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Mark Personius
Director

Memorandum

DATE: January 5, 2021
TO: Planning Commission
FROM: Cliff Strong, Senior Planner
THROUGH: Mark Personius, Director
RE: Continued Review of Shoreline Management Program Periodic Update 2020

Tonight's Goal

In your review of the 2020 Shoreline Management Program Periodic Update the Commission has so far tentatively¹ approved Exhibits A (C/P Ch. 10 Environment), B (C/P Ch. 11 Shorelines), and C (C/P Ch. 8 Marine Resource Lands). At your December 10th meeting you started to review Exhibit D, (Title 23, SMP Regulations) but did not finish.

So on January 14th we will pick up where you left off and continue to review and talk about the proposed amendments to Exhibit D.

Please note that Commissioner Hansen has submitted some proposed edits to Title 23, which are attached. There is also one set of comments from Mike MacKay.

The Commission should review and be prepared to comment on the proposed amendments to:

- Exhibit D – Title 23, SMP Regulations (revised version, attached)

And again, all documents are available in pdf and Word versions on PDS's SMP Update webpage: <https://www.whatcomcounty.us/3119/SMP-Update-2020-Documents> .

Revised Version of Exhibit D

Staff is providing the Commission with a revised version of Exhibit D (Title 23, SMP Regulations). Throughout the Commission's review, staff has also been working with Department of Ecology staff and filling out their Periodic *and* Comprehensive Update checklists. These are checklists Ecology staff use for their review, and point to where the SMP addresses state requirements. Normally for a periodic update we would only have to complete the Periodic checklist; however, since we've majorly restructured the SMP, Ecology staff has requested that we complete the Comprehensive Update checklist as well to help with their review. In working with them, we found that a few required items were proposed for deletion or not addressed adequately. Thus, we have reinserted some of the deleted text and/or added additional text to address these requirements. Additionally, we corrected a few organizational issues we found. In each such instance, we have added a comment that begins "Note to P/C" so that you can clearly see what we changed. (If you get the Word version (link above) you can search for that clause.) We are not listing each of those changes in this memo as we don't think any of them are substantive

¹ Meaning the Commission moved to approve them for introduction at your eventual public hearing, though reserved the right to reconsider.

policy changes (only complying with state requirements). However, if there are any you want to discuss, we certainly can.

Follow-Up from 12/10/20 Meeting

At your December 10th meeting you asked staff to review a few issues in Exhibit D. These, and our thoughts, are:

23.10.160 Violations, Enforcement, and Penalties

Regarding subsections (C) and (D) you asked staff to explain or rectify the terms “at a ratio double” (in (C)) versus “at a rate of 200% (in (D)).

Staff Response: Subsection (C) is intended to address temporal loss, and subsection (D) is intended to be a penalty for violators willfully not complying. We have updated the language to be clearer. You can see this revised language in the revised Exhibit D.

23.30.030 Water Quality and Quantity.

There was concern over subsection (A) (1), which would require all minimum requirements of the DOE manual be met in the shoreline.

Staff Response: This is a complicated matter, as we have different regulations/requirements for different parts of the County depending on whether a property falls in an NPDES Phase II area, a special stormwater district (watersheds), in the shoreline jurisdiction, or outside of any of these. Ryan is preparing a chart comparing the different regulations and will discuss it at your meeting.

23.40.010 Shoreline Use and Modification.

Regarding Table 1, Shoreline Use by Environment Designation, you asked us to confirm that the “New or expansion of existing legal renewable fuel refinery operations or renewable fuel transshipment facilities” row is consistent with your actions on Title 20 in your review of Council’s Cherry Point amendments.

Staff Response: We have re-reviewed your previous recommendations to Council on the Cherry Point amendments and they appear to be consistent.

23.40.020 Shoreline Bulk Provisions.

You asked us to review Table 2, Bulk Regulations for Shoreline Development for consistency with the existing standards.

Staff Response: We have done so, and it appears that the only difference is one of the side setbacks for commercial uses in Shoreline Residential designation. We have updated that table to rectify this discrepancy by splitting the “commercial, signs, and utilities” row into “commercial” and “signs and utilities” and reinstating that one side setback.

23.40.130 Land Division

Re Sources and Futurewise has suggested some language for land divisions that would account for sea level rise. Staff had raised issues with their proposal, and the Commission suggested we get together to see if we could develop a workable solution. We met on 12/29/20 and discussed our concerns, but left it up to them to propose some alternative language.

Previously Identified Amendments to Exhibit D (Title 23, SMP Regulations)

[Note: The below is repeated from the staff memo from the Commission's 12/10/20 meeting. Topic #s and letters below refer to the number assigned in the Scoping Report]

Topic #1, Consistency with State law (required amendments)

- a) *Revise the definition of "Development" to clarify that development does not include dismantling or removing structures.*

The definition of "development" (§23.60.040(6)) has been updated to meet DOE guidelines.

- f) *Revise the SMP aquaculture provisions for consistency with WAC 173-26-241(3)(b).*

§23.40.050, in particular subsections (D)(1) and (G), has been revised to be consistent with WAC 173-26-241(3)(b) regarding commercial geoduck farming.

Topic #2, Consistency with State law

- b) *Revise language to clarify that forest practices that involve only timber cutting are not SMA "developments" and do not require Shoreline Substantial Development Permits.*

§23.40.110(A)(3) (Forest Practices) has been added to clarify that forest practices that involve only timber cutting are not SMA "developments" and do not require shoreline substantial development permits.

- c) *Revise language in §23.50.040 to clarify that the SMA does not apply to lands under exclusive federal jurisdiction.*

Subsection (E)(1) has been added to §23.10.020 (Applicability, which used to be §23.50.040) to clarify that the SMA does not apply to lands under exclusive federal jurisdiction.

- d) *Update definitions to include distinct definitions for "nonconforming use," "nonconforming structure," and "nonconforming development" in accordance with WAC 173-27-080.*

To conform to WAC 173-27-080, the definitions of "nonconforming lot" (§23.60.140(5)) and "nonconforming use" (§23.60.140(7)) have been amended, and the definition of "nonconforming structure" (§23.60.140(6)) has been added.

- f) *Incorporate a reference to WAC 173-27-215 for criteria and procedures for instances in which a shoreline restoration project creates a shift in OHWM.*

A reference to WAC 173-27-215 for criteria and procedures for instances in which a shoreline restoration project creates a shift in OHWM has been added as §23.40.180(A)(3) (Restoration and Enhancement).

- g) *Revise definition of "Floodway" for complete consistency with Ecology's recommended language.*

The definition of "floodway" (§23.60.060(21)) has been amended to be consistent with DOE's recommended language.

- h) *Update the list and maps of streams and lakes that are in shoreline jurisdiction as necessary.*

The list of waters that are in the shoreline jurisdiction has been revised in §23.20.010(B) (Shoreline Jurisdiction), using the language from the WAC 90.58.030 (2)(d).

- i) Revise the SMP to include the required provisions of WAC 90.58.140(12).*

§23.40.080(B)(4)(b) (Dredging and Dredge Material Disposal) has been added to clarify that dredge material disposal at an open water disposal site approved through the Dredged Material Management Program (RCW 79.105.500) is allowed and shall not require a shoreline permit.

Topic #3, Consistency with WCC Ch. 16.16 (Critical Areas)

- a) Ensure Council changes regarding standards for view preservation in the CAO are reflected in the SMP.*

§16.16.235(5) (Activities Allowed with Notification) of the critical areas regulations (Exhibit F) allows (with certain restrictions) for view corridors to be created and maintained. §23.30.040(L) (Views and Aesthetics) of the SMP has been added that acknowledges and cross-references this allowance (except for in the Natural shoreline environment).

Topic #5, Consistency with Shoreline Management Act (RCW 90.58) and 2003 SMP Update Guidelines (WAC 173-26)

- a) Clarify permit review no net loss analysis*

The primary regulations ensuring no net loss in Title 23 are:

- §23.10.040(A) (Code Interpretation) requires that the regulations be interpreted to allow development only when a proposal is “designed, constructed, and/or mitigated to provide no net loss of or a net lift to ecological functions and ecosystem wide processes.”
- §23.30.010(B) (Ecological Protection) requires that “any unavoidable impacts shall be mitigated to meet no net loss of ecological function and ecosystem-wide processes.”
- §23.60.140(4) (Definition) defines what no net loss means.

The term is also already used in numerous other sections as a reminder of this requirement.

Additionally, staff is proposing some amendments to Ch. 16.16 (Critical Areas) to further this goal, but the Commission will review those at a later meeting.

- e) Align Use standards with State statutes.*

Staff is proposing numerous amendments throughout Ch. 23.40 (Shoreline Use and Modification Regulations) that we believe better aligns them with State statutes, in most cases using the language from the WAC. Furthermore, in the existing code Table 23.100.010 is fairly meager and many use allowances or prohibitions are included only in the text of the various use and modification categories, making it difficult to find them all. We have updated that table as Table 1 Shoreline Use by Environment Designation and moved all allowances and prohibitions from the text to the table, hopefully making it easier to see what one can or can't do in the various environment designations.

Topic #7, Definitions

- a) Add definitions for common words with a specific meaning in the SMP.*

In Ch. 23.600 staff has added many definitions of words that were undefined, amended others to meet current standards and/or to be consistent amongst Titles, and deleted those words already defined elsewhere but added the sentence to §23.60.005, “Any words not defined herein shall be defined pursuant to WWC Chapter 16.16 (Critical Areas) or Titles 20 (Zoning) or 22 (Land Use and Development), or their common meanings when not defined in code.”

b) Add definitions for regional, local, and accessory utilities and ensure consistency with Zoning.

Said definitions have been added to §23.60.210(6).

c) Define a single use dock and joint use dock.

“Shared moorage” was already defined in §23.60.190. Additionally, definitions of all moorage types (from DOE guidance) have been added to §23.60.130(17) “Moorage Structure.”

Topic #8, Habitat

c) Consider ways to improve protections for salmon and forage fish habitat.

While the protection of fish and wildlife habitat is already required throughout various sections of Title 23, additional language has been added in:

- §23.30.050 (Vegetation Management) has been amended to strengthen and better tie the protection and/or revegetation of native shoreline vegetation to the protection of salmon and forage fish habitat.
- In §23.40.060(E)(8) (Marinas and Launch Ramps) has been added to the standards requiring that boat launches be designed to minimize impacts to critical saltwater habitats.
- In §23.40.140 (Mining):
 - Subsection (A)(3) now states that “Preference shall be given to mining proposals that result in the creation, restoration, or enhancement of habitat for priority species.”
 - Subsection (A)(6) has been added to prohibit “motorized or gravity siphon aquatic mining or discharge of effluent from such activity to any waters of the state that has been designated under the endangered species act as critical habitat, or would impact critical habitat for salmon, steelhead, or bull trout” pursuant to RCW 90.48.615.
 - Subsection (B)(1) has been added for consistency with WAC 173-26-241(3)(h), prohibiting mining waterward of the ordinary high-water mark of a river if it would cause a net loss of ecological functions of the shoreline.
- In §23.40.150 (Moorage Structures):
 - Subsections (A)(6) and (7) (moved from the existing Boating Facilities section) prohibits moorage structures in certain shoreline habitats.
 - Subsections (B) & (C), having to do with construction and locational standards for moorage structures have been amended and augmented to meet current state and federal habitat protection requirements and guidance.
- In §23.40.190(A)(10) (Shoreline Stabilization) has been amended to prohibit hard shoreline stabilization in jurisdictional shoreline streams on estuarine shores, in wetlands, and in salmon spawning areas, except for the purpose of fish or wildlife habitat enhancement or restoration.
- In §23.40.220(B)(5)(a) (Utilities) has been added, requiring that hydropower facilities be located, designed, and operated to minimize impacts to fish and wildlife resources.

Similarly, while the protection of fish and wildlife habitat is already required throughout various sections of WCC 16.16 (Critical Areas) (Exhibit F), in §16.16.255 (Critical Areas Assessment Reports) new subsection(C)(3) has been added, strengthening the requirement that impacts to salmon and forage fish habitat be address in assessment reports to improve protections for salmon and forage fish. The Planning Commission will review that language at a later meeting.

Topic #10, Nonconforming

- a) *Ensure consistency with Zoning, the CAO, and the SMP regarding nonconforming uses and structures.*

Staff has rewritten Chapter 23.50 (Nonconforming Uses, Structures, and Lots) to conform to the latest DOE guidance addressing nonconforming uses, development, and lots as separate issues. Additionally, definitions for each term have been added to §23.60.140.

- b) *Add standards for nonconforming structures to meet current construction standards.*

In §23.50.020 (Nonconforming Structures):

- (A)(4) now allows legal nonconforming non-overwater structures to be maintained, repaired, renovated, or remodeled to the extent that nonconformance with the standards and regulations of this program is not increased, “provided that a nonconforming structure that is moved any distance must be brought into conformance with this program and the Act.”
- (A)(5) allows overwater nonconforming structures to be maintained or repaired to the extent that nonconformance with the standards and regulations of this program is not increased, “provided that when replacement is the common method of repair, the replaced components shall meet the construction and materials standards of §23.40.150 (Moorage Structures).”

- c) *Address nonconforming expansion dimensional standards.*

§23.50.010(B) (Nonconforming Uses) now clearly states that the expansion, alteration, and/or intensification of a nonconforming use is prohibited, and §23.50.020 (Nonconforming Structures), subsections (E) & (F) clearly address when and how expansion of nonconforming structures are handled.

- d) *Clarify administratively approved single-family dimensional standards.*

To §23.50.020(F) (Nonconforming Structures) we have added clear standards as to how to address the enlargement or expansion of nonconforming single-family structures.

Topic #11, Overwater Structures

- a) *Add dimensional standards for overall square footage.*

§23.40.150 (Moorage Structures) has been completely revamped to meet current state and federal standards. To meet this scoped task, thorough design and dimensional standards, including for overall square footage, have been added to subsection (B).

- b) *Add shared moorage standards.*

Dimensional standards for shared moorage have been added to §23.40.150(B) (Moorage Structures). Subsection (D) prioritizes shared moorage over individual use structures, and subsection (F) provides additional standards for shared moorage.

Topic #12, Permitting

- b) *Add a reference to the Swift Creek Sediment Management Action Plan so as to clarify permitting procedures for actions necessitated by this plan.*

To §23.10.020 (Applicability) we have added subsection (H), which lists the activities to which the SMP does not apply. Subsection (H)(1) specifically exempts “Activities undertaken to comply with a United States Environmental Protection Agency Superfund-related order, or a Washington Department of Ecology order pursuant to the Model Toxics Control Act (such as the Swift Creek Sediment Management

Action Plan), or a Department of Homeland Security order that specifically preempts local regulations in the findings of the order.”

Topic #13, Public Access

- a) Clarify standards for construction in the aquatic designation (work occurring in the water).*

This issue had to do with what materials are allowed for structures built in contact with water (e.g., moorage structures). The list of such materials (untreated wood, concrete, approved plastic composites, or steel) are already found in §23.30.030(D) (Water Quality and Quantity), §23.40.125(E)(1)(e) (Cherry Point Management Area), §23.40.150(C)(2) (Moorage Structures), §23.40.210(B)(8) (Transportation), & §23.50.020(D) (Nonconforming Structures), with no distinction between galvanized or non-galvanized steel, as had been scoped. However, state law and guidance makes no such distinction, so the list has been unaltered.

- b) Add ADA standards consistent with federal statutes.*

In §23.40.020 (Shoreline Bulk Provisions), subsection (G) (Uses Allowed in Buffers and Setbacks) (6), we have added language that allows stairs and walkways to exceed standard width requirements to meet ADA requirements. Similar language has been added to Ch. 16.16 (Critical Areas), but the Commission will review that at a later meeting.

- c) Consider revising dimensions for stairs and walkways located within the shoreline or critical area buffers to accommodate public trails.*

In §23.40.160 (Recreation), subsection (A)(6) has been added, directing applicants to WCC Chapter 16.16 (Critical Areas), which contains the standards for trails in critical areas (including the shoreline setback (i.e., HCA buffer).

Additional amendments are being made to Ch. 16.16 (Critical Areas) to further this goal, but the Commission will review those at a later meeting.

- d) Consider amending trail location standards to allow trails to be located closer than in the outer 50% of a critical area buffer.*

In §23.40.020 (Shoreline Bulk Provisions), subsection (G) (Uses Allowed in Buffers and Setbacks), we have added subsection (11) that allows passive recreation facilities that are part of a non-motorized trail system or environmental education program, including walkways, wildlife viewing structures, or public education trails in the shoreline buffer.

Additional amendments are being made to Ch. 16.16 (Critical Areas) to further this goal, but the Commission will review those at a later meeting.