

**WHATCOM COUNTY**

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**J.E. "Sam" Ryan**  
Director

**Memorandum**

TO: The Honorable County Council  
Jack Louws, County Executive

FROM: Cliff Strong, Senior Planner

THROUGH: Mark Personius, Asst. Director

DATE: February 23, 2017

SUBJECT: 2016 Critical Areas Ordinance Update  
County Council Review Workshop 6 on March 7, 2017

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On March 7<sup>th</sup> the Council will continue its review of the 2016 Critical Areas Ordinance Update. Topics to be covered include:

- Review of additional staff proposed amendments (post-Planning Commission recommendation) related to:
  - Article 6, Wetlands
  - Article 7, Habitat Conservation Areas
  - Article 3, Geologically Hazardous Areas (tsunami hazard areas)
  - Article 9, Definitions.
- Review of certain questions, comments, and suggestions by Council members related to:
  - Overall (shall v. may)
  - Article 1, Purpose
  - Article 2, Administrative Provisions
  - Article 7, Habitat Conservation Areas

Note that we have received other questions and comments by Council members on Articles 5 (Critical Aquifer Recharge Areas), 8 (Conservation Program on Agriculture Lands), and 9 (Definitions) that are not yet addressed in this memo as they will take additional time to research and address. Those we will address at a subsequent workshop.

To prepare for this meeting, please review this memo.

## Additional Proposed Amendments (Post-Planning Commission Recommendation)

### ISSUE 1. (Staff)

#### 16.16.263 Mitigation Banking.

A.3 Preference shall be given to mitigation banks that implement restoration actions that have been identified formally by an adopted shoreline restoration plan, watershed planning document prepared and adopted pursuant to Chapter 90.82 RCW, a salmonid recovery plan or project that has been identified on the WRIA 1 [Watershed Management Salmon Recovery](#) Board Habitat Project List or by the Washington State Department of Fish and Wildlife as essential for fish and wildlife habitat enhancement.

#### 16.16.680 Wetland mitigation.

A.6. Opportunities to implement restoration actions formally identified by an adopted shoreline restoration plan, watershed planning document prepared and adopted pursuant to Chapter 90.82 RCW, a watershed plan prepared pursuant to Chapter 400-12 WAC, a salmonid recovery plan or project that has been identified on the WRIA 1 [Watershed Management Salmon Recovery](#) Board Habitat Project List or by the Washington State Department of Fish and Wildlife as essential for fish and wildlife habitat enhancement, a fully authorized mitigation bank (§16.16.260(f)), or an in lieu fee program.

#### 16.16.720 Habitat conservation areas – General standards.

B. Relocation of streams, or portions of streams, when there is no other feasible alternative and when the relocation will result in equal or better habitat and water quality and quantity, and will not diminish the flow capacity of the stream or other natural stream processes; provided, that the relocation meets state hydraulic project approval requirements and that relocation of shoreline streams shall be prohibited unless the relocation has been identified formally by the Washington State Department of Fish and Wildlife as essential for fish and wildlife habitat enhancement or identified in watershed planning documents prepared and adopted pursuant to Chapter 90.82 RCW, the WRIA 1 Salmonid Recovery Plan or the WRIA 1 [Watershed Management Salmon Recovery](#) Board Habitat Project List or County shoreline restoration plan.

M. In-stream structures such as, but not limited to, high-flow bypasses, dams, and weirs, shall be allowed only as part of a watershed restoration project as defined pursuant to WCC 23.110.230(10) or identified in watershed planning documents prepared and adopted under Chapter 90.82 RCW, the salmonid recovery plan or WRIA 1 [Watershed Management Salmon Recovery](#) Board Habitat Project List, and the County's shoreline restoration plan and upon acquisition of any required state or federal permits. The structure shall be designed to avoid adverse effects on stream flow, water quality, or other habitat functions and values.

#### 16.16.760 Habitat conservation areas – Mitigation standards.

A.6 Opportunities to implement restoration actions formally identified by an adopted shoreline restoration plan, watershed planning document prepared and adopted pursuant to Chapter 90.82 RCW, a salmonid recovery plan or project that has been identified on the WRIA 1 [Watershed Management Salmon Recovery](#) Board Habitat Project List or by the Washington State Department of Fish and Wildlife as essential for fish and wildlife habitat enhancement.

**Reason:** The name of this Board changed in 2017 by Interlocal agreement.

**ISSUE 2. (Staff)**

**16.16.230 Exempt Activities.**

D. Low impact activities ~~that do not cause adverse impacts~~ such as hiking, canoeing, viewing, nature study, photography, hunting, fishing, education or scientific research when the activity does not cause adverse impacts.

**Reason:** Sentence structure.

**ISSUE 3. (Staff)**

**16.16.270 Reasonable use.**

Replace the word “permit” throughout this section with the word “exception.”

**Reason:** Natural Resources staff recommends this word replacement, as they don’t really issue a permit for a reasonable use, but rather allow an exception to the regulations in their Natural Resources review.

**ISSUE 4. (Staff)**

**16.16.365 Tsunami Hazard Areas – Standards.**

The standards of WCC 16.16.320 ~~and 16.16.350~~ shall apply. For development within tsunami hazard areas the proposed development shall be designed to provide protection for the tsunami hazard that meets the projected hazard on the Department of Natural Resources Tsunami Inundation Maps. For other low lying coastal areas not included on the Inundation maps, development shall be designed to provide protection for debris impact and an inundation as determined by current Department of Natural Resource modeling unless other measures can be shown to provide equal or greater protection.

**Reason:** 16.16.350 contains the standards for volcanic hazard areas, none of which could apply to tsunami hazard areas.

**ISSUE 5. (Staff)**

**16.16.620 Wetlands – General standards.**

K. Phosphorus reducing BMP structures approved and installed through the Homeowners’ Improvement Program (or as may be renamed) within the Lake Whatcom watershed to treat runoff from existing development may be permitted within the outer 50% percent of a Category II, III or IV wetland buffer.

**16.16.720 Habitat conservation areas – General standards.**

U. Phosphorus reducing BMP structures approved and installed through the Homeowners’ Improvement Program (or as may be renamed) within the Lake Whatcom watershed to treat runoff from existing development may be permitted within 25 feet of the lake shoreline.

**Reason:** Requested by Public Works to allow homeowners participating in the Lake Whatcom Homeowners’ Improvement Program to install phosphorus reducing structures (grass swales, etc.) near

(though not on the immediate shore of) the lake. This is often where such structures need to be due to gravity.

### **ISSUE 6. (Staff)**

#### **16.16.710 Habitat conservation areas – Designation, mapping, and classification**

- A. Habitat conservation areas, as defined in Article 9, are those areas identified as being of critical importance to the maintenance of certain fish, wildlife, and/or plant species. These areas are typically identified either by known point locations of specific species (such as a nest or den) or by habitat areas or both. All areas within the County meeting these criteria are hereby designated critical areas and are subject to the provisions of this article.

**Reason:** Added a reference to the updated definition in Article 9. The language in this subsection is a synopsis of the definition, but not the official definition.

### **ISSUE 7. (Staff)**

#### **16.16.710 Habitat conservation areas – Designation, mapping, and classification**

- A. Habitat conservation areas shall include all of the following:
1. Streams<sup>1</sup>. Streams, as defined in Article 9, shall be designated according to the following criteria:
    - ~~a. Shoreline streams are those streams identified and regulated as shorelines of the state as defined by WAC 173-18-410 and designated in the Whatcom County Shoreline Master Program (WCC Title 23).~~
    - ~~b. Other fish-bearing streams that do not meet the definition of shorelines of the state but have current, historic, known or potential use by anadromous or resident fish species. The technical administrator shall make determinations of known or potential fish use in consultation with federal, state and tribal biologists and in accordance with best available science, and shall take into consideration factors such as Factors of consideration when determining a stream as fish bearing include but are not limited to species life cycle requirements, habitat suitability, channel gradient, presence or lack of fish passage barriers, stocked fish populations by government or tribal entities, and/or a reasoned evaluation of current, historic, and potential fish use by a qualified professional.~~
    - ~~c.a. Non-fish-bearing streams are those streams that have no current, historic, known or potential use by anadromous or resident fish. All streams which meet the criteria for Type S, F, Np or Ns waters as set forth in WAC 222-16-030 of the Washington Department of Natural Resources (DNR) Water Typing System, as now or hereafter amended.~~
      - i. Type S Streams are those surface waters which meet the criteria of the Washington Department of Natural Resources, WAC 222-16-030(1) as now or hereafter amended, as a Type S Water and are inventoried as “Shorelines of the State” under the Shoreline Management Master Program for Whatcom County, pursuant to RCW Chapter 90.58. Type S waters contain salmonid fish habitat.
      - ii. Type F Streams are those surface waters, which meet the criteria of the Washington Department of Natural Resources, WAC 222-16-030(2) as now or hereafter amended, as Type F Water. Type F streams contain habitat for salmonid fish, game fish and other anadromous fish.

<sup>1</sup> Note that ditched channels may or may not meet the definition of a stream. See Article 89, Definitions.

- iii. Type Np Streams are those surface waters, which meet the criteria of the Washington Department of Natural Resources, WAC 222-16-030(3) as now or hereafter amended, as Type Np Water. Type Np waters do not contain fish habitat.
  - iv. Type Ns Streams are those surface waters, which meet the criteria of the Washington Department of Natural Resources, WAC 222-16-030(4) as now or hereafter amended, as a Type Ns Water. These streams are areas of perennial or intermittent seepage, ponds, and drainage ways having short periods of spring or storm runoff. Type Ns waters do not contain fish.
- b. Ditches or other artificial water courses are considered streams for the purposes of this Chapter. when:
- i. Used to convey natural streams existing prior to human alteration; and/or,
  - ii. The waterway is used by anadromous or resident salmonid or other fish populations; or
  - iii. Flows directly into shellfish habitat conservation areas.

**Reason:** The stream typing system we currently have is an older model. The WA Department of Natural Resources, who has jurisdiction on the typing system, now uses this system. Natural Resources staff recommends moving to this system so as to be consistent with DNR and most other jurisdictions. DNR staff concurs.

**Water Type Conversion Table**

Permanent Water Typing	Previous Water Typing
Type S	Type 1
Type F	type 2 and 3
Type Np	Type 4
Type Ns	Type 5

**ISSUE 8. (Staff)**

**16.16.710 Habitat conservation areas – Designation, mapping, and classification**

- C. Habitat conservation areas shall include all of the following:
- 6. Areas in which state listed saltwater critical areas are found, as listed in WAC 173-26-221(2)(c)(iii)(A) Commercial and recreational shellfish areas, including designated Shellfish Habitat Conservation Areas.
  - 7. ~~Kelp and eelgrass beds.~~
  - 8. Documented and potential Surf smelt, Pacific herring, and Pacific sand lance spawning areas of forage fish, including but not limited to: surf smelt, Pacific herring, Pacific sand lance, northern anchovy, and longfin smelt.

**Reason:** Natural Resources staff recommends amending C.6 to read as above and deleting 7 & 8 as WAC 173-26-221(2)(c)(iii)(A) includes all these listings. This WAC is under State Master Program Approval/Amendment Procedures and Master Program Guidelines, General Master Program Provisions, and reads as follows:

**Applicability.** Critical saltwater habitats include all kelp beds, eelgrass beds, spawning and holding areas for forage fish, such as herring, smelt and sandlance; subsistence, commercial and recreational shellfish beds; mudflats, intertidal habitats with vascular plants, and areas with which priority species have a primary association. Critical saltwater habitats require a higher level of protection due to the important ecological functions they provide. Ecological functions of marine shorelands can affect the viability of critical saltwater habitats. Therefore, effective protection and restoration of critical saltwater habitats should integrate management of shorelands as well as submerged areas.

**ISSUE 9. (Staff)**

**16.16.900 Definitions.**

“Critical Saltwater Habitat” saltwater habitats includes all kelp beds, eelgrass beds, spawning and holding areas for forage fish, such as pacific herring, surf smelt and pacific sandlance; subsistence, commercial and recreational shellfish beds; mudflats, intertidal habitats with vascular plants, and areas with which priority species have a primary association.

**Reason:** If the Council accepts the proposed amendment listed under Issue 8, staff would also recommend adding this definition.

**ISSUE 10. (Staff)**

“Ditch” or “Drainage Ditch” means an artificially created watercourse constructed to convey surface or groundwater. Ditches are graded (manmade) channels installed to collect and convey water to or from fields and roadways. Ditches may include:

- irrigation ditches,
- waste ways,
- drains,
- outfalls,
- operational spillways,
- channels,
- stormwater runoff facilities
- or other wholly artificial watercourses, ~~except those that directly result from the modification to a natural watercourse.~~

~~Ditched channels that support fish are considered to be streams or other artificial water courses where:~~  
~~7. natural streams existed prior to human alteration, and/or~~  
~~8. the waterway is used by anadromous or resident salmonid or other fish populations, or~~  
~~9. flows directly into shellfish habitat conservation areas~~

~~are not considered ditches, but are considered streams for the purposes of this Chapter.~~

**Reason:** If the Council accepts the proposed amendment listed under Issue 7, staff would also recommend amending this definition as the latter, struck out portion would be incorporated into code.

**ISSUE 11. (Staff)**

“Reasonable use” means a property that is deprived of all reasonable use when the owner can realize no reasonable return on the property or make any productive use of the property. Reasonable return does

not mean a reduction in value of the land, or a lack of a profit on the purchase and sale of the property, but rather, where there can be no beneficial use of the property; and which is attributable to the implementation of the Critical Areas Ordinance. ~~means any one of the uses allowed within a given zone that has the least impact on the critical areas found on the subject property. For zones that allow single-family residential uses, this typically would mean a house that has a development footprint (including all appurtenances except drainfields) and landscaping of 2,500 square feet or less.~~

“Reasonable Use Exception” means an exception to the standards of this title that allows for any one of the uses allowed within a given zoning designation which cannot otherwise conform to the requirements set forth in this title, including the variance criteria; that have the least impact on the critical areas found on the subject property.

**Reason:** Natural Resources staff recommends adding these definitions. The first defines what a reasonable use is (the existing definition describes the exception) and removes language already found in 16.16.270. The second adds language to clarify what the exception does.

#### ***ISSUE 12. (Staff)***

“Streams” means those areas where surface water flows are sufficient to produce a defined channel or bed. A defined channel or bed is an area which demonstrates clear evidence of the ~~annual~~ passage of water and includes but is not limited to bedrock channels, gravel beds, sand and silt beds and defined-channel swales. The channel or bed need not contain water year-round. This definition is not meant to include ditches or other artificial water courses unless they are used to convey streams naturally occurring where streams existed prior to human alteration, and/or the waterway is used by anadromous or resident salmonid other fish populations, or flows directly into shellfish habitat conservation areas. (See also “drainage ditch” definition.)

**Reason:** Natural Resources staff recommends amending this definition.

#### ***ISSUE 13. (Staff)***

“Swale” means a shallow drainage conveyance with relatively gentle side slopes, generally with flow depths less than one foot.

**Reason:** Natural Resources staff recommends adding this definition.

#### ***ISSUE 14. (Council)***

##### **16.16.710 Habitat conservation areas – Designation, mapping, and classification**

C.14.a.i. The Department of Planning and Development Services shall maintain a current list of Species of Local Importance as designated by the County Council. As of 201~~7~~6 the list includes:

- 1) ~~None.~~ Osprey;
- 2) ~~Turkey Vulture;~~
- 3) ~~Nooksack dace;~~
- 4) ~~Salish sucker.~~

**Reason:** Changing the date since the CAO update won't be adopted until this year. The list is subsection 1) to be deleted per direction by County Council given at 1/24/17 workshop.

### **ISSUE 15. (Staff)**

#### **16.16.720 Habitat conservation areas – General standards.**

- T. On Eliza Island, applicants shall complete the U.S. Fish & Wildlife Service (USFWS) self-assessment (<https://www.fws.gov/pacific/eagle/>) to determine whether a USFWS bald eagle permit is needed, and if so, apply for one. Development activities near bald eagle habitat shall be carried out consistent with the national Bald Eagle Guidelines. WCC 20.35.653 (Bald eagle management plan) shall also apply.

#### **16.16.750 Habitat conservation areas – Review and reporting requirements.**

- C.6 Applicants near a bald eagle nest shall complete the U.S. Fish & Wildlife Service (USFWS) self-assessment (<https://www.fws.gov/pacific/eagle/>) to determine whether a USFWS bald eagle permit is needed, and if so, apply for one. Development activities near bald eagle habitat shall be carried out consistent with the national Bald Eagle Guidelines. Bald eagle habitats shall be protected pursuant to the Washington State Bald Eagle Protection Rules (WAC 232-12-292), the provisions of which require a site cooperative habitat management plan to be developed in coordination between the WDFW and landowner whenever projects are proposed on land that involves land containing or adjacent to an eagle nest or communal roost site that alter habitat are proposed within a nest territory or communal roost. The County shall issue development permits only after certification from the WDFW that the development is in compliance with an approved habitat management plan. (See WAC 232-12-292 for specific details.)

**Reason:** Received word from WDFW on 11/28/16 that WAC 232-12-292 has no effect; referencing it in a CAO is meaningless and that WDFW no longer participates in developing or reviewing Bald Eagle Management Plans; CAOs should not require it. WDFW recommends USFWS self-assessment instead. WCC 20.35.653 should probably be repealed.

### **ISSUE 16. (Council)**

#### **16.16.750 Habitat conservation areas – Review and reporting requirements.**

- B. The technical administrator shall have the authority to waive the report requirement when he/she determines that the project is a single-family building permit that involves less than one-half acre of clearing and/or vegetation removal and will not directly disturb the species, or specific areas or habitat features that comprise the habitat conservation area (nest trees, breeding sites, etc.) as indicated by a site plan or scaled drawing of the proposed development.

**Reason:** At your 1/24/17 workshop Council requested staff to reinsert this language that had been proposed to be deleted.

### **ISSUE 17. (Staff)**

#### **16.16.900 Definitions.**

“Fish and wildlife habitat conservation areas” are areas that serve a critical role in sustaining needed habitats and species for the functional integrity of the ecosystem, and which, if altered, may reduce the

likelihood that the species will persist over the long term. These areas may include, but are not limited to, rare or vulnerable ecological systems, communities, and habitat or habitat elements including seasonal ranges, breeding habitat, winter range, and movement corridors; and areas with high relative population density or species richness. Counties and cities may also designate locally important habitats and species. "Fish and wildlife habitat conservation areas" does not include such artificial features or constructs as irrigation delivery systems, irrigation infrastructure, irrigation canals, or drainage ditches that lie within the boundaries of, and are maintained by, a port district or an irrigation district or company. means areas important for maintaining species in suitable habitats within their natural geographic distribution so that isolated populations are not created.

**Reason:** The state definition has been updated. (WAC 365-190-030(6)(a) & (c) and WSR 15-04-039 Permanent Rules, Department of Commerce.).

## Questions, Comments, and Suggestions by Council Members

### Overall

**ISSUE 18. (Brown)** asked for a review of the specific reasons to change each instance of "may" to "shall."

#### 16.16.255 Critical areas assessment reports.

The intent of these provisions is to require a reasonable level of technical study and alternatives analysis pursuant to WCC 16.16.225 sufficient to assess potential project impacts and to protect critical areas. When the technical administrator determines a need for additional critical area assessment pursuant to WCC 16.16.250(C)(3) proposed development is within, abutting, or is likely to adversely affect a critical area or buffer pursuant to the provisions of this chapter, s/he/she shall have the authority to require a critical areas assessment report, to be prepared by a qualified professional, as defined by this chapter, shall prepare the report and be consistent with best available science.

#### 16.16.260 General mitigation requirements.

##### C. Mitigation Monitoring and Maintenance.

1. The technical administrator shall have the authority to require that compensatory mitigation projects be monitored annually for at least five years to establish that performance standards have been met.

#### 16.16.270 Reasonable use

4. In making reasonable use or variance decisions, the technical administrator and/or hearing examiner shall have the authority to require submittal of technical reports in accordance with WCC 16.16.255 and/or 16.16.260(B).

**Staff Response:** In all cases of removing "shall have the authority to," the department has been operating under the assumption that this is effectively a requirement. PDS considers the removal of "have the authority to" a simplification of the verbiage with no impact on operational flexibility.

**16.16.255 Critical areas assessment reports.**

- E. The technical administrator shall may reject or request revision of the field and literature findings and conclusions reached in a critical areas assessment report when s/he can demonstrate that the assessment is inaccurate, incomplete, or does not fully address the critical areas impacts involved.

**Staff Response:** If the administrator finds the assessment inaccurate, incomplete, etc., and can demonstrate such, it would be strange not to reject or request revision of the report. In practice this change has no impact.

**16.16.262 Watershed-Based Management Plans.**

- B. If approved, said plan shall may be used to satisfy the requirements of this chapter and provide relief and/or deviation as appropriate from the specific standards and requirements thereof; provided, that the standards of impact avoidance and minimization shall remain as guiding principles in the application of these provisions and when it is demonstrated that all of the following circumstances exist:

**Staff Response:** If an applicant goes through the rather lengthy process to develop said plan, the department should be required to use the plan to satisfy the requirements. Flexibility in this example seems inappropriate.

**16.16.680 Standards—Wetland mitigation.**

In addition to the applicable general protective measures found in WWC 16.16.265, Aactivities that adversely affect wetlands and/or wetland buffers shall include mitigation sufficient to achieve no net loss of wetland function and values in accordance with WCC [16.16.260](#) and this section.

- A. In determining the extent and type of mitigation required, the technical administrator shall may consider all of the following:
1. The ecological processes that affect and influence critical area structure and function within the watershed or sub-basin;
  2. The individual and cumulative effects of the action upon the functions of the critical area and associated watershed;
  3. Observed or predicted trends regarding the gains or losses of specific wetland types in the watershed, in light of natural and human processes;
  4. The likely success of the proposed mitigation measures;
  5. Effects of the mitigation actions on neighboring properties; and
  6. Opportunities to implement restoration actions formally identified by an adopted shoreline restoration plan, watershed planning document prepared and adopted pursuant to Chapter [90.82](#) RCW, a watershed plan prepared pursuant to Chapter [400-12](#) WAC, a salmonid recovery plan or project that has been identified on the Salmon Recovery Board Habitat Project List or by the Washington State Department of Fish and Wildlife as essential for fish and wildlife habitat enhancement, [a fully authorized mitigation bank \(§16.16.260\(f\)\), or an in lieu fee program.](#)

**Staff Response:** The language requires the administrator to consider all items. It is unlikely there is any impact of this change in practice. The underlying requirement is that “mitigation [must be] sufficient to achieve no net loss of wetland function and values” it is unlikely the consideration of these items has any meaningful impact on this requirement.

## Article 1. Purpose and intent

**ISSUE 19. (Donovan)** *Doesn't WAC 365-196-830(2) require protection of critical areas and ecosystems?*

**Staff Response:** WAC 365-196-830(1) states, "The Growth Management Act requires the *designation of critical areas and the adoption of regulations for the protection of such areas* by all counties and cities." It does not mention ecosystems, only critical areas. However, subsection (2) then says, "Critical areas that must be protected include *the following areas and ecosystems.*" Staff reads the two, taken together, to mean that *not all* ecosystems need be protected under the CAO, though certainly *those ecosystems of our critical areas* must be protected. Adding "and ecosystems" to the purpose in the wrong place or out of context with "critical areas and *their* ecosystems" may put the County on the hook to protect all ecosystems. Council could elect to do so, though it would be going beyond what's required by State law.

**ISSUE 20. (Donovan)** *Section A should state:*

### 16.16.100 Purpose and intent.

- A. ~~The purposes of this chapter are to carry out the goals of the Whatcom County comprehensive plan and the State of Washington Growth Management Act (Chapter 36.70A RCW) and its implementing rules by designating and classifying critical areas, and by protecting the functions and values of critical areas and the ecological processes that sustain them, while allowing for appropriate economically beneficial or productive use of land and property. Critical areas regulated under this chapter include geologically hazardous areas, frequently flooded areas, critical aquifer recharge areas, wetlands, and fish and wildlife habitat conservation areas. This chapter seeks to maintain harmonious relationships between human activity and the natural environment.~~
1. The Growth Management Act requires the designation of critical areas and the adoption of regulations for the protection of such areas by all counties and cities. The Washington Department of Commerce department has adopted minimum guidelines in chapter 365-190 WAC detailing the process involved in establishing a program to protect critical areas.
  2. Critical areas that must be protected include the following areas and ecosystems:
    - (a) Wetlands;
    - (b) Areas of critical recharging effect on aquifers used for potable water;
    - (c) Fish and wildlife habitat conservation areas;
      - (i) Fish and Wildlife Habitat Conservation Areas are areas that serve a critical role in sustaining needed habitats for the functional integrity of the ecosystem, and which, if altered, may reduce the likelihood that the species will persist over the long term. These areas are further defined in WAC 365-190-030(6)(a).
      - (ii) Fish and wildlife habitat conservation means land management for maintaining populations of species in suitable habitats within their natural geographic distribution so the habitat available is sufficient to support viable populations over the long term and isolated sub-populations are not created. This means not degrading or reducing populations of habitats so that they are no longer viable over the long term.
    - (d) Frequently flooded areas; and

(e) Geologically hazardous areas

3. "Protection" in this context means preservation of the functions and values of the natural environment, or to safeguard the public from hazards to health and safety.
4. Although counties and cities may protect critical areas in different ways or may allow some localized impacts to critical areas, or even the potential loss of some critical areas, development regulations must preserve the existing functions and values of critical areas. If development regulations allow harm to critical areas, they must require compensatory mitigation of the harm. Development regulations may not allow a net loss of the functions and values of the ecosystem that includes the impacted or lost critical areas.
5. Counties and cities must include the best available science in developing policies and development regulations to protect functions and values of critical areas. See chapter 365-195 WAC.
6. Functions and values must be evaluated at a scale appropriate to the function being evaluated. Functions are the conditions and processes that support the ecosystem. Conditions and processes operate on varying geographic scales ranging from site-specific to watershed and even regional scales. Some critical areas, such as wetlands and fish and wildlife habitat conservation areas, may constitute ecosystems or parts of ecosystems that transcend the boundaries of individual parcels and jurisdictions, so that protection of their function, and values should be considered on a larger scale.
7. Protecting some critical areas may require using both regulatory and nonregulatory measures. When impacts to critical areas are from development beyond jurisdictional control, counties and cities are encouraged to use regional approaches to protect functions and values. It is especially important to use a regional approach when giving special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries. Conservation and protection measures may address land uses on any lands within a jurisdiction, and not only lands with designated critical areas.
8. Local government may develop and implement alternative means of protecting critical areas from some activities using best management practices or a combination of regulatory and nonregulatory programs. When developing alternative means of protection, counties and cities must assure no net loss of functions and values and must include the best available science.
9. In designing development regulations and nonregulatory programs to protect designated critical areas, counties and cities should endeavor to make such regulations and programs fit together with regional, state and federal programs directed to the same environmental, health, safety and welfare ends. Local plans and policies may in some respects be adequately implemented by adopting the provisions of such other programs as part of the local regulations.

**Staff Response:** The text above is identical to WAC 365-196-830 with the exception of paragraphs A.2.c.i and ii (that following "Fish and wildlife habitat conservation areas"). Subsection (i) is an abbreviated version of the definition of "Fish and wildlife habitat conservation areas" found in WAC 365-190-030(6)(a). Staff doesn't think it needs to be repeated here, as our own definition of "Fish and wildlife habitat conservation areas" (in Article 9) is proposed to be amended to this language verbatim.

Subsection (ii) is an abbreviated version of WAC 365-190-130(1), part of the minimum guidelines for protecting F&W HCAs. Staff doesn't think it necessary to repeat state law in our own code.

## Article 2. Administrative Provisions

### 16.16.215. Relationship to other jurisdictions

**ISSUE 21. (Donovan) Subsection (B):** Other agencies...Such agencies may include, but are not limited to, the... We need clarification as to what specific permits can be "substituted." Perhaps a specific, exhaustive list is needed here.

**Staff Response:** Substitution of permit conditions from other agencies is a discretionary administrative action subject to the review and approval of the Technical Administrator on a case-by-case basis. Those documents and conditions of approval from outside agencies would be discussed in the written findings required in WWC 16.16.250(C)(4), if approved. Furthermore, other agencies permit requirements change over time, so listing specific permits would likely require a code revision every time another agency amends their rules.

**ISSUE 22. (Donovan) Subsection (C):** "The County shall make written findings."

**Staff Response:** Staff believes this insertion is fine, though the code WWC 16.16.250(C)(4) (Submittal requirements and critical areas review process), which covers the processes for all critical areas, is already proposed to be amended to state this.

### 16.16.220 Identification and mapping of critical areas.

**ISSUE 23. (Weimer) Subsection (A):** The County has identified critical areas and areas where the conditions under which critical areas typically occur and/or have the potential to occur. The approximate location and extent of critical areas within the County's jurisdiction are shown on maps, which shall be available at the planning and development services department and online for public inspection.

**Staff Response:** Staff has no issue with adding this language.

### 16.16.225. Regulated activities

**ISSUE 24. (Weimer) Subsection (A):** The following activities shall be subject to the provisions of this chapter when they occur within critical areas or their buffers or will impair the functions and values of a critical area:

**Staff Response:** Staff has no issue with adding this language.

**ISSUE 25. (Donovan/Weimer) Subsection (B)(2):** Alteration is necessary to accommodate an essential public facility or public utility where no feasible alternative location will accommodate the facility and the facility is located, designed, and constructed to minimize and, where possible, avoid critical areas disturbance to the maximum extent feasible. Mitigation is required for alteration of a critical area in order to accommodate an essential public facility or public utility; or

**Staff Response:** Staff believes this added language is unnecessary as the rest of the code, including the requirement to mitigate impacts, would still be applicable for such a facility. All this part of the code is saying is that an Essential Public Facilities or public utility may alter a critical area or buffer if it *must* be located in a certain place.

**ISSUE 26. (Donovan/Weimer) Subsection (B)(3):** Alteration is necessary to accommodate an approved water-~~dependent oriented~~-use and any associated development/activity and/or the development activities listed in WCC 23.90.130(B)(7)(a) when permitted in accordance with the Whatcom County Shoreline Management Program (SMP);

**Staff Response:** Staff believes this is a good change as it mimics the language in the Shoreline regulations.

**ISSUE 27. (Donovan) Subsection (B)(4):** Such feasible measures shall include, ~~but not be limited to,~~ clustering...

**Staff Response:** Removing this language would leave clustering as the only feasible measure to avoid and minimize impacts for “essential elements of an activity allowed by this chapter,” though there may be others. It seems like we should be open to other possibilities. However, it is odd that it only goes on to explain the benefits of clustering. Staff believes the text would be better were it to just end at the end of the first sentence, deleting “~~Such feasible measures shall include, but not be limited to, clustering where permitted by zoning and as appropriate to protect critical areas. The purposes of clustering shall be to minimize adverse effects of development on critical area functions and values, minimize land clearing, maintain soil stability, preserve native vegetation, provide for wildlife corridors, maintain hydrology, and mitigate risk to life and property;~~” This would give the most flexibility.

#### 16.16.230. Exempt activities

**ISSUE 28. (Donovan)** Exemption B is too broad. Cut all but the exemption for removing invasive and noxious species. Or move this to activities allowed with notification.

- B. ~~Maintenance of lawfully established vegetation, landscaping, and gardens within a regulated critical area or its buffer, including, but not limited to, cutting, mowing lawns, weeding, r~~Removal of noxious and invasive species, ~~harvesting and replanting of garden crops, pruning and planting of noninvasive ornamental vegetation or indigenous native species to maintain the general condition and extent of such areas; provided, that native growth protection areas, mitigation sites, or other areas protected via conservation easements or similar restrictive covenants are not covered by this exception.~~

**Staff Response:** Staff’s understanding is that this exemption is here because prior to the adoption of the first CAO there were many instances where people had encroached their landscaping into what are now defined and protected as critical areas and/or their buffers, but Council didn’t want to make such existing instances illegal. Staff supports maintaining the existing language.

#### 16.16.250: Submittal requirements

**ISSUE 29. (Donovan) Subsection (B):** ...within a critical area or its buffer

**ISSUE 30. (Donovan) Subsection (C)(2):** ...adversely affect the functions and values of a critical area or buffer

**ISSUE 31. (Donovan) Subsection (C)(3):** ...and would affect the functions and values of a critical area

**Staff Response:** Staff has no issue with any of these additions.

#### 16.16.255 Critical areas assessment reports

**ISSUE 32. (Donovan) Subsection (A):** Restore the sentence: The intent of these provisions is to require a reasonable level of technical study and analysis sufficient to protect critical areas... The analysis shall be commensurate with the value or sensitivity of ~~a particular critical area and relative to the scale and potential impacts of the proposed activity~~ the functions and values of the critical area.

**Staff Response:** The first sentence, which Councilmember Donovan suggests reinstating, wasn't deleted, but moved to before (A), as it seemed better to express intent right up front. Reinsertion isn't necessary.

As for his proposed change to the next sentence: What the current text basically says that if it's a minor critical area or a minor impact, the assessment doesn't have to be as complicated as were it an important critical area or a major impact. This section is basically giving the Technical Administrator some discretion as to how complicated an assessment report needs to be. Often someone proposes something that may only slightly affect a critical area or its buffer, and in these instances it's best to be able to tailor the scope of the report to the scope of the impact, thus saving the applicant money. Staff does not support this change.

**ISSUE 33. (Donovan) Subsection G:** Need clarification on what the changes in this subsection are doing.

**Staff Response:** This section requires applicants to submit their critical areas data (e.g., delineations, etc.) electronically so that we can update our database and maps. The purpose of the amendments is to ensure it's in a format we can use.

#### 16.16.263 Mitigation Banking.

**ISSUE 34. (Donovan) Off-site mitigation...** any evidence that this works?

**Staff Response:** The Department of Ecology has undertaken numerous studies to evaluate whether wetland mitigation actually works or not. Ecology started reevaluating various mitigation techniques after the results of their 2002 *Wetland Mitigation Evaluation Study* (<http://www.ecy.wa.gov/programs/sea/wetlands/mitigation/study/index.html>) were published.

The results of this study showed:

- Over all, three projects (13%) were found to be fully successful; eight projects (33%) were moderately successful; eight (33%) were minimally successful; and five (21%) were not successful.
- The results of the Phase 2 study indicate that "created wetlands" are more successful than previous studies have shown, since 60% of them were at least moderately successful, and only

one project (10%) was not successful. However, only 65% of the total acreage of wetlands lost was replaced by creating or restoring new wetland area, thereby resulting in a net loss of 24.18 acres of wetland area.

- No enhancement projects were fully successful, while eight out of nine (89%) enhancement projects were minimally or not successful. Nearly two-thirds of the total acreage of mitigation that was established resulted from enhancement activities.
- In addition, mitigation projects designed and implemented by public entities fared worse than projects done by private entities: 71% of private mitigation projects were judged to be fully or moderately successful, while 35% of public mitigation projects were judged to be fully or moderately successful. However, the difference in level of success between public and private projects is not statistically significant, because the sample size was too small.
- Seventy-nine percent of mitigation projects were at least somewhat achieving their ecologically relevant measures, while 63% of projects at least partially compensated for the permitted wetland losses. This implies that, although projects may be doing a reasonable job of achieving ecologically relevant permit requirements, these requirements are not always sufficient indicators of whether mitigation projects adequately compensate for the permitted loss of wetlands.
- Phase 2 findings suggest that follow-up by regulatory agencies results in more-successful mitigation projects. Responses to a consultant questionnaire indicated that 75% of the fully and moderately successful projects experienced some degree of agency follow-up, while only 27% of the minimally and not-successful projects had some follow-up.
- It was interesting to note that being out of compliance with permit requirements did not necessarily mean a mitigation project ultimately would be unsuccessful. In fact, 66% of the projects that ultimately were fully successful were not in compliance in Phase 1. However, all of the projects that ultimately did not succeed also were not in compliance with their permits. The primary key to success appears to be follow-up monitoring and maintenance to make sure the mitigation actions have a chance to work.
- Based on these results, the authors recommend that Department of Ecology improve the follow-up on wetland mitigation projects by developing and implementing a compliance tracking system. Additionally, Ecology should work collaboratively with other regulatory agencies, applicants, and their consultants to come up with new guidance to improve mitigation at every step in the process, from choosing an appropriate site to monitoring and performing site maintenance. By working together, those involved in wetland mitigation can develop solutions and approaches that improve wetland mitigation, and thereby help to protect the state's valuable wetland resources.

Based on these results, as well as other findings regarding the complexity of wetland mitigation, Ecology started their "Mitigation That Works Initiative" (see <http://www.ecy.wa.gov/programs/sea/wetlands/mitigation/initiative.html>), working with other agencies and stakeholders to improve success. They claim to have made significant progress since 2006.

Regarding wetland banks in particular (the section under which Councilmember Donovan asked his question, Ecology states: *The wetland mitigation banking system we are creating in Washington works for the environment. And it provides a predictable option for developers. Alternatives like wetland mitigation banks work because they put successful solutions in place before any mitigation is needed. The tool also demonstrates innovative environmental solutions can go hand in hand with economic prosperity and faster project delivery.*

**16.16.265 Critical areas protective measures.**

**ISSUE 35. (Donovan) Subsection (B):** Delete the last sentence: ~~This requirement may be waived by the Technical Administrator... (e.g. old alluvial deposits).~~

**Staff Response:** Staff has no issue with deleting this sentence.

**16.16.270 Reasonable use.**

**ISSUE 36. (Donovan) Subsection (B)(2)(e):** Do we need to define what measures to protect surface and groundwater quality?

**Staff Response:** Staff doesn't think so, as there are too many and covered by code elsewhere and subject to change.

**ISSUE 37. (Donovan) Subsection (B)(2)(k):** Is this creating a new exemption (a new "reasonable use"?) Why allow new exemption for 2500 sq. ft. single family house?

**Staff Response:** No. If someone has a lot that's totally encumbered with critical areas, we must still allow the use of that property (otherwise it could be found to be a "regulatory taking"). Across the State, a single family residence is typically considered the least impactful use, and thus the most "reasonable" to allow to impact a critical area. However, there have been many court and GMHB cases challenging jurisdictions attempt at limiting the house to the smallest size possible. The courts generally look to the sizes of homes in the neighborhood and lean toward a median home size as reasonable. The inserted language comes from PDS Policy PL5-85-001A, adopted and in use since 1985 as a guide to what a reasonable house size is in Whatcom County.

**ISSUE 38. (Donovan) Subsection (C)(1)(a):** Need clarity on this change. Why an exemption for single family homes?

**Staff Response:** Most the changes here relate to separating out the reasonable use rules from the variance rules, which were moved into a new section (the two mechanisms are different and each warrants its own section). The existing "exemption" for SFR from a reasonable use public hearing allows staff to process the permit and keep the cost lower for homeowners.

## **Article 7. Habitat Conservation Areas**

**16.16.710 HCA Designation, mapping, and classification**

**ISSUE 39. (Donovan) Subsection (A):** Shouldn't the designation reflect specifics as defined in WAC 365-190-030(6)(a)

**Staff Response:** WAC 365-190-030(6)(a) reads, "Fish and wildlife habitat conservation areas" are areas that serve a critical role in sustaining needed habitats and species for the functional integrity of the ecosystem, and which, if altered, may reduce the likelihood that the species will persist over the long term. These areas may include, but are not limited to, rare or vulnerable ecological systems, communities, and habitat or habitat elements including seasonal ranges, breeding habitat, winter range, and movement corridors; and areas with high relative population density or species richness. Counties and cities may also designate locally important habitats and species."

Staff believes our proposed CAO does cover all these specifics listed therein. WCC 16.16.710 lists all ecosystems, habitats, and species that would be protected, though perhaps it's not readily apparent as there is no long list of individual species and habitats, as is found in our current CAO in Appendix D, which is proposed for deletion. As explained in the workshop on this Article, we are proposing to replace this list with 16.16.710 subsections (C)2, 3, 4, & 5, which adopts the federally and state listed species and habitats. The reason for doing so is that these lists do change from time-to-time, with new species being added and others removed. Adopting their lists would mean we wouldn't have to do a code amendment every time their lists change (or having an out-of-date list were the code not amended). Staff would keep these lists (and our maps) current at the counter, with links online.

If you would like to review these lists, they can be found at the following links:

- US Fish & Wildlife's Threatened & Endangered Species List or Critical Habitat List (<http://ecos.fws.gov/ecp/>)
- Washington Department of Fish and Wildlife's Priority Habitats and Species list (<http://wdfw.wa.gov/mapping/phs/> or <http://wdfw.wa.gov/conservation/phs/list/>)
- Department of Natural Resources' Natural Heritage Program (<http://www1.dnr.wa.gov/nhp/refdesk/plants.html>)

The question did raise a scrivener's error, however. It appears that subsections 3 and 4 address the same lists (state listed), though with slightly difference language. We would suggest that subsection 4 be deleted as it's a duplicate of 3.

#### **16.16.720 General standards**

**ISSUE 40. (Donovan) Preamble:** *What are the implications of the inserted "When pursuant to Article 2," given that Article 2 would seem to expand administrative discretion?*

**Staff Response:** You will notice throughout the code that cross-references to other pertinent sections were added, basically as a reminder to readers to look at those sections as well. Even without them, those sections would apply; however, the Citizens Advisory Committee thought it would be helpful to add them.

**ISSUE 41. (Donovan) Subsection (O):** *Does this standard require that a person has to prove something that is impossible?*

**Staff Response:** Subsection (O), as proposed to be amended, reads:

- O. On-site sewage disposal systems (OSS) may be permitted in the outer 50% of HCA buffers when accessory to an approved residential structure for which there are no alternatives and when it is

not feasible to connect to a public sanitary sewer system and when operated and maintained in accordance with WCC [24.05.170](#); provided, that there are no adverse effects on water quality and slope stability ~~are avoided~~.

The added language of allowing OSS in HCA buffers was added by the Citizens Advisory Committee to clarify that while they may be allowed in an HCA buffer, they shouldn't be allowed in an actual HCA. This language was modified by the Planning Commission to "the outer 50%" so as to keep them as far away from the HCA as possible while still allowing them. The phrase "there are no alternatives and when" was added by the Technical Advisory Committee in an effort to minimize such intrusions by having to show that one has looked at other alternatives prior to encroaching into the HCA. We don't believe that any of these are impossible to do or show. Thus, we suspect that it's the last added phrase "there are no" that Councilmember Donovan is asking about. This was added by the TAC as a way to ensure that allowing such systems in an HCA buffer had no effects on water quality or slope stability. That would be an administrative decision the Technical Administrator would make on a case-by-case, site-specific basis.

**ISSUE 42. (Donovan) Subsection (R):** *What is the consequence of changing from ~~when permitted by zoning~~ to with a valid permit?*

**Staff Response:** The term "when permitted by zoning" only implies that a development may be allowed if allowed by the zoning code; it doesn't say one must go through the permitting process. "With a valid development permit" implies the same, as well as having met all other codes (a condition of obtaining a valid permit).

#### 16.16.760 HCA Mitigation standards

**ISSUE 43. (Donovan) Add New Subsection (B)(9):** Cumulative impacts of mitigation described in WCC 16.16.760 will be evaluated by PDS to determine if mitigation succeeds in ensuring no net loss of habitat function and values.

**Staff Response:** This is a new concept. The "impacts of mitigation" have never been addressed in site-specific Critical Area Assessment Reports (done by applicants) since mitigation is seen as a positive impact and we're generally looking at how a project might *harm* critical areas. Furthermore, addressing the "*cumulative* impacts of mitigation" seems to be the same thing as doing an overall assessment of the effectiveness of our mitigation strategies. It doesn't seem that this should be required of individual applicants. Rather, if Council wants such an assessment, it seems that it would be best just to say so by requesting PDS to commence such an undertaking. Obviously, this would be a multi-year project, as mitigation takes 5-10 years to get established, and Council would need to appropriate resources.

If Councilmember Donovan's intent is to address the cumulative impacts a particular project might have on critical areas, adding (modified) language to this section is not necessary, as the requirement to address cumulative impacts is already found in 16.16.255 (Critical areas assessment reports), subsection (B)(4), which applies to all assessments.