

Draft Chapter 5

Critical Areas Assistance Handbook

Protecting Critical Areas in Natural Resource Lands

**8-31-18 Public Review Draft**

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## Natural Resource Lands and Critical Areas Protection

The Growth Management Act (GMA) requires designation and protection of critical areas on all lands, including those designated as natural resource lands of long-term commercial significance. One of the GMA's goals is to maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Conserving productive forest and agricultural lands is encouraged and allowing incompatible uses is discouraged.<sup>1</sup>

All 39 counties are required to classify and designate natural resource lands of long-term commercial significance and to classify, designate, and protect critical areas.<sup>2</sup> Natural resource lands include agricultural, forest, and mineral lands. The 29 counties that are fully planning under the GMA (i.e., adopting GMA compliant comprehensive plans and development regulations) are also required to adopt regulations to conserve natural resource lands of long-term commercial significance. The regulations must ensure that the use of lands adjacent to natural resource lands does not interfere with the continued use, in the accustomed manner, and in accordance with best management practices of designated natural resource lands for the production of food, agricultural products, or timber, or for the extraction of minerals.<sup>3</sup>

Mining and forest practices are regulated through local and state permits that address how natural resources are extracted, how environmentally sensitive areas will be protected, and how the land will be restored or reclaimed for future uses (i.e., restoration of a mining site or reforestation). Local governments typically regulate agricultural land uses through zoning, but not the specific agricultural practices. However, local governments have the duty to protect critical areas that may be impacted by agricultural practices.

Restoration and protection of watersheds in natural resource lands provide economic value by preventing downstream water quality degradation and protecting our drinking water. Proper land stewardship protects salmon habitats, which support commercial and recreational fisheries. Additionally, wetlands provide important functions in the regulation of stormwater and prevention of flood damage.<sup>4</sup>

The Growth Management Act requires local governments to go through a deliberative and well-documented process to achieve a balanced program that provides for critical area protection and long-term natural resource production. They must consider both the sustainability of the natural resource industry and the functions and values of critical areas to determine the most appropriate elements for their critical areas protection program.

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<sup>1</sup> See RCW 36.70A.020(8)

<sup>2</sup> See RCW 36.70A.050

<sup>3</sup> See RCW 36.79A.060

<sup>4</sup> Washington State Department of Natural Resources, [Forest Watershed Ecosystem Services Publication](#), 2012.

## Agricultural Lands and Critical Areas Protection

Protecting critical areas where they intersect with agricultural lands has been particularly challenging for counties, where the majority of agricultural activities occur. Consequently, in 2007 the Legislature passed Substitute Senate bill 5248. This bill established a three-year moratorium that precluded counties from adopting amendments to critical areas ordinances with respect to agricultural activities.<sup>5</sup>

The William D. Ruckleshaus Center, a neutral policy consensus center operated by Washington State University and the University of Washington, was asked by the Legislature to convene the Agriculture and Critical Areas Committee to examine the issue of critical areas protections where agricultural activities occur, and to provide a recommendation on new legislation. Based on a consensus recommendation in 2010 from the Committee, the Legislature passed and the governor signed into law the Voluntary Stewardship Program (VSP) in 2011.

The VSP provides an alternative to counties to protect critical areas where agricultural activities are conducted.<sup>6</sup> Twenty-seven of the state's thirty nine counties opted into the VSP. The Washington State Conservation Commission is the state agency lead for implementing the VSP. See the Washington State Conservation Commission [VSP web site](#) for detailed program information. This document provides more information on local implementation of the VSP program starting on page 17.

## The Value of Agricultural Lands: Economy and Ecosystem Services

Washington State hosts a tremendous diversity of crops and types of food production. The State is also home to rich soil, diverse climate, and large-scale irrigation, making it one of the most productive growing regions enabling farmers to produce over 300 crops each year. With approximately 36,000 farms, and the top producer in the country of nine specific crops, the agricultural economy is an important State asset. The agricultural production in 2016 alone was \$10.6 billion. Fisheries and the aquaculture industry are also essential to the State's healthy economy.<sup>7</sup>

The landscape across the State varies considerably, with diverse ecosystems and climates. Types and condition of critical areas, local species, and habitats that exist throughout agricultural lands should be examined and evaluated for critical areas conservation opportunities. Beneficial to a discussion of critical areas protection is an examination of the types of production and needs of the agricultural industry in any one county. Communities will need to consider the unique landscape characteristics of the area, whether it is shrub-steppe, Columbia River floodplain, tidal estuary, or lowland Western Washington prairies.

Agriculture is a central element of economic development for rural counties and in rural areas of more urban counties. In recognition of the importance of agricultural and other natural resource industries,

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<sup>5</sup> Chapter 353, Laws of 2007

<sup>6</sup> Chapter 360, Laws of 2011 (primarily codified in RCW 36.70A.700 through .760)

<sup>7</sup> Washington State Department of Agriculture, "[Agriculture: A Cornerstone of Washington's Economy](#)", April 25, 2017.

the GMA requires counties to designate and conserve agricultural lands of long-term commercial significance. It is important to note that agricultural activities occur on designated resource lands of long-term commercial significance, as well as in rural areas. A number of counties have designated both agricultural lands of long-term commercial significance and rural agricultural lands. Both are important to the economy. Even if agricultural land does not meet the criteria for long-term commercial, smaller farms can be an important source of income for rural residents.

## The Impacts of Farm Practices on Critical Areas

Many land use activities, including agriculture, have historically impacted critical areas, including filling wetlands, draining wetlands, channelizing streams and converting natural riparian habitat to other uses. The conversion of riparian habitat can lead to pollution of adjacent streams, creeks and natural drainages. Precipitation runoff from large farm buildings can impact the water quality of surface waters. Chemical, fuel and fertilizer spills from farm storage structures, as well as the chemical use associated with agriculture, can pollute ground and surface waters. Streams in agricultural areas may be susceptible to elevated temperatures given that most agricultural areas are in the lowlands and many streams do not have extensive vegetated buffers.

Improper farm practices as well as existing non-conforming farm operations may result in:

- Soil erosion and sedimentation that affect habitat and water quality.
- Pesticide and fertilizer pollution that impact fish and wildlife survival, kill non-target insect species, and impact aquatic plants.
- Animal wastes that degrade water quality, reduce fish production, introduce diseases to water that are harmful to people, and cause excessive aquatic plant and algal growth.<sup>8</sup>

Unmanaged grazing can negatively impact riparian ecosystems and is usually the result of inappropriate livestock management. Grazing can affect all characteristics of riparian and associated aquatic systems, including:

- Vegetative cover.
- Soil stability.
- Bank and channel structure.
- Instream structure.
- Water quantity and quality.<sup>9</sup>

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<sup>8</sup> See Washington Department of Fish and Wildlife, *Priority Habitat and Species, Management Recommendations for Washington's Priority Habitats: Riparian* (1997), pp. 56-58. **NEED TO UPDATE THIS REFERENCE?**

<sup>9</sup> See Washington Department of Fish and Wildlife, *Priority Habitat and Species, Management Recommendations for Washington's Priority Habitats: Riparian* (1997), pp. 60-61. **NEED TO UPDATE THIS REFERENCE?**

Animal feeding operations<sup>10</sup> (AFOs) have implications for critical aquifer recharge areas and source water. They are considered to be “point sources” under the federal Clean Water Act and are subject to NPDES permits. Agricultural operators meeting certain conditions must apply to participate in Ecology’s Concentrated Feeding Operation (CAFO) General Permit.<sup>11</sup> AFO and CAFOs associated with dairies are subject to the nutrient (organic waste) management requirements in RCW 90.64, as administered by the state Department of Agriculture.

In reviewing a critical areas protection program, counties and cities need to recognize that different types of agriculture have different types of impacts. For example, drainage agriculture raises very different issues than from livestock or dairy. Irrigated agriculture affects critical areas differently from dry land farming, and the impacts from row crops are different than tree fruit. It is important for city and county planners to evaluate the different agricultural practices occurring within their jurisdictions. We encourage local government to use agricultural expertise available to them (WSU extension, local conservation districts, etc.) to better understand potential critical area impacts specific to different agricultural sectors.

One example of an analysis of different types of agricultural use is the Department of Ecology’s *Guidance on Widths of Buffers and Ratios for Compensatory Mitigation for Use with the Western Washington Wetland Rating System and Eastern Washington Wetland Rating System*<sup>12</sup>. The guidance separates different types of agriculture into different land-use intensity buckets in Table 8C-3 (Western Washington) and 8D-3 (Eastern Washington), page 5.

## Regulatory Programs

Cities and counties are required to adopt development regulations to assure the protection of critical areas functions and values. Counties with watersheds participating in the VSP are not required to use development regulations to protect critical areas where agricultural activities take place, but the VSP work plan must incorporate any existing regulations relied upon to achieve goals and benchmarks.<sup>13</sup>

In 2017, the Washington State Department of Commerce produced a report that analyzes critical areas regulations in the twelve non-VSP counties. The report includes a summary of common approaches and key themes for critical area protection; and highlights regulations, incentives, and tools these twelve counties use to protect critical areas on agricultural lands. The report provides a basis for many of the recommendations in this chapter regarding critical areas protection in agricultural lands.<sup>14</sup>

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<sup>10</sup> <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/plantsanimals/livestock/afo/>

<sup>11</sup> <https://agr.wa.gov/foodanimal/livestock-nutrient/npdescafopermit.aspx>

<sup>12</sup> <https://fortress.wa.gov/ecy/publications/parts/0506008part1.pdf>  
<https://fortress.wa.gov/ecy/publications/parts/0506008part2.pdf>

<sup>13</sup> RCW 36.70A.720(1).

<sup>14</sup> See [Critical Areas and Agriculture: Review of Development Regulations](#), Washington State Department of Commerce, 2017.

Local governments should consult with the [Department of Natural Resources, Aquatic Resources Division](#) to obtain information about the presence, if applicable, of aquatic Lands adjacent to natural resource lands.

#### Court and Growth Management Hearings Board Decisions

All local governments should consult recent court and growth management hearings board decisions when developing and reviewing critical areas ordinances. The courts have ruled that broadly exempting agricultural activities does not protect critical areas.

The Washington State Court of Appeals Division II held that an exception from critical areas regulations for agricultural activities must be supported by evidence in the record that such an exception is necessary and that the best available science was employed in crafting the exception.<sup>15</sup>

The Division II Court of Appeals reviewed of the legislative history of RCW 36.70A.060, the broad definition of “development regulations” in RCW 36.70A.030, the breadth of the best available science requirement in RCW 36.70A.172(1), and the natural resources goal in RCW 36.70A.020(8). Based on that review, the Court concluded the Legislature intended that counties regulate critical areas, including existing uses, to advance the GMA’s goals. The Court held a county could expand its agricultural land exemption to include agricultural uses outside designated agricultural lands, but it must balance the exemption with restrictions based on best available science that address any threatened harm resulting from the expanded exemption. The court concluded that preexisting agricultural uses are not exempt from all critical areas regulation. The court also held that the county was not limited to exempting only designated agricultural resource land from full critical areas regulation and that it may expand its exempt agricultural land to meet its local conditions. However, the county must balance such expanded exemption with corresponding restrictions that take into account the specific harms threatened by the expanded class of farm lands.<sup>16</sup>

In the *Swinomish*<sup>17</sup> decision, the state Supreme Court recognized the competing goals in the GMA of protection of critical areas and natural resource lands stating that local governments are not given much direction as to whether protecting critical areas or maintaining agricultural lands is a priority. The court noted that RCW 36.70A.172(1) requires local governments to include best available science in developing regulations and policies to protect critical areas and that they are to “give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.” However, the Court recognized that there was still deference given to balancing of local circumstances and, in this case, the court did not require the county to curtail historic agricultural activities in critical areas and upheld the county’s “no harm” provision in its ordinance. The Court concluded that the “no harm” standard protected critical areas by maintaining existing conditions. The

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<sup>15</sup> *Whidbey Environmental Action Network v. Island County*, 122 Wn. App. 156, 93 P.3d 885 (June 7, 2004), review denied, 153 Wn.2d 1025 (2005).

<sup>16</sup> *Clallam County v. Western Washington Growth Management Hearings Board*, 130 Wn. App. 127, 121 P.3d 764 (Oct. 25, 2005), review denied, 163 Wn.2d 1053 (2008).

<sup>17</sup> *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415 (2007).

Court upheld the county's decision against requiring mandatory riparian buffers in agricultural lands because doing so would impose a requirement to restore habitat functions that no longer existed.

For recent Growth Management Hearings Board decisions, see Appendix 1.A - *Critical Areas Case Law*, Appendix 5.A - *Critical Areas and Agriculture: Review of Development Regulations*, and the [Growth Management Hearings Board](#) web site.

#### How to address Existing, Ongoing and New Agriculture in Development Regulations

Counties and cities should specify the length of time agriculture can lay dormant before it is no longer considered existing and ongoing in their critical areas regulations. Existing and ongoing agriculture is often defined as agricultural activity that has been conducted or maintained within the past five years.

In 2014, Island County was challenged by the Whidbey Environmental Action Network (WEAN) for failing to protect fish and wildlife habitat conservation areas as required by RCW 36.70A.060. The County critical areas ordinance stated that existing and ongoing agriculture ceased to be ongoing if the land was idle for more than five years, unless an extension was granted, or the property was enrolled in a federal conservation program. The ordinance allowed for an extension to the five-year period by a reasonable amount of time if unavoidable events would make active agricultural use impossible, such as a death or difficulty selling the property. In 2015, the Growth Management Hearings Board issued a final decision and order that determined the County had failed to establish clear standards for extending critical area exemptions to agricultural practices because their definition included a vague and potentially unlimited extension standard.<sup>18</sup> Island County then amended its definition to state that existing and ongoing agriculture is exempt if it lays idle for three years. The option for a time extension was removed from the definition. In 2016, the Hearings Board found this update to be in compliance with the requirements of the GMA.

Klickitat County defines existing agricultural or ranching activities as those that have been active in 2 out of the last 5 years.

Local government regulations typically recognize agricultural land enrolled in a federally recognized conservation program, such as the Conservation Reserve Program (CRP), as meeting the definition of existing and ongoing agriculture. Existing and ongoing agricultural activity exemptions and allowances for maintenance or repair may not continue or transfer when a new use is established, and the existing and ongoing agricultural activity is discontinued. New uses would be subject to the critical area regulations.

In addition to defining the length of time an agricultural activity must be in use, further definitions of ongoing and existing agriculture commonly include:

- Current use in areas designated as agricultural lands of long-term significance.
- Activities involved in the production of crops or livestock, operation and maintenance of existing farm and stock ponds or drainage and irrigation ditches.

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<sup>18</sup> *WEAN v. Island County, Case No. 14-2-0009*, FDO, June 24, 2015.

- Changes between agricultural activities, such as crop rotation, are considered ongoing and existing activities.
- Activities that bring an area into agricultural use are not part of an ongoing activity.
- An operation ceases to be ongoing when the area where it was conducted has been converted to a nonagricultural use. In a few instances, a county offers an extension for the ongoing or existing use designation.

When defining the time period in which an agricultural activity remains existing and ongoing, counties and cities are advised to also define what constitutes new agricultural activities. Often, new and expanded agricultural activities are subject to additional regulatory requirements, making it important to define and distinguish between new and existing agricultural operations. Jefferson County defines “new” agriculture as agricultural activities proposed or conducted after 2003 that does not meet their definition of “existing and ongoing” agriculture.

Several county development codes regulate new or expanding agriculture per the conditions of their critical areas ordinance or their livestock ordinance. King County, for example, provides that new agriculture or the expansion of agriculture is allowed in a specific set of critical areas if the use meets the development standards for each of the critical areas. Clallam County requires new and expanded agricultural activities to comply with both the substantive and procedural provisions of their ordinance.

#### Agricultural Activities: Descriptions and Definitions

Definitions for agricultural activities may vary among jurisdictions based on the unique characteristics of the geography and ecology in their area. A diversity of landscapes offers opportunities for different types of agricultural uses. With this in mind, local governments must find the best definition for their area. Defining agricultural activities makes it clear which activities are subject to the regulation. A common reference is found in RCW 90.58.065(2)(a) in the Shoreline Management Act. This is the definition included the VSP statute (RCW 36.70A.703)(1) and within the GMA Statutory definitions in WAC 365-196-200.

Once agricultural activities are defined, the development regulations can describe how the activities are regulated. For example, in the review of the twelve county critical areas development regulations, the following agricultural related uses and activities are regulated:

- Nonconforming (preexisting) uses and structures
- Maintenance, repair, reconstruction and remodeling
- Agricultural chemicals
- Fencing and signage

#### Impact Ratings for Agricultural Activities

Impact or intensity ratings can be used to categorize potential impacts of agricultural activities in critical areas. A rating system assists in categorizing agricultural activities into low, moderate or high impacts. The impact level can then be used to determine allowed uses, and necessary regulations and protection standards to assure the protection of critical areas.

Several counties permit low-impact agricultural uses in critical areas, but require monitoring and adaptive management through a standard farm conservation plan. Moderate-to-high impact farm or livestock operations are also subject to monitoring and adaptive management, but it is conducted through a custom farm conservation plan. Farm plans are used to lower the risk of the agricultural activity.

Clallam County uses high-to-low risk assessment criteria to evaluate existing and ongoing agriculture within and adjacent to aquatic habitat conservation areas and wetlands.<sup>19</sup> The ratings are based on risk assessment scores from six performance standards and four environmental categories (river and streams, wetlands, ponds, irrigation/drainage ditches, livestock and heavy use areas, and manure storage). Depending on the rating, either high, moderate or low-risk, various protection standards are required. Agricultural activities are compliant if they score moderate-to-low-risk in the assessment. If the agricultural use is found to be causing harm or receives a high-risk rating in one of the six performance standards then the agricultural operator is required to develop a farm conservation plan. The purpose of the plan is to reduce the risk assessment from high to moderate.

In Whatcom County, ongoing low-impact agricultural uses are permitted, but also subject to monitoring and adaptive management through a required standard farm conservation plan. Ongoing moderate-to-high-impact farm or livestock operations follow the same guidelines, but must implement a custom farm conservation plan. King County also uses farm plans to bring agricultural activities with moderate-to-high-impacts into compliance with low-to-moderate impact standards.

### Non-regulatory and Incentive Programs

In pursuing environmental protection, comprehensive plan policies should identify non-regulatory programs to protect critical areas, in addition to regulatory approaches.<sup>20</sup> Non-regulatory programs include but are not limited to:

- Providing incentives to protect critical areas;
- Public education regarding the value of critical areas;
- Public recognition of good stewards of the land;
- Purchase or transfer of development rights from environmentally sensitive areas; or
- Paying landowners for providing ecosystem services such as water quality protection.

Programs that provide incentives to implement best management practices in agricultural lands provide a good approach to protect critical areas given the challenges of regulating farm practices and the need to maintain and enhance the agricultural industry. For jurisdictions seeking to balance the economic needs of the agricultural industry with critical areas protection, non-regulatory, incentive-based

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<sup>19</sup> Appendix 5.B: Clallam County Risk Assessment Criteria

<sup>20</sup> WAC 365-196-485(1)(f).

approaches that can be easily monitored by the local government are a promising means to achieve critical areas protection.

Voluntary and incentive-based measures are usually implemented with support and partnership with local conservation districts, federal agencies, and regional non-profit organizations. Landowners can be supported with assistance from a local jurisdiction to encourage participation in private, state and federally-funded resource enhancement projects or programs.

Cooperative and non-regulatory, incentive-based programs that promote best management practices can provide some or all of the protection needed to protect the functions and values of critical areas in agricultural lands. This is premised on the assurance that they are comprehensive, achieve the outcomes for protecting critical areas over time, and are implemented with a high degree of certainty. To ensure certainty, implementation of voluntary programs should be monitored for effectiveness, tracked with an adequately funded adaptive management program, and backed by development regulations that adequately protect critical areas if protection is not being achieved after a reasonable period of time.

### Best Management Practices

Best management practices (BMPs) have been developed to control water and soil erosion both on the farm and off. Leaving vegetation along streams, contour plowing (plowing across the slope), and terracing decrease the speed of runoff and allow for more water to soak into the soil. More recently, many farmers have adopted “conservation tillage” and “no till” farming methods.

Jurisdictions may look to the National Resources Conservation Service Field Office Technical Guide (NRCS FOTG) for practical guidance on the most effective conservation practice standards and specification for their area. Agricultural experts, including the Washington State Conservation Commission, WSDA, WSU and others, generally regard FOTGs as a well-researched and science based toolkit. FOTGs provide landowners and technical assistance providers with management techniques and practices that can be used to protect natural resources and maintain agricultural viability. However, NRCS conservation practice standards are not designed, nor provide the specificity to meet state water quality standards. The Department of Ecology requires additional analysis and specificity to ensure BMPs will result in water quality protection that complies with state law and water quality standards. Working with local conservation districts and Ecology to ensure BMPs are tailored to the unique needs of your area is advised.

The Department of Ecology is working on developing best management practices for agricultural landowners (see [Voluntary Clean Water Guidance for Agriculture](#)). Completing the guidance is an important part of Ecology’s [Water Quality Management Plan to Control Nonpoint Sources of Pollution](#), which addresses pollution coming from a wide variety of sources such as city streets, forest lands and farms.

### Federal Incentive Programs

There are a number of federal programs available that provide incentives for landowners to implement best management practices:

- Conservation Reserve Enhancement Program (CREP) – CREP is a joint partnership between the state of Washington and U.S. Department of Agriculture that is administered by the Washington State Conservation Commission and the USDA Farm Services Agency (FSA) to restore riparian habitat. Under the voluntary program, land enrolled in CREP is removed from production and grazing under ten- or 15-year contracts. In return for planting trees and shrubs to stabilize the stream bank and to provide a number of additional ecological functions, landowners receive payments to cover annual rent, incentive and maintenance payments, and cost share for practice installations. Payments can result in no cost to the landowner for participation.
- Conservation Reserve Program (CRP) – CRP provides technical and financial assistance to eligible farmers and ranchers to address soil, water, and related natural resource concerns on their lands in an environmentally beneficial and cost-effective manner. Funding from the Commodity Credit Corporation (CCC) provides assistance to farmers and ranchers in complying with federal, state, and tribal environmental laws, and encourages environmental enhancement.
- Environmental Quality Incentives Program (EQIP) – EQIP provides technical and financial assistance to eligible farmers and ranchers to address soil, water, and related natural resource concerns on their lands in an environmentally beneficial manner. Contracts of up to ten years are made with eligible producers to implement one or more eligible conservation practices, such as animal waste management facilities, terraces, filter strips, tree planting, and permanent wildlife habitat. Incentive payments can be made to implement one or more land management practices.
- Section 319 nonpoint grants – Provide grants for water quality BMPs that address nonpoint source pollution projects. Eligible nonpoint projects include: livestock fencing, off-stream water development, stream crossings, riparian plantings and subsidization of on-site sewage repair and replacement local loan programs. There is also limited funding available for education and outreach.
- Habitat conservation plans (HCPs) under the federal Endangered Species Act – HCPs are planning documents required as part of an application for an “incidental take permit”. The plan describes the anticipated effects of the proposed taking; how those impacts will be minimized, or mitigated and how the HCP is to be funded. HCPs can apply to both listed and non-listed species, including those that are candidates or have been proposed for listing. The HCP describes potential impacts to known threatened and endangered species by specified activities, which can include agriculture. The incidental take permit allows the permit-holder to legally proceed with an activity that would otherwise result in the unlawful take of a listed species.<sup>21</sup> HCPs can be developed at the county level, so that any BMPs or mitigation required of landowners can be streamlined through a countywide process, local regulations, and permitting processes, and so corrective actions and mitigation processes can be developed on a countywide basis.

Local governments that include federal programs in their critical areas protection programs need to understand how federal programs fit with local protection goals and requirements, as farmers are very familiar with them. Local governments should work closely with federal agencies and local conservation

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<sup>21</sup> [U.S. Fish & Wildlife Services Habitat Conservation Plans | Overview](#)

districts to understand these programs. For example, NRCS can explain how the field office technical guides are used as a basis for best management practices.

Local governments also need to be aware of issues that can come up if they choose to rely on federal programs for critical areas protection. For example, a farmer's eligibility for a federal program may be affected by local regulatory requirements because the federal programs are intentionally voluntary. If riparian buffers are mandated by local regulations, a farmer may not be eligible for CREP. A related issue is that farm plans are not subject to public disclosure requirements under federal law. The federal and state agencies, as well as local conservation districts, understand the nuances of these programs and can help a county or city work through these issues. For example, a local conservation district may be able to work with the property owner to exclude proprietary information from a farm plan.

### State Incentive Programs

Farmers and local governments can access a variety of state conservation programs. They include the Salmon Recovery Fund, the Interagency Committee on Outdoor Recreation's Washington Wildlife and Recreation Program, and the Washington State Department of Natural Resources' Aquatic Land Enhancement Grants.

Finally, counties and cities have a variety of local non-regulatory tools available to assist with developing a critical areas program for agricultural lands. They include:

- *Comprehensive plan policies* – policies in the plan requiring use of incentive programs to encourage water quality and habitat protection.
- *Land acquisition or purchase of conservation easements* – county and city programs for acquisition funded by conservation futures or other local funding sources and federal and state funding noted above. Conservation Futures is an open space acquisition program authorized by state law, funded by a tax levy on real estate.
- *Long-term lease* – land trust/governmental agency leases property from the landowner, thereby preventing other uses of the property during the lease term.
- *Restoration of habitat projects* – projects to create fish passage at culverts, restore estuaries, etc. with conservation futures or other local funding sources and federal and state funding noted above.
- *Purchase of development rights* – the local government purchases rights to develop allowed under current zoning from the landowner with conservation futures or other local, state, or federal funding sources.
- *Transfer of development rights* – the local government sets up a program whereby development rights may be transferred from agricultural land to an area where higher densities are encouraged.
- *Open space taxation* – The Open Space Taxation Act, enacted in 1970, allows property owners to have their open space, farm and agricultural, and timber lands valued at their current use rather than their highest and best use. The act allows for property tax abatement for land designated as open space land in local comprehensive and zoned accordingly or otherwise meeting certain

criteria. To receive property tax relief, a landowner must apply for and receive the open space classification and abide by the restrictions placed upon the land in the open space classification. The owner is obliged to leave property in the program for ten years, or face penalties upon withdrawal. Some counties, such as King, Island and Chelan, have made it easier for property owners to enter the system by adopting a public benefit rating system. If the county legislative authority has established a public benefit rating system for the open space classification, the criteria contained within the rating system govern both the eligibility of the lands described in each application filed for that classification and the current use valuation of that land.

### Farm Management Plans

Common voluntary approaches to agricultural land stewardship and environmental protection are individual stewardship plans, farm management plans, or habitat protection plans. These plans not only lay out best management practices for critical area protection, they also can be used to leverage and qualify for funding from federal and state sources to support implementation efforts. Farm plans are often associated with uses in fish and wildlife conservation areas, wetlands and aquifer recharge areas to protect and enhance water quality. They also help to improve the efficiency of farm operations. A farm plan may still be required in addition to a permit per the requirement of the development code. If a landowner's agricultural operation is found to be adversely impacting a critical area without appropriate mitigation, a farm plan may be required as a form of enforcement.

Several counties have developed manuals to describe best management practices and offer seminars and presentations to interested land owners. Local governments may offer technical assistance to facilitate the critical area protection. Non-monetary incentives such as farm management or habitat protection plans offered to property owners encourage the implementation of projects that provide increased protections and enhancements to critical areas.

Farm management plans typically address:

- Farm size
- Soil types
- Slope of the land
- Waste and manure piles
- Location of streams and water bodies
- Surface water, water flow controls, water treatment and management
- Type of crops or livestock
- Machinery and farm buildings

Farm management plans are intended to help agricultural operators maintain productive and economically viable agricultural land, while protecting and enhancing critical areas and water quality using best available science and effective mitigation measures. Farm management or conservation plans are not limited to large commercial operations; farms of all sizes can utilize and benefit from the development of a farm plan. Plans can effectively reduce impacts from farm activities on natural

resources with solutions unique to each farm to avoid or minimize adverse impacts with mitigation techniques.

Common farm plans include:

- **Goals:** Restore or enhance critical areas and hydrologic systems.
- **Inventory maps:** Critical areas, designated habitat areas, existing and proposed structures, cleared and forested areas, utilities, roads, driveways, wetlands and property lines.
- **Planning Map, Scope and Timeline:** Map and proposed new agricultural activities, the scope of the agricultural activities, a timeline for their implementation, use of pesticides, fertilizers or other chemicals, and identification of existing habitat functions and values.
- **Implementation Plan:** Description and implementation plan for performance standards, integrated pest management, mitigation measures and best management practices to be implemented for the maintenance, restoration and enhancement of critical areas and their buffers.
- **Future Plan:** Changes to the site, including structures, land use conversion, and changes to the landscape.
- **Monitoring:** Ensure the effectiveness of proposed strategies to protect critical areas. If monitoring shows the farm plan does not effectively protect critical areas a new farm plan may be required. Whatcom County farm plans are also subject to adaptive management.
- **Approval Process:** Typically conducted by a NRCS, WDFW or conservation district certified agricultural technician, a qualified planning advisor or the county technical administrator. Approval is based on compliance with the BMPs of the NRCS field guide.
- **Compliance:** Once approved, the farm plan is considered in compliance with the county's critical areas provisions. Compliance is typically sought through education and voluntary measures, but an inspection may be required to confirm compliance. Refusal or inability to implement the farm plan effectively may result in the farm plan being revoked, requiring the property owner to be subject to provisions in the standard critical areas regulation. County planning advisors may provide suggestions to support compliance, but responsibility for compliance is typically with the farm operator. If compliance is not resolved, enforcement actions per the critical areas ordinance may be applied.
- **Technical Assistance and Resources:** Provided to the property owner through the county, the conservation district, the watershed improvement district or the Washington State University agricultural extension office. This can include workshops, web-based information and manuals.
- **Conservation Practice Standards:** The most recent version of the [USDA NRCS Field Office Technical Guide \(FOTG\)](#) is often referenced for conservation practices and specifications within the plan.
- **Site Inspections:** Evaluation, monitoring, compliance and enforcement of farm plan effectiveness are conducted by the county through scheduled site inspections and farm operator self-assessment.

Farm plans are an optional and recommended strategy to protect critical areas, particularly for existing and ongoing agricultural activities. In the case of new agriculture, counties may choose to require a farm plan before new or expanded agricultural activities may take place. Farm plans may be required for agricultural activities that receive high-impact ratings or high-risk assessment scores. With low-impact ratings or scores, farm plans can remain optional.

In Snohomish County, agricultural operators can submit a farm conservation plan to the county for approval as one option to show compliance with county critical area regulations. The farm conservation plan must include provisions to protect critical areas specific to the farm site recommended by the NRCS or the Snohomish Conservation District. Any confidential or propriety information contained in a farm conservation plan may be redacted prior to public disclosure.<sup>22</sup>

Snohomish County allows agricultural operators to submit farm conservation plans as one option to show compliance with critical area regulations.

To increase and promote the use of farm plans, jurisdictions can provide ready-made farm plan templates for agricultural activities that are more common or typical. These plans can be modified and tailored based on the unique goals and activities of each farm operation. Local conservation districts are important partners and can play an essential role in providing technical assistance in the development of farm plans and farm plan templates.

When developing farm plans, local governments are advised to address how confidential and proprietary information will be handled within their critical areas ordinance. In most instances, farm plans are not open to the public unless required by law or court. Financial, commercial, and proprietary information in farm plans are typically exempt from disclosure unless permission is given by the landowner. Public disclosure of farm plans for agricultural operations including dairies and animal feeding operations, and concentrated animal feeding operations is addressed in RCW 42.56.270(17), RCW 42.56.610, and RCW 90.64.190.

Note that any information used to review or demonstrate compliance with National Flood Insurance Program (NFIP) standards must be included in the local jurisdiction's NFIP permanent file. If an element of a farm plan is used to demonstrate NFIP compliance, it should be understood that any such elements of the farm plan cannot remain confidential.

To see examples of farm plans, additional details about common farm plan elements, and a sample farm plan factsheet, see Appendix 5.B item "Critical Areas and Agriculture: Review of Development Regulations, Chapter 6: Farm Conservation Plans".

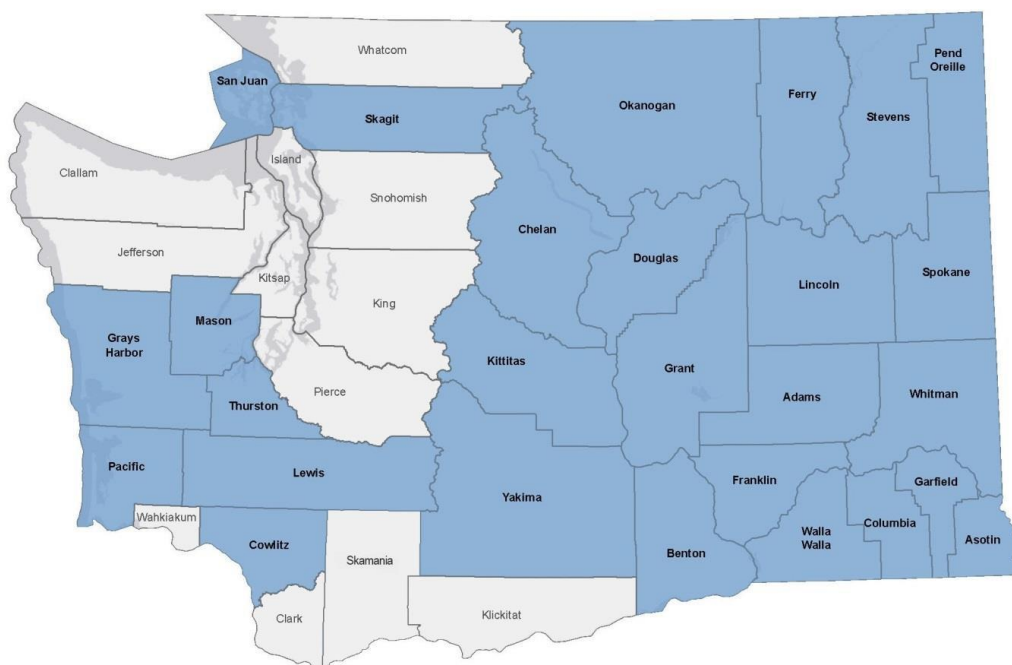
## Voluntary Stewardship Program

In 2011, the Voluntary Stewardship Program (VSP) was adopted into the GMA as an alternative approach for counties to protect critical areas where agricultural activities are conducted. Counties had until January, 2012 (six months after July 22, 2011) to opt into the VSP by ordinance or resolution, with 27 counties choosing to opt-in (Figure 1). Non-VSP counties must continue regulating agricultural

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<sup>22</sup> See [Snohomish County Code, Section 30.62A.620](#)

Figure 1. Washington State Conservation Commission Voluntary Stewardship County Participation Map



The program is administered by the Washington State Conservation Commission with guidance from a statewide advisory committee and technical panel. The Legislature appropriated funding for the Conservation Commission to administer and support counties in the development of incentive-based strategies and local guidelines for watershed stewardship. Each participating county must identify the watersheds that will participate in the program.<sup>23</sup>

## Watershed Work Groups and Watershed Work Plans

In 2015, counties began developing VSP work plans to protect critical areas and maintain agricultural viability. Pursuant to RCW 36.70A.720, the purpose of a watershed work plan is to protect critical areas

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while maintaining the viability of agriculture in the watershed. Counties designate watershed groups to develop the work plan, which must include goals and benchmarks to protect and enhance critical areas.

Watershed work groups, comprised of farmers, tribes, local environmental groups and agricultural industry representatives, must develop watershed work plans with goals and measurable benchmarks to determine the progress and success of the program over time. Some workgroups also have participation from county and state agency representatives. The VSP applies to all areas where agricultural activities are conducted in designated watersheds and not just designated agricultural resource lands of long term commercial significance. All agricultural operators participating in the VSP are eligible to receive funding and assistance under watershed programs.<sup>24</sup>

Once completed, watershed work plans are submitted to the Conservation Commission Director, who then forwards to the technical panel for review. The technical panel, consisting of representatives from the Washington State Departments of Agriculture, Fish and Wildlife, Ecology and the Conservation Commission, reviews and evaluates the work plans. The technical panel assesses whether the work plan will meet VSP requirements to protect critical areas while maintaining and enhancing the viability of agriculture in the watershed. If the technical panel determines that the work plan meets these requirements, they will recommend approval to the Conservation Commission Director. If the technical panel determines that the work plan does not meet the VSP requirements, the work plan may not be approved, or may be modified and resubmitted.<sup>25</sup>

A Statewide Advisory Committee advises the Conservation Commission and Technical Panel in the development and operation of the VSP.

State natural resource agencies support the work plan by developing materials which will assist the local watershed groups with this process. State agency monitoring efforts related to the implementation of the program focus on the goals and benchmarks of the work plan. Within five years of receiving funding for a participating watershed, the watershed group must report to the Director and the county on whether the work plan's goals and benchmarks were met.

A report to the Conservation Commission Director is also required no later than ten years after receipt of funding, and every five years thereafter, to determine whether the goals and benchmarks are being met. After the approval of a work plan, counties and watersheds may request that state and federal agencies focus existing enforcement authority in participating watersheds if it will support achieving the work plan goals and benchmarks.

Prior to the approval of a work plan by the Conservation Commission Director, agricultural activities located in participating watersheds are subject to the county's existing development regulations that protect critical areas. After watershed work plan approval, protection of the functions and values of

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<sup>24</sup> RCW 36.70A.720

<sup>25</sup> RCW 36.70A.725

critical areas from agricultural located in participating watersheds is provided by the watershed work plan.

After a county's watershed work plan is approved, counties are encouraged to reference and describe their participation in the VSP within their critical areas development regulations. Counties should be very clear in describing critical areas regulations that still apply to agricultural activities after work plan approval. County VSP work plans may rely on existing development regulations to achieve the goals and benchmarks for critical areas protection.<sup>26</sup> For example, work plans may defer to existing regulations for steep slopes, erodible soils for flood hazards. In shoreline areas, agricultural activities are still subject to local Shoreline Master Programs.

### Agricultural Activities

The Voluntary Stewardship Program legislation uses the Shoreline Master Program definition for "agricultural activities".<sup>27</sup> Therefore, once the Conservation Commission approves a watershed work program, all agricultural activities, as defined, are governed by the VSP watershed work plan. Agricultural uses and practices not consistent with the agricultural activities definition will be subject to the county's critical area regulations. For example, the definition for agricultural activities states that agricultural facilities may be maintained, repaired or replaced, as long as the facility is not located closer to the shoreline than the original facility. The agricultural activities definition does not include brand new agricultural facilities. Therefore, new agricultural facilities, such as barns, ditches and access corridors, must comply with county critical area regulations, including setbacks and buffer standards.

The SMP definition for "agricultural activities" describes existing and ongoing agricultural operations and facilities. It does not include "new" agriculture. Therefore, counties must evaluate "new" agricultural activities to ensure that they comply with their critical area regulations.

The Shoreline definition for agricultural activities includes "maintaining agricultural lands under production or cultivation", but does not include new or expanded agricultural uses or practices. Therefore, bringing new land into cultivation must be evaluated under the county's critical areas regulations.

Due to the varied style and content of VSP counties' critical areas ordinances, it is difficult to provide a one-size-fits-all solution for how to revise the development regulations to reflect the recommendations of the watershed work plan. As a best practice, counties are encouraged to consult with legal staff for advice on how best to address it for each individual county.<sup>28</sup> Which provisions or standards of the development regulations apply need to be clear to agricultural operators.

### Monitoring and Adaptive Management

RCW 36.70A.720 requires that watershed work plans establish baseline monitoring for the participation and implementation of VSP projects, stewardship activities, and the effects on critical areas and

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<sup>26</sup> RCW 36.70A.720(1)(h)

<sup>27</sup> RCW 90.58.065(2)(a)

<sup>28</sup> WAC 365-196-832

agriculture as they relate to the benchmarks developed for each watershed. This underscores the importance of selecting appropriate benchmarks and collecting accurate baseline monitoring data. Counties are required to evaluate adaptive management approaches within 60 days after the end of each biennium.

Within five years of receiving funding to implement the program, a report to the Conservation Commission is required to show if benchmarks and goals have been met. If goals are not met, implementation of the work plan continues and the watershed group must identify additional voluntary actions and funding necessary to meet the benchmarks.

Actions must be implemented upon receipt of funding. A report to the State Conservation Commission Director is required within ten years of when funding was received, and every five years thereafter, to report if the goals and benchmarks in the watershed work plan were met.<sup>29</sup>

For more on adaptive management and monitoring related to both VSP and non-VSP counties, please see Chapter 7 of the Critical Areas Assistance Handbook. Note that the type of monitoring recommended in Chapter 7 is not the type required by the VSP.

#### County Responsibilities When Exiting or Withdrawing from the Voluntary Stewardship Program

Counties that elect to protect critical areas through the VSP may withdraw participating watersheds from the program by adopting an ordinance or resolution. Counties may withdraw watersheds from the program at the end of three, five or eight years after receipt of funding, or any time after ten years of funding.

Within 18 months after withdrawing a participating watershed from the program, a county must review and, if necessary, revise its development regulations that protect critical areas in that watershed as they specifically apply to agricultural activities.<sup>30</sup> During the 18-month interim period, counties are required to continue protecting critical areas in watersheds withdrawn from the VSP. The adopted ordinance or resolution used to withdraw the participating watersheds must describe how the county will continue to protect critical areas in watersheds withdrawn from the VSP. Counties have three options:<sup>31</sup>

- 1) Adopt interim development regulations;
- 2) Revert to development regulations that were in place at the time of watershed work plan approval; or
- 3) Continue to implement the watershed work plan.

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<sup>29</sup> RCW 36.70A.720

<sup>30</sup> RCW 36.70A.710(7)(b)

<sup>31</sup> WAC 365-196-832(4).

### County Responsibilities When Work Plans Not Approved, Fail or are Not Funded

When watershed work plans are not approved by the Conservation Commission, fail, or are not funded, counties are required, within 18 months, to adopt one of four options:<sup>32</sup>

- 1) Develop, adopt and implement a watershed work plan.
- 2) Adopt development regulations previously adopted by another local government to protect critical areas used for agricultural activities.
- 3) Adopt development regulations certified by the department as protective of critical areas in areas used for agricultural activities as required by this chapter.
- 4) Review and, if necessary, revise development regulations adopted under this chapter to protect critical areas as they relate to agricultural activities.

During the 18-month interim period, counties must continue to protect critical areas in areas used for agricultural activities using one of the four options. One of the options, as stated in RCW 36.70A.735 (1)(b), was clarified in a State Department of Commerce rule update in WAC 365-196-832(5)(b)<sup>33</sup> to provide implementation guidance:

“Counties may adopt another county's 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.”

Counties considering Clallam County's ordinance for adoption of VSP development regulations pursuant to RCW 36.70A.735 (1)(b) need to be aware that Clallam County's critical areas ordinance was under appeal in 2011 at the time the VSP legislation was signed into law. The Court of Appeals subsequently held that Clallam County's ordinance was required to be compliant with the GMA only for those counties participating in the VSP. Because Clallam County was not participating in the VSP, the County would have to comply with the “traditional” requirements of RCW 36.70A.060 rather than the alternative requirements for VSP participants.<sup>34</sup> On remand from the Court, the Growth Management Hearings Board found the County's ordinance out of compliance. Since that time, Clallam County revised its development regulations as they pertain to the protection of critical areas where agricultural activities take place. With respect to RCW 36.70A.735, counties are advised to only adopt development regulations that have been upheld by the courts as adequate for the protection of critical areas functions and values in areas used for agricultural activities.<sup>35</sup>

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<sup>32</sup> RCW 36.70A.735(1)

<sup>33</sup> Effective November 4, 2017.

<sup>34</sup> *Protect the Peninsula's Future v. Growth Management Hearings Board*, 185 Wn. App. 959 (2015).

<sup>35</sup> WAC 365-196-832(5)(b)

## Agricultural Viability

Watershed work plans must protect critical areas while maintaining and enhancing the viability of agriculture in the watershed.<sup>36</sup> The VSP statute does not define or provide guidance for counties to measure agricultural viability. Therefore, each county must develop criteria tailored to their unique agricultural characteristics to measure or describe agricultural viability. The state Conservation Commission provides guidance for counties on this issue in their *Agricultural Viability Toolkit*, which provides the following considerations for agricultural viability:

- Productively farm on a given piece of land or in specific area,
- Maintain an economically viable farm business,
- Keep the land in agriculture long-term, and
- Steward the land so it will remain productive in the future.<sup>37</sup>

Agriculture needs adequate land and water resources. Other land uses, such as housing and industrial developments, compete for land and water, threatening agricultural viability. Farms and ranches need sufficient infrastructure and market access systems to maintain viability. Other considerations include technical support for modern conservation practices and education, research and succession planning.

## Periodic Review and Update Requirements

All counties and cities must comply with the periodic review and update requirements as they apply to critical areas regulations in agricultural lands as required by RCW 36.70A.130. The statute provides an exception for counties with watersheds participating in the VSP. Counties are not required to develop or update critical areas regulations applicable to agricultural activities in those participating watersheds if they are meeting established benchmarks and goals for critical areas protection under their watershed plan.<sup>38</sup> However, those counties must still comply with the periodic update schedule and guidelines regarding the critical areas ordinance as it applies to all other activities and in non-VSP watersheds.

## State and Federal Regulations Impacting Agricultural Lands and Critical Areas

Regardless of participation or non-participation in the VSP, jurisdictions are required to comply with state and federal regulations, such as the federal Clean Water Act and the state Water Pollution Control Act. Producers participating in the VSP still must comply with water quality standards, including wetlands protection, and comply with state and federal environmental regulations.

Statutes and regulations that regulate agricultural activities includes, but are not limited to:

- Hydraulic project approval
- Livestock management ordinance
- Washington State Dairy Nutrient Management Act

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<sup>36</sup> RCW 36.70A.725

<sup>37</sup> [Agriculture Viability Toolkit, Washington State Conservation Commission, 2016](#)

<sup>38</sup> RCW 36.70A.130(8)

- Washington Shoreline Management Act
- Water Pollution Control Act
- Water quality standards for surface water
- Water quality standards for groundwater
- Endangered Species Act
- Federal Clean Water Act
- Federal Emergency Management Agency Laws
- National Flood Insurance Program

### Agriculture and Shoreline Master Programs

The Shoreline Management Act (SMA) was enacted in 1971 and amended in 2002 to clarify that Shoreline Master Programs (SMPs) cannot modify or limit agricultural activities occurring on land where agricultural activities are conducted. If there are conflicts between critical areas regulations and SMP policies, the SMP provisions will prevail. New agricultural activities must comply with SMP requirements when land is being converted from another use to agriculture. New development that does not meet the definition of “agricultural activity” per RCW 90.58.065 must also comply with SMP standards.

After the Department of Ecology (Ecology) approves a comprehensively updated SMP, critical areas within shorelines of the state are protected by SMPs and are not subject to procedural or substantive requirements of the GMA. However, counties may rely on critical areas ordinances within shoreline jurisdiction provided they meet Ecology standards. [Ecology’s Shoreline Master Program Handbook](#) describes options for local governments to incorporate relevant portions of critical areas ordinances into SMPs directly, or adopting critical area regulations by reference.

Counties participating in the VSP are still subject to the SMA and local SMP requirements.

### Agriculture and Drinking Water

Agricultural land uses can negatively impact drinking water in numerous ways. In terms of critical areas, the explicit drinking water relationship is between agricultural uses/practices and critical aquifer recharge areas; but another relationship exists in terms of proximity to public water systems and the associated times of travel to the water source. In these circumstances, a jurisdiction should limit or condition specific land uses *and practices* that are likely to foul drinking water.

Pesticides and other agricultural chemicals can appear in surface and ground waters proximate to agricultural lands through surface runoff and/or groundwater infiltration. The state departments of

ecology and agriculture jointly published best management practices for storing and using agricultural chemicals.<sup>39</sup>

Manure-producing agricultural uses can likewise contribute to nitrate pollution if manure is not managed properly. The Department of Ecology published guidance for assessing the risks to water quality associated with livestock operations in 2015, which is helpfully organized in terms of riparian areas, confinement areas, manure storage areas, and upland pasture areas.<sup>40</sup>

In 2013, the Washington Nitrate Prioritization Project identified a consolidated approach for state agencies to address agricultural pollution of surface and ground water.<sup>41</sup> In part, the project identified hydrogeological information necessary to understand how groundwater's presence and movement affects nitrate contamination and formed a basis for information-sharing among regulatory agencies. Additional technical information was published separately in 2016.<sup>42</sup> Also in 2016, Ecology published a literature review that examined scientific information on manure management associated with CAFOs, strategized measures of these practices' effectiveness, and identified practices and treatment technologies to maintain and protect groundwater.<sup>43</sup>

Agricultural uses, specifically farms and dairies, are categorized as "severe and high health cross-contamination hazard premises requiring premises isolation by [air gap] or [reduced pressure backflow assembly]." <sup>44</sup> What this means in practice is that technical requirements must be met to prevent backflow from user connections that could contaminate public water systems. Water purveyors are responsible for cross-connection control between their systems and individual service connections or meters.

While drinking water purveyors must comply with all local plans,<sup>45</sup> they must, at the same time, "exercise surveillance over conditions and activities in the watershed affecting source water quality"<sup>46</sup> as a part of their water system plans, which are to include a discussion of "the foreseeable effect from current and future use on the water quantity and quality of any body of water from which its water is diverted or withdrawn."<sup>47</sup> Water system plans must incorporate several aspects of source water protection: (1) an immediate sanitary control area (minimum 100-foot radius for wells and 200-foot radius for springs); (2) a wellhead protection program, typically comprised of six-month and one-, five-, and ten-year times of travel to the source; and (3) a watershed control program for surface sources or groundwater under the direct influence of surface water, including "an inventory of all potential surface water contamination sources and activities, including site locations and other/operators, located within

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<sup>39</sup> <https://fortress.wa.gov/ecy/publications/documents/94189.pdf>

<sup>40</sup> <https://fortress.wa.gov/ecy/publications/documents/1510020.pdf>

<sup>41</sup> <https://fortress.wa.gov/ecy/publications/documents/1410005.pdf>

<sup>42</sup> <https://fortress.wa.gov/ecy/publications/documents/1610011.pdf>

<sup>43</sup> <https://fortress.wa.gov/ecy/publications/documents/1603026.pdf>

<sup>44</sup> WAC 246-290-490, Table 9

<sup>45</sup> WAC 246-290-108

<sup>46</sup> WAC 246-290-668

<sup>47</sup> WAC 246-290-100(4)(f)(ii)(B)

the watershed and having the significant potential to contaminate the source water quality.”<sup>48</sup> In addition, it must evaluate “conditions/activities in the watershed that are adversely affecting source water quality” and reevaluate changes that have occurred since the last evaluation that *could* adversely affect quality.<sup>49</sup>

Purveyors must ask local governments to review water system plans and assess consistency with local planning efforts, generally on a 60-day turnaround.<sup>50</sup> However, there is no complementary clause requiring that local governments actually provide them with a review or comments, so it’s possible that sometimes the ends don’t meet. Similar to the best practices identified for overall critical aquifer recharge area planning, it’s to the jurisdiction’s advantage to engage with local water purveyors when considering agricultural uses within the community and how their operations relate to drinking water protection.

Some parts of the state are designated as “critical water supply service areas” in which there are not just individual water system plans but a coordinated water system plan that may cover numerous jurisdictions and/or water systems. Critical water supply service area boundaries are set by the county legislative authority and also have a relationship with local plans and zoning.<sup>51</sup>

## Forest Lands and Critical Areas Protection

Forest practices, including timber harvest and its associated activities (e.g., road building, pre-commercial thinning, controlled burning, herbicide and insecticide spraying), temporarily or permanently alter the character of forested landscapes, including critical areas. For example, vegetation removal, road construction, and soil disturbance are the chief mechanisms by which forest practices influence riparian areas. These disturbances can result in:

- Hydrologic (relating to water flow) effects
- Soil destabilization, erosion, and sedimentation
- Stream temperature increases and a more severe microclimate
- Loss of large woody debris
- Habitat fragmentation
- Introduction of invasive species
- Fish and wildlife impacts
- Cumulative effects

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<sup>48</sup> WAC 246-290-135

<sup>49</sup> WAC 246-290-668

<sup>50</sup> WAC 246-290-108

<sup>51</sup> See, generally, Ch. 70.116 RCW and Ch. 246-293 WAC

The Washington State Forest Practices Board adopts the Forest Practices Rules in Title 222 WAC, establishing minimum standards for forest practice activities on non-federal forest land under Chapter 76.09 RCW, the Forest Practices Act. As defined in the act, “forest practice” means:

- [A]ny activity conducted on or directly pertaining to forest land and relating to growing, harvesting, or processing timber, or removing forest biomass, including but not limited to:
- Activities in and over typed water;
- Road and trail construction, including forest practices hydraulic projects that include water crossing structures, and associated activities and maintenance;
- Harvesting, final and intermediate;
- Pre-commercial thinning;
- Reforestation;
- Fertilization;
- Prevention and suppression of diseases and insects;
- Salvage of trees; and
- Brush control.

Forest practice activities do not include preparatory work such as tree marking, land surveying, road flagging and removal of incidental vegetation such as berries, ferns, or mushrooms. These activities and the removal of incidental vegetation do not result in damage to forest soils or public resources.<sup>52</sup>

“Forest land” is defined in the Forest Practices Rules as “all land which is capable of supporting a merchantable stand of timber and is not being actively used for a use which is incompatible with timber growing.”<sup>53</sup> Thus, “forest land” for purposes of the Forest Practices Act includes all land meeting this definition regardless of whether it has been designated natural resource land of long-term commercial significance under RCW 36.70A.170. However, forest practices are subject to local critical area regulations instead of the Forest Practices Rules when forest land is converted to non-forestry use, or when a conversion is likely.

### Administration of the Forest Practices Rules

The Washington State Department of Natural Resources (WDNR) administers the Forest Practices Rules, except when jurisdiction has been transferred to local government. Forest practices include activities related to growing, harvesting, or processing timber, including, but not limited to, road construction and maintenance, thinning, salvage, harvest, reforestation, brush control, and the application of fertilizers or pesticides. There are four classes of forest practices:<sup>54</sup>

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<sup>52</sup> WAC 222-16-010

<sup>53</sup> WAC 222-16-010

<sup>54</sup> RCW 76.09.050 and WAC 222-16-050

- Class IV-Special - Certain activities determined to have potential for a substantial impact on the environment that require review under the State Environmental Policy Act (SEPA).
- Class IV-General - Activities that are not listed as Class IV-Special that are subject to SEPA review and that are being converted to another use.
- Class I – Determined to have no direct potential for damaging a public resource.
- Class II – Determined to have a less than ordinary potential to damage a public resource (water, fish and wildlife).
- Class III – All other forest practices not classified as I, II or IV. Class III forest practices within the urban growth area where the transfer of jurisdiction has occurred to a local government are regulated by WDNR if it is on contiguous forest land equal to or greater than twenty acres and the landowner provides documentation as noted under the Class IV-General above regarding intention not to convert or an obtains an approved conversion harvest plan.

#### When to Apply the Critical Areas Ordinance and the Shoreline Master Program

Class IV-General forest practices will be subject to local critical area regulations when a conversion activity is planned or conversion is likely to another land use. Conversion is considered to be likely when forest practices involve timber harvest or road construction within a designated urban growth area. Exceptions are provided to this where:

- The forest landowner provides a written statement of intent not to convert for ten years, with either a written forest management plan approved by WDNR or the land is enrolled under Chapter 84.33 or 84.34 RCW; or
- A Conversion Option Harvest Plan has been approved by the local government and submitted to WDNR.

Except as stated above under Class III forest practices, the CAO would also apply to forest activity requiring a forest practices application when located within an urban growth area.

The SMA applies to forest practices activities administered by WDNR when harvesting or road construction is planned within shorelines of the state. Forest practices that constitute a substantial development within the “shoreline” as defined by the SMA may require a substantial development permit. Applicants are required to contact the county having jurisdiction before submitting a Forest Practices Application to ensure compliance with the requirements of the local shoreline master program.

#### Transfer of Jurisdiction to Local Government

Counties with a population greater than 100,000, and the cities and towns within them, are required to adopt ordinances or regulations to assume jurisdiction over certain forestry activities under the Forest Practices Act.<sup>55</sup> Local governments assume jurisdiction over forestry activities within the urban growth area and conversion activities outside the urban growth area. The local government initiates the transfer process; WDNR provides technical assistance during the process and reviews the local government’s

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<sup>55</sup> RCW 76.09.240

regulations for meeting the statute. Local critical areas and development regulations must be in compliance with RCW 36.70A.130 and, if applicable RCW 36.70A.215. In addition, they must at a minimum include:

- Provisions requiring appropriate approvals for all phases of the conversion of forest lands, including land clearing and grading; and
- Procedures for the collection and administration of permit and recording fees.<sup>56</sup>

As of June 2018, the following counties and cities have been approved by WDNR for a transfer of jurisdiction.

- Counties: Thurston, King, Spokane, Clark, Mason, Pierce, and Snohomish.
- Cities: Port Townsend, Bonney Lake, Monroe, University Place, Federal Way, Lacey, Mill Creek, Everett, Olympia, Tumwater, Arlington, Mount Vernon, and Bothell.

#### Conversion to a Non-Forest Use

A landowner who has not stated an intent to convert and decides to convert within six years of receiving an approved forest practices application or notification, must:

- Stop all forest practices activities on the parcel subject to the proposed land use conversion;
- Contact Ecology and the applicable local government to begin the permit process; and
- Notify WDNR, withdraw any applicable applications or notifications, and submit a new application for conversion.<sup>57</sup>

Upon being contacted by a landowner, the local government must:

- Notify WDNR and request the status of an application forest practices applications, notifications, or final orders or decisions; and
- Require full compliance with SEPA and outstanding final order or decisions from WDNR; and
- Make a determination of full compliance with local ordinances and regulations. If full compliance is not found, a mitigation plan must be required and approved by the local government.<sup>58</sup>

For more information and technical assistance regarding the Forest Practices Rules as they relate to critical areas regulations under the GMA, contact the [WDNR Forest Practices Division staff](#).

## Mineral Resource Lands and Critical Areas Protection

Aggregate and hard rock mining can impact critical areas through ground water harvest, ground water pollution, surface water pollution, slope stability, ground surface subsidence, and noise, light, and

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<sup>56</sup> RCS 76.09.240(2)

<sup>57</sup> RCW 76.09.470(1)

<sup>58</sup> RCW 76.09470(2)

vibration. The processing of minerals into asphalt or other aggregate products may also have similar impacts. Conditions can be required on mineral resource permits such as regulating the time of mining operation and other permit conditions permits to ensure that habitat and water quantity and quality issues are addressed and avoided. The issuance of a water rights permit may be required if it is determined that aquifers will be impacted by mining activity.

As with other natural resource lands, local governments were required to designate mineral lands of long-term commercial significance. They are also responsible for approval of mine sites and/or the subsequent use of the mine site. Mining operations will be regulated by the local jurisdiction's critical areas relations.

WDNR regulates certain aspects of the mineral industry, including surface mining and reclamation as specified in the Surface Mine Reclamation Program (SMRP), created in 1971.<sup>59</sup> The SMRP makes sure that all lands and waters within the state are protected. WDNR also regulates metal mining and milling operations.<sup>60</sup> Critical areas that may overlay designated mineral resource lands include critical aquifer recharge areas, frequently flooded areas, geologically unstable areas, and fish and wildlife habitat conservation areas.

When considering the designation of mineral lands as well as creating development standards and administering local permits, it is important to check for proximity to drinking water sources to avoid conflicts with not just aquifer recharge but also to avoid impact to the aquifer such as breach, sedimentation or other degradation of water quality. The State Department of Heath maintains a statewide map of public water systems and their associated wellhead protection areas.<sup>61</sup>

Local designation of both resource lands and critical areas should have considered ranking designated mineral resource lands on the basis of several factors to assign priority levels to these designated lands. Criteria to consider in assigning priorities could have included their ease of access for transportation, surrounding land uses and the compatibility of mining with those uses, the quantity and quality of the resource, demand for the resource, and environmental impacts of mining based on local circumstances, including the presence of critical areas.

## Building the Legal Record and Including Best Available Science

Counties, and in some instances cities, may face significant challenges in their efforts to protect critical areas on natural resource lands. For example, there will be instances where local governments must reconcile the need to protect critical areas with the need to conserve farmland and enhance the agricultural industry. Consequently, it will be important for local governments to build a record that documents the inclusion of any new best available science in critical areas protection, as well as consideration of the economic impacts to local natural resource industries. The record should include

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<sup>59</sup> RCW 78.44, Surface Mining

<sup>60</sup> RCW 78.56, Metals Mining and Milling Operations

<sup>61</sup> <https://fortress.wa.gov/doh/eh/maps/SWAP/index.html>

local information about critical areas generated through inventory, survey, and assessment data. Once this level of information is known, management approaches necessary to protect critical areas can be developed that look at local circumstances and opportunities.

See Chapter 1 of this *Critical Areas Handbook* for more information on Best Available Science.