

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

SMP Submittal accepted September 13, 2011, Ordinance No.3062
Prepared by Rick Mraz on December 15, 2011

Brief Description of Proposed Amendment:

The City of Port Townsend has submitted to Ecology for approval, a limited amendment to their Shoreline Master Program (SMP) consistent with Shoreline Management Act (SMA) and SMP Guidelines requirements. The City of Port Townsend completed a comprehensive update of its SMP in 2007. In the four years of implementation, the city has identified a number of scrivener's errors, internal inconsistencies, incomplete definitions and misidentified, cross-referenced codes.

This limited amendment is an effort to remedy those inconsistencies, incorporate state and federal regulatory changes and improve the document's cohesiveness with other local regulations. Regional staff recommends approval.

The City proposes amending Chapter 19.05 Critical Areas Ordinance (CAO) of the Port Townsend Municipal Code, and the Development Regulations of the Shoreline Master Program (SMP) Additional reports and supporting information and analyses noted below, are included in the submittal.

FINDINGS OF FACT

Need for amendment. The proposed amendment is needed to remedy those inconsistencies, incorporate state and federal regulatory changes and improve the document's cohesiveness with other local regulations.

SMP provisions to be changed by the amendment as proposed:

To facilitate review, following is a brief explanation for each of the amendments to the SMP and CAO regulations. This should be read in concert with the attached Ordinance 3062.

SECTION 1. Amend Sections 10.17 Duration of Permits of the Shoreline Master Program to be consistent with WAC 173-27-090(4) regarding the time limitation of SSDP as follows:

There is an inconsistency between City of Port Townsend Shoreline Master Program and WAC 173-27-090(4) regarding the time limitation of shoreline permit approvals. Therefore, notwithstanding the provisions in the SMP, the 2-year time period to commence construction (and the 5-year time period for development activities) does not include the time "due to the need to obtain any other governmental permits and approvals" (per WAC 173-27-090(4)). Consistent with the WAC, the amended language clarifies that the city may, based upon specific findings, set a shorter expiration period.

SECTION 2. Amend Sections 10.14.3 City Council and 10.15 Appeals of the Shoreline Master Program consistent with the appeals procedures codified in the Port Townsend Municipal Code (PTMC) as follows:

The SMP currently refers to user to the PTMC Title 20 for the appeals procedure. However, in 2010, Chapter 20.01 Land Development Administrative Procedures was amended to refer the user to Section 10.15 of the SMP; Foot note 5 to Table 2 reads: “For appeals of shoreline permits, see Section 10.15 of the City of Port Townsend Shoreline Master Program. Furthermore, Chapter 20.01 was amended such that decisions by the Shoreline Administrator or Hearing Examiner could no longer be appealed to the City Council. These amendments created an inconsistency between the two documents. The proposal is to make corollary amendments to Sections 10.14.3 and 10.15 of the SMP.

SECTION 3. Amend Shoreline Master Program Section 14.11 Monitoring and Adaptive Management #3 paragraph 3 to require reassessment consistent with recent updates to the RCW 90.58.080 4(b):

ESHB 1478 effective July 22, 2011 provides cities and counties an extra year between required review and revision of shoreline master programs (Now required every eight years rather than seven.)

SECTION 4. Amend Critical Areas Section 19.05.030D, 19.05.040 and 19.05.050B (1) of the Port Townsend Municipal Code to clarify the overlap of Critical Areas ordinance, SMP and SEPA:

Pursuant to 19.05.050 B. Permit Processing - The director shall consolidate the processing of related aspects and permits from other regulatory programs which affect activities in critical areas, such as SEPA, shorelines, subdivision, etc., with the critical area review process established in this chapter to provide a timely and coordinated permit process as set forth in Chapter 20.01 PTMC.

SEPA Overlap: SEPA has broader application than CAO and thus, if SEPA is triggered (e.g., greater than 500cy or historic resources), CAO review should be addressed in the SEPA document. (See WAC 197-11-908). Proposed underline text is from the Department of Commerce model ordinance.

SECTION 5. Amend Critical Areas Section 19.05.040, Critical area permit requirements – Exemptions, nonconforming structures, application requirements, special reports, and advance determinations of the Port Townsend Municipal Code to clarify submittal requirements and documentation of waivers:

19.05.040 is intended to be a comprehensive list of submittal requirements, however, it currently lacks reference to the requirement for a stormwater plan (19.05.060 (5)) and site mitigation plans (19.05.060 (6)).

In regards to waivers, it is standard practice to document a waiver of compliance with application requirements and delineations in a short waiver form, similar to an exemption from a shoreline substantial development permit. The City’s fee schedule currently includes a critical areas waiver fee of \$100.00. During the Waiver process, the DSD director has the ability to require a HH/NOT as warranted.

SECTION 6. Amend Critical Areas Section 19.05.020 Definitions of the Port Townsend Municipal Code to add a definition for “critical slope”, “geotechnical engineer”, and “infill”, and to modify the definitions of “qualified critical areas consultant” and “steep slope”:

In Section 13 below, proposed amendments to Section 19.05.100 E uses the term “infill” however, infill is not defined in Chapter 19.05. The proposal is to use the same definition as found in Title 17, Zoning.

The code is internally inconsistent in the way “steep slope” is defined and measured. For example, the definition of “steep slope” refers to a run of 40-feet while the critical areas code in three other sections refers to a run of 25-feet (See Exhibit C attached); definition and classification in 19.05.100B are different and thus have caused confusion. Planning staff consulted with Ken Clow, Public Works Director and Hugh Shipman, Coastal Geologist with the Washington Department of Ecology (Exhibit D, email from Hugh Shipman) and Department of Commerce Guidance document: Appendix A Example Code Provisions For Designating and Protecting Critical Areas. The definition 1a-c is taken from the example code.

In 2002, the City of Port Townsend modified its Critical Areas Ordinance based on a 2001 letter received from the Washington Dept. of Licensing (attached). Specifically, we modified the definition of “Qualified Consultant” as follows:

“Qualified critical area consultant” means a person who has the qualifications specified below to conduct critical areas studies pursuant to this chapter, and to make recommendations for critical area mitigation. For areas of potential geologic instability, the qualified critical areas consultant shall be an engineering geologist with a Washington specialty license in engineering geology as specified in Chapter 18.220 RCW.”

Not only are there very few that meet this requirement in the city (Exhibit 2, attached), but, it does not appear to be the appropriate license for the type of report we typically require (i.e., a report with mitigation measures); from the Washington State Licensing Website: Licenses and seals:

What professional designation do I use now that I am a licensed geologist?

The law doesn’t address the issue of professional designations. The Geologist Licensing Board recommends the use of LG (Licensed Geologist), LHG (Licensed Hydrogeologist), and LEG (Licensed Engineering Geologist). These designations are consistent with the wording on geologist stamps. This is a recommendation, however, not a requirement.

What is the difference between an engineering geologist and a geotechnical engineer?

An engineering geologist is an earth scientist who has specialized in the application of geologic principles to civil works. A geotechnical engineer is a civil engineer who has specialized in the design and construction aspects of earth materials. Both professions share many of the same knowledge, skills and abilities. Each field, however, has particular strengths. Engineering geologists typically have greater skills in characterization of geologic conditions and processes, and in evaluation of how processes will be affected or will affect a specific

development activity. Geotechnical engineers will typically have greater skill in development of site-specific geotechnical design recommendations and criteria.

Proposed Resolution: Modifying the code to be similar to the Bainbridge code with modifications suggested by Washington Department of Licensing.

SECTION 7. Amend Critical Areas Section 19.05.040 B Minor Critical Area Permits of the Port Townsend Municipal Code to provide further guidance on what constitutes “minor” improvements:

The amendment provides further guidance on what constitutes “minor development” based upon Section 040E (g)(i) which allows waiver of special reports for when less than 250 square feet.

SECTION 8. Amend Critical Areas Section 19.05.060 D.4.a Performance Standards of the Port Townsend Municipal Code to clarify the table accompanying the text regarding impervious surface limits:

This section pertains to impervious surfaces while the table uses the term “lot coverage” the terms are not interchangeable and thus the table should be amended consistent with the text. Impervious surface includes structures and all impervious surfaces such as parking areas and driveways while, per Chapter 17, Zoning, “Lot coverage” means the total ground coverage of all buildings or structures on a site measured from the outside of external walls or supporting members, including accessory buildings or structures, but not to include at-grade off-street parking lots, deck areas, terraces, swimming pools, pool deck areas, walkways, roadways, or driveways.

SECTION 9. Amend Critical Areas Section 19.05.080 for Fish and Wildlife Habitat Conservation Areas of the Port Townsend Municipal Code to correct inconsistencies and reflect the overlap with Title 16 Flood Damage Prevention and the mandate to comply with the Endangered Species Act:

Amendment is needed to correct an internal inconsistency – one section of the CAO says a habitat management plan is required “for any development in or adjacent to areas identified as habitat for endangered, threatened or priority species” while another says “for any development in areas identified as breeding or nesting habitat for endangered, threatened or priority species” (emphasis added). Staff consulted with Theresa Nation of WDFW, Land Use and Environmental Planner. The WAC 360-190-130 Fish and Wildlife Conservation Areas requires local jurisdictions to consider classification and designation of areas where endangered, threatened, and sensitive species have a primary association (emphasis added). The City may choose to provide broader protections such as protecting “breeding and nesting” habitat of priority species, which appears to be the intent here. (See Exhibit E for definitions of the terms: endangered, threatened, sensitive and priority).

Reflect Section 19.05.080 F1. Development in areas waterward of the ordinary high water mark requires a habitat analysis.

The amendment incorporates verbatim language from FEMA’s NFIP-ESA Model Ordinance. Cities and counties must amend their local floodplain management ordinances to comply with Endangered Species Act (ESA) requirements by September, 2011. Local governments have three primary compliance methods:

1. *Adopt the newly revised model ordinance;*
2. *Demonstrate that existing plans and regulations provide protection for listed species; or*
3. *Comply project by project (by consulting with the federal services and preparing a habitat assessment).*

Port Townsend is currently considering Option #3.

The CAO and Floodplain Management Provisions, codified in Chapter 16 of the PTMC have significant Overlap. Proposed Amendments to the CAO are intended to acknowledge the overlap and the mandate to comply with the ESA. However, the amendments are not intended to demonstrate compliance through regulatory amendments - at this time, it is the City's intent to comply via project by project analysis as warranted. The intent is to require a habitat assessment prepared in accordance with the FEMA guidance for development applications in the regulatory floodplain.

SECTION 10 Amend Critical Areas Section 19.05.080 B1 and C1 for Fish and Wildlife Habitat Conservation Areas of the Port Townsend Municipal Code to improve consistency with WAC 365-190-130:

Both Sections B and C are amended to include areas with which federally listed species have a primary association consistent with WAC 365-190-130 Fish and Wildlife habitat conservation areas.

Section B. Classification, lists nine conservation areas, however only four are listed in C. Regulated development. This may have been intentional however, two conservation areas that require protection under the WACs are not listed in Section C and are proposed for inclusion: federally listed species and naturally occurring ponds.

Pursuant to WAC 365-190-080 Critical Areas, Counties and cities should clearly state that maps showing known critical areas are only for information or illustrative purposes.

Proposed revisions are based upon staff's review of Department of Commerce Guidance document: Appendix A Example Code Provisions For Designating and Protecting Critical Areas, WAC 365-190-080 and 130 and conversations with Theresa Nation of WDFW, Land Use and Environmental Planner, Washington Department of Fish and Wildlife.

(See Exhibit E, WDFW Definitions of Species Status)

SECTION 11. Amend Critical Areas Sections 19.05.080 F Performance Standards for Marine Habitats and new G. under Fish and Wildlife Habitat Conservation Areas of the Port Townsend Municipal Code to address new requirements for implementing the National Flood Insurance Program (NFIP) consistent with the Endangered Species Act (ESA):

RCW 36.70A.172(1) requires that local governments give special consideration to conservation and protection measures necessary to preserve or enhance anadromous fish.

SECTION 12. Amend Critical Areas Section 19.05.100 B Classification for Geologically hazardous areas of the Port Townsend Municipal Code to improve consistency with definition of "steep slope" in section 19.05.020 of the Critical Areas Ordinance:

Staff consulted with Ken Clow, Public Works Director and Hugh Shipman, Coastal Geologist with the Washington Department of Ecology and the Example Code Provisions for Designating and Protecting Critical Areas by the Department of Commerce. The language is taken from the example code provisions.

SECTION 13. Amend Critical Areas Section 19.05.100 D (2)(e) Landscaping Design for Geologically hazardous areas of the Port Townsend Municipal Code to cross-reference the associated mitigation plan:

Landscape design in Section 19.05.100 D (2) (e) is intended to be incorporated into the mitigation plan required under Section 19.05.050D (6) rather than a separate plan requirement.

SECTION 14. Amend Section 19.05.100 E Critical area 4 – Geologically hazardous area of the Port Townsend Municipal Code to more equitably apply buffers and setbacks for infill development and for single lots whether platted or unplatted.

As currently written, one could interpret Section E1 such that the buffer is established by the applicant's engineering geologist; minimum buffers in Sections E2 and E3 do not apply. However, both city staff and Department of Ecology staff agree that the section should be read in its entirety and the minimum buffers should apply. Another weakness in the existing code is that it is silent in regards unplatted land and thus one may interpret that minimum buffers do not apply.

The amended language clarifies that minimum buffers apply to all properties (platted and unplatted). Furthermore, the revisions to Section E3 allow for infill subdivisions, thus allowing larger parcels to meet the underlying density provided the proposed plat does not allow an increase in the number of waterfront lots; thus the amendment does not increase the potential environmental impact. (Note: any application for subdivision would be reviewed for compliance with all applicable sections of the code including but not limited to Title 18 Land Division and Critical Areas Section 19.05.060D (3) New Short Plats, Binding Site Plans, and Subdivisions – Building Pad). (See analysis in the SEPA Addendum, Exhibit F).

SECTION 15. Amend Critical Areas Section 19.05.110 E 3(a) Buffer Widths of the Port Townsend Municipal Code to correct the table:

This is a minor housekeeping amendment to correct the placement of the header which has caused some confusion and delete repetitive language.

Amendment History, Review Process: The city indicates the proposed SMP amendments originated from a local planning process that began on June 22, 2011. The record shows that a workshop open to the public was held on July 14, 2011 and public hearings before the Planning Commission were held on July 28, 2011 and August 15, 2011.

Documents provided by the City/County indicate notice of the hearing was published on June 22, 2011.

With passage of Ordinance #3062, on September 6, 2011, the City authorized staff to forward the proposed amendments to Ecology for approval.

The proposed SMP amendments were received by Ecology for state review and verified as complete on October 5, 2011. Notice of the state comment period was distributed to state task force members and interested parties identified by the City on October 18, 2011, in compliance with the requirements of WAC 173-26-120. The state comment period began on October 31, 2011 and continued through December 9, 2011.

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 has also provided evidence of its compliance with SMA procedural requirements for amending their SMP contained in RCW 90.58.090(1) and (2).

Consistency with “applicable guidelines” (Chapter 173-26 WAC, Part III): 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.

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 amendments on September 13, 2011. Notice of the SEPA determination was published in the *Port Townsend Leader* on June 22, 2011. Ecology did not comment on the DNS.

Summary of Issues Raised During The Public Review Process:

No public comment was received during the City or Ecology comment periods.

Summary of Issues Identified by Ecology as Relevant To Its Decision:

Additional minor text edits were identified and are recommended changes as detailed below:

- Page 14, Line 14 "Habitat Mitigation Plan - If the assessment conducted under Section 4 concludes..." should read Section 3.
- Page 15 Line 5 "As required in Section 4.7, the building official..." strike “As required in Section 4.7”.
- Page 15 Line 9 "unfinished portions of the project will be completed, in accordance with Section 4.7.B." strike “in accordance with Section 4.7.B”.

CONCLUSIONS OF LAW

After review by Ecology of the complete record submitted and all comments received, Ecology concludes that the City’s proposed limited SMP amendment is 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). This includes a conclusion that approval of the proposed SMP contains sufficient policies and regulations to assure that no net loss of shoreline ecological functions will result from implementation of the new updated master program (WAC 173-26-201(2)(c)).

Ecology also concludes that a separate set of recommended changes to the submittal (identified during the review process and itemized in Attachment B) would be consistent with SMA policy and the

guidelines and would be beneficial to SMP implementation. These changes are not required, but can, if accepted by the City, be included in Ecology's approved SMP amendments.

Consistent with RCW 90.58.090(4), Ecology concludes that those SMP segments relating to critical areas within Shoreline Management Act jurisdiction provide a level of protection at least equal to that provided by the City's existing critical areas ordinance.

Ecology concludes that the proposed SMP amendments satisfy the criteria for approval of limited amendments found in WAC 173-26-201(1)(c). Analysis of consistency is as follows:

WAC 173-26-201 (1) (c) Limited master program amendments may be approved by the department provided the department concludes:

(i) The amendment is necessary to:

(A) Comply with state and federal laws and implementing rules applicable to shorelines of the state within the local government jurisdiction;

The proposed amendment establishes provisions consistent with new requirements for implementing the National Flood Insurance Program (NFIP) consistent with the Endangered Species Act (ESA):

RCW 36.70A.172(1) requires that local governments give special consideration to conservation and protection measures necessary to preserve or enhance anadromous fish.

(B) Include a newly annexed shoreline of the state within the local government jurisdiction;

N/A

(C) Address the results of the periodic master program review required by RCW [90.58.080\(4\)](#), following a comprehensive master program update;

N/A

(D) Improve consistency with the act's goals and policies and its implementing rules; or

The proposed amendment will increase consistency with the implementing rules by incorporating clarifying language on several topics (see Sections 1, 3 & 9 below).

(E) Correct errors or omissions.

This is the primary purpose of the amendment. As detailed below, the City has identified internal and external inconsistencies, areas of incompleteness and text errors that require correction to produce a more coherent, comprehensive document.

(ii) The local government is not currently conducting a comprehensive shoreline master program update designed to meet the requirements of RCW [90.58.080](#), unless the limited amendment is vital to the public interest;

Port Townsend completed their comprehensive SMP update in 2007.

(iii) The proposed amendment will not foster uncoordinated and piecemeal development of the state's shorelines;

(iv) The amendment is consistent with all applicable policies and standards of the act;

(v) All procedural rule requirements for public notice and consultation have been satisfied; and

(vi) Master program guidelines analytical requirements and substantive standards have been satisfied, where they reasonably apply to the limited amendment. All master program amendments must demonstrate that the amendment will not result in a net loss of shoreline ecological functions.

Provisions (iii) thru (vi) are satisfied and evidence thereof is present in the application and public record that the City submitted to Ecology.

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 has complied with the requirements of RCW 90.58.100 regarding the SMP amendment process and contents.

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

Ecology concludes 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, government agencies and Ecology.

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

Ecology concludes that the City'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) requiring a SMP Submittal Checklist.

Ecology concludes that it has complied with the procedural requirements for state review and approval of shoreline master program amendments as set forth in RCW 90.58.090 and WAC 173-26-120.

DECISION AND EFFECTIVE DATE

Based on the preceding, Ecology has determined the proposed limited amendments updating the SMP, are consistent with Shoreline Management Act policy, the applicable guidelines and implementing rules. Ecology approval of the proposed amendments is effective 14 days from Ecology's final action approving the amendment.