State of Washington
Joint Legislative Audit & Review Committee (JLARC)

Review of the Management of State-Owned Aquatic Lands

Proposed Final Report

June 18, 2008

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Audit Authority

The Joint Legislative Audit and Review Committee (JLARC) works to make state government operations more efficient and effective. The Committee is comprised of an equal number of House members and Senators, Democrats and Republicans.

JLARC's non-partisan staff auditors, under the direction of the Legislative Auditor, conduct performance audits, program evaluations, sunset reviews, and other analyses assigned by the Legislature and the Committee.

The statutory authority for JLARC, established in Chapter 44.28 RCW, requires the Legislative Auditor to ensure that JLARC studies are conducted in accordance with Generally Accepted Government Auditing Standards, as applicable to the scope of the audit. This study was conducted in accordance with those applicable standards. Those standards require auditors to plan and perform audits to obtain sufficient, appropriate evidence to provide a reasonable basis for findings and conclusions based on the audit objectives. The evidence obtained for this JLARC report provides a reasonable basis for the enclosed findings and conclusions, and any exceptions to the application of audit standards have been explicitly disclosed in the body of this report.

TABLE OF CONTENTS

REVIEW OF THE MANAGEMENT OF STATE-OWNED AQUATIC LANDS
PROPOSED FINAL REPORT

JUNE 18, 2008

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REPORT SUMMARY

At statehood, Washington State's Constitution declared state ownership of the 2.8 million acres of tidelands, shorelands, and bedlands within the boundaries of the state. Statute directs the Department of Natural Resources (DNR) to manage these state-owned aquatic lands.

In 2007, the Legislature directed the Joint Legislative Audit and Review Committee (JLARC) to analyze DNR's management of state-owned aquatic lands. This report analyzes the history of the state's ownership of aquatic lands, and reviews how DNR is structured to manage aquatic lands and the source of funding for that management. The report provides an in-depth analysis of DNR's compliance with both broad and specific legal obligations from statute and case law. The report also provides an analysis of DNR's compliance with the principles of sound public property asset management.

The History of State Ownership of Aquatic Lands

Article XVII of the state's Constitution declared state ownership of aquatic lands. Until 1971, the state sold some of its tidelands and shorelands. As the table below illustrates, 64 percent of tidelands and 29 percent of shorelands are now in other ownership.

Aquatic Land Type	State-Owned Acres	% of Total	Acres Owned by Others	% of Total	Total Acres
Marine Bedlands	2,162,531	100%	0	0%	2,162,531
Marine Tidelands	88,540	36%	156,079	***64%***	244,619
Freshwater Bedlands	320,002	100%	0	0%	320,002
Freshwater Shorelands	33,454	71%	13,982	***29%***	47,436
Other Aquatic Lands	13,691	100%	0	0%	13,691
Totals	**2,618,218**	**94%**	**170,061**	**6%**	**2,788,279**

Aquatic Lands Management, Expenditures and Revenues

Within DNR, the Aquatic Resources sub-program (Aquatic Resources) has primary responsibility for managing state-owned aquatic lands. In the 2005-07 Biennium, Aquatic Resources' operating expenditures totaled $29.8 million. The Policy & Program Development, Administration, and Operations sections are located in Olympia (57 FTEs), with additional staff based in three districts (27 FTEs), for a total of 84 FTEs.

Statute authorizes various uses of state-owned aquatic lands, which DNR manages. Such uses generated $41.6 million in the 2005-07 Biennium. Just over half the money—$21.5 million or 52 percent—comes from the sale of geoducks, with leases for such things as marinas equaling $16.8 million or 40 percent. The remainder—$3.3 million, or 8 percent—comes from a variety of sources such as rights-of-way and mineral sales. Traditionally, Aquatic Resources' operations are funded from these revenues, creating a link between managing the lands and the ability to generate revenue from the lands. The Legislature also funds a number of aquatic lands enhancement projects from this revenue, through the Aquatic Lands Enhancement Account.

Complying With Broad Legal Obligations

Unlike the forest lands managed by DNR, state-owned aquatic lands *are not* established as fiduciary trusts with a guiding principle of generating sustainable revenue. Rather, aquatic lands have statutorily established general management guidance, called the "Four Plus" benefits. Benefits that are to be provided by state-owned aquatic lands include: encouraging

direct public use and access, fostering water-dependent use, ensuring environmental protection, and utilizing renewable resources. The "Plus" is that generating revenue, in a manner consistent with the other four benefits, is considered a benefit. DNR is charged with balancing these benefits.

JLARC determined that DNR's activities support each benefit. However, statute does not specify how to measure the balance, and DNR cannot demonstrate whether these benefits are "balanced."

Complying with Specific Legal Obligations

Statute also sets specific directives. We focus on the most relevant 27 directives summarized into eight areas, ranging from how to sell geoducks to how to lease lands for uses such as marinas. DNR is in compliance with five areas and not in compliance with three specific statutes: charging fair market value for nonwater-dependent use, charging for easements, and implementing a plastic debris action plan.

Court decisions have impacted state-owned aquatic lands management in numerous ways. There are two areas where DNR has legal obligations that are defined completely by case law rather than by statute: the public trust doctrine, and a major tribal shellfish decision. For both areas, DNR is in compliance.

There are also two emerging compliance issues for DNR: a habitat conservation plan and Puget Sound Partnership.

DNR is currently in the process of developing a habitat conservation plan (HCP) for all state-owned aquatic lands. HCPs are submitted to the federal government to comply with the Endangered Species Act when a landowner or land manager recognizes that its activities may result in the taking (e.g., harming or killing) of endangered species. DNR is in the process of estimating the costs and defining any needed policy changes associated with mitigating the impacts of its activities.

In 2007, the Legislature created and charged the Puget Sound Partnership with developing an action agenda to restore the environmental health of Puget Sound by the year 2020. The exact impact on DNR as the manager of state-owned aquatic lands has not been identified.

Complying With the Principles of Sound Asset Management

JLARC reviewed literature in the field of public property asset management to learn theories on benchmarks or best practices in the management of public lands. Comparing DNR's performance against the guidance found in the literature provides useful insights into how well DNR is doing in managing state-owned aquatic lands. We summarize the literature into five questions to use in assessing DNR's management of state-owned aquatic lands, with the report detailing our concerns.

Question	Answer
Does DNR know where the asset is?	Yes
Does DNR understand the legal mandates regarding managing the asset?	Yes
Does DNR know the condition of the asset?	No
Is DNR preserving the productive capacity of the asset?	?
Does DNR have clearly stated goals for aquatic lands management and measures for reaching those goals?	No

Asset condition is a key concern. While DNR has substantially increased its knowledge of the asset's uses and condition through various efforts such as the development of the habitat conservation plan, a more comprehensive knowledge is needed to insure the ongoing provision of the Four Plus public benefits.

Report Recommendations

The report concludes with five recommendations to DNR regarding asset management and compliance with statute.

Asset Management

Recommendations 1 and 2: Building on the work of the Habitat Conservation Plan, DNR should complete a feasibility study of how it will develop a comprehensive knowledge of the condition of the state-owned aquatic lands asset. In addition, DNR should develop a strategic plan, specific to state-owned aquatic lands, with quantifiable performance targets that demonstrate how DNR is balancing the Four Plus benefits.

Complying With Statute

Recommendations 3-5: DNR should comply, and report to the Legislature on their plan for complying, with statutory guidance regarding: charging fair market value for nonwater-dependent leases; charging the fee for public utility easements; and coordinating and implementing the plastic debris action plan.

OVERVIEW: AQUATIC LANDS MANAGEMENT REVIEW

At statehood, Washington State claimed ownership to the tidelands, shorelands, and bedlands within the state. Such lands are called state-owned aquatic lands, with ownership by the state established in the state's Constitution.

The Legislature has directed the Department of Natural Resources (DNR) to manage these aquatic lands for the citizens of the state. This report explores a number of issues regarding DNR's management of aquatic lands, with the main question: To what extent do the management practices of DNR regarding state-owned aquatic lands comply with legal obligations and sound asset management principles?

To help understand DNR's compliance with statute and other obligations, the report presents information in three parts:

- **Part 1:** History of the state's ownership and management of aquatic lands: How did the state claim ownership? How many acres are there of state-owned aquatic lands? Who manages state-owned aquatic lands?
- **Part 2:** DNR's aquatic lands management structure: How is DNR organized to manage state-owned aquatic lands? What are the sources of revenue for managing state-owned aquatic lands? How much does DNR spend on aquatic lands management?
- **Part 3:** DNR's compliance with legal obligations and the principles of sound asset management:

  Category A: Compliance with *specific directives* from statute and case law.

  Category B: Compliance with *broader* statutory guidance: the "Four Plus" benefits.

  Category C: Compliance with sound public land asset management principles.

The report concludes with recommendations geared to help legislators more clearly understand the extent to which DNR is complying with legal obligations and sound asset management practices.

PART ONE: HISTORY OF THE STATE'S OWNERSHIP AND MANAGEMENT OF AQUATIC LANDS

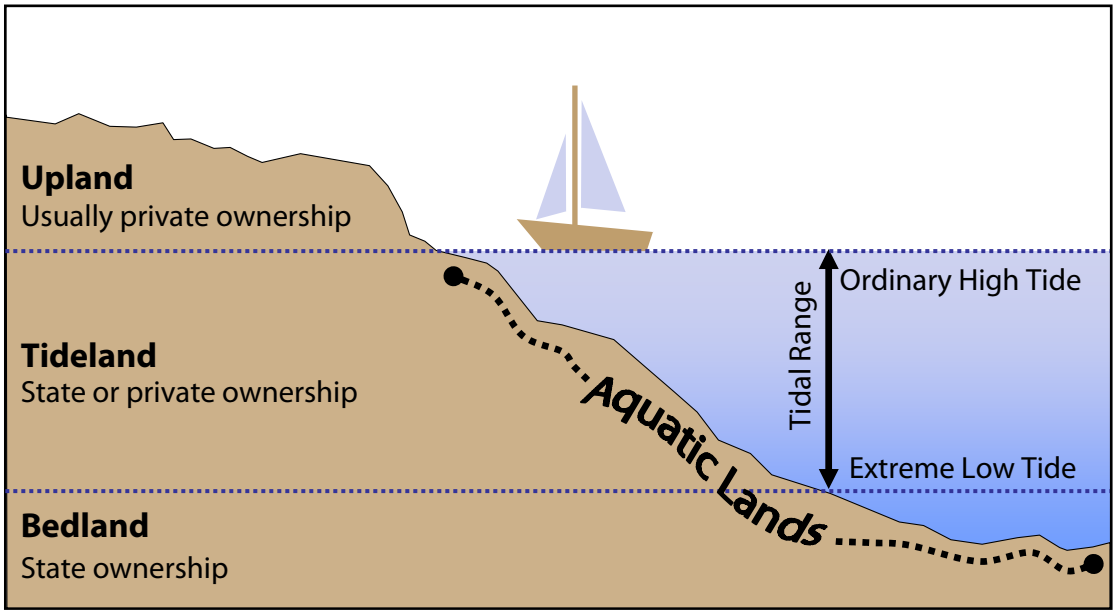
How Did the State Claim Ownership?

In Article XVII, § 1 of its Constitution, Washington State claims ownership to its aquatic lands:

> The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes.

Exhibit 1 below illustrates the boundaries of this ownership in marine areas (saltwater). Here, tides are the key to ownership boundaries. The land between the extreme low tide and the ordinary high tide is called the *tideland.* The area below the extreme low tide is the *bedland.* These two areas are covered by the ownership declared at statehood. Following its initial declaration of ownership, the state subsequently sold some of the tidelands. The area above the ordinary high tide is the *upland,* which is not part of the lands claimed in Article XVII, § 1 of the state's Constitution.

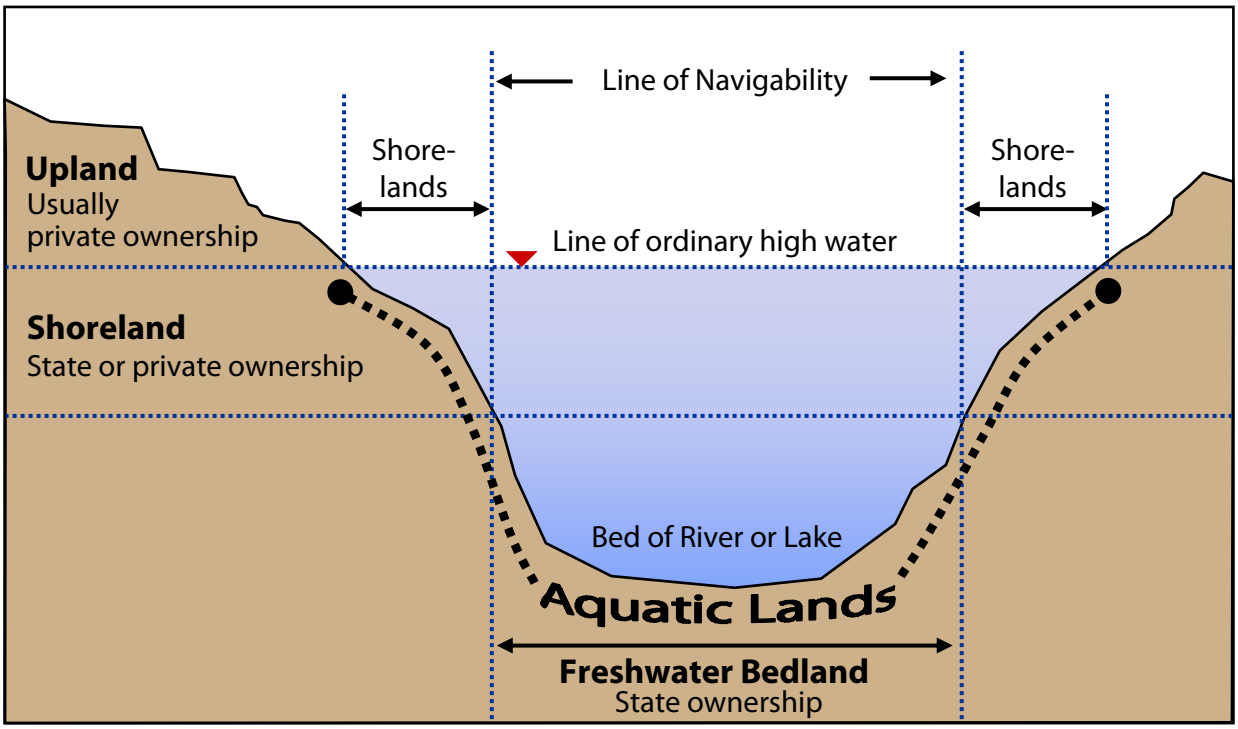
Exhibit 1 – Ownership of Aquatic Lands in Marine Areas—Tides are the Key



Source: Department of Natural Resources.

Exhibit 2 on the following page illustrates the boundaries determining ownership in rivers and lakes. In freshwater areas, the concept of navigability is the key to defining ownership. If the river or lake is navigable, the bedlands and shorelands are covered by the ownership declared at statehood. The state subsequently sold some of the shorelands it originally owned. The upland is not part of the lands claimed in Article XVII, § 1 of the state's Constitution.

Exhibit 2 – Ownership of Aquatic Lands in Rivers and Lakes—Line of Navigability is Key



Source: Department of Natural Resources.

How Many Acres of State-Owned Aquatic Lands?

Exhibits 1 and 2 also illustrate that tidelands and shorelands may or may not be in state ownership. From 1889 to 1971, the Legislature authorized the sale of tidelands and shorelands. However, in 1971, the Legislature stopped further sales.[1] To date, the state has sold 64 percent of the tidelands and 29 percent of the shorelands. Even though large parts of the state's tidelands and shorelands were sold, the state still retains ownership of 94 percent of all aquatic lands within its boundaries, primarily bedlands. Exhibit 3 below illustrates the acres of aquatic land by land type and current ownership.

Exhibit 3 – Acres of Aquatic Lands by Land Type and Current Ownership

Aquatic Land Type	State-Owned Acres	% of Total	Acres Owned by Others	% of Total	Total Acres
Marine Bedlands	2,162,531	100%	0	0%	2,162,531
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Totals	**2,618,218**	**94%**	**170,061**	**6%**	**2,788,279**

Source: JLARC analysis of DNR data.

[1] State-owned aquatic lands can still be sold in limited circumstances to public entities (RCW 79.125.200) and to upland owners (RCW 79.125.450). According to DNR, only one direct sale has happened in the last ten years.

Who Manages State-Owned Aquatic Lands?

Statute defines state-owned aquatic lands (RCW 79.105.060) as all tidelands, shorelands, harbor areas, the beds of navigable waters, and waterways *owned by the state and managed by DNR*. Thus, DNR is **the** manager of all state-owned aquatic lands. The focus of this JLARC report is on DNR and those lands formally defined as state-owned aquatic lands.[2]

As the manager of state-owned aquatic lands, DNR coordinates and interacts with a number of federal and state agencies who have responsibilities related to aquatic lands. Appendix 3 provides detail on the roles of the federal government, state agencies, tribes, port districts, and other local governments.

A Note on Other States

JLARC reviewed aquatic lands management in other states to determine if there are benchmarks or best practices for the management of aquatic lands. We concluded that no state sets a benchmark for other states, but we did learn much about the resources other states use to manage aquatic lands, how they set lease rates, and common issues involved in their management. See Appendix 4 for more detail.

[2] The exception to this rule is state-owned aquatic lands managed by port districts through agreements with DNR (RCW 79.105.420).

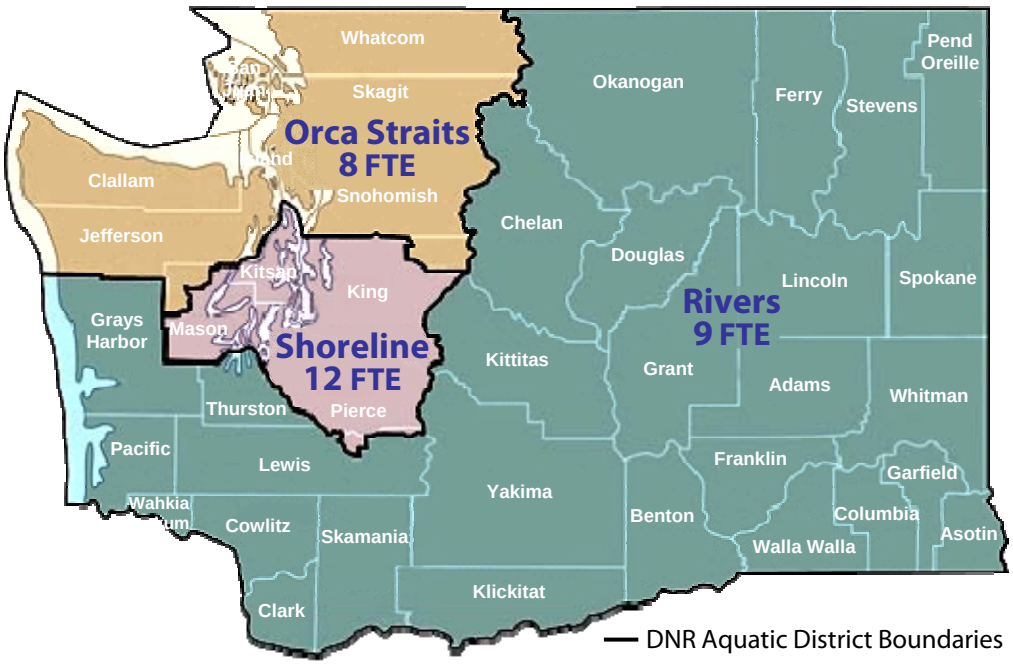
PART TWO: DNR'S AQUATIC LANDS MANAGEMENT STRUCTURE

How is DNR Organized to Manage State-Owned Aquatic Lands?

As directed by statute (RCW 79.105.010), DNR manages state-owned aquatic lands. DNR manages these lands primarily by authorizing and overseeing various uses of the lands.

The Commissioner of Public Lands appoints an Aquatic Lands Steward who manages DNR's Aquatic Resources sub-program within the Resource Management program. Aquatic Resources is split between head office sections and regional districts. As illustrated in Exhibit 4 below, the districts divide the state into three areas: Orca Straits, Shoreline, and Rivers. Field staff in regional districts manage leases and provide on-site review and management of state-owned aquatic lands.

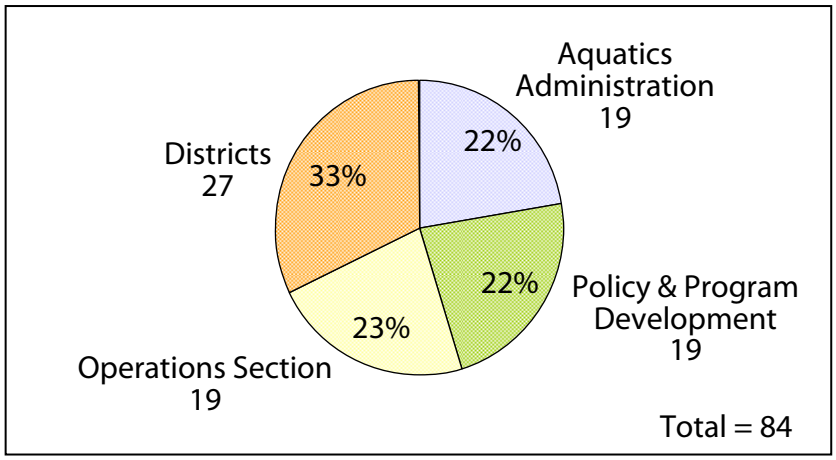
Exhibit 4 – DNR Aquatic Resources' Three Districts



Source: Department of Natural Resources. Counties are shown in white print. FTEs are FY 2007.

There are also three head office sections. The Policy & Program Development and Administration sections support field staff in managing uses of state-owned aquatic lands and provide statewide planning, policy development, and oversight. The Operations Section manages some statewide field programs such as derelict vessel removal and geoduck harvest management. Exhibit 5, on the following page, illustrates how Aquatic Resources' 84 FTEs in Fiscal Year 2007 were split between these efforts.

Exhibit 5 – 33% of Staff are Based in Districts, FY 2007

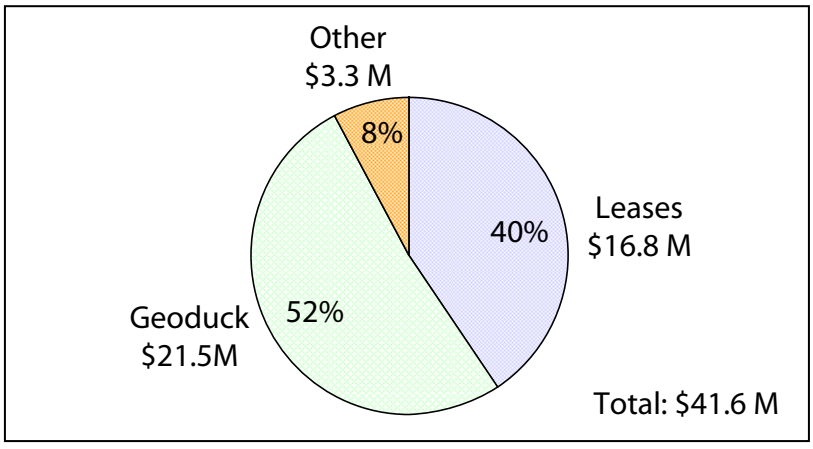


Source: JLARC analysis of Legislative Evaluation and Accountability Program (LEAP) data.

What are the Sources of Revenue for Managing State-Owned Aquatic Lands?

In the 2005-07 Biennium, uses of state-owned aquatic lands generated $41.6 million in revenues. As shown in Exhibit 6 below, the main sources of revenue from state-owned aquatic lands are auctions of contracts to harvest geoducks from state bedlands and leases of aquatic lands for uses such as marinas. Additional revenue is generated through granting rights of way, mineral sales, royalty fees, interest and administrative fees.

Exhibit 6 – Geoduck Sales Accounted for 52% of Revenues in the 2005-07 Biennium



Source: JLARC analysis of DNR data.

Statute directs that revenues from state-owned aquatic lands be used to manage and enhance aquatic lands within the state. Two accounts are established for this purpose. A percentage of revenues generated from state-owned aquatic lands is deposited into the Resource Management Cost Account (RMCA) for DNR's management of state-owned aquatic lands. This percentage varies depending on the type of land under agreement. All other revenues are to be used for aquatic lands enhancement projects and deposited into the Aquatic Lands Enhancement Account (ALEA). Exhibit 7 below illustrates the percentages for the 2005-07 Biennium.

Exhibit 7 – Aquatic Lands Revenues by Account, 2005-07 Biennium

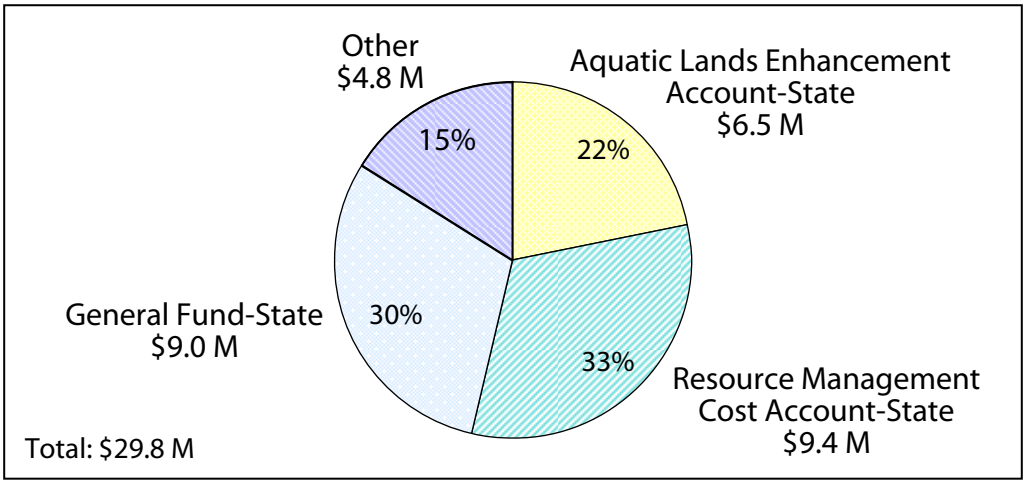
Account	**Total Deposited**	
	$'s Millions	**% of Total**
Resource Management Cost Account	$18. 2	*44 %*
Aquatic Lands Enhancement Account	$23. 4	*56 %*
Total Revenues	**$41.6**	*100%*

Source: JLARC analysis of DNR data.

How Much Does DNR Spend on Aquatic Lands Management?

In the 2005-07 Biennium (Fiscal Years 2006 and 2007), the Aquatic Resources sub-program spent $29.8 million from all funds. Traditionally, Aquatic Resources' main sources of funding are RCMA and ALEA (Appendix 5 provides eight years of expenditure detail). However, the 2005-07 total includes a one-time expenditure in Fiscal Year 2007 of $11 million related to tribal obligations, $9 million of which was from the General Fund-State, $2 million from the Aquatic Lands Enhancement Account. Exhibit 8 shows the sources for expenditures during the 2005-07 Biennium.

Exhibit 8 – Aquatic Resources Sub-Program Expenditures by Source, 2005-07



Source: JLARC analysis of LEAP data. "Other" includes federal, local, derelict vessel, toxics, and dredged material funds.

The sum of individual sub-program expenditures differs slightly from the total due to rounding.

According to DNR, there are additional expenditures that provide support to managing aquatic lands not shown in the sub-program's budget. This includes costs associated with information systems, assistant attorneys general, and various technical and administrative services. DNR estimates that in Fiscal Year 2007, these costs totaled $3.6 million.

Aquatic Lands Enhancement Account (ALEA)

While DNR generates all revenues deposited into ALEA, it is only one of several entities which use the money in the account to enhance aquatic lands. The Legislature appropriates funds from the ALEA in its biennial budgets to several agencies for a variety of uses related to aquatic lands. Additionally, the Recreation and Conservation Funding Board (formerly the Interagency Committee for Outdoor Recreation) awards grants of ALEA moneys to state agencies, tribes, and local jurisdictions throughout the state for aquatic lands projects. Exhibit 9 shows the agencies which have received appropriations from the ALEA in the 2005-07 and 2007-09 Biennial Operating and Capital Budgets.

Exhibit 9 – Aquatic Lands Enhancement Account Appropriations Go to a Variety of Agencies

Agency	2005-07 Appropriation		2007-09 Appropriation	
	$'s	% of Total	$'s	% of Total
Interagency Comm. For Outdoor Recreation / Recreation and Conservation Funding Board	$9,984,000	*35%*	$8,705,000	*32%*
Department of Natural Resources	$9,651,000	*33%*	$8,271,000	*30%*
Department of Fish & Wildlife	$6,272,000	*22%*	$6,372,000	*23%*
Department of Agriculture	$1,990,000	*7%*	$2,052,000	*8%*
Department of Health	$600,000	*2%*	$600,000	*2%*
State Parks & Recreation Commission	$345,000	*1%*	$363,000	*1%*
Puget Sound Partnership	$0	*0%*	$500,000	*2%*
Department of Ecology	$0	*0%*	$400,000	*1%*
Office of the Governor	$0	*0%*	$4,000	*>1%*
Total Appropriations	**$28,842,000**	*100%*	**$27,267,000**	*100%*

Source: JLARC analysis of LEAP data.

PART THREE: DNR'S COMPLIANCE WITH LEGAL OBLIGATIONS AND THE PRINCIPLES OF SOUND ASSET MANAGEMENT

As the manager of state-owned aquatic lands, DNR must comply with a number of legal obligations. We divide these legal obligations into two categories:

Category A: Compliance with *specific directives* contained in statute and case law; and

Category B: Compliance with *broader* statutory guidance: the "Four Plus" benefits.

A third category for compliance review covers DNR's role as the manager of a large public land asset:

Category C: Compliance with sound public land asset management principles.

The following sections will explain what legal requirements DNR must comply with, and analyze the extent of compliance. The sections conclude with a review of DNR's compliance with asset management principles.

Category A: Compliance with Specific Directives from Statute and Case Law

In this first category of our compliance review, we examine DNR compliance with specific directives. The discussion is organized in two parts, the first dealing with directives from specific statutes, and the second addressing two specific areas from case law.

What are the Specific Statutory Directives for DNR?

DNR is required to comply with specific directives in statute on how state-owned aquatic lands are to be managed. While we reviewed 114 pages of statute, we focus on the most relevant 27 directives, summarizing them into eight areas. Appendix 6 provides a list of the 27 specific statutes. Exhibit 10 on the following page summarizes the eight statute areas.

Exhibit 10 – Eight Specific Areas of Statute that Direct DNR's Management of State-Owned Aquatic Lands

Statute Area	Statutory Directive
Aquatic land sales and exchanges	Limits DNR's authority to sell state-owned aquatic land and allows DNR to exchange state-owned aquatic land of equal value when the exchange provides a public benefit.
Harbor areas[3]	States that DNR cannot sell land in harbor areas unless the sale is approved by the Legislature.
Leases	Sets the process for determining rents for water-dependent, nonwater-dependent, and multiple use leases. Gives leasing preferences on tidelands and shorelands to the adjacent upland owner.
Aquaculture	Provides direction on leasing state-owned aquatic lands for aquaculture.
Geoducks and other valuable materials	States that geoducks are considered "valuable material" (except when geoducks are produced through aquaculture) and provides direction for the sale of valuable materials.
Easements	The process for determining charges for easements is set in statute. The charge for a public utility easement is determined by a fee schedule in statute.
Recreational docks and buoys	States that the abutting residential owner to state-owned aquatic lands may install and maintain a dock and a mooring buoy without charge if the dock or buoy is used exclusively for private recreational purposes.
Environmental issues	Directs DNR on how to address: aquatic land dredged material disposal sites, plastic debris clean-up, and derelict vessels.

Source: JLARC analysis of statute.

To What Extent Is DNR Complying With Specific Statutory Directives?

DNR is complying with five areas of specific statutory directives. DNR is not complying with three specific statutory directives, summarized in Exhibit 11 on the following page.

[3] In Article XV § 1 of the state's Constitution, the Legislature appoints a commission whose duty is to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays, and inlets that lie within one mile of a city limit. Currently, the Board of Natural Resources serves as the Harbor Line Commission.

Exhibit 11 – Three Areas Where DNR Does Not Comply With Statute

Specific Statutory Directive	Compliance Issue
Leases	
RCW 79.105.270: Rent for nonwater-dependent use is the fair market value of the leased lands, determined in accordance with appraisal techniques specified in rule.	DNR rule specifies appraisal techniques and then adds that negotiation of rental amounts may occur when necessary to address the uniqueness of a particular site or use. This means that DNR might charge an amount different from the appraised value when determining fair market value.
Easements	
RCW 79.110.240: The charge for a public utility easement is determined by a fee schedule in statute.	DNR does not collect the fee if DNR cannot determine ownership.
Environmental issues	
RCW 79.145.010: DNR is to coordinate and implement the plastic debris action plan. The plan was created by the marine plastic debris task force in 1988.	DNR does not currently coordinate or implement the plastic debris action plan.

Source: JLARC analysis of statute.

What are the Specific Directives From Case Law for DNR?

Courts have weighed in with a number of decisions that affect the management of state-owned aquatic lands. For example, the courts are the ultimate arbitrator in determining whether a body of water is navigable, and therefore whether the shorelands and bedlands associated with that waterbody fall under state ownership. Court decisions have also clarified DNR's management authority, from challenges to whether DNR may legally take certain actions like derelict vessel removal, to which upland parcel DNR should use in calculating an aquatic land lease rate.

There are, however, two areas where DNR has specific legal obligations that are defined by case law: the public trust doctrine, and a major tribal shellfish decision.

The Public Trust Doctrine

The public trust doctrine is a principle of law regarding how aquatic lands are to be managed, with a history that reaches back to the time of the ancient Romans.

The doctrine impacts two aspects of state ownership of aquatic lands: the state's title to the land and the public's interest in the land. The state may relinquish its title to the land but may not relinquish the public interest element of its ownership. This means that if the state sells property which is subject to the public trust doctrine such as aquatic lands, the buyer cannot impair the public's rights to navigation, fishing, boating, swimming, and other recreational uses of the

public waters. Likewise, the state is prohibited from using its aquatic lands in a manner inconsistent with the public's interest.

Appendix 7 contains a detailed discussion of the public trust doctrine and related cases.

To What Extent is DNR Complying With the Public Trust Doctrine?

There have been two cases directly related to the interface between the public trust doctrine and the state's management of state-owned aquatic land:

> **Caminiti v. Boyle (1987):** Recreational users of state-owned aquatic land challenged the statute that allows free recreational docks to adjacent upland owners. The court concluded that the statute did not violate the public trust doctrine.
>
> **Washington State Geoduck Harvest Assn. v. DNR (2004):** The Association argued that the Public Trust Doctrine provides a "right to fish" and that DNR's regulation of geoduck harvesting interferes with that right. The court concluded that DNR's procedures and regulations satisfied the public trust doctrine's requirements.

In these two instances, the court found that the state and DNR are in compliance with the public trust doctrine.

The Tribal Shellfish Decision

In 1974, Judge Boldt of the U.S. District Court, interpreting treaties from the 1800s, found that treaty Indian tribes were entitled to half the harvestable fish in a given fishery. In 1989, the tribes argued that this principle should be applied to shellfish as well. Ownership of burrowing shellfish (such as clams, oysters, and geoducks) is generally attached to ownership of the land.

In 1994, District Court Judge Rafeedie affirmed the tribes' rights to half the harvestable naturally occurring shellfish in Puget Sound. This included the right to clams, oysters and geoducks from state-owned aquatic lands as well as from aquatic lands that had been sold or leased by the state. In 1995, Judge Rafeedie issued a plan to implement the Court's decision, which directed the state and the tribes to share equal portions of the shellfish harvest and ordered the state and tribes to enter into and comply with management plans regarding shellfish fisheries.

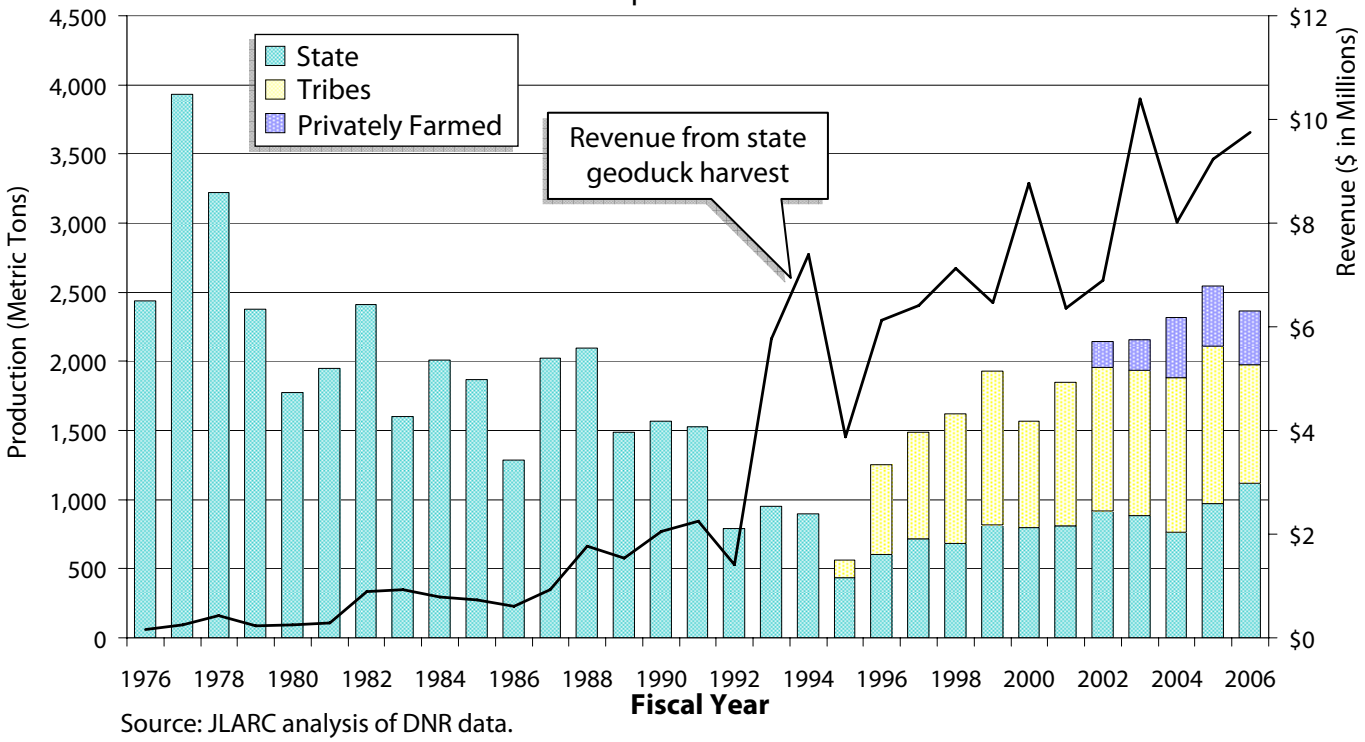
The Rafeedie decision had three major impacts on how DNR must manage the state's aquatic lands:

1. The Court reduced the state's share of geoduck resources on state-owned aquatic lands to half of the allowable harvest.
2. DNR and the Department of Fish & Wildlife (WDFW) jointly represent the state regarding management of geoducks on state-owned aquatic lands. The state and treaty Indian tribes must work together to sustainably manage the geoduck fisheries.
3. Per an agreement signed by the parties in June 2007, tribes surrendered their treaty harvest rights to certain established aquaculture operations, including some located on state-owned aquatic lands which are leased for commercial aquaculture. Under this agreement, DNR may not renew these leases for a term longer than ten years.

The state's reduction of its share of geoduck harvests is significant because historically the geoduck harvest is the largest source of revenues from state-owned aquatic lands. Revenue from the geoduck harvest provided 52 percent or $21.5 million of the total of $41.6 million in revenues generated from state-owned aquatic lands in the 2005-07 Biennium. From Fiscal Year 1992 through Fiscal Year 2007, DNR earned $115 million from geoduck harvest contracts.

However, the impact of the reduced quantity of geoduck harvested by the state has been mediated by the increase in the price of geoduck on the shellfish market. Exhibit 12 illustrates harvest levels from 1976 through 2006 and how the state currently harvests half of the allowable total harvest. While state revenue from geoduck harvest dropped by half from 1994 to 1995, the increase in the price per pound received for geoduck sales quickly caused revenues to rebound to pre-Rafeedie levels.

Exhibit 12 – Geoduck Harvests – Revenues Have Increased Over Time
Even With a Drop in State Harvest Levels



Source: JLARC analysis of DNR data.

To What Extent is DNR Complying With its Obligations From the Tribal Shellfish Decision?

DNR has complied with the responsibilities outlined in the Memoranda of Understanding (MOU) between DNR and WDFW to jointly manage geoduck resources on behalf of the state. Additionally, the two agencies have entered into management agreements with affected tribes. The state and tribes have cooperatively established the minimum densities for four species of clams and oysters that defines a naturally occurring shellfish bed, as required by the 1995 implementation plan.

Emerging Compliance Issues: A Habitat Conservation Plan (HCP) for State-Owned Aquatic Lands, and the Puget Sound Partnership

Habitat Conservation Plan

DNR is currently in the process of developing a habitat conservation plan (HCP) for all state-owned aquatic lands. HCPs are submitted to the federal government to comply with the Endangered Species Act when landowners or land managers recognize that their activities may result in the taking (e.g., capturing, harming, wounding, or killing) of endangered species. An HCP is essentially a guarantee to the federal government that the taking is incidental and that there is a plan to mitigate the impacts of incidental taking.

Since 2003, the federal government and the state Legislature have provided $6 million for the development of the plan. Planning documents identify 22 endangered or threatened species—including birds, fish, and Orca whales—impacted by DNR management activities on state-owned aquatic lands. DNR expects to submit the HCP to the federal government in summer 2008, with approval (issuance of an incidental take permit) expected in early 2009.

Authorizing docks on state-owned aquatic lands is an example of an activity impacting endangered species. According to DNR, an individual dock might have only minimal impact, but many docks placed near each other can affect the aquatic habitat, affecting both endangered birds and fish.

As part of the HCP, DNR will propose to the federal government the steps it will put in place to minimize the impact of activities such as docks on endangered and threatened species. Steps to mitigate taking will likely have a cost and require changes in state policies. DNR plans to include in its 2009-11 Biennial Budget request funding for any costs associated with implementing the HCP.

The timing of the HCP's development means that JLARC is not able to determine exactly what the policy or fiscal impacts of the HCP might be (Appendix 9 provides a detailed timeline for the HCP). We were able to review much of the information collected as part of the HCP's development. This review leads us to conclude that the HCP will likely have far-reaching impacts on the management of state-owned aquatic lands.

The Puget Sound Partnership

In 2007, the Legislature created a new state agency, the Puget Sound Partnership, to oversee restoration of the environmental health of Puget Sound by the year 2020. The Partnership is to create an action agenda that will be a comprehensive schedule of projects, programs, and other activities designed to achieve a healthy Puget Sound. The action agenda is to be developed by December 2008.

Since the action agenda is not yet complete, the exact impact on DNR as the manager of state-owned aquatic lands has not been identified. However, according to DNR there are a number of clear connections between what DNR is attempting to accomplish with its management of state-owned aquatic lands and the objectives for the action agenda, such as protecting habitat.

At a minimum, DNR will be an important component of the Partnership since 66 percent of the state-owned aquatic lands managed by DNR are in Puget Sound.

Category B: Compliance with Broader Statutory Guidance: The "Four Plus" Benefits

In this second category of our compliance analysis, we examine DNR's compliance with the broader policy guidance the Legislature has provided on the management of state-owned aquatic lands.

What is the Broad Statutory Guidance for DNR?

In addition to the directives from specific statutes and case law, DNR must also comply with statute's broad policy guidance for the management of state-owned aquatic lands. Statute directs DNR to strive to balance the following public benefits (RCW 79.105.030):

1. Encourage direct public use and access;
2. Foster water-dependent uses;
3. Ensure environmental protection; and
4. Utilize renewable resources.

In addition, generating revenue in a manner consistent with the other four benefits is also considered a public benefit. These benefits are often referred to as the "Four Plus" benefits.

To What Extent is DNR Complying With the "Four Plus" Benefits?

To understand compliance with these guidelines, JLARC reviewed DNR policies and programs and found support for each of the Four Plus benefits. Exhibit 13 illustrates examples of DNR activities that support the Four Plus benefits.

Exhibit 13 – Examples of DNR Activities That Support the Four Plus Benefits

Four Plus Benefits	DNR Activities
Encourage public use and access	• Discount for water-dependent leases that offer public access • Conservation leasing • Shoreline master planning
Foster water-dependent uses	• Fair market values for nonwater-dependent leases • Shellfish aquaculture • Lower lease rates for water-dependent leases
Ensure environmental protection	• Habitat Conservation Plan • Aquatic reserves • Conservation leasing
Utilize renewable resources	• Invasive species management • Geoduck program • Shellfish aquaculture
Generate revenue (when it supports the other four benefits)	• Leases • Geoduck sales • Shellfish aquaculture

Source: JLARC analysis of DNR activities and statute.

In a broad sense, DNR is complying with the Four Plus benefits. However, statute also directs DNR to strive to provide a *balance* of the Four Plus benefits. Nothing in statute or DNR publications indicates how such a balance should be measured, with no metric for determining when that balance is reached. DNR cannot demonstrate whether these benefits are in balance.

As we analyzed the Four Plus benefits, we identified two issues of particular interest to the Legislature. The first issue is important DNR initiatives not *explicitly* authorized in statute. The second issue is the "Plus" in the Four Plus benefits: the tradition of paying for the management of state-owned aquatic lands from revenues derived from the use of those lands.

DNR Initiatives Not Explicitly Identified in Statute

Aquatic Reserve Program

DNR created the Aquatic Reserve Program to protect important aquatic areas (described as ecosystems). DNR points to its authority to withdraw public lands from conflicting uses (RCW 79.10.210) to establish aquatic reserves. There is, however, no specific statutory direction to establish an aquatic reserve program.

According to DNR, the aquatic reserve areas have special educational or scientific interest, or have special environmental importance. With the reserves, DNR states that it has recognized the increasing need for conservation management for specific sites. [4]

There are currently four such reserves, all in Puget Sound: Cherry Point, Cypress Island, Fidalgo Bay, and Maury Island. Three other reserves are in the planning stage: Admiralty Inlet, Colvos Passage, and the Nisqually Reach.

Conservation Leasing

According to DNR, conservation leasing offers the public a way to engage in conservation activities on state-owned aquatic lands through establishing a lease for specific conservation purposes (as opposed to uses such as a marina or aquaculture). Such activities might include restoration or preservation of an area. In addition, a conservation lease requires an active role on the part of the lessee, such as implementing a restoration plan. Statute does not explicitly identify or create a "conservation lease."

Discounting Leases For Public Access

DNR's process for leasing state-owned aquatic lands is specifically mandated in statute. For instance, the formula for setting a lease rate for water-dependent uses is defined in statute.

However, in practice DNR "discounts" water-dependent uses that encourage public access. For example, DNR may discount a marina's lease for a portion that allows public use and access. This discount is not specifically identified in the statute establishing the lease formula.

[4] DNR has articulated the goals and objectives for the Aquatic Reserve Program in the detailed publication "Aquatic Reserve Program Implementation and Designation: Guidance, September 2005."

The "Plus" in the Four Plus — Generating Revenue

Generating revenue is considered a public benefit if it is done in a manner consistent with the other four benefits: encouraging direct public use and access, fostering water-dependent uses, ensuring environmental protection, and utilizing renewable resources.

The Legislature traditionally uses such revenues as the primary source of funding for the operations of the Aquatic Resources sub-program. As such, Aquatic Resources' ability to provide public benefits is dependent on the amount of revenues it can generate.

Two possible impacts of this dependency are:

1. Geoduck harvest revenue constitutes over half of total revenues generated from state-owned aquatic lands. If the price of geoducks goes down, resources to manage all of the benefits will also go down. Managing aquatic lands is based on the rise and fall of the price and availability of a commodity—geoducks.
2. Generating revenue is a public benefit if it is done in a manner consistent with the other four benefits. Since Aquatic Resources is reliant on generating revenue to provide any of the benefits, this has the potential to create conflict between the benefits. However, JLARC found no reason to believe that revenue generation is favored over the other four benefits.

Category C: Compliance with the Principles of Sound Public Property Asset Management

The analysis in the previous two categories focused on DNR's compliance with the its legal obligations, both in specific directives from statute and case law as well as with the Legislature's broader "Four Plus" benefits policy guidance. The third category examines DNR's aquatic lands management from the perspective of the principles of sound public property asset management.

What Principles Define Sound Public Property Asset Management?

JLARC reviewed the literature in the field of public property asset management, with a focus on theories on benchmarks or best practices in the management of public lands and buildings. Appendix 8 provides a list of the literature reviewed. While this literature is not specifically directed at the management of aquatic lands, reviewing DNR's management of aquatic lands against the guidance found in the literature provides useful insights into how DNR is doing in managing state-owned aquatic lands.

JLARC synthesized the common threads from the asset management literature into five key questions to use in assessing an asset manager's compliance with the principles of sound asset management:

QUESTION
1. Does DNR know where the asset is?
2. Does DNR understand the legal mandates regarding managing the asset?
3. Does DNR know the condition of the asset?
4. Is DNR preserving the productive capacity of the asset?
5. Does DNR have clearly stated goals for aquatic lands management and measures for reaching those goals?

To What Extent is DNR Complying With These Asset Management Principles?

Applying these five key questions to DNR's management of state-owned aquatic lands, we have no concerns with the first two: knowing where the asset is and understanding the legal mandates regarding how the asset is to be managed. We do have concerns with the final three: knowledge of the condition of the asset, maintaining the productive capacity of the asset, and establishing clearly prioritized goals and performance measures. Below we address each of the five key questions in detail.

QUESTION 1: Does DNR know where the asset is?

Yes, DNR does know where the asset is. Nevertheless, it should be recognized that due to the nature of the asset, there are outstanding ownership questions regarding the entire aquatic land asset. For instance, rivers may change their course, changing ownership boundaries, or courts may find that a given waterbody is or is not navigable. However, our analysis leads us to conclude that DNR has the systems and procedures in place to know where the state's aquatic land assets are.

QUESTION 2: Does DNR understand the legal mandates regarding how the asset is to be managed?

Yes, DNR does have a thorough knowledge of the legal mandates regarding the management of state-owned aquatic lands.

QUESTION 3: Does DNR know the condition of the asset?

No, DNR's ***information on the condition of the asset is limited***.

While DNR generally knows where the state's ownership of aquatic lands starts and stops, DNR has limited information on the current condition and use of that asset. DNR does know when there is a formal encumbrance on the land, such as a lease or other authorized use. However, DNR has limited knowledge of both unauthorized uses and no-fee uses, such as recreational docks.

DNR is increasing its knowledge of the condition and use of the asset. Examples of activities include: eelgrass and kelp bed monitoring, spartina eradication efforts, and identifying contaminated sediments sites. Developing a better understanding is part of the current development of a Habitat Conservation Plan (HCP). To understand the impact of the activities that take place on aquatic lands, DNR must know what those activities are. In order to make assurances to the federal government that DNR will mitigate the impact of those activities on endangered species, DNR must know where those activities are taking place. An HCP requires an increased knowledge of current uses and conditions as well as a means of keeping that knowledge up-to-date.

Developing knowledge about the condition of the asset can be a lengthy and difficult process. The literature includes the example of Oregon where the process of locating and authorizing structures on state-owned aquatic lands was still incomplete after five years.

A Condition and Use Concern: Recreational Docks and Buoys

In 1983, the Legislature changed statute to allow upland owners rent free private recreational docks and buoys (see RCW 79.105.430). However, DNR still retains the authority to issue leases and place conditions on docks and buoys.

Currently, DNR does not require use authorizations for recreational docks. DNR does review county Joint Aquatic Resource Permit Applications (JARPA) to ensure that docks meet environmental and recreational standards and do not harm the public's interest. Once reviewed, DNR sends comments back to the permitting county. However, DNR notes that not all JARPA applications are forwarded to them and that some docks are exempted from the JARPA process.

For mooring buoys, DNR has created a self registration process for waterfront owners. Non-waterfront property owners can also get a use authorization, but they must pay a fee. DNR estimates there are 8,000 buoys on state-owned aquatic lands, of which 665 are authorized.

The lack of use authorizations for recreational docks and buoys means that DNR does not have detailed information on these uses of state-owned aquatic land. It also means DNR cannot protect the following public rights found in statute:

- Waterward access;
- The rights of other landowners;
- Public health or safety; and
- Public resources.

If DNR had more detailed information, it could actively protect these rights by revoking uses that cause hazard or obstruction to navigation or fishing, degrade aquatic habitat, or negatively affect shellfish beds.

QUESTION 4: Is DNR preserving the productive capacity of the asset?

This question centers on the issue of managing public land assets for perpetuity and sustainability. DNR cannot fully answer this because of the absence of complete information on the condition and use of the asset.

QUESTION 5: Does DNR have clearly stated goals for aquatic lands management and measures for reaching those goals?

No, DNR Aquatic Resources does not have a current strategic plan.

Aquatic Resources does have a variety of internal measures (internal to DNR and Aquatic Resources) that it uses, as well as external measures it reports to OFM.

DNR has a current strategic plan for the entire agency, which is regularly updated and includes some goals and strategies for aquatic lands. However, the last time Aquatic Resources published a specific strategic plan was 1992. According to DNR, the agency has nearly completed a strategic plan specific to the management of state-owned aquatic lands. Due to the timing of its development the timing of this analysis, JLARC was not able to review the new plan.

Statute has no requirement for Aquatic Resources to have its own strategic plan. But a plan specific to managing aquatic resources is particularly important given that state-owned aquatic lands, unlike forest lands, are not a fiduciary trust, which have clear benchmarks for performance.

REPORT CONCLUSION AND RECOMMENDATIONS

DNR is charged with managing state-owned aquatic lands and to do so by striving to provide a balance between four public benefits:

- Encouraging direct public use and access;
- Fostering water-dependent uses;
- Ensuring environmental protection; and
- Utilizing renewable resources.

In addition, generating revenue in a manner consistent with these four benefits is also considered a public benefit.

This report reviews the history of the ownership of state-owned aquatic lands and the resources used to manage those lands. The report has a specific focus on how the management of those lands complies with the legal directives placed on that management and identifies three areas where DNR is not complying with statute.

The report also identifies two areas of special interest for the Legislature regarding the Four Plus public benefits: important initiatives of DNR not explicitly identified in statute, and the tradition of funding the management of state-owned aquatic lands from revenues derived from those lands.

The report concludes with a look at how DNR complies with the principles of sound public asset management, using five benchmarks from the field of public sector asset management to develop an understanding of a basic question: how well is DNR doing in managing this 2.6 million acre asset?

Below we make specific recommendations to the Department of Natural Resources in two areas: asset management and compliance with specific statutes.

Area 1: Principles of Sound Public Land Asset Management

Asset Condition and Preservation

Knowing the current condition of the asset is considered a key to sound asset management and fundamental to preserving the asset so it can be used "in perpetuity." For state-owned aquatic lands, this might include knowing its current use (Is there a structure on state-owned aquatic lands? Is it an authorized use?) as well as past uses (Is the state-owned aquatic land contaminated in some way and thus restricted in its use?). DNR is increasing its condition and use knowledge as it develops the Habitat Conservation Plan (HCP). Building on this work and integrating this knowledge into a complete condition assessment is needed to better understand the condition of the asset and manage it into the future.

Recommendation 1: DNR should develop a feasibility study to identify the time and resources needed to determine the condition of state-owned aquatic lands. This study should include the framework DNR intends to use to define condition, such as a condition index or other identifiers of condition.

Legislation Required:	None
Fiscal Impact:	DNR should determine whether it can accomplish this recommendation within existing resources.
Report Date:	June 2009

Clarity of Goals and Performance Measures

Clearly identified and measurable goals are needed to evaluate how well an organization is managing its assets. For state-owned aquatic lands, a strategic plan containing such goals and measures should indicate how DNR will balance the specific benefits outlined in statute. While DNR does have an agency-wide strategic plan, Aquatic Resources has not updated its own strategic plan since 1992.

***Recommendation 2*:** DNR should develop a strategic plan specific to the management of state-owned aquatic lands and present that plan to the Legislature. The plan should include measurable goals and performance measures. The plan should also clearly identify the activities DNR is undertaking in pursuit of each of the Four Plus benefits identified in statute and how DNR is balancing those benefits.

Legislation Required:	None
Fiscal Impact:	JLARC assumes the plan can be developed with existing resources.
Report Date:	January 2009

Area 2: Compliance with Specific Statute

There are three instances where DNR is not complying with specific directives contained in statute. The recommendations below address these specific compliance issues.

Charging Fair Market Value for Nonwater-Dependent Uses

Statute directs DNR to charge fair market value for nonwater-dependent leases as determined in accordance with *appraisal techniques* specified in rule. DNR rule specifies *appraisal techniques*, and then adds that *negotiation* of rental amounts may occur when necessary to address the uniqueness of a particular site or use. This means that DNR might charge an amount different from the appraised value when determining fair market value.

Recommendation 3*:* DNR should clarify what is required to arrive at a fair market value. If techniques other than appraisal are required, DNR should report to the Legislature whether any changes are needed in statute.

Legislation Required:	None
Fiscal Impact:	JLARC assumes analysis can be developed with existing resources.
Reporting Date:	November 2008

Fees for Easements

Statute contains a fee schedule that determines the charge for public utility easements on state-owned aquatic lands. DNR does not collect the fee if DNR cannot determine ownership.

Recommendation 4: DNR should collect the fee for easements and report to the Legislature on how this will be accomplished. The report should include analysis of any barriers to fee collection, costs and benefits of enforcing fee collection, and administrative costs to collect fees for all easements.

Legislation Required:	None
Fiscal Impact:	JLARC assumes the report can be developed with existing resources.
Reporting Date:	November 2008

Plastic Debris Action Plan

Statute directs DNR to coordinate and implement the plastic debris action plan. The plan was created by the marine plastic debris task force in 1988. DNR does not currently coordinate or implement the plastic debris action plan.

Recommendation 5: DNR should coordinate and implement the plastic debris action plan as well as provide a report to the Legislature on how this will be accomplished. If plastic debris is no longer an area of concern, this should be demonstrated in the report through a review of scientific research. The report should also include current and future marine debris clean-up efforts.

Legislation Required:	None
Fiscal Impact:	JLARC assumes the report can be developed with existing resources.
Reporting Date:	November 2008

APPENDIX 1: SCOPE & OBJECTIVES

REVIEW OF MANAGEMENT OF AQUATIC LANDS

SCOPE AND OBJECTIVES

SEPTEMBER 26, 2007

STATE OF WASHINGTON
JOINT LEGISLATIVE AUDIT AND REVIEW COMMITTEE

STUDY TEAM
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Why a JLARC Analysis of Aquatic Lands Management?

The 2007-09 Biennial Operating Budget directs JLARC to review the Department of Natural Resources' management of state-owned aquatic lands.

Background

In its Constitution, Washington State claims ownership to its aquatic lands:

> "The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes…" (Article XVII, §1).

While the state has disposed of a number of these lands, it retains ownership of portions of the original tidelands and shorelands, and all marine bedlands and the bedlands of navigable lakes and rivers.

Statute directs the Department of Natural Resources (DNR) to manage the majority of state-owned aquatic lands (approximately 2.4 million acres). DNR is to balance the following public benefits:

- Encourage direct public use and access;
- Foster water-dependent uses;
- Ensure environmental protection; and
- Utilize renewable resources.

When consistent with the above public benefits, revenue generation is also considered a public benefit.

The Department of Natural Resources generates revenue from aquatic lands by leasing the aquatic lands for private and commercial use (such as docks and marinas) and by selling the materials harvested from aquatic lands. Such materials vary from gravel to geoducks. These revenues fund DNR aquatic land management activities as well as other local and state programs to enhance aquatic lands and improve public access to these lands.

In addition to statute, federal laws, court decisions, and tribal agreements guide how aquatic lands are to be managed. Other entities, such as the state Department of Fish and Wildlife and the Department of Ecology, have responsibilities to regulate certain activities on both private and publicly owned aquatic lands.

Scope

The proviso directs JLARC to conduct a review of the constitutional, case law, and statutory objectives and obligations regarding management of state-owned aquatic lands by the Department of Natural Resources. The review will include a determination of the degree to which the management practices of the Department and other agencies are meeting those objectives and complying with legal obligations.

Study Objectives

In response to the legislative directive, the study will focus on the following questions:

1) What are the constitutional, case law, and statutory objectives and obligations regarding state-owned aquatic lands management?
2) What is the role of the Department of Natural Resources in managing state-owned aquatic lands? What resources does the Department use to manage these lands?
3) What other entities have a role in managing state-owned aquatic lands, and how does the Department interact with these entities?
4) To what degree do the management practices of the state regarding aquatic lands comply with statutory objectives and legal obligations?
5) How does Washington State compare to other jurisdictions in the management of state-owned aquatic lands?

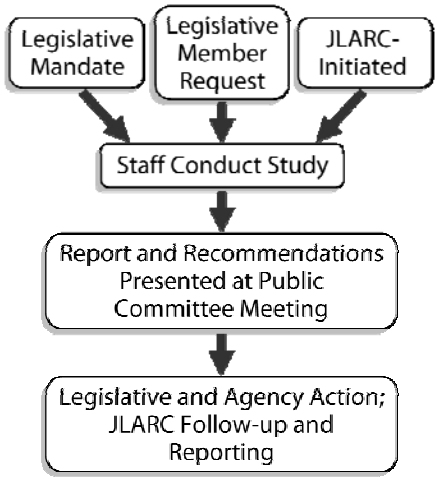
Timeframe for the Study

Staff will present proposed preliminary and final reports at the JLARC meetings in May and June 2008.

JLARC Staff Contact for the Study

Joy Adams	(360) 786-5297	Adams.Joy@leg.wa.gov
Ruth White	(360) 786-5182	White.Ruth@leg.wa.gov
John Woolley	(360) 786-5184	Woolley.John@leg.wa.gov

JLARC Study Process



Criteria for Establishing JLARC Work Program Priorities

- Is study consistent with JLARC mission? Is it mandated?
- Is this an area of significant fiscal or program impact, a major policy issue facing the state, or otherwise of compelling public interest?
- Will there likely be substantive findings and recommendations?
- Is this the best use of JLARC resources? For example:
  - Is JLARC the most appropriate agency to perform the work?
  - Would the study be nonduplicating?
  - Would this study be cost-effective compared to other projects (e.g., larger, more substantive studies take longer and cost more, but might also yield more useful results)?
- Is funding available to carry out the project?

APPENDIX 2: AGENCY RESPONSES

- Department of Natural Resources
- Office of Financial Management

WASHINGTON STATE DEPARTMENT OF
Natural Resources
Doug Sutherland • Commissioner of Public Lands

Caring for
your natural resources
... now and forever

MEMORANDUM

TO: Ms. Ruta Fanning, Legislative Auditor
Joint Legislative Audit and Review Committee

FROM: Doug Sutherland, Commissioner of Public Lands

DATE: May 22, 2008

SUBJECT: **Review of the Management of State-Owned Aquatic Lands – Preliminary Report**

Thank you for the opportunity to provide comments on the Joint Legislative Audit and Review Committee (JLARC) Preliminary Report - Review of the Management of State-Owned Aquatic Lands. It was a pleasure working with JLARC staff as they gathered the information necessary for their report.

The report confirmed DNR is managing state-owned aquatic lands in a manner that supports the public benefits as directed by state law. However, we need to demonstrate that these benefits are balanced in the way we carry out our work. As noted by JLARC staff, the nearly completed Aquatics Program Strategic Plan will document to the legislature and other interested parties how public benefits are being balanced.

My staff will be reprioritizing staff workloads to ensure we deliver quality reports on time.

We look forward to working with JLARC and the Legislature as we report on other areas of the Program. Clearly, this is an opportunity to ensure that state-owned aquatic lands provide abundant and diverse social, ecological, and economic benefits for all the people of Washington, in this and all future generations.

Following are the responses to the specific recommendations in the JLARC Preliminary Report.

RECOMMENDATION	AGENCY POSITION	COMMENTS
Recommendation 1: Develop feasibility study to determine the time and resources needed to determine the condition of state-owned aquatic lands.	Concur	The Aquatics Program agrees a conceptual framework is a necessary prerequisite to determine what criteria should be used to define the condition of state-owned aquatic lands. The Program has and continues to collect much of the environmental data that

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EQUAL OPPORTUNITY EMPLOYER

		will be incorporated into that framework. The report may be presented early to coordinate it with the responses to other recommendations.
Recommendation 2: Develop a strategic plan specific to the management of state-owned aquatic lands.	Concur	The Aquatics Program is currently working on a Strategic Plan. The completed plan will provide the necessary performance metrics to accurately assess the Program's progress in managing public assets and providing a balance of public benefits. As noted in the report, it is nearly complete and will be forwarded to JLARC and the Legislature upon completion.
Recommendation 3: Clarify what is required to arrive at fair market value.	Concur	Determining the fair market value of aquatic lands for non-water dependent uses sometimes presents challenges for our leasing program. Frequently, non-water dependent rents are negotiated because other techniques do not adequately capture the value of the aquatic lands or there are extenuating circumstances that require negotiation. We welcome the ability to study this further and determine if other appraisal techniques will more consistently capture the fair market value of aquatic lands and whether any changes are needed in statute.
Recommendation 4: Collect the fee for easements and report to the legislature on how this will be accomplished.	Partially concur	The Aquatics Program is charging for all easements across state-owned aquatic lands and collecting fees when the owner of the improvement is known. In situations where the owner of the improvement is not known, the Program is not able to collect the fees. The Program does work to identify the owner of the improvements in order to get the use under an easement. The workload associated with determining ownership is prioritized based on staff and resource availability. To the extent legally possible, all fees and interest accrued are collected when these uses are ultimately authorized by DNR. The process DNR currently uses to do this will be included in the report required by the recommendation.

Recommendation 5: Coordinate and implement the plastic debris action plan.	Partially concur	The Aquatics Program does some plastic debris removal through beach cleanup efforts and derelict fishing gear removals. However, the plastic debris action plan is out of date and we recommend it be updated prior to implementation. The report required by this recommendation will include an accounting of resources required to update and implement the plan as well as what changes should be made with regard to leading and coordinating the efforts.

We look forward to your final report. Please do not hesitate to contact me or my staff if you have any questions.

STATE OF WASHINGTON
OFFICE OF FINANCIAL MANAGEMENT
Insurance Building, PO Box 43113 • Olympia, Washington 98504-3113 • (360) 902-0555

May 30, 2008

TO: Ruta Fanning, Legislative Auditor
Joint Legislative Audit and Review Committee

FROM: Victor A. Moore
Director

SUBJECT: **OFM RESPONSE TO PRELIMINARY REPORT ON THE REVIEW OF THE MANAGEMENT OF STATE-OWNED AQUATIC LANDS**

Thank you for giving the Office of Financial Management the opportunity to review and comment on the Joint Legislative Audit and Review Committee's preliminary report on Review of the Management of State-Owned Aquatic Lands. Here is our response to the recommendations.

RECOMMENDATION	AGENCY POSITION	COMMENTS
Asset condition and preservation	Concur	While the Department of Natural Resources' role is clear, actual implementation of a comprehensive asset survey may be limited by consideration of costs and benefits.
Clarity of goals and performance measures	Concur	
Charging fair market value for nonwater-dependent uses	Concur	
Fees for easements	Concur	
Plastic debris action plan	Concur	

Thank you again for the opportunity to comment. If you have questions, please contact David Giglio at 902-0654.

APPENDIX 3: THE ROLE OF OTHER ENTITIES IN MANAGING STATE-OWNED AQUATIC LANDS

While state-owned aquatic lands, by statutory definition, are managed by DNR, other entities do have responsibilities related to aquatic lands. This appendix provides a summary of those roles and provides more detail on the Shoreline Management Act.

The Role of Other Entities

Exhibit 18 below summarizes the responsibilities of other entities related to aquatic lands. Multiple agencies participate in Memoranda of Understanding (MOUs) and interagency agreements with DNR for data systems development, monitoring programs, data collection and analysis, and other technical services. Multiple agencies also coordinate with DNR to choose dredged material sites.

Exhibit 18 – Other Entities' Responsibilities Related to State-Owned Aquatic Lands

Entity	Role
Federal Government	• Reviews uses proposed on state-owned aquatic lands for compliance with a number of federal regulations, such as those dealing with navigation. • May conduct emergency remedial actions on state-owned aquatic lands without authorization and condemn land for federal purposes. • DNR must consider compliance with federal requirements, such as Executive Orders and federal regulations, addressing issues such as floodplains, essential fish habitat, and critical resource water. • When exchanging tideland and shoreland, DNR must consider whether the land abuts a critical and/or essential habitat or may be beneficial to nearshore habitat functions, as identified by the National Marine Fisheries Service and/or the United States Department of Fish and Wildlife.
Department of Fish and Wildlife	Coordinates with DNR to: • Manage shellfish • Manage and lease oyster reserves • Manage geoduck fisheries and hatcheries • Lease lands for shellfish cultivation • Provide public access • Remove and dispose of derelict vessels • Provide enforcement • Conduct geoduck research • Conduct geoduck dive team operations • Conduct Endangered Species Act compliance work

Entity	Role
Department of Ecology	• Reviews all current and new shellfish aquaculture activities through the Shellfish Aquaculture Regulatory Committee. • May enter into agreements with DNR to participate in and administer the federal Safe Drinking Water Act. • Is the lead agency for the Shoreline Management Act and Shoreline Master Program.
Parks and Recreation Commission	• Coordinates with DNR to negotiate sales to the Parks Commission, for park and outdoor recreation purposes. • Approves leases of tidelands and bedlands in front of state parks. • Manages the Seashore Conservation Area. • Works with DNR to establish a system of underwater parks to provide for diverse recreational diving opportunities and to conserve and protect unique marine resources of the state of Washington.
Department of Health	• Determines shellfish safety.
Puget Sound Partnership	• Develops strategies to protect and restore the health of Puget Sound by the year 2020.
Tribes	• Shares in the harvest of shellfish. • Cooperatively manages shellfish fisheries with WDFW and DNR.
Port Districts	• May manage state-owned aquatic lands through Port Management Agreements with DNR.
Other Local Governments	• May improve streets that cross tidelands and harbor areas and improve and control waterways within city limits. • Participate in Shoreline Master Programs.

Source: JLARC analysis of federal/state laws and regulations and DNR responses to JLARC enquiries.

Shoreline Management Act

Washington's Shoreline Management Act (SMA) was passed by the state Legislature in 1971 and adopted by the public in a 1972 referendum. The overarching goal of the SMA is "to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines."[5] The Department of Ecology is directed by RCW 90.58.010 to adopt guidelines for shorelines and local governments that give preference to uses which:

1. Recognize and protect the statewide interest over local interest;
2. Preserve the natural character of the shoreline;
3. Result in long-term over short-term benefit;
4. Protect the resources and ecology of the shoreline;

[5] http://www.ecy.wa.gov/programs/sea/sma/st_guide/intro.html.

5. Increase public access to publicly owned areas of the shorelines;
6. Increase recreational opportunities for the public in the shoreline; and
7. Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

Shoreline Master Program

The Shoreline Master Program establishes a cooperative program of shoreline management between local government and the state (RCW 90.58.050). Local government has the primary responsibility for initiating the planning and administering the regulatory program. The Department of Ecology acts primarily in a supportive and review capacity with an emphasis on providing assistance to local government and ensuring compliance with related policies and provisions.

DNR's Role

According to DNR, it uses the Shoreline Management Act and Shoreline Master Programs to identify appropriate uses for state-owned aquatic lands. Participation in Shoreline Master programs is considered by DNR as a primary tool for planning and thus, a priority for DNR (WAC 332-30-107). Level of involvement depends upon the area, as well as available staff and resources. DNR indicates that all planning activities are closely coordinated with federal, state, and local agencies having jurisdiction, and public participation is encouraged.

APPENDIX 4: AQUATIC LANDS MANAGEMENT IN OTHER STATES

To determine if there are benchmarks or best practices for the management of public aquatic lands, JLARC reviewed aquatic lands management in other states. While we did not find any best practices, we did learn much about the resources other states use to manage their aquatic lands, how they set lease rates, and common issues involved in their management.

We began the review of other states by conducting a broad internet search of states that had similar geography to Washington State or that had similar management issues. We then constructed a questionnaire that was initially distributed at the 2007 International Submerged Lands Conference. Utilizing the results from the internet review and questionnaire, four states and one British Province were selected for an in-depth interview: Alaska, British Columbia, California, Oregon, and Florida.

What We Learned

Table 1 summarizes information across jurisdictions on key variables. Note that Washington has been included for comparison purposes.

The number of acres managed by each jurisdiction varies from 800,000 in Oregon to 65,000,000 in Alaska. Only one jurisdiction, California, had confidence in the accuracy of the number of acres they manage. Two could not provide an answer. Other jurisdictions cited problems with getting correct estimates from the federal Bureau of Land Management (AK), and surveying their land (AK, BC, OR). Washington has said that determining ownership can be difficult due to shifting boundaries and issues around determining navigability.

By examining the number of acres per FTE, we know that each FTE has to manage hundreds of thousands of acres of submerged land, and in the case of Alaska, nearly two million acres of submerged land. However, the frequency of actual fieldwork and job responsibilities varies greatly across jurisdictions – making direct comparisons difficult. As a simple indicator, Exhibit 14, on the following page, also looks at the number of boats used by field staff as a measure of the resources available to field staff. Alaska and British Columbia have no boats and rely on other agencies to lend them boats when they need to access areas that cannot be accessed by land.

Exhibit 14 – Comparing Key Variables Across Jurisdictions (ranked by acres/FTE)

State	Number of Acres Managed	Number of FTEs who do fieldwork*	Acres/ FTE	Number of Boats
Alaska	60 to 65 million (not sure)	35	1.7 to 1.9 million	0
Oregon	800,000 (fairly sure)	3	266,667	1
California	3 million (very sure)	17	176,470	1
Washington	2.6 million (fairly sure)	22	136,842	1
British Columbia	Unknown (some land has not been surveyed)	25**	N/A	0
Florida	Unknown	8 ***	N/A	2 to 3

Source: JLARC analysis of data collected from other states.

*Respondents were asked how many FTEs go out in the field to check unauthorized uses and handle leases.

**BC FTEs rarely conduct fieldwork.

***FL has regulatory FTEs and enforcement FTEs that go out into the field regularly.

Exhibit 15, on the following page, looks at how these jurisdictions set lease rates. Here JLARC found many different approaches:

- Four jurisdictions set their rates by use category (BC, CA, OR, WA).
- Alaska starts with a baseline appraisal rate and negotiates up in price for different uses.
- Florida charges a set rate per square foot of lease area or 6 percent of revenue.
- British Columbia and Oregon have a minimum rent charge.

Exhibit 15 – How Are Lease Rates Determined in Other Jurisdictions?

State	Process for Setting Lease Rates
Alaska	Rates are set by statute, appraisal, and fair market value. AK usually starts with a baseline appraisal rate and then negotiates the price up for different uses.
British Columbia	Rates are set by use. BC may use a zone rate, appraised rate, or a flat rate. They use a flat rate for private moorage and a commercial rate for marinas. They charge a minimum rent and a percentage of land value depending on type of land and type of use.
California	Rental rates are set by use category. There is a discount for continued public access. Every lease is put together on a case by case basis. The goal is to get the best rate for CA.
Florida	FL charges a set rate per square foot of lease area or 6% of revenue. They check slip rates to estimate revenue. They charge the set rate one year ahead of time. If the 6% revenue rate ends up being more, there is a supplemental charge to the lessee.
Oregon	Lease rates are based on use categories and rates outlined in rule. There is a minimum charge and the lease rate increases by 3% each year. Lessees can choose one of three methods: flat rate, percent of gross income, and riparian land value.
Washington	The process for determining water-dependent leases is based on 30 percent of the assessed value of the upland parcel multiplied by the real capitalization rate. Rent for nonwater-dependent uses is the fair market value of the leased lands. Discounts water-dependent use are given for public access.

Source: JLARC analysis of data collected from other states.

A number of other issues emerged as we conducted the in-depth interviews. These include:

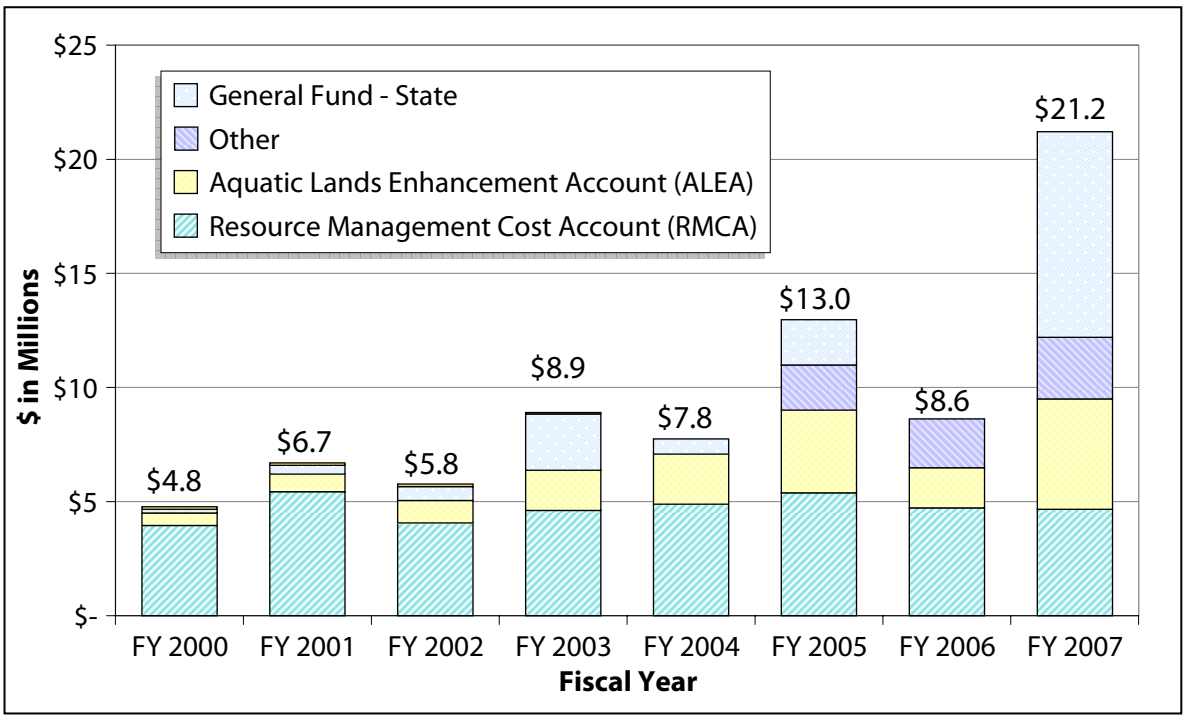
- All of the interviewees indicated that they had issues with unauthorized uses and structures including, docks, buoys, and improvements.
- All of the jurisdictions coordinated with other departments to enforce compliance and conduct fieldwork.
- Oregon and Washington support their management of aquatic lands primarily by revenue generated from aquatic lands.
- All of the jurisdictions interviewed felt they did not have the staff, funding, or resources to appropriately manage aquatic lands given their state's priorities for management.

APPENDIX 5: AQUATIC RESOURCES SUB-PROGRAM EXPENDITURES

The following exhibits provide eight years of detail on the sources of funding for the expenditures of the Aquatic Resources sub-program.

Traditionally, Aquatic Resources' main sources of funding are RCMA and ALEA. However, the 2005-07 total includes a one-time expenditure in Fiscal Year 2007 of $11 million related to tribal obligations, $9 million of which was from the General Fund-State, $2 million from the Aquatic Lands Enhancement Account.

Exhibit 16 – Aquatic Resources Expenditures by Source: Fiscal Year 2000 Through 2007



Source: JLARC analysis of LEAP data. "Other" includes federal, local, derelict vessel, toxics, and dredged material funds.

Exhibit 17 – Aquatic Resources Sub-Program Expenditures by Source: Detail

Account & Appropriation Type	Fiscal Year Expenditure							
	2000	2001	2002	2003	2004	2005	2006	2007
041-1 Resource Management Cost Account-State	$3,933,514	$5,414,497	$4,084,402	$4,638,964	$4,912,293	$5,377,976	$4,745,982	$4,695,340
02R-1 Aquatic Lands Enhancement Account-State	$554,887	$771,096	$955,336	$1,733,856	$2,178,519	$3,651,318	$1,729,761	$4,807,814
001-1 General Fund-State	$103,100	$88,383	$100,800	$79,476	$21,289	$2,000,000	$0	$9,000,105
001-2 General Fund-Federal	$0	$0	$0	$0	$0	$0	$353,246	$361,419
001-3 General Fund-Federal – Unanticipated	$0	$0	$0	$0	$44,083	$612,907	$0	$0
001-7 General Fund-Private/Local	$0	$29,659	$121,478	$155,547	$67,025	$69,844	$28,578	$0
158-1 Aquatic Land Dredged Mat Disp Site-State	$190,935	$404,449	$522,084	$302,475	$264,187	$137,807	$342,104	$617,533
173-1 State Toxics Control Account-State	$0	$0	$0	$1,865,000	$0	$890,000	$1,132,076	$1,022,176
513-1 Derelict Vessel Removal Account-State	$0	$0	$0	$124,400	$260,173	$237,730	$270,223	$717,211
Grand Total	**$4,782,436**	**$6,708,084**	**$5,784,099**	**$8,899,717**	**$7,747,569**	**$12,977,583**	**$8,601,971**	**$21,221,597**

Source: JLARC analysis of LEAP data.

APPENDIX 6: SPECIFIC STATUTE

Statute provides specific instructions on how DNR is to manage state-owned aquatic lands. The following table provides a full list of statutes included in the JLARC compliance review. This includes directives on how to sell and exchange land, manage harbor areas and leases, conduct aquaculture, sell geoduck and other valuable materials, charge for easements, allow free recreational docks and buoys, and approach environmental issues.

Statutory Directives
Land Sales and Exchanges
RCW 79.125.200 (2): State-owned aquatic lands shall not be sold, except to public entities.
RCW 79.125.450: Second-class shorelands on navigable lakes with minimal public value can be sold to the abutting upland owner.
RCW 79.105.400: DNR has the authority to exchange state-owned aquatic lands. However, DNR can only do so if the exchange actively contributes to the public benefits previously outlined.
RCW 79.105.400: DNR is authorized to exchange state-owned aquatic lands for other aquatic lands of equal value in the same county in order to provide suitable state-owned aquatic lands for the purpose of public use.
Harbor Areas
RCW 79.115.020: DNR cannot sell land in harbor areas, unless the sale goes through the Legislature.
Leases
RCW 79.105.240: Rent for water-dependent state-owned aquatic lands is 30% of the assessed value of the nearest upland tax parcel (without improvements i.e. a dock) multiplied by the real capitalization rate.
RCW 79.105.240: The nearest comparable upland parcel used for similar purposes may be substituted if the assessed value of the nearest parcel is inconsistent with the purpose of the lease.
RCW 79.105.270: Rent for nonwater-dependent use is the fair market value of the leased lands, determined in accordance with appraisal techniques specified in rule. However, rents for nonwater-dependent uses shall always be more than the amount that would be charged as rent for a water-dependent use of the same parcel.
RCW 79.105.290: If there are both water-dependent and nonwater-dependent uses of the state-owned aquatic lands, DNR must prorate the rental rate depending on the whole parcel that each use occupies.
RCW 79.105.310: Rent shall not be charged for improvements.
RCW 79.125.400: In cases where the tidelands and shorelands are adjacent to private lands, leasing preference is given to private upland owners who must be notified that the adjacent tidelands and shorelands are available for lease.

Statutory Directives
RCW 79.130.010: Allows DNR to lease the beds of navigable waters to the abutting shoreland or tideland owner or lessee. If the shoreland or tidelands are not improved or occupied, the statute says DNR may lease the beds to any one for 10 years for log booming purposes.
Aquaculture
RCW 79.135.110: The beds of all navigable waters lying below extreme low tide are subject to lease for the purposes of planting and cultivating aquaculture.
RCW 79.135.130: WDFW must inspect potential beds.
RCW 79.135.100: Rules and fees for aquaculture production and harvesting are established through competitive bidding and negotiation.
RCW 79.135.100: DNR may lease an initial twenty-three acres for geoduck aquaculture but is prohibited from offering leases that would permit the intertidal commercial aquaculture of geoducks on more than fifteen acres of state-owned aquatic lands a year until December 1, 2014. DNR must condition the leases so that DNR can engage in monitoring and study of the environmental impacts of the lease's execution, without unreasonably diminishing the economic viability of the lease. DNR must notify all abutting landowners and any landowner within three hundred feet of the lands to be leased of the intent of DNR to lease any intertidal lands for the purposes of geoduck aquaculture.
Studies of geoduck in Hood Canal: • RCW 79.135.050 • RCW 79.135.060 • RCW 79.135.070
Valuable Material
RCW 79.135.140: Geoducks are considered valuable material (except as provided in RCW 79.135.040, where state-owned land is leased for aquaculture).
RCW 79.140.150: Provides direction for the sale of rock, gravel, sand, silt and other valuable materials.
Easements
RCW 79.110.240: The charge for an easement is determined by a fee schedule in statute.
Recreational docks and buoys
RCW 79.105.430: The abutting residential owner to state-owned aquatic lands may install and maintain a dock or a mooring buoy without charge if used exclusively for private purposes.
Environmental issues
RCW 79.105.500: DNR to provide, manage, and monitor aquatic lands dredged material disposal sites.
RCW 79.145.010: DNR to coordinate and implement plastic debris action plan.
RCW 79.100.100: Gives authority to DNR to create a derelict vessel account to help reimburse entities who are authorized to remove and dispose of derelict vessels.

APPENDIX 7: THE PUBLIC TRUST DOCTRINE

This appendix provides some additional detail on the Public Trust Doctrine and its application in Washington.

Origins and General Principals

The essential concept of the public trust doctrine is that the state holds the beds of navigable waters in trust for the people.[6] The doctrine results not from legislation but rather was created through court decisions.[7] The doctrine originated in Roman law and was carried through English common law which provides the basis for the state's legal theories.[8]

In general, property law consists of a "bundle of rights" with respect to the physical object. Such a bundle includes the right to possess and exclude others from the property, the right to dispose of the property, and the right to make use of and enjoy the property.[9] With regard to property subject to the public trust doctrine, however, the courts have stated that there are two distinct parts to the ownership.[10] Those rights contained in the "bundle" discussed above are deemed to be "private property rights" or *jus privatum*.[11] These rights are possessed by both private and public owners.

The second component of ownership is *jus publicum* or the "public authority property rights."[12] The traditional rights provided for here are the public use of the navigable waterways for navigation, commerce, and fisheries.[13] Washington courts have added public recreation[14] and environmental protection[15] to these public rights. Thus, under this doctrine, control of aquatic lands must remain with the state as distinguished from the title to the property which may be transferred to a private party.[16] Article XVII, §1 of the state constitution is consistent with this principal.[17]

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[6] Caminiti v. Boyle, 107 Wn. 2d 662, 668-69 (1987).

[7] Johnson, Ralph W. 1991. *The public trust doctrine and coastal zone management in Washington state.* Washington Department of Ecology at p. 1.

[8] Id. at 7.

[9] Orion Corp. v. State, 109 Wn. 2d 621, 664 (1987).

[10] Caminiti, 107 Wn. 2d at 668.

[11] Id.

[12] Id.

[13] Orion Corp. v. State, 109 Wn. 2d 621, 664 (1987).

[14] Caminiti v. Boyle, 107 Wn. 2d 662 (1987).

[15] Orion Corp., 109 Wn. 2d at 621 (1987).

[16] Caminiti, 107 Wn. 2d at 669-70.

[17] Johnson, *supra* note 2, at 11. Art. 17, Section 1 provides: "**DECLARATION OF STATE OWNERSHIP**. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided*, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state."

Implications of the Public Trust Doctrine on the Management of Aquatic Lands

A Two-Prong Test for Doctrine Compliance

The state must comply with the public trust doctrine in the management of its aquatic lands. State laws and agency management actions affecting state-owned aquatic lands may be challenged under the public trust doctrine. A court's review of such a challenge consists of a two-prong analysis:[18]

1. Did the state give up its right of control over the public interests contained in *jus publicum*?
2. If so, has the state:
    a. Promoted the public interest under *jus publicum* or
    b. Not substantially impaired it?

Regulatory Takings Challenges

State laws and regulations which result in negative economic impacts on a private land owner may be challenged as an unconstitutional "taking" of the property without due process. A successful challenge may result in the government having to provide payments to compensate for the loss of specific uses of the property.[19] This analysis is premised on the theory that the government has deprived the private owner of one of the "bundle of rights" previously discussed. If, however, the private landowner never possessed such a property right, the owner cannot have suffered unconstitutional taking. In other words, such a property right must have existed before it can be taken.[20]

The public trust acts as a "covenant running with the land …for the benefit of the public and the land's dependent wildlife."[21] Accordingly, "private property owners never had the right to do anything inconsistent with the public trust."[22] Because the state does not give up its *jus publicum*, in regulating the aquatic lands, the state is not regulating "private property" but rather controlling a right it already possesses.[23] Accordingly "[w]hen properly invoked, the [public trust] doctrine can limit private property rights while avoiding claims of unconstitutional takings."[24]

[18] Caminiti, 107 Wn. 2d at 670.
[19] Orion, 109 Wn. 2d at 647.
[20] Id. at 641-42.
[21] Id. at 640.
[22] Johnson, *supra* note 2, at 58 (Emphasis in original).
[23] Id. at 2.
[24] Id. at 1.

Application of the Public Trust Doctrine in Washington

What follows are brief descriptions of three key court decisions in Washington. For these three cases, the core issue of the case was the interaction between the public trust doctrine and the management of aquatic lands in Washington.

Caminiti v. Boyle (1987)

The first specific articulation of the public trust doctrine in Washington came in the case of *Caminiti v. Boyle.*[25] The challenge related to the Legislature's enactment of a statute which allowed abutting property owners to install and maintain private recreational docks on state-owned tidelands and shorelands free of charge. A group of recreational water users contended this statute violated the public trust doctrine. Applying the two-prong test, the Washington Supreme Court concluded:

1. The Legislature did not give up the right of control over the *jus publicum* because:
    a. The scope of the statute was limited as it only applied to abutting landowners.
    b. The docks are subject to local regulation regarding size and construction.
2. The state may revoke the permission for the docks.[26]
    a. In regard to the promotion or impairment of the *jus publicum:*
    b. Allowing the docks promoted the public interest by encouraging the use of public waters.[27]
    c. The public interest was not impaired as the state retained ownership over the public tidelands and shorelands and the right to regulate the docks.[28]

The court concluded that the statute did not violate the public trust doctrine.[29]

Orion Corp. v. State (1987)

Decided just ten months after *Caminiti*, the *Orion*[30] case involved a takings claim. By 1968, the Orion Corporation owned approximately 5,600 acres of tideland contained in Padilla Bay, an area of approximately 11,000 acres. Orion intended to build a "Venetian-style" community. Beginning in 1971, with the passage of the Shoreline Management Act, state and local government regulations made commercial development of the property virtually impossible. Orion sued, claiming that the regulations had effectively "taken" its property and thus it was entitled to compensation. Applying the public trust doctrine, the court noted that Orion purchased the property subject to the limitations imposed by the doctrine.[31] Accordingly, if

[25] Caminiti v. Boyle, 107 Wn. 2d 662 (1987).
[26] Id. at 673.
[27] Id. at 674.
[28] Id.
[29] Id at 675.
[30] Orion Corp. v. State, 109 Wn. 2d 621 (1987).
[31] Id. at 659.

"Orion could make no reasonably profitable use of its property without injuring the public trust or the public's interest in the health or in the environment, [then] no compensable taking would have occurred."[32] The court stated that it could not tell from the information before it whether Orion could make use of its property within the requirements of the doctrine and thus remanded the case to the trial court for further review.[33] Orion Corporation settled with the state in 1993 transferring its property to the Department of Ecology for a sum of $3.6 million.[34]

Washington State Geoduck Harvest Assn. v. Department of Natural Resources (2004)

The most recent decision analyzing the effect of the public trust doctrine on the state's management of its aquatic lands is *Washington State Geoduck Harvest Assn. v. Department of Natural Resources.*[35] The Association argued that the public trust doctrine provides a "right to fish" and that the Department of Natural Resources' regulation of geoduck harvesting interferes with that right. The court first noted that the public trust doctrine "obligates the state to balance the protection of the public's right to use resources on public land with the protection of the resources that enable these activities."[36] The court then specifically found that the public trust doctrine applies to DNR's sale of commercial geoduck harvesting rights on public lands.[37]

The court then analyzed whether DNR's management of the geoduck harvest violated the public trust doctrine, utilizing the two-prong test. First, the court found that the state had not given up its right of control of geoduck resources because DNR had specific procedures to control the harvest and had not given up title to any state land in the process. [38] Moving to the second prong, the court noted that the state's actions are improper only if they do not promote, or if they interfere with, the public interest. To the contrary, the court concluded that, by regulating the geoduck harvest, the state was supporting regeneration of the resource for recreational and commercial fishing. Moreover, the court noted that the proceeds from the sale of the geoducks help fund the management and enhancement of aquatic lands thus serving the public interest.[39]

The court concluded that DNR's procedures and regulations satisfied the public trust doctrine's requirements.[40]

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[32] Id. at 661.

[33] Id. at 662.

[34] http://padillabay.gov/abouthistory.asp.

[35] Wash. State Geoduck Harvest Assn. v. Dep't of Natural Res., 124 Wn. App. 441 (2004). This case also involved the Geoduck Harvest Association's challenge that DNR had no authority to regulate geoduck harvesting (the court found specific authority for DNR to do so) and that animals found in the wild belong to no one until they are "reduced to possession" (the court found this rule does not apply to shellfish).

[36] Wash. State Geoduck Harvest Assn., 124 Wn. App. at 449.

[37] Id.

[38] Id at 452.

[39] Id.

[40] Id.

APPENDIX 8: ASSET MANAGEMENT LITERATURE

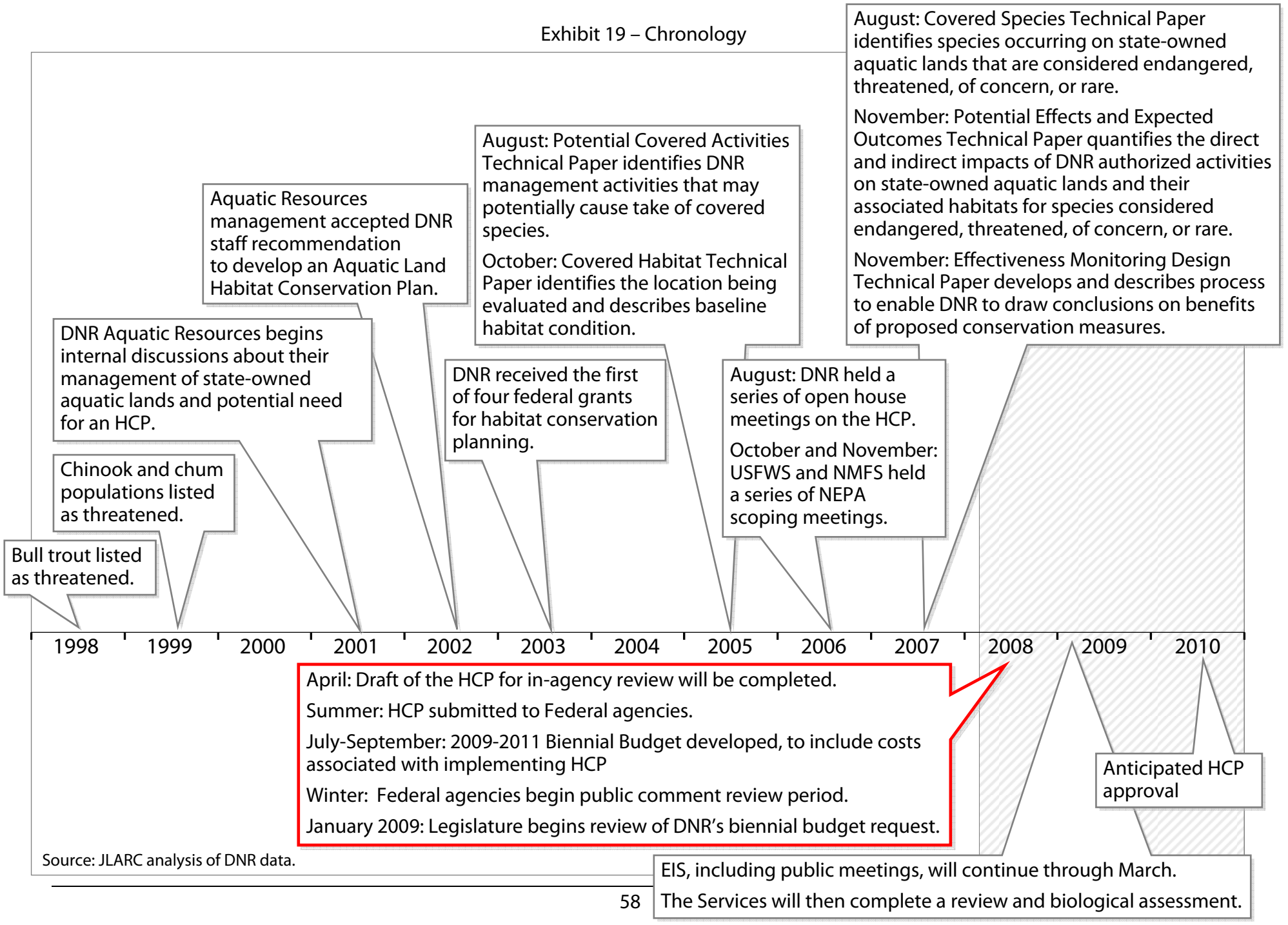
JLARC reviewed the following literature to find benchmarks or best practices for managing public assets:

1. 2007 Guidance for Real Property Inventory Reporting, June 8, 2007, Federal Real Property Council.
2. An Asset Management Primer for the Western States Land Commissioners Association, January 8, 2001.
3. Asset Management Plan, October 2006, The State Land Board, Oregon Department of State Lands.
4. Executive Order: Federal Real Property Asset Management, February 2004, http://whitehouse.gov/news/releases/2004/02/print/20040204-1html.
5. Key Performance Indicators for Federal Facilities Portfolios: Federal Facilities Council Technical Report #147, 2005, The National Academies Press.
6. NR-17 Land Management and Land Use Planning, March 30, 2007, National Governors Association.
7. Performance Measures and Targets for Transportation Asset Management, 2006, NCHRP Report 551.
8. Principles of Real Estate Management, Institute of Real Estate Management, 2006.
9. Real Property Performance Results, December 2006, Office of Real Property Management, Performance Management Division, GSA Office of Governmental Policy.
10. Trust Performance Measurement: A report to the Western States Land Commission, December 15, 2000.

APPENDIX 9: HABITAT CONSERVATION PLAN CHRONOLOGY

DNR is nearing the completion and submission of a Habitat Conservation Plan (HCP), covering all state-owned aquatic lands. An HCP is one route to compliance with the federal Endangered Species Act. The chronology on the following page outlines key steps and dates in both the development of the HCP and its planned implementation.

Exhibit 19 – Chronology



Source: JLARC analysis of DNR data.