



Skagit County Planning & Development Services

DALE PERNULA, AICP *Director*

JACK MOORE, CBCO *Building Official*

Supplemental Staff Report #2

To: Planning Commission
From: Betsy Stevenson, AICP, Senior Planner, Team Supervisor, Project Manager
Re: Shoreline Master Program Update – Comprehensive Plan Policies, Development Regulations and Shoreline Environment Designation Maps
Date: April 22, 2016

This memo prepares for the Planning Commission deliberations on the SMP on April 26, 2016, and addresses public comments received during the written comment period between February 4 and April 4, 2016, and testimony received at the public hearing on March 15, 2016.

The Proposal

Now that the comment period has concluded, the Planning Commission is charged with generating a recommendation on the proposal, i.e.:

- The proposed Comprehensive Plan policies
- The proposed development regulations (shoreline development regulations SCC 14.26 and supplemental changes to SCC 14.04, 14.06, 14.24)
- The proposed Shoreline Environment Designation maps

The Planning Commission's recommendation takes the form of a Recorded Motion, including findings of fact, reasons for action, and recommendations. Planning Commissioners who are unfamiliar with the recorded motion format may wish to review the Planning Commission's recent recorded motions on [marijuana](#) and [stormwater](#).

Deliberations Process

The Planning Commission adopted a structured deliberation protocol for the SMP Update at its April 19 meeting. The Commission adopted a list of issues to discuss, in the following order:

April 19 meeting (now complete):

- Guemes Island (setbacks, prohibitions on docks and aquaculture)
- Tree clearing
- Sea level rise
- Public access
- SMP Update process
- Public notification for the SMP Update + process

April 26 meeting:

- No net loss of ecological functions (baseline)
- Buffers
- Shoreline code v critical areas code
- Dikes (maintenance/reconstruction, OHWM/jurisdiction)
- Maps
- Aquaculture (Taylor Shellfish changes)
- Concept plans
- Shoreline Environment Designation Map changes (other than Guemes)

May 3 meeting:

- Monitoring of enhancement projects
- Regulatory flexibility
- Lake Cavanaugh (other lake/river communities?)
- Docks (dimensional standards)
- Structure size for redevelopment vs lot size
- Comments on other specific code sections
- Ecology Comments

At each meeting, the Planning Commission will:

Take each concept one at a time. The chair should require discussion to follow the outline and, on his or her own, rule out of order any member who strays from the topic on the floor. If the chair does not interrupt a member who strays from the topic, any planning commissioner can call for a point of order.

Focus on the content of the recorded motion. The PC's objective is to generate a Recorded Motion that captures their recommendation and reasons for it. Staff has prepared a draft Recorded Motion to work from. As the discussion proceeds and coalesces into specific points, PC members should make motions using the following process:

- a. Articulate, in general terms, and as many words as you need, what finding/reason or recommendation you want included in the Recorded Motion.
- b. Staff will type that into a concise statement in Track Changes on the screen.
- c. Say, "I move that we add the [statement on the screen] to the Recorded Motion."
- d. If the motion is seconded, discuss *only* the motion, and then take a voice vote.
- e. Move to the next recommendation or finding.

Responses to Public Comments, Part 2

Public comments are in bold marked with 🗨️ and followed by the Department response. Where the Department agrees with a particular change, we have marked proposed language for the Planning Commission recommendation with “RC-#” in the margin.

No Net Loss

This section is copied from last week’s memo. The County received substantive comments on “no net loss” issues from Gary Hagland, Roger Mitchell, Ellen Bynum (FOSC), and Perry/Manns (Skagit Audubon).

🗨️ **What is “no net loss of ecological functions” and how is that determination made?**

WAC 173-26-186(8)(b) requires that “[l]ocal master programs shall include policies and regulations designed to achieve no net loss of ...ecological functions.” “Ecological function” is defined in WAC 173-26-020 and in the SMP Update (proposed SCC 14.26.820, Definitions) as “the work performed or role played by the physical, chemical, and biological processes that contribute to the maintenance of the aquatic and terrestrial environments that constitute the shoreline’s natural ecosystem.” Net loss is measured from the baseline conditions as established in the Shoreline Analysis Report prepared in 2011.

The proposed SMP Update also includes a “no net loss” standard for individual project proposals (SCC 14.26.305), to be achieved by following the standards in the SMP, as well as requiring mitigation where necessary to address adverse impacts.

🗨️ **There is no baseline condition established to determine “no net loss of ecological functions.” How does County verify accuracy of baseline and enforce the “no net loss” principle?**

A No Net Loss Report was prepared to demonstrate how the proposed SMP policies, regulations, and supporting documents, if implemented, achieve this goal. The Shoreline Analysis Report provides a shoreline inventory and documents the baseline conditions by which the no net loss determination must be made. The Shoreline Analysis Report also made recommendations for how the SMP proposal could achieve “no net loss.” A Cumulative Impacts Analysis then evaluated what impact foreseeable development consistent with the proposed SMP would look like, in conjunction with proposed shoreline restoration as outlined in the Shoreline Restoration Plan. The Cumulative Impacts Analysis and No Net Loss Report concluded that the proposed SMP, if implemented, would achieve “no net loss” because it would maintain existing shoreline functions within the county while accommodating reasonably foreseeable future shoreline development. The Shoreline Restoration Plan further identified opportunities for restoration efforts that provide potential for ecological lift, or improvement.

🗨️ **We appreciate the emphasis throughout the draft Shoreline Master Program on no net loss of shoreline ecological functions and the encouragement for restoration of these important habitats.**

Shoreline Buffers

The SMP Update proposes essentially no changes to the existing required buffers for shorelines. Those buffers are found in our existing critical areas code at SCC 14.24.530. Buffers for streams and rivers that qualify as shoreline jurisdiction are 200 ft, and listed in the riparian buffer width table at SCC 14.24.530(1)(c). Buffers for lakes and ocean (marine) shorelines vary from 100-200 ft, and are listed in SCC 14.24.530(2). These are the same buffers that are applied to development applications today, and have been since the current version of the critical areas code was adopted in 2008.

Shorelines and Critical Areas

Protection of “critical areas” is required by the Growth Management Act. Critical areas include:

- Geologically hazardous areas
- Frequently flooded areas
- Aquifer recharge areas
- Wetlands
- Fish and Wildlife Habitat Conservation Areas (largely streams, lakes, and marine shorelines)¹

Since 2010, state law has required that “upon department of ecology approval of a shoreline master program..., critical areas within shorelines of the state are protected under [the SMA] and are not subject to the procedural and substantive requirements of [the GMA]...” RCW 36.70A.480(d). Until the SMP Update is adopted, the adopted Critical Areas Ordinance in SCC 14.24 applies. See RCW 36.70A.480(3)(b).

The draft SMP Update’s approach is to use the existing critical areas regulations so that we are operating with the *same* rules for critical areas both inside and outside shoreline jurisdiction. This will help set uniform expectations for permit applicants and simplify administration. The CAO for shorelines will be the version existing at the time of adoption of this SMP, and this version will be attached as an appendix to the SMP. See proposed SCC 14.26.500 for the text of how this integration is accomplished.

The effect of this change is as follows. Currently, a development proposed within shoreline jurisdiction must comply with both the SMP and the CAO. If a setback variance is sought, for example, two separate permit processes (with separate fees) are required to allow for both a shoreline buffer reduction under the SMP and a Fish and Wildlife Habitat Conservation Area buffer reduction under the CAO (SCC Chapter 14.24). When the SMP update is adopted, this will be an integrated process—the SMP will guide the development, the same critical areas regulations that exist today will be applied, and the duplicative processes will be unified.

The current draft SMP reserves five section numbers in Part V for shoreline-specific regulations for each of the five types of critical areas. While this structure made sense to us during development of the SMP draft, all but one of these sections is essentially empty. We now believe that a couple of

¹ N.B., all “shorelines” regulated by the SMP and all “critical saltwater habitats” are Fish and Wildlife Habitat Conservation Areas.

changes could further simplify this structure. If the Planning Commission agrees, it could add the following language to its recorded motion:

RC-1. Delete empty proposed SCC 14.26.520-540, and section .560.

RC-2. 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.

The current draft SMP requires buffers along shorelines both through integration of the critical areas regulations (all “shorelines” regulated by the SMP and all “critical saltwater habitats” are Fish and Wildlife Habitat Conservation Areas) *and* through the dimensional standards in Table 14.26.310-1 (page 59). We suggest the Planning Commission add the following language to its recorded motion to update the older shorelines buffer table in the critical areas code:

RC-3. Update the table in existing SCC 14.24.530(2), Lake and Marine Shoreline Buffers, to reflect the new shoreline environment designations.

Despite the two distinct concepts, the shoreline buffer for upland uses and FWHCA buffer widths will be the same and are determined based on the type of water body and the environment designation. To reduce confusion, we will call both shoreline buffers for discussion purposes.

Aquaculture

The County received substantive comments on this topic from Kevin Bright (American Gold Seafoods), Bill Dewey (Taylor Shellfish) and Tim Hyatt (Skagit River System Cooperative).

- 🔊 **Encourages the County to maintain the current language with regard to aquaculture in the draft SMP. The broad view and intention of the State Shoreline Management Act (SMA) is correctly applied in the locally written SMP.**
- 🔊 **Local SMPs require strong enough language to safeguard the environment, but do so in a manner that also allows for the controlled beneficial uses of the shoreline environment. The current draft SMP has found that balance.**
- 🔊 **Expansion of aquaculture into native eelgrass and other fragile ecosystems should fall under full SMP review, and should be mitigated accordingly, as any other shoreline development would be. Expansion of current aquaculture operations into native eelgrass should be treated the same as new aquaculture.**

Proposed SCC 14.26.415(2) describes when shoreline review is required. It progressively describes the various scenarios. Under (2)(b)(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 permitted 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.

The Department believes that this issue is addressed appropriately. The specific section on mitigation and mitigation sequencing (previously proposed at SCC 14.26.310) was removed from the document, because mitigation sequencing is already addressed in existing SCC Chapter 14.24. In proposed SCC 14.26.415(4) General requirements:

(c) Impacts to ecological functions must be mitigated according to the mitigation sequence described in 14.26.310(4).

(d) An assessment and mitigation plan in accordance with SCC 14.26.310(5) is required. The standards found in SCC 14.26.550 for critical saltwater habitats must also be addressed in the assessment.

RC-4. Fix the reference to mitigation sequencing in SCC 14.26.415(4)(c) and (d).

There are still general references to mitigation at proposed SCC 14.26.305 and 14.26.710(3)(e).

The question of new or existing aquaculture is addressed in proposed SCC 14.26.415(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.

🔍 **Adopt WDOE guidance on aquaculture regulations, including the provision that “aquaculture should not be permitted in areas where it would result in a net loss of ecological functions, adversely impact eelgrass and macroalgae, or significantly conflict with navigation and other water-dependent uses.” (WAC 173-26-241(2)(b)(i)(c).**

These issues are addressed in proposed SCC 14.26.415(4)(a)-(k).

🔍 **In Section 14.26.415(2)(b)(ii) clarify that changing culture techniques to geoduck requires a conditional use permit, consistent with the State shoreline regulations (WAC173-26-241(2)(b)) and the remainder of the Skagit SMP, particularly in regards to geoduck (Section 14.26.415(8)).**

The Department disagrees with this suggestion. Pursuant to WAC 173-26-241(3)(b)(iv)(A):

Conditional use permits are required for new commercial geoduck aquaculture only. Where the applicant proposes to convert existing nongeoduck aquaculture to geoduck aquaculture, the requirement for a conditional use permit is **at the discretion of the local government**.

The change from one species to another is addressed in proposed SCC 14.26.415(2)(b)(ii) and would not require shoreline review unless significant adverse environmental impacts would occur.

- 🗨️ **The Shorelines Management Act recognizes shellfish as a preferred use. State and national policies promote the preservation and expansion of shellfish aquaculture beds, and recognize the ecosystem benefits they provide.**
- 🗨️ **County should not duplicate WDFW's review (as the agency with expertise and jurisdiction) for introduction of new species unless introduction would have significant adverse impacts.**

The Department supports the change proposed by the commenter.

RC-5. 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)."

- 🗨️ **Expansion of existing aquaculture without an existing shoreline permit should receive shoreline review, but will not always require a shoreline permit.**

The Department agrees. The draft SMP defines "shoreline permit" to include a shoreline substantial development permit, variance, conditional use permit, or revision; we created the term "shoreline review" to include any shoreline permit, plus the possibility of a shoreline exemption. Aquaculture is by substantial development permit or shoreline exemption in every environment designation, except for Natural where it is allowed as a conditional use.

RC-6. Revise proposed SCC 14.26.415(2)(b)(iii) to require "shoreline review," not necessarily a "shoreline permit."

Similarly, we recommend the following change that was also highlighted by the commenter:

RC-7. Revise proposed SCC 14.26.415(3) to read, "A letter of exemption is required for aquaculture activities that require shoreline review and do not constitute substantial development or otherwise require a Conditional Use Permit or Variance."

For aquaculture without an existing shoreline permit, a letter of exemption is required for any expansion that requires shoreline review and that does not constitute substantial development or otherwise require a Conditional Use Permit or Variance.

- 🗨️ **Predator control measures for aquaculture should be allowed to control invasive species.**

The commenter notes that some predators, such as oyster drills (a species of small predatory sea snail), are considered invasive species and are encouraged to be controlled by state

agencies. The Department agrees, and suggests the Planning Commission include the following in its recorded motion:

RC-8. Revise SCC 14.26.415(4)(h) to allow control of invasive species.

- ☛ **Replace the requirement for geoduck aquaculture to avoid significant conflicts with neighboring uses, which is not contained within WAC 173-26-241(3)(b)(i)(C), with a requirement for geoduck aquaculture to avoid conflicts with navigation and other water-dependent uses, which is in the WAC.**

This comment references SCC 14.26.415(8)(d)(vi), which requires an application for geoduck aquaculture include:

(vi) specific periods when limits on activities are necessary to protect priority habitats and associated species and avoid conflicts with neighboring uses;

The WACs are minimum guidelines and we are not constrained to follow them, however the Department recognizes that aquaculture is a preferred use in the SMA, above neighboring uses. Because proposed SCC 14.26.415(8)(d)(xii) addresses navigation, we recommend deleting the conflict with neighboring uses language.

RC-9. Revise SCC 14.26.415(8)(d)(vi) to delete “and avoid conflicts with neighboring uses.”

- ☛ **Aquaculture should not be regulated by proposed SCC 14.26.440, Fill, Excavation, and Grading.**

The Department agrees because the Aquaculture section addresses aquaculture impacts. We recommend a change to this section to note it does not apply, similar to how the draft notes it does not apply to agriculture.

RC-10. Add a note to proposed SCC 14.26.440, Fill, Excavation, and Grading, to explicitly exempt aquaculture from that section.

Dikes (maintenance/reconstruction, OHWM/jurisdiction)

Substantive comments on this issue were received from Jan Davis and Daryl Hamburg (on behalf of Dike District 1, 3, 17, 22).

- ☛ **Concern that an existing agricultural dike could not be repaired under proposed SCC 14.26.640.**

Proposed SCC 14.26.640 describes the rules for repair and replacement of “structural shoreline stabilization.” Dikes are more properly considered “flood hazard reduction” measures (see proposed SCC 14.26.350 Flood Hazard Reduction), and therefore instead follow the more general and liberal repair and replacement rules in 14.26.650.

RC-11. Add a definition of “flood hazard reduction” to Part VIII, Definitions, and make it clear that it excludes dikes. Add notes to “shoreline stabilization” sections in Part IV and VI to clarify that these sections do not apply to flood hazard reduction measures.

N.B., certain dikes, i.e., agricultural dikes that existed as of September 8, 1975, are exempt from the requirement to obtain SMP permits. See proposed SCC 14.26.410(1)(b). An exemption from permits is not an exemption from the substantive requirements of the SMP.

🗨️ **Concern about public access requirement for dikes.**

This provision (proposed SCC 14.26.350(3)(d)) applies only to *new* dikes, does not require public access when permission cannot be obtained from the underlying landowner, and was addressed by the Planning Commission at its last meeting.

🗨️ **SMP must exempt certain dikes from substantial development permits**

The SMP already exempts from substantial development permits the complete list of developments allowed by state law. See Appendix 1.

🗨️ **Concern that county staff has interpreted the Ordinary High Water Mark (OHWM) as the top of the levee.**

This concern originally arose during a Planning Commission discussion, but is based on *some other jurisdiction's* characterization of the OHWM as the top of the levee. Skagit County staff do not propose any such interpretation.

Shoreline jurisdiction includes the area 200 ft landward of the OHWM, plus the floodway, plus contiguous floodplain area 200 ft from the floodway. Proposed SCC 14.26.140. The OHWM is defined by WAC 173-22-030. Floodway is defined by RCW 90.58.030.

On a diked river shoreline where the river channel is hundreds of feet waterward of the dike, the OHWM is likely found somewhere near the edge of the channel. Shoreline jurisdiction would continue landward up to the dike, because the entire area waterward between the dikes is considered floodway. Shoreline jurisdiction would then continue an additional 200 ft landward beyond the dike to include the 200 ft of continuous floodplain area. Riparian buffers, however, would be measured from the OHWM (near the edge of the channel). SCC 14.26.310(3).

Skagit Countywide UGA Open Space Concept Plan

At its last meeting, the Planning Commission added a line to its draft recorded motion recommending that the Board delete SCC 14.26.370(4) regarding the Shoreline Public Access Plan, which mentions the Skagit Countywide UGA Open Space Concept Plan. Staff has reviewed WAC 173-26-221(4)(c) and (d), which prescribes that the County can pursue either site-by-site public access requirements, or create a public access plan, but need not do both. The reference to the UGA Open Space Concept Plan can therefore be deleted, and the Department agrees with the Planning Commission's recommendation to do so.

Shoreline Environment Designation Map changes (other than Guemes)

The Planning Commission already discussed the Guemes map changes at its last meeting. Additional requests for shoreline environment designation map changes were submitted by Perry/Manns (Skagit Audubon).

🗨️ Change the designation around Secret Harbor on Cypress Island from Rural Conservancy to Natural.

This property, largely owned by DNR, may be the subject of future restoration work. A “Natural” designation may add requirements for additional permitting to implement those projects. DNR has requested we not designate their areas as “Natural.” The Department recommends no change.

🗨️ Change the designation near Barney Lake owned by Clear Valley Environmental Farm or Skagit Land Trust to Natural.

This property is already protected via the noted ownerships, and a Natural designation would therefore not significantly increase protection. Public access is sometimes desired by the Land Trust to the properties it owns, and a Natural designation would increase permitting costs for public access. The Department recommends no change.

🗨️ Change the designation of the WDFW Johnson DeBay Swan Reserve off Francis Road from Rural Conservancy to Natural.

WDFW has similarly requested we not designate their areas as “Natural.” The Department recommends no change.