

# Whatcom County Planning & Development Services Staff Report

## Shoreline Management Program Periodic Update 2020

### I. File Information

**File #:** PLN2020-00006

**File Name:** Shoreline Management Program Periodic Update 2020

**Applicant:** Whatcom County Planning and Development Services (PDS)

**Project Summary:** Additional amendments to Whatcom County's Shoreline Management Program Periodic Update, including amendments to WCC Title 23 (Shoreline Management Program), WCC Title 22 (Land Use & Development), and WCC Chapter 16.16 (Critical Areas).

**Location:** Countywide.

**Staff Recommendation:** Approve.

**Attachments:** Draft resolution and Exhibit A (proposed amendments)

### II. Background

On December 7, 2021, the Whatcom County Council approved Resolution No. 2021-056, which approved amendments to the Whatcom County Shoreline Management Program (SMP), including some to WCC Chapter 16.16<sup>1</sup>, for Department of Ecology final review and approval.

At their previous meeting on November 23, 2021, the Council had also approved a settlement agreement with Petitioners involved in Western Washington Growth Management Hearings Board Case No. 18-2-0001, an appeal of certain portions of WCC Chapter 16.16 that had been made in 2017 via Ordinance 2017-077. In this settlement agreement the Council agreed to consider certain amendments to WCC Chapter 16.16. However, it was too late to include the agreed upon amendments in the SMP documents under consideration.

After Council's approval of Resolution No. 2021-056 a few errors in the SMP documents were found. We thought it would be a simple matter to correct these, and incorporate the agreed to amendments from the settlement agreement, at the time Council adopts and codifies the approved SMP amendments *after* the Department of Ecology's final review and approval of the amended SMP. However, Ecology has indicated that that would constitute a new SMP amendment and necessitate another review and approval cycle on their part. They have suggested Council consider (and approve, if Council wishes) these additional amendments now so that they can be considered in their current review and approval process.

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<sup>1</sup> Which is a part of the Shoreline Management Program

### III. Amendments

Please refer to Exhibit A to review the proposed amendments. The following are the rationale for them.

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

The settlement agreement contains five amendments to which the Council agreed to consider:

1. **The word “ongoing” will be removed from WCC 16.16.235(B)(9)(a) (Activities Allowed Without Notification) This section, will read:**

**“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...”**

*Proposed Code Amendment:* This amendment is shown in Exhibit A.

2. **WCC 16.16.620(E)(1) will be revised to remove the words “appurtenant” and “primary” so that it reads: “Construction of an accessory structure that is associated with an agricultural use.”**

*Proposed Code Amendment:* This amendment is shown in Exhibit A.

3. **Language will be included in the next to last sentence of WCC 16.16.800 (Purpose) to read: “If farmers and ranchers enter into the CPAL program *and demonstrate no impacts to critical areas through the assessment*, then flexibility in these provisions shall be extended to them.”**

*Proposed Code Amendment:* This amendment is shown in Exhibit A.

4. **“Exemption” language will be added to WCC 16.16.840 (Conservation Farm Plan Requirements), to read: “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.”**

*Proposed Code Amendment:* Staff believes that this language would be more appropriately housed in WCC 16.16.820 (Classification and Applicability), and is shown as such in Exhibit A.

5. **The disclosure requirement found in WCC 16.16.870(C) (“The County will provide to the public via its website information regarding which farms have approved conservation farm plans and the date of their approval”) will be removed.**

*Proposed Code Amendment:* This amendment is shown in Exhibit A.

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

After the amended SMP documents were approved a few areas were identified that needed clarification.

### 6. Clarifying the Reasonable Use Exception (RUE) rules. (SMP Exhibit F, WCC Chapter 16.16)

*Proposed Code Amendment:* Through the SMP periodic update Council approved a new approach to Reasonable Use Exceptions (WCC 16.16.270). 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. The new approach places reasonable use exceptions as the last method of altering standards to allow reasonable economic use of constrained property, and that they be decided upon by the Hearing Examiner. The new approach is:

- **Administrative Reduction/Average** – Staff would have the ability to administratively reduce or average a buffer width by 25% if the impacts can be fully mitigated, though avoidance and minimization criteria are applied first. This allows for flexibility in project design and road alignments. If the applicant’s plans can’t be achieved by this, then...
- **Administrative Variance** – An administrative (minor) variance could be granted to reduce a buffer by 25-50% if the impacts can be fully mitigated and the variance criteria are met. If the applicant’s plans can’t be achieved by this, 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 the applicant’s plans can’t be achieved by this, 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 to 4,000 square feet of impacts (depending on lot size<sup>2</sup>) to critical areas themselves (not just their buffers).

The SMP updated code included a criteria (#11) that the Hearing Examiner could not approve a Reasonable Use Exceptions until: “The applicant has requested and been denied a variance under the provisions of WCC 16.16.273 (Variances).” Unfortunately, having such a criterion would necessitate an applicant having to apply for and be denied a variance, even when it’s evident that the variance criteria couldn’t be met. This would cause an applicant to spend time and money—and staff to process a variance request—needlessly. Thus, staff is proposing to amend this section to delete finding #11 while making it clear (in subsections A and B) that RUEs apply when critical areas themselves—and not just their buffers—need be impacted in order to avoid a taking.

Additionally, in subsection old 12/new 11 staff proposes to delete on-site septic systems as being included in the maximum impact area to be consistent with the language of 23.40.170(B)(3), in which Council deleted septic systems from being included.

### 7. Change in forest practices permitting authority (SMP Exhibit F, WCC Chapter 16.16)

On April 26, 2022, a code amendment transferring jurisdiction from the Department of Natural Resources to Whatcom County on regulating Forest Practice Authorizations in Urban Growth Areas was

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<sup>2</sup> 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.

adopted by Council. Amendments to 16.16.230 (Exempt Activities Allowed without Notification), subsection (A) are proposed to be consistent with this change.

#### **8. Fixing an error in lake buffers (SMP Exhibit F, WCC Chapter 16.16)**

When changing our water typing system to the Department of Natural Resources' water typing system, staff inadvertently increased the buffers on our lakes from 100 to 200 feet. We are now proposing to amend 16.16.730 Table 4 to rectify this by listing Type S lakes separately from Type S streams, clarifying that those lakes have a 100 foot buffer (which it currently is).

#### **9. Deleting a conflicting note in the Permit Processing Table regarding appeals of shoreline permits (SMP Exhibit E, WCC Title 22)**

Shoreline permit appeals go to the State's Shoreline Hearings Board. An existing legacy note in the Permit Processing Table (§22.05.020(2)(f)) still indicates that an applicant could appeal to the Council. It is proposed to delete this note and renumber the subsequent subsections.

#### **10. Removing the requirement for pre-application conferences for Shoreline Exemptions and Shoreline Conditional Use for single-family development in the Permit Processing Table (SMP Exhibit E, WCC Title 22)**

Pre-application meetings for Shoreline Exemptions and Shoreline Conditional Use for single-family developments are not required. Staff is proposing to delete the two checkmarks in the Permit Processing Table indicating that they are.

#### **11. Clarifying shoreline permit expiration language (SMP Exhibit E, WCC Title 22)**

Shoreline permits expire after 5 years if the project isn't commenced within that timeframe, though this timeframe may be extended due to tolling (extensions granted by way of appeals and legal challenges). In §22.07.080 (Expiration of Shoreline Permits), Council approved subsection (F), which was proposed to deal with projects that spanned multiple versions of the Shoreline Management Program and limit permits to 8 years *with* tolling. But the language wasn't as clear as it could be and could be read to mean that *all* shoreline permits expire after 8 years. It is now proposed to revise the language of subsection (F) to clarify its intent.

#### **12. Clarifying shoreline bulk provisions (SMP Exhibit D, WCC Title 23)**

In 23.40.020 (Shoreline Bulk Provisions), Table 2, footnote (3) states that "a side setback of 5 feet applies to residential decks and accessory structures *15 feet tall or less.*" Though this is existing language, the setback should apply to all decks and accessory structures, not just those less than 15 feet tall. Thus, it is proposed to delete the "*15 feet tall or less*" clause.

#### **13. Clarifying the freshwater dock length standards (SMP Exhibit D, WCC Title 23)**

In the table of freshwater moorage structure dimensional standards (§23.40.150(B)(1)) we did not include a length limit as we had thought that overall dock length would be self-limiting<sup>3</sup>. However, we have since realized that there are areas (e.g., Geneva area of Lake Whatcom) that have very shallow depths for quite a distance from the shore that could necessitate extremely long docks (up to 300 feet)

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<sup>3</sup> Given the maximum area and width standards along with the "Minimum necessary to obtain a moorage depth of 5.5 feet measured below ordinary high watermark at the waterward end of the dock" length standard.

to achieve a usable depth. Thus, to minimize potential impediments to navigation we propose to add the clause “though in no instance shall a dock be longer than adjacent docks or 100 feet, whichever is lesser,” which is the standard in our current SMP.

#### **14. Clarifying the maximum number of shared moorage slips in multifamily, camping clubs, and subdivision developments allowed (SMP Exhibit D, WCC Title 23)**

Whatcom County has long required that if multifamily, camping clubs, or subdivisions provide or allow recreational docks that they be provided though one shared moorage facility rather than a multitude of individual docks. Historically, the maximum number of slips have been limited to the number of lots/dwelling units with water frontage plus a quarter of the non-water frontage lots/dwelling units within shoreline jurisdiction. And that policy has been carried through in this update. But the language is unclear, with of some reading it as allowing more slips that dwelling units in the development. Therefore, §23.40.150(E)(2)(f) and (B) are proposed to be further amended to be more clear. Staff also proposes to replace “leased” with “served” as not all slips are leased.

#### **15. Adding a definition of “finger” (SMP Exhibit D, WCC Title 23)**

In moorage lingo, a finger is 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. The dimensional standards of fingers (and all moorage structure components) are regulated in §23.40.150. A definition is being proposed to §23.60.130(17) as subsection (m).

#### **16. Clarifying how many slips constitutes a marina vs. shared moorage (SMP Exhibit D, WCC Title 23)**

It has been found that there is an inconsistency between what’s defined as “shared moorage” vs. what’s defined as a marina in terms of number of slips. The definition of “marina” (§23.60.130(2)) states that “Shared moorage of 5 or more residential units is considered a marina,” whereas the definition of “shared moorage” (§23.60.190(3)) states, “If a shared moorage provides commercial services or is of a large scale (*four* or more slips), it shall be considered a marina.” This is likely a previous error as marinas are five or more slips per US Army Corps of Engineers’ guidance. Thus, we are proposing to amend the definition of shared moorage to read “five or more slips,” as shown in Exhibit A.

## **IV. Comprehensive Plan Evaluation**

The proposed amendments to the regulations (WCC Titles 22 and 23 and Ch. 16.16) are consistent with the goals and policies of the Comprehensive Plan.

## **V. Draft Findings of Fact and Reasons for Action**

Staff recommends the Council adopts the following findings of fact and reasons for action:

1. All findings of fact of Resolution No. 2021-056 are herein incorporated.
2. 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,

3. 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,
4. 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,
5. 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,
6. 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; and,
7. The reasoning for these amendments are described above under Section III, Amendments; and,
8. 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,
9. The Whatcom County Council held an additional duly noticed public hearing on May 24, 2022, to receive testimony on the proposed amendments.

## **VI. Proposed Conclusions**

1. The amendments are in the public interest.
2. The amendments are consistent with the Whatcom County Comprehensive Plan.

## **VII. Recommendation**

Planning and Development Services recommends that the County Council approve the resolution, which would make additional amendments to Whatcom County's Shoreline Management Program Periodic Update documents and authorize staff to forward them to the Department of Ecology for their final review and approval.