

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
WESTERN WASHINGTON REGION  
STATE OF WASHINGTON

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NO. 17-2-0009

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FRIENDS OF THE SAN JUANS,

Petitioner,

v.

SAN JUAN COUNTY and the DEPARTMENT OF ECOLOGY,

Respondents.

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BRIEF OF SAN JUAN COUNTY

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TABLE OF CONTENTS

1  
2  
3 **TABLE OF AUTHORITIES**..... iii  
4 **I. INTRODUCTION**..... 1  
5 **II. BACKGROUND FACTS** ..... 1  
6     **A. Inventory and Characterization Report** ..... 2  
7     **B. Marine Resource Committee**..... 3  
8 **III. AUTHORITY AND ARGUMENT**..... 4  
9     **A. Burden, Standard, Presumption of Validity** ..... 4  
10     **B. Friends Has Not Met its Burden of Proof** ..... 5  
11     **C. Issue 1: The SMP Shoreline Designations meet the requirements**  
12         **of the SMA, the GMA and all applicable guidelines** ..... 6  
13         1. **The function of environmental designations**..... 7  
14         2. **I&C Report** ..... 8  
15         3. **Shaw Island’s Blind Bay** ..... 9  
16         4. **Lopez Sound**..... 10  
17         5. **SMP Designation Amendment List** ..... 10  
18     **D. Issue 2: The SMP’s Mitigation Provisions are Consistent**  
19         **with the SMA and SMP Guidelines** ..... 11  
20     **E. Issue 3: The SMP Protects Shoreline Vegetation Consistent**  
21         **with the SMA and the Guidelines** ..... 12  
22     **F. Issues 4 and 5: The SMP’s Shoreline Stabilization and Overwater**  
23         **Structure Rules are Consistent with the SMA and the SMP Guidelines** ..... 14  
24         1. **Shoreline stabilization**..... 14  
           2. **Overwater structures** ..... 15  
25     **G. Issue 6: The SMP’s Nonconforming Development Provisions**  
           **are Consistent with the SMA and its Guidelines** ..... 17  
26     **H. Issue 7: The SMP Ensures No Net Loss as Required by the SMA** ..... 19  
27     **I. Invalidity** ..... 21  
28 **IV. CONCLUSION**..... 21

TABLE OF AUTHORITIES

CASES

*Elizabeth Mooney v. City of Kenmore*, GMHB Case No. 12-3-0004, FDO (02/27/2013) ....6

*Futurewise, et al. v. Spokane County et al.*, Case No. 13-1-0003c, FDO (12/23/13) .....5

*Lake Burien Neighborhood v. City of Burien*, GMHB Case No. 13-3-0012,  
FDO (06/16/14) .....5, 6

*Olympic Stewardship Found. v. State Env'tl. & Land Use Hearings Office through W.  
Washington Growth Mgmt. Hearings Bd.*,  
199 Wn. App. 668, 399 P.3d 562 (2017) .....19

*Weyerhaeuser, et al. v. Thurston County*, Case No. 10-2-0020c,  
Amended FDO (06/17/11) .....21

STATUTES

RCW 35.63.125 .....4

RCW 35A.63.105 .....4

RCW 36.70A.040(4) .....4

RCW 36.70A.070 .....4

RCW 36.70A.280 .....4

RCW 36.70A.290 .....4

RCW 36.70A.302 .....21

RCW 36.70A.320(1) .....5

RCW 36.70A.3201 .....6

Chapter 43.21C RCW .....4

RCW 90.58.020 .....4

RCW 90.58.030(2)(f)(iii) .....5

RCW 90.58.050 .....6

RCW 90.58.060(1) .....6

RCW 90.58.190(2) .....4, 5

ADMINISTRATIVE CODE

WAC 173-26-186(8)(d) .....19

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3  
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WAC 173-26-201 .....2, 8, 12, 19, 20  
WAC 173-26-211 .....7, 8, 10  
WAC 173-26-231 .....14, 15, 17  
WAC 173-27-080 .....18  
WAC 220-660-140 .....15  
WAC 220-660-380 .....15, 16

LOCAL REGULATIONS

San Juan County Home Rule Charter, Section 2.30(2)(d) .....4  
San Juan County Code 18.20.030 .....11  
San Juan County Code Table 18.35.130-2 .....13  
Resolution 35-1996 .....3

1 **I. INTRODUCTION**

2 This is an appeal of San Juan County's Shoreline Master Program Update, Ordinances 01-  
3 2016 and 11-2017. Though there are certainly a myriad of ways to achieve compliance with the  
4 GMA, a failure to do so in the ways advocated for by Friends does not mean the County failed to  
5 comply with the GMA.

6 **II. BACKGROUND FACTS**

7 San Juan County has spent many years developing the Shoreline Master Program (SMP)  
8 amendments adopted in Ordinances 01-2016 and 11-2017. The County hired Herrera  
9 Environmental Consultants, ICF International, and The Watershed Company to assist updating the  
10 SMP and prepare the Shoreline Inventory and Characterization Report (I&C Report). IR 001499.  
11 In 2011, the County established a Technical Advisory Committee (TAC) composed of individuals  
12 from the Marine Resource Committee, MRC Science Subcommittee, the San Juan Salmon  
13 Recovery Project's Technical Advisory Group and the Stormwater Citizen's Advisory Committee.  
14 IR 000111. The scope of work for the TAC was as follows:

15 The work of the TAC will focus on 5 distinct documents; the inventory and  
16 characterization analysis of the County's shoreline, the restoration plan, the draft  
17 regulations, the cumulative impact analysis and the no-net loss report. The TAC  
18 will review and evaluate these documents for the breadth as well as authority of  
19 the data, and the scientific legitimacy of the conclusions drawn from those  
20 sources. The TAC will evaluate the draft regulations solely for consistency with  
21 expected impacts detailed in the cumulative impact analysis. The TAC will  
22 review and evaluate the restoration plan for completeness, expected outcomes and  
23 potential priorities. The TAC is not expected to review or evaluate any of the  
24 proposed or existing goals or policies of the SMP.

IR 000104.

The first public draft of the I&C Report was published online for review on September 7,  
2011. IR 000210. Following extensive public participation, a second draft of the I&C Report was  
published five months later on February 1, 2012. IR 000341. After the addition of property

1 owners' descriptions of their property and following a public meeting and additional feedback from  
2 the public, a third draft was published online on April 29, 2013. IR 001479. On July 19, 2013,  
3 The Planning Commission concluded a lengthy public hearing and deliberations and adopted  
4 findings and recommendations. IR 002463. The County Council was regularly briefed on the  
5 development of the SMP throughout 2012, 2013, 2014 and 2015. IR 007522.<sup>1</sup> The Council held  
6 a public hearing spanning several days in November and December 2015 and January, February  
7 and March 2016. *Id.* Ordinance 01-2016 was adopted on April 5, 2016. (IR 007681) and submitted  
8 to Ecology on June 28, 2016. IR 008551. In response to the Ecology review process, the County  
9 adopted Ordinance 11-2017 amending Ordinance 1-2016 on September 19, 2017. IR ECY036017.<sup>2</sup>

10 On October 16, 2017, Ecology approved the County's SMP comprehensive update. IR  
11 010178. This appeal followed.

#### 12 **A. Inventory and Characterization Report**

13 In accordance with WAC 173-26-201(c) and (d), the County prepared an Inventory and  
14 Characterization report to inventory shoreline conditions and analyze shoreline issues of concern.  
15 IR 001479. This is a detailed and thorough 375 page analysis. As the I&C Report explains,

16 Shorelines in the County were characterized using a nested system of reaches and  
17 management areas. A management area is an area of shoreline typically  
18 distinguished by similar characteristics relating to the relative intensity of land use,  
19 the physical landscape and/or critical hydrogeomorphic or biological processes.  
20 The use of management areas take the place of "hydrologic units" used in more  
21 typical Puget Sound shoreline inventories and serve to divide the County into large  
22 units that can be discussed in general narrative form to help organize the body of  
23 information as well as make comparisons or note differences between the County's  
24 islands or regional areas. The management areas are also used to organize a  
restoration strategy. ...

Reaches are smaller units that comprise the management areas and provide a means  
in which to evaluate shoreline conditions that relate more closely to shoreline

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<sup>1</sup> To avoid duplication the County has not attached Ordinance 01-2016, which is attached to Friends' brief.

<sup>2</sup> To avoid duplication the County has not attached Ordinance 11-2017, which is attached to Friends' brief.



1 designations. A reach is a segment of shoreline that has a similar geomorphic and  
2 land use context that can be used for assessment of existing ecological and land use  
conditions.

3 IR 001507. This approach is consistent with Ecology recommendations – Shoreline Management  
4 Plan Handbook: Chapter 7: Shoreline Inventory and Characterization. Though the I&C Report  
5 provided average scores for the entire management area, individual reach scores were used to  
6 determine the shoreline designations. The I&C Report goes on to state:

7 The specifications for reach delineation by Ecology are more explicit than for  
8 management area delineation. Here the guidance (Ecology 2011c) suggests the use  
9 of drift cells as a way to delineate marine shorelines throughout Puget Sound where  
10 (glacial) sediment-rich soils are common. However, a considerable portion of the  
11 County marine shoreline is bedrock, and cannot be mapped into drift cells  
12 (MacLennan et al. 2010). Even where littoral sediment exists, it exhibits different  
13 characteristics than in Puget Sound. In addition, several features are found in the San  
14 Juans (such as tombolos and pocket beaches) that do not readily fall within the drift  
cell model. These features and many others common in the County often cross drift  
cells. Therefore, the shoreline was classified into geomorphic units described by  
Shipman (2008), which allowed for a broader scope that better addressed the range  
of shoreline conditions found in San Juan County than a traditional drift cell-based  
reach delineation. In addition to these physical characteristics, other aspects of land  
use were used to specify further the location of reach boundaries including: zoning,  
parcel density, and existing riparian cover and structures along the shoreline, as  
recommended by Ecology (2011c).

15 IR 001510.

## 16 **B. Marine Resource Committee**

17 Since 1996, the San Juan County Marine Resource Committee has advised the Board of  
18 County Commissioners about issues which affect the marine environment of San Juan County by  
19 completing a specific list of tasks. Resolution 35-1996. The MRC has since been reauthorized  
20 and remains an active advisory committee to the County Council to this day. The purpose of the  
21 MRC, generally, is to advise the Board of County Commissioners and promote the protection and  
22 restoration of the marine resources of the County. The MRC is one of many advisory boards and  
23 committees tasked with advising the County Council regarding specialized topics.  
24

1 The County Council, as the legislative body of the County, is authorized to adopt by  
2 ordinance comprehensive plan and development regulations. San Juan County Home Rule  
3 Charter, Section 2.30(2)(d). The County Council is composed of three members, one of which,  
4 Mr. Jamie Stephens, brings unique knowledge and perspective having been appointed by  
5 Governor Inslee to serve on the Shoreline Hearings Board to hear appeals of Shoreline permit  
6 applications.

7 Ultimately, it is the responsibility of the County Council to weigh all the information  
8 presented to it by special interest groups, advisory committees, county staff, and the public and  
9 adopt an SMP that meets the requirements of the law while reflecting local circumstances and the  
10 desires of the community. The County Council has done so here.

### 11 III. AUTHORITY AND ARGUMENT

#### 12 A. Burden, Standard, Presumption of Validity

13 The statutory provisions for appealing a Shoreline Master Program Amendment to the  
14 Growth Management Hearings Board (GMHB) are found in RCW 90.58.190(2), RCW  
15 36.70A.280, and RCW 36.70A.290. There are two standards of review applicable to SMPs.

16 RCW 90.58.190(2)(b) applies to appeals concerning “shorelines” and requires the Growth  
17 Board review the challenged SMP solely for compliance with the requirements of the SMA, the  
18 policy of RCW 90.58.020 and the applicable guidelines, the internal consistency provisions of  
19 RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and Chapter 43.21C RCW.

20 RCW 90.58.190(2)(c) applies to appeals concerning “shorelines of statewide significance”  
21 and requires the Growth Board to uphold the decision by Ecology unless the Growth Board, by  
22 clear and convincing evidence, determines that the decision of Ecology is noncompliant with the  
23 policy of RCW 90.58.020 or the applicable guidelines, or chapter 43.21C RCW as it relates to the  
24 adoption of an SMP. “Shorelines of statewide significance” means, in San Juan County, those



1 areas of Puget Sound and the Strait of Juan de Fuca and adjacent salt waters north to the Canadian  
2 line and lying seaward from the line of extreme low tide. RCW 90.58.030(2)(f)(iii).

3 The petitioner has the burden of proof in all appeals to the GMHB under RCW  
4 90.58.190(2). *Futurewise, et al. v. Spokane County et al*, Case No. 13-1-0003c, FDO at 2  
5 (12/23/13). In *Futurewise*, the Growth Board stated that because the petitioners challenged  
6 particular SMP provisions that applied uniformly to shorelines of the state located in Spokane  
7 County without differentiating between “shorelines” and “shorelines of statewide significance”,  
8 the Growth Board’s scope of review would be based on RCW 90.58.190(2)(c). *Id.* at 4.

9 **B. Friends Has Not Met its Burden of Proof.**

10 In this case, Friends challenge SMP provisions that apply uniformly to shorelines of  
11 statewide significance in San Juan County. Friends does not attempt to differentiate between  
12 “shorelines” and “shorelines of statewide significance.”<sup>3</sup> In any case, Friends has failed to meet  
13 its burden in this appeal of establishing noncompliance under either RCW 90.58.190(2)(b) or (c).  
14 At a minimum, the burden is on Friends to prove that Ecology’s decision to approve the County’s  
15 SMP is inconsistent with the requirements of the SMA, Ecology’s shoreline master program  
16 guidelines, the internal consistency requirements and SEPA as it relates to the adoption of master  
17 programs and amendments under Chapter 90.58 RCW.

18 Comprehensive plans and development regulations, including shoreline master programs,  
19 are presumed valid on adoption. RCW 36.70A.320(1); *Lake Burien Neighborhood v. City of*  
20 *Burien*, GMHB Case No. 13-3-0012, FDO (06/16/14), at 3. This presumption creates a high  
21  
22

23 \_\_\_\_\_  
24 <sup>3</sup> Friends states that portions of Issue No 3.5 extend into “shorelines of statewide significance”. Friends Brief,  
pg. 4, Ins 14-15. Notwithstanding the nonexistence of an Issue 3.5, Friends cites to no authority for the premise  
that the Growth Board would apply different standards of review to “portions” of an issue.

1 threshold for challengers, who have the burden to overcome the presumption of validity. *Id.* at  
2 3-5.

3 The legislature provides that the Growth Board must grant deference to cities in their  
4 planning for growth, so long as such planning is consistent with the requirements and goals of the  
5 GMA. RCW 36.70A.3201. This is because, while local planning takes place within a framework  
6 of state requirements, the local community has the responsibility to account for local  
7 circumstances. RCW 36.70A.3201. Deference is also due to Ecology's interpretation of the SMA  
8 regulations (guidelines), which are adopted by Ecology to assist jurisdictions in the development  
9 of their master programs. RCW 90.58.060(1); *Elizabeth Mooney v. City of Kenmore*, GMHB Case  
10 No. 12-3-0004, FDO (02/27/13), at 5.

11 In addition to local government's discretion in developing or amending an SMP, the  
12 Department of Ecology approves the SMP only after determining that it is consistent with the  
13 SMA and SMA guidelines. See RCW 90.58.050.

14 Thus, a heavy burden is on Friends to overcome the presumption of validity and  
15 demonstrate the County's local discretion in adopting the challenged SMP and Ecology's  
16 authority in approving it are, at a minimum, clearly erroneous.

17 **C. Issue 1: The SMP Shoreline Designations meet the requirements of the SMA, the**  
18 **GMA and all applicable guidelines.**

19 Friends complains about the shoreline designation of certain segments of the shoreline and  
20 alleges that the County's shoreline designations are somehow inconsistent with its comprehensive  
21 plan and SMA guidelines and "should have resulted in the Natural designation for a substantial  
22 amount of forage fish spawning beaches and feeder bluffs." Friends brief, pg. 9-10. Friends  
23 further alleges that the SMP "ignores scientific information". Friends brief, pg. 11, lns 12-13. To  
24 support this allegation Friends cites to its own presentation material submitted to the County

1 Council. IR 005090-91<sup>4</sup>. Comments submitted during public comment periods are not authority  
2 to establish noncompliance with regulations. Friends must do more than simply provide statistics  
3 and alternative science it claims conflict with the science used in developing the SMP.

4 **1. The function of environmental designations.**

5 The protection of shoreline ecological functions occurs through shoreline designations and  
6 through regulations that apply to specific activities and uses in the shorelines. The criteria for the  
7 environment designation system are found in WAC 173-26-211. Criteria for shoreline  
8 designations WAC 173-26-211(2)(a) include existing use pattern, biological and physical  
9 characteristics, and the goals and aspirations of the community.

10 There are seven shoreline designations: aquatic, natural, conservancy, rural, rural farm  
11 forest, and urban. Two shoreline designations are important to this appeal, the aquatic designation  
12 and the natural designation.

13 The "aquatic" designation is specifically intended for areas seaward of the ordinary high-  
14 water mark (OHWM). The purpose of the "aquatic" designation is to protect, restore and manage  
15 the unique characteristics and resources of the areas waterward of the OHWM. WAC 173-26-  
16 211(5)(c)(i). In fact, designation of areas seaward of the OHWM with a designation other than  
17 aquatic is a local option and not required.

18 Local governments may designate submerged and intertidal lands with shoreland  
19 designations (e.g., "high-intensity" or "rural conservancy") if the management  
20 policies and objectives for aquatic areas are met. In this case, the designation  
21 system used must provide regulations for managing submerged and intertidal  
22 lands that are clear and consistent with the "aquatic" environment management  
23 policies in this chapter. Additionally, local governments may assign an "aquatic"  
24 environment designation to wetlands.

22 WAC 173-26-211(5)(c)(iii).

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24 <sup>4</sup> To avoid duplication the County has not attached these items which are attached to Friends' brief.

1 Pursuant to WAC 173-26-211(5)(a)(i) The purpose of the “natural” environment is to  
2 protect those shoreline areas that are relatively free of human influence or that include intact or  
3 minimally degraded shoreline functions intolerant of human use. WAC 173-26-211(5)(a)(iii)  
4 defines “ecologically intact”:

5 Ecologically intact shorelines, as used here, means those shoreline areas that  
6 retain the majority of their natural shoreline functions, as evidenced by the  
7 shoreline configuration and the presence of native vegetation. Generally, but not  
8 necessarily, ecologically intact shorelines are free of structural shoreline  
9 modifications, structures, and intensive human uses. In forested areas, they  
10 generally include native vegetation with diverse plant communities, multiple  
11 canopy layers, and the presence of large woody debris available for recruitment  
12 to adjacent water bodies. Recognizing that there is a continuum of ecological  
13 conditions ranging from near natural conditions to totally degraded and  
14 contaminated sites, this term is intended to delineate those shoreline areas that  
15 provide valuable functions for the larger aquatic and terrestrial environments  
16 which could be lost or significantly reduced by human development. Whether or  
17 not a shoreline is ecologically intact is determined on a case-by-case basis.

18 Examination of the two examples presented by Friends further rebuts Friends’ claims.

## 19 **2. I&C Report**

20 The methodology used in the development of the I&C Report is discussed in detail in the  
21 Background section above. Friends’ allegations of error, supported purely by citations to public  
22 comments, do not meet Friends high burden in this case.

23 The purpose of the I&C Report is to “[i]dentify the ecosystem-wide processes to determine  
24 their relationship to ecological functions present within the jurisdiction and identify which  
25 functions are healthy, which have been significantly altered and/or adversely impacted and which  
26 functions may have previously existed and are missing.” WAC 173-26-201(3)(d)(iii).  
27 Ecosystem-wide processes and ecological functions occur at a scale larger than a parcel. IR  
28 001512.

29 Further, the intent of the guidelines is to generally characterize the shorelines for planning  
30 purposes jurisdiction-wide, not for development review purposes. Planning for development



1 review will occur when applications for a use or development are submitted. Pursuant to WAC  
2 173-26-201(3)(c) the I&C Report can be based on readily available data, and in fact is intended to  
3 use regionally available data. Most readily available data for San Juan County is not reliable for  
4 planning purposes at a parcel-by-parcel scale.

5 As discussed above, the shoreline was divided into reaches and management areas, and the  
6 analysis was conducted consistent with Ecology guidance. The reaches were determined based  
7 on geomorphic units described by Shipman (2008). The delineation of the reaches was conducted  
8 consistent with Ecology recommendations found in the Washington State Department of Ecology  
9 Shoreline Management Plan Handbook: Chapter 7: Shoreline Inventory and Characterization.

10 In the I&C Report, each reach throughout the county has individual scoring for habitat  
11 conditions (8 categories) and physical conditions (8 categories). For example, Blind Bay on Shaw  
12 Island is divided into 5 reaches. IR 001719-25. Individual scores for habitat and physical  
13 conditions for each reach are addressed on pages 228 and 229 of the I&C Report. IR 001728-29.  
14 Blind Bay is designated with four designations: four upland designations (Rural, Conservancy,  
15 Natural and Rural Farm Forest) and one seaward designation (Aquatic). *Id.* Though the I&C  
16 Report does provide average scores for the entire management area, the individual reach scores  
17 were used to determine the shoreline designations as can be seen by the different shoreline  
18 designations throughout the management area.

### 19 **3. Shaw Island's Blind Bay**

20 Blind Bay is designated Rural Farm Forest, Natural and Rural landward of the ordinary  
21 high water mark and aquatic seaward of the OHWM. While it has high habitat scores for herring  
22 spawning (which would occur in the area subject to the Aquatic designation), much of its upland  
23 shoreline is armored and is developed with Blind Bay Road, which leads to the Shaw ferry landing  
24



1 and hence is one of the primary transportation corridors on Shaw Island. The I&C Report notes  
2 that Blind Bay provides restoration opportunities. IR 001725.

3 The County has appropriately designated the shoreline as rural, and the use of the aquatic  
4 designation seaward of the ordinary high-water mark is consistent with the requirements of WAC  
5 173-26-211. The upland designations of Rural Farm Forest, Rural and Natural are consistent with  
6 the requirements of WAC 173-26-211.

#### 7 **4. Lopez Sound**

8 Lopez Sound is designated Aquatic seaward of the OHWM and Conservancy, Rural Farm  
9 Forest and Rural landward of the OHWM. It is partially located in the Mud Bay Management  
10 Area described in the I&C Report. IR 001673. It is not ecologically intact, having a relatively  
11 high level of shoreline modification and residential development. IR 001679. Many of the feeder  
12 bluffs in Mud Bay and Lopez Sound are developed with existing shoreline residential development  
13 on relatively small lots. The environment designations proposed for Lopez Sound are consistent  
14 with the designation criteria in WAC 173-26-211.

#### 15 **5. SMP Designation Amendment List**

16 Friends states, "County's SMP Designation Amendment List further confirms that the  
17 SMP's designation amendments did not incorporate the ecological information gathered since the  
18 last SMP update in 1998." Friends brief, pg. 12, lns 8-9. Yet Friends does not identify any specific  
19 areas as having an environment designation that is incorrect or inconsistent with the designation  
20 criteria other than Blind Bay and Lopez Sound, discussed above.

21 Friends' argument turns the deliberative process of the development of shoreline  
22 regulations on its head. The Amendment List alone cannot be used to determine how shoreline  
23 environments were determined. The information in the I&C Report, which was gathered after  
24 1998, was used to review the shoreline environment designations. It provided information at the

1 reach level scale, which was sufficient to review environment designations countywide. *Supra*.

2 The Amendment List simply provides an explanation for those reaches that were changed.

3 Friends' statement that the SMP "missed an opportunity to modernize its designations with  
4 new information and contravenes the Guidelines requirement" (Friends brief, pg. 14, lns 8-9) does  
5 not meet Friends' burden of establishing noncompliance with the GMA. Similarly, as previously  
6 discussed, comments submitted during public comment periods are not authority to establish  
7 noncompliance with regulations.

8 **D. Issue 2: The SMP's Mitigation Provisions are Consistent with the SMA and SMP**  
9 **Guidelines.**

10 Friends' statement that "mitigation plan approval criteria apply only to impacts to critical  
11 areas, not impacts to the functions of shorelines generally" (Friends brief, pg. 15, lns 9-10) is just  
12 plain wrong. When a mitigation plan is presented, the administrator will examine the "functions  
13 and values" of critical areas. This means that the impacts on the functions of shorelines will, in  
14 fact, be considered. Critical areas functions and values includes shoreline ecological functions  
15 and processes.

16 "Critical area functions and values" means the beneficial roles served by critical  
17 areas and the values people derive from these roles including: water quality  
18 protection and enhancement; fish and wildlife habitat; food chain support; flood  
19 storage, conveyance, and attenuation; groundwater recharge and discharge;  
20 erosion control; wave attenuation; protection from hazards; water infiltration; fine  
21 sediment control; shade/microclimate; large woody debris; litterfall/organic  
22 matter; maintenance of hydrologic function; slope stability; aesthetics; property  
23 value; economic development; recreation; carbon sequestration; **and within  
24 shoreline jurisdiction, shoreline ecological functions and processes.**

21 SJCC 18.20.030 (emphasis added).

22 The allegations regarding mitigation monitoring and the claim that "full mitigation is not  
23 required," are equally misplaced. Mitigation is required to meet the no net loss criteria and must  
24 be based on Best Available Science. See Ord. 11-2017, §§10 and 11. IR ECY035970-74.

1 Mitigation plans that do not meet these requirements will not be approved. *Id.* Friends has failed  
2 to cite any authority suggesting otherwise. Friends' concern that mitigation in connection with  
3 specific applications for uses and developments may be inadequate is a question under the SMP  
4 that is addressed when an application is filed. The County's SMP amendments meet the  
5 requirements of the law.

6 **E. Issue 3: The SMP Protects Shoreline Vegetation Consistent with the SMA and the**  
7 **Guidelines.**

8 Friends claims the SMP does not properly identify and characterize shoreline vegetation.  
9 Friends brief, pg. 20, lns 7-8. In reference to steps for preparing and amending a master program  
10 WAC 173-26-201(3)(d)(viii) states:

11 Identify how existing shoreline vegetation provides ecological functions and  
12 determine methods to ensure protection of those functions. Identify important  
13 ecological functions that have been degraded through loss of vegetation. Consider  
14 the amount of vegetated shoreline area necessary to achieve ecological objectives.  
15 While there may be less vegetation remaining in urbanized areas than in rural  
16 areas, the importance of this vegetation, in terms of the ecological functions it  
17 provides, is often as great or even greater than in rural areas due to its scarcity.  
18 Identify measures to ensure that new development meets vegetation conservation  
19 objectives.

20 The I&C Report identifies how riparian vegetation contributes to shoreline ecosystem  
21 processes in San Juan County on pages 13-17, Tables 3 and 4. IR 001513-001517. Table 5A,  
22 Ecological Function Scoring Criteria for Marine Shorelines includes the following functions:  
23 "Shade" measured on the presence of forested conditions within 30 feet of the shoreline; and "Total  
24 vegetation" measured on the presence of forested conditions within the entire shoreline, and  
"wetland habitat" measured on the presence or absence of wetlands associated with lake  
shorelines. IR 001521. Each reach in the County was analyzed and scored for "Shade" and  
"Vegetation Coverage." See reach tables throughout the I & C Report, *supra*.

1 Shoreline vegetation is characterized by reach and summarized by management area under  
2 the sections entitled “Marine, Riparian, Nearshore and Estuarine Habitats” in the summary of each  
3 management area. As an example, for Blakely Island this section concludes: “The forested riparian  
4 zone is intact overall.” IR 001620.

5 The SMP protects shoreline vegetation in a variety of ways: (1) through designations that  
6 recognize and protect the intact riparian zones (for example, most of Blakely Island’s shorelines  
7 are designated “Conservancy”); (2) through regulations that allow only limited clearing within the  
8 shoreline jurisdiction (Ord 01-2016, New Section 16) (IR 007564); (3) through critical area  
9 regulations that limit clearing of vegetation within 110 feet of the OHWM (SJCC Table 18.35.130-  
10 2); (4) through aesthetic setbacks that require retention of trees within 50 feet of the top of bank.  
11 (Ord 01-2016, New section 60) (IR 07621); and (5) through residential shoreline regulations that  
12 limit development to 50% coverage of the width of the lot (Ord. 01-2016, New section 60) (IR  
13 007619).

14 The SMP does not facilitate substantial development in the buffers.

15 Land uses and developments that include vegetation removal, fill, excavation  
16 or grading on County shorelines must be designed, located, sized, constructed  
and maintained to result in **no net loss of shoreline ecological functions**

17 (Emphasis added). Ord. 11-2017, §8(A). IR ECY035968.

18 The “most current and accurate scientific literature” referenced by Friends (Friends brief,  
19 pg. 21, ln 5), is a citation to material attached to a Friends comment letter submitted to Ecology  
20 after the SMP amendments were adopted in Ordinance 01-2016. As previously stated, the analysis  
21 and regulations used by the County and its consultants is based on scientific information  
22 determined to be applicable and appropriate. See I&C Report *supra*. The submittal of comments,  
23 late in the process, which contain its own science and analysis does not meet Friends’ burden.  
24

1 Friends' misrepresentations of the County's regulations and mischaracterizations of  
2 scientific authority are an attempt to make the regulations what Friends wishes it to be, rather than  
3 what it is. The SMP complies with the SMA and Guidelines and was thus appropriately approved  
4 by Ecology. The County has complied with the SMA and Friends has not met its burden to  
5 demonstrate otherwise.

6 **F. Issues 4 and 5: The SMP's Shoreline Stabilization and Overwater Structure Rules**  
7 **are Consistent with the SMA and the SMP Guidelines.**

8 **1. Shoreline stabilization**

9 Friends states, "the SMP significantly loosened restrictions on shoreline armoring..."  
10 Friends' brief, pg. 25, ln 22. In fact, the requirements for shoreline stabilization structures are  
11 stronger overall everywhere in the County than they were previously. First, the times when  
12 structural stabilization can be used are extremely limited. Hard and soft structural shoreline  
13 stabilization measures are only allowed to protect an existing primary structure, an accessory  
14 dwelling unit, underground utilities and components of on-site sewage disposal systems and wells  
15 that cannot feasibly be relocated; or a road or driveway that cannot be relocated and where there  
16 is no feasible alternative means of access. IR 007597.

17 Second, hard shoreline stabilization structures are only allowed when a geotechnical  
18 analysis demonstrates that the structure(s) needing protection are expected to be damaged within  
19 3 years; and there can be no net loss of ecological functions. *Id.* Forage fish spawning is among  
20 the shoreline ecological functions required to be protected.

21 "New hard structural shoreline stabilization measures are prohibited adjacent to  
22 documented forage fish spawning areas except replacements as defined in Section 47(A) of this  
23 ordinance" (Replacement, repair and maintenance). IR 007601. Shoreline stabilization structures  
24 are required to be located at or landward of the OHWM. IR 007599. Since forage fish spawning



1 areas are seaward of the OHWM, the SMP does not allow shoreline armoring “on” forage fish  
2 habitat as claimed by Friends. In general, the SMP is more restrictive than WAC 173-26-231  
3 because it does not allow for shoreline stabilization measures for new development. WAC 173-  
4 26-231 does not require a jurisdiction to prohibit shoreline modification adjacent to or within  
5 forage fish spawning habitat.

## 6 **2. Overwater structures**

7 Friends shockingly asserts that the SMP authorizes “unnecessary overwater structure  
8 impacts to critical habitats inconsistent with the SMA and SMP Guidelines’ ...” Friends brief,  
9 pg. 30, Ins 20-21. Friends goes on to state: “The SMP authorizes the development of mooring  
10 buoys and docks in critical habitats like eelgrass and kelp notwithstanding the scientific literature  
11 and MRC recommendation that efforts to replace those habitats are likely to fail.” Friends brief,  
12 pg. 32, Ins 1-2. This is absolutely incorrect. The SMP does not authorize the development of  
13 mooring buoys and docks in critical habitats.

14 All overwater structures, including docks and mooring buoys are subject to Ordinance 01-  
15 2016 New Sections 29-39. IR 007584-96. New section 29 contains General Regulations and  
16 General Design and Construction standards that apply to ALL overwater structures. IR 007584.  
17 In addition to the General Design and Construction requirements, there are specific regulations  
18 for each type of overwater structure: boating facilities, mooring buoys and floats, ramps and  
19 marine railways, private recreational floats,

20 General regulation A.3 requires “The construction of all over-water structures including,  
21 new modifications or replacements of existing facilities, must meet the applicable design criteria  
22 established by WDFW in WAC 220-660-140 and 220-660-380 relative to materials, siting,  
23 disruption of currents, restrictions of tidal prisms, flushing characteristics, and fish passage to the  
24

1 extent that those criteria are consistent with the protection of the shore process corridor and its  
2 operating systems.” *Id.*

3 WAC 220-660-380 (3)(iii)(A) & (B) include the WDFW siting criteria that do not allow  
4 docks in seagrass and kelp beds, or documented herring spawning areas; and in fact require  
5 setbacks of 25 feet from these areas.

6 Mooring Buoys may be allowed in eelgrass or herring spawning areas provided that it can  
7 be demonstrated that *there is no feasible alternative location AND mitigation is proposed* that  
8 would result in no net loss of ecological functions. See New Section 35, C “Unless there is no  
9 feasible alternative, mooring buoys shall be located to avoid eelgrass beds and other critical  
10 saltwater habitats.” IR 007592. This is more restrictive than the WDFW regulations which allow  
11 mooring buoys in eelgrass beds with the use of a specific anchoring system (WAC-220-660-  
12 380(8)(a)(i)(A)).

13 Friends next states: “the SMP newly authorizes docks that interfere with feeder bluff  
14 functioning by allowing recreational docks for four or fewer users that interfere with normal  
15 erosion-accretion process associated with feeder bluffs.” Friends brief, pg. 32, lns 17-19. This  
16 too is incorrect. The SMP does not authorize docks for four or fewer users that interfere with  
17 normal erosion-accretion process associated with feeder bluffs. Ordinance 01-2016 New section  
18 29 contains General Regulations and General Design and Construction standards that apply to  
19 ALL overwater structures. *Supra.*

20 Section 29 subsection A.11 states, “Boating facilities that are expected to interfere with  
21 the normal erosion-accretion process associated with feeder bluffs are prohibited.” Recreational  
22 docks for four or fewer users meet the definition of “Boating facilities” as they are a use that  
23 supports access to shoreline waters for purposes of boating and are therefore subject to this  
24 standard. While docks for four or fewer users are not specifically listed as an example, the list of

1 examples is not exclusive. Ordinance 01-2016 Section 68 amended the existing definition of  
2 boating facilities to read: “Boating facilities” means development and uses that support access to  
3 shoreline waters for purposes of boating such as marinas, covered moorages, boathouses, ramps,  
4 marine railways, mooring buoys, piers, docks and floats serving five or more single-family  
5 residences, or multifamily units.

6 Finally, as to Friends assertions regarding the County’s “overly limited alternative  
7 analysis” for docks (Friends brief, pg. 33), the previous SMP required a demand analysis for the  
8 “service area” of the proposed facility, but did not define “service area,” rather it was defined  
9 through hearing examiner and shoreline hearings board decisions. The current SMP includes a  
10 new definition of “service area” for the purpose of the demand analysis required by Ord. 11-2010,  
11 §17 for all boating facilities, docks, piers, floats and ramps.

12 It is an appropriate exercise of legislative authority to define terms to ensure that the intent  
13 of the County’s regulations are clear. Friends have not pointed to any authority that indicates  
14 otherwise. Indeed, San Juan County’s SMP contains regulations that are more restrictive for  
15 residential docks than the SMA and Guidelines which do not require a demand analysis for  
16 residential docks. See WAC 173-26-231(3)(b).

17 The proposed regulations comply with the SMA Guidelines which only require a  
18 preference for joint use or community docks serving two or more residences. The County’s SMP  
19 requires not a only a demand analysis for a dock for a single family residence, but has a clear  
20 preference for and requires an applicant to demonstrate that mooring buoys, existing marinas, and  
21 existing joint use facilities are not feasible before a dock serving a single family residence could  
22 be allowed. Ordinance 01-2016 New Section 29.A.9, *supra*. Friends has not met its burden.

23 **G. Issue 6: The SMP’s Nonconforming Development Provisions are Consistent with**  
24 **the SMA and its Guidelines.**

1 Friends are correct that the SMP *conditionally* allows “any use or structure legally located  
2 within shoreline jurisdiction that was established before the effective date of [Ordinance 01-2016]  
3 may be moved, replaced, redeveloped, expanded, or otherwise modified on the same parcel  
4 provided that work is consistent with the provisions of this section.” IR 007561 (emphasis added).

5 This section of Ordinance 01-2016 goes on to state that the applicant must demonstrate that the  
6 proposed action will not:

- 7 1. Result in a net loss of shoreline ecological functions;
- 8 2. Increase adverse impacts on shoreline critical areas;
- 9 3. Create a new nonconformance or increase the degree of inconsistency with  
the provisions of this SMP; or
4. Result in a hazard to people or property.

10 IR 007562. The Ordinance then outlines the analysis that the applicant must use to demonstrate  
11 no net loss of shoreline ecological functions. *Id.*

12 Friends provides no actual authority as to how these provisions conflict with the SMA and  
13 its Guidelines. Rather, Friends proposes a different manner in which the Ordinance could have  
14 been drafted and states that this proposed approach is consistent with the SMA and its Guidelines.  
15 Friends brief, pg. 35, lns 3-5.

16 Dealing with existing nonconforming structures is one of the most contentious political  
17 decisions that any government official will make. There are many vested interests that seek to be  
18 protected against the unknown, and preserve value and investments. The Department of Ecology  
19 has developed one way of dealing with nonconforming structures, in the shoreline, but it does not  
20 insist that its rules be used to the exclusion of others.

21 Local governments typically develop their own approaches to addressing  
22 nonconforming use and development. This section is intended to apply if a  
23 shoreline master program does not contain locally adopted nonconforming use  
and development standards. When nonconforming use and development  
standards do not exist in the applicable master program, the following definitions  
and standards shall apply.



1 WAC 173-27-080.

2 There are many ways an SMP can be drafted that comply with the SMA and Guidelines.  
3 Simply because the County did not chose the one advocated for by Friends does not establish  
4 noncompliance. "Passing treatment of an issue or lack of reasoned argument is insufficient to  
5 merit judicial consideration. We also do not consider claims unsupported by legal authority,  
6 citation to the record, or argument." *Olympic Stewardship Found. v. State Env'tl. & Land Use*  
7 *Hearings Office through W. Washington Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 687,  
8 399 P.3d 562 (2017). Friends has not met its burden on this issue.

9 **H. Issue 7: The SMP Ensures No Net Loss as Required by the SMA.**

10 In adopting the Master Program guidelines, the DOE adopted the phrase "no net loss of  
11 ecological functions" as a guiding principle for considering whether to approve local government  
12 programs. WAC 173-26-186(8)(d). In construing this principle, the Master Program guidelines  
13 acknowledge that any development has potential for "actual, short-term or long-term impacts" and  
14 that mitigation and other measures can assure the "end result will not diminish the shoreline  
15 resources and values as they currently exist." WAC 173-26-201(2)(c). *Olympic Stewardship*  
16 *Found. v. W. Washington Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 702, 399 P.3d 562  
17 (2017).

18 WAC 173-26-186(8)(d) states, in part:

19 Local master programs shall evaluate and consider cumulative impacts of  
20 reasonably foreseeable future development on shoreline ecological functions and  
21 other shoreline functions fostered by the policy goals of the act. To ensure no net  
22 loss of ecological functions and protection of other shoreline functions and/or  
23 uses, master programs shall contain policies, programs, and regulations that  
24 address adverse cumulative impacts and fairly allocate the burden of addressing  
cumulative impacts among development opportunities. Evaluation of such  
cumulative impacts should consider ...



1 SMPs are programmatic by nature – environment designations, development standards for  
2 uses and shoreline modifications, provisions for critical areas, and mitigation measures all work  
3 together to ensure no net loss. The SMA and Guidelines do not require a mechanism to document  
4 and periodically evaluate cumulative effects of authorized development as Friends asserts. Rather,  
5 this evaluation occurs as part of the I&C Report and cumulative impacts analysis that are required  
6 each time an SMP is updated.

7 Pursuant to WAC 173-26-201(2)(c):

8 Master programs shall contain policies and regulations that assure, at minimum,  
9 no net loss of ecological functions necessary to sustain shoreline natural  
10 resources. To achieve this standard while accommodating appropriate and  
11 necessary shoreline uses and development, master programs should establish and  
12 apply:

- 11 • Environment designations with appropriate use and development standards; and
- 12 • Provisions to address the impacts of specific common shoreline uses, development activities and modification actions; and
- 13 • Provisions for the protection of critical areas within the shoreline; and
- 14 • Provisions for mitigation measures and methods to address unanticipated impacts.

15 When based on the inventory and analysis requirements and completed  
16 consistent with the specific provisions of these guidelines, the master program  
17 should ensure that development will be protective of ecological functions  
18 necessary to sustain existing shoreline natural resources and meet the standard.

19 WAC 173-26-201(3)(E)(iii) requires a programmatic cumulative impacts analysis for the update,  
20 but does not require individualized evaluation of cumulative impacts (except as required by  
21 conditional use permit):

22 Complying with the above guidelines is the way that master program policies  
23 and regulations should be developed to assure that the commonly occurring  
24 and foreseeable cumulative impacts do not cause a net loss of ecological  
functions of the shoreline. For such commonly occurring and planned development, policies and regulations should be designed without reliance on an individualized cumulative impacts analysis.

1 (Emphasis added). If the County SMP complies with the guidelines, then it has met it  
2 requirements as relates to cumulative impacts.

3 Finally, the County continues its objection to Friends' citation to documents received in a  
4 public records request and references and incorporates the arguments made in the County's  
5 Response to Friends of the San Juans' Motion to Supplement the Record filed with the Growth  
6 Board on February 22, 2018.

### 7 **I. Invalidity**

8 Friends requests the Growth Board "deem the challenged provisions invalid." Friends  
9 brief, pg. 40, ln 8. Pursuant to RCW 36.70A.302, the Growth Board has the authority to invalidate  
10 all or part of a development regulation. If the Growth Board:

11 (a) Makes a finding of noncompliance and issues an order of remand under  
RCW 36.70A.300;

12 (b) Includes in the final order a determination, supported by findings of fact  
13 and conclusions of law, that the continued validity of part or parts of the plan  
or regulation would substantially interfere with the fulfillment of the goals of  
14 this chapter; and

15 (c) Specifies in the final order the particular part or parts of the plan or  
regulation that are determined to be invalid, and the reasons for their  
16 invalidity.

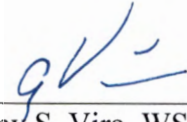
17 Invalidity is a discretionary remedy available to the Growth Board when it determines the  
18 continued validity of the challenged legislative enactment would substantially interfere with the  
19 fulfillment of the GMA goals. *Weyerhaeuser, et al. v. Thurston County*, Case No. 10-2-0020c,  
20 Amended FDO, at 60-61 (06/17/11). In this case, Friends has not met its burden of establishing  
21 noncompliance. Having failed to establish noncompliance, Friends has likewise failed to show  
22 that the SMP interferes, substantially or otherwise, with the goals of the GMA. Even if the Growth  
Board finds some defect, invalidity in this case is not appropriate.

### 23 **IV. CONCLUSION**

1 San Juan County has done an admirable job of implementing the laws and regulations that  
2 pertain to its shorelines. Friends has failed to meet their burden of establishing that the County's  
3 SMP is not consistent with the SMA and in compliance with the GMA. For the above reasons,  
4 San Juan County requests that the Growth Board issue an order finding the County's SMP  
5 consistent with the Shoreline Management Act and in compliance with the Growth Management  
6 Act and dismiss the petition for review.

7 Date: April 10, 2018  
8 Friday Harbor, Washington

RANDALL K. GAYLORD  
PROSECUTING ATTORNEY

9 By:   
10 Amy S. Vira, WSBA #34197  
11 Deputy Prosecuting Attorney  
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## TABLE OF EXHIBITS

000103	TAC Scope of Work
000111	April 25, 2011 Staff Report re: Composition of the TAC
000210	Email from Colin Maycock re: First Draft I&C
000341	Email from Colin Maycock re: Second Draft I&C
001479	Shoreline Inventory and Characterization Report – April 2013
002463	Planning Commission Findings and Recommendations
005087	Friends comments (attached to Friends' brief)
007518	Ordinance 01-2016 (attached to Friends' brief)
008551	Shoreline Master Program Transmittal Memo
010178	Final Ecology Approval of the San Juan County Comprehensive Shoreline Master Program Update
ECY035948	Ordinance 11-2017 (attached to Friends' brief)
	Resolution 35-1996

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BEFORE THE WESTERN WASHINGTON  
GROWTH MANAGEMENT HEARINGS BOARD

FRIENDS OF THE SAN JUANS,

Petitioner.

v.

SAN JUAN COUNTY and the  
DEPARTMENT OF ECOLOGY,

Respondents.

GMHB No. 17-2-0009

DECLARATION OF SERVICE

The undersigned declares and states that on this day I served papers as follows:

Description of Papers: Brief of San Juan County.

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I make the foregoing statement under penalty of perjury of the laws of the state of Washington.

Dated April 10, 2018, at Friday Harbor, Washington.



Tamara Greene  
Legal Assistant

DECLARATION OF SERVICE - 1

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