



**Chapter 365-195 WAC – Preliminary Draft Comment Summary and Response to Comments**

**GROWTH MANAGEMENT ACT—BEST AVAILABLE SCIENCE**

<b>WAC 365-195-900</b>		
<b>Stakeholder</b>	<b>Comment</b>	<b>Response</b>
American Planning Association – Washington Chapter	<p><i>Overview of WAC 365-195: The changes actually water down clear, incisive decisions from the Washington Supreme Court in Swinomish and the Court of Appeals in WEAN. We recommend revising to be consistent with these two appellate decisions.</i></p> <p><i>Reason: Case law; Swinomish and WEAN.</i></p>	<p>Commerce does not agree that monitoring and adaptive management is a requirement of the GMA. Our CAO guidebook, in reference to the Swinomish decision and the broader issue, states: “No court decisions have held that local governments are required to adopt a monitoring and adaptive management program. However, the Supreme Court found that if Skagit County were to rely on monitoring and adaptive management to protect critical areas in agricultural lands, it needed to establish benchmarks for monitoring.” The Growth Management Hearing Board recently affirmed this position (see <i>Ian Munce and Evergreen Islands v. City of Anacortes, FDO, Case No. 21-2-0002c</i>).</p> <p>In <i>Swinomish</i>, Skagit County adopted a monitoring and adaptive management process as part of their critical areas regulations <u>specific to agricultural uses</u>. The Supreme Court affirmed that the County must adopt benchmarks as part of the process. The Court notes that “under GMA regulations,</p>

		<p>local governments must either be certain that their critical areas regulations will prevent harm or be prepared to recognize and respond effectively to any unforeseen harm that arises. In this respect, adaptive management is the second part of the process initiated by adequate monitoring”. If a local government adopts regulations consistent with the best available science, is certain its regulations will protect critical area and is properly implementing those regulations, then monitoring and adaptive management with established benchmarks is not required.</p> <p>In the <i>WEAN</i> case, the Court cites the current WAC requirement that counties and cities take a “precautionary or no risk” approach when there is an absence of scientific certainty or valid scientific information. Only then is “an effective adaptive management program” required to ensure regulations protect critical areas.</p> <p>Neither <i>Swinomish</i> nor <i>WEAN</i> establish a requirement to conduct ecosystem wide monitoring and adaptive management programs. Both cases address unique facts and circumstances.</p>
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<p>American Planning Association – Washington Chapter</p>	<p><i>WAC 365-195-900: This section currently states that comprehensive plans and development regulations need to be updated "every five years".</i></p> <p><i>Reason: Legislation. The WAC should be updated to clarify that updates should occur every eight years to be consistent with RCW 36.70A.130(5). (This may change to a ten-year update cycle, depending on the outcome of the 2022 legislative session.)</i></p>	<p>Commerce replaced the five-year time period reference with "periodically". This will alleviate the need to amend this section with legislative changes to the periodic update cycle.</p>
<p>American Planning Association – Washington Chapter</p>	<p><i>WAC 365-195: Suggest including the following language within this section: "Any departure from the Critical Areas Ordinance WAC's direction and recommendations shall be explained in a report that accompanies the CAO Update or Amendment".</i></p>	<p>Local governments have discretion in how they document and develop their legislative record. This suggestion is more appropriate for technical guidance.</p>

<b>WAC 365-195-905</b>		
<b>Stakeholder</b>	<b>Comment</b>	<b>Response</b>
<p>American Planning Association – Washington Chapter</p>	<p><i>WAC 365-195-905(3): Expand "Source of Change" with "and the rulings of Swinomish" and change "should" to "shall".</i></p> <p><i>Reason: Case law; required by Swinomish.</i></p>	<p>Commerce changed "should" to "must" for consistency with current language in WAC 365-196-485(3).</p>
<p>Pierce County Planning and Public Works</p>	<p><i>The proposed language does not clarify that local jurisdictions need to contact the appropriate agencies to identify BAS resources. As the proposed language states Commerce will work with state agencies to identify BAS resources, it would be assumed a local jurisdiction could contact Commerce for its findings. As agencies may have conflicting BAS determinations, it would be appropriate for Commerce to provide guidance to local jurisdictions in determining how to balance these differences, as well as all GMA planning goals. This expertise and resources are needed as not all local jurisdictions have the capacity or expertise to determine BAS.</i></p>	<p>Commerce identifies sources of BAS in our <i>Critical Areas Handbook</i>, which can be updated as new sources are identified. The handbook is also the appropriate place to provide guidance on balancing conflicting BAS.</p>



Pierce County Planning and Public Works	<i>The “should” language is inconsistent with proposed amendments to WAC 365-196-485(3) and WAC 365-196-610 which state a BAS analysis “must” be conducted.</i>	Commerce changed “should” to “must” for consistency with current language in WAC 365-196-485(3).
Black Hills Audubon Society	<p><i>In general, BHAS commends the department on the updated codes in the preliminary drafts to enforce the Growth Management Act (GMA). Please see below a list of the code changes that we recognize are especially important for environmental protection.</i></p> <p><i>BHAS highlights the following code changes as being particularly helpful to protect our environment for current and future generations:</i></p> <p><i>WAC 360-195-905 (3) ....Cities and counties should conduct a best available science review when updating critical area regulations...</i></p>	Thank you for the comment.

<b>WAC 365-195-910</b>		
<b>Stakeholder</b>	<b>Comment</b>	<b>Response</b>
Pierce County Planning and Public Works	<i>Per changes to WAC 365-195-900 (2), Commerce will work with state agencies to identify BAS resources, it would be assumed a local jurisdiction could contact Commerce for its findings. As agencies may have conflicting BAS determinations, it would be appropriate for Commerce to provide guidance to local jurisdictions in determining how to balance these differences, as well as all GMA planning goals. This expertise and resources are needed as not all local jurisdictions have the capacity or expertise to determine BAS..</i>	Commerce identifies sources of BAS in our <i>Critical Areas Handbook</i> , which can be updated as new sources are identified. The handbook is also the appropriate place to provide guidance on balancing conflicting BAS.

<b>WAC 365-195-915</b>		
<b>Stakeholder</b>	<b>Comment</b>	<b>Response</b>
American Planning Association – Washington Chapter	<p>WAC 365-195-915: Change “should” to “shall”.</p> <p><i>Reason: Case law; to comply with Swinomish and WEAN.</i></p>	See response above under WAC 365-195-900 concerning the Swinomish and WEAN court decisions.

<b>WAC 365-195-920</b>		
<b>Stakeholder</b>	<b>Comment</b>	<b>Response</b>
Ann Aagaard	<p>Recommends the following language elaborating on monitoring and adaptive management: <u>“counties and cities should establish monitoring and adaptive management procedures that apply at both the project level and countywide. These procedures should ensure that individual projects do not result in impacts to critical area functions or values and that they fully replace impacted functions and values.”</u></p>	Monitoring and adaptive management is only required when it is uncertain if regulations will protect critical areas. The proposed language recommends, but does not require, counties and cities to monitor and adaptively manage permit implementation. This is consistent with the critical areas guidebook.
American Planning Association – Washington Chapter	<p>WAC 365-195-920: Expand the “Source of Change” consistent with the rulings in Swinomish and WEAN and change “should” and “recommendation” to mandatory language. Also, in (v) change “making recommendations” to “taking corrective action”.</p> <p><i>Reason: Case law; required by Swinomish and WEAN.</i></p>	See the response above for WAC 365-195-900 concerning Swinomish and WEAN interpretations.
Black Hills Audubon Society	<p><i>In general, BHAS commends the department on the updated codes in the preliminary drafts to enforce the Growth Management Act (GMA). Please see below a list of the code changes that we recognize are especially important for environmental protection.</i></p> <p><i>BHAS highlights the following code changes as being particularly helpful to protect our environment for current and future generations:</i></p>	Thank you for the comment.

	<p><i>WAC 365-195-920 (2) (a) ...the department recommends counties and cities develop and maintain ongoing monitoring and adaptive management procedures to ensure implementation of critical area regulations is efficient and effective..</i></p>	
<p>Black Hills Audubon Society</p>	<p><i>Finally, city and county jurisdictions will always have inadequate application of even the “no net loss” standard if they do not track the ecological function of critical areas over time. Yet in WAC 365-195- (2) the Department of Commerce recommends on-going monitoring but does not require it. Also, there is no recommendation for where local jurisdictions can acquire funding for this monitoring.</i></p>	<p>Monitoring and adaptive management is only required when it is uncertain if regulations will protect critical areas. The proposed language recommends, but does not require, counties and cities to monitor and adaptively manage permit implementation. This is consistent with the critical areas guidebook.</p>
<p>Futurewise, Friends of Clark County, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network</p>	<p><i>While we strongly support monitoring and adaptive management programs, we recommend that their purpose be clarified to ensuring that impacts to critical areas functions and values are avoided or fully mitigated.</i></p> <p>As noted above, critical areas regulations must protect functions and values of critical areas. We agree that monitoring and adaptive management can help achieve this requirement so we support the recommendations to call for monitoring and adaptive management in proposed WAC 365-195-920(2). We recommend that the purposes of this program be clarified to ensure that impacts to critical areas functions and values are avoided or fully mitigated. Our recommended additions are double underlined and our recommended deletions are double struck through.</p> <p>(a) In addition to the use of formal scientific approaches to monitoring and adaptive management program as an interim approach as described above, <u>counties and</u></p>	<p>Monitoring and adaptive management language is focused on permit implementation.</p>



Washington State  
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**Commerce**

	<p><u>cities should establish monitoring and adaptive management procedures that apply at both the project level and countywide. These procedures should ensure that individual projects do not result in cumulative impacts to critical area functions or values and that they fully replace impacted functions and values.</u> <del>the department recommends counties and cities develop and maintain ongoing monitoring and adaptive management procedures to ensure implementation of critical area regulations is efficient and effective.</del> Counties and cities should consult department guidance documents for information.</p>	
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