



Enforcing the Shoreline Management Act

Guidance for Local Government Administrators



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**For:
Washington Department of Ecology
Shorelands and Environmental Assistance Program**

Revised July 1998
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Note to the Reader

It is the policy of the Washington Department of Ecology to provide quality technical assistance to local governments. We welcome any comments on how we can improve the usefulness of this manual. Please send your written comments to: Shorelands Enforcement Coordinator, Washington Department of Ecology, PO Box 47600, Olympia, WA 98504-7600.

For additional copies of this manual, contact: Washington Department of Ecology, Publications Office, PO Box 47600, Olympia, WA 98504-7600, telephone (360) 407-7472.

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Table of Contents

| | |
|--|----|
| Chapter 1 – Introduction | 3 |
| Purpose | 3 |
| Organization..... | 3 |
| SMA Enforcement Steps | 5 |
| Finding out about a violation | 5 |
| Investigation | 5 |
| Evaluating the violation | 5 |
| Legal tools and options..... | 5 |
| Legal follow-up | 5 |
| Overview: Enforcement and the Shoreline Management Act..... | 6 |
| The Shoreline Management Act | 6 |
| Local and State Roles under the SMA | 6 |
| Local Enforcement Programs | 7 |
| What is Enforcement | 8 |
| Common Shoreline Violations | 9 |
| Abuse of exemptions | 10 |
| Violations of permit conditions..... | 10 |
| Chapter 2 – Learning About Violations | 11 |
| Intake: Recording & Evaluating Complaints | 12 |
| Telephone Complaints | 12 |
| Written Complaints | 14 |
| Reports from Agencies | 14 |
| Reports from City/County Inspectors..... | 15 |
| Complaint Follow-up | 17 |
| Evaluating Complaint Information..... | 17 |
| Setting up Case Files | 17 |
| Acknowledging the Complaint | 18 |
| Chapter 3 – Investigating a Violation | 21 |
| Importance of the Investigation..... | 21 |
| The Site Inspection | 21 |
| Inform Interested Parties of Your Activities | 23 |
| Bring Help If You Need It..... | 23 |
| Pre-Inspection Reconnaissance..... | 25 |
| Entering the Site | 25 |
| Physical Site Assessment — What To Do..... | 25 |
| Physical Site Assessment — What To Look For..... | 26 |
| Interviewing..... | 30 |
| Some Interview Tips..... | 30 |
| The Team Approach To Interviewing | 31 |
| Photography as Documentation..... | 31 |
| The Closing Conference | 33 |
| Site Inspection Follow-up, Reporting and Record Keeping..... | 34 |
| Follow-up to the Site Inspection..... | 34 |

Table of Contents

| | |
|--|----|
| Reporting..... | 34 |
| Record Keeping..... | 35 |
| Chapter 4 - Assessing the Violation..... | 39 |
| SMP Enforcement Guidance..... | 39 |
| SMA Policy Guidance..... | 39 |
| Other Considerations | 45 |
| Chapter 5 - Legal Tools and Options..... | 47 |
| Local Government Enforcement Procedures | 48 |
| Legal Tools under the SMA: What's Available | 49 |
| Considerations in Selecting Enforcement Options | 49 |
| Techniques for Reaching Voluntary Compliance | 53 |
| Alternative Dispute Resolution Techniques | 53 |
| Negotiation..... | 53 |
| Mediation | 54 |
| Joint Ecology/Local Government Action..... | 55 |
| Assistance from the Department of Ecology | 55 |
| Joint Enforcement Actions | 55 |
| Coordination with Other Agencies..... | 56 |
| Chapter 6 - Legal Follow-up | 59 |
| Appeals | 59 |
| Appeals to Local Government..... | 60 |
| Appeals to the Shoreline Hearings Board..... | 60 |
| Appeals to Superior Court..... | 61 |
| Going to Court..... | 62 |
| Appendix 1 – Sample Forms and Letters..... | 65 |
| Appendix 2 - The Shoreline Management Act and Regulations | 75 |
| Appendix 3 - References..... | 81 |
| Appendix 4 - Other Shoreline Related Programs, Regulations & Permits | 83 |

Chapter 1 – Introduction

This chapter describes the purpose and organization of the manual; the steps involved in responding to a violation; Shoreline Management Act (SMA) jurisdiction; state and local roles; elements of local enforcement programs; and common shoreline violations.

Purpose

Limited resources, competing priorities, a lack of specialized environmental expertise, local political pressure, and concerns about costly litigation may all be constraints to effective shoreline enforcement. Despite these constraints, many tools are available to improve enforcement programs. This manual offers ideas about enforcement techniques that are cost effective even for small communities with limited enforcement capabilities.

This manual is directed to shoreline program administrators who have enforcement responsibilities. The manual takes the reader step by step through the enforcement process and describes techniques and suggestions for investigating and determining appropriate enforcement action. In addition, the manual provides practical information and approaches for setting up and implementing enforcement programs to address multiple violations in a more efficient manner. This manual may also be useful as a guide for training inspectors, code enforcement staff, or other personnel involved in shoreline complaints or enforcement.

This manual is intended to complement the 1994 Shoreline Management Guidebook (Ecology Publication No. 94-104). Whereas the Shoreline Guidebook serves as an excellent general reference on a broad range of shoreline program management issues, (including a chapter on administration and enforcement), the SMA Enforcement Manual provides detailed “how to” information specific to shoreline enforcement.

Organization

The SMA Enforcement Manual is organized according to the steps an administrator would typically follow once a complaint or potential violation is reported. Figure 1, which depicts these steps, can be used as a quick reference to chart the course of a specific enforcement action. Practical information and “how to” techniques and procedures — including tips, reminders and checklists for each of the steps — are provided.

Within each chapter, the step by step “how to” discussion is supplemented by a section called: 💡 *ideas—Improving Your Program*. This section provides suggestions for improving the overall effectiveness of local shoreline enforcement programs.

Manual topics include:

- learning about violations via complaints and inspections;
- effective investigation techniques, including pre-planning, initial contact and interviewing, documentation, photography and reporting;
- coordinating enforcement efforts with agencies;
- evaluating the seriousness of a shoreline violation under the SMA;
- determining the most appropriate compliance strategy;
- legal tools and procedural options, including voluntary compliance;
- issues to consider if cases are appealed or litigated; and
- legal, administrative, and technical support available from the Department of Ecology.

SMA Enforcement Steps

Finding out about a violation

- Complaints
- Local and agency reports

Investigation

- Research
- Site Inspection
- Building a case

Evaluating the violation

- SMA guidance
- Facts to consider

Legal tools and options

- Local actions
- Joint Local-Ecology enforcement
- Voluntary compliance
- Coordination with resource agencies

Legal follow-up

- Appeals
- Going to court

Enforcement provisions of the Shoreline Management Act (Chapter 90.58 RCW), and SMA regulations (Chapter 173-27 WAC), are included as an appendix for easy reference. Sample forms, sample notification letters, and other reference materials are also included in the appendix.

IMPORTANT:

This manual attempts to be comprehensive and inclusive. You may not have the time to accomplish all of the steps or the resources to complete the recommended, detailed review and documentation .

If you need to take a shortcut — or you can only do some of the steps — focus on how you might best accomplish the primary goal — protection of the shoreline resource. Highlights to remember:

- Make a site inspection as soon as possible;
- Have your paperwork for violations set up (get your OK from your supervisor and/or attorney) so that you can move quickly; and
- Know who you can contact in other agencies such as the state Department of Ecology, the Department of Fish and Wildlife, the U.S. Army Corps of Engineers, or U.S. Environmental Protection Agency (EPA) for necessary technical support.

Overview: Enforcement and the Shoreline Management Act

The Shoreline Management Act

The Shoreline Management Act (SMA), enacted by the state legislature in 1971, is intended to protect valuable shoreline resources, to plan for and manage uses, to increase opportunities for the public to enjoy state shorelines, and to assure public involvement in decisions about shoreline resources. The SMA regulates most shorelines of the state including marine waters, streams and rivers (with a mean annual flow of 20 cfs or more), lakes and reservoirs or water areas of the state (larger than 20 acres), associated wetlands, and portions of the flood plain. During the past 20 years, the SMA has proven to be an effective tool in protecting and managing shoreline environments.

Local and State Roles under the SMA

The SMA establishes shoreline management as a cooperative effort between the state and local government, with specific roles for each entity.

Local governments are given the primary responsibility for administering the SMA through local Shoreline Master Programs (SMPs). Every county in the state as well as

many cities and towns have adopted SMPs to implement the SMA at the local level. Primary responsibilities for enforcement also falls to cities and counties as part of local administration of the SMA.

The Department of Ecology acts in a supportive and review capacity with primary emphasis on providing assistance to local governments and to ensuring compliance with the SMP and SMA. Ecology typically defers lead on enforcement actions to local government, but is interested in consistent enforcement of similar violations throughout the state.

Most frequently, Ecology's role in shoreline enforcement is to assist local government. However, it should be noted that the State (through the Attorney General's Office and the Department of Ecology's Shorelands and Environmental Assistance Program) is authorized to enforce shoreline programs if local government is unable or unwilling to take action. In all cases, Ecology informs local government of any action the department is considering concerning shoreline violations within that jurisdiction.

Local Enforcement Programs

Enforcement plays a crucial role in assuring protection of fragile and unique shoreline environments, in preserving public use and enjoyment of shorelines, and in assuring implementation of shoreline use decisions. As in other areas of land use regulation, adoption of shoreline regulation and policies provides no guarantee of public compliance. Landowners and developers may be unaware of SMA or SMP requirements, permit conditions may be ambiguous, leading to unwitting violations, or people may simply choose to proceed with development in disregard of regulations.

Because the SMA is administered by local governments and is implemented through local permitting actions, strong local government enforcement programs are essential to achieving SMA goals and objectives. Local governments invest considerable time and public resources in developing and applying shoreline policies, plans, and regulations. A strong local enforcement program is the insurance policy on this investment in planning.

The size and organization of local shoreline enforcement programs varies widely among cities and counties, as does the division of responsibility among departments. Responsibilities may be divided among planning, permitting, building or code enforcement departments as well as the city attorney or county prosecutor's office.

Local enforcement programs typically encompass a number of functions:

- complaint response;
- field inspection;
- investigating violations;
- determining SMA/SMP compliance;
- documenting and record keeping;
- inter-agency coordination;

- determining corrective action or restoration;
- negotiating with violators;
- pursuing enforcement actions;
- providing support for appeals; and
- education of the public and regulated community

Local government responsibility for shoreline enforcement offers a number of advantages. First, a regulatory role in shoreline protection is consistent with the traditional emphasis on local land use control in Washington State. Other land use and environmental laws such as the State Environmental Policy Act (SEPA) and the Growth Management Act also emphasize local decision-making and regulation.

Second, local government is usually in the best position to evaluate compatibility of shoreline use and development with community goals and values. Local government is typically more knowledgeable about the local shoreline environment, development activities, and shoreline use issues, and can better evaluate potential community impacts. Proximity may allow local government to respond more quickly.

Third, the SMA provides local government the opportunity to retain control and to exercise considerable discretion and flexibility in how they attain compliance and meet enforcement obligations of the SMA. If results can be achieved through voluntary informal agreement — assuming consensus among affected parties — there may be no need to pursue formal legal action.

What is Enforcement

“Enforcement” includes all actions necessary to assure that shoreline uses and activities comply with the intent of the SMA and the local Shoreline Master Program (SMP). A variety of tools — including civil and criminal penalties, cease and desist orders, corrective action orders, requiring that a permit be obtained (after the fact), and permit rescission — are available to local administrators pursuant to SMA statutory authority. SMA enforcement authority can be used independently or in combination with other state or local enforcement authority and procedures. Local SMPs are also important tools, in that they define community goals, policies, and performance standards that should be used to determine the existence or severity of a violation.

Effective enforcement may also involve use of informal methods such as negotiation, mediation, and/or settlements. Depending on circumstances, these methods may be more effective in obtaining voluntary compliance in a reasonable time frame.

Proactive and preventive efforts should also play a role in a shoreline enforcement strategy. A well-designed shoreline master program and clearly written shoreline permits can be helpful in minimizing violations.

Public education also has a role. For example, information programs targeting contractors, developers, and property owners can promote compliance and reduce

misunderstandings about the existence or meaning of regulations. Educating citizens about shoreline goals is also important in building community support for shoreline programs. In addition, community awareness that shoreline regulations are consistently and equitably enforced promotes compliance.

Common Shoreline Violations

Local shoreline administrators frequently encounter a variety of enforcement cases. Violations encompass a wide range of activities, factors and issues.

Shoreline violations may be substantive, procedural, or both

Examples of substantive violations include physical harm to the environment, impacts to public shoreline use, and violations of any performance criteria or standard within the SMA or SMP. Substantive violations may be minor, significant or critical.

Examples of procedural violations include failure to obtain a permit, abuse of permit exemptions, failure to comply with requirements for public notice, or improper processing of a permit. Procedural violations are of concern because of the emphasis the SMA places on the public review process. Compliance strategies need to consider both substantive and procedural issues.

In general, SMA violations typically fall into three categories:

- The shoreline activity or development occurs without an SMA permit; the development, use or activity (all or part) may or may not be legal; or
- The shoreline activity or development is exempt from the procedural requirement to obtain an SMA permit (permit exempt), but the activity or development fails to comply with substantive policies or regulations of the Shoreline Master Program; or
- An SMA permit has been obtained for the shoreline use, activity or development, but SMA permit condition(s) are violated.

Commonly encountered violations

Examples include illegal placement of fill in wetlands or waterbodies; improper bulkhead placement or construction; unlawful restriction of public access; illegal timber harvest or rechanneling of a stream or creek. Changes in use or activity may also result in a violation. Examples include changing a mobile home to an RV park, cutting a bank for view or access, obstruction of a floodway or flood plain, or removal of protected vegetation. As summarized above, in addition to potential procedural violations (failure to obtain the SMA permit), the development or activity may involve substantive violations in that the use or activity may not be permissible, or the SMA and SMP provisions may place restrictions and conditions on the use or activity.

Abuse of exemptions

Abuse or improper claim to permit exemptions (e.g.; single family residential, emergency repair, or agricultural permit exemptions) is another commonly encountered shoreline violation. Examples include construction of a non-owner occupied single family residence or conversion of a garage into a rental cabin; “repair or maintenance” that results in a structure larger than the original structure; and fabrication of emergencies to compensate for poor planning.

Examples of agricultural activities improperly asserted as normal and (permit) exempt farming practices include construction too close to the shoreline, diversions of streams, or encroachment of setbacks. Misuse of permit exemption criteria involves a procedural violation that may be remedied by applying for a permit and observing proper public notice. However, permit exemption abuse may also involve a substantive violation (i.e., the use or activity may not be legal).

Violations of permit conditions

Enforcement action may also be required to address violation(s) of SMA permit conditions. The most common complaint of this type occurs when development does not conform with approved construction plans. However, also of concern, is failure to comply with SMA permit conditions established during the public review and hearing process. Major shoreline projects (residential, industrial, commercial facilities) are frequently approved contingent on compliance with special construction and operational conditions — many applicable for the life of the project or the duration of the permit. Special permit conditions are often established as a means of implementing mitigation measures identified during the SEPA review process. Examples of these permit conditions include mitigation for lost habitat (habitat construction, monitoring, and maintenance); use of best management practices during construction and operation; and dedication, construction, and maintenance of public access improvements.

Violation of SMA permit conditions may occur years after permit issuance and project completion. Periodic review and inspection may be necessary to assure ongoing compliance.

Chapter 2 – Learning About Violations

This chapter gives suggestions for responding to complaints and for collecting the information needed to make decisions regarding the potential violation. The chapter also provides recommendations for complaint follow-up, and identifies common policy issues and staff training needs.

In this first step, the administrator's job is to acknowledge the complaint, record reported information, seek additional information if necessary (usually through telephone interview), and verify whether a violation has occurred. Information will be used to make an initial assessment of whether a violation exists, if response is necessary, and most important, to determine if there is an immediate or significant threat to shoreline resources.

Intake: Recording & Evaluating Complaints

☞ ***YOUR FIRST PRIORITY:***

Determine if there is an immediate or serious threat to the shoreline environment or to public health or safety.

☞ ***YOUR SECOND PRIORITY:***

Get Answers To The Five Basic Questions:

Who? What? Where? When? Why?

The shoreline administrator usually hears about potential violations through citizen complaints or from local or resource agency inspectors.

Complaints originate from:

- neighboring land owners
- business competitors;
- neighborhood or environmental groups; and
- employees of violators

Reports are usually received from:

- federal or state resource agencies; and
- local building/development inspectors

Telephone Complaints

The majority of complaints are received by telephone. Keep in mind that the knowledge, bias, and sophistication of callers will vary. As a result, it may be difficult to evaluate the situation solely on the basis of the caller's statements. Remember also that people making a complaint may want to remain anonymous.

In taking a telephone complaint, your goal is to obtain as much detailed information as possible about the alleged problem. Conduct your interview efficiently. Callers may not be able to (or want to) spend a lot of time on the telephone. Having a telephone checklist can help you systematically record information, focus on key questions, and take full advantage of the caller's knowledge. Remember, your primary job is to listen.

TELEPHONE CHECKLIST:

use as a checklist

The following questions will help elicit a more complete response. Use the checklist to verify that you've obtained necessary information. Careful listening may suggest additional questions.

- **Who is the caller?** (Note: Take care early on to determine if they want to remain anonymous or want the report to remain confidential.) Find out their name, address, phone number, and the best time to contact them.
- **What is going on at the site?** What is the activity? What exactly is the complaint or problem? What does he/she think will happen? How does he/she think the shoreline environment is being harmed? Why does the caller think it's a problem?
- **Where is the site located?** What is the site address? What waterbody is affected? If address is not known, ask for information about cross streets, local landmarks, and the best route for reaching the site. It may be helpful to sketch a map or note directions on the reverse side of the complaint form. (Note: Verify that the site is in your jurisdiction. If not, you may be able to direct the caller to the appropriate agency.)
- **When did it happen (date and time observed)?** How long has it been going on? Is there work in progress? How quickly is work progressing? How much work is completed? Is this an ongoing operation or activity?
- **Who does the caller believe is responsible for the violation?** Can the caller identify the person(s) or know where you might contact them (phone number or address)? Is there someone at the site?
- **Other Assistance** — Would the caller be willing to serve as a witness? If the complaint is serious or time critical, can the caller take photographs or a video? Can he/she suggest other contacts with knowledge or other sources of information about the site or problem?
Ask if the caller knows if a permit has been issued, or if there has been public notice or a public hearing on the project. (Remember, the work may be entirely legal, i.e., work may be occurring under a shoreline permit or exemption).

Written Complaints

Many of the suggestions for handling telephone complaints also apply to written complaints. The advantage of a written complaint is that the complaint is right in front of you. Unfortunately, written complaints only provide information deemed important by the author and may leave out important facts. In all probability, you will need to do a telephone interview (see above), and follow-up work (see Complaint Follow-up, the next section) to determine if further action is warranted. Written complaints may or may not be time critical.

Use your telephone checklist to translate written complaints into a helpful summary of the issue, and to identify the information you will need to obtain in your complaint follow-up. Check to see if a written complaint was sent to other persons or agencies. If so, you may want to contact other parties to determine their reactions and intended response.



Reports from Agencies

State and federal resource agencies often share jurisdiction and inspection responsibilities with local government, especially on major shoreline development projects. If an agency notifies you of a potential violation, use your telephone checklist to make sure you get a full report. In addition, ask your agency contact the following questions:

QUESTIONS FOR AGENCIES:



use as a checklist

- How important or serious is this case? What is the compliance goal for this problem? Do they have specific suggestions for corrective action or penalties?
- If the agency inspector is at or near the site, can they assist you in documenting and photographing the violation?
- How do they perceive their jurisdiction in this issue? Will they be doing any follow-up? Do they want to stay involved or informed? Will they be taking enforcement action? How can you work together, if you so chose?
- Can they provide you copies of their permit, field notes, photographs, or any other pertinent documentation they may possess?

Reports from City/County Inspectors

Local inspectors are in a good position to observe violations because of the time they spend in the field and their knowledge of local terrain and development. Inspectors can serve as your front line in proactive enforcement. Routine inspection can reveal a number of less obvious compliance issues. Examples are exceeding building height limits, encroachment of fill beyond approved boundaries, or public view impact. Close coordination is important, especially if shoreline development projects are inspected by a separate department, for example by building or subdivision inspectors.

Inspectors should be trained in environmental investigation techniques in order to recognize shoreline and environmental violations in the field. Make sure your inspectors are familiar with and understand SMP and SMA requirements.

If a potential violation is noted, inspectors should phone in or submit a basic inspection report. At a minimum, the inspector's report should cover the same information as the telephone checklist. If the inspector calls you with an emergency or time critical problem, ask for her/his assistance in photographing and documenting the problem.

When you are investigating a complaint, work with the inspector to review the violation and to assure a mutual understanding of the problem and roles and responsibilities.

ideas—Improving Your Program

A telephone complaint form or checklist helps ensure you get all important information. Use the suggested checklist or prepare your own. Distribute the telephone complaint form for use among shoreline program staff, to your inspectors, and to other departments that might receive complaints about shoreline violations.

Confidentiality can be a major concern. Some people want to remain anonymous, particularly if a complaint involves neighbors. What, if any, assurances can you give the caller that complaint files are confidential and access is limited? Discuss and define your policy with your city/county attorney.

ideas—Improving Your Program

Review the Washington State Public Disclosure Act (RCW 42.17) to understand what type of information can be kept confidential and what must be disclosed. Make sure that all staff understand your policy on confidentiality of complaints. It may help if all complaints are logged in a central file or notebook and kept separate from case files to minimize inadvertent disclosure.

Take time to establish contacts with agencies and with local Tribes. Set aside time to meet with agencies to address the issue of coordination and to develop a plan for coordinating enforcement actions. Develop a meeting agenda. Discuss roles and responsibilities, areas of assistance, exchange names, addresses, phone and fax numbers. It may be helpful to review a range of cases in your jurisdiction to determine special areas

of expertise, level of interest, and assignment of lead agency. Provide agencies with your enforcement policies, checklists, contacts and so on. Talk about a division of labor and commitment for use of their expertise. Ask for copies of their procedures. Solicit their ideas.

Develop a standard field checklist to help inspectors identify and document violations. Provide your inspection team with current copies of applicable Shoreline Master Program requirements for work on permit exempt activities (e.g., residential construction, maintenance activities). Building inspectors play a critical role in assuring that shoreline permit exempt activities substantively comply with Shoreline Master Program requirements.

Establish a routine to meet with your inspectors to review projects after permit approval, but prior to construction. On major shoreline development projects, help your inspector by reviewing unusual or complicated shoreline permit conditions. Inspectors may be unfamiliar with issues that arose during the earlier phases of the project and project permitting. Let your inspectors know if the project was controversial. Alert them to special areas of environmental concern.

Review current “best management practices” (BMPs) with your inspection and administrative staff. Many long accepted construction and operational practices may violate current SMA policy and regulations. Detailed BMPs are available from the Department of Ecology for construction projects, storm water control, agriculture and logging practices, and for a variety of commercial and industrial operations. BMPs can provide a useful performance yardstick during compliance inspections.

ideas—Improving Your Program

A good training program in SMA fundamentals can help to make the most of your inspection staff. Local governments have incurred extensive legal fees and have even assumed financial responsibility for costly removal of illegal construction and shoreline resource restoration when they failed to use sufficient care in training staff and advising the public of their rights and responsibilities under the SMP/SMA.

Violations or non-compliance issues often result from vague permit conditions or from a lack of knowledge about SMP provisions. Make sure you have an evaluation and a review process to periodically review misunderstandings over unclear or ambiguous permit conditions.

Complaint Follow-up

Evaluating Complaint Information

Following initial contact, review your information to see if you can fully answer the five basic questions: **Who? What? Where? When? Why?**

Review available information to determine what else you need to know to define follow-up action. Be aware that additional investigation — in particular a site visit — is typically required to fully respond to these questions. At this early stage, the basics you want to be able to convey include:

- the type and nature of the alleged violation (for example, illegal fill or grading operation, habitat or water quality impact, setback or structural violation, public access or view problem, and so on);
- the magnitude of the problem (critical, significant, minor) or no problem;
- how quickly you need to respond; and
- preliminary recommendations for follow-up, including abatement or corrective action, staff assignment, and time frame.

Site inspections are generally essential to meaningful enforcement. However, since staff and resource constraints may delay or even preclude a site visit or follow-up, your primary concern at this stage is identifying and assuring response to situations that significantly threaten the shoreline environment, or that will likely be irreversible.

Situations likely requiring immediate action include wetland or shoreline fills, illegal construction or construction of buildings inconsistent with plans or local SMPs, in-water construction during fisheries spawning or out migration, or uncontrolled construction that is causing a water quality violation.

Setting up Case Files

Keeping good records of complaints and information is essential. Set up a file, notebook or log to help you record all calls, letters or reports of violations. You may want to start a separate case file once you have documented that a specific violation exists. The specific file can be cross referenced in your general log or notebook. Make sure you include any detailed notes such as copies of the complaint and telephone checklist. If you determine no violation exists or that no action is warranted, make a brief note to the file outlining your rationale. You may need to refresh your memory several years later. Well-organized records can save you time and difficulties in the future.

Acknowledging the Complaint

It's good practice and good public relations to follow up complaints with a telephone call to acknowledge the complaint and identify what steps you are taking to investigate or resolve the complaint. If you can't make phone contact, send a short note acknowledging the complaint. A form letter can be created for this purpose to save time. You can also use this opportunity to request additional information. See *INTERVIEWING* in Chapter 3 for suggested questions that may assist you with follow-up inquiries.

During follow-up discussions with the individual reporting the violation, limit your comments to factual information and observation. Avoid stating conclusions or opinions until the issue has been fully resolved to the satisfaction of all parties (local government, agencies, neighbors, and violator), or you've determined there is no violation. Expressing an opinion or conclusion at this time may raise unwarranted expectations in the complainant or prejudice your case if a party later pursues legal action.

IMPORTANT — In responding to complaints and reports, keep in mind:

At this point, ask questions, discuss process, but avoid making conclusions. It's premature to discuss potential enforcement action or your interpretation of liability or fault.

ideas—Improving Your Program

To avoid delays and confusion, the shoreline administrator needs to be aware of complaints involving shoreline management issues. Make sure your system for handling complaints is set up to give you the necessary information efficiently and accurately.

Determine the public contact person for your jurisdiction. Preferably, you can select an experienced person who has good public communication skills. Alternatively, you may need to train someone. As appropriate, coordinate with your code enforcement people. Is there a public relations person in your jurisdiction? They can be a source of advice and assistance. Get the word out to appropriate county or city departments, elected officials, key agencies, and important community groups on how to best make contact.

Find out how complaints are directed within your jurisdiction. Do citizens know how to direct complaints? Consider conducting a survey of callers to determine how well your jurisdiction handles complaints. Ask about problems. Ask for recommendations.

You may want to prepare a generic handout to assist in your complaint follow-up. The handout can explain the process and time frame for dealing with shoreline violations and include information about opportunities for formal and informal appeals.

Develop a system to report and track all complaints and reports regardless of whether you take action. This system may be as simple as keeping a master notebook or file with geographic cross references. Review complaints periodically. Inventory the type, number and seriousness of complaints, and how you responded to them.

ideas—Improving Your Program

A tracking system can help you document demands and commitments on staff time and resources. This information can also be useful during program budget development and can help identify areas where more enforcement support is needed.

Given staff and resource constraints, it's often necessary to set priorities for response and follow-up. It's usually easy to identify critical situations (and to justify the staff time and resources necessary to respond). Setting priorities among the less obvious or less critical cases, and determining the appropriate level of investigation and response is more difficult.

Recognize that setting priorities is an iterative process. As information becomes available, you'll need to reevaluate priorities and revisit individual cases.

Remember — a site visit is usually essential to fully evaluate a situation. Include time for site visits in your scheduling. For less critical situations, it may be helpful for inspectors to incorporate the follow-up site investigation as part of their routine area inspection. Keep in mind it's important to document your reasons for not taking action.

In setting enforcement program priorities, periodic review of historical cases can help you identify the most likely violations in your jurisdiction and the areas of concern. The priorities (and prohibitions) expressed in your SMP, critical resource designations, and precedent are also useful criteria.

Chapter 3 – Investigating a Violation

Chapter 3 discusses techniques for conducting a substantive investigation. Topics include initial site research, site inspection, evidence gathering, and building a case through use of interviews, photography, and reporting.

During the investigation, the administrator's job is to conduct fact finding, to determine whether a violation exists, to document the impact of the violation, and to begin identifying necessary corrective actions.

Importance of the Investigation

Your investigation — especially your site inspection — will help you judge if a problem exists and how serious it is. Keep in mind that your investigation must provide legally defensible evidence should you need to pursue legal action. Although it takes time, early and thorough documentation is worthwhile. A well documented case can provide considerable leverage in later negotiations and reduce the likelihood of appeal or litigation.

Enforcement experts stress how difficult it is to anticipate which cases will be difficult. A small operation may have caused a significant fish kill; a home builder, cooperative at first, may later refuse to correct a problem; or other agencies may view the case more seriously than you did. Since you can't always foresee what might happen, a careful, systematic approach to investigation is good strategy.

REMEMBER:

☞ Your first visit may be your best — and only — chance to document the violation and the impacts to shoreline resources.

The Site Inspection

The site visit provides the best opportunity to learn first hand about physical site conditions, the use or activity, and the nature of the alleged violation. Careful preparation including review of available information will result in a more productive site visit. Develop a list of questions and concerns you want to address during your site inspection. Think about what you still need to know. Spend enough time to thoroughly prepare for your visit.

Research and preparation tips are provided in the checklist on the next page.

RESEARCH AND PREPARATION:



use as a checklist

- Check with other departments and review relevant files to learn what you can about the site and shoreline activity. Talk with other staff who have knowledge of the project, the site, or vicinity.
- Is the shoreline activity occurring pursuant to a permit? If so, review site plans, structural drawings, and permit conditions. Evaluate site conditions and drainage relative to the affected waterbody.
- Review appropriate maps (e.g., zoning maps, assessor's maps, SMP maps, critical areas maps). Aerial photographs, USGS maps, and other published maps such as Kroll maps can be helpful.
- Identify and review SMP provisions relevant to potential substantive violations. Note the shoreline environmental designation, permitted uses and any significant restrictions.
- Review area planning studies, special environmental studies, and previous permit actions applicable to the site or vicinity. Previous shoreline permits, enforcement actions, rezones, subdivisions, and utility and road plans also can be helpful.
- What other federal, state and local permits and approvals might be required? Check to see if other agencies or programs might be involved, and if you have time, call them.
- Determine if you want to meet with the owner or neighbors and whether to contact them in advance. Think about what questions you want to ask. You may want to prepare a list of questions or put together information to leave with the property owner.
- How large is the site? If the site is much larger than several acres, is densely wooded or your access might be obstructed by natural features or structures, use aerial photographs to identify your route and the areas you want to and will be able to inspect.

Inform Interested Parties of Your Activities

Prior to your site inspection, inform your supervisor and/or attorney about the nature of the alleged violation. Clarify procedures and the extent of your authority, especially if the situation is likely to require immediate decisions in the field. Discuss issues of concern, your objectives, and your investigation schedule.

Call your agency contacts if they also have jurisdiction on the site. If an agency has jurisdiction, interest, or expertise, ask if they want to do a joint inspection. Ask if they expect to do follow-up. Notifying other agencies promotes good working relationships and avoids decisions based on incomplete information.

You may want to meet the owner or operator at the site to discuss their reasons for the actions being questioned. A meeting with the owner or operator assures they are immediately aware of a (potential) problem, and may speed up the process of resolving the problem. However, if the violation presents a serious threat to the environment, or you believe work must be stopped immediately, a timely meeting with the owner may not be possible.

Bring Help If You Need It

Consider setting up a team inspection in these circumstances:

- Bring special expertise to help assess impacts to fishery and wildlife resources, wetlands, water quality, or the impact of toxic substance release.
- Invite the building inspector if the investigation requires a difficult structural assessment.
- Bring your attorney (or get advice on how best to handle the situation) if the alleged violator is bringing an attorney.
- If the situation has potential to be adversarial or you will be talking to a large group, team members can help keep discussions balanced and neutral.
- Invite agency representatives to attend if the problem is serious; a joint meeting conveys a high level of concern and may bring about more immediate compliance.
- A team approach is also prudent if the site is isolated or hazardous, or if presence of animals, weather conditions, difficult access, or similar factors raise issues of safety.

WHAT SHOULD YOU BRING WITH YOU:



use as a checklist

- Put together a file or notebook of site information. Suggested items to include (if available): site maps, the complaint form, a field checklist, copies of the plans, permits, aerial photos, copies of the SMP and other pertinent regulations, and your list of questions, concerns and information needs.
- Write down important phone numbers in case you need to make a phone call from the field. If one is available, bring a cellular telephone.
- Bring your identification, business cards, boots and appropriate weather gear.
- Bring a measuring tape and other instruments to evaluate distance, size or volume if needed.
- Bring a your camera kit and film, a clipboard, notebook paper, and a sketch pad or a clean site plan you can draw on to mark observations and field conditions. A tape recorder can also be useful.
- Make sure you have a good local map and clear directions to the site.

Pre-Inspection Reconnaissance

Drive by and check the site and vicinity before starting your inspection. The site is often not as you envisioned when you reviewed site information in the office. Think about safety issues, especially if you are alone.

Now that you are at the site, a quick review of maps, aerials and site plans will help you get oriented and confirm your route and features you want to inspect. Review your list of concerns and questions to confirm what you want to include in your tour and/or meeting. Make sure your camera is loaded with appropriate film. Fill out as much of your field checklist as possible before entering the site.

Entering the Site

Remember that you are here as a government official. You are looking for something that is likely to make life more difficult for the owner, operator or developer. Use your authority with tact and diplomacy.

If the owner or operator is on the site, identify yourself immediately. Giving the person your business card can be a good way to introduce yourself. Be friendly, but professional. Let the owner or person in charge know you are there, who you are, why you are making this site visit, what you plan to do and how long you expect to be on the site. Explain how you plan to document your inspection. For example, you may want to talk to employees, take notes to record conversations and observations, or take photographs (or use a video camera).

If you are threatened, or you believe you are in danger, leave immediately! Call the police if necessary. If you are denied entry or are physically threatened, make detailed notes of the circumstances. If the activity that you are investigating poses an immediate public or environmental hazard, you may want to call your attorney or even the police.

Physical Site Assessment — What To Do

It may be helpful to sketch your observations as you conduct your site inspection. Take time to complete field notes as you proceed, making notes as clear and complete as possible.

Observe and compare actual site conditions with that indicated on maps, plans, drawings, and aerial photographs.

Quick notations or abbreviations whose meaning seemed obvious when you were on the site can be difficult to interpret once you're back in the office. You might want to use a tape recorder to record your observations.

Remember, good observation skills are critical to your field assessment. Take time and look around carefully.

Physical Site Assessment — What To Look For

On the following pages, you'll find checklists that provide general guidance for conducting a site inspection. Checklists cover “what to look for” and are divided into three topics:

- *GENERAL OBSERVATIONS OF THE SITE & VICINITY*

- *OBSERVATIONS ABOUT SITE ACTIVITY OR DEVELOPMENT*

- *ASSESSMENT OF THE ALLEGED VIOLATION*

GENERAL OBSERVATIONS OF THE SITE & VICINITY:

use as a checklist

As appropriate, consider the following:

- Determine your compass orientation (i.e., north, south, east, and west). If you are on a large or wooded site, confirm your route across the site.
- What is the character and pattern of adjacent development and nearby lands? Is the neighborhood residential, rural, industrial, or forested? How does the actual development pattern compare with the SMP shoreline or land use designation for the area? How recent is development in the area?
- What part of the site is actually within shoreline jurisdiction? Verify or sketch the area of shoreline jurisdiction relative to site boundaries. Is the shoreline natural or built? Describe shoreline characteristics, including shoreline bathymetry (submerged shoreline conditions) - if visible.
- Measure and sketch the location of the OHWM, low tide lines or top of bank as appropriate. If the site is on a lake, stream or river, note visible or seasonal indications of flooding, floodway or flood plain limits. Note direction, rate and volume of flow of streams, rivers, or other drainage. Identify significant elements of shoreline process such as feeder bluffs, spits, etc.
- Describe site topography, drainage or observable hydrology. Do you see steep slopes, wetlands, streams, seeps or drainage not previously noted or located incorrectly? Where is the water coming from and where is it going? Is site drainage directed by manmade structures?
- Note weather conditions. What stage of the seasonal cycle are you observing and how typical is it?
- Are there indications of wetlands? Document those indications. Sketch and describe boundaries and wetland conditions or verify information if the wetland was previously mapped or documented. Is the wetland an associated wetland or an isolated wetland?
- What are general habitat conditions on the site? What specific shoreline habitat conditions do you observe? What plant communities are present? (Trees, shrubs, grass, native, invasive, none at all) What animals are likely to be present, if any?

OBSERVATIONS ABOUT SITE ACTIVITY OR DEVELOPMENT:



use as a checklist

As appropriate, evaluate the following:

- What uses, operations or activities are occurring on the site? What activities are affecting the area of shoreline jurisdiction?
- How does development compare with proposed (or approved) plans and drawings? Review location, size, dimensions, and setback.
- How does the use, activity or operation compare with that allowed under the SMP and/or described on permit approvals?
- Are access roads as depicted on maps or plans? Are access roads paved, recently cleared and/or constructed?
- Are structures existing or under construction? What are they? What is their function? Where are they located?
- Do you see signs of illegal and/or recent construction within shoreline jurisdiction?
- If construction is underway, describe site grading, clearing, logging or other site disturbance. Note extent and location of cuts and fills, stockpiles of dirt or presence of other construction materials if they pose an erosion hazard to the waterbody or are within shoreline jurisdiction. Are erosion control or stormwater controls in place? Are they functioning?
- What are the limits of clearing? How does this compare with setbacks or vegetation protection easements?
- If the owner or operator is on the site during your field assessment, discuss what you are observing with them. Request explanation or clarification of any of your observations. Discuss what you are observing. However, avoid expressing legal conclusions or site remediation strategies, as they are often premature at this stage, and may establish expectations which are difficult to change as the investigation evolves.

ASSESSMENT OF THE ALLEGED VIOLATION:

use as a checklist

As appropriate, consider the following:

- Sketch, describe, and photograph your observations of the alleged violation. Describe the physical problem, including dimensions, distances, volumes, size, and area of impacted area relative to the site boundaries, and description of affected wetlands and shoreline areas.
- What, if any, environmental impacts do you observe? What functions are impacted? Are there indications of (potential) water quality violations? Are there indications of habitat damage?
- Are conditions temporary or permanent? What potential problems might occur if the use or activity continues? What resources might be harmed? Describe your observations and any visual evidence that might indicate when the violation happened or how long the problem has been going on.
- Is public access currently or potentially an issue? Is public access impeded in any way? Is view protection a consideration? Does the use or activity impair or block neighboring views? Document with sketches or photographs. (View blockage is best illustrated from the perspective of the view to be protected).
- If new construction is the subject of the inspection, note what specific construction activity is involved (e.g., grading, filling, or residential, bulkheads, piers, commercial, industrial, utility, road construction).
- Compare the location, size, setbacks, and height of structures with what is shown on plans. If a fill or grading violation is involved, estimate the volume and extent of work. Sketch and photograph any variances. Indicate where measurements were taken.
- Do your observations or conversations suggest that the action may have been intentional or the result of negligence? Has the problem been caused or exacerbated by a natural event?
- If you speak with the owner or operator, ask what contacts he/she has had with government agencies regarding this project. Get specifics. When did discussions occur? What directions or comments were provided?

Interviewing

Information gained through interviews can greatly assist your investigation. Interviews can give you new information or help you fill in gaps in the record. If it is later determined that a violation occurred, interviews with the owner or operator can be valuable in defining your enforcement strategy, and in helping you assess intent or negligence on the part of the violator.

Keep in mind that interviews must be conducted systematically and documented carefully, or information may not be accepted as evidence. Remember that information you receive through an interview may be incomplete and may lack objectivity. Be sensitive to the possibility of bias on the part of the persons you interview.

Certain interviewing techniques help put the person at ease and help elicit a more informative response. Being comfortable (and making others feel at ease) in an interview is usually a matter of experience. Experience also teaches you when to keep the discussion focused on specifics and when to let the other person talk in more general terms.

Some Interview Tips

- Try to have privacy for the interview. Respect the other person's personal space. Be flexible to the situation and personality of the person being interviewed.
- Ask simple, direct, neutral questions. Avoid double negatives and other complex phrases. Avoid multiple subjects in your questions. Give the person time to answer.
- Listen. Make sure you understand the response. A restatement of the response can often help ensure that you understand the answer.
- Keep an open mind. The purpose of the visit is fact finding.
- Emphasize that you want the full truth — not just the bad stuff. Show that you are recording positive statements as well as those which may be at issue.
- Don't emphasize your note taking, it can be intimidating. Explain that you need to take notes in order to do your job well.
- Don't mix past, present, and future when interviewing. Work from the known to the unknown and from the general to the specific. Use standard references for time, distance, size, and volume. Avoid jargon and specialized technical terms. Don't try to sound like an attorney or a police officer.

- Avoid accusations. Don't be judgmental. Don't make promises of confidentiality or protection.
- If the interview gets tense or uncomfortable, take a break. Excuse yourself to take a phone call or confer with a colleague, or ask another staff person to come in. Remember, you're in charge of the interview. Know when to quit. If the discussion becomes confrontational or angry, calmly close the interview. If possible, leave options open to continue the discussion at some other time.
- Use the interview as an opportunity to explain why shoreline protection laws exist and why they are so important.

The Team Approach To Interviewing

If you are part of a team, the following strategies may be helpful:

- One team member asks questions and the other takes notes.
- One team member leads the questioning and the other injects questions only when they see a line of questioning that needs follow up.
- Different topics are addressed by different team members depending on expertise.
- One person can be the “good news” guy — another team member can be the “bad news” guy.

Photography as Documentation

You may be asked to recall details of what you saw at the site some months or years after the site visit. Nothing will refresh your memory as well as a good photograph. Photographs provide excellent evidence, and are one of the least challenged tools used to document a case.

Take a lot of pictures. The most common problem is too few photographs. Photographs should be of high quality and should illustrate the facts of the site and potential violation as accurately as possible. Know what the issue is that you're trying to document. Photographic documentation should tell the story with as little need for narrative as possible.

Remember, size and distance of objects in photographs can often be deceiving. Think about including a reference point in your photographs — a person, a notebook, a pen, or ruler are examples of common objects that can give a sense of scale to other objects in the picture. Remember too that photographs can also distort or understate conditions. Try to be objective in making your visual record. It is helpful to take a series of photos from varying perspectives as described below.

- Establish a reference: Take photos from a distance to establish perspective. Show the subject in reference to one or more permanent landmarks. If helpful, show the compass orientation of the subject.
- Medium shots: Take multiple photos to depict the object or event in context of the immediate surroundings. Shoot a series from all angles.
- Tight or Detail shots: Focus on the issue under review; photos should identify the specific item or event in question.

YOUR BASIC PHOTO-DOCUMENTATION KIT should include the following basic supplies:

- _ a camera: in good working order
- _ extra camera and flash batteries
- _ extra film: outdoor & "post-its" to identify the subject
- _ high speed indoor
- _ a notebook, paper, and pen

Extra equipment might include a wide angle and/or zoom lens. Remember that wide angle lenses make things look farther apart; telephoto lenses compress distances and make things look closer together.

Video photography is a viable alternative to film photography. Video offers color, sound, compactness and instant replay. Be aware that you may need permission to record someone.

The Closing Conference

If the owner or operator has been present during your site investigation, before you leave the site, take time to review and confirm your observations. Identify potential problems or questions that remain. Request any clarification that might offer a more complete or accurate picture of the event or subject. The fact that you made this request may be important in later stages of enforcement actions.

If you ask the owner to provide specific information, state how long the owner has to get information to you and identify the person who should receive it.

Remember your role at this point is generally limited to fact finding (except as described below). Refer to your observations and the regulations without reaching specific regulatory conclusions. Don't make any statements that could be misleading, misinterpreted, or could prejudice your case if legal action is required.

If it's within your expertise and authority, and environmental damage is imminent, continuing and/or severe, it may be appropriate to discuss concepts for necessary corrective or restorative actions, or to stop work. You may give verbal warning to the owner or developer at this time. (See Chapter 5, Legal Tools and Options). To the extent of your understanding, explain to the owner or operator what will happen next, and what their options will be.

IMPORTANT: If you interview someone or hold a closing conference, record the following information in your notebook:



use as a checklist

- Your case reference name and number, and the date and time;
- Who you were talking to (name and position) and how you can contact them (address and phone number);
- What you asked them, key discussion points, and any directives concerning corrective action, abatement and the time frame for compliance, and
- A summary of their answers and/or commitments.

Site Inspection Follow-up, Reporting and Record Keeping

Follow-up to the Site Inspection

If the owner or operator were not present during your site inspection you will need to locate them and inform them immediately, and in detail, of the situation. Both telephone and written communication are recommended in this situation.

If you met with the owner, or other responsible party during your investigation, a follow-up letter may encourage cooperation and immediate attention to the problem. This letter may be a written warning and may reference any previous verbal warnings (See Chapter 5). The tone of the letter should reflect the character of the discussions. Form letters can be helpful, but may need to be tailored to fit the circumstances.

Sending a certified letter to assure that the party is properly notified is good practice and gives you a record that they were informed. However, be aware that delivery of certified mail can be delayed if the party is not present to receive the certified letter. Sending an additional copy of your letter via normal mail service addresses this potential concern. You may want to send copies of follow-up letters (or written warnings) to other agencies with jurisdiction.

Reporting

As you proceed with your site inspection and investigation, prepare detailed reports of your findings, observations, and interviews. A standardized outline can be helpful to organize your thoughts, save you time, and provide consistency among reports over time.

If possible, prepare your reports immediately. Part of your job may be to inform members of the community as well as make observations related to compliance. If so, your report should be tailored to address this aspect specifically.

Reporting supports your investigation and is critical to case development. Good reports are a narrative of what happened at a specific time. Avoid unnecessary jargon and technical terms. Clear, direct writing that states the facts and issues in a straightforward manner helps readers understand the problem, draw conclusions and make appropriate decisions.

The recommended approach is to write the report as you did the inspection or as the interview proceeded. For example, say, “I inspected the bulkhead, I asked Joe Dokes, I took photos, I measured the distance from the shoreline, Mary Dokes said...,” and so on. Use the active voice, “I did,” not the passive voice, “it was determined.” The less translation between the report and possible future testimony, the better.

Avoid drawing conclusions, especially about subjective matters. Write the facts so that readers can reach their own conclusions. “Joe was hostile,” is a conclusion. “Joe began swearing and punching holes in the wall” is a statement of events from which the reader can draw their own conclusions.

Poor choice of words can sometimes limit the choices open to the agency by appearing to pre-judge the issue or show bias. Certain phrases should be avoided when writing a report because they imply more knowledge than the inspector was likely to have, may be ambiguous, or can not be substantiated.

Phrases to Avoid:

- “All,” “always,” “never” — these absolute terms can often be challenged if any exceptions exist. On the other hand, if you're sure of your facts, these terms can be appropriately used.
- “Violations” as in “there were violations,” or “that was a violation,” may be a premature conclusion. Your documentation may not be adequate to substantiate a violation, or you may be making a decision without using the system of checks and balances built into the program.
- “No violations” is also reaching a conclusion. Be sure you know that all issues have been explored. Changes in interpretations of regulations and policies or the effect of some other regulations can affect whether a violation has occurred or not.
- “It was determined,” is vague and doesn't say who made the decision. If you made the judgment call, say so. However, be sure you are qualified to make that determination, and that there is a clear legal basis and relevance for making that judgement.
- “They said,” is also vague. Who said? Be precise in attributing comments. Documentation about who said what can be critical to a case.

Record Keeping

Careful record keeping is essential if you need to pursue formal enforcement action. Good records can serve as a strong incentive to voluntary compliance, and are your best defense against later disputes.

Your records should include copies of the initial complaints or report (remember to protect anonymity, if requested), the site or project description, project or permit reference numbers, site plans, maps, photographs, a description of all telephone communication, and all written communication. Most important, your records should document the scope and timing of your investigation and indicate the thoroughness of your investigation procedures.

ideas—Improving Your Program

Consider holding a staff training session in field inspection techniques. It may be beneficial to coordinate with other agencies and jurisdictions having similar needs, and to sponsor a joint training program. Local or agency experts may be available to serve as instructors. Focus on common situations or conditions. Examples of topics might include wetland or habitat identification, structural or bulkhead inspection, assessment of drainage and hydrology, and identification and measurement of field indicators such as the OHWM, inter tidal areas, steep slopes, and top of bank.

Develop a series of field inspection checklists that reflect violations and site conditions typically encountered in your jurisdiction. Identify staff with special expertise within your jurisdiction. Develop guidelines for calling in an outside agency with special expertise.

Work with management, legal counsel and other departments to develop a system for notifying key staff of potential violations that require investigation and possible field decisions. Discuss priorities for investigation. Work on developing a mutually agreed upon understanding of what constitutes critical, significant, and minor violations within your jurisdiction.

Define your working relationship with legal counsel. What authority is delegated to the shoreline administrator? Do you have authority to access sites, especially if there is no permit? Do you have authority to stop work if the situation so warrants? Talk with your city attorney or county prosecutor to establish basic ground rules for investigation and enforcement.

ideas—Improving Your Program

Legal issues, such as denial of entry, proper evidence and documentation, liability and record keeping are likely to arise. These legal issues have multiple dimensions and deserve special attention. A session with legal counsel and management to review your internal procedures and policies on site inspection and investigation-related issues is important to ensure your enforcement efforts are on a solid legal base.

Shoreline Hearings Board decisions are published and indexed. These decisions may assist you and your legal counsel in identifying key legal issues, and in evaluating the strength of your arguments in similar factual contexts.

Note: Parts of this section were incorporated verbatim or adapted from the EPA Region 10 manual Conducting Compliance Inspections, 3rd Edition, authored by Douglas Smith. The EPA manual gives excellent and concise guidance on compliance inspections. The EPA manual covers many of the complexities of inspection such as denial of entry, level of care, and evidence gathering and other legal issues. The EPA manual is geared to facility violations involving hazardous substances. Changes and omissions within this manual reflect the more typical shoreline violations and the legal framework of the SMA.

Chapter 4 - Assessing the Violation

This chapter discusses factors you should consider in assessing the seriousness of the violation, including degree of harm, risk, intent, precedent, economic factors, and timing issues. This discussion assumes you have determined a violation exists.

In this step, the administrator will use Shoreline Master Program (SMP) policies and regulations, and SMA enforcement policy to assess the seriousness of the violation — a major consideration in choosing the appropriate enforcement strategy. (Note: enforcement actions and penalties are discussed in Chapter 5).

SMP Enforcement Guidance

In most cases, your SMP will be the starting point in your assessment. SMPs specifically discuss permitted uses and development standards for regulated shorelines in your jurisdiction. SMPs designate shoreline environments (typically as: natural, conservancy, rural and urban); define the purpose and general types of land use allowed (or prohibited) within these environments, and establish goals, objectives and policies. SMPs also include procedures for review and approval of permits, administration and enforcement.

SMPs include regulations and standards — often quite detailed — for permitted uses. Specific activities likely to be regulated include clearing and grading, dredging, landfills, moorage, docks, bulkheads, use of herbicides, roads, fences, landscaping, parking, and signs. In addition, standards for location, length, height, design, and setbacks of structures may be included in SMPs.

Several key questions to consider: What is the type and nature of the use or activity? Is it allowed under the SMP? Is some aspect of the activity permitted and others are not? If the use is permitted under the SMP, does the use or activity meet required standards? If there's a question about the nature of the activity or how measurements (i.e., height, setbacks, ordinary high water mark, etc.) are taken, the definition section of your SMP may provide useful guidance. You may also need to verify whether the violation is legally non conforming (i.e., “grandfathered”) or is an exempt activity.

Remember the SMP contains policies as well as regulations. In most cases, regulations address significant aspects of the policies. However, if regulations are unclear or don't address a particular problem, policies may help clarify the intent and purposes. Also, review how the SMP was applied to past enforcement decisions or related permit decisions on similar cases.

SMA Policy Guidance

The Shoreline Management Act rules (Chapter 173-27-260 WAC) provide the following guidance:

“The choice of enforcement action and the severity of any penalty should be based on the nature of the violation and the damage or risk to the

public or to public resources and/or the existence or degree of bad faith of the persons subject to the enforcement action.”

This SMA enforcement policy provides a useful framework for evaluating the seriousness of the violation in that it describes a number of factors that should be considered. You will find that although certain impacts can be quantified (for example, acres of wetland filled), many factors require professional judgment and qualitative assessment. Note that under the SMA, you can consider the intent and attitude of the violator as well as the impact or potential for harm.

The SMA enforcement policy does not assign a weight or importance to any particular factor, rather it suggests the situation should be assessed in its entirety and within the context of impacts to community and shoreline resources. Review of local SMP policies may help you by expressing community values or identifying significant resources. Further elaboration of the specific factors is provided below. It may be helpful to use the following discussion as a conceptual checklist during your assessment.

NATURE OF THE VIOLATION AND SEVERITY OF RISK:

use as a checklist

Examples of what you might consider include the type and degree of harm (or threat of harm) to the natural environment, and the magnitude of impact (or potential impact) to public use or enjoyment of shoreline resources. This checklist also encompasses common SMP violations including procedural violations, and violations such as setbacks, height limits, and issues of shoreline land use compatibility.

- Has the action affected a shoreline of statewide significance? Note the guidance and preference established for such shorelines under 90.58.020.
- *Shoreline Designation:* Is the use or activity consistent with the shoreline designation within the applicable SMP (industrial, urban, residential, conservancy)?
- *Fills or Disruption of Habitat:* Review SMP policies and critical areas ordinances relative to environmentally sensitive habitats which include fish breeding, rearing or feeding areas, critical salt water habitats, wildlife habitat, estuaries, and wetland habitats and their buffers. Can the habitat be restored? How quickly? Is the impact temporary or permanent?
- *Release of Pollutants:* What is the type and magnitude of the release? Is the pollutant persistent, bio-accumulative or highly toxic? Can it be cleaned up? Is the substance hazardous under state or federal law?
- *Public Health:* Is public health threatened? Consider physical safety as well as potential toxic exposure. Is the impact short or long term?
- *Impact to Use of Waters:* Does the use or activity impact navigability of the water body? Are tribal fishing rights impacted? Are existing water rights impacted? Does the use or activity impact hydrology, for example, impacts to a stream, river, or important headwater, or impede flow within a flood plain or floodway?

NATURE OF THE VIOLATION AND SEVERITY OF RISK:



use as a checklist (continued)

- *Public Use of the Shoreline:* Is there existing (de facto) public access? Will public use be impacted? Is the impact temporary or permanent? Are public views destroyed? What's the duration of the impact?
- *Preservation of Setbacks:* Is the action permanent (e.g., a structure)? What is the function and importance of the setback (e.g., floodway, vegetative buffer, etc.)?
- *Permit Issues, Procedural and Substantive:* Was the use or activity pursued without required permits? Is there a permit? Is the use or activity a violation of shoreline permit conditions? Was the use or activity shoreline permit exempt? Would the use be legal under the existing SMP and other relevant regulations? Is the violation substantive, procedural or both?
- *Cumulative Impacts:* Would (or has) repetition of similar activities or similar development result(ed) in increasing or critical impact upon the shoreline resource? Are such impacts adverse? Is the use or activity consistent with neighboring uses? Is the use or activity, together with past, existing, or planned uses or activities, protective of area natural resources?

EXISTENCE OF BAD FAITH:

use as a checklist

Bad faith refers to the intent and the attitude of the violator, and generally refers to actions intended to deceive, or that involve a knowing disregard of some duty. A willful, deliberate violation may warrant higher penalties or escalation of enforcement action. Because a finding of bad faith can give rise to severe penalties, exercise care in reaching such conclusions. Remember, actions can be open to different interpretations and motives are not always clear. Differences in values or philosophy are not sufficient to determine that someone acted in bad faith. Factors to consider in determining whether a person acted in bad faith include the following:

- Are there indications that the action was willful and deliberate?
- Is there a history of (similar) violations or a pattern of violations indicating a general disregard of environmental regulations? Have there been past efforts to acquaint the violator with the law?
- Should the violator have known better? How sophisticated is the violator regarding such matters? Is the violator in a position to repeat the violation? How likely do you believe that to be?
- Was the violation due to negligence? Were precautions taken to prevent the problem? Consider the degree of negligence, regardless of whether the violation may have also been intentional.
- Did the violator apply for, or obtain a permit, from you or from other agencies? Was a permit granted, but conditions ignored? If the activity was permit exempt, is the use or activity in compliance with substantive provisions of the SMP?
- Was the violator ignorant or unclear about requirements? Were requirements clearly conveyed and understood? Difficult to understand?
- How cooperative is the violator? Are they proposing or willing to undertake corrective action? Are they taking initiative to abate or correct the problem on their own? How quickly is the violator responding?
- Was the violation so intentional or the environmental impacts so great that criminal prosecution ought to be considered?

ECONOMIC CONSIDERATIONS:



use as a checklist

The fact that corrective action is costly is not a legitimate reason for excusing corrective action or a penalty. However, you may consider the relative costs of compliance in your decision in choosing *among* corrective actions. That is, you may consider the incremental cost of various options relative to their additional benefit to the shoreline resource.

Other points to keep in mind:

- Weigh the benefits that may accrue to the violator. The public should not suffer the loss of resources solely for the benefit of the violator.
- Corrective action must adequately compensate for the impact on shoreline resources. Coordinate with other resource agencies and Tribes to assure consistency in approach.
- Be sensitive to the fact that enforcement decisions may affect the economic viability of the regulated community and that all violations need to be pursued equitably.
- Strive to avoid unwarranted economic impacts on individuals or on a particular class of activities.
- It is important to convey to the owner or applicant that you have heard, and are considering, their point of view.

Other Considerations

Remember that your response to violations (or lack of response) sends a message to the community. What message are you sending? For enforcement to be effective, the community needs to be aware that rules will be applied consistently and equitably over time.

Coordinate with resource agencies to ensure your actions and decisions are mutual and consistent, or at least complementary on sites where there is multiple jurisdiction. You may want to take the initiative to assure the project complies with applicable local, federal or state regulations.

ideas—Improving Your Program

A team approach can be helpful when evaluating a violation. Meet with management, staff, and your attorney to jointly review the findings of your investigation and to determine the most appropriate course of action. Team reviews can help assure consistency in interpreting and applying the SMP. It may also be beneficial to invite agency representatives to hear their perspective and assessment of the violation.

Review of Shoreline Hearings Board decisions may help you in determining appropriate action and the seriousness of the violation.

Some enforcement cases stem from vague or ambiguous SMP policies and regulations, or from poorly written permit conditions. If you repeatedly encounter the same violation within the regulated community and the issue remains controversial, SMP policies, regulations and procedures may need to be reassessed. Repeated misunderstanding or misinterpretation by the regulated public may also indicate a need to rewrite (and clarify) regulations and policies. Formal feedback should be conveyed to planning and permitting programs to assure that policies and regulations are understandable, practical, and reasonable.

Violations may also result from incorrect, incomplete, or unclear information or advice from government officials. You may want to review interpretation and procedures with appropriate staff, or better communication of your requirements to sister agencies.

If repeated violations of a specific regulation occur, target the appropriate audience for a concerted public education effort.

Chapter 5 - Legal Tools and Options

This chapter outlines legal authorities and enforcement mechanisms that local government can use pursuant to the SMA; describes options for cooperative or joint enforcement actions that local government may pursue in conjunction with the Department of Ecology; and summarizes jurisdictions of other agencies that may be involved.

At this step, the administrator will be determining (or recommending) a strategy for achieving compliance. The compliance strategy may combine methods, or include a phasing or escalation of enforcement action as warranted.

Local Government Enforcement Procedures

Under state law, local government has been given the mandate to take all actions necessary to make sure no shoreline uses or activities conflict with the SMA and local SMP (Chapter 90.58.210 RCW). At the same time, state regulations also give local government discretion and flexibility in determining the appropriate type and level of enforcement action.

Under the SMA, local government has the option of adopting its own separate rules to implement the SMA enforcement provisions. As a first step, it's important to know the range of enforcement options and the legal support available to you. Check with the city attorney/county prosecutor and discuss your objectives and concerns. Competing demands for time and resources may mean that legal support is limited except for very important issues.

SMPs are often written to be complementary to other local land use regulations, such as zoning regulations. Critical areas ordinances adopted by many local governments to meet state Growth Management Act requirements may also interact with shoreline regulations. Development within regulated shorelines must comply with other applicable land use regulations as well as the SMP. If there is a conflict, usually the more restrictive regulation controls.

Familiarity with other applicable regulations can be very helpful in determining your enforcement strategy. You may have a greater possibility of resolving the problem through enforcement of another local ordinance. Remember too, that SMA authority can be used in addition to, or in combination with local rules and procedures. Also, as discussed below, local government can pursue a joint enforcement action with the Department of Ecology. Each case needs to be assessed individually; however, integrated enforcement actions can often be very effective.

Local enforcement tools and procedures for addressing shoreline violations are usually the same as those used in pursuing other local land use violations, and frequently parallel state SMA enforcement tools procedures. Examples of such tools are stop work orders, revocation of permits, and monetary penalties are common enforcement tools. In some extreme cases, criminal prosecution is undertaken.

REMEMBER:



Provisions of the SMA can be used in addition to, or in combination with local rules and procedures.

Legal Tools under the SMA: What's Available

This chapter includes a table summarizing the menu of legal tools provided for in the SMA and within its enforcement regulations (90.58 RCW and Chapter 173-27 WAC; see Appendix B for complete text).

Use these enforcement tools as necessary to achieve compliance. The appropriateness of a particular action depends on the violation. You may want to combine one or more methods, or plan on escalating your legal action if informal requests are not achieving desired, timely results, or if a resource is being threatened. If you are uncertain about the best course of action, consult your legal counsel for advice on which tool is most appropriate in a given situation.

Considerations in Selecting Enforcement Options

As shoreline administrator, your goal is to select (or recommend) specific enforcement measures that will resolve the problem in the most effective and efficient manner. Select those options which will bring the results you want with the least expenditure of resources. Remember, most cases are resolved in negotiations prior to the appeal. Except in cases warranting immediate action, your strategy should allow time and resources for discussion and negotiation.

If the violator is likely to appeal your decision, your strategy should also consider how the appeal process may affect the schedule and outcome of abatement or corrective action. Negotiation and subsequent resolution frequently occur during the appeal process. The appeal process may provide leverage in negotiations, and an opportunity to reach more rapid resolution of the problem. Chapter 6 discusses appeal processes in more detail.

You may find it helpful to phase your enforcement actions. In the first phase, abate the problem (prevent it from getting any worse). In the second phase, determine how best to restore the specific site or mitigate the damages. Keep in mind that the primary goal is compliance and that enforcement is only one tool. Enforcement actions may be also phased in order to escalate the penalties as necessary to achieve compliance

Menu of SMA Enforcement Tools

| Tool | What It Is / How You Use It | Comments |
|---|--|---|
| <p>Warning Notice</p> <p style="text-align: center;"><i>Oral</i></p> | <p>Use a verbal warning to give the violator an opportunity to comply voluntarily and to communicate actions that may appropriately abate or correct the problem.</p> | <p>Used for minor actions or as a step in preparing for further enforcement action. Use to request more information. Documentation of a verbal warning is recommended (date, problem, person contacted, content of warning).</p> |
| <p>Warning Notice</p> <p style="text-align: center;"><i>Written</i></p> | <p>A written warning is a letter or other notice sent to the violator, identifying the violation, citing relevant sections of the SMP, explaining how to correct the problem, and setting a time for compliance. A written warning can be used as a follow-up to a verbal warning. It gives the violator an opportunity to comply voluntarily and may help you determine how cooperative the individual will be.</p> | <p>A warning letter usually carries more weight than a verbal warning and provides documentation of enforcement actions. A letter from the city attorney/county prosecutor is likely to be seen as more serious than one from the shoreline administrator. Letters should reference prior verbal warning (if any), describe the problem and the action to be taken by the recipient. Include options for appeal if there are any, a deadline for responding, and further enforcement measures that will be pursued if the warning is ignored. Sending by certified mail is a good practice.</p> |
| <p>Cease & Desist (Stop Work Order):</p> <p><i>RCW 90.58.210</i> <i>WAC 173-27-270</i></p> | <p>Construction work or other activities are prohibited until compliance with regulations has been achieved. Stop work orders can be issued directly by a site/building inspector (or other administrative staff) and do not require a hearing. The order must describe the specific nature, extent, damage (or potential damage) and time of the violation; a statement that the violation must stop; describe the specific corrective action to be taken; and state the time allowed for correcting the violation. Stop work orders are effectively immediately upon receipt by the person(s) responsible for the activities in question. Civil penalties (fines) can be issued in combination with a stop work order.</p> | <p>A stop work order may be necessary to prevent continued environmental damage. It can also be important in setback or height disputes, because of the political and practical difficulties of ordering the removal or demolition of a structure after completion. A stop work order has greatest impact if the violator faces seasonal work constraints, if a contractor faces costs if schedules are not met, or other circumstances where delays create financial hardship. Because of the potential for serious financial harm, a stop work order should be used only where warranted.</p> |

| Tool | What It Is / How You Use It | Comments |
|---|--|--|
| <p>Civil Penalties: <i>90.58.210 RCW</i> <i>WAC 173-27-280</i></p> | <p>State law allows local governments to impose fines of up to \$1000 per day per violation for persons who fail to get necessary permits for work or activities in the shoreline or who ignore a stop work order. A person who assists or helps in the commission of a violation can also be fined. Each day the violation continues is subject to the fine. Written notice must be given by either certified mail or by delivering it to the individual in person. The notice must describe the violation and the date (approximate date is adequate), and order the violation stopped. Corrective action can also be requested. Appeal processes should be described. A civil penalty can be appealed within 30 days of notice.</p> | <p>Monetary penalties or fines can be an effective disincentive for disregarding shoreline regulations. Costs must be high enough to outweigh the potential benefits of violating the regulations. If not, some persons may find it economically beneficial to run the risk of the violation being discovered and paying the fine. The potential of fines can encourage settlement in many cases. Because local government or Ecology can remit or mitigate the penalty if the person involved can demonstrate extraordinary circumstances, (including new information), imposition of penalties often provides a strong negotiating tool.</p> |
| <p>Liability for Restoration & Corrective Action <i>90.58.230 RCW</i></p> | <p>A person who violates shoreline regulations is liable for all damages to public and private property and can be required to pay for the costs of restoration or other corrective action.</p> <p>This is a type of civil penalty that could be separate or in addition to fines or other penalties.</p> | <p>This provision is helpful when shoreline resources and associated wetlands are involved. More than one avenue of enforcement may be available. Other state and federal authorities for resource damage under MTCA and CERCLA (Superfund) provide for very strong penalties as well as for costs of restoration.</p> |
| <p>Revocation or Revision of SMA Permit <i>90.58.140(8)RCW</i></p> | <p>A permit can be revoked or modified if permit conditions are not being met or the permit was obtained by fraud. Documentation of the violation is needed to support a report to the city or county legislative body requesting revocation or modification of the permit. A public hearing is required with standard requirements for public notice. Written notice must be given to the holder of the permit. The decision can be appealed to the SHB.</p> | <p>Revocation actions are both a form of punishment for the person who violated regulations and a technique to stop or remove harmful shoreline activities. Because such actions involve action by local elected officials, they may also have political overtones. In general, there is often resistance to revoking a properly issued permit except in cases of egregious or flagrant violations. Initiation of revocation proceedings can also be used as a negotiating tool. When considering such action, make sure that the initial permit was properly issued and that the conditions were clear and unambiguous.</p> |

| Tool | What It Is / How You Use It | Comments |
|--|---|---|
| <p>Performance Assurance Devices</p> <p><i>Shoreline Handbook</i></p> | <p>Performance bonds, letters of credit, or other financial devices to assure compliance with the SMA, the SMP and any permit conditions can be imposed as a condition of approval on a shoreline permit. These are intended to provide financial resources to allow the jurisdiction to complete work on some aspect of a project if it is left unfinished by the owner or developer.</p> | <p>Bonds are commonly used as conditions of construction and building permits for landscaping, streets, sidewalks and similar site improvements. There are established procedures for imposing and enforcing a bond. Considerations for using bonds include the cost, whether the improvement or construction is specifically described (such as landscaping or construction of a pathway), and whether the triggering device for using the bond is clearly defined.</p> |
| <p>Attorney Fees/Costs</p> <p><i>90.58.230 RCW</i></p> | <p>Local jurisdictions or the state can file a legal action against a person who has violated shoreline regulations. In addition to other penalties, the court can award attorney's fees and costs of the litigation to the prevailing party.</p> | <p>The potential of paying the court costs and attorney fees of the other party if you lose in a legal battle can be a powerful incentive to resolve problems of shoreline violations through negotiated settlements.</p> |
| <p>Property Lien</p> | <p>A lien is an encumbrance or charge against a property. In the event that a person who has been fined for shoreline violations does not pay, a lien can be placed upon the affected property. The lien is imposed by filing legal documents that establish the basis for the claim against the property at the office of the County Assessor. The lien is removed when the violator pays the fine. If not, the amount of the lien is paid to the jurisdiction who filed the lien when the property is sold.</p> | <p>Liens can be a useful tool to encourage payment of penalties. Because liens encumber a property, they can be an impediment to sale of property or its use as collateral to borrow money, and may give an owner incentive to pay the fine. Local jurisdictions may be reluctant to impose liens unless it involves a serious offense or the violation has resulted in costs that must otherwise be borne by the public. Legal advice as to procedures and requirements is important if liens are to be part of your enforcement strategies.</p> |
| <p>Criminal or General Penalties</p> <p><i>90.58.220 RCW WAC 173-27-300</i></p> | <p>Criminal acts as used in the SMP concern willful violations of shoreline regulations. Willful violations are defined as gross misdemeanors (penalties include fines and the possibility of imprisonment). Violators are subject to a fine of not less than \$100 nor more than \$1000 and/or time in the county jail for up to 90 days for each separate offense. Subsequent violations within 5 years increase the range of fines from \$500 to \$10,000.</p> | <p>Criminal prosecutions for shoreline violations are uncommon. In part, this is because the burden of proof is more substantial (i.e., it can be difficult to prove that an action resulting in a violation was done willfully). "Willful" in the context of criminal actions generally means an act done with a bad purpose, or with a careless disregard of whether an action can legally be taken. Most local governments would prefer to work toward resolution of violations without pursuing criminal penalties. However, the potential is there for use in extreme cases.</p> |

Techniques for Reaching Voluntary Compliance

In most situations, it is worthwhile to seek voluntary compliance before proceeding with other enforcement approaches. Meetings between the permit violator and the shoreline administrator are usually the first step in an effort to reach agreement (Note: remember to keep the property owner informed of these negotiations if the permit violator and the property owner are different people). Bringing such meetings to successful completion can require a great deal of skill and patience. Many of the techniques used in mediation and negotiation (see discussion below) are applicable to these less formal processes as well.

Alternative Dispute Resolution Techniques

Other options to legal processes include a variety of alternative dispute resolution techniques such as mediation and negotiation. These techniques are gaining wider acceptance in land use and environmental disputes. When and which of these options may be appropriate depends on a variety of factors, including the complexity of the issues, the number and interests of people and agencies involved, time and resources available, and whether the nature of the dispute is such that a mutually acceptable outcome seems possible. Even if a formalized mediation or negotiation process is not appropriate, an understanding of the basic principles can be useful in your efforts to achieve voluntary compliance.

Negotiation

Negotiation can be informal or formal and can use a variety of processes, strategies and tactics. Negotiations can involve the use of a neutral facilitator, structured agendas, and organized meetings, or they can simply involve meetings between two parties trying to resolve a dispute. A basic purpose of negotiation is to reach a durable settlement agreement that is satisfactory to all those involved.

There are a number of things to consider before your meeting. Remember — your role will not be that of the enforcer, but will be the more complex role of the negotiator. Can you be objective about the needs and interests of the property owner? Do you have a good understanding of the policy objectives of the affected provisions of the SMP? What are the key environmental interests that you need to protect? Look for areas where both your interests and those of the property owner may coincide and think about solutions that will meet both your objectives and the property owner's interests. Your general objective will be to achieve voluntary compliance with certain provisions of the SMP (reducing time and resources expended on enforcement) while minimizing adverse environmental impacts.

TIPS FOR NEGOTIATING:

- Identify where you can and can't be flexible. Know your bottom line and communicate the basic performance standards that you must achieve.
- Give the violator the opportunity to suggest solutions that may be more timely and cost effective.
- Make sure you are aware of interests and needs of affected parties, including agencies with jurisdiction and the affected parties.
- Listen actively to the information and explanation offered by the other parties.

Mediation

Mediation is a voluntary process by which the parties in a dispute agree to work together to reach an informed and mutually acceptable settlement of specific issues. A mediator, a neutral person, facilitates communication between the parties to the dispute and assists them to develop a mutually agreeable solution. The mediator has no authority to decide issues. Successful mediation processes often result in settlements or recommendations that include solutions different from those proposed by either party. A written agreement is used to embody the solutions. A successful mediation is one where all of the parties believe that they have negotiated a result that is better than that they could otherwise have obtained even though each may have given up something in the process.

Information about mediation and negotiation techniques is available from a wide range of sources. One basic text that is very useful is *Getting to Yes; Negotiating Agreement Without Giving In* by Roger Fisher and William Ury. Another useful resource is a videotape and report on *Negotiating And Mediating Land Use Disputes* produced by the American Institute of Certified Planners. More information about mediation in Washington State including training programs can be obtained from the University of Washington School of Law Continuing Education Program, the Snohomish-Island County Dispute Resolution Center, and the Thurston County Dispute Resolution Center. In addition, the Department of Community Development maintains a roster of people who work as facilitators and mediators.

Joint Ecology/Local Government Action

Assistance from the Department of Ecology

The SMA rules and regulations call for a cooperative program between local government and the Department of Ecology. Upon request, the Shoreline Management Program at Ecology can assist local government in SMA enforcement with investigation, interagency coordination, and legal and technical support during the enforcement action. Ecology can also serve as a third party to help facilitate agreement on a particularly contentious issue.

UPON REQUEST ECOLOGY WILL:

- Provide technical assistance, (e.g. clarifying boundaries of SMA jurisdiction, determinations regarding wetlands or location of the ordinary high water mark, and evaluations of relevant hydrology);
- Assist in gathering evidence, making site inspections, supplying photos;
- Assist in preparing needed documentation such as administrative orders;
- Co-signing enforcement actions such as orders and penalties; and
- Coordinating legal support from the State Attorney General's Office.

Joint Enforcement Actions

Under the SMA, the Department of Ecology has the authority to pursue joint enforcement action with local governments. Alternatively, local governments or Ecology have equal authority to enforce the SMA independently. The Ecology Shorelands Program typically gets involved in shoreline enforcement cases when:

- Local government requests technical assistance (for example, assistance from wetland experts).
- Local government expects an appeal, and sees an advantage for that appeal to go the Shoreline Hearings Board. In this case, local government pursues enforcement action jointly with the Department of Ecology. By law, the appeal of a joint Ecology-local government order is routed through the Shoreline Hearings Board rather than through the local legislative body.
- Local government is unable or unwilling to achieve voluntary compliance.

- When complainants or citizens convince Ecology that they are not getting or will not be able to obtain a fair hearing from local government.

Coordination with Other Agencies

As discussed in previous chapters, many shoreline uses and activities require permits and approvals from other state or federal agencies. Note that compliance with the local government Shoreline Master Program does not preclude any requirements to obtain permits, certificates, licenses, or approval from other governments.

Depending on the nature of the violation, consider whether use of SMA enforcement authority will be as effective as use of other environmental regulations. Consider also whether local government should serve as lead agency on the enforcement action. A joint or coordinated enforcement action with other agencies may be appropriate in situations where:

- the violation is serious and more stringent penalties are available and warranted;
- the violation requires special expertise to investigate and or to develop an appropriate restoration or correction plan; or
- other agencies are already involved and committed to pursuing enforcement.

For example, stronger sanctions exist within the Section 404 provisions of the federal Clean Water Act to address draining and fill of wetlands. The Washington State Pollution Control Act (Chapter 90.48 RCW) includes a number of very strong provisions for addressing water quality violations, including use of unilateral administrative orders with fines of up to \$10,000 per day for non-compliance.

REMEMBER:

- If you defer enforcement lead to other agencies, you still need to ensure your enforcement duties are met, and that resolution of the problem is consistent with your SMP.
- Check to ensure your enforcement solution meets other laws and regulations.

The Appendix includes a list of other laws and programs that commonly apply to shoreline use or development. Agencies most frequently involved in shoreline projects include the Department of Ecology, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, Indian Tribes with jurisdiction (typically determined by river basin), and the Washington State Department of Fish & Wildlife.

Areas of regulatory overlap with SMA authorities typically include:

- any in-water construction in streams, rivers, lakes, or marine waters
- dredging and dredge material disposal
- use or construction involving fisheries and wetland habitat
- contaminated sediments
- water quality, including storm water and industrial discharges and accidental release of pollutants or debris;
- handling or release of solid or hazardous wastes or hazardous substances
- critical or environmentally sensitive areas (for example: unstable slopes, erosion hazard areas, wetlands, or marine habitat);
- natural resources damage from release of toxic substances.

Chapter 6 - Legal Follow-up

This chapter describes the appeal process and discusses the different jurisdictional levels and agencies that hear appeals. This chapter also offers advice for the shoreline administrator should the case be appealed. The focus is on going to court, but the basic recommendations apply to quasi-judicial bodies as well.

Appeals

There are various ways to appeal enforcement actions under the SMA. *Where* an appeal is heard depends upon *who* (which agency) issued the order. There are also several levels of appeals.

Appeals of administrative shoreline enforcement decisions can occur at three different levels. The appeal is made to the agency issuing the order and include:

- Local: Hearing examiners, city/county councils or commissions
- State: Shoreline Hearings Board
- Judicial: Washington State Superior Court

The initial level of appeal is simply to ask the agency that issued the penalty to reconsider its decision. This is called a “request for remission” or “mitigation” or a “request for relief.” Generally, a person receiving a penalty has 30 days from the date of receipt to request relief (it’s always good practice to verify appeal periods). If the enforcement action was taken solely by local government, the request for relief is usually to the local legislative body (the council or commission). Sometimes these legislative bodies delegate the responsibility for hearing appeals to a hearings examiner. Specific procedures for local appeals are established by local government rules.

If an enforcement action is taken by Ecology (or jointly by Ecology and local government), requests for relief are directed to the agencies that issued the penalty. If the penalty is jointly issued, any decision to remit or mitigate the penalty must be agreed to by both Ecology and local officials.

If a request for relief from penalties issued by Ecology (including joint enforcement actions) is denied, an appeal can be made to the Shoreline Hearings Board.

Parties dissatisfied with a decision of the Shoreline Hearings Board can seek review in superior court. Such judicial appeals are not “de novo,” but are limited to a review of the administrative record. This means that the court *will not* take a new look at the witnesses and exhibits, but *will only* examine the findings of fact and determinations of law made by the Shoreline Hearings Board to determine if the Board’s decision was in error.

In most instances, appeals must be heard either by local government or the Shoreline Hearings Board before the court will accept a matter for judicial review. Appeals can involve a complex array of procedural requirements that vary among jurisdictions. Familiarity with the requirements and time periods for the appeal processes of their local jurisdiction as well as those of the Shoreline Hearings Board will be very helpful to local shoreline administrators.

Appeals to Local Government

Although appeal procedures differ among jurisdictions, the requirements and processes are generally similar. At this level, primary responsibilities for processing appeals will likely fall to the local shoreline administrator. Appeal of administrative decisions may be to a hearing examiner (if one is used by the jurisdiction) or to city/county legislative body. Appeals of hearing examiner or planning commission decisions on shoreline matters are heard by the local government council or commission. Generally, appeals can be filed only by someone who participated in the public hearing as a party (i.e., they were the applicant, own the property or gave testimony at the hearing). Requirements for notice, notification of parties and other procedural aspects of the hearing are usually established by ordinance. Depending upon the rules of the jurisdiction, hearings can be either on the record or de novo (i.e., a new hearing). Appeal hearings must meet the due process and procedural standards for quasi-judicial hearings.

“Quasi-judicial” is a term applied to the actions of public bodies when they are required to hold public hearings, consider evidence for or against a proposal, and when their decisions affect specific parties. As part of their deliberation, they must make decisions based on a determination of the facts and consideration of applicable law. In general, they exercise discretion of a judicial nature similar to a court of law. Local government councils or commissions are primarily legislative bodies, but are considered to be quasi-judicial bodies when they hold hearings on shoreline appeals. If the state joins in local SMA enforcement actions, the actions of a city council or board of county commissioners on a shoreline appeal can be appealed further to either the Shoreline Hearings Board or to the courts. However, a person who wishes to appeal a joint state/local enforcement action must first seek review by the Shoreline Hearings Board before being entitled to judicial review.

Appeals to the Shoreline Hearings Board

The Shoreline Hearings Board (SHB) was created by the Shoreline Management Act. It is a quasi-judicial body (see the preceding discussion of quasi-judicial), which means that standards of due process and procedural rules apply to the conduct of the hearings. The Board is an independent agency, not affiliated with any other unit of government. Of the six members of the Board, three are members of the Pollution Control Hearings Board; two are representatives from the Washington State Association of Counties and Association of Washington Cities; and one member is the Commissioner of Public Lands or his designee.

The SHB hears appeals of SMA enforcement actions if such enforcement was initiated by the Department of Ecology or jointly by Ecology and local government. When local governments alone enforce the SMA, appeals are to local government legislative bodies, and not to the SHB. The Board also has jurisdiction to hear appeals of shoreline substantial development permits, conditional use permits, and variances, as well as local government appeals of rules or regulations approved by Ecology. There is no longer a requirement that permit appeals be “certified” to go to the board. Appeal of Shoreline Master Program amendments are not to the SHB but to the Regional Growth Management Hearings Board.

Appeals to the Shoreline Hearings Board involving local government actions are usually handled by the legal staff. However, the local shoreline administrator will likely be asked to provide background information about the case and may be required to give a deposition or give testimony at the hearing. Pre-hearing conferences are often held prior to scheduling of the hearing. A pre-hearing conference has two main purposes: to provide the parties an opportunity to reach a settlement, and to prepare the case for hearing if a settlement is not reached. A pre-hearing conference is the place to articulate legal issues for hearing, to identify witnesses and exhibits, and to schedule the date and time for the actual hearing and pre-hearing activities (e.g., motions). If no settlement is reached, the matter will go before the Board in a formal hearing, similar to court proceedings. The hearing held by the Board is not restricted to the record developed by local government or Ecology. New information can be presented and the Board typically makes a visit to the site. In most cases, the burden of proof is on the party making the appeal. However, in an appeal of an SMA enforcement action, the burden of proof shifts to the Department of Ecology (or to both Ecology and the local jurisdiction in the case of a joint enforcement action). The Board bases its decision on the evidence presented to it (e.g., written testimony, exhibits, and legal arguments). Particular emphasis is placed on the enforcement order and the specific language of the applicable SMP. The Board's decision, which is issued in writing and contains the reasons for their decision, can be appealed to Superior Court within 30 days from the date of the order. A petition for reconsideration can also be filed with the Board within 10 days of the date the order was issued.

Appeals to Superior Court

Decisions of local government and the Shorelines Hearings Board on enforcement, permits, master programs, rules, regulations, guidelines and designations are subject to judicial review. The time in which the appeal must be filed, the place where the appeal can be filed, and who must be included within the legal action are all governed by state or local regulations. Judicial review of decisions of the Shorelines Hearing Board must be filed within 30 days of the Board's action. A party who wishes to bring suit against the Board's decision on a permit can file in the Superior Court of Thurston County; in the county where he/she lives; or the county in which the property is located. However, judicial review of the Board's decision on appeals of master programs, rules, regulations, guidelines or designations must be filed in the Superior Court of Thurston County.

Rules of procedure for Washington courts require that the person requesting the shoreline permit, the property owners of record, and government agencies which have regulatory authority over the matter must be included in any lawsuit concerning shoreline permits and master programs.

Going to Court

Well-documented cases tend to settle out of court without the added expense of a lengthy defense. However, if the case goes to court, you will likely be called as a witness. This section provides tips and reminders for witnesses. These recommendations may also be helpful in quasi-judicial hearings (such as those before the Shorelines Hearings Board). Careful preparation before giving testimony will help establish roles and greatly increase your level of comfort.

Under most circumstances the administrator or inspector will be called as a “fact witness” to testify about matters that they have personal knowledge of. Your basis for having that knowledge will be established prior to your testimony.

The three most common attacks on a witness are competency, credibility, and impeachment. The following is a brief discussion of each:

- **Competency** concerns questions of whether you have sufficient qualifications to give adequate testimony. It is determined by the judge case by case. In most cases, a person who serves as a shoreline administrator would likely be considered to be a competent witness.
- **Credibility** refers to the reliability and trustworthiness of your testimony. Were you in a position to make the observation? Do you have the experience necessary to substantiate your testimony? Is there any reason for disbelieving your account of the facts? There are many subtleties here. A lack of composure under fire can tarnish your credibility in the view of a jury or judge. Do not elaborate beyond your direct knowledge or you may provide unexpected opportunities for the defense to attack your credibility as well as other aspects of the case.
- **Impeachment** occurs when the defense detects a flaw in your testimony such as inconsistent statements, contradictions of fact, a poor reasoning process, or bias about the case and/or the opposing party. Opposing counsel will use such flaws to challenge the truthfulness and credibility of your entire testimony. The defense can use a chink in your credibility to discredit you and the body of your testimony in the eyes of a judge or jury.

Your principal responsibility will be to give a truthful accounting of the facts. In most cases, your attorney should help prepare you for giving testimony in court or giving a deposition (depositions are a way of taking testimony under oath outside of a courtroom).

Your attorney should review the strength and weakness of your knowledge, refresh your memory and help make you more comfortable with the court proceedings. Your attorney should review the questions they intend to ask and may review your answers as well. In contrast, the defense may try to create doubt or insecurity in the witness's mind by asking the question, "Did you discuss this with your attorney before you came here?" suggesting there may be something improper about it (there isn't). You would answer, "yes." The defense might then ask you, "Were you told how to answer?" Your answer would be, "I was told to tell the truth."

The more you say, the more opportunity the defense has to find areas of weakness in your testimony. Listen carefully to the questions asked of you. Answer only the question asked and then shut up. Don't ramble. A common problem is to answer a question that is anticipated, but has not been asked. You may think you know where the defense is going, but they may have another agenda or may not have thought of the question at all until you volunteered an answer. The issues you bring up may or may not be relevant and could create unforeseen or undesirable consequences.

You cannot accurately answer a question that you do not fully understand. If you don't understand a question, pause and think about it. You may ask the judge to allow you to refer to your field notes, photographs, or inspection report. You can ask that the question be repeated if you have not heard it clearly or have trouble understanding it. It is usually permissible for you to ask that a question be rephrased, or that a complicated or compound question be broken up. Some aggressive defense counsels may press you for answers by establishing a rhythm of easy "yes or no" questions and then abruptly change pace with a complicated question in hopes of getting a poorly considered answer or disrupting your composure. Pausing and thinking before giving your answer will allow you time to reflect, to maintain your demeanor, and stay in control of your testimony.

Don't let silence by the defense counsel motivate you to fill the void by talking. Asking leading questions (those which suggest an answer), efforts to intimidate, assaults on your credibility, or twisting interpretations are all techniques used by attorneys and that are allowed within certain ethical boundaries. Some defense attorneys may tend to test these boundaries if these techniques work to their client's favor. Don't allow actions by the defense to affect your emotions or behavior. Your attorney is allowed to object to possible breaches of protocol and your calm composure will only reflect your professionalism.

Trials are by nature adversarial — recognize it, stick to what you know, and answer only the questions put before you. Remember, you are there only as a witness of fact. Relate what you did and what you know and always tell the truth.

Appendix 1 – Sample Forms and Letters

Shoreline Enforcement Form Inserts

1. Local jurisdiction:
2. Full legal name of violator:
(QUERY: as individual? marital community? partnership? or corporation?)
3. Docket No.: (From Ecology if joint order)
4. Name and address of violator:
5. Amount of penalty:
6. Street Address of location of violation:
7. Legal description of location of violation:
(e.g., quarter section, section, township, range)
8. Date of investigation:
9. What investigation disclosed:
(Nature, location, dimensions or scope of violation)
10. Shorthand phrase describing violating activity:
(e.g., “bulkheading waterward of the ordinary high water mark”)
11. Shoreline Master Program provisions being violated:
(remember to note the shoreline designation within the SMP)
12. Water body:
(QUERY: Shoreline of statewide significance?)
13. Date of signature:
14. Local Shoreline Administrator:



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

P.O. Box 47600 • Olympia, Washington 98504-7600 • (206) 407-6000 • TDD Only (Hearing Impaired) (206) 407-6006

CERTIFIED MAIL

[13]

[4]

Re: Shoreline Violation, Order No. [3]

Dear [2]:

Enclosed is an original Ecology Enforcement Order No. [3] from the Department of Ecology (and [1] if joint).

A form entitled "Acknowledgement of Service" is also enclosed. Please sign this form and return it to this office.

This order is being issued by ([1] (if joint and) the Washington State Department of Ecology under provisions of RCW 90.58.210, WAC 173-27 and the applicable shoreline master program.

All correspondence and questions relating to these documents should be directed to the undersigned, at the Department of Ecology and to [14] of [1].

Sincerely,

James D. Anest
Enforcement Coordinator
Shorelands and Environmental
Assistance Program
(360) 407-6529

JA:
Enclosure

cc:

[1] (if joint)
and
THE DEPARTMENT OF ECOLOGY

IN THE MATTER OF COMPLIANCE BY [2])
WITH THE SHORELINE MANAGEMENT ACT AND) ACKNOWLEDGEMENT OF SERVICE
THE [1] SHORELINE MASTER PROGRAM) ENFORCEMENT DOCKET NO. [3]
)

TO: Department of Ecology
State of Washington
P.O. Box 47600
Olympia, WA 98504-7600

Attention: Jim Anest
Enforcement Coordinator
Shorelands and Environmental Assistance Program

Receipt is acknowledged of Shorelands Enforcement Order No. [3]

Dated this _____ day of _____, 199_.

(Signature)

(Title)

Company/agency (if applicable)

[1] (if joint enforcement)
and
Washington State
Department of Ecology

IN THE MATTER OF THE)
COMPLIANCE BY [2] WITH CHAPTER) DOCKET NO. [3]
90.58 RCW AND THE RULES AND) ORDER AND NOTICE
REGULATIONS ADOPTED THEREUNDER) OF PENALTY INCURRED
INCLUDING THE [1] SHORELINE)
MASTER PROGRAM)

To: [4]

NOTICE IS HEREBY GIVEN that you have incurred, and there is now due and payable from you, a penalty in the amount of [5] thousand dollars (\$ [5],000) for undertaking an activity on the shorelines of the state in violation of Chapter 90.58 RCW and the [1] Shoreline Management Master Program. OPTIONAL; if all of the following requirements, terms and conditions of this order are fully satisfied in a timely manner by [2], the penalty will be waived in full. This Order and Penalty is based upon the following allegations of fact and law:

ALLEGATIONS OF FACT

1. That [2] own(s) or control(s) certain real property located at [6] and within Section [7], Township [7], Range [7] of W.M. within [1].
2. That on [8], enforcement staff from the Shorelands and Environmental Assistance Program of the Department of Ecology conducted (or from [1] if joint enforcement the city or county) a site inspection of the above described property.
3. That the above described site inspections disclosed that [9].

ALLEGATIONS OF LAW

4. The above described real property is in relevant part within shoreline jurisdiction, RCW 90.58.030 (2). QUERY; Shoreline of statewide significance?
5. That the above described [10] constitutes substantial development under RCW 90.58.030.
6. RCW 90.58.140 states that a development shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this chapter and after adoption or approval, as appropriate, the applicable guidelines, rules, or master program governing that shoreline.

Shoreline Order [3]

[2]
[13]

7. RCW 90.58.140(2) states that "A substantial development shall not be undertaken on shorelines of the state without first obtaining a permit from the government entity having administrative jurisdiction under this chapter."
8. RCW 90.58.210 (2) provides that once substantial development is permitted within shoreline jurisdiction, that such development must be conducted in a manner that is consistent with the terms and conditions of said permit.
9. RCW 90.58.020 requires that permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.
10. WAC 173-27-270 provides that local government and/or the Department of Ecology shall have the authority to serve an order upon a person if an activity being undertaken on shorelines of the state is in violation of chapter 90.58 RCW or the applicable local master program.
11. [Add Local Master Program Plan Provisions]
QUERY; Specific shoreline designation in master program?

In view of the foregoing and in accordance with the provisions of WAC 173-27 (the Washington Administration Code).

IT IS ORDERED THAT [2] and any other person acting as his employee or agent shall, upon receipt of this Order, immediately cease and desist from all further [10] activities within 200 feet of the ordinary high water mark of the [11], or within associated wetlands on the above referenced parcel, unless and only to the extent such work is specifically authorized by a currently valid shoreline permit issued by [1] or authorized by an enforcement order from both the Department of Ecology and [1] for the purpose of restoring the site.

IT IS FURTHER ORDERED THAT [2] shall within twenty (20) days of your receipt of this Order, respond specifically whether you admit or deny or lack sufficient knowledge to admit or deny each of the numbered Allegations of Fact or Allegations of Law contained in this Order.

IT IS FURTHER ORDERED THAT [2] submit a plan within thirty (30) days of his receipt of this Order to the Shorelands and Environmental Assistance Program of the Department of Ecology (P.O. Box 47690, Olympia, WA 98504-7690) in which he describes in detail his plans to restore to the maximum extent feasible, the shoreline of [12].

Failure to comply with the terms of this order shall result in further actions by the Department of Ecology, including, but not limited to, the issuance of further civil penalties of up to one thousand dollars per day and criminal prosecution pursuant to 90.58.210 RCW.

Shoreline Order [3]
[2]
[13]

The penalty herein described is due and payable by you within thirty (30) days of your receipt of this Notice of Penalty. Please remit the penalty fee payable to Department of Ecology, Cashiering Section, P.O. Box 5128, Lacey, WA 98503.

If, however, for any reason you believe that the violation herein described did not occur or you have an explanation as to why it occurred, or any other fact which you believe the Department should consider with regard to this penalty and you desire to submit an "Application of Relief from Penalty," set forth these facts and return it to this Department within thirty (30) days. Your statement must be signed under oath before a notary public or any other person authorized to take oaths.

Upon receipt of an "Application for Relief from Penalty" the Department will consider the same and will either reduce the penalty, cancel the penalty, or allow it to remain as originally stated. You will be duly notified of our decision. Ecology's decision regarding your "Application for Relief" is appealable to the Shorelines Hearings Board pursuant to RCW 90.58.210 and WAC 173-27-290.

Signed in Olympia, Washington
this [13] day of [13] 199__

[Regional Supervisor]
Shorelands and Environmental
Assistance Program

Signed in _____, Washington
this [13] day of [13] 199__

for [1]



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

P.O. Box 47600 • Olympia, Washington 98504-7600 • (206) 407-6000 • TDD Only (Hearing Impaired) (206) 407-6006

[13]

CERTIFIED MAIL

[4]

Subject: Shoreline Warning and Investigation

Dear Mr. or Ms.: [2]

The Revised Code of Washington (RCW 90.58.140, the State Shoreline Management Act) provides that a development shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this Chapter and the guidelines, rules, and master programs established under that law. A substantial development shall not be undertaken on shorelines of the state without first obtaining a permit from the government entity having administrative jurisdiction under this chapter.

Representatives of [and/or] [1] the Department of Ecology have reason to believe that you are responsible for substantial development within Shoreline Management jurisdiction in violation of the provision of Chapter 90.58 and provisions of the [1] Shoreline Master Program. Specifically we have seen [10].

This letter is primarily intended to gather the information necessary to determine whether or not a violation has occurred, and if so, what kind of enforcement action is appropriate under the circumstances. This determination does not constitute an order or directive under RCW 90.58.210. However, the Department has authority to issue an administrative order and penalty (of up to one thousand dollars per day) on this matter. We are prepared to do so, unless within thirty days from the receipt of this letter, you file a full report with the department which provides detailed responses to the following questions:

1. Describe in detail what work was done in and along the shoreline of [12] on your property during the past three years.
2. Identify to the best of your recollection specifically when such work was done.
3. Describe the purpose of the work done and the future plans and final results you hope to achieve at that location.

Shoreline Warning and Investigation Letter
[2]
[13]

4. Identify those individuals or organizations who were physically and/or financially involved in the work performed. Include equipment owners, operators, and others.
5. Was the work performed on your property done with your permission? If not, explain any actions you have taken or will take with regard to the work done.
6. Identify specific government permits or authorization secured from any level of government, and identify those individuals contacted to secure such permits or other authorizations necessary.

Upon receipt of this report, [1] [and/or if joint] the Department shall determine its response in light of the facts and applicable law, and shall notify [2] by certified mail. Any questions or correspondence regarding this letter should be directed to Jim Anest, the Shorelands Enforcement Coordinator, phone (206) 407-6529 (and to [14] if joint enforcement).

Dated at _____ this _____ day of _____, 1994.

Regional Supervisor
Shorelands and Environmental
Assistance Program

TM:JA:
swai.wp

Appendix 2 - The Shoreline Management Act and Regulations

**SMA
ENFORCEMENT
SECTIONS**

RCW 90.58.210 Court actions to insure against conflicting uses and to enforce -- Civil penalty -- Review. (1) The attorney general or the attorney for the local government shall bring such injunctive, declaratory, or other actions as are necessary to insure that no uses are made of the shorelines of the state in conflict with the provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter.

(2) Any person who shall fail to conform to the terms of a permit issued under this chapter or who shall undertake development on the shorelines of the state without first obtaining any permit required under this chapter shall also be subject to a civil penalty not to exceed one thousand dollars for each violation.

Each permit violation or each day of continued development without a required permit shall constitute a separate violation.

(3) The penalty provided for in this section shall be imposed by a notice in writing, either by certified mail with return receipt requested or by personal service, to the person incurring the same from the department or local government, describing the violation with reasonable particularity and ordering the act or acts constituting the violation or violations to cease and desist or, in appropriate cases, requiring necessary corrective action to be taken within a specific and reasonable time.

(4) Within thirty days after the notice is received, the person incurring the penalty may apply in writing to the department for remission or mitigation of such penalty. Upon receipt of the application, the department or local government may remit or mitigate the penalty upon whatever terms the department or local government in its discretion deems proper. Any penalty imposed pursuant to this section by the department shall be subject to review by the shorelines hearings board. Any penalty imposed

pursuant to this section by local government shall be subject to review by the local government legislative authority. Any penalty jointly imposed by the department and local government shall be appealed to the shorelines hearings board. [1986 c 292 § 4; 1971 ex.s. c 286 § 21.]

RCW 90.58.220 General penalty. In addition to incurring civil liability under RCW 90.58.210, any person found to have wilfully engaged in activities on the shorelines of the state in violation of the provisions of this chapter or any of the master programs, rules, or regulations adopted pursuant thereto shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than twenty-five nor more than one thousand dollars or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment: Provided, That the fine for the third and all subsequent violations in any five-year period shall be not less than five hundred nor more than ten thousand dollars: Provided further, That fines for violations of RCW 90.58.550, or any rule adopted thereunder, shall be determined under RCW 90.58.560. [1983 c 138 § 3; 1971 ex.s. c 286 § 22.]

RCW 90.58.230 Violators liable for damages resulting from violation -- Attorney's fees and costs. Any person subject to the regulatory program of this chapter who violates any provision of this chapter or permit issued pursuant thereto shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to violation. The attorney general or local government attorney shall bring suit for damages under this section on behalf of the state or local governments. Private persons shall have the right to bring suit for damages under this section on their own behalf and on the behalf of all persons similarly situated. If liability has been established for the cost of restoring an area affected by a violation the court shall make provision to assure that restoration will be accomplished within a reasonable time at the expense of the violator. In addition to such relief, including money damages, the court in its discretion may award attorney's fees and costs of the suit to the prevailing party. [1971 ex.s. c 286 § 23.]

Shoreline Management Act
Chapter 173-27 WAC
Sections 240 – 310

WAC 173-27-240 Authority and purpose.
WAC 173-27-250 Definitions.
WAC 173-27-260 Policy.
WAC 173-27-270 Order to cease and desist.
WAC 173-27-280 Civil penalty.
WAC 173-27-290 Appeal of civil penalty.
WAC 173-27-300 Criminal penalty
WAC 173-27-310 Oil or natural gas exploration--Penalty.

WAC 173-27-240 Authority and purpose. This part is adopted under RCW 90.58.200 and 90.58.210 to implement the enforcement responsibilities of the department and local government under the Shoreline Management Act. The act calls for a cooperative program between local government and the state. It provides for a variety of means of enforcement, including civil and criminal penalties, orders to cease and desist, orders to take corrective action, and permit rescission. The following should be used in addition to other mechanisms already in place at the local level and does not preclude other means of enforcement.

[Statutory Authority: RCW 90.58.140(3) and [90.58].200. 96-20-075 (Order 95-17), § 173-27-240, filed 9/30/96, effective 10/31/96.]

WAC 173-27-250 Definitions. The definitions contained in WAC 173-27-030 shall apply in this part also except that the following shall apply when used in this part of the regulations:

(1) "Permit" means any form of permission required under the act prior to undertaking activity on shorelines of the state, including substantial development permits, variances, conditional use permits, permits for oil or natural gas exploration activities, permission which may be required for selective commercial timber harvesting, and shoreline exemptions; and

(2) "Exemption" means authorization from local government which establishes that an activity is exempt from substantial development permit requirements under WAC 173-27-040, but subject to regulations of the act and the local master program.

[Statutory Authority: RCW 90.58.140(3) and [90.58].200. 96-20-075 (Order 95-17), § 173-27-250, filed 9/30/96, effective 10/31/96.]

WAC 173-27-260 Policy. These regulations should be used by local government in carrying out enforcement responsibilities under the act, unless local government adopts separate rules to implement the act's enforcement provision.

Enforcement action by the department or local government may be taken whenever a person has violated any provision of the act or any master program or other regulation promulgated under the act. The choice of enforcement action and the severity of any penalty should be based on the nature of the violation, the damage or risk to the public or to public resources, and/or the existence or degree of bad faith of the persons subject to the enforcement action.

[Statutory Authority: RCW 90.58.140(3) and [90.58].200. 96-20-075 (Order 95-17), § 173-27-260, filed 9/30/96, effective 10/31/96.]

WAC 173-27-270 Order to cease and desist. Local government and/or the department shall have the authority to serve upon a person a cease and desist order if an activity being undertaken on shorelines of the state is in violation of chapter 90.58 RCW or the local master program.

(1) Content of order. The order shall set forth and contain:

(a) A description of the specific nature, extent, and time of violation and the damage or potential damage; and

(b) A notice that the violation or the potential violation cease and desist or, in appropriate cases, the specific corrective action to be taken within a given time. A civil penalty under WAC 173-27-280 may be issued with the order.

(2) Effective date. The cease and desist order issued under this section shall become effective immediately upon receipt by the person to whom the order is directed.

(3) Compliance. Failure to comply with the terms of a cease and desist order can result in enforcement actions including, but not limited to, the issuance of a civil penalty.

[Statutory Authority: RCW 90.58.140(3) and [90.58].200. 96-20-075 (Order 95-17), § 173-27-270, filed 9/30/96, effective 10/31/96.]

WAC 173-27-280 Civil penalty. (1) A person who fails to conform to the terms of a substantial development permit, conditional use

permit or variance issued under RCW 90.58.140, who undertakes a development or use on shorelines of the state without first obtaining a permit, or who fails to comply with a cease and desist order issued under these regulations may be subject to a civil penalty by local government. The department may impose a penalty jointly with local government, or alone only upon an additional finding that a person:

(a) Has previously been subject to an enforcement action for the same or similar type of violation of the same statute or rule; or

(b) Has been given previous notice of the same or similar type of violation of the same statute or rule; or

(c) The violation has a probability of placing a person in danger of death or bodily harm; or

(d) Has a probability of causing more than minor environmental harm; or

(e) Has a probability of causing physical damage to the property of another in an amount exceeding one thousand dollars.

(2) In the alternative, a penalty may be issued to a person by the department alone, or jointly with local government for violations which do not meet the criteria of subsection (1)(a) through (e) of this section, after the following information has been provided in writing to a person through a technical assistance visit or a notice of correction:

(a) A description of the condition that is not in compliance and a specific citation to the applicable law or rule;

(b) A statement of what is required to achieve compliance;

(c) The date by which the agency requires compliance to be achieved;

(d) Notice of the means to contact any technical assistance services provided by the agency or others; and

(e) Notice of when, where, and to whom a request to extend the time to achieve compliance for good cause may be filed with the agency.

Furthermore, no penalty shall be issued by the department until the individual or business has been given a reasonable time to correct the violation and has not done so.

(3) Amount of penalty. The penalty shall not exceed one thousand dollars for each violation. Each day of violation shall constitute a separate violation.

(4) Aiding or abetting. Any person who, through an act of commission or omission

procures, aids or abets in the violation shall be considered to have committed a violation for the purposes of the civil penalty.

(5) Notice of penalty. A civil penalty shall be imposed by a notice in writing, either by certified mail with return receipt requested or by personal service, to the person incurring the same from the department and/or the local government, or from both jointly. The notice shall describe the violation, approximate the date(s) of violation, and shall order the acts constituting the violation to cease and desist, or, in appropriate cases, require necessary corrective action within a specific time.

(6) Application for remission or mitigation. Any person incurring a penalty may apply in writing within thirty days of receipt of the penalty to the department or local government for remission or mitigation of such penalty. Upon receipt of the application, the department or local government may remit or mitigate the penalty only upon a demonstration of extraordinary circumstances, such as the presence of information or factors not considered in setting the original penalty.

When a penalty is imposed jointly by the department and local government, it may be remitted or mitigated only upon such terms as both the department and the local government agree.

[Statutory Authority: RCW 90.58.140(3) and [90.58].200. 96-20-075 (Order 95-17), § 173-27-280, filed 9/30/96, effective 10/31/96.]

WAC 173-27-290 Appeal of civil penalty. (1) Right of appeal. Persons incurring a penalty imposed by the department or imposed jointly by the department and local government may appeal the same to the shorelines hearings board. Appeals to the shorelines hearings board are adjudicatory proceedings subject to the provisions of chapter 34.05 RCW. Persons incurring a penalty imposed by local government may appeal the same to the local government legislative authority.

(2) Timing of appeal. Appeals shall be filed within thirty days of receipt of notice of penalty unless an application for remission or mitigation is made to the department or local government. If such application is made, appeals shall be filed within thirty days of receipt of local government's and/or the department's decision regarding the remission or mitigation.

(3) Penalties due.

(a) Penalties imposed under this section shall become due and payable thirty days after receipt of notice imposing the same unless application for remission or mitigation is made or an appeal is filed. Whenever an application for remission or mitigation is made, penalties shall become due and payable thirty days after receipt of local government's and/or the department's decision regarding the remission or mitigation. Whenever an appeal of a penalty is filed, the penalty shall become due and payable upon completion of all review proceedings and upon the issuance of a final decision confirming the penalty in whole or in part.

[Statutory Authority: RCW 90.58.140(3) and [90.58].200. 96-20-075 (Order 95-17), § 173-27-310, filed 9/30/96, effective 10/31/96.]

(b) If the amount of a penalty owed the department is not paid within thirty days after it becomes due and payable, the attorney general, upon request of the department, shall bring an action in the name of the state of Washington to recover such penalty. If the amount of a penalty owed local government is not paid within thirty days after it becomes due and payable, local government may take actions necessary to recover such penalty.

(4) Penalty recovered. Penalties recovered by the department shall be paid to the state treasurer. Penalties recovered by local government shall be paid to the local government treasury. Penalties recovered jointly by the department and local government shall be divided equally between the department and the local government unless otherwise stipulated in the order.

[Statutory Authority: RCW 90.58.140(3) and [90.58].200. 96-20-075 (Order 95-17), § 173-27-290, filed 9/30/96, effective 10/31/96.]

WAC 173-27-300 Criminal penalty.

The procedures for criminal penalties shall be governed by RCW 90.58.220.

[Statutory Authority: RCW 90.58.140(3) and [90.58].200. 96-20-075 (Order 95-17), § 173-27-300, filed 9/30/96, effective 10/31/96.]

WAC 173-27-310 Oil or natural gas exploration--Penalty. Persons violating the provisions of RCW 90.58.550 or chapter 173-15 WAC shall be subject to a civil penalty issued by the department in an amount of up to five thousand dollars a day. The procedures for oil or natural gas exploration penalties shall be governed by RCW 90.58.560.

Appendix 3 - References

1. Anest, Jim. 1992. Presentation Materials for SMA Enforcement Workshops.
2. Deusen, Millard. 1994. Telephone conversation with Millard Deusen, Habitat Management Division, Washington Department of Fisheries, March 25, 1994.
3. Farr, Ann. 1994. Telephone conversation with Ann Farr. Contributing Author Shoreline Master Program Handbook, April 12, 1994.
4. Huckell/Weinman Associates, Inc. 1994 Telephone Survey of Local Government Shoreline Administrators, Unpublished, February, 1994.
5. Katich, Peter. 1994 Telephone conversation with Peter Katich, City of Tacoma Building and Land Use Division, April, 11, 1994.
6. MacAuliffe, Chris. 1994. Telephone conversation with Chris MacAuliffe, U.S. Army Corps of Engineers, March 11, 1994.
7. Smith, Douglas. 1994. Telephone conversations with Douglas Smith, U.S. Environmental Protection Agency, Region 10 March 7 & 9, 1994.
8. Washington State Department of Ecology. 1994. Shoreline Master Program Guidebook, Volume I and Volume II, Second Edition, Publication No. 93-104.
9. Washington State Department of Ecology. 1990. Ecology Enforcement Manual, Guidelines and Procedures. Central Programs/Enforcement Unit, July, 1990.
10. Washington State Department of Ecology. 1990. Commonly Required Environmental Permits for Washington State. Document No. 90-29, September 1990.
11. U.S. Environmental Protection Agency, Region 10. 3rd Edition, Conducting Compliance Inspections. Environmental Services Division, Technical Support Branch EPA 910/9-91-047.
12. Wright, Steve. 1994. Meeting with Steve Wright, U.S. Army Corps of Engineers, March 16, 1994.

Appendix 4 - Other Shoreline Related Programs, Regulations & Permits

| Permit/program/ or Regulatory Approval | Primary Subject Area | Primary Jurisdiction | Enabling Legislation (federal, State, Local) |
|---|--|---|--|
| Section 10 Permit | Dredging | Corps of Engineers | Rivers & Harbor Act |
| Section 404 Permit | Placement of Fill | Corps of Engineers | Clean Water Act 33 USC Section 1251 et. seq. |
| Section 401 Certification | Regulate Water quality Impacts | Dept. of Ecology | Clean Water Act |
| Hydraulics Project Approval | Water habitat impacts | Dept. of Fish & Wildlife | 75.20 RCW |
| NEPA | Process for assuring public/environmental review of proposals | Corps of Engineers or other federal lead agency | National Environmental Policy Act 40 CFR Part 1500 |
| SEPA | Process for assuring public/environmental review of proposals | Dept. of Ecology; other state/local lead agency | State Environmental Policy Act 42.21C RCW |
| CZM Consistency | consistency with federal coastal zone policy requirements | Dept. of Ecology | Coastal Zone Mgt. Act 16 USC Section 1451 et seq. |
| NPDES Program/Permit | Water quality; industrial/ stormwater discharges | Dept. of Ecology/Local Utility | Clean Water Act 33 USC Section 1251 et. seq. Water Pollution Control Act 90.48 RCW |
| PSWQA Plan | Puget Sound protection/basin water quality framework | Dept. of Ecology/Local | Puget Sound Water Quality Authority Act 90.70 RCW |
| DNR Open Water | dredge disposal | Dept. of Natural Resources | 33 USC Section 1251 et.seq. |
| DNR Tidelands | public use of tidelands | Dept. of Natural Resources | |
| GMA/Critical Area Ordinance | Growth management provisions | City or County | 36.70A RCW |

| Permit/program/ or Regulatory Approval | Primary Subject Area | Primary Jurisdiction | Enabling Legislation (federal, State, Local) |
|---|---|---|--|
| | including resource protection | | |
| Zoning | | City or County | |
| Tribal Review | Tribal resource protection | Individual Tribes | MOA w/EPA/Ecology |
| Sediment Mgt. Standards | sediment quality | Dept. of Ecology | Chapter 173-204 WAC implementing 70.105, 90.48, and 90.70 RCW |
| Air Quality | air quality standards | EPA, Dept. of Ecology Regional Authority | |
| Dangerous Waste Mgt. | state hazardous waste | Dept. of Ecology, local health dept. | 70.105 RCW Chapter 173-303 |
| Hazardous Waste Mgt. | federal hazardous waste | EPA | |
| Contaminated Sites | Cleanup and management of historically contaminated sites | EPA (federal sites), Dept of Ecology (state sites) | CERCLA/SARA 42 USC Section 9601 et seq./PL NO. 99-499 Model Toxics Control Act |
| Natural Resource Damage | contamination impacts to upland, wetland or marine habitat, to air and water quality and to, land resources | NOAA (federal) Dept. of Ecology (state) and other "Trustees" | CERCLA Model Toxics Control Act (see above) |