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CC: Jackie Chandler, Shoreline Administrator, WA Department of Ecology
FROM: Maria Sandercock, Shoreline Planner, WA Department of Ecology
Date: May 18, 2021
Subject: Initial Determination of Consistency
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Use of this Document

Ecology's *Initial Determination of Consistency* provides Ecology's review of the proposed amendment to the Kitsap County (County) Shoreline Master Program (SMP). This document is divided into two sections: **Findings of Fact**, which provides findings related to the County's proposed amendment, amendment history, and the review process and **Initial Determination** of the proposed amendment with next steps.

Attachment 1 itemizes issues that must be addressed for Ecology's final approval of the proposed amendment.

Brief Description of Proposed Amendment

The County has submitted Shoreline Master Program (SMP) amendments to Ecology for initial determination of concurrence to comply with periodic review requirements. Ecology is required under WAC 173-26-104(3)(b) to make an initial determination of consistency with applicable laws and rules.

FINDINGS OF FACT

Need for amendment

The County's comprehensive update to their SMP went into effect in 2015. Now, the proposed amendment is needed to comply with the statutory deadline for a periodic review of the Kitsap Shoreline Master Program pursuant to RCW 90.58.080(4).

SMP provisions to be changed by the amendment as proposed

The County prepared a checklist and an analysis that documents proposed amendments. The amendments bring the SMP into compliance with requirements of the act or state rules that have been added or changed since the last SMP amendment, ensure the SMP remains consistent with amended comprehensive plans and regulations, and incorporate amendments deemed necessary to reflect changed circumstances, new information, or improved data. The County has proposed the following amendments:

22.100 Introduction

- Minor changes to Purpose and Intent to acknowledge tribal treaty rights.
- New sub-section listing developments not required to obtain shoreline permits or local reviews.
- Appendix F (List of Shoreline Waterbodies) is added to list of regulatory elements.

22.150 Definitions

- Definitions for the following words are added: Floating homes, floodway, RCW, Tram.
- The following definitions are revised: Development, Existing lots, Pier, Principal building, Setback, Shoreline stabilization, Substantial development.

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- Definitions for the follow words are removed: Accessory structure – View blockage, Lot coverage.

22.200 Shoreline Jurisdiction and Environmental Designation

- Reference to new list of shoreline waterbodies in Appendix F is added.

22.300 General Goals and Policies

- Minor changes related to global removal of phrase “or as now or hereafter amended.”

22.400 General Regulations

- 22.400.100 Existing development - Timeline to apply for permits following damage to a legally existing structure is revised from 6 months to 12 months.
- 22.400.110 Mitigation – clarification added that using alternative mitigation ratios requires a plan prepared by a qualified professional.
- 22.400.115 Critical Areas – the existing incorporation of 2007 critical areas ordinance is updated to incorporate the 2021 critical areas ordinance. The County underwent a larger update to the CAO in 2017 and a minor update to just the wetlands section in 2021. The following sections of the critical areas ordinance are incorporated into the SMP:
 - 19.100.130 Standards for existing development. No changes from 2007 version proposed.
 - 19.100.155 General application requirements. No changes from 2007 version proposed.
 - 19.100.160 Inventory provisions. No changes from 2007 version proposed.
 - 19.150 Definitions.
 - New definitions: functions and values, geological assessment, seismic hazard area, significant tree, use or activity.
 - Revised definitions: adjacent, agricultural activities, bank stabilization, bog, buffer, channel migration zone, creation, critical aquifer recharge areas, critical areas, critical facilities, danger trees, enhancement, erosion hazard areas, existing and ongoing agriculture, fen, Fish and wildlife habitat, forest practices, frequently flooded areas, geologically hazardous area, groundwater, habitat of local importance, mitigation, ordinary high water mark, priority habitat, priority species, reasonable use, rehabilitation, restoration, riparian area, shorelines, single-family dwelling, special flood hazard areas, utilities, utility corridor, wetland delineation, wetland mosaic, wetland report.
 - Deleted definitions: Aquaculture practices, draining, feeder bluff, forage fish, grazed wet meadows, hazardous substance, lot, open space, non-conforming use or structure, performance based development, permit, pond, regulated use or activity, unavoidable and necessary impacts, wetlands isolated.
 - 19.200 Wetlands.
 - 19.200.205. Purpose and Objectives. Minor changes made.
 - 19.200.210 Wetland identification and functional rating. Amendments made to update delineation procedures to the federal wetland delineation manual and applicable regional supplement and to update the wetland rating system to Ecology’s 2014 system. Sub-sections on non-regulated wetlands and wetlands

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- divided by a manmade feature are removed. Updates to exemptions for small wetlands are made.
- 19.200.215 Wetland review procedures. Time limitations are removed and reference to outdated delineation manual is removed.
 - 19.200.220 Wetland buffer requirements. Buffer tables are revised for clarity and for use of 2014 rating system, but required buffer widths are not amended. The County proposes to consider wetlands with a habitat score of 5 as having low habitat function. Provisions for buffer averaging are amended. Provisions for buffer reductions are amended.
 - 19.200.225. Additional development standards for regulated uses. Dock provisions are removed. Agricultural restrictions are amended. Utilities provisions are amended.
 - 19.200.230 Special use review. This section is deleted.
 - 19.200.250 Wetland mitigation requirements. Sub-section on mitigation for regulated activities in wetlands is removed. A sub-section on alternative mitigation plans is added. Provisions are added to the sub-section on off-site mitigation.
- 19.300 Fish and Wildlife Habitat Conservation Areas.
 - 19.300.305 Purpose. Minor amendments made.
 - 19.300.310 Fish and wildlife habitat conservation area categories. Clarifying amendments to Streams sub-section. Sub-section on shorelines is removed.
 - 19.300.315 Development standards. Type S waters removed from streams table. Saltwater shorelines and lakes removed from tables. Modifications are made to provisions for decreasing buffer widths. Provision for water-dependent activities is removed. Class I Wildlife habitat conservation area standards are revised. Agricultural restrictions are revised. Trail provisions are revised.
 - 19.400 Geologically Hazardous Areas. A number of revisions are made to this section. Separate sub-sections are added for erosion hazards, landslide hazard areas, and seismic hazard areas with criteria for determining the presence of these hazards.
 - 19.600 Critical Aquifer Recharge Areas. Minor clarifying amendments are made.
- 22.400.120 Vegetation conservation buffers –
 - Clarification is added to procedures for Reduced Standard Buffer in subsection B.2.
 - Clarifications added to procedures for expansion of development in a reduced buffer in subsection C.2. The County prohibits any development within the reduced standard buffer, and so this may only occur through the variance process. The County wishes to reduce the procedural burden on applicants and so allows some variances to be processed administratively rather than through a hearing examiner. From Ecology's perspective, there is no substantive difference between these – however it is processed, the purpose of a variance is strictly limited to granting relief from specific bulk, dimensional or performance standards of the SMP where strict implementation will impose unnecessary hardships. Where the SMP says that a particular development requires a variance, this means that the SMP prohibits this development and so the only way to develop in that manner would be through a variance.

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- Clarifications are added to allowances for structures in vegetation conservation buffers in subsection D and a new allowance for trams and associated standards is added. Trams are only allowed outside of the Aquatic and Natural Shoreline Environment Designations; tram landings shall be no more than 100 sf, the width of clearing for a tram shall be no more than 5 feet on either side for a maximum corridor of 15 feet; installation of trams is only allowed in geologically hazardous areas and subject to a special study; and mitigation sequencing must be followed.
- 22.400.125 Water quality and quantity - a reference to Title 12 and requirements for an SDAP is added.
- 22.400.135 View Blockage – Several text amendments are proposed in order to add clarity on how view blockage setbacks shall be calculated. Amendments do not substantively change the view blockage setback requirements. A new provision for setback lines for additions, remodels, or rebuilds is added. Amendments for clarity are proposed for the conditional waiver of the view blockage requirement.
- 22.400.140 Bulk and dimension standards.
 - Standards for minimum lot width are removed and replaced with a reference to Title 17.
 - Standards for side setbacks are removed and replaced with a reference to KCC 17.420.
 - Maximum impervious surface area standards are removed. They are replaced with references to either KCC 17.420 or SMP 22.400.125, depending on the shoreline environment designation.

22.500 Permits Provisions, Review, and Enforcement

- 22.500.100 Permit application review and permit types
 - A reference to RCW 47.01.485 and RCW 90.58.140 is added for projects on a state highway.
 - Minor clarifications to procedures for SDPs and exemptions are proposed.
 - List of activities exempt from an SDP are amended to include revised cost thresholds and to improve consistency with WAC 173-27-040.
- 22.500.105 Procedure – Minor additions to site plan requirements for shoreline applications. Clarification on time requirements for shoreline permits added.

22.600 Shoreline Use and Modification Development Standards

- 22.600.105 Use and modifications matrix – hybrid shoreline stabilization is added to the use matrix as a conditional use.
- 22.600.115 Aquaculture – a requirement is added (C.3.h) that that finfish aquaculture programs comply with RCW 77.125. New or expanded leases of nonnative marine finfish aquaculture are prohibited.
- 22.600.145 Forest practices/timber harvest – clarification is added that forest practices involving only timber harvest are not development.
- 22.600.160 Mooring structures and activities – clarification is added that replacement pilings must be spaced 20 feet apart when installed to support a replacement structure.
- 22.600.170 Residential development –
 - Clarification added that subdivision that does not meet the exemption criteria requires an SDP. Subdivision of land where every new lot is outside of shoreline jurisdiction does not require an SDP.

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- Revision of date to establish legally existing over-water residences from date of SMP adoption to January 1, 2011. Clarification added that such structures are a conforming use.
- 22.600.175 Shoreline Stabilization – Addition of requirement to obtain an administrative CUP for hybrid shoreline stabilization.
- 22.600.180 Transportation – addition of requirement to obtain an SDP for transportation projects in Rural Conservancy and Urban conservancy SEDs.

22.700 Special Reports

- 22.700.140 Shoreline Mitigation Plan – the following change is made: “E. The mitigation will require semi-annual progress updates until the department determines the mitigation is successful.”

Appendix F

The County proposes to add a list of shoreline waterbodies in Appendix F.

Amendment History, Review Process

The County prepared a public participation program in accordance with WAC 173-26-090(3)(a) to inform, involve and encourage participation of interested persons and private entities, tribes, and applicable agencies having interests and responsibilities relating to shorelines.

The County used Ecology’s checklist of legislative and rule amendments to review amendments to chapter 90.58 RCW and department guidelines that have occurred since the master program was last amended, and determine if local amendments were needed to maintain compliance in accordance with WAC 173-26-090(3)(b)(i). The County also reviewed changes to the comprehensive plan and development regulations to determine if the shoreline master program policies and regulations remain consistent with them in accordance with WAC 173-26-090(3)(b)(ii). The County considered whether to incorporate any amendments needed to reflect changed circumstances, new information or improved data in accordance with WAC 173-26-090(3)(b)(iii). The County consulted with Ecology and solicited comments throughout the review process.

The County held a joint local/state comment period on the proposed amendments following procedures outlined in WAC 173-26-104. The comment period began on February 2, 2021 and continued through March 3, 2021. A virtual public hearing before the Planning Commission was held on March 2, 2021.

The County provided notice to local parties, including a statement that the hearings were intended to address the periodic review in accordance with WAC 173-26-090(3)(c)(ii). Ecology distributed notice of the joint comment period to state interested parties and affected tribes on January 28, 2021.

The County received twenty (20) comment letters on the proposed amendments. The County identified 25 issues raised in these letters, as outlined in the Comment Response Matrix. The County made several changes to the SMP amendment in response to comments. In response to comments on proposed changes to view blockage requirements, the County modified Section 22.400.135 to clarify the existing principal buildings may occur consistent with 22.400.100(B). In response to comments from WDFW, the County made several modifications to the amendment. The County modified KCC 22.400.120(1)(c) to require stair landings comply with WAC 220-660-380 and WAC 220-660-140; 22.150.570 to clarify what may be considered soft versus hybrid shoreline stabilization and that beach nourishment used for

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compensatory mitigation does not reclassify a project as a hybrid structure; and 22.600.160(C)(3)(b) to clarify that pile spacing on piers shall be no less than 20 feet apart. In response to comments from the Skokomish Indian Tribe, the County modified Section 22.100.110 (Purpose and Intent) to recognize the Point No Point Treaty and the usual and accustomed tribal areas. In response to comments from a Kitsap County resident, the County clarified in 22.400.120(B)(3) that buffer reductions only apply to Hood Canal. In response to comments from Ecology, the County made modifications to wetland provisions in Section 19.200.

The proposed SMP amendments were received by Ecology on April 9, 2021 for initial state review and verified as complete on April 12, 2021. The submittal included a copy of all comments received during the joint comment period, the County's response to comments, the proposed amendments to Title 22, Title 21, Title 19, and Title 15, and a "Consistency Analysis Report" (which includes the periodic review checklist), and a "Kitsap County SMP Periodic Review - No Net Loss Addendum."

Summary of Issues Identified by Ecology as Relevant to Its Decision

Ecology is required to review all SMPs to ensure consistency with the Shoreline Management Act (SMA) and implementing rules including WAC 173-26, State Master Program Approval/Amendment Procedures and Master Program Guidelines. WAC 173-26-186(11) specifies that Ecology "shall insure that the state's interest in shorelines is protected, including compliance with the policy and provisions of RCW 90.58.020."

Based on review of the proposed amendments to the SMP for consistency with applicable SMP Guidelines requirements and the Shoreline Management Act, and consideration of supporting materials in the record submitted by the County, the following issues remain relevant to Ecology's final decision on the proposed amendments to the County's SMP, with Findings specific to each issue identifying amendments needed for compliance with the SMA and applicable guidelines:

Critical Areas Regulations

The Kitsap SMP currently incorporates the 2007 Critical Areas Ordinance. The County updated the CAO in 2017 and is making additional minor revisions with the SMP amendment. The County proposes to update the SMP to incorporate the newest critical area regulations in the CAO. The incorporation of the 2007 CAO excludes certain sections from the SMP that are inconsistent with the SMA or SMP Guidelines. The County proposes to strike all exclusions from the wetlands section (and therefore include the entirety of the wetland section in the SMP). However, several of these provisions remain in the CAO and remain inconsistent with the SMA or the SMP guidelines.

Exemptions for small wetlands in KCC 19.200.210.C can result in a loss of wetland functions within shoreline jurisdiction. Ecology's wetland guidance is that these types of exemptions are only appropriate outside of shoreline jurisdiction (see [Bunten et al 2016](#)). Consistent with Ecology's recommendations, the exemptions for small wetlands in Kitsap's CAO may only be used if "[t]hey are not associated with shorelines of the state or their associated buffers" [19.200.210.C.3]. Because these provisions already cannot be used in shoreline jurisdiction, they should not be incorporated into the SMP.

The CAO requires buffers for wetlands that are consistent with Ecology's guidance; however, there are two buffer reduction provisions that are inconsistent. These are the buffer averaging provisions in KCC 19.200.220.B.1.e and the buffer reduction provisions in 19.200.220.B.2.a-d. From Ecology's review of

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the best available science, buffers smaller than these widths would not provide adequate protection to wetland functions and values. Buffer averaging is a technique that can be used for development on constrained sites while still protecting wetlands. However, protection of the wetland is only adequate if the buffer is reduced by no more than 25% (see [Granger et al. 2005](#), [Hruby 2013](#), [Bunten et al 2016](#)). Allowing wetlands buffers to be reduced by more than 25% through buffer averaging could result in a loss of shoreline ecological function. Allowing buffer reductions without buffer averaging could also result in impacts to the wetland and could result in a loss of shoreline ecological function. Further, the CAO only allows these reductions through a CAO variance. CAO permitting provisions do not apply within shoreline jurisdiction [see RCW 90.58.610 & RCW 36.70A.480(3)(d) for the relationship between CAOs and SMPs], so this reduction cannot be used in shoreline jurisdiction and so should not be incorporated into the SMP. If an applicant is experiencing an unnecessary hardship because of these standards, they may seek relief via a shoreline variance.

Sections 19.200.225.C and G would allow roads and utility corridors to be located in wetlands and their buffers. However, both of these are non-water oriented uses that are not preferred in shoreline jurisdiction. Protecting and restoring ecological functions shall be preferred over non-water oriented uses (WAC 173-26-201(2)(d)).

Finding. Ecology finds KCC 19.200.210.C, 19.200.220.B.1, and 19.200.220.B.2.a-d to be inconsistent with the requirement to “base master program provisions on an analysis incorporating the most current, accurate, and complete scientific or technical information available” [WAC 173-26-201(2)(a)] and the requirement that protection of critical areas “assures no net loss of shoreline ecological functions” [WAC 173-26-221(2)(a)(ii)]. Ecology finds 19.200.225.C and G to be inconsistent with the use preferences of the Act as outlined in RCW 90.58.020 and WAC 173-26-201(2)(d). Ecology has identified a change necessary for consistent with the SMA and the SMP Guidelines (**Attachment 1, Req-1**).

Permitting Requirements

The County proposes several amendments throughout the SMP that clarify what permits are required for various activities.

In KCC 22.400.120.C, the County proposes to add language to clarify that some developments in shoreline buffers may be approved through a Type II variance and some may be approved through a Type III variance. Local governments have the discretion to determine shoreline permit procedures, including whether shoreline variances are processed administratively or through a hearing examiner. However, the SMA and WAC 173-27 do not provide local governments with the discretion to determine what types of development require a shoreline variance. WAC 173-27-170 provides that “[t]he purpose of a variance permit is strictly limited to granting relief from specific bulk, dimensional or performance standards set forth in the applicable master program where there are extraordinary circumstances relating to the physical character or configuration of property such that the strict implementation of the master program will impose unnecessary hardships on the applicant or thwart the policies set forth in RCW [90.58.020](#).” [Emphasis added] Several public comments were received during the comment period expressing concern about this apparent allowance for expansions within the reduced shoreline buffer. However, by definition, if the expansion requires a shoreline variance, then that is because it is not allowed. These expansions will still need to demonstrate consistency with the shoreline variance criteria in WAC 173-27-170 and receive approval from Ecology.

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Finding. Ecology finds that the proposed amendments to KCC 22.400.120.C.2.c are inconsistent with the permitting framework of the SMA. Ecology has identified a change necessary to ensure consistency with RCW 90.58.100(5) and WAC 173-27-170 [Attachment 1, Req-2].

In KCC 22.400.120.D.1, the County has added trams as an allowed structure in vegetation conservation buffers and made clarifying changes to permitting requirements for trams and beach stairs. Trams are identified as appurtenances to single family residences. The permitting provisions imply that beach stairs and trams are exempt from the requirement to obtain an SDP. However, there are no exemption in WAC 173-27-040 that would apply to beach stairs or trams. Neither beach stairs nor trams are considered appurtenances to single family residences (WAC 173-27-040(2)(g)).

Finding. Ecology finds that the proposed amendments to KCC 22.400.120.D.1 are inconsistent with the permitting framework of the SMA. Ecology has identified a change necessary to ensure consistency with RCW 90.58.100(2) and WAC 173-27-040 [Attachment 1, Req-3, Req-4].

In KCC.600.170.A.3, the County proposes to clarify what shoreline permits are required for subdivision and lot creation. Determining what permits are necessary for a proposal must be based on the facts of the proposal and should occur when an application is being submitted. Subdivision of land by itself does not meet the definition of development and so does not require an SDP or an exemption. If site improvements are proposed as part of the subdivision, then an SDP may be necessary if the development is not exempt. Because of this, it is not appropriate for the County to require and SDP for subdivision.

Finding. Ecology finds that subdivision of land by itself does not meet the definition of development in RCW 90.58.030(3)(a). Ecology finds that the proposed requirement for a substantial development permit for subdivision in KCC 22.600.170.A.3 is inconsistent with the definition of development and the permitting requirements of the Act in WAC 173-27. Ecology has identified a change necessary to ensure consistency with RCW 90.58.030(3)(a) and WAC 173-27 [Attachment 1, Req-5].

The County is proposing changes to Title 21 for consistency with the proposed division between Type II and Type III variances. The County proposes to clarify in KCC 21.04.100 Review Authority Table that shoreline variances for a smaller than 25% reduction of the reduced buffer in shoreline residential designations are a Type II decision, and variances for greater than a 25% reduction are a Type III variance.

However, an applicant may apply for a variance to any bulk, dimensional, or performance standard in the SMP and not just to the buffer standard in the shoreline residential designation. It's not clear if an applicant for a variance to other standards (for example a variance to exceed the height limit) would go through the Type II or Type III variance process.

Finding. Ecology finds that RCW 90.58.100(5) requires that "[e]ach master program shall contain provisions to allow for the varying of the application of use regulations of the program, including provisions for permits for conditional uses and variances, to insure that strict implementation of a program will not create unnecessary hardships." Ecology finds that the proposed revisions to KCC 21.04.100 limits the use of variances to only modifications of shoreline buffers in the shoreline residential environment. Ecology finds that this proposed change is inconsistent with RCW 90.58.100(5). Ecology has identified a change necessary to ensure consistency [Attachment 1, Req-6].

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[Recommended changes](#)

Ecology has identified ten (10) recommended changes. These changes have been identified in places where Ecology finds that clarification would help with implementing the County's intent for the SMP amendments. These recommended changes are consistent with the SMA and the SMP Guidelines.

INITIAL DETERMINATION

After review by Ecology of the complete record submitted and all comments received, Ecology has determined that the County proposed amendments, subject to and including Ecology's required changes (itemized in Attachment 1), are consistent with the policy and standards of RCW 90.58.020 and RCW 90.58.090 and the applicable SMP guidelines (WAC 173-26-171 through 251 and .020 definitions).

Next Steps

- Consider the changes Ecology has identified in Attachment 1 to resolve the issues identified above. Please let me know if you would like to discuss alternative language or different approaches for resolving these issues.
- If these issues are resolved prior to local adoption, we anticipate being able to approve your SMP Periodic Review amendment promptly after formal submittal is provided consistent with WAC 173-26-110.