



Planning & Development Services

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Memorandum

Planning Commission deliberations on Shoreline Master Program

Supplemental staff report concerning the Comprehensive Update and the Periodic Review of the Shoreline Master Program

To: Skagit County Planning Commission
From: Betsy Stevenson, AICP, Senior Planner, Team Supervisor and Project Manager
Re: Shoreline Master Program Comprehensive Update and Periodic Review
Date: November 4, 2021 in advance of the November 9, 2021 meeting

Background

During review of the draft recorded motion at the meeting on October 26, 2021, a request was made for staff to provide some additional information about items in the draft recorded motion. Specifically, those from earlier discussion and those from the 2016 Planning Commission recommendations.

Working from the October 26 version of the DRAFT recorded motion, the initial recommendation is from the Planning Commission, the portion in italics is information provided by the department, in numerical order as written.

1. PC recommendation: Delete SCC 14.26.370(4)(a) & (b) regarding the Shoreline Public Access Plan.

Staff information: We received several comments with various viewpoints regarding public access. We spent a considerable amount of time with the Planning Commission leading up to the 2016 Planning Commission recommendation, coming up with policies and regulations that meet the state laws and guidelines but provide flexibility for development applicants.

Two legal standards also have to be met – nexus and proportionality. When requiring public access as part of a project approval, we have the burden of showing that there is a nexus between the impacts of the proposed project on public access and an increased demand for public access that is created by the project. Consideration also has to be given to the scale of the proposed project and the scale of the identified impacts to public access from the project. A requirement for public access needs to be proportional to the demand for public access created by the proposal.

Ecology SMP Handbook: For the shoreline inventory and characterization report, local governments should identify both existing physical and visual access to a jurisdiction's shorelines, including public rights of way and utility corridors, and potential opportunities for enhancing public access [WAC 173-26-201(3)(c)(vi)]. Public access sites should be shown on inventory maps, preferably for each shoreline reach. Existing plans that address public access should be summarized in the report. For example, a parks plan may call for a new trail to the water or kayak launching beach or marina.

The department recommends that 14.26.370 (4) be retained as written.

2. PC recommendation: Move the content of proposed SCC 14.26.550, Additional Provisions for Fish and Wildlife Habitat Conservation Areas, into SCC Chapter 14.24, Critical Areas.

Staff information: As noted in the margin of the DRAFT recorded motion, this recommendation is no longer relevant since we chose to move the applicable portions of the Critical Areas Ordinance (SCC 14.24) into the new SMP (SCC 14.26 Part V). The department suggests that it be deleted as a recommendation in the DRAFT recorded motion.

3. PC recommendation: Revise proposed SCC 14.26.415(2)(b)(ii) to read: “Ongoing maintenance, harvest, replanting, changing culture techniques or species does not require shoreline review unless cultivating a new species in the waterbody or using a new culture technique, and that new species or culture technique has significant adverse environmental impacts (if not allowed by an existing shoreline permit).”

Staff information: The proposed language recommended by the Planning Commission, although meant to clarify, makes it confusing and less clear. 14.26.415 (2) is titled **When shoreline review is required**. (b) is titled Existing aquaculture. If the section is read sequentially, it makes sense and is clear. The shellfish aquaculture section of the new SMP took several months to come to some agreement on language (through the aquaculture subcommittee) between the Skagit River System Cooperative representative to the Shoreline Advisory Committee (SAC) and the shellfish growers representative to the SAC. The department recommends we retain the original language, as agreed to by the parties.

(2) When shoreline review is required.

(a) New aquaculture. Shoreline review is required for the initial siting, construction, planting, or stocking of a facility or farm.

(b) Existing aquaculture.

(i) Determination of existing aquaculture area.

(A) Determination of the existing aquaculture area is made by the Administrative Official.

(B) The Administrative Official may determine that an area that was previously cultivated has been abandoned and no longer constitutes “existing aquaculture.” In its determination, the Administrative Official must consult with the aquaculture operator and may consider such factors as whether the property was acquired under the Bush or Callow Acts of 1895, the use of crop rotation and fallowing, state or federal permit requirements, pest infestations, seed or juvenile availability, market fluctuations, and pollution of the farm site from other uses or developments.

(ii) Ongoing maintenance, harvest, replanting, changing culture techniques or species does not require shoreline review unless cultivating a new species or using a new culture technique that has significant adverse environmental impacts (if not allowed by an existing shoreline permit).

4. PC recommendation: Revise proposed SCC 14.26.415(2)(b)(iii) to require “shoreline review,” not necessarily a “shoreline permit.”

Staff information: 14.26.415(2)(b)(iii) reads:

(iii) Expansion of existing aquaculture.

(A) For aquaculture without an existing shoreline permit, a shoreline permit is required for any expansion.

(B) For aquaculture permitted under this SMP, a shoreline permit is required when the activity expands beyond the permitted area.

(C) For aquaculture permit under a previous version of this SMP, a shoreline permit is required when the activity expands more than 10% or one acre, whichever is less, beyond the area cultivated on the effective date of this SMP, or when the expansion creates unmitigated impacts to native plant and animal populations.

(A) is the section identified to change shoreline permit to shoreline review. If there is a shellfish aquaculture farm operating without an existing shoreline permit, any expansion requires a shoreline permit. They are allowed to continue to operate as they existed prior to the SMP being in effect in 1976, but any expansion would require that they acquire a shoreline permit. The State guidelines recognize that this type of operation is a nonconforming use. No expansion of a nonconforming use or structure is allowed, which is why we have made accommodation for that scenario here by requiring a shoreline permit. The department does not want to regulate for the type of aquaculture that falls under (A) as a nonconforming use under Part VI Legally Established Pre-existing Uses and Structures, so we chose to write it this way to be straight forward and more defensible.

Please remember that we are also changing the shoreline substantial development permit to an administrative process (Level 1), which does not require a public hearing before the Hearing Examiner (14.26.710(2)(b)). And again, this language was agreed upon by the aquaculture subcommittee of the SAC, after several months of thoughtful and diverse debate. The department recommends we retain the original language, as agreed to by the parties.

5. PC recommendation: Revise SCC 14.26.415(8)(d)(vi) to delete “and avoid conflicts with neighboring uses.”

Staff information: Item (d) from this section is the list of what must be included in an application for geoduck aquaculture. The state guidelines found in WAC 173-26-241 Shoreline uses, (3) Standards,(b) Aquaculture are quite detailed and include references to adjacent uses. One such item is specific to allowing work during night time and weekend low tides, but giving the local government the ability to consider “limits and conditions to reduce impacts, such as noise and lighting, to adjacent existing uses.” We are requiring from the applicant for geoduck aquaculture information that addresses times when their operation needs to be limited to protect priority habitats and associated species, and also to avoid conflicts with neighboring (because adjacent becomes contentious and hard to define) uses. It requires the applicant to consider their siting decision on many factors, including potential conflicts with existing uses in the area. Many of the complaints and challenges of geoduck aquaculture applications come from existing neighboring uses. It makes sense that the applicant has a plan of how they are addressing such concerns and potential conflicts. Keeping this in the SMP may provide for more discussion with neighboring uses and suggested ways to address these conflicts that are agreeable to the neighboring uses. The department recommends we retain the original language.

6. PC recommendation: Add a note to proposed SCC 14.26.440, Fill, Excavation, and Grading, to explicitly exempt aquaculture from that section.

*Staff information: 14.26.440 (1) Applicability, (b) This section does not apply to: (ii) Fill, excavating or dredging incidental to an otherwise authorized use or modification (e.g. agriculture, **aquaculture**, shoreline crossings, bulkhead replacements), which is regulated by the section governing the associated use or modification.*

This is already included in the existing language – the section does not apply to the otherwise authorized uses and modifications where fill, excavating and grading make take place, but is incidental and reviewed and regulated in the section of the SMP for the specific use or modification. Staff has followed the format and style of the SMP document (where applicable) by describing what the section does apply to and what it doesn't apply to. A full exemption from this section may be inconsistent with the permit/review provisions in the aquaculture section of the SMP, as well as with the Guidelines. The department feels that the existing language has addressed the PC recommendation and no change is needed here.

7. **PC recommendation:** Add a definition of “flood hazard reduction” to Part VIII, Definitions, and make it clear that it includes dikes and levees.

Staff information: The description in 14.26.350 Flood Hazard Reduction, (1)(a), Applicability, already includes language about dikes and levees:

*This section applies to actions taken to reduce flood damage or hazard and to uses, development, and shoreline modifications that may increase flood hazards. Flood hazard reduction measures include nonstructural measures, such as setbacks, land use controls, wetland restoration, dike removal, use relocation, biotechnical measures, and stormwater management programs, and structural measures, **such as dikes, levees**, revetments, floodwalls, channel realignment, and elevation of structures consistent with the National Flood Insurance Program.*

This language comes from WAC 173-26-221 General master program provisions, (3) Flood hazard reduction. Since this is a broad category of uses and modifications and a more general topic that needs to be included and addressed in the new SMP document, it would be very difficult to devise a definition to include in Part VIII Definitions. Attempting to do so could prove problematic for implementation of the SMP once adopted. Since the dikes and levees are included in the Applicability portion of this section, the department feels it is clear that flood hazard reduction measures include dikes and levees and no change is needed.

8. **PC recommendation:** Reverse the order of (1)(d) and (1)(e) in SCC 14.26.140.

Staff information: The order of the listing in 14.26.140 Shoreline jurisdiction, (1) is somewhat sequential in items (d), (e) and (f). First is the 200 feet of the OHWM, then there are associated wetlands in some areas, which may extend beyond the 200 feet, and then there are floodways and contiguous floodplains to consider, which also may extend beyond the 200 feet. The department feels the existing order makes the most sense and makes it easier to understand. The department recommends we retain the existing order of the items (d) and (e) here.

9. **PC recommendation:** Add Shoreline Exemptions to the list of applications exempt from Notice of Development Application in SCC 14.06.150(2).

Staff information: The department is no longer recommending changes to SCC 14.06 as part of this SMP Update process. Part VII Administration, 14.26.710 Applications, (2)(a) reads: Shoreline exemptions are a type of Level I application. A Notice of Development Application is not required for shoreline exemptions.

The department feels this language addresses the recommendation by the PC and suggests that it be deleted as a recommendation in the DRAFT recorded motion.

10. **PC recommendation:** In SMP Part II, add 10% impervious surface limit to Rural Conservancy and Urban Conservancy for new lots created after the adoption of the SMP.

Staff information: The department has recommended that a footnote be added to the Dimensional Standards Table 14.26.310-1, to address the PC recommendation and also address public comment (see Matrix issue 14(c.)). The department feels this language addresses the recommendation by the PC and suggests that it be deleted as a recommendation in the DRAFT recorded motion.

11. **PC recommendation:** In proposed SCC 14.26.420(4)(b), regarding development standards for docks, replace Table 14.26.420-1 (and related dimensional standards in the narrative) with a requirement for all saltwater docks to comply with WAC 220-660-380 or the conditions of Hydraulic Project Approval, and all freshwater docks to comply with WAC 220-660-140 or the conditions of Hydraulic Project Approval. Move the numeric limits on the number of boat lifts and canopies into the development standards section.

Staff information: This amendment was recommended by the department, when there were concerns about varying standards between the local and state requirements for docks. Washington Department of Fish and Wildlife (WDFW) had recently updated its requirements for docks. The PC and department recommended replacing this table, and related dimensional standards in the narrative, with a requirement for all saltwater docks to comply with WAC 220-660-380 or the conditions of HPA, and all freshwater docks to comply with WAC 220-660-140 or the conditions of HPA. And the PC and department also recommended that we move numeric limits on number of boat lifts and canopies into the development standards section.

The department realized that tying our requirements to those of WDFW could create more issues than it resolved, so reinserted Table 14.26.420-1. Tables like these are extremely useful for both applicants and implementing County staff. Consistency with HPA requirements is a benefit in this case. Most of the width standards are in line with the state standards.

This recommendation is no longer relevant and the department suggests that it be deleted as a recommendation in the DRAFT recorded motion.

12. **PC recommendation:** Add definitions of “dock” (already defined in Boating Facilities but not in Part VIII) and “pier,” “ramp,” and “float” from WAC 220-660-140(1) to Part VIII. Add cross-references to Part VIII, Definitions, for the definitions contained in SCC 14.26.420.

Staff information: This section of the new SMP was created to provide the information that an individual would need to answer questions about permitting and constructing a dock for personal or community use. The items identified in the PC recommendation are defined in this section to keep with the intent to make it easier for the applicant to find the relevant information in one location in the SMP. Having the illustration of the dock components, Figure 14.26.420-1, and the definitions in the same section simplifies the use of the SMP for the applicant, as described herein. Including definitions in two locations in the document is redundant. The department suggests that this recommendation be deleted in the DRAFT recorded motion.

13. **PC recommendation:** Extend the Rural Conservancy-Skagit Floodway designation on the map to cover all Rural Conservancy upstream on the Sauk River to the limit of the FEMA floodway, and make the designation criteria (policy 6B-5.1) consistent.

Staff information: The PC recommendation included extending this designation to both the Sauk River and the upper Skagit River. In 2021, the PC discussed this recommendation with department staff. The department acknowledged that the Sauk River meanders widely and thus extending this designation to the Sauk may not make sense. The most current draft Shoreline Environment Designation Maps reflect this change on the upper Skagit River. The department feels this map revision addresses the recommendation by the PC and suggests that it be deleted as a recommendation in the DRAFT recorded motion.

14. **PC recommendation:** Add definitions in Part VIII for each of the Shoreline Environment Designations that include cross-references to SMP Part II, Shoreline Environment Designations.

Staff information: The shoreline environment designations are addressed in great detail in 6B, including the purpose of each designation, the criteria for designation, and the management policies. Part II also addresses the shoreline environment designations. There isn't an actual definition for each of the designations, so trying to add one to Part VIII for each of the shoreline designations would require including the purpose, designation criteria and the management policies, which is redundant and makes the document longer and repetitive. The department suggests that this recommendation be deleted in the DRAFT recorded motion.

15. **PC recommendation:** Public access on dikes must be agreeable to all parties including the property owner and the process to determine feasibility should be written into the regulations in SMP Section 14.26.350(3)(d). Clarify new vs. existing dike maintenance.

Staff information: The department feels that any reference to public access and dikes should remain the 14.26.370. In (1) Applicability, (a) This section applies to the following shoreline uses and activities, which are required to provide shoreline public access:

- (i) Water-enjoyment, water-related, and nonwater-dependent uses;
- (ii) Commercial and industrial development proposed on land in public ownership.
- (iii) Land divisions creating five or more lots;
- (iv) Development that involves five or more multi-unit residential dwelling units;
- (v) Development by public entities, including local governments, port districts, state agencies, and public utility districts;
- (vi) Marinas when water-enjoyment uses are associated with the marina;
- (vii) Recreation pursuant to SCC 14.26.470;
- (viii) New public structural flood hazard reduction measures, such as **new dikes and levees, where access rights can be secured.**

Item (viii) specifically says where access rights can be secured. It also indicates new dikes and levees. This is clear and concise and would meet the intent of the PC recommendation to be sure all parties are agreeable (to public access and dikes). The feasibility determination is outlined in 14.26.370(2)(c) How to determine feasibility.

Public access is feasible unless the applicant demonstrates to the satisfaction of the Administrative Official that one or more of the following apply:

- (i) public access would result in unavoidable public health or safety hazards that cannot be prevented by any practical means;
- (ii) public access is not feasible due to inherent security requirements of the use that cannot be satisfied through the application of alternative design features or other solutions;
- (iii) public access is not feasible as part of an ecological restoration project such as a levee setback;
- (iv) public access would result in significant adverse environmental impacts that cannot be mitigated;
- (v) public access would result in significant undue and unavoidable conflict with proposed use or adjacent uses that cannot be mitigated;
- (vi) public access is not feasible because the subject site is separated from the shoreline water body by intervening public or private improvements such as highways, railroads, existing structures, or similar significant improvements;
- (vii) the cost of providing the public access is unreasonably disproportionate to the total long-term cost of the proposed development;

(viii) public access is deemed detrimental to threatened or endangered species under the Endangered Species Act and the Administrative Official has consulted with governmental agencies or authorities with jurisdiction in making that determination.

The department feels that the concerns of the PC are addressed in 14.26.370, as cited herein, and the public access discussion should remain within 14.26.370. The department suggests this PC recommendation be deleted in the DRAFT recorded motion.

16. PC recommendation: Include a statement about flood protection and drainage in policies. The SMP should contain a statement on the unique role of the dike and drainage special districts in Skagit County and their relevance to Shorelines. Add to 6C-1.4.
Comment response matrix item 13.b. says: Include statement about flood protection and drainage in opening recital.

Staff information: Department staff met with the commenter to clarify concerns and discuss ways to address them. The following language was agreed upon as the best way to resolve concerns and included in the supplemental staff report to the Planning Commission dated October 24, 2021.
In 14.26.130 Applicability, add:

(5) As provided in RCW Title 85 and through the US Army Corps of Engineers PL84-99 Program, the provisions of this SMP do not affect the authorities and powers of diking and drainage districts. The department resolved the concern with the recommended addition of 14.26.130(5). The department suggests the Planning Commission delete the PC recommendation stated above and replace it with the staff recommendation, that was developed in collaboration with the commenter and discussed by Planning Commissioner Hughes (approved by consensus) on October 26, 2021.

17. PC recommendation: In 14.26.130 Applicability, add:

(5) As provided in RCW Title 85 and through the US Army Corps of Engineers PL84-99 Program, the provisions of this SMP do not affect the authorities and powers of diking and drainage districts.

Staff information: Please see discussion in 16 above.

18. PC recommendation: Remove requirement in Table 14.26.420-1 for watercraft lift canopies to be constructed of light permeable fabric.

Staff information: Found in the comment response matrix as item 1.a. and the department response is: Overwater cover provided by in and above-water structures such as docks and boatlift canopies shades the aquatic area, providing potential habitat for predators of juvenile salmon as well as inhibiting growth of aquatic plants. Requiring boat lift canopies to be of light permeable fabric is known to minimize the impact of solid structures similar to the use of grated decking on docks. The department recommends that we retain the language in the new SMP and not make the change.

(18) (numbering issue on original) **PC recommendation:** Forest practices that are not intended for conversion to other uses consistent with SCC 14.26.445(1) should be allowed to construct temporary access roads without a shoreline substantial development permit. Roads should be properly abandoned following harvest.

Staff information: The state guidelines changed in 2017 (WAC 173-26-241 Shoreline Uses, (3)(e) and clarified that forest practices only involving timber cutting are not considered development under the Shoreline Management Act and do not require shoreline review.

(3)(e) Forest practices. Local master programs should rely on the Forest Practices Act and rules implementing the act and the Forest and Fish Report as adequate management of commercial forest uses within shoreline jurisdiction. A forest practice that only involves timber cutting is not a

development under the act and does not require a shoreline substantial development permit or a shoreline exemption. **A forest practice that includes activities other than timber cutting may be a development under the act and may require a substantial development permit.** In addition, local governments shall, where applicable, apply this chapter to Class IV-General forest practices where shorelines are being converted or are expected to be converted to nonforest uses.

Forest practice conversions and other Class IV-General forest practices where there is a likelihood of conversion to nonforest uses, shall assure no net loss of shoreline ecological functions and shall maintain the ecological quality of the watershed's hydrologic system. Master programs shall establish provisions to ensure that all such practices are conducted in a manner consistent with the master program environment designation provisions and the provisions of this chapter. Applicable shoreline master programs should contain provisions to ensure that when forest lands are converted to another use, there will be no net loss of shoreline ecological functions or significant adverse impacts to other shoreline uses, resources and values provided for in RCW **90.58.020** such as navigation, recreation and public access.

Master programs shall implement the provisions of RCW **90.58.150** regarding selective removal of timber harvest on shorelines of statewide significance. Exceptions to this standard shall be by conditional use permit only.

Lands designated as "forest lands" pursuant to RCW **36.70A.170** shall be designated consistent with either the "natural," "rural conservancy," environment designation.

Where forest practices fall within the applicability of the Forest Practices Act, local governments should consult with the department of natural resources, other applicable agencies, and local timber owners and operators.

14.26.445 has been rewritten (from the February 2, 2021 version to the April 22, 2021 public release draft) to reflect changes to state requirements (as part of the periodic review process). State rules require that we follow these standards, which necessitated some changes to our new SMP. The language that is currently included as 14.26.445 closely follows the state rules and have been preliminarily approved by Ecology.

I met with the Forest Advisory Board and went over the proposed changes to the SMP with them. Most of the members were aware of the state changes and understood what it means for them (and have been working in jurisdictions where these requirements are already in place). What I was able to share with them was that we are changing our process for shoreline substantial development permits, so they will become an administrative permit review process under Part VII and will not require a public hearing before the Hearing Examiner. The administrative review process would also cost less without the need for a public hearing and will be processed timelier than under our current process. So, if and when forest practice activities constitute development under the Shoreline Management Act, and are not specifically identified as a conditional use, the permitting process is administrative, won't take as long as the process in place now which requires a public hearing for shoreline substantial development permits.

The department is not thrilled with the new requirements, but we have devised code language which meets the requirement of the state rules, but still provides some flexibility by being less specific. The department recommends that we retain the language in the new SMP and not make the recommended change in order to be compliant with the state guidelines.

19. **PC recommendation:** Maintenance of public access should not be the financial responsibility of the landowner.

Staff information: It isn't clear from the discussion or the DRAFT recorded motion if the PC intended this language be inserted into the new SMP. The department (per the previous public access discussion in 15) believes that the existing language in 14.26.370 addresses the issue. The department feels that the concerns of the PC are addressed in 14.26.370, as cited in recommendation 15, and the public

access discussion should remain within 14.26.370 and the language in the new SMP should be retained as written.

20. **PC recommendation:** We recommend that the Skagit County SMP allow for future possibility of floating homes when they can be properly sited, designed, supported, regulated and served by appropriate infrastructure such as access, power, water and waste disposal.

Staff information: Floating homes are addressed in WAC 173-26-241 Shoreline uses, (3)(j) Residential development. (iv) Over-water residences:

(A) New over-water residences, including floating homes, **are not a preferred use and should be prohibited.** It is recognized that certain existing communities of floating and/or over-water homes exist and should be reasonably accommodated to allow improvements associated with life safety matters and property rights to be addressed provided that any expansion of existing communities is the minimum necessary to assure consistency with constitutional and other legal limitations that protect private property.

WAC 173-26-020 Definitions includes:

(34) "Shall" means a mandate; the action must be done.

(37) "Should" means that the particular action is required unless there is a demonstrated, compelling reason, based on policy of the Shoreline Management Act and this chapter, against taking the action.

The department doesn't believe that the PC recommendation meets the test in (37) to be in compliance with state rules and guidelines above. The department recommends that the proposed PC recommendation be deleted from the DRAFT recorded motion.

21. **PC recommendation:** The max width for a single user pier/fixed piling is 6 feet.

Staff information: The staff recommendation has been to revert back to Table 14.26.420-1 from the February 2, 2021 draft which had separate columns for Lakes With Anadromous Fish and Lakes Without Anadromous Fish. So, the lakes without anadromous fish would have a 6 foot maximum width for the pier/fixed piling portion, a 4 foot maximum width for the ramp, and an 8 foot width for the floating section.

The department believes that this change would address the PC concerns. According to information from a quick search of WDFW's website, Big Lake is the only lowland Skagit County lake within shoreline jurisdiction that may contain anadromous fish. The department recommends the insertion of the previous Table 14.26.420-1 to address the dock width issue.

22. **PC recommendation:** The Planning Commission recommends leaving the setback averaging provision in the SMP.

Staff information: The averaging provision in the current SMP for residential development will no longer be feasible, since we are required to integrate our applicable critical areas regulations into the new SMP. There are buffers that will apply and averaging to determine a shoreline setback is no longer possible in the SMP Update and Periodic Review. The department recommends that this PC recommendation be deleted from the DRAFT recorded motion.