ATTACHMENT A: FINDINGS AND CONCLUSIONS
WHATCOM COUNTY SHORELINE MASTER PROGRAM PERIODIC REVIEW AMENDMENT

SMP Submittal Complete on August 10, 2022, Resolution Nos. 2021-056 and 2022-027
Prepared by Department of Ecology on May 29, 2024

Introduction

The Department of Ecology (Ecology) Findings and Conclusions (presented herein as Attachment A), including reference to Required Changes (Attachment B), provides the factual basis for our conditional approval of the Whatcom County (County) Shoreline Master Program (SMP) periodic review 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. Attachment B outlines Ecology's identified required changes to the SMP amendment.

Brief Description of Proposed Amendment

The County is undergoing a statutorily required periodic review of their SMP and has submitted amendments to Ecology for review and approval. The County has elected to utilize the optional joint review process for SMP amendments available per WAC 173-26-104; therefore, Ecology provided an initial determination of consistency with applicable laws and rules. The County's final adopted resolution incorporated all of our required and recommended changes outlined within the initial determination.

The County proposes amendments to bring the SMP into compliance with requirements of the Shoreline Management Act (Act) or State Rules that have been added or changed since the County's comprehensive SMP update. This includes numerous changes to the SMP, as well as changes to the incorporated Critical Areas Ordinance, County Comprehensive Plan, and Permit Procedures Ordinance to address changing local circumstances, reorganization of county code structure, and to address implementation challenges that have occurred since the comprehensive SMP update completed in 2008.

The SMP periodic review amendment package includes changes to the SMP adopted through two resolutions: No. 2021-056, and No. 2022-027. Resolution No. 2021-056 amends the County's Comprehensive Plan, SMP, Critical Areas Ordinance (CAO) and administrative provisions. Resolution No. 2021-056 also supersedes two previously initiated SMP amendments that were not finalized, Resolution No. 16-039 related to short term rentals, and Resolution No. 19-057 related to hazard tree removal, by incorporating the same proposed amendments again through the periodic review process. Resolution No. 2022-027 amends Resolution No. 2021-056 to include additional changes to the CAO to incorporate settlement agreement amendments associated with an appeal[1] of the County's CAO and correcting errors within SMP, CAO, and administrative provisions identified after the local adoption of Resolution No. 2021-056.

FINDINGS OF FACT

Need for amendment

The County's comprehensive update to their SMP went into effect in 2008, and a few locally initiated amendments have been completed since that time. This proposed amendment is needed to comply

[1] Western WA Growth Management Hearings Board Case No. 18-2-0001

with the statutory deadline for a periodic review of the County's SMP pursuant to RCW 90.58.080(4). The amendment will bring the SMP into compliance with requirements of the Shoreline Management Act or state rules that have been added or changed since the SMP was comprehensively updated; 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

As a result of their SMP periodic review, the County locally adopted Resolution No. 2021-056 which includes changes identified through the periodic review process and incorporates the same changes previously identified in Resolution No. 2016-039 (short-term rentals) and Resolution No. 2019-057 (hazard trees), essentially replacing those previously initiated SMP amendments with this one combined under the periodic review process. Resolution No. 2021-056 modifies the County's Comprehensive Plan, SMP, and other development and administrative regulations, not all of which are part of the SMP. Resolution No. 2022-027 further amends Resolution No. 2021-056 to incorporate CAO updates resulting from an appeal settlement and modifying other sections of the CAO, SMP, and administrative provisions.

Resolution No. 2021-056

In addition to minor clerical changes to improve document clarity, formatting, re-organization, and updates to references and citation, the following is a general description of substantive changes relevant to the SMP per Resolution No. 2021-056:

Comp Plan (Resolution Exhibit B)
The existing SMP is a self-contained document including goals, policies, and regulations. As part of this amendment, the County removed the SMP goals and policies from the SMP regulations and placed them in a new chapter of the Comprehensive Plan (Chapter 11 – Shorelines). In addition to the restructuring, new policies were added to address the following:

- The protection of shoreline ecological functions through consideration of climate change and sea level rise.
- The identification, protection, and preservation of cultural resources.
- The management of live-aboard vessels to prevent adverse impacts to public health and safety.
- Incorporation of fossil fuel industrial use amendments to the Cherry Point Management Area (CPMA) by the Whatcom County Council.

Shoreline Master Program (Resolution Exhibit D)
The SMP is codified in Title 23 of the Whatcom County Code (WCC). The shoreline management program (SMP) has been substantially reformatted and reorganized, including relocation of all policy language into a new chapter of the Whatcom County Comprehensive Plan as mentioned above. Title 23 now houses only the regulatory provisions of the County's SMP. Substantive changes to these regulations are summarized by topic as follows:

Shoreline Jurisdiction/Map

- The geomorphic floodway, as mapped by the County during its comprehensive SMP update is no longer being used to determine the lateral extent of shoreline jurisdiction on the Nooksack and Sumas Rivers. The County will now extend shoreline jurisdiction to include the entire 100-year FEMA floodplain boundary, with some modifications, as part of shoreline jurisdiction in these areas.

- The "H-Street Wetlands", located between the Cities of Blaine and Sumas along the international border with Canada were added to shoreline jurisdiction as lake(s) and assigned a Conservancy Shoreline Environment Designation (SED).
- An existing lake near the City of Everson has been removed from shoreline jurisdiction as portions of the feature are still subject to on-going mining operations.

General Regulations

The County made changes to provisions related to water quality and quantity, views and aesthetics, vegetation management, cultural resources, and public access.

Use and Modification Regulations

The County made changes to provisions related to aquaculture, dredging and dredge disposal, fill and excavation, marinas and launch ramps, commercial development, flood hazard reduction, forest practices, industrial and port development, land division, mining, moorage structures, residential development, restoration and enhancement, shoreline stabilization signs and utilities.

Nonconforming Uses, Structures, and Lots

The County amended numerous provisions related to how nonconforming uses and structures are addressed by the SMP.

Vacation Rentals

The proposed amendment would allow short-term rentals of single-family residences and/or accessory dwelling units as a form of residential use, a permitted use in all upland shoreline areas.

Definitions

The County altered, added, and removed definitions to provide clarity, including an amendment to the definition of "hazard tree" within the SMP to be consistent with the term as defined within the County's CAO and zoning code. Definition changes related to the short-term rental provisions include new definitions of "bed and breakfast" and "vacation rental unit" as well as modified definitions for "commercial development" and "residential development."

WCC Title 22 Administrative Provisions (Resolution Exhibit E)
To consolidate all of the County's permitting procedures into a single location, the County has relocated some of its administrative provisions from its SMP into Title 22 – Project Permits.

WCC Chapter 16.16 Critical Areas (Resolution Exhibit F)
Chapter 16.16 includes the County's critical areas regulations, which are incorporated into the SMP with limited exclusions. Concurrent with the periodic review of its SMP, Whatcom County proposed changes to its Critical Areas Ordinance. Note that not all the changes to WCC 16.16 are incorporated as part of the SMP. The County made changes affecting regulated activities, activities allowed with notification, critical areas review process/submittal requirements, critical areas assessment reports, general mitigation requirements, critical area protection measures, geologically hazardous areas (GHAs), landslide hazard areas, erosion hazard areas, GHA review and reporting requirements, wetlands, fish and wildlife habitat conservation areas (HCAs), and definitions.

Shoreline Environment Designations (Resolution Exhibit G)
This resolution includes an update to the official shoreline map, dated 2/24/2021.

Addendum to the Whatcom County Shoreline Restoration Plan (Resolution Exhibit J)

The County's Shoreline Restoration Plan is a non-regulatory document intended to help identify restoration or enhancement projects and areas of the shoreline for improvement that was created in 2007 during the County's SMP comprehensive update process. This resolution includes an addendum which updates the list of potential restoration actions and identifies completed or in process projects that were not included in the original plan.

Resolution No. 2022-027

The County subsequently adopted Resolution No. 2022-027 amending Resolution No. 2021-056, to include additional changes to the critical areas provisions resulting from a recently completed critical areas ordinance (CAO) appeal settlement action and correct errors identified in other CAO, SMP, and administrative provisions. However, some of these changes are to provisions that have not been incorporated into the SMP. The following is a summary of changes relevant to the SMP that occurred as a result of Resolution No. 2022-027:

WCC Title 22 Administrative Provisions (Resolution Exhibit E)
This amendment removes an obsolete or incorrect permit processing language referencing a local appeals process for shoreline permits and pre-application meeting requirements for shoreline exemptions and single family residential proposals, which are not applicable.

WCC Chapter 16.16 Critical Areas (Resolution Exhibit F)
This amendment clarifies the within shoreline jurisdiction reasonable use is considered through the shoreline variance process and a 100-foot buffer requirement for lakes is added back into Table 4.

Shoreline Master Program (Resolution Exhibit D)
This amendment clarifies that a 5-foot minimum setback applies to all decks and accessory structures. The clause "though in no instance shall a dock be longer than adjacent docks or 100 feet, whichever is lesser" is added to further limit dock lengths in addition to the existing language that provides as necessary to obtain a moorage depth of 5.5 feet. Clarifies the maximum number of slips in a multifamily, camping clubs, and subdivision development shared moorage. The amendment also adds a definition for moorage structure "finger" and clarifies that five or more slips constitutes a marina rather than a shared moorage.

Amendment History, Review Process

Initial Local Adoption Process

The County 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 County maintained a website[2] where documents related to the amendment were posted. Three (3) open houses (Birch Bay, Everson, and Lake Whatcom) were held during the summer of 2019 to inform the community about the update process and to hear initial concerns for the purpose of developing the scope of the SMP amendment. According to the record, the County also held meetings with citizen advisory groups and various interested parties. The Whatcom County Planning Commission (PC) and the Whatcom County Council (CC) held public hearings on July 25, 2019, and August 7, 2019 (respectively) to receive testimony on topics the public believed should be addressed during the amendment process.

[2] https://www.whatcomcounty.us/3097/Shoreline-Master-Program-Periodic-Update

The County 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 master program was last amended, and to determine if local amendments were needed to maintain compliance in accordance with WAC 173-26-090(3)(b)(i). The County also reviewed changes to the comprehensive plan and development regulations to determine if the shoreline master program policies and regulations remain consistent with them in accordance with WAC 173-26-090(3)(b)(ii). The County 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 County consulted with Ecology and solicited comments throughout the review process.

On February 18, 2021, the County issued a State Environmental Policy Act (SEPA) Determination of Non-significance (DNS) per WAC-197-11-340(2). The SEPA comment and appeal period closed on March 4, 2021. No comments were received.

According to the record, the County provided a 60-day notice of intent to adopt amendments to Washington State Department of Commerce on March 12, 2021, in accordance with RCW 36.70A.106 and WAC 173-26-100(5).

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

The County and Ecology held a joint local/state comment period on the proposed amendment following procedures outlined in WAC 173-26-104. The comment period began on March 12, 2021, and continued through April 12, 2021. A joint local/state public hearing was held virtually via Zoom on April 22, 2021.

The County provided notice to local parties, including a statement that the hearings were intended to address the periodic review in accordance with WAC 173-26-090(3)(c)(ii). Affidavits of publication provided by the County indicate notice of the hearing was published on April 17, 2021, in *The Bellingham Herald* for the joint public hearing.

Ecology distributed notice of the joint comment period to state interested parties and affected Tribes on March 12, 2021. Ecology sent invitations to comment and consult Government to Government, as necessary, to local Tribal governments including the Lummi Nation and the Nooksack Indian Tribe. An additional opportunity to provide comment or consult Government to Government was extended to the Swinomish Tribal Community, the Tulalip Tribes, and the Upper Skagit Tribe during the state review process. No Tribal comments or feedback was received.

A total of seventeen (17) written comments were received during the joint comment period and seven (7) verbal comments were made at the public hearing. Comments were received from Miller Environmental Services, RE-Sources, Taylor Shellfish Farms, Building Industry of Whatcom County, Phillips 66, Western States Petroleum Association, Ashton Engineering, Whatcom County Marine Resources Committee, Petrogas and eight (8) members of the public.

The County compiled these comments and prepared a comment summary and response matrix. The summary demonstrates that the County considered all comments, and as a result made several changes to the SMP amendment. Ecology has reviewed the comments received along with the County's responses during our initial determination process and again as part of this state review process. Ecology finds that the County considered comments and incorporated additional amendments to

address issues raised during the comment period. Additional discussion is provided below on a subset of topics raised:

Non-applicable Critical Areas Ordinance (CAO) Provisions

The bulk of the comments submitted were related to concerns with amendments to CAO provisions that do not apply within shoreline jurisdiction (reasonable use, administrative variance review, 4,000 square foot buffer impact allowance, regulation of Type O waters, etc.). These CAO sections are specifically excluded from incorporation into the SMP, so these comments were not directly addressed by Ecology.

Sea Level Rise

Several commenters brought up the need for the County to address climate change, and specifically sea-level rise within its updated SMP. In response, the County identified several changes addressing sea level rise within the SMP at the policy level. In its response to comments, the County explains that they are a participating agency in a United States Geological Survey (USGS) Coastal Storm Modeling System (CoSMoS) study for the region. The CoSMoS study will help inform predicted sea level rise in coastal areas of Whatcom County as well as its impacts to flooding on the lower reaches of the Nooksack River. Whatcom County plans to use this information to inform a sea-level rise risk and vulnerability assessment prior to developing regulations. Through a grant provided by Ecology, the County completed the Whatcom County Compound Flood Vulnerability Assessment in June 2023. In addition, the County has recently been awarded another Ecology competitive grant to continue working on regulations to address sea level rise within shoreline areas.

We find that the County has considered the comments related to climate change and sea level rise. In response to these comments the County has added sea-level rise policies to this SMP amendment which establish a firm framework for future regulations. The County has chosen to postpone making regulatory changes while additional technical studies are still being completed.

Ecology agrees climate change and related effects are important topics. With the recent addition of RCW 90.58.630, the legislature amended the SMA to require Ecology to update the SMP Guidelines to require SMPs to address the impact of sea level rise and increased storm severity on people, property, and shoreline natural resources and the environment. We began this rulemaking process on May 2, 2024, with a goal of having amended SMP Guidelines in place in time for the next SMP periodic review funding cycle starting in 2027. Once the SMP guideline rulemaking is complete the County will have clear direction regarding future requirements for addressing sea-level rise within their SMP.

Riparian Buffers

Numerous commenters expressed concerns that the County's riparian buffers should be increased to be consistent with recent guidance published by the Washington State Department of Fish and Wildlife (WDFW). The primary element of WDFW riparian ecosystem management recommendations is the establishment of riparian management zones (RMZs) landward of the waterbody based on a distance determined by the 200-year Site Potential Tree Height (SPTH). In addition, the guidance also suggests that RMZs start at the outer edge of the channel migration zone (CMZ), if present, within the river system. Note that no comments were received from WDFW during this amendment process.

The current riparian buffer provisions of the SMP were adopted during the County's Comprehensive SMP Update after extensive public review and comment, supported by a technical review committee and Shoreline Inventory and Characterization. Currently, habitat conservation area buffers apply a

prescriptive 150-foot buffer to all shoreline streams and a 50 to 100-foot buffer, based on fish presence, for all non-shoreline streams that flow through shoreline jurisdiction.

Through this amendment, the County has amended its buffer scheme for consistency with the decision in National Wildlife Federation v. FEMA (Federal District Court Case No. 2:11cv-02044-rsm; NMFS Doc. #2006-00472). The County has also adopted the Washington Department of Natural Resources stream typing system and will now apply 200-feet buffers for all shoreline streams, 150-foot buffers for all other fish-bearing streams and maintain the 50-foot buffer requirement for all non-fish-bearing streams flowing through shoreline jurisdiction. Whatcom County has also incorporated the entire 100-year floodplain into shoreline jurisdiction based on recently updated mapping completed by FEMA. These buffers presume the presence of a dense vegetated community adequate to protect the ecological functions and values at the time of the proposed activity. In situations where existing buffer areas lack adequate vegetation, the County has the authority to increase the standard buffer or require buffer enhancement. Buffers in Whatcom County are measured from the OHWM, however where a channel migration zone (CMZ) is identified, the buffers are applied from the CMZ.

In its response to comments, the County points out that its amended buffers are overall consistent with WDFW's riparian guidance as applied in Whatcom County. The County concluded that their proposed 200-foot buffers on shoreline streams were just under WDFW's recommendation of 208-feet for dominant soil types in Whatcom County.

Ecology finds that the County considered WDFW's draft riparian guidance and determined that its revised buffer scheme is generally consistent with the WDFW recommendations and will achieve no net loss of shoreline ecological functions consistent with the SMA and SMP Guidelines.

Short Term Rentals

The same short term rental provisions proposed within this SMP periodic review amendment (Resolution No. 2021-056) were the subject of a previous SMP locally initiated amended, that resulted in a conditional approval which was never finalized. Comments received during our 2017 comment period on this previous locally initiated SMP amendment were considered as part of our April 3, 2018, Conditional Approval, which included four (4) recommended changes related to clarifying the definitions for *bed and breakfast*, *commercial development*, *residential development*, and *vacation rental unit*. The definition changes described above were incorporated into this SMP periodic review amendment.

Since the County incorporated SMP amendments related to short term rentals (Resolution No. 16-039) into their periodic review amendment, comments received in 2017 were also considered as part of this this review. In general, these comments were not in favor of the SMP amendments which allow the use of single-family residences for short term rental as a residential use within shoreline jurisdiction. Comments submitted on this topic expressed a belief that the use of existing single family homes for monetary gain should be considered a commercial use and should be regulated as such. Commenters cited concerns regarding overuse of homes for parties or large events, degradation of existing neighborhoods due to transient use, inadequate parking requirements, increased risk of introduction or spread of aquatic invasive species, and potential water quality issues due to overloaded on-site septic systems as well as an increase in recreational use of the lake by people (boating, swimming, etc.).

Concerns were also raised regarding the lack of a permit process to authorize use of existing single-family residences as vacation rentals, resulting in a lack of public input and due process. Concerns

related to the SMP amendment process were also raised, related to incomplete use of Ecology's submittal checklist and lack of a cumulative impacts analysis for what some commenters consider to be an increase in use intensity over existing conditions.

Ecology finds that the use of single-family residences, both short and long-term, as proposed by the County, remains consistent with a residential shoreline use as provided by WAC 173-26-241(3)(j). Ecology also finds that the County has placed performance standards, intended to address potential issues resulting from short-term vacation rentals through recently adopted zoning amendments. These include a conditional use permit review process for short-term rentals within the Lake Whatcom Watershed, and a registration system to address standards such as occupancy, parking, nuisance complaints, etc. According to the County, the registration program is currently being developed by an outside vendor according to the County and will be implemented in three to six months.

All residential development, including appurtenant and accessory developments, are subject to the specific bulk, dimensional, and performance standards outlined in the County's SMP. These include, among other things, restrictions on overwater development and maintaining buffers adequate to protect water quality, quantity and habitat functions consistent with RCW 90.58.020 (SMA policy goal regarding the control of pollution and prevention of damage to the natural environment). Any new residential developments proposed, which include short-term rentals will be reviewed through either a Shoreline Substantial Development Permit or Statement of Exemption, as appropriate. Allowing residential use, even as a vacation or short-term rental, of an existing improved residential property, does not constitute development under the SMA.

Initial Determination of Consistency

As part of this review, the County chose to utilize the joint review process set forth in WAC 173-26-104. After the joint local/state comment period and hearing, and consideration of the comments received, the County submitted the proposed amendment to Ecology for initial review. Ecology is required under WAC 173-26-104(3)(b) to provide the County with an initial determination of consistency with the policy of the SMA and applicable rules.

Following Planning Commission review, the proposed SMP amendments were received by Ecology on May 18, 2021, for initial state review and verified as complete. This began our review and initial determination.

On October 29, 2021, after collaboration with County staff, we provided the County a formal written statement documenting our initial determination of consistency. Ecology concluded that portions of the proposal were <u>not</u> consistent with applicable laws and rules and provided a written statement describing the specific areas of concern and changes necessary. We identified twenty-two (22) required changes on a variety of topics deemed necessary for consistency with the SMA and SMP Guidelines. Ecology also identified twenty-six (26) recommended changes to improve clarity of the proposed amendments.

After review by Ecology of the complete initial record submitted and all comments received, Ecology determined that the County's proposed amendments, subject to and including Ecology's required changes, are 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). Based upon this determination, we advised the County to consider the issues we identified, and changes proposed prior

to local adoption. We concluded that if the issues identified within our required and recommended changes were resolved prior to local adoption, we anticipated being able to approve this SMP Periodic Review amendment upon formal submittal per WAC 173-26-110.

Final Local Adoption Process

The County Council held six (6) workshops to review the Planning Commission's recommendations and held a public hearing on November 23, 2021. Notice of the public hearing was advertised in the *Bellingham Herald* on November 14, 2021.

After an additional work session on December 7, 2021, the County Council passed Resolution No. 2021-056, approving the draft amendments, including all changes required and recommended by Ecology during review of the initial determination of consistency. The resolution authorized staff to forward the amendment to Ecology to initiate state review of the amendment.

Ecology received the final submittal from the County on December 10, 2021, and began reviewing for completeness pursuant to WAC 173-26-110. On November 23, 2021, the Whatcom County Council approved a settlement agreement with the Washington Farm Bureau, Whatcom County Farm Bureau, Whatcom County Cattlemen's Association and Whatcom Family Farmers related to an appeal before the Growth Management Hearings Board (Case No. 18-2-0001) related to an update to the County's Critical Areas Ordinance in 2017 (Ordinance No. 2017-077). The settlement agreement resulted in changes to the Critical Areas Ordinance related to its Conservation Program on Agricultural Lands (CPAL) provisions.

The County contacted Ecology about the feasibility of integrating the changes into Ecology's review of the SMP Periodic Review Amendment. In addition, the County had a list of additional SMP changes to provide clarity on a number of items that they also wanted to integrate into Ecology's final review. The County requested that Ecology pause its review in order for the County to locally adopt the additional changes for incorporation into the SMP amendment.

On May 24, 2022, the Whatcom County Council held a public hearing on the additional changes to the CAO and SMP and approved Resolution No. 2022-027, authorizing the additional changes and directing staff to submit the amendment to Ecology for final state review.

Final Submittal

Ecology received the final submittal from the County on May 25, 2022, and issued a determination of completeness on August 10, 2022, following receipt of additional information requested by Ecology.

Additional delays

As mentioned previously, the County elected to incorporate SMP amendments proposed through a 2016 locally initiated SMP amendment (Resolution No. 16-039) into this periodic review amendment. The 2016 amendment, which addressed the use of single-family residences for transient use, was conditionally approved by Ecology on April 11, 2018; however, the County never followed through on the final steps necessary to accept our changes and adopt the amendment. This was primarily because the proposed zoning amendments on which the SMP amendment was based, had not yet been adopted by the County Council. The County wished to pause final adoption of the SMP amendment so that the two ordinances (Zoning and SMP) could be implemented simultaneously countywide. The zoning amendments related to short-term rentals were still being deliberated before the County Council in May of 2022 when this SMP amendment was submitted to Ecology for review. Based on a mutual desire to

have the zoning amendments in place prior to final adoption of the SMP, the County and Ecology agreed to wait until the Council acted on the zoning amendments before finalizing the SMP amendment.

On July 25, 2023, the County Council adopted Ordinance No. 2023-041 related to the regulation of short-term rentals in the Whatcom County Zoning Code (Title 20). The ordinance establishes where short-term rentals are allowed, the required review process and makes amendments to the zoning definitions that the 2016 SMP amendment was intended to align with. In addition, the ordinance directs county staff to engage with a third-party vendor to develop and administer the proposed registration system, and to develop an outreach strategy and fee structure. The County anticipates the registration program will be implemented within the next three to six months.

State Review

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

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 County 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)

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 County.

Consistency with SEPA Requirements

The County submitted evidence of SEPA compliance in the form of a SEPA checklist and issued a Determination of Non-Significance (DNS) for the proposed SMP amendment on February 18, 2021.

Other Studies or Analyses supporting the SMP amendment

Ecology also reviewed supporting documents prepared for the County in support of the SMP amendment. These documents include a public participation plan, a Consistency Analysis Report (prepared by the Watershed Company, November 25, 2020), No Net Loss Statement (prepared by the Watershed Company, December 31, 2020, and No Net Loss Addendum, (prepared by the Watershed Company, March 24, 2021), a hybrid checklist addressing both periodic review requirements and locally initiated SMP amendments.

Summary of Issues Identified by Ecology as Relevant to its Decision

Ecology is required to review all SMPs to ensure consistency with the Shoreline Management Act (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 Shoreline Management Act, 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:

Common-Line Setback

The existing SMP contains a reference to use of a "common-line setback" to determine the maximum buffer reduction allowed for new single-family residential development on an existing, nonconforming lot. The provision is intended to limit encroachment of single-family residences closer to the shoreline than existing adjacent homes for the purposes of view protection. This amendment expands the applicability to use a common-line setback for any new residential development on any lot regardless of size. Ecology finds that the use of a common-line setback on larger conforming lots where application of standard buffers is feasible, is inconsistent with the required mitigation sequence outlined in WAC 173-26-201(2)(e). The County's addendum to its no net loss report finds that the new common-line setbacks standards will result in no net loss of ecological functions because they require compliance with the SMP's mitigation sequencing standards. Avoiding impacts when feasible is the first step of the mitigation sequence. The new common-line provisions would allow an applicant to bypass the required avoidance and minimization standards and skip directly to compensatory mitigation.

During the initial determination review, Ecology had discussions with county staff regarding the above concerns but ultimately issued the initial determination of consistency since use of the common-line setback standards contained a maximum reduction of 25 percent of the standard buffer. The reference to the 25-percent maximum is found in the applicable sections of the CAO incorporated into the SMP. Ecology finds that the common-line provisions add unnecessary confusion to the SMP as they don't result in buffer reductions any greater than those already allowed by the CAO standards. This will likely lead to inconsistent implementation and litigation and as such, Ecology requires that the section be removed (See Attachment B – Final Ecology Required Changes).

Timber Removal Within Buffer Areas

The updated CAO contains a new provision that allows timber removal within the outer 50% of required buffers through and administrative review process. The County created this new process based on review of a similar provision in the Skagit County CAO. Upon further review following our initial determination of consistency, Ecology requested additional information from the County on the specific scientific and/or technical information for which the provisions are based. Neither Whatcom nor Skagit County could produce any background information supporting the removal of timber from the outer 50-percent of the standard buffers. As such, we require the provision be removed from application within shoreline jurisdiction (See Attachment B – Final Ecology Required Changes).

CONCLUSIONS OF LAW

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

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

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

Ecology concludes that the County's 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, WAC 173-26-104, WAC 173-26-110, and WAC 173-26-120.

Ecology concludes that with this action the County 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 is consistent with the policy of the Shoreline Management Act, the applicable guidelines, and implementing rules, once required changes set forth in Attachment B are accepted by the County. Pursuant to RCW 90.58.090(2)(e), the County must notify Ecology of the changes accepted before we can take final action on this amendment.

As provided in RCW 90.58.090(2)(e)(ii) the County may also choose to submit an alternative to all or part of the changes identified by Ecology. If Ecology determines that the alternative proposal is consistent with the purpose and intent of Ecology's original changes and with Chapter 90.58 RCW, we will approve the alternative proposal as part of our final action. Upon receipt of the County's acceptance of Ecology's required changes, Ecology will take final action. The SMP amendment will be effective 14 days from Ecology's final action letter approving the amendment[3].

[3] RCW 90.58.090(7)