

Adam Zack

From: Kyle Loring <kyle@loringadvising.com>
Sent: Tuesday, July 21, 2020 12:57 PM
To: SMP Comments
Cc: Rick Hughes; Jamie Stephens; Bill Watson; Tina Whitman; Jennifer Barcelos
Subject: SMP comments from Friends of the San Juans
Attachments: 2020 SMP update -- FSJ cmt ltr.pdf

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Mr. Zack,

Please find attached a comment letter on behalf of Friends of the San Juans that addresses two of the proposed Shoreline Master Program amendments. We look forward to the hearing scheduled for July 28.

Sincerely,
Kyle Loring

Kyle A Loring
LORING ADVISING PLLC
PO Box 3356 | Friday Harbor, WA 98250
360-622-8060 | www.loringadvising.com
he / him / his

CONFIDENTIALITY NOTICE--The information contained in this email message may be privileged, confidential, and protected from disclosure and is intended for the use of the addressee(s) only. If you are not an intended addressee, please be advised that any dissemination, distribution or copying of this e-mail is prohibited. If you receive this communication in error, please notify the sender by reply email and delete the message and any attachments.



VIA E-MAIL

July 21, 2020

Adam Zack
SJC Department of Community Development
PO Box 947
Friday Harbor, WA 98250
smpcomments@sanjuanco.com

Re: Friends of the San Juans Comments on Update to Shoreline Master Program regulations

Dear Mr. Zack,

The following comments, submitted on behalf of Friends of the San Juans (“Friends”), address two of the elements of the Shoreline Master Program update (“SMP Update”) proposed for hearing on July 28, 2020—barge landing authorization and the permit review process. Friends requests that San Juan County (“County”): (1) decline the draft language for barge landings and continue to receive information about barge landings; and (2) ensure that members of the public continue to receive the required notice and opportunity for comment on projects reviewed by either the Hearing Examiner or Department of Community Development Administrator (“Administrator”). Section E below describes these changes, both of which would be consistent with our community’s rich tradition of public participation and environmental heritage, with the Shoreline Management Act’s (“SMA”) primary purpose to protect shorelines as fully as possible, and with the need to track cumulative impacts.

A. Friends’ History.

Friends has been advocating to conserve the beauty, rural character, and ecological richness of the San Juans for more than forty years. Friends’ mission is to protect and restore the San Juan Islands and the Salish Sea for people and nature. To achieve that mission, Friends and its approximately 2,000 members, seek to foster wild and healthy shorelines by campaigning for science-based regulatory protections and permit decisions and by carrying out substantial shoreline restoration and conservation efforts.

B. The Shoreline Management Act Protects Shorelines from Ecological Harm.

In 1971, the Washington legislature enacted the SMA, finding that “the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation.”¹ The SMA therefore establishes a policy that “contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally the public right of navigation and corollary rights incidental thereto.”² In addition, “uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state’s shoreline.”³ And the SMA clarifies that alterations of the natural condition of the shorelines of the state are to be authorized only in limited instances.⁴ Thus, contrary to the general rule of strict construction for laws, and to achieve its primary purpose, the SMA “is to be broadly construed in order to protect the state shorelines as fully as possible.”⁵

C. SMA Regulations Require the Protection and Restoration of Shorelines.

The SMA regulations that govern the adoption of Shoreline Master Program updates incorporate the SMA’s shoreline preservation priorities and its emphasis on “maintenance, protection, restoration, and preservation.”⁶ An SMP must therefore not only conserve the ecological functions that remain along a community’s shorelines, but promote the restoration of impaired ecological functions.⁷ Counties must manage shorelines to safeguard their functioning at both of the ecosystem scale and the localized scale featuring shoreline

¹ *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.* 199 Wn. App. 668, 399 P.3d 562 (2017) (emphasis in original).

² *Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994) (citing RCW 90.58.020; *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987)).

³ RCW 90.58.020.

⁴ *Id.* (emphasis added).

⁵ *Buechel*, 125 Wn.2d at 203 (citing RCW 90.58.900 for broad interpretation); *Lund v. Dep’t of Ecology*, 93 Wn. App. 329, 336-37, 969 P.2d 1072 (1998).

⁶ WAC 173-26-181, -186(8).

⁷ WAC 173-26-181, -186(8), -201(2)(c), -201(2)(f), -221(2), -221(5), -221(6).

vegetation.⁸

The SMP must also include policies and regulations that protect and restore **critical habitats**, including wetlands, critical freshwater habitats, and critical saltwater habitats like kelp and eelgrass beds, spawning and holding areas for forage fish, subsistence, commercial and recreational shellfish beds, mudflats, intertidal habitats with vascular plants, and areas with which priority species have a primary association.⁹

D. The County Must Gather Information about Shoreline Activity Impacts to Meet Its Obligation to Identify and Compensate for County-wide Cumulative Impacts.

In a June 13, 2018 Final Decision and Order, the Washington Growth Management Hearings Board (“Board”) concluded that San Juan County had failed to include a mechanism for documenting all project review actions and to include a process for periodically evaluating cumulative impacts of authorized development.¹⁰ The Board noted in that decision that the Shoreline Master Program Guidelines (“Guidelines”) direct local governments to “‘evaluate and consider cumulative impacts of reasonably foreseeable future shoreline development.’”¹¹ This decision is consistent with the Guidelines’ mandate that SMPs ensure that the aggregated impacts of exempt development will not cause a net loss of ecological functions.¹²

In response to that decision, the County established a cumulative impacts review process to “document all project review actions in the shoreline jurisdiction and evaluate the cumulative effects of such development on shoreline conditions.”¹³ Hence, every four years, the County will review information like: (1) permit applications, decisions, environmental reports, and other data from authorized shoreline exemptions and permits and GIS maps; (2) aerial and

⁸ WAC 173-26-201(2)(c).

⁹ WAC 173-26-221(2)(b)(iii), 221(2)(c)(i), 221(c)(ii), and 221(c)(iii).

¹⁰ *Friends of the San Juans v. San Juan County, et al.*, GHMB No. 17-2-0009, Final Decision and Order, 34 (June 13, 2018)

¹¹ *Id.* at 31.

¹² WAC 173-26-186(8)(b)(ii).

¹³ SJCC 18.50.020.E.e.

LIDAR photographs; (3) other observable data; and (4) field observations.¹⁴

For the cumulative effects review to be effective, the County must gather as much information as simply as possible. To date, it has experienced significant challenges in identifying, much less addressing, the cumulative impacts of shoreline development it authorizes. Even today, nearly a decade after it initially promised to begin tabulating those impacts, it does not appear to have created or implemented a clear way to do so. When updating the SMP, the County should ensure that it doesn't miss opportunities to gather information necessary for that effort.

E. The SMP Update Should Be Revised to Continue to Require Information about Barge Landings and to Provide Suitable Public Notice and Transparency.

Against the above backdrop, Friends requests that the County make the following revisions to the SMP Update:

- 1. Existing nonconforming temporary barge land sites (SJCC 18.50.550, Ordinance at 34) – revise to decline proposed language and require the submission of a certificate of exemption. Also, update barge landing inventory commenced during 2000s and clarify that log transfer activities would be governed by the SMP's existing log transfer facility rules rather than temporary barge landing regulations.**

The use of a shoreline for a barge landing can cause substantial neighborhood and ecological impacts. Those impacts must be tracked so that the County can meet its obligation to address cumulative impacts countywide every four years. Thus, some documentation must be submitted to the County with details about the proposed use, particularly if it is part of an ongoing project. A certificate of exemption would provide that tracking mechanism.

¹⁴ *Id.*

As of a November 18, 2004 San Juan County Public Works inventory¹⁵ of existing barge and landing craft sites, ninety-six (96) locations exist throughout the county. This means that nearly two hundred adjacent property owners are directly impacted by this policy. In addition, as can be seen on the map attached to these comments and prepared by Tina Whitman, Friends' Science Director, barge landing sites naturally find their way to soft, or non-bedrock shores of the county, places that are known to have high ecological importance and many critical habitats. Ms. Whitman oversaw a parcel-scale GIS analysis of the 2004 inventory and found that a full 72 of the 96 barge landing sites are located at sites with eelgrass and that many are also located at documented forage fish spawning habitats (13 forage fish spawning beaches and 4 Pacific herring spawning grounds). Five (5) sites are even located in places identified as having the highest likelihood of rearing wild juvenile chinook salmon.

Landing a barge amidst these sensitive marine habitats and species can directly damage lower intertidal and subtidal eelgrass beds and associated spawning herring, rearing juvenile fish, shellfish and invertebrates. These impacts result from the barge physically grounding out on habitat, propeller scouring vegetation and substrates, and water quality impacts (sedimentation, oils). The equipment typically associated with barge use of shorelines also causes significant impacts. Large equipment or ramps on the beach bury mid and upper beach forage fish spawning habitats and interfere with coastal processes like sediment transport. Juvenile salmon (as well as other rearing fish) are sensitive to noise impacts from the barge itself and may leave

¹⁵ It should be noted that Friends' staff encountered significant difficulties in obtaining barge landing information. Friends' staff received three different, inconsistent sets of information—from DCD, Table 3.1 of the San Juan County comprehensive land use plan (Section B, Element 3, subsection 3.4.E); from the County's mapping staff, nothing (in response to a request for spatial data layers); and finally, from a formal public records request, a scanned copy of a November 18, 2004 Department of Public Works Inventory of Existing Barge and Landing Craft Site table. The inconsistency in information gathered from different County sources further underscores the need for a tracking mechanism for all barge landings.

the sheltered nearshore habitats to deeper waters while barges are present, where predation risks are much higher.

Consequently, some documentation, even a minimal certificate of exemption, must be submitted at least annually to confirm that the use is consistent with historic use and to be able to track the cumulative impacts associated with those landings. This would also allow neighbors who would be impacted by that shoreline use to track it through the County's improved permit tracking system.

In addition, due to the high number of parcels, neighbors, communities, and critical habitats affected by the barge landings, **Friends requests that the County update the inventory of barge landing sites.** We understand that an effort to complete such a review occurred in the early 2000s but that the process did not reach completion and that the current list used by managers contains outdated and inaccurate information

Last, Friends requests that the County tidy up its regulations to clarify that logging activities that require transport via marine shorelines are addressed by the SMP's log storage and transfer site provisions rather than barge landing regulations. This would be accomplished by removing the cross-references between the definitions for "log storage or transfer site" and "barge landing site, permanent." The operative provisions of the SMP would not need revision because they do not include cross-references--the SMP independently addresses "log transfer sites, facilities and storage" at SJCC 18.50.480, and barge landings at SJCC 18.50.550.H. This change would also decrease potential confusion about which provisions apply to logging operations by observing the rule of statutory interpretation that, in the event of conflicting language, the more specific provision applies. Here, that provision is the SMP's existing directions for log transfer sites, facilities and storage.

2. **Decisionmaker for substantial development permits (SJCC 18.50.020, 18.80.110.H.3, Ordinance at 16)** – either withdraw the proposal to carve out trail and accessory structure permit decisions for the Administrator, or revise notice and hearing procedures to ensure that members of the public receive notice of applications for shoreline substantial development permits for public pedestrian trails and residential accessory structures that do not meet exemption thresholds and that they have an opportunity to deliver public comment.¹⁶ At present, provisions of Chapter 18.80 SJCC continue to identify the hearing examiner as the decisionmaker for these permits and identify public notice and comment procedures associated with the hearing examiner. If the Administrator becomes the decisionmaker on these topics, the SMP update should revise those provisions to avoid conflicting language that would identify both of the hearing examiner and the development director as decisionmakers for the same permits.

F. Conclusion

We appreciate your consideration of these recommendations.

Sincerely,

LORING ADVISING PLLC



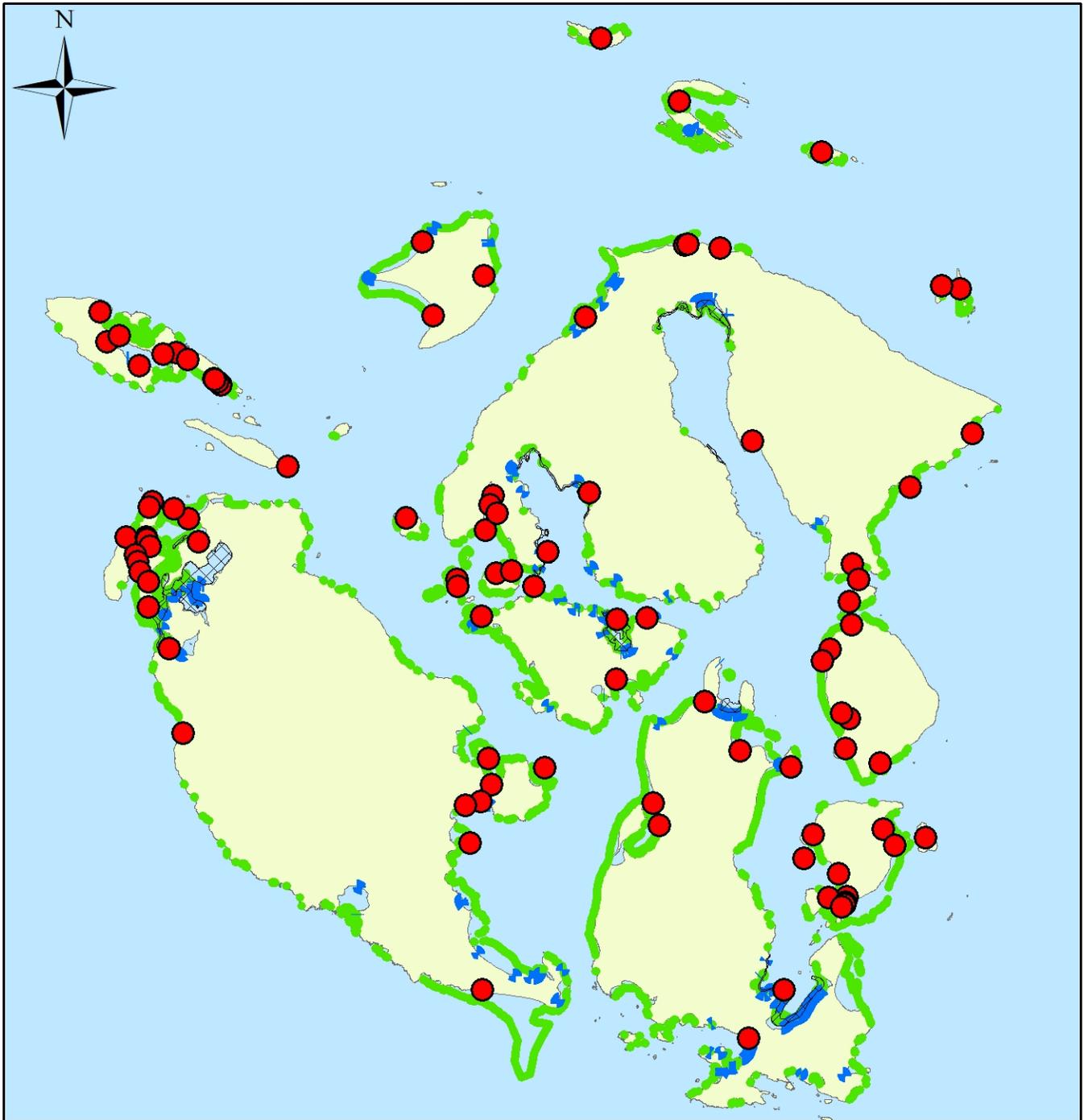
Kyle A. Loring

cc: Rick Hughes, County Council Dist. 2
Jamie Stephens, County Council Dist. 3
Bill Watson, County Council Dist. 1
Tina Whitman, Friends Science Director
Jennifer Barcelos, Friends Staff Attorney

¹⁶ WAC 173-26-140(4) states that “[e]xcept as otherwise specifically provided in subsection (11) of this section, the local government shall require notification of the public of all applications for permits governed by any permit system established pursuant to subsection (3) of this section.... The notices shall include a statement that any person desiring to submit written comments concerning an application, or desiring to receive notification of the final decision concerning an application as expeditiously as possible after the issuance of the decision, may submit the comments or requests for decisions to the local government within thirty days of the last date the notice is to be published pursuant to this subsection.”

ATTACHMENT

Barge Landing Sites and Nearshore Habitat



Legend

-  Barge Landing Site
-  Herring Spawn Area
-  Forage Fish Spawn
-  Eelgrass, Outer Line of Surveyed Beds
-  SJC Shoreline

