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Enforcement discretion and best practices for enforcement

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Enforcing Ecological Protections -- challenges and opportunities

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Friends of the San Juans

April 6, 2018



Friends *of the*
San Juans

Marine Shoreline Focus

Common Violations

- Fill
- Bulkhead or rockery unpermitted or larger than permitted
- Dock larger or different location than permitted
- Unlicensed mooring buoys
- Tree and shrub cutting
- Repair or maintenance that increases size of structure

Washington Department of Ecology, Enforcing the Shoreline Management Act: Guidance for Local Government Administrators, pub. No. 95-101, 9-10 (revised July 1998)
San Juan Initiative, Protecting Our Place for Nature and People, 18 (Dec. 2008) (>50% of structures (docks and bulkheads) larger than permitted)



Recognized Challenges

Per Ecology shoreline enforcement guidance

- Limited resources
- Competing priorities
- Lack of specialized environmental expertise
- Local political pressure
- Concerns about costly litigation

Limited Resources

- Costly to engage enough enforcement staff to monitor for unpermitted activity
- Difficult to detect whether approved structures built to size and configuration authorized
- Can become very expensive depending on landowner capacity to hire consultants.
- Potentially time-consuming even if enforcement action upheld -- public monitoring, review, sign-off

Competing Priorities

Lack of Specialized Environmental Expertise

- Absence of expertise within jurisdiction
- Lack of coordination of expertise
- Lack of absolute scientific certainty
- Lack of appreciation for magnitude of impact or disagreement with cumulative impacts concerns

Local Political Pressure





Concerns about litigation costs



Other Enforcement Issues

- Complexity or ambiguity in rules
- Shared Jurisdiction
- Agency capture
- Myth of Mitigation
- Political Will

Ambiguity / Complexity

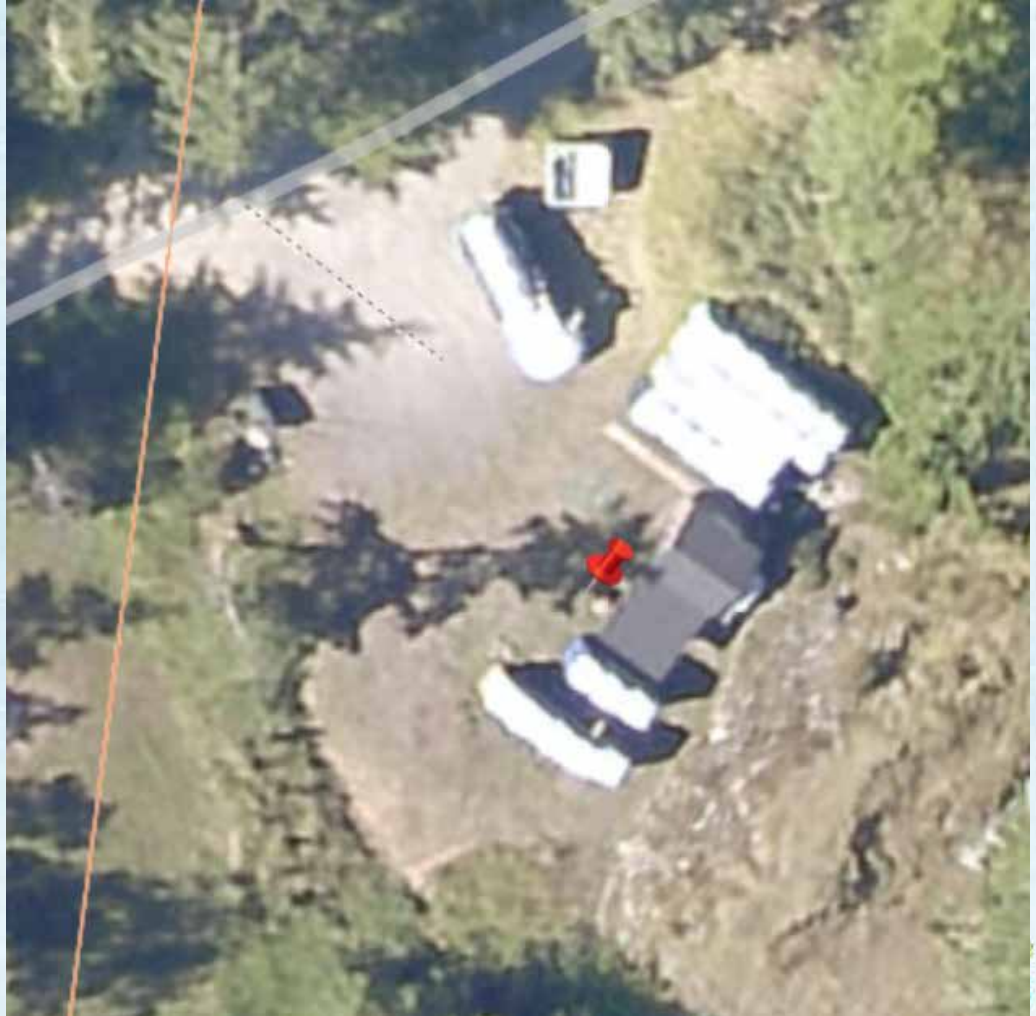
Outdoor storage yard?

Outdoor area used for the storage of equipment, vehicles, and materials. SJCC 18.20.190

or

Cottage enterprise?

an accessory use to the residential use of a dwelling unit, that is a commercial or manufacturing activity conducted in whole or in part in either the resident's single-family dwelling unit or in an accessory building, but is of a scale larger than a home occupation. SJCC 18.20.030; 18.40.190.D).



Shared Jurisdiction



Agency capture

natural outcome of interacting primarily with development community and not those directly impacted?

Hello?



Myth of Mitigation

- Belief that any harm can be undone or cured
- But, requires simple, measurable, interchangeable commodities
- Biodiversity trading schemes rarely successful due to:
 - Complexity of ecological systems
 - Difficulty in measuring component health
 - Not all components interchangeable
 - Power differential between applicants and others

E.g., This



Whatcom County photo

for This?



More out-of-kind mitigation



Payment for unidentified mooring buoy removal

Political Will

What is it?

- “The slipperiest concept in the political lexicon.”

Four main elements:

- sufficient set of decision-makers
- with common understanding of particular problem
- committed to supporting
- commonly perceived, potentially effective policy solution

Political Will?

- Prosecutorial discretion
- No penalty for agency that declines enforcement
- Possible job-related penalty for enforcing rules, especially against landowner with elevated social stature
- Personal relationships – antipathy or sympathy

Gone Fishin'



Wetland clearing and grading

Personal relationships

Adverse

- Personal dislike
- Belief that unclean hands
 - have a bulkhead, dock, 3-story house, boat-building business)

Sympathetic

- Decisionmaker may have relationship with landowner as neighbor, fellow congregant, etc.

Incentives to violate?

San Juan County's 2017 SMP Update authorizes the remediation of someone else's shoreline violation as compensatory mitigation. SJCC 18.50.150.D ("[r]emoval of shoreline modifications constructed in violation of this code cannot be used to mitigate new adverse impacts to shoreline ecological functions and critical area functions if those modifications were made by the owner of the property, or if they are located on the property that is the subject of the application.")

Solutions?

- Organize to apply pressure
- Elect representatives who believe in fair enforcement
- Citizen Enforcement
- Find officials that have demonstrated willingness to enforce
- Random chance

Organize



Photo – Paul Anderson

Elections



Citizen Enforcement



Find Officials Willing to Enforce

Is luck a viable strategy?



Questions?



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