



# Department of Commerce

## GROWTH MANAGEMENT ACT RULE UPDATE AGRICULTURAL ACTIVITIES IN CRITICAL AREAS

The Washington State Department of Commerce (Commerce) is updating rules to provide additional guidance and clarification on implementation of the Voluntary Stewardship Program and the protection of critical areas where agricultural activities take place. This document presents the final draft rule proposal for public review and comment.

### Background

The Growth Management Act (GMA) requires local jurisdictions to designate and protect critical areas. Due to litigation related to regulations for agricultural activities in critical areas, the Washington State Legislature enacted SSB 5248 in 2007, which requested tribal and county governments and environmental and agricultural interests to work together to develop recommendations to preserve agricultural viability while protecting critical areas, pursuant to the GMA. The William D. Ruckelshaus Center was also tasked with the responsibility of developing policy solutions to ensure critical areas protection and the preservation of farm lands. During this time, the Legislature placed a three-year moratorium on counties adopting amendments to critical areas ordinances related to agricultural activities.

In 2010, Commerce Growth Management Services completed an extensive GMA rule update. However, due to the moratorium and Ruckelshaus Center research going on at the time, rulemaking efforts related to critical areas and agricultural activities were set aside for a future rulemaking effort. The Ruckelshaus Center produced a report in 2010, which outlined an alternative framework for protecting critical areas where agricultural activities take place. The report's recommendation led to legislative action. In 2011, ESHB 1886 was signed into law, creating the Voluntary Stewardship Program (VSP) and an amendment to the GMA to include the VSP (RCW 36.70A.700).

The rule amendments presented in this document update Washington Administrative Code Chapter 365-196 (Growth Management Act – Procedural Criteria for Adopting Comprehensive Plans and Development Regulations), to provide additional guidance to regulate agricultural activities where critical areas are present, to reflect recent court case decisions and to guide implementation of the VSP.

### For More Information

Visit the project [website](#) for an overview of the rule development process meeting dates and times, a library of resource documents, including the *Critical Areas and Agriculture: Review of Development Regulations* report and the current version of the Commerce Critical Areas Assistance Handbook. Additionally, the Commerce GMA rulemaking [website](#) provides details about the rule update process and timeline.

### Public Comment

The public comment period is open until 5pm, August 23, 2017. A public hearing will be held on August 23, 2017 in Olympia, WA, starting at 10am at the State Department of Commerce Bldg 5, Rm 307. Please submit comments to: [scott.kuhta@commerce.wa.gov](mailto:scott.kuhta@commerce.wa.gov).

### Questions?

Please contact Scott Kuhta with the Growth Management Services Unit at 509-795-6884 or [scott.kuhta@commerce.wa](mailto:scott.kuhta@commerce.wa).

## Update Process

To support the rule update, Commerce reviewed non-VSP county critical areas ordinances, hearings board decisions, and court cases related to agriculture and critical areas, which is summarized in a report, *Critical Areas and Agriculture: Review of Development Regulations*. This report provides an overview of current critical areas regulations and the legal background for regulating agricultural activities occurring in critical areas. The report assisted the rule update and provided detailed information for the Commerce *Critical Areas Assistance Handbook*, which is also being updated at this time.

## Public Outreach

An advisory committee including representatives from the Washington State Association of Counties, Washington State Conservation Commission, multiple state agencies, counties, and environmental groups was used as the primary stakeholder group in developing the proposed rule language. The committee met several times during the winter of 2016 and spring of 2017 to develop the draft rule. Further outreach efforts included several announcements to a list of interested parties representing a wide variety of stakeholders. The draft rules were sent via email to the WAC Update listserv. Articles were posted in the Growth Management Services newsletter, on the Growth Management Services rulemaking web page, and on a project website created specifically for the rule update. A rule update guide was circulated during an informal public comment period and was concluded with an informational webinar, held on June 8, 2017.

## Proposed Amendments

The following rule amendments provide additional clarity for implementing the Voluntary Stewardship Program in participating watersheds while also effectively regulating critical areas where agricultural activities take place in watersheds that are not participating in the Voluntary Stewardship Program. The final draft rule addresses the most pressing issues related to development regulations pertaining to agricultural activities in critical areas.

New language for each WAC is shown with underline and deleted language is shown with ~~strikethrough~~.

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## WAC 365-196-200 Statutory Definitions

### WAC Amendment Background and Description

Several WAC amendments in this document refer to agricultural activities. However, WAC 365-196-200, Statutory Definitions, does not include a definition for agricultural activities. The proposed amendment adds the definition found in [RCW 90.58.065](#), Shoreline Management Act, and in the VSP [RCW 36.70A.703](#) to the WAC 365-196-200 list of statutory definitions. The use of this definition maintains consistency between statutory definitions.

### WAC 365-196-200 Statutory Definitions

- (1) "Adopt a comprehensive land use plan" means to enact a new comprehensive land use plan or to update an existing comprehensive land use plan.
- (2) "Agricultural activities" means all agricultural uses and practices as defined in [RCW 90.58.065](#).
- (3) "Agricultural land" means land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to the excise tax imposed by \*[RCW 84.33.100](#) through [84.33.140](#), finfish in upland hatcheries, or livestock and that has long-term commercial significance for agricultural production.
- (4) "City" means any city or town, including a code city.
- (5) "Comprehensive land use plan," "comprehensive plan," or "plan" means a generalized coordinated land use policy statement of the governing body of a county or city that is adopted pursuant to this chapter.
- (6) "Critical areas" include the following areas and ecosystems:
- (a) Wetlands;
  - (b) Areas with a critical recharging effect on aquifers used for potable water;
  - (c) Fish and wildlife habitat conservation areas;
  - (d) Frequently flooded areas; and
  - (e) Geologically hazardous areas.
- "Fish and wildlife habitat conservation areas" does not include such artificial features or constructs as irrigation delivery systems, irrigation infrastructure, irrigation canals, or drainage ditches that lie within the boundaries of and are maintained by a port district or an irrigation district or company.
- (7) "Department" means the department of commerce.
- (8) "Development regulations" or "regulation" means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in [RCW 36.70B.020](#), even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.
- (9) "Essential public facilities" includes those facilities that are typically difficult to site, such as airports, state education facilities and state or regional transportation facilities as defined in [RCW 47.06.140](#), state and local correctional facilities, solid waste handling facilities, and in-patient facilities including substance abuse facilities, mental health facilities, group homes, and secure community transition facilities as defined in [RCW 71.09.020](#).

(10) "Forest land" means land primarily devoted to growing trees for long-term commercial timber production on land that can be economically and practically managed for such production, including Christmas trees subject to the excise tax imposed under \*RCW [84.33.100](#) through [84.33.110](#), and that has long-term commercial significance. In determining whether forest land is primarily devoted to growing trees for long-term commercial timber production on land that can be economically and practically managed for such production, the following factors shall be considered:

- (a) The proximity of the land to urban, suburban, and rural settlements;
- (b) Surrounding parcel size and the compatibility and intensity of adjacent and nearby land uses;
- (c) Long-term local economic conditions that affect the ability to manage for timber production; and
- (d) The availability of public facilities and services conducive to conversion of forest land to other uses.

(11) "Geologically hazardous areas" means areas that because of their susceptibility to erosion, sliding, earthquake, or other geological events, are not suited to the siting of commercial, residential, or industrial development consistent with public health or safety concerns.

(12) "Long-term commercial significance" includes the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land.

(13) "Master planned resort" means a self-contained and fully integrated planned unit development, in a setting of significant natural amenities, with primary focus on destination resort facilities consisting of short-term visitor accommodations associated with a range of developed on-site indoor or outdoor recreational facilities.

(14) "Minerals" include gravel, sand, and valuable metallic substances.

(15) "Public facilities" include streets, roads, highways, sidewalks, street and road lighting systems, traffic signals, domestic water systems, storm and sanitary sewer systems, parks and recreational facilities, and schools.

(16) "Public services" include fire protection and suppression, law enforcement, public health, education, recreation, environmental protection, and other governmental services.

(17) "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:

- (a) In which open space, the natural landscape, and vegetation predominate over the built environment;
- (b) That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;
- (c) That provide visual landscapes that are traditionally found in rural areas and communities;
- (d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat;
- (e) That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;
- (f) That generally do not require the extension of urban governmental services; and
- (g) That are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas.

(18) "Rural development" refers to development outside the urban growth area and outside agricultural, forest, and mineral resource lands designated pursuant to RCW [36.70A.170](#). Rural development can consist of a variety of uses and residential densities, including clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas.

(19) "Rural governmental services" or "rural services" include those public services and public facilities historically and typically delivered at an intensity usually found in rural areas, and may include domestic

water systems, fire and police protection services, transportation and public transit services, and other public utilities associated with rural development and normally not associated with urban areas. Rural services do not include storm or sanitary sewers, except as otherwise authorized by RCW [36.70A.110](#)(4). (20) "Urban governmental services" or "urban services" include those public services and public facilities at an intensity historically and typically provided in cities, specifically including storm and sanitary sewer systems, domestic water systems, street cleaning services, fire and police protection services, public transit services, and other public utilities associated with urban areas and normally not associated with rural areas.

(21) "Urban growth" refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources rural uses, rural development, and natural resource lands designated pursuant to RCW [36.70A.170](#). A pattern of more intensive rural development, as provided in RCW [36.70A.170](#) (1)(d), is not urban growth. When allowed to spread over wide areas, urban growth typically requires urban governmental services. "Characterized by urban growth" refers to land having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth.

(22) "Urban growth areas" means those areas designated by a county pursuant to RCW [36.70A.110](#).

(23) "Wetland" or "wetlands" means areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from nonwetland areas created to mitigate conversion of wetlands.

## WAC 365-196-580 Integration with the Shoreline Management Act

### WAC Amendment Background and Description

WAC 365-196-580, Integration with the Shoreline Management Act, does not currently address the Voluntary Stewardship Program (VSP). The new section (7) detailed below updates the WAC with a reference to the VSP in order to clarify the relationship between the Shoreline Management Program and the VSP.

### WAC 365-196-580(7) Integration with the Shoreline Management Act

(7) County participation in the voluntary stewardship program does not change applicability of the shoreline management act, or requirements of local shoreline master programs.

(a) As required by RCW 90.58.065, shoreline master programs shall not limit or modify existing and ongoing agricultural activities occurring on agricultural lands.

(b) Master programs shall include provisions addressing new agricultural activities on land not meeting the definition of agricultural land, conversion of agricultural lands to other uses, and other development on agricultural land that does not meet the definition of agricultural activities.

## WAC 365-196-610 Periodic Review and Update of Comprehensive Plans and Development Regulations

### WAC Amendment Background and Description

WAC 365-196-610 refers to [RCW 36.70A.040](#), which describes planning requirements for cities and counties, including the review and revision of development regulations and critical areas ordinances. However, the current WAC language does not address counties participating in the Voluntary Stewardship Program (VSP).

The WAC amendment clarifies that counties with watersheds participating in the VSP are still required to review and revise their critical areas ordinances as part of their regular periodic update process, except as they pertain to agricultural activities as stated in [RCW 36.70A.130\(8\)](#). The new WAC language makes it clear that the revision and review of development regulations as part of the periodic review process must be completed by all counties, even if participating in the VSP.

### WAC 365-196-610(1) Periodic review and update of comprehensive plans and development regulations

(d) What must be reviewed.

(i) Counties and cities that plan under RCW [36.70A.040](#) must review and, if needed, revise their comprehensive plans and development regulations for compliance with the act. This includes the critical areas ordinance.

(ii) Counties and cities that do not plan under RCW [36.70A.040](#) must review and, if needed, revise their resource lands designations and their development regulations designating and protecting critical areas.

(iii) Counties participating in the voluntary stewardship program must review and, if needed, revise their development regulations not governed by the voluntary stewardship program, except as provided in RCW 36.70A.130(8).



## WAC 365-196-830 Protection of Critical Areas

### WAC Amendment Background and Description

Recent Growth Management Hearings Board Cases and Supreme Court decisions have shown that providing broad exemptions for agricultural activities in development regulations that protect critical areas will not adequately protect critical areas functions and values.

New sections (b), (c) in WAC 365-196-830(8) Protection of Critical Areas encourage local governments to consider the legal context when developing or updating critical areas ordinances. New section (d) makes it clear what is required for VSP counties.

Further, the WAC advises against the broad exemption for agricultural activities that take place in critical areas. It suggests minimum guidelines that represent outcomes from recent court cases and the legal direction provided by the courts for the protection of critical areas functions and values as they relate to agricultural activities.

### WAC 365-196-830 Protection of Critical Areas

(1) The act requires the designation of critical areas and the adoption of regulations for the protection of such areas by all counties and cities, including those that do not plan under RCW [36.70A.040](#). The department has adopted minimum guidelines in chapter [365-190](#) WAC detailing the process involved in establishing a program to protect critical areas.

(2) Critical areas that must be protected include the following areas and ecosystems:

- (a) Wetlands;
- (b) Areas of critical recharging effect on aquifers used for potable water;
- (c) Fish and wildlife habitat conservation areas;
- (d) Frequently flooded areas; and
- (e) Geologically hazardous areas.

(3) "Protection" in this context means preservation of the functions and values of the natural environment, or to safeguard the public from hazards to health and safety.

(4) Although counties and cities may protect critical areas in different ways or may allow some localized impacts to critical areas, or even the potential loss of some critical areas, development regulations must preserve the existing functions and values of critical areas. If development regulations allow harm to critical areas, they must require compensatory mitigation of the harm. Development regulations may not allow a net loss of the functions and values of the ecosystem that includes the impacted or lost critical areas.

(5) Counties and cities must include the best available science in developing policies and development regulations to protect functions and values of critical areas. See chapter [365-195](#) WAC.

(6) Functions and values must be evaluated at a scale appropriate to the function being evaluated. Functions are the conditions and processes that support the ecosystem. Conditions and processes operate on varying geographic scales ranging from site-specific to watershed and even regional scales. Some critical areas, such as wetlands and fish and wildlife habitat conservation areas, may constitute ecosystems or parts of ecosystems that transcend the boundaries of individual parcels and jurisdictions, so that protection of their function, and values should be considered on a larger scale.

(7) Protecting some critical areas may require using both regulatory and nonregulatory measures. When impacts to critical areas are from development beyond jurisdictional control, counties and cities are encouraged to use regional approaches to protect functions and values. It is especially important to use



a regional approach when giving special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries. Conservation and protection measures may address land uses on any lands within a jurisdiction, and not only lands with designated critical areas.

(8) Local government may develop and implement alternative means of protecting critical areas from some activities using best management practices or a combination of regulatory and nonregulatory programs.

(a) When developing alternative means of protection, counties and cities must assure no net loss of functions and values and must include the best available science.

(b) Local governments must review and evaluate their development regulations to assure the protection of critical areas where agricultural activities take place.

(c) Local governments shall not broadly exempt agricultural activities from their critical areas regulations.

(d) Counties participating in the voluntary stewardship program must review and, if needed, revise their development regulations not governed by the voluntary stewardship program, except as provided in RCW 36.70A.130(8).

(9) In designing development regulations and nonregulatory programs to protect designated critical areas, counties and cities should endeavor to make such regulations and programs fit together with regional, state and federal programs directed to the same environmental, health, safety and welfare ends. Local plans and policies may in some respects be adequately implemented by adopting the provisions of such other programs as part of the local regulations.

## NEW WAC 365-196-832 Protection of Critical Areas and Voluntary Stewardship Program

### NEW WAC Introduction and Description

The new WAC 365-196-832 Protection of Critical Areas and the Voluntary Stewardship Program (VSP) addresses issues pertaining to development regulations and agricultural activities in watersheds participating in the VSP. The new WAC provides implementing guidance for RCW 36.70A.700-760 Voluntary Stewardship Program.

New WAC 365-196-832 provides guidance regarding development regulations for counties with watersheds participating in the VSP, with the purpose of clarifying:

- How to reference participation in the VSP within development regulations.
- How participation in the program will impact development regulations for agricultural activities in critical areas.
- The applicability of development regulations for agricultural activities occurring in critical areas in both non VSP and VSP participating watersheds.
- When development regulations cease to be enforced for agricultural activities in VSP participating watersheds.
- The four options available to counties if they exit the VSP, as identified in [RCW 36.70A.735](#).
- Responsibilities for counties exiting or withdrawing from the VSP under [RCW 36.70A.735](#) and RCW [36.70A.710\(7\)](#).

### New Section WAC 365-196-832 Protection of Critical Areas and Voluntary Stewardship Program

(1) Upon approval of a watershed work plan, counties participating in the voluntary stewardship program pursuant to RCW 36.70A.710 are encouraged to reference and describe their participation in the program within their critical areas development regulations. Counties should ensure their development regulations are consistent with the approved watershed work plan.

(2) Prior to the approval of a work plan by the state conservation commission director, agricultural activities located in participating watersheds as defined in RCW 36.70A.703(5) are subject to existing development regulations that protect critical areas.

(3) After watershed work plan approval, protection of functions and values of critical areas from agricultural activities located in participating watersheds as defined in RCW 36.70A.703(5) is provided by the watershed work plan and any applicable development regulations.

(a) Agricultural activities located in non-participating watersheds are subject to applicable development regulations that protect critical areas.

(4) **County responsibilities when withdrawing from the voluntary stewardship program.** Counties that elect to protect critical areas through the voluntary stewardship program under RCW 36.70A.710(1)(a) may withdraw a participating watershed from the program by adopting an ordinance or resolution withdrawing the watershed from the program. A county may withdraw a watershed from the program at the end of three years, five years or eight years after receipt of funding, or any time after ten years of funding. Watersheds withdrawn from the program are subject to RCW 36.70A.710(7)(b).

(a) Within eighteen months after withdrawing a participating watershed from the program, counties must review and, if necessary, revise their development regulations that protect critical areas in that

watershed as they specifically apply to agricultural activities. The development regulations must protect the critical area functions and values as they existed on July 22, 2011. During this interim period, counties must continue to protect critical areas in watersheds withdrawn from the program. The adopted ordinance or resolution used to withdraw participating watersheds must state how counties will continue to protect critical areas in watersheds withdrawn from the program. Counties have two options during the interim period:

(i) Adopt interim development regulations or revert to development regulations that were in place at the time of watershed work plan approval; or

(ii) Continue to implement the watershed work plan.

**(5) County responsibilities when exiting the voluntary stewardship program.** Watershed work plans that are not approved, fail, or are not funded are subject to RCW 36.70A.735(1).

(a) Within eighteen months, counties must adopt one of the four options pursuant to RCW 36.70A.735(1). During this interim period, counties must continue to protect critical areas in areas used for agricultural activities. The four options include:

(i) Pursuant to RCW 36.70A.735(1)(a) develop, adopt, and implement a watershed work plan approved by the state department of commerce that protects critical areas in areas used for agricultural activities while maintaining the viability of agriculture in the watershed.

(ii) Pursuant to RCW 36.70A.735(1)(b) adopt development regulations previously adopted by another local government to protect critical areas in areas used for agricultural activities. Counties may adopt their regulations from other counties' critical area development regulations, provided such regulations are from a region with similar agricultural activities, geography, and geology, and are from Clallam, Clark, King, or Whatcom counties at the time the voluntary stewardship program legislation was enacted, and have not been invalidated, or are from any county (including Clallam, Clark, King, or Whatcom) and have been upheld as adequately protective of critical areas functions and values in areas used for agricultural activities by the growth management hearings board or court after July 1, 2011.

(iii) Pursuant to RCW 36.70A.735(1)(c) adopt development regulations certified by the state department of commerce as protective of critical areas in areas used for agricultural activities.

(iiii) Pursuant to RCW 36.70A.735(1)(d) review, and if necessary, revise development regulations adopted to protect critical areas as they relate to agricultural activities.

## WAC 365-196-850 Impact Fees

### WAC Amendment Background and Description

The WAC 365-196-850 update includes a housekeeping edit related to HB 1080 Impact Fees – Public Facilities – Fire Protection Facilities, that passed the Legislature in 2010 and amended RCW 82.02.090, including the definition of ‘Public Facilities’.

The bill removed the limitation on the use of impact fees for fire protection facilities “in jurisdictions that are not part of a fire protection district”. The proposed amendment listed below updates WAC 365-196-850(2)(e) to reflect this change.

### WAC 365-196-850 Impact fees

- (1) Counties and cities planning under the act are authorized to impose impact fees on development activities as part of public facilities financing. However, the financing for system improvements to serve new development must provide a balance between impact fees and other sources of public funds and cannot rely solely on impact fees.
- (2) The decision to use impact fees should be specifically implemented through development regulations. The regulations should call for a specific finding on all three of the following limitations whenever an impact fee is imposed. The impact fees:
  - (a) Must only be imposed for system improvements that are reasonably related to the new development. "System improvements" (in contrast to "project improvements") are public facilities included in the capital facilities plan that are designed to provide service to service areas within the community at large;
  - (b) Must not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and
  - (c) Must be used for system improvements that will reasonably benefit the new development.
- (3) Impact fees may be collected and spent only for the following capital facilities owned or operated by government entities:
  - (a) Public streets and roads;
  - (b) Publicly owned parks;
  - (c) Open space and recreation facilities;
  - (d) School facilities; and
  - (e) Fire protection facilities ~~in jurisdictions that are not part of a fire district.~~
- (4) Capital facilities for which impact fees will be imposed must have been addressed in a capital facilities plan element which identifies:
  - (a) Deficiencies in public facilities serving existing development and the means by which existing deficiencies will be eliminated within a reasonable period of time;
  - (b) Additional demands placed on existing public facilities by new development; and
  - (c) Additional public facility improvements required to serve new development.
- (5) The local ordinance by which impact fees are imposed must conform to the provisions of RCW [82.02.060](#). The department recommends that jurisdictions include the authorized exemption for low-income housing.