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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: May 30, 2017

SUBJECT: 2016 Critical Areas Ordinance Update
County Council Review Workshop 7 on May 30, 2017

In putting together your review memo today, staff inadvertently left out some of Councilmember Brenner's suggested edits to Chapter 8.

This memo is intended to rectify that. Mea culpa.

Questions, Comments, and Suggestions by Council Members

ISSUE 149. (Brenner)

16.16.810 Resource Concerns.

- D. Degradation of Riparian Areas. The term “riparian” is defined in Article 9 of this chapter and includes the areas adjacent to streams, lakes, marine shorelines and other waters. A healthy riparian area is essential to protecting fish and wildlife, including salmon and shellfish. Dense riparian vegetation along the water’s edge will slow and protect against flood flows; provide infiltration and filtering of pollutants; secure food and cover for fish, birds and wildlife; and keep water cooler in summer. **Uncontrolled grazing removes important riparian vegetation.**

Staff Response: Staff does not recommend this change. This entire section is intended to identify the rationale behind our CPAL regulations. Each of the paragraphs identifies a concern and how agricultural practices, if poorly-managed, can harm that resource. Removing just sentence removes the nexus of why we’re trying to protect riparian areas in agricultural areas.

ISSUE 150. (Brenner)

16.16.820 Classification and Applicability.

- D. Agricultural activities that qualify for coverage under this section include:
1. **Type 1 Low impact farm or Livestock** **Low impact farm or Livestock** Operations.

Staff Response: Staff does not recommend this change. The Critical Areas Citizens Advisory Committee recommended renaming the farm operation types from low, moderate, and high impact to Type 1, 2, and 3 to avoid value-loaded words. Putting them back in for just one of the types isn’t consistent. If Council does want to revert for this one type, staff would suggest reverting all back to their original names (Low, Moderate, and High Impact Operations).

ISSUE 151. (Brenner)

16.16.820 Classification and Applicability.

- D. Agricultural activities that qualify for coverage under this section include:
2. **Type 2 Moderate** Operations.
 - a. Type 2 operations are farms that **include, but are not limited to those that** exceed one animal unit per one acre of grazable pasture; farms that have orchards, vineyards, small-fruit field or row crops; and drainage improvement districts. These operations present a potential moderate risk to critical area degradation, including ground or surface water contamination, because the nutrients applied from manure or commercial fertilizers may exceed that which can be easily used by the crops grown there without careful planning and management. The agricultural activities are also likely to be much more intense than Type 1 operations, posing greater potential risks to other critical areas.

Staff Response: Staff is neutral.

ISSUE 152. (Brenner)

16.16.830 Conservation Farm Plans – General Standards.

B. A conservation farm plan ~~shall~~may not authorize filling, draining, grading, or clearing activities within critical areas or buffers;

1. except Only on existing ongoing agricultural land where such activities are a demonstrated to be an integral essential part of the ongoing agricultural use or part of routine maintenance; and,

Staff Response: Staff does not recommend these changes. As explained previously, the CPAL program is intended to only apply to on-going agriculture; new agriculture *must* protect the functions and values of critical areas. This section is basically saying that certain activities (filling, draining, grading, or clearing activities within critical areas or buffers), where those activities have already been historically been performed, may continue to do so via a Conservation Farm Plan. New ag should not be allowed to do these things in new areas.

ISSUE 153. (Brenner)

16.16.830 Conservation Farm Plans – General Standards.

C. ~~The~~A conservation farm plan ~~shall~~not may authorize:

1. The construction of new structures. New structures shall be constructed in compliance with the applicable provisions standard requirements of this chapter and the Whatcom County Code. Landowner shall ensure that all of the following are met:
 - ~~Siting of structures shall not result in surface or groundwater contamination.~~
 - ~~Dust, odor, and noise concerns attendant to the use of the improvement shall be mitigated.~~
 - ~~Impermeable surfaces such as building roofs, roads, and yards shall not change the flow, volume, and/or direction of runoff, or cause erosion or downstream flooding.~~
2. New or expanded drainage systems. (Routine maintenance of existing drainage systems may be allowed but only in compliance with the Washington State hydraulic code (WAC 220-660) and the Best Management Practices found in the “Drainage Management Guide for Whatcom County Drainage Improvement Districts.”)
3. The conversion of land to agricultural use.

Staff Response: Staff does not recommend this change. By definition, all of these items would expand agricultural uses into areas where previously not done, and therefore not considered ongoing agriculture. Amending the language as proposed would explicitly say that a farm plan—again, intended to apply only to areas already impacted—could be done. Farm plans *cannot* apply to activities that *cause additional harm* to critical areas.

ISSUE 154. (Brenner)

16.16.840 Conservation Farm Plan Requirements.

A. Type 1 (Standard) Conservation Farm Plans. Owners of Type 1 low impact livestock operations have limited options to control animal waste because their operations are small. The required conservation farm plan can be prepared by the landowner and include a simple map of the property, a standard checklist designed to protect water quality, and the following additional components:

1. System Siting and Design. Barns, corrals, paddocks, or lots are to be sited to avoid runoff directly into critical areas.

- a. Where structures exist in critical areas or buffers and cannot be relocated, corrective measures must be taken if necessary to avoid runoff of pollutants and bacteria to critical areas.

Staff Response: Staff is neutral.

ISSUE 155. (Brenner)

16.16.840 Conservation Farm Plan Requirements.

- A. **Type 1 (Standard) Conservation Farm Plans.** Owners of Type 1 low impact livestock operations have limited options to control animal waste because their operations are small. The required conservation farm plan can be prepared by the landowner and include a simple map of the property, a standard checklist designed to protect water quality, and the following additional components:
1. System Siting and Design. Barns, corrals, paddocks, or lots are to be sited to avoid runoff directly into critical areas.
 - b. Where trees and shrubs exist along regulated a-streams[‡], lakes, ponds, or wetlands:
 - i. Where trees and shrubs already exist, they shall be retained and managed to preserve the existing functions of the buffer pursuant to the NRCS Conservation Practice 391, “Riparian Forest Buffer.”

Staff Response: Staff does not recommend either the removal of the footnote, and the deletion of “retained.” Though the footnote contains no regulation, it was added as a reminder to the reader to review the definitions of “stream” and ditch,” since there’s always been confusion. Removing the word “retained” in reference to existing trees and shrubs goes against the BMP recommended by the NRCS.

ISSUE 156. (Brenner)

16.16.840 Conservation Farm Plan Requirements.

- A. **Type 1 (Standard) Conservation Farm Plans.** Owners of Type 1 low impact livestock operations have limited options to control animal waste because their operations are small. The required conservation farm plan can be prepared by the landowner and include a simple map of the property, a standard checklist designed to protect water quality, and the following additional components:
5. Existing native vegetation within critical areas and their buffers shall be retained to the extent practicable ~~to the extent practicable~~.

Staff Response: Staff does not recommend this change. The phrase was stricken because the definition of ongoing ag says that no new area will be cleared per 16.16.290.B.1. Reintroducing it would allow some clearing of existing vegetation.

ISSUE 157. (Brenner)

16.16.840 Conservation Farm Plan Requirements.

- B. **Type 2 (Custom) Conservation Farm Plans.** In addition to the elements of a Type 1 conservation farm plan, Type 2 plans must address the following:
3. ~~Treatment of Wetlands.~~ Except for impacts allowed by this Title, Wwetlands shall be conserved pursuant to the provisions of Title 180 – National Food Security Act Manual (see <http://www.nrcs.usda.gov/programs/wetlands/index.html>).

[‡] ~~Note that ditched channels may or may not meet the definition of a stream. See Article 9, Definitions.~~

Staff Response: Staff does not recommend this change. Title 180 is already more lenient than the CAO.

ISSUE 158. (Brenner)

16.16.840 Conservation Farm Plan Requirements.

B. **Type 2 (Custom) Conservation Farm Plans.** In addition to the elements of a Type 1 conservation farm plan, Type 2 plans must address the following:

5. Where potential significant impacts to critical areas are identified through a risk assessment, then plans shall be prepared to ~~mitigate~~ **mitigate and/or prevent** same by:
 - a. A planning advisor; or
 - b. Through the USDA Natural Resources Conservation Service; or
 - c. The Whatcom conservation district; or
 - d. An eligible farmer or rancher, who participates in this program by:
 - Attending a County-sponsored or approved workshop, and
 - Conducting a risk assessment of their farm or ranch, alone or with a planning advisor's assistance, and
 - Developing a plan to **mitigate and/or prevent** ~~mitigate~~ any identified risks, and
 - Having the plan approved pursuant to WCC [16.16.290](#).

Staff Response: Staff is neutral.

ISSUE 159. (Brenner)

16.16.850 Preparation and Approval of Conservation Farm Plans.

Table 1. Who May Prepare Conservation Farm Plans

Who May Prepare	Type 1 Operations	Type 2 and 3 Operations
The farm operator	X	
Whatcom County Planning and Development Services	X	X
A Qualified Consultant	X	X
A Watershed Improvement District (for a farm or ranch that is within its boundaries)	X	
The Whatcom Conservation District	X	X
A Planning Advisor	X	X

Staff Response: Staff does not recommend this change. Currently there are no qualified consultants to prepare even Type 1 Conservation Farm Plans in Whatcom County (though there is one Planning Advisor). Staff added the ability for someone to become qualified, but only for the simpler Type 1 farm plans. In order to be qualified to prepare Type 2 or 3 farm plans, one must go through Federal training, by which one becomes a Planning Advisor.

ISSUE 160. (Brenner)

16.16.860 Monitoring and Compliance.

Define "Monitoring"

Staff Response: Staff does not recommend this change. There are too many types of monitoring within the CAO to have just one definition, and frankly, each section where monitoring is mentioned appear to self-define what it is. Staff doesn't think it necessary.

ISSUE 161. (Brenner)

16.16.860 Monitoring and Compliance.

A. The technical administrator and/or the farm operator shall periodically monitor plan implementation and compliance beginning one year after plan approval and every two years thereafter, through the life of the plan, or more frequently at the Technical Administrator's discretion. The monitoring may include periodic site inspections, self-assessment by the farm operator, or other appropriate actions. For a time period of up to every 5 years, self-certification is allowed for Type 1 conservation farm plans, or if the for any plan that is prepared by the Whatcom Conservation District or Planning Advisor and approved by the department. If a sufficient self-certification monitoring report (must include photos and implemented Best Management Practices) is not submitted within 30 days of request, County staff may make a site visit. Site visits will be coordinated with the landowner/farm operator. Prior to carrying out a site inspection, the technical administrator shall provide reasonable notice to the owner or manager of the property as to the purpose or need for the entry, receive confirmation, and afford at least two weeks in selecting a date and time for the visit. At the landowner's/farm operator's discretion, staff may be accompanied by the planning advisor or Whatcom Conservation District planner.

Staff Response: Staff does not recommend this change. Changing the language to "any plan prepared by the WCD or PA" would allow all Type 2 and 3 farm plans to be self-certified. Allowing self-certification of Type 1 farm plans was intended to assist the small farm operators. However, allowing larger operations to self-certify would go against the standard practices of the WCD, the Department of Ecology, and other regulatory agencies. The language was incorporated from PDS Policy PL1-85-003Z.

ISSUE 162. (Brenner)

Define "imminent threat."

16.16.860 Monitoring and Compliance.

B. Where the planning advisor has reason to believe that there is an imminent threat to public health or significant pollution with major consequences occurring as a result of the agricultural operations, ~~a~~the planning advisor will advise the agricultural operator of his or her concerns in writing. While the planning advisor may provide suggestions for resolving the issue, the responsibility for compliance and resolution of issues rests solely with the farm operator. If compliance issues are not promptly resolved, the planning advisor shall promptly withdraw from representing the farm operator, notify the Technical Administrator of such, and may report such situations to the Technical Administrator for subsequent action and enforcement in accordance with WCC 16.16.285.

Staff Response: Staff does not recommend this change. We feel that there are too many types of potential imminent threats and too many agencies potentially involved (health, agriculture, ecology, etc.) to classify. We feel it would be better for the various departments' directors to have the discretion to determine what constitutes an "imminent threat."

ISSUE 163. (Brenner)

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:
3. When substantial changes in the agricultural activities of the farm or livestock operation have occurred that render the current conservation farm plan ineffective. Substantial changes that render a conservation farm plan ineffective are those that:
 - a. Degrade baseline critical area conditions for riparian and wetland areas that existed when the plan was approved; or,
 - b. Result either in an increased a direct discharge or substantial potential discharge of pollution to surface or ground water; or,
 - c. The type of agricultural practices change from Type 1 to Type 2, Type 2 to Type 3, or Type 1 to Type 3 operations.

Staff Response: Staff does not recommend adding “with detailed written findings” as Council has declined this suggestion in other areas. Staff also doesn’t recommend adding “an increased” as direct discharges of pollution are never “grandfathered;” each discharge is a separate and illegal activity under the federal Clean Water Act.

ISSUE 164. (Brenner)

16.16.860 Monitoring and Compliance.

- 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 with detailed written findings by the Technical Administrator are observed and the landowner fails to immediately and permanently remediate, then the observations may be used in an enforcement action.

Staff Response: Staff does not recommend adding “with detailed written findings” as Council has declined this suggestion in other areas.

ISSUE 165. (Brenner)

16.16.900 Definitions.

“Actively farmed” means land that has a n documented history of ongoing agricultural use and that is currently used primarily for the production of crops and/or raising or keeping livestock.

Staff Response: Staff recommends deleting this entire definition, as we find now that the term isn’t used anywhere in the CAO.

ISSUE 166. (Brenner)

16.16.900 Definitions.

“Agricultural activities” means those activities directly pertaining to the production of crops or livestock including, but not limited to: cultivation; harvest; grazing; animal waste storage and disposal; fertilization; the

operation and maintenance of farm and stock ponds or drainage ditches, irrigation systems, and canals; and normal maintenance, repair, or operation of existing serviceable structures, facilities, or improved areas. **Neither the construction of new structures nor Activities that bring an a new, non-ongoing agricultural area into agricultural use are not considered agricultural activities.**

Staff Response: Staff does not recommend this change. Where this term is used in the code it is in reference to exempting standard farming practices from some of the rules. However, both constructing new buildings and bringing new areas into agricultural use are supposed to always fall under the standard rules.

ISSUE 167. (Brenner)

Change, "Aquifer susceptibility" and "Aquifer vulnerability" to one definition that uses both terms since they are really the same. (p.86, ln 3-8)

16.16.900 Definitions.

"Aquifer susceptibility" means the ease with which contaminants can move from the land surface to the aquifer based solely on the types of surface and subsurface materials in the area. Susceptibility usually defines the rate at which a contaminant will reach an aquifer unimpeded by chemical interactions with the vadose zone media.

"Aquifer vulnerability" is the combined effect of susceptibility to contamination and the presence of potential contaminants.

Staff Response: Staff does not recommend this change. Though related, these words are not the same. Susceptibility how easily a particular aquifer may be contaminated. Its vulnerability is a measure of both its susceptibility and its likelihood of being contaminated given what types of uses are located above it.

ISSUE 168. (Brenner)

16.16.900 Definitions.

"Cumulative Impact" means effects on the environment that are caused by the combined results of past, current and reasonably foreseeable future activities. Evaluation of such cumulative impacts should consider: (i) current circumstances affecting the critical area and relevant natural processes; (ii) reasonably foreseeable future development that may affect the critical area; and (iii) beneficial effects of any established regulatory programs under other local, state, and federal laws.

Staff Response: Staff does not recommend this change. The term "cumulative impact" is used in 6 instances in the code and it would be best to define it. This definition is paraphrased from WAC 173-26-186(8)(d) of the Shoreline Management Act.

ISSUE 169. (Brenner)

16.16.900 Definitions.

"Debris flow," **also called "lahar,"** means a moving mass of rock fragments, soil, and mud, more than half of the particles being larger than sand size; a general term that describes a mass movement of sediment mixed with water and air that flows readily on low slopes.

Staff Response: Staff does not recommend this change. Though all lahars are a type of debris flow, not all debris flows are lahars. Some can be non-volcanic in nature.

ISSUE 170. (Brenner)

16.16.900 Definitions.

“Geologically hazardous areas” means areas that, because of their susceptibility to erosion, sliding, earthquake, or other geological events, ~~pose unacceptable risks to public health and safety and may~~ ~~are may~~ not ~~be~~ be suited to the siting of commercial, residential, or industrial development consistent with public health or safety concerns.

Staff Response: Staff does not recommend this change. This definition is straight out of RCW 36.70A.030(9).

ISSUE 171. (Brenner)

16.16.900 Definitions.

~~“Ongoing agriculture” means those activities conducted on lands defined in RCW 84.34.020(2), and those activities involved in the production of crops and livestock, including, but not limited to, operation and maintenance of existing farm and stock ponds or drainage ditches, irrigation systems, changes between agricultural activities, and maintenance or repair of existing serviceable structures and facilities. Activities that bring an area into agricultural use are not part of an ongoing activity. An operation ceases to be ongoing when the area on which it was conducted has been converted to a nonagricultural use, or has lain idle for more than five consecutive years unless that idle land is registered in a federal or state soils conservation program. Forest practices are not included in this definition.~~

Staff Response: Staff does not recommend this change. We realize that several amendments have been proposed that would open up the CPAL program to all farming (both new and existing, or ongoing), but that was never the intent of this program. To do so may make us vulnerable to appeals, since treating new ag as old and allowing new impacts could be construed as violating the GMA.

ISSUE 172. (Brenner)

Under "Reasonable Use" Change "2,500 square feet" to "3,000 square feet"

16.16.900 Definitions.

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

Staff Response: The section of this definition that refers to the square feet is already proposed for deletion so changing the number wouldn't do any good. And Council has already changed this number to 4,000 in 16.16.270.