



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

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December 5, 2013

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PEND OREILLE CO.  
PUBLIC WORKS DEPT.

The Honorable Karen Skoog  
The Honorable Mike Manus  
The Honorable Stephen Kiss  
Commissioners, Pend Oreille County  
PO Box 5025  
Newport, WA 99256-5025

**Re: Final Ecology Approval of the Pend Oreille County Comprehensive Shoreline Master Program Comprehensive Update**

Dear Commissioners:

The Washington State Department of Ecology (Ecology) is approving the Pend Oreille County (County) Shoreline Master Program (SMP) comprehensive update as submitted by the County on March 7, 2013.

I want to specifically thank you for the extra work and time the Board of County Commissioners took in reviewing public comments and providing us ideas for additional actions needed to help Pend Oreille County manage its shorelines in partnership with its citizens. Therefore, along with my approval action today, I am directing my staff to work with you and your fine staff in developing a shoreline stewardship program and crafting any future amendments you decide are necessary to improve the newly adopted Shoreline Master Program (SMP).

We have reviewed and carefully considered the details found in Resolution 2013-31, expressing an interest in additional elements that you feel should be included, and a desire to modify the locally adopted SMP. Please see the attached Findings and Conclusions (Attachment A) for detailed analysis of these resolutions.

Ecology finds the County's program to be consistent with the policy and procedural requirements of the Shoreline Management Act (RCW 90.58) and its implementing rules. Ecology, therefore, approves the County's comprehensive SMP update as submitted under Pend Oreille County Ordinance No. 2012-3 on October 30, 2012. This is Ecology's final action on the SMP submitted to us by Pend Oreille County on March 7, 2013, and there will be no further modifications to the SMP. The enclosed Attachment A, Findings and Conclusions document, provides more information about our decision. Attachment B is a summary of comments submitted during the state's review and Ecology's responses.



Pend Oreille County Commissioners  
December 5, 2013  
Page 2

The SMP is effective on December 19, 2013, 14 days from the date of this letter. This time period was established by the state legislature and is intended to provide lead time for the County to prepare to implement the new SMP.

Ecology is required to publish a newspaper notice that the County's SMP has received final approval. The publication of this notice, in the form of a legal ad, will begin a 60-day appeal period. Per RCW 90.58.190(2) and RCW 36.70A.290, an interested party may file an appeal with the Growth Management Hearings Board within 60 days of the publication date of Ecology's written notice of final action. We anticipate publication in the Newport Miner on December 18, 2013. We will provide a copy of the legal ad to the County for its records.

To review Ecology's documents related to Pend Oreille County comprehensive SMP update, please visit Ecology's website at:  
<http://www.ecy.wa.gov/programs/sea/shorelines/smp/mycomments/PendOreille.html>

In closing, I would like to note the strong work that your Planning Director Mike Lithgow and staff, your consultant Greg Dorn, and the County Planning Commission did in working through the many details needed to complete this update.

If you have any questions, please contact our regional Shorelines and Environmental Assistance (SEA) Program Section Manager, Sara Hunt at [Sara.Hunt@ecy.wa.gov](mailto:Sara.Hunt@ecy.wa.gov) / (509) 329-3561.

Sincerely,



Maia D. Bellon  
Director

Enclosures

By Certified Mail [7012 1010 0003 3028 2761]

cc: Mike Lithgow, Pend Oreille County  
Sara Hunt, Ecology  
Grant Pfeifer, Ecology  
Betty Renkor, Ecology  
Jaime Short, Ecology  
Jeremy Sikes, Ecology

**ATTACHMENT A: FINDINGS AND CONCLUSIONS  
FOR PROPOSED COMPREHENSIVE UPDATE TO THE PEND OREILLE COUNTY  
SHORELINE MASTER PROGRAM**

SMP Submittal accepted March 7, 2013, Ordinance No. 2012-3  
Prepared by Jaime Short, Jeremy Sikes, & Sara Hunt on November 22, 2013

**Brief Description of Proposed Amendment**

Pend Oreille County has submitted to Ecology for approval a comprehensive update to their Shoreline Master Program (SMP) to comply with Shoreline Management Act (SMA) and SMP Guidelines requirements. The updated master program submittal contains locally tailored shoreline management policies, regulations, environment designation maps, and administrative provisions. Additional reports and supporting information and analyses noted below, are included in the submittal.

**I. FINDINGS OF FACT**

**1.1 Need for amendment**

The proposed amendment is needed to comply with the statutory deadline for a comprehensive update of the County's local Shoreline Master Program pursuant to RCW 90.58.080 and 100. This amendment is also needed for compliance with the planning and procedural requirements of the SMP Guidelines contained in WAC 173-26 and 27. The original County SMP was approved by Ecology in April 1975 and was last amended in June 1997. The SMP has never been comprehensively updated. This SMP update is also needed to address land use changes that have occurred along the County's shorelines over the past 40 years and to provide consistency among the updated SMP and the environmental protection and land use management policies and practices provided by the County's Comprehensive Plan, which was adopted in October 2005. Ecology has reviewed the updated Pend Oreille County SMP policies, regulations and environment designations for compliance with the SMA and Guidelines. Following are the findings and conclusion of that review.

**1.2 SMP provisions to be changed by the amendment as proposed**

This comprehensive SMP update is intended to entirely replace the County's existing SMP. This SMP will regulate approximately sixty-one bodies of water, including the Pend Oreille River, Sullivan Creek, Sullivan Lake and Calispell Lake, all of which are Shorelines of Statewide Significance.

The Pend Oreille County SMP jurisdiction includes all rivers, streams with a mean annual flow greater than 20 cubic feet per second, all lakes greater than 20 acres, and all lands within 200 feet of the ordinary high water mark of these bodies of water and associated wetlands. The County has elected to increase shoreline jurisdiction to also include buffers of critical areas within shorelines of the state, as allowed under RCW 90.58.030(2)(d)(ii). See Section xx.34.020(A)(5) of the locally adopted SMP for specific language regarding the expansion of jurisdiction for environmentally sensitive area buffers.

**1.3 Amendment History, Review Process**

The record indicates the proposed SMP amendments originated from a local planning process that began on July 1, 2007. Between 2007 and 2011, the Pend Oreille County Planning Commission (PC) worked with staff and the County's consultant to draft the goals, policies, and use regulations of the Shoreline Master Program. According to the County's adopting resolution, "*...over a four-year period, utilizing a process featuring extensive opportunities for public involvement, the County*

*Planning Commission prepared draft amendments to update the County Shoreline Master Program” (Resolution #2012-3).*

The record shows that two public workshops were held in the summer of 2010 and two additional workshops were held in the summer of 2011. On November 2, 2011, the Planning Commission sent a recommended public review draft of the SMP to the Board of County Commissioners (BOCC) for their consideration. The draft SMP was sent out for a 60-day public comment period on November 23, 2011. The BOCC received feedback that the holidays had made it difficult for members of the public to meaningfully participate, so they opened up a second 60-day public comment period on January 23, 2012. The BOCC received a large number of comments on the draft plan, held numerous tabletop work sessions, and made significant changes as a result. The revised draft was released for an additional 60-day public comment period on June 6, 2012. Ecology submitted written comments on the draft, focusing on elements of the plan that were out of compliance with RCW 90.58 and WAC 173-26.

The BOCC held three public hearings on July 30, July 31, and August 1, 2012, to solicit comments on the revised draft document. Notice of the hearings was published in the Newport Miner on July 18, 2012. Following the hearings, the BOCC worked diligently with local interested parties and Ecology staff to resolve the areas of noncompliance. Modifications were made to the draft and with the passage of Resolution #2012-3, on October 30, 2012; the County BOCC adopted the SMP comprehensive update and authorized staff to forward the SMP and required documentation to Ecology for review and approval.

The proposed SMP amendments were received by Ecology for state review and verified as complete on March 7, 2013. Notice of the state comment period was distributed to state task force members and interested parties identified by the County on April 9, 2013, advertising a 30-day comment period. After consultation with interested parties, an updated notification was mailed out on April 11, 2013, to advertise an extended public comment period in compliance with the requirements of WAC 173-26-120. The state comment period began on April 15, 2013, and continued through May 29, 2013. Thirty-two individuals or organizations submitted comments on the proposed amendments. Ecology hand delivered all written comments it received to the County on June 11, 2013.

On June 25, 2013, the County requested and was granted an additional 45 days to review the public comments, moving the due date for responses to September 16, 2013. The record shows the County then requested a second 45-day extension on August 20, 2013 which was subsequently denied by Ecology on August 21, 2013. A negotiated extension was granted to the County by Ecology on August 29, 2013, which revised the deadline for a response to comment to September 30, 2013. Ecology’s Shorelands and Environmental Assistance (SEA) Program Manager, Gordon White, and Regional SEA Section Manager, Sara Hunt, met with the Board of County Commissioners and Washington State Representative Shelly Short over the phone to discuss the process on September 23, 2013.

Instead of responding to the individual comments received, the County passed Resolution #2013-31 which generally addresses the issues raised during the public comment period. Resolution #2013-31 was sent directly to the Director of the Ecology, Maia Bellon, on September 30, 2013. Ecology’s responses to issues raised during the comment period are available in these findings and in *Attachment B – Pend Oreille County Comment Response Matrix*.

#### **1.4 Consistency with Chapter 90.58 RCW**

The proposed amendment has been reviewed and found consistent with the policy of RCW 90.58.020 and the approval criteria of RCW 90.58.090(3), (4) and (5). The County has also provided evidence of its compliance with SMA procedural requirements for amending their SMP contained in RCW 90.58.090(1) and (2).

The Pend Oreille SMP comprehensive update includes Chapter 5 Environmentally Sensitive Areas, with use regulations xx.36.010-080. These regulations will be applicable to all environmentally sensitive areas, also known as Critical Areas, whether they are located in jurisdictional shoreline areas or not. If there is a conflict between the provisions of these regulations and the regulations specifically implementing the SMP, the provisions of the SMP regulations shall apply. These regulations, in concert with the other provisions of the SMP, provide a level of protection that is at least equal to the County's existing Critical Area Ordinances, in accordance with RCW 90.58.090(4). The Pend Oreille County SMP comprehensive update provides a level of protection to critical areas located within the shorelines of the state that assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources as defined the SMP Guidelines and as required by RCW 36.70A.480(4).

#### **1.5 Consistency with "applicable guidelines" (Chapter 173-26 WAC, Part III)**

The proposed amendment has been reviewed and found in compliance with the requirements of the applicable Shoreline Master Program Guidelines (WAC 173-26-171 through 251 and 173-26-020 definitions). This included review of a SMP Submittal Checklist, which was completed by the County.

#### **1.6 Consistency with SEPA Requirements**

The County submitted evidence of SEPA compliance in the form of a SEPA checklist and issued a Determination of Non-Significance (DNS) for the proposed SMP amendments on January 24, 2012. Notice of the SEPA determination was published in the Newport Miner on November 23, 2011, and November 30, 2011. Ecology did not comment on the DNS.

#### **1.7 Other Studies or Analyses supporting the SMP update**

Ecology also reviewed the following reports, studies, map portfolios and data prepared for the County in support of the SMP amendment:

These supporting documents include:

- a restoration plan (Appendix C, page 193)
- a public access plan (Appendix D, page 216)
- a cumulative impacts analysis and no net loss report (Appendix E, page 248)
- a shoreline inventory and characterization (Davidson Morlin, 2010)
- a reach scale inventory and assessment (ESA Adolfson, 2010)

#### **1.8 Summary of Issues Raised During the Public Review Process**

Issues raised during the state public review process generally fell into five categories:

- The scientific underpinnings of buffers approved by the BOCC,
- Whether the application of the new shoreline regulations constitute a taking,
- The perceived adverse economic impact of the new SMP to individuals and the County economy,
- Remanding the SMP back to the new BOCC, and

- Compliance with HB1113.

We will address the issues raised in these general topics, acknowledging that certain individual comments may not be addressed in these findings. Ecology has responded to individual comments in *Attachment B – Pend Oreille County Comment Response Matrix*.

### 1.8.1 Application and Foundational Science of Buffers

The Shoreline Master Program Guidelines (WAC 173-26) address shoreline buffers and setbacks and vegetation conservation in several sections – including steps in developing a master program (such as resource inventory and characterization), assigning environment designations, and developing policies for shoreline vegetation conservation.

Shoreline vegetation is listed as an ecological function for streams in WAC 173-26-201(3)(d)(i)(C) and 201(3)(d)(viii), where local governments are directed to “*Identify how existing shoreline vegetation provides ecological functions and determine methods to ensure protection of those functions. Identify important ecological functions that have been degraded through loss of vegetation. Consider the amount of vegetated shoreline area necessary to achieve ecological objectives.*” An Inventory, Analysis, and Characterization report (Davidson Morlin, 2010) and a Reach Scale Inventory and Assessment (ESA Adolfson, 2010) were developed consistent with these SMP Guideline requirements characterizing shoreline functions within Pend Oreille County. Methods for both of these products are detailed within each report.

Based on a detailed analysis of existing shoreline uses and conditions, the County elected to establish its own customized Environment Designations (ED), rather than use the “Recommended Designations” as provided for in WAC 173-26-211(4)(c). The tailored designations are as follows (with locally approved buffers in parenthesis):

- Natural (200 feet from OHWM)
- Rural Conservancy (150 feet from OHWM)
- Rural Residential (100 feet from OHWM)
- Rural Higher Intensity (50 feet from OHWM)
- Urban Conservancy (100 feet from OHWM)
- Urban Residential (50 feet from OHWM)
- Urban Higher Intensity (50 feet from OHWM)

Criteria for designating each ED, along with Purpose and Management Policies, were crafted by the Planning Commission and County staff, and can be found in Chapter 3.B. Shoreline Designations. County staff applied the criteria to determine the appropriate Environment Designation reach-by-reach through a detailed GIS analysis, using data layers developed during the Inventory and Characterization, aerial photos, and information from the Reach Scale Assessment of Functions summarized in Appendix A of the Reach-scale Inventory and Assessment (ESA Adolfson, 2010). As adopted, Ecology concluded that the EDs, which act as the scaffolding for the application of buffers in

the shoreline, accurately reflect the suite of shoreline types and uses, as well as the ecological functions, in the County.

The shoreline vegetation conservation section in the Guidelines [WAC 173-26-221(5)] defines vegetation conservation as *“activities to protect and restore vegetation along or near marine and freshwater shorelines that contribute to the ecological functions of shoreline areas.”* These activities include *“the prevention or restriction of plant clearing and earth grading, vegetation restoration, and the control of invasive weeds and nonnative species.”*

The appropriateness of shoreline buffers present in the SMP is the most contested of all of the provisions in the locally adopted SMP. Prior to local adoption, the buffers established for the various Environment Designations had been reviewed and generally approved by the Pend Oreille County SMP Technical Advisory Group (TAG) and the Planning Commission (PC). Late in the PC review process, a select group of citizens began to provide intense scrutiny and feedback on this particular issue, prompting the PC to include provisions that, during draft review phases, Ecology informed them could not be approved (primarily a wide-ranging grandfathering clause). This draft was then recommended to the Board of County Commissioners (BOCC), who subsequently reduced buffers to 50 feet in all Environment Designations, in contravention to Ecology’s technical assistance. This 50 foot uniform generic buffer proposal (with ample opportunity to reduce further) was not based on any scientific or technical rationale.

The BOCC initiated lengthy public comment periods on two separate occasions and held three additional public hearings. The size and application of the buffers in particular Environment Designations remained a significant issue.

Ecology proceeded to work closely with staff to modify existing language and develop new administrative provisions. Ecology recommended administrative alternatives that had been approved elsewhere in the state and some clarifying language, resulting in the two-tier buffer approach that was approved by the BOCC. Following this approach, an applicant may choose to abide by simple standard buffer setbacks, or may choose a more complex route to deploy one of several alternative site-specific buffers. The result of the negotiated agreement was a method for applying technically sound buffers in a manner that allows for reasonable flexibility, while satisfying the no net loss standard. Ecology indicated to the BOCC that the proposed methodology would likely be approvable if adopted. In October 2012, the final draft SMP adopted by the BOCC included these more flexible buffer alternatives along with standard minimum buffers that are based on current, accurate, and available scientific information on riparian areas .

Comments provided by Reynolds Law Firm, on behalf of the Pend Oreille County Chapter of the Citizen’s Alliance for Property Rights (CAPR), as well as comments from several individuals, question the underpinning technical information used to set the minimum buffers. This constituency feels that a uniform 50 foot buffer should be sufficient to protect shoreline function.

Fifty foot buffers may be appropriate for specific environment designations where the landscape is more heavily developed. The most current scientific and technical information demonstrates, however, that 50 foot buffers will not provide the level of protection required by law where the shorelines are more intact and provide a higher level of ecosystem function. Therefore, a larger buffer is appropriate for other, less densely developed or impacted areas.

Riparian areas function both as buffers to aquatic habitat (providing water quality protection, shading/temperature regulation, and large woody debris recruitment) and as habitats in their own right, used by multiple species as travel corridors, breeding and nesting areas, daytime refuges, winter cover, and foraging areas (NRC 2002). The Washington Department of Fish and Wildlife (WDFW) Management Recommendations suggest that riparian habitat areas be designated between 150-250 feet wide on either side of the stream (measured from the ordinary high water mark, or channel migration zone, if known) in order to protect most functions. Intermittent streams are recommended to have riparian habitat area widths not less than 150 feet wide (Table 3, Knutson and Naef, 1997). The National Research Council finds in their wide-reaching 2002 study *Riparian Areas: Functions and Strategies for Management*, that, “*Riparian areas, in proportion to their area within a watershed, perform more biologically productive functions than do uplands. They provide stream microclimate modification and shade, bank stabilization and modification of sedimentation processes, organic litter and wood to aquatic systems, nutrient retention and cycling, wildlife habitat, and food-web support for a wide range of aquatic and terrestrial organisms. Even though they occupy only a small proportion of the total land base in most watersheds, riparian areas are regional hot spots of biodiversity and exhibit high rates of biological productivity in marked contrast to the larger landscape.*” (NRC, 2002).

While the authors do not provide recommended buffer widths, the authors cite several studies indicating buffer widths of 100 to 150 feet are needed to capture the breadth of functions discussed under WAC 173-26-201(3)(d)(i).

Pollutants such as excess nutrients, metals, and organic chemicals are commonly found in stormwater and agricultural runoff. Therefore sediment control is critical for removing a large percentage of the pollutant load. A 50 foot buffer would be about 60 percent effective at removing sediments, while an 82 to 300 foot buffer would remove about 80 percent of sediment load (Brennan and Culverwell, 2004). Buffers of approximately 27 feet could reduce nitrogen by about 60 percent, while widths up to 200 feet would reduce nitrogen by 80 percent (Desbonnet et al, 1994). Control of fecal coliform inputs from agriculture or septic systems to acceptable levels for primary contact recreational use require a 115 foot buffer (Young et al, 1980).

Achieving 80 percent effectiveness at providing a given ecological service is generally accepted to provide “most” of the function, thereby resulting in “moderate risk” of functional loss over time. Generally, once you achieve 80 percent, effectiveness increases very little with increasing buffer width (NRC, 2002). The following riparian buffer widths are needed to maintain 80 percent effectiveness of specific riparian functions as summarized below in Table III.7 from Appendix G in Brennan et al, 2009.



Table III.7 from Appendix G.

Riparian Function	Range of buffer widths	Average of all literature	Minimum buffer width based on FEMAT curves
Water quality	16 – 1,968 ft	358 ft	82 ft sediment 197 ft total suspended solids (TSS) 197 ft nitrogen 279 ft phosphorus
Fine sediment control	92 - 299 ft	190 ft	82 ft sediment 197 ft TSS
Shade	56 -125 ft	79 ft	121 ft
Large woody debris	33 - 328 ft	180 ft	131 ft
Wildlife	240 - 902 ft	571 ft	N/A

These recommendations are based on a review of literature, most of which was adapted from research in freshwater riparian habitats similar to those found in Pend Oreille County. In Appendix G, the table summarizes buffer width recommendations to achieve a minimum 80 percent effectiveness. This is done in three ways. First listed is the smallest and largest buffer widths recommended in the literature that achieved a minimum of 80 percent effectiveness for that function. Second listed are the average values, which are based on the arithmetic mean of all buffer widths recommendations from the literature that achieves a minimum effectiveness of 80 percent. Finally the table provides buffer width recommendations to meet 80 percent effectiveness based solely on Forest Ecosystem Management Assessment Team (FEMAT) curves. The FEMAT curves plot the relationship between the effectiveness of a mature forests buffer at providing a specific ecosystem function at various buffer widths (FEMAT, 1993).

Since the scientific literature reports effective buffer widths in ranges, one must select buffer widths from within reported ranges, some of which vary greatly, to protect all the ecological functions provided by shoreline riparian areas. The widths for buffers have deliberately been selected by the County to fall generally in the middle of these published ranges. The assumption is that using buffers of these widths will provide a moderate risk to the resource, and along with required mitigation sequencing, will result in no net loss of ecological functions.

Regarding the legitimacy of the body of science used to inform the adopted buffers, the documents relied upon were well-researched and peer-reviewed, and have been foundational to many SMP updates with similar climate and ecosystem types. Ecology relied on principles found in the National Research Council Document *Riparian Areas: Functions and Strategies for Management* (NRC, 2002), the WDFW *Management Recommendations for Washington's Priority Habitats; Riparian* (Knutsen and Naef, 1997) and *Protecting Nearshore Habitat and Functions in Puget Sound* (AHG, 2010), a document largely based on the most current freshwater riparian science, then adapted for use in Puget Sound. These documents possess the hallmarks of scientific literature in that they include: replicable methods for obtaining the information, logical conclusions and reasonable inferences, proper context, proper referencing of citations, and were peer-reviewed.

The process of establishing appropriate buffers that respect analytical scientific fact, local development patterns, and established preferred uses in the SMA is challenging. The County did not adopt

generalized one-size-fits-all science-based buffers as has been alleged. The WDFW Management Recommendations document generally recommends the application of 250 foot buffers on all shorelines of the state regardless of condition or location (Knutsen and Naef, 1997, Table 3, Page 87). However, the buffers adopted by the BOCC in October 2012 integrate key components of the recommendations of the WDFW Management Recommendations including the more recent scientific literature, cited above, resulting in a range of buffer widths adequate to protect existing vegetative cover and environmental functions of each Environmental Designation.

It is Ecology's conclusion that the buffer alternatives, as described in the locally adopted SMP, are appropriate and essential to meet the policy and standards of the SMA and the Guidelines. The buffers, in concert with the SMP use regulations and the County's Restoration Plan, are consistent with the policy and standards of RCW 90.58.020 and RCW 90.58.090 and the applicable SMP guidelines (WAC 173-26-201(3)(d), -211, and -221(5)). Because the Environment Designations - and therefore the extent of buffers - are based on a detailed reach-scale assessment of current function and use (Davidson Morlin, 2010 and ESA Adolphson, 2010), the adopted buffers are demonstrably tailored to local conditions and responsive to the analysis conducted to provide a foundation for the SMP.

### 1.8.2 Takings

The Shoreline Management Act (SMA) reflects a legislative intent to protect public trust resources and designs a land use program that governs both state-owned and private lands under its jurisdiction. The Act emphasizes preservation of shorelines for public access and water-related or water-dependent uses, and promotes environmental and aesthetic values. The SMA reflects public trust principles, in part, in its underlying policy of "*protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the navigation and corollary rights incidental thereto.*" [RCW 90.58.020]. The SMA also recognizes and protects the public interest in all associated shoreland areas. Ecology is responsible for ensuring local shoreline programs protect the statewide public interest.

State governments have the authority and responsibility to protect the public health, safety, and welfare. This authority is an inherent attribute of state governmental sovereignty and is shared with local governments in Washington under the state constitution. Pursuant to that authority, which is called the "police power," the government has the ability to regulate or limit the use of property. However, when such regulations go too far, it can be considered a taking of property. There are two types of regulatory takings, categorical and non-categorical. A categorical taking occurs when a regulatory action causes a property to lose all economic value. To determine whether a non-categorical taking has occurred a court will analyze a number of factors in order to determine whether a regulation has gone so far as to amount to a taking: the nature of the government action, including consideration of whether the goals could be achieved through less burdensome means; the extent to which the regulation interferes with the property owner's investment-backed expectations; and the economic impact of the regulation. There is another type of taking that is referred to as land use exaction. An exaction refers to an interest in real property, such as an easement, that is required to compensate for the adverse impacts caused by the use or development of a property. In order to meet constitutional requirements, an exaction must meet the Nollan/Dolan tests for nexus and proportionality. *See Nollan v. Cal. Coastal Com.*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (2005).

Some commenters assert that the SMP buffers may result in a taking and violate constitutional nexus and proportionality requirements, unless there is a strong supporting rationale. These commenters rely

on the recent US Supreme Court ruling in *Koontz v. St. Johns River Water Management District*, in which the Court held that the nexus and proportionality requirements apply to monetary as well as real property exactions. *See* 2013 WL 3184628. To the extent the concepts of nexus and proportionality apply to other regulatory requirements such as buffers or other forms of mitigation (i.e., not just monetary or real property exactions), our courts have already stated that the nexus and proportionality requirements are met when they are supported by an analysis of the available science. As explained in *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Board*, 160 Wn. App. 250, 273-74 (2011) and *Olympic Stewardship Foundation v. Western Washington Growth Management Hearings Board*, 166 Wn. App. 172, 199 (2012), where local government has undertaken a reasoned process to analyze the available science on buffers, and that is the basis for the buffer requirements, then the buffers meet the nexus and proportionality tests. As described above and as detailed in the Davidson Morlin, 2010 and ESA Adolfson, 2010 reports that were developed for the SMP, the County engaged in a thorough, reasoned, and science-based process in which it analyzed the available science on buffers and considered it in light of local conditions. Ecology concludes that nexus and proportionality tests are met.

The SMP guidelines require SMPs to result in no net loss of existing ecological functions in shoreline jurisdiction once they are adopted and implemented. Assignment of Environment Designations is required to reflect actual conditions according to specified criteria. Protection of currently existing shoreline ecological functions, as characterized with the Inventory and Characterization, shall be maintained by implementing all the updated SMP goals, policies, regulations and standards. To achieve no-net loss of ecological functions, the SMP requires each project to mitigate impacts by avoiding, then minimizing adverse effects, then replacing damaged resources through compensatory mitigation efforts. At the same time, there are numerous provisions in the SMP that are designed to provide relief to property owners in appropriate circumstances. For example, on-site or off-site mitigation, informed by a restoration plan, can be used when smaller buffers are necessary to accommodate existing uses, smaller, existing parcels adjacent to the shoreline, water dependent uses, or other local circumstances. Shoreline variance permits can be approved as situations warrant. Waterfront property owner can apply the provisions of the SMP to reasonably develop their land while preserving the ecological functions which are essential to the long term well being of the regional environment.

Ecology finds that Pend Oreille County has realistically assessed the present condition and projected reasonably likely future development of various kinds in its shoreline areas, based on available information. In its locally adopted SMP, the County established appropriate measures to manage future development with minimum adverse impacts, while at the same time protecting property rights. Ecology finds that property rights have been explicitly taken into account along with meeting the No Net Loss requirement by Pend Oreille County in developing the locally adopted SMP. Ecology finds that Pend Oreille County thoughtfully and deliberately evaluated reasonably foreseeable future development and sought to ensure that ownership rights were protected while meeting the requisite regulatory limitations on adverse impacts. Ecology concludes that this SMP does not constitute a "regulatory taking" as described in the Washington State's Attorney General's Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property (December 2006).

### 1.8.3 Economic Impact of Riparian Buffers on Private Property and Economic Analysis of Implementation

### ***1.8.3.1 Economic impact of buffers***

A theme of comments from various individuals expresses concern that the proposed riparian buffers would adversely impact property values or make the sale of property difficult.

While specific studies of the economic impacts of riparian buffers on residential property in Pend Oreille County are not available, recent peer-reviewed literature on the impacts in other states and Canada is available. Following is a brief summary of key findings from those studies.

Riparian buffers are a relatively low cost, easily enforceable and effective means of delivering valuable ecological services - such as the prevention of diffuse source pollution, protection of water supplies, bank stabilization, flood mitigation, and aesthetic and recreational amenities that accrue to property owners and the public. (Duffy, 2010; Knutson and Naef, 1997; NRC, 2002). Riparian buffers could also have an unfavorable “development” effect by constraining development. Though there is little evidence of diminished individual property values when all properties are similarly restricted, or regional economic loss, studies do show that land use restrictions that improve water quality often lead to substantial increases in property values both on and near riparian and wetland areas. By maintaining a minimum level of environmental protection, riparian buffers can also help to mitigate a number of unintended consequences of rapid residential and commercial development that can drain state budgets, such as increased flooding, declining water tables and increasing strain on public water systems, as well as the spread of invasive plant species. Failure to address these issues can negate many of the benefits of economic growth. Studies have also demonstrated that protection is far more efficient than clean-up (Bin, Landry and Meyer, 2009; CRWP and Schwartz, 2006; Duffy, 2010; Knutson and Naef, 1997; NRC, 2002).

Several recent studies we reviewed have examined the economic impact of vegetated riparian buffers on adjacent property values. Bin, Landry and Meyer (2009) found that riparian properties were valued at a premium of more than \$37,000 compared to non-riparian properties. In assessing economic values of riparian buffers, preserved farmlands, open space, stream proximity, and flood threat in the Dardenne Creek watershed, Missouri, researchers Qiu, Prato and Boehrn (2006) concluded that residents were paying more for living closer to a stream. However, if a property was too close to a stream and in the flood zone, the flooding threat reduced property value by 4.7 to 5.6 percent. Residents were willing to pay \$1,400 to \$1,625 more per property in a subdivision with community owned and openly accessible buffers along a creek and more than \$6,000 for property adjacent to those buffers. Quale and Hamilton (1999) assessed the economic effect of riparian greenways on adjacent property values in several suburban communities in the Lower Mainland and east coast Vancouver Island, British Columbia. This assessment was supplemented with a resident opinion survey to assess the intrinsic values of these greenways to the local population. The results of the assessment and the survey indicate that property values are positively affected by a magnitude of 10 to 15 percent for proximity to a greenway. Local residents valued the greenway above many other features of their neighborhood.

The Chagrin River Watershed Partners, Inc. (CRWP) and Schwartz (2006) study, which synthesized research from various states and Canada, found the amenity effects from minimum frontage requirements increased the sales price of lakefront homes in Wisconsin by 18 to 21 percent. Similarly, a 3-mile greenbelt around Lake Merritt, near Oakland’s city center, was found to add \$41 million to the surrounding property values. Ontario, Canada homeowners did not perceive Provincial floodplain regulations to have any significant effect on home prices - a perception that was validated by their analysis of observed sales price data. The statistical analysis of 7,658 sales transactions of single

family homes located within 1.5 miles of Tanque Verde Wash in northeast Tucson, Arizona found proximity to riparian corridors had a very significant positive effect on home prices. Homes located within 0.1 mile (528 feet) of the riparian corridor commanded a 5.9 percent price premium compared to identical homes 1.5 miles away. Similar analysis of home prices in three California counties found urban stream restoration projects which decreased flooding, stabilized banks, and enhanced fisheries added between 3 and 13 percent to mean property values. (CRWP and Schwartz, 2006)

Netusil's (2006) analysis of the effect of environmental overlay zoning in Portland, Oregon examined how the quantity of upland wildlife habitat, and the quantity and quality of riparian corridors, are related to the sale price of single family residential properties. Portland has two levels of environmental zoning with strong restrictions on development of parcels in the environmental protection zone (p-zone) and somewhat more accommodation of some development in the conservation zone (c-zone). Netusil estimated home price effects for each of the 3 zoning combinations in each of 5 different areas of Portland. She found properties with a c-zone designation in North Portland sell for 35 percent more than homes without any environmental zoning, while c-zone designations are estimated to lower the sale price of properties in Southwest Portland by 2.6 percent. Property owners are placing a premium on lots with habitat providing the highest ecological values and a discount on lots with lower-valued. The mixed results highlight the importance of interaction effects from the full range of amenities affecting consumer perceptions and preferences in home purchases. (Netusil, 2006)

#### ***1.8.3.2 Economic Impact Analysis requests***

Several individuals as well as the current BOCC expressed a desire to undertake an economic impact analysis of the revised SMP post-implementation. Resolution #2013-31 specifically cites RCW 43.21H in the supporting declarations.

RCW 43.21H is a Washington law that requires an economic analysis for rule-making. The Department of Ecology (Ecology) complied with this RCW in full during the process of developing WAC 173-26 (Guidelines) in 2003 ([fortress.wa.gov/ecy/publications/SummaryPages/0306035.html](http://fortress.wa.gov/ecy/publications/SummaryPages/0306035.html)). Ecology determined whether the probable benefits exceed the probable costs associated with the new proposed Shoreline Master Program Guidelines rule. Ecology also determined whether the new proposed rule changes are the least burdensome alternative. The benefits considered were the public's valuation of shoreline improvements and the benefit from land appreciation due to vegetation conservation, setbacks, clearing and grading, etc. The costs considered were the foregone land value, loss of employment and government implementation costs. Other benefits and costs were very difficult to quantify based on existing knowledge and data, so a qualitative analyses was used.

The study found that maintaining a buffer will cause the price of land behind the buffer (up to 4000 feet from the waterfront) to appreciate for residential, commercial and industrial developments. Although waterfront parcels may lose some development opportunities, surrounding parcels benefit through increased green spaces, view corridors, better access to the water, etc. The land is most expensive at the waterfront, and decreases at an increasing rate until 4000 feet from the waterfront, where no land value premium exists. On the other hand, the land value within the buffer will decrease due to limitations to the land uses. So in the new residential, commercial and industrial developments, the benefits are combined with the costs. The benefit is the social economic gain from the land appreciation and the cost is the land value loss. The result of the cost benefit analysis suggests that the probable benefits would exceed the probable costs (WDOE, 2003).

A locally-tailored economic impact analysis for Pend Oreille County would fall well outside the required elements of the SMA or the Guidelines. Since there is no requirement that a jurisdiction include this element, there are no standards against which to review the results. Perhaps most importantly, there is no funding mechanism through the update process to conduct one. Additionally, as indicated by the discussion regarding buffer requirements, ample evidence would suggest that an updated SMP would have positive social and economic impacts.

#### 1.8.4 Remand SMP to current BOCC

The Citizens Alliance for Property Rights (CAPR) group has been advocating that Ecology remand the locally adopted plan to the County to address their perceived shortcomings of the SMP. In apparent response, the current BOCC passed Resolution #2103-31 in which the BOCC indicated an interest in having more time to seek “peer-reviewed” science applicable to Pend Oreille County to support a different buffer regimen; to develop unspecified changes to the draft adopted by the previous board; and to develop an Education Component and an Economic Analysis.

The previous section provides a robust discussion of the application and foundational science of the buffer widths adopted by the former BOCC. The discussion also addresses comments regarding economic impacts of buffers and concern about a perceived “takings”. As stated in the previous section, an economic analysis is not required in the SMA or Guidelines for SMP comprehensive updates. However, Ecology did prepare an economic analysis when developing WAC 173-26 (Guidelines) as required by RCW 43.21H.

Regarding the request to develop an Education Component, Ecology strongly supports and encourages environmental education in all facets of our work. While we appreciate the desire for education and outreach as a supplement to well-crafted regulation, an education component is not required by RCW 90.58 or WAC 173-26. We can pledge to support efforts in scoping and applying for funding for a robust education plan (as we have in the past), that is parallel to and complementary of the new SMP.

Ecology concludes that the County’s proposed comprehensive SMP update is consistent with the policy and standards of RCW 90.58.020 and RCW 90.58.090 and the applicable SMP guidelines (WAC 173-26-171 through 251 and .020 definitions), and that a duly-elected legislative body adopted the SMP incorporating significant revisions based on their extended public participation process. Ecology is obligated to act on the locally adopted draft SMP under RCW 90.58.090(2) and WAC 173-26-120(7). The County entered into a grant agreement with Ecology to complete the SMP as an early-adopter pursuant to RCW 90-58.080(5), which, together with RCW 90.58.080(8) superseded the December 2014 deadline with an earlier June 30, 2010 deadline. Ecology supported the County’s desire for significant additional public participation (which resulted in substantially more flexible buffer provisions) and thus, the locally adopted SMP was submitted nearly 3 years past the June 30, 2010 deadline. In addition, the legislature set a goal for completion of this state adoption process within 180 days. In this particular case, Ecology granted two extensions as requested by the County to complete substantive responses to public comments. These extensions have taken up much of this 180-day timeline. It is imperative that Ecology execute its legal obligation to approve the locally adopted SMP.

The County may, at anytime, propose limited amendments to the SMP, in accordance with the provisions of the SMA and Guidelines. There is no time constraint to undertake additional studies and develop use regulations that are more tailored to specific locations, and that could be used to support future limited amendments. The County would benefit from experience implementing the updated

SMP to determine how effective the use regulations are in achieving no net loss and providing the desired flexibility.

### 1.8.5 Compliance with EHB 1113

CAPR and some individual chapter members have stated that prior to approval, Ecology must first fully comply with EHB 1113. The bill requires the agency to identify the scientific information that is, “reviewed and relied upon by the agency in the course of preparing to take significant agency action” (EHB 1113, Pg 2, at 4-6). Ecology routinely identifies technical references, and continues to do so in this Findings and Conclusions for Pend Oreille County, though the approval of a locally adopted SMP is not a “Significant Agency Action”. Please see the Reference section of this document and the website for the Pend Oreille County SMP update for and index of records used to support this decision. The references listed have been hyperlinked to documents available online.

## **II. CONCLUSIONS OF LAW**

After review by Ecology of the complete record submitted and all comments received, Ecology concludes that the County’s proposed comprehensive SMP update is consistent with the policy and standards of RCW 90.58.020 and RCW 90.58.090 and the applicable SMP guidelines (WAC 173-26-171 through 251 and .020 definitions). This includes a conclusion that the proposed SMP contains sufficient policies and regulations to assure that no net loss of shoreline ecological functions will result from implementation of the new updated master program (WAC 173-26-201(2)(c)).

Ecology concludes that the County has chosen to exercise its option pursuant to RCW 90.58.030(2)(d)(ii) to increase shoreline jurisdiction to include buffers of critical areas within shorelines of the state. Therefore, as required by RCW 36.70A.480(6), effective upon approval of the SMP, Critical Areas within shorelines and land necessary for buffers on those areas are regulated solely by the updated SMP.

Ecology concludes that those SMP segments relating to shorelines of statewide significance provide for the optimum implementation of Shoreline Management Act policy (RCW 90.58.090(5)).

Ecology concludes that the County has complied with the requirements of RCW 90.58.100 regarding the SMP amendment process and contents.

Ecology concludes that the County has complied with the requirements of RCW 90.58.130 and WAC 173-26-090 regarding public and agency involvement in the SMP update and amendment process.

Ecology concludes that the County has exceeded the purpose and intent of the local amendment process requirements contained in WAC 173-26-100, including conducting open houses and public hearings, providing notice, consultation with parties of interest and solicitation of comments from tribes, government agencies and Ecology. A detailed description of the exceptional steps taken by the previous BOCC to solicit public participation is found in the **Amendment History, Review Process** section above.

Ecology concludes that the County has complied with requirements of Chapter 43.21C RCW, the State Environmental Policy Act.

Ecology concludes that the County's comprehensive SMP update/amendment submittal to Ecology was complete pursuant to the requirements of WAC 173-26-110 and WAC 173-26-201(3)(a) and (h) requiring a SMP Submittal Checklist.

Ecology concludes that it has complied with the procedural requirements for state review and approval of shoreline master program amendments as set forth in RCW 90.58.090 and WAC 173-26-120.

### III. DECISION AND EFFECTIVE DATE

Based on the preceding, Ecology has determined the proposed amendments comprehensively updating the SMP, are consistent with Shoreline Management Act policy, the applicable guidelines and implementing rules. Per RCW 90.58.090, the effective date of Pend Oreille County's shoreline program is December 19, 2013, 14 days after Ecology provided notice to the County that their updated shoreline program was approved.

### IV. REFERENCES

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