

PRACTICAL GUIDE:

COST-EFFECTIVE COMPLIANCE WITH SHORELINE REGULATIONS



PRACTICAL GUIDE: **COST-EFFECTIVE** **COMPLIANCE WITH** **SHORELINE REGULATIONS**

August 2014

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Futurewise

This practical guide is one of a series of guides addressing protection of shorelines in the Puget Sound region.

This project has been funded wholly or in part by the United States Environmental Protection Agency under assistance agreement PC 00J29801 to Washington Department of Fish and Wildlife. The contents of this document do not necessarily reflect the views and policies of the Environmental Protection Agency, nor does mention of trade names or commercial products constitute endorsement or recommendation for use. Any opinions, findings, conclusions, or recommendations expressed in this document are those of the author(s) and do not necessarily reflect the views or policies of the Washington State Departments of Fish and Wildlife, Natural Resources, or Ecology.

EXECUTIVE SUMMARY

The shorelines of the Puget Sound basin are the fragile narrow ribbon that supports our marine ecosystem in vital ways, from serving as the nursery area for many aquatic species, to being the migration corridor for outgoing juvenile salmon and the source of land-based nourishment to the water. In 1972, citizens in Washington State passed the referendum which adopted the Shoreline Management Act. The Act is designed to guide the management and use of the shorelines of the state while protecting its natural resources and allowing for responsible development and public access. Under the Act, cities and counties in Washington are required to adopt, update, and implement local Shoreline Master Programs (SMPs) which are land use policies and regulations designed to manage shoreline use.

IMPORTANCE OF COMPLIANCE

The success of shoreline management depends on both the quality of the SMPs and the ability of local jurisdictions to implement those SMPs. Cities and counties have been increasingly under financial pressure resulting in staff cutbacks and lack of funding for technology upgrades, on-the-ground restoration work and enforcement. Streamlining innovative techniques, providing quick easy tips, and sharing lessons learned are ways to help enhance local implementation of SMPs.

Having protective shoreline regulations and developing effective permit processes are both important for protecting the shoreline resources but, by themselves, they do not ensure either compliance with the regulations or protection of resources. Another important component is a compliance program, both in terms of ensuring that permit requirements are implemented (whether during construction or later), and in terms of identifying and correcting violations unrelated to permits.

Research shows that at least a rudimentary compliance program is critical so that the regulated community will comply with the rules and thus forestall future compliance issues.

THIS GUIDE

To assist and inform strong compliance and enforcement programs, lessons can be gleaned from studies of successful compliance efforts as well as from local agency peers. With this in mind, Futurewise, with funding support from Washington State Department of Fish and Wildlife through the Environmental Protection Agency, developed this practical guide to assist with and to increase the compliance and enforcement activities that protect and restore shoreline ecosystems.

METHODOLOGY

The approach in developing this guide has been a combination of literature review and expert consultation through interviews. The literature review involved a review of compliance and enforcement motivations and approaches. These data and literature review results were then enriched through Puget Sound stakeholder interviews with local planners and state and federal agency staff which in turn informed our recommendations.

KEY FINDINGS AND CONCLUSIONS

What are current conditions?

Local jurisdictions, primarily due to restricted resources, have limited enforcement and compliance programs. Some of the factors for these limited programs are:

- Staff resources are lacking overall.
- Counties and cities rely primarily on citizen complaints.
- Permitting and planning staff do some violation checking on an ad hoc basis.
- There is a “Get a permit” not “Fix the damage” approach.
- Enforcement takes a long time.
- Money from fines goes to the general fund.
- There are challenges with the legal system.
- Monitoring is sparse.
- There are feelings of a lack of backing by the State.

What is the role of deterrence as a motivator for compliance?

The majority of reviews and research studies about compliance and enforcement are related to air and water pollution laws which have required permit compliance checks and often are associated with industrial or commercial facilities. This body of literature generally supports the comments, observations, and advice of local government and agency staff. Deterrence is the key motivator for compliance. Classic deterrence theory includes three principles:

- Detection and penalty of a violation must be certain.
- The penalties must exceed the benefit of the illegal activity.
- Penalties must be swiftly applied.
- What factors support compliance motivation?
- Regulation works best.
- Reputation is important.
- Reputation must be kept up.
- Voluntary over-compliance can be accomplished.
- Customization to specific types of violations is needed.

- Cultural motivators can play an important role.
- Sense of civic duty can also influence decision-making.
- Enforcement style – one focusing on communication and incentives to get voluntary commitment from contractors, the other focusing on penalties and process to deter contractors – needs to be balanced.

What are approaches for effective compliance and enforcement programs?

Compliance and enforcement research as well as interviews with agency, local and conservation staff provide the following basic principles which underpin the recommendations in this guide:

- Build a strong reputation to create a compliance program that nets voluntary compliance.
- Prevention is important.
- Integrate compliance and enforcement with the permit review system.
- Financial guarantees improve compliance.
- Use the “Procurement Motivation” of permit review.
- Basic public education helps improve compliance.
- Capitalize on existing systems.
- Consider motivations and perspectives of all participants in the enforcement system.

challenges. Fundamentally, they are designed to increase the landowner motivations for compliance. Tool approaches which would most significantly improve compliance and enforcement are:

- Using the permit system to track compliance and violation enforcement
- Enhancing the use of financial guarantees
- Coordinated enforcement with other departments or other agencies
- Preparing ahead for legal cases

COMPLIANCE AND ENFORCEMENT RECOMMENDATIONS

In the shoreline protection arena, non-compliance or violations fall into these general categories:

- Permit non-compliance: developer doesn’t fulfill conditions.
- Permit non-compliance: development goes beyond the approved allowances.
- Work done without obtaining a required permit or exemption and illegal work (development which would not be allowed, even with a permit).

All of these actions can ultimately trigger legal action. Enforcement, thus, involves a series of steps which get progressively more expensive for jurisdictions to undertake as attorneys and courts (or similar settings) come into play. This is a key reason why enforcement programs are chronically underfunded. A jurisdiction can turn this official nature to its advantage, and thus save money, by turning the earliest and simplest actions into a strong deterrent to violations and a strong motivator for potential violators to voluntarily comply with regulations due to the costs, unpleasant experience, and associations of unlawfulness.

To address current conditions, twenty-three tools are recommended in Chapter 5 (and are summarized in the table below) to improve permit compliance and violation enforcement. These tools also take into consideration barriers such as staff overload, communication gaps, tracking, and coordination

Recommended Compliance Recommended Tools

| Compliance Approach | Staff or other resources required | Type of Approach |
|--|-----------------------------------|--|
| Tools for Improving Compliance with Shoreline Permits | | |
| Use Permit Review System to track compliance | Low | Technical Upgrade |
| Build Compliance-Enhancing Features into Permits | Moderate | Permit Strengthening Internal Procedures Change |
| Incorporate Financial Guarantees in Permits | Moderate | Permit Strengthening |
| Combine Compliance Checks and Monitoring with Other Checks | Moderate | Permit Strengthening |
| Systemize Monitoring Requirements and Reporting | Low | Internal Procedures Change |
| Incorporate Compliance Funding into Permit Fees | Low | Legislative Action |
| Tools for Improving Violation Enforcement | | |
| Track Violations in Permit System | Low | Technical Upgrade |
| Raise Awareness about Regulations and Enforcement Ramifications | Moderate | Internal Procedures Change |
| Capitalize on Official Stature of the Jurisdiction | Low | Internal Procedures Change |
| Publicly Disclose Violations | Low | Internal Procedures Change |
| Expand or Enhance Existing Code Enforcement Programs | Moderate | Legislative Action |
| Leverage the Citizen Complaint System | Low | Internal Procedures Change |
| Identify Unpermitted Development during Permit Review | Low | Permit Strengthening |
| Enhance Reporting by Staff During other Duties | Low | Internal Procedures Change |
| Create a One-Stop-Shop for Violation Enforcement | High | Legislative Action |
| Increase Funding for Violation Enforcement and Restoration Work | Moderate | Legislative Action |
| Legal and Regulatory Tools | | |
| Maximize Policy and Legal Tools to Resolve Non-Compliance | Moderate | Permit Strengthening |
| Choose Enforcement Method Based on Characteristics of the Case | Moderate | Internal Procedures Change |
| Incorporate preparation for legal work at all steps in the process | Low | Internal Procedures Change |
| Issue Cease and Desist Orders and Orders to Correct | Low | Internal Procedures Change |
| Address Unresponsive Violators | Moderate | Internal Procedures Change |
| Maximize Impact of After-the-Fact Permits | Low | Strengthen Permits |
| See Enforcement Actions through Court and Beyond | Moderate | Internal Procedures Change |

THANK YOU

We gratefully would like to acknowledge the assistance and information provided in creating this series of guides. Shorelines and planning work in Washington State is the work of many!

As a note: We thank many people here rather than reference them in the text in order to preserve confidentiality of our interviews. While we reflect individual opinions in specific segments of the guide, the persons listed below do not necessarily support the views, findings, or recommendations of this entire document.

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 Bill Bernstein, King County
 Ty Booth, Pierce County
 Allan Borden, Mason County
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 Wildlife
 Warren Chaney, King County
 Patty Charnas, Kitsap County
 Wayne Chaudiere, Whatcom
 Conservation District
 Robin Clark, Whidbey Watershed
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 Emily Derenne, Skagit County
 Jane Dewell, WA Reg. Innovation and
 Assistance
 Vicki Diamond, Pierce County
 Mike Erkkinen, Pierce County
 Nicole Faghin, Washington Sea Grant
 Wayne Fitch, Whatcom County
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 Tim Gates, WA Dept. of Ecology
 Wendy Gerstel, Qwg Applied Geology
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 Maggie Glowacki, City of Seattle
 Mike Grady, National Oceanic and
 Atmospheric Administration
 Libby Grage, City of Anacortes
 Steve Gray, Clallam County
 David Greetham, Kitsap County
 Jeremy Hammar, Mason County
 Kathleen Herrmann, Snohomish County

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 Assistance
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 Hugh Shipman, WA Dept. of Ecology
 Thomas Sibley, National Oceanic and
 Atmospheric Administration
 William Simpson, Island County
 John Starbard, King County
 Ted Sullivan, King County
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 Laboratory
 Randi Thurston, WA Dept. of Fish and
 Wildlife
 David Tiemann, King County
 Mike Tobin, North Yakima Conservation
 District
 Tina Tong, Army Corps of Engineers
 Jean White, King County
 Cindy Wilson, Thurston County
 Deirdre Wilson, Pierce County

*We also appreciate the significant help
 from Futurewise staff and board
 members who helped edit and
 produce these guides:
 Hayley Bonsteel, Ryan Ericson,
 Amy Gore, Kristin Kelly, Roberta
 Lewandowski and Franziska McKay*

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Citation for this document:

Futurewise. (2014). Practical Guide: Cost-Effective Compliance with Shoreline Regulations. Written by Dean Patterson, Heather Trim, and Tim Trohimovich.

Guides in this series:

Practical Guide: Incentives to Help Meet Priority Shoreline Restoration and Protection Objectives
Practical Guide: Shoreline Permitting and Mitigation to Achieve No Net Loss
Practical Guide: Cost-Effective Compliance with Shoreline Regulations
Practical Guide: Interagency Coordination in Implementing Shoreline Regulations

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1. COMPLIANCE AND ENFORCEMENT: CRITICAL TO SHORELINE PROTECTION AND RESTORATION

INTRODUCTION

The shorelines of the Puget Sound basin are the fragile narrow ribbon that supports the ecosystem in vital ways, from serving as the nursery area for many aquatic species, to providing a migration corridor for outgoing juvenile salmon, and an important conduit for land-based nourishment to the water. In 1972, the citizens of Washington State voted to adopt the Shoreline Management Act (SMA). The Act is designed to guide the management and use of the shorelines of the state while protecting their natural resources and allowing for responsible development and public access. Under the Act, cities and counties in Washington are required to adopt, update, and implement local Shoreline Master Programs (SMPs) which are land use policies and regulations designed to manage shoreline uses and activities. The Washington Department of Ecology (Ecology) is charged with assisting local governments in carrying out the Act and with approving locally adopted SMPs. In recent years, local jurisdictions have been updating their SMPs to incorporate new science, the Shoreline Master Program Guidelines, and local priorities and information.

The success of shoreline management depends on both the quality of the SMPs and the ability of local jurisdictions to implement those SMPs through regulatory programs, such as shoreline permits and voluntary actions (including restoration projects). Cities and counties have been increasingly under financial pressure, resulting in staff cutbacks, lack of funding for technology upgrades, and cuts in enforcement programs.

Having protective shoreline regulations and developing effective permit processes are both important for protecting the shoreline resources but, by themselves, they do not ensure either compliance with the regulations or protection of resources. An effective *compliance program* can ensure that permit requirements are implemented (during construction or later) and violations unrelated to permits are identified and corrected.

The importance of compliance and enforcement is emphasized in the Shoreline Management Act (SMA) as no fewer than seven sections of the SMA address enforcement.¹

A specific reality for local jurisdictions, however, is the challenge of funding a compliance program. In times of budget cutbacks, this regulatory function is often one of the hardest hit. Nevertheless, research shows that at least a rudimentary

compliance program is critical so that the regulated community will comply with the rules and thus forestall future compliance issues. At its worst, a program that is believed to be weak by the community can encourage violations of permits and illegal development. A well-funded and effective compliance program can both produce implementation of permit requirements and reduce costs of enforcement actions.

With this in mind, Futurewise, with funding support from Washington Department of Fish and Wildlife through the Environmental Protection Agency, developed this practical guide to help local governments and agencies improve compliance and enforcement. The focus is on recommendations for practical and low-cost methods for gaining compliance with permit conditions and resolving violations by streamlining, using innovative techniques, and learning from others. Specifically, this can be accomplished by incorporating compliance activity into everyday work that is already being done, by making the steps of compliance systematic (tracking systems, checklists, procedures, etc.), and by incorporating motivating components into the system to get permit holders and violators to comply with the laws voluntarily rather than choosing to violate. Tools which incorporate recommended approaches are found in Chapter 5.

This guide addresses the following “big picture” questions:

- What are the current constraints?
- What is the role of deterrence in compliance?
- What factors support compliance motivation?
- Does enforcement style affect compliance?
- In what ways does education strengthen compliance?
- What efforts can be undertaken to improve compliance and enforcement?

METHODOLOGY

The approach in developing this guide has been a combination of literature review and expert consultation through interviews.

Step 1: Literature Review

To better understand compliance and enforcement, we researched as studies on motivations for compliance with regulations or voluntary actions. There is a wealth of literature related to some enforcement topics, such as air and water

¹ RCW 90.58.050, RCW 90.58.140(8), RCW 90.58.210, RCW 90.58.200, RCW 90.58.220, RCW 90.58.230, and RCW 90.58.560.

pollution, but relatively fewer studies on effective compliance strategies for land use issues. The general insights and conclusions from this review informed our interviews and our coordination recommendations.

Step 2: Consultation Interviews

We carried out interviews with permit review practitioners from the staff of different agencies at the federal, state and local level to learn about:

- Their experience with regard to compliance with permitted activities and their current practices related to enforcement.
- Their opinion and experience on ways to improve compliance and enforcement.
- Success factors and barriers to adoption and/or implementation of potential approaches.

Step 3: Analysis

We then performed an analysis of the experiences of practitioners and the information from the literature. Through the process, it became clear that people often think about compliance from two perspectives - compliance with approved permit conditions and violation enforcement - and thus recommended tools in this guide (Chapter 5) primarily address those two areas.

COMPLIANCE AND ENFORCEMENT ARE CRITICAL FOR ACHIEVING NO NET LOSS

A “no net loss” standard is required to be met by Shoreline Master Programs (see side box) that are currently being updated by local jurisdictions in Washington State. Compliance and enforcement programs are critical components that are needed to help meet the standard. Thus existing programs will likely need to be strengthened in cost-effective ways. Technical, scientific and other literature² as well as information from practitioners help provide information about approaches for these needed improvements.

SHORELINE MASTER PROGRAM: COMPLIANCE AND ENFORCEMENT

Implications of no net loss requirements for compliance
An important component of accomplishing no net loss is a compliance program that ensures that permit requirements are implemented and violations unrelated to permits are identified and enforced. This is emphasized in the SMP Guidelines by the requirement to account for all impacts in the Cumulative Impact Analysis, including outside the permit system. The analysis must account for impacts of:

- Existing development,
- Unregulated activity,
- Development that is exempt from a permit, and
- Development that requires permits.

When project developers obtain permits or exemptions but fail to comply with the conditions of approval, they must account for those impacts. In addition, impacts from violations that **should have** obtained permits or exemptions also must be considered.

Preventing losses of ecological functions from these compliance impacts means that the local jurisdictions should have compliance programs to require violators and permit holders to undo or compensate for the damage they do. Effective compliance programs will minimize unmitigated impacts.

Source: WAC 173-26-186(8) – The overall protection of ecological functions requirement. Also found in several locations in the SMP Guidelines, including WAC 173-26-201(3)(d)(iii), WAC 173-26-201(2)(c), and others.

² For a comprehensive list of compliance and enforcement research in the environmental field see the EPA compliance research website: <http://www.epa.gov/compliance/resources/reports/compliance/research/index.html>. It includes many links, and includes the following bibliographies of the research: *Compliance Literature Search Results: Citations to Over Two Hundred Compliance-Related Books and Articles From 1999 to 2007*. US EPA, April 2007 <http://www.epa.gov/compliance/resources/reports/compliance/research/lit-results-2007.pdf>
Compliance Information Project: Literature Summaries. US EPA, April 1999, (EPA-300-R-99-002) <http://www.epa.gov/compliance/resources/reports/compliance/research/lit-summary-99.pdf>. Summarizes enforcement literature thru 1999. The summary of the first document and Appendix II cover 148 articles.

2. CURRENT CONDITIONS

A significant number of shoreline landowners throughout Puget Sound undertake activities that are destructive to habitat without permits or which go beyond the extent of their permits. Such activities include vegetation removal and construction or expansion of docks, bulkheads, gazebos or other structures. In addition, other landowners fail to complete the required mitigation or other conditions of their permits.

For a variety of reasons, financial and otherwise, local jurisdictions have historically had inadequate budgets for natural resources compliance and enforcement, and this problem has been even more pronounced in the recent years of economic downturn.

What are the current constraints?

In developing this guide and investigating current constraints related to compliance and enforcement, a number of permitting and planning staff at local, state and federal agencies were interviewed. Their knowledge and experiences provide valuable insight into on-the-ground successes and barriers.

COMPLIANCE AND VIOLATIONS IN PUGET SOUND

While there is no comprehensive assessment of shoreline violations in Puget Sound, local, state and federal practitioners identified many examples including:

- Landowners installing structures with no permits.
- Mom and pop do-it-yourself (DIY) using cinder block or concrete pillars to create bulkheads. Sometimes property owners tie logs together or tie logs to structures on their waterfront in order to reduce wave energy hitting their shore.
- Landowners putting in plants that they prefer rather than those specified in their permit landscape plan.
- Landowners not following their permit conditions and requirements in various ways: for example, docks that are longer than specified, using materials other than grating for docks, and installing swimming floats that are too big.
- Landowners building accessory “sheds” at the top of the bank and then later converting these to guest homes or living quarters.

Recent studies that identified specific shoreline violations in specific areas or permit categories include:

- Friends of San Juan Study assessment of permit violation activities (see Side Box on page 14),
- Washington Department of Fish and Wildlife (WDFW) assessment of Hydraulic Project Approval permits (see Side Box on page 16),
- Ecology and WDFW Puget Sound Compliance Assessment

(see Side Box on page 18),

- King County comparison of shoreline conditions with permits (see Side Box on page 19), and
- Kitsap and San Juan Counties T.A.C.T. Review (see Side Box on page 20).

BARRIERS IDENTIFIED BY PRACTITIONERS

Staff resources are lacking overall

Many jurisdictions do not have the staff resources available to check compliance with natural resource permit conditions. Similarly, a large majority of jurisdictions in the Puget Sound region do not actively seek out natural resource violations. In our interviews with local jurisdiction staff, we have found that no cities or counties have staff that conduct routine patrols for violations even though many reported that their jurisdictions had previously been able to support dedicated enforcement staff. Now only a few of the larger jurisdictions have part time enforcement staff (they respond to complaints but do not actively seek out violations). For the rest, enforcement is added “on top of existing job for staff.”

Some staff believe that public perception is that they don’t have good regulations but the reality is that compliance gaps occur and enforcement is difficult because there isn’t the staff to follow through. One practitioner described their current work balance as skewed:

“Could use much more enforcement. Right now it is 95% regulatory, 5% compliance and 0% education.”

Another noted that permit staff only have time to focus on getting as good a permit as possible:

“Permitting is simply not calibrated to follow-up. [We] get the best issuance conditions and then move on to the next project.”

Lacking significant enforcement funding, withholding a permit is used as a key approach. One planner said:

“Withholding the final permit is our biggest tool.”

Counties and cities rely primarily on citizen complaints

Due to this lack of enforcement funding, jurisdiction primarily

FRIENDS OF SAN JUAN STUDY OF PERMIT VIOLATION ACTIVITY

In 2007, Friends of San Juans conducted an assessment of permit violation activity in San Juan County for the period of 1972 to 2005. The islands of San Juan County have over 400 miles of shoreline and are home to extensive forage fish spawning beach areas, six stocks of Puget Sound rockfish, and multiple species of seabirds, including the federally threatened Marbled Murrelet. Most of the shoreline development is single family residential. This study was the first to examine land use policies and permit procedures to determine if existing regulations are protecting natural resources. The study was funded by The Russell Family Foundation, the Northwest Fund for the Environment and the Washington State Department of Ecology.

Study method

The authors analyzed existing shoreline development activities in major permit categories. They obtained permit information and then created a searchable permit database which linked to GIS. The permit activity locations were matched with priority habitat (eelgrass and forage fish) locations.

The permit categories assessed were: aquaculture, barge, beach access, boat house, boat ramp, bulkhead, clearing and grading, dock, guesthouse, logging, marine railway, mooring buoy, setback, shoreline, stormwater and transient rental. They obtained information about 2,607 permits, which represented an annual rate of 77 permits per year in the period 1972-2005.

Shoreline permit activity by permit type included in the study were primarily exemptions:

- 43% of land use permits were exemptions.
- 26% of land use permits were substantial developments.
- 14% of land use permits were violations.

Violation Results

The authors found that there had been 68 shoreline violations issued from 2000-2005. Of those, one third (27) were not sufficiently described to assign a project type. Of the remaining 41, violation activity types included:

| | |
|--|----|
| Illegal work in the shoreline | 18 |
| Illegal building/structures in the shoreline | 16 |
| Illegal digging in the shoreline | 5 |
| Illegal tree cutting in the shoreline | 2 |
| Illegal decks in the shoreline | 2 |
| Illegal fill in the shoreline | 1 |
| Horses | 1 |
| Illegal shoreline fence | 1 |

It should be noted that these were violations which had been identified and subject to county action.

Recommendations

The report had four key recommendations:

- The County's database needed to be updated so that permit and violation data would be easier to access.
- Existing policies and codes needed improved implementation.
- Additional studies would help clarify a number of permitting and violation issues.
- A cumulative impact assessment was needed.

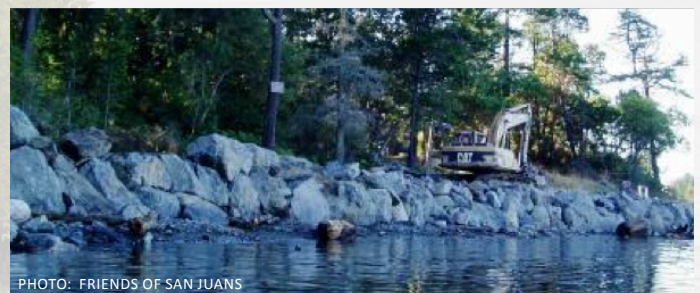


PHOTO: FRIENDS OF SAN JUANS

Bulkhead installation.

reply on citizen complaints for identification of violations. Violations are reported by mail, internet or telephone from citizens, often by neighbors. A planner noted:

“There are a lot of citizen eyes on shorelines. People do report violations. Usually when someone ticks off a neighbor.”

Most cities and counties only respond to complaints that are filed and some don’t have the resources to respond fully to all complaints.

Permitting and planning staff do some violation checking on an ad hoc basis

While they do not regularly do enforcement as part of their regular work, planner and permit staff do sometimes submit reports of complaints or violations they find. For example, one planner said:

“Every time I go south on the freeway, I see something new. It is amazing that people don’t come to the county and ask ‘can I do this?’ I try to stay on top of it. When I see something, I report it.”

For those staff that report violations when they are seen, they may have logistical challenges. When out in the field, staff may not know the permit status of a specific property. Staff often has to go back to the office to find out the status. Several jurisdictions are working to update the technology so that permits and violations can be tracked with online systems in the field.

There is a “Get a permit” not “Fix the damage” approach

Historically compensation for damage has not often been required when compliance or violations have been found. Rather the objective has been to fix non-compliance problems or get violations corrected under a permit. Practitioners report that for larger issues, most landowners end up getting a permit. Planners said that they work with the landowners until “they won’t work with us anymore and then you go to legal.” For smaller issues, the typical approach is:

“I get a call from a neighbor. ‘John is dumping all of his grass clippings and then garbage and now he has his hose out and is trying to flush it all down the bank.’

I go out and talk to him, ‘Hey you need to get this off the bank.’ 99% of the time, I can persuade them. I don’t fine them. If he says, ‘Get off my property,’ then we do fines, penalties, violation. I haven’t had to get to that point in 18 years.”

Enforcement takes a long time

In many cases, the code enforcement process gets drawn out over a long time span. One planner commented:

“Mr. and Mrs. Smith are given every chance to correct their ills. There are many appeals processes, and timelines for appeals, and appeals of appeals.”

The time-consuming nature of enforcement can be exacerbated, in some cases, by a lack of clarity of the regulations. When the regulations are not totally clear, the property owner may be advised by their consultant or lawyer to argue.

Some staff told us, in addition, that it is very time-consuming for them to figure out the rules and how to write the enforcement letters. For example, one question is the definition of “top of bank,” an important determination for measuring setback distance and which is a key method for managing impacts from shoreline development. The policy team that prepared the San Juan Initiative recommendations in 2009 found that scientists generally map the shoreline using tidal elevation but this is not what is used to determine the setback. Instead:

“Setbacks for houses are identified by establishing ‘top of bank.’ Top of bank is more a term of art than a scientifically documented shoreline location. One particularly descriptive definition for top of bank [they] heard was, ‘The edge of where you would comfortably park your new Mercedes.’”

The report continues, “This lack of a mapped ‘top of bank’ makes tracking where the setback is, and how it may be changing over time, almost impossible” (San Juan Initiative, 2008).

Money from fines goes to general fund

Fines are viewed as a positive attention-getter for potential

WDFW STUDY: INCREASING EFFECTIVENESS OF STATE AGENCY ENFORCEMENT ACTIVITIES

jurisdictions through enforcement activities for in-water work associated with state Hydraulic Project Approvals (HPAs) administered by Washington Department of Fish and Wildlife (WDFW), SMPs administered by Washington Department of Ecology jointly with local governments, federal Rivers and Harbors Act Section 10 permits and Clean Water Act, Section 401 and 404 permits administered by the Army Corps of Engineers, and other permits. Similar to local jurisdictions, these state and federal agencies are strapped for resources to support their enforcement programs.

Compliance levels and effectiveness of HPAs

WDFW reviews and issues approximately 5,000 HPA permits per year. In 2006, the Department conducted a review of the compliance, implementation and effectiveness of a select number (58) of HPAs and determined that while compliance with the permit conditions was relatively high, though not 100%, the effectiveness of HPAs at achieving no net loss of fish habitat was relatively low. Interestingly, compared to other permits reviewed in the study, the HPAs for marine bank protection (14 permits reviewed) contained the highest number of protective provisions, had relatively high compliance rates, and had relatively high implementation rates (a measure of outcomes against a hypothetical permit that contained all appropriate provisions). Compliance rates for marine bank protection permits were:

- Bulkhead location 85%
- Bulkhead material 86%
- Filling depressions below the OHWL 100%
- Pea gravel placement 54%
- Leaving waste material below the OHWL 42%

With regard to permit effectiveness, more than 50 percent of the marine bank protection permits reviewed received

less than a medium score for ability to meet no net loss (see figure to right). Similarly, scores for the permit's ability to mitigate impacts were mainly in the low to medium range.

WDFW Enforcement Recommendations

Based on this pilot study, executive level management and scientific staff from WDFW made three recommendations to state legislators to improve effectiveness of the Hydraulic Code and outcomes for fish and their habitat:

- “Provide funding to WDFW to conduct compliance and effectiveness monitoring wherein projects are followed through completion to determine if permit conditions are sufficiently protecting fish habitat;
- Provide WDFW civil authority for HPA violations, as opposed to the current system of jurisdiction within county courts as criminal offenses, to improve follow through and outcomes for violations³; and
- Investigate WDFW statutory authority under RCW 77.55 to determine which statutes restrict the department's authority to meet the “no net loss” goal (since the passage of 77.55 RCW in 2000, numerous statutory changes have weakened the department's ability to protect fish life).”

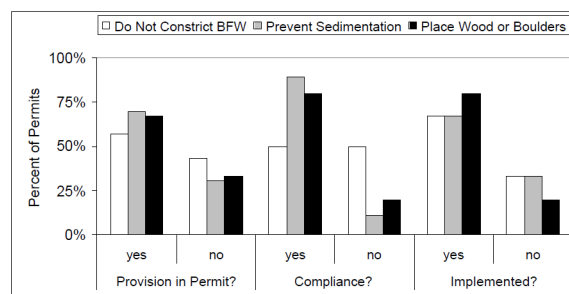


IMAGE FROM WDFW (2007)

³ WDFW has authority under 77.55.291 to levy civil penalties of up to \$100 per day for violation of any provisions of RCW 77.55.021. WDFW is proposing rules to implement this civil authority in the HPA rule update. WDFW will have to develop procedures after the rules are adopted by the commission.

Sources: Carman, R, Taylor, K, and Skowlund, P. (2010). *Regulating Shoreline Armoring in Puget Sound*. In Shipman, H., Dethier, M. N., Gelfenbaum, G., Fresh, K. L., and Dinicola, R. S., (Eds.). (2010). *Puget Sound Shorelines and the Impacts of Armoring – Proceedings of a State of the Science Workshop, May 2009: US Geological Survey Scientific Investigations Report 2010-5254*, p. 49-54.
Washington Department of Fish and Wildlife. (2007). *A 2006 Pilot Study of Hydraulic Permit Compliance, Implementation and Effectiveness in Region 6*. White paper for Washington Department of Fish and Wildlife. Written by Quinn, T., Kalinowski, S., Bicknell, R., Olds, C., Schirato, M., Price, D., Byrnes, C., Kloempkin, D., and Barnard, R.

violators. The violation fines, however, usually go to the general funds in local jurisdictions rather than back into the regulatory program. In addition, the fines are not large enough to cover costs or there are other complications as one planner noted:

“Now there is a base fine and so we can’t waive the fees if they work with you. And the base fine doesn’t cover staff time.”

There are challenges with the legal system

Some planners noted that additional natural resources education for judges could be helpful. They noted that the judges don’t realize that the staff has gone through a significant amount of history with the property and:

“We have already compromised, don’t compromise more.”

Monitoring is sparse

In addition, there has been a limited amount of ecological monitoring. Staff resources are not available to conduct monitoring activities, and furthermore, water quality monitoring is expensive and land cover analysis requires a

technical shop. Many staff have commented that they are not sure what monitoring will be required for the next round of SMP updates nor what protocols exist for shoreline monitoring.

There are feelings of a lack of backing by the State

Although not universal, several planners commented on feelings about a lack of support by state staff. They feel that the SMPs are largely driven by state code but commented that Ecology doesn’t always “stand behind us.” Another planner noted that educational messaging from the state is desired:

“People don’t know the rules. They come in and find this out and they get mad. The state could help by doing public messaging. So this is not the first time they hear it. Local jurisdictions don’t have the funds to do this.”

Another area where state assistance is desired is in the legal process. Local jurisdictions have to pay for third party experts. One planner commented that it would be helpful if the state could send in experts to help with enforcement appeals. State and federal agencies work in concert with local

PUGET SOUND COMPLIANCE ASSESSMENT

Ecology and WDFW recently completed a project to compile information about compliance with and enforcement of existing county and state-scale shoreline development regulations across Puget Sound. The team reviewed literature on improving implementation of regulatory programs, interviewed and distributed an online survey to regulatory program staff and reviewed enforcement tracking data.

Assessment Results

The assessment showed that there are not enough data on compliance rates to make a solid determination that non-compliance is a problem in the Puget Sound region:

“There is a significant gap in reliable data demonstrating compliance rates in Puget Sound.”

Thus the authors were unable to accurately characterize the problem and determine contributory causes, issues or patterns. One of their key recommendations (see below) is that more research is needed.

Part of the challenge is that the different local and state agencies track compliance and enforcement in inconsistent ways and in some cases the data available are very limited. Follow-up to complaints in some jurisdictions is tracked using excel spread sheets which detail number of complaints received, number of complaints addressed, type of infraction, and if and how complaints were resolved. In other jurisdictions, the tracking is handled in a different way.

Survey responses included numerous ideas for improvements as well as comments on current compliance and enforcement approaches that are working. These ideas were incorporated into the report recommendations.

Recommendations

The report included the following comprehensive set of recommendations to facilitate compliance and enforcement at the state and local level:

- Improve permit monitoring practices and conduct additional research on compliance rates (top priority).
- Develop consistent method for tracking formal and informal enforcement actions (top priority).
- Consider new approaches to monitoring unpermitted activities along the shoreline.
- Develop strategic education and outreach plans which meet the needs of landowners, including trainings, educating landowners before or during the preliminary application processes, and enhancing webpages.
- Conduct research on permit fees and processing time to determine if barriers to compliance.
- Consolidate or streamline permits to address inconsistent regulations and permit processes.
- Expand the Aquatic Protection Permitting System (APPS) program (between local governments and WDFW).
- Increase professional training opportunities (i.e., Washington State Coastal Training Program) and networking/collaboration opportunities, including formal networks and access to technical experts.
- Support WDFW monitoring efforts (policy 5212 and permit monitoring projects) and publication of results.
- Provide local governments more explicit guidance on permit monitoring to create consistency across jurisdictions, help clarify monitoring priorities, and reduce inefficiencies.
- Explore opportunities to improve enforcement authority for WDFW.
- Enhance state and local government coordination and partnerships, and sharing of resources.

KING COUNTY SHORELINE MONITORING AND COMPLIANCE PROJECT

In 2012-2013, King County, on behalf of Watershed Resource Inventory Area 9 (WRIA 9), surveyed 92 miles of shoreline by boat, from Seattle to Federal Way, and all of Vashon-Maury Island. The purpose was to assess the change in shoreline armor and other shoreline infrastructure that has occurred since a 2005 survey.

Shoreline changes observed

While the majority of the shoreline (96-99%) did not have any observable changes, the 2012 survey found 85 distinct changes in shoreline condition that had occurred since 2004, and the 2013 survey found 60 additional distinct changes, most of which occurred between 2012 and 2013. The 145 total observed changes included:

- **Armor.** (51% of the changes). Most changes were repairs (66). There were 7 new armor structures representing 602 new feet of armor.
- **Vegetation clearing.** (10%). 5.5 acres of treed areas were cleared, the majority in unincorporated King County. Most instances of clearing were unpermitted and were near homes, suggesting that the clearing was related to improving views or related to home remodeling.
- **Docks and other overwater structures.** (10%). There were 15 dock changes.
- **Stairs.** (11%). There were 16 stair changes.
- **Houses.** (7%). There were 10 house changes.
- **Other.** (5%). There were 2 deck, 7 retaining wall, 4 ramp, 1 aquaculture operation and 2 groin changes.

Key findings were that more new shoreline armor has been built since 2005 than has been removed through restoration and the amount of shoreline trees has decreased since 2005. Also other construction activities occurred on the shorelines.



IMAGE: KING COUNTY

Example of new cable log bulkhead found in the survey.

Compliance Results

The 145 changes in shoreline condition were compared to permit records in relevant local jurisdictions (see table). The research team found that most of the changes were not permitted, although it was unknown if all of the changes would have required a permit. Preliminary compliance rates (non-field verified) were 34% for the 2012 survey and 43% for the 2013 survey. It was found that higher value properties (appraised land and improvement value) had fewer compliance problems.

Ecosystem impacts

For the 2012 survey, the team found that 34 (40%) of the observed changes “did not appear to have any obvious physical or ecological effect.” The 2013 survey found 23 (38%) changes with no apparent effect. The majority of the changes did have effects and the longest unpermitted new bulkhead was a 292 foot long cable log bulkhead along the toe of an “exceptional feeder bluff.”

Compliance rate for both years

| | Permitted | | Not Permitted | |
|----------|-----------|-----|---------------|-----|
| | # | % | # | % |
| Armoring | 28 | 38% | 45 | 62% |
| Clearing | 2 | 14% | 12 | 86% |
| Houses | 7 | 70% | 3 | 30% |
| Docks | 4 | 27% | 11 | 73% |
| Stairs | 2 | 13% | 14 | 88% |
| Other | 3 | 19% | 13 | 81% |

KITSAP & SAN JUAN COUNTIES' T.A.C.T. REVIEW OF BULKHEAD PERMITTING EFFECTIVENESS

Kitsap County and San Juan County are implementing a troubleshooting, action planning, course correction, and tracking and monitoring (T.A.C.T.) approach for shoreline bulkhead permits issued by the counties and WDFW. The project is funded by Washington Department of Fish and Wildlife through the Environmental Protection Agency. They are looking specifically at the effectiveness of their current bulkhead *permitting process*. The goal is to determine if the regulations are making a difference to the nearshore ecosystem health.

Review results

The researchers reviewed 5 years of armor permits (2007-2012) and found that for those 65 permits, 56 were for repair and replacement. The project includes field investigation conducted by WDFW to determine if existing bulkhead permit conditions are being implemented and they are monitoring the effectiveness at protecting habitat.

The preliminary findings are:

- There is no verification link between Hydraulic Project Approval (HPA) and county permits.
- Permits have insufficient information about existing site conditions using fixed landmarks so can't identify where the old structure was located.
- The documentation is done in a bit of a "hodgepodge" way. This needs to be standardized.
- Staff lacks technical training and do not have the time and resources to follow up.
- "Exemption" permits for bulkheads only cover a limited number of staff hours, including administration and inspections, with additional hours billed to the applicant.
- Staff are unable to follow-up to check on mitigation conditions because permit fees have been expended. Kitsap County, for example, has low to moderate permit fees. They are entirely reliant on fees.
- Bulkhead exemption permit fees do not reflect the



PHOTO: KITSAP COUNTY

amount of resources required, depending on the permit.

- Information on permits that required mitigation was difficult to access. Mitigation needs to be recorded better and in standardized ways. The county is considering using mitigation bonding and mitigation banking.

A final report card with findings is expected at the end of 2014.

3. FACTORS THAT ENCOURAGE COMPLIANCE AND EFFECTIVE ENFORCEMENT

The majority of reviews and research studies about compliance and enforcement are related to air and water pollution laws.⁴ These regulatory programs include required permit compliance checks and often are associated with industrial or commercial facilities. Useful principles can be applied from this body of research to the land use and natural resources arena. This body of literature generally supports the comments, observations, and advice of local government staff who were interviewed in the preparation of this guide regarding shoreline and critical areas permits.

What is the role of deterrence in compliance?

A major concept that underpins compliance and enforcement is that of deterrence. Deterrence is the primary tool of regulation and is itself a form of motivation. In other words, the potential negative consequence of violating the law provides a high barrier. While deterrence mainly applies to convincing people to comply with rather than not violating the law, it is also useful in gaining compliance after a violation has happened. The negative consequences of deterrence extend beyond the financial penalties and the additional costs of time and physical changes to correct the violation to the negative social and personal consequences resulting from being embroiled in a law enforcement situation.

Classic deterrence theory includes three principles that a would-be violator is assumed to perceive and react to in a rational manner:

- Detection and penalty of a violation must be certain.
- The penalties must exceed the benefit of the illegal activity.
- Penalties must be swiftly applied, a factor termed “celerity.”

Early on, this theory assumed that rational action was largely based on an economic calculation. However, research in recent years has confirmed the observations of many land use enforcement staff: motivations for compliance include a variety of other factors as well, both negative and positive.

SPECIFIC AND GENERAL DETERRENCE

There are two aspects of deterrence - specific and general. The distinction is important because of the hidden effects on the larger community. *Specific deterrence* is the effect that an enforcement action has on future compliance by the company

or person who is the target of the enforcement action. The effects of specific deterrence are intuitive and have been well documented in the literature. *General deterrence* is the effect that an enforcement action has on compliance in the broader community, such as other companies, neighbors, and the general population. It is in the hidden and broader area of general deterrence that the research has found important benefits of enforcement activity. Thus laws that have little or no compliance activity behind them will not only lose the immediate effects of specific deterrence but the much broader effects of general deterrence in preventing violations in the wider community.

What factors support compliance motivation?

A United States Environmental Protection Agency (EPA) document by Jay Shimshack (2007) synthesized the research on the motivations of deterrence. Shimshack investigated the factors of both specific and general deterrence and found that “the literature strongly suggests one result central to this report. Regulation, monitoring, and enforcement have historically been, and remain, critical determinants of environmental behavior. ...Every reviewed study indicated that regulation/legislation is a more important determinant of environmental behavior than any other single factor.” Several key findings from this study and an additional 2011 paper by Shimshack and W.B. Gray have implications for natural resources compliance programs:

- **Regulation works best.** Regulation, monitoring, and enforcement are more effective than non-regulatory methods of obtaining compliance.
- Environmental monitoring and enforcement activities generate substantial specific deterrence. Monitoring reinforces the thought that someone is watching. Inspection and enforcement reinforce the negative consequences of a violation on the violator. Direct negative consequences deter future violation activity and create or enhance motivations for compliance in the future.
- Environmental monitoring and enforcement activities generate substantial general deterrence. Hearing about monitoring and enforcement activities related to activities of rivals, peers, and others in the community reminds people of the negative consequences of violations and encourages compliance.

⁴ Clean air and water laws are federal and state laws with inspection, enforcement, and penalty elements built into them. The federal laws are often delegated to the states, who administer in many circumstances with federal oversight.

- **Reputation is important.** Monitoring and enforcement activities serve to build and reinforce the reputation of the regulator and deter future violations. Furthermore, when the three principles of classic deterrence theory are used (certain, costly and rapid penalties), the reputation effect is maximized. Shimshack's additional studies found that the effect of enforcement actions/fines at other companies is almost as great as at the penalized company. The effect is driven by the increased agency reputation in the community created by the enforcement action. A penalty with "economic teeth" such as a substantive monetary fine is most effective. Penalties without teeth (mostly non-monetary sanctions, such as follow-up education efforts) have little effect (Shimshack and Ward, 2005).
- **Reputation must be kept up.** The effect of the regulator's reputation underlying general deterrence tends to decay over time unless renewed with new monitoring and enforcement activity. With a lengthy period of inactivity, deterrence decays to levels as if there were no compliance program.
- **Reputation only goes so far.** There are limits to the "reach" of the reputation effect underlying general deterrence. It is not effective in all situations. For example, the reputation of other agencies doesn't help one agency. Additionally, if there is no knowledge of a reputation, it cannot affect compliance.
- **Voluntary over-compliance can be accomplished.** Environmental monitoring and enforcement activities may generate significant emissions reductions, even for where compliance is typically high. The deterrence factor may even encourage some to over-comply beyond the required level (perhaps as a safety factor) - especially for specific deterrence. Specifically, Shimshack's additional studies have found that enforcement dramatically increases compliance both for the penalized company and for other companies, mainly for economic reasons. The effect can result in over-compliance well beyond the strict limit of the regulation (Shimshack and Ward, 2008). While less applicable to land use situations, this finding reinforces the importance of deterrence in obtaining voluntary compliance with the law.
- **Customization is needed.** Different tools will get different responses – though criminal enforcement gets better response than civil/administrative enforcement. Nuances of industries, firms, and people affect their responses. For example, if costs to comply are prohibitive, response to enforcement will be subdued. One has to be aware of such limits and be flexible in using motivations.

A 2004 Oregon Dept. of Environmental Quality survey identified a list of the top motivators for companies to comply with laws. Most are directly financial or have a financial component, but some have a non-financial component to them, and these are italicized:

- Concern over a forced shut-down
- *Concern about the environment*
- *Concern over criminal prosecution*
- *Concern about reputation*
- *Pressure or concern from the community*
- Pressure or concern from customers
- Financial pressure of actual fines
- Financial pressure of potential fines
- Pressure from insurers
- *Pressure from employees*
- Withholding of state or federal contracts

The study also found that small companies are much more sensitive to actual fines and pressure from insurers than larger companies. They are also less responsive to effects of general deterrence because they lack knowledge of agencies and their activities.

Overall the study emphasized the need to use a range of compliance techniques. It is important to convey a sense of fairness in the enforcement compliance program in terms of distinguishing between accidental and purposeful violations, ensuring a level playing field that encourages continued compliance, and imposing penalties consistent with the scale of violation (Oregon Department of Environmental Quality, 2004)

CULTURAL MOTIVATORS CAN PLAY AN IMPORTANT ROLE

While the largest proportion of compliance comes from deterrence, a program that increases landowner motivation can also significantly boost compliance. Some motivating approaches can be simple and inexpensive, such as notification and education about laws.

Many studies show that cultural motivation can be an important factor for compliance by businesses as well. These cultural motivators have an indirect financial consequence in that when a firm sees a downside to a cultural issue, it would increase their compliance rate. Each company, however, can have its own cultural motivators. Some companies will be largely unresponsive to cultural motivators. This knowledge can be used in finding additional motivations to resolve compliance problems.

Cultural motivators for industries, which can also be extrapolated to individual landowners, include:

- **Knowledge of a level playing field.** Seeing that the rules are being enforced reinforces the perception of a level playing field, so people are more willing to continue to comply.
- **Reputation and social standing.** People and companies may not want their reputation or social standing tarnished in the eyes of others by the possibility of enforcement for criminal or unlawful behavior.

- **Going Green.** People or companies may want to use compliance as positive environmental marketing.
- **Desire to be a good steward.** People or companies may simply believe that being a good steward is the right thing to do. A common issue raised, however, is that a lack of knowledge of stewardship measures hinders this motivation being translated into effective compliance.
- **Desire to follow the law.** People or companies may simply believe following the law is the right thing to do. Like stewardship, a common issue raised is that a lack of knowledge of what the law requires hinders this motivation being translated into effective compliance.

ROLE OF SENSE OF CIVIC DUTY

A 2004 study by May and others surveyed marinas and boatyards to determine how traditional regulatory and voluntary approaches affect motivations related to water quality protection. While the researchers determined that regulation is more effective than voluntary approaches alone, deterrent fears and the sense of duty (or civic obligation) to comply are important motivations for action. In addition, peer reputation and attitudes toward government were found to be important considerations (May, 2005). A 2001 study by Winter and May of Danish farmers found that variety of motivations play into compliance including the critical role of awareness of rules. They found that social/cultural motivations were as important as economic motivations and that enforcement style can affect compliance in that formalism is helpful, but coercion can backfire. These findings were contrary to postulated “benefits of flexible enforcement.” In a 2005 article, May summarized his team’s studies of these different environmental contexts: Danish farmer compliance with environmental law, Pacific Northwest marine facility compliance with water quality laws, and American homebuilder compliance with building safety laws. They noted the importance of “civic duty to comply” and “deterrent fear” motivations. For those with a high level of sense of duty, deterrent fear motivated higher levels of compliance in all three arenas. Overall, high levels of deterrence fear motivated higher levels of compliance for homebuilders and marinas, but not farmers. Concern about one’s reputation is one of the more significant findings. Awareness and knowledge of the regulations is also important, if following the law is to contribute toward sense of duty. Responses to different compliance activity can vary widely (Winter and May, 2001; May, 2005).

Does enforcement style affect compliance?

Studies by May and others found that the social/cultural differences in each regulatory situation are important and can drive or influence the different motivations to comply. They show that “social contracts” can influence compliance by increasing or substituting for sense of duty. For example, the building inspection system has created a social contract system

that encourages compliance through the social need for well-constructed buildings, regulatory expectations emphasized by automatic inspections, and by the problem solving enforcement style of regulators (May, 2005).

May also investigated the effect of the inspector’s enforcement style on compliance – either facilitative or formalistic. While their study shows that enforcement style had little effect on compliance rates due to other factors reducing its importance, style does affect relationships. When facilitation creates inconsistencies, it can undermine contractor understanding and expectations of rules (May and Wood, 2003).

Work by May and Burby and others examined factors related to two different enforcement approaches: systematic and facilitative. The difference between the approaches is the relative emphasis on gaining voluntary compliance – one focusing on communication and incentives to get voluntary commitment from contractors, the other focusing on penalties and process to deter contractors. Capacity to enforce and contractor voluntary commitment to comply were important – hallmarks of the respective approaches. While capacity to enforce is most important, the commitment of contractors to comply voluntarily was also important. The study found that the approaches are not mutually exclusive, and suggest that the appropriate emphasis is a mix of improving enforcement capacity and stimulating voluntary compliance. A strictly systematic approach leaves potential compliance untapped. Education about regulations is important for gaining voluntary compliance (Burby et al, 1998).

Another study by May and Burby looking at enforcement style found that code enforcement agencies generally pursue one of three different enforcement strategies: strict, creative and accommodative. The first two approaches correspond to those described above. The accommodative enforcement strategy is the most frequently used. It is applied where enforcement philosophies are highly unsystematic and is only moderately facilitative, and entails little overall agency effort (May and Burby 1998).

SUMMARY OF MOTIVATION AND DETERRENCE FACTORS

An extensive body of research on compliance and enforcement (primarily related to water and air regulations) provides an underpinning of effective approaches for shoreline protection:

- Most compliance is accomplished by deterrence, but motivation can be used to boost compliance.
- Deterrence (both specific and general) is based on the jurisdiction’s reputation.
- The jurisdiction’s reputation is derived from actual compliance activity and must be maintained with regular activity.
- Deterrence and reputation inspire compliance because people know:

- Someone is watching and a violation will be caught.
- The penalty for a violation is worse than complying – both in cost and unpleasantness.
- They cannot put off compliance until the jurisdiction gives up and goes away.
- A compliance program that is well-known to be ineffective or non-existent provides limited deterrent motivation for people to comply. Without deterrence, the jurisdiction has to rely on people's sense of duty and other voluntary motivations for compliance. This rewards people willing to violate and penalizes those that comply.
- Many compliance programs have a somewhat scatter-gun approach with little philosophical or logical foundation and little effort expended. These programs can benefit greatly from carefully chosen systematic improvements to get the most bang for the buck.
- The building code enforcement system (with systematic permits, inspections, and sanctions) has an existing social contract with the development community with high levels of compliance. Jurisdictions often link the zoning enforcement process into the building code enforcement system. Tapping into this system for natural resource enforcement can improve compliance resources, though careful coordination and training will be needed.
- The style of compliance is important. Friendly and flexible enforcement approaches can encourage a variety of motivations to comply with permits and motivations to correct violations; however, they must be used carefully to avoid sending conflicting messages about rules and expectations.
- Social, cultural, and personal motivations can improve compliance, if used strategically to encourage the best motivation for the situation. These can be applied both to prevent violations and to obtain voluntary correction of violations.
- Motivations that cause *aversion* can be used, such as protecting one's reputation, avoiding criminal prosecution, social pressure, and avoiding bad experiences.
- *Education* about the unpleasant consequences of enforcement action can be used to gain voluntary compliance after violations have occurred. Social marketing and other community-based techniques can help reinforce a culture of compliance.
- Positive motivations can be used, such as following the law, stewardship (protecting resources), being "green," and seeing a level playing field.
- *Notification and education* is an important tool needed for tapping into people's sense of duty and the positive motivations to follow the law, and for stewardship. People that do not know about the law or the importance of natural resources are more likely to cause violations.
- An effective compliance program should be tied into the permit review system. Required inspections should be included in the permit tracking system and permit conditions should also be included.
- *Procurement motivation* for permits can be used to resolve past violations. Since the applicant wants a permit, this gives the local government an opportunity to get the applicant to resolve any past complaints.
- Raising awareness about regulations and about the value of natural resources can be accomplished for a low cost to increase compliance. Examples include brochures, explaining the value of natural resources through an organization's educational programs, including this information on websites.

4. APPROACHES FOR EFFECTIVE COMPLIANCE AND ENFORCEMENT PROGRAMS

Compliance and enforcement research as well as interviews with agency, local and conservation staff provide underlying effectiveness principles. Ecology has published an enforcement manual (see Side Box on page 30) which also provides helpful information. These ideas are summarized below. Recommendations in this guide (Chapter 5) are based on these principles.

LOCAL JURISDICTIONS NEED COMPLIANCE DATA

Under updated shoreline regulations, additional compensatory mitigation will likely be required in most permit and exemption reviews. These will take the form of enhancement projects or other conditions of approval will need to be checked in the post-issuance phase of permitting. Failures of these enhancement projects or other non-compliance will leave development impacts that are unmitigated. Since the cities and counties are ultimately responsible for both permit and non-permit cumulative impacts in the shoreline zone, jurisdictions have a strong motivation to ensure that required enhancement and other conditions are implemented.

BUILDING A STRONG REPUTATION THAT NETS VOLUNTARY COMPLIANCE

A strong, adequate compliance program will become a well-known part of the local development culture and a major component of the reputation of the regulatory agency. This directly influences people's voluntary willingness to comply with laws. Conversely, an inadequate compliance program undermines the entire development review environment because it is inherently unfair to those who do follow the law, and encourages non-compliance.

A strong compliance reputation is especially important for natural resources permitting because many members of the public do not understand the need for natural resource protection and is often the subject of high levels of philosophical opposition.

Because monitoring and enforcement staffing is expensive, the challenge is to find the sweet spot or balance between an overfunded compliance program and one that is understaffed, so that the reputation is strong enough to reap voluntary actions by the public – to obtain the most bang for the buck.

CLARIFICATIONS REGARDING MONITORING

In the course of undertaking permit compliance, the subject of monitoring often arises. An important distinction needs to be made. Monitoring in the *environmental permit* arena generally refers to compliance checks on the condition of natural resources, and usually on the progress of enhancement or restoration work (such as for recreating wetlands). On the other hand, agencies and jurisdictions undertake *site-specific and regional ecological monitoring* (such as assessing biological function, condition of habitat, water quality) outside of the permit arena. This kind of monitoring is used to evaluate the success of a jurisdiction in meeting the no net loss standard and informing necessary changes during future SMP reviews and updates.

A local jurisdiction builds their reputation through a history of effective and fair enforcement action. Even if the jurisdiction chooses to rarely go to court due to costs, those rare cases can be enough to capture much of the deterrence motivation and voluntary compliance. The strong program has these features:

- Early enforcement steps are simple, systematic and low cost so that a strong enough program is possible.
- It is clear to people that if they violate, they will get caught.
- Going through a violation resolution process is *much more unpleasant* than going through a permit application process – more cost, more trouble, more fraught with the stigma of unlawfulness.
- For those who don't comply with their permit conditions, swift action by the jurisdiction will send the message to others that it is not worth it to try to skirt compliance.

PREVENTION IS IMPORTANT

A well-known characteristic of compliance and enforcement is how difficult it is to undo a violation. Consequently the best approach is prevention. It is important for the jurisdiction to obtain voluntary compliance as much as possible— meaning that developers make the choice to comply with permits or law instead of violate them. While there are different ways to gain voluntary compliance, deterrence is the most effective.

Interacting with project developers in a manner that encourages

the choice to undertake voluntary compliance is worthwhile. It is a careful balance to gain a large amount of voluntary compliance at low cost with just enough of the more costly deterrence actions in order to create a believable set of adverse consequences.

This idea was supported by one planner we interviewed who noted for enforcement and code violation issues:

“Easier to ask forgiveness than permission.’ That is now a myth. For example, in the late 1990s with the Forest Practices Act there was a 6-year moratorium. Once the code was clear that there would be no permit, people figured out they needed to stop the activity. Consistently applied, consistent ramifications.”

INTEGRATE COMPLIANCE AND ENFORCEMENT WITH THE PERMIT REVIEW SYSTEM

Compliance and enforcement functions should be integrated into the permit review process as a cost-effective way to track enforcement and consolidate resources. Some of the important permitting elements that can also help improve the compliance program include:⁵

- A systematic permit tracking system (preferably digital) that can both track permit compliance problems and violation enforcement actions and also inform system users about them.
- A tracking system that can both identify the existence of the natural resources permit and the limits of the approved conditions for anyone accessing site information. This is important to determine if the property subject to a violation inquiry actually has a permit already.
- A robust Geographic Information System (GIS) platform (especially with an air photo history) that also supports enforcement functions.
- A site visit system that can incorporate compliance and enforcement needs as they arise.
- Staff with natural resources expertise and training who can accurately identify impacts of violations, and the needed corrections and compensation.
- Use of permit conditions to reduce permit compliance problems.

FINANCIAL GUARANTEES IMPROVE COMPLIANCE

Financial guarantees include performance bonds, cash escrows, property escrows, standby letters of credit, improvement credit agreements, and liens and covenants. A survey of planners by Feiden and others demonstrated the utility in of financial guarantees for strengthening compliance. Ninety percent of the participants indicated that financial guarantees are very effective or somewhat effective. Performance bonds, cash escrows, and letters of credit were found to be most effective, with letters of credit recommended as the preferred tool. The authors also recommended that jurisdictions authorize a variety of options for flexibility (Feiden et al, 1989).

In interviews with practitioners, we were told definitively by one planner:

“A financial guarantee is an effective way to get mitigation done.”

Another planner noted that his jurisdiction requires a hefty financial guarantee and then they release it as the landowner does the mitigation:

“This has worked pretty well...They would never call us back if we didn’t have this. It is the only hook we have.”

PROCUREMENT MOTIVATION OF THE PERMIT ITSELF

While much research focusses on the motivations for complying with permits, the permit itself is also a form of motivation. The need to acquire items from another party can be a strong motivator for people. In the case of government approvals, the applicant is motivated to complete required actions so their development can be considered legal. The procurement motivation can be extended to other instances besides obtaining the primary permit. It can be applied to obtaining other approvals or reviews (such as building permit inspections) or to recovering resources that are held (such as financial guarantees).

One of the few tools that all jurisdictions have, regardless of resources, is the ability to withhold any additional approvals that a specific project needs until a compliance issue is resolved. This includes issuance of subsequent permits, construction inspections, and occupancy permits. Similarly, if a landowner is not complying with their permit, the local government can rescind the permit to prevent future violations.⁶ Regulatory changes can be made to support these policies and address both outright violations and violations occurring during permitted construction.

⁵ Additional recommendations for a strong permitting program are described in detail in Futurewise’s Practical Guide for Shoreline Permitting to Achieve No Net Loss which is part of this guide series.

In interviews with local planning staff, we learned that in some jurisdictions, legal counsel doesn't allow permits to be withheld for violations and non-compliance. Such a policy results in situations where the staff person may issue a shoreline violation notice and have to turn around and issue a shoreline permit for the same property without the violation being corrected, thus undermining the enforcement approach. This can be solved if requirements are added to permitting and enforcement regulations stating that permits cannot be issued if uncorrected violations are outstanding.

BASIC PUBLIC EDUCATION HELPS IMPROVE COMPLIANCE

As compliance and enforcement research shows, education can be useful for bringing "sense of duty" motivations into play - specifically following the law, ensuring a level playing field, and being a good steward of natural resources.

In what ways does education strengthen compliance?

Getting basic knowledge to the right people can prevent violations before they happen. Educating permit applicants can also help convince people to comply with their permit requirements or continue complying with past permits.

From practitioners, we learned that one of the biggest barriers staff face is getting people to understand why regulations have changed. For example, why the setback doubled or tripled, or what function the regulations provide in areas that are already degraded? Landowners are fairly unaware of current regulations. One planner explained:

"A lot of people don't know but they see their neighbors clearing the buffers and so they assume it is OK. Or things may have been allowed 15-20 years ago and they think it is still OK. People aren't informed when things are changed."

Another planner suggested that a marketing program is needed via webpages and other means to deliver the basic message:

"Did you know that if you want to replace your bulkhead, you have to get a permit?"

If property owners don't know that the law requires permits for the activity they plan, they are likely to cause a violation, even if they would normally follow the law. This is a common response by people being confronted by enforcement staff and a common source of after-the-fact permits. Informing people

of the need for permits before they make alterations can prevent accidental violations. In addition, knowledge that the law applies to everyone also helps convince people that they are being treated fairly and makes them more willing to comply with the law and with permit requirements.

Another important role of education is to raise awareness about the value of the resource. If people don't know the importance of the natural resources on their property, they may be more likely to make alterations that cause damage, or to go beyond the limits of their permit. Often landowner negligence may be due to lack of awareness and in other cases it may be because their values are utilitarian rather than "stewardship," and they are confusing the word. Education can change how people think about the resources and get them to be more careful to avoid altering those resources.

CAPITALIZE ON EXISTING SYSTEM

Given the realities of tight budgets, it is highly beneficial for local agencies to build on and enhance existing structures and processes and many of our tools (Chapter 5) are based on this concept.

Examples of use of existing structures and processes include:

- Adding permit compliance and unpermitted violation enforcement into the permit review tracking system.
- Directing the citizen complaint system to glean complaints most desired by the jurisdiction.
- Enhancing or passing ordinances to support legal tools such as abatement funds and ticketing.
- Piggy-backing on similar activities being conducted in other programs to save time and money.

CONSIDER MOTIVATIONS AND PERSPECTIVES OF ALL PARTICIPANTS IN THE ENFORCEMENT SYSTEM

Understanding and accounting for the anticipated actions or perspectives of other parties involved when planning an enforcement action is important for gaining the most successful enforcement outcome. There are a variety of participants, often non-experts, involved in an enforcement action (see Side Box on page xx about the Snohomish County assessment which considered many of these perspectives). By tailoring an enforcement approach to account for the perspectives, a jurisdiction can maximize enforcement success. These perspectives include the following:

Violators/Defendants

The first defense of violators fighting an enforcement action is often to delay, deflect, confuse, raise technicalities, and object to procedures. They attempt to delay and deflect the staff hoping that the violation gets put on the back burner. They

may attempt to confuse judges and get by on technicalities and procedures. This is important because they don't have to prove anything--just add enough comment for the judge to get the case thrown out. This is one reason it is important to follow explicit enforcement process steps and ensure that details are correctly followed.

On the other hand, some violators that are philosophically opposed to the regulations sometimes say they don't believe the jurisdiction has the right to tell them "no." Such cases can be easy to prove, since they provide no defense against the details of the case.

Judges

Judges and prosecuting attorneys often have little or no knowledge of natural resources and land use. A common misconception is that the violation is "just a ticket." Another misconception is that issuing a permit for the violation will correct it. This doesn't address the violation, however, nor does it meet the requirements of the SMA.

Lack of specialized knowledge

Lack of specialized knowledge is a challenge in the case of judges, because judges are randomly assigned to cases. Therefore, since consistent judges who are knowledgeable about the issues are not assigned, it is necessary to provide the judge with educational material about the nature of land use and natural resources cases. On top of that, many cases are also limited in the amount of material that can be provided and judges are busy and have a limited time to devote to a case. This situation makes it difficult to educate judges on the specialized subject, and is a major obstacle to enforcement cases. Staff do their best to provide the basic educational materials.

Jurisdictions, however, have another option. They can modify the appeal and hearing process to reduce the importance of the judge's lack of expertise.

Other factors to consider include:

- **Workload issues.** Judges typically have large workloads and those workloads have a direct consequence on their approach to cases. With a heavy workload, there is a motivation to clear the docket using some of these methods:
 - Technicality and procedure issues are easy ways to resolve a case.
 - Looking for a reason to continue the case temporarily addresses pressure from other cases.
 - Looking for a reason to continue the case is an easy way to avoid making a decision on a difficult case.
 - Finding ways to make a deal between the parties is an easy way to reduce workload.
- **Ongoing cases.** Judges also have a perspective driven by the characteristics of normal cases, which are different from land use cases. The distinction is that land use cases are ongoing, as opposed to discrete incidents. The violation needs to be undone or it continues to reoccur.
- **Equity concerns.** In normal cases, judges are looking for "equity." Thus they are influenced by defendants' pleas that "it just doesn't seem right." This makes judges more willing to reduce or waive the required corrections.
- **Flexibility.** Judges are not strictly bound by procedures, and their sense of equity may lead them to give special dispensation to defendants.
 - They can "set aside" previous decisions/orders that were in the jurisdictions favor, in order to help the defendant have more options. This may even occur for defendants that purposefully ignore previous legal requirements.
 - They may allow (or even counsel) defendants to change their claimed position to one with a better chance to win their case – for example changing their position from "contesting" the enforcement action ("I didn't do it") to a request for the judge to "mitigate" (reduce or waive) the requirements in whole or part.
 - Photos and videos are critical to help judges evaluate the veracity of defendant's claims.

Prosecuting or city attorneys

Prosecuting or city attorneys have similar issues as judges:

- **Expertise.** Prosecuting or city attorneys may lack specific expertise in natural resource topics. Approaches to help improve expertise include:
 - The permit department can work with the legal department to get a consistent attorney assigned to land use and natural resources cases in order to increase familiarity with the topics.
 - The natural resources staff can conduct intensive education and training about the nature and nuances of land use and natural resource violations. Other prosecuting attorneys may be interested in gaining such educational opportunities.
- **Workload.** Prosecuting attorneys are typically busy people with heavy workloads that cause them to try to reduce time on natural resource cases. Some considerations are:
 - When pressed by other cases, prosecutors will often look for ways to continue the case.
 - Land use and natural resources cases are boring compared to most criminal prosecution cases. In competition with more interesting cases, it is often more appealing to table or "continue" the land use/natural resource cases. In addition, the United States constitution guarantees a speedy trial for criminal defendants so criminal cases have priority over violations and civil cases.
 - With a heavy workload, there is a motivation to clear the case backlog. This makes negotiations appealing

to the prosecutor, so they don't have to go to court. Negotiations, however, may not fix the violation unless done correctly.

Elected officials

Elected officials come into the enforcement equation in a couple ways. Depending on the local regulations, they may be the appeal body for violations. In addition, the violator may ask the elected officials to intercede in the enforcement action, especially if the case gets into the news or other media. Consequently, it is important to establish a political strategy in addition to a legal strategy to be ready for political inquiries. Some recommendations include:

- Have a general department policy or strategy for how political inquiries are handled.
- Early in the process, have staff discussions on key specific cases so as to be prepared for political inquiries and media inquiries.
- Establish regular department manager meetings with elected officials to improve communication with them regarding the enforcement program practices and cases. This is discussed in more detail in the "Implement early violation response" section.
- Have the prosecuting or city attorney brief elected official on the proper response to requests to intervene in enforcement actions. This reduces risks for the jurisdiction, helps the elected official respond properly, and helps make the enforcement system more effective.

CONDUCT STUDY TO UNDERSTAND LANDOWNERS' PERSPECTIVES

In King County's recent 5-year study of the success of their critical areas ordinances, the authors suggest that it would be helpful to conduct a study to assess the landowner perspective and reasons why the regulations were or weren't followed as a possible way to learn how to improve regulations and their implementation. Specifically they suggest that interviews be conducted with landowners to better understand their awareness and motivations and determine if (and why) their willingness to comply varies between jurisdictions or geographic areas. This would help determine if compliance is driven by awareness of the regulations, desire to follow them or, perhaps, other issues and could help with future development of regulations or effective programs to improve compliance (King County, 2014).

ECOLOGY'S SHORELINE ENFORCEMENT MANUAL

In 1998, the Washington State Department of Ecology (Ecology) published a comprehensive manual to assist local governments with enforcement related to Shoreline Master Programs (SMPs). Some key areas of focus were on a) the critical nature of interactions between enforcement staff and the public, b) those who called in complaints or c) the violators themselves.

Phone in-take and site visits

When taking initial violation complaint calls, the recommendation was to have a telephone checklist ready (see right). In addition, the manual noted that special care be taken for the initial site visits stating, "Reminder: Your first visit may be your best – and only- chance to document the violation and the impacts to shoreline resources." The recommendation was to take a team approach:

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

The manual also includes suggestions for site reconnaissance, interview questions while at the site and follow-up record keeping with some pointers on how to avoid language that shows a bias or pre-judgment. Example phrases to avoid include:

- "All,' 'always,' 'never. These absolute terms can often be challenged if any exceptions exist. On the other hand, if you're sure of your facts, these terms can be appropriately used.
- 'Violations' as in 'there were violations,' or 'that was a violation,' may be a premature conclusion. Your documentation may not be adequate to substantiate a violation, or you may be making a decision without using the system of checks and balances built into the program.
- 'They said,' is also vague. Who said? Be precise in attributing comments. Documentation about who said what can be critical to a case."

Legal aspects

The manual includes suggestions about looking at these enforcement factors: nature of violation and severity of risk; existence of bad faith; and economic considerations. Legal tools and alternative dispute resolution techniques are summarized and the areas where joint enforcement with other agencies may occur (i.e., areas of regulatory overlap with SMA authorities) are listed:

- Any in-water construction in streams, rivers, lakes or marine waters.
- Dredging and dredging material disposal.
- Use or construction involving fisheries and wetland habitat.
- Contaminated sediments.
- Water quality, including storm water and industrial discharges and accidental release of pollutants or debris.
- Handling or release of solid or hazardous wastes or hazardous substances.
- Critical or environmentally sensitive areas (for example: unstable slopes, erosion hazard areas, wetlands or marine habitat.
- Natural resources damage from release of toxic substances."

SNOHOMISH COUNTY APPEAL REDUCTION EFFORT

In response to concerns that there had been an increase in land use appeals as a percentage of total permit applications, in 2009, Snohomish County Council approved a Budget Note to form a Land Use Working Group to evaluate the land use decision making process in Snohomish County and make recommendations for improvements. Specifically the working group was charged to examine ways to reduce the total time and expense incurred by applicants, appellants, other parties, and the County from the initial development of a proposal through final resolution of any legal appeals; reduce the number of appeals; reduce the number of proposals failing to meet applicable criteria; improve communication and consistency among county agencies involved in the process; and ensure that public participation processes associated with county permits are serving their intended purposes. The working group concluded their effort in 2010.

Appeals had become more complex and time consuming but had not increased in number

The work group concluded that the number of appeals had remained relatively constant during the years 2006 through 2008, but the nature of the appeals became increasingly complex and time-consuming due to:

- An unusually high number of extremely complex and controversial projects;
- An increase in the number of code enforcement violations;
- A record number of rezones in the urban areas; and
- A record number of rural cluster subdivision applications in the rural areas.

Recommendations

Working group recommendations relevant to this guide included:

High priority

- Clarify the difference between the level of detail needed for preliminary and final project approval.
- Encourage or create a mechanism for regular communication between staff and the Hearing Examiner [regarding lessons learned from cases or to talk hypothetically about differing interpretations in various aspects of the code or review process].



Medium priority

- Educate and engage the public through outreach and use of technology early in the process.
- Increase use of alternative determinations where information is insufficient for a decision [including the pre-condition, leaving open the record until a date certain, a continuance, and a remand].
- Encourage communication and problem solving during early stages of a proposed development.

Low priority

- Increase the quality and completeness of applications by developing a list of qualified consultants.
- Clearly identify weight of evidence assigned to expert and lay testimony.
- [Council should] continue to hear land use appeals.

5. RECOMMENDED TOOLS

In the shoreline protection arena, non-compliance or violations fall into these general categories:

- Permit non-compliance: developer doesn't fulfill conditions.
- Permit non-compliance: development goes beyond the approved allowances.
- Work done without obtaining required permits or exemptions and illegal work (development which would not be allowed, even with permits).

All of these actions can ultimately trigger legal action. Enforcement, thus, involves a series of steps which get progressively more expensive for jurisdictions to undertake as attorneys and courts (or similar settings) come into play. This is a key reason why enforcement programs are chronically underfunded. A jurisdiction can turn this official nature to its advantage, and thus save money, by turning the earliest and simplest actions into a strong deterrent to violations and a strong motivator for potential violators to voluntarily comply with regulations due to the costs, unpleasant experience, and associations of unlawfulness.

Anecdotally, a large amount of illegal work is done without permits. At this time there are no studies or documentation of the amount of violations but some federal staff believe that it could be at a level that is equivalent in volume to the number of projects that are done under legal permits.

To address these current conditions, twenty-three tools are recommended on the following pages (and summarized in Table 1) to improve permit compliance and violation enforcement. These tools also take into consideration barriers such as staff overload, communication gaps, tracking, and coordination challenges. Fundamentally, they are designed to increase the landowner motivations for compliance. Tool approaches which would most significantly improve compliance and enforcement are:

- Using the permit system to track compliance and violation enforcement
- Enhancing the use of financial guarantees
- Coordinated enforcement with other departments or other agencies
- Preparing ahead for legal cases

GUIDE TO COMPLIANCE AND ENFORCEMENT TOOL CHARACTERISTICS

The recommended tools for compliance and enforcement are summarized in Table 1 and detailed in the rest of this chapter. At the top of each tool, the following categories are identified:

Primary area of coordination

The tools are organized into the following three sections:

- Tools for Improving Compliance with Shoreline Permits
- Tools for Improving Violation Enforcement
- Legal and Regulatory Tools

Improving Compliance with Shoreline Permits

The most important aspect of effective permit compliance is an active inspection and enforcement program. This, in turn creates a strong reputation within the development community, which then helps deter additional non-compliance and boosts voluntary compliance. The recommended tools in this section are designed to help improve the effectiveness of permit compliance and reduce its costs.

Historic practices in local permitting systems may need to change if jurisdictions are to accomplish no net loss requirements in updated Shoreline Master Programs, starting from the permit review process.⁷ In addition, to meet no net loss in shoreline areas, local compliance programs will need to efficiently ensure that permit requirements are implemented.

Improving Violation Enforcement

Improving violation enforcement is addressed by recommended tools ranging from increasing deterrence motivators (i.e., publicly disclose violations) and increasing coordination to legislative changes.

Legal and Regulatory

Ultimately, some compliance issues and violations will require legal action. There are steps that staff can take while in the field or as the cases develop to help make the legal process more cost-efficient and effective. In addition, other tools help enhance the deterrence motivator for potential violators such as educating landowners about regulations and ramifications of conducting illegal activities and public disclosure of violations.

Staff or other resources required

In developing this guide, we endeavored to find low cost recommendations with the greatest bang for the buck. Many tools are in the low cost category. A few tools, though, will require moderate or high resources, especially those involving permit strengthening or legislative action.

Type of approach

Tools fall within the following categories of approach types:

- Technical upgrade
- Permit strengthening
- Internal procedures change
- Legislative action

⁷ The recommendations in our companion guide, *Practical Guide for Shoreline Permitting to Achieve No Net Loss*, addresses techniques to help a permit process accomplish no net loss

Table 1. Recommended Tools to improving compliance with permits and enforcement of violations

| Compliance Approach | Staff or other resources required | Type of Approach |
|--|-----------------------------------|--|
| Tools for Improving Compliance with Shoreline Permits | | |
| Use Permit Review System to track compliance | Low | Technical Upgrade |
| Build Compliance-Enhancing Features into Permits | Moderate | Permit Strengthening Internal Procedures Change |
| Incorporate Financial Guarantees in Permits | Moderate | Permit Strengthening |
| Combine Compliance Checks and Monitoring with Other Checks | Moderate | Permit Strengthening |
| Systemize Monitoring Requirements and Reporting | Low | Internal Procedures Change |
| Incorporate Compliance Funding into Permit Fees | Low | Legislative Action |
| Tools for Improving Violation Enforcement | | |
| Track Violations in Permit System | Low | Technical Upgrade |
| Raise Awareness about Regulations and Enforcement Ramifications | Moderate | Internal Procedures Change |
| Capitalize on Official Stature of the Jurisdiction | Low | Internal Procedures Change |
| Publicly Disclose Violations | Low | Internal Procedures Change |
| Expand or Enhance Existing Code Enforcement Programs | Moderate | Legislative Action |
| Leverage the Citizen Complaint System | Low | Internal Procedures Change |
| Identify Unpermitted Development during Permit Review | Low | Permit Strengthening |
| Enhance Reporting by Staff During other Duties | Low | Internal Procedures Change |
| Create a One-Stop-Shop for Violation Enforcement | High | Legislative Action |
| Increase Funding for Violation Enforcement and Restoration Work | Moderate | Legislative Action |
| Legal and Regulatory Tools | | |
| Maximize Policy and Legal Tools to Resolve Non-Compliance | Moderate | Permit Strengthening |
| Choose Enforcement Method Based on Characteristics of the Case | Moderate | Internal Procedures Change |
| Incorporate preparation for legal work at all steps in the process | Low | Internal Procedures Change |
| Issue Cease and Desist Orders and Orders to Correct | Low | Internal Procedures Change |
| Address Unresponsive Violators | Moderate | Internal Procedures Change |
| Maximize Impact of After-the-Fact Permits | Low | Strengthen Permits |
| See Enforcement Actions through Court and Beyond | Moderate | Internal Procedures Change |

TOOLS FOR IMPROVING COMPLIANCE WITH SHORELINE PERMITS

USE PERMIT REVIEW SYSTEM TO TRACK COMPLIANCE

BUILD COMPLIANCE-ENHANCING FEATURES INTO PERMITS

INCORPORATE FINANCIAL GUARANTEES IN PERMITS

COMBINE COMPLIANCE CHECKS AND MONITORING WITH OTHER CHECKS

SYSTEMIZE MONITORING REQUIREMENTS AND REPORTING

INCORPORATE COMPLIANCE FUNDING INTO PERMIT FEES

USE PERMIT REVIEW SYSTEM TO TRACK COMPLIANCE

| Area of enforcement | Staff or other resources | Type |
|---------------------|--------------------------|-------------------|
| Permit Compliance | Low | Technical upgrade |

WHAT IS IT?

Incorporating compliance activities into the permit review system (including automatic reminders) increases ability to track those activities to ensure achievement of conditions in the office or in the field.

Background and description

Given the prevalent underfunded state of city and county planning departments, one of the most cost-effective ways to increase post-issuance compliance is to integrate permit compliance tracking into the permit review system upfront. Like building permit and zoning permits, the staff person's work on the permit would continue after they approve the permit through construction or implementation. Many jurisdictions already perform this integration to some extent, but in others the connection needs to be made more systematic. The easiest way to make the process more systematic is to use online databases similar to those used for compliance tracking in the zoning and building permit processes or to tap into those existing systems.

Features could be added to automate compliance checks such as tickler reminders about monitoring report deadlines. Staff in the field could remotely look up permit conditions. Some systems allow the landowner to view conditions and compliance status online as well.

Packaged permit tracking software systems are available but many jurisdictions prefer to build their own systems using their IT services to ensure compatibility with other city database management platforms.

An efficient permitting process

Strong permit compliance builds upon an efficient permitting process⁸ which includes the following features:

- Has staff on hand with natural resource expertise that can check enhancement efforts.
- Requires adequate application submittals that in turn support compliance checks.
- Includes a systematic site visit process that the compliance checks can tap into with minimal added expense.
- Uses a GIS system with thorough natural resources information so compliance staff can rapidly check the natural situation of a site.
- Establishes a centralized permit review platform that can coordinate all jurisdiction reviews for each project, track the required reviews, and provide easy access to final decisions on reviews.
- Uses permit conditions that help improve post-issuance compliance - financial guarantees, and timing/staging conditions.
- Applies mitigation sequencing for the impacts of non-compliance, if the work is not done already. Require correction of non-approved alterations, and compensatory mitigation for those impacts.
- Enhances certainty and compliance by property owners, develops a mitigation manual to help identify impacts and describes compensatory mitigation for them.

⁸ Detailed description of an effective permit tracking process is described in detail in Futurewise's Practical Guide for Shoreline Permitting to Achieve No Net Loss which is part of this guide series.

BUILD COMPLIANCE-ENHANCING FEATURES INTO PERMITS

| Area of enforcement | Staff or other resources | Type |
|---------------------|--------------------------|--|
| Permit Compliance | Moderate | Permit strengthening Internal procedures change |

WHAT IS IT?

Building compliance-enhancing features into permits, such as inspection and compliance checks, strengthens their deterrence power.

Background and description

The best way to reduce compliance problems is to prevent them in the first place. Research (described on page xx) shows that deterrence is the most effective motivator to gain that compliance. Effective deterrence methods which can be incorporated into permit or into departmental procedures include addition of inspections and mid-construction compliance checks right into the permit conditions and placement of financial guarantees in permits.

In order to have time and resources to add these compliance-enhancing features into permits, staff will need support from upper management.

Compliance-enhancing features

Incorporation of inspections into permit conditions

A key deterrent motivation for landowners is knowledge that the jurisdiction is watching. For permit compliance, this means that the jurisdiction must have staff resources available to check on the progress of the permit through inspections. Inspections have two aspects – short-term and long-term. Short-term inspections focus on completion of conditions and installation of required enhancement, usually before final completion of construction. Long-term inspections check on long term progress of required enhancement (including more traditional monitoring), usually after construction is complete, but including construction that proceeds for long periods of time. Incorporating inspections into the approved permit's conditions can greatly improve compliance.

Incorporation of mid-construction compliance checks in permits and in tracking system

To maximize the procurement and deterrence motivations of landowners, jurisdiction can build approvals (usually inspection approvals) into the approved permit's conditions. Final construction approval would not be granted until all permit conditions are met. Incorporating the process steps into the permit tracking system can help prevent compliance checks from falling through the cracks.

Permit conditions provide an opportunity to ensure compliance before the period of intense interaction with the landowner and the project is over, by incorporating procurement motivators into the approval. Compliance checks are typically used in the building permit system and can be extended to natural resources permits by one of two methods. Building inspections can add a shoreline permit check to their normal inspections or can set a separate compliance check. Alternatively, the land use permit can include its own check point requirements.

Mid-construction compliance checks provide multiple benefits

- They motivate developers to fulfill their requirements before the end of the project in order to procure the approvals they need.

- The inspection element provides a deterrence motivation to complete the work.
- Since compliance is obtained in stages during construction, non-compliance issues that do arise at the end of the project are minimized.

The overall objective is to avoid allowing the landowner to put off permit compliance and required enhancement until after construction. If enhancement is treated as an afterthought, it will be subject to delay, convenience choices, or funding cuts. In addition, after the project is constructed, there is a likelihood that the permit holder will want to delay enhancement work because they missed the planting season or another reason. Enhancement work or other requirements, however, can readily be coordinated upfront, for example:

- Exterior staging areas can be adjusted spatially to accommodate the enhancement area.
- Timing of phases can be adjusted to plant vegetation in-season, even if it happens before the end of the project.
- Enhancement can be split into multiple phases, just like other elements of the development.
- Equipment for enhancement work can be coordinated to utilize downtime from other stages.
- If necessary, some parts of the enhancement can be completed to minimize post-construction work and the remainder can be financially guaranteed.

Some development projects such as larger subdivisions, mines, industrial parks, large retail developments, and malls are naturally phased, lending themselves to compliance checks. For other development projects, the permit writer will have to be creative and establish the checks at logical points in the construction timeline. In both cases, the staff person should also consider requiring additional phasing break points when needed. The building permit process will be of help in finding appropriate check points, especially if there is a robust and meaningful certificate of occupancy or similar final approval step in place.

Recommended check points for small and single stage development (in order of preference):

- Look for ways to break the project into discrete phases, and follow phased development recommendations (see below).
- Require that building permit inspection approvals for enclosing the structure (roofing, siding, windows, etc.) not be issued until start of enhancement work, and require that enhancement be completed before issuing a certificate of occupancy. Alternative inspection points can be used as needed. Include checks on other conditions of approval as well.
- Require that projects that do not have a structural enclosure inspection begin enhancement during the project, rather than waiting until afterward. Require an inspection for completion of the enhancement before commencing the use of the property.
- Use financial guarantees for any enhancement that can't be finished before the project is completed.
- Use financial guarantees for follow-up corrections during any required monitoring period.

Recommended check points for phased development, including larger projects and naturally phased development (in order of preference):

- Require compliance checks tied to project phases.
- Complete any enhancement for the first phase before the end of the second phase.
- Complete enhancement for the second and later phases before they are completed. This results in concurrent mitigation so final mitigation is not left until after the project is done.
- Use financial guarantees for any enhancement that can't be finished before the end of the last phase.
- Use financial guarantees to cover follow-up corrections during any required monitoring period.

Incorporation of financial guarantees in permits

Financial guarantees (described in more detail on page xx) incorporated into permit can serve as strong procurement and deterrent motivators.

INCORPORATE FINANCIAL GUARANTEES IN PERMITS

| Area of enforcement | Staff or other resources | Type |
|---------------------|--------------------------|----------------------|
| Permit Compliance | Moderate | Permit strengthening |

WHAT IS IT?

Incorporating financial guarantees into the permit conditions of approval better assures permit compliance through a financial motivation.

Background and description

Financial guarantees are used to set aside money to ensure completion of work required in a permit. Funds are held in reserve to ensure completion of work, creating a direct procurement motive to the applicant to regain the financial resources. Many practitioners feel that use of financial guarantees in permit conditions is one of the best methods to improve compliance.

Permit conditions provide an opportunity to ensure compliance before the period of intense interaction with the landowner and the project is over, by incorporating procurement motivators into the approval.

In the normal course of construction, when the enhancement work or other conditions of approval are implemented at the same time, there is little need for financial guarantees. Projects which put off fulfilling those requirements, however, are those where financial guarantees become important. The recommended instances for the use of financial guarantees are:

- During phased projects - when delaying enhancement work so that it is not concurrent with the phase.
- During single stage projects - when enhancement cannot be completed before the end of the project.
- To guarantee success of any project needing long-term monitoring.

Use of financial guarantees

Financial guarantees are often used for subdivisions and similar projects. It is possible to tap into those existing systems for use to protect and restore natural resources. Financial guarantees can also be configured to invoke a deterrence motivation by guaranteeing the removal of the development (which is causing the need for the enhancement work that is not being completed). This might also be accompanied by rescinding the permit or an automatic expiration of the permit. Building financial guarantees into the approved permit's conditions can greatly improve compliance.

Examples of work that can be financially guaranteed include vegetation plantings, restoration of altered topography (removing fill, etc.), and construction of public access. The incentive that will have the largest effect, however, is to create a deterrence motive by financially guaranteeing the demolition and site restoration costs for permitted structures in the face of non-compliance. This should include bank armoring, docks, and accessory buildings, but it should not normally include a major structure, such as a primary residence or business. For major structures, the financial guarantee should require completion of the enhancement compensation.

Types of financial guarantees

Feiden and others (1998) summarized the types of financial guarantees along with their salient features:

- **Performance bonds.** Performance bonds are obtained from surety companies (essentially a form of insurance) and guarantee the performance of another's obligation. Performance bonds may be difficult for small companies and individuals to obtain because surety companies try to limit risk by requiring good track records and resources. If default is likely, surety companies

may help the contractor complete the performance requirement. After default, they may pay the original contractor to finish the work, hire someone else, or they may just pay off the face value of the bond. Arranging for the work to be completed would be most likely if some of the work had already been done. A jurisdiction may have to go to court if surety companies balk, but the funds would be assured.

- **Cash Escrows.** For cash escrows, funds are placed in accounts held by third parties (bank, escrow company, etc.). Jurisdictions usually authorize release of funds back to developer or they can claim default and collect money. Jurisdictions can release money as work is done or hold it all until completion. This option is generally unpopular because it ties up a large amount of money if held until the end of a project – essentially requiring double funding for a project. This can be alleviated if jurisdictions will do partial releases to help pay costs, but the jurisdictions then assume risk of running out of funds for corrections.
- **Property Escrows.** Property escrows are like cash escrows, but the contracts require valuation of the property, and collection requires sale of the property. These types of guarantees are unpopular and rarely used. In addition, they have high administration costs.
- **Standby Letters of Credit.** With standby letters of credit, financial institutions agree to pay money to third parties if developers default. Third parties can be local governments or other contractors who will complete the work. Developers agree to pay back the money in separate agreements with financial institutions. These are popular types of guarantee, because they are less expensive and easier to get than performance bonds, especially for smaller companies and individuals, and don't require additional capital. They are also easy for jurisdictions to collect; the jurisdictions only have to document the defaults.
- **Improvement Credit Agreements.** Improvement credit agreements are three way agreements with banks. Money is held by banks, which pays for improvements as they are completed. Jurisdictions and developers authorize releases together. The agreements only require single funding compared with cash escrows. Money may run out for corrections, however, if estimates are too low.
- **Liens/Covenants.** Liens or covenants run with property and inform future buyers of obligation. Jurisdictions can foreclose but it may be difficult. If bankruptcies happen, other claims will limit money collected.

Considerations in use of financial guarantees

Considerations regarding the use of financial guarantees that were noted by Burby include:

- **Time Limits.** It is important to establish time limits to complete improvements. A local government can be flexible or include extensions. The terms of the performance guarantee should extend beyond the time limits for completing the improvements to give jurisdictions time to collect on guarantees if needed.
- **Certificates of Occupancy.** Many jurisdictions will issue certificates of occupancy before all of the required improvements are made when financial guarantees are used to assure their completion.
- **Costing.** Accurate costing is one of the difficult parts of using financial guarantees. It is important to include a cushion for unforeseen costs, which is also difficult to estimate. Jurisdictions can use their own costing estimates, contractor bids, or other means. Cushions should be at least 25 percent and even higher in an environment where construction costs are significantly increasing.
- **Releasing.** Accurate accounting for releasing funds is also one of the difficult parts of the use of these tools. The conditions should limit releases to certain percentages to ensure funds are available for corrections.
- **Default.** Jurisdictions can use other methods to obtain compliance before declaring default on financial guarantees. It is important, however, to collect on any guarantees before they expire. If a bankruptcy happens, other claimants may have access to financial guarantee money, and the jurisdiction may have to go to court. If a guarantor balks, the jurisdiction may also have to go to court. Complicated legal proceedings to gain the funds cost money. The local government may want to consider this in formulation of any agreement and choice of tool – letters of credit are most resistant.

Financial guarantees are not popular

Overall, financial guarantees are not popular with developers, who would prefer to avoid the cost. Some people may see them as a part of business, but some (even higher-income landowners) don't want to tie up resources – especially to guarantee expensive items. In addition, lower-income people and under-capitalized projects can't afford them, although a lack of resources also means a greater likelihood that the applicant can't pay for the required enhancement or other conditions, which may be an even stronger reason to require financial guarantees.

Due to their unpopularity, financial guarantees can become limited by the political will. Applicants may ask elected officials to request the permit reviewers to drop the requirement. This puts elected officials in difficult positions. To avoid this problem, it is important to minimize the barriers to the use of financial guarantees. In addition, local government staff may be reluctant to require financial guarantees because of the time and effort required to put them in place.

Making financial guarantees easier and less costly to implement

Approaches that can make financial guarantees quicker and easier to implement include:

- **Guarantee part of the work.** The cost of financial guarantees can be reduced, while also providing a deterrence motivation, by only guaranteeing the demolition/grading costs to remove a structure or otherwise undo the work. Demolition and grading is inexpensive compared to construction.
- **Create a standard system.** If a jurisdiction develops a standard system to accept, hold, release, and use financial guarantees, this will ease individual staff time for each project. Financial guarantees are best authorized in regulations, and administered through department policy and include:
 - Develop boilerplate agreements that can be altered for each project. Reusing a standard agreement reduces costs and the time to put the guarantee into place. ADD TEMPLATE EXAMPLE HERE as APPENDIX
 - Require estimates based on hiring a contractor to do the work and “reality-check” the amount. The applicant’s consultant is usually required to prepare these estimates.
 - Include an “extra cushion,” using a percentage of the total, to account for changes in cost over time--usually at least 25 percent.
 - Include site access and authorization for the jurisdiction to do the work in the event the applicant does not.
 - Avoid requiring developers to double fund a project. This is partly accomplished by choosing the type of financial guarantee. It is also accomplished by carefully allowing flexibility in releasing funds, so that work can be paid for while also reserving funds to cover corrections that may be needed.
- **Use bonds carefully.** Take care using bonds, which have a defined life after which the bond expires.
- **Don’t forget about interest.** Address the status of interest accrued by held funds in the regulations. Any interest is typically refunded after the work is completed unless it is needed to do the work.
- **Keep it simple.** Keep the process simple so that it is not a burden for the homeowner and they won’t need to hire a consultant. For example, each time the landowner turns in a planting report, they get some money back. In addition, the description does not need to be lengthy and detailed, but more similar to a checklist. Then when staff turnover occurs, there is less guesswork. It becomes just like applying for a permit.

COMBINE COMPLIANCE CHECKS AND MONITORING WITH OTHER CHECKS

| Area of enforcement | Staff or other resources | Type |
|---------------------|--------------------------|----------------------|
| Permit Compliance | Moderate | Permit strengthening |

WHAT IS IT?

Combining compliance check and monitoring with other checks reduces the cost and resource demand of inspections and monitoring.

Background and description

Site visits are necessary to conduct compliance checks during project construction and confirm that the work is done. Because site visits (inspections and compliance monitoring) are an effective tool as part of permit review, ideally these compliance visits can be incorporated into a broader site visit system.

Permit compliance check site visits can be conducted strategically to minimize additional burdens on staff time. Combining compliance site visits with other site visits scheduled for the same areas minimizes travel time expended. Delegating compliance check site visits to other staff eliminates duplicate costs of for multiple staff deployment.

Maximizing outcomes of compliance checks

Some strategic considerations maximizing benefits of compliance checks include:

- If compliance items need specialized knowledge of the project, then the original staff that issued the permits should do the checks.
- If specific project elements need qualitative assessment or careful placement confirmation, then one of the other expert staff performing site visits in the area of the project may be able to do quick checks. If the elements are simple quantitative checks or presence/absence checks, non-experts who happen to be in the area can do the checks.
- Some project elements can be checked without a site visit. *Photo submittals* by the applicant may work well to document compliance. Such checks should be limited to instances where presence/absence and other simple confirmation are needed.
- For some types of work, local governments will need experts to review whether the work is properly done and functional. It is best for jurisdictions to select the consultants and supervise their work. The costs of third party consultants to help enforce permit conditions can be paid through permit fees or through a condition that requires the jurisdictions costs to be paid.

Track and provide reminders for compliance checks using the permit review system

Tracking compliance checks and generating reminders for compliance checks should be done systematically using established procedures to reduce staff burdens and make sure that they are completed consistently. While this can be accomplished in paper or electronic systems, good online permit tracking systems can automate the process, placing fewer burdens on the users and resulting in increased certainty. Of particular usefulness is the ability to link reminders to inspections or other events.

One of the challenges of *monitoring* is remembering to check back on the project. This is where the systematic reminder system is particularly important. When the project is done, the developer has no desire to keep expending money on monitoring so it is desirable that financial guarantees be required that can be released on completion of each monitoring report (i.e., when there are annual required reports). This is in addition to guarantees for correction work.

SYSTEMIZE MONITORING REQUIREMENTS AND REPORTING

| Area of enforcement | Staff or other resources | Type |
|---------------------|--------------------------|----------------------------|
| Permit Compliance | Low | Internal procedures change |

WHAT IS IT?

Systemizing monitoring requirements and reporting reduces the cost and resource demand of compliance by streamlining the process, including providing flexibility based on project complexity.

Background and description

A key part of permit compliance checking is monitoring. This compliance reporting should include both the verification of installation (or completion) and subsequent checks on the progress of enhancement work (traditional monitoring). Systemizing monitoring and making it consistent can reduce the burden on staff.

The level of monitoring needs to match the scope of the project. Reporting and monitoring of required enhancement work and other required conditions can vary along with the complexity of the work to be done. The simplest requirements can be reported more informally, whereas complex enhancement and creation projects will require official reports from experts. The initial report of installation should be provided at the completion of the development or at least soon afterward.

Methods to increase systematic reporting

Methods to increase systematic reporting that matches the scope of the project include the following techniques (in order of increasing levels of complexity of projects).

Photo documentation

Photos can be helpful both for documenting site conditions and for referencing several years later. While photos are usually included in formal reports, the submittal of photo documentation is useful for simple enhancement or other permit requirements.

Examples where photo documentation alone may be acceptable include:

- Removal of discrete items.
- Construction of minor items that don't affect the environment.
- Minor grading work.
- Small areas of simple plantings. The plantings might be done by the landowner, without the assistance of a professional.

Photo documentation alone, however, should not be used for in-water or wetland work, in complicated environmental situations, nor in situations where accurate measurements are of critical importance.

Professional certification

More complicated projects might require professional certification in addition to photo documentation, but not full monitoring reports. For example, complicated construction and removal should require that the contractor certify that it is completed to meet the permit requirements.

Extensive plantings should require that the landscape professional certify that the work was completed to meet the permit requirements. Professional certification should not be used, however, for any project requiring a professional to design the mitigation, such as wetland creation or enhancement, and most in-water work. Rather, a jurisdictional staff person should verify the work.

Monitoring report submittal by natural resources consultant

The most complicated projects require an official report prepared by a natural resource professional (wetland scientist, biologist, etc.) that includes both photo documentation and certification of the work. These types of projects include wetland enhancement and creation, in-water and bank reconfiguration or alteration, and complex and extensive replanting work.

Timing of monitoring reports

Timing or spacing of monitoring reports and total reporting period should be systemized for consistency.

- For non-planting elements, a one-time installation report may be all that is needed.
- Simpler planting enhancements may need follow-up reporting only once 1-2 years after installation.
- More complex enhancement projects may need periodic reporting over an extended period of time, based on the extensive requirements that normally go along with monitoring. Wetland mitigation, for example, is often monitored for five years.

INCORPORATE COMPLIANCE FUNDING INTO PERMIT FEES

| Area of enforcement | Staff or other resources | Type |
|---------------------|--------------------------|--------------------|
| Permit Compliance | Low | Legislative action |

WHAT IS IT?

Incorporating compliance funding into permit fees alleviates some of the compliance resource burdens for local jurisdictions.

Background and description

Funding for permit compliance activities is more easily assured than that for violation enforcement because it can be incorporated into the permit process. In order to obtain this funding, however, it is helpful for post-issuance compliance work to be explicitly incorporated into the permit fee structure. Legislative action will be necessary for amending fee schedules.

Building funding into the permit system

Ideally a permit fee structure and review system will contain the following features:

- All natural resources permits and exemptions should have one basic final compliance check built into their fee. This should cover the needs of the most basic permit reviews that only need a follow-up confirmation check as well as the first check for more complex projects that may need more than one compliance check.
- Additional inspection charges should be established for complex projects to cover compliance site visits and follow-up work for projects needing more than one compliance check and for projects that cannot pass their first checks.
- The conditions of approval language should refer to the compliance check policy and fee arrangement so applicants are aware of, and can make informed decisions about, arranging their compliance checks.

The City of Pasadena has a flat fee that is charged for permit conditions monitoring and a variable fee (based on hourly rate) for mitigation monitoring:

Payment of a standard fee for mitigation monitoring is required prior to the issuance of any building permit which requires mitigation monitoring. The fee is required to cover the cost of inspections to verify compliance with the approved mitigation measures. Fees for monitoring are based on an estimate of time for the monitoring, and on an hourly rate established in the City's general fee schedule. Applicants are subject to additional billing if the actual time exceeds the initial estimates. Billing rates are subject to change annually (Pasadena Planning webpage).

TOOLS FOR IMPROVING VIOLATION ENFORCEMENT

TRACK VIOLATIONS IN PERMIT SYSTEM

RAISE AWARENESS ABOUT REGULATIONS AND ENFORCEMENT RAMIFICATIONS

CAPITALIZE ON OFFICIAL STATURE OF THE JURISDICTION

PUBLICLY DISCLOSE VIOLATIONS

EXPAND OR ENHANCE EXISTING CODE ENFORCEMENT PROGRAMS

LEVERAGE THE CITIZEN COMPLAINT SYSTEM

IDENTIFY UNPERMITTED DEVELOPMENT DURING PERMIT REVIEW

ENHANCE REPORTING BY STAFF DURING OTHER DUTIES

CREATE A ONE-STOP-SHOP FOR VIOLATION ENFORCEMENT

INCREASE FUNDING FOR VIOLATION ENFORCEMENT AND RESTORATION WORK

TRACK VIOLATIONS IN PERMIT SYSTEM

| Area of enforcement | Staff or other resources | Type |
|---------------------------|--------------------------|-------------------|
| Enforcement of violations | Low | Technical upgrade |

WHAT IS IT?

Incorporating violations in the permit database system assists with tracking the resolution of violations and determining future compliance needs.

Background and description

Local jurisdictions can save money by systematically incorporating violations in their permit tracking systems. A large number of violations already get recorded in the permit system in a variety of ways. Adding violations to the online permit database will require technological upgrades. Staff in the field could remotely look up information about the site. Some systems allow the landowner to violation enforcement status online as well.

Packaged permit tracking software systems are available but many jurisdictions prefer to build their own systems using their IT services to ensure compatibility with other city database management platforms.

Benefits of systematic tracking

A recent compliance assessment conducted by Ecology and WDFW (see Side Box on page 18) found that of the jurisdictions contacted, there was not a consistent mode of tracking violations and a cross-comparison therefore was not possible.

In addition, creating a specific method to document enforcement activity for a site provides staff with information that can be used for future interactions with landowners (future enforcement actions or future permit applications) which can be used to improve future compliance.

Tracking in the same system will help prevent violations from falling through the cracks. For example, in Kitsap County, permit conditions for mitigation are tagged to the parcel through the county's permitting system. Anytime that property comes up for review, the existing permit conditions will pop up. So if the owner mows down plantings, then the new owner will be required to replant. Pierce County also has a robust permit tracking system, which includes a feature enabling landowners to see who is being inspected on each day (see Side Box on page 50). These types of systems could be expanded to include violation information.

An efficient permitting process

Strong violation enforcement builds upon an efficient permitting process⁹ which includes the following features:

- Has staff on hand with natural resource expertise that can rapidly evaluate and act on violations.
- Has a systematic site visit process that the violation enforcement can tap into with minimal expense.
- Uses a Geographic Information System (GIS) program with a good air photo history so that the original site configuration can be determined compared to the violation, and so that illegal development or activity can be checked against claims that it has always been there.
- Establishes a centralized permit review platform that can document and track the violation, and that can electronically notify others of the existence of the violation.
- Requires correction of non-approved alterations, and compensatory mitigation for those impacts.
- Develops a mitigation manual to help identify impacts and describe compensatory mitigation for violations.

⁹ Detailed description of an effective permit tracking process is described in detail in Futurewise's Practical Guide for Shoreline Permitting to Achieve No Net Loss which is part of this guide series.

PIERCE COUNTY UPGRADE OF PERMIT REVIEW AND ENFORCEMENT

Pierce County recently underwent a major overhaul of their permit review process. This multi-year effort resulted in a new in-house database and online system for the public. One outcome of this effort is a clearly displayed inspection schedule on the home webpage as well as enhanced in-the-field ability for inspectors to look up information about individual sites

The metamorphosis

Pierce County staff reported that Planning and Land Services (PALS) of the past was:

- “Fast Paced and Intimidating to our customers
- Piles and Piles of Regulations
- Guilty of requiring ‘One more thing ...’
- Long and daunting Land Use Process
- Perceived as economic roadblock
- Frustrated Customers
- Frustrated Staff
- Frustrated Elected Officials”

PALS overhaul goals included modifying the permitting process and departments’ structure to maximize skills and decision making authority within PALS and improving the permit process, supporting information and technology systems so decisions can be timely, reliable, and predictable or more simply to:

This change has been accomplished by creating a user friendly and intuitive webpage, doing more e-reviews, allowing on-line payments, doing e-notify, allowing on-line submittals for residential applications, and more.

Technological improvements for code enforcement

A key aspect of the upgrade included a strategy to “Give employees the tools and resources to be efficient and effective” which would directly improve enforcement capacity as specified in these substrategies:

- Create a call center whose staff provide reliable answers to development inquiries and thus reduce trips to the Annex.
- Develop a program for inspectors to have work schedules downloaded nightly to assigned computers, and equip inspection vehicles with mounts, wireless connections, and GPS to make workflow more efficient.
- Prioritize IT Department requests as they support development review processes and thus improve the turnaround time from items coming out of the IT Department.
- Train staff and expand administrative authority to allow for decision making for some of the cases that now require decisions by the Hearing Examiner (HE).
- Formalize a process for timely code interpretations and policy review that also becomes the basis for future code revisions and amendments.”



PHOTO: PIERCE COUNTY

RAISE AWARENESS ABOUT REGULATIONS AND ENFORCEMENT RAMIFICATIONS

| Area of enforcement | Staff or other resources | Type |
|---------------------------|--------------------------|----------------------------|
| Enforcement of violations | Moderate | Internal procedures change |

WHAT IS IT?

Raising awareness by educating existing and future project proponents about regulations and ramifications of illegal activities helps avert violations.

Background and description

Education about regulations can enhance landowners' "sense of duty" motivations. Since some violations are accidental, because people didn't know better, education can play a part in getting voluntary compliance. Educating the community about ramifications of illegal activities serves as a deterrent for violations as well. Key aspects of education include:

- Widely broadcasting that permits are required for specific types of work, so that people that do have a sense of duty to follow the law can take the steps to become lawful.
- Conveying the importance of the resource so that people understand that what they did or might consider doing causes great harm to the animals and natural systems. This education has to be done in simple, clear, and concrete terms that non-experts can understand.
- Widely broadcasting consequences for conducting illegal activities (i.e., development work without permits) so that potential violators might be discouraged.

Enhancing the deterrence motivator

Education can enhance deterrence motivations. In the worst cases, violations are committed with no intent to comply with any permit or correction order. In some cases, they are done with the intent that they will just receive an after-the-fact permit assuming that they won't have to remove what they did, even though the activity would not normally have been allowed. There are also those that may accidentally conduct a violation, but for philosophical or financial reasons, the violator refuses to undo the damage.

Educating people about the negative consequences of choosing a non-compliance path can create a deterrence motivation. An educational communication with the violator can help them make a decision to voluntarily resolve the violation based on a full understanding of the unpleasant consequences of fighting the violation. It is generally best to communicate early in the process before positions are highly polarized by anger and philosophical differences.

Education methods

Staff typically communicate with violators in meetings or in letters laying out two different paths and consequences: correct the violation or fight the violation. Moving violators to voluntary compliance is generally better accomplished using a friendly but frank manner or tone, and with an emphasis on communicating that they are breaking the law.

The effort and cost needed for education will vary based on the amount of information that needs to be transmitted. Basic notification can be enough to inform many people about the need for permits. Enhanced educational efforts can inform people about the importance of natural resources. More effort will be needed to educate people about how to care for their resources. Table 2 below lists a variety of educational options that can be used at a range of cost points and levels of effectiveness. The recommended options with the most bang for the buck are:

- **Website.** Establish an educational website element that can provide all levels of education and can supplement all other educational efforts. Such a website will enhance anything the jurisdiction chooses to do. Thurston County has an especially strong web page designed for landowners (see Side Box on page 54).


- **Early assistance.** Provide early assistance information at the front desk or via telephone.
- **Mailings.** Establish a periodic (2-3 year) mailing program that is geographically targeted for natural resources. This program can provide more than notification-level information. Individual parcel cost mailings are higher than tax notice mailings, but can be offset by fewer mailings. These mailings can also include utility bill inserts
- **Presentations.** Provide presentations to target audience. This allows a face-to-face contact and for more information to be presented. Some of the most effective presentations about stewardship for natural resources are those by respected messengers such as university professors or community leaders. Having presentations hosted by homeowner associations or local community groups at their regularly scheduled meetings can be some of the best ways to reach good numbers of landowners. Presentations and curricular additions at schools are important for educating the next generation of landowners.

Improving compliance with permits through education

In addition to education helping potential applicants become more aware of the regulations and requirements, there is also a need to address the problem of incomplete compliance with permits. Many property owners may assume that their project will not be checked for compliance with permit conditions due to staff shortages at local, state and federal levels. The Army Corps has developed a brochure directly addressing this issue (see Side Box on page 55).

Table 2. Educational Approaches to aid compliance and enforcement

Approaches with the most bang for the buck are highlighted in orange.

| Educational Approach | Cost | Level of Information Provided | | |
|---|--|-------------------------------|-------|----------|
| | | Minimal | Basic | Detailed |
| General notice on annual tax statement. Received by all parcels, including shoreline properties. Limited to 1-2 sentences. |  | X | | |
| Geographically targeted mailing. Target natural resource parcels using GIS. Limited to a few pages. | | X | | |
| Presentations to targeted audience at their regular meetings, such as professional associations and community groups (lake, valley, marine subdivision). Strongest if presented by trusted messengers such as university professors or community leaders. | | X | X | |
| General public education meetings/workshops. | | X | X | |
| Maintained Social Media program: Twitter, Facebook, similar services | | X | X | |
| Website with extensive educational information and links to detailed resource information. | | X | X | X |
| Short videos included on websites and YouTube or similar video services. | | X | X | |
| Early assistance materials and natural resources staff available in the office for general public and for those coming in for a permit. | | X | X | |
| Regular deployment of educational/outreach booths at public events with messaging that draws target audience (shoreline property owners). Booth can be enhanced by interactive activities such as games or quizzes. | | X | | |
| Regular program of theatrical outreach activities: parade, skit, street theatre, and other similar activities | | X | | |
| Targeted door to door information packet distribution: booklets, flyers, etc., including face-to-face contact. | | X | X | |

THURSTON COUNTY EDUCATIONAL WEBSITE

Thurston County has developed a useful easy-to-read website, based on San Diego's approach, for guiding landowners through the permitting process. Critical areas and shorelines are specifically called out:

Check for Critical Areas

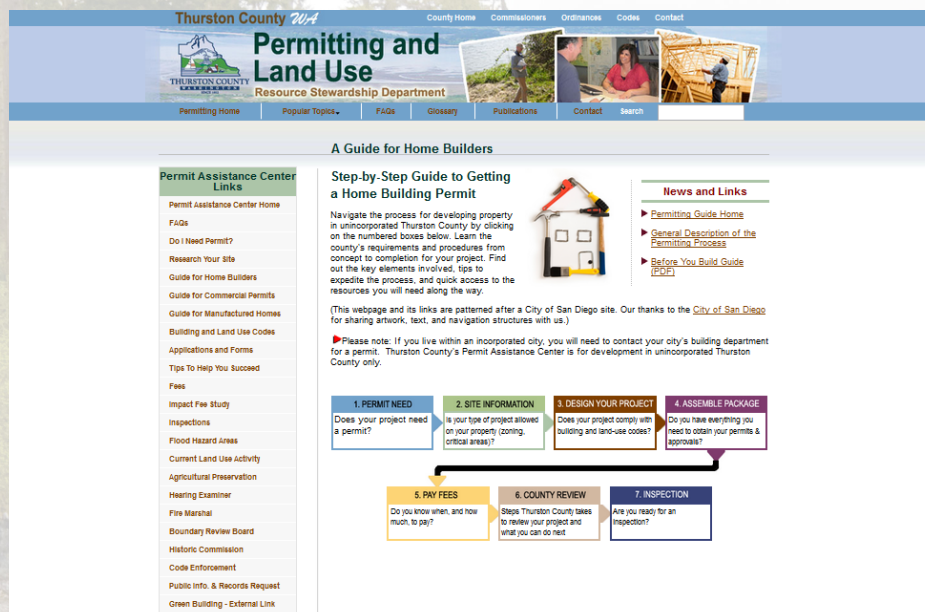
State law requires local governments to protect five types of critical areas: important fish and wildlife habitat areas, wetlands, critical aquifer recharge areas, frequently flooded areas; and geologically hazardous areas, (such as bluffs). Thurston County's critical areas regulations are a response to that law – they regulate how development and redevelopment can safely occur on lands that contain critical areas. In many cases, buffers around critical areas are required.

Check for Shorelines

Thurston County's Shoreline Master Program governs uses and activities on all marine (salt water) shorelines and many lake and river shorelines in the county. In most cases, buffers are required."

Sprinkled throughout the web page are notices inviting potential applicants to come in to the permit center to get help. For critical areas and shorelines, they advertise special hours:

"If you have questions about land use (critical areas, shorelines), septic systems, or wells, please be sure to come on a Tuesday, Wednesday or Thursday from 8 a.m. to 12:30 p.m., when staff from Land Use and Environmental Review and from the Environmental Health Department are available to answer questions."



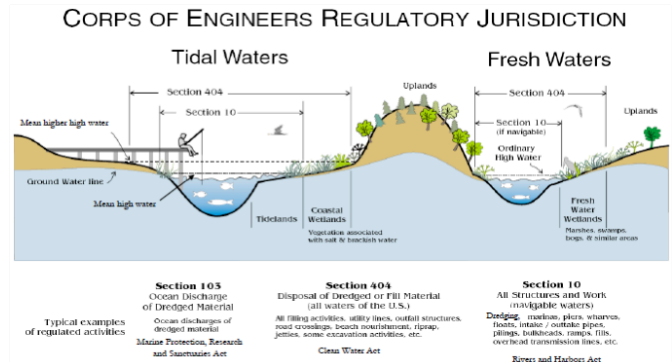
Source: Thurston County. *Thurston County Permitting and Land Use*. Retrieved from <http://www.co.thurston.wa.us/permitting/guide/guide-steps.htm>

ARMY CORPS HELPFUL HINTS FOR PERMITTEES AND CONTRACTORS CLARIFYING COMPLIANCE RESPONSIBILITIES

The Corps' permit program began in 1899, with the principal purpose of prohibiting the creation of obstructions in navigable waters. The Clean Water Act (1972) broadened their scope to include the chemical and biological integrity of all waters of the nation. The laws administered by the Corps today are:

- Rivers and Harbors Act, Section 10: requires a permit for any structures or work in US navigable waters.
- Clean Water Act, Section 404: requires a permit for the discharge of dredged or fill material into all US waters (tidal and estuarine areas, rivers, streams, lakes, wetlands, ditches and canals).

In marine waters of Washington State, the Corps' jurisdiction is Mean Higher High Water (MHHW) or lower as depicted above. (Anecdotally we learned that many bulkhead contractors work to convince their clients to build higher in order to avoid Corps permits.)



Education materials

In addition to a *Permit Guidebook*, the Corps produces a helpful brochure for permittees and contractors that explains and clarifies compliance responsibilities and provides helpful hints (see below).

Now that you have received your Corps permit, what do you do?

Read the entire permit - know and understand all permit conditions

Both the permittee and all contractors working on a project permitted by the Corps must be fully aware of all of the permit conditions. The contractor and all subcontractors must receive a copy of all permits.

Some Corps permits state that in order for the Corps permit to be valid, the permittee must obtain and comply with a Section 401 Water Quality Certification. The contractor and all subcontractors must receive and review a copy of the Water Quality Certification, if one is required, before work can begin.

In a typical Corps permit, there are conditions related to:

Timing - Work can only occur in waters of the U.S. during a certain time period.

Limits of fill or work - A description of the work and/or

permit drawings show which portion of a water of the U.S. can be impacted; for example, which wetland can be filled, the width and length of a pier, the number and location of piling, etc.

Reporting to the Corps - Some projects require reporting to the Corps when the work or mitigation has been completed.

Compliance - Work must be in compliance with Water Quality Certification special conditions.

If you have any questions about the permit, special conditions, or drawings, contact the Corps project manager before work commences.

Seek Corps approval for changes in project plans

The Corps realizes that during the life of a construction project unforeseen conditions may arise. For example, during pile driving the contractor may encounter bedrock which necessitates moving the location of piling or requires access to a wetland area that will involve the construction of a road through wetlands that was not permitted. The Corps should be contacted immediately should these type of situations arise and the appropriate permit revisions should be obtained before additional work occurs.

Failure to comply with permit conditions

The Corps realizes that stopping work and waiting for approval for revised plans results in a time delay and an increase in costs for the

permittee and contractor. The Corps will work to expedite permit revisions, as appropriate. However, if work occurs without approval from the Corps, the consequences can involve an enforcement action which may include, stopping construction, legal action, issuance of fines, and/or additional mitigation. The costs of proceeding without authorization could easily exceed the costs of waiting for approval.

Both the permittee and all contractors are responsible for ensuring that all conditions of the permit are met. If there is a permit violation, both the permittee and contractor can be held liable.

Other permits

Compliance with Corps permit conditions may be complex because other permits for the project (e.g. building, grading, and shoreline permits, Water Quality Certification, and hydraulic project approval) may have different conditions, all of which must be met.

If a non-Corps permit requires work in a water of the U.S. that is not authorized in the Corps permit, the permittee and contractor must get approval from the Corps before this work occurs.

If a Corps permit condition conflicts with a non-Corps permit condition, the permittee and contractor must coordinate with both agencies to resolve the conflict before work commences.



CAPITALIZE ON OFFICIAL STATURE OF THE JURISDICTION

| Area of enforcement | Staff or other resources | Type |
|---------------------------|--------------------------|----------------------------|
| Enforcement of violations | Low | Internal procedures change |

WHAT IS IT?

Capitalizing on the official stature of the jurisdiction through enhancing communication documents and staff contact style increases the deterrence motivation for landowners.

Background and description

“Official”-ness or the stature of authority can increase the deterrence motivator for violators. Thus communications, such as notices and personal contacts, should be designed to increase the official-ness and emphasize the unpleasant consequences, which to some extent is a requirement of preparing a court case.

Communication must be balanced

There is a potential downside, however, to emphasizing the unlawful nature of the violation in communications. Implying that somebody did something wrong often generates negative responses, including denial or a claim that “they are being treated like a common criminal.” This can be difficult for enforcement staff who will want to emphasize that these violations are civil in nature and thus the jurisdiction will work with them first to address the violations rather than involving sheriff officers.

Webpages and educational materials

The material published by a jurisdiction, including their webpage, can send a strong message to the public which reinforces official stature. It is important, however, to balance that with a friendly and helpful tone. *Mypermit.com* (see Side Box on page 57) is a good example.

MYPERMIT.COM SENDS A STRONG MESSAGE

A number of central Puget Sound jurisdictions have joined together to create an online permit and inspection tracking system that makes a visible statement about regulations. It also sends a message that permitting is required but it can be straightforward to get through a transparent process. Started in 1998 by building officials from Bellevue, Issaquah, Kirkland, Mercer Island, and Redmond as a unified approach to building processes and services, *MyBuildingPermit.com* now additionally serves Bothell, Burien, Kenmore, Mill Creek, Newcastle, Renton, Sammamish, Snohomish County, Snoqualmie and Woodinville. The effort involves improving building code consistency between the cities, providing easy-to-read information bulletins, developing common ordinances that regulate construction, co-sponsoring training seminars, and developing partnerships with businesses in the community. Inspections can be requested through the online portal.

Electronic permits

Permits are issued electronically for some types of work, which vary from jurisdiction to jurisdiction, but generally includes a number of non-review and plan review application types in the areas of building, clearing and grading, electrical, fire, mechanical, plumbing, right of way, signs, and utilities, and land use. In order for a permit to be issued through the system, the contractor must be registered. This ensures that the contractor has the appropriate state and local licenses to do the work.

Education about permits

The *MyBuildingPermit.com* website contains numerous resources about permits, permit types, trainings, interpretation and guidance, and updates. A FAQ is included about why permits are needed (see below).

The screenshot shows the homepage of MyBuildingPermit.com, a service of eCityGov.net. The header includes a search bar and a navigation menu with links to Home, Contractor Registration, Permit Packets, Resources, Contact Us, About Us, and Help. A 'Quick Links' sidebar on the left lists: Apply, Check Status, Request an Inspection, Customer Login, Government Login, Help, and Site Map. The main content area features a 'Welcome to MyBuildingPermit.com' section with a photo of a person working on a laptop. Below this, it states: 'MyBuildingPermit.com provides one-stop online development service applications, inspection scheduling, permit status information, and tip sheets for government agencies in the Puget Sound region. Visit our [contact page](#) for participating jurisdictions.' A section titled 'Available Application Types' lists: Building, Clearing and Grading, Electrical, Fire, Land Use, Mechanical, Plumbing, Right of Way, Signs, and Utilities. It notes that applications vary by jurisdiction and to contact the [jurisdiction](#) for questions. To the right, there are sections for 'News' (Washington Cities Electrical Code has been adopted by 11 Cities), 'Training & Seminars' (Click below for Training Classes & Seminars), and 'Service Message' (Routine maintenance is...).

PUBLICLY DISCLOSE VIOLATIONS

| Area of enforcement | Staff or other resources | Type |
|---------------------------|--------------------------|----------------------------|
| Enforcement of violations | Low | Internal procedures change |

WHAT IS IT?

Publishing notices of violations using various media increases the deterrence motivation for landowners.

Background and description

Public disclosure of violations can increase the deterrence motivation. The advertisement nature of public disclosures spreads the knowledge of the consequences of violations to a broader audience, which in turn increases the jurisdiction's enforcement reputation. It can also generate several related deterrent motivations in the violator, including protecting a personal or company reputation, concern about public opinion, or shame from unlawfulness or lack of stewardship. At a minimum the consequence serves as a general deterrence within the community.

Forms of public disclosure

Public discloser can take a variety of different forms:

Public sign

It can be quite effective to post a violation notice on the property in a prominent location (road access, etc.) and require that it be retained until the case is resolved. Posting a notice also gives contractors or subcontractors notice that work occurring on the property is in violation of the SMP or other regulations. Many contractors will not want to work on a project that is in violation, so this can also give the violator an incentive to bring their project into compliance. This requirement may require an amendment to the enforcement regulations, similar to the following:

"It is a violation of this Title to remove or deface any sign, notice, complaint, or order required by or posted under any code or ordinance."

Published notice

Publishing a notice of the violation or penalty in the newspaper or other media is rare for land use codes, but is common for pollution law violations. Ecology and the Clean Air Agencies regularly publish violations and penalties in local papers, and release them to the media for news stories. King County regularly publishes wastewater violations (see Side Box on page 59).

Mailed notice

Mailing notices of violations to nearby property owners can be used for all official orders and in preparation for a hearing. This option also serves as a direct public service purpose, in that adjacent owners are sometimes affected by the violation or may be the complainants of the violation. Whether an opportunity to comment is allowed is up to the jurisdiction.

PUBLIC NOTICE OF VIOLATIONS: KING COUNTY WASTEWATER TREATMENT DIVISION

The King County Industrial Waste program is guided by an Enforcement Response Plan for enforcement of Chapter 28.84.060 of the King County Code and its associated local limits.

Enforcement Tools

The program issues notices of violations related to discharge permits and has available enforcement tools such as compliance schedules, fines, charges for post-violation monitoring and inspections. They also have the ability to recover costs for damages caused by noncompliant discharges.

Display advertisements in The Seattle Times

A highly visible enforcement tool the program uses is the publication of display advertisements in *The Seattle Times* twice annually. The ads list all King County companies and facilities that violated the program's permit conditions and describes the violations, penalties, and requirements for corrective action.

Companies Violate Wastewater Pretreatment Standards

King County's Industrial Waste Program is responsible for making sure that water used by industries returns to our waterways clean and safe. This protects our water resources, our public health, workers at treatment plants, and the biosolids produced there.

The vast majority of King County's businesses do an excellent job of meeting these clean water goals by treating their industrial wastewater before they discharge it to the sewer. Whenever possible, we work to provide technical assistance and help industries reach compliance before enforcement actions become necessary. If companies and facilities violate clean water standards, however, we do take enforcement actions.

The following companies and facilities are users of the County sewer system that violated treatment requirements between January and June 2011 (or have not had their violations previously published). They were found in significant non-compliance during the reporting period; received fines; had violations that were unique or warranted special attention; or met a combination of those actions.

King County Wastewater Treatment Division (Kenmore Construction Site), Kenmore

| Nature of Violation/Type of Pollutant: | Basis for Publication: | Comment: |
|---|--|---|
| Permit violations for: 1) Failure to report changes in waste discharge characteristics; 2) Failure to obtain prior approval for modification of pretreatment system; 3) Failure to notify King County within 24 hours of becoming aware of a violation. | King County Wastewater Treatment Division (Kenmore Portal Construction Site) had violations that warranted a monetary penalty. | King County Wastewater Treatment Division completed all required items in the compliance order. |

Penalty: A \$16,093 fine, \$1,205 post-violation charge and a compliance schedule.

Puget Sound Recycling, Auburn

| Nature of Violation/Type of Pollutant: | Basis for Publication: | Comment: |
|---|---|--|
| Discharge violations-n-Octadecane (4); n-Decane (1); copper (1); Non-Polar FOG (1). | Puget Sound Recycling had a violation that warranted a fine and was in significant non-compliance because it exceeded the chronic review criteria, that is, during a six-month period at least 66 percent or more of all measurements of n-Octadecane were in excess of the limit by any magnitude. | Puget Sound Recycling was required to provide engineering plans and details for an improved sludge handling process and repair specified units of its pretreatment system as identified in the compliance order. |

Penalty: A compliance schedule, a notice of significant non-compliance, a fine of \$18,752 and a \$3,560 post-violation charge.

Shultz Distributing, Inc., Seattle

| Nature of Violation/Type of Pollutant: | Basis for Publication: | Comment: |
|---|--|-----------------------|
| Filing a report past the final notice deadline. | Shultz Distribution had a violation that warranted a monetary penalty. | The report was filed. |

Penalty: A \$500 fine.

Other Enforcement Actions:

The King County Industrial Waste Program also acted on 18 other violations at 10 companies and facilities for the following parameters: chromium (1); permit violations: A) failure to properly maintain pretreatment system (1); B) failure to follow solids best management practices (1); C) failure to notify KCIW of a facility change (1); D) failure to collect required samples and maintain log (1); E) failure to manage stormwater as required by permit (1); F) exceeding maximum allowed flow rate (1); G) failure to continuously monitor pH (1); H) failure to properly maintain pretreatment system (1); reporting-late reports (8); zinc (1).

We all need to work together to prevent pollution. If you have information for, or questions about the Industrial Waste Program, please call 206-263-3000 or TTY: 711, or email: info.KCIW@kingcounty.gov. You may also go to: www.kingcounty.gov/industrialwaste to learn more.



King County
Department of Natural Resources and Parks
Wastewater Treatment Division
Industrial Waste Program

IMAGE: KING COUNTY

EXPAND OR ENHANCE EXISTING CODE ENFORCEMENT PROGRAMS

| Area of enforcement | Staff or other resources | Type |
|---------------------------|--------------------------|--------------------|
| Enforcement of violations | Moderate | Legislative action |

WHAT IS IT?

Using or expanding existing enforcement programs or creating additional enforcement tools increases opportunities for identifying and enforcing more violations.

Background and description

To increase opportunities for identifying and enforcing shoreline natural resource violations, existing programs can be expanded or enhanced, including expansion of code enforcement programs to include natural resource violation, using ticketing, title notification and abatement funds, and “licensing” docks and other permitted structures.

Expansion of code enforcement programs to include natural resource violations

Most jurisdictions have building code and/or zoning enforcement staff that are familiar with the legal necessities of undertaking enforcement activity, including rules of photo documentation, details to include in notices, etc. These staff members may not, however, have the specialized knowledge of natural resources or how to identify those violations. Thus natural resource violation enforcement is typically left to the natural resources staff and because of funding cuts in some jurisdictions, this means that it may be the responsibility of permit review staff who do not normally have to intersect with the legal process. Additional training may be helpful for this staff.

An efficient and cost-effective way to undertake natural resources enforcement is to tap into the existing code enforcement programs, such as building inspections (see Side Box on page 61 about a combined inspection program in Carson City, Nevada). This allows for the use of staff that has experience with legal complexities. It can also improve the consistency of natural resources enforcement by making enforcement more systematic. For success, natural resources staff would need to coordinate with and support the enforcement staff, and provide case-by-case assistance. There would also need to be cross training between the two programs, though much of that happens with day-to-day contact. This kind of coordination between programs may require approval by the elected officials, and possible need regulatory changes for authorization.

Whether or not it is possible to tap into code enforcement programs, tools to automate the complexity of enforcement actions, such as checklists and procedure guides, can be developed that are specialized for natural resources enforcement. It is important to work with a jurisdiction’s legal counsel to make sure these materials assist with gathering the evidence that may be needed if a case proceeds to court and that the investigation is conducted in a way that protects the jurisdiction and, if a criminal case is necessary, the rights of the accused. Decisions on whether to proceed with a civil or criminal case should always be made with a jurisdiction’s legal counsel.

Adding field ticketing

Some enforcement programs are moving towards allowing inspectors in the field to issue tickets. This allows for a quicker and potentially effective tool in the field. In one county, however, the comment we heard about tickets is “These require a court date, but often the judge reduces it to \$400 or zero. People plead their case.” Another issue is that the ticket fines accrue daily creating an incentive for landowners to appeal it. This may end up resulting in increased administrative cost and work. The jurisdictions need some guidance on the laws for this and how to proceed in order to make this an effective tool.

COMBINED INSPECTION PROGRAM: CARSEN CITY, NEVADA

In order to save money and in response to business community requests for more coordination, Carson City, Nevada, conducted a study to examine the cost and feasibility of combining fire, building, health, and environmental inspection services into one program. Inspections were conducted by three different city departments: Carson City Fire Department was responsible for fire inspection services; Carson City Health Department conducted health and environmental inspections and permitting; Carson City Building Department conducted building inspections. The study included a literature review followed by interviews with fire department staff across the US.

Combined inspections save money

They found that combined inspections would save money and would be feasible, and that they would be able to attract inspectors at a market rate. Building inspections were the most numerous type of inspection. Part of the reason for this is that the Building Department inspected new construction at seven different stages. Although this study focused on inspections related to businesses, lessons learned could be applied to shoreline land use inspections as well.

Biggest need: Cross-training and training

The study determined that a certain amount of cross-training, as well as some college courses (chemistry, for example) would be needed so that inspectors could be well versed in the requirements across all of the departments. Each department had different training and qualification requirements (i.e., amount of education and experience) but the amount of needed training was easily quantified:

“The fire department reported that 160 hours of training would be sufficient for health department officials to become competent in fire code enforcement. The building department reported that the fire inspectors would have no problem with building code enforcement, but that it would require health officials 30-60 days of training to learning the building code. Health Director Darrin Winkleman would require the fire and building inspectors to take 2-3 college classes in addition to 60-90 days of on the job training.”

How common are combined inspection programs?

The literature review and the questionnaire sent to 100 city fire departments across the US (51% response rate) indicated that the most common combination of inspections are fire and building (12 out of 52 respondents). In many jurisdictions, state inspectors (16) or county (16) performed health inspections for the cities. The building department performed health inspections in 8 jurisdictions. For environmental inspections, the majority (29) were handled by a state agency. Thirteen cities did their own inspections while 9 were handled by county health departments. Only 1 respondent, Bismarck, conducted all 4 types of inspections in one program.



PHOTO: CARSON CITY

Source: Carson City Fire Department, Carson City, Nevada. (2000, August). *Analyzing the cost impact of combining fire, building, health, and environmental inspection services into one organization: Strategic management of change*. An applied research project submitted to the National Fire Academy as part of the Executive Fire Officer Program. Written by Robert Stacey Giomi. Retrieved from <http://www.usfa.fema.gov/pdf/efop/efo24411.pdf>

Incorporating title notification

Title notification is another potentially strong enforcement tool. It can be made mandatory when a landowner is given a permit. A future buyer can then see what is approved. If a violation problem goes to court, the future owner can't say that they didn't know about the permit conditions. This does have some associated costs and staff time, but it is helpful nonetheless.

Improving the use of abatement funds

Some jurisdictions have authority to create abatement funds but it appears that this tool has not been universally used successfully. In one county, the fund was managed through the building department. Contractors would take out offending structures. There was a certain amount of money in the fund but it ended up being diverted to another purpose. In another county, a fine process kicked in after a period of noncompliance. The fines can be used for abatement and liens placed on property to collect them. They can go in and make the correction to sites, using a vender, and charge the costs to the landowner (or place a lien). The abatement fund is like an internal loan for funding the next phase of correction on another property.

“Licensing” docks and other permitted structures

An idea has been ‘circulating’/gaining acceptance for some time that could potentially solve a difficult enforcement problem: a compliance-assurance mechanism associated with shoreline construction such as licenses attached to the structures (docks, bulkheads, etc.). These could be one-time licenses, similar to boat and automobile licenses that are prominently displayed (see Side Box on page 63 about the Washington boat licensing program).

In order to avoid forgery problems, the licenses should be part of a database and able to be easily be verified, even wirelessly while in a roving enforcement boat if desirable. With GPS units connected to laptops now, the data could be carried in the laptop or some dedicated unit and referenced against a “permitted locations database” using the GPS and then checking the number stamped on the plate. The license could start with a uniquely-stamped, non-rusting plaque (probably heavy aluminum) and a stiff penalty for any attempts at forgery.

WASHINGTON STATE BOAT VISIBLE BOAT REGISTRATION NUMBERS AND DECALS

Washington's boat licensing program provides a potential model for visible and permanent licenses placed on permitted shoreline features such as docks and bulkheads. These could be checked by patrolling enforcement officers and cross-referenced with an online database.

State registration requirement for boats

To navigate, operate, employ, or moor your vessel in Washington State, most non-motorized vessels greater than 16 feet long and motorized vessels are required to be registered. Exceptions include military vessels, public vessels owned by the federal government, and vessels held for sale by licensed dealers. Registration includes a decal that must be displayed.

Visible registration number and decal



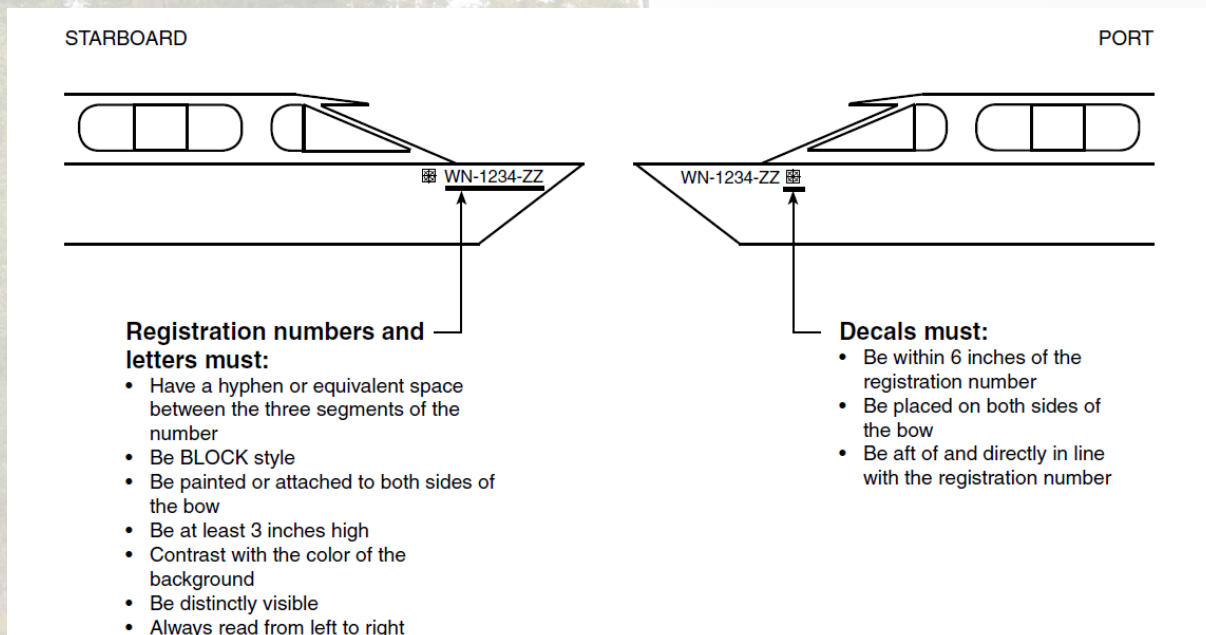
Per WAC 308-93-145, all vessels registered under chapter 88.02 RCW are required to display the vessel registration numbers which uniquely identify a vessel (similar to an

automobile license plate number). Registration numbers remain with the vessel permanently.

The registration number assigned must:

- Be painted on or permanently attached to each side of the forward half of the vessel and easily visible for law enforcement.
- Be in plain vertical block characters of not less than three inches in height.
- Contrast with the color of the background and be distinctly visible and legible.
- Have spaces or hyphens that are equal to the width of a letter other than "I" or a number other than "1" between the letter and number groupings (example: WN 5678 EF or WN-5678-EF).
- Read from left to right.

In addition, annual state registration decals are required and must be displayed on the forward half of the vessel so they are easily visible for law enforcement.



LEVERAGE THE CITIZEN COMPLAINT SYSTEM

| Area of enforcement | Staff or other resources | Type |
|---------------------------|--------------------------|----------------------------|
| Enforcement of violations | Low | Internal procedures change |

WHAT IS IT?

Benefits of citizen complaint-based violation reporting can be maximized by designing the process to direct complaints to specifically address jurisdictional priorities and creating timely response.

Background and description

The best way to identify violations is to have a dedicated natural resources enforcement officer patrolling for violations. The financial reality is that few jurisdictions can afford such pro-active approaches and instead rely on citizen complaints to identify violations. Thus it is important to consider how to leverage the citizen complaint reporting to maximize the effectiveness of the system. Ultimately, jurisdictions can also work towards incorporating compliance into other work that is already being done - thus making the system less reliant on complaints and more driven by staff activities.

Since most jurisdictions rely so heavily on citizen complaints to identify violations, it is important to consider how to maximize the utility of these complaints.

Challenges of existing citizen complaint systems

Citizens are willing to take the initiative to call in violations but face challenges. Typical concerns include:

- **Who to call?** Citizen violation reports often may be for single violations which relate to multiple codes that are handled by different municipal departments. At worst, this may require a different person and different phone number for each code. Further, the person making the report may not know who to contact. Municipalities with a single point of contact (e.g., a hot line) are thus more user-friendly.
- **Lack of timely response.** Another concern is lack of response to complaints in a timely manner, especially when the violation is occurring in real time. Some jurisdictions do not respond to complaints for weeks. Even a jurisdiction with a rapid response time may have difficulty with violations committed on the weekend and at night. Programs that have automated reporting are better able to capture night and weekend violations, even if they are addressed the next business day.
- **Lack of database.** A common problem is a lack of a consistent means of gathering information about violations. With an array of different enforcement programs within a municipality, each program will gather different information. In addition, various training, experiences, and tools available to each enforcement staff will result in gathering different information. Jurisdictions with systematic data gathering and documentation have more thorough and consistent support information for their enforcement actions.

Approaches to leveraging citizen complaint reporting benefits

There are many ways to improve and capture more benefit from citizen complaints.

Target the complaints towards specific jurisdictional priorities

Because there is such a heavy reliance on citizen complaints for identification of violations, there is an opportunity to use these complaints to the maximum advantage of the jurisdiction by directing the complaints to topics that are desired. If, for example, the jurisdiction is most interested in enforcing illegal “do it yourself” cinderblock or wood bulkheads, a campaign can be conducted to encourage those complaints. There are a variety of ways to conduct education and direct complaints on specific topics, but one tried and true method is to create an easy-to-remember hotline number that can also serve as a targeted public education tool in order to guide complaints on enforcement priorities. For example, if the jurisdiction is most interested in bulkhead, illegal fill, or vegetation clearing violations, then they could advertise hotlines using those terms such as 1-800-BULKHEAD, 1-800-STOPFILL, or 1-800-SAVEVEG. Good examples where this technique has been used elsewhere are the California 1-800-CutSmog hotline (see Side Box on page 66) and the Washington State Department of Transportation HERO

hotline (1-877-764-HERO) to report HOV/HOT carpool lane violators. These are most successful if they are heavily advertised using bill boards, other signage, radio, television, etc. A state- or regional-scale complaint line could be sponsored by Ecology to report specific types of shoreline violations.

Improve technology tools

Technology can be used to improve the complaint system. In order to maximize public participation, it is beneficial for a jurisdiction to use both a dedicated webpage and a dedicated phone line to provide a single point of contact to report violations. The advantages of a consistent point of contact using a complaint webpage or a complaint phone number is that the jurisdiction can receive complaints around the clock.

Both a complaint phone line and a complaint webpage allow citizens to provide rudimentary information about the violation. Thus both the webpage and the phone line methods should strive for consistency of information gathering using techniques such as:

- **Automated web forms.** The web page form is useful for extracting specific information about the violation from the complainant, and at gathering information (especially basic information) consistently across enforcement programs. A form may turn off some people that don't want to spend the time typing in the information but is used willingly by most people. When a report is received, it would be reviewed by a staff person and routed to the correct enforcement program(s). Additional contacts might be needed to gather additional information.
- **Phone checklists.** If the phone system is unstaffed, the system message can encourage complainants to leave better information if the outgoing messages ask for specific information such as addresses and dates. A staffed phone line allows staff to gather information on the violation while it is fresh in the complainant's mind. It is beneficial to provide staff with a checklist and script to make the information gathering as systematic as possible. The report would be reviewed and routed to the correct enforcement program(s).

Triage complaints in order to avoid getting involved in inter-neighbor disputes

Complaint-based elements are important for any enforcement system because the local citizens are the "eyes on the ground." While some complaints come from people who are interested in protecting the natural resource, many complaints come from people that have grievances against neighbors. This places the enforcement program in the middle of feuds between neighbors, which can distort the priorities of the enforcement program. Jurisdictions should be careful to set their own priorities rather than letting neighbor feuds set priorities. Maintaining priorities requires a program with a rapid assessment capability to accomplish three things:

- Weed out complaints that are not violations before spending resources on them,
- Document those instances of non-violation in the system for others to see in the future, and
- Report them back to the complainant to eliminate their expectations of jurisdiction intervention.

Inattention to these elements can damage the jurisdiction's reputation, similar to ineffective enforcement of actual violations, since feuding neighbors will continue to see it as a valid violation.

Make sure there is follow-through

Jurisdictions should be cautious about actively soliciting complaints if there is not the capacity to effectively respond. Lack of follow-through will negatively affect the jurisdiction's reputation for enforcement and the larger permit system.

1(800)CUTSMOG AS TOOL TO MAXIMIZE BENEFIT FROM CITIZEN COMPLAINTS

The Los Angeles Air Pollution Control District instituted a hotline for reporting smoking vehicles in the early 1990s. Drivers could call the hotline at the time they saw a car with smoke coming out of the tailpipe and report the location, car license, and type of car. Large billboards were placed along highways to advertise the number. By choosing 1 (800) CUT SMOG, the clean air agency had both an easy-to-remember number/name as well as a way to direct people about what complaints were desired. The use of this type of hotline number has now spread throughout California and to many other states.

Pros and Cons of the hotline

The smog hotlines are well used. For example, in adjacent Ventura County, between 1992 and 1998, an average of 7 complaints a day were received. The clean air agency, however, has no enforcement authority for the smoking vehicles because the complaints are citizen-based. When a complaint comes in, the agency sends the owner a questionnaire, asking the owner to explain why the car has

smoke emissions and encouraging repairs. In 1998, it was reported that 30% of Ventura County vehicle owners who receive the letters replied (anonymously) and sometimes they apologized for their excess pollution.

Officials felt that the program was effective as a tool to educate the public about the need to get repairs. Some vehicle owners complained that it is an intrusion, or that the complaints are sometimes vindictive.

In Salt Lake, where the program was initiated in 1995, the hotline received 1,954 calls in the first six months resulting in 1,100 letters sent to vehicle owners. In response to those 1,100 letters, 60 vehicles were voluntarily brought in for emissions checks at the county's technical facility. While primarily viewed as an educational tool, if there are multiple complaints regarding certain vehicles, agency staff will send certified letters requiring that the vehicles be brought in for testing, and if the letters are ignored they will follow-up with in-person visits.

Saturday, August 16, 2014

UP LINKS

- Reducing Air Pollution - ARB Programs
- Enforcement Programs
- Air Pollution Complaints

PROGRAM LINKS


- Idling Bus or Vehicle at or Near a School
- Idling Commercial Vehicle
- Rail Yard Complaints
- Smoking Vehicle

RESOURCES

- Contact Us
- Join Any Enforcement Email List(s)
- RSS / Newsfeed

Smoking Vehicle Complaint Program

This page last reviewed January 9, 2014



Smoking vehicles are detrimental to California's air quality. Here's how you can help reduce harmful air pollutants caused by smoking vehicles:

- Keep up the maintenance on your own car, truck, or other vehicle. A well-maintained vehicle is a cleaner-running vehicle.
- Report smoking vehicles on the roadway.

Complaint Form for Smoking Vehicles

To report a smoking vehicle, you may submit a [Complaint Form for Smoking Vehicles](#) to the Air Resources Board, or call ARB or the local Air Pollution Control District.

Please have this information ready to report:

- Vehicle Type
- License Plate Number
- Date, Time, and Location of the Incident
- Make and Model of the Vehicle

Call the Air Resources Board or the local Air Pollution Control District:

The following phone numbers are available in the regions listed:

| | |
|---|----------------|
| Air Resources Board (throughout California) | 1-800-END-SMOG |
| Bay Area AQMD | 1-800-EXHAUST |
| Smoking Vehicle Assistance Program | |
| San Diego County APCD | 1-800-28-SMOKE |
| San Joaquin Valley Unified APCD | 1-800-559-9AIR |
| Shasta County AQMD | 1-888-249-SMOG |
| South Coast AQMD | 1-800-CUT-SMOG |
| Ventura County APCD | 1-800-559-SMOG |

Sources: California Air Resources Board. *Smoking vehicles complaint program*. Retrieved from <http://www.arb.ca.gov/enf/complaints/smoke.htm>
 Polakovic, Gary. (1998, September 24). Smog Snitches Driven to Help Clear the Air. *Los Angeles Times*. Retrieved from <http://articles.latimes.com/1998/sep/24/local/me-25853>
 Israelsen, Brent. (1996, February). Smog Hotline Choked With Complaints About Cars. *Deseret News*. Retrieved from <http://www.deseretnews.com/article/472443/SMOG-HOTLINE-CHOKED-WITH-COMPLAINTS-ABOUT-CARS.html?pg=all>

IDENTIFY UNPERMITTED DEVELOPMENT DURING PERMIT REVIEW

| Area of enforcement | Staff or other resources | Type |
|---------------------------|--------------------------|----------------------|
| Enforcement of violations | Low | Permit strengthening |

WHAT IS IT?

At the time permit applications are submitted, potential violations at the site can be quickly assessed and then corrected along with the proposed project.

Background and description

It can be quite effective to identify unpermitted development when reviewing permits because this potential enforcement moment comes at the point when the violator wants something from the jurisdiction. Each permit review provides the opportunity to find violations on the parcel as it is scrutinized. GIS technology, air photos, and project history databases can greatly facilitate the review in that comparisons of changes to the property over time become evident.¹⁰ When an unpermitted alteration is found, the jurisdiction can require the applicant to perform the correction in the new permit application. The jurisdiction can withhold approvals until either the violation is corrected or it is included in the proposed development.

Consideration in identification of potential violations

This approach moves violation enforcement work into the permit review system. There are a number of things that need to be considered in using this tool:

- Confronting a permit applicant can be awkward for staff, so training is needed to provide language and techniques to raise the issue with successful results. The goal is to get the violation fixed or compensated without going through an enforcement action and court costs.
- The permit review approach for identification of violations is highly dependent on a thorough and readily accessible air photo history in a GIS system, although the historic images available in online mapping programs can help fill in gaps in the GIS system.
- It is important that the jurisdiction either require the activity to be corrected before issuing the new permit or as a condition of the new permit. If a jurisdiction issues a subsequent permit with a known violation present and unresolved, it weakens the jurisdiction's position later when they do determine that the violation must be corrected.
- Financial guarantees should be used to ensure removal of the violation work after issuing the permit.

¹⁰ Futurewise's companion paper *Practical Guide for Shoreline Permitting to Achieve No Net Loss* contains recommendations on these technology and permit review tools.

ENHANCE REPORTING BY STAFF DURING OTHER DUTIES

| Area of enforcement | Staff or other resources | Type |
|---------------------------|--------------------------|----------------------------|
| Enforcement of violations | Low | Internal procedures change |

WHAT IS IT?

Enhancing the ability of staff and associates, in other departments or at other agencies, to identify violations during their other field duties (and project interactions) increases reporting of violations for enforcement action.

Background and description

It can be quite successful and cost-effective for natural resources staff to identify violations when they see them in the field during other review duties. They have direct access to the tracking system and are empowered to conduct an investigation into the violation at the time they see it. Other jurisdictional staff or state or regional staff who drive around the jurisdiction may see reportable violations or problems and with a little coordination and cross-training, these staff can be resources that improve the effectiveness of an enforcement program. Specific agreements can be set up with other departments to systemize cross-departmental enforcement.

Using site visits to identify violations

A strong permit review program incorporates site visits to accurately understand site conditions before issuing the approvals for permits and exemption requests.¹¹ In the course of those daily duties, permit staff see extensive areas of the jurisdiction and consequently have the opportunity to observe many violations. Having the review staff report violations is the easiest method of identifying violations that are not complaints. Upper management support in the form of department policy and guidance, as well as training, can ensure this style of violation identification.

Staff should document observed violations in a systematic manner, which is made easier by having a support system in place including:

- An efficient way for staff to coordinate their visual observations of the landscape with the information systems of the jurisdiction: parcel numbers, addresses, ownership, maps, etc.
- A good tracking system in which to place the reports.
- Mobile tools that can link field staff with the jurisdiction's electronic information systems such as tablet PCs and smart phones.

Coordination with other staff within the jurisdiction

Non-natural resource staff can assist in identification and enforcement of shoreline violations relatively easily because usually they have close relationships within the jurisdiction. For example, since land use planning and building code enforcement staff work in close proximity and work on the same development projects, they also have a familiarity with the natural resources staff activities. Repeated interaction and communication and their own experience give them some knowledge about potential natural resources violations. They also have access to similar tools. At a minimum they would be able to report possible violations to the natural resources staff. With some training, they may also be able to take action when they see the violations – possibly issuing a stop work order or similar action. WDFW recently created a cross-departmental partnership between the Habitat Program and the Enforcement Program (and developed Policy and Procedures 5212) to improve enforcement of HPAs (see Side Box on page 70).

¹¹ See also Futurewise's companion paper *Practical Guide for Shoreline Permitting to Achieve No Net Loss* contains recommendations on site visits.

Deputation of these staff may be desirable, or even required, depending on the jurisdiction's regulations. Alternatively, the code may not allow it. The jurisdiction can make the needed regulatory changes to implement the desired option.

Other jurisdictional staff persons also drive around and may see violations. These include staff from the roads and local law enforcement departments. Roads staff are often familiar with construction practices and the need for environmental permits. Law enforcement personnel are skilled at seeing irregular activity. Coordination and training with the staff of those departments will allow them to report suspicious activity to the natural resource staff. Law enforcement staff with the right training could even help fill gaps when natural resources enforcement staff is not available, such as nights and weekends.

Cooperative reporting with staff external to the jurisdiction

Violation response can be improved by collaborative response with other agencies. Since a violation for one agency is also likely to be a violation for another, a good working relationship can also engage other agencies or departments in collaborative enforcement. Each agency maintains a separate enforcement action, but coordinates the activity to provide a common message and a united front that encourages voluntary correction of the violation.

Good working relationships allow staff from different agencies to contact each other to report violations. This is an easy arrangement to make on an informal level. Making it more formal requires greater coordination that may be difficult for tribal, state, and federal agencies. The resource agencies that can be of most assistance include WDFW, DNR, Ecology, the local tribal representatives (usually fisheries), and the Army Corps of Engineers and National Marine Fisheries Service (although federal agencies have broad jurisdiction and a large workload that makes it difficult to coordinate with them).

Ecology also often works jointly with local governments on shoreline enforcement actions and can provide useful technical assistance on any shoreline enforcement action whether Ecology is participating formally or not.

Those agencies that have natural resource enforcement staff may be interested in reciprocity or mutual aid agreements to perform code enforcement which would require interagency coordination and training. It would be limited by relevant regulations. Interagency assistance may require or benefit from cross deputation.

WDFW'S CROSS-DEPARTMENT ENFORCEMENT PROGRAM

Recognizing the need to improve enforcement even in times of reduced funding, WDFW's Habitat Program recently partnered with the Enforcement Program to jointly address HPA compliance and violations. In May 2014, they created a formal set of policies and procedures.

By partnering, the two programs are able to match the best suited staff to compliance check and enforcement activities. Commissioned Fish and Wildlife Officers will direct their efforts on unpermitted projects while Habitat Biologists (staff authorized to sign HPAs) will conduct compliance inspection of permitted projects and work with those permittees who need to come into compliance. Fish and Wildlife officers may also conduct compliance inspections of permitted projects. Officers on their boats can access an online system to check specific sites. The emphasis is on getting the problems fixed. In addition, it is now a policy that enforcement is part of the agenda for the weekly management meetings.

How the partnership will work

The policies and procedures established that the two departments would work together in the following ways:

- Train staff in the regulations and enforcement procedures (how to write up reports, investigation techniques, and how to provide testimony as an expert witness).
- Integrate the Enforcement Program and Habitat Program databases and design them to allow information to be added to the system accurately and quickly.
- For **permitted** hydraulic projects (which are prioritized, based on habitat value):
 - The Habitat Biologist will conduct compliance checks. If a permit violation is found, the Habitat Biologist will inform the landowner or their representative and provide them a written statement with corrective actions.
 - If the violation is significant and/or if the landowner or their representative is unwilling to comply with corrective actions, the Habitat Biologist will refer violations to the Fish and Wildlife Officer who will

decide the appropriate enforcement track to take.

- For **unpermitted** hydraulic activity:
 - Fish and Wildlife Officers will have primary responsibility for conducting investigations. They will coordinate with the Habitat Biologist to identify/assess fish and habitat impacts and integrate mitigation alternatives into the case report.
 - If Habitat Biologists observe unpermitted activity, they will document the physical location and report to the Fish and Wildlife Officers.
 - Habitat biologists will refer unpermitted hydraulic project activity to Fish and Wildlife Officers for investigation.
- Tracking monitoring and violation data in Aquatic Protection Permitting System (APPS):
 - Fish and Wildlife Officers will track hydraulic code violation cases in the Enforcement Program database system and will provide Habitat Biologists with the case tracking number, case updates, and final disposition.
 - Habitat Biologists will enter compliance monitoring information case tracking number and final disposition of violations into APPS



Enforcement sequence

In addition, the procedure formally established an enforcement sequence. After formal notification of violation, the Officer will recommend the alleged violator cease hydraulic project work, will investigate the violation and take appropriate enforcement action. The next steps are to issue a citation or, as appropriate, refer the case report to a prosecutor to file charges with the court within 30 days after the violation. The Fish and Wildlife Officer will work with the prosecutor, notify the Habitat Biologist if additional biological/technical information is needed, and monitor follow-up.

Sources: Lisa Veneroso, WDFW, personal communication, June 6, 2014.
Washington Department of Fish and Wildlife. (2014, April 25). *Policy 5212: Monitoring Compliance with the State Hydraulic Code (Chapter 77.55 RCW)*.
Washington Department of Fish and Wildlife. (2014, April 25). *Procedure 5212: Monitoring Compliance with the State Hydraulic Code (Chapter 77.55 RCW)*.
Puget Sound Marine and Nearshore Grant Program. (2014, March). *Compliance Assessment Project*. Written by Bobbak Talebi (Washington State Department of Ecology) and Julie Tyson (Washington State Department of Fish and Wildlife).

CREATE A ONE-STOP-SHOP FOR VIOLATION ENFORCEMENT

| Area of enforcement | Staff or other resources | Type |
|---------------------------|--------------------------|--------------------|
| Enforcement of violations | High | Legislative action |

WHAT IS IT?

Creating a one-stop-shop as a single point of contact for enforcement at the state level (including local, federal and tribal agencies) through a coordination process could increase identification and enforcement of violations.

Background and description

Because the Shoreline Management Act authorizes a state agency – Ecology- to administer and enforce it (in conjunction with local jurisdictions) violation response could be established as a more defined shoreline enforcement program across the state – including shoreline enforcement officers. Other agencies with similar enforcement needs (federal, state, and tribal) could be incorporated into the effort. In other words, the state could create a one-stop-shop of shoreline enforcement. Such an initiative could greatly improve enforcement, especially in jurisdictions where enforcement is very limited.

One-stop-shop approaches

One-stop-shop for permitting and/or enforcement was mentioned often in our interviews with practitioners. One approach could be cross-governmental (i.e., federal, tribal, state and local). Another option for a coordinated approach, which also includes collaborative enforcement, would be for Ecology to partner with the State Patrol or Fish and Wildlife, similar to existing arrangement between NOAA and the Coast Guard in enforcing NOAA Fisheries laws. Such a collaborative approach was recommended in the 2009 San Juan Initiative Report (see Side Box on page 72).

SAN JUAN INITIATIVE: ENFORCEMENT AND COMPLIANCE IMPROVEMENTS IDENTIFIED

What is the San Juan Initiative?

The San Juan Initiative was embodied by a 24-member Policy Group whose members were appointed by the San Juan County Council. They worked over two years to assess the current ecosystem protection programs and, through consensus, develop recommendations for improvements. The goal of the San Juan Initiative was to “improve ecosystem protection in San Juan County in a manner that supports the prosperity of the San Juan community, builds local capacity for ecosystem protection, and serves as a pilot for the rest of Puget Sound.” The overall conclusion published in their 2009 report was that current protection programs are not effective at stopping ecosystem decline.



The project focused on the marine shoreline and addressed federal, state and local education-, regulatory-, and incentive-based programs to determine whether they are meeting required protections to meet “no net loss” of habitat function.

Significant compliance issues were found

In the project’s review of permits in select locations, they found that more than 200 parcels had shoreline armor, but could find only nine County and 12 State Hydraulic Permit Approval (HPA) permits for those parcels. Those 9 properties with County permits were not the same as the 12 properties that had obtained HPAs. In the field, they reviewed parcels associated with 18 bulkhead permits and 24 dock permits. They found that **half** of those docks did not comply with the conditions of the permit. “Length was most often out of compliance with an average length over that stated in the permit by 52 feet....When the permit called for grating, it was only found in the field half the time.” They speculated that “The low level of compliance with dock permit conditions may be the result of the lack of inspections after or during construction.” Due to a lack of information in the permits, they were unable to assess compliance with bulkhead permits.

Recommendations

The committee decided that their recommendations should focus on what would matter most in the near-term: shoreline vegetation (trees and ground cover) and natural beachforming sedimentation processes (erosion). Their *regulatory* recommendations, many of which relate to compliance, were:

- Refine the requirements for bulkheads and other shoreline armoring to require that new bulkheads meet the standards recommended below and document pre and post construction conditions. Maintain this requirement even if repairing a bulkhead is exempt from the shoreline substantial development permit. [Note: this was the sole recommendation upon which the committee did not reach consensus]
- Allow homes to be moved back and remain non-conforming in areas that are the most ecologically sensitive to shoreline armoring, such as feeder bluffs and forage fish beaches.
- Require before and after construction inspections of new shoreline structures such as bulkheads or removal of shoreline vegetation.
- Support current efforts to create financial penalties issued by the County for removal of trees or placement of bulkheads. Penalties should be sufficient to deter activity.
- Work with the Department of Fish and Wildlife to find ways to administer their regulations in a way that is consistent with the recommended changes to County regulations.
- Work with State DOE or WDFW to implement a code enforcement inspection and monitoring program that periodically inventories the most sensitive shoreline areas to deter and prevent illegal activities.
- Create a design commission that allows staff, property owners and contractors to recommend solutions for sites where the standard regulations do not make sense for protecting shoreline resources.”

INCREASE FUNDING FOR VIOLATION ENFORCEMENT AND RESTORATION WORK

| Area of enforcement | Staff or other resources | Type |
|-----------------------|--------------------------|--------------------|
| Violation enforcement | Moderate | Legislative action |

WHAT IS IT?

Strategic planning and implementation of methods for funding increases capacity for enforcement programs and restoration work.

Background and description

Violation enforcement and restoration funding are often intertwined because enforcement activities may require that violation corrections be done by or arranged by the jurisdiction. Funding sources for enforcement and restoration include general funds, permit surcharge fees, judgments for costs, penalty fines, and judgments for restoration.

Funding sources

General fund

Funding from the jurisdictions general fund or departmental budgets is a traditional source of enforcement funding, although it is typically inadequate. General funds are generally used because compliance-based fees are either not allowed or it is politically objectionable to use permit review fees for non-permit processes such as enforcement actions. Thus jurisdictions often fund violation enforcement with the general fund, even if the permit system is self-supported with fees.

Permit surcharge fees

One way to fund an enforcement program is to establish a surcharge fee on permits. Thus the underlying permit fee continues to fund permit review while the surcharge is evenly distributed through the system to support the enforcement program. An example of this is the funding of the building code council out of a building permit surcharge (however, it hasn't been able to increase that funding level for many years). The state legislature would need to authorize a building permit surcharge for enforcement.

Judgments for costs

Financial judgments and associated liens that are collected to recover costs will go back to the jurisdiction – likely the treasury. The jurisdiction can determine the disposition of such judgments using policy or regulation and clearly indicating that these awards go back to the enforcement program and legal department.

Notice of Penalty fines

Penalty fines are not dependent on court judgments, though many will be appealed. The fines and associated liens that are collected for penalties go back to the jurisdiction treasury. The jurisdiction can determine the disposition of these funds by policy or regulation and clearly indicating that these awards go back to the enforcement program and legal department. Jurisdictions can also use penalties to fund the work to restore violations.

Judgments for restoration

Financial judgments and associated liens that are collected to correct violations will go back to the jurisdiction – likely the treasury. Since the court ordered the judgment to correct the violation, the jurisdiction should arrange (possibly through policy or regulation) for the money to go to an account that can be used for such restoration work.

Seed money for revolving fund

If a revolving fund is established (see below), it may need seed funding from the jurisdiction. This would normally be a one-time action with establishment of the fund, but may also include refresher deposits as deemed necessary.

Revolving fund for restoration work

A revolving fund account, where money spent over the course of operations is replenished by deposits over time, can be used to pay for restoration work. This is different from a normal annual appropriation budget for a program. It is recommended that a jurisdiction establish the account with seed funding, but this is not required if other sources of money are anticipated. The above sources of funding can be used to fund the account over time, especially financial penalties and judgments for restoration.

There is a budgetary concern related to using these accounts. During discussions with planners and natural resources staff, we found that some jurisdictions have used these accounts, but in all cases that we heard about, the accounts were later raided during a budget crisis and the accounts are now empty. It is recommended that the local government establish a policy that restricts the use of these funds for restoration work.

The money from these special accounts can be used for the restoration work to correct violations. That work may be done by the jurisdiction, the jurisdiction may hire a contractor to do the work, or the jurisdiction can contract with a land trust or other organization that does restoration work and hand over the money. The last option also solves the problem of any held money being raided for budget purposes.

State funding of circuit riders

A funding option that could greatly improve violation enforcement would be to establish a funding grant to each of the 39 counties in the state to be used to pay for an enforcement staff person or to fund circuit rider enforcement staff. These staff could also assist local cities in the county.

LEGAL AND REGULATORY TOOLS

MAXIMIZE POLICY AND LEGAL TOOLS TO RESOLVE NON-COMPLIANCE

CHOOSE ENFORCEMENT METHOD BASED ON CHARACTERISTICS OF THE CASE

INCORPORATE PREPARATION FOR LEGAL WORK AT ALL STEPS IN THE PROCESS

ISSUE CEASE AND DESIST ORDERS AND ORDERS TO CORRECT

ADDRESS UNRESPONSIVE VIOLATORS

MAXIMIZE IMPACT OF AFTER-THE-FACT PERMITS

SEE ENFORCEMENT ACTIONS THROUGH COURT AND BEYOND

MAXIMIZE POLICY AND LEGAL TOOLS TO RESOLVE NON-COMPLIANCE

| Area of enforcement | Staff or other resources | Type |
|---------------------|--------------------------|----------------------|
| Permit Compliance | Moderate | Permit strengthening |

WHAT IS IT?

Enhancing policy and legal aspects of permits and the permitting process ensures stronger compliance.

Background and description

The ultimate objective of a compliance program is to move violators or permit holders to voluntarily make corrections. The cost and difficulty of going to court or a hearing make those a last resort if there are other options available. The traditional method of obtaining compliance is simply hounding a violator into compliance, but there are more direct actions possible as well. In the case of a permit holder that refuses to comply with the permit requirements, jurisdictions have a variety of tools they can use, and these often bring other motivations into play. A permit holder's foreknowledge of these options can deter non-compliance, but at a minimum these options provide a penalty that may motivate compliance later on.

Tools to gain permit compliance

It is important to use the available compliance tools described below as these will trigger action. Like all non-compliant situations, one should not let them linger for long periods of time. One of the primary reasons any compliance situation fails to be resolved is that it languishes and is then forgotten or circumstances change so much that it is difficult to require that the violation be corrected.

Provide for correction of non-compliance in permit conditions

Phasing conditions (described on page xx) and financial guarantees (page xx) incorporated into permits allow for using conditions of approval to ensure compliance. These can include provisions to address the consequences of non-compliance such as financial guarantees that the newly constructed structure will be removed in the event of non-compliance.

To implement this tool, language must be added to the permit, such as:

"Any violation of a condition of this permit must be corrected within the time period set by the administrator."

Establish a policy to deny new approvals for non-complying properties

In interviews with local planning staff, we learned that in some jurisdictions, legal advisors do not allow new permits to be withheld for existing violations and non-compliance. Such a policy results in situations where the staff person may issue a shoreline violation notice, and have to turn around and issue a shoreline permit for the same property without the violation being corrected, or other similarly conflicting scenario. Such policies on permit issuance

- Undermines the jurisdiction's credibility with both the violator and development community for not enforcing their own laws, thereby encouraging non-compliance,
- Sends a clear signal to staff that pursuing violations and enforcing the code is a waste of time, and
- Deprives the community of an effective enforcement mechanism.

The solution is to include a requirement that permits cannot be issued if there are uncorrected violations into the local government's permitting and enforcement regulations (preferably one for enforcement of all the jurisdiction's regulations).

In order to create these stronger permit provisions, the following language should be included in the Shoreline Master Program (SMP) enforcement provisions:

- **Regarding violation penalties:** "In addition to other penalties described in this chapter, actions that can be taken include withholding any and all permits for development or land division, unless said permit directly remedies the violation. A violation of any code or ordinance shall also be grounds for denial of a permit. A permit may be rescinded if its requirements or conditions of approval are violated."
- **Regarding permit compliance:** "No further development shall be authorized unless and until compliance with the development authorization conditions and/or terms of this title has been achieved to the satisfaction of the administrative official. Violations of this chapter constitute a public nuisance and may be abated as such."

A public nuisance is an unreasonable act or omission that adversely affects the community. Nuisance is a relatively common legal concept that many judges are familiar with. Abating nuisances, which requires a lawsuit, can be an effective way of addressing major violations which a busy superior court judge may readily understand.

Incorporate clause for automatic expiration of permit unless a final compliance sign-off is issued

Inclusion in a permit of an automatic expiration clause unless a final compliance sign-off is issued accomplishes several things. First, it provides motivation for the property owner to resolve non-compliance – all the work of obtaining the permit will be lost, and the loss of the permit creates great risk for already completed construction. Second, such a clause avoids the need to rescind the permit for projects that fail to comply with requirements, because it will automatically be rescinded. Third, it eliminates the ability of the violator to use the existence of valid permits to delay or obfuscate enforcement action. Finally, it improves the jurisdiction's position in court or hearing if the site has no permit.

Non-compliance due to extenuating situations can be accommodated by extensions at the discretion of the jurisdiction. Like the final approval of a permit, the expiration of the permit also needs to be tracked in the permit system.

To implement this tool, language must be added to permit approval regulations (which may need to be in different sections such as):

- **Regarding documentation of compliance:** "The applicant shall complete all required conditions, submit documentation certifying that all conditions were met, and request inspection or review to determine that the requirements have been fulfilled. Such shall be completed within the timeframe specified in the decision and any authorized extensions."
- **Regarding expiration:** "If compliance with the terms of permit approval has not occurred within the timeframe specified by the decision and any authorized extension, the project shall be considered expired by time limitation and the land use approval shall be null and void. Expiration of a project permit shall not be subject to appeal."

Rescind permit

An automatic expiration clause primarily addresses compliance problems for projects under construction. Rescinding the permit can also address completed projects that go out of compliance with permit requirements. It is also useful for permits of an "on-going" nature, such as mines.

The rescinding of permits invokes motivations similar to the automatic expiration option described above. It also helps remove any implication that the project somehow has a legal permit in effect. In addition, rescinding the permit increases the unlawfulness motivation through the notices, official procedures, and hearings.

Rescinding a shoreline permit is a useful tool, but it is rarely used. There is little guidance in state laws or rules. RCW 90.58.140(8) states: "Any permit may, after a hearing with adequate notice to the permittee and the public, be rescinded by the issuing authority upon the finding that a permittee has not complied with conditions of a permit. ..." (The remainder of this RCW section describes Ecology procedures, and does not apply to local governments.) The result is that few jurisdictions include it in their

enforcement provisions. Indeed many jurisdictions simply refer to the state rules for enforcement rather than establishing their own (which is allowed as described on page xx).

Thus rescinding a permit may suffer from the adage “out of sight, out of mind.” It thus would be helpful to specifically include permit rescission language in the jurisdiction enforcement regulations, including specifics. These rules should follow the jurisdiction’s existing hearing rules. Rescinding a permit should be coordinated with other notice, appeal, and hearing actions described in more detail starting on page xx.

To implement this tool, language must be added to enforcement regulations such as:

“A permit may be rescinded if its requirements or conditions of approval are violated. The procedures for rescinding a permit are provided in [cite the enforcement provision that allows rescinding a permit].”

CHOOSE ENFORCEMENT METHOD BASED ON CHARACTERISTICS OF THE CASE

| Area of enforcement | Staff or other resources | Type |
|----------------------|--------------------------|----------------------------|
| Legal and regulatory | Moderate | Internal procedures change |

WHAT IS IT?

Choosing the method of enforcement based on the characteristics of the case maximizes efficacy of subsequent legal steps.

Background and description

The Shoreline Management Act allows enforcement actions to proceed as either civil or criminal cases, or both. Choosing the case type is important because the jurisdiction must include specific information when communicating with the violator about potential sanctions in its notices, orders, and other legal documents. For example, with criminal enforcement the jurisdiction must define the type and level of offense. EPA's enforcement (<http://www.epa.gov/enforcement/basics.html>) provides basic information about enforcement actions, including the differences between civil and criminal enforcement.

Differences between criminal and civil cases

Pursuing criminal or civil cases have different benefits, and jurisdictions have the flexibility to choose the one most likely to produce desired results, or even both in rare cases. Criminal prosecution is rarely used, however, given the costs and focus on penalties rather than on fixing the violation, even though the penalties may result in more action. The differences between the criminal and civil case types are summarized in Table 3.

Table 3. Key Differences between pursuit of criminal and civil prosecution in shoreline cases

| Considerations | Criminal Case | Civil Case |
|---|--|--|
| Standard of evidence | Higher: beyond a reasonable doubt. | Lower: preponderance of evidence. |
| Decision maker | Jury trial required if requested by defendant. | Judge/Hearing Examiner hears case in appellate capacity for previous decision. |
| Verdict options | Guilty or not guilty. | Responsible or not responsible. |
| Payment for legal counsel for violator? | Have to provide legal counsel if the violator cannot afford their own attorney, unless the penalty of imprisonment is waived. | Defendant provides own legal counsel. |
| Degree to which case has potential to motivate action | Being charged with a crime may get the violator to pay more attention, but not always. Can have major repercussions to profession and lifestyle. | Non-criminal nature has lower alarm factor. Can still get jail time for contempt of court choices. |
| Opportunity for broader participation | Limited to defendant and jurisdiction. | Others can join the case as "friends of the court." |

INCORPORATE PREPARATION FOR LEGAL WORK AT ALL STEPS IN THE PROCESS

| Area of enforcement | Staff or other resources | Type |
|----------------------|--------------------------|----------------------------|
| Legal and regulatory | Low | Internal procedures change |

WHAT IS IT?

Enhancing enforcement processes to be compatible with future legal action strengthens future cases.

Background and description

Violation enforcement work has complicated process requirements related to due process and legal proceedings. The result is that there are legal requirements for preparing an enforcement action for court that require careful investigation.¹² As staff interact with landowners, they should include preparatory work in their work and processes.

Steps staff can take to prepare for future cases

Given the complexity and procedural steps of enforcement, it may be tempting for staff to try to bluff violators but this is not advised because if bluffs get called and are shown to not have real backing, word can get out and hurt the jurisdiction's reputation. Indeed, all enforcement actions include elements of convincing, cajoling, and threatening legal action to get people to correct the violation voluntarily and should be backed by enforcement steps, as if the case might go to court. It is beneficial to make the steps as systematic, automatic, and easy to perform as possible.

The following sections highlight actions that staff can take to prepare for potential legal action throughout the process. It is critical that staff have the backing of their department as they move through the process.

Enforcement procedures before hearing or court action

Because of the legalistic nature of preparing for an enforcement case, staff preparation needs to follow certain requirements while moving through the steps. These requirements are not explicitly defined in a law, but rather they are court procedures and best practices to improve a case – both of which have developed over time. Different laws have requirements or guidance for how the law is to be enforced. In the case of the SMA, the RCWs and the WACs provide a default set of procedures that jurisdictions must use unless they establish their own procedures. They also more specifically direct Ecology's role in enforcement in the absence of alternative local enforcement.

Many jurisdictions have little or no enforcement procedures established in their codes and most of these specifically defer to the state procedures. Consequently, most jurisdictions use the state procedures entirely or in part. The relevant state laws are RCW 90.58.140(8), RCW 90.58.200 thru -.230, and WAC 173-27-240 thru -.300 (provided in Appendix A with annotated descriptions of practical implications for local enforcement programs). These rules apply to enforcement actions unless jurisdictions establish their own individual enforcement rules. If a jurisdiction relies heavily on the state laws and rules, it is important for the staff to be trained to use them effectively.

Implement early violation response to minimize both damage and future permit work

One of the main obstacles for natural resources enforcement is that there is rarely dedicated enforcement staff. Consequently, it is up to the permit staff to do the work. The recommended approach described in this guide focuses on using existing resources and incorporating enforcement tasks into the daily activity of the permit staff to minimize costs. This includes identifying violations while out on site visits for other work, stopping the illegal work when it is seen, and incorporating the enforcement work into the permit review system (both in the tracking system and the workload).

¹² The Washington Department of Ecology manual *Enforcing the Shoreline Management Act: Guidance for Local Government Administrators* provides additional details that are specifically oriented toward shorelines.

Planning staff and natural resource experts generally have not been placed in the enforcement role but due to budget cuts, in recent years, enforcement has become a more routine part of the job description. It is helpful for departments to support staff in this new role by providing a strong backing such as the following:

- Staff need to know that the department and managers want violations resolved in a way that protects shoreline ecological resources. Conducting enforcement actions for violations needs to be a component in the policies and workload within the department and an identified priority.
- Staff need to know that their effort will pay off. If violations are allowed to linger unresolved, they will feel that their efforts are wasted. The program should have a commitment to following up on violations.
- Staff need to know that the violation won't automatically be theirs to resolve. They have other work. If stopping to act on a violation automatically adds more to their list of things to do, it creates an incentive to not act on the violation.
- Staff need to have the skills to address violations. Staff need training (even if informally) in how to communicate with violators, how to efficiently act on and follow-up on violations, and on the important procedural steps that avoid problems if the case has to go to court.
- Staff need to have the tools available to make acting on the violation as easy as possible. Not having the tools creates the incentive to not act on a violation.

Jurisdiction commitment to both early response and enforcement in general

Land use and natural resources permits and enforcement can easily become political. Violators often contact the elected officials to enlist their aid in getting the department to stop or ease the enforcement action. This aspect of enforcement makes it important for the jurisdiction to create strong internal policies and establish communication channels with the elected officials that build support for the staff to do their work, specifically establishing:

- Policies at the management or department level to support responding to violations when they happen, especially if they are a work in progress. Other enforcement matters can also benefit by written policies.
- Protocols, with training, for how to perform fast response to violations in an efficient and systematic manner. The protocols should be guided by many of the permit review and enforcement recommendations described in this document.
- Policies for staff attention to the complaint reporting systems (phone line and website). Specifically determine whether staff will respond to complaints outside office hours (night time, weekends, and holidays). Many violations are purposefully committed during times when they won't be observed or when the office is closed.
- Periodic meetings and updates by department managers, including the enforcement program managers, with elected officials. This provides communication opportunities:
 - For the elected officials to inquire about enforcement actions they hear about. This includes both complaints and calls for relief they receive.
 - For the managers to demonstrate that laws are being enforced and that enforcement is being done in a professional manner, rather than arbitrarily.
 - To demonstrate that law-abiding people getting permits are not being penalized for doing so.
 - To reinforce the importance of funding the enforcement program to the elected officials.
- Managers should take care in assigning follow-up responsibility for violations to different staff so they are not penalized for identifying violations.

Preparation and tools to make early response easy

It is important for staff to have all the tools necessary for responding to a violation readily at hand including:

- **Technology.** Technology used for the permit system can be used to address violation reports that are received from others. In these cases, there is time in the office to prepare for the site visit to the violation site – most specifically using technology. However, new electronic devices are available that can link staff in the field with office information systems (See Appendix B for tips for using technology to help make violation response as easy as possible).
- **Enforcement kit.** Having material supplies that are needed to undertake enforcement actions on hand helps natural resources staff act on a violation observed during their permit review duties. The enforcement kit should include the equipment and materials needed for issuing and posting violation notices, and for documenting the violation, all gathered into a handheld kit (possibly for each staff person) or a car trunk kit, as well as the needed electronic devices (see Appendix B for tips for what to include in the enforcement kit).

Respond to reported violations as early as possible

Early enforcement response depends on whether it is reported or observed by staff while the violation is still in progress. The response can be improved by the following measures:

- When natural resources staff (or other staff with authority to respond to violations) sees a violation during site visit duties, stop to investigate and stop the work regardless whether work is in progress or not.
- When violations are reported by other staff, agencies, or citizens, determine if the work is in progress. If so, make a fast-response site visit to investigate whenever possible.
- If the work is not in-progress, work the violation site visit into the normal site visit schedule for later response.

Enforcement activities during site visits will need to follow rules to support a possible future court case. It is important that the legal department assist in developing the enforcement rules and procedures that build a case suitable for going to court (if all else fails). Existing enforcement staff for other codes should also be consulted, as they may have good knowledge of requirements and best practices. Ecology's enforcement manual can provide useful details and best practices related specifically to shorelines (Ecology 1998). Existing enforcement procedures may have already been worked out with the legal department that can be tailored for use in natural resources enforcement.

During site visits, a number of objectives should be documented in the tracking system afterward:

- Determine if work is being done without a permit.
- Identify the persons causing the violation, including contractors, equipment operators, and landowner.
- Take photos or videos of the unpermitted activity.
- Issue and post orders to stop work - as described in the next section.

ISSUE CEASE AND DESIST ORDERS AND ORDERS TO CORRECT

| Area of enforcement | Staff or other resources | Type |
|----------------------|--------------------------|----------------------------|
| Legal and regulatory | Low | Internal procedures change |

WHAT IS IT?

Issuing orders - Cease and Desist and Orders to Correct- allows for early response to stop further damage to shoreline ecological functions.

Background and description

The main reason for early response to violations is to stop the work and reduce the damage to shoreline ecological functions. This early action can also reduce later pressure on staff to approve the permit “as-is,” since less work was completed. Stopping the work requires issuing an official Order to Cease and Desist, or possibly a more informal “stop work order” that is typical of building code enforcement when inspectors identify problems followed by Orders to Correct. These orders can be fairly straight forward.

Order to Cease and Desist

Issuing an Order to Cease and Desist is fairly easy when placed in the form of a boilerplate notice that can be filled in during a site visit (See Appendix C for an example).

Regardless of whether the violation (or possible violation as allowed in WAC 173-27-270(1)) is found while in-progress or after the fact, it is important to always issue an Order to Cease and Desist for a violation because the order prevents the violator from doing more damage later. If there is no order to stop work, the violator is not obligated to stop. It is important not to let people argue that they should do “a little more” after the staff person departs because it undermines the enforcement position in their mind, and it gives them the impression they were right to do the work without checking. It also undermines the jurisdiction’s position with the legal system, because an order was issued but they were allowed to keep working.

“Emergency” work should be included.

Property owners doing “emergency” work should be issued a Cease and Desist Order because owners are required to notify or get clearance from the permit office prior to starting work. There are limits to emergency work, such as the minimum work necessary, removal after the emergency (thus being temporary measures), and obtaining permits after the emergency. In addition, some of the most destructive work is done as “emergency” work – usually excessive armoring and dike building. Some people use emergencies to build what they normally could not get a permit for - including after the emergency has passed.

Some other points to keep in mind are:

- If other enforcement staff are performing an enforcement function, they may use the more rudimentary Stop Work Order form, which directs the recipient to contact the jurisdiction before continuing work. This should be followed up with a regular Order to Cease and Desist, which is the official order under the state rules (WAC 173-27-270).
- Per state rules, the order applies when it is “received” by someone (WAC 173-27-270(2)), with no additional clarification. It is recommended that the local regulations be adjusted to include hand delivery, verified delivery tracking (rather than signature) such as for priority mail, and posting the property. Including posting the property is useful since it will be seen by the people doing the work.
- Direct the order generally (i.e. unnamed) to all persons doing the work. Those people are all responsible, and it includes the contractor and the landowner or tenant directing the work.

- Issuing the order estimates or establishes the violation date, and simply directs people to contact the jurisdiction.
- Correction options and other requirements should not be provided in order to simplify this step. Leave those to the Order to Correct.
- The order should describe the \$1000 per day fine, but should not impose the fine. That would make it a Notice of Penalty. It is recommended that a penalty almost always be issued, but not at this point.
- Issue the Order to all parties undertaking the violation work: landowner, contractors (excavation company, etc.), and equipment operators.
- Make a copy for the file using carbon paper, portable printer, etc.

Post the order with documentation

When the Order to Cease and Desist is issued, it should also be posted on the property and documented with photos. Doing so marks the site as a violation. The local regulations should stipulate that the posted sign must remain, and that defacing or removing it is a further violation. This public disclosure element incorporates a deterrence motivation to correct the violation. Avoiding or correcting a violation is motivated by a desire to protect one's personal reputation and standing among the community and peers.

Follow up with an Order to Correct

An *Order to Correct* would not normally be issued until after a site visit has been performed to confirm the violation and to understand the site and extent what needs to be corrected. There may be some cases where it would be issued with the Order to Cease and Desist, such as when work has been completed and there is a reasonable understanding of the damage done.

The Order to Correct has no defined format or content requirements, so the jurisdiction may choose its own. But if a *Notice of Penalty* is issued at the same time, the content will have to meet more stringent requirements, including a penalty appeal opportunity.¹³ It is recommended that the order be in the form of a letter, since the corrective directions will likely take a sizable amount of text.

Strategy for using the Order to Correct

The recommended elements to include in the Order to Correct follow a specific strategy that is intended to address the potential lack of expertise of judges, and to forestall defense tactics of avoidance, deflection, and confusion so often used by violators to avoid fixing the violation. These include:

- Be sure to title the document as an "Order" to reinforce its official nature and that it is an order to take action or face consequences.
- A Notice of Penalty should not be included at this time, although penalties should be issued for most violations at a later point. A penalty requires an appeal opportunity, and the large financial amount motivates people to appeal rather than fix the violation. It is not prudent to start with the most expensive and difficult step, as the goal is to get the violators to fix the problem themselves.
- Include a list of options including:
 - Appeal the Order, which is not desired but which is central to the overall legal strategy.
 - Requirement to get a permit, which is the option most often taken, though not necessarily successfully.
 - Requirement to remove structures and fix the damage, which is occasionally chosen.
- Set a reasonable, but relatively short appeal opportunity, such as 10 days. Having the appeal option set in the Order addresses the challenges of facing bad actor violators who choose tactics to ignore, deflect, and confuse:
 - If violators ignore the order, they forgo their appeal option.
 - If violators pursue a permit but can't make it complete for review (often the case for bad violations), they forgo their appeal option.
 - If violators do get a permit application into the system, they will have a different appeal option for a denial or conditions of approval.
- Judges and prosecutors often see cases in which someone fails to follow an order, whereas they may have less experience in land use and natural resources law, and especially the natural sciences. When the appeal opportunity has passed, the future civil action becomes one of failing to follow the order, rather than debating the merits of the natural resources damage or the particulars of the law. Suing for damages and other actions becomes much easier.

¹³ For more information, see WAC 173-27-280(5).

Contents of the Order to Correct

The Order to Cease and Desist can address potential violations, and, along with the site visit, is more of an investigatory step. The Order to Correct, however, is more formal, in that the violation has been affirmatively identified. The legal components of the case come into play much more prominently. Legal details to support a court case need to be provided and the legal department and existing enforcement staff should be consulted to cover all bases. There are some important pieces of information that need to be gathered (listed below). When possible, it's good to collect these items for the Order to Cease and Desist, but that is not always possible from the field:

- Correct property number/address.
- Correct owner and contractor.
- Citation of regulations violated.
- Documentation that the owner allowed entry to the property during meeting and investigation. This is most often the case, when the owner gets the Cease and Desist and contacts the office. Unless staff obtained an administrative search warrant, it is important to obtain permission to enter any occupied land or unoccupied land posted with no trespassing or similar signs.
- Alternatively, documentation that photos and observations were made from off the property. This option will be most common with a landowner that is uncooperative from the beginning.
- List of work that constitutes the violation.
- Summary of site visit findings.
- Description of work needed to correct the violation.

Negotiations to correct violation

Once the Order to Correct is issued, the next stage is to work with the violator to resolve the violation. This can include efforts to correct the violation. These may be successful, or they may fail and need continued enforcement action. This step also includes efforts to keep all or part of the violation work by submitting a permit to get it approved. Consequently, this is the point where many violations are moved into the permit review system. Finally, sometimes the violators will file an appeal sending the enforcement action straight to hearing.

ADDRESS UNRESPONSIVE VIOLATORS

| Area of enforcement | Staff or other resources | Type |
|----------------------|--------------------------|----------------------------|
| Legal and regulatory | Moderate | Internal procedures change |

WHAT IS IT?

Addressing unresponsive violators decisively helps reduce a protracted enforcement process.

Background and description

To get to resolution of enforcement actions, it is of greatest importance for staff to not let the violation drag on through multiple iterations of attempted correction. The human response for the review staff and enforcement staff is to avoid unpleasant situations and difficult work like a hearing or going to court. Thus staff may inadvertently let violators keep having another chance and this greatly increases the chance that attention to the violation will peter out, and the violator will get what they want.

It is recommended that violators only be given two chances to correct the violation. If it is not corrected, the violator's tactic is clear and the jurisdiction should not waste time and money with continued attempts to achieve compliance through permits or voluntary correction. Any issued permits should be rescinded through the appropriate administrative process, or included in the hearing process.

Addressing unresponsive violators

Bad actor violators typically try to deflect and delay enforcement action using a variety of defensive tactics, hoping officials will go away and forget the matter. Examples include:

- Apply for a permit, get denied; apply again for an altered proposal, get denied; repeat.
- Agree to perform some amount of work, do none or only part of the work, wait for the jurisdiction to press the matter again, repeat.
- Try to negotiate to keep all or part of violation.
- Try to avoid compensating for damage.

Steps that staff may need to take to get to resolution include:

Issue a Notice of Penalty

Almost all violations, except those based on mistakes that do no environmental damage, should be issued a Notice of Penalty. As was discussed above, research shows that penalties are most effective for deterring violations. Timing is important an important component of the strategy for the Order to Correct. While it is recommended that a Notice of Penalty not be issued at the start of an enforcement action, it should still be mentioned to serve as a motivator in those early stages. After the Order to Correct and its appeal period have passed, the Notice of Penalty can be issued at any time, though combining the appeal and hearing work with other appeals and hearings is recommended to reduce the duplication of such work.

For some unresponsive violators, issuing a Notice of Penalty could motivate them to voluntarily correct a violation before the hearing. This means there needs to be an opportunity for them to avoid the hearing by allowing the jurisdiction to withdraw the penalty if they comply. It is recommended that rules governing the penalty allow it to be reduced upon voluntary compliance, but it should not be waived entirely or it will lessen its deterrence value. Without a reduction option, the penalty is limited to being a consequence of the current violation rather than a motivator to the violator. Thus the motivation will be for the future in the form of specific deterrence (for future violations by them) or general deterrence for the community as a whole.

With a sizable penalty, the violator will likely appeal and the case will wind up in court. Thus, when the jurisdiction is ready to go to court or a hearing, it is an especially good time to issue the notice, as the appeals and hearings can be combined. Some important points to remember in issuing a Notice of Penalty are derived from the state laws and rules oriented to the financial penalty (see Appendix A):

- The notice must include or restate an Order to Cease and Desist.

- The notice must use certified mail with return receipt or hand delivery
- There is a 30-day appeal period to the local legislative body, though the jurisdiction can change this in its regulations.
- The penalty can be up to \$1000 per day.
- The penalty goes to treasury, not to the department or to correct the violation. The jurisdiction can change this disposition in its regulations.
- The jurisdiction can issue penalty multiple times (for each day). For example: a \$1000 penalty first, then a larger amount later or alternatively set a high amount early, and allow it to be reduced before being finalized.
- Remember that a Notice of Penalty can be used in most but not all situations (listed in WAC 173-27-280(1)):
 - Failure to conform with a listed permit (but not failure to conform with an exemption); and
 - Failure to obtain a permit or exemption, failure to comply with a Cease and Desist Order.
 Jurisdictions can state in their SMP that failure to conform with an exemption is subject to the penalty. Otherwise, a Cease and Desist Order must be issued and ignored by the violator prior to use of the penalty.

Rescind any active permits

If a case is being forwarded for violation enforcement because the permit holder refuses to comply, that permit should be rescinded (see page xx regarding rescinding permits that have been issued that are in non-compliance). Like issuing a Notice of Penalty, rescinding a permit should be done before a hearing so that any appeals and hearings can be combined into one action to avoid duplication.

Record a certificate of violation on the property

Recording a certificate of violation on a property is an option that is available any time after the opportunity to appeal the Order to Correct has passed, including after a hearing or court judgment. It is best if the local SMP authorizes a certificate of violation to be recorded in the county's real property records. Recording the violation on the property informs future buyers or potential funding sources of the unlawful condition of the property. The main effect is that it will likely scare off any potential buyers or lenders if the property is being sold. This may serve as a motivation for the violator to fix the damage, especially a developer that is dependent on selling property. If the property is not being sold, there may be no immediate consequence.

Consider adding criminal charges

While enforcement using the criminal case-type is more expensive and difficult for jurisdictions to use, filing criminal charges can motivate some types of violators to correct the violation before the hearing. Facing criminal charges definitely ups the stakes for people to pay more attention to the jurisdiction. Alternatively, if the case goes to trial, the judge might give them one last chance to correct the violation. Given the cost and work, the jurisdiction should carefully consider whether this path will provide actual motivation based on their knowledge of the violator. Going to jail serves as a consequence to the violator. It also serves as a specific and general motivation for future compliance.

MAXIMIZE IMPACT OF AFTER-THE-FACT PERMITS

| Area of enforcement | Staff or other resources | Type |
|----------------------|--------------------------|--------------------|
| Legal and regulatory | Low | Strengthen permits |

WHAT IS IT?

Treating after-the-fact permits for enforcement actions differently than normal permits increases their compliance effect.

Background and description

Commonly, violators apply for permits to keep the violation work in place. This approach moves the violation to the permit review system which has benefits of getting the development into a program that is set up to address mitigation and other issues but does not necessarily ensure that mitigation will be included and may encourage further development. Further, it weakens the jurisdictions' reputation and related enforcement deterrence value.

Benefits and problems of after-the-fact permitting

After-the-fact permits have the following benefits and problems:

- The permit system often is more robust and may have greater success of correcting the violation.
- Simply getting a permit does not mean the damage is corrected. This problem is one of the reasons that stopping violations in the act is so important.
- Violators may wish to, or staff may even encourage them to, do more work through the permit. Doing so encourages the impression that their violation was valid work, when it probably would not have been approved as built.
- It can be easy for staff to just tell violators they need to get a permit. Often, the real problem is that the work was done in a way that would not have been approved in the first place.

Implementing after-the-fact permits

There are some important objectives to accomplish when addressing a violation through the permit process:

- Staff should not treat the violation as just another permit.
- There may be pressure to allow more work that causes even more damage but this should be avoided.
- If the work would not have been permitted as constructed, then require its removal and consider acceptable alternatives through the permit.
- If a permit is issued, it is advisable to include financial guarantees for removal of the violation in the event the conditions are not fulfilled. Staff should also consider including permission for the jurisdiction to do the work in the event of continued non-compliance.

After-the-fact permits may also require special studies to identify the resources present before the work was started, the damage that has occurred, and how the damage is to be mitigated. Special studies may also be needed to determine if the hidden parts of the work meet the jurisdiction's requirements. The jurisdiction permitting system should require the applicant to pay for this work.

Higher fees for after-the-fact permits

Most jurisdictions also require after-the-fact permittees to pay a permit fee that is often a multiple of the fee required for a standard permit. This both covers the additional work the jurisdiction must do for after-the-fact permits and deters people from failing to obtain permits in advance and then relying on the after-the-fact permits.

SEE ENFORCEMENT ACTIONS THROUGH COURT AND BEYOND

| Area of enforcement | Staff or other resources | Type |
|----------------------|--------------------------|----------------------------|
| Legal and regulatory | Moderate | Internal procedures change |

WHAT IS IT?

Seeing enforcement actions through hearing and additional court actions, and beyond, requires planning out the full strategy for enforcement actions, including education for non-experts.

Background and description

Commonly, violators apply for permits to keep the violation work in place. This approach moves the violation to the permit review system which has benefits of getting the development into a program that is set up to address mitigation and other issues but does not necessarily ensure that mitigation will be included and may encourage further development. Further, it weakens the jurisdictions' reputation and related enforcement deterrence value.

Jurisdiction for Appeals

The jurisdiction or Ecology will usually end up in a hearing or court setting when the applicant appeals an Order to Correct or a Notice of Penalty. An appeal hearing may be in front of the jurisdiction's elected officials, or a hearing examiner, or some other body. Rarely, a jurisdiction will need to file a lawsuit in court to get the violator to correct a violation. This is usually when there has been neither a reaction nor appeal to an order. More commonly, the jurisdiction will file a lawsuit to collect a previously issued penalty or judgment or to get a previous order enforced.

In the case of appeals, the jurisdiction has discretion to decide who will hear the appeal-- elected officials, hearing examiner, or some other body. Given the technical nature of natural resources and land use issues, and given the lack of expertise in the legal system and elected officials, it is recommended that regulations grant the jurisdiction to hear the appeal to the body with the best understanding of these subjects. This is likely to be a local hearing examiner, especially if a hearing examiner is already used for land use matters. The benefits of hearing examiners include:

- They already are or can be educated to be familiar with land use law and natural resource issues.
- They are consistent decision makers that do not change with every case.
- The rules of practice are slightly more lenient to allow flexibility in the presentation of land use and natural resources cases.
- They are less subject to inconsistent decisions due to political influences.

In a similar vein, the regulations should set the appeal of the hearing examiner decision to be at Superior Court, rather than with elected officials. Elected officials may even welcome avoiding the roles of being judges of legal matters.

With regard to hearing examiners, it should be noted that many counties and cities do not have access to geotechnical experts who can testify on cases. Situations where the local jurisdiction does not have access to geotechnical professionals and landowners are able to hire them results in imbalances. For example, the landowner's expert might testify that "the only recourse is to put in a hard bulkhead" and the hearing examiner then has to weigh a geotechnical professional against a planner who does not have the same certification or degree--and the bulkhead gets a permit. One county staffer suggested that it would be really helpful if the state could provide local jurisdictions with access to geotechnical or other professionals for these cases.

Objective of the case

One of the most basic needs in a successful court case is the provision of clarity about the natural resource protection objective (i.e., to fix the damage of the violation) to the non-experts. The objective is not to get a fine because fines just go to the treasury. It is also not put someone in jail. Both of these may be motivators to get someone to act but don't fix the violation. These outcomes by themselves leave the violation ongoing, and then the jurisdiction must start from scratch to get the violation fixed,

or at worst, the jurisdiction ends up leaving the violation in place. The jurisdiction should try to get both a financial award and the required action as outcomes of the initial court decision. Future court action would then be related to failure to comply with the initial decision.

Desired Judgments

Unfortunately, many violators have already demonstrated an unwillingness to correct their violations. In addition, many land use court and appeal cases that use normal judgments (i.e. simply telling the violator to fix the problem) do not result in compliance. To address this problem, the jurisdiction should strive for decisions that include the consequences of non-action to reduce the need for additional court action. It is up to the jurisdiction staff to ask for a strong decision and make the need understood. The judge may or may not be amenable to including consequences of non-action. Important judgment elements to include are:

- Be sure to emphasize that a normal judgment (telling the violator to fix the damage) is unlikely to resolve the violation, so try to avoid such decisions – otherwise the violation cycle continues.
- If the judge will not include consequences of non-action, try to get the judge to retain jurisdiction over the case, and more importantly, schedule a defined follow-up hearing that can be cancelled in the event of compliance. Continuing jurisdiction comes with many tools useful for extracting compliance from recalcitrant violators.
- Obtain injunctive judgment to require the correction of the damage, including allowing others to correct the damage. This might include the jurisdiction doing the restoration work using a revolving fund or other source of funding. This judgment establishes responsibility for correcting the damage, including cost recovery if the jurisdiction does the work. This might be all that is needed if the defendant is likely to actually follow directions of the court, but the financial elements should still be carefully considered as back-up.
- Obtain financial judgment to pay for others to correct the damage, including the option to waive this component if the violator corrects the violation. This is useful if the defendant is *not* likely to fix the violation:
 - If the defendant is philosophically and adamantly opposed to land use regulation, someone else should do the work. The violator may only delay or minimally do the work. If the judge is reluctant to grant judgment to pay others to do the work, the staff may need to demonstrate the violator's unwillingness.
 - If the defendant has no resources and the correction will require significant resources, then someone else will have to do the work. If the judge is reluctant to grant judgment to pay others to do the work, staff may have to demonstrate the defendant's financial inability, or the defendant may have to make a statement about their financial state.
- Obtain financial judgments to pay for jurisdiction costs. Add these into above judgments. These are difficult to actually collect from low income defendants, and may require using alternative judgments.
- Obtain financial penalty (if a Notice of Penalty was issued) that will go to the treasury. This can be substantial, given the time delay of enforcement actions. Jurisdictions can direct funds as they see fit, such as backing the enforcement program or restoration program.
- Rescind any permits that were issued, if still necessary.
- Alternative judgments may be needed in some situations, especially instances where defendants have no financial resources to recover, or where the defendant refuses to pay costs:
 - *Court-ordered forfeiture of security items (bank resources, vehicles, garnish wages, etc.).* The jurisdiction may have to take action to prevent removal of the resources. This entails sending the sheriff to enforce the order and seize the property. This is especially useful for violators with their own heavy equipment, such as a bulldozer, causing the violation.
 - *Court ordered sale of property to pay for financial judgment, similar to a divorce sale.* The award to the jurisdiction might be also settled by a "credit bid." In the auction at the courthouse, the creditor (jurisdiction in this case) can bid using the debt they are owed, while others must bid with a cash equivalent - highest bidder wins.
 - *Consensual disposition of property to pay financial award.* Since other disposition of real property must be with consent of the owner, the court and parties can consensually agree on an alternative property solution. Property received by the jurisdiction as payment should be transferred to a stewardship program: Flood Control District (for floodplains and streams), Parks Dept., Land Trust, etc.
 - In a court-ordered subdivision (action for partition), the resource lands can be subdivided from the main property and given to the jurisdiction in payment. Restoration would be performed at another time. The subdivision staff needs to provide guidance on using the subdivision exemption processes similar to utility/roads/restoration segregations.
 - Transfer of the entire property if the value of the property is equal to or less than the cost to fix the violation. Restoration would be performed at another time.

Post-judgment options

Once a judgment is official, more options become available to the jurisdiction. Presumably, there is an order to correct the violation, which may result in an award to have someone else do the work. In addition, there is usually a financial award for costs and a penalty award.

It is likely that the jurisdiction will be collecting money from the violator and will be arranging or overseeing physical work on the property.

Liens

The laws governing liens vary by state and local jurisdiction, but generally cannot be used without an official determination of financial responsibility. If the judge does not directly order disposition of property or equipment in the judgment but does order a financial award, the jurisdiction will have to directly collect the award. After an official judgment of financial responsibility, an award of damages can be treated like a loan.

Liens are the common method to encumber property to recover a financial award. If there are no stated terms of repayment, the lien will remain on the property until its sale. This can be a long time if the owner is in no hurry to sell. It is recommended that terms of repayment be included in the judgment like they are in a loan, so that a default of payment can be declared and the property will be disposed of to pay the award.

- *Liens on a vehicle or heavy equipment.* This can be useful against violators with their own equipment. When default is declared, the court can order the vehicle's seizure by the sheriff to pay the award.
- *Liens on real property.* When default is declared, the court can order the auction sale, including a "credit bid" of the property to pay the award.

A lien without repayment terms can result in the violation being corrected if the owner needs to sell it, or if the buyer is willing to do the work (assuming an adjusted price). But it can also have undesirable consequences that can make a lien of limited value:

- If the value of the property is less than the lien, the jurisdiction will not recover the full amount.
- If the existence of the lien makes the property unsalable to buyers or lenders, then the award will not be recovered.
- If the property cannot be sold, it may go to tax sale, in which case the selling price may be less than market value, and the money first goes to pay taxes. Thus the award may not be fully recovered.
- A saving point about the property going to tax sale is that the local park district or flood control district may find the property desirable for their purposes. They can take ownership and pay the taxes, and can then do restoration work at a later date.

Collection agency

Once a financial judgment is received, one option to collect the award is to hire a collection agency. The jurisdiction may already have one hired for other collection purposes (taxes, etc.,) and can simply extend that contract to include these judgments. Both the jurisdiction and collection agency would likely report the matter to a credit reporting service. This can add motivation to the violator to take positive action, or at least serve as a consequence.

Violation correction program

Jurisdictions should be prepared to arrange or perform the work to correct violations in those situations where the violator refuses to do so. This will require a program and system to make it happen. There are a number of tasks that need to be considered:

- Establish a system to hire contractors to perform correction work.
- Alternatively contract with a land conservancy or other organization that does restoration work.
- Establish multiple funding sources so that work can be performed right away, as needed.

KITSAP COUNTY PROPOSAL TO SPEED COMPLIANCE THROUGH VOLUNTARY COMPLIANCE AGREEMENTS

In 2011, Kitsap County prosecutors, with support of county commissioners, proposed a new ordinance to consolidate enforcement in multiple areas under a new title in the county law to be called “Code Enforcement.” The goal of this ordinance was to help create a consistent enforcement program and to create a speedier way to bring land-use violators (from junk cars to wetlands to noise) into compliance.

How it would work

Those who are the subject of a complaint would be encouraged to enter into mediation. Enforcement staff would be able to negotiate methods and time limits. A “voluntary compliance agreement” would be offered which would detail the steps to correct the problem, the timeline, and the specific ramifications if the work is not done. If signed, the violator could avoid fines.

A “notice of noncompliance” would be issued if the work is not done, which may be appealed to a hearing examiner. If upheld by the hearings officer, the county could then impose sanctions and recover costs. If landowners don’t sign the agreement, they can still go through the process of arguing their case in front of a hearing examiner and then a judge. The county can bypass the voluntary agreement and instead issue a “notice of abatement” in emergencies or cases of repeat offenders.

According to a Kitsap Sun article about the ordinance, deputy prosecutor Eileen McKain, who helped draft the ordinance said that:

“One of the goals is to keep enforcement efforts on track, through mediation, voluntary compliance and sanctions if necessary... More cases are likely to be taken to a hearing examiner instead of a district judge. And when a case does go to court, many of the issues should already be resolved.”



PHOTO: INSIDE BAINBRIDGE

Source: Dunagan, Christopher. (2011, April 24). Streamlined process proposed for violators. Kitsap Sun. Retrieved from <http://www.kitsapsun.com/news/2011/apr/24/streamlined-process-proposed-for-violators-of/#ixzz2o99p8EL3>

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APPENDICES

APPENDIX 1: SMA ENFORCEMENT LAWS AND RULES AND THEIR IMPLICATIONS

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APPENDIX 3: EXAMPLE BOILERPLATE ORDER TO CEASE AND DESIST FORM

APPENDIX 1: SMA ENFORCEMENT LAWS AND RULES AND THEIR IMPLICATIONS

Each section of the SMA and rules is listed side-by-side with a description of its practical implications for a jurisdiction's enforcement program, which in turn relate to the highlighted items in the laws or rules.

| RCWs and WACs | Implications |
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| RCW 90.58.200 Rules and Regulations. | |
| The department and local governments are authorized to adopt such rules as are necessary and appropriate to carry out the provisions of this chapter. | Local governments can make their own rules as long as they are not inconsistent with the SMA enforcement provisions. |
| RCW 90.58.210 Court actions to ensure against conflicting uses and to enforce — Civil penalty — Review | Authorizes lawsuits to enforce the SMA and SMP. |
| (1) Except as provided in RCW 43.05.060 through 43.05.080 and 43.05.150 , the attorney general or the attorney for the local government shall bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the shorelines of the state in conflict with the provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter. | Gives attorneys the discretion to decide whether to file suit. There are other methods that staff can use, and they are not precluded by this provision. |
| (2) Any person who shall fail to conform to the terms of a permit issued under this chapter or who shall undertake development on the shorelines of the state without first obtaining any permit required under this chapter shall also be subject to a civil penalty not to exceed one thousand dollars for each violation. Each permit violation or each day of continued development without a required permit shall constitute a separate violation. | Civil penalty applies if (1) a permit is required and not obtained, or (2) if an issued permit is violated. Definitions below also consider shoreline exemptions to be "permits." Most violations by their nature do not meet all regulations as they are built, including minimization and compensatory mitigation. Thus they would require a variance permit, as built. This allows Penalties to be used on the common development that normally goes through exemption review. |
| (3) The penalty provided for in this section shall be imposed by a notice in writing, either by certified mail with return receipt requested or by personal service, to the person incurring the same from the department or local government, describing the violation with reasonable particularity and ordering the act or acts constituting the violation or violations to cease and desist or, in appropriate cases, requiring necessary corrective action to be taken within a specific and reasonable time. | Using the penalty requires written notice with specific delivery requirements, and specific content requirements. Must include a Cease and Desist Order. Can include Order to Correct. |
| (4) The person incurring the penalty may appeal within thirty days from the date of receipt of the penalty. The term "date of receipt" has the same meaning as provided in RCW 43.21B.001 . Any penalty imposed pursuant to this section by the department shall be subject to review by the shorelines hearings board. Any penalty imposed pursuant to this section by local government shall be subject to review by the local government legislative authority. Any penalty jointly imposed by the department and local government shall be appealed to the shorelines hearings board. | Notice of penalty has 30-day appeal. Local appeals are heard by the local legislators, or jurisdiction can establish another appeal process. Can combine this appeal with other appeal options for sake of streamlining. |

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| RCW 90.58.220 General penalty. | |
| <p>In addition to incurring civil liability under RCW 90.58.210, any person found to have willfully engaged in activities on the shorelines of the state in violation of the provisions of this chapter or any of the master programs, rules, or regulations adopted pursuant thereto shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than twenty-five nor more than one thousand dollars or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment: PROVIDED, That the fine for the third and all subsequent violations in any five-year period shall be not less than five hundred nor more than ten thousand dollars: PROVIDED FURTHER, That fines for violations of RCW 90.58.550, or any rule adopted thereunder, shall be determined under RCW 90.58.560.</p> | <p>Establishes option for criminal penalty. Penalties increase with repeated violations.</p> |
| RCW 90.58.230 Violators liable for damages resulting from violation — Attorney's fees and costs. | |
| <p>Any person subject to the regulatory program of this chapter who violates any provision of this chapter or permit issued pursuant thereto shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to violation. The attorney general or local government attorney shall bring suit for damages under this section on behalf of the state or local governments. Private persons shall have the right to bring suit for damages under this section on their own behalf and on the behalf of all persons similarly situated. If liability has been established for the cost of restoring an area affected by a violation the court shall make provision to assure that restoration will be accomplished within a reasonable time at the expense of the violator. In addition to such relief, including money damages, the court in its discretion may award attorney's fees and costs of the suit to the prevailing party.</p> | <p>In addition to direct penalties, violators are liable for other costs:</p> <ul style="list-style-type: none"> -Damage to other property -Costs of restoring damage -Attorney fee and costs <p>Recovery of money requires going to court.</p> <p>An SMP can authorize a local government to restore damage and then seek to recover the costs from the person who caused the damage.</p> |
| WAC 173-27-240 Authority and Purpose | |
| <p>This part is adopted under ... The act calls for a cooperative program between local government and the state. It provides for a variety of means of enforcement, including civil and criminal penalties, orders to cease and desist, orders to take corrective action, and permit rescission. The following should be used in addition to other mechanisms already in place at the local level and does not preclude other means of enforcement.</p> | <p>Authorizes:</p> <ul style="list-style-type: none"> -Order to Cease and Desist -Order to Correct -Permit rescission <p>Order to Cease and Desist is specifically described in another section</p> <p>Notice of correction is not specifically described in another section.</p> |
| WAC 173-27-250 Definitions | |
| <p>The definitions contained in WAC 173-27-030 shall apply in this part also except that the following shall apply when used in this part of the regulations:</p> <p>(1) "Permit" means any form of permission required under the act prior to undertaking activity on shorelines of the state, including substantial development permits, variances, conditional use permits, ... and shoreline exemptions; and</p> <p>(2) "Exemption" means ...</p> | <p>Shoreline exemptions are considered to be permits for purposes of enforcement. This applies liberal construction to support the policy of the SMA and protection of shoreline resources.</p> |
| WAC 173-27-260 Policy | |

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| <p>These regulations should be used by local government in carrying out enforcement responsibilities under the act, unless local government adopts separate rules to implement the act's enforcement provision.</p> <p>Enforcement action by the department or local government may be taken whenever a person has violated any provision of the act or any master program or other regulation promulgated under the act. The choice of enforcement action and the severity of any penalty should be based on the nature of the violation, the damage or risk to the public or to public resources, and/or the existence or degree of bad faith of the persons subject to the enforcement action.</p> | <p>Local governments are authorized to adopt separate rules. This includes adopting these rules but adding additional provisions, or establishing detailed provisions of their own.</p> <p>The jurisdiction can include provisions in its SMP that allows the shoreline administrator to issue civil penalties for violations. The jurisdiction can also use the authority for civil penalties in the SMA and the enforcement regulations.</p> |
| WAC 173-27-270 Order to cease and desist. | |
| <p>Local government and/or the department shall have the authority to serve upon a person a cease and desist order if an activity being undertaken on shorelines of the state is in violation of chapter 90.58 RCW or the local master program.</p> | <p>Cease and Desist Orders can be used for any activity, not just permits, nor just "development."</p> |
| <p>(1) Content of order. The order shall set forth and contain:</p> <p>(a) A description of the specific nature, extent, and time of violation and the damage or potential damage; and</p> <p>(b) A notice that the violation or the potential violation cease and desist or, in appropriate cases, the specific corrective action to be taken within a given time. A civil penalty under WAC 173-27-280 may be issued with the order.</p> | <p>A Cease and Desist Order has content requirements. The Order can be used for potential violations. There does not have to be a determination of violation by a court or the Shoreline Hearings Board (SHB). If the person receiving the Order thinks it is not a violation, they can appeal the Order. The Order can include an Order to Correct and a Notice of Penalty, if desired.</p> |
| <p>(2) Effective date. The cease and desist order issued under this section shall become effective immediately upon receipt by the person to whom the order is directed.</p> | <p>Jurisdictions can define how an Order can be received. It can specify 5 days after mailing (as for Notice of Penalty), hand delivery, or posting the property. The order can be directed using a description of individuals: "the owner of XX parcel" or "persons engaging in grading activity."</p> |
| <p>(3) Compliance. Failure to comply with the terms of a cease and desist order can result in enforcement actions including, but not limited to, the issuance of a civil penalty.</p> | <p>Cease and Desist Order can include civil penalty, or penalty can be added later.</p> |
| WAC 173-27-280 Civil penalty. | |
| <p>(1) A person who fails to conform to the terms of a substantial development permit, conditional use permit or variance issued under RCW 90.58.140, who undertakes a development or use on shorelines of the state without first obtaining a permit, or who fails to comply with a cease and desist order issued under these regulations may be subject to a civil penalty by local government. The department may impose a penalty jointly with local government, or alone only upon an additional finding that a person:</p> <p>(a) A description of the condition that is not in compliance and a specific citation to the applicable law or rule;</p> <p>(b) Has been given previous notice of the same or similar type of violation of the same statute or rule; or</p> <p>(c) The violation has a probability of placing a person in danger of death or bodily harm; or</p> <p>(d) Has a probability of causing more than minor environmental harm; or</p> <p>(e) Has a probability of causing physical damage to the property of another in an amount exceeding one thousand dollars.</p> <p>Furthermore, no penalty shall be issued by the department until the individual or business has been given a reasonable time to correct the violation and has not done so.</p> | <p>When Ecology is involved with the penalty, the criteria listed above allow it to skip the Order to Correct listed in this section. The criteria allow skipping the Order to Correct for damaging and harmful development, and for repeat offenders.</p> <p>Other violations are relatively minor – mainly activity that could have been permitted as a formality with little damage or harm. Violations for these instances must have an Order to Correct issued with the Notice of Penalty, so they have a chance to avoid the penalty.</p> <p>Again, local jurisdictions are not limited by this.</p> |

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| (3) Amount of penalty. The penalty shall not exceed one thousand dollars for each violation. Each day of violation shall constitute a separate violation. | One penalty can be issued for each day or group of days. Consequently, jurisdictions can issue as many penalties as needed. |
| (4) Aiding or abetting. Any person who, through an act of commission or omission procures, aids or abets in the violation shall be considered to have committed a violation for the purposes of the civil penalty. | Jurisdictions can issue penalties to contractors and other people doing the work. This rapidly gets the attention of contractors that are willing to violate under the assumption only the owner will be held responsible |
| (5) Notice of penalty. A civil penalty shall be imposed by a notice in writing, either by certified mail with return receipt requested or by personal service, to the person incurring the same from the department and/or the local government, or from both jointly. The notice shall describe the violation, approximate the date(s) of violation, and shall order the acts constituting the violation to cease and desist, or, in appropriate cases, require necessary corrective action within a specific time. | Each penalty requires a Notice of Penalty with specific requirements. It must also include a Cease and Desist Order, and may include a Notice to Correct. The format of the notice can be the same as other notices, to save work; or even combined with other orders. |
| WAC 173-27-290 Appeal of civil penalty | |
| (1) Right of appeal. Persons incurring a penalty imposed by the department or imposed jointly by the department and local government may appeal the same to the shorelines hearings board. Appeals to the shorelines hearings board are adjudicatory proceedings subject to the provisions of chapter 34.05 RCW. Persons incurring a penalty imposed by local government may appeal the same to the local government legislative authority. | Civil penalties are appealed for local government legislators |
| (2) Timing of appeal. Appeals shall be filed within thirty days of the date of receipt of the penalty. The term “date of receipt” has the same meaning as provided in RCW 43.21B.001 . | Penalties have 30 day appeal period. The date of receipt only affects the appeal period, it does not affect the calculation of the amount of penalty, which is dependent only on the date of violation (or discovery). |
| (3) Penalties due. (a) Penalties imposed under this section shall become due and payable thirty days after receipt of notice imposing the same unless application for remission or mitigation is made or an appeal is filed. (b) If the amount of a penalty owed the department is not paid within thirty days after it becomes due and payable, If the amount of a penalty owed local government is not paid within thirty days after it becomes due and payable, local government may take actions necessary to recover such penalty. | If the penalty is not appealed, it must be paid within that same period. Jurisdictions can sue 30 days after that to recover funds. |
| (4) Penalty recovered. Penalties recovered by the department shall be paid to the state treasurer. Penalties recovered by local government shall be paid to the local government treasury. Penalties recovered jointly by the department and local government shall be divided equally between the department and the local government unless otherwise stipulated in the order. | Penalty funds do not go to fix the violations – they go to the treasury. |

APPENDIX 2: PREPARATION AND TOOLS TO MAKE EARLY RESPONSE EASY

If staff have the feeling that they are ill prepared to respond to a violation they see, it becomes easy to pass it by. It is important to have all the tools necessary for responding to a violation in hand to eliminate this barrier.

Technology used for the permit system can be used to help address violation reports that are received from others. In these cases, there is time in the office to prepare for the site visit to the violation site – most specifically using technology. However, new electronic devices are available that can link staff in the field with office information systems. These electronic devices can even be used to assist staff when they identify violations during the site visits on other permits. Below are recommendations to prepare for violation site visits:

- Review the permit system for permit history on the site, so you can compare approved permits to field observations, and to determine if violation activity is occurring.
- Prepare a travel map or directions to the site.
- Print site maps that can be annotated and used as discussion tools.
- Provide enforcement staff with individual or shared PC tablet (or other electronic devices) to assist on site visits.
 - Load a copy of the jurisdiction's GIS interface and at least some of the coverage layers, especially air photos. Include protective covers to provide desired level of weather and damage protection.
 - Allow remote access to permit tracking system if possible. This might use the law enforcement data sharing system.

Having material supplies that are needed to undertake enforcement actions on hand helps natural resources staff act on a violation they identify in the field during their permit review duties. Again, these will be similar to those needed for efficient permit review site visits, with a few additions specific to addressing violations such as equipment and materials for issuing and posting violation notices and for documenting the violations:

- Handheld kit – an aluminum clipboard case works well. Each staff might keep one for themselves.
 - Personal identification and business cards.
 - Pre-printed “Cease and Desist Order” forms that can be filled in by hand.
 - Carbon copy paper or other means of making copies – photos may work.
 - An alternative to the above items is a PC Tablet with a car-portable printer.
 - Plastic protector sheets (for weather resistance) and other materials needed for the posted order.
 - Pens and pad of paper for notes and sketches.
 - Copies of natural resource regulations for staff reference, and to bolster position with people involved with violations.
- Car trunk kit – keep organized with toolboxes, other boxes, etc.
 - Stakes to post notices.
 - Tools kept in toolbox: hammer, pliers, cutting blade, pocket knife, etc.
 - Sign attachment materials kept in toolbox: heavy duty staple gun, staples, wire, twine, duct tape, etc.
 - Reel style measuring tape – at least 100 feet long, preferably 200 feet.
 - Wetland shovel or other suitable digging tool – consider weight factor.
- Other equipment not normally left in the car.
 - Camera kit – batteries, spare storage disk, zoom lens, etc.
 - Cell phone with service that provides best coverage in isolated areas of jurisdiction.
 - Safety gear: hard hats for when construction sites are visited, visibility vests for traffic locations.

APPENDIX 3: EXAMPLE BOILERPLATE ORDER TO CEASE AND DESIST FORM

ORDER TO CEASE AND DESIST

Date of Issuance: _____
To: _____
Property: _____
From: ___ Shoreline and Critical Areas Administrator _____

This notice serves to notify the above individuals that the above premises are found to be in non-compliance with the:

☐ XX County Shoreline Master Program

☐ XX County Critical Areas Ordinance.

The landowner and/or operator conducting unpermitted activity on the property is hereby ordered to:

1. Immediately discontinue all exterior development activity within Shoreline and/or Critical Areas jurisdiction, including:

a. Land Modification: Excavating, grading, filling, etc.

b. Construction Activities: Including additions, paving, decks, playgrounds, etc.

c. Vegetation Alterations: Clearing vegetation, planting lawns, cutting trees, etc.

2. Contact the XX County Planning Department to determine the necessary corrective measures within __14__ calendar days. If the Planning Department has not been contacted within said period of time, fines of up to \$1000 per day (as noted below) may be imposed.

The applicable laws regarding shoreline and/or critical areas penalties are attached to the back of this notice for your information. If you have any questions regarding this Order, you may contact _____ at _____.

Signed: _____ Date: _____