

# Commentary

## Section 19.322

### WATER QUALITY AND NATURAL RESOURCE REGULATIONS

The City proposes to repeal the current Section 19.322 ("Water Quality Resource Regulations") and replace it with a new, expanded section that provides regulations for both water quality and other designated natural resources. This would ensure that the City's municipal code is compliant with Statewide Land Use Planning Goals 5 and 6 and Titles 3 and 13 of the Metro Urban Growth Management Functional Plan (UGMFP).

Statewide Goal 6 ("Air, Water, and Land Resources Quality") and Metro Title 3 ("Water Quality, Flood Management, and Fish and Wildlife Conservation") focus on protecting water quality resources such as streams, wetlands, and adjacent buffer areas by regulating activities that take place in or near those resources.

Statewide Goal 5 ("Natural Resources, Scenic and Historic Areas, and Open Spaces") and Metro Title 13 ("Nature in Neighborhoods") are concerned with protecting and enhancing fish and wildlife habitat along stream corridors and improving connections with upland habitat areas.

#### 19.322.1 Intent

This subsection is currently titled, "Purpose, General Policies, and Declarations." It would be renamed for simplicity.

- A. This subsection (currently 19.322.1.E) would be updated to more correctly reflect the state and regional requirements being implemented.
- B. This subsection (currently 19.322.1.A) would be expanded to include a reference to wildlife habitat.
- C. This subsection (currently 19.322.1.B) would be updated to add references to wildlife habitat and to Title 13 and Goal 5. The language is taken primarily from the Title 13 model code (Section 1, Intent). However, a reference to local Goal 5 resources (e.g., wetlands) has been added. The acronym HCA (Habitat Conservation Area) would be formally established in this subsection.
- D. This subsection (currently 19.322.1.C) would be amended for clarity.
- E. This subsection (currently 19.322.1.F) would be clarified to eliminate redundancy. The text would be updated to reflect the new map name. The new map would show water quality resource areas as well as HCAs.
- F. (currently 19.322.1.G)
- G. This section (currently 19.322.1.I) would be updated to reflect the new adoption date.

H. This subsection (currently 19.322.1.K) would be amended to refer to a document or other list maintained by the Planning Director, and to include native, noxious, and invasive plants.

Notes: The current 19.322.1.D would be deleted, as the discretionary review process provides a mechanism for allowing some development within the various resource areas. The current 19.322.1.H would be moved to the revised 19.322.2 (Coordination with Other Regulations). The current 19.322.1.J is redundant and would be deleted.

### **19.322.2 Coordination with Other Regulations**

This subsection is currently titled, "Coordination with the Willamette Greenway Overlay." It would be renamed to be more generally inclusive of other related regulations, both those within the municipal code and those managed by other jurisdictions and agencies.

- A. As proposed, the current 19.322.1.H would be moved into this subsection.
- B. (currently 19.322.2.A)
- C. (currently 19.322.2.B)
- D. This is new text borrowed from Gresham's municipal code for Habitat Conservation Areas (Section 5.0415.D).
- E. This is new text from the Title 13 model code (Section 2-G, Applicability).

### **19.322.3 Applicability**

This subsection would be expanded for clarity, with six new subsections where there was only one single paragraph before.

- A. New text would be added to clarify when and how the regulations apply to the entire site. The name of the map (Water Quality and Natural Resource Area Map, or WQNR map) would be updated in this reference. A reference to "locally significant resources" would be added should the City wish to map additional Goal 5 resources in the future. The current code's applicability only to "properties" and not to public rights-of-way would be retained.
- B. The current code identifies "properties containing protected water features" as the standard of applicability. However, the existing standards should actually apply to "water quality resource areas," which include more than just the "protected water feature" itself. The proposed subsection would clarify that issue and would waive applicability of the proposed regulations (including the proposed requirements for boundary verifications and construction management plans) for activities located farther than 100 ft from a designated resource.
- C. This subsection would clarify the various designations on the new WQNR map. For water quality resource areas, the map is not intended to show the exact location of the resource on a property; the measurement standards in Table 19.322.17-1 are what an

applicant would use to determine the precise location of protected resource areas. For HCAs, the new map represents the City's best estimation of the exact location of the resource; an applicant could challenge the map's accuracy using the standards provided in the proposed 19.322.17.

- D. This subsection would establish 100-ft and 50-ft thresholds for requiring a construction management plan and/or boundary verification, depending on the type of activity proposed and the type of resource that would be affected. These thresholds are intended to provide some leniency for development that would take place well away from a designated resource. The Title 13 model code does not provide such flexibility, but since the City's current code only requires that detailed information be submitted when a resource is actually going to be disturbed, establishing these thresholds seems reasonable.
- E. This subsection would direct an applicant to the proposed 19.322.16.A, where there is a list of adjustments to particular development standards that would be allowed in order to prevent disturbance to the natural resource. Adjustments are in essence "mini variances" that would be permitted outright and could be granted as part of the normal review process for non-exempt activities.
- F. As proposed, this subsection would include a table to illustrate the various requirements for different activities, such as when a construction management plan and/or boundary verification would be required as well as the particular standards that would apply.

#### **19.322.4 Exempt Activities**

This subsection is currently titled "Activities Permitted Outright." It would be renamed to more accurately show that the activities listed would not be subject to the standards of the revised 19.322, even if some of those activities may require some type of development permit. The subsection would be reorganized into two distinct parts, showing that some activities are exempt within both water quality resource areas and HCAs, while other activities are exempt only within HCAs. In general, the list of exempted activities would be expanded.

- A. This subsection lists activities that would be exempt within both water quality resource areas and HCAs. The phrase in the current code, "except if they result in direct stormwater discharges to the water quality resource area," serves as an overarching one but does not make sense when applied to all of the items on the list. That phrase would be deleted from the introductory statement and added to individual activities where appropriate.
- B. This subsection would be added to list specific activities allowed within HCAs but not within water quality resource areas. These activities are based on the exempted activities found in the Title 13 model code (Section 3, Exempt Uses and Conditioned Activities).

Note: The current 19.322.4.H ("Other activities similar to the above . . .") would be deleted because of the increased specificity of the revised 19.322.4 and to provide language that is less discretionary.

### **19.322.5 Prohibited Activities**

The current 19.322.8 (titled "Prohibited Uses") is separated from the exempt activities by lists of activities allowed under various other levels of review. It would be renamed, moved, and renumbered to more clearly juxtapose the activities that are allowed without any review and the activities that are not allowed at all. A new introductory sentence would clarify that the listed activities are prohibited in both water quality resource areas and HCAs.

Language for the proposed 19.322.5.C and 5.D is borrowed from the Title 13 model code (Section 4, Prohibitions).

### **19.322.6 Activities Permitted Under Type I Application Review**

(currently 19.322.5)

*Type I review is the simplest level of review for land use applications. Proposals are evaluated by staff against clear and objective criteria and staff has little or no discretion—either a proposal meets the standards or it does not. Type I decisions do not require a hearing by the Planning Commission or that notice of the decision be provided to neighboring property owners. The decision may be appealed to the Planning Commission and is subject to the standards of Section 19.1011.1 in the City's municipal code.*

- A. This new subsection would make the boundary verification process and the review of construction management plan subject to Type I review.
- B. This subsection would continue to allow hazardous trees to be removed with Type I review. However, the revised language would eliminate the current code's implied requirement that hazardous tree removal be automatically subject to minor quasi-judicial review if the activity increases direct stormwater discharge to a water quality resource area. The rationale is that (1) it is inappropriate to apply the overarching caveat regarding an increase in direct stormwater discharge to the activity of hazardous tree removal and (2) the City's requirements for stormwater management will limit direct discharges.
- C. This new subsection stems from language in the Title 13 model code (Section 6, Development Standards) and would allow development within HCAs that is in compliance with clear and objective standards to be reviewed through the Type I process.

Notes: The current 19.322.5.A ("Measures to remove or abate nuisances . . .") would be moved into the revised 19.322.4 (Exempt Activities).

The current 19.322.5.C ("Improvements and modifications to legal structures . . .") would be moved into two places in the revised code. In the revised 19.322.4 (Exempt Activities),

existing structures could be maintained, altered, replaced, etc., without review as long as there is no change or increase in disturbance within the water quality resource area or HCA. In the proposed 19.322.7 (Activities Permitted Under Type II Review), legal structures may be altered, expanded, replaced, etc., under Type II review as long as there is no more than 500 sq ft of disturbance within an HCA and as long as the new disturbance does not go closer to a protected water feature than pre-existing development. All other changes to legal structures would still require minor quasi-judicial review.

The current 19.322.5.D ("Other activities similar to the above . . .") would be deleted because the proposed 19.322.6 is more specific and because the existing language is very discretionary.

### **19.322.7 Activities Permitted Under Type II Review**

(currently 19.322.6)

*Type II review is an intermediate level of review for land use applications, between Type I and Minor Quasi-Judicial review. Proposals are evaluated by staff against clear and objective criteria and but there is more room for discretion, and an approval may be accompanied by conditions. Type II decisions do not require a hearing by the Planning Commission but require that a "tentative notice of decision" be mailed to property owners and residents within 300 ft of the site. Those receiving notice have two weeks from the date of the tentative decision to make any comments before the decision becomes final. The tentative decision can be amended based on relevant comments. Once final, the decision may be appealed to the Planning Commission and is subject to the standards of Section 19.1011.2 in the City's municipal code.*

- A. This subsection would be revised to establish a category of "special uses" that includes some uses that were previously listed as activities needing minor quasi-judicial review. These activities would be allowed with Type II review if done in compliance with special use standards in the proposed 19.322.13 (Special Use Standards). The revised subsection would include the current 19.322.6.A (improvements to existing public utility facilities).
- B. This subsection would be revised to be more specific than the current 19.322.6.B. As proposed, the revised subsection would include modifications to existing uses that exceed the limits allowed for exempt activities in the revised 19.322.4. Since it is difficult to establish clear and objective standards for these types of activities (e.g., how much additional direct discharge is acceptable?), they would be subject to the discretionary development standards in the revised 19.322.15 but processed as Type II applications.
- C. This new subsection would allow some partitions, which would normally be processed with Type II review, to continue with Type II review if they meet the specific standards of the proposed 19.322.13.E. As proposed, if any HCAs could be evenly distributed across the new parcels, or if the HCA and/or water quality resource area could be placed in a

separate, non-developable tract, then the partition could proceed with Type II review instead of going to the Planning Commission.

Notes: The current 19.322.6.C would be deleted because more specific standards are proposed for modifications to nonconforming structures based on the amount of new disturbance to water quality resource areas and/or HCAs. The current code requires a Type II review for any alteration of a nonconforming structure on a property that includes a water quality resource area, regardless of whether or not the resource was impacted. The new arrangement would allow modifications to nonconforming structures that impact water quality resource areas to be processed with Type II review if the new disturbance is less than 100 square feet of water quality resource area and with minor quasi-judicial review if the disturbance is more than 100 square feet. Limited modifications to nonconforming structures that impact only HCAs would be considered exempt activities.

The current 19.322.6.D ("Other activities similar to the above . . .") would be deleted because the proposed 19.322.7 is more specific and because the existing language is very discretionary.

### **19.322.8 Activities Permitted Under Minor Quasi-Judicial Review**

(currently 19.322.7)

*Minor Quasi-Judicial review (also referred to as "Type III" review in other jurisdictions) is a higher level of review that involves a hearing and decision by the Planning Commission. While the proposal may have to meet some clear and objective criteria, the decision is largely subjective or discretionary. The Planning Commission can impose such conditions as it sees as necessary to make the proposal comply with the City's Zoning Ordinance and Comprehensive Plan. Property owners and residents within 300 ft of the site receive notice of the land use hearing and have the opportunity to present testimony at the hearing. The Planning Commission's decision may be appealed to the City Council and is subject to the standards of Section 19.1011.3 in the City's municipal code.*

- A. This subsection would include most of the items that are listed with their own subsection letter in the current code (19.322.7.A through 7.G). It retains the "catch-all" language for activities allowed in the base zone that do not qualify for processing with a lower level of review. Tree removal would be added to the proposed 19.322.8.A.8 for clarity, since tree removal is not currently listed as a specific activity permitted in the base zones. More specific provisions for alteration or expansion of existing structures and utilities/streets would be added to parallel the provisions in the proposed 19.322.7 (Type II activities).
- B. This subsection (currently 19.322.7.I) would be amended to specify that certain partitions and all subdivisions involving water quality resource areas and/or HCAs are subject to minor quasi-judicial review. The current code subjects all partitions on properties that include water quality resource areas to minor quasi-judicial review,

regardless of whether or not the proposal would actually impact or disturb the resource.

Note: The current 19.322.7.H would be deleted because natural resource management plans and stormwater management plans would be considered special uses and therefore subject to the standards of the proposed 19.322.13 (Special Use Standards).

### **19.322.9 Construction Management Plans**

This new subsection would outline the proposed requirements to provide a construction management plan when activities occur within or within a certain distance of a water quality resource area or HCA. Construction management plans, similar to boundary verification (in the proposed 19.322.17) would be subject to Type I review.

### **19.322.10 Submittal Requirements**

The current 19.322.9 (titled "Application Requirements") would be renumbered and renamed to establish consistency with similar language regarding submittal requirements found in other parts of the zoning code.

Staff proposes to reconfigure this subsection to provide submittal requirements for all non-exempt activities except construction management plans and boundary verifications, the requirements for which would be found in 19.322.9 and 19.322.17, respectively. As proposed, the revised subsection indicates that Type I activities require almost exactly the same provision of information as Type II and minor quasi-judicial activities.

- A. This subsection would be added to establish standards for a scaled site map required for all Type I, Type II, and minor quasi-judicial applications. Much of the language was borrowed from the Title 13 model code, specifically from the application requirements for activities subject to non-discretionary review (Section 6, Development Standards).
- B. and C. These proposed subsections also include language borrowed from the Title 13 model code, from the application requirements for activities subject to non-discretionary review (Section 6, Development Standards).
- D., E., and F. These proposed subsections would be introduced to establish consistency with similar requirements in other parts of the zoning code.
- G. As proposed, this subsection would incorporate the current 19.322.9.B, 9.C, 9.D, and 9.F and would provide special submittal requirements for activities requiring Type II or minor quasi-judicial review. Staff believes that these items are too detailed for Type I submittals.

Notes: The current 19.322.9.A would be moved into the proposed 19.322.17 as the primary requirement for verifying the boundary of a water quality resource area.

The current 19.322.9.E, 9.G, 9.H, and 9.I would all be moved into the proposed 19.322.15.B (Discretionary Development Standards), which would provide requirements for impact evaluation and alternatives analysis.

### **19.322.11 Approval Criteria**

This new subsection is proposed to provide guidance as to which standards would be considered for each application type. Rather than re-listing the standards from each related subsection, the proposed 19.322.11 would simply provide a table that indicates which particular relevant subsections apply to which activities.

### **Development Standards**

As proposed, the current 19.322.10 (titled "Development Standards"), which provides development standards for all activities, would be divided into multiple sections as follows:

- 19.322.12 Non-Discretionary Development Standards for HCAs (Type I review)
- 19.322.13 Development Standards for Special Uses (Type II review)
- 19.322.14 Standards for Partitions and Subdivisions (Type II and minor quasi-judicial review)
- 19.322.15 Discretionary Review Standards (minor quasi-judicial review)

Notes: The current 19.322.10.A, 10.B, and 10.C would be moved into the proposed 19.322.13.A (Special Use Standards, general).

The current 19.322.10.D, 10.H, 10.L, and 10.N would be moved into the proposed 19.322.9.C as part of the requirements for construction management plans.

The current 19.322.10.E would be moved into the proposed 19.322.13.B (Special Use Standards for new stormwater pre-treatment facilities).

The current 19.322.10.F.1 would be deleted because it is redundant—it does not need to be stated that changes made to nonconforming structures are subject to 19.800. The current 19.322.10.F.2 would be deleted because its principles would be captured in the proposed subsections for Type II (19.322.7) and minor quasi-judicial (19.322.8) review. Development that encroaches closer to a protected water feature would be subject to the discretionary standards of minor quasi-judicial review instead of requiring a variance, as the case with the current code.

The current 19.322.10.G, 10.K, and 19.M would be moved into the general discretionary standards of the proposed 19.322.15, specifically B.2.e(5), B.2.e(3)(c), and B.2.c(4), respectively.

The current 19.322.10.I would be moved into the proposed 19.322.10.B (Submittal Requirements).

The current 19.322.10.J would be deleted because, as proposed, its principles would be captured in both the specific standards for walkways and bike paths reviewed as Type II special uses (under the proposed 19.322.13.C) and the requirement of discretionary review (under the proposed 19.322.15.B) that a proposal demonstrate that no alternatives would have a lesser impact on the resource.

### **19.322.12 Non-Discretionary Development Standards for HCAs**

This proposed new subsection borrows language from Section 6-C (Development within HCAs) of the Title 13 model code and would provide clear and objective standards for activities that qualify for Type I review within HCAs. Applicants seeking to develop within a water quality resource area or those that cannot comply with the non-discretionary standards of 19.322.12 would utilize the special use standards (19.322.13), the partition and subdivision standards (19.322.14), or the discretionary standards (19.322.15) as appropriate. The proposed subsection would include limitations on the amount of HCA that could be disturbed by development, as well as requirements for protecting the HCA during development and standards for mitigating impacts.

### **19.322.13 Special Use Standards**

This proposed new subsection would establish specific requirements for various special uses, which could be processed with Type II review. As noted above, this new subsection would incorporate the current 19.322.10.E as well as language from several sections of the Title 13 and Title 3 model codes.

### **19.322.14 Standards for Partitions and Subdivisions**

This proposed new subsection would house specific standards for partitions and subdivisions. These standards would apply to partitions and subdivisions in both water quality resource areas and HCAs. Partitions, which are normally reviewed as Type II applications, could still receive a Type II review (instead of minor quasi-judicial review) if they meet the particular standards of 19.322.14.E. For partitions involving a water quality resource area, this change would provide more flexibility than the current code, which requires minor quasi-judicial review even when the proposed partition will not directly impact the resource.

### **19.322.15 Discretionary Development Standards**

This proposed new subsection would provide requirements applicable in minor quasi-judicial review for those activities that do not qualify for a lower level of review or for which there are no specific standards (such as for partitions and subdivisions in the proposed 19.322.14).

- A. This subsection borrows language from Section 7 (Alternative Discretionary Standards) of the Title 13 model code, specifically 7-C. It would provide an opportunity for an applicant who complies with the development standards of 19.322.12 to proportionally

vary the number and size of plants required to be planted to meet the mitigation requirements of the proposed 19.322.12.C.

- B. This subsection also borrows language from Section 7 of the Title 13 model code, specifically 7-D. It would provide general discretionary review standards for activities within a water quality resource area or HCA where the applicant cannot meet the standards of 19.322.12, 19.322.13, or 19.322.14, as appropriate, or where an applicant simply chooses to use the discretionary development standards. This subsection would incorporate the requirements for the alternatives analysis listed in the current 19.322.9.G (Application Requirements) and would expand them to provide more guidance on content and criteria for review.

### **19.322.16 Adjustments and Variances**

The current 19.322.11 (titled "Variances") would be renumbered, renamed, and reorganized to provide more clarity about how and when some relief from other standards in the zoning code is available.

- A. This proposed new subsection would allow relief from some of the specific standards of the underlying base zone. The adjustments include some of the methods for avoiding HCAs found in Section 6-B of the Title 13 model code. As noted in the proposed 19.322.3.E, these adjustments could not be used to avoid the requirements for boundary verification or a construction management plan but they may be used as part of a Type I, Type II, or minor quasi-judicial application.
- B. This proposed new subsection incorporates the language of the current 19.322.11.C. As proposed, the specific variance criteria of Chapter 19.700 would not apply to variance requests involving water quality resource areas or HCAs. Economic hardship would be more allowable as a justification than for a normal variance request. However, this is not to suggest that the proposed language would open the floodgates for a sort of "internal-to-19.322" variance. As a whole, the proposed 19.322 would establish a structure that requires applicants to seek the next higher (and more discretionary) level of review if they cannot meet the standards of a particular review-type, in effect offering ample opportunity to "vary" from clear and objective standards where they are found in the proposed code. Staff believes that this structure would limit the need for variance requests and that the impacts evaluation and alternatives analysis required as part of the discretionary review process would provide a sufficiently rigorous standard that allows the Planning Commission to be the decision maker just as it would be for a conventional variance request.
- C. This proposed new subsection incorporates the language of the current 19.322.11.D, which provides guidance to the Planning Commission about the conditions that can be imposed when a variance is requested. The proposed language clarifies that, a variance request involving an encroachment into a water quality resource area "may be" subject to the particular conditions listed instead of "shall be." This would allow the Planning

Commission more flexibility in determining what conditions are most appropriate for a given situation and would not bind them as decision makers to specific criteria that may not be appropriate in all situations.

Notes: The current 19.322.11.A would be deleted because its principles would be incorporated into the proposed 19.322.16.B.

The current 19.322.11.B would be deleted because the language is confusing and because the proposed changes would make the standards of Chapter 19.700 inapplicable.

### **19.322.17 Boundary Verification and Map Administration**

The current 19.322.12 (titled "Map Administration") would be renumbered, renamed, and expanded to include new requirements for amending the HCA portion of the new resource map. Some existing language would be amended to improve clarity.

- A. This proposed new subsection incorporates the current 19.322.9.A (Application Requirements) to outline what would be needed to verify the boundary of a water quality resource area. Essentially, an applicant must take actual measurements in the field based on the actual protected water feature itself in order to determine where the vegetated corridor is located. As noted in the proposed 19.322.3 (Applicability), boundary verification for a water quality resource area would be required when development is proposed within 100 ft of the water quality resource area.
- B. This proposed new subsection borrows language from Section 9 of the Title 13 model code (Map Administration and HCA Verification), specifically 9-F and 9-G. This would establish several specific methods for verifying the boundary of an HCA, depending on whether an applicant agrees with the boundary shown on the City's map, believes there is a small inaccuracy on the map, can demonstrate that some legal development has occurred between the date the resource inventory was done and these proposed changes are adopted, or believes there is a more significant inaccuracy on the map. Under the proposed change, the more serious the suggested inaccuracy, the more information and detail would be required from the applicant to amend the map.
- C. (currently 19.322.12.B)
- D. This proposed subsection would combine the current 19.322.12.C and 12.D.

## **Section 19.103 DEFINITIONS (related to natural resources)**

Section 19.103 is the place in the City's zoning code that holds definitions for specific terms that are used in the Zoning Ordinance. In conjunction with the proposed

amendments to 19.322, staff is proposing to update and/or change several of the terms in 19.103 that relate specifically to natural resources.

In most cases, the changes are proposed to ensure that references are up to date and that the terms are consistent with the proposed changes to 19.322. Text to be removed is marked with a ~~strike through~~, while text to be added is underlined.

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