Chapter 2
Planning Context

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Chapter 2.
Planning Context

Aquatic land management involves compliance with a number of federal, tribal, state, and local laws and regulations. This chapter provides a synopsis of the regulatory context in which the Washington State Department of Natural Resources (Washington DNR) provides proprietary land management of state-owned aquatic lands.

2.1 History of aquatic land management

At statehood, Washington received title to all the land underlying navigable fresh, marine, and estuarine waters within the state. To manage the land underlying navigable waters and understand the role of Washington DNR as proprietary manager of state-owned aquatic lands, one must have a general understanding of the concept of *navigability* and the rights that others have in such lands.

2.1.1 Ownership and other rights associated with aquatic lands

When the United States was formed in 1789, the lands under all of the navigable waters within the 13 original colonies were reserved for the states and were not granted by the United States Constitution to the federal government. The U.S. Supreme Court case of Pollard v. Hagen of 1845 established that the *equal footing doctrine* holds that all subsequent states shall take title to navigable waters on the same basis as the original 13 states (Ivey, 2002).[1] Washington State did not give up ownership, but instead asserted ownership to the beds and shores of all navigable waters up to the line of ordinary high tide in tidal waters and up to the line of ordinary high water in navigable rivers and lakes.[2] The only lands the state did not claim are "tide, swamp, and overflowed lands" that the federal government conveyed to individuals before statehood in 1889 (known as *federal patents*).[3]

[1] *Phillips Petroleum Company v. Mississippi,* 484 U.S. 469, 482-83, 108 S. Ct. 791, 98 L. Ed. 877 (1988) quoting *Shively v. Bowlby*, 152 U.S. 1, 26, 14 S. Ct. 548, 38 L. Ed. 331 (1894).
[2] Wash. Const. art. XVII, § 1.
[3] Wash. Const. art XVII, § 2.

Navigability

Under federal law, the aquatic lands that the state received at statehood were under *navigable* waters.[4] Whether a particular water body is navigable for the purposes of establishing title (*navigable for title*) is a question that must be answered by federal common law.[5] Under federal law, a water body is navigable for title if it is, in its natural and ordinary condition, susceptible for use as a highway for commerce using customary modes of travel and trade on water.[6] In Section 332-30-106(41) of the Washington Administrative Code (WAC), Washington DNR defines navigability or navigable in a manner generally consistent with the federal test and further identifies ". . . all bodies of water meandered[7] by government surveyors as navigable unless otherwise declared by a court."

In marine and estuarine waters, the extent of state-owned lands is easily determined because the state received title to all lands under waters subject to the ebb and flow of the tide, regardless of whether the particular location is navigable.[8] Therefore, the state owns the land under all tidal waters—including otherwise non-navigable marine water sloughs and channels—unless the state has sold the land since statehood or the federal government either reserved the land or conveyed it to others before statehood.

In the case of freshwater, whether a particular body of water is *navigable for state title* is less certain, although some water bodies, such as the Columbia River, are clearly navigable. Washington DNR decided to assert state ownership over particular bodies of water on a case-by-case basis. The agency presumes that meandered waters are navigable, but meandering is not conclusive. The federal test for navigability determines title by analyzing the capacity of a water body to support the customary modes of trade or travel. This is supplemented by documented history of use and investigation of any artificial improvements that may have altered the flow of the waterway—such as channel straightening.

A history of actual use supports a finding of navigability for state title, but the absence of historical use will not nullify the finding. This is because, under federal common law, *susceptibility* of use determines navigability, rather than manner and extent of actual use.[9] Any person who disagrees with Washington DNR's determination that a water body is navigable for state title can challenge the agency in court, and the judiciary makes the final determination.

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[4] In law, the term *navigability* has more than one meaning. Under federal law, there are three major categories of navigability: (1) for admiralty jurisdiction, (2) for federal regulatory jurisdiction under the Commerce Clause, and (3) for title which establishes whether the state owns the lands underlying water bodies. States also may recognize navigability for different purposes, such as navigability for floating rights.

[5] *Oklahoma v. Texas*, 258 U.S. 574, 586; 42 S.Ct.. 574, 66 L. Ed. 771 (1922); *Brewer-Elliott Oil & Gas Co. v. U.S.*, 260 U.S. 77, 88, 43 S. Ct. 60, 67 L. Ed. 140 (1922); *U.S. v. Holt State Bank*, 270 U.S. 49, 55-56, 46 S. Ct. 197, 70 L. Ed. 465 (1926).

[6] *Brewer-Elliott Oil & Gas Co. v. U.S.,* 260 U.S. 77, 43 S. Ct. 60, 67 L. Ed. 140 (1922); *U.S. v. Holt State Bank,* 270 U.S. 49, 55-56, 46 S. Ct. 197, 70 L. Ed. 465 (1926); *U.S. v. Utah,* 283 U.S. 64, 75, 51 S. Ct. 438, 75 L. Ed. 844 (1931).

[7] Meander lines are boundaries created by government surveyors. They are used to define the *sinuosity* of the shore so that fractional subdivisions can be calculated. Meander lines are not natural boundaries and are often imprecise.

[8] See *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 476, 108 S. Ct. 791, 98 L. Ed. 877 (1988).

[9] *U.S. v. Utah,* 283 U.S. at 82-83; *see Utah v. U.S.,* 403 U.S. at 12.

Verification of navigability

Washington DNR is developing a method that will serve as the first step toward determining whether rivers are navigable. Because physical characteristics and exploration, as well as actual uses, indicate the potential navigability of rivers, Washington DNR developed a table of physical river-channel characteristics that can serve as criteria for assessing whether a river is likely to be navigable (Table 2.1).

Table 2.1. Physical criteria for initial navigability determination.

	Navigability		
Physical Criteria	**Probably Not Navigable for State Title**	**Navigability Depends on a Balance of Factors**	**Probably Navigable for State Title**
Depth is Generally…	Less than 0.6 meters	0.6 to 1.1 meters	More than 1.1 meters
Surface Width is Generally…	Less than 7.3 meters	7.3 to 12.2 meters	More than 12.2 meters
Bottom Width is Generally….	Less than 5.5 meters	N/A	Greater than 5.5 meters
Gradient is Generally*….	Greater than 7.6 meters/kilometer*	3.1 to 7.6 meters/kilometer	0 to 3.1 meters/kilometer

* There may be exceptions.

In order to use Table 2.1, one must have data on depth, surface width, bottom width, and general gradient. Because these data do not exist for all water bodies across the state, Washington DNR approached the U.S. Geological Survey to see if there was a way to use other available data to estimate the physical criteria needed to determine navigability using this table.

The U.S. Geological Survey found that it was possible to estimate the physical criteria with reasonable confidence from available statewide channel-characteristic data, such as that provided by the Enhanced River Reach File, a geographic information system coverage (map layer) that contains a network of stream reaches with attributes, including mean annual discharge, mean velocity, and other information. Washington DNR is working in collaboration with the U.S. Geological Survey to develop a method to estimate the physical criteria related to navigability (as defined by Washington DNR) from these available statewide data.

This work is an initial step towards developing a better method of establishing ownership of state-owned aquatic land.

Riparian and preference rights

Many states observe common law riparian rights, which allow the landowners bordering the water to use the adjacent aquatic lands for purposes such as accessing the water and building a dock for certain uses. In navigable waters, however, Washington State law does not vest riparian rights in the upland landowner at a waterfront boundary. Instead, the owner of the aquatic land at a waterfront boundary enjoys such rights.[10] Thus, riparian rights do not impose any practical

[10] *Spath v Larsen,* 20 Wn.2d 500, 508, 148 P.2d 834 (1944); *Sturtevant,* 76 Wn. at 164 citing *Bilger v. State,*

limitation on Washington DNR's ability to implement this habitat conservation plan (HCP) on state-owned aquatic lands. Nonetheless, where the state still owns first-class tidelands or shorelands (those within or near to cities and towns), owners of adjoining uplands have a right of first refusal to lease state-owned aquatic lands (Chapter 79.125 Revised Code of Washington). This is a statutory preference right, not a common law riparian right.

Public Trust Doctrine

The *public trust doctrine* is an ancient and universal legal principle that recognizes the need for public access to water and aquatic resources. It acts like an easement over the aquatic lands. Under the trust, no matter who owns the land below, the public has the right to use navigable waters.

While a state cannot abolish the public trust doctrine, a state can, to a degree, define the rights protected by the trust.[11] In Washington, the interest protected by the trust includes ". . . the right of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters."[12]

The practical effect of the public trust doctrine is that any limitation Washington DNR wants to impose on the rights protected by the trust must be accomplished through a rule-making process under the Washington Administrative Procedures Act (RCW 34.05).

Federal interests

The federal government retains an interest in state-owned aquatic lands under the Commerce Clause of the United States Constitution. The Commerce Clause gives Congress the power to promote and regulate interstate commerce; this, in turn, gives Congress the authority to control navigation. Called *federal navigational servitude*, this means that the government is empowered to regulate and control submerged lands of the U.S. in the interest of commerce. The servitude is like an easement that the federal government may exercise for the purpose of improving or protecting navigation on navigable water bodies.[13] For example, the U.S. Army Corps of Engineers may, without approval from Washington DNR, build a jetty on state-owned aquatic lands to protect a navigational channel, because the jetty is within the scope of the federal navigational servitude.

Tribal interests

Under federal treaties, many Pacific Northwest tribes retain the right to harvest fish, including shellfish, at all "usual and accustomed" grounds and stations. These usual and accustomed fishing areas cover the marine aquatic lands of Puget Sound, the Strait of Juan de Fuca, and most of the Pacific Coast and Columbia River (together with many associated freshwater lakes, streams, and rivers). In terms of state-owned aquatic lands, the treaty right to harvest includes the ability to access usual and accustomed grounds and stations to harvest up to one half of both embedded shellfish and free swimming fish and shellfish. However, the treaty right to harvest embedded

63 Wn. 457, 465, 116 P. 19 (1911).

[11] *State of Washington v. Longshore,* 141 Wn.2d 414, 427-28, 5 P.3d 1256 (2000) quoting *Phillips Petroleum Company v. Mississippi,* 484 U.S. 469, 475, 108 S. Ct. 791, 98 L. Ed. 877 (1988)

[12] *Caminiti v. Boyle,* 107 Wn. 2d 662, 669, 732 P.2d 989 (1987) quoting *Wilbour v. Gallagher,* 77 Wn.2d 306, 316, 462 P.2d (1969).

[13] *Kingsport Horizontal Prop. Regime v. United States*, 46 Fed. Cl. 691 (2000)

shellfish does not include the right to shellfish from artificial beds created by private shellfish growers or the enhanced production of shellfish created from naturally occurring shellfish beds through private aquaculture practices.[14] Settlement agreements between Washington State and the Treaty Tribes have further defined how the treaty right to harvest shellfish is implemented in those cases where the state has leased its aquatic lands for commercial aquaculture.

In the early 1970s, federal and tribal authorities initiated the case known as United States v. Washington to secure treaty fishing rights. The Boldt Decision (1974) and Rafeedie Decision (1994) are two prominent decisions in the ongoing case affecting state-owned aquatic lands. The state, through both the Washington Department of Fish and Wildlife and Washington DNR, continues to work with tribal authorities and other affected parties to reach agreement on management and harvest issues.

United States v. State of Washington, 384 F. Supp. 312 (W. D. Washington, 1974) (Boldt Decision)

The United States District Court (Judge Boldt) upheld the right of the Treaty Tribes in the Northwest to take up to 50 percent of the harvestable surplus of anadromous fish that pass through the usual and accustomed fishing areas of the various tribes. Subsequent proceedings in this continuing case have extended this principle to other marine species of fish and have further delineated the scope of the treaty harvesting rights.

United States v. State of Washington, 873 F. Supp. 1422 (W. D. Washington, 1994) (Rafeedie Decision)

The United States District Court (Judge Rafeedie) held that the Treaty Tribes' reserved harvest rights extend to intertidal and subtidal shellfish populations. The treaty right applies to all shellfish species, including species that were not present in Washington at the time the treaties were signed. Adoption of a shellfish implementation order and several settlement agreements as consent decrees further describe harvesting rights.

The Commissioner of Public Lands Order on Tribal Relations, signed on September 10, 2010 (Commissioner's Order # 201029) recognizes the sovereign status accorded to the 29 federally recognized tribes in the state of Washington. Washington DNR will encourage partnerships with tribes by pursuing opportunities for information exchange, collaborative problem solving, issue resolution, periodic meetings, and continuing collaboration and communication.

[14] *United States v. Washington*, 157 F.3d 630, 651-653 (9th Cir. 1998)

2.1.2 Washington DNR's responsibilities for managing state-owned aquatic lands

The Washington State Legislature delegated to Washington DNR proprietary authority over the state's aquatic lands. The control of Washington DNR's authority to manage state-owned aquatic lands is established through a hierarchy of laws, regulations, and guidelines, starting with the Washington State Constitution. The Washington State Legislature grants Washington DNR proprietary authority to manage state-owned aquatic lands under Title 79 of the Revised Code of Washington (RCW).

The primary source of directive for Washington DNR's management activities is under Revised Code of Washington Chapters 79.105–.145. Other statutes affecting state-owned aquatic lands are in RCW Title 79 and Revised Code of Washington Chapters 43.12 and 43.30. To fill gaps in statutory directive, Washington DNR adopts rules published under Chapter 332-30 of the Washington Administrative Code (WAC). The agency also observes standard practice memoranda and guidelines, which are internal policy statements that, while they do not have the force of law, help ensure that the agency's management practices are consistent.

In Section 79.105.030 of the Revised Code of Washington, the legislature provides direction to Washington DNR regarding how it should fulfill its management responsibilities:

> The management of state-owned aquatic lands shall be in conformance with constitutional and statutory requirements. The manager of state-owned aquatic lands shall strive to provide a balance of public benefits for all citizens of the state. The public benefits provided by aquatic lands are varied and include:
>
> (1) Encouraging direct public use and access;
>
> (2) Fostering water-dependent uses;
>
> (3) Ensuring environmental protection;
>
> (4) Utilizing renewable resources.

Generating revenue in a manner consistent with subsections (1) through (4) of this section is a public benefit.

To implement this directive, Washington DNR adopted Section 332-30-100 of the Washington Administrative Code, which restates the statute and clarifies that this regulation incorporates other statutory obligations to:

> (d) Promote production on a continuing basis of renewable resources.
>
> (e) Allow suitable state-owned aquatic lands to be used for mineral and material production.

Sales of State-owned Aquatic Lands

Between statehood and 1971, the state sold approximately 70 percent of tidelands and approximately 30 percent of shorelands to private entities. Since August 9, 1971, state-owned aquatic lands ". . . shall not be sold except to public entities as may be authorized by law and they shall not be given away" (RCW 79.125.200).

Proprietary authorizations for use of state-owned aquatic land

In fulfillment of its statutory duty to balance public benefits, Washington DNR issues to persons seeking to use state-owned aquatic lands authorizations such as leases, easements or rights-of-way, and licenses, such as rights of entry and waterway permits. Any person can apply for an authorization. The Aquatic Resources Division of Washington DNR is responsible for issuing the authorizations to qualified applicants. In issuing authorizations, the legislature directs Washington DNR to favor water-dependent uses over nonwater-dependent uses. Washington DNR uses a statutory formula to develop rental rates for water-dependent, non-aquaculture uses. Rental rate for aquaculture uses can be by bid or negotiation. Washington DNR bases calculations of rental rates for nonwater-dependent uses on fair market value.

A lease grants to the lessee (or tenant) the temporary right to possess the leased property (leasehold), subject to the terms and conditions of the lease agreement. A lease is the most comprehensive legal instrument for granting use of state-owned aquatic land. A lease is not revocable at will, but may be terminated by expiration, mutual agreement, or breach of the lease terms. Usually, a lessee has exclusive use of the leasehold and can exclude others from using it. This right is limited in lease agreements for state-owned aquatic lands, in that Washington DNR typically reserves the right to grant other uses such as easements within the leasehold that do not unreasonably interfere with the lessee's use. In addition, the lessee's possession is subject to third-party interests, such as those covered by the public trust doctrine.

An easement, also known as a right-of-way, is a more limited grant of authority compared to a lease. An easement does not grant a right to possess the land, only a right to use the land for a specific purpose. Typically, easements are for utility lines or similar uses that do not fully encumber the land. Like a lease, an easement is not revocable at will. Termination occurs through expiration, mutual agreement, breech, or non-use. Traditionally, many easements are perpetual and are intended to benefit another parcel of land, regardless of who owns the land (easement appurtenant). Washington DNR's current practice is to issue easements only for a specific term and only to a specific easement holder. Typically easements issued by Washington DNR are not exclusive. In appropriate circumstances, Washington DNR will permit an assignment of easements.

The most limited form of authorization is a license. Like the easement, a license does not grant the right to possess land, only the temporary use of the land for a specific purpose. Unlike easements, licenses are revocable at will. A license holder (or licensee or grantee) cannot assign the license to another person. Washington DNR issues two types of licenses: a waterway permit and a right-of-entry. Typically, a waterway permit is for temporary use of an area reserved for navigation. Washington DNR can issue a right-of-entry for any aquatic lands.

2.2 Relationship to Washington DNR's other Habitat Conservation Plans

Washington DNR has completed three other habitat conservation plans (HCPs). **The State Trust Lands Habitat Conservation Plan** (1997) covers "...all DNR-managed forest lands within the range of the northern spotted owl, excluding those lands designated as urban or leased for commercial, industrial, or residential purposes and those lands designated as agricultural. All DNR management activities on these lands are covered" (Washington DNR, 1997).

As a *programmatic* habitat conservation plan, the **Forest Practices Habitat Conservation Plan** (FPHCP 2005) is linked to Washington's Forest Practices program, which regulates forest practices activities on primarily non-federal and non-tribal forestlands in the state. Forest practices activities on these lands must comply with the state's Forest Practices Act (RCW 76.09) and rules (WAC 222). "The purpose of the FPHCP is to assure those conducting forest practice activities, covered by or subject to the Forest Practices program, will also be in compliance with the Endangered Species Act (ESA) for covered, threatened, and endangered species (Washington DNR, 2005c).

The Habitat Conservation Plan for **Washington DNR's Wildstock Geoduck Fishery** covers activities related to the commercial harvest of wildstock geoduck clams from subtidal tracts of state-owned aquatic lands in the Puget Sound where geoduck grow in commercial quantities. The commercial geoduck tracts comprise approximately 6,000 acres of state owned aquatic lands.

This Aquatic Lands Habitat Conservation Plan complements the two previous HCPs by covering state-owned aquatic lands and the activities that occur there. The Aquatic Lands HCP covers some of the same species as the State Trust Lands HCP and the Forest Practices HCP. All three together encompass a large portion of the land base in Washington.

2.3 Regulatory framework

The following sections provide a synopsis of regulations that overlap with Washington DNR's management of state-owned aquatic land and the entities with an instrumental role in implementing these regulations.

2.3.1 Federal authorities

Endangered Species Act
(U.S. Fish and Wildlife Service and NOAA Fisheries)

Initially passed in 1973, the Endangered Species Act (ESA), provides for the special designation and protection of invertebrates, wildlife, fish, and plant species that are in danger of becoming extinct (16 U.S.C. § 1531-1544, 87 Stat. 884, as amended). A fundamental purpose of the act is to protect and recover endangered and threatened species and to provide a means to conserve the ecosystems on which they depend.

The ESA defines an *endangered* species as any species that is in danger of becoming extinct throughout all or a significant portion of its range (16 U.S.C. § 1532(6)). A *threatened* species is one that is likely to become endangered in the foreseeable future (16 U.S.C. § 1532(20)).

The U.S. Fish and Wildlife Service and NOAA Fisheries share responsibility for administering the ESA. Generally, the U.S. Fish and Wildlife Service is responsible for terrestrial species and freshwater aquatic species, while NOAA Fisheries is responsible for marine mammals, anadromous fish, and other marine species.

Section 9 of the ESA makes it unlawful to take a species that is listed as endangered. The term *take* under the act is defined as ". . . to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture,

or collect, or to attempt to engage in any such conduct" (16 U.S. Code § 1532 (19)). By federal regulation, the take prohibitions can be extended to species listed as threatened as well (16 U.S.C. § 1538(a)).

Section 10 of the ESA provides an exception to the take prohibition in Section 9. It states that the secretary of the interior or the secretary of commerce (depending on the species involved) may permit any taking otherwise prohibited by Section 9, if such taking is incidental to, and not the purpose of, carrying out an otherwise lawful activity (16 U.S.C. § 1539(a)). A landowner can obtain an incidental take permit under this provision if he or she submits a conservation plan (i.e., an HCP) that meets certain requirements (16 U.S.C. 1539(a)(2)(A)).

The plan must specify:

- The impact that will likely result from the take.
- What steps the applicant will take to avoid, minimize, and compensate for such impacts; the funding available to implement such steps; and the procedures to be used to deal with changed and unforeseen circumstances.
- What alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized.
- Other measures that the secretary of the interior or the secretary of commerce may require as necessary or appropriate for purposes of the plan.

Issuance criteria

The U.S. Fish and Wildlife Service and NOAA Fisheries will determine when Washington DNR meets all criteria for a habitat conservation plan. After an opportunity for public comment, the U.S. Fish and Wildlife Service and NOAA Fisheries will issue an incidental take permit if they find that:

- The taking will be incidental.
- The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.
- The applicant will ensure that adequate funding for the plan will be provided.
- The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.
- Any measures that the secretary of the interior and the secretary of commerce deem necessary or appropriate for the purposes of the plan will be met (16 U.S.C. 1539(a)(2)(B)).

Section 7 of the ESA outlines the procedures for federal interagency cooperation to conserve federally listed species and designated critical habitats (16 U.S.C. 1531 *et seq.*). In particular, Section 7, 16 U.S.C. Section 1536(a)(2), requires all federal agencies to consult with NOAA Fisheries regarding marine and anadromous species or with the U.S. Fish and Wildlife Service regarding freshwater and terrestrial wildlife, if the agencies are proposing an action that may affect listed species or their designated habitat. *Action* is defined broadly to include funding, permitting, and other regulatory actions. Any project that requires a federal permit or receives federal funding is subject to Section 7.

Each federal agency is to ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse

modification of designated critical habitat. Federal agencies are required to consult with the U.S. Fish and Wildlife Service and NOAA Fisheries about their actions. If such species may be present, the project proponent must conduct a biological assessment to analyze the potential effects of the project on listed species and critical habitat to establish and justify an *effect determination*. (Assistance and coordination may be available from the state, especially in the case of transportation projects.) The federal agency reviews the biological assessment, and, if it concludes that the project may adversely affect a listed species or its habitat, the agency prepares a *biological opinion*. The biological opinion may recommend "reasonable and prudent alternatives" to the proposed action to avoid jeopardizing or adversely modifying habitat.

Fish and Wildlife Coordination Act (U.S. Fish and Wildlife Service)

The Fish and Wildlife Coordination Act (FWCA) was enacted in 1934 (16 U.S.C. §§ 661 et seq.). It requires consultation with the U.S. Fish and Wildlife Service to prevent loss or damage to wildlife resources:

> . . . whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license… (16 U.S.C. § 662 (a)).

In connection with the required consultation, the U.S. Fish and Wildlife Service and NOAA Fisheries provide comments and recommendations to prevent loss of, and damage to, fish and wildlife populations and their habitats. The U.S. Fish and Wildlife Service does not have authority under this act to require any entity to implement recommended measures.

Magnuson-Stevens Fishery Conservation and Management Act (NOAA Fisheries)

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) provides for the conservation and management of fishery resources within 200 miles of the coasts of the United States, throughout the migratory range of anadromous species spawned in the United States and on the continental shelf contiguous with the United States beyond the 200-mile limit (16 U.S.C. §§ 1801 *et seq*.). The act established eight regional fishery management councils to manage and conserve the fishery resources within their regions and to prepare a fishery management plan (FMP) for each fishery. As amended by the Sustainable Fisheries Act, the act also requires each council to designate essential fish habitat for any species managed under a fishery management plan (SFA, P.L. 104-297, 1996). Essential fish habitat means ". . . those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity . . ." and covers the entire life history of that species. Federal agencies are required, under section 305(b)(2) of the Magnuson-Stevens Act and its implementing regulations (50 CFR 600 Subpart K), to consult with NOAA Fisheries regarding actions that the agencies authorize, fund, or undertake that may adversely affect the quality or quantity of essential fish habitat. NOAA Fisheries then provides recommendations to the federal agencies regarding measures to avoid, minimize, compensate for, or otherwise offset any adverse effects to essential fish habitat that would result from the agencies' actions. Essential fish habitat consultations are often conducted concurrently with considerations in Section 7 of the ESA.

Marine Mammal Protection Act
(U.S. Fish and Wildlife Service and NOAA Fisheries)

The Marine Mammal Protection Act (MMPA) provides authority for the conservation and protection of marine mammals (16 U.S.C. §§ 1361 *et seq*.). The act prohibits, with certain exceptions, the take of marine mammals in United States waters and by United States citizens on the high seas and the importation of marine mammals and marine mammal products into the United States. Under the Marine Mammal Protection Act, take means to ". . . harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal." The act allows NOAA Fisheries to authorize take of marine mammals incidental to commercial fishing operations.

Coastal Zone Management Act
(Office of Ocean and Coastal Resource Management and Environmental Protection Agency)

The purpose of the Coastal Zone Management Act is to encourage states to protect and preserve coastal resources (including "fish and wildlife, and their habitat") and to allow for economic growth, reduce coastal hazards, improve water quality through a non-point pollution plan approved by the Environmental Protection Agency, and plan for sensible coastal development (16 U.S.C. §§ 1461 *et seq*.). Coastal states develop coastal zone management programs that are reviewed by NOAA for compliance with applicable state and federal laws. Once a coastal zone management program is approved (§ 1455), projects with a federal nexus located in a coastal county must conform to it to the "maximum extent practicable" (§ 1456) if any of the state or federal laws are triggered. A federal consistency review specifies if a project is consistent with the enforceable policies or requires further consultation. The Washington State Department of Ecology has the authority to object at the federal level to a project, if it finds that the project is not consistent with the enforceable policies of the Washington State Coastal Zone Management Program and the proponent is not willing to negotiate changes to the design of the project. No federal license or permit shall be granted by a federal agency until the Department of Ecology has concurred with the applicant's consistency certification (Washington State Department of Ecology, 2001).

In Washington, the approved coastal zone management program has six enforceable "authorities and enforceable policies" for actions in coastal counties with a federal nexus (permit, funding, or agency):

- The Shoreline Management Act
- The Washington State Environmental Policy Act (SEPA)
- The Ocean Resources Management Act
- The Clean Water Act
- The Clean Air Act

Decisions made by the Energy Facility Site Council

Many of these statutes and policies are described elsewhere in this chapter.

Migratory Bird Treaty Act
(U.S. Fish and Wildlife Service)

The Migratory Bird Treaty Act establishes protection and take prohibitions for migratory birds in North America, based upon treaties between the United States, Great Britain, Mexico, Japan, and Russia (16 U.S.C. §§ 703-712). The U.S. Fish and Wildlife Service may issue permits for taking protected birds based on specified criteria intended to protect the abundance of the species at issue. The act provides both criminal and civil penalties for violation.

Bald and Golden Eagle Protection Act
(U.S. Fish and Wildlife Service)

Although now delisted, bald eagles are still protected by the Bald and Golden Eagle Protection Act, the Migratory Bird Treaty Act, and the Lacey Act. Under the Bald and Golden Eagle Protection Act (16 U.S.C. § 668), it is a violation to:

> …take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or golden eagle, alive or dead, or any part, nest or egg thereof…(16 U.S.C. § 668b).

The act provides both criminal and civil penalties for violation.

Federal Clean Water Act
(U.S. Army Corps of Engineers and Environmental Protection Agency)

The purpose of the Federal Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters (33 U.S.C. §§ 1251 *et seq*.). The Clean Water Act focuses primarily on pollution and the adverse impacts of pollution on wildlife and their habitat. The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) work together to administer the federal Clean Water Act. The Corps is responsible for Section 404 (33 U.S.C. § 1344), regarding issuance of permits to discharge dredged or fill materials into waters of the United States (33 U.S.C. § 1344).

The EPA has authority under the act to review and comment on impacts of all proposed permits and to prohibit any activity that has an unacceptable impact on municipal water supplies, shellfish beds, fishery areas, wildlife, and recreational areas. The EPA, in consultation with the Corps, develops guidelines for evaluating discharges subject to Section 404 (40 C.F.R. Part 230).

The EPA administers the regulation and discharge of pollutants under the National Pollutant Discharge Elimination System (NPDES) (Section 402; 33 U.S.C. § 1342). Discharges into the territorial sea[15] also require a permit (Section 403; 33 U.S.C. § 1343). The 1987 amendments to

[15] Defined by the 1982 United Nations Convention on the Law of the Sea , is a belt of coastal waters extending at most twelve nautical miles (22.224 km) from the baseline (usually the mean low-water mark) of a coastal state.

the federal Clean Water Act included the "non-point source" pollution program for pollutants such as stormwater runoff (Section 319; 33 U.S.C. § 1329).

The act has very strong enforcement mechanisms, including the ability to obtain injunctions, assess civil penalties, and pursue criminal actions against offenders (33 U.S.C. § 1319). The act also allows for private enforcement through citizen suits in federal court (33 U.S.C. § 1365).

Rivers and Harbors Act
(U.S. Army Corps of Engineers)

Sections 9 and 10 of the Rivers and Harbors Act authorize the U.S. Army Corps of Engineers to regulate construction in navigable waters, including building canals, boat ramps, navigational aids, marinas, outfalls, or bank stabilization projects (33 U.S.C. §§ 401 *et seq*.). The act provides for criminal charges against violators and issuance of injunctions requiring removal of structures constructed without a permit (33 U.S.C. § 406).

Oil Pollution Act
(U.S. Coast Guard and Environmental Protection Agency)

The Oil Pollution Act of 1990 streamlined and strengthened the federal government's ability to prevent and respond to catastrophic oil spills (33 U.S.C. §§ 2701-2729). It provides funds when the responsible party is incapable or unwilling to clean up the spill. The act requires oil storage facilities and vessels to submit detailed petroleum spill response plans. Area contingency plans (ACPs) are necessary under the act for oil spill response on a regional scale (33 U.S.C. § 4202 and § 1321). These area contingency plans require consideration of listed species and habitat, and a Section 7 consultation with the U.S. Fish and Wildlife Service and NOAA Fisheries under the ESA.

National Environmental Policy Act
(Council on Environmental Quality, Environmental Protection Agency)

The National Environmental Policy Act (NEPA) requires that federal agencies analyze and publicly disclose the social, economic, and environmental effects associated with major federal actions (42 U.S.C. §§ 4321 *et seq*.; § 4332). This analysis can take the form of an Environmental Assessment[16] (EA), an Environmental Impact Statement (EIS), or both. The issuance of an incidental take permit under the ESA is a federal action subject to NEPA compliance. NEPA generally requires a broader analysis of environmental impacts and of alternatives to the proposed action than the analysis done in a habitat conservation plan. While NEPA does not contain any express penalty provisions, many federal agencies may not receive federal funding until NEPA is

[16] Serves to briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. The environmental assessment aids an agency's compliance with the NEPA when no environmental impact statement is necessary, and facilitates preparation of a statement when one is necessary.

completed, and courts have routinely invalidated federal actions for failure to comply. The Environmental Protection Agency is required to review and publicly comment on the environmental impacts of major federal actions. If the Environmental Protection Agency determines an action to be environmentally unsatisfactory, it reports its objections to the agency in question and to the Council on Environmental Quality.

Federal Power Act
(Federal Energy Regulatory Commission)

The Federal Energy Regulatory Commission (FERC) issues licenses to nonfederal entities (primarily utilities) pursuant to the Federal Power Act for interstate transmission of electricity, natural gas, and oil and for construction and operation of hydroelectric projects (16 U.S.C. §§ 791a *et seq*.). Those who apply for a hydropower license or seek to renew an existing license must consult with all relevant state and federal fish and wildlife agencies and tribes regarding measures necessary to protect fish and wildlife resources impacted by the hydropower project (§ 808).

Comprehensive Environmental Response, Compensation, and Liability Act
(Environmental Protection Agency)

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Environmental Protection Agency has broad authority to require contaminated sediment cleanup and remediation activities by polluters and other responsible parties (42 U.S.C. §§ 9601 *et seq*.). CERCLA provides substantial penalties for noncompliance (§§ 9608 and 9609). The act also authorizes citizen suits to compel compliance and recover damages (§ 9659).

2.3.2 State and local authorities

Water Pollution Control Act
(Washington State Department of Ecology)

The Water Pollution Control Act prohibits the discharge of pollution into waters of the state and establishes the jurisdictional authority of the Washington State Department of Ecology to set water quality standards (RCW 90.48). The Water Pollution Control Act designates the Washington State Department of Ecology as the state agency responsible for implementing and enforcing all programs necessary for the state to comply with the federal Clean Water Act.

Puget Sound Water Quality Protection Act
(Puget Sound Partnership)

The legislature enacted the Puget Sound Water Quality Protection Act on July 1, 2007 (RCW 90.71). Through this act, the legislature created a new agency, the Puget Sound Partnership, to coordinate and lead the effort to restore and protect Puget Sound. The legislature intends that all governmental entities, including federal and state agencies, tribes, cities, counties, ports, and special purpose districts, will support and help implement the partnership's restoration efforts. The

Puget Sound Partnership is not a regulatory authority and does not have the authority to transfer the responsibility for, or implementation of, any state regulatory program, unless otherwise specifically authorized by the legislature. The primary duties of the Puget Sound Partnership are to:

- Define a strategic action agenda that prioritizes necessary actions, both basin-wide and within specific areas, and create an approach that addresses all of the complex connections among the land, water, web of species, and human needs. The action agenda shall be based on science and include clear, measurable goals for the recovery of Puget Sound by 2020.
- Determine accountability for performance, oversee the efficiency and effectiveness of money spent, educate and engage the public, and track and report results to the legislature, the governor, and the public.

Shoreline Management Act
(Washington State Department of Ecology, counties, and cities)

The purpose of the Shoreline Management Act of 1971 (SMA) is to prevent the harm caused by uncoordinated and piecemeal development of shorelines (RCW 90.58). The act provides the framework for federal, state, and county entities to engage in joint planning for shorelines. It requires shoreline master programs to assist counties with land use planning. Under the act, a permit is required for shoreline alteration within 200 feet of the shoreline.

Counties are responsible for developing shoreline management plans that reflect their unique geographic, environmental, and economic needs per the guidance provided in Shoreline Management Guidelines (WAC 173-26).

In Section 79.105.040 of the Revised Code of Washington, the legislature specifies that the general provisions of the aquatic lands statutes do not modify, alter, or affect the applicability of the Shoreline Management Act. Washington DNR adopted WAC 332-30-107 to address planning under the act and directing the agency to:

- Use shoreline management planning as a primary tool for identifying “the best combination of aquatic uses” (WAC 332-30-107(2)).
- Coordinate with other jurisdictions and their shoreline management efforts (WAC 332-30-107(4)).
- Supplement the shoreline master program planning process as necessary to meet constitutional and statutory proprietary responsibilities for aquatic lands (WAC 332-30-107(5)).
- Mitigate for unavoidable adverse impacts (WAC 332-30-107(6)).

State Environmental Policy Act

The State Environmental Policy Act (SEPA) is intended to ensure that environmental values are considered when state and local agencies make decisions (RCW 43.21C). Its federal counterpart is the National Environmental Policy Act (NEPA). Under SEPA, state and local agencies must consider environmental information (impacts, alternatives, and mitigation) before committing to a

particular course of action. At the direction of the legislature, the Washington State Department of Ecology adopted Chapter 197-11 of the Washington Administrative Code to implement SEPA.

The State Environmental Policy Act requires that Washington DNR consider conducting a SEPA review before the agency decides to make a purchase, sale, lease, transfer, or exchange of state-owned land or natural resources. Washington DNR is exempt from this requirement when considering a lease of state-owned aquatic lands that will not change the use of the property from its existing use. A lease for pleasure craft mooring buoys is also exempt from SEPA. Although Washington DNR must consider SEPA review, the agency is excused from serving as lead agency for all private projects in which the sale or lease of state-owned aquatic lands is incidental to a larger project for which one or more licenses from other state or local agencies is required. In such circumstances, the other state or local agency is the lead agency; however, Washington DNR can assume lead agency status within 14 days of the other agency's threshold determination, if Washington DNR is not content with the other agency's process or determination.

Growth Management Act
(Washington State Department of Commerce)

The Growth Management Act (GMA) requires cities and counties that meet certain criteria (set forth in RCW 36.70A.040) to develop comprehensive growth management plans (RCW 36.70A). The legislature adopted the Growth Management Act in response to concerns that ". . . uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and wise use of our lands, pose a threat to the environment, sustainable economic development, and the . . . high quality of life enjoyed by residents of this state" (RCW 36.70A. 010). All counties and cities of the state are required to designate and protect critical areas and designate natural resource lands. Other elements include designating urban areas, shorelines, transportation, harbor areas, and utilities (Washington State Department of Commerce, 2006). Consequently, these plans affect local jurisdictions' priorities for the use of state-owned aquatic lands.

Watershed Planning Act
(Washington State Department of Ecology)

The purpose of the Watershed Planning Act is to develop a more thorough and cooperative method of assessing water resources for an inventory area (Water Resource Inventory Area or WRIA), through the creation of comprehensive watershed management plans (RCW 90.82).

State Endangered Species Authority
(Washington Department of Fish and Wildlife)

Chapter 77.12 of the Revised Code of Washington lists the powers and duties of the Washington Department of Fish and Wildlife. The Washington Fish and Wildlife Commission may designate a species of wildlife as protected (RCW 77.12.020 (5)) or as endangered (RCW 77.12.020 (6)). In April 2012, the Washington Department of Fish and Wildlife published its annual report on threatened and endangered wildlife. It listed 28 endangered species, 10 threatened species, and 7 sensitive species; it removed 2 species. Endangered species are designated under Section 232-12-

014 of the Washington Administrative Code; threatened species are designated under Section 232-12-011 (Washington Department of Fish and Wildlife, 2012).

Salmon Recovery Act
(Washington State Recreation and Conservation Office and Washington Department of Fish and Wildlife)

Chapter 77.85 of the Revised Code of Washington establishes a Governor's Salmon Recovery Office, residing within the Recreation and Conservation Office, to coordinate salmon recovery efforts statewide among regional salmon recovery regions, state agencies, tribes, local governments, lead entities, and non-profit organizations. The Governor's Salmon Recovery Office also works with federal agencies to ensure the statewide salmon recovery strategy is consistent with federal salmon recovery objectives and requirements of the ESA.

Hydraulic Code
(Washington Department of Fish and Wildlife)

Section 77.55.100 of the Revised Code of Washington gives the Washington Department of Fish and Wildlife the authority to require a hydraulic project approval (HPA) permit for construction activities in or near state waters. Such a permit is required for the performance of work that will use, divert, obstruct, or change the natural flow or bed of any waters of the state. The purpose of the permit is to ensure the protection of fish life, including shellfish.

Sanitary Control of Shellfish
(Washington State Department of Health)

The Washington State Department of Health determines shellfish closure zones, issues certifications for sanitary commercial shellfish areas, and conducts biotoxin studies (RCW 69.30 and WAC 246-282). The Washington State Department of Health administers the Recreational Shellfish Program and provides information to the public about where and how to safely harvest recreational shellfish, free of contamination, in Washington State.

Oil Spill Prevention and Response
(Washington State Department of Ecology)

The Washington State Department of Ecology is responsible for oil and hazardous substance spill prevention and response (RCW 90.56). Washington DNR participates in spill responses and damage assessments.

Model Toxics Control Act
(Washington State Department of Ecology)

The Washington State Department of Ecology is the lead agency for conducting investigations and leading cleanup of contaminated sediments (RCW 70.105D). Chapter 173-204 of the Washington Administrative Code sets sediment management standards.

Food Fish and Shellfish: Commercial Licenses
(Washington Department of Fish and Wildlife)

The Washington Department of Fish and Wildlife regulates licenses for the commercial harvest of food fish and shellfish (RCW 77.65). Chapter 77.32 of the Revised Code of Washington regulates recreational fishing, shellfishing, and hunting.

Aquaculture Disease Control
(Washington Department of Fish and Wildlife)

Chapter 77.115 of the Revised Code of Washington sets requirements for control of diseases from aquaculture operations and provides for registration of aquatic farmers.

Transportation Authorities
(Washington State Department of Transportation)

The Washington State Constitution grants municipalities the right to extend streets across tidelands and harbor areas. Chapter 47.12 of the Revised Code of Washington sets requirements for the Washington State Department of Transportation's acquisition and disposition of state highway property, including state-owned aquatic lands.

Port Districts
(Washington DNR)

Section 79.105.420 of the Revised Code of Washington states that a port district and Washington DNR may enter into an agreement authorizing the port district to manage state-owned aquatic lands ". . . abutting or used in conjunction with and contiguous to uplands owned, leased, or otherwise managed by a port district, for port purposes . . . ."

Counties, cities, and towns

Counties, cities, and towns have the power to police activities on the waters within their jurisdiction (RCW 36.04; RCW 35.21.160). This includes the authority to regulate navigation, vessel speed, and anchorage.

2.4 References

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