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J.E. "Sam" Ryan
Director

Memorandum

TO: Planning Commission

FROM: Cliff Strong, Senior Planner

THROUGH: Mark Personius, Asst. Director

DATE: 3 May 2016

SUBJECT: Critical Areas Ordinance Review for 12 May 2016

At its next meeting the Planning Commission will continue its review of the Critical Areas Ordinance and hold its public hearing. In preparation, please review this memo and the attached, revised BAS/staff report and draft code

Unfinished Items

At your last meeting, staff introduced revised volcanic hazard language; however, the Commission has not finished its review of it.

Commission Questions/Comments from Previous Meeting(s)

Provide public disclosure statute regarding farm plans

Commissioner Hunter asked to be provided the statue that makes farm plans non-disclosable under the Public Records Act. Below are the statutes, and attached to this memo is PDS Policy PL1-85-002Z, which implements RCW 42.56.270.

RCW Chapter 42.56 PUBLIC RECORDS ACT

RCW 42.56.270. Financial, commercial, and proprietary information.
The following financial, commercial, and proprietary information is exempt from disclosure under this chapter:

(17)(a) Farm plans developed by conservation districts, unless permission to release the farm plan is granted by the landowner or operator who requested the plan, or the farm plan is used for the application or issuance of a permit;

(b) Farm plans developed under chapter 90.48 RCW and not under the federal clean water act, 33 U.S.C. Sec. 1251 et seq., are subject to RCW 42.56.610 and 90.64.190;

RCW 42.56.610. Certain information from dairies and feedlots limited—Rules.
The following information in plans, records, and reports obtained by state and local agencies from dairies, animal feeding operations, and concentrated animal feeding operations, not required to apply for a national pollutant discharge elimination system permit is disclosable only in ranges that provide meaningful information to the public while ensuring confidentiality of business information regarding: (1) Number of animals; (2) volume of livestock nutrients generated; (3) number of acres covered by the plan or used for land application of livestock nutrients; (4) livestock nutrients transferred to other

persons; and (5) crop yields. The department of agriculture shall adopt rules to implement this section in consultation with affected state and local agencies.

Chapter 90.64 RCW DAIRY NUTRIENT MANAGEMENT

RCW 90.64.190. Information subject to public records disclosure—Rules.

This section applies to dairies, AFOs, and CAFOs, not required to apply for a permit. Information in plans, records, and reports obtained by state and local agencies from livestock producers under chapter 510, Laws of 2005 regarding (1) number of animals; (2) volume of livestock nutrients generated; (3) number of acres covered by the plan or used for land application of livestock nutrients; (4) livestock nutrients transferred to other persons; and (5) crop yields shall be disclosable in response to a request for public records under chapter 42.56 RCW only in ranges that provide meaningful information to the public while ensuring confidentiality of business information. The department of agriculture shall adopt rules to implement this section in consultation with affected state and local agencies.

Could staff tie the Best Available Science documents to the amended policies?

Commissioner McClendon has ask if staff could show which BAS documents were used in support of which proposed amendments. Staff has now done this, and it is reflected in the attached, revised BAS/Staff report. As you'll see, many of the amendments don't rely on BAS, since most of the amendments have to do with procedures and process.

Could the County use the CPAL program for all agriculture, not just ongoing agriculture?

CPAL was developed to protect critical areas in agricultural areas where the critical areas and their buffers have already been impacted by past practices, prior to the adoption of such protective laws. At one time, it was acceptable to farm right up to—and even in—wetlands, streams, etc. But in the 1990's, rules were enacted to protect these resources, and the rules essentially made those farming operations legal nonconforming uses[1] (i.e., grandfathered). However, the County still had (and has) a legal obligation to protect the critical areas.

Thus, CPAL was developed to allow farmers to continue what they were doing, on land they were already doing it on, by using Best Management Practices developed by the NRCS to minimize the effects as much as possible. These BMPs are considered state of the art in terms of protecting water quality in a circumstance with an already altered baseline, and if properly implemented can be as effective in doing so as are the larger, standard buffers.

However, they are not as good as the standard buffers in terms of protecting habitat. The NRCS BMP's would not preserve a riparian microclimate for example, when compared to a fully forested buffer. Nor would they protect a potential habitat corridor in a similar situation. To best protect the habitat functions and values of the critical areas we have to prevent encroachment from new agriculture, where trees are often felled, wetlands filled, and riparian corridors degraded. Again, on previously farmed areas, this kind of harm has already been done, and since we

[1] In terms of how they were using the critical areas, not that farming itself became nonconforming.

can't use the critical areas regulations to require famers to *improve* habitat (Swinomish vs. Skagit), all we can do is address the water quality issues. Thus, CPAL helps prevent further degradation. But for new agriculture, we *can* require that existing habitat be maintained. No farmers should be going out and filling wetlands or clearing riparian corridors or dredging streams that hadn't already been previously done before these rules were adopted. That doesn't mean they shouldn't be using the BMPs to manage their water quality: Yes, we want them to. But we also don't want them tilling up new critical areas.

The 5-year limitation on ongoing agriculture comes from the state's agricultural taxation program (84.34 RCW). If someone's farming, they're surely taking advantage of reduced taxation. But if someone stops farming, then they would lose that reduction and be taxed at full value. The state assumes that they're doing something else with their property, or at least *not farming*, and the whole system is set up to encourage farming. The 5-year timeframe also coincides with the federal and state wetland rules for when someone is no longer "grandfathered," (e.g., Prior Converted Cropland) and you lose protection under their rules as well. The practice is similar for any legal nonconforming use: You get to keep doing what was legal under older rules, but once you choose to no longer do that activity, you lose that protection and have to follow the current rules. Essentially, all such nonconforming use laws are enacted to get people to follow laws over time, when they choose to stop doing what was at one time allowed but no longer is. In the case of agriculture, it's not to get people to stop farming, it's to bring them into compliance with current critical areas (and other) laws as practices change.

Conceivably we could get rid of the 5-year rule, but then a nonconforming use would fall under our standard nonconforming use rules. Under them, you lose your legal nonconforming status after 12 months WCC 20.83.010, instead of 5 years.

It is possible to require using CPAL when in a CARA to address nutrient management?

Commissioner Oliver asked if it would be possible to require farmers in the Abbottsford/Sumas Aquifer to participate in the CPAL program, having them address how they would prevent further groundwater contamination, particularly from nitrates.

The short answer is yes, but…

According to the Whatcom County Health Department they're just not seeing many wells that have nitrate contamination. Their data has a significantly lower ratio than what Ecology found[2] through routine monitoring of existing private water supplies. According to their data, since 2000 there have been a total of 634 private water availability applications in the Sumas-Abbotsford Aquifer, of which 22 were contaminated sources, and of those 7 were contaminated with nitrate (1%).

Nevertheless, the recommendations from the Department of Ecology's *Sumas-Blaine Aquifer Nitrate Contamination Summary* are shown below. All are either not

[2] Department of Ecology's *Sumas-Blaine Aquifer Nitrate Contamination Summary* (BAS document 65)

within PDS's purview and/or already being done. It does not recommend additional land use regulations, which *is* within our purview.

- Conduct aquifer-wide follow-up nitrate monitoring in shallow wells to compare with 1997.
- Monitor nitrate concentrations in wells 40 feet deep and greater in the Sumas-Blaine Aquifer (SBA) to evaluate the extent of nitrate contamination throughout the aquifer.
- Work cooperatively among government agencies, with agriculture, environment, and human health responsibilities, to ensure that residents of the SBA are not harmed by drinking water above the nitrate maximum contaminant level (MCL).
- Encourage all residents on private wells to have their drinking water tested for nitrate.
- Provide public education and outreach to residents whose well water exceeds 10 mg/L-nitrogen (N).
- Intensify efforts to minimize nitrate leaching. Examples of strategies include:
    - Improving synchronization of nitrogen application and crop need
    - Track nitrogen mass balance for all crops grown on the SBA
    - Include groundwater and drinking water standards into technical standards for crop management.
    - Curtail fall nitrogen application.
- Coordinate with Canadian federal, provincial, and academic groups conducting monitoring and research to improve groundwater nitrate conditions on both sides of the transboundary Abbotsford-Sumas Aquifer. Investigate the degree of influence of Canadian nitrate sources on groundwater in Washington.

Also remember that CPAL is a voluntary program. PDS does not go out and actively look for farms to get on the CPAL program. Our only triggers for bringing someone into the program is either when they come in for a permit of some sort (new building, new grading, etc.), or when they've been referred by Public Works' Pollution Identification and Control (PIC) program.

Lastly, other than AFOs and CAFOs, we could find no other Washington county that regulates standard farming practices to this extent in their Critical Areas Ordinance. All exempt agriculture (other than AFOs and CAFOs) from their CARA regulations.