-
79-32 (1980)	Floating breakwater, moorages, pump-out facility	Private	Adj	0	-1	1	2	2	2	-1	2	7	G	G	-	-
79-24 (1980)	Fill and bulkhead like adj. SFRs	Private	Adj	0	0	-1	0	0	-2	0	0	-2	G	R	-	-
79-23 (1980)	Park with natural area & campgrnd.	Public	Local gov	-3	0	3	2	3	2	0	2	9	D	G	-	-

CASE	DEVELOPMENT PROPOSED	APPLICANT	CONTESTANT	A	B	C	D	E	F	G	H	TOTAL	LOCAL GVNMT	SHB	TRIAL COURT	APPELLATE REVIEW
79-18 (1979)	Landfill & log	Private	State	-2	0	-1	-1	0	-2	0	-1	-7	G	D	—	—
79-10 (1979)	Condominiums	Private	State, ?	0	-1	-1	0	2	2	0	0	2	G	G	—	—
79-5 (1980)	Marina	Private	Adj	0	-1	0	0	2	2	-1	2	4	G	G	—	—
78-51 (1980)	Landfill	Private	Local gov	-1	-1	-1	-1	0	-2	0	0	-6	D	D	—	—
78-18 DNR	Boat access park/campground	Public	Local gov	-4	0	2	2	3	?	0	2	5	D	G	G	G
77-37 DNR	SFR development	Private	Local gov, adj	-2	0	-1	-1	0	2	0	2	0	D	G	G	D
244 Skagit County	Dredge spoil	Private	State	-5	-5	-1	-1	-1	-1	0	2	-12	G	G	G	D
238 (1977)	SFR Development	Private	State	-2	-2	-1	0	0	-2	0	2	-5	G	D	—	—
237 (1977)	Condominiums	Private	Adj	0	0	0	0	0	2	0	0	2	G	G	—	—
228 (1977)	SFR, condos,	Private	St, Loc Gov	-4	-4	0	1	0	-2	0	2	-8	G	R	—	—
194 Port, Bay	Houseboats	Private	Adj	0	0	0	0	1	?	-1	2	2	G	G	G	G
185 English Bay	Dredge for clams	Private	Local Gov	-1	-1	-1	-1	0	?	0	2	-2	D	D	D	D
183 (1976)	Collector sewer	Public	Adj	0	0	1	1	0	?	0	0	2	G	G	G	—
173 (1975)	Storm-water settling pond	Public	Adj	-2	-2	3	2	0	2	0	0	3	G	G	—	—
169 (1975)	Fast food rest.	Private	Local Gov	0	-1	0	0	1	-2	0	0	-2	G	D	—	—
166 (1975)	Port	Public	Citizens	-1	0	0	0	3	?	0	2	4	G	G	G	—
162 (1975)	Shpg. cntr/marina	Private	State	0	-1	0	1	2	?	0	2	4	G	G	—	—
159 (1975)	Fill for vac. hm.	Private	State	-4	0	-1	-1	0	-1	-1	2	-6	G	D	G	—
158 (1974)	Office & storage	Private	Adj, State	0	0	0	0	3	?	0	1	4	G	G	—	—
156 (1975)	Office buildings	Private	Local Gov, State	0	0	-1	0	0	-2	0	-1	-4	D	D	—	—
153 (1975)	Bulkhead & fill for SFR	Private	State	-2	-2	-1	-1	0	?	-1	2	-5	G	D	—	—
151 (1975)	SFR	Private	State	0	-1	0	0	0	?	0	2	1	G	G	—	—
150 (1975)	Landfill & road for SFR sites	Private	Local Gov, State	-4	0	-1	-1	0	?	-1	0	-7	D	D	G	—
144 (1974)	Community beach access boat ramp	Private	Adj, State	-4	-4	-1	-1	0	?	0	2	-8	G	D	—	—

CASE	DEVELOPMENT PROPOSED	APPLICANT	CONTESTANT	A	B	C	D	E	F	G	H	TOTAL	LOCAL GVNMT	SHB	TRIAL COURT	APPELLATE REVIEW
140 (1974)	Pier for beach club	Private	Adj, State	-4	-4	0	-1	0	-1	-1	2	-9	G	D	-	-
128 (1975)	Bulkhead & fill for prtg. lot	Private	State	0	-1	-1	-1	-1	?	0	-1	-5	G	D	-	-
115 (1976)	Pier & barge-loading/gravel	Private	State, env	-4	-4	0	-1	0	?	-1	2	-8	G	D	-	-
114 (1976)	Condominiums	Private	Env	0	0	0	0	3	?	1	2	6	G	G	-	-
85 Hayes	Landfill	Private	State	-2	-2	-1	-1	-1	?	0	-1	-8	G	D	G	D
22 Ballard	Club	Private	State	0	0	0	0	2	?	0	0	2	G	G	G	G
Elks																
104 Eickhoff	Marina	Private	Adj, State	-1	0	0	0	2	?	1	2	4	G	G	G	G
Hunt	SFR	Private	Adj	-1	-1	0	-1	0	?	0	2	-1	-	-	D	D
Merkel	Port	Public	St, Loc Gov	-4	-4	0	0	2	?	2	2	-2	-	-	G	D
Pacesetter	Fraudulent SFR	Private	State, Adj	0	-1	0	-1	0	?	0	2	0	-	-	D	D

LEGEND

Columns

- A Natural
- B Shoreline of State-wide Significance
- C Long-term Benefits
- D Environmental Protection
- E Public Access or Recreation
- F Master Program Consistency
- G Protects Navigation
- H Water Development or other Preferences

Symbols

- G Granted
  - D Denied
  - R Remanded
- Adj - Adjacent Landowner(s)  
 Env - Environmental Group

## Appendix B — Methodology for Model

The model adds together the assigned values for eight weighted attributes to produce a total. The model is oriented so that the more total points that a proposed project has according to SMA criteria, the more desirable or preferred the project should be. A total greater than 0 indicates a positive project that should, to the extent that the model is accurate, enhance the public interest according to SMA criteria.

The model assigns negative points when the developer proposes a site that is in a natural or undeveloped condition, especially if the shoreline has been designated a shoreline of statewide significance (SOSS). Negative points are also generated when a project contradicts other basic objectives of the SMA. Conversely, the model generates positive points when a proposed development advances goals of the SMA, such as increased public access to shorelines, environmental protection, or shoreline-dependent development or development consistent with master planning.

The total is the sum of the values for 8 attributes for each substantial development, 2 attributes of the proposed site, and 6 regarding the proposed project. The attributes are all featured in the policy statement of the SMA. They are weighted generally according to the order of preference expressed in the SMA. This means that it is better for a project to have the maximum value of a high preference attribute (therefore heavily weighted) than the maximum value of a lower preference attribute.

The attributes are weighted as follows:

A, B: (5) points.

C, D, E, F: (4) points.

G, H: (3) points.

A and B are site characteristics, and are assigned values from (-5) to (0).

C-H are attributes of the proposed project.

C, D, E are assigned values that range from (-1) through (+3); F, from (-2) through (+2); G, H, from (-1) through (+2).

The selection of the specific range (as opposed to the magnitude of the range) is purely aesthetic. This arrangement permits the "cutoff point" for approving projects to begin at (+1), which appealed to the author.

The selection and weighting of attributes determines how desirable certain projects appear relative to other projects.



Selection of particular attributes as criteria is justified by the legal analysis in Part II of this study, and the brief supporting statements made below. The weighting is a personal judgment by the author based on the perceived preferences of the SMA and supported, like any model, by its ability to produce results that are in accord with common sense.

The two site characteristics, which correspond to specific preferences (1) and (2) of § 90.58.020, are each weighted for a potential 5 points:

- A) natural character of the shoreline;
- B) shoreline of statewide significance.

Preservation of the physical and aesthetic qualities of natural shorelines of the state is a specific goal of the SMA policy statement. In order to discourage development on natural shorelines, a development proposed for a natural site in a pristine area would be rated a full five points lower than if it were sited on an intensely developed shoreline, whereas development on a wooded site in an otherwise developed shoreline would be rated only two points lower than the same development on an intensely developed shoreline.

Shorelines of statewide significance, especially in a natural state, are by definition assigned special importance under the SMA. They are also often designated as areas of particular concern under the Washington CZMP. A shoreline that is not a shoreline of statewide significance is assigned a value of 0, not affecting the model's result, whereas a natural shoreline of statewide significance would be rated 2-4 points lower than a developed SOSS.

The basic concept here is that the goal of preservation of a natural shoreline should be advanced by "giving points" to projects that are proposed for already developed sites. Conversely, negative points reflect policy goals intended to preserve the natural shorelines where they exist and to especially discourage piecemeal development in large natural areas. Similarly, the model reflects the statewide interest in channelling development away from SOSS, but directing it toward already developed areas when development does occur on SOSS. Thus, the model subtracts fewer points for non-SOSS development and, as is encouraged by Department of Ecology Guidelines,<sup>157</sup> for choos-

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157. WASH. ADMIN. CODE R. 173-16-040(5)(b)(ii) (1983).

ing SOSS sites that are already developed.

*A — natural state of shoreline*

- 0 = developed urban or suburban
- 1 = agricultural, other less-developed
- 2 = undeveloped (usually wooded) site in area with development
- 4 = natural area, valuable habitat
- 5 = pristine area, invaluable habitat

*B — Shoreline of Statewide Significance (SOSS)*

- 0 = not an SOSS
- 1 = SOSS, developed (urban, suburban, agricultural)
- 2 = undeveloped site in area with development
- 4 = natural area, valuable habitat
- 5 = pristine area, invaluable habitat

The first 4 project attributes (as distinct from the attribute of the site) are assigned weights of 4 points each; the last 2 project attributes are assigned 3 points each.

- C) long-term rather than short-term benefits;
- D) environmentally beneficial, rather than harmful;
- E) increases public access or recreation, rather than decreases it;

F) is consistent with master plan, rather than inconsistent.

Environmental protection, as reiterated emphatically in the SMA policy statement and as pronounced frequently by the Washington Supreme Court, is an overriding objective of the SMA. Increasing public access and opportunities for recreation is a major theme of the Washington CZMP and required by the CZMA. Giving priority consideration to long-term benefits is a fundamental corollary to environmental protection. Each of these project attributes is also listed as a high preference in the SMA delineation of public interest for shorelines of statewide significance. Planning, and development consistent with planning, is established as a major, overriding objective of the SMA.

*C — long-term benefit*

- 1 = short term
- 0 = no major effect
- 1 = some long-term benefit
- 2 = significant long-term benefits
- 3 = excellent long-term benefits.

*D — environmental protection*

- 1 = adverse environmental effect
- 0 = no non-trivial effect
- 1 = slight positive environmental effect
- 2 = significant environmental benefit
- 3 = excellent environmental benefit

*E. — increased public access*

- 1 = decreased access
- 0 = no effect
- 1 = slightly increased public access
- 2 = increased public access
- 3 = major increased public access

*F — consistency with Master Program*

- 2 = inconsistency
- 1 = slight inconsistency
- ? = undetermined or no existing plan
- 1 = consistent, but with reservations
- 2 = consistency

Thus, for example, a project that increases public access can receive as many as 4 points more than a project that decreases such access. Similarly, a project wholly consistent with the local government's Shoreline Master Program would be rated 4 points higher than one inconsistent with local shoreline planning.

The last two attributes appear prominently in the SMA policy statement. Also, in some areas, navigation is a constitutionally protected public right in Washington.

G) protects navigation, rather than hinders it;

H) is shoreline dependent use, a single-family residence, or prevents environmental harm.

The assignment of these values is simple and has plain effects.

*G — protects navigation*

- 1 = hinders navigation
- 0 = no effect
- 1
- 2 = enhances navigation without hindrance

*H — shoreline dependent, SFR, or prevents harm to environment*

- 1 = none of above, conflicts with other shoreline use
- 0 = none of above
- 1 = could be located elsewhere, but benefits from shoreline site
- 2 = shoreline dependent, SFR, or prevents environmental harm

An example may illustrate better how the model operates:

*Case:* SHB 82-31                      *Project:* Moorage for condominiums

*Site Characteristics*

A. *Natural?*                      B. *SOSS?*  
                     0    -1

*Project Characteristics*

C. Long-Term Benefit?	D. Environmental Effect	E. Public Access or Recreation?
0	0	1
F. Master Program Consistency?	G. Effect on Navigation	H. Water Dependent or Preferred?
2	0	2

Total Score	Local Gov.	SHB	Trial Court	Highest Appellate Court
4	G	G	No Appeal	

SHB 82-31 was a project to add 20 wooden moorage spaces on an existing 80-foot guest dock on Lake Washington. The site is clearly developed (A=0) (existing dock, condominiums on the shoreline, adjacent to supermarket, office building and fast food restaurant), but is nonetheless a shoreline of statewide significance, pursuant to RCW 90.58.030(2)(e)(iv) (B=-1). The project is found to have no short term (C=0) or environmentally harmful (D=0) effect because of permit conditions, which prohibited excavation or dredging below ordinary high water mark, covered moorage, and major boat repairs. Conditions also required addition of a pump-out facility for pleasure boat sewage (otherwise discharged to lake waters) and provision for an oil containment boom. Although it was near valuable wetlands, the SHB did not find that it would cause significant disturbance.

It increases public access slightly because it adds moorages to a guest dock that permits access to waters (E=1) but increases access much less than, for instance, a park, bikeway, or even a marina. It is consistent with the Master Program because the area is designated urban by King County and moorage is a permitted use in the urban environment (F=2) (consistency = +2; inconsistency = -2). This project was found not to hinder navigation (G=0), and was a water-dependent use (H=2). The sum total score was +4, the local government granted (G) the permit, and the SHB upheld it (G). This matter was not appealed to trial or appellate courts.