

# Whatcom County Planning & Development Services Staff Report

## Shoreline Management Program Periodic Update 2020

### I. File Information

**File #** PLN2020-00006, PLN2019-00011, & PLN2018-00010

**File Name:** Shoreline Management Program Periodic Update 2020

**Applicant:** Whatcom County Planning and Development Services (PDS)

**Project Summary:** Periodic update of Whatcom County's Shoreline Management Program, which includes amendments to the Whatcom County Comprehensive Plan (shoreline and other policies), WCC Titles 23 (shoreline regulations) and 22 (permitting procedures), WCC Chapter 16.16 (critical areas regulations), and the official Shoreline Map. A list of proposed amendments, and how the draft addresses them, is attached. Additionally, the project addresses Council's docketed items 1) PLN2019-00011, a directive to amend the CompPlan and codes to allow the seasonal extraction of sand and gravel from dry upland areas under certain conditions (but has been found to be unnecessary); and 2) PLN2018-00010, the addition of a Sustainable Salmon Harvest Goal policy to the CompPlan.

**Location:** Countywide.

**Staff Recommendation:** Approve, though it should be noted that staff still recommends that the maximum impact area allowed through a Reasonable Use Exception be 2,000 sq. ft., rather than the 4,000 allowed in the existing code (Exhibit F, §16.16.270(C)(12)).

### II. Background

Whatcom County (County) is undertaking a periodic review of its Shoreline Management Program (SMP), as required by the Washington State Shoreline Management Act, RCW 90.58.080(4). The Shoreline Management Act (SMA) requires each SMP be reviewed, and revised if needed, on an eight-year schedule established by the state Legislature. The review ensures the SMP stays current with changes in laws and rules, remains consistent with other County plans and regulations, and is responsive to changed circumstances, new information and improved data.

The County adopted its current SMP in 2007 (Ordinance No. 2007-017; approved by Ecology in 2008) through a comprehensive update process, which included an inventory and characterization of shoreline land use and ecological conditions (otherwise known as the "baseline condition"), a shoreline restoration plan, and an evaluation of cumulative impacts to ensure implementation of the SMP would result in no net loss of shoreline ecological functions.

Since then, the Council has amended the SMP numerous times, though those amendments were fairly minor in nature, addressing specific issues. The SMP was most recently amended in 2019 to adopt by reference the 2017 Critical Areas Ordinance (CAO).

## Periodic Update Requirements

The primary requirement of the periodic update process is to ensure that the SMP remains consistent with updates to the legislative requirements of the SMA. The Washington State Department of Ecology (DOE) provides a list of legislative amendments which have taken effect between 2007 and 2017 as a Periodic Review Checklist.

The periodic update also provides an opportunity to review the SMP for consistency with the County's Comprehensive Plan and development regulations, including critical areas regulations. The County's SMP regulates critical areas in the shoreline jurisdiction by adopting by reference as part of the SMP the County's CAO as adopted in 2017 (Ordinance No. 2017-077) and codified in Chapter 16.16 of the WCC.

The County's Comprehensive Plan and other development regulations were also reviewed for consistency with the SMP, and amendments are being proposed to maintain consistency.

The periodic review process also represents an opportunity to revise and improve the overall functionality, clarity, and usability of the SMP for both the public and County staff. This includes clarifying permit processes and requirements and improving the overall organization and clarity of the documents. The majority of amendments shown in the documents are to achieve this goal.

Note that this periodic update is not required to: re-evaluate the ecological baseline that was established as part of the 2007 comprehensive update; extensively assess no net loss criteria other than to ensure that proposed amendments do not result in degradation of the baseline condition; or change shoreline jurisdiction or environment designations, unless deemed appropriate and necessary. And doing so was not included in the scope or budget for this update, so staff has not undertaken any amendments that would require such actions. A link to those 2007 documents can be found below under "Attachments."

## Project Scope

In starting this project, staff compiled ideas for amendments from various sources (see Public Outreach, below) and compiled them into a list that the Planning Commission and Council reviewed and adopted as the "Scoping Document." This set the "bookends" for what staff would work on (and by corollary, what we would not work on). It contains a list of 22 topic areas, with 68 specific issues to address. A link to that document can be found below under "Attachments."

Staff understands that through the review process other ideas may arise, but if they are big issues that need a lot of work to accomplish, we will not be able to take them on and meet our update deadline of June 30<sup>th</sup> or stay within budget.

## Public Outreach

The County has provided multiple opportunities for public participation throughout the process using a variety of communication tools to inform the public and encourage participation. This included our SMP Update website (<http://www.co.whatcom.wa.us/3097/Shoreline-Master-Program-Periodic-Update>), a list-serve, news releases, public notices, open houses, and public work sessions with the Planning Commission and County Council.

The early months of the project were used to gather input and outline the extent of the review; three public open houses were held in different parts of the County to illicit amendment ideas<sup>1</sup>. Both the

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<sup>1</sup> Note: Though we had planned on holding three additional open houses to present the draft to the public, due to the COVID-19 pandemic we had to cancel those and rely on electronic review.

Planning Commission and the County Council then reviewed and adopted a final scope of potential amendments based on input from staff, the public, local jurisdictions, tribes, and other stakeholders.

Based on that scope, County staff and consultants drafted amendments. These draft amendments were issued for a 30-day public review period from August 18 – September 18, 2020, before the Planning Commission’s work sessions. Prior to the Planning Commission’s hearing the revised amendments were reissued for another 30-day public review period, from March 12 – April 12, 2021.

### **Planning Commission Review**

Between October 2020 and April 2021 the Planning Commission held ten public work sessions to review the draft amendments. After a second 30-day public review period they then held a joint Planning Commission/Department of Ecology public hearing on April 22, 2021.

### **County Council/Department of Ecology Review**

Staff expects that the Council will hold multiple work sessions and an additional public hearing prior to adoption. By state law, the SMP update was supposed to be adopted by June 30, 2020; however, as a DOE grant recipient (and in part due to the pandemic) our official deadline is now June 30, 2021. Staff anticipates that Council will provisionally adopt the update via resolution forwarding it to DOE for their final review and approval. After we receive DOE’s approval, Council will then need to adopt an ordinance adopting and effecting the update. If the anticipated schedule is kept, the revised SMP should become effective sometime this Fall.

### **Attachments**

*To Review* (provided in your packet):

- Exhibit A – CompPlan Ch. 10 Environment
- Exhibit B – CompPlan Ch. 11 Shorelines
- Exhibit C – CompPlan Ch. 8 Marine Resource Lands
- Exhibit D – WCC Title 23 Shoreline Regulations
- Exhibit E – WCC Title 22 Land Use & Development
- Exhibit F – WCC 16.16 Critical Areas Regulations
- Exhibit G – Shoreline Map
- Exhibit H – Table of public comments, with staff responses
- Exhibit I – No Net Loss Addendum
- Exhibit J – Shoreline Restoration Addendum

*Background Documents:*

- 2020 SMP Update Scoping Document
- Materials from the 2007 Comprehensive Update:
  - Vol. 1 - Inventory and Characterization Report
  - Vol. II - Scientific Literature Review
  - Vol. III - Restoration Plan
  - Vol. IV - Cumulative Effects Analysis

All documents are available on PDS’s SMP Update webpage at <http://www.co.whatcom.wa.us/3119/SMP-Update-2020-Documents>.

### III. Amendments

The proposed amendments are found in Exhibits A through G. Please refer to those attachments; explanations are provided therein. Following, however, is a list of proposed policy changes.

#### Scoped Amendments

This is the list of items Council directed staff to address, and how we did. Topic #s refer to the topic number assigned in the Scoping Report.

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

- a) Revise language to cite updated substantial development cost threshold or to rely solely on reference to WAC 173-27-040 for exemptions to substantial development permitting.**

Every five years the Office of Financial Management (OFM) recalculates the dollar threshold for projects qualifying as exempt from having to obtain a substantial development permit. Thus, in §22.07.020(B)(1) (Exhibit E), we have updated the dollar amount to the most recent (2017) OFM calculation of \$7,047. Additionally, we have revised the definition of “substantial development” in §23.60.190 to better meet the state definition (Exhibit D).

- b) Revise the definition of “development” to clarify that development does not include dismantling or removing structures.**

The definition of “development” has been updated to meet DOE guidelines (Exhibit D, §23.60.040(6)).

- c) Add reference to statutory exceptions to local review to the SMP. Revise or remove existing references to remedial actions and projects certified pursuant to RCW 80.50 to clarify their status as exceptions to local review under the SMA.**

The requisite language has been added (and revised) to §22.07.010(G) (Exhibit E) to clarify the referenced project types’ status as exceptions to local review under the SMA, and deleted from (old) §23.50.060 (Exhibit D).

- d) Revise language to include a shoreline permit exemption for retrofitting existing structures to comply with the ADA or to rely solely on reference to WAC 173-27-040 for exemptions to substantial development permitting.**

The requisite language has been added as §22.07.020(B)(17) (Exhibit E).

- e) Revise language in the SMP to cite the updated cost thresholds for dock construction or to rely solely on reference to WAC 173-27-040 for exemptions to substantial development permitting.**

§22.07.020(B)(8) has been revised to meet the statutory requirements (Exhibit E) and the cost threshold has been deleted from the definition of “substantial development” in §23.60.190 (Exhibit D).

- 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. (Exhibit D)

- g) Revise the SMP to clarify that the effective date of SMP amendments is 14 days from notice of final approval by Ecology.**

Both §23.05.090 (Effective Date) and §23.10.030(C)(2) (Administrative Duties) have been updated to clarify that the effective date of SMP amendments is 14 days from notice of final approval by Ecology (Exhibit D).

- h) Review the SMP for consistency with 2003 SMP Guidelines and make any necessary changes.**

Numerous amendments are proposed to make our SMP consistent with the SMP Guidelines; too many to list here. However, prior to submitting to DOE for approval, staff will complete the SMP checklist for their use.

## **Topic #2, Consistency with State law**

- a) Revise the SMP for consistency with Ecology's updated permit filing procedures.**

The requirements for filing permits with DOE have been updated in §22.07.060 (Filing Shoreline Permits with the Department of Ecology) (Exhibit E).

- 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 (Forest Practices), subsection (A)(3) 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. (Exhibit D)

- 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. (Exhibit D)

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

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

- e) Define special procedures for WSDOT projects per WAC 173-27-125.**

Subsection (1)(c) has been added to §22.05.130 (Permit Review Time Frames) to define special procedures for WSDOT projects. (Exhibit E)

- 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) (Exhibit D).

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

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

**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). (Exhibit D)

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

§23.40.080 (Dredging and Dredge Material Disposal), subsection (B)(4)(b) 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. (Exhibit D)

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

**a) Ensure Council changes in Ch. 16.16 regarding standards for view preservation are reflected in the SMP.**

§16.16.235(5) (Activities Allowed with Notification) of the critical areas regulations (Exhibit F) allows for view corridors to be created and maintained (though certain restrictions apply). Subsection (L) has been added to §23.30.030 (Views and Aesthetics) (Exhibit D) that acknowledges and cross-references this allowance (except for in the Natural shoreline environment).

**Topic #4, Consistency with Land Use procedures (Title 22)**

**a) Update SMP to align with recently adopted Title 22 permit procedures.**

In keeping with placing all land use permitting procedures in one place (Title 22) started a couple of years ago, all shoreline permitting procedures in Title 23 (Exhibit D) are being moved to Title 22 (Exhibit E). Where processes overlap with PDS's other project permit types, we refer to and rely on (slightly modified) existing language (Ch. 22.05). However, shoreline permits also have requirements unique to them, so have supplemented the processing rules with a new Ch. 22.07 (Additional Requirements for Shoreline Permits and Exemptions).

**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 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." (Exhibit D)
- §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." (Exhibit D)
- §23.60.140(4) (Definition) defines what no net loss means. (Exhibit D)
- §16.16.250(2) (Critical Areas Review Process) requires that applicants demonstrate no net loss to the Director's satisfaction in order to approve a critical areas review (and thus, a project permit). (Exhibit F)
- §16.16.260(C) General Mitigation Requirements allows for alternative mitigation options in order to provide the greatest ecological benefit... to achieve no net loss of ecological functions. (Exhibit F)
- §16.16.260(G) requires that mitigation plans demonstrate no net loss. (Exhibit F)

However, the term is also used in numerous other sections as a reminder of this requirement.

**b) Clarify development mitigation requirements.**

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

- §16.16.260 (General Mitigation Requirements):
  - Subsection (B) 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 (C) 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 overall solution 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 (B), subsections (D) and (E) have been moved from the more specific critical areas rules (habitat conservation areas) to the more general so as to apply more broadly.
  - Subsection (G)(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 now 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

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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.

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 federal court's 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 now covers the specific.
  - 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).

**c) Align appeal procedures with State statutes.**

Subsection (3) has been added to §22.05.160 (Appeals) to align the County's shoreline permit appeals process with the state statutes. (Exhibit E)

**d) Shoreline permit review (Exemption, Substantial, Conditional Use, or Variance) should reflect State statutes and level of review required.**

The rules for shoreline permit review have been updated to meet state standards in Ch. 22.07. (Exhibit E)

**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 uses allowed or prohibited 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.



**f) Incorporate improved permit streamlining for priority salmon recovery projects**

§22.07.020 (Exemptions from Shoreline Substantial Development Permits) subsection (B)(16) already exempts projects whose primary purpose is to improve fish or wildlife habitat or fish passage. (Exhibit E)

**Topic #6, Climate Change/Sea Level Rise**

**a) Develop and/or strengthen policies regarding climate change/sea level rise, including the incorporation and use of new data (as it becomes available), to review and revise, if warranted, shoreline use regulations.**

Chapter 10 of the CompPlan (Exhibit A) already contains a section on Climate Change (starting on page 10-8), including Goal 10D and Policies 10D-1 through 10D-10. However, these are aimed at how the County should respond overall and are not specific to the shoreline itself.

Council's direction through the Scoping Document, recommended for approval by the Planning Commission, was to "develop and/or strengthen policies..." not regulations. Thus, staff has developed seven new policies specific to our management of the shoreline in light of anticipated impacts due to climate change (Exhibit B, C/P Ch. 11, Policies 11AA-1 – 11AA-7) , including proposed Policy 11AA-5, which reads:

"Whatcom County should periodically assess the best available sea level rise projections and incorporate them into future program updates, as relevant"

This policy specifically addresses "*the incorporation and use of new data (as it becomes available), to review and revise, if warranted, shoreline use regulations.*"

We understand that some folks would like to see more directive policies<sup>3</sup>, as well as actual regulations<sup>4</sup>; however, before adopting (and then implementing) something along those lines, we'd need to know the details of likely sea level rise (location, elevation, magnitude, etc.). As we mentioned when the Commission and Council were scoping this project, staff anticipates the development of the CoSMoS model on which the City of Bellingham and Whatcom County Public Works are working, which should provide the Best Available Science to Whatcom County. The policies being introduced would set us up for developing regulations once this model is completed.

It should also be noted that in reviewing development proposals, Planning and Development Services already requires structures to be built above the anticipated flood/sea level rise stage through the County's critical area (i.e., geohazard/tsunami) and flood regulations.

Nonetheless, this is a policy decision and all comments are being forwarded to the Planning Commission and Council for their consideration.

**Topic #7, Definitions**

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

In Ch. 23.600 (Exhibit D) we 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."

3 See Exhibit H, Public Comments FW/WEC01, FW/WEC02, WCPW07, WCPW08, & RES03

4 See Exhibit H, Public Comments FW/WEC12, FW/WEC21, WCPW08, WCPW09, WCPW10, & RES03.

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

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

**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 have been added to §23.60.130(17) “Moorage Structure.” (Exhibit D)

## Topic #8, Habitat

**a) Reference WDFW and DNR’s Shore Friendly Program**

Staff has amended C/P Policy 11I-2 (Exhibit B) to reference this program as an example of “voluntary and incentive-based public and private programs.”

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

§23.40.030 (General Shoreline Use and Modification Regulations), subsection J (which is existing language moved from elsewhere), already requires that buildings, fencing, walls, hedges, and similar features shall be designed, located, and constructed in a manner that does not preclude or significantly interfere with wildlife movement to or from important habitat areas.

Apart from all the existing rules about maintaining connectivity in WCC Ch. 16.16 (Critical Areas) (Exhibit F), 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.**

Policy 11LL-4 in C/P Ch. 11 (Exhibit B) is proposed to be amended in support of this task by adding additional critical saltwater habitats to the list of where moorage structures ought to be avoided.

And while the protection of fish and wildlife habitat is already required throughout various sections of Title 23 (Exhibit D), additional language has been added in:

- §23.30.040 (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 (Marinas and Launch Ramps) (Exhibit D), subsection (E)(8) 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 (Shoreline Stabilization), subsection (A)(10) 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 (Utilities), subsection (B)(5)(a) has been added, require that hydropower facilities shall 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.

**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.”

**Topic #9, Layout and Structure of the SMP**

**a) Reorganize the SMP, putting the background information, discussions, and goals and policies into the Comprehensive Plan as a chapter**

One of the biggest changes was to reorganize the SMP to shorten it and make it easier to use. One of the ways we’re doing this is to move the SMP policies into the Comprehensive Plan. The SMP was already adopted by reference as part of the CompPlan; it just wasn’t contained in it. However, in modern code construction, code normally doesn’t contain policies (or appendices) as our current Title 23 does. Staff is proposing to create a new Chapter 11 of the CompPlan entitled “Shorelines” (Exhibit B). We have moved all the SMP policies from Title 23 (Exhibit D) as well as related policies from Chapter 10, Environment (Exhibit A), to this chapter, putting all the shoreline policies into one place. Thus, the amendments to Chapter 10 are mostly showing the deletion of policies that are moving to Chapter 11.

Most of the changes shown in C/P Ch. 11 (Exhibit B) are also in support of this effort. We have moved everything from Title 23 that appeared to be policy (rather than regulation) into this chapter. We’ve also

put it in the same format as other chapters of the CompPlan, struck redundancies, and corrected grammar and tenses. There are, however a few proposed new policies and/or amendments that we discuss below.

Another major organizational change is to move all permitting regulations to WCC Title 22 (Exhibit E). Title 22 was created a few years ago to eventually contain all of the County's procedures for land use permitting and code administration. However, moving sections to this Title is continuing to occur as we progress through various code amendments (e.g., the annual code scrub, upcoming code enforcement amendments, this SMP update, etc.).

Similarly, since WCC Chapter 16.16 (Exhibit F, Critical Areas) is adopted as part of the SMP, they are to be read together, and where there are redundancies between Ch. 16.16 and Title 23, we are proposing to delete those redundancies in Title 23 (Exhibit D).

**b) Simplify the language as much as possible and remove redundancies**

See response to 18.a.

**Topic #10, Nonconforming**

**a) Ensure consistency with Zoning, CAO, and 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. (Exhibit D)

In §16.16.275 (Nonconforming Uses, Structures, and Lots) (Exhibit F) 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).

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

In §23.50.020 (Nonconforming Structures) (Exhibit D):

- (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 (Nonconforming Uses), subsection (B) 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. (Exhibit D)

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

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

**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 recommendation, thorough design and dimensional standards, including for overall square footage, have been added to subsection (B) (Exhibit D).

**b) Add shared moorage standards.**

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

**Topic #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.

**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 what activities the SMP does not apply to. Subsection (H)(1) applies to “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.”

**c) Single-Family Residential Development on Constrained Lots**

Staff is proposing to redefine what and how **reasonable use exceptions and variances** are used and who decides them. Our Hearing Examiner has questioned our current schema, in particular 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. Staff is proposing that reasonable use exceptions be the last method of altering standards to allow reasonable economic use of constrained property, and that they be decided upon by the Hearing Examiner (see 16.16.270 Reasonable Use Exceptions). 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>5</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. This would return the reasonable use exception to truly the last effort of avoiding a taking.

However, to counter the additional time and cost of this process, staff is also proposing to create a new category of variances, called minor variances (16.16.273 Variances). They would be limited to variances for a 25% to 50% reduction of critical area buffers (when mitigated and they meet certain criteria) but would address most of the instances that reasonable use exceptions are currently applied for. We believe that overall, these changes would significantly reduce the number of cases having to go to the Hearing Examiner and cost less to the citizens of Whatcom County overall.

Note, too, that under the reasonable use rules, staff had proposed to go back to the 2,500 sq. ft. maximum impact area we had prior to the 2017 Critical Areas update<sup>6</sup>, as under a reasonable use exception granted by the Hearing Examiner no mitigation would be required. The Planning Commission disagreed with this amendment and voted to retain the 4,000 sq. ft. impact area. This is the one policy difference on which staff and the Commission differs, and staff still recommends to Council that it be changed back to 2,500 sq. ft.

### 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 §23.30.020(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. (Exhibit D)

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<sup>5</sup> This mechanism was created by Council in 2020 and is found in WCC 22.05.024 (Variances).

<sup>6</sup> Note that the Planning Commission has provisionally voted to keep it at 4,000 sq. ft., though they have not yet made their final recommendation.



**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. (Exhibit D)

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. (Exhibit F)

**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). (Exhibit D)

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. (Exhibit F)

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) (Exhibit F).

**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. (Exhibit D)

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) (Exhibit F).

## **Topic #14, Shoreline Designations**

**a) Consider changing the shoreline designation for certain, more urban parks to an urban designation.**

It turned out that changing shoreline (environment) designations on certain properties would have entailed updating the 2007 shoreline inventory and characterization reports, which was beyond the scope of this periodic update.

## Topic #15, Shoreline Jurisdiction and Environment Designation Map

### a) **Revise the Shoreline Jurisdiction and Environment Designation map to conform to the latest FEMA FIRM maps**

The Shoreline map has been updated to include all areas of the FEMA floodway and floodplain. This primarily widened the Resource designation on the Nooksack from Ferndale to Lynden and portions of the South Fork of the Nooksack though narrowed it in some areas. Floodway and Floodplain are differentiated in the database. It should be noted that the actual shoreline jurisdiction has not changed, as that is set by state law and our code (§23.20.010), but the map now more accurately displays the jurisdiction.

A few other changes have been made as well. These include:

- UGA and City boundaries have been updated.
- On the Lummi Nation, parcels that have been put under Tribal jurisdiction since the last update were updated with the “Tribal” shoreline designation.
- Designations were adjusted, where necessary, to match the updated and spatially corrected parcel boundaries. This was just a housekeeping task and no designations were changed.
- Shoreline designation breaks (thick black bars) have been removed from the map as they made it difficult to read.
- The complex of beaver ponds north and south of H Street Road between Sunrise and Markwork Roads (NE of Lynden) were added to the Conservancy designation. These ponds have grown in size and now surpass the 20-acre threshold for being a Water of the State. Since these ponds were identified and characterized in the 2007 Characterization report, we did not need to update that report; the data is still valid.
- At the request of the owners of APN 390302-428076-0000, 390302-485039-0000, and 390302-440200-0000 we have removed the Resource environment designation from a mining pond located to the NW of the intersection of E. Pole X Everson-Goshen Roads, just southeast of Everson. This designation was applied during the last SMP update, but has been determined to have been an error. Though it is a waterbody greater than 20 acres, it is a mineral extraction pond and DOE guidance is that such ponds do not qualify as a Water of the State until mineral extraction is complete and the restoration plan is realized. Once that happens, it automatically is designated as Conservancy under state law and our SMP. The County would then have 3 years to amend the map and finalize its designation.

## Topic #16, Shoreline Modifications

### a) **Review for consistency with the 2SHB 1579 regarding HPAs, and with State guidelines regarding prioritizing living shorelines over hardscape solutions.**

In §23.40.010 (Shoreline Use and Modification), Table 1 (Shoreline Use by Environment Designation), the various types of stabilization have been broken out into their respective types. Bioengineering Approaches & other Soft-Shore Measures are shown as permissible, while hardscape solutions are either prohibited or require a Conditional Use Permit, and then allowed only when necessary for shoreline restoration or to support a water-dependent use that cannot be located elsewhere. Then throughout §23.40.190 (Shoreline Stabilization) language has been added to prioritize soft- over



hardscape stabilization measures, in particular in subsection (A)(5), where an order of preference has been established. (Exhibit D)

**b) Consider allowing interpretive, wayfinding, safety, and park identification signs, based on park standards.**

In §23.40.020 (Shoreline Bulk Provisions), subsection (G) (Uses Allowed in Buffers and Setbacks) (10) (Signs) we have added language that allows interpretive, wayfinding, and park identification signs on publicly owned park properties. (Exhibit D)

### Topic #17, Shoreline Uses

**a) Revise as necessary any SMP policies or regulations pertaining to the Cherry Point area as directed by Council.**

In 2018 the Council started a process of amending the policies and regulations related to fossil fuel facilities in the Cherry Point Management Area. The Council hired consultants specifically for this task and it is principally being administered under a separate process. Their amendments affecting C/P Ch. 2 (Land Use), WCC Ch. 16.08 (SEPA), WCC Title 20 (Zoning), and WCC Title 22 (Land Use & Development) have already been reviewed by the Commission. None of the Council's amendments to C/P Ch. 2, WCC Ch. 16.08, or WCC Title 20 affects the documents the Planning Commission reviewed as part of this SMP Update.

Their amendments to Title 22, however, have been incorporated into Exhibit E, and are being show as new as they are not yet adopted. We have also incorporated the Commission's recommended changes to this specific language, also flagged by comments in the document.

Their amendments also affect WCC Title 23 (Exhibit D) and (by way of this update) C/P Ch. 11 (Exhibit B), and the Planning Commission has not yet reviewed these as they are being processed through this update. As we are proposing to do with the rest of the SMP policies, we're moving the Cherry Point Management Area policies from Title 23 to C/P Ch. 11 (Exhibit B). As such, they're not shown as new policies (i.e., no underline) in Exhibit B, but Council's proposed amendments to them are being show in ~~strikeout/~~ underline. Other changes to Title 23 regarding this topic are flagged as Council-proposed language in §23.40.125 (Cherry Point Management Area). (Exhibit D)

**b) Revise as necessary any SMP policies or regulations pertaining to sand and gravel extraction as directed by Council.**

In 2019 the County Council placed the following proposal (PLN2019-00011) on the docket:

Amend the Whatcom County Comprehensive Plan and Whatcom County Code to allow the seasonal extraction of sand and gravel from dry upland areas located within the 1,000 year meander zone of the Nooksack River, provided that such extraction has no negative impact on salmon spawning habitat. The intent is to (a) reduce the conversion of land currently used for farming, forestry and wildlife habitat into gravel pits, and (b) safely remove some of the significant sediment load that enters the Nooksack River every year in an effort to reduce flooding and the need to build higher flood prevention berms along the river as the climate continues to change.

To carry out this directive we have tried to mimic the language of the WAC, eliminating language that is not required but adding (or retaining) required language. (§23.40.140 (Mining), Exhibit D)

This matter was forwarded to the Surface Mining Advisory Committee (SMAC) for their advice. At their June 26, 2019, meeting the SMAC reviewed this matter and found that no changes were necessary to the SMP code in order to allow for extraction of sand and gravel from dry upland areas located within shoreline jurisdiction and/or the FEMA 100-year floodplain. Furthermore, it was confirmed that the lack of recent sand and gravel extraction within the Nooksack River shoreline jurisdiction/FEMA floodplain/floodway is primarily a function of the time and costs for studies associated with permitting and review at the state and federal level, compared to the economic return on investment.

At the federal level, the Endangered Species Act (ESA) is the primary law affecting this activity. It requires that any activities be done in such a manner as to not cause a “take” of any listed species, which also means protecting their habitat from impacts. At the state level, the Shoreline Management Act requires that there be no net loss of shoreline ecological functions and processes. As one can imagine, either of these requirements would make it difficult to make it easier to extract sand and gravel.

**c) Ensure internal consistency with allowed uses in the code and the Use Table.**

In the existing code, the allowances/permit type required for some uses are specified in Table 1 and others are sprinkled about the text, making it difficult to find whether something is allowed or not. So throughout Ch. 23.40 (Shoreline Use and Modification Regulations) we have removed any use allowances found in the text and expanded the table to include these (as well as other uses that hadn't been specified). Thus, almost all rules about whether something's allowed or not, and with what type of permit, are found in Table 1. There were also several footnotes that modified the table. We have replaced these footnotes with just one, telling the reader to look to the text for certain uses in certain environment designations, as there remain a few specific provisions in the text, typically stating that certain uses have caveats in certain environment designations. In short, we believe we have made things easier to find, and the text and the table should be internally consistent now.

**d) Modify the accessory structure height standards.**

In §23.40.020 Shoreline Bulk Provisions, subsection (E) (Height), two new subsections have been added. Subsection (4) would allow equipment necessary for the functions of water-dependent uses or the servicing of vessels to extend above the applicable maximum height limit provided in Table 1, provided that such structures shall be designed to minimize view obstruction. Subsection (5) would allow residential accessory structures that are not waterward of the primary structure to be built to the maximum height for the environment designation.

**e) Add standards for retaining walls.**

In §23.40.020 (Shoreline Bulk Provisions), subsection (G) (Uses Allowed in Buffers and Setbacks), we have added subsection (8) to allow retaining walls or similar slope stabilization structures, when associated with an approved shoreline use or development; and in (9) have clarified that retaining walls can exceed the standard 4-foot height limit for fences, walls, and hedges. (Exhibit D)

**f) Update Memorandum of Understanding with Department of Archaeology and Historic Preservation.**

Through this update process, staff was not able to actually update the MOU with DAHP, as that will take some time and involve many others. But based on the language in it, we are proposing some new policies to the cultural resources sections of both the Overall SMP Goals and Objectives (Exhibit B, page 11-9) and the General Polices (page 11-27) sections (see policies 11G-3, 11G-4, & 11X-9).

We are also proposing to revise the regulations in §23.30.050 (Cultural Resources) (Exhibit D). The existing regulations are full of rules about how reports are supposed to be done and what they need to contain. However, Department of Archaeologic and Historic Preservation (DAHP) now has standard practices outlined in their guidance, and we are proposing to remove all of our extraneous rules and just refer to DAHP's standards; this cuts down on the amount of text considerably and ensures that practices and reports follow state standards. The proposed text has been collaboratively developed with us, DAHP, and the Lummi Nation Tribal Historic Preservation Office (LNTHPO).

That said, there are three policy issues posed by the revised text:

- Subsection (A)(1) reads:

Upon receipt of an application for a permit, exemption, or other approval for a proposed project, the County shall determine whether the project lies within 500 feet of a site known to *or could* contain a cultural resource based on the Washington State Department of Archaeology & Historic Preservation's (DAHP) Inventory of Cultural Resources.

Currently, regulations require applicants to prepare a cultural resources report (and adhere to any recommendations therein) if their project lies within 500 feet of a site known to contain a cultural resource based on the Washington State Department of Archaeology & Historic Preservation's (DAHP) Inventory of Cultural Resources. The LNTHPO has proposed that we insert the phrase "or could" in this sentence. They would like to be consulted on all projects within the shoreline, not just ones within 500 ft of a previously recorded site, as they believe they may have additional information regarding an area that is not included in the State's inventory. They would like an opportunity to review and comment on the report no matter what may be found. However, this would expand the scope beyond what we regulate now.

- Subsection (A)(4) reads:

Based upon consultation with DAHP and the affected Tribe(s), the Director may approve the report *with tribal concurrence* or reject or request revision of the conclusions reached and/or management recommendations when the assessment is inaccurate or does not fully address the cultural resource management concerns involved.

The LNTHPO recommends that we include the phrase "with tribal concurrence." This would mean that the Tribe would have to agree with a report before PDS could approve it.

Staff believes that requiring their concurrence runs contrary to the GMA's permitting requirements of expeditious review and issuance, as it could hold up projects while we're awaiting their concurrence. A simple fix may be to set a time limit for how long they have to respond.

- Subsection (A)(5) reads:

If the cultural resource report identifies the presence of a cultural resource, any permit issued shall be conditioned on meeting the approved report's management recommendations. *If no cultural resources are found, then the permit may be issued without conditions regarding cultural resources.*

The LNTHPO commented that an Inadvertent Discovery Plan (IDP) should be required regardless of whether cultural resources are found, as there are times when additional requirements are necessary (e.g., when there is a site documented just outside of the project area, monitoring

may be recommended). However, this does go beyond what we do now and so raise it as a policy issue.

**g) Clarify Forest Practice standards.**

§23.40.110 (Forest Practices) has been updated to reflect the WAC provisions for Forest Practices in shorelines. (Exhibit D)

Additionally, 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 (see 16.16.720(V)). To alleviate this issue, staff is proposing to add to 16.16.720 (Habitat Conservation Areas – Use and Modification) subsection (P). The section sets performance standards for removing timber in Habitat Conservation Areas (e.g., riparian areas) and would allow timber harvesting to occur within buffers while still retaining the HCA’s functions. These standards vary by water type, and are tied to existing buffer conditions. This amendment is aimed at closing a loophole wherein applicants remove trees before applying for a development permit, which is when the CAO becomes applicable (except for Class IV Conversions, forest practices are not reviewable under the CAO).

**h) Add temporary use standards.**

This was a task staff had proposed, thinking we might be able to develop a temporary use permit for short-term uses. However, we could not find a good example from other jurisdictions, nor is there any guidance from Ecology. Thus, we determined it is probably best to review such uses at the time of a request for a temporary easement, temporary use permit, etc.

**i) Clarify utility standards for regional, local, and accessory.**

Under the existing code, the only categories for utilities are local or regional transmission lines, which has led some people to believe that utility installation, repair, or maintenance to single-family homes (accessory utilities) needs the same level of permitting and scrutiny as a power substation or regional transmission line.

In the proposed amendments to §23.40.010 (Shoreline Use and Modification), Table 1 (Shoreline Use by Environment Designation), utilities have been broken out into three categories: accessory, local, and regional. Each are now distinctly defined in §23.60.210(6), and have distinct permitting paths, depending on what environment designation they are located, making it clear that running an electrical line (or something similar) to a house is outright permitted.

Additionally, in §23.40.220 (Utilities) we have moved all the utility requirements that had been spread throughout in various sections into one, cohesive section.

**j) Add standards for live-aboard vessels in marinas.**

In §23.40.060 (Marinas and Launch Ramps) standards for live-aboard vessels have been added as subsection (F) (Exhibit (D)). Staff is also proposing to add Policy 11DD-13 to CompPlan Ch. 11 (Exhibit B) to support the proposed addition of standards to Title 23.

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

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

§23.30.030 (Views and Aesthetics) (Exhibit D), subsection (M) now points to the regulations in §16.16.235(B)(5) (Activities Allowed with Notification) (Exhibit F).

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

**b) Provide incentives to enhance Fish and Wildlife Habitat Conservation Areas (FWHCA).**

This was another task staff had scoped. We had hoped to create an incentive for new single-family residential development to maintain and/or improve shoreline vegetation by allowing those who do so to have a reduced shoreline buffer. Unfortunately, we could not figure out a way of doing this without impacting existing homeowners' views. Furthermore, it would have required an update to the inventory and characterization background documents, which was not included in the scope or budget of the project.

Additionally, 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, as they 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.

**c) Clarify setback standards for protection of views to and from the water.**

To protect views of the shoreline from existing structures when new development is proposed, §23.30.030 (Views and Aesthetics) (Exhibit D), new subsection (B) now allows setbacks to be modified pursuant to WCC 23.400.020(D) (Shoreline Bulk Provisions, Setbacks, Common-Line Setback for Single-Family Residences). That section (incorporated from former Appendix F) allows for setbacks to be reduced or increased, depending on how existing homes are situated, to provide the greatest view opportunities for both the existing and new development (though when reduced, mitigation (i.e., planting of the shoreline setback) may be required).

To minimize impacts to views from the water, §23.30.030 (Views and Aesthetics) (Exhibit D), new subsection (C) also now allows the Director to require the planting of vegetation to mitigate the impacts.

Furthermore, §23.30.030 (Views and Aesthetics) (Exhibit D), new subsection (L) precludes new uses or development from substantially obscuring shoreline views within shoreline view areas or from existing residences on adjacent property.

## **Topic #19, Water Quality**

**a) Include language/policies about the importance of Lake Whatcom as the source of drinking water for most of the County and the water quality improvement plan (TMDL).**

After reviewing the existing CompPlan, staff believes that it already addresses this issue sufficiently. In Chapter 10, under *Water Resources* (Exhibit A, page 10-11), subsection *Lake Whatcom Watershed Management* (pages 10-22 – 10-25) there are four pages of text describing Lake Whatcom's importance as a source of drinking water and the efforts the County (and City of Bellingham) are under taking to protect it. Under Goal 10-J alone there are 14 specific policies (Policies 10J-1 - 10J-14) regarding protecting Lake Whatcom, and there are numerous other, more generic goals and policies that deal with water quality protection more generically.

## Topic #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 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 request, staff worked with the local wetlands consultants to review the issue and try to determine what effects it might have. Three consulting firms<sup>7</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 Category IV 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>8</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 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.

## Topic #21, Marine Resource Lands

- a) **Consider adding a Marine Resource Lands policy section as developed by the Marine Resources Committee**

When the Council amended the CompPlan in 2016 they included a new section entitled "Marine Resource Lands" that contained one goal and one policy that directed staff to assist in developing the section more thoroughly:

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<sup>7</sup> NW Ecological Services, NW Wetlands Consulting, and Aqua-Terr Systems, Inc.

<sup>8</sup> Paired sample t-tests were conducted to compare the proposed buffer results with categories of the wetlands impacted.

**Goal 8T: Conserve and enhance Whatcom County's marine land base for the long-term and sustainable production of commercial and recreational economic activities.**

**Policy 8T-1:** Whatcom County will work with committees including but not limited to the Marine Resource Committee, the Shellfish Protection Advisory Committee, and other local marine land experts to create a new section of this chapter to support Goal 8T to be docketed and processed for consideration no later than 2017.

The project was docketed as (PLN2017-00005), and staff worked with these groups to help develop some language, goals, and policies for this section, which is shown as Exhibit C (C/P Ch. 8). However, there was mixed recommendations from the groups who reviewed the language.

- The **Marine Resources Committee** reviewed the proposal at their June 7, 2018, meeting, and after adding Policy 8V-4 (addressing educational efforts and programs) they recommended that the County Council adopt the proposed language.
- The **Birch Bay Watershed and Aquatic Resources Management Committee (BBWARM)** reviewed the proposal at their June 20, 2018, meeting. They recommended that the Council *not* adopt the proposed language. They felt that the new Marine Resource Lands section of the CompPlan was already covered by the existing Shoreline Management Program and that including it would add unnecessary complication/duplication. They recommended that the Council postpone any action on the Marine Resource Lands amendment until the SMP update commenced.
- The **Portage/Drayton Shellfish Protection Districts** reviewed the proposal at their July 25, 2018, meeting. However, they did not have a quorum and could not act.
- The **Planning Commission** held a workshop on June 14 and a public hearing on June 28, 2018. They recommended that the Council *not* adopt the Marine Resource Lands proposal. There was concern amongst some of the Commissioners that regulations adopted subsequent to these policies could affect farmers, even though staff explained that it was not our nor CM Weimer's intent to address agricultural runoff. They also thought it would be better to consider this during our SMP update, perhaps incorporating some of the goals and policies into that rather than having a separate section.

When staff brought the project forward to Council's Planning & Development Committee for review they decided to consider it with the (then) upcoming SMP update.

## Topic #22, No Net Loss

### a) Prepare a No Net Loss technical memo

On September 10, 2019, staff presented to the Council's Natural Resources Committee an overview of how No Net Loss is achieved.

No net loss incorporates the following concepts:

- The existing condition or baseline of shoreline ecological functions, documented in the 2007 documented in the shoreline inventory and characterization, should not deteriorate due to permitted development.
- Shoreline functions may improve through shoreline restoration.
- New adverse impacts to the shoreline environment that result from planned development should be avoided.

- When this is not possible, impacts should be minimized through mitigation sequencing.
- Mitigation for development projects alone cannot prevent all cumulative on-going impacts and shoreline violations, so restoration is also needed.

Based on past practice, current science tells us that most, if not all, shoreline development produces some impact to ecological functions. However, the recognition that future development will occur is basic to the no net loss standard. The challenge is in maintaining shoreline ecological functions while allowing appropriate new development and ensuring adequate land for preferred shoreline uses and public access. With due diligence, local governments can properly locate and design development projects and require conditions to avoid or minimize impacts.

In 2007 Whatcom County underwent a comprehensive update of its Shoreline Management Program (SMP). At that time the County prepared an Inventory and Characterization Report (Vol. I), a Scientific Literature Review (Vol. II), a Restoration Plan (Vol. III), and a Cumulative Effects Analysis (Vol. IV), all of which were approved by County Council and the Department of Ecology. These documents formed the basis for developing the County's Shoreline Management Program and determining that it would achieve no net loss of ecological functions when implemented.

Whatcom County is now undergoing a periodic update. For such an update the County is not required to re-do all these documents except to augment them if something changes that might negatively affect the shoreline's ecological functions. For the most part there are few significant policy changes in this update; most of the proposed amendments are an effort to reorganize the SMP so as to make it easier to use and understand.

There are a few policy changes, though, and the No Net Loss Statement, prepared by The Watershed Company as an addendum to the 2007 Cumulative Effects Analysis, addresses these (Exhibit I). The conclusion is that each of these amendments works to strengthen the shoreline ecological protections provided by the SMP.

#### **b) Shoreline Restoration Plan Addendum**

Simply stated, the no net loss standard is designed to halt the introduction of new impacts to shoreline ecological functions resulting from new development by requiring mitigation. However, over all, protection, restoration, and mitigation are needed to achieve no net loss. Restoration is the only mechanism by which we can improve shoreline functions and ecosystem-wide processes over time. Local governments must achieve this standard through both the SMP planning process and by appropriately regulating individual developments as they are proposed in the future.

The concept of no net loss of shoreline ecological functions is rooted in the Act and in the goals, policies, and governing principles of the state's shoreline guidelines. These principles suggest that no net loss is achieved primarily through regulatory approaches and that restoration occurs mainly via goals, policies, and voluntary or incentive-based mechanisms. It is also important to note that more than simply preventing further loss of ecological functions, master program provisions must also "...achieve overall improvements in shoreline ecological functions over time when compared to the status upon adoption of the master program."

The mandate to improve functions over time provides the basis for restoration planning and creates a distinction between mitigation and restoration. As mentioned, applicants for shoreline permits must fully mitigate new impacts caused by their proposed development. However, applicants are not required to restore past permitted ecosystem damages as a condition of permit approval. Permit applicants will not be required to implement the restoration measures identified in the plan as mitigation for project



impacts, but they may elect to implement elements of this plan as mitigation for shoreline development if appropriate. And they may be required to mitigate for recurring impacts.

## SMP updates: Achieving no net loss of ecological function

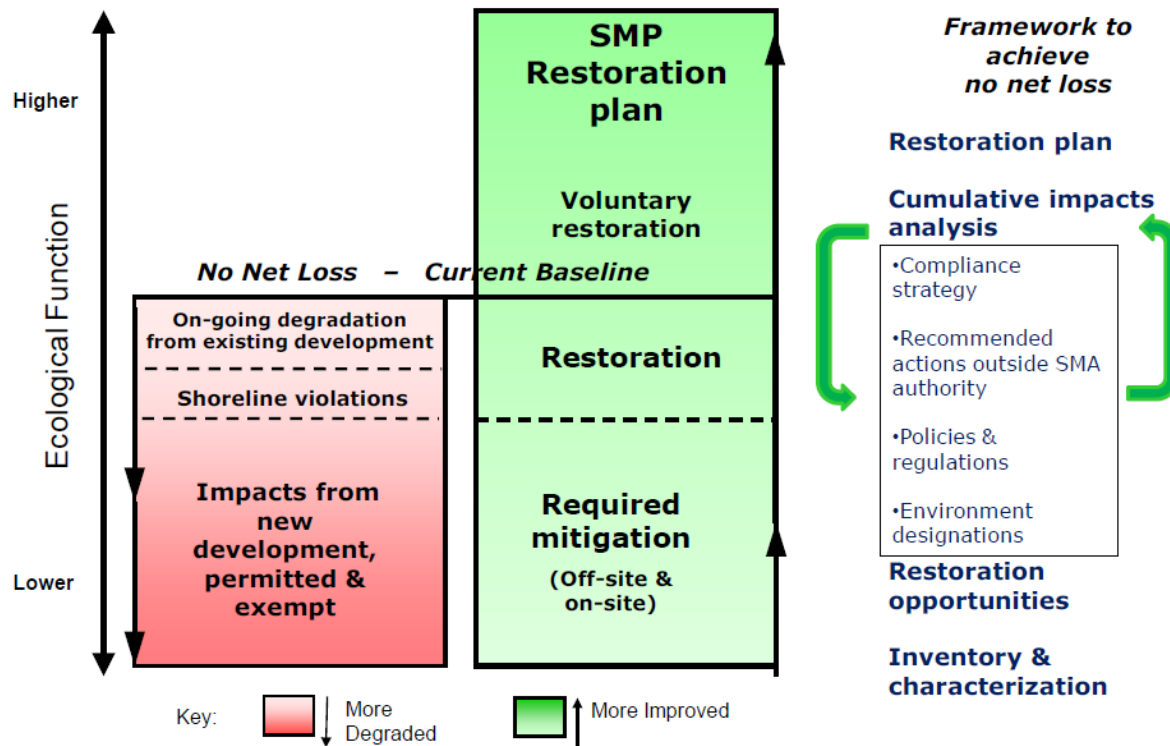


Figure 4-1: During the SMP update process, local governments should use existing shoreline conditions as the baseline for measuring no net loss of shoreline ecological functions.

Exhibit J is an addendum to the 2007 Shoreline Restoration Plan. It references projects listed in the Shoreline Restoration Plan containing enhancement and restoration project proposals and updates them based on information received by the County, agencies, tribes, and stakeholder organizations. It also lists several projects that were not included in that Plan, but nonetheless have been undertaken and completed, and that improve shoreline ecological functions.

It is important to note that to continue to achieve NNL over time the County should continue to fund and implement the projects listed in the restoration plan.

## Non-Scoped Amendments

### Sustainable Salmon Harvest Goal

There is a new Policy 10L-19 proposed to be added to Chapter 10 regarding a sustainable salmon harvest goal (Exhibit A, page 11-47). Adding this policy is not a part of the SMP Update per se, and in fact was not part of the scope. Rather, it is a policy the Council expressed in interest in adding in support of the fisheries co-manager's Sustainable Salmon Harvest Goal. Adding such a policy was placed on the docket by Council in 2018 (#PLN2018-00010). Rather than process its addition as a separate CompPlan amendment, staff is proposing to add it while we're already amending the CompPlan for the SMP

Update. We should note, however, that through the Salmon Recovery Staff Team the fisheries co-managers (WDFW, Lummi Nation, and Nooksack Tribe) are reviewing this draft language and may propose some additional amendment(s) to it. If so, we will inform the Planning Commission later in your review.

### **Short-Term Rentals**

Though already approved by Council via Resolution 2016-039 and by the Department of Ecology, Council's actions on short-term rentals has not been finalized by ordinance. Thus, staff has included in the draft Title 23 those amendments on short-term rentals already approved. Please note that there are similar amendments to Title 20 that Council has not acted on, and these would need to be followed up shortly after the SMP amendments are approved.

### **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 is challenging 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.

## **IV. Comprehensive Plan Evaluation**

The proposed amendments to the regulations (WCC Titles 22 and 23 and Ch. 16.16) have been developed using the guidance of the Comprehensive Plan so as to remain consistent. Generally, the specific guiding goals and policies would be listed here so as to inform the Council of consistency; however, that would just be a relisting of each, as every goal and policy of Comprehensive Plan Chapter 11 is relevant. Those goals and policies may be reviewed in Exhibit B. Suffice it to say that staff finds no inconsistencies.

## **V. Draft Findings of Fact and Reasons for Action**

Staff recommends the Planning Commission adopt the following findings of fact and reasons for action:

1. Whatcom County is subject to the requirements of the Washington State Growth Management Act (GMA), RCW 36.70A.480 'Shorelines of the State.'
2. On February 27, 2007 (Ordinance # 2007-017), Whatcom County adopted a comprehensive update to the SMP as required by law. This comprehensive SMP update review included but was not limited to assessment of ecological functions, baseline conditions, and SMP environmental designations. This local adoption was approved by the Washington State Department of Ecology (Ecology).
3. The Washington State Shoreline Management Act (SMA), RCW 90.58.080 (4)(a)(ii), mandates Whatcom County shall periodically review its SMP every 8-years. This periodic update is due June 30, 2021. The purpose of this periodic review is to update the local SMP to reflect changes to state law and associated rules and guidance, ensure internal consistency with the Whatcom County Comprehensive Plan and associated development regulations, as well as provide an opportunity to improve usability and predictability of the SMP.

4. The GMA, RCW 36.70A.130(1), also mandates that Whatcom County's Comprehensive Plan and development regulations are subject to continuing review and evaluation.
5. RCW 36.32.120(7) provides that the county legislative authorities shall make and enforce, by appropriate resolutions or ordinances, all such police and sanitary regulations as are not in conflict with state law.
6. Whatcom County Planning and Development Services (PDS) submitted an application (PLN2020-00006) to make various amendments to Whatcom County's Shoreline Management Program.
7. On May 21, 2019, the County Council reviewed and approved the Shoreline Master Program Periodic Review Public Participation Plan. The Public Participation Plan was submitted to Ecology. Public outreach regarding the proposed amendments was conducted through:
  - a. A dedicated project webpage;
  - b. Legal notices published in the official newspaper of record for Whatcom County;
  - c. Electronic announcements and notifications to:
    - Subscribers of relevant lists in the Kitsap County Electronic Notification System;
    - Relevant Kitsap County advisory groups; and
    - Relevant local, state and federal agencies, and community groups;
    - Federally recognized tribes with usual and accustomed areas in Whatcom County and relevant tribal organizations;
  - d. Three public open houses;
  - e. Meetings with citizen advisory groups and various interested parties;
  - f. Two 30-day public review periods of the amendments, one prior to the Planning Commission review workshops (August – September 2020) and a joint public comment period with the Department of Ecology prior to their joint public hearing (March – April 2021).
  - g. Ten public workshops and a public hearing with the Planning Commission; and
  - h.   X   public workshops and a public hearing with the County Council.
8. With the assistance of a consultant and development of a consistency analysis, Whatcom County PDS proposed amendments to the Whatcom County Comprehensive Plan (Chapters 8 (Resource Lands), 10 (Environment), and 11 (Shorelines)) and WCC Titles 22 (Land Use & Development) and 23 (Shoreline Management Regulations), and WCC Chapter 16.16 (Critical Areas).
9. Following review and approval by the Whatcom County Council, a public participation plan, consistency analysis, and scoping document was developed to aid in developing the draft amendments.
10. A determination of non-significance (DNS) was issued under the State Environmental Policy Act (SEPA) on February 18, 2021.
11. Notice of the subject amendments was submitted to the Washington State Department of Commerce on March 12, 2021, for their 60-day review.
12. On April 22, 2021, the Planning Commission held a duly noticed joint public hearing with the Department of Ecology to consider testimony on the proposed draft amendments to the Shoreline Master Program and related codes.
13. The County Council held a duly noticed public hearing on the proposed amendments on   X  , 2021.
14. As evidenced by the recommendation of the Surface Mining Advisory Committee, Title 23 already meets Council's intent to allow sand and gravel extraction within shoreline jurisdiction under certain

circumstances as described in PLN2019-00011 and thus no amendments are proposed to achieve this.

15. The amendments are consistent with the Shoreline Management Act, Growth Management Act, Whatcom County Comprehensive Plan, and other applicable requirements.
16. The proposed amendments reflect current local circumstances and promote the general public health, safety, morals and welfare.

## **VI. Proposed Conclusions**

1. The amendments are in the public interest.
2. The amendments are consistent with the Whatcom County Comprehensive Plan.

## **VII. Recommendation**

Planning and Development Services recommends the Planning Commission forward the proposed amendments to the County Council with a recommendation of approval.