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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: April 3, 2017

SUBJECT: 2016 Critical Areas Ordinance Update
County Council Review Workshop for April 18, 2017

On April 18, 2017 the Council will continue its review of the 2016 Critical Areas Ordinance Update.

Topics to be covered include:

- Review of certain questions, comments, and suggestions by both staff and Councilmembers related to:
 - Global Issues
 - Article 2. Administrative Provisions
 - Article 3. Geologically Hazardous Areas
 - Article 4. Frequently Flooded Areas
 - Article 5. Critical Aquifer Recharge Areas
 - Article 6. Wetlands

To prepare for this meeting, please review this memo, the draft code, and the 2016 BAS Report Addendum. The **yellow highlighted text** in this memo indicates newly proposed edits (post-Planning Commission recommendation).

(Councilmembers also have suggestions for Article 5, Critical Aquifer Recharge Areas, and Article 8, Conservation Program on Agriculture Lands, but we will review them at a later date.)

Holdover from last workshop

ISSUE 44. (Brenner)

At Council's 4/4/17 workshop, Council discussed Councilmember Brenner's proposal for this section. No decision was reached, and Council asked staff to provide a clean version of it (i.e., without all the strikeouts/underlines). Here it is:

16.16.350 Volcanic hazard areas – Standards.

B. **Lahar Hazard Zones.** Implement evacuation procedures and other emergency preparedness measures. Create a lahar warning system. All property owners within Lahar Hazard Zones will be notified of risks and will sign a Hold Harmless Agreement with the County. This will also be attached to title of property. All commercial buildings in Lahar Hazard Zones will have signage placed at entrances.

She also proposed some statements that staff suggested be put into the Findings of Fact if her proposal is accepted, to which she and the rest of the Council agreed.

The Council postponed this discussion, and Councilmember Browne made a motion, which passed, outlining what Council expects of lahar regulations. The motion was:

"The County's primary responsibility with regard to lahars is to:

1. Warn property owners of the potential risks before they invest.
2. Monitor potential sources of the risk.
3. Include the risk within the County's emergency management plan.
4. Warn people present of the risks that exist and alert them when a hazardous event is anticipated.
5. Provide clear guidance to persons present how to best evacuate the area when necessary."

Staff Response: Staff would suggest that the only point in this motion that could/should become a CAO regulation is the first. This can be done by (1) keeping our volcanic hazard map current, updating it as new Best Available Science is available and continue to make it available online; and, (2) requiring a notice on title that a property is within a volcanic hazard area when someone applies for a permit. And pursuant to 16.16.265(B), this is already a requirement of the CAO. We could also require that for any new building permits issued for commercial or public uses signage be placed at entrances or other visible places (similar to Maximum Occupancy signs). This could help further point 4 of Councilmember Browne's motion.

The rest of these items would need to be put on a work program, perhaps under Emergency Management. It would entail paying for (or helping pay for) monitoring equipment, revising our emergency management plan, installing community signage, and producing informational materials.

However, having heard clearly from Council as to their goals, staff has prepared yet another alternative that we hope captures what Council's looking for.

- It allows all uses allowed per the property's zoning district and expansion of nonconforming uses.
- For anything more than single-family residences, duplexes, accessory structures, and sewer lines, it requires a property specific Emergency Management Plan.
- And it requires that all uses put a notice on title that the property is in a volcanic hazard area (compliance with WCC 16.16.265).

In subsection (B), we've highlighted text for your consideration that would allow the requirement for an Emergency Management Plan to be waived if farther away from Mount Baker. This would mean that applicants farther away, say near Ferndale, wouldn't need to prepare such a plan. We've left the travel time blank for Council to decide where that line should be.

16.16.350 Standards – Volcanic hazard areas.

- A. Subject to WCC 16.16.320(A, B, and C) and WCC 16.16.265, the following uses are allowed in any volcanic hazard areas:
 - 1. Single-family residences and duplexes.
 - 2. Accessory structures not involving human occupancy.
 - 3. Sewer collection facilities, communication facilities, and other utilities that are not likely to cause harm to people or the environment if inundated by a lahar. Underground utilities such as pipelines shall be allowed if demonstrated through a geotechnical analysis to be sufficiently buried as to not likely be damaged by scour caused by a lahar.
 - 4. Agricultural and forestry uses not including human habitation.
- B. Subject to WCC 16.16.320(A, B, and C) and WCC 16.16.265, the following uses may be allowed in volcanic hazard areas subject to the submittal and approval of a Volcanic Hazard Emergency Management Plan meeting the requirements of subsection (C); however, this requirement may be waived for properties **located in an area with an estimated lahar arrival time of more than XXX minutes:**
 - 1. Expansion of legal nonconforming uses meeting criteria of WCC 16.16.270 and WCC 20.83.
 - 2. All other uses allowed per the property's zoning district.
- C. Volcanic Hazard Emergency Management Plan. Where required by subsection A, a Volcanic Hazard Emergency Management Plan shall be submitted for approval and meet the following requirements:
 - 1. Is consistent with and integrated into a community emergency plan maintained by the Sheriff's Office of Emergency Management.
 - 2. Includes an emergency evacuation plan showing that the proposed project is that is within walking distance to a legally accessible area outside of the lahar inundation zone in an amount of time less than the anticipated time that it takes a lahar to reach the site, ideally after the triggering of a lahar warning system. The County will maintain travel time projection maps to estimate lahar approach times.
 - 3. Is required to be updated and exercised every three years.
 - 4. Evacuation route maps must be posted on the premises.

Global Issues

ISSUE 45. (Brenner)

Throughout the code, Councilmember Brenner proposes to delete language that obligates the County to address cumulative impacts. This is reflected by deletions in the following sections:

- 16.16.100 Purpose and intent, subsection (B)(10)
- 16.16.235 Activities allowed with notification, subsection (B)(5)(c).
- 16.16.255 Critical areas assessment reports, subsection (B)(4).

- 16.16.700 Purpose, subsection (D).
- 16.16.720 Habitat conservation areas – General standards, subsection (G)(4).
- 16.16.900 Definitions. (Definition of cumulative impact)

However, there are several places where cumulative impacts are mentioned but not proposed for deletion:

- 16.16.680 Wetland mitigation, subsection (A)(2).
- 16.16.710 Habitat conservation areas – Designation, mapping, and classification, subsection (D)(1)(ii).
- 16.16.750 Habitat conservation areas – Review and reporting requirements, subsection (B)(2).
- 16.16.760 Habitat conservation areas – Mitigation standards, subsection (A)(2).

Staff Response: Staff recommends against. While there is no GMA requirement to address cumulative impacts via the CAO, most jurisdictions have incorporated this practice. The reason is that SEPA *does* require addressing cumulative impacts, and the legislature has made several attempts, most recently in 2013, to streamline SEPA by relying on local ordinances to meet the requirements of state review for environmental impacts (see WAC 365-196 below). It has been the legislature’s intent to have local environmental or other state environmental regulatory review satisfy mitigating below the significant adverse impact threshold in SEPA; this requires cumulative impact analysis review. If we do not address cumulative impacts when addressing critical areas, then we would be obligated to do so through SEPA, making for a lengthier, parallel permitting process.

Nonetheless, if it is Council’s desire to strike cumulative impact analysis from the CAO, you should do so in all instances where cumulative impacts are mentioned (the second list above).

WAC 365-196 GROWTH MANAGEMENT ACT—PROCEDURAL CRITERIA FOR ADOPTING COMPREHENSIVE PLANS AND DEVELOPMENT REGULATIONS

Part 7 - RELATIONSHIP OF GROWTH MANAGEMENT PLANNING TO OTHER LAWS

WAC 365-196-705 Basic assumptions

(1) Where the legislature has spoken expressly on the relationship of the act to other statutory provisions, the explicit legislative directions shall be carried out. Examples of such express provisions are set forth in WAC [365-196-745](#).

WAC 365-196-745 Explicit statutory directions.

(j) RCW [43.21C.240](#) (project review under the act);

RCW 43.21C.240 Project review under the growth management act

(1) If the requirements of subsection (2) of this section are satisfied, a county, city, or town reviewing a project action shall determine that the requirements for environmental analysis, protection, and mitigation measures in the county, city, or town's development regulations and comprehensive plans adopted under chapter [36.70A](#) RCW, and in other applicable local, state, or federal laws and rules provide adequate analysis of and mitigation for the specific adverse environmental impacts of the project action to which the requirements apply. Rules adopted by the department according to RCW [43.21C.110](#) regarding project specific impacts that may not have been adequately addressed apply to any determination made under this section. In these situations, in which all adverse environmental impacts will be mitigated below the level of significance as a result of mitigation measures included by changing, clarifying, or conditioning of the proposed action and/or regulatory requirements of development regulations adopted under chapter [36.70A](#) RCW or other local, state, or federal laws, a determination of nonsignificance or a mitigated determination of nonsignificance is the proper threshold determination.

- (2) A county, city, or town shall make the determination provided for in subsection (1) of this section if:
- (a) In the course of project review, including any required environmental analysis, the local government considers the specific probable adverse environmental impacts of the proposed action and determines that these specific impacts are adequately addressed by the development regulations or other applicable requirements of the comprehensive plan, subarea plan element of the comprehensive plan, or other local, state, or federal rules or laws; and
 - (b) The local government bases or conditions its approval on compliance with these requirements or mitigation measures.
- (3) If a county, city, or town's comprehensive plans, subarea plans, and development regulations adequately address a project's probable specific adverse environmental impacts, as determined under subsections (1) and (2) of this section, the county, city, or town shall not impose additional mitigation under this chapter during project review. Project review shall be integrated with environmental analysis under this chapter.
- (4) A comprehensive plan, subarea plan, or development regulation shall be considered to adequately address an impact if the county, city, or town, through the planning and environmental review process under chapter [36.70A](#) RCW and this chapter, has identified the specific adverse environmental impacts and:
- (a) The impacts have been avoided or otherwise mitigated; or
 - (b) The legislative body of the county, city, or town has designated as acceptable certain levels of service, land use designations, development standards, or other land use planning required or allowed by chapter [36.70A](#) RCW.
- (5) In deciding whether a specific adverse environmental impact has been addressed by an existing rule or law of another agency with jurisdiction with environmental expertise with regard to a specific environmental impact, the county, city, or town shall consult orally or in writing with that agency and may expressly defer to that agency. In making this deferral, the county, city, or town shall base or condition its project approval on compliance with these other existing rules or laws.
- (6) Nothing in this section limits the authority of an agency in its review or mitigation of a project to adopt or otherwise rely on environmental analyses and requirements under other laws, as provided by this chapter.
- (7) This section shall apply only to a county, city, or town planning under RCW [36.70A.040](#).

ISSUE 46. (Brenner)

Throughout the code, Councilmember Brenner suggests adding the use of “detailed written findings” to many decision points.

16.16.255 Critical areas assessment reports.

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

16.16.260 General mitigation requirements.

- C. Mitigation Monitoring and Maintenance.
 - 3. ~~Permanent protection shall be achieved through deed restriction or other protective covenant in accordance with WCC 16.16.265. If the technical administrator establishes additional~~

requirements beyond the standards of the code, he/she shall issue detailed written findings as the basis.

16.16.660 Standards—Wetland buffer increases.

Based on detailed written findings, the technical administrator shall have the authority to increase the width of the standard buffer width on a case-by-case basis when there is sound evidence that a larger buffer is required by an approved habitat management plan as outlined in WCC 16.16.750, or such increase is necessary to:

16.16.690 Standards—Compensatory wetland mitigation plan.

B. All compensatory mitigation projects shall be monitored in accordance with WCC 16.16.260(C) for a period necessary to establish that performance standards have been met. Based on detailed written findings, the technical administrator shall have the authority to extend the monitoring period for up to 10 years and require additional monitoring reports when any of the following conditions apply:

16.16.720 Habitat conservation areas – General standards.

- D. Access to private development sites may be permitted to cross habitat conservation areas if there are no feasible alternative alignments. Alternative access shall be pursued to the maximum extent feasible, including through the provisions of Chapter 8.24 RCW. Exceptions or deviations from technical standards may be considered by the Technical Administrator on a case-by-case basis where the resulting outcome reduces overall impacts to any identified Critical Area for width or other dimensions, and specific construction standards to minimize impacts may be specified, including placement on elevated structures as an alternative to fill, if feasible. The technical administrator shall issue detailed written findings if the exception or deviation is denied.
- G. Stormwater conveyance or discharge facilities such as dispersion trenches, level spreaders, and outfalls may be permitted in a habitat conservation area buffer on a case-by-case basis when the technical administrator, with detailed written findings, determines that all of the following are met:

16.16.730 Standards—Locally important habitats and species – Standards.

Alterations that occur within a locally important habitat area or that may affect a locally important species as defined herein shall be subject to review on a case-by-case basis. Based on detailed written findings, the technical administrator shall have the authority to require an assessment of the effects of the alteration on species or habitats and may require mitigation to ensure that unmitigated adverse effects do not occur. This standard is intended to allow for flexibility and responsiveness with regard to locally important species and habitats.

16.16.740 Standards—Habitat conservation area buffers – Standards.

C. Buffers for Other Habitat Conservation Areas. The technical administrator shall determine appropriate buffer widths for other habitat conservation areas based on the best available information and detailed written findings to that effect. Buffer widths for non-stream habitat conservation areas shall be as ~~follows~~identified in Table 4:

Table 1. Buffer Requirements for HCAs (last cell)

The need for and dimensions of buffers for other locally important species or habitats shall be determined on a case-by-case basis with detailed written findings, according to the needs of the specific species or habitat area of concern. Buffers shall not be required adjacent to the Chuckanut wildlife corridor. The technical administrator shall coordinate with the Washington State Department of Fish and Wildlife and other state, federal or tribal experts in these instances, and may use WDFW PHS management recommendations when available.

- F. Based on detailed written findings, The technical administrator shall have the authority to increase the width of a habitat conservation area buffer on a case-by-case basis when there is clear evidence that such increase is necessary to achieve any of the following:

16.16.860 Monitoring and Compliance

- D. Agricultural operations shall cease to be in compliance with this Article, and a new or revised conservation farm plan will be required, section when the technical administrator determines with detailed written findings that any of the following has occurred:
- E. With one exception, Whatcom County will not use conservation farm plans (standard or custom) as an admission by the landowner that s/he or she has violated this Chapter. Disclosure of current farm practices, structures on conservation farm plan documents, or observations made through monitoring inspections or conservation farm plan approval, will not be used to bring other enforcement actions against a farm operator. ~~W~~ The exception is that when matters of major life, health, environment, or safety issues, as determined by the Technical Administrator with detailed written findings are observed and the landowner fails to immediately and permanently remediate, then the observations may be used in an enforcement action.

Staff Response: Staff mildly recommends against. Staff agrees and strongly supports the notion that findings should be made for all decisions, as doing so not only helps applicants and the public understand the rationale for decisions, but any appeal body as well. This is why staff proposed language in 16.16.250, below. It was put into this section as this section applies to all decisions reached pursuant to the CAO. Having it here covers all the other sections where Councilmember Brenner has added such language, as well as sections where she hasn't. So basically we're opposed since adding that language throughout is redundant and only serves to lengthen the code.

16.16.250 Submittal requirements and critical areas review process.

- C. The technical administrator shall be responsible, in a timely manner, to make one of the following determinations regarding critical areas review:
3. Decision to Approve, Condition, or Deny. The technical administrator shall review all pertinent information pertaining to the proposed development and shall approve, condition, or deny the permit based on their review, and shall provide a written decision, including findings of fact to support the decision made, ~~Such determinations shall be provided to the applicant in writing.~~

Article 1. Purpose & Intent

ISSUE 47. (Brenner)

16.16.100 Purpose and intent.

- B. By regulating development and minimizing critical area alterations, this chapter seeks to:
1. Protect the public from~~Reduce~~ harm due to landslides, earthquakes, erosion, volcanic events, flooding, and other natural hazards.
 2. Ensure there are no adverse impacts to the quality and quantity of water resources~~Protect against adverse impacts to water quality and quantity resources.~~

Staff Response: Throughout the code, several word changes are proposed that would seem to lessen the County's ability to protect the public. Staff recommends against.

ARTICLE 2. ADMINISTRATIVE PROVISIONS

ISSUE 48. (Brenner)

16.16.215 Relationship to other jurisdictions.

- A. Permit applicants are responsible for complying with all federal, state, tribal, and local regulations that ~~may~~ may pertain to a proposed development. Compliance with the provisions of this chapter does not necessarily constitute compliance with other regulations and permit requirements; ~~provided, that the following shall apply:~~

Staff Response: Staff is neutral. Whether “may” is here or not has no real effect on the code. We had just tried to remove superfluous words.

ISSUE 49. (Brenner)

16.16.220 Identification and mapping of critical areas.

- B. Property owners, the technical administrator, and/or members of the public may use these maps as a general guide, but the maps do not provide a comprehensive accounting of areas subject to this chapter nor do they provide a definitive critical areas designation. Critical area locations and boundaries shown on the County’s maps are approximate and do not include buffers that may be associated with critical areas, ~~and some critical areas may not be shown on the maps at all. It is also possible that some maps showing critical areas in certain areas may not be accurate.~~
- C. Field investigation, analysis by a qualified professional, and/or consideration of other sources of credible scientific information may be required to confirm the presence or absence of a critical area and its boundaries and buffers. ~~The County shall update the maps on a regular and consistent basis as new information becomes available.~~
- D. ~~Planning and Development Services has the authority and shall to update critical areas~~ the maps and shall do so as new critical areas are identified and as new information becomes available.

Staff Response: Staff is OK with these amendments. The statement in (B) is accurate, and the sentence in (C) is covered by (D) (and thus redundant).

ISSUE 50. (Brenner)

16.16.230 Exempt activities.

The following activities as specified are exempt from the provisions of this chapter:

- B. Maintenance of ~~existing, lawfully established~~ vegetation, landscaping, and gardens within a regulated critical area or its buffer, including, but not limited to, cutting, mowing lawns, weeding, 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 recommends against. Staff surmises that this exemption for landscaping was included with the first CAO, as undoubtedly there were many instances where people had encroached their landscaping into areas that under the CAO they couldn’t. This exemption essentially “grandfathered” (made legally nonconforming) those instances. Deleting the words “existing, lawfully established” would basically allow anyone to encroach into critical areas or their buffers with their

landscaping, for if we didn't see them do it, then when they came in for a permit, the landscaping would be allowed to remain. Over time, this would lead to a loss of functions and values.

ISSUE 51. (Brenner)

16.16.235 Activities allowed with notification.

- B. The ~~following~~ activities ~~as~~ specified in subsection (B) are authorized within critical areas and buffers; provided, that:
3. Notification shall be submitted to the technical administrator at least 10 full business days prior to initiating work. The technical administrator shall issue approval within that timeframe.

Staff Response: Staff supports, but with a modification. The proposed language says we must *approve* it; it should say we must *issue a decision* within so many days (not all requests are *approved*). Additionally, some actions might require SEPA review, a request for additional information, or something else that would extend the timeframe for issuing a decision. Furthermore, subsection (3) is something that the applicant must do; directives to staff are found in the last subsection. Staff suggest a better alternative might be:

16.16.235 Activities allowed with notification.

- A. The ~~following~~ activities ~~as~~ specified in subsection (B) are authorized within critical areas and buffers; provided, that:
1. ~~The applicant provides a written notification to the technical administrator (see Appendix B of this chapter) on a form provided by the department.~~
 2. The notification will provide a site plan (in a common scale), photos, and specific information describing the activity and the mitigation to be implemented, if required by the Technical Administrator, to document that the activity will not result in increased risk to public health, safety, and welfare; that adverse impacts to critical areas are minimized; and that disturbed areas are restored as soon as possible following the activity.
 3. Notification shall be submitted to the technical administrator at least 10 full business days prior to initiating work.
 4. Upon receipt of the notification, the County Technical Administrator shall issue a decision within 10 days unless additional information is required from the applicant or other review processes necessitate additional time. Additionally, the Technical Administrator may provide guidance on best management practices for tree and vegetation protection, construction management, erosion and sedimentation control, water quality protection, and use of chemical applications to be used in the execution of the following activities listed in Subsection (B):
 - 4.5. Unless otherwise specified, notification shall be valid for one year per activity; provided, that there is no change in the scope of the project including, but not limited to, the location and/or extent of the activity allowed under the notification process.
 - 5.1. ~~Upon receipt of the notification, the County may provide guidance on best management practices for tree and vegetation protection, construction management, erosion and sedimentation control, water quality protection, and use of chemical applications to be used in the execution of the following activities:~~

ISSUE 52. (Brenner)

16.16.235 Activities allowed with notification.

- C. Activities allowed with notification:
9. Routine maintenance of ~~drainage channels-ditches~~ on agricultural lands; provided, that all of the following are met:
 - a. The maintenance is necessary to support ongoing agricultural operations;

- b. The maintenance activity does not expand the dimensions of the drainage channel beyond the original, lawfully established dimensions;
The agricultural activities are conducted pursuant to an approved conservation farm plan prepared pursuant to WCC 16.16.290.
- c. The farm operator obtains a hydraulic project approval (HPA), if required, from the Washington State Department of Fish and Wildlife (WDFW) prior to the maintenance activity; and
- d. The farm operator provides a copy of the HPA to the technical administrator as part of the written notification. ~~No other written notification is needed.~~

Staff Response: Staff is OK with deleting “ongoing” in subsection (a) and the sentence following (b). However, we oppose deleting “lawfully established” in subsection (b) because any ditches proposed to be expanded must go through both County and State review (WDFW at a minimum), and in some instances, Federal review. Yet someone could illegally expand a ditch when no one’s watching then claim that that was the original configuration. Anyone who’s expanded a ditch legally should have the documentation to show that they did so.

ISSUE 53. (Brenner)

16.16.240 Technical administrator and hearing examiner authority.

- A. The technical administrator shall have the primary responsibility for reviewing development proposals for compliance with this chapter and is authorized to approve, deny, or condition permits in accordance with the standards set forth herein. The technical administrator shall also have the following authority:
 - 2. Authority to grant, condition, or deny reasonable use permits for single-family residential building permits residences proposed to be located outside of geologically hazardous areas within critical areas and/or their buffers if the permits do not satisfy the applicable regulations.
- C. The Whatcom County hearing examiner is hereby vested with responsibility and authority to hear appeals and perform the following duties:
 - 2. Authority to grant, condition, or deny reasonable use permits for all ~~non-single-family~~ developments, except single-family building permits, affecting critical areas if permits do not satisfy the applicable regulations and for all developments in geologically hazardous areas.
- D. In granting, revising, or extending a permit, the technical administrator, or hearing examiner, to the extent allowed by applicable laws as appropriate applicable, may attach such conditions, modifications, or restrictions thereto regarding...

Staff Response: Staff is unclear what the language added to (A)(2) or (C)(2) is intended to do: “Authority to grant, condition, or deny reasonable use permits... if the permits do not satisfy the applicable regulations?”

As for (D) the addition isn’t really necessary, as we can only condition as law allows. It doesn’t change anything to add it here, and is redundant.

ISSUE 54. (Brenner)

16.16.245 Interdisciplinary team.

- B. The interdisciplinary team shall include the applicant and/or their technical representative, local, state, or federal agency or tribal representatives with expertise in the field if appropriate, and/or independent qualified professionals with expertise relating to the critical area issue.

Staff Response: Staff is neutral. It's not really necessary, though, as this whole section is "if appropriate." We would really only do something like this on large, complex projects.

ISSUE 55. (Brenner)

16.16.250 Submittal requirements and critical areas review process.

D. The technical administrator may waive the requirement for critical areas review under this chapter when he/s/he determines that all of the following conditions are met:

1. The proposed development activity is located on a parcel that received approval of a previous critical areas review within the prior 5 years, site conditions have not changed, and the applicable regulations have not substantively changed, and appropriate County permits were issued;
2. All critical areas on the parcel have been identified and delineated and the effects of the proposed development activity have been thoroughly considered in accordance with the most current regulations in effect at the time and Best Available Science regulations in effect at the time;
3. The activity is in compliance with all permit conditions including mitigating measures, as applicable, that were imposed as part of the prior review and there are no outstanding violations of conditions that were imposed as part of the previous review. If a permit was obtained, the activity is in compliance with all permit conditions, including mitigating measures, as applicable, that were imposed as part of the prior review and there are no outstanding violations of conditions that were imposed as part of that review;

Staff Response:

(D)(1) – Staff recommends that Council not delete “and the applicable regulations have not substantially changed.” The reason is that Council (or the State) may at some point change the regulations, in which case we would think Council would want future developments to comply with those newer regulations. We’ve no issue with deleting “and appropriate County permits were issued.”

(D)(2) –Staff has no issue with this deletion.

(D)(3) - Staff has no issue with this change, and the grammar works better if “and appropriate County permits were issued” in (D)(1) is deleted.

ISSUE 56. (Brenner)

16.16.260 General mitigation requirements.

Developments permitted pursuant to this chapter that adversely impact or alter a critical area or buffer shall include mitigation sufficient to minimize risks associated with geologic hazards and/or maintain or replace critical areas functions and values. Any proposed development that cannot adequately mitigate critical area impacts as determined by the technical administrator shall be denied unless a reasonable use variance is obtained.

Staff Response: Staff recommends against this for a couple of reasons. First, a reasonable use exception is not the same as a variance, so it's not a "reasonable use variance." There is no such mechanism as a reasonable use variance. Secondly, even for reasonable use exceptions or variances, mitigation is required. This section is intended to say that no matter the permit type obtained, if impacts can't be adequately mitigated, then the permit must be denied. Perhaps the proposed wording assumes that this is true unless ones availed themselves of either the reasonable use exception or variance mechanisms? If so, a better way to state it might be: “Unless otherwise allowed pursuant to this Title, A any proposed

development that cannot adequately mitigate critical area impacts as determined by the technical administrator shall be denied.”

ISSUE 57. (Brenner)

16.16.260 General mitigation requirements.

B. Mitigation Plan.

2. The mitigation plan shall contain the following information:
 - d. The goals, objectives, and performance standards that the proposed mitigation action(s) shall achieve or demonstrate consistency with.

Staff Response: Staff recommends against. This language was added since goals, objectives, and performance standards of a plan are often written in the general (think CompPlan). When a project comes in years later, it may not fit precisely within what was envisioned, even though it’s consistent with them. The addition seemed to add some flexibility.

ISSUE 58. (Staff)

16.16.260 General mitigation requirements.

Developments permitted pursuant to this chapter that adversely impact or alter a critical area or buffer shall include mitigation sufficient to minimize risks associated with geologic hazards and/or maintain or replace critical areas functions and values. Any proposed development that cannot adequately mitigate critical area impacts as determined by the technical administrator shall be denied.

A. Mitigation Sequence.

1. When an alteration or impact to a critical area or buffer is proposed, the applicant shall conduct an alternatives/mitigation sequencing analysis and demonstrate that all reasonable efforts have been taken to mitigate impacts in the following prioritized order:
 - a. ...
2. Compensatory mitigation shall be provided for all unavoidable adverse alternations to a critical area or buffer. Mitigation for individual projects may include a sequenced combination of the above measures as needed to achieve the most effective protection, compensation for buffer functions and values, or compensatory mitigation for critical area functions and values.
3. ...

B. Mitigation Plan.

1. Compensatory mitigation shall be provided for all unavoidable adverse alternations to a critical area or buffer. A mitigation plan shall be developed in accordance with an approved critical areas assessment report and be consistent with best available science. Where appropriate, the mitigation plan should be compatible with watershed and recovery planning goals for Whatcom County. The intent of these provisions is to require a level of technical study and analysis sufficient to protect critical areas and/or protect developments and occupants from critical areas involving hazards. 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.
2. ...

Reason: Natural Resources staff recommends the text in double strikeout/underline be moved from subsection B.1 to A.2, as providing mitigation is a general requirement requiring a mitigation plan and not a component of the plan. Other language added for consistency with use of the terms “functions and values.” Compensatory mitigation is specific to direct wetland impacts as a form of compensation for impacts.

ISSUE 59. (Brenner)

16.16.260 General mitigation requirements.

C. Mitigation Monitoring and Maintenance.

1. The technical administrator shall ~~have the authority to~~ 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. Required monitoring reports shall be submitted to the County annually during the monitoring period to document milestones, successes, problems, and contingency actions of the compensatory mitigation. The technical administrator may reduce the monitoring timeframe to three years for minor mitigation projects involving critical area or buffer revegetation or vegetation enhancement, but not for projects involving wetland creation, wetland restoration, stream restoration or other activities that require manipulation of soils or water. All mitigation areas shall be maintained and managed to prevent degradation and ensure protection of critical area functions and values subject to field verification by the technical administrator.

Staff Response: Staff supports. The Technical Advisory Committee had recommended striking throughout as they wanted to remove some of the discretion staff has.

ISSUE 60. (Brenner)

16.16.260 General mitigation requirements.

C. Mitigation Monitoring and Maintenance.

3. ~~Permanent protection shall be achieved through deed restriction or other protective covenant in accordance with WCC 16.16.265.~~

~~E. Permanent Protection. All mitigation areas shall be protected and managed to prevent degradation and ensure protection of critical area functions and values in perpetuity. Permanent protection shall be achieved through deed restriction or other protective covenant in accordance with WCC 16.16.265. If additional development is proposed that impacts a mitigation area and those impacts are accounted for under a new, approved mitigation plan, such protection may be removed so long as the final plan meets the requirements of this chapter for all cumulative impacts.~~

Staff Response: Staff recommends against. Eliminating the requirement to put a notice on the title that there is a permanent restriction would mean that subsequent buyers wouldn't know that there are protected areas on the property prior to purchasing the property. It seems like it would be in public's interest to know this before buying a property.

ISSUE 61. (Brenner)

16.16.262 Watershed-Based Management Plans.

~~D. Watershed-Based Management Plans shall be approved by the County Council by ordinance and appended to this chapter. The process for approval shall be as follows:~~

1. ~~The plan shall be reviewed by the technical administrator to ensure compliance with the purposes of this chapter, the Whatcom County Shoreline Management Program (WCC Title 23), and with the comprehensive plan, and to ensure accuracy of the data and effectiveness of proposed management strategies. In making this determination the technical administrator shall consult with the State Departments of Fish and Wildlife, Ecology, Natural Resources if appropriate, and/or other local, state, federal, and/or, if appropriate, tribal agencies or experts.~~

Staff Response: Staff is neutral. It's not really necessary, though, as this whole section is "if appropriate." We would really only do something like this on large, complex projects.

ISSUE 62. (Brenner)

16.16.263 Mitigation Banking.

- B. Mitigation banks shall require a major project permit in accordance with Chapter [20.88](#) WCC and shall be subject to a formal review process including public review as follows:
3. If the technical administrator determines that the bank prospectus is complete, technically accurate, and consistent with the purpose and intent of this chapter, ~~s/he/she~~ shall forward the prospectus to the County Council for initial review. If the proposed bank involves conversion of agricultural land to nonagricultural uses, the County Council shall seek an initial recommendation from the Agricultural Advisory Committee as to whether the conversion ~~shall~~ **should** be allowed. The Committee's recommendation shall be nonbinding. The County Council may require mitigation for the loss of agricultural lands.

Staff Response: Staff supports this change.

ISSUE 63. (Brenner)

16.16.263 Mitigation Banking.

6. Following receipt of the recommendation, the County Council shall proceed with review in accordance with the procedures outlined in Chapter [20.88](#) WCC. ~~The county council shall seek a final recommendation from the agricultural advisory committee if the proposal involves conversion of agricultural land.~~ **The county council shall seek a final recommendation from the agricultural advisory committee if the proposal involves conversion of agricultural land.**

Staff Response: No need to reinsert this; it was stricken because (B)(3) (above) already states this (though we could strike "initial" in (B)(3) if that is Councilmember Brenner's concern).

ISSUE 64. (Brenner)

16.16.265 Critical areas protective measures.

~~When an impact to critical area or a buffer has been proposed or a buffer will occur because of a proposed development,~~ a standard buffer width has been altered, or mitigation is required, one or more of the following protective measure shall be applied:

Staff Response: Staff is neutral; they both mean the same thing (all impacts are "proposed" prior to the development being built).

ISSUE 65. (Brenner)

16.16.265 Critical areas protective measures.

- B. **Notice on Title.** The owner of any property containing **any** critical area or buffer for which a development permit is about to be issued **and for which the proposed development will impact a critical area or buffer** shall record a notice with the County Auditor real estate records, in a format approved by the technical administrator, and provide a copy of the filed notice to the Planning and Development Services Department at the time the permit is issued. The notice shall ~~state advise of~~ the ~~general~~ presence of ~~the an impacted~~ critical area or buffer on the property, and ~~the fact~~ that limitations on actions in or affecting the critical area or buffer exist. The notice shall provide that restrictions on uses within the critical area exist until such time as the technical administrator

approves a change in restriction and such approval is filed. This notice on title shall not be required for a development proposal by a public agency or public or private utility within a right-of-way or easement for which they do not have fee-simple title. This requirement may shall be waived by the Technical Administrator for certain geologically hazardous areas if s/he finds that the risk is so low as to not warrant notification (e.g., old alluvial deposits); and/or if the technical administrator determines there will be no impacts to critical areas or buffers on the development site.

Staff Response: The proposed amendments here change the standard as to whether something is recorded on the title from having a critical area onsite to having an *impacted* critical area onsite. That's fine, if that's how Council wants to proceed, though it does mean that subsequent buyers wouldn't know that there are critical areas on the property prior to purchasing the property. It seems like it would be in the public's interest to know this before buying a property.

Additionally, this section seems to be contradictory to the proposed deletion of 16.16.260(C) & (E) (Issue 59, above), for even if it just applies to an *impacted* critical area onsite this section still says it needs to be recorded, though she's proposed deleting that requirement in the other two sections.

ISSUE 66. (Brenner)

16.16.265 Critical areas protective measures.

- D. **Building Setback.** The County shall require buildings and other structures to be set back a minimum distance of 10 feet from the edge of geological hazard setback, a critical area buffer, or from the critical area where no buffer is required. The following uses are allowed in the building setback:
3. Building overhangs 18 inches or less less than 18 inches;

Staff Response: Staff has no issue with this.

ISSUE 67. (Brenner)

16.16.270 Reasonable use.

- B. Reasonable Use Standards.
2. To qualify as a reasonable use, the technical administrator or hearing examiner, as appropriate, must find that the proposal is consistent with all of the following criteria:
 - a. There is no portion of the site where the provisions of this chapter allow reasonable economic use, including agricultural use or continuation of legal nonconforming uses;
 - b. There is no feasible alternative to the proposed activities that will provide reasonable economic use with less adverse impact on critical areas and/or buffers. Feasible alternatives may include, but are not limited to, locating the activity on a contiguous parcel that has been under the ownership or control of the applicant since September 30, 2005 the effective date of the ordinance codified in this chapter, change in use, reduction in size, change in timing of activity, and/or revision of project design;

Staff Response: Staff recommends against, as this could lead to someone short platting a property, leaving a parcel where a reasonable use exemption would be needed, and thus necessitating an impact.

ISSUE 68. (Donovan)

Is 16.16.270(B)(2)(k) 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" use 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. However, also see Issue 67 regarding what that size might be.

ISSUE 69. (Brenner)

16.16.270 Reasonable use.

B. Reasonable Use Standards.

- a. To qualify as a reasonable use, the technical administrator or hearing examiner, as appropriate, must find that the proposal is consistent with all of the following criteria:

- k. For single-family residences, the maximum impact area shall may be no larger than 2,500-3000 square feet. This impact area shall include the residential structure as well as appurtenant development that are necessarily connected to the use and enjoyment of a single-family residence. These appurtenant developments include garages, decks, driveways, parking, utilities (exclusive of an on-site septic system), and all lawn and landscaping, with the following exceptions:

- a. On lots outside of the shoreline jurisdiction, when an extended driveway is necessary to access a portion of a development site with the least impact on critical area and/or buffers, those portions of the driveway shall be excluded from the 2,500-3000 square foot maximum impact area provided that the access road meets the standards of WCC 16.16.620(E) or 16.16.720(C), as applicable.

Staff Response: Staff had originally proposed 2,500 s.f. since it's consistent with the Shoreline Management Program rule, and so we'd used it for years as a guideline for reasonable uses. However, the Natural Resources Supervisor now says that such inconsistency is OK, as the 2,500 s.f. rule would still apply in the shoreline jurisdiction, where lots tend to be smaller. In fact, he now believes that, given that rural, non-shoreline lots tend to be much larger (5 & 10 acres), we could actually bump this up to 4,000 s.f. or 10% of the parcel size, whichever is smaller.

ISSUE 70. (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 (staff felt that 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.

ISSUE 71. (Brenner)

16.16.270 Reasonable use.

D. Reasonable Use ~~and Variance~~ Procedures.

1. Procedural requirements for ~~variances and~~ reasonable use permit applications shall be as follows:

- f. Any person aggrieved by the granting, denying, or rescinding of a reasonable use permit by the technical administrator may seek review from the hearing examiner pursuant to WCC 16.16.280.

Staff Response: Staff supports, as this is a repeat of the rule already in subsection (e).

ISSUE 72. (Brenner)

16.16.273 Variances.

- B. ~~Variance Standards. In cases where the reasonable use criteria of subsection A of this section do not apply, or for a variance from other standards of this chapter, the hearing examiner may grant a variance from the dimensional any requirements in this chapter when the applicant proves by clear, cogent, and convincing evidence of all of the following elements:~~

Staff Response: Staff recommends against. Variances are supposed to be only applicable to dimensional requirements, not use or procedural requirements. Variances are intended to allow someone to enjoy a property right that his/her neighbors are enjoying, but that s/he can't due to the property or a previous change in the law.

ISSUE 73. (Brenner)

16.16.275 Nonconforming uses/buildings.

The following provisions shall apply to legally existing uses and/or buildings and/or structures that do not meet the specific standards of this chapter:

- A. The lawful use of any legal nonconforming building, structure, land, or premises existing on ~~September 30, 2005~~the effective date of the adoption or amendment of this chapter, or authorized under a permit or approval issued, or otherwise vested, prior to the ~~ate effective date of the adoption or amendment of this chapter~~ date may be continued, subject to the provisions for a nonconforming structure in Chapter 20.83 WCC; provided, that agricultural activities shall conform to section WCC 16.16.290 Article 98 (Conservation Program on Agriculture Lands). If a nonagricultural nonconforming use is intentionally abandoned for a period of 12 months or more, then any future use of the nonconforming building, land, or premises shall be consistent with the provisions of this chapter.
- ~~B.~~ Expansion, alteration, and/or intensification of a nonconforming use is prohibited.
- ~~B-C.~~ Expansion, alteration, and/or intensification of a legal nonconforming building, or structure, or use (excluding normal maintenance and repair), is ~~prohibited~~ allowed unless if such use will produce significant impacts that degrade the critical area, including but not limited to vegetation clearing; additional impervious surfaces; generation of surface water runoff; discharge, or risk of discharge of pollutants; increased noise, light or glare, or significant increased risk associated with geologically hazardous areas.
- ~~C-D.~~ Nonconforming structures that are destroyed by fire, explosion, flood, or other casualty may be restored or replaced in kind if there is no alternative that allows for compliance with the standards of this chapter; provided, that the following are met:
- The reconstruction process is commenced within 18 months of the date of such damage; and
 - The reconstruction does not expand, enlarge, or otherwise increase the nonconformity, except as provided for in subsection ~~B-C~~ of this section.
- ~~D-E.~~ Nonconforming uses in shoreline areas shall be governed by the shoreline management provisions of the WCC Title 23.
- ~~E-F.~~ When a development permit is sought for a parcel containing a nonconforming building or structure that has been intentionally abandoned for a period of 12 months or more, the technical

administrator may require removal of the nonconforming building and restoration of the critical area or buffer in accordance with this chapter as a condition of permit approval.

Staff Response:

Subsection (A) – Staff is OK with this deletion.

Subsection (B) & (C) – Staff recommends against the deletion of the prohibition on nonconforming uses in subsection (B) and the addition of “or use” to subsection (C). Most jurisdictions don’t typically allow the expansion of a nonconforming use, only the structures, since in general a jurisdiction does not want facilitate more nonconforming uses.

Subsection (C) – Staff recommends against the introduction of the concept of "significant" impacts to the CAO. That standard is from SEPA, and is not in the GMA. Under the GMA we are to protect the functions and values of critical areas. Prohibiting only significant impacts would by default allow nonsignificant impacts, which over time would degrade the functions and values.

Subsection (D) – Staff recommends against the deletion of “if there is no alternative that allows for compliance with the standards of this chapter; provided that:” If a structure is destroyed to the point that it needs to be completely rebuilt, and there is ample space to rebuild on the property without impacting critical areas, then we should have the applicant move it to a better location.

Subsection (D)(1) – Staff recommends against this deletion. This language mimics 20.83 (Nonconforming uses), and our codes ought to be consistent.

Subsection (F) – Staff recommends against deleting the first half of this subsection, regarding getting rid of old derelict buildings in critical areas or their buffers, but we're OK with getting rid of the requirement to restore.

ISSUE 74. (Brenner)

16.16.280 Appeals.

A. Final permit decisions made by the technical administrator shall be subject to appeal in accordance with the procedures of Chapter 2.33 WCC and WCC Title 20; provided, that the applicant may request administrative review by the director of planning and development services prior to initiating a formal appeal process. Decisions of conditions applied to specific permits shall be subject to the appeal provisions for that permit. A request to the director for an administrative review stays the appeal process.

~~G. Any issue not raised by the time of appeal in the original appeal filing to superior court is thereafter waived.~~

Staff Response:

Subsection (A) - Since the appeal hasn't actually started, staff suggests that this read, "A request for administrative review shall stay the time within which one must file an appeal until a decision on the review is issued."

Subsection (G) - Staff recommends against. This was proposed by staff so as to ensure all appeal issues are raised with the first appeal body in the appeal process. Eliminating it would mean that someone could appeal to the Hearing Examiner, not raise certain issues, then appeal to the County Council and add new issues, then appeal to the courts and add new issues. Normally in any appeal process the appellant must raise all issues up front so that each appeal body addresses the same issues.

ISSUE 75. (Brenner)

16.16.285 Penalties and enforcement.

Throughout this section Councilmember Brenner suggests changing the time frame for enforcement activities from “calendar” days to “working” days.

Staff Response: Staff is OK with this, though suggests using the term “business” days, as that is commonly used in other parts of the WCC.

ISSUE 76. (Brenner)

16.16.285 Penalties and enforcement.

B. If work activity has occurred on a site in violation of this chapter, prompt corrective action, restoration, or mitigation of the site will be required when appropriate. If this provision is not complied with, the County may restore or mitigate the site and charge the ~~responsible person~~responsible person who is liable for the full cost of such an activity. Additionally, any and all permits or approvals issued by the County may be denied for that site for a period of up to six years.

Staff Response: Staff recommends against. The Prosecuting Attorney recommended changing “responsible person” to “property owner” because “responsible person” is ambiguous, and since the property owner must give permission for all work done on their property and are thus ultimately responsible, regardless of who did the work. Otherwise, if someone illegally builds something then sells the property, it then becomes legal since we can't prosecute the new property owner. Holding the property owner responsible is the same as how the building code works for building code violations.

ISSUE 77. (Brenner)

16.16.285 Penalties and enforcement.

~~F.G. After the Fact Permit Fee. After the fact application fees shall be double the amount established by the Unified fee schedule.~~

Staff Response: Staff recommends against. This section was added since some people take the position that it's easier to ask for forgiveness rather than permission. It seems like we should encourage asking permission. Additionally, After the Fact (ATF) permits costs more in staff time. This is consistent with how PDS handles ATF building permits.

ARTICLE 3. GEOLOGICALLY HAZARDOUS AREAS

ISSUE 78. (Brenner)

16.16.310 Designation, mapping, and classification.

(C)(1) **Landslide Hazard Areas.** Landslide hazard areas shall include areas ~~potentially~~ susceptible to landslides based on a combination of geologic, topographic, and hydrologic factors. They include any areas susceptible to mass movement due to any combination of bedrock, soil, slope (gradient), slope aspect, slope form (concave, convex, planar), geological structure, surface and subsurface hydrology, or other physical factors. Landslide hazard areas shall also and include areas along which landslide material may be routed or which may be subject to deposition of landslide delivered material. Potential landslide hazard areas include but are not limited to the following areas. Landslide hazard areas shall be further classified as follows:

16.16.375 Review and reporting requirements.

- A. When County critical area maps or other sources of credible information indicate that a site proposed for development or alteration is, or may be, located within an active or **potential** geologically hazardous area, the technical administrator shall have the authority to require the submittal of a geological assessment report.

Staff Response: In both of these subsections, the proposed change deletes the term “potentially” or “potential” (used in reference to geohazardous areas). Staff is OK with this; however, it should be pointed out that this terminology was recommended by Dan McShane, a local geologist and member of the Citizens Advisory Committee. His argument was that in geologist terms, all geohazardous areas are only “potential” unless they’re in the act of actually moving. However, staff doesn’t believe that removing the term will have any effect on the code.

ISSUE 79. (Brenner)

16.16.320 Geologically hazardous areas – General standards.

- B. Impact Avoidance.** Impact avoidance measures shall include, but not be limited to if possible, locating the use/development outside of the hazard area, reducing the number, size or scale of buildings, driveways and other features; altering the configuration or layout of the proposed development; implementing special engineering methods for construction, drainage, runoff management etc.; foregoing construction of accessory structures; preserving native vegetation; and other feasible protective measures as determined by an alternatives analysis. For some geologic hazards, impact avoidance may mean no development will be permitted on a property. Impact avoidance may not be possible. In those instances the applicant will be made aware of risks and will sign a “Hold Harmless” agreement with the county, which will also be attached to title of property.

Staff Response: Staff doesn’t have an issue with the first amendment (changing “but not be limited to” to “if possible,” as we don’t see that it will have an impact on the code.

Staff recommends against deleting, “impact avoidance may mean no development will be permitted on a property.” This line comes straight from the WAC. Deleting it could lead to development not only in lahar hazard areas, but in other geohazard areas, such as active landslides, known debris flows, or alluvial fans, as well.

Additionally, this change may be considered inconsistent with CompPlan Policy 10E-10, which states, "Require applicants for development permits located in natural hazard areas to provide development plans designed to minimize the potential to exacerbate the natural hazard as well as the risk of damage to property or threats to human health and safety. In natural hazard areas where engineering solutions cannot be designed to withstand the forces expected to occur under the design event of a particular natural hazard, or off-site adverse impacts to adjacent properties or ecosystems cannot be adequately mitigated, *Whatcom County may deny development permits intended for permanent or seasonal human habitation as described in the Critical Areas Ordinance.*" (emphasis added)

As to the last sentence about a hold harmless agreement, staff is OK with but recommends the following instead:

Where assessment by a qualified professional has shown that mitigation of the hazard or avoidance cannot fully eliminate the risk to human safety, the technical administrator may require the applicant to enter into a Release and Indemnification Agreement with the county, which will be attached to title of the property along with a Notice on Title for Regulated Critical Areas. The Release and Indemnification Agreement shall not substitute for the implementation of all reasonable mitigation measures

recommended by the qualified professional to minimize the risk to human safety, and shall only be used to allow development in a geologically hazardous area when the risk to human safety has been minimized to as low as reasonably practicable.

ISSUE 80. (Brenner)

16.16.320 Geologically hazardous areas – General standards.

E. **Review by Qualified Professional.** A qualified professional geologist or other qualified professional geotechnical engineer, licensed in the State of Washington, shall review projects development proposals that occur in potentially geologically hazardous areas to ensure that they are properly designed and constructed as provided for in WCC 16.16.225 determine the potential risk. If development takes place within an identified geologically hazardous area requiring design or structural elements to mitigate minimize the hazard, the design mitigation shall be approved designed by a qualified professional geotechnical engineer licensed in the State of Washington with expertise in mitigation of geological hazards.

Staff Response: Staff recommends against, as the change is inconsistent with the rest of the text.

ISSUE 81. (Brenner)

16.16.320 Geologically hazardous areas – General standards.

I. **Land Subdivision.** Land that is located wholly within a landslide hazard area, riverine or coastal erosion hazard area, alluvial fan hazard area, lahar hazard area, or mine hazard area or its buffer may not be subdivided to create buildable parcels entirely within the hazardous area. Land that is located partially within a hazard area or its buffer setback may be divided provided that each resulting lot has sufficient buildable area outside of the hazardous area with provision for drainage, erosion control and related features that will not adversely affect the hazard area or its buffer setback.

Staff Response: Staff strongly recommends against. This would greatly increase the potential population density within the lahar hazard areas over time. The County has a duty to protect not only the current population, but future generations as well. Prior to allowing increased densities, a public risk analysis should be performed, as Dan McShane provided an example of in his presentation to Council on 4/4/17, followed by his comment letter on the same day.

As an option land division could be allowed in lahar hazard areas downstream of Nugent’s Corner or Deming, but prohibited upstream, should the Council desire to be less conservative in regard to lahar hazard regulations. This could be justified in that we heard from the experts (USGS, Dr. Easterbrook, and Mr. McShane) that there is no evidence of lahars ever extending that far downslope, and even there models show this as unlikely.

ISSUE 82. (Brenner)

16.16.325 Landslide Hazard Areas – Standards.

A. **General Standards.** The following activities may be allowed in active landslide hazards areas when all reasonable measures have been taken to minimize risks and other adverse effects associated with landslide hazards, and when the amount and degree of the alteration are limited to the minimum needed to accomplish the project purpose:

1. Developments that will have no not increase the threat to the health or safety of people and will not increase potential for landslides on or off the site and meet the reasonable use standards as set forth in WCC [16.16.270](#).

3. Access roads and trails that are engineered and built to standards that ~~avoid~~ minimize the need for major repair or reconstruction beyond that which would be required in non-hazard areas. Access roads and trails may be permitted only if the applicant demonstrates that no other feasible alternative exists, including through the provisions of Chapter 8.24 RCW. If such access through critical areas is granted, exceptions or deviations from technical standards for width or other dimensions and specific construction standards to minimize impacts, including drainage and drainage maintenance plans, may be required ~~specified~~.

Staff Response: Both of these proposed amendments lessen the County's ability to protect people from landslides.

ISSUE 83. (Brenner)

16.16.325 Landslide Hazard Areas – Standards.

- B. **Landslide hazard Management Zone Standards.** Alteration may be allowed within 300 feet of an active landslide hazard area when the technical administrator determines that the following standards are met:

2. ~~The proposed alteration is located outside of an active landslide hazard area and any required setback buffer, as set forth in WCC 16.16.335.~~

5. ~~The development is outside of the area of potential upslope or downslope surface movement or potential deposition in the event of a slope failure.~~

Staff Response: Staff recommends against. The proposal would delete two of the 8 standards that allow development within 300 feet of an *active* landslide area. An active landslide area is an area in which the landslide is actively occurring, i.e., now, and not potentially in the future. Deleting subsection (2) would allow develop in these areas, and deleting subsection (5) would allow development on the upper lip of the landslide, or in its runout area.

ISSUE 84. (Brenner)

16.16.340 Seismic Hazard Areas – Standards.

Development may be allowed in seismic hazard areas when all of the following apply:

- B. Public roads, bridges, utilities, and trails shall be allowed when there are no feasible alternative locations and geotechnical analysis and design are provided that ~~ensure the~~ minimize damage to roadway, bridge, and utility structures and facilities ~~will not be susceptible to damage~~ from seismically induced ground deformation. Mitigation measures shall be designed in accordance with the most recent version of the American Association of State Highway and Transportation Officials (AASHTO) Manual or other appropriate document.

As well as in:

16.16.345 Alluvial Fan Hazard Areas – Standards.

- C. Roads, utilities, bridges, and other infrastructure ~~when that are~~ located and designed to prevent reduce adverse impacts on critical areas and avoid the need for channel dredging or diking or other maintenance activities that have the potential to substantially degrade river and stream functions.

And:

16.16.355 Erosion hazard areas – Standards.

- A.1 Developments that ~~will have no~~ minimize threat to the health or safety of people and will not increase the risks of alluvial fan hazards on or off the site and meet the reasonable use or variance standards as set forth in WCC 16.16.270.

Staff Response: Staff is neutral. Again, these amendment seem to lessen the County’s ability to protect from “ensure” or “prevent” to “reduce” or “minimize,” but on the other hand, it may be an unattainable goal to design infrastructure to “ensure the structures and facilities will not be susceptible to damage.”

ARTICLE 4. FREQUENTLY FLOODED AREAS

ISSUE 85. (Brenner)

16.16.400 Purpose.

- B. Avoid ~~and or~~ minimize impacts to fish and wildlife habitats that occur within frequently flooded areas.

Staff Response: Staff is OK with this.

ISSUE 86. (Staff)

16.16.420 Frequently flooded areas – General standards.

- A. All development shall conform to the provisions of WCC Title [17](#), Flood Damage Prevention, and the applicable provisions of this chapter.
- B. Development within frequently flooded areas shall be allowed [only when it is consistent with pursuant](#) all of the following:
 - 1. [FEMA’s National Flood Insurance Program \(NFIP\), including the protection standards for critical habitats for listed species, which shall be demonstrated through submittal of a habitat assessment, and if necessary, a mitigation plan prepared by a qualified professional, in accordance with the FEMA Regional Guidance for the Puget Sound Basin. The plan shall identify any federally listed species and associated habitats, and demonstrate that no harm will occur to such species or habitats as a result of development within frequently flooded areas; and,](#)
 - 1.2. [The mitigation sequence in WCC \[16.16.260\]\(#\);](#)
 - 2.3. [Article 7, Habitat Conservation Areas, of this chapter; and,](#)
 - 4. [The applicable general protective measures found in WWC \[16.16.265\]\(#\).](#)
- C. The technical administrator shall have the authority to require [a habitat assessment, and if necessary, a mitigation plan prepared by a qualified professional, in accordance with the FEMA Regional Guidance for the Puget Sound Basin and](#) ~~mitigation~~ for adverse impacts to ~~floodplain~~ the ecological functions [of Frequently Flooded Areas](#); provided, that such mitigation shall be consistent and compatible with the goal of protecting health and safety and minimizing risks to property.

ISSUE 87. (Staff)

16.16.430 Review and report requirements.

- C. In addition to the requirements of WCC 16.16.225, critical areas assessment reports for frequently flooded areas shall:
 - 1. [Meet the requirement of WCC \[17.12.010\]\(#\) and \[16.16.255\]\(#\). Identify any federally listed species and associated habitats, and demonstrate that no harm will occur to such species or habitats as a result of development within frequently flooded areas.](#)
 - 1.2. [Address adverse impacts to ecological functions and processes, including riparian vegetation. Positive impacts may also be discussed.](#)
 - 2.3. [Include mitigation for adverse effects on Frequently Flooded Areas’ ecological functions, where applicable.](#)

Reason: Natural Resources and Public Works' Flood staff recommends that the first sentence in 16.16.420(B)(1) be moved to subsection (C), and that the last sentence of 16.16.420(B)(1) be moved to 16.16.430(C)(1) as those topics relate more to those headings. The language is only moved, not changed.

ISSUE 88. (Brenner)

16.16.430 Review and report requirements.

F. Critical areas assessment report requirements may be waived for single-family developments and structures accessory to agricultural uses when the technical administrator and the public works department determine that no-minimal adverse impacts or risks to life, property, or ecological functions will occur.

Staff Response: Staff recommends against. Again, these amendments seem to lessen the County's ability to protect and remove the ability to assess risks to life, property, or ecological functions. This would violate the FEMA BiOp and is not consistent with GMA or ESA.

ARTICLE 5. CRITICAL AQUIFER RECHARGE AREAS

ISSUE 89. (Brenner)

16.16.520 Critical aquifer recharge areas – General standards.

In addition to the applicable general protective measures found in WCC 16.16.265, Aall development in a critical aquifer recharge area shall meet the following standards:

A. The proposed development will not cause significant contaminants contamination to enter the aquifer and will not significantly adversely affect the recharging of the aquifer in an adverse manner.

Staff Response: Staff recommends against. What constitutes "significant" contamination versus insignificant contamination?

ARTICLE 6. WETLANDS

ISSUE 90. (Staff)

16.16.610 Wetlands Designation, Rating, and Mapping.

A. Wetlands shall be delineated identified in accordance with the requirements of RCW 36.70A.175. Unless otherwise provided for in this chapter, all areas within the County determined to be wetlands meeting the criteria in accordance with ~~the Washington State Wetlands Identification and Delineation Manual (Ecology Publication 96-94) or the U.S. Army Corps of Engineers Wetlands Delineation Manual, 1987 Edition, and the Western Mountains, Valleys, and Coast Region supplement (Version 2.0) 2010 or as revised~~ corresponding guidance letters, regardless of any formal identification, are hereby designated critical areas and are subject to the provisions of this article.

Reason: Natural Resources staff recommends changing "identified" to "delineated," as it is the term used in WAC 36.70A.175, and "determined to be wetlands in accordance with" instead of "meeting the criteria," as this is the language used in the Army Corps Manual.

ISSUE 91. (Brenner)

16.16.610 Wetlands Designation, Rating, and Mapping.

D. All wetlands shall be regulated regardless of size; provided, that hydrologically isolated Category IV wetlands less than one tenth acre ~~one-tenth acre (4,356 1,000 (4956 square feet) in size)~~ may be adversely impacted ~~shall be exempt from the requirements of this article~~ when all of the following criteria are met:

7. Adverse impacts are mitigated pursuant to WCC 16.16.680 The wetland meets the criteria set forth in the entire section.

Staff Response: PDS recommends against deleting “hydrologically isolated,” as that’s part of the state definitions of Category IV wetlands, and it’s based on federal case law (Rapinos).

As for the size, 1/10th of an acres is 4,356 sf, not 4,956 (we suspect this was a typo).

As for the issue of whether to reduce the size of Class IV wetlands to be protected, or leave it at 1/10th of an acre, let us reiterate that this was a recommendation from the Department of Ecology, based on their guidance, which in turn is based on Best Available Science. Diane Hennessey, our DOE representative on the Technical Advisory Committee (following Susan Meyer’s departure), has forwarded seven papers addressing this issue. They include:

Gibbs, J. P. (1993). Importance of small wetlands for the persistence of local populations of wetland-associated animals. *Wetlands*, 13, 25-31.

Richter, K. O., & Azous, A. L. (1995). Amphibian occurrence and wetland characteristics in the Puget Sound Basin. *Wetlands*, 15(3), 305-312.

Raisin, G. W. (1996). The role of small wetlands in catchment management: Their effect on diffuse agricultural pollutants. *Internationale Revue der Gesamten Hydrobiologie*, 81(2), 213-222.

Semlitsch, R. D., & Bodie, J. R. (1998). Are small isolated wetlands expendable? *Conservation Biology*, 12, 1129-1133.

Adamus, P. R. (2013). Wetland functions: not only about size. *National Wetlands Newsletter*, 35(5), 18-19.

Detenbeck, N. E. (2013). SLOSS (single large or several small) or not? Factoring wetland size into decisions for wetland conservation, enhancement, restoration, and creation. *National Wetlands Newsletter*, 35(5), 15-17.

Semlitsch, R., Anderson, T. L., Drake, D. L., Ousterhout, B. H., Peterman, W. E., & Shulse, C. D. (2013). Small, clustered wetlands promote amphibian persistence. *National Wetlands Newsletter*, 35(5), 20-21.

These articles will be posted for your reading to the website where the rest of the BAS is found (<http://www.whatcomcounty.us/2417/County-Council-Review>).

As for the subsection (7), this was proposed by the TAC. It’s deletion would mean that impacts to small wetlands would not need to be mitigated, which is currently the case and probably makes no sense in a section aimed at exempting certain wetlands. Staff is OK with deleting it.

ISSUE 92. (Brenner)

16.16.620 Wetlands – General standards.

The following activities may be permitted in wetlands and/or wetland buffers as specified when all reasonable measures have been taken to avoid adverse effects on wetland functions and values as documented through an alternatives analysis, the amount and degree of alteration are limited to the

minimum needed to accomplish the project purpose, and compensatory mitigation is provided for all adverse impacts to wetlands that cannot be avoided, and the amount and degree of alteration are limited to the minimum needed to accomplish the project purpose category 4 wetlands are exempt from this section):

Staff Response: Deleting “as documented through an alternatives analysis” would have no bearing on the code; it’s only a reminder of this requirement, found in 16.16.225, Critical Areas Assessment Reports.

Adding “category 4 wetlands are exempt from this section” is problematic on two accounts. First WCC 16.16.610(D) exempts Cat IV wetlands less than a certain size, not all Cat IV wetlands. Secondly, this section is about what’s *allowed* in wetlands and their buffers, so exempting them from this section would mean that none of the listed uses that follow would be allowed in any Cat IV wetlands. We don’t think this is what Councilmember Brenner intended.

Therefore, staff recommends against these amendments.

ISSUE 93. (Brenner)

16.16.620 Wetlands – General standards.

E. Agricultural Uses as follows:

1. Construction of an an appurtenant structure that is associated with ~~an~~ an primary agricultural use; or the reconstruction, remodeling, or maintenance of such structures in wetland buffers, subject to all of the following specific criteria:
 - i. The structure is located within an existing lot of record and is an existing ongoing agricultural use.
 - ii. For new construction, if there is no other feasible location with less impact to critical areas.
 - iii. Clearing and grading activity and impervious surfaces are limited to the minimum necessary to accommodate the proposed structure and, where possible, surfaces shall be made of pervious materials.
2. Existing ongoing agricultural activities subject to the following:
 - i. The activities are conducted in accordance with all applicable provisions of this chapter and WCC Title 17; or
 - ii. The agricultural activity is in compliance with the Conservation Program on Agricultural Lands (CPAL) as described in WCC 16.16.290, and Appendix A Article 8 of this chapter. This requirement is for property owners who have an existing farm plan.

Staff Response: Staff recommends against. In subsection (1), “appurtenant” and “primary” were added by the Technical Advisory Committee as a way to preclude non-agricultural structures from being allowed in a critical area. For instance, if a farm operator decided to open a second, unrelated business on their site.

In subsection (1)(i), we cannot delete “ongoing,” as new buildings cannot be built for new agriculture in a way that impacts critical areas; therefore we cannot allow them in wetlands or their buffers.

In subsection (1)(ii), the addition of “for new construction” is OK, as that’s the only time we’d look for less impactful alternatives.

In subsection (2), again, we cannot delete “ongoing,” as we cannot allow new agriculture to impact wetlands (or other critical areas).

And in subsection (2)(ii), this is one of the ways we get people to sign up for the CPAL program. Making this section only applicable to those who already have a farm plan would reduce the incentive to create one.

ISSUE 94. (Brenner)

16.16.620 Wetlands – General standards.

- H. Passive recreation facilities that are part of a nonmotorized trail system or environmental education program, including walkways, wildlife viewing structures, ~~and or public education trails in wetland buffers~~; provided, that all of the following criteria are met:
- a. ~~Private trails shall not exceed 46 feet in width, and public trails shall not exceed 10 feet in width.~~ Trails shall not exceed 10 feet in width.
 - ~~a.b.~~ ~~and~~ They shall be made of pervious material ~~or on an elevated structure where feasible.~~
 - c. They shall be designed to ~~avoid minimize~~ removal of significant trees.

Staff Response: Staff recommends against the first amendment. In most jurisdictions 6 feet is the standard width used for private trails, and 10 feet for public trails. The reason is that public trails tend to attract a larger number of users than private trails (used just by the residents of a particular development).

Staff is neutral on the second edit.

ISSUE 95. (Staff)

16.16.630 Wetland buffer widths.

The technical administrator shall have the authority to require buffers from the edges of all wetlands (in addition to the building setback required by 16.16.265(D)) in accordance with the following:

- A. Wetland buffers shall be established to protect the integrity, functions and values of the wetland. Wetland buffers shall be measured horizontally from a perpendicular line established by to the wetland boundary based on the base buffer width identified in Table 2. Standard Buffer Widths edge on all sides as marked in the field. Buffers shall not include areas that are functionally and effectively disconnected from the wetland by an existing, legally established road or other substantial developed surface.

Reason: Natural Resources staff recommends changing this language to clarify that the buffer is a polygon a distance from the edge of the wetland in accordance with Table 2.

ISSUE 96. (Department of Ecology)

16.16.630 Wetland buffer widths.

- D. Standard buffer widths are shown in Table 2. However, Category I or II wetlands with "special characteristics" as determined and defined through the Washington State Department of Ecology (2014) Wetland Rating System (including Estuarine, Coastal Lagoons, Wetlands of High Conservation Value, Bogs, Forested, and Interdunal wetlands) only buffers in the highest habitat score (8-9) group are applied.

Staff Response: Staff supports this edit. Upon further review by the WA State Department of Ecology, they recommend this language to account for wetlands with "special characteristics."

ISSUE 97. (Brenner)

16.16.670 Review and reporting requirements.

- A. A wetland assessment report describes the characteristics of the subject property and adjacent areas and must be consistent with WCC 16.16.255. The assessment shall include the occurrence, distribution, delineation, and determination of the wetland category and standard wetland buffers as set forth in WCC 16.16.630. The investigation shall also include field identification and a complete delineation of all wetland boundaries (with delineations field flagged and left in the field for County verification), and may include analysis of historical aerial photos, and review of public records, and interviews with adjacent property owners. Assessment reports shall include the following site- and proposal-related information unless the technical administrator determines that any portion of these requirements is unnecessary given the scope and/or scale of the proposed development:

Staff Response: Staff is OK with this edit.

ISSUE 98. (Staff)

16.16.670 Review and reporting requirements.

- B.7(b)(ii) Parcel map, with scale, showing all wetlands within 300 feet of the development footprint unless access is denied in writing by the adjacent property owner. Parcel map shall include all streams and drainages (Type 1S, 2, 3F, 4Np, or 5Ns streams), shorelines, floodplains, flood prone areas and critical habitat for threatened and endangered species within 150 feet of the development footprint.
- B.7(c) Wetland Analysis. A wetland delineation report shall provide an analysis of all wetlands and buffers (to the extent they can be legally accessed) within 150 feet of the development footprint including, at a minimum, the following information:

Reason: Natural Resources staff recommends changing the language in 7(b)(ii) if we move to the newer DNR stream-typing system discussed at your last workshop, and deleting the “within 150 feet” language as it conflicts with the 300-foot requirement in 16.16.670(7)(b)(ii).

ISSUE 99. (Brenner)

16.16.670 Review and reporting requirements.

- D. ~~When the proposed single family dwelling and associated features are located outside the standard buffer required under WCC 16.16.630 (no encroachment), no assessment report shall be required.~~
When the proposed single-family dwelling and associated features are located outside the standard buffer required under WCC 16.16.630 (no encroachment), no assessment report shall be required.

Staff Response: Reinserting this language isn't really necessary, as per WCC 16.16.250 only projects that would potentially impact a critical area is required to submit an assessment. This language was proposed for deletion as it's redundant.

ISSUE 100. (Brenner)

16.16.680 Wetland mitigation.

In addition to the applicable general protective measures found in WCC 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~~ ~~may~~ consider all of the following when applicable:

Staff Response: Staff has no issue with these edits.

ISSUE 101. (Staff)

16.16.680 Wetland mitigation standards.

B(2) Buffer Alterations. Compensatory mitigation for buffer impacts shall:

- a. ~~be consistent with WCC 16.16.630, 640, 650, and 660; and,~~
- a-b. ~~Include~~ enhancement of degraded buffers by planting native species, removing structures and impervious surfaces within buffers, and other measures to achieve equivalent or greater buffer functions.

Reason: Natural Resources staff recommends adding 630 as another reference, and breaking this sentence into 2 subsections for ease of reading.

ISSUE 102. (Staff)

16.16.680 Wetland mitigation standards.

C. Mitigation Ratios.

1. Compensation for wetland buffer impacts shall occur at a minimum 1:1 ratio on an area basis.

Reason: Natural Resources staff recommends this change to be consistent with the mitigation sequencing of 16.16.260 and Article 7, HCA buffer mitigation.

ISSUE 103. (Staff)

- D. Re-established or created Replacement wetlands established pursuant to these mitigation provisions shall have adequate buffers to ensure their protection. The buffer shall be based on the category of the reestablished, created, rehabilitated, enhanced, or preserved wetland; ~~provided, that the technical administrator shall have the authority to approve a smaller buffer when existing site constraints (such as a road) prohibit attainment of the standard buffer. Replacement wetlands shall not create buffer encumbrances on adjoining properties.~~

Reason: Natural Resources staff recommends these changes to be consistent with the language of Table 3.

ISSUE 104. (Brenner)

16.16.680 Wetland mitigation.

E. The technical administrator shall have the authority to adjust the replacement ratios when one or more of the following apply:

1. When a combination of mitigation approaches is proposed. In such cases, the area of altered wetland shall be replaced at a 1:1 ratio through reestablishment or creation, and the remainder of the area needed to meet the ratio can be replaced by enhancement or rehabilitation using Table 3 at a 2:1 ratio. ~~For example, impacts to one acre of a Category II wetland requiring a 3:1 ratio for creation can be compensated by creating one acre and enhancing four acres (instead of the additional two acres of creation that would otherwise be required).~~ For example, impacts to

one acre of a Category II wetland requiring a 3:1 ratio for creation can be compensated by creating one acre and enhancing four acres (instead of the additional two acres of creation that would otherwise be required).

Staff Response: Staff recommends against this reinsertion, as the example is no longer relevant under the new Department of Ecology tables.

ARTICLE 7. HABITAT CONSERVATION AREAS (HCA)

ISSUE 105. (Staff)

Global Change – Throughout this Article, change the phrase “compensatory mitigation” to “mitigation.”

Reason: Natural Resources staff recommends this global change since “compensatory mitigation” is a term of art applied to wetlands, but not other forms of mitigation.

ISSUE 106. (Brenner)

16.16.700 Purpose.

C. Regulate development so that isolated populations of species are not created and habitat degradation and fragmentation are ~~avoided~~ minimized, especially along riparian corridors.

Staff Response: Another instance of lessening the County’s ability to protect.

ISSUE 107. (Brenner)

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

- C. ~~For purposes of this chapter, h~~Habitat conservation areas shall include all of the following:
1. Streams. Streams, ~~as defined in Article 9,~~ shall be designated according to the following criteria:
 - i. 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](#)).
 - ii. ~~Other f~~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.
 - iii. ~~Non-fish-bearing streams are those streams that have no~~ [current, historic, known or potential](#) use by anadromous or resident fish.
 2. Areas ~~with in~~ which federally ~~and/or state~~-listed species are found, ~~have a primary association with,~~ or contain suitable habitat for said listed species, as listed in the US Fish & Wildlife’s [Threatened & Endangered Species List or Critical Habitat List \(http://ecos.fws.gov/ecp/\)](#), as amended ~~have a primary association~~.
 - 2-3. Areas in which state listed priority species are found, ~~have a primary association with,~~ or contain suitable habitat for said listed species, as listed [Washington Department of Fish and Wildlife’s](#)

<http://wdfw.wa.gov/mapping/phs/> or <http://wdfw.wa.gov/conservation/phs/list/>), as amended.

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.

Staff Response: Staff recommends against. The criteria proposed for deletion (“historic,” “known,” “potential,” “have a primary association with”) are from the State definitions of priority habitats and species and forage fish spawning areas. Even if we don’t include them, these criteria will still be used by WDFW. It would be best if our definitions matched those of the State.

ISSUE 108. (Brenner)

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

- C.9 Naturally occurring ponds **and lakes or manmade ponds and lakes (created prior to September 30, 2005, excluding agricultural, fire protection, and stormwater facilities) under 20 acres in size. In-stream ponds shall be regulated based on associated stream type or manmade ponds and lakes (created prior to September 30, 2005, excluding agricultural, fire protection, and stormwater facilities) under 20 acres in size**

Staff Response: Staff supports this edit as it improves the grammar.

ISSUE 109. (Brenner)

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

14. **Species and Habitats of Local Importance.** Locally important species and habitats that have recreational, cultural, and/or economic value to citizens of Whatcom County, including the following:

- a. Species.

~~The Department of Planning and Development Services is authorized to shall maintain a current list of Species of Local Importance as designated by the County Council. As of 2016 the list includes:~~

~~— Osprey;~~

~~— Turkey Vulture;~~

~~— Nooksack dace;~~

~~— Salish sucker.~~

- ii. ~~Osprey;~~

Staff Response: This deletion was already made by Council.

ISSUE 110. (Staff)

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

C(14)(b)

- i. The marine nearshore habitat, **including coastal lagoons**, and the associated vegetated marine riparian zone. These areas support productive eelgrass beds, marine algal turf, and kelp beds that provide habitat for numerous priority fish and wildlife species including, but not limited to, forage fish, seabird and shorebird foraging and nesting sites, and harbor seal pupping and haulout sites. This designation applies to the area from the extreme low tide limit to the **upper limits of the shoreline jurisdiction ordinary high water mark;**

provided, that reaches of the marine shoreline that were lawfully developed for commercial and industrial uses prior to the original adoption of this chapter may be excluded from this designation, but not otherwise exempt from this chapter. See Appendix E-A of this chapter.

Reason: Natural Resources staff recommends these changes since the first statement includes Marine Riparian areas which extend 100m according to BAS.

ISSUE 111. (Brenner)

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

- D. In addition to the species, habitats, and wildlife corridors identified in subsection (C)(~~1014~~) of this section, the County Council may designate additional species, habitats of local importance, and/or wildlife corridors as follows:
1. In order to nominate an area, species, or corridor to the category of “locally important,” an individual or organization must:
 - i. Demonstrate a need for special consideration based on:
 - i. ~~Identified species of declining population;~~
 - ii. Documented species sensitivity to habitat manipulation and cumulative loss;
 - iii. Commercial, recreational, cultural, or, biological, other special value; or
 - iv. Maintenance of connectivity between habitat areas;
 - ii. Propose conceptual relevant management strategies considered effective and within the scope of this chapter;
 - iii. Identify the general effects on property ownership and use; and
 - iv. Provide a map showing the species or habitat location(s).
 2. Submitted proposals shall be reviewed by the County and may be forwarded to the State Departments of Fish and Wildlife, Natural Resources, and/or other local, state, federal, and/or tribal agencies or experts for comments and recommendations regarding accuracy of data and effectiveness of proposed management strategies.
 3. If the proposal is found to be complete, accurate, and consistent with the purposes and intent of this chapter and the various goals and objectives of the Whatcom County comprehensive plan and the Growth Management Act, the County Council will hold a public hearing to solicit comment. Approved nominations will become designated locally important habitats, species, or corridors and will be subject to the provisions of this chapter.
 - ~~3-4.~~ The Council may remove species, habitats, or corridors from this list if it can be shown that there is no longer a need to provide protection above and beyond that afforded by WDFW management strategies. Species and habitats of local importance that are not regulated elsewhere in this chapter may be removed if sufficient evidence has been provided by qualified professionals that demonstrates that the species no longer meets any provisions of 16.16.710(D)(1)(a).”

Staff Response: Staff is OK with these amendments.

ISSUE 112. (Donovan)

What are the implications of the inserted “When pursuant to Article 2,” given that Article 2 would seem to expand administrative discretion?

16.16.720 General standards

The following activities may be permitted in habitat conservation areas and/or their buffers when, pursuant to Article 2, all reasonable measures have been taken to avoid adverse effects on species and

habitats, any applicable Washington Department of Fish and Wildlife management recommendations have been applied, compensatory mitigation is provided for all adverse impacts that cannot be avoided, and the amount and degree of the alteration are limited to the minimum needed to accomplish the project purpose; provided, that locally important species and habitats shall be subject to WCC [16.16.730](#):

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.

At your workshop on 4/4/17, Councilmember Donovan asked if staff could provide language that more precisely identifies the sections in Article 2.

16.16.720 General standards

The following activities may be permitted in habitat conservation areas and/or their buffers when, pursuant to WCC 16.16.255 and 16.16.260, all reasonable measures have been taken to avoid adverse effects on species and habitats, any applicable Washington Department of Fish and Wildlife management recommendations have been applied, compensatory mitigation is provided for all adverse impacts that cannot be avoided, and the amount and degree of the alteration are limited to the minimum needed to accomplish the project purpose; provided, that locally important species and habitats shall be subject to WCC [16.16.730](#):

ISSUE 113. (Brenner)

16.16.720 Habitat conservation areas – General standards.

- E. Construction or improvements that are of a structure, other than a building, that is associated with an agricultural use in the outer 25% of the CPAL designated buffer; or the reconstruction, remodeling, or maintenance of such structures in a habitat conservation area buffer, subject to all of the following criteria:
1. The structure is located within an existing lot of record and is an existing ongoing agricultural use.
 2. There is no other feasible location with less impact to critical areas. However, this provision does not apply to reconstruction, maintenance and/or remodeling of pre-existing structure.
 3. Clearing and grading activity and impervious surfaces are limited to the minimum necessary to accommodate the proposed structure and, where possible, surfaces shall be made of pervious materials.
 4. Unavoidable adverse effects on critical areas are mitigated in accordance with this chapter.

Staff Response: Staff recommends against these amendments. This section was intended to allow ongoing agriculture to continue in areas where the critical areas have historically and already been impacted. Certain allowances are allowed for ongoing agriculture; however, new agricultural uses are not supposed to be allowed to create new impacts.

ISSUE 114. (Brenner)

16.16.720 Habitat conservation areas – General standards.

- G. Stormwater conveyance or discharge facilities such as dispersion trenches, level spreaders, and outfalls may be permitted in a habitat conservation area buffer on a case-by-case basis when the technical administrator, with detailed written findings, determines that all of the following are met:

4. The discharge meets freshwater and marine state water quality standards, including the need to evaluate cumulative impacts to 303(d) impaired waterbodies and total maximum daily load (TMDL) standards as appropriate at the point of discharge. Standards should include filtration through mechanical or biological means, vegetation retention, timely reseeding of disturbed areas, use of grass-lined bioswales for drainage, and other mechanisms as appropriate within approved stormwater “special districts.”

Staff Response: This language was added by the Technical Advisory Committee, based on the argument that this is already a requirement of the federal Clean Water Act.

ISSUE 115. (Staff)

16.16.720 Habitat conservation areas – General standards.

- I(1) The stabilization or protection measures shall be designed in accordance with the techniques contained within the Washington Department of Fish and Wildlife’s most recent Integrated Streambank Protection Guidelines. Deviation from these techniques requires written justification from a qualified professional/engineer.

Reason: Public Works’ Flood Division staff recommends these changes as occasionally they use techniques similar to but not precisely what’s found in the referenced Manual. Washington Department of Fish and Wildlife staff concurs.

ISSUE 116. (Staff)

16.16.720 Habitat conservation areas – General standards.

- I(5) No net loss adverse impact to critical fish or wildlife Habitat Conservation Areas or associated wetlands will occur.
- N(4) No net loss adverse impact to critical fish or wildlife Habitat Conservation Areas or associated wetlands will occur.

Reason: Natural Resources staff recommends these changes since we don’t use these terms any more, only HCA.

ISSUE 117. (Brenner)

16.16.720 Habitat conservation areas – General standards.

- J. Construction of trails and roadways less than or equal to 30 feet wide may be permitted in a habitat conservation area buffer when not directly related to a crossing and are subject to all of the following standards:
 4. Private trails shall not exceed 45 feet in width, and public trails shall not exceed 10 feet in width, and shall be made of pervious material or on an elevated structure where feasible. Trails may include limited viewing platforms that shall not exceed 12 feet in width and shall be made of pervious materials where feasible.

Staff Response: Similar to Issue 88, Staff recommends against. In most jurisdictions 6 feet is the standard width used for private trails, and 10 feet for public trails. The reason is that public trails tend to attract a larger number of users than private trails (used just by the residents of a particular development).

ISSUE 118. (Brenner)

I don't understand why we wouldn't allow repair, reconstruction, or maintenance of already existing private launches. Rephrase subsection (N) to read:

16.16.720 Habitat conservation areas – General standards.

- N. Construction of docks and public launching ramps, and reconstruction, repair, and maintenance of ~~docks and~~ public or private or private launching ramps may be permitted subject to the following:

Staff Response: Staff supports this amendment with a further amendment:

- N. Construction of docks and public launching ramps, and reconstruction, repair, and maintenance of docks and ~~docks and~~ public or private or private launching ramps may be permitted subject to the following:

Councilmember Brenner's suggestion left out docks as being allowed to be repaired and maintained.

ISSUE 119. (Staff)

16.16.720 Habitat conservation areas – General standards.

- N(1) The dock or ramp is located and oriented and constructed in a manner that minimizes adverse effects on navigation; wave action, water quality, movement of aquatic and terrestrial life; ecological processes; critical saltwater eelgrass beds, shellfish beds, spawning habitats, and wetlands, or other critical areas.

And

16.16.740 Habitat conservation area buffers – Standards.

In Table 4, Buffer Requirements for HCAs, combine to rows for "commercial and recreational shellfish areas," "kelp and eelgrass beds," "surf smelt, pacific herring, and pacific sand lance areas" and rename to "critical saltwater habitats."

Reason: Natural Resources staff recommends this change for consistency and the WAC and the change in terminology discussed at a previous workshop.

ISSUE 120. (Brenner)

16.16.720 Habitat conservation areas – General standards.

- O. On-site sewage disposal systems (OSS) may be permitted in the outer 50% of stream or other aquatic HCA buffers when accessory to an approved residential structure for which 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 adverse effects on water quality and slope stability are avoided.

Reason: Staff concurs with the intent of the amendment, though suggests alternative language to further the intent:

- P. On-site sewage disposal systems (OSS) may be permitted non-aquatic HCA buffers and in the outer 50% of stream or other aquatic HCA buffers when accessory to an approved residential structure for which it is not feasible to connect to a public sanitary sewer system and when operated and maintained in accordance with WCC [Chapter 24.05.170](#); provided, that adverse effects on water quality and slope stability are avoided.

We concur since there are some HCA buffers (e.g., bird habitat) that might cover a large portion of a property and that an OSS wouldn't impact. It is the aquatic HCAs that could likely be affected by OSS operation.

Staff also recommends changing "WCC 24.05.170" to "WCC Chapter 20.05." In researching this proposal, we see that section 170 only addresses "Repair of failures." The rest of the chapter also talks about installation, maintenance, etc.

ISSUE 121. (Brenner)

16.16.750 Habitat conservation areas – Review and reporting requirements.

- B. ~~In addition to the reporting requirements of WCC 16.16.255, the~~ Habitat Conservation Area assessment report/HMP shall describe the characteristics of the subject property and adjacent areas, including condition, quality, function, and values of the Habitat Conservation Area at a scale appropriate to the function being evaluated (see WAC 365-196-830(6)). The assessment shall include determination of appropriate buffers as set forth in WCC 16.16.740. The assessment shall also include field identification and/or delineation of habitat areas, analysis of historical aerial photos and, review of public records, and interviews with adjacent property owners as necessary to determine potential effects of the development action on critical areas. Assessment reports shall include the following site- and proposal-related information unless the technical administrator determines that any portion of these requirements is unnecessary given the scope and/or scale of the proposed development:

Staff Response: Staff is OK with this deletion.

ISSUE 122. (Brenner)

16.16.750 Habitat conservation areas – Review and reporting requirements.

- B.6 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.)

Staff Response: Staff supports this deletion.

ISSUE 123. (Brenner)

16.16.760 Habitat conservation areas – Mitigation standards.

- D. The following additional mitigation standards shall apply:
4. Compensatory mitigation shall be provided on-site whenever feasible, ~~or~~ off-site mitigation in ~~the a~~ location that will provide ~~the a~~ greater ~~st~~ ecological benefit to the species and/or habitats affected and have ~~the a~~ greater ~~st~~ likelihood of success may be accepted at the discretion of the Technical Administrator. Mitigation shall occur as close to the impact site as possible, ~~within the same sub-basin, and in a similar habitat type as the permitted alteration unless the applicant demonstrates to the satisfaction of the technical administrator through a watershed or landscape-based analysis that mitigation within an alternative sub-basin of the same watershed would~~ As mitigation is moved further away from the impacted habitat the Technical

Administrator may increase the amount of mitigation required. If offsite mitigation is proposed, the applicant must demonstrate through an alternatives/ mitigation sequencing analysis (WCC 16.16.260) that the mitigation will have greater ecological benefit. **Small projects, less than 1,000 square feet, shall be exempt.**

Staff Response: Staff recommends against. No matter how small the project, if someone must mitigate but doesn't have the room to do so onsite, there ought to be an option to do so off-site.

ISSUE 124. (Brenner)

16.16.760 Habitat conservation areas – Mitigation standards.

B. The following additional mitigation standards shall apply:

6. The technical administrator shall ~~have authority to~~ require annual monitoring of mitigation activities and submittal of annual monitoring reports in accordance with WCC 16.16.260(C) to ensure and document that the goals and objectives of the mitigation are met. The frequency and duration of the monitoring shall be based on the specific needs of the project as determined by the technical administrator. Monitoring shall be for a duration of up to 5 years.

Staff Response: Staff supports this amendment.

Article 9. Definitions

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16.16.900 Definitions

“Delineation” means the precise determination of wetland/~~non-wetland~~ boundaries in the field according to the application of the specific method described in ~~the 1997 Washington State Wetland Delineation Manual and/or~~ the Corps of Engineers Wetlands Delineation Manual, 1987 Edition, as amended and the Western Mountains, Valleys, and Coast Region supplement (Version 2.0) 2010 or as revised.

Reason: Natural Resources staff recommends these changes for clarification and to reference the newest manuals.