

ATTACHMENT A: FINDINGS AND CONCLUSIONS TOWN OF CONCRETE SHORELINE MASTER PROGRAM PERIODIC REVIEW AMENDMENT

SMP Submittal accepted October 21, 2021, Ordinance No. 829
Prepared by Department of Ecology on January 21, 2022

Use of this Document

Washington State Department of Ecology's (Ecology) Findings and Conclusions (presented herein as Attachment A), including reference to *Required and Recommended Changes* (Attachment B), provide the factual basis for Ecology's decision on the Town of Concrete's (Town) proposed amendment to their Shoreline Master Program (SMP) as a result of their SMP periodic review. This document divides into three sections: **Findings of Fact**, which provides findings related to the Town's proposed amendment, amendment history, and the review process, **Conclusions of Law**, and Ecology's **Decision and Effective Date** of the amendment. Attachment B outlines Ecology's required and recommended changes to the SMP amendment.

Brief Description of Proposed Amendment

The Town underwent a statutorily required periodic review of their SMP, identified necessary changes and submitted the amendment to Ecology for review. As part of this review, the Town chose to use the joint review process set forth in WAC 173-26-104. On July 15, 2021, per WAC 173-26-104(3)(b), Ecology provided the Town with an initial determination of consistency with the policy of the Shoreline Management Act (SMA) and applicable rules. Originally, Ecology did not require or recommend changes as part of the initial determination; however after the Town locally adopted amendments to their SMP on July 26, 2021, Ecology found inconsistencies with some of the amended provision when comparing the changes to SMA policies and applicable rules. This document, and Attachment B, address these inconsistencies.

FINDINGS OF FACT

Need for amendment

The Town's comprehensive update to their SMP went into effect in 2013. The Town initiated the current proposed amendment to comply with the statutory deadline for completion of a periodic review of the SMP pursuant to RCW 90.58.080(4).

SMP provisions to be changed by the amendment as proposed

The Town prepared a checklist and an analysis to document the proposed amendment. The amendment brings the SMP into compliance with requirements of the SMA, or changes to state rules since completion of their SMP comprehensive update. This ensures the SMP remains consistent with amended comprehensive plans and regulations, and incorporates changes deemed necessary to reflect changed circumstances, new information, or improved data.

The Town's SMP is a standalone planning document that outlines goals and policies for the shoreline of the town and establishes regulations for development occurring within shoreline jurisdiction.

The SMP regulates shoreline uses and development along Lake Shannon, the Baker River Canyon and Baker River Channel Segments, and portions of the Upper Skagit River and Lower Skagit River segments. The Official Shoreline Designation Map is located in Attachment A of the Town's SMP.

The Town's SMP amendment proposes the following changes:

Periodic Review Checklist

The Town revised the SMP based on items identified on Ecology's 2019 SMP Periodic Review Checklist.

- Replaced language under section 9.3.1 with Ecology's example language to adjust the cost threshold for building freshwater docks, per 2019a.
- Amended the definition of development per 2017a.
- Added new subsection 9.3.2, listing the exception categories with their statutory basis per 2017c.
- Added shoreline permit exemption language under section 9.3.1 for retrofitting existing structure to comply with the Americans with Disabilities Act, per 2016a.
- Added a new provision under new subsection 9.3.3, using Ecology's example language to list special procedures for WSDOT projects on state highways.

Amendment History, Review Process

The Town prepared a public participation program in accordance with WAC 173-26-090(3)(a) to inform, involve, and encourage participation of interested persons and private entities, tribes, and applicable agencies having interests and responsibilities relating to shorelines. The Town relied on their [website](#)¹ as the primary method of disseminating information relating to the review to the public and other interested parties. The Town developed the periodic review through a series of regularly scheduled zoom meetings with the Town Council, beginning February 16, 2021 and continuing through May 18, 2021.

The Town used Ecology's checklist of legislative and rule amendments to review amendments to Chapter 90.58 RCW and department guidelines that have occurred since their comprehensive update. Using the checklist, the Town identified which laws and rules they should consider for amendment in the SMP, pursuant to WAC 173-26-090(3)(b)(i). The Town also reviewed changes to the comprehensive plan and development regulations to determine if the shoreline master program policies and regulations remain consistent, pursuant to WAC 173-26-090(3)(b)(ii). The Town considered whether to incorporate any amendments needed to reflect changed circumstances, new information, or improved data, pursuant to WAC 173-26-090(3)(b)(iii). The Town consulted with Ecology and encouraged stakeholders' response to environmental review through the State Environmental Policy Act (SEPA), and decision makers' response through the public hearing process.

Joint local/state comment period under WAC 173-26-104

The Town and Ecology held a joint local and state comment period on the proposed amendments following procedures outlined in WAC 173-26-104. The comment period began on April 29, 2021 and

¹ <http://www.townofconcrete.com/planning.php>

continued through May 29, 2021. A virtual public hearing was held before the Planning Commission on June 14, 2021.

The Town provided notice to local interested parties, including a statement that the hearing was intended to address the periodic review in accordance with WAC 173-26-090(3)(c)(ii). Ecology distributed notice of the joint comment period to state interested parties on April 22, 2021. The Samish, Sauk-Suiattle, Swinomish, and Upper Skagit Tribes were invited to provide comment and to consult government to government, if needed, on April 22, 2021.

The Town accepted public comments on the proposed SMP amendment during the 30-day public comment period. There were no comments submitted on the proposed amendments.

Initial Determination of Consistency

As part of this review, the Town chose to use the joint review process set forth in WAC 173-26-104. After the joint local and state comment period and hearing, the Town submitted the proposed amendment to Ecology for initial review. Under WAC 173-26-104(3)(b), Ecology must provide the Town with an initial determination of consistency with the policy of the SMA and applicable rules.

Ecology received the Town's submittal for an initial determination of consistency on June 15, 2021. We issued our formal written statement of initial concurrence to the Town's proposed amendments on July 15, 2021.

The record was considered, and Ecology concluded the proposal was consistent with applicable laws and rules. Based upon this determination, Ecology advised the Town to proceed to local adoption.

Final Submittal

With passage of Ordinance #829, on July 26, 2021, the Town authorized staff to forward the proposed amendments to Ecology for final review and approval. Ecology received the Town's original submittal of the amendments on July 27, 2021. This initial submittal did not include a copy of the Town's current Critical Areas Regulations, which Ecology later received on October 13, 2021. Ecology verified the submittal as complete on October 21, 2021. This began our formal review of the Town's proposed amendment.

At the conclusion of our formal review, Ecology's Director must decide to approve the amended program as submitted, approve it with required changes and/or recommended changes, or deny the amendment.

Consistency Review

Consistency with Chapter 90.58 RCW

The proposed amendment has been reviewed for consistency with the policy of RCW 90.58.020 and the approval criteria of RCW 90.58.090(3), (4) and (5). The Town has also provided evidence of compliance with SMA procedural requirements for amending their SMP contained in RCW 90.58.090(1) and (2).

Consistency with applicable guidelines (Chapter 173-26 WAC, Part III)

The proposed amendment has been reviewed for compliance with the requirements of the applicable Shoreline Master Program Guidelines (WAC 173-26-171 through 251 and 173-26-020 definitions). This includes review for compliance with the SMP amendment criteria found in WAC 173-26-201(1)(c) along with review of the SMP Periodic Review Checklist completed by the Town.

Consistency with SEPA Requirements

The Town submitted evidence of SEPA compliance in the form of a SEPA checklist and issued a Determination of Non-Significance (DNS) for the proposed SMP amendments on April 29, 2021.

Other Studies or Analyses supporting the SMP amendment

Ecology reviewed the following supporting documents prepared for the Town in support of the SMP amendment:

- Public participation plan
- Periodic review checklist
- Shoreline environment designation map dated March 13, 2013
- Five memorandums describing the periodic review process, potential changes to the SMP, and status updates to the Concrete Town Council between February 16, 2021 through May 18, 2021
- SMP periodic review staff report prepared by Graham – Bunting Associates, dated April 26, 2021, amended June 7, 2021.

Summary of Issues Identified by Ecology as Relevant to Its Decision

Ecology must review all SMPs to ensure consistency with the SMA and implementing rules, including WAC 173-26, State Master Program Approval/Amendment Procedures, and Master Program Guidelines. WAC 173-26-186(11) specifies that Ecology “shall insure that the state’s interest in shorelines is protected, including compliance with the policy and provisions of RCW 90.58.020.”

Based on Ecology’s review of the proposed amendments for consistency with applicable SMP Guidelines requirements and the SMA with consideration of supporting materials in the record submitted by the Town, Ecology has identified issues relevant to its decision, which are outlined below and in Attachment B:

Critical Areas Regulation Incorporation

The current SMP adopted the Town’s 2008 Critical Areas Regulations (CAR Chapter 16.12 - Ordinance 631) by direct reference and is included as an appendix (titled “Attachment B”) to the SMP. The Town proposes to substitute out-of-date critical area regulations language with CAR updated in 2018 (Chapter 16.12, Ordinance 784), and eliminate its inclusion as an appendix. The 2018 CAR incorporate Ecology’s 2014 Wetland Rating System for Western WA and recommended buffer table consistent with Ecology’s Guidance.

As part of this amendment, the Town updated the SMP’s incorporation of critical area regulations from the 2008 CAR to the 2018 CAR, as codified in CMC 16.12. The CAR incorporation located in section 7 of the SMP includes the entirety of the updated CAR provisions without any exclusion of CAR exemptions.

We reviewed the Towns CAR incorporation for consistency with the SMA and applicable SMP Guidelines requirements and find inconsistencies of multiple provision with state shoreline requirements. RCW 90.58.610 and RCW 36.70A.480 govern the relationship between SMPs and development regulations to protect critical areas. Specifically, RCW 36.70A.480 provides that upon Ecology approval of a jurisdiction’s comprehensive update, critical areas in shoreline jurisdiction are protected solely by the SMA and SMP, and that the procedural and substantive requirements of the Growth Management Act do not apply to these critical areas located within shoreline jurisdiction [RCW 36.70A.480(3)(d)].

Local governments may incorporate regulations from other municipal codes by referencing a specific, dated edition of the ordinance pursuant to WAC 173-26-191(2)(b), thus formally incorporating the referenced provisions into the SMP.

Finding. Ecology finds that the Town's proposed incorporation of CAR provisions is inconsistent with the requirements of WAC 173-26-191(2)(b), as the proposed incorporation does not include the specific dated edition of these provision. Ecology has identified changes to the amendment that are necessary for consistency [See detailed rationale in Attachment B, Item Req-1].

Finding. As detailed in Attachment B, Ecology finds inconsistency with provisions 16.12.100(3)(a), 16.12.100(4)(a)(vii), and 16.12.170 of CMC 16.12, containing exemptions and allowed uses in wetlands, wetland buffer averaging, and reasonable use allowance, to the permitting framework of the SMA established in RCW 90.58.140 and WAC 173-27 [See detailed rationale in Attachment B, Item Req-2].

Finding. Ecology finds inconsistency with CMC 16.12.120(5)(b), allowing buffer reduction below those established by best available science, thus potentially causing net loss of shoreline ecological functions. Therefore, we find the CAR provisions inconsistent with state requirements, ensuring that SMP regulations achieve no net loss of shoreline ecological functions, pursuant to WAC 173-26-186(8)(b) [See detailed rationale in Attachment B, Item Req-2].

Finding. Ecology finds the Town's definition for "development" in CMC 16.12.020 inconsistent with SMP Guideline requirements at WAC 173-26-030(6) [See detailed rationale in Attachment B Item Req-2].

Finding. Ecology finds the Town's CAR provisions in CMC 16.12.040(5) are inconsistent with state requirements, specifically allowing development and uses listed in (m) and (o) to occur within critical areas without a critical area review. WAC 173-26-201(2)(d) lists preferred uses in shoreline jurisdiction, these uses do not include new and expanded utilities (unless water dependent); therefore, retaining the critical area and its buffer is preferred over new or expanded utilities. Furthermore, Ecology finds regulations for utilities must comply with WAC 173-26-241 [See detailed rationale in Attachment B, Item Req-3].

Commercial Forestry

The current SMP requires a conditional use permit for commercial timber harvest on shorelines of statewide significance. The Town attempted to address Ecology's Periodic Review Checklist, item 2017e, by proposing to delete the conditional use requirement for commercial forestry in the Natural Shoreline Environment.

Finding. Ecology finds the removal of requirement to obtain a conditional use permit for commercial forestry in the "natural" environment does not comply with WAC 173-26-211(5)(ii)(D). Pursuant to WAC 173-26-211(5)(ii)(D), commercial forestry may be allowed as a conditional use in the "natural" environment provided it meets the conditions of the State Forest Practices Act and its implementing rules and is conducted in a manner consistent with the purpose of this environmental designation. If the Town will allow commercial forestry in the natural environment, the town shall require a conditional use permit [See detailed rationale in Attachment B, Items Req-4 & Req-5].

Recommended Changes

Ecology identified one recommended change to provide clarity and improved implementation. This recommendation is listed in Attachment B, item Rec-1.

CONCLUSIONS OF LAW

After review of the complete record submitted and all comments received, Ecology concludes that the Town's proposed amendment with incorporation of Ecology's required changes as shown in Attachment B, can be considered consistent with the policy and standards of RCW 90.58.020 and RCW 90.58.090 and the applicable SMP guidelines (WAC 173-26-171 through 251 and 020 definitions).

Ecology concludes that the proposed amendment with acceptance of Ecology's required changes satisfies the criteria for approval of amendments found in WAC 173-26-201(1)(c). This includes the conclusion that approval of the SMP amendment will not foster uncoordinated and piecemeal development of the state's shorelines (WAC 173-26-201(1)(c)(i) and will assure no net loss of shoreline ecological functions will result from implementation of the amended master program (WAC 173-26-201(1)(c)(iv) and WAC 173-26-186(8)).

Ecology concludes that those SMP segments relating to shorelines of statewide significance continue to provide for the optimum implementation of Shoreline Management Act policy (RCW 90.58.090(5)).

Ecology concludes that the Town has complied with the requirements of RCW 90.58.100 regarding the SMP amendment process and contents.

Ecology concludes that the Town has complied with the requirements of RCW 90.58.130 and WAC 173-26-090 and WAC 173-26-104 regarding public and agency involvement in the SMP review and amendment process, including conducting a public hearing, providing notice, consultation with parties of interest, and solicitation of comments from tribes, government agencies and Ecology.

Ecology concludes that the Town has complied with requirements of Chapter 43.21C RCW, the State Environmental Policy Act.

Ecology concludes that the Town SMP submittal to Ecology was complete pursuant to the requirements of WAC 173-26-090, WAC 173-26-104, and WAC 173-26-110.

Ecology concludes that we have complied with the state's procedural requirements for review and approval of shoreline master program amendments as set forth in RCW 90.58.090 and WAC 173-26-104, WAC 173-26-110, and WAC 173-26-120.

Ecology concludes that with this action the Town has completed the required process for periodic review in accordance with RCW 90.58.080(4) and applicable state guidelines (WAC 173-26).

DECISION AND EFFECTIVE DATE

Based on the preceding, Ecology has determined the proposed amendment will be consistent with the policy of the SMA, the applicable guidelines and implementing rules, once the required changes set forth in Attachment B are accepted by the Town. Ecology has also determined that the SMP could benefit from incorporation of the recommended changes identified in Attachment B. The Town may choose to adopt some or all of the recommended changes in Attachment B. Pursuant to RCW 90.58.090(2)(e), the Town must notify Ecology of the approval or denial of the recommended changes.

As provided in RCW 90.58.090(2)(e)(ii) the Town may choose to submit an alternative to all or part of the changes required by Ecology. If Ecology determines that the alternative proposal is consistent with

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the purpose and intent of Ecology's original changes and with RCW 90.58, then the department shall approve the alternative proposal and that action shall be the final action on the amendment.

Upon written receipt of the Town's acceptance of Ecology's required changes and decision to include, propose alternative language, or reject Ecology's recommended changes, Ecology will take final action on this SMP periodic review. Ecology's approval of the SMP amendment, with all changes as accepted, will become effective 14 days from Ecology's final action approving the amendment. Ecology's final action will be a letter verifying the receipt of written notice that the Town has agreed to the required changes identified in Attachment B.