

December 21, 2011

Diane Sugimura
City of Seattle
Director, Department of Planning and Development
700 5th Avenue
P.O. Box 34019
Seattle, WA 98124-4019

Re: Comments on 2011 Draft Shoreline Master Program
Second Formal Draft (released 10/26/11)

Dear Ms. Sugimura:

The Port of Seattle appreciates the opportunity to provide comments on the second draft of the Shoreline Master Program (SMP). The Port respects the amount of time and effort applied by City staff in preparing this draft document. Our analysis of certain key issues and the complexity of the proposed Shoreline Master Program, however, compels us to request that DPD continue its outreach efforts and to issue a third draft SMP for further public review and comment.

We believe the city shares our interest in supporting a vibrant maritime industry while also protecting and enhancing scarce shoreline resources. We are concerned that some of the proposed policies and regulations may hinder the competitive position of water dependent businesses in the region as well as discourage environmental enhancement.

We appreciate many specific changes in the second draft that improve the ability of water dependent businesses to operate efficiently and thrive in Seattle. The changes include: exemptions related to priority salt-water habitat, hard shoreline stabilization and light transmitting features; increased flexibility in the ability to repair or replace piles; and the deletion of a live-aboard registration program.

Our request for a third public draft is based on a number of issues of concern to the Port and other water dependent businesses:

- a. Ecological mitigation and measuring
- b. The required Restoration Plan, which has not been released
- c. Dredging language
- d. Nonconforming uses and structures

The SMP's proposed ecological mitigation strategy is not consistent with federal and state in-lieu (ILF) proposals. While we support alternative mitigation strategies and in-lieu fee programs, we view the current proposal as unnecessarily burdensome for shoreline businesses and believe that it may actually discourage mitigation and restoration of Seattle's shorelines.

Development of an alternative mitigation approach is not a requirement of the Ecology Guidelines and we can find no examples from other local jurisdictions of programs with similar scope and complexity as in this draft SMP. We believe that the program must be federally approved, be optional, and be fully defined as part of the SMP public review process rather than adopted later as a Director's Rule.

The Port has retained Mr. Glenn Grette of Grette Associates for a review of the associated scientific and implementation issues associated with the mitigation proposals. Mr. Grette has considerable experience in the permitting, design, and implementation of numerous compensatory habitat projects within Puget Sound. His letter is attached.

Regarding the required Restoration Plan, we note that the plan has important implications in relation to the "habitat unit" proposal. Preparation of the plan is a requirement of the Ecology Guidelines, and it forms the basis for the City's compliance with the "no net loss" (NNL) standard.

The Restoration Plan may have important ramifications to the Port as we move forward with habitat mitigation and restoration projects on our properties. We understood from our meeting with you on December 8 that the draft Restoration Plan will be released on or before December 22. We ask that the Restoration Plan be released as soon as possible to afford the public an opportunity for review.

We appreciate the changes in the latest draft regarding maintenance dredging and dredged material disposal that will make these sections consistent with state and federal policies and regulations. We request that additional language be added, consistent with the state SMP regulations, to allow for new or expanded dredging, where impacts are mitigated and the NNL standard is met. Having consulted directly with Ecology staff on this issue, we propose amended language in our attachments to address this issue.

Finally, within our broad mission of fostering maritime economic activities within the Port district, we voice caution about provisions that reclassify many shoreline commercial and industrial properties as non-conforming uses or structures. Many of these businesses are economically productive but the result, if the use or structure is classified as non-conforming, will be to discourage improvements. A more flexible approach could result in preservation of job-producing businesses with restoration of shoreline ecological resources.

Furthermore, we are specifically concerned that shoreline substantial developments and uses at Piers 66 and 69 previously approved by the City will become nonconforming under provisions proposed in this SMP draft. We discuss this in further detail and propose alternative language in attachments A and C.

This letter includes an attachment which summarizes our major concerns with several of the proposed SMP regulatory proposals. We also have provided a detailed matrix containing our comments by section which includes suggestions for alternative language.

Thank you for the opportunity to comment. We look forward to working with the City on these issues.

Sincerely,



Stephanie Jones Stebbins
Director, Seaport Environmental and Planning
Port of Seattle

Attachment A: Summary of policy and regulatory concerns

Attachment B: Glenn Grette letter

Attachment C: Matrix containing comments by section with suggested alternative language

Attachment A: Summary of policy and regulatory concerns

1. Mitigation and Measuring Program:

Rather than incentivizing habitat-friendly redevelopment of urbanized Seattle shorelines, the SMP proposes a duplicative, expensive, and potentially unworkable new system for measuring ecological impacts and compensatory mitigation. Complication and duplication of an already highly complex regulatory environment is counter to the goals for no net loss (NNL) and shoreline restoration because it will impose redundant requirements for mitigation and measuring on shoreline development proposals. This will be a disincentive for many shoreline investments that could potentially improve and restore habitat within the City.

The creation of an alternative habitat mitigation program is *not* a requirement of the state SMP regulations because state law does not require such a program. Other jurisdictions have declined to incorporate such complex, expensive and process-heavy programs within their SMPs. This proposal would require the City to substantially expand its budget and administrative capacities as well as develop new professional competencies. We suggest that the City withdraw the ecological mitigation and measuring program requirements (SMC 23.60.027) and the standards for mitigation sequencing (SMC 23.60.158) and revise these sections so that they comply with existing federal and state regulatory programs.

At a minimum, these sections, and the City's proposals for any locally administered alternative mitigation and/or measuring program, must:

1. Be approved through the federal process and interagency review team led by the US Army Corps of Engineers, consistent with 33 CFR 332;
2. Allow that participation in requirements imposed by this locally administered program is entirely voluntary, and compensatory mitigation accepted by federal and state regulatory agencies is acceptable to the City;
3. Adopt an existing measurement tool (preferably HEA, the "habitat equivalency analysis" being used by NOAA for determination of natural resource compensation actions);
4. Require full cost accounting and transparency to assure that ILF transactions are consistent with federal rules;
5. Measure impacts relative to baseline conditions (as required by SEPA, and consistent with the Ecology SMP guidelines, which is clear that mitigation of impacts are to be addressed so that the end result will not diminish shoreline resources and values "...as they currently exist." (See WAC 173-26-201(2)(c)).
6. Clearly delineate the relationship between any proposed ILF requirements and the City Restoration Plan.

By proposing its own unique mitigation and "habitat unit" measuring requirements, the SMP does not reflect WAC guidance to local governments for updating shoreline master programs or promote consistency with other local, state and federal laws and regulations. See WAC 173-26-186(8)(c). As such, we suggest that the City withdraw the Ecological Mitigation and Monitoring Program (SMC 23.60.027) and insert the following proposed alternative language:

23.60.027 Ecological Mitigation and Measuring Program

A. To support compliance with general development standards (SMC 23.60.152), mitigation sequencing requirements (SMC 23.60.158), and the environmental protection objectives of this Chapter, the Director is authorized to develop and implement a program that will identify practical methods for measuring:

- 1. baseline ecological conditions in proposed project areas;*
- 2. the type and extent of potential impacts to ecological functions resulting from a proposed development, shoreline modification and/or shoreline use, relative to baseline ecological conditions;*
- 3. the type and extent of compensatory mitigation that may be required to offset a net loss of ecological functions; and,*
- 4. the type and extent of ecological functions that are created, restored or enhanced through a proposed compensatory mitigation action.*

B. To the maximum extent feasible, ecological measurement methods should rely on and/or be consistent with state and federal methods for measuring and evaluating ecological functions;

C. If compensatory mitigation actions have been required to offset a net loss of ecological functions pursuant to SMC 23.60.152.A and 23.60.158, the Director is authorized to allow the payment of fees in-lieu of an applicant-constructed compensatory mitigation project. The "in-lieu fee" (ILF) option shall be developed and operated consistent with the federal standards for ILF programs enumerated in 33 CFR 332. All fee payments shall be used by the Director for ecological restoration or enhancement in the Shoreline District.

The above proposed language in subpart C. is critical to the Port and its maritime industry partners. Without state and federal approval, applicants will risk having to mitigate twice for the same impact. An unsanctioned program also creates an unfair condition for private sector compensatory mitigation providers.

In addition to the above requested changes to the Ecological Mitigation and Measuring Program, the Port also requests that subpart A. and B. of the standards for mitigation sequencing (SMC 23.60.158) are revised to include:

A. Mitigation, as used in this Chapter, is the action taken to prevent, minimize or replace the loss of ecological functions that may result from shoreline development, shoreline modifications and/or shoreline uses. Determinations regarding the type and extent of affected ecological functions shall consider the location, design, materials, construction methods, construction timing, and post-construction operation of the development, modifications and/or uses.

B. Application of a mitigation sequence shall be undertaken to prevent net loss of ecological functions pursuant to SMC 23.60.152.A. The mitigation sequence, as required by this Chapter, shall be consistent with the sequence of steps required by the Washington State Environmental Policy Act (WAC 197-11-768) and Clean Water Act (33 U.S.C. 1251).

Likewise, the definition of "mitigation" (SMC 23.60.926) should be revised to be consistent with state and federal standards. Specifically, references to "ongoing" impacts from nonconforming uses and/or structures should be omitted and the mitigation sequence presented in clear and familiar terms. A consistent and simplified definition would include:

"Mitigation" means the action taken to avoid, minimize or replace the loss of ecological functions that may result from shoreline development, shoreline modifications and/or shoreline uses. Determinations regarding the type and extent of affected ecological functions shall consider the location, design, materials, construction methods, construction timing, and post-construction operation of the development, modifications and/or uses.

Similarly, the requirements for Mitigation and Monitoring Plans (SMC 23.60.158.E.) risk being inconsistent with the requirements of other agencies. The Port requests that the section be simplified and revised as follows:

E. Mitigation and Monitoring Plans

1. Mitigation and Monitoring Plans may be required by the Director to:

a. evaluate probable affects of proposed shoreline development, modification or use on baseline ecological conditions;

b. specify design, construction, monitoring and maintenance standards for compensatory mitigation projects.

2. The required level of detail in Mitigation and Monitoring Plans shall be determined by the Director after considering the location, size and type of the proposed shoreline development, modification, use and/or compensatory mitigation project.

3. The applicant may combine Mitigation and Monitoring Plans with any related studies required by other agencies. The Mitigation and Monitoring Plans shall be submitted to those agencies as part of their required regulatory review and permitting process.

In light of our significant concerns with the mitigation sections, we engaged Mr. Glenn Grette, a well known expert on matters related to environmental permitting and habitat mitigation, to conduct a review. His task was to offer opinions as a biologist and subject matter expert on ecological mitigation, regarding sections SMC 23.60.027 and SMC 23.60.158, as well as any other portion of the document that references *mitigation*, *mitigation sequencing*, *compensatory mitigation*, or *habitat units*. We also asked him to analyze how the city's proposed mitigation requirements conform with established state and federal mitigation requirements, definitions, WAC Guidelines, Ecology guidance, and industry standards. His findings concluded that the mitigation provisions are, "confusing, open to multiple interpretations, and an overall poor basis for the consistency and predictability needed for making vital mitigation decisions as part of a shoreline permit." He further concluded that, "these problems are so pervasive that the mitigation program, as written, is unworkable in its present form." Mr. Grette, in addition to constructive criticisms, includes recommendations for improvement in his analysis. We urge the City to consider Mr. Grette's input.

2. Dredging regulations:

We previously provided written comments about our concerns with the proposed regulations related to dredging and also met with City staff regarding this issue. However, the second draft of the SMP retained language that could be construed to limit navigational dredging to only support "existing" uses, and omits the language in the state regulations that makes it clear that new dredging can be considered if it incorporates impact mitigation and adheres to the NNL standard. Based on direct guidance from Ecology Shoreland's staff, we propose that the word "existing" be deleted from the present version of SMC23.60.182(C) and that the following language be added:

"The location, design, construction and management of new development, including any new and maintenance dredging that may be needed to support it, shall be guided by rigorous application of the mitigation sequence."

3. Exceptions within the UH environment to allow existing uses at Piers 66 and 69:

A significant shortfall in the draft SMP lies within the Urban Harbor front Environmental Designation (UH) for Piers 66 and 69. Both these piers are multi use passenger facilities that have brought great urban vitality to an area of our shoreline long neglected and dilapidated. The draft SMP does not sufficiently allow for the existing uses occurring at these facilities. Fortunately, language provided in proposed SMC 23.60.442 could be altered slightly to alleviate this situation (please see attached matrix). Our recommendation is to extend the exceptions for Colman Dock to Piers 66 and 69 as well and to add an exemption for "conference center and event spaces."

4. Public Access Requirements:

The current draft SMP has added new requirements that public access be provided on all publicly owned shoreline "lots." (SMC 23.60.164(B)). This requirement exceeds the WAC Guideline's direction that the SMP "address" public access on publicly owned property. See WAC 173-26-221(4)(d)(i). It appears that the proposed SMP requires that all Port public access and plans be reviewed for the exceptions, including the potential for payments-in-lieu or possible additional public access requirements for every "lot" (noting that most Port properties include numerous "lots"). As explained above, this requirement will not likely meet regulatory goals and may result in a flood of boundary line adjustment applications.

Per WAC Guidelines 173-26-221(4)(d)(iv), "Where there is an irreconcilable conflicts between water-dependent shoreline uses or physical public access and maintenance of views from adjacent properties, the water-dependent uses and physical public access shall have priority, unless there is a compelling reason to the contrary." This concept should be explicitly stated in proposed SMC 23.60.164.B.

5. Expansion of existing structures defined as nonconforming:

The SMP will convert many currently allowed uses into nonconforming developments, uses and modifications in the shoreline district. Converting allowed uses into non-conforming uses increases the costs, level of proof and submittal requirements for applicants, while also having the unintended consequence of decreasing public and private investment in shoreline redevelopment. In the marine industrial shoreline environment facilities must be upgraded to meet customers' needs. When existing marine industrial facilities are upgraded, the Port typically makes environmental improvements as part of the permitting process. If these facilities cannot be upgraded because the City has deemed them to be non-conforming, the property will likely lie fallow resulting in a lost opportunity to create environmental enhancements. Requiring new mitigation through the purchase of "habitat units" for maintaining and/or upgrading nonconforming uses creates an unnecessary disincentive for shoreline redevelopment. Such a policy also disconnects specific adverse impacts from mitigation measures and is counter to statutory and regulatory guidance for substantive authority, conditioning of government actions, and mitigation in the State Environmental Policy Act (SEPA). See RCW 43.21C.060; WAC 197-11-660. Moreover, this approach would constitute a "fee" that is not currently defined in the City's fee ordinances.

A more flexible approach that applies traditional mitigation sequencing concepts, instead of expanding nonconformance and imposing punitive fees, could be used to address new or ongoing environmental impacts (where they exist), improve aesthetics and function, and retain Seattle's treasured maritime character in a manner that is sensitive to site and project-specific conditions. We would further encourage DPD staff to review Shoreline Plans from other port-city jurisdictions (Bellingham, Anacortes, Tacoma, Olympia) to ascertain the policy approach those jurisdictions have taken on this subject. The Port is concerned that the City's approach to nonconformance in the draft SMP may place Seattle's water dependent businesses at a competitive disadvantage to other Puget Sound businesses in relation to ease of performing major maintenance or upgrading facilities.

6. Lack of a Restoration Plan:

We are discouraged that, this late in the process of updating the SMP, the City has yet to release its Shoreline Restoration Plan for public review and comment. The proposed draft code (SMC 23.60.001) defines the Restoration Plan as one of the major elements of the SMP. As noted in the draft code, the Plan is a required element of the SMP development process under the state regulations. WAC 173-26-201(2)(f) mandates that the SMP shall include goals, policies and actions for restoration of impaired shoreline ecological functions. The City has indicated that a draft Restoration Plan document exists, and has repeatedly promised that the Restoration Plan will be released prior to SMP adoption. It is imperative that the City not withhold this important element of the SMP from public review and comment. All interested stakeholders in the SMP process need to understand how the Restoration Plan integrates with the goals and policies of the proposed SMP. Ecology recommends stakeholder involvement in the development of mechanisms and strategies for implementation of the Restoration Plan. To date, we are not aware of any City action related to this recommendation. We request this document, as well as updated shoreline environment designation maps, be released prior to any further steps in adopting the SMP.

Likewise, the SMP misses the opportunity to adopt and incorporate Port of Seattle plans (the 2007 Seaport Shoreline Plan and the 2009 Lower Duwamish Habitat Restoration Plan) that were developed with the express intent of assisting the City to accomplish its shoreline management planning requirements for identifying habitat restoration and public access sites. Consideration of such Port plans is encouraged by the state Guidelines. See WAC 173-26201(3)(d)(ii).

7. Shoreline Setback in the Urban Maritime Environmental Designation:

Based on a conversation held on November 14th between Port and DPD staff, we understand the shoreline setback for the UM Environment will be reduced from 40 feet to 35 feet (23.60.510A). We appreciate this change.

8. Setback requirements for Shilshole Bay Marina (UC Environment):

The Port is concerned that a 35' setback in the UC environment places restrictions on planned developments for Shilshole Bay Marina (SBM) without corresponding ecological benefits. Through substantial investments in the reconfiguration of docks and enhancement of near-shore areas during the redevelopment of the marina, the Port worked to maximize ecological values along this saltwater shoreline and also accommodate a broad range of water-dependent and water-related public and private uses. SBM differs from other potentially affected properties in UC environments in that its shoreline is 100% publicly accessible; it is in the salt-water environment; and the in-water and storm water infrastructure has been redeveloped such that minimal if any ecological function would be enhanced by the required setback. In the attached matrix, we propose alternative language related to this issue.

9. Editorial concerns:

Generally, the SMP continues to include unclear language with the serious potential for unintended regulatory and policy consequences:

- Under proposed SMC 23.60.062(B), the SMP appears to impermissibly expand its jurisdictional reach over shoreline "developments" (defined in RCW 90.58.030(3)(a)) to include certain "activities." Adding a broad range of "activities" that may not necessarily qualify as "development" to the jurisdictional scope of the SMP will increase administrative burdens on both applicants and the City without achieving any significant shoreline management objective or public good. Similarly, SMC 23.60.158 (B) references "land or water disturbing activity" instead of "development, shoreline modification or use." We suggest the City review the use of the words "activity" and "activities" as they are used throughout the document to assure consistency with the definition of "development" under the SMA.
- The draft SMP convolutes nuanced terms of art related to mitigation which creates significant ambiguity as to when various types of mitigation might be required. For example, the SMP uses "mitigation," "mitigation sequencing," and "compensatory mitigation" interchangeably, which creates ambiguity in how, when, or if mitigation sequencing is applied. Further, ambiguity is created for when compensatory habitat mitigation would be required, as opposed to other types of impact mitigation that might be imposed under SEPA substantive authority. We recommend DPD carefully review usage of the term "mitigation" so that mitigation requirements are clear for both DPD staff and applicants.
- Regulations that are clearly intended to apply to a "facility" or "site" are applied instead to all "lots." Use of "lots" instead of "facility" or "site" might result in insufficient regulation; over-regulation and/or will likely generate many applications for boundary line adjustments or plat amendments.
- Consistent with our prior comments, numerous sections of the draft code remain unclear in their intent and their impact on the regulated community. We have noted the sections in the attached matrix that we infer may affect Port properties or operations. We urge the City to clarify and streamline the code language.



Paul Meyer
Port of Seattle
P.O. Box 1209
Seattle, Washington 98111

December 7, 2011

Re: Grette Comments on Seattle SMP Update Mitigation Issues

Dear Paul,

I have completed my review, requested by the Port of Seattle, of the habitat mitigation elements of the October 2011 draft of the City of Seattle's Shoreline Master Program Update (SMP update). My review is focused on the clarity and predictability for users, compatibility with other permit programs, and ultimately how the updated program may affect progress on ecological restoration.

I am a fisheries biologist with over 25 years experience permitting shoreline actions along and in Puget Sound for private and public clients including the ports of Seattle and Tacoma. I have designed and implemented numerous large and small mitigation actions associated with development and sediment cleanup projects under a range of local, state, and federal permit programs. This experience as a user of mitigation programs has provided me with a unique perspective on the efficiency of regulations for meeting the important objective of achieving no net loss of ecological functions. My review is focused on sections 23.60.027 and 23.60.158 of the SMP update and those sections that reference them.

I have a number of serious concerns about the code in the October 2011 draft including:

- Clarity and Predictability
- Undefined Compensatory Mitigation Requirements and Goals
- Requiring Mitigation for Non-ecological Issues
- Duplication of Mitigation Requirements
- Does this SMP Update Support Ecological Restoration?

My concerns on these points are summarized below. Additional details supporting these conclusions are presented in Attachment A.

My greatest concern with the proposed code is that it is not written or organized clearly. This makes it confusing, open to multiple interpretations, and a poor basis for the consistency and predictability needed for making vital mitigation decisions as part of shoreline permits. Essentially, these problems are so pervasive that the mitigation program is unworkable in its present form.

The requirements and costs for providing compensatory mitigation actions to comply with the SMP update are undefined because key elements are not available for review. First, no Restoration Plan has been presented. Therefore, future permit applicants have no idea of the City's goals for ecological restoration in terms of habitat types or magnitude of ecological improvement.

Also, the City's Shoreline Habitat Unit and Measuring Program (Section 23.60.027) has been deferred until after review and approval of the SMP update. That program will define the relationship between project impacts and mitigation requirements. Therefore, without that program or the Restoration Plan available, even with over 25 years experience with aquatic habitat mitigation projects and programs, I cannot predict for the Port or other clients the cost implications of the City's new mitigation program.

The proposed code requires ecological mitigation for both impacts to ecological functions and to address other completely unrelated issues. An example is the requirement to use "habitat units" to offset an unrelated policy issue. The translation between ecological functions and non-ecological issues is the ultimate apples and oranges comparison. I have never seen anything like this in a mitigation program under other local, state, or federal law. This requirement immediately entails a mitigation standard much greater than no net loss of ecological function because the current nonconforming use exists (current habitat conditions define the ecological baseline) and the classification of the use (conforming or nonconforming) has no predictable bearing on ecological function. It is inappropriate to have the technical issues of no net loss of ecological function used as leverage for a non-ecological policy issue.

As I read the mitigation sections I am struck by the implicit assumption that there are few existing regulations or mitigation requirements for aquatic habitat (i.e., the areas located below Ordinary High Water). However, below Ordinary High Water the aquatic habitat within the City of Seattle is the most regulated habitat in both the state and the nation based on other state and federal laws. It is vital that the SMP update takes seriously the charge to avoid duplication in mitigation requirements from other state and federal permit programs.

I have been convinced of the importance of redevelopment in driving small and large scale ecological improvement by my experience working on aquatic habitat issues in the urban environment. Because the existing habitat is degraded or at least substantially altered from natural conditions an excessive focus on habitat protection does not allow the typical benefits of redevelopment to be realized. Redevelopment leads to a myriad of habitat benefits that are required by other regulatory programs (e.g., stormwater improvement) or a result of changes in typical building materials (e.g., removal of creosote laden pilings and installation of steel pilings) that have ecological benefits. Redevelopment is a key means to yield improvement. The challenge is to craft the code in the SMP update so that it provides both the incentives and flexibility to allow redevelopment and its related ecological improvements to occur regularly. In

my opinion, the current draft of the code will hinder redevelopment and its related ecological benefits.

I have been assisting clients in complying with mitigation requirements for over 25 years and I would not be able to determine the magnitude or range of mitigation actions that may be appropriate for offsetting impacts to habitat under the proposed code. This SMP update is nearly at the approval stage and does not contain enough information for me to advise the Port or other clients on the implications of their current project plans nor offer guidance for their future plans.

Sincerely,

A handwritten signature in black ink, appearing to read "Glenn B. Grette", with a long horizontal line extending to the right.

Glenn B. Grette
Principal

cc: Jon Sloan

enclosure – Attachment A

ATTACHMENT A

Clarity and Predictability

My greatest concern with the proposed code is that it is not written or organized clearly. The code has severe problems with consistency of terms, syntax, organization, and overlapping direction in different sections. This makes it confusing, open to multiple interpretations, and a poor basis for the consistency and predictability needed by the City and applicants for making vital mitigation decisions as part of shoreline permits and future planning. Section 23.60.158 A. sets the tone for the mitigation approach and is a good example of the confusion that can result from what appears to be a simple straight forward section.

Section 23.60.158 Standards for mitigation sequencing

- A. 1. *Mitigation is required for the loss of ecological functions resulting from:*
 - a. *new or replacement development, shoreline modifications or uses,*
 - b. *maintaining, repairing or altering existing development, shoreline modification, or uses that creates new adverse impacts to ecological functions, or*
 - c. *substantially improving, replacing or rebuilding nonconforming uses or structures.*
2. *Mitigation is intended to prevent net loss of ecological functions due to, but not limited to, location, design, construction and management of the development, shoreline modification, or use.*
3. *Mitigation shall achieve the equivalent ecologic functions, as determined by the Director.*

This is a key section for defining the City's approach to mitigation. However, the first sentence confuses the question of mitigation. Much of the problem is due to the imprecise use of the word "mitigation". To be consistent with federal and state permit programs, including SMP update guidance; "mitigation" has a broad meaning encompassing avoidance and minimization of impacts to ecological functions, as well as compensation for losses of ecological functions. The problem starts in A. 1: "*Mitigation is required for the loss of ecological functions resulting from:*" I believe the word "mitigation" is being used in the sense of "compensatory mitigation" which means replacing losses of function. Under my interpretation of the definition, the subject of this section ("mitigation sequencing") with its multiple facets for achieving no net loss of ecological functions has been bypassed to apparently require mitigation in the compensatory sense of the word. In effect, the classes of activities listed in 23.60.158 A. 1. a-c. require compensatory mitigation regardless of whether they could be reconfigured to have no net loss of ecological functions. With a few word changes Section 23.60.158 A. could be redirected to be referencing that mitigation sequencing is required to achieve no net loss of ecological functions consistent with SMP update guidance. Alternately, Section 23.60.158 A. could be reworded and placed after Section 23.60.158 C., which actually lays out the subject of the chapter (mitigation sequencing), to clarify situations where mitigation in the compensatory sense of the word is *likely* to be needed.

Moving to Section 23.60.158 A. 2., “mitigation” now appears to be used in the broad sense encompassing avoidance, minimization or compensation of impacts to ecological functions. However, the appropriate term here would appear to be “mitigation sequencing” rather than “mitigation” to convey how no net loss of ecological functions may be achieved. The meaning of mitigation appears to shift in Section 23.60.158 A. 3. back to “compensatory mitigation”.

In final review, Section 23.60.158 A. creates confusion and essentially contradicts Section 23.60.158 C. which lays out sequencing as specified in the SMPs update guidance. This creates great uncertainty about future application of the code and nearly ensures inconsistent permit decisions regarding mitigation.

The problems with Section 23.60.158 A. are not unique with regard to confusing the issue of how mitigation sequencing is applied to achieve no net loss of ecological function. Section 23.60.158 B. suffers from the same ambiguity with regard to the meaning of “mitigation”.

B. Regulations set out in this Chapter 23.60 to mitigate impacts to ecological functions, including regulations for environmentally critical areas, are minimum requirements to mitigate impacts to ecological functions and are to be supplemented by using mitigation sequencing in this Section 23.60.158 to achieve no net loss of ecological functions. Mitigation under this Section is not intended to duplicate mitigation for the same ecological functions that is required under other City regulations or under state and federal permits. The permit conditions most protective of the ecological functions shall be enforced.

However, in this case “mitigation” with all its vague meanings is now outsourced to a number of sections of the code which similarly vacillate in meaning.

Section 23.60.158 B. raises additional questions as it references regulations that are minimum requirements for mitigation. If mitigation sequencing is the functional approach that is to be used for achieving no net loss, how can the requirements specified in other sections be concluded to be part of the minimum mitigation before an analysis of the potential impacts that would normally be considered as part of mitigation sequencing? Those requirements may or may not need to be met to achieve no net loss of ecological function and may even be required on their own for other reasons. The key is that Section 23.60.158 B. has the effect of bringing requirements forward as being vital for achieving no net loss of ecological function that do not warrant that level of consideration. This allows a whole list of requirements to be justified as essential based on no net loss of ecological functions even if they lack a true mechanistic link to ecological functions. Their importance is based on being referenced as “minimum requirements to mitigate impacts to ecological functions” in Section 23.60.158 B. This approach bypasses mitigation sequencing and can justify regulations and limitation on applicant’s proposals that have little or no bearing on protecting ecological functions.

Overall, the mitigation sections of the SMP update require extensive editing and reorganization to be usable. Terms need to be clarified and used carefully and the mitigation approach/requirements should be consolidated within Section 23.60.158 with mitigation sequencing clearly presented as the organizing principle. Currently, mitigation language and requirements are included in multiple sections that will lead to confusion. Further, many of the sections specify differing information requirements to support an application. This organization

will lead to cumbersome and costly permit applications and review processes and inconsistent permit decisions.

Undefined Compensatory Mitigation Requirements and Goals

The requirements and costs for providing compensatory mitigation actions to comply with the SMP update are undefined because key elements are not available for review. First, no Restoration Plan has been presented. Therefore, future permit applicants have no idea of the City's goals for ecological restoration in terms of habitat types or magnitude of ecological improvement. The focus of the Restoration Plan will influence the cost of complying with the mitigation requirements. It will also highlight overlapping proposals at the limited physical sites where restoration/mitigation might occur in the urban environment. In a developed urban area with substantial existing priority water-dependent and water-related uses, ecological restoration opportunities are always limited and in my experience are very expensive. The City's Restoration Plan will be a guide for how to provide acceptable compensatory mitigation. This plan will be one of several plans and initiatives that address restoration of aquatic habitats along the City's shorelines. The City's Restoration Plan needs robust review in the context of other planning efforts to be a valuable component of ecological restoration rather than an impediment to coordinated action.

Also, the City's Shoreline Habitat Unit and Measuring Program (Section 23.60.027) has been deferred until after review and approval of the SMP update. That program will define the relationship between project impacts and mitigation requirements. Therefore, without that program or the Restoration Plan available, even with over 25 years experience with aquatic habitat mitigation projects and programs, I cannot predict for my client the cost implications of the City's new mitigation program.

Further, there are emerging federal approaches for evaluating the ecological impacts of a development and the benefits that would result from a mitigation action for aquatic habitat. Currently, the USACE Seattle District and Portland District are beginning to use Habitat Equivalency Analysis (HEA) as a means to evaluate impacts and mitigation. This tool was developed to evaluate habitat restoration benefits as part of Natural Resource Damage (NRD) claims due to releases of contaminants at CERCLA (Superfund) sites. The City should not develop their own system but should build on such approaches so that as much overlap as possible occurs amongst the "currency" used to evaluate impacts and mitigation in the different state and regulatory programs. This will help ensure that any in-lieu-fee mitigation program that is developed is compatible with multiple permit programs. This will reinforce compliance with the SMP update guidance that emphasizes avoidance of duplicative mitigation requirements with other state and federal permits.

Requiring Mitigation for Non-ecological Issues

The ecological mitigation program has a well-defined target based on the SMP update guidance. This is to ensure that developments yield no net loss of ecological function as measured from the current baseline habitat condition. However, the proposed code requires ecological mitigation for both impacts to ecological functions and to address other completely unrelated issues. For example, Section 23.60.158 A. 1. c. addresses the non-ecological issue of nonconforming uses

that cannot be directly tied to loss of an ecological function or an appropriate mitigation response. I also reviewed Section 23.60.122 D. 2. which states:

2. If the Director determines that a nonconforming use in a structure over water and/or within the required setback may be changed, the Director shall require the applicant to provide twenty four habitat units per square foot of over water coverage, plus two habitat units for additional floor area above the over water portion, and 10 habitat units per square foot of developmental coverage located with (sic) the shoreline setback.

Clearly the code envisions the application of compensatory ecological mitigation to the non-ecological issue of nonconforming uses. Therefore, this is not an example of imprecise use of the term mitigation. The code goes beyond the mitigation requirements necessary for an SMP update and incorporates technically unsupportable mitigation and methods.

In addition, Section 23.60.122 D. 2. demonstrates the uncertainty in the future application of the code because it has already established a habitat unit equivalency for a non-ecological issue (nonconforming uses). This situation increases my concern with deferring review of the habitat measuring system described in Section 20.63.027. Amazingly, the City has not yet developed its habitat measuring system or defined the "habitat units" specified in 20.63.027 (which is a very daunting technical challenge even to address ecological functions); meanwhile the proposed code already specifies how these habitat units translate to non-ecological issues.

The translation between ecological functions and non-ecological issues is the ultimate apples and oranges comparison. I have never seen anything like this in a mitigation program under other local, state, or federal law. This requirement immediately entails a mitigation standard much greater than no net loss of ecological function because the current nonconforming use exists (current habitat conditions define the ecological baseline) and the classification of the use (conforming or nonconforming) has no predictable bearing on ecological function. It is inappropriate to have the technical issues of no net loss of ecological function used as leverage for a non-ecological policy issue.

Duplication of mitigation requirements

As I read the mitigation sections I am struck by the implicit assumption that there are few existing regulations or mitigation requirements for aquatic habitat (i.e., the areas located below Ordinary High Water). State and federal agencies with specific mandates to protect and recover aquatic species and their habitat have been dealing with these issues for over thirty years. These agencies have broad regulatory reach and extensive staff with specialized expertise in reviewing and permitting in-water development and their mitigation actions. Their scrutiny has increased in response to the listing of Chinook salmon under the Endangered Species Act (ESA).

Ecology's SMP update guidance recognizes that local jurisdictions are late comers to the regulation of aquatic habitat. Specifically, Ecology guidance is that mitigation requirements under the SMP Updates are not to duplicate requirements under state and federal permits. It is appropriate for the City to figure out how it fits into the cumulative regulatory and permit process in shoreline areas so that shoreline management is comprehensive. The SMP was and is still the primary regulatory process for areas located *above* Ordinary High Water and this is

appropriate focus area for the SMP Update. However, *below* Ordinary High Water the aquatic habitat within the City of Seattle is the most regulated habitat in the state.

The U.S. Army Corps of Engineers (USACE), Environmental Protection Agency (EPA) and Ecology can require extensive habitat mitigation pursuant to Sections 404 and 401 of the Clean Water Act. NOAA Fisheries and the U.S. Fish and Wildlife Service must approve all developments in the Duwamish River, Puget Sound, Ship Canal, Lake Union and Lake Washington shorelines based on the responsibilities under the ESA. The aquatic habitat in these areas are all designated “critical habitat” for ESA-listed salmon species and are given the highest level of protection and project review of any habitat in the United States. Additional, protection is afforded to aquatic habitat by Washington Department of Fish and Wildlife (WDFW) through the Hydraulic Code. Complying with these regulations is difficult, costly and time consuming without adding additional mitigation requirements with additional and possibly conflicting requirements that are administered by an understaffed City department.

Habitat mitigation requirements for federal permits in Washington State (primarily Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act) are increasingly driven by the need to support recovery of ESA-listed species. For Puget Sound we can expect additional aquatic species to be listed under the ESA; however, the focus of habitat requirements has remained on the needs of juvenile salmonids. This focus is expected to continue. Mitigation actions that will meaningfully contribute to recovery of salmonids are increasingly favored over approaches that force habitat actions “on-site” while providing little benefit. The Seattle District USACE is focusing on consolidating mitigation where it has ecological value.

A parallel movement in mitigation is the federal interest in mitigation banks, in-lieu-fee mitigation and other means to locate mitigation within the watershed where it makes ecological sense. The USACE’s 2008 mitigation guidance emphasizes this approach for wetlands and that mitigation guidance is applicable to the aquatic habitats on Seattle’s waterfront. Overall, the dominant direction for federal mitigation is towards flexibility of actions that provide benefits, rather than prescriptions.

Another important aspect of federal permitting is that the USACE has been requesting more mitigation than merely no net loss for aquatic habitat impacts. This is occurring due to the federal government’s affirmative responsibility to contribute to recovery of ESA-listed species. This means that federal mitigation requirements can be pointed to as being in excess of a no net loss standard. This combined with the extensive definition of “critical habitat” for ESA-listed salmonids (essentially all wetted habitat) means that federally defined mitigation requirements are extensive. These requirements should exceed City mitigation requirements in nearly all cases involving aquatic habitat and should be given due consideration as meeting the City’s obligations under the Shoreline Management Act.

Because most of the shoreline projects that would be subject to the mitigation requirements under the new code would also be subject to federal permits and mitigation requirements, it is vital that the City’s codes be parallel with the emerging direction in federal mitigation requirements and encourage flexibility. This flexibility should include ensuring that any in-lieu-fee mitigation proposal developed under Section 23.60.027 defers to federal guidance and requirements so that it is compatible with that program.

Does this SMP Update Support Ecological Restoration?

I have been convinced of the importance of redevelopment in driving small and large scale ecological improvement by my experience working on aquatic habitat issues in the urban environment. This is because the existing habitat conditions are poor and it is relatively easy to provide improvements. The simple fact is that redevelopment has been a major driver for ecological improvement that has occurred in urban areas of Puget Sound. The challenge in these areas is that opportunities are limited and that vital human uses will necessarily occur on the shoreline. Redevelopment has spurred habitat mitigation, sediment cleanup, and removal of contaminants in the landscape.

Because the existing habitat is degraded or at least substantially altered from natural conditions, an excessive focus on habitat protection does not allow the typical benefits of redevelopment to be realized. The SMP update guidelines do not require a shift to restoring the shoreline to pristine conditions. The requirement is for no net loss of ecological function. Redevelopment leads to a myriad of habitat benefits that are required by other regulatory programs (e.g., stormwater improvement) or a result of changes in typical building materials (e.g., removal of creosote laden pilings and installation of steel pilings) that have ecological benefits. Redevelopment is a key means to yield improvement. The challenge is to craft the code in the SMP update so that it provides both the incentives and flexibility to allow redevelopment and its related ecological improvements to occur regularly. In my opinion, the current draft of the code will hinder redevelopment and its related ecological benefits.

In my experience the means to ensure that redevelopment and its benefits continue are to:

1. Be compatible with other state and federal regulatory programs as described above.
2. Limit prescriptive solutions to shoreline challenges.

Overly prescriptive responses to mitigation (whether they entail impact avoidance, minimization, or compensation) redirects the design focus for a project from the big picture as to how it may provide benefits to a set of disconnected micro issues that must be navigated for approval. Over the last 30 years a strong ethic to do the right thing on the shoreline and in the aquatic habitat has developed. But the overly prescriptive codes hamper design creativity to address the unique issues and opportunities that arise on individual project sites.

3. Avoid requiring extraneous analysis.

Different sections of the code require specific types of analysis to be conducted as part of permit review. These sections are often pertinent to activities that have substantial federal and state permit involvement. The specified analysis may not be required for all these types of activities under federal and state permits. The federal and state programs and staff recognize the varying degree of information that is necessary to make permit decisions. The City's code should not require analysis that is in excess of that which is required for federal or state permits to address the same technical issue below ordinary high water. The federal and state agencies have more experience and expertise in evaluating those issues than the City and can be relied on to exceed the level of scrutiny necessary for the City to meet its obligations under the Shoreline Management Act.

Attachment C: Matrix containing comments by section with suggested alternative language

Draft SMP Section	SMP Draft Language with highlight	Port comments	Suggested edit/action
<p>SMC 23.60.001 Definition of the Seattle Shoreline Master Program</p>	<p>The Seattle Shoreline Master Program (Master Program) is composed of the Seattle Shoreline Master Program Regulations, the Shoreline Goals and Policies in the Seattle Comprehensive Plan and the Shoreline Restoration and Enhancement Plan required by WAC 173-26-201(2)(f).</p>	<p>Please see main comment letter and attachments. An integral element of the SMP, the Shoreline Restoration and Enhancement Plan has not been released in any form for review. Even though “non-regulatory”, the restoration plan could establish policies and goals for city-wide restoration, as well as identify specific areas as restoration sites. WAC 173-26-201(f) mandates that the SMP shall include goals, policies and actions for restoration of impaired shoreline ecological functions.</p>	<p>Release the draft Restoration Plan immediately for public review as part of the SMP public and stakeholder process.</p>
<p>SMC 23.60.027 Ecological Mitigation and Measuring Program</p>	<p>Entire section</p>	<p>Please see main comment letter and attachments.</p> <p>Eliminate reference to “best available science” which is a GMA term, and inappropriate within the SMP.</p>	<p>Substitute the following language in Sections A and B:</p> <p>23.60.027 Ecological Mitigation and Measuring Program</p> <p>A. To support compliance with general development standards (SMC 23.60.152), mitigation sequencing requirements (SMC 23.60.158), and the environmental protection objectives of this Chapter, the Director is authorized to develop and implement a program that will identify practical methods for measuring:</p> <ol style="list-style-type: none"> 1. baseline ecological conditions in proposed project areas; 2. the type and extent of potential impacts to ecological functions resulting from a proposed development, shoreline modification and/or shoreline use, relative to baseline ecological conditions; 3. the type and extent of compensatory mitigation that may be required to offset a net loss of ecological functions; and, 4. the type and extent of ecological functions that are created, restored or enhanced through a proposed compensatory mitigation action.

			<p>B. To the maximum extent feasible, ecological measurement methods should rely on and/or be consistent with state and federal methods for measuring and evaluating ecological functions;</p> <p>C. If compensatory mitigation actions have been required to offset a net loss of ecological functions pursuant to SMC 23.60.152.A and 23.60.158, the Director is authorized to allow the payment of fees in-lieu of an applicant-constructed compensatory mitigation project. The "in-lieu fee" (ILF) option shall be developed and operated consistent with the federal standards for ILF programs enumerated in 33 CFR 332. All fee payments shall be used by the Director for ecological restoration or enhancement in the Shoreline District.</p> <p>Section E should be revised as follows:</p> <p>E. Mitigation and Monitoring Plans</p> <p>1. Mitigation and Monitoring Plans may be required by the Director to:</p> <ol style="list-style-type: none"> a. evaluate probable affects of proposed shoreline development, modification or use on baseline ecological conditions; b. specify design, construction, monitoring and maintenance standards for compensatory mitigation projects. <p>2. The required level of detail in Mitigation and Monitoring Plans shall be determined by the Director after considering the location, size and type of the proposed shoreline development, modification, use and/or compensatory mitigation project.</p> <p>3. The applicant may combine Mitigation and Monitoring Plans with any related studies required by other agencies. The Mitigation and Monitoring Plans shall be submitted to those agencies as part of their required regulatory review and permitting process.</p>

<p>2 3.60.062.B Procedures for determining consistency with the chapter and for obtaining exemptions from Shoreline Development Permit requirements</p>	<p>B. A determination that either a development exempt from the requirement for a Shoreline Substantial Development Permit or an activity or use <i>that is not development</i> is consistent with the regulations of this chapter, as required by Section 23.60.012 shall be made by the Director as follows:</p>	<p>Please see main comment letter. Inclusion of "activity or a use that is not "development" substantially expands the range of actions that might require permit and/or exemption review by the city. This is not consistent with the well established concept of what constitutes a regulated "development" under the SMA. Does the City intend to require that an "activity" such as the Fall Fishermen's Festival (which is not a "development" under the SMA) would require a formal request for a letter of exemption? What about lawn mowing and sweeping? What is the intent of such a broadening of DPD oversight, when it is not consistent with the RCW or WAC definitions of "development"? The RCW and the relevant WACs are clear here in multiple instances about what constitutes a shoreline development: <i>RCW 90.58.030 (3)(a); WAC 173-27-030(5)</i>: "Development" means a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level;" The SMP guidelines are very clear that the intent is to "...provide for the management of all development and uses within its jurisdiction..." WAC 173-26-191(2)(a)(iii)(A). We are not aware of an Ecology directive to regulate "an activity or use that is not development" nor are we aware of any other local jurisdiction that has asserted this.</p>	<p>Delete "...that is not development" here. Additionally, we ask that the City review all instances in the code where the word "activity" is used, to assure that it is consistent with well-established concepts of "development" that is regulated under the SMA and related regulations</p>
<p>23.60.090 (A)(1) Identification of principal and accessory uses</p>	<p>A. In all shoreline environments all uses are prohibited over water as a principal or accessory use unless the use is allowed or allowed as a special use, a shoreline conditional use or a Council conditional use in the shoreline environment where the use is proposed and the use is: 1. Boat moorage, off-loading goods from boats, dry-docks, swimming platforms, uses on vessels authorized under Section 23.60.214, and other use components that by their nature require an over water location to operate;</p>	<p>It's unclear whether "off-loading goods from boats" includes marine cargo terminals as an allowed over-water use.</p>	<p>The section should be clarified to state that water-dependent marine industrial uses are allowed over-water uses.</p>

23.60.090 (C)	C. An accessory use that is prohibited as a principal use in a particular shoreline environment can be allowed on dry land if incidental to, and necessary for, the operation of the principal use. The same process used to authorize the principal use(s) shall be used to authorize a prohibited accessory uses.	The proposed new language would limit accessory uses to locating on dry land. The proposed language would potentially ban parking (or make existing parking non-conforming) at Pier 66 and Pier 69.	Accessory uses should be allowed over the water for certain water-dependent and water-related uses for which there is no alternative location, and is required by zoning regulations and/or the ADA.
23.60.157B Essential public facilities	B. Essential public facilities are required to comply with development standards in this chapter for each component of the essential public facility and to mitigate all adverse impacts to the ecological functions of shorelines and critical areas by applying mitigation sequencing set forth in Section 23.60...	The uses of this phrase "mitigate all adverse effects" (and repeated elsewhere within the draft SMP are an unreasonable expansion of scope of Master Program. The goal of the plan is to foster reasonable uses, protect ecological functions, and while protecting the public right of navigation and corollary uses. (See WAC 173-260176 (3)). To set a standard of mitigation of all adverse effects to ecological functions does not a) recognize the state's goal to achieve no net ecological loss, and b) does not explicitly recognize a distinction between existing development vs. new development .	Amend as follows: D. The proposed use can prevent, minimize or replace the loss of ecological functions that may result from shoreline development, shoreline modifications and/or shoreline uses such that there is no net ecological loss associated with the proposed use. We repeat our request for the removal of references to a requirement for mitigation of "all adverse impacts" in the code.
SMC 23.60.090.B. C. and D. Identification of principal uses.	B. ((Unless otherwise stated in this chapter all principal uses on waterfront lots shall be water-dependent, water-related or non-water-dependent with public access.)) <u>Any principal use allowed, allowed as a special use, allowed as a shoreline conditional use, or as a Council conditional use in a specific shoreline environment may be an accessory use and shall be administered as an allowed use, or as a special use, shoreline conditional use or Council conditional use, using the same process as the principal use.</u>	These sections are vague and ambiguous. These sections appear to redefine all accessory uses as principal uses, and to require the regulation accessory uses as principal uses under the SMP. Would a separate permit approval now be required for accessory uses?	Delete or substantially revise to clarify intent and impact on regulated uses. The language appears to redefine all accessory uses as principal uses, and regulate them identically.
23.60. 152.D	D. All shoreline developments, shoreline modifications and uses shall be located, designed, constructed and managed in a manner that minimizes adverse impacts to surrounding land and water uses and is compatible with the affected area.	Unclear, and appears to expand the SMP jurisdiction to an undefined area.	See our letter comments regarding use of the term "mitigation". We do not agree with the City's perceived need to write multiple and inconsistent concepts of "mitigation" throughout the code. This concept is covered in multiple sections elsewhere in the SMP, and is also already available under SEPA substantive authority. Delete.
SMC 23.60.152. I	I. All ((shoreline developments and uses)) <u>in- and over-water structures shall be ((located and)) designed, located and managed to ((minimize interference with or adverse impacts to beneficial natural shoreline processes such as water circulation, littoral drift, sand movement, erosion and accretion))keep adverse impacts, such as increased salmonid predator habitat and those adverse impacts due to shading, to a minimum.</u>	This requirement is covered elsewhere in the code e.g. in mitigation sequencing and requirements for "no net loss" of shoreline ecological functions.	See our letter comments regarding use of the term "mitigation". We do not agree with the City's perceived need to write multiple and inconsistent concepts of "mitigation" throughout the code. This concept is covered in multiple sections elsewhere in the SMP. Inclusion of multiple sections on the same concept invites confusion and inconsistency. Delete.

<p>SMC 23.60. 158 Standards for Mitigation Sequencing</p>	<p>Entire section as amended.</p>	<p>Please see main comment letter and attachments.</p>	<p>Revise to incorporate the following language:</p> <p>A. Mitigation, as used in this Chapter, is the action taken to prevent, minimize or replace the loss of ecological functions that may result from shoreline development, shoreline modifications and/or shoreline uses. Determinations regarding the type and extent of affected ecological functions shall consider the location, design, materials, construction methods, construction timing, and post-construction operation of the development, modifications and/or uses.</p> <p>B. Application of a mitigation sequence shall be undertaken to prevent net loss of ecological functions pursuant to SMC 23.60.152.A. The mitigation sequence, as required by this Chapter, shall be consistent with the sequence of steps required by the Washington State Environmental Policy Act (WAC 197-11-768) and Clean Water Act (33 U.S.C. 1251).</p>
<p>23.60.164. B. Standards for regulated public access</p>	<p>B. Public Property. Public access shall be provided and maintained on all publicly owned and publicly controlled waterfront lots whether leased to private lessees or not, except if the lot is submerged land that does not abut dry land.</p>	<p>Please see main comment letter. It is not practical for the Port to provide public access on "all publicly owned and publicly controlled lots..." and the WAC exceptions provided for comprehensive public access plans and incompatibilities for reasons of safety, security or environmental impacts need to be incorporated here (See WAC 173-26-221(4)(d)(ii)).</p>	<p>Review use of "lots" here, and substitute "development site" or "property". Per WAC guidelines, in many instances "there are irreconcilable conflicts between WD shoreline uses or physical public access and maintenance of views from adjacent property". In these situations the WD uses have priority "unless there is a compelling reason to the contrary". See WAC 173-26-221(4)(d)(iv). This concept should be explicitly stated in proposed SMC 23.60.164(B).</p>
<p>23.60.166. C</p>	<p>C. Any proposed activity occurring within public rights of way located on state-owned aquatic lands must be authorized by the WA DNR prior to obtaining City of Seattle shoreline permits.</p>	<p>State-owned aquatic lands covered by the Port Management Agreement (PMA) between WA DNR and the Port of Seattle are managed by the Port, and such authorization is already granted by the agreement under RCW 79.90.475.</p>	<p>Amend to read: Any proposed activity occurring within public rights of way located on state-owned aquatic lands must be authorized by the WA DNR prior to obtaining City of Seattle shoreline permits, unless such lands already are covered by a Port Management Agreement, in which case the authorization is not necessary.</p>

<p>23.69.172.B Applicable standards for shoreline modifications.</p>	<p>B. Any proposed shoreline modification located on state-owned aquatic lands must be authorized by the WA DNR prior to obtaining authorization from the Director.</p>	<p>State-owned aquatic lands covered by the Port Management Agreement (PMA) between WA DNR and the Port of Seattle are managed by the Port, and such authorization is already granted by the agreement under RCW 79.90.475.</p>	<p>Amend to read: Any proposed activity occurring within public rights of way located on state-owned aquatic lands must be authorized by the WA DNR prior to obtaining City of Seattle shoreline permits, unless such lands already are covered by a Port Management Agreement, in which case the authorization is not necessary.</p>
<p>SMC 23.60.182C Standards for dredging</p>	<p>C. Dredging for the purpose of establishing, expanding, ((or))relocating or reconfiguring navigation channels and basins is allowed if the applicant demonstrates ((shall)) dredging is necessary for assuring safe and efficient accommodation of existing navigational uses.</p>	<p>See main comment letter.</p> <p>By limiting dredging only to "existing navigational uses" the proposed codes does not comply with the mandate in Ecology SMP rules to accommodate water-dependent uses, and incorporate port plans. See WAC 173-26-201(3)(d)(ii). The City has selectively included only some language from the WAC guidance, leaving out the sentence that refers to, and distinguishes allowed <i>new</i> dredging development within state SMP guidelines regarding dredging. New dredging could be a component of a cleanup and restoration plan as part of a terminal expansion, and this should be allowed under the SMP. It is clear that the state's intent is that dredging of both new channel and existing developments be allowed, as long as it is in a manner which avoids or minimizes significant impacts, and/or these impacts are mitigated to assure NNL. See WAC 173-26-231(3)(f) <i>in its entirety</i>.</p> <p>We would be happy to work with DPD in articulating 'minimum necessary' criteria for dredging to support existing water dependent and water related uses.</p>	<p>Based on direct guidance from Ecology Shorelands staff on this issue, we are proposing to DPD that 'existing' be deleted from the present version of SMC 23.60.182(C), and that the following be added:</p> <p><i>"The location, design, construction and management of new development, including any new and maintenance dredging that may be needed to support it, shall be guided by rigorous application of the mitigation sequence."</i></p>
<p>SMC 23.60.187.C.3 Standards for Piers and Floats</p>	<p>Covered Moorage</p>	<p>The Port is concerned that existing covered moorage within the city are being designated as nonconforming structures. Replacement of existing covered moorage should be allowed consistent with the no net loss standard, and as allowed under proposed WDFW rules for the Hydraulic Project Approval program.</p>	<p>Language should be amended to allow repair and replacement of covered moorage if no new over-water coverage is created, and when mitigation elements such as light transmitting materials and/or interior white paint are incorporated. See proposed WAC 220-110-069.</p>

23.60.187.C.5 Standards for piers and floats and over water structures (mitigation sequencing)	E. In applying mitigation sequencing pursuant to Section 23.60.158, adverse impacts to ecological functions to be addressed include, but are not limited to, shading of habitat and vegetation, adverse impacts to migration corridors, creation of habitat for non-native or abundant predator species, changes to the strength and pattern of wave and water movement, alteration of growing conditions and aquatic productivity, pollution resulting from boat and other uses (including maintenance of facilities and ancillary recreation uses), periodic or continual disturbance by human activity and remaining shading of habitat after installation of grating.	New language has been added in this draft. It would require mitigation for existing impacts. (e.g. "remaining shading" and "periodic or continual disturbance by human activity") which is contrary to well-founded legal concepts established under SEPA and the SMA, and related regulations. "Periodic or continual disturbance by human activity" could be interpreted to include such minor and allowed activities as swimming, wading, or recreational boating.	Delete the newly added phrases: "...changes to the strength and pattern of wave and water movement, alteration of growing conditions and aquatic productivity, pollution resulting from boat and other uses (including maintenance of facilities and ancillary recreation uses), periodic or continual disturbance by human activity and remaining shading of habitat after installation of grating."
23.60.188 E Standards for shoreline stabilization	E. Geologically hazardous areas Shoreline stabilization in geologically hazardous areas are required to: 1. Demonstrate that no alternatives, including relocation or reconstruction of existing structures, are found to be feasible, and less expensive than the proposed stabilization measure, stabilization structures or measures to protect existing primary residential structures; and 2. Meet the provisions of this Section 23.60.187.	This would require the justification of nearly every shoreline stabilization on Port properties, since many lie within liquefaction zones. This is burdensome and unnecessary. Reference to -187 is a typo and should refer to -188.	Shoreline stabilization should be allowed if water dependent/water-related and consistent with Section 188.E.1.
SMC 23.60.188 G Standards for shoreline stabilization.	G. Mitigation sequencing 1. In applying mitigation sequencing for new or replaced hard engineering stabilization pursuant to Section 23.60.158, adverse impacts on ecological functions to be addressed include, but are not limited to, disturbance of underwater substrate, turbidity, loss or disturbance of food, shelter, spawning, and migration habitat, and loss or disturbance of fish runs, biological communities and biodiversity, particularly benthic productivity.	Standards for mitigation are incorporated in the general development standards, and should not be partially excerpted here. This introduces risk of confusion and/or inconsistency.	See our letter comments regarding mitigation. We do not agree with the City's perceived need to write multiple and inconsistent concepts of "mitigation" throughout the code. This concept is covered in multiple sections elsewhere in the SMP. Inclusion of multiple sections on the same concept invites confusion and inconsistency. Delete.
SMC 23.60.190. B3 Vegetation and impervious surface water management	3. In applying mitigation sequencing pursuant to Section 23.60.158, adverse impacts on ecological functions to be addressed include, but are not limited to, disturbance of underwater substrate, turbidity, loss or disturbance of food, shelter, spawning, and migration habitat, and loss or disturbance of fish runs, biological communities and biodiversity, particularly benthic productivity. Note: similar language appears in F2.	Standards for mitigation are incorporated in the general development standards, and should not be partially excerpted here. This introduces risk of confusion and/or inconsistency.	See our main comment letter. Delete B3 and F2. This section is redundant, and this is an opportunity to simplify the code. We do not agree with the City's perceived need to write multiple and inconsistent concepts of "mitigation" throughout the code. This concept is covered in multiple sections elsewhere in the SMP. Inclusion of multiple sections on the same concept invites confusion and inconsistency.
SMC 23.60.200 B.6 Standards for marinas, commercial and recreational	All buildings and open areas used for boat and/or trailer storage are required to be screened with natural existing vegetated buffers or planted landscaped areas except for lots with less than 35-50-ft of upland.	We are concerned about this section for the following reasons: Vegetation around these areas will create security hazards. Criminals will be able to more easily steal from dry moorage vessels because they cannot be easily seen. There is an increased risk to personal safety because criminals can easily hide in the surrounding vegetation.	Delete this section.

		The section does not specify what constitutes a vegetated buffer or planted landscapes. How wide does the bed need to be? Is there a height requirement for the plants? Will the City interpret this differently for different affected parties depending on who is reviewing the ruling?	
SMC 23.60.382 C.4 Uses in the UC Environment	Use tables and explanatory text. Development that includes any of the uses listed in subsection 23.60.382.B.1 shall comply with one of the following conditions or a combination of conditions if the Director determines the combination would achieve a similar offset for siting a use that is not water-dependent or water-related on a waterfront lot: Et seq.	This entire section is extremely confusing as written. It sets up a long chain of interdependent criteria, with unclear linkages. We were unable to discern how existing and potential future developments at Port facilities within the UC would be affected. Re parking: it is our understanding parking at Shilshole Bay Marina is an accessory to the water-dependent use, and that zoning regulations direct the number of spaces. It appears that this section would alter this, and disallow several existing water-related uses. Because a large part of the site is parking, the requirement for 50% of dry-land being water-dependent may have unintended consequences.	Withdraw and revise extensively for clarity. Recommend that statements be in the affirmative (e.g. what is allowed) rather than prohibited with multiple exceptions and caveats. We continue to find this section incomprehensible in its regulatory intent and its impact on Port facilities.
SMC 23.60.390 A Shoreline Setbacks in the UC Environment	A shoreline setback of 35 feet from the OHW mark is required.	The Port is concerned that a 35' setback in the UC environment places restrictions on existing development infrastructure at Shilshole Bay Marina (SBM) without corresponding ecological benefits. SBM differs from other potentially affected properties in UC environments in that its shoreline is 100% publicly accessible; it is in the salt-water environment; and the in-water and stormwater infrastructure has been redeveloped such that minimal if any ecological function would be enhanced by the required setback.	Reduce the setback to 25 feet for facilities where there is substantial public access, moorage greater than 9,000 feet, and the property lies within the salt-water environment.
SMC 23.60.442 B Uses in the UH Environment	B.(1). The following uses are allowed on the dry land portion of waterfront lots: Eating and drinking establishments, entertainment uses, (except adult motion picture theaters and panorams), parks and open <u>space</u> uses, custom and craft work;, museums; and sales and services, general are allowed on dry land and- B(2)_The uses described in B(1) are prohibited on overwater;, except on existing <u>and replaced</u> structures as a shoreline conditional use if: a. the lot depth is less than 35 feet measured from OHW mark to the landward lot line; an unenclosed water enjoyment use is provided in the area between the	It is unclear what the effect of the proposed changes would be on existing restaurants, conference facilities, and commercial uses at Piers 66 and 69. The draft revisions are not clear if such existing uses or possibly the entire pier structures would be categorized as non-conforming.	This creates beneficial exceptions for the Colman Dock in the Urban Harborfront (23.60.442(D)) that should be extended to other passenger terminals, including the Bell Harbor International Conference Center and Cruise Terminal on Pier 66 as well as the Victoria Clipper passenger terminal at Pier 69. The SMP draft should not prohibit existing uses identical to those at Pier 66 and 69 while allowing such uses in the UH environment. Such uses would be subject to DPD review and approval, including permit conditioning. We formally

	building and 15 feet from the seaward end of the pier;		requests that the same accessory uses related to Coleman Dock also be allowed for the water-dependent and water-related uses at Piers 66 and 69, and that "conference center and event spaces" be added here also. Consistent with the allowances for Colman Dock, these facilities are ideally set up to accommodate and serve passenger and/or participant populations that comes and goes in cycles i.e. episodically present in varying numbers. They are also unique for this purpose because they are located at multi-modal transportation hubs; they are well served or in close proximity to taxi stands, buses, trains, light rail, and boats. Meeting/event spaces on the waterfront also bring large number of people to the shoreline environment, where they can take advantage of views and public access opportunities
SMC 23.60.450.B Shoreline and side setbacks in the UH Environment	B. All development allowed in the shoreline setback shall be designed to: <ol style="list-style-type: none"> 1. avoid reducing vegetation coverage; 2. avoid adverse impacts to habitat; 3. minimize disturbance to natural topography; 4. minimize impervious surface; and 5. prevent the need for shoreline stabilization to protect these structures. 6. prioritize meeting the requirements of Step E through planting native vegetation as close to OHW as possible. 	If mitigation sequencing is followed during the review process, these issues would be covered. The standards are vague, and it is unclear what the expectation is, and how it would be determined.	See our main comment letter. Delete this section and refer to overall mitigation sequencing requirements. This section is redundant, and this is an opportunity to simplify the code. We do not agree with the City's perceived need to write multiple and inconsistent concepts of "mitigation" throughout the code. This concept is covered in multiple sections elsewhere in the SMP. Inclusion of multiple sections on the same concept invites confusion and inconsistency. Delete.
Definitions	"Habitat unit"; "Quay"	Please see main comment letter and attachments. The definition of "habitat unit" is not consistent with its use within the proposed code, in that it carries a financial value and this remains undefined within the SMP. "Quay" contains a comment/typo.	
Definitions	Mitigation	Please see our main comment letter and attachments.	