Chapter 18
Integration of Critical Areas Ordinances

Phase 3, Task 3.2
Shoreline Master Program Planning Process

Introduction

The interaction between the Shoreline Management Act (SMA) and the Growth Management Act (GMA, RCW 36.70A) is complex and can be confusing. This is especially true regarding the incorporation of Critical Areas Ordinances (CAO) provisions into Shoreline Master Program (SMP) comprehensive updates. What applies where, and when? This guidance will help local shoreline planners address critical areas within shoreline jurisdiction.

CAOs in shoreline jurisdiction

When do CAOs apply within shoreline jurisdiction? Local CAOs continue to apply to critical areas within SMA jurisdiction until the Department of Ecology approves one of the following:

- A comprehensive SMP update consistent with the 2003 SMP Guidelines.
- A new master program (for new cities) consistent with the 2003 SMP Guidelines.
- A segment (limited) SMP amendment that specifically addresses critical areas.

Figure 1. Shoreline master programs should address wetlands like these along Baker Bay in the Columbia River. (Washington Coastal Atlas photo.)

After Ecology approves the updated or new SMP or segment amendment, the SMP alone will provide protection for critical areas within shoreline jurisdiction. This transfer of authority occurs immediately with Ecology approval. At that point, you will no longer use the CAO for critical areas planning or regulatory purposes within shoreline jurisdiction. This was clarified by legislation adopted in 2010. See Ecology's web page on this bill (EHB 1653) at http://www.ecy.wa.gov/programs/sea/sma/news/reconsider.html for more information.

(Adopting or updating a CAO that will apply outside shoreline jurisdiction is not a comprehensive or segment SMP update and does not require Ecology approval.)

There is also an important option regarding "buffers necessary to protect critical areas" that extend outside of customary shoreline jurisdiction. See discussion later in this document.

Consider CAO integration early

Early in the SMP update process, start thinking about how critical areas within shoreline jurisdiction will continue to be regulated through the SMP. It's best to conduct a thorough review of the CAO early on and determine whether it meets the standards of the Guidelines (discussed below), rather than waiting until the SMP is almost finished and then adding sections of the CAO. If the CAO meets the standards, appropriate portions can be integrated with the SMP through one of several methods discussed later. If not, new critical areas regulations can be written specifically for the SMP, or the existing ones can be revised for application within shoreline jurisdiction.

Keep a record of decisions

Keep a written record of review and decision-making processes, including those related to critical areas regulations, through the SMP update process. Keeping records is important for several reasons. As you move through the update process, you can look back at the reasons for the decisions and potentially avoid having to make the same decision twice. Also, Ecology will want to know how and why you arrived at certain decisions during the formal review and approval process. Providing the record will help with the review process.

The record also will be part of the defense if the SMP is appealed. For jurisdictions planning under the GMA, SMP appeals are heard by the Growth Management Hearings Board. The growth board reviews the written record compiled by the local government and Ecology and typically does not ask for new evidence or oral testimony. The board will look for information on the record that backs up your decisions.

Some things to track:

- Science-based documents you are using to make your decisions.
- How the science-based documents apply to the local conditions as shown in the inventory and characterization.
- Consideration given to the preferred uses priorities of WAC 173-26-201(2)(d).
- Why critical areas regulations in the SMP are different from those in the CAO (if they are).
- How the critical areas standards in the SMP are consistent with the SMP Guidelines.
- Recommendations and decisions made at key steps in the process by the consultants and local planners, advisory committee, planning commission and elected officials, for example. It may be helpful to track this information in a table that you update as you go.

If CAO regulations are adequate and can be incorporated into the SMP, the CAO record, including use of best available science, should be part of the SMP record. However, the best available science relied on for the CAO may not be adequate to achieve no net loss of shoreline ecological functions, particularly if the science is old and doesn't meet the requirement for "the most current, accurate and complete" information available.

Option – new critical areas regulations

This guidance focuses on integrating CAO provisions into the SMP. Another option is to develop new critical areas regulations specifically for the SMP. Under this option, the existing CAO would not be incorporated into the SMP. New regulations ensure that SMP critical area provisions in the SMP are the most up-to-date standards based on the latest science and related analysis conducted as part of the comprehensive SMP update. In terms of content and organization, this approach can also provide the greatest flexibility when integrating critical area provisions into the rest of the SMP document.

CAO standards for SMPs

CAOs must be based on the GMA requirement to use best available science. These standards can be a useful starting point to meet SMP Guidelines standards, provided the critical areas provisions are also consistent with SMP Guidelines requirements.

For all SMP provisions, the Guidelines require use of "the most current, accurate and complete scientific and technical information available" [*WAC 173-26-201(2)(a)*]. Local governments that plan to integrate CAOs into SMPs must review the existing CAO regulations to ensure they meet SMA requirements for critical area protection. CAO regulations that do not meet the standards of the SMP Guidelines must be changed to meet those standards before being incorporated into the SMP.

> *WAC 173-26-201(2)(a): First, identify and assemble the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern. The context, scope, magnitude, significance, and potential limitations of the scientific information should be considered. At a minimum, make use of and, where applicable, incorporate all available scientific information, aerial photography, inventory data, technical assistance materials, manuals and services from reliable sources of science.*

Local governments often do not want to revise their CAOs. The option is to supplement the SMP regulations to fill in the CAO gaps and inadequacies. In any case, the science used as the basis for SMP critical area provisions must be the most current available.

When Ecology reviews the CAO provisions proposed for incorporation into the SMP, we will check our earlier comments on the CAO. Here is a real-world example:

- In 2007, Ecology provided comments to a local government on its proposed CAO stream and wetland buffers. During the SEPA process, Ecology stated that the proposed buffers were inconsistent with current scientific and technical information.

- Under its GMA authority, the local government adopted its proposed buffer standards. The local government had no legal obligation to address the concerns expressed by Ecology or other agency reviewers.

- When the local government submitted the SMP for approval, it proposed incorporating the CAO buffer standards into the SMP. Ecology reviewed the CAO provisions to make sure they were consistent with current scientific and technical information. Ecology determined that some critical areas provisions, including monitoring and buffers, needed to be upgraded.

- The local government revised its standards in accord with Ecology's recommendations. Ecology approved the updated standards as part of the SMP update.

Incorporating CAOs into SMPs

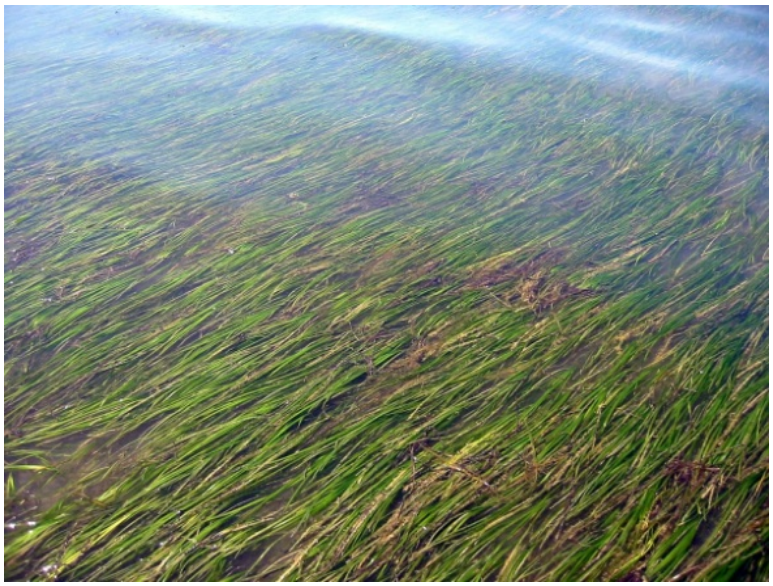

Figure 2. Eelgrass is an important species in marine fish and wildlife habitat conservation areas.

All policies and regulations contained in an updated SMP must be based on the findings of the shoreline inventory and characterization. Many CAOs were developed before the SMP update and do not reflect the results of a recent shoreline inventory and characterization. Local governments must demonstrate how all SMP provisions, including the CAO regulations being incorporated into the SMP, reflect the SMP inventory and shoreline characterization.

CAOs often include regulations and procedures that are not consistent with the SMA or the Guidelines. These include reasonable use exceptions, administrative exemptions and waivers. Other GMA authorized administrative provisions of a CAO such as appeals, permits, penalties and enforcement are not applicable to an SMP. Therefore, local governments cannot include or reference an entire CAO in the SMP. Ecology will not approve an SMP that contains CAO provisions inconsistent with the SMA and its procedural rules or the SMP Guidelines. See the examples of acceptable approaches at the end of this document.

Consider the following for incorporating CAO provisions into the comprehensive SMP update.

- SMP regulations must take into account existing shoreline land uses. CAO buffers often do not. The SMP must accommodate SMA-preferred water-oriented uses, in particular. These uses may be allowed within buffers in appropriate environment designations after mitigation

sequencing is applied. For example, water-dependent port facilities may be allowed within a wetland buffer after mitigation sequencing is applied.

- The cumulative impacts analysis and other no net loss considerations may indicate a need for greater levels of protection than the CAO provides. SMP provisions to ensure more effective mitigation may be needed to meet no net loss.

- Administrative buffer reductions in CAOs must be carefully analyzed for their consistency with SMP guidelines and ability to meet no net loss requirements before being incorporated into the SMP. For the purposes of analyzing cumulative impacts and evaluating no net loss, local government and Ecology must generally assume that local officials will approve administrative buffer reduction requests in the majority of cases. The impacts to ecological functions resulting from buffer reductions must be evaluated accordingly.

Local governments in the process of developing a CAO that may be incorporated into a future SMP update should work closely with Ecology during the CAO development process. Ecology can help assure that CAO provisions are based on current science appropriate for SMPs.

Options to integrate CAO provisions in SMPs

Local jurisdictions can integrate CAO standards into the SMP if the CAO meets the requirements of the SMP Guidelines and SMA procedural rules. If proposed SMP provisions are designed to rely on other local ordinances such as the CAO to meet shoreline management requirements, those local ordinances must be a part of the SMP that is ultimately approved by Ecology. Without this, Ecology has no assurance that referenced provisions in the future will remain compliant with shoreline management requirements.

There are several options to integrate CAO provisions into an SMP:

1. Copy specific sections from the CAO and embed them into the body of the SMP. (Preferred method.)

2. Reference a “specific, dated edition” of the CAO in the SMP, noting in detail either the CAO provisions that will not apply to the SMP, or the CAO provisions that will apply. You must submit a copy of all referenced CAO sections when submitting the SMP to Ecology for approval.

3. Include the relevant portions of the CAO as an appendix and explain in the SMP that the appendix is specifically approved as a part of the SMP.

Incorporation by reference (the last two bullets, above) makes the referenced provisions part of the approved SMP. In order to change referenced provisions in the future, the CAO changes will constitute a limited SMP amendment and must be submitted to Ecology for review and approval before they take effect. Otherwise, the previous version originally approved as part of the SMP update process will continue to apply.

Whatever option you choose, be clear. Local planners and Ecology will need to know precisely what CAO provisions are part of the SMP and what provisions are not. For example, local planners reviewing shoreline permits will need to know that the typical reasonable use exception sections of the CAO are not applicable.

Local governments considering including or referencing parts of their CAO in their SMP should decide on an appropriate integration approach during Phase 3 of the SMP planning process. Consult with Ecology about the proposed approach before moving on to the next steps in the SMP planning process.

CAO integration tips

- Consult with Ecology staff, and describe your approach to meeting critical areas protection requirements, before proceeding with integration.
- Be clear and concise. Avoid ambiguity in references, terms and definitions.
- Check for conflicts and inconsistencies between the CAO and SMP Guidelines.
- Strive for balance. Prepare a document that is easy to read and understand, clear and efficient and legally defensible.

Buffers necessary to protect critical areas

The legislative intent for sole regulation under an updated SMP includes an important caveat. If a local government's SMP does not include "land necessary for buffers for critical areas," then the CAO will continue to regulate critical areas that are partly within the normal SMA jurisdiction and their buffers (RCW 36.70A.480(6). The SMP also will apply within shoreline jurisdiction, resulting in dual coverage – by both the CAO and SMP. This is an important issue regarding the intersection of CAOs and SMPs.

When approving an SMP amendment, local government can voluntarily extend shoreline jurisdiction to include critical area buffers that are beyond the usual SMA jurisdiction (RCW 90.58.030(2)(f)(ii). This is a fundamental issue to be considered during the SMP update process. Extending SMA jurisdiction to include the entire critical area and its buffer can help reduce regulatory duplication.

See discussion of this issue in Chapter 5, *Shoreline Jurisdiction* of the SMP Handbook at http://www.ecy.wa.gov/programs/sea/shorelines/smp/handbook/index.html.

Critical areas not in the SMP

Historically, SMPs have not addressed certain types of critical areas that may exist within shoreline jurisdiction. For example, most SMPs do not include provisions regulating critical aquifer recharge areas and certain types of geologically hazardous areas (such as lahar hazard

areas). The CAO alone has regulated such critical areas. The SMP Guidelines do not address these critical areas.

The statutory intent is that the updated SMP will supersede the CAO. One option for critical areas that are not included in the SMP is to incorporate these CAO regulations into your SMP by reference. (A disadvantage with this option is that any future amendments to the CAO provisions will require a limited SMP amendment to be applied to the Shoreline area.) Your legal counsel may identify other, more flexible options (such as clearly indicating in the adopting ordinance the specific critical area types that are not superseded by the updated SMP.) Local governments with these types of critical areas may contact Ecology for more information about how to address them in their SMP updates.

Examples of CAOs incorporated in the SMP

Following are several examples of CAOs incorporated into master programs. In the Marysville, Whatcom County and Redmond examples, note the reference to a specific, dated version of the CAO and the exclusion of sections that do not apply. While local governments may use a variety of integration approaches to best suit specific needs, they should follow these two practices at a minimum.

City of Marysville

"The Marysville Critical Areas Regulations, as codified in Chapter 19.24 MMC (dated May 2nd, 2005, Ordinance #2571), are herein incorporated into this master program, except as noted below.

Exceptions to the applicability of Marysville Critical Areas Regulations in Shoreline Jurisdiction in the instances specified below.

> *1. If provisions of the Critical Areas Regulations and other parts of the master program conflict, the provisions most protective of the ecological resource shall apply, as determined by the City.*
>
> *2. Provisions of the Critical Areas Regulations that are not consistent with the Shoreline Management Act Chapter, 90.85 RCW, and supporting Washington Administrative Code chapters shall not apply in Shoreline jurisdiction.*
>
> *3. The provisions of Marysville Critical Areas Regulations do not extend Shoreline Jurisdiction beyond the limits specified in this SMP. For regulations addressing critical area buffer areas that are outside Shoreline Jurisdiction, see Marysville Critical Areas Regulations.*
>
> *4. Provisions of Marysville Critical Area Regulations that include a "reasonable use determination" shall not apply within Shoreline Jurisdiction. Specifically,*
>
> - *The sentence in MMC 19.24.020 referring to reasonable use determination does not apply.*
> - *MMC Section 19.24.420 does not apply.*
>
> *5. Provisions of Marysville Critical Areas Regulations relating to variance procedures and criteria do not apply in Shoreline Jurisdiction. Within Shoreline Jurisdiction, the purpose of a variance permit is strictly limited to granting relief from specific bulk, dimensional or performance standards set forth in the applicable master program where there are extraordinary circumstances relating to the physical character or configuration of property such that the strict implementation of the master program will impose unnecessary hardships on the applicant or thwart the policies set forth in RCW 90.58.020. Specifically,*

- *MMC section 19.24.320(2) shall not apply.*

Variance procedures and criteria shall be established in this SMP, Chapter 8 Section B and in Washington Administrative Code WAC 173-27-170.4. Environmental Impacts.

6. Criteria (b) and (c) describing exceptions for approved plats and legally created lots in MMC section 19.24.330(7) shall not apply, except where adjacent to the QWULOOLT Restoration Project."

Whatcom County

Whatcom County's adoption of the CAO into the SMP is similar to Marysville's, but shorter:

23.10.06 References to Plans, Regulations or Information Sources
A. The Whatcom County Critical Areas Ordinance, WCC 16.16 (Ordinance No. 2005-00068, dated Sept 30, 2005, and as amended on February 27, 2007) is herby adopted in whole as a part of this Program, except that the permit, non-conforming use, appeal and enforcement provisions of the Critical Areas Ordinance (WCC 16.16.270-285) shall not apply within shoreline jurisdiction. All references to the Critical Area Ordinance WCC 16.16 (CAO) are for this specific version.

City of Redmond

20D.150.30

(2) Shoreline Master Program Regulations. The following regulations shall constitute the Redmond Shoreline Master Program development regulations
- (a) RCDG 20D.150, *Shoreline Regulations*
- (b) RCDG 20D.140, Critical Areas (Ord. 2259, dated May 28, 2005), with the exception of the following subsections:
  - (i) 20D.140.10-030, *Exemptions*
  - (ii) 20D.140.10-060, *Permit Process and Application Requirements*
  - (iii) 20D.140.10-170, *Buffer Width Variances*
  - (iv) 20D.140.10-190, *Reasonable Use Provision*
  - (v) 20D.140.10-200, *Public Project Reasonable Use Provision*
  - (vi) 20D.140.20-020(6), (7), *Stream Buffer Width Averaging*
  - (vii) 20D.140.20-020(8), *Clearing and Grading in Outer Buffer*
  - (viii) 20D.140.20-020(10), *Expansion of Nonconformity in Stream Buffer*
  - (ix) 20D.140.20-030, *Alteration of Fish and Wildlife Habitat Conservation Areas*
  - (x) 20D.140.60-030, *Alteration of Geologically Hazardous Areas – Generally*
  - (xi) 20D.140.60-040, *Alteration of Geologically Hazardous Areas*
  - (xii) 20D.140.70, *Procedures*

20D.150.30-020

(2) In the event of any conflict between these regulations and any other regulations of the City, the regulations that provide greater protection of the shoreline natural environment and aquatic habitat shall prevail.

City of Chewelah

Chewelah's SMP includes critical areas regulations in Chapter 7, *Critical Areas in Shoreline Areas.* These CAO regulations do not include provisions that are inconsistent with the SMA or Guidelines, such as reasonable use exceptions, administrative exemptions and other provisions discussed earlier.