

Title 19 – Environmental Protection
Chapter 4 – Shorelines and Sensitive Areas

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Legislative History

Enacted:

- Ordinance 386 Amending STC Title 19 Environmental Protection, Chapter 4 Shoreline and Sensitive Areas (10/09/18).
- Ordinance 248 Amending STC Title 19 and Chapter 4, the Shorelines and Sensitive Areas Ordinance (07/11/06), BIA (07/18/06).
- Ordinance 239 Enacting A Shorelines and Sensitive Areas Code, STC Title 19 Chapter 4 (08/02/05), BIA (08/18/05).

Repealed and Superseded:

- Ordinance 176 Section 20-03.410 of Land Use and Zoning (09/05/03), BIA (09/12/03).
- Ordinance 145 Amending the Coastal Zone Management Plan (12/05/00), BIA (03/26/01).
- Ordinance 54 Coastal Zone Management Plan (04/01/86), Enacting Res. 86-4-23, BIA (determined that BIA approval was not required, 04/24/96).

19-04.010 Title.

This Chapter shall be known as the “Shorelines and Sensitive Areas Code.”

[History] Ord. 239 (08/02/05).

19-04.020 Purpose and Scope.

The purposes of this Chapter are:

- (A) To preserve, restore or enhance the functions and values of the sensitive areas within the exterior boundaries of the Swinomish Indian Reservation for present and future generations;
- (B) To preserve, restore or enhance Reservation wetlands, and the functions and values of the wetlands including, but not limited to, those functions and values listed in 19-04.400(B);
- (C) To preserve, restore or enhance the shoreline ecological functions and processes within the exterior boundaries of the Swinomish Indian Reservation for present and future generations including through adaptation to shoreline migration related to sea level rise;

- (D) To preserve or enhance habitat used by species during all phases of their life cycles. In the case of fish, this includes habitat the fish use for spawning, incubation, rearing, schooling, feeding, resting and migrating. In the case of wildlife, this includes habitat the wildlife uses for mating, rearing, foraging or hunting and resting;
- (E) To manage and guide the development of Swinomish Indian Reservation lands and waters away from shorelines and sensitive areas and toward less ecologically important and vulnerable areas;
- (F) To protect against and regulate conduct that threatens or affects the political integrity, economic security, and health and welfare of the Swinomish Indian Tribal Community as a unique people and a sovereign government by protecting the shorelines and sensitive areas of the Swinomish Indian Reservation;
- (G) To provide part of the legal framework within which the members of the Swinomish Indian Tribal Community and other residents of the Swinomish Indian Reservation may live in harmony with each other and the natural environment of the Reservation;
- (H) To protect the natural resources within or adjacent to the shorelines and sensitive areas within the exterior boundaries of the Swinomish Indian Reservation; and
- (I) To protect public health and safety from threats of injury and damage due to landslides, earthquakes and sea level rise through regulation of development on lands at risk for such hazards.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.030 Authority.

This Chapter is authorized by the following provisions of the Constitution of the Swinomish Indian Tribal Community: Article VI, Sections 1(h), 1(k)(1), 1(l), and 1(s) and Article VI, Section 5(a).

[History] Ord. 239 (08/02/05).

19-04.040 Jurisdiction.

Swinomish Indian Tribal Community jurisdiction over the projects subject to this Chapter shall extend to all lands and waters within the exterior boundaries of the Swinomish Indian Reservation to the maximum extent permitted by law.

[History] Ord. 239 (08/02/05).

19-04.050 Construction.

- (A) This Chapter shall be construed in concert with the following plans:
 - (1) Swinomish Comprehensive Plan; and
 - (2) The Swinomish Shorelines and Sensitive Areas Plan; and
 - (3) The Swinomish Climate Adaptation Action Plan.
- (B) In the event that provisions of this Chapter should be determined to conflict with any other provisions of Tribal law, the provision that better protects the environment shall control.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.060 Findings.

The Swinomish Tribal Senate finds the following:

- (A) The Swinomish Indian Reservation was established pursuant to the Treaty of Point Elliot as a permanent homeland for the Indian Tribes and bands that now comprise the Swinomish Indian Tribal Community (Tribe). Treaty of Point Elliott, 12 Stat. 927, Article 2;
- (B) The Tribe's federally approved Constitution and Bylaws provide that the Tribe's jurisdiction shall extend to the territory within the exterior boundaries of the Reservation as established by the Treaty of Point Elliott. Swinomish Indian Tribe Constitution Article I, Section 2;
- (C) Reservation waters are of critical importance to the Tribe's treaty fishery, for fish and wildlife habitat and for cultural and aesthetic reasons;
- (D) The Tribe has federally reserved water rights under the Treaty of Point Elliott, 12 Stat. 927, and *Winters v. United States*, 207 U.S. 564 (1908);
- (E) The Tribe's adjudicated usual and accustomed fishing grounds and stations include all marine areas surrounding the Swinomish Indian Reservation. *United States v. Washington*, 459 F.Supp. 1020, 1049 (1978);
- (F) The exterior boundaries of the Swinomish Indian Reservation include all tidelands and extend to the point of extreme low water. *Corrigan v. Brown*, 169 F. 477, 480 (W.D. Wash. 1907); *State v. Edwards*, 188 Wash. 467, 62 P.2d 1094 (1936);
- (G) The Tribe's treaty fishing right includes shellfishing and the right to erect temporary houses to cure fish and shellfish. Treaty of Point Elliott, 12 Stat. 927, Article 5;

- (H) The Tribe's fishing right is exclusive within the exterior boundaries of the Swinomish Indian Reservation. *United States v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974); *United States v. Winans*, 198 U.S. 371, 381-382 (1905);
- (I) Fishing and hunting, including shellfish harvest, are a central focus of the Tribe's culture and are of critical importance to the Tribe's economy and the economic well-being of its members, many of whom are dependent upon fishing, hunting and shellfish harvest for their livelihood, and for ceremonial and subsistence purposes;
- (J) Protection of fish and wildlife, their habitat and the shorelines and sensitive areas upon which they depend are essential to the Tribe's goals of preserving and increasing fish and wildlife populations;
- (K) Tribal fisheries and the aquatic resources upon which they depend are highly vulnerable to damage from adverse impacts to Reservation shorelines, waters and wetlands resulting from development and activities within the exterior boundaries of the Reservation;
- (L) Development activities and land uses within the exterior boundaries of the Reservation have the potential to seriously impact: (1) Reservation natural resources including fisheries, wildlife, and waters; (2) wetlands; (3) shorelines; and (4) other sensitive areas and natural resources;
- (M) Protection and management of land, natural resources, shorelines and sensitive areas within the exterior boundaries of the Reservation through regulation of such development activities and land uses is of vital importance to the Tribe's economy and political integrity, and to the health, welfare and economic well-being of its members and the Reservation community;
- (N) Continued protection and enhancement of the essential Indian character of the Reservation and Reservation community is of vital importance to the Tribe;
- (O) Climate change is occurring both globally and regionally with potential for significant impacts to Reservation natural resources and the Tribe including impacts from sea level rise on shoreline ecological functions and values, property, built structures and infrastructure within the sea level rise inundation risk zones; and
- (P) Shoreline functions, and the boundary of Tribal Tidelands demarked at Mean High Water, will shift shoreward as the sea level rises. Blocking this shoreline migration with hard bank protection structures will lead to the loss of shoreline ecological functions and values.

(Q) **Ecological Functions and Values.** The ecological functions and values of sensitive areas include, but are not limited to:

(1) **Fish, Wildlife and Plant Habitat.**

- (a) Biodiversity;
- (b) Breeding, spawning, incubating, schooling, rearing, feeding, migration and resting habitat for various organisms, including but not limited to resident and migratory fish, shellfish, waterfowl and other birds, and threatened and endangered species;
- (c) Areas suitable for the deposition of eggs from beneficial insects, fish, amphibians, reptiles, birds and other organisms;
- (d) Production of organisms that constitute the food web;
- (e) Provision of food, shelter and shade for fish and wildlife; and
- (f) Habitat for salmon prey species, including Pacific herring (*Clupea harengus pallasii*) spawning beds which occur in lower beach areas and shallow subtidal areas including kelp and eel grass beds, and surf smelt (*Hypomesus pretiosus*) and Pacific sand lance (*Ammodytes hexapterus*) spawning beds located in the upper marine beaches containing sand and/or gravel materials.

(2) **Water Quality, especially as provided by wetlands.**

- (a) Removal of inorganic nutrients, including nitrogen and phosphorous, from surface water;
- (b) Reduction of ecological events associated with nutrient loading, including algal blooms and fish kills;
- (c) Break down and simplification of organic wastes;
- (d) Reduction of suspended sediments; and
- (e) Moderation of changes in water temperature.

(3) **Water Cycle, especially as provided by wetlands.**

- (a) Storage and slow release of flood waters;

- (b) Recharge of groundwater; and
 - (c) Maintenance of stream flow during the dry season.
- (4) **Soil Erosion.**
 - (a) Break-up and attenuation of the erosive force of stream currents; and
 - (b) Protection of stream banks.
- (R) **Cultural and Economic.** The cultural and economic functions and values of sensitive areas include, but are not limited to:
 - (1) Traditional hunting, fishing, and gathering activities;
 - (2) Traditional spiritual practices;
 - (3) Protection of groundwater;
 - (4) Protection of property from potential flood damage, damage due to soil erosion or sediment deposition and damage due to geological hazards;
 - (5) Viewing and appreciation of nature, including fish and wildlife; and
 - (6) Solitude and contemplation.
- (S) **Shoreline Ecological Functions and Processes.** The shoreline ecological functions and processes include, but are not limited to:
 - (1) **Functions.**
 - (a) Transportation and stabilization of marine and estuarine sediments;
 - (b) Attenuation of wave and tidal energy;
 - (c) Removal of excessive nutrients and toxic compounds;
 - (d) Recruitment, redistribution and reduction of woody debris and other organic material;
 - (e) Moderation of temperature changes in the shoreline microclimate;
 - (f) Breeding, rearing, resting and feeding habitat for aquatic and shoreline-dependent birds, invertebrates, mammals and amphibians; and
 - (g) Habitat for anadromous and resident fish.

(2) **Processes.**

- (a) Erosion from wave, tidal and other processes;
- (b) The accretion and ablation of beaches;
- (c) Long-shore drift; and
- (d) Any other naturally occurring physical, geological or chemical process that shapes landforms within a specific ecosystem and determines both the types of habitat provided by the shoreline and the associated ecological functions.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.070 Definitions.

(A) For the purposes of this Chapter, the following words and phrases shall have the following definitions:

- (1) **“Aquatic Lands”** means all areas below the ordinary high water mark and above the extreme low water mark.
- (2) **“Beach Nourishment”** means the placement of sand or gravel along a section of shoreline that has been deprived of natural sediment inputs.
- (3) **“Best Available Science”** means the best information currently available that is derived from a valid scientific process or scientific sources that have been adopted by a majority of the scientific community at large. The characteristics of a valid scientific process include: peer reviewed and published information and methods, conclusions logically based on reasonable assumptions and placed in the proper context, use of quantitative analysis, and references to relevant peer reviewed and published literature. “Best available science” does not include non-scientific information such as legal, social, economic and political information.
- (4) **“Buffer”** means an area around a core designated area in which development is limited by the provisions of this Chapter in order to provide protection for the natural resources and ecological functions and values of such areas.
- (5) **“Buffer Averaging”** means reducing the standard buffer width around a wetland in some locations and increasing it in other locations such that the total area within the buffer around the wetlands after averaging remains at least equal to what was required by the standard buffer around the wetlands.

- (6) **“Bulkhead”** means a “hard” wall built along the shoreline for bank protection, which reflects wave energy back towards the water.
- (7) **“Commercial Use”** means the use of land for activities that provide goods, merchandise or services for compensation.
- (8) **“Commission”** means the Planning Commission of the Swinomish Indian Tribal Community.
- (9) **“Compensate”** means to substitute or provide equal value for economic or environmental assets that would be been adversely affected or lost due to the proposed project.
- (10) **“Department”** means the Department of Environmental Protection of the Swinomish Indian Tribal Community.
- (11) **“Development”** means the construction, reconstruction, conversion, relocation or enlargement of any structure, including its foundation; mining, excavation, landfill or land disturbance; or any use or extension of use of land that changes the existing conditions on the land. “Development” includes “surface modification.”
- (12) **“Director”** means the Director of the Department of Environmental Protection of the Swinomish Indian Tribal Community or his or her designee.
- (13) **“Dredging”** means the removal of materials, including but not limited to silt, mud, sediments and sand, from the bottom of water bodies.
- (14) **“Emergency”** means a situation in which action is needed in order to reduce imminent danger to the health, safety and welfare of the Tribe, Tribal members, any person who lives or works on the Reservation or any person who is present on the Reservation at the time the situation arises.
- (15) **“Energy Dissipating Device”** means a structure or device designed to spread or dissipate water flow and erosive energy from the outflow of a pipe or storm water conduit.
- (16) **“Enhance”** means to actively improve the conditions of an ecosystem so its functions and values are of higher quality than currently existing conditions.
- (17) **“Fish and Wildlife Sensitive Area”** means an area managed to maintain or restore a designated species or an assemblage of species in suitable habitat within their natural geographic distribution.
- (18) **“Fisheries Resource”** means any population of fish or shellfish used by members of the Tribe for subsistence, ceremonial or commercial purposes.

- (19) **“Geological Hazardous Sensitive Area”** means an area that may not be suitable for development because of susceptibility to erosion, sliding, earthquakes or other geological events.
- (20) **“Hazard Tree”** means a standing tree which is located within a tree length of a structure and poses a risk to life or property.
- (21) **“Horizontal Distance” and “Distance Measured Horizontally”** mean the distance between two points of a cross section of a slope measured along the horizontal axis, rather than along the angle of the slope.
- (22) **“Industrial Use”** means the use of land for activities that create economic value by storing or processing raw or bulk materials, systematic or large-scale fabrication, construction, manufacturing or transportation.
- (23) **“Inundation Risk Zone”** means those areas identified in the Swinomish Climate Change Initiative Impact Assessment Technical Report (2009) as being at potential risk from either projected sea level rise or tidal surge, at five (5) vertical feet or eight (8) vertical feet above Mean Higher High Water (MHHW) respectively.
- (24) **“Longshore Drift”** means the process whereby sediments are transported by wave and current actions along the shoreline.
- (25) **“Managed Retreat”** means moving buildings and coastal infrastructure inland to allow natural shoreline erosion or shoreline migration associated with sea level rise.
- (26) **“Marine Bluff”** means a high bank at the edge of a marine water body that is composed largely of unconsolidated deposits and with a near vertical face.
- (27) **“Marine Feeder Bluff”** means a marine bluff that provides sediments to shoreline systems down-current as a result of erosion on the bluff.
- (28) **“Mean Higher High Water (MHHW)”** means the average of the higher high water height of each tidal day over a total epoch (19 years).
- (29) **“Migration Corridor”** means a strip of land or a body of water through which members of a fish or wildlife species migrate to access habitats associated with different life cycle phases or different seasons.
- (30) **“Mitigation”** means the reduction of the adverse impacts of a project to an insignificant level through management practices or the enhancement or restoration of ecosystem functions and values.

- (31) **“Non-Conforming Use”** means a use or development which was lawfully established or constructed prior to the effective date of the Chapter, but which does not conform to present applicable requirements of the ordinance.
- (32) **“Ordinary High Water Mark”** means the mark where the presence and action of waters are so common, usual and continued in ordinary years as to mark upon the shoreline or stream bank a character distinct from abutting uplands; provided, that where such mark cannot be found on marine shorelines such point shall be the mean higher high tide line, and on streams shall be the mean high water line.
- (33) **“Person”** means any individual, entity, firm, company, association, society, corporation or group.
- (34) **“Preserve”** means to maintain an existing ecosystem such that its functions and values and/or ecosystem-wide processes remain steady over time.
- (35) **“Project”** means a development, surface modification or use activity or proposed development, surface modification or use activity.
- (36) **“Reservation”** means all lands and waters within the exterior boundaries of the Swinomish Indian Reservation.
- (37) **“Reservation Wetlands Map”** means the official map of the Reservation wetlands published by the Department.
- (38) **“Residential Development”** means any structure or facility used for living accommodations for a person or person(s).
- (39) **“Restoration”** means measures taken to restore a currently altered or damaged natural feature or habitat to properly functioning conditions, as determined by best available science. For example, restoration of a wetland means restoring a drained or filled wetland to properly functioning wetland processes.
- (40) **“Senate”** means the Swinomish Indian Senate, the governing body of the Swinomish Indian Tribal Community.
- (41) **“Sensitive Areas”** means any of the following designated areas: wetlands sensitive areas, fish and wildlife sensitive areas, geological hazard sensitive areas, and sea level rise risk sensitive areas, as defined in this Chapter.
- (42) **“Setback”** means the minimum distance allowed from ordinary high water mark or another specified boundary to a structure or development.

- (43) **“Shoreline Zone”** means the area that extends from the extreme low water mark to two hundred (200) feet upland from the ordinary high water mark of marine waters, measured horizontally.
- (44) **“Significant Adverse Affects”** means a negative impact on the environment or on the values and functions of Shorelines or Sensitive Areas consistent with Swinomish Tribal Code Title 19, Chapter 1, the Tribal Environmental Policy Act.
- (45) **“Soft Bank Protection”** means “soft” techniques and practices that stabilize and maintain marine banks and bluffs while preserving or minimizing impacts to natural shoreline processes and ecological functions. It includes bioengineering, anchoring of drift logs or woody debris, and other techniques and practices but does not include “hard” techniques such as construction of bulkheads and rip rap.
- (46) **“Structure”** means any human-made assemblage of materials extending above and/or below the surface of the earth and attached thereto.
- (47) **“Surface Modification”** means any change in the profile, topography, hydrology or vegetative cover of the surface of the ground or the bed of a water body including but not limited to agricultural cultivation, timber harvest, road building and excavation.
- (48) **“Swinomish”** means the Swinomish Indian Tribal Community.
- (49) **“Tribe”** or **“Tribal”** means or refers to the Swinomish Indian Tribal Community, a federally recognized Indian Tribe reorganized pursuant to Section 16 of the Indian Reorganization Act of 1934, which is composed of members tracing their ancestry to the aboriginal Swinomish, Samish, Kikiallus and Lower Skagit bands of Indians.
- (50) **“Water-Dependent Use”** means a use that cannot exist in a location that is not adjacent to the water. For example, a dock is a water-dependent use.
- (51) **“Watershed”** or **“Sub-Watershed”** means the areas of the Reservation so designated by the Watershed Map of the Swinomish Indian Reservation.
- (52) **“Water-Oriented Use”** means a use that is either water-dependent, or its economic viability is dependent upon a location adjacent to the water.
- (53) **“Wetlands”** means any lands that fit the criteria established by the U.S. Army Corps of Engineers Wetlands Delineation Manual (1987). Generally, wetlands are those areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation.

- (54) **“Wetland Creation”** means establishment of a wetland with properly functioning wetland processes on an area that was formerly not a wetland.
- (55) **“Wildlife”** means all species of the animal kingdom that exist within the exterior boundaries of the Reservation in a wild state, including but not limited to mammals, birds, reptiles, amphibians and non-marine invertebrates. The term “wildlife” does not include feral domestic mammals, old world rats and mice of the family Muridae of the order Rodentia or fish, shellfish and marine invertebrates. The term “wildlife” includes all stages of development of “wildlife” members.

(B) All other words and phrases shall have their ordinary and customary definitions.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

Subchapter I – Administration

19-04.080 Permit.

- (A) **Permit Required.** No person shall commence any project within any shoreline classification, sensitive area or associated buffer within the exterior boundaries of the Reservation without first obtaining a permit from the Department.
- (B) **Exemptions.** Activities meeting the following criteria shall be exempt from the terms and provisions of Section 19-04.080(A).
- (1) An emergency action; provided, that as soon as possible after the emergency, the person or agency undertaking the emergency action contacts the Department and fully mitigates any impacts of the emergency action. The Department shall determine whether the impacts of the emergency action have been fully mitigated based on best available science.
 - (2) Operation, maintenance or repair of existing permitted structures, utilities or roads where the operation, maintenance or repair does not increase the impact of the structure, utility or road on the shoreline, sensitive area or associated buffer.
 - (a) Exempt maintenance or repair shall be limited to replacement or modification of no more than twenty percent (20%) of the area or value of a structure, whichever is greater, within any three (3) year period and shall not include changing the footprint or increasing the size of the original structure, or using different materials unless the Department, using best available science, determines that the use of such material will create fewer adverse environmental impacts.

- (b) Exempt maintenance or repair shall not include:
 - (i) Any dredge or fill activities in any shoreline, sensitive area or their associated buffer; or
 - (ii) Maintenance or repair of conventional tidegates which restrict fish passage to historic or suitable habitat; or
 - (iii) Repair of armoring which is blocking sediment input from a marine feeder bluff to the shoreline system; or
 - (iv) Repair of a bulkhead, other than such repair within the High Intensity shoreline class where the structure is necessary to protect a water dependent use.
- (3) Removal of trees four (4) inches or less in diameter at breast height (dbh) from within the shoreline zone or a buffer of a geological hazard area, provided the total canopy area of trees removed is less than 500 square feet.
- (4) Removal from the beach of small pieces of driftwood, weighing less than 100 pounds, provided that removal of larger pieces of such natural occurring wood, or the cutting of larger pieces into smaller pieces, is prohibited without a permit.
- (5) Construction of a fence or other minor structure of 100 square feet or less in the Shoreline Zone provided all of the following criteria are met:
 - (a) A building permit is not required;
 - (b) The structure does not adversely impact shoreline values and functions;
 - (c) The structure is not within any Wetland or Fish and Wildlife Sensitive Area or associated buffer; and
 - (d) The structure is not within the shoreline setback for the Class where it occurs regardless of whether it is a non-water dependent structure; provided, however, that this subsection (d) is not applicable to construction of a fence.
- (6) Traditional Swinomish spiritual activities recognized by the Tribe.

(C) **Exemption Letter Process.**

- (1) Any confirmation of an exemption for activities under Section 19-04.080(B)(2)(a) or 19-04.080(B)(5) shall be in the form of an exemption letter from the Department. The Department may require the applicant to provide additional information before issuing the exemption letter or denying such exemption.
- (2) A denial of a request for an exemption letter may be appealed by the party requesting the exemption in accordance with Sections 19-04.610 to 19-04.670.

(D) Permits are valid for two (2) years unless extended or renewed.

(E) **Open Permit.** A single land owner or manager for an area greater than 40 contiguous acres may apply for one Shoreline and Sensitive Areas permit covering removal of trees, or one permit for bank protection repair and maintenance, and if approved by the Department, keep that permit open for additional such actions on the subject property, for up to two years for tree removals, or up to five years for bank protection activities.

- (1) Additional tree removals may be added, subject to Department approval, without additional permit applications and permit fees under this Chapter, provided the actions:
 - (a) Are subject to any additional appropriate mitigation requirements or fees; and
 - (b) Are covered under a forestry plan for the subject property approved by the Department.
- (2) Bank protection repair and maintenance actions may be added to an open permit for such actions, subject to Department approval, without individual permit applications under this Chapter provided:
 - (a) The actions are subject to any additional appropriate mitigation requirements or fees, if mitigation for these actions has not already been provided;
 - (b) The actions are covered under a plan for the subject property approved by the Department and meet all criteria and standards for such plan; and
 - (c) The Department may charge a \$100.00 review fee on such individual proposed actions.

[History] Ord. 386 (10/09/18); Ord. 248 (07/11/06), Ord. 239 (08/02/05).

19-04.090 Fees.

- (A) The minimum fee for commencing a project subject to the terms and provisions of this Chapter shall be \$200.00.
- (B) The fee for the following types of applicable projects shall be at least \$500.00:
 - (1) Structures 2,000 square feet or larger;
 - (2) Clearing areas of 5,000 square feet or more;
 - (3) Hard bank protection projects;
 - (4) Any project within a designated sensitive area or associated buffer, below MHW or within applicable shoreline setbacks; or
 - (5) New or major repair to dikes or conventional tidegates.
- (C) The Department may charge additional, reasonable fees based on the time and resources required to process the application, subject to Senate approval.
- (D) The Department shall charge a fee of at least \$500.00 for an appeals hearing process under Section 19-04.610.
- (E) The Department shall publish the fees in the Office of Planning and Community Development's Schedule of Fees, and make copies available for public inspection during regular business hours.
- (F) The Department may amend the fee schedule from time-to-time, subject to Senate approval.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.100 Permit Application, Review and Determination.

- (A) All persons applying for a permit subject to the terms and provisions of this Chapter shall submit an application to the Department on a form supplied by the Department. At a minimum, the application shall include the following information:
 - (1) Name, address and phone number of the applicant. In addition, the Department, at its discretion, may require the name, address, and phone number of other persons involved with the project;
 - (2) A description of the proposed project including a timeframe;

- (3) A map showing the location of the proposed project and the location of the shorelines or sensitive areas affected by the project;
 - (4) A site plan and basic design of the project;
 - (5) A description of the anticipated impacts the project would have on the shorelines, sensitive areas or associated buffers if approved;
 - (6) A description of any proposed mitigation for the proposed project, including a list of potential contractors, if any, who may implement the mitigation plan and a preliminary time frame for completion of the mitigation; and
 - (7) Signature of the applicant.
- (B) In its discretion, the Department may require the applicant to submit additional information reasonably necessary to determine the anticipated impacts of the proposed project and ensure that the project is constructed in compliance with the terms of this Chapter and other provisions of Tribal law.
- (C) Within a reasonable time after receipt of the final application, but not to exceed one-hundred and eighty (180) days, the Department shall:
- (1) Grant, deny or grant with conditions the issuance of a permit, as necessary to fulfill the terms and provisions of this Chapter; or
 - (2) Submit the permit application to the Planning Commission for a public hearing pursuant to Sections 19-04.620 to 19-04.670 if the Director determines that such a review is warranted or required under the Tribal Code.
- (D) An applicant whose application is denied by the Department may request a hearing by the Planning Commission in accordance with Sections 19-04.610 to 19-04.670.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.110 Variance.

- (A) An applicant whose proposed project does not meet the terms and conditions of this Chapter may seek a variance from the Planning Commission by filing a variance petition with the Department demonstrating unreasonable hardship and that such a variance meets all of the criteria of this Section.

(B) The Planning Commission shall review the request for a variance utilizing the following criteria:

(1) **Unreasonable Hardship.**

(a) The variance is necessary to avoid unreasonable hardship on the applicant because strict application of this Chapter is found to deprive the subject property owner of rights enjoyed by other property owners in the vicinity under the same shoreline or sensitive area classifications because of the unique qualities or characteristics of the subject property. Examples of “unreasonable hardship” include but are not limited to:

(i) Loss of access to the property; or

(ii) Loss of nearly all economically beneficial or productive use of the property.

(b) The applicant did not create such unique qualities and characteristics;

(2) The variance would not significantly adversely affect the shoreline ecological functions and processes;

(3) The variance would not significantly adversely affect the functions and values of a sensitive area or its associated buffer;

(4) The variance is not a grant of special privilege that is inconsistent with the limitations upon other properties in the vicinity and in the classification where the property is located;

(5) The variance is consistent with best available science;

(6) The variance is consistent with the traditional community values; and

(7) The variance would give special consideration to conservation measures that preserve or enhance anadromous fish and their habitat.

[History] Ord. 248 (07/11/06), Ord. 239 (08/02/05).

19-04.120 Hearing on Variance.

Upon receipt of an application for a variance, the Planning Commission shall hold a hearing pursuant to Sections 19-04.620 to 19-04.670. The Planning Commission shall issue a written recommendation to the Senate that the variance be granted, be granted subject to additional requirements or be denied.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.130 Restrictions on Variance.

In recommending a variance to the Senate, the Planning Commission may attach specific, written terms and conditions to secure protection of, or mitigation of adverse impacts to, shorelines, sensitive areas or associated buffers.

[History] Ord. 239 (08/02/05).

19-04.140 Senate Determination of Variance.

- (A) The Planning Commission shall forward all recommendations for variances to the Senate. The Senate shall review the record of the proceedings, including the recommendation of the Planning Commission, and shall base its decision upon the entire record, applying the provisions of the Swinomish Code and of Federal law.
- (B) **Written Decision.** The Senate shall issue its decision in writing. Copies shall be provided to the Department, Planning Commission and applicant and shall be available for public inspection and copying at reproduction cost.
- (C) **Appeal.** An aggrieved party may appeal the decision of the Senate in accordance with Sections 19-04.640 through 19-04.670.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.150 Sensitive Area Maps.

Maps showing locations of sensitive areas shall serve as a general guide to alert the user to the possible distribution, location and extent of sensitive areas. Map identification of sensitive areas provides approximate boundaries and locations. The actual locations and boundaries of sensitive areas, as well as their quality and quantity, shall be based upon the most current information, acceptable to the Department using best available science, that is provided to or obtained by the Department concerning the presence of the features applicable to each sensitive area in this Code. Maps shall not be considered a standard or substitute for site-specific assessments that are called for in this Code. The application of definitions, methodologies and performance standards in the site-specific assessments required in this Code, in conjunction with best available science and the most current information acceptable to the Department, shall control in determining the actual presence and extent of sensitive areas.

[History] Ord. 239 (08/02/05).

19-04.160 Documents Available for Public Inspection.

- (A) The Department shall make the following documents referred to in this Chapter available for inspection during regular business hours:
- (1) Watershed Map of the Swinomish Indian Reservation;
 - (2) Shorelines and Sensitive Areas Plan, upon adoption;
 - (3) Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1987);
 - (4) Shorelines Classification Map; and
 - (5) Sensitive Areas Map(s) including wetlands, Fish and Wildlife Sensitive Areas, Geological Hazards and Inundation Risk Zones.
- (B) The Department may charge reasonable administrative fees for copying any document available for public inspection during regular business hours.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.170 Shorelines and Sensitive Areas Protection and Restoration Fund.

- (A) The establishment of the Shorelines and Sensitive Areas Protection and Restoration Fund (“Fund”) is hereby authorized. Allocations of land or money may be made to the Fund in lieu of on-site mitigation for the purpose of the protection or restoration of shorelines, sensitive areas or associated buffers, if approved by the Department pursuant to this Chapter.
- (B) In establishing the Fund, a charter shall be developed to address details of its formation, governance, project selection and funds administration.
- (C) The Fund shall be used by the Tribe for habitat restoration projects, soft bank protection projects that reduce impacts to shorelines, or to purchase natural shorelines, sensitive areas or associated buffers.
- (D) Charitable donations of land or money may be made to the Fund for the above purposes.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.180 Shorelines and Sensitive Areas Plan.

- (A) The Department shall, as feasible, develop a Shorelines and Sensitive Areas Plan.
- (B) Such plan may include but not be limited to:
 - (1) Specific management plans for shoreline and sensitive areas in trust;
 - (2) Policy and procedures to provide guidance to implementation of this Chapter;
 - (3) Identification of projects and areas for protection and restoration;
 - (4) Identification of geological hazard areas;
 - (5) Updated maps associated with this Chapter.
- (C) The Plan shall be effective upon adoption by the Senate.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

Subchapter II – General Requirements

19-04.190 Preserve, Restore and Enhance.

The Department shall implement the terms and provisions of this Chapter so that the overall shoreline functions and processes, and the overall sensitive area ecological functions and values, within the exterior boundaries of the Reservation are preserved, restored and enhanced.

[History] Ord. 239 (08/02/05).

19-04.200 Mitigation.

- (A) **Preserve, Restore or Enhance.** The Department shall require an applicant seeking a permit under the terms and provisions of this Chapter to undertake mitigation designed to preserve, restore or enhance the shoreline ecological functions and processes, and functions and values of any sensitive area affected by the project for which the applicant seeks the permit.
- (B) **Rough Proportionality.** The scope of such mitigation shall be roughly proportional to the effect of the proposed project on the shoreline ecological functions and processes and functions and values of any sensitive area so that it bears a reasonable relationship to the anticipated impacts of the proposed project, taking into consideration uncertainty and failure rates for restoration projects and the time required to develop functioning ecological systems.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.210 Water Quality.

- (A) No project or continuing operations shall cause either increases in temperature, nutrient levels, fecal contamination, turbidity, sediment load or toxic substances; or decreases in dissolved oxygen, or adverse modifications to pH, salinity and conductivity characteristics of marine or fresh water that either:
 - (1) Violate Tribal or Federal water quality standards; or
 - (2) Adversely impact fisheries resources or habitat.
- (B) All projects shall conform to the standards of the Federal Clean Water Act, 33 USC §§ 1251 – 1387.
- (C) When a project requires both a Federal Clean Water Act Section 401 certification and a Shorelines and Sensitive Areas permit under Tribal law, the Tribe may require compliance with this Chapter as a condition of issuance of the 401 certification if such compliance may contribute to meeting applicable water quality standards.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.220 Migration Corridors.

Projects shall be designed to preserve, restore or enhance wildlife and fisheries migration corridors.

[History] Ord. 239 (08/02/05).

19-04.230 Fisheries Resources.

- (A) **Mitigation.** The applicant shall mitigate any impacts of the proposed development on the fisheries resources pursuant to a mitigation plan acceptable to the Department.
- (B) **Anadromous Fish.**
 - (1) All projects shall be designed and maintained with special consideration for conservation measures that protect, restore or enhance anadromous fish and their habitat during all phases of their life cycle.
 - (2) The Department may impose seasonal work windows on particular projects in order to protect anadromous fisheries, or other fish and wildlife for which sensitive areas have been designated under this Chapter.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.240 Bank or Bluff Stability.

All new development shall be designed so that it does not destabilize any shoreline bank or bluff.

[History] Ord. 239 (08/02/05).

19-04.250 Mitigation Sequencing.

If mitigation is required by the Department, the Department shall require the applicant to mitigate the effects of his or her project in the following order of preference:

- (A) Avoid the impacts altogether by not taking certain actions or parts of an action;
- (B) Minimize the impacts by limiting the scope of the project, in a manner acceptable to the Department, based on best available science and using appropriate technology or best management practices;
- (C) Repair, restore or enhance the affected shorelines and sensitive areas to properly functioning conditions;
- (D) Replace, restore or enhance substitute ecological values and functions of shorelines or sensitive areas of equal or higher ecological values;
- (E) Make payment to the Shorelines and Sensitive Areas Protection and Restoration Fund consistent with Section 19-04.170 and any guidelines developed for establishment of the Fund; or
- (F) Mitigation for new or expanded hard bank stabilization structures shall meet the requirements of Section 19-04.290(A)(2)(b).

[History] Ord. 386 (10/19/18); Ord. 239 (08/02/05).

19-04.260 Horizontal Distance.

All setbacks and buffer widths shall be measured in horizontal distance, unless otherwise specified.

[History] Ord. 239 (08/02/05).

19-04.270 Mining.

No mining shall be permitted in any shoreline classification, sensitive area or associated buffer.

[History] Ord. 239 (08/02/05).

19-04.280 Dredging.

- (A) **Shoreline Classification.** The Department may issue a permit for dredging in a shoreline classification for the following activities:
- (1) Routine maintenance operations of existing structures, including but not limited to docks, piers and boat channels; or
 - (2) New development where:
 - (a) Reasonable alternatives to dredging are infeasible; and
 - (b) All impacts of the dredging are mitigated.
 - (3) Notwithstanding Section 19-04.280(A)(2), dredging shall not be permitted in Aquatic Lands along the Natural Shorelines classification, except for the express purpose of restoring natural tideland elevations and shoreline ecological functions and processes.
- (B) No dredging shall be permitted in any sensitive area, including named streams, except for the express purpose of restoring the functions and values of the sensitive area, as part of a restoration project approved by the Tribe.
- (C) **Dredge Spoils.**
- (1) The Department may permit disposal of dredge spoils in the following areas and for the following purposes:
 - (a) Upland areas as approved by the Tribe; or
 - (b) Habitat restoration projects approved by the Tribe.
 - (2) The Department shall approve a revegetation and erosion control plan before issuing a permit under the terms and provisions of this Section.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

Subchapter III – Shorelines

19-04.290 Marine Bank Protection or Bluff Stabilization Works.

(A) New Construction.

(1) **Need.** To obtain a permit for new construction of a marine bank protection or bluff stabilization works, the applicant shall demonstrate the need to protect occupied structures existing as of August 18, 2005, or critical public infrastructure.

(2) **Bank Protection Practices.**

(a) **Soft.** Wherever possible, the applicant shall use soft bank protection practices which may include, but are not limited to, managed retreat, vegetative plantings, soft structures and beach nourishment.

(b) **Hard.** Bank protection practices such as bulkheads or other “hard” structures that do not minimize impacts to shoreline ecological functions and processes shall be permitted only if:

(i) The applicant documents that soft bank protection practices are infeasible; and

(ii) All anticipated adverse impacts of the proposed “hard” bank protection practices are fully mitigated pursuant to a mitigation plan acceptable to the Department, which shall include the prior removal of approximately an equal length of such structure restoring equal or greater ecological values within the exterior boundaries of the Reservation. If such structure is not available for removal, then an alternative location shall be approved by the Department.

(c) Notwithstanding provisions in 19-04.290(A)(2)(a)-(b), new hard bank protection structures may be used where determined by the Department as necessary to protect critical public infrastructure when it is not feasible to relocate such infrastructure landward, and the new structures are fully mitigated.

(B) Existing Structures.

(1) Maintenance or repair of existing soft bank protection structures is exempt from the requirements of this Section; provided that:

(a) Such maintenance or repair is limited to activities consistent with Section 19-04.080(B)(2).

- (b) An exemption letter from the Department, pursuant to Section 19-04.080(C), is required prior to commencing any such activities under this subsection.
- (2) Repair of existing hard bank protection structures is not exempt from obtaining a permit. Such permit application shall include information regarding the proposed percent repair of the structure.
- (C) **Repair of Fifty Percent (50%) of a Structure.** When the applicant proposes to repair fifty percent (50%) or more of a hard bank stabilization structure, calculated over the lifetime of the structure, he or she instead shall replace the structure with a soft bank protection practice or structure that minimizes impacts to shoreline ecological functions and processes, unless such replacement is determined by the Department to be infeasible.
- (D) Removal of bulkheads and hard bank protection structures, other than those necessary for the protection of vital public infrastructure and water dependent uses in the high intensity shoreline class, shall be encouraged.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.300 Shoreline Access Structures.

- (A) In order to minimize the number of shoreline access structures such as paths, ramps or stairs, landowners and tenants shall be encouraged to allow adjacent homeowners or tenants to utilize such structures, and homeowners without shoreline access structures shall be encouraged to seek permission to use existing access rather than build new structures.
- (B) Beach access structures shall be designed and constructed to minimize impacts to shoreline values and functions, including, where applicable, stairs with the lowest section retractable and without permanent attachment to the beach.
- (C) Beach access structures requiring repair of damage caused by inundation or storm surge shall meet the requirements of 19-04.300(B).

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.310 Shoreline Classifications.

- (A) The Shoreline Zone is hereby subdivided into five (5) classes, as follows:
 - (1) High Intensity Development;
 - (2) Shoreline Residential;

- (3) Rural Conservancy;
 - (4) Natural Shorelines; and
 - (5) Aquatic Lands.
- (B) The five (5) classes shall be as delineated on the Shorelines Classification Map. The Department shall update the map periodically or upon receipt of significant new information.
- (C) The shoreline class is an overlay to requirements in STC Title 20, Chapter 3 Zoning, and activities are subject to the requirements of STC 20-03, as well as this Chapter.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.320 High Intensity Development.

- (A) **Objective.** The objective of the High Intensity Development class is to provide for high-intensity water-oriented commercial, public, transportation and industrial uses while preserving, restoring and enhancing, to the extent practicable, existing shoreline ecological functions and processes.
- (B) **Preferred Uses.** The preferred use of the High Intensity Development classification is water-dependent industrial, commercial, public or marine transportation uses.
- (C) **Setbacks.** Minimum setback for structures that are not water-dependent shall be fifty (50) feet from the ordinary high water mark.

[History] Ord. 239 (08/02/05).

19-04.330 Shoreline Residential.

- (A) **Objective.** The objectives of the “Shoreline Residential” classification are to accommodate residential development in areas of existing residential development and to provide appropriate public access and recreational uses while, to the maximum extent practicable, preserving, restoring and enhancing shoreline ecological functions and processes.
- (B) **Preferred Uses.** The preferred uses in the Shoreline Residential Zone are residential and water-oriented recreational uses.

(C) **Prohibited Uses.** The following uses are prohibited:

- (1) Industrial uses;
- (2) Commercial uses, other than water-dependent recreational uses; or
- (3) New hard bank protection structures unless they meet the requirements of Section 19-04.290(A).

(D) **Setbacks.**

- (1) Minimum setbacks for structures that are not water-dependent structures shall be fifty (50) feet from the ordinary high water mark.
- (2) Provided, however, that if the site is controlled by building setbacks contained in the terms of a lease, or in a general plan of development or protective covenants adopted pursuant to such a lease, and that lease, general plan or covenant was approved by the Secretary of the Interior prior to the effective date of this Code, then the setback in such lease, general plan or covenants shall control shoreline structure setback requirements of the site.
- (3) The area between the fifty (50) foot setback line and the ordinary high water mark shall be maintained in a buffer of native vegetation for all projects for which a permit issued after the effective date of this Chapter, except:
 - (a) hazard trees may be removed from such buffer for safety needs as long as, based on best available science, the functional integrity of the buffer is maintained, and mitigation requirements are met; and
 - (b) For setbacks subject to 19-04.330(D)(2), the area from the applicable setback to the ordinary high water mark shall be maintained in native vegetation to the extent feasible.
- (4) Where new construction or an addition to an existing structure is permitted within the fifty (50) foot setback, mitigation shall replace with native vegetation an area at a ratio of 1.5 to 1 to that being developed.

[History] Ord. 386 (10/09/18); Ord. 248 (07/11/06), Ord. 239 (08/02/05).

19-04.340 Rural Conservancy.

(A) **Objective.** The objectives of the “Rural Conservancy” classification are as follows:

- (1) To preserve, restore and enhance shoreline ecological functions and processes;
- (2) To conserve historical and cultural resources;

- (3) To provide for sustainable use of natural resources; and
 - (4) To provide for low-intensity recreational opportunities.
- (B) **Preferred Uses.** The preferred uses in the Rural Conservancy classification are those that preserve, restore or enhance shoreline ecological functions and processes and provide for sustainable use of natural resources. Such uses include hunting and gathering, forestry, as well as water-dependent recreational facilities for boating, fishing, wildlife viewing trails and swimming beaches.
- (C) **Prohibited Uses.**
- (1) Industrial use; and
 - (2) Commercial use other than for sustainable natural resource management or low-intensity water-dependent recreation.
- (D) **Setbacks.**
- (1) Minimum setbacks of one hundred (100) feet from the ordinary high water mark shall be required for all structures or projects that are not water-dependent.
 - (2) At least seventy-five percent (75%) of the area waterward of the one hundred (100) foot setback shall be maintained in native vegetation.
- (E) **Bank Stabilization Works.**
- (1) **New Construction.** Construction of new hard bank protection structures in the Rural Conservancy classification shall not be permitted, except for habitat restoration projects approved by the Department, or where the Department determines alternatives are not feasible for the protection of critical public infrastructure, existing prior to the adoption of this Chapter.
 - (2) **Repair.** Repair of existing structures may be permitted subject to the terms and provisions of Section 19-04.290(B) and (C).

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.350 Natural Shorelines.

- (A) **Objective.** The objective of the Natural Shoreline classification is to preserve, restore and enhance shoreline ecological functions and processes of shorelines that are relatively free of development impacts and include intact or minimally degraded shorelines.

- (B) **Preferred Uses.** The preferred uses of the Natural Shorelines classification include: fish and wildlife habitat, scientific, historical, cultural, traditional, subsistence and educational uses and low-intensity water-oriented recreational access uses; provided, that the Department determines that the use will not result in adverse impacts to the shoreline ecological functions and processes.
- (C) **Prohibited Uses.** The following uses within the Natural Shorelines classification are not permitted:
- (1) Industrial use;
 - (2) Commercial use;
 - (3) Timber harvest;
 - (4) Agriculture, including livestock use;
 - (5) Roads, utility corridors and parking areas; provided that the Department determines these can be reasonably located outside the Natural Shorelines classification;
 - (6) New structures that would require a building permit under Tribal Code;
 - (7) New “hard” bank stabilization works, notwithstanding Section 19-04.290(A)(2)(b);
 - (8) Any use that would degrade or impair the recovery of the shoreline ecological functions and processes of the project area; and
 - (9) Land clearing or vegetation removal of 5,000 square feet or greater, except removal of invasive or noxious weeds.
- (D) **Bank Stabilization Works.**
- (1) **New.** New bank stabilization works and practices are prohibited; provided, that new soft bank protection works and practices are permitted where necessary for a habitat restoration project approved by the Department. .
 - (2) **Existing.** Repair of existing bank stabilization works is permitted, subject to Section 19-04.290(B) and (C).

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.360 Aquatic Lands.

- (A) **Objective.** The objective of the “Aquatic Lands” classification is to preserve, enhance, restore and manage the unique characteristics and resources of the tidelands and near-shore waters of the Reservation below the ordinary high water mark and above the extreme low water mark.
- (B) **Preferred Use.** Preferred uses for the Aquatic Lands classification are fishing, shellfish harvesting, fish and wildlife habitat, and low-impact recreation including nature study, wildlife viewing, swimming and boating.
- (C) **Prohibited Uses.** The following uses are prohibited in the Aquatic Lands classification:
 - (1) Placement of fill, including but not limited to dredge spoils, except for habitat restoration projects approved by the Department;
 - (2) Non-water dependent structures, except as authorized by the Tribe for a utility right-of-way;
 - (3) Bank protection works of any kind, unless they:
 - (a) Were built prior to August 18, 2005 and meet the requirements of Section 19-04.360(G); or
 - (b) Are necessary for habitat restoration projects approved by the Department.
- (D) All projects in the Aquatic Lands classification shall be located and designed to minimize interference with surface navigation, public views and access to traditional Tribal fishing areas, and to provide for the safe, unobstructed passage of fish and wildlife, particularly migratory fish and wildlife.
- (E) Shoreline projects that affect the Aquatic Lands classification shall be designed and managed to preserve, restore or enhance shoreline ecological functions and processes.
- (F) The Department shall not permit any project within the Aquatic Lands classification that impacts the shoreline ecological functions and processes of such areas or results in the reduction of the productivity of commercial or subsistence shellfish beds. This provision shall not apply to the lawful harvest of any fish or shellfish that are subject to Title 18 – Natural Resources, or any regulation issued thereunder.

- (G) Existing unpermitted structures or uses on Tribal tidelands within the Aquatic Lands shall be removed or obtain a permit under this Chapter and a lease under the provisions of STC 23-01 Subchapter III. The Department, in cooperation with the Department of Land Management, shall provide a recommendation to the Senate regarding leasing or removal of such individual structures based on criteria developed jointly by the Department of Land Management and the Department of Environmental Protection.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

Subchapter IV – Sensitive Areas: General Requirements

19-04.370 Uses.

- (A) **Preferred Uses.** The preferred uses of any and all sensitive areas and their associated buffers are projects approved by the Department for the purpose of conserving, enhancing and restoring the functions or values of the sensitive area.

- (B) **Prohibited Uses.**

The following uses are prohibited in sensitive areas and associated buffers, except for uses in geological hazard areas and associated buffers that are in conformance with the provisions of 19-04.500:

- (1) Development;
 - (2) Agricultural, including livestock operations; or
 - (3) Any other activity that is determined by the Department to have an impact on the values and functions of sensitive area or a species for which the sensitive area was established.
- (C) **Existing Uses.** The terms and provisions of this Chapter do not apply to development within a sensitive area that existed prior to August 18, 2005, including but not limited to the use of an utility right-of-way; provided, that agricultural cultivation and livestock operations, and operations causing impacts covered under 19-04.210(A), are not subject to such exception.

[History] Ord. 386 (10/09/18); Ord. 248 (07/11/06), Ord. 239 (08/02/05).

19-04.380 Mitigation.

The Department shall not issue a permit for any project that may adversely affect the functions and values of any sensitive area unless the anticipated adverse effects are mitigated in accordance with 19-04.250 and applicable approved guidelines and standards.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

Subchapter V – Wetlands Sensitive Areas

19-04.390 Determination.

- (A) **Boundaries.** The Department shall determine, or cause to be determined, wetland boundaries in accordance with the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1987). The Department may also use supplemental standards and/or methods to determine wetlands boundaries, as appropriate. If the Department uses or develops such supplemental standards and/or methods, it shall place a copy of the supplemental standards and/or methods on file for public inspection during regular business hours at the Department.

- (B) **Map.** Wetlands shall be indicated by classification on the Reservation Wetlands Map. The Department shall update the Map periodically or upon receipt of substantive new information concerning the boundaries of a wetland.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.400 Wetlands Classification.

- (A) Wetlands on the Reservation are hereby classified into one of three (3) categories of functions and values according to the Swinomish Wetlands Rating System as follows:
 - (1) High Functioning Wetlands (Class 1) provide significant wetland functions and values including important wetland species habitat and meet at least one of the following criteria:
 - (a) Represents a high quality example of a rare wetland type for the Reservation;
 - (b) Contributes to regional diversity or contiguous support of wetland habitat types;
 - (c) Is relatively undisturbed and contains ecological attributes that are irreplaceable within a human lifetime;
 - (d) Significantly contributes to the abundance of culturally important plants.
 - (2) Moderate Functioning Wetlands (Class 2) provide significant wetland functions and values including wetland species habitat, may be difficult to replace, contribute to the abundance of culturally important plants or are one acre or greater in area, but have a lower value under the Swinomish Wetlands Rating System than Class 1 wetlands.

- (3) Low Functioning Wetlands (Class 3) do not satisfy either Class 1 or Class 2 criteria.
- (B) In classifying the wetlands, the Department shall consider the ability of the wetlands to perform the following functions:
- (1) Flood and stormwater control;
 - (2) Maintenance of base flow;
 - (3) Groundwater support;
 - (4) Erosion control;
 - (5) Water quality improvement;
 - (6) Creation and maintenance of fish and wildlife habitat;
 - (7) Preservation, restoration or enhancement of the ecological, cultural and economic functions and values of the wetland; and
 - (8) Preserve and enhance traditional and cultural opportunities, including for subsistence, medicinal and ceremonial use.
- (C) The Department shall not change the classification of a wetland during review of a permit application for a project impacting such wetland, unless new information is provided or obtained by the Department that indicates the original designation was made in error.
- (D) The Department shall not alter a wetland classification to permit unauthorized modifications to the wetland.
- (E) For purposes of designation and regulation, wetlands created for mitigation of a project shall be treated in the same manner as naturally existing wetlands of the same Class.
- (F) **Forested Wetlands.** Wetlands dominated by woody vegetation twenty (20) feet or taller are forested wetlands, which shall be regulated in the same manner as other wetlands; provided however, that timber harvest and forest management practices, when done in accordance with a Forest Management Plan approved by the Senate, shall be allowed as follows:
- (1) Class 1 Wetlands – No harvest activities are allowed within the wetland or 200 foot buffer.

- (2) Class 2 Wetlands – No harvest is allowed within the wetland, and no harvest is allowed within associated buffers, except if required to address forest health concerns or improve ecological function, and the impacts are fully mitigated.
- (3) Class 3 Wetlands – Harvest may be allowed in these wetlands and buffers subject to review and approval of the Department.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.410 Buffers.

- (A) **Establishment.** Buffers around wetlands are hereby established. A buffer shall be subject to the same use restrictions as the wetland that it buffers.
- (B) **Width.** The widths of the wetlands buffers, measured from the wetland boundary, shall be based on the wetland classification as follows:
 - (1) Class 1: 200 feet;
 - (2) Class 2: 100 feet; and
 - (3) Class 3: 25 feet.
- (C) **Increased Width.** The Department may increase the buffer width of a wetland on a case-by-case basis in order to protect the wetland’s functions and values. The Department shall base any decision to increase the buffer widths on consideration of each of the following:
 - (1) The recommendations of a qualified professional biologist with wetland ecology expertise;
 - (2) Best available science; and
 - (3) A determination that a wider buffer is needed to protect the wetland’s functions and values.
- (D) **Decreased Width.**
 - (1) The Department may grant an applicant’s request to decrease the buffer width around a Class 1 and Class 2 wetland on a case-by-case basis to accommodate the development needs of the applicant upon findings by the Department of each of the following:
 - (a) The decreased buffer width is necessary to prevent the loss of nearly all beneficial or productive use of the property;

- (b) A decrease in buffer width is in the best interest of the Tribe;
 - (c) The decreased buffer is adequate to protect the wetland's functions and values; and
 - (d) The applicant shall mitigate any and all impacts to the wetlands functions and values resulting from the proposed use pursuant to a mitigation plan acceptable to the Department.
- (2) The Department shall make the findings required by Section 19-04.410(D)(1)(a) through (d) based upon a consideration of each of the following:
- (a) The recommendation of a qualified professional with wetlands ecology expertise;
 - (b) Best available science; and
 - (c) The extent of vegetation in the proposed buffer.
- (3) **Minimum Width.** In no case shall the buffer be reduced to less than fifty percent (50%) of a standard buffer width for the wetland class or to less than twenty-five (25) feet from the wetland boundary.
- (F) **Buffer Averaging.** As an alternative to the process in Section 19-04.410(D), wetland buffer widths may be adjusted by the Department on a case-by-case basis utilizing buffer averaging where the Department determines that each of the following conditions exists:
- (1) The total area contained within the wetland buffer after the adjustment shall not be less than that contained within the standard buffer;
 - (2) The averaging will increase or enhance the wetland's functions and values; and
 - (3) Buffer width shall not be reduced to less than fifty (50) feet in width, for Class 1 or Class 2 wetlands.
- (G) **Estuarine Wetland Buffers.** Buffers for estuarine wetlands shall be no less than fifty (50) feet, but may be up to one hundred (100) feet in width, as determined by the Department and delineated on the Wetlands Map, as needed to address shoreline migration associated with sea level rise.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.420 Wetland Reports.

- (A) An applicant who proposes any project within a designated wetland or its associated buffer shall submit a Wetlands Report that is acceptable to the Department. The Department may require such report if a boundary delineation is needed to determine if a project is within a wetland or its buffer.
- (B) The Wetland Report shall be prepared by a qualified professional biologist with wetlands ecology expertise.
- (C) The report shall include each of the following:
 - (1) A description of the proposed project and associated reasonably foreseeable adverse impacts;
 - (2) A wetlands boundary survey, which shall include a written assessment and maps, at a scale of not less than 1" = 100', of the wetlands or associated buffers impacted by the proposed project; and
 - (3) A determination of the wetland's class and an analysis of vegetative, faunal, soil, topographic and hydrologic characteristics.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.430 Wetlands Mitigation.

- (A) **Order of Preference.** All wetland mitigation shall be conducted in the following order of preference:
 - (1) Modify the proposed project to avoid impacts to the wetland's functions and values;
 - (2) Restore wetlands on upland sites that were formerly wetlands;
 - (3) Enhance significantly degraded wetlands;
 - (4) Create wetlands on disturbed upland sites;
 - (5) Preserve high quality wetlands that are under imminent threat from development; or
 - (6) Pay an amount of money determined by the Department to equal the cost of mitigating the proposed project in lieu of on-site mitigation. Such funds shall be deposited in the Shorelines and Sensitive Areas Protection and Restoration Fund in accordance with Section 19-04.170.

- (B) **Mitigation Plan.** No project shall be permitted in a wetlands sensitive area without a wetland mitigation plan approved by the Department that is consistent with Sections 19-04.430(C) and (D) and Departmental guidelines, except timber harvest activities consistent with 19-04.400(F).
- (C) **Mitigation Projects.**
- (1) All mitigation projects shall be constructed “on-site” or within the same watershed or sub-watershed as the wetlands affected by the project.
 - (2) **Exceptions.** The Department may permit off-site and out of the same or sub-watershed mitigation on a case-by-case basis, based upon findings of each of the following:
 - (a) Either:
 - (i) Mitigation within the same or sub-watershed would impose unreasonable hardship on the applicant; or
 - (ii) Mitigation within the same or sub-basin would be infeasible; and
 - (b) The proposed off-site mitigation would protect, enhance, or restore wetland values that significantly contribute to the environmental quality of the Reservation or enhancement of Treaty resources.
 - (3) In deciding whether to approve the location of a mitigation project, the Department shall consider the anticipated functions and values, acreage, and habitat type and class of the proposed mitigation, in addition to the timing and the probability of success of the proposed mitigation.
 - (4) Mitigation projects shall be completed in accordance with the mitigation plan approved by the Department, and, where feasible, a mitigation project shall be completed prior to the commencement of the project that is anticipated to have a significant adverse impact on the functions and values of the wetland.
 - (5) The proponent of the wetland mitigation project shall, prior to approval of such project, demonstrate to the Department that he or she has sufficient expertise, supervisory capability and financial resources to successfully complete the proposed mitigation.
 - (6) No mitigation project shall be permitted outside the exterior boundaries of the Reservation without a binding contract between the Tribe and the applicant that requires the applicant to provide for the preservation of the mitigation project in perpetuity. An example of such a binding contract is a conservation easement.

(D) **Mitigation Ratios.**

- (1) **Creation or Restoration of Wetland.** The following acreage replacement ratios shall apply to the creation or restoration of a wetland in the same wetland class and habitat type as the wetland affected by the proposed project.

Class	Affected Acres	Replacement Acres
1	1	6
2	1	3
3	1	2

- (2) **Enhancement of Existing Wetland.** The following acreage replacement ratios shall apply to the enhancement of an existing wetland in the same wetland class and habitat type as the wetland affected by the proposed project.

Class	Affected Acres	Enhancement Acres
1	1	12
2	1	6
3	1	4

- (3) The Department may increase the ratios in Section 19-04.430(D)(1) and (2). The Department shall base its decision to increase the ratio on consideration of each of the following:

- (a) The recommendations of a qualified professional biologist;
- (b) Best available science;
- (c) The best interests of the Tribe;
- (d) Probability of success of the proposed wetland restoration, creation, enhancement or preservation;
- (e) Period of time between destruction of the existing wetland functions and values and creation, restoration, preservation or enhancement of the new wetland's functions and values;
- (f) Projected losses in the wetland's function and values;
- (g) Off-Reservation mitigation projects as approved in writing by the Department; and
- (h) Whether the proposed wetland mitigation is required to mitigate for non-compliance with the terms and provisions of this Chapter.

- (4) **Preserving Existing Wetland.** Where the Department approves an applicant's choice and plan to mitigate for a wetland impacted by his or her project by preserving other high quality wetlands under threat of development, the ratio of preserved wetlands to affected wetlands shall be between 12-to-1 and 20-to-1, as determined by the Department based on the factors in Section 19-04.430(D)(3)(a)-(h).

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

Subchapter VI – Fish and Wildlife Sensitive Areas

19-04.440 Designation.

- (A) The Department is authorized to designate Fish and Wildlife Sensitive Areas for the habitat of the following species, and the following habitat types:
 - (1) Species on the list of Threatened and Endangered Species prepared pursuant to the Federal Endangered Species Act, 16 U.S.C. § 1531 – 1544, as may be amended from time to time;
 - (2) Bald Eagles;
 - (3) Pacific Herring;
 - (4) Surf Smelt and Sand Lance;
 - (5) Streams and riparian habitat;
 - (6) Concentration areas for waterfowl and nesting of other bird species;
 - (7) Shellfish harvest areas; and
 - (8) Other species or habitats designated by the Environment and Lands Committee, subject to Senate approval.
- (B) **Map.** Fish and Wildlife Sensitive Areas shall be indicated by classification of species or habitat type on the Reservation Fish and Wildlife Sensitive Areas Map. The Department shall update the Map periodically or upon receipt of substantive new information concerning the boundaries of a Sensitive Area.
- (C) Fish and Wildlife Sensitive Areas shall have a minimum buffer of one hundred (100) feet unless otherwise specified in this Chapter. Within such buffers all new development is prohibited unless fully mitigated.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.450 Report.

- (A) An applicant for a project within one hundred (100) feet of a Fish and Wildlife Sensitive area shall submit a Fish and Wildlife Sensitive Areas Report that is acceptable to the Department.
- (B) The Fish and Wildlife Sensitive Areas Report shall be prepared by a qualified professional fisheries or wildlife biologist.
- (C) The report shall contain each of the following:
 - (1) A description of the proposed project;
 - (2) A map of the project area and any and all sensitive areas within two hundred (200) feet of the project area;
 - (3) A description of all species or habitat types for which the Fish and Wildlife Sensitive Area was designated;
 - (4) An assessment of any effects the project may have on the Fish and Wildlife Sensitive Area, species or habitat for which it was designated;
 - (5) A discussion of measures to avoid, reduce or mitigate the adverse effects of the project on the Fish and Wildlife Sensitive Area; and
 - (6) A plan, approved by the Department, on how to protect, enhance or restore the Fish and Wildlife Sensitive Area, if applicable.
- (D) A Biological Assessment developed for compliance with the Endangered Species Act, or a comprehensive environmental review developed for compliance with the Tribal Environmental Policy Act, may be substituted, as appropriate, for a Fish and Wildlife Sensitive Areas Report as long as it fully addresses Section 19-04.450(C)(1)-(6).

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.460 Streams and Riparian Habitat.

- (A) All five named streams on the Reservation, Fornsby, Lone Tree, Snee-Oosh, Turner and Munks Creeks, are hereby established as Fish and Wildlife Sensitive Areas in order to protect the functions and values of the streams and their associated riparian habitats.

(B) **Stream Buffers.**

- (1) Stream buffers shall be sufficiently wide to achieve a full range of riparian and aquatic ecosystem functions and values including:
 - (a) Recruitment of large woody debris to a stream to maintain salmonid productive capacity and species diversity;
 - (b) Shading by the forest canopy to maintain cooler water temperatures and dissolved oxygen availability for salmonids;
 - (c) Bank integrity (root reinforcement) to maintain habitat and water quality by reducing bank erosion and creating habitat structure and instream hiding cover for salmon;
 - (d) Filtration of nutrients, pollutants and sediments in runoff to maintain water quality; and
 - (e) Functional wildlife habitat for riparian dependent species.
- (2) Unless explicitly stated otherwise in this Chapter, buffers for streams are hereby established as follows:
 - (a) For Fornsby, Lone Tree, Snee-Oosh, Turner and Munks Creeks, the stream buffers are as designated on the Fish and Wildlife Sensitive Areas Map but not less than minimum buffer widths specified in Section 19-04.460(B)(2)(b); and
 - (b) Minimum stream buffers shall extend from the ordinary high water mark of the stream to a line one hundred (100) feet upland, or fifty (50) feet upland from the top of the slope of a ravine fifteen (15) feet or greater in depth in which a stream is located, whichever is greater; and
 - (c) For drainage ditches in agricultural lands protected from tidal inundation, buffers shall extend a minimum of fifty (50) feet from the edge of the ditch.

(C) **Increased Buffer Width.** The Department may increase the width of a stream or drainage ditch buffer on a case-by-case basis in order to protect the functions and values of the stream, the waters into which the drainage ditch flows or its associated riparian habitat. The Department shall base its decision to increase the buffers on consideration of each of the following factors:

- (1) The recommendations of a qualified professional biologist;
- (2) Best available science; and

- (3) A determination that a larger size is needed to protect the functions and values of the stream, the waters into which the drainage ditch flows or its associated riparian habitat.

(D) **Fish Passage.**

- (1) Structures that prevent the migration of salmonids shall not be allowed in the portion of water bodies currently or historically used by anadromous fish. Facilities shall be provided that allow the upstream migration of adult fish and that prevent fry and juveniles migrating downstream from being trapped or harmed by such structures, unless other adequate ingress or egress points are available to provide fish passage.
- (2) **Map.** Water bodies in Fish or Wildlife Sensitive Areas currently or historically used by anadromous fish shall be indicated on a map. The Department shall update the map periodically or upon receipt of substantive new information concerning the boundaries of a Sensitive Area.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.470 Bald Eagle Habitat.

- (A) **Active Nests.** Fish and Wildlife Sensitive Areas for bald eagles are hereby designated around any and all active bald eagle nests on the Reservation or within one-half mile of the exterior boundaries of the Reservation. The boundary of each such Sensitive Area shall be a circle around each active nest with the nest at the center of the circle, or that portion of such circle within the exterior boundaries of the Reservation. The radius of the circle shall depend on the season as follows:

- (1) **January 1 through August 15.** The radius around the active bald eagle nest shall be one-half (1/2) mile from January 1 through August 15.
- (2) **August 16 through December 31.** The radius around the active bald eagle nest shall be one-quarter (1/4) mile from August 16 through December 31.

(B) **Sensitive Areas Plan.**

- (1) The Department shall review all proposed projects within a Fish and Wildlife Sensitive Area for bald eagle nesting to determine if a site specific Fish and Wildlife Sensitive Area Plan is required. The determination shall be based on best available science, and on the following criteria:
 - (a) Distance from the activity to the active nest,

- (b) Nature of the proposed activity,
 - (c) Line of sight from the nest to the activity and any existing intervening activities, and
 - (d) Whether the nesting activity or nest use is likely to be affected by the project.
- (2) A mitigation proposal to address any identified impacts must be approved by the Department before any permit will be issued pursuant to this Chapter.
- (C) **Eagle Perch Trees.** Within eight hundred (800) feet of an active eagle nest, or within a Sensitive Area for eagle perching as designated on a map approved and made publicly available by the Department, the following shall apply:
- (1) Retain all known eagle perch trees,
 - (2) Retain all conifers twenty-four (24) inches or more at breast height (dbh), and
 - (3) Retain at least fifty percent (50%) of all conifers greater than ten inches dbh.
 - (4) Exception to 19-04.470(C)(1)-(3) may be made on approval of the Department for a tree presenting a hazard to an occupied structure which existed prior to the effective date of this sub-section, provided the applicant submits adequate justification and mitigates impacts.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.480 Commercial and Subsistence Shellfish Harvest Areas.

- (A) **Buffers.** A buffer of one hundred (100) feet is hereby established around the sensitive areas for commercial and subsistence shellfish harvest. A buffer is subject to the same use restrictions as the sensitive area that it buffers.
- (B) **On-Site Septic Systems.** New on-site septic systems are prohibited within two hundred (200) feet of a shoreline adjacent to a sensitive area for shellfish, provided that systems which meet the following treatment standards may be allowed within one hundred (100) feet of such locations if the Department determines there is no reasonable alternative:
- (1) A thirty day average of less than 10 mg / literL Biological Oxygen Demand (BOD); and

- (2) A thirty day average of less than 10 mg / literL Total Suspended Solids (TSS); and
- (3) A thirty day geometric mean of less than 200 fecal coliform /100 milliliters.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

Subchapter VII – Geological Hazard Sensitive Areas

19-04.490 Designation.

- (A) Geological Hazard Sensitive Areas are hereby established, for areas sensitive to the following geological hazards:
 - (1) Erosion hazard area;
 - (2) Landslide hazard area; and
 - (3) Seismic activity hazard area.
- (B) Criteria for identification of the Geological Hazard Sensitive Areas established in Section 19-04.490(A) are the following:
 - (1) Areas of historic failure;
 - (2) Areas with each of the following characteristics:
 - (a) Slopes steeper than fifteen (15) degrees;
 - (b) Hillsides intersecting geological contacts with a relatively permeable sediment overlying a relatively impermeable sediment or bedrock; and
 - (c) Springs or groundwater seeps.
 - (3) Slopes that are parallel or subparallel to planes of weakness (such as bedding planes, joint systems and fault planes) in subsurface materials;
 - (4) Slopes steeper than eighty (80) degrees subject to rockfall during seismic shaking;
 - (5) Areas potentially unstable as a result of rapid stream incision, stream bank erosion and undercutting by wave action;
 - (6) Slopes steeper than forty (40) degrees with a vertical relief of ten (10) or more feet, except areas composed of consolidated rock; or

(7) Areas subject to soil liquefaction or settlement during an earthquake.

(C) **Buffer.**

(1) **Establishment.** There is hereby established a buffer around each of the Geological Hazard Sensitive Areas.

(2) **Width.** The buffer shall begin at the boundary of the geological hazard area and extend away from the boundary to a width of fifty (50) feet, subject to the exceptions in Section 19-04.490(C)(3).

(3) **Exceptions.**

(a) The buffer for a landslide hazard area shall begin at the boundary of the geological hazard area and extend away from the boundary to a width of either fifty (50) feet, or twice the height of the slope, whichever is greater.

(b) Areas meeting only the criteria in 19-04.490(B)(7) shall have no additional buffer.

(4) **Native Vegetation.** Any portion of an erosion or landslide hazard area or associated buffer not permitted for development shall remain in native vegetation unless determined by the Department to be infeasible or inconsistent with the needs for public health and safety.

(D) **Map.** The Department shall identify Geological Hazard Sensitive Areas on a map and shall update the map periodically or upon receipt of substantive new information concerning the boundaries of a Geological Hazard Sensitive Area.

[History] Ord. 386 (10/09/18); Ord. 248 (07/11/06), Ord. 239 (08/02/05).

19-04.500 Projects.

(A) **Criteria.** All structures proposed within Geological Hazard Sensitive Areas or associated buffers shall be determined by the Department to meet each of the following requirements:

(1) The development does not pose a significant risk to health or welfare;

(2) The development does not increase the risk of damage to adjacent properties, or to the functions and values of other sensitive areas; and

(3) The development is in the best interest of the Tribe.

(B) **Report.**

- (1) **Submission.** An applicant for a permit to build a project within a Geological Hazard Sensitive Area shall submit a geological hazards report acceptable to the Department.
- (2) **Preparation.** The geological hazards report shall be prepared by a qualified professional geologist, engineer or soils scientist.
- (3) **Contents.** The report shall contain each of the following:
 - (a) A description of the proposed project;
 - (b) An assessment of the geological characteristics of the project area including soils, hydrology, vegetation, details of field investigations and a description of the vulnerability of the site to landslide, seismic and flooding events;
 - (c) An analysis of the proposed project in relationship to the geologic hazards and potential impact to the site, adjacent properties and natural resources;
 - (d) A recommendation for a minimum setback from any geological hazard;
 - (e) An erosion control plan and a drainage plan with suggested mitigation, where appropriate, to reduce the risk to slope stability; and
 - (f) A site map showing all fill areas within two hundred (200) feet of the project area or that pose potential risk to the project, adjacent properties and natural resources of the area.

[History] Ord. 248 (07/11/06), Ord. 239 (08/02/05).

19-04.510 Point Source Discharge into a Landslide Hazard Sensitive Area.

- (A) **Prohibition.** Point source discharges from surface water facilities, impervious surfaces and roof drains onto or within fifty (50) feet upslope from a landslide hazard area are prohibited, subject to the exceptions in Section 19-04.510(B).
- (B) **Exceptions.** The Department may permit point source discharges into a landslide hazard sensitive area, provided:
 - (1) The point source discharge is conveyed via a continuous storm pipe down slope to a point below the geological hazard sensitive area and utilizes, where appropriate, an energy dissipating device; or

- (2) The point source discharge is dispersed upslope of the steep slope onto a low gradient of undisturbed vegetation, but only if a geological hazards report by a qualified professional shows that upslope dispersal is adequate for infiltration and that such discharge will not increase saturation or instability of the slope.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.520 Protection of Marine Feeder Bluffs.

- (A) Setbacks for new construction from the top of a marine feeder bluff shall be a minimum of fifty (50) feet.
- (B) For existing structures located within twenty five (25) feet of the top of a marine feeder bluff, such structures requiring repair of fifty percent (50%) or more of structure within a three (3) year period shall be moved to meet the setback or shall be removed.
- (C) New hard armoring of a marine feeder bluff is prohibited.
- (D) Repair of existing armoring on a marine feeder bluff shall be fully mitigated. If fifty percent (50%) or more of such structure is repaired or requires repair, measured over the life of the structure, the structure shall be removed.

[History] Ord. 386 (10/09/18).

Subchapter VIII – Inundation Risk Zone Sensitive Area

19-04.530 Inundation Risk Zone.

The Inundation Risk Zone is as identified and published in the Swinomish Climate Change Initiative Impact Assessment Technical Report (IATR, 2009) and as amended hereafter, including via map update of the Inundation Risk Zone adopted by the Senate. The Inundation Risk Zone is five (5) vertical feet above the 2009 Mean Higher High Water mark, which represents the area at potential risk from sea level rise and coastal flooding, and the tidal surge risk zone with an additional three (3) vertical feet, which represents the area at potential risk from tidal and storm surge in the IATR.

[History] Ord. 386 (10/09/18).

19-04.540 Structures.

- (A) Construction of new homes, buildings and other structures shall only be allowed within the Inundation Risk Zone if the proposed new construction meets the following requirements:
- (1) The structure conforms to all applicable shoreline setbacks;
 - (2) The structure, except for bank protection structures permitted in conformance with this Chapter, will not block the landward migration of the shoreline associated with sea level rise for the lifetime of the structure;
 - (3) The lowest occupied floor of the structure is elevated at least five (5) feet above Mean Higher High Water at the time of construction;
 - (4) The structure meets all applicable Tribal building and zoning codes as necessary to protect public health and safety including provisions applicable to inundation risks;
 - (5) The owner signs an acknowledgement of sea level rise risk to the structure; and
 - (6) If such structure is still in place when the designated Mean High Water Mark reaches any part of it, the structure shall be removed or obtain a new permit under the Aquatic Lands provisions of this Chapter and a lease under STC 23-01, Subchapter III.
- (B) Repair of existing structures, except for bank protection structures, within the Inundation Risk Zone which are damaged by coastal flooding, inundation or storm surge shall meet the following:
- (1) Repair of twenty percent (20%) or more of the area or value of the structure, whichever is greater, shall require minimizing or mitigating impacts on shoreline values and functions including blocking of shoreline migration.
 - (2) Repair of fifty percent (50%) or more of a structure over its lifetime for damage caused by coastal flooding, inundation or storm surge, shall meet the requirements for new construction in Section 19-04.540(A) above, otherwise such structure shall be removed from the Inundation Risk Zone.

[History] Ord. 386 (10/09/18).

19-04.550 Non-Conforming Use.

- (A) Structures which existed as of August 18, 2005 but are non-conforming with regard to shoreline setbacks as specified herein may be enlarged provided:
 - (1) Expansion waterward of a non-conforming structure within applicable setbacks is prohibited.
 - (2) Expansion laterally or landward within applicable setbacks may be considered provided impacts are reasonably limited, but any such expansion shall be fully mitigated at a ratio of not less than 1:1.5, impacted to mitigated resources or area.
- (B) A non-conforming use that has been discontinued for 12 consecutive months, or for 12 months within any two (2) year period will deemed abandoned regardless of owner intent and any subsequent use shall conform to all applicable setbacks and buffers as required under this Chapter for new development.

[History] Ord. 386 (10/09/18).

19-04.560 Dikes.

New or proposed dikes are prohibited from blocking shoreline migration related to sea level rise, except as part of a planned retreat strategy or habitat restoration project approved by the Department.

[History] Ord. 386 (10/09/18).

Subchapter IX – Enforcement

19-04.570 Inspections.

- (A) The Department shall inspect all projects subject to this Chapter to ensure compliance with the terms and provisions of this Chapter and the terms and provisions of the permit.
- (B) When it is necessary to make an inspection to enforce the provisions of this Chapter, Department officials may enter the premises at reasonable times to inspect or perform the duties established by the terms and provisions of this Chapter. The Department official shall make a reasonable effort to locate the owner or a person with authority over the premises to request entry. If such entry is refused, the official shall have recourse to the remedies provided by law to secure entry.

- (C) The permit holder or their agent is responsible for notifying the Department at least 24 hours in advance of a required inspection. The following are required inspections under this Chapter:
- (1) After an activity is marked for clearing or in preparation of the permitted activity, such as installation of erosion control facilities; and
 - (2) Upon completion of the permitted project or activity.

*Previously codified as STC 19-04.520.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.580 Enforcement Orders.

- (A) In the event of any violation of any provision of this Chapter or any violation of a permit condition or mitigation requirement pursuant to this Chapter, the Director may issue an administrative order requiring the landowner or other responsible party to perform any or all of the following:
- (1) Cease the activity, use or work causing the violation;
 - (2) Abate the work, development or structure in violation;
 - (3) Remediate, restore or mitigate for any adverse environmental effects of such activity, use, work, development or structure in violation;
 - (4) Pay a civil fine or penalty pursuant to Section 19-04.590; and
 - (5) Pay statutory damages pursuant to Section 19-04.600.
- (B) Any administrative order issued by the Director pursuant to Section 19-04.580 may be appealed in accordance with Sections 19-04.610 to 19-04.670.

*Previously codified as STC 19-04.530.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.590 Penalties.

- (A) Penalties that may be levied for violations of this Chapter shall be a civil fine of not less than \$200.00 per violation and not more than \$5,000.00 per violation.

- (B) The fine shall be based on the following factors:
- (1) Severity of the violation, in terms of effect on the values and functions of a Shoreline or Sensitive Area;
 - (2) History of violations of this Chapter or other chapters of the Swinomish Tribal Code related to environmental protection or land use for the same parcel or violator;
 - (3) Staff time required to correct the violation as per the fee schedule;
 - (4) Cooperation with the Tribe, which may allow reduction of the fine by up to fifty percent (50%) based on all of the following:
 - (a) Immediate compliance with an order to cease an ongoing violation;
 - (b) Actions taken to correct the violation as quickly as feasible;
 - (c) Full cooperation with investigations related to the violation; and
 - (d) The violation was fully rectified within 30 days of notice.
- (C) For the purpose of assessing a fine, each day the project remains in violation may be considered a separate violation.
- (D) When a Shoreline or Sensitive Area has been altered in violation of the terms and provisions of this Chapter or a permit condition or mitigation requirement pursuant to this Chapter, the area shall be remediated and restored in accordance with the terms and provisions of this Chapter and a plan approved by the Department.

*Previously codified as STC 19-04.540.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.600 Statutory Damages.

- (A) In addition to any other remedies for violations of this Chapter, the Department is authorized to assess and to recover, on behalf of the Tribe, statutory damages in the following amounts:
- (1) Double the economic benefit the violator gained by non-compliance, as determined by the Department; or
 - (2) Double the amount of money the Tribe lost due to the person's violation of this Chapter, as determined by the Department; and/or

- (3) Double the amount of money the Tribe expended in mitigating the environmental affects of the violation of this Chapter, as determined by the Department.

*Previously codified as STC 19-04.550.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

Subchapter X – Hearings, Appeals, Computation of Time and Law Applicable

19-04.610 Request for Hearing Before the Planning Commission.

- (A) Any party aggrieved by a decision or action of the Department or Director, for which this Chapter provides a right to request a hearing, may request such a hearing by the Planning Commission within thirty calendar days from the date of notice of the challenged decision or within thirty calendar days from the date of the challenged action, as applicable.
- (B) Any request for a hearing shall be filed with the Department and shall state:
 - (1) The reasons for the hearing request, specifically identifying any claimed errors involving any of the following in the challenged decision or action:
 - (a) Conclusions as to Swinomish law, plans or policies, as to Federal law, or in the application of such law, plans or policies;
 - (b) Any factual findings or statements of facts; or
 - (c) Any arbitrary or capricious action; and
 - (2) Any way in which the party requesting a hearing has been or will be substantially prejudiced by the challenged decision or action.

*Previously codified as STC 19-04.560.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.620 Hearings by the Planning Commission.

- (A) All Planning Commission hearings held pursuant to this Chapter shall be conducted in accordance with the provisions of this Section.

- (B) **Notice of Public Hearing.** The Department shall publish and shall provide the party who requested a hearing notice of the Planning Commission hearing at least fifteen (15) calendar days in advance of the date of the hearing. The hearing shall be held within sixty (60) calendar days of the date on which the request for hearing was filed.
- (C) **Public Hearing Procedures.** Planning Commission hearings shall proceed in the following manner:
- (1) The Department shall provide copies of any application or request, supporting documents and any documents relating to the challenged decision or action. Planning Commission members may ask questions of the staff.
 - (2) The party who requested the hearing may submit written documents or materials in response to the Department's recommendation, decision or action. Planning Commission members may ask questions of the party who requested the hearing.
 - (3) Members of the public may offer comments on the proposal for consideration by the Planning Commission. Questions or comments from the public shall be addressed to the Planning Commission and directed by the Chair of the Commission to staff or the party that requested the hearing, at the discretion of the Chair.
 - (4) Response or clarifying statements by the Department and the party that requested the hearing.
 - (5) Closing of the evidentiary portion of the hearing and deliberation on the proposal by the Planning Commission.
- (D) **Public Record.** The Planning Commission shall make a written or audio record of all hearings.
- (E) **Basis of Decision.** The Planning Commission shall review the record of the hearing and the documents submitted at the hearing, and shall base its decision upon such record, applying the provisions of the Swinomish Code and of Federal law and considering the best interests of the Tribe.
- (F) **Written Decision.** The Planning Commission shall issue its decision in writing. Copies shall be provided to the Department and the party requesting the hearing, and shall be available for public inspection and copying at reproduction cost. The decision shall be issued within thirty (30) calendar days of the date of the hearing.

*Previously codified as STC 19-04.570.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.630 Appeals of Planning Commission Decisions.

- (A) Any party aggrieved by a decision of the Planning Commission may appeal that decision to the Senate by filing a written notice of appeal within thirty (30) calendar days from the date of notice of the decision; provided, however, that this Section is not applicable to recommendations made by the Planning Commission to the Senate.
- (B) The Senate shall make a decision on appeal based on the administrative record of the proceedings before the Planning Commission. The Senate shall not receive or consider any additional evidence not contained in the administrative record of the proceedings before the Planning Commission, and shall not consider any issue that was not raised by the appealing party in the administrative proceedings before the Planning Commission. The Senate shall issue a decision within sixty (60) calendar days of the date on which the notice of appeal was filed.
- (C) The Senate shall affirm the decision of the Planning Commission unless the appealing party demonstrates to the Senate both (1) and (2) below:
 - (1) The decision of the Planning Commission is either:
 - (a) Contrary to Swinomish or Federal law; or
 - (b) Arbitrary or capricious; or
 - (c) Not supported by substantial evidence in the record of proceedings held before the Planning Commission; or
 - (d) Not in the best interests of the Tribe; and
 - (2) The appealing party has been or will be substantially prejudiced by the challenged action.
- (D) If the Senate determines that the aggrieved party has met the burden set forth in subsection (C)(1) and (2), then the Senate, in its discretion, may issue a decision on the merits or may send the matter back to the Planning Commission for further proceedings in accordance with the Senate's ruling.

*Previously codified as STC 19-04.580.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.640 Appeals of Senate Decisions.

- (A) Any party aggrieved by a decision of the Senate pursuant to this Chapter may appeal such decision to Tribal Court within thirty (30) calendar days from the date of notice of the decision. Any appeal to the Tribal Court shall be in writing and shall identify the name of the party petitioning for review, the interest of the petitioning party in the decision appealed from, and shall name as respondent only the Director, in his or her official capacity.
- (B) The review by the Tribal Court shall be limited to the evidentiary record made in the administrative proceedings held before the Planning Commission. The Department may charge an appealing party the reasonable costs of preparing copies of the administrative record or of transcribing a recording of a hearing for the Tribal Court and for the appealing party.
- (C) The Tribal Court shall not receive or consider any additional evidence not contained in the administrative record of the proceedings before the Planning Commission. The Tribal Court shall not consider any issue that was not raised by the appealing party in the administrative proceedings before Planning Commission and before the Senate.
- (D) The Tribal Court review shall be conducted by the Court, without a jury. The review shall be in accordance with those provisions of the Swinomish Rules of Civil Procedure that are determined to be applicable by the Tribal Court.
- (E) Any appeal from a decision of the Tribal Court shall be filed and adjudicated in accordance with the Swinomish Rules of Appellate Procedure.
- (F) The review by the Swinomish Tribal Court of Appeals shall be limited to the evidentiary record made in the administrative proceedings held before the Planning Commission. The Court of Appeals shall not consider any issue that was not raised by the appealing party in both the administrative proceedings before the Planning Commission and the Senate and in the record of proceedings before the Tribal Court.
- (G) The Tribal Court and the Court of Appeals shall affirm the decision of the Senate upon review unless the appealing party demonstrates to the Court both (1) and (2) below:
 - (1) The decision of the Senate is either:
 - (a) Contrary to Swinomish or Federal law;
 - (b) Arbitrary or capricious; or
 - (c) Not supported by substantial evidence in the record of proceedings held before the Senate; and

- (2) The appealing party has been or will be substantially prejudiced by the challenged action.
- (H) If the Court determines that the aggrieved party has met the burden set forth in subsection (G)(1) and (2), then the Court shall reverse the decision appealed from and shall remand the matter to the Senate for further proceedings in accordance with the Court's ruling. The Senate, in its discretion, may send the matter to the Planning Commission for further proceedings in accordance with the Court's ruling. The Tribal Court and the Court of Appeals shall not have authority to issue a permit, impose a penalty or to grant an exemption, exception or a variance under this Chapter, and shall not have authority to grant any relief other than an order reversing the decision appealed from and remanding the matter to the Senate for further proceedings.
- (I) The decision of the Court of Appeals shall be final, and is not subject to further review.

*Previously codified as STC 19-04.590.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.650 Time and Finality.

- (A) The date of notice of any decision shall be the date on which the decision is mailed by the body making the decision to the last known address of the applicant. The date of notice shall be stated in the decision.
- (B) All time periods set forth in Sections 19-04.610 to 19-04.640 shall be calculated in accordance with Rule 3-02.100, "Computation and Extension of Time", of the Swinomish Rules of Civil Procedure.
- (C) Any decision issued by any person or body under this Chapter shall inform the recipient of any right to request a hearing or to appeal that is provided by this Chapter, of the procedure for requesting a hearing or filing an appeal, and of the time period in which such a request for hearing or notice of appeal must be filed.
- (D) If a decision or action of the Department, Planning Commission, Senate, or Tribal Court is not appealed within the time period set forth in this Subchapter, then that decision is final and conclusive, and is not subject to further review.

*Previously codified as STC 19-04.600.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.660 Tribal Administrative Remedies and Tribal Court.

All cases or controversies arising under the terms and provisions of this Chapter shall be heard only in the Swinomish Tribal Court, and only as provided in this subchapter. An applicant or other aggrieved party must exhaust any and all administrative remedies provided in this Chapter before seeking review in Tribal Court.

*Previously codified as STC 19-04.610.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.670 Sovereign Immunity.

The sovereign immunity of the Tribe is not in any way waived or limited by this Chapter, or by any appeal commenced pursuant to this Chapter, and nothing in this Chapter shall constitute or be construed as a waiver of the sovereign immunity of the Tribe. Such sovereign immunity shall extend to the Tribe, the Senate, the Planning Commission, the Department, the Director, all tribal officials, employees, staff and agents, as to all actions taken in, or concerning, the administration or enforcement of this Chapter, and as to all actions taken pursuant to any authority of any action, decision or order authorized by this Chapter.

*Previously codified as STC 19-04.620.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

Subchapter XI – Effective Date, Repealer and Severability

19-04.680 Effective Date.

This Chapter shall become effective immediately upon approval of the Swinomish Tribal Senate.

*Previously codified as STC 19-04.630.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.690 Repealer.

This Chapter repeals and supersedes Ordinance No. 54 and Section 20-03.410 of Ordinance 176.

*Previously codified as STC 19-04.640.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).

19-04.700 Severability.

The terms and provisions of this Chapter are severable. If a court of competence should find any section, subsection, clause or phrase of this Chapter invalid, such finding shall not affect the validity of any of the remaining sections, subsections, clauses or phrases of this Chapter.

*Previously codified as STC 19-04.650.

[History] Ord. 386 (10/09/18); Ord. 239 (08/02/05).