

Chapter 3 – Relevant Regulatory and Capital Improvement Programs

3.0 Overview

Numerous Federal and state regulations apply to floodplain and flood risk management as well as to ecosystem protection and restoration. This section provides an overview of regulations.

3.1 Federal Policies

3.1.1 National Flood Insurance Program (NFIP)

The U.S. Congress established the National Flood Insurance Program (NFIP) with the passage of the National Flood Insurance Act of 1968. The NFIP, administered by FEMA, is a Federal program enabling property owners in participating communities to purchase insurance as a protection against flood losses in exchange for State and community floodplain management regulations that reduce future flood damages. Participation in the NFIP is based on an agreement between communities and the Federal Government. If a community adopts and enforces a floodplain management ordinance to reduce future flood risk to new construction in floodplains, the federal government will make flood insurance available within the community as a financial protection against flood losses. This insurance is designed to provide an insurance alternative to disaster assistance to reduce the escalating costs of repairing damage to buildings and their contents caused by floods (FEMA, 2002).

The official map of a community on which FEMA has delineated both the special hazard areas and the risk premium zones applicable to the community is the Flood Insurance Rate Map (FIRM). Skagit County's FIRM became effective on January 3, 1985. The FIRM designated unincorporated areas that lie within the 100-year floodplain of the Skagit River. Therefore, federally subsidized flood insurance is available for local residents. To continue coverage, the County must maintain participation in the NFIP and maintain minimum floodplain management regulations. Skagit County participates in the NFIP Community Rating System (CRS) to obtain credits that further reduce flood insurance premium rates. Mount Vernon, Burlington, Sedro-Woolley, and La Conner also take part in the NFIP (Skagit County, 1989).

At the time of writing this report, the County's FIRM was in the process of being updated to reflect current conditions in the study area and current FEMA policies. The Corps feasibility study is based upon Corps regulations and requirements that in some cases differ from those required by FEMA for development of a FIRM and administration of the NFIP.

In September 2008, the National Marine Fisheries Service (NMFS) issued a Section 7 Consultation Final Biological Opinion for Implementation of the National Flood Insurance Program in the State of Washington, Puget Sound Region (NMFS, 2008). Recommended actions from this feasibility study may have an effect on the regulatory floodplains to be identified in the ongoing FIRM update. This could result in need for further future FIRM updates.

3.1.2 Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) of 1972 and subsequent amendments establish a voluntary program under which states can receive financial and technical assistance to formulate a plan for the efficient use of coast zones within their boundaries. The provisions of the CZMA established a planning and regulatory program to manage coastal resources that is initiated at the local level under state guidance with Federal financial assistance. As described in the State Regulations section, shoreline protection is implemented in the State of Washington by the Washington State Shoreline Management Act and in unincorporated Skagit County by the County's Shoreline Management Master Plan (Skagit County, 1989). Any project measures proposed within the shoreline zone will need to be consistent with the State and County plans.

3.1.3 National Environmental Policy Act (NEPA)

The National Environmental Policy Act (NEPA) (42 USC 4321 et seq.) requires Federal agencies to consider the environmental impact of agency and privately sponsored development projects that have a Federal nexus (e.g. Federal funding, projects occurring on Federal land, Federal permits). The NEPA process requires the full disclosure of environmental impacts and consideration of such impacts, along with technical and economic considerations, prior to an agency decision. NEPA requires an EIS for any action with a Federal nexus that would have significant adverse environmental impact. The EIS must thoroughly evaluate any adverse environmental impact of the proposed action and alternatives to that action (Skagit County, 1989). An EIS is under development concurrent with this feasibility study.

As part of the NEPA process, the project involves other federal agencies in the preparation of the EIS as "cooperating agencies". The project has contacted the Environmental Protection Agency, National Marine Fisheries Service, U.S. Fish and Wildlife Service, and other State and tribal agencies to discuss and coordinate project activities. As part of the on-going coordination process with agencies interested in environmental and cultural issues with the Skagit Feasibility Study, the project will establish an Environmental Advisory Committee of interested agencies and groups to assist in development of Environmental Restoration projects and to avoid or minimize important resources during the development of flood reduction projects.

3.1.4 Endangered Species Act

The Endangered Species Act (ESA) provides for the conservation of endangered and threatened species of fish, wildlife, and plants. Threatened species are defined as those that are "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Endangered means that the species is "in danger of becoming extinct throughout all or a portion of its range." When a species is listed as threatened or endangered under the ESA, regulations are adopted to prohibit "take of" (harm to) the species and its habitat. Two salmonid species are listed as threatened in the Puget Sound region. The National Marine Fisheries Services listed chinook salmon (*Oncorhynchus tshawytscha*) as threatened in May 1999. Regulations to conserve and protect Puget Sound chinook salmon became effective January 8, 2001. The U.S. Fish and Wildlife Service listed bull trout in the

Puget Sound region as threatened and put protective regulations in place in December 1999. Both species live in the Skagit River system.

Under Section 7 of the ESA, Federal agencies that issue funding, permits, or approvals to local governments must consult with the Services to ensure that their actions are not harming listed species. A Section 7 consultation is required to gain Services approval of a specific project. Multiple phases of a project (immediate actions and future ones) can be included in a Section 7 approval as long as they are adequately identified and evaluated in the Section 7 biological assessment. Any activity not written into the original Section 7 would require the applicant to go through another Section 7 consultation again to gain approval for that activity. Recommended actions that may affect Chinook salmon or bull trout habitat and require Federal funding, permits, or approvals must go through Section 7 consultation with the appropriate Services (Skagit County, 1989).

3.1.5 U.S. Army Corp of Engineers – Section 10 Permit – Rivers and Harbors Act

Enacted in 1989 to preserve the navigability of the nation's waterways, Section 10 prohibits the unauthorized obstruction or alteration of those navigable waters without a permit from the Corps. The provisions apply to all structures or activities associated with a structure located "in, over, or affecting" navigable waters below the mean high water mark of tidal waters or ordinary high water mark of fresh waters.

This law pertains to navigable waters that are presently, historically, or have a reasonable potential to be navigable and all waters subject to the ebb and flow of the tide up to mean higher high tide or ordinary high water mark. The permit process includes consideration of navigational waters, flood control, fish and wildlife management, and environmental impacts. Section 10 review often occurs simultaneously with the Section 404 permitting process and includes compliance with NEPA.

3.1.6 U.S. Army Corps of Engineers – Section 404 Permit – Clean Water Act

Section 404 of the Clean Water Act is one of three federal laws that expanded the regulatory authority of the Corps during the 1970s from regulating navigable waters of the United States to maintaining the biological integrity of the nation's waters. Section 401 is the most relevant to structural flood control measures, although section 401 of the Clean Water Act ensures that federally permitted activities comply with the federal Clean Water Act, State water quality laws, and any other appropriate state laws.

Section 404 requires a Corps permit for any project that alters or degrades the waters of the United States, ranging from the open water disposal of dredge or fill material to the filling of nearshore areas. This includes adjacent wetland and tributaries to navigable waters, and any degradation or destruction of which could affect interstate or foreign commerce. Guidelines for the permit approval have been developed by the Environmental Protection Agency (EPA).

There are two types of permits issued: an individual permit and a general, or nationwide permit. (Ecology, 1991)

3.1.7 Emergency Flood Control Act (PL 84-99)

PL 84-99 provides the authority for the Chief of Engineers, acting for the Secretary of the Army, to undertake activities including disaster preparedness, Advance measures, emergency operations (Flood Response and Post Flood Response), rehabilitation of flood control works threatened or destroyed by flood, protection or repair of federally authorized shore protective works threatened or damaged by coastal storm, and provisions of emergency water due to drought or contaminated source.

All systems considered eligible for PL 84-99 rehabilitation assistance have to be in the Rehabilitation and inspection Program (RIP) prior to the flood event. Acceptable operation and maintenance by the public levee sponsor are verified by levee inspections conducted by USACE on a regular basis. USACE has the responsibility to coordinate levee repair issues with interested Federal, State, and local agencies following natural disaster events where flood control works are damaged.

Levees on the Skagit River system, owned and maintained by Skagit County or a number of Drainage and Diking Districts, have been determined to be eligible for inclusion in the PL 84-99 program. A variety of factors contribute to levee eligibility, including vegetation maintenance. The existing levee system is adequately maintained and is not anticipated to impact the Feasibility Study analysis or impacts resulting from the alternatives investigated.

3.1.8 National Pollutant Discharge Elimination System (NPDES)

Twenty-five years ago, only a third of the nation's waters were safe for fishing and swimming. Wetland losses were estimated at four hundred and sixty thousand acres annually. Agricultural runoff resulted in the erosion of two and a quarter billion tons of soil and the deposit of large amounts of phosphorus and nitrogen into many waters. Sewage treatment plants served only eight-five million people.

Over the last 25 years, the quality of rivers, lakes and bays has improved dramatically as a result of the cooperative efforts by federal, state, tribal and local governments and communities to implement the public health and pollution control programs. Today, two-thirds of the nation's surveyed waters are safe for fishing and swimming. Wetland losses are estimated at seventy to ninety thousand acres annually. The amount of soil lost due to agricultural runoff has been reduced by one billion tons annually, and phosphorus and nitrogen levels in water sources have decreased. The number of people served by modern wastewater treatment facilities has more than doubled to one hundred seventy-three-million people.

While the limits and conditions in an individual NPDES permit are unique to the permittee, the process used to develop the limits and conditions and issue the permit generally follows a

common set of steps. The order of these steps may vary depending on whether the permit is an individual or general permit. (EPA)

3.1.9 Forest Practices Act

The timber industry is a major economic entity in Skagit County. It also has an effect on flood problems, as forest practices can aggravate runoff through increased sedimentation, debris, volume, and velocity. The Forest Practices Act (RCW 76.09) and the Forest Practices Board (WAC 22) regulate the management of the resources, and the State enforces the regulations. The Act has mitigating measures to protect stream erosion. (Skagit County, 1989)

3.1.10 Fish and Wildlife Coordination Act (FWCA)

The FWCA (16 USC 661 et seq.) requires Federal agencies to consult with US Fish and Wildlife Service, or, in some instances, with National Marine Fisheries Service, and with State fish and wildlife resource agencies before undertaking or approving water projects that control or modify surface water. The purpose of this consultation is to ensure that wildlife concerns receive equal consideration to water resource development projects and are coordinated with the features of these projects. The consultation is intended to promote the conservation of fish and wildlife resources by preventing their loss or damage and to provide for the development and improvement of fish and wildlife resources in connection with water projects. Federal agencies undertaking water projects are required to fully consider recommendations made by US Fish and Wildlife Service, National Marine Fisheries Service, and State fish and wildlife resource agencies in project reports, such as documents prepared to comply with NEPA, and to include measures to reduce impacts on wildlife in project plans.

3.2 State Policies

3.2.1 Flood Hazard Management Statutes

Washington State's Floodplain Management Program (RCW 86.16) integrates local and state regulatory programs in a comprehensive effort to reduce flood damage and protect human health and safety. The state program requires that local flood-prone jurisdictions adopt a flood damage prevention ordinance based on Federal standards contained in the NFIP. Skagit County's Flood Damage Prevention Ordinance (SCC 14.34), is consistent with the requirements of the NFIP, as well as the state Floodplain Management Program. Therefore, Skagit County is eligible for national flood insurance and for matching funds from the state to improve or construct flood management facilities and to develop flood management plans (Skagit County, 1989).

Under the State Requirements for Flood Control by Counties (RCW 86.12), counties are given responsibility for basin plan development, including how land is managed or developed on the floodplain. Plans are to be developed through a participatory process involving cities, towns, or special districts within the basin. Skagit County already has in place a body of policies and regulations that together, satisfy the floodplain development and land use requirements of RCW

86.12. These include a Critical Areas Ordinance (SCC14.24), a Shoreline Management Master Program (SCC14.26), a Flood Damage Prevention Ordinance (SCC14.34), a Land Division Ordinance (SCC 14.18), and a Drainage Ordinance (SCC14.32) (Skagit County, 1989).

3.2.2 Washington State Hydraulic Code

The purpose of the Hydraulic Code (RCW 77.55.100) is to preserve fish and wildlife habitat in and around the waters of the state. The Washington State Department of Fish and Wildlife (WDFW) administers the Hydraulic Code. Hydraulic projects are defined in the Code as work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state. Any work that falls within the definition of a hydraulic project requires a Hydraulic Project Approval (HPA) from WDFW. A cost shared flood control project in the study area would require an HPA.

3.2.3 State Environmental Policy Act (SEPA)

The Washington State Environmental Policy Act (SEPA) (Chapter 43.21C RCW) was passed by the legislature to ensure that environmental values are considered (in addition to technical and economic considerations) in decisions by state and local government officials. SEPA requires preparation of an environmental review (i.e., environmental checklist, environmental assessment, or EIS) documents for any implemented project and adherence to its provisions and guidelines. SEPA is a regulatory tool used by local jurisdictions, such as Skagit County, to control and mitigate activities that are likely to have significant adverse environmental impact (Skagit County, 1989). NEPA compliance documents to be prepared for this study should be sufficient in scope to address all SEPA requirements.

3.2.4 Washington State Shoreline Management Act

The Washington State Shoreline Management Act (SMA) (RCW 90.58) protects public resources, such as water, fish and wildlife and the habitat that supports them, by regulating public and private development in shoreline areas. The SMA applies to all shorelines of the state, including "shorelines" and "shorelines of statewide significance." Shorelines of Statewide Significance are regulated separately from other state shorelines in the SMA and include rivers downstream of where mean annual flow is 1,000 cfs or greater, adjacent lands within 200 feet of the ordinary high water mark, adjacent areas within the floodway, contiguous floodplain areas landward 200 feet from the floodway, and all associated marshes, bogs, and swamps. The provisions of the SMA establish a planning and regulatory program that is initiated at the local level by SCC 14.26. Any project measures proposed within the shoreline zone will need to be consistent with the State Shoreline Management Act.

3.2.5 Revised Code of Washington (RCW) 86.15 Flood Control Zone Districts

RCW 86.15 Flood Control Zone Districts address the organization and funding of county flood control efforts. The eight Sub Flood Control Zone Districts were established by the County based on the provisions of RCW 86.15 (Skagit County, 1989). These eight zones serve areas of the County not served by the Diking and Drainage Districts. Finally, the County has organized a

Drainage Utility that provides for drainage and flood control for unincorporated areas not served by Drainage Districts or Sub Flood Control Zone Districts (Skagit County, 2008). (USACE, 2009)

3.3 Local Policies

3.3.1 Skagit County Code 14.24 – Critical Areas Ordinance

This code was developed under the requirements of the Growth Management Act. Defined as a “critical area,” frequently flooded areas are dynamic natural systems that are a part of the County’s ever-changing landscape. It is set up to help promote public health, safety, and general welfare, and minimize public and private losses due to flood conditions in areas established by Skagit County Code 14.34 – Flood Damage Prevention.

Code 14.34 – Flood Damage Prevention – was established to:

1. To protect human life and health;
2. To minimize expenditure of public money and costly flood control projects;
3. To minimize the need for rescue and relief efforts associated with flooding and generally undertaken at the expense of the general public;
4. To minimize prolonged business interruption;
5. To minimize damage to public facilities and utilities such as water and gas mains, electric, telephone and sewer lines, streets and bridges located in areas of special flood hazard;
6. To help maintain a stable tax base by providing for the sound use and development of areas of special flood hazard so as to minimize future flood blight areas;
7. To ensure that potential buyers are notified that property is in an area of special flood hazard; and
8. To ensure that those who occupy the areas of special flood hazard assume responsibility for their actions.

In order to achieve this, the County has set up methods or provisions for:

1. Restricting or prohibiting uses which are dangerous to health, safety, and property due to water or erosion hazards, or which result in damaging increases in erosion or in flood heights or velocities;
2. Requiring that uses vulnerable to floods, including facilities which serve such uses, be protected against flood damage at the time of initial construction;
3. Controlling the alteration of natural floodplains, stream channels, and natural protective barriers, which help accommodate or channel floodwaters;
4. Controlling filling, grading, dredging, and other development which may increase flood damage; and

5. Preventing or regulating the construction of flood barriers which will unnaturally divert floodwaters or which may increase flood hazards in other areas. (Ord. O20070002 (part): Ord. 17938 Attachment F (part), 2000)

Skagit County Code 6.36 outlines Sub-Flood Control Zone Districts. Much like the Flood Control Zone District, it is powered by RCW 86.15. However, many of these special use districts have been abolished and their assets incorporated into the Drainage Utility.

3.3.2 City of Burlington Code 15.15 – Regulations for Critical Areas

This code was adopted, and codified under RCW 36.70A.172, to protect critical areas, such as flood hazard areas, while promoting public health, safety, and general welfare, and minimizing public and private losses due to flood conditions in the floodplain and the floodway. Code 15.15.610 – 15.15.630 specifically states the requirements for new construction, mobile homes, replacement water and sewer systems, subdivisions, and elevation necessities for new and older homes. It provides parameters for development in special flood risk areas while prohibiting development in the floodway. Exceptions include development that is authorized by the Corps for a utility outfall structure, or levee construction that maintains the integrity of critical infrastructure.

3.3.3 City of Mount Vernon Code 15.36 – Floodplain Management Standards

The intention of this code is to promote the public health, safety and general welfare, and to minimize public and private losses due to flood conditions in specific areas. Provisions are designed to protect human life and health, minimize project expenditures, minimize rescue and relief efforts associated with flooding, minimize prolonged business interruption, minimize damage to public facilities and utilities, maintain a stable tax base by providing for the sound use and development of areas of special flood hazard, ensure potential buyers are notified that property is in an area of special flood hazard, and to ensure that those who occupy the areas of special flood hazard assume responsibility for their actions.

3.3.4 City of Sedro-Woolley Code 17.66 – Flood Damage Prevention

Code 17.66 follows the same guidelines as that of Skagit County Code 14.34. The City of Sedro-Woolley incorporated a report called “The Flood Insurance Study for Sedro-Woolley” dated December of 1989, into its code. This was authored by the Federal Insurance Administration. Sedro-Woolley’s code also notes that any Flood Insurance Study and Rate Maps revisions be adopted as reference and are a part of 17.66.

3.3.5 Town of LaConner Code 15.70 – Floodplain Management

Code 15.70 also follows the same guidelines as that of Skagit County Code 14.34. The Town of LaConner incorporated a report called “The Flood Insurance Study for the Town of La Conner,” dated June 18, 1984, into its code as well; authored by the Federal Insurance Administration. Likewise, LaConner’s code notes that any Flood Insurance Study and Rate Maps revisions be adopted as reference and are a part of 15.70.

3.4 References:

Burlington, City of – Code 15.15 – Regulations for Critical Areas. Burlington, WA.

Environmental Protection Agency (EPA). *Water Permitting 101*. Accessed online at: <http://www.epa.gov/npdes/pubs/101pape.pdf>

FEMA, 2002. National Flood Insurance Program Description, Federal Emergency Management Administration, August 1, 2002.

LaConner, Town of – Code 15.70 – Floodplain Management. LaConner, WA.

Mount Vernon, City of – Code 15.36 – Floodplain Management Standards. Mount Vernon, WA.

NMFS, 2008. Endangered Species Act –Section 7 Consultation Final Biological Opinion and Magnuson- Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation. Implementation of the National Flood Insurance Program in the State of Washington Phase One Document – Puget Sound Region. Consultation conducted by National Marine Fisheries Service Northwest Region. <https://pcts.nmfs.noaa.gov/pcts/>.

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Skagit County, State of Washington (1989). Skagit County Comprehensive Flood Control Management Plan. Skagit County, WA. Consulting Engineers: Brown and Caldwell.

Skagit County, State of Washington (2008). Surface Water Management: Drainage Utility. Retrieved January 26, 2009, from Skagit County Public Works Web site: <http://www.skagitcounty.net/Common/Asp/Default.asp?d=PublicWorksSurfaceWaterManagement&c=General&p=drainageutility.htm>

United States Army Corps of Engineers (USACE)(2009). *Skagit River Flood Risk Management and Ecosystem Restoration Feasibility Study - Read Ahead Draft*. Skagit County, WA. Consulting Engineers: Tetra Tech.

Washington State Department of Ecology (Ecology). 1991. *Comprehensive Planning for Flood Hazard Management Guidebook*. Washington State.