



Memorandum

DATE: October 15, 2021
TO: The Honorable County Council
FROM: Cliff Strong, Senior Planner
THROUGH: Mark Personius, Director
RE: Continued Review of Shoreline Management Program (SMP) Periodic Update 2020

Today's Goals

On October 26th the Council's Committee of the Whole will continue its review of the SMP Update, focusing on proposed amendments to WCC Chapter 16.16 (Critical Areas).

Attachments

- Exhibit F – WCC Chapter 16.16

All documents are available in pdf and Word versions on PDS's SMP Update webpage:
<https://www.whatcomcounty.us/3119/SMP-Update-2020-Documents>.

Amendments to Exhibit F (WCC Chapter 16.16, Critical Areas)

(Note: Topic numbers (1, 2, 3...) and letters (a, b, c...) refer to the topic numbers assigned in the Scoping Report and thus may not be sequential. Note, too, that other amendments to other exhibits addressing these issues are listed in the memos dealing with those exhibits, so these may not be ways we're addressing these topics. The complete list was provided to Council in the full staff report.)

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

- a) Ensure Council changes regarding standards for view preservation in the CAO are reflected in the SMP.

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

Topic #5, Consistency with Shoreline Management Act (RCW 90.58) and 2003 SMP Update Guidelines (WAC 173-26)

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

b) Clarify development mitigation requirements.

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

- §16.16.260 (General Mitigation Requirements):
 - Subsection (B) now contains text describing what information the Director may use in determining the extent and type of mitigation required. This text had been found repeated in various Articles of Ch. 16.16, so we've moved it to the overall mitigation section.
 - Subsection (C) is a new policy that will allow for off-site mitigation when it's better for the environment. In the past several years of processing permits, staff has found that the best solution overall is not necessarily "on-site and in-kind" mitigation, since sometimes there's not enough room, or that the mitigation is in a place that can't be guaranteed to remain after the initial 5-year monitoring period. Under this new policy, though the preference is still for "on-site and in-kind" (subsection (1)), off-site and in-kind mitigation may be allowed when the applicant demonstrates that greater biological and/or hydrological functions and values will be achieved (subsection (2)), or on-site and out-of-kind mitigation may be allowed when the applicant demonstrates an ecological uplift of biological and/or hydrological functions and values will be achieved (subsection (3)). Subsections (4) and (5) also point to our already existing use of Alternative Mitigation Plans and Mitigation Banking.
 - Like subsection (B), subsections (D) and (E) have been moved from the more specific critical areas rules (habitat conservation areas) to the more general so as to apply more broadly.
 - Subsection (G)(3) has been moved from §23.30.010 (Ecological Protection). This text puts the burden on the applicant "demonstrate that all reasonable efforts have been taken to provide sufficient mitigation such that the activity does not have significant adverse impacts and results in no net loss of shoreline and critical area ecological functions." Since WCC Ch. 16.16 (Critical Areas) is considered a part of the Shoreline Management Program, staff thought it more fitting that all the rules for mitigation plans be located in one place.
- §16.16.680 (Wetlands – Mitigation Standards)
 - Certain sections that we moved to §16.16.260 (General Mitigation Requirements) have been deleted, since the general covers the specific.
 - To account for temporal loss of functions, in subsection (C) staff is proposing to amend the wetland *buffer* mitigation ratio¹ from a standard 1:1 (subsection (C)(1)) to a range of ratios depending on when the mitigation is implemented (subsection (4)) (including at a double ratio for those who don't initially get permits and the mitigation is provided long after the impact (subsection (c))). This section now mimics the HCA mitigation standards (§16.16.760(E)(3)).
- §16.16.740 (Habitat Conservation Area Buffers). Apart from the clarifying amendments, staff is proposing to modify:
 - Subsection (B) (Habitat Conservation Areas Buffer Widths), which includes Table 4. The mitigation schema in Table 4 moves us from an older system of classifying water types and

¹ Note that the ratios for *wetland* mitigation (Table 2, which are from DOE guidance) are not proposed for amendment.

buffer widths to the newer Washington Department of Fish & Wildlife (WDFW) water-typing system. Though we had already adopted this newer system in identifying surface waters of the state (16.16.710(C)(1)(a)), we had not followed through on using that nomenclature for the various types' buffer widths (the table didn't match the text). Table 4 corrects this. The buffer widths themselves are the same except for Type S – Freshwater. It is currently 150 feet, but staff is proposing to increase it to 200 feet, which is the Court recommended width under the Endangered Species Act based on *National Wildlife Federation v. FEMA*². It is also in line with WDFW's newly recommended 200-year site potential tree height (SPTH) buffer for streams containing Chinook salmon³, and endangered species.

- §16.16.760 (Habitat Conservation Areas – Mitigation Standards)
 - Certain sections that we moved to §16.16.260 (General Mitigation Requirements) have been deleted, since the general covers the specific.
 - We have added subsection (D) as a reminder to applications that the Army Corps of Engineer Regional General Permit 6 for inland marine waters may apply to their project(s). RGP-6 is a permit issued by the Corps that authorizes the construction of new residential in- and overwater structures in inland marine waters of Washington State while meeting the Endangered Species Act, though it has conditions on the construction.
 - Like with wetland buffer mitigation, we have added subsection (E)(3), doubling the mitigation ratio for those who don't initially get permits (subsection (c)) and the mitigation is provided long after the impact.
- §16.16.640 (Wetland Buffer Modification) and §16.16.745 (Habitat Conservation Area Buffer Modification). In Articles 6 (Wetlands) and 7 (Habitat Conservation Areas) staff is proposing to combine their respective buffer modification rules into one section for each Article, each covering the types of buffer modifications allowed (increase, averaging, reduction, and variance). For wetlands, we have also modified some of the text to be consistent with DOE guidance (Wetlands in Washington State, Volume 2, Appendix 8C, updated 2018), which is based on and considered Best Available Science.

Topic #8, Habitat

b) Consider strengthening ecological connectivity and wildlife corridor requirements.

Apart from all the existing rules about maintaining connectivity in WCC Ch. 16.16 (Critical Areas) (Exhibit F), new rules to strengthen ecological connectivity and wildlife corridor requirements in that document include:

- In §16.16.225 (General Regulations), new subsection (C) has been added, requiring development proposals to maintain ecological connectivity and habitat corridors;

² Federal District Court Case No. 2:11cv-02044-rsm; NMFS Doc. #2006-00472

³ WDFW's 204 ft. buffer is not a hard SPTH; this is the weighted 3rd Quantile. WDFW Vol. 2 provides a step-by-step process to determine the Riparian Management Area for a parcel based on the ability of a given soil type to support tree growth. The 200 yr. index curve is variable, and as shown in Figure A2-33 of Vol. 2. The SPTH in Whatcom Co. ranges from 101' to 250'. The buffer on Type S Freshwater is proposed to be 200 feet (16.16.740(B), Table 4), measured, presumably, from the edge of the floodway.

- In §16.16.255 (Critical Areas Assessment Reports) new subsection(C)(3) has been added, strengthening the requirement that connectivity be addressed in assessment reports;
- In §16.16.640 (Wetland Buffer Modification), subsection (A) allows the Director to increase wetland buffers to protect wetland functions and provide connectivity to other wetland and habitat areas;
- In §16.16.745 (Habitat Conservation Area Buffer Modification) subsection (A)(2) allows the Director to increase wetland buffers to protect wetland functions and provide connectivity when a Type S or F waterbody is (among other things) located within 300 feet of another Type S or F water body, a fish and wildlife HCA, or a Category I, II or III wetland.

None of these amendments actually change the buffer widths from wildlife corridors; they only require that applicants address ecological connectivity when a wildlife corridor is present.

c) Consider ways to improve protections for salmon and forage fish habitat.

While the protection of fish and wildlife habitat is already required throughout various sections of WCC 16.16 (Critical Areas) (Exhibit F), in §16.16.255 (Critical Areas Assessment Reports) new subsection (C)(3) has been added, strengthening the requirement that impacts to salmon and forage fish habitat be addressed in assessment reports to improve protections for salmon and forage fish.

d) Clarify functional disconnect standards for protection of Fish & Wildlife Habitat Conservation Areas

The term “functional disconnect,” which many people have interpreted differently and is not widely used anymore, has been eliminated in §16.16.630(B) (Wetland Buffers) and §16.16.740 (Habitat Conservation Area Buffers), which now say, “Buffers shall not include areas of an existing, legally established substantially developed surface.” This will preclude including roads or other development in a buffer, but still account for HCAs that substantially extend beyond a road or driveway.

Topic #10, Nonconforming

a) Ensure consistency with Zoning, CAO, and SMP regarding nonconforming uses and structures.

In §16.16.275 (Nonconforming Uses, Structures, and Lots) (Exhibit F) two amendments are proposed to align this chapter with Title 20 (Zoning) and Title 23 (SMP):

- In subsection (B), the time within which an intentionally abandoned *nonagricultural* nonconforming use or structure may maintain its nonconforming status is changed from 5 years to 12 months, the same timeframe in Title 20 (Zoning).
- In subsection (E), which allows nonconforming structures to be rebuilt if they’re destroyed by fire, explosion, flood, or other casualty, a new (1) is being added, stating that “intentional demolition or removal is not a casualty,” as in Title 23 (SMP). This means that one can’t intentionally destroy a nonconforming structure then be allowed to rebuild it.

Topic #12, Permitting

a) Consider simplifying utility repair and maintenance permitting.

In §16.16.235 (Activities Allowed with Notification), though subsection (B)(2) already allows maintenance and repair of infrastructure (including utilities), it has been amended to be clearer by adding the term “utility corridors.” Additionally, a new subsection (B)(3) has been added regarding utility installation.

Topic #13, Public Access

b) Add ADA standards consistent with federal statutes.

In both §16.16.620 (Wetlands – Use and Modification) subsection (H) and §16.16.720 (Habitat Conservation Areas – Use and Modification) subsection (G)(1), text has been added to allow trails to exceed standard width requirements to meet ADA requirements. (Exhibit F)

c) Consider revising dimensions for stairs and walkways located within the shoreline or critical area buffers to accommodate public trails.

In §16.16.325 (Landslide Hazard Areas – Use and Modification), a new subsection (A)(3) has been added to allow trails (meeting certain conditions) in landslide hazard areas. (Exhibit F)

In §16.16.620 (Wetlands – Use and Modification), subsection (H) (Recreation) has been amended to allow public trails to include viewing platforms, and to be closer than the outer 25 percent of the buffer “when necessary to provide wetland educational opportunities or for public health and safety,” and to be wider than the standard widths when necessary to meet ADA requirements. Corresponding amendments have also been made to 16.16.720(G)(1) (Habitat Conservation Areas – Use and Modification) (Exhibit F).

d) Consider amending trail location standards to allow trails to be located closer than in the outer 50% of a critical area buffer.

In §16.16.620 (Wetlands – Use and Modification), subsection (H) (Recreation) has been amended to allow public trails to include viewing platforms, and to be closer than the outer 25% of the buffer “when necessary to provide wetland educational opportunities or for public health and safety,” and to be wider than the standard widths when necessary to meet ADA requirements. Corresponding amendments have also been made to 16.16.720(G)(1) (Habitat Conservation Areas – Use and Modification) (Exhibit F).

Topic #18, Shoreline Setbacks/ Riparian Management

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

§23.30.030 (Views and Aesthetics) (Exhibit D), subsection (M) now points to the regulations in §16.16.235(B)(5) (Activities Allowed with Notification) (Exhibit F), which has been updated to stress limbing over removal of trees to provide view corridors (Exhibit F).

Topic #20, Wetland Buffers

a) PDS will conduct a parallel process, convening a group of local wetland consultants, to consider revisions to the CAO regulations regarding wetland habitat function score break points, buffer widths, reduction, averaging to meet DOE guidelines, and having buffers based on habitat performance instead of static/standard buffers. If they complete this work in time, it can be incorporated into this update; otherwise it can follow.

In July 2018 the Washington Department of Ecology (DOE) modified the habitat score ranges and recommended buffer widths in their wetland buffer tables in the DOE guidance, with some minor text changes to ensure consistency. Some citizens, local environmental consulting firms, and the Building Industry Association of Whatcom County (BIAWC) then requested that we amend our code to meet this new guidance, and it was docketed as PLN2019-00008.

The project was brought before the Planning Commission on March 14, 2019. But there was confusion on staff's part as to what we actually *had* to do at that time and what impacts it would have on

development. DOE had informed staff that, while we didn't need to amend our code at that point (having just updated Ch. 16.16 (Critical Areas) (Exhibit F) that they would review our code for consistency with their guidance when Ch. 16.16 was opened for amendment again, noting that that would occur during the 2020 SMP Periodic Update.

So at the Commission's direction, staff worked with the local wetlands consultants to review the issue and try to determine what effects it might have. Three consulting firms⁴ provided analyses based on data from projects they had worked on. From these analyses, it appears that many of Whatcom County's lower quality wetlands (e.g., small wetlands in agricultural fields) would end up with smaller buffers, but that our higher quality wetlands (Categories II and III) would end up with larger buffers. (But even this is speculation, as ATSI noted that the comparison results are not statistically significant.⁵) Thus, farmers may benefit but developers/builders may not, as many of our lower quality wetlands are those typically found in agriculture fields, while our higher quality wetlands are more typically found in non-agricultural rural areas.

Nonetheless, given the Department of Ecology's statements that they'll be monitoring the SMP Update to ensure that we meet their latest guidance (which is based on Best Available Science), and given that Comprehensive Plan Policy 10M-2 directs the County to "Develop and adopt criteria to identify and evaluate wetland functions that meet the Best Available Science standard and that are consistent with state and federal guidelines," staff is proposing to amend §16.16.630 (Wetland Buffers) Table 1 (Standard Wetland Buffer Widths) to meet DOE guidance. As indicated, these changes would lessen buffers on lower quality wetlands, and increase them on higher quality ones.

Other Amendments

UGA Wetlands

In 16.16.225 (General Regulations) staff is proposing to add subsection (B)(7), which would allow "alteration of Type III or IV wetlands that have a habitat area score of less than 6 when associated with an approved commercial development within an Urban Growth Area" when impacts are fully mitigated. This would allow the alteration of certain wetlands in Urban Growth Areas (UGAs) (in particular, Birch Bay) so as to encourage development of commercially zoned property. Commercial development in Birch Bay is challenging because so much of the remaining commercially zoned property contains small, isolated wetlands. Yet under the Growth Management Act we're required to encourage development within UGAs so development doesn't sprawl to less developed rural areas of the County.

Accessory Uses within the Shoreline

The SMA identifies "preferred" uses in the shoreline as water-oriented uses and single-family residences. Other uses are not allowed. However, we know that folks that have waterfront property want and expect to have access for swimming, boating, relaxation, etc., and recreational amenities near the shore (e.g., fire pits, kayak sheds, etc.). But these uses would require the clearing of vegetation in what is considered a Habitat Conservation Area. So we have added to 16.16.720 (Habitat Conservation Areas – Use and Modification) subsection (G)(4), which allows but sets limits on how much of the shoreline can be cleared of vegetation for such uses and requires mitigation to offset the impacts so as to achieve No Net Loss.

⁴ NW Ecological Services, NW Wetlands Consulting, and Aqua-Terr Systems, Inc.

⁵ Paired sample t-tests were conducted to compare the proposed buffer results with categories of the wetlands impacted.

Timber Removal within Habitat Conservation Areas

The current Ch. 16.16 (Critical Areas) does not have guidance for Conversion Option Harvest Plans as allowed by WAC 222. For other permits this would allow for a limited removal of trees, while retaining larger trees to help with managing a riparian buffer. When development alters a functioning forested system some level of continued forest management is required (see 16.16.720(V)). To alleviate this issue, staff is proposing to add to 16.16.720 (Habitat Conservation Areas – Use and Modification) subsection (P), based on language borrowed from Skagit County. The section sets performance standards for removing timber in Habitat Conservation Areas (e.g., riparian areas) and would allow timber harvesting to occur within buffers while still retaining the HCA's functions. These standards vary by water type, and are tied to existing buffer conditions. This amendment is aimed at closing a loophole wherein applicants remove trees before applying for a development permit, which is when the CAO becomes applicable (except for Class IV Conversions, forest practices are not reviewable under the CAO).

Single-Family Residential Development on Constrained Lots

Staff is proposing to redefine what and how **reasonable use exceptions and variances** are used and who decides them. Our Hearing Examiner has questioned our current schema, in particular why he isn't the final decision maker, as the current code allows an administrative determination to be made *after* a quasi-judicial decision, and in the hierarchy of permitting, applicants should have to exhaust any administrative remedies before seeking a quasi-judicial decision. Staff is proposing that reasonable use exceptions be the last method of altering standards to allow reasonable economic use of constrained property, and that they be decided upon by the Hearing Examiner (see 16.16.270 Reasonable Use Exceptions). Under the proposed schema we would use (in hierarchical order):

- **Administrative Reduction/Average** – Staff would have the ability to administratively reduce or average a buffer by 25% if the impacts can be fully mitigated, though avoidance and minimization criteria are applied. This allows for flexibility in project design and road alignments. If this doesn't work, then...
- **Administrative Variance** – Staff would have the ability to administratively grant an administrative variance⁶ to reduce a buffer by 25-50% if the impacts can be fully mitigated and the variance criteria are met. If this doesn't work, then...
- **Hearing Examiner Variance** – The Hearing Examiner would have the ability to grant a variance from *any* dimensional standard by any degree if the impacts can be fully mitigated and the variance criteria are met. If this doesn't work, then...
- **Hearing Examiner Reasonable Use Exception** – The Hearing Examiner would have the ability to grant a Reasonable Use Exception to allow up to 2,500 square feet of impacts, and the homeowner would only have to mitigate what can actually fit on the property (which conceivably could be none).

In this schema, the degree to which one can vary standards while providing the least amount of mitigation moves up a level at each step, with the Hearing Examiner making the tougher decisions through a quasi-judicial process.

However, to counter the additional time and cost of this process, staff is also proposing to create a new category of variances, called minor variances (16.16.273 Variances). They would be limited to variances

⁶ This mechanism was created by Council in 2020 and is found in WCC 22.05.024 (Variances).

for a 25% to 50% reduction of critical area buffers (when mitigated and they meet certain criteria) but would address most of the instances that reasonable use exceptions are currently applied for. We believe that overall, these changes would significantly reduce the number cases having to go to the Hearing Examiner and cost less to the citizens of Whatcom County overall. Reasonable Use cases are becoming increasingly prevalent as smaller more critical area constrained parcels are developed and they are challenging for both applicants and PDS staff to process and still maintain the No Net Loss Standard. PDS believes these proposed amendments to the Reasonable Use process will result in improved permitting efficiencies and still maintain adequate ecosystem protections.

Note, too, that under the reasonable use rules, the Planning Commission is proposing to amend the maximum impact area to a range of “10% of the lot area or 2,500 square feet⁷, whichever is greater; provided that in no instance shall it exceed 4,000 square feet.” Since the property would not need to fully mitigate, a smaller footprint is warranted. This returns the reasonable use exception to truly the last effort of avoiding a taking.

⁷ What it was prior to the 2017 Critical Areas update.