ATTACHMENT A: FINDINGS AND CONCLUSIONS

AMENDMENTS TO THE CITY OF BURIEN’S
SHORELINE MASTER PROGRAM
SUBMITTED TO THE DEPARTMENT OF ECOLOGY AS RESOLUTION 317

Brief Description of Proposed Amendments:

The City of Burien (City) has submitted to the Department of Ecology (Department) a comprehensive update of its shoreline master program (SMP). The City is adopting the Critical Areas Ordinance (CAO) as part of the SMP by direct reference. The CAO was originally adopted as Ordinance 394, BMC 19.40, on October 20, 2003, and utilized Best Available Science. In order to be consistent with Chapter 173-26 WAC - Part III Guidelines, (Guidelines) and the no net loss of ecological functions standard, some changes were required.

FINDINGS OF FACT

Need for Amendment: The City currently uses an older version of King County’s SMP hence a tailored set of policies and regulations are needed. The proposed update is required to bring the SMP into compliance with RCW 90.58.080 – Timetable for local governments to develop or amend master programs and the most recent standards for SMPs as set forth in the Guidelines.

Amendment History, Review Process: The data shows that the City’s developed shorelines consist almost entirely of single, family, residential homes. Roughly 5-miles of marine shorelines exist, a little over a mile of which is City park. The marine shorelands consist of a mix of high density homes and undeveloped, steep slopes. Few lots are completely undeveloped. Lake Burien is roughly 1.5-miles of shoreline surrounded by single family homes with the exception of a single parcel currently utilized as a children’s center.

The City began its SMP update in late 2007 through a grant from the Department. The record shows numerous Citizen Advisory Committee meetings and public workshops conducted by the Citizen Advisory Committee, Planning Commission and City Council between March 2008 and September 2010.

The record shows that a SEPA Final Environmental Impact Statement Addendum was issued on April 9, 2010. The State of Washington Department of Commerce (Commerce) received the shoreline master program materials on April 12, 2010, for the required 60-day review period. In a letter dated April 13, 2010, Commerce indicated that it had received the document and had forwarded notice of the City’s actions to other state agencies.

The Burien Planning Commission recommended approval of the SMP at its March 30, 2010, meeting. The Burien City Council adopted the SMP on September 27, 2010, through Resolution 317. The Resolution references Exhibit A which is the City’s SMP comprised of Chapters I through VI which includes the Shoreline Environment Designation Map – 20.25.025 Figure 3 and Critical Areas Ordinance BMC 19-40 (Ordinance 394, adopted October 20, 2003).
The proposed SMP amendment was received by Ecology for state review and approval on October 19, 2010. The submittal was verified as complete on October 21, 2010.

Along with interested parties identified by the City, notice of the state comment period was distributed to state task force members and other interested parties on November 2, 2010, in compliance with the requirements of WAC 173-26-120 – State process for approving/amending shoreline master programs. The state comment period began on November 5, 2010, and continued through December 17, 2010.

Ecology held a public hearing at the Burien City Hall to seek input on the proposed amendments. Notice of the hearing, including a description of the proposed amendment and the authority under which the action is proposed, the times and locations of the hearings, and the manner in which interested persons may obtain copies and present their views was provided in the Seattle Times, the City's official newspaper of record.

Over fifty individuals or organizations submitted comments on the proposed amendments during the state comment period. Ecology sent a summary of the comments to the City on January 5, 2010. The City subsequently submitted to Ecology its responses to issues raised during the state comment period on February 18, 2011.

**Consistency with Chapter 90.58 RCW:** The proposed amendments have 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 has also provided evidence of its compliance with SMA procedural requirements for amending an SMP contained in RCW 90.58.090.

**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 -020 definitions). This included review of a SMP Submittal Checklist, which was completed by the City.

**Consistency with SEPA Requirements:** The City issued a SEPA addendum on April 9, 2010, consistent with WAC 197-11-600. The preparation and notice of addenda was done in accordance with WAC 197-11-625.

**Summary of Issues Raised During The Public Review Process:**

Nonconforming structures, buffers and public access were among the list of concerns expressed by citizens.

**Nonconforming structures and buffers:** The SMP development process initially proposed a marine, shoreline buffer of 50-feet with a 15-foot setback for single family homes and most accessory structures. The distance was based primarily on information found in “Protecting Nearshore Habitat and Functions in Puget Sound, an Interim Guide” – EnviroVison et al., October 2007, (Revised June 2010) and analysis of the existing development pattern. The 50-
foot buffer was determined to be a reasonable balance between the distances of existing primary structures from the shoreline with the science for protecting the remaining ecological functions. It should be noted that the submitted SMP includes a 150-foot “vegetation conservation buffer”. This buffer allows new development and redevelopment while regulating the removal of vegetation through a vegetative management plan. Among other things, the regulations state that the management plan should place an emphasis on mitigation that revegetates the first 20-feet adjacent to the ordinary high water mark (OHWM) with native vegetation.

The 50-buffer with 15-setback was advanced by both the citizen Shoreline Advisory Committee and Burien Planning Commission. Allowances were included in the SMP for the reduction of this distance through a common line setback up to 20-feet in areas where density is the highest and homes are closest to the shoreline. Provisions were also created that utilized conditional use and variance permits to reduce the buffer/setback. During the review stage by the City Council, concern was expressed by property owners that homes made nonconforming because of the buffer/setback would lose their value, be difficult to sell and the possibility of expansion or to rebuild questionable. Ultimately the City Council directed staff to reduce the buffer from 50-feet to 20-feet consistent with the existing 20-foot marine setback, and eliminate the proposed 15-foot setback to the buffer. At the same time the City chose to make all legal use and development conforming.

The justification for the 20-foot buffer is based on the development pattern expressed in data collected by the Burien Marine Homeowners Association (BMHA) and a memorandum by their consultant Cedarock Consultants, Inc. “The Use of Science to Develop Marine Buffer Recommendations in Burien”, June 4, 2010. The BMHA reports essentially argue for a smaller buffer based on the number of homes that would be made nonconforming because of the existing development waterward of the homes. Generally, the BMHA science report questions the science used to determine the 50-foot buffer, offers options for improving habitat other than use of buffers, and discusses “no net loss”. BMHA also hired attorneys GordonDerr who argued in support of the 20-foot buffer and against the 50-foot buffer and setback in a letter dated December 17, 2010.

Ecology does not dispute the accuracy of the data collected by the BMHA. Ecology appreciates the work that was done by the group. BMHA’s own detailed studies (A Review of the Grette Associates / Reid Middleton Shoreline Analysis) show that the average setback of existing homes is approximately 58-feet for the residential, marine areas. Recognizing that this number is skewed by homes that might otherwise be closer to the shoreline due to steep slopes or roads, and again using BMHA’s information (Setback Evaluation of the Burien marine Shoreline), approximately 47% of existing homes are between 20 and 100-feet from the ordinary high water mark, 15% between 50 and 100, all of which are unencumbered by steep slopes or roads between the house and shoreline. Less than 20% of the existing homes are between 0 and 20-feet from the OHWM. At the same time it appears that the only science behind the 20-foot buffer is based on a Cedarock’s argument that the science for a 50-foot buffer is not applicable to Burien because it is based on work done on streams and rivers in native forests and that not all the ecological functions that are generally addressed exist in Burien. See Docket Number 38017-0,
Kapo, Et Al, Appellants V Central Puget Sound Growth Management Hearings Board, Respondents, published opinion for a rebuttal of this argument.

Burien’s residential, marine shoreline is highly developed. It is intermixed with areas of minimal to moderate habitat value. The BMHA data shows that out of 293 waterfront properties, there are only 11 vacant properties adjacent to the OHWM, most of which are influenced by steep slopes. Even in this urbanized setting, the science supports buffers and setbacks that remove sedimentation and contaminates, protect existing vegetation, and provide for revegetation thus improving ecological functions. There are numerous opportunities to manage runoff and provide critical shoreline vegetation as development and redevelopment occur that address the ranges presented by scientific standards as established in the EnviroVison report and others (Futurewise document “Making Small Shoreline Buffers Work with Buffer Science” working draft – November 2009 – Updated March 2010. “Protection of Marine Riparian Functions in Puget Sound, Washington”, Brennan et al, June 15, 2009.), all of which translates into protection of ecological function consistent with Ecology’s Guidelines.

Besides better addressing the scientific standards, the 50-foot buffer allows more opportunity for mitigation, restoration, esthetics and alternatives to flat walled bulkheads or the need for a bulkhead at all. The larger buffer recognizes Burien’s shorelines as critical habitat to endangered salmonid (NOAA Fisheries NW Region Critical Habitat Designations for West Coast Salmon and Steelhead in Washington – August 2005). It provides better protection from storm damage. A 20-foot buffer with no setback would allow all new and expanded homes, including appurtenant structures, to be built within 20 feet of the shoreline. This would bring more development closer to the shoreline and affect any existing buffer functions leaving little room for mitigation or options for bulkheads while intensifying the disturbance to remaining nearshore aquatic and terrestrial wildlife. Mitigation is necessary to achieve no net loss of ecological functions by improving functions that are continually impacted by existing development. The 15-foot setback protects the buffer and at the same time allows for some development. The 15-foot setback is also supported by the critical areas regulations Section 19.40.230(2) adopted as part of the SMP by the City Council.

Public Access: Lake Burien home owners have been stewards to the lake long before the City of Burien was established. Relative to other similarly developed lakes, it is in good health and provides significant habitat value. Home owners have presented evidence demonstrating the threat of invasive species such as milfoil to the lake. While there is currently no public access to the lake, there is a possibility that it could exist in the future, primarily as a part of redevelopment of one particular lot. As a result, language was adopted in the Recreation section of the SMP that prohibits the launching of watercraft from any future public access site on the lake.

Home owners and their friends currently use various types of watercraft on the lake which is considered waters of state. The SMP prohibits gas engines on the lake. The Public Access section of the SMP promotes appropriate public access, both visual and physical, as is required by Shoreline Management Act (SMA - Chapter 80.58 RCW) and Guidelines (WAC 173-26 Part
III). The section also requires consideration of protection of private property, public health, and the environment when allowing public access. Environmentally safe watercraft access by the public has not been shown to be impossible. As an example, a city park could provide canoe rentals that did not leave the lake. This is consistent with the statements made by representatives of lake homeowners that their boats do not leave the lake hence have kept out invasive species. Rentals would also control hours of public use on the water.

CONCLUSIONS OF LAW

The City of Burien’s updated shoreline jurisdiction does not include expanded jurisdiction necessary for buffers of critical areas within shorelines of the state (RCW 90.58.030(2)(f)). Therefore, as required by RCW 36.70A.480(6), those critical areas and their buffers not within shoreline jurisdiction as defined by RCW 90.58.030(2.d. or 2.d.i.) shall be regulated by the City’s Critical Areas Ordinance.

The review of the record indicates that the City has complied with the requirements of RCW 90.58.100 regarding the SMP amendment process and contents.

The review of the record indicates 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 amendment process.

The review of the record indicates that the City has complied with the purpose and intent of the local amendment process requirements contained in WAC 173-26-100, including conducting open houses and public hearings, notice, consultation with parties of interest and solicitation of comments from tribes and government agencies.

The review of the record indicates that the City has complied with requirements of Chapter 43.21C RCW, the State Environmental Policy Act.

The City’s amendment submittal to Ecology was complete pursuant to the requirements of WAC 173-26-110.

Ecology has complied with the procedural requirements for state review and approval of shoreline master program amendments as set forth in WAC 173-26-120.

The record submitted indicates that the City’s SMP proposal is not fully 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 on the provisions of RCW 90.58.090, Ecology is required to provide specific changes necessary to make the proposal approvable. Therefore, if the following Attachment “B” (required changes) is accepted by the City, the proposal will be determined consistent with the policy and provisions of RCW 90.58 and the applicable Guidelines. Attachment “C” contains a number of “suggested” changes proposed by either the City or Ecology. With required changes contained in Attachment B and
consistent with RCW 90.58.090(4), Ecology concludes that those SMP segments relating to critical areas within SMA jurisdiction provide a level of protection to assure no net loss of shoreline ecological functions. In particular, the locally adopted 20-foot marine buffer cannot be approved by Ecology. The record provides little or no evidence that the proposed 20-foot buffer is supported by evaluation of the most current, accurate, and complete scientific and technical information, sufficient to achieve no net loss of shoreline ecological functions. Even in developed shoreline areas, ecological functions remain that require protection not afforded by such a limited buffer, including water quality maintenance, fine sediment control, woody debris recruitment, microclimate moderation, nutrient delivery and retention, fish and wildlife habitat, and slope stability. Existing development does not preclude any opportunity for mitigation or restoration otherwise provided by the originally proposed 50-foot buffer with a 15-foot setback. There is no evidence provided that a 20-foot buffer with no setback will achieve no net loss of ecological functions as homes are expanded and rebuilt waterward over time. While it may be true that some areas of the shoreline possess limited existing functions and allowances are made for this through the proposed common-line setback option, there are also other areas that require greater standards of protection in order to maintain and restore ecological functions based on recognized scientific literature in order to achieve the required no net loss of ecological functions standard.

Ecology further concludes that those SMP segments relating to shorelines of statewide significance provide for the optimum implementation of SMA policy. The record shows that the implementing policies and regulations, as well as the shoreline environment designations, are based on the inventory, characterization and analysis.

**DECISION AND EFFECTIVE DATE**

Ecology has required a number changes as indicated in Attachment “B”. Ecology has also provided a number of suggested changes listed in Attachment “C”. Based on all preceding records, Ecology has determined the proposed amendments, with required changes, are consistent with the policy of the Shoreline Management Act, the applicable Guidelines and implementing rules, once required changes set forth herein are approved by the City. Ecology approval of the proposed amendments with required changes is effective on the date on which Ecology receives written notice that the City has agreed to the required changes. This will represent the City’s and Ecology’s final action regarding the proposed SMP update.

As provided in RCW 90.58.090(2)(e)(ii) the City may choose to submit an alternative to all or part of the changes required or suggested 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 and associated rules, then Ecology shall approve the alternative proposal and that action shall be the final action on the amendment.