



Whatcom County

COUNTY COURTHOUSE
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Agenda Bill Master Report

File Number: AB2022-261

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|----------------------|--|----------------------|---------------------------------------|----------------|----------|
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| Assigned to: | Council | Final Action: | 05/24/2022 | | |
| Agenda Date: | 05/24/2022 | Enactment #: | RES 2022-027 | | |

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TITLE FOR AGENDA ITEM:

Resolution amending Resolution No. 2021-056, making additional amendments to the 2020 Shoreline Management Program Periodic Update documents to be considered by the Department of Ecology in their final review and approval

SUMMARY STATEMENT OR LEGAL NOTICE LANGUAGE:

Proposed Resolution to amend Resolution No. 2021-056, making additional amendments to the 2020 Shoreline Management Program Periodic Update documents, including Exhibit D (WCC Title 23, Shoreline Management Program), Exhibit E (WCC Title 22, Land Use & Development), and Exhibit F (WCC Chapter 16.16, Critical Areas)

HISTORY OF LEGISLATIVE FILE

| Date: | Acting Body: | Action: | Sent To: |
|------------|--------------|--|----------|
| 05/10/2022 | Council | INTRODUCED FOR PUBLIC HEARING | Council |
| | | Aye: 7 Buchanan, Byrd, Donovan, Elenbaas, Frazey, Galloway, and Kershner | |
| | | Nay: 0 | |
| | | Absent: 0 | |
| 05/24/2022 | Council | APPROVED | |
| | | Aye: 6 Buchanan, Byrd, Donovan, Frazey, Galloway, and Kershner | |
| | | Nay: 0 | |

Agenda Bill Master Report Continued (AB2022-261)

Absent: 0
Recused: 1 Elenbaas

Attachments: Staff report, Proposed resolution

RESOLUTION NO. 2022-027

AMENDING RESOLUTION NO. 2021-056, MAKING ADDITIONAL AMENDMENTS TO THE 2020 SHORELINE MANAGEMENT PROGRAM PERIODIC UPDATE DOCUMENTS TO BE CONSIDERED BY THE DEPARTMENT OF ECOLOGY IN THEIR FINAL REVIEW AND APPROVAL

WHEREAS, on December 5, 2017, the County Council adopted Ordinance 2017-077 containing amendments to Whatcom County's critical areas regulations (WCC Chapter 16.16) to ensure that the regulations meet Growth Management Act requirements, including consistency with the Whatcom County Comprehensive Plan, Best Available Science, and state agency guidance; and,

WHEREAS, on February 7, 2018, the Washington Farm Bureau, Whatcom County Farm Bureau, Whatcom County Cattlemen's Association, and Whatcom Family Farmers initiated a Petition for Review before the Western Washington Growth Management Hearings Board (Case No. 18-2-0001) appealing Ordinance 2017-077 and certain portions of the regulations; and,

WHEREAS, on November 23, 2021, the County Council approved a settlement agreement with the Petitioners, agreeing to consider certain amendments to WCC Chapter 16.16; and,

WHEREAS, on December 7, 2021, the Whatcom County Council approved Resolution No. 2021-056, which approved for Department of Ecology final review and approval amendments to the Whatcom County Shoreline Management Program, including some to WCC Chapter 16.16, which is a part of the Shoreline Management Program, though it was too late to include the amendments agreed to in the settlement agreement; and,

WHEREAS, after Council's approval of Resolution No. 2021-056 staff found a few errors in these documents and believes it more expedient to correct them and include the amendments agreed to in the settlement agreement prior to the Department of Ecology's final approval rather than having to initiate an additional SMP amendment process, which would only prolong codification of the amendments.

WHEREAS, the Council's Prosecuting Attorney has determined that the amendments proposed herein do not require review by the Planning Commission, as they are within the scope of what they had already reviewed through the SMP Periodic Update; and

WHEREAS, the Whatcom County Council held an additional duly noticed public hearing on May 24, 2022, to receive testimony on the proposed amendments.

NOW, THEREFORE, BE IT RESOLVED by the Whatcom County Council that:

Section 1. Review and Evaluation. The Council hereby finds that the review and evaluation required by RCW 90.58.080(4) has occurred.

Section 2. Revisions. Whatcom County Code Title 23 and Chapter 16.16 (Exhibits D and F to Resolution No. 2021-056) are hereby further amended as shown in Exhibit A of this resolution, which is

attached and incorporated herein by this reference. The remaining portions of the County's Shoreline Management Program Periodic Update shall remain as provided by Resolution No. 2021-056.

Section 3. Approval. The Council hereby approves the revisions shown in Exhibit A to the versions of the referenced Shoreline Management Program documents approved by Resolution No. 2021-056 and finds the amended Shoreline Management Program consistent with the requirements of RCW 90.58 and WAC 173-26, as they apply to these amendments, with the understanding that in accordance with RCW 90.58.190(3), and if Ecology adopts the amendments, the Whatcom County Council intends to adopt (and codify), by ordinance, the subject shoreline master program amendments.

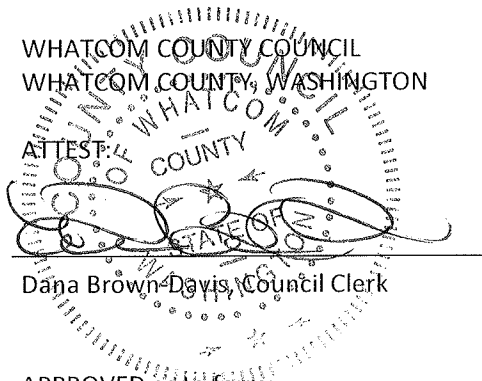
Section 4. Submission to Department of Ecology. The Director of Planning and Development Services is directed to re-submit the revised Shoreline Management Program documents to the Department of Ecology for their review and approval prior to formal adoption. If/Once approved by the Department of Ecology no further action is necessary for compliance with RCW 90.58.080(4) for the periodic review update due on June 30, 2021.

Section 5. Staff is authorized to work with Code Publishing to correct any scrivener's errors and cross-references made ineffective by these amendments.

ADOPTED this 24th day of May, 2022.

WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON

ATTEST:



Dana Brown-Davis, Council Clerk

Todd Donovan, Council Chair

APPROVED as to form:

/s/ Royce Buckingham (approved via E-mail 5.20.22) / JL

Civil Deputy Prosecutor

EXHIBIT A

Part 1. Amendments Agreed to per the Approved Settlement Agreement for Western Washington Growth Management Hearings Board Case No. 18-2-0001

SMP Exhibit F – WCC Chapter 16.16 (Critical Areas)

Article 2. Administrative Provisions

16.16.235 Activities allowed with notification.

...

B. Activities Allowed with Notification.

...

9. Routine maintenance of ditches on agricultural lands; provided, that all of the following are met:
 - a. The maintenance is necessary to support agricultural operations;
 - b. The maintenance activity does not expand the dimensions of the drainage channel beyond the original, lawfully established dimensions;
 - c. The agricultural activities are conducted pursuant to an approved conservation farm plan prepared pursuant to Article 8 of this chapter;
 - d. The farm operator obtains a hydraulic project approval (HPA), if required, from the Washington State Department of Fish and Wildlife (WDFW) prior to the maintenance activity; and
 - e. The farm operator provides a copy of the HPA to the technical administrator as part of the written notification.

Article 6. Wetlands

16.16.620 Wetlands – General standards.

The following activities may be permitted in wetlands and/or wetland buffers as specified when all reasonable measures have been taken to avoid adverse effects on wetland functions and values as documented through an alternatives analysis, the amount and degree of alteration are limited to the minimum needed to accomplish the project purpose, and compensatory mitigation is provided for all adverse impacts to wetlands that cannot be avoided:

...

E. Agricultural uses as follows:

1. Construction of a structure that is associated with an agricultural use; or the reconstruction, remodeling, or maintenance of such structures in wetland buffers, subject to all of the following specific criteria:
 - a. The structure is located within an existing lot of record and is an ongoing agricultural use.
 - b. There is no other feasible location with less impact to critical areas.
 - c. Clearing and grading activity and impervious surfaces are limited to the minimum necessary to accommodate the proposed structure and, where possible, surfaces shall be made of pervious materials.
2. Ongoing agricultural activities subject to the following:

- a. The activities are conducted in accordance with all applicable provisions of this chapter and WCC Title 17; or
- b. The agricultural activity is in compliance with the conservation program on agricultural lands (CPAL) as described in Article 8 of this chapter.

...

Article 8. Conservation Program on Agriculture Lands (CPAL)

16.16.800 Purpose.

- A. The well-being of farms and ranches in Whatcom County depends in part on good quality soil, water, air, and other natural resources. Agricultural operations that incorporate protection of the environment, including critical areas and their buffers as defined by this chapter, are essential to achieving this goal.
- B. The purpose of the CPAL program is to allow farmers practicing ongoing agricultural activities that may affect critical areas, their functions and values, and/or their buffers to do so either (1) in accordance with the standard requirements of this chapter or (2) pursuant to a conservation farm plan voluntarily prepared and approved pursuant to this article. If farmers and ranchers are willing to enter into the CPAL program, and demonstrate no impacts to critical areas through the assessment, then flexibility in these provisions may be extended to them. If not, then they must observe the standard provisions of this chapter.
- C. This program shall be subject to continued monitoring and adaptive management to ensure that it meets the purpose and intent of this chapter.

16.16.820 Classification and applicability.

- A. A conservation farm plan identifies the farming or ranching activities and the practice(s) necessary to avoid their potential negative impacts (resource concerns). Practice selection depends upon the types of livestock raised and crops grown. Based upon the type and intensity of the operation, some generalizations can be made as to the resource concerns and remedies that apply.
- B. Some operations present relatively low risks to critical areas because of their benign nature, timing, frequency, or location. For these operations, the resource concerns and remedies are relatively easy to identify and implement. These are described in more detail as Type 1 agricultural operations subject to standardized conservation farm plans in WCC 16.16.830 and 16.16.840(A).
- C. Where the potential negative impacts to critical areas are moderate or high, solutions are more difficult to formulate and implement. In those circumstances, a more rigorous planning process is required. In such cases, a formal written plan shall provide the desired environmental protection. These types of operations are described as agricultural operations requiring custom conservation farm plans in WCC 16.16.830 and 16.16.840(B) or (C).
- D. Any agricultural activity that an assessment by the Conservation District or a Conservation District-approved third party determines has no adverse impacts to critical areas, based on number/type of animals, type of soils, productivity of the pasture, among other factors, or already-implemented best management practices, shall not be required to have a farm plan and shall be deemed to be in compliance with the provisions of CPAL and this Chapter.
- E. Agricultural activities that qualify for coverage include:
 - 1. Type 1 Operations.
 - a. To qualify as a Type 1 operation, a farm shall not exceed one animal unit per one acre of grazable pasture. These operations present a low potential risk to critical area degradation

including ground/surface water contamination because the animals kept generate fewer nutrients than can be used by the crops grown there.

- b. Critical areas on Type 1 operations are protected against the potential negative impacts of agricultural activities through the implementation of an approved standard conservation farm plan prepared in accordance with WCC 16.16.830 and 16.16.840(A).
 - c. Those operators qualifying for a Type 1 (standard) conservation farm plan may elect to do a Type 2 (custom) conservation farm plan if they want to use “Prescribed Grazing” (NRCS Practice 528A) to manage vegetative filter strips installed alongside critical areas.
2. Type 2 Operations.
- a. Type 2 operations are farms that include, but are not limited to, those that exceed one animal unit per one acre of grazable pasture; farms that have orchards, vineyards, small-fruit field or row crops; and drainage improvement districts. These operations present a potential moderate risk to critical area degradation, including ground or surface water contamination, because the nutrients applied from manure or commercial fertilizers may exceed that which can be easily used by the crops grown there without careful planning and management. The agricultural activities are also likely to be much more intense than Type 1 operations, posing greater potential risks to other critical areas.
 - b. Critical areas on Type 2 operations are protected against the potential negative impacts of agricultural activities through the implementation of an approved custom conservation farm plan prepared in accordance with WCC 16.16.830 and 16.16.840(B).
3. Type 3 Operations.
- a. Type 3 operations include dairies and animal feeding operations/concentrated animal feeding operations (AFO/CAFOs). These operations are already regulated by state and federal governments (see Chapter 90.64 RCW et seq.; 40 CFR 122.23 and 40 CFR Part 412).
 - b. Critical areas are protected against the potential negative impacts of Type 3 agricultural activities through the implementation of an approved custom conservation farm plan prepared in accordance with WCC 16.16.830 and 16.16.840(C).

16.16.870 Limited public disclosure.

- A. Conservation farm plans will not be subject to public disclosure unless required by law or a court of competent jurisdiction;
- B. Provided, that the County will collect summary information related to the general location of a farming enterprise, the nature of the farming activity, and the specific best management practices to be implemented during the conservation farm plan review process. The summary information shall be provided by the farm operator or his/her designee and shall be used to document the basis for the county’s approval of the plan.
- C. Upon request, the County may provide a sample conservation farm plan, exclusive of site- or property-specific information, to give general guidance on the development of a conservation farm plan.

Part 2. Correcting errors found in the Shoreline Management Program Periodic Update documents

SMP Exhibit F – WCC Chapter 16.16 (Critical Areas)

Article 2. Administrative Provisions

16.16.270 Reasonable Use Exceptions.

- A. If the application of this Chapter would result in denial of all reasonable and economically viable use of a property, and if such reasonable and economically viable use of the property cannot be obtained by consideration of a variance, then a landowner may seek a reasonable use exception. Reasonable use exceptions are intended as a last resort when impacts to critical areas themselves (not just their buffers) cannot be avoided while allowing the applicant a reasonable and economically viable use of his or her property.
- B. Requests for reasonable use exceptions shall be a Type III project permit application and shall follow the permitting procedures for variances found in WCC Title 22 (Land Use & Development).
 - 1. If in the shoreline jurisdiction Reasonable Use Exceptions shall be processed per the shoreline variance procedures of WCC 22.07.050 (Shoreline Variances);
 - 2. If not in the shoreline jurisdiction, then Reasonable Use Exceptions shall be processed per the variance procedures of WCC 22.05.024 (Variances).
- C. The Hearing Examiner shall only grant a reasonable use exception under all of the following conditions:
 - 1. The proposed development is otherwise allowed under Whatcom County code.
 - 2. There is no portion of the site where the provisions of this chapter allow reasonable economic use, including agricultural use or continuation of legal nonconforming uses.
 - 3. The application of this Chapter would deny all reasonable and economically viable use of the property so that there is no reasonable and economically viable use with a lesser impact on the critical area than that proposed.
 - 4. There is no feasible alternative to the proposed activities that will provide reasonable economic use with less adverse impact on critical areas and/or buffers. Feasible alternatives may include, but are not limited to, locating the activity on a contiguous parcel that is under the ownership or control of the applicant, change in use, reduction in size, change in timing of activity, and/or revision of project design.
 - 5. Activities will be located as far as possible from critical areas and the project employs all reasonable methods to avoid adverse effects on critical area functions and values, including maintaining existing vegetation, topography, and hydrology. Where both critical areas and buffer areas are located on a parcel, buffer areas shall be disturbed in preference to the critical area.
 - 6. The proposed development does not pose a threat to the public health and safety.
 - 7. The proposed activities comply with all state, local and federal laws, such as special flood hazard areas restrictions and on-site wastewater disposal.
 - 8. Measures shall be taken to ensure the proposed activities will not cause degradation of groundwater or surface water quality, or adversely affect drinking water supply.
 - 9. Any proposed modification to a critical area will be evaluated by the Hearing Examiner through consideration of an approved critical area assessment report and habitat management plan and will be the minimum modification necessary to allow reasonable use of the property.
 - 10. The inability of the applicant to derive reasonable use of the property is not the result of actions by the current or previous owners in segregating or dividing the property and/or creating the condition of lack of use after September 30, 2005.
 - 11. For single-family residences, the maximum impact area shall not exceed 10% of the lot area or 2,500 square feet, whichever is greater; provided that in no instance shall it exceed 4,000 square feet. This impact area shall include the proposed residential structure as well as appurtenant development that is necessarily connected to the use and enjoyment of a single-family

residence. Such appurtenant development includes garages, decks, driveways, parking, and all lawn and nonnative landscaping; except, that when an extended driveway is necessary to access a portion of a development site with the least impact on critical area and/or buffers, those portions of the driveway and drainfields shall be excluded from the maximum impact area provided that the access road or driveway meets the standards of WCC 16.16.620(D) or 16.16.720(D), as applicable.

- D. The Hearing Examiner may issue conditions of approval including modifications to the size and placement of structures and facilities to minimize impacts to critical areas and associated buffers. The Hearing Examiner may also specify mitigation requirements that ensure that all impacts are mitigated to the maximum extent feasible using best available science.

16.16.230 Activities Allowed without Notification.

The following activities do not require authorization from Whatcom County. However, this shall not be construed to grant authorization for any work to be done in any manner in violation of the provisions of this chapter or any other laws or ordinances of this jurisdiction. Activities within the shoreline jurisdiction (WCC 23.20.10) may require a shoreline permit or statement of exemption:

- A. Forest practices regulated by the Washington State Department of Natural Resources.
(...)

16.16.730 Habitat Conservation Area Buffers

(...)

- B. Buffers for Other Habitat Conservation Areas Buffer Widths.

Table 4. Buffer Requirements for HCAs

| Habitat Conservation Area | Buffer Requirement |
|---------------------------|--|
| Type S – Freshwater | Streams – 200 feet Lakes – 100 feet |
| (...) | |

(...)

SMP Exhibit E – WCC Title 22 (Land Use & Development)

Chapter 22.05 Project Permits

22.05.020 Project Permit Processing Table.

(...)

- (2) **Project Permit Processing Table Notes.** As indicated in Table 1, project permits are subject to the following additional requirements:

(...)

(...) (and renumber the subsequent subsections)

22.05.020 Project Permit Processing Table.

Table 1. Project Permit Processing Table

| Permit Application Processing Table | WCC Reference for Specific Requirements | Pre-Application Required (see <u>22.05.040</u>) | (...) |
|---|---|--|-------|
| Type I Applications (Administrative Decision with No Public Notice or Hearing) | | | |
| (...) | | | |
| Shoreline Exemption | <u>22.05 & .07</u> | | |
| (...) | | | |
| Type II Applications (Administrative Decision with Public Notice; No Public Hearing) | | | |
| (...) | | | |
| Shoreline Conditional Use for single-family development, uses, and activities (a) | 22.05 & .07 | | |
| (...) | | | |

Chapter 22.07 Additional Requirements for Shoreline Permits and Exemptions

22.07.080 Expiration of Shoreline Permits.

(...)

F. All shoreline permits shall expire as indicated in subsection (B); however, regardless of tolling no shoreline permit shall be valid beyond 8 years from the date of filing.

SMP Exhibit D – WCC Title 23 (Shoreline Management Program)

Chapter 23.40 Shoreline Use and Modification Regulations

23.40.020 Shoreline Bulk Provisions – Buffers, Setbacks, Height, Open Space and Impervious Surface Coverage.

(...)

Table 2. Bulk Regulations for Shoreline Development

(...)

Footnotes:

(...)

(3) = A side setback of 5 feet applies to residential decks and accessory structures.

(...)

23.40.150 Moorage Structures

(...)

B. Dimensional Standards

1. Freshwater – Moorage structures in freshwater environments may be permitted, subject to the following:

| | Design and Dimensional Standards |
|---|--|
| Maximum Area: surface coverage, including all attached float decking, platform lifts, covered moorage, ramps, ells, and fingers | <ul style="list-style-type: none"> • 480 sq. ft. for an individual use dock or pier • 700 sq. ft. for a shared moorage facility used by 2 residential property owners • 1,000 sq. ft. for a shared moorage facility used by 3 or more residential property owners • Public and commercial moorage structures shall be limited to the minimum area needed to accommodate the intended use. • These area limitations shall include platform lifts • Where a pier or dock cannot reasonably be constructed under the area limitation above to obtain a moorage depth of 5.5 feet measured below ordinary high water mark, an additional 4 sq. ft. of area may be added for each additional foot of pier or dock length needed to reach 5.5 feet of water depth at the waterward end of the pier or dock; provided, that all other area dimensions, such as maximum width and length, have been minimized. |
| Maximum Width | <ul style="list-style-type: none"> • For moorage structures accessory to a residential use: <ul style="list-style-type: none"> ○ 4 feet for pier or dock walkway or ramp ○ 6 feet for ells ○ 2 feet for fingers ○ 6 feet for float decking • Public and marina moorage structures shall be a maximum of 6 feet for all elements unless a need for a larger size is demonstrated |
| Height | <ul style="list-style-type: none"> • Minimum of 1.5 feet above ordinary high water to bottom of pier stringers, except the floating section of a dock and float decking attached to a pier |
| Maximum Length <ul style="list-style-type: none"> ○ Marine Rails ○ Floats ○ Overall Dock Length | <ul style="list-style-type: none"> • 20 feet waterward from the ordinary high water mark • 20 feet per user (e.g. single user – 20 feet, 2-users – 40 feet, etc.) • Minimum necessary to obtain a moorage depth of 5.5 feet measured below ordinary high watermark at the waterward end of the dock, though in no instance shall a dock be longer than adjacent docks or 100 feet, whichever is the lesser. |
| Decking for piers, docks, walkways, platform lifts, ells, and fingers | <ul style="list-style-type: none"> • Floats 6 feet wide or less must have at least 30% of the deck surface covered in functional grating • Floats greater than 6 feet wide must have at least 50% of the deck surface covered in functional grating • All other dock components must have 100% of the deck surface covered in functional grating • The open area of functional grating must be at least 60% • Replacement of more than 33% or 250 sq. ft., whichever is greater, of decking or replacement of decking substructure requires installation of functional grating in the replaced portion only |

23.40.150 Moorage Structures

(...)

E. Additional Standards for Shared Moorage.

1. When allowed under the provisions of this program, a shared moorage dock may be permitted for multiple users. Such docks may consist of one pier and multiple floats or platform lifts, boat lifts, and covered moorages, not to exceed the number of authorized users nor the total maximum area allowed per WCC 23.40.140(B).
2. Shared moorage shall be required in accordance with the following to prevent the proliferation of moorage facilities:

- a. Shared moorage shall be provided for all residential developments of more than two dwelling units.
- b. Subdivisions shall contain a restriction on the face of the plat prohibiting individual docks.
- c. Shared moorage facilities shall be available to property owners in the subdivision for community access and may be required to provide public access depending on the scale of the facility. A site for shared moorage should be owned in undivided interest by property owners within the subdivision.
- d. If shared moorage is provided, the applicant/proponent shall file at the time of plat recordation a legally enforceable joint use agreement or other legal instrument that, at minimum, addresses the following:
 - i. Apportionment of construction and maintenance expenses;
 - ii. Easements and liability agreements; and
 - iii. Use restrictions.
- e. On marine shorelines a dock or pier may be approved only if it is not feasible to provide mooring buoys with an adequate landing area or a dock or marine rail system sized to accommodate tenders.
- f. Where a new multifamily residential, camping club, or subdivision development proposes to provide shared moorage, the number of slips shall be limited to the amount of moorage needed to serve dwelling units/rental spaces with water frontage; provided, that a limited number of upland dwelling units/rental spaces within shoreline jurisdiction may also be accommodated at a ratio of 0.25 slips per such dwelling units/rental spaces. Applications for shared moorage shall demonstrate that mooring buoys are not feasible prior to approval of dock moorage. Shared moorage currently serving or proposed to serve upland dwelling units/rental spaces shall be reviewed as a marina. This provision does not apply to existing developments.

(...)

Chapter 23.60 Definitions

23.60.130 "M" definitions.

17. "Moorage Structure" means any in- or overwater structures, used for mooring, launching, or storing vessels and may contain any one or combination of the following:

(...)

- m. "Finger" means a narrow extension to a fixed-pile pier, usually extending perpendicular to the pier walkway along with an ell to form an enclosed area for boat moorage.

23.160.190 "S" definitions.

3. "Shared moorage" means moorage for pleasure craft and/or landing for water sports for use in common by shoreline residents of a certain subdivision or community within shoreline jurisdiction or for use by patrons of a public park or quasi-public recreation area, including rental of non-powered craft. If a shared moorage provides commercial services or is of a large scale (five or more slips), it shall be considered a marina. Shared moorage proposed to be leased to upland property owners shall also be considered as a marina. If a proposal includes covered moorage, commercial sale of goods or services, or a means of launching other than a ramp, swinging boom, or davit style hoist, it shall be considered a marina.