

**ATTACHMENT A: FINDINGS AND CONCLUSIONS
FOR PROPOSED LIMITED AMENDMENT TO THE CITY OF SAMMAMISH
SHORELINE MASTER PROGRAM**

SMP Submittal accepted January 17, 2014, Ordinance No. 02013-350
Prepared by Joe Burcar on March 2, 2016

Brief Description of Proposed Amendment:

The City of Sammamish submitted to Ecology for approval, a limited amendment to their Shoreline Master Program (SMP) incorporating revised standards from their updated environmental Critical Areas Ordinance (CAO).

FINDINGS OF FACT

Need for amendment. Following the City’s 2013 review of their environmental CAO, the proposed shoreline amendment intends to incorporate changes affecting the SMP to allow implementation of the updated CAO standards city-wide. According to the City, the 2013 amendments were informed by an updated Best Available Science review, which they conclude will ensure adequate environmental protection while also providing flexibility for property owners developing sites constrained by environmental critical areas.

SMP provisions to be changed by the amendment as proposed: As described within the City’s Cumulative Impact Analysis (ESA, 2013; 2):

“The new (revised) ECA regulations as adopted by the Council maintain most of the critical areas protections incorporated by reference into the SMP. Some of the proposed amendments would alter the standards for wetlands, streams, fish and wildlife habitat conservations areas, and erosion hazards – all of which play an important role in maintaining shoreline ecological functions”.

The amendment includes a number of changes that vary in significance to the SMP. As described in Ecology’s comments to the City in April of 2013, the most significant concerns are related to the proposed wetland amendments.

The following table adapted from the City’s Cumulative Impact Analysis (ESA, 2013) provides a summary of the major revisions adopted by the City. The middle column of the table generally describes the City’s intent in making the revision and the right-hand column describes the anticipated effect of the change on shoreline ecological functions as they are described by the City’s shoreline Inventory/Characterization report.

CAO Section	Intent of Revision to CAO	Potential Effect – to Shoreline Ecologic Functions
21A.50.350 (3) Streams – Mitigation requirements	Allows fee-in-lieu mitigation for impacts to streams	Neutral or Beneficial , especially with use of mitigation” receiving” sites within City’s shoreline jurisdiction.
21A.50.327 Fish and wildlife habitat corridors.	Alternative wildlife protection approach for fish and wildlife habitat corridors - requires site specific analysis of wildlife habitats as opposed to reliance on outdated King County habitats map.	Beneficial , especially for habitat functions.
21A.50.060 Allowances for existing	New allowances for addition to existing single detached dwelling units and accessory dwelling	Detailed analysis of potential cumulative impacts provided in Chapter 4.

CAO Section	Intent of Revision to CAO	Potential Effect – to Shoreline Ecologic Functions
urban development and other uses	units within critical areas buffers – allows for limited expansion of these structures within some ECA buffers which could weaken buffer protection.	
21A.50.310(4) & 21A.50.315 (2) Wetlands – Mitigation requirements / Alternative mitigation	Allows fee-in-lieu mitigation for allowed impacts to wetlands	Neutral or Beneficial , especially with use of mitigation “receiving” sites within City’s shoreline jurisdiction.
Wetlands – Mitigation requirements	Revised wetland mitigation ratios – requires mitigation ratios to be based upon different types of wetland mitigation (e.g., creation, rehabilitation, etc), and provides specific criteria for Category 1 bog and natural heritage site wetlands ensuring that mitigation is functionally appropriate and feasible for wetlands with special characteristics. Clarifies expectations for wetland mitigation and establishes consistency with state and federal regulatory guidelines.	Beneficial , especially for habitat and water quality functions.
21A.50.320(3) Wetlands – Development Flexibilities	Allowance for Alteration of Small, Isolated Wetlands – Establishes a pilot program that would allow isolated wetlands less than 4,000 SF to be filled without first avoiding the impact; must be non-riparian and score 15 or less habitat points. Allowed for a maximum of three single family home development projects.	Potentially negative ; detailed analysis of potential cumulative impacts provided in Chapter 4.
21A.50.320(2) Wetlands – Development Flexibilities	Buffer reduction without avoidance / minimization for Category III and IV wetlands 4,000 SF or less in size – mitigation as enhancement is provided within wetland, remaining buffer, or adjoining high value habitat.	Potentially negative ; detailed analysis of potential cumulative impacts provided in Chapter 4.
21A.50.225(3) EHNSWB Overlay, No-disturbance area development standards.	New allowances for development and subdivision in the no-disturbance area of the Erosion Hazard Near Sensitive Water Bodies (EHNSWB) Overlay. The update provides new allowances for single-family home construction and modification on existing lots in the EHNSWB Overlay no-disturbance area; allows for an expansion in the amount of impervious surface on a site as long as there is no increase in stormwater volume; limited areas overlap with Lake Sammamish shoreline jurisdiction.	Potentially negative to functions supporting Lake Sammamish water quality; detailed analysis of potential cumulative impacts provided in Chapter 4.
21A.50.225(5) EHNSWB Overlay, Pilot program	The update authorizes up to four subdivisions in the no-disturbance area of the EHNSWB Overlay subject to a pilot program; criteria are provided directing how subdivision would manage runoff (either through a direct discharge / tightline approach, or through use of LID approaches for land development and stormwater management).	Potentially negative to functions supporting Lake Sammamish water quality; detailed analysis of potential cumulative impacts provided in Chapter 4.

Amendment History, Review Process: According to the City, the proposed SMP amendment was prompted by a comprehensive review of the City’s environmental Critical Areas Ordinance that started in 2011. The record shows that the City provided multiple opportunities for the public or interested parties to comment on the proposed amendments. In fact, the City Council held a public hearing on the amendments, which was preceded by five study sessions and six public meetings dedicated to this topic. In addition, the City’s Planning Commission reportedly held over 20 public meetings throughout their time developing the proposed amendment.

With passage of Ordinance #02013-350, on July 13, 2013 the City authorized staff to forward the proposed amendments to Ecology for state review of the limited amendment to the City's existing Shoreline Master Program.

Ecology certified the amendment package as complete on January 17, 2014. In compliance with the requirements of WAC 173-26-120 (2) Notice of Ecology's comment period was distributed to over 100 state or local interested parties identified by the City in early September 2014 and was posted on Ecology's website.¹ The notice included a description of the proposed amendment, a description of the authority under which the action is proposed, and details of the manner in which interested persons may obtain copies and present their views. The state comment period formally started on September 12, 2014 and continued through October 13, 2014. At the close of the comment period, Ecology received written comments from three individuals, as summarized in attachment D.

Finding

Ecology finds that the City satisfied SMP-Guideline requirements related to public process in WAC 173-26-201 (3) (b), through Planning Commission review/deliberation and City Council review/deliberation, as well as extensive staff outreach throughout their amendment process.

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 City also provided evidence of compliance with SMA procedural requirements in amending their SMP, as 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 included review of a SMP Submittal Checklist, which was completed by the City and submitted to Ecology along with the other amendment materials.

Consistency with SEPA Requirements: The City 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 May 20, 2013. Notice of the SEPA determination was published in *The Seattle Times*.

Other Studies or Analyses supporting the SMP update: Ecology also reviewed the following materials submitted by the City in support of the limited SMP amendment:

These materials include:

- *City of Sammamish Best Available Science Review (AMEC, 2013);*
- *Cumulative Impacts Analysis dated October 2, 2013 (ESA, 2013);*
- *City of Sammamish Ordinance #02013-35 dated July 9, 2013*
- *Shoreline Master Program Submittal Checklist dated November 8, 2013;*
- *Department of Ecology comment letter dated October 3, 2012*

¹ <http://www.ecy.wa.gov/programs/sea/shorelines/smp/mycomments/SammamishLimitedAmendment.html>

- *Department of Ecology comment letter dated April 23, 2013; and*
- *Additional materials provided by the City's limited amendment submittal accepted by Ecology as complete on January 17, 2014.*

Summary of Issues Identified by Ecology as Relevant To Its Decision: The scope of the City's amendments to their Shoreline Master Program (SMP) are a subset of the changes included in the City's 2013 amendments to their Critical Areas Ordinance (CAO), as not all of the CAO provisions are included in the City's SMP. As described in our October 3, 2012 and April 23, 2013 letters to the City, the adequacy of the City's wetland provisions are particularly important to Ecology, as the SMP-Guidelines require that SMP provisions protect existing functions from loss from anticipated future development (i.e., No Net Loss). Consistent with this early feedback to the City, Ecology's formal review of the amendment considered all information provided in the record in determining consistency with state requirements.

WAC 173-26-186 (8) (b) of the SMP-Guidelines requires that; *"Local master programs shall include policies and regulations designed to achieve no net loss of those ecological functions."*

Consistent with the process described in WAC 173-26-201 of the SMP Guidelines, the City submitted to Ecology a Cumulative Impact Analysis prepared by ESA dated October 2013, analyzing the likely effects of amended SMP provisions.

WAC 173-26-221 (2) of the SMP-Guidelines requires that Shoreline Master Programs manage critical areas located within shoreline jurisdiction in a manner that adequately protects shoreline ecological functions. Subsection (c) (i) provide minimum standards specific to managing wetlands. Related to the City's "isolated wetland" amendment, WAC 173-26-221 (2) (c) (i) (C) states: ***"Alterations to wetlands. Master program provisions addressing alterations to wetlands shall be consistent with the policy of no net loss of wetland area and functions, wetland rating, scientific and technical information, and the mitigation priority sequence defined in WAC [173-26-201](#) (2) (e)."***

Based on our review of the amended provisions for consistency with applicable SMP-Guideline requirements, and consideration of information/comments provided during Ecology's comment period (attachment D), the following topics remain relevant to Ecology's decision on this amendment:

Isolated Wetland Provisions – The City's amendment adds a definition for "wetlands isolated" in section 21A.15.1410 and authorizes alteration (filling) of some "isolated wetlands," without first demonstrating avoidance of impacts through new provisions in section 21A.50.320. The amendments appear to authorize wetland alteration under three of the following scenarios:

- Provision 21A.50.320 (1) modifies the definition of "isolated wetlands" provided in section 21A.15.1410 by deferring to a "qualified professional" in designating "isolated wetlands" that are less than 1000-sq' in total area;
- Provision 21A.50.320 (2) provides a 15-foot buffer reduction for Category III and IV wetlands less than 4,000-sq' in size and with a habitat score of "4"² or less;
- Provision 21A.50.320 (3) creates a pilot program, authorizing alteration of up to three Category III and IV "isolated wetlands" over a two year period. The pilot program would be

² Note the 2014 Wetland Rating System provide an updated scoring system, for which a score of "15" under the previous rating system is equivalent to a score of "4 or less" under the updated system.

limited to “isolated wetlands” that are less than 4,000-sq’ in size and are characterized as “non riparian” and have a habitat score of “4”³ or less.

Issue #1: By definition it is unlikely that “isolated wetlands” exist within shoreline jurisdiction, raising questions related to the need or appropriateness for the City’s amendment.

As detailed in *attachment B* and *attachment C*, Ecology noted a number of inconsistencies with the City’s amendment related to definitions and authorities associated with managing “isolated wetlands.”

Provision 21A.50.320 (1) authorizes alteration of wetlands less than 1,000-sq’ and inappropriately defers federal authority to a “qualified professional” to designate these features as “isolated wetlands.” Under the Clean Water Act (CWA), the federal government (not the City or Ecology) has authority to make a jurisdictional determination on whether a particular wetland is regulated under the CWA or not. The U.S. Army Corps of Engineers regulates wetlands as waters of the United States, except for isolated wetlands which the Corps generally considers to be those wetlands without sufficient hydrologic connection with, or location next to, navigable water (such as a river, lake, or marine water). This federal authority was reaffirmed through a United States Supreme Court ruling in 2001 (*Solid Waste Agency of Northern Cook County vs. United States Army Corps of Engineers et al.*, 531 U.S. 159). In this case, the Court determined that jurisdictional waters of the United States should be regulated under the Clean Water Act and that non-jurisdictional water called “isolated wetlands” would not be subject to federal oversight. The case clearly confirmed the federal government’s authority to determine Clean Water Act jurisdiction, including designation of wetlands as connected or isolated from waters of the United States. Even though a qualified professional can assess the wetland and offer a written opinion of jurisdiction, they do not have the authority to determine if a wetland is in or out of Clean Water Act jurisdiction. As noted in the City’s *Cumulative Impact Analysis*, the approach being proposed would likely generate ongoing disputes or debate between City staff, private consultants and Ecology when the ultimate decision lies with the federal government to determine jurisdiction relative to the Clean Water Act.

In addition, associated wetlands as defined in the City’s SMP⁴ and under state statute could not be considered to be an “isolated wetlands,” as any influence to the wetland from the adjacent lake or stream is evidence of a connection and thus not “isolated.”

Based on consideration of applicable SMP-Guideline requirements and the issues described above, Ecology cannot approve provision 21A.50.320 (1) to be included in the SMP as proposed. The proposed standards create inconsistencies related to the SMP’s definition of “isolated wetlands” provided in 21A.15.1410 and inappropriately defers to a “qualified professional” to designate “isolated wetlands” as opposed to relying upon the federal authority (confirmed by the Supreme Court in 2001) under the CWA. Further, the underlying need to allow the amendment (within shoreline jurisdiction), is not adequately described in the record, nor are any “isolated wetlands”

³ Note the 2014 Wetland Rating System provide an updated scoring system, for which a score of “15” under the previous rating system is equivalent to a score of “4 or less” under the updated system.

⁴ (97) **Wetland, Associated.** Associated Wetland means wetlands that are in proximity to lakes, rivers or streams that are subject to the Shoreline Management Act and either influence or are influenced by such waters. Factors used to determine proximity and influence include but are not limited to: location contiguous to a shoreline waterbody, presence of a surface connection including through a culvert or similar device, location in part or whole within the 100 year floodplain of a shoreline, periodic inundation, and/or hydraulic continuity.

identified or anticipated to be found in shoreline jurisdiction according to the City's *Cumulative Impact Analysis*. Therefore, Ecology has no information or analysis to support a conclusion that the amendment would be consistent with applicable SMP-Guideline requirements such as maintaining no net loss of shoreline ecological functions (WAC 173-26-186) or consistency with applicable Critical Area standards in WAC 173-26-221.

Issue #2: Potential impacts associated with the amendment cannot be determined, as it is not clear if "isolated wetlands" exist in shoreline jurisdiction.

Ecology is not aware of any technical information or scientific literature that would support exempting the alteration of small wetlands. As suggested in comments provided to the City on April 23, 2013, if exemptions are proposed as a matter of regulatory flexibility, then the regulations should clearly state that the exemptions would only apply to "isolated" Category III and Category IV wetlands that meet the specific criteria.⁵ In addition, Ecology recommended that a critical areas study would need to be required to demonstrate that the wetland to be altered satisfies the applicable criteria and to assure that all impacts are fully mitigated.

Section 21A.50.320 (1) of the amended ordinance does not limit alteration of wetlands based on criteria recommended by Ecology. Section 21A.50.320 (1) make no mention of wetland type (i.e., Category I – IV), characterization of riparian areas, buffers, wetland mosaics or local populations of priority species, as potential factors to consider before authorizing alteration of the wetland.

Ecology notes that the City did adopt language consistent with the Washington Department of Fish and Wildlife for "riparian area"⁶ in the definitions section, but have not included the term "riparian" in 21.A50.320 (1) with regards to alteration of small isolated wetlands less than 1,000-sq' in size. As described in Ecology's October 3, 2012 letter to the City, it is not possible to conclude from size alone what functions and values a particular wetland is providing. Ecology's *Wetlands in Washington State, Volume 1: A Synthesis of the Science*⁷ emphasizes that small wetlands and isolated wetlands provide many important functions. Many of these small and/or isolated wetlands are biologically unique systems that are critically important to amphibians. The loss of small wetlands could result in increased fragmentation of habitat and greater distances between wetland patches (See Chapter 4 of Volume 1). These impacts could have a significant effect on the ability of a landscape to support viable populations of wetland-dependent wildlife, including amphibians.

Consistent with the City's *Cumulative Impact Analysis* (CIA) prepared by ESA dated October 2013, Ecology believes that by definition it is very unlikely that "isolated wetlands" exist within shoreline jurisdiction. In fact, section 4.5.2. of the CIA acknowledges that while unlikely, it might be possible

⁵ See *Wetlands & CAO Updates: Guidance for Small Cities (Western Washington Version)*, Ecology Publication #10-06-002, January 2010

⁶ As described in Ecology's comment letter to the City, WDFW defines riparian areas as the area adjacent to flowing or standing freshwater aquatic systems. Riparian habitat encompasses the area beginning at the ordinary high water mark and extends to that portion of the terrestrial landscape that is influenced by, or that directly influences, the aquatic ecosystem. In riparian systems, the vegetation, water tables, soils, microclimate, and wildlife inhabitants of terrestrial ecosystems are often influenced by perennial or intermittent water. Simultaneously, adjacent vegetation, nutrient and sediment loading, terrestrial wildlife, as well as organic and inorganic debris, influence the biological and physical properties of the aquatic ecosystem. Riparian habitat includes the entire extent of the floodplain and riparian areas of wetlands that are directly connected to stream courses or other freshwater.

⁷ Ecology Publication #05-06-006, March 2005, sections 5.3.3 and 5.3.4

for an isolated wetland to exist, they state: *“it could be argued that any wetland within the shoreline jurisdiction is still within or adjacent to the riparian area...”*

In addition, Section 4.5.2 of the *Cumulative Impacts Analysis* cautions that: *“The allowance may create a tendency for applicants to claim that some wetlands are isolated and non-riparian, which could put an administrative burden on City staff to determine if wetlands in question are in fact isolated and not adjacent to a riparian area.”*

The SMP-Guidelines at WAC 173-26-191 (2) (a) (ii) requires that master program regulations *“be sufficient in scope and detail to ensure the implementation of the Shoreline Management Act, statewide shoreline management policies of this chapter, and the local master program policies.”*

Therefore, Ecology cannot approve the incorporation of provision 21A.50.320 (1) into the updated SMP, as the standards do not provide sufficient detail related to anticipated effects and/or potential cumulative impacts resulting from implementation of the amended provisions within the City’s shoreline areas.

Finding

Ecology finds that the proposed SMP amendments as approved by the City under Ordinance 02013-350 cannot be approved as submitted, but can be modified to be consistent with applicable SMP-Guideline requirements as identified by Ecology’s required changes listed in attachment B. Ecology also finds the proposed SMP amendments would be improved through adoption of recommended changes listed in attachment C.

CONCLUSIONS OF LAW

After review by Ecology of the complete record submitted and all comments received, Ecology concludes that the City's proposal, subject to and including Ecology's required changes (**attachment B**), could 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 SMP amendment, subject to the required changes in attachment B, can satisfy the intent of the provision for no net loss of shoreline ecological functions provided in WAC 173-26-201 (2) (c).

Ecology concludes that recommended changes in attachment C will further clarify and improve the proposed SMP amendment.

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

Ecology concludes that the City of Sammamish complied with the purpose and intent of local amendment requirements contained in WAC 173-26-100, including conducting public hearings, notice, consultation with parties of interest and solicitation of comments from tribes, government agencies and Ecology.

Ecology concludes that the City of Sammamish complied with the requirements of RCW 90.58.130 and WAC 173-26-090 regarding public and agency involvement in the SMP amendment process.

Ecology concludes that the City of Sammamish complied with requirements of Chapter 43.21 (C) RCW, the State Environmental Policy Act.

Ecology concludes that the City of Sammamish's limited SMP amendment submittal to Ecology was complete pursuant to the requirements of WAC 173-26-110 and WAC 173-26-201 (3) (a) and (h) and as demonstrated through the SMP Submittal Checklist submitted by the City.

Ecology concludes that procedural requirements for state review and approval of shoreline master program amendments have been followed, as set forth in WAC 173-26-120.

DECISION AND EFFECTIVE DATE

Based on the preceding, Ecology has determined the proposed amendments will be consistent with the policy of the Shoreline Management Act, the applicable guidelines and implementing rules, once changes set forth in **attachment B** are accepted by the City.

As provided in RCW 90.58.090 (2) (e) (ii) the City may choose to submit an alternative to all or part of 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.

As provided in RCW 90.58.090 (7) Ecology's final approval of the proposed amendment will become effective fourteen days from the date of Ecology's written notice of final action.