



## Memorandum

DATE: January 19, 2021  
TO: Planning Commission  
FROM: Cliff Strong, Senior Planner  
THROUGH: Mark Personius, Director  
RE: Continued Review of Shoreline Management Program Periodic Update 2020

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### Tonight's Goal

In your review of the 2020 Shoreline Management Program Periodic Update the Commission has so far tentatively<sup>1</sup> approved Exhibits A (C/P Ch. 10 Environment), B (C/P Ch. 11 Shorelines), C (C/P Ch. 8 Marine Resource Lands) and D (Shoreline Regulations) Chapters 23.05, 23.10, and 23.20.

On January 28<sup>th</sup> we will pick up where you left off and continue to review and talk about the proposed amendments to Exhibit D. If the Commission gets through Exhibit D, staff will also be prepared to start your review of Exhibit F (Ch. 16.16, Critical Areas).

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

- Exhibit D – Title 23, SMP Regulations
- Exhibit F –Ch. 16.16, Critical Areas (revised version attached)

Staff is providing the Commission with a revised version of Exhibit F (Ch. 16.16, Critical Areas). Some changes have been made by staff in working through the DOE checklists. In working through them, we found that a few items were not addressed adequately. 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 policy changes (only complying with state requirements). However, if there are any you want to discuss, we certainly can.

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> .

### Follow-Up from 1/14/21 Meeting

At your January 14<sup>th</sup> meeting you asked staff to review a few issues in Exhibit D. These, and our thoughts, are:

#### Sea Level Rise Regulations

The Commission asked if it is possible to do a GIS analysis now of potential sea level rise impacts were the Commission to adopt the Re Sources/Futurewise/Washington Environmental Council's proposal to require that lots and buildings be designed to take into account for predicted sea level rise by 2100 (based on the Projected Sea Level Rise for Washington State – A 2018 Assessment for Whatcom County,

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

rather than the forthcoming PS-CoSMoS model). Staff responded that doing such an analysis—in fact adopting sea level rise regulations—is not in the approved scope of this update. Furthermore, the USGS—the lead agency preparing the CoSMoS model—in association with the Washington Sea Grant Program has recommended that jurisdictions use the final CoSMoS model outputs (expected by the end of 2021) as a tool to conduct a sea-level rise vulnerability analysis and then consider potential regulatory amendments.

The Commission also asked that staff consult with the County’s attorney on potential legal exposure were we to adopt such regulations without having local data, updating our shoreline inventory and characterization, and performing a vulnerability and risk assessment (which is what the Department of Ecology suggests). Our attorney’s response was that, though it’s possible to do, she always advises against going beyond state requirements, and that our legal exposure would increase were we not to do the background work.

### **Flood & Shoreline Stabilization Issues**

Commissioner Maberry had a few questions regarding an individual’s ability to install weirs, deflectors, and other stabilization measures on agricultural property. This led to a realization that these sections may need some additional language to address this issue, and staff committed to re-reviewing those sections. We will not have had time to develop solutions by the time this memo needs to be completed for inclusion in your packet, but will report orally at your meeting.

### **23.40.020 Shoreline Bulk Provisions**

Commissioner Mocerri noted discrepancies between the proposed bulk requirements in Table 2 and existing requirements. Staff reported that was our intent to keep them the same, though that in simplifying the table errors may have been made. Staff committed to double-checking them. We will not have had time to do so by the time this memo needs to be completed for inclusion in your packet, but will report orally at your meeting.

### **Stormwater Regulations**

Staff presented a table comparing the proposed stormwater regulations to the existing SMP and Title 20 (Zoning) ones for different parts of our County. The Commission asked if they could get a copy of that table so it is attached for your use.

### **Amendments to Exhibit F (Ch. 16.16, Critical Areas)**

*[Note: Topic #s and letters below refer to the number assigned in the Scoping Report]*

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

#### **b) Clarify development mitigation requirements.**

The mitigation standards have been clarified in the following sections as described:

- 16.16.225 General Regulations
  - Subsection (B) has been added to provide clear guidance on order of preference in what vegetation should be avoided when clearing in shorelines.
- §16.16.260 (General Mitigation Requirements):
  - Subsection (C) now contains text describing what information the Director may use in determining the extent and type of mitigation required. This text had been found repeated in various Articles of Ch. 16.16, so we’ve moved it to the overall mitigation section.

- Subsection (D) is a new policy that will allow for off-site mitigation when it's better for the environment. In the past several years of processing permits, staff has found that the best solution overall is not necessarily "on-site and in-kind" mitigation, since sometimes there's not enough room, or that the mitigation is in a place that can't be guaranteed to remain after the initial 5-year monitoring period. Under this new policy, though the preference is still for "on-site and in-kind" (subsection (1)), off-site and in-kind mitigation may be allowed when the applicant demonstrates that greater biological and/or hydrological functions and values will be achieved (subsection (2)), or on-site and out-of-kind mitigation may be allowed when the applicant demonstrates an ecological uplift of biological and/or hydrological functions and values will be achieved (subsection (3)). Subsections (4) and (5) also point to our already existing use of Alternative Mitigation Plans and Mitigation Banking.
- Like subsection (C), subsections (E) and (F) have been moved from the more specific critical areas rules (habitat conservation areas) to the more general so as to apply more broadly.
- Subsection (H)(3) has been moved from §23.30.010 (Ecological Protection). This text puts the burden on the applicant "demonstrate that all reasonable efforts have been taken to provide sufficient mitigation such that the activity does not have significant adverse impacts and results in no net loss of shoreline and critical area ecological functions." Since WCC Ch. 16.16 (Critical Areas) is considered a part of the Shoreline Management Program, staff thought it more fitting that all the rules for mitigation plans be in one place.
- §16.16.680 (Wetlands – Mitigation Standards)
  - Certain sections that we moved to §16.16.260 (General Mitigation Requirements) have been deleted, since the general covers the specific.
  - To account for temporal loss of functions, in subsection (C) staff is proposing to amend the wetland *buffer*<sup>2</sup> mitigation ratio from a standard 1:1 (subsection (C)(1)) to a range of ratios depending on when the mitigation is implemented (subsection (4)) (including at a double ratio for those who don't initially get permits (subsection (c)) and the mitigation is provided long after the impact. This section now mimics the HCA mitigation standards (§16.16.760(E)(3)).
- §16.16.740 (Habitat Conservation Area Buffers). Apart from the clarifying amendments, staff is proposing to modify:
  - Subsection (B) (Habitat Conservation Areas Buffer Widths), which includes Table 4. The mitigation schema in Table 4 moves us from an older system of classifying water types and buffer widths to the newer WDFW water-typing system. Though we had already adopted this newer system in identifying surface waters of the state (16.16.710(C)((1)(a)), we had not followed through on using that nomenclature for the various types' buffer widths (the table didn't match the text). Table 4 corrects this. The buffer widths themselves are the same except for Type S – Freshwater. It is currently 150 feet, but staff is proposing to increase it to 200 feet, which is the Court recommended width based on *National Wildlife Federation v. FEMA* (Federal District Court Case No. 2:11cv-02044-rsm; NMFS Doc. #2006-00472).
- §16.16.760 (Habitat Conservation Areas – Mitigation Standards)
  - Certain sections that we moved to §16.16.260 (General Mitigation Requirements) have been deleted, since the general covers the specific.

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<sup>2</sup> Note that the ratios for *wetland* mitigation (Table 2, which are from DOE guidance) are not proposed for amendment.

- We have added subsection (D) as a reminder to applications that the Army Corps of Engineer Regional General Permit 6 for inland marine waters may apply to their project(s). RGP-6 is a permit issued by the Corps that authorizes the construction of new residential in- and overwater structures in inland marine waters of Washington State while meeting the Endangered Species Act, though it has conditions on the construction.
- Like with wetland buffer mitigation, we have added subsection (E)(3), doubling the mitigation ratio for those who don't initially get permits (subsection (c)) and the mitigation is provided long after the impact.
- §16.16.640 (Wetland Buffer Modification) and §16.16.745 (Habitat Conservation Area Buffer Modification). In Articles 6 (Wetlands) and 7 (Habitat Conservation Areas) staff is proposing to combine their respective buffer modification rules into one section for each Article, each covering the types of buffer modifications allowed (increase, averaging, reduction, and variance). For wetlands, we have also modified some of the text to be consistent with DOE guidance (Wetlands in Washington State, Volume 2, Appendix 8C, updated 2018).

## #8, Habitat

### **b) Consider strengthening ecological connectivity and wildlife corridor requirements.**

Apart from all the existing rules about maintaining connectivity in WCC Ch. 16.16 (Critical Areas), new rules to strengthen ecological connectivity and wildlife corridor requirements in that document include:

- In §16.16.225 (General Regulations), new subsection (C) has been added, requiring development proposals to maintain ecological connectivity and habitat corridors;
- In §16.16.255 (Critical Areas Assessment Reports) new subsection (C)(3) has been added, strengthening the requirement that connectivity be addressed in assessment reports;
- In §16.16.640 (Wetland Buffer Modification), subsection (A) allows the Director to increase wetland buffers to protect wetland functions and provide connectivity to other wetland and habitat areas;
- In §16.16.745 (Habitat Conservation Area Buffer Modification) subsection (A)(2) allows the Director to increase wetland buffers to protect wetland functions and provide connectivity when a Type S or F waterbody is (among other things) located within 300 feet of another Type S or F water body, a fish and wildlife HCA, or A Category I, II or III wetland;

### **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 WCC 16.16 (Critical Areas), 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.

### **d) Clarify functional disconnect standards for protection of Fish & Wildlife Habitat Conservation Areas**

The term "functional disconnect," which many people have interpreted differently and is not widely used anymore, has been eliminated in §16.16.630(B) (Wetland Buffers) and §16.16.740 (Habitat Conservation Area Buffers), which now say, "Buffers shall not include areas of an existing, legally established substantially developed surface." This is consistent with Ecology's Wetland Guidance Volume 2.

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## #10, Nonconforming

### a) Ensure consistency with Zoning, CAO, and SMP regarding nonconforming uses and structures.

In §16.16.275 (Nonconforming Uses, Structures, and Lots) two amendments are proposed to align this chapter with Title 20 (Zoning) and Title 23 (SMP):

- In subsection (B), the time within which an intentionally abandoned *nonagricultural* nonconforming use or structure may maintain its nonconforming status is changed from 5 years to 12 months, the same timeframe in Title 20 (Zoning).
- In subsection (E), a new (1) is being added, stating that “intentional demolition or removal is not a casualty,” as in Title 23 (SMP).

## #12, Permitting

### a) Consider simplifying utility repair and maintenance permitting.

In §16.16.235 (Activities Allowed with Notification), though subsection (B)(2) already allows maintenance and repair of infrastructure (including utilities), it has been amended to be clearer by adding the term “utility corridors.” Additionally, a new subsection (B)(3) has been added regarding utility installation.

We have also added subsection (B)(3), which would allow utility installation with only notification.

### b) SFR Permits on Constrained Lots

Staff is proposing to alter the way we permit single-family residences on lots that are constrained by critical areas.

Under the current schema (existing code), we use (in hierarchical order):

- **Administrative 25% Buffer Reduction** – Staff has the ability to administratively reduce a buffer by 25% where feasible on lots that are somewhat constrained by critical areas if the impacts can be fully mitigated. If doing this doesn’t allow a standard home, then...
- **Hearing Examiner Variance** – The Hearing Examiner has the ability to grant a variance from *any* dimensional standard by any degree if the impacts can be fully mitigated and the variance criteria are met. If this doesn’t work, then...
- **Reasonable Use Exception**<sup>3</sup> – Staff has the ability to administratively allow a standard-sized home (up to 4,000 sq. ft. of impacts) on lots that are very constrained by critical areas if the impacts can be fully mitigated.

However, the Hearing Examiner has questioned why he isn’t the final decision maker, as the current code allows an administrative determination to be made *after* a quasi-judicial decision, and in the hierarchy of permitting, applicants should have to exhaust any administrative remedies before seeking a quasi-judicial decision. Our Natural Resources Supervisor has taken this to heart and would like to alter who approves the more impactful cases.

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<sup>3</sup> A state-authorized allowance to be used for properties so encumbered by critical areas and/or buffers that application of the critical areas regulations would preclude all reasonable economic use of property. In other words, that even if a legal lot is totally covered by critical areas, one can still develop what’s considered a “reasonable use” for that zone (generally a standard sized home and its appurtenances) so as to avoid a “taking” of private property.

Thus, we have rewritten the processes and changed the order of the various mechanisms so that the more impactful cases are heard by the Hearing Examiner. Under the proposed schema we would use (in hierarchical order):

- **Administrative Reduction/Average** – Staff would have the ability to administratively reduce or average a buffer by 25% if the impacts can be fully mitigated, though avoidance and minimization criteria are applied. This allows for flexibility in project design and road alignments. If this doesn't work, then...
- **Administrative Variance** – Staff would have the ability to administratively grant an administrative variance<sup>4</sup> to reduce a buffer by 25-50% if the impacts can be fully mitigated and the variance criteria are met. If this doesn't work, then...
- **Hearing Examiner Variance** – The Hearing Examiner would have the ability to grant a variance from *any* dimensional standard by any degree if the impacts can be fully mitigated and the variance criteria are met. If this doesn't work, then...
- **Hearing Examiner Reasonable Use Exception** – The Hearing Examiner would have the ability to grant a Reasonable Use Exception to allow up to 2,500 square feet of impacts, and the homeowner would only have to mitigate what can actually fit on the property (which conceivably could be none).

In this schema, the degree to which one can vary standards while providing the least amount of mitigation moves up a level at each step, with the Hearing Examiner making the tougher decisions through a quasi-judicial process.

Note, too, that under the reasonable use rules, staff is proposing to go back to the 2,500 sq. ft. maximum impact area we had prior to the 2017 Critical Areas update. This returns the reasonable use exception to truly the last effort of avoiding a taking. Since the property would not need to fully mitigate, a smaller footprint is warranted.

### **#13, Public Access**

#### **c) Add ADA standards consistent with federal statutes.**

In both §16.16.620 (Wetlands – Use and Modification) subsection (H) and §16.16.720 (Habitat Conservation Areas – Use and Modification) subsection (G)(1), text has been added to allow trails to exceed standard width requirements to meet ADA requirements.

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

In §16.16.325 (Landslide Hazard Areas – Use and Modification), a new subsection (A)(3) has been added to allow trails (meeting certain conditions) in landslide hazard areas.

In §16.16.620 (Wetlands – Use and Modification), subsection (H) (Recreation) has been amended to allow public trails to include viewing platforms, and to be closer than the outer 25 percent of the buffer “when necessary to provide wetland educational opportunities or for public health and safety,” and to be wider than the standard widths when necessary to meet ADA requirements. Corresponding amendments have also been made to 16.16.720(G)(1) (Habitat Conservation Areas – Use and Modification).

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<sup>4</sup> This mechanism was created by Council in 2020 and is found in WCC 22.05.024 (Variances).

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

In §16.16.620 (Wetlands – Use and Modification), subsection (H) (Recreation) has been amended to allow public trails to include viewing platforms, and to be closer than the outer 25% of the buffer “when necessary to provide wetland educational opportunities or for public health and safety,” and to be wider than the standard widths when necessary to meet ADA requirements. Corresponding amendments have also been made to 16.16.720(G)(1) (Habitat Conservation Areas – Use and Modification).

## **#18, Shoreline Setbacks/ Riparian Management**

**a) Update vegetation conservation standards to prefer limbing over removal.**

§16.16.235(B)(5) (Activities Allowed with Notification) has been updated to stress limbing over removal of trees to provide view corridors.

## **#20, Wetland Buffers**

**a) PDS will conduct a parallel process, convening a group of local wetland consultants, to consider revisions to the CAO regulations regarding wetland habitat function score break points, buffer widths, reduction, averaging to meet DOE guidelines, and having buffers based on habitat performance instead of static/standard buffers. If they complete this work in time, it can be incorporated into this update; otherwise it can follow.**

In July 2018 the Washington Department of Ecology (DOE) modified the habitat score ranges and recommended buffer widths in their wetland buffer tables in the DOE guidance, with some minor text changes to ensure consistency. Some citizens, local environmental consulting firms, and the Building Industry Association of Whatcom County then requested that we amend our code to meet this new guidance, and it was docketed as PLN2019-00008.

The project was brought before the Planning Commission on March 14, 2019. But there was confusion on staff's part as to what we actually *had* to do at that time and what impacts it would have on development. DOE had informed staff that, while we didn't need to amend our code at that point (having just updated Ch. 16.16 (Critical Areas) (Exhibit F) that they would review our code for consistency with their guidance when Ch. 16.16 was opened for amendment again, noting that that would occur during the 2020 SMP Periodic Update.

So at the Commission's direction, staff worked with the local wetlands consultants to review the issue and try to determine what effects it might have. Three consulting firms<sup>5</sup> provided analyses based on data from projects they had worked on. From these analyses, it appears that many of Whatcom County's lower quality wetlands (e.g., small wetlands in agricultural fields) would end up with smaller buffers, but that our higher quality wetlands (Categories II and III) would end up with larger buffers. (But even this is speculation, as ATSI noted that the comparison results are not statistically significant.<sup>6</sup>) Thus, farmers may benefit but developers/ builders may suffer, as many of our lower quality wetlands are those found in agriculture fields, while our higher quality wetlands are typically found in non-agriculture rural areas.

Nonetheless, given the Department of Ecology's statements that they'll be monitoring the SMP Update to ensure that we meet their latest guidance (which is based on Best Available Science), and given that Comprehensive Plan Policy 10M-2 directs the County to “Develop and adopt criteria to identify and

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<sup>5</sup> NW Ecological Services, NW Wetlands Consulting, and Aqua-Terr Systems, Inc.

<sup>6</sup> Paired sample t-tests were conducted to compare the proposed buffer results with categories of the wetlands impacted.

evaluate wetland functions that meet the Best Available Science standard and that are consistent with state and federal guidelines,” staff is proposing to amend §16.16.630 (Wetland Buffers) Table 1 (Standard Wetland Buffer Widths) to meet DOE guidance. As indicated, these changes would lessen buffers on lower quality wetlands, and increase them on higher quality ones.

## **Other Proposed Policy Changes**

### **UGA Wetlands**

In 16.16.225 (General Regulations) staff is proposing to add subsection (B)(7), which would allow “alteration of Type III or IV wetlands that have a habitat area score of less than 6 when associated with an approved commercial development within an Urban Growth Area” when impacts are mitigated. This would allow the alteration of certain wetlands in Urban Growth Areas (UGAs) (in particular, Birch Bay) so as to encourage development of commercially zoned property. Commercial development in Birch Bay has been stifled because so much of the remaining commercially zoned property contains small, isolated wetlands. Yet under the Growth Management Act we’re supposed to encourage development within UGAs so that development doesn’t sprawl to less developed areas of the County.

### **Accessory Uses within the Shoreline**

Given that the shoreline is defined and regulated as a Habitat Conservation Area, theoretically we should not allow uses (other than water-oriented uses and single-family residences which are SMA ‘preferred uses’) within the shoreline (which would necessitate vegetation clearing). However, we know that folks that have waterfront property want and expect to have access (for swimming, boating, relaxation, etc.) and recreational amenities near the shore (e.g., fire pits, kayak sheds, etc.)

So we have added to 16.16.720 (Habitat Conservation Areas – Use and Modification) subsection (G)(4), which sets limits on how much of the shoreline can be cleared of vegetation for such uses and requires mitigation to offset the impacts so as to achieve No Net Loss.

### **Timber Removal**

The current Ch. 16.16 (Critical Areas) does not have guidance for Conversion Option Harvest Plans as allowed by WAC 222. For other permits this would allow for a limited removal of trees, while retaining larger trees to help with managing a riparian buffer. When development alters a functioning forested system some level of continued forest management is required.

To alleviate this issue, staff is proposing to add to 16.16.720 (Habitat Conservation Areas – Use and Modification) subsection (P), which sets performance standards for removing timber in Habitat Conservation Areas (e.g., riparian areas). These standards vary by water type, and are tied to existing buffer conditions.