ATTACHMENT A: FINDINGS AND CONCLUSIONS
CITY OF SUMAS SHORELINE MASTER PROGRAM PERIODIC REVIEW AMENDMENT

SMP Submittal accepted April 20, 2022, Resolution No. 806
Prepared by Department of Ecology on July 26, 2023

Introduction

The Department of Ecology (Ecology) *Findings and Conclusions* (presented herein as Attachment A), including reference to *Required and Recommended Changes* (Attachment B), provides the factual basis for our decision on the City of Sumas' (City) Shoreline Master Program (SMP) periodic review and associated amendment. This document is divided into three sections: Findings of Fact regarding the amendment history and the review process, Conclusions of Law, and Decision and Effective Date of the amendment.

Brief Description of Proposed Amendment

The City is undergoing a statutorily required periodic review of their SMP and has submitted an amendment to Ecology for review and approval. The City opted to use the standard review process in WAC 173-26-100 for this periodic review and associated amendment.

FINDINGS OF FACT

Need for amendment

The City comprehensively updated their master program in 2017. The proposed amendment is needed to comply with the statutory deadline for a periodic review of the SMP pursuant to RCW 90.58.080(4). The amendment will bring the SMP into compliance with requirements of the Shoreline Management Act (SMA), or state rules that have been added or changed since the comprehensive update, ensure the SMP remains consistent with amended comprehensive plans and regulations, and incorporate revisions deemed necessary to reflect changed circumstances, new information, or improved data.

SMP provisions to be changed by the amendment as proposed

The SMP regulates shoreline uses and activities along shorelines within city limits including sections of the Sumas River and Johnson Creek, and those lands within 200 feet of the shoreline floodway of these waterbodies, and those wetlands associated with these waterbodies located within the 100-year floodplain.

Sumas' SMP is divided into four parts: Goals and Policies, Shoreline Management Regulations, and Code Chapters Adopted by Reference, and the Official Shoreline Map. The City regulates critical areas in shoreline jurisdiction with an incorporation by reference of their critical areas ordinance and floodplain development regulations in section 15.04.470(A) and (C) of the SMP.

The City prepared a checklist and an analysis documenting the proposed amendment. The key changes proposed include:

- Modifying the extent of shoreline jurisdiction within the city to reflect the minimum jurisdictional area required by the SMA. This includes removing the existing 50-foot jurisdictional area currently applied to shoreline associated wetlands and clarifying that the SMP uses the top of bank to determine the extent of the floodway rather than relying on FEMA maps.
- Adding a section clarifying the Conservancy and Urban-2 wetlands designations.
- Incorporating select changes made to the City's critical area regulations adopted in 2016 and changes to their flood ordinance adopted in 2018. Revised provisions, clarifying that public access is required for developments creating more than four lots or units.

The following list summarizes the proposed amendment[1] by specific SMP sections:

Part One, Section 5.0: Shoreline Jurisdiction and Environment Designations

5.1 - Revised the provisions outlining the City's shoreline jurisdiction to reflect the City's action to eliminate the previously adopted optional jurisdictional area adjacent to shoreline associated wetlands.

5.8.1 - Clarified the Urban-Conservancy Wetland Environment designation applies to associated wetlands of the Sumas River or Johnson Creek.

Part Two, Section One: Authority and Purpose

15.04.025 – Added language clarifying the effective date of SMP amendments (checklist item 2010a).

Part Two, Section Two: Definitions

15.04.030 - Revised the following definitions: "Development" (checklist item 2017b & 2017e), "Floodway" to clarify use of the shoreline floodway (non-FEMA) criteria established in the SMA (checklist item 2007a), "Shorelands" to reflect minimum required jurisdictional area, and "Substantial Development" to update the cost threshold (checklist item 2017a).

Part Two, Section Three: Applicability

15.04.060 - Revised the description the City's shoreline jurisdiction to reflect the elimination the previously adopted optional jurisdictional area adjacent to shoreline associated wetlands.

15.04.060(D) - Added a provision clarifying the SMP does not apply to lands under exclusive federal jurisdiction (checklist item 2017f).

15.04.060(E) - Inserted statutory exceptions to local review (checklist items 2017c and 2019b).

15.04.090(A) - Revised the dollar threshold for substantial development (checklist item 2017a).

15.04.090(A)(17) - Added an exemption for retrofits complying with ADA (checklist item 2016a).

Part Two, Section Six: General Requirements

15.04.470 – Revised the critical areas regulations incorporation by reference to include Sumas Municipal Code (SMC), Chapter 15.20 (Ordinance No. 1687, 2016) and Chapter 15.10 (Ordinance No. 1738, 2018).

15.04.473 - Clarifying the designation of "conservancy wetlands" versus "urban-2 wetlands".

15.04.490 - Minor change establishing a consistent threshold for public access.

Part Two, Section Seven: Shoreline Use Regulations

15.04.530(H)(3)(h) - Minor change to residential development use regulations to reflect the same change made in 15.04.490(H).

Part Two, Section Eight: Shoreline Modification Regulations

15.04.540(G)(2)(c) - Added reference to WAC 173-27-215 for restoration projects (checklist item 2009a).

Part Three, Code Chapter Adopted by Reference

Inserted updated Critical Areas Ordinance and Flood Damage Prevention Ordinance.

Part Four: Official Shoreline Map

Updated the official shoreline map to reflect the elimination of the optional 50-foot SMP jurisdictional area adjacent to associated wetlands of the Sumas River or Johnson Creek.

[1] All references are to section numbering in the revised locally adopted SMP as submitted for Ecology review.

Amendment History, Review Process

Local SMP Amendment Process

The City 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. An important element of the public participation plan is the City's SMP Periodic Review project website[2]. The City held a 60-day public comment period and one public hearing. The public comment period occurred between April 7, 2021 and June 7, 2021, and the public hearing with the City council on June 14, 2021, both of which were Noticed in the *Lynden Tribune* on April 7, 2021.

The City used Ecology's Periodic Review checklist of legislative and rule amendments to review amendments to chapter 90.58 RCW and department guidelines that have occurred since the SMP was comprehensively updated and determine if local amendments were needed to maintain compliance in accordance with WAC 173-26-090(3)(b)(i). The City also reviewed changes to the comprehensive plan and development regulations to determine if the SMP policies and regulations remain consistent, in accordance with WAC 173-26-090(3)(b)(ii). The City considered whether to incorporate any amendments needed to reflect changed circumstances, new information or improved data in accordance with WAC 173-26-090(3)(b)(iii). The City consulted with Ecology and solicited comments throughout the review process, including opportunities to comment on draft materials.

The City provided 60-day Notice of Intent to Adopt to the Department of Commerce on April 6, 2021. The record indicates the City completed a State Environmental Policy Act (SEPA) checklist and issued a Determination of Non-Significance (DNS) for the proposed amendments to the SMP on June 14, 2021.

The City received one written comment regarding the proposed amendment. A member of the City Planning Commission raised the issue of perceived adverse impacts to shoreline waterbodies. This relates to the City's elimination of the optional 50-foot jurisdictional area adjacent to shoreline associated wetlands. The City's consultant clarified to the City council in a memo dated June 11, 2021, that the optional land areas removed were originally included at a time when the City did not have adequate critical area regulations in place. The land areas removed by this amendment remain under the jurisdiction of the City's Critical Areas Ordinance (CAO), with regulations such as wetland buffers, being identical to those in the SMP. The consultant further clarified neither Sumas Creek nor Bone Creek qualify as shorelines of the state thereby the revision does not result in a removal of protection for shorelines of the state.

With passage of Resolution No. 806 on June 28, 2021, the City Council directed the mayor to submit the SMP amendment to Ecology for formal review and approval.

Ecology SMP Amendment Review and Approval Process

The proposed SMP amendments were received by Ecology for state review on March 31, 2022. Ecology verified the submittal as complete on April 20, 2022. This began our formal review and decision-making process per WAC 173-26-120.

[2] https://www.cityofsumas.com/shoreline-management-master-program/

When the local government opts to use the standard process of WAC 173-26-100, Ecology must follow the procedures of WAC 173-26-120(2) to provide reasonable notice and opportunity for written comment. Ecology distributed notice of the state comment period via email to state and local interested parties on June 17, 2022. Ecology individually notified and invited the Lummi Nation and the Nooksack Indian Tribe to comment. Notice of the comment period, including a description of the proposed amendments and the authority under which the action is proposed along with the manner in which interested persons may obtain copies and present their views, was provided on Ecology's website[3] and as part of the written notice.

The state comment period began on June 21, 2022, and continued through July 21, 2022. No comments were submitted on the proposed amendment.

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

Consistency Review

Consistency with Chapter 90.58 RCW

Ecology reviewed the proposed amendment for consistency with the policy of RCW 90.58.020 and the approval criteria of RCW 90.58.090(3), (4) and (5). The City has also provided evidence of its 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)

Ecology reviewed the proposed amendment for compliance with the requirements of the applicable Shoreline Master Program Guidelines (WAC 173-26-171 through 251 and 173-26-020 definitions). This included a review of SMP Periodic Review Checklist completed by the City.

Consistency with SEPA Requirements

The City submitted evidence of SEPA compliance in the form of a SEPA checklist and issuance of a Determination of Non-Significance (DNS) on June 14, 2021.

Summary of Issues Identified by Ecology as Relevant to Its Decision

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

[3] https://ecology.wa.gov/Water-Shorelines/Shoreline-coastal-management/Shoreline-coastal-planning/State-approved-Shoreline-Master-Programs/Sumas

SMP Amendment Effective Date

The proposed amendment adds section 15.04.025 *Authority and Purpose* which includes a statement saying the SMP becomes effective *upon adoption by the City Council and 14 days* from the date of the department's written notice of final action (*emphasis added*). This is not consistent with RCW 90.58.090(7) which establishes the effective date of an SMP to be 14 days from Ecology's final action. The City council must first locally adopt SMP amendments and submit them to Ecology for review and approval, but it is Ecology's final action letter that establishes the effective date. *Ecology has identified a change necessary for consistency with RCW 90.58.090(7) [Attachment B, Req-1].*

Definitions

The City revises their definition of floodway to match the SMA definition. We require revisions to the definition to clarify that the jurisdictional extent of the floodway may differ from the definition, based on information obtained at the time of permitting. *Ecology has identified a change necessary for consistency with WAC 173-26-221(3) [Attachment B, Req-2].*

The City's elimination of the optional 50-foot extension of shoreline jurisdiction to include buffers necessary to protect associated wetlands required a revision to their definition of "Shorelands" and description of the City's shoreline geographic jurisdiction. Ecology finds that the SMP lacks clarity around shorelands based off of the floodway and associated wetlands located within the 100-year floodplain. We have identified modifications necessary for consistency with RCW 90.58.030, WAC 173-26-020, and WAC 173-22-040. These changes to the definition and geographic jurisdiction description ensure the definition is inclusive of all potential waterbodies and shorelands. To ensure consistency within the SMP, our revision to the definition requires the City to expand their designation criteria for the Urban-Conservancy Wetland Environment for the same reasons as stated above. *Ecology has identified changes necessary for consistency with WAC 173-22-040(3)(c) and WAC 173-26-191(2)(a)(ii)(A) [Attachment B, Req-3 and -6].*

Persons, projects, and activities not required to obtain permits, letters of exemption, or other local review

We require edits to proposed language addressing checklist items 2017c and 2017f.

The City proposed the addition of 15.04.080 Section D which references WAC 173-27-060 addressing direct federal agency activities. Ecology finds that this language is related to our application of the WA Coastal Zone Mangement (WACZM) program for federal consistency determinations. This is an authority that is executed by Ecology and not the City. We have identified changes to this section to clarifies the applicability of the SMP and SMA to project and activities occurring on federal lands. Ecology also finds that the SMP does not address checklist item 2017f, so additional language is proposed to address areas or uses occurring on lands under exclusive federal jurisdiction. *Ecology has identified a change necessary for consistency with WAC 173-27-060 and WAC 173-22-070 [Attachment B, Req-4].*

Additionally, Ecology finds that the new Section E is not consistent with the allowance provided for in RCW 90.58.355. This section is intended to clarify the applicability of statutory exceptions that remove the requirement to obtain shoreline permits, or other review conducted by a local government to implement the SMA. Ecology proposes to add a direct reference to RCW 90.58.355 and to remove the listed examples which are not illustrative of this exception. *Ecology has identified changes necessary for consistency with WAC 173-27-044 and checklist item 2017c [Attachment B, Req-5].*

Urban Conservancy-Wetland Environment

The City's Urban Conservancy-Wetland shoreline environment designation applies to an area of the City that is heavy encumbered by wetlands and their buffers. The City's elimination of the optional 50-foot jurisdictional area adjacent to shoreline associated wetlands affects the Urban Conservancy-Slough shoreline designation environment. Under this change, development pressure could result in additional shoreline variances for permitted uses within wetlands or buffers. Ecology finds that additional wetland protections are necessary within this shoreline environment designation. For this reason, Ecology finds that industrial development, landfill and excavation, and residential uses within the Urban Conservancy-Slough environment should only be allowed as a conditional use. *Ecology has identified changes necessary for consistency with WAC 173-26-186(8)(b)(i) and WAC 173-26-221 [Attachment B, Req-7].*

The above required change triggers revisions to the wetland performance standards for Conservancy and Urban-2 wetlands and wetland buffer reduction provision to ensure consistency within the SMP. Ecology also finds that revisions to the specific shoreline modification regulations pertaining to landfill and excavation activities are needed for wetland protection. Within SMP section 15.04.540(D)(2)(g) landfill and excavation are only allowed waterward of the ordinary high water mark where directly associated with ecological restoration or through a shoreline variance. Ecology finds that this restriction should also apply to landfill and excavation in a wetland. Ecology requires the City clarify that fill placement within a wetland, except where directly associated with ecological restoration or authorized use, requires approval of a shoreline variance permit. This additional change carries forward protections to wetlands from development not listed as permitted or conditional uses. *Ecology has identified a change necessary for consistency with WAC 173-26-186(8)(b)(i) and WAC 173-26-221 [Attachment B, Req -8].*

Critical Areas

The City recently updated their frequently flooded areas provisions of Chapter 15.20 (Ordinance 1783 in October 2021) and flood hazard regulations in Chapter 14.30. This occurred during the City's SMP periodic review process but was not captured in the final locally adopted SMP critical areas incorporation by reference section in 15.04.470. The City found these amendments necessary to ensure continued consistency with the National Flood Insurance Program and have requested that the updated provisions be included as a required change within this conditional approval. Ecology reviewed Chapter 15.20 and find these provisions remain consistent with the SMA and implementing rules. *Ecology has identified changes necessary for consistency with WAC 173-26-191(2)(b) [Attachment B, Req-9].*

The proposed amendment removes the current outdate Critical Areas Ordinance (CAO) provisions adopted by reference and replaces them with the City's most current CAO. Upon review of the amended incorporation by reference, Ecology finds that SMP needs the following:

- To include a statement about how to resolve any conflicts between the critical area provisions incorporated by reference and the remainder of the SMP.
- To exclude portions of the CAO that are not applicable or are inconsistent with the SMA.

Ecology has identified changes necessary for consistency with RCW 90.58.610, RCW 36.70A.480, RCW 90.58.140, WACs 173-26 and -27 [Attachment B, Req-10 and -11].

Additional recommended changes

Ecology identified seven (7) recommended changes for consideration by the City. These are documented in Attachment B. These changes would improve clarity and implementation of the SMP and are consistent with SMA policy (RCW 90.58.020) and the SMP Guidelines (WAC 173-26, Part III).

CONCLUSIONS OF LAW

After review of the complete record submitted and all comments received, Ecology concludes that the City's proposed amendment with incorporation of Ecology's required changes as shown in Attachment B, complies 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 City has complied with the requirements of RCW 90.58.100 regarding the SMP amendment process and contents.

Ecology concludes that the City has complied with the requirements of RCW 90.58.130 and WAC 173-26-090 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 City has complied with requirements of Chapter 43.21C RCW, the State Environmental Policy Act.

Ecology concludes that the City SMP submittal to Ecology was complete pursuant to the requirements of WAC 173-26-100 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, WAC 173-26-100, WAC 173-26-110, and WAC 173-26-120.

Ecology concludes that with this action the City 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, subject to required changes set forth in Attachment B. Ecology has also determined that the SMP could benefit from incorporation of the recommended changes identified in Attachment B. The City may choose to adopt some or all of the

recommended changes. Pursuant to RCW 90.58.090(2)(e), the City must notify Ecology of the approval or denial of the recommended changes.

As provided in RCW 90.58.090(2)(e), the City may agree to the proposed changes by written notice to Ecology or choose to submit additional alternatives to all or part of the changes required by Ecology. If Ecology determines that the alternative proposal is consistent with 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.

Ecology approval of the proposed amendment, with required changes or approved alternative language, will be 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 City has agreed to the required changes and the City's decision to include or reject the recommended changes identified in Attachment B.