STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
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January 10, 2017

The Honorable Kristiana Johnson, President
City of Edmonds Council
121 Fifth Avenue North
Edmonds, WA 98020

RE: City of Edmonds Response to Department of Ecology's June 27, 2016, Conditional SMP Approval

Dear Ms. Johnson:

Thank you for your October 19, 2016, letter in response to the Department of Ecology's (Ecology) conditional approval of the City of Edmonds (City) Shoreline Master Program (SMP) update. For required changes one through six, the City has either accepted Ecology's required changes or offered alternatives that Ecology finds are consistent with the SMA and Ecology guidelines, and are consistent with the original intent of the required changes. This letter formally accepts the City's final determination on Ecology's required changes one through six. The amended text provided by the City in Attachment E – Revised (10/19/2016) will become part of the approved SMP amendment through Ecology's final action.

We have only one remaining issue. The City has proposed alternatives to Ecology's required change seven and eight concerning Edmonds Marsh buffers and setbacks. We recognize the intense community interest and engagement surrounding the marsh. Over the past few months, Ecology staff have attended many Council meetings and engaged in robust discussions among citizens and Councilmembers. I have met personally with representatives of Friends of the Marsh and the Port of Edmonds to hear their perspectives.

Ecology understands the importance of preserving and improving the Edmonds Marsh. We believe this is a common interest among all involved parties. However, Ecology is concerned the City's proposed alternatives must be clarified for consistency with the purpose and intent of Ecology's original change.[1] The difficulty remains how to achieve this objective given the surrounding land uses, and the near absence of a marsh buffer within the Urban Mixed IV shoreline environment.

[1] WAC 173-26-120(7)(b)(ii).

To that end, Ecology proposes two options for clarifying the SMP that would address our concerns, as well as the interests of the community. Please review the attached "Ecology Response to City Alternatives." The attached document responds to the City's thoughtful *Evaluation of Scientific and Regulatory Consideration Related to Ecology's Required Changes 7 and 8.*

Each of these options clarify how appropriate mitigation would be established during redevelopment of the Urban Mixed Use IV environment through site specific assessments that acknowledge existing conditions. These suggested change are consistent with RCW 90.58.100 (use of scientific information) and WAC 173-26-201(2)(c) & (e) (protection of ecological functions and environmental impact mitigation).

We appreciate the City's continued work on the SMP. There are many positive aspects to the SMP update that will benefit the City's Puget Sound and Lake Ballinger shorelines. The Edmonds Marsh issue is the last remaining issue related to the Edmonds SMP update process. I believe all parties interested in the outcome of the SMP have a common interest in protecting and improving the quality of Edmonds Marsh for future generations. We hope the options we have provided will help us reach a final resolution.

We would like the opportunity to present these options to Council, answer questions you may have, and conclude the SMP update process. Please contact Joe Burcar of our Northwest Regional Office at (425) 649-7096 or joe.burcar@ecy.wa.gov.

Sincerely,

Maia D. Bellon
Director

cc: Dave Earling, Mayor, City of Edmonds
Shane Hope, Edmonds City Development Services
Friends of the Edmonds Marsh
Bob McChesney, Executive Director, Port of Edmonds

Attachment G

Options for addressing City of Edmonds Alternatives to Ecology's Required Changes addressing Edmonds Marsh Buffers and Setbacks.

This document presents Ecology's response to the City of Edmonds alternatives addressing the Edmonds Marsh Buffers and Setbacks. The City's response, dated October 19, 2016, provides an alternative to Ecology's Required Changes (Row Numbers 7 and 8) issued during the June 27, 2016 Conditional SMP Approval.

Under WAC 173-26-120(7), Ecology may approve the City's alternatives if they comply with the SMA and substantive guidelines and are "consistent with the purpose and intent of the changes originally proposed by [Ecology]." The purpose and intent of Ecology's original proposed amendments are found in Ecology's Findings and Conclusions (Attachment A, p. 11), and Required Changes (Attachment B, p. 4), dated June 27, 2016.

The City's alternatives would establish a fixed requirement for a 110' vegetated buffer upon redevelopment within the Urban Mixed Use IV environment designation. Ecology finds the City's alternatives could be consistent with applicable laws, rules and the intent of Required Changes, provided they are clarified to acknowledge legally existing uses and site conditions on the landward side of the levee that rings the Marsh. The 110-foot area the City's regulations would require to be revegetated is historic fill, and includes paved areas, tennis courts, a Health Club, other existing structures, and a brownfields clean-up site at the southern boundary of the Marsh.

This document outlines the background of this issue, reviews the city alternatives and rationale, and provides two different options for addressing our common interest in establishing a legally defensible framework for protecting and restoring the Marsh.

The City's rationale for their alternatives are provided in a memo prepared by Attorney Jeff Taraday of Lighthouse Law Group titled "Evaluation of scientific and regulatory considerations related to Ecology's Required Changes 7 and 8," dated September 23, 2016. The Memo is described by the City as Attachment B. To reduce confusion with Ecology's Attachment B (Required Changes), this Evaluation memo is hereafter referred to as the "Lighthouse Memo."

Background on Ecology's Conditional Approval Required Changes to Rows 7 and 8

Buffers and setbacks for the Urban Mixed Use IV environment designation for Edmonds Marsh have been discussed extensively during the SMP update. The City Planning Commission had proposed a 50' buffer based on an evaluation of applicable scientific information and existing conditions. A 50-foot buffer is generally consistent with existing conditions on the intensely developed north side of the Marsh. The Planning Commission acknowledged the presence of the levee limits the water quality benefits that a larger buffer would provide. Requiring a vegetative buffer larger than 50' would require significant removal of historic fill and removal of existing paved areas and structures.

In adopting the final SMP the City Council *retained* the 50' buffer but increased the building setback to 50' for a total buffer/setback of 100.' Ecology's Required Changes (Rows 7 and 8) did not reduce the 50' buffer width, but amended the City's 50' setback to incorporate a 15' setback from the edge of the vegetative buffer for a 65' combined buffer/setback. The 15' setback was chosen for internal consistency with the City Critical Areas Ordinance that requires a 15-foot setback from the edge of a buffer (ECDC 24.40.280, Building Setbacks). The changes also added a threshold for redevelopment to

clarify when the requirement would apply. Ecology's changes were intended to align the SMP with the planning commission draft, recognize existing conditions, and maintain consistency with the City's Critical Areas Ordinance.

Description of City Alternatives to Rows 7 and 8

For Rows 7 and 8 the City provides alternative setback/buffer for the UMU IV shoreline environment in 24.40.090 Shoreline Bulk and Dimensional Standards. The City's alternative would establish a definitive 125' building setback and mandate the installation of a 110' vegetative buffer when approved master plans for the area are implemented.

The City's description for the Change to Row 7:

> For *every instance* in Shoreline Bulk and Dimensional Standards table contained in 24.90.090 *where the Urban Mixed Use IV shoreline indicates a shore setback of 100/50, that will be changed to 125/110*. This means there will be a requirement for a 110 foot vegetative buffer with an additional 15 foot structural setback for a total of a 125-foot shore setback measured from the edge of the Marsh.

The City's description of the Change to Row 8:

> The Harbor Square site on the north side of the Marsh has been developed in accordance with a contract rezone. The existing development cannot be expanded as the limitations of the contract rezone have been met. The Harbor Square site has a comprehensive plan designation of Downtown Master Plan. In order for the Harbor Square site to be redeveloped, the redevelopment will have to be approved through a master planning process. When an approved master plan is implemented, the 110-buffer will be required to be established.
>
> Likewise, the property on the south side of the Marsh has a comprehensive plan designation of Master Plan Development and a zoning designation of Master Plan 2. Development on the south side of the Marsh will also occur through a master plan process. When an approved master plan implemented on the south side of the Marsh, the 110-foot buffer will be required to be established.
>
> While buffer establishment is required with an implemented master plan, the 110-foot may be established prior to the implementation of master planned development through a voluntary buffer restoration effort.

City Rationale: Legal Standards

The Lighthouse Memo includes a summary of Legal Standards to guide local decision-making. The citations address the requirements to protect ecological functions based on available scientific information. The memo cites WAC 173-26-186(8)(b) which states that SMPs "shall include **policies and regulations** designed to achieve no net loss of [shoreline] ecological functions." The Lighthouse Memo also cites WAC 173-26-186(8)(c) which states that SMPs "shall include **goals and policies** that provide for restoration of… impaired ecological functions."
However, it is important to note that the SMP Guidelines clarify that restoration be addressed through goals and policies, but is not intended to be achieved through regulations.

The guidelines include other citations that reinforces this distinction. For example, WACs 173-26-201(2)(c) and (e) describe how to address protection of ecological functions and environmental impact

mitigation. The rules require application of a mitigation sequence to achieve no net loss of ecological functions for each new development. The rules include an important restraint on SMP authority. The mitigation sequence may "not result in required mitigation *in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions*…" [WAC 173-26-201(2)(e)(ii)(A)].

In other words, protective regulations can only require new developments to provide mitigation that compensates for the impacts of new development. A fundamental principle of the guidelines is that the "no net loss" standard protects *existing* functions, and restoration to improve conditions is met through nonregulatory means Restoration Planning WAC 173-26-201(2)(f). This was a cornerstone of the guidelines, which were negotiated with diverse interests to resolve a legal challenge. Ecology has approved SMPs that include incentive-based approaches to encourage restoration, but these cannot be required.

City Rationale: Scientific and Technical Information

The Lighthouse Memo includes a summary of Ecology's wetland guidance documents (Citations A – F). The citations correctly identify Ecology's recommended buffer widths for Category II estuarine wetlands would be 110 feet provided minimization measures are provided.

However, buffers areas in Ecology's guidance documents are presumed to be functionally connected and therefore capable of performing ecological functions. The City's existing CAO recognizes this. In a section titled "Allowed Activities," a project applicant may propose to modify a standard buffer based on a site-specific study that determines an area is functionally isolated (23.40. 220 C.4).

The Lighthouse Memo cites examples provided in Ecology's *Wetlands in Washington State, Volume 2: Guidance for Protecting and Managing Wetlands* in reference to buffer requirements for "new" development. However, any proposal in the UMU IV would be considered "redevelopment", not new development. In addition to the wetland guidance, the Lighthouse Memo cites Ecology's SMP Handbook chapters on Vegetation Conservation (Chpt 11) and Legally Existing Uses (Chpt 14). These chapters recognize that tailored buffers should be based on existing conditions.

By contrast, the City's alternative establishes a fixed area that would have to be revegetated during redevelopment that would "over-ride" the existing allowance in the City's CAO based on a site-specific study. The regulation relies on the "default" buffer width rather than developing a tailored buffer that acknowledges existing conditions.

City Rationale: Effects of City Marsh Restoration

The Lighthouse Memo notes "The city council appears to hold unanimously the goal of restoring the ecological functions and values of the Edmonds Marsh. To the extent that there are differing opinions on the city council, they appear to concern the extent to which the Edmonds Marsh can or should be restored, and/or the best strategies for accomplishing such restoration."

Ecology fully agrees with the unanimous goal of the Council to restore the ecological functions and values of the Marsh. It appears Port of Edmonds Commissioners also share this goal. This should be an ideal circumstance for reaching agreement on a reasonable path forward.

An SMP can include restoration *goals and policies* to improve existing conditions. As noted above the SMP guidelines acknowledge improvements are to be achieved through voluntary restoration activities or through regulatory incentives.

Ecology options based on the City's analysis of alternatives

The Lighthouse Memo includes 4 options. Option 2 (75' buffer based on City's old CAO) is no longer applicable, as the City has already amended the CAO to include a 110' buffer for Category 2 wetlands. Option 4 is Ecology's original Required Changes, which the Council has indicated it does not want to pursue. Ecology offers the following two options based on the City's analysis of alternatives.

The Lighthouse Memo starts its evaluation of alternatives with the following:

> "It will simplify the discussion of alternative buffer widths, if the setback from the edge of the buffer (not from the edge of the wetland) remains consistent across the various alternatives. We agree with Ecology that the SMP should strive for consistency with the CAO in this area. Because the city's CAO currently requires any structure to be setback from the edge of a buffer by 15 feet, the options discussed below will all assume that structures cannot be placed any closer than 15 feet from the edge of a buffer."

Ecology's two options below are therefore premised on the use of a 15' setback measured from the edge of the buffer (whatever it may be). Both options include application of a site-specific study that allows the regulatory regime to acknowledge existing conditions and adapt to anticipated impacts of proposed development.
For either of these options, the city may want to include a requirement for a Conditional Use Permit for developments in the UM-IV designation. The intent here is to address possible concerns that a site-specific study might not get adequate review. The requirement for a CUP adds a heightened degree of scrutiny and projects would require Ecology formal review and approval.

Option: 110-foot buffer/ 125-foot setback

The City has offered this Option as its alternative to Ecology's Required Changes in Row 7 and 8. The Lighthouse Memo cites Ecology's Wetlands Guidance for CAO Updates (June 2016) as the source for the inclusion of a 110-foot buffer with minimization measures as the appropriate buffer for a Category 2 wetland, consistent with the City's recent CAO amendments.

The Lighthouse Memo acknowledges the reality that adoption of a 110-foot buffer does not do anything to change conditions on the ground. The Memo recognizes that existing developments could be maintained indefinitely, and that a wide buffer could be a disincentive to redevelopment.

Ecology finds the City's alternative should be clarified to include recognition that at the project scale the buffers are to be implemented in a manner that acknowledges legally existing uses and site conditions and ensure the project includes necessary protections commensurate with the proposed development. A few clarifications could remove the disincentive for redevelopment and provide an equitable regulatory framework consistent with SMA authorities. As noted above, the Edmonds CAO already includes a section which allows for exemptions from prescribed buffer widths for areas proven to be functionally isolated. The provision requires a qualified consultant prepare a site assessment and includes criteria for evaluating the assessment, as follows:

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Edmonds Critical Areas Code 23.40. 220 C.4 (Development Proposals within Interrupted Stream or Wetland Buffers)
Adjacent areas that may be physically separated from a stream or wetland due to existing, legally established structures or paved areas may be exempted from the prescribed buffer widths if proven scientifically to be functionally isolated from the stream or wetland. The director will require the applicant to provide a site assessment and functional analysis documentation report by a qualified critical area consultant that demonstrates the interrupted buffer area is functionally isolated. The director shall consider the hydrologic, geologic, and/or biological habitat connection potential and the extent and permanence of the physical separation.

The fixed buffer width in the City's alternative SMP provision would override the application of the CAO which allows for adapting necessary protections at the project level.

The City's Alternative could be modified to incorporate existing CAO provisions through the following modification to the standards table:

24.40.090 Shoreline Bulk and Dimensional Standards

Shoreline development	Urban Mixed Use IV
All Other Commercial and Light Industrial Development	
Shore Setback	~~100/50~~ 125/110[18]
Recreation	
Shore Setback	15' [17]
Residential Development	
Shore Setback	~~100/50~~ 125/110[18]
Transportation and Parking	
Uncovered Parking	
Shore Setback	~~100/50~~ 125/110[18]
Covered Parking	
Shore Setback	~~100/50~~ 125/110[18]
All Other Development	
Shore Setback	~~100/50~~ 125/110[18]

Footnote:
18. Setback for new development within the Urban Mixed-Use IV environment is 15 feet from the edge of a vegetative buffer. A 110-foot vegetative buffer is required to be established when an approved master planned development is implemented on the north or south side of the Marsh. An alternative buffer width may be established with approval of a CUP and when consistent with 23.40. 220 C.4 The 110-buffer may be established in the absence of a master planned redevelopment through a standalone restoration project.

Option: Minimum 50-foot buffer/ 65-foot setback, after confirming through site specific scientific study that a 50-foot buffer is appropriate for the UMU4

The Lighthouse Memo identifies some of the assumptions behind Ecology's assertion that the City Planning Commission recommendation for a 50-foot buffer is appropriate. These assumptions *(and others, including assumptions about restraints on requirements to restore during redevelopment)* were

identified during the local planning process. The City notes this approach might be acceptable if these assumptions were tested in scientifically and/or economically supported findings.

One option to build on this approach is to incorporate such a scientific study into the SMP requirements, using a 50' buffer as a minimum, with site-specific determination at the project level. This could be accomplished with the following clarifications:

24.40.090 Shoreline Bulk and Dimensional Standards

Shoreline development	Urban Mixed Use IV
All Other Commercial and Light Industrial Development	
Shore Setback	~~100/50~~ 125/110 to 65/50[18]
Recreation	
Shore Setback	15' [17]
Residential Development	
Shore Setback	~~100/50~~ 125/110 to 65/50[18]
Transportation and Parking	
Uncovered Parking	
Shore Setback	~~100/50~~ 125/110 to 65/50[18]
Covered Parking	
Shore Setback	~~100/50~~ 125/110 to 65/50[18]
All Other Development	
Shore Setback	~~100/50~~ 125/110 to 65/50[18]

Footnote:

18. Setback for new development within the Urban Mixed-Use IV environment is 15 feet from the edge of a vegetative buffer. A vegetative buffer is required to be established when an approved master planned development is implemented on the north or south side of the Marsh, based on approval of a CUP and a site-specific assessment. The assessment shall determine the width based on the potential lift in ecological functions through the re-establishment of a vegetated buffer and retrofitting storm water system(s) to meet current State treatment standards. To ensure no net loss of ecological function from site redevelopment, this study shall use the existing conditions as the baseline for assessing the potential benefit of restoring the buffer and improving storm water treatment. The buffer width shall not be less than 50 feet. A 110-foot vegetative buffer may be established in the absence of a master planned redevelopment through a standalone restoration project.

Attachment G

Additional changes to clarify the CUP requirement.

The City does not need to amend the Shoreline Development Table because Footnote 1 clarifies that text in the SMP over-rides the table. However, if the City wants to clarify the CUP requirement for alternative buffers, the table could be amended as follows:

24.40.080 Shoreline Development Table: Shoreline Development Permitted by Area Designation

Shoreline development	Urban Mixed Use IV
Commercial and Light Industrial Development	
Water-oriented	SDP[3]
Nonwater-oriented	SDP[3]
Residential Development	
Detached Residential (Single-Family)	X
Attached or stacked Residential (Multi-Family)	X
Transportation and Parking	
Railroads	X
Ferry Terminals	SDP[3]
Parking – supporting associated water-dependent uses	SDP[3]
Parking – not supporting associated water-dependent uses	SDP[3]
Other	SDP[3]

1: In the event that there is a conflict between the development(s) identified in this Table 24.40.080 and the policies and/or regulations with the text of this Master Program, the policies and regulations within the text shall apply.

2: Artwork associate with a permitted use in the Aquatic I or Aquatic II designation may by permitted; otherwise it is a prohibited use.

<u>3: A CUP is required where the applicant proposes an alternative buffer.</u>