

# City of Des Moines



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## **SMP Periodic Review Memo to the Department of Ecology and Supporting Findings of Consistency LUA2019-0012**

**Date:** April 22, 2019

**To:** Misty Blair, WA Department of Ecology

**From:** Jason Woycke, AICP – Planner II

### **Background**

In 2018 the City of Des Moines (City) embarked on a periodic review of the Shoreline Master Program (SMP). The SMP provides the development standards for land use within 200 feet landward of the Ordinary High Water Mark (OHWM) and within the waters of Puget Sound under the City's jurisdiction. It provides a comprehensive vision, the policy framework and regulations for how the shoreline areas will be used and developed over time. Approximately 115 acres of prime real estate in the City is within 200 feet of Puget Sound and regulated by the SMP. Most of the City's marina and much of the Redondo neighborhood is included in this area.

The City's first SMP was adopted in 1972 after the Shoreline Management Act (SMA) was adopted by Washington State in 1971. The SMA is administered through a cooperative program between local governments and the Washington State Department of Ecology (Ecology), whereby local communities prepare a SMP that is adopted under guidelines established by Ecology. The City's current SMP was adopted in 2011.

Every eight years State law (Chapter 90.58 RCW and Chapter 173-26 WAC) requires that the City conduct a periodic review of the SMP and this time the City has a deadline of June 30, 2019, to complete it. Ecology provided grant funds to assist the City with the periodic review work. The purpose of this SMP periodic review is:

- To ensure that the SMP complies with current State law that has been updated since the City's last SMP amendment in 2011;
- To ensure consistency of the SMP with the City's comprehensive plan and development regulations that have been updated since the City's last SMP amendment in 2011;
- To consider amendments to address changes in City policy, as directed by the Des Moines City Council; and
- To facilitate the submittal and review of projects by clarifying SMP content.

The City's goal is that the SMP amendment will make it easier for residents, developers, and applicants to understand the permitting process as well as make the review of projects more efficient. A public participation plan has been implemented throughout the SMP periodic review process to provide the public an opportunity to learn about the process, review, and comment on the draft regulations. The plan has included a project webpage, news media press releases, social media updates, two open houses, a booth at the farmers market, and formal public comment period and hearing.

## **Discussion**

Approval by the Des Moines City Council of Ordinance No. 19-010 would enact proposed amendments found in the Proposed Amended Shoreline Master Program, which is available to view on the City's webpage at <http://www.desmoineswa.gov/smp>. The required joint City and State public hearing was held on April 11, 2019, where the public had an opportunity to provide comments on the draft SMP. This memo is being submitted to the Department of Ecology for review of the proposed SMP amendments and the City's response to public comments. If the Department of Ecology issues an initial determination of consistency, the Des Moines City Council may adopt the amendments on second reading. June 27, 2019, is currently targeted for the City Council's adoption.

Ecology's review criteria is found in WAC 173-26-201(1)(c) and is intended to ensure that the proposed amendment:

- Will not foster uncoordinated and piecemeal development of the state's shorelines.
- Is consistent with all applicable policies and standards of the SMA.
- Meets all procedural rule requirements for public notice and consultation.
- Satisfies master program guidelines analytical requirements and substantive standards, including that the amendment will not result in a net loss of shoreline ecological functions.

The City of Des Moines utilized the joint local and state review process and consulted with Ecology early in the local adoption process. Ecology assisted by providing a checklist to all jurisdictions that outlines the State laws that have changed since the last SMP update. Once amendments were drafted, the City and Ecology noticed on March 19, 2019, for concurrent public comment periods, the SEPA Determination of Non-Significance, and the shared local and state public hearing that was held on April 11, 2019.

The combined Ecology/City public hearing was one of the ways that the public could comment on the proposed SMP amendments. Comments could also be submitted by mail, email, or through the City's online comment form at <http://www.desmoineswa.gov/smp>, through the end of the public comment period on April 18, 2019. City staff considered comments received and prepared a response to comments as part of the amendment package that the City is submitting to Ecology.

A summary of the proposed amendments follows. It demonstrates that the amended SMP will comply with current State law, will be consistent with the City's comprehensive plan and development regulations, will be consistent with regulatory/policy changes as directed by the Des Moines City Council, and will facilitate the submittal and review of projects within the shoreline jurisdiction.

SMP Appendix A - Shoreline Inventory and Characterization is also being submitted with the Proposed Amended Shoreline Master Program. There were no changes to the appendix.

## **Summary of the City's Primary Amendments and Supporting Findings of Consistency**

1. Ecology provided a Periodic Review Checklist of required amendments for cities to stay current with amended State laws and rules. The Periodic Review Checklist is included with this submittal to Ecology and includes explanation of the reviews completed by the City as well as what actions were completed by the City.
2. Proposed SMP amendments that are intended to provide clarification of city regulations and flexibility in permitting:

- a) Permit illuminated signs, with conditions, in the High Intensity Environment without a Conditional Use Permit (CUP). A CUP is currently required by the City's SMP (SMP 6.3.6(3)). Nothing in the RCW or WAC dictates that a CUP is required for illuminated signs. It is proposed that the City Manager or the City Manager's designee may condition the location, design, and/or brightness of illuminated signs to ensure no net loss of ecological functions.
- b) Permit dive parks in the Aquatic Environment without a CUP or variance. The permitting of dive parks is currently not clear in the City's SMP (SMP 6.3.12). Dive parks are a foreseeable water-dependent recreational use within Des Moines. Adding clarity to allow for this use plans for and fosters reasonable and appropriate uses, and implements the use prioritization goal of RCW 90.58.020. The City proposes that project-specific conditions would be added and mitigation would be required to ensure no net loss of ecological functions.
- c) Allow for water-related and water-enjoyment commercial uses in the Urban Conservancy Environment. These types of commercial uses are not currently permitted in the City's SMP (SMP 6.3.4(1)). This is consistent with WAC 173-26-211(5)(e)(ii)(C). Public parks and recreation would still be the primary uses within the Urban Conservancy Shoreline Environment. Allowing accessory water-related and water-enjoyment commercial uses would still implement the public access and public recreation objectives of the SMA.
- d) Raise the nonconforming structure replacement cost threshold to 75%. Currently if an applicant removes in excess of 50% the replacement cost of a structure, the structure shall become compliant with current zoning and shoreline development standards (SMP 6.3.2(2)(h)(i)). There is no applicable State SMP requirement. This increase in cost threshold would result in no net loss of shoreline ecological function because it is related to the replacement of an existing structure and shall demonstrate mitigation sequencing.
- e) Add additional single-family residential appurtenances that will be considered exempt from a Shoreline Substantial Development Permit (SSDP). These will include sheds, patios, cabanas, and hot tubs (SMP 7.2.6). WAC 173-27-040(2)(g) provides that in addition to the established statewide normal appurtenances, "local circumstances may dictate additional interpretations of normal appurtenances which shall be set forth and regulated within the applicable master program." In Des Moines these include sheds, patios, cabanas, and hot tubs.
- f) Allow for a reduction in yard requirements when the reduction would move proposed development further away from the ordinary high water mark (OHWM). There is a similar allowance in the City's environmentally critical area code, but none that currently applies to the marine buffer in the SMP (SMP 6.1.1(4)). WAC 173-26-201(2)(e) states that, to assure no net loss of shoreline ecological functions, master programs shall include provisions that require proposed individual uses and developments to analyze environmental impacts of the proposal and include measures to mitigate environmental impacts not otherwise avoided or mitigated by compliance with the master program and other applicable regulations.
- g) Allow for upland fill with associated permitted uses, and specifically for cultural resources, without a CUP. City regulations regarding upland fill within the shoreline is currently more stringent than State law and this change would make it more consistent (SMP 6.2.7(2)(b)). The WAC, and specifically WAC 173-26-231(3)(c), only states that fills waterward of the ordinary high-water mark for any use except ecological restoration should require a CUP. It also states that fills shall be located, designed, and constructed to protect shoreline ecological functions and ecosystem-wide processes, including channel migration.
- h) List specific uses that are permitted within marine and critical area buffers through an SSDP or Shoreline Exemption. While most of these uses are currently permitted without the CUP or variance requirement, the new list will provide added clarity and will make implementation of

the SMP easier (SMP 7.5.10). The proposed amendments clarify that the following activities shall not require shoreline variance permits: Private shoreline access paths, walkways, stairs, and trails (WAC 173-26-221(4), RCW 90.58.020, RCW 90.58.100(2)); Public access and recreation (WAC 173-26-221(4), RCW 90.58.020, RCW 90.58.100(2)); Park improvements (WAC 173-26-221(4), RCW 90.58.020, RCW 90.58.100(2)); Bulkheads, bioengineered erosion stabilization, and upland bluff stabilization (WAC 173-26-231(3)(a), RCW 90.58.100(6)); Utilities (WAC 173-27-040); Fill required specifically for the protection of archaeological or cultural resources ((WAC 173-26-231(3)(c)); Maintenance dredging (WAC 173-26-231(3)(f)); At-grade patios adjacent to a primary single-family residence (WAC 173-27-040(2)(g)); Hazardous Waste Cleanup (RCW 90.58.355, WAC 173-27-044); and Beach Restoration (WAC 173-26-186(8), WAC 173-26-201(2)(f)).

- i) Allow for maintenance dredging without a CUP. Washington State allows for this, but the City's existing SMP does not (SMP 6.2.6(4)). WAC 173-26-231(3)(f) states that maintenance dredging of established navigation channels and basins should be restricted to maintaining previously dredged and/or existing authorized location, depth, and width.
3. Incorporation of the City's environmentally critical area regulations into the SMP under Section 6.4, as recommended by the Department of Ecology. WAC 173-26-191(2)(b) states that "for the purposes of completeness and consistency, local governments may include other locally adopted policies and regulations within their master programs. For example, a local government may include its critical area ordinance in the master program to provide for compliance with the requirements of RCW 90.58.090(4), provided the critical area ordinance is also consistent with this chapter." WAC 173-26-221(2)(a) states that "pursuant to the provisions of RCW 90.58.090(4) and 36.70A.480(3) as amended by chapter 107, Laws of 2010 (EHB 1653), shoreline master programs must provide for management of critical areas designated as such pursuant to RCW 36.70A.170 (1)(d) located within the shorelines of the state." Incorporation of the City's environmentally critical area regulations into the SMP is also consistent with WAC 173-26-201(2)(a) & (c).
4. Incorporation of the City's applicable nonconforming regulations into the SMP under Section 6.3.2, as recommended by the Department of Ecology. WAC 173-26-191(2)(b) states that "for the purposes of completeness and consistency, local governments may include other locally adopted policies and regulations within their master programs." Pursuant to WAC 173-26-191(2)(a)(iii)(A), "in some circumstances existing uses and properties may become nonconforming with regard to the regulations and master programs should include provisions to address these situations in a manner consistent with achievement of the policy of the act and consistent with constitutional and other legal limitations."

### **Public Comments and the City's Response**

The City received comments from two individuals during the public comment period that ended on April 18, 2019. One comment was received from an individual who testified at the joint local and state public hearing held on April 11, 2019 and the other comment was received from the Muckleshoot Indian Tribe Fisheries Division Habitat Program on April 18, 2019 at 4:55 PM.

#### *Summary of comment by JC Harris on April 11, 2019:*

Three Tree Point and south of it, including Poverty Bay, is not protected, monitored appropriately, or treated with the respect it deserves. Fishing is poor. Would like Ecology to take care when allowing for any changes to the SMP in case the changes contribute to the degradation of habitat and sea life in Des Moines. A dive park would not make sense if there is no sea life to observe.

*Verbatim comments from Karen Walter, Watersheds and Land Use Team Leader for the Muckleshoot Indian Tribe on April 18, 2019:*

We have reviewed the available documents for the City of Des Moines' Shoreline Master Program Update/review. We offer the following comments in the interest of protecting and restoring the Tribe's treaty-protected fisheries resources.

1. In the restoration section, there is mention of replacing the culvert on Barnes Creek as a requirement of the culvert case injunction without noting its origin as a case within *U.S v. Washington*. Please note that the correct way to describe this requirement is to say that it is part of *U.S v Washington's* federal court injunction.
2. It is not clear why various accessory uses in the shoreline warrant a shoreline exemption, particularly if they would make a site less conforming and result in more impacts to shoreline areas that reduce habitat and functions needed for salmon, shellfish and other fisheries resources. There also appears to be no new analysis about the cumulative impacts associated with this proposed change.
3. Notification requirements. We request notification of all applications for projects and actions in the regulated shoreline- exemptions, variances, conditional uses, and substantial development permits. We also request a copy of all city issued approvals for these proposed permit actions. The notification language currently proposed makes no mention of the Muckleshoot Indian Tribe or affected tribes so it is not clear that we would receive these notices and decisions.

We appreciate the opportunity to review this proposal and look forward to responses to these comments.

***The City's response to comment(s):***

1. Comment: Des Moines shorelines are not protected, monitored appropriately, or treated with the respect they deserve. Fishing is poor.

Response: The City's shorelines are regulated by the City's SMP that was adopted in 2011. In 2011 it was determined that the SMP was consistent with State laws and rules, and specifically the Shoreline Management Act. The City is required to meet the same applicable State laws and rules that apply elsewhere in the State.

2. Comment: Would like Ecology to take care when allowing for any changes to the SMP in case the changes contribute to the degradation of habitat and sea life in Des Moines.

Response: The proposed amended SMP to be adopted in 2019 shall be consistent with State laws and rules, and specifically the Shoreline Management Act, just as the SMP was required to be consistent in 2011. A major requirement of SMPs is that they ensure no net loss of ecological functions and the City's proposed amended SMP will be held to that standard.

3. Comment: A dive park would not make sense if there is no sea life to observe.

Response: The City proposes that project-specific conditions would be added and mitigation would be required to ensure no net loss of ecological functions.

4. Comment: In the restoration section, there is mention of replacing the culvert on Barnes Creek as a requirement of the culvert case injunction without noting its origin as a case within U.S v. Washington. Please note that the correct way to describe this requirement is to say that it is part of U.S v Washington's federal court injunction.

Response: The document reference will be corrected.

5. Comment: It is not clear why various accessory uses in the shoreline warrant a shoreline exemption, particularly if they would make a site less conforming and result in more impacts to shoreline areas that reduce habitat and functions needed for salmon, shellfish and other fisheries resources. There also appears to be no new analysis about the cumulative impacts associated with this proposed change.

Response: The added uses are similar in nature to other uses currently allowed as exemptions per the Shoreline Management Act. The potential impacts and associated mitigation would be similar to those exempt uses previously analyzed in the cumulative impacts discussion.

6. We request notification of all applications for projects and actions in the regulated shoreline- exemptions, variances, conditional uses, and substantial development permits. We also request a copy of all city issued approvals for these proposed permit actions. The notification language currently proposed makes no mention of the Muckleshoot Indian Tribe or affected tribes so it is not clear that we would receive these notices and decisions.

The City provides notice to the Tribes for substantial development, variances, and conditional use permits that require public notice. We defer to Ecology regarding their process for providing notice to Tribes on their decisions.