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As an awareness of ecological values and environmental concerns becomes increasingly shared by all citizens, much attention has been focused on uses and abuses of the coastal zone. The public's stake in preserving those economic and aesthetic resources created by the interface of land and water has been well documented and eloquently stated, and need not be restated here.[1] With approval of the Shoreline Management Act of 1971[2] (SMA), Washington has joined the increasing ranks of states which are attempting to influence legislatively the course of development of their coastal resources.[3] The Washington Act, unusually broad in scope, concerns not merely "coastal" areas but also shorelines of bodies of water of virtually every description, including lakes and streams so small or so obscure as to be nameless.[4] This article, after briefly describing the circumstances of the SMA's enactment and the prior law, examines and evaluates (to the extent possible based on two years of operation) the resource management program established by the Act.

I. CIRCUMSTANCES OF ENACTMENT

Bills affecting various segments of the state's shorelines were intro-

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1. Probably the single most complete discussion of the coastal zone is THE WATER'S EDGE: CRITICAL PROBLEMS OF THE COASTAL ZONE (B. Ketchum, ed. 1972). *See also* COMM'N ON MARINE SCIENCE, ENGINEERING AND RESOURCES, OUR NATION AND THE SEA (1969) (popularly known as the Stratton Report).

2. WASH. REV. CODE §§ 90.58.010-.930 (Supp. 1972).

3. *See* E. BRADLEY & J. ARMSTRONG, A DESCRIPTION AND ANALYSIS OF COASTAL ZONE AND SHORELAND MANAGEMENT PROGRAMS IN THE UNITED STATES (1972). The National Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (Supp. II, 1973) is designed to encourage and assist states in developing coastal management programs.

4. WASH. REV. CODE § 90.58.030(2)(c)-(e), discussed in text accompanying notes 50-56 *infra*. The State Department of Ecology's catalogue of rivers and streams covered by the Act is set forth in WASH. AD. CODE § 173-18 (1972). Lakes are similarly catalogued in WASH. AD. CODE § 173-20 (1972). Together the two lists require 183 pages in the Administrative Code.

duced in several legislative sessions prior to 1971.[5] None passed. Fearing continued legislative inaction, the Washington Environmental Council, a citizens' organization, drafted a Shoreline Protection Act and obtained enough signatures on petitions to submit it as Initiative Measure 43 to the 1971 Legislature.[6]

The Legislature took no action on Initiative 43 but enacted the SMA, also styled as Alternative Measure 43B, as a substitute.[7] The two major differences between the SMA and the initiative were that the former covered land 200 feet landward of the shoreline and placed primary planning and administrative responsibility on local governments, while the latter extended coverage to 500 feet and centralized responsibility in the state Department of Ecology.[8]

At the November 1972 general election, the two measures were submitted to the people. The ballot procedure allowed the electorate first to vote for or against either system of statutory shoreline regulation, and then to express a preference between them.[9] Either of the two measures was preferred, as against no shoreline legislation, by

5. These included a "Scenic Rivers Act" in 1967, a wetlands bill in 1969, and several seacoast management bills in 1970. The progressive intensifying of interest is described, often with personal commentary on the political atmosphere, by two who were close to the process (James M. Dolliver, Administrative Assistant to the Governor, and Dorothy Morrell, Chairman, Salt Water Shorelines Committee, Washington Environmental Council) in papers delivered at a symposium held in Seattle Center on June 24, 1972. These papers are collected in Shorelines Management: The Washington Experience, June 24, 1972 [hereinafter cited as Symposium].

6. *See* Dolliver & Morrell, Symposium, *supra* note 5.

7. An initiative to the Legislature, such as Initiative 43, presents the Legislature with four choices. The legislature: (1) May simply enact the initiative as presented; (2) may enact it subject to approval by the voters; (3) may reject or take no action on it, in which case it still must be referred to the electorate for possible adoption or (4) may enact substitute legislation on the same subject (essentially rejecting the initiative), in which case both the substitute and the initiative must be referred to the people. In this last situation, the voters first vote on whether they desire either of the two choices offered rather than neither, then cast a second vote designating which choice they prefer (or find less onerous, if they oppose both). WASH. CONST. art. II, § 1(a) (amend. 7).

8. Due, no doubt, to the circumstances of presentation to the voters (*see* text accompanying note 9 *infra*), a number of pamphlets and broadsides were produced comparing the acts. *See, e.g.*, J. Barron, Shoreline Management—What Are the Choices? December, 1971. Another comparison, not produced for voter consumption, is included in BRADLEY & ARMSTRONG, *supra* note 3, at 267-298. The complete text of the initiative is contained in SECRETARY OF STATE, OFFICIAL VOTER'S PAMPHLET 88-93 (1972).

9. *See* note 7 *supra*. Apparently this legislative alternative procedure had never been used prior to the November, 1972, election. W. Spencer, Environmental Management for Puget Sound: Certain Problems of Political Organization and Alternative Approaches 33, November, 1971. That election presented not only the shoreline acts but also less controversial litter control legislation in that form. OFFICIAL VOTERS PAMPHLET, *supra* note 8, at 28-35.

603,167 to 551,132, and Alternative Measure 43B (the SMA) was preferred to Initiative 43 by 611,748 to 285,721.[10]

In enacting the SMA, the legislature provided that it would be in force during the interim between its enactment and its subsequent approval or rejection by the voters.[11] The SMA thus became effective on June 1, 1971.[12]

II. THE LAW PRIOR TO ENACTMENT OF THE SMA

Although the Environmental Council deserves much credit for provoking legislative action on shoreline planning, the ultimate responsibility for passage of the SMA belongs to the Washington Supreme Court. On December 4, 1969, the court handed down its decision in the celebrated *Lake Chelan* case,[13] a decision whose potential ramifications produced muffled curses from the developers and chortles of glee from the environmentalists.[14] Both groups suddenly became aware of the desirability of shoreline legislation: the former to cut their losses and define their legal positions and the latter to solidify what was seen as a far-reaching and unexpected victory. Though sharp controversy developed over the full import of the decision,[15] the simple creation of uncertainty was probably as important as the substance of the decision in promoting the enactment of the Shoreline legislation.

The level of Lake Chelan is artificially fluctuated. Defendants owned land that was submerged when the lake level was high. They

10. Final tally obtained by the University of Washington Law Library reference desk from the Secretary of State, August 20, 1973.

11. WASH. REV. CODE § 90.58.930. *See* note 177 *infra*.

12. WASH. REV. CODE § 90.58.920.

13. Wilbour v. Gallagher, 77 Wn. 2d 306, 462 P.2d 232 (1969) [hereinafter cited as *Lake Chelan*, the case's common name].

14. These responses, suitably muted for the medium of scholarly legal commentary, are exemplified by the exchange between Professor Corker (Corker, *Thou Shalt Not Fill Public Waters Without Public Permission—Washington's Lake Chelan Decision*, 45 WASH. L. REV. 65 (1970) [hereinafter cited as Corker]) and Edward A. Rauscher (Rauscher, *The Lake Chelan Case—Another View*; 45 WASH. L. REV. 523 (1970) [hereinafter cited as Rauscher]). Professor Corker's disclaimer of the environmentalist label (*see* Corker at 83 n.45) may be sincere, but for our purposes may be declared void. Mr. Rauscher responded explicitly "in the spirit of an advocate" for developers.

15. Corker and Rauscher, *supra* note 14.

had filled that land to a grade permanently above the highest water level in order to use it as a trailer court. The Washington court ordered abatement of the fill, on the ground that it "obstructed the rights of plaintiffs and the public to swim, boat, fish, bathe, recreate and navigate in the waters of the lake."[16] Professor Corker's statement of the holding[17]—"ownership of lands beneath navigable waters does not give the owner a right to restrict use of those waters for all the public purposes to which they are suited"—provides an easy avenue into examination of the controversy surrounding the decision.

Over the years the state has sold much shoreland and tideland[18] which, in its natural state, was navigable part-time, at high water, for some or all of the uses catalogued above.[19] Some of that privately owned land has been filled in dramatic fashion.[20] More, undoubtedly, is (or was at the time of *Lake Chelan*) the subject of development plans which would require fills. In assessing the decision's impact, Professor Corker recognized the potentially important distinction between the privately owned property in *Lake Chelan* which had neither been naturally submerged nor ever owned by the state, and tidelands and shorelands which have been sold by the state to private owners,[21] often with an intent to encourage economically productive development. As to the latter, although he saw "not inconsiderable"[22] equities in favor of prior fills, he cautioned against fills subsequent to the *Lake Chelan* decision: "public waters, and lands underlying them, which have not been filled cannot be the subject of constitutionally vested property rights in the same sense as may lands which are wholly above water."[23]

16. Corker, *supra* note 14, at 65.
17. *Id.* at 68.
18. First and second class tidelands and shorelands are defined in WASH. REV. CODE §§ 79.01.020-.032 (1963).
19. Mr. Rauscher argues that the waters periodically overlying tide and shorelands are not necessarily "navigable," even though the primary adjacent body of water is. Rauscher, *supra* note 14, at 530. Professor Corker would prefer to abandon the "navigability" concept as without consistent or reliable meaning, either in the abstract or the particular, and praises *Lake Chelan* for progress in that direction. *See* Corker, *supra* note 14, at 65 n.2 & 76-81.
20. Mr. Rauscher cites, as examples of filled tideland, Seattle's Harbor Island and portions of downtown Seattle as far "upland" as Second Avenue. Rauscher, *supra* note 14, at 531.
21. Corker, *supra* note 14, at 71-76.
22. *Id.* at 73.
23. *Id.* at 75.

Mr. Rauscher, writing in rejoinder, emphatically disagreed: "The Washington Supreme Court has clearly not deemed the rights derived from private ownership of tide or shorelands to be of the rather flimsy nature suggested by Professor Corker."[24] Rather, he argued that in many cases the grant by the state was of an absolute fee simple title which carried with it, among other rights, the right to fill.

It is unnecessary to advance a personal opinion as to which commentator had the best of this argument at the time.[25] The court did not have the opportunity to resolve the question prior to the enactment of the SMA, by which time its significance had diminished.[26] There is little doubt, however, that despite Mr. Rauscher's arguments tide and shoreland property owners recognized the decision as a threatening cloud over plans for development.[27]

If the breadth of applicability of *Lake Chelan* was unclear, its effect when applicable was not. The owner of land underlying navigable waters with a fluctuating level could not use that land by filling it, although the court suggested no limitation on his right to make any use he wished during times when the water level was low and the land not submerged.[28]

Different rules pertained to privately owned land underlying non-navigable bodies of water. In *Bach v. Sarich*,[29] the court ordered abatement of an apartment building which extended over the surface of non-navigable 19 acre Bitter Lake in Seattle. Both plaintiffs and defendants were riparian owners, defendants owning that portion of the lake bed onto which their building extended. In the court's view, the defendants could not interfere with the plaintiffs' right to use the entire lake surface, unless defendants' use of their portion of the lake bed was reasonable. Under no circumstances, however, could a non-riparian use like the apartment building in question be found rea-

24. Rauscher, *supra* note 14, at 527.
25. It might also be unwise to take sides. Agreeing with Corker might suggest academic conspiracy. Agreeing with Rauscher might lead a colleague to bark at me over lunch.
26. *But see* discussion accompanying notes 198-204 *infra*.
27. *See* Gorton, Symposium, *supra* note 5, at 3.
28. 77 Wn. 2d at 315, 317 n.13, 462 P.2d at 238, 239 n.13. The court also suggested, in the cited footnote, that government might authorize otherwise illegal fills. *See* text accompanying notes 198-99 *infra*.
29. 74 Wn. 2d 575, 445 P.2d 648 (1968).

sonable. Presumably, uses such as docks or piers would be riparian and would be permissible if reasonable.[30]

Thus, property sometimes underlying navigable waters was in one sense subject to greater restriction than was property underlying non-navigable waters. The former could not be developed in a fashion which would interfere with use of the water's surface, while the latter could be, as long as the development was reasonable and riparian. As will be noted in assessing the impact of the SMA, however, it seemed that the legislative power to authorize otherwise inappropriate uses in navigable waters was greater than for non-navigable waters.[31] It should also be noted that for navigable waters inappropriate uses would interfere with public rights of navigation, and might be challenged by any member of the public;[32] inappropriate uses of non-navigable waters, on the other hand, could only be challenged by other riparians.

Even prior to the SMA, then, state law imposed significant restrictions on the use of land which was submerged full or part-time.[33] But the Act, as we shall see, applies to substantial dry land areas as well. While prior to the Act those areas might have been subject to restrictions imposed or authorized by general state law (for example, the same zoning or nuisance laws potentially applicable to any property in the state), with one minor exception no restrictions were imposed solely because of the land's proximity to a shoreline. The single exception was that privately owned dry sand beach areas abutting the seacoast are possibly subject to the right of the public to use the beach. The Oregon Supreme Court, in *State ex rel. Thornton v. Hay*,[34] found such a public right, arising from customary use, to prohibit defendant resort owners from fencing off that portion of their land which was dry sand beach. An opinion by the Attorney General of Washington

30. The case is discussed extensively in Johnson & Morry, *Filling and Building on Small Lakes—Time for Judicial and Legislative Controls*, 45 WASH. L. REV. 27 (1970) [hereinafter cited as Johnson & Morry].

31. *Id.* at 57-58. *Lake Chelan*, 77 Wn. 2d at 317-18 n.13, 462 P.2d at 239.

32. Corker, *supra* note 14, at 80.

33. State law is not the only consideration. For example, federal law may pose hurdles to developments in "navigable waters of the United States." These problems, however, are beyond the scope of this article.

34. 254 Ore. 584, 462 P.2d 671 (1969).

concludes that the doctrine of custom would support the same result in this state.[35]

III. THE REGULATORY DESIGN OF THE SMA

The SMA begins with an extensive statement of legislative findings and policy. It then creates a regulatory scheme which requires an inventory of the state's shorelines and subsequent development of "master programs" which designate the types of uses permissible for individual segments of those shorelines. To enforce this regulatory scheme the Act establishes a permit system which requires prior approval for many types of shoreline uses. For each major aspect of this regulatory program, administrative responsibility rests primarily with local governments, reviewed and supported by the state Department of Ecology (the Department).[36]

A. Legislative Findings and Policy

Section 2 of the Act[37] states that Washington's shorelines are a vital resource and announces a policy of coordinated, environmentally aware planning. However, since the act was a compromise designed to attract broad support—and win voter approval at the polls[38]—shining phrases can be mined from the statement of policy to support most positions which an attorney, environmentalist or developer may desire to promote.

Initially, "[t]he legislature finds 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."[39] Unrestricted and uncoordinated construction on the shorelines is not in the public interest, although private property rights must be recognized and protected. "There is, therefore, a clear and urgent demand for a planned, ra-

35. OP. WASH. ATT'Y GEN. No. 27 (1970).
36. WASH. REV. CODE § 90.58.050.
37. WASH. REV. CODE § 90.58.020.
38. *See* notes 7-9 and accompanying text *supra*.
39. WASH. REV. CODE § 90.58.020.

tional, and concerted effort . . . to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines."[40]

At first, the policy statements seem as straightforward as the findings. Easily digestible are the notions of providing "for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses" and "protecting against adverse effects to the public health, the land and its vegetation and wild life, and the waters of the state and their aquatic life . . . ."[41] Complexity arrives with a listing in preferential order[42] of general criteria for determining uses to be made of those shorelines which the Act designates "shorelines of state-wide significance."[43] These criteria, it has been suggested,[44] tend to favor the environment over the economy, a tendency which seems to carry into the final two paragraphs of Section 2. Those final paragraphs again state policies for the "shorelines of the state," a classification broader than and inclusive of "shorelines of state-wide significance."[45] Mentioned explicitly are "the public's opportunity to enjoy the physical and aesthetic quality of natural shorelines" and "control of pollution and prevention of damage to the natural environment . . . ."

Furthermore:

> Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facil-

40. *Id.*
41. *Id.*
42. Uses are to be preferred which (in the following order of preference):
(1) Recognize and protect the state-wide interest over local interest;
(2) Preserve the natural character of the shoreline;
(3) Result in long term over short term benefit;
(4) Protect the resources and ecology of the shoreline;
(5) Increase public access to publicly owned areas of the shorelines;
(6) Increase recreational opportunities for the public in the shoreline;
(7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

WASH. REV. CODE § 90.58.020. This list in itself may be too general and vague to be of much value in planning. However, the Department's final guidelines for development of master programs discuss these criteria in detail and lend a degree of substance to them. *See* WASH. AD. CODE § 173-16-040(5) (1972).
43. Defined in WASH. REV. CODE § 90.58.030(2)(e). *See* notes 53-56 and accompanying text *infra*.
44. Graham, Symposium, *supra* note 5, at 83-86.
45. WASH. REV. CODE § 90.58.030(2)(c).

> itating public access to the shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state . . . .

This is an enumeration of specific favored developments, not merely a list of criteria as is provided for shorelines of state-wide significance. No order of preference is suggested for these developments. However, the character of the list emphasizes the Act's policy of devoting shorelines to water-related or water-dependent uses.[46]

The final admonition of Section 2 is again ecologically concerned: "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."

Section 37 requires that the act be liberally construed "to give full effect to . . . [its] objectives and purposes."[47]

B. Coverage

The first step required for planning is to determine which land and water areas are subject to the Act. The Act thus directs local governments (counties and municipalities)[48] to complete, within 18 months of the effective date of the act, inventories of "shorelines of the state" within their jurisdictions.[49] "Shorelines of the state," the statutory designation for the area covered by the Act, is composed of two subcategories: "shorelines," and "shorelines of state-wide significance."[50]

46. WASH. REV. CODE § 90.58.020. It would seem consonant with the purpose of this section to allow even favored developments to encroach on the shorelines or the water's surface only to the extent that such encroachment is necessary to a particular development's function. For example, there is no necessity for a single family residence to extend over the water's surface. Port development, on the other hand, would usually require some construction over water.

47. WASH. REV. CODE § 90.58.900.

48. WASH. REV. CODE § 90.58.030(1)(c). *See* note 111 *infra*.

49. WASH. REV. CODE § 90.58.080(1). WASH. REV. CODE § 90.58.070 directed local governments to submit to the Department letters stating their intent to complete inventories. The Department was directed to undertake inventories for those local governments which failed to submit such a letter. Lewis and Skamania Counties elected to allow the Department to compile their inventories, as did three or four cities. Rogers, Symposium, *supra* note 5, at 104.

50. WASH. REV. CODE § 90.58.030(2)(c).

The Act defines "shorelines" as "all of the water areas of the state, including reservoirs, and their associated wetlands, together with the lands underlying them" with the exception of "shorelines of state-wide significance," shorelines of stream segments above the point where the mean annual flow is 20 cubic feet per second and shorelines of lakes smaller than twenty acres.[51] Applying this definition presents few difficulties beyond the problem, discussed below, of defining "associated wetlands."

"Shorelines of state-wide significance" is a category of shorelines which were thought to be of sufficient importance to give the state, through the Department more substantial planning authority than it was given for ordinary "shorelines."[52] This designation includes:[53] (1) The ocean coastline of the state (including bays, etc.) seaward from the ordinary high water mark (technically defined in the Act, but basically the line of vegetation);[54] (2) specifically described portions of Puget Sound and the Strait of Juan de Fuca, between the ordinary high water mark and the line of extreme low tide; (3) all of Puget Sound and the Strait below the line of extreme low tide; (4) lakes over 1,000 acres; (5) segments of rivers which, if west of the crest of the Cascades, have a mean annual flow of at least 1,000 cubic feet per second, or if east of the crest of the Cascades, have either a mean annual flow of at least 200 cubic feet per second or are downstream from the first 300 square miles of drainage area;[55] and (6) wetlands associated with (1), (2), (4) and (5).[56]

51. WASH. REV. CODE § 90.58.030(2)(d).

52. *See* text accompanying notes 94-96 *infra*. Recall also that the Act's statement of purpose specifies priorities for determining uses of shorelines of state-wide significance. *See* note 42 *supra*. This categorizing device, whose conception is attributed to Charles B. Roe, Jr., Senior Assistant Attorney General, State of Washington, is credited with rendering the Act more politically appealing to the legislature. *See* Dolliver, Symposium, *supra* note 5, at 26-27.

53. WASH. REV. CODE § 90.58.030(2)(e).

54. WASH. REV. CODE § 90.58.030(2)(b).

55. Were it not for this drainage area criterion there could be no "shoreline of state-wide significance" which would not otherwise be a "shoreline." It is conceivable, however, that a stream could still have a mean annual flow below 20 cubic feet per second at a point where it drained 300 square miles. The Department regulations designating streams subject to the act obliquely recognize this possibility. WASH. AD. CODE § 173-18-040(1)(b) (1972).

56. Note the omission here of wetlands associated with category 3 shorelines of state-wide significance—the water areas of Puget Sound, etc. The result is that the tidelands and uplands bordering most of Puget Sound (including, for example, Seattle's Elliott Bay) are shorelines but not shorelines of state-wide significance. This

The Act's coverage of certain upland areas follows from its definition of "wetlands" as:[57]

> those lands extending landward for two hundred feet . . . from the ordinary high water mark; and all marshes, bogs, swamps, floodways, river deltas, and flood plains associated with the streams, lakes and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology.

There are thus two tests by which land may qualify for designation as wetland: It may be land within 200 feet of the high water mark, or it may be land of a specified type (marsh, bog, etc.) which is "associated with" a body of water covered by the Act. The first test is easily applied, although potentially requiring preliminary surveying to establish the baseline when the line of vegetation (the "ordinary high water mark") is indistinct.[58] The second test, however, requires both delineation of the area in question and a determination of "association." The Department has provided "designation criteria" to govern delineation of the various specified types of wetland[59] and has also tackled the thorny question of "association" on which the statute itself is silent.

The Department's current definition of "associated wetlands"—"those wetlands which are strongly influenced by and in close proximity to any stream, river, lake, or tidal water, or combination thereof, subject to [the Act]"[60]—is not particularly concrete. Moreover, a different definition was in effect when wetlands were originally designated by the Department. Associated wetlands were initially defined as "wetlands which have a surface water connection with any stream

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omission appears to have been quite deliberate, but seems to have escaped the Department. The Department in its Guidelines includes wetlands associated with these waters within the definition of shorelines of state-wide significance. WASH. AD. CODE § 173-16-030(13)(c), (f) (1972). The Department, however, has no authority to expand the statutory definition. WASH. REV. CODE § 90.58.310.

57. WASH. REV. CODE § 90.58.030(2)(f).

58. WASH. REV. CODE § 90.58.030(2)(b); WASH. AD. CODE § 173-22-040(1) (1973).

59. The designation criteria are codified as WASH. AD. CODE § 173-22-040 (1973). The designations themselves are three volumes of maps (incorporated into the administrative code by reference, WASH. AD. CODE § 173-22-060 (1972)) available from the Department, the Code Revisor, and the appropriate county auditor or city clerk. If the map designations conflict with the criteria, the latter control. WASH. AD. CODE § 173-22-055 (1973).

60. WASH. AD. CODE § 173-22-030(2) (1973).

. . . subject to [the Act]."[61] To this definition was added the criterion (which appeared nowhere in the regulations) that the area should be "essentially at the same level as the major body of water."[62] This definitional package withstood challenge in *Juanita Bay Valley Community Association v. City of Kirkland*,[63] suggesting that the Department has considerable discretion in designating wetlands, and that its designation of (or failure to designate) particular land as wetland will not be an easy target in litigation.

The new definition appears more clearly than its predecessor to reflect the broad discretion exercised by the Department in applying the "association" test. In addition, however, it recognizes that wetlands of the types specified in the statute as requiring "association" are not all necessarily "wet" (*e.g.*, "dry" floodplains are included, as well as "wet marshes"), and thus that the original surface water connection

61. *Formerly* WASH. AD. CODE § 173-22-030(2) (1972).

62. Testimony of a witness from the Department, quoted in Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wn. App. 59, 78-79, 510 P.2d 1140, 1152 (1973).

63. In *Juanita Bay*, plaintiff property owners association sought to halt development of an industrial park on marshland, arguing, *inter alia*, that the land in question was covered by the SMA and that the work therefore required a permit which had not been obtained. The plaintiffs prevailed on their argument that the State Environmental Policy Act had not been complied with (*see* text accompanying notes 153-62 *infra*), thus the court's rejection of the SMA theory was dicta. Nevertheless, that rejection was thorough and explicit.

The land for the proposed development included marshlands, three-fourths of a mile east of Lake Washington, a shoreline of state-wide significance. These marshlands were connected to the lake by Forbes Creek, which has a mean annual flow of only four cubic feet per second. Forbes Creek and its marsh thus are clearly not subject to the Act's permit requirement unless they qualify as associated wetlands. The Department, applying the "same grade" criterion, had not so designated the area. Arguing from both the protective policy of the SMA and the legislative directive that it be liberally construed, the plaintiff Association contended the "same grade" criterion had no sound ecological basis and had led to an administrative decision which was "unscientific and contrary to the spirit and letter" of the Act, since the marsh was a part of the same ecological system as Lake Washington. The court responded that adopting plaintiff's theory would expand the coverage of the Act well beyond the geographic limits carefully delineated in the Act. True, the environment is a continuum. But the court continued:

> [E]ven though it may not make perfect ecological sense to draw a line across this continuum, as the legislature did with its 20 cubic feet per second cut-off point, that is apparently what the legislature expected the Department of Ecology to do by delegating to the department the authority to designate "associated wetlands". . . . In this regard, it is notable that there is no indication in the legislation that the designation . . . should be based solely on ecological factors. On the contrary, factors such as physical proximity, practical recreational use, and increased public assets are also involved.

Id. at 81, 510 P. 2d at 1153-54.

requirement did not always make sense. In any event, since it seems likely that the current wetland designations were based on the original definition,[64] judicial approval of that definition has not become irrelevant.[65]

Even when lands inland from the 200 foot line have not been designated as associated wetlands, it should not be assumed that the SMA has no effect on their use. In *Merkel v. Port of Brownsville,*[66] defendants had been enjoined from proceeding with development of a small boat marina, a complex which was to encompass 12½ acres of "shoreline" (including "wetland") and 10 additional acres of upland, on the dual grounds that no permit had been issued for shoreline development and that defendants had not complied with the State Environmental Policy Act (SEPA).[67] After several attempts, the defendants submitted an apparently satisfactory environmental impact statement as required by SEPA. The trial court then modified its restraining order to enjoin development only within the 200 feet of "wetlands" for which an SMA permit had not yet been obtained.[68] Petitioners immediately appealed this modification, and the restraint on development of even the uplands portion of the marina was reinstated. While the court of appeals could find only two references in the SMA to adjacent uplands,[69] both seeming to be mere admonitions to local government to consider upland uses in planning for shoreline development, it nevertheless found that the policy of both the SMA and SEPA would be frustrated by allowing upland development on the project to proceed prior to compliance with the permit requirements of SMA. The court relied heavily on the environmentally protective purpose of

64. The designation maps (*see* note 59 *supra*) were initially filed July 27, 1972. Code Revisor's note to WASH. AD. CODE § 173-22-060 (1972). The amended definition of "associated wetlands" was effective July 28, 1973.

65. The regulations make the designations effective for five years. Periodic review is designed to allow consideration of natural or artificial alterations of the shorelines. WASH. AD. CODE § 173-22-050 (1973).

66. 8 Wn. App. 844, 509 P.2d 390 (1973).

67. WASH. REV. CODE §§ 43.21C.010-.900 (Supp. 1972). *See* discussion accompanying notes 153-62 *infra*.

68. *Merkel*, 8 Wn. App. at 845-47, 509 P.2d at 392-93.

69. *Id.* at 849, 509 P.2d at 394. The SMA sections are WASH. REV. CODE § 90.58.100(2)(e), suggesting that master programs include a use element considering uses of "adjacent land areas," and WASH. REV. CODE § 90.58.340, directing local governments to "review administrative and management policies, regulations, plans, and ordinances relative to lands . . . adjacent to the shorelines . . . ."

both acts, and noted in particular that to allow development of a single integrated project to proceed by stages might well have coercive impact on subsequent decision making:[70]

> There is nothing in the record before us to indicate that the contemplated construction has ever been anything but one project. The question, therefore, is whether the port may take a single project and divide it into segments for purposes of SEPA and SMA approval. The frustrating effect of such piecemeal administrative approvals upon the vitality of these acts compels us to answer in the negative.
>
> . . .
>
> Irreparable damage would flow from allowing any portion of this project to proceed without full compliance with the permit requirements of the SMA.

Although the provisions in the SMA relied on by the court seem to provide at best oblique support for its conclusion, this decision seems completely consonant with the Act's purpose. A single project requiring development of both shoreline and upland ought not be allowed to proceed in its upland portion prior to the granting of the SMA permit without which the shoreline portion cannot legally be begun.

C. Master Programs—The Planning Process

While determining the area covered by the SMA is a prerequisite to comprehensive planning, the planning itself—the preparation by each local government of a "master program"[71] for shorelines within its jurisdiction—is a subject of far greater statutory intricacy. Here the initial step contemplated by the statute is the preparation by the Department of formal "guidelines"[72] to direct local governments in their development of master programs. The Act requires in sequence: drafting of proposed guidelines, submission of written comments by

70. *Merkel*, 8 Wn. App. at 850-51, 509 P.2d at 395.

71. Defined in WASH. REV. CODE § 90.58.030(3)(b) as "the comprehensive use plan for a described area, and the use regulations together with maps, diagrams, charts or other descriptive material and text, a statement of desired goals and standards developed in accordance with the policies enunciated in RCW 90.58.020."

72. Defined in WASH. REV. CODE § 90.58.030(3)(a) as "those standards adopted to implement the policy of this chapter for regulation of use of the shorelines of the state prior to adoption of master programs. Such standards shall also provide criteria to local governments and the department in developing master programs."

local governments, revision of the proposed guidelines, public hearings and adoption of final guidelines.[73] Local governments are to develop master programs within 18 months of June 20, 1972,[74] the date the Final Guidelines were adopted.[75]

Since the master programs, when effective, "shall constitute use regulations for the various shorelines of the state,"[76] and will thus form the basis for subsequent decisions on permit applications, their content and method of preparation are of prime importance. In describing the methods to be employed in preparing the programs, Section 10 of the Act speaks in impressive-sounding but indefinite terms (*e.g.*, "utilize a systematic interdisciplinary approach . . ."). [77] This same section then suggests elements which master programs should include.[78] Although these statutory directives seem merely a vague catalogue of things to think about in connection with the master program, the Guidelines adopted by the Department are more concrete. They require classification of the shorelines into four distinct environments (natural, conservancy, rural and urban) to "reflect the natural character of the shoreline areas and the goals for use of characteristically different shorelines."[79] The Guidelines also contain helpful descriptions of the various geographical characteristics which shorelines can present (*e.g.*, marine beaches, dunes, estuaries),[80] as well as specific guidelines for broad categories of shoreline uses (*e.g.*, aquaculture, commercial or residential development, breakwaters).[81] These features of the Guidelines provide specific points of reference for designing substance into the master program elements suggested by Section 10.[82]

73. WASH. REV. CODE § 90.58.060.
74. WASH. REV. CODE § 90.58.080(2).
75. WASH. AD. CODE §§ 173-16-010 through -070 (1972). The Guidelines were thus adopted not quite six months prior to the statutory deadline for completion of inventories.
76. WASH. REV. CODE § 90.58.100(1). *See also* the definition in note 71 *supra*.
77. WASH. REV. CODE § 90.58.100(1)(a)-(f).
78. WASH. REV. CODE § 90.58.100(2). The suggested elements are economic development, public access, recreational, circulation, use, conservation, historic and "other."
79. WASH. AD. CODE § 173-16-040(4)(a) (1972).
80. WASH. AD. CODE § 173-16-050 (1972).
81. WASH. AD. CODE § 173-16-060 (1972).
82. In developing master programs for shorelines of state-wide significance, local governments must also observe the preferential ordering of uses mandated in Section 2 of the Act. *See* note 42 *supra*.

One of the major perceived differences between the SMA and the Environmental Council's initiative was the required degree of citizen participation in the planning process.[83] The initiative, in requiring preparation of a statewide comprehensive plan by the Department, called for creation of at least seven regional citizen's councils which would hold public hearings and consult with the Department. Those councils, each composed of at least 30 persons, were to include some public officials, but in each council citizen members not employed by local government were to form the majority.[84] Proponents of the initiative argued that this requirement assured greater public involvement in the planning process than did the SMA's vague direction to the Department and local governments to "not only invite but actively encourage participation by all persons . . . showing an interest in shoreline management programs . . . ."[85]

The Guidelines, however, overcome this statutory vagueness; they are elaborate and concrete in their requirements for citizen participation in preparation of the master programs. After warning that failure to involve citizens "may be noted as a failure to comply with the act,"[86] the Guidelines suggest a detailed method of assuring such involvement through a citizen's advisory committee for each local governmental unit. These committees should, for example, hold at least three public meetings and one public hearing[87] and publish and circulate a newsletter. The goal is preparation of a master program which has obtained "a general concurrence of the public and the advisory committee."[88] Thus, to the extent that citizen participation can be insured by regulation, the Guidelines seem seriously designed toward that end; certainly they do assure an opportunity for such participation.[89]

83. *See, e.g.*, Barron, *supra* note 8, at 8.
84. *Id.* at 5.
85. WASH. REV. CODE § 90.58.130(1).
86. WASH. AD. CODE § 173-16-040(1)(1972).
87. WASH. AD. CODE § 173-16-040(1)(b) (1972). A public hearing is likewise required by WASH. REV. CODE § 90.58.120(1), though the section does not make it clear who is to conduct that hearing. Note that while the Guidelines do not require the design outlined as the only method for assuring citizen involvement, a local government which deviates from it must explain whatever alternative method it adopts, and must satisfy the Department as to its efficacy.
88. WASH. AD. CODE § 173-16-040(1)(f)(1972).
89. Citizen support of a technical variety has also been marshalled by the department. Several hundred private citizens with expertise in technical or scientific areas

Another distinction between the initiative and the SMA is the locus of primary planning responsibility; the initiative placed this responsibility with the state rather than the local governments. This choice by the initiative's drafters reflected both greater faith in the public accessibility of state government as compared to local government[90] and a fear of balkanized planning because of the sheer number of local jurisdictions involved. Under the SMA scheme, it was feared, each local governmental entity might plan merrily for its own shorelines without regard to either contiguous shorelines outside its jurisdiction or to the overall interest of the state as a whole. The statutory planning directives and the Guidelines might even encourage this fragmented planning by prompting each local government to provide for widely diverse uses within its particular shoreline area.[91] One visualizes with some horror the riverside town with its mile of shoreline, divided neatly into a port, a marina, a residential area, a historic site, a recreational beach and perhaps a wilderness beach, the whole design to be repeated by a neighboring town five miles down river.

The SMA's only clear response to this threat is the discretion given to the director of the Department to designate regions, including two or more local governments, for which a joint master program is to be developed.[92] Furthermore, the Guidelines require master programs to "recognize plans and programs of the other governmental units, adjacent jurisdictions and private developers."[93] Moreover, the regular procedure for Department approval or adoption of master programs, as described below, does give the Department some opportunity to deal with multiple use planning which is unsuited to the character of particular shorelines. The degree to which balkanization can be avoided under the local government planning approach adopted by the SMA will not be clear, however, until the master programs have been completed and approved.

Master programs, according to Section 9, become effective when

have been formed into an Interdisciplinary Advisory Committee, whose purpose is to provide assistance to local governments which have limited professional staffs and inadequate funds to hire outside consultants.

90. *See, e.g.*, Durning, Symposium, *supra* note 5, at 95-97.

91. The reader will recall the list of elements suggested for each master program. *See* note 78 *supra*.

92. WASH. REV. CODE § 90.58.110(1).

93. WASH. AD. CODE § 173-16-040 (1972).

"adopted or approved by the department as appropriate,"[94] and at this point in the process the distinction between "shorelines" and "shorelines of state-wide significance" becomes critical. A master program for "shorelines" submitted by the local government to the Department may be approved as submitted; if approval is denied the Department within 90 days is to detail its reasons and suggest modifications. The local government may then submit a modified program. The statute does not indicate how often this process may be repeated, but no master program for shorelines becomes effective prior to departmental approval or approval by the Shorelines Hearing Board as described below. Grounds for Departmental disapproval are inconsistencies with either the Act's policy stated in Section 2 or the Guidelines.[95]

Master programs for "shorelines of state-wide significance" may likewise be either approved by the Department or returned without approval, again with suggested modifications and an opportunity for resubmission. Following resubmission, however, if the Department decides that the program "does not provide the *optimum* implementation of the policy of [the Act] to satisfy the state-wide interest," it can develop and adopt its own master program for the shorelines of state-wide significance in question.[96]

The Act also provides a process of appeal to the newly created Shorelines Hearings Board[97] for situations in which the Department and a local government find themselves at loggerheads over a submitted master program. Local governments are given the right to appeal "master programs . . . *adopted* or *approved* by the department."[98] and the Act categorizes appropriate Board responses accord-

94. WASH. REV. CODE § 90.58.090. The terminology convention implicit in the Act seems to be that the Department "approves" master programs prepared by local government, and "adopts" master programs of its own. The only deviation from this convention appears in the final sentence of § 90.58.090(2) which reads "adopt the resubmitted program" although "approve" would seem the correct meaning.

95. WASH. REV. CODE § 90.58.090(1).

96. WASH. REV. CODE § 90.58.090(2) (emphasis added).

97. Created by WASH. REV. CODE § 90.58.170. The Board is sometimes referred to in the Act as the "shoreline appeals board." It is a six member body, comprised of three members of the Pollution Control Board, one representative each appointed by the Association of Washington Cities and the Association of County Commissioners, and the State Land Commissioner or his designee. As someone might have foreseen, a six member board can cause untold commotion by the simple expedient of splitting 3-3. This occurred before the statute was much more than a year old. *See* text accompanying notes 149-52 *infra*.

98. WASH. REV. CODE § 90.58.180(4) (emphasis added).

ing to whether the master program relates to "shorelines" or "shorelines of state-wide significance."

With respect to "shorelines" programs, the appeal provisions seem confused. An appeal by a local government from departmental "adoption" of such a program can seldom be anticipated, since the Department has no authority to adopt such programs unless directed to do so by the Board following a prior appeal (see *infra*). And certainly local government will not appeal "approval" of its program by the Department. To make sense, therefore, the Act must be read as authorizing local government appeals from departmental disapproval. Unfortunately, however, it is not clear from Section 9 that disapproval of a submitted program is the same sort of formal event as approval, and a formal event is necessary to allow compliance with the requirement that appeals be taken "within thirty days of the date of adoption or approval."[99] The critical date from which the time for appeal runs should be the date on which the Department communicates to the local government its reasons for failure to approve and its suggested modifications.

The Shorelines Hearings Board is to declare the master program for shorelines valid unless it is deficient in one or more of five specified particulars, in which case the Department is to be directed to adopt a new program.[100] Three of these particulars are standard, and require no discussion: A program is to be declared invalid if it violates statutory or constitutional provisions, is arbitrary and capricious or fails to conform to required procedures. The two remaining grounds for a declaration of invalidity require consideration.

The Board shall declare the program invalid if it "is clearly erroneous in light of the policy of this chapter."[101] This ground appears narrower than the grounds specified in Section 9(1) for departmental disapproval ("not consistent with the policy of RCW 90.58.020 . . . and the applicable guidelines").[102] This seems to mean that although consultation between the Department and local governments on the

99. *Id.*
100. WASH. REV. CODE § 90.58.180(4)(a)(v).
101. WASH REV. CODE § 90.58.180(4)(a)(i).
102. WASH. REV. CODE § 90.58.090(1). The policy of "this chapter," *i.e.*, the Act, is presumably the same as "the policy of section 2." The inclusion or exclusion of the guidelines may matter, however, as, without doubt, does the difference between "clearly erroneous" and "not consistent with."

master programs is encouraged through the device of departmental "disapproval" and suggested modification, where agreement cannot be reached it is the local government's position, rather than the Department's, which is presumptively correct.[103] If this was indeed the legislative intent, the practical effect of the Guidelines on the development of master programs for shorelines, may be limited[104] as may be the ability of the Department to "insure compliance" with the Act's policy, as is its responsibility under Section 5.[105] Again, evaluation of these questions must await submission of the master programs.

The board also may disapprove a master program for shorelines which "was developed without fully considering and evaluating all proposed master programs submitted to the department by the local government."[106] While it is conceivable that local government may have an inadequate memory or may choose to ignore its prior submissions (particularly as years pass),[107] this provision seems addressed to programs developed by the Department after the Board has declared a local government program invalid for one of the other four reasons.

The Act fails to provide for appeals by the Department. In theory a local government might paralyze the process by never submitting an acceptable master program to the Department and declining to appeal the Department's refusal to approve its unacceptable programs. At some point the Department might choose to treat this standoff as noncompliance by the local government with section 7(2) of the Act,[108] and adopt its own program.

The waters which surround appeals relating to master programs for shorelines of state-wide significance are considerably less murky. In these cases, the appeal will always be taken by local government from a program adopted by the Department. The Department's master program must be approved unless the local government "by clear and

103. If the Department's criterion and the Board's criterion are read as equivalents, there would be no such presumption in favor of local government. The differing language, however, makes such an argument tenuous. *See* note 102 *supra*.

104. *See* WASH. REV. CODE §§ 90.58.030(3)(a) & .060(1)(a).

105. WASH. REV. CODE § 90.58.050.

106. WASH. REV. CODE § 90.58.180(4)(a)(iv).

107. WASH. REV. CODE § 90.58.190 requires periodic review of master programs to make such adjustments as become necessary.

108. WASH. REV. CODE § 90.58.070(2). The Section directs the department to undertake development of master programs for those jurisdictions which fail to do so.

convincing evidence and argument" persuades the board that the program is inconsistent with the policy of the Act or the Guidelines.[109]

D. The Permit Requirement

The Act's basic regulatory device is the prohibition of any "development" on the shorelines of the state not "consistent with the policy of [the Act] and, after adoption or approval, the applicable guidelines, regulations or master programs."[110] In addition, "[n]o *substantial* development shall be undertaken . . . without first obtaining a permit from the [local] government entity having administrative jurisdiction under [the Act]."[111] The master programs, together with the Act's Section 2 statement of policy, will provide the criteria for decisions on permit applications. Until completion of the programs, since the permit requirement became effective immediately for substantial developments begun subsequent to SMA's enactment,[112] permit decisions must be consistent with the Guidelines, after their adoption, and "so far as can be ascertained, the master programs being developed for the area."[113]

109. Under WASH. REV. CODE § 34.04.070 (1963), expressly made applicable by WASH. REV. CODE § 90.58.180(4)(c), the master program also is subject to disapproval if it "violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures."

110. WASH. REV. CODE § 90.58.140(1).

111. WASH. REV. CODE § 90.58.140(2) (emphasis added). The "government entity" wording may appear unnecessarily awkward since the effective meaning is local government. Initially, however, the Act provided that the state Department of Natural Resources would have, over lands under its jurisdiction, the "same powers, duties, and obligations as local government has as to other lands covered by [the Act]." Ch. 286, § 3(1)(c) [1971] Wash. Laws, 1st Ex. Sess. This provision was the subject of an item veto by the Governor, who stated in his veto message that it "place[d] more than one agency of state government in a policy making position and in effect allow[ed] a large land owner to both make and approve its own plans."

112. Whether actual construction had commenced prior to the effective date of the Act is, of course, a question of fact. (*But see* note 177 *infra*.) In Eastlake Community Council v. Roanoke Associates, Inc., 82 Wn. 2d 475, 513 P.2d 36 (1973), the court approved a finding that construction had been commenced when defendant had demolished pre-existing structures and driven 10 steel pile pipes intended to be permanent. Since the Act has now been effective for over two years, it is unlikely that many more developers will have occasion to argue that their construction began in time to exempt them from coverage. Indeed, WASH. AD. CODE § 173-14-050(3) (1973) requires a permit for substantial developments undertaken prior to the effective date of the Act "[w]here the development is not completed within two years after . . ." that date. The running of the two year period is tolled if litigation interferes with completion of the development. *See also* note 211 *infra*.

113. WASH. REV. CODE § 90.58.140(2)(a)(iii).

Because of the practical importance of the permit requirement, the definition of "substantial development" is critical, as is the definition of "development" on which it is built. "Development" is defined as:[114]

> [A] use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level . . . .

"Substantial development" means:[115]

> . . . [A]ny development of which the total cost or fair market value exceeds one thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state . . . .

The catch-all clauses at the ends of the two definitions should be compared to avoid potential traps in applying the terms to shoreline uses which do not fall into the explicitly enumerated categories. "Development" includes any project not specifically enumerated which "interferes with the normal public use of the *surface* of the waters . . . ." To be "substantial," the project, if not worth or costing $1,000, must *"materially* interfere," although that interference may be with either the water *or* shorelines (which would include wetlands). That a project might "interfere" and thus be a "development," without interfering "materially" to make it a "substantial development," is not surprising. However, a project which appears to be "substantial" because it materially interferes with use of wetlands may not even be a "development" if there is no interference with the use of the surface of the waters.

Such a possibility may at first seem farfetched, given the apparent completeness of the list of specific uses defined as "developments." Consider, however, commercial timber cutting, a potential shoreline "use" thought sufficiently important by the Legislature to merit a separate statutory section governing the extent and method of commercial timber cutting which local government or the Department can allow

114. WASH. REV. CODE § 90.58.030(3)(d).
115. WASH. REV. CODE § 90.58.030(3)(e).

on shorelines of state-wide significance.[116] That Section clearly implies that this use requires a prior permit, assuming the "substantial development" value criterion is met. However, it is not at all certain that timber cutting is a "development," since it does not easily fit within any of the enumerated uses in that definition and might well be carried on without in any way interfering with "normal public use of the surface of the waters."[117] Perhaps this particular dilemma can be solved by construing the commercial timber cutting provision to create a separate category of "substantial development," invariably requiring a permit, thus enabling local governments to enforce the strictures specifically imposed by the Legislature.

The Act lists certain uses which are not to be considered "substantial developments" and thus do not require a permit; these uses will usually still be "developments," however, and therefore must still conform to the policy of the Act. Even though the exemptions are rather narrowly drawn, their applicability to any given situation may often be difficult to determine. Indeed, one prosecutor has suggested, after a year's experience administering the Act, that "interpreting the applicability of the several exemptions . . . is as difficult as, or more difficult than, determining whether a permit should be granted for a project which requires a permit."[118] The exemptions, together with some of the more obvious problems which may arise in construing them, include:[119] (1) Normal maintenance or repair of existing structures and construction of "normal protective bulkheads common to single family residences" (what, in each case, is normal?); (2) emergency construction (how much is truly justified by the emergency?); (3) construction of barns, etc. on wetlands; (4) construction of navigational aids; (5) construction on wetlands of a single family residence for an owner's or lessee's own use, if its height does not exceed 35 feet above average grade level (the Department apparently interprets this to in-

116. WASH. REV. CODE § 90.58.150. This Section requires selective cutting rather than clear cutting except where the former is ecologically unsound.

117. The Guidelines, in discussing forest management practices (WASH. AD. CODE § 173-16-060(3) (1972)) point out that certain timbering practices may have effects on nearby waters, such as higher water temperature or increased sediment load. Such effects might constitute interference with use of the water's surface. *See* 1973 Wash. Att'y Gen. Op. (Letter) No. 73, which discusses SMA permit requirements for logging operations.

118. Bayley, Symposium, *supra* note 5, at 71.

119. WASH. REV. CODE § 90.58.030(3)(e).

clude auxiliary structures such as garages);[120] and (6) private noncommercial pleasure craft docks costing under $2,500 for single family residences (added by amendment[121] at the instance of waterfront homeowners).[122] Also exempted[123] from permit requirements, though not from compliance with the Act's policy, are holders of certifications under the Thermal Power Plant Siting Act.[124] Other exemptions were granted to certain developments in connection with previously platted land by use of elaborate grandfather provisions;[125] these exemptions are no longer significant since any qualifying development must by now be complete.[126]

Neither does the permit requirement seem applicable to governmental actions such as platting or rezoning which may be prerequisites to some shoreline developments. Although it might be argued that this type of governmental action is itself part of the project and thus an SMA permit must be obtained first,[127] mere platting or rezoning would not seem to fit within the definition of "development"[128]—such actions themselves involve no physical alteration of the land or interference with its use. Unlike the *Merkel*[129] situation, subsequent decision-making is not prejudiced by any commencement of construction, and thus there is no justification for stretching the "development" definition. However, if plat approval is conditioned on certain physical improvements being made on the land,[130] and if those improvements constitute "substantial developments," a prior SMA permit would of course be required.

120. Department of Ecology, Shoreline Management Act of 1971 (undated informational pamphlet published by the Department, along with the Association of Washington Cities and the Washington State Association of Counties).

121. Ch. 203, § 1(3)(e)(vii) [1973] Wash. Laws, 1st Ex. Sess. (adding a new subsection, (3)(e)(vii), to WASH. REV. CODE § 90.58.030).

122. Interdisciplinary Advisory Committee Newsletter, Shoreline Management, May, 1973.

123. WASH. REV. CODE § 90.58.140(8).

124. WASH. REV. CODE §§ 80.50.010-.900 (1963).

125. WASH. REV. CODE § 90.58.140(9)-(10).

126. Among the conditions for exemption is that the development be completed within two years of the effective date of the Act. WASH. REV. CODE § 90.58.140(9)(e).

127. *Cf.* the requirement for a prior environmental assessment under the State Environmental Policy Act, discussed in text accompanying notes 153-62 *infra*.

128. *Cf.* WASH. AD. CODE § 173-14-030 (1971), where, for purposes of determining whether "substantial development" commenced prior to the effective date of the Act, a distinction is drawn between "actual construction" and "preliminary engineering or planning."

129. *See* notes 66-70 and accompanying text *supra*.

130. *See* WASH. REV. CODE § 58.17.120 (Supp. 1972).

E. The Permit Procedure

Having determined that a substantial development permit is necessary, or at least prudent, the developer submits an application to the local government. This must be done well in advance of the development's proposed commencement date, since construction cannot be authorized for 83 days, *at the minimum,* from the date of application.[131] The developer must publish notice twice, in consecutive weeks, according to a prescribed format. Interested members of the public are then given 30 days to submit their views to local government.[132] At this stage local government, at its option, may require a public hearing prior to issuance or denial of the permit.[133] Concurrently with transmittal of the permit decision to the developer, local government must submit the application and ruling to the Department and the Attorney General.[134] These agencies have 45 days, during which no construction under an issued permit can begin, in which either may institute review proceedings.[135] If review proceedings (described below) are initiated, construction will be delayed even longer.

131. *See* Bayley, Symposium, *supra* note 5, at 70-71, suggesting that this period causes inconvenience and may be longer than necessary.

132. WASH. REV. CODE § 90.58.140(3). WASH. AD. CODE § 173-14-070 (1972).

133. WASH. AD. CODE § 173-14-080 (1972).

134. WASH. REV. CODE § 90.58.140(5). The ruling must also be sent to any member of the public who so requests or who submitted views on the application. WASH. AD. CODE § 173-14-070 (1972).

135. If review proceedings are instituted during the 45 days (*see* text accompanying notes 140-44 *infra*), construction is delayed until their termination. WASH. REV. CODE § 90.58.140(4). This Section was recently amended to grant a single exception. Construction of the third Lake Washington Bridge has been delayed in part because of permit review proceedings, and the bridge controversy was the subject of legislative action at the September, 1973, "mini-session." Apparently agreeing with the Department of Highways' concern over mounting projected costs while the appeal process continued (estimated at as much as $30,000,000 per year, Lane, *I-90: State's turn to bid,* Seattle Times, September 23, 1973, at C 1, col. 4), the Legislature exempted from the automatic delay provision "any permit issued to the state of Washington, Department of Highways, for the construction and modification of the SR 90 (I-90) bridges across Lake Washington." S.B. 2657, ch. 19, [1973] Wash. Laws, 2d Ex. Sess. 1350. The result of this amendment is that construction may commence in spite of in-progress SMA review proceedings. However, this new exemption is peculiar in that it seems in no way to address the legality of the bridge under the SMA. This approach would appear to present numerous difficulties. For example, it would seem that the Attorney General or the attorney for local government could still, under Section 21 (*see* text at note 172 *infra*), seek to have the construction enjoined. And if the bridge is ultimately found to violate the SMA those attorneys or private citizens might bring suit under Section 23 (*see* text at notes 173-74 *infra*) for the "cost of restoring the affected area to its condition prior to violation." WASH. REV. CODE § 90.58.230. "STOP I-90" has been a local bumper-sticker slogan in recent years. This amendment may require its revision, to "ABATE THE THIRD BRIDGE."

The burden of proving that the proposed development is consistent with the appropriate criteria rests, at the application stage, with the applicant.[136] If the permit requires a variance or conditional use,[137] it shall be granted "only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect,"[138] and decisions allowing for such variance or conditional use must be submitted to the Department for specific approval or disapproval.[139]

As noted, the Department and the Attorney General have 45 days following a local government's permit decision to request Shorelines Hearing Board review.[140] Similar review may also be obtained by "any person aggrieved" who so requests within 30 days of receiving the permit decision, if the Department or Attorney General certifies that he "has valid reasons to seek review." If the request is not certified, the requestor may still obtain superior court review "under any right to review otherwise available . . . ."[141]

"Any person aggrieved" probably includes any person or organization who would qualify under developing notions of standing. While a full examination of the standing question is beyond the scope of this article, there is little doubt that in order to be "aggrieved" one need not have suffered economic injury.[142] Injury in fact is required, but may include injury to "[a]esthetic and environmental well-being."[143] Thus, an owner of the property subject to the permit would always qualify, as most likely would an owner of nearby property or a mere

136. WASH. REV. CODE § 90.58.140(6).

137. All master programs must provide for the granting of variances or conditional uses. WASH. REV. CODE § 90.58.100(5).

138. WASH. REV. CODE § 90.58.100(5). Discussed in greater detail in the Guidelines. WASH. AD. CODE § 173-16-070 (1972).

139. WASH. REV. CODE § 90.58.140(11).

140. WASH. REV. CODE§ 90.58.180(2).

141. WASH. REV. CODE § 90.58.180(1). The reference in this Section to § 90.58.150 seems clearly erroneous. That Section deals with timber cutting. The intended reference is to § 90.58.140 which describes the permit process. A similar error, caused by the deletion of a Section prior to passage which required subsequent renumbering of the sections, was corrected by the Code Revisor. *See* Revisor's Note to WASH. REV. CODE § 90.58.020(7).

142. *See* Durning, Symposium, *supra* note 5, at 99-100. *But compare* Graham, *id.* at 88.

143. This is the language of the Supreme Court, interpreting the word "aggrieved" in Section 10 of the federal Administrative Procedure Act, 5 U.S.C. § 702 (1970) in Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (*quoted with approval* in the Court's latest tilt with the "standing" windmill, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 673 (1973)). Durning suggests, soundly, that the federal cases may properly be looked to for the SMA standard.

recreational user of the shoreline area affected by the permit decision. The Statute gives no criteria for the Department or Attorney General to use in certifying that the party "has valid reasons to seek review," nor have regulations been promulgated suggesting how this determination is to be made.[144]

The Board's review of permit decisions[145] is to be conducted according to the provisions of the State Administrative Procedure Act (APA) governing review of contested cases.[146] Judicial review of the Board's decisions is also governed by the APA.[147] The SMA provides that the burden of proof rests on the party seeking review.[148] One foreseeable problem concerning judicial review of board decisions has already been litigated. In *Department of Ecology v. City of Kirkland,*[149] the Department sought superior court review of a permit issuance on which the Board, in its review, had split 3-3. Respondents argued that under the APA judicial review was available only of a "final decision" of the Board,[150] and that, according to the SMA, a final decision "must be agreed to by at least four members . . . ."[151] The court of appeals noted that the Board's split was in effect a decision to let the granting of the permit stand; that this decision could be effectively reviewed despite the nonexistence of any Board findings, conclusions, or affirmative order; and that to rule to the contrary would cut off

144. As of November, 1973, the Department had reviewed 1,725 permits. Of these, the Department or Attorney General appealed 77 (20 concurrently with private citizens) and 32 more were certified for appeal by private citizens alone. Letter to the author from Charles B. Roe, Jr., Senior Assistant Attorney General, Nov. 16, 1973. The informal position taken by the Department and the Attorney General is to certify requests for review if the requestor alleges facts which, if proved, would require either remand of the permit decision to local government or invalidation of an issued permit. Standing is not considered in the certification process.

145. WASH. REV. CODE § 90.58.180(3).

146. WASH. REV. CODE §§ 34.04.010-.940 (1963).

147. In Dept. of Highways. v. Environmental Council, 82 Wn. 2d 280, 510 P.2d 216 (1973), the court faced a statutory ambiguity, (caused by inartful reference to both the APA and the Pollution Control Hearings Board Act (WASH. REV. CODE §§ 43.21B.010..900 (Supp. 1972)) in Section 18(3) of the SMA (ch. 286, § 18(3) [1971] Wash. Laws, 1st Ex. Sess.) concerning whether appeals from the board are to the superior court or the court of appeals. The decision, requiring appeal to the superior court in the first instance, has been incorporated into the Act by an amendment which deletes the reference to the Pollution Control Hearings Board Act. Ch. 203, § 2 [1973] Wash. Laws, 1st Ex. Sess.

148. WASH. REV. CODE § 90.58.140(6).

149. 8 Wn. App. 576, 508 P.2d 1030, *review granted,* 82 Wn. 2d 1006, ____ P.2d ____ (1973).

150. WASH. REV. CODE § 34.04.130(1) (1963).

151. WASH. REV. CODE § 90.58.170.

judicial review in a number of cases, perhaps even as a result of deliberate vote splitting by a Board majority.[152] It therefore directed the superior court to assume jurisdiction.

F. SMA Permits and the State Environmental Policy Act

The State Environmental Policy Act[153] (SEPA), like the SMA, "is an attempt by the people to shape their future environment by deliberation, not default."[154] A basic purpose of SEPA is to require agencies of state government, including counties and municipalities,[155] to consider environmental and ecological factors when taking "major actions significantly affecting the quality of the environment."[156] Although a full discussion of the workings of SEPA is beyond the scope of this article, some observations should be made to indicate its effects on the SMA permit process.

In *Eastlake Community Council v. Roanoke Associates, Inc.*,[157] a shoreline development was challenged on the ground that in renewing a building permit the City of Seattle had failed to assess the project's environmental effects, as required by SEPA. The court agreed, holding that the permit renewal required prior preparation of an environmental impact statement.[158] The decision demonstrates that the mere issuance by government of a permit or license for a private project may be a "major action" triggering the applicability of SEPA; SEPA is not directed only at projects undertaken by government itself.[159] Determining whether the exercise of the permit function is a "major action" that brings SEPA into play turns on whether the permit decision involves a discretionary, nonduplicative stage of gov-

152. 8 Wn. App. at 579, 508 P.2d at 1031-32. If a majority of the Board approved the permit decision of the local government, they could affirm and preclude review by having only three members vote for affirmance.

153. WASH. REV. CODE §§ 43.21C.010-.900 (Supp. 1972).

154. Stempel. v. Dept. of Water Resources, 82 Wn. 2d 109, 118, 508 P.2d 166, 172 (1973).

155. WASH. REV. CODE 43.21C.030(2).

156. WASH. REV. CODE 43.21C.030(2)(c).

157. 82 Wn. 2d 475, 513 P.2d 36 (1973). The *Eastlake* development was also challenged, unsuccessfully, on SMA grounds. *See* note 112 *supra* and notes 199 & 207 *infra*. *Cf. Merkel*, notes 66-70 and accompanying text *supra*, and *Juanita Bay*, note 63 *supra*, both of which also involved dual SEPA and SMA challenges.

158. 82 Wn. 2d at 487-98, 513 P.2d at 44-50.

159. *Id.* at 489, 513 P.2d at 45.

ernmental approval of a project.[160] If so, the decision maker must at a minimum assess the environmental effects of the project.[161] If this assessment leads to the conclusion that the project significantly affects the quality of the environment an environmental impact statement must be prepared.[162]

The requirements of SEPA thus clearly overlay the SMA permit process. Issuance of a substantial development permit certainly qualifies as a discretionary stage of a project's approval. Most often it will also be nonduplicative,[163] necessitating at least an informal assessment of the development's environmental effects. This informal assessment will in many instances lead to a determination that an environmental impact statement must be prepared prior to the issuance of the SMA permit. (In most cases, particularly if the permit-issuing local government is small, the developer must bear the major burden of preparing the statement.)

An unresolved question is whether the Shorelines Hearing Board, in reviewing an SMA permit, has authority to invalidate the permit on grounds of noncompliance with SEPA. The SMA itself specifies no criteria for Board review, aside from the requirement applicable at all stages of the permit process that permits be issued "only when the development proposed is consistent with . . . the policy of R.C.W. § 90.58.020."[164] However, given that section's emphasis on environmentally intelligent planning,[165] it would seem peculiar if the Board could not, for example, require a satisfactory environmental impact statement. In addition, it can be argued that SEPA itself injects this criterion into the SMA review process. SEPA provides that any environmental impact statement "shall accompany the proposal through the existing agency review process."[166] As the Department has argued in

160. *Id.* at 487-90, 513 P.2d at 45-46. *Accord,* Loveless v. Yantis, 82 Wn. 2d 754, 513 P.2d 1023 (1973).
161. *Juanita Bay,* 9 Wn. App. at 73, 510 P.2d at 1149.
162. *Id.*
163. It will be nonduplicative unless there has been some *prior* discretionary nonduplicative stage (such as platting or a rezone, *see* text at notes 127-30 *supra*) since which time "no new information or developments have intervened . . . ." "SEPA does not mandate bureaucratic redundancy . . . ." *Loveless,* 82 Wn. 2d at 764-65, 513 P.2d at 1029.
164. WASH. REV. CODE § 90.58.140(2)(b).
165. *See* text accompanying notes 37-47 *supra.*
166. WASH. REV. CODE § 43.21C.030(2)(d).

support of the Board's authority (or indeed mandate) to consider SEPA:[167]

> The provisions of SEPA are clear that the policies and goals of that act must be read into other state laws, including the Shoreline Management Act of 1971. To give efficacy to those provisions . . . the board may, when reviewing . . . substantial developments, invalidate permits for such developments if compliance has not been had with the procedural requirements of SEPA pertaining to the preparation of detailed impact statements, as well as the substantive provisions of that law.

G. Noteworthy Miscellaneous Provisions

Several additional provisions of the Act, although relating only obliquely to the planning or permit process, are noteworthy. Section 32 provides special protection for residential views. Structures which rise more than 35 feet above average grade level and which "obstruct the view of a substantial number of residences" are to be permitted only "where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served."[168]

The Act absolutely prohibits surface drilling for oil or gas in the waters of Puget Sound or the Strait of Juan de Fuca, and on land within 1,000 feet of those waters.[169]

The Department and local government are given power to acquire land "to achieve implementation of master programs" by purchase, lease, or gift.[170] Originally this list included eminent domain, but prior to the submission of the Act to the voters for approval that power was withdrawn by amendment, perhaps because of fear of the political consequences.[171]

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167. Brief of the Department of Ecology as Amicus Curiae at 13-14, in Dept. of Highways v. Environmental Council, 82 Wn. 2d 280, 510 P.2d 216 (1973) (decided on other grounds; *see* note 147 *supra*).

168. WASH. REV. CODE § 90.58.320. Query whether a variance or conditional use permit could ever appropriately override a master program prohibition for purposes of this Section. This concern for views also carries into the Guidelines. *See, e.g.*, WASH AD. CODE §§ 173-16-060(4)(c) & (7)(c) (1972).

169. WASH. REV. CODE § 90.58.160. The Environmental Council's initiative prohibited slant drilling as well as surface drilling; it included the Hood Canal within the prohibition, but applied only 500 feet landward. Barron, *supra* note 8, at 6.

170. WASH. REV. CODE § 90.58.240(1).

171. Ch. 53 [1972] Wash. Laws., 1st Ex. Sess. The "statement for" Alternative Measure 43B (the SMA) in OFFICIAL VOTORS' PAMPHLET (*supra* note 8, at 34) noted that "[t]here is no local or state take-over of private land."

H. Enforcement

Enforcement of the Act is primarily the responsibility of the Attorney General and the attorneys for local governments. Section 21 authorizes these officials to bring "injunctive, declaratory, or other actions"[172] to insure compliance with the Act; Section 23 enables them to bring suit for damages to public property, "including the cost of restoring the affected area to its condition prior to the violation [of the Act or a permit granted under it]."[173] The latter section also provides for suits by private parties "on their own behalf and on the behalf of all persons similarly situated." The court may thus award damages for and require abatement of developments in violation of the Act; it also has discretion to award attorney's fees and costs to the prevailing party.[174]

In addition to these civil sanctions, willful violators of the Act or the master programs adopted under it may be found guilty of a gross misdemeanor, punishable by fines of from $25 to $1,000 or 90 days in jail, with the fine escalated to $500 to $10,000 for the third such violation within a five-year period.[175]

As one county prosecutor has suggested, effective enforcement will require local governments to develop an administrative inspection capacity, but will depend as well "on private persons to both bring possible violations to [local government's] attention and to bring suits enforcing the Act."[176]

IV. A POTENTIAL CONSTITUTIONAL PROBLEM—UNCOMPENSATED TAKING[177]

Regulation of land use by the SMA may encounter a constitutional objection raised by property owners. A prospective developer, fol-

172. WASH. REV. CODE § 90.58.210.
173. WASH. REV. CODE § 90.58.230.
174. *Id.*
175. WASH. REV. CODE § 90.58.220.
176. Bayley, Symposium, *supra* note 5, at 73.
177. This discussion of "taking" is intended merely to alert the reader to the potential issue. For more complete treatment, consult the sources cited in note 180 *infra*.

The SMA also presents state constitutional problems of a different type, arising out of the unusual enactment process (*see* notes 6-12 and accompanying text *supra*). The first of these questions concerns the propriety of adopting an alternative to an initiative to the Legislature during an extraordinary legislative session (as was the case

lowing denial of a permit application,[178] may assert that the Act has resulted in an uncompensated and therefore unconstitutional taking of

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with SMA) rather than during the regular session. WASH. CONST. amend. 7, *amending* WASH. CONST. art. II, § 1(a) provides that:

> [An initiative to the Legislature] shall be either enacted or rejected without change or amendment by the legislature before the end of [the] regular session [to which it is certified] . . . . If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted . . . to the people . . . .

While this language nowhere deals explicitly with the timing of legislative action on an alternative, the following argument might be advanced: Three courses of action are open to the Legislature with regard to the initiative itself. It may be enacted during the regular session; it may be rejected during the regular session or it may be the subject of no action. Though "no action" is the equivalent of legislative rejection for purposes of its submission to the people for their approval or rejection, the proposing of an alternative requires explicit rejection ("no action" not being mentioned in the last quoted sentence). Further, since the language of that sentence joins rejection of the initiative with proposal of the alternative, the constitution must contemplate that those actions will be taken together—during the regular session.

This argument, however, is not particularly persuasive. First, there seems no good reason to distinguish between no action and explicit rejection. Second, in recent years extraordinary sessions of the Legislature have become distinctly regular events. Often they are mere continuations of the 60-day-maximum regular sessions and are convened immediately so that the Legislature can continue with unfinished business. (Here, for example, the regular session adjourned March 11, 1971, and the extraordinary session convened March 12.) To void a legislative alternative which has been preferred by the people, on the ground that the Legislature acted in May rather than March, would appear nonsensical. This seems particularly true since the subject matter had been under legislative scrutiny even in prior sessions (*see* note 5 *supra*), and since there is no doubt that the alternative was enacted in time to give voters ample opportunity to thoroughly compare its provisions to those of the initiative.

Another issue is raised by the legislative decision to allow the SMA to become effective immediately, prior to its approval by the people. This was done on the advice of the Attorney General (OP. WASH. ATT'Y GEN. No. 5, at 10 (1971)) who concluded that, as long as the SMA would not remain in effect unless approved by the people, no constitutional provision would be violated. This seems a particularly nice question in light of the Attorney General's conclusion (in the same opinion) that the Legislature could not attach an emergency clause to the initiative, in order to make *it* immediately effective. Reason would suggest, in support of the Legislature's decision, that barring clear constitutional mandate the Legislature should not be found powerless to deal with pressing problems merely because an initiative has been submitted to it. It would be a startling result were a court to require the Legislature to fiddle for a year and a half while the state burned. In any event, now that the SMA has been presented to and approved by the voters, and as the effective date slips deeper into the past, the question may not provide significant ground for controversy.

A final question arises from the Governor's exercise of his veto power over a portion of the alternative (*see* note 107 *supra*) despite the constitutional provision that "[t]he veto power . . . shall not extend to measures . . . referred to the people." WASH. CONST. amend. 7, *amending* WASH. CONST. art II, § 1(d). To the extent that the alternative was an ordinary legislative enactment (as it was, presumably, until the date of the general election) the veto presents no problems. But it is not so clear whether the alternative ought to have been submitted to the people with or without

his property.[179] Shoreline and wetland regulations in other states have been challenged on this theory with occasional success.[180] For example, in *State v. Johnson*[181] the Maine Supreme Court held the recently enacted Maine Wetlands Act unconstitutional as applied to deny a permit to fill a segment of privately owned salt water marsh. Under the *Johnson* facts, which one commentator has argued were highly unfavorable to the state's theory of the case,[182] the permit denial was found to deprive the owner of the ability to make any reasonable use of his land and thus to constitute an improper taking by the state.

The basic principle, of course, is deceptively simple: The state may without doubt regulate land uses under the police power,[183] but at some point regulation becomes so restrictive that it amounts to confiscation requiring compensation. Theories explaining how to distinguish permissible from confiscatory regulation are numerous. Viewed simplisticly, in modern application the tests often involve balancing be-

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the vetoed provision. Even given that problem, had the alternative as presented to the voters been clear (in either including or excluding the provision) it might be possible to fall back on some notion that the ultimate legislative power rests with the people, and whatever they approved should be law. Unfortunately, the SMA as submitted was ambiguous. The OFFICIAL VOTERS' PAMPHLET (*supra* note 8, at 93-100), which gave the text of the Act, included the vetoed provision *and* the Governor's veto message, and, to further complicate matters, described Alternative Measure 43B (the SMA) as the law then in effect, *id.* at 35.

To duck this problem rather than solve it, it may at least be noted that the SMA as approved by the people contains a severability clause, WASH. REV. CODE § 90.58.910 and even if the vetoed provision is found to be invalid because the veto was improper, this should not cripple the act.

These problems are raised briefly by Graham, Symposium, *supra* note 5, at 88-90.

178. Or while defending a challenge to development without a permit.

179. U.S. CONST. amend. V: "[N]or shall private property be taken for public use, without just compensation." WASH. CONST. amend. 9, *amending* WASH. CONST. art. I, § 16: "No private property shall be taken or damaged for public or private use without just compensation having been first made."

180. *See* Comment, *The Wetlands Statutes: Regulation or Taking?* 5 CONN. L. REV. 64 (1972). The comment reviews various taking theories (relying heavily on Sax, *Takings and the Police Power,* 74 YALE L.J. 37 (1964) and Sax, *Takings, Private Property and Public Rights,* 81 YALE L.J. 149 (1971)) and considers them with relation to the wetlands statutes of Connecticut, Maine and Massachusetts. *See also* the FOURTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, 121-153 (1973); Note, 86 HARV. L. REV. 1582 (1973).

181. 265 A.2d 711 (Me. 1970).

182. Halperin, *Conservation, Policy, and the Role of Counsel,* 23 ME. L. REV. 119 (1971). *See also* Wilkes, *Constitutional Dilemmas Posed by State Policies Against Marine Pollution—the Maine Example,* 23 ME. L. REV. 143 (1971).

183. A reasonably standard formulation is that: "It is . . . well established that reasonable restraints on the use of property in the interest of the common good and bearing a real and substantial relation to the public health, safety, morals and general welfare constitute a valid exercise of the police power." *Quoted* from an Illinois case in Hauser v. Arness, 44 Wn. 2d 358, 368, 267 P.2d 691, 697 (1954).

tween the public interest being protected or furthered and the extent to which the private economic usefulness of the property is diminished or destroyed.[184]

Since a claim of improper taking is less apt to be successful when economic value remains in the property even as restricted, particularly when the regulatory purpose is clearly related to the public welfare, the problem may not be significant under the SMA. The Statute recognizes the need to protect private property rights.[185] Elsewhere it encourages design of master programs to reflect that state-owned shorelines "are particularly adapted"[186] to some uses (*e.g.*, wilderness areas) which would tend to destroy the economic value of privately-owned shorelines. Private property therefore may seldom be subjected to restrictions which severely diminish economic value. The extent of the potential problem can not be satisfactorily evaluated, however, without an evaluation of the master programs (which are still under development)[187] and the manner in which they are applied in making permit decisions.

Furthermore, a property right must exist before it can be taken. The various types of shoreline subject to regulation under the Act are not all capable of being privately "owned" in the same degree. Property rights in uplands which are "wetlands" under the Act arguably differ from rights in privately owned tidelands,[188] which in turn differ from riparian owners' rights in the beds of non-navigable waters.[189]

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184. *See* Comment, *supra* note 180, at 72-83. The classic statement is that of Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922):

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

185. WASH. REV. CODE § 90.58.020.

186. WASH. REV. CODE § 90.58.100(4)

187. *See* text accompanying notes 71-75 *supra*.

188. *See* Corker, *supra* note 14, at 73-76.

189. *See* Johnson & Morry, *supra* note 30, at 51-59. In *Bach*, 74 Wn. 2d at 580, 445 P.2d at 652, the court noted that to allow the fill would allow a taking of the rights of the lake's other riparian owners. Zoning by the city of Seattle could not divest plaintiffs of their riparian rights without compensation. Nor, suggest Johnson & Morry, is it likely that zoning could totally prohibit defendant from devoting his submerged land to reasonable riparian uses. *See* text accompanying notes 195-97, *infra*.

The question will arise whether an alleged taking by regulation is in fact an invasion of a protected private property right.

Finally, since the Act was amended to withdraw from the Department and local governments the power of eminent domain,[190] if a SMA restriction on use of particular property is found to be unconstitutional the proper remedy will be to invalidate the restriction. Compensation for the taking is not an available alternative.

V. EFFECT ON PRIOR LAW

The SMA's effect on prior law governing use of uplands—land above the high water mark—should be considered separately from its effect on the law previously applicable to land or water lying below that line. Prior law seldom imposed any use restrictions based on upland property's proximity to water.[191] The SMA, although specifically prohibiting few if any uses, requires a planning and permit process which regulates and thus may restrict development on uplands which are "wetlands." The extent of those restrictions on particular property will vary according to the master programs which are developed, but even where no serious restrictions are imposed, many types of development are now subject to the procedural requirements of the permit program. Developments on upland "wetlands" which were begun before the effective date of the Act cause no particular difficulty—they are not covered by the Act, and the Act does not affect their legality.[192]

Prior law governing land and water below the high water mark was considerably more complex, as is an assessment of the Act's effect. Here, pre-SMA law was most concerned with regulating those uses of submerged land which interfered with uses of the water's surface; different restrictions pertained depending on whether the water in question was navigable or non-navigable.[193] This distinction, which was always slippery at best,[194] is nowhere relied upon in the SMA. Inclusion of bodies of water within the Act's regulatory ambit is based on

190. *See* text accompanying notes 170-71 *supra*.
191. *See* text accompanying notes 34-35 *supra*.
192. *See* note 112 and accompanying text *supra*. *But cf.* note 211 *infra*.
193. *See* text accompanying notes 13-32 *supra* and Johnson & Morry, *supra* note 30, at n.121.
194. *See* Corker, *supra* note 14, at 76-78.

their size rather than their navigability. This attempt to avoid a ticklish definitional problem should be applauded, and yet the navigability issue still lurks in the shadows, and in some instances will have to be reckoned with.

Bach v. Sarich[195] forbade non-riparian uses of privately owned non-navigable lake beds when such uses would interfere with the rights of other riparian owners. Presumably this decision still governs bodies of water too small to be subject to the Act.[196] But *Bach* also applied to numerous non-navigable lakes larger than 20 acres which *are* now covered by the Act. One might conclude that all uses of submerged land under such lakes are now permitted, subject only to restrictions imposed under the Act. However, *Bach* seems, on constitutional "taking" grounds, to forbid even legislatively authorized non-riparian uses which interfere with the vested property rights of other riparian owners.[197] Thus, the SMA may impose new restrictions on non-navigable lakes, but cannot ease old ones.

No such limitation applies to regulation of navigable waters, for which Washington recognizes no riparian rights. While requiring removal of a fill on the ground that it interfered with public use of navigable waters, *Lake Chelan*[198] invited legislative action; in contrast to *Bach*, it suggested that legislation might indeed authorize interfering uses which otherwise would be unlawful.[199] With enactment of the SMA, the Legislature and the people accepted that invitation and adopted a process of management which could lead to such authorization. Whether anything is left of the use restriction imposed by *Lake Chelan*, or whether that case has been pre-empted by the SMA remains to be determined. This question can be illustrated by considering developments, such as docks for private residences, which are exempt from the permit requirements of the Act.[200] Could a challenge still be mounted on *Lake Chelan* grounds—that the development interfered with public rights of navigation—since the government has not affirmatively authorized the interference by issuing a permit?

195. *See* note 29 *supra*.
196. WASH. REV. CODE § 90.58.030(2)(d). Nineteen acre Bitter Lake, the subject of the *Bach* litigation, is itself an example of lakes not covered by the Act.
197. 74 Wn. 2d at 575, 445 P.2d at 652. *See* Johnson & Morry, *supra* note 30, at 58, & note 189 *supra*.
198. *See* note 13 *supra*.
199. *See* note 28 *supra*.
200. *See* Bayley, Symposium, *supra* note 5, at 74.

Probably the answer is no. Although the Act requires no permits for some developments,[201] the Legislature has nonetheless regulated those developments by its decision to exempt them from the permit requirement. Furthermore, the Act provides that "[n]o development [whether requiring a permit or not] shall be undertaken on the shorelines of the state except those which are consistent with the policy of [the Act] and . . . the applicable guidelines, regulations or master programs."[202] The policy of the Act is not one of complete prohibition of development, as would have been the result of *Lake Chelan,* but one of fostering appropriate uses.[203]

Even apart from the effect of the SMA, although perhaps influenced by its enactment, the Washington court in recent cases has evidenced a reluctance to extend the prohibition of *Lake Chelan* to tidelands and shorelands which have been sold by the state, particularly when those lands lie in heavily developed urban areas. In *Harris v. Hylebos Industries, Inc.,*[204] for example, the court, in refusing to apply *Lake Chelan,* relied heavily on a long history of legislative encouragement of urban tidelands development to deny plaintiff's claimed easement over tidelands which the defendant owned and desired to fill and improve.

Although this refusal may not of itself be an unhappy result if tideland uses can be regulated under the SMA, a frightening aspect of the opinion was an implication that the Act might not apply. The applicability of the SMA was apparently not asserted by plaintiff, either at trial or on appeal. However, the Attorney General, in an amicus brief on behalf of the Department, did argue that defendant's development required a permit under the SMA. This argument was addressed only

201. *See* text accompanying notes 118-26 *supra.*

202. WASH. REV. CODE § 90.58.140(1).

203. While the courts have not yet squarely faced this issue, such indications as are available suggest that they too will reach the conclusion that *Lake Chelan* type actions will not be available to challenge developments undertaken subsequent to the effective date of the Act, whether or not a permit was required and obtained. *See, e.g.,* the court's language in *Eastlake,* 82 Wn. 2d at 500, 513 P.2d at 51:

> The necessity of thoughtful management of our shorelines was recognized by our [*Lake Chelan*] decision and the legislature has recently enacted significant instruments for such management, the Shoreline Management Act of 1971 and the State Environmental Policy Act of 1971. Such enactments should provide the means for intelligently reconciling disparate interests in shoreline uses.

The *Eastlake* development, of course, was undertaken prior to the effective date of the Act.

204. 81 Wn. 2d 770, 505 P.2d 457 (1973).

in an ambiguous footnote[205] in which the court observed that "[i]f the Shoreline Management Act contains provisions showing that the legislature has changed its policy regarding the proper use of harbor areas, those provisions have not been brought to our attention." The Legislature may indeed have changed its policy;[206] more significantly, however, if the footnote means to suggest that the SMA will not be applied because the Legislature has not clearly stated that it no longer wants tideland development in harbor areas the court has missed perhaps the major point of the Act. In the Act, the Legislature says very little, directly, about the kinds of development appropriate in any given location. What it *does* clearly say, without distinguishing between developed industrial shorelines and serene wilderness shorelines, is that coordinated planning is needed. The Legislature sees "a clear and urgent demand for a planned, rational, and concerted effort . . . to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines,"[207] while at the same time recognizing that provision must be made for many types of shoreline uses. Certainly the Act nowhere suggests that developments on harbor tidelands are exempt from the directive that "[p]ermitted uses . . . shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment . . . ."[208]

The Act's basic policy is neither to prescribe nor to proscribe uses, but to plan and regulate. The permit system is an essential element of that policy which the *Hylebos* footnote threatens to scuttle for a significant portion of the state's shorelines. A master program for the area in question which impeded harbor development might be appropriately challenged, as might a denial of a permit application, on grounds that it was inconsistent with legislative encouragement of such development. But to suggest that no permit is required simply misstates the intent behind the SMA. If the *Hylebos* footnote is subsequently interpreted in this fashion, an amendment to the Statute is called for to make its message plain.

Finally, the SMA also changes the rule of *Lake Chelan* as applied

205. *Id.* at 786 n.11, 505 P.2d at 466.
206. "[U]nrestricted construction on the privately owned . . . shorelines of the state is not in the best public interest." WASH. REV. CODE § 90.58.020.
207. *Id.*
208. *Id.*

to developments placed in navigable waters prior to December 4, 1969 (the date of that decision which presumably put developers on notice of their peril). For such developments the state consents "to the impairment of public rights of navigation, and corollary rights incidental thereto."[209] This provision thus precludes new *Lake Chelan* type actions against most existing uses, although it does not preclude private challenges based on theories other than the public rights of navigation.[210] Neither does it affect *Lake Chelan* actions against uses begun during the hiatus between the date of the decision and the effective date of the Act. Very likely, however, there were few such developments in that year and a half because of the confusion and caution which the case engendered.[211]

VI. CONCLUSION

Articles discussing various states' coastal or wetlands statutes tend to conclude according to a discernable pattern: They congratulate the legislature for taking a bold step, warn of impending difficulties in the courts and hope for a brighter future for our grandchildren's grandchildren.[212] The reader is invited to decide for himself whether the conclusion to an article analyzing the SMA should observe this ritual.

Certainly Washington, in enacting the SMA, has embarked on an ambitious program of shoreline resource management. Probably the

209. WASH. REV. CODE § 90.58.270(1).

210. WASH. REV. CODE § 90.58.270(2). *And see* Bayley, Symposium, *supra* note 5, at 74.

211. *See* text accompanying notes 13-28 *supra*. The regulations suggest that a permit may be required for developments begun prior to the effective date of the Act "[w]here the activity was unlawful prior to the effective date of the act." WASH. AD. CODE § 173-14-050(1) (1973). This cryptic provision may have been intended to allow legislation by permit of developements, improper under *Lake Chelan*, begun after December 4, 1969. A development begun prior to the effective date of the Act may be unlawful for other reasons as well, however, and thus subsequently require an SMA permit. In *Eastlake, supra* note 112, construction was commenced prior to the effective date of the Act; the development was successfully challenged both on the ground that the original building permit was improperly issued (pre-SMA) and on the ground that SEPA had not been complied with at a subsequent (post-SMA) stage (*see* text accompanying notes 157-58 *supra*). The court noted that "[a]s no valid [building] permit was in force to justify the preshoreline construction . . . the [SMA] would now apply if substantial development is renewed. *See* WAC 173-14-050." 82 Wn. 2d at 498 n.7, 513 P.2d at 48.

212. Mr. John Dunnigan, J.D., 1973, who performed a preliminary literature search for the author and suffered through an early draft of this article, deserves credit for this succinct and accurate observation.

most significant feature of this program is the degree of responsibility placed on local governments. We must rely on future observers to assess whether local governments have the capacity and desire to exercise that responsibility fully and wisely. However, we must recognize that for the most part the Act's effects will be invisible—in 10, or 20, or 100 years shorelines simply will not look as they might have looked without the planning and regulation which the Act provides. Concerned citizens, whether or not they are trained in the law, should attempt to monitor those invisible effects. As the state's experience under the SMA grows, those citizens should evaluate the management choices made by the SMA and work for such changes as may prove necessary to allow the Act to fulfill its goal of intelligent development of one of "the most valuable and fragile of [Washington's] natural resources."[213]

213. WASH. REV. CODE § 90.58.020.